Pattern
Instructions for Kansas—

CRIMINAL 3d

(Cite as PIK 3d)

Prepared by:

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CRIMINAL JURY INSTRUCTIONS

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CHAPTER 51.00

INTRODUCTORY AND CAUTIONARY INSTRUCTIONS

51.01 INSTRUCTIONS BEFORE INTRODUCTION OF EVIDENCE

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

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

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

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

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

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

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

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

51.01-B BASE YOUR DECISION AS A JUROR ON WHAT IS PRESENTED IN COURT

As jurors chosen to try this case, you must base your decision only on the evidence presented here in open court during this trial and my instructions on the law. Therefore, from now until I dismiss you from jury service you must not:

- **Conduct any research on your own or with anyone else about the issues of this case.**
- **Use dictionaries, the internet, any book or any other source to look up an information about the issues of this case.**
- **Investigate the issues, conduct experiments, or try to gain any specialized knowledge about the case.**
- **Receive help from any outside source in deciding the case.**
- **Listen to discussions among other people about this case or receive any information from them.**
- **Visit or view the scene of any event involved in this case. If you happen to pass by the scene, do not stop or examine it.**
- **Talk to the parties, their lawyers, any of the witnesses, or members of the media about this case.**
- **Listen to, read or view any media coverage of the trial.**

I caution you not to talk with anyone about this case nor tell by any method of communication what you are doing as a juror. I mean face-to-face conversations, as well as electronic communications including e-mails and posting comments on internet chat rooms, blogs, or any social networking website such as Facebook, MySpace, or Twitter. Also, you must not use Google or some similar search engine to do research about the issues of the case, the law, the parties, the witnesses, the lawyers, or the judge.

Our courts have made these rules to assure fair trials.

If you do learn something about the case from a source outside the trial, do not tell any such information to the other jurors. Tell the bailiff as soon as possible, so I can be told about that fact and take any necessary action.

51.10 PENALTY NOT TO BE CONSIDERED BY JURY

Your only concern in this case is determining if the defendant is guilty or not guilty. The disposition of the case thereafter is a matter for determination by the Court.

Notes on Use

This instruction was approved in *State v. Osburn*, 211 Kan. 248, 254, 505 P.2d 742 (1973), when the words "guilt or innocence" were in the instruction. The Committee modified that language to comport with recent appellate court decisions. For those decisions, see PIK 3d 52.02, Burden of Proof, Presumption of Innocence, Reasonable Doubt.

Deletion of the second sentence of this instruction was approved when the jury was instructed on the defense of insanity in *State v. Alexander*, 240 Kan. 273, 286, 287, 729 P.2d 1126 (1986). See also PIK 3d 54.10-A, Mental Disease or Defect—Commitment.

See PIK 3d 51.10-A for an alternative instruction to be used in death penalty cases, durational departure cases, and pre-July 1, 1994, "Hard 40" cases.

51.10-A PENALTY NOT TO BE CONSIDERED BY JURY - CASES THAT INCLUDE A SENTENCING PROCEEDING

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.

Notes on Use

This instruction should be used as an alternative to PIK 3d 51.10 in death penalty cases, durational departure cases, and pre-July 1, 1994, "Hard 40" cases since these cases may include a separate sentencing proceeding involving the jury.

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 version of the instruction complies with the recommendation of the Supreme Court in *State v. Wilkerson*, 278 Kan. 147, 91 P.3d 1181 (2004). Prior versions of this instruction should not be used. See *State v. Gallegos*, 286 Kan. 869, 877, 190 P.3d 232 (2008).

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."

52.03 PRESUMPTION OF INNOCENCE

The Committee recommends that there be no separate instruction given defining presumption of innocence.

Notes on Use

For authority, see K.S.A. 21-3109. PIK 3d 52.02, Burden of Proof, Presumption of Innocence, Reasonable Doubt, states the law as to presumption of innocence.

Comment

Failure to give a detailed instruction was approved in *State v. Taylor*, 212 Kan. 780, 784, 512 P.2d 449 (1973). See Comment to PIK 3d 52.02.

52.04 REASONABLE DOUBT

The Committee recommends that there be no separate instruction given defining reasonable doubt.

Notes on Use

For authority, see K.S.A. 21-3109. PIK 3d 52.02, Burden of Proof, Presumption of Innocence, Reasonable Doubt, states the law as to reasonable doubt. See Notes on Use therein.

Comment

The Committee believes that the words "reasonable doubt" are so clear in their meaning that no explanation is necessary.

The Kansas Supreme Court approved this principle in *State v. Bridges*, 29 Kan. 138, 141 (1882), by stating: "It has often been said by courts of the highest standing that perhaps no definition or explanation can make any clearer what is meant by the phrase 'reasonable doubt' than that which is imparted by the words themselves."

State v. Davis, 48 Kan. 1, 10, 28 Pac. 1092 (1892), states: "It is to be presumed that the jury understood what the words 'reasonable doubt' meant. The idea intended to be expressed by these words can scarcely be expressed so truly or so clearly by any other words in the English language."

The Committee's recommendation that no separate instruction on reasonable doubt be given was approved in *State v. Mack*, 228 Kan. 83, 88, 612 P.2d 158 (1980); *State v. Dunn*, 249 Kan. 488, Syl. ¶ 4, 820 P.2d 412 (1991); *State v. Johnson*, 255 Kan. 252, 874 P.2d 623 (1994); *State v. Lumbrera*, 257 Kan. 144, 891 P.2d 1096 (1995); and *State v. Banks*, 260 Kan. 918, 927 P.2d 456 (1996).

In *State v. Wilson*, 281 Kan. 277, Syl. ¶ 4, 130 P.3d 48 (2006), the court said the term "reasonable doubt" does not require jury instruction or definition.

52.05 STIPULATIONS AND ADMISSIONS

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

(1) _____.

(2) _____.

(3) _____.

Notes on Use

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

Comment

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

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

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

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

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

52.06 PROOF OF OTHER CRIME - LIMITED ADMISSIBILITY OF EVIDENCE

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

Notes on Use

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

The Kansas Supreme Court has held that in *every* case in which evidence of other crimes is admitted either for a purpose listed in K.S.A. 60-455 or for some other relevant purpose not relying upon inferences from propensity, the trial court must give an instruction (PIK 3d 52.06) limiting the purpose for which evidence of other offenses is to be considered by the jury. *State v. Gunby*, 282 Kan. 39, 144 P.3d 647 (2006). It is unclear whether a limiting instruction will be required, or what the form of an instruction would be, if evidence is admitted in a prosecution for a sexual offense for a propensity inference pursuant to the 2009 amendment that added K.S.A. 60-455(d)-(g), discussed in the Comment below.

The instruction need not be given contemporaneously with the evidence; timing of the instruction is left to the court's discretion. *State v. Hall*, 246 Kan. 728, 740-41, 793 P.2d 737 (1990). The limiting instruction must not be in the form of a "shotgun" instruction that broadly covers all of the eight factors set forth in K.S.A. 60-455. *State v. Donnelson*, 219 Kan. 772, 777, 549 P.2d 964 (1976). An instruction concerning the purpose of evidence of other offenses should include only those factors that appear to be applicable under the facts and circumstances. Those factors that are inapplicable should not be instructed upon. *State v. Bly*, 215 Kan. 168, 176, 523 P.2d 397 (1974).

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

When a limiting instruction under K.S.A. 60-455 is not given because defendant objects, the defendant cannot successfully claim error that none was given. *State v. Gray*, 235 Kan. 632, 634, 681 P.2d 669 (1984). When defendant neither requests a limiting instruction nor objects to its omission, the failure to give the instruction

is reversible only if it is clearly erroneous. *State v. Gunby*, 282 Kan. 39, 144 P.3d 647 (2006). If defendant's request for a limiting instruction is refused in error, the conviction will be reversed unless failure to give the instruction is harmless error. *Id.* See also *State v. Denney*, 258 Kan. 437, 446, 905 P.2d 657 (1995) ("we caution trial judges that a limiting instruction should be given when requested by the defendant in every case where prior crimes evidence is admissible for one purpose but not for another, as is mandated by K.S.A. 60-406."). *State v. Wilkerson*, 278 Kan. 147, 91 P.3d 1181 (2004), found failure to give an instruction was not reversible error, under the unique facts of the case, where the other crimes evidence was so interwoven with the commission of the crime and defendant's arrest that there was little or no chance the jury would have used the evidence solely for the propensity inference.

Comment

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

I. INTRODUCTION

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

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

"First, a jury might well exaggerate the value of other crimes as evidence proving that, because the defendant has committed a similar crime before, it might properly be inferred that he committed this one. Secondly, the jury might conclude that the defendant deserves punishment because he is a general wrongdoer even if the prosecution has not established guilt beyond a reasonable doubt in the prosecution at hand. Thirdly, the jury might conclude that because the defendant is a criminal, the evidence put in on his behalf should not be believed. Thus, in several ways the defendant is prejudiced by such evidence."

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

II. ADMISSION FOR NON-PROPENSITY INFERENCES

The starting point in any examination of the admissibility of other crimes or civil wrongs should be K.S.A. 60-455. Subsections (a) and (b), which provide for the exclusion of any evidence tending to show the defendant's general disposition to commit crimes, read as follows:

(a) Subject to K.S.A. 60-447, and amendments thereto, evidence that a person committed a crime or civil wrong on a specified occasion is inadmissible to prove such person's disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion.

(b) Subject to K.S.A. 60-445 and 60-448, and amendments thereto, such evidence is admissible when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

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

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

161, 166 (1978). The hearing should be held prior to trial to avoid delaying the progression of the trial. The purpose of the hearing is to apply the three-part test set forth below.

B. *Test of Admissibility.* In accordance with the restrictive stance of the Court regarding admission of other crimes or civil wrongs, the trial court must employ a three-part test to determine whether such evidence may be admitted. Before admitting the evidence, the trial court must find that the other crime is: (1) *relevant* to prove; (2) a *material fact that is substantially in issue*; and (3) then *balance* the *probative value* of the evidence against its *prejudicial effect.*

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

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

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

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

For example, where criminal intent is obviously proved by the mere doing of an act, the introduction of other-crimes evidence has no probative value to prove intent (i.e., where an armed robber extracts money from a store owner at gunpoint, his or her intent is not genuinely in dispute). Likewise, where a defendant admits committing the act and the defendant's presence at the scene of the crime is not disputed, a trial court should not admit other-crimes evidence for the purpose of proving identity. The obvious reason is that such evidence has no probative value if the fact it is supposed to prove is not

substantially in issue. Such evidence serves no purpose to justify whatever prejudice it creates and must be excluded for that reason. *State v. Bly*, 215 Kan. at 176. See also *State v. Nunn*, 244 Kan. 207, 212, 768 P.2d 268 (1989).

(3) *Balancing.* As the third step of the test, the trial court must weigh the probative value of the evidence for the limited purpose for which it is offered against the risk of undue prejudice. *State v. Marquez*, 222 Kan. at 445. If the potential for natural bias and prejudice overbalances the contribution to the rational development of the case, the evidence must be barred. *State v. Bly*, 215 Kan. at 175. The balancing process is discussed extensively in *State v. Davis*, 213 Kan. 54, 57-59, 515 P.2d 802 (1973).

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

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

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

State v. Carapezza, 286 Kan. 992, Syl. ¶ 6, 191 P.3d 256 (2008), held that, depending on the facts of the case, evidence of drug usage and addiction may be admitted under K.S.A. 60-455 to prove a motive to commit robbery or burglary. The court rejected defendant's argument that because the inherent and obvious primary motive to commit these crimes is financial gain, evidence showing a secondary motive to use the stolen money to purchase drugs was irrelevant. Evidence explaining why defendant may have committed the crime charged is admissible even when motive is not an element of the offense.

(2) *Opportunity.* Opportunity simply means that the defendant was at a certain place at a certain time and consequently had the opportunity to commit the offense charged. Note, *Evidence of Other Crimes in Kansas*, 17 Washburn L. J. 98, 112 (1977); *State v. Russell*, 117 Kan. 228, 230 Pac. 1053 (1924). Opportunity also

includes the defendant's physical ability to commit the offense. Slough, *Other Vices, Other Crimes: Kansas Statutes Annotated Section 60-455 Revisited*, 26 Kan. L. Rev. 161, 164 (1978). In order to introduce evidence of another crime to prove opportunity, the two crimes must be closely connected in time and place. *Example*: If a defendant is charged with burglary during which a larceny was committed, evidence showing that the defendant committed the larceny is admissible as tending to show that he or she also committed the burglary.

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

(3) *Intent.* For crimes requiring only a general criminal intent, such as battery, larceny, or rape, the element of intent is proved by the mere doing of the act and evidence of other crimes on the issue of intent ordinarily has no probative value and should not be admitted. For crimes requiring a specific criminal intent, such as premeditated murder or possession with intent to sell, prior convictions evidencing the requisite intent may be very probative. *State v. Faulkner*, 220 Kan. 153, 158, 551 P.2d 1247 (1976). However, the crucial distinction in admitting other crimes evidence on the issue of intent is not whether the crime is a specific or general intent crime, but whether the defendant has claimed his acts were innocent. *State v. Graham*, 244 Kan. 194, 198, 768 P.2d 259 (1989). Intent becomes a matter substantially in issue when the commission of an act is admitted by the defendant and the act may be susceptible of two interpretations, one innocent and the other criminal. In that instance, the intent with which the act is done is the critical element in determining its character. *State v. Nading*, 214 Kan. 249, 254, 519 P.2d 714 (1974). Intent may be closely related to the factor of absence of mistake or accident.

Where criminal intent is obviously proved by the mere commission of an act, the introduction of other-crimes evidence has no real probative value to prove intent and it is error to admit it. *State v. Nunn*, 244 Kan. 207, 212, 768 P.2d 268 (1989).

State v. Davidson, 31 Kan. App. 2d 372, 65 P.3d 1078 (2003), acknowledged that Kansas case law has not always been consistent on the question whether other crimes evidence is admissible to show intent when defendant simply denies that the acts charged ever occurred. The court concluded that the most recent cases require defendant to have asserted an innocent explanation for an acknowledged act before intent will be considered a disputed material issue. *Davidson* is cited with approval in *State v. Boggs*, 287 Kan. 298, 315, 197 P.3d 441 (2008) (defendant's use of controlled substance on other occasions may be relevant in non-exclusive possession case on issues of intent, knowledge, or absence of mistake; however, when defendant does not assert that his actions were innocent but rather presents defense that he did not know substance was present in pickup, evidence of other crimes is inadmissible to prove intent or knowledge).

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

(4) *Preparation.* Preparation for an offense consists of devising or arranging means or measures necessary for its commission. *State v. Marquez*, 222 Kan. at 446 (citing Black's Law Dictionary). A series of acts may have strong probative value in showing preparation if such acts convince a reasonable person that the actor intended that prior activities culminate in the commission of the crime at issue. *State v. Grissom*, 251 Kan. 851, 925, 840 P.2d 1142 (1992); Slough, *Other Vices, Other Crimes*, 20 Kan. L. Rev. at 422.

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

The line between using evidence of other incidents for the propensity inference and using it for another purpose has been difficult for courts to draw, particularly when it is offered to prove common plan and defendant denies that the act charged occurred. *State v. Prine*, 287 Kan. 713, 200 P.3d 1 (2009), described appellate decisions discussing this issue as irreconcilable. It concluded that the standard used in older cases, requiring that the method used to commit the other crime be "similar enough" to establish common modus operandi, made "the line between

mere propensity evidence and plan evidence . . . simply too thin for this court–or any court–to traverse predictably or reliably." To admit evidence of prior bad acts to prove plan, *Prine* held "the evidence must be so strikingly similar in pattern or so distinct in method of operation to the current allegations as to be a signature." (Syl. ¶ 6). *Prine*, a prosecution for sexual abuse of a child, held that evidence of defendant's conduct with two other young girls was inadmissible because the similarities did not constitute a "signature." The court was disturbed that "the modern psychology of pedophilia tells us that propensity evidence may actually possess probative value for juries faced with deciding the guilt or innocence of a person accused of sexually abusing a child" but concluded that modification of the propensity rule to take account of these psychological insights was for the legislature, not the courts.

The 2009 legislature responded to *Prine* by adding subsections (d)-(h), altering the rules governing admission of evidence of other offenses in prosecutions for sexual offenses generally. These subsections are discussed in section (9), *infra*. It also added subsection (c), providing that in prosecutions for offenses other than sexual offenses, evidence of other crimes "is admissible to show the modus operandi or general method used by a defendant to perpetrate similar but totally unrelated crimes when the method of committing the prior acts is so similar to that utilized in the current case before the court that it is reasonable to conclude the same individual committed both acts." The *Prine* standard of proof for evidence offered to show plan may still apply in prosecutions other than for sexual offenses. Subsection (c) does not mandate a return to the "similar enough" standard used in older cases to determine when common modus operandi was provable. Rather, subsection (c) requires that the method of committing the other offense be "so similar" to the method in the current case "that it is reasonable to conclude the same individual committed both acts." So phrased, the subsection merely states the rationale for admitting evidence to show plan, not a test for similarity. It uses language identical to that in *State v. Damewood*, 245 Kan. 676, 682, 783 P.2d 1249 (1989) ("The rationale for admitting evidence of prior unrelated acts to show plan under K.S.A. 60-455 is that the method of committing the prior acts is so similar to that utilized in the case being tried that it is reasonable to conclude the same individual committed both acts."). Subsection (c) thus poses the question of how much similarity is required to draw that conclusion but does not answer the question. *Prine* posed the same question and its answer was that it is reasonable to conclude that the same person committed both offenses only when there are striking similarities between the methods of committing the offenses, amounting to a signature. Continued application of that standard would not be inconsistent with subsection (c).

Subsection (c) has one oddity. "Signature" crimes committed after the crime charged have always been admissible when relevant to show modus operandi or common plan, but new subsection (c) refers only to "the method of committing the prior acts."

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

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

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

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

(9) *Sexual Offenses.* Subsections (d)-(g) were added to K.S.A. 60-455 in 2009 in response to the opinion in *State v. Prine*, 287 Kan. 713, 200 P.3d 1 (2009), that restricted the admission of evidence of other instances of child sexual abuse to prove plan. Subsection (d) provides:

> Except as provided in K.S.A. 60-445, and amendments thereto, in a criminal action in which the defendant is accused of a sex offense under articles 34, 35 or 36 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto, evidence of the defendant's commission of another act or offense of sexual misconduct is admissible, and may be considered for its bearing on any matter to which it is relevant and probative.

Under subsection (d), evidence of another offense "is admissible" for any purpose for which it is relevant, and it is relevant for the propensity inference. The traditional rule in subsection (a) excluding other crimes offered for the propensity inference is not based on lack of relevance, as discussed in the Introduction. Subsection (d) clearly represents legislative approval in cases like *Prine* of the admission for the propensity inference of other acts of sexual

molestation of a child, even without striking similarities. However, the amendment applies to prosecutions for sex offenses generally and is not limited to *Prine's* example of pedophilia, in which the value of propensity evidence may be higher than for other sex offenses. The breadth of subsection (d) could eliminate the prerequisites to admissibility established in prior decisions, not only when evidence is offered to prove plan, but also when it is offered to prove identity, intent, and other facts.

Subsections (d)-(g) are patterned after Federal Rules of Evidence 413(a) and 414 (a). However, there are changes that may affect how subsection (d) is applied. For example, the language "Except as provided in K.S.A. 60-445," was added by the House Judiciary Committee to make it clear that other offense evidence still may be excluded when the value of the evidence is substantially outweighed by the risk of prejudice, an issue that had to be litigated under Federal Rule 413. The Senate Judiciary Committee added the requirement that the evidence be "probative" in addition to "relevant." This addition arguably restricts admissibility somewhat. See the discussion of "probative value" in section II(B)(2)(b), *supra*. Thus, although a prosecutor could invoke subsection (d) when defendant is charged with fondling his six-year old niece on the couch at his home to argue that testimony that defendant raped an elderly stranger in the woods twenty years earlier "is admissible" because it is relevant to show a propensity for sexual misconduct, the trial judge still may exclude it as lacking probative value or because of the risk of prejudice. The extent to which subsection (d) changes Kansas law will not be clear until appellate decisions interpret it.

An excellent discussion of Federal Rules 413 and 414 is found in 2 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence 3d*, §§ 4.83-4.86, pp 325-385 (2007).

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

* *Notice.* Subsection (e), added in 2009, imposes an obligation on the prosecution to give pretrial notice of its intent "to offer evidence under this rule." One may expect defendants to argue that "this rule" is the entirety of K.S.A. 60-455, so that pretrial notice now is required whenever a prosecutor intends to offer evidence for any permissible purpose under K.S.A. 60-455, not just in prosecutions for sex offenses. The problem arises because both subsection (e) and subsection (f), which also uses the term "rule," were borrowed from Federal Rules 413(b) and (c) and 414(b) and (c). The references to "this rule" should have been changed to "subsection (d)" if the legislature intended to limit the notice requirement to prosecutions for sexual offenses, but they were not.

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

thereof where otherwise admissible; the acquittal bears only upon the weight to be given to such evidence. *State v. Searles*, 246 Kan. 567, 579, 793 P.2d 724 (1990).

* *Acquittal as a Collateral Estoppel. Dowling v. United States*, 493 U.S. 342, 107 L.Ed.2d 708, 110 S.Ct. 668 (1990), holds that the doctrine of collateral estoppel implicit in the Double Jeopardy Clause of the Fifth Amendment ordinarily does not bar receipt of evidence of other crimes that is relevant for a purpose permitted by Federal Rule of Evidence 404(b), the counterpart of K.S.A. 60-455, even though criminal charges based upon that evidence resulted in an acquittal. Acquittal means only that the jury did not find defendant guilty beyond a reasonable doubt based upon the evidence. Under *Huddleston v. United States*, 485 U.S. 681, 99 L. Ed. 2d 771, 108 S.Ct. 1496 (1988), evidence need not satisfy the "beyond a reasonable doubt" standard to be admissible for a purpose identified in Rule 404(b). All that is required is evidence sufficient to permit a jury reasonably to conclude that the act occurred and that defendant was the actor. *Dowling* distinguished *Ashe v. Swenson*, 397 U.S. 436, 25 L.Ed 2d 469, 90 S.Ct. 1184 (1970), which held that defendant's acquittal of robbing one of six men playing poker in a home precluded, under the doctrine of collateral estoppel, subsequent prosecution of defendant for robbing a second of the six men. In *Ashe*, both prosecutions involved the same ultimate facts; in *Dowling*, the second prosecution involved different ultimate facts.

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

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

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

* *Remoteness in Time.* Remoteness in time of a prior conviction, if otherwise admissible, affects the weight of the prior conviction rather than its admissibility. *State v. Breazeale*, 238 Kan. 714, 723, 714 P.2d 1356 (1986). The probative value of a prior conviction progressively diminishes as the time interval between

the prior crime and the present offense lengthens. *State v. Cross*, 216 Kan. at 520 (proper admission of 15-year-old conviction); *State v. Werkowski*, 220 Kan. 648, 649, 556 P.2d 420 (1976) (improper admission of 19-year-old conviction on collateral issue was reversible error). See also *State v. Carter*, 220 Kan. 16, 20, 551 P.2d 851 (1976) (proper admission of 7-year-old conviction); *State v. Finley*, 208 Kan. 49, 490 P.2d 630 (1971) (proper admission of 11- and 16-year-old convictions); *State v. O'Neal*, 204 Kan. 226, 461 P.2d 801 (1969) (improper admission of 29-year-old dissimilar conviction); *State v. Jamerson*, 202 Kan. 322, 449 P.2d 542 (1969) (proper admission of 20-year-old conviction).

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

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

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

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

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

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

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

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

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

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

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

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

(3) *Res Gestae.* Prior to adoption of the Kansas rules of evidence, the common law doctrine of *res gestae* often was used to justify admission of other crimes evidence. *State v. Gunby*, 282 Kan. 39, 144 P.3d 647 (2006), holds that *res gestae* no longer is an independent basis for admission of evidence of prior crimes or of hearsay. Admissibility must be determined by the same standards, including the determination of relevance and the balancing of probative value against prejudice, that apply to other crimes evidence generally. *Id.*

In many instances, evidence of other crimes that are part of the *res gestae* will satisfy the code's requirement of relevance, such as by showing opportunity, intent or some other purpose listed in K.S.A. 60-455, or when other evidence relevant to prove the crime charged necessarily discloses the other crime, as discussed in subsection (6), *infra.State v. Ward*, 31 Kan. App. 2d 284, 288, 64 P.3d 972 (2003), held that mere temporal proximity of the other crime to the crime charged is insufficient to make the other crime relevant. The court reversed the trial court for admitting as *res gestae* evidence of a drug transaction that preceded the charged sex offense where the drug crime was "not logically related to one or more of the material facts in issue," since it did not explain why the charged crime occurred, did not facilitate it, and was not naturally, necessarily or logically connected with it or illustrative of it.

(4) *Relationship or Continuing Course of Conduct Between Defendant and the Victim.* Evidence of prior acts of a similar nature between the defendant and the victim often is relevant to establish one of the eight factors listed in K.S.A. 60-455, such as motive. *State v. Vasquez*, 287 Kan. 40, 194 P.3d 563 (2008). While *Gunby* rejects prior decisions freely admitting evidence of other crimes independently of K.S.A. 60-455 to prove marital discord, *Gunby's* characterization of the statute's eight listed non-propensity uses as illustrative only means there may be cases in which evidence of other acts showing marital discord may be relevant for an unlisted purpose. However, as in other cases, the trial court must determine the evidence is relevant other than by showing defendant's general propensity, *e.g.*, for violence, and must balance probative value against prejudice. *State v. Gunby*, 282 Kan. 39, 144 P.3d 647 (2006).

State v. McHenry, 276 Kan. 513, 78 P.3d 403 (2003), explains more carefully than many earlier opinions why these non-propensity uses were relevant. The defense attacked the veracity of the victim and other family members, contending the rest of the family concocted allegations of sexual abuse to remove defendant from the home, and introduced evidence that the victim had stated she could get whatever she wanted from defendant by claiming he had sexually abused her. Evidence of the previous incidents thus aided the jury in assessing the defense by showing the timing of past complaints in the context of other family dynamics, that past complaints had not resulted in action by those in authority, and that a long-standing system of rewards might explain the victim's initial failure to come forward. But see *State v. Blaurock*, 41 Kan. App. 2d 178, 201 P.3d 728 (2009), refusing to rely solely upon *McHenry* after observing that no post-*Gunby* Supreme Court decision yet has relied upon a theory of relevance to admit other crimes evidence other than the eight listed in the statute.

(5) *Other Crime as Element of Crime Charged.* Evidence of a prior conviction is relevant if proof of the prior conviction is an *essential* element of the crime charged. *State v. Knowles*, 209 Kan. 676, 679, 498 P.2d 40 (1972).

In *State v. Lee*, 266 Kan. 804, 977 P.2d 263 (1999), the Kansas Supreme Court held that in a prosecution for criminal possession of a firearm, when requested by a defendant, the trial court must approve a stipulation whereby the parties acknowledge that the defendant is, without further elaboration, a prior convicted felon. The procedure for adopting the stipulation is set forth in the opinion. In *State v. Gill*, 268 Kan. 247, 997 P.2d 710 (2000), the Court confirmed that this procedure is only necessary when requested by a defendant.

(6) *Admissible Evidence of the Crime Charged which Discloses Other Crimes.* Evidence tending to establish the crime charged is not rendered inadmissible because it discloses the commission of another and separate offense. Testimony about other crimes may be admissible as a part of the background and circumstances when the defendant made damaging admissions which connected him with the crime charged. *State v. Schlicher*, 230 Kan. 482, 639 P.2d 467 (1982); *State v. Holt*, 228 Kan. 16, 612 P.2d 570 (1980), reaffirming *State v. Solem*, 220 Kan. 471, 552 P.2d 951 (1976). Such evidence need not be direct evidence of the charged crime. It may be circumstantial. *State v. Wilkerson*, 278 Kan. 147, Syl. ¶ 3, 91 P.3d 1181 (2004).

(7) *Rebuttal of Credibility Evidence.* After the defendant has introduced evidence at trial for the purpose of supporting his or her credibility, the trial court may allow the admission of evidence of prior convictions for the purpose of impeaching the defendant's credibility. K.S.A. 60-420, 60-421, and 60-422. The impeachment evidence must be limited to evidence of a *conviction* of a crime involving *dishonesty* or *false statement.* The crimes of larceny, theft, and receiving stolen property involve dishonesty and are admissible on the issue of credibility. *Tucker v. Lower*, 200 Kan. 1, 5, 434 P.2d 320 (1967). Under K.S.A. 60-421, "crime" includes both felonies and misdemeanors. *Tucker v. Lower*, 200 Kan. at 5. See also *State v. Burnett*, 221 Kan. 40, 558 P.2d 1087 (1976); *State v. Werkowski*, 220 Kan. 648, 556 P.2d 420 (1976); *State v. Johnson*, 21 Kan. App. 2d 576, 907 P.2d 144 (1995).

(8) *Other Crimes of a Person Other Than a Defendant. State v. Bryant,* 228 Kan. 239, 613 P.2d 1348 (1980) held that K.S.A. 60-455 does not apply in a criminal case to a person other than the accused, and evidence that such a person may have committed a crime or civil wrong may not be introduced thereunder. Neither the text of K.S.A. 60-455 nor the policies underlying it support restricting admission of prior crimes to those of the criminal defendant. Exclusion of evidence of third party crimes is justified in many cases for the distinct reason that the risk such evidence will mislead the jury or confuse the issues substantially outweighs its limited probative value, as where defendant offers evidence of other crimes to show a third party had a motive to kill the victim but offers no other evidence linking the third party to the crime. However, where there is conflicting evidence whether defendant or a third party killed the victim, evidence that the third party had killed others in the same distinctive way would be highly probative on the issue of identity. *Bryant* and related cases are criticized in Dennis Prater and Tammy M. Somogye, *Some Other Dude Did It (But Will You Be Allowed to Prove It?),* 65 J. KAN. B.A. 28, 35 (May 1998). Authority under the Federal Rules of Evidence counterpart to K.S.A. 60-455 admits third party crimes evidence in these circumstances. *See* 2 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE ¶ 404 [15], p. 404-94 (1995) ["A defendant in order to prove mistaken identity may show that other crimes similar in detail have been committed at or about the same time by some person other than himself," citing *United States v. O'Connor*, 580 F.2d 38, 41 (2d Cir. 1978), and *Holt v. United States*, 342 F.2d 163, 166 (5th Cir. 1965)].

The Committee believes it is unlikely that the rule stated in *Bryant* survives the decision in *State v. Marsh*, 278 Kan. 520, 529-532, 102 P.3d 445 (2004), *reversed on other grounds sub. nom Kansas v. Marsh*, 548 U.S. 163, 126 S. Ct. 2516, 165 L.Ed.2d 429 (2006). *Marsh* recognized that the "probative values" of direct and circumstantial evidence are intrinsically similar and disapproved decisions suggesting that when the prosecution relies upon direct evidence, such as eyewitness identification, circumstantial evidence offered by defendant that the crime may have been committed by a third party is inadmissible. The court limited the application of this so-called "third-party evidence rule" by tracing its origins to *State v. Neff*, 169 Kan. 116, Syl. ¶ 7, 218 P.2d 248, *cert. denied,* 340 U.S. 866, 71 S.Ct. 90, 95 L.Ed. 632 (1950), which stated the rule as follows:

"Where the State relies on direct rather than on circumstantial evidence for conviction, evidence offered by defendant to indicate a *possible motive* of someone other than defendant to commit the crime is incompetent *absent some other evidence to connect the third party with the crime*." Evidence of the third party's motive alone would confuse the jury and permit it to indulge in speculation on collateral matters. Henceforth, "circumstantial evidence connecting a third party to a crime will not be excluded merely because the State relies upon direct evidence of the defendant's guilt." There is no bright line rule and admissibility is dependent upon the totality of circumstances. *See also State v. Evans*, 275 Kan. 95, 105, 63 P. 3d 220 (2003), which held that even when the State offers direct evidence from an eyewitness, "Circumstantial evidence that would be admissible and support a conviction if introduced by the State cannot be excluded by a court when offered by the defendant to prove his or her defense that another killed the victim." While neither *Marsh* nor *Evans* involved evidence of third party crimes, their reasoning applies to such cases. *See also Holmes v. South Carolina*, 547 U.S. 319, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006).

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

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

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

IV. CONCLUSIONS AND RECOMMENDATIONS

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

52.07 MORE THAN ONE DEFENDANT - LIMITED ADMISSIBILITY OF EVIDENCE

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

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

Notes on Use

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

Comment

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

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).

A defendant is entitled to an instruction on a theory of defense only when there is evidence, viewed in the light most favorable to the defendant, sufficient to justify a finding in accordance with defendant's theory. *State v. Anderson*, 287 Kan. 325, 334, 197 P.3d 409 (2008).

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."

State v. Miller, 42 Kan. App. 2d 12, 208 P.3d 774 (2009), held that a child victim's statements made at a hospital to a Sexual Assault Nurse Examiner were testimonial and therefore inadmissible because of the confrontation clause, even though the trial court found the statement fit the hearsay exception in K.S.A. 60-460(dd). However, admission of the nurse's testimony was harmless error because similar statements the child made to her mother and grandmother were admissible under subsection (dd) and were not testimonial.

Giles v. California, 554 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).

CHAPTER 54.00

PRINCIPLES OF CRIMINAL LIABILITY

54.01 INFERENCE OF INTENT

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

Notes on Use

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

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

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

Comment

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

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

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

This instruction has been approved in *State v. McDaniel & Owens*, 228 Kan. 172, 180, 612 P.2d 1231 (1980); *State v. Costa*, 228 Kan. 308, 320, 613 P.2d 1359 (1980); *State v. Robinson, Lloyd & Clark*, 229 Kan. 301, 306, 624 P.2d 964 (1981); *State v. Beebe*, 244 Kan. 48, 58, 766 P.2d 158 (1988). It also has been thoroughly discussed in *State v. Mason*, 238 Kan. 129, 708 P.2d 963 (1985); *State v. Ransom*, 239 Kan. 594, 605, 722 P.2d 540 (1986); *State v. Stone*, 253 Kan. 105, 853 P.2d 662 (1993); and in *State v. Ellmaker*, 289 Kan. 1132, 221 P.3d 1105 (2009) (considering all instructions, this instruction did not mislead jury to believe prosecution did not have to prove defendant premeditated killing and could meet its burden by proving defendant premeditated stabbing).

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); *State v. Ellmaker*, 289 Kan. 1132, 221 P.3d 1105 (2009).

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, Inference 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.

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.

To convict a defendant of a specific-intent crime on an aiding and abetting theory, defendant must be shown to have the same specific intent to commit the crime as the principal. *State v. Overstreet*, 288 Kan. 1, 13, 200 P.3d 427 (2009). *Overstreet* held it was error to give PIK 54.06 in addition to PIK 54.05 in a prosecution for attempted 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. The jury improperly could have understood PIK 54.06 to permit it to convict, without a finding that defendant possessed the specific intent of premeditation, if it found defendant aided or abetted an aggravated assault and that premeditated murder was a reasonably foreseeable consequence of aggravated assault. See also *State v. Engelhardt*, 280 Kan. 113, 119 P.3d 1148 (2005) (improper to use PIK 3d 54.06 in prosecution for premeditated murder). In *Engelhardt*, 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, if an instruction on felony murder had been given, it is well settled

that PIK 3d 54.05 rather than 54.06 is the appropriate aiding and abetting instruction. *State v. Gleason, supra.*

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

Failing to stop or report a crime is not a basis for liability under an aider or abettor theory. *State v. Simmons*, 282 Kan. 728, 148 P.3d 525 (2006). However, a parent's awareness of a child's injuries and failure to do anything to discover their cause or prevent their reoccurrence may be sufficient evidence to warrant an instruction on aiding and abetting abuse of the child. *State v. Smolin*, 221 Kan. 149, 557 P.2d 1241 (1976).

54.06 RESPONSIBILITY FOR CRIMES OF ANOTHER - CRIME NOT INTENDED

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

Notes on Use

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

Comment

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

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

To convict a defendant of a specific-intent crime on an aiding and abetting theory, defendant must be shown to have the same specific intent to commit the crime as the principal. *State v. Overstreet*, 288 Kan. 1, 13, 200 P.3d 427 (2009). *Overstreet* held it was error to give PIK 3d 54.06 in addition to PIK 54.05 in a prosecution for attempted premeditated first-degree murder. Under K.S.A. 21-3205(1), upon which PIK 3d 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. The jury improperly could have understood PIK 3d 54.06 to permit it to convict, without a finding that defendant possessed the specific intent of premeditation, if it found defendant aided or abetted an aggravated assault and that premeditated murder was a reasonably foreseeable consequence of aggravated assault. See also *State v. Engelhardt*, 280 Kan. 113, 119 P.3d 1148 (2005) (improper to use PIK 3d 54.06 in prosecution for premeditated

murder). In *Engelhardt*, 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, if an instruction on felony murder had been given, it is well settled that PIK 3d 54.05 rather than 54.06 is the appropriate aiding and abetting instruction. *State v. Gleason, supra.*

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

54.10 MENTAL DISEASE OR DEFECT (For Crimes Committed January 1, 1996 or Thereafter)

Evidence has been presented that the defendant was afflicted by mental disease or defect at the time of the alleged crime. Such evidence is to be considered only in determining whether the defendant had the state of mind required to commit the crime. You are instructed the defendant is not criminally responsible for (his)(her) acts if because of mental disease or defect the defendant lacked the (set out the particular state of mind which is an element of the crime or crimes charged).

Notes on Use

For authority, see K.S.A. 22-3220. This statute was amended so that, effective January 1, 1996, the term "insanity" has been replaced by "mental disease or defect."

This instruction should be given where the defense of mental disease or defect is asserted and evidence has been introduced in support of such claim. Where only general criminal intent is required for the crime charged, the language "intent to engage in the conduct" should be included in place of a particular state of mind in the concluding parenthetical. PIK 3d 54.01-A, General Criminal Intent, should also be given in such a case.

See K.S.A. 22-3219 for the requirement that defendant serve notice of intent to assert defense of mental disease or defect.

Comment

State v. Hunter, 41 Kan. App. 2d 507, 203 P.3d 23 (2009), noted that PIK 3d 54.10 and 54.10-A "properly instructed the jury" on defendant's defense of mental disease or defect.

In *State v. Hedges*, 269 Kan. 895, 901, 8 P.3d 1259 (2000), and *State v. Jorrick*, 269 Kan. 72, 83, 4 P.3d 610 (2000), the court makes it clear that after January 1, 1996, both the traditional "insanity" defense and the "diminished mental capacity" defense have been replaced by the "mental disease or defect" defense codified at K.S.A. 22-3220.

54.10-A MENTAL DISEASE OR DEFECT - COMMITMENT (For Crimes Committed Prior to January 1, 1996)

A person found not guilty because of insanity is committed to the State Security Hospital for safe-keeping and treatment until discharged according to law.

Notes on Use

For authority, see K.S.A. 22-3428 prior to amendments made by L. 1995, Ch. 251, §28.

This instruction must be given in any case where there is reliance on the defense of insanity.

Comment

See *State v. Hamilton*, 216 Kan. 559, 534 P.2d 226 (1975).

This instruction was approved in *State v. Wright*, 219 Kan. 808, 814, 549 P.2d 958 (1976).

In *State v. Alexander*, 240 Kan. 273, 287, 729 P.2d 1126 (1986), the Court reasoned that people in general were aware of the meanings of verdicts of guilty and not guilty. A verdict of not guilty by reason of insanity has no such commonly understood meaning. Hence, the purpose of this instruction is not to force the jury into considering disposition, but to educate them regarding the insanity defense.

54.10-A MENTAL DISEASE OR DEFECT—COMMITMENT (For Crimes Committed January 1, 1996 or Thereafter)

If you find the defendant 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, then the defendant is committed to the State Security Hospital for safe-keeping and treatment until discharged according to law.

Notes on Use

For authority, see K.S.A. 22-3428.

This instruction must be given in any case where there is reliance on the defense of mental disease or defect.

Comment

State v. Hunter, 41 Kan. App. 2d 507, 203 P.3d 23 (2009), noted that PIK 3d 54.10 and 54.10-A "properly instructed the jury" on defendant's defense of mental disease or defect.

54.11 INTOXICATION - INVOLUNTARY

Intoxication involuntarily produced is a defense if it renders the accused substantially incapable of knowing or understanding the wrongfulness of (his)(her) conduct and of conforming (his)(her) conduct to the requirements of law.

Notes on Use

For authority, see K.S.A. 21-3208(1). If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

Comment

Before a defendant's intoxication may be said to be involuntary, he must show something more than a strong urge or compulsion to drink. *State v. Seely*, 212 Kan. 195, 510 P.2d 115 (1973).

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.

State v. Anderson, 287 Kan. 325, 334, 197 P.3d 409 (2008), disapproved contrary decisions and clarified that defendant is entitled to an instruction on a theory of defense, including compulsion, only when there is evidence that, "viewed in the light most favorable to the defendant, is sufficient to justify a rational factfinder finding in accordance with defendant's theory." Defendant's own testimony may alone be sufficient evidence of the defense.

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." *State v. Irons*, 250 Kan. 302, 309, 827 P.2d 722 (1992), applied the reasoning of *Hundley* to the defense of compulsion.

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). *State v. Harvey*, 41 Kan. App. 2d 104, 202 P.3d 21 (2009), concluded that an instruction based upon the *Irons* case should be denied only when the evidence, viewed in the light most favorable to defendant, "could not provide a substantial basis of fact to reasonably conclude all five required elements were satisfied."

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).

This instruction is appropriate only when defendant uses actual physical force. *State v. Hendrix*, 289 Kan. 859, 218 P.3d 40 (2009). When defendant merely threatens to use physical force, self-defense is not a defense to a charge of criminal threat or assault. *Id.* The court in *Hendrix* acknowledged the oddity that K.S.A. 21-3213 includes "the threat ... of force" within self-defense of property other than a dwelling but K.S.A. 21-3211 does not include the threat of force within self-defense of a person.

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

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

Comment

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

This instruction is appropriate only when defendant uses actual physical force. *State v. Hendrix*, 289 Kan. 859, 218 P.3d 40 (2009). When defendant merely threatens to use physical force, self-defense is not a defense to a charge of criminal threat or assault. *Id.* The court in *Hendrix* acknowledged the oddity that K.S.A. 21-3213 includes "the threat ... of force" within self-defense of property other than a dwelling but K.S.A. 21-3211 does not include the threat of force within self-defense of a person.

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

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

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

Notes on Use

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

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).

In *State v. Horn*, 288 Kan. 690, 206 P.3d 526 (2009), the defendant was convicted of an attempt to commit aggravated sodomy in violation of K.S.A. 21-3301(a) and 21-3506(a)(1), a nondrug, severity level 1 felony. The district court, however, sentenced the defendant to the more severe sanctions set forth in K.S.A. 21-4643, Jessica's Law. Under Jessica's Law, attempted aggravated sodomy is subject to a sentence of life with a hard 25. The Supreme Court held that when the legislature allows " . . . the existence of conflicting statutory provisions prescribing different sentences to be imposed for a single criminal offense, the rule of lenity requires that any reasonable doubt as to which sentence applies must be resolved in the defendant's favor." The matter was remanded with directions to sentence the defendant pursuant to the Kansas Sentencing Guidelines Act, which was the lesser sentence.

(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.

Subject to the exceptions in the statute, K.S.A. 21-3452 makes this crime applicable when the victim is an "unborn child."

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. See also *Trotter v. State*, 288 Kan. 112, Syl. ¶ 1, 200 P.3d 1236 (2009).

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.

Subject to the exceptions in the statute, K.S.A. 21-3452 makes this crime applicable when the victim is an "unborn child."

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).

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.

Subject to the exceptions in the statute, K.S.A. 21-3452 makes this crime applicable when the victim is an "unborn child."

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.

Subject to the exceptions in the statute, K.S.A. 21-3452 makes this crime applicable when the victim is an "unborn child."

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.

Subject to the exceptions in the statute, K.S.A. 21-3452 makes this crime applicable when the victim is an "unborn child."

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).

(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."

Subject to the exceptions in the statute, K.S.A. 21-3452 makes this crime applicable when the victim is an "unborn child."

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

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

Subject to the exceptions in the statute, K.S.A. 21-3452 makes this crime applicable when the victim is an "unborn child."

Comment

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

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

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

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

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

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

56.06-A INVOLUNTARY MANSLAUGHTER - DRIVING UNDER THE INFLUENCE

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

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

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

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

Notes on Use

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

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

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

Subject to the exceptions in the statute, K.S.A. 21-3452 makes this crime applicable when the victim is an "unborn child."

Comment

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

56.07 VEHICULAR HOMICIDE

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

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

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

Notes on Use

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

Subject to the exceptions in the statute, K.S.A. 21-3452 makes this crime applicable when the victim is an "unborn child."

Comment

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

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

56.16 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.

Subject to the exceptions in the statute, K.S.A. 21-3452 makes this crime applicable when the victim is an "unborn child."

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.

56.18 AGGRAVATED BATTERY

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

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

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

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

Notes on Use

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

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

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

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

Subject to the exceptions in the statute, K.S.A. 21-3452 makes this crime applicable when the victim is an "unborn child."

Comment

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

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

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

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

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

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

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. In order for the court to sentence the defendant for committing an off-grid, person felony, the fact that the victim was less than 14 years of age and the defendant was 18 years of age or older at the time the offense was committed must be submitted to the jury and proven beyond a reasonable doubt. *State v. Bello*, 289 Kan. 191, 211 P.3d 139 (2009). See also *State v. Gonzales*, 289 Kan. 351, 212 P.3d 215 (2009). In this instance, unless the defendant stipulates to the ages of the victim and defendant, the State must present evidence to the jury of the ages at the time the offense was committed. The following question should then be included on the verdict form submitted to the jury: "If you find the defendant guilty of aggravated trafficking, do you also unanimously find beyond a reasonable doubt that the defendant was 18 years of age or older and the victim was under the age of 14 years at the time the offense was committed? Yes ____ No ____."

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

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. In order for the court to sentence the defendant for committing an off-grid, person felony, the fact that the defendant was 18 years of age or older at the time the offense was committed must be submitted to the jury and proven beyond a reasonable doubt. *State v. Bello*, 289 Kan. 191, 211 P.3d 139 (2009). See also *State v. Gonzales*, 289 Kan. 351, 212 P.3d 215 (2009). In this instance, unless the defendant stipulates to his or her age, the State must present evidence to the jury of the defendant's age at the time the offense was committed. The following question should then be included on the verdict form submitted to the jury: "If you find the defendant guilty of rape, do you also unanimously find beyond a reasonable doubt that the defendant was 18 years of age or older at the time the offense was committed? Yes ____ No ____." 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. 1185 (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).

57.06 AGGRAVATED INDECENT LIBERTIES WITH A CHILD

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

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

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

OR

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

   or

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

   or

   That the defendant caused _____ to engage in fondling or touching of the person of another in a lewd manner, with intent to arouse or satisfy the sexual desires of _____, the defendant or another;
2. **That at the time of the act _____ was a child 14 or more years of age but less than 16 years of age; and**
3. **That _____ did not consent to such fondling or touching; and**

OR

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

   or

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

or

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

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

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

Notes on Use

For authority, see K.S.A. 21-3504. Aggravated indecent liberties as described in subsections (a)(1) and (3) of K.S.A. 21-3504 is a severity level 3, person felony. When the act is committed pursuant to subsection (a)(2), it is a severity level 4, person felony. When the offender is 18 years of age or older, aggravated indecent liberties with a child as described in subsection (a)(3) is an off-grid, person felony. In order for the court to sentence the defendant for committing an off-grid, person felony, the fact that the defendant was 18 years of age or older at the time the offense was committed must be submitted to the jury and proven beyond a reasonable doubt. *State v. Bello*, 289 Kan. 191, 211 P.3d 139 (2009). See also *State v. Gonzales*, 289 Kan. 351, 212 P.3d 215 (2009). In this instance, unless the defendant stipulates to his or her age, the State must present evidence to the jury of the defendant's age at the time the offense was committed. The following question should then be included on the verdict form submitted to the jury: "If you find the defendant guilty of aggravated indecent liberties with a child, do you also unanimously find beyond a reasonable doubt that the defendant was 18 years of age or older at the time the offense was committed? Yes ____ No ____."

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

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

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

Comment

An instruction similar to PIK Crim. 3d 57.06 was approved by the Supreme Court in *State v. Isley*, 262 Kan. 281, 291, 936 P.2d 275 (1997). In *Isley* the court ruled that aggravated indecent liberties with a child as defined by K.S.A. 21-3504(a)(1) is a general intent crime. Proof of criminal intent does not require proof that the accused had knowledge of the age of a minor even though age is a material element of the crime. The State must only show that the defendant had sexual intercourse with the victim at a time when the victim was 14 or more years of age, but less than 16 years of age.

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

Battery is not a lesser included offense of aggravated indecent liberties with a child. *State v. Banks*, 273 Kan. 738, 46 P.3d 546 (2002).

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

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

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

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

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

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

Notes on Use

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

(a) sexual intercourse with a child;

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

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

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

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

57.08 AGGRAVATED CRIMINAL SODOMY—CHILD UNDER 14

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

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

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

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

Notes on Use

For authority, see K.S.A. 21-3506. Aggravated criminal sodomy is a severity level 1, person felony. But, aggravated criminal sodomy as described in K.S.A. 21-3506(a)(1) or (a)(2) and committed by an offender who is 18 years of age or older is an off-grid, person felony. In order for the court to sentence the defendant for committing an off-grid, person felony, the fact that the defendant was 18 years of age or older at the time the offense was committed must be submitted to the jury and proven beyond a reasonable doubt. *State v. Bello*, 289 Kan. 191, 211 P.3d 139 (2009). See also *State v. Gonzales*, 289 Kan. 351, 212 P.3d 215 (2009). In this instance, unless the defendant stipulates to his or her age, the State must present evidence to the jury of the defendant's age at the time the offense was committed. The following question should then be included on the verdict form submitted to the jury: "If you find the defendant guilty of aggravated criminal sodomy, do you also unanimously find beyond a reasonable doubt that the defendant was 18 years of age or older at the time the offense was committed? Yes ____ No ____."

Comment

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

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

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

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

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

exhibiting, or advertising, for pecuniary profit or with intent to arouse or gratify the sexual desire or appeal to the prurient interest of the defendant, the child or another.

c. "Performance" means any film, photograph, negative, slide, book, magazine or other printed or visual medium, any audio tape recording or any photocopy, video tape, video laser disk, computer hardware, software, floppy disk or any other computer related equipment or computer generated image that contains or incorporates in any manner any film, photograph, negative, photocopy, video tape or video laser disk, or any play or other live presentation.

d. "Nude" means any state of undress in which the human genitals, pubic region, buttock or female breast, at a point below the top of the areola, is less than completely and opaquely covered.

Notes on Use

For authority, see K.S.A. 21-3516. Sexual exploitation of a child is a severity level 5, person felony. Sexual exploitation of a child as described in K.S.A. 21-3516(a)(5) or (a)(6) when the offender is 18 years of age or older is an off-grid, person felony. 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. In order for the court to sentence the defendant for committing an off-grid, person felony, the fact that the defendant was 18 years of age or older at the time the offense was committed must be submitted to the jury and proven beyond a reasonable doubt. *State v. Bello*, 289 Kan. 191, 211 P.3d 139 (2009). See also *State v. Gonzales*, 289 Kan. 351, 212 P.3d 215 (2009). In this instance, unless the defendant stipulates to his or her age, the State must present evidence to the jury of the defendant's age at the time the offense was committed. The following question should then be included on the verdict form submitted to the jury: "If you find the defendant guilty of sexual exploitation of a child, do you also unanimously find beyond a reasonable doubt that the defendant was 18 years of age or older at the time the offense was committed? Yes ____ No ____."

Comment

In *State v. Zabrinas*, 271 Kan. 422, 24 P.3d 77 (2001), the Kansas Supreme Court held that K.S.A. 21-3516 is not unconstitutionally overbroad. The Kansas Supreme Court held that the words "exhibition in the nude" do not make the statute unconstitutionally broad when read in conjunction with the surrounding language. In *State v. Coburn*, 32 Kan. App. 2d 657, 87 P.3d 348 (2004), the Court held that the phrase "exhibition in the nude" means more than mere nudity and encompasses a child's awareness so that the depiction is posed, displayed, or presented for public view.

For a definition of the word "lewd," see *State v. Wells*, 223 Kan. 94, 573 P.2d 580 (1977).

Possessing a floppy disk containing two or more sexually explicit images of a minor is a single act and cannot be divided into two or more distinct acts for prosecution. *State v. Donham*, 29 Kan. App. 2d 78, 24 P.3d 750 (2001).

Promoting obscenity is not a lesser included offense of sexual exploitation of a child. *State v. Zabrinas*, 271 Kan. 422, 24 P.3d 77 (2001).

57.12-B PROMOTING SEXUAL PERFORMANCE BY A MINOR

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

57.12-C ELECTRONIC SOLICITATION OF A CHILD

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

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

1. **That the defendant by means of communication conducted through the telephone, internet, or by other electronic means (enticed) (solicited) _____ to (commit) (submit to) an act of (rape) (taking indecent liberties with a child) (taking aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery); and**
2. **That _____ was a person whom the defendant believed was a child (under 14) (14 or more but less than 16) years of age; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

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

The elements of (rape) (taking indecent liberties with a child) (taking aggravated indecent liberties with a child) (criminal sodomy) (aggravated criminal sodomy) (lewd and lascivious behavior) (sexual battery) (aggravated sexual battery) are as follows: _____

Notes on Use

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

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

OR

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

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

Notes on Use

For authority, see K.S.A. 21-3513. Promoting prostitution is a class A, nonperson misdemeanor when the prostitute is 16 or more years of age. Promoting prostitution when the prostitute is 16 or more years of age is a severity level 7, person felony if committed by a person who has prior to the commission of the crime been convicted of promoting prostitution. When the prostitute is under 16 years of age, promoting prostitution is a severity level 6, person felony. Promoting prostitution is an off-grid, person felony when the offender is 18 years of age or older and the prostitute is less than 14 years of age. In order for the court to sentence the defendant for committing an off-grid, person felony, the fact that the defendant was 18 years of age or older at the time the offense was committed must be submitted to the jury and proven beyond a reasonable doubt. *State v. Bello*, 289 Kan. 191, 211 P.3d 139 (2009). See also *State v. Gonzales*, 289 Kan. 351, 212 P.3d 215 (2009). In this instance, unless the defendant stipulates to his or her age, the State must present evidence to the jury of the defendant's age at the time the offense was committed. The following question should then be included on the verdict form submitted to the jury: "If you find the defendant guilty of promoting prostitution, do you also unanimously find beyond a reasonable doubt that the defendant was 18 years of age or older at the time the offense was committed? Yes ____ No ____."

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

The appropriate category of the offense should be selected.

Comment

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

57.15-A PROMOTING PROSTITUTION - CHILD UNDER 16

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

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

1. **That the defendant (procured _____ as a prostitute for a house of prostitution) (induced _____ to become a prostitute) (solicited a patron for _____, a prostitute) (procured _____, a prostitute, for a patron) [(procured transportation for) (paid for the transportation of) (transported) _____ with the intent of assisting or promoting _____'s engaging in prostitution];**
2. **That _____ was then under 16 years of age; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3513. Promoting prostitution of a prostitute under 16 years of age is a severity level 6, person felony.

Notes on Use

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

Comment

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

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

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

57.27 UNLAWFUL VOLUNTARY SEXUAL RELATIONS

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

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

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

Notes on Use

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

Comment

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

The plain language of K.S.A. 21-3522(a) requires the offender to be older than the victim. *In re E.R.*, 40 Kan. App. 2d 986, 197 P.3d 870 (2008).

58.04 AGGRAVATED INCEST

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

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

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

OR

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

Notes on Use

For authority, see K.S.A. 21-3603. Aggravated incest is a severity level 7, person felony, except when it results from otherwise lawful sexual intercourse or sodomy with a person who is 16 or 17 years old, which is a severity level 5, person felony.

As the facts require, reference should be made to PIK 3d 57.02, Sexual Intercourse - Definition, for a definition of sexual intercourse, or PIK 3d 57.18, Sex Offenses - Definitions, for a definition of sodomy.

Comment

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

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

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

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

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

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

58.10-A AFFIRMATIVE DEFENSE TO ENDANGERING A CHILD

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

Notes on Use

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

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

58.10-B AGGRAVATED ENDANGERING A CHILD

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

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

1. **(a) That the defendant intentionally 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. 21-36a01(i). For the definition of "drug paraphernalia" see K.S.A. 21-36a01(f).

58.11 ABUSE OF A CHILD

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

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

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

Notes on Use

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

Comment

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

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

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

In a felony-murder case, the proper test for determining whether an underlying felony merges into a homicide is whether all the elements of the felony are present in the homicide and whether the felony is a lesser included offense of the homicide, following *State v. Rueckert*, 221 Kan. 727, Syl. ¶ 6, 561 P.2d 850 (1977). A charge

of abuse of a child may meet the *Rueckert* test for merger into a charge of felony-first-degree murder. In *State v. Brown*, 236 Kan. 800, 803, 696 P.2d 954 (1985), the Court stated: "We are not called upon, and do not here decide, whether a single instance of assaultive conduct, as opposed to a series of incidents evidencing extensive and continuing abuse or neglect, would support a charge of felony-murder."

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

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

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

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

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

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

Neither severity level 7 aggravated battery under K.S.A. 21-3414(a)(1)(C) nor battery under K.S.A. 21-3412 are lesser included offenses of abuse of a child under K.S.A. 21-3609. *State v. Alderete*, 285 Kan. 359, 172 P.3d 27 (2007).

For definitions of "torture," "cruel," and "inhuman," see *State v. Wilson*, 41 Kan. App. 2d 37, 200 P.3d 1283 (2008).

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

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

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

1. **That the defendant [(owned)(occupied)(procured)] [(a residence)(a building)(a structure)(a room)(any land)];**
2. **That the defendant (intentionally) (recklessly) permitted the (residence) (building) (structure) (room) (land) to be used in a manner that resulted in the possession or consumption of alcoholic liquor or cereal malt beverages there by persons under the age of 21; and**
3. **That this occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

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

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

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

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

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CHAPTER 59.00

CRIMES AGAINST PROPERTY

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 $1,000 but less than $25,000) (less than $1,000); and**
5. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3720(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 $1,000 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 $1,000 or is of the value of $1,000 or more and is damaged to the extent of less than $1,000.

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.

See PIK Civil 3d, Chapter 171 for instructions as to property damage and value.

Comment

Under the statute, property cannot be damaged more than the value of the property at the time the damage occurred. If the value of the property at the time it is damaged is less than $1,000, then the defendant cannot be convicted of a felony. The preceding two sentences may be made the basis for an instruction, if needed.

Where a defendant is convicted of criminal damage to property and where the jury did not determine the amount of the damage and there was an issue as to whether the damage was more or less than $50, the conviction was set aside and the trial court was directed to sentence the defendant for a misdemeanor. *State v. Smith*, 215 Kan. 865, 528 P.2d 1195 (1974); *State v. Piland*, 217 Kan. 689, 538 P.2d 666 (1975).

Criminal damage to property is not a lesser included offense of theft. *State v. Shoemake*, 228 Kan. 572, 618 P.2d 1201 (1980).

It is doubtful if a charge under K.S.A. 21-3720(a)(1) is a lesser included offense of arson. Where the cause of damage is in issue, a charge in the alternative may be appropriate. Cases supporting this view are: *State v. Saylor*, 228 Kan. 498, 618 P.2d 1166 (1980); *State v. Lamb*, 215 Kan. 795, 530 P.2d 20 (1974); *State v. Jackson*, 223 Kan. 554, 575 P.2d 536 (1978).

Voluntary intoxication is not a defense to a general intent crime, and a jury instruction thereon would not ordinarily be appropriate or required. In *State v. Sterling*, 235 Kan. 526, 680 P.2d 301 (1984), the Court found that K.S.A. 21-3720(a)(1) is a general intent crime whereas K.S.A. 21-3720(a)(2) is a specific intent crime. Therefore, an instruction on voluntary intoxication would not ordinarily be appropriate under K.S.A. 21-3720(a)(1). However, it might be a defense where the evidence shows that defendant did not participate as a principal but only as an aider and abettor. Under those circumstances, a specific intent of a defendant may be a proper issue in the case. *State v. McDaniel & Owens*, 228 Kan. 172, 612 P.2d 1231 (1980).

The sole distinction between Criminal damage to property, K.S.A. 21-3720 and Arson, K.S.A. 21-3718, is that arson proscribes knowingly damaging another person's property by means of fire or explosive and criminal damage to property proscribes willfully damaging another person's property by means other than by fire or explosive. That the damages to property of another was brought about by means other than by fire or explosive is an essential element of Criminal damage to property K.S.A. 21-3720. *Zapata v. State*, 14 Kan. App. 2d 94, 782 P.2d 1251 (1989).

In *State v. Jones*, 247 Kan. 537, 802 P.2d 533 (1990), the criminal damage to property involved the breaking of windows in a 1977 Dodge car. The Supreme Court held that, for purposes of determining if the offense was a felony or misdemeanor, the value of damage was the cost of replacement plus installation, not to exceed the total value of the car. Since the State failed to present evidence to establish the value of the car, the Supreme Court reversed the felony convictions of criminal damage to 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. 1993 Supp. 21-3718) to mean "explosion."

59.24 CRIMINAL DAMAGE TO PROPERTY—WITH INTENT TO DEFRAUD AN INSURER OR LIENHOLDER

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 the defendant intentionally (damaged) (defaced) _____ by means other than by fire or explosion;**
2. **That _____ was an insurer of the property;**

   or

   That _____ had an interest in the property because (he)(she) had a lien thereon;
3. **That the defendant did so with the intent to (injure) (defraud) _____;**
4. **That the property was damaged to the extent of ($25,000 or more) (at least $1,000 but less than $25,000) (less than $1,000); and**
5. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-3720(a)(2). 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 $1,000 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 $1,000 or is of the value of $1,000 or more and is damaged to the extent of less than $1,000.

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.

This instruction should not be used for K.S.A. 21-3720(a)(1).

See PIK Civil 3d, Chapter 171 for instructions as to property damage and value.

Voluntary intoxication is not a defense to a general intent crime, and a jury instruction thereon would not ordinarily be appropriate nor required. In *State v. Sterling*, 235 Kan. 526, 680 P.2d 301 (1984), the Court found that K.S.A. 21-3720(a)(1) is a general intent crime whereas K.S.A. 21-3720(a)(2) is a specific intent

crime. Therefore, an instruction on voluntary intoxication would not ordinarily be appropriate under K.S.A. 21-3720(a)(1). However, it might be a defense where the evidence shows that defendant did not participate as a principal but only as an aider and abettor. Under those circumstances, a specific intent of a defendant may be a proper issue in the case. *State v. McDaniel & Owens*, 228 Kan. 172, 612 P.2d 1231 (1980).

Comment

Under the statute, property cannot be damaged more than the value of the property at the time the damage occurred. If the value of the property at the time it is damaged is less than $1,000, then the defendant cannot be convicted of a felony. The preceding two sentences may be the basis for an instruction, if needed.

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. 1993 Supp. 21-3718) to mean "explosion."

59.67-B REMOVAL OF A THEFT DETECTION DEVICE

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

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

Notes on Use

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

Comment

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

In *State v. Davison*, 41 Kan. App. 2d 70, 199 P.3d 1278 (2009), the court held that a jury instruction on removal of a theft detection device which lacked a specific intent element was clearly erroneous.

59.68 COUNTERFEITING MERCHANDISE OR SERVICES

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

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

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

   or

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

   and

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

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

2. **That the defendant did so knowingly and maliciously; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

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

Notes On Use

For authority, see K.S.A. 21-3832. Intimidation of a witness or victim is a class B, person misdemeanor. For the definition of "malice," see K.S.A. 21-3831(b).

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

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

Insert name of individual in blank spaces.

Comment

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

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

60.06-B AGGRAVATED INTIMIDATION OF A WITNESS OR VICTIM

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

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

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

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

Notes On Use

For authority, see K.S.A. 21-3833. Aggravated intimidation of a witness or victim is a severity level 6, person felony. For the definition of "malice," see K.S.A. 21-3831(b).

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

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

Comment

See Comment to PIK 3d 60.06-A. For the definition of "malice," see K.S.A. 213831(b).

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

When the defendant is charged with an attempt to prevent a witness from testifying by threat of force or violence, the State need not prove that the victim or witness actually perceived the threat. Further, because an attempt to intimidate a witness is a specific and alternative means of committing aggravated intimidation of a witness, the State is not required to prove the elements of attempt under the general attempt statute, K.S.A. 21-3301. *State v. Quinones*, 42 Kan. App. 2d 48, 208 P.3d 335 (2009).

In *State v. Johnson*, 40 Kan. App. 2d 397, 192 P.3d 661 (2008), the Court of Appeals found that a Kansas district court had jurisdiction over a defendant who took her granddaughter from Colorado to an undisclosed location in New Mexico in order to prevent the child from appearing in Kansas to testify about alleged sexual abuse perpetrated upon her by her father. The court analyzed the jurisdictional question under K.S.A. 21-3104 and found that the proximate result of the defendant's act occurred in Reno County, when the child failed to appear to testify, and thus found jurisdiction was proper under K.S.A. 21-3104(c)(2).

60.06-C UNLAWFUL DISCLOSURE OF AUTHORIZED INTERCEPTION OF COMMUNICATIONS

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

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

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

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

Notes On Use

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

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

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. 1176 (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.

Compulsion as a defense to escape from custody is available to a defendant who presents evidence that 1) the inmate faced a specific threat of imminent death or great bodily harm; 2) there was no time for a complaint to authorities or a history of futile complaints to authorities; 3) there was no time or opportunity to resort to the courts; 4) there is no evidence of force or violence toward prison personnel or other innocent

persons in the escape; and 5) the inmate promptly reported to the proper authorities once he attained a position of safety from the imminent threat. *State v. Irons*, 250 Kan. 302, 827 P.2d 722 (1992), *State v. Harvey*, 41 Kan. App. 2d 104, 202 P.3d 21 (2009). In the event that the defendant presents evidence on these elements, the jury should be given the compulsion instruction, PIK 3d 54.13.

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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. 1176 (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.

Compulsion as a defense to escape from custody is available to a defendant who presents evidence that 1) the inmate faced a specific threat of imminent death or great bodily harm; 2) there was no time for a complaint to authorities or a history of futile complaints to authorities; 3) there was no time or opportunity to resort to the courts; 4) there is no evidence of force or violence toward prison personnel or other innocent persons in the escape; and 5) the inmate promptly reported to the proper authorities once he attained a position of safety from the imminent threat. *State v. Irons*, 250 Kan. 302, 827 P.2d 722 (1992), *State v. Harvey*, 41 Kan. App. 2d 104, 202 P.3d 21 (2009). In the event that the defendant presents evidence on these elements, the jury should be given the compulsion instruction, PIK 3d 54.13.

Comment

In a prosecution for aggravated failure to appear under K.S.A. 21-3814, the State is not required to notify the defendant of the forfeiture of the appearance bond as provided in K.S.A. 22-2807 in order to establish the element of willfulness in K.S.A. 21-3814. To establish willfulness, it is sufficient if the State proves the defendant failed without just cause or excuse to surrender himself within 30 days following the forfeiture of his appearance bond. See *State v. Rodgers*, 225 Kan. 242, 245, 589 P.2d 981 (1979).

Failure to appear is "aggravated" only if the charge involved is a felony. When applicable, this element should be included in the trial court's instruction. See *State v. DeAtley*, 11 Kan. App. 2d 605, 731 P.2d 318 (1987).

The State need not present evidence that the surety has paid on the forfeited bond in order to prevail in a failure to appear prosecution. *State v. Jones*, 38 Kan. App. 2d 924, 173 P.3d 1179 (2008).

60.16 ATTEMPTING TO INFLUENCE A JUDICIAL OFFICER

The defendant is charged with the crime of attempting to influence a judicial officer. The defendant pleads not guilty.

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

1. **That _____ was a judicial officer;**
2. **That the defendant knew _____ was a judicial officer;**
3. **That the defendant communicated with _____ relative to a matter which (was before) (might have been brought before) _____;**
4. **That such act was done by the defendant with the intent to improperly influence _____; and**
5. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes On Use

For authority, see K.S.A. 21-3815. Attempting to influence a judicial officer is a severity level 9, nonperson felony.

Judicial officer is defined in K.S.A. 21-3110(19)(c).

Comment

In *State v. Torline*, 215 Kan. 539, 542, 543, 527 P.2d 994 (1974), the Court stated, "The phrase with intent improperly to influence a judicial officer as it appears in K.S.A. 1973 Supp. 21-3815, encompasses a broad range of possible conduct but is limited to conduct affecting a governmental function, the administration of justice by a judicial officer in relation to any matter which is or may be brought before him as a judicial officer."

In the above-cited case, the Court held that where an assault or threat is directed against a judicial officer some months after the final termination of proceedings before such officer, the one making the threat is not guilty of attempting to improperly influence a judicial officer.

60.27 TRAFFIC IN CONTRABAND IN A CORRECTIONAL INSTITUTION

The defendant is charged with the crime of traffic in contraband in a correctional institution. The defendant pleads not guilty.

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

1. That the defendant intentionally
[(took) (attempted to take) (sent) (attempted to send)] [name of (contraband) (firearms) (ammunition) (explosives) (controlled substance)]
[(into) (upon the grounds of) (from)]
or
[possessed name of (contraband) (firearms) (ammunition) (explosives) (controlled substance) in]
or
[distributed name of (contraband) (firearms) (ammunition) (explosives) (name of controlled substance) within]
a correctional institution;

2. That the defendant did so without the consent of the administrator of the correctional institution; [and]

[3. That the defendant was an employee of a correctional institution; and]

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

"Correctional institution" means any (state correctional institution or facility) (conservation camp) (state security hospital) (juvenile correctional facility) (community correction center or facility used for detention or confinement) (juvenile detention facility) (jail).

Notes on Use

For authority, see K.S.A. 21-3826. Under this statute, any item may be considered contraband. The particular item(s) should be designated in the instruction. Traffic in any contraband in a correctional institution is a severity level 6, nonperson felony, unless the offense is committed by an employee of a correctional institution, in which case it is a severity level 5, nonperson felony. In addition, if the contraband is firearms, ammunition, explosives, or a controlled substance, as defined in subsection (a) of K.S.A. 21-36a01, it is a severity level 5, nonperson felony.

Optional paragraph 3 should be used when the state has charged a severity level 5, nonperson felony based solely on the defendant's status as an employee of a correctional institution at the time of commission of the charged act.

In cases where the state has charged a severity level 5, nonperson felony and there is an issue of fact regarding the type of contraband involved or the defendant's status as an employee of the correctional institution, an alternative verdict form should be used.

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. 1180 (2008).

62.12 UNLAWFUL SMOKING - DEFENSE OF SMOKING IN DESIGNATED SMOKING AREA

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

Notes on Use

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

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

62.13 IDENTITY THEFT

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

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

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

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

Notes on Use

For authority, see K.S.A. 21-4018(a). Identity theft is a severity level 8, nonperson felony. If the monetary loss to the victim or victims is more than $100,000, identity theft is a severity level 5, nonperson felony. Intent to defraud is defined in K.S.A. 21-3110(9). See also K.S.A. 21-3830(b), "identification documents."

Comment

In *City of Liberal v. Vargas*, 28 Kan. App. 2d 867, 24 P.3d 155, *rev. denied* 271 Kan. 1035 (2001), Vargas, an illegal alien, had purchased false identity papers to obtain employment. Misrepresentation of his true identity to the employer gave rise

to identity theft charges. The Court of Appeals affirmed the District Court's acquittal of Vargas, noting that a review of the legislative history of K.S.A. 21-4018 revealed no legislative intent to protect a third party (here, the employer) from identity theft.

Additionally, the Court noted that the assumption of a false identity is not identity theft unless a real person's identity has, in the process, been "stolen." Since *Vargas*, these issues have been addressed by the legislature in K.S.A. 21-4018(d). See PIK 3d 62-13-A, Identity Fraud.

State v. Hardesty, 42 Kan. App. 2d 431, 213 P.3d 745 (2009), found that the identity of a deceased person is included in the statutory language of "another person" set forth in K.S.A. 21-4018.

In *State v. Green*, 38 Kan. App. 2d 781, 172 P.3d 1213 (2007), the court rejected a claim of double jeopardy and multiplicious charging when the defendant was convicted of three counts of identity theft stemming from the use of the same stolen identification on three separate occasions during a two-day period. The court stated, "[e]ach time an innocent person's identity is intentionally used for some fraudulent purpose it is a crime. Each use of another person's identity is a unit of prosecution for the crime of identity theft."

62.13-A IDENTITY FRAUD

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

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

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

Notes on Use

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

CHAPTER 63.00

CRIMES AGAINST THE PUBLIC PEACE

63.01 DISORDERLY CONDUCT

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

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

1. **That the defendant:**
   (a) **engaged in brawling or fighting;**

   OR

   (b) **disturbed an assembly, meeting, procession, not unlawful in its character;**

   OR

   (c) **engaged in noisy conduct of such a nature that it would tend to reasonably arouse alarm, anger or resentment in others;**

   OR

   (d) **used offensive, obscene or abusive language that would tend to reasonably arouse alarm, anger or resentment in others.**
2. **That the defendant acted with knowledge or reasonable cause to believe that (his) (her) (conduct) (language) would alarm, anger, or disturb others or provoke an assault or other breach of the peace; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

(The language used by the defendant must be "fighting words" directed to a specific person or group. "Fighting words" means words that by their very utterance inflict injury or tend to incite the listener to an immediate breach of the peace.)

Notes on Use

For authority, see K.S.A. 21-4101. Disorderly conduct is a class C misdemeanor. This offense covers conduct formerly called disturbing the peace. The last

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

Comment

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

"Disorderly conduct is an offense which may be committed in either a public or private place." *State v. Beck*, 9 Kan. App. 2d 459, Syl. ¶ 1, 682 P.2d 137 (1984). No special standard applies when the language is directed at a police officer; instead the jury must consider the totality of the circumstances to determine what is disorderly conduct. 9 Kan. App. 2d at 462-63.

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

63.02 UNLAWFUL ASSEMBLY

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

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

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

   OR

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

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

[Disorderly conduct is (engaging in brawling or fighting) (disturbing an assembly, meeting, or procession, not unlawful in its character) (engaging in noisy conduct of such a nature that it would tend to reasonably arouse alarm, anger or resentment in others) (using offensive, obscene or abusive language that would tend to reasonably arouse alarm, anger or resentment in others) with knowledge or reasonable cause to believe that such (conduct) (language) would alarm, anger or disturb others or provoke an assault or other breach of the peace.]

[Riot is any use of force or violence that produces a breach of the public peace, or any threat to use such force or violence against any person or property if accompanied by power or apparent power of immediate execution, by five or more persons acting together and without authority of law.]

Notes on Use

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

63.03 REMAINING AT AN UNLAWFUL ASSEMBLY

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

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

1. **That the defendant intentionally failed to depart from the place of an unlawful assembly after being directed to leave by a law enforcement officer; and**
2. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Unlawful assembly means a meeting of five or more persons for the purpose of engaging in conduct constituting (disorderly conduct) (a riot) or a meeting of five or more persons agreeing to engage in such conduct.

[Disorderly conduct is (engaging in brawling or fighting) (disturbing an assembly, meeting, or procession, not unlawful in its character) (engaging in noisy conduct of such a nature that it would tend to reasonably arouse alarm, anger or resentment in others) (using offensive, obscene or abusive language that would tend to reasonably arouse alarm, anger or resentment in others) with knowledge or reasonable cause to believe that such (conduct) (language) would alarm, anger or disturb others or provoke an assault or other breach of the peace.]

[Riot is any use of force or violence that produces a breach of the public peace, or any threat to use such force or violence against any person or property if accompanied by power or apparent power of immediate execution, by five or more persons acting together and without authority of law.]

Notes on Use

For authority, see K.S.A. 21-4103. Remaining at an unlawful assembly is a class A, nonperson misdemeanor. A definition of disorderly conduct or riot must be given with this instruction.

63.04 RIOT

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

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

A. 1. That the defendant used force or violence which resulted in a breach of the public peace;

2. That the defendant acted in a group of five or more persons;

3. That the defendant acted without authority of law; and

OR

B. 1. That the defendant threatened to use force or violence to produce a breach of the public peace against any person or property;

2. That such threat was accompanied by power or apparent power of immediate execution;

3. That the defendant acted in a group of five or more persons;

4. That the defendant acted without authority of law; and

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

Notes on Use

For authority, see K.S.A. 21-4104. Riot is a class A person misdemeanor. For definition of breach of the public peace, see Chapter 53.00, Definitions and Explanations of Terms.

Comment

PIK 3d 63.03 through 63.05 define crimes deemed inimical to the public peace. The distinction between riot and incitement to riot was noted in *State v. Dargatz*, 228 Kan. 322, 326-327, 614 P.2d 430 (1980), where the Court approved the substance of PIK 2d 63.04, Riot and 63.05, Incitement to Riot.

63.05 INCITEMENT TO RIOT

The defendant is charged with the crime of incitement to riot. The defendant pleads not guilty.

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

1. **That the defendant by words or conduct intentionally urged others to engage in a riot under circumstances which produced a clear and present danger of injury to persons or property or a breach of the public peace; and**
2. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Riot is any use of force or violence which produces a breach of the public peace, or any threat to use such force or violence against any person or property if accompanied by power or apparent power of immediate execution, by five or more persons acting together and without authority of law.

Notes on Use

For authority, see K.S.A. 21-4105. Incitement to riot is a severity level 8, person felony.

Comment

See Comment to PIK 3d 63.04, Riot. Incitement to riot is a specific intent crime. *State v. Dargatz*, 228 Kan. 322, 331, 614 P.2d 430 (1980). Hence, in a proper case, an instruction on voluntary intoxication may be appropriate. See PIK 3d 54.12, Intoxication.

63.06 MAINTAINING A PUBLIC NUISANCE

The defendant is charged with the crime of maintaining a public nuisance. The defendant pleads not guilty.

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

1. **That the defendant intentionally_____ _____;**
2. **That this act or omission injured or endangered the public health, safety or welfare; and**
3. **That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4106. Maintaining a public nuisance is a class C misdemeanor.

Claim No. 1 should be completed by specifying the act or omission alleged to constitute the nuisance.

63.07 PERMITTING A PUBLIC NUISANCE

The defendant is charged with the crime of permitting a public nuisance. The defendant pleads not guilty.

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

1. **That some person or persons intentionally _____ _____;**
2. **That this act or omission endangered the public health, safety or welfare;**
3. **That the defendant knowingly permitted this condition on property under (his)(her) control; and**
4. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4107 and 21-4106. Permitting a public nuisance is a class C misdemeanor.

Claim No. 1 should be completed by specifying the act or omission alleged to constitute the nuisance. If the defendant committed the act or omission constituting the nuisance, the crime is Maintaining a Public Nuisance, PIK 3d 63.06.

63.08 VAGRANCY

The statute upon which this instruction was based (K.S.A. 21-4108) was repealed, effective July 1, 1993.

63.11 CRIMINAL DESECRATION—FLAGS

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

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

1. **That the defendant, by means other than by fire or explosive, intentionally (damaged) (defaced) (destroyed) the (flag) (ensign) (_____, a symbol) of (the United States) (Kansas) in which another, _____, had a property interest without the consent of such other person; and**
2. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4111. Criminal desecration as used herein is a class A nonperson misdemeanor. The Committee ventures no opinion as to the significance of "ensign" or "symbol." For other kinds of criminal desecration, see PIK 3d 63.12, Criminal Desecration—Monuments/Cemeteries/Places of Worship, and 63.13, Criminal Desecration—Dead Bodies.

63.12 CRIMINAL DESECRATION—MONUMENTS/ CEMETERIES/PLACES OF WORSHIP

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

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

1. **That the defendant, by means other than by fire or explosive, intentionally (damaged) (defaced) (destroyed) a (public monument or structure) [(tomb) (monument) (memorial) (marker) (grave) (vault) (crypt gate) (tree) (shrub) (plant) (other property) in a cemetery] (_____, a place of worship);**
2. **That the property was damaged to the extent of (less than $1,000) (at least $1,000 but less than $25,000) ($25,000 or more); and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4111. Desecrating public monuments, property in a cemetery, and places of worship is a class A nonperson misdemeanor if damage is less than $1,000; if at least $1,000 but less than $25,000 it is a severity level 9, nonperson felony; and if $25,000 or more, a severity level 7, nonperson felony. Where the extent of damage is in issue, PIK 3d 68.11, Verdict Form - Value in Issue, and PIK 3d 59.70, Value in Issue, should be used and modified accordingly. For other kinds of criminal desecration, see PIK 3d 63.11, Criminal Desecration—Flags, and 63.13, Criminal Desecration—Dead Bodies.

63.13 CRIMINAL DESECRATION—DEAD BODIES

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

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

1. **That the defendant, by means other than by fire or explosive, intentionally (obtained) (attempted to obtain) unauthorized control of (a dead body) (the remains of any human being) (a coffin, urn or other article containing a dead body or the remains of any human being); and**
2. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-4111. Criminal desecration as described herein is a class A nonperson misdemeanor. For other kinds of criminal desecration, see PIK 3d 63.11, Criminal Desecration—Flags, and PIK 3d 63.12, Criminal Desecration—Monuments/Cemeteries/Places of Worship.

63.14 HARASSMENT BY TELEPHONE

The defendant is charged with the crime of harassment by telephone. The defendant pleads not guilty.

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

1. That the defendant (used a telephone) (knowingly permitted a [telephone] [telefacsimile communication machine] under [his][her] control to be used) (knowingly transmitted a telefacsimile communication) to:

(a) (make) (transmit) any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy or indecent with the intent to harass; and

or

(b) intentionally abuse, threaten or harass any person at the called number, whether or not conversation ensues; and

or

(c) cause the telephone of another to ring repeatedly with intent to harass any person at the called number; and

or

(d) make repeated (telephone calls during which conversation ensued) (transmissions of telefacsimile communications), solely to harass any person at the (called) (receiving) number; and

or

(e) play any recording on a telephone, except recordings such as weather information or sports information, when the number thereof is dialed, unless the person or group playing the recording be identified and state that it is a recording; and

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

Notes on Use

For authority, see K.S.A. 21-4113. Harassment by telephone is a class A nonperson misdemeanor. The statute provides that "telephone communication" includes telefacsimile communication. For a criminal charge of refusal to yield a party line, see PIK 3d 64.13. For criminal threat, see PIK 3d 56.23.

Comment

Identification of the voice of defendant over the telephone was mentioned in *State v. Visco*, 183 Kan. 562, 331 P.2d 318 (1958).

In *State v. Thompson*, 237 Kan. 562, 701 P.2d 694 (1985), intent to harass was determined to be an element of the crime of harassment by telephone under K.S.A. 21-4113(1)(a).

The Kansas Supreme Court in *State v. Schuette*, 273 Kan. 593, 44 P.3d 459 (2002), discussed at length the evidentiary foundation necessary to admit caller ID information and also determined that the caller ID device display was not hearsay. The Court further found that the defendant's convictions of both telephone harassment and criminal threat were not multiplicitous.

63.14-A (HARASSMENT OF COURT BY TELEFACSIMILE previously appeared at this location. It has been moved to 60.31.)

63.15 DESECRATION OF FLAGS

The statute upon which this instruction was based (K.S.A. 21-4114) was repealed, effective July 1, 1993.

See PIK 3d 63.11, Criminal Desecration—Flags.

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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) (possessed) (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. See PIK 3d 64.04, Criminal Use of Weapons—Affirmative Defense, and K.S.A. 21-4201(b)-(i) for statutory exemptions.

Comment

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

1. 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

1. 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

1. 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

1. 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. See PIK 3d 64.04, Criminal Use of Weapons—Affirmative Defense, and K.S.A. 21-4201(b)-(i) for statutory exemptions. Any prosecutor claiming exemption under K.S.A. 21-4201(c)(7) must be properly licensed for concealed carry.

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.

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.

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

2. **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

For authority, see K.S.A. 21-4217. The violation of this statute is a class C misdemeanor.

See PIK 3d 64.02-B, Criminal Discharge of a Firearm - Affirmative Defense, and K.S.A. 21-4217(b) for statutory exemptions.

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 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 (<u>allege any of the violations listed in PIK 3d 64.01 and 64.02</u>);**
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

2. **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.

See PIK 3d 52.06, Proof of Other Crime - Limited Admissibility of Evidence, for the required limiting instruction concerning defendant's prior conviction.

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 _____;

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

OR

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

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

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

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

Notes on Use

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

Alternative C concerns the transfer or sale of a firearm to anyone convicted of a specified felony or released from imprisonment for such a felony within five years of the act charged. For the purposes of this alternative, the specified felony conviction is defined as any felony except a felony as defined by K.S.A. 21-3401; 21-3402; 21-3403; 21-3404; 21-3410; 21-3411; 21-3414; 21-3415; 21-3419; 21-3420; 21-3421; 21-3427; 21-3442; 21-3502; 21-3506; 21-3518; 21-3716; 21-36a05; or 21-36a06, and amendments thereto, or a crime under the law of another jurisdiction which is substantially the same as such felony. It is important to note that there is no longer any barrel length specification.

Alternative D concerns the transfer or sale of a firearm to anyone convicted of a specified felony or released from imprisonment for such a felony within 10 years of the act. The specified felony conviction for this alternative is any felony defined by K.S.A. 21-3401; 21-3402; 21-3403; 21-3404; 21-3410; 21-3411; 21-3414; 21-3415; 21-3419; 21-3420; 21-3421; 21-3427; 21-3442; 21-3502; 21-3506; 21-3518; 21-3716; 21-36a05; or 21-36a06, and amendments thereto, or a crime under the law of another jurisdiction which is substantially the same as such felony.

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

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

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

See PIK 3d 52.06, Proof of Other Crime - Limited Admissibility of Evidence, for the required limiting instruction concerning defendant's prior conviction.

Comment

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

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

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

See PIK 3d 52.06, Proof of Other Crime - Limited Admissibility of Evidence, for the required limiting instruction concerning defendant's prior conviction.

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).

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64.07 CRIMINAL POSSESSION OF A FIREARM—MISDEMEANOR

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

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

A. 1. That the defendant was both addicted to and an unlawful user of _____, a controlled substance;

2. That the defendant knowingly had possession of a firearm; and

OR

B. 1. That the defendant knowingly had possession of a firearm and was not a law enforcement officer;

2. That the defendant was [in or on school (property) (grounds) upon which was located a (building) (structure) used by (a unified school district) (an accredited nonpublic school) for student (instruction) (attendance) (extracurricular activities) for pupils enrolled in (kindergarten) (any of the grades 1 through 12)] [at a regularly scheduled school sponsored activity or event]; and

OR

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

2. That the defendant refused to (surrender) (immediately remove) the firearm (from school [property] [grounds]) (at a regularly scheduled school sponsored activity or event) when (requested) (directed) by a (duly authorized school employee) (law enforcement officer); and

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

Notes on Use

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

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

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

Comment

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

"Under the plain language of K.S.A. 21-4204(a)(5), a person may be found guilty of criminal possession of a firearm on school property, even when school is not in session or children are not present on the school property at the time the offense is committed." *State v. Toler*, 41 Kan. App. 2d 896, Syl. ¶ 6, 206 P.3d 548 (2009).

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

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

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

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

Notes on Use

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

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

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

Subsection (c) of K.S.A. 21-4218 provides that it is not a violation of this statute for prosecutors, with the authority of their superior, to possess a firearm in a county courthouse or court facility, subject to any restriction imposed by the chief judge, and assuming the prosecutor is properly licensed for concealed carry.

Subsection (d) of K.S.A. 21-4218 allows a county commission, by resolution, to override prosecutor carry 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.

64.11 CRIMINAL DISPOSAL OF EXPLOSIVES

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

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

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

OR

2. **That the defendant knew _____ was (a person who was both addicted to and an unlawful user of a controlled substance, _____) (a person who, within the preceding five years, had been convicted of a felony) (a person who, within the preceding five years, had been released from imprisonment for a felony); and**
3. **That this act occurred on or about the _____ day of _____, ____, in _____ County, Kansas.**

Notes on Use

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

See PIK 3d 52.06, Proof of Other Crime - Limited Admissibility of Evidence, for the required limiting instruction concerning defendant's prior conviction.

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

Comment

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

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

64.11-A CRIMINAL POSSESSION OF EXPLOSIVES

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

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

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

Notes on Use

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

See PIK 3d 52.06, Proof of Other Crime - Limited Admissibility of Evidence, for the required limiting instruction concerning defendant's prior conviction.

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

Comment

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

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

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

64.11-B CRIMINAL POSSESSION OF EXPLOSIVES—DEFENSE

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

64.12 CARRYING CONCEALED EXPLOSIVES

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

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

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

Notes on Use

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

Comment

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

64.13 REFUSAL TO YIELD A TELEPHONE PARTY LINE

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

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

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

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

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

Notes on Use

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

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

Comment

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

64.14 CREATING A HAZARD

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

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

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

   or

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

   or

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

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

Notes on Use

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

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

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.

64.15 UNLAWFUL FAILURE TO REPORT A WOUND

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

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

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

Notes on Use

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

Comment

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

64.16 UNLAWFUL ACTS CONCERNING A PRESCRIPTION-ONLY DRUG

The defendant is charged with the crime of committing an unlawful act concerning a prescription-only drug. The defendant pleads not guilty.

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

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

   or

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

   or

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

   or

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

   or

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

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

As used in this instruction, practitioner means a person licensed to practice medicine and surgery, dentist, podiatrist, veterinarian, optometrist licensed under the optometry law as a therapeutic licensee or diagnostic and therapeutic licensee, or scientific investigator, or other person authorized by law to use a prescription-only drug in teaching or chemical analysis or to conduct research with respect to a prescription-only drug.

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 licensed physician's assistant who 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 whether intended for use by man or animal, required by federal or state law to be dispensed only pursuant to a written or oral prescription or order of a practitioner or restricted to use by practitioners only.

As used in this instruction, prescription order means an order transmitted in writing, orally, telephonically or by other means of communication 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 licensed to practice pharmacy.

Notes on Use

For authority, see K.S.A. 21-36a08, effective for crimes committed on or after July 1, 2009. Unlawfully obtaining or distributing a prescription-only drug is a class A, nonperson misdemeanor for the first offense and a severity level 9, nonperson felony for a second or subsequent offense. It is a nondrug severity level 6, nonperson felony if the distribution involves selling, possession with intent to sell, or offering for sale the prescription-only drug so obtained. In such cases, the trial court must ask a special fact question as part of the verdict form.

Definitions of "practitioner," "mid-level practitioner," "prescription-only drug," and "pharmacist" can be found 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. 21-36a08 provides that if a prosecution for unlawfully obtaining prescription-only drugs could be brought under the provisions of K.S.A. 21-36a05 or 21-36a06, such prosecutions may not be brought under this section.

64.17 UNLAWFULLY OBTAINING PRESCRIPTION-ONLY DRUG FOR RESALE

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

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

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

   or

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

   or

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

Pharmacist means any natural person registered to practice pharmacy.

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

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

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

Notes on Use

This instruction is effective only for acts committed prior to July 1, 2009, because the statute authorizing the instruction, K.S.A. 21-4215, was repealed on that date. No new enactment contains the elements of this crime, although similar language appears in K.S.A. 21-36a08(b)(2), a penalty provision of that statute. See PIK 3d 64.16. Obtaining a prescription-only drug by fraudulent means for resale is a severity level 6, nonperson felony.

CHAPTER 67.00

CONTROLLED SUBSTANCES

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67.01 - 67.12

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

Then, in 2009, substantial legislative changes were made. Prior to July 1, 2009, statutes dealing with criminal acts involving controlled substances were located within the Uniform Controlled Substances Act, K.S.A. 65-4101 *et seq.* The Kansas Legislature moved the statutes containing crimes relating to controlled substances to Chapter 21 of the Kansas Statutes Annotated. See K.S.A. 21-36a01 through 21-36a17. The new statutes were not merely relocated, but were also substantively amended. For ease of use and clarity, the PIK Committee drafted new instructions that correspond to the new statutes.

PIK 3d 67.13 through 67.30 remain in the book and are to be used when conduct occurred prior to July 1, 2009. The exception is PIK 3d 67.24, Possession by Dealer—No Tax Stamp Affixed, which has been moved to PIK 3d 67.51. PIK 3d 67.51, applies to conduct occurring before, on, and after July 1, 2009.

The new instructions, PIK 3d 67.31 through 67.52, should be used when conduct occurred on or after July 1, 2009.

67.13 NARCOTIC DRUGS AND CERTAIN STIMULANTS—POSSESSION

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

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

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

Notes on Use

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

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

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

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

This instruction is for use when conduct occurred prior to July 1, 2009, the date on which K.S.A. 65-4160 was repealed. When conduct occurred on or after July 1, 2009, use PIK 3d 67.34, Possessing A Controlled Substance.

Comment

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

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

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

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

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

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

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

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

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

67.13-A CONTROLLED SUBSTANCES—SALE DEFINED

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

Notes on Use

For authority, see *State v. Griffin*, 221 Kan. 83, 558 P.2d 90 (1976); *State v. Maxwell*, 10 Kan. App. 2d 62, 691 P.2d 1316 (1984); *State v. Nix*, 215 Kan. 880, 529 P.2d 147 (1974). This instruction is for use when conduct occurred prior to July 1, 2009. In *State v. Evans*, 219 Kan. 515, 548 P.2d 772 (1976), the court disapproved of the use of the definition of "sale" normally given it in the context of commercial law.

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. This instruction is for use when conduct occurred prior to July 1, 2009, the date on which K.S.A. 65-4161 was repealed. When conduct occurred on or after July 1, 2009, use PIK 3d 67.32, Cultivating, Distributing, Or Possessing With Intent To Distribute A Controlled Substance (Schedule I-IV).

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).

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

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

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

1. That the defendant (possessed) (offered to sell) [insert name of narcotic drug or stimulant];

2. That the defendant did so with the intent to (sell) (sell, deliver or distribute) it;

[3. That the defendant did so in, on or within 1,000 feet of school property upon which was located a school;

4. That the defendant was 18 years of age or over;] and

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

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

Notes on Use

For authority, see K.S.A. 65-4161. This instruction is for use when conduct occurred prior to July 1, 2009, the date on which K.S.A. 65-4161 was repealed. 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 possessed with intent to sell, deliver or distribute or offered for sale in, on or within 1,000 feet of any school property upon which was located a school structure. If the defendant is charged with such a violation, the bracketed elements and definition of "school" should be included in the instruction.

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

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

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

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

Comment

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

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

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

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

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

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

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

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

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

67.13-D POSSESSION OF A CONTROLLED SUBSTANCE DEFINED

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

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

[When a defendant is in nonexclusive possession of (the premises upon) (an automobile in) which a controlled substance is found, it cannot be inferred that the defendant knowingly possessed the controlled substance unless there are other circumstances linking the defendant to the controlled substance. You may consider the following factors in determining whether the defendant knowingly possessed the controlled substance, if you find they are supported by the evidence:

1. whether the defendant previously participated in the sale of a controlled substance;

2. whether the defendant used controlled substances;

3. whether the defendant was near the area where the controlled substance was found;

4. whether the controlled substance was found in plain view;

5. whether the defendant made any incriminating statements;

6. whether the defendant's behavior was suspicious; and

7. whether the defendant's personal belongings were near 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). This instruction is for use when conduct occurred prior to July 1, 2009. When conduct occurred on or after July 1, 2009, see K.S.A. 21-36a01(p) for a statutory definition of "possession."

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. 1184 (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.

67.14 STIMULANTS, DEPRESSANTS AND HALLUCINOGENIC DRUGS OR ANABOLIC STEROIDS—POSSESSION OR OFFER TO SELL WITH INTENT TO SELL

The defendant is charged with the crime of unlawfully (possessing) (offering to sell) [insert name of stimulant, depressant, hallucinogenic drug, controlled substance, or anabolic steroid] with intent to (sell) (sell, deliver or distribute) it. The defendant pleads not guilty.

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

1. That the defendant (possessed) (offered to sell) [insert name of stimulant, depressant, hallucinogenic drug, controlled substance, or anabolic steroid];

2. That the defendant did so with the intent to (sell) (sell, deliver or distribute) it;

[3. That the defendant did so in, on or within 1,000 feet of school property upon which was located a school;

4. That the defendant was 18 years of age or over;] and

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

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

Notes on Use

For authority, see K.S.A. 65-4163. This instruction is for use when conduct occurred prior to July 1, 2009, the date on which K.S.A. 65-4163 was repealed. When conduct occurred on or after July 1, 2009, use PIK 3d 67.32, Cultivating, Distributing, or Possessing With Intent to Distribute A Controlled Substance (Schedule I-IV). K.S.A. 65-4163 refers to the various other sections of the Uniform Controlled Substances Act that identify the stimulants, depressants, hallucinogenic drugs, anabolic steroids and other controlled substances that are included. For example, it refers to K.S.A. 65-4105(d) and 65-4107(g) relative to the hallucinogenic drugs involved, which include such substances as lysergic acid diethylamide, marijuana,

mescaline, and peyote, among others. K.S.A. 65-4163(a)(4) covers substances designated in 65-4105(g) and 65-4111(c), (d), (e), (f) and (g) which apparently do not fit within the usual categories of stimulants, depressants and hallucinogenic drugs. There will be occasions when a court should include the definition of the specific substance involved, either in the same or in additional instructions.

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

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

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

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

Comment

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

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

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

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

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

The crime of offering to sell a controlled substance requires proof of the specific intent to sell and not just proof of an intentional offer. *State v. Werner*, 8 Kan. App. 2d 364, 657 P.2d 1136 (1983). Possession with intent to sell requires proof of possession and an intent to sell. *State v. Heiskell*, 21 Kan. App. 2d 105, 896 P.2d 1106 (1995) (citing PIK 67.14).

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

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

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

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

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. This instruction is for use when conduct occurred prior to July 1, 2009, the date on which K.S.A. 65-4163 was repealed. When conduct occurred on or after July 1, 2009, use PIK 3d 67.32, Cultivating, Distributing, or Possessing With Intent to Distribute A Controlled Substance (Schedule I-IV). 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. This instruction is for use when conduct occurred prior to July 1, 2009, the date on which K.S.A. 65-4162 was repealed. When conduct occurred on or after July 1, 2009, use PIK 3d 67.34, Possessing A Controlled Substance. 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.

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

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

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

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

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

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

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

Notes on Use

For authority, see K.S.A. 65-4152. This instruction is for use when conduct occurred prior to July 1, 2009, the date on which K.S.A. 65-4152 was repealed. A

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

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

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

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

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

As of July, 2007, the statute was amended to provide that "the fact that an item has not been used or did not contain a controlled substance at the time of the seizure is not a defense to a charge that the item was possessed with the intention for use as drug paraphernalia." K.S.A. 65-4152(f). The trial court should be aware of this provision and may need to separately instruct the jury on what appears to be a statutory non-defense.

Comment

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

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

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

67.18 POSSESSION OR MANUFACTURE OF SIMULATED CONTROLLED SUBSTANCE

The defendant is charged with the crime of unlawfully (selling) (offering for sale) (possessing with intent to sell) (delivering a simulated controlled substance) (possessing a simulated controlled substance with intent to deliver) (manufacturing a simulated controlled substance with the intent to deliver) (causing a simulated controlled substance to be delivered) within the State of Kansas. The defendant pleads not guilty.

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

1. That the defendant knowingly (sold) (offered for sale) (possessed with intent to sell) (delivered a simulated controlled substance) (possessed a simulated controlled substance with the intent to deliver it) (manufactured a simulated controlled substance with the intent to deliver it) (caused a simulated controlled substance to be delivered) within the State of Kansas; and

[2. That the defendant did so in, on, or within 1,000 feet of school property upon which was located a school;

3. That the defendant was 18 years of age or over;] and

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

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

Notes on Use

For authority, see K.S.A. 65-4153(a)(1) and 65-4150(e). This instruction is for use when conduct occurred prior to July 1, 2009, the date on which K.S.A. 65-4150 and 65-4153 were repealed. When conduct occurred on or after July 1, 2009, use PIK 3d 67.45, Simulated Controlled Substances. A violation of K.S.A. 65-4153(a)(1) is a nondrug severity level 9, nonperson felony. The defendant is guilty of a nondrug

severity level 7, nonperson felony if the defendant was 18 years of age or over and the substances involved were sold in, on or within 1,000 feet of any school property upon which was located a school structure. If the defendant is charged with such a violation, the bracketed elements and definition of "school" should be included in the instruction.

PIK 3d 67.18-B defining "simulated controlled substance" should be given.

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

67.18-A DISTRIBUTION OF DRUG PARAPHERNALIA

The defendant is charged with the crime of unlawfully (selling) (offering for sale) (possessing with intent to sell) (delivering) (possessing with the intent to deliver) (manufacturing with the intent to deliver) (causing to be delivered) drug paraphernalia within the State of Kansas. The defendant pleads not guilty.

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

1. **That the defendant knowingly (sold drug paraphernalia to [insert name of person to whom drug paraphernalia was sold]) (offered drug paraphernalia for sale to [insert name of person to whom drug paraphernalia was offered for sale]) (possessed drug paraphernalia with the intent to sell to [insert name of person to whom sale of drug paraphernalia was intended]) (delivered drug paraphernalia to [insert name of person to whom drug paraphernalia was delivered]) (possessed drug paraphernalia with the intent to deliver it to [insert name of person to whom delivery of drug paraphernalia was intended]) (manufactured drug paraphernalia with the intent to deliver it to [insert name of person to whom delivery of drug paraphernalia was intended]) (caused drug paraphernalia to be delivered to [insert name of person to whom drug paraphernalia was delivered]) within the State of Kansas;**
2. **(a) That defendant knew or under the circumstances reasonably should have known that the drug paraphernalia would be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, sell or distribute [insert name of controlled substance];**

OR

(b) That defendant knew or under the circumstances reasonably should have known that the drug paraphernalia would be used to (use, store, contain, conceal [insert name of controlled substance specified under K.S.A. 65-4162]) (inject, ingest, inhale, or otherwise introduce [insert name of controlled substance specified under K.S.A. 65-4162] into the human body);

OR

(c) That defendant knew or under the circumstances reasonably should have known that the drug paraphernalia would be used to (use, store, contain, conceal [insert name of controlled substance other than those specified under K.S.A. 65-4162]) (inject, ingest, inhale, or otherwise introduce [insert name of controlled substance other than those specified under K.S.A. 65-4162] into the human body);

[3. That the defendant did so in, on, or within 1,000 feet of school property upon which was located a school;

4. That the defendant was 18 years of age or over;] and

[3.] or [5.] That [insert name of person to whom drug paraphernalia was delivered or intended to be delivered] was under 18 years of age;] and

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

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

Notes on Use

For authority, see K.S.A. 65-4153(a)(2), (3) and (4). The penalty provisions are found in K.S.A. 65-4153(c), (d), (e), (g), (h), and (i). This instruction is for use when conduct occurred prior to July 1, 2009, the date on which K.S.A. 65-4153 was repealed.

When this instruction is given, the controlled substance or substances in connection with which the prohibited use was (allegedly and supported by the evidence) known or foreseeable by the defendant must be named. Pursuant to K.S.A. 65-4150, "controlled substance" means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111, and 65-4113 and amendments thereto. The appropriate controlled substance should be inserted in the instruction.

Instructions defining "drug paraphernalia," PIK 3d 67.18-B, and setting forth factors to be considered in determining whether an object is drug paraphernalia, PIK 3d 67.18-C, should be given. Only those objects in evidence that might be classified by K.S.A. 65-4150(c) as "drug paraphernalia" should be included in this instruction.

This instruction should include only those factors in K.S.A. 65-4151 supported by evidence.

Inapplicable words should be stricken from paragraph 2.

Bracketed elements [3 and 4] and the definition of "school" should be included in the instruction if the defendant was 18 years of age or over and the substances involved were sold in, on or within 1,000 feet of any school property upon which was located a school structure.

Bracketed element [3] or [5] should be given only when option 2(b) or 2(c) is used and the defendant is charged with delivery or causing delivery to a person under 18 years of age.

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

Comment

When defendant fails to present substantive evidence concerning reasonable legitimate uses for items of drug paraphernalia, an inference is raised that defendant is aware items will be used for illegal purposes and intends to sell them for such purposes. *State v. Dunn*, 233 Kan. 411, 430-431, 662 P.2d 1286 (1983).

67.18-B SIMULATED CONTROLLED SUBSTANCE AND DRUG PARAPHERNALIA DEFINED

A. Simulated Controlled Substance

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

B. Drug Paraphernalia

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

(1) [insert specific item of paraphernalia],

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

(3) [insert specific item of paraphernalia].

Notes on Use

For authority, see K.S.A. 65-4150(c) and (e), and amendments thereto. This instruction is for use when conduct occurred prior to July 1, 2009, the date on which K.S.A. 65-4150 was repealed. The specific items of paraphernalia listed in the statute and that are applicable to the case should be inserted into the instruction. This instruction should include only those items supported by the evidence. Inapplicable words should be stricken. See PIK 3d 67.17 regarding misdemeanor and felony drug paraphernalia possession.

Comment

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

67.18-C DRUG PARAPHERNALIA—FACTORS TO BE CONSIDERED

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

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

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

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

[The proximity of the object to controlled substances.]

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

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

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

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

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

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

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

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

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

[Expert testimony concerning the object's use.]

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

[Advertising of the item in magazines or other means which specifically glorify, encourage or espouse the illegal use, manufacture, sale or cultivation of controlled substance.]

Notes on Use

For authority, see K.S.A. 65-4151, and amendments thereto. This instruction is for use when conduct occurred prior to July 1, 2009, the date on which K.S.A. 65-4151 was repealed. When conduct occurred on or after July 1, 2009, use PIK 3d 67.39, Drug Paraphernalia—Factors to be Considered. This instruction should include only those factors in K.S.A. 65-4151 which are supported by evidence.

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67.19 PROMOTION OF SIMULATED CONTROLLED SUBSTANCES OR DRUG PARAPHERNALIA

The statute upon which this instruction was based (K.S.A. 65-4154) has been repealed effective July 1, 1993. See L. 1992, ch. 298, § 97.

67.20 REPRESENTATION THAT A NONCONTROLLED SUBSTANCE IS A CONTROLLED SUBSTANCE

The defendant is charged with the crime of knowingly delivering or causing to be delivered a noncontrolled substance under circumstances that it would appear to be [insert name of controlled substance]. The defendant pleads not guilty.

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

1. That the defendant knowingly delivered or caused to be delivered to [insert name of person to whom substance was delivered] a substance which was not [insert name of controlled substance];

2. (a) That the defendant made an express representation that the substance delivered was [insert name of controlled substance];

or

(b) That the defendant made an express representation that the substance delivered was of such nature or appearance that the recipient would be able to distribute it as [insert name of controlled substance];

or

(c) That the delivery of the noncontrolled substance was made under circumstances that would cause a reasonable person to believe the substance was [insert name of controlled substance];

[3. That the defendant was 18 or more years of age;

4. That [insert name of person to whom substance was delivered] was under 18 years of age;

5. That the defendant was at least three years older than [insert name of person to whom substance was delivered];] and

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

Notes on Use

For authority, see K.S.A. 65-4155. This instruction is for use when conduct occurred prior to July 1, 2009, the date on which K.S.A. 65-4155 was repealed. When conduct occurred on or after July 1, 2009, use PIK 3d 67.46, Representation That a Noncontrolled Substance is a Controlled Substance. Violation of K.S.A. 65-4155 is a class A, nonperson misdemeanor, except that any person 18 or more years of age who delivers or causes to be delivered in this State of Kansas a substance to a person under 18 years of age and who is at least three years older than the person under 18 years of age to whom the delivery is made is guilty of a nondrug severity level 9, nonperson felony. "Controlled substance" means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111, and 65-4113 and amendments thereto. K.S.A. 65-4150. The appropriate controlled substance should be inserted in the instruction.

If applicable, an instruction should be given covering the presumption arising by virtue of K.S.A. 65-4155(b). See PIK 3d 67.20-A.

Comment

A conviction for violation of K.S.A. 65-4155(a)(2) "requires proof of knowing delivery, but does not require proof of knowledge the delivered substance was not a controlled substance or proof of specific intent to deliver a noncontrolled substance." *State v. Marsh*, 9 Kan. App. 2d 608, 613, 684 P.2d 459 (1984).

The *Marsh* Court also found that K.S.A. 65-4155 was not unconstitutionally vague and that the jury must be instructed that K.S.A. 65-4155(b)(3) does not shift the burden of proof to the defendant.

67.20-A REPRESENTATION THAT NONCONTROLLED SUBSTANCE IS CONTROLLED SUBSTANCE—PRESUMPTION

If you find that any of the following factors is established by the evidence, then you may presume that delivery of the substance was under circumstances which would give a reasonable person reason to believe that the substance is a controlled substance:

(1) The substance was packaged in a manner normally used for the illegal delivery of controlled substances.

(2) The delivery of the substance included an exchange of or demand for money or other consideration for delivery of the substance, and the amount of the consideration was substantially in excess of the reasonable value of the substance.

(3) The physical appearance of the capsule or other material containing the substance was substantially identical to a specific controlled substance.

This presumption may be considered by you along with all the other evidence in the case. You may accept or reject it in determining whether the State has met the burden to prove that the delivery of the noncontrolled substance was made under circumstances that would cause a reasonable person to believe the substance was a controlled substance. This burden never shifts to the defendant.

Notes on Use

For authority, see K.S.A. 65-4155(b). This instruction is for use when conduct occurred prior to July 1, 2009, the date on which K.S.A. 65-4155 was repealed. When conduct occurred on or after July 1, 2009, use PIK 3d 67.47, Representation That Noncontrolled Substance is Controlled Substance—Inference.

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

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

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

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

Notes on Use

For authority, see K.S.A. 65-4159. This instruction is for use when conduct occurred on or after July 1, 1999 and before July 1, 2009, the date on which K.S.A. 65-4159 was repealed. When conduct occurred on or after July 1, 2009, use PIK 3d 67.31, Manufacturing a Controlled Substance. Where conduct occurred prior to July 1, 1999, use PIK 3d 67.21-A.

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

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

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

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

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

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

P.3d 578 (2004). As of May 20, 2004, compounding was deleted from K.S.A. 65-4161(a).

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

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

Comment

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

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

In *State v. Martens*, 274 Kan. 459, 54 P.3d 960 (2002), the Kansas Supreme Court modified *State v. Martens*, 273 Kan. 179, 42 P.3d 142 (2002) *overruling State v. Martens*, 29 Kan. App. 2d 361, 28 P.3d 408 (2001). In *Martens II*, the Court held that despite the statute's title which includes the term "attempting," K.S.A. 65-4159 criminalizes only the manufacture of controlled substances or analogs thereof. However, the Court interpreted the term "manufacture" to include not only the completed manufacture of a controlled substance, but also facts showing that the manufacturing could have been successfully completed.

In *Martens II*, the Court further held that although prosecution for attempted manufacture is a separate offense controlled by K.S.A. 21-3301(a), this offense is nonetheless a lesser included crime of manufacturing, citing *State v. Peterson*, 273 Kan. 217, 42 P.3d 137 (2002). The *Martens II* Court stated that although the better or preferred practice is to charge the attempted manufacture alternatively, such is not required. A defendant may be charged in the complaint with violating K.S.A. 65-4159 and subsequently convicted of the lesser crime of attempt to manufacture. The penalties for the two offenses, however, are the same. K.S.A. 65-4159(b).

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

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

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

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

1. That the defendant manufactured a controlled substance known as [include here a controlled substance listed in the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111, and 65-4113];

2. That the defendant did so intentionally;

[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. 65-4159. This instruction is for use when conduct occurred prior to July 1, 1999. When conduct occurred on or after July 1, 1999 and prior to July 1, 2009, use PIK 3d 67.21. When conduct occurred on or after July 1, 2009, the date on which K.S.A. 65-4159 was repealed, use PIK 3d 67.31, Manufacturing a Controlled Substance. A first offense of K.S.A. 65-4159 is a drug severity level 2 felony. For a second or subsequent offense it is a drug severity level 1 and the sentence shall not be subject to statutory provisions for suspended sentence, community work service or probation. A more severe penalty is imposed where the defendant is 18 or more years of age and the offense occurred within 1,000 feet of school property.

If the defendant is charged with selling the controlled substance on or within 1,000 feet of school property, the bracketed elements of the instruction and the definition of "school" should be included in the instruction.

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

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

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

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

Comment

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

In *State v. Martens*, 29 Kan. App. 2d 361, 28 P.3d 408 (2001), the Court held that manufacturing and attempting to manufacture a controlled substance are separate offenses under K.S.A. 65-4159. In *Martens*, the State argued that under the statute, manufacturing and attempting to manufacture were a single offense. The Court disagreed and held that an attempt to manufacture a controlled substance is controlled by the element of attempt set forth in K.S.A. 21-3301, with the exception of the penalty provision in 21-3301(d).

67.22 UNLAWFUL USE OF COMMUNICATION FACILITY TO FACILITATE FELONY DRUG TRANSACTION

The defendant is charged with the crime of unlawful use of a communication facility (in committing) (in causing or facilitating the commission of) (in an attempt to commit) (in a conspiracy to commit) (in the solicitation of) the felony of _____. The defendant pleads not guilty.

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

1. **That the defendant intentionally used a [insert type of communication facility] in (committing) (causing the actual commission of) (facilitating the actual commission of) [insert the appropriate felony violation]; and**

   or

   That the defendant intentionally used a [insert type of communication facility] in (an attempt to commit) (a conspiracy to commit) (a criminal solicitation of) the felony of [insert the appropriate felony violation]; and

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

(Conspiracy means 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 the facts and circumstances.)

(Solicitation means commanding, encouraging, or requesting another person to commit a felony, attempt to commit a felony or aid and abet in the commission or attempted commission of a felony for the purpose of promoting or facilitating a felony.)

(Facilitate means to aid, assist, or make easier fulfillment of a goal.)

The elements of [insert the appropriate felony violation] are (set forth in Instruction No. _____) (as follows: _____).

Notes on Use

For authority, see K.S.A. 65-4141. This instruction is for use when conduct occurred prior to July 1, 2009, the date on which K.S.A. 65-4141 was repealed. When conduct occurred on or after July 1, 2009, use PIK 3d 67.49, Unlawful Use of Communication Facility to Facilitate Felony Drug Transaction. A violation of K.S.A. 65-4141 is a nondrug severity level 8 nonperson felony.

K.S.A. 65-4141(b) defines "communication facility" to mean any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures or sounds of all kinds and includes telephone, wire, radio, computer, computer networks, beepers, pagers and all other means of communication.

The appropriate felony violations under K.S.A. 65-4127a, 65-4127b, 65-4159, and 65-4160 through 65-4164 should be inserted in the second blank of Element No. 1 and the elements of the appropriate felony violation should be referred to or set forth in the concluding portion of the instruction.

Comment

In *State v. Hill*, 252 Kan. 637, 847 P.2d 1267 (1993), the Court held that in a prosecution under K.S.A. 65-4141 charging a defendant with having used a communication facility to facilitate a felony violation of K.S.A. 65-4127a and K.S.A. 65-4127b, the State is required to prove the actual commission of the underlying felony violation. Proof of the actual commission of the underlying felony is not required in a prosecution under K.S.A. 65-4141 based upon conspiracy or solicitation. *State v. Garrison*, 252 Kan. 929, 850 P.2d 244 (1993).

In a prosecution under K.S.A. 1999 Supp. 65-4141 charging a defendant with having used a communication facility to facilitate a felony violation of K.S.A. 1999 Supp. 65-4163, the State is required to prove the underlying felony offense. Convictions of both K.S.A. 1999 Supp. 65-4141 and the underlying felony offense do not violate the Double Jeopardy Clause. *State v. Kee*, 27 Kan. App. 2d 677, 6 P.3d 938 (2000).

67.23 SUBSTANCES DESIGNATED UNDER K.S.A. 65-4113—SELLING, OFFERING TO SELL, POSSESSING WITH INTENT TO SELL OR DISPENSING TO PERSON UNDER 18 YEARS OF AGE

The defendant is charged with the crime of unlawfully (possessing) (controlling) (prescribing) (administering) (delivering) (distributing) (dispensing) (compounding) (selling) (offering for sale) (possessing with intent to sell) a (material) (compound) (mixture) (preparation) containing [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 intentionally (possessed) (controlled) (prescribed) (administered) (delivered) (distributed) (dispensed) (compounded) (sold) (offered for sale) (possessed with intent to sell) a (material) (compound) (mixture) (preparation) containing [insert name of narcotic drug or stimulant];

OR

[1. That the defendant intentionally (prescribed) (administered) (delivered) (distributed) (dispensed) (sold) (offered for sale) (possessed with intent to sell) a (material) (compound) (mixture) (preparation) containing [insert name of narcotic drug or stimulant] (for) (to) [insert name of person for whom substance was intended];

2. That [insert name of person for whom substance was intended] was a person under 18 years of age; and]

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

Notes on Use

For authority, see K.S.A. 65-4164. This instruction is for use when conduct occurred prior to July 1, 2009, the date on which K.S.A. 65-4164 was repealed. K.S.A. 65-4164 covers unlawful acts relating to medicinals with a lower potential for abuse designated in K.S.A. 65-4113.

A violation of K.S.A. 65-4164 is a class A nonperson misdemeanor, except that if the substance was prescribed for or administered, delivered, distributed, dispensed, sold, offered for sale or possessed with intent to sell to a child under 18 years of age, it is a drug severity level 4 felony.

K.S.A. 21-3202(2) states, "Proof of criminal intent does not require proof that the accused had knowledge of the age of the minor, even though age is a material element of the crime with which he is charged."

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

Comment

K.S.A. 65-4164 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 and controlled substances (defined in K.S.A. 65-4101(e)) may be lawfully possessed, manufactured, sold, or otherwise produced, transported, dispensed, and used. See, for example, K.S.A. 65-4116, 65-4117, 65-4122, 65-4123, and 65-4138.

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

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

67.24 POSSESSION BY DEALER—NO TAX STAMP AFFIXED

The instruction that previously appeared as PIK 3d 67.24 has been moved to PIK 3d 67.51.

67.25 RECEIVING OR ACQUIRING PROCEEDS DERIVED FROM A VIOLATION OF THE UNIFORM CONTROLLED SUBSTANCES ACT

The defendant is charged with the crime of (receiving) (acquiring) (engaging in a transaction involving) proceeds derived from a violation of the Uniform Controlled Substances Act. The defendant pleads not guilty.

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

1. That the defendant (received or acquired proceeds) (engaged in a transaction involving proceeds) known to be derived from _____, a violation of the Controlled Substances Act;

or

That the defendant (gave) (sold) (transferred) (traded) (invested) (concealed) (transported) (maintained an interest in) (made available) _____, a thing of value which defendant knew was intended to be used for the purpose of furthering the commission of _____, a violation of the Controlled Substances Act;

or

That the defendant (directed) (planned) (organized) (initiated) (financed) (managed) (supervised) (facilitated) the (transportation) (transfer) of proceeds known to be derived from _____, a violation of the Controlled Substances Act;

or

That the defendant conducted a financial transaction involving the proceeds derived from _____, a violation of the Controlled Substances Act which was designed (to conceal or disguise the [nature] [location] [source] [ownership] [control]) of the proceeds (known to be derived from _____, a violation of the Controlled Substances Act) (to avoid _____, a

transaction reporting requirement under [state] [federal] law);

2. **That the defendant did so knowingly or intentionally;**
3. **That the value of the proceeds was (less than $5,000) (at least $5,000 but less than $100,000) (at least $100,000 but less than $500,000) ($500,000 or more); and**
4. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 65-4142. This instruction is for use when conduct occurred prior to July 1, 2009, the date on which K.S.A. 65-4142 was repealed. When conduct occurred on or after July 1, 2009, use PIK 3d 67.50, Receiving or Acquiring Proceeds Derived from Drug Crimes. The severity level for a violation of K.S.A. 65-4142 varies depending on the value of the proceeds involved. The crime is a drug severity level 4 felony if the value of the proceeds is less than $5,000, a drug severity level 3 felony if the value of the proceeds is at least $5,000 but less than $100,000, a drug severity level 2 felony if the value of the proceeds is at least $100,000 but less than $500,000, and a drug severity level 1 felony if the value of the proceeds is $500,000 or more.

67.26 CONTROLLED SUBSTANCE ANALOG—POSSESSION, SALE, ETC.

The defendant is charged with the crime of [insert applicable introductory charge from PIK 3d 67.13, 67.13-B, 67.13-C, 67.14, 67.15, 67.16 or 67.21] as it pertains to a controlled substance analog known as _____. The defendant pleads not guilty.

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

1. **[Here insert appropriate elements from PIK 3d 67.13, 67.13-B, 67.13-C, 67.14, 67.15, 67.16 or 67.21, substituting the name of the analog in place of the narcotic drug, stimulant, depressant, hallucinogenic drug, controlled substance, or anabolic steroid.]**

(__.) **That the chemical structure of (__name of analog__) is substantially similar to the chemical structure of [insert name of narcotic drug, stimulant, depressant, hallucinogenic drug, controlled substance, or anabolic steroid];**

(__.) **That (__name of analog__) has a (stimulant) (depressant) (hallucinogenic) effect on the central nervous system substantially similar to the (stimulant) (depressant) (hallucinogenic) effect on the central nervous system of [insert name of narcotic drug, stimulant, depressant, hallucinogenic drug, controlled substance, or anabolic steroid];**

or

That the defendant (represented) (intended) that (__name of analog__) (has) (have) a (stimulant) (depressant) (hallucinogenic) effect on the central nervous system substantially similar to the (stimulant) (depressant) (hallucinogenic) effect on the central nervous system of [insert name of narcotic drug, stimulant, depressant, hallucinogenic drug, controlled substance, or anabolic steroid];

(__.) That the defendant did so with the intent that (name of analog) be used for human consumption; and

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

Notes on Use

For authority, see K.S.A. 65-4159(a) and (b), 65-4101(bb), 65-4160(e), 65-4161(f), 65-4162(c) and 65-4163(d). These subsections state that the prohibitions contained in their respective sections apply to controlled substance analogs as defined in K.S.A. 65-4101(bb). To be a controlled substance analog, a substance must have a chemical structure and an effect, or intended effect, on the central nervous system substantially similar to a controlled substance contained in the schedules in K.S.A. 65-4105 or 65-4107. The name of the controlled substance to be inserted in the appropriate blanks in element nos. 1 and 2 must be a substance contained in K.S.A. 65-4105 or 65-4107. This instruction is for use when conduct occurred prior to July 1, 2009, the date on which K.S.A. 65-4159 through 65-4163 were repealed. When conduct occurred on or after July 1, 2009, use PIK 3d 67.35, Controlled Substance Analog—Possession, Sale, Etc.

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

67.27 METHAMPHETAMINE COMPONENTS—POSSESSION WITH INTENT TO MANUFACTURE

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

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

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

Notes on Use

For authority, see K.S.A. 65-7006(a), a violation of which is a drug severity level 2 felony. For crimes committed prior to May 25, 2006, see *State v. Frazier*, 30 Kan. App. 2d 398, 42 P.3d 188, *rev. denied* 274 Kan. 1115 (2002), which holds that a violation of K.S.A. 2001 Supp. 65-7006(a) is a drug severity level 4 felony because the elements thereof are identical to K.S.A. 65-4152, a drug severity level 4 felony. For definitions and discussion of possession, joint possession and constructive possession, see PIK 3d 67.13-D. This instruction is for use when conduct occurred prior to July 1, 2009, the date on which K.S.A. 65-7006 was repealed. When conduct occurred on or after July 1, 2009, use PIK 3d 67.41, Methamphetamine Components—Possession With Intent to Manufacture.

Comment

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

67.28 METHAMPHETAMINE COMPONENTS—MARKETING, SALE, ETC. FOR USE IN MANUFACTURING

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

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

1. **That the defendant (marketed) (sold) (distributed) (advertised) (labeled) any drug product containing (ephedrine) (pseudoephedrine) (red phosphorus) (lithium metal) (sodium metal) (iodine) (anhydrous ammonia) (pressurized ammonia) (phenylpropanolamine) (salts, isomers, or salts of an isomer of one of the above); and**
2. **That the defendant knew or reasonably should have known that the purchaser would use the product to manufacture a controlled substance; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 65-7006(b), a violation of which is a drug severity level 2 felony. This instruction is for use when conduct occurred prior to July 1, 2009, the date on which K.S.A. 65-7006 was repealed. When conduct occurred on or after July 1, 2009, use PIK 3d 67.43, Methamphetamine Components—Marketing, Distribution, Etc. for Use in Manufacturing.

67.29 METHAMPHETAMINE COMPONENTS—MARKETING, SALE, ETC. FOR NON-INDICATED USE

The defendant is charged with the crime of unlawfully (marketing) (selling) (distributing) (advertising) (labeling) any drug product containing (ephedrine) (pseudoephedrine) (phenylpropanolamine) (salts, isomers, or salts of an isomer of one of the above). The defendant pleads not guilty.

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

1. **That the defendant (marketed) (sold) (distributed) (advertised) (labeled) any drug product containing (ephedrine) (pseudoephedrine) (phenylpropanolamine) (salts, isomers, or salts of an isomer of one of the above); and**
2. **That the defendant knowingly did so for (stimulation) (mental alertness) (weight loss) (appetite control) (energy) or other use not approved by federal law; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 65-7006(c), a violation of which is a drug severity level 2 felony. This instruction is for use when conduct occurred prior to July 1, 2009, the date on which K.S.A. 65-7006 was repealed. When conduct occurred on or after July 1, 2009, use PIK 3d 67.44, Methamphetamine Components—Marketing, Distribution, Etc. for Non-Indicated Use.

67.30 METHAMPHETAMINE COMPONENTS—EPHEDRINE OR PSEUDOEPHEDRINE BASE

The defendant is charged with the crime of unlawfully (purchasing) (receiving) (otherwise acquiring) at retail any (compound) (mixture) (preparation) containing pseudoephedrine base or ephedrine base. The defendant pleads not guilty.

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

1. **That the defendant knowingly (purchased) (received) (otherwise acquired) at retail any (compound) (mixture) (preparation) containing more than (3.6 grams of pseudoephedrine base or ephedrine base in any single transaction) (9 grams of pseudoephedrine base or ephedrine base within any 30-day period); and**
2. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 65-7006(d), a violation of which is a class A nonperson misdemeanor. This instruction is for use when conduct occurred prior to July 1, 2009, the date on which K.S.A. 65-7006 was repealed. When conduct occurred on or after July, 1 2009, use PIK 3d 67.42, Methamphetamine Components—Unlawfully Acquiring.

67.31 MANUFACTURING A CONTROLLED SUBSTANCE

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

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

1. **That the defendant intentionally manufactured _____; and**
2. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

"Manufacture" means the production, preparation, propagation, compounding, conversion or processing of a controlled substance either directly or indirectly, by extraction from substances of natural origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis. "Manufacture" includes any packaging or repackaging of the substance or labeling or relabeling of its container.

"Manufacture" does not include the preparation or compounding of a controlled substance by an individual for the individual's own lawful use.

"Manufacture" also does not include the preparation, compounding, packaging or labeling of a controlled substance:

(1) by a practitioner, or by the practitioner's agent pursuant to a lawful order of a practitioner, as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or

(2) by a practitioner, or by the practitioner's authorized agent under such practitioner's supervision, for the purpose of or as an incident to research, teaching or chemical analysis or by a pharmacist or medical care facility as an incident to dispensing of a controlled substance.

Notes on Use

For authority, see K.S.A. 21-36a03(a), violation of which is a drug severity level 1 felony. This instruction is for use when conduct occurred on or after July 1, 2009. The definitions used here can be found in K.S.A. 21-36a01.

Insert in the blank in element number 1 the appropriate controlled substance listed in the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111, and 65-4113.

If a controlled substance analog is involved, see PIK 67.35.

The sentencing reduction found in K.S.A. 21-3301(d) does not apply to a violation of attempting to unlawfully manufacture any controlled substance pursuant to K.S.A. 21-36a03.

For persons arrested and charged under K.S.A. 21-36a03, bail must be at least $50,000 cash or surety unless the court determines, on the record, that the defendant is not likely to re-offend, the court imposes pretrial supervision, or the defendant agrees to participate in a licensed or certified drug treatment program. K.S.A. 21-36a03(c).

The sentence of a person who violates K.S.A. 21-36a03, or K.S.A. 65-4159 prior to July 1, 2009, must not be reduced because the statutes prohibit conduct identical to that prohibited in K.S.A. 21-36a05, or K.S.A. 65-4161 or 65-4163 prior to July 1, 2009.

67.32 CULTIVATING, DISTRIBUTING, OR POSSESSING WITH INTENT TO DISTRIBUTE A CONTROLLED SUBSTANCE (SCHEDULE I-IV)

The defendant is charged with the crime of unlawfully (cultivating) (distributing) (possessing with the intent to distribute) a controlled substance. The defendant pleads not guilty.

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

1. That the defendant intentionally (cultivated) (distributed) (possessed with the intent to distribute) _____; and

[2. That the defendant did so in, on or within 1,000 feet of school property; and]

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

["Cultivate" means the planting or promotion of growth of five or more plants which contain or can produce controlled substances.]

["Distribute" means the actual, constructive or attempted transfer of some item from one person to another, whether or not there is an agency relationship between them. "Distribute" includes sale, offer for sale or any act that causes some item to be transferred from one person to another.

"Distribute" does not include acts of administering, dispensing or prescribing a controlled substance as authorized by law.]

["Possession" means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.]

["School property" means property on which is located a 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 1 through 12. It is not required that school be in session or that classes are actually being held at the time of the alleged offense or that children must be present within the structure or on the property during the time of any alleged offense.]

Notes on Use

For authority, see K.S.A. 21-36a05(a). This instruction is for use when conduct occurred on or after July 1, 2009. Violation of K.S.A. 21-36a05(a) is a drug severity level 3 felony, except that violation within 1,000 feet of any school property is a drug severity level 2 felony. Unlike the former law, there is no requirement that the defendant also be 18 or more years of age for the enhanced penalty. Violation of subsection (a)(1) is a drug severity level 2 felony if that person has one prior conviction under subsection (a)(1), under K.S.A. 65-4161 prior to its repeal, or under a substantially similar offense from another jurisdiction. Violation of subsection (a)(1) is a drug severity level 1 felony if that person has two prior convictions under subsection (a)(1), under K.S.A. 65-4161 prior to its repeal, or under a substantially similar offense from another jurisdiction.

Insert in the blank in element number 1 the appropriate controlled substance listed in the schedules designated in K.S.A. 65-4105(d)-(g), 65-4107(d)(1)-(4), (e), (f)(1)-(2), (g), 65-4109(b), (c), (e)-(g), and 65-4111(b)-(g).

If a controlled substance analog is involved, see PIK 67.35.

It is not a defense to charges arising under K.S.A. 21-36a05 that the defendant was acting in an agency relationship on behalf of any other party in a transaction involving a controlled substance.

67.33 DISTRIBUTING OR POSSESSING WITH INTENT TO DISTRIBUTE A CONTROLLED SUBSTANCE (SCHEDULE V)

The defendant is charged with the crime of unlawfully (distributing) (possessing with intent to distribute) a controlled substance. The defendant pleads not guilty.

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

1. That the defendant intentionally (distributed) (possessed with intent to distribute) _____; and

OR

1. That the defendant intentionally (distributed) (possessed with intent to distribute) _____ to [insert name of person];

2. That [insert name of person] was a person under 18 years of age; and

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

["Distribute" means the actual, constructive or attempted transfer of some item from one person to another, whether or not there is an agency relationship between them. "Distribute" includes sale, offer for sale or any act that causes some item to be transferred from one person to another.

"Distribute" does not include acts of administering, dispensing or prescribing a controlled substance as authorized by law.]

["Possession" means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.]

Notes on Use

For authority, see K.S.A. 21-36a05(b). This instruction is for use when conduct occurred on or after July 1, 2009. Violation of K.S.A. 21-36a05(b) is a class A nonperson misdemeanor, except it is a drug severity level 4 felony if the substance was distributed to or possessed with the intent to distribute to a child under 18 years of age. The definitions used here can be found in K.S.A. 21-36a01.

Insert in the blank in element number 1 the appropriate controlled substance listed in K.S.A. 65-4113.

If a controlled substance analog is involved, see PIK 67.35.

It is not a defense to charges arising under K.S.A. 21-36a05 that the defendant was acting in an agency relationship on behalf of any other party in a transaction involving a controlled substance.

67.34 POSSESSING A CONTROLLED SUBSTANCE

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

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

1. **That the defendant intentionally possessed _____ _____; and**
2. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Possession means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.

Notes on Use

For authority, see K.S.A. 21-36a06. This instruction is for use when conduct occurred on or after July 1, 2009. Violation of K.S.A. 21-36a06(a) is a drug severity level 4 felony. Violation of subsection (b) is a class A nonperson misdemeanor, except it is a drug severity level 4 felony if that person has a prior conviction under subsection (b), under K.S.A. 65-4162 prior to its repeal, under a substantially similar offense from another jurisdiction, or under any city ordinance or county resolution for a substantially similar offense if the substance involved was 3, 4-methylenedioxymethamphetamine (MDMA), marijuana or tetrahydrocannabinol as designated in subsection K.S.A. 65-4105(d). The definition of "possession" can be found in K.S.A. 21-36a01(p).

Insert in the blanks in the first paragraph and in element number 1 the appropriate controlled substance listed in the schedules designated in K.S.A. 65-4105(d)-(g), 65-4107(d)(1)-(4), (e), (f)(1)-(2), (g), 65-4109(b), (c), (e)-(g), and 65-4111(b)-(g).

If a controlled substance analog is involved, see PIK 67.35.

It is not a defense to charges arising under K.S.A. 21-36a06 that the defendant was acting in an agency relationship on behalf of any other party in a transaction involving a controlled substance.

67.35 CONTROLLED SUBSTANCE ANALOG—POSSESSION, SALE, ETC.

The defendant is charged with the crime of unlawfully (manufacturing) (cultivating) (distributing) (possessing with intent to distribute) (possessing) [insert name of analog]. The defendant pleads not guilty.

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

1. **[Here insert appropriate element(s) from PIK 3d 67.31, 67.32, 67.33 or 67.34, substituting the name of the analog in place of the controlled substance.]**
2. **That the chemical structure of [insert name of analog] is substantially similar to the chemical structure of [insert name of controlled substance];**
3. **That [insert name of analog] has a (stimulant) (depressant) (hallucinogenic) effect on the central nervous system substantially similar to the (stimulant) (depressant) (hallucinogenic) effect on the central nervous system of [insert name of controlled substance];**

   OR

   That the defendant (represented) (intended) that [insert name of analog] (has) (have) a (stimulant) (depressant) (hallucinogenic) effect on the central nervous system substantially similar to the (stimulant) (depressant) (hallucinogenic) effect on the central nervous system of [insert name of controlled substance];
4. **That the defendant did so with the intent that [insert name of analog] be used for human consumption; and**
5. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-36a01(b), 21-36a03(a), 21-36a05(a) and (b), and 21-36a06(a) and (b). This instruction is for use when conduct occurred on or after July 1, 2009. The name of the controlled substance to be inserted in the appropriate blanks in elements 2 and 3 must be a substance contained in K.S.A. 65-4105 or 65-4107.

Depending on the prohibited act involved, the appropriate elements from PIK 3d 67.31, 67.32, 67.33 or 67.34 should be added as part of element 1 of this instruction.

67.36 DRUG PARAPHERNALIA—USE OR POSSESSION WITH INTENT TO USE

The defendant is charged with the crime of unlawfully (using) (possessing with intent to use) drug paraphernalia. The defendant pleads not guilty.

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

1. **That the defendant intentionally (used) (possessed with the intent to use) [insert description of object] as drug paraphernalia to**
   (a) **manufacture, cultivate, plant, propagate, harvest, test, analyze, or distribute [insert name of controlled substance];**

   OR

   (b) **store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body [insert name of controlled substance]; and**
2. **That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

["Cultivate" means the planting or promotion of growth of five or more plants which contain or can produce controlled substances.]

["Distribute" means the actual, constructive or attempted transfer of some item from one person to another, whether or not there is an agency relationship between them. "Distribute" includes sale, offer for sale or any act that causes some item to be transferred from one person to another.

"Distribute" does not include acts of administering, dispensing or prescribing a controlled substance as authorized by law.]

["Possession" means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.]

Notes on Use

For authority, see K.S.A. 21-36a09(b). This instruction is for use when conduct occurred on or after July 1, 2009. The definitions used here can be found in K.S.A. 21-36a01.

A violation based on option 1(a) is a drug severity level 4 felony, except that a violation is a class A nonperson misdemeanor if the drug paraphernalia was used to cultivate fewer than five marijuana plants. K.S.A. 21-36a09(e)(2). A violation based on option 1(b) is a class A nonperson misdemeanor. K.S.A. 21-36a09(e)(3).

Inapplicable words should be stricken from elements 1(a) or 1(b), whichever is given.

PIK 3d 67.40 defining "drug paraphernalia" should be given. Only those objects in evidence that might be classified by K.S.A. 21-36a01(f) as "drug paraphernalia" should be included in this instruction as well as PIK 3d 67.40.

PIK 3d 67.39 setting forth factors to be considered in determining whether an object is drug paraphernalia should be given. PIK 3d 67.39 should include only those factors in K.S.A. 21-36a11 supported by evidence.

67.37 DISTRIBUTION OF DRUG PARAPHERNALIA FOR USE IN MANUFACTURING OR DISTRIBUTING CONTROLLED SUBSTANCES

The defendant is charged with the crime of unlawfully (marketing) (distributing) (manufacturing with the intent to distribute) drug paraphernalia. The defendant pleads not guilty.

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

1. **That the defendant knowingly (marketed) (distributed) (manufactured with the intent to distribute) [insert description of object] as drug paraphernalia to [insert name of person]);**
2. **That defendant knew or under the circumstances reasonably should have known that the drug paraphernalia would be used to (manufacture) (distribute) [insert name of controlled substance]; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

["Distribute" means the actual, constructive or attempted transfer of some item from one person to another, whether or not there is an agency relationship between them. "Distribute" includes sale, offer for sale or any act that causes some item to be transferred from one person to another.

"Distribute" does not include acts of administering, dispensing or prescribing a controlled substance as authorized by law.]

["Manufacture" means the production, preparation, propagation, compounding, conversion or processing of a controlled substance either directly or indirectly, by extraction from substances of natural origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis. "Manufacture" includes any packaging or repackaging of the substance or labeling or relabeling of its container.

"Manufacture" does not include the preparation or compounding of a controlled substance by an individual for the individual's own lawful use.

"Manufacture" also does not include the preparation, compounding, packaging or labeling of a controlled substance:

(1) by a practitioner, or by the practitioner's agent pursuant to a lawful order of a practitioner, as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or

(2) by a practitioner, or by the practitioner's authorized agent under such practitioner's supervision, for the purpose of or as an incident to research, teaching or chemical analysis or by a pharmacist or medical care facility as an incident to dispensing of a controlled substance.]

Notes on Use

For authority, see K.S.A. 21-36a10(b), violation of which a drug severity level 4 felony. This instruction is for use when conduct occurred on or after July 1, 2009. This subsection does not include the crime of possession. There is no enhanced penalty for violation within 1000 feet of school property. The definitions used here can be found in K.S.A. 21-36a01.

When this instruction is given, the controlled substance or substances in connection with which the prohibited use was (allegedly and supported by the evidence) known or foreseeable by the defendant must be named. Pursuant to K.S.A. 21-36a01(a), "controlled substance" means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111, and 65-4113 and amendments thereto. The appropriate controlled substance should be inserted in the instruction.

PIK 3d 67.40, defining "drug paraphernalia," and PIK 3d 67.39, setting forth factors to be considered in determining whether an object is drug paraphernalia, should be given. Only those objects in evidence that might be classified by K.S.A. 21-36a01(f) as "drug paraphernalia" should be included in this instruction as well as PIK 3d 67.40.

67.38 DISTRIBUTION OF DRUG PARAPHERNALIA FOR USE AS PARAPHERNALIA

The defendant is charged with the crime of unlawfully (distributing) (possessing with the intent to distribute) (manufacturing with the intent to distribute) drug paraphernalia. The defendant pleads not guilty.

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

1. That the defendant knowingly (distributed) (possessed with the intent to distribute) (manufactured with the intent to distribute) [insert description of object] as drug paraphernalia to [insert name of person]);
2. That defendant knew or under the circumstances reasonably should have known that the drug paraphernalia (would be used) (was primarily intended) (was primarily designed) for use in any of the following: planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body [insert name of controlled substance].

[3. That the defendant did so in, on, or within 1,000 feet of school property;]

[(3.) or (4.) That [insert name of person to whom drug paraphernalia was distributed or intended to be distributed] was under 18 years of age;] and

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

["Distribute" means the actual, constructive or attempted transfer of some item from one person to another, whether or not there is an agency relationship between them. "Distribute" includes sale, offer for sale or any act that

causes some item to be transferred from one person to another.

"Distribute" does not include acts of administering, dispensing or prescribing a controlled substance as authorized by law.]

["Manufacture" means the production, preparation, propagation, compounding, conversion or processing of a controlled substance either directly or indirectly, by extraction from substances of natural origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis. "Manufacture" includes any packaging or repackaging of the substance or labeling or relabeling of its container.

"Manufacture" does not include the preparation or compounding of a controlled substance by an individual for the individual's own lawful use.

"Manufacture" also does not include the preparation, compounding, packaging or labeling of a controlled substance:

(1) by a practitioner, or by the practitioner's agent pursuant to a lawful order of a practitioner, as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or

(2) by a practitioner, or by the practitioner's authorized agent under such practitioner's supervision, for the purpose of or as an incident to research, teaching or chemical analysis or by a pharmacist or medical care facility as an incident to dispensing of a controlled substance.]

["Possession" means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.]

["School property" means property on which is located a 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 1 through 12. It is not required that school be in session or that classes are actually being held at the time of the alleged offense or that children must be present within the structure or on the property during the time of any alleged offense.]

Notes on Use

For authority, see K.S.A.21-36a10(c) and (d). The penalty provisions are found in K.S.A. 21-36a10(e)(3) and (4). This instruction is for use when conduct occurred on or after July 1, 2009. The definitions used here can be found in K.S.A. 21-36a01.

When this instruction is given, the controlled substance or substances in connection with which the prohibited use was (allegedly and supported by the evidence) known or foreseeable by the defendant must be named. Pursuant to K.S.A. 2136a01(a), "controlled substance" means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111, and 65-4113 and amendments thereto.

PIK 3d 67.40, defining "drug paraphernalia," and PIK 3d 67.39, setting forth factors to be considered in determining whether an object is drug paraphernalia, should be given. Only those objects in evidence that might be classified by K.S.A. 21-36a01(f) as "drug paraphernalia" should be included in this instruction as well as PIK 3d 67.40.

Inapplicable words should be stricken from paragraph 2.

Bracketed element [3] should be included in the instruction if the substances involved were sold in, on or within 1,000 feet of any school property. The statute does not require that the defendant be over 18 years of age.

Bracketed element [3] or [4] should be given only when the defendant is charged with distribution to a person under 18 years of age.

67.39 DRUG PARAPHERNALIA—FACTORS TO BE CONSIDERED

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

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

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

[The proximity of the object, in time and space, to a direct commission of a drug crime.]

[The proximity of the object to controlled substances.]

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

[(Direct) (circumstantial) evidence of the intent of (an owner) (a person in control) of the object, to deliver it to a person (the owner) (the person in control) of the object knows, or should reasonably know, intends to use the object to facilitate the commission of a drug crime. A finding that (the owner) (the person in control) of the object is innocent of directly committing a drug crime does not prevent a finding that the object is intended for use as drug paraphernalia.]

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

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

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

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

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

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

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

[Expert testimony concerning the object's use.]

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

[Advertising of the item in magazines or other means which specifically glorify, encourage or espouse the illegal use, manufacture, sale or cultivation of controlled substance.]

Notes on Use

For authority, see K.S.A. 21-36a11. This instruction is for use when conduct occurred on or after July 1, 2009. This instruction should include only those factors in K.S.A. 21-36a11 that are supported by evidence.

K.S.A. 21-36a11(b) provides that "the fact that an item has not been used or did not contain a controlled substance at the time of the seizure is not a defense to a charge that the item was possessed with the intention for use as drug paraphernalia." The trial court should be aware of this provision and may need to separately instruct the jury on what appears to be a statutory non-defense.

67.40 DRUG PARAPHERNALIA DEFINED

"Drug paraphernalia" means all equipment, and materials of any kind which are used or primarily intended or designed for use in (planting) (propagating) (cultivating) (growing) (harvesting) (manufacturing) (compounding) (converting) (producing) (processing) (preparing) (testing) (analyzing) (packaging) (repackaging) (storing) (containing) (concealing) (injecting) (ingesting) (inhaling) (or otherwise introducing into the human body) a controlled substance.

"Drug paraphernalia" includes:

(1) [insert specific item of paraphernalia],

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

(3) [insert specific item of paraphernalia].

Notes on Use

For authority, see K.S.A. 21-36a01(f). This instruction is for use when conduct occurred on or after July 1, 2009. The specific items of paraphernalia listed in the statute and that are applicable to the case should be inserted into the instruction. This instruction should include only those items supported by the evidence. Inapplicable words should be stricken. See PIK 3d 67.36 regarding misdemeanor and felony drug paraphernalia possession.

Comment

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

67.41 METHAMPHETAMINE COMPONENTS—POSSESSION WITH INTENT TO MANUFACTURE

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

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

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

"Manufacture" means the production, preparation, propagation, compounding, conversion or processing of a controlled substance either directly or indirectly, by extraction from substances of natural origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis. "Manufacture" includes any packaging or repackaging of the substance or labeling or relabeling of its container.

"Manufacture" does not include the preparation or compounding of a controlled substance by an individual for the individual's own lawful use.

"Manufacture" also does not include the preparation, compounding, packaging or labeling of a controlled substance:

(1) by a practitioner, or by the practitioner's agent pursuant to a lawful order of a practitioner, as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or

(2) by a practitioner, or by the practitioner's authorized agent under such practitioner's supervision, for the purpose of or as an incident to research, teaching or chemical analysis or by a pharmacist or medical care facility as an incident to dispensing of a controlled substance.

"Possession" means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.

Notes on Use

For authority, see K.S.A. 21-36a09(a), a violation of which is a drug severity level 2 felony. This instruction is for use when conduct occurred on or after July 1, 2009. The definitions used here can be found in K.S.A. 21-36a01.

For persons arrested and charged under K.S.A. 21-36a09(a), bail must be at least $50,000 cash or surety unless the court determines, on the record, that the defendant is not likely to re-offend, the court imposes pretrial supervision, or the defendant agrees to participate in a licensed or certified drug treatment program. K.S.A. 21-36a09(f).

67.42 METHAMPHETAMINE COMPONENTS—UNLAWFULLY ACQUIRING

The defendant is charged with the crime of unlawfully (purchasing) (receiving) (acquiring) at retail a (compound) (mixture) (preparation) containing pseudoephedrine base or ephedrine base. The defendant pleads not guilty.

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

1. **That the defendant intentionally (purchased) (received) (acquired) at retail a (compound) (mixture) (preparation) containing more than (3.6 grams of pseudoephedrine base or ephedrine base in any single transaction) (9 grams of pseudoephedrine base or ephedrine base within any 30-day period); and**
2. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 21-36a09(d), violation of which is a class A nonperson misdemeanor. This instruction is for use when conduct occurred on or after July 1, 2009.

67.43 METHAMPHETAMINE COMPONENTS—MARKETING, DISTRIBUTION, ETC. FOR USE IN MANUFACTURING

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

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

1. **That the defendant (advertised) (marketed) (labeled) (distributed) (possessed with intent to distribute) a product containing (ephedrine) (pseudoephedrine) (red phosphorus) (lithium metal) (sodium metal) (iodine) (anhydrous ammonia) (pressurized ammonia) (phenylpropanolamine) (salts of one of the above) (an isomer of one of the above) (salts of an isomer of one of the above); and**
2. **That the defendant knew or reasonably should have known that the purchaser would use the product to manufacture a controlled substance; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

"Manufacture" means the production, preparation, propagation, compounding, conversion or processing of a controlled substance either directly or indirectly, by extraction from substances of natural origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis. "Manufacture" includes any packaging or repackaging of the substance or labeling or relabeling of its container.

"Manufacture" does not include the preparation or compounding of a controlled substance by an individual for the individual's own lawful use.

"Manufacture" also does not include the preparation, compounding, packaging or labeling of a controlled substance:

(1) by a practitioner, or by the practitioner's agent pursuant to a lawful order of a practitioner, as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or

(2) by a practitioner, or by the practitioner's authorized agent under such practitioner's supervision, for the purpose of or as an incident to research, teaching or chemical analysis or by a pharmacist or medical care facility as an incident to dispensing of a controlled substance.

["Distribute" means the actual, constructive or attempted transfer of some item from one person to another, whether or not there is an agency relationship between them. "Distribute" includes sale, offer for sale or any act that causes some item to be transferred from one person to another.

"Distribute" does not include acts of administering, dispensing or prescribing a controlled substance as authorized by law.]

["Possession" means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.]

Notes on Use

For authority, see K.S.A. 21-36a10(a)(1), violation of which is a drug severity level 2 felony. K.S.A. 21-36a10(e)(1). This instruction is for use when conduct occurred on or after July 1, 2009. The definitions used here can be found in K.S.A. 21-36a01.

67.44 METHAMPHETAMINE COMPONENTS—MARKETING, DISTRIBUTION, ETC. FOR NON-INDICATED USE

The defendant is charged with the crime of unlawfully (advertising) (marketing) (labeling) (distributing) (possessing with intent to distribute) a product containing (ephedrine) (pseudoephedrine) (phenylpropanolamine) (salts, isomers, or salts of an isomer of one of the above). The defendant pleads not guilty.

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

1. **That the defendant (advertised) (marketed) (labeled) (distributed) (possessed with intent to distribute) a product containing (ephedrine) (pseudoephedrine) (phenylpropanolamine) (salts of one of the above) (an isomer of one of the above) (salts of an isomer of one of the above); and**
2. **That the defendant knowingly did so for indication of (stimulation) (mental alertness) (weight loss) (appetite control) (energy) or other use not approved pursuant to federal law; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

["Distribute" means the actual, constructive or attempted transfer of some item from one person to another, whether or not there is an agency relationship between them. "Distribute" includes sale, offer for sale or any act that causes some item to be transferred from one person to another.

"Distribute" does not include acts of administering, dispensing or prescribing a controlled substance as authorized by law.]

["Possession" means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.]

Notes on Use

For authority, see K.S.A. 21-36a10(a)(2), violation of which is a drug severity level 2 felony. K.S.A. 21-36a10(e)(1). This instruction is for use when conduct occurred on or after July 1, 2009. The definitions used here can be found in K.S.A. 21-36a01.

67.45 SIMULATED CONTROLLED SUBSTANCES

The defendant is charged with the crime of unlawfully (distributing) (possessing with the intent to distribute) (manufacturing with the intent to distribute) (using) (possessing with the intent to use) a simulated controlled substance. The defendant pleads not guilty.

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

1. That the defendant intentionally (distributed) (possessed with the intent to distribute) (manufactured with the intent to distribute) (used) (possessed with the intent to use) a simulated controlled substance; and

[2. That the defendant did so in, on or within 1,000 feet of school property, and was 18 or more years of age; and]

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

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

["Distribute" means the actual, constructive or attempted transfer of some item from one person to another, whether or not there is an agency relationship between them. "Distribute" includes sale, offer for sale or any act that causes some item to be transferred from one person to another.

"Distribute" does not include acts of administering, dispensing or prescribing a controlled substance as authorized by law.]

["Manufacture" means the production, preparation, propagation, compounding, conversion or processing of a controlled substance either directly or indirectly, by extraction from substances of natural origin, independently by means of chemical synthesis, or by a combination of

extraction and chemical synthesis. "Manufacture" includes any packaging or repackaging of the substance or labeling or relabeling of its container.

"Manufacture" does not include the preparation or compounding of a controlled substance by an individual for the individual's own lawful use.

"Manufacture" also does not include the preparation, compounding, packaging or labeling of a controlled substance:

(1) by a practitioner, or by the practitioner's agent pursuant to a lawful order of a practitioner, as an incident to the practitioner's administering or dispensing of a controlled substance in the course of the practitioner's professional practice; or

(2) by a practitioner, or by the practitioner's authorized agent under such practitioner's supervision, for the purpose of or as an incident to research, teaching or chemical analysis or by a pharmacist or medical care facility as an incident to dispensing of a controlled substance.]

["Possession" means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.]

["School property" means property on which is located a 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 1 through 12. It is not required that school be in session or that classes are actually being held at the time of the alleged offense or that children must be present within the structure or on the property during the time of any alleged offense.]

Notes on Use

For authority, see K.S.A. 21-36a13(a) and (b). This instruction is for use when conduct occurred on or after July 1, 2009. Violation of K.S.A. 21-36a13(a) is a nondrug severity level 9, nonperson felony, except that it is a nondrug severity level 7, nonperson felony if the person is 18 years or older and the violation occurs on or within 1,000 feet of any school property. Violation of subsection (b) is a class A nonperson misdemeanor. The definition of "simulated controlled substance" can be found in K.S.A. 21-36a01(r).

67.46 REPRESENTATION THAT A NONCONTROLLED SUBSTANCE IS A CONTROLLED SUBSTANCE

The defendant is charged with the crime of (distributing) (possessing with the intent to distribute) a noncontrolled substance under circumstances that it would appear to be [insert name of controlled substance]. The defendant pleads not guilty.

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

1. **That the defendant (distributed) (possessed with the intent to distribute) to [insert name of person to whom substance was distributed] a substance which was not [insert name of controlled substance];**
2. **That the defendant made an express representation that the substance distributed was [insert name of controlled substance];**

OR

That the defendant made an express representation that the substance distributed was of such nature or appearance that the recipient would be able to distribute it as [insert name of controlled substance];

OR

That the distribution of the noncontrolled substance was made under circumstances that would cause a reasonable person to believe the substance was [insert name of controlled substance];

[3. That the defendant was 18 or more years of age;

4. **That [insert name of person to whom substance was distributed] was under 18 years of age;**
5. **That the defendant was at least three years older than [insert name of person to whom substance was distributed];]** and

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

"Distribute" means the actual, constructive or attempted transfer of some item from one person to another, whether or not there is an agency relationship between them. "Distribute" includes sale, offer for sale or any act that causes some item to be transferred from one person to another.

"Distribute" does not include acts of administering, dispensing or prescribing a controlled substance as authorized by law.

["Possession" means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.]

Notes on Use

For authority, see K.S.A. 21-36a14. This instruction is for use when conduct occurred on or after July 1, 2009. Violation of K.S.A. 21-36a14 is a class A, nonperson misdemeanor, except that any person 18 or more years of age who distributes or possesses with the intent to distribute a substance to a person under 18 years of age and who is at least three years older than the person under 18 years of age to whom the distribution is made is guilty of a nondrug severity level 9, nonperson felony. The definitions used here can be found in K.S.A. 21-36a01.

Controlled substance means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111 and 65-4113, and amendments to these sections. See K.S.A. 21-36a01(a). The appropriate controlled substance should be inserted in the instruction.

If applicable, an instruction should be given covering the presumption arising by virtue of K.S.A. 21-36a14(c). See PIK 3d 67.47.

67.47 REPRESENTATION THAT NONCONTROLLED SUBSTANCE IS CONTROLLED SUBSTANCE—INFERENCE

If you find that any of the following factors is established by the evidence, then you may presume that distribution of the substance was under circumstances which would give a reasonable person reason to believe that the substance is a controlled substance:

(1) The substance was packaged in a manner normally used for the illegal distribution of controlled substances.

(2) The distribution of the substance included an exchange of or demand for money or other consideration for distribution of the substance, and the amount of the consideration was substantially in excess of the reasonable value of the substance.

(3) The physical appearance of the capsule or other material containing the substance was substantially identical to a specific controlled substance.

You may consider this inference 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 that the distribution of the noncontrolled substance was made under circumstances that would cause a reasonable person to believe the substance was a controlled substance. This burden never shifts to the defendant.

"Distribute" means the actual, constructive or attempted transfer of some item from one person to another, whether or not there is an agency relationship between them. "Distribute" includes sale, offer for sale or any act that causes some item to be transferred from one person to another.

"Distribute" does not include acts of administering, dispensing or prescribing a controlled substance as authorized by law.

Notes on Use

For authority, see K.S.A. 21-36a14(c). This instruction is for use when conduct occurred on or after July 1, 2009.

67.48 ANHYDROUS OR PRESSURIZED AMMONIA—NON-APPROVED CONTAINER

The defendant is charged with the crime of unlawfully [(using) (possessing with intent to use)] [(anhydrous) (pressurized) ammonia]. The defendant pleads not guilty.

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

1. **That the defendant intentionally [(used) (possessed with intent to use)] [(anhydrous) (pressurized) ammonia] in a container not approved for that chemical by the Kansas department of agriculture; and**
2. **That this act occurred on or about the ____ day of _____, _____, in _____ County, Kansas.**

[Possession means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.]

Notes on Use

For authority, see K.S.A. 21-36a09(c), a violation of which is a drug severity level 4 felony. K.S.A. 21-36a09(d)(4). This instruction is for use when conduct occurred on or after July 1, 2009. The definition of "possession" can be found in K.S.A. 21-36a01(p).

For persons arrested and charged under K.S.A. 21-36a09(c), bail must be at least $50,000 cash or surety unless the court determines, on the record, that the defendant is not likely to re-offend, the court imposes pretrial supervision, or the defendant agrees to participate in a licensed or certified drug treatment program. K.S.A. 21-36a09(f).

67.49 UNLAWFUL USE OF COMMUNICATION FACILITY TO FACILITATE FELONY DRUG TRANSACTION

The defendant is charged with the crime of unlawful use of a communication facility (in committing) (in causing or facilitating the commission of) (in an attempt to commit) (in a conspiracy to commit) (in the solicitation of) the felony of _____. The defendant pleads not guilty.

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

1. **That the defendant intentionally used a [insert type of communication facility] in (committing) (causing the actual commission of) (facilitating the actual commission of) [insert the appropriate felony violation]; and**

   OR

   That the defendant intentionally used a [insert type of communication facility] in (an attempt to commit) (a conspiracy to commit) (a criminal solicitation of) the felony of [insert the appropriate felony violation]; and
2. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

[Conspiracy means 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 the facts and circumstances.]

[Solicitation means commanding, encouraging, or requesting another person to commit a felony, attempt to commit a felony or aid and abet in the commission or attempted commission of a felony for the purpose of promoting or facilitating a felony.]

[Facilitate means to aid, assist, or make easier fulfillment of a goal.]

The elements of [insert the appropriate felony violation] are (set forth in Instruction No. _____) (as follows: _____).

Notes on Use

For authority, see K.S.A. 21-36a07. This instruction is for use when conduct occurred on or after July 1, 2009.

A violation of K.S.A. 21-36a07 is a nondrug severity level 8 nonperson felony.

K.S.A. 21-36a07(c) defines "communication facility" to mean any and all public and private instrumentalities used or useful in the transmission of writing, signs, signals, pictures or sounds of all kinds and includes telephone, wire, radio, computer, computer networks, beepers, pagers and all other means of communication.

The felony violations under K.S.A. 21-36a03, 21-36a05, and 21-36a06 should be inserted in the second blank of element 1 and the elements of the appropriate felony violation should be referred to or set forth in the concluding portion of the instruction.

67.50 RECEIVING OR ACQUIRING PROCEEDS DERIVED FROM DRUG CRIMES

The defendant is charged with the crime of (receiving) (acquiring) (engaging in a transaction involving) proceeds known to be derived from the crime of _____. The defendant pleads not guilty.

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

1. **That the defendant (received) (acquired) (engaged in a transaction involving) proceeds known to be derived from the crime of _____;**

   OR

   That the defendant (distributed) (invested) (concealed) (transported) (maintained an interest in) (made available) _____, a thing of value which defendant knew was intended to be used for the purpose of furthering the commission of the crime of _____;

   OR

   That the defendant (directed) (planned) (organized) (initiated) (financed) (managed) (supervised) (facilitated) the (transportation) (transfer) of proceeds known to be derived from the crime of _____;

   OR

   That the defendant conducted a financial transaction involving the proceeds derived from the crime of _____, which transaction was designed (to conceal or disguise the [nature] [location] [source] [ownership] [control]) of the proceeds known to be derived from _____) (to avoid a transaction reporting requirement under [state] [federal] law);
2. **That the defendant did so knowingly or intentionally;**
3. **That the value of the proceeds was (less than $5,000) (at least $5,000 but less than $100,000) (at least $100,000 but less than $500,000) ($500,000 or more); and**

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

["Distribute" means the actual, constructive or attempted transfer of some item from one person to another, whether or not there is an agency relationship between them. "Distribute" includes sale, offer for sale or any act that causes some item to be transferred from one person to another.

"Distribute" does not include acts of administering, dispensing or prescribing a controlled substance as authorized by law.]

[The elements of [insert the appropriate felony violation] are (set forth in Instruction No. _____) (as follows: _____).]

Notes on Use

For authority, see K.S.A. 21-36a16. This instruction is for use when conduct occurred on or after July 1, 2009. The severity level for a violation of K.S.A. 21-36a16 varies depending on the value of the proceeds involved. The crime is a drug severity level 4 felony if the value of the proceeds is less than $5,000, a drug severity level 3 felony if the value of the proceeds is at least $5,000 but less than $100,000, a drug severity level 2 felony if the value of the proceeds is at least $100,000 but less than $500,000, and a drug severity level 1 felony if the value of the proceeds is $500,000 or more.

References in the elements above to the "crime of _____" refers to violations of K.S.A. 21-36a01 through 21-36a017, except that a violation of the first alternative in element 1 may be based either on a violation of K.S.A. 21-36a01 through 21-36a017 or a substantially similar law from another jurisdiction.

67.51 POSSESSION BY DEALER—NO TAX STAMP AFFIXED

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

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

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

"Possession" means having joint or exclusive control over an item with knowledge of and the intent to have such control or knowingly keeping some item in a place where the person has some measure of access and right of control.

Notes on Use

For authority, see K.S.A. 79-5201 *et seq.* This instruction is for use whether conduct occurred before, on, or after July 1, 2009. Pursuant to K.S.A. 79-5208, a dealer distributing or possessing marijuana or controlled substances without affixing the appropriate stamps, label or other indicia is guilty of a severity level 10 felony.

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

Comment

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

In *State v. Hutcherson*, 25 Kan. App. 2d 501, 968 P.2d 1109 (1998), a defendant found to be in possession of nine rocks of crack cocaine was not considered a dealer, the court holding that evidence showed crack cocaine is sold by dosage although powder cocaine may be sold by weight. However, a defendant in possession of three

rocks of crack cocaine was found to be a dealer where one rock weighed more than seven grams and the charge referred to weight rather than dosage. *State v. Edwards*, 27 Kan. App. 2d 754, 9 P.3d 568 (2000).

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

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

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

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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).

This verdict form was cited with approval in *State v. Hunter*, 41 Kan. App. 2d 507, 518, 203 P.3d 23 (2009).

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).

68.09 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). 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).

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). 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).

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). Premeditated first-degree murder defined by K.S.A. 21-3401(a) is a lesser included offense of capital murder defined by K.S.A. 21-3439(a). *State v. Martis*, 277 Kan. 267, Syl. ¶ 1, 83 P.3d 1216 (2004).

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. **Conspiracy to Commit Murder** - Conspiracy to commit murder is a separate and distinct crime from murder, not a lesser included offense. *Harris v. State*, 288 Kan. 414, 417, 204 P.3d 557 (2009).
10. **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).
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. **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).
15. **Drug Paraphernalia** - The misdemeanor crime of possession of drug paraphernalia is not a lesser included offense of felony possession of drug paraphernalia with the intent to use to package a controlled substance for sale. *State v. Dean*, 42 Kan. App. 2d 32, 208 P.3d 343 (2009).
16. **Fleeing or Attempting to Elude** - Moving violations are not lesser included offenses of the crime of fleeing or attempting to elude a police officer. *State v. Richardson*, 40 Kan. App. 2d 602, 194 P.3d 599 (2008).

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." See also *State v. Overstreet*, 288 Kan. 1, 200 P.3d 427 (2009).

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*, 288 Kan. 263, 200 P.3d 464 (2009), Syl. ¶ 2, the court held that although the language "[a]nother trial would be a burden on both sides" used in a prior version of PIK 3d 68.12 was misleading, inaccurate, and confusing, it was harmless error since the defendant did not object to the jury instruction. However, when the defendant objected to the trial court's instruction which included the same sentence, the court of appeals reversed the defendant's conviction in *State v. Page*, 41 Kan. App. 2d 584, 203 P.3d 1277 (2009).

	PIK 3d 51.06, Statements and Arguments of Counsel.
	PIK 3d 52.09, Credibility of Witnesses.
Instruction 2.	**PIK 3d 67.14, Stimulants, Depressants and Hallucinogenic Drugs Or Anabolic Steroids - Possession With Intent to Sell.**
Instruction 3.	**PIK 3d 52.08, Affirmative Defenses - Burden of Proof.**
Instruction 4.	**PIK 3d 54.14, Entrapment.**
Instruction 5.	**PIK 3d 52.02, Burden of Proof, Presumption of Innocence, Reasonable Doubt.**
Instruction 6.	**PIK 3d 54.01, Inference of Intent.**
Instruction 7.	**PIK 3d 68.01, Concluding Instruction.**
Verdict Forms.	**PIK 3d 68.02, Guilty Verdict - General Form.** **PIK 3d 68.03, Not Guilty Verdict - General Form.**

TEXT OF SUGGESTED INSTRUCTIONS

Instruction No. 1.

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

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

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

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

Instruction 2.

The defendant is charged with the crime of unlawfully possessing marijuana with intent to sell it. The defendant pleads not guilty.

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

1. **That the defendant possessed marijuana;**
2. **That the defendant did so with the intent to sell it;**
3. **That this act occurred on or about the 5th day of October, 1996, in Sedgwick County, Kansas.**

(PIK 3d 67.14)

PIK CRIMINAL INDEX

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