Pattern
Instructions for Kansas—

CRIMINAL 3d

(Cite as PIK 3d)

Prepared by:

KANSAS JUDICIAL COUNCIL
ADVISORY COMMITTEE ON
CRIMINAL JURY INSTRUCTIONS

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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).

The current version of PIK 3d 52.02 was approved in *State v. Gallegos*, 286 Kan. 869, 877, 190 P.3d 226 (2008).

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."

52.08 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
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55.04 Conspiracy - Withdrawal as a Defense
55.10 Criminal Solicitation - Defense
56.34 Defense to Disclosing Information Obtained in Preparing Tax Returns
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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
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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. This was reemphasized in *State v. Cooperwood*, 282 Kan. 572, 147 P.3d 125 (2006).

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).

CHAPTER 54.00

PRINCIPLES OF CRIMINAL LIABILITY

54.12-A VOLUNTARY INTOXICATION—SPECIFIC INTENT CRIME

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

Notes on Use

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

Comment

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

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

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

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

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

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

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

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

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

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

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

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

54.12-A-1 VOLUNTARY INTOXICATION—PARTICULAR STATE OF MIND

Voluntary intoxication may be a defense to the charge of (particular state of mind crime) where the evidence indicates that such intoxication impaired a defendant's mental faculties to the extent that (he)(she) was incapable of forming the necessary state of mind (set out particular state of mind element of crime).

Notes on Use

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

Comment

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

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

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

54.12-B DIMINISHED MENTAL CAPACITY

Diminished mental capacity [not amounting to insanity] may be considered in determining whether the defendant was capable of forming the necessary intent (__set out specific element of the crime__).

Notes on Use

This instruction may be used when there is some evidence of diminished mental capacity. The clause in brackets should be included when the defense of insanity has also been raised. This instruction is applicable only to crimes committed before January 1, 1996.

Comment

In *State v. Jackson*, 238 Kan. 793, 714 P.2d 1368 (1986), the Supreme Court expressly recognized the doctrine of diminished capacity. The Court cautioned that evidence of diminished capacity is "admissible only for the limited purpose of negating specific intent and is not a substitute for a plea of insanity." 238 Kan. at 798.

While a trial court is not required to instruct on diminished capacity, the "better practice" is to instruct on diminished capacity where necessary to inform the jury of the effect of defendant's diminished capacity on the specific intent required for the crime charged. *State v. Maas*, 242 Kan. 44, 52, 744 P.2d 1222 (1987). *State v. Pioletti*, 246 Kan. 49, 59, 785 P.2d 963 (1990), reiterated that the decision whether or not to give an instruction on diminished capacity is a matter of judicial discretion. See also, *State v. Cady*, 248 Kan. 743, 748, 811 P.2d 1130 (1991); *State v. Borman*, 264 Kan. 476, 482, 956 P.2d 1325 (1998).

The complete defense of insanity does not have to be asserted in order to claim diminished capacity. Moreover, mere personality characteristics, such as poor impulse control, a short temper, frustration, feelings of dependency, "snapping", lack of concern for the rights of other people, etc., do not constitute a mental disease or defect bringing the doctrine of diminished capacity into play. *State v. Wilburn*, 249 Kan. 678, 686, 822 P.2d 609 (1991). See also, *State v. Borman*, 264 Kan. 476, 481, 956 P.2d 1325 (1998).

Whether notice of a defense of diminished mental capacity is required under K.S.A. 22-3219 has not been determined in any published decision. As amended in 1989, that statute requires notice of intent to assert the defense of insanity "or other defense involving the presence of mental disease or defect."

54.16 RESTITUTION

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

Comment

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

54.17 USE OF FORCE IN DEFENSE OF A PERSON

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

Defendant is permitted to (insert one of the choices from below)

- **use physical force against another person [—including using a weapon—] [—including through the actions of another—]**
- **threaten by words or actions to use physical force against another person [—including a threat to cause death or great bodily harm—]**
- **display to another person a (insert the means of force used)**

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

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

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

[You must presume that a person had a reasonable belief that use of physical force likely to cause death or great bodily harm was necessary to prevent imminent death or great bodily harm to (himself) (herself) (someone else) if you find the following:

1. **at the time the force likely to cause death or great bodily harm was used, the individual against whom the force was used (insert one of the choices from below)**

   - **(was unlawfully or forcefully entering) (had unlawfully or forcefully entered) and was presently within the (dwelling) (place of work) (occupied vehicle) of the person using the force; [and]**

   - **(had removed) (was attempting to remove) a person against that person's will from the (dwelling) (place of work) (occupied vehicle) of the person using the force; [and]**

2. **the person using the force knew or had reason to believe (insert the applicable condition described in paragraph 1) [.]**

[; and 3. **if the person against whom force was used was a law enforcement officer who (had entered) (was attempting to enter) the (dwelling) (place of work) (occupied vehicle) in the lawful performance of the officer's duties, the person using the force did not know and should not reasonably have known that the person who (entered) (attempted to enter) was a law enforcement officer.]**

This presumption may be overcome if you are persuaded beyond a reasonable doubt that the person did not reasonably believe that use of force likely to cause death or great bodily harm was necessary to prevent imminent death or great bodily harm to (himself) (herself) (someone else).

Notes on Use

For authority, see K.S.A. 21-3211, 21-3212a, and *State v. Simon*, 231 Kan. 572, 646 P.2d 1119 (1982).

The third paragraph dealing with deadly force is in brackets because it should be given only when there is evidence that defendant used deadly force. When there is undisputed evidence defendant used deadly force, this paragraph should be used in lieu of 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."

K.S.A. 21-3220 requires extensive 2010 amendments to the self-defense statutes to be "applied retroactively." One amendment permits a defendant to assert self-defense when charged with a crime based on a threat to use force when physical force was not used, contrary to the holding in *State v. Hendrix*, 289 Kan. 859, 219 P.3d 40 (2009).

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).

The presumption described in the final paragraphs of the instruction which are in brackets was enacted in 2010 at K.S.A. 21-3212a. When given, the instruction on the presumption should be given after PIK 3d 52.08. The instruction should be given only in a case involving the use of deadly force and only if there is evidence sufficient to find that the case is one described in subparagraph (1). Subparagraph (3) should be used only when the person against whom deadly force was used was a law enforcement officer acting in the lawful performance of the officer's lawful duties. In such a case, K.S.A. 21-3212a(b)(4) makes the presumption inapplicable if the defendant "knows or reasonably should know" that the person was an officer. When defendant's knowledge is disputed, the jury must resolve that issue to determine whether the presumption arises. K.S.A. 21-3212a(b)(1)-(3) specifies three other

circumstances in which the presumption does not arise. The Committee believes that ordinarily there will not be a factual issue for the jury to resolve regarding subsections K.S.A. 21-3212a(b)(1)-(3) and that the court should decline to give the instruction when there is no dispute that the circumstance exists. In the rare case in which there is a factual dispute whether the circumstance exists, appropriate language should be substituted for subparagraph (3) of the presumption instruction. For example, in a case involving K.S.A. 21-3212a(b)(1), subparagraph (3) could read: "the person against whom force was used (did not have a right to be in) (was not a lawful resident of) the (dwelling) (place of work) (occupied vehicle)."

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

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

Comment

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

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

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

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

The defense of self-defense requires both a subjective and a reasonable belief that use of force was necessary. In contrast, voluntary manslaughter is an intentional killing upon an unreasonable belief that self-defense is necessary. K.S.A. 21-3403(b); *State v. Holmes*, 278 Kan. 603, 102 P.3d 406 (2004). The voluntary manslaughter analysis is identical to the first, subjective prong required to justify a self-defense instruction. Even though the court gives an instruction on voluntary manslaughter, it may refuse a self-defense instruction if the evidence does not support a finding of the second, objective prong, that a reasonable person would have perceived the need for the use of force in self-defense. *State v. Gonzalez*, 282 Kan. 73, 106-113, 145 P.3d 18 (2006). *Gonzalez* cited with approval *Tyler v. Nelson*, 163 F.3d 1222 (10th Cir. 1999), which concluded that fulfilling the objective prong requires more than defendant's stated belief and requires evaluation of the evidence in light of the totality of the circumstances.

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

54.17-A NO DUTY TO RETREAT

Comment

This instruction is no longer necessary and has been deleted. K.S.A. 22-3218 was amended in 2010, and the independent standard of "meet force with force" was deleted.

54.18 USE OF FORCE IN DEFENSE OF A DWELLING, PLACE OF WORK, OR OCCUPIED VEHICLE

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

Defendant is permitted to (insert one of the choices from below)

- **use physical force against another person [—including using a weapon—] [—including through the actions of another—]**
- **threaten by words or actions to use physical force against another person [—including a threat to cause death or great bodily harm—]**
- **display to another person a (insert the means of force used)**

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

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

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

[You must presume that a person had a reasonable belief that use of physical force likely to cause death or great bodily harm was necessary to prevent imminent death or great bodily harm to (himself) (herself) (someone else) if you find the following:

1. **at the time the force likely to cause death or great bodily harm was used, the individual against whom the force was used (insert one of the choices from below)**

   - **(was unlawfully or forcefully entering) (had unlawfully or forcefully entered) and was presently within the (dwelling) (place of work) (occupied vehicle) of the person using the force; [and]**

   - **(had removed) (was attempting to remove) a person against that person's will from the (dwelling) (place of work) (occupied vehicle) of the person using the force; [and]**

2. **the person using the force knew or had reason to believe (insert the applicable condition described in paragraph 1) [.]**

[; and 3. **if the person against whom force was used was a law enforcement officer who (had entered) (was attempting to enter) the (dwelling) (place of work) (occupied vehicle) in the lawful performance of the officer's duties, the person using the force did not know and should not reasonably have known that the person who (entered) (attempted to enter) was a law enforcement officer.]**

This presumption may be overcome if you are persuaded beyond a reasonable doubt that the person did not reasonably believe that use of force likely to cause death or great bodily harm was necessary to prevent imminent death or great bodily harm to (himself) (herself) (someone else).

Notes on Use

For authority, see K.S.A. 21-3212 as amended May 25, 2006. The applicable parenthetical phrase or phrases should be selected. If this instruction is used, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

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

The third paragraph dealing with deadly force is in brackets because it should be given only when there is evidence that defendant used deadly force. When there is undisputed evidence defendant used deadly force, this paragraph should be used in lieu of 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."

K.S.A. 21-3220 requires extensive 2010 amendments to the self-defense statutes to be "applied retroactively." One amendment permits a defendant to assert self-defense when charged with a crime based on a threat to use force when physical force was not used, contrary to the holding in *State v. Hendrix*, 289 Kan. 859, 219 P.3d 40 (2009).

The presumption described in the final paragraphs of the instruction which are in brackets was enacted in 2010 at K.S.A. 21-3212a. When given, the instruction on the presumption should be given after PIK 3d 52.08. The instruction should be given only in a case involving the use of deadly force and only if there is evidence sufficient to find that the case is one described in subparagraph (1). Subparagraph (3) should be used only when the person against whom deadly force was used was a law enforcement officer acting in the lawful performance of the officer's lawful duties. In such a case, K.S.A. 21-3212a(b)(4) makes the presumption inapplicable if the defendant "knows or reasonably should know" that the person was an officer. When defendant's knowledge is disputed, the jury must resolve that issue to determine whether the presumption arises. K.S.A. 21-3212a(b)(1)-(3) specifies three other circumstances in which the presumption does not arise. The Committee believes that ordinarily there will not be a factual issue for the jury to resolve regarding subsections K.S.A. 21-3212a(b)(1)-(3) and that the court should decline to give the instruction when there is no dispute that the circumstance exists. In the rare case in which there is a factual dispute whether the circumstance exists, appropriate language should be

substituted for subparagraph (3) of the presumption instruction. For example, in a case involving K.S.A 21-3212a(b)(1), subparagraph (3) could read: "the person against whom force was used (did not have a right to be in) (was not a lawful resident of) the (dwelling) (place of work) (occupied vehicle)."

Comment

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

54.19 USE OF FORCE IN DEFENSE OF PROPERTY OTHER THAN A DWELLING, PLACE OF WORK, 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 is permitted to (insert one of the choices from below)

- **use such physical force not likely to cause death or great bodily harm against another person [—including using a weapon—] [—including through the actions of another—]**
- **threaten by words or actions to use physical force against another person [—including a threat to cause death or great bodily harm—]**
- **display to another person a (insert the means of force used)**

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. This instruction should not be given when defendant used deadly force. Use of physical force likely to cause death or great bodily harm is permitted only when necessary to prevent imminent death or great bodily harm. See PIK 3d 54.17.

54.20 FORCIBLE FELON NOT ENTITLED TO USE FORCE

A person is not permitted to (use physical force) (threaten to use physical force) (display a means of force) in defense of (himself)(herself)(someone else) ([his][her] dwelling) ([his][her] place of work) ([his][her] occupied vehicle) ([his][her] property) if (he)(she) is (attempting to commit) (committing) (escaping after the commission of) _____.

[For the elements of _____, see instruction (insert instruction number).]

[As used in this instruction, _____ is (insert elements from the appropriate pattern instruction).]

Notes on Use

For authority, see K.S.A. 21-3214(1). Insert in the blank space the name of the particular forcible felony applicable to the particular case. For a definition of forcible felony, see K.S.A. 21-3110(8). If defendant also is charged with the forcible felony, use the first sentence in brackets. If defendant is not charged with the forcible felony, use the second sentence in brackets.

Comment

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

In *State v. Bell*, 276 Kan. 785, 80 P.3d 367 (2003), the Court stated that where criminal discharge of a firearm into an occupied vehicle is the underlying felony for a charge of felony murder, it is a forcible felony and precludes the use of self defense under K.S.A. 21-3214(1). See also *State v. Kirkpatrick*, 286 Kan. 329, 184 P.3d 247 (2008) (improper to give self-defense instruction in felony murder case when underlying felony was forcible felony of criminal discharge of a weapon at occupied building; imperfect self-defense not available for underlying felony either since imperfect self-defense applies only to homicide charge; thus, no duty to instruct on lesser included offense when charge is felony murder). The dissent in *Kirkpatrick* argued that whether defendant committed a forcible felony was a question for the jury to decide and that it thus was proper to give the self-defense instruction, along with

instructions explaining when self-defense is not available. The majority limits its holding "to the facts of this case," in which "at all times during the events," defendant "and his friends were the aggressors."

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

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54.21 PROVOCATION OF FIRST FORCE AS EXCUSE FOR RETALIATION

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

Notes on Use

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

Comment

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

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

54.22 INITIAL AGGRESSOR'S USE OF FORCE

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

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

or

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

Notes on Use

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

Comment

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

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

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

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

A (law enforcement officer) (private person who is summoned or directed by a law enforcement officer to assist [him][her]) need not retreat or cease the efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. (He)(She) is permitted to (insert one of the choices from below)

- **use physical force against another person [—including using a weapon—] [—including through the actions of another—]**
- **threaten by words or actions to use physical force against another person [—including a threat to cause death or great bodily harm—]**
- **display to another person a (insert the means of force used)**

which (he)(she) reasonably believes (to be necessary to effect the arrest) (to be necessary to defend [himself] [herself] [someone else] from bodily harm while making the arrest).

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

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

or

(is necessary to prevent the arrest from being defeated by resistance or escape and such officer has probable cause to

believe that the person to be arrested has committed or attempted to commit _____, a felony that involves death or great bodily harm or [is attempting to escape by use of a deadly weapon] [otherwise indicates (he)(she) will endanger human life or inflict great bodily harm unless arrested without delay]).

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

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

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

Notes on Use

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

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

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

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

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

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

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

A private person who (makes) (assists another private person in making) a lawful arrest need not retreat or cease efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. (He)(She) is permitted to (insert one of the choices from below)

- **use physical force against another person [—including using a weapon—] [—including through the actions of another—]**
- **threaten by words or actions to use physical force against another person [—including a threat to cause death or great bodily harm—]**
- **display to another person a (insert the means of force used)**

which (he)(she) reasonably believes to be necessary to:

(effect the arrest).

or

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

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

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

Notes on Use

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

Comment

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

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

54.25 USE OF FORCE IN RESISTING ARREST

A person is not authorized to (use physical force) (threaten to use physical force) (display a means of force) to resist an arrest which (he)(she) knows is being made by a (law enforcement officer) (private person summoned and directed by a law enforcement officer to make the arrest) even if the person believes that the arrest is unlawful and the arrest is, in fact, unlawful.

Notes on Use

For authority, see K.S.A. 21-3217.

This instruction should not be given when the defendant claims that the officer used excessive force in making the arrest. *State v. Heiskell*, 8 Kan. App. 2d 667, Syl. ¶ 4, 666 P.2d 207 (1983).

Comment

See *Kansas Judicial Council Bulletin*, April 1968, p.43.

CHAPTER 55.00

ANTICIPATORY CRIMES

55.01 ATTEMPT

A. (The defendant is charged with the crime of an attempt to commit _____. The defendant pleads not guilty.)

OR

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

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

1. **That the defendant performed an overt act toward the commission of the crime of _____;**
2. **That the defendant did so with the intent to commit the crime of _____;**
3. **That the defendant failed to complete commission of the crime of _____; and**
4. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

An overt act necessarily must extend beyond mere preparations made by the accused and must sufficiently approach consummation of the offense to stand either as the first or subsequent step in a direct movement toward the completed offense. Mere preparation is insufficient to constitute an overt act.

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

_____

_____

_____).

Notes on Use

For authority, see K.S.A. 21-3301. K.S.A. 21-3301(c) provides that an attempt to commit an off-grid felony (murder in the first degree, treason) is a nondrug severity level 1 crime. For other nondrug crimes, if committed prior to July 1, 2010, an attempt to commit is ranked two crime severity levels below the severity level for the

underlying crime. The lowest level for an attempt to commit a nondrug felony offense is severity level 10. Other nondrug crimes committed on or after July 1, 2010, are also ranked two crime severity levels below the severity level for the completed crime except for the following crimes, which take their sentence from the underlying crime without reduction: aggravated trafficking, as defined in K.S.A. 21-3447, if the offender is 18 years of age or older and the victim is less than 14 years of age; terrorism as defined in K.S.A. 21-3449; illegal use of weapons of mass destruction as defined in K.S.A. 21-3450; rape, as defined in K.S.A. 21-3502(a)(2), if the offender is 18 years of age or older; aggravated indecent liberties with a child, as defined in K.S.A. 21-3504(a)(3), if the offender is 18 years of age or older; aggravated criminal sodomy, as defined in K.S.A. 21-3506(a)(1) or (a)(2), if the offender is 18 years of age or older; promoting prostitution, as defined in K.S.A. 21-3513, if the offender is 18 years of age or older and the prostitute is less than 14 years of age; or sexual exploitation of a child, as defined in K.S.A. 21-3516(a)(5) or (a)(6), if the offender is 18 years of age or older.

K.S.A. 21-3301(d) provides that conviction for an attempt to commit a drug felony reduces the prison term prescribed in the drug sentencing grid for the underlying or completed crime by six months. A violation of K.S.A. 21-36a03, unlawfully manufacturing controlled substances, is exempted from this reduced term of sentence.

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

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

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

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

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

Comment

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

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

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

K.S.A. 21-3402 was amended in 1993 to include two alternative definitions of second-degree murder. Under subsection (a) it is defined as the intentional killing of a human being. Under subsection (b) it is defined as a killing committed "unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life." K.S.A. 1999 Supp. 21-3402. The Supreme Court has held that attempted second-degree murder charged under subsection (b) cannot be recognized as a crime in Kansas, as it would required proof of an intent to commit an unintentional act, a logical impossibility. *State v. Shannon*, 258 Kan. at 429. In *State v. Clark*, 261 Kan. 460, 466-67, 931 P.2d 664 (1997), the Court acknowledged the propriety of an instruction on attempted second-degree murder charged under subsection (a) of K.S.A. 21-3402, though the Court held that the evidence in that particular case did not warrant the instruction.

A problem inherent in the law of attempts concerns the point when criminal liability attaches for the overt act. There is no definitive rule concerning what constitutes an overt act; each case depends on the inferences a jury may reasonably draw from the facts. The overt act necessarily must extend beyond mere preparations made by the accused and must approach sufficiently near to consummation of the offense to stand either as the first or subsequent step in a direct movement toward the completed offense. *State v. Stevens*, 285 Kan. 307, 318, 172 P.3d 570 (2007); *State v. Zimmerman*, 251 Kan. 54, 833 P.2d 925 (1992); *State v. Chism*, 243 Kan. 484, 759 P.2d 105 (1988); *State v. Garner*, 237 Kan. 227, 699 P.2d 468 (1985).

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

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

Holding that attempted rape does not require attempted penetration or even that the defendant be in close proximity to the victim, the Supreme Court upheld the conviction for attempted rape in *State v. Peterman*, 280 Kan. 56, 118 P.3d 1267

(2005). The Court noted that the line between preparation and overt act may be indistinct, and held that each case is dependent on its particular facts and the reasonable inferences the jury may draw from those facts. The Court stated, "Although the overt act does not have to be the last proximate act in the consummation of the crime, it must be either the first or some subsequent step in a direct movement toward the commission of the crime after the preparations are made."

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

Where there was an overt act by the defendant but failure to complete the crime, a defense of voluntary abandonment was rejected by the Court of Appeals in *State v. Morfitt*, 25 Kan. App. 2d 8, 956 P.2d 719, *rev. denied* 265 Kan. 888 (1998). The trial court has a duty to instruct on lesser included offenses established by the evidence, even though the instructions have not been requested. Such an instruction must be given even though the evidence is weak and inconclusive and consists solely of the testimony of the defendant. The duty to so instruct exists only where the defendant might reasonably be convicted of the lesser offense. *State v. Dixon*, 252 Kan. 39, 843 P.2d 182 (1992). K.S.A. 22-3414(3) codifies the duty of the court to instruct on lesser included offenses; however, no party may assign as error the giving or failure to give an instruction, including a lesser included offense instruction, unless the party objects thereto or unless the instruction or failure to give an instruction is clearly erroneous.

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

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

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

same conduct are proper. Burglary with the intent to commit rape is not duplicitous with the crime of an attempt to commit rape. *State v. Lora*, 213 Kan. 184, 515 P.2d 1086 (1973).

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

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

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

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

In *State v. Martens*, 273 Kan. 179, 42 P.3d 142, *modified* 274 Kan. 459, 54 P.3d 960 (2002), the Supreme Court reversed a conviction under K.S.A. 65-4159 because the district court seemingly convicted the defendant of both attempted manufacture and actual manufacture of methamphetamine. Although K.S.A. 65-4159 deals with the sentence for both the manufacture and attempted manufacture of methamphetamine, the Court held that convicting the defendant of both is a violation of K.S.A. 21-3107(2). In *State v. Peterson*, 273 Kan. 217, 42 P.3d 137 (2002), the Court held that attempting to manufacture methamphetamine is a lesser included offense of the crime of manufacturing methamphetamine, and held that the failure to give a separate instruction on attempt to manufacture methamphetamine was reversible error.

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

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.

55.02 ATTEMPT - IMPOSSIBILITY OF COMMITTING OFFENSE - NO DEFENSE

The Committee recommends that there be no separate instruction given.

Notes on Use

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

Comment

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

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

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

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

55.03 CONSPIRACY

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

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

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

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

Notes on Use

For authority, see K.S.A. 21-3302. K.S.A. 21-3302(c) provides that conspiracy to commit an off-grid felony (murder in the first degree, treason) is a severity level 2 crime. A conspiracy to commit any other nondrug felony offense is ranked two crime severity levels below the severity level for the completed crime. However, on and after July 1, 2010, the following nondrug felonies take their sentence from the underlying crime without reduction: aggravated trafficking, as defined in K.S.A. 21-3447, if the offender is 18 years of age or older and the victim is less than 14 years of age; terrorism as defined in K.S.A. 21-3449; illegal use of weapons of mass destruction as defined in K.S.A. 21-3450; rape, as defined in K.S.A. 21-3502(a)(2), if the offender is 18 years of age or older; aggravated indecent liberties with a child, as defined in K.S.A. 21-3504(a)(3), if the offender is 18 years of age or older; aggravated criminal sodomy, as defined in K.S.A. 21-3506(a)(1) or (a)(2), if the offender is 18 years of age or older; promoting prostitution, as defined in K.S.A. 21-3513, if the offender is 18 years of age or older and the prostitute is less than 14 years of age; or sexual exploitation of a child, as defined in K.S.A. 21-3516(a)(5) or (a)(6), if the offender is 18 years of age or older. The lowest level for a conspiracy to commit a nondrug felony offense is severity level 10.

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

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

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

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

Comment

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

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

In *Borserine*, the Supreme Court held that the order of proof in a conspiracy case is largely controlled by the trial judge. "A conspiracy may be established by direct proof, or circumstantial evidence, or both. Ordinarily when acts and declarations of one or more co-conspirators are offered in evidence against another co-conspirator by a third party witness or witnesses, the conspiracy should first be established prima facie, and to the satisfaction of the trial judge. But this cannot always be required. Where proof of the conspiracy depends on a vast amount of circumstantial evidence-a vast number of isolated and independent facts-it cannot be required. In any case where such acts and declarations are introduced in evidence, and the whole of the evidence introduced at the trial taken together shows that a conspiracy actually exists, it will be considered immaterial whether the conspiracy was established before, or after, the introduction of such acts and declarations. (*State v. Winner*, 17 Kan. 298.)" (Syl.4) *State v. Marshall & Brown-Sidorowicz*, 2 Kan. App. 2d at 198.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The conspiracy agreement may be established in any manner sufficient to show agreement. It may be oral or written, or inferred from acts of the persons accused that were done in furtherance of the unlawful purpose. See *State v. Small*, 5 Kan. App. 2d at 762-763; *State v. Hernandez*, 24 Kan. App. 2d 285, 944 P.2d 188, *rev. denied* 263 Kan. 888 (1997); *State v. Denny*, 38 Kan. App. 2d 724, 172 P.3d 57 (2007) *rev. denied* 286 Kan. 1181 (2008).

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

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

55.09 CRIMINAL SOLICITATION

The defendant is charged with the crime of solicitation to commit _____, a felony. The defendant pleads not guilty.

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

1. **That the defendant intentionally (commanded) (encouraged) (requested) _____ (to commit) (attempt to commit) the crime of _____, a felony;**

   or

   That the defendant intentionally (commanded) (encouraged) (requested) _____ to aid and abet in the (commission) (attempted commission) of the crime of _____, a felony, for the purpose of promoting or facilitating the felony; and

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

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

Notes on Use

For authority, see K.S.A. 21-3303. K.S.A. 21-3303(d) provides that soliciting another to commit an off-grid felony (murder in the first degree, treason) is a severity level 3 crime. Soliciting another to commit any other nondrug felony offense is ranked three crime severity levels below the appropriate level for the completed crime. However, on and after July 1, 2010, the following nondrug felonies take their sentence from the underlying crime without reduction: aggravated trafficking, as defined in K.S.A. 21-3447, if the offender is 18 years of age or older and the victim is less than 14 years of age; terrorism as defined in K.S.A. 21-3449; illegal use of weapons of mass destruction as defined in K.S.A. 21-3450; rape, as defined in K.S.A. 21-3502(a)(2), if the offender is 18 years of age or older; aggravated indecent liberties with a child, as defined in K.S.A. 21-3504(a)(3), if the offender is 18 years of age or older; aggravated criminal sodomy, as defined in K.S.A. 21-3506(a)(1) or (a)(2), if the

offender is 18 years of age or older; promoting prostitution, as defined in K.S.A. 21-3513, if the offender is 18 years of age or older and the prostitute is less than 14 years of age; or sexual exploitation of a child, as defined in K.S.A. 21-3516(a)(5) or (a)(6), if the offender is 18 years of age or older. The lowest severity level for soliciting another to commit a nondrug felony offense is severity level 10.

K.S.A. 21-3303(e) provides that conviction for solicitation of a drug felony reduces the prison term prescribed in the sentencing grid for the underlying or completed crime by six months.

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

Comment

The crime of solicitation is separate and distinct from an attempt to commit a crime or from the crime of conspiracy. Solicitation is in the nature of preparation; whereas, an attempt involves an overt act beyond the solicitation. See *State v. Bowles*, 70 Kan. 821, 837, 79 Pac. 726 (1905); and 21 Am. Jur. 2d, Criminal Law, §§ 161 and 162. Solicitation is distinguished from the crime of conspiracy in that the latter requires an agreement between two or more persons to commit, or assist in committing, a crime along with an overt act in furtherance of the object of the conspiracy. See *State v. Garrison*, 252 Kan. 929, 850 P.2d 244 (1993); *State v. Crozier*, 225 Kan. 120, 126, 587 P.2d 331 (1978). The crime of solicitation, on the other hand, is complete when the solicitation request is made without the requirement of an agreement or an overt act. *State v. Westfahl*, 21 Kan. App. 2d 159, 898 P.2d 87 (1995).

PIK 55.09 was approved as a correct statement of the offense of criminal solicitation in *State v. Westfahl*, supra.

It should be noted that subsection (b) provides that it is immaterial ". . . that the actor fails to communicate with the person solicited to commit a felony if the person's conduct was designed to effect a communication." Apparently, this subsection covers the unusual situation where one might place an offer in a newspaper or use some other form of communication or utilize the concepts of an agency to carry out the prohibited solicitation. In the event the provision becomes material, an appropriate paraphrase of the statute should be presented.

In a "loan scam" case, the defendants' convictions of criminal solicitation and aiding and abetting were held neither to have merged nor to have been multiplicitous. *State v. Edwards*, 250 Kan. 320, 826 P.2d 1355 (1992).

Solicitation to commit first-degree murder is a separate and independent criminal offense from aiding and abetting first-degree murder, and the jury need not be instructed on criminal solicitation as a lesser included offense. *State v. Webber*, 260 Kan. 263, 918 P.2d 609 (1996); *State v. DePriest*, 258 Kan. 596, 907 P.2d 868 (1995).

An alternative request, i.e., that a friend either raise the money to post the defendant's bond or murder the complaining witness, constituted sufficient evidence to support a conviction of criminal solicitation. *State v. Mason*, 268 Kan. 37, 40, 986 P.2d 387 (1999).

"Solicitation is a specific intent crime under Kansas law. A person is not guilty of solicitation unless he or she intentionally commits the actus reus of the offense, viz., he or she commands, encourages, or requests another person to commit a felony with the specific intent that the other commit the crime he or she solicited. The actus reus of the solicitation occurs under Kansas law if a person by words or actions invites, requests, commands, or encourages a second person to commit a crime. The crime is complete when the person communicates the solicitation to another with the requisite mens rea. No act in furtherance of the target crime needs to be performed by either person." *State v. DePriest*, 258 Kan. 596, 907 P.2d 868 (1995). See also; *State v. Esher*, 22 Kan. App. 2d 779, 922 P.2d 1123 (1996).

The rule that two witnesses or one witness and corroborating circumstances are necessary to establish the fact of perjury is not applicable to prove the crime of solicitation to commit perjury. *State v. Ellis*, 25 Kan. App. 2d 61, 957 P.2d 520, *rev. denied* 265 Kan. 887 (1998).

55.10 CRIMINAL SOLICITATION - DEFENSE

It is a defense to a charge of criminal solicitation that the defendant, after soliciting another person to commit a felony, persuaded that person not to do so or otherwise prevented the commission of the felony, under circumstances demonstrating a complete and voluntary abandonment of the defendant's criminal plan.

Notes on Use

For authority, see K.S.A. 21-3303(c). If this instruction is given, PIK 3d 52.08, Affirmative Defenses - Burden of Proof, should be given.

CAPITAL MURDER JURY INSTRUCTIONS NOTICE

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

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

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

56.11 CRIMINAL ABORTION - JUSTIFICATION

Notes on Use

See PIK 3d 56.10, Criminal Abortion.

56.12 ASSAULT

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

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

1. **That the defendant intentionally placed _____ in reasonable apprehension of immediate bodily harm; and**
2. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

No bodily contact is necessary.

Notes on Use

For authority, see K.S.A. 21-3408. Assault is a class C person misdemeanor. The elements of this crime were modified, effective July 1, 1993.

Comment

Apprehension is fear of harm to the person who is threatened, not fear of harm to a third person. *State v. Warbritton*, 215 Kan. 534, 527 P.2d 1050 (1974).

56.40 EXPOSING ANOTHER TO A LIFE THREATENING COMMUNICABLE DISEASE

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

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

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

Notes on Use

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

56.41 INJURING A PREGNANT WOMAN

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

56.42 INJURY TO A PREGNANT WOMAN BY VEHICLE

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

56.43 HUMAN TRAFFICKING

The defendant is charged with the crime of human 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 for (labor) (services) through use of (force) (fraud) (coercion) for the purpose of subjecting the person to (forced labor) (involuntary servitude); and**

OR

1. **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) (coercion), would be caused to engage in (forced labor) (involuntary servitude); and**

OR

1. **That the defendant coerced employment by [(obtaining) (maintaining)] [(labor) (services)] [(performed) (provided by)] another person through (causing) (threatening to cause) physical injury to any person;**

or

(physically restraining) (threatening to restrain) another person;

or

[(abusing) (threatening to abuse)] [(the law) (legal process)];

or

threatening to withhold (food) (lodging) (clothing);

or

knowingly (destroying) (concealing) (removing) (confiscating) (possessing) an (actual) (purported) government identification document of another person;

or

knowingly holding another person in a condition of peonage in satisfaction of a debt owed the person who is holding such other person; and

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

As used in this instruction, "peonage" means a condition of involuntary servitude in which the victim is forced to work for another person by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or legal process.

Notes on Use

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

56.44 AGGRAVATED HUMAN 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 for (labor) (services) through use of (force) (fraud) (coercion) for the purpose of subjecting the person to (forced labor) (involuntary servitude); and**

OR

1. **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) (coercion), would be caused to engage in (forced labor) (involuntary servitude); and**

OR

1. **That the defendant coerced employment by [(obtaining) (maintaining)] [(labor) (services)] [(performed) (provided by)] another person through (causing) (threatening to cause) physical injury to any person;**

or

(physically restraining) (threatening to restrain) another person;

or

[(abusing) (threatening to abuse)] [(the law) (legal process)];

or

threatening to withhold (food) (lodging) (clothing);

or

knowingly (destroying) (concealing) (removing) (confiscating) (possessing) an (actual) (purported) government identification document of another person;

or

knowingly holding another person in a condition of peonage in satisfaction of a debt owed the person who is holding such other person; and

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.

As used in this instruction, "peonage" means a condition of involuntary servitude in which the victim is forced to work for another person by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or legal process.

Notes on Use

For authority, see K.S.A. 21-3447. Aggravated human 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.

57.25 AGGRAVATED SEXUAL BATTERY - INTOXICATION

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

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

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

Notes on Use

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

Comment

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

57.26 UNLAWFUL SEXUAL RELATIONS

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

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

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

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

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

OR

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

4. **That _____ was 16 years of age or older and had been released on (parole) (conditional release) (post-release supervision) and the defendant knew that _____ was an inmate who had been released and was on (parole) (conditional release) (post-release supervision);] and**

OR

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

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

OR

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

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

OR

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

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

OR

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

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

OR

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

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

OR

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

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

OR

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

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

OR

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

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

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

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

Notes on Use

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

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).

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

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

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

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

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

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

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

In *State v. Watson*, 39 Kan. App. 2d 923, 186 P.3d 812 *rev. denied* 287 Kan. 769 (2008), the court held that "taking" property from the owner is not an element of theft under K.S.A. 21-3701(a)(1). All that is required is unauthorized control, coupled with intent to permanently deprive the owner of the use or benefit of the property.

59.01-A THEFT—KNOWLEDGE PROPERTY STOLEN

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

Notes on Use

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

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

Comment

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

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

59.67-B REMOVAL OF A THEFT DETECTION DEVICE

The defendant is charged with removal of a theft detection device. The defendant pleads not guilty.

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).

60.01 TREASON

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

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

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

   or

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

   or

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

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

Notes On Use

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

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

60.01-A TERRORISM

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

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

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

Notes On Use

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

The sentence reduction provisions in K.S.A. 21-3301(c) do not apply to a conviction for terrorism, even if the defendant was charged with and convicted of attempting to commit an act of terrorism. K.S.A. 21-3449.

Comment

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

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

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

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

In *State v. Hudson*, 261 Kan. 535, 931 P.2d 679 (1997), the court held that the classification of obstruction as a felony or misdemeanor depends upon the knowledge and intent of the officer as to whether a misdemeanor or felony arrest was being made. See also *State v. Kelly*, 38 Kan. App. 2d 224, 227, 162 P.3d 832 (2007); *State v. Johnson*, 40 Kan. App. 2d 196, 190 P.3d 995 (2008).

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

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

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

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

60.10 ESCAPE FROM CUSTODY

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

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

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

   OR

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

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

Notes On Use

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

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

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

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

Comment

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

"Lawful custody" contemplates an intent on the part of prison officials to exercise actual or constructive control over the prisoner in some way that restrains the prisoner's liberty. A prisoner who fails to abide by the conditions of house arrest may be found guilty of escape from custody. The key factor is whether or not prison officials have shown an intent to abandon or give up their prisoner, leaving him free to go on his way. *State v. Kraft*, 38 Kan. App. 2d 215, 219, 163 P.3d 361, *rev. denied*, 285 Kan. 1176 (2007).

In *State v. Urban*, 291 Kan. 214, 239 P.3d 837 (2010), the Supreme Court held that a defendant who had been granted a personal recognizance bond, conditioned upon her residing at the Johnson County Residential Center pending sentencing, was not "in custody" within the meaning of K.S.A. 21-3809, and therefore could not be convicted of escape from custody after she absconded from the Residential Center.

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).

In *State v. Urban*, 291 Kan. 214, 239 P.3d 837 (2010), the Supreme Court held that a defendant who had been granted a personal recognizance bond, conditioned upon her residing at the Johnson County Residential Center pending sentencing, was not "in custody" within the meaning of K.S.A. 21-3809, and therefore could not be convicted of escape from custody after she absconded from the Residential Center.

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.

62.11 UNLAWFULLY SMOKING IN A PUBLIC PLACE

Comment

This instruction has been deleted. Cigarette and tobacco infractions are punishable by fine only, and the statute was amended in 1998 to eliminate the right to request a jury trial. See K.S.A. 22-3404.

62.11-A FAILURE TO POST SMOKING PROHIBITED AND DESIGNATED SMOKING AREA SIGNS

Comment

This instruction has been deleted. Cigarette and tobacco infractions are punishable by fine only, and the statute was amended in 1998 to eliminate the right to request a jury trial. See K.S.A. 22-3404.

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

   or

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

   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 with a core of less than 60% lead by weight; 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)(6) through (a)(8). 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) through (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) (switch-blade 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) through (i) for statutory exemptions.

If the weapon is a switch-blade knife, the complete definition of switch-blade found at K.S.A. 21-4201(a)(1), including the language regarding ordinary pocket knives not being switch-blades, should be inserted after the numbered paragraphs of the instruction. Likewise, if the weapon is one listed in K.S.A. 21-4201(a)(2), and the exclusion regarding ordinary pocket knives with blades less than 4 inches applies, such language should be inserted after the numbered paragraphs of the instruction.

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.

64.03 AGGRAVATED WEAPONS VIOLATION

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

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

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

OR

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. 752, 545 P.2d 379 (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, entities or situations 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

State v. Lassley, 218 Kan. 752, 545 P.2d 379 (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, or, prior to the section's repeal, K.S.A. 65-4127a, 65-4127b, or 65-4160 through 65-4165, 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, or, prior to the section's repeal, K.S.A. 65-4127a, 65-4127b, or 65-4160 through 65-4165, 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.

64.06 CRIMINAL POSSESSION OF A FIREARM - FELONY

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

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

A. 1. That the defendant knowingly possessed a firearm;

2. That the defendant had been

- **convicted of (insert appropriate offense from subsection (a)(2) of K.S.A. 21-4204);**

  or

- **adjudicated as a juvenile offender because of the commission of _____, an act which if done by an adult would constitute the commission of a [person felony][violation of (insert appropriate statute number);**

3. That the defendant was found to have been in possession of a firearm at the time of the commission of the prior offense; and

OR

B. 1. That the defendant knowingly possessed a firearm;

2. That the defendant within five years preceding such possession had been

- **convicted of (insert appropriate offense from subsection (a)(3) of K.S.A. 21-4204), a felony;**

  or

- **convicted of _____, a crime in (name of jurisdiction), that is substantially the same as _____, a felony in Kansas;**

  or

- **released from imprisonment for _____, a felony;**

  or

- **adjudicated as a juvenile offender because of the commission of an act which if done by an adult would constitute the commission of a felony; and**

OR

C. 1. That the defendant knowingly possessed a firearm;

2. That the defendant within 10 years preceding such possession had been

- **convicted of (insert appropriate offense from subsection (a)(4) of K.S.A. 21-4204), a felony;**
  or
- **convicted of an attempt, conspiracy, or criminal solicitation to commit (insert appropriate offense from subsection (a)(4) of K.S.A. 21-4204), a felony;**
  or
- **convicted of _____, a crime in (name of jurisdiction) that is substantially the same as _____, a felony in Kansas;**
  or
- **released from imprisonment for _____, a felony;**
  or
- **adjudicated as a juvenile offender because of the commission of _____, an act which if done by an adult would constitute the commission of a felony; and**

OR

D. 1. That the defendant knowingly possessed a firearm;

2. That the defendant within 10 years preceding such possession had been

- **convicted of _____, a nonperson felony;**
  or
- **convicted of _____, a crime in (name of jurisdiction) that is substantially the same as _____, a nonperson felony in Kansas;**
  or
- **released from imprisonment for _____, a nonperson felony;**
  or
- **adjudicated as a juvenile offender because of the commission of an act which if done by an adult**

would constitute the commission of a nonperson felony;

3. That the defendant was found to have been in possession of a firearm at the time of the commission of the prior offense; and

OR

E. 1. That the defendant knowingly possessed a firearm;

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

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

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

Notes on Use

Authority for Alternative A is K.S.A. 21-4204(a)(2), Alternative B is K.S.A. 21-4204(a)(3), Alternative C is K.S.A. 21-4204(a)(4)(A), Alternative D is K.S.A. 21-4204(a)(4)(B), and Alternative E is K.S.A. 21-4204(a)(7). An exemption to K.S.A.21-4204(a)(7) is found at K.S.A. 21-4204(c). 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).

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 knowingly possessed a firearm;

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

OR

B. 1. That the defendant knowingly possessed 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 possessed 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);

3. That the defendant was (requested) (directed) to do so by a (duly authorized school employee) (law enforcement officer); and

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

Notes on Use

Authority for Alternative A is K.S.A. 21-4204(a)(1). Authority for Alternative B is K.S.A. 21-4204(a)(5). Exemptions to K.S.A. 21-4204(a)(5) are found at K.S.A. 21-4204(b). 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 AT A STATE BUILDING OR COUNTY COURTHOUSE

The defendant is charged with the crime of possession of a firearm at a state building or county courthouse. The defendant pleads not guilty.

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

1. **That the defendant knowingly possessed a firearm;**
2. **That the defendant was on the grounds of __(state the applicable prohibited location as listed in the statute)_; 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(a). A violation of this statute is a class A misdemeanor. Various individuals or settings are exempted from application of the statute. They are found at K.S.A. 21-4218(b) through (f).

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.

64.15 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 UNLAWFULLY OBTAINING A PRESCRIPTION-ONLY DRUG

The defendant is charged with the crime of unlawfully obtaining 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; and**

   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; and

   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; and

   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; and

   or

   That the defendant provided false information, with the intent to deceive, 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(a), effective for crimes committed on or after July 1, 2009. Unlawfully obtaining or distributing a prescription-only drug is a class A, nonperson misdemeanor. If the defendant has a prior conviction under K.S.A. 21-4214 (prior to its repeal), the present offense is a severity level 9, nonperson felony.

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.

64.17-A UNLAWFULLY SELLING A PRESCRIPTION-ONLY DRUG

The defendant is charged with the crime of unlawfully selling 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 unlawfully obtained a prescription-only drug by (insert appropriate part of PIK 64.16 instruction);**
2. **That the defendant (sold) (offered for sale) (possessed with intent to sell) that prescription-only drug; 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

For authority, see K.S.A. 21-36a08(b), which applies to crimes committed after April 15, 2010. Unlawfully selling a prescription-only drug is a severity level 6, nonperson felony.

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 was 18 or more years of age;

3. That the defendant did so in, on or within 1,000 feet of school property; and]

[2.] or [4.] 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. Between July 1, 2009 and June 30, 2010, there was no requirement that defendant be 18 or older for an 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.]

67.37 DISTRIBUTION OF DRUG PARAPHERNALIA FOR USE IN MANUFACTURING OR DISTRIBUTING CONTROLLED SUBSTANCES

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 to (manufacture) (distribute) [insert name of controlled substance]; and**

[3. That the defendant was 18 or more years of age;

[4. That the defendant did so in, on or within 1,000 feet of school property; and]

[3.] 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.]

Notes on Use

For authority, see K.S.A. 21-36a10(b). A violation of this statute is a drug severity level 4 felony, except that a violation within 1,000 feet of any school property is a drug severity level 2 felony if the defendant was 18 or older. This instruction is for use when conduct occurred on or after July 1, 2009. This subsection does not include the crime of possession. Between July 1, 2009 and June 30, 2010, there was no enhanced penalty for violation within 1,000 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) (causing to be distributed) (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) (caused to be 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 was 18 or more years of age;

4. That the defendant did so in, on, or within 1,000 feet of school property; and]

[(3.) or (5.) 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 [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.]

["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 elements [3] and [4] should be included in the instruction if the substances involved were sold in, on or within 1,000 feet of any school property and the defendant is 18 or older. Between July 1, 2009 and June 30, 2010, the statute did not require that the defendant be 18 or older for an enhanced penalty.

The second bracketed element [3] or [5] 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.]

CHAPTER 70.00

TRAFFIC AND MISCELLANEOUS CRIMES

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

The defendant is charged with the crime of (operating) (attempting to operate) a vehicle (while under the influence of [alcohol] [drugs] [a combination of alcohol and drugs]) (while being a habitual user of any [narcotic] [hypnotic] [somnifacient] [stimulating] drug). The defendant pleads not guilty.

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

1. **That the defendant (drove) (attempted to drive) a vehicle;**
2. **That the defendant, while (driving) (attempting to drive), was under the influence of (alcohol) (a drug) (a combination of drugs) (a combination of alcohol and any drug[s]) to a degree that rendered (him) (her) incapable of safely driving a vehicle; and**

   or

2. **The defendant, while (driving) (attempting to drive), was a habitual user of a (narcotic) (hypnotic) (somnifacient) (stimulating) drug; and**
3. **That this act occurred on or about the _____ day of _____, _____, in _____ County, Kansas.**

Notes on Use

For authority, see K.S.A. 8-1567(a)(3), (4), and (5), K.S.A. 8-1567(b), and K.S.A. 8-1005.

K.S.A. 8-1567(h) provides that a person's punishment will be enhanced by one month of imprisonment when the person has one or more children under the age of 14 years in the vehicle at the time of the offense. In such a case the court should ask the jury to answer the following special question:

> Do you unanimously find beyond a reasonable doubt that the defendant had one or more children under the age of 14 years in the vehicle at the time of the offense?
>
> Yes ____ No ____

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

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

Comment

K.S.A. 8-126 defines "vehicle" generally, as well as a number of types of vehicles specifically.

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

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

A defendant must drive a vehicle in order to be convicted of operating a vehicle while under the influence [K.S.A. 8-1567(a)]; that is, there must be movement of the vehicle and direct or circumstantial evidence that the defendant drove the vehicle while intoxicated. *State v. Fish*, 228 Kan. 204, 210, 612 P.2d 180 (1980); *State v. Kendall*, 274 Kan. 1003, 58 P.3d 660 (2002). When charged with an *attempted* violation of the same statute, no movement of the vehicle is required. *State v. Kendall*, 274 Kan. 1003, 58 P.3d 660 (2002).

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

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

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

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

A refusal to submit to a breath test is not protected by the Fifth Amendment. *State v. Leroy*, 15 Kan. App. 2d 68, 803 P.2d 577 (1990); *State v. Wahweotten*, 36 Kan. App. 2d 568, 143 P.3d 58 (2006).

Intent is not an element of the crime of driving while under the influence of alcohol or drugs as the legislature intended that the commission of the prohibited act constitutes the crime regardless of intent, knowledge, or ignorance. *State v. Martinez*, 268 Kan. 21, 988 P.2d 735 (1999); *State v. Creamer*, 26 Kan. App. 2d 914, 996 P.2d 339 (2000).

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

When a defendant is tried for both refusing to submit to a preliminary breath test under K.S.A. 8-1012 and driving under the influence of alcohol under K.S.A. 8-1567, the jury should be instructed that evidence of the defendant's preliminary breath test refusal is to be considered only for the charge of refusing to submit to a preliminary breath test. *State v. Wahweotten*, 36 Kan. App. 2d 568, 143 P.3d 58 (2006).

Other than a preliminary breath test, a refusal to submit to testing may be used at any trial on a charge arising out of the operation or attempted operation of a vehicle while under the influence of alcohol or drugs, or both. See K.S.A. 8-1001(k)(8) and *State v. Armstrong*, 236 Kan. 290, 689 P.2d 987 (1984).

The Court of Appeals in *State v. Baatrup*, 40 Kan. App. 2d 467, 193 P.3d 472 (2008), made it clear that when a defendant is charged with both B.A.T. .08 or more and DUI it is a multiple acts situation and jury unanimity can only be assured by giving separate instructions (both PIK 3d 70.01 and 70.01-A) and having separate verdict forms for each charge.

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

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

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

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

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

Notes on Use

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

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

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

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

K.S.A. 8-1567(h) provides that a person's punishment will be enhanced by one month of imprisonment when the person has one or more children under the age of 14 years in the vehicle at the time of the offense. In such a case the court should ask the jury to answer the following special question:

Do you unanimously find beyond a reasonable doubt that the defendant had one or more children under the age of 14 years in the vehicle at the time of the offense?

Yes ____ No ____

Comment

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

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

A defendant must drive a vehicle in order to be convicted of operating a vehicle while under the influence [K.S.A. 8-1567(a)]; that is, there must be movement of the vehicle and direct or circumstantial evidence that the defendant drove the vehicle while intoxicated. *State v. Fish*, 228 Kan. 204, 210, 612 P.2d 180 (1980); *State v. Kendall*, 274 Kan. 1003, 58 P.3d 660 (2002). When charged with an *attempted* violation of the same statute, no movement of the vehicle is required. *State v. Kendall*, 274 Kan. 1003, 58 P.3d 660 (2002).

To obtain a conviction for a per se violation under K.S.A. 8-1567(a)(2), the State must show the alcohol concentration was tested *within* two hours of the last time a defendant operated or attempted to operate a motor vehicle. *State v. Pendleton*, 18 Kan. App. 2d 179, 849 P.2d 143 (1993). However, the result of any alcohol concentration test performed more than two hours after the defendant last operated or attempted to operate a motor vehicle is admissible as "other competent evidence" if the prosecution is pursuant to K.S.A. 8-1567(a)(1). *State v. Silva*, 25 Kan. App. 2d 437, 962 P.2d 1146 (1998).

Intent is not an element of the crime of driving while under the influence of alcohol or drugs as the legislature intended that the commission of the prohibited act constitutes the crime regardless of intent, knowledge, or ignorance. *State v. Martinez*, 268 Kan. 21, 988 P.2d 735 (1999); *State v. Creamer*, 26 Kan. App. 2d 914, 996 P.2d 339 (2000).

When a defendant is tried for both refusing to submit to a preliminary breath test under K.S.A. 8-1012 and driving under the influence of alcohol under K.S.A. 8-1567, the jury should be instructed that evidence of the defendant's preliminary breath test refusal is to be considered only for the charge of refusing to submit to a preliminary breath test. *State v. Wahweotten*, 36 Kan. App. 2d 568, 143 P.3d 58 (2006).

The Court of Appeals in *State v. Baatrup*, 40 Kan. App. 2d 467, 193 P.3d 472 (2008), made it clear that when a defendant is charged with both B.A.T. .08 or more and DUI it is a multiple acts situation and jury unanimity can only be assured by giving separate instructions (both PIK 3d 70.01 and 70.01-A) and having separate verdict forms for each charge.

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

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

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

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

Notes on Use

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

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

The Court of Appeals in *State v. Baatrup*, 40 Kan. App. 2d 467, 193 P.3d 472 (2008), made it clear that when a defendant is charged with both B.A.T. .08 or more and DUI it is a multiple acts situation and jury unanimity can only be assured by giving separate instructions (both PIK 3d 70.01 and 70.01-A) and having separate verdict forms for each charge.

K.S.A. 8-1567(h) provides that a person's punishment will be enhanced by one month of imprisonment when the person has one or more children under the age of 14 years in the vehicle at the time of the offense. In such a case the court should ask the jury to answer the following special question:

> Do you unanimously find beyond a reasonable doubt that the defendant had one or more children under the age of 14 years in the vehicle at the time of the offense?
> Yes ____ No ____

PIK CRIMINAL INDEX

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