

this section shall be guilty of a class A misdemeanor.

History: L. 1971, ch. 308, § 1; July 1.

Cross References to Related Sections:

Upon filing, returns declared confidential, see 79-3234.

Law Review and Bar Journal References:

Protection of taxpayers' right of privacy in "1971 Legislative Synopsis," Robert F. Bennett, 40 J.B.A.K. 307, 353 (1971).

21-3431.

History: L. 1972, ch. 114, § 1; L. 1975, ch. 196, § 2; Repealed, L. 1978, ch. 119, § 1; July 1.

CASE ANNOTATIONS

1. No error in failure to include instruction hereunder in prosecution under 21-2437; lack of evidence. *State v. Gander*, 220 K. 88, 89, 551 P.2d 797.

2. Court did not err in refusing to instruct hereunder as lesser included offenses of aggravated battery. *State v. Wright*, 221 K. 132, 136, 137, 141, 557 P.2d 1267.

3. First degree murder prosecution; not error to instruct hereunder under facts. *State v. Franklin*, 221 K. 739, 744, 561 P.2d 860.

4. Conviction hereunder reversed; statute declared unconstitutional and void as being impermissibly vague. *State v. Kirby*, 222 K. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 563 P.2d 408.

5. Conviction based on a jury instruction as to a crime held to be unconstitutionally vague cannot stand. *State v. Woods*, 222 K. 179, 186, 563 P.2d 1061.

6. Defendant's conviction hereunder reversed; section unconstitutional. *State v. Wilson*, 223 K. 563, 565, 575 P.2d 32.

7. Provisions vague; constitutional due process not met; conviction hereunder reversed. *State v. Sullivan*, 224 K. 110, 578 P.2d 1108.

8. Convictions hereunder reversed; statute held unconstitutionally vague. *State v. McQueen & Hardyway*, 224 K. 420, 422, 582 P.2d 251.

9. Conviction hereunder void; reversed. *State v. Sanders*, 225 K. 156, 159, 587 P.2d 906.

10. Not reversible error to instruct hereunder even though section unconstitutional because defendant not found guilty hereunder. *State v. Trujillo*, 225 K. 320, 324, 590 P.2d 1027.

11. Mentioned in holding 21-3608 unconstitutionally vague and indefinite for failure to establish reasonably definite standards of guilt required by due process of law. *State v. Meinert*, 225 K. 816, 819, 594 P.2d 232.

12. Writ of habeas corpus granted; conviction hereunder, as lesser included offense, implied acquittal of aggravated battery charge; abuse of child prosecution based on acts proved in former prosecution barred by 21-3108(2)(a). *In re Berkowitz*, 3 K.A.2d 726, 728, 602 P.2d 99.

13. Cited in finding portion of 8-1701 unconstitutionally vague. *State v. Carpenter*, 231 K. 235, 238, 642 P.2d 998 (1982).

21-3432.

History: L. 1972, ch. 114, § 2; Repealed, L. 1975, ch. 196, § 3; July 1.

21-3433. Aircraft piracy. Aircraft piracy is the willful or unauthorized seizure in this state of any aircraft containing a pilot and one or more persons by the use of force or any other means with the intent to exercise control over the aircraft.

Aircraft piracy is a class A felony.

History: L. 1973, ch. 138, § 1; July 1.

21-3434. Hazing. (a) No person shall recklessly participate in the hazing of another.

(b) As used in this section, "hazing" means willfully and wantonly coercing, demanding or encouraging another person to perform as a condition of membership in a social or fraternal organization, any act which could reasonably be expected to result in great bodily harm, disfigurement or death or which is done in a manner whereby great bodily harm, disfigurement or death could be inflicted.

(c) Violation of this section is a class B misdemeanor.

(d) This section shall be part of and supplemental to the Kansas criminal code.

History: L. 1986, ch. 117, § 1; July 1.

Attorney General's Opinions:

Hazing is prohibited in the Shrine and Elks lodges. 86-106.

Article 35.—SEX OFFENSES

Law Review and Bar Journal References:

"Survey of Kansas Law: Criminal Law," Robert A. Watson, 32 K.L.R. 395 (1984).

21-3501. Definitions. The following definitions apply in this article unless a different meaning is plainly required:

(1) "Sexual intercourse" means any penetration of the female sex organ by a finger, the male sex organ or any object. Any penetration, however slight, is sufficient to constitute sexual intercourse. "Sexual intercourse" does not include penetration of the female sex organ by a finger or object in the course of the performance of:

(a) Generally recognized health care practices; or

(b) a body cavity search conducted in accordance with K.S.A. 22-2520 through 22-2524, and amendments thereto.

(2) "Sodomy" means oral or anal copulation; oral or anal copulation or sexual intercourse between a person and an animal; or any penetration of the anal opening by any body part or object. Any penetration, however slight, is sufficient to constitute sodomy. "Sodomy" does not include penetration of the anal

opening by a finger or object in the course of the performance of:

(a) Generally recognized health care practices; or

(b) a body cavity search conducted in accordance with K.S.A. 22-2520 through 22-2524, and amendments thereto.

(3) "Spouse" means a lawful husband or wife, unless the couple is living apart in separate residences or either spouse has filed an action for annulment, separate maintenance or divorce or for relief under the protection from abuse act.

(4) "Unlawful sexual act" means any rape, indecent liberties with a child, aggravated indecent liberties with a child, criminal sodomy, aggravated criminal sodomy, lewd and lascivious behavior, sexual battery or aggravated sexual battery, as defined in this code.

History: L. 1969, ch. 180, § 21-3501; L. 1983, ch. 109, § 1; July 1.

Revisor's Note:

For Judicial Council comment, see 21-3502.

Law Review and Bar Journal References:

"Reform in Kansas Domestic Violence Legislation," David J. Gottlieb and L. Eric Johnson, 31 K.L.R. 527, 554 (1983).

Attorney General's Opinions:

Code for care of children; definition of sexual abuse and exploitation in code; conformity with federal regulations. 83-186.

CASE ANNOTATIONS

1. Failure to instruct on definition herein not clearly erroneous; conviction hereunder and of other crimes upheld. *State v. James*, 217 K. 96, 100, 535 P.2d 991.

2. Applied; conviction under 21-3503 (1) (a) upheld. *State v. Sisson*, 217 K. 475, 476, 536 P.2d 1369.

3. Cited in holding that second prosecution under 21-3511 did not constitute double jeopardy under the provisions of 21-3108. *Williams v. Darr*, 4 K.A.2d 178, 603 P.2d 1021.

4. Cited; effect of changes in statutes involving indecent liberties with child discussed. *State v. Armstrong*, 238 K. 559, 564, 712 P.2d 1258 (1986).

5. It is clear from reading 21-3506 and 21-3401 that all elements of aggravated criminal sodomy not present in homicide. *State v. Strauch*, 239 K. 203, 217, 718 P.2d 613 (1986).

21-3502. Rape. (1) Rape is sexual intercourse with a person who does not consent to the sexual intercourse, under any of the following circumstances:

(a) When the victim is overcome by force or fear;

(b) when the victim is unconscious or physically powerless;

(c) when the victim is incapable of giving

consent because of mental deficiency or disease, which condition was known by the offender or was reasonably apparent to the offender; or

(d) when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance, administered to the victim by the offender, or by another person with the offender's knowledge, unless the victim voluntarily consumes or allows the administration of the substance with knowledge of its nature.

(2) Rape is a class B felony.

History: L. 1969, ch. 180, § 21-3502; L. 1978, ch. 120, § 1; L. 1983, ch. 109, § 2; July 1.

Source or prior law:

21-424, 21-425.

Judicial Council, 1968: Rape was not defined in the former statutes of Kansas. The crime was described as "carnally and unlawfully knowing" and as "forcibly ravishing" any female. While these terms have accepted common law meanings; it seems desirable that the crime should be more specifically defined. Also, the term "sexual intercourse" is specifically defined for the sake of clarity. The section does not change the former law relating to forcible rape. It simply seeks to clarify.

The section contains elements of New Mexico Criminal Code, 9-1 and 9-2.

Law Review and Bar Journal References:

"Reform in Kansas Domestic Violence Legislation," David J. Gottlieb and L. Eric Johnson, 31 K.L.R. 527, 529 (1983).

"Survey of Kansas Law: Criminal Law," Robert A. Watson, 32 K.L.R. 395, 396 (1984).

"The Battered Woman's Syndrome Defense," Colleen Cacy, 34 K.L.R. 337, 364 (1985).

"Kansas Recognizes Rape Trauma Syndrome," Charles H. Herd, 24 W.L.J. 653, 661 (1985).

CASE ANNOTATIONS

1. Conviction upheld; due process not violated by lineup procedure; counsel present during viewing. *State v. Kelly*, 210 K. 192, 499 P.2d 1040.

2. Conviction hereunder affirmed; search not objectionable; prior rapes admissible; lesser included crimes instruction not required. *State v. Masqua*, 210 K. 419, 502 P.2d 728.

3. Cited; conviction under prior statute set aside as being duplicative. *Jarrell v. State*, 212 K. 171, 510 P.2d 127.

4. Conviction hereunder upheld; statement of accused not inadmissible solely because counsel not present. *State v. Nichols*, 212 K. 814, 512 P.2d 329.

5. Conviction hereunder not error in failure to instruct on adultery; separate crimes; record reviewed; conviction upheld. *State v. Platz*, 214 K. 74, 77, 519 P.2d 1097.

6. Conviction hereunder; record examined; conviction upheld. *State v. Winston*, 214 K. 525, 520 P.2d 1204.

7. Section is not unconstitutional classification discrim-

inating against sex. *State v. Price*, 215 K. 718, 723, 529 P.2d 85.

8. No abuse of discretion in admission of evidence of similar offenses; instructions proper; conviction upheld. *State v. Hampton*, 215 K. 907, 909, 529 P.2d 127.

9. Conviction of assault and battery and rape; alleged trial errors reviewed and conviction upheld. *State v. James*, 216 K. 235, 531 P.2d 70.

10. Rape is not a lesser included offense of aggravated kidnapping. *Wisner v. State*, 216 K. 523, 532 P.2d 1051.

11. Defendant charged hereunder cannot claim former jeopardy as to a crime convicted of, where conviction reversed and case dismissed; rights not denied. *State v. Dolack*, 216 K. 622, 623, 533 P.2d 1282.

12. Conviction hereunder and of other crimes reviewed; evidence of similar offenses; instructions; no reversible error. *State v. James*, 217 K. 96, 100, 535 P.2d 991.

13. Conviction hereunder; no abuse of discretion in admission of evidence of similar offenses or instructions. *State v. Gonzales*, 217 K. 159, 535 P.2d 988.

14. Use of word "rape" during prosecution under 21-3503 not prejudicial. *State v. Wonsler*, 217 K. 406, 409, 537 P.2d 197.

15. Conviction hereunder and of other crimes affirmed; evidence admissible. *State v. Donahue*, 218 K. 351, 543 P.2d 962.

16. Alleged trial errors examined on appeal from conviction hereunder; no error. *State v. Emery*, 218 K. 423, 543 P.2d 897.

17. Alleged errors reviewed and conviction hereunder upheld. *State v. Adams*, 218 K. 495, 499, 545 P.2d 1134.

18. Conviction hereunder; certain statements made by victim held not to imply consent. *State v. Clark*, 218 K. 726, 728, 544 P.2d 1372.

19. Conviction hereunder upheld; aggravated assault charge duplicitous and conviction reversed. *State v. Lasley*, 218 K. 758, 761, 762, 545 P.2d 383.

20. Conviction hereunder upheld; evidence sufficient to sustain verdict. *State v. Robinson*, 219 K. 218, 547 P.2d 335.

21. Conviction hereunder upheld; testimony and physical evidence properly allowed. *State v. Steward*, 219 K. 256, 257, 547 P.2d 773.

22. Record reviewed from convictions of murder, aggravated battery and rape; no error found. *State v. King*, 219 K. 508, 548 P.2d 803.

23. Erroneous admission of prior conviction constituted prejudice; conviction hereunder reversed. *State v. Donnelson*, 219 K. 772, 773, 549 P.2d 964.

24. Conviction hereunder reviewed; no reversible error. *State v. Johnson*, 219 K. 847, 848, 549 P.2d 1370.

25. Conviction hereunder and of other crimes; record examined; no reversible error. *State v. Lewis*, 220 K. 791, 556 P.2d 888.

26. Convictions hereunder and of other crimes affirmed on review. *State v. Lee*, 221 K. 109, 110, 558 P.2d 1096.

27. Conviction hereunder and of other offenses; no error in refusing new trial or in refusing proposed instruction. *State v. Robertson*, 221 K. 409, 559 P.2d 810.

28. Conviction of attempted rape reversed; failure to instruct on lesser offense of battery. *State v. Arnold*, 1 K.A.2d 642, 645, 573 P.2d 1087. Reversed: 223 K. 715, 716, 717, 576 P.2d 651.

29. Alleged trial errors reviewed in affirming conviction hereunder. *State v. Gilder*, 223 K. 220, 221, 574 P.2d 196.

30. No abuse of discretion in refusing to grant separate trials nor in refusal to sever counts; conviction affirmed. *State v. Howell*, 223 K. 282, 573 P.2d 1003.

31. Bill of particulars in prosecution hereunder alleged force only; evidence of force and fear properly admitted; conviction affirmed. *State v. Corn*, 223 K. 583, 589, 575 P.2d 1308.

32. Prejudicial error in prosecution hereunder; case remanded for new trial. *State v. Nixon*, 223 K. 788, 789, 576 P.2d 691.

33. Alleged errors in conviction hereunder reviewed; conviction affirmed. *State v. Cook*, 224 K. 132, 578 P.2d 257.

34. Conviction hereunder affirmed; limitations on evidence of previous sexual conduct constitutional; statutory definition of sodomy construed. *State v. Williams*, 224 K. 468, 471, 580 P.2d 1341.

35. Alleged errors reviewed on appeal from conviction hereunder; judgment affirmed. *State v. Higdon*, 224 K. 720, 585 P.2d 1048.

36. Conviction under section affirmed and sentence approved. *State v. Pencek*, 224 K. 725, 585 P.2d 1052.

37. Conviction hereunder upheld; alleged errors reviewed. *State v. Stewart*, 225 K. 410, 591 P.2d 166.

38. No error in failure to instruct jury on sodomy or patronizing a prostitute; conviction affirmed. *State v. Blue*, 225 K. 576, 580, 592 P.2d 897.

39. Conviction affirmed; 60-447a construed and applied. *In re Nichols*, 2 K.A.2d 431, 436, 580 P.2d 1370.

40. Minor convicted as adult hereunder; failure to receive fair treatment and fair trial; conviction reversed. *State v. Gammill*, 2 K.A.2d 627, 628, 585 P.2d 1074.

41. Admissibility of testimony of expert witness is subject to the trial court's discretion; convictions of rape and aggravated kidnapping affirmed. *State v. Reed*, 226 K. 519, 601 P.2d 1125.

42. Appeal from conviction hereunder. *State v. Washington*, 226 K. 768, 602 P.2d 1377.

43. Conviction hereunder upheld; no error in admission into evidence of expert testimony on bite-mark identification. *State v. Peoples*, 227 K. 127, 605 P.2d 135.

44. Conviction affirmed; defendant received effective assistance of counsel; sentencing of defendant proper. *State v. Rice*, 227 K. 416, 417, 607 P.2d 489.

45. Conviction upheld; trial court did not abuse discretion by failing to find jury deadlocked. *State v. Sanders*, 227 K. 892, 610 P.2d 633.

46. Fact that accused previously retained counsel does not make inadmissible voluntary statement made by defendant in counsel's absence. *State v. Costa*, 228 K. 308, 309, 613 P.2d 1359.

47. Confinement in automobile was merely incidental to the commission of the rape; conviction of aggravated kidnapping reversed. *State v. Cabral*, 228 K. 741, 745, 619 P.2d 1160.

48. Expert scientific opinion must be generally accepted as reliable before received in evidence; court did not err in allowing assistant district attorney to testify. *State v. Washington*, 229 K. 47, 622 P.2d 986.

49. Duty to instruct on lesser included offenses arises

only when there is evidence under which defendant might reasonably have been convicted thereof. *State v. Everson*, 229 K. 540, 626 P.2d 1189.

50. Defense not surprised by appearance of state's missing witness; two days before trial witness available for interview. *State v. Jordan*, 229 K. 558, 559, 629 P.2d 1172 (1981).

51. Mistrial declared after 2* days of trial because of ineligible juror; double jeopardy did not attach. *State v. Folkerts*, 229 K. 608, 629 P.2d 173 (1981).

52. Conviction reversed; insufficient evidence of specific intent to commit rape. *State v. Carr*, 230 K. 322, 634 P.2d 1104 (1981).

53. No error in admitting evidence of flight, excluding evidence of victim's prior sexual activity or denying dismissal of action for violation of speedy trial statute. *State v. Anderson*, 230 K. 681, 682, 640 P.2d 1232 (1982).

54. Failure to object to bailiff not being sworn held waiver; trial court prohibited from ordering polygraph examination of victim. *State v. Dedman*, 230 K. 793, 640 P.2d 1266 (1982).

55. Psychiatrist's testimony that person suffers rape trauma syndrome held admissible. *State v. Marks*, 231 K. 645, 646, 647 P.2d 1292 (1982).

56. No instruction on attempted rape required where both defendant and victim testified as to penetration. *State v. Korbel*, 231 K. 657, 658, 659, 647 P.2d 1301 (1982).

57. No error in refusal to instruct on indecent liberties where rape victim's age prevented consent. *State v. Lilley*, 231 K. 694, 695, 696, 647 P.2d 1323 (1982).

58. Various alleged evidentiary and procedural errors considered. *State v. Thompson*, 232 K. 364, 654 P.2d 453 (1982).

59. No error in excluding prior sexual experience between defendant and victim; irrelevant to issue of consent because of remoteness. *State v. Stellwagen*, 232 K. 744, 659 P.2d 167 (1983).

60. Uncorroborated testimony of prosecutrix was so unbelievable it was not sufficient to sustain conviction. *State v. Matlock*, 233 K. 1, 660 P.2d 945 (1983).

61. Defendant found guilty of rape; conviction of lesser included offense of indecent liberties with child set aside. *State v. Coberly*, 233 K. 100, 106, 107, 661 P.2d 383 (1983).

62. Admission of evidence and jury instruction considered. *State v. Jones*, 233 K. 112, 660 P.2d 948 (1983).

63. Court properly combined post-arraignment time of first prosecution and post-arraignment time of second prosecution. *State v. Ransom*, 233 K. 185, 661 P.2d 392 (1983).

64. Threats made incidental to commission of rape will not support conviction for terroristic threats. *State v. Reeves*, 234 K. 250, 256, 671 P.2d 553 (1983).

65. Court may not issue ex parte order of resentencing; defendant must be present at time of sentencing. *State v. Coy*, 234 K. 414, 420, 672 P.2d 599 (1983).

66. Evidence sufficient to show victim's resistance overcome by both force and fear. *State v. Cantrell*, 234 K. 426, 429, 673 P.2d 1147 (1983).

67. Rights and responsibilities of prosecution and court regarding juveniles waiver hearings (38-636) and preliminary hearings (22-2902) outlined. *In re Davis*, 234 K. 766, 771, 674 P.2d 1045 (1984).

68. Identikit composite goes to weight and sufficiency; pretrial photographic lineup identification not impermissibly

suggestive; spouse's observation of keys not privileged. *State v. Galloway*, 235 K. 70, 680 P.2d 268 (1984).

69. Foundation for admission of tape recordings in most jurisdictions outlined and applied ("911" recording of crime in progress). *State v. Williams*, 235 K. 485, 486, 491, 681 P.2d 660 (1984).

70. Conviction hereunder; evidence admissible under 60-455 may be admissible to show commission of crime itself. *State v. Gray*, 235 K. 632, 634, 681 P.2d 669 (1984).

71. Statute not discriminatory against men. *State v. Wood*, 235 K. 915, 919, 686 P.2d 128 (1984).

72. Conviction hereunder; fingerprint identification and use of photographic evidence discussed at length. *State v. Murdock*, 236 K. 146, 689 P.2d 814 (1984).

73. Rape trauma syndrome testimony not violation of rape shield provisions; absence of syndrome inadmissible where consent is defense. *State v. McQuillen*, 236 K. 161, 172, 689 P.2d 822 (1984).

74. Sufficiency of evidence; medical expert not authorized to testify complainant was raped. *State v. Bressman*, 236 K. 296, 297, 304, 689 P.2d 901 (1984).

75. Sufficiency of evidence. *State v. Hanks*, 236 K. 524, 525, 536, 694 P.2d 407 (1985).

76. Behavior and comments of defendant during arrest admitted as part of res gestae. *State v. Davis*, 236 K. 538, 539, 694 P.2d 418 (1985).

77. Sufficiency of uncorroborated prosecutrix testimony evidence sustained; constitutional, ex post facto challenges reinvented meritless. *State v. Lile*, 237 K. 210, 211, 213, 699 P.2d 456 (1985).

78. Time limitations of appeal of conviction (22-3608); revocation of probation following imposition of sentence (21-4603). *State v. Tripp*, 237 K. 244, 699 P.2d 33 (1985).

79. Refusal to order psychiatric examination for, and use of videotaped deposition of, victim discussed. *State v. Woolridge*, 237 K. 737, 703 P.2d 1375 (1985).

80. Cited; right to counsel infringed where law partner represents another charged with same crime and conflict arises. *State v. Lemmons*, 238 K. 1, 2, 705 P.2d 552 (1985).

81. Effect of delays from interlocutory appeals (22-3603) on constitutional right to speedy trial discussed. *State v. Galloway*, 238 K. 100, 708 P.2d 508 (1985).

82. In-custody statement without counsel, witness comment on defendant's silence, impeachment of prosecution witnesses discussed. *State v. O'Neal*, 238 K. 183, 708 P.2d 206 (1985).

83. Attempted rape instruction, sexual battery (21-3517) and aggravated sexual battery (21-3518) as lesser offenses discussed. *State v. Galloway*, 238 K. 415, 710 P.2d 1320 (1985).

84. Evidence of prior crimes (60-455), sufficiency of complaint affidavit, photographic evidence, trial consolidation discussed. *State v. Breazeale*, 238 K. 714, 714 P.2d 1356 (1986).

85. Specific intent is not element of crime of rape. *Wiley v. Rayl*, 767 F.2d 679, 680 (1985).

86. Admission of state rebuttal testimony by former prosecuting attorney and rape counselor examined. *State v. Hayes*, 239 K. 443, 720 P.2d 1049 (1986).

87. Severity of sentence, in-court identifications, photographic evidence of lineup examined. *State v. Slansky*, 239 K. 450, 720 P.2d 1054 (1986).

88. Expert testimony on rape trauma syndrome relevant

and admissible where consent is defense. *State v. McQuillen*, 239 K. 590, 721 P.2d 740 (1986).

89. Speedy trial, justices qualified on rehearing, hearsay statements, incriminating statements, witness sequestration, new evidence examined. *State v. Ransom*, 239 K. 594, 722 P.2d 540 (1986).

90. Testimony on incarceration, rebuttal regarding sanity, venue change, hair samples and confession in evidence, jury instructions examined. *State v. Alexander*, 240 K. 273, 729 P.2d 1126 (1986).

91. Cited by concurring judge in majority holding that aggravated sexual battery (21-3518) not lesser included offense of indecent liberties (21-3503). *State v. Fulcher*, 12 K.A.2d 169, 173, 737 P.2d 61 (1987).

92. Aggravated incest (21-3603) not lesser included offense (21-3107); prior sexual relations, limiting instructions, prosecutorial remarks examined. *State v. Moore*, 242 K. 1, 7, 9, 748 P.2d 833 (1987).

93. Insanity defense (22-3219) as speedy trial delay (22-3402), diminished capacity instruction, ex parte order for psychiatric evaluation examined. *State v. Maas*, 242 K. 44, 744 P.2d 1222 (1987).

94. Non-identical offense to aggravated incest (21-3603), 60-460 hearing examined. *State v. Hutchcraft*, 242 K. 55, 744 P.2d 849 (1987).

95. Peremptory challenges of members of defendant's minority race or group examined. *State v. Hood*, 242 K. 115, 116, 744 P.2d 816 (1987).

96. Admission of expert testimony (60-456) by forensic examiner from KBI upheld. *State v. Stukey*, 242 K. 204, 747 P.2d 137 (1987).

97. Photo lineups, victim's eyewitness description, uncorroborated defense testimony, use of rape kit examined. *State v. Grubbs*, 242 K. 224, 747 P.2d 140 (1987).

98. Indecent liberties (21-3503) as not identical nor more specific crime, discharge of juror after empaneling examined. *State v. Helms*, 242 K. 511, 748 P.2d 425 (1988).

99. Prior crimes and rape instructions, jury requests for information, venue, victim's prior sexual conduct examined. *State v. Redford*, 242 K. 658, 659, 750 P.2d 1013 (1988).

100. Evidence available at trial of "newly discovered" evidence tending to impeach or discredit, materiality of evidence examined. *Baker v. State*, 243 K. 1, 3, 12, 755 P.2d 493 (1988).

21-3503. Indecent liberties with a child. (1) Indecent liberties with a child is engaging in any of the following acts with a child who is not married to the offender and who is under 16 years of age:

- (a) Sexual intercourse; or
- (b) any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender, or both; or
- (c) soliciting the child to engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another.

(2) Indecent liberties with a child is a class C felony.

History: L. 1969, ch. 180, § 21-3503; L. 1975, ch. 193, § 1; L. 1983, ch. 109, § 3; L. 1984, ch. 118, § 1; L. 1985, ch. 109, § 2; L. 1987, ch. 108, § 1; April 16.

Source or prior law:

21-424.

Judicial Council, 1968: This section is in lieu of the former provision relating to statutory rape. The name of the crime has been changed. The prohibited conduct includes not only sexual intercourse, but other indecent sexual conduct. Moreover, the section applies to the one who submits to as well as performs indecent acts with a child. Thus, the female participant in a sexual relationship with a child might be prosecuted under this section.

The section adopts part of the Illinois Criminal Code, 11-4.

Law Review and Bar Journal References:

"The New Kansas Law Regarding Admissibility of Child-Victim Hearsay Statements," G. Joseph Pierron, 52 J.K.B.A. 88, 94 (1983).

"The Admissibility of Child Victim Hearsay in Kansas: A Defense Perspective," Christopher B. McNeil, 23 W.L.J. 265, 268 (1984).

"Survey of Kansas Law: Criminal Law," Robert A. Wason, 32 K.L.R. 395, 398 (1984).

Attorney General's Opinions:

Code for care of children; definition of sexual abuse and exploitation in code; conformity with federal regulations. 83-186.

CASE ANNOTATIONS

1. Failure to give aiding and abetting instruction not error in prosecution hereunder. *State v. Ingram*, 211 K. 587, 506 P.2d 1148.

2. Cited in dismissal of state reserved question appeal arising from prosecution hereunder. *State v. Chittenden*, 212 K. 178, 510 P.2d 152.

3. Conviction hereunder upheld; statement of accused not inadmissible solely because counsel not present. *State v. Nichols*, 212 K. 814, 512 P.2d 329.

4. Conviction hereunder; motion to vacate sentence and conviction denied. *Underwood v. State*, 214 K. 633, 522 P.2d 457.

5. Subsection (1) (b) not sufficiently definite to satisfy constitutional requirements as to due process. *State v. Conley*, 216 K. 66, 67, 68, 69, 71, 531 P.2d 36.

6. Record examined from conviction hereunder; precise time of offense not stated in indictment; use of word "rape" not prejudicial; conviction upheld. *State v. Wonsler*, 217 K. 406, 408, 537 P.2d 197.

7. Conviction under (1) (a) upheld; instructions and admission of evidence proper. *State v. Sisson*, 217 K. 475, 476, 536 P.2d 1369.

8. Conviction under subsection (1) (b) vacated provisions unconstitutionally vague. *State v. Sisson*, 217 K. 475, 476, 536 P.2d 1369.

9. Record examined in appeal from conviction hereunder; no reversible error. *State v. Morton*, 217 K. 642, 538 P.2d 675.

10. Conviction hereunder reversed; defendant's sixth amendment right to effective cross-examination denied by admission of out of court statement. *State v. Fisher*, 222 K. 76, 563 P.2d 1012.

11. Findings on admissibility of voluntary extrajudicial statement supported by substantial competent evidence; conviction affirmed. *State v. Holt*, 2 K.A.2d 1, 574 P.2d 152.

12. Alleged errors in conviction hereunder reviewed; conviction affirmed. *State v. Cook*, 224 K. 132, 578 P.2d 257.

13. Mentioned in holding 21-3608 unconstitutionally vague and indefinite for failure to establish reasonably definite standards of guilt required by due process of law. *State v. Meinert*, 225 K. 816, 819, 594 P.2d 232.

14. Conviction hereunder reversed; reference to polygraph tests constituted prejudicial misconduct; new trial ordered. *State v. Kilpatrick*, 2 K.A.2d 349, 352, 578 P.2d 1147.

15. No merit in contention that this section violates due process. *State v. Kilpatrick*, 2 K.A.2d 349, 352, 578 P.2d 1147.

16. Conviction of taking indecent liberties with a child upheld; statute not unconstitutionally vague or indefinite. *State v. Voiles*, 226 K. 469, 470, 472, 601 P.2d 1121.

17. No error in failure to instruct jury on lewd and lascivious behavior or indecent solicitation of a child; conviction affirmed. *State v. Gregg*, 226 K. 481, 483, 602 P.2d 85.

18. Conviction upheld; evidence sufficient to support uncorroborated extrajudicial confession. *State v. Tillery*, 227 K. 342, 607 P.2d 1031.

19. Conviction hereunder upheld; crime committed in transit; venue allegation and instruction proper. *State v. Lovelace*, 227 K. 348, 349, 607 P.2d 49.

20. Cited in holding that second prosecution under 21-3511 did not constitute double jeopardy under the provisions of 21-3108. *Williams v. Darr*, 4 K.A.2d 178, 179, 180, 181, 603 P.2d 1021.

21. Where defendant testified to his presence at both alleged incidents of indecent liberties, such testimony negates contention of prejudicial deprivation of alibi defense. *State v. Gilley*, 5 K.A.2d 321, 322, 323, 615 P.2d 827.

22. Trial court order excluding "other crimes" evidence not an order suppressing evidence; appellate court has no jurisdiction to hear appeal by state. *State v. Boling*, 5 K.A.2d 371, 372, 617 P.2d 102.

23. In cases involving illicit sexual relations between adult and child, evidence of prior acts of similar nature between same parties is admissible. *State v. Crossman*, 229 K. 384, 624 P.2d 461.

24. Arrest of judgment and dismissal is not an acquittal; second trial on same charge not double jeopardy. *State v. Love*, 5 K.A.2d 768, 769, 625 P.2d 7.

25. No error in refusal to instruct on indecent liberties where rape victim's age prevented consent. *State v. Lilley*, 231 K. 694, 696, 647 P.2d 1323 (1982).

26. Hearsay testimony of mother of four-year-old victim admissible under contemporaneous statements exception. *State v. Rodriguez*, 8 K.A.2d 353, 354, 357, 657 P.2d 79 (1983).

27. Crime of indecent liberties with a child was a

lesser included offense of rape; conviction of rape bars conviction of lesser offense. *State v. Coberly*, 233 K. 100, 106, 107, 661 P.2d 383 (1983).

28. Time of offense not essential element of indecent liberties with child; admission of extrajudicial statements of child as exception to hearsay rules. *State v. Myatt*, 237 K. 17, 28, 697 P.2d 836 (1985).

29. Dismissal following preliminary hearing; failure of court to conduct hearing pursuant to 60-460(dd) on child's testimony. *State v. Lanter*, 237 K. 309, 699 P.2d 503 (1985).

30. Written instructions only at close of argument, prejudicial effect of failing to deliver orally. *State v. Norris*, 10 K.A.2d 397, 699 P.2d 585 (1985).

31. Cited; provisions of 60-460(dd) (statements by children) inapplicable to proceedings under juvenile offenders code (38-1601 et seq). *In re Mary P.*, 237 K. 456, 701 P.2d 681 (1985).

32. Acceptance and validity of guilty plea (22-3210) discussed; grounds to set aside reviewed and applied. *State v. Snyder*, 10 K.A.2d 450, 451, 701 P.2d 969 (1985).

33. Cited; right to counsel infringed where law partner represents another charged with same crime and conflict arises. *State v. Lemmons*, 238 K. 1, 2, 705 P.2d 552 (1985).

34. What actions necessary to toll statute of limitations (21-3106) discussed. *State v. Mills*, 238 K. 189, 708 P.2d 1079 (1985).

35. Cited; effect of changes in statutes involving indecent liberties with child discussed. *State v. Armstrong*, 238 K. 559, 564, 712 P.2d 1258 (1986).

36. Hearsay statements of children; proper instructions on statements (60-460(dd)) examined. *State v. Clark*, 11 K.A.2d 586, 730 P.2d 1104 (1986).

37. Threat to child not to talk does not constitute concealment (21-3106 (3)(c)) to toll statute of limitations. *State v. Bentley*, 239 K. 334, 339, 721 P.2d 227 (1986).

38. Failure of information to allege essential elements of crime examined. *State v. Jackson*, 239 K. 463, 464, 721 P.2d 232 (1986).

39. Statutory guidelines for acceptance of guilty plea (22-3210) examined in 60-1507 proceeding. *Noble v. State*, 240 K. 162, 727 P.2d 473 (1986).

40. Cited; prior law under 21-3504 and related statutes examined. *State v. Ramos*, 240 K. 485, 488, 731 P.2d 837 (1987).

41. Technical irregularities in execution of search warrant, voluntariness of confession examined. *State v. Holoman*, 240 K. 589, 731 P.2d 294 (1987).

42. Admission of suppression hearing transcript harmless error and late endorsement of witnesses not abuse of discretion. *State v. Phifer*, 241 K. 233, 737 P.2d 1 (1987).

43. Aggravated sexual battery (21-3518) not lesser included offense, no instruction thereon necessary. *State v. Fulcher*, 12 K.A.2d 169, 170, 737 P.2d 61 (1987).

44. Noted as lesser included offense (21-3107) of rape (21-3502); other lesser included offenses noted. *State v. Moore*, 242 K. 1, 3, 748 P.2d 833 (1987).

45. Non-identical offense to aggravated incest (21-3603), instruction on aggravated sexual battery (21-3518), 60-460 hearing examined. *State v. Hutchcraft*, 242 K. 55, 744 P.2d 849 (1987).

46. Indecent liberties neither identical to nor more specific than rape (21-3502). *State v. Helms*, 242 K. 511, 513, 748 P.2d 425 (1988).

21-3504. Aggravated indecent liberties with a child. (1) Aggravated indecent liberties with a child is the commission of indecent liberties with a child, as defined in K.S.A. 21-3503 and amendments thereto, by any guardian, proprietor or employee of any foster home, orphanage or other public or private institution for the care and custody of minor children, to whose charge the child has been committed or entrusted by any court, court services officer, department of social and rehabilitation services or other agency acting under color of law.

(2) Aggravated indecent liberties with a child is a class B felony.

History: L. 1969, ch. 180, § 21-3504; L. 1975, ch. 193, § 2; L. 1983, ch. 109, § 4; L. 1984, ch. 112, § 3; L. 1984, ch. 118, §2; July 1.

Source or prior law:

21-909.

Judicial Council, 1968: The advisory committee was of the view that the crime of indecent liberties with a child is more reprehensible when committed by a person in whose charge the child has been placed by a court or other agency acting pursuant to law. Hence, the crime of indecent liberties with a ward is defined and a more severe penalty is provided.

Attorney General's Opinions:

Code for care of children; definition of sexual abuse and exploitation in code; conformity with federal regulations. 83-186.

CASE ANNOTATIONS

1. Conviction hereunder upheld; victim was defendant's ward although not placed in his custody by department of social welfare. *State v. Dunham*, 213 K. 469, 470, 472, 475, 476, 517 P.2d 150.

2. Expert witness (60-456); may not testify as to whether defendant molested alleged victim. *State v. Lash*, 237 K. 384, 699 P.2d 49 (1985).

3. Amendment of information, denial of bill of particulars, jury instructions, changes in statutes discussed. *State v. Armstrong*, 238 K. 559, 712 P.2d 1258 (1986).

4. Ineffective assistance of counsel-remand procedure amended complaint, reclassification of crime, sentencing discussed. *State v. Van Cleave*, 239 K. 117, 118, 716 P.2d 580 (1986).

5. Preexisting psychologist-client privilege in 38-1514(c)(2), question of new trial based on newly discovered evidence examined. *State v. Munyon*, 240 K. 53, 726 P.2d 1333 (1986).

6. Prior law and related statutes examined. *State v. Ramos*, 240 K. 485, 731 P.2d 837 (1987).

7. Cited; aggravated sexual battery (21-3518) as lesser included offense of indecent liberties with child (21-

3503) examined. *State v. Hutchcraft*, 242 K. 55, 59, 744 P.2d 849 (1987).

21-3505. Criminal sodomy. (1) Criminal sodomy is sodomy between persons who are members of the same sex or between a person and an animal.

(2) Criminal sodomy is a class B misdemeanor.

History: L. 1969, ch. 180, § 21-3505; L. 1983, ch. 109, § 5; July 1.

Revisor's Note:

For Source or Prior Law and Judicial Council comment, see 21-3506.

Law Review and Bar Journal References:

"Reform in Kansas Domestic Violence Legislation," David J. Gottlieb and L. Eric Johnson, 31 K.L.R. 527, 554 (1983).

"Survey of Kansas Law: Criminal Law," Robert A. Wason, 32 K.L.R. 395, 400, 401 (1984).

"Recent Developments: Public Health and Employment Issues Generated by the AIDS Crisis," Mark J. Lazzo and Christopher A. McElgunn, 25 W.L.J. 505, 516 (1986).

CASE ANNOTATIONS

1. Sufficient evidence of penetration for reasonable inference that defendant committed aggravated sodomy. *State v. Kelly*, 210 K. 192, 499 P.2d 1040.

2. Evidence supported conviction hereunder. *State v. Rhone*, 219 K. 542, 546, 548 P.2d 752.

3. Statute is not unconstitutional on grounds raised. *State v. Thompson*, 221 K. 165, 171, 172, 558 P.2d 93.

4. Defendant's rights not prejudiced by one day continuance during trial proceedings; conviction affirmed. *State v. Nelson*, 223 K. 251, 573 P.2d 602.

5. Cited; conviction of aggravated sodomy affirmed; statutory definition of sodomy construed. *State v. Williams*, 224 K. 468, 471, 580 P.2d 1341.

6. Aggravated sodomy and rape prosecution; no error in failure to instruct jury on sodomy. *State v. Blue*, 225 K. 576, 580, 592 P.2d 897.

7. Cited; evidence sufficient to establish sufficient penetration for oral copulation; conviction affirmed. *State v. Lovelace*, 227 K. 348, 351, 607 P.2d 49.

8. Duty to instruct on lesser included offenses arises only when there is evidence under which defendant might reasonably have been convicted thereof. *State v. Everson*, 229 K. 542, 626 P.2d 1189.

9. Prior to amendment of act (July 1, 1983); husband not guilty of aggravated sodomy with wife. *State v. Dubish*, 234 K. 708, 712, 675 P.2d 877 (1984).

10. Cited; evidence of previous sexual relationship at aggravated incest (21-3603) trial discussed. *State v. Perigo*, 10 K.A.2d 651, 652, 708 P.2d 987 (1985).

21-3506. Aggravated criminal sodomy. Aggravated criminal sodomy is:

(a) Sodomy with a child who is not married to the offender and who is under 16 years of age;

(b) causing a child under 16 years of age,

to engage in sodomy with any person or an animal; or

(c) sodomy with a person who does not consent to the sodomy or causing a person, without the person's consent, to engage in sodomy with any person or an animal, under any of the following circumstances:

(i) When the victim is overcome by force or fear;

(ii) when the victim is unconscious or physically powerless;

(iii) when the victim is incapable of giving consent because of mental deficiency or disease, which condition was known by the offender or was reasonably apparent to the offender; or

(iv) when the victim is incapable of giving consent because of the effect of any alcoholic liquor, narcotic, drug or other substance administered to the victim by the offender, or by another person with the offender's knowledge, unless the victim voluntarily consumes or allows the administration of the substance with knowledge of its nature.

(2) Aggravated criminal sodomy is a class B felony.

History: L. 1969, ch. 180, § 21-3506; L. 1983, ch. 109, § 6; July 1.

Source or prior law:

21-907.

Judicial Council, 1968: Former K.S.A. 21-907 prohibited the "detestable and abominable crime against nature, committed with mankind and with beast." The elements of the crime were not specified. Section 21-3506 identifies the conduct ordinarily included in the crime of sodomy or crime against nature. It probably does not materially change the former law. It only seeks to clarify. Some of the new codes have abandoned the term "sodomy" and instead employ the terms "deviate sexual conduct" or "sexual perversion." See Illinois Criminal Code, 11-2 and Wisconsin Criminal Code, 944.17.

Sexual crimes involving violence and those against children are usually regarded as more serious. Hence, section 21-3506 defines a distinct crime of aggravated sodomy and permits a more severe penalty.

The language is similar to New Mexico Criminal Code, 9-6.

Law Review and Bar Journal References:

"Reform in Kansas Domestic Violence Legislation," David J. Gottlieb and L. Eric Johnson, 31 K.L.R. 527, 554 (1983).

"Survey of Kansas Law: Criminal Law," Robert A. Wason, 32 K.L.R. 395, 396, 400 (1984).

CASE ANNOTATIONS

1. Conviction hereunder and of other crimes reviewed; evidence of similar offenses; instructions; no reversible error. State v. James, 217 K. 96, 100, 535 P.2d 991.

2. Conviction hereunder and of other offenses reviewed; failure to move for severance of offenses constitutes waiver of joinder. State v. Townsley, 217 K. 102, 535 P.2d 1.

3. Conviction hereunder and of other crimes affirmed; evidence admissible. State v. Donahue, 218 K. 351, 543 P.2d 962.

4. Defendant charged hereunder; conviction under 21-3505; evidence supported conviction. State v. Rhone, 219 K. 542, 546, 548 P.2d 752.

5. No error in admission of evidence or in failing to instruct on lesser offense. State v. Yates, 220 K. 635, 556 P.2d 176.

6. Conviction hereunder and of other crimes; record examined; no reversible error. State v. Lewis, 220 K. 791, 556 P.2d 888.

7. Conviction of aggravated robbery and aggravated sodomy reviewed and judgment affirmed. State v. Thompson, 221 K. 165, 173, 174, 558 P.2d 93.

8. Section does not contain elements of bill of attainder. State v. Thompson, 221 K. 165, 171, 173, 558 P.2d 93.

9. Statute is not unconstitutional on grounds raised. State v. Thompson, 221 K. 165, 171, 172, 173, 558 P.2d 93.

10. Conviction hereunder reversed; defendant's sixth amendment right to effective cross-examination denied by admission of out-of-court statement. State v. Fisher, 222 K. 76, 563 P.2d 1012.

11. Defendant charged hereunder acquitted. State v. Holt, 2 K.A.2d 1, 574 P.2d 152.

12. Lewd and lascivious behavior not lesser degree of aggravated sodomy. State v. Crawford, 223 K. 127, 128, 573 P.2d 982.

13. Alleged trial errors reviewed in affirming conviction hereunder. State v. Gilder, 223 K. 220, 221, 574 P.2d 196.

14. Defendant's rights not prejudiced by one day continuance during trial proceedings; conviction affirmed. State v. Nelson, 223 K. 251, 573 P.2d 602.

15. No abuse of discretion in refusing to grant separate trials nor in refusal to sever counts; conviction affirmed. State v. Howell, 223 K. 282, 573 P.2d 1003.

16. Prejudicial error in prosecution hereunder; case remanded for new trial. State v. Nixon, 223 K. 788, 789, 576 P.2d 691.

17. Conviction hereunder affirmed; limitations on evidence of previous sexual conduct constitutional; statutory definition of sodomy construed. State v. Williams, 224 K. 468, 471, 580 P.2d 1341.

18. No error in failure to instruct jury on sodomy or patronizing a prostitute; conviction affirmed. State v. Blue, 225 K. 576, 580, 592 P.2d 897.

19. No error in failure to instruct jury on lewd and lascivious behavior or indecent solicitation of a child; conviction affirmed. State v. Gregg, 226 K. 481, 482, 602 P.2d 85.

20. Evidence sufficient to establish sufficient penetration for oral copulation with child; conviction affirmed. State v. Lovelace, 227 K. 348, 349, 351, 607 P.2d 49.

21. No error in trying defendants jointly; offenses were part of a common scheme; conviction of aggravated anal sodomy affirmed. State v. Tate, 228 K. 752, 620 P.2d 326.

22. Where allegations in information fail to constitute

- offense in language of statute, information fatally defective; convictions of aiding and abetting aggravated sodomy void. *State v. Robinson, Lloyd & Clark*, 229 K. 301, 302, 305, 624 P.2d 964.
23. In cases involving illicit sexual relations between adult and child, evidence of prior acts of similar nature between same parties is admissible. *State v. Crossman*, 229 K. 384, 624 P.2d 461.
24. Duty to instruct on lesser included offenses arises only when there is evidence under which defendant might reasonably have been convicted thereof. *State v. Everson*, 229 K. 542, 626 P.2d 1189.
25. Mistrial declared after two and one-half days of trial because of ineligible juror; double jeopardy did not attach. *State v. Folkerts*, 229 K. 608, 629 P.2d 173 (1981).
26. Forcing victim to commit sodomy constitutes bodily harm as used in 21-3421; charges not multiplicitous. *State v. Cheers*, 231 K. 161, 643 P.2d 154 (1982).
27. Multiple charges involving three victims consolidated for trial. *State v. Bagby*, 231 K. 176, 642 P.2d 993 (1982).
28. Psychiatrist's testimony that person suffers rape trauma syndrome held admissible. *State v. Marks*, 231 K. 645, 646, 647 P.2d 1292 (1982).
29. Substantial prejudice to defendant avoided; court sustained objection to prosecution questions regarding pending aggravated battery charge. *State v. Stellwagen*, 232 K. 744, 659 P.2d 167 (1983).
30. No error in limiting cross-examination of witness, admitting hearsay evidence, excluding irrelevant evidence; erroneous jury instruction not prejudicial. *State v. Aldrich*, 232 K. 783, 658 P.2d 1027 (1983).
31. Crime committed on child complete in and of itself; kidnapping occurring in another county held to be independent. *State v. Calderon*, 233 K. 87, 88, 90, 91, 92, 661 P.2d 781 (1983).
32. Prior to amendment of act (July 1, 1983); husband not guilty of aggravated sodomy with wife. *State v. Dubish*, 234 K. 708, 712, 675 P.2d 877 (1984).
33. Identikit composite goes to weight and sufficiency; pretrial photographic lineup identification not impermissibly suggestive; spouse's observation of keys not privileged. *State v. Galloway*, 235 K. 70, 680 P.2d 268 (1984).
34. Foundation for admission of tape recordings in most jurisdictions outlined and applied ("911" recording of crime in progress). *State v. Williams*, 235 K. 485, 486, 491, 681 P.2d 660 (1984).
35. Refusal to commit pursuant to 22-3430; sentence imposed under 21-4608. *State v. Adkins*, 236 K. 259, 689 P.2d 880 (1984).
36. Behavior and comments of defendant during arrest admitted as part of *res gestae*. *State v. Davis*, 236 K. 538, 539, 694 P.2d 418 (1985).
37. Sufficiency of uncorroborated prosecutrix testimony evidence sustained. *State v. Lile*, 237 K. 210, 211, 699 P.2d 456 (1985).
38. Right to counsel infringed where law partner represents another charged with same crime and conflict arises. *State v. Lemmons*, 238 K. 1, 2, 705 P.2d 552 (1985).
39. Effect of delays from interlocutory appeals (22-3603) on constitutional right to speedy trial discussed. *State v. Galloway*, 238 K. 100, 708 P.2d 508 (1985).
40. In-custody statement without counsel, witness comment on defendant's silence, impeachment of prosecution witnesses discussed. *State v. O'Neal*, 238 K. 183, 708 P.2d 206 (1985).
41. Evidence of prior crimes (60-455), sufficiency of complaint affidavit, photographic evidence, trial consolidation discussed. *State v. Breazeale*, 238 K. 714, 714 P.2d 1356 (1986).
42. Conviction for acts committed on Indian reservation; Allen instruction, Brady evidence rule, sufficiency of evidence examined. *United States v. Blandin*, 784 F.2d 1048 (1986).
43. Warrantless arrest, confession, prosecutorial misconduct, expert testimony, lesser included offenses, excessive sentencing examined. *State v. Strauch*, 239 K. 203, 718 P.2d 613 (1986).
44. Admission of state rebuttal testimony by former prosecuting attorney and rape counselor examined. *State v. Hayes*, 239 K. 443, 720 P.2d 1049 (1986).
45. Statute compared with 21-3503 and applicability of each regarding date of crime examined. *State v. Jackson*, 239 K. 463, 471, 721 P.2d 232 (1986).
46. Expert testimony on rape trauma syndrome where consent is defense (21-3502) examined. *State v. McQuillen*, 239 K. 590, 721 P.2d 740 (1986).
47. Direct appeal from sentence imposed after plea of guilty or *nolo contendere* (22-3602) examined. *State v. Harrold*, 239 K. 645, 722 P.2d 563 (1986).
48. Videotaped testimony of child victim does not per se violate right to confront witness; newly discovered evidence; constitutional issue first raised on appeal. *State v. Johnson*, 240 K. 326, 729 P.2d 1163 (1986).
49. Recommendation regarding training during incarceration, consideration of sentencing criteria examined. *State v. Bennett*, 240 K. 575, 731 P.2d 284 (1987).
50. Use of state rebuttal testimony on alibi defense, eyewitness identification instruction examined. *State v. Willis*, 240 K. 580, 731 P.2d 287 (1987).
51. Technical irregularities in execution of search warrant, voluntariness of confession examined. *State v. Holloman*, 240 K. 589, 731 P.2d 294 (1987).
52. Cited by concurring judge in majority holding that aggravated sexual battery (21-3518) not lesser included offense of indecent liberties (21-3503). *State v. Fulcher*, 12 K.A.2d 169, 173, 737 P.2d 61 (1987).
53. Non-identical offense to aggravated incest (21-3603), 60-460 hearing examined. *State v. Hutchcraft*, 242 K. 55, 744 P.2d 849 (1987).
54. Prior crimes instruction, jury requests for information, venue, victim's prior sexual conduct examined. *State v. Redford*, 242 K. 658, 659, 750 P.2d 1013 (1988).

21-3507. Adultery. (1) Adultery is engaging in sexual intercourse or sodomy with a person who is not married to the offender if:

- The offender is married; or
- The offender is not married and knows that the other person involved in the act is married.

(2) Adultery is a class C misdemeanor.
History: L. 1969, ch. 180, § 21-3507; L. 1983, ch. 109, § 7; July 1, 1988.

Source or prior law:
21-908.

Judicial Council, 1968: Adultery was not defined in the laws of Kansas, although it was made criminal (former K.S.A. 21-908). Hence, the courts adhered to the common law concept and held that adultery cannot be committed by an unmarried person (State v. Chafin, 80 Kan. 653). The section is applicable to extramarital sexual intercourse committed both by a married person and by a single person who has knowledge that his partner in the amorous frolic is married.

CASE ANNOTATIONS

1. Conviction of forcible rape; not error to fail to instruct on adultery. State v. Platz, 214 K. 74, 77, 519 P.2d 1097.
2. Not considered lesser included offense (21-3107) of rape (21-3502); other non-included offenses noted. State v. Moore, 242 K. 1, 3, 748 P.2d 833 (1987).

21-3508. Lewd and lascivious behavior.

(1) Lewd and lascivious behavior is:

- (a) Engaging in sexual intercourse or sodomy with any person or animal with knowledge or reasonable anticipation that the participants are being viewed by others; or
- (b) the exposure of a sex organ in a public place, or in the presence of a person who is not the spouse of the offender and who has not consented thereto, with intent to arouse or gratify the sexual desires of the offender or another.

(2) Lewd and lascivious behavior is a class B misdemeanor.

History: L. 1969, ch. 180, § 21-3508; L. 1983, ch. 109, § 8; July 1.

Source or prior law:
21-908.

Judicial Council, 1968: This section and the preceding one restate the substance of former K.S.A. 21-908. The former statute uses such epithets as "lewdness," "lascivious behavior," "indecent," "grossly scandalous," etc., without defining the terms. This section attempts to identify the conduct to which the epithets apply.

The section is adapted from the Wisconsin Criminal Code, 944.20.

Attorney General's Opinions:

Persons prohibited from employment in boarding homes for children or family day care homes; effect of certain misdemeanor convictions. 85-154.

CASE ANNOTATIONS

1. Lewd and lascivious behavior not lesser degree of aggravated sodomy. State v. Crawford, 223 K. 127, 128, 573 P.2d 982.
2. Lewd and lascivious behavior not lesser degree of aggravated sodomy or indecent liberties with a child; conviction affirmed. State v. Gregg, 226 K. 481, 482, 483, 484, 602 P.2d 85.
3. Cited in holding that second prosecution under 21-3511 did not constitute double jeopardy under the provisions of 21-3108. Williams v. Darr, 4 K.A.2d 178, 179, 180, 181, 603 P.2d 1021.
4. Lewd and lascivious behavior not a lesser included

offense of aggravated sodomy. State v. Robinson, Lloyd & Clark, 229 K. 301, 307, 624 P.2d 964.

5. Offense hereunder not lesser degree of aggravated sodomy nor rape. State v. Davis, 236 K. 538, 542, 694 P.2d 418 (1985).

6. Resolution using statutory language aimed at sex for hire in adult entertainment centers not a ban on nude dancing. Moody v. Board of Shawnee County Comm'rs, 237 K. 67, 75, 697 P.2d 1310 (1985).

7. Cited; intent to arouse or gratify sexual desire makes offense narrow and specific; not unconstitutionally overbroad or vague. State v. Perrigo, 10 K.A.2d 651, 655, 708 P.2d 987 (1985).

8. Not considered lesser included offense (21-3107) of rape (21-3502); other non-included offenses noted. State v. Moore, 242 K. 1, 3, 748 P.2d 833 (1987).

21-3509. Enticement of a child. Enticement of a child is inviting, persuading or attempting to persuade a child under the age of sixteen (16) years to enter any vehicle, building, room or secluded place with intent to commit an unlawful sexual act upon or with the person of said child.

Enticement of a child is a class D felony.

History: L. 1969, ch. 180, § 21-3509; July 1, 1970.

Revisor's Note:

For Judicial Council comment, see 21-3511.

Attorney General's Opinions:

Code for care of children; definition of sexual abuse and exploitation in code; conformity with federal regulations. 83-186.

CASE ANNOTATIONS

1. No error in failure to instruct jury on lewd and lascivious behavior or indecent solicitation of a child; conviction affirmed. State v. Gregg, 226 K. 481, 482, 483, 602 P.2d 85.

2. Cited; right to counsel infringed where law partner represents another charged with same crime and conflict arises. State v. Lem'Mons, 238 K. 1, 2, 705 P.2d 552 (1985).

3. What actions necessary to toll statute of limitations (21-3106) discussed. State v. Mills, 238 K. 189, 708 P.2d 1079 (1985).

21-3510. Indecent solicitation of a child. Indecent solicitation of a child is the accosting, enticing or soliciting of a child under the age of sixteen (16) years to commit or to submit to an unlawful sexual act.

Indecent solicitation of a child is a class A misdemeanor.

History: L. 1969, ch. 180, § 21-3510; July 1, 1970.

Revisor's Note:

For Judicial Council comment, see 21-3511.

Attorney General's Opinions:

Code for care of children; definition of sexual abuse and

exploitation in code; conformity with federal regulations. 83-186.

Persons prohibited from employment in boarding homes for children or family day care homes; effect of certain misdemeanor convictions. 85-154.

CASE ANNOTATIONS

1. No error in failure to instruct jury on lewd and lascivious behavior or indecent solicitation of a child; conviction affirmed. *State v. Gregg*, 226 K. 481, 482, 483, 602 P.2d 85.

2. Cited in holding that second prosecution under 21-3511 did not constitute double jeopardy under the provisions of 21-3108. *Williams v. Darr*, 4 K.A.2d 178, 190, 603 P.2d 1021.

21-3511. Aggravated indecent solicitation of a child. Aggravated indecent solicitation of a child is the accosting, enticing or soliciting of a child under the age of twelve (12) years to commit or to submit to an unlawful sexual act.

Aggravated indecent solicitation of a child is a class E felony.

History: L. 1969, ch. 180, § 21-3511; July 1, 1970.

Judicial Council, 1968: Sexual crimes against children are often committed in vehicles, buildings or secluded places. Section 21-3509 is intended to protect the child from exposure to the danger of being induced to enter such a place by a person who intends to abuse the child sexually. Under this section, the gist of the crime is the invitation to enter, coupled with the unlawful intent.

Sections 21-3510 and 21-3511 prohibit the solicitation or invitation to the child to participate in the unlawful act. The solicitation may be in a public as well as in a private place. It involves no effort to obtain control over the child's person in a secluded location.

New Mexico Criminal Code, 9-10, and Wisconsin Criminal Code, 944.12, have been used as guides in drafting. Also, note that 21-3510 and 21-3511 cover substantially the same conduct as former K.S.A. 38-711.

Attorney General's Opinions:

Code for care of children; definition of sexual abuse and exploitation in code; conformity with federal regulations. 83-186.

CASE ANNOTATIONS

1. Conviction hereunder affirmed; psychiatric examination of complaining witness is discretionary with trial judge. *State v. Gregg*, 226 K. 481, 482, 483, 602 P.2d 85.

2. Cited in holding that second prosecution under this section did not constitute double jeopardy under the provisions of 21-3108. *Williams v. Darr*, 4 K.A.2d 178, 179, 180, 181, 603 P.2d 1021.

3. Mother's testimony at trial as to child's statements permissible hearsay under 60-460(dd); Sixth Amendment not violated. *State v. Pendelton*, 10 K.A.2d 26, 32, 690 P.2d 959 (1984).

4. Cited; provisions of 60-460(dd) (statements by children) inapplicable to proceedings under juvenile offenders

code (38-1601 et seq). In re. *Mary P.*, 237 K. 456, 701 P.2d 681 (1985).

5. Cited; expungement of 1974 conviction record, ex post facto nature of 21-4619 examined. *State v. Anderson*, 12 K.A.2d 342, 744 P.2d 143 (1987).

21-3512. Prostitution. (1) Prostitution is performing for hire, or offering or agreeing to perform for hire where there is an exchange of value, any of the following acts:

- (a) Sexual intercourse;
- (b) sodomy; or
- (c) manual or other bodily contact stimulation of the genitals of any person with the intent to arouse or gratify the sexual desires of the offender or another.

(2) Prostitution is a class B misdemeanor.

History: L. 1969, ch. 180, § 21-3512; L. 1980, ch. 98, § 1; L. 1983, ch. 109, § 9; July 1.

Revisor's Note:

For Source or Prior Law and Judicial Council comment, see 21-3515.

CASE ANNOTATIONS

1. Indictment hereunder sufficient for federal offense where alleged acts included travel and use of facilities in interstate commerce; two locales insufficient for instructions on two conspiracies. *United States v. Russo*, 527 F.2d 1051.

2. Statute not unconstitutionally vague nor overly broad. *State v. Parker*, 236 K. 353, 356, 690 P.2d 1353 (1984).

21-3513. Promoting prostitution. (1) Promoting prostitution is:

- (a) Establishing, owning, maintaining or managing a house of prostitution, or participating in the establishment, ownership, maintenance, or management thereof; or
- (b) Permitting any place partially or wholly owned or controlled by the defendant to be used as a house of prostitution; or
- (c) Procuring a prostitute for a house of prostitution; or
- (d) Inducing another to become a prostitute; or
- (e) Soliciting a patron for a prostitute or for a house of prostitution; or
- (f) Procuring a prostitute for a patron; or
- (g) Procuring transportation for, paying for the transportation of, or transporting a person within this state with the intention of assisting or promoting that person's engaging in prostitution; or
- (h) Being employed to perform any act which is prohibited by this section.

(2) Promoting prostitution is a class A misdemeanor when the prostitute is 16 or more years of age. Promoting prostitution is a class

E felony when the prostitute is under 16 years of age.

History: L. 1969, ch. 180, § 21-3513; L. 1986, ch. 120, § 1; July 1.

Revisor's Note:

For Source or Prior Law and Judicial Council comment, see 21-3515.

Law Review and Bar Journal References:

"The Obscenity Law's Application in Kansas: Issues and Procedures," Stan N. Wilkins, 12 W.L.J. 185, 196 (1973).

Mentioned in note, "Constitutional Law—Regulation of Massage Parlors," 24 K.L.R. 462 (1976).

Attorney General's Opinions:

Sex offenses; promoting prostitution; newspaper advertisements. 83-131.

CASE ANNOTATIONS

1. Conviction hereunder reversed; failure to advise of jury trial right; no waiver. *State v. Irving*, 216 K. 588, 533 P.2d 1225.

2. Indictment hereunder sufficient for federal offense where alleged acts included travel and use of facilities in interstate commerce; two locales insufficient for instructions on two conspiracies. *United States v. Russo*, 527 F.2d 1051.

3. Section properly applied; conviction upheld. *State v. Dodson*, 222 K. 519, 521, 524, 525, 565 P.2d 291.

4. Stop of defendant's car under 22-2402 held justified by reasonable suspicion. *State v. Hayes*, 3 K.A.2d 517, 519, 597 P.2d 268.

21-3514. Habitually promoting prostitution. Habitually promoting prostitution is, the commission of any act constituting promoting prostitution, as defined in section 21-3513, by a person who has, prior to the commission of such act, been convicted of a prior violation of said section 21-3513.

Habitually promoting prostitution is a class E felony.

History: L. 1969, ch. 180, § 21-3514; July 1, 1970.

Revisor's Note:

For Source or Prior Law and Judicial Council comment, see 21-3515.

Law Review and Bar Journal References:

"The Kansas Habitual Criminal Act," Bruce E. Miller, 9 W.L.J. 244, 258 (1970).

"The Obscenity Law's Application in Kansas: Issues and Procedures," Stan N. Wilkins, 12 W.L.J. 185, 196 (1973).

CASE ANNOTATIONS

1. Crimes in which prior conviction is a necessary element distinguished from crimes considered in establishing penalties. *State v. Loudermilk*, 221 K. 157, 159, 557 P.2d 1229.

2. Cited; knowledge, intent or absence of mistake as not constituting element of subsequent offense under 21-4619(f)(4) (expungement statute). *State v. Riedel*, 242 K. 834, 835, 752 P.2d 115 (1988).

21-3515. Patronizing a prostitute. (1) Patronizing a prostitute is either:

(a) Knowingly entering or remaining in a house of prostitution with intent to engage in sexual intercourse, sodomy or any unlawful sexual act with a prostitute; or

(b) knowingly hiring a prostitute to engage in sexual intercourse, sodomy or any unlawful sexual act.

(2) Patronizing a prostitute is a class C misdemeanor.

History: L. 1969, ch. 180, § 21-3515; L. 1983, ch. 109, § 10; July 1.

Source or prior law:

21-426, 21-427, 21-428, 21-937, 21-938, 21-939, 21-940, 21-942, 38-705.

Judicial Council, 1968: Prostitution, per se, was not prohibited by the laws of Kansas. Penalties were provided for keeping a place of prostitution, soliciting, taking a woman for purposes of prostitution, etc. However, there were both gaps and overlaps to be encountered. The sections attempt to cover the ground more completely and, at the same time, to collect and systematize material formerly scattered through several sections and articles.

Section 21-3515 creates a new crime. The view of the committee is simply that both parties to a prohibited transaction share in the culpability and both should be dealt with accordingly.

Note that the persistent violation of section 21-3513 is to be treated as a felony under 21-3514. Proof of a crime under 21-3514 would include proof of a prior conviction under 21-3513.

The section draws upon Illinois Criminal Code, 11-14, and New Mexico Criminal Code, 9-12 and 9-13.

CASE ANNOTATIONS

1. Aggravated sodomy and rape prosecution; no error in failure to instruct jury on patronizing a prostitute. *State v. Blue*, 225 K. 576, 580, 592 P.2d 897.

21-3516. Sexual exploitation of a child.

(1) Sexual exploitation of a child is:

(a) Employing, using, persuading, inducing, enticing or coercing a child under 16 years of age to engage in sexually explicit conduct for the purpose of promoting any performance;

(b) possessing any film, photograph, negative, slide, book, magazine or other printed or visual medium in which a real child under 16 years of age is shown engaging in sexually explicit conduct with intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the offender, the child or another; or

(c) being a parent, guardian or other person having custody or control of a child under 16 years of age and knowingly permitting such child to engage in, or assist another to engage

in, sexually explicit conduct for any purpose described in subsection (1)(a) or (b).

(2) As used in this section and K.S.A. 1986 Supp. 21-3519:

(a) "Sexually explicit conduct" means actual or simulated: Exhibition in the nude; sexual intercourse or sodomy, including genital-genital, oral-genital, anal-genital or oral-anal contact, whether between persons of the same or opposite sex; masturbation; sado-masochistic abuse for the purpose of sexual stimulation; or lewd exhibition of the genitals or pubic area of any person.

(b) "Promoting" means procuring, selling, providing, lending, mailing, delivering, transferring, transmitting, distributing, circulating, disseminating, presenting, producing, directing, manufacturing, issuing, publishing, displaying, exhibiting or advertising:

(i) For pecuniary profit; or

(ii) with intent to arouse or gratify the sexual desire or appeal to the prurient interest of the offender, the child or another.

(c) "Performance" means any film, photograph, negative, slide, book, magazine or other printed or visual medium, or any play or other live presentation.

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

(3) Sexual exploitation of a child is a class D felony.

(4) This section shall be part of and supplemental to the Kansas criminal code.

History: L. 1978, ch. 122, § 1; L. 1985, ch. 109, § 1; L. 1986, ch. 121, § 1; July 1.

Law Review and Bar Journal References:

"Survey of Kansas Law: Family Law," Camilla Klein Haviland, 27 K.L.R. 241, 252 (1979).

"Survey of Kansas Law: Criminal Law and Procedure," Keith G. Meyer, 27 K.L.R. 391, 392 (1979).

Attorney General's Opinions:

Code for care of children; definition of sexual abuse and exploitation in code; conformity with federal regulations. 83-186.

CASE ANNOTATIONS

1. Statutory guidelines for acceptance of guilty plea (22-3210) examined in 60-1507 proceeding. Noble v. State, 240 K. 162, 727 P.2d 473 (1986).

21-3517. Sexual battery. (1) Sexual battery is the unlawful, intentional touching of the person of another who is not the spouse of the offender and who does not consent thereto,

with the intent to arouse or satisfy the sexual desires of the offender or another.

(2) Sexual battery is a class A misdemeanor.

(3) This section shall be part of and supplemental to the Kansas criminal code.

History: L. 1983, ch. 109, § 13; July 1.

CASE ANNOTATIONS

1. Plea and conviction void where defendant erroneously bound over (22-2902) on misdemeanor. State v. Leslie, 237 K. 318, 319, 699 P.2d 510 (1985).

2. Sexual battery and aggravated sexual battery (21-3518) are not lesser included offenses of rape (21-3502). State v. Galloway, 238 K. 415, 418, 710 P.2d 1320 (1985).

3. Cited; 21-3518 as lesser included offense of prior 21-3504 examined. State v. Ramos, 240 K. 485, 488, 731 P.2d 837 (1987).

4. Cited by concurring judge in majority holding that aggravated sexual battery (21-3518) not lesser included offense of indecent liberties (21-3503). State v. Fulcher, 12 K.A.2d 169, 173, 737 P.2d 61 (1987).

5. Cited; aggravated sexual battery (21-3518) as lesser included offense of indecent liberties with child (21-3503) examined. State v. Hutchcraft, 242 K. 55, 59, 744 P.2d 849 (1987).

21-3518. Aggravated sexual battery. (1) Aggravated sexual battery is:

(a) The unlawful, intentional application of force to the person of another who is not the spouse of the offender and who does not consent thereto, with the intent to arouse or satisfy the sexual desires of the offender or another;

(b) sexual battery, as defined in K.S.A. 1983 Supp. 21-3517 and amendments thereto, against a person under 16 years of age;

(c) sexual battery, as defined in K.S.A. 1983 Supp. 21-3517 and amendments thereto, committed in another's dwelling by one who entered into or remained in the dwelling without authority;

(d) sexual battery, as defined in K.S.A. 1983 Supp. 21-3517 and amendments thereto, of a person who is unconscious or physically powerless; or

(e) sexual battery, as defined in K.S.A. 1983 Supp. 21-3517 and amendments thereto, of a person who is incapable of giving consent because of mental deficiency or disease, which condition was known by or was reasonably apparent to, the offender.

(2) Aggravated sexual battery is a class D felony.

(3) This section shall be part of and supplemental to the Kansas criminal code.

History: L. 1983, ch. 109, § 14; July 1.

CASE ANNOTATIONS

1. No jeopardy where defendant erroneously bound over (22-2902) on misdemeanor; refiled within 21-3106

permitted on remand. *State v. Leslie*, 237 K. 318, 319, 699 P.2d 510 (1985).

2. Sexual battery (21-3517) and aggravated sexual battery hereunder are not lesser included offenses of rape (21-3502). *State v. Galloway*, 238 K. 415, 418, 710 P.2d 1320 (1985).

3. Cited; 21-3518 as lesser included offense of prior 21-3504 examined. *State v. Ramos*, 240 K. 485, 731 P.2d 837 (1987).

4. Cited; not lesser included offense of indecent liberties (21-3503), no instruction necessary. *State v. Fulcher*, 12 K.A.2d 169, 170, 737 P.2d 61 (1987).

5. Not considered lesser included offense (21-3107) of rape (21-3502); other non-included offenses noted. *State v. Moore*, 242 K. 1, 3, 748 P.2d 833 (1987).

6. Crime hereunder, lesser included offense of indecent liberties with child (21-3503). *State v. Hutchcraft*, 242 K. 55, 744 P.2d 849 (1987).

21-3519. Promoting sexual performance by a minor. (1) Promoting sexual performance by a minor is promoting any performance that includes sexually explicit conduct by a child under 18 years of age, knowing the character and content of the performance.

(2) Promoting sexual performance by a minor is a class E felony.

(3) This section shall be part of and supplemental to the Kansas criminal code.

History: L. 1986, ch. 121, § 2, July 1.

21-3520 to 21-3524. Reserved.

21-3525. Evidence of previous sexual conduct in prosecutions for sex offenses; motions; notice. (1) The provisions of this section shall apply only in a prosecution for: (a) Rape, as defined by K.S.A. 21-3502 and amendments thereto; (b) indecent liberties with a child, as defined in K.S.A. 21-3503 and amendments thereto; (c) aggravated indecent liberties with a child, as defined in K.S.A. 21-3504 and amendments thereto; (d) aggravated criminal sodomy as defined by K.S.A. 21-3506 and amendments thereto; (e) enticement of a child, as defined in K.S.A. 21-3509 and amendments thereto; (f) aggravated indecent solicitation of a child, as defined in K.S.A. 21-3511 and amendments thereto; (g) sexual exploitation of a child as defined in K.S.A. 21-3516 and amendments thereto; (h) aggravated sexual battery, as defined in K.S.A. 1983 Supp. 21-3518 and amendments thereto; (i) incest, as defined in K.S.A. 21-3602 and amendments thereto; (j) aggravated incest, as defined in K.S.A. 21-3603 and amendments thereto; (k) aggravated assault, as defined in K.S.A. 21-3410 and amendments thereto, with intent to commit any

crime specified above; (l) indecent solicitation of a child, as defined in K.S.A. 21-3510 and amendments thereto; (m) sexual battery, as defined in K.S.A. 1983 Supp. 21-3517 and amendments thereto; or (n) attempt, as defined in K.S.A. 21-3301 and amendments thereto, or conspiracy, as defined in K.S.A. 21-3302 and amendments thereto, to commit any crime specified above.

(2) Except as provided in subsection (3), in any prosecution to which this section applies, evidence of the complaining witness' previous sexual conduct with any person including the defendant shall not be admissible, and no reference shall be made thereto in the presence of the jury, except under the following conditions: The defendant shall make a written motion to the court to admit evidence or testimony concerning the previous sexual conduct of the complaining witness. The motion must be made at least seven days before the commencement of the trial unless that requirement is waived by the court. The motion shall state the nature of such evidence or testimony and its relevancy and shall be accompanied by an affidavit in which an offer of proof of the previous sexual conduct of the complaining witness is stated. The court shall conduct a hearing on the motion in camera. At the conclusion of the hearing, if the court finds that evidence proposed to be offered by the defendant regarding the previous sexual conduct of the complaining witness is relevant and is not otherwise inadmissible as evidence, the court may make an order stating what evidence may be introduced by the defendant and the nature of the questions to be permitted. The defendant may then offer evidence and question witnesses in accordance with the order of the court.

(3) In any prosecution for a crime designated in subsection (1), the prosecuting attorney may introduce evidence concerning any previous sexual conduct of the complaining witness, and the complaining witness may testify as to any such previous sexual conduct. If such evidence or testimony is introduced, the defendant may cross-examine the witness who gives such testimony and offer relevant evidence limited specifically to the rebuttal of such evidence or testimony introduced by the prosecutor or given by the complaining witness.

(4) As used in this section, "complaining witness" means the alleged victim of any crime

designated in subsection (1); the prosecution of which is subject to this section.

History: L. 1976, ch. 162, § 1; L. 1983, ch. 109, § 15; July 1.

Law Review and Bar Journal References:

Protected testimony of rape victim, 18 W.L.J. 665, 667, 669, 670, 671, 672 (1979).

"Survey of Kansas Law: Evidence," Spencer A. Gard, 27 K.L.R. 225, 234 (1979).

"The Kansas Rape Shield Law," 2 J.K.T.L.A. No. 4, 11, 12 (1978).

"Kansas Recognizes Rape Trauma Syndrome," Charles H. Herd, 24 W.L.J. 653, 662 (1985).

CASE ANNOTATIONS

1. Applied; trial court did not abuse discretion in restricting cross-examination in prosecution for rape. State v. Corn, 223 K. 583, 585, 575 P.2d 1308.

2. Cited; court properly refused to allow questions concerning rape victim's prior sexual experience. State v. Cook, 224 K. 132, 135, 577 P.2d 257.

3. Section held constitutional; limitations on evidence of previous sexual conduct not violation of due process; conviction affirmed. State v. Williams, 224 K. 468, 469, 470, 580 P.2d 1341.

4. Statute constitutional; sixth amendment guarantees not offended; no abuse of discretion by trial court. State v. Blue, 225 K. 576, 578, 579, 580, 592 P.2d 897.

5. Construed and applied on appeal from conviction under 21-3502 and 21-3205; section constitutional; judgment affirmed. In re Nichols, 2 K.A.2d 431, 432, 433, 435, 436, 437, 580 P.2d 1370.

6. Mentioned; the trial judge has discretion to order a psychiatric examination of a complaining witness in a sex crime case. State v. Gregg, 226 K. 481, 489, 602 P.2d 85.

7. No abuse of discretion in excluding evidence of questionable relevancy, though possibly not within purview of section. State v. Washington, 226 K. 768, 773, 774, 602 P.2d 1377.

8. Conviction of rape upheld; victim's alleged prior sex acts not admitted because required affidavit not furnished. State v. Sanders, 227 K. 892, 893, 610 P.2d 633.

9. Conviction of rape upheld; not error for trial court to exclude evidence of victim's prior sexual activity. State v. Anderson, 230 K. 681, 682, 640 P.2d 1232 (1982).

10. Rape victim's prior sexual activity generally inadmissible; no implication of consent to act complained of. State v. Stellwagen, 232 K. 744, 746, 747, 659 P.2d 167 (1983).

11. Evidence as to prior sexual conduct between defendant and victim, although material, was irrelevant as too remote. State v. Williams, 235 K. 485, 488, 489, 681 P.2d 660 (1984).

12. Admission of rape trauma syndrome testimony not violation of rape shield provisions. State v. McQuillen, 236 K. 161, 172, 689 P.2d 822 (1984).

13. Evidence of prior sexual conduct allowed if proven relevant to any fact at issue. State v. Bressman, 236 K. 296, 299, 300, 689 P.2d 901 (1984).

14. Evidence that victim pregnant would not tend to show intercourse was consensual. State v. Zuniga, 237 K. 788, 793, 703 P.2d 805 (1985).

15. Term "sexual conduct" is not so vague that person of common intelligence must guess at meaning. State v. Carmichael, 240 K. 149, 154, 156, 727 P.2d 918 (1986).

16. Defendant may not ignore requirements herein because of other crimes charged in addition to those covered. State v. Redford, 242 K. 658, 673, 674, 750 P.2d 1013 (1988).

**Article 36.—CRIMES AFFECTING
FAMILY RELATIONSHIPS
AND CHILDREN**

21-3601. Bigamy. (1) Bigamy is any of the following:

(a) Marriage within this state by any person who shall have another spouse living at the time of such marriage;

(b) Marriage within this state by an unmarried person to a person known to such unmarried person to be the spouse of some other person;

(c) Cohabitation within this state after marriage in another state or country under circumstances described in subsection (1)(a) or subsection (1)(b) of this section.

(2) It shall be a defense to a charge of bigamy that the accused reasonably believed the prior marriage had been dissolved by death, divorce or annulment.

(3) Bigamy is a class E felony.

History: L. 1969, ch. 180, § 21-3601, July 1, 1970.

Source or prior law: 21-901, 21-902, 21-903, 21-905.

Judicial Council, 1968: The section substantially restates the law of Kansas. Note, however, that fewer defenses are stated in the new statute. Also, the definition of bigamy includes the crime of cohabiting within the state after a bigamous marriage without, how prohibited by a separate section.

The section follows former K.S.A. 21-901 and 21-905 and Illinois Criminal Code, 11-12.

Revisor's Note:

Procedural aspects, see K.S.A. 22-2613.

CASE ANNOTATIONS

1. Annulment of bigamous marriage no defense to prosecution for crime of bigamy. State v. Fitzgerald, 240 K. 187, 190, 726 P.2d 1344 (1986).

21-3602. Incest. Incest is marriage to or engaging in sexual intercourse, sodomy or any unlawful sexual act, as defined by K.S.A. 21-3501 and amendments thereto, with a person who is 18 or more years of age and who is known to the offender to be related to the offender as any of the following biological relatives: parent, child, grandparent of any degree, grandchild of any degree, brother, sister,

half-brother, half-sister, uncle, aunt, nephew or niece.

Incest is a class E felony.

History: L. 1969, ch. 180, § 21-3602; L. 1983, ch. 109, § 11; L. 1984, ch. 118, § 3; July 1.

Revisor's Note:

For Source or Prior Law and Judicial Council comment, see 21-3603.

Law Review and Bar Journal References:

"Child Abuse and Neglect: The Legal Challenge," G. Joseph Pierron, 46 J.B.A.K. 167, 172, 173 (1977).

CASE ANNOTATIONS

1. Marriage between first cousins valid in Kansas if valid where celebrated and not odious to public policy nor evasive. In re Estate of Loughmiller, 229 K. 584, 590, 629 P.2d 156 (1981).

21-3603. Aggravated incest. (1) Aggravated incest is marriage to or engaging in any prohibited act enumerated in subsection (2) with a person who is under 18 years of age and who is known to the offender to be related to the offender as any of the following biological, step or adoptive relatives: child, grandchild of any degree, brother, sister, half-brother, half-sister, uncle, aunt, nephew or niece.

(2) The following are prohibited acts under subsection (1):

(a) Sexual intercourse, sodomy or any unlawful sex act, as defined by K.S.A. 21-3501 and amendments thereto; or

(b) any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child or the offender or both.

(3) Aggravated incest is a class D felony.

History: L. 1969, ch. 180, § 21-3603; L. 1983, ch. 109, § 12; L. 1984, ch. 118, § 4; July 1.

Source or prior law:

21-906.

Judicial Council, 1968: Two grades of incest are included in the new sections. It is the view of the committee that sexual intercourse between parent and child is more reprehensible than similar acts between others within the prohibited degrees of relationship. The definition of the term "child" does not include an adopted child or stepchild who is 18 years of age or older. It was the drafting committee's thought when the child has reached the age of consent and discretion and is not related by blood to the other partner in the enterprise, the matter should be treated as any other sexual conduct between consenting, non-related adults.

In drafting, the committee relied upon former K.S.A. 21-906 and K.S.A. 23-102 and Illinois Criminal Code, 11-11.

CASE ANNOTATIONS

1. Marriage between first cousins valid in Kansas if valid where celebrated and not odious to public policy nor evasive. In re Estate of Loughmiller, 229 K. 584, 590, 629 P.2d 156 (1981).

2. Cited; effect of changes in statutes involving indecent liberties with child (21-3503, 21-3504) discussed. State v. Armstrong, 238 K. 559, 565, 712 P.2d 1258 (1986).

3. Evidence of previous sexual relationship, use of interpreters, prosecutorial comments, competency of victim discussed. State v. Perrigo, 10 K.A.2d 651, 708 P.2d 987 (1985).

4. Cited; license to practice law suspended indefinitely pending appeal from conviction hereof. In re Keithley, 238 K. 245, 708 P.2d 984 (1985).

5. Cited; crime and penalty at time of offense: control unless legislature gives retroactive effect to change made subsequent to commission of offense. State v. Van Cleave, 239 K. 117, 122, 716 P.2d 580 (1986).

6. Necessity of mistrial after admission by juror of hearing impairment examined. State v. Miller, 11 K.A.2d 410, 722 P.2d 1131 (1986).

7. Direct appeal from sentence imposed after plea of guilty or nolo contendere (22-3602) examined. State v. Harrold, 239 K. 645, 722 P.2d 563 (1986).

8. Cited; classification of aggravated indecent liberties (21-3504) under prior law examined. State v. Ramos, 240 K. 485, 489, 731 P.2d 837 (1987).

9. Not lesser included offense (21-3107) of rape (21-3502); prior sexual relations, limiting instructions, prosecutorial remarks examined. State v. Moore, 242 K. 1, 7, 9, 748 P.2d 833 (1987).

10. Cited; rape (21-3502), indecent liberties with child (21-3503), aggravated criminal sodomy (21-3506) as non-identical offenses examined. State v. Hutchcraft, 242 K. 55, 744 P.2d 849 (1987).

21-3604. Abandonment of a child. Abandonment of a child is the leaving of a child under the age of sixteen (16) years, in a place where such child may suffer because of neglect, by the parent, guardian or other person to whom the care and custody of such child shall have been entrusted, when done with intent to abandon such child.

Abandonment of a child is a class E felony.

History: L. 1969, ch. 180, § 21-3604; July 1, 1970.

Source or prior law:

21-441.

Judicial Council, 1968: The section is similar in content to former K.S.A. 21-441, but it has been broadened. Also, the maximum age of protected children is stated in the statute.

The idea is found in many statutes. The language "in a place where he may suffer because of neglect," comes from Wisconsin Criminal Code, 940.28.

CASE ANNOTATIONS

1. Parents have right to counsel in some deprived child actions that may be basis of prosecution. In re Cooper, 230 K. 57, 67, 631 P.2d 632 (1981).

2. Pretrial order suppressing admission of extrajudicial statement of defendant charged hereunder affirmed; Miranda warning not timely given. State v. Goering, 8 K.A.2d 338, 339, 656 P.2d 790 (1983).

21-3605. Nonsupport of a child or spouse. (1) (a) Nonsupport of a child is a parent's failure, neglect or refusal without lawful excuse to provide for the support and maintenance of the parent's child in necessitous circumstances.

(b) As used in this section, "child" means a child under the age of 18 years and includes an adopted child or a child born out of wedlock whose parentage has been judicially determined or has been acknowledged in writing by the person to be charged with the support of such child.

(c) At any time before the trial, upon petition and notice, the court may enter such temporary order as may seem just providing for support of such child, and may punish for violation of such order as for contempt.

(d) At any stage of the proceeding, instead of or in addition to imposing the penalty hereinafter provided, the court, in its discretion and having regard for the circumstances and the financial ability or earning capacity of the defendant, may enter an order which shall be subject to change by the court, as circumstances may require, directing the defendant to pay a certain sum periodically, for a term not exceeding the period during which the obligation to support shall continue, to the guardian, conservator or custodian of such child or to an organization or individual approved by the court as trustee. The court shall also have the power to release the defendant on probation for the period so fixed, upon the defendant's entering into a recognizance, with or without surety, in such sum as the court may order and approve. The condition of the recognizance shall be such that if the defendant shall make a personal appearance in court whenever ordered to do so and shall further comply with the terms of such order of support, or of any subsequent modification thereof, then such recognizance shall be void; otherwise the recognizance shall be of full force and effect.

(e) If the court is satisfied by due proof that, at any time during the period while the obligation to support continues, the defendant

has violated the terms of such order, the court may forthwith proceed with the trial of the defendant under the original charge, or sentence the defendant under the original conviction, or enforce the suspended sentence as the case may be.

(f) A preponderance of the evidence shall be sufficient to prove that the defendant is the father or mother of such child. In no prosecution under this act shall any existing statute or rule of law prohibiting the disclosure of confidential communications between husband and wife apply, and both husband and wife shall be competent witnesses to testify against each other to any and all relevant matters, including the parentage of such child. Proof of the nonsupport of such child in necessitous circumstances or neglect or refusal to provide for the support and maintenance of such child shall be prima facie evidence that such neglect or refusal is willful.

(g) Nonsupport of a child is a class E felony.

(2) (a) Nonsupport of a spouse is an individual's failure without just cause to provide for the support of such individual's spouse in necessitous circumstances.

(b) At any time before the trial in a prosecution for nonsupport of a spouse, upon petition and notice, the court may enter such temporary order as may seem just providing for support of such spouse, and may punish for violation of such order as for contempt.

(c) At any stage of the proceeding, instead of or in addition to imposing the penalty hereinafter provided, the court, in its discretion and having regard for the circumstances and the financial ability or earning capacity of the defendant, may enter an order which shall be subject to change by the court, as circumstances may require, directing the defendant to pay a certain sum periodically, for a term not exceeding the period during which the obligation to support shall continue, to the spouse or to the guardian or conservator of such spouse or to an organization or individual approved by the court as trustee. The court shall also have the power to release the defendant on probation for the period so fixed, upon the defendant's entering into a recognizance, with or without surety, in such sum as the court may order and approve. The condition of the recognizance shall be such that if the defendant shall make a personal appearance in court whenever ordered to do so, and shall further comply with the terms of such order of sup-

port, or of any subsequent modification thereof, then such recognizance shall be void; otherwise the recognizance shall be of full force and effect.

(d) If the court is satisfied by due proof that, at any time during the period while the obligation to support continues, the defendant has violated the terms of such order, the court may forthwith proceed with the trial of the defendant under the original charge, or sentence the defendant under the original conviction, or enforce the suspended sentence as the case may be.

(e) (i) A division of resources by an individual and such individual's spouse in accordance with K.S.A. 1988 Supp. 39-786 shall be considered just cause for failure to use such individual's share of such resources to provide medical support of such individual's spouse so long as such spouse is receiving medical assistance as defined by K.S.A. 39-702 and amendments thereto.

(ii) A division of income by an individual and such individual's spouse in accordance with K.S.A. 1988 Supp. 39-787 shall be considered just cause for using only that portion of such individual's annual income which exceeds \$9,000 plus any allowable excess shelter allowance up to a maximum total of \$14,400 to provide medical support of such individual's spouse so long as such spouse is receiving medical assistance as defined by K.S.A. 39-702 and amendments thereto.

(f) Nonsupport of a spouse is a class E felony.

History: L. 1969, ch. 180, § 21-3605; L. 1970, ch. 124, § 4; L. 1976, ch. 157, § 1; L. 1988, ch. 143, § 7; May 1.

Source or prior law:

21-442, 21-443, 21-444, 21-445, 21-446.

Judicial Council, 1968: The former law of Kansas protected both the wife and children. It was based upon the Uniform Desertion and Non-Support Act which was drafted in 1910. The proposal substantially follows the former law.

Subsection (1) (b) makes the act specifically applicable to adopted children and illegitimate children whose paternity has been judicially established or acknowledged in writing. Note, under the present statutes of Kansas, paternity is regularly and normally an issue only in a bastardy proceeding. It may be proper to provide for a special proceeding in which a preliminary determination of paternity may be made. Such a section probably should be located in the chapter on procedure.

The section was based largely on former K.S.A. 21-442 through 21-447, as modified.

Law Review and Bar Journal References:

Definition of "nonsupport of a spouse" limited, Robert F. Bennett, 39 J.B.A.K. 107, 185 (1970).

"Child Support and The New Federal Legislation," R.E. Schulman and Peter E. Rinn, 46 J.B.A.K. 105, 112 (1977).

"Procedure and Defenses Under the Kansas Uniform Reciprocal Enforcement of Support Act of 1970," Jack Peggs, 46 J.B.A.K. 233, 238 (1977).

"Kansas Enacts New Provisions for Child Support Enforcement—Mandatory Wage Withholding," Yvonne C. Anderson, Richard A. Forster, 25 W.L.J. 91, 92 (1985).

"Kansas Child Support Guidelines: An Elusive Search for Fairness in Support Orders," Linda Henry Elrod, 27 W.L.J. 104, 107 (1987).

CASE ANNOTATIONS

1. Conviction supported by sufficient evidence; liberal construction of predecessor 21-442 relied on; "destitute" and "necessitous" have virtually same meaning. State v. Knetzer, 3 K.A.2d 673, 600 P.2d 160.

2. Parents have right to counsel in some deprived child actions that may be basis of prosecution. In re Cooper, 230 K. 57, 67, 631 P.2d 632 (1981).

21-3606. Criminal desertion. Criminal desertion is a husband's or wife's abandonment or willful failure without just cause to provide for the care, protection or support of a spouse who is in ill health or necessitous circumstances.

Criminal desertion is a class E felony.

History: L. 1969, ch. 180, § 21-3606; July 1, 1970.

Judicial Council, 1968: This section supplements section 21-3605. Penalties are imposed for desertion of either spouse who is ill or in necessitous circumstances.

21-3607.

History: L. 1969, ch. 180, § 21-3607; Repealed, L. 1978, ch. 123, § 3; July 1.

Source or prior law: 38-712.

21-3608. Endangering a child. (1) Endangering a child is willfully:

(a) Causing or permitting a child under the age of eighteen (18) years to suffer unjustifiable physical pain or mental distress; or

(b) Unreasonably causing or permitting a child under the age of eighteen (18) years to be placed in a situation in which its life, body or health may be injured or endangered.

(c) Nothing in this section shall be construed to mean a child is endangered for the sole reason his parent or guardian, in good faith, selects and depends upon spiritual means alone through prayer, in accordance with the tenets and practice of a recognized church or religious denomination, for the treatment or cure of disease or remedial care of such child.

(2) misdemeanor
History: 1, 1970
Source or 38-713.
Attorney Licensure; Criminality. 84- Persons for child misdemeanor

1. Reference State v. I
2. "Un-constituted conduct, pure to est-quired by 816, 817.
3. Evid State v. B
4. Pare actions th 230 K. 57
5. Subs gue. State P.2d 239
6. Cite vague. St. (1982).

21-3609. child is inflicting ment up Abuse History 1984, ch

Source or 38-714.

Law Revi "Parent dren to M 595, 608

1. Hab- barred by 728, 602

2. Pare actions th 230 K. 57

3. Char into charg 236 K. 80

21-3610. minor. (

(2) Endangering a child is a class A misdemeanor.

History: L. 1969, ch. 180, § 21-3608; July 1, 1970.

Source or prior law:
38-713.

Attorney General's Opinions:

Licensing and related provisions; person ineligible for licenses; conviction of crimes opposed to decency and morality. 84-118.

Persons prohibited from employment in boarding homes for children or family day care homes; effect of certain misdemeanor convictions. 85-154.

CASE ANNOTATIONS

1. Referred to in construing Campaign Finance Act. State v. Doyen, 224 K. 482, 489, 580 P.2d 1351.

2. "Unjustifiable physical pain" as used herein held unconstitutional for failure to sufficiently identify prohibited conduct; provision (1)(a) held vague and indefinite for failure to establish reasonably definite standards of guilt required by due process of law. State v. Meinert, 225 K. 816, 817, 818, 820, 594 P.2d 232.

3. Evidence found insufficient to sustain convictions. State v. Brooks, 228 K. 562, 563, 564, 565, 618 P.2d 830.

4. Parents have right to counsel in some deprived child actions that may be basis of prosecution. In re Cooper, 230 K. 57, 67, 631 P.2d 632 (1981).

5. Subsection (1) (b) upheld; not unconstitutionally vague. State v. Fisher, 230 K. 192, 194, 195, 199, 200, 631 P.2d 239 (1981).

6. Cited in finding portion of 8-1701 unconstitutionally vague. State v. Carpenter, 231 K. 235, 238, 642 P.2d 998 (1982).

21-3609. Abuse of a child. Abuse of a child is willfully torturing, cruelly beating or inflicting cruel and inhuman corporal punishment upon any child under the age of 18 years.

Abuse of a child is a class D felony.

History: L. 1969, ch. 180, § 21-3609; L. 1984, ch. 119, § 12; May 17.

Source or prior law:
38-714.

Law Review and Bar Journal References:

"Parental Power in the Voluntary Commitment of Children to Mental Institutions," Beth A. Riggert, 17 W.L.J. 595, 608 (1978).

CASE ANNOTATIONS

1. Habeas corpus proceeding; prosecution hereunder barred by 21-3108(2)(a). In re Berkowitz, 3 K.A.2d 726, 728, 602 P.2d 99.

2. Parents have right to counsel in some deprived child actions that may be basis of prosecution. In re Cooper, 230 K. 57, 67, 631 P.2d 632 (1981).

3. Charge of child abuse does not meet test for merger into charge of felony first-degree murder. State v. Brown, 236 K. 800, 803, 696 P.2d 954 (1985).

21-3610. Furnishing alcoholic liquor to a minor. (1) Furnishing alcoholic liquor to a mi-

nor is directly or indirectly, selling to, buying for, giving or furnishing any alcoholic liquor to any person under the age of 21 years.

(2) Furnishing alcoholic liquor to a minor is a class B misdemeanor for which the minimum fine is \$200.

(3) As used in this section, "alcoholic liquor" has the meaning provided by K.S.A. 41-102 and amendments thereto.

History: L. 1969, ch. 180, § 21-3610; L. 1988, ch. 165, § 7; July 1.

Source or prior law:
38-715.

Judicial Council, 1968: This section restates former K.S.A. 38-715, passed by the legislature in 1965. Presumably it reflects the current thinking of the legislature.

Law Review and Bar Journal References:

"Third Party Liability for Drunken Driving," Betsey J. Morgan, 26 W.L.J. 267, 280, 295 (1987).

Attorney General's Opinions:

Intoxicating liquors and beverages; licensing and related provisions; classes of persons to whom licenses not issued; conviction of violation of intoxicating liquor laws. 85-44.

Intoxicating liquors; cereal malt beverages; local regulations. 86-23.

National minimum drinking age act; history and intent of language of 41-104. 86-74.

CASE ANNOTATIONS

1. Discussed; absent legislation, suppliers of alcohol not liable to victims of intoxicated tort-feasors; violation hereof, not negligence per se. Ling v. Jan's Liquors, 237 K. 629, 639, 640, 703 P.2d 731 (1985).

2. Seller need not have knowledge of minor's age; statute neither unconstitutionally vague nor overbroad. State v. Robinson, 239 K. 269, 272, 274, 718 P.2d 1313 (1986).

21-3610a. Furnishing cereal malt beverage to a minor. (a) Furnishing cereal malt beverage to a minor is buying for or selling, giving or furnishing, whether directly or indirectly, any cereal malt beverage to any person under the legal age for consumption of cereal malt beverage.

(b) Furnishing cereal malt beverage to a minor is a class B misdemeanor for which the minimum fine is \$200.

(c) This section shall not apply to the furnishing of cereal malt beverage by a parent or legal guardian to such parent's child or such guardian's ward.

(d) As used in this section, "cereal malt beverage" and "legal age for consumption of cereal malt beverage" have the meanings provided by K.S.A. 41-2701 and amendments thereto.

(e) This section shall be part of and supplemental to the Kansas criminal code.

(4) watchmen, while actually engaged in the performance of the duties of their employment;

(5) private detectives licensed by the state to carry the firearm involved, while actually engaged in the duties of their employment;

(6) detectives or special agents regularly employed by railroad companies or other corporations to perform full-time security or investigative service, while actually engaged in the duties of their employment; or

(7) the state fire marshal, the state fire marshal's deputies or any member of a fire department authorized to carry a firearm pursuant to K.S.A. 31-157 and amendments thereto, while engaged in an investigation in which such fire marshal, deputy or member is authorized to carry a firearm pursuant to K.S.A. 31-157 and amendments thereto.

(c) Unlawful discharge of a firearm is a class C misdemeanor.

History: L. 1986, ch. 126, § 2; July 1.

Article 43.—CRIMES AGAINST THE PUBLIC MORALS

21-4301. Promoting obscenity. (1) Promoting obscenity is knowingly or recklessly:

(a) Manufacturing, issuing, selling, giving, providing, lending, mailing, delivering, transmitting, publishing, distributing, circulating, disseminating, presenting, exhibiting or advertising any obscene material or obscene device; or

(b) possessing any obscene material or obscene device with intent to issue, sell, give, provide, lend, mail, deliver, transfer, transmit, publish, distribute, circulate, disseminate, present, exhibit or advertise such material or device; or

(c) offering or agreeing to manufacture, issue, sell, give, provide, lend, mail, deliver, transmit, publish, distribute, circulate, disseminate, present, exhibit or advertise any obscene material or obscene device; or

(d) producing, presenting or directing an obscene performance or participating in a portion thereof which is obscene or which contributes to its obscenity.

(2) Evidence that materials or devices were promoted to emphasize their prurient appeal or sexually provocative aspect shall be relevant in determining the question of the obscenity of such materials or devices. There shall be a presumption that a person promoting obscene materials or obscene devices did so knowingly or recklessly if:

(a) The materials or devices were promoted to emphasize their prurient appeal or sexually provocative aspect; or

(b) the person is not a wholesaler and promotes the materials or devices in the course of the person's business.

(3) (a) Any material or performance is "obscene" if:

(i) The average person applying contemporary community standards would find that the material or performance, taken as a whole, appeals to the prurient interest;

(ii) the average person applying contemporary community standards would find that the material or performance has patently offensive representations or descriptions of (A) ultimate sexual acts, normal or perverted, actual or simulated, including sexual intercourse or sodomy, or (B) masturbation, excretory functions, sadomasochistic abuse or lewd exhibition of the genitals; and

(iii) taken as a whole, a reasonable person would find that the material or performance lacks serious literary, educational, artistic, political or scientific value.

(b) "Material" means any tangible thing which is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound or other manner.

(c) "Obscene device" means a device, including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital organs.

(d) "Performance" means any play, motion picture, dance or other exhibition performed before an audience.

(e) "Sexual intercourse" and "sodomy" have the meanings provided by K.S.A. 21-3501 and amendments thereto.

(f) "Wholesaler" means a person who sells, distributes or offers for sale or distribution obscene materials or devices only for resale and not to the consumer and who does not manufacture, publish or produce such materials or devices.

(4) It is a defense to a prosecution for obscenity that:

(a) The persons to whom the allegedly obscene material was disseminated, or the audience to an allegedly obscene performance, consisted of persons or institutions having scientific, educational or governmental justification for possessing or viewing the same;

(b) the defendant is an officer, director, trustee or employee of a public library and the