SURVEY OF KANSAS LAW: CRIMINAL LAW

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This article will discuss certain of the significant enactments of the Kansas legislature and decisions of the Kansas appellate courts during the past two years in the area of substantive criminal law.[1] No attempt has been made to be comprehensive, but care has been taken to avoid duplicating the efforts of others.[2] The topics covered include sex offenses, anticipatory crimes, sentencing and parole, and the insanity defense and diminished capacity. A final section will group together other noteworthy decisions that do not fit under any of these topics.

I. SEX OFFENSES

During the 1983 session, the Kansas Legislature enacted a comprehensive revision of Article 35 of the Kansas Criminal Code dealing with sex offenses. Significant changes were made in the rape statute, the statutes dealing with indecent liberties with a child and sodomy, and the shield statute. In addition, new statutes proscribing sexual battery were enacted.

A. Rape

1. *The Rape Statute*

In the area of substantive criminal law, the amendments to the rape statute[3] are without doubt the most significant and controversial product of the 1983 legislative session. Prior to July 1, 1983,[4] rape in Kansas was the act of sexual intercourse committed by a man with a woman not his wife, without the woman's consent, when the woman's resistance was overcome by force or fear or the woman was unconscious or physically powerless to resist.[5] Sexual intercourse was

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* B.A., (1973) Duke; J.D. (1977), Univ. of Va.

[1] The survey period includes the 1982 and 1983 sessions of the Kansas legislature and decisions of the Kansas Supreme Court and the Kansas Court of Appeals between July 1, 1982 and June 30, 1983.

[2] During the 1982 session, the Kansas legislature amended the statute dealing with driving while under the influence of alcohol or drugs. KAN. STAT. ANN. § 8-1567 (1982). *See also id.* at §§ 8-1001, 8-1005. The new statute has been commented upon extensively. *See* Comment, *The New Kansas Drunk Driving Law: A Closer Look*, 31 KAN. L. REV. 409 (1983); Note, *The New Kansas DUI Law: Constitutional Issues and Practical Problems*, 22 WASHBURN L.J. 340 (1983); Cox and Strole, *S.B. 699—A Comment on Kansas' New "Drunk Driving" Law*, 51 J.B.A.K. 230 (1982). Since these articles were published, the Kansas Supreme Court has held, following South Dakota v. Neville, 51 U.S.L.W. 4148 (Feb. 22, 1983), that admission into evidence of a defendant's refusal to take a blood alcohol test does not violate the privilege against self-incrimination contained in the fifth amendment of the United States Constitution or Section 10 of the Bill of Rights of the Kansas Constitution. State v. Compton, 233 Kan. 690, 693-94, 664 P.2d 1370, 1374-75 (1983). The court also held that the prohibition against plea bargaining contained in the amended statute was not a sufficient encroachment upon the powers of the prosecutor so as to constitute a violation of the constitutional separation of powers principle. *Id.* at 701, 664 P.2d at 1379. In State v. Mourning, 233 Kan. 678, 664 P.2d 857 (1983), the Kansas Supreme Court held that reckless driving, KAN. STAT. ANN. § 8-1566 (1982), is not a lesser included offense of driving while under the influence of alcohol or drugs.

[3] Act of April 18, 1983, ch. 109, § 2, 1983 Kan. Sess. Laws 650.

[4] The effective date of the amendments to Article 35 of the Kansas Criminal Code.

[5] KAN. STAT. ANN. § 21-3502 (1981). Rape also occurred when the woman was incapable of giving her consent because of mental deficiency or disease, which condition was known to the man or was reasonably apparent to him; or when the woman's resistance was prevented by the effect of any alcoholic liquor, narcotic, drug or other substance administered to the woman by the man or another for the purpose of preventing the woman's resistance, unless the woman voluntarily consumed or allowed the administration of the substance with knowledge of its nature. *Id.*

defined as any penetration of the female sex organ by the male sex organ.[6] Thus, a husband could not rape his wife, the so-called spousal exemption; a man could not be raped by a woman; a woman could not be raped by another woman; a woman with the capacity to resist had to do so; and rape did not include penetration of the female sex organ by anything other than the male sex organ.

The situation changed dramatically with the enactment of the amended rape statute. Rape is now sexual intercourse with a person who does not consent to the sexual intercourse when the victim is overcome by force or fear or the victim is unconscious or physically powerless.[7] Sexual intercourse in turn is defined as any penetration, however slight,[8] of the female sex organ by a finger, the male sex organ, or any object.[9]

A number of important differences from the former statute are apparent. First, there are no longer any references to man, woman, and wife in the definition of rape. Instead, the new statute uses the sexually neutral terms "person" and "victim."[10] One result of this change is that the spousal exemption is eliminated and a husband can be charged with raping his wife. A second result is that a woman can be charged with raping a man. The amended statute requires that there be penetration of the female sex organ by the male sex organ or another object.[11] It does not, however, specify which of the individuals must be the active party.

A second important difference from the former rape statute is the expansion of the definition of sexual intercourse to include penetration of the female sex organ by a finger or other object.[12] As a result, a man can be charged with raping a woman with a finger or other object. More significantly, a woman can be charged with raping another woman. A third important difference from the former rape statute is that all references to resistance by the victim have been eliminated.[13]

2. *Rape Trauma Syndrome and Corroboration*

The Kansas Supreme Court decided two rape cases during the survey period that primarily involved evidentiary issues, but that are relevant to a discussion of recent developments in the area of rape. In *State v. Marks*,[14] the defendant was charged with rape.[15] The defendant did not deny that he had sexual intercourse

[6] *Id.* at § 21-3501 (1981).

[7] Act of April 18, 1983, ch. 109, § 2(1), 1983 Kan. Sess. Laws 650. The other two circumstances under which rape can occur were carried over into the new statute except that references to woman and man are replaced by victim and offender and references to resistance by the woman are deleted. *See supra* note 5.

[8] If there is any penetration, even though slight, the crime of rape is complete. In State v. Korbel, 231 Kan. 657, 659, 647 P.2d 1301, 1304 (1982), the Kansas Supreme Court held that in an instance in which the penetration was slight, it was proper for the trial court to refuse an instruction on attempted rape.

[9] Act of April 18, 1983, ch. 109, § 1(1), 1983 Kan. Sess. Laws 650. An exception is provided for penetration of the female sex organ by a finger or object in the course of the performance of generally recognized health care practices or a body cavity search authorized by statute. *Id.* Under this definition of sexual intercourse, a man cannot have sexual intercourse with another man, and therefore, could not be convicted of raping another man. *Id.*

[10] *Id.* at § 2(1).

[11] *Id.* at § 1(1), 2(1).

[12] *Id.* at § 1(1).

[13] *Id.* at § 2(1).

[14] 231 Kan. 645, 647 P.2d 1292 (1982).

[15] KAN. STAT. ANN. § 21-3502 (1981). The defendant also was charged with and convicted of aggravated sodomy. *Id.* at § 21-3506.

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[16] 231 Kan. at 651-52, 647 P.2d

[17] *Id.* at 653, 647 P.2d at 1299.

[18] *Id.* The psychiatrist indicate
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[19] *Id.*

[20] *See* KAN. STAT. ANN. § 60-45

[21] 231 Kan. at 653-54, 647 P.2d

[22] *See* KAN. STAT. ANN. § 60-456
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[23] The court cited a number of

[24] *Id.*

[25] Courts in other states are divi
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with the victim, but he asserted consent as his defense.[16] Over the defendant's objection, the state called a forensic psychiatrist who testified about the diagnosis and treatment of post-traumatic stress disorders. The condition may result when a person experiences a "very frightening, stressful event" and manifests itself in a kind of "psychological hangover."[17] According to the psychiatrist, a type of post-traumatic stress disorder known as rape trauma syndrome may result from a sexual assault.[18] The psychiatrist examined the victim two weeks after the rape. Based upon his evaluation, he testified that in his opinion she had been the victim of "a frightening assault, an attack," and that she was suffering from rape trauma syndrome.[19]

The defendant appealed his conviction for rape to the Kansas Supreme Court. The defendant did not contend that the psychiatrist lacked the requisite "special knowledge, skill, experience or training"[20] to testify as an expert in the area of post-traumatic stress disorders. Rather, he argued that expert testimony regarding rape trauma syndrome should be *per se* inadmissable in a case where consent is the defense because it invades the province of the jury.[21] The Kansas Supreme Court disagreed. It acknowledged that identification of rape trauma syndrome was a relatively new psychiatric development. The court indicated, however, that if the presence of rape trauma syndrome is detectible and reliable evidence that a forcible assault took place, it is relevant when a defendant claims that the victim consented to sexual intercourse.[22] The court examined the literature and found that rape trauma syndrome is generally accepted as a common reaction to sexual assault.[23] It concluded that qualified expert testimony regarding the existence of rape trauma syndrome is relevant and admissible in a case in which the defense to a rape charge is consent.[24]

The clear implication from the court's opinion is that expert testimony regarding rape trauma syndrome is admissible only where the defense is consent. In such a situation, the identity of the alleged offender is not in issue and the question is whether the admitted sexual intercourse was forcible. Where identity is in issue, evidence of rape trauma syndrome would ordinarily be irrelevant. The defendant in such a case would be asserting that he was not the person involved in the sexual intercourse, rather than that the intercourse was not forcible.[25]

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[16] 231 Kan. at 651-52, 647 P.2d at 1298.

[17] *Id.* at 653, 647 P.2d at 1299.

[18] *Id.* The psychiatrist indicated that the symptoms of rape trauma syndrome included "fear of offender retaliation, fear of being raped again, fear of being home alone, fear of men in general, fear of being out alone, sleep disturbance, change in eating habits and sense of shame." *Id.*

[19] *Id.*

[20] *See* KAN. STAT. ANN. § 60-456(b) (1976).

[21] 231 Kan. at 653-54, 647 P.2d at 1299.

[22] *See* KAN. STAT. ANN. § 60-456(d) (1976) ("Testimony in the form of opinions or inferences otherwise admissible under this article is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of fact.").

[23] The court cited a number of sources in support of its finding. 231 Kan. at 654, 647 P.2d at 1299.

[24] *Id.*

[25] Courts in other states are divided on the admissibility of evidence of rape trauma syndrome. Expert testimony of a rape victim advocate was admitted in State v. LeBrun, 37 Or. App. 411, —, 587 P.2d 1044, 1047 (1978). *See also* State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983) (reaction of victims of familial sexual abuse). In companion cases, the Minnesota Supreme Court held that expert testimony regarding rape trauma syndrome was erroneously admitted. State v. Saldana, 324 N.W.2d 227 (Minn. 1982); State v. McGee, 342 N.W.2d 232 (Minn. 1982). The court determined that "[t]he scientific evaluation of rape trauma syndrome has not reached a level of reliability that surpasses the quality of common sense evaluation present in jury deliberations," and that "[s]ince jurors of ordinary abilities are competent to consider

The second case involving an evidentiary issue in the context of a rape prosecution was *State v. Matlock*.[26] The defendant was convicted of raping his 22-year-old adopted stepdaughter. The rape charge was not filed until 15 months after the alleged rape took place. The only witness called by the state was the victim. The defendant took the stand and unequivocably denied the charge. In addition, four witnesses, including the victim's mother and two sisters, were in the house on the night in question and testified that they did not see or hear anything.

On appeal to the Kansas Supreme Court, the defendant argued that the uncorroborated testimony of the alleged rape victim was insufficient to sustain a conviction.[27] The court indicated that Kansas has not followed the lead of several states which have modified the common law and required some corroboration in order to sustain a conviction of rape.[28] Kansas has consistently held that the testimony of the victim alone is sufficient to sustain a conviction. The court noted that appellate courts in other states have held that in order to convict on the uncorroborated testimony of the victim, the victim's testimony must be clear and convincing and that when her testimony is so incredible and improbable as to defy belief, the evidence is not sufficient to sustain a conviction.[29] Applying this standard, the court concluded that the uncorroborated testimony of the victim in *Matlock* was unbelievable to the extent that it was not sufficient to sustain the conviction of the defendant for rape.[30] The court reversed the defendant's conviction.

B. Indecent Liberties with a Child

1. *The Indecent Liberties with a Child Statutes*

Prior to July 1, 1983, there were two statutes in Kansas dealing with indecent liberties with a child: indecent liberties with a child[31] and indecent liberties with a ward.[32] Indecent liberties with a child was engaging in sexual intercourse or certain other proscribed conduct with a child under the age of 16 years who was not the spouse of the offender.[33] Indecent liberties with a ward was indecent liberties with a child by a guardian or proprietor or employee of a foster home, orphanage, or other public or private institution for the care and custody of minor children.[34] Because consent of the victim was irrelevant, these statutes may be viewed as successors to the former statutory rape statutes.[35]

The indecent liberties statute was not amended materially during the 1983

the evidence and determine whether the alleged crime occured, the danger of unfair prejudice outweighs any probative value." State v. Saldana, 324 N.W.2d 227, 230 (Minn. 1982).

[26] 233 Kan. 1, 660 P.2d 945 (1983).

[27] *Id.* at 2, 660 P.2d at 946.

[28] *Id.* at 3, 660 P.2d at 946.

[29] *Id.*

[30] *Id.* at 4, 660 P.2d at 947.

[31] KAN. STAT. ANN. § 21-3503 (1981).

[32] *Id.* at § 21-3504.

[33] *Id.* at § 21-3503. The other conduct proscribed by the statute included 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. *Id.*

[34] *Id.* at § 21-3504.

[35] Consent was and is relevant if the offender and the child are married. *Id.* at § 21-3503(1); Act of April 18, 1983, ch. 109, § 3(1), 1983 Kan. Sess. Laws 650, 651.

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[38] Act of April 18, 1983, ch. 109,
[39] *Id.* at § 3(1)(a).
[40] *Id.* at §§ 2(2), 4(2) (class B felon
§ 3(2).
[41] 231 Kan. 694, 647 P.2d 1323 (1
[42] *Id.* at 696, 647 P.2d at 1325.
[43] KAN. STAT. ANN. § 21-3107(3)
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[44] 231 Kan. at 696-97, 647 P.2d at
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[45] The court recognized that in so
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P.2d at 1326.

legislative session. The legislature did, however, incorporate the expanded definition of sexual intercourse used in the rape statute so that indecent liberties with a child can involve penetration of the female sex organ by a finger or other object.[36] An additional result of this expanded definition is that a woman can engage in indecent liberties with a female child.[37]

Of greater significance is the amendment of the indecent liberties with a ward statute. The statute is now denominated aggravated indecent liberties with a child.[38] In addition to the status relationships covered by the former statute, the amended statute applies to situations where the offender is a parent, adoptive parent, stepparent or grandparent of the child.[39] Aggravated indecent liberties with a child is a felony of the same class as rape.[40]

2. *Lesser Included Offense of Rape*

In two cases decided under the former statutes, but which appear to remain relevant after their amendment, the Kansas Supreme Court considered the relationship between the rape and indecent liberties with a child statutes. Under different fact situations, the court held in one case that indecent liberties with a child was not a lesser included offense of rape and in the other case that it was.

In *State v. Lilley*,[41] the defendant was convicted of raping a 14-month-old girl. On appeal to the Kansas Supreme Court, the defendant argued that it was error for the trial court to refuse to instruct on the lesser included offense of indecent liberties with a child.[42] The court noted that a trial court's duty to instruct on lesser included offenses is governed by statute,[43] and that the duty arises only when there is evidence demonstrating that the defendant reasonably might have been convicted of the lesser offense.[44] The court concluded that under the circumstances of the case, the age of the victim prevented her consent and, therefore, no evidence of the lesser offense could have been offered.[45] The refusal to

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[36] Act of April 18, 1983, ch. 109, §§ 1(1) and 3(1)(a), 1983 Kan. Sess. Laws 650, 651.

[37] Under the former statute, a woman could have engaged in indecent liberties only with a male child. KAN. STAT. ANN. § 21-3501(1) (1981). The amended statute continues to proscribe conduct other than sexual intercourse which would cover a male-male child or female-female child situation. Act of April 18, 1983, ch. 109, § 3(1)(b), 1983 Kan. Sess. Laws 650, 651; *see supra* note 33. A man, however, cannot engage in sexual intercourse with a male child. *See supra* note 9. The latter point is worthy of note only because an intent element must be shown where conduct other than sexual intercourse is involved, Act of April 18, 1983, ch. 109, § 3(1)(b), 1983 Kan. Sess. Laws 650, 651, which could cause problems of proof under certain circumstances.

[38] Act of April 18, 1983, ch. 109, § 4, 1983 Kan. Sess. Laws 650, 651.

[39] *Id.* at § 3(1)(a).

[40] *Id.* at §§ 2(2), 4(2) (class B felonies). Indecent liberties with a child remains a class C felony. *Id.* at § 3(2).

[41] 231 Kan. 694, 647 P.2d 1323 (1982).

[42] *Id.* at 696, 647 P.2d at 1325.

[43] KAN. STAT. ANN. § 21-3107(3) (1981). The lesser included offenses statute was amended during the 1983 legislative session. Previously, the trial court was required to give instructions on lesser included offenses even over the defendant's objection. The amended statute provides that "[i]f the defendant objects to the giving of the instructions, the defendant shall be considered to have waived objection to any error in the failure to give them, and the failure shall not be a basis for reversal of the case on appeal." Act of April 18, 1983, ch. 107, § 1(3), 1983 Kan. Sess. Laws 645.

[44] 231 Kan. at 696-97, 647 P.2d at 1326 (citing State v. Staab, 230 Kan. 329, 339, 635 P.2d 257, 264 (1981)).

[45] The court recognized that in some situations, presumably where the victim was old enough to consent, indecent liberties with a child could constitute a lesser included offense of rape. 231 Kan. at 696, 647 P.2d at 1326.

give the instruction was proper.[46]

A different situation was presented in *State v. Coberly*.[47] The defendant was convicted of raping and engaging in indecent liberties with a 15-year-old girl.[48] On appeal to the Kansas Supreme Court, the defendant argued that indecent liberties with a child is a lesser included offense of rape and, therefore, that the two charges were multiplicitous and constituted double jeopardy.[49] Citing earlier case law,[50] the court indicated that the test for multiplicity is whether each of the offenses charged required proof of an additional element that the other did not.[51] If proof of an additional element is required, the offenses are not multiplicitous.

The court examined the rape and indecent liberties with a child statutes and found that when a man has forcible sexual intercourse with a girl under 16 years of age, he has committed both rape and indecent liberties with a child.[52] The court concluded that the crime of indecent liberties with a child was necessarily proved when the evidence presented by the State established that the defendant had forcible sexual intercourse with the victim, who was under 16 years of age.[53] Indecent liberties with a child was, therefore, a lesser included offense of rape.[54]

The decisions in *Lilley* and *Coberly* are consistent. *Coberly* holds that when a defendant has forcible sexual intercourse with a victim under 16 years of age, the defendant cannot be convicted of both rape and indecent liberties with a child. A rape conviction normally would be appropriate because the indecent liberties with a child statute is meant for the situation where the victim consents. *Lilley* holds that a conviction for indecent liberties with a child would not be appropriate where the victim was incapable of consenting.

C. *The Sodomy Statutes*

Prior to July 1, 1983, the sodomy statute prohibited oral or anal copulation between persons who were not husband and wife or consenting adult members of the opposite sex, or between a person and an animal, or coitus with an animal.[55] Any penetration, however slight, was sufficient.[56] The aggravated sodomy statute prohibited sodomy committed with force or threat of force, when bodily harm was inflicted on the victim, or the act was committed with a child under 16 years of age.[57] Aggravated sodomy was a felony of the same class as rape, and sodomy was a misdemeanor.[58]

The sodomy statute was amended by transferring the description of the proscribed conduct to the general definitional section.[59] In addition to using more

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[46] *Id.*
[47] 233 Kan. 100, 661 P.2d 383 (1983).
[48] The defendant also was convicted of aggravated kidnapping, KAN. STAT. ANN. § 21-3421 (1981).
[49] 233 Kan. at 107, 661 P.2d at 389. *See* KAN. STAT. ANN. § 21-3107(2)(d) (1981).
[50] *See, e.g.*, Jarrell v. State, 212 Kan. 171, 173, 510 P.2d 127, 129 (1973).
[51] 233 Kan. at 107, 661 P.2d at 389.
[52] *Id.* at 108, 661 P.2d at 390.
[53] *Id.*
[54] *Id.* The rape conviction was affirmed and the indecent liberties with a child conviction was reversed.
[55] KAN. STAT. ANN. § 21-3505 (1981).
[56] *Id.*
[57] *Id.* at § 21-3506.
[58] *Id.* at §§ 21-3505, 21-3506.
[59] Act of April 18, 1983, ch. 109, § 1(2), 1983 Kan. Sess. Laws 650, 650.

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[61] KAN. STAT. ANN. § 21-3505
[62] Act of April 18, 1983, ch. 10
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[63] Act of April 18, 1983, ch. 10
[64] *Id.* at § 6(1)(b), (c). Consent
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[65] *Id.* at §§ 1(2), 6(1)(c).
[66] *See supra* note 9.
[67] Act of April 18, 1983, ch. 10
[68] *See id.* at § 13(2) (class A mis
[69] Act of April 18, 1983, ch. 10

modern terminology, the definition of sodomy has been expanded along the same lines as the definition of sexual intercourse. Sodomy now includes any penetration, however slight, of the anal opening by any body part or object.[60]

The amended sodomy statute, which now denominates the offense criminal sodomy, clarifies the target of the statute. Instead of speaking in terms of who is excluded from coverage—under the former statute husbands and wives and consenting adult members of the opposite sex[61]—the amended statute specifies who is included. Criminal sodomy is sodomy between members of the same sex.[62] Thus, the target of the amended statute is clearly homosexual conduct.

The amendments to the aggravated sodomy statute are more significant. Aggravated criminal sodomy now includes: (1) sodomy with a child who is not married to the offender and who is under 16 years of age; (2) causing a child under 16 years of age to engage in sodomy with a person or an animal; or (3) 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 a person or animal, under the same circumstances as for rape, including when the victim is overcome by force or fear or the victim is unconscious or physically powerless.[63]

The first change is that aggravated sodomy with a child or adult now includes causing the child or adult to engage in sodomy with another person or animal.[64] More importantly, elimination of the requirement that the persons engaging in sodomy not be husband and wife means that a husband or wife can commit aggravated sodomy with his or her spouse if the spouse does not consent.[65] Aggravated sodomy can be committed by a male with a male, thereby covering the situation of male homosexual rape.[66]

D. The Sexual Battery Statutes

The new offenses of sexual battery and aggravated sexual battery were enacted by the Kansas legislature during the 1983 session. 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.[67] This statute, which is a misdemeanor of a higher class than simple battery,[68] prohibits nonconsensual contact of a sexual nature that does not involve force. The "with the intent to arouse or satisfy the sexual desires" language is drawn from the indecent liberties with a child statute.[69]

Aggravated sexual battery is, among other things: (1) the unlawful, inten-

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[60] *Id.* An exception similar to the exception in the rape statute is provided for penetration of the anal opening by a finger or object in the course of the performance of generally recognized health care practices or a body cavity search authorized by statute. *Id.*

[61] KAN. STAT. ANN. § 21-3505 (1981).

[62] Act of April 18, 1983, ch. 109, § 5(1), 1983 Kan. Sess. Laws 650, 652. The amended statute continues to prohibit sodomy between a person and an animal. *Id.*

[63] Act of April 18, 1983, ch. 109 § 6(1), 1983 Kan. Sess. Laws 650, 652. *See also supra* note 7.

[64] *Id.* at § 6(1)(b), (c). Consent is relevant to a charge of aggravated sodomy of a child if the conduct is between the offender and the child and they are married. *Id.* at § 6(1)(a). Otherwise it is irrelevant.

[65] *Id.* at §§ 1(2), 6(1)(c).

[66] *See supra* note 9.

[67] Act of April 18, 1983, ch. 109, § 13, 1983 Kan. Sess. Laws 650, 654.

[68] *See id.* at § 13(2) (class A misdemeanor); KAN. STAT. ANN. § 21-3412 (1981) (class B misdemeanor).

[69] Act of April 18, 1983, ch. 109, § 3(1)(b), 1983 Kan. Sess. Laws 650, 651.

tional 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; (2) sexual battery against a person under 16 years of age; or (3) sexual battery committed in another's dwelling by one who entered into or remained in the dwelling without authority.[70] The first situation reaches nonconsensual contact of a sexual nature when force is used, but when the conduct of the offender does not constitute rape or sodomy. The second situation overlaps with the indecent liberties with a child statute.[71] It is not clear exactly how these statutes are meant to fit together.[72] The third situation appears to cover sexual battery committed during a criminal trespass.[73]

Sexual battery and aggravated sexual battery cannot be committed on the spouse of the offender.[74] The definition of spouse incorporated into these statutes is, however, narrower than the ordinary usage of the term. Spouse as used in the sexual battery statutes 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.[75] Unlike the rape and sodomy statutes which make no distinction between married and unmarried victims, the legislature, in enacting the sexual battery statutes, recognized the difficulty of bringing less serious sexual contacts between husband and wives within the reach of the criminal law.[76] The narrow definition of spouse acknowledges, however, that the same considerations are not involved when the marital relationship has been disrupted.

E. The Shield Statute

Prior to July 1, 1983, the Kansas shield statute excluded from a rape trial evidence of the victim's previous sexual conduct with any person, including the defendant, unless after motion and hearing, the court found that the evidence was relevant.[77] The rationale behind the shield statute was expressed by the Kansas Supreme Court in *State v. Stellwagen*:[78]

> In the rape shield act the legislature sent a clear message to the courts that a rape victim's prior sexual activity is generally inadmissible since prior sexual activity, even with the accused, does not of itself imply consent to the act complained of. In saying this the legislature was attempting to further the strong state interest in protecting the rape victim.[79]

The shield formerly applied to prosecutions for rape, aggravated assault with

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[70] *Id.* at § 14. Aggravated sexual battery also includes sexual battery of a person who is unconscious or physically powerless, or sexual battery 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. *Id.*

[71] *Id.* at § 3(1).

[72] Aggravated sexual battery which requires lack of consent is a class D felony. *Id.* at § 14(2). Indecent liberties with a child which may or may not be with the consent of the child is a class C felony. *Id.* at § 3(2).

[73] KAN. STAT. ANN. § 21-3721 (1981).

[74] Act of April 18, 1983, ch. 109, §§ 13, 14, 1983 Kan. Sess. Laws 650, 654.

[75] *Id.* at § 1(3).

[76] Aggravated sexual battery clearly presents a closer question since force is involved.

[77] KAN. STAT. ANN. § 60-447a (1976).

[78] 232 Kan. 744, 747, 659 P.2d 167, 171 (1983).

[79] Evidence that the defendant and the victim had sexual intercourse six months before the incident in question and that the victim fantasized about being raped was excluded. *Id.* at 746, 659 P.2d at 169.

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During the 1983 session, include within its coverage can be shown, evidence of in prosecutions for rape, in erties with a child, aggrav vated indecent solicitation sexual battery, incest, aggr mit any of the above, indec or conspiracy to commit an reflects the belief of the legi setting.

II. ANTICIPATORY CRIMES

A. State v. Sexton *and the (*

Prior to the 1982 legislat Kansas: attempt[82] and con was faced with the followin one to kill his estranged w two undercover agents of Firearms met several times mined and details for carry wife, were furnished by the

Based upon the informat charged with an attempt t motion of the defendant at charge. The trial court hel Kansas. The State appeale In *State v. Sexton*,[86] the Kan that the crime of attempte rationale for this conclusio

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[80] KAN. STAT. ANN. § 60-447a(1

[81] Act of April 18, 1983, ch. 109

[82] KAN. STAT. ANN. § 21-3301 legislative session to make clear that punishment specified in any other st Kan. Sess. Laws 646, 649.

[83] KAN. STAT. ANN. § 21-3302 (

[84] *See* State v. Sexton, 232 Kan.

[85] KAN. STAT. ANN. §§ 21-3301,

[86] 232 Kan. 539, 657 P.2d 43 (1

[87] *Id.* at 540, 657 P.2d at 44.

[88] *Id.* at 540-42, 657 P.2d at 44-

[89] "Legal impossibility [in the co ant performs, or sets in motion, even

intent to rape, attempt to commit rape, or conspiracy to commit rape.[80]

During the 1983 session, the Kansas legislature amended the shield statute to include within its coverage a broader spectrum of sex offenses. Unless relevancy can be shown, evidence of the victim's previous sexual conduct now is excluded in prosecutions for rape, indecent liberties with a child, aggravated indecent liberties with a child, aggravated criminal sodomy, enticement of a child, aggravated indecent solicitation of a child, sexual exploitation of a child, aggravated sexual battery, incest, aggravated incest, aggravated assault with intent to commit any of the above, indecent solicitation of a child, sexual battery, or attempt or conspiracy to commit any of the above.[81] The broadening of the shield statute reflects the belief of the legislature that the former statute worked well in the rape setting.

II. ANTICIPATORY CRIMES

A. State v. Sexton *and the Crime of Attempted Conspiracy*

Prior to the 1982 legislative session, there were only two anticipatory crimes in Kansas: attempt[82] and conspiracy.[83] Under this statutory scheme, a trial court was faced with the following fact situation.[84] An individual sought to hire someone to kill his estranged wife. Acting on a tip from a local police department, two undercover agents of the United States Bureau of Alcohol, Tobacco and Firearms met several times with the individual. A price for the killing was determined and details for carrying out the killing, including the whereabouts of his wife, were furnished by the individual to the agents.

Based upon the information obtained by the federal agents, the individual was charged with an attempt to conspire to commit the murder of his wife.[85] On motion of the defendant at the preliminary hearing, the trial court dismissed the charge. The trial court held that there was no crime of attempted conspiracy in Kansas. The State appealed the trial court's order to the Kansas Supreme Court. In *State v. Sexton*,[86] the Kansas Supreme Court affirmed the trial court, agreeing that the crime of attempted conspiracy did not exist in Kansas.[87] The court's rationale for this conclusion is not entirely persuasive.

After framing the question and setting out the attempt and conspiracy statutes, the Kansas Supreme Court quoted at length from the trial court's order.[88] The trial court offered two arguments in support of its holding that there was no crime of attempted conspiracy in Kansas. The first argument relied upon the doctrine of legal impossibility.[89] It was undisputed that the federal agents had

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[80] KAN. STAT. ANN. § 60-447a(1) (1976).

[81] Act of April 18, 1983, ch. 109, § 15, 1983 KAN. STAT. ANN. 650.

[82] KAN. STAT. ANN. § 21-3301 (1981). The general attempt statute was amended during the 1983 legislative session to make clear that the punishment scheme set forth therein would give way to a different punishment specified in any other statute prohibiting an attempt. Act of April 7, 1983, ch. 108, § 8, 1983 Kan. Sess. Laws 646, 649.

[83] KAN. STAT. ANN. § 21-3302 (1981).

[84] *See* State v. Sexton, 232 Kan. 539, 657 P.2d 43 (1983).

[85] KAN. STAT. ANN. §§ 21-3301, -3302, -3401 (1981).

[86] 232 Kan. 539, 657 P.2d 43 (1983).

[87] *Id.* at 540, 657 P.2d at 44.

[88] *Id.* at 540-42, 657 P.2d at 44-45.

[89] "Legal impossibility [in the context of an attempt charge] occurs when the actions which the defendant performs, or sets in motion, even if fully carried out as he desires, would not constitute a crime." State

sentenced under the mandatory minimum firearm statute, were eligible for parole after serving the entire minimum sentence, less good time credits.[202] An exception provided that an inmate sentenced for a class A felony was not eligible for parole before serving 15 years, regardless of good time credits.[203] The amendment also provided that if consecutive sentences were imposed, the inmate was eligible for parole after serving the aggregate minimum sentences, less good time credits.[204]

The second amendment changed the manner in which parole is determined when consecutive sentences are imposed and at least one of the crimes for which the inmate was sentenced was a class A felony. The amendment provides that if consecutive sentences were imposed, the inmate is eligible for parole after serving the total of the aggregate minimum sentences, less good time credits for those crimes that were not class A felonies, plus an additional 15 years without deduction of good time credits for each crime that was a class A felony.[205] The second amendment makes the parole eligibility of inmates serving consecutive sentences, one or more of which is for a class A felony, consistent with the eligibility of inmates serving a single sentence for a class A felony.

IV. THE INSANITY DEFENSE AND DIMINISHED CAPACITY

A. The Insanity Defense

The Kansas Supreme Court consistently has refused to waiver from its support of the *M'Naughten* test for insanity.[206] Most recently in *State v. Grauerholz*,[207] the court rejected the defendant's contention that application of the *M'Naughten* rule unduly prejudiced him and that the court should adopt the American Law Institute test for insanity.[208] At present, all federal jurisdictions and a bare majority of the states use some variant of the American Law Institute test.[209] In the wake of the not guilty by reason of insanity verdict in the case of John Hinckley, the man accused of attempting to assassinate President Reagan, both the American Bar Association and the American Psychiatric Association have come out in favor of returning to a modified *M'Naughten* test for insanity.[210] Thus, the Kansas Supreme Court can feel vindicated in its perseverance.

The most important aspect of the alternative tests proposed by the American

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[202] Act of April 23, 1982, ch. 137, § 3(a), 1982 Kan. Sess. Laws 585.

[203] *Id.*

[204] *Id.*

[205] KAN. STAT. ANN. § 22-3717(b) (Supp. 1982).

[206] M'Naughten's Case, 10 Cl. & F. 200, 8 Eng. Rep. 718 (H.L. 1843). The pattern jury instruction that includes the Kansas test for insanity provides in pertinent part:

> The defendant is not criminally responsible for his acts if his mental capacity was such that he did not understand the nature of his acts or did not understand that what he was doing was wrong because of his mental inability to distinguish between right and wrong.

Pattern Instructions for Kansas 2d [Criminal] 54.10 (1982). *See also* State v. Andrews, 187 Kan. 458, 465, 357 P.2d 739, 744-45 (1960), *cert. denied*, 368 U.S. 868 (1961).

[207] 232 Kan. 221, 228, 654 P.2d 395, 401 (1982).

[208] The American Law Institute test for insanity provides: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962).

[209] *American Bar Association Policy on the Insanity Defense*, ABA Standing Comm. on Ass'n Standards for Criminal Justice, app. 1 (Feb. 9, 1983) [hereinafter ABA Policy].

[210] *Id.* at 1; *American Psychiatric Association Statement on the Insanity Defense* 10-12 (Dec. 1982) [hereinafter APA Statement].

Bar Association and the American Psychiatric Association is their elimination of the control or volitional part of the American Law Institute test for insanity.[211] The sole focus of the proposed tests is whether the individual, as a result of mental disease or defect, was unable to appreciate the wrongfulness of his or her conduct at the time of the offense.[212] The tests retain the essence of the first part of the American Law Institute test, which broadened the *M'Naughten* notion of knowledge or cognition by use of the word "appreciate."[213] They do, however, substitute the term "unable to appreciate" for the vaguer term "lacks substantial capacity to appreciate."[214]

B. Diminished Capacity

The State of California pioneered in the development of the doctrine of diminished capacity.[215] In *People v. Anderson*,[216] the California Supreme Court recognized that "[t]he theory that a mental disease or defect not amounting to legal insanity may negate an element of a crime has been adopted in California . . . ."[217] The court indicated that the relevant consideration in cases in which the doctrine was invoked was whether the defendant had a "diminished capacity to achieve the state of mind requisite for the commission of the crime."[218] Although the California courts have referred to the doctrine of diminished capacity as a defense,[219] it clearly is not a defense of the same type as insanity.[220] In *People v. Henderson*, however, the court stated:

> [W]here, as here, substantial evidence sufficient to inform the court that defendant is relying upon the defense of diminished responsibility [capacity] is received, it must on its own motion instruct the jury as to the legal significance of such evidence, for such an instruction is "necessary for the jury to be full and fairly charged upon the relevant law."[221]

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[211] The volitional part of the American Law Institute test for insanity is the latter part: whether the person lacks substantial capacity "to conform his conduct to the requirements of law." MODEL PENAL CODE § 4.01 (Proposed Official Draft 1962). The ABA Policy concludes, "[E]xperience confirms that there is no accurate scientific basis for measuring one's capacity for self-control or for calibrating the impairment of such capacity . . . . In our opinion, to even ask for volitional question invites fabricated expert claims, undermines the equal administration of the penal law and compromises the law's deterrent end." ABA Policy, *supra* note 209, at 4-5. The APA Statement notes: "The concept of volition is the subject of some disagreement among psychiatrists." APA Statement, *supra* note 210, at 11.

[212] ABA Policy, *supra* note 209, at 1; *see also* APA Statement, *supra* note 210, at 12.

[213] ABA Policy, *supra* note 209, at 4; *but see also* APA Statement, *supra* note 210, at 10-11.

[214] ABA Policy, *supra* note 209, at 4.

[215] *See* People v. Wells, 33 Cal. 2d 330, 202 P.2d 53, *cert. denied*, 338 U.S. 836 (1949). *Cf.* People v. Wetmore, 22 Cal. 3d 318, 583 P.2d 1308 (1978).

[216] 63 Cal. 2d 351, 406 P.2d 43, 46 Cal. Rptr. 763 (1965).

[217] *Id.* at —, 406 P.2d at 51, 46 Cal. Rptr. at 771. In People v. Henderson, 60 Cal. 2d 482, 386 P.2d 667, 35 Cal. Rptr. 77 (1963), the California Supreme Court indicated that the purpose and effect of the doctrine of diminished capacity was to ameliorate the *M'Naughten* rule.

[218] 63 Cal. 2d at —, 406 P.2d at 52, 46 Cal. Rptr. at 772.

[219] *See, e.g.*, People v. Henderson, 60 Cal. 2d 482, —, 386 P.2d 677, 682, 35 Cal. Rptr. 77, 82 (1963).

[220] Diminished capacity actually represents a failure by the prosecution to prove an element of the offense charged. *See* People v. Anderson, 63 Cal. 2d 351, —, 406 P.2d 43, 52, 46 Cal. Rptr. 763, 772 (1965). In this respect it is similar to mistake, KAN. STAT. ANN. § 21-3203(1) (1981), or intoxication, *id.* at § 21-3208(2). The defendant ordinarily may be convicted of a lesser crime which does not require the state of mind the defendant is incapable of achieving. For this reason, diminished capacity is sometimes described as a partial defense. Insanity, on the other hand, is a complete defense. The defendant admits the elements of the offense, but contends that his actions should be excused and he should not be held responsible because his mental disease or defect was such that he satisfied the relevant test for insanity.

[221] 60 Cal. 2d at —, 386 P.2d at 682 (citations omitted). *See also* 1 CAL. JURY INST. CRIM. No. 3.35 (4th ed. P.P. 1979). Approval of this instruction was withdrawn after the action of the California legislature referred to in note 227, *infra*. *See* 1 CAL. JURY INST. CRIM. No. 3.35 (4th ed. P.P. 1982).

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[222] *See* Annot., 22 A.L.R.3D 1228

[223] 223 Kan. 322, 614 P.2d 430 (

[224] *Id.* at 332, 614 P.2d at 437. S
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[225] 228 Kan. at 332, 614 P.2d at

[226] *Id.*

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[228] 232 Kan. 221, 229, 654 P.2d

[229] 231 Kan. 167, 170, 642 P.2d

[230] *See* State v. Sexton, 232 Kan.

Thus, regardless of how it was denominated, a defendant in a proper case is entitled to an instruction on diminished capacity.

Courts and legislatures in other states are sharply divided on whether the doctrine of diminished capacity should be recognized, and, if so, to what extent.[222] In *State v. Dargatz*,[223] the defendant argued that the trial court erred in refusing to allow him to assert the defense of diminished capacity. The Kansas Supreme Court held that "[t]he doctrine of diminished mental capacity . . . is inconsistent with the law of this state and we decline to adopt it."[224] In *Dargatz*, evidence of the defendant's diminished mental capacity was admitted by the trial court solely on the issue of the defendant's specific intent to commit the crime charged.[225] In affirming the trial court, the Kansas Supreme Court concluded:

> Although a mental illness or defect not amounting to legal insanity is not a defense, since, for purposes of the capacity to commit crime, degrees of mental abnormality are not recognized, where the crime charged requires a specific intent, evidence of a mental defect which negates the specific intent is admissible.[226]

The proper focus under *Dargatz* is on whether the defendant actually formed the specific intent required rather than on his capacity to do so in the abstract.[227]

In two cases decided during the survey period, the Kansas Supreme Court reiterated its holding *Dargatz*. In *State v. Grauerholz*,[228] the court concluded that a special instruction on the doctrine of diminished capacity was not required. In *State v. Topham*,[229] the court held that instructions on lesser included offenses were not required by the doctrine of diminished capacity.

V. OTHER SIGNIFICANT DECISIONS OF THE KANSAS APPELLATE COURTS

Because there are no common law crimes in Kansas,[230] the appellate courts are concerned primarily with determining the intent of the legislature in enacting certain offenses and with defining undefined terms. The cases discussed below represent some of the significant decisions of the Kansas appellate courts during the survey period in the area of substantive criminal law.

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[222] *See* Annot., 22 A.L.R.3D 1228 (1968).

[223] 223 Kan. 322, 614 P.2d 430 (1980).

[224] *Id.* at 332, 614 P.2d at 437. Specifically, the court concluded that the defense of diminished mental capacity was inconsistent with the *M'Naughten* test for insanity. *Id. See supra* note 217.

[225] 228 Kan. at 332, 614 P.2d at 438.

[226] *Id.*

[227] In reaction to the judicial expansion of the doctrine of diminished capacity, the California legislature amended § 28 of the Penal Code in 1982 to provide in pertinent part:

> (a) Evidence of mental disease, mental defect, or mental disorder shall not be admitted to negate the capacity to form any mental state . . . with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue whether or not the accused actually formed a required specific intent . . . when a specific intent crime is charged.
>
> (b) As a matter of public policy there shall be no defense of diminished capacity, diminished responsibility, or irresistible impulse in a criminal action . . . .

CAL. PENAL CODE § 28 (West 1982 P.P.).

[228] 232 Kan. 221, 229, 654 P.2d 395, 401-02 (1982).

[229] 231 Kan. 167, 170, 642 P.2d 986, 989 (1982).

[230] *See* State v. Sexton, 232 Kan. 539, 542-43, 657 P.2d 43, 46 (1983).