

Colorado

18-3-401. Definitions.

Statute text

As used in this part 4, unless the context otherwise requires:

(1) "Actor" means the person accused of a sexual offense pursuant to this part 4.

(1.5) "Consent" means cooperation in act or attitude pursuant to an exercise of free will and with knowledge of the nature of the act. A current or previous relationship shall not be sufficient to constitute consent under the provisions of this part 4. Submission under the influence of fear shall not constitute consent. Nothing in this definition shall be construed to affect the admissibility of evidence or the burden of proof in regard to the issue of consent under this part 4.

(1.7) "Diagnostic test" means a human immunodeficiency virus (HIV) screening test followed by a supplemental HIV test for confirmation in those instances when the HIV screening test is repeatedly reactive.

(2) "Intimate parts" means the external genitalia or the perineum or the anus or the buttocks or the pubes or the breast of any person.

(2.5) "Pattern of sexual abuse" means the commission of two or more incidents of sexual contact involving a child when such offenses are committed by an actor upon the same victim.

(3) "Physically helpless" means unconscious, asleep, or otherwise unable to indicate willingness to act.

(3.5) One in a "position of trust" includes, but is not limited to, any person who is a parent or acting in the place of a parent and charged with any of a parent's rights, duties, or responsibilities concerning a child, including a guardian or someone otherwise responsible for the general supervision of a child's welfare, or a person who is charged with any duty or responsibility for the health, education, welfare, or supervision of a child, including foster care, child care, family care, or institutional care, either independently or through another, no matter how brief, at the time of an unlawful act.

(4) "Sexual contact" means the knowing touching of the victim's intimate parts by the actor, or of the actor's intimate parts by the victim, or the knowing touching of the clothing covering the immediate area of the victim's or actor's intimate parts if that sexual contact is for the purposes of sexual arousal, gratification, or abuse.

(5) "Sexual intrusion" means any intrusion, however slight, by any object or any part of a person's body, except the mouth, tongue, or penis, into the genital or anal opening of another person's body if that sexual intrusion can reasonably be construed as being for the purposes of sexual arousal, gratification, or abuse.

(6) "Sexual penetration" means sexual intercourse, cunnilingus, fellatio, analingus, or anal intercourse. Emission need not be proved as an element of any sexual penetration. Any penetration, however slight, is sufficient to complete the crime.

(7) "Victim" means the person alleging to have been subjected to a criminal sexual assault.

History

Source: L. 75: Entire part R&RE, p. 627, § 1, effective July 1. L. 83: (4) amended, p. 697, § 1, effective March 3; (3.5) added, p. 693, § 1, effective June 15. L. 86: (3.5) amended, p. 770, § 6 effective July 1. L. 88: (2) amended, p. 712, § 17, effective July 1. L. 89: (2.5) added, p. 903, § 1, effective June 1. L. 90: (3.5) amended, p. 1028, § 15, effective July 1. L. 92: (1.5) added, p. 322, § 3, effective July 1. L. 93: (2) and (4) amended, p. 1731, § 15, effective July 1. L. 2000: (1.7) added, p. 452, § 5, effective April 24. L. 2003: (1) amended, p. 1432, § 22, effective April 29.

Annotations

Editor's note: This section was contained in a part that was repealed and reenacted in 1975. Provisions of this section, as it existed in 1975, are similar to those contained in 18-3-409 as said section existed in 1974, the year prior to the repeal and reenactment of this part.

Annotations

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Law reviews. For note discussing changes in terminology and classification of offenses of part 4 of this article, and constitutional issues raised thereunder, see 53 Den. L.J. 349 (1976).

Statute not void for vagueness due to definition of "position of trust", since a person of ordinary intelligence could readily understand its meaning and application. *People v. Duncan*, 31 P.3d 874 (Colo. App. 2001).

Defendant charged under former section where conduct occurred prior to effective time of amendatory section. Where the criminal conduct charged in a prosecution for rape occurred prior to 3:50 p.m., July 1, 1975, the time the governor signed the bill amending this section and therefore the effective time of the amendment, the defendant was properly charged with rape under former § 18-3-401. *People v. Glenn*, 200 Colo. 416, 615 P.2d 700 (1980).

Where assault established by evidence, intent to commit rape no defense. Where all the elements of the crime charged (attempt to commit third degree sexual assault) were established by the evidence, the fact that the defendant's actions might also be construed as evincing an intent to commit rape did not constitute a defense to the charge. *People v. DeLeon*, 44 Colo. App. 146, 613 P.2d 639 (1980).

Scientific evidence to support the victim's testimony is not a legal prerequisite to a jury's finding that the defendant is guilty of unlawful sexual behavior. *People v. Graham*, 678 P.2d 1043 (Colo. App. 1983), cert. denied, 467 U.S. 1216, 104 S. Ct. 2660, 81 L. Ed.2d 366 (1984).

Definition of "sexual contact" construed. *People v. Myers*, 714 P.2d 513 (Colo. App. 1985); *People v. West*, 724 P.2d 623 (Colo. 1986); *People in Interest of J.A.*, 733 P.2d 1197 (Colo. 1987).

Definition of the term "sexual contact" is not unconstitutionally vague. *People v. West*, 724 P.2d 623 (Colo. 1986); *People in the Interest of J.A.*, 733 P.2d 1197 (Colo. 1987); *People v. Jensen*, 747 P.2d 1247 (Colo. 1987).

Ejaculation of semen onto clothing covering another person's intimate parts may constitute "touching" for purposes of establishing "sexual contact". *People v. Vinson*, 42 P.3d 86 (Colo. App. 2002).

"Consent" and the affirmative defense of consent discussed in *People v. Williams*, 899 P.2d 306 (Colo. App. 1995).

The term "pattern of sexual abuse" is clearly and unambiguously defined in this section and, therefore, the sentencing enhancement provision of § 18-3-405 (2)(c) which incorporates that term is not unconstitutionally vague. *People v. Longoria*, 862 P.2d 266 (Colo. 1993).

Evidence sufficient to establish victim was "physically helpless". Record demonstrated that there was sufficient evidence from which the jury could find that the victim was unable to indicate a willingness to act and therefore "physically helpless" within the statutory definition of that term. There was testimony that the victim was virtually unable to converse and required total care; that she needed assistance in everything she did; that while she could at times respond to a simple yes-or-no question, her answers could be nonsensical or inaccurate; that she was physically incapable of protecting herself against any attack; that she was in a locked facility for her own protection, because she would otherwise wander away; and that the

Alzheimer's disease affected her both mentally and physically. *People v. Klausner*, ___ P.3d ___ (Colo. App. 2003).

Trial court committed reversible error by refusing defendants' request to instruct the jury on the affirmative defense of consent where the evidence bearing on the possible existence of consent, while not strong, at least satisfied the "scintilla" standard required for an instruction on an affirmative defense. *People v. Cruz*, 903 P.2d 1198 (Colo. App. 1995).

Because the alleged victim's alleged consent would have "negative[d] an element of the [sexual assault] offense", the trial court was required to instruct the jury on the affirmative defense of consent. *People v. Cruz*, 903 P.2d 1198 (Colo. App. 1995).

A stepparent is in a position of trust for purposes of this section. *People v. Brown*, 749 P.2d 436 (Colo. App. 1987); *People v. Brown*, 761 P.2d 261 (Colo. App. 1988).

Jury could conclude that defendant was "in a position of trust" relative to the victim within the meaning of the applicable statute, where defendant lived in the same residence with the victim and her family and contributed to the household income, the victim spent hours alone with the defendant in his room, the victim was the only child the defendant allowed in his room, and neither the victim's mother nor any other individual intervened during the time that the victim was alone in the defendant's room. *People v. Luman*, 994 P.2d 432 (Colo. App. 1999) (decided prior to 1990 amendment).

Upon taking the victim to defendant's home where the two of them were to be alone, defendant assumed responsibility for the welfare and supervision of the child both en route and in the home. *People v. Duncan*, 31 P.3d 874 (Colo. App. 2001).

Any deficiency in instructions with respect to definition of sexual contact was harmless error when evidence concerning defendant's touching of victim could not reasonably be construed as being for any purpose other than sexual arousal, gratification, or abuse. *People in Interest of B.D.S.*, 739 P.2d 902 (Colo. App. 1987).

Trial court properly refused to instruct jury concerning consent as an affirmative defense in sexual assault case. Affirmative defense not warranted where one victim testified that she did not resist or cry out when defendant assaulted her and another testified that her failure to resist or cry out was motivated by fear and that her submission was induced by fear, *People v. Braley*, 879 P.2d 410 (Colo. App. 1993).

Applied in *People v. Osborn*, 42 Colo. App. 376, 599 P.2d 937 (1979); *People v. Fierro*, 199 Colo. 215, 606 P.2d 1291 (1980); *People v. Opson*, 632 P.2d 602 (Colo. App. 1980); *People v. Reynolds*, 638 P.2d 43 (Colo. 1981); *People v. Mack*, 638 P.2d 257 (Colo. 1981); *People v. Thatcher*, 638 P.2d 760 (Colo. 1981); *People v. Salazar*, 648 P.2d 157 (Colo. App. 1981).

18-3-402. Sexual assault.

Statute text

(1) Any actor who knowingly inflicts sexual intrusion or sexual penetration on a victim commits sexual assault if:

(a) The actor causes submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the victim's will; or

(b) The actor knows that the victim is incapable of appraising the nature of the victim's conduct; or

(c) The actor knows that the victim submits erroneously, believing the actor to be the victim's spouse; or

(d) At the time of the commission of the act, the victim is less than fifteen years of age and the actor is at least four years older than the victim and is not the spouse of the victim; or

(e) At the time of the commission of the act, the victim is at least fifteen years of age but less than seventeen years of age and the actor is at least ten years older than the victim and is not the spouse of the victim; or

(f) The victim is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over the victim and uses this position of authority to coerce the victim to submit, unless the act is incident to a lawful search; or

(g) The actor, while purporting to offer a medical service, engages in treatment or examination of a victim for other than a bona fide medical purpose or in a manner substantially inconsistent with reasonable medical practices; or

(h) The victim is physically helpless and the actor knows the victim is physically helpless and the victim has not consented.

(2) Sexual assault is a class 4 felony, except as provided in subsections (3), (3.5), (4), and (5) of this section.

(3) Sexual assault is a class 1 misdemeanor if committed under the circumstances of paragraph (e) of subsection (1) of this section.

(3.5) Sexual assault is a class 3 felony if committed under the circumstances described in paragraph (h) of subsection (1) of this section.

(4) Sexual assault is a class 3 felony if it is attended by any one or more of the following circumstances:

(a) The actor causes submission of the victim through the actual application of physical force or physical violence; or

(b) The actor causes submission of the victim by threat of imminent death, serious bodily injury, extreme pain, or kidnapping, to be inflicted on anyone, and the victim believes that the actor has the present ability to execute these threats; or

(c) The actor causes submission of the victim by threatening to retaliate in the future against the victim, or any other person, and the victim reasonably believes that the actor will execute this threat. As used in this paragraph (c), "to retaliate" includes threats of kidnapping, death, serious bodily injury, or extreme pain; or

(d) The actor has substantially impaired the victim's power to appraise or control the victim's conduct by employing, without the victim's consent, any drug, intoxicant, or other means for the purpose of causing submission.

(e) (Deleted by amendment, L. 2002, p. 1578, § 2, effective July 1, 2002.)

(5) (a) Sexual assault is a class 2 felony if any one or more of the following circumstances exist:

(I) In the commission of the sexual assault, the actor is physically aided or abetted by one or more other persons; or

(II) The victim suffers serious bodily injury; or

(III) The actor is armed with a deadly weapon or an article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon or represents verbally or otherwise that the actor is

armed with a deadly weapon and uses the deadly weapon, article, or representation to cause submission of the victim.

(b) (I) If a defendant is convicted of sexual assault pursuant to this subsection (5), the court shall sentence the defendant in accordance with section 18-1.3-401 (8) (e). A person convicted solely of sexual assault pursuant to this subsection (5) shall not be sentenced under the crime of violence provisions of section 18-1.3-406 (2). Any sentence for a conviction under this subsection (5) shall be consecutive to any sentence for a conviction for a crime of violence under section 18-1.3-406.

(II) The provisions of this paragraph (b) shall apply to offenses committed prior to November 1, 1998.

(6) Any person convicted of sexual assault committed on or after November 1, 1998, under any of the circumstances described in this section shall be sentenced in accordance with the provisions of part 10 of article 1.3 of this title.

History

Source: L. 75: Entire part R&RE, p. 628, § 1, effective July 1. L. 77: (1) amended, p. 962, § 15, effective July 1. L. 83: IP(1) amended, p. 698, § 1, effective July 1. L. 85: (2) R&RE and (3) and (4) amended, pp. 666, 667, §§ 1, 2, effective July 1. L. 95: (4) amended, p. 1252, § 9, effective July 1. L. 98: (4) amended, p. 1293, § 13, effective November 1. L. 2000: Entire section R&RE, p. 698, § 18, effective July 1. L. 2002: (1)(g), (2), and (4)(e) amended and (1)(h) and (3.5) added, p. 1578, §§ 1, 2, effective July 1; (5)(b)(I) and (6) amended, p. 1512, § 189, effective October 1.

Annotations

Editor's note: This section was contained in a part that was repealed and reenacted in 1975. Provisions of this section, as it existed in 1975, are similar to those contained in 18-3-401 as said section existed in 1974, the year prior to the repeal and reenactment of this part.

Annotations

Cross references: For the legislative declaration contained in the 2002 act amending subsections (5)(b)(I) and (6), see section 1 of chapter 318, Session Laws of Colorado 2002.

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Analysis

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I. GENERAL CONSIDERATION.

Am. Jur.2d. See 65 Am. Jur.2d, Rape, §§ 1-10.

C.J.S. See 75 C.J.S., Rape, §§ 1, 4, 15-25.

Law reviews. For article, "Criminality of Voluntary Sexual Acts in Colorado", see 40 U. Colo. L. Rev. 268 (1968). For article, "Reform Rape Legislation: A New Standard of Sexual Responsibility", see 49 U. Colo. L. Rev. 185 (1978). For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

Annotator's note. Since § 18-3-402 is similar to § 18-3-402 as it existed prior to its 2000 repeal and reenactment, and former § 18-3-402 is similar to former § 18-3-401, as it existed prior to the 1975 revision of this part, and § 40-2-25, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

This section is not unconstitutionally vague where it sets out the act, the requisite mental state, and the content of the threat used to force the victim's submission, and each of these elements is defined. *People v. Thatcher*, 638 P.2d 760 (Colo. 1981).

This section does not violate equal protection. Putting a victim of sexual assault in fear -- and in danger -- of losing life and limb is a graver and more morally reprehensible act than subjecting the victim to lesser threats. The two kinds of threats are constitutionally distinguishable. Statutes proscribing acts based on this distinction do not violate equal protection. *People v. Thatcher*, 638 P.2d 760 (Colo. 1981).

Prohibition against double punishment for same criminal act is not violated where a defendant is found guilty of first degree kidnapping and first degree sexual assault for the same criminal episode. *People v. Molina*, 41 Colo. App. 128, 584 P.2d 634 (1978).

It is clear that the general assembly intended to impose a more severe punishment in situations in which more than one person commits the sexual assault. *People v. Osborne*, 973 P.2d 666 (Colo. App. 1998).

Rape and incest were separate and distinct crimes with certain different elements essential to their proof; either or both of these crimes may be charged in an appropriate factual situation. *McGee v. People*, 160 Colo. 46, 413 P.2d 901 (1966).

Before July 1, 1977, "knowingly" was not statutory element of first degree sexual assault, and it was not necessary, therefore, to include that factor in the definition of the crime, so long as the general intent factor was covered elsewhere in the instruction. *People v. Mattas*, 44 Colo. App. 139, 618 P.2d 675 (1980), *aff'd*, 645 P.2d 254 (Colo. 1982).

Merger doctrine inapplicable to convictions for kidnapping, assault, and robbery. The merger doctrine does not apply to a single transaction resulting in convictions under § 18-3-301 (1)(a), this section, and § 18-3-301 (1). *People v. Bridges*, 199 Colo. 520, 612 P.2d 1110 (1980).

For lesser included offense of crime of rape, see *People v. Futamata*, 140 Colo. 233, 343 P.2d 1058 (1959); *People v. Barger*, 191 Colo. 152, 550 P.2d 1281 (1976); *People v. Hansen*, 191 Colo. 175, 551 P.2d 710 (1976).

Section 18-3-409 and this section are severable so that even if the former were invalidated, the latter would still be capable of enforcement. *People v. Brown*, 632 P.2d 1025 (Colo. 1981).

Victim's submission to assault insufficient concession for first degree kidnapping. Proof of the victim's submission to a sexual assault is not sufficient per se to establish the concession required for first degree kidnapping. *People v. Bridges*, 199 Colo. 520, 612 P.2d 1110 (1980).

Voluntary intoxication not defense. The mental culpability requirement of both second degree kidnapping and first degree sexual assault is "knowingly"; therefore, they are, by statutory definition, general intent crimes and voluntary intoxication is not a defense to either crime. *People v. Vigil*, 43 Colo. App. 121, 602 P.2d 884 (1979).

For constitutionality of former statute relating to deviate sexual intercourse by force or its equivalent, see *People v. Beaver*, 190 Colo. 554, 549 P.2d 1315 (1976).

For lesser included offense of former crime of deviate sexual intercourse by force or its equivalent, see *People v. Barger*, 191 Colo. 152, 550 P.2d 1281 (1976).

For cases construing former statute relating to deviate sexual intercourse by force or its equivalent, see *Martin v. People*, 114 Colo. 120, 162 P.2d 597 (1945); *Huerta v. People*, 168 Colo. 276, 450 P.2d 648 (1969); *White v. People*, 177 Colo. 386, 494 P.2d 585 (1972).

The offenses of first and second degree sexual assault are mutually exclusive. Second degree sexual assault is not a lesser included offense of the crime of first degree sexual assault. *People v. Shields*, 822 P.2d 15 (Colo. 1991) (reversing *People v. Silburn*, 807 P.2d 1167 (Colo. App. 1990)).

There is no merger between what was formerly first degree sexual assault and second degree assault even if both involved the proof of serious bodily injury. Although the infliction of serious bodily injury for purposes of the sexual assault statute raised the class of felony for which one could be convicted, it was not an element of the offense itself. *People v. Martinez*, 32 P.3d 520 (Colo. App. 2001).

Applied in *People ex rel. VanMeveren v. District Court*, 195 Colo. 1, 575 P.2d 405 (1978); *People v. Reynolds*, 195 Colo. 386, 578 P.2d 647 (1978); *People v. McKenna*, 196 Colo. 367, 585 P.2d 275 (1978); *People v. Blalock*, 197 Colo. 320, 592 P.2d 406 (1979); *People v. Jacobs*, 198 Colo. 75, 596 P.2d 1187 (1979); *People v. Mikkleson*, 42 Colo. App. 77, 593 P.2d 975 (1979); *People v. Osborn*, 42 Colo. App. 376, 599 P.2d 937 (1979); *People v. DeLeon*, 44 Colo. App. 126, 613 P.2d 639 (1980); *People v. Frysig*, 628 P.2d 1004 (Colo. 1981); *People v. Williams*, 628 P.2d 1011 (Colo. 1981); *People v. Francis*, 630 P.2d 82 (Colo. 1981); *People v. Jordan*, 630 P.2d 613 (Colo. 1981); *People v. Martinez*, 634 P.2d 26 (Colo. 1981); *People v. Anderson*, 637 P.2d 354 (Colo. 1981); *People v. Smith*, 638 P.2d 1 (Colo. 1981); *People v. Mack*, 638 P.2d 257 (Colo. 1981); *People v. Evans*, 630 P.2d 94 (Colo. App. 1981); *People v. Crespin*, 631 P.2d 1144 (Colo. App. 1981); *People v. Hamling*, 634 P.2d 1023 (Colo. App. 1981); *People v. Sharpless*, 635 P.2d 896 (Colo. App. 1981); *People v. Flowers*, 644 P.2d 916 (Colo. 1982); *People v. Constant*, 645 P.2d 843 (Colo. 1982); *People v. Phillips*, 652 P.2d 575 (Colo. 1982); *People v. White*, 656 P.2d 690 (Colo. 1983); *People v. Clark*, 662 P.2d 1100 (Colo. App. 1982); *People v. Bridges*, 662 P.2d 161 (Colo. 1983); *People v. District Court*, 663 P.2d 616 (Colo. 1983); *People v. Brandt*, 664 P.2d 712 (Colo. 1983); *People v. Vigil*, 718 P.2d 496 (Colo. 1986).

II. ELEMENTS OF OFFENSE.

Victim must show resistance or that resistance was overcome by fear. To constitute the crime of rape there must be the utmost reluctance and resistance on the part of the female complainant, or her will must be overcome by fear and terror so extreme as to preclude resistance. *Bigcraft v. People*, 30 Colo. 298, 70 P. 417 (1902).

This section recognizes the offense even though there is no actual resistance where the female person is prevented from resistance by threats of immediate and great bodily harm, accompanied by apparent power of execution. *People v. Futamata*, 140 Colo. 233, 343 P.2d 1058 (1959).

Acts and circumstances may obviate the necessity of proof of physical resistance, as where they show fear making it impossible, or conditions making it useless. *Cortez v. People*, 155 Colo. 317, 394 P.2d 346 (1964).

Proof of sexual intrusion is sufficient to support a conviction for first degree sexual assault. *People v. Lankford*, 819 P.2d 520 (Colo. App. 1991).

Sexual intercourse for the purposes of sexual assault does not include simulated intercourse. *People v. Jurado*, 30 P.3d 769 (Colo. App. 2001).

Where the jury is properly instructed as to the elements of the offense and the term "knowingly," the jury should properly focus on whether the defendant knowingly caused submission of the victim through the application of physical force or violence. The defendant's awareness of the victim's non-consent is neither an element of the offense nor a topic for argument to the jury. *People v. Dunton*, 881 P.2d 390 (Colo. App. 1994).

Proof of defendant's awareness of nonconsent is not necessary under this section, except under the circumstances described in subsection (1)(e). In all other circumstances, the prohibited conduct by its very nature negates the existence of the victim's consent. *Dunton v. People*, 898 P.2d 571 (Colo. 1995).

And it is not error for trial court to refuse jury instruction on the affirmative defense of consent where the statute equates the victim's nonconsent with proof that defendant had caused the victim's submission by means "of sufficient consequence reasonably calculated to cause submission against the victim's will". In such case, the jury can only convict a defendant after concluding that the prosecution has proved the victim's lack of consent beyond a reasonable doubt. *People v. Martinez*, 36 P.3d 154 (Colo. App. 2001).

Submission induced by fear of great bodily harm does not constitute consent, especially where the threats are accompanied by a demonstration of actual force. *Cortez v. People*, 155 Colo. 317, 394 P.2d 346 (1964).

Principles of complicity apply to sexual assault in the first degree such that, if the actor or an accomplice is armed with and uses a deadly weapon, then both may be found to have committed a class 2 felony. *People v. Walford*, 716 P.2d 137 (Colo. App. 1985).

Sexual assault is not a lesser included offense of, and therefore not merged into, second-degree kidnapping involving sexual assault. *People v. Henderson*, 810 P.2d 1058 (Colo. 1991); *People v. McKnight*, 813 P.2d 331 (Colo. 1991); *People v. Johnson*, 815 P.2d 427 (Colo. 1991); *People v. Martinez*, 32 P.3d 520 (Colo. App. 2001).

For first degree assault to be elevated from a class 3 felony to a class 2 felony, there must be more than one person involved in the sexual assault. *People v. Osborne*, 973 P.2d 666 (Colo. App. 1998).

Evidence insufficient to support jury's determination that defendant physically aided or abetted in the commission of the sexual assault. *People v. Osborne*, 973 P.2d 666 (Colo. App. 1998).

The term "extreme pain" is one of ordinary and not technical usage. *People v. Albo*, 195 Colo. 102, 575 P.2d 427 (1978).

Extreme pain measure of criminal conduct. The term "extreme pain" as used in subsection (1)(b) of this section is a measure of criminal conduct and a gauge for determining whether the threat was the cause for the victim's submission; it is not so vague or overbroad as to render the section unconstitutional. *People v. Albo*, 195 Colo. 102, 575 P.2d 427 (1978).

Element of submission through actual application of physical force or physical violence is applied in *People v. Cole*, 926 P.2d 164 (Colo. App. 1996).

Term "attended" in subsection (3) is applied in *People v. Cole*, 926 P.2d 164 (Colo. App. 1996).

III. TRIAL AND PROSECUTION.

A. In General.

Where acts were continuous people may be compelled to rely on certain act. Where in a prosecution under this section of a male for having carnal knowledge of an unmarried female, it appearing that the illicit intercourse was continuous, the people may on motion be compelled to select the occasion upon which

they will demand a conviction, and this selection must be made before the accused is required to proceed to his defense. The prosecutor is not required to select any specific date, but must individualize a certain act upon which he will rely. *Laycock v. People*, 66 Colo. 441, 182 P. 880 (1919).

Where there was evidence of several different acts committed at different times, it was error to refuse to require the prosecuting attorney to elect upon which offense he would rely for a conviction. *Schuetz v. People*, 33 Colo. 325, 80 P. 890 (1905).

On the trial of a statutory rape case, election of the district attorney to rely upon a particular offense committed on or about a certain date, at the conclusion of the state's case and before the beginning of the case for the defense, held not to violate the rule in *Laycock v. People* (66 Colo. 441, 182 P. 880 (1919)). *Wills v. People*, 100 Colo. 127, 66 P.2d 329 (1937).

Leading questions addressed to prosecuting witness 14 years of age on direct examination may be permitted in the discretion of the trial court, and the supreme court will not reverse an action on such ground unless it clearly appears that defendant was denied a fair trial. *Ewing v. People*, 87 Colo. 6, 284 P. 341 (1930).

Discretionary power of court to permit district attorney to reopen case. Permission to the district attorney in a prosecution for rape to reopen his case for the purpose of showing the age of defendant is properly granted by the court as within its discretionary powers. *Monchego v. People*, 105 Colo. 486, 99 P.2d 193 (1940).

B. Indictment or Information.

Information need not follow exact language of section. It is sufficient that the offense be charged in language from which the nature of it may be readily understood by the accused and the jury. *Tracy v. People*, 65 Colo. 226, 176 P. 280 (1918); *Sarno v. People*, 74 Colo. 528, 223 P. 41 (1924).

One count may contain different ways crime committed. It is proper in one count of an information to charge in all ways in which a crime may be committed by the use of the word "and" even where the statute uses "or". *Cortez v. People*, 155 Colo. 317, 394 P.2d 346 (1964).

Information which contained substantially same language as this section not defective as description of charges permitted defendant to adequately defend himself and ensured defendant would not be prosecuted again for same offense. *People v. Mogul*, 812 P.2d 705 (Colo. App. 1991).

C. Evidence.

Law reviews. For comment, "Expert Testimony on Rape Trauma Syndrome in Colorado: Broadening Admissibility to Address the Question of Consent in Sexual Assault Prosecutions", see 61 U. Colo. L. Rev. 833 (1990).

Evidence necessary to prove act. Though it is true that the law does not require the female's statement of actual penetration, nevertheless, some evidence other than an inference is essential to prove the act. Generally, it is held that uncorroborated evidence by the prosecution must be clear and convincing or that it should be scrutinized carefully. *Martinez v. People*, 160 Colo. 534, 422 P.2d 44 (1966).

Where the evidence of defendant's guilt was overwhelming and the issue of whether the defendant acted knowingly was not contested at trial, the trial court's error in instructing the jury on the meaning of "knowingly" is not plain error in defendant's conviction for sexual assault in the first degree. *Espinoza v. People*, 712 P.2d 476 (Colo. 1985).

Circumstances tending to discredit prosecutrix. The failure of the prosecutrix to avail herself of assistance when at hand, to report the assault at the earliest possible moment, and to call immediate attention to the

injuries received and afterwards complained of, are circumstances tending to discredit the testimony of the party alleged to have been outraged. *Bueno v. People*, 1 Colo. App. 232, 28 P. 248 (1891).

For complaint of prosecutrix as evidence, see *Donaldson v. People*, 33 Colo. 333, 80 P. 906 (1905).

Corroborative testimony of prompt complaint by an alleged victim is properly admitted in a rape case, but even that exception is restricted to the mere fact of complaint, and the details of the occurrence as related to an investigating officer by a prosecutrix and his opinions as to the seriousness of the charge and the difficulties of prosecution as told to the prosecutrix are never admissible in evidence. *People v. Montague*, 181 Colo. 143, 508 P.2d 388 (1973).

A complaint about a sexual assault, made soon after its occurrence, can constitute corroboration of the victim's testimony. *People v. Fierro*, 199 Colo. 215, 606 P.2d 1291 (1980).

In sexual assault cases, testimony tending to prove the promptness of the victim's complaint to the police is admissible corroboration evidence. *People v. Gallegos*, 644 P.2d 920 (Colo. 1982).

An eleven-year-old victim's complaint to her nine-year-old sister on the day immediately following a sexual assault by their father was sufficient to corroborate the victim's testimony to the effect that sexual penetration had occurred during the assault. *People v. Fierro*, 199 Colo. 215, 606 P.2d 1291 (1980).

Evidence that the victim of a sexual assault failed to make a complaint soon after the crime is admissible as a circumstance which tends to discredit that person's testimony. *People v. Oliver*, 665 P.2d 152 (Colo. App. 1983).

Testimony of officer as to victim's credibility improper. When a police officer who investigates a rape complaint made by a prosecutrix, is permitted to testify as to statements he made to her about his opinions on the seriousness and difficulties experienced by a prosecutrix in rape prosecutions, there is error because the testimony improperly lends credibility to the testimony of the prosecuting witness. *People v. Montague*, 181 Colo. 143, 508 P.2d 388 (1973).

Permissible police testimony is restricted to the mere fact of the victim's complaint and may not encompass the details related to the investigating officer. *People v. Gallegos*, 644 P.2d 920 (Colo. 1982).

Testimony of prosecutrix' physical handicap is admissible on issue of her ability to resist forcible attack, notwithstanding contention that such testimony is offered solely to invoke sympathy. *People v. Chavez*, 179 Colo. 316, 500 P.2d 365 (1972).

Evidence as to day of offense. Under an information charging the crime of rape to have been committed on a certain day, evidence is admissible of any rape committed by defendant on the prosecuting witness prior to the filing of the information and within the statute of limitations. *Schuetz v. People*, 33 Colo. 325, 80 P. 890 (1905).

Approximate date sufficient where there is evidence of several offenses. In a prosecution for rape, there being evidence of the commission of several offenses, the district attorney is not required to fix a definite date of the occurrence upon which he relies for a conviction, the time being alleged as "on or about" a certain date. The approximate date is sufficient, the specific occasion being definitely identified. *Wills v. People*, 100 Colo. 127, 66 P.2d 329 (1937).

Birth of child is sufficient to establish sexual intercourse. In a prosecution for rape, the fact that prosecutrix gave birth to a child was sufficient evidence to establish sexual intercourse. *Monchego v. People*, 105 Colo. 486, 99 P.2d 193 (1940).

Evidence of abortion not error. Where defendant convicted of statutory rape contends admission of doctor's testimony to prosecutrix' therapeutic abortion is error, court will not consider such for first time on appeal. *People v. Chavez*, 179 Colo. 316, 500 P.2d 365 (1972).

Evidence of intercourse insufficient. It cannot be inferred in law that because defendant intended to rape his victim or that her clothes were torn that an act of sexual intercourse took place or that there was any penetration. The latter is mere conjecture and does not rise to the dignity of legal proof. *Martinez v. People*, 160 Colo. 534, 422 P.2d 44 (1966).

Evidence sufficient to support jury's conclusion that defendant used deadly weapon to force victim to submit to first-degree sexual assault. *People v. Powell*, 716 P.2d 1096 (Colo. 1986).

Other crimes related to force and were properly admitted. Where evidence of kidnapping, assault, and the forced commission of another sexual act tended to prove the *res gestae* and the force element of rape, it was not error to admit such evidence of other crimes because they were not wholly independent of the offense charged. *White v. People*, 177 Colo. 386, 494 P.2d 585 (1972).

Aiding or abetting does not require physical assistance during the actual act of penetration. *People v. Beigel*, 646 P.2d 948 (Colo. App. 1982).

Evidence sufficient to support a general verdict based upon the alternative methods of committing sexual assault in the first degree, including the third alternative of causing the victim's submission with threats of future retaliation. *James v. People*, 727 P.2d 850 (Colo. 1986).

Evidence sufficient to sustain conviction. *Harlan v. People*, 32 Colo. 397, 76 P. 792 (1904); *Boegel v. People*, 95 Colo. 319, 35 P.2d 855 (1934); *Davis v. People*, 112 Colo. 452, 150 P.2d 67 (1944); *Armstead v. People*, 168 Colo. 485, 452 P.2d 8 (1969); *People v. Duran, Jr.*, 179 Colo. 129, 498 P.2d 937 (1972); *Yescas v. People*, 197 Colo. 379, 593, P.2d 358 (1979); *People v. Powell*, 716 P.2d 1096 (Colo. 1986); *People v. Mogul*, 812 P.2d 705 (Colo. App. 1991).

Evidence to support multiple convictions. Evidence of three separate and distinct incidents of sexual assault which occurred in three different ways, each in a separate time period, is sufficient to support a finding of guilty on three separate counts under this section. *People v. Saars*, 196 Colo. 294, 584 P.2d 622 (1978).

Evidence insufficient to support conviction. A conviction for rape based solely upon the evidence of the prosecuting witness, who had passed the age of consent at the time of the alleged crime, where there was no evidence as to what force was used or what resistance was made, and no evidence that the consent of the prosecuting witness was obtained or her resistance prevented by any threat of defendant or fear of violence at his hands, the only threat testified to being a threat to kill her and the rest of the family if she told of the acts, evidence was insufficient to support conviction. *Bigcraft v. People*, 30 Colo. 298, 70 P. 417 (1902).

Evidence insufficient to support conviction as a matter of law under the "physically aided and abetted" standard of subsection (3)(a). *People v. Higa*, 735 P.2d 203 (Colo. App. 1987).

There was sufficient evidence of the required element of penetration beyond a reasonable doubt where the victim testified to the occurrence of penetration and the codefendant pleaded guilty to a crime involving penetration, admitted intrusion with his fingers, and admitted he and the defendant "raped" the victim. *People v. Lankford*, 819 P.2d 520 (Colo. App. 1991).

Trial court did not err in providing a dictionary definition of the term "submission" which did not include physical force or violence in response to a jury inquiry, where the jury was explicitly instructed that one of the elements of first degree sexual assault was that the defendant caused the victim's submission through

the actual application of physical force or physical violence. *People v. Cruz*, 923 P.2d 311 (Colo. App. 1996).

D. Jury.

Evidence determines if lesser offense is submitted to jury. It does not follow from the conclusion that the aggravated assault need not be specifically pleaded that a court is invariably required to submit the lesser included crime to the jury. There remains the question whether the evidence justifies this action. Oftentimes the evidence precludes submission even when the offense is charged in a separate count, and in some cases the evidence is such that the jury must determine the case on the greater offense and that alone. *People v. Futamata*, 140 Colo. 233, 343 P.2d 1058 (1959).

Where there was uncontroverted evidence that the sexual penetration was obtained by means of physical force, it was not error for the trial court to refuse to instruct the jury on the lesser offense of second degree sexual assault. *People v. Naranjo*, 200 Colo. 1, 612 P.2d 1099 (1980).

Where the evidence is sufficient to support a charge of assault with intent to commit rape, and such as to justify a simultaneous acquittal of the charge of rape, refusal of a trial court to submit a verdict and instruction on assault with intent to commit rape is error. *People v. Futamata*, 140 Colo. 233, 343 P.2d 1058 (1959).

Failure of the court to construct an assault with intent to commit rape as a lesser included offense of forcible rape does not affect substantial rights of defendant, and is therefore not cognizable as plain error where defendant was convicted of statutory rape and at trial had denied both assault and commission of act itself. *People v. Chavez*, 179 Colo. 316, 500 P.2d 365 (1972).

Jury to evaluate threat. It is for the jury to decide the magnitude of the threat and to evaluate the victim's belief of the defendant's ability at the time the threats were made to carry them out. *People v. Thatcher*, 638 P.2d 760 (Colo. 1981).

E. Instructions.

"Force" requires no further definition. The trial court does not commit reversible error by failing to define "force" in its instructions. An instruction which contains the word "force", with no further definition, is written in plain understandable English. *People v. Johnson*, 671 P.2d 1017 (Colo. App. 1983); *People v. Powell*, 716 P.2d 1096 (Colo. 1986).

Instructions as to corroboration. Instruction to the effect that testimony of prosecutrix must be corroborated by other evidence, such as evidence of a struggle, or by making proof of complaint by prosecutrix at her earliest opportunity, or by other evidence tending to prove the commission of the offense charged was held not subject to the criticism that it authorized conviction of forcible rape without any corroboration of testimony of prosecutrix with respect to the question of whether or not the act of intercourse was accompanied by force. *Davis v. People*, 112 Colo. 452, 150 P.2d 67 (1944).

Complicity instruction not error simply because possibility of inconsistent verdict. The trial court did not err by instructing on complicity and on sexual assault when the defendant was aided or abetted by others simply because the instructions, when given together, could lead to an inconsistent verdict. *People v. Naranjo*, 200 Colo. 11, 612 P.2d 1106 (1980).

Aiding or abetting must be established beyond a reasonable doubt. Jury instructions which did not inform the jury that being "physically aided or abetted" had to be established beyond a reasonable doubt, coupled with conflicting evidence presented at trial on the issue of aiding or abetting, requires reversal of defendant's conviction for first degree sexual assault as a class two felony. *Beigel v. People*, 683 P.2d 1188 (Colo. 1984).

Instruction on fear as substitute for force required. In a prosecution for rape following a vicious assault on a victim, the people are entitled to an instruction which adequately and clearly defines fear and apprehension of bodily injury as a substitute for the ingredient of force. *People v. Futamata*, 140 Colo. 233, 343 P.2d 1058 (1959).

Failure of trial court to include the sentencing enhancement factor in the elemental instruction to the substantive charge was not plain error. *People v. Torres*, 701 P.2d 78 (Colo. App. 1984).

The courts failure to give a straightforward negative response to the jurors' question concerning the definition of "sexual penetration" was harmless error. In order to convict the defendant of first degree sexual assault or incest the jurors had to accept the victim's testimony because the victim testified unequivocally to actual sexual intercourse while the defendant denied any improper touching at all. *People v. Fell*, 832 P.2d 1015 (Colo. App. 1991).

The trial court erred by failing to respond adequately to the jury's question regarding the difference between first and second degree sexual assault. A jury should be referred back to the instructions only when it is apparent that it has overlooked some portion of the instructions or when the instructions clearly answer its inquiry. *People v. Shields*, 805 P.2d 1140 (Colo. App. 1990).

The court must take adequate measures to insure that the jury understands the difference between the principal charged offense and the lesser included offense if a lesser included offense instruction is given. COLJI-Crim. No. 12:05 is insufficient to apprise the jury of the differences between first and second degree sexual assault, and, accordingly, the conviction for first degree sexual assault should be reversed. *People v. Shields*, 805 P.2d 1140 (Colo. App. 1990).

Sexual assault in the second degree is a lesser included offense of sexual assault in the first degree. *People v. Silburn*, 807 P.2d 1167 (Colo. App. 1990).

Trial court did not err in refusing to give the consent defense jury instruction tendered by the defendant in a first degree sexual assault case where the crime itself requires that the prosecution prove a lack of consent. *People v. Cruz*, 923 P.2d 311 (Colo. App. 1996).

The jury was not instructed on both elements of alternative (c) and could not have assessed whether the prosecution had proven each element of that alternative beyond a reasonable doubt. *People v. Rodriguez*, 914 P.2d 230 (Colo. 1996).

IV. VERDICT AND SENTENCE.

A sentence imposed beyond the presumptive range for a defendant convicted of both first degree sexual assault with a deadly weapon and a crime of violence does not deny equal protection of law since it cannot be said that the sentencing statutes permit different degrees of punishment for persons in the defendant's situation. *People v. Haymaker*, 716 P.2d 110 (Colo. 1986).

A rational distinction exists in the sentencing scheme for people convicted of first degree sexual assault with a deadly weapon in contrast to convictions of the same crime without a deadly weapon since the legislature could rationally perceive that use of a deadly weapon during the course of such an assault is more reprehensible and dangerous than commission of such a crime without a deadly weapon. *People v. Haymaker*, 716 P.2d 110 (Colo. 1986), disapproving *People v. Montoya*, 709 P.2d 58 (Colo. App. 1985), rev'd, 736 P.2d 1208 (Colo. 1987).

Evidence controls whether lesser included offense of assault with intent to rape can stand alone or fall on acquittal of forcible rape. *Miera v. People*, 164 Colo. 254, 434 P.2d 122 (1967).

Section not inconsistent with § 18-3-405. Charges under each section are distinguishable by the nature of the prohibited sexual activity. *People v. Hawkins*, 728 P.2d 385 (Colo. App. 1986).

Conviction of sexual assault under this section meets conviction of sexual offense criterion within the meaning of § 18-1.3-1001 et seq. The defendant is subject to indeterminate sentencing accordingly. People v. Klausner, ___ P.3d ___ (Colo. App. 2003).

Sentence found not excessive. A sentence of 27 to 50 years for sexual assault in the first degree was not excessive. People v. Hall, 619 P.2d 492 (Colo. 1980).

Sentence of six years was not inappropriate. The prosecutor recommended a minimum sentence of four years, but it is not improper for the sentencing court, on its own volition, to sentence contrary to the district attorney's recommendation. People v. Fell, 832 P.2d 1015 (Colo. App. 1991).

Jury verdict convicting defendant of felony menacing is not inconsistent with the jury's verdict acquitting defendant of first degree sexual assault. People v. Frye, 872 P.2d 1316 (Colo. App. 1993).

18-3-404. Unlawful sexual contact.

Statute text

(1) Any actor who knowingly subjects a victim to any sexual contact commits unlawful sexual contact if:

(a) The actor knows that the victim does not consent; or

(b) The actor knows that the victim is incapable of appraising the nature of the victim's conduct; or

(c) The victim is physically helpless and the actor knows that the victim is physically helpless and the victim has not consented; or

(d) The actor has substantially impaired the victim's power to appraise or control the victim's conduct by employing, without the victim's consent, any drug, intoxicant, or other means for the purpose of causing submission; or

(e) Repealed.

(f) The victim is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over the victim and uses this position of authority, unless incident to a lawful search, to coerce the victim to submit; or

(g) The actor engages in treatment or examination of a victim for other than bona fide medical purposes or in a manner substantially inconsistent with reasonable medical practices.

(1.5) Any person who knowingly, with or without sexual contact, induces or coerces a child by any of the means set forth in section 18-3-402 to expose intimate parts or to engage in any sexual contact, intrusion, or penetration with another person, for the purpose of the actor's own sexual gratification, commits unlawful sexual contact. For the purposes of this subsection (1.5), the term "child" means any person under the age of eighteen years.

(1.7) Any person who knowingly observes or takes a photograph of another person's intimate parts without that person's consent, in a situation where the person observed has a reasonable expectation of privacy, for the purpose of the observer's own sexual gratification, commits unlawful sexual contact. For purposes of this subsection (1.7), "photograph" includes any photograph, motion picture, videotape, print, negative, slide, or other mechanically, electronically, or chemically reproduced visual material.

(2) Unlawful sexual contact is a class 1 misdemeanor, but it is a class 4 felony if the actor compels the victim to submit by use of such force, intimidation, or threat as specified in section 18-3-402 (4) (a), (4) (b), or (4) (c) or if the actor engages in the conduct described in paragraph (g) of subsection (1) of this section or subsection (1.5) of this section.

(3) If a defendant is convicted of the class 4 felony of unlawful sexual contact pursuant to subsection (1.5) or (2) of this section, the court shall sentence the defendant in accordance with the provisions of section 18-1.3-406; except that this subsection (3) shall not apply to paragraph (g) of subsection (1) of this section as it applies to subsection (2) of this section.

History

Source: L. 75: Entire part R&RE, p. 629, § 1, effective July 1. L. 77: IP(1) amended, p. 962, § 17, effective July 1. L. 86: (3) added, p. 777, § 6, effective July 1. L. 89: (1.5) added and (2) and (3) amended, p. 830, § 41, effective July 1. L. 90: (1)(e) repealed, p. 1033, § 25, effective July 1. L. 91: (3) amended, p. 1912, § 21, effective June 1. L. 92: (1.5) amended and (1.7) added, p. 404, § 15, effective June 3. L. 94: (1.5) and (1.7) amended, p. 1717, § 9, effective July 1. L. 95: (3) amended, p. 1252, § 10, effective July 1. L. 96: (1.7) amended, p. 1581, § 4, effective July 1. L. 2000: IP(1), (1.5), (1.7), (2), and (3) amended, p. 700, § 20, effective July 1. L. 2002: (3) amended, p. 1513, § 190, effective October 1.

Annotations

Editor's note: This section was contained in a part that was repealed and reenacted in 1975. Provisions of this section, as it existed in 1975, are similar to those contained in 18-3-403, 18-3-404, and 18-3-410 as said sections existed in 1974, the year prior to the repeal and reenactment of this part.

Annotations

Cross references: For the legislative declaration contained in the 2002 act amending subsection (3), see section 1 of chapter 318, Session Laws of Colorado 2002.

Annotations

ANNOTATION

Annotations

Am. Jur.2d. See 65 Am. Jur.2d, Rape, §§ 15-20.

Law reviews. For comment, "Expert Testimony on Rape Trauma Syndrome in Colorado: Broadening Admissibility to Address the Question of Consent in Sexual Assault Prosecutions", see 61 U. Colo. L. Rev. 833 (1990).

Where assault established by evidence, intent to commit rape no defense. Where all the elements of the crime charged (attempt to commit third degree sexual assault) were established by the evidence, the fact that the defendant's actions might also be construed as evincing an intent to commit rape did not constitute a defense to the charge. *People v. DeLeon*, 44 Colo. App. 146, 613 P.2d 639 (1980).

No violation of equal protection of the laws under the Colorado Constitution is created even though subsection (1) (e) of this section and the offense described in § 18-3-405 (2) (b) contain some similar elements. The offenses also contain elements which make them distinguishable. The fact that a single act may give rise to more than one criminal violation does not, by itself, create an equal protection problem. *People v. Madril*, 746 P.2d 1329 (Colo. 1987).

Defendant's prior conviction of assault did not bar his subsequent conviction of sexual assault, as offenses had distinct elements that were not subsumed by each other. *People v. Williams*, 736 P.2d 1229 (Colo. App. 1986).

Attempted third-degree sexual assault is a lesser included offense of attempted first-degree sexual assault. *People v. Staggs*, 740 P.2d 21 (Colo. App. 1987).

The courts failure to give a straightforward negative response to the jurors' question concerning the definition of "sexual penetration" was harmless error. Because third degree sexual assault may be

committed without proof of sexual penetration, defendant's conviction of that crime could not have been affected by the lack of response to the jurors' inquiry. *People v. Fell*, 832 P.2d 1015 (Colo. App. 1991).

To be used as a ground for discipline in an attorney disciplinary proceeding sexual assault in the third degree need only be proved by clear and convincing evidence. *In re Egbune*, 971 P.2d 1065 (Colo. 1999).

Notwithstanding the entry of attorney's "Alford" plea in sexual assault proceedings, for purpose of disciplinary proceeding the attorney was held to have actually committed the acts necessary to accomplish third degree sexual assault and therefore the attorney knowingly had sexual contact with a former client and with a current client without either woman's consent. *People v. Bertagnolli*, 922 P.2d 935 (Colo. 1996).

Applied in *People in Interest of M.M.*, 43 Colo. App. 65, 599 P.2d 968 (1979); *People v. Opson*, 632 P.2d 602 (Colo. App. 1980); *People v. Johnson*, 653 P.2d 737 (Colo. 1982).

18-3-405. Sexual assault on a child.

Statute text

(1) Any actor who knowingly subjects another not his or her spouse to any sexual contact commits sexual assault on a child if the victim is less than fifteen years of age and the actor is at least four years older than the victim.

(2) Sexual assault on a child is a class 4 felony, but it is a class 3 felony if:

(a) The actor applies force against the victim in order to accomplish or facilitate sexual contact; or

(b) The actor, in order to accomplish or facilitate sexual contact, threatens imminent death, serious bodily injury, extreme pain, or kidnapping against the victim or another person, and the victim believes that the actor has the present ability to execute the threat; or

(c) The actor, in order to accomplish or facilitate sexual contact, threatens retaliation by causing in the future the death or serious bodily injury, extreme pain, or kidnapping against the victim or another person, and the victim believes that the actor will execute the threat; or

(d) The actor commits the offense as a part of a pattern of sexual abuse as described in subsection (1) of this section. No specific date or time must be alleged for the pattern of sexual abuse; except that the acts constituting the pattern of sexual abuse must have been committed within ten years prior to or at any time after the offense charged in the information or indictment. The offense charged in the information or indictment shall constitute one of the incidents of sexual contact involving a child necessary to form a pattern of sexual abuse as defined in section 18-3-401 (2.5).

(3) If a defendant is convicted of the class 3 felony of sexual assault on a child pursuant to paragraphs (a) to (d) of subsection (2) of this section, the court shall sentence the defendant in accordance with the provisions of section 18-1.3-406.

History

Source: L. 75: Entire part R&RE, p. 630, § 1, effective July 1. L. 77: (1) amended, p. 962, § 18, effective July 1. L. 83: (5) amended, p. 693, § 2, effective June 15. L. 86: (3) added, p. 777, § 7, effective July 1. L. 89: (2)(b) and (3) amended and (2)(c) added, p. 903, §§ 2, 3, effective June 1. L. 90: (2)(b) repealed, p. 1033, § 25, effective July 1. L. 95: (2) and (3) amended, p. 1252, § 11, effective July 1. L. 2002: (2)(d) amended, p. 1582, § 8, effective July 1; (3) amended, p. 1513, § 191, effective October 1.

Annotations

Editor's note: This section was contained in a part that was repealed and reenacted in 1975. Provisions of this section, as it existed in 1975, are similar to those contained in 18-3-408 as said section existed in 1974, the year prior to the repeal and reenactment of this part.

Annotations

Cross references: For the legislative declaration contained in the 2002 act amending subsection (3), see section 1 of chapter 318, Session Laws of Colorado 2002.

Annotations

ANNOTATION

Annotations

Am. Jur.2d. See 65 Am. Jur.2d, Rape, § 15.

C.J.S. See 75 C.J.S., Rape, § 6.

Law reviews. For note, "One Year Review of Constitutional Law", see 41 Den. L. Ctr. J. 77 (1964). For article, "The Adolescent Sex Offender: An Overview", see 16 Colo. Law. 1844 (1987).

Annotator's note. Since § 18-3-405 is similar to former § 18-3-408, as it existed prior to the 1975 revision of this part, and § 40-2-32, C.R.S. 1963, and laws antecedent thereto, relevant cases construing those provisions have been included in the annotations to this section.

Enhanced crime of violence sentence on conviction for pattern of sexual assault on a child does not violate defendant's due process and equal protection guarantees. Prosecution not required to charge and prove a separate crime of violence count pursuant to § 16-11-309 (4) and (5) for per se crimes of violence even though the elements of the pattern sentence enhancer do not overlap with the elements of a crime of violence. *People v. Brown*, __ P.3d __ (Colo. App. 2002).

Neither § 18-3-403 (1) nor subsection (1) of this section is lesser included offense of the other, as each contains elements not found in the other. *People v. Opson*, 632 P.2d 602 (Colo. App. 1980).

Convictions under both not double jeopardy. Convictions for violations of § 18-3-403(1) and subsection (1) of this section arising from the same act do not constitute double jeopardy. *People v. Opson*, 632 P.2d 602 (Colo. App. 1980).

But, sexual assault on a child, as described in subsection (1), is a lesser included offense of second degree sexual assault, as described in § 18-3-403 (1)(e). Accordingly, defendant could not be convicted of both offenses, and the court was required to vacate the conviction that would effectuate as fully as possible the jury's verdict. As such, the court was required to consider the general assembly's felony classification of the various crimes committed by the defendant, together with the length of sentences, and maximize the jury's verdict, which gives effect to the most serious offense. *People v. Gholston*, 26 P.3d 1 (Colo. App. 2000).

Conviction under this section is not violative of equal protection on grounds that § 18-3-404 prohibits the same conduct with a lesser penalty. Statutory classifications are valid, even if difference in prohibited conduct is only a matter of degree. *People v. Oliver*, 745 P.2d 222 (Colo. 1987).

This section does not violate equal protection of the laws under the Colorado Constitution because, although the felony offense of sexual assault on a child by one in a position of trust and the misdemeanor offense of sexual assault in the third degree under § 18-3-404 (1)(e) contain some of the same elements, the two offenses contain elements which make them distinguishable. The fact that a single act may give rise to more than one criminal violation does not, by itself, create an equal protection problem. *People v. Madril*, 746 P.2d 1329 (Colo. 1987).

Subsection (2)(c) does not violate due process by allowing the prosecution to use evidence of alleged uncharged crimes since evidence of multiple instances of sexual abuse is not similar transaction evidence but rather evidence that forms integral part of the offense. *People v. Bowring*, 902 P.2d 911 (Colo. App. 1995).

Conduct proscribed by this section is different than conduct proscribed by § 18-6-403, sexual exploitation of a child, and imposing different penalties for the two sections does not offend equal protection. *People v. Slusher*, 844 P.2d 1222 (Colo. App. 1992).

Subsection (2)(c) does not violate equal protection of the law since the classification of those charged with pattern sexual offense involving children has a rational basis in fact and is reasonably related to the legitimate governmental interest of protecting young children. *People v. Bowring*, 902 P.2d 911 (Colo. App. 1995).

Subsection (2)(c) is not unconstitutionally vague. *People v. Longoria*, 862 P.2d 266 (Colo. 1993); *People v. Graham*, 867 P.2d 68 (Colo. App. 1994); *People v. Luman*, 994 P.2d 432 (Colo. App. 1999).

Subsection (2)(c) was possibly applied ex post facto, therefore, enhancement portion of conviction is reversed where several assaults occurred before this law was enacted, the verdict could have been based on an act that preceded the law's enactment, and the jury was not instructed that the conviction had to be based on an act that occurred after the law's passage. *People v. Graham*, 867 P.2d 68 (Colo. App. 1994).

If the acts preceding the date of the enactment of the statute are included in the charges, the jury must be instructed not to consider them in determining defendant's guilt or innocence with respect to sexual abuse as a part of a pattern of sexual abuse. If the jury is permitted to consider them, the statute, as applied to the defendant, is retrospective and violates the ex post facto prohibition. *People v. Luman*, 994 P.2d 432 (Colo. App. 1999).

Subsection (2)(c) did not violate the prohibition against ex post facto laws since the defendant had the requisite fair warning of the consequences of committing the offense with which he was charged. *People v. Bowring*, 902 P.2d 911 (Colo. App. 1995).

Subsection (2)(c) did not violate the prohibition against ex post facto laws since the conduct that triggered the pattern sexual abuse statute occurred after the statute's effective date. *People v. Bowring*, 902 P.2d 911 (Colo. App. 1995).

Although defendant's criminal acts were committed prior to the effective date of subsection (2)(d), application of this subsection to him did not violate the ex post facto clauses of the federal and state constitutions, because the general assembly had passed legislation increasing the penalty for sexual assault as a pattern of sexual abuse as early as 1989, before defendant committed the acts for which he was convicted. Because the acts were therefore not innocent when committed and the changes to subsection (2)(d) did not change the punishment or deprive defendant of a defense, subsection (2)(d) was not an ex post facto law. *People v. Gholston*, 26 P.3d 1 (Colo. App. 2000).

The 1982 amendment extending the statute of limitations from a three-year period to a seven-year period for the offense of sexual assault on a child applies to all offenses which are not time-barred as of the effective date of the amendatory legislation. *People v. Whitesell*, 729 P.2d 985 (Colo. 1986).

Section not inconsistent with § 18-3-402. Charges under each section are distinguishable by the nature of the prohibited sexual activity. *People v. Hawkins*, 728 P.2d 385 (Colo. App. 1986).

Ejaculation of semen onto clothing covering another person's intimate parts may constitute "touching" for purposes of establishing the "sexual contact" element of sexual assault on a child. *People v. Vinson*, 42 P.3d 86 (Colo. App. 2002).

The term "pattern of sexual abuse" is clearly and unambiguously defined in § 18-3-401 (2.5) and, therefore, the sentencing enhancement provision of subsection (2)(c) which incorporates that term is not unconstitutionally vague. *People v. Longoria*, 862 P.2d 266 (Colo. 1993).

Defining sexual assault on a child as part of a "pattern of sexual abuse" is a sentencing enhancer of sexual assault on a child because it increases the punishment for that offense from a class 4 felony to a class 3 felony. *People v. Luman*, 994 P.2d 432 (Colo. App. 1999).

Defendant's position of trust in relation to victim could not be used as aggravating factor under § 18-1-105 where it was also element of substantive crime. *People v. Garciadealba*, 733 P.2d 1240 (Colo. App. 1986).

The crime of sexual assault on a child as part of a pattern of sexual abuse is not a lesser included offense of the crime of sexual assault on a child by one in a position of trust. In addition, neither of these are sentence enhancers for a person convicted of sexual assault on a child. All are separate crimes and each requires proof of facts not required by any of the others. *People v. Valdez*, 874 P.2d 415 (Colo. App. 1994).

Dismissal of specific counts alleging a violation of subsection (1) does not preclude conviction on subsection (2)(d). *People v. Melillo*, 976 P.2d 353 (Colo. App. 1998), *aff'd*, 25 P.3d 769 (Colo. 2001).

Verdicts for sexual assault on a child as part of a pattern of sexual abuse and sexual assault on a child by one in a position of trust were not inconsistent and were based upon separate statutory provisions requiring proof of different elements. *People v. Hoefer*, 961 P.2d 563 (Colo. App. 1998).

Where the jury instructions invited the jury to find defendant guilty of a pattern of sexual abuse count based on any two sexual acts, regardless of when they occurred, the conviction required reversal. Since the pattern of sexual abuse under subsection (2)(d) is a sentence enhancer to a crime charged under subsection (1), only a count charged under subsection (1) can serve as the predicate offense, and the jury must find the defendant guilty both of the predicate offense and of another act of sexual abuse occurring within 10 years prior to the period in which the predicate offense occurred. Reversal of the conviction was required where the jury instruction did not specify the 10-year requirement. *People v. Gholston*, 26 P.3d 1 (Colo. App. 2000).

Jury verdict form for sexual assault on a child should not have included the word "pattern" because pattern is a sentence enhancement and not a separate offense. However, use of such instruction was not plain error because there was no reasonable possibility that it contributed to defendant's convictions. *People v. Brown*, ___ P.3d ___ (Colo. App. 2002).

Both the predicate act and the earlier pattern act or acts may occur within the period alleged in the pattern of sexual assault count in the information. The period in the information was less than ten years, therefore it would have been impossible to find the defendant guilty of the enhancer unless the jury found the defendant committed two separate acts within the period in the information. *People v. Honeysette*, 53 P.3d 714 (Colo. App. 2002).

Former section held constitutional. *Gallegos v. People*, 176 Colo. 191, 489 P.2d 1301 (1971).

Purpose of former statute was to protect morals of children. The evident purpose of former statute was to protect children under a certain age from those acts which would tend to corrupt their morals, so that the question of the consent or nonconsent of those included within the law was not material, because its prime object was to protect the morals of such youth. *Dekelt v. People*, 44 Colo. 525, 99 P. 330 (1908); *Martinez v. People*, 111 Colo. 52, 137 P.2d 690 (1943); *Cross v. People*, 122 Colo. 469, 223 P.2d 202 (1950).

Former statute was designed to protect children from depravity and licentiousness. *Kidder v. People*, 115 Colo. 72, 169 P.2d 181 (1946).

Former statute was neither obscure nor indefinite. It was designed to protect the morals of children in any place, and arbitrary rules of construction were not to be invoked to restrict its meaning. *Martinez v. People*, 111 Colo. 52, 137 P.2d 690 (1943).

Evidence on age of juvenile-defendant required. Where the petition in delinquency states the respondent's age, although § 19-3-106 and rule 8, C.R.J.P., specify that "jurisdictional matters of the age and residence of the child shall be deemed admitted . . . unless specifically denied", the juvenile-defendant's age is not thereby admitted, and it is necessary to present evidence specifically on that element of an offense when it is critical under this section. *People in Interest of M. M.*, 41 Colo. App. 44, 582 P.2d 692 (1978).

Effect of lack of evidence on four-year age differential. Since the four-year age differential is an essential element of the offense, a conviction cannot be sustained where no evidence was adduced as to that element. *People in Interest of M. M.*, 41 Colo. App. 44, 582 P.2d 692 (1978).

Evidence of age differential admitted. An eleven-year-old child's estimate of her father's age as within a range greater than her own by only four years is not so inherently speculative as to be without probative value. *People v. Fierro*, 199 Colo. 215, 606 P.2d 1291 (1980).

Where evidence of many acts, prosecution compelled to select specific transaction for conviction. Where there is evidence of many acts, any one of which would constitute the offense charged, the prosecution may be compelled to select the transaction on which it relies for a conviction, and although it is not required to identify the exact date of the offense, it must individualize and select a specific act. *People v. Estorga*, 200 Colo. 78, 612 P.2d 520 (1980).

Mental state required is "knowingly". The general assembly intended that the mental state requirement for this crime be "knowingly", and that this supersedes any indication of mens rea suggested by the term "intentional" in § 18-3-401. *People v. Salazar*, 648 P.2d 157 (Colo. App. 1981).

Evidence of similar offenses committed by accused against same child is admissible in prosecutions for taking indecent liberties with the child. *Godfrey v. People*, 168 Colo. 299, 451 P.2d 291 (1969).

The exception to the general rule excluding evidence of other offenses allows such evidence to show design, motive, or intent. The exception is broadened in cases of sexual offenses. *Huerta v. People*, 168 Colo. 276, 450 P.2d 648 (1969).

Evidence of prior sexual episodes with the victim which goes to prove a common plan, scheme, or design, is admissible under § 16-10-301 (1). *People v. Whitesel*, 200 Colo. 362, 615 P.2d 678 (1980).

Similar acts as to other persons cannot be shown in evidence. *Huerta v. People*, 168 Colo. 276, 450 P.2d 648 (1969).

Other offenses inadmissible where guilty knowledge is necessary conclusion. Where the intent or guilty knowledge is a necessary conclusion from the act done, proof of other offenses of a similar character is inadmissible, and violates the rule that the evidence must be confined to the issue. *Huerta v. People*, 168 Colo. 276, 450 P.2d 648 (1969).

Testimony of prior offenses not prejudicial. Each of the witnesses testified that defendant had perpetrated indecent liberties on occasions prior to the ones with which he was charged. The witnesses gave no dates or in any other manner identified or testified about any particular occurrence. In this circumstance no election is required because the evidence only tends to show one particular transaction, which in each instance was the transaction charged in the information. Examination of the record fails to disclose that the jury could have somehow convicted defendant for some act other than the very ones with which he was charged. *Nowels v. People*, 166 Colo. 140, 442 P.2d 410 (1968).

Attempt to commit sexual assault on child is offense under Colorado law. *People v. Martinez*, 42 Colo. App. 257, 592 P.2d 1358 (1979).

Evidence sufficient to support conviction. *Rapue v. People*, 171 Colo. 324, 466 P.2d 925 (1970); *People v. Ortega*, 672 P.2d 215 (Colo. App. 1983).

Evidence insufficient for class 3 conviction sufficient for class 4 conviction. Evidence which was insufficient to support a conviction for a class 3 felony charge was sufficient to convict for a lesser included class 4 felony. *People v. Whitesel*, 200 Colo. 362, 615 P.2d 678 (1980).

Verdicts of guilty under this section and of contributing to juvenile delinquency. Verdicts of guilty under this section and also as to a count of contributing to juvenile delinquency were not inconsistent. *Warren v. People*, 121 Colo. 118, 213 P.2d 381 (1949).

In a trial for commission of a crime under subsection (2)(c), no limiting instructions were required, as evidence of multiple sexual abuse incidents is not similar transaction evidence but is evidence of an integral part of the offense. *People v. Graham*, 867 P.2d 68 (Colo. App. 1994).

Sentence enhancement under subsection (2)(c) is not precluded by fact that prior conduct contributing to the establishment of pattern sexual abuse occurred in another state. *People v. Bowring*, 902 P.2d 911 (Colo. App. 1995).

When a defendant is convicted of sexual assault on a child by one in a position of trust, the offense of sexual assault on a child is not a lesser included offense. *People v. Leske*, 957 P.2d 1030 (Colo. 1998); *People v. Duncan*, 31 P.3d 874 (Colo. App. 2001).

A victim's belief that defendant would continue to hold her against her will unless she complied with his sexual demands could constitute a continuing threat of imminent kidnap sufficient to support defendant's conviction for violating subsection (2)(b). *People v. Zamora*, 940 P.2d 939 (Colo. App. 1996).

Applied in *Continental Liquor Co. v. Kalbin*, 43 Colo. App. 438, 608 P.2d 353 (1977); *People v. Lake*, 195 Colo. 454, 580 P.2d 788 (1978); *People v. Cavalier*, 41 Colo. App. 119, 584 P.2d 92 (1978); *People v. Boyette*, 635 P.2d 552 (Colo. 1981); *People in Interest of W.C.L.*, 650 P.2d 1302 (Colo. App. 1982); *People v. Green*, 658 P.2d 281 (Colo. App. 1982); *People v. Corbett*, 656 P.2d 687 (Colo. 1983); *People v. Lindsey*, 660 P.2d 502 (Colo. 1983); *People v. Wood*, 743 P.2d 422 (Colo. 1987); *People v. Melillo*, 25 P.3d 769 (Colo. 2001).

18-3-405.3. Sexual assault on a child by one in a position of trust.

Statute text

(1) Any actor who knowingly subjects another not his or her spouse to any sexual contact commits sexual assault on a child by one in a position of trust if the victim is a child less than eighteen years of age and the actor committing the offense is one in a position of trust with respect to the victim.

(2) Sexual assault on a child by one in a position of trust is a class 3 felony if:

(a) The victim is less than fifteen years of age; or

(b) The actor commits the offense as a part of a pattern of sexual abuse as described in subsection (1) of this section. No specific date or time need be alleged for the pattern of sexual abuse; except that the acts constituting the pattern of sexual abuse must have been committed within ten years prior to or at any time after the offense charged in the information or indictment. The offense charged in the information or indictment shall constitute one of the incidents of sexual contact involving a child necessary to form a pattern of sexual abuse as defined in section 18-3-401 (2.5).

(3) Sexual assault on a child by one in a position of trust is a class 4 felony if the victim is fifteen years of age or older but less than eighteen years of age and the offense is not committed as part of a pattern of sexual abuse, as described in paragraph (b) of subsection (2) of this section.

(4) If a defendant is convicted of the class 3 felony of sexual assault on a child pursuant to paragraph (b) of subsection (2) of this section, the court shall sentence the defendant in accordance with the provisions of section 18-1.3-406.

History

Source: L. 90: Entire section added, p. 1028, § 16, effective July 1. L. 98: Entire section amended, p. 1444, § 33, effective July 1. L. 2002: (2)(b) amended, p. 1582, § 9, effective July 1; (4) amended, p. 1513, § 192, effective October 1.

Annotations

Cross references: For the legislative declaration contained in the 2002 act amending subsection (4), see section 1 of chapter 318, Session Laws of Colorado 2002.

Annotations

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Application of this section to the defendant violated the ex post facto clauses of the federal and state constitutions because, while defendant's conviction was based on incidents occurring between June 1, 1990, and June 1, 1991, jurors were not clearly instructed that defendant's conviction had to be based on an act that occurred after July 1, 1990, the effective date of the statute. *People v. Gholston*, 26 P.3d 1 (Colo. App. 2000).

The crime of sexual assault on a child as part of a pattern of sexual abuse is not a lesser included offense of the crime of sexual assault on a child by one in a position of trust. In addition, neither of these are sentence enhancers for a person convicted of sexual assault on a child. All are separate crimes and each requires proof of facts not required by any of the others. *People v. Valdez*, 874 P.2d 415 (Colo. App. 1994).

The crime of sexual assault on a child is not a lesser included offense of sexual assault on a child by one in a position of trust under analysis of either § 18-1-408(5)(a) or 18-1-408 (5)(c). *People v. Leske*, 957 P.2d 1030 (Colo. 1998).

Because this section requires a "knowingly" culpable mental state, the requisite intent by the assailant could be demonstrated in a juvenile proceeding. *Swentkowski v. Dawson*, 881 P.2d 437 (Colo. App. 1994).

Jury could conclude that defendant was "in a position of trust" relative to the victim within the meaning of the applicable statute, where defendant lived in the same residence with the victim and her family and contributed to the household income, the victim spent hours alone with the defendant in his room, the victim was the only child the defendant allowed in his room, and neither the victim's mother nor any other individual intervened during the time that the victim was alone in the defendant's room. *People v. Luman*, 994 P.2d 432 (Colo. App. 1999) (decided under law in effect prior to 1990 amendment to § 18-3-401 (3.5)).

Ejaculation of semen onto clothing covering another person's intimate parts may constitute "touching" for purposes of establishing the "sexual contact" element of sexual assault on a child by one in a position of trust. *People v. Vinson*, 42 P.3d 86 (Colo. App. 2002).

18-3-411. Sex offenses against children - unlawful sexual offense defined - limitation for commencing proceedings - evidence - statutory privilege.

Statute text

(1) As used in this section, "unlawful sexual offense" means enticement of a child, as described in section 18-3-305, sexual assault, as described in section 18-3-402, when the victim at the time of the commission of the act is a child less than fifteen years of age, sexual assault in the first degree, as described in section

18-3-402, as it existed prior to July 1, 2000, when the victim at the time of the commission of the act is a child less than fifteen years of age; sexual assault in the second degree, as described in section 18-3-403 (1) (a), (1) (b), (1) (c), (1) (d), (1) (g), or (1) (h), as it existed prior to July 1, 2000, when the victim at the time of the commission of the act is a child less than fifteen years of age, or as described in section 18-3-403 (1) (e), as it existed prior to July 1, 2000, when the victim is less than fifteen years of age and the actor is at least four years older than the victim; unlawful sexual contact, as described in section 18-3-404 (1) (a), (1) (b), (1) (c), (1) (d), (1) (f), or (1) (g), when the victim at the time of the commission of the act is a child less than fifteen years of age; sexual assault in the third degree, as described in section 18-3-404 (1) (a), (1) (b), (1) (c), (1) (d), (1) (f), or (1) (g), as it existed prior to July 1, 2000, when the victim at the time of the commission of the act is a child less than fifteen years of age; sexual assault on a child, as described in section 18-3-405; sexual assault on a child by one in a position of trust, as described in section 18-3-405.3; aggravated incest, as described in section 18-6-302; trafficking in children, as described in section 18-6-402; sexual exploitation of a child, as described in section 18-6-403; procurement of a child for sexual exploitation, as described in section 18-6-404; indecent exposure, as described in section 18-7-302, soliciting for child prostitution, as described in section 18-7-402; pandering of a child, as described in section 18-7-403; procurement of a child, as described in section 18-7-403.5; keeping a place of child prostitution, as described in section 18-7-404; pimping of a child, as described in section 18-7-405; inducement of child prostitution, as described in section 18-7-405.5; patronizing a prostituted child, as described in section 18-7-406; or criminal attempt, conspiracy, or solicitation to commit any of the acts specified in this subsection (1).

(2) (a) No person shall be prosecuted, tried, or punished for an unlawful sexual offense other than the misdemeanor offenses specified in sections 18-3-402 and 18-3-404, unless the indictment, information, complaint, or action for the same is found or instituted within ten years after commission of the offense. No person shall be prosecuted, tried, or punished for a misdemeanor offense specified in section 18-3-402 or 18-3-404, unless the indictment, information, complaint, or action for the same is found or instituted within five years after the commission of the offense. The ten-year statute of limitations shall apply to all offenses specified in subsection (1) of this section which are alleged to have occurred on or after July 1, 1979, but prior to July 1, 1992.

(b) No person shall be prosecuted, tried, or punished for an unlawful sexual offense charged as a felony unless the indictment, information, complaint, or action for the same is found or instituted within ten years after the victim reaches the age of eighteen years. The ten-year statute of limitations shall apply to all felony offenses specified in subsection (1) of this section which are alleged to have occurred on or after July 1, 1992.

(3) Out-of-court statements made by a child describing any act of sexual contact, intrusion, or penetration, as defined in section 18-3-401, performed with, by, or on the child declarant, not otherwise admissible by a statute or court rule which provides an exception to the objection of hearsay, may be admissible in any proceeding in which the child is a victim of an unlawful sexual offense pursuant to the provisions of section 13-25-129, C.R.S.

(4) All cases involving the commission of an unlawful sexual offense shall take precedence before the court; the court shall hear these cases as soon as possible after they are filed.

(5) The statutory privilege between the husband and the wife shall not be available for excluding or refusing testimony in any prosecution of an unlawful sexual offense.

History

Source: L. 82: Entire section added, p. 313, § 1, effective July 1. L. 83: (3) added, p. 630, § 2, effective May 25; (4) and (5) added, p. 694, § 3, effective June 15. L. 85: (1) and (2) amended, p. 618, § 12, effective July 1. L. 88: (5) amended, p. 713, § 19, effective July 1. L. 91: (1) amended, p. 406, § 11, effective June 6. L. 94: (1) amended, p. 1717, § 10, effective July 1. L. 2000: (1) and (2) amended, p. 704, § 29, effective July 1. L. 2002: (2) amended, p. 1128, § 2, effective June 3.

Annotations

Cross references: For provisions concerning child abuse which are similar to the provisions of this section, see § 18-6-401.1; for the physician-patient and husband-wife privilege, see § 13-90-107.

Annotations

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Law reviews. For article, "Review of New Legislation Relating to Criminal Law", see 11 Colo. Law. 2148 (1982). For article, "The Child Sex Abuse Case in the Courtroom", see 15 Colo. Law. 807 (1986).

Specific expression of legislative intent to apply ten-year statute of limitations to offenses occurring on or after July 1, 1979, overcomes presumption of prospective operation. *People v. Midgley*, 714 P.2d 902 (Colo. 1986).

In prosecution for sexual assault, the prosecutor had obligation to provide defense counsel with a victim's prior, allegedly false, rape report because the rape report was highly probative of the victim's credibility as a witness. *People v. Wilson*, 678 P.2d 1024 (Colo. App. 1983), cert. denied, 469 U.S. 843, 105 S. Ct. 148, 83 L. Ed.2d 87 (1984).

No error in instructing jury that exact dates of two offenses charged need not be proved, where evidence clearly showed two different incidents, defendant was charged in connection with both, and neither could have occurred outside the applicable limitation period. *People v. Bolton*, 859 P.2d 303 (Colo. App. 1993).

Applied in *People v. Wood*, 743 P.2d 422 (Colo. 1987); *People v. District Court*, 743 P.2d 432 (Colo. 1987).

18-3-412. Habitual sex offenders against children - indictment or information - verdict of the jury.

Statute text

(1) For the purpose of this section, "unlawful sexual offense" means sexual assault, as described in section 18-3-402, when the victim at the time of the commission of the act is a child less than fifteen years of age, sexual assault in the first degree, as described in section 18-3-402, as it existed prior to July 1, 2000, when the victim at the time of the commission of the act is a child less than fifteen years of age; sexual assault in the second degree, as described in section 18-3-403 (1) (a), (1) (b), (1) (c), (1) (d), (1) (g), or (1) (h), as it existed prior to July 1, 2000, when the victim at the time of the commission of the act is a child less than fifteen years of age, or as described in section 18-3-403 (1) (e), as it existed prior to July 1, 2000, when the victim is less than fifteen years of age and the actor is at least four years older than the victim; unlawful sexual contact, as described in section 18-3-404 (1) (a), (1) (b), (1) (c), (1) (d), (1) (f), or (1) (g), when the victim at the time of the commission of the act is a child less than fifteen years of age; sexual assault in the third degree, as described in section 18-3-404 (1) (a), (1) (b), (1) (c), (1) (d), (1) (f), or (1) (g), as it existed prior to July 1, 2000, when the victim at the time of the commission of the act is a child less than fifteen years of age; sexual assault on a child, as described in section 18-3-405; sexual assault on a child by one in a position of trust, as described in section 18-3-405.3; aggravated incest, as described in section 18-6-302; trafficking in children, as described in section 18-6-402; sexual exploitation of a child, as described in section 18-6-403; procurement of a child for sexual exploitation, as described in section 18-6-404; soliciting for child prostitution, as described in section 18-7-402; pandering of a child, as described in section 18-7-403; procurement of a child, as described in section 18-7-403.5; keeping a place of child prostitution, as described in section 18-7-404; pimping of a child, as described in section 18-7-405; inducement of child prostitution, as described in section 18-7-405.5; patronizing a prostituted child, as described in section 18-7-406; or criminal attempt, conspiracy, or solicitation to commit any of the acts specified in this subsection (1).

(2) Every person convicted in this state of an unlawful sexual offense who has been previously convicted upon charges prior to the commission of the present act, which were separately brought, either in this state or elsewhere, of an unlawful sexual offense or who has been previously convicted under the laws of any

other state, the United States, or any territory subject to the jurisdiction of the United States of an unlawful act that, if committed within this state, would be an unlawful sexual offense shall be adjudged an habitual sex offender against children. If the second or subsequent unlawful sexual offense for which a defendant is convicted constitutes a felony, the court shall impose a sentence to the department of corrections of not less than three times the upper limit of the presumptive range for that class felony as set out in section 18-1.3-401. If the second or subsequent unlawful sexual offense for which a defendant is convicted constitutes a misdemeanor, the court shall impose a sentence to the county jail of not less than three times the maximum sentence for that class misdemeanor as set out in section 18-1.3-501.

(3) Any previous conviction of an unlawful sexual offense shall be set forth in apt words in the complaint, indictment, or information. For purposes of trial, a duly authenticated copy of the record of previous convictions and judgments of any court of record for any of said crimes of the party indicted, charged, or informed against shall be prima facie evidence of such convictions and may be used in evidence against such party. A duly authenticated copy of the records of institutions of treatment or incarceration, including, but not limited to, records pertaining to identification of the party indicted, charged, or informed against, shall be prima facie evidence of the facts contained therein and may be used in evidence against such party.

(4) Any person who is subject to the provisions of this section shall not be eligible for suspension of sentence.

(5) The procedures specified in section 18-1.3-803 shall govern in a trial to which the provisions of this section are alleged to apply based on a previous conviction or convictions for an unlawful sexual offense as set out in the complaint, indictment, or information.

History

Source: L. 82: Entire section added, p. 316, § 1, effective July 1. L. 85: (1) amended, p. 619, § 13, effective July 1. L. 96: (5) amended, p. 1846, § 18, effective July 1. L. 99: (1) amended, p. 1154, § 18, effective July 1. L. 2000: (1) amended, p. 711, § 49, effective July 1; (2) amended, p. 249, § 1, effective August 2. L. 2002: (2) and (5) amended, p. 1513, § 193, effective October 1. L. 2003: (2) and (4) amended, p. 1427, § 7, effective April 29.

Annotations

Cross references: (1) For provisions concerning habitual child abusers which are similar to the provisions of this section, see § 18-6-401.2; for limitations on collateral attacks on prior convictions, see § 16-5-402.

(2) For the legislative declaration contained in the 2002 act amending subsections (2) and (5), see section 1 of chapter 318, Session Laws of Colorado 2002.

Annotations

ANNOTATION

Annotations

Law reviews. For article, "Review of New Legislation Relating to Criminal Law", see 11 Colo. Law. 2148 (1982).

18-3-412.5. Failure to register as a sex offender.

Statute text

(1) Any person who is required to register pursuant to article 22 of title 16, C.R.S., and who fails to comply with any of the requirements placed on registrants by said article, including but not limited to committing any of the acts specified in this subsection (1), commits the offense of failure to register as a sex offender:

(a) Failure to register pursuant to article 22 of title 16, C.R.S.;

(b) Submission of a registration form containing false information or submission of an incomplete registration form;

(c) Failure to provide information or knowingly providing false information to a probation department employee, to a community corrections administrator or his or her designee, or to a judge or magistrate when receiving notice pursuant to section 16-22-106 (1), (2), or (3), C.R.S., of the duty to register;

(d) If the person has been sentenced to a county jail, otherwise incarcerated, or committed, due to conviction of or disposition or adjudication for an offense specified in section 16-22-103, C.R.S., failure to provide notice of the address where the person intends to reside upon release as required in sections 16-22-106 and 16-22-107, C.R.S.;

(e) Knowingly providing false information to a sheriff or his or her designee, department of corrections personnel, or department of human services personnel concerning the address where the person intends to reside upon release from the county jail, the department of corrections, or the department of human services. Providing false information shall include, but is not limited to, providing false information as described in section 16-22-107 (4) (b), C.R.S.;

(f) Failure when registering to provide the person's current name and any former names;

(g) Failure to register with the local law enforcement agency in each jurisdiction in which the person resides upon changing an address, establishing an additional residence, or legally changing names;

(h) Failure to provide the person's correct date of birth, to sit for or otherwise provide a current photograph or image, to provide a current set of fingerprints, or to provide the person's correct address;

(i) Failure to complete a cancellation of registration form and file the form with the local law enforcement agency of the jurisdiction in which the person will no longer reside.

(2) (a) Failure to register as a sex offender is a class 6 felony if the person was convicted of felony unlawful sexual behavior, or of another offense, the underlying factual basis of which includes felony unlawful sexual behavior, or if the person received a disposition or was adjudicated for an offense that would constitute felony unlawful sexual behavior if committed by an adult, or for another offense, the underlying factual basis of which involves felony unlawful sexual behavior; except that any second or subsequent offense of failure to register as a sex offender by such person is a class 5 felony.

(b) Any person convicted of felony failure to register as a sex offender shall be sentenced pursuant to the provisions of section 18-1.3-401. If such person is sentenced to probation, the court shall require, as a condition of probation, that the person participate until further order of the court in an intensive supervision probation program established pursuant to section 18-1.3-1007. If such person is sentenced to incarceration and subsequently released on parole, the parole board shall require, as a condition of parole, that the person participate in an intensive supervision parole program established pursuant to section 18-1.3-1005.

(3) Failure to register as a sex offender is a class 1 misdemeanor if the person was convicted of misdemeanor unlawful sexual behavior, or of another offense, the underlying factual basis of which involves misdemeanor unlawful sexual behavior, or if the person received a disposition or was adjudicated for an offense that would constitute misdemeanor unlawful sexual behavior if committed by an adult, or for another offense, the underlying factual basis of which involves misdemeanor unlawful sexual behavior.

(4) (a) Any juvenile who receives a disposition or is adjudicated for a delinquent act of failure to register as a sex offender that would constitute a felony if committed by an adult shall be sentenced to a forty-five-day mandatory minimum detention sentence; except that any juvenile who receives a disposition or is adjudicated for a second or subsequent delinquent act of failure to register as a sex offender that would constitute a felony if committed by an adult shall be placed or committed out of the home for not less than one year.

(b) Any juvenile who receives a disposition or is adjudicated for a delinquent act of failure to register as a sex offender that would constitute a misdemeanor if committed by an adult shall be sentenced to a thirty-day mandatory minimum detention sentence; except that any juvenile who receives a disposition or is adjudicated for a second or subsequent delinquent act of failure to register as a sex offender that would constitute a misdemeanor if committed by an adult shall be sentenced to a forty-five-day mandatory minimum detention sentence.

History

Source: L. 91: Entire section added, p. 393, § 1, effective April 17. L. 94: Entire section R&RE, p. 1736, § 1, effective July 1. L. 95: (6) amended and (6.5) and (9) added, p. 1309, § 1, effective June 5; (3) and (4) amended, p. 468, § 16, effective July 1. L. 96: (1), (2), (4), and (6) amended and (6.7) added, p. 1581, § 5, effective July 1; (8) amended, p. 1691, § 25, effective January 1, 1997. L. 97: IP(6.7) amended, p. 173, § 1, effective March 31; (1)(f) amended, p. 1547, § 19, effective July 1; (2) and (6.7)(c) amended and (6.7)(e) added, pp. 1553, 1554, §§ 6, 7, effective July 1; (3.5) added and IP(7) and (8) amended, p. 1563, § 9, effective July 1. L. 98: Entire section amended, p. 389, § 1, effective April 21. L. 99: (1)(a)(II), IP(1)(b), (1)(b)(XXI) to (1)(b)(XXIII), (1)(c), (2)(a), (2)(c), (3)(d), (6)(b), (6.5)(b), (6.5)(c), (7)(a)(II), and (7)(a)(III) amended and (1)(d), (4)(a)(III.5), and (6)(b.5) added, pp. 1144, 1146, 1150, 1156, 1155, 1151, §§ 2, 6, 13, 20, 19, 14, 21, effective July 1; IP(4)(a) amended, p. 799, § 19, effective July 1. L. 2000: IP(1)(b), (1)(d), (2)(a)(I), (3)(a), (3)(d), (3.5)(a), (6)(c), (6.5)(d), and IP(7)(a) amended and (1)(b)(XXIV), (3.7), (4)(a)(VII), (5)(c), (6)(e), (6.5)(e), and (7)(c) added, pp. 915, 919, 920, 918, §§ 1, 5, 6, 8, 2, 3, 4, effective July 1; (1)(b)(I), (1)(b)(II), (1)(b)(III), (7)(a)(II), and (7)(a)(III) amended, p. 705, § 30, effective July 1; (2)(a)(I) and (6)(b) amended and (3)(e), (3.5)(e), (3.5)(f), and (4)(a)(VI) added, pp. 718, 719, §§ 2, 5, 3, 1, 4, effective May 23; (8.5) added, p. 432, § 2, effective July 1; (6.5)(b) amended, p. 250, § 3, effective August 2. L. 2001: (4)(b) and (4)(c) amended, p. 567, § 2, effective May 29; (3)(a)(I.5) and (3.9) added and (7)(c) amended, pp. 656, 658, §§ 1, 8, 2, effective May 30; (2)(a)(I), (2)(a)(II), (3)(e), (3.5)(e), (3.5)(f), (6)(b), (6.5)(c), (6.5)(d), IP(7)(a), (7)(a)(I), (7)(a)(II), and (7)(a)(III) amended and (3.6) and (7)(a)(VI) added, pp. 962, 960, 961, §§ 3, 1, 2, effective June 5. L. 2002: Entire section R&RE, p. 1178, § 2, effective July 1; (2)(b) amended, p. 1567, § 393, effective October 1.

Annotations

Editor's note: (1) Amendments to subsection (2)(a)(I) by House Bill 00-1232 and House Bill 00-1317 were harmonized.

(2) Provisions relating to sex offender registration requirements formerly contained in this section were relocated to article 22 of title 16 in 2002 (see L. 2002, p. 1157).

Annotations

Cross references: For the legislative declaration contained in the 2000 act enacting subsection (8.5), see section 1 of chapter 125, Session Laws of Colorado 2000. For the legislative declaration contained in the 2001 act amending subsections (4)(b) and (4)(c), see section 1 of chapter 176, Session Laws of Colorado 2001. For the legislative declaration contained in the 2002 act amending subsection (2)(b), see section 1 of chapter 318, Session Laws of Colorado 2002.

18-3-413. Video tape depositions - children - victims of sexual offenses.

Statute text

(1) When a defendant has been charged with an unlawful sexual offense, as defined in section 18-3-411 (1), or incest, as defined in section 18-6-301, and when the victim at the time of the commission of the act is a child less than fifteen years of age, the prosecution may apply to the court for an order that a deposition be taken of the victim's testimony and that the deposition be recorded and preserved on video tape.

(2) The prosecution shall apply for the order in writing at least three days prior to the taking of the deposition. The defendant shall receive reasonable notice of the taking of the deposition.

(3) Upon timely receipt of the application, the court shall make a preliminary finding regarding whether, at the time of trial, the victim is likely to be medically unavailable or otherwise unavailable within the

meaning of rule 804 (a) of the Colorado rules of evidence. Such finding shall be based on, but not be limited to, recommendations from the child's therapist or any other person having direct contact with the child, whose recommendations are based on specific behavioral indicators exhibited by the child. If the court so finds, it shall order that the deposition be taken, pursuant to rule 15 (d) of the Colorado rules of criminal procedure, and preserved on video tape. The prosecution shall transmit the video tape to the clerk of the court in which the action is pending.

(4) If at the time of trial the court finds that further testimony would cause the victim emotional trauma so that the victim is medically unavailable or otherwise unavailable within the meaning of rule 804 (a) of the Colorado rules of evidence, the court may admit the video tape of the victim's deposition as former testimony under rule 804 (b) (1) of the Colorado rules of evidence.

(5) Nothing in this section shall prevent the admission into evidence of any videotaped statements of children which would qualify for admission pursuant to section 13-25-129, C.R.S., or any other statute or rule of evidence.

History

Source: L. 83: Entire section added, p. 694, § 4, effective June 15. L. 91: (5) added, p. 406, § 12, effective June 6. L. 2003: (1) amended, p. 974, § 6, effective April 17.

Annotations

Cross references: For provisions concerning video tape depositions of victims of child abuse which are similar to the provisions of this section, see § 18-6-401.3.

Annotations

ANNOTATION

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Law reviews. For article, "The Child Sex Abuse Case in the Courtroom", see 15 Colo. Law. 807 (1986). For comment, "Confrontation of Child Victim-Witnesses: Trauma, Unavailability, and Colorado's Hearsay Exceptions for Statements Describing Sexual Abuse", see 60 Colo. L. Rev. 659 (1989). For article, "Children as Witnesses", see 31 Colo. Law. 15 (October 2002).

Constitutionality. Implementation of this statute in a manner which preserves other aspects of the right to confrontation is not violative of the defendant's constitutional rights even though witness does not look directly upon the defendant or testify in the defendant's direct physical presence. *People v. Thomas*, 770 P.2d 1324 (Colo. App. 1988), rev'd on other grounds, 803 P.2d 144 (Colo. 1990).

As subsection (5), enacted in 1991, did not apply to offenses committed before June 6, 1991, this subsection was not applicable to offenses committed between June 1, 1989, and April 10, 1990. *People v. Carter*, 919 P.2d 862 (Colo. App. 1996).

Medical unavailability includes a situation in which testifying in front of the defendant would cause the child substantial and long term emotional or psychological harm. *Thomas v. People*, 803 P.2d 144 (Colo. 1990); *People v. Newbrough*, 803 P.2d 155 (Colo. 1990).

Specific findings required. Testimony about the likely impact of the child's age and emotional inability to testify must be related to the particular child witness. The mere unwillingness, nervousness, excitement, or reluctance to testify are not sufficient to render the child medically unavailable. *People v. Thomas*, 770 P.2d 1324 (Colo. App. 1988).

Children's videotaped depositions were admitted at sexual abuse trial where evidence established that both victims were medically unavailable and would be severely traumatized by the defendant's presence during their testimony. *Thomas v. Guenther*, 754 F. Supp. 833 (D. Colo. 1990), aff'd, 962 F.2d 1477 (10th Cir. 1992).

This section governs all videotaped statements obtained from child sexual abuse victims. People v. Newbrough, 803 P.2d 155 (Colo. 1990).

18-3-413.5. Use of closed circuit television - child victims of sexual offenses.

Statute text

(1) (a) When a defendant has been charged with an unlawful sexual offense against a child, as defined in section 18-3-411 (1), or incest, as defined in section 18-6-301, and when the victim at the time of the trial is a child less than twelve years of age, the court may, upon motion of any party or upon its own motion, order that any testimony taken of the child victim be taken in a room other than the courtroom and be televised by closed circuit television in the courtroom if:

(I) The testimony is taken during the proceeding;

(II) The judge determines that testimony by the child victim in the courtroom and in the presence of the defendant would result in the child suffering serious emotional distress or trauma such that the child would not be able to reasonably communicate; and

(III) Closed circuit television equipment is available for such use.

(b) To obtain an order authorizing the use of closed circuit television for testimony by a child victim, the party shall file a written motion with the court no less than ten days prior to the trial.

(c) Only the prosecuting attorney, the attorney for the defendant, the guardian ad litem, if any, and the judge may question the child victim when he or she testifies by closed circuit television.

(d) The operators of the closed circuit television equipment shall make every effort to be unobtrusive while the child victim is testifying.

(2) (a) Only the following persons may be in the room with the child victim when the child testifies by closed circuit television:

(I) The prosecuting attorney;

(II) The attorney for the defendant;

(III) The guardian ad litem, if any;

(IV) The operators of the closed circuit television equipment;

(V) Unless the defendant objects, any person whose presence, in the opinion of the court, contributes to the welfare and well-being of the child victim, including a person who has dealt with the child in a therapeutic setting concerning the abuse; and

(VI) The jury.

(b) During the child victim's testimony by closed circuit television, the judge and the defendant, if present, shall remain in the courtroom.

(c) The judge and the defendant shall be allowed to communicate with the persons in the room where the child is testifying by any appropriate electronic method.

(3) The provisions of this section shall not apply if the defendant is appearing pro se.

(4) This section shall not be interpreted to preclude, for purposes of identification of a defendant, the presence of both the child victim and the defendant in the courtroom at the same time.

(5) Nothing in this section shall be interpreted to preclude the removal of the defendant, rather than the child, from the courtroom upon the stipulation of both parties and the approval of the court.

History

Source: L. 96: Entire section added, p. 677, § 1, effective May 2. L. 2003: IP(1)(a) amended, p. 974, § 7, effective April 17.

18-3-414. Payment of treatment costs for the victim or victims of a sexual offense against a child.

Statute text

(1) In addition to any other penalty provided by law, the court may order any person who is convicted of an unlawful sexual offense, as defined in section 18-3-411 (1), or of incest, as defined in section 18-6-301, when the victim was under the age of fifteen at the time of the commission of the offense, to meet all or any portion of the financial obligations of treatment prescribed for the victim or victims of his or her offense.

(2) At the time of sentencing, the court may order that an offender described in subsection (1) of this section be put on a period of probation for the purpose of paying the treatment costs of the victim or victims.

History

Source: L. 83: Entire section added, p. 694, § 5, effective June 15. L. 2003: Entire section amended, p. 974, § 8, effective April 17.

Annotations

Cross references: For provisions concerning payment of treatment costs for child abuse victims which are similar to the provisions of this section, see § 18-6-401.4.

18-3-414.5. Sexually violent predator.

Statute text

(1) As used in this section, unless the context otherwise requires:

(a) "Sexually violent predator" means an offender:

(I) Who is eighteen years of age or older as of the date the offense is committed or who is less than eighteen years of age as of the date the offense is committed but is tried as an adult pursuant to section 19-2-517 or 19-2-518, C.R.S.;

(II) Who has been convicted on or after July 1, 1999, of one of the following offenses committed on or after July 1, 1997:

(A) Sexual assault, in violation of section 18-3-402 or sexual assault in the first degree, in violation of section 18-3-402, as it existed prior to July 1, 2000;

(B) Sexual assault in the second degree, in violation of section 18-3-403, as it existed prior to July 1, 2000;

(C) Unlawful sexual contact, in violation of section 18-3-404 (1.5) or (2) or sexual assault in the third degree, in violation of section 18-3-404 (1.5) or (2), as it existed prior to July 1, 2000;

(D) Sexual assault on a child, in violation of section 18-3-405; or

(E) Sexual assault on a child by one in a position of trust, in violation of section 18-3-405.3;

(III) Whose victim was a stranger to the offender or a person with whom the offender established or promoted a relationship primarily for the purpose of sexual victimization; and

(IV) Who, based upon the results of a risk assessment screening instrument developed by the division of criminal justice in consultation with and approved by the sex offender management board established pursuant to section 16-11.7-103 (1), C.R.S., is likely to subsequently commit one or more of the offenses specified in subparagraph (II) of this paragraph (a) under the circumstances described in subparagraph (III) of this paragraph (a).

(b) "Convicted" includes having pleaded guilty or nolo contendere.

(2) At the time a presentence investigation report is conducted for a defendant who is convicted of one of the offenses specified in subparagraph (II) of paragraph (a) of subsection (1) of this section, the probation department shall, in coordination with the evaluator completing the mental health sex offense specific evaluation, complete the sexually violent predator risk assessment. Based on the results of such assessment, the court shall make specific findings of fact and enter an order concerning whether the defendant is a sexually violent predator. If the defendant is found to be a sexually violent predator, the defendant shall be required to register pursuant to the provisions of section 16-22-108, C.R.S.

(3) When considering release on parole for an offender who was convicted of one of the offenses specified in subparagraph (II) of paragraph (a) of subsection (1) of this section, the parole board shall make specific findings concerning whether the offender is a sexually violent predator, based on the results of a sexually violent predator assessment conducted by the department of corrections. If the parole board finds that the offender is a sexually violent predator, the offender shall be required to register pursuant to the provisions of section 16-22-108, C.R.S.

History

Source: L. 97: Entire section added, p. 1564, § 10, effective July 1. L. 98: Entire section amended, p. 397, § 2, effective April 21. L. 99: Entire section amended, p. 1148, § 9, effective July 1. L. 2000: (1)(a)(II)(A), (1)(a)(II)(B), and (1)(a)(II)(C) amended, p. 706, § 31, effective July 1. L. 2001: (2) amended, p. 657, § 4, effective May 30. L. 2002: (2) and (3) amended, p. 1186, § 22, effective July 1.

Annotations

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Law reviews. For article, "Constitutional Challenges to Sex Offender Registration and Community Notification Laws", see 30 Colo. Law. 51 (February 2001).

Trial court's adjudication of defendant as a sexually violent predator under this section did not violate defendant's right to trial under *Apprendi v. New Jersey*. Lifetime duty to register as a sex offender and posting of defendant's personal information on internet were not additional punishments giving rise to right to trial by jury. *People v. Stead*, ___ P.3d ___ (Colo. App. 2002).

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