

## Nebraska

28-105

Felonies; classification of penalties; sentences; where served; eligibility for probation.

(1) For purposes of the Nebraska Criminal Code and any statute passed by the Legislature after the date of passage of the code, felonies are divided into nine classes which are distinguished from one another by the following penalties which are authorized upon conviction:

Class I felony ..... Death

Class IA felony ..... Life imprisonment without parole

Class IB felony ..... Maximum -- life imprisonment  
Minimum -- twenty years imprisonment

Class IC felony ..... Maximum -- fifty years imprisonment  
Mandatory minimum -- five years imprisonment

Class ID felony ..... Maximum -- fifty years imprisonment  
Mandatory minimum -- three years imprisonment

Class II felony ..... Maximum -- fifty years imprisonment  
Minimum -- one year imprisonment

Class III felony .... Maximum -- twenty years imprisonment, or twenty-five thousand dollars fine, or both  
Minimum -- one year imprisonment

Class IIIA felony ... Maximum -- five years imprisonment, or ten thousand dollars fine, or both  
Minimum -- none

Class IV felony ..... Maximum -- five years imprisonment, or ten thousand dollars fine, or both  
Minimum -- none

(2) All sentences of imprisonment for Class IA, IB, IC, ID, II, and III felonies and sentences of one year or more for Class IIIA and IV felonies shall be served in institutions under the jurisdiction of the Department of Correctional Services. Sentences of less than one year shall be served in the county jail except as provided in this subsection. If the department certifies that it has programs and facilities available for persons sentenced to terms of less than one year, the court may order that any sentence of six months or more be served in any institution under the jurisdiction of the department. Any such certification shall be given by the department to the State Court Administrator, who shall forward copies thereof to each judge having jurisdiction to sentence in felony cases.

(3) Nothing in this section shall limit the authority granted in sections 29-2221 and 29-2222 to increase sentences for habitual criminals.

(4) A person convicted of a felony for which a mandatory minimum sentence is prescribed shall not be eligible for probation.

Source:

Laws 1977, LB 38, § 5; Laws 1989, LB 592, § 1; Laws 1995, LB 371, § 2; Laws 1997, LB 364, § 1; Laws 1998, LB 900, § 1;

Laws 1998, LB 1266, § 1; Laws 2002, Third Spec. Sess., LB 1, § 1.  
Effective date November 23, 2002.

Annotations:

County jail was not under the jurisdiction of the Department of Correctional Services; therefore, it was plain error for district court to sentence defendant convicted of Class III felony to term in county jail. *State v. Wilcox*, 239 Neb. 882, 479 N.W.2d 134 (1992).

Pursuant to subsection (2) of this section, the district court lacks statutory authority to sentence a defendant convicted of a Class III felony to a term of imprisonment in the county jail. *State v. Wren*, 234 Neb. 291, 450 N.W.2d 684 (1990).

Under the provisions of this section and section 28-304(2), a court is not authorized to sentence one convicted of second degree murder to an indeterminate sentence, but must sentence such a person to imprisonment either for life or for a definite term of not less than 10 years. *State v. Ward*, 226 Neb. 809, 415 N.W.2d 151 (1987).

Where an indeterminate sentence is pronounced, the minimum limit fixed by the court shall not be less than the minimum provided by law nor more than one-third of the maximum term. Where maximum allowable sentence is five years, an indeterminate sentence of two to five years is excessive and must be modified to a sentence of not less than one year eight months nor more than five years. *State v. Bosak*, 207 Neb. 693, 300 N.W.2d 201 (1981).

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28-311

Criminal child enticement; penalties.

(1) No person, by any means and without privilege to do so, shall knowingly solicit, coax, entice, or lure any child under the age of fourteen years to enter into any vehicle, whether or not the person knows the age of the child, if:

(a) The person does not have the express or implied permission of the parent, guardian, or other legal custodian of the child in undertaking the activity; and

(b)(i) The person is not a law enforcement officer, emergency services provider as defined in section 71-507, firefighter, or other person who regularly provides emergency services, is not the operator of a bookmobile or other such vehicle operated by the state or a political subdivision and used for informing, educating, organizing, or transporting children, is not a paid employee of, or a volunteer for, a nonprofit or religious organization which provides activities for children, and is not an employee or agent of or a volunteer acting under the direction of any board of education or (ii) the person is a person listed in subdivision (1)(b)(i) of this section but, at the time the person undertakes the activity, he or she is not acting within the scope of his or her lawful duties in that capacity.

(2) It is an affirmative defense to a charge under this section that the person undertook the activity in response to a bona fide emergency situation or that the person undertook the activity in response to a reasonable belief that it was necessary

to preserve the health, safety, or welfare of the child.

(3) Any person who violates this section commits criminal child enticement and is guilty of a Class I misdemeanor. If such person has previously been convicted of (a) criminal child enticement under this section, (b) sexual assault of a child under section 28-320.01, or (c) assault under section 28-308, 28-309, or 28-310, kidnapping under section 28-313, or false imprisonment under section 28-314 or 28-315 when the victim was under eighteen years of age when such person violates this section, such person is guilty of a Class IV felony.

Source:  
Laws 1999, LB 49, § 2.

Cross Reference:  
Registration of sex offenders, see sections 29-4001 to 29-4013.

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28-311.02  
Stalking and harassment; legislative intent; terms, defined.

(1) It is the intent of the Legislature to enact laws dealing with stalking offenses which will protect victims from being willfully harassed, intentionally terrified, threatened, or intimidated by individuals who intentionally follow, detain, stalk, or harass them or impose any restraint on their personal liberty and which will not prohibit constitutionally protected activities.

(2) For purposes of sections 28-311.02 to 28-311.05, 28-311.09, and 28-311.10:

(a) Harass means to engage in a knowing and willful course of conduct directed at a specific person which seriously terrifies, threatens, or intimidates the person and which serves no legitimate purpose; and

(b) Course of conduct means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including a series of acts of following, detaining, restraining the personal liberty of, or stalking the person or telephoning, contacting, or otherwise communicating with the person.

Source:  
Laws 1992, LB 1098, § 1; Laws 1993, LB 299, § 1;  
Laws 1998, LB 218, § 3.

Cross Reference:  
Registration of sex offenders, see sections 29-4001 to 29-4013

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28-311.03  
Stalking.

Any person who willfully harasses another person with the intent to injure, terrify, threaten, or intimidate commits the offense of stalking.

Source:

Laws 1992, LB 1098, § 2; Laws 1993, LB 299, § 2;  
Laws 1998, LB 218, § 4.

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28-311.04

Stalking; violations; penalties.

Any person convicted of violating section 28-311.03 shall be guilty of a Class I misdemeanor, except that any person convicted of violating such section who has a prior conviction under such section within the last seven years for acts committed against the same victim shall be guilty of a Class IV felony.

Source:

Laws 1992, LB 1098, § 3;  
Laws 1993, LB 299, § 3.

28-311.05

Stalking; not applicable to certain conduct.

Sections 28-311.02 to 28-311.04, 28-311.09, and 28-311.10 shall not apply to conduct which occurs during labor picketing.

Source:

Laws 1992, LB 1098, § 4; Laws 1998, LB 218, § 5.

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28-311.08

Unlawful intrusion; penalty.

(1) It shall be unlawful for any person to knowingly intrude upon any other person without his or her consent or knowledge in a place of solitude or seclusion.

(2) For purposes of this section:

(a) Intrude means the viewing or recording, either by video, audio, or other electronic means, of a person in a state of undress; and

(b) Place of solitude or seclusion means a place where a person would intend to be in a state of undress and have a reasonable expectation of privacy, including, but not limited to, any facility, public or private, used as a restroom, tanning booth, locker room, shower room, fitting room, or dressing room.

(3) Violation of this section is a Class III misdemeanor unless the victim is under the age of eighteen in which case a violation is a Class II misdemeanor. Lack of knowledge as to the victim's age is not a defense to the enhanced penalty under this section.

Source:

Laws 1996, LB 908, § 1.

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28-312

Terms, defined.

As used in sections 28-312 to 28-315, unless

the context otherwise requires:

(1) Restrain shall mean to restrict a person's movement in such a manner as to interfere substantially with his liberty:

(a) By means of force, threat, or deception; or

(b) If the person is under the age of eighteen or incompetent, without the consent of the relative, person, or institution having lawful custody of him; and

(2) Abduct shall mean to restrain a person with intent to prevent his liberation by:

(a) Secreting or holding him in a place where he is not likely to be found; or

(b) Endangering or threatening to endanger the safety of any human being.

Source:

Laws 1977, LB 38, § 27.

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28-313

Kidnapping; penalties.

(1) A person commits kidnapping if he abducts another or, having abducted another, continues to restrain him with intent to do the following:

(a) Hold him for ransom or reward; or

(b) Use him as a shield or hostage; or

(c) Terrorize him or a third person; or

(d) Commit a felony; or

(e) Interfere with the performance of any government or political function.

(2) Except as provided in subsection (3) of this section, kidnapping is a Class IA felony.

(3) If the person kidnapped was voluntarily released or liberated alive by the abductor and in a safe place without having suffered serious bodily injury, prior to trial, kidnapping is a Class II felony.

Source:

Laws 1977, LB 38, § 28.

Cross Reference:

Registration of sex offenders, see sections 29-4001 to 29-4013.

Annotations:

Kidnapping is not a lesser-included offense of first degree sexual assault, nor is sexual assault a lesser-included offense of kidnapping; it is not impossible to commit one of these crimes without having committed the other. *State v. Maeder*, 229 Neb. 568, 428 N.W.2d 180 (1988).

Sections 28-313 and 28-314 define separate offenses. *State v. Miller*, 216 Neb. 72, 341 N.W.2d 915 (1983).

The purpose of kidnapping in every instance is to make it possible to commit some other crime. One may not erase the commission of a crime simply because, after committing it, a second crime is committed. *State v. Schmidt*, 213 Neb. 126, 327 N.W.2d 624 (1982).

The Nebraska kidnapping statute defines only a single criminal offense which is punishable by two different ranges of penalties depending on the treatment accorded the victim. *State v. Schneckloth, Koger, and Heathman*, 210 Neb. 144, 313 N.W.2d 438 (1981).

The district court did not abuse its discretion in sentencing the defendant to forty years for aiding and abetting kidnapping where sentence was well within the statutory limits, whether crime was classified as a Class IA or Class II felony, and the court had correctly considered that the victims were not voluntarily released and one victim had been raped, though defendant was not convicted of aiding and abetting the rape. *United States v. Gomez*, 733 F.2d 69 (8th Cir. 1984).

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28-317

Sexual assault; legislative intent.

It is the intent of the Legislature to enact laws dealing with sexual assault and related criminal sexual offenses which will protect the dignity of the victim at all stages of judicial process, which will insure that the alleged offender in a criminal sexual offense case have preserved the constitutionally guaranteed due process of law procedures, and which will establish a system of investigation, prosecution, punishment, and rehabilitation for the welfare and benefit of the citizens of this state as such system is employed in the area of criminal sexual offenses.

Source:

Laws 1977, LB 38, § 32.

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28-318

Terms, defined.

As used in sections 28-317 to 28-321, unless the context otherwise requires:

- (1) Actor means a person accused of sexual assault;
- (2) Intimate parts means the genital area, groin, inner thighs, buttocks, or breasts;
- (3) Past sexual behavior means sexual behavior other than the sexual behavior upon which the sexual assault is alleged;
- (4) Serious personal injury means great bodily injury or disfigurement, extreme mental anguish or mental trauma, pregnancy, disease, or loss or impairment of a sexual or reproductive organ;
- (5) Sexual contact means the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact shall also mean the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's sexual or intimate parts when such touching is intentionally caused by the actor. Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party.

Sexual contact shall also include the touching of a child with the actor's sexual or intimate parts on any part of the child's body for purposes of sexual assault of a child under section 28-320.01;

(6) Sexual penetration means sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes. Sexual penetration shall not require emission of semen;

(7) Victim means the person alleging to have been sexually assaulted;

(8) Without consent means:

(a)(i) The victim was compelled to submit due to the use of force or threat of force or coercion, or (ii) the victim expressed a lack of consent through words, or (iii) the victim expressed a lack of consent through conduct, or (iv) the consent, if any was actually given, was the result of the actor's deception as to the identity of the actor or the nature or purpose of the act on the part of the actor;

(b) The victim need only resist, either verbally or physically, so as to make the victim's refusal to consent genuine and real and so as to reasonably make known to the actor the victim's refusal to consent; and

(c) A victim need not resist verbally or physically where it would be useless or futile to do so; and

(9) Force or threat of force means (a) the use of physical force which overcomes the victim's resistance or (b) the threat of physical force, express or implied, against the victim or a third person that places the victim in fear of death or in fear of serious personal injury to the victim or a third person where the victim reasonably believes that the actor has the present or future ability to execute the threat.

Source:

Laws 1977, LB 38, § 33; Laws 1978, LB 701, § 1; Laws 1984, LB 79, § 3; Laws 1985, LB 2, § 2; Laws 1995, LB 371, § 3; Laws 2004, LB 943, § 4. Effective date April 16, 2004.

Annotations:

1. Jury instruction
2. Sexual contact
3. Sexual penetration

1. Jury instruction

Jury instruction approved, defining cunnilingus as including licking, kissing, sucking, or otherwise fondling the sex organ of a female with the mouth or tongue. *State v. Piskorski*, 218 Neb. 543, 357 N.W.2d 206 (1984).

2. Sexual contact

In proving sexual contact, the State need not prove sexual arousal or gratification, but only circumstances and conduct

which could be construed as being for such a purpose.  
State v. Osborn, 241 Neb. 424, 490 N.W.2d 160 (1992).

"Sexual contact," as defined in subsection (5) of this section, is established when the State proves that defendant intentionally touched the victim's underpants in the area between the legs.

State v. Andersen, 238 Neb. 32, 468 N.W.2d 617 (1991).

In proving "sexual contact," defined in subdivision (5) of this section, the State need not prove sexual arousal or gratification, but only circumstances and conduct which could be construed as being for such a purpose. State v. Berkman, 230 Neb. 163, 430 N.W.2d 310 (1988).

### 3. Sexual penetration

Penetration need not be penile to be sufficient to establish first degree sexual assault. State v. Shepard, 239 Neb. 639, 477 N.W.2d 567 (1991).

The act of fellatio constitutes a sexual penetration within the meaning of this section. State v. Gonzales, 219 Neb. 846, 366 N.W.2d 775 (1985).

The slightest penetration of the sexual organs is sufficient, if established beyond a reasonable doubt, to constitute the necessary element of penetration in a prosecution for first degree sexual assault. State v. Tatum, 206 Neb. 625, 294 N.W.2d 354 (1980).

28-319

Sexual assault; first degree; penalty.

(1) Any person who subjects another person to sexual penetration (a) without consent of the victim, or (b) who knew or should have known that the victim was mentally or physically incapable of resisting or appraising the nature of his or her conduct, or (c) when the actor is nineteen years of age or older and the victim is less than sixteen years of age is guilty of sexual assault in the first degree.

(2) Sexual assault in the first degree is a Class II felony. The sentencing judge shall consider whether the actor caused serious personal injury to the victim in reaching a decision on the sentence.

(3) Any person who is found guilty of sexual assault in the first degree for a second time when the first conviction was pursuant to this section or any other state or federal law with essentially the same elements as this section shall be sentenced to not less than twenty-five years and shall not be eligible for parole.

Source:

Laws 1977, LB 38, § 34; Laws 1978, LB 748, § 5; Laws 1993, LB 430, § 1; Laws 1995, LB 371, § 4.

Cross Reference:

Registration of sex offenders, see sections 29-4001 to 29-4013.

Annotations:

1. Constitutionality

2. Defenses
3. Elements
4. Evidence
5. Force
6. Generally
7. Lesser-included offense
8. Sentencing
9. Sexual penetration

#### 1. Constitutionality

A constitutional amendment adding first degree sexual assault to offenses for which bail may be denied, is constitutional and is not violative of the fourteenth amendment, due process clause of the U.S. Constitution. *Parker v. Roth*, 202 Neb. 850, 278 N.W.2d 106 (1979).

Statute held to be constitutional and not violative of equal protection under the fourteenth amendment. *Country v. Parratt*, 684 F.2d 588 (8th Cir. 1982).

#### 2. Defenses

In a charge of sexual assault on a child, it is no defense that the victim engaged in active concealment or misrepresentation of age, and evidence on the issue of the victim's chastity is irrelevant and inadmissible. *State v. Campbell*, 239 Neb. 14, 473 N.W.2d 420 (1991).

Consent or reasonable mistake as to the age of the victim is not a defense to first degree sexual assault upon a child. *State v. Navarrete*, 221 Neb. 171, 376 N.W.2d 8 (1985).

#### 3. Elements

Intent is not an element of first degree sexual assault as defined by subsection (1) of this section. *State v. Trackwell*, 244 Neb. 925, 509 N.W.2d 638 (1994).

Only in first degree sexual assault does the State have to prove that the actor subjected the victim to sexual penetration. *State v. Narcisse*, 231 Neb. 805, 438 N.W.2d 743 (1989).

#### 4. Evidence

Under subsection (2) of this section, before imposition of a sentence on a defendant convicted of first degree sexual assault, a sentencing judge is not required to conduct an evidentiary hearing to determine whether the victim has sustained serious personal injury as a result of the sexual assault by the defendant; rather, concerning the question of personal injury to the victim, the judge shall consider information appropriately before the court in the sentencing process. *State v. Bunner*, 234 Neb. 879, 453 N.W.2d 97 (1990).

#### 5. Force

For use of a firearm to subject a victim to sexual penetration by force or threat of force, it is only necessary that the victim be aware of the firearm's presence; that the assailant, in proximity to the firearm and knowing the firearm's location, has realistic accessibility to that firearm; and that the victim reasonably believes that the assailant will discharge the firearm to harm the victim unless the victim submits to the act of the assailant. *State v. Dondlinger*, 222 Neb. 741, 386 N.W.2d 866 (1986).

Removing articles of clothing from a sleeping person, physically spreading her legs, and performing nonconsensual cunnilingus is "force" sufficient to violate the statute. *State v. Moeller*, 1 Neb. App. 1046, 510 N.W.2d 500 (1993).

#### 6. Generally

Cunnilingus, that is, stimulation by the tongue or lips of any part of a female's genitalia, is an act which may subject the actor to prosecution for first degree sexual assault. Once the perpetrator's lips or tongue touches any part of the female's genitalia, the act of cunnilingus is complete, irrespective of any actual penetration of the genitalia. *State v. Brown*, 225 Neb. 418, 405 N.W.2d 600 (1987).

Whatever basis there may have been for assuming that the common-law rule of spousal exclusion was applicable under the former rape law of this state, such assumption was effectively abrogated by the Legislature when it enacted this section. *State v. Willis*, 223 Neb. 844, 394 N.W.2d 648 (1986).

In a prosecution for sexual assault, the prosecutrix may testify on direct examination, if within a reasonable time under all the circumstances after the act was committed she made complaint to another, to the fact and nature of the complaint, but not as to its details. *State v. Watkins*, 207 Neb. 859, 301 N.W.2d 338 (1981).

It is sufficient if the victim's testimony is corroborated as to material facts and circumstances which support her testimony as to the principal facts at issue. *State v. Red Feather*, 205 Neb. 734, 289 N.W.2d 768 (1980); *State v. Rhodes*, 201 Neb. 576, 270 N.W.2d 920 (1978).

#### 7. Lesser-included offense

Kidnapping is not a lesser-included offense of first degree sexual assault, nor is sexual assault a lesser-included offense of kidnapping; it is not impossible to commit one of these crimes without having committed the other. *State v. Maeder*, 229 Neb. 568, 428 N.W.2d 180 (1988).

#### 8. Sentencing

Under subsection (2) of this section, before imposition of a sentence on a defendant convicted of first degree sexual assault, a sentencing judge is not required to conduct an evidentiary hearing to determine whether the victim has sustained serious personal injury as a result of the sexual assault by the defendant; rather, concerning the question of personal injury to the victim, the judge shall consider information appropriately before the court in the sentencing process. *State v. Bunner*, 234 Neb. 879, 453 N.W.2d 97 (1990).

A sentence of thirty-five years without the possibility of parole for first degree sexual assault, second offense, did not constitute cruel and unusual punishment. *State v. Brand*, 219 Neb. 402, 363 N.W.2d 516 (1985).

#### 9. Sexual penetration

When a defendant is charged with first degree sexual assault under this section, the issue is not whether the defendant had sexual intercourse with the victim; rather, the issue is whether the defendant achieved even the slightest penetration. *State v. Faatz*, 234 Neb. 796, 452 N.W.2d 751 (1990).

Only in first degree sexual assault does the State have to prove that the actor subjected the victim to sexual penetration. *State v. Narcisse*, 231 Neb. 805, 438 N.W.2d 743 (1989).

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28-320

Sexual assault; second or third degree; penalty.

(1) Any person who subjects another person to sexual contact (a) without consent of the victim, or (b) who knew or should have known that the victim was physically or mentally incapable of resisting or appraising the nature of his or her conduct is guilty of sexual assault in either the second degree or third degree.

(2) Sexual assault shall be in the second degree and is a Class III felony if the actor shall have caused serious personal injury to the victim.

(3) Sexual assault shall be in the third degree and is a Class I misdemeanor if the actor shall not have caused serious personal injury to the victim.

Source:

Laws 1977, LB 38, § 35; Laws 1978, LB 701, § 2; Laws 1995, LB 371, § 5.

Cross Reference:

Registration of sex offenders, see sections 29-4001 to 29-4013.

Annotations:

1. Elements
2. Generally
3. Jury instructions
4. Lesser-included offense
5. Sexual contact

1. Elements

Defendant's conviction of sexual abuse of a vulnerable adult reversed because evidence was insufficient to establish element of sexual contact. *State v. Hulshizer*, 245 Neb. 244, 512 N.W.2d 372 (1994).

This section requires only that the state prove that the sexual contact took place and that the actor knew or should have known that the victim was mentally or physically incapable of resisting the actor's aggressions. *In re Interest of J.M.*, 223 Neb. 609, 391 N.W.2d 146 (1986).

2. Generally

It is sufficient if the victim's testimony is corroborated as to material facts and circumstances which support her testimony as to the principal facts at issue. *State v. Red Feather*, 205 Neb. 734, 289 N.W.2d 768 (1980); *State v. Rhodes*, 201 Neb. 576, 270 N.W.2d 920 (1978).

3. Jury instructions

Trial court erred in instructing jury on second degree sexual assault. *State v. Beermann*, 231 Neb. 380, 436 N.W.2d 499 (1989).

4. Lesser-included offense

Third degree sexual assault is not a lesser-included offense of attempted first degree sexual assault. State v. Swoopes, 223 Neb. 914, 395 N.W.2d 500 (1986).

Third degree sexual assault is a lesser-included offense of second degree sexual assault. State v. Schwartz, 219 Neb. 833, 366 N.W.2d 766 (1985).

5. Sexual contact

Defendant's conviction of sexual abuse of a vulnerable adult reversed because evidence was insufficient to establish element of sexual contact. State v. Hulshizer, 245 Neb. 244, 512 N.W.2d 372 (1994).

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28-320.01

Sexual assault of a child; penalties.

(1) A person commits sexual assault of a child if he or she subjects another person fourteen years of age or younger to sexual contact and the actor is at least nineteen years of age or older.

(2) Sexual assault of a child is a Class IIIA felony for the first offense.

(3) Any person who is found guilty of sexual assault of a child under this section and who has previously been convicted (a) under this section, (b) under section 28-319 of first degree or attempted first degree sexual assault, or (c) in any other state or federal court under laws with essentially the same elements as this section or section 28-319 shall be guilty of a Class IC felony.

Source:

Laws 1984, LB 79, § 1; Laws 1991, LB 23, § 1; Laws 1996, LB 645, § 14; Laws 1997, LB 364, § 6.

Cross Reference:

Registration of sex offenders, see sections 29-4001 to 29-4013.

Annotations:

As used in this section, the phrase "fourteen years of age or younger" designates persons whose age is less than or under fourteen years, and also designates persons who have reached and passed their fourteenth birthday but have not reached their fifteenth birthday. State v. Carlson, 223 Neb. 874, 394 N.W.2d 669 (1986).

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28-320.02

Sexual assault; use of computer; prohibited acts; penalties.

(1) No person shall knowingly solicit, coax, entice, or lure (a) a child sixteen years of age or younger or (b) a peace officer who is believed by such person to be a child sixteen years of age or younger, by means of a computer as that term is defined in section 28-1343, to engage in an act which would be in violation of section 28-319 or 28-320.01 or

subsection (1) or (2) of section 28-320. A person shall not be convicted of both a violation of this subsection and a violation of section 28-319 or section 28-320.01 or subsection (1) or (2) of section 28-320 if the violations arise out of the same set of facts or pattern of conduct and the individual solicited, coaxed, enticed, or lured under this subsection is also the victim of the sexual assault under section 28-319 or section 28-320.01 or subsection (1) or (2) of section 28-320.

(2) A person who violates this section is guilty of a Class IIIA felony. If a person who violates this section has previously been convicted of a violation of this section or section 28-308, 28-309, 28-310, 28-311, 28-313, 28-314, 28-315, 28-319, or 28-320.01 or subsection (1) or (2) of section 28-320, the person is guilty of a Class III felony.

Source:

Laws 2004, LB 943, § 3.

Effective date April 16, 2004.

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28-321

Sexual assault; evidence of past sexual behavior; when admissible; procedure.

(1) If the defendant intends to offer evidence of specific instances of the victim's past sexual behavior, notice of such intention shall be given to the prosecuting attorney and filed with the court not later than fifteen days before trial.

(2) Upon motion to the court by either party in a prosecution in a case of sexual assault, an in camera hearing shall be conducted in the presence of the judge, under guidelines established by the judge, to determine the relevance of evidence of the victim's or the defendant's past sexual behavior. Evidence of a victim's past sexual behavior shall not be admissible unless such evidence is: (a) Evidence of past sexual behavior with persons other than the defendant, offered by the defendant upon the issue whether the defendant was or was not, with respect to the victim, the source of any physical evidence, including but not limited to, semen, injury, blood, saliva, and hair; or (b) evidence of past sexual behavior with the defendant when such evidence is offered by the defendant on the issue of whether the victim consented to the sexual behavior upon which the sexual assault is alleged if it is first established to the court that such activity shows such a relation to the conduct involved in the case and tends to establish a pattern of conduct or behavior on the part of the victim as to be relevant to the issue of consent.

Source:

Laws 1977, LB 38, § 36; Laws 1984, LB 79, § 4.

Annotations:

Statements made by victim to examining physician that she had been molested for 4 years by her brother, that she has been sexually assaulted four times in high school, and that her 5-year-old

child was the product of a sexual assault were not relevant and not admissible under the rape shield law.

State v. Welch, 241 Neb. 699, 490 N.W.2d 216 (1992).

Under subsection (2) of this section, testimony regarding victim's past sexual behavior was improper. State v. Fraser, 230 Neb. 157, 430 N.W.2d 512 (1988).

Nebraska rape shield law is constitutional on its face and as applied in this case to exclude evidence of the victim's previous consensual sexual relations with third parties. State v. Schenck, 222 Neb. 523, 384 N.W.2d 642 (1986).

Although evidence of a victim's past sexual behavior may be admissible under subsection (2)(b) on the issue of consent, the trial court, nevertheless, may apply the balance found in Rule 403 of the Nebraska Evidence Rules. State v. Hopkins, 221 Neb. 367, 377 N.W.2d 110 (1985).

In order that a victim's past consensual behavior with a defendant be admitted as evidence relevant to a charge of sexual assault, the defendant must, by offer of proof at the in camera hearing, adduce some evidence tending to prove a defendant's claim that the victim consented to the sexual act which is the subject of the prosecuted charge against the defendant. State v. Hopkins, 221 Neb. 367, 377 N.W.2d 110 (1985).

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