

## New Mexico

### ARTICLE 6A

#### Sexual Exploitation of Children

##### Section

30-6A-1 Short title.

30-6A-2 Definitions.

30-6A-3 Sexual exploitation of children.

30-6A-4 Sexual exploitation of children by prostitution.

30-6A-1. Short title. (1984)

Sections 1 through 4 [30-6A-1 to 30-6A-4 NMSA 1978] of this act may be cited as the "Sexual Exploitation of Children Act."

History: Laws 1984, ch. 92, § 1.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity and construction of 18 USCS §§ 371 and 2252(a) penalizing mailing or receiving, or conspiring to mail or receive, child pornography, 86 A.L.R. Fed. 359.

30-6A-2. Definitions. (2001)

As used in the Sexual Exploitation of Children Act [30-6A-1 NMSA 1978]:

A. "prohibited sexual act" means:

(1) sexual intercourse, including genital-genital, oral-genital, anal-genital or oral-anal, whether between persons of the same or opposite sex;

(2) bestiality;

(3) masturbation;

(4) sadomasochistic abuse for the purpose of sexual stimulation; or

(5) lewd and sexually explicit exhibition with a focus on the genitals or pubic area of any person for the purpose of sexual stimulation;

B. "visual or print medium" means:

(1) any film, photograph, negative, slide, computer diskette, videotape, videodisc or any computer or electronically generated imagery; or

(2) any book, magazine or other form of publication or photographic reproduction containing or incorporating any film, photograph, negative, slide, computer diskette, videotape, videodisc or any computer generated or electronically generated imagery;

C. "performed publicly" means performed in a place that is open to or used by the public;

D. "manufacture" means the production, processing, copying by any means, printing, packaging or repackaging of any visual or print medium depicting any prohibited sexual act or simulation of such an act if one or more of the participants in that act is a child under eighteen years of age; and

E. "obscene" means any material, when the content if taken as a whole:

(1) appeals to a prurient interest in sex, as determined by the average person applying contemporary community standards;

(2) portrays a prohibited sexual act in a patently offensive way; and

(3) lacks serious literary, artistic, political or scientific value.

History: Laws 1984, ch. 92, § 2; 1993, ch. 116, § 1; 2001, ch. 2, § 1.

The 1993 amendment, effective June 18, 1993, in Subsection A(5), substituted "lewd and sexually explicit exhibition with a focus on" for "lewd exhibition of"; in Subsection B(1), substituted "computer diskette, videotape, videodisc or any computer or electronically generated imagery" for "videotape or videodisk"; in Subsection B(2), substituted "computer diskette, videotape, videodisc or any computer generated or electronically

generated imagery" for "videotape or videodisk"; and in Subsection D, deleted "for pecuniary profit" following "repackaging" and substituted "eighteen" for "sixteen".

The 2001 amendment, effective July 1, 2001, added Subsection E.

"Lewdness" - factors considered. - Factors used to help determine whether a photograph involving a child is lewd include consideration of whether: (1) the focus is on the genital or pubic area; (2) the setting is sexually suggestive; (3) the child is depicted in an unnatural pose, or in inappropriate attire, considering the child's age; (4) the child is fully or partially clothed; (5) the depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) the depiction is designed to elicit a sexual response in the viewer. *State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

"Sexually explicit exhibition". - A "lewd and sexually explicit exhibition" means a visible display or readily discernable depiction of a child engaged in sexually provocative conduct; thus, to qualify, a photograph must be identifiable as hard-core child pornography, that is, it must display visible signs of sexual eroticism, rather than merely depict a naked child. *State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

"Focus on the genitals or pubic area". - Focus can be determined by photographic elements, such as design, composition, lighting, positioning, attire, and setting; in some instances the question of whether a photo focuses on the genitals or pubic area is apparent on the face of the photo and therefore can be dealt with as an undisputed fact - the photo either focuses on the area or it does not. *State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

"For the purpose of sexual stimulation". - Under an objective standard, the central question is whether, based on the overall content of a photograph, a reasonable person could find the photograph was intended to elicit a sexual response; it is not a defendant's private reaction that transforms an innocent photo into a lewd exhibition, but rather the objectively ascertainable intended effect on the viewer. *State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

Under an objective intent analysis, child pornography is not created and the Sexual Exploitation of Children Act is not violated simply because a person derives sexual enjoyment from otherwise innocent photographs; rather, the focus is on the harm to the child that flows from trespasses against the child's dignity when treated as a sexual object. *State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

"Patently offensive"- community tolerance standard adopted. - Contemporary community standards should be judged by whether the average person or community would be tolerant of the materials in the possession of another, even though most members of the community might themselves be offended; community tolerance thus determines whether the material is patently offensive. *State v. Rendleman*, 2003-NMCA-150, 134 N.M. 744, 82 P.3d 554, cert. denied, 2003-NMCERT-003, 135 N.M. 51, 84 P.3d 668.

30-6A-3. Sexual exploitation of children. (2001)

A. It is unlawful for a person to intentionally possess any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the obscene

medium depicts any prohibited sexual act or simulation of such act and if that person knows or has reason to know that one or more of the participants in that act is a child under eighteen years of age. A person who violates the provisions of this subsection is guilty of a fourth degree felony.

B. It is unlawful for a person to intentionally distribute any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if that person knows or has reason to know that the obscene medium depicts any prohibited sexual act or simulation of such act and if that person knows or has reason to know that one or more of the participants in that act is a child under eighteen years of age. A person who violates the provisions of this subsection is guilty of a third degree felony.

C. It is unlawful for a person to intentionally cause or permit a child under eighteen years of age to engage in any prohibited sexual act or simulation of such an act if that person knows, has reason to know or intends that the act may be recorded in any obscene visual or print medium or performed publicly. A person who violates the provisions of this subsection is guilty of a third degree felony, unless the child is under the age of thirteen, in which event the person is guilty of a second degree felony.

D. It is unlawful for a person to intentionally manufacture any obscene visual or print medium depicting any prohibited sexual act or simulation of such an act if one or more of the participants in that act is a child under eighteen years of age. A person who violates the provisions of this subsection is guilty of a second degree felony.

E. The penalties provided for in this section shall be in addition to those set out in Section 30-9-11 NMSA 1978.

History: Laws 1984, ch. 92, § 3; 1989, ch. 170, § 1; 1993, ch. 116, § 2; 2001, ch. 2, § 2.

Cross references. - For the Sex Offender Registration Act, see Chapter 29, Article 11A NMSA 1978.

For sentencing for noncapital felonies, see 31-18-15 NMSA 1978.

The 1989 amendment, effective June 16, 1989, in Subsection A deleted "for pecuniary profit" following "possess with intent to distribute" in the first sentence, and substituted "third" for "fourth" in the second sentence; in Subsection B substituted "third" for "fourth" near the beginning of the second sentence and "second" for "third" near the end of that sentence; deleted former Subsection C, which read: "It is unlawful for any person to intentionally cause or permit a child under sixteen years of age to engage in any prohibited sexual act or simulation of such an act if that person knows or intends that the act be recorded in any visual or print medium made for the purpose of sale or other pecuniary profit. Any person who violates this subsection is guilty of a third degree felony, unless the child is under the age of thirteen, in which event the person is guilty of a second degree felony"; redesignated former Subsection D as present Subsection C, while substituting "second" for "third" in the second sentence therein; and added present Subsection D.

The 1993 amendment, effective June 18, 1993, inserted "that person knows or has reason to know that" in the first sentence of Subsection A; and substituted "eighteen" for "sixteen" in the first sentence of Subsections A, B, and C.

The 2001 amendment, effective July 1, 2001, added Subsection A and renumbered the remaining subsections accordingly; in Subsection B, deleted "or possess with intent to distribute" following "intentionally distribute," and inserted "obscene" preceding "medium depicts"; throughout the section, inserted "obscene" preceding "visual or print medium"; and made stylistic

changes.

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity, construction, and application of statutes regulating sexual performance by child, 42 A.L.R.5th 291.

Admissibility of expert testimony as to criminal defendant's propensity toward sexual deviation, 42 A.L.R.4th 937.

Liability of church or religious society for sexual misconduct of clergy, 5 A.L.R.5th 530.

Validity, construction, and application of state statutes or ordinances regulating sexual performance by child, 42 A.L.R.5th 291.

Construction and application of United States Sentencing guideline § 2G2.1 et seq., pertaining to child pornography, 145 A.L.R. Fed. 481.

30-6A-4. Sexual exploitation of children by prostitution. (1989)

A. Any person knowingly receiving any pecuniary profit as a result of a child under the age of sixteen engaging in a prohibited sexual act with another is guilty of a second degree felony, unless the child is under the age of thirteen, in which event the person is guilty of a first degree felony.

B. Any person hiring or offering to hire a child over the age of thirteen and under the age of sixteen to engage in any prohibited sexual act is guilty of a second degree felony.

C. Any parent, legal guardian or person having custody or control of a child under sixteen years of age who knowingly permits that child to engage in or to assist any other person to engage in any prohibited sexual act or simulation of such an act for the purpose of producing any visual or print medium depicting such an act is guilty of a third degree felony.

History: Laws 1984, ch. 92, § 4; 1989, ch. 170, § 2.

Cross references. - For abandonment or abuse of child, see 30-6-1 NMSA 1978.

For enticement of child, see 30-9-1 NMSA 1978.

For criminal sexual contact of a minor, see 30-9-13 NMSA 1978.

For the Sex Offender Registration Act, see Chapter 29, Article 11A NMSA 1978.

For sentencing for noncapital felonies, see 31-18-15 NMSA 1978.

The 1989 amendment, effective June 16, 1989, in Subsection A inserted "knowingly" near the beginning of the subsection, and substituted "second" for "third" near the middle of the subsection and "first" for "second" near the end of the subsection; substituted "second" for "third" near the end of Subsection B; and substituted "third" for "fourth" near the end of Subsection C.

30-9-1. Enticement of child. (1963)

Enticement of child consists of:

Whoever commits enticement of child is guilty of a misdemeanor.

"Enticement" means to incite or instigate, to allure, attract or lead astray; it indicates an intentional act. State v. Garcia, 100 N.M. 120, 666 P.2d 1267 (Ct. App. 1983).

Not lesser included offense of criminal sexual penetration. - The offense of enticement of a child is not a lesser included offense of criminal sexual penetration. State v. Garcia, 100 N.M. 120, 666 P.2d 1267 (Ct. App. 1983).

Offense of enticement of child is not lesser included offense of criminal sexual penetration. State v. Garcia, 100 N.M. 120, 666 P.2d 1267 (Ct. App. 1983).

## ARTICLE 9

### Sexual Offenses

#### Section

30-9-1 Enticement of child.

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30-9-4 Promoting prostitution.

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30-9-15 Corroboration.

30-9-16 Testimony; limitations; in camera hearing.

30-9-17 Videotaped depositions of alleged victims who are under sixteen years of age; procedure; use in lieu of direct testimony.

30-9-18 Alleged victims who are under thirteen years of age; psychological evaluation.

30-9-1. Enticement of child. (1963)

#### Statute text

Enticement of child consists of:

A. enticing, persuading or attempting to persuade a child under the age of sixteen years to enter any vehicle, building, room or secluded place with intent to commit an act which would constitute a crime under Article 9 [30-9-1 to 30-9-9 NMSA 1978] of the Criminal Code; or

B. having possession of a child under the age of sixteen years in any vehicle, building, room or secluded place with intent to commit an act which would constitute a crime under Article 9 of the Criminal Code.

Whoever commits enticement of child is guilty of a misdemeanor.

#### History

History: 1953 Comp., § 40A-9-10, enacted by Laws 1963, ch. 303, § 9-10.

#### Annotations

Cross references. - For sexual exploitation of children, see 30-6A-1 NMSA 1978 et seq.

For sexually oriented material harmful to minors, see 30-37-1 NMSA 1978 et seq.

Meaning of Article 9 of the Criminal Code. - The words "Article 9 of the Criminal Code" refer to Article 9 of Laws 1963, ch. 303, the unrepealed portions of which are compiled herein as 30-9-1 to 30-9-4 and 30-9-5 to 30-9-9 NMSA 1978.

#### ANNOTATION

"Enticement" means to incite or instigate, to allure, attract or lead astray; it indicates an intentional act. *State v. Garcia*, 100 N.M. 120, 666 P.2d 1267 (Ct. App. 1983).

Not lesser included offense of criminal sexual penetration. - The offense of enticement of a child is not a lesser included offense of criminal sexual

penetration. *State v. Garcia*, 100 N.M. 120, 666 P.2d 1267 (Ct. App. 1983).

Possession of minor girl. - A man who had a minor girl in his possession for evil purposes was guilty, whether she had been enticed away or carried off by him. *State v. Martin*, 28 N.M. 489, 214 P. 575 (1923); *State v. Chenault*, 20 N.M. 181, 147 P. 283 (1915); *State v. Chitwood*, 28 N.M. 484, 214 P. 575 (1923).

Completion of offense in evil intent. - The gravamen of charge that defendant had a female minor in his possession for evil purposes, to wit: sexual intercourse, was the evil purpose and intent of the possession, so that the offense was complete from the instant the accused formed the evil intent and purpose of sexual intercourse, regardless of whether it ever came about. *State v. Phipps*, 47 N.M. 316, 142 P.2d 550 (1943).

Charging offense. - Where, in charging the offense, the words "for the purpose of unlawful sexual intercourse" were used, the quoted phrase did not describe an act of fornication only, since an act of sexual intercourse was lawful or unlawful according to the relation of the parties. *State v. Chenault*, 20 N.M. 181, 147 P. 283 (1915).

Conclusions of jury sustained. - Where jury had opportunity to see the witnesses, heard their testimony and concluded that sexual intercourse had taken place, conviction would be sustained even though it necessitated the rejection of the truth of some of the state's testimony in the case. *State v. Phipps*, 47 N.M. 316, 142 P.2d 550 (1943).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity, construction, and application of statutes or ordinances regulating sexual performance by child, 42 A.L.R.5th 291.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 A.L.R.4th 395.

Validity, construction, and application of state statutes or ordinances regulating sexual performance by child, 42 A.L.R.5th 291.

30-9-2. Prostitution. (1989)

Statute text

Prostitution consists of knowingly engaging in or offering to engage in a sexual act for hire.

As used in this section "sexual act" means sexual intercourse, cunnilingus, fellatio, masturbation of another, anal intercourse or the causing of penetration to any extent and with any object of the genital or anal opening of another, whether or not there is any emission.

Whoever commits prostitution is guilty of a petty misdemeanor, unless such crime is a second or subsequent conviction, in which case such person is guilty of a misdemeanor.

History

History: 1953 Comp., § 40A-9-11, enacted by Laws 1963, ch. 303, § 9-11; 1981, ch. 233, § 1; 1989, ch. 132, § 1.

Annotations

The 1989 amendment, effective June 16, 1989, substituted "a sexual act" for "sexual penetration" in the first and second paragraphs, and inserted "masturbation of another" in the second paragraph.

ANNOTATION

Constitutionality. - This section does not violate the equal protection clause of the fourteenth amendment of the United States constitution or the equal rights amendment of the New Mexico constitution. *State v. Sandoval*, 98 N.M. 417, 649 P.2d 485 (Ct. App. 1982).

"Masturbation" construed. - A jury instruction defining masturbation to

include erotic stimulation of the genital organs by the alternative means of "sexual fantasies" extended the scope of criminal conduct prohibited by this section and constituted reversible error. *State v. Mayfield*, 120 N.M. 198, 900 P.2d 358 (Ct. App. 1995).

Possession of woman for unlawful purposes. - The having in possession of a woman for purposes of unlawful sexual intercourse was criminal. *State v. Chenault*, 20 N.M. 181, 147 P. 283 (1915).

Law reviews. - For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 63A Am. Jur. 2d Prostitution §§ 1 to 30.

Entrapment defense in sex offense prosecutions, 12 A.L.R.4th 413.

Laws prohibiting or regulating "escort services," "outcall entertainment" or similar services used to carry on prostitution, 15 A.L.R.5th 900.

73 C.J.S. Prostitution and Related Offenses §§ 2 to 20.

30-9-3. Patronizing prostitutes. (1989)

Statute text

Patronizing prostitutes consists of:

- A. entering or remaining in a house of prostitution or any other place where prostitution is practiced, encouraged or allowed with intent to engage in a sexual act with a prostitute; or
- B. knowingly hiring or offering to hire a prostitute, or one believed by the offeror to be a prostitute, to engage in a sexual act with the actor or another.

As used in this section, "a sexual act" means sexual intercourse, cunnilingus, fellatio, masturbation of another, anal intercourse or the causing of penetration to any extent and with any object of the genital or an anal opening of another whether or not there is any emission.

Whoever commits patronizing prostitutes is guilty of a petty misdemeanor, unless such crime is a second or subsequent conviction, in which case such person is guilty of a misdemeanor.

History

History: 1953 Comp., § 40A-9-12, enacted by Laws 1963, ch. 303, § 9-12; 1981, ch. 233, § 2; 1989, ch. 132, § 2.

Annotations

The 1989 amendment, effective June 16, 1989, substituted "a sexual act" for "sexual penetration" throughout the section, in Subsection B inserted "or one believed by the offeror to be a prostitute", inserted "masturbation of another" in the next-to-last undesignated paragraph, and substituted "an anal" for "oral" in the next-to-last undesignated paragraph.

ANNOTATION

Law reviews. - For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

30-9-4. Promoting prostitution. (1981)

Statute text

Promoting prostitution consists of any person, acting other than as a prostitute or patron of a prostitute:

- A. knowingly establishing, owning, maintaining or managing a house of prostitution or a place where prostitution is practiced, encouraged or allowed, or participating in the establishment, ownership, maintenance or management thereof;
- B. knowingly entering into any lease or rental agreement for any premises which a person partially or wholly owns or controls, knowing that such premises are intended for use as a house of prostitution or as a place where prostitution is practiced, encouraged or allowed;

- C. knowingly procuring a prostitute for a house of prostitution or for a place where prostitution is practiced, encouraged or allowed;
  - D. knowingly inducing another to become a prostitute;
  - E. knowingly soliciting a patron for a prostitute or for a house of prostitution or for any place where prostitution is practiced, encouraged or allowed;
  - F. knowingly procuring a prostitute for a patron and receiving compensation therefor;
  - G. knowingly procuring transportation for, paying for the transportation of or transporting a person within the state with the intention of promoting that person's engaging in prostitution;
  - H. knowingly procuring through promises, threats, duress or fraud any person to come into the state or causing a person to leave the state for the purpose of prostitution; or
  - I. under pretense of marriage, knowingly detaining a person or taking a person into the state or causing a person to leave the state for the purpose of prostitution.
- Whoever commits promoting prostitution is guilty of a fourth degree felony.

#### History

History: 1953 Comp., § 40A-9-13, enacted by Laws 1963, ch. 303, § 9-13; 1981, ch. 233, § 3.

#### Annotations

Cross references. - For sexual exploitation of children by prostitution, see 30-6A-4 NMSA 1978.

#### ANNOTATION

Suspension of sentence set aside. - Substantial evidence that defendant permitted certain premises which were under her control to be used for purposes of prostitution, lewdness and assignation, supported judgment of trial court in setting aside order of suspension of one month jail sentence imposed for keeping a house of prostitution. *State v. Snyder*, 28 N.M. 387, 212 P. 736 (1923).

Indictment sufficient. - A count in which it was charged that defendant, on a certain day, at a certain place, did, unlawfully, set up and keep a house of prostitution in a certain town, within seven hundred feet of a certain theater, contrary to the form of the statute, sufficiently conformed with the statute (Laws 1901, ch. 84, § 1). *Territory v. McGrath*, 16 N.M. 202, 114 P. 364 (1911).

It was unnecessary to set forth in the indictment the names of persons permitted to use the premises unlawfully. *State v. Alston*, 28 N.M. 379, 212 P. 1031 (1923).

Law reviews. - For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 24 Am. Jur. 2d Disorderly Houses §§ 14, 19; 63A Am. Jur. 2d Prostitution §§ 7 to 9, 15 to 23.

Criminal responsibility of woman who connives or consents to her own transportation for immoral purposes, 84 A.L.R. 376.

Separate acts of taking earnings of or support from prostitute as separate or continuing offenses of pimping, 3 A.L.R.4th 1195.

Entrapment defense, availability in state court of defense where one accused of pandering denies participation in offense, 5 A.L.R.4th 1128.

Entrapment defense in sex offense prosecution, 12 A.L.R.4th 413.

Validity, construction, and application of state statute forbidding unfair trade practice or competition by discriminatory allowance of rebates, commissions, discounts, or the like, 41 A.L.R.4th 675.

27 C.J.S. Disorderly Houses §§ 2 to 6; 73 C.J.S. Prostitution and Related Offenses §§ 4 to 13.

30-9-4.1. Accepting earnings of a prostitute. (1981)

Statute text

Accepting the earnings of a prostitute consists of accepting, receiving, levying or appropriating money or anything of value, without consideration, from the proceeds of the earnings of a person engaged in prostitution with the knowledge that the person is engaged in prostitution and that the earnings are derived from engaging in prostitution, or knowingly owning or knowingly managing a house or other place where prostitution is practiced or allowed and living or deriving support or maintenance, in whole or in part, from the earnings or proceeds of a person engaged in prostitution at that house or place.

Whoever commits accepting the earnings of a prostitute is guilty of a fourth degree felony.

History

History: Laws 1981, ch. 233, § 4.

Annotations

Am. Jur. 2d, A.L.R. and C.J.S. references. - 63A Am. Jur. 2d Prostitution §§ 24 to 26.

73 C.J.S. Prostitution §§ 17, 18.

30-9-5. Order for medical examination and treatment. (1963)

Statute text

In addition to its general sentencing authority, the court may order any defendant convicted of prostitution or patronizing prostitutes to be examined for venereal disease and shall sentence any diseased defendant to submit to medical treatment until he is discharged from treatment as noninfectious. If the defendant is without funds to pay for medical treatment, it shall be provided by the state department of public health [department of health].

History

History: 1953 Comp., § 40A-9-14, enacted by Laws 1963, ch. 303, § 9-14.

Annotations

Bracketed material. - The bracketed reference to the department of health was inserted by the compiler. Section 12-1-2, 1953 Comp. (Laws 1937, ch. 39, § 2), creating the state department of health, was repealed by Laws 1968, ch. 37, § 7. Laws 1968, ch. 37, § 3, (former 12-1-28, 1953 Comp.), transferred all powers, duties, etc. of the department of public health to the health and social services department, which department was abolished by Laws 1977, ch. 253, § 5. Section 4 of the 1977 act established the health and environment department, consisting of several divisions. Laws 1991, ch. 25, § 16 repeals former 9-7-4 NMSA 1978, relating to the health and environment department, and enacts a new 9-7-4 NMSA 1978, creating the department of health. The bracketed material was not enacted by the legislature and is not part of the law.

30-9-6. Testimony of witnesses to prostitution and lewdness. (1963)

Statute text

In any investigation, proceeding, preliminary hearing or trial before any court, magistrate or grand jury concerning a violation of or an attempt to commit any crime in violation of Sections 9-11, 9-12 and 9-13 [30-9-2, 30-9-3 and 30-9-4 NMSA 1978] of this article, no person shall be excused from giving testimony or producing documentary or other evidence material to such investigation, proceeding, preliminary hearing or trial on the ground that the testimony or evidence required of him is incriminating evidence; provided that, any person who is so subpoenaed and ordered to testify or

produce evidence concerning such crimes shall be immune to prosecution or conviction for any violation of such crimes about which he may testify.

#### History

History: 1953 Comp., § 40A-9-15, enacted by Laws 1963, ch. 303, § 9-15.

#### Annotations

Cross references. - For protection against self-incrimination, see N.M. Const., art. II, § 15.

30-9-7. Evidence. (1963)

#### Statute text

In any proceeding under Article 9 [30-9-1 to 30-9-9 NMSA 1978] or action to abate a public nuisance under Article 8 [30-8-1 to 30-8-4, 30-8-8 to 30-8-13 NMSA 1978], testimony about the following circumstances is admissible in evidence:

- A. the general reputation of the place;
- B. the reputation of the persons who reside in or frequent the place;
- C. the frequency, timing and length of visits by nonresidents; and
- D. prior convictions of the defendant or persons who reside in or frequent the place under Sections 9-11, 9-12 and 9-13 [30-9-2, 30-9-3 and 30-9-4 NMSA 1978] of this article or Sections 40-34-1 through 40-34-5 New Mexico Statutes Annotated, 1953 Compilation, or of any other offense of like nature wherever committed.

#### History

History: 1953 Comp., § 40A-9-16, enacted by Laws 1963, ch. 303, § 9-16.

#### Annotations

Cross references. - For general rule on admissibility of evidence of other crimes, see Paragraph B of Rule 11-404 NMRA.

Sections repealed. - Sections 40-34-1 through 40-34-5, 1953 Comp., relating to prostitution, which are referred to in Subsection D, were repealed by Laws 1963, ch. 303, § 30-1.

#### ANNOTATION

Proof not restricted. - Evidence by which an establishment might be proved a house of prostitution was not limited to a proof of facts mentioned in statute. *Territory v. McGrath*, 16 N.M. 202, 114 P. 364 (1911).

Admissibility of prior conviction. - Proof of a prior conviction for keeping a house of prostitution should have been restricted to a conviction previously had under the provisions of current act (Laws 1921, ch. 69) and not of a prior act. *State v. Snyder*, 28 N.M. 388, 212 P. 736 (1923).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 24 Am. Jur. 2d *Disorderly Houses* §§ 29 to 32; 63A Am. Jur. 2d *Prostitution* § 28.

Admissibility, in prosecution for sexual offense, of evidence of other similar offense, 77 A.L.R.2d 841, 2 A.L.R.4th 330.

Admissibility, at criminal prosecution, of expert testimony on rape trauma syndrome, 42 A.L.R.4th 879.

Admissibility of expert testimony as to criminal defendant's propensity toward sexual deviation, 42 A.L.R.4th 937.

Admissibility, in rape case, of evidence that accused raped, or attempted to rape person other than prosecutrix - prior offenses, 86 A.L.R.5th 59.

Admissibility, in rape case, of evidence that accused raped or attempted to rape person other than prosecutrix - subsequent acts, 87 A.L.R.5th 181.

Admissibility, in rape case, of evidence that accused raped, or attempted to rape, person other than prosecutrix - offenses unspecified as to time, 88 A.L.R.5th 429.

27 C.J.S. *Disorderly Houses* § 14 (1-5); 73 C.J.S. *Prostitution and Related Offenses* § 6.

30-9-8. House of prostitution; public nuisance. (1989)

Statute text

As used in this section "house of prostitution" means a building, enclosure or place that is used for the purpose of prostitution as that crime is defined in Section 30-9-2 NMSA 1978. A house of prostitution is a public nuisance per se.

History

History: 1953 Comp., § 40A-9-17, enacted by Laws 1963, ch. 303, § 9-17; 1989, ch. 114, § 2.

Annotations

Cross references. - For abatement of public nuisance, see 30-8-8 NMSA 1978.

The 1989 amendment, effective March 28, 1989, added the first sentence.

ANNOTATION

Criminal proceeding. - Former statute providing for injunction and abatement of nuisance and forfeiture of premises on proof that lewdness, assignation or prostitution existed was criminal in nature and the complaint was an action in the nature of a criminal proceeding. *State ex rel. Murphy v. Morley*, 63 N.M. 267, 317 P.2d 317 (1957).

Crime not enjoined as such. - Where a ground of equitable jurisdiction to enjoin otherwise exists, the claim to such relief is not to be denied merely because the act complained of constitutes a crime, but a crime may not in and of itself be made an independent ground for injunction; hence, trial court could not extend authority of its restraint against defendant from maintaining a certain premises for purposes of lewdness, assignation or prostitution throughout entire county, and its attempt to do so fell squarely within the interdiction that equity may not be employed to forestall the commission of a crime. *State v. Robertson*, 63 N.M. 74, 313 P.2d 342 (1957).

Sufficiency of complaint. - Where the nuisance complained of is a nuisance per se, and denounced as such in the statute, it is sufficient for the complaint to allege its existence in the language of the statute. *State v. Robertson*, 63 N.M. 74, 313 P.2d 342 (1957).

Bond as enforcement device. - A trial judge has both the statute and the discretion inherent in his broad equitable powers to draw upon in providing means for the enforcement of order restraining defendant, from using, occupying or maintaining a certain premises for purposes of lewdness, assignation or prostitution, by requiring a bond of defendant, so long as its effect is confined to the premises in question. *State v. Robertson*, 63 N.M. 74, 313 P.2d 342 (1957).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Validity of statutes or ordinances requiring sex-oriented businesses to obtain operating licenses, 8 A.L.R.4th 130.

30-9-9. Remedy of lessor. (1963)

Statute text

If the lessee of property has been convicted of using it as a house of prostitution, or if the property has been adjudged to constitute a public nuisance for that reason, the lease by which the property is held is voidable by the lessor. The lessor shall have the same remedies for regaining possession as in the case of a tenant holding over his term.

History

History: 1953 Comp., § 40A-9-18, enacted by Laws 1963, ch. 303, § 9-18.

Annotations

Cross references. - For provisions on forcible entry and unlawful detainer, see 35-10-1 NMSA 1978 et seq.

For Uniform Owner-Resident Relations Act, see 47-8-1 NMSA 1978 et seq.  
ANNOTATION

Recovery of rent barred. - Where building was leased with intent that it be used as a house of prostitution, and the house was so used, the lessor could not recover rent. *McRae v. Cassan*, 15 N.M. 496, 110 P. 574 (1910).  
30-9-10. Definitions. (2001)

Statute text

As used in Sections 30-9-10 through 30-9-16 NMSA 1978:

A. "force or coercion" means:

- (1) the use of physical force or physical violence;
- (2) the use of threats to use physical violence or physical force against the victim or another when the victim believes that there is a present ability to execute the threats;
- (3) the use of threats, including threats of physical punishment, kidnapping, extortion or retaliation directed against the victim or another when the victim believes that there is an ability to execute the threats;
- (4) the perpetration of criminal sexual penetration or criminal sexual contact when the perpetrator knows or has reason to know that the victim is unconscious, asleep or otherwise physically helpless or suffers from a mental condition that renders the victim incapable of understanding the nature or consequences of the act; or
- (5) the perpetration of criminal sexual penetration or criminal sexual contact by a psychotherapist on his patient, with or without the patient's consent, during the course of psychotherapy or within a period of one year following the termination of psychotherapy.

Physical or verbal resistance of the victim is not an element of force or coercion;

B. "great mental anguish" means psychological or emotional damage that requires psychiatric or psychological treatment or care, either on an inpatient or outpatient basis, and is characterized by extreme behavioral change or severe physical symptoms;

C. "patient" means a person who seeks or obtains psychotherapy;

D. "personal injury" means bodily injury to a lesser degree than great bodily harm and includes, but is not limited to, disfigurement, mental anguish, chronic or recurrent pain, pregnancy or disease or injury to a sexual or reproductive organ;

E. "position of authority" means that position occupied by a parent, relative, household member, teacher, employer or other person who, by reason of that position, is able to exercise undue influence over a child;

F. "psychotherapist" means a person who is or purports to be a:

- (1) licensed physician who practices psychotherapy;
- (2) licensed psychologist;
- (3) licensed social worker;
- (4) licensed nurse;
- (5) counselor;
- (6) substance abuse counselor;
- (7) psychiatric technician;
- (8) mental health worker;
- (9) marriage and family therapist;
- (10) hypnotherapist; or
- (11) minister, priest, rabbi or other similar functionary of a religious organization acting in his role as a pastoral counselor;

G. "psychotherapy" means professional treatment or assessment of a mental or an emotional illness, symptom or condition;

H. "school" means any public or private school, including the New Mexico military institute, the New Mexico school for the visually handicapped, the New Mexico school for the deaf, the New Mexico boys' school, the New Mexico youth diagnostic and development center, the Los Lunas medical center, the Fort Stanton hospital, the Las Vegas medical center and the Carrie Tingley crippled children's hospital, that offers a program of instruction designed to educate a person in a particular place, manner and subject area. "School" does not include a college or university; and

I. "spouse" means a legal husband or wife, unless the couple is living apart or either husband or wife has filed for separate maintenance or divorce.

#### History

History: 1953 Comp., § 40A-9-20, enacted by Laws 1975, ch. 109, § 1; 1979, ch. 28, § 1; 1993, ch. 177, § 1; 2001, ch. 161, § 1.

#### Annotations

The 1993 amendment, effective July 1, 1993, in Subsection A, substituted "contact" for "conduct" near the beginning of Paragraph (4), redesignated the former second sentence of Paragraph (4) as the second undesignated paragraph of the subsection, added Paragraph (5), making a related grammatical change, and made stylistic changes; and added present Subsections C, F, and G, making related subsection redesignations.

The 2001 amendment, effective July 1, 2001, added Subsection H and redesignated former Subsection H as Subsection I.

#### ANNOTATION

Phrase "unless the couple is living apart" is not void for vagueness when construed and applied in the ordinary sense to mean a suspension of the marital relationship. *State v. Brecheisen*, 101 N.M. 38, 677 P.2d 1074 (Ct. App. 1984).

Evidence supported finding that defendant and his wife were living apart at the time of an alleged attack by defendant upon his wife, where the wife testified that she felt she was living apart from defendant at the time of the attack, and there was evidence of the couple's physical separation and the defendant's securing other housing and paying one month's rent.

*Brecheisen v. Mondragon*, 833 F.2d 238 (10th Cir. 1987), cert. denied, 485 U.S. 1011, 108 S. Ct. 1479, 99 L. Ed. 2d 707 (1988).

Consensual sex between therapist and adult patient. - A defendant's conduct did not constitute the crimes of second or third degree criminal sexual penetration because consensual sex between a therapist and his adult patient is not a crime. *State v. Leiding*, 112 N.M. 143, 812 P.2d 797 (Ct. App. 1991).

Law reviews. - For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

For article, *New Mexico Joins the Twentieth Century: The Repeal of the Marital Rape Exemption*, see 22 N.M.L. Rev. 551 (1992).

Am. Jur. 2d, A.L.R. and C.J.S. references. - Rape or similar offense based on intercourse with woman who is allegedly mentally deficient, 31 A.L.R.3d 1227.

Criminal responsibility for physical measures undertaken in connection with treatment of mentally disordered patient, 99 A.L.R.3d 854.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution, 45 A.L.R.4th 310.

Conviction of rape or related sexual offenses on basis of intercourse accomplished under the pretext of, or in the course of, medical treatment,

65 A.L.R.4th 1064.

30-9-11. Criminal sexual penetration. (2004 AARS)

Statute text

A. Criminal sexual penetration is the unlawful and intentional causing of a person to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse or the causing of penetration, to any extent and with any object, of the genital or anal openings of another, whether or not there is any emission.

B. Criminal sexual penetration does not include medically indicated procedures.

C. Criminal sexual penetration in the first degree consists of all sexual penetration perpetrated:

- (1) on a child under thirteen years of age; or
- (2) by the use of force or coercion that results in great bodily harm or great mental anguish to the victim.

Whoever commits criminal sexual penetration in the first degree is guilty of a first degree felony.

D. Criminal sexual penetration in the second degree consists of all criminal sexual penetration perpetrated:

- (1) on a child thirteen to eighteen years of age when the perpetrator is in a position of authority over the child and uses this authority to coerce the child to submit;
- (2) on an inmate confined in a correctional facility or jail when the perpetrator is in a position of authority over the inmate;
- (3) by the use of force or coercion that results in personal injury to the victim;
- (4) by the use of force or coercion when the perpetrator is aided or abetted by one or more persons;
- (5) in the commission of any other felony; or
- (6) when the perpetrator is armed with a deadly weapon.

Whoever commits criminal sexual penetration in the second degree, is guilty of a second degree felony. Whoever commits criminal sexual penetration in the second degree when the victim is a child who is thirteen to eighteen years of age is guilty of a second degree felony for a sexual offense against a child and, notwithstanding the provisions of Section 31-18-15 NMSA 1978, shall be sentenced to a minimum term of imprisonment of three years, which shall not be suspended or deferred. The imposition of a minimum, mandatory term of imprisonment pursuant to the provisions of this subsection shall not be interpreted to preclude the imposition of sentencing enhancements pursuant to the provisions of Sections 31-18-17, 31-18-25 and 31-18-26 NMSA 1978.

E. Criminal sexual penetration in the third degree consists of all criminal sexual penetration perpetrated through the use of force or coercion.

Whoever commits criminal sexual penetration in the third degree is guilty of a third degree felony. Whoever commits criminal sexual penetration in the third degree when the victim is a child who is thirteen to eighteen years of age is guilty of a third degree felony for a sexual offense against a child.

F. Criminal sexual penetration in the fourth degree consists of all criminal sexual penetration:

- (1) not defined in Subsections C through E of this section perpetrated on a child thirteen to sixteen years of age when the perpetrator is at least eighteen years of age and is at least four years older than the child and not the spouse of that child; or

(2) perpetrated on a child thirteen to eighteen years of age when the perpetrator, who is a licensed school employee, an unlicensed school employee, a school contract employee, a school health service provider or a school volunteer, and who is at least eighteen years of age and is at least four years older than the child and not the spouse of that child, learns while performing services in or for a school that the child is a student in a school.

Whoever commits criminal sexual penetration in the fourth degree is guilty of a fourth degree felony.

#### History

History: 1953 Comp., § 40A-9-21, enacted by Laws 1975, ch. 109, § 2; 1987, ch. 203, § 1; 1991, ch. 26, § 1; 1993, ch. 177, § 2; 1995, ch. 159, § 1; 2001, ch. 161, § 2; 2003 (1st S.S.), ch. 1, § 3.

#### Annotations

- I. GENERAL CONSIDERATION.
  - A. IN GENERAL.
  - B. CONSTITUTIONALITY.
  - C. ELEMENTS OF OFFENSE.
  - D. MULTIPLE CONVICTIONS OR PUNISHMENTS.
- II. INDICTMENT AND INFORMATION.
- III. EVIDENCE.
  - A. ADMISSIBILITY.
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  - D. SUFFICIENCY.
- IV. DEFENSES.
  - A. CONSENT.
  - B. IMPOTENCY.
- V. SODOMY.
- VI. INSTRUCTIONS.

- I. GENERAL CONSIDERATION.
  - A. IN GENERAL.

Cross references. - For assault with intent to commit a violent felony, see 30-3-3 NMSA 1978.

For sexual exploitation of children, see 30-6A-3 NMSA 1978.

For provision that testimony of a victim hereunder need not be corroborated, see 30-9-15 NMSA 1978.

For limitations on testimony regarding victim's past sexual conduct, see 30-9-16 NMSA 1978.

For the Sex Offender Registration Act, see Chapter 29, Article 11A NMSA 1978.

The 1987 amendment, effective June 19, 1987, added Subsection D.

The 1991 amendment, effective June 14, 1991, deleted "other than one's spouse" following "person" in the first paragraph and substituted "and not the spouse of that child" for "the child" at the end of the first sentence in Subsection D.

The 1993 amendment, effective July 1, 1993, designated the formerly undesignated provisions as Subsection A; added present Subsection B; redesignated former Subsections A through D as Subsections C through F; and substituted "Subsections C through E" for "Subsection A, B, or C" in the first paragraph of Subsection F.

The 1995 amendment, effective July 1, 1995, in Subsection D, added Paragraph

(2) and redesignated the remaining paragraphs accordingly.

The 2001 amendment, effective July 1, 2001, substituted "eighteen" for "sixteen" in Paragraph D(1); and in Subsection F, added the Paragraph (1) designation, inserted "the child" following "older than" in Paragraph (1), and added Paragraph (2).

The 2003 (1st S.S.) amendment, effective February 3, 2004, added the last two sentences of Subsection D and the last sentence of Subsection E.

Compiler's notes. - For Laws 2003, ch. 257 enactment concerning time limit for prosecution under this section, see 30-1-9.2 NMSA 1978 and notes thereto.

#### ANNOTATION

Exclusion of defendant from courtroom. - Defendant's exclusion from the courtroom while child testified created a substantial risk that the jury would assume that the trial court believed that the defendant had engaged in misconduct necessitating his absence from the courtroom. *State v. Rodriguez*, 114 N.M. 265, 837 P.2d 459 (Ct. App. 1992).

Defendant absent from trial voluntarily. - Factors articulated in *State v. Clements*, 108 N.M. 13, 765 P.2d 1195 (Ct. App. 1988), as to waiver of right to be present being occasioned by the voluntary absence of an accused, were to be applied only when the defendant was absent from trial voluntarily. *State v. Rodriguez*, 114 N.M. 265, 837 P.2d 459 (Ct. App. 1992).

Trial of co-defendants. - Whether separate trials are to be held for defendants jointly indicted for attempted forcible rape was a matter to be addressed to and resolved by the sound discretion of the trial court. *State v. Pope*, 78 N.M. 282, 430 P.2d 779 (Ct. App. 1967).

Defense of mistake of fact. - Twenty year-old defendant's conviction of fourth-degree criminal sexual penetration was reversed, where the trial court did not consider his defense of mistake of fact, which was based on evidence that he had asked the fifteen year-old victim her age and was told by her and another person that she was seventeen. *Perez v. State*, 111 N.M. 160, 803 P.2d 249 (1990).

Prosecutor's remarks held prejudicial. - The prosecutor made a legally incorrect statement of the law when he told the jury the crime for which the defendant was charged (criminal sexual penetration) was less serious than committing the crime with a weapon, thus invading the province of the court to give instructions on the law. Because the evidence of defendant's guilt was less than overwhelming, it is fair to assume that the prosecutor's remarks had some prejudicial impact, substantial enough to require a new trial at the trial court's discretion. *State v. Gonzales*, 105 N.M. 238, 731 P.2d 381 (Ct. App. 1986).

Adoption of child conceived as result of rape. - Man convicted of criminal sexual penetration of a child had no constitutional right under the due process clauses of the United States or New Mexico Constitutions to withhold consent to adoption of the child conceived and born as a result of that act. *Christian Child Placement Serv. of the N.M. Christian Children's Home v. Vestal*, 1998-NMCA-098, 125 N.M. 426, 962 P.2d 1261.

Law reviews. - For article, "The Confusing Law of Criminal Intent in New Mexico," see 5 N.M.L. Rev. 63 (1974).

For article, "Rape Law: The Need For Reform," see 5 N.M.L. Rev. 279 (1975).

For symposium, "The Impact of the Equal Rights Amendment on the New Mexico Criminal Code," see 3 N.M.L. Rev. 106 (1973).

For annual survey of New Mexico law relating to criminal law, see 12 N.M.L. Rev. 229 (1982).

For annual survey of New Mexico law relating to criminal procedure, see 12

N.M.L. Rev. 271 (1982).

For article, New Mexico Joins the Twentieth Century: The Repeal of the Marital Rape Exemption, see 22 N.M.L. Rev. 551 (1992).

For survey of 1990-91 criminal procedure and evidence, see 22 N.M.L. Rev. 713 (1992).

For note, "New Mexico Applies the Strict Elements Test to the Collateral Felony Doctrine - State v. Campos," see 28 N.M.L. Rev. 535 (1998).

Am. Jur. 2d, A.L.R. and C.J.S. references. - 65 Am. Jur. 2d Rape §§ 1 to 30; 70A Am. Jur. 2d Sodomy §§ 1 to 24.

Liability of parent or person in loco parentis for personal tort against minor child, 19 A.L.R.2d 423, 41 A.L.R.3d 904, 6 A.L.R.4th 1066.

Blood grouping tests, 46 A.L.R.2d 1000, 43 A.L.R.4th 579.

Admissibility and propriety, in rape prosecution, of evidence that accused is married, has children and the like, 62 A.L.R.2d 1067.

Admissibility, in nonstatutory rape prosecution, of evidence of pregnancy, 62 A.L.R.2d 1083.

Assault with intent to commit unnatural sex act upon minor as affected by the latter's consent, 65 A.L.R.2d 748.

Applicability of rape statute concerning children of a specified age, with respect to a child who has passed the anniversary date of such age, 73 A.L.R.2d 874.

Incest as included within charge of rape, 76 A.L.R.2d 484.

Rape by fraud or impersonation, 91 A.L.R.2d 591.

Mistake or lack of information as to victim's age as defense to statutory rape, 8 A.L.R.3d 1100.

Impotency as defense to charge of rape, attempt to commit rape or assault with intent to commit rape, 23 A.L.R.3d 1351.

Statutory rape of female who is or has been married, 32 A.L.R.3d 1030.

Recantation by prosecuting witness in sex crime as ground for new trial, 51 A.L.R.3d 907.

Consent as defense in prosecution for sodomy, 58 A.L.R.3d 636.

What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163.

Fact that rape victim's complaint or statement was made in response to question as affecting res gestae character, 80 A.L.R.3d 369.

Multiple instances of forcible intercourse involving same defendant and same victim as constituting multiple crimes of rape, 81 A.L.R.3d 1228.

Propriety of publishing identity of sexual assault victim, 40 A.L.R.5th 787.

Propriety of, or prejudicial effect of omitting or of giving, instruction to jury, in prosecution for rape or other sexual offense, as to ease of making or difficulty of defending against such a charge, 92 A.L.R.3d 866.

Modern status of admissibility, in forcible rape prosecution, of complainant's prior sexual acts, 94 A.L.R.3d 257.

Modern status of admissibility, in forcible rape prosecution, of complainant's general reputation for unchastity, 95 A.L.R.3d 1181.

Constitutionality of rape laws limited to protection of females only, 99 A.L.R.3d 129.

Venue in rape cases where crime is committed partly in one place and partly in another, 100 A.L.R.3d 1174.

Validity and construction of statute defining crime of rape to include activity traditionally punishable as sodomy or the like, 3 A.L.R.4th 1009.

Entrapment defense in sex offense prosecutions, 12 A.L.R.4th 413.

Validity of statute making sodomy a criminal offense, 20 A.L.R.4th 1009.

Criminal responsibility of husband for rape, or assault to commit rape, on wife, 24 A.L.R.4th 105.

Sufficiency of allegations or evidence of serious bodily injury to support charge of aggravated degree of rape, sodomy, or other sexual abuse, 25 A.L.R.4th 1213.

Admissibility, at criminal prosecution, of expert testimony on rape trauma syndrome, 42 A.L.R.4th 879.

Constitutionality, with respect to accused's rights to information or confrontation, of statute according confidentiality to sex crime victim's communications to sexual counselor, 43 A.L.R.4th 395.

Necessity or permissibility of mental examination to determine competency or credibility of complainant in sexual offense prosecution, 45 A.L.R.4th 310.

Sexual child abuser's civil liability to child's parent, 54 A.L.R.4th 93.

Imputation of criminal, abnormal, or otherwise offensive sexual attitude or behavior as defamation - post-New York Times cases, 57 A.L.R.4th 404.

Intercourse accomplished under pretext of medical treatment as rape, 65 A.L.R.4th 1064.

Prosecution of female as principal for rape, 67 A.L.R.4th 1127.

Admissibility, in prosecution for sex-related offense, of results of tests on semen or seminal fluids, 75 A.L.R.4th 897.

Fact that murder-rape victim was dead at time of penetration as affecting conviction for rape, 76 A.L.R.4th 1147.

Admissibility of expert opinion stating whether a particular knife was, or could have been, the weapon used in a crime, 83 A.L.R.4th 660.

Liability of church or religious society for sexual misconduct of clergy, 5 A.L.R.5th 530.

Statute protecting minors in a specified age range from rape or other sexual activity as applicable to defendant minor within protected age group, 18 A.L.R.5th 856.

Propriety of publishing identity of sexual assault victim, 40 A.L.R.5th 787.

Sufficiency of allegations or evidence of victim's mental injury or emotional distress to support charge of aggravated degree of rape, sodomy, or other sexual offense, 44 A.L.R.5th 651.

Mistake or lack of information as to victim's age as defense to statutory rape, 46 A.L.R.5th 499.

Defense of mistake of fact as to victim's consent in rape prosecution, 102 A.L.R.5th 447.

75 C.J.S. Rape §§ 1 to 35; 81 C.J.S. Sodomy §§ 1 to 8.

#### B. CONSTITUTIONALITY.

Phrase "perpetrated by the use of force or coercion" not vague. - Phrase "perpetrated by the use of force or coercion" in this section is not unconstitutionally vague since the crime is defined in terms of a result that defendant causes, and if a defendant causes such a result by the use of force or coercion, force or coercion was the method which caused the result, that is, the crime. *State v. Jiminez*, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

Distinctions between degrees on basis of harm constitutional. - Determining the degree of a crime by the amount of the harm done to the victim does not make the statute unconstitutionally vague. *State v. Jiminez*, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

Section not void for vagueness. - Criminal sexual penetration could be committed by the use of force or coercion without the victim suffering

personal injury as a result thereof and the distinction between second and third degree criminal sexual penetration based on personal injury to the victim is not void for vagueness as a matter of law. *State v. Jiminez*, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

This section is not unconstitutionally vague or overbroad, nor does the statute encourage arbitrary or discriminatory prosecution. *State v. Pierce*, 110 N.M. 76, 792 P.2d 408 (1990).

Former sodomy statute constitutional. - Former 40A-9-6, 1953 Comp., which embraced and proscribed sodomitic conduct even on the part of consenting adults was constitutionally valid. *State v. Elliott*, 89 N.M. 305, 551 P.2d 1352 (1976).

And not violative of right of privacy. - On attack by an inmate of penal institution against constitutionality of former sodomy statute on grounds that it violated right of privacy, nothing in the language of the act could reasonably be considered as violative of any constitutionally protected area, nor did the record disclose an unconstitutional application of the law in the particular instance. *Washington v. Rodriguez*, 82 N.M. 428, 483 P.2d 309 (Ct. App. 1971).

Standing to challenge constitutionality. - Defendant's claims that definitional distinctions which go to difference between first and second-degree criminal sexual penetration are unconstitutionally vague would not be considered by the appeals court when defendant was convicted of second-degree criminal sexual penetration. *State v. Jiminez*, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

Since defendant did not claim nor argue that he was a member of the class discriminated against by the former sodomy statute or that his rights had been impaired by application of the statute to him, he lacked standing to challenge the constitutionality of the act. *State v. Armstrong*, 85 N.M. 234, 511 P.2d 560 (Ct. App.), cert. denied, 85 N.M. 228, 511 P.2d 554 (1973), overruled, 88 N.M. 187, 539 P.2d 207 (1975); *State v. Kasakoff*, 84 N.M. 404, 503 P.2d 1182 (Ct. App. 1972).

In prosecution for sodomy, where the state's evidence was that the act was committed by force and the defendant denied committing the act, defendant could not then argue that the incident was a consensual act between two adult persons and that the statute was unconstitutional as overbroad for prohibiting private consensual acts of adults. *State v. Kasakoff*, 84 N.M. 404, 503 P.2d 1182 (Ct. App. 1972).

#### C. ELEMENTS OF OFFENSE.

Criminal sexual penetration is not continuing offense. Once the penetration is perpetrated, that criminal sexual penetration is a completed offense. *State v. Ramirez*, 92 N.M. 206, 585 P.2d 651 (Ct. App. 1978); *State v. Corneau*, 109 N.M. 81, 781 P.2d 1159 (Ct. App. 1989).

Penetration not essential. - Despite the heading "Criminal sexual penetration" for this section, the offense does not require penetration. *State v. Delgado*, 112 N.M. 335, 815 P.2d 631 (Ct. App. 1991).

"Anguish" as personal injury. - "Anguish" means "distress," and mental anguish is distress of the mind; if such results from the use of force or coercion it is personal injury under this statute. *State v. Jiminez*, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

Specific intent to rape was not element of the crime. *State v. Ramirez*, 84 N.M. 166, 500 P.2d 451 (Ct. App.), cert. denied, 84 N.M. 180, 500 P.2d 1303 (1972).

The wording of this section was not meant to impose the additional requirement of showing specific intent. The intent which must be present to perform the act satisfies the "intentional causing" provision in this

section. *State v. Keyonnie*, 91 N.M. 146, 571 P.2d 413 (1977).  
Voluntary drunkenness no defense. - Instruction that rape requires no specific intent and that voluntary drunkenness is neither excuse nor justification for crime of rape was correct. *State v. Ramirez*, 84 N.M. 166, 500 P.2d 451 (Ct. App.), cert. denied, 84 N.M. 180, 500 P.2d 1303 (1972).

Specific sexual intent not an element. - The legislature did not intend to adopt a requirement of specific sexual intent as an element of this section. *State v. Pierce*, 110 N.M. 76, 792 P.2d 408 (1990).

State was not required to prove motive or intent. *State v. Alva*, 18 N.M. 143, 134 P. 209 (1913).

"Perpetrated," in Subsection D, means accomplished, performed, committed. *State v. Ramirez*, 92 N.M. 206, 585 P.2d 651 (Ct. App. 1978).

Penetration must be intentional. - To prove criminal sexual penetration in the third degree, the state must establish that the penetration was intentional. *State v. Lucero*, 118 N.M. 696, 884 P.2d 1175 (Ct. App. 1994).

Child under age of 13. - Causing a child under the age of 13 to engage in cunnilingus, even where there is no penetration, is sufficient to establish violation of this section. *State v. Orona*, 97 N.M. 232, 638 P.2d 1077 (1982).

Penetration and felony must be continuous transaction under Subsection D(4).

- If a criminal sexual penetration occurs within the res gestae of a felony, Subsection D(4) is applicable, and for the sexual penetration to come within the res gestae, the felony and the sexual penetration must be part of one continuous transaction and closely connected in point of time, place and causal connection. *State v. Martinez*, 98 N.M. 27, 644 P.2d 541 (Ct. App. 1982).

Means of committing offense. - Former law defining rape did not embrace several distinct offenses, but merely defined the various means by which the same offense might be committed. *Territory v. Edie*, 6 N.M. 555, 30 P. 851 (1892), aff'd, 7 N.M. 183, 34 P. 46 (1893).

Force or coercion. - Unless there is force or coercion beyond that inherent in almost every criminal sexual penetration, the proper charge is third degree criminal sexual penetration. *State v. Pizio*, 119 N.M. 252, 889 P.2d 860 (Ct. App. 1994).

Coercion not element under Subsection F. - Subsection F does not include an element of force or coercion, and there is no basis for construing it to require nonconsent by the child as an element of the crime. 1988 Op. Att'y Gen. No. 88-69.

Intercourse with underage girl. - Rape could be perpetrated in any of the ways set out in the statutes and sexual intercourse with a girl with her consent constituted rape if she was less than 16 years of age. *State v. Richardson*, 48 N.M. 544, 154 P.2d 224 (1944).

Submission to request of authority figure is coercion if it is achieved through undue influence or affected by external forces. *State v. Gillette*, 102 N.M. 695, 699 P.2d 626 (Ct. App. 1985).

Consensual sex between therapist and adult patient. - A defendant's conduct did not constitute the crimes of second or third degree criminal sexual penetration because consensual sex between a therapist and his adult patient is not a crime. *State v. Leiding*, 112 N.M. 143, 812 P.2d 797 (Ct. App. 1991).

Guilt of each participant. - A person engages in sexual intercourse, cunnilingus, fellatio, or anal intercourse if that person is one of the two persons required for the performance of the act. *State v. Delgado*, 112 N.M.

335, 815 P.2d 631 (Ct. App. 1991).

Statutory language genderless. - The genderless language used in the statute makes clear that the defendant can be either male or female. *State v. Delgado*, 112 N.M. 335, 815 P.2d 631 (Ct. App. 1991).

Child not conceived "as a result of rape". - Child conceived as a result of fourth-degree criminal sexual penetration of a 16-year-old was not conceived "as a result of rape" authorizing dismissal of the father from adoption proceedings under Subsection C of 32A-5-19 NMSA 1978. *State ex rel. Children, Youth & Families Dep't v. Paul P.*, 1999-NMCA-077, 127 N.M. 492, 983 P.2d 1011.

Defendant entitled to discovery of information relevant to element of mental anguish which the state has to prove. *State v. Garcia*, 94 N.M. 583, 613 P.2d 725 (Ct. App. 1980).

And defendant may require complaining witness to undergo psychological examination. - When the mental condition of the victim is relevant because the state alleges the force or coercion resulted in mental anguish to the victim, defendant may require complaining witness to undergo a psychological examination, in order to adequately prepare his defense. *State v. Garcia*, 94 N.M. 583, 613 P.2d 725 (Ct. App. 1980).

#### D. MULTIPLE CONVICTIONS OR PUNISHMENTS.

Offense of enticement of child is not lesser included offense of criminal sexual penetration. *State v. Garcia*, 100 N.M. 120, 666 P.2d 1267 (Ct. App. 1983).

Aggravated sodomy and murder not merged. - Homicide resulting from great bodily harm provided sufficient evidence for the jury to find aggravated sodomy and first-degree kidnapping, and there was no merger with the charge of murder of which defendant was acquitted. *State v. Melton*, 90 N.M. 188, 561 P.2d 461 (1977).

Merger of attempted criminal sexual penetration and criminal sexual contact of minor from unitary conduct. - Despite the state's contention that the conduct underlying the offenses charged against the defendant was not unitary, in that the defendant's action of lying on the victim constituted criminal sexual contact of a minor and his action of preparing to "hump" her constituted attempted criminal sexual penetration of a minor, the actions can only reasonably be deemed to constitute unitary conduct; the contact and attempted penetration all took place within the same short space of time, with no physical separation between the illegal acts. *State v. Mora*, 2003-NMCA-072, 133 N.M. 746, 69 P.3d 256, cert. denied, 133 N.M. 727, 69 P.3d 237 (2003).

Criminal sexual contact of minor is not lesser included offense of attempted criminal sexual penetration. - For purposes of double jeopardy, the offenses of criminal sexual contact of a minor and attempted criminal sexual penetration of a minor cannot be characterized as lesser-included and greater-inclusive crimes because they each contain different elements and stand independently in relation to one another. *State v. Mora*, 2003-NMCA-072, 133 N.M. 746, 69 P.3d 256, cert. denied, 133 N.M. 727, 69 P.3d 237 (2003).

Charges of kidnapping and second-degree criminal sexual penetration do not merge since the elements of the offense of second-degree criminal sexual penetration do not involve all of the elements of kidnapping. *State v. Singleton*, 102 N.M. 66, 691 P.2d 67 (Ct. App. 1984).

The fact that a kidnapping charge was used to raise a charge of criminal sexual penetration to a second-degree felony does not pose a double jeopardy problem. Convictions normally are allowed for both predicate and compound offenses, and criminal sexual penetration statutes and kidnapping statutes

protect different social norms. *State v. McGuire*, 110 N.M. 304, 795 P.2d 996 (1990).

Under the facts of this case, the jury could have inferred from facts other than the rape itself that defendant intended to hold the victim against her will from the moment of the abduction. Since the conduct underlying the offenses is not the same, the double jeopardy clause does not prohibit multiple punishments in this case. *State v. Ramos*, 115 N.M. 718, 858 P.2d 94 (Ct. App. 1993).

Merger of criminal sexual penetration and kidnapping based on same act. - Defendant's convictions for second degree criminal sexual penetration (commission of a felony) and kidnapping (no great bodily harm) under 30-4-1 NMSA 1978, stemming from the same act of sexual intercourse, potentially violated double jeopardy rights and were required to be set aside. *State v. Crain*, 1997-NMCA-101, 124 N.M. 84, 946 P.2d 1095.

Consecutive sentences for kidnapping and criminal sexual penetration. - Consecutive sentences for the compound crime of criminal sexual penetration during commission of kidnapping and the predicate felony of kidnapping with intent to hold for service is, in general, permissible because the two crimes address different social norms. *State v. Tsethlikai*, 109 N.M. 371, 785 P.2d 282 (Ct. App. 1989).

Consecutive sentences for kidnapping and criminal sexual penetration did not violate the double jeopardy prohibition against multiple punishments for the same offense, where the evidence supported an inference that defendant intended to commit criminal sexual penetration from the moment of the abduction. *State v. McGuire*, 110 N.M. 304, 795 P.2d 996 (1990).

Where the defendant took control of the car at gunpoint and then drove the victims to a remote location before raping them, the crime of kidnapping was complete before the act of criminal sexual penetration began; because the two crimes did not constitute a "unitary act," imposition of consecutive sentences was not double jeopardy. *State v. Andazola*, 2003-NMCA-146, 134 N.M. 710, 82 P.3d 77.

Force or coercion for kidnapping or false imprisonment. - A person is entitled to withdraw his or her consent or express a lack of consent to an act of criminal sexual penetration at any point prior to the act itself, but force or coercion exerted prior to the act itself will support a conviction for kidnapping or false imprisonment. *State v. Pisio*, 119 N.M. 252, 889 P.2d 860 (Ct. App. 1994).

No merger of false imprisonment and criminal sexual penetration. - There was sufficient evidence to support separate charges for false imprisonment and criminal sexual penetration where the victim testified that defendant would not let her out of the bedroom for a period of time after the penetration occurred. *State v. Traeger*, 2000-NMCA-015, 128 N.M. 668, 997 P.2d 142, *aff'd* in part, *rev'd* in part on other grounds, 2001-NMSC-022, 130 N.M. 618, 29 P.3d 518 (2001).

No merger of aggravated burglary and criminal sexual penetration. - Since aggravated burglary (30-16-4 NMSA 1978) and criminal sexual penetration in the third degree (this section) each require proof of facts which the other does not and since neither offense necessarily involves the other, there is no double jeopardy violation and no merger of the offenses despite the fact that the same evidence may go toward proving both. *State v. Young*, 91 N.M. 647, 579 P.2d 179 (Ct. App.), *cert. denied*, 91 N.M. 751, 580 P.2d 972 (1978), and *cert. denied*, 439 U.S. 957, 99 S. Ct. 357, 58 L. Ed. 2d 348 (1978). *cert. denied*, 91 N.M. 751, 580 P.2d 972, *cert. denied*, 439 U.S. 957, 99 S. Ct. 357, 58 L. Ed. 2d 348 (1978).

Where there was evidence that the victim awoke and found the defendant on

top of her and that the defendant told her not to move or make a noise or he would blow her head off, that was evidence of a battery. When the battery preceded sexual activity, there was evidence of an aggravated burglary apart from a sex offense, and the two offenses did not merge, nor was the "same transaction" test applied. *State v. Archunde*, 91 N.M. 682, 579 P.2d 808 (Ct. App. 1978).

Where defendant's acts constituting battery for purposes of aggravated burglary charges and acts constituting criminal sexual penetration (CSP) were separate and distinct, convictions and consecutive sentences for both CSP and aggravated burglary did not violate double jeopardy. *Lucero v. Kerby*, 133 F.3d 1299 (10th Cir.), cert. denied, 523 U.S. 1110, 118 S. Ct. 1684, 140 L. Ed. 2d 821 (1998).

Aggravated burglary and attempted criminal sexual penetration merged. - Defendant's conduct consisting of his entry into a dwelling with intent to commit a felony and attempted criminal sexual penetration (CSP II) was unitary; thus, his convictions for both aggravated burglary and attempted CSP II violated double jeopardy. *Lucero v. Kerby*, 133 F.3d 1299 (10th Cir.), cert. denied, 523 U.S. 1110, 118 S. Ct. 1684, 140 L. Ed. 2d 821 (1998).

Contributing to delinquency is separate offense. - Criminal sexual penetration of a minor requires proof of sexual penetration and contributing to delinquency of a minor requires proof that the defendant's act or omission contributed to the delinquency of a minor, and neither of those facts is required to prove the other. The legislature intended separate punishments for criminal sexual penetration of a minor and contributing to delinquency of a minor when the same conduct violates both statutes. *State v. Walker*, 116 N.M. 546, 865 P.2d 1190 (1993).

Felony-murder doctrine applied. - Applying the strict-elements test, first-degree criminal sexual penetration (CSP) is not a lesser-included offense of second-degree murder and, accordingly, first degree CSP could properly serve as a predicate for applying the felony-murder doctrine. *State v. Campos*, 1996-NMSC-043, 122 N.M. 148, 921 P.2d 1266.

Sentence and prison discipline for same offense. - Contention by inmates convicted of sodomy that sentence imposed by court amounted to double jeopardy because they had already been punished by prison officials for same offense was without merit. *Washington v. Rodriguez*, 82 N.M. 428, 483 P.2d 309 (Ct. App. 1971).

Multiple sentences improper. - Consecutive sentences of 45 to 50 years and 80 to 99 years imposed on defendant for convictions of assault with intent to commit rape and rape, respectively, were improper, since where charges arose out of the same transaction, were committed at the same time as part of a continuous act and were inspired by the same criminal intent which was an essential element of each offense, they were susceptible of only one punishment. *State v. Blackwell*, 76 N.M. 445, 415 P.2d 563 (1966).

Increasing sentence based on consideration of element of offense. - Where defendant noted that physical injury is an element of the crime of second degree criminal sexual penetration under Subsection D(3), and he contended that the trial court's consideration of the physical injury suffered by the victim in increasing the basic sentence pursuant to § 31-18-15.1 exposed him to double jeopardy, it was held that the court's consideration of circumstances surrounding an element of the offense did not expose defendant to double jeopardy. *State v. Bernal*, 106 N.M. 117, 739 P.2d 986 (Ct. App. 1987).

Aggravating factor improperly considered in sentencing. - While the victim's blood relationship to defendant arguably was a circumstance surrounding the offense of criminal sexual penetration, it was error for the court to

consider such relationship as an aggravating factor at sentencing on a criminal sexual penetration count after defendant had also been convicted of incest. *Swafford v. State*, 112 N.M. 3, 810 P.2d 1223 (1991).

Multiple penetrations. - Penetrations of separate orifices with the same object constitute separate offenses. Therefore, the acts of anal intercourse, sexual intercourse, and at least one instance of fellatio constitute separate offenses. *State v. Wilson*, 117 N.M. 11, 868 P.2d 656 (Ct. App. 1993).

The number of contacts is not dispositive of the existence of a separate violation of this section. *State v. Pizio*, 119 N.M. 252, 889 P.2d 860 (Ct. App. 1994).

Single criminal intent of several acts. - Defendant's contention that "single criminal intent" doctrine should have been applied to four acts of sodomy which he was convicted of having performed on victim over period of one and one half to two hours was neither supported by sufficient evidence nor properly preserved for review. *State v. Elliott*, 89 N.M. 756, 557 P.2d 1105 (1977).

This section cannot be said, as a matter of law, to evince a legislative intent to punish separately each penetration occurring during a continuous attack absent proof that each act of penetration is in some sense distinct from the others. *Herron v. State*, 111 N.M. 357, 805 P.2d 624 (1991).

A case involving a single defendant tried on an indictment alleging multiple penetrations was remanded to the trial court with instructions to vacate 14 convictions and sentences for second-degree criminal sexual penetration and to resentence accordingly, where the evidence supported, at most, five convictions and sentences. *Herron v. State*, 111 N.M. 357, 805 P.2d 624 (1991).

Defense must raise "single criminal intent" doctrine at trial. *State v. Elliott*, 89 N.M. 756, 557 P.2d 1105 (1977).

Double jeopardy. - Where the evidence established that defendant committed three separate and distinct battery offenses, double jeopardy did not preclude the first two batteries supporting a conviction for battery, even though the third battery satisfied elements of a charge of criminal sexual penetration. *Brecheisen v. Mondragon*, 833 F.2d 238 (10th Cir. 1987), cert. denied, 485 U.S. 1011, 108 S. Ct. 1479, 99 L. Ed. 2d 707 (1988).

There is no double jeopardy impediment to convicting and sentencing a defendant to consecutive terms for both incest and criminal sexual penetration arising out of the same act. *Swafford v. State*, 112 N.M. 3, 810 P.2d 1223 (1991).

There was no double jeopardy bar to punishment for the offenses of assault with intent to commit rape and criminal sexual penetration, where the victim testified at trial that defendant bound her to a bed, struck her several times, and threatened her verbally for a period of time before commencing the sexual assault. *Swafford v. State*, 112 N.M. 3, 810 P.2d 1223 (1991).

When the defendant received consecutive sentences upon his plea of guilty to second degree criminal sexual penetration, aggravated burglary, kidnapping, and aggravated battery, in order to support a double jeopardy challenge he had the burden to provide a sufficient record for the court to determine unitary conduct for purposes of the double jeopardy analysis. *State v. Sanchez*, 1996-NMCA-089, 122 N.M. 280, 923 P.2d 1165.

Because the crimes of kidnapping and attempted criminal sexual penetration contain elements not contained in the Order Prohibiting Domestic Violence (OPDV) obtained by victim against defendant, defendant's double jeopardy rights were not violated by his conviction for those crimes following his conviction for contempt for violating the OPDV. *State v. Powers*,

1998-NMCA-133, 126 N.M. 114, 967 P.2d 454.

Defendant's right to freedom from double jeopardy was not violated by punishment for attempted first-degree murder, aggravated battery with a deadly weapon, and criminal sexual penetration. *State v. Traeger*, 2000-NMCA-015, 128 N.M. 668, 997 P.2d 142, *aff'd in part, rev'd in part* on other grounds, 2001-NMSC-022, 130 N.M. 618, 29 P.3d 518 (2001).

## II. INDICTMENT AND INFORMATION.

Information not unconstitutionally vague. - Where information expressly stated age of minor rape victim, and that age was under 10 years, argument that the information was so vague and indefinite as to violate due process in that it stated an offense both under statute covering rape of female under or over 16 when resistance is overcome by force, and also under statute relating to rape of female child under 10, was without merit. *Gallegos v. Cox*, 358 F.2d 703 (10th Cir.), *cert. denied*, 385 U.S. 869, 87 S. Ct. 138, 17 L. Ed. 2d 97 (1966).

Notice sufficient. - The trial court did not deprive defendant of opportunity to be informed of charges against him by failing to require the state to specify precisely which of several acts of sodomy defendant was accused of having been accessory to, where the indictment and bill of particulars which were a part of the record identified the date, the approximate time and nature of the crimes alleged, the prosecutrix and the associates with whom defendant was alleged to have committed the crimes. *State v. Barnett*, 85 N.M. 404, 512 P.2d 977 (Ct. App. 1973).

Lack of specificity not violative of double jeopardy. - The trial court's refusal to require that the state specify which act of sodomy the defendant was accessory to did not subject him to double jeopardy, on the basis of the argument that if he were indicted or informed against as accessory to a particular act of sodomy based on the same incident he could not point to his present conviction as precluding his trial on any particular act of sodomy, where he had not been indicted or informed against for another crime growing out of the same set of facts. *State v. Barnett*, 85 N.M. 404, 512 P.2d 977 (Ct. App. 1973).

Separate counts of incest and criminal sexual penetration. - There was no error in charging defendant on separate counts of criminal sexual penetration and incest under a theory that he had sexual intercourse with a child under 13 years of age and a child between 13 and 16 years of age, and he knew each was his biological daughter. *State v. Hargrove*, 108 N.M. 233, 771 P.2d 166 (1989).

Language of statute sufficient. - It was unnecessary to charge crime pursuant to the common law; an indictment in language of statute which in effect charged sexual intercourse with a female under the age of fourteen was sufficient, use of the word "ravish" being unnecessary. *State v. Alva*, 18 N.M. 143, 134 P. 209 (1913).

Use of words "carnally know and abuse" in indictment was surplusage. *State v. Alva*, 18 N.M. 143, 134 P. 209 (1913).

Charge of rape adequate. - An information "did, with force and arms in and upon the body of Agnes Vigil . . . unlawfully and feloniously make an assault, and did then and there wickedly and feloniously against her will . . . ravish and unlawfully know, contrary to the form of the statute . . ." was sufficient to charge rape and not merely an assault, notwithstanding the omission of any such words as "her the said Agnes Vigil" between the words "know" and "contrary." *State v. Alarid*, 40 N.M. 450, 62 P.2d 817 (1936).

Information failing to name statutory rape victim not fatally defective. *State v. Roessler*, 58 N.M. 102, 266 P.2d 351 (1954); *Ex parte Kelley*, 57 N.M. 161, 256 P.2d 211 (1953).

Assault with intent to rape. - An indictment charging that defendant unlawfully, violently and forcibly assaulted prosecutrix with intent to ravish was sufficient charge of assault with intent to rape. State v. Raulie, 35 N.M. 135, 290 P. 789 (1930).

Allegation of defendant's virility unnecessary. - It was unnecessary that indictment allege that defendant was over the age of fourteen or, being under that age, had the physical ability to commit the offense. State v. Ancheta, 20 N.M. 19, 145 P. 1086 (1915).

Information and bill construed together. - In determining whether acts alleged constituted offense of sodomy, the information and the bill of particulars are to be read together as a single instrument. State v. Putman, 78 N.M. 552, 434 P.2d 77 (Ct. App. 1967).

Overinclusive bill of particulars not binding. - Although bill of particulars alleged two acts of sodomy, namely, requiring victim to take into her mouth the defendant's sexual organ and the placing of defendant's sexual organ in the victim's anus, the state was not bound by the statement in the bill of particulars to prove acts of both types of sodomy on the part of the defendant, and failure to instruct that the state must prove both types of sodomy before a conviction would be justified did not require reversal. State v. Barnett, 85 N.M. 404, 512 P.2d 977 (Ct. App. 1973).

Variance between information and instructions. - Jury instructions describing crime perpetrated by defendant as that of sexual intercourse with a female under sixteen years impaired no fundamental rights of defendant even though the crime was charged as "rape" in the information. State v. Richardson, 48 N.M. 544, 154 P.2d 224 (1944).

### III. EVIDENCE.

#### A. ADMISSIBILITY.

Subsequent beating irrelevant to determination of degree of offense. - Defendant's beating of the victim with a blunt instrument subsequent to intercourse was not considered in determining whether or not the offense of criminal sexual penetration was committed by force or coercion resulting in personal injury because this beating went to the aggravated battery conviction. State v. Jiminez, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

Out-of-court identification. - Where victim testified that rapist was in her presence for approximately an hour and 40 minutes and at the police station she described him with some specificity, action of police officer in showing victim the driver's license photograph which victim knew came from wallet she had taken from rapist's pocket and asking "is this the man" was not so suggestive as to bar evidence of victim's out-of-court identification, nor was in-court identification inadmissibly tainted because of it. State v. Baldonado, 82 N.M. 581, 484 P.2d 1291 (Ct. App. 1971).

The out-of-court photographic identification procedure was not so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification where the photographs viewed by the victim were all of male caucasians of about the same age and hirsuteness as defendant. State v. Clark, 104 N.M. 434, 722 P.2d 685 (Ct. App. 1986).

Identification by child. - Testimony by witness that three-year old child said "this is the man" a half hour after attack upon her was properly admitted over objection that it was hearsay. State v. Godwin, 51 N.M. 65, 178 P.2d 584 (1947).

Victim's identification was not tainted by the fact that the case agent and the child's grandmother hugged the child after she indicated that she was sure of her identification of the defendant as her assailant. State v. Clark, 104 N.M. 434, 722 P.2d 685 (Ct. App. 1986).

Hypnotically enhanced testimony. - Post-hypnotic recollections, revived by

the hypnosis procedure, are only admissible in a trial where a proper foundation has also first established the expertise of the hypnotist and that the techniques employed were correctly performed, free from bias or suggestibility. *State v. Clark*, 104 N.M. 434, 722 P.2d 685 (Ct. App. 1986).

If the trial court's determination that the identifications were not "post-hypnotic recollections revived by hypnosis" is supported by substantial evidence, then the requirements established by *State v. Beachum*, 97 N.M. 682, 643 P.2d 246 (Ct. App. 1981), were not triggered. *State v. Clark*, 104 N.M. 434, 722 P.2d 685 (Ct. App. 1986).

Where no details of the incident were mentioned during the hypnotic sessions; no information was sought from the child, nor details suggested, but the only suggestion made was that the child should remember; and there was independent, objective verification of the facts presented by other witnesses, the child victim's in-court identification was not impermissibly tainted by the unproductive hypnotic session. *State v. Clark*, 104 N.M. 434, 722 P.2d 685 (Ct. App. 1986).

Testimony concerning rape trauma syndrome. - Record did not suggest that the danger of unfair prejudice so outweighed the probative value of a witness's testimony concerning rape trauma syndrome as to require reversal in the absence of an objection, where there was little likelihood that the jury viewed the testimony as a "diagnosis" that the victim had been raped. *State v. Barraza*, 110 N.M. 45, 791 P.2d 799 (Ct. App. 1990).

Foot tracks. - Nonexpert evidence as to identity of accused, derived from a comparison of foot tracks with other tracks known to be those of accused, was admissible. *State v. Ancheta*, 20 N.M. 19, 145 P. 1086 (1915).

Confession admissible. - Where defendant, believing that prosecutrix had told of his relations with her, put himself under the protection of a third person and admitted to such person that he had slept with the prosecutrix, the confession was purely voluntary and admissible. *State v. Whitener*, 25 N.M. 20, 175 P. 870 (1918).

Suppression of evidence of rape trauma syndrome. - An order suppressing a psychologist's testimony relating to rape trauma syndrome was affirmed, where it could not be said that the trial court's order was clearly against the logic and effect of the facts and circumstances, and where there was no request to limit the evidence rather than exclude it altogether. *State v. Bowman*, 104 N.M. 19, 715 P.2d 467 (Ct. App. 1986).

Ordinarily previous chastity of prosecuting witness is immaterial in a statutory rape case. *State v. Armijo*, 64 N.M. 431, 329 P.2d 785 (1958).

Prior relations corroborative of statutory rape. - Evidence tending to show more than one act of criminal intercourse between accused and prosecutrix was admissible to show the relation and familiarity of the parties, and was corroborative of prosecutrix' testimony concerning the particular act relied upon for a conviction of statutory rape. *State v. Whitener*, 25 N.M. 20, 175 P. 870 (1918).

Exclusion of evidence of prior rape and sexual conduct. - In prosecution for second-degree criminal sexual penetration where theory of defense was that of fabrication of the rape and consensual intercourse, trial court properly excluded evidence of prior rape of victim and victim's prior sexual conduct. *State v. Fish*, 101 N.M. 329, 681 P.2d 1106 (1984).

Previous intercourse admissible on issue of identity. - Exception to the rule that previous chastity of victim is immaterial might be where her pregnancy is shown and testimony given that defendant was father of the child, as there the testimony of prior sexual acts might be pertinent on rebuttal as tending to show that another might have been the cause of such

condition. *State v. Armijo*, 64 N.M. 431, 329 P.2d 785 (1958).

Previous intercourse not admissible on issue of penetration. - Trial court did not err in refusing to permit cross-examination of prosecuting witness in prosecution for statutory rape concerning prior acts of intercourse with other men, since the sole reason advanced by defendant's counsel for admissibility was on the issue of penetration, an issue about which there was no genuine controversy. *State v. Armijo*, 64 N.M. 431, 329 P.2d 785 (1958).

Defendant's occupation as police officer. - Evidence of the defendant's status as a police officer was material and relevant to the issue of whether he committed criminal sexual penetration in the third degree using his status as a police officer to force the victim to engage in fellatio or perform other delinquent acts. *State v. Lucero*, 118 N.M. 696, 884 P.2d 1175 (Ct. App. 1994).

#### B. INHERENT IMPROBABILITY.

Rule of inherent improbability. - Because of highly emotional and prejudicial elements present in cases of rape, supreme court has taken the position that over and above the substantial evidence rule applicable in appeals, it will review the evidence to determine whether or not it is so inherently improbable that, by conviction of the crime, a fundamental wrong has been done to defendant. *State v. Shouse*, 57 N.M. 701, 262 P.2d 984 (1953).

Where defendant in prosecution for rape of a child contended that evidence was too vague and insufficient to establish guilt of defendant, appellate court would only weigh the evidence in the scales of inherent probability, and where there was substantial evidence tending to sustain the jury's verdict, its determination would be conclusive. *State v. Till*, 78 N.M. 255, 430 P.2d 752 (1967), appeal dismissed and cert. denied, 390 U.S. 713, 88 S. Ct. 1426, 20 L. Ed. 2d 254 (1968).

Reversal since evidence improbable. - District court should, and supreme court would, examine the evidence in a rape case with great care to determine whether testimony of prosecuting witness was inherently improbable; and if so, in absence of some evidence of some fact unequivocally and unerringly pointing to the defendant's guilt, a conviction would not be permitted to stand. *State v. Richardson*, 48 N.M. 544, 154 P.2d 224 (1944).

Where there was absolutely no evidence corroborating the prosecuting witness, and her evidence was outside the domain of reasonable probability, and accused denied the offense, a verdict of guilty was set aside and a new trial ordered. *Mares v. Territory*, 10 N.M. 770, 65 P. 165 (1901).

In cases of common-law rape, where in the absence of such corroboration as outcries, torn and disarranged clothing, wounds or bruises, or if there is long delay in making complaint, the evidence is so inherently improbable as to be unsubstantial, unless there is other testimony which points unerringly to the defendant's guilt, an appellate court will not uphold a conviction.

*State v. Boyd*, 84 N.M. 290, 502 P.2d 315 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972), cert. denied, 411 U.S. 937, 93 S. Ct. 1916, 36 L. Ed. 2d 398 (1973).

Directed verdict. - Court was to instruct jury to find a verdict of not guilty on defendant's or its own motion when at the close of testimony in rape case insufficiently supported testimony of prosecuting witness was inherently improbable and a verdict based on it would constitute a miscarriage of justice. *State v. Richardson*, 48 N.M. 544, 154 P.2d 224 (1944).

Rape not inherently improbable. - Testimony of examining physician that he

found no evidence of trauma or injury to the vagina; that such lack of trauma is unusual in a rape case; that he found no other physical indication on the prosecutrix or her clothes that a rape had occurred; and that he found sperm in the vagina but that they were all immotile did not render the testimony of the prosecutrix inherently improbable. *State v. Boyd*, 84 N.M. 290, 502 P.2d 315 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972), 411 U.S. 937, 93 S. Ct. 1916, 36 L. Ed. 2d 398 (1973), rehearing denied, 412 U.S. 924, 93 S. Ct. 2739, 37 L. Ed. 2d 151 (1973).

Time element. - Where the prosecutrix testified that she was raped twice by defendant and forced to commit an act of sodomy within a period of approximately 30 minutes, and in addition, there was some conversation between the prosecutrix and defendant during this time, it could not be said as a matter of law that the events described could not in fact have occurred during the period stated. *State v. Boyd*, 84 N.M. 290, 502 P.2d 315 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972), rehearing denied, 412 U.S. 924, 93 S. Ct. 2739, 37 L. Ed. 2d 151 (1973).

Initial denial of sodomy. - Prosecutrix' denial that act of sodomy had occurred in first written statement to police and failure to mention it in second statement to police or to examining doctor did not render her testimony inherently improbable, where she explained that her denial and her failure to mention the act were the result of her embarrassment about it. *State v. Boyd*, 84 N.M. 290, 502 P.2d 315 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972), cert. denied, 411 U.S. 937, 93 S. Ct. 1916, 36 L. Ed. 2d 398 (1973).

Unusual circumstances not inherently improbable. - The uncorroborated testimony of a minor child competent to testify, unless there be something inherently improbable in it, is deemed substantial evidence and sufficient to uphold a conviction, and testimony which merely discloses unusual circumstances does not come within that category. *State v. Trujillo*, 60 N.M. 277, 291 P.2d 315 (1955).

Rule inapplicable to sodomy. - The "inherently improbable" rule enunciated by the supreme court in *State v. Shouse*, 57 N.M. 701, 262 P.2d 984 (1953), a rape case, is not applicable in cases of sodomy. *State v. Kasakoff*, 84 N.M. 404, 503 P.2d 1182 (Ct. App. 1972).

#### C. CORROBORATION.

Bald charge insufficient. - In this jurisdiction, no corroboration of a prosecutrix by way of testimony of an independent character emanating from an outside source was required to sustain a conviction. But the bald charge of a woman against a man in that regard, unsupported and uncorroborated by facts and circumstances pointing to guilt of accused, was insufficient to meet requirement that verdict be supported by substantial evidence. *State v. Boyd*, 84 N.M. 290, 502 P.2d 315 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972), cert. denied, 411 U.S. 937, 93 S. Ct. 1916, 36 L. Ed. 2d 398 (1973); *State v. Armijo*, 25 N.M. 666, 187 P. 553 (1920).

Surrounding facts as corroboration. - Testimony of prosecutrix required no corroboration except that surrounding facts and circumstances must have tended to establish truth of her testimony, but it need not have been evidence of an independent character, disconnected from her testimony. *State v. Ellison*, 19 N.M. 428, 144 P. 10 (1914).

Other witnesses not required. - Corroboration of prosecutrix' testimony by other witnesses as to particular acts constituting offense of rape was not required and an instruction to that effect would correctly state the law. *State v. Richardson*, 48 N.M. 544, 154 P.2d 224 (1944).

Corroboration in victim's complaint to mother. - In prosecution for rape, testimony of prosecuting witness was corroborated by proof of complaint made

to her mother of the outrage committed upon her. *Territory v. Edie*, 6 N.M. 555, 30 P. 851 (1892), *aff'd*, 7 N.M. 183, 34 P. 46 (1893).

Defendant's own actions corroborative. - Defendant's actions both preceding and following rape, including rather severely injuring nose and lip of prosecutrix, making of threats on way home, and fleeing even before any report was made to the police pointed unerringly to his guilt, and constituted corroborating circumstances of the truth of prosecutrix' story. *State v. Ramirez*, 70 N.M. 54, 369 P.2d 973 (1962).

Corroboration rule in rape cases was not applicable to sodomy. - *State v. Boyd*, 84 N.M. 290, 502 P.2d 315 (Ct. App.), *cert. denied*, 84 N.M. 271, 502 P.2d 296 (1972), 411 U.S. 937, 93 S. Ct. 1916, 36 L. Ed. 2d 398 (1973), *rehearing denied*, 412 U.S. 924, 93 S. Ct. 2739, 37 L. Ed. 2d 151 (1973).

Corroboration rule not applicable to statutory rape. - In prosecutions for statutory rape, where consent was immaterial and force was not used, corroboration was not essential to a conviction, and it had only to be determined that the testimony of the prosecuting witness was not inherently improbable. *State v. Trujillo*, 60 N.M. 277, 291 P.2d 315 (1955).

Corroboration was not required in cases of statutory rape because the usual concomitant facts present in common-law rape, such as torn and disarranged clothing, wounds or bruises, outcries, etc., neither necessarily nor ordinarily appear. *State v. Trujillo*, 60 N.M. 277, 291 P.2d 315 (1955).

Uncorroborated testimony of child. - The uncorroborated testimony of a minor child competent to testify, unless there be something inherently improbable in it, is deemed substantial evidence and sufficient to uphold a conviction. *State v. Trujillo*, 60 N.M. 277, 291 P.2d 315 (1955).

In statutory sex offenses against a young victim corroboration of the claim that the defendant is the guilty party is not necessary where the evidence of guilt is substantial. *State v. Montoya*, 62 N.M. 173, 306 P.2d 1095 (1957).

Independent of statute, a man could be convicted of rape upon the uncorroborated evidence of a strumpet or a girl under the age of ten years. *State v. Ellison*, 19 N.M. 428, 144 P. 10 (1914).

Instruction properly refused. - As no corroboration of prosecutrix was necessary to uphold conviction, a requested instruction on subject of corroboration, contrary to the rule, was properly refused. *State v. Whitener*, 25 N.M. 20, 175 P. 870 (1918).

Absence of corroboration. - In rape prosecution, where prosecutrix was not corroborated, evidence was insufficient, for want of such corroboration, to sustain conviction. *State v. Clevenger*, 27 N.M. 466, 202 P. 687 (1921).

In cases of common-law rape, in the absence of such corroboration as outcries, torn and disarranged clothing, wounds or bruises, or if there is long delay in making complaint, the evidence might be so inherently improbable as to be unsubstantial, and would not uphold a conviction. *State v. Shults*, 43 N.M. 71, 85 P.2d 591 (1938), *cert. denied*, 84 N.M. 271, 502 P.2d 296 (1972), *cert. denied*, 411 U.S. 937, 93 S. Ct. 1916, 36 L. Ed. 2d 398 (1973).

#### D. SUFFICIENCY.

Jury's function. - It is the jury's function in a rape case to judge the credibility of the witnesses and the weight to be given their testimony. *State v. White*, 77 N.M. 488, 424 P.2d 402 (1967).

The jury was to determine how much incriminating circumstances were weakened by contrary characterizations, more or less plausible, or by other facts having an opposite tendency in the evidence. *State v. Godwin*, 51 N.M. 65, 178 P.2d 584 (1947).

Victim's age for jury. - Whether prosecutrix was under the age of consent

was a jury question. *State v. Whitener*, 25 N.M. 20, 175 P. 870 (1918).

Proof of penetration alone was sufficient to establish the crime of statutory rape. *State v. Harbert*, 20 N.M. 179, 147 P. 280 (1915).

Penetration provable from circumstances. - Proof of penetration was essential to conviction of having carnally known and abused a minor child, but it was not necessary that it be proved by direct evidence; it might be established by circumstantial evidence. *State v. Godwin*, 51 N.M. 65, 178 P.2d 584 (1947).

Opportunity and physical condition. - Proof of carnal knowledge could be adequately shown by fact that opportunity for sexual intercourse existed and that physical condition of the child showed abuse. *State v. Godwin*, 51 N.M. 65, 178 P.2d 584 (1947).

Evidence of penetration sufficient. - Testimony of doctor who examined victim, a minor child under the age of 13, in the evening of the day of alleged act of sodomy, that there had been a penetration into boy's anus, along with child's testimony as to the assault and as to the pain experienced by him as a result thereof, was sufficient evidence of penetration for jury's consideration. *State v. Mase*, 75 N.M. 542, 407 P.2d 874 (1965).

Evidence sufficient to sustain conviction. - The prosecutrix' testimony, which was not inherently improbable and which was corroborated by facts and circumstances, pointed unerringly to defendant and was sufficient evidence to sustain the conviction. *State v. Boyd*, 84 N.M. 290, 502 P.2d 315 (Ct. App.), cert. denied, 84 N.M. 271, 502 P.2d 296 (1972), cert. denied, 411 U.S. 937, 93 S. Ct. 1916, 36 L. Ed. 2d 398 (1973).

Evidence consisting of the testimony of the victim's counselor and the victim herself was sufficient to support convictions of criminal sexual contact with a minor and criminal sexual penetration of a minor. *State v. Ortiz-Burciaga*, 1999-NMCA-146, 993 P.2d 96, cert. denied, 128 N.M. 149, 990 P.2d 823 (1999).

When evidence as a whole left no doubt as to fact of intercourse and penetration, it was sufficient, even though if certain questions addressed to complaining witness with their answers alone were considered, there might have been some doubt as to sufficiency of proof. *State v. Alva*, 18 N.M. 143, 134 P. 209 (1913).

Appellate court found no ground to disturb verdict of guilty where after sifting from any recitation of facts made to support claim that 11 year old prosecutrix' testimony was inherently improbable, all facts and inferences which verdict resolves against defendant, there remains testimony of a substantial character sufficient to support the conviction. *State v. Trujillo*, 60 N.M. 277, 291 P.2d 315 (1955).

Rape established. - Where the evidence establishes that defendant had sexual intercourse with a female without her consent and by forcibly overcoming her resistance, this was rape, regardless of the age of the victim. *State v. Garcia*, 78 N.M. 136, 429 P.2d 334 (1967).

Conviction for rape not barred by facts also establishing statutory rape. *State v. Garcia*, 78 N.M. 136, 429 P.2d 334 (1967).

Rape of child. - In prosecution for rape of child, statement of 9 year old prosecutrix and testimony of examining doctor expressing opinion that child had undergone sexual intercourse as late as the day charged constituted substantial evidence and met test of inherent probability. *State v. Till*, 78 N.M. 255, 430 P.2d 752 (1967), appeal dismissed and cert. denied, 390 U.S. 713, 88 S. Ct. 1426, 20 L. Ed. 2d 254 (1968).

When testimony of prosecuting witness, a child of between twelve and thirteen, was convincing, was not inherently improbable, was unshaken by

cross-examination and was corroborated by the mother, and, up to a certain point, by defendant, it was sufficient to sustain a conviction of statutory rape. *State v. Keener*, 43 N.M. 94, 85 P.2d 748 (1938).

Spouses living apart. - Evidence supported finding that defendant and his wife were living apart at the time of the attack, where the wife testified that she felt she was living apart from defendant at the time of the attack, and there was evidence of the couple's physical separation and the defendant's securing other housing and paying one month's rent. *Brecheisen v. Mondragon*, 833 F.2d 238 (10th Cir. 1987), cert. denied, 485 U.S. 1011, 108 S. Ct. 1479, 99 L. Ed. 2d 707 (1988).

Attempted sodomy. - Acts of defendant constituted an active effort to consummate crime of sodomy and were more than mere preparation, where in addition to his announced intention to "screw" 16 year old victim, defendant beat victim until he passed out and removed victim's clothes, during course of which events the fly on defendant's pants was open. *State v. Trejo*, 83 N.M. 511, 494 P.2d 173 (Ct. App. 1972).

#### IV. DEFENSES.

##### A. CONSENT.

Absence of consent not element of criminal sexual penetration. - Although absence of consent was an element of the rape statute, which has now been repealed, absence of consent is not an element of the crime of criminal sexual penetration as defined by the legislature. *State v. Jiminez*, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976); *State v. Gillette*, 102 N.M. 695, 699 P.2d 626 (Ct. App. 1985).

Nor of statutory rape. - Under former law, where intercourse was with a girl under age of 16 the state need have proved only that defendant indulged in intercourse with her, regardless of question of her consent. *State v. Richardson*, 48 N.M. 544, 154 P.2d 224 (1944).

But required for rape. - Under former law, where victim was over age of consent, it was necessary to prove intercourse against her will. *State v. Richardson*, 48 N.M. 544, 154 P.2d 224 (1944).

As was resistance. - To constitute the crime of rape of one over the age of consent, there must be resistance, and it must be forcibly overcome; it was not sufficient that the carnal act was violently accomplished, or that it was without her consent. *Mares v. Territory*, 10 N.M. 770, 65 P. 165 (1901).

Amount of resistance required of victim depended upon the facts of the particular case. Resistance may be overcome by fear induced by threats as by physical violence. *State v. White*, 77 N.M. 488, 424 P.2d 402 (1967).

Violent injury indicative of adequate resistance. - Less than satisfactory evidence of resistance would not warrant reversal of rape conviction where the physical violence done to the prosecutrix and her resultant injuries therefrom tend to show that further resistance would have been of no avail and perhaps would have resulted in more serious injuries to her. *State v. Ramirez*, 70 N.M. 54, 369 P.2d 973 (1962).

Threats overcoming resistance. - Fact that threats by which prosecutrix' resistance had been overcome were made by someone other than the defendant was immaterial. *State v. Barnett*, 85 N.M. 404, 512 P.2d 977 (Ct. App. 1973).

Consent inconsistent with evidence. - Evidence that prosecutrix' clothes were torn, that she suffered a scratch or cut on the side of her head which bled during the preliminary hearing, that immediately after the assault various witnesses noticed red welts or marks, on prosecutrix' throat and that her bedroom was in disarray, was inconsistent with sexual intercourse by consent. *State v. White*, 77 N.M. 488, 424 P.2d 402 (1967).

## B. IMPOTENCY.

Assault with intent to rape. - Impotency could be shown but was not a complete defense to charge of assault with intent to rape. *State v. Ballamah*, 28 N.M. 212, 210 P. 391 (1922).

## V. SODOMY.

Force was not element of crime of sodomy under former law. *Washington v. Rodriguez*, 82 N.M. 428, 483 P.2d 309 (Ct. App. 1971).

Consent no defense. - Under former law, consent of both parties to the act of sodomy did not constitute a defense to that crime. *Washington v. Rodriguez*, 82 N.M. 428, 483 P.2d 309 (Ct. App. 1971).

Emission was not necessary element of crime of sodomy. *State v. Massey*, 58 N.M. 115, 266 P.2d 359 (1954).

Each act distinct. - Since under former 40A-9-6, 1953 Comp., "any penetration" could complete the crime of sodomy, on its face the statute clearly allowed prosecution for different kinds or acts of sodomy. *State v. Elliott*, 89 N.M. 756, 557 P.2d 1105 (1977).

Cunnilingus and fellatio. - Under former 40A-9-6, 1953 Comp., sodomy included a taking into the mouth "the sexual organ of any other person"; the statute was not limited to the sexual organ of the male, "any other person" including both male and female. *State v. Putman*, 78 N.M. 552, 434 P.2d 77 (Ct. App. 1967).

Where former statute (Laws 1876, ch. 34, § 1) provided a penalty for crime of sodomy, but did not define the term, the common-law definition would apply; hence, sexual copulation per os or fellatio, was not included in the offense of sodomy. *Bennett v. Abram*, 57 N.M. 28, 253 P.2d 316 (1953)(discharging petitioners in habeas corpus proceeding where they pleaded guilty to charge of sodomy without proper advice as to nature of the crime).

Aiding and abetting shown. - It was not necessary that the state prove that defendant aided and abetted a particular act of sodomy, as his presence at the scene and active participation in the criminal conduct being undertaken, in such a way as to encourage the commission of the charged offenses, was enough to constitute aiding and abetting. *State v. Barnett*, 85 N.M. 404, 512 P.2d 977 (Ct. App. 1973).

## VI. INSTRUCTIONS.

Essential elements of crime. - A jury must be instructed on the essential elements of the crime charged, and failure so to do is fundamental error because the error is jurisdictional and thus not harmless. *State v. Kendall*, 90 N.M. 236, 561 P.2d 935 (Ct. App.), rev'd in part, 90 N.M. 191, 561 P.2d 464 (1977), (holding that under the circumstances an instruction that victim must not be defendant's spouse, was not necessary).

Instruction in language of statute. - An instruction which set forth the elements of the crime of second degree criminal sexual penetration in the language of the statute was sufficient, and there was no error in failing to instruct on absence of the victim's consent. *State v. Jiminez*, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

Reading of statute permissible. - In prosecution for rape though there was no evidence tending to show that the prosecuting witness, through idiocy, imbecility or unsoundness of mind, either temporary or permanent, was incapable of giving consent, it was not error for the court, in its instructions, to read the entire section to the jury. *Territory v. Edie*, 6 N.M. 555, 30 P. 851 (1892), aff'd, 7 N.M. 183, 34 P. 46 (1893).

Instruction constituting constructive amendment of information. - Jury instruction which allowed for conviction based on digital penetration occurring prior to the enactment of this section constituted a constructive

amendment of the information which required reversal. *Hunter v. New Mexico*, 916 F.2d 595 (10th Cir. 1990), cert. denied, 500 U.S. 909, 111 S. Ct. 1693, 114 L. Ed. 2d 87 (1991).

Instruction on personal injury. - In a prosecution for criminal sexual penetration, where the trial court gave the statutory definition of personal injury appearing at 30-9-10C NMSA 1978, and also gave the statutory definition of great bodily harm at 30-1-12A NMSA 1978 in the instruction on first-degree criminal sexual penetration, the lack of additional definition of personal injury was not error; if defendant desired that personal injury be further defined, he should have submitted a requested instruction to that effect, and since he did not do so, he could not complain of the lack of additional definition of the term. *State v. Jiminez*, 89 N.M. 652, 556 P.2d 60 (Ct. App. 1976).

Failure to give charge of offense in third degree. - Failure to give defendant's tendered charge on criminal sexual penetration in the third degree was reversible error at his trial for false imprisonment and criminal sexual penetration in the second degree, where the jury could find from the evidence that the sexual intercourse occurred by coercion or force, but without the requisite elements of false imprisonment as an independent felony. *State v. Corneau*, 109 N.M. 81, 781 P.2d 1159 (Ct. App. 1989).

Victim other than spouse. - Where there was no evidence whatsoever that the victim raped, sodomized and killed was the spouse of the defendant, failure to instruct the jury that it must find that the victim was not defendant's wife in the rape conviction was not a jurisdictional error. *State v. Melton*, 90 N.M. 188, 561 P.2d 461 (1977).

Reversal of defendant's conviction of criminal sexual penetration because of trial court's failure to instruct that jury must find that victim was other than defendant's spouse was improper under facts of the case, and defendant was properly convicted of criminal sexual penetration. *Kendall v. State*, 90 N.M. 191, 561 P.2d 464 (1977).

Lesser included offenses. - In trial of Indian for rape under the federal Major Crimes Act (18 U.S.C. §§ 1153, 3242, conferring federal jurisdiction over certain enumerated major crimes committed by Indians on Indian reservations), it was reversible error for trial court to refuse to instruct on the non-enumerated offenses of attempted rape, simple assault and battery, all of which were lesser included offenses under New Mexico law. *Joe v. United States*, 510 F.2d 1038 (10th Cir. 1974).

Any variance between the victim's testimony at trial and her testimony before the grand jury was insufficient to require an instruction on a lesser included offense, where defendant's own testimony that he had no contact of any sort with the victim negated the possibility that such an instruction might have been warranted. *Chavez v. Kerby*, 848 F.2d 1101 (10th Cir. 1988).

Lesser included offenses and alibi. - Because the defendant offered the defense of an alibi, he was not entitled to a lesser-included offense instruction on the ground that the jury might have rejected the part of the complainant's testimony regarding the use of a gun. *State v. Wilson*, 117 N.M. 11, 868 P.2d 656 (Ct. App. 1993).

Charge on third degree not warranted. - Where there was no evidence tending to establish that the criminal sexual penetration was committed by force or coercion without resultant personal injury, since the only evidence was that defendant used force which resulted in personal injury, beating the victim with his fists, twisting her breasts and pulling her hair immediately prior to sexual intercourse, there was no evidence supporting an instruction on third degree criminal sexual penetration. *State v. Jiminez*, 89 N.M. 652, 556

P.2d 60 (Ct. App. 1976).

Instruction on consent properly refused. - Where a review of the record and a thorough examination of the prosecutrix' testimony does not ever raise a slight inference of consent on part of victim, it was not error for trial court to deny defendant's requested instruction on consent as a defense.

State v. Armstrong, 85 N.M. 234, 511 P.2d 560 (Ct. App.), cert. denied, 85 N.M. 228, 511 P.2d 554 (1973), overruled, 88 N.M. 187, 539 P.2d 207 (1975).

Requested instruction on lesser offense properly refused when no supporting evidence. - Where there is no view of the evidence adduced which would support the jury in finding the defendant guilty of third-degree criminal sexual penetration which would not also require the jury to find him guilty of second-degree criminal sexual penetration, a requested instruction on the lesser offense is properly refused. State v. Romero, 94 N.M. 22, 606 P.2d 1116 (Ct. App. 1980), overruled on other grounds, State v. Johnson, 1997-NMSC-036, 123 N.M. 640, 944 P.2d 869 (1997).

Charge on probability unnecessary. - It was not erroneous in rape case to refuse instructions calling for jury's consideration of reasonable probability of testimony of prosecuting witness where jury was instructed that they must find beyond a reasonable doubt that defendant committed the offense charged before they could return verdict of guilty. State v. Richardson, 48 N.M. 544, 154 P.2d 224 (1944).

Circumstantial evidence. - There was no error in court's refusal to give the usual stock instruction relating to circumstantial evidence where the state did not rely upon circumstantial evidence to prove its case in prosecution for sodomy involving two juveniles. State v. Frederick, 74 N.M. 42, 390 P.2d 281 (1964).

Impotency. - Where certain statements and testimony of defendant were only evidence of impotency, and no request for instruction on defense of impotency was tendered, it was not fundamental error on trial court's part to fail to instruct on its own motion on the defense, in view of confession and statements made by defendant admitting the act giving rise to the statutory rape prosecution. State v. Johnson, 64 N.M. 83, 324 P.2d 781 (1958).

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