Document: C.R.S. 18-3-402

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CO - Colorado Revised Statutes Annotated TITLE 18. CRIMINAL CODE ARTICLE 3. OFFENSES AGAINST THE PERSON PART 4. UNLAWFUL SEXUAL BEHAVIOR

18-3-402. Sexual assault

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

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

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

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

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

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

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

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

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

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

(3) If committed under the circumstances of paragraph (e) of subsection (1) of this section, sexual assault is a class 1 misdemeanor and is an extraordinary risk crime that is subject to the modified sentencing range specified in section 18-1.3-501 (3).

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

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

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

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

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

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

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

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

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

(II) The victim suffers serious bodily injury; or

(III) The actor is armed with a deadly weapon or an article used or fashioned in a manner to cause a person to reasonably believe that the article is a deadly weapon or represents verbally or otherwise that the actor is armed with a deadly weapon and uses the deadly weapon, article, or representation to cause submission of the victim.

(b)

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

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

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

(7) A person who is convicted on or after July 1, 2013, of a sexual assault under this section, upon conviction, shall be advised by the court that the person has no right:

(a) To notification of the termination of parental rights and no standing to object to the termination of parental rights for a child conceived as a result of the commission of that offense;

(b) To allocation of parental responsibilities, including parenting time and decision-making responsibilities for a child conceived as a result of the commission of that offense;

(c) Of inheritance from a child conceived as a result of the commission of that offense; and

(d) To notification of or the right to object to the adoption of a child conceived as a result of the commission of that offense.

History

Source: L. 75: Entire part R&RE, p. 628, § 1, effective July 1. **L. 77:** (1) amended, p. 962, § 15, effective July 1. **L. 83:** IP(1) amended, p. 698, § 1, effective July 1. **L. 85:** (2) R&RE and (3) and (4) amended, pp. 666, 667, § § 1, 2, effective July 1. **L. 95:** (4) amended, p. 1252, § 9, effective July 1. **L. 98:** (4) amended, p. 1293, § 13, effective November 1. **L. 2000:** Entire section R&RE, p. 698, § 18, effective July 1. **L. 2002:** (1)(g), (2), and (4)(e) amended and (1)(h) and (3.5) added, p. 1578, § § 1, 2, effective July 1; (5)(b)(I) and (6) amended, p. 1512, § 189, effective October 1. **L. 2004:** (3) and (6) amended, p. 635, § 5, effective August 4. **L. 2013:** (7) added, (SB 13-227), ch. 353, p. 2060, § 6, effective July 1.

Annotations

Notes

Editor's note: This section is similar to former § 18-3-401 as it existed prior to 1975.

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

Case Notes

RECENT ANNOTATIONS

The sentence enhancer in subsection (4)(a) does not require proof of a mens rea. Garcia v. People, 2019 CO 64, 445 P.3d 1065.

ANNOTATION

I. General Consideration.

II. Elements of Offense.

III. Trial and Prosecution.

A. In General.

B. Indictment or Information.

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E. Instructions.

IV. Verdict and Sentence.

I. GENERAL CONSIDERATION.

Law reviews. For article, "Criminality of Voluntary Sexual Acts in Colorado", see 40 U. Colo. L. Rev. 268 (1968). For article, "Reform Rape Legislation: A New Standard of Sexual Responsibility", see 49 U. Colo. L. Rev. 185 (1978). For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981). For comment, "Warning Bell: The Inherent Difficulties of Responding to Student-on-Student Sexual Harassment in Colorado Middle Schools", see 76 U. Colo. L. Rev. 813 (2005).

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

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

The "sufficient consequence" language in subsection (1)(a) is not unconstitutionally vague. People v. Komar, 2015 COA 171M, 411 P.3d 978.

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

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

Application of 2008 Colorado sex offender management board handbook not ex post facto violation in regard to pre-2008 misdemeanor sexual assault because sexually violent predator statute, not the handbook, applied to defendant's case. Said statute clearly covered defendant's misdemeanor sexual assault for the time the crime was committed. People v. Tuffo, 209 P.3d 1226 (Colo. App. 2009).

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

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

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

Merger doctrine inapplicable to convictions for kidnapping, assault, and robbery. The merger doctrine does not apply to a single transaction resulting in convictions under § 18-3-301 (1)(a), this section, and § 18-4-301 (1). People v. Bridges, 199 Colo. 520, 612 P.2d 1110 (1980).

Attempted sexual assault and sexual assault convictions merge, so the attempted sexual assault conviction must be vacated. People v. Marko, 2015 COA 139, 434 P.3d 618, aff'd, 2018 CO 97, 432 P.3d 607.

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

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

Individuals convicted of misdemeanor sexual assaults in violation of subsection (1)(e) should not be excluded from designation as sexually violent predators. People v. Tuffo, 209 P.3d 1226 (Colo. App. 2009).

Because sexually violent predator statute, § 18-3-414.5, plainly covers misdemeanor sexual assault, court need not consider any agency publications. People v. Tuffo, 209 P.3d 1226 (Colo. App. 2009).

Even if the defendant's 18-year-old wife could not be prosecuted for having sex with a 15-year-old girl, the defendant could still be prosecuted for photographing his wife with the girl pursuant to § 18-6-403. People v. Campbell, 94 P.3d 1186 (Colo. App. 2004).

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

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

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

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

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

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

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

The aggravators found in subsection (4) apply to attempted sexual assaults in addition to completed sexual assaults. People v. King, 151 P.3d 594 (Colo. App. 2006).

Each unit of prosecution for sexual assault by means of penetration requires evidence of sexual penetration that transpired in a factually distinct act or incident. In the definition of "sexual penetration", the legislature intended to describe alternative means of committing the element of sexual penetration in a single assault, rather than to create separate offenses for each type of sexual penetration. People v. Morales, 2014 COA 129, 356 P.3d 972.

A conviction under subsection (1)(e) is not a "crime of violence" under § 4B1.2 of the United States sentencing guidelines. United States v. Wray, 776 F.3d 1182 (10th Cir. 2015).

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

II. ELEMENTS OF OFFENSE.

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

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

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

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

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

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

An offense under subsection (1)(e) is a strict liability offense. United States v. Wray, 776 F.3d 1182 (10th Cir. 2015).

Nothing in the plain language of subsection (1)(b) suggests that the section is limited to cases involving victims who suffer from a mental infirmity. People v. Platt, 170 P.3d 802 (Colo. App. 2007), aff'd, 201 P.3d 545 (Colo. 2009).

The coexistence of subsections (1)(b) and (1)(h) represents a reasoned legislative determination that, depending on the facts of a particular case, a victim who is partially asleep and incapable of appraising the nature of his or her own conduct may not necessarily be physically "unable to indicate willingness to act." People v. Platt, 170 P.3d 802 (Colo. App. 2007), aff'd, 201 P.3d 545 (Colo. 2009).

Proof of defendant's awareness of nonconsent is not necessary under this section, except under the circumstances described in subsection (1)(e) (now (1)(h)). In all other circumstances, the prohibited conduct by its very nature negates the existence of the victim's consent. Dunton v. People, 898 P.2d 571 (Colo. 1995); Platt v. People, 201 P.3d 545 (Colo. 2009).

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

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

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

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

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

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

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

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

Evidence that defendant's body weight caused victim to submit against his or her will is sufficient to establish probable cause to believe that defendant applied the physical force required under subsection (4)(a). Physical force means force applied to the body and physical violence means unjust or unwarranted exercise of physical force. These definitions do not require an extra application of force other than any force applied to the body, but the physical force or physical violence must cause the victim to submit to sexual intrusion or sexual penetration. People v. Keene, 226 P.3d 1140 (Colo. App. 2009).

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

Although both victims were ultimately able to escape, the evidence still showed defendant used physical force to effectuate submission to his illegal sexual contacts. People v. Bryant, 2013 COA 28, 316 P.3d 18.

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

Threats of future retaliation not made until after the assault were insufficient to establish the class 3 felony aggravator under subsection (4)(c). People v. Baker, 178 P.3d 1225 (Colo. App. 2007).

Unlawful sexual contact is a lesser included offense of sexual assault based on sexual intrusion. Proof of sexual intrusion requires proof of sexual contact with a person's intimate parts satisfying the strict elements test, and unlawful sexual contact involves less serious injury than sexual intrusion and lesser culpability than sexual assault. People v. Loyas, 259 P.3d 505 (Colo. App. 2010), overruled in Page v. People, 2017 CO 88, 402 P.3d 468, as annotated below.

Unlawful sexual contact is a lesser included offense of sexual assault. When a defendant is convicted of both offenses based on the same conduct, the conviction for unlawful sexual contact merges into the conviction for sexual assault. Establishing the elements of sexual assault by means of penetration necessarily establishes the elements of unlawful sexual contact. The elements of unlawful sexual contact are a subset of the elements of sexual assault by means

of penetration. Page v. People, 2017 CO 88, 402 P.3d 468 (overruling Loyas v. People, 259 P.3d 505 (Colo. App. 2010), to the extent it held otherwise).

III. TRIAL AND PROSECUTION.

A. In General.

Where acts were continuous people may be compelled to rely on certain act. Where in a prosecution under this section of a male for having carnal knowledge of an unmarried female, it appearing that the illicit intercourse was continuous, the people may on motion be compelled to select the occasion upon which they will demand a conviction, and this selection must be made before the accused is required to proceed to his defense. The prosecutor is not required to select any specific date, but must individualize a certain act upon which he will rely. Laycock v. People, 66 Colo. 441, 182 P. 880 (1919).

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

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

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

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

B. Indictment or Information.

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

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

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

C. Evidence.

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

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

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

Circumstances tending to discredit prosecutrix. The failure of the prosecutrix to avail herself of assistance when at hand, to report the assault at the earliest possible moment, and to call immediate attention to the injuries received and afterwards complained of, are circumstances tending to discredit the testimony of the party alleged to have been outraged. Bueno v. People, 1 Colo. App. 232, 28 P. 248 (1891).

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

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

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

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

An 11-year-old victim's complaint to her nine-year-old sister on the day immediately following a sexual assault by their father was sufficient to corroborate the victim's testimony to the effect that sexual penetration had occurred during the assault. People v. Fierro, 199 Colo. 215, 606 P.2d 1291 (1980).

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

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

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

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

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

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

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

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

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

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

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

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

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

Evidence that defendant knocked victim unconscious at some point before they had sex establishes that defendant had means to cause submission against the victim's will. People v. Marko, 2015 COA 139, 434 P.3d 618, aff'd, 2018 CO 97, 432 P.3d 607.

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

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

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

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

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

The victim's testimony describing soreness, the counselor's testimony that both defendant and the victim were naked from the waist down, and the defendant's statement that "it was consensual" were sufficient circumstantial evidence to prove penetration occurred. People v. Hoskay, 87 P.3d 194 (Colo. App. 2003).

There was sufficient evidence of an attendant circumstance that defendant impaired victim's power to appraise or control victim's conduct by employing, without victim's consent, a drug to cause victim's submission where defendant gave victim a pill he described as comparable to taking eight naproxen pills for victim's headache, victim blacked out shortly after taking the pill, victim awoke to defendant having sex with her, victim could not move or talk at the time, and victim soon blacked out again. People v. Garcia, 2012 COA 79, 296 P.3d 285.

There was sufficient evidence to show victim incapable of appraising the nature of her conduct when defendant was having sex with her. The record showed that the victim suffers from cognitive difficulties and that she took medication prior to bedtime that made her groggy and sleepy. The jury could have inferred, either separately or together, that she was incapable of appraising the nature of her conduct. The jury was not required to agree on the evidence or theory that established the element. People v. Bertrand, 2014 COA 142, 342 P.3d 582.

Trial court did not err in providing a dictionary definition of the term "submission" which did not include physical force or violence in response to a jury inquiry, where the jury was explicitly instructed that one of the elements of first degree sexual assault was that the defendant caused the victim's submission through the actual application of physical force or physical violence. People v. Cruz, 923 P.2d 311 (Colo. App. 1996).

D. Jury.

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

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

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

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

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

E. Instructions.

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

The court properly defined "physical force" and "physical violence" in its instructions. People v. Holwuttle, 155 P.3d 447 (Colo. App. 2006).

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

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

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

For deadly weapon sexual assault, it is sufficient to instruct the jury that it needs to consider whether a deadly weapon was used to cause submission. The jury does not need to determine whether submission was obtained by actual physical force or by sufficient consequences reasonably calculated to cause submission. People v. Lehmkuhl, 117 P.3d 98 (Colo. App. 2004).

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

Court erred when instructing the jury that a person is incapable of appraising the nature of his or her conduct when asleep or partially asleep. The proper instruction should have been: A person who is fully or partially asleep during an assault may be incapable of appraising the nature of his or her conduct. The instruction error went to an essential element of the crime, so the error required reversal because there was a reasonable possibility that the error might have contributed to the conviction. People v. Bertrand, 2014 COA 142, 342 P.3d 582.

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

Sentence enhancers in subsection (4) are not additional substantive elements of the crime and do not require proof of a mens rea. Instruction on enhancer did not need to include "knowingly". People v. Santana-Medrano, 165 P.3d 784 (Colo. App. 2006).

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

Omission of the definition of "sexual penetration" from jury instructions did not rise to the level of plain error because the issue of whether sexual penetration occurred was not contested at trial. People v. Lozano-Ruiz, 2018 CO 86, 429 P.3d 577.

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

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

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

Trial court did not err in refusing to give the consent defense jury instruction tendered by the defendant in a first degree sexual assault case where the crime itself requires that the prosecution prove a lack of consent. People v. Cruz, 923 P.2d 311 (Colo. App. 1996); People v. Bertrand, 2014 COA 142, 342 P.3d 582.

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

IV. VERDICT AND SENTENCE.

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

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

Consecutive sentences for two counts of sexual assault upheld where the convictions were not supported by identical evidence. Although this section proscribes a single crime of sexual assault, the evidence at trial was sufficient to support a jury finding that, by beginning the assault while the victim was physically helpless, and then using physical force to continue the assault after the victim awoke, defendant committed that crime twice against the victim. Schneider v. People, 2016 CO 70, 382 P.3d 835.

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

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

Conviction of sexual assault under this section meets conviction of sexual offense criterion within the meaning of § 18-1.3-1001 et seq. The defendant is subject to indeterminate sentencing accordingly. People v. Klausner, 74 P.3d 421 (Colo. App. 2003).

Trial court's omission of the word "physically" from its interrogatory distinguishing class 2 from class 4 felony sexual assault did not amount to plain error under the circumstances, and there was no indication that the trial court failed to exercise its discretion with regard to the full range of penalties available for class 2 felonies. Sentencing court's choice of 16 years for the lower component of its indeterminate sentence was well within the permissible range, according to any of the arguably applicable statutes, and the sentencing court supported its exercise of discretion with reference to the nature of the particular offense, the character of the offender, and the public interest. Tumentsereg v. People, 247 P.3d 1015 (Colo. 2011).

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

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

Sentence found excessive. Defendant's sentence of a minimum of 32 years exceeded what is authorized by § 18-1.3-401 (6), since the minimum sentence is greater than twice the 12-year presumptive maximum for a class 3 felony. People v. Clark, 214 P.3d 531 (Colo. App. 2009), aff'd on other grounds, 232 P.3d 1287 (Colo. 2010).

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

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