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### The Rape Investigator's Handbook

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**Regis University**  
School for Professional Studies Graduate Programs  
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# THE RAPE INVESTIGATOR'S HANDBOOK

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By Julie Kazimer

SENIOR CAPSTONE PROJECT

# **The Rape Investigator's Handbook**

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## INTRODUCTION

Every two and half minutes in the United States, someone is sexual assaulted<sup>1</sup>. However, fewer than fifty percent of these crimes are reported, and a fraction of those recounted lead to a conviction. In 2005, Colorado criminal justice agencies received 1,971 reports of forcible rape; yet, reported only 480 arrests.<sup>2</sup>

There are numerous barriers to the arrest and conviction of rapists; however, the rape investigator does not have to be one of them. With proper training and insight, a rape investigator can ensure the resulting investigation is handled with professionalism and care.

The Rape Investigator's Handbook is a culmination of various law enforcement and forensic training techniques, as well as investigational philosophies geared towards improving sexual assault investigations within smaller Colorado police departments.

This handbook is intended as a resource guide. The techniques, tools, and ideas expressed are derived from numerous sources, and should be carefully evaluated in accordance with departmental needs and policies before implementation.



### What is sexual assault?

According to the Colorado Revised Statute 18-13-402, sexual assault is defined as:

- (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

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<sup>1</sup> Rainn, (n.d.).

<sup>2</sup> FBI Uniform Crime Report (2005). The FBI defines forcible rape as, "The carnal knowledge of a female forcibly and against her will." This does not include male sexual assault, or statutory rape.

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.<sup>3</sup>

It is essential for the sexual assault investigator to know the law concerning unlawful sexual behavior at the state, county, and local level. The full Colorado Revised Statute for unlawful sexual behavior is located in appendix A.



Knowledge of the defining classifications for rape and sexual assault in accordance with the FBI's *Crime Classification Manual* (CCM) is helpful to law enforcement personnel when investigating allegations of assault. The Crime Classification Manual is focused on intent and motivation of the offender.

The following are a listing of some of the crime classifications of rape and sexual assault:<sup>4</sup>

- 300: Criminal Enterprise Rape
- 301: Felony Rape
  - 301.01: Primary Felony Rape
  - 301.02: Secondary Felony Rape
- 310: Personal Cause
- 312: Domestic Sexual Assault
- 313: Entitlement Rape
  - 313.01: Social Acquaintance Rape
  - 313.02: Subordinate Rape
  - 313.03: Power-Reassurance Rape
  - 313.04: Exploitative Rape

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<sup>3</sup> Colorado Revised Statute Part 4: Unlawful Sexual Behavior was taken from the LEXIS database

<sup>4</sup> Douglas, J. E., Burgess, A. W., Burgess, A. G., & Ressler, R. K. (1997).



- 314: Anger Rape
  - 314.01: Gender Anger Rape
  - 314.02: Age Anger Rape
  - 314.03: Racial Anger Rape
  - 314.04: Global Anger Rape
- 315: Sadistic Rape
- 319: Abduction Rape
- 330: Group Cause Sexual Assault
- 331: Formal Gang Assault
- 332: Informal Gang Assault

The manual can be a beneficial tool for appraising rapist typology and rationale. In addition, the manual creates a standard language for sexual assault investigators and forensic personnel worldwide.

## **Rape Myths**

Before reading further, it is important to understand and discharge a few misconceptions regarding sexual assault. The following myths are commonly held in countless communities:

*Myth #1: Females are the only victims of rape, and males are the only gender to commit rape.*

Statistics suggest as many as nine percent of rape victims are male, and nearly one percent of rapists are female. Men can and are sexual assaulted, and a female offender can commit these crimes.<sup>5</sup>

Throughout the handbook, the victim is referred to as ‘she’, and the offender as ‘he’; however, that fact is not intended to perpetuate this myth, but rather, reflects the statistical trend of greater female victimization by male offenders.

*Myth #2: Women often make false claims of rape.*

While there is some debate regarding the number of false confessions, every case should be given careful attention and assessment before passing judgment. It is true, false confessions exist, but the deeper question is how the investigator identifies them.

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<sup>5</sup> Crime and Sexual Assault Support Services (n.d.).

*Myth #3: The victim is, in some way, responsible for the assault.*

This is likely the most widely held illusion. It is true, victims may be responsible for the situational aspects of a rape, i.e., the victim is a prostitute or intoxicated; however, those situational factors do not justify an assault. Cases must stop being weighed by the victim's deeds and instead, be investigated based upon evidence.

### **Who should use this handbook?**

- ✓ Sexual assault investigators
- ✓ Rural law enforcement
- ✓ Prosecutors
- ✓ First responders
- ✓ Forensic technicians
- ✓ Forensic nurse examiners
- ✓ Profilers
- ✓ Police academy instructors
- ✓ Law enforcement trainees
- ✓ Students
- ✓ Persons interested in rape investigation

### **How should this handbook be used?**

The handbook should be used as a resource for assistance during investigations of sexual assault. The handbook is structured chronologically by the 'standard' timeline of procedures associated with a rape investigation after receiving the initial report. As no two reports are alike, the handbook should be used as guideline to what might occur at the time of report.

The handbook is further divided by the role of the user. For example, one section deals strictly with the response of the first responder on scene, another handles the issues, and investigational aspects of the lead investigator. It is suggested that all sections are read and reviewed in order to gain the best comprehension of rape investigation from the initial report to testifying at trial. At the conclusion of the handbook, various reference materials are provided.

### **What makes a good sexual assault investigator?**

A good investigator trains in the latest forensic and investigational techniques, including the scientific method. He is constantly revisiting the evidence and forming new hypotheses. An open-mind is essential, as is the willingness to make mistakes. Rape investigation relies heavily on matching the evidence to witness statements while maintaining professional detachment. It is often painful and unrelenting work with few rewards. Objectivity is fundamental to being an effective investigator, as is a deep understanding of self and human motivations. An investigator should be compassionate and patient, in addition to being comfortable with discussing the convoluted details of the crime. A willingness to learn is central, and reading this handbook is a right step on the journey to becoming a stronger investigator.

# FIRST RESPONDER

The first responder on scene is critical to the success of any rape investigation. The first few minutes of interaction between the victim and officer often reflects the rest of the victim's experience throughout the investigation. A victim who is treated with respect and in a non-judgmental way will be far more likely to proceed with prosecution.



In a small or rural department, the first responder may assume various roles within an investigation, including lead investigator, evidence technician, and interviewer. However, when arriving on scene, the first responder, no matter what additional roles he might take on, should conduct the following duties in accordance with departmental policy.

## Duties of the First Responder<sup>6</sup>

### *Approach the scene*

Approach with caution. Be aware of biohazards and other dangers at the scene. Prepare for an emotionally volatile situation, and try to maintain an empathic and compassionate professionalism.

### *Assist the victim*

It is critical that the victim receives proper medical care, and that the victim's safety is assured. Introduce yourself by name and badge. Make the victim as comfortable as possible. Ask if you can contact someone for the victim. Determine if the victim needs special assistance like an interpreter.

### *Get the basic facts*

Ask the victim for basic information to be relayed to the lead investigator, and to determine whether a crime has occurred. Make sure to include the victim's name, date of birth, and address. Collect the same information from any witnesses, and/or the suspect. Document the name of the person reporting the crime, where the report

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<sup>6</sup> Turvey, B. E., & Savino, J. (2005); International Association of Chiefs of Police. (2005, May); New York Coalition against Sexual Assault. (n.d.).

was made, and the time, and date of actual assault.<sup>7</sup> Find out if a weapon was used in the assault, as well as the basic facts of the assault. Get a description of the offender(s), and find out in which direction the offender fled.

Additional questions may include: (a) Did the suspect ejaculate, and if so, where, (b) Did the suspect use a tissue, sheet or item of clothing to wipe his genitals, (c) Did the suspect wear a condom, (d) Was a lubricant used, and if so, did the suspect bring it to the scene, (e) Did the victim scratch or bite the suspect, (f) Were drugs or alcohol used to facilitate the attack, (g) Does the victim know the offender, and if so, how, (h) Did the suspect take anything from the scene, (i) Where can the lead investigator contact the victim?<sup>8</sup> These questions aid the first responder in determining where and what type of physical evidence might be present. Explain the investigational process to the victim, and avoid making predictions or promises.

#### *Remove Offender from Scene (if Present)*

Try to determine what type of assault has occurred (stranger rape, acquaintance rape, or drug-facilitated rape). If the offender is present, find out if he denies having sex with the victim, and if not, whether act was consensual. Determine whether an immediate arrest is required.

#### *Notify personnel per departmental regulations*

In many cases, the first responder notifies the investigator on call. The first responder should provide the necessary details, but avoid biasing the investigator with assumptions and/or judgments. The reason for this is simple, providing the barest details without assumptions or judgment allows the investigator to conduct an unbiased investigation, and protects the victim's credibility if and when the case goes to trial.

#### *Secure the crime scene*

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<sup>7</sup> Many sexual assaults reports are delayed reports, the act having taken place days, weeks, months, or years prior. There are special considerations for delayed reports in terms of physical evidence, but all reports must be carefully investigated. It is important to ensure a delayed report is protected under the statute of limitations, which in Colorado is ten years from the date of offense. (C.R.S. §16-5-401(8) (a) - Ten (10) years after the commission of the offense).

<sup>8</sup> West Virginia Foundation for Rape Information and Services, Inc. (n.d.).

If additional personnel and resources are needed to control the scene, request them. Make sure to secure all the crime scenes; often the crime occurs at a differing location from where the victim is located. Evaluate the need for a search warrant. Keep a detailed log every person entering and exiting the crime scene (see appendix B).

*Write down the names of any person at the scene*

This includes medical personnel and witnesses, note their clothing and footwear for evidentiary exclusion.

*Note the make, model, and license plate of any vehicle in the vicinity*

Ask other first responders (medical personnel) to aid if there are numerous vehicles in the area.

*Keep witnesses and victim separate*

Instruct witnesses and victim not to discuss the event.

*Contact Rape Crisis Advocate*

See Appendix C for listing of Rape Crisis Centers in Colorado if your department does not have a victim's advocate.

*Listen to ambient conversation*

Much can be learned from actively listening to ambient discussions; however, any information gained must be verified.

*Protect the evidence*

Do not let the victim shower, wash, douche, brush her teeth, or remove physical evidence from her person. If the victim has done any of these prior to reporting, do not berate her for doing so. In addition, ensure additional physical evidence is secured and protected from the elements, as well as contamination. Conduct a preliminary scene examination, including photographs, video, crime scene sketches, and evidence logging.

*Tell Lead Investigator*

Fill the lead investigator in on the details of the crime, including the victim's state. However, note victim's react in various manners including calm acceptance. The victim's state should never be used to determine the validity of a report. Avoid making assumptions and judgments about the crime or victim. Make sure to note all factual data collected.

At this point in the investigation, the lead investigator and first responder should make a decision whether to send the victim for a forensic rape examination. A victim should never be forced or coerce into a forensic examination; however, it is important for the victim to understand the investigational need for the exam, together with the benefits in terms of medical appraisal and STD/pregnancy prevention.

## SANE's Examination

The primary purposes of a forensic rape exam are to corroborate the victim's account, identify a suspect, establish the use of force, and/or confirm sexual activity. A SANE or Sexual Assault Nurse Examiner is a licensed, registered nurse trained in the collection of forensic evidence that achieves the aforementioned purposes. This evidence is paramount to the investigation of sexual assault, and can consist of DNA, hair and fiber evidence, as well as bite marks, bruising, tissue, and blood.



A forensic rape exam should be conducted at a hospital following the victim's initial report. The exam should follow the State of Colorado evidence collection protocol (see Appendix D).

In cases of stranger rape, physical evidence such as blood and DNA can increase the odds of identification and prosecution of a suspect. However, the results of a forensic rape exam can also benefit the acquaintance rape investigation. Therefore, it is vital for most rape victims to submit to a forensic examination.<sup>9</sup>

The current standard among the SANE's and law enforcement communities suggests an adult rape victim should undergo a forensic rape exam if the attack occurred within 72 hours. If the victim is under the age of 18, additional time (five days) is allotted for the exam. If the victim complains of pain or bleeding after 72 hours, an exam should be ordered without regard for age.<sup>10</sup> Note, these are guidelines for forensic examination submission, and should be evaluated on a case-by-case basis. It is better to err on the side of caution and send the victim for an exam, rather than miss critical physical evidence because an exam was not conducted.

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<sup>9</sup> Victims who delay reporting for longer than a week are the exception; however, forensic examination of the clothing and other evidence is still important.

<sup>10</sup> Crowley, S. R. (1999).



It is important to brief the SANE's examiner on the details of the assault, and the examiner should return the courtesy following the exam. Often victims will deny facts viewed as shameful or embarrassing to investigators, but share the information with medical personnel. If new details emerge, the first responder should discuss them with the victim if the lead investigator is absent.

A SANE's exam will include the following:<sup>11</sup>

- ✓ Medical care for injuries
- ✓ Medical history and interview (see Appendix E for glossary of SANE's Terms).
  - When the assault took place
  - Prior sexual history
  - Sexual acts that took place during attack
  - If ejaculation occurred and where
  - If condom and/or lubricant was used
  - Victim/suspect position
  - Use of drugs or alcohol in prior 12 hours
  - Description of force used
- ✓ Collection of physical evidence
  - Proper collection and storage of specimens is necessary (see Appendix F).
- ✓ Evaluation for STD's and treatment
- ✓ Assessment and treatment for possible pregnancy
- ✓ Crisis intervention and referrals

#### Types of Evidence Collected

- DNA
- Hair
- Seminal fluid
- Clothing
- Saliva
- Blood
- Urine
- Non-biological trace evidence

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<sup>11</sup> Crowley, S. R. (1999).

- Injury evidence
  - Genital injury
  - Bite marks
  - Bruising
  - Pattern injury evidence
  - Non-pattern injury evidence
- Photographic evidence of injuries
- Colposcopic evidence
- Toluidine blue (dye)

Depending on the type of sexual assault investigation (stranger rape, acquaintance rape, drug-facilitated rape) differing physical evidence can provide clues. For example, the victim's clothing in a stranger rape may aid in the recovery of DNA evidence, and eventual identification of a suspect. Additionally, the victim's torn clothing in an acquaintance 'consent' rape may provide evidence of force, and therefore, lead to a conviction. With this in mind, it is essential for investigators to collect, analyze and reflect on all physical evidence. Evidence is crucial to understanding and investigating a sexual assault.

## Crime Scene Evidence Collection

Crime scenes are ripe with physical evidence, but it is up to the investigator to find it. Often the first responder is charged with the duty of securing evidence at a crime scene. This can entail as little as creating a security and evidence log to the difficult task of collecting physical evidence. Departmental policy should be reviewed regarding the role of the first responder in evidential collection at the scene.

The following section describes what evidence should be collected at the scene, plus how collection should be accomplished.

Before any evidence is collected, it is vital for the scene to be documented. Often times, the documentation (photographs, video, and sketches) are the only reference a lead investigator will have to the scene.

### Crime Scene Photography

The goal in crime scene photography is to record the scene as you came upon it. It is a visual documentation of evidence, as well as a general overview of the scene. Investigators rely heavily on crime scene photographs, as do other forensic personnel such as criminalists and prosecuting attorneys. A picture really is worth a thousand words, and in cases of rape, a picture can provide the evidence necessary to move an investigation in the right direction.



#### *Photography Steps*

- 1) Photograph the exterior of the crime scene. In some cases, aerial photography can provide additional evidence. Include photographs of points of entry and exit, in addition to all other windows and doors.
- 2) Once inside, take photographs of the entranceway.
- 3) Photograph the crime scene, as it appeared when you entered. This should be a general overview of the scene.
- 4) Move around the room shooting photographs of the walls in order to reference physical evidence.
- 5) Photograph all rooms associated with the crime scene.

- 6) Photograph the evidence. Take three photographs of the evidence. One should be a midrange shot to reference scale, the second, should be a close up of the evidence and the third, a close up shot with a measurement device.
- 7) Photograph the victim's injuries. These should include a photograph of the victim's face, and any injuries received.

See Appendix F for additional information on crime scene photography.



### Crime Scene Video

Video is a great tool for laying out the crime scene.

Furthermore, it is inexpensive and easily available to even the smallest departments.

#### *Steps of Video Recording the Crime Scene*

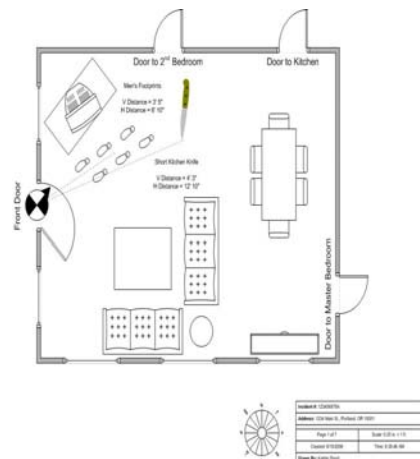
- 1) Start the video with a narrative introduction, including the time, date, location, and type of crime scene. Also, provide a brief descriptive summary of the crime.
- 2) After the introduction, tape the scene without audio, as ambient conversation could influence viewers.
- 3) As with still photography, tape the scene first as an overview of the general scene and layout. Use a tripod to avoid camera shake, and slow movements.
- 4) Record all evidence a wide angle shot for scene layout, and again up close with and without measurement device.

See Appendix F for additional information on crime scene video recording.

### Crime Scene Sketch

The crime scene sketch is often overlooked when crime scene photography and videos are present. However, a crime scene sketch can be invaluable to an investigation. It provides a clear reference for the location and layout of the scene.

When sketching a movable object, the measurements must be referenced to an immovable one. Two



measurements should be used. For example, a weapon lying in the middle of a room should be measure in context of an immovable object like a wall and a door.

Include only necessary detail in a sketch, and make sure to verify measurements. Make sure to note, the sketch is not to scale. Add a legend, key, and compass scale to the sketch, as well as the case number, crime classification, victim name, date, time and location, weather and lighting of when the sketch was made.

For additional information on crime scene sketching, see appendix F.

### **Evidence Collection**

One of the most important aspects of evidence collection is the development and implementation of a chain of custody. Without a clear and accurate chain of custody, a simple case can become an investigational nightmare resulting in injustice. In addition to a chain of custody, proper collection, and storage techniques must be applied.

A chain of custody is developed by logging each piece of evidence, and the individual responsible for the care and custody of it (see Appendix G).

A chain of custody log should contain the following:

- ✓ Name of person receiving the evidence
- ✓ Date, time, and location of collection
- ✓ Name of evidence custodian
- ✓ Description of evidence
- ✓ Description of collection method
- ✓ Description of evidence was transferred
- ✓ Date, time and name of any individual accessing the evidence
- ✓ Description of evidence analysis
- ✓ Miscellaneous notes and detail

An evidentiary log should also be maintained (see Appendix H). An evidence log should contain the following:

- ✓ Case number/identifier
- ✓ Name of evidence custodian

- ✓ Date and time evidence was collected
- ✓ Name of person collecting evidence
- ✓ Name of individual logging evidence
- ✓ Description of evidence
- ✓ Description of evidence and location
- ✓ Information on collection
- ✓ Evidence identification number
- ✓ Miscellaneous notes and details



In smaller, rural departments, the first responder may be responsible for evidence collection. Therefore, proper evidence collection, and storage protocol is central to an investigation.

*Types of Crime Scene Evidence (Not exclusive) see Appendix L for Crime Scene Evidence Check List<sup>12</sup>*

- 1) Clothing-victim and suspect (see Appendix I for Evidence Clothing log).
- 2) Bite mark impressions from the suspect
- 3) Photographs of victim injuries
- 4) DNA (see Appendix J for additional DNA information).
  - a. Blood
  - b. Sweat
  - c. Tissue
  - d. Saliva
  - e. Hair
  - f. Urine
  - g. Known samples of saliva, head hair, blood and pubic hair from the suspect
- 5) Finger nail clippings
- 6) Bedding
- 7) Condoms/lubricant
- 8) Rope, twine, cordage (ligatures)
- 9) Witness statements

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<sup>12</sup> International Crime Scene Investigators Association. (n.d.).

- 10) Fibers
- 11) Soil
- 12) Tire tread and impressions
- 13) Bodily fluids
  - a. Semen
  - b. Blood
  - c. Vaginal fluid
- 14) Tampons or sanitary napkins
- 15) Latent fingerprints
- 16) Items used in assault
  - a. Weapons
  - b. Burglary tools
- 17) Items left by suspect
- 18) Facial and toilet tissue
- 19) Towels
- 20) Sofa cushions
- 21) Carpet
- 22) Footprints
- 23) Tool marks
- 24) All stains
- 25) Victim Rape kit
- 26) Suspect Rape Kit



Follow the evidence storage and submission guidelines in the Colorado Bureau of Investigation Evidence Handbook (Appendix K).

The following table shows how evidence like bloodstains and bedding should be collected, packaged, and stored.

## FORENSIC SAMPLE<sup>13</sup>

Evidence	Collection	Packaging	Storage
Bloodstain	1. Collect the entire stain or cut out stain and adjacent area.  2. Scrap a crust. 3. Moisten sterile swab with distilled water and apply to stain.	1. Paper bag or wrapper.  2. Paper envelope or bindle.  3. Glass tube.	Air-dried and frozen
Clothing/bedding	Entire Item	Bags, butcher paper wrap (All items must be packaged separately)	Air-dried; frozen
Condoms	Entire Item	Paper bag or envelope	Frozen
Cigarette Butts	Entire Item	Paper bag or envelope	Frozen
Trace Evidence	Collect using forceps, tape lifts, or gloved fingers.	If collected with forceps, place in paper bindle. Tape lifts should be secured with Mylar sheet	Room temperature
Shoe Prints/'Tire Tread	Photograph using L-Scale (see crime scene photography) Take 4 slides per item	Casts should be secured in boxes	Room temperature
Firearms	Unload before packaging	Cardboard box	Depends on additional forensic materials like blood on weapon.
Ligatures	Do not untie. If you must cut, cut away from knots and mark your cut.	Paper bag or envelope	Frozen

The following is a listing of things and places investigating officers should consider when looking for evidence in a sexual assault (not an exclusive list):<sup>14</sup>

- Clothing (victim and offender)
- Victim's purse or wallet
- Jewelry and jewelry boxes

<sup>13</sup> Crowley, S. R. (1999).

<sup>14</sup> Turvey, B. E., & Savino, J. (2005)



- Safes and/or lockboxes
- File cabinets
- Drawers
- Gloves
- Computer hardware (see Appendix L for computer evidence collection)
- Computer software
- Pornography
- Pillows, sheets, blankets and bedding
- Rags and towels
- Condoms and wrappers
- Tissues
- Paper towels
- Eyeglasses
- Cigarette butts
- Weapons
- Discarded gum
- Ligatures
- Television
- DVD/Video
- Telephone
- Cell phone
- Remote control
- Chairs, couches, seat cushions
- Carpet
- Light switches
- Personal correspondence
- Email
- Toilet seat and lids
- Doorknobs
- Vehicles
- Vehicle door handles
- Vehicle pedals

- Steering wheel
- Rearview mirrors
- Floors
- Tabletops and countertops
- Ceilings
- Point of entry and exit
- Windows and screens
- Bathroom mirrors, shower/bath and sinks
- Trash and garbage cans

Sadly, less than ten percent of physical evidence collected from a scene is submitted for forensic analysis<sup>15</sup>. A good forensic investigator will seek to collect and submit as much evidence as necessary to provide a well-rounded and fair investigation.

Evidence collection and analysis is the foundation of a good investigation. Physical evidence should be the primary factor in corroboration of a victim's report, as well as the basis to locating and arresting an offender. Without properly collected, logged, and stored physical evidence, a case is unlikely to result in a conviction.

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<sup>15</sup> Chisum, J. (2006, August 13).



## Write the Report

Any officer who identifies evidence, interviews a victim, or processes a crime scene should write a report. The report should detail the action of the first responder, and be complied with other supplementary reports like the incident report. Reports will aid the lead investigator in determining the events that took place

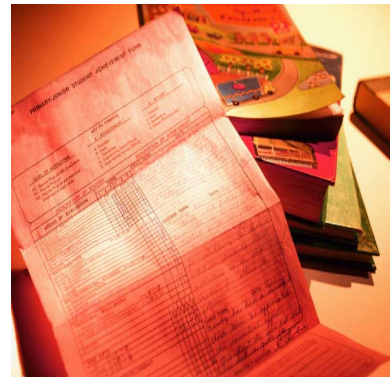
before he or she arrives on scene, in addition to documenting what actions and scene processing occurred.

The report should include a who, what, when and where. If possible, leave out the why question and answer. Why asks for assumptions and conclusions on the part of the officer, which can be used later as a defense.

The report must be fair, and accurate. It should also be as complete and legible as possible, but not include extraneous details. Keep it short and to the point. The preferred report is written in a narrative format on word processing software, often in a chronological order. However, each policing agency has its own format and standards.

As a general guideline, reports should have the following as appropriate:

- *Source of Activity Section:* Why the officer was responding? (Example: on January 1, 2006 at approximately 0001 hours, I was dispatched to 1234 Main Street in reference to a sexual assault report).
- *Observation Section*
- *Statements Section:* Victim, witness, and suspect formal statements.
- *Evidence Section:* Note chain of custody and evidence log. What evidence was collected and who is in charge of the evidence.
- *Additional Notes Section:* Facts, observation and the like that fill the required who, what, where, when and why narrative.
- *Arrest and Booking Sections:* If a suspect was arrested and booked, the arresting officer and transport as well as booking information should be provided.



Remember when completing a report, whatever is recorded becomes evidence at trial. Therefore, it is important to refrain from statements that are inflammatory, and/or assumptions about the case, victim, or offender.



## Workbook Problems I

### Test Your Knowledge

Answer the following questions.

- 1) True or False: It is your duty as a first responder to make sure the victim is safe.
- 2) True or False: Your demeanor does not affect the victim.
- 3) True or False: Every victim should have a forensic rape exam.
- 4) True or False: Tell the lead investigator every observation you have regarding the victim's state of mind.
- 5) True or False: Clothing in a consent acquaintance rape is not important, as the suspect is a known offender.
- 6) True or False: A crime scene sketch is not necessary if you have photographed and videotaped the scene.
- 7) True or False: In a crime scene sketch, a movable object should be measured from an immovable one.
- 8) True or False: Never videotape a scene with the audio recorded.
- 9) True or False: When writing a report, include every detail you can remember.
- 10) True or False: A chain of custody is not needed if the case is an acquaintance rape, as the suspect is known.
- 11) True or False: An evidence log should be maintained during the collection and storage of physical evidence.
- 12) True or False: A first responder should note all personnel on scene, as well as their clothing and footwear.
- 13) True or False: In an acquaintance rape, you should collect the license plate, make, and model of vehicles in the area.
- 14) True or False: A SANE's Exam is only needed when the offender is unknown.
- 15) Collect trace evidence with:
  - a. Forceps
  - b. Tape lifts
  - c. Gloved fingers
  - d. All of the above

- 16) Reports should be written in a \_\_\_\_\_ format.
- 17) True or False: Reports should include who, what, where and when.
- 18) True or False: When collecting a ligature, cut it at the knot.
- 19) Which of the following is not a section that should be included in a report?
- a. Source of Activity Section
  - b. Observation Section
  - c. Statements Section
  - d. Evidence Section
  - e. Assumption Section
  - f. Additional Notes Section
  - g. Arrest Section
  - h. Booking Section

### **For Discussion**

Read the following scenarios. As a first responder, what would you do in these situations? Answer the three questions below:

- 1) Has a crime been committed?
- 2) What should your first step in the investigation be?
- 3) What will complicate your investigation?
- 4) What type of evidence should you look for?

#### **Scenario 1:**

You are dispatched to the local park, a known meeting place for homosexuals. A twenty-three year old man reports he was the victim of a sexual assault by two unknown males. When you arrive, the man is distraught and confused. The man states he does not know the offenders, but has seen them at the park. During his statement, the man confesses he visits the park to engage in homosexual acts.

#### **Scenario 2:**

You receive a call from an apartment complex in an upscale neighborhood. A twenty-six year old woman claims a neighbor raped her. When you arrive on scene, the woman is bleeding and her clothing is torn. The crime scene indicates a struggle, but the woman is calm. During questioning, you are confused by the inconsistencies in her story. The accused neighbor claims the sex was consensual, and the victim has a history of mental illness.



## LEAD INVESTIGATOR

The role of the lead investigator in a sexual assault case usually is the responsibility of a detective within the crimes against persons division; however, smaller departments may not have a specific division for crimes against persons, or more than one detective for the entire department. On occasion, a department does not have a detective at all, and the responsibility of sexual assault investigation falls to the first responder. No matter what the specific departmental situation, it is important for all individuals investigating sex crimes to have an understanding of rape investigation, in addition to objectivity, compassion and empathy.

Training can provide the skill set necessary for investigating rape claims; however, it cannot give an investigator the personality needed to investigate such crimes. A rape investigator must be well versed in interview and interrogation skills. Moreover, he must be self aware of his own preconceived notions regarding sex and rape. Moreover, he should have a detailed understanding of human anatomy and sexual function. He should be compassionate, and empathic to the victim while maintaining a detached professionalism and cynicism.

Victims, witnesses, and suspects lie. Evidence does not. It is up to the investigator to weigh the statement against physical evidence surrounding the case before making any judgment. This objectivity allows the investigator to constantly question his hypothesis of events, and seek the truth. Ultimately, that should be the investigators goal, to find the truth.

An investigator should also have the resources and materials equated with the investigation of rape. These resources include forensic testing and training, crime scene and evidence collection protocol, as well as access to additional aid from criminalists, other investigators, superiors, and profilers.

The materials every lead rape investigator and first responder should have on hand prior to entering a crime scene are:<sup>16</sup>

- ✓ Business cards
- ✓ Pens

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<sup>16</sup> Turvey, B. E., & Savino, J. (2005).

- ✓ Small notebook
- ✓ Flashlight
- ✓ Paper evidence bags
- ✓ Paper evidence envelopes
- ✓ Cardboard evidence storage boxes
- ✓ Evidence labels
- ✓ Evidence tape
- ✓ Crime scene tape
- ✓ Permanent marker
- ✓ Rubber gloves
- ✓ Camera and film (35mm preferred)
- ✓ Audiotapes and recorder
- ✓ Blank audiotapes
- ✓ Spare batteries
- ✓ Q-tips for swabs
- ✓ Tweezers
- ✓ Forceps
- ✓ A binder with copies of local sex crime statutes
- ✓ Binder with evidence collection and packaging procedures
- ✓ Blank consent forms for taking exclusionary suspect samples

In any investigation, it is vital that the investigator goes to the scene.<sup>17</sup> Even if the victim has been removed from, the scene or the scene has been cleared, or is days old. The crime scene can provide the investigator with a point of reference for the evidence, photographs, and statements.

The information the first responder should provide the lead investigator with is:

- Name of reporter
- The contact information (telephone number, address) of reporter
- Scene location
- Victim location (hospital, etc.)
- Victim's name

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<sup>17</sup> Even if the report is delayed, the investigator should visit the scene.



- Victim's date of birth
- Victim's address and telephone number
- Name of any witnesses
- Witness date of birth
- Witness address and telephone number
- Suspect name (if known)
- Suspect's date of birth (if known)
- Suspect's address and telephone (if known) number
- Circumstances of the allegation
- Is the crime scene secure?
- Who has been notified and is on scene? (CSI, sergeant, medical personnel, etc.).

The lead investigator should also be briefed on the details of the preliminary interview conducted by first responder. This should contain information on the nature and extent of the investigation, the location of the crime scene and any secondary scenes, the known facts, evidentiary discoveries, background information like residence history, education, employment, and mental state of the victim, plus background information on suspect.

## The Victim Interview

In many investigations, the lead investigator's first contact with the victim occurs during the victim interview. Often, the first responder has been the point of contact between the lead investigator, victim, and crime until this point.



The lead investigator is responsible for conducting an in-depth follow-up interview with the victim. This interview can take place at the scene, after the victim has been transported to the hospital, or days after the crime. The interview should be conducted after the victim's physical and mental needs have been satisfied.

The goal of the interview is to determine how the crime occurred, and to ensure the victim's cooperation.

Victim cooperation is fundamental to a thorough investigative strategy, and ultimate prosecution of a suspect. Victims are uncooperative for a variety of reasons (embarrassment, shame, criminal enterprise, etc.); therefore, an investigator should not make assumptions about the victim's story due to her unwillingness to aid the investigation. Instead of making assumptions or accusations, a good investigator will try to determine the reason for the behavior and seek to address it in order to gain the victim's cooperation.

Before a follow-up interview is conducted between the lead investigator and victim, the investigator should consult with the first responder as well as other personnel who responded to the scene. The investigator should collect 9-1-1 tapes, printouts, and reports regarding the crime. The investigator should also contact the victim's advocate to discuss the means of keeping the victim informed throughout the investigation.

The investigator should develop and implement an investigational strategy based upon the assault and the possible defense. This is especially important in cases of consent and/or acquaintance rape.



The strategy is central to the development of the interview and evidence collection. Once a strategy is engaged, the investigator should follow the interview protocol. Protocol may be reflective of departmental guidelines, or if guidelines do not exist, follow the protocol below.

### **Follow-up Interview Protocol<sup>18</sup>**

- 1) Have a plan. Know what questions you want to ask, and be willing to alter the interview content.
- 2) The interview should be conducted after the victim has received medical treatment, and personal needs have been met. The interview should be delayed if the victim is experiencing extreme emotional distress or under the influence of drugs or alcohol.
- 3) Arrange for the interview to take place in a private room without distractions. Transportation should be provided to the victim. Arrange tape recording equipment so the investigator's attention remains on the victim.
- 4) Remain objective, professional and detached while maintaining tact and empathy. Remain non-judgmental, and patient.
- 5) Introduce yourself to the victim by name and title. Acknowledge the victim's ordeal. Use sentences like, "I'm sorry this happened to you." Ask non-invasive questions at first to develop a rapport. Questions like, "May I call you by your first name and how are you feeling?" help to communicate empathy.
- 6) Determine who will be present. Ask the victim if she would like a support person present. If yes, provide a rape advocate. Try to avoid using family, or friends as support persons.
- 7) Use open-ended questions. The first part of the interview should be a narrative by the victim. Let the victim tell the story at her own pace. Use open-ended prompts if the narrative stalls.
  - Prompts include, then what happened and, tell me more about that
  - Allow the victim control of the telling. Do not interrupt or ask questions unless prompts are needed or to clarify terms.

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<sup>18</sup> Turvey, B. E., & Savino, J. (2005); Hunter, S. M., Bentley Cewe, B. R., & Mills, J. L. (2000, June); International Association of Chiefs of Police. (2005, May); The National Center for Women and Policing (Ed.). (2001, May); Women's Justice Center. (n.d.).

- 8) Ensure clarity of terms. For example, the term rapist can have specific meaning for different individuals. Make sure you understand the victim's terminology.
- 9) Listen closely to the victim's statements without judgment or accusation.
- 10) Pay attention to the victim's body language and non-verbal responses.
- 11) Stop for breaks as needed. Keep the victim as comfortable as possible.
- 12) Once the victim finishes the narrative, ask if she would like to add anything else. If not, the investigator should ask direct questions relating to the assault.
- 13) Let the victim know that you will ask several questions in various ways. Tell the victim the types of questions you will be asking, and the reason for each question.
- 14) Avoid leading, and judgmental questions like, did he use physical force to restrain you, and did you resist? Ask questions one at a time to avoid confusion.
- 15) Use effective body language. Do not touch the victim.
- 16) Use reflective comments.
  - Example:
    - Victim: "I met him at a few parties."
    - Investigator: "You knew him casually?"
- 17) Avoid inappropriate sequencing
  - Do not sequence from report or form
- 18) Make sure to obtain the following information (not exclusive):
  - The victim's activity prior to attack
  - Past relationship/contact with suspect
  - How initial contact between victim and suspect occurred
  - When victim had consensual sex last and with whom (tell the victim the reason this information is necessary, and reserve judgment)
  - Who did victim tell about attack

- Was there any witnesses to attack, and if so, what information might they hold
- Victim/Suspect behaviors
  - How did the suspect enter and exit the scene
  - Did the suspect bring anything to the scene
  - Did the suspect touch or move anything at the scene
  - Did the suspect take photographs or video
  - Did the suspect show any photographs or video to victim
  - Did the suspect use any objects during the assault
  - Did the suspect move the victim
  - Did the suspect threaten victim, and if so, what specific language was used
  - Did the suspect commit additional crimes at the time of attack
- Specific acts committed
  - Penile-vaginal intercourse
  - Sodomy
  - Oral copulation
  - Digital penetration
  - Foreign object penetration
  - Contact other than penetration
- Suspects sexual behavior
  - Was a condom used
  - Type of condom and packaging
  - Was condom provided by suspect
  - Location of used condom
  - Was lubricant used
  - Did suspect ejaculate and if so, where
  - Did suspect wipe his genital, and if so where
- Establish force or threat
  - Was physical force used
  - Were weapons used

- Did suspect use restraints or his body to restrain victim
    - What was the suspects physical positioning in reference to victim
    - Were threats made
    - The size and strength of the suspect
    - What made the victim feel threatened
    - Was victim incapacitated
  - Description of suspect
  - MO/Signature behaviors
    - Did suspect have difficult maintain erection
    - Statements or words used by offender
    - Contact with victim before assault
  - Prior reports by victim
- 19) After the Q & A section of the interview, assist the victim in developing a safety plan.
  - 20) Review and revise contact information. Provide the victim with your information, as well as contact information for support organizations.
  - 21) Inform the victim of her rights (see Appendix N, Colorado Victim Bill of Rights)
  - 22) Inform the victim of the complex nature of the decision to arrest, and who will be making the decision
  - 23) Ask victim to keep in contact with you regarding further developments in the case
  - 24) Ask the victim if she has any questions, and if so, answer them as best as you can without making predictions.

As you conclude the interview, make sure the victim's safety and mental state are assured. Provide the victim with transportation. End the interview by thanking the victim, and making sure all her questions have been answered to the best of your ability.



## Rape Types & Strategies

Identifying the type of assault is paramount to developing a sound investigational strategy. The investigational strategy reflects any and all possible defensive strategies, in addition to a plan for identifying and prosecuting the offender. For example, a standard acquaintance rape defense is the act was a consensual one between the suspect and victim. Knowing the use of this possible defense, an investigator should tailor the investigative strategy to proving the act was not consensual.

The three main types of assault are stranger rape, acquaintance rape, and drug-facilitated rape. The following section will look at these assault types and provide investigational strategies for each.



## Stranger Rape

A stranger commits nearly thirty-one percent of rapes in the United States<sup>19</sup>. The defining criterion for a stranger rape is that the offender is a person not known to the victim.

Stranger rapes are commonly thought to be the most heinous and violent; however, that is a myth. What is true, is stranger rapes are the most difficult to solve, often requiring a certain degree of investigational luck. The arrest and conviction rate dramatically decreases when the rapist is unknown to the victim, and therefore, additional investigational strategies must be applied.

Stranger rapes typically involve pattern or serial offences, and it is unlikely the rapist is in custody or identifiable at the scene. Therefore, identifying the offender is the first investigative strategy employed in a stranger rape case.

The investigator should obtain a comprehensive physical description of the suspect, as well as the method of operation. A detailed examination of the MO and signature can provide behavioral clues to identity, or at least identify serial cases. The investigator should obtain as much physical evidence as possible from the victim, and compare evidence like DNA for matches throughout the United States using the FBI CODIS database.

The investigational strategy for a stranger rape is identification, and capture. The means and methods are physical evidence, eyewitness statements, and behavioral indicators. The more data collected, the greater the opportunity for identifying the suspect.



## Acquaintance Rape

Acquaintance rape accounts for nearly seventy percent of rapes in the United States<sup>20</sup>. Acquaintance rape includes assaults by friends, dates, relatives, and spouses. The definition of acquaintance rape is when a person known to the victim has sexual contact (in accordance with Colorado law) without her

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<sup>19</sup> Rainn (n.d.)

<sup>20</sup> Rainn (n.d.)



consent. Date rape is a term associated with acquaintance rape; however, a domestic partner perpetrates at least seventeen percent of acquaintance rapes<sup>21</sup>.

Acquaintance rape can often be an investigational and prosecution nightmare, boiling down to a he said/she said defense.

The typical defensive strategies employed during a rape trial are the act was consensual, the victim is mistaken regarding the offender's identity, or the victim is lying. Disproving consent is difficult for investigators as physical evidence of force is often lacking. In addition, the victim's actions are used against them in the 'she was asking for it' defense.

The investigational focus in a consent acquaintance rape should be identification and documentation of force. When there is limited evidence of force, the victim versus offender credibility should be weighed. Also, the plausibility of the victim and offender's statements must be evaluated.

Because a victim reports a rape does not make it a fact, and the investigator must keep that in mind throughout the investigation. False reporting is rare, but it does occur.

The consent investigation should document any evidence of force or threat of force. In addition, the victim's resistance efforts and the words used to try to dissuade the offender should be documented. The investigator should document any evidence of the victim's fear of the offender and/or environment. Most importantly, the investigator should document any physical injury to the victim, making sure to evaluate the victim's clothing for rips and tears<sup>22</sup>.

The SANE's examination will aid in the discovery of physical injury. Please note a standard defense to physical injury is consensual rough sex. This defense can be overcome by documenting reoccurring injury. In a consensual act, physical injury may occur; however, it is unlikely continued physical injury will<sup>23</sup>.

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<sup>21</sup> Rainn (n.d.)

<sup>22</sup> Archambault, J. & Faugno, D. K. (2001).

<sup>23</sup> Turvey, B. E. (2006, August 13).



A pre-text meeting or phone call in an acquaintance rape case is one investigational tool utilized by many investigators. A pre-text conversation is a recorded conversation between the victim and the suspect initiated by the investigator. The conversation can take place in person, over the telephone, or by email. The conversation seeks to corroborate the victim's account of the assault, in addition to implicating the suspect.

The debate of whether to use this tool is based upon the admissibility of the recorded conversation between the victim and the suspect. According to the State of Colorado Attorney General, Colorado is a 'one-party' state, which means as long as one of the persons involved in the conversation knows the discussion is being recorded the recording is admissible.

It is advisable to obtain an eavesdropping warrant, if possible, prior to recording a pre-text conversation. In order to do so, the investigator must show they have reasonable belief that the suspect committed the rape, and that other avenues will not provide the necessary evidence.

A pre-text telephone call is utilized more often than a face-to-face meeting to ensure the victim's safety, as well as protect the victim's mental well-being. Furthermore, the offender perceives a phone call as less suspicious.



When arranging for a pre-text telephone conversation, if the conversation takes place at a police facility make sure the telephone line cannot be traced, and that the caller ID is disabled. Make sure the victim is aware of the goals of the pre-text conversation (get the suspect to admit to the truth), and has a plan for the initiation of the discussion.

The victim should use the following discussion points:<sup>24</sup>

- Complain that the suspect took advantage of her
- Tell him he hurt her
- Ask why he did it

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<sup>24</sup> Carney, T. P. (2004).

- Tell him she thought she could trust him
- After the suspect apologizes and/or rationalizes the assault, the victim should use the term rape

Every pre-text call will be different and as such, flexibility is required; yet, the goal remains stable. Get the suspect to admit guilt, corroborate the victim's story, and provide admissible evidence at trial.

Acquaintance rape is difficult to prove, and the investigator must make every effort to foresee the defensive strategy and address it. In addition, the investigator must let the evidence lead the investigation, weighing theories against scientific fact.

### **Drug-Facilitated Rape**

While there is no hard data on the number of drug-facilitated rapes in the United States in any given year, it is apparent drug-induced rape is a growing issue in our society. New and powerful drugs, as well as the inability of police and prosecutors to investigate, arrest, and convict these offenders add to the problem. It is time for law enforcement to gain a better understanding and evaluation of drug-facilitated cases.

The main obstacle for the investigation of a drug-facilitated rape is the difficulty of identifying what type of substance was utilized in the crime. As with acquaintance rape, the investigator is often responsible for investigating a 'he said/she said' case without a clear recollection from the victim of what occurred. Therefore, the evidence of a crime in these cases is dependant upon identifying the substance used, in addition to forensically documenting that the crime occurred.

The defensive position in the typical drug-facilitated rape is either denial that any sex act occurred, or insistence the act was consensual and the victim was conscious. With this in mind, the investigative strategy should seek to prove the victim was drugged (toxicology), and the type of substance used. Additionally, the investigator must provide evidence that a rape occurred. The acquaintance rape strategy should be employed to gather the necessary evidence of rape.

The following table provides a listing of drug most often associated with drug-facilitated rapes:

<b>Drug</b>	<b>Street/Slang Name</b>	<b>Effect</b>	<b>In System</b>
Ethanol/Alcohol	Beer, wine, liquor	Alcohol reduces activity in the central nervous system. The intoxicated victim exhibits loose muscle tone, loss of fine motor coordination.	10-12 hours
Methylenedioxymethamphetamine (MDMA)	Ecstasy, XTC, X, Adam, Clarity, Lover's Speed	Confusion, depression, sleep problems, drug craving, severe anxiety, and paranoia, muscle tension, involuntary teeth clenching, nausea, blurred vision, rapid eye movement, faintness, and chills or sweating.	1-5 days
Gamma-hydroxybutyrate (GHB)	GHB, Grievous Bodily Harm, G, Liquid Ecstasy, Georgia Home Boy, Easy Lay, Scoop, Salty Water, Soap	Effects of large doses: decreased inhibition, sedation, the desire to sleep, rambling and incoherent speech, giddiness, difficulty thinking, slurred speech, respiratory depression.	1-2 days
Benzodiazepines	Valium, Rohypnol, roofies, xanax,	Decreased blood pressure, memory impairment, drowsiness, visual disturbances, dizziness, confusion, gastrointestinal disturbances.	2-3 days
Hallucinogens	Ketamine, K, Special K, Vitamin K, Wonk, HOSS, Kit-Kat	Dissociated state, changes in the perception of distances and durations	2-4 days

Alcohol is the most common substance used in drug-facilitated rapes, nearly forty percent of victims report the use of alcohol.<sup>25</sup>

When investigating a sexual assault report, watch the victim for the following symptoms, which indicate a drug-facilitated assault:<sup>26</sup>

<sup>25</sup> Turvey, B. E., & Savino, J. (2005).

<sup>26</sup> West Virginia Foundation for Rape Information and Services, Inc. (n.d.).

- Victim is not sure if she was assaulted (i.e., she woke up in a different place, or is unnecessarily sore or injured, etc.)
- Victim is confused and her recollection of the attack is patchy. She only remembers part of the attack, or none at all
- The victim remembers the attack, but was unable to speak or move, or the experience seemed detached
- Victim feels her intoxication level does not equate to the amount of alcohol she consumed

If a victim displays any of the aforementioned signs, it is imperative to have her screened for drug intoxication at the hospital. These drugs used a high doses can be fatal; therefore, prompt medical treatment is essential. In an investigation, a toxicology and urine screen can identify the type of substance used; however, many of the drugs are cleared from the system within 72 hours. In the event of a delayed report, the lack of physical evidence of drugging is problematic.

Additional investigative focus should be placed on answering what the victim's role in



consumption of the intoxicant. In a case where a victim is somewhat responsible for the situational aspect (i.e., drinks to excess, willingly takes drugs) a conviction is less likely. An investigator should know, prior to developing a case, what role the victim played in the victimization. However, the culpability of a victim does not excuse the act, nor should it hinder the investigation. The investigator needs to be

prepared for the defense to utilize that fact and seek to overcome it.

Another investigational focus for drug-facilitated rape is finding evidence that the offender had access to the drug used in the attack. The ideal situation is when the drug is found on the suspect's person or at his residence.

In addition, the investigation should ensure the victim's accounting of the drug's effects is consistent with the drug itself. For example, if a victim complains of overwhelming drowsiness; yet, toxicology identifies the intoxicant as ecstasy; the investigator must reevaluate the case.

In many ways, drug facilitated and acquaintance rapes are similar in motivation and victim selection, as well as investigative strategy. In drug-induced cases, inexperienced investigator, unsure of the symptoms and types of drugs employed, often overlooks the evidence. The standard SANE's exam does not test for all intoxicants unless specified by the investigating officer. Therefore, it is vital the investigator knows what to look for in these types of assaults.

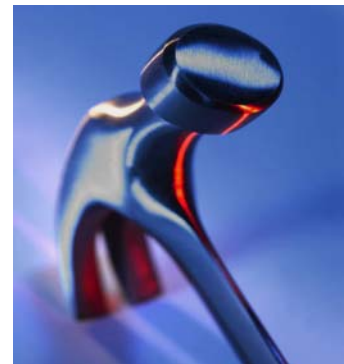


## Behavioral Evidence Analysis

After collecting statements and evidence from the crime scene, victim, witnesses, or suspect an investigation can become stilted. If this occurs, one investigational tool that may provide additional theories and hypotheses is Behavioral Evidence Analysis (BEA), or criminal profiling. BEA is the deductive analysis of behavioral and physical evidence as a means of determining distinctive personality characteristics of an offender.

Behavioral Evidence Analysis suggests identification of a rapist, as well as prediction of future behaviors can be determined by a careful appraisal of the offender's behaviors at the scene, motivations, and evidence left following the assault.

The BEA investigational tool is most often associated with stranger assaults, in that, Behavioral Evidence Analysis can aid in identification. However, it can also be useful in acquaintance and drug facilitated cases. In an acquaintance rape, the investigator may need to assess the risk level of the victim and act in accordance. Behavioral Evidence Analysis can assist in developing a risk assessment, as past behaviors are the greatest predictor of future ones. Furthermore, BEA can help to identify possible patterns of assault. Research suggests drug-facilitated rapists have numerous victims, and Behavioral Evidence Analysis can help the investigator recognize patterns of assault and predict possible future victimization.



In order to develop a behavioral profile of the offender, the victim should be asked certain behavioral questions by the investigator. The following is a listing of possible inquiries that should elicit the needed information:<sup>27</sup>

- 1) How did the offender approached and gained control?
- 2) How did the offender maintain control during the attack?
- 3) What type and when was physical force applied during the assault?

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<sup>27</sup> Hazelwood, R. R. & Wolbert Burgess, A. (Ed.). (2001); Turvey, B. E., & Savino, J. (2005); Turvey, B., (2002).

- 4) Did you resist? (Make sure the victim knows this is not a judgment about her) If so, describe how you resisted and when and how he reacted to the resistance.
- 5) Did he display any sexual dysfunctions, and if so, at what point during the attack? Was he later able to perform? Did he request the victim perform specific acts so he could overcome the dysfunction?
- 6) Describe the acts and sequence of the sexual acts he forced the victim to perform, or preformed on the victim.
- 7) When he spoke, describe his tone of voice, attitude and word choice in detail.
- 8) Did he demand the victim to speak in a certain manner? If so, in what way?
- 9) Did his manner change at any time during the assault, and if so, how and when did it change?
- 10) Did he take actions so the victim would not be able to identify him, and if so, what actions? Did he take actions against the possibility of police or forensic identification?
- 11) Did he take anything from the victim or scene?
- 12) Has the victim received any unidentified telephone calls or personal notes before or after the assault? Does the victim believe she was specifically targeted, and if so, why?
- 13) How would people surrounding the rapist describe him as a person?

The questions above should aid the investigator in gathering motivational, signature, and behavioral aspects of the rape in order to develop a profile of the offender. These questions are in no means exclusive, and should be used to direct the interview.

Behavioral aspect of rape can provide a wealth of investigational avenues for the trained investigator. It can also aid in linking cases, as an offender's signature is often static, where as, the motivational and behaviors can change.



The following sections reflect the use of Behavioral Evidence Analysis in stranger rape investigations; however, the information provided is applicable to acquaintance and drug-facilitated rape cases too.





## Rape Typologies

The first step in developing an offender profile is to determine what type of rapist you are investigating. While each case and offender is different, a large percentage can be categorized into four rapist typologies with a unique set of motivational aspects, methods of approach and attack, signature and sexual behavior.

The four types of rapist are power reassurance or compensatory, power assertive or entitlement, anger retaliatory and sadistic or anger excitation. Identifying and classifying the offender into one or more of these categories allows the investigator to identify possible patterns and characteristics of the rapist.

### Power Reassurance Rapist

The power reassurance rapist rapes to increase his flagging sense of self worth. The rape is low in aggressive force, and often uses verbal threats and a weapon to control the attack. The method of approach is surprise, and the victim is usually left physically unharmed. The power reassurance rapist will often verbalize his lack of self-worth with questions like, "Do you like that? Does your boyfriend do this with you? Am I hurting you?" The rapist will often attempt foreplay and try to persuade the victim to be involved with the assault. The offender usually lives or works close to the attack, in a comfortable geographical zone. The offender will watch the victim and attacks when she is alone. The attack is short and often occurs in the early morning or late evening. The power reassurance rapist will keep personal items of the victim, and most likely will keep a record of the attack. He will also try to contact the victim in some way.

### Power Assertive Rapist

The power assertive rapist suffers from low self worth too. However, the power assertive rapist uses moderate to high levels of aggression to boost it. He enjoys the feeling of control and humiliation inflicted on his victim. He approaches the victim by surprise or con, and controls the victim following capture with threats, physical force, and weapons. The power assertive rapist does not care about the victim's comfort. The victim may be repeatedly attacked and is viewed strictly as an object to be manipulated and controlled for his own pleasure. The power assertive rapist will rip and tear the victim's clothing, and utilize curative force to maintain control. The brutality of the attack increases as the victim resists. The

victim is pre-selected for attack or a victim of opportunity. The attack location is one of opportunity. The victim will often be harmed during the attack as a means of restraint.

### **Anger Retaliatory Rapist**

The anger retaliatory rapist is extremely angry with a specific person or group, and the victim becomes a representation of the target. The method of approach is a blitz or surprise style, and the attack is extremely violent utilizing weapons, brutal force, and sometimes explosives. The victim receives blame for the occurring attack, and is degraded and humiliated by the offender. The victim's clothing is often torn. The offender dresses for the rape, usually in military regalia. The violence of the rape is extreme with great harm to the victim. The attack is usually preplanned for a specific victim or a crime of opportunity with the victim becoming representational of another. Harm is inflicted on the victim prior to the rape, and the emotional rage felt by the offender is apparent in the crime.

### **Anger Excitation Rapist**

The sadistic rapist receives sexual pleasure from the suffering of the victim. He utilizes a con type approach to gain the trust of the victim, and attacks with surprise physical force and a weapon. The offender will ask the victim for help to lure the victim to an isolated area to commence the attack. The attack will be brutal, and the offender will inflict pain for his own sexual pleasure. The offender's signature behaviors will include the taking of trophies from the victim, in addition to keeping a record of the attack. The victim will receive injury to sexually significant areas of the body, and the brutality will increase as the offender sexual arousal increases. The sadist plans his attack, and executes it with cold-blooded precision.

The following table provides additional insights into the differing typologies:<sup>28</sup>

Typology	Motivation	Characteristics/Signatures	
Power Reassurance	Assure himself of his masculinity	Indoor type	Victim alone or with small children
		Victim is asleep when attack occurs	Victim is local
		Hides his face from victim	Loner
			Dominant mother

<sup>28</sup> Geberth, V. J. (1996); Turvey, B., (2002).

		<p>Underachiever</p> <p>Tries to please victim</p> <p>Kisses victim</p> <p>May contact victim</p> <p>Feels guilt for act</p>	<p>May keep a journal</p> <p>Not athletic</p> <p>Allows victim to negotiate</p> <p>Takes a souvenir</p> <p>Likely married</p> <p>Uses weapon for show</p>
Power Assertive	Wants to prove dominance	<p>Selfish</p> <p>Poor military service record</p> <p>Involved in sports</p> <p>Drives showy car</p> <p>Body conscious</p> <p>Rips or tears clothing from victim</p> <p>Oral assault</p> <p>Outdoor crime scene</p>	<p>Roughly same age group as victim</p> <p>Trolls for victim</p> <p>Lives near crime</p> <p>Victims are of opportunity</p> <p>Short time frame between attacks</p> <p>Prior institutionalization</p> <p>Uses direct approach</p>
Anger Retaliatory	Getting even with women, uses sex as a weapon	<p>Victims are symbolic</p> <p>Rips clothing</p> <p>Drinks Alcohol</p> <p>No pattern</p>	<p>Low risk victims (elderly/prostitutes)</p> <p>Attack is quick</p> <p>Blitz approach &amp; attack</p>
Anger Excitation	Sadistic	<p>Degrading language</p> <p>S&amp;M</p> <p>No guilt or remorse</p> <p>Average or above average IQ</p>	<p>Might have accomplice</p> <p>Not mentally ill</p> <p>Uses vehicle</p> <p>Brings weapon to scene</p>

It is important for investigators to note, this list is not exclusive, nor will every offender fall neatly into one typology. The typologies should be utilized as a guide to weigh against the victim statement, witness testimony and crime scene evidence.

The typologies can aid in developing a general idea of what type of offender you might be looking for, but should never limit the investigation to a specific person or population.



### **Victimology**

Victimology is the study and analysis of victim characteristics, behavioral and physical, often resulting in a victim profile. In an investigation, developing a victimology profile allows the investigator to determine if a specific victim pattern exists and to identify the context of the assault (i.e., if, when, and where the victim and offender came into contact prior to the assault) in

addition to assessing the offender and victim risk.

A victimology profile includes specific information about the victim's physical, and mental characteristics, plus a detailed account of the twenty-four to forty-eight hours prior to the crime. In addition, it should include the victim's employment status, criminal history, substance use history, educational history, residence history, personal environments (i.e., where does the victim grocery shop, etc.), and travel routes<sup>29</sup>.

The victimology profile should also cover the victim's risk level, meaning what activities or characteristics put the victim at a greater risk for attack. For example, a prostitute is at a greater risk for victimization than a housewife. Assessing this risk provides clues to the offender's victim preference, as well as the amount of risk the offender is willing to undergo for victimization.



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<sup>29</sup> Turvey, B., (2002).

The method of approach and attack are important to the investigation. The methods of approach are surprise, con, and blitz<sup>30</sup>. Each method provides behavioral indicators about the offender, and can aid in developing a complete picture of the rapist.



Also, knowing and recognizing a method of approach and attack can help law enforcement in strategic planning for the capture and/or to warn the public regarding the offender. For example, if an offender only attacks Caucasian, female joggers late at night in a specific area of town by a blitz style, the investigator can employ decoy officers to the area in hopes of catching the offender in the act, or the investigator can utilize the media to warn women in the area not to jog alone after dark.

Furthermore, a victimology profile allows the investigator to address where and when the offender may have had contact with the victim. Did he decide on a particular victim or was it a crime of opportunity? If he did pick the victim, where and when was the decision made? Identifying the victim's travel path can provide a wealth of investigational opportunities.



Overall, a victimology profile can provide the investigator with numerous investigational possibilities. It can work to limit a potential suspect pool, in addition to broadening the investigation. As a tool, it can jump start an investigation and help to define its scope.



### **Geographic Profiling**

Geographic profiling is the statistic analysis and mapping of crimes resulting in predictive residence and/or attack patterns of an offender. Geographical profiling of rapists seems to achieve the greatest results. Research suggests, over eighty percent of rapists live and/or work within a circular ten-mile radius of the crime scene<sup>31</sup>.

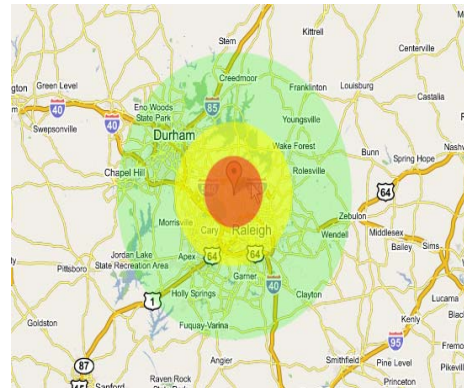
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<sup>30</sup> Turvey, B., (2002).

<sup>31</sup> Canter, D. & Larkin P. (1993).

There are numerous geographic profiling packages available to law enforcement personnel like Rigel, Crimestat, and Dragnet. However, if your department does not have these capability or resources to purchase these software packages—as many rural or smaller departments do not—the circle theory of geographic profiling, in its simplest form, uses the following criteria to determine possible residence/employment/offense pattern:

- Measure the distance between the farthest two offenses (point A & B) in a serial rape
- Mark a circular pattern from point A to point B
- The red area is the circle between point A & B, which indicates it is likely the suspect resides, works or will attack within that radius.
- The yellow and green are additional areas of concentration



The above formula should not be used in place of professional geographical profiling. It is merely a quick and easy means of developing a possible investigational area. It is not a scientific calculation for criminal mapping, and must be treated as one theory of geographic profiling. Remember, only eighty percent of offender attack within the ten-mile radius; therefore, investigational focus must consider the likelihood of the offender residing outside the circle.

Appendix O provides a crime mapping guidebook from the U.S. Department of Justice. It provides an overview of the various uses of crime mapping, as well as theories and practices.

The outcome of the Behavioral Evidence Analysis is often the development of an offender profile. The profile can and should include any and all of the previously mentioned subsections (rape typology, victimology, geographic profiling), but more importantly, must contain opinions formed from hard physical evidence.



A profile should avoid making assumptions based upon statistical, and/or presumptive data. For example, a profile should not include offender traits

like age, or physical features like hair or eye color unless the victim and/or witness statements corroborate the fact<sup>32</sup>.

In addition, it is important for the investigator to recognize and understand offender profiling is not a science, but an art based on interpretation of physical and behavioral evidence. As such, care must be taken to accept a profile for what it is—an investigational tool. It is formed to aid the investigative direction, but should not limit the offender pool.

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<sup>32</sup> Turvey, B. E. (2006, August 13).

## False Reporting

The rate of false rape reporting in the United States is widely debated by the forensic community. Some statistics claim only 2% of rape reports are false, while others suggest 10% to 15% are unfounded<sup>33</sup>. Be aware of the difference between a false report and an unfounded allegation (not enough evidence to confirm). This section looks strictly at false reporting.



False reports do happen, but at what rate is unknown. As such, the investigator must determine when false allegation is reported and act accordingly. To do this, the investigator must be aware of the psychological factors and motivations surrounding false reporting, plus indicators of false reports.

Often, investigators are trained to accept the victim at her word. While this provides support for the victim, it does not fulfill the investigators mission, which is to evaluate and investigate when and if a crime has occurred, identify the suspect, and evaluate the evidence to condemn or exonerate the suspect.

An investigator should never make an assumption about the guilt or innocence of a suspect and seek to prove their hypothesis, but rather, let the evidence lead the investigation. Victims, witnesses, and suspects lie, but the evidence does not.

### Why do victims make false reports?

The following list is not exhaustive, but a brief listing of motivations and factors most often associated with false reporting.

- Personal gain
- Revenge
- Mental illness
- Mental defect
- Politics
- Providing an alibi

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<sup>33</sup> Turvey, B. E., & Savino, J. (2005).



- Attention/sympathy seeking

To determine if a report is false, the investigator needs to consider the evidence, and appraise the victim's story in conjunction with witness and suspect statements.



The investigator should be aware of the following red flags associated with a false report:<sup>34</sup>

- ✓ The victim account is too bizarre or sensational
- ✓ The victim's injuries are simulated
- ✓ The report is delayed, and initiated by others
- ✓ Claims overwhelming force, and/or multiple assailants
- ✓ The statement is overly detailed
- ✓ The statement is vague
- ✓ The victim has an excuse for inability to provide details (i.e., eyes closed during attack)
- ✓ Indifference to injuries
- ✓ No forensic evidence of assault found
- ✓ No crime scene evidence
- ✓ Victim is vague about where assault occurred
- ✓ Damage to clothing and/or person is inconsistent with account
- ✓ The victim has escalating personal problems
- ✓ The victim has been exposed to similar accounts
- ✓ The victim's behavior is inconsistent with allegations
- ✓ The victim is uncooperative
- ✓ Victim steers the topic away from specific
- ✓ History of false allegations
- ✓ History of extensive medical care
- ✓ Victim demands to speak with female officer
- ✓ The victim's significant other forces the report
- ✓ Victim's parents force the report
- ✓ Underage victim returned home after curfew

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<sup>34</sup> Turvey, B. E., & Savino, J. (2005).

- ✓ Victim claims abduction from public place, or intersection during the day without witness corroboration
- ✓ Provides paradoxical offender behavior
- ✓ Victim is in-patient at drug rehab, and broke curfew
- ✓ Victim is pregnant and forced to report by parent
- ✓ Victim is focused on personal gain (i.e., lawsuit, relocating, monetary gain)
- ✓ Victim displays TV behavior

It is important to note, a victim displaying one or more of these flags might be telling the truth. Therefore, the investigator must investigate every report, and work to corroborate the victim's account if possible.

If the reporter is earnest in her report, but the report is false, the investigator should refer the reporter for mental health evaluation and counseling. On occasion, the reporter is unaware the allegation is false, and should not be penalized for reporting due to mental defect or illness. However, in cases where the reporter maliciously reports an offense, the investigator should contact the district attorney concerning the possibility of filing charges.

## The Suspect Interview

Following identification, the suspect is interviewed. The suspect interview is crucial to the investigation. It can provide the investigator with corroboration of the victim account, and an idea of future defensive strategies, as well as, a confession to the crime.



The interview and interrogation techniques employed by law enforcement personnel during non-rape investigations like the Reid technique succeed for the rape investigator. Follow all departmental policies and procedures for suspect interrogations and interviewing techniques.

The following are guidelines for the suspect interview:<sup>35</sup>

- 1) Form a plan. Know what information you want to gather, and what questions will provide said response.
- 2) One investigator should lead the interview with a second acting as backup. The second investigator should be silent unless the need for additional support becomes necessary. The second investigator should take detailed notes during the interview.
- 3) Limit distractions. Use a small room with bare walls, no furnishings other than two chairs. The room should not have a telephone.
- 4) The investigator's chair should be slightly higher than the suspect's should and capable of sliding. The suspect's chair should be bolted to the floor or difficult to move.
- 5) There should not be any barrier like a desk between the suspect and interviewer.
- 6) Do not take written notes (main investigator), record with audio, and/or video. Video is the preferred method. The recording device should be kept out of the direct view of the suspect.
- 7) Arrange seating so the investigator is directly across from the suspect.
- 8) Provide necessary food, water, and bathroom breaks.
- 9) Read the suspect his Miranda warning prior to the interview.
- 10) Tell the suspect if he is under arrest prior to the interview.

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<sup>35</sup> Turvey, B. E., & Savino, J. (2005).

- 11) Be respectful no matter what the suspect says or infers.
- 12) Compliment the suspect as appropriate. Build a sense of rapport.
- 13) Find a common ground with the suspect (i.e., sports teams, hometown, etc.), and develop a rapport from it.
- 14) Avoid yelling, or browbeating a suspect.
- 15) Cut the suspect's denials short.
- 16) Do not make promises beyond your control.
- 17) Take the suspect's side when necessary, and blame the victim is required.
- 18) Minimize the crime.
- 19) Try to maintain the suspect's trust, which includes avoiding poorly formed bluffs.
- 20) Do not show disgust, dismay, or animosity toward the suspect or any statement made by him.
- 21) Get the suspect to admit to being at or near the scene.
- 22) Detail the suspect's denial.
- 23) Recognize your own limitations and accept them.
- 24) Act ethically.

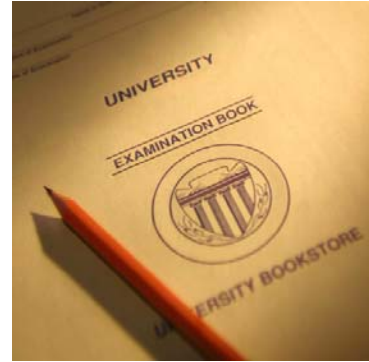
Proper suspect interrogation is based on developing a rapport with the suspect. Keeping your personal values and beliefs from the interview room is crucial, and should be the foremost consideration when formulating an interrogation plan.

Following the interview, reflect on the suspect's statements and compare the statements to the victim account, and the physical evidence. Identify all possible defensive strategies, and prepare your case in accordance.

## Workbook Problems II

### Test Your Knowledge

- 1) Which is not a rape typology?
  - a. Power Assertive
  - b. Anger Excitation
  - c. Anger Assertive
  - d. Power Reassurance
- 2) True or False: Statistics show only a 5% false reporting for rape.
- 3) True or False: The circle theory of Geographic profiling states 80% of offenders' live/work/travel within a ten-mile circular radius of the crime scene.
- 4) True or False: GHB is the drug most widely associated with drug-facilitated rape.
- 5) True or False: As an investigator, it is your job to trust the victim.
- 6) True or False: During a pre-text call, the victim should not use the word rape.
- 7) True or False: The Power Reassurance rapist seeks to harm physically punish the victim.
- 8) True or False: The victim of an Anger Excitation rapist will likely be physically harmed during the attack.
- 9) True or False: When interviewing a suspect, place blame on the victim if necessary.
- 10) True or False: Read the suspect's Miranda warning following the interview when remanding custody.
- 11) True or False: Stranger rapes are the easiest to solve.
- 12) True or False: The investigator should seek evidence to support his theory of the crime.
- 13) True or False: Evidence can lie.
- 14) True or False: The most common defense in an acquaintance rape is the sex was consensual.
- 15) True or False: During a victim interview, you should interrupt the victim when a question occurs to you.



### For Discussion

Read the following scenarios. As the lead investigator, what would you do in these situations? Answer the three questions below:

- 1) What should your first step in the investigation be?

- 2) What questions would you ask the victim and/or suspect?
- 3) Is this a valid report, and if so, what defensive strategy is likely?

Scenario 1:

You are called in on an acquaintance rape report. A thirty-year-old woman reports being sexually assaulted by her employer following an office party. The woman is not physically harmed, and the suspect is at the scene denying the allegation. A rape exam is inconclusive.

Scenario 2:

A thirteen-year-old girl comes into the station with her parents to report she was a victim of a rape the previous night. The hysterical victim states the offender is not someone she knows, and provides a vague physical description of the offender. The victim claims she was abducted while walking along a dark, tree lined path by a masked offender. There are no witnesses to the assault, and a SANE's exam suggests sexual activity, but no conclusive indicators of rape. The victim's parents state the victim did not return home until after midnight.



## **COURT**

The wheels of justice can spin exceedingly slow for the victim of a sexual assault. Worse, the victim's lifestyle and choices are judged by inconsiderate lawyers and uninformed judges. What's more, conviction rate for sexual offenders are low while the rate of recidivism is quite high. Yet knowing these facts, the law enforcement community perseveres and seeks to find justice for victims of sexual assaults.

Every rape investigational strategy must consider what will happen once the case appears in court, and as such, must gather the evidence necessary to combat the suspect utilizes. Often, the investigator must act as a soothsayer, and predict the future while maintaining the professional detachment necessary to investigate the crime. Moreover, the investigator must also act as a go-between between the victim and court system, providing insight and information.

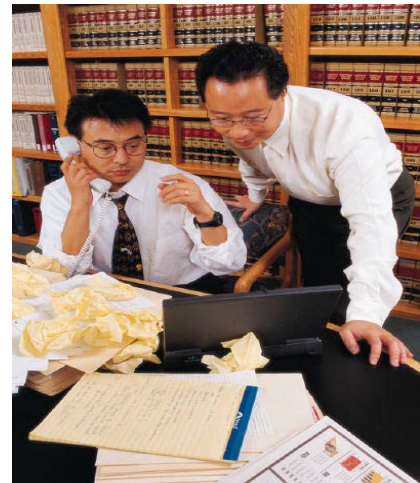
Preparing for the case, and knowing it backward and forward will help to address the issues often associated with the courtroom.

## The Defense

In the Rape Types & Investigation Strategies section of this handbook, a brief overview of possible defensive strategies and countermeasures was established, accounting for defensive structures like consensual intercourse.

Additional defenses utilized are no sexual penetration, mistaken identity, denial, 'she wanted it' defense. Each of these can be overcome with hard evidence, as well as indications of resistance and force. When investigating a rape, possible defensive strategies must be identified and the necessary evidence gathered to overcome them.

Rape is a difficult crime to prove beyond a reasonable doubt without the evidence. It is the investigator's job to find, evaluate, and present the evidence in such a manner that every reasonable persons doubt is overwhelmed, and the offender punished.







## Testimony

In preparation for court, the investigator should review any and all case notes and reports. In addition, the investigator should consider the following:<sup>36</sup>

- ✓ Know the victim
  - It is important for the investigator to know everything they can about the victim, and to uncover any inconsistencies or issues. Once on the stand, any inconsistency will harm the case, and the victim's credibility. Review the case with the victim until you are sure that every inconsistency has been uncovered.
  - Provide the victim with an understanding of what to expect during the court proceedings. Ensure the victim is aware of how she might be treated and is prepared to answer questions about her history unrelated to the event.
- ✓ Organize & know the case
  - Follow departmental guidelines in regard to case organization. If your department does not have guidelines in place, ask a superior officer to assist you in developing a protocol, and organize the case in accordance. Make sure you have documented everything, and that the record is clear and concise.
- ✓ Make it solid
  - Securely pull the case together before handing it to the prosecutor. Make sure it is as complete as possible, and that all investigational avenues have been pursued.



When testifying in court the investigator should speak as directly and clearly as possible, and maintain eye contact with the prosecutor and the jury. In many instances, the information being relayed to the jury will be scientific or jargon-filled. The investigator should remain patient, and provide explanations in clear, non-scientific terms. What the jury does not understand can hurt the case.

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<sup>36</sup> Turvey, B. E., & Savino, J. (2005).

## CONCLUSION

Rape investigation is a long and often difficult process. It takes a special type of investigator who can handle the oftentimes unrewarding, and emotionally draining work.

Reading this handbook should have provided an increased knowledge about rape investigation, either as a first responder or as the lead investigator. In addition, it is my hope; this handbook has provided you with a better understanding of the vital role a first responder and lead investigator plays throughout the investigation. Your job is not easy, and as such, it is important to have any and every resource available.



In the subsequent sections, appendixes with additional resource materials are provided, as well as an annotated bibliography of reference works. In addition, a suggested reading list has been compiled.

## **Appendix A:**

Colorado Revised Statutes for Unlawful Sexual Behaviors

**PART 4**  
**UNLAWFUL SEXUAL BEHAVIOR**

**Cross references:** For introduction of evidence of similar acts or transactions by a defendant prosecuted pursuant to this part 4, see § 16-10-301.

**18-3-401. Definitions.**

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

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

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

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

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

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

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

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

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

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<sup>1</sup> Statutes retrieved from LEXIS Database

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

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

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

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

## ANNOTATION

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

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

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

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

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

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

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

**The court interpreted "any sexual contact"** as an unlimited, nonrestrictive phrase that generally encompasses a multitude of types of sexual contacts. People v. Woellhaf, 105 P.3d 209 (Colo. 2005).

**The distinction of numerous "intimate parts"** merely demarcates different intimate parts of the human anatomy and has no effect on the scope of conduct the general assembly sought to criminalize. People v. Woellhaf, 105 P.3d 209 (Colo. 2005).

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

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

**Jury instruction on "consent" properly provided to jury.** The instruction substantially tracked the language of this section. The slight variance from the statute was only to clarify properly that the definition was applicable to first degree sexual assault. The definition was important to explain to the jury the specialized meaning of "consent" in the context of sexual assault. People v. Pahlavan, 83 P.3d 1138 (Colo. App. 2003).

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

**The phrase "two or more incidents of sexual contact" in the definition of "pattern of sexual abuse" means** that the sexual contacts must occur during distinct episodes of sexual assault and be separated by time or an intervening event. People v. Woellhaf, 87 P.3d 142 (Colo. App. 2003), rev'd on other grounds, 105 P.3d 209 (Colo. 2005).

**A defendant can be charged with one pattern count for each underlying substantive count.** People v. Bobrik, 87 P.3d 865 (Colo. App. 2003).

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

wander away; and that the Alzheimer's disease affected her both mentally and physically. *People v. Klausner*, 74 P.3d 421 (Colo. App. 2003).

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

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

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

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

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

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

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

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

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### 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.

**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.

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

**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.

## ANNOTATION

### Analysis

#### I. GENERAL CONSIDERATION.

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

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

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

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

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

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

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

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

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

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

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

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

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

**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).

**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. Crespino, 631 P.2d 1144 (Colo. App. 1981); People v. Hamling, 634 P.2d 1023 (Colo. App. 1981); People v. Sharpless, 635 P.2d 896 (Colo. App. 1981); People v. Flowers, 644 P.2d 916 (Colo. 1982); People v. Constant, 645 P.2d 843 (Colo. 1982); People v. Phillips, 652 P.2d 575 (Colo. 1982); People v. White, 656 P.2d 690 (Colo. 1983); People v. Clark, 662 P.2d 1100 (Colo. App. 1982); People v. Bridges, 662 P.2d 161 (Colo. 1983); People v. District Court, 663 P.2d 616 (Colo. 1983); People v. Brandt, 664 P.2d 712 (Colo. 1983); People v. Vigil, 718 P.2d 496 (Colo. 1986).

## II. ELEMENTS OF OFFENSE.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### III. TRIAL AND PROSECUTION.

#### A. In General.

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

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

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

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

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

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

#### B. Indictment or Information.

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

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

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

#### C. Evidence.

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

**Evidence necessary to prove act.** Though it is true that the law does not require the female's statement of actual penetration, nevertheless, some evidence other than an inference

is essential to prove the act. Generally, it is held that uncorroborated evidence by the prosecution must be clear and convincing or that it should be scrutinized carefully. *Martinez v. People*, 160 Colo. 534, 422 P.2d 44 (1966).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Evidence sufficient to support a general verdict based upon the alternative methods of committing sexual assault in the first degree, including the third**



alternative of causing the victim's submission with threats of future retaliation. *James v. People*, 727 P.2d 850 (Colo. 1986).

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

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

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

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

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

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).

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

D. Jury.

**Evidence determines if lesser offense is submitted to jury.** It does not follow from the conclusion that the aggravated assault need not be specifically pleaded that a court is invariably required to submit the lesser included crime to the jury. There remains the

question whether the evidence justifies this action. Oftentimes the evidence precludes submission even when the offense is charged in a separate count, and in some cases the evidence is such that the jury must determine the case on the greater offense and that alone. *People v. Futamata*, 140 Colo. 233, 343 P.2d 1058 (1959).

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

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

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

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

#### E. Instructions.

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

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

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

**Aiding or abetting must be established beyond a reasonable doubt.** Jury instructions which did not inform the jury that being "physically aided or abetted" had to be established beyond a reasonable doubt, coupled with conflicting evidence presented at trial

on the issue of aiding or abetting, requires reversal of defendant's conviction for first degree sexual assault as a class two felony. *Beigel v. People*, 683 P.2d 1188 (Colo. 1984).

**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*, \_\_\_ P.3d \_\_\_ (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).

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

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

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

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

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

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

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

#### IV. VERDICT AND SENTENCE.

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

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

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

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

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

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

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

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

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#### **18-3-403. Sexual assault in the second degree. (Repealed)**

**Source:** **L. 75:** Entire part R&RE, p. 628, § 1, effective July 1. **L. 77:** IP(1) amended, p. 962, § 16, effective July 1. **L. 83:** (1)(b) and (2) amended, p. 698, § 2, effective July 1. **L. 88:** (1)(e) amended, p. 725, § 1, effective July 1. **L. 90:** (1)(f) repealed, p. 1033, § 25, effective July 1. **L. 99:** (1)(e.5) added and (2) amended, p. 347, §§ 1, 2, effective July 1. **L. 2000:** Entire section repealed, p. 700, § 19, effective July 1.

**18-3-404. Unlawful sexual contact.**

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

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

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

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

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

(e) Repealed.

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

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

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

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

(2) (a) Unlawful sexual contact 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).

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

(3) If a defendant is convicted of the class 4 felony of unlawful sexual contact pursuant to paragraph (b) of subsection (2) of this section, the court shall sentence the defendant in accordance with the provisions of section 18-1.3-406; except that this subsection (3) shall

not apply if the actor engages in the conduct described in paragraph (g) of subsection (1) of this section.

**Source:** **L. 75:** Entire part R&RE, p. 629, § 1, effective July 1. **L. 77:** IP(1) amended, p. 962, § 17, effective July 1. **L. 86:** (3) added, p. 777, § 6, effective July 1. **L. 89:** (1.5) added and (2) and (3) amended, p. 830, § 41, effective July 1. **L. 90:** (1)(e) repealed, p. 1033, § 25, effective July 1. **L. 91:** (3) amended, p. 1912, § 21, effective June 1. **L. 92:** (1.5) amended and (1.7) added, p. 404, § 15, effective June 3. **L. 94:** (1.5) and (1.7) amended, p. 1717, § 9, effective July 1. **L. 95:** (3) amended, p. 1252, § 10, effective July 1. **L. 96:** (1.7) amended, p. 1581, § 4, effective July 1. **L. 2000:** IP(1), (1.5), (1.7), (2), and (3) amended, p. 700, § 20, effective July 1. **L. 2002:** (3) amended, p. 1513, § 190, effective October 1. **L. 2004:** (2) and (3) amended, p. 635, § 6, effective August 4.

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

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

## ANNOTATION

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

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

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

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

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

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

**The court's failure to give a straightforward negative response to the jurors' question concerning the definition of "sexual penetration" was harmless error.** Because third degree sexual assault may be committed without proof of sexual penetration, defendant's conviction of that crime could not have been affected by the lack of response to the jurors' inquiry. *People v. Fell*, 832 P.2d 1015 (Colo. App. 1991).

**Jury instruction defining a variety of third degree sexual assault different from the charged offense** was an improper constructive amendment of the information after the close of the evidence and is reversible error per se. *People v. Madden*, 87 P.3d 153 (Colo. App. 2003).

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

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

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

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

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

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

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

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

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

(d) The actor commits the offense as a part of a pattern of sexual abuse as described in subsection (1) of this section. No specific date or time must be alleged for the pattern of sexual abuse; except that the acts constituting the pattern of sexual abuse must have been committed within ten years prior to or at any time after the offense charged in the information or indictment. The offense charged in the information or indictment shall

constitute one of the incidents of sexual contact involving a child necessary to form a pattern of sexual abuse as defined in section 18-3-401 (2.5).

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

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

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

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

## ANNOTATION

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

**C.J.S.** See 75 C.J.S., Rape, § 6.

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

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

**Enhanced crime of violence sentence on conviction for pattern of sexual assault on a child does not violate defendant's due process and equal protection guarantees.** Prosecution not required to charge and prove a separate crime of violence count pursuant to § 16-11-309 (4) and (5) for per se crimes of violence even though the elements of the pattern sentence enhancer do not overlap with the elements of a crime of violence. *People v. Brown*, 70 P.3d 489 (Colo. App. 2002).

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

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



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

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

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

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

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

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

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

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

**If the acts preceding the date of the enactment of the statute are included in the charges,** the jury must be instructed not to consider them in determining defendant's guilt or innocence with respect to sexual abuse as a part of a pattern of sexual abuse. If the jury is

permitted to consider them, the statute, as applied to the defendant, is retrospective and violates the ex post facto prohibition. *People v. Luman*, 994 P.2d 432 (Colo. App. 1999).

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

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

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

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

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

**Convictions on four separate counts of sexual assault on a child**, based upon different types of sexual contact, but not clearly separate incidents, violates constitutional prohibition against double jeopardy. Defendant, therefore, received more than one sentence for each single contact, and the charges were multiplicative. *People v. Woellhaf*, 105 P.3d 209 (Colo. 2005).

**But, if evidence supports a conclusion that the offenses were separated in time or location, and comprised separate volitional departures**, defendant may be charged and convicted on separate offenses for identically worded counts of sexual assault on a child without violating constitutional prohibitions on double jeopardy. *Quintano v. People*, 105 P.3d 585 (Colo. 2005).

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

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

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

**A pattern count citing both the statute on sexual assault on a child and the pattern sentence enhancer is sufficient to charge both charges.** *People v. Bobrik*, 87 P.3d 865 (Colo. App. 2003).

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

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

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

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

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

**Jury verdict form for sexual assault on a child should not have included the word "pattern"** because pattern is a sentence enhancement and not a separate offense. However, use of such instruction was not plain error because there was no reasonable possibility that it contributed to defendant's convictions. *People v. Brown*, 70 P.3d 489 (Colo. App. 2002).

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

**Enhanced penalty under subsection (2)(d) improper** when, based on jury instruction and argument of prosecutor, jury could have found a pattern of abuse from multiple sexual contacts during a single sexual assault episode. *People v. Woellhaf*, 87 P.3d 142 (Colo. App. 2003), rev'd on other grounds, 105 P.3d 209 (Colo. 2005).

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

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

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

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

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

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

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

**Where evidence of many acts, prosecution compelled to select specific transaction for conviction.** Where there is evidence of many acts, any one of which would constitute the offense charged, the prosecution may be compelled to select the transaction on which it relies for a conviction, and although it is not required to identify the exact date of the offense, it must individualize and select a specific act. *People v. Estorga*, 200 Colo. 78, 612 P.2d 520 (1980); *People v. Quintano*, 105 P.3d 585 (Colo. 2005).

**The appropriate "unit of prosecution" for the crime of sexual assault on a child is "any sexual contact"** not each separate offense of touching within a single incident that encompasses a multitude of types of sexual contacts. *People v. Woellhaf*, 105 P.3d 209 (Colo. 2005).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## ANNOTATION

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

**Convictions on four separate counts of sexual assault on a child**, based upon different types of sexual contact, but not clearly separate incidents, violates constitutional prohibition against double jeopardy. Defendant, therefore, received more than one sentence for each single contact, and the charges were multiplicative. *People v. Woellhaf*, 105 P.3d 209 (Colo. 2005).

**The appropriate "unit of prosecution" for the crime of sexual assault on a child** is "any sexual contact" not each separate offense of touching within a single incident that encompasses a multitude of types of sexual contacts. *People v. Woellhaf*, 105 P.3d 209 (Colo. 2005).

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

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

**Violent crime sentencing for patterned enhanced counts of sexual assault on a child by one in a position of trust only apply to offenses committed on or after July 1, 1998.** *People v. Bobrik*, 87 P.3d 865 (Colo. App. 2003).

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

**Jury could conclude that defendant was "in a position of trust"** relative to the victim within the meaning of the applicable statute, where defendant lived in the same

residence with the victim and her family and contributed to the household income, the victim spent hours alone with the defendant in his room, the victim was the only child the defendant allowed in his room, and neither the victim's mother nor any other individual intervened during the time that the victim was alone in the defendant's room. *People v. Luman*, 994 P.2d 432 (Colo. App. 1999) (decided under law in effect prior to 1990 amendment to § 18-3-401 (3.5)).

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

**Enhanced penalty under subsection (2)(b) improper** when, based on jury instruction and argument of prosecutor, jury could have found a pattern of abuse from multiple sexual contacts during a single sexual assault episode. *People v. Woellhaf*, 87 P.3d 142 (Colo. App. 2003), rev'd on other grounds, 105 P.3d 209 (Colo. 2005).

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**18-3-405.5. Sexual assault on a client by a psychotherapist.**

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

(I) The actor is a psychotherapist and the victim is a client of the psychotherapist; or

(II) The actor is a psychotherapist and the victim is a client and the sexual penetration or intrusion occurred by means of therapeutic deception.

(b) Aggravated sexual assault on a client is a class 4 felony.

(2) (a) Any actor who knowingly subjects a victim to any sexual contact commits sexual assault on a client if:

(I) The actor is a psychotherapist and the victim is a client of the psychotherapist; or

(II) The actor is a psychotherapist and the victim is a client and the sexual contact occurred by means of therapeutic deception.

(b) Sexual assault on a client is a class 1 misdemeanor.

(3) Consent by the client to the sexual penetration, intrusion, or contact shall not constitute a defense to such offense.

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

(a) "Client" means a person who seeks or receives psychotherapy from a psychotherapist.



(b) "Psychotherapist" means any person who performs or purports to perform psychotherapy, whether or not such person is licensed by the state pursuant to title 12, C.R.S., or certified by the state pursuant to part 5 of article 1 of title 25, C.R.S.

(c) "Psychotherapy" means the treatment, diagnosis, or counseling in a professional relationship to assist individuals or groups to alleviate mental disorders, understand unconscious or conscious motivation, resolve emotional, relationship, or attitudinal conflicts, or modify behaviors which interfere with effective emotional, social, or intellectual functioning.

(d) "Therapeutic deception" means a representation by a psychotherapist that sexual contact, penetration, or intrusion by the psychotherapist is consistent with or part of the client's treatment.

**Source:** **L. 88:** Entire section added, p. 726, § 1, effective July 1. **L. 89:** (3) amended, p. 831, § 42, effective July 1.

**Cross references:** For the licensing of mental health professionals, see article 43 of title 12.

## ANNOTATION

**Section is not unconstitutionally overbroad.** Neither the treating psychotherapist nor the psychotherapy client has a fundamental constitutional right to engage in sexual intercourse with each other during the existence of the psychotherapist-client relationship. *Ferguson v. People*, 824 P.2d 803 (Colo. 1992).

**Although consent is eliminated as a defense, prosecution must still prove mental culpability of the crime.** Crime is not a strict liability offense. *Ferguson v. People*, 824 P.2d 803 (Colo. 1992).

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### 18-3-406. Criminality of conduct. (Repealed)

**Source:** **L. 75:** Entire part R&RE, p. 630, § 1, effective July 1. **L. 2001:** Entire section repealed, p. 859, § 5, effective July 1.

**Editor's note:** Current provisions relating to criminality of conduct are contained in § 18-1-503.5.

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### 18-3-407. Victim's and witness's prior history - evidentiary hearing - victim's identity - protective order.

(1) Evidence of specific instances of the victim's or a witness's prior or subsequent sexual conduct, opinion evidence of the victim's or a witness's sexual conduct, and reputation evidence of the victim's or a witness's sexual conduct may be admissible only at trial and shall not be admitted in any other proceeding except at a proceeding pursuant to paragraph (c) of subsection (2) of this section. At trial, such evidence shall be presumed to be irrelevant except:

(a) Evidence of the victim's or witness' prior or subsequent sexual conduct with the actor;

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, disease, or any similar evidence of sexual intercourse offered for the purpose of showing that the act or acts charged were or were not committed by the defendant.

(2) In any criminal prosecution under sections 18-3-402 to 18-3-405.5, 18-6-301, 18-6-302, 18-6-403, and 18-6-404, or for attempt or conspiracy to commit any crime under sections 18-3-402 to 18-3-405.5, 18-6-301, 18-6-302, 18-6-403, and 18-6-404, if evidence, that is not excepted under subsection (1) of this section, of specific instances of the victim's or a witness's prior or subsequent sexual conduct, or opinion evidence of the victim's or a witness's sexual conduct, or reputation evidence of the victim's or a witness's sexual conduct, or evidence that the victim or a witness has a history of false reporting of sexual assaults is to be offered at trial, the following procedure shall be followed:

(a) A written motion shall be made at least thirty days prior to trial, unless later for good cause shown, to the court and to the opposing parties stating that the moving party has an offer of proof of the relevancy and materiality of evidence of specific instances of the victim's or witness' prior or subsequent sexual conduct, or opinion evidence of the victim's or witness' sexual conduct, or reputation evidence of the victim's or witness' sexual conduct, or evidence that the victim or witness has a history of false reporting of sexual assaults that is proposed to be presented.

(b) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated.

(c) If the court finds that the offer of proof is sufficient, the court shall notify the other party of such. If the prosecution stipulates to the facts contained in the offer of proof, the court shall rule on the motion based upon the offer of proof without an evidentiary hearing. Otherwise, the court shall set a hearing to be held in camera prior to trial. In such hearing, to the extent the facts are in dispute, the court may allow the questioning of the victim or witness regarding the offer of proof made by the moving party or otherwise allow a presentation of the offer of proof, including but not limited to the presentation of witnesses.

(d) An in camera hearing may be held during trial if evidence first becomes available at the time of the trial or for good cause shown.

(e) At the conclusion of the hearing, or by written order if no hearing is held, if the court finds that the evidence proposed to be offered regarding the sexual conduct of the victim or witness is relevant to a material issue to the case, the court shall order that evidence may be introduced and prescribe the nature of the evidence or questions to be permitted. The moving party may then offer evidence pursuant to the order of the court.

(f) All motions and supporting documents filed pursuant to this section shall be filed under seal and may be unsealed only if the court rules the evidence is admissible and the case proceeds to trial. If the court determines that only part of the evidence contained in the motion is admissible, only that portion of the motion and supporting documents pertaining to the admissible portion may be unsealed.

(g) The court shall seal all court transcripts, tape recordings, and records of proceedings, other than minute orders, of a hearing held pursuant to this section. The court may unseal the transcripts, tape recordings, and records only if the court rules the evidence is admissible and the case proceeds to trial. If the court determines that only part of the evidence is admissible, only the portion of the hearing pertaining to the admissible evidence may be unsealed.

(3) (a) In a criminal prosecution including an offense described in subsection (2) of this section, the court may, at any time upon motion of the prosecution or on the court's own motion, issue a protective order pursuant to the Colorado rules of criminal procedure concerning disclosure of information relating to the victim or a witness. The court may punish a violation of a protective order by contempt of court.

(b) The victim who would be the subject of the protective order may object to the motion for a protective order.

**Source:** **L. 75:** Entire part R&RE, p. 630, § 1, effective July 1. **L. 91:** IP(2) amended, p. 405, § 10, effective June 6. **L. 98:** Entire section amended and IP(2) amended, pp. 399, 400, §§ 7, 8, effective April 21. **L. 2004:** (3) added, p. 375, § 1, effective April 8. **L. 2005:** IP(1), (2)(c), and (2)(e) amended and (2)(f) and (2)(g) added, p. 426, § 5, effective April 29.

**Editor's note:** Amendments to the introductory portion to subsection (2) by sections 7 and 8 of House Bill 98-1177 were harmonized.

## ANNOTATION

**Am. Jur.2d.** See 65 Am. Jur.2d, Rape, §§ 66, 67.

**C.J.S.** See 75 C.J.S., Rape, §§ 66, 86-89.

**Law reviews.** For article, "Hearsay in Criminal Cases Under The Colorado Rules of Evidence: An Overview", see 50 U. Colo. L. Rev. 277 (1979).

**Basic purpose of section** is one of public policy: to provide rape and sexual assault victims greater protection from humiliating and embarrassing public "fishing expeditions" into their past sexual conduct, without a preliminary showing that evidence thus elicited will be relevant to some issue in the pending case. *People v. McKenna*, 196 Colo. 367, 585 P.2d 275 (1978); *People v. Braley*, 879 P.2d 410 (Colo. App. 1993); *People v. Murphy*, 919 P.2d 191 (Colo. 1996); *People in Interest of K.N.*, 977 P.2d 868 (Colo. 1999); *People v. Kyle*, \_\_\_ P.3d \_\_\_ (Colo. App. 2004).

**This section reflects the general assembly's intent to prevent victims of sexual assaults from being subjected to psychological or emotional abuse as the price of their cooperation in prosecuting sex offenders.** *People v. Kyle*, \_\_\_ P.3d \_\_\_ (Colo. App. 2004).

**Section held not to apply** where victim was not a rape victim, the defendant was not accused of sexual assault, the defense asserted was not consent, nor was the evidence offered to impeach the victim's credibility. *People v. Miller*, 981 P.2d 654 (Colo. App. 1998); *People v. Carlson*, 72 P.3d 411 (Colo. App. 2003).

**Homosexual orientation is within the purview of this section.** People v. Koon, 713 P.2d 410 (Colo. App. 1985); People v. Murphy, 919 P.2d 191 (Colo. 1996).

**Prosecution may "open the door" to inadmissible evidence** of a rape victim's sexual orientation and past sexual conduct, allowing the defendant to inquire into the previously barred matter. People v. Murphy, 919 P.2d 191 (Colo. 1996).

**But the concept of "opening the door" is subject to the considerations** of relevance and prejudice required under C.R.E. 401 and C.R.E. 403. People v. Melillo, 25 P.3d 769 (Colo. 2001).

**But "opening the door" to evidence on an issue does not mean that any evidence on that issue is automatically admissible.** Where prosecution opened the door to evidence of victim's homosexuality, defendant was still required to present such evidence via reputation or opinion evidence, not via a specific instance of conduct. People v. Miller, 981 P.2d 654 (Colo. App. 1998).

**Victim's statements that he was "not into whatever it is", that he believed the defendant was a "sick bastard", and that he was "not that kind" did not necessarily suggest that the victim was heterosexual,** opening the door to evidence of the victim's sexual orientation or past sexual contact. People v. Murphy, 919 P.2d 191 (Colo. 1996).

**No denial of right to confront accuser.** This section strikes a balance by conditioning admission of evidence of the victim's sexual history on the defendant's preliminary showing that it is relevant, and involves no denial of the defendant's right to confront his accuser for there is no constitutional right to introduce irrelevant and highly inflammatory evidence. People v. McKenna, 196 Colo. 367, 585 P.2d 275 (1978).

This section does not deny a defendant's right to confront his accuser. Certain exceptions are made therein to preserve such rights of the defendant. People v. Johnson, 671 P.2d 1017 (Colo. App. 1983).

This section does not violate defendant's confrontation rights. Defendant's inability to confront the victim at trial resulted not from the provisions of this section, but from his failure to follow the procedure set forth in this section or to show good cause why he should have been excused from following that procedure. People v. Gholston, 26 P.3d 1 (Colo. App. 2000).

**Section neither wholly substantive nor procedural.** This section cannot be characterized as either purely substantive and thus entirely within the general assembly's power, or purely procedural and thus subject solely to this court's rulemaking power, but rather it is "mixed" in nature. People v. McKenna, 196 Colo. 367, 585 P.2d 275 (1978); People in Interest of K.N., 977 P.2d 868 (Colo. 1999).

**Section does not unconstitutionally intrude into matters exclusively judicial** nor does it violate § 21 of art. III or art. VI, Colo. Const. People v. McKenna, 196 Colo. 367, 585 P.2d 275 (1978).

**Evidence of prior sex act of prosecutrix.** It is essential that an accused lay a proper foundation for the introduction of the evidence of the prosecutrix's prior sex act. *People v. Martinez*, 634 P.2d 26 (Colo. 1981).

Evidence of a specific instance of sexual activity, offered to show the source or origin of semen, is not precluded by the statutory presumption of irrelevance or the procedural safeguards which are given to other evidence of a prosecutrix's past sexual activity. *People v. Martinez*, 634 P.2d 26 (Colo. 1981).

Evidence of a prior sexual act with another man, which could explain the presence of semen in the prosecutrix's vaginal tract, is relevant in that it tends to render more probable the inference that defendant did not have sexual intercourse with the prosecutrix. *People v. Martinez*, 634 P.2d 26 (Colo. 1981).

**Victim's testimony about lack of prior sex.** This section does not specifically prohibit the victim from testifying as to the lack of prior sexual activity. *People v. Johnson*, 671 P.2d 1017 (Colo. App. 1983).

**Deletion of reference to prior sexual conduct** in sexual assault victim's personal diary that was admitted into evidence after she relied on it to pinpoint the date of offense was proper under rape shield law. *People v. Wilson*, 678 P.2d 1024 (Colo. App. 1984).

**Under subsection (1), evidence of prior or subsequent sexual conduct is presumptively irrelevant** unless such contact is with the defendant or unless there are specific instances of sexual activity showing the source or origin of semen, pregnancy, disease, or similar evidence that would show that the act charged was not committed by the defendant. *People v. Braley*, 879 P.2d 410 (Colo. App. 1993).

**The term "similar evidence" in subsection (1)(b) refers to evidence having characteristics in common with, or very much like, evidence showing the source or origin of semen, pregnancy, or disease,** all of which are examples of physical evidence or condition. *People v. Kyle*, \_\_ P.3d \_\_ (Colo. App. 2004).

**If the evidence does not fall within one of the statutory exceptions contained in subsection (1), the presumption of irrelevance may nevertheless be rebutted when the defendant offers proof that the evidence is relevant to a material issue in the case.** If the trial court determines the offer of proof to be sufficient, it must conduct an in-camera hearing regarding the evidence. *People v. Kyle*, \_\_ P.3d \_\_ (Colo. App. 2004).

**Evidence within the ambit of subsection (2) is not automatically admissible, as it remains subject to the usual rules of evidence.** Specifically, a trial court must apply C.R.E. 403 to balance the probative value of the proffered evidence against any possible unfair prejudice. *People v. Kyle*, \_\_ P.3d \_\_ (Colo. App. 2004).

**Exception for "similar evidence of sexual intercourse" does not include evidence of a victim's prior sexual conduct because that would defeat the purpose of the rape shield statute.** *People v. Kyle*, \_\_ P.3d \_\_ (Colo. App. 2004).

**Subsection (2) only requires defense counsel to file a motion and an affidavit** in which the offer of proof is stated, and it does not indicate any limitations upon, nor does it identify, who may be an affiant. *People in Interest of K.N.*, 977 P.2d 868 (Colo. 1999).

**Evidence does not become inadmissible under this section or under C.R.E. 404** simply because it might indirectly cause the finder of fact to make an inference concerning the victim's prior sexual conduct. *People v. Cobb*, 962 P.2d 944 (Colo. 1998).

**Prior sexual conduct evidence not presumptively irrelevant is also not automatically admissible;** trial court must apply C.R.E. 403 to balance the probative value of the proffered evidence against any possible unfair prejudice. *People v. Harris*, 43 P.3d 221 (Colo. 2002).

**Evidence of victim's prior sexual encounter was not logically relevant** to the question of whether the defendant committed sexual assault or whether victim consented to intercourse and trial court properly excluded it under the rape shield statute's presumption of irrelevance. *People v. Harris*, 43 P.3d 221 (Colo. 2002).

**Trial court did not commit error in denying defendant's motion to admit witness testimony in sexual assault prosecution without a hearing** where defendant sought to admit testimony that one of the victims had stated that she was having a sexual relationship with defendant and that she had sex for money. Such evidence was presumptively irrelevant and court properly concluded that offer of proof was insufficient to require evidentiary hearing. *People v. Braley*, 879 P.2d 410 (Colo. App. 1993).

**Proffered testimony that victim owned condoms and had a male visitor was only marginally probative as to whether the victim was sexually active prior to the incidents involving the defendant.** *Richmond v. Embry*, 122 F.3d 866 (10th Cir. 1997).

In addition, the proffered testimony was not the type that if believed would have, by necessity, exculpated the defendant. *Richmond v. Embry*, 122 F.3d 866 (10th Cir. 1997).

Moreover, in the context of the entire record, the appellate court was not persuaded that the proffered testimony, even if admitted, would have created a reasonable doubt that did not exist without the evidence. *Richmond v. Embry*, 122 F.3d 866 (10th Cir. 1997).

**Trial court properly excluded evidence under the rape shield statute.** The rape shield statute is designed to keep out evidence offered to show the victim was predisposed to homosexual, pedophilic experiences. *People v. Dembry*, 91 P.3d 431 (Colo. App. 2003).

**Credibility of a victim** in a sexual assault case may be attacked by showing that she has a history of making false accusations. *People v. Wilson*, 678 P.2d 1024 (Colo. App. 1983), cert. denied, 469 U.S. 843, 105 S. Ct. 148, 83 L. Ed.2d 87 (1984).

**Evidence that a third person claimed that the victim had been previously raped while the victim denied the alleged prior rape properly excluded** because it was not evidence of false reporting of a rape incident. *People v. Schmidt*, 885 P.2d 312 (Colo. App. 1994).

**Evidence of victim's reputation for sexual conduct was not relevant**, in order to show defendant's state of mind at time he committed alleged sexual assault, where there was no indication that defendant knew anything about victim's reputation at time of assault; accordingly, evidence was properly excluded. *People v. Moreno*, 739 P.2d 866 (Colo. App. 1987).

**Where the material issue at trial is whether the complainant consented** to the sexual contact, the understanding or state of mind of the accused regarding the complainant's sexual history is neither material nor relevant to the issue of whether the complainant consented, and a trial court may only allow the admission of such evidence that is relevant to a material issue to the case. *People in Interest of K.N.*, 977 P.2d 868 (Colo. 1999).

**Defendant cannot justify his behavior or mitigate his culpability through his knowledge of the victim's sexual history**; accordingly, evidence of the victim's sexual history contained in defendant's offer of proof was held irrelevant and immaterial because it only served to foster an impermissible inference, namely, that the victim's prior sexual activity demonstrated that she did not refuse the defendant's sexual advances. *People in Interest of K.N.*, 977 P.2d 868 (Colo. 1999).

**Propounding questions with no reasonable basis in fact for the interrogation.** Under C.R.E. 403 and this section, the defendant held not to have established entitlement to elicit the name of the male whom the child sexual assault victim allegedly had intercourse with days before the date of the sexual assault. *People v. Vialpando*, 804 P.2d 219 (Colo. App. 1990).

**Evidence of victim's sexual history inadmissible to attack her credibility as a witness** after victim stated to a treating nurse that the defendant had taken her virginity, because victim's statement related to a collateral issue, and extrinsic evidence is generally inadmissible to contradict a witness's testimony on a collateral matter. *People in Interest of K.N.*, 977 P.2d 868 (Colo. 1999).

**The term "prior sexual conduct" includes prior sexual assaults.** *People v. Aldrich*, 849 P.2d 821 (Colo. App. 1992); *People v. Kyle*, \_\_ P.3d \_\_ (Colo. App. 2004).

**The term "prior or subsequent sexual conduct" includes sexual assaults perpetrated by the victim.** Because perpetrators may also be the victims of sexual assault, the court concluded that, under the plain language of this section, such perpetrators are within the statute's protection. Because the defendant failed to comply with the procedural requirements of this section for the introduction of testimony regarding the victim's sexual conduct, such testimony was appropriately barred. *People v. Gholston*, 26 P.3d 1 (Colo. App. 2000).

**Applied** in *People v. Blalock*, 197 Colo. 320, 592 P.2d 406 (1979); *People in Interest of M.M.*, 43 Colo. App. 65, 599 P.2d 968 (1979); *People v. Gallegos*, 644 P.2d 920 (Colo. 1982); *People v. Rice*, 709 P.2d 67 (Colo. App. 1985); *People v. Meis*, 837 P.2d 258 (Colo. App. 1992); *People v. Wallen*, 996 P.2d 182 (Colo. App. 1999).

**18-3-407.5. Victim evidence - forensic evidence - electronic lie detector exam without victim's consent prohibited.**

(1) Any direct cost associated with the collection of forensic evidence from the victim shall be paid by the referring or requesting law enforcement agency.

(2) No law enforcement agency may require a victim of a sexual offense to submit to a polygraph examination or any form of a mechanical or electrical lie detector examination as the sole condition for proceeding with any criminal investigation or prosecution. A law enforcement agency shall conduct any such examination only with the victim's written informed consent. Consent shall not be considered informed unless the law enforcement agency informs the victim in writing of the victim's right to refuse to submit to the examination. In addition, the law enforcement agency shall orally provide to the victim information about the potential uses of the results of such tests.

**Source: L. 95:** Entire section added, p. 948, § 3, effective July 1.

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**18-3-408. Jury instruction prohibited.**

In any criminal prosecution under sections 18-3-402 to 18-3-405, or for attempt or conspiracy to commit any crime under sections 18-3-402 to 18-3-405, the jury shall not be instructed to examine with caution the testimony of the victim solely because of the nature of the charge, nor shall the jury be instructed that such a charge is easy to make but difficult to defend against, nor shall any similar instruction be given. However, the jury shall be instructed not to allow gender bias or any kind of prejudice based upon gender to influence the decision of the jury.

**Source: L. 75:** Entire part R&RE, p. 631, § 1, effective July 1. **L. 90:** Entire section amended, p. 925, § 8, effective March 27.

**ANNOTATION**

**Am. Jur.2d.** See 65 Am. Jur.2d, Rape, §§ 89, 90.

**C.J.S.** See 75 C.J.S., Rape, § 105.

**Section not unconstitutional.** This section does not operate to deprive a defendant of due process of law by prohibiting the exercise of trial court discretion with respect to giving this instruction, nor does it violate the constitutional requirement of separation of powers by interfering with the rule-making power of the Colorado supreme court. *People v. Fierro*, 199 Colo. 215, 606 P.2d 1291 (1980).

This section does not violate the constitutional requirement of separation of powers (art. III, Colo. Const.) by interfering with the rule-making power of the court established in § 21 of art. VI, Colo. Const. *People v. Estorga*, 200 Colo. 78, 612 P.2d 520 (1980).

**Failure to instruct the jury on gender bias** was not a "structural defect" or plain error requiring reversal of third degree sexual assault conviction where gender bias was not raised



during the trial and the jury was instructed sympathy or prejudice should not influence its decision. *People v. Johnson*, 870 P.2d 571 (Colo. App. 1993).

**Where the case involved a homosexual act and the defendant's theory of the case was consent, omission of a gender bias instruction did not rise to the level of plain error.** Defendant erroneously equated gender bias with bias against homosexuals, and the record provided no reason to believe the jury would confuse the two concepts. In addition, the trial court instructed the jury not to allow prejudice to influence its decision. Further, omission of the instruction was not a structural error and did not require reversal because it was harmless beyond a reasonable doubt. *People v. Hoskay*, 87 P.3d 194 (Colo. App. 2003).

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#### **18-3-408.5. Jury instruction on consent - when required.**

In any criminal prosecution under section 18-3-402 (1) (a) or 18-3-404 (1) (a), (1) (c), (1) (d), or (1.7) or under section 18-3-402 (1) (b), (1) (c), or (1) (e) or 18-3-403 (1) (a) or (1) (b), for offenses committed before July 1, 2000, or for attempt or conspiracy to commit any crime listed in this section, upon request of any party to the proceedings, the jury shall be instructed on the definition of consent as set forth in section 18-3-401 (1.5). Notwithstanding the provisions of section 18-1-505 (4), an instruction on the definition of consent given pursuant to this section shall not constitute an affirmative defense, but shall only act as a defense to the elements of the offense.

**Source: L. 92:** Entire section added, p. 322, § 4, effective July 1. **L. 2002:** Entire section amended, p. 757, § 1, effective July 1.

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#### **18-3-409. Marital defense.**

Any marital relationship, whether established statutorily, putatively, or by common law, between an actor and a victim shall not be a defense to any offense under this part 4 unless such defense is specifically set forth in the applicable statutory section by having the elements of the offense specifically exclude a spouse.

**Source: L. 75:** Entire part R&RE, p. 631, § 1, effective July 1. **L. 88:** Entire section R&RE, p. 725, § 2, effective July 1.

### **ANNOTATION**

**Am. Jur.2d.** See 65 Am. Jur.2d, Rape, §§ 22, 29.

**Law reviews.** For article, "Mens Rea and the Colorado Criminal Code", see 52 U. Colo. L. Rev. 167 (1981).

**Annotator's note.** The cases annotated below were all decided prior to the 1988 amendment to this section.

**Marital exception of this section is neither arbitrary nor irrational** as it may remove an obstacle to the resumption of normal marital relations and also avoids the difficult

emotional issues and problems of proof inherent in this sensitive area. *People v. Brown*, 632 P.2d 1025 (Colo. 1981).

**Section 18-3-402 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).

**Former law.** For cases construing requirement of former rape statute that the victim could not be the wife of the actor, see *Waelchi v. People*, 77 Colo. 147, 234 P. 1113 (1925); *Schreiner v. People*, 95 Colo. 392, 36 P.2d 764 (1934); *Efsiever v. People*, 105 Colo. 88, 96 P.2d 8 (1939); *McGee v. People*, 160 Colo. 46, 413 P.2d 901 (1966).

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#### **18-3-410. Medical exception.**

The provisions of this part 4 shall not apply to any act performed for bona fide medical purposes if such act is performed in a manner which is not inconsistent with reasonable medical practices.

**Source: L. 75:** Entire part R&RE, p. 631, § 1, effective July 1.

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

(1) As used in this section, "unlawful sexual offense" means enticement of a child, as described in section 18-3-305, sexual assault, as described in section 18-3-402, when the victim at the time of the commission of the act is a child less than fifteen years of age, sexual assault in the first degree, as described in section 18-3-402, as it existed prior to July 1, 2000, when the victim at the time of the commission of the act is a child less than fifteen years of age; sexual assault in the second degree, as described in section 18-3-403 (1) (a), (1) (b), (1) (c), (1) (d), (1) (g), or (1) (h), as it existed prior to July 1, 2000, when the victim at the time of the commission of the act is a child less than fifteen years of age, or as described in section 18-3-403 (1) (e), as it existed prior to July 1, 2000, when the victim is less than fifteen years of age and the actor is at least four years older than the victim; unlawful sexual contact, as described in section 18-3-404 (1) (a), (1) (b), (1) (c), (1) (d), (1) (f), or (1) (g), when the victim at the time of the commission of the act is a child less than fifteen years of age; sexual assault in the third degree, as described in section 18-3-404 (1) (a), (1) (b), (1) (c), (1) (d), (1) (f), or (1) (g), as it existed prior to July 1, 2000, when the victim at the time of the commission of the act is a child less than fifteen years of age; sexual assault on a child, as described in section 18-3-405; sexual assault on a child by one in a position of trust, as described in section 18-3-405.3; aggravated incest, as described in section 18-6-302; trafficking in children, as described in section 18-6-402; sexual exploitation of a child, as described in section 18-6-403; procurement of a child for sexual exploitation, as described in section 18-6-404; indecent exposure, as described in section 18-7-302, soliciting for child prostitution, as described in section 18-7-402; pandering of a child, as described in section 18-7-403; procurement of a child, as described in section 18-7-403.5; keeping a place of child prostitution, as described in section 18-7-404; pimping of a child, as described in section 18-7-405; inducement of child prostitution, as described in section 18-7-405.5; patronizing a

prostituted child, as described in section 18-7-406; or criminal attempt, conspiracy, or solicitation to commit any of the acts specified in this subsection (1).

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

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

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

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

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

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

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

## ANNOTATION

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

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

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

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

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

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

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

(2) Every person convicted in this state of an unlawful sexual offense who has been previously convicted upon charges prior to the commission of the present act, which were

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

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

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

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

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

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

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

## ANNOTATION

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

**The fact that this section allows a judge, not a jury, to find facts that increase a defendant's sentence beyond that authorized by the jury's verdict is not**

**unconstitutional** pursuant to *Ring v. Arizona*, 536 U.S. 584, 122 S. Ct. 24228, 153 L. Ed. 2d 556 (2002); *People v. Kyle*, \_\_ P.3d \_\_ (Colo. App. 2004).

**There was no abuse of discretion by the court in the use of a prior conviction for sentencing purposes.** *People v. Quintano*, 81 P.3d 1093 (Colo. App. 2003), *aff'd* on other grounds, 105 P.3d 585 (Colo. 2005).

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

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

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

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

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

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

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

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

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

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

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

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

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

(c) A person who is convicted of a felony sex offense in another state or jurisdiction, including but not limited to a military or federal jurisdiction, and who commits failure to register as a sex offender in this state commits felony failure to register as a sex offender as specified in paragraph (a) of this subsection (2) and shall be sentenced as provided in paragraph (b) of this subsection (2).

(3) (a) Failure to register as a sex offender is a class 1 misdemeanor if the person was convicted of misdemeanor unlawful sexual behavior, or of another offense, the underlying factual basis of which involves misdemeanor unlawful sexual behavior, or if the person received a disposition or was adjudicated for an offense that would constitute misdemeanor unlawful sexual behavior if committed by an adult, or for another offense, the underlying factual basis of which involves misdemeanor unlawful sexual behavior. A class 1 misdemeanor conviction pursuant to this subsection (3) is an extraordinary risk crime that is subject to the modified sentencing range specified in section 18-1.3-501 (3).

(b) A person who is convicted of a misdemeanor sex offense in another state or jurisdiction, including but not limited to a military or federal jurisdiction, and who commits failure to register as a sex offender in this state commits misdemeanor failure to register as a sex offender as specified in paragraph (a) of this subsection (3).

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

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

(5) For purposes of this section, unless the context otherwise requires, "unlawful sexual behavior" has the same meaning as set forth in section 16-22-102 (9), C.R.S.

**Source:** **L. 91:** Entire section added, p. 393, § 1, effective April 17. **L. 94:** Entire section R&RE, p. 1736, § 1, effective July 1. **L. 95:** (6) amended and (6.5) and (9) added, p. 1309, § 1, effective June 5; (3) and (4) amended, p. 468, § 16, effective July 1. **L. 96:** (1), (2), (4), and (6) amended and (6.7) added, p. 1581, § 5, effective July 1; (8) amended, p. 1691, § 25, effective January 1, 1997. **L. 97:** IP(6.7) amended, p. 173, § 1, effective March 31; (1)(f) amended, p. 1547, § 19, effective July 1; (2) and (6.7)(c) amended and (6.7)(e) added, pp. 1553, 1554, §§ 6, 7, effective July 1; (3.5) added and IP(7) and (8) amended, p. 1563, § 9, effective July 1. **L. 98:** Entire section amended, p. 389, § 1, effective April 21. **L. 99:** (1)(a)(II), IP(1)(b), (1)(b)(XXI) to (1)(b)(XXIII), (1)(c), (2)(a), (2)(c), (3)(d), (6)(b), (6.5)(b), (6.5)(c), (7)(a)(II), and (7)(a)(III) amended and (1)(d), (4)(a)(III.5), and (6)(b.5) added, pp. 1144, 1146, 1150, 1156, 1155, 1151, §§ 2, 6, 13, 20, 19, 14, 21, effective July 1; IP(4)(a) amended, p. 799, § 19, effective July 1. **L. 2000:** IP(1)(b), (1)(d), (2)(a)(I), (3)(a), (3)(d), (3.5)(a), (6)(c), (6.5)(d), and IP(7)(a) amended and (1)(b)(XXIV), (3.7), (4)(a)(VII), (5)(c), (6)(e), (6.5)(e), and (7)(c) added, pp. 915, 919, 920, 918, §§ 1, 5, 6, 8, 2, 3, 4, effective July 1; (1)(b)(I), (1)(b)(II), (1)(b)(III), (7)(a)(II), and (7)(a)(III) amended, p. 705, § 30, effective July 1; (2)(a)(I) and (6)(b) amended and (3)(e), (3.5)(e), (3.5)(f), and (4)(a)(VI) added, pp. 718, 719, §§ 2, 5, 3, 1, 4, effective May 23; (8.5) added, p. 432, § 2, effective July 1; (6.5)(b) amended, p. 250, § 3, effective August 2. **L. 2001:** (4)(b) and (4)(c) amended, p. 567, § 2, effective May 29; (3)(a)(I.5) and (3.9) added and (7)(c) amended, pp. 656, 658, §§ 1, 8, 2, effective May 30; (2)(a)(I), (2)(a)(II), (3)(e), (3.5)(e), (3.5)(f), (6)(b), (6.5)(c), (6.5)(d), IP(7)(a), (7)(a)(I), (7)(a)(II), and (7)(a)(III) amended and (3.6) and (7)(a)(VI) added, pp. 962, 960, 961, §§ 3, 1, 2, effective June 5. **L. 2002:** Entire section R&RE, p. 1178, § 2, effective July 1; (2)(b) amended, p. 1567, § 393, effective October 1. **L. 2004:** (2)(c) and (5) added and (3) amended, p. 1119, §§ 17, 18, effective May 27; (3) amended, p. 635, § 7, effective August 4.

**Editor's note:** (1) Amendments to subsection (2)(a)(I) by House Bill 00-1232 and House Bill 00-1317 were harmonized. Amendments to subsection (3) by House Bill 04-1388 and Senate Bill 04-154 were harmonized.

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

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

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

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



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

(3) Upon timely receipt of the application, the court shall make a preliminary finding regarding whether, at the time of trial, the victim is likely to be medically unavailable or otherwise unavailable within the meaning of rule 804 (a) of the Colorado rules of evidence. Such finding shall be based on, but not be limited to, recommendations from the child's therapist or any other person having direct contact with the child, whose recommendations are based on specific behavioral indicators exhibited by the child. If the court so finds, it shall order that the deposition be taken, pursuant to rule 15 (d) of the Colorado rules of criminal procedure, and preserved on video tape. The prosecution shall transmit the video tape to the clerk of the court in which the action is pending.

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

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

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

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

## ANNOTATION

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

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

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

**Medical unavailability includes** a situation in which testifying in front of the defendant would cause the child substantial and long term emotional or psychological harm.

Thomas v. People, 803 P.2d 144 (Colo. 1990); People v. Newbrough, 803 P.2d 155 (Colo. 1990).

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

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

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

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**18-3-413.5. Use of closed circuit television - child victims of sexual offenses. (Repealed)**

**Source: L. 96:** Entire section added, p. 677, § 1, effective May 2. **L. 2003:** IP(1)(a) amended, p. 974, § 7, effective April 17. **L. 2004:** (2)(a)(V) amended, p. 1380, § 7, effective July 1. **L. 2005:** Entire section repealed, p. 427, § 8, effective April 29.

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

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

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

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

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

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**18-3-414.5. Sexually violent predator.**

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

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

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

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

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

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

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

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

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

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

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

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

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

(3) When considering release on parole for an offender who was convicted of one of the offenses specified in subparagraph (II) of paragraph (a) of subsection (1) of this section, the parole board shall make specific findings concerning whether the offender is a sexually violent predator, based on the results of a sexually violent predator assessment conducted by the department of corrections. If the parole board finds that the offender is a sexually

violent predator, the offender shall be required to register pursuant to the provisions of section 16-22-108, C.R.S.

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

## ANNOTATION

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

**Trial court's adjudication of defendant as a sexually violent predator under this section did not violate defendant's right to trial under Apprendi v. New Jersey.** Lifetime duty to register as a sex offender and posting of defendant's personal information on internet were not additional punishments giving rise to right to trial by jury. *People v. Stead*, 66 P.3d 117 (Colo. App. 2002).

**Court improperly found defendant to be a sexually violent predator** under this section when there was no evidence in the record to establish that the victim was a stranger or that the defendant established or promoted a relationship for the purpose of sexual victimization. *People v. Woellhaf*, 87 P.3d 142 (Colo. App. 2003), rev'd on other grounds, 105 P.3d 209 (Colo. 2005).

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### **18-3-415. Acquired immune deficiency syndrome testing for persons charged with any sexual offense.**

Any adult or juvenile who is bound over for trial for any sexual offense involving sexual penetration as defined in section 18-3-401 (6), subsequent to a preliminary hearing or after having waived the right to a preliminary hearing, or any person who is indicted for or is convicted of any such offense, shall be ordered by the court to submit to a diagnostic test for the human immunodeficiency virus (HIV) that causes acquired immune deficiency syndrome, said diagnostic test to be ordered in conjunction with the diagnostic test ordered pursuant to section 18-3-415.5. The results of such diagnostic test shall be reported to the court or the court's designee, who shall then disclose the results to any victim of the sexual offense who requests such disclosure. Review and disclosure of diagnostic test results by the courts shall be closed and confidential, and any transaction records relating thereto shall also be closed and confidential. If the person who is bound over for trial or who is indicted for or convicted of any such offense voluntarily submits to a diagnostic test for the human immunodeficiency virus (HIV), the fact of such person's voluntary submission shall be admissible in mitigation of sentence if the person is convicted of the charged offense.

**Source:** **L. 88:** Entire section added, p. 728, § 1, effective July 1. **L. 93:** Entire section amended, p. 1731, § 16, effective July 1. **L. 99:** Entire section amended, p. 1003, § 10, effective May 29. **L. 2000:** Entire section amended, p. 451, § 1, effective April 24.

**Cross references:** (1) For the provision allowing the test to be done without the knowledge and consent of the person, see § 25-4-1405 (8)(a)(V).

(2) For the legislative declaration contained in the 1999 act amending this section, see section 1 of chapter 254, Session Laws of Colorado 1999.

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**18-3-415.5. Acquired immune deficiency syndrome testing for persons charged with certain sexual offenses - mandatory sentencing.**

(1) For purposes of this section, "sexual offense" is limited to a sexual offense that consists of sexual penetration, as defined in section 18-3-401 (6), involving sexual intercourse or anal intercourse.

(2) Any adult or juvenile who is bound over for trial subsequent to a preliminary hearing or after having waived the right to a preliminary hearing on a charge of committing a sexual offense shall be ordered by the court to submit to a diagnostic test for the human immunodeficiency virus (HIV) that causes acquired immune deficiency syndrome, said diagnostic test to be ordered in conjunction with the diagnostic test ordered pursuant to section 18-3-415. The results of said diagnostic test shall be reported to the district attorney. The district attorney shall keep the results of such diagnostic test strictly confidential, except for purposes of pleading and proving the mandatory sentencing provisions specified in subsection (5) of this section.

(3) (a) If the person tested pursuant to subsection (2) of this section tests positive for the human immunodeficiency virus (HIV) that causes acquired immune deficiency syndrome, the district attorney may contact the state department of public health and environment or any local health department to determine whether said person had been notified prior to the date of the offense for which the person has been bound over for trial that he or she tested positive for the human immunodeficiency virus (HIV) that causes acquired immune deficiency syndrome.

(b) If the district attorney determines that the person tested pursuant to subsection (2) of this section had notice of his or her HIV infection prior to the date the offense was committed, the district attorney may file an indictment or information alleging such knowledge and seeking the mandatory sentencing provisions authorized in subsection (5) of this section. Any such allegation shall be kept confidential from the jury and under seal of court.

(c) The state department of public health and environment or any local health department shall provide documentary evidence limited to whether the person tested pursuant to subsection (2) of this section had notice of or had discussion concerning his or her HIV infection and the date of such notice or discussion. The parties may stipulate that the person identified in said documents as having notice or discussion of his or her HIV infection is the person tested pursuant to subsection (2) of this section. Such stipulation shall constitute conclusive proof that said person had notice of his or her HIV infection prior to committing the substantive offense, and the court shall sentence said person in accordance with subsection (5) of this section.

(d) If the parties do not stipulate as provided in paragraph (c) of this subsection (3), an officer or employee of the state department of public health and environment or of the local health department who has had contact with the person tested pursuant to subsection (2) of this section regarding his or her HIV infection and can identify said person shall provide, for purposes of pretrial preparation and in court proceedings, oral and documentary evidence limited to whether said person had notice of or had discussion concerning his or her HIV infection and the date of such notice or discussion. If the state department or the local health department no longer employs an officer or employee who has had contact with the person tested pursuant to subsection (2) of this section regarding the person's HIV infection, the state department or the local health department shall provide:

(I) The names of and current addresses, if available, for each former officer or employee who had contact with the person tested pursuant to subsection (2) of this section regarding the person's HIV infection;

(II) Documentary evidence concerning whether the person tested pursuant to subsection (2) of this section was provided notice of or had discussion concerning his or her HIV infection and the date of such notice or discussion; and

(III) If none of said former officers or employees are available, any officer or employee who has knowledge regarding whether the person tested pursuant to subsection (2) of this section was provided notice of or had discussion concerning his or her HIV infection and the date of such notice or discussion. Said officer or employee shall provide such evidence for purposes of pretrial preparation and in court proceedings.

(4) Nothing in this section shall be interpreted as abridging the confidentiality requirements imposed on the state department of public health and environment and the local health departments pursuant to part 14 of article 4 of title 25, C.R.S., with regard to any person or entity other than as specified in this section.

(5) (a) If a verdict of guilty is returned on the substantive offense with which the person tested pursuant to subsection (2) of this section is charged, the court shall conduct a separate sentencing hearing as soon as practicable to determine whether said person had notice of his or her HIV infection prior to the date the offense was committed, as alleged. The sentencing hearing shall be conducted by the judge who presided at trial or before whom the guilty plea was entered or a replacement for said judge in the event he or she dies, resigns, is incapacitated, or is otherwise disqualified as provided in section 16-6-201, C.R.S. At the sentencing hearing, the district attorney shall have the burden of proving beyond a reasonable doubt that said person had notice of his or her HIV infection prior to the date the offense was committed, as alleged.

(b) If the court determines that the person tested pursuant to subsection (2) of this section had notice of his or her HIV infection prior to the date the offense was committed, the judge shall sentence said person to a mandatory term of incarceration of at least three times the upper limit of the presumptive range for the level of offense committed, up to the remainder of the person's natural life, as provided in section 18-1.3-1004.

**Source: L. 99:** Entire section added, p. 1000, § 5, effective May 29. **L. 2000:** (2) amended, p. 451, § 2, effective April 24. **L. 2002:** (5)(b) amended, p. 1514, § 195, effective October 1.

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

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**18-3-416. Reports of convictions to department of education.**

When a person is convicted, pleads nolo contendere, or receives a deferred sentence for a violation of the provisions of this part 4 when the victim is a child and the court knows the person is a current or former employee of a school district in this state or holds a license or authorization pursuant to the provisions of article 60.5 of title 22, C.R.S., the court shall report such fact to the department of education.

**Source: L. 90:** Entire section added, p. 1025, § 6, effective July 1. **L. 2000:** Entire section amended, p. 1847, § 31, effective August 2.

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## **Appendix B:**

Sample Crime Scene Log (personnel)



### Crime Scene Entry Log

All persons entering the crime scene must sign this sheet

Agency: \_\_\_\_\_

Case/Incident #: \_\_\_\_\_

Scene Location: \_\_\_\_\_

NOTE: Officers assigned to maintain scene security must also log in and out on this sheet and should state their reason as "Log Officer".

Name & Title	Signature	Agency	Date/Time In	Date/Time Out	Reason for Entering

## **Appendix C:**

Rape Crisis Centers in Colorado

## **Colorado Rape Crisis**

### **High Plains Sexual Assault Center**

1-800-522-6484

Located in Sterling. Counties served include: Logan, Sedgwick, Phillips, Yuma, Washington, Morgan, and Kit Carson.

### **Moving to End Sexual Assault (MESA)**

303-443-7300

Located in Boulder. Counties served include: Boulder and Broomfield.

### **Pueblo Rape Crisis Services, Inc.**

719-549-0549

Located in Pueblo and serves Pueblo County.

### **Rape Assistance and Awareness Program (RAAP)**

303-322-7273

Located in Denver. Counties served include: Denver, Jefferson, Douglas, Adams, Arapahoe, Elbert, and Lincoln.

### **Sexual Assault Services Organization (SASO)**

970-247-5400

Located in Durango. Counties served include: La Plata, San Juan and Archuleta.

### **Sexual Assault Survivors, Inc. (SASI)**

970-352-7273

SASI is located in Greeley. County served is Weld.

### **Sexual Assault Victim Advocate (SAVA) Team**

970-472-4200

The SAVA Team is located in Fort Collins, Colorado. Counties served include Larimer and Jackson.

## **Appendix D:**

Colorado Evidence Collection Protocol

Access the appendix from the following website:

<http://cbi.state.co.us/lab/pdf/CECP%20for%20Internet.pdf>

## **Appendix E:**

Glossary of SANE's Terminology

## Glossary of SANE's Terminology

***Abrasion:*** A scraping away of the surface.

***Adhesion:*** Process of adhering or uniting of two surfaces or parts

***Anoscope:*** A piece of health care equipment used to assess injury to the anus and rectum

***Castration:*** Removal of sex organs

***Causation:*** The fact of being the cause of something produced or happening

***Chain of custody:*** A legal term, which means the movement and location of evidence from the time it is obtained to the time it is presented in court. Chain of custody requires testimony of continuous possession by each individual having possession, together with testimony by each that the object remained in substantially the same condition during its presence in his possession. If the evidence cannot be accounted for at all times since its collection, there exists the possibility that someone may have tampered with it. It is difficult for evidence to be admitted if the chain of custody is not intact.

***Colposcope:*** An instrument used to magnify the perineum and vagina, using an optimal illumination source. Colposcopes usually have attachments to accommodate a 35mm camera or a video camera.

***Contusion:*** Bruise

***Force:*** That which tends to produce motion in a body

***Fossa navicularis:*** The internal area between the external entryway to the vagina and the hymen

***Hymen:*** A fold of tissue in the lower segment of the vagina

***Labia majora:*** The outer lips external to the vagina

***Labia minora:*** The inner lips external to the vagina

***Laceration:*** Tear, cut

***Perineum:*** The area dorsal to the pubic arch and ventral to the coccyx

***Petechiae:*** minute hemorrhagic spots, of pinhead size in the skin, which are not blanched by diascopy

***Posterior fourchette:*** The tissue connecting the posterior labia minora, a common area of sexual assault injury

***Sexual assault examiner (SANE):*** A health care professional (physician, physician or sexual assault forensic assistant, registered professional nurse, nurse examiner practitioner) with specific sexual assault and forensic training, who examines and treats patients reporting sexual assault and testifies as needed.

**Swab:** Most often, a wooden stick with a cotton tip, used for the collection of biological material

**Swab dryer:** An electric machine, which expedites the process of drying swabs

**Smear:** A glass slide, prepared with swabs and saturated with biological material

**Toluidine Blue dye:** A dye used to assist sexual assault examiners with identification and photodocumentation of injuries

**Vagina:** Birth canal

**Wood's lamp** An ultraviolet light source used to detect the presence of semen and other substances

## **Appendix F:**

NIJ Crime Scene Training Manual

Access the appendix from the following website:

<http://www.ncjrs.gov/pdffiles1/nij/178280.pdf>



## **Appendix G:**

Sample Chain of Custody Log

Chain of Custody Log

Agency: \_\_\_\_\_

Log Officer Name: \_\_\_\_\_

Case/ Incident Number: \_\_\_\_\_

Log Officer Badge Number: \_\_\_\_\_

Person Receiving Evidence (Name & Title)	Date/Time Evidence Collected	Location of Evidence Collection	Name & Title of Evidence Custodian	Description of Evidence	Description of Means of Evidence Collection	Date/Time of Other Parties Accessing Evidence	Name & Title of Other Parties Accessing Evidence	Description of Evidence Analysis to be Performed	Notes

## **Appendix H:**

Sample Evidence Log

**Evidence Log**  
**(Non-Photographic Evidence)**

Incident Identification: \_\_\_\_\_

Evidence Custodian: \_\_\_\_\_

Date Collected	Name of Individual who Collected the Evidence	Name of Person Logging the Evidence	Description of Evidence	Remarks (location found, etc.)	Evidence Identification Number	Sign In (Signature Required)	Date Signed-in

## **Appendix I:**

Crime Scene Evidence Checklist

Access the appendix from the following website:

<http://icsia.org/ReminderCard.pdf>

## **Appendix J:**

Sample Clothing Log

## Clothing Evidence Log

Agency: \_\_\_\_\_

Log Officer: \_\_\_\_\_

Case/Incident Number: \_\_\_\_\_

Date/Time: \_\_\_\_\_

Obtain a complete history prior to evidence collection and documentation. Complete all blanks. If not applicable, write N/A. When specific evidence is not required, write "deferred." Document accurately. **Write clearly and neatly:**

### **Patient Presented at Hospital Wearing Clothing Worn During the Assault:**

Describe clothing (with minimal handling) carefully noting condition (clean, dirty, rips, tears, stretched out elastic, missing buttons) and visible signs of foreign material (grass, fiber, hair, twigs, soil, splinters, glass, blood, dry or moist secretions).

**Procedure for wet clothing: Items must be dry to preserve evidence. If clothing is wet, lie on a sheet of clean, unused, white paper and cover with another sheet of white paper. Gently fold each article of clothing and place in a labeled, sealed paper bag. Give to the officer. Advise that the clothing is wet.**

Bra:

\_\_\_\_\_

Shirt:

\_\_\_\_\_

Undershirt:

\_\_\_\_\_

Sweater:

\_\_\_\_\_

Jacket:

\_\_\_\_\_

Pants:

\_\_\_\_\_

Underwear:

\_\_\_\_\_

Socks (state one or two socks present):

\_\_\_\_\_

Shoes (state one or two shoes present):

\_\_\_\_\_

Other:

\_\_\_\_\_

### **Patient Presented at Hospital Wearing Clothing Put On Immediately After the Assault:**

Describe clothing put on after the assault, (with minimal handling) carefully noting any visible signs of foreign material (grass, fiber, hair, twigs, soil, splinters, glass, blood, dry or moist secretions). Focus on clothes worn closest to the genitals or areas where the suspect's mouth made contact, i.e., breasts/bra.

Bra:

\_\_\_\_\_

Shirt:

\_\_\_\_\_

Undershirt:

Sweater:

Jacket:

Pants:

Underwear:

Socks (state one or two socks present):

Shoes (state one or two shoes present):

Other:

**Patient's Description of Clothing Worn During the Assault:**

\_\_\_\_\_ Patient brought clothing worn during assault. Collected by SANE.

\_\_\_\_\_ Clothing worn at the time of the assault collected by law enforcement prior to the arrival of the initial forensic examiner.

\_\_\_\_\_ Patient provides location of clothing worn at the time of the assault and/or additional evidence and initial law enforcement is notified at \_\_\_\_\_ hours.

\_\_\_\_\_ Clothing collected by law enforcement.

In cases involving non-acute exams where clothing, bedding, or other evidence has been identified and collected, a DNA reference sample must be collected from the patient.

Buccal Swab \_\_\_\_\_ Blood \_\_\_\_\_

Based on the patient's history, note any areas that need to be evaluated by the Crime Lab and/or investigating officer for foreign material, i.e., blood, dry or moist secretions, and/or tears, stretched out material, and missing buttons.

Bra:

Shirt:

Undershirt:

Sweater:

Jacket:

Pants:

Underwear:

Socks (state one or two socks present):

Shoes (state one or two shoes present):

Other: \_\_\_\_\_



Notes:

Logging Officer Signature:\_\_\_\_\_

SANE Signature: \_\_\_\_\_

Date/Time Clothing Logged:\_\_\_\_\_

Collection Location:\_\_\_\_\_

## **Appendix K:**

DNA Evidence Training

Access the appendix from the following website:

<http://www.dna.gov/training/letraining/>

## **Appendix L:**

CBI Evidence Handbook

Access the appendix from the following website:

<http://cbi.state.co.us/lab/pdf/Physical%20Evidence%20Handbook%20v4.02.pdf>

## **Appendix M:**

Computer Evidence Collection

Access the appendix from the following website:

<http://www.iwar.org.uk/ecoespionage/resources/cybercrime/ecrime-scene-investigation.pdf>

## **Appendix N:**

Colorado Victim Bill of Rights

Access the appendix from the following website:

<http://dcj.state.co.us/ovp/Files/OVP%20Info/vra%20eng.pdf>

## **Appendix O:**

Crime Mapping Manual

Access the appendix from the following website:

<http://www.ncjrs.gov/html/nij/mapping/pdf.html>

## Annotated Bibliography

Archambault, J. & Faugno, D. K. (2001). Overcoming a consent defense to sexual assault. *Journal of Emergency Nursing*, 27(1), 204-208.

Good information pertaining to clothing evidences value in a consensual rape investigation. However, the article is much too limited.

Canter, D. & Larkin P. (1993). The environmental range of serial rapists. *Journal of Environmental Psychology*. 13: 63-69.

Good information on geographical profiling for serial rapists.

Carney, T. P. (2004). *Practical investigation of sex crimes: A strategic and operational approach*. Boca Raton, FL: CRC.

Detailed information from an operational standpoint of rape investigation and a clear understanding of the forensic aspects of rape investigation.

Chisum, J. (2006, August 13). Crime reconstruction & criminal profiling. Keynote speech presented at Academy of Behavioral Profiling, Henderson, NV.

Excellent conference, filled with leaders within the Behavioral Profiling community. Jerry Chisum provided various insights for the handbook via his lecture regarding forensic evaluation of the crime scene.

Colorado Bureau of Investigations (2000, December). Colorado evidence collection protocol. Retrieved August 27, 2006, from <http://cbi.state.co.us/lab/default.asp>  
The handbook has great information about the collection and storage of physical evidence of sexual assault.

Colorado Sexual Assault Prevention. (1999, February). *Sexual assault investigation: An evaluation of current practices*. Denver, CO: Colorado Department of Public Health and Environment.

This report is an excellent resource for the current practices of larger departments in Colorado, and the issues that still need to be addressed.

Crime and Sexual Assault Support Services (n.d.). Statistics. Retrieved August 18, 2006 from <http://www.wvu.edu/chw/preventionandwellness/casas/Statistics.html>

Lots of statistics on sexual assault.

Crowley, S. R. (1999). *Sexual assault: The medical-legal examination*. Stanford, CT: Appleton & Lange.

Excellent reference for SANE's investigation. Provides a detailed account of what examinations are preformed, and what and how evidence is collected.

Douglas, J. E., Burgess, A. W., Burgess, A. G., & Ressler, R. K. (1997). *Crime classification manual: A standard system for investigating and classifying violent crimes*. Hoboken, NJ: Jossey-Bass

Great resource for categorizing crimes, and developing motivational signatures.

Federal Bureau of Investigations (2005). Uniform crime report. Retrieved August 27, 2006, from <http://cbi.state.co.us/dr/cic2k5/intro.htm>

This site has a wealth of statistical data on crime in Colorado, as well as across the nation. The Uniform Crime Report does have drawbacks in reliability and reporting; however, it is the best clearing house for statistical crime data.

Geberth, V. J. (1996). *Practical homicide investigation: Tactics, procedures, and forensic techniques*. CRC Press, New York.

Good resource, but some of the material is outdated. Best used for the everyday homicide investigator. Be aware, the text is filled with graphic images.

Hazelwood, R. R., & Wolbert Burgess, A. (Ed.). (2001). *Practical investigation of sex crimes: A multidisciplinary approach*. Boca Raton, FL: CRC.

Good insights. This text provided a detailed accounting of rape investigation, and the technical aspects of conducting one.

Hunter, S. M., Bentley Cewe, B. R., & Mills, J. L. (2000, June). Police response to crimes of sexual assault: A training curriculum. *Minnesota Center Against Violence and Abuse*. Retrieved August 27, 2006, from <http://www.mincava.umn.edu/documents/policeresponse/policeresponse.html>

Great resource geared toward the response of police to the victim.

International Association of Chiefs of Police. (2005, May). Investigating sexual assaults: Model policy. Alexandria, VA: *International Association of Chiefs of Police*.

This report is a systematic guide for law enforcement in handling rape investigation. It is a wonderful resource with a wealth of information about the process of investigation.

International Crime Scene Investigators Association. (n.d.). Crime scene reminder card [Brochure]. International Crime Scene Investigators Association. Retrieved August 25, 2006, from <http://icsia.org/ReminderCard.pdf>

Good checklist of items to consider for evidence when responding to a sexual assault report.



Jordan, J. (2004). Beyond belief? Police, rape, and women's credibility. *Criminal Justice*, 4(1), 29-59.

Interesting study for future evaluation of the way victims of sexual assault are perceived.

Lewis, S. H. (2003). Unspoken crimes: Sexual assault in rural America. *National Sexual Violence Resource Center*. Retrieved August 16, 2006 from <http://www.nsvrc.org/publications/booklets/rural.pdf>

Good resource on rural sexual assault issues.

The National Center for Women and Policing (Ed.). (2001, May). Successfully investigating acquaintance sexual assault: A national training manual for law enforcement. *Minnesota Center Against Violence and Abuse*. Retrieved August 23, 2006, from <http://www.mincava.umn.edu/documents/acquaintsa/acquaintsa.html>

Plenty of well-researched information on acquaintance rape, and the strategies employed by the defense to counter allegations of rape.

New York Coalition against Sexual Assault. (n.d.). Pocket guide for police response to sexual assault [Brochure]. Albany, NY: *New York State Coalition against Sexual Assault*.

Excellent guide for first responders, it provides detailed information on what actions to take at the scene.

Petherick, W. (Ed.). (2006). *Serial crime: Theoretical and practical issues in behavioral profiling*. Burlington, MA: Elsevier Academic Press.

Good resource for behavioral profiling in terms of theory.

Peterick, W. (2006, August 13). Profiling stalkers. Keynote speech presented at Academy of Behavioral Profiling, Henderson, NV.

Excellent conference, filled with leaders within the Behavioral Profiling community.

Wayne Peterick provided various insights for the handbook via his lecture.

Rainn (n.d.). Statistics. Retrieved August 18, 2006 from <http://www.rainn.org/statistics/index.html>

Various statistics on rape, most taken from victimization survey.

State of Colorado Revised Statutes (2005). Unlawful Sexual Behavior, 18-3-401 (LEXIS).

Legal definitions for sexual assault in the state of Colorado.

Turvey, B. E. (2006, August 13). Mining the scene: crime scene investigation's contribution to the profiling process. Keynote speech presented at Academy of Behavioral Profiling, Henderson, NV.

Excellent conference, filled with leaders within the Behavioral Profiling community. Brent Turvey, the keynote, was knowledgeable and provided various insights for the handbook.

Turvey, B. E., & Savino, J. (2005). *The rape investigation handbook*. Burlington, MA: Elsevier Academic Press.

Most of the information referenced in the handbook was found within this text. The text was filled with valuable information, and an excellent resource.

Turvey, B., (2002). *Criminal profiling: An introduction to behavioral evidence analysis*. Academic Press, New York.

Excellent resource for learning how to apply behavioral evidence analysis to a case provides detailed examples of case reports and reasoning. Overall, this text is the best resource for criminal profiling currently available.

West Virginia Foundation for Rape Information and Services, Inc. (n.d.). First response to sexual assault [Brochure]. Fairmont, WV: *West Virginia Foundation for Rape Information and Services, Inc.*

Nice little brochure for first responders with bulleted structure. It is easy to read, and can work as a quick reference.

Women's Justice Center. (n.d.). Advocating for women in the criminal justice system in cases of rape, domestic violence and child abuse. Santa Rosa, CA: *Women's Justice Center*.

Retrieved August 24, 2006, from <http://www.justicewomen.com/handbook/>  
Information geared toward the victim. Good resource for understanding the victim, and the victim's response.

Yarmey, D.A. (1990). *Understanding police and police work*. New York, NY: University Press.

Little information on rape investigation and most of it is outdated; however, it does state the importance of the victim's perception of the investigator and its affect on subsequent investigation.

## Further Suggested Reading

The following are websites and textbooks that will provide additional training in regard to rape investigation and awareness:

### Websites

Colorado Coalition against Sexual Assault

<http://www.ccasa.org/statistics.cfm>

Successfully Investigating Acquaintance Sexual Assault: A National Training Manual for Law Enforcement, National Center for Women and Policing

<http://www.evawintl.org/ncwp.htm>

Colorado Bureau of Investigations, Uniform Crime Report (2005)

<http://cbi.state.co.us/dr/cic2k5/major%20crime/rape.htm>

Federal Bureau of Investigations, Uniform Crime Report (2004)

[http://www.fbi.gov/ucr/cius\\_04/offenses\\_reported/violent\\_crime/forcible Rape.html](http://www.fbi.gov/ucr/cius_04/offenses_reported/violent_crime/forcible Rape.html)

Women's Justice Center

<http://www.justicewomen.com/handbook/index.html>

Rape Assistance and Awareness Program

<http://www.raap.org/>

### Textbooks

Carney, T. P. (2004). *Practical investigation of sex crimes: A strategic and operational approach*. Boca Raton, FL: CRC.

Hazelwood, R. R. & Wolbert Burgess, A. (Ed.). (2001). *Practical investigation of sex crimes: A multidisciplinary approach*. Boca Raton, FL: CRC.

Turvey, B. E., & Savino, J. (2005). *The rape investigation handbook*. Burlington, MA: Elsevier Academic Press.

## **Workbook I & II Answer Key**

# Workbook Problems I

## Answer Key

- 1) **True** or False: It is your duty as a first responder to make sure the victim is safe.
- 2) True or **False**: Your demeanor does not affect the victim.
- 3) True or **False**: Every victim should have a forensic rape exam.
- 4) True or **False**: Tell the lead investigator every observation you have regarding the victim's state of mind.
- 5) True or **False**: Clothing in a consent acquaintance rape is not important, as the suspect is a known offender.
- 6) True or **False**: A crime scene sketch is not necessary if you have photographed and videotaped the scene.
- 7) **True** or False: In a crime scene sketch, a movable object should be measured from an immovable one.
- 8) **True** or False: Never videotape a scene with the audio recorded.
- 9) True or **False**: When writing a report, include every detail you can remember.
- 10) True or **False**: A chain of custody is not needed if the case is an acquaintance rape, as the suspect is known.
- 11) True or **False**: An evidence log should be maintained during the collection and storage of physical evidence.
- 12) **True** or False: A first responder should note all personnel on scene, as well as their clothing and footwear.
- 13) **True** or False: In an acquaintance rape, you should collect the license plate, make and model of vehicles in the area.
- 14) True or **False**: A SANE's Exam is only needed when the offender is unknown.
- 15) Collect trace evidence with:
  - a. Forceps
  - b. Tape lifts
  - c. Gloved fingers
  - d. **All of the above**
- 16) Reports should be written in a **Narrative** format.
- 17) **True** or False: Reports should include who, what, where and when.
- 18) True or **False**: When collecting a ligature, cut it at the knot.

- 19) Which of the following is not a section that should be included in a report?
- a. Source of Activity Section
  - b. Observation Section
  - c. Statements Section
  - d. Evidence Section
  - e. **Assumption Section**
  - f. Additional Notes Section
  - g. Arrest Section
  - h. Booking Section

### **For Discussion**

**Note these are merely discussion points. There are no wrong answers.**

Read the following scenarios. As a first responder, what would you do in these situations? Answer the three questions below:

- 1) Has a crime been committed?
- 2) What should your first step in the investigation be?
- 3) What will complicate your investigation?
- 4) What type of evidence should you look for?

#### Scenario 1:

You are dispatched to the local park, a known meeting place for homosexuals. A twenty-three year old man reports he was the victim of a sexual assault by two unknown males. When you arrive, the man is distraught and confused. The man states he does not know the offenders, but has seen them at the park. During his statement, the man confesses he visits the park to engage in homosexual acts.

- 1) **The reporter claims he was raped, and therefore, the first responder must assume his statement to be true until evidence suggests otherwise.**
- 2) **First step should be to ensure the victim's physical well-being. Call for medical attention if required, and ensure the offenders are not on scene.**
- 3) **The victim's situational risk factors will complicate the investigation, in addition to the crime scene being outdoors and in a fairly well used public location.**
- 4) **Injuries to the victim, physical evidence at the scene like condoms, etc.**

#### Scenario 2:

You receive a call from an apartment complex in an upscale neighborhood. A twenty-six year old woman claims she was raped by a neighbor. When you arrive on scene, the woman is bleeding and her clothing is torn. The crime scene indicates a struggle, but the woman is calm. During questioning, you are confused by the inconsistencies in her story. The accused neighbor claims the sex was consensual, and the victim has a history of mental illness.

- 1) The victim has reported a crime, and until evidence can prove otherwise, the first responder must assume a crime has been committed.
- 2) Ensure the offender is removed from the scene, and provide the victim with medical attention.
- 3) The victim's history of mental illness will complicate the investigation, as will the inconsistencies in her account of the assault.
- 4) The evidence you should look for is any evidence of force. Check her injuries to assess possible causation. Do the same with the torn clothing. Are the injuries and torn clothing possible simulated acts? How is the victim responding to the injuries? Does the suspect have injuries or any biological materials on his clothing or person?

## Workbook Problems II

### Answer Key

- 1) Which is not a rape typology?
  - a. Power Assertive
  - b. Anger Excitation
  - c. **Anger Assertive**
  - d. Power Reassurance
- 2) True or **False**: Statistics show only a 5% false reporting for rape.
- 3) **True** or False: The circle theory of Geographic profiling states 80% of offenders' live/work/travel within a ten-mile circular radius of the crime scene.
- 4) True or **False**: GHB is the drug most widely associated with drug-facilitated rape.
- 5) True or **False**: As an investigator, it is your job to trust the victim.
- 6) True or **False**: During a pre-text call, the victim should not use the word rape.
- 7) True or **False**: The Power Reassurance rapist seeks to harm physically punish the victim.
- 8) **True** or False: The victim of an Anger Excitation rapist will likely be physically harmed during the attack.
- 9) **True** or False: When interviewing a suspect, place blame on the victim if necessary.
- 10) True or **False**: Read the suspect's Miranda warning following the interview when remanding custody.
- 11) True or **False**: Stranger rapes are the easiest to solve.
- 12) True or **False**: The investigator should seek evidence to support his theory of the crime.
- 13) True or **False**: Evidence can lie.
- 14) **True** or False: The most common defense in an acquaintance rape is the sex was consensual.
- 15) True or **False**: During a victim interview, you should interrupt the victim when a question occurs to you.

### For Discussion

**Note these are merely discussion points. There are no wrong answers.**



Read the following scenarios. As the lead investigator, what would you do in these situations? Answer the three questions below:

- 1) What should your first step in the investigation be?
- 2) What questions would you ask the victim and/or suspect?
- 3) Is this a valid report, and if so, what defensive strategy is likely?

Scenario 1:

You are called in on an acquaintance rape report. A thirty-year-old woman reports being sexually assaulted by her employer following an office party. The woman is not physically harmed, and the suspect is at the scene denying the allegation. A rape exam is inconclusive.

- 1) **Consider the possible defensive strategies. Collect any indications of force, i.e. torn or ripped clothing.**
- 2) **Does the suspect admit to engaging in any sexual act with the victim? If so, what acts?**
- 3) **If the suspect indicates a consensual act took place, the likely strategy would be consensual sex. If the suspect denies any sexual acts took place, the defensive strategy would likely be to place blame on the victim, and question her mental health.**

Scenario 2:

A thirteen-year-old girl comes into the station with her parents to report she was a victim of a rape the previous night. The hysterical victim states the offender is not someone she knows, and provides a vague physical description of the offender. The victim claims she was abducted while walking along a dark, tree lined path by a masked offender. There are no witnesses to the assault, and a SANE's exam suggests sexual activity, but no conclusive indicators of rape. No DNA evidence is found. The victim's parents state the victim did not return home until after midnight.

- 1) **Remove the parents (if possible) and discuss the assault with the victim.**
- 2) **Ask the victim to repeat the details of the attack, and ask for more information when inconsistencies emerge. Ask the victim if she has recently engaged in consensual sexual activity, and if so, how long ago?**

- 3) The likely defense strategy, if the case is not a false report, would be mistaken identity. The victim was attacked by a masked offender, and no DNA evidence was present for comparison.

