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Title 76: Criminal Code Chapter 05 Offenses Against the Person - 1995 Replacement Volume

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CHAPTER 5

OFFENSES AGAINST THE PERSON

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PART 1
ASSAULT AND RELATED OFFENSES

76-5-101. "Prisoner" defined.

For purposes of this part "prisoner" means any person who is in custody of a peace officer pursuant to a lawful arrest or who is confined in a jail or other penal institution or a facility used for confinement of delinquent juveniles operated by the Division of Youth Corrections regardless of whether the confinement is legal.

History: C. 1953, 76-5-101, enacted by L. 1973, ch. 196, § 76-5-101; 1994, ch. 36, § 1.

Amendment Notes. — The 1994 amendment, effective March 2, 1994, inserted "or a facility used for confinement of delinquent juveniles operated by the Division of Youth Corrections."

NOTES TO DECISIONS

Cited in State v. Pilling, 875 P.2d 604 (Utah Ct. App. 1994).

76-5-102. Assault.

(1) Assault is:

(a) an attempt, with unlawful force or violence, to do bodily injury to another;

(b) a threat, accompanied by a show of immediate force or violence, to do bodily injury to another; or

(c) an act, committed with unlawful force or violence, that causes or creates a substantial risk of bodily injury to another.

(2) Assault is a class B misdemeanor.

History: C. 1953, 76-5-102, enacted by L. 1974, ch. 32, § 38; 1989, ch. 51, § 1; 1991, ch. 75, § 3.

Repeals and Reenactments. — Laws 1974, ch. 32, § 38 repealed former § 76-5-102, as enacted by L. 1973, ch. 196, § 76-5-102, relating to assault, and enacted present § 76-5-102.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, inserted "or creates a substantial risk of" in Subsection (1)(c).

Cross-References. — Bus hijacking, assault with intent to commit, § 76-10-1504.

Power of city to prohibit assault and battery, § 10-8-47.

NOTES TO DECISIONS

ANALYSIS

Evidence.
Immediacy of threat.
Included offenses.
Intent.
Object of threat.
—Victim.
Verdict.
—Ambiguous verdict.
—Variance from verdict.
Cited.

Evidence.

Introduction of defendant's commitment papers to establish that defendant was an inmate of the state prison was proper in prosecution for assault by a convict with a deadly weapon. State v. Duran, 522 P.2d 1374 (Utah 1974).

Immediacy of threat.

Although the proximity of the assailant to the victim has some relevance in determining whether the threat was accompanied by an "immediate" show of force, the absence of evidence in the record regarding the exact dis-

tance between the victim and the defendant did not require reversal on insufficiency of evidence grounds given the surrounding circumstances. State v. Brown, 853 P.2d 851 (Utah 1992).

Included offenses.

In prosecution under former § 76-7-7, which described offense of assault with intent to commit rape or mayhem, court had to instruct jury that defendant could be convicted of simple assault; attempt to commit offense charged was included in the offense under former Penal Code definition of attempts. State v. Hyams, 64 Utah 285, 230 P. 349 (1924).

In prosecution for rape, it was not error to charge that assault was an included offense where the evidence would have supported a finding of the elements of this crime. State v. Smith, 90 Utah 482, 62 P.2d 1110 (1936).

Crime of simple assault was included in offense of indecent assault. State v. Waid, 92 Utah 297, 67 P.2d 647 (1937).

The offense of assault is a lesser included offense of aggravated sexual assault, § 76-5-405. State v. Elliott, 641 P.2d 122 (Utah 1982).

Defendant charged with aggravated kidnaping was entitled to a jury instruction on assault as a lesser included offense since there was sufficient overlap in elements of two offenses and if jury had accepted defendant's version of evidence, however unlikely that might have been, it could have voted to acquit him of aggravated kidnaping and convict him of assault. State v. Brown, 694 P.2d 587 (Utah 1984).

Assault is a lesser included offense of forcible sexual abuse. State v. Jones, 243 Utah Adv. Rep. 35 (Utah Ct. App. 1994).

Intent.

Intent with which assault is made is of essence in offense of assault with intent to commit rape; to justify conviction jury must have been satisfied that defendant had ability and intended to gratify his passions on person of woman assaulted, and to do so regardless of any resistance she might have made. State v. McCune, 16 Utah 170, 51 P. 818 (1898).

Object of threat.

—Victim.

One cannot be charged with an aggravated assault of a particular person by "threatening to do bodily injury to [another person]." The "another" referred to in this section and § 76-5-103 is the ultimate victim of the assault, not any other person. State v. Garcia, 744 P.2d 1029 (Utah Ct. App. 1987).

Verdict.

—Ambiguous verdict.

If verdict left it doubtful as to whether defendant was found guilty of assault, or of an assault with deadly weapon, defendant was entitled to have uncertainty resolved in his favor. State v. Kakarikos, 45 Utah 470, 146 P. 750 (1915).

—Variance from verdict.

Where jury returned verdict that defendant was guilty of attempt to commit rape, court could not enter judgment that defendant was guilty of different offense of assault with intent to commit rape. State v. Hyams, 64 Utah 285, 230 P. 349 (1924).

Cited in State v. Pike, 712 P.2d 277 (Utah 1985); Utah Dep't of Cors. v. Despain, 824 P.2d 439 (Utah Ct. App. 1991); State v. Tinoco, 860 P.2d 988 (Utah Ct. App. 1993).

COLLATERAL REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d Assault and Battery § 9.

C.J.S. — 6A C.J.S. Assault and Battery § 62.

A.L.R. — Assault and battery: sexual nature of physical contact as aggravating offense, 63 A.L.R.3d 225.

Liability for injury to martial arts participant, 47 A.L.R.4th 403.

Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

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

Transmission or risk or transmission of human immunodeficiency virus (HIV) or acquired immunodeficiency syndrome (AIDS) as basis for prosecution or sentencing in criminal or military discipline case, 13 A.L.R.5th 628.

Key Numbers. — Assault and Battery ⚷ 48.

76-5-102.3. Assault against school employees.

(1) Any person who assaults an employee of a public or private school, with knowledge that the individual is an employee, and when the employee is acting within the scope of his authority as an employee, is guilty of a class A misdemeanor.

(2) As used in this section, "employee" includes a volunteer.

History: C. 1953, 76-5-102.3, enacted by L. 1992, ch. 163, § 1.

Effective Dates. — Laws 1992, ch. 163 became effective on April 27, 1992, pursuant to Utah Const., Art. VI, Sec. 25.

76-5-102.4. Assault against peace officer.

Any person who assaults a peace officer, with knowledge that he is a peace officer, and when the peace officer is acting within the scope of his authority as a peace officer, is guilty of a class A misdemeanor.

History: C. 1953, 76-5-102.4, enacted by L. 1974, ch. 32, § 32; 1987, ch. 23, § 1.

Cross-References. — Assault on conservation officer, § 23-20-26.

Peace officers, Title 77, Chapter 1a.

NOTES TO DECISIONS

ANALYSIS

Assault by prisoner.
Burden of proof.
Unlawful search of premises.
Cited.

Assault by prisoner.

Defendant's claim that his assault on a peace officer could have been charged under this section instead of § 76-5-102.5 did not entitle him to have his felony conviction reduced to a misdemeanor because this section and § 76-5-102.5 do not proscribe identical conduct and defendant was properly charged under § 76-5-102.5. State v. Duran, 772 P.2d 982 (Utah Ct. App. 1989).

Burden of proof.

This section does not require that the state prove that the precise act the officer is performing is not legally challengeable, i.e., that the arrest or search being effected is entirely lawful and beyond challenge. All that must be shown is that the officer is acting within the "scope of authority of a peace officer." State v. Gardiner, 814 P.2d 568 (Utah 1991).

Unlawful search of premises.

Defendant's convictions of assaulting a peace officer and interfering with a peace officer were affirmed, where the officer was acting within the scope of his authority in responding to a complaint regarding a party where minors were consuming alcohol, even though his attempted search of the premises was later found to be unlawful. State v. Gardiner, 814 P.2d 568 (Utah 1991).

Cited in State v. Pilling, 875 P.2d 604 (Utah Ct. App. 1994).

COLLATERAL REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d Assault and Battery § 87.

C.J.S. — 6A C.J.S. Assault and Battery § 81.

76-5-102.5. Assault by prisoner.

Any prisoner who commits assault, intending to cause bodily injury, is guilty of a felony of the third degree.

History: C. 1953, 76-5-102.5, enacted by L. 1974, ch. 32, § 33.

NOTES TO DECISIONS

ANALYSIS

Assault against peace officer.
Evidence of assault.
—Sufficient.
Cited.

Assault against peace officer.
This section and § 76-5-102.4 do not proscribe identical conduct when the assault is against a peace officer. The statutes apply to different classes of persons, the former applying to "any person" and the latter applying to "any prisoner." State v. Duran, 772 P.2d 982 (Utah Ct. App. 1989).

Evidence of assault.
Where, as part of standard jail procedure, the videotape of all bookings, including the defendant's, was erased and recycled after 72 hours if there was no request to retain it, and the defendant sought dismissal of the charge that she, while in custody, had assaulted a police officer, because there was no showing that loss of the tape destroyed evidence vital to the issue of the defendant's guilt, the trial court erred in dismissing the assault charge. State v. Jiminez, 761 P.2d 577 (Utah Ct. App. 1988).

—Sufficient.
Jury verdict, implicitly rejecting statutory defenses of self-defense and defense of habitation, was supported by the evidence. State v. Duran, 772 P.2d 982 (Utah Ct. App. 1989).

Cited in State v. Pilling, 875 P.2d 604 (Utah Ct. App. 1994).

76-5-102.6. Assault on a correctional officer.

Any prisoner who throws or otherwise propels fecal material or any other substance or object at a peace or correctional officer is guilty of a class A misdemeanor.

History: C. 1953, 76-5-102.6, enacted by L. 1992, ch. 149, § 1; 1994, ch. 37, § 1.

Amendment Notes. — The 1994 amendment, effective July 1, 1994, inserted "or otherwise propels."

Effective Dates. — Laws 1992, ch. 59 became effective on April 27, 1992, pursuant to Utah Const., Art. VI, Sec. 25.

NOTES TO DECISIONS

Spitting.
Spitting on a correctional officer was not a crime under this section, as the only prohibited means of propelling a substance or object was by throwing. State v. Paul, 860 P.2d 992 (Utah Ct. App. 1993) (decided before 1994 amendment adding "or otherwise propels").

76-5-103. Aggravated assault.

(1) A person commits aggravated assault if he commits assault as defined in Section 76-5-102 and he:

(a) intentionally causes serious bodily injury to another; or

(b) uses a dangerous weapon as defined in Section 76-1-601 or other means or force likely to produce death or serious bodily injury.

(2) Aggravated assault is a third degree felony.

History: C. 1953, 76-5-103, enacted by L. 1973, ch. 196, § 76-5-103; 1974, ch. 32, § 10; 1989, ch. 170, § 2.

Cross-References. — Attempt, § 76-4-101. Possession of a dangerous weapon with intent to assault, § 76-10-507.

NOTES TO DECISIONS

ANALYSIS

Dangerous weapon.
Defense of habitation.
Evidence.
—Sufficient.
Included offense.
Indictment or information.
Instructions.
—Flight.
—Vicarious liability.
Jury question.
Object of threat.
—Victim.
Recklessness.
Self-defense.
Serious bodily injury.
Threatening with dangerous weapon distinguished.
Voluntary intoxication.
Cited.

Dangerous weapon.

Under former statute which described assault with deadly weapon, character of weapon could be inferred from wounds or other indicia, even though name or precise character of the instrument could not be proven. State v. Jukanovich, 45 Utah 372, 146 P. 289 (1915).

A razor could be a deadly weapon under former statute describing assault with a deadly weapon. State v. Anselmo, 46 Utah 137, 148 P. 1071 (1915).

Instructing jury that fist could under certain circumstances become deadly or dangerous weapon was prejudicial error as it might have directed minds of jury away from crucial issue as to whether defendant used razor blade as a deadly weapon. State v. Ireland, 22 Utah 2d 17, 447 P.2d 375 (1968).

Defense of habitation.

Defendant's appearances at his estranged wife's apartment to visit his children gave him no proprietary right or justification to consider or treat the apartment as his own "habitation," and his aggravated assault on his wife's overnight male companion was therefore not justified by § 76-2-405. State v. McKenna, 728 P.2d 984 (Utah 1986).

Evidence.

In a prosecution for aggravated assault, the trial court's admission of a knife, similar to the one used in the assault, and a ruler, illustrative of the testimony of a witness and indicative of the actual length of the weapon, was not unduly prejudicial. State v. Royball, 710 P.2d 168 (Utah 1985).

—Sufficient.

Evidence indicating that defendant had threatened his former wife and her father with loaded sawed-off shotgun was sufficient, if believed by jury, to support conviction of defendant for assault with deadly weapon. State v. Dunnivan, 26 Utah 2d 147, 486 P.2d 393 (1971).

The defendant's conduct in pulling a loaded .38 caliber revolver from his waistband and shooting one of his victims in the upper leg, followed by threats to both victims, was sufficient evidence to support a conviction under Subsection (1)(b). State v. Haro, 703 P.2d 301 (Utah 1985).

Where the defendant testified at trial that he was angered by his wife's comments, so he struck her, and he did not contradict her testimony, or that of the doctor, which described the seriousness of the injuries, the combination of the uncontroverted testimony from the defendant, his wife, and her physician established overwhelming evidence to support a conviction of aggravated assault. State v. Harper, 761 P.2d 570 (Utah Ct. App. 1988).

Included offense.

Charge of assault with intent to do bodily harm also included simple assault; court had to submit possible verdict of simple assault to jury. State v. Barkas, 91 Utah 574, 65 P.2d 1130 (1937).

The offense of aggravated assault is a lesser included offense of aggravated sexual assault, § 76-5-405. State v. Elliott, 641 P.2d 122 (Utah 1982).

Defendant charged with aggravated assault committed by use of a deadly weapon was entitled to a jury instruction regarding offense of threatening with a dangerous weapon, § 76-10-506, as a lesser included offense where two offenses had overlapping elements, facts of case tended to prove both offenses, and evidence was subject to an interpretation which provided both a rational basis for a verdict acquitting defendant of the aggravated assault charge and convicting him of threatening with a dangerous weapon. State v. Oldroyd, 685 P.2d 551 (Utah 1984).

Because the assaults committed upon victims were indisputably aggravated, there would have been no basis for finding defendant guilty of the lesser crime of assault if he was found innocent of the greater crime of aggravated assault. State v. Dumas, 721 P.2d 498 (Utah 1986).

Trial court properly refused to instruct the jury on the offense of aggravated assault at defendant's trial for second-degree murder, as the evidence would not support both an acquittal on the murder charge and a conviction on the aggravated assault charge. State v. Velarde, 734 P.2d 440 (Utah 1986).

Refusal to give defendant's requested in-

struction on aggravated assault at his trial for second-degree murder was reversible error, where the jury needed to determine whether the defendant lacked the intent to cause death or serious bodily injury, which would permit an acquittal on the murder charge while allowing a conviction on the aggravated assault charge. State v. Velarde, 734 P.2d 449 (Utah 1986).

Aggravated assault was a lesser and included offense of aggravated burglary, because the jury was not required to find any additional elements to convict defendant of aggravated assault once it had found him guilty of aggravated burglary. State v. Bradley, 752 P.2d 874 (Utah 1988).

Indictment or information.

An information for assault and battery with intent to murder did not necessarily include assault with a deadly weapon; an information for the former need not have described the instrument with which assault was made as a deadly weapon. State v. Jukanovich, 45 Utah 372, 146 P. 289 (1915); State v. Kakarikos, 45 Utah 470, 146 P. 750 (1915).

Words "without just cause or excuse" in former section defining assault with deadly weapon need not have been used in indictment. State v. McDonald, 14 Utah 173, 46 P. 872 (1896).

Instructions.

—Flight.

It was error to give any flight instruction where no flight occurred after commission of the crime charged, since the defendant was charged with aggravated assault but the "aggravating" element, his knife, was not drawn until he was on the ground in front of the store after he had run from the initial encounter. State v. Howland, 761 P.2d 579 (Utah Ct. App. 1988).

—Vicarious liability.

In prosecution for assault with deadly weapon and attempted burglary, where there was an inference of joint participation based upon circumstantial evidence that both defendants were armed and that one of them apparently drove escape vehicle and was also present at scene, evidence was sufficient to warrant instruction on the law of principals. State v. Rowley, 15 Utah 2d 4, 386 P.2d 126 (1963).

Jury question.

Degree of injury or harm inflicted or threatened was for jury to determine. State v. Kakarikos, 45 Utah 470, 146 P. 750 (1915).

Object of threat.

—Victim.

One cannot be charged with an aggravated assault of a particular person by "threatening to do bodily injury to [another person]." The "another" referred to in § 76-5-102 and this section is the ultimate victim of the assault, not any other person. State v. Garcia, 744 P.2d 1029 (Utah Ct. App. 1987).

Recklessness.

Reckless conduct using means or force likely to produce serious bodily injury constitutes aggravated assault under Subsection (1)(b); defendant's act of suddenly and without provocation throwing or swinging a glass from which he had been drinking, striking victim in face, was aggravated assault despite defendant's claim that he threw the glass in an attempt to break it against the side of a nearby cliff and was unaware victim was in the way. In re McElhaney, 579 P.2d 328 (Utah 1978).

Trial court did not err in finding that defendant acted recklessly in placing a rattlesnake on the shoulders of a two-year-old child. State v. Wessendorf, 777 P.2d 523 (Utah Ct. App.), cert. denied, 781 P.2d 878 (Utah 1989).

Self-defense.

In prosecution for assault with deadly weapon with intent to commit bodily harm, defendant was not required to establish his claim of self-defense by preponderance of evidence, but was entitled to acquittal if jury entertained reasonable doubt as to whether or not he acted in self-defense. State v. Talarico, 57 Utah 229, 193 P. 860 (1920).

In prosecution for assault with deadly weapon, with intent to commit bodily harm, refusal to give instruction on self-defense was not error prejudicial to substantial rights of defendant, where no evidence supported self-defense. State v. Talarico, 57 Utah 229, 193 P. 860 (1920).

Trial court properly refused jury instruction on self-defense tendered by defendant charged with assault with deadly weapon; since facts were such that reasonable men could not have concluded that defendant acted in self-defense, there was no substantial evidence to justify the instruction requested. State v. Castillo, 23 Utah 2d 70, 457 P.2d 618 (1969).

Where defendant was convicted of aggravated assault for firing shots at another man, the existence of contradictory testimony on the issue of self-defense, by itself, was not sufficient grounds for reversal. State v. Buel, 700 P.2d 701 (Utah 1985).

Serious bodily injury.

Defendant must have a specific intent to inflict serious bodily injury at the time of the confrontation, and the injuries must create a substantial serious permanent disfigurement, or a serious protracted loss or impairment of function of body members or organs, or a substantial risk of death, to establish an intentional causing of serious bodily injury. State ex

rel. Besendorfer, 568 P.2d 742 (Utah 1977).

Evidence was sufficient to establish that victim sustained serious bodily injury where he had been beaten so badly that he did not regain consciousness for 15 to 18 hours after assault, he had dried blood in his nose and throat, and attending doctor testified he was in a very dangerous state and very well could have died. State v. Poteet, 692 P.2d 760 (Utah 1984).

Threatening with dangerous weapon distinguished.

Aggravated assault committed by use of a deadly weapon (now "dangerous weapon") or such means or force likely to produce death or serious bodily injury is not the same crime proscribed by § 76-10-506, drawing or exhibiting any dangerous weapon in an angry and threatening manner, and a person convicted under this section is not entitled to receive the misdemeanor penalty provided by § 76-10-506. State v. Verdin, 595 P.2d 862 (Utah 1979).

Voluntary intoxication.

Trial judge, as trier of fact, having found that any inability of defendant to understand right and wrong and to adhere to right resulted from his voluntary intoxication, could properly find defendant guilty under this section, notwithstanding conflicting opinions by alienists on insanity. State v. Howell, 554 P.2d 1326 (Utah 1976).

A defendant's voluntary intoxication does not preclude his conviction for aggravated assault since criminal responsibility for that crime can be established through recklessness, and voluntary intoxication does not absolve a defendant of criminal responsibility for reckless acts. State v. Royball, 710 P.2d 168 (Utah 1985).

Cited in State v. Kirgan, 712 P.2d 240 (Utah 1985); State v. Miller, 718 P.2d 403 (Utah 1986); State v. Speer, 750 P.2d 186 (Utah 1988); State v. Cantu, 750 P.2d 591 (Utah 1988); State v. Griffiths, 752 P.2d 879 (Utah 1988); State v. Grueber, 776 P.2d 70 (Utah Ct. App. 1989); Utah Dep't of Cors. v. Despain, 824 P.2d 439 (Utah Ct. App. 1991); State v. Tinoco, 860 P.2d 988 (Utah Ct. App. 1993); State v. Streeter, 860 P.2d 988 (Utah Ct. App. 1993).

COLLATERAL REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d Assault and Battery § 48.

C.J.S. — 6A C.J.S. Assault and Battery § 72.

A.L.R. — Fact that gun was unloaded as affecting criminal responsibility, 68 A.L.R.4th 507.

Criminal assault or battery statutes making attack on elderly person a special or aggravated offense, 73 A.L.R.4th 1123.

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

Sufficiency of bodily injury to support charge of aggravated assault, 5 A.L.R.5th 243.

Kicking as aggravated assault, or assault with dangerous or deadly weapon, 19 A.L.R.5th 823.

Key Numbers. — Assault and Battery ⇐ 54.

76-5-103.5. Aggravated assault by prisoner.

(1) Any prisoner, not serving a sentence for a felony of the first degree, who commits aggravated assault is guilty of a felony of the second degree.

(2) Any prisoner serving a sentence for a felony of the first degree who commits aggravated assault is guilty of:

(a) a felony of the first degree if no serious bodily injury was caused; or

(b) a capital felony if serious bodily injury was intentionally caused.

History: C. 1953, 76-5-103.5, enacted by L. 1974, ch. 32, § 34.

NOTES TO DECISIONS

Evidence.

It was permissible for the state to introduce evidence of defendant's prior conviction to prove an element of the offense for which he was on trial, i.e., to show that he was in fact a "prisoner" at the time of the assault. State v. Lancaster, 765 P.2d 872 (Utah 1988).

76-5-104. Consensual altercation no defense to homicide or assault if dangerous weapon used.

In any prosecution for criminal homicide under Part 2 of this chapter or assault, it is no defense to the prosecution that the defendant was a party to any duel, mutual combat, or other consensual altercation if during the course of the duel, combat, or altercation any dangerous weapon as defined in Section 76-1-601 was used.

History: C. 1953, 76-5-104, enacted by L. 1973, ch. 196, § 76-5-104; 1989, ch. 170, § 3.

COLLATERAL REFERENCES

Am. Jur. 2d. — 6 Am. Jur. 2d Assault and Battery §§ 66, 68.

C.J.S. — 6A C.J.S. Assault and Battery § 85.

Key Numbers. — Assault and Battery ⚩ 65.

76-5-105. Mayhem.

[(1)] Every person who unlawfully and intentionally deprives a human being of a member of his body, or disables or renders it useless, or who cuts out or disables the tongue, puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem.

(2) Mayhem is a felony of the second degree.

History: C. 1953, 76-5-105, enacted by L. 1973, ch. 196, § 76-5-105.

Compiler's Notes. — The bracketed subsection designation "(1)" was added by the compiler.

NOTES TO DECISIONS

Instructions.

In prosecution for mayhem, arising from defendant's alleged biting off end of sister-in-law's nose, instructions on defendant's intoxication, flight, and intent were not erroneous. State v. Fairclough, 86 Utah 326, 44 P.2d 692 (1935).

COLLATERAL REFERENCES

Am. Jur. 2d. — 53 Am. Jur. 2d Mayhem and Related Offenses § 1.

C.J.S. — 56 C.J.S. Mayhem § 3.

Key Numbers. — Mayhem ⚩ 7.

76-5-106. Harassment.

(1) A person is guilty of harassment if, with intent to frighten or harass another, he communicates in writing a threat to commit any violent felony.

(2) Harassment is a class C misdemeanor.

History: C. 1953, 76-5-106, enacted by L. 1973, ch. 196, § 76-5-106.

COLLATERAL REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d Extortion, Blackmail, and Threats § 57 et seq.

C.J.S. — 86 C.J.S. Threats & Unlawful Communications § 1.

76-5-106.5. Definitions — Crime of stalking.

(1) As used in this section:

(a) "Course of conduct" means repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct or a combination thereof directed at or toward a person.

(b) "Immediate family" means a spouse, parent, child, sibling, or any other person who regularly resides in the household or who regularly resided in the household within the prior six months.

(c) "Repeatedly" means on two or more occasions.

(2) A person is guilty of stalking who:

(a) intentionally or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person:

(i) to fear bodily injury to himself or a member of his immediate family; or

(ii) to suffer emotional distress;

(b) has knowledge or should have knowledge that the specific person:

(i) will be placed in reasonable fear of bodily injury to himself or a member of his immediate family; or

(ii) will suffer emotional distress; and

(c) whose conduct:

(i) induces fear in the specific person of bodily injury to himself or a member of his immediate family; or

(ii) causes emotional distress in the specific person.

(3) Stalking is a class B misdemeanor.

(4) Stalking is a class A misdemeanor if the offender:

(a) has been previously convicted of an offense of stalking;

(b) has been convicted in another jurisdiction of an offense that is substantially similar to the offense of stalking; or

(c) has been previously convicted of any felony offense in Utah or of any crime in another jurisdiction which if committed in Utah would be a felony, in which the victim of the stalking was also a victim of the previous felony offense.

(5) Stalking is a felony of the third degree if the offender:

(a) has been previously convicted two or more times of the offense of stalking;

(b) has been convicted two or more times in another jurisdiction or jurisdictions of offenses that are substantially similar to the offense of stalking;

(c) has been convicted two or more times, in any combination, of offenses under Subsections (5)(a) and (b); or

(d) has been previously convicted two or more times of felony offenses in Utah or of crimes in another jurisdiction or jurisdictions which, if committed in Utah, would be felonies, in which the victim of the stalking was also a victim of the previous felony offenses.

History: C. 1953, 76-5-106.5, enacted by L. 1992, ch. 188, § 1; 1994, ch. 206, § 1.

Amendment Notes. — The 1994 amendment, effective May 2, 1994, rewrote Subsections (1) and (2) to such an extent that a detailed comparison is impracticable and added Subsections (4) and (5).

Effective Dates. — Laws 1992, ch. 188 became effective on April 27, 1992, pursuant to Utah Const., Art. VI, Sec. 25.

76-5-107. Threat against life or property — Penalty.

(1) A person commits a threat against life or property if he threatens to commit any offense involving violence with intent to:

(a) cause action of any nature by an official or volunteer agency organized to deal with emergencies;

(b) place a person in fear of imminent serious bodily injury; or

(c) prevent or interrupt the occupation of a building or room; place of assembly; place to which the public has access; or aircraft, automobile, or other form of transportation.

(2) A threat against life or property is a class B misdemeanor, except if the actor's intent is to prevent or interrupt the occupation of a building, a place to which the public has access, or a facility of public transportation operated by a common carrier, the offense is a third degree felony.

History: C. 1953, 76-5-107, enacted by L. 1973, ch. 196, § 76-5-107; 1988, ch. 38, § 1.

Cross-References. — Bus Passenger Safety Act, hijacking, bombing and other offenses, §§ 76-10-1501 to 76-10-1511.

COLLATERAL REFERENCES

Am. Jur. 2d. — 31A Am. Jur. 2d Extortion, Blackmail, and Threats § 57 et seq.

C.J.S. — 86 C.J.S. Threats & Unlawful Communications § 1.

A.L.R. — Validity and construction of terroristic threat statutes, 45 A.L.R.4th 949.

76-5-107.5. Prohibition of "hazing" — Definitions — Penalties.

(1) "Hazing" means any action or situation that, for the purpose of initiation, admission into, affiliation with, or as a condition for continued membership in any organization:

(a) recklessly or intentionally endangers the mental or physical health or safety of any person;

(b) willfully destroys or removes public or private property;

(c) involves any brutality of a physical nature such as whipping, beating, branding, forced calisthenics, or exposure to the elements;

(d) involves forced consumption of any food, liquor, drug, or other substance or any other forced physical activity that could adversely affect the physical health and safety of the individual;

(e) involves any activity that would subject the individual to extreme mental stress, such as sleep deprivation, forced exclusion from social contact, forced conduct that could result in extreme embarrassment, or any other forced activity that could adversely affect the mental health or dignity of the individual; or

(f) involves brutality toward or willful mistreatment of any animal.

(2) Under Subsection (1) any activity as described upon which the initiation, admission into, affiliation with, or continued membership in an organization is directly or indirectly conditioned is presumed to be "forced."

(3) An actor who recklessly, knowingly, or intentionally hazes another is guilty of a:

(a) class B misdemeanor if there are no aggravating circumstances;

(b) class A misdemeanor if the act of hazing involves the operation or other use of a motor vehicle;

(c) third degree felony if the act of hazing involves the use of a deadly or dangerous weapon;

(d) third degree felony if the hazing results in serious bodily injury to a person; or

(e) second degree felony if hazing under Subsection (d) involves the use of a deadly or dangerous weapon.

(4) A person who in good faith reports or participates in reporting of an alleged hazing is not subject to any civil or criminal liability regarding the reporting.

History: C. 1953, 76-5-107.5, enacted by L. 1989, ch. 59, § 1.

76-5-108. Protective orders restraining abuse of another — Violation.

Any person who has been restrained from abusing or contacting another or ordered to vacate a dwelling or remain away from the premises of the other's residence, employment, or other place as ordered by the court under a protective order or ex parte protective order issued under Title 30, Chapter 6, or Title 78, Chapter 3a, who violates that order after having been properly served with it, is guilty of a class A misdemeanor.

History: C. 1953, 76-5-108, enacted by L. 1979, ch. 111, § 10; 1984, ch. 12, § 1; 1991, ch. 75, § 4; 1993, ch. 137, § 12.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, substituted "or contacting another or ordered to vacate a dwelling or remain away from the premises of the other's residence, employment, or other place as ordered by the court under" for "another, or who has been ordered to vacate a dwelling by," inserted "or ex parte protective order," and made a minor stylistic change.

The 1993 amendment, effective May 3, 1993, substituted "class A misdemeanor" for "class B misdemeanor."

76-5-109. Child abuse.

(1) As used in this section:

(a) "Child" means a human being who is 17 years of age or less.

(b) "Physical injury" means an injury to or condition of a child which impairs the physical condition of the child, including:

(i) a bruise or other contusion of the skin;

(ii) a minor laceration or abrasion;

(iii) failure to thrive or malnutrition; or

(iv) any other condition which imperils the child's health or welfare and which is not a serious physical injury as defined in this section.

(c) "Serious physical injury" means any physical injury or set of injuries which seriously impairs the child's health, or which involves physical

torture or causes serious emotional harm to the child, or which involves a substantial risk of death to the child, including:

(i) fracture of any bone or bones;

(ii) intracranial bleeding, swelling or contusion of the brain, whether caused by blows, shaking, or causing the child's head to impact with an object or surface;

(iii) any burn, including burns inflicted by hot water, or those caused by placing a hot object upon the skin or body of the child;

(iv) any injury caused by use of a deadly or dangerous weapon;

(v) any combination of two or more physical injuries inflicted by the same person, either at the same time or on different occasions;

(vi) any damage to internal organs of the body;

(vii) any conduct toward a child which results in severe emotional harm, severe developmental delay or retardation, or severe impairment of the child's ability to function;

(viii) any injury which creates a permanent disfigurement or protracted loss or impairment of the function of a bodily member, limb, or organ;

(ix) any conduct which causes a child to cease breathing, even if resuscitation is successful following the conduct; or

(x) any conduct which results in starvation or failure to thrive or malnutrition that jeopardizes the child's life.

(2) Any person who inflicts upon a child serious physical injury or, having the care or custody of such child, causes or permits another to inflict serious physical injury upon a child is guilty of an offense as follows:

(a) if done intentionally or knowingly, the offense is a felony of the second degree;

(b) if done recklessly, the offense is a felony of the third degree;

(c) if done with criminal negligence, the offense is a class A misdemeanor.

(3) Any person who inflicts upon a child physical injury or, having the care or custody of such child, causes or permits another to inflict physical injury upon a child is guilty of an offense as follows:

(a) if done intentionally or knowingly, the offense is a class A misdemeanor;

(b) if done recklessly, the offense is a class B misdemeanor;

(c) if done with criminal negligence, the offense is a class C misdemeanor.

(4) Criminal actions under this section may be prosecuted in the county or district where the offense is alleged to have been committed, where the existence of the offense is discovered, where the victim resides, or where the defendant resides.

History: C. 1953, 76-5-109, enacted by L. 1981, ch. 64, § 1; 1992, ch. 192, § 1.

Amendment Notes. — The 1992 amendment, effective April 27, 1992, subdivided and rewrote Subsection (1)(b), substituting the present language for former similar provisions and transferring the rest to Subsection (1)(c); in Subsection (1)(c), designated the existing provisions as Subsection (1)(c)(viii), except for a reference to "substantial risk of death" now in the introductory language, and added the rest of the subsection; in Subsections (2) and (3), substituted "or" for "and" after "having the care"; and made stylistic changes.

Cross-References. — Child abuse and neglect prevention and treatment, § 62A-4a-301 et seq.

Reporting requirements, § 62A-4a-403.

NOTES TO DECISIONS

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Multiple injuries.
Cited.

Multiple injuries.

Multiple injuries that cumulatively result in impairment of a child's physical condition will sustain a second-degree felony conviction where the impairment is of the requisite magnitude and the perpetrator's conduct is knowing or intentional. State v. Jones, 735 P.2d 399 (Utah Ct. App. 1987).

Cited in State v. Magee, 837 P.2d 993 (Utah Ct. App. 1992).

COLLATERAL REFERENCES

Utah Law Review. — Utah Legislative Survey — 1981, 1982 Utah L. Rev. 125, 162.

The Utah Child Protection System: Analysis and Proposals for Change, 1983 Utah L. Rev. 1.

Uncharged Misconduct Evidence in Child Abuse Litigation, 1988 Utah L. Rev. 479.

Confronting Supreme Confusion: Balancing Defendants' Confrontation Clause Rights Against the Need to Protect Child Abuse Victims, 1993 Utah L. Rev. 407.

A.L.R. — Failure of state or local government to protect child abuse victim as violation of federal constitutional right, 79 A.L.R. Fed. 514.

76-5-110. Abuse or neglect of disabled child.

(1) As used in this section:

(a) "Abuse" means physical injury, as that term is defined in Subsection 76-5-109(1)(b), or unreasonable confinement.

(b) "Caretaker" means:

(i) any parent, legal guardian, or other person having under his care and custody a disabled child; or

(ii) any person, corporation, or public institution that has assumed by contract or court order the responsibility to provide food, shelter, clothing, medical, and other necessities to a disabled child.

(c) "Disabled child" means any person under 18 years of age who is impaired because of mental illness, mental deficiency, physical illness or disability, or other cause, to the extent that he is unable to care for his own personal safety or to provide necessities such as food, shelter, clothing, and medical care.

(d) "Neglect" means failure by a caretaker to provide care, nutrition, clothing, shelter, supervision, or medical care.

(2) Any caretaker who abuses or neglects a disabled child is guilty of a third degree felony. A parent or legal guardian who provides a child with treatment by spiritual means alone through prayer, in lieu of medical treatment, in accordance with the tenets and practices of an established church or religious denomination of which the caretaker is a member or adherent shall not for that reason alone be considered to be in violation under this section. However, this exception shall not preclude a court from ordering medical services from a physician licensed to engage in the practice of medicine to be provided to the child where there is substantial risk of harm to the child's health or welfare.

History: C. 1953, 76-5-110, enacted by L. 1988, ch. 39, § 1; 1993, ch. 299, § 1.

Amendment Notes. — The 1993 amendment, effective May 3, 1993, subdivided Subsection (1)(b), added Subsection (1)(b)(i), making related changes, and added the second and third sentences of Subsection (2).

Compiler's Notes. — The defined terms in this section were alphabetized by the compiler at the direction of the Office of Legislative Research and General Counsel.

PART 2
CRIMINAL HOMICIDE

76-5-201. Criminal homicide — Elements — Designations of offenses.

(1) (a) A person commits criminal homicide if he intentionally, knowingly, recklessly, with criminal negligence, or acting with a mental state otherwise specified in the statute defining the offense, causes the death of another human being, including an unborn child.

(b) There shall be no cause of action for criminal homicide for the death of an unborn child caused by an abortion.

(2) Criminal homicide is aggravated murder, murder, manslaughter, negligent homicide, or automobile homicide.

History: C. 1953, 76-5-201, enacted by L. 1973, ch. 196, § 76-5-201; 1983, ch. 90, § 3; 1983, ch. 95, § 1; 1991, ch. 10, § 7; 1991 (1st S.S.), ch. 2, § 1.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, substituted "aggravated murder, murder" for "murder in the first and second degree" in Subsection (2).

The 1991 (1st S.S.) amendment, effective April 29, 1991, subdivided Subsection (1) and in Subsection (1)(b) deleted "against a mother or a physician" after "criminal homicide" and "where the abortion was permitted by law and the required consent was lawfully given" from the end.

Cross-References. — Attempt, § 76-4-101.

Criminal conduct requirements, § 76-2-101.

Intentionally, knowingly, recklessly, and criminal negligence defined, § 76-2-103.

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Analysis

Corpus delicti.
Elements.
Evidence.
Issues, proof and variance.
Jury determination.
Mental state.
Self-defense.

Corpus delicti.

"Corpus delicti," as applied to homicide cases, was proved when the fact of death and the criminal agency of another person as the cause thereof were shown; proof of death due to hemorrhage caused by external violence to deceased's face and head was sufficient without determining what instruments were used. State v. Cobo, 90 Utah 89, 60 P.2d 952 (1936).

Elements.

In a case of homicide, if it appears that the elements of first degree murder are lacking and that there are no exceptions of manslaughter involved, then upon proof beyond a reasonable doubt that a criminal homicide was perpetrated, the verdict should be murder in the second degree. Farrow v. Smith, 541 P.2d 1107 (Utah 1975) (decided before 1991 substitution of aggravated murder and murder for first and second degree murder).

Evidence.

Proof of malice and intent could be shown by either direct or circumstantial evidence in accordance with general rules governing evidence in criminal cases; without shifting burden of proof from prosecution, they could be presumed from the fact of the killing in absence of explanatory facts and circumstances, or they could be inferred from attendant facts and circumstances. State v. Dewey, 41 Utah 538, 127 P. 275 (1912).

Malice and premeditation could not be presumed from use of gun when facts and circumstances to the contrary were shown, but facts and circumstances, by their very nature, could show premeditation, deliberation and malice aforethought; showing of either express or implied malice was sufficient proof of malice. State v. Masato Karumai, 101 Utah 592, 126 P.2d 1047 (1942).

Issues, proof and variance.

If no particular degree of homicide was charged, under plea of not guilty any degree could be proven; a charge included lesser degrees of the offense. State v. Spencer, 101 Utah 287, 121 P.2d 912 (1942).

Jury determination.

It was for jury to determine whether evidence

was sufficient to show that accused had formed specific design to kill deceased before he struck fatal blow, an element of first degree murder, as opposed to premeditated design to cause great bodily injury or to do an act likely to cause such injury, an element of second degree murder. State v. Russell, 106 Utah 116, 145 P.2d 1003 (1944).

Mental state.

Criminal homicide does not require a finding of criminal negligence if the act is done either knowingly, intentionally, or recklessly. State v. Wade, 572 P.2d 398 (Utah 1977).

Self-defense.

The absence of self-defense is not one of the prima facie elements of homicide needed to be proved beyond a reasonable doubt by the state. State v. Knoll, 712 P.2d 211 (Utah 1985).

COLLATERAL REFERENCES

Brigham Young Law Review. — For Everything There Is a Season: The Right to Die in the United States, 1982 B.Y.U. L. Rev. 545.

Journal of Contemporary Law. — Note, *State v. Fontana*: An Illusory Solution to Utah's Depraved Indifference Mens Rea Problem, 12 J. Contemp. L. 177 (1986).

Prosecuting Mothers of Drug-Exposed Babies: The State's Interest in Protecting the Rights of a Fetus Versus the Mother's Constitutional Rights to Due Process, Privacy and Equal Protection, 17 J. Contemp. L. 325 (1991).

Am. Jur. 2d. — 40 Am. Jur. 2d Homicide § 7.

C.J.S. — 40 C.J.S. Homicide §§ 29, 31.

A.L.R. — Insulting words as provocation of homicide or as reducing the degree thereof, 2 A.L.R.3d 1293.

Homicide by automobile as murder, 21 A.L.R.3d 116.

Mental or emotional condition as diminishing responsibility for crime, 22 A.L.R.3d 1228.

Criminal liability for death resulting from unlawfully furnishing intoxicating liquor or drugs to another, 32 A.L.R.3d 589.

Homicide based on killing of unborn child, 40 A.L.R.3d 444.

Application of felony-murder doctrine where the felony relied upon is an includible offense with the homicide, 40 A.L.R.3d 1341.

Homicide predicated on improper treatment of disease or injury, 45 A.L.R.3d 114.

What felonies are inherently or foreseeably dangerous to human life for purposes of felony-murder doctrine, 50 A.L.R.3d 397.

Criminal liability where act of killing is done by one resisting felony or other unlawful act committed by defendant, 56 A.L.R.3d 239.

Homicide by withholding food, clothing, or shelter, 61 A.L.R.3d 1207.

Corporation's criminal liability for homicide, 45 A.L.R.4th 1021.

Homicide: cremation of victim's body as violation of accused's rights, 70 A.L.R.4th 1091.

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

Validity and construction of "extreme indifference" murder statute, 7 A.L.R.5th 758.

Admissibility, in homicide prosecution, of evidence as to tests made to ascertain distance from gun to victim when gun was fired, 11 A.L.R.5th 497.

Admissibility of evidence in homicide case that victim was threatened by one other than defendant, 11 A.L.R.5th 831.

Key Numbers. — Homicide ⟹ 7 et seq.

76-5-202. Aggravated murder.

(1) Criminal homicide constitutes aggravated murder if the actor intentionally or knowingly causes the death of another under any of the following circumstances:

(a) the homicide was committed by a person who is confined in a jail or other correctional institution;

(b) the homicide was committed incident to one act, scheme, course of conduct, or criminal episode during which two or more persons are killed;

(c) the actor knowingly created a great risk of death to a person other than the victim and the actor;

(d) the homicide was committed while the actor was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit, aggravated robbery, robbery, rape, rape of a child, object rape, object rape of a child, forcible sodomy, sodomy upon a child,

sexual abuse of a child, child abuse of a child under the age of 14 years, as otherwise defined in Subsection 76-5-109(2)(a), or aggravated sexual assault, aggravated arson, arson, aggravated burglary, burglary, aggravated kidnapping, kidnapping, or child kidnapping;

(e) the homicide was committed for the purpose of avoiding or preventing an arrest of the defendant or another by a peace officer acting under color of legal authority or for the purpose of effecting the defendant's or another's escape from lawful custody;

(f) the homicide was committed for pecuniary or other personal gain;

(g) the defendant committed, or engaged or employed another person to commit the homicide pursuant to an agreement or contract for remuneration or the promise of remuneration for commission of the homicide;

(h) the actor was previously convicted of aggravated murder, murder, or of a felony involving the use or threat of violence to a person. For the purpose of this subsection an offense committed in another jurisdiction, which if committed in Utah would be punishable as aggravated murder or murder, is considered aggravated murder or murder;

(i) the homicide was committed for the purpose of:

(i) preventing a witness from testifying;

(ii) preventing a person from providing evidence or participating in any legal proceedings or official investigation;

(iii) retaliating against a person for testifying, providing evidence, or participating in any legal proceedings or official investigation; or

(iv) disrupting or hindering any lawful governmental function or enforcement of laws;

(j) the victim is or has been a local, state, or federal public official, or a candidate for public office, and the homicide is based on, is caused by, or is related to that official position, act, capacity, or candidacy;

(k) the victim is or has been a peace officer, law enforcement officer, executive officer, prosecuting officer, jailer, prison official, firefighter, judge or other court official, juror, probation officer, or parole officer, and the victim is either on duty or the homicide is based on, is caused by, or is related to that official position, and the actor knew, or reasonably should have known, that the victim holds or has held that official position;

(l) the homicide was committed by means of a destructive device, bomb, explosive, incendiary device, or similar device which the actor planted, hid, or concealed in any place, area, dwelling, building, or structure, or mailed or delivered, or caused to be planted, hidden, concealed, mailed, or delivered and the actor knew, or reasonably should have known, that his act or acts would create a great risk of death to human life;

(m) the homicide was committed during the act of unlawfully assuming control of any aircraft, train, or other public conveyance by use of threats or force with intent to obtain any valuable consideration for the release of the public conveyance or any passenger, crew member, or any other person aboard, or to direct the route or movement of the public conveyance or otherwise exert control over the public conveyance;

(n) the homicide was committed by means of the administration of a poison or of any lethal substance or of any substance administered in a lethal amount, dosage, or quantity;

(o) the victim was a person held or otherwise detained as a shield, hostage, or for ransom;

(p) the actor was under a sentence of life imprisonment or a sentence of death at the time of the commission of the homicide; or

(q) the homicide was committed in an especially heinous, atrocious, cruel, or exceptionally depraved manner, any of which must be demonstrated by physical torture, serious physical abuse, or serious bodily injury of the victim before death.

(2) Aggravated murder is a capital offense.

History: C. 1953, 76-5-202, enacted by L. 1973, ch. 196, § 76-5-202; 1975, ch. 53, § 1; 1977, ch. 83, § 1; 1983, ch. 88, § 12; 1983, ch. 93, § 1; 1984, ch. 18, § 5; 1985, ch. 16, § 1; 1991, ch. 10, § 8; 1994, ch. 149, § 1.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, substituted "aggravated murder" for "murder in the first degree" in the introductory paragraph of Subsection (1) and in Subsection (2), and substituted "aggravated murder, murder" for "first or second degree murder" several times in Subsection (1)(h) while making stylistic changes throughout that subsection.

The 1994 amendment, effective May 2, 1994, substituted "incendiary device" for "infernal machine" in Subsection (1)(l) and made stylistic changes.

Cross-References. — Appeal to Supreme Court where death sentence imposed, procedure, Rule 26, R. Crim. P.

Jury trial, rights of accused, Utah Const., Art. I, § 10; § 77-1-6.

Prosecution for capital felony commenced any time, § 76-1-301.

Voluntary intoxication not a defense, § 76-2-306.

NOTES TO DECISIONS

Compiler's Notes. — Before 1991, the offenses defined by this section and § 76-5-203 were called "murder in the first degree" and "murder in the second degree." Many of the notes below refer to those offenses under their former names.

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—Aggravated robbery.
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—Theft.
Murder for gain.
Notice of charge.
Other felony.
Prior conviction.
Sentencing.
Two or more persons killed.
Cited.

Constitutionality.

Utah's statutory sentencing scheme is constitutional because it has restricted capital homicides to intentional or knowing murders committed under eight aggravating circumstances which are elements of the crime of first degree murder, one or more of which must be proved beyond a reasonable doubt in the guilt phase of a capital case. Andrews v. Shulsen, 802 F.2d 1256 (10th Cir. 1986), cert. denied, 485 U.S. 919, 108 S. Ct. 1091, 99 L. Ed. 2d 253, rehearing denied, 485 U.S. 1015, 108 S. Ct. 1491, 99 L. Ed. 2d 718 (1988).

The Utah death penalty statute imposes no unconstitutional burden upon defendants in capital cases. Pierre v. Shulsen, 802 F.2d 1282 (10th Cir. 1986), cert. denied, 481 U.S. 1033, 107 S. Ct. 1964, 95 L. Ed. 2d 536, rehearing denied, 483 U.S. 1012, 107 S. Ct. 3246, 97 L. Ed. 2d 750 (1987).

Subsection (1)(h) does not violate the double jeopardy clause of the federal constitution. A person who commits a second intentional homicide is more culpable than one who has not repeated the act, and it is not unconstitutional

to make the second intentional homicide a capital offense. State v. Holland, 777 P.2d 1019 (Utah 1989).

Subsection (1)(h) distinguishes between persons with a history of violence and those without such a history; punishing murderers with a past history of violence more severely than other murderers is rationally related to the state's objectives of punishing criminals according to the seriousness of their acts and protecting its citizens from criminal violence. State v. James, 819 P.2d 781 (Utah 1991).

Aggravating circumstances.

This section allows as aggravating circumstances all felony convictions for violent crimes, whether committed in Utah or in another state. The purpose behind the aggravating circumstances requirement is to distinguish those murders which the legislature feels should be punished more severely than other murders. State v. James, 819 P.2d 781 (Utah 1991).

—Rape.

Evidence was sufficient to establish the existence of the aggravating circumstances of rape. See State v. Kelly, 718 P.2d 385 (Utah 1986).

Attempted murder.

The crime of attempted murder requires proof of intent to kill. Attempted murder does not fit within the felony-murder doctrine because an attempt to commit a crime requires proof of an intent to consummate the crime. Therefore, it follows that attempted felony-murder does not exist as a crime in Utah. State v. Bell, 785 P.2d 390 (Utah 1989).

In order to convict a defendant of attempted first degree murder, the state had the burden of proving beyond a reasonable doubt the following: (i) she had the intent to kill or knowledge that her acts would result in death if carried out; (ii) she engaged in conduct constituting a substantial step toward causing the death of her husband; and (iii) she did so either (a) by administering or attempting to administer a poison or lethal substance or a substance administered in a lethal amount, dosage, or quantity or (b) for pecuniary or other personal gain. State v. Johnson, 821 P.2d 1150 (Utah 1991).

When the charge is attempted first degree murder, which is distinguishable under Subsection (1) from attempted second degree murder only by the presence of specified objective aggravating circumstances, the legislature must have intended that the aggravating circumstance actually be present, so that a subjective mistake by the actor as to the presence of an aggravating circumstance required by this section would be a defense to a charge of attempted first degree murder. Under such circumstances, the actor can be convicted only of an attempted intentional killing — attempted second degree murder. State v. Johnson, 821 P.2d 1150 (Utah 1991).

Where the jury returned a general verdict of guilty on each count of attempted first degree murder, but no special verdicts were given that would indicate upon which aggravating circumstance the jury based the conviction, because the court could not determine whether the jury was unanimous on the elements of the offense based on Subsection (1)(f) alone, the insufficiency of the evidence to support the state's proof of the Subsection (1)(n) aggravating circumstance made it impossible for the court to affirm on the alternative pecuniary gain theory. State v. Johnson, 821 P.2d 1150 (Utah 1991).

Cause of death.

As long as there was life in a human being, extinguishment of it could be homicide, and where it could not be determined which of wounds received by decedent caused or contributed to his death, it became a question of fact for jury to determine. State v. BeBee, 113 Utah 398, 195 P.2d 746 (1948).

Corpus delicti.

The corpus delicti of murder has two components: (1) Proof that the victim is actually dead, and (2) proof that the death was caused by criminal means. The state must establish the corpus delicti by clear and convincing evidence. State v. Bishop, 753 P.2d 439 (Utah 1988).

Aggravating circumstances are not part of the corpus delicti of first-degree murder. State v. Bishop, 753 P.2d 439 (Utah 1988).

Double jeopardy.

Defendant convicted of first degree murder under Subsection (1)(b) of this section after he shot to death a man and a woman was not unconstitutionally put twice in jeopardy for the same offense by being tried and convicted on two counts, in one of which the man was the principal victim and the woman the "other," and in the second of which the woman was the principal victim and the man the other. State v. Standrod, 547 P.2d 215 (Utah 1976).

Defendant's trial in state court on two counts of murder after his conviction in federal court for violating the civil rights of the two murder victims did not violate the prohibition against double jeopardy. State v. Franklin, 735 P.2d 34 (Utah 1987).

Evidence.

—Hypnotically enhanced testimony.

Admission of witness's hypnotically enhanced testimony was harmful error, where, without such testimony, there was a reasonable likelihood that the outcome would have been more favorable for defendant, i.e., he might have been convicted of second degree murder or some other lesser included offense. State v.

Mitchell, 779 P.2d 1116 (Utah 1989).

Intent.

Defendant's possession of stolen wallet of deceased, along with evidence that defendant entered deceased's hotel room with loaded pistol, took deceased's wallet from his trousers, and shot and killed deceased upon deceased's emergence from bathroom, was sufficient to sustain inference that defendant had specific intent to commit robbery, and to sustain conviction of felony murder. State v. Boyland, 27 Utah 2d 268, 495 P.2d 315 (1972).

Evidence that defendant, fearing he would be arrested for recently committed robbery, drew and pointed pistol at deputy sheriff who had stopped in vicinity of defendant's disabled automobile, that defendant shot deputy sheriff five times when deputy attempted to seize the pistol, and thereafter escaped in the deputy's car, was sufficient to support conviction of first degree murder as against defendant's contention that he had no prior intention of killing the deputy and panicked when latter attempted to take defendant's pistol from him. State v. Weddle, 29 Utah 2d 464, 511 P.2d 733 (1973).

Defendant's confession that he killed victim for his money was sufficient to support finding that robbery was defendant's motive in killing victim. State v. Wood, 648 P.2d 71 (Utah), cert. denied, 459 U.S. 988, 103 S. Ct. 341, 74 L. Ed. 2d 383 (1982).

Evidence was insufficient to prove a specific intent to kill a peace officer in order to prevent or avoid arrest, and therefore did not support defendant's conviction for attempted first degree murder, where there were no witnesses who saw defendant's gun or saw defendant point the gun at the police officer, no witnesses saw a muzzle blast, no bullet was found near or around the spot where the officer was standing when he heard the gunshot despite fact that defendant was an expert shot, and there was no other evidence that the shot heard fired was fired at the police officer by the defendant. State v. Castonguay, 663 P.2d 1323 (Utah 1983).

The intent to commit murder need not be proven by evidence independent of a defendant's confession. State v. Bishop, 753 P.2d 439 (Utah 1988).

—Photographs.

Trial judge did not abuse his discretion in admitting photographs of murder victims, since the photographs were not particularly bloody or gruesome and were shown on a large piece of cardboard in an array that included nonobjectionable photos, thereby greatly minimizing the challenged photos' visual impact. State v. Valdez, 748 P.2d 1050 (Utah 1987).

—Sufficient.

Evidence was sufficient to convict. See State v. Shaffer, 725 P.2d 1301 (Utah 1986); State v. Valdez, 748 P.2d 1050 (Utah 1987); State v. Gardner, 789 P.2d 273 (Utah 1989), cert. denied, 459 U.S. 988, 110 S. Ct. 1837, 108 L. Ed. 2d 965 (1990).

Evidence supported the conclusion that the victim was murdered while defendant was engaged in assaulting the victim's wife, where the murder and assault were one continuous, interrelated occurrence and it appeared that the attack that led to the victim's death was in part undertaken to facilitate the assault on the victim's wife. State v. Johnson, 740 P.2d 1264 (Utah 1987).

Evidence supported jury's finding of murder committed for pecuniary or other personal gain and its finding that defendant employed another person to commit the homicide for remuneration. State v. Johnson, 774 P.2d 1141 (Utah 1989).

Great risk of death to another.

The act creating a great risk of death to a person other than the victim and the actor (Subsection (1)(c)) may be directed against a particular person and need not be directed against people generally. State v. Pierre, 572 P.2d 1338 (Utah 1977), cert. denied, 439 U.S. 882, 99 S. Ct. 219, 58 L. Ed. 2d 194 (1978).

Heinousness.

Subsection (1)(q) was inapplicable to the facts, where, although the victim was stabbed seven times and may have been conscious for three or four minutes after infliction of the first deep stab wound, the record contained no evidence that defendant intended to do or in fact did anything but kill his victim by stabbing her. State v. Tuttle, 780 P.2d 1203 (Utah 1989), cert. denied, 494 U.S. 1018, 110 S. Ct. 1323, 108 L. Ed. 2d 498 (1990).

Even though the facts of the case did not justify consideration of heinousness as an aggravating factor, the trial court could consider the nature and circumstances of the crime, including its brutality, as an aggravating factor at sentencing. State v. Menzies, 235 Utah Adv. Rep. 23 (Utah 1994).

Homicide by convict.

Where evidence warranted it, convict who killed victim in knife fight while in prison could be convicted of second degree murder notwithstanding Subsection (1)(a) of this section. State v. Gaxiola, 550 P.2d 1298 (Utah 1976).

Instructions.

—Aggravating circumstances.

Although the phrase "you are instructed to consider" amounted to an improper directed verdict on an aggravating circumstance, the subsequent imposition of the death penalty was supported by three other valid aggravating factors and the relative lack of mitigating fac-

tors, which indicated that the jury's verdict would have been the same without the invalid aggravator. State v. Archuleta, 850 P.2d 1232 (Utah 1993), cert. denied, U.S. , 114 S. Ct. 476, 126 L. Ed. 2d 427 (1993).

—Degrees of offense.

If evidence did not justify jury to find other than first degree murder, court need not have submitted question of second degree murder, and although it might have done so without committing error against the accused, it would have been highly improper. State v. Thorne, 41 Utah 414, 126 P. 286 (1912); State v. Mewhinney, 43 Utah 135, 134 P. 632 (1913).

Trial court should have charged jury with regard to all degrees of murder in every case where there was any direct or inferential evidence with respect to the different degrees of murder; this rule should have been followed where there was any doubt with regard to whether or not the higher degree was established. State v. Mewhinney, 43 Utah 135, 134 P. 632 (1913).

If defendant had wanted court to give instruction on first degree murder or nothing, taking his chance on outcome, his position would have merit only if evidence showed there could be no offense in between; however, where defense counsel did not request instruction on first degree murder or nothing, court did not err in giving instruction as to second degree murder. State v. Frayer, 17 Utah 2d 288, 409 P.2d 968 (1965), cert. denied, 385 U.S. 936, 87 S. Ct. 297, 17 L. Ed. 2d 216 (1966).

Where circumstances surrounding homicide were such that jury could have viewed facts as constituting crime of first degree murder, second degree murder, involuntary manslaughter or voluntary manslaughter, court had to comply with defendant's requests for instructions on lesser offenses. State v. Gillian, 23 Utah 2d 372, 463 P.2d 811 (1970).

Error in instruction to jury on elements of second degree murder was harmless where jury was instructed to consider second degree murder only after ascertaining that defendant was not guilty of first degree murder and jury found defendant guilty of first degree murder; jury was not duty bound to canvass the second degree instruction. State v. Murphy, 27 Utah 2d 98, 493 P.2d 617 (1972).

Instructions on first and second degree murder were not improper and prejudicial to one convicted of first degree murder; considered together, the instructions clearly specified the requisite distinctions between the two offenses, and accused did not except to the challenged instructions. State v. Valdez, 30 Utah 2d 54, 513 P.2d 422 (1973).

—Intent.

Defendant, on trial for first degree murder, set up claim that shooting was accidental and not intentional; failure to instruct that necessary element was intentional shooting was prejudicial and reversible error. State v. Thompson, 110 Utah 113, 170 P.2d 153 (1946).

This section requires only that defendant intentionally cause the death of the victim, not that defendant formulate the intent to kill the victim at the time each aggravating act was committed, and an instruction reflecting this statutory construction was properly submitted to the jury. State v. Archuleta, 850 P.2d 1232 (Utah 1993), cert. denied, U.S. , 114 S. Ct. 476, 126 L. Ed. 2d 427 (1993).

—Lesser included offense.

First degree murder embraced all elements and essentials of second degree, and consisted of additional elements; where defendant was charged with first degree murder, giving instructions on second degree murder was proper, and defendant could not contend that if he was guilty at all he was guilty of first degree murder. State v. Kukis, 65 Utah 362, 237 P. 476 (1925).

Failure to give defendant's requested instruction on second degree felony-murder was prejudicial error where, although the trial court instructed the jury on the charged offense of first degree murder — a knowing or intentional killing committed during the course of an aggravated arson — the jury was never given the choice of finding that defendant was not responsible for the fire, yet was still guilty of a felony during which an unintentional killing occurred, its only choice being to find that he was responsible for the fire that caused the death or to acquit him altogether. State v. Hansen, 734 P.2d 421 (Utah 1986).

Trial court properly refused a depraved indifference murder instruction, where the evidence established that defendant intentionally killed his victims, and the evidence was not ambiguous or susceptible to alternative interpretations with respect to defendant's intent. State v. Bishop, 753 P.2d 439 (Utah 1988).

—Self-defense.

Instructions in both criminal and civil cases had to be based upon competent, relevant evidence; matters and issues not supported by evidence could not be submitted to jury; on trial for first degree murder, theory that defendant had gun in question for purpose of self-protection, and that it was accidentally discharged, thus reducing his guilt to involuntary manslaughter, could not be submitted to jury where there was no evidence introduced to justify such an instruction. State v. Thompson, 110 Utah 113, 170 P.2d 153 (1946).

Conviction of murder in first degree for homicide growing out of forcible ejection of defendant from beer parlor by peace officer not in

uniform was proper against claim of self-defense where defendant shot two potentially fatal shots at deceased and instructions to jury on self-defense required both shots to be justified by defendant's fear of serious bodily harm. State v. BeBee, 113 Utah 398, 195 P.2d 746 (1948).

Intent.

There is no difference between the intent required as an element of the crime of attempted aggravated murder and that required for aggravated murder itself. State v. Maestas, 652 P.2d 903 (Utah 1982).

The intent required to commit attempted aggravated murder is the same intent as that required to commit the murder itself and may be inferred from defendant's conduct and the surrounding circumstances. State v. Collier, 736 P.2d 231 (Utah 1987).

Intoxication as a defense.

Evidence that defendant had been drinking did not provide a defense to a first degree murder charge alleging the murder was committed during a robbery; to establish voluntary intoxication as a defense to such charge, it was necessary to show defendant's mind had been affected to such an extent that he did not have the capacity to form the requisite specific intent or purpose, prior to the murder, to commit robbery. State v. Wood, 648 P.2d 71 (Utah), cert. denied, 459 U.S. 988, 103 S. Ct. 341, 74 L. Ed. 2d 383 (1982).

If voluntary intoxication is so great as to negate the existence of a necessary specific intent for aggravated murder, the crime is reduced to murder. State v. Wood, 648 P.2d 71 (Utah), cert. denied, 459 U.S. 988, 103 S. Ct. 341, 74 L. Ed. 2d 383 (1982).

Evidence supported defendant's conviction of attempted first degree murder notwithstanding stipulated evidence that his blood alcohol level was .203 after the event, where he was aware of his surroundings and was able to understand and answer questions, and he exhibited speed, dexterity, and strength in fleeing from the scene of the crime. State v. Johnson, 784 P.2d 1135 (Utah 1989).

Jury selection.

In first-degree murder trial where jury recommended life imprisonment, elimination of persons conscientiously opposed to death penalty from jury was not denial of due process and equal protection. Sinclair v. Turner, 447 F.2d 1158 (10th Cir. 1971), cert. denied, 405 U.S. 1048, 92 S. Ct. 1329, 31 L. Ed. 2d 590 (1972).

Killing to prevent testimony.

State is not required to prove that a victim, allegedly killed to prevent him from testifying against defendant in another homicide case, would have been a competent witness; such a requirement would emasculate the statute because it cannot be known whether a witness is competent until he is called to testify. State v. Brown, 607 P.2d 261 (Utah 1980).

Lesser included offense.

—Aggravated robbery.

Under the test for separateness found in § 76-1-402(3), aggravated robbery becomes a lesser included offense of first degree felony murder where the predicate felony for first degree murder is aggravated robbery. State v. Shaffer, 725 P.2d 1301 (Utah 1986).

—Depraved indifference murder.

Depraved indifference murder is a lesser included offense of first-degree murder. State v. Bishop, 753 P.2d 439 (Utah 1988).

—Theft.

Where the taking of personal property established the crime of theft and provided an element of aggravated robbery and, to the extent that aggravated robbery served as the aggravating circumstance, first degree murder, the statutory element of taking personal property is common to both theft and first degree murder, making theft a lesser included offense of first degree murder. State v. Shaffer, 725 P.2d 1301 (Utah 1986).

A conviction for theft did not merge with a conviction for first degree murder because evidence at the trial was sufficient to prove the crime of murder in the first degree without relying on the theft conviction as the aggravating circumstance required for the murder conviction. State v. Young, 853 P.2d 327 (Utah 1993).

Murder for gain.

Where the jury convicted the defendant of aggravated robbery as a separate offense, the appellate court could uphold the jury's verdict on first degree murder under the robbery alternative, without addressing the constitutional adequacy of the "other personal gain" alternative of this section. State v. Shaffer, 725 P.2d 1301 (Utah 1986).

Defendant's contention that he was prejudiced in the penalty phase, on the grounds that the vagueness of "other personal gain" results in an arbitrary and capricious imposition of the death penalty, in violation of the eighth and fourteenth amendments, was rejected since the defendant did not receive the death penalty. State v. Shaffer, 725 P.2d 1301 (Utah 1986).

In order to be convicted of first-degree murder under Subsection (1)(f) a defendant must intentionally or knowingly cause the death of another person with the intent to gain personally or pecuniarily. The fact that a defendant does not so gain is irrelevant; it is the intent and belief which controls. State v. Schreuder,

726 P.2d 1215 (Utah 1986).

Evidence indicating that defendant believed that she would inherit under her father's will and that she had him murdered to get that inheritance was sufficient to convict defendant of first degree murder, notwithstanding the fact that defendant misapprehended the terms of the will, which gave everything to the victim's widow. State v. Schreuder, 726 P.2d 1215 (Utah 1986).

Notice of charge.

The aggravating circumstances set forth in this section are adequate notice to one charged with a capital felony of what the state must prove so that the defendant is able to prepare his defense. Andrews v. Morris, 607 P.2d 816 (Utah), cert. denied, 449 U.S. 891, 101 S. Ct. 254, 66 L. Ed. 2d 120 (1980).

Other felony.

A defendant commits first-degree murder if the murder is committed knowingly or intentionally in conjunction with the commission of any one of several enumerated felonies, whether the felony is an integral part of, or merely incidental to, the murder. State v. Tillman, 750 P.2d 546 (Utah 1987), cert. denied, Tillman v. Cook, U.S. , 114 S. Ct. 706, 126 L. Ed. 2d 671 (1994).

Prior conviction.

Under Subsection (1)(h), the jury is not initially to be presented with mention or evidence of defendant's prior conviction. If the jury finds him guilty of an intentional and knowing killing, it may then be instructed on the prior conviction if the trial court determines that it qualifies under the subsection. The jury should then return to deliberate the existence or nonexistence of the prior conviction, which will, in turn, determine whether the homicide is first or second degree murder. State v. James, 767 P.2d 549 (Utah 1989).

Admission of two of defendant's prior convictions in the guilt phase of the trial was not unfairly prejudicial, where, after the aggravating circumstance required by Subsection (1)(h) was proven by entering into evidence copies of defendant's commitments to the Utah State Prison on robbery charges, no attempt was made to try defendant on the basis of his "bad character." State v. Gardner, 789 P.2d 273 (Utah 1989), cert. denied, 459 U.S. 988, 110 S. Ct. 1837, 108 L. Ed. 2d 965 (1990).

Trial court did not err in refusing to order the state to accept defendant's profferred stipulation regarding his prior convictions of assault, because the state had the burden to prove beyond a reasonable doubt that defendant had previously been convicted of "a felony involving the use or threat of violence to a person" under Subsection (1)(h). State v. Florez, 777 P.2d 452 (Utah 1989).

Admission of defendant's prior convictions pursuant to Subsection (1)(h) in the guilt phase of the trial was prejudicial error, where there was sufficient evidence to support his manslaughter theory and the jury was allowed to consider evidence of his prior convictions before determining his culpable mental state. State v. Florez, 777 P.2d 452 (Utah 1989).

Sentencing.

Where defendant was convicted of first degree murder and sentenced to death after the jury was instructed that there is no fixed standard as to the degree of persuasion needed for a particular sentence, and the Utah Supreme Court subsequently established a new rule, while the defendant's appeal was pending, imposing a "reasonable doubt" standard for a penalty hearing in a capital case, the defendant was entitled to the benefit of the new rule and was granted a new sentencing hearing. State v. Norton, 675 P.2d 577 (Utah 1983), cert. denied, 466 U.S. 942, 104 S. Ct. 1923, 80 L. Ed. 2d 470 (1984).

The Legislature has defined and proscribed a single offense in this section, the intentional or knowing killing of an individual in connection with one or more aggravating circumstances. There is no evidence that the Legislature intended to expose defendants to multiple punishments. Therefore, a single punishment was envisioned for a violation of the statute. State v. Tillman, 750 P.2d 546 (Utah 1987), cert. denied, Tillman v. Cook, U.S. , 114 S. Ct. 706, 126 L. Ed. 2d 671 (1994).

A case-by-case (comparative) proportionality review was not required in regard to defendant's contention that his sentence of death was disproportionate to the crime committed, the immunity granted his accomplice, and the sentences meted out in other first-degree murder cases. State v. Tillman, 750 P.2d 546 (Utah 1987), cert. denied, Tillman v. Cook, U.S. , 114 S. Ct. 706, 126 L. Ed. 2d 671 (1994).

Where defendant was convicted of first-degree murder, and the jury was instructed disjunctively as to the alternative evaluating circumstances aggravating the offense, jury unanimity on the evaluating circumstances was not required, the record having shown substantial evidence to support all of the alternatives set forth in the instructions. State v. Tillman, 750 P.2d 546 (Utah 1987), cert. denied, Tillman v. Cook, U.S. , 114 S. Ct. 706, 126 L. Ed. 2d 671 (1994).

The sentencing body may not rely on other violent criminal activity as an aggravating factor supporting a death penalty unless it is first convinced beyond a reasonable doubt that the accused did commit the other crime. State v. Lafferty, 749 P.2d 1239 (Utah 1988), aff'd on reconsideration, 776 P.2d 631 (Utah 1989), habeas corpus granted and judgment vacated,

Lafferty v. Cook, 949 F.2d 1546 (10th Cir. 1991), cert. denied, U.S. , 112 S. Ct. 1942, 118 L. Ed. 2d 548 (1992).

The state not only has the burden of persuading the sentencer beyond a reasonable doubt that the totality of the aggravating circumstances outweighs the totality of the mitigating circumstances, but also has the burden of proving to the sentencer beyond a reasonable doubt that the defendant actually committed the violent crime which is to be treated as an aggravating factor. State v. Lafferty, 749 P.2d 1239 (Utah 1988), aff'd on reconsideration, 776 P.2d 631 (Utah 1989), habeas corpus granted and judgment vacated, Lafferty v. Cook, 949 F.2d 1546 (10th Cir. 1991), cert. denied, U.S. , 112 S. Ct. 1942, 118 L. Ed. 2d 548 (1992).

Erroneous instruction on Subsection (1)(q) necessitated remand for new sentencing, because the failure to instruct the jury properly during the guilt phase permitted them to find the existence of the Subsection (1)(q) aggravating circumstance and then to consider that erroneous finding when determining the penalty. State v. Carter, 776 P.2d 886 (Utah 1989).

In the penalty phase, the sentencer may consider any relevant facts in aggravation or mitigation of the penalty; inclusion of a particular aggravating factor in this section is not a prerequisite for consideration by the sentencing body. Parsons v. Barnes, 871 P.2d 516 (Utah 1994).

In sentencing defendant for first degree murder, including both the robbery-murder factor and the pecuniary-gain factor on the special verdict form unfairly divided a single act of the defendant, aggravated robbery, into two aggravating factors; jury instructions or special verdict forms which contain either of the two murder-robbery factors in Subsection (1)(d) should not contain the pecuniary-gain factor as well. Parsons v. Barnes, 871 P.2d 516 (Utah 1994).

Even though defendant's death sentence under Subsection (1)(q) in an earlier trial was reversed due to faulty jury instructions, it was not error for the trial court to permit the jury to consider the allegedly heinous nature of the murder in a second sentencing proceeding. State v. Carter, 233 Utah Adv. Rep. 18 (Utah 1994).

Two or more persons killed.

The definition of "criminal episode" in Subsection (1)(b) does not require that the criminal objective be murder. State v. Alvarez, 872 P.2d 450 (Utah 1994).

There is no requirement that a defendant kill the "two or more" persons referred to in Subsection (1)(b) or that a defendant kill one person and be a party to the murder of the others. The killings must occur during one act, scheme, course of conduct, or criminal episode, but the defendant need only be responsible for one of them. State v. Alvarez, 872 P.2d 450 (Utah 1994).

Cited in State v. Jones, 734 P.2d 473 (Utah 1987); State v. Parsons, 781 P.2d 1275 (Utah 1989); State v. Taylor, 818 P.2d 1030 (Utah 1991); Tillman v. Cook, 855 P.2d 211 (Utah 1993).

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — Judicial Decisions — Criminal Law, 1988 Utah L. Rev. 177.

Note, Enhancing Penalties by Admitting "Bad Character" Evidence During the Guilt Phase of Criminal Trials — *State v. Bishop*, 1989 Utah L. Rev. 1013.

Note, *State v. Johnson* and Multiple Factual Theories: A Practitioner's Guide to Interpreting Utah's "Patchwork Verdict" Rules, 1993 Utah L. Rev. 907.

Journal of Contemporary Law. — Note, *State v. Fontana:* An Illusory Solution to Utah's Depraved Indifference Mens Rea Problem, 12 J. Contemp. L. 177 (1986).

Am. Jur. 2d. — 40 Am. Jur. 2d Homicide § 45.

C.J.S. — 40 C.J.S. Homicide § 42.

A.L.R. — Criminal liability where act of killing is done by one resisting felony or other unlawful act committed by defendant, 56 A.L.R.3d 239.

What constitutes termination of felony for purpose of felony-murder rule, 58 A.L.R.3d 851.

Homicide: physician's withdrawal of life supports from comatose patient, 47 A.L.R.4th 18.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed to avoid arrest or prosecution, to effect escape from custody, to hinder governmental function or enforcement of law, and the like — post-*Gregg* cases, 64 A.L.R.4th 755.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that in committing murder, defendant created risk of death or injury to more than one person, to many persons, and the like — post-*Gregg* cases, 64 A.L.R.4th 837.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant was previously convicted of or committed other violent offense, had history of violent conduct, posed continuing threat to society, and the like — post-*Gregg* cases, 65 A.L.R.4th 838.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that murder was committed for pecuniary gain, as consideration or in expectation of receiving something of monetary value, and the like — post-*Gregg* cases, 66 A.L.R.4th 417.

Sufficiency of evidence, for death penalty purposes, to establish statutory aggravating circumstance that murder was committed in course of committing, attempting, or fleeing from other offense, and the like — post-*Gregg* cases, 67 A.L.R.4th 887.

Sufficiency of evidence, for purposes of death penalty, to establish statutory aggravating circumstance that defendant committed murder while under sentence of imprisonment, in confinement or correctional custody, and the like — post-*Gregg* cases, 67 A.L.R.4th 942.

Application of felony-murder doctrine where person killed was co-felon, 89 A.L.R.4th 683.

76-5-203. Murder.

(1) Criminal homicide constitutes murder if the actor:

(a) intentionally or knowingly causes the death of another;

(b) intending to cause serious bodily injury to another commits an act clearly dangerous to human life that causes the death of another;

(c) acting under circumstances evidencing a depraved indifference to human life engages in conduct which creates a grave risk of death to another and thereby causes the death of another;

(d) while in the commission, attempted commission, or immediate flight from the commission or attempted commission of aggravated robbery, robbery, rape, object rape, forcible sodomy, or aggravated sexual assault, aggravated arson, arson, aggravated burglary, burglary, aggravated kidnapping, kidnapping, child kidnapping, rape of a child, object rape of a child, sodomy upon a child, forcible sexual abuse, sexual abuse of a child, aggravated sexual abuse of a child, or child abuse, as defined in Subsection 76-5-109(2)(a), when the victim is younger than 14 years of age, causes the death of another person other than a party as defined in Section 76-2-202; or

(e) causes the death of a peace officer while in the commission or attempted commission of:

(i) an assault against a peace officer as defined in Section 76-5-102.4; or

(ii) interference with a peace officer while making a lawful arrest as defined in Section 76-8-305 if the actor uses force against a peace officer.

(2) Murder is a first degree felony.

History: C. 1953, 76-5-203, enacted by L. 1973, ch. 196, § 76-5-203; 1975, ch. 53, § 2; 1977, ch. 83, § 2; 1979, ch. 74, § 1; 1986, ch. 157, § 1; 1990, ch. 227, § 1; 1991, ch. 10, § 9.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, deleted "in the second degree" following "murder" in the introductory language of Subsection (1) and substituted the present language of Subsection (2) for "Murder in the second degree is a felony of the first degree."

NOTES TO DECISIONS

Compiler's Notes. — Before 1991, the offenses defined by § 76-5-202 and this section were called "murder in the first degree" and "murder in the second degree." Many of the notes below refer to those offenses under their former names.

ANALYSIS

Attempt.
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Depraved indifference.
—Elements.
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When offense should be charged.
Cited.

Attempt.

The crime of attempted murder requires proof of intent to kill. Attempted murder does not fit within the felony-murder doctrine because an attempt to commit a crime requires proof of an intent to consummate the crime. Therefore, it follows that attempted felony-murder does not exist as a crime in Utah. State v. Bell, 785 P.2d 390 (Utah 1989).

A defendant may not be prosecuted for attempted second degree murder under the depraved indifference alternative of Subsection (1)(c) of this section; Utah does not recognize attempted depraved indifference homicide. State v. Vigil, 842 P.2d 843 (Utah 1992); State v. Haston, 846 P.2d 1276 (Utah 1993).

Proof of the "knowing" mental state required for depraved indifference homicide under Subsection (1)(c) of this section is not sufficient to satisfy the mental state required by the attempt statute, § 76-4-101. State v. Vigil, 842 P.2d 843 (Utah 1992).

Burden of proof.

—Intent.

Because intent is an element of the offense under this section, the state must carry the burden of proving the defendant's intent. This intent need not be proved by direct evidence, but may be inferred from the defendant's conduct and surrounding circumstances. State v. Lopez, 789 P.2d 39 (Utah Ct. App. 1990).

Circumstantial evidence.

Circumstantial evidence alone may be sufficient to establish defendant's guilt of murder in the second degree. State v. Clayton, 646 P.2d 723 (Utah 1982).

Circumstantial, as well as direct, evidence that placed defendants as participants at the scene at the time of the killing and placed the murder weapons in their possession was sufficient to sustain a guilty verdict. State v. Stewart, 729 P.2d 610 (Utah 1986).

Depraved indifference.

In a prosecution for second degree murder, although the court's jury instruction did not expressly treat the element of knowledge, there was no error since the other jury instructions and the evidence of the defendant's actions left little room for the jury to misunderstand that the defendant must have been aware that his conduct created a grave risk of death to another, within the definitions contained in the instructions. State v. Fontana, 680 P.2d 1042 (Utah 1984).

Although the defendant pulled a cord around the victim's neck during intercourse, the evidence was insufficient to support a finding that the defendant "evidenced a depraved indifference to human life" in the conduct which caused the victim's death, but it was sufficient to support a conviction for the included offense of manslaughter. State v. Bolsinger, 699 P.2d 1214 (Utah 1985).

Depraved indifference murder is a lesser included offense of first-degree murder. State v. Bishop, 753 P.2d 439 (Utah 1988).

Trial court properly refused a depraved indifference murder instruction, where the evidence established that defendant intentionally killed his victims, and the evidence was not ambiguous or susceptible to alternative interpretations with respect to defendant's intent. State v. Bishop, 753 P.2d 439 (Utah 1988).

—Elements.

The jury should be instructed that to convict of depraved indifference murder it must find (1) that the defendant acted knowingly (2) in creating a grave risk of death, (3) that the defendant knew the risk of death was grave, (4) which means a highly likely probability of death, and (5) that the conduct evidenced an utter callousness and indifference toward human life. State v. Standiford, 769 P.2d 254 (Utah 1988).

A jury instruction defining "depraved indifference" that was similar to the instruction disapproved in State v. Standiford, 769 P.2d 254 (1988), and which did not set out the five elements required to convict of depraved indifference murder as enumerated in *Standiford* fell short of the standard established in that case, but defendant had not objected to the instruction nor submitted a different instruction and there was no manifest injustice or plain error. State v. Powell, 872 P.2d 1027 (Utah 1994).

—Standard.

The term "depraved indifference to human life" does not refer to the mens rea, or subjective culpable mental state, of depraved murder, but rather to an objective reasonable person standard as to the value of human life. Thus, the

element of depraved indifference must be based on an objective evaluation of the magnitude of the risk created and of all the circumstances surrounding the killing. State v. Standiford, 769 P.2d 254 (Utah 1988).

Evidence.

In prosecution for murder, evidence that defendant was among strikers and was shooting toward train carrying workers to mine sustained his conviction for second degree murder. State v. Kukis, 65 Utah 362, 237 P. 476 (1925).

That defendant's "heat of passion" was sustained for two and one-half hours, that cause of death by strangulation contradicted defendant's testimony that his wife was alive when he departed to call an ambulance, that magnitude of wife's injuries seriously undermined defendant's account of alleged altercation, and that basis for alleged provocation appeared insufficient to render an ordinary man of average disposition liable to act irrationally and without due deliberation and reflection constituted substantial evidence from which jury could reasonably infer a purpose and design on defendant's part to take unlawfully the life of his wife, and sustain conviction of murder in second degree as opposed to manslaughter. State v. Ross, 28 Utah 2d 279, 501 P.2d 632 (1972).

Evidence that defendant met with victim on the street on the evening she disappeared, that he left the state to visit his sister the day following victim's disappearance, that he made statements describing a strange dream he had in which he may have hurt or killed a girl, and statement made two years after the disappearance that he once had a fight with a girl in Utah was insufficient to establish beyond a reasonable doubt that he caused the victim's death, and even if it proved he caused her death, it was insufficient to establish that he did so intentionally or knowingly as charged in the complaint for second degree murder. State v. Petree, 659 P.2d 443 (Utah 1983).

Defendant's threatening statements and conduct immediately before the fight, kicking the victim in the head, and entering into the fight with knife in hand are facts sufficient to support a finding that defendant either intended to kill the victim or intended to cause "serious bodily injury" while acting in a manner clearly dangerous to human life, or that defendant knowingly participated in conduct which created a grave risk of death, while evidencing a depraved indifference to human life. State v. Frame, 723 P.2d 401 (Utah 1986).

Evidence was sufficient to support defendant's second-degree murder convictions, where he was heard telling his neighbors "If I don't start getting some answers, I am going to start blowing everybody away" just prior to shooting two of them with a gun which required a hammer-cock before it could be fired. State v. Russell, 733 P.2d 162 (Utah 1987).

Evidence that a child was fatally injured while under the defendant's sole care and custody was sufficient to support the inference that the defendant, in inflicting the injury, acted with the requisite mental state described in this section. State v. DeMille, 756 P.2d 81 (Utah 1988).

In order to convict defendant of attempted murder under this statute, the state must have adduced evidence that would have allowed the jury to find beyond a reasonable doubt that defendant intentionally or knowingly attempted to cause victim's death. State v. Dumas, 721 P.2d 498 (Utah 1986).

Evidence, including expert testimony, that the victim was "brain dead," was sufficient to prove beyond a reasonable doubt that the injuries to the victim's head, not removal of hospital life support systems, were the proximate cause of the victim's death. State v. Velarde, 734 P.2d 449 (Utah 1986).

Even if life support systems had been removed prematurely from the victim, who was deemed "brain dead" under accepted medical standards, defendant would still be responsible for the victim's death since intervening medical error is not a defense to a defendant who has inflicted a mortal wound upon another. State v. Velarde, 734 P.2d 449 (Utah 1986).

Erroneous admission of six-minute portion of videotape that lingered on victim's body and wounds did not necessitate reversal of defendant's conviction, because defendant, by failing to object to the admission of gruesome still photographs, undermined his claim that the improper introduction of the videotape was harmful error. State v. Dibello, 780 P.2d 1221 (1989).

There was sufficient evidence to sustain defendant's conviction, where defendant, along with three other men, entered the victim's trailer and defendant remained inside, preventing the victim's roommate from assisting the victim, while the other men forced the victim outside and beat him to death. State v. Cayer, 814 P.2d 604 (Utah Ct. App. 1991).

Felony murder.

The Legislature did not intend the multiple crimes comprising felony murder to be punished as a single crime, but rather that the homicide be enhanced to felony murder in addition to the underlying felony. Allowing punishment for both felony murder and the underlying felony does not violate the double jeopardy principles of the fifth amendment to the United States Constitution, Article I, Sec. 12 of the Utah State Constitution, nor § 76-1-402(3). State v. McCovey, 803 P.2d 1234 (Utah 1990).

Gravamen of offense.

The gravamen of the offense of murder in the second degree is the intentional killing of a human being without the exceptions set out under the manslaughter statute. Farrow v. Smith, 541 P.2d 1107 (Utah 1975).

Included offenses.

Attempted manslaughter is an included offense under a charge of attempted criminal homicide. State v. Norman, 580 P.2d 237 (Utah 1978).

Manslaughter is a lesser included offense of second degree murder. State v. Day, 815 P.2d 1345 (Utah Ct. App. 1991).

Instructions.

"Depraved indifference to human life" are nontechnical words whose understanding by jurors is presumed, and failure by court to give an instruction on such words, when not requested, is not error. State v. Day, 572 P.2d 703 (Utah 1977).

In second degree murder case against defendant based upon circumstantial evidence, jury instruction that adequately conveyed the concept of care or caution in the consideration of circumstantial evidence was not defective although it did not contain the precise wording that circumstantial evidence should be treated with "caution." State v. Clayton, 646 P.2d 723 (Utah 1982).

In case of second degree murder conviction arising from death resulting from arson, it was proper for court to deny defendant's request for jury instruction involving hypothetical scenario where intervening force breaks chain of causation, since instruction was not sufficiently relevant to situation where victim may have gone back into burning building to retrieve belongings. State v. Dronzank, 671 P.2d 199 (Utah 1983).

Failure to give defendant's requested instruction on second degree felony-murder was prejudicial error where, although the trial court instructed the jury on the charged offense of first degree murder — a knowing or intentional killing committed during the course of an aggravated arson — the jury was never given the choice of finding that defendant was not responsible for the fire, yet was still guilty of a felony during which an unintentional killing occurred, its only choice being to find that he was responsible for the fire that caused the death or to acquit him altogether. State v. Hansen, 734 P.2d 421 (Utah 1986).

Defendant, who was convicted of second-degree murder after the jury was instructed on the alternative theories set out in Subsections (1)(a), (1)(b), and (1)(c), was not deprived of his right to a unanimous jury verdict under Utah Const., Art. I, Sec. 10, when the trial court refused to give his requested instruction that the jury had to agree unanimously upon one of the three theories as the basis for its verdict. State v. Russell, 733 P.2d 162 (Utah 1987).

—Lesser included offense.

Trial court properly refused to instruct the jury on the offense of aggravated assault at defendant's trial for second-degree murder, as the evidence would not support both an acquittal on the murder charge and a conviction on the aggravated assault charge. State v. Velarde, 734 P.2d 440 (Utah 1986).

Refusal to give defendant's requested instruction on aggravated assault at his trial for second-degree murder was reversible error, because the jury needed to determine whether the defendant lacked the intent to cause death or serious bodily injury, which would permit an acquittal on the murder charge while allowing a conviction on the aggravated assault charge. State v. Velarde, 734 P.2d 449 (Utah 1986).

Trial judge did not err in refusing to instruct the jury on negligent homicide at defendant's trial for second-degree murder, where the evidence showing his participation in a fatal beating was not ambiguous or susceptible to alternative interpretations that would have made it possible for the jury to acquit him of second-degree murder and convict him of negligent homicide. State v. Velarde, 734 P.2d 449 (Utah 1986).

Intent inferable.

Defendant's belligerent behavior, his use of vulgar, abusive, and threatening language to arresting officer, his destruction of police radio while in patrolman's automobile, his threatened harm to officer's wife and daughter, and threat to kill the officer provided sufficient evidence from which jury could conclude that defendant's act in beating to death defendant's cellmate shortly after defendant's arrest were committed either with intent to kill the victim or with intent to do such great bodily harm to the victim that death was likely to result and justified a verdict of second degree murder. State v. Bennett, 30 Utah 2d 343, 517 P.2d 1029 (1973), cert. denied, 416 U.S. 992, 94 S. Ct. 2403, 40 L. Ed. 2d 771 (1974).

Although ordinarily an assault with hands or feet does not imply an intent to kill, this is not an absolute rule, and when such an assault causes death and is attended by circumstances of violence, excessive force or brutality, malice may be inferred, in which case the evidence may support a conviction under this section. State v. Wardle, 564 P.2d 764 (Utah 1976).

Where defendant was convicted of second-degree murder for the death of a 14-month-old child, it was not necessary to prove directly that defendant had an intent to kill, but rather it was only necessary to prove that he intentionally struck the child in such a way that the

natural result would be the child's death. State v. Watts, 675 P.2d 566 (Utah 1983).

Intentionally or knowingly causing death.
Evidence that defendant stabbed victim three times and then raped victim's female companion instead of aiding the dying victim was sufficient to establish that defendant intentionally or knowingly caused the victim's death. State v. Gibson, 565 P.2d 783 (Utah 1977).

Intent to cause serious bodily injury.
Brutality of murder of convict who was stabbed ten times by four weapons was not inconsistent with finding that defendant intended only to cause serious bodily injury so as to be guilty of second degree, rather than first degree, murder where there was no evidence to indicate defendant used more than one knife. State v. Gaxiola, 550 P.2d 1298 (Utah 1976).

Jury unanimity.
A jury does not have to be unanimous in deciding which of the culpable mental states it finds in convicting of second-degree murder, as long as the jurors find unanimously that one or another form of second-degree murder was committed. State v. Russell, 733 P.2d 162 (Utah 1987); State v. Standiford, 769 P.2d 254 (Utah 1988); State v. Goddard, 871 P.2d 540 (Utah 1994); State v. Powell, 872 P.2d 1027 (Utah 1994).

Killing in perpetration of felony.
Where act of sodomy was committed with deceased's neck so bound that it prevented a return flow of blood from his head, trial court did not err in giving jury instruction on felony murder in second degree; death resulted from felony greatly dangerous to lives of others and evidencing depraved mind without regard for human life, which would have constituted murder at common law. State v. Schad, 24 Utah 2d 255, 470 P.2d 246 (1970).

"Malice aforethought" rejected.
The culpable mental states included in the second-degree murder statute are (1) an intent to kill, (2) an intent to inflict serious bodily harm, (3) conduct knowingly engaged in and evidencing a depraved indifference to human life, and (4) intent to commit a felony other than murder. The term "malice aforethought" is a confusing carry-over from prior law and should no longer be used. State v. Standiford, 769 P.2d 254 (Utah 1988).

Trial court properly refused to give defendant's requested "malice aforethought" instruction. State v. Padilla, 776 P.2d 1329 (Utah 1989).

Party to felony.
In the phrase "another person other than a party" in Subsection (1)(d), "party" means a co-participant in the felony that is the subject of the subsection, and does not mean a victim of the felony. State v. Hansen, 734 P.2d 421 (Utah 1986).

Reckless conduct.
Reckless conduct is not sufficient to prove the offense of murder in the second degree. State v. Bindrup, 655 P.2d 674 (Utah 1982).

When offense should be charged.
If it appears that the elements of first degree murder are lacking and that there are no exceptions of manslaughter involved, then upon proof beyond a reasonable doubt that a criminal homicide was perpetrated, the verdict should be murder in the second degree. Farrow v. Smith, 541 P.2d 1107 (Utah 1975).

Cited in State v. Bishop, 717 P.2d 261 (Utah 1986); State v. Loe, 732 P.2d 115 (Utah 1987); State v. Jones, 734 P.2d 473 (Utah 1987); State v. Underwood, 737 P.2d 995 (Utah 1987); State v. Aase, 762 P.2d 1113 (Utah Ct. App. 1988); State v. Tuttle, 780 P.2d 1203 (1989); Lancaster v. Cook, 780 P.2d 1246 (1989); State v. Gotschall, 782 P.2d 459 (Utah 1989); State v. Pascual, 804 P.2d 553 (Utah Ct. App. 1991); State v. Perdue, 813 P.2d 1201 (Utah Ct. App. 1991); State v. Sherard, 818 P.2d 554 (Utah Ct. App. 1991); Andrews v. Deland, 943 F.2d 1162 (10th Cir. 1991); Stewart v. State, 830 P.2d 306 (Utah Ct. App. 1992); State v. Allen, 839 P.2d 291 (Utah 1992); State v. Gardner, 844 P.2d 293 (Utah 1992); State v. Dunn, 850 P.2d 1201 (Utah 1993); State v. Germonto, 868 P.2d 50 (Utah 1993); State v. Labrum, 246 Utah Adv. Rep. 11 (Utah Ct. App. 1994).

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Am. Jur. 2d. — 40 Am. Jur. 2d Homicide § 53.

C.J.S. — 40 C.J.S. Homicide § 29 et seq.

A.L.R. — Homicide: physician's withdrawal of life supports from comatose patient, 47 A.L.R.4th 18.

Application of felony-murder doctrine where person killed was co-felon, 89 A.L.R.4th 683.

76-5-204. Death of other than intended victim no defense.

In any prosecution for criminal homicide, evidence that the actor caused the death of a person other than the intended victim shall not constitute a defense for any purpose to criminal homicide.

History: C. 1953, 76-5-204, enacted by L. 1973, ch. 196, § 76-5-204.

COLLATERAL REFERENCES

C.J.S. — 40 C.J.S. Homicide § 39.
Key Numbers. — Homicide ⇐ 17.

76-5-205. Manslaughter.

(1) Criminal homicide constitutes manslaughter if the actor:

(a) recklessly causes the death of another; or

(b) causes the death of another under the influence of extreme emotional disturbance for which there is a reasonable explanation or excuse; or

(c) causes the death of another under circumstances where the actor reasonably believes the circumstances provide a legal justification or excuse for his conduct although the conduct is not legally justifiable or excusable under the existing circumstances.

(2) Under Subsection (1)(b), emotional disturbance does not include a condition resulting from mental illness as defined in Section 76-2-305.

(3) The reasonableness of an explanation or excuse under Subsection (1)(b), or the reasonable belief of the actor under Subsection (1)(c), shall be determined from the viewpoint of a reasonable person under the then existing circumstances.

(4) Manslaughter is a felony of the second degree.

History: C. 1953, 76-5-205, enacted by L. 1973, ch. 196, § 76-5-205; 1975, ch. 53, § 3; 1985, ch. 177, § 1.

NOTES TO DECISIONS

ANALYSIS

Attempted manslaughter.
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—Intervening medical error.
Elements of offense.
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—Directed verdict improper.
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Attempted manslaughter.

There cannot be an attempt to commit manslaughter under Subsection (1)(a), which provides that criminal homicide is manslaughter if the actor recklessly causes death, but there can be an attempt to commit manslaughter under Subsection (1)(b), which makes criminal homicide manslaughter if the actor causes death while under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. State v. Norman, 580 P.2d 237 (Utah 1978).

There is a crime of attempted manslaughter

under Subsection (1)(c). State v. Howell, 649 P.2d 91 (Utah 1982).

Defenses.

—Intervening medical error.

Defendant was precluded from claiming intervening medical error as a defense, where the state proved beyond a reasonable doubt that snakebite, not subsequent medical treatment, was the proximate cause of the death of the victim, who died after being bitten by a rattlesnake placed on her shoulders by defendant. State v. Wessendorf, 777 P.2d 523 (Utah Ct. App.), cert. denied, 781 P.2d 878 (Utah 1989).

Elements of offense.

For cases discussing voluntary and involuntary manslaughter under former Penal Code, including provocation, heat of passion, and intent, see People v. Calton, 5 Utah 451, 16 P. 902 (1888), rev'd on another point, 130 U.S. 83, 9 S. Ct. 435, 32 L. Ed. 870 (1889); State v. Green, 78 Utah 580, 6 P.2d 177 (1931); State v. Cobo, 90 Utah 89, 97, 60 P.2d 952 (1936); State v. Rasmussen, 92 Utah 357, 68 P.2d 176 (1937); State v. Johnson, 112 Utah 130, 185 P.2d 738 (1947); State v. Lingman, 97 Utah 180, 91 P.2d 457 (1939); State v. Barker, 113 Utah 514, 196 P.2d 723 (1948).

Emotional disturbance.

For cases discussing killing to prevent defilement of female relative under former justifiable homicide statute, see People v. Halliday, 5 Utah 467, 17 P. 118 (1888); State v. Botha, 27 Utah 289, 75 P. 731 (1903); State v. Williams, 49 Utah 320, 163 P. 1104 (1916); State v. Besares, 75 Utah 141, 283 P. 738 (1929).

"Extreme emotional disturbance" as used in Subsection (1)(b) of this section is not a term of art deriving its meaning from usage, but is to be understood in its common everyday sense. State v. Gaxiola, 550 P.2d 1298 (Utah 1976).

Some external initiating circumstance must bring about the disturbance described in Subsection (1)(b), and use of the phrase "triggered by an external event" in an instruction to the jury is therefore not error. State v. Bishop, 753 P.2d 439 (Utah 1988).

Evidence.

In prosecution of striker for murder of fireman on train carrying strikebreakers and armed guards to mine, when train was assaulted by band of strikers, evidence supported conviction of defendant for voluntary manslaughter. State v. Pagialakis, 65 Utah 552, 238 P. 256 (1925).

In prosecution of hit-and-run driver for involuntary manslaughter of two youths who were changing tire when hit, evidence including defendant's testimony that he had "subconscious" feeling that he had hit something warranted submission of case to jury and sustained its guilty verdict. State v. Rasmussen, 92 Utah 357, 68 P.2d 176 (1937).

Admission of evidence concerning revocation of defendant's driver's license, in prosecution for involuntary manslaughter, was error, in view of fact that driving without license, or after it had been revoked, was offense malum prohibitum that was not foundation for an involuntary manslaughter charge. State v. Peterson, 116 Utah 362, 210 P.2d 229 (1949).

Autopsy evidence that baby had subdural hematoma and fractured ribs did not support conviction of parents for involuntary manslaughter in absence of evidence of any act or omission on part of parents or any marked disregard for baby's safety that contributed to her death. State v. Bassett, 27 Utah 2d 272, 495 P.2d 318 (1972).

Conviction for manslaughter may be based entirely upon circumstantial evidence. State v. John, 586 P.2d 410 (Utah 1978).

—Directed verdict improper.

On evidence that defendant, driving at night at excessive speed, veered to right and struck group of pedestrians walking on gravel shoulder of highway, trial court erred in granting defendant's motion for directed verdict and dismissal of charge of involuntary manslaughter. State v. Thatcher, 108 Utah 63, 157 P.2d 258 (1945).

Included offense.

Voluntary manslaughter was not necessarily included in first degree murder. State v. Mitchell, 3 Utah 70, 278 P.2d 618 (1955).

Attempted manslaughter is an included offense under a charge of attempted criminal homicide under Section 76-5-203. State v. Norman, 580 P.2d 237 (Utah 1978).

Negligent homicide is an included offense under a charge of manslaughter. State v. Dyer, 671 P.2d 142 (Utah 1983).

Although defendant pulled a cord around the victim's neck during intercourse, the evidence was insufficient to support a conviction of second degree murder based on depravity in the conduct of the defendant that caused the victim's death, but it was sufficient to support a conviction for the included offense of manslaughter. State v. Bolsinger, 699 P.2d 1214 (Utah 1985).

Manslaughter is a lesser included offense of second degree murder. State v. Day, 815 P.2d 1345 (Utah Ct. App. 1991).

There was no rational basis for a verdict acquitting the defendant of manslaughter and convicting him of negligent homicide, when the only issue relevant to the choice was defendant's awareness of the risk of death, and any absence of awareness could only have been due to voluntary intoxication, making unawareness

immaterial under § 76-2-306. State v. Day, 815 P.2d 1345 (Utah Ct. App. 1991).

Indictment or information.

In prosecution for involuntary manslaughter, wherein it appeared that homicide was result of automobile accident, information that, in addition to alleging that automobile was driven negligently, recklessly, wantonly, willfully, and unlawfully, charged that automobile was so driven by defendant "without observing the course the said automobile was taking to see if the said course was obstructed or about to be obstructed by any persons or other obstacles, so as to endanger the life and limb of persons being then and there upon said public highway as aforesaid, to-wit, at a rate of speed in excess of 25 miles an hour," was sufficient. State v. Lake, 57 Utah 619, 196 P. 1015 (1921).

Information alleging that accused "then and there, without due caution and circumspection, recklessly, willfully, and unlawfully, at said time and place, did drive said automobile in a reckless manner," specifying the acts constituting reckless, willful, and unlawful driving or operation of the automobile, sufficiently charged manslaughter by automobile. State v. Assenberg, 66 Utah 573, 244 P. 1027 (1926).

Instructions.

Where circumstances surrounding homicide were such that jury could have viewed facts as constituting crime of first degree murder, second degree murder, involuntary manslaughter or voluntary manslaughter, defendant's requests for instructions on offenses lesser than first degree murder to jury should have been granted. State v. Gillian, 23 Utah 2d 372, 463 P.2d 811 (1970).

In a prosecution for second degree murder, the jury was instructed on the elements of murder in the second degree, manslaughter, and negligent homicide in language directly borrowed from the statute, gainsaying the defendant's contention that no consideration was given to the instructions on manslaughter and negligent homicide. State v. Watts, 675 P.2d 566 (Utah 1983).

Mental state.

The sole difference between reckless manslaughter and negligent homicide is whether the defendant actually knew of the risk of death or simply was not, but should have been, aware of it. In both cases, a defendant's conduct must be a "gross deviation" from the standard of care exercised by an ordinary person. Thus, ordinary negligence, which is the basis for a civil action for damages, is not sufficient to constitute criminal negligence. State v. Standiford, 769 P.2d 254 (Utah 1988).

Defendant's conviction of manslaughter was affirmed, because he was aware that there was substantial and unjustifiable risk of death in his act of placing a rattlesnake on the shoulders of the victim, a two-year-old child. State v. Wessendorf, 777 P.2d 523 (Utah Ct. App.), cert. denied, 781 P.2d 878 (Utah 1989).

Evidence that defendant had struck infant, along with fact that defendant must have known that continually striking a three-month-old infant with adult force created a substantial risk of severe injury or death, was sufficient to show that the defendant possessed the necessary intent to support a manslaughter conviction. State v. Morgan, 865 P.2d 1377 (Utah Ct. App. 1993).

—Reckless disregard.

For discussion of reckless disregard for the safety of others under former negligent homicide by automobile statute, § 41-6-43.10, see State v. Berchtold, 11 Utah 2d 208, 357 P.2d 183 (1960).

Self-defense.

Evidence held sufficient to sustain conviction for manslaughter where self-defense at issue. See State v. Knoll, 712 P.2d 211 (Utah 1985).

Sufficiency of information.

State was not required to specify in information under which subdivision of Subsection (1) it desired to proceed; information charging an offense under all three subdivisions was sufficient. State v. Butler, 560 P.2d 1136 (Utah 1977).

Voluntary intoxication.

Evidence of an alleged "alcoholic blackout" is inadmissible as a defense to a manslaughter charge, since the requisite mens rea of a manslaughter charge is recklessness, and voluntary intoxication is not a defense to a crime based on reckless acts. State v. Bryan, 709 P.2d 257 (Utah 1985).

Cited in State v. Michalcewicz, 712 P.2d 253 (Utah 1985); State v. Benson, 712 P.2d 256 (Utah 1985); State v. Rodriguez, 718 P.2d 395 (Utah 1986); State v. Padilla, 776 P.2d 1329 (Utah 1989); State v. Gotschall, 782 P.2d 459 (Utah 1989); State v. Lopez, 789 P.2d 39 (Utah Ct. App. 1990); State v. Dunn, 850 P.2d 1201 (Utah 1993).

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Am. Jur. 2d. — 40 Am. Jur. 2d Homicide § 54.

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A.L.R. — Homicide: physician's withdrawal of life supports from comatose patient, 47 A.L.R.4th 18.

Key Numbers. — Homicide ⚩ 32.

76-5-206. Negligent homicide.

(1) Criminal homicide constitutes negligent homicide if the actor, acting with criminal negligence, causes the death of another.

(2) Negligent homicide is a class A misdemeanor.

History: C. 1953, 76-5-206, enacted by L. 1973, ch. 196, § 76-5-206.

NOTES TO DECISIONS

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Criminal negligence.
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—Expert testimony.
—Mitigating circumstances.
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—Negligent homicide as included offense.
Negligence.
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—Burden of proof.
—Evidence sufficient.
Cited.

Criminal negligence.

For cases discussing criminal negligence as element of former offense of involuntary manslaughter, see State v. Lingman, 97 Utah 180, 91 P.2d 457 (1939); State v. Thatcher, 108 Utah 63, 157 P.2d 258 (1945); State v. Olsen, 108 Utah 377, 160 P.2d 427 (1945); State v. Riddle, 112 Utah 356, 188 P.2d 449 (1948); State v. Barker, 113 Utah 514, 196 P.2d 723 (1948).

The bending down of a stop sign at an intersection so that it was not visible to traffic was sufficient to constitute criminal negligence. State v. Hallett, 619 P.2d 335 (Utah 1980).

Evidence.

—Expert testimony.

While expert testimony is not required to prove the mental state of a criminal defendant accused of homicide, expert testimony is required where criminal negligence is alleged and the nature and degree of risk are beyond the ken of the average layperson. State v. Warden, 784 P.2d 1204 (Utah Ct. App. 1989), rev'd on other grounds, 813 P.2d 1146 (Utah 1991).

Trial court committed no abuse of discretion in allowing physicians to testify at defendant physician's trial for negligent homicide involving the death of an infant after a premature home delivery. State v. Warden, 784 P.2d 1204 (Utah Ct. App. 1989), rev'd on other grounds, 813 P.2d 1146 (Utah 1991).

—Mitigating circumstances.

At defendant's trial for negligent homicide because he ran a red light and was involved in an intersection collision, he should have been allowed to introduce evidence of other similar accidents occurring at the same intersection, and the city traffic engineer, as an expert, should have been permitted to testify as to the lenses in the semaphore signal and their tendency to cause "sun phantom." State v. Stewart, 12 Utah 2d 273, 365 P.2d 785 (1961).

—Sufficient.

Evidence showing that from the length of defendant's skid marks the police estimated his speed to have been 55 to 65 miles per hour at the time his auto struck and killed a pedestrian in a 35-mile-per-hour zone, and that the defendant was familiar with the area and should have realized that people might be crossing the highway there, was sufficient for trial court to find defendant guilty of negligent homicide. State v. Park, 17 Utah 2d 90, 404 P.2d 677 (1965) (decided under former § 41-6-43.10).

Evidence showing that defendant knew of stop sign and restricted view at intersection where the collision occurred, and that, whether or not defendant ran the stop sign, he was traveling over forty miles per hour when he reached the point of impact, and that the two vehicles were so close together when defendant entered the intersection that the driver of the other auto had no opportunity to apply her brakes prior to the collision was sufficient to

show conduct evincing a reckless disregard for the safety of others. State v. Selman, 18 Utah 2d 199, 417 P.2d 975 (1966) (decided under former § 41-6-43.10, negligent homicide by automobile).

Evidence that doctor's treatment of premature infant created a risk of such a nature and degree that the doctor should have perceived it and that his failure to perceive the risk constituted a gross deviation from the appropriate standard of care was sufficient to support conviction under this section for infant's death. State v. Warden, 813 P.2d 1146 (Utah 1991).

Instructions.

For cases involving jury instructions on former offense of involuntary manslaughter, see State v. Rasmussen, 92 Utah 357, 68 P.2d 176 (1937); State v. Lingman, 97 Utah 180, 91 P.2d 457 (1939); State v. Thompson, 110 Utah 113, 170 P.2d 153 (1946); State v. Johnson, 112 Utah 130, 185 P.2d 738 (1947); State v. McQuilkin, 113 Utah 268, 193 P.2d 433 (1948); State v. Barker, 113 Utah 514, 196 P.2d 723 (1948); State v. Peterson, 116 Utah 362, 210 P.2d 229 (1949); State v. Wilson, 117 Utah 368, 216 P.2d 630 (1950); State v. Gallegos, 16 Utah 2d 102, 396 P.2d 414 (1964); State v. Lancaster, 20 Utah 2d 80, 433 P.2d 312 (1967).

In manslaughter prosecution, negligent homicide instruction was not supported by evidence that defendant fired shotgun at intended victim but hit another man who stepped into the line of fire at the last second; question is defendant's subjective state of mind as to the intended victim, not the actual victim. State v. Howard, 597 P.2d 878 (Utah 1979).

In second degree murder prosecution, negligent homicide instruction was not supported by evidence that defendant fired shotgun at man who was heading towards door by which stood a rifle, after the two had argued. State v. Howard, 597 P.2d 878 (Utah 1979).

In homicide prosecution of defendant who shot and killed an unarmed person who was leaning against defendant's car, evidence would not support jury instructions concerning "imminent use of unlawful force" by decedent or threat of "death or serious bodily injury" by decedent, nor would it support instruction concerning one's right to use of force "other than deadly force" in defense of one's personal property. State v. Valdez, 604 P.2d 472 (Utah 1979).

Where defendant was tried for the shooting death of his wife, there was no evidence to support a verdict of negligent homicide, and defendant was not entitled to an instruction on negligent homicide, where defendant, aware of the risk involved in his act, pointed and fired a gun, which he thought was unloaded, at his wife thereby killing her; under such circumstances, defendant was properly convicted of manslaughter. Boggess v. State, 655 P.2d 654 (Utah 1982).

In prosecution for second degree murder, the jury was instructed on the elements of murder in the second degree, manslaughter, and negligent homicide in language directly borrowed from the statute, gainsaying the defendant's contention that no consideration was given to the instructions on manslaughter and negligent homicide. State v. Watts, 675 P.2d 566 (Utah 1983).

Trial judge did not err in refusing to instruct the jury on negligent homicide at defendant's trial for second-degree murder, where the evidence showing his participation in a fatal beating was not ambiguous or susceptible to alternative interpretations which would have made it possible for the jury to acquit him of second-degree murder and convict him of negligent homicide. State v. Velarde, 734 P.2d 449 (Utah 1986).

Jury question.

In prosecution for involuntary manslaughter, where homicide was result of automobile accident, whether defendant kept proper lookout and observed course his automobile was taking so as to avoid collision was a question for the jury. State v. Lake, 57 Utah 619, 196 P. 1015 (1921).

In involuntary manslaughter prosecution arising out of automobile accident, jury could have found that, by reason of defendant's intoxicated condition, he had failed to react in normal manner to situation which confronted him, and that his conduct was responsible cause of collision and resulting death. State v. McQuilkin, 113 Utah 268, 193 P.2d 433 (1948).

Conflicting evidence as to defendant's negligence presented jury question, unless reasonable minds could have arrived at no conclusion other than that there was no criminal negligence. State v. Read, 121 Utah 453, 243 P.2d 439 (1953).

Manslaughter.

—Negligent homicide as included offense.

Negligent homicide is an included offense under a charge of manslaughter. State v. Dyer, 671 P.2d 142 (Utah 1983).

There was no rational basis for a verdict acquitting the defendant of manslaughter and convicting him of negligent homicide, when the only issue relevant to the choice was defendant's awareness of the risk of death, and any absence of awareness could only have been due to voluntary intoxication, making unawareness immaterial under § 76-2-306. State v. Day, 815 P.2d 1345 (Utah Ct. App. 1991).

Negligence.

Mere negligence was not sufficient to authorize verdict of manslaughter. State v. Adamson,

101 Utah 534, 125 P.2d 429 (1942).

Pleas and defenses.

Acquittal under former § 57-7-102 for failure to report automobile accident was not bar to prosecution for manslaughter. State v. Cheeseman, 63 Utah 138, 223 P. 762 (1924).

Self-defense.

—Burden of proof.

The state was not required to prove the absence of self-defense as one of the elements of its cause of action. State v. Strieby, 790 P.2d 98 (Utah Ct. App. 1990).

—Evidence sufficient.

A conviction of manslaughter, after a bench trial, was contrary to the clear weight of the evidence, where defendant fatally shot her husband after his violent physical attack, coupled with his threats to kill her, led her to believe that she was in immediate danger of serious injury or death. State v. Strieby, 790 P.2d 98 (Utah Ct. App. 1990).

Cited in State v. Mincy, 838 P.2d 648 (Utah Ct. App. 1992).

COLLATERAL REFERENCES

Am. Jur. 2d. — 40 Am. Jur. 2d Homicide § 91.

C.J.S. — 40 C.J.S. Homicide §§ 93, 94.

Key Numbers. — Homicide ⚷ 74.

76-5-207. Automobile homicide.

(1) (a) Criminal homicide is automobile homicide, a third degree felony, if the actor operates a motor vehicle while having a blood alcohol content of .08% or greater by weight, or while under the influence of alcohol, any drug, or the combined influence of alcohol and any drug, to a degree that renders the actor incapable of safely operating the vehicle, and causes the death of another by operating the vehicle in a negligent manner.

(b) For the purpose of this subsection, "negligent" means simple negligence, the failure to exercise that degree of care that reasonable and prudent persons exercise under like or similar circumstances.

(2) (a) Criminal homicide is automobile homicide, a second degree felony, if the actor operates a motor vehicle while having a blood alcohol content of .08% or greater by weight, or while under the influence of alcohol, any drug, or the combined influence of alcohol and any drug, to a degree that renders the actor incapable of safely operating the vehicle, and causes the death of another by operating the motor vehicle in a criminally negligent manner.

(b) For the purpose of this subsection, "criminally negligent" means criminal negligence as defined by Subsection 76-2-103(4).

(3) The standards for chemical breath analysis as provided by Section 41-6-44.3 and the provisions for the admissibility of chemical test results as provided by Section 41-6-44.5 apply to determination and proof of blood alcohol content under this section.

(4) Percent by weight of alcohol in the blood is based upon grams of alcohol per one hundred cubic centimeters of blood.

(5) The fact that a person charged with violating this section is on or has been legally entitled to use alcohol or a drug is not a defense to any charge of violating this section.

(6) Evidence of a defendant's blood or breath alcohol content or drug content is admissible except when prohibited by Rules of Evidence or the constitution.

(7) For purposes of this section, "motor vehicle" means any self-propelled vehicle and includes any automobile, truck, van, motorcycle, train, engine, watercraft, or aircraft.

History: C. 1953, 76-5-207, enacted by L. 1985 (1st S.S.), ch. 1, § 1; 1988, ch. 148, § 2; 1993, ch. 161, § 3.

Repeals and Reenactments. — Laws 1985 (1st S.S.), ch. 1, § 1 repealed former § 76-5-207, as last amended by L. 1983, ch. 99, § 20, relating to automobile homicide, and enacted present § 76-5-207.

Amendment Notes. — The 1993 amendment, effective May 3, 1993, substituted Subsection (6) for former language admitting any chemical test if in accordance with the Rules of Evidence and if administered either with consent or without consent when the officer reasonably believes that the victim may die; deleted former Subsection (7), which required a chemical test when a defendant is placed under arrest; renumbered former Subsection (8) as Subsection (7); deleted "but is not limited to" after "includes" in Subsection (7); and made stylistic changes.

Cross-References. — Jurisdiction of juvenile court, § 78-3a-16.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
Causation.
Causing death of fetus.
Death by automobile.
Double jeopardy.
Evidence.
Evidence sufficient.
Negligent homicide.
Proof of corpus delicti.

Constitutionality.

Former § 76-30-7.4, which described automobile homicide, was not unconstitutional on grounds that it substituted status of being under influence of drugs or liquor for criminal intent. State v. Twitchell, 8 Utah 2d 314, 333 P.2d 1075 (1959).

Causation.

In prosecution of driver involved in intersection collision charged with automobile homicide, jury was not required to find defendant to be sole proximate cause of death before handing down guilty verdict, and court was not required to give jury instruction on superseding intervening cause, since any negligence on part of other driver could only have been concurrent cause. State v. Hamblin, 676 P.2d 376 (Utah 1983).

Causing death of fetus.

Term "death of another" does not include the death of an unborn fetus, and person causing death of unborn fetus by negligent operation of an automobile does not commit automobile homicide. State v. Larsen, 578 P.2d 1280 (Utah 1978).

Death by automobile.

Conviction of motorist for speeding or reckless driving did not bar subsequent prosecution for involuntary manslaughter. State v. Empey, 65 Utah 609, 239 P. 25, 44 A.L.R. 558 (1925); State v. Thatcher, 108 Utah 63, 157 P.2d 258 (1945).

Where evidence did not show that defendant was driving his automobile recklessly or with marked disregard for safety of others, conviction of involuntary manslaughter was improper; there could be no finding of criminal negligence upon the question of speed. State v. Lingman, 97 Utah 180, 91 P.2d 457 (1930); State v. Gutheil, 98 Utah 205, 98 P.2d 943 (1940); State v. Adamson, 101 Utah 534, 125 P.2d 429 (1942).

Driver of automobile was not guilty of manslaughter just because his vehicle was an instrumentality by means of which someone was killed; failure to see deceased in time to avoid hitting him did not by itself show recklessness or marked disregard for safety of others. State v. Adamson, 101 Utah 534, 125 P.2d 429 (1942).

Double jeopardy.

Where defendant was charged originally with negligent homicide under former § 41-6-43.10, and after preliminary hearing the charge was dismissed and he was charged, tried, and convicted of automobile homicide, he had not been placed twice in jeopardy by having been tried for automobile homicide after dismissal of original charge. State v. Romero, 12 Utah 2d 210, 364 P.2d 828 (1961).

Evidence.

Negligibly gruesome photographs merely showing that a severe accident occurred and that defendant failed to use his brakes were not cumulative or prejudicial. State v. Pascoe, 774 P.2d 512 (Utah Ct. App. 1989).

Evidence sufficient.

Evidence that defendant drove into opposite lane of traffic in car loaded with empty beer and whiskey bottles and collided head-on with a car driven in lawful manner by decedent's husband in his outside lane was sufficient to sustain conviction of automobile homicide. State v. Cook, 21 Utah 2d 36, 439 P.2d 852 (1968).

The operation of a motor vehicle by a person who is so intoxicated that he cannot do so safely is a reckless act showing a marked disregard for the safety of others; therefore, evidence showing (1) that the driver was in such a state of intoxication, and (2) that as a result of his

negligence the death of another resulted will support a conviction under this section; the negligence required for violation of the statute need not amount to "criminal negligence" as defined in § 76-2-103(4), but negligence is "criminal" when, notwithstanding the fact that the actor's conduct does not evince a wanton or reckless disregard for human safety, he does a thing dangerous in itself, or has charge of a thing dangerous in its use, and acts without that degree of care which a person of ordinary prudence would exercise under the circumstances, resulting in the death of another person. State v. Durrant, 561 P.2d 1056 (Utah 1977).

Negligent homicide.
Refusal in automobile homicide prosecution to instruct jury on negligent homicide as a lesser included offense was not error since automobile homicide did not require the degree of negligence requisite to constitute negligent homicide; offense of automobile homicide could be made out by simple negligence in a person's driving while intoxicated if death of another resulted therefrom, while negligent homicide required more than carelessness or simple negligence. State v. Risk, 520 P.2d 215 (Utah 1974).

Proof of corpus delicti.
In prosecution for automobile homicide, where defendant was driving on wrong side of street when he collided head-on with car in which the decedent was riding, and woman who proved to be the deceased was observed to be bleeding and was pronounced dead on arrival at the hospital, corpus delicti was proven. State v. Romero, 12 Utah 2d 210, 364 P.2d 828 (1961).

COLLATERAL REFERENCES

Am. Jur. 2d. — 7A Am. Jur. 2d Automobiles and Highway Traffic § 324 et seq.
C.J.S. — 61A C.J.S. Motor Vehicles § 660.
A.L.R. — Homicide by automobile as murder, 21 A.L.R.3d 116.
Alcohol-related vehicular homicide: nature and elements of offense, 64 A.L.R.4th 166.
Key Numbers. — Automobiles ⟹ 342.

76-5-208. Child abuse homicide.

(1) Criminal homicide constitutes child abuse homicide if the actor causes the death of a person under 17 years of age and the death results from child abuse:

(a) if done recklessly as provided in Subsection 76-5-109(2)(b);

(b) if done with criminal negligence as provided in Subsection 76-5-109(2)(c); or

(c) if done with the mental culpability as provided in Subsection 76-5-109(3)(a), (b), or (c).

(2) Child abuse homicide as defined in Subsection (1)(a) is a second degree felony.

(3) Child abuse homicide as defined in Subsections (1)(b) and (c) is a third degree felony.

History: C. 1953, 76-5-208, enacted by L. 1994, ch. 65, § 1.
Effective Dates. — Laws 1994, ch. 65 became effective on May 2, 1994, pursuant to Utah Const., Art. VI, Sec. 25.

PART 3

KIDNAPING

76-5-301. Kidnaping.

(1) A person commits kidnaping when he intentionally or knowingly and without authority of law and against the will of the victim:

(a) detains or restrains another for any substantial period; or

(b) detains or restrains another in circumstances exposing him to risk of serious bodily injury; or

(c) holds another in involuntary servitude; or

(d) detains or restrains a minor without consent of its parent or guardian.

(2) Kidnaping is a felony of the second degree.

History: C. 1953, 76-5-301, enacted by L. 1973, ch. 196, § 76-5-301; 1983, ch. 88, § 13.

Cross-References. — Bus hijacking, § 76-10-1504.

NOTES TO DECISIONS

ANALYSIS

Circumstances exposing victim to risk.
Evidence that victim a minor.
Kidnaping as separate offense.
Lesser included offenses.
Multiple victims.
Substantial period.
When kidnaping begins.

Circumstances exposing victim to risk.

The provision of this section that detention be in circumstances exposing the victim to risk of serious bodily injury requires some circumstances of risk in addition to those inherent in the commission of crimes incidentally involving detention or restraint. State v. Couch, 635 P.2d 89 (Utah 1981).

Evidence that victim a minor.

Evidence was sufficient to establish victim's minority for purposes of sustaining a conviction of kidnaping a minor where victim's mother and two police officers testified that victim was a "child" or "little girl," one officer testified that victim appeared to be about ten years old, and jurors themselves observed the victim as she testified and were able to determine from her appearance and behavior whether reasonable doubt existed as to whether she was a minor. State v. Cross, 649 P.2d 72 (Utah 1982).

Kidnaping as separate offense.

Kidnaping was not merely incidental or subsidiary to the crime of aggravated sexual assault, but was an independent, separately punishable offense, where defendant detained victim for a substantial period of time and forcibly removed her a substantial distance from her normal surroundings and natural sources of aid to an isolated area where she was entirely at the mercy of her assailant and sexually assaulted. State v. Couch, 635 P.2d 89 (Utah 1981).

Lesser included offenses.

Unlawful detention, § 76-5-304, is not a lesser included offense of kidnaping a minor. State v. Cross, 649 P.2d 72 (Utah 1982).

Multiple victims.

Defendant's holding five persons hostage was five separate offenses of kidnaping arising out of a single criminal episode; double jeopardy protections did not prohibit defendant from being convicted of five counts of kidnaping. State v. James, 631 P.2d 854 (Utah 1981).

Substantial period.

The term "substantial period" apparently requires a period of detention longer than the minimum inherent in the commission of other crimes, such as robbery or rape, which involve detention or restraint. State v. Couch, 635 P.2d 89 (Utah 1981).

When kidnaping begins.

A kidnaping begins when the detention begins to be against the will of the victim. State v. Couch, 635 P.2d 89 (Utah 1981).

COLLATERAL REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d Abduction and Kidnaping § 21 et seq.

C.J.S. — 51 C.J.S. Kidnapping § 1.

A.L.R. — Seizure or detention for purpose of committing rape, robbery, or similar offense as constituting separate crime of kidnaping, 43 A.L.R.3d 699.

Seizure of prison official by inmates as kidnaping, 59 A.L.R.3d 1306.

Coercion, compulsion, or duress as defense to charge of kidnapping, 69 A.L.R.4th 1005.

Key Numbers. — Kidnapping ⚷ 1.

76-5-301.1. Child kidnaping.

(1) A person commits child kidnaping when the person intentionally or knowingly, without authority of law and against the will of the victim, by any means and in any manner, seizes, confines, detains, or transports a child under the age of 14 with intent to keep or conceal the child from its parent, guardian, or other person having lawful custody or control of the child.

(2) A seizure, confinement, detention, or transportation is deemed to be against the will of the victim if the victim is younger than 14 years of age at the time of the offense, and the seizure, confinement, detention, or transportation, is without the effective consent of the victim's custodial parent, guardian, or person acting in loco parentis.

(3) Violation of Section 76-5-303 is not a violation of this section.

(4) Child kidnaping is a felony of the first degree punishable by a term which is a minimum mandatory term of imprisonment of 5, 10, or 15 years, and which may be for life.

History: C. 1953, 76-5-301.1, enacted by L. 1983, ch. 88, § 14; 1984, ch. 18, § 6.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
Evidence.
—Admissible.
Cited.

Constitutionality.

Subsection (4) is not unconstitutional: (1) it is not cruel and unusual punishment on the theory that the sentences are disproportionate to the crime of kidnaping, (2) it does not infringe on inherent judicial power and authority, (3) it does not invade the province of the Board of Pardons, and (4) the sentencing scheme is not unconstitutionally vague. State v. Shickles, 760 P.2d 291 (Utah 1988).

Evidence.

—Admissible.

Evidence of defendant's sexual assaults on the victim were properly admitted at his trial for child kidnaping, because the evidence was directly probative of the proposition that defendant took the victim out of the state with the requisite intent and without a good faith belief that he had implied permission from the child's parents. State v. Shickles, 760 P.2d 291 (Utah 1988).

Cited in State v. Bishop, 717 P.2d 261 (Utah 1986).

COLLATERAL REFERENCES

A.L.R. — Liability of legal or natural parent, or one who aids and abets, for damages resulting from abduction of own child, 49 A.L.R.4th 7.

76-5-302. Aggravated kidnaping.

(1) A person commits aggravated kidnaping if the person intentionally or knowingly, without authority of law and against the will of the victim, by any means and in any manner, seizes, confines, detains, or transports the victim with intent:

(a) to hold for ransom or reward, or as a shield or hostage, or to compel a third person to engage in particular conduct or to forbear from engaging in particular conduct; or

(b) to facilitate the commission, attempted commission, or flight after commission or attempted commission of a felony; or

(c) to inflict bodily injury on or to terrorize the victim or another; or

(d) to interfere with the performance of any governmental or political function; or

(e) to commit a sexual offense as described in Part 4 of this chapter.

(2) A detention or moving is deemed to be the result of force, threat, or deceit if the victim is mentally incompetent or younger than sixteen years and the detention or moving is accomplished without the effective consent of the victim's custodial parent, guardian, or person acting in loco parentis to the victim.

(3) Aggravated kidnaping is a felony of the first degree punishable by a term which is a minimum mandatory term of imprisonment of 5, 10, or 15 years and which may be for life.

History: C. 1953, 76-5-302, enacted by L. 1973, ch. 196, § 76-5-302; 1974, ch. 32, § 12; 1983, ch. 88, § 15.

NOTES TO DECISIONS

ANALYSIS

Lesser included offenses.
Sentence.
—Constitutionality.
—Upheld.
Cited.

Lesser included offenses.

Defendant charged with aggravated kidnaping was entitled to a jury instruction on assault as a lesser included offense since there was sufficient overlap in elements of two offenses and if jury had accepted defendant's version of evidence, however unlikely that might have been, it could have voted to acquit him of aggravated kidnaping and to convict him of assault. State v. Brown, 694 P.2d 587 (Utah 1984).

Sentence.

—Constitutionality.

The aggravated kidnaping minimum mandatory sentencing provision is constitutional. State v. Russell, 791 P.2d 188 (Utah 1990).

—Upheld.

Concurrent 15-year minimum mandatory sentences for aggravated kidnapping and aggravated sexual assault found not cruel and unusual punishment. See State v. Russell, 791 P.2d 188 (Utah 1990).

Cited in State v. DePlonty, 749 P.2d 621 (Utah 1987); State v. Babbell, 770 P.2d 987 (Utah 1989); State v. Archuleta, 850 P.2d 1232 (Utah 1993).

COLLATERAL REFERENCES

C.J.S. — 51 C.J.S. Kidnapping § 1.

A.L.R. — What is "harm" within provisions of statutes increasing penalty for kidnaping where victim suffers harm, 11 A.L.R.3d 1053.

76-5-303. Custodial interference.

(1) A person, whether a parent or other, is guilty of custodial interference if, without good cause, the actor takes, entices, conceals, or detains a child under the age of 16 from its parent, guardian, or other lawful custodian:

(a) knowing the actor has no legal right to do so; and

(b) with intent to hold the child for a period substantially longer than the visitation or custody period previously awarded by a court of competent jurisdiction.

(2) A person, whether a parent or other, is guilty of custodial interference if, having actual physical custody of a child under the age of 16 pursuant to a judicial award of any court of competent jurisdiction which grants to another person visitation or custody rights, and without good cause the actor conceals or detains the child with intent to deprive the other person of lawful visitation or custody rights.

(3) Custodial interference is a class A misdemeanor unless the child is removed and taken from one state to another, in which case it is a felony of the third degree.

History: C. 1953, 76-5-303, enacted by L. 1973, ch. 196, § 76-5-303; 1979, ch. 70, § 1; 1984, ch. 18, § 7.

NOTES TO DECISIONS

ANALYSIS

Custody.
Detaining child beyond visitation period.
Violation of custody order an element.

Custody.

While it may be possible to violate both Subsections (1) and (2) simultaneously, the offense defined by Subsection (1) generally applies to the conduct of parents who do not have primary custody, and Subsection (2) is intended to apply to conduct by parents with primary custody. State v. Smith, 764 P.2d 997 (Utah Ct. App. 1988).

Detaining child beyond visitation period.

Parent's detention of child beyond visitation period was not crime of custodial interference when the child was detained for a brief period for the purpose of seeking legal intervention to modify custody award and there was a good faith belief by parent that he had good cause, which he substantiated by filing a petition for custody modification and receiving a temporary restraining order to prevent the child's removal from the state until the custodial issue could be determined. Nielsen v. Nielsen, 620 P.2d 511 (Utah 1980).

Violation of custody order an element.

Subsection (1)(b) criminalizes the conduct of those who, when exercising visitation or custody under the authority of a custody order, act to deprive another person of her or his custodial or visitation rights in derogation of that existing order. Even one who is subject to a custody or visitation decree does not violate this section unless he or she acts in derogation of his or her right under the order. State v. Smith, 764 P.2d 997 (Utah Ct. App. 1988).

COLLATERAL REFERENCES

Am. Jur. 2d. — 1 Am. Jur. 2d Abduction and Kidnaping § 34.

C.J.S. — 51 C.J.S. Kidnapping § 4.

A.L.R. — Liability of legal or natural parent, or one who aids and abets, for damages resulting from abduction of own child, 49 A.L.R.4th 7.

76-5-304. Unlawful detention.

(1) A person commits unlawful detention if he knowingly restrains another unlawfully so as to interfere substantially with his liberty.

(2) Unlawful detention is a class B misdemeanor.

History: C. 1953, 76-5-304, enacted by L. 1973, ch. 196, § 76-5-304.

NOTES TO DECISIONS

ANALYSIS

Elements.
Kidnaping a minor.
Liability of peace officer.
Cited.

Elements.
For cases discussing definition and elements of former offense of false imprisonment, see Smith v. Clark, 37 Utah 116, 106 P. 653, 1912B Ann. Cas. 1366 (1910); Mildon v. Bybee, 13 Utah 2d 400, 375 P.2d 458 (1962).

Kidnaping a minor.
Unlawful detention is not a lesser included offense of kidnaping a minor, § 76-5-301. State v. Cross, 649 P.2d 72 (Utah 1982).

Liability of peace officer.
A peace officer would not necessarily be held liable for mistaking identity of person named in warrant of arrest if he had exercised reasonable diligence and care in ascertaining identity before he served warrant. Mildon v. Bybee, 13 Utah 2d 400, 375 P.2d 458 (1962).

Cited in State v. James, 819 P.2d 781 (Utah 1991).

COLLATERAL REFERENCES

Am. Jur. 2d. — 32 Am. Jur. 2d False Imprisonment § 151.
C.J.S. — 35 C.J.S. False Imprisonment § 71.
A.L.R. — Excessiveness or inadequacy of compensatory damages for false imprisonment or arrest, 48 A.L.R.4th 165.
Penalties for common-law criminal offense of false imprisonment, 67 A.L.R.4th 1103.
Key Numbers. — False Imprisonment ⚩ 43.

PART 4

SEXUAL OFFENSES

76-5-401. Unlawful sexual intercourse.

(1) A person commits unlawful sexual intercourse if, under circumstances not amounting to a violation of Section 76-5-402, Section 76-5-402.1, or Section 76-5-405, that person has sexual intercourse with a person, not that person's spouse, who is under sixteen years of age.

(2) Unlawful sexual intercourse is a felony of the third degree except when at the time of intercourse the actor is no more than three years older than the victim, in which case it is a class B misdemeanor. Evidence that the actor was not more than three years older than the victim at the time of the intercourse shall be raised by the defendant.

History: C. 1953, 76-5-401, enacted by L. 1973, ch. 196, § 76-5-401; 1979, ch. 73, § 1; 1983, ch. 88, § 16.

Cross-References. — Adultery, bigamy, fornication and incest, §§ 76-7-101 to 76-7-104.
Mistake as to age not a defense, § 76-2-304.5.

NOTES TO DECISIONS

ANALYSIS

Circumstantial evidence.
Elements of offense.
Evidence.
Indictment or information.
Instructions.
Purpose of statutes.
Single offense charged.
Variance.

Circumstantial evidence.
Element of crime that female is not male defendant's wife may be established by circumstantial evidence. State v. Housekeeper, 588 P.2d 139 (Utah 1978).

Elements of offense.

Victim's age is an element of offense of unlawful sexual intercourse. State v. Elton, 680 P.2d 727 (Utah 1984).

Evidence.

In trial for offense of carnal knowledge, intimacy and improper relations of parties could be proved only so far as such intimacy and improper relations occurred prior, and not subsequent, to offense relied on for conviction. State v. Hilberg, 22 Utah 27, 61 P. 215 (1900).

In trial for carnal knowledge, testimony of the prosecutrix who was not considered an accomplice could alone be sufficient to support conviction. State v. Hilberg, 22 Utah 27, 61 P. 215 (1900); State v. Hodges, 14 Utah 2d 197, 381 P.2d 81 (1963).

In prosecution for carnal knowledge, child of the prosecutrix could be brought into court to corroborate her testimony as to its birth following alleged offense, but not to show resemblance to defendant. State v. Neel, 23 Utah 541, 65 P. 494 (1901).

Because prosecutrix was not an accomplice, her testimony alone, if believed by the jury, was sufficient to sustain a finding that sexual act occurred in trial of offense of carnal knowledge, and question of credibility arising from inconsistencies in testimony was for jury. State v. Reese, 43 Utah 447, 135 P. 270 (1913); State v. Bayes, 47 Utah 474, 155 P. 335 (1916).

Evidence of former relations of parties and that former acts were committed was admissible as tending to show probability or improbability of commission of offense of carnal knowledge. State v. Hadley, 65 Utah 109, 234 P. 940 (1925).

Where state relied upon birth of child to prosecutrix as evidence of crime charged, defendant was entitled to submit evidence that prosecutrix had intercourse with others during month of conception. State v. Orton, 69 Utah 304, 254 P. 1003 (1927).

Admissibility of evidence of birth of child was not error, although child was born eight days before the end of the ordinary period of gestation calculated from date offense was alleged to have been committed. State v. Hanna, 81 Utah 583, 21 P.2d 537 (1933).

In prosecution for carnal knowledge, chastity or general character of prosecutrix could not be attacked, and since she was not an accomplice, her testimony did not require corroboration; but veracity of her testimony was material and was subject to acceptance or rejection by court. State v. Olson, 100 Utah 174, 111 P.2d 548 (1941).

Testimony of fourteen-year-old victim that she did not know whether penetration was by defendant's finger or his private, considered with the age of complainant, circumstances of assault, and conduct of defendant, did not form proper basis for reversal of conviction of carnal knowledge. State v. Wixom, 106 Utah 382, 148 P.2d 806 (1947).

Where there was nothing inherently unreasonable or improbable in uncorroborated testimony of prosecutrix, it alone could support conviction if jury found guilt beyond reasonable doubt. State v. Mills, 122 Utah 306, 249 P.2d 211 (1952).

Accused could not be convicted on his confession alone, and in prosecution for carnal knowledge there must have been independent, clear and convincing evidence of corpus delicti; where girl in question refused to attend trial and the only independent evidence of corpus delicti to lend credence to confession was testimony of deputy who had asked the girl if defendant and she had relations, it was insufficient to establish corpus delicti; truth of purported statement and veracity of one who made it should have been tested by cross-examination. State v. Ferry, 2 Utah 2d 371, 275 P.2d 173 (1954).

Where defendant was prosecuted on charge of carnal knowledge, evidence regarding several events subsequent to date of alleged act was admissible to show that defendant took long, less-traveled road home, along which road car in which defendant and prosecutrix were traveling was stopped, and the act alleged occurred; that defendant gave prosecutrix an engagement ring; that defendant took her to doctor, and that at family gathering called for purpose of discussing pregnancy that had taken place, defendant failed to deny having had intercourse with prosecutrix; such evidence tended to show guilty knowledge or an admission of responsibility. State v. Hodges, 14 Utah 2d 197, 381 P.2d 81 (1963).

Pregnancy of an unmarried prosecutrix could be shown to prove that an illicit act of intercourse had taken place; weight to be given such evidence was question for trier of fact. State v. Hodges, 14 Utah 2d 197, 381 P.2d 81 (1963).

Indictment or information.

Information charging defendant with assaulting victim and committing offense of carnal knowledge need not have stated that ravished female was not defendant's wife. State v. Williamson, 22 Utah 248, 62 P. 1022, 83. Am. St. R. 780 (1900).

In prosecution for carnal knowledge of female under age of eighteen years, time was not material ingredient, and it was not essential that it be precisely stated in information; evidence of commission of offense, alleged on date other than and prior to that alleged, was competent and admissible. State v. Hoben, 36 Utah 186, 102 P. 1000 (1909).

Instructions.

Refusal of court to give cautionary instruc-

tions was not error where testimony of prosecutrix was corroborated and jury was properly instructed as to presumption of defendant's innocence, requirement that he be found guilty beyond reasonable doubt, and that jury was sole judge of weight of evidence and credibility of witnesses. State v. Rutledge, 63 Utah 546, 227 P. 479 (1924).

For cases discussing necessity of specifying time of former offense of carnal knowledge, see State v. Distefano, 70 Utah 586, 262 P. 113 (1927); State v. Hanna, 81 Utah 583, 21 P.2d 537 (1933); State v. Rosenberg, 84 Utah 402, 35 P.2d 1004 (1934).

Instruction that referred to "the place where the offense was committed, at the time of the commission thereof" assumed that offense had been committed and was prejudicial error. State v. Hanna, 81 Utah 583, 21 P.2d 537 (1933).

Purpose of statutes.

The purpose of former statutes establishing the age of consent was to protect young girls from illicit acts of the opposite sex; even if married, they could continue to be immature and need such protection, which the statute provided. State v. Huntsman, 115 Utah 283, 204 P.2d 448 (1949).

Single offense charged.

Where single offense was charged, but on trial six different offenses were proven, four of them prior to offense charged, and state failed to elect on which offense to stand, the law made the election and chose first offense of which evidence was offered; thereafter no subsequent election could be made, nor could state prove any other act of carnal knowledge as substantive offense on which conviction could be had. State v. Hilberg, 22 Utah 27, 61 P. 215 (1900).

Variance.

In prosecution for carnal knowledge of female under eighteen years of age, where defendant was given preliminary examination on complaint charging offense had been committed on April 1, and information charged offense on that date, but proof showed that female was then over eighteen years of age, evidence of prior acts of intercourse before female became eighteen was not sufficient to sustain conviction since state had elected to try defendant for offense committed on April 1. State v. Hoben, 36 Utah 186, 102 P. 1000 (1909).

COLLATERAL REFERENCES

Utah Law Review. — *State v. Elton:* The Failure to Recognize a Defense to Statutory Rape, 1983 Utah L. Rev. 437.

Journal of Contemporary Law. — Comment, Who Pays for the Cure? Restitution for Adolescent Rape Victims, 13 J. Contemp. L. 301 (1987).

The Abolition of the Juvenile Court: A Proposal for the Preservation of Children's Legal Rights, 16 J. Contemp. L. 23 (1990).

Am. Jur. 2d. — 65 Am. Jur. 2d Rape § 15.

C.J.S. — 75 C.J.S. Rape § 13.

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

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

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

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

Conviction of rape or related sexual offenses on basis of intercourse accomplished under the pretext of, or in the course of, medical treatment, 65 A.L.R.4th 1064.

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

Admissibility in prosecution for sex offense of evidence of victim's sexual activity after the offense, 81 A.L.R.4th 1076.

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

Key Numbers. — Rape ⚷ 52(2).

76-5-402. Rape.

(1) A person commits rape when the actor has sexual intercourse with another person without the victim's consent.

(2) This section applies whether or not the actor is married to the victim.

(3) Rape is a felony of the first degree.

History: C. 1953, 76-5-402, enacted by L. 1973, ch. 196, § 76-5-402; 1977, ch. 86, § 1; 1979, ch. 73, § 2; 1983, ch. 88, § 17; 1991, ch. 267, § 1.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, deleted "not the actor's spouse" following "another person" in Subsection (1), added present Subsection (2), and redesignated former Subsection (2) as Subsection (3).

Cross-References. — Attempt, §§ 76-4-101, 76-4-102.

Evidence regarding victim, U.R.E. 412.

NOTES TO DECISIONS

ANALYSIS

Aggravated sexual assault distinguished.
Consent.
—Lack of consent.
Date of alleged offense.
Defenses.
Degree of resistance.
Delay in complaining.
Elements.
Evidence.
—Admissibility.
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—Sufficiency.
Included offenses.
Indictment or information.
Instructions.
Intent.
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Overcoming victim's will.
Polygraph test.
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Threats.
Uncorroborated testimony.
Vicarious liability.
Victim's age as element of rape.
Victim's prior sexual experience.
Cited.

Aggravated sexual assault distinguished.

Elements of the two crimes of rape and aggravated sexual assault are not the same, since the latter offense includes the additional element of infliction or threat of serious bodily injury. State v. Smathers, 602 P.2d 708 (Utah 1979).

There is a sufficient difference between rape and aggravated sexual assault to justify the statutory distinction between the two offenses. State v. Cude, 784 P.2d 1197 (Utah 1989).

Aggravated sexual assault encompasses a broader scope of criminal conduct than rape, and it includes attempted criminal conduct; thus, rape is not a predicate felony for aggravated sexual assault because the two crimes require proof of different elements. State v. Hancock, 874 P.2d 132 (Utah Ct. App. 1994).

Consent.

Where prosecutrix was first laid hold of by force and violence against her will, but did not afterwards resist because, in some degree, she voluntarily consented to defendant's acts, defendant should not have been convicted of rape, although he could have been convicted of assault. State v. McCune, 16 Utah 170, 51 P. 818 (1898).

In prosecution for rape, fact that prosecutrix received money from defendant did not of itself establish consent. State v. Roberts, 91 Utah 117, 63 P.2d 584 (1937).

It was not necessary to show that victim resisted to her utmost capacity to prevent penetration in order to show that there was no consent and act was forcibly done. State v. Roberts, 91 Utah 117, 63 P.2d 584 (1937).

In prosecution for rape, jury could properly consider conduct of prosecutrix towards defendant after commission of assault as bearing upon whether she consented. State v. Roberts, 91 Utah 117, 63 P.2d 584 (1937).

If a woman is friendly in accepting the proffered hospitality of a man for food and drink, and engages in necking over a period of time, she does not lose her right to protest against further advances the man may desire to force upon her. State v. Myers, 606 P.2d 250 (Utah 1980).

Fact that prosecutrix assisted defendant in achieving erection by means of manual stimulation did not establish consent in view of fact that prosecutrix was held against her will and expressly threatened with violence. State v. Herzog, 610 P.2d 1281 (Utah 1980).

A rape victim's failure to escape or call for help despite the opportunity to do so is not necessarily inconsistent with the victim's assertion that she did not consent. State v. Archuleta, 747 P.2d 1019 (Utah 1987).

—Lack of consent.

The absence of outcries, serious wounds or injuries, or physical resistance induced by fear or reasonable apprehension of bodily harm or death does not establish consent to the act. State v. Stettina, 635 P.2d 75 (Utah 1981).

Where state presents evidence that rape and forcible sodomy victim is under 14 years of age, no other evidence is needed to establish lack of consent to the acts. State v. Bundy, 684 P.2d 58 (Utah 1984).

Date of alleged offense.

Where complaint on preliminary examination for statutory rape charged act of unlawful intercourse as having occurred on July 13,

defendant could not be convicted for offense committed on same girl on July 15. State v. Nelson, 52 Utah 617, 176 P. 860 (1918).

Defenses.

Bad reputation of prosecutrix for chastity was not defense to charge of assault with intent to commit rape, if prosecutrix was forced against her will. State v. McCune, 16 Utah 170, 51 P. 818 (1898).

Insanity was defense to statutory rape if properly proven. State v. Hadley, 65 Utah 109, 234 P. 940 (1925).

Degree of resistance.

The victim need do no more than her age and her strength of body and mind make it reasonable for her to do under the circumstances to resist. State v. Studham, 572 P.2d 700 (Utah 1977).

Delay in complaining.

Whether prosecutrix complained of alleged rape immediately thereafter, or delayed making complaint for considerable time, bore on credibility of her testimony. State v. Halford, 17 Utah 475, 54 P. 819 (1898).

Elements.

Emission of semen was not essential to constitute the crime of rape. State v. Warner, 79 Utah 500, 291 P. 307, rev'd on another point, 79 Utah 510, 13 P.2d 317 (1932).

Emission of semen is not necessary to crime of rape; penetration is all that is necessary. State v. Gehring, 694 P.2d 599 (Utah 1984).

Evidence.

—Admissibility.

In prosecution for rape, wherein it was theory of defendant that prosecutrix had had intercourse with another person, and wrongfully had charged defendant with offense to shield herself in view of her supposed pregnancy, defendant had right to prove that such was her purpose in lodging complaint against defendant and that she had had intercourse with other person. State v. Scott, 55 Utah 553, 188 P. 860 (1920).

In prosecution for rape of ten-year-old girl, where prosecutrix' gonorrheal infection was relied on by state as evidence of commission of the crime, defendant could submit evidence that prosecutrix' father, mother and sister also had disease, in order to cast doubt on contention that defendant was source of infection. State v. Dean, 69 Utah 268, 254 P. 142 (1927).

In a prosecution for rape by defendant of his minor daughter, evidence of his stepdaughter that defendant had raped her four different times in the past was inadmissible. State v. Winget, 6 Utah 2d 243, 310 P.2d 738 (1957).

Testimony of doctor, who had examined fifteen-year-old prosecutrix, that the examination showed that girl's hymen had been recently torn, that tears were fresh and still bleeding, and that a hymen which is intact normally indicates virginity was admissible in rape prosecution because evidence would be material as surrounding circumstance of crime, and as having tendency to prove that girl was violated. State v. Glispy, 10 Utah 2d 13, 347 P.2d 562 (1959).

Where there was reasonable foundation for admitting opinion testimony of doctor as to whether the prosecutrix had been forcibly attacked, it was within discretion of court to admit evidence and to allow any frailties therein to be exposed by cross-examination. State v. Ward, 10 Utah 2d 34, 347 P.2d 865 (1959).

In prosecution for statutory rape, testimony of the physician who examined prosecutrix to the effect that her hymen was ruptured and that she was capable of having intercourse with an adult was properly admitted to show the possibility that she had had intercourse. State v. Sanchez, 11 Utah 2d 429, 361 P.2d 174 (1961).

In prosecution for statutory rape, it was not error to admit the testimony of the prosecutrix that while she was in the bedroom with the defendant, some other men who had come to the house with defendant were in another room taking turns committing a similar offense with her sister; this evidence was material to show all relevant facts surrounding commission of offense charged. State v. Sanchez, 11 Utah 2d 429, 361 P.2d 174 (1961).

In prosecution for statutory rape, it was not error to admit the testimony of a police captain that defendant had been defensive and evasive by making denials when first questioned about his association with girl's mother and visits to their home, and that he had later made admissions of truth inconsistent with his denials; such evidence reasonably could be regarded as showing awareness of guilt and desire to protect himself by misleading officers in investigation. State v. Sanchez, 11 Utah 2d 429, 361 P.2d 174 (1961).

—Corroborative.

Corroboration in a rape case may consist of circumstantial rather than direct evidence and is sufficient if it affords proof of circumstances which legitimately tend to show the existence of the material facts; prosecutrix's claim that act of intercourse occurred without her consent was corroborated where witness testified that prosecutrix told him the story of the rape shortly after it occurred and that she was crying and very upset. State v. Stettina, 635 P.2d 75 (Utah 1981).

—Sufficiency.

Conviction of rape of thirteen-year-old subnormal girl, whose mental age was between

eight and ten and who had frequent epileptic seizures, was not sustained by evidence; victim's testimony was unclear as to sequence of events which preceded and followed alleged rape, the time period during which rape was alleged to have occurred was extremely short, and locus of rape was alleged to have been only a few feet from defendant's car, which was parked on public city street at dusk, where two of his companions had been waiting for him to return from a house, and where neither his companions nor any other witness testified as to having seen or heard anything to indicate improper conduct on defendant's part. State v. Williams, 111 Utah 379, 180 P.2d 551 (1947).

Evidence which tended to show that prosecutrix was an unwilling passenger in defendant's car, medical evidence of recent sexual intercourse and severe bruises and cuts on prosecutrix' legs tending to show involuntary nature of act supported conviction of forcible rape. State v. Moore, 111 Utah 458, 183 P.2d 973 (1947).

Included offenses.

In prosecution for rape of six-year-old girl, verdict of guilty of assault with intent to commit rape was within power of jury though it might have appeared that rape was actually completed. State v. Blythe, 20 Utah 378, 58 P. 1108 (1899).

Crime of adultery was not necessarily included in crime of rape and did not constitute lesser degree of that offense; prosecutor could not insert words in information wholly unnecessary to principal crime charged, thereby charging another offense, but where no timely objection was made to statement that victim was a married woman, objection was waived. State v. Anderson, 69 Utah 53, 252 P. 280 (1926).

Indictment or information.

Information charging defendant with being an accessory to rape of fourteen-year-old girl alleging that defendant had taken principal and prosecutrix in his car and had let them out on road, waiting in car some distance away until principal called after committing crime, but which did not allege knowledge or intent on part of defendant to aid principal in commission of crime of rape on prosecutrix, was insufficient. State v. Steele, 67 Utah 1, 245 P. 332 (1926); State v. Davis, 67 Utah 7, 245 P. 334 (1926).

Any allegation of force in information for assault upon girl under age of thirteen was surplusage. State v. Smith, 90 Utah 482, 62 P.2d 1110 (1936).

Instructions.

On prosecution for rape of six-year-old girl, charge of rape necessarily included charge of assault with intent to commit rape. State v. Blythe, 20 Utah 378, 58 P. 1108 (1899).

In prosecution for rape, instruction that jury could determine weight and credibility to be given testimony of female upon whom it was alleged rape had been committed, and who had testified to facts and circumstances of the rape, "as of any other witness testifying in the case," was erroneous, since prosecutrix necessarily had greater interest in result of case than disinterested witness would have had. State v. Scott, 55 Utah 553, 188 P. 860 (1920).

Instruction which included text of § 76-5-406 was sufficient, without further elaboration, to meet the requirement of making clear to jury in rape case that the force and threats had to be of such character and had such an effect on prosecutrix as to overcome an earnest desire on her part to resist. State v. Reddish, 550 P.2d 728 (Utah 1976).

Instruction that either force or threat may be used to overcome a victim's resistance is proper. State v. Lovato, 702 P.2d 101 (Utah 1985).

Intent.

Where defendant returned to girl's home and performed acts which indicated his intention to accomplish intercourse by force and then suddenly passed out or fell asleep, he was guilty of assault with intent to commit rape since there was nothing which indicated an intention on defendant's part to cease or withdraw voluntarily from struggle. State v. Waters, 122 Utah 592, 253 P.2d 357 (1953).

Juvenile testimony.

In a sex crime case, testimony of a child is not inherently improbable simply because it reflects the age, immaturity and juvenile vocabulary of a child. State v. Lairby, 699 P.2d 1187 (Utah 1985).

Mental state of accused.

This section does not require any specific mental state, and the crime may be proved by an intentional, knowing, or reckless mental state. State v. Whitehair, 735 P.2d 39 (Utah 1987).

Misjoinder with sodomy charge.

Rape charges involving defendant's two stepdaughters should have been severed from charge of sodomy involving his stepson. State v. Gotfrey, 598 P.2d 1325 (Utah 1979).

Overcoming victim's will.

The victim's will and resistance may be overcome by either physical force and violence, or by psychological or emotional stress, or by a combination thereof. State v. Studham, 572 P.2d 700 (Utah 1977).

Polygraph test.

In rape case tried without a jury where the only issue was the consent of the prosecutrix and the only witnesses were defendant and prosecutrix, conviction could not be sustained

where sole basis for judge's decision was polygraph test results in situation where (1) defendant was given his test without presence of counsel, (2) defendant signed stipulation as to admission of test results but state did not, (3) defendant appeared to have tried deception when asked whether he had forced victim to have sex but test of victim was inconclusive as to whether she had given her consent, and (4) in this case state argued the test results were reliable and should have been admitted without a stipulation but in similar pending case state argued test results are inherently unreliable and should not be admitted. State v. Abel, 600 P.2d 994 (Utah 1979).

Prejudice.

Prosecutor's reference to the fact that defendant was a black man did not prejudice the jury, where the fact that defendant was black was obvious to the jury, and there was no indication that the remark was made with derogatory intent or to suggest that because defendant was black, he was more likely to have committed the alleged crime. State v. Thomas, 777 P.2d 445 (Utah 1989).

Threats.

Threats were sufficient, for purposes of crime of rape, if they were such as to create real apprehension of dangerous consequences, or of great and immediate bodily harm, accompanied by apparent power of execution, or were such as in any manner to overpower mind of woman so that she dare not resist. State v. McCune, 16 Utah 170, 51 P. 818 (1898).

Uncorroborated testimony.

The testimony of a rape victim, without additional evidence, can support a conviction, especially where nothing contradicts the victim's testimony. State v. Archuleta, 747 P.2d 1019 (Utah 1987).

Vicarious liability.

One who aided and abetted another in commission of rape could be guilty of rape though he did not have intercourse with prosecutrix. State v. Brinkman, 68 Utah 557, 251 P. 364 (1926).

Victim's age as element of rape.

For crime of rape, victim's age is not an element of crime if victim did not consent to act of sexual intercourse; if victim did consent in fact to act but was under age of 14, law treats act as having been done without consent, and only in that circumstance is age of victim an element of crime of rape. Smith v. Morris, 690 P.2d 560 (Utah 1984).

Victim's prior sexual experience.

In prosecution for rape, if prosecutrix had had sexual intercourse with defendant at other times than one in question, that fact could ordinarily be shown; but prosecutrix could not be interrogated on cross-examination as to whether she had had sexual intercourse with others than defendant. State v. Scott, 55 Utah 553, 188 P. 860 (1920).

Absent circumstances which enhance its probative value, evidence of a rape victim's sexual promiscuity, whether in the form of testimony concerning her general reputation or testimony concerning specific acts with persons other than defendant, is ordinarily insufficiently probative to outweigh the highly prejudicial effect of its introduction at trial. State v. Archuleta, 747 P.2d 1019 (Utah 1987).

Cited in State v. Logan, 712 P.2d 262 (Utah 1985); State ex rel. R.W., 717 P.2d 258 (Utah 1986); State v. Templin, 805 P.2d 182 (Utah 1990).

COLLATERAL REFERENCES

Utah Law Review. — Rape Victim Confrontation — 1985, 1985 Utah L. Rev. 3, 687.

Am. Jur. 2d. — 65 Am. Jur. 2d Rape § 7.

C.J.S. — 75 C.J.S. Rape § 11.

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

Admissibility of prosecution evidence on issue of consent, that rape victim was a virgin, absent defense attack on her chastity, 35 A.L.R.3d 1452.

Seizure or detention for purpose of committing rape, robbery, or similar offense as constituting separate crime of kidnaping, 43 A.L.R.3d 699.

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

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

Conviction of rape or related sexual offenses on basis of intercourse accomplished under the pretext of, or in the course of, medical treatment, 65 A.L.R.4th 1064.

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

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

Key Numbers. — Rape ⚿ 9 et seq.

76-5-402.1. Rape of a child.

(1) A person commits rape of a child when the person has sexual intercourse with a child who is under the age of 14.

(2) Rape of a child is punishable, as a felony of the first degree, by imprisonment in the state prison for a term which is a minimum mandatory term of 5, 10, or 15 years and which may be for life.

History: C. 1953, 76-5-402.1, enacted by L. 1983, ch. 88, § 18.

NOTES TO DECISIONS

ANALYSIS

Testimony of prosecutrix.
Victim's age as element of rape.
Cited.

Testimony of prosecutrix.

In prosecution for statutory rape, it was within discretion of judge to permit ten-year-old prosecutrix to testify; child that age was assumed to be qualified if she appeared to have sufficient intelligence, understood questions, knew and remembered facts, and had sense of moral duty to tell truth. State v. Sanchez, 11 Utah 2d 429, 361 P.2d 174 (1961).

Victim's age as element of rape.

For crime of rape, victim's age is not an element of crime if victim did not consent to act; if victim did consent in fact to act but was under age of 14, law treats act as having been done without consent, and only in that circumstance is age of victim an element of crime of rape. Smith v. Morris, 690 P.2d 560 (Utah 1984).

Cited in State v. Bishop, 717 P.2d 261 (Utah 1986); Matthew v. Cook, 754 P.2d 666 (Utah 1988); State v. Lorrah, 761 P.2d 1388 (Utah 1988); State v. Kelly, 784 P.2d 144 (Utah 1989).

COLLATERAL REFERENCES

A.L.R. — Admissibility of evidence that juvenile prosecuting witness in sex offense case had prior sexual experience for purposes of showing alternative source of child's ability to describe sex acts, 83 A.L.R.4th 685.

76-5-402.2. Object rape.

A person who, without the victim's consent, causes the penetration, however slight, of the genital or anal opening of another person who is 14 years of age or older, by any foreign object, substance, instrument, or device, not including a part of the human body, with intent to cause substantial emotional or bodily pain to the victim or with the intent to arouse or gratify the sexual desire of any person, commits an offense which is punishable as a felony of the first degree.

History: C. 1953, 76-5-402.2, enacted by L. 1983, ch. 88, § 19; 1984, ch. 18, § 8.

NOTES TO DECISIONS

Instructions.

—Failure to follow.

Where defendant was charged with aggravated sexual assault, and the jury, after being instructed that it could find him guilty of only one lesser included offense, convicted him of object rape, forcible sodomy, and forcible sexual abuse, the object rape conviction was affirmed and the other two convictions were vacated as surplusage. State v. Thompson, 776 P.2d 48 (Utah 1989).

COLLATERAL REFERENCES

Utah Law Review. — Utah Legislative Survey — 1983, 1984 Utah L. Rev. 115, 159.

76-5-402.3. Object rape of a child.

A person who causes the penetration, however slight, of the genital or anal opening of a child who is under the age of 14 by any foreign object, substance, instrument, or device, not including a part of the human body, with intent to cause substantial emotional or bodily pain to the child or with the intent to arouse or gratify the sexual desire of any person, commits an offense which is punishable as a felony of the first degree, by imprisonment in the state prison for a term which is a minimum mandatory term of 5, 10, or 15 years and which may be for life.

History: C. 1953, 76-5-402.3, enacted by L. 1983, ch. 88, § 20.

NOTES TO DECISIONS

Cited in State v. Bishop, 717 P.2d 261 (Utah 1986).

COLLATERAL REFERENCES

Utah Law Review. — Utah Legislative Survey — 1983, 1984 Utah L. Rev. 115, 159.

A.L.R. — Admissibility of evidence that juvenile prosecuting witness in sex offense case had prior sexual experience for purposes of showing alternative source of child's ability to describe sex acts, 83 A.L.R.4th 685.

76-5-403. Sodomy — Forcible sodomy.

(1) A person commits sodomy when the actor engages in any sexual act with a person who is 14 years of age or older involving the genitals of one person and mouth or anus of another person, regardless of the sex of either participant.

(2) A person commits forcible sodomy when the actor commits sodomy upon another without the other's consent.

(3) Sodomy is a class B misdemeanor. Forcible sodomy is a felony of the first degree.

History: C. 1953, 76-5-403, enacted by L. 1973, ch. 196, § 76-5-403; 1977, ch. 86, § 2; 1979, ch. 73, § 3; 1983, ch. 88, § 21.

Cross-References. — Assault, § 76-5-102.

NOTES TO DECISIONS

ANALYSIS

Defense of intoxication not applicable.
Elements.
Force.
Guilty plea under prior statute.
Instructions.
Juvenile testimony.
Misjoinder with rape charge.
Separate offenses.
—Forcible sexual abuse.
Cited.

Defense of intoxication not applicable.

Since in prosecution for sodomy no particular intent was necessary element, defendant was not entitled to instruction based on statute which required jury to consider intoxication in determining intent whenever any particular

purpose, motive or intent was necessary element of crime. State v. Turner, 3 Utah 2d 285, 282 P.2d 1045 (1955).

Elements.

Emission is not a necessary element of the crime of sodomy. State v. Peterson, 81 Utah 340, 17 P.2d 925 (1933).

Penetration is not a necessary element of forcible sodomy. State v. Glenny, 656 P.2d 990 (Utah 1982).

Force.

Jury verdict of guilty of forcible sodomy was supported by evidence that victim was given a pill by defendant prior to the commission of the offense, that the victim then became weak, dizzy, and on the verge of unconsciousness and was later found to have an unusually high concentration of trichloral ethanol in her system, and that the victim performed fellatio upon defendant only after he became angry and threatened her with a beer bottle. State v. Archuletta, 597 P.2d 1348 (Utah 1979).

Guilty plea under prior statute.

It was a violation of due process for defendant, who pled guilty under prior sodomy statute which did not contain force as an element, to be sentenced under this section after a hearing determined defendant had used force. Von Atkinson v. Smith, 575 F.2d 819 (10th Cir. 1978).

Instructions.

In trial for forcible sodomy, where jury asked trial court for an instruction on the meaning of the term "genitals" as used in this section, it was reversible error for trial court to refuse to give the requested instruction. State v. Couch, 635 P.2d 89 (Utah 1981).

Juvenile testimony.

In a sex crime case, testimony of a child is not inherently improbable simply because it reflects the age, immaturity and juvenile vocabulary of a child. State v. Lairby, 699 P.2d 1187 (Utah 1985).

Misjoinder with rape charge.

Sodomy charge involving defendant's stepson should have been severed from charges of rape involving his two stepdaughters. State v. Gotfrey, 598 P.2d 1325 (Utah 1979).

Separate offenses.

—Forcible sexual abuse.

Forcible sexual abuse was not a lesser included offense of forcible sodomy, because neither of the acts on which the forcible sexual abuse counts were based satisfied the elements of forcible sodomy. State v. Young, 780 P.2d 1233 (1989).

Cited in State v. Thompson, 776 P.2d 48 (Utah 1989).

COLLATERAL REFERENCES

Utah Law Review. — Legislative Violence Against Lesbians and Gay Men, 1994 Utah L. Rev. 209.

Brigham Young Law Review. — Right of Privacy — State Statute Prohibiting Private Consensual Sodomy Is Constitutional, 1977 B.Y.U. L. Rev. 170.

Journal of Contemporary Law. — The Ugly Mirror: Bowers, Plessy and the Reemergence of the Constitutionalism of Social Stratification and Historical Reinforcement, 19 J. Contemp. L. 21 (1993).

Am. Jur. 2d. — 70A Am. Jur. 2d Sodomy §§ 3, 17.

C.J.S. — 81 C.J.S. Sodomy § 4.

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

Prejudicial effect of prosecutor's reference in argument to homosexual acts or tendencies of accused which are not material to his commission of offense charged, 54 A.L.R.3d 897.

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

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

Key Numbers. — Sodomy ⚬ 1.

76-5-403.1. Sodomy on a child.

(1) A person commits sodomy upon a child if the actor engages in any sexual act upon or with a child who is under the age of 14, involving the genitals or anus of the actor or the child and the mouth or anus of either person, regardless of the sex of either participant.

(2) Sodomy upon a child is punishable as a felony of the first degree, by imprisonment in the state prison for a term which is a minimum mandatory term of 5, 10, or 15 years and which may be for life.

History: C. 1953, 76-5-403.1, enacted by L. 1983, ch. 88, § 22; 1988, ch. 156, § 1.

NOTES TO DECISIONS

Analysis

Constitutionality.
Guilty plea vacated.
Information.
Mandatory sentence.
—Challenge on appeal.
Sufficiency of evidence.
Testimony.
—Instructions.
—Leading questions.
—Related offense.
Time of offense.
Cited.

Constitutionality.

This section is not a special law which violates Utah Const., Art. VI, § 26. All people convicted of the crime are treated similarly by the statute. There is a reasonable basis for distinguishing between those who commit child sodomy and those who commit other offenses. State v. Bishop, 717 P.2d 261 (Utah 1986).

Guilty plea vacated.

Defendant's guilty plea was vacated, because neither his affidavit regarding the plea agreement nor the transcript of the plea itself contained language clearly and unequivocally advising him that by pleading guilty to sodomy on a child he was subjecting himself to a mandatory prison sentence of at least five years. State v. Smith, 776 P.2d 929 (Utah 1989).

Information.

Incorrectly amended information did not undermine the sufficiency of the evidence to support defendant's conviction, because defendant's counsel understood how the information was to be amended, and throughout the trial, all parties acted as though the information had been amended correctly. State v. Ireland, 773 P.2d 1375 (1989).

Mandatory sentence.

This section, which does not permit a judge to suspend the sentence of a defendant convicted of child sodomy, does not infringe the separation of powers provision of the state constitution. Courts have no inherent power to permanently suspend a statutorily defined sentence. State v. Bishop, 717 P.2d 261 (Utah 1986).

The minimum mandatory sentencing scheme does not interfere with the inherent power of the court to impose sentences and the power of the Board of Pardons to commute sentences. State v. Bywater, 748 P.2d 568 (Utah 1987).

Imposition of a 15-year minimum mandatory sentence was not cruel and unusual punishment of defendant who admitted sexually abusing his niece on several occasions over an extended period of time and while in a position of trust toward the victim. State v. Copeland, 765 P.2d 1266 (Utah 1988).

The fact that defendant was a victim of sexual abuse as a child did not make the imposition of a ten-year minimum mandatory sentence cruel punishment as applied to him in contrast to other offenders. State v. Bastian, 765 P.2d 902 (Utah 1988).

—Challenge on appeal.

The defendant argued on appeal that the trial court erred in failing to make specific findings of fact and to articulate the standard of proof applied in reaching the determination that a sentence of middle severity should be imposed. However, the defendant had accepted without challenge the reasons stated by trial court for imposing the sentence. The issue not having been raised in the trial court, the longstanding rule of appellate review precluded the issue from being raised for the first time on appeal. State v. Bywater, 748 P.2d 568 (Utah 1987).

Sufficiency of evidence.

Evidence consisting of somewhat confused and conflicting testimony of the defendant's five-year-old son that the defendant briefly touched the boy's genitals while rubbing his body with baby oil and testimony by the defendant's wife that he had bought the oil without her knowledge did not establish a prima facie case against the defendant. State v. Emmett, 839 P.2d 781 (Utah 1992).

Testimony.

—Instructions.

Upon trial for assault with intent to commit sodomy upon child of tender years, in which child was the principal witness, cautionary instructions with regard to weight of such evidence should have been given to safeguard rights of accused. State v. Morasco, 42 Utah 5, 128 P. 571 (1912).

Evidence, which consisted primarily of testimony of alleged victim who was under six years of age, was sufficient to sustain conviction of sodomy, where witness was examined by court as to capability of receiving correct impressions and ability to relate facts accurately, and where court gave cautionary instruction calling jury's attention to witness' tender years. State v. Dixon, 114 Utah 301, 199 P.2d 775 (1948).

—Leading questions.

Use of leading questions was not error, in

light of the victim's use of dolls to demonstrate that defendant had sodomized him, the prosecutor's careful use of leading questions, and the trial court's considered opinion that leading questions were necessary to develop the victim's testimony. State v. Ireland, 773 P.2d 1375 (1989).

—Related offense.

There was no error in allowing the victim to testify as to what occurred even though it became necessary for him to mention defendant's criminal involvement with his brother, where the crimes against the two boys were committed at the same time and on the same occasion and in the presence of each other, the events being so intertwined that realistically they could not be separated. State v. Nelson, 777 P.2d 479 (Utah 1989).

Time of offense.

Time is not a statutory element of the offense charged under this section; when the prosecution does not have to prove the precise time of the offense, insufficiency of the evidence on that point is not a ground upon which the verdict can be attacked. State v. Fulton, 742 P.2d 1208 (Utah 1987), cert. denied, 484 U.S. 1044, 108 S. Ct. 777, 98 L. Ed. 2d 864 (1988).

There was no fatal variance between the charges and the proof of sodomy on a child, where the information stated that the offense took place on or about June 1, 1983, and defendant's alibi evidence did not preclude the possibility that he abused the victim on May 31st or June 2nd, two dates acceptably close to the June 1st date charged in the information. State v. Fulton, 742 P.2d 1208 (Utah 1987), cert. denied, 484 U.S. 1044, 108 S. Ct. 777, 98 L. Ed. 2d 864 (1988).

Defendant did not receive insufficient notice of the time of the offense to permit him to adequately prepare a defense to a charge of sodomy on a child, where the information included an allegation that the offense took place "on or about June 1, 1983" and defendant made no inquiry of the prosecution regarding additional facts and did not raise the inadequacy of the information before trial by written motion. State v. Fulton, 742 P.2d 1208 (Utah 1987), cert. denied, 484 U.S. 1044, 108 S. Ct. 777, 98 L. Ed. 2d 864 (1988).

Cited in State v. Banner, 717 P.2d 1325 (Utah 1986); State v. Tucker, 727 P.2d 185 (Utah 1986); State v. Hadfield, 788 P.2d 506 (Utah 1990).

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — Judicial Decisions — Criminal Law, 1988 Utah L. Rev. 177.

A.L.R. — Admissibility of evidence that juvenile prosecuting witness in sex offense case had prior sexual experience for purposes of showing alternative source of child's ability to describe sex acts, 83 A.L.R.4th 685.

76-5-404. Forcible sexual abuse.

(1) A person commits forcible sexual abuse if the victim is 14 years of age or older and, under circumstances not amounting to rape, object rape, sodomy, or attempted rape or sodomy, the actor touches the anus, buttocks, or any part of the genitals of another, or touches the breast of a female, or otherwise takes indecent liberties with another, or causes another to take indecent liberties with the actor or another, with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person, without the consent of the other, regardless of the sex of any participant.

(2) Forcible sexual abuse is a felony of the second degree.

History: C. 1953, 76-5-404, enacted by L. 1973, ch. 196, § 76-5-404; 1977, ch. 86, § 3; 1979, ch. 73, § 4; 1983, ch. 88, § 23; 1984, ch. 18, § 9.

NOTES TO DECISIONS

Analysis

Constitutionality.
Aggravated sexual assault distinguished.
Elements of proof.
Evidence.
Indecent liberties.
Intent.
Juvenile testimony.
Lack of consent.
Lesser included offenses.
Separate offenses.
Specific intent.
Cited.

Constitutionality.

The phrase "or otherwise takes indecent liberties" refers to acts of equal magnitude of gravity to those specifically set forth in the section and is not unconstitutionally vague. State v. Kennedy, 616 P.2d 594 (Utah 1980).

Aggravated sexual assault distinguished.

Aggravated sexual assault is distinguishable from forcible sexual abuse. State v. Cude, 784 P.2d 1197 (Utah 1989).

Elements of proof.

It is not necessary for the state to prove the absence of rape or attempted rape in order to secure a conviction under this section, notwithstanding the language therein which specifies that it applies only to certain acts committed "under circumstances not amounting to rape ... or attempted rape." State v. Peters, 550 P.2d 199 (Utah 1976).

Evidence.

Evidence of defendant's honesty and capacity for truthfulness does not go to prove guilt or innocence on a sexual abuse charge but may be used to establish the credibility of the defendant as a witness. State v. Sisneros, 581 P.2d 1339 (Utah 1978).

Indecent liberties.

The momentary touching or grabbing of the clothed breasts of an adolescent girl by a 17-year-old boy does not come within the phrase "otherwise takes indecent liberties with another"; use of disjunctive phrase "or otherwise" was indicative of legislative intent that conduct proscribed by prohibition against indecent liberties was to be of equal gravity to that proscribed by prohibition against touching anus or genitals. In re J.L.S., 610 P.2d 1294 (Utah 1980).

The brief touching of woman's clothed buttocks did not constitute "taking indecent liberties." In re L.G.W., 641 P.2d 127 (Utah 1982).

Absent any express direction from the Legislature, the presence of clothing on a touched body part is an important fact in determining whether a defendant has taken indecent liberties. State v. Peters, 796 P.2d 708 (Utah Ct. App. 1990).

When the defendant enticed the youthful female victim into an abandoned house by pretense and there detained her against her will for about 20 minutes to serve his sexual purposes, and it was in that setting that he placed his hand on the breast of his frightened, pleading victim although fully clothed, the defendant did take indecent liberties. State v. Peters, 796 P.2d 708 (Utah Ct. App. 1990).

Intent.

Evidence was sufficient to establish that husband acted to gratify his sexual desires when he forced his wife to have sexual intercourse with other men, tape recorded and sometimes witnessed the acts of intercourse, and replayed the recordings over and over again. State v. Kennedy, 616 P.2d 594 (Utah 1980).

This section requires only that defendant act with intent to arouse or gratify the sexual desires of any person and is not limited to his own sexual desires. State v. Kennedy, 616 P.2d 594 (Utah 1980).

The intent required by the offense of forcible sexual abuse is a general intent to take indecent liberties or touch the anus or genitals of another without that person's permission and the specific intent or purpose to cause substantial emotional or physical pain or to sexually arouse or gratify any person. State v. Sessions, 645 P.2d 643 (Utah 1982).

Juvenile testimony.

In a sex crime case, testimony of a child is not inherently improbable simply because it reflects the age, immaturity, and juvenile vocabulary of a child. State v. Lairby, 699 P.2d 1187 (Utah 1985).

Lack of consent.

Outright violence, display of a weapon or other extreme tactics is not a necessary element of a crime requiring lack of consent, to establish lack of consent due to force or threats; § 76-5-406 requires, without more, such threat of whatever character as will overcome the resistance of a person of ordinary resolution; husband's requiring of wife to have sexual intercourse with other men through psychological abuse consisting of systematic harassment, intimidation and abuse which included threats of violence to wife and her father, threats of separation of wife from her child, and threats of blackmail was sufficient to overcome the resistance of a person of ordinary resolution and establish lack of wife's consent, and, under such circumstances, wife's failure to actively resist

did not constitute consent to the intercourse with the other men. State v. Kennedy, 616 P.2d 594 (Utah 1980).

Lesser included offenses.
Gross lewdness under circumstances which perpetrator should know will likely cause affront or alarm, § 76-9-702, is a lesser included offense of the felony of forcible sexual abuse. In re L.G.W., 641 P.2d 127 (Utah 1982).

Assault is a lesser included offense of forcible sexual abuse. State v. Jones, 243 Utah Adv. Rep. 35 (Utah Ct. App. 1994).

Separate offenses.
Defendant's contacts with victim were separate acts requiring proof of different elements and constituted separate offenses. State v. Suarez, 736 P.2d 1040 (Utah 1987).

Forcible sexual abuse was not a lesser included offense of forcible sodomy, because neither of the acts on which the forcible sexual abuse counts were based satisfied the elements of forcible sodomy. State v. Young, 780 P.2d 1233 (1989).

Specific intent.
Reasonable inference from defendant's admission that he had stroked and examined a little girl was that he had intended to arouse or gratify his sexual desires, though he denied such intent; thus, his contention that there was insufficient evidence of his intent was without merit. State v. Cooley, 603 P.2d 800 (Utah 1979).

Cited in State v. Logan, 712 P.2d 262 (Utah 1985); State v. Banner, 717 P.2d 1325 (Utah 1986); Robbins v. Cook, 737 P.2d 225 (Utah 1986); State v. Thompson, 776 P.2d 48 (Utah 1989).

COLLATERAL REFERENCES

Utah Law Review. — Child Sexual Abuse Cases, 1986 Utah L. Rev. 443.

Recent Developments in Utah Law — Judicial Decisions — Constitutional Law, 1987 Utah L. Rev. 82.

76-5-404.1. Sexual abuse of child — Aggravated sexual abuse of child.

(1) A person commits sexual abuse of a child if, under circumstances not amounting to rape of a child, object rape of a child, sodomy upon a child, or an attempt to commit any of these offenses, the actor touches the anus, buttocks, or genitalia of any child, the breast of a female child younger than 14 years of age, or otherwise takes indecent liberties with a child, or causes a child to take indecent liberties with the actor or another with intent to cause substantial emotional or bodily pain to any person or with the intent to arouse or gratify the sexual desire of any person regardless of the sex of any participant.

(2) Sexual abuse of a child is punishable as a second degree felony.

(3) A person commits aggravated sexual abuse of a child when in conjunction with the offense described in Subsection (1) any of the following circumstances have been charged and admitted or found true in the action for the offense:

(a) The offense was committed by the use of a dangerous weapon as defined in Section 76-1-601, or by force, duress, violence, intimidation, coercion, menace, or threat of harm, or was committed during the course of a kidnapping.

(b) The accused caused bodily injury or severe psychological injury to the victim during or as a result of the offense.

(c) The accused was a stranger to the victim or made friends with the victim for the purpose of committing the offense.

(d) The accused used, showed, or displayed pornography or caused the victim to be photographed in a lewd condition during the course of the offense.

(e) The accused, prior to sentencing for this offense, was previously convicted of any felony, or of a misdemeanor involving a sexual offense.

(f) The accused committed the same or similar sexual act upon two or more victims at the same time or during the same course of conduct.

(g) The accused committed, in Utah or elsewhere, more than five separate acts, which if committed in Utah would constitute an offense described in this chapter, and were committed at the same time, or during the same course of conduct, or before or after the instant offense.

(h) The offense was committed by a person who occupied a position of special trust in relation to the victim; "position of special trust" means that position occupied by a person in a position of authority, who, by reason of that position is able to exercise undue influence over the victim, and includes, but is not limited to, the position occupied by a youth leader or recreational leader who is an adult, adult athletic manager, adult coach, teacher, counselor, religious leader, doctor, employer, foster parent, babysitter, or adult scout leader, though a natural parent, stepparent, adoptive parent, or other legal guardian, not including a foster parent, who has been living in the household, is not a person occupying a position of special trust under this subsection.

(i) The accused encouraged, aided, allowed, or benefited from acts of prostitution or sexual acts by the victim with any other person, or sexual performance by the victim before any other person.

(4) Aggravated sexual abuse of a child is punishable as a first degree felony by imprisonment in the state prison for a term which is a minimum mandatory term of 3, 6, or 9 years and which may be for life.

History: C. 1953, 76-5-404.1, enacted by L. 1983, ch. 88, § 24; 1984, ch. 18, § 10; 1989, ch. 170, § 4.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
Aggravating circumstances.
Bill of particulars.
Child witness.
Evidence.
—Character.
—Credibility of victim.
—Harmless error.
—Insufficient.
—Sufficient.
—Videotape.
Indecent liberties.
Lewdness.
Sexual exploitation of minor.
Time of offense.
Cited.

Constitutionality.

The sentencing provisions of this section are constitutional. State v. Kaus, 744 P.2d 1375 (Utah 1987).

The minimum mandatory sentencing scheme set forth in Subsections 76-5-404.1(4), 76-3-201(5), 76-3-406(1), and 77-27-9(2) is not unconstitutionally vague. State v. Gerrish, 746 P.2d 762 (Utah 1987).

Subsection (3)(g) constitutionally promotes a legitimate legislative objective without undermining the principle that guilt must be established by probative evidence and beyond a reasonable doubt. State v. Bishop, 753 P.2d 439 (Utah 1988).

Subsection (3)(g) does not violate the prohibitions against ex post facto laws, since the statute in no way makes punishment more burdensome for acts perpetrated prior to enactment. State v. Bishop, 753 P.2d 439 (Utah 1988).

Aggravating circumstances.

Evidence supported finding that victim suffered sufficient bodily injury to warrant conviction for aggravated sexual abuse of a child. State v. Mitchell, 769 P.2d 817 (Utah 1989).

A defendant's guilt or innocence on the primary charge of sexual abuse should first be determined by the trier of fact before evidence of the aggravating acts is adduced under Subsection (3)(g). State v. Wareham, 772 P.2d 960 (1989).

Bill of particulars.

Although time is not a statutory element of

sexual abuse of a child under this section, where the state amended the information, after learning of the defendant's alibi defense, to charge that the alleged offense, sexual abuse of a child, occurred "on or about the first two weeks of February, 1984," rather than "on or about the 4th day of February, 1984," defendant was clearly entitled to know whether this change was made in good faith or to avoid the alibi defense, and to any information the prosecution had that would have narrowed the time period, but no prejudicial error was shown by the trial court's denial of defendant's motion for bill of particulars since he did not supply a trial transcript to show that he was unable to mount whatever defenses he had against the charge. State v. Robbins, 709 P.2d 771 (Utah 1985).

Child witness.

Six-year-old alleged victim of assault could testify at trial after court determined that child was sufficiently intelligent and mature to understand questions put to her, that she had some knowledge of subject matter of inquiry, that she was able to remember what happened, and that she had a sense of moral duty to tell the truth. State v. Smith, 16 Utah 2d 374, 401 P.2d 445 (1965).

Evidence.

The fact-finder is to determine the existence of the circumstances in Subsection (3) at trial. State v. Bishop, 753 P.2d 439 (Utah 1988).

—Character.

Since a defendant's character is not an element of the crime of sexual abuse of a child, the court does not err in denying the request of a defendant charged with that crime for admission of past instances of conduct relating to his "reputation for sexual morality." State v. Miller, 709 P.2d 350 (Utah 1985).

In a prosecution for sexually abusing a child, the judge's decision to exclude expert testimony about the behavioral and personality characteristics of a "typical" child sexual offender was not arbitrary or irrational, since the tendency of such evidence to confuse the issues or mislead the jury outweighed its probative value. State v. Miller, 709 P.2d 350 (Utah 1985).

Character is not an essential element of sexual abuse of a child. State v. Lenaburg, 781 P.d 432 (1989).

—Credibility of victim.

The trial court erred in allowing a sheriff's secretary-deputy to testify about her prior experience with delayed reporting in sexual abuse cases and on whether other victims were truthfully reporting the alleged incidents of abuse. State v. Iorg, 801 P.2d 938 (Utah Ct. App. 1990).

—Harmless error.

Erroneous admission of testimony of defendant's two older daughters that he had sexually abused them, before the jury decided whether defendant had committed the primary charge alleged against him, was not prejudicial, because the force of defendant's own confession on the primary charge was so compelling as to wipe out the shadow of prejudice. State v. Wareham, 772 P.26 960 (1989).

—Insufficient.

One-and-a-half-year-old girl's exclamations, "Ow bum," or "Ow bum daddy," uttered while being bathed by her mother, was insufficient evidence, as a matter of law, to support her father's conviction of aggravated sexual abuse of a child. State v. Webb, 779 P.2d 1108 (1989).

—Sufficient.

The evidence was sufficient to support father's conviction for forcible sexual abuse of his 12-year-old daughter. See State v. Thatcher, 667 P.2d 23 (Utah 1983).

Conflict between child victim's testimony at preliminary hearing and at trial did not render evidence as a whole so inconclusive as to warrant reversal. State v. Speer, 718 P.2d 383 (Utah 1986).

Where there was evidence on the record of commission of the elements of the offense, but the defendant argued that this evidence was insufficient to sustain his conviction because the young victim gave confused testimony on nonessential details, such as whether the offense occurred in the bedroom or the living room and where her mother was when the alleged offense occurred, the evidence was sufficiently conclusive to eliminate any reasonable doubt that the defendant was guilty. State v. Lactod, 761 P.2d 23 (Utah Ct. App. 1988).

Victim's testimony, supported by the testimony of two investigating officers and the victim's grandmother, was abundantly sufficient to support the jury's guilty verdict. State v. Wilson, 771 P.2d 1077 (Ct. App. 1989).

—Videotape.

Admission of videotape of interview between five year-old victim and Division of Family Services worker was reversible error, where the tape was the most damning evidence presented at trial, and defendant was unable to explore contradictory or confusing portions of the victim's testimony. State v. Lenaburg, 781 P.2d 432 (1989).

Indecent liberties.

Defendant's acts of inducing a child to disrobe for an illicit photo session, when viewed with evidence of defendant's criminal intent, constituted taking "indecent liberties with a child." State v. Bishop, 753 P.2d 439 (Utah 1988).

Lewdness.

This section and the lewdness involving a

child statute (§ 76-9-702.5) proscribe different acts, and the requisite mens rea under the two statutes is significantly different. State v. Vogt, 824 P.2d 455 (Utah Ct. App. 1991).

Sexual exploitation of minor.
This section and § 76-5a-3(1)(a) (sexual exploitation of a minor) were not designed to proscribe parallel conduct. State v. Bishop, 753 P.2d 439 (Utah 1988).

The act of photographing "nude children" under the provisions of the sexual exploitation statute is different from photographing young children in a "lewd condition" pursuant to the sexual abuse statute. State v. Bishop, 753 P.2d 439 (Utah 1988).

Time of offense.
Child's testimony that she could not remember any abuse occurring on the date alleged in the information did not support defendant's claim of insufficient evidence to support his conviction. Time was not an element of the offense that the state was required to prove. State v. Marcum, 750 P.2d 599 (Utah 1988).

Time is not a statutory element of sexual abuse of a child. State v. Wilson, 771 P.2d 1077 (Ct. App. 1989).

Time and place, except insofar as pertinent to the statute of limitations, are not integral to a charge of child sexual abuse. State v. Hoyt, 806 P.2d 204 (Utah Ct. App. 1991).

Cited in State v. Walker, 743 P.2d 191 (Utah 1987); State v. Erickson, 749 P.2d 620 (Utah 1987); State v. West, 765 P.2d 891 (Utah 1988); Hurst v. Cook, 777 P.2d 1029 (Utah 1989); State v. Hadfield, 788 P.2d 506 (Utah 1990); State v. Wareham, 801 P.2d 918 (Utah 1990); State v. Pedersen, 802 P.2d 1328 (Utah Ct. App. 1990); State v. Palmer, 860 P.2d 339 (Utah Ct. App. 1993).

COLLATERAL REFERENCES

Utah Law Review. — Note, Enhancing Penalties by Admitting "Bad Character" Evidence During the Guilt Phase of Criminal Trials — *State v. Bishop,* 1989 Utah L. Rev. 1013.

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

Admissibility of evidence that juvenile prosecuting witness in sex offense case had prior sexual experience for purposes of showing alternative source of child's ability to describe sex acts, 83 A.L.R.4th 685.

76-5-405. Aggravated sexual assault.

(1) A person commits aggravated sexual assault if in the course of a rape or attempted rape, object rape or attempted object rape, forcible sodomy or attempted forcible sodomy, or forcible sexual abuse or attempted forcible sexual abuse the actor:

(a) causes bodily injury to the victim;

(b) uses or threatens the victim by use of a dangerous weapon as defined in Section 76-1-601;

(c) compels, or attempts to compel, the victim to submit to rape, object rape, forcible sodomy, or forcible sexual abuse, by threat of kidnapping, death, or serious bodily injury to be inflicted imminently on any person; or

(d) is aided or abetted by one or more persons.

(2) Aggravated sexual assault is a first degree felony punishable by imprisonment in the state prison for a term which is a minimum mandatory term of 5, 10, or 15 years and which may be for life.

History: C. 1953, 76-5-405, enacted by L. 1973, ch. 196, § 76-5-405; 1977, ch. 86, § 4; 1983, ch. 88, § 25; 1986, ch. 31, § 1; 1989, ch. 170, § 5.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
Aiders and abettors.
Elements of offense.
—Threat of injury.
Error on jury verdict form.
Evidence.
—Prosecutrix's prior sexual activity.
—Sufficient.
Forcible sexual abuse distinguished.

Instructions.
—Deviation from information.
—Failure to follow.
Lesser included offenses.
Rape distinguished.
Sentences.
—Constitutionality.
—Upheld.
Separate acts.
Testimony of child.
Cited.

Constitutionality.

Any vagueness to be found in the minimum mandatory term provision in Subsection (2) is dispelled by the implementing language of Subsection 76-3-201(5), which plainly mandates imposition of the sentence of middle severity unless there are circumstances in aggravation or mitigation of the crime. It is also plain from that statute that imposition of the sentence of highest severity is dependent upon a determination of the existence of aggravating circumstances, while imposition of the sentence of lowest severity is dependent upon a determination of the existence of mitigating circumstances. State v. Egbert, 748 P.2d 558 (Utah 1987).

The minimum mandatory sentencing scheme provided for in this section is not violative of equal protection or the separation of powers requirement and does not constitute cruel and unusual punishment. State v. Gentry, 747 P.2d 1032 (Utah 1987).

Aiders and abettors.

Where record was replete with evidence that would sustain, if not compel, a finding that defendant was not coerced or threatened with immediate use of unlawful physical force when he aided and abetted in rape, there was no need to determine whether to use a subjective or objective standard as to defendant's perception of coercion or threat of force. State v. Alexander, 597 P.2d 890 (Utah 1979).

Elements of offense.

—Threat of injury.

Evidence was sufficient to show that the victim was compelled to submit by threat of death or serious bodily injury, where defendant told her that he had a knife after he struck her on the back with what she perceived to be the butt of a knife. State v. John, 770 P.2d 994 (Utah 1989).

When a verbal threat of "death, or serious bodily injury to be inflicted imminently on any person" is made during the course of a rape or forcible sodomy, the aggravated circumstance requirement of Subsection (1)(c) is fully satisfied. State v. Hartmann, 783 P.2d 544 (Utah 1989).

Error on jury verdict form.

Although the verdict form signed by the jury foreman stated that the defendant was guilty of "forcible sexual assault," but the information had charged the defendant with "aggravated sexual assault," the variance did not justify the granting of a motion to arrest judgment on the basis of uncertainty as to what the jury intended; an error on the jury verdict form does not create uncertainty per se, and there was no reason to doubt that the jury intended to find the defendant guilty as charged. State v. Gentry, 747 P.2d 1032 (Utah 1987).

Evidence.

—Prosecutrix's prior sexual activity.

Evidence of prosecutrix's prior sexual activity is admissible in rape prosecution only when the court finds under the circumstances of the particular case such evidence is relevant to a material factual dispute and its probative value outweighs the inherent danger of unfair prejudice to the prosecutrix, confusion of issues, unwarranted invasion of the complainant's privacy, considerations of undue delay and time waste and the needless presentation of cumulative evidence. State v. Johns, 615 P.2d 1260 (Utah 1980). (See also U.R.E. 412.)

Evidence of the complainant's last consensual intercourse was not relevant to the issue of her consent under the facts presented, and its exclusion, therefore, did not deprive the defendant of his constitutional right of confrontation. State v. Lovato, 702 P.2d 101 (Utah 1985).

Probative value of evidence of victim's prior consensual intercourse with a neighbor was outweighed by its prejudicial effect. State v. Williams, 773 P.2d 1368 (1989).

—Sufficient.

Evidence, including the victim's voice identification of the defendant, along with ample circumstantial evidence to corroborate this identification, was sufficient to sustain the defendant's conviction of aggravated sexual assault, even though the victim neither recognized any peculiarities of speech nor possessed prior familiarity with the defendant's voice. State v. Booker, 709 P.2d 342 (Utah 1985).

Evidence was sufficient to sustain defendant's conviction of aggravated sexual assault, where the victim testified that defendant approached her from behind and held a sharp object against her neck before raping her, and there was medical evidence of sperm in the victim's vagina. State v. Walker, 765 P.2d 874 (Utah 1988).

Evidence was sufficient to support a conviction under this section. See State v. Young, 780 P.2d 1233 (1989); State v. Featherson, 781 P.2d 424 (1989).

Evidence was sufficient to support defendant's conviction, where defendant grabbed the

victim from behind, fondled her legs, breasts, and vaginal area, and the jury could reasonably conclude that the encounter was not consensual and that the assault was perpetrated by force and fear, including the use of a knife as a dangerous weapon. State v. Hopkins, 782 P.2d 475 (Utah 1989).

Forcible sexual abuse distinguished.

Aggravated sexual assault is distinguishable from forcible sexual abuse. State v. Cude, 784 P.2d 1197 (Utah 1989).

Instructions.

—Deviation from information.

Difference in wording between information, citing this section and charging defendant with causing bodily injury to the victim "in the course of a rape or attempted rape, or forcible sodomy," and jury instruction using the same wording except for substitution of "forcible sexual abuse, or attempted forcible sexual abuse" in place of "forcible sodomy" was not prejudicial and was not plain error. State v. Ellifritz, 835 P.2d 170 (Utah Ct. App. 1992).

—Failure to follow.

Where defendant was charged with aggravated sexual assault, and the jury, after being instructed that it could find him guilty of only one lesser included offense, convicted him of object rape, forcible sodomy, and forcible sexual abuse, the object rape conviction was affirmed and the other two convictions were vacated as surplusage. State v. Thompson, 776 P.2d 48 (Utah 1989).

Lesser included offenses.

The offenses of aggravated assault, § 76-5-103, and assault, § 76-5-102, are lesser included offenses of aggravated sexual assault. State v. Elliott, 641 P.2d 122 (Utah 1982).

Rape distinguished.

Aggravated assault, rather than rape, was established by evidence that defendant lured victim to acquaintance's house to attend a party, held her captive there for four days, beat her with his fists, placed his hands upon her throat, took her clothes from her, repeatedly raped her and threatened her with violence. State v. Anselmo, 558 P.2d 1325 (Utah 1977).

Elements of the two crimes of rape and aggravated sexual assault are not the same, since the latter offense includes the additional element of infliction or threat of serious bodily injury. State v. Smathers, 602 P.2d 708 (Utah 1979).

There is a sufficient difference between rape and aggravated sexual assault to justify the statutory distinction between the two offenses. State v. Cude, 784 P.2d 1197 (Utah 1989).

Aggravated sexual assault encompasses a broader scope of criminal conduct than rape, and it includes attempted criminal conduct; thus, rape is not a predicate felony for aggravated sexual assault because the two crimes require proof of different elements. State v. Hancock, 874 P.2d 132 (Utah Ct. App. 1994).

Sentences.

—Constitutionality.

Four concurrent 10-year minimum mandatory sentences on four counts of aggravated sexual assault were not unconstitutionally disproportionate to the severity of the crimes. State v. Bell, 754 P.2d 55 (Utah 1988).

Imposition of the minimum mandatory sentence of five years to life upon defendant's conviction of aggravated sexual assault did not violate the state constitution's prohibition against cruel and unusual punishment. State v. Cude, 784 P.2d 1197 (Utah 1989).

—Upheld.

Concurrent 15-year minimum mandatory sentences for aggravated kidnapping and aggravated sexual assault were not cruel and unusual punishment, even though defendant committed crimes as a juvenile, because he was properly tried as an adult and several aggravating circumstances were present. State v. Russell, 791 P.2d 188 (Utah 1990).

Separate acts.

Where an act of digital penetration preceded a penile contact, and the former act was in no way necessary to the latter act, the two acts were not part of the "same act" and could support two counts of aggravated sexual assault based on separate acts of forcible sexual abuse and forcible sodomy. State v. Young, 780 P.2d 1233 (1989).

Testimony of child.

Eight-year-old boy is competent to testify to act of sodomy committed upon him; and his testimony, corroborated by his identification of the defendant, his previous description of defendant's clothing and sleeping bag, and the testimony of other witnesses, was sufficient to sustain conviction. State v. Mills, 530 P.2d 1272 (Utah 1975).

Cited in State v. Bishop, 717 P.2d 261 (Utah 1986); State v. Wade, 725 P.2d 1316 (Utah 1986); State v. Babbell, 770 P.2d 987 (Utah 1989); State v. Whittle, 780 P.2d 819 (1989); State v. Brooks, 833 P.2d 362 (Utah Ct. App. 1992); State v. Depaoli, 835 P.2d 162 (Utah 1992).

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — Judicial Decisions — Criminal Law, 1989 Utah L. Rev. 207.

76-5-406. Sexual intercourse, sodomy, or sexual abuse without consent of victim — Circumstances.

An act of sexual intercourse, rape, attempted rape, rape of a child, attempted rape of a child, object rape, attempted object rape, object rape of a child, attempted object rape of a child, sodomy, attempted sodomy, sodomy upon a child, attempted sodomy upon a child, forcible sexual abuse, attempted forcible sexual abuse, sexual abuse of a child, attempted sexual abuse of a child, or simple sexual abuse is without consent of the victim under any of the following circumstances:

(1) the victim expresses lack of consent through words or conduct;

(2) the actor overcomes the victim through the actual application of physical force or violence;

(3) the actor is able to overcome the victim through concealment or by the element of surprise;

(4) (a) (i) the actor coerces the victim to submit by threatening to retaliate in the immediate future against the victim or any other person, and the victim perceives at the time that the actor has the ability to execute this threat; or

(ii) the actor coerces the victim to submit by threatening to retaliate in the future against the victim or any other person, and the victim believes at the time that the actor has the ability to execute this threat;

(b) as used in this subsection "to retaliate" includes but is not limited to threats of physical force, kidnapping, or extortion;

(5) the victim has not consented and the actor knows the victim is unconscious, unaware that the act is occurring, or physically unable to resist;

(6) the actor knows that as a result of mental disease or defect, the victim is at the time of the act incapable either of appraising the nature of the act or of resisting it;

(7) the actor knows that the victim submits or participates because the victim erroneously believes that the actor is the victim's spouse;

(8) the actor intentionally impaired the power of the victim to appraise or control his or her conduct by administering any substance without the victim's knowledge;

(9) the victim is younger than 14 years of age;

(10) the victim is younger than 18 years of age and at the time of the offense the actor was the victim's parent, stepparent, adoptive parent, or legal guardian or occupied a position of special trust in relation to the victim as defined in Subsection 76-5-404.1(3)(h); or

(11) the victim is 14 years of age or older, but not older than 17, and the actor is more than three years older than the victim and entices or coerces the victim to submit or participate, under circumstances not amounting to the force or threat required under Subsection (2) or (4).

History: C. 1953, 76-5-406, enacted by L. 1973, ch. 196, § 76-5-406; 1983, ch. 88, § 26; 1988, ch. 156, § 2; 1989, ch. 259, § 1; 1992, ch. 64, § 1.

Amendment Notes. — The 1992 amendment, effective April 27, 1992, inserted "or occupied a position of special trust in relation to the victim as defined in Subsection 76-5-404.1(3)(h)" in Subsection (10).

NOTES TO DECISIONS

ANALYSIS

Consent.
Crime of violence.
Drugs and threats.
Earnest resistance.
Evidence of victim's character.
Force and threats.
Use as jury instruction.
Cited.

Consent.

One does not surrender the right to refuse sexual intimacy by the act of accepting another's company or even by encouraging and accepting romantic overtures. State v. Myers, 606 P.2d 250 (Utah 1980); State v. Herzog, 610 P.2d 1281 (Utah 1980).

Determination of whether consent was present or absent in any given case is factual in nature, and thus a matter for determination by the finder of fact; reviewing court will not overturn any determination in that regard unless there appears of record such evidence that reasonable minds could not agree with the verdict reached. State v. Myers, 606 P.2d 250 (Utah 1980); State v. Herzog, 610 P.2d 1281 (Utah 1980).

Fact that prosecutrix accepted ride from defendant, accompanied him to a store where she bought beer for the two of them, and agreed to ride into a canyon with him was not legally determinative of question of consent. State v. Herzog, 610 P.2d 1281 (Utah 1980).

Fact that prosecutrix assisted defendant in achieving erection by means of manual stimulation did not establish consent in view of fact that prosecutrix was held against her will and expressly threatened with violence. State v. Herzog, 610 P.2d 1281 (Utah 1980).

When the state presents evidence in a rape and forcible sodomy case that the victim is under 14 years of age, no other evidence is needed to establish the victim's lack of consent to the acts. State v. Bundy, 684 P.2d 58 (Utah 1984).

If the victim did consent in fact to act of intercourse but was under age of 14, the law treats the act as having been done without consent, and only in that circumstance is the age of the victim an element of crime of rape. Smith v. Morris, 690 P.2d 560 (Utah 1984).

Crime of violence.

A common sense view of this section, in combination with the legal determination that children are incapable of consent, suggests that when an older person attempts to touch sexually a child under the age of fourteen, there is always a substantial risk that physical force will be used to ensure the child's compliance. Sexual abuse of a child is therefore a crime of violence. United States v. Reyes-Castro, 13 F.3d 377 (10th Cir. 1993).

Drugs and threats.

Victim who was given pill probably containing chloral hydrate which rendered her weak, dizzy, and almost unconscious, and was then threatened with a beer bottle, did not consent to sodomy. State v. Archuletta, 597 P.2d 1348 (Utah 1979).

Earnest resistance.

For a victim with an intellectual disability, constant verbal refusals, combined with her emotional distress and attempts to push defendant away, may establish earnest resistance under the circumstances for purposes of former Subsection (1). State v. Archuleta, 747 P.2d 1019 (Utah 1987).

Evidence of victim's character.

Where evidence shows that association between defendant and prosecutrix came about in peaceable manner, then transition into violence is claimed, and there is genuine issue as to consent, probative value of victim's reputation as to moral character is sufficient to justify admission of such evidence. State v. Howard, 544 P.2d 466 (Utah 1975).

Force and threats.

Husband's requiring wife to have sexual intercourse with other men through psychological abuse consisting of systematic harassment, intimidation and abuse which included threats of violence to wife and her father, threats of separation of wife from her child, and threats of blackmail was sufficient to overcome the resistance of a person of ordinary resolution and establish lack of wife's consent, and, under such circumstances, wife's failure to actively resist did not constitute consent to the intercourse with the other men. State v. Kennedy, 616 P.2d 594 (Utah 1980).

Use as jury instruction.

Instruction which included text of this section was sufficient, without further elaboration, to meet the requirement of making clear to jury

in rape case that the force and threats had to be of such character and had such an effect on prosecutrix as to overcome an earnest desire on her part to resist. State v. Reddish, 550 P.2d 728 (Utah 1976).

Cited in In re J.F.S., 803 P.2d 1254 (Utah Ct. App. 1990).

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law — Judicial Decisions — Constitutional Law, 1987 Utah L. Rev. 82.

Recent Developments in Utah Law — Legislative Enactments — Criminal Law, 1990 Utah L. Rev. 222.

A.L.R. — Rape or similar offense based on intercourse with woman who is allegedly mentally deficient, 31 A.L.R.3d 1227.

Mistake or lack of information as to victim's chastity as defense to statutory rape, 44 A.L.R.3d 1434.

76-5-406.5. Circumstances required for probation or suspension of sentence for certain sex offenses against a child.

(1) In a case involving conviction for Section 76-5-402.1, rape of a child; Section 76-5-402.3, object rape of a child; Section 76-5-403.1, sodomy on a child; Subsections 76-5-404.1(3) and (4), aggravated sexual abuse of a child; and any attempt to commit a felony under those sections, the court may impose an indeterminate term for a first degree felony, or execution of sentence may be suspended and probation may be considered only if all of the following circumstances are found by the court to be present and the court in its discretion, considering the circumstances of the offense, including the nature, frequency, and duration of the conduct, and considering the best interests of the public and the child victim, finds modification of the sentence from a mandatory minimum term to an indeterminate term for a first degree felony or probation to a residential sexual abuse treatment center is proper:

(a) the defendant did not use a weapon or use force, violence, substantial duress or menace, or threat of harm, in committing the offense or before or after committing the offense, in an attempt to frighten the child victim or keep the child victim from reporting the offense;

(b) the defendant did not cause bodily injury to the child victim during or as a result of the offense and did not cause the child victim severe psychological harm;

(c) the defendant, prior to the offense, had not been convicted of any public offense in Utah or elsewhere involving sexual misconduct in the commission of the offense;

(d) the defendant did not commit an offense described in Part 4 of this chapter against more than one child victim or victim, at the same time, or during the same course of conduct, or previous to or subsequent to the instant offense;

(e) the defendant did not use, show, or display pornography or create sexually-related photographs or tape recordings in the course of the offense;

(f) the defendant did not act in concert with another offender during the offense or knowingly commit the offense in the presence of a person other than the victim or with lewd intent to reveal the offense to another;

(g) the defendant did not encourage, aid, allow, or benefit from any act of prostitution or sexual act by the child victim with any other person or sexual performance by the child victim before any other person;

(h) the defendant admits the offense of which he has been convicted and has been accepted for mental health treatment in a residential sexual abuse treatment center that has been approved by the Department of Corrections under Subsection (2);

(i) rehabilitation of the defendant through treatment is probable, based upon evidence provided by a treatment professional who has been approved by the Department of Corrections and the Department of Human Services under Subsection (2) and who has accepted the defendant for treatment;

(j) the defendant has undergone a complete psychological evaluation conducted by a professional approved by the Department of Corrections and the Department of Human Services and:

(i) the professional's opinion is that the defendant is not an exclusive pedophile and does not present an immediate and present danger to the community if released on probation and placed in a residential sexual abuse treatment center; and

(ii) the court accepts the opinion of the professional;

(k) if the offense is committed by a parent, stepparent, adoptive parent, or legal guardian of the child victim, the defendant shall, in addition to establishing all other conditions of this section, establish it is in the child victim's best interest that the defendant not be imprisoned by presenting evidence provided by a treatment professional who:

(i) is treating the child victim and understands he will be treating the family as a whole; or

(ii) has assessed the child victim for purposes of treatment as ordered by the court based on a showing of good cause;

(l) if probation is imposed, the defendant, as a condition of probation, may not reside in a home where children younger than 18 years of age reside for at least one year beginning with the commencement of treatment, and may not again take up residency in a home where children younger than 18 years of age reside during the period of probation until allowed to do so by order of the court; and

(m) a term of incarceration of at least 90 days is to be served prior to treatment and continue until such time as bed space is available at a residential sexual abuse treatment center as provided under Subsection (2) and probation is to be imposed for up to a maximum of ten years.

(2) (a) The Department of Corrections shall develop qualification criteria for the approval of the sexual abuse treatment programs and professionals under this section. The criteria shall include the screening criteria employed by the department for sexual offenders.

(b) The sexual abuse treatment program shall be at least one year in duration, shall be residential, and shall specifically address the sexual conduct for which the defendant was convicted.

(3) Establishment by the defendant of all the criteria of this section does not mandate the granting under this section of probation or modification of the mandatory minimum sentence that would otherwise be imposed by Section 76-3-406 regarding sexual offenses against children. The court has discretion to deny the request based upon its consideration of the circumstances of the offense, including:

(a) the nature, frequency, and duration of the conduct;

(b) the effects of the conduct on any child victim involved;

(c) the best interest of the public and any child victim; and

(d) the characteristics of the defendant, including any risk the defendant presents to the public and specifically to children.

(4) The defendant has the burden to establish by a preponderance of evidence eligibility under all of the criteria of this section.

(5) If the court finds a defendant granted probation under this section fails to cooperate or succeed in treatment or violates probation to any substantial degree, the mandatory minimum sentence previously imposed for the offense shall be immediately executed.

(6) If the court finds the defendant has established the criteria under Subsections (1)(a), (b), (c), (d), (e), (f), and (g) by a preponderance of the evidence, the court may in its discretion modify the sentence under Section 76-3-406 by imposing an indeterminate term of imprisonment of five years to life as an alternative to imposing the mandatory minimum sentence. A court may not modify the mandatory minimum sentence to an indeterminate term of five years to life and then suspend execution of that sentence and impose probation.

(7) The court shall enter written findings of fact regarding the conditions established by the defendant that justify the modification of sentence or granting of probation under this section.

History: C. 1953, 76-5-406.5, enacted by L. 1983, ch. 88, § 27; 1984, ch. 18, § 11; 1986, ch. 41, § 2; 1991, ch. 62, § 1; 1994, ch. 64, § 2.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, rewrote Subsections (1) and (2); added present Subsection (3); redesignated former Subsections (3) and (4) as present Subsections (4) and (5); in present Subsection (5), inserted "the court finds," "or succeed," and "mandatory minimum"; and added Subsections (6) and (7).

The 1994 amendment, effective May 2, 1994, substituted the language beginning "In a case involving conviction" and ending "attempt to commit a felony under those sections" for "In a case involving rape of a child, aggravated sexual abuse of a child, or sodomy upon a child" at the beginning of Subsection (1).

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
Discretion of court.
Evidence.
Parent.
Probation.
—Eligibility.
Psychological harm.
Cited.

Constitutionality.

Limiting probation to the class of persons defined in this section is not discriminatory and unconstitutional, because the state has an interest in preserving the family unit and protecting the child victim, and this section bears a substantial relationship to that interest. State v. Copeland, 765 P.2d 1266 (Utah 1988); State v. Bastian, 765 P.2d 902 (Utah 1988).

Discretion of court.

Even if the requirements of Subsections (1)(a) through (l) are met, a trial court still has discretion under Subsection (1)(l) to deny probation upon consideration of "the circumstances of the offense, including the nature, frequency, and duration of the conduct." State v. Johnson, 856 P.2d 1064 (Utah 1993).

Evidence.

Nothing in Subsection (1)(g) or in the remainder of this section indicates that expert evidence is necessary. Evidence from a parent, the victim, and those close to the victim, as well as evidence concerning the circumstances of the victim and his or her family, may prove what a victim's best interests are without the aid of expert testimony. State v. Johnson, 856 P.2d 1064 (Utah 1993).

Parent.

A person who is not the parent of a child and has not entered into a solemnized marriage with a child's parent may still be the "stepparent" of that child under this section if the relationship qualifies as a valid marriage under § 30-1-4.5. State v. Johnson, 856 P.2d 1064 (Utah 1993).

Probation.

—Eligibility.

In order to be considered for probation a defendant must demonstrate his eligibility under all of the criteria set forth in Subsection (1); imposition of the minimum mandatory five-year sentence was not cruel and unusual punishment of a defendant unable to satisfy two of the criteria. State v. Larson, 758 P.2d 901 (Utah 1988).

A defendant convicted of a sexual crime against a child can receive probation or reduction of sentence only if he satisfies all the enumerated requirements of this section. If a defendant does not meet all the requirements, § 76-3-406 precludes the granting of probation under any other statute. State v. Gibbons, 779 P.2d 1133 (Utah 1989).

A defendant convicted of a sexual crime against a child can receive probation or reduction of the minimum mandatory sentence only if he or she satisfies by a preponderance of the evidence all the enumerated requirements of Subsection (1) of this section. State v. Gentlewind, 844 P.2d 372 (Utah Ct. App. 1992).

Subsection (3) of this section gives the court discretion to deny the request for probation based on its consideration of the circumstances of the offense and impose the minimum mandatory sentence. State v. Gentlewind, 844 P.2d 372 (Utah Ct. App. 1992).

The trial court's findings that defendant did not meet the statutory qualifications of this section were not clearly erroneous, where there was ample evidence to support the trial court's finding that the victim suffered severe psychological harm from defendant's conduct. State v. Gentlewind, 844 P.2d 372 (Utah Ct. App. 1992).

Psychological harm.

Substantial psychological harm is not the same as "severe psychological harm," which is the standard fixed by Subsection (1)(b). State v. Johnson, 856 P.2d 1064 (Utah 1993).

Cited in Herman v. State, 821 P.2d 457 (Utah 1991).

76-5-407. Applicability of part — "Penetration" or "touching" sufficient to constitute offense.

(1) The provisions of this part do not apply to consensual conduct between persons married to each other.

(2) In any prosecution for unlawful sexual intercourse, rape, rape of a child, object rape of a child, or sodomy, any sexual penetration or, in the case of sodomy, rape of a child, or object rape of a child any touching, however slight, is sufficient to constitute the relevant element of the offense.

(3) In any prosecution for sodomy on a child, sexual abuse of a child, or aggravated sexual abuse of a child any touching, even if accomplished through clothing, is sufficient to constitute the relevant element of the offense.

History: C. 1953, 76-5-407, enacted by L. 1973, ch. 196, § 76-5-407; 1974, ch. 32, § 13; 1977, ch. 86, § 5; 1979, ch. 73, § 5; 1988, ch. 181, § 1; 1989, ch. 255, § 1; 1991, ch. 267, § 2.

Amendment Notes. — The 1991 amendment, effective April 29, 1991, in Subsection (1), inserted "consensual" and deleted "except for purposes of this part, persons living apart pursuant to a lawful order of a court of competent jurisdiction are not considered to be married" from the end of the subsection.

NOTES TO DECISIONS

ANALYSIS

Penetration.
Sodomy.

Penetration.

Emission of semen is not necessary to crime of rape; penetration is all that is necessary. State v. Gehring, 694 P.2d 599 (Utah 1984).

Evidence was insufficient to support the jury's finding of penetration. See State v. Simmons, 759 P.2d 1152 (Utah 1988).

Sodomy.

Penetration is not a necessary element of the offense of sodomy; touching alone is sufficient. State v. Glenny, 656 P.2d 990 (Utah 1982).

COLLATERAL REFERENCES

Journal of Contemporary Law. — Utah Task Force on Gender And Justice: Report to the Utah Judicial Council, March 1990, 16 J. Contemp. L. 135 (1990).

76-5-408. Reserved.

76-5-409. Corroboration of admission by child's statement.

(1) Notwithstanding any provision of law requiring corroboration of admissions or confessions, and notwithstanding any prohibition of hearsay evidence, a child's statement indicating in any manner the occurrence of the sexual offense involving the child is sufficient corroboration of the admission or the confession regardless of whether or not the child is available to testify regarding the offense.

(2) A child, for purposes of Subsection (1), is a person under the age of 14.

History: C. 1953, 76-5-409, enacted by L. 1983, ch. 88, § 28.

NOTES TO DECISIONS

Cited in State v. Fulton, 742 P.2d 1208 (Utah 1987).

COLLATERAL REFERENCES

A.L.R. — Admissibility of evidence that juvenile prosecuting witness in sex offense case had prior sexual experience for purposes of showing alternative source of child's ability to describe sex acts, 83 A.L.R.4th 685.

76-5-410. Child victim of sexual abuse as competent witness.

A child victim of sexual abuse under the age of ten is a competent witness and shall be allowed to testify without prior qualification in any judicial proceeding. The trier of fact shall determine the weight and credibility of the testimony.

History: C. 1953, 76-5-410, enacted by L. 1983, ch. 88, § 29; 1985, ch. 74, § 1.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
Admissibility of testimony.
In general.
Victim.
Cited.

Constitutionality.

This section is not void for vagueness. State v. Loughton, 747 P.2d 426 (Utah 1987).

Application of this section in a case where the statute had become effective after the crime was committed but before the trial did not violate the federal constitutional prohibition against ex post facto laws. State v. Eldredge, 773 P.2d 29 (Utah), cert. denied, 493 U.S. 814, 110 S. Ct. 62, 107 L. Ed. 2d 29 (1989).

Allowing the child victim to testify pursuant to this section did not deny defendant his right

to confrontation, where the record demonstrated that defendant's cross-examination was very effective, so effective that the child recanted and denied the abuse. State v. Eldredge, 773 P.2d 29 (Utah), cert. denied, 493 U.S. 814, 110 S. Ct. 62, 107 L. Ed. 2d 29 (1989).

Admissibility of testimony.
Admission of testimony of a child victim of sodomy that met the standard of Rules of Evidence 403, governing exclusion of relevant evidence, did not deprive defendant of his due process right to a fair trial. State v. Fulton, 742 P.2d 1208 (Utah 1987), cert. denied, 484 U.S. 1044, 108 S. Ct. 777, 98 L. Ed. 2d 864 (1988).

In general.
This section is not superseded by the Utah Rules of Evidence. State v. Loughton, 747 P.2d 426 (Utah 1987).

Victim.
The term "victim," as used in this section and § 76-5-411, should be interpreted as meaning "alleged victim," so that it is not necessary to prove actual abuse before presenting the evidence allowed by these sections; otherwise, the court would be required in many cases to find the defendant guilty before the prosecution could present its evidence. State v. Loughton, 747 P.2d 426 (Utah 1987).

Cited in State v. Marcum, 750 P.2d 599 (Utah 1988).

COLLATERAL REFERENCES

Utah Law Review. — Child Sexual Abuse Cases, 1986 Utah L. Rev. 443.

Note, Videotaping the Testimony of an Abused Child: Necessary Protection for the Child or Unwarranted Compromise of the Defendant's Constitutional Rights?, 1986 Utah L. Rev. 461.

Confronting Supreme Confusion: Balancing Defendants' Confrontation Clause Rights Against the Need to Protect Child Abuse Victims, 1993 Utah L. Rev. 407.

Journal of Contemporary Law. — Comment, Victims of Child Sexual Abuse in the Courtroom: New Utah Rules and Their Constitutional Implications, 15 J. Contemp. L. 81 (1989).

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

Witnesses: child competency statutes, 60 A.L.R.4th 369.

76-5-411. Admissibility of out-of-court statement of child victim of sexual abuse.

(1) Notwithstanding any rule of evidence, a child victim's out-of-court statement regarding sexual abuse of that child is admissible as evidence although it does not qualify under an existing hearsay exception, if:

(a) the child is available to testify in court or under Rule 15.5(2) or (3), Utah Rules of Criminal Procedure;

(b) if the child is not available to testify in court or under Rule 15.5(2) or (3), Utah Rules of Criminal Procedure, there is other corroborative evidence of the abuse; or

(c) the statement qualifies for admission under Rule 15.5(1), Utah Rules of Criminal Procedure.

(2) Prior to admission of any statement into evidence under this section, the judge shall determine whether the interest of justice will best be served by admission of that statement. In making this determination the judge shall consider the age and maturity of the child, the nature and duration of the abuse, the relationship of the child to the offender, and the reliability of the assertion and of the child.

(3) A statement admitted under this section shall be made available to the adverse party sufficiently in advance of the trial or proceeding, to provide him with an opportunity to prepare to meet it.

(4) For purposes of this section, a child is a person under the age of 14 years.

History: C. 1953, 76-5-411, enacted by L. 1983, ch. 88, § 30; 1985, ch. 74, § 2; 1988, ch. 156, § 3; 1989, ch. 187, § 5.

NOTES TO DECISIONS

ANALYSIS

Constitutionality.
Age.
Corroborating evidence.
Court findings.
Court rules.
Credibility.
Effect of noncompliance.
Termination of parental rights.
Victim.
Videotapes.
Waiver of objection.
Weighing reliability and need.
Cited.

Constitutionality.

Admission of the victim's out-of-court statements did not violate defendant's constitutional right to confront witnesses where the victim was available to testify on cross-examination regarding the subject matter of the hearsay declarations. State v. Nelson, 725 P.2d 1353 (Utah 1986).

This section is not void for vagueness. State v. Loughton, 747 P.2d 426 (Utah 1987).

The age specification in this section is not arbitrary and capricious, bears a reasonable relation to the purpose of the legislation, and, therefore, is not a classification that violates equal protection. State v. Loughton, 747 P.2d 426 (Utah 1987).

Application of this section in a case where the statute had become effective after the crime was committed but before the trial did not violate the federal constitutional prohibition against ex post facto laws. State v. Eldredge, 773 P.2d 29 (Utah), cert. denied, 493 U.S. 814, 110 S. Ct. 62, 107 L. Ed. 2d 29 (1989).

Admission of a child victim's out-of-court statements pursuant to this section does not abridge a defendant's right to confrontation if the child victim is present and available to testify and be cross-examined. State v. Eldredge, 773 P.2d 29 (Utah), cert. denied, 493 U.S. 814, 110 S. Ct. 62, 107 L. Ed. 2d 29 (1989).

The confrontation right is not universally or automatically violated by this section. State v. Van Matre, 777 P.2d 459 (Utah 1989).

This section does not define an offense; rather, it is a rule of evidence and procedure for interpretation by the court. Therefore, a vagueness challenge to the statute is not appropriate. State v. Van Matre, 777 P.2d 459 (Utah 1989).

A victim's lack of memory at trial about statements she had made on a videotape and the fact that the victim was a child did not make her constitutionally unavailable for cross-examination and defendant's right to confrontation was not violated. State v. Seale, 853 P.2d 862 (Utah 1993).

Age.

To admit a statement by an older child based on the conclusion that he acts or appears to be under 12 ignores both the language and the spirit of this section. State v. Nelson, 777 P.2d 479 (Utah 1989).

The word "age" in its common usage means "the length of time during which a being or thing has lived or existed," not the mental age of a mentally retarded person. State v. Hallett, 796 P.2d 701 (Utah Ct. App. 1990), aff'd, 856 P.2d 1060 (Utah 1993).

Trial counsel's failure to object to the erroneous construction of the term "age" met the test for ineffective assistance where hearsay statements of a nineteen-year-old victim were admitted despite the fact that this section then applied explicitly only to children under ten. State v. Hallett, 856 P.2d 1060 (Utah 1993).

Corroborating evidence.

In any case where the declarant is found "unavailable" within the meaning of Subsection (1)(b), the trial court may not rely on the presence of corroborating evidence in determining under Subsection (2) that the "interest of justice" warrants admission of that hearsay. This is because Subsection (2) demands a determination of reliability that will at least satisfy federal and state confrontation clause concerns. State v. Matsamas, 808 P.2d 1048 (Utah 1991).

Under Subsection (2), the presence of evidence tending to corroborate the truth of the matter asserted in hearsay statements of an alleged child victim can never be considered by a court in making the "interest of justice" reliability determination. State v. Matsamas, 808 P.2d 1048 (Utah 1991).

Court findings.

The court must make findings detailing its reasoning in admitting a statement under this section. State v. Nelson, 777 P.2d 479 (Utah 1989).

A trial court faced with the admissibility of out-of-court statements by an alleged victim of child sexual abuse must determine the admissibility of that evidence under this section and, in making that determination, must enter express findings and conclusions explaining why it finds that "the interest of justice will best be

served by admission of that statement." Such findings are to focus on the trustworthiness and reliability of the out-of-court statements. State v. Lamper, 779 P.2d 1125 (1989).

Trial court's admission of the victim's hearsay statements without making the requisite findings on the reliability of the statements was reversible error, where the other evidence of the two crimes charged, sodomy and rape, was slight, and the hearsay may have been essential to prove the necessary elements of the crime of rape. State v. Matsamas, 808 P.2d 1048 (Utah 1991).

The trial court committed plain error by failing to enter written findings in accordance with this section. State v. Cook, 246 Utah Adv. Rep. 26 (Utah Ct. App. 1994).

Court rules.

This section is not superseded by the Utah Rules of Evidence. State v. Loughton, 747 P.2d 426 (Utah 1987).

Because this section explicitly incorporates Rule 15.5(1), Utah Rules of Criminal Procedure, all the requirements of both provisions must be met for the proffered out-of-court statement to be admitted. Although the two provisions are couched in slightly different terms, both seek the same end, a determination that proffered out-of-court statements are sufficiently reliable and trustworthy to be admitted. State v. Seale, 853 P.2d 862 (Utah 1993).

Credibility.

Allowing a therapist to testify as to his opinion regarding a child sexual abuse victim's credibility at the time out-of-court statements were given by the victim was reversible error, where the state made no attempt to prove that the therapist's methodology was reliable, and it could not be said that, absent the testimony bolstering the credibility of the victim, there would not have been a result more favorable to defendant. State v. Nelson, 777 P.2d 479 (Utah 1989).

Effect of noncompliance.

Failure to follow the requirements of this section results in harmful error. State v. Reiners, 803 P.2d 1300 (Utah Ct. App. 1990).

Termination of parental rights.

This section does not apply in termination of parental rights proceedings. State v. E.J.D. & B.D., 876 P.2d 397 (Utah Ct. App. 1994).

Victim.

The term "victim," as used in § 76-5-410 and this section, should be interpreted as meaning "alleged victim," so that it is not necessary to prove actual abuse before presenting the evidence allowed by these sections; otherwise, the court would be required in many cases to find the defendant guilty before the prosecution could present its evidence. State v. Loughton, 747 P.2d 426 (Utah 1987).

Videotapes.

It was prejudicial error in a child abuse case to admit into evidence videotapes of an interview of the child victim with a psychologist, when the tapes had not been presented to the defendant for viewing, and the written reports which had been given the defendant concerning the videotapes did not sufficiently inform the defendant of their contents so as to allow him an opportunity to meet the statements contained therein at trial. State v. Loughton, 747 P.2d 426 (Utah 1987).

Normally, the trial court must comply with the requirements of both this section and R. Crim. P. 15.5 when considering videotaped out-of-court statements of child victims of sexual abuse. State v. Lamper, 779 P.2d 1125 (1989).

Trial court's error in not making the findings required under Subsection (2) was harmless, where the court considered the analogous, if not identical, requirement of R. Crim. P. 15.5 (1)(g) that the videotape not be admitted unless the court determines that the recording is "sufficiently reliable and trustworthy and that the interest of justice will best be served by admission of the statement into evidence." State v. Lamper, 779 P.2d 1125 (1989).

Waiver of objection.

Social worker's cross-examination testimony that the victim had told her that the abuse "first started happening when I was five" was properly admitted, since defendant's counsel had introduced the witness's testimony on direct examination in order to discredit the victim. State v. Ireland, 773 P.2d 1375 (1989).

Weighing reliability and need.

Under this section, the court must carefully weigh the reliability of the statement and the need to admit it into evidence. State v. Nelson, 777 P.2d 479 (Utah 1989).

Cited in State v. Speer, 718 P.2d 383 (Utah 1986); State v. Fulton, 748 P.2d 1208 (Utah 1987); State v. Marcum, 750 P.2d 599 (Utah 1988); State v. Ramsey, 782 P.2d 480 (Utah 1989).

COLLATERAL REFERENCES

Utah Law Review. — Child Sexual Abuse Cases, 1986 Utah L. Rev. 443.

Victims Have Rights Too, 1986 Utah L. Rev. 449.

Note, Videotaping the Testimony of an Abused Child: Necessary Protection for the Child or Unwarranted Compromise of the Defendant's Constitutional Rights, 1986 Utah L. Rev. 461.

Confronting Supreme Confusion: Balancing Defendants' Confrontation Clause Rights Against the Need to Protect Child Abuse Victims, 1993 Utah L. Rev. 407.

Journal of Contemporary Law. — Comment, Victims of Child Sexual Abuse in the Courtroom: New Utah Rules and Their Constitutional Implications, 15 J. Contemp. L. 81 (1989).

PART 5

HIV TESTING — SEXUAL OFFENDERS AND VICTIMS

Severability Clauses. — Laws 1993, ch. 40, § 10 provides: "If any provision of this act, or the application of any provision to any person or circumstance, is held invalid, the remainder of this act shall be given effect without the invalid provision or application."

76-5-501. Definitions.

For purposes of this part:

(1) "Convicted sexual offender" means a person or a juvenile as provided in Subsection 76-5-502(1).

(2) "Department of Health" means the state Department of Health as defined in Section 26-1-2.

(3) "HIV infection" means an indication of Human Immunodeficiency Virus (HIV) infection determined by current medical standards and detected by any of the following:

(a) presence of antibodies to HIV, verified by a positive "confirmatory" test, such as Western blot or other method approved by the Utah State Health Laboratory. Western blot interpretation will be based on criteria currently recommended by the Association of State and Territorial Public Health Laboratory Directors;

(b) presence of HIV antigen;

(c) isolation of HIV; or

(d) demonstration of HIV proviral DNA.

(4) "HIV positive individual" means a person who is HIV positive as determined by the State Health Laboratory.

(5) "Local department of health" means the department as defined in Subsection 26A-1-102(5).

(6) "Positive" means an indication of the HIV infection as defined in Subsection (3).

(7) "Sexual offense" means a violation of state law prohibiting a sexual offense under Title 76, Chapter 5, Part 4.

(8) "Test" or "testing" means a test or tests for HIV infection conducted by and in accordance with standards recommended by the Department of Health.

History: C. 1953, 76-5-501, enacted by L. 1993, ch. 40, § 3.

Effective Dates. — Laws 1993, ch. 40 became effective on May 3, 1993, pursuant to Utah Const., Art. VI, Sec. 25.

76-5-502. Mandatory testing — Liability for costs.

(1) (a) A person who has entered a plea of guilty, a plea of no contest, a plea of guilty and mentally ill, a plea of not guilty by reason of insanity or been found guilty for violation of a sexual offense or an attempted sexual offense under Title 76, Chapter 5, Part 4, or a juvenile who is adjudicated to have violated or attempted to violate state law prohibiting a sexual offense under Title 76, Chapter 5, Part 4, shall be required to submit to a mandatory test upon the request of a victim or the parent or legal guardian of the minor victim or victim of a sexual offense within six months of conviction to determine if the offender is an HIV positive individual.

(b) The court shall order the convicted sexual offender to submit to the test upon sentencing or as a condition of probation. The order to the convicted sexual offender shall not include the identity and address of the victim requesting the test. The court shall forward the order to the Department of Health, including separate information about the victim's identity and address for notification and counseling purposes.

(2) If the mandatory test has not been conducted, and the convicted offender or adjudicated juvenile is already confined in a county jail, state prison, or a secure youth corrections facility, the person shall be tested while in confinement.

(3) The secure youth corrections facility or county jail shall cause the blood specimen of the offender as defined in Subsection (1) confined in that facility to be taken and shall forward the specimen to the Department of Health.

(4) The Department of Corrections shall cause the blood specimen of the offender defined in Subsection (1) confined in any state prison to be taken and shall forward the specimen to the Department of Health as provided in Section 64-13-36.

(5) The person tested shall be responsible for the costs of testing, unless the person is indigent. The costs will then be paid by the Department of Health from the General Fund.

History: C. 1953, 76-5-502, enacted by L. 1993, ch. 40, § 4.

Effective Dates. — Laws 1993, ch. 40 became effective on May 3, 1993, pursuant to Utah Const., Art. VI, Sec. 25.

76-5-503. Voluntary testing — Victim to request — Costs paid by Crime Victim Reparations.

(1) A victim or minor victim of a sexual offense as provided under Title 76, Chapter 5, Part 4, may request a test for the HIV infection.

(2) (a) The local health department shall obtain the blood specimen from the victim and forward the specimen to the Department of Health.

(b) The Department of Health shall analyze the specimen of the victim.

(3) The testing shall consist of a base-line test of the victim at the time immediately or as soon as possible after the alleged occurrence of the sexual offense. If the base-line test result is not positive, follow-up testing shall occur at three months and six months after the alleged occurrence of the sexual offense.

(4) The Crime Victim Reparations Fund shall pay for the costs of the victim testing if the victim provides a substantiated claim of the sexual offense, does

not test HIV positive at the base-line testing phase, and complies with eligibility criteria established by the Crime Victim Reparations Act.

History: C. 1953, 76-5-503, enacted by L. 1993, ch. 40, § 5.
Effective Dates. — Laws 1993, ch. 40 became effective on May 3, 1993, pursuant to Utah Const., Art. VI, Sec. 25.

76-5-504. Victim notification and counseling.

(1) The Department of Health shall provide the victim who requests testing of the convicted sexual offender's human immunodeficiency virus status counseling regarding HIV disease and referral for appropriate health care and support services. If the local health department where the victim resides and the Department of Health agree, the Department of Health shall forward a report of the convicted sexual offender's human immunodeficiency virus status to the local health department and the local health department shall provide the victim who requests the test with the test results, counseling regarding HIV disease, and referral for appropriate health care and support services.

(2) Notwithstanding the provisions of Section 26-25a-101, the Department of Health and a local health department acting pursuant to an agreement made under Subsection (1) may disclose to the victim the results of the convicted sexual offender's human immunodeficiency virus status as provided in this section.

History: C. 1953, 76-5-504, enacted by L. 1993, ch. 40, § 6.
Effective Dates. — Laws 1993, ch. 40 became effective on May 3, 1993, pursuant to Utah Const., Art. VI, Sec. 25.

CHAPTER 5a
SEXUAL EXPLOITATION OF CHILDREN

Section
76-5a-1. Legislative determinations — Purpose of chapter.
76-5a-2. Definitions.
76-5a-3. Sexual exploitation of a minor.
76-5a-4. Determination whether material violates chapter.

76-5a-1. Legislative determinations — Purpose of chapter.

The Legislature of Utah determines that the sexual exploitation of minors is excessively harmful to their physiological, emotional, social, and mental development; that minors cannot intelligently and knowingly consent to sexual exploitation; that regardless of whether it is classified as legally obscene, material that sexually exploits minors is not protected by the First Amendment of the United States Constitution or by the First or Fifteenth sections of Article I of the Utah Constitution and may be prohibited; and that prohibition of and punishment for the distribution, possession, possession with intent to distribute, and production of materials that sexually exploit minors is necessary and justified to eliminate the market for those materials and to reduce the harm to the minor inherent in the perpetuation of the record of his sexually exploitive activities. It is the purpose of this chapter to prohibit the production, possession, possession with intent to distribute, and distribution of materials

which sexually exploit minors, regardless of whether the materials are classified as legally obscene.

History: C. 1953, 76-5a-1, enacted by L. 1983, ch. 87, § 1; 1985, ch. 226, § 1.

NOTES TO DECISIONS

Cited in State v. Workman, 806 P.2d 1198 (Utah Ct. App. 1991).

COLLATERAL REFERENCES

Utah Law Review. — Recent Developments in Utah Law, 1986 Utah L. Rev. 95, 171.

Child Sexual Abuse Cases, 1986 Utah L. Rev. 443.

Journal of Contemporary Law. — Obscene Comparisons: Canadian and American Attitudes Toward Pornography Regulation, 19 J. Contemp. L. 51 (1993).

A.L.R. — Validity and construction of 18 USCS §§ 371 and 2252(a) penalizing mailing or receiving, or conspiring to mail or receive, child pornography, 86 A.L.R. Fed. 359.

76-5a-2. Definitions.

As used in this chapter:

(1) "Distribute" means the selling, exhibiting, displaying, wholesaling, retailing, providing, giving, granting admission to, or otherwise transferring or presenting material or live performances with or without consideration.

(2) "Live performance" means any act, play, dance, pantomime, song, or other activity performed by live actors in person.

(3) "Material" means any visual representation including photographs, motion pictures, slides, videotapes, or other pictorial representations produced or recorded by any mechanical, chemical, photographic, or electrical means and includes undeveloped photographs, negatives, or other latent representational objects.

(4) "Minor" means a person younger than 18 years of age.

(5) "Nude or partially nude" means any state of dress or undress in which the human genitals, pubic region, buttocks, or the female breast, at a point below the top of the areola, is less than completely and opaquely covered.

(6) "Produce" means the photographing, filming, taping, directing, producing, creating, designing, or composing of material or live performances or the securing or hiring of persons to engage in the production of material or live performances.

(7) "Sexual conduct" means and includes the following acts, whether actual or simulated, regardless of the gender of the participants or their state of dress:

(a) sexual intercourse or deviate sexual intercourse;

(b) masturbation;

(c) sodomy or bestiality;

(d) sadomasochistic activities;

(e) the fondling or touching for purpose of sexual arousal of the genitals, pubic region, buttocks, or female breast; or

(f) the explicit representation of the defecation or urination functions.

(8) "Simulated sexual conduct" means a feigned or pretended act of sexual conduct which duplicates, within the perception of an average person, the appearance of an actual act of sexual conduct.

History: C. 1953, 76-5a-2, enacted by L. 1983, ch. 87, § 1; 1985, ch. 226, § 2.

NOTES TO DECISIONS

ANALYSIS

Minor.
—Marital status irrelevant.
Partial nudity.

Minor.

—Marital status irrelevant.
This section defines a minor as "a person younger than 18 years of age." In cases involving sexual exploitation of a minor and dealing in harmful material to a minor, the legislature expressly prohibited sexual exploitation of all persons under eighteen regardless of marital status. State v. Moore, 788 P.2d 525 (Utah Ct. App.), cert. denied, 800 P.2d 1105 (Utah 1990).

Partial nudity.
Even though child was wearing a gymnastics suit when photographed, her state of dress fit the minimal technical definition of partial nudity. State v. Workman, 806 P.2d 1198 (Utah Ct. App.), aff'd, 852 P.2d 981 (Utah 1993).

76-5a-3. Sexual exploitation of a minor.

(1) A person is guilty of sexual exploitation of a minor:

(a) When he knowingly produces, distributes, possesses, or possesses with intent to distribute, material or a live performance depicting a nude or partially nude minor for the purpose of sexual arousal of any person or any person's engagement in sexual conduct with the minor.

(b) If he is a minor's parent or legal guardian and knowingly consents to or permits that minor to be sexually exploited under Subsection (1)(a) above.

(2) Sexual exploitation of a minor is a felony of the second degree.

History: C. 1953, 76-5a-3, enacted by L. 1983, ch. 87, § 1; 1985, ch. 226, § 3.

NOTES TO DECISIONS

ANALYSIS

Intent.
Sexual abuse of child.

Intent.
Evidence insufficient to support inference of intent by defendants to allow photographing of partially nude child. See State v. Workman, 806 P.2d 1198 (Utah Ct. App.), aff'd, 852 P.2d 981 (Utah 1993).

Sexual abuse of child.
Subsection (1)(a) and § 76-5-404.1 (sexual abuse of a child) were not designed to proscribe parallel conduct. State v. Bishop, 753 P.2d 439 (Utah 1988).

76-5a-4. Determination whether material violates chapter.

In determining whether material is in violation of this chapter, the material need not be considered as a whole, but may be examined by the trier of fact in part only. It is not an element of the offense of sexual exploitation of a minor

that the material appeal to the prurient interest in sex of the average person nor that prohibited conduct need be portrayed in a patently offensive manner.

History: C. 1953, 76-5a-4, enacted by L. 1983, ch. 87, § 1; 1985, ch. 226, § 4.

CHAPTER 6
OFFENSES AGAINST PROPERTY

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Property Destruction

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Robbery

76-6-301. Robbery.
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Part 4
Theft

76-6-401. Definitions.
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76-6-409.5. Definitions.
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Part 5
Fraud

76-6-501. Forgery — "Writing" defined.
76-6-502. Possession of forged writing or device for writing.
76-6-503. Fraudulent handling of recordable writings.
76-6-504. Tampering with records.
76-6-505. Issuing a bad check or draft — Presumption.
76-6-506. Financial transaction card offenses — Definitions.
76-6-506.1. Financial transaction card offenses — Falsely making, coding, or signing card — Falsely signing evidence of card transaction.
76-6-506.2. Financial transaction card offenses — Unlawful use of card or automated banking device — False application for card.
76-6-506.3. Financial transaction card offenses — Unlawful acquisi-