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State Bar Court of California
Hearing Department
Los Angeles

Counsel For The State Bar	Case Number (s)	(for Court's use)
Michael J. Glass **Deputy Trial Counsel** **1149 S. Hill Street** **Los Angeles, CA 90015** **(213) 765-1254** Bar # **102700**	**07-C-13533 RAP**	FILED JUN 25 2008 STATE BAR COURT CLERK'S OFFICE LOS ANGELES **PUBLIC MATTER**
In Pro Per Respondent **Robert J.Corry** **South Tower** **600 17th Street, Suite 2800** **Denver, Colorado 80202** **(303) 634-2244** Bar # **171979**	Submitted to: **Assigned Judge** STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING **ACTUAL SUSPENSION** ☒ PREVIOUS STIPULATION REJECTED	
In the Matter Of: **Robert John Corry** Bar # **171979** A Member of the State Bar of California (Respondent)		

Note: All information required by this form and any additional information which cannot be provided in the space provided, must be set forth in an attachment to this stipulation under specific headings, e.g., "Facts," "Dismissals," "Conclusions of Law," "Supporting Authority," etc.

A. Parties' Acknowledgments:

(1) Respondent is a member of the State Bar of California, admitted **December 2, 1994.**.

(2) The parties agree to be bound by the factual stipulations contained herein even if conclusions of law or disposition are rejected or changed by the Supreme Court.

(3) All investigations or proceedings listed by case number in the caption of this stipulation are entirely resolved by this stipulation and are deemed consolidated. Dismissed charge(s)/count(s) are listed under "Dismissals." The stipulation consists of **11** pages, not including the order.

(4) A statement of acts or omissions acknowledged by Respondent as cause or causes for discipline is included under "Facts."

(5) Conclusions of law, drawn from and specifically referring to the facts are also included under "Conclusions of Law".

(6) The parties must include supporting authority for the recommended level of discipline under the heading "Supporting Authority."

(7) No more than 30 days prior to the filing of this stipulation, Respondent has been advised in writing of any pending investigation/proceeding not resolved by this stipulation, except for criminal investigations.

(8) Payment of Disciplinary Costs—Respondent acknowledges the provisions of Bus. & Prof. Code §§6086.10 & 6140.7. (Check one option only):

☐ until costs are paid in full, Respondent will remain actually suspended from the practice of law unless relief is obtained per rule 284, Rules of Procedure.

☒ costs to be paid in equal amounts prior to February 1 for the following membership years: **prior to February 1 in three billing cycles following the effective date of the discipline.**
(hardship, special circumstances or other good cause per rule 284, Rules of Procedure)

☐ costs waived in part as set forth in a separate attachment entitled "Partial Waiver of Costs"

☐ costs entirely waived

B. Aggravating Circumstances [for definition, see Standards for Attorney Sanctions for Professional Misconduct, standard 1.2(b)]. Facts supporting aggravating circumstances are required.

(1) ☒ **Prior record of discipline** [see standard 1.2(f)]

(a) ☒ State Bar Court case # of prior case **99-C-10450.**

(b) ☒ Date prior discipline effective **January 6, 2000.**

(c) ☒ Rules of Professional Conduct/ State Bar Act violations: **Respondent was convicted of a crime involving other misconduct warranting discipline under standard 3.4. In the underlying matter, on October 20, 1998, Respondent pled guilty and was convicted of violating Tiltle 22, District of Columbia, section 504(a)(Simple Assault), a misdemeanor, Title 22, District of Columbia, section 3214(b)(Possession of Prohibited Weapon), a misdemeanor, and Title 6, District of Columbia 2311(a)(Possession of Unregistered Firearm), a misdemeanor.**

(d) ☒ Degree of prior discipline **Public Reproval.**

(e) ☐ If Respondent has two or more incidents of prior discipline, use space provided below.

(2) ☐ **Dishonesty:** Respondent's misconduct was surrounded by or followed by bad faith, dishonesty, concealment, overreaching or other violations of the State Bar Act or Rules of Professional Conduct.

(3) ☐ **Trust Violation:** Trust funds or property were involved and Respondent refused or was unable to account to the client or person who was the object of the misconduct for improper conduct toward said funds or property.

(4) ☒ **Harm:** Respondent's misconduct harmed significantly a client, the public or the administration of justice. **See Attachment Page 4.**

(5) ☐ **Indifference:** Respondent demonstrated indifference toward rectification of or atonement for the consequences of his or her misconduct.

(6) ☐ **Lack of Cooperation:** Respondent displayed a lack of candor and cooperation to victims of his/her misconduct or to the State Bar during disciplinary investigation or proceedings.

(7) ☐ **Multiple/Pattern of Misconduct:** Respondent's current misconduct evidences multiple acts of wrongdoing or demonstrates a pattern of misconduct.

(8) ☐ **No aggravating circumstances** are involved.

Additional aggravating circumstances:

C. Mitigating Circumstances [see standard 1.2(e)]. Facts supporting mitigating circumstances are required.

(1) ☐ **No Prior Discipline:** Respondent has no prior record of discipline over many years of practice coupled with present misconduct which is not deemed serious.

(2) ☐ **No Harm:** Respondent did not harm the client or person who was the object of the misconduct.

(3) ☐ **Candor/Cooperation:** Respondent displayed spontaneous candor and cooperation with the victims of his/her misconduct and to the State Bar during disciplinary investigation and proceedings.

(4) ☒ **Remorse:** Respondent promptly took objective steps spontaneously demonstrating remorse and recognition of the wrongdoing, which steps were designed to timely atone for any consequences of his/her misconduct. **See Attachment Page 4.**

(5) ☐ **Restitution:** Respondent paid $ on in restitution to without the threat or force of disciplinary, civil or criminal proceedings.

(6) ☐ **Delay:** These disciplinary proceedings were excessively delayed. The delay is not attributable to Respondent and the delay prejudiced him/her.

(7) ☐ **Good Faith:** Respondent acted in good faith.

(8) ☐ **Emotional/Physical Difficulties:** At the time of the stipulated act or acts of professional misconduct Respondent suffered extreme emotional difficulties or physical disabilities which expert testimony would establish was directly responsible for the misconduct. The difficulties or disabilities were not the product of any illegal conduct by the member, such as illegal drug or substance abuse, and Respondent no longer suffers from such difficulties or disabilities.

(9) ☐ **Severe Financial Stress:** At the time of the misconduct, Respondent suffered from severe financial stress which resulted from circumstances not reasonably foreseeable or which were beyond his/her control and which were directly responsible for the misconduct.

(10) ☐ **Family Problems:** At the time of the misconduct, Respondent suffered extreme difficulties in his/her personal life which were other than emotional or physical in nature.

(11) ☐ **Good Character:** Respondent's good character is attested to by a wide range of references in the legal and general communities who are aware of the full extent of his/her misconduct.

(12) ☐ **Rehabilitation:** Considerable time has passed since the acts of professional misconduct occurred followed by convincing proof of subsequent rehabilitation.

(13) ☐ **No mitigating circumstances** are involved.

Additional mitigating circumstances

D. Discipline:

(1) ☒ **Stayed Suspension:**

(a) ☒ Respondent must be suspended from the practice of law for a period of **one (1) year**.

i. ☐ and until Respondent shows proof satisfactory to the State Bar Court of rehabilitation and present fitness to practice and present learning and ability in the law pursuant to standard 1.4(c)(ii) Standards for Attorney Sanctions for Professional Misconduct.

ii. ☐ and until Respondent pays restitution as set forth in the Financial Conditions form attached to this stipulation.

iii. ☐ and until Respondent does the following:

(b) ☒ The above-referenced suspension is stayed.

(2) ☒ **Probation:**

Respondent must be placed on probation for a period of **three (3) years**, which will commence upon the effective date of the Supreme Court order in this matter. (See rule 9.18, California Rules of Court)

(3) ☒ **Actual Suspension:**

(a) ☒ Respondent must be actually suspended from the practice of law in the State of California for a period of **sixty (60) days**.

i. ☐ and until Respondent shows proof satisfactory to the State Bar Court of rehabilitation and present fitness to practice and present learning and ability in the law pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct

ii. ☐ and until Respondent pays restitution as set forth in the Financial Conditions form attached to this stipulation.

iii. ☐ and until Respondent does the following:

E. Additional Conditions of Probation:

(1) ☐ If Respondent is actually suspended for two years or more, he/she must remain actually suspended until he/she proves to the State Bar Court his/her rehabilitation, fitness to practice, and learning and ability in general law, pursuant to standard 1.4(c)(ii), Standards for Attorney Sanctions for Professional Misconduct.

(2) ☒ During the probation period, Respondent must comply with the provisions of the State Bar Act and Rules of Professional Conduct.

(3) ☒ Within ten (10) days of any change, Respondent must report to the Membership Records Office of the State Bar and to the Office of Probation of the State Bar of California ("Office of Probation"), all changes of information, including current office address and telephone number, or other address for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code.

(4) ☒ Within thirty (30) days from the effective date of discipline, Respondent must contact the Office of Probation and schedule a meeting with Respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, Respondent must meet with the probation deputy either in-person or by telephone. During the period of probation, Respondent must promptly meet with the probation deputy as directed and upon request.

(5) ☒ Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the period of probation. Under penalty of perjury, Respondent must state whether Respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. Respondent must also state whether there are any proceedings pending against him or her in the State Bar Court and if so, the case number and current status of that proceeding. If the first report would cover less than 30 days, that report must be submitted on the next quarter date, and cover the extended period.

In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the period of probation and no later than the last day of probation.

(6) ☐ Respondent must be assigned a probation monitor. Respondent must promptly review the terms and conditions of probation with the probation monitor to establish a manner and schedule of compliance. During the period of probation, Respondent must furnish to the monitor such reports as may be requested, in addition to the quarterly reports required to be submitted to the Office of Probation. Respondent must cooperate fully with the probation monitor.

(7) ☒ Subject to assertion of applicable privileges, Respondent must answer fully, promptly and truthfully any inquiries of the Office of Probation and any probation monitor assigned under these conditions which are directed to Respondent personally or in writing relating to whether Respondent is complying or has complied with the probation conditions.

(8) ☐ Within one (1) year of the effective date of the discipline herein, Respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the Ethics School, and passage of the test given at the end of that session.

☒ No Ethics School recommended. Reason: **Respondent resides in Colorado. In lieu ot State Bar Ethics School, Respondent must complete 6 hours of MCLE courses in general legal ethics. See Attachment Page 4.**

(9) ☒ Respondent must comply with all conditions of probation imposed in the underlying criminal matter and must so declare under penalty of perjury in conjunction with any quarterly report to be filed with the Office of Probation.

(10) ☐ The following conditions are attached hereto and incorporated:

☐ Substance Abuse Conditions ☐ Law Office Management Conditions

☐ Medical Conditions ☐ Financial Conditions

F. Other Conditions Negotiated by the Parties:

(1) ☒ **Multistate Professional Responsibility Examination:** Respondent must provide proof of passage of the Multistate Professional Responsibility Examination ("MPRE"), administered by the National Conference of Bar Examiners, to the Office of Probation during the period of actual suspension or within one year, whichever period is longer. **Failure to pass the MPRE results in actual suspension without further hearing until passage. But see rule 9.10(b), California Rules of Court, and rule 321(a)(1) & (c), Rules of Procedure.**

☐ No MPRE recommended. Reason: .

(2) ☐ **Rule 9.20, California Rules of Court:** Respondent must comply with the requirements of rule **9.20**, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within 30 and 40 calendar days, respectively, after the effective date of the Supreme Court's Order in this matter.

(3) ☐ **Conditional Rule 9.20, California Rules of Court:** If Respondent remains actually suspended for 90 days or more, he/she must comply with the requirements of rule **9.20**, California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within 120 and 130 calendar days, respectively, after the effective date of the Supreme Court's Order in this matter.

(4) ☐ **Credit for Interim Suspension [conviction referral cases only]:** Respondent will be credited for the period of his/her interim suspension toward the stipulated period of actual suspension. Date of commencement of interim suspension: .

(5) ☐ **Other Conditions:**

ATTACHMENT TO

STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION

IN THE MATTER OF: ROBERT JOHN CORRY

CASE NUMBER(S): 07-C-13533

FACTS AND CONCLUSIONS OF LAW.

Respondent admits that the following facts are true and that he is culpable of violation of the specified statutes and/or Rules of Professional Conduct.

Case No. 07-C-13533

1. On November 13, 2006, Respondent Robert John Corry ("Respondent") pled guilty to and was convicted of violating Colorado Revised Statutes ("C.R.S.") section 18-3-204 (Third Degree Assault). A true and correct copy of C.R.S. section 18-3-204 is attached hereto as Exhibit 1.

2. The underlying offense occurred on September 23, 2005 when Respondent and Mrs. Jessica Corry, Respondent's wife, gave a dinner party at Respondent's residence in Arvada, Colorado. Respondent's wife invited a group of approximately ten people including Ms. Antonia Gaona. Ms. Gaona's boyfriend, Mr. Kristopher Lecciso, showed up later at the dinner party. Ms. Gaona suffered from Narcolepsy. Respondent and Ms. Gaona consumed a full meal and several alcoholic beverages during the course of the evening. At approximately 2:00 a.m., Ms.Gaona experienced an episode of Narcolepsy. Mr. Lecciso left the premises. Ms. Gaona then went to a guest bedroom where Ms. Gaono fell asleep fully clothed. At some point, Ms. Gaona awoke and discovered Respondent touching her shoulder, waist, and hips. Ms. Gaona then left the premises.

3. On November 23, 2005, a Complaint and Information was filed charging Respondent in Count One with violating C.R.S. section 18-3-402(1)(h) (Sexual Assault), a felony, in Count Two with violating C.R.S. section 18-3-402(1)(b) (Sexual Assault), a felony, and in Count Three with violating C.R.S. section 18-3-404(1)(a) (Unlawful Sexual Contact), a misdemeanor. A true and correct copy of C.R.S. section 18-3-402 is attached hereto as Exhibit 2. A true and correct copy of C.R.S. section 18-3-404 is attached hereto as Exhibit 3.

4. As part of the police investigation in the underlying matter, Dr. Ronald Kramer,

a Neurologist, was contacted by Detective John F. Doll, at the request of Dr. Tamara Miller, Ms. Gaona's treating physician. Dr. Kramer reviewed Ms. Gaona's medical records, the police report and videotape of Ms. Gaona on the night of the incident. In a Declaration by Dr. Kramer, Dr. Kramer concluded that in his opinion, given Ms. Gaona's medical condition, Ms. Gaona's potrayal of what occured and her mental state at the time of the incident was not supported by the medical evidence, research, and her own medical records.

5. On November 13, 2006, the Complaint and Information was amended and Count Four was added charging Respondent with violating C.R.S. section 18-3-204 (Third Degree Assault), a misdemeanor. Due to the Declaration by Dr. Kramer and evidentiary issues, the prosecutor entered into a plea agreement with Respondent. Under the terms of the plea agreement, Respondent pled guilty to Count Four of the Complaint and Information, and Counts One, Two, and Three of the Complaint and Information were dismissed with prejudice. Further, under the terms of the plea agreement, the prosecutor stipulated that the offense to which Respondent pled guilty, ie. violating C.R.S. section 18-3-204 (Third Degree Assault), a misdemeanor, did not involve unlawful sexual behavior and did not constitute an unlawful sexual offense.

6. On January 22, 2007, Respondent was sentenced to five (5) years probation with conditions including, but not limited to, 60 days in jail, substance abuse evaluation/treatment, and costs in the amount of $3,198.00. Respondent served 44 days of the 60 days in jail and was released early due to good behavior, is undergoing treatment for substance abuse, and is fully compliant with all terms of probation.

Conclusions of Law

7. The parties stipulate that the facts and circumstances surrounding Respondent's guilty plea to and conviction for violating C.R.S. section 18-3-204 (Third Degree Assault), a misdemeanor, involved other misconduct warranting discipline.

PENDING PROCEEDINGS.

The disclosure date referred to, on page one, paragraph A.(7), was May 19, 2008.

COSTS OF DISCIPLINARY PROCEEDINGS.

Respondent acknowledges that the Office of the Chief Trial Counsel has informed respondent that as of May 19, 2008, the costs in this matter are $3,530.00. Respondent further acknowledges that should this stipulation be rejected or should relief from the stipulation be granted, the costs in this matter may increase due to the cost of further proceedings.

PROCEDURAL BACKGROUND IN CONVICTION PROCEEDING.

1. This is a proceeding pursuant to sections 6101 and 6102 of the Business and Professions Code and rule 9.10 of the California Rules of Court.

2. On November 13, 2008, Respondent was convicted of violating C.R.S. section 18-3-204 (Third Degree Assault), a misdemeanor.

3. On October 12, 2007, the Review Department of the State Bar Court issued an order referring the matter to the Hearing Department on the following issues: The discipline to be imposed in the event that the Hearing Department finds that the facts and circumstances surrounding Respondent's conviction for violating C.R.S. section 18-3-204 involved moral turpitude or other misconduct warranting discipline.

AUTHORITIES SUPPORTING DISCIPLINE.

Standard 1.7 (a) provides that "If a member is found culpable of professional misconduct in any proceeding in which discipline may be imposed and the member has a record of one prior imposition of discipline as defined by standard 1.2(f), the degree of discipline imposed in the current proceeding shall be greater than that imposed in the prior proceeding unless the prior discipline imposed was so remote in time to the current proceeding and the offense for which it was imposed was so minimal in severity that imposing greater discipline in the current proceeding would be manifestly unjust."

Standard 3.4 provides that "Final conviction of a member of a crime which does not involve moral turpitude inherently or in the facts and circumstances surrounding the crime's commission but which does involve other misconduct warranting discipline shall result in a sanction as prescribed under part B of these standards appropriate to the nature and extent of the misconduct found to have been committed by the member."

In *In the Matter of Stewart* (Review Dept. 1994) 3 Cal.State Bar Ct. Rptr. 52, the Respondent was convicted of misdemeanor battery on a police officer. He drank a 100 proof alcoholic beverage while his 18- month -old son was in his sole care, trespassed on his ex-wife's apartment, refused to leave when officers told him to, berated his ex-wife, bear hugged an officer when the officer took hold of his arm, and made racial epithets towards one of the officers. In the criminal matter, the Respondent received two years of probation with conditions including 2 days in jail, attendance at 30 meetings of Alcoholics Anonymous, and 40 hours of community service. The Review Department recommended discipline consisting of a two- year stayed suspension, and two years of probation with conditions including a 60-day actual suspension. In aggravation, the Respondent had one prior discipline just one year prior to the misconduct which was also of a different nature and not imposed until after his criminal conviction so that the

Respondent could not have learned from it.

In *In re Kelley* (1990) 52 Cal 3d 487, while the Respondent was on probation for a prior April 1984 DUI conviction, in November 1986 the Respondent received a second DUI conviction. The Supreme Court imposed discipline consisting of a public reproval and three years of probation with conditions. In aggravation the court found that Respondent made no attempts to show rehabilitative efforts and maintained she had no alcohol-abuse problem.

AGGRAVATING CIRCUMSTANCES.

FACTS SUPPORTING AGGRAVATING CIRCUMSTANCES.

Under standard 1.2(b)(iv), Respondent's misconduct significantly harmed the public as Respondent assaulted a member of the public, at Respondent's residence, which resulted in Respondent's November 13, 2006, guilty plea and conviction for violating C.R.S. section 18-3-204 (Third Degree Assault), a misdemeanor.

MITIGATING CIRCUMSTANCES

FACTS SUPPORTING MITIGATING CIRCUMSTANCES

Under standard 1.2(e)(vii), on or about October 1, 2005, Respondent apologized to Ms. Antonia Gaona, at a lunch, for any harm she may have suffered as a result of Respondent's misconduct. Respondent's apology was sincere and heartfelt and designed to timely atone for any consequences of his misconduct. Respondent's apology occurred before Respondent knew this matter had been reported to the police or any State Bar.

MCLE COURSES IN GENERAL LEGAL ETHICS

In lieu of State Bar Ethics School, within six (6) months of the effective date of discipline herein, Respondent must submit to the Office of Probation satisfactory evidence of completion of no less than six (6) hours of Minimum Continuing Legal Education (MCLE) approved courses in general legal ethics. This requirement is separate from any MCLE requirement, and Respondent will not receive MCLE credit for attending these courses.

Document 1 of 1

Source:
Colorado Statutes/Colorado Revised Statutes /TITLE 18 CRIMINAL CODE/ARTICLE 3 OFFENSES AGAINST THE PERSON/PART 2 ASSAULTS/18-3-204. Assault in the third degree.

18-3-204. Assault in the third degree.

A person commits the crime of assault in the third degree if the person knowingly or recklessly causes bodily injury to another person or with criminal negligence the person causes bodily injury to another person by means of a deadly weapon. Assault in the third degree is a class 1 misdemeanor and is an extraordinary risk crime that is subject to the modified sentencing range specified in section 18-1.3-501 (3).

Source: L. 71: R&RE, p. 421, § 1. **C.R.S. 1963:** § 40-3-204. **L. 77:** Entire section amended, p. 961, § 10, effective July 1. **L. 2004:** Entire section amended, p. 635, § 4, effective August 4.

ANNOTATION

Am. Jur.2d. See 6 Am. Jur.2d, Assault and Battery, §§ 34-38.

C.J.S. See 6A C.J.S., Assault and Battery, §§ 73, 74, 78-82, 91-94.

Annotator's note. Since § 18-3-204 is similar to former § 40-2-35, C.R.S. 1963, relevant cases construing that provision have been included in the annotations to this section.

Essential elements of assault are an unlawful attempt to commit a violent injury and the present ability to commit a violent injury, and these elements must be shown to have existed at the time in order to sustain a charge of assault. People v. Cardwell, 181 Colo. 421, 510 P.2d 317 (1973).

Assault is an unlawful attempt coupled with a present ability to commit a violent injury on the person of another. Sims v. People, 177 Colo. 229, 493 P.2d 365 (1972).

Conduct which creates substantial risk of serious bodily injury not element of offense. The establishment of every element of third degree assault would not necessarily include proving conduct which creates a substantial risk of serious bodily injury, an element of reckless endangerment. Third degree assault requires proof of bodily injury but not proof of a substantial risk of serious bodily injury. Therefore reckless endangerment is not a lesser included offense of third degree assault. People v. Berner, 42 Colo. App. 520, 600 P.2d 112 (1979).

Separate blows in single criminal transaction are single offense. Where two blows were delivered to the same person within a short period of time as part of a continuous harangue to extract information, these two blows were not separate transactions but were part of a single criminal transaction arising from a single impulse. Therefore it was error to charge and convict defendant twice for the same transaction. People v. Berner, 42 Colo. App. 520, 600 P.2d 112 (1979).

Offense of assault and battery is a matter of mixed state and local concern. City of Aurora v. Martin, 181 Colo. 72, 507 P.2d 868 (1973).

It is no defense to show that the specific intent was directed at someone else other than the victim. People v. Tafoya, 179 Colo. 438, 501 P.2d 118 (1972).

Mental impairment evidence admissible to negate mens rea. Opinion evidence of a mental impairment due to a mental disease or defect may be admitted to negate the mens rea for a nonspecific intent crime such as assault in the third degree. Hendershott v. People, 653 P.2d 385 (Colo. 1982), cert. denied, 459 U.S. 1225, 103

S. Ct. 1232, 75 L. Ed.2d 466 (1983).

Evidence sufficient to show specific intent. People v. Tafoya, 179 Colo. 438, 501 P.2d 118 (1972).

Bodily injury need not be of a crippling or otherwise incapacitating nature to be within the statutory prohibition. People v. Lobato, 187 Colo. 285, 530 P.2d 493 (1975).

BB gun can be a deadly weapon. Testimony that if a person hit with a BB in a vulnerable area of the body, such as the eyes, the BB could cause serious bodily injury was sufficient to prove that the BB gun was a deadly weapon. People in Interest of J.R., 867 P.2d 125 (Colo. App. 1993).

The issue in evaluating whether a device is a deadly weapon is whether, in the manner it was used, the device could have caused death or serious bodily injury. The fact that in this particular case death or serious bodily injury did not occur is irrelevant. People in Interest of J.R., 867 P.2d 125 (Colo. App. 1993).

Third degree assault is a lesser included offense of second degree assault. People v. Thompson, 187 Colo. 252, 529 P.2d 1314 (1975); People v. Annan, 665 P.2d 629 (Colo. App. 1983); People v. Brown, 677 P.2d 406 (Colo. App. 1983); People v. Smith, 682 P.2d 493 (Colo. App. 1983); People v. Howard, 89 P.3d 441 (Colo. App. 2003).

The third degree assault conviction merges into the conviction for second degree assault. People v. Howard, 89 P.3d 441 (Colo. App. 2003).

And only difference between second and third degree assault is degree of injury. People v. Thompson, 187 Colo. 252, 529 P.2d 1314 (1975); People v. Brown, 677 P.2d 406 (Colo. App. 1983).

Third degree assault is distinguishable from second degree assault on a peace officer, as described in § 18-3-203, and resisting arrest, as described in § 18-8-103, and therefore these sections do not violate equal protection. This section and § 18-8-103 require that the defendant act knowingly, whereas § 18-3-203 requires that the defendant act intentionally. Further, § 18-3-203 requires proof that the defendant intended to prevent a police officer from performing a lawful duty, which is not required for a conviction under this section. People v. Whatley, 10 P.3d 668 (Colo. App. 2000).

Proper to submit different degrees of assault to jury. Where the trial judge submitted to the jury not only the offense of assault with a deadly weapon, but also simple assault as a lesser included offense, this was not error. Plainly, an instruction on general intent was necessary for simple assault, and it was also necessary for the court to instruct on specific intent for the charge of assault with a deadly weapon. Arellano v. People, 174 Colo. 456, 484 P.2d 801 (1971).

Because two counts of second degree assault were premised on identical evidence, once the trial court concluded that the evidence was sufficient to submit an instruction regarding third degree assault as a lesser included offense to count one, it was obligated to make the same conclusion with respect to the defendant's request for a lesser nonincluded instruction as to count two. People v. Castro, 952 P.2d 762 (Colo. App. 1998).

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

When there is no doubt on intent, court should deny third degree assault instruction. People v. Gibson, 623 P.2d 391 (Colo. 1981).

Where court instructed jury on third degree assault relating to intentional conduct on lesser-included offense of second degree assault, but refused to instruct on third degree assault relating to criminal negligence, see People v. White, 191 Colo. 353, 553 P.2d 68 (1976).

Third degree assault not included in robbery. Third degree assault requires proof of bodily injury, an

element not necessary to culpability under robbery, and therefore, the former offense is not included within the latter. People v. Flores, 39 Colo. App. 556, 575 P.2d 11 (1977).

A misdemeanor conviction under this section for third degree assault involves a crime of violence for purposes of § 4B1.2(a)(2) of the United States Sentencing Guidelines. United States v. Krejcarek, 453 F.3d 1290 (10th Cir. 2006).

Applied in People v. Lobato, 192 Colo. 357, 559 P.2d 224 (1977); People v. Sepeda, 196 Colo. 13, 581 P.2d 723 (1978); People in Interest of C.B., 196 Colo. 362, 585 P.2d 281 (1978); People v. Kreiser, 41 Colo. App. 210, 585 P.2d 301 (1978); People v. Dowdell, 197 Colo. 76, 589 P.2d 948 (1979); People v. Trout, 198 Colo. 98, 596 P.2d 762 (1979); Kreiser v. People, 199 Colo. 20, 604 P.2d 27 (1979); People v. Johnson, 644 P.2d 34 (Colo. App. 1980); Godbold v. Wilson, 518 F. Supp. 1265 (D. Colo. 1981); People v. Francis, 630 P.2d 82 (Colo. 1981); People v. Henry, 631 P.2d 1122 (Colo. 1981); People v. Martinez, 634 P.2d 26 (Colo. 1981); People v. Noble, 635 P.2d 203 (Colo. 1981); People v. Sanchez, 644 P.2d 95 (Colo. App. 1982); People v. Dement, 661 P.2d 675 (Colo. 1983); People v. Gouker, 665 P.2d 113 (Colo. 1983); People v. Reedy, 705 P.2d 1032 (Colo. App. 1985).

Document 1 of 1

Source:
Colorado Statutes/Colorado Revised Statutes /TITLE 18 CRIMINAL CODE/ARTICLE 3 OFFENSES AGAINST THE PERSON/PART 4 UNLAWFUL SEXUAL BEHAVIOR/18-3-402. Sexual assault.

18-3-402. Sexual assault.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

physical violence; or

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

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

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

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

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

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

(II) The victim suffers serious bodily injury; or

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

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

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

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

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

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

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

ANNOTATION

Analysis

I. General Consideration.
II. Elements of Offense.
III. Trial and Prosecution.
A. In General.
B. Indictment or Information.
C. Evidence.
D. Jury.
E. Instructions.
IV. Verdict and Sentence.

I. GENERAL CONSIDERATION.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Applied in People ex rel. VanMeveren v. District Court, 195 Colo. 1, 575 P.2d 405 (1978); People v.

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

II. ELEMENTS OF OFFENSE.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. TRIAL AND PROSECUTION.

A. In General.

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

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

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

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

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

B. Indictment or Information.

Information need not follow exact language of section. It is sufficient that the offense be charged in language from which the nature of it may be readily understood by the accused and the jury. Tracy v. People, 65

Colo. 226, 176 P. 280 (1918); Sarno v. People, 74 Colo. 528, 223 P. 41 (1924).

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

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

C. Evidence.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Evidence insufficient to support conviction. A conviction for rape based solely upon the evidence of the

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

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

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

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

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

D. Jury.

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

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

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

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

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

E. Instructions.

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

The court properly defined "physical force" and "physical violence" in its instructions. People v.

Holwuttle, __ P.3d __ (Colo. App. 2006).

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

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

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

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

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

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

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

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

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

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

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

Trial court did not err in refusing to give the consent defense jury instruction tendered by the defendant in a first degree sexual assault case where the crime itself requires that the prosecution prove a lack of consent.

People v. Cruz, 923 P.2d 311 (Colo. App. 1996).

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

IV. VERDICT AND SENTENCE.

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

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

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

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

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

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

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

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

Document 1 of 1

Source:
Colorado Statutes/Colorado Revised Statutes /TITLE 18 CRIMINAL CODE/ARTICLE 3 OFFENSES AGAINST THE PERSON/PART 4 UNLAWFUL SEXUAL BEHAVIOR/18-3-404. Unlawful sexual contact.

18-3-404. Unlawful sexual contact.

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

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

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

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

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

(e) Repealed.

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

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

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

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

(2) (a) Unlawful sexual contact is a class 1 misdemeanor and is an extraordinary risk crime that is subject to the modified sentencing range specified in section 18-1.3-501 (3).

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

(3) If a defendant is convicted of the class 4 felony of unlawful sexual contact pursuant to paragraph (b) of subsection (2) of this section, the court shall sentence the defendant in accordance with the provisions of section 18-1.3-406; except that this subsection (3) shall not apply if the actor engages in the conduct described in paragraph (g) of subsection (1) of this section.

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

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

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

ANNOTATION

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

Law reviews. For comment, "Expert Testimony on Rape Trauma Syndrome in Colorado: Broadening Admissibility to Address the Question of Consent in Sexual Assault Prosecutions", see 61 U. Colo. L. Rev. 833 (1990). For comment, "Warning Bell: The Inherent Difficulties of Responding to Student-on-Student Sexual Harassment in Colorado Middle Schools", see 76 U. Colo. L. Rev. 813 (2005).

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

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

The general assembly determined that persons who commit unlawful sexual contact with force must be sentenced to at least the midpoint of the sentencing range. People v. Holwuttle, __ P.3d __ (Colo. App. 2006).

It was proper for the court to include the definition of "consent" from § 18-1-505 (3)(d) in its instruction for unlawful sexual contact. People v. Holwuttle, __ P.3d __ (Colo. App. 2006).

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

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

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

A difference in the description of third degree sexual assault between the charging document and the jury instructions was not unconstitutional. The defendant received adequate notice that he could potentially have to defend against allegations that he subjected the victim to sexual contact in the course of attempting to induce her to expose intimate parts. People v. Madden, 111 P.3d 452 (Colo. 2005).

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

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

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

(Do not write above this line.)

In the Matter of **Robert John Corry**	Case number(s): **07-C-13533**

SIGNATURE OF THE PARTIES

By their signatures below, the parties and their counsel, as applicable, signify their agreement with each of the recitations and each of the terms and conditions of this Stipulation Re Fact, Conclusions of Law and Disposition.

May 29, 2008 Date	Respondent's Signature	Robert John Corry Print Name
Date	Respondent's Counsel Signature	Print Name
5/30/08 Date	Deputy Trial Counsel's Signature	Michael J. Glass Print Name

(Do not write above this line.)

In the Matter Of **Robert John Corry**	Case Number(s): **07-C-13533**

ORDER

Finding the stipulation to be fair to the parties and that it adequately protects the public,
IT IS ORDERED that the requested dismissal of counts/charges, if any, is GRANTED without prejudice, and:

☑ The stipulation as to facts and conclusions of law is APPROVED.

☐ The stipulation as to facts and conclusions of law is APPROVED AS MODIFIED as set forth below.

☐ All court dates in the Hearing Department are vacated.

The parties are bound by the stipulation as approved unless: 1) a motion to withdraw or modify the stipulation, filed within 15 days after service of this order, is granted; or 2) this court modifies or further modifies the approved stipulation; or 3) Respondent is not accepted for participation in the Program or does not sign the Program Contract. (See rule 135(b) and 802(b), Rules of Procedure.)

June 23, 2008
Date

Judge of the State Bar Court

RICHARD A. PLATEL

CERTIFICATE OF SERVICE
[Rule 62(b), Rules Proc.; Code Civ. Proc., § 1013a(4)]

I am a Case Administrator of the State Bar Court of California. I am over the age of eighteen and not a party to the within proceeding. Pursuant to standard court practice, in the City and County of Los Angeles, on June 25, 2008, I deposited a true copy of the following document(s):

STIPULATION RE FACTS, CONCLUSIONS OF LAW AND DISPOSITION AND ORDER APPROVING

in a sealed envelope for collection and mailing on that date as follows:

[X] by first-class mail, with postage thereon fully prepaid, through the United States Postal Service at Los Angeles, California, addressed as follows:

ROBERT J CORRY
SOUTH TOWER
600 17TH ST STE 2800
DENVER CO 80202

[X] by interoffice mail through a facility regularly maintained by the State Bar of California addressed as follows:

MICHAEL GLASS, Enforcement, Los Angeles

I hereby certify that the foregoing is true and correct. Executed in Los Angeles, California, on **June 25, 2008**.

Angela Owens-Carpenter
Case Administrator
State Bar Court