Construction and application of U.S. sentencing guideline 2G1.3(b)(3), providing two-level enhancement for use of computer to persuade, induce, entice, coerce, or facilitate the travel of, minor to engage in prohibited sexual conduct, 58 ALR Fed. 2d 1.

Sec. 11.41.410. Sexual assault in the first degree. (a) An offender commits the crime of sexual assault in the first degree if

(1) the offender engages in sexual penetration with another person without consent of that person;

(2) the offender attempts to engage in sexual penetration with another person without consent of that person and causes serious physical injury to that person;

(3) the offender engages in sexual penetration with another person

(A) who the offender knows is mentally incapable; and

(B) who is in the offender's care

(i) by authority of law; or

(ii) in a facility or program that is required by law to be licensed by the state; or

(4) the offender engages in sexual penetration with a person who the offender knows is unaware that a sexual act is being committed and

(A) the offender is a health care worker; and

(B) the offense takes place during the course of professional treatment of the victim.

(b) Sexual assault in the first degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 3 ch 166 SLA 1978; am § 8 ch 102 SLA 1980; am § 6 ch 143 SLA 1982; am § 10 ch 78 SLA 1983; am § 1 ch 96 SLA 1988; am § 7 ch 4 SLA 1990; am § 5 ch 79 SLA 1992; am § 3 ch 30 SLA 1996; am § 1 ch 61 SLA 1996)

Cross references. — For punishment, see AS 12.55.125(i) for imprisonment and AS 12.55.035 for fines. For evidence of past sexual conduct in trials of sexual assault in any degree or attempt to commit sexual assault in any degree, see AS 12.45.045.

Editor's notes. — From May 16 through September 1996, "the Department of Administration under AS 47.23.030 or by the Department of Health and Social Services" appeared where "the state" now appears in (a)(3)(B)(ii).

Legislative history reports. — For a report on Chapter 102, SLA 1980 (HCS CSSB 511), see 1980 Senate Journal Supplement, No. 44, May 29, 1980, or 1980 House Journal Supplement, No. 79, May 28, 1980.

For legislative letter of intent relating to the amendments to (a) of this section by ch. 96, SLA 1988 (CSHB 546 (Jud)), see 1988 House Journal 3065.

NOTES TO DECISIONS

I. General Consideration.
II. Former Law.
A. Generally.
B. Age of Consent.
C. Procedure.

I. GENERAL CONSIDERATION.

History of first-degree sexual assault statute. — Reynolds v. State, 664 P.2d 621 (Alaska Ct. App. 1983).

Constitutionality. — In order to prove a violation of AS 11.41.410(a)(1), the state must prove that the defendant knowingly engaged in sexual intercourse and recklessly disregarded his victim's lack of consent. Construed in this way, the statute does not criminalize harmless conduct and is neither vague nor overbroad. Reynolds v. State, 664 P.2d 621 (Alaska Ct. App. 1983).

Considering the Revised Code and the concurrent sentencing statutes governing sentences together indicates that the legislature has not irrationally failed to distinguish between degrees of culpability; and the sentencing provisions of the sexual offenses provisions of the Revised Code did not subject defendant to cruel and unusual punishment or deny him substantive due process or the equal protection of the laws. Reynolds v. State, 664 P.2d 621 (Alaska Ct. App. 1983).

Victim's vulnerability is not a necessary element of the offense of first-degree sexual assault; therefore, there was no error in using that as an aggravating factor. Grandstaff v. State, 171 P.3d 1176 (Alaska Ct. App. 2007).

Where defendant had a pattern of sexually abusing his stepdaughters, it was reasonable for the jury to conclude that the victim was afraid of protesting his assault and that his assault was coerced. Her failure to protest did not constitute consent, and the applicability of the language in (a)(1) was clear in light of the evidence presented. Adams v. State, — P.3d — (Alaska Ct. App. Mar. 28, 2012), (memorandum opinion).

Probable cause for arrest. — Police did not need a warrant to arrest defendant for sexual assault in the first degree because they had probable cause, based on

burglary held excessive. — See Hansen v. State, 657 P.2d 862 (Alaska Ct. App. 1983); Hancock v. State, 706 P.2d 1164 (Alaska Ct. App. 1985) (decided under section as it read before 1982 amendment).

Collateral references. — Defense of mistake of fact as to victim's consent in rape prosecution. 102 ALR5th 447.

Sec. 11.41.420. Sexual assault in the second degree. (a) An offender commits the crime of sexual assault in the second degree if

(1) the offender engages in sexual contact with another person without consent of that person;

(2) the offender engages in sexual contact with a person

(A) who the offender knows is mentally incapable; and

(B) who is in the offender's care

(i) by authority of law; or

(ii) in a facility or program that is required by law to be licensed by the state;

(3) the offender engages in sexual penetration with a person who the offender knows is

(A) mentally incapable;

(B) incapacitated; or

(C) unaware that a sexual act is being committed; or

(4) the offender engages in sexual contact with a person who the offender knows is unaware that a sexual act is being committed and

(A) the offender is a health care worker; and

(B) the offense takes place during the course of professional treatment of the victim.

(b) Sexual assault in the second degree is a class B felony. (§ 3 ch 166 SLA 1978; am § 1 ch 78 SLA 1983; am § 2 ch 96 SLA 1988; am § 8 ch 4 SLA 1990; am § 6 ch 79 SLA 1992; am § 4 ch 30 SLA 1996; am § 2 ch 61 SLA 1996)

Cross references. — For punishment, see AS 12.55.125(i) for imprisonment and AS 12.55.035 for fines.

Editor's notes. — From May 16 through September 9, 1996, "the Department of Administration under AS 47.33 or by the Department of Health and Social Services" appeared where "the state" now appears in (a)(2)(B)(ii).

Legislative history reports. — For legislative letter of intent relating to the amendments to (a) of this section by ch. 96, SLA 1988 (CSHB 545 (Jud)), see 1988 House Journal 3065.

NOTES TO DECISIONS

For cases construing former crime of rape, see notes to AS 11.41.410.

Constitutionality. — Where man was convicted of second-degree sexual assault under paragraph (a)(3) for engaging in sexual penetration with a woman who was so intoxicated that she was either incapacitated or unaware of the sexual penetration, the court of appeals held that the definition of second-degree sexual assault did not violate the single subject clause of the Alaska Constitution and was not unconstitutionally vague. Ragsdale v. State, 23 P.3d 653 (Alaska Ct. App. 2001).

Attempted sexual assault in the first degree and sexual assault in the second degree are closely related, since sexual penetration involves sexual contact and both offenses proceed on a theory of coerced assent. Nicholson v. State, 656 P.2d 1209 (Alaska Ct. App. 1982).

Construction. — The statutory language in this section is not so imprecise that ordinary persons of common intelligence are left to guess at its meaning and are apt to differ as to its scope; the trial court did not err in rejecting defendant's claim of vagueness and overbreadth. Jackson v. State, 890 P.2d 587 (Alaska Ct. App. 1995).

Constitutionality of conviction where original charge was under AS 11.41.410. — Where defendant was charged with attempted sexual assault in the first degree, he was thereby assumed to have notice that he might be convicted of second-degree sexual assault because of the similarities in the elements of the two offenses, and his conviction for the latter offense did not violate due process. Nicholson v. State, 656 P.2d 1209 (Alaska Ct. App. 1982).

Attempt to commit sexual assault is a crime under Alaska law and requires that defendant, intending to engage in sexual contact with another person without regard to that person's lack of consent, take a substantial step toward accomplishing this goal. Guertin v. State, 854 P.2d 1130 (Alaska Ct. App. 1993).

Evidence was sufficient to convict defendant of attempted sexual assault in the second degree; an eyewitness's testimony, which was corroborated, was that the victim was incapacitated. Other corroborating evidence led the trial judge to the conclusion that

v. State, — P.3d — (Alaska Ct. App. Sept. 23, 2009), (memorandum opinion).

Sec. 11.41.425. Sexual assault in the third degree. (a) An offender commits the crime of sexual assault in the third degree if the offender

(1) engages in sexual contact with a person who the offender knows is

(A) mentally incapable;

(B) incapacitated; or

(C) unaware that a sexual act is being committed;

(2) while employed in a state correctional facility or other placement designated by the commissioner of corrections for the custody and care of prisoners, engages in sexual penetration with a person who the offender knows is committed to the custody of the Department of Corrections to serve a term of imprisonment or period of temporary commitment;

(3) engages in sexual penetration with a person 18 or 19 years of age who the offender knows is committed to the custody of the Department of Health and Social Services under AS 47.10 or AS 47.12 and the offender is the legal guardian of the person; or

(4) while employed in the state by a law enforcement agency as a peace officer, or while acting as a peace officer in the state, engages in sexual penetration with a person with reckless disregard that the person is in the custody or the apparent custody of the offender, or is committed to the custody of a law enforcement agency.

(b) In this section, "peace officer" has the meaning given in AS 01.10.060.

(c) Sexual assault in the third degree is a class C felony. (§ 3 ch 96 SLA 1988; am § 9 ch 4 SLA 1990; am § 7 ch 79 SLA 1992; am § 1 ch 33 SLA 2000; am §§ 3, 4 ch 20 SLA 2011)

Revisor's notes. — Subsection (b) was enacted as (c). Relettered in 2011, at which time former subsection (b) was relettered as (c).

Cross references. — For punishment, see AS 12.55.125(i) for imprisonment and AS 12.55.035 for fines.

Effect of amendments. — The 2011 amendment, effective July 1, 2011, added (a)(4), and made a related stylistic change; added (b) (now (c)).

Legislative history reports. — For governor's transmittal letter concerning the amendment of subsection (a) by § 1, ch. 33, SLA 2000 (HB 99), see 1999 House Journal 256.

NOTES TO DECISIONS

Cited in Herreid v. State, 69 P.3d 507 (Alaska Ct. App. 2003); Simon v. State, 121 P.3d 815 (Alaska Ct. App. 2005).

Sec. 11.41.427. Sexual assault in the fourth degree. (a) An offender commits the crime of sexual assault in the fourth degree if

(1) while employed in a state correctional facility or other placement designated by the commissioner of corrections for the custody and care of prisoners, the offender engages in sexual contact with a person who the offender knows is committed to the custody of the Department of Corrections to serve a term of imprisonment or period of temporary commitment;

(2) the offender engages in sexual contact with a person 18 or 19 years of age who the offender knows is committed to the custody of the Department of Health and Social Services under AS 47.10 or AS 47.12 and the offender is the legal guardian of the person; or

(3) while employed in the state by a law enforcement agency as a peace officer, or while acting as a peace officer in the state, the offender engages in sexual contact with a person with reckless disregard that the person is in the custody or the apparent custody of the offender, or is committed to the custody of a law enforcement agency.

(b) In this section, "peace officer" has the meaning given in AS 01.10.060.

(c) Sexual assault in the fourth degree is a class A misdemeanor. (§ 2 ch 33 SLA 2000; am §§ 5, 6 ch 20 SLA 2011)

Revisor's notes. — Subsection (b) was enacted as (c). Relettered in 2011, at which time former subsection (b) was relettered as (c).

Cross references. — For punishment of class A misdemeanors, see AS 12.55.135(a) for imprisonment and AS 12.55.035 for fines.

Effect of amendments. — The 2011 amendment, effective July 1, 2011, added (a)(3), and made a related stylistic change; added (b) (now (c)).

Legislative history reports. — For governor's transmittal letter concerning the enactment of this section by § 2, ch. 33, SLA 2000 (HB 99), see 1999 House Journal 256.

NOTES TO DECISIONS

Cited in Doe v. State, 189 P.3d 999 (Alaska 2008).

Sec. 11.41.430. Sexual assault in the third degree. [Repealed, § 10 ch 78 SLA 1983. For current law, see AS 11.41.425.]

Sec. 11.41.432. Defenses. (a) It is a defense to a crime charged under AS 11.41.410(a)(3), 11.41.420(a)(2), 11.41.420(a)(3), or 11.41.425 that the offender is

(1) mentally incapable; or

(2) married to the person and neither party has filed with the court for a separation, divorce, or dissolution of the marriage.

(b) Except as provided in (a) of this section, in a prosecution under AS 11.41.410 or 11.41.420, it is not a defense that the victim was, at the time of the alleged offense, the legal spouse of the defendant. (§ 4 ch 96 SLA 1988; am § 27 ch 50 SLA 1989)

Legislative history reports. — For an analysis of the 1989 amendment to this section, see Senate-House Joint Journal Supplement No. 10, May 5, 1989, p. 5, under "Sec. 27."

Sec. 11.41.434. Sexual abuse of a minor in the first degree. (a) An offender commits the crime of sexual abuse of a minor in the first degree if

(1) being 16 years of age or older, the offender engages in sexual penetration with a person who is under 13 years of age or aids, induces, causes, or encourages a person who is under 13 years of age to engage in sexual penetration with another person;

(2) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 18 years of age, and the offender is the victim's natural parent, stepparent, adopted parent, or legal guardian; or

(3) being 18 years of age or older, the offender engages in sexual penetration with a person who is under 16 years of age, and

(A) the victim at the time of the offense is residing in the same household as the offender and the offender has authority over the victim; or

(B) the offender occupies a position of authority in relation to the victim.

(b) Sexual abuse of a minor in the first degree is an unclassified felony and is punishable as provided in AS 12.55. (§ 2 ch 78 SLA 1983; am § 3 ch 66 SLA 1988; am § 1 ch 151 SLA 1990)

Cross references. — For punishment, see AS 12.55.125(i) for imprisonment and AS 12.55.035 for fines.

Legislative history reports. — For House letter of intent on ch. 66, SLA 1988 (CSHB 237 (Jud)), which amended this section, see 1988 House Journal 2330-2337.

For legislative letter of intent in connection with the amendment of subsection (a) by § 1, ch. 151, SLA 1990 (HCS CSSB 355 (Jud)), see 1990 House Journal, p. 4199.

NOTES TO DECISIONS

Annotator's notes. — Some of the cases cited in the notes below were decided under former AS 11.15.134. Some were also decided under former AS 11.41.410(a)(4), which provided that a person 18 years

contest to attempted first-degree sexual abuse of a minor and received a sentence of 12 years' imprisonment with seven years suspended, for an effective five-year sentence, to establish the sentencing range defendant stipulated to two aggravating factors; defendant knew the victim of his offense was particularly vulnerable and his prior criminal history included a delinquency adjudication for felony conduct. Malutin v. State, 198 P.3d 1177 (Alaska Ct. App. 2009).

Sentence under former AS 11.15.134 held excessive. — See Qualle v. State, 652 P.2d 481 (Alaska Ct. App. 1982).

Sentence for assault held excessive. — Sentence of 20 years imprisonment for first-degree sexual assault of two-year old child was excessive and case was remanded for resentencing not to exceed 10 years. Langton v. State, 662 P.2d 954 (Alaska Ct. App. 1983).

Sentence for assault held too lenient. — Suspended five-year sentence for first-degree sexual assault of defendant's four-year old son was disapproved as too lenient, with a 90-day to three-year sentence suggested. Langton v. State, 662 P.2d 954 (Alaska Ct. App. 1983).

Sentence under former AS 11.41.410(a)(4) for assault held too lenient. — See State v. Rushing, 680 P.2d 500 (Alaska Ct. App. 1984); State v. Woods, 680 P.2d 1195 (Alaska Ct. App. 1984).

Given a series of nine assaults of a stepdaughter by a stepfather, substantial evidence that intercourse was accomplished without consent, and the fact that the victim has left the defendant's home, a sentence of one year of incarceration under former AS 11.41.410(a)(4) was disapproved and a sentence of at least three years recommended. State v. Couey, 680 P.2d 513 (Alaska Ct. App. 1984).

Remand for resentencing for conviction under former law. — See State v. Covington, 711 P.2d 1183 (Alaska Ct. App. 1985).

Sentence clearly mistaken. — A sentence of 24 years with four years suspended, upon conviction of three counts of sexual abuse of a minor in the first degree, was clearly mistaken, where the trial court did not address the 10- to 15-year benchmark established in prior decisions concerning aggravated cases of sexual assault, and nothing in the record established that a sentence in excess of 15 years was necessary to protect the public. Mosier v. State, 747 P.2d 548 (Alaska Ct. App. 1987).

A sentence of 20 years with five years suspended for a first felony offender, for sexual abuse of a minor in the first degree, was clearly mistaken, where the offense did not involve multiple acts with multiple victims or a prior felony record. Zackar v. State, 761 P.2d 1015 (Alaska Ct. App. 1988).

Sentence of 15 years with five years suspended was clearly mistaken, where defendant was a first felony offender with an otherwise good record. Lawrence v. State, 764 P.2d 318 (Alaska Ct. App. 1988).

Composite term of sixty years upon conviction of two counts of sexual abuse of a minor in the first degree was clearly mistaken, and the case was remanded for imposition of a total sentence not to exceed sixty years with ten years suspended, where the sentencing court's reliance upon the seriousness of defendant's prior murder conviction placed inordinate and disproportionate weight on a single aggravating factor. Murray v. State, 770 P.2d 1131 (Alaska Ct. App. 1989).

Remand for resentencing. — See Lewis v. State, 706 P.2d 715 (Alaska Ct. App. 1985); Bodine v. State, 737 P.2d 1072 (Alaska Ct. App. 1987); Howell v. State, 758 P.2d 103 (Alaska Ct. App. 1988).

Conditions of probation. — Conditions of probation restricting defendant from unauthorized contact with his daughter and with other girls under 18-years of age were not vague or unduly restrictive of his constitutionally protected right to freedom of association. Nitz v. State, 745 P.2d 1379 (Alaska Ct. App. 1987).

Applied in Seymore v. State, 655 P.2d 786 (Alaska Ct. App. 1982); Juelson v. State, 758 P.2d 1294 (Alaska Ct. App. 1988); Allen v. State, 769 P.2d 457 (Alaska Ct. App. 1989); Simpson v. State, 796 P.2d 840 (Alaska Ct. App. 1990); Carr v. State, 840 P.2d 1000 (Alaska Ct. App. 1992); Hess v. State, 20 P.3d 1121 (Alaska 2001); State v. Moreno, 151 P.3d 480 (Alaska Ct. App. 2006); Sikeo v. State, 258 P.3d 906 (Alaska Ct. App. 2011).

Quoted in Harris v. State, 790 P.2d 1379 (Alaska Ct. App. 1990).

Cited in Higgs v. State, 676 P.2d 610 (Alaska Ct. App. 1984); Benboe v. State, 698 P.2d 1230 (Alaska Ct. App. 1985); Dancer v. State, 715 P.2d 1174 (Alaska Ct. App. 1986); James v. State, 739 P.2d 1314 (Alaska Ct. App. 1987); Patterson v. State, 747 P.2d 535 (Alaska Ct. App. 1987); Kirby v. State, 748 P.2d 757 (Alaska Ct. App. 1987); Jager v. State, 748 P.2d 1172 (Alaska Ct. App. 1988); James v. State, 754 P.2d 1336 (Alaska Ct. App. 1988); Osterback v. State, 789 P.2d 1037 (Alaska Ct. App. 1990); Cook v. State, 792 P.2d 682 (Alaska Ct. App. 1990); Capwell v. State, 823 P.2d 1250 (Alaska Ct. App. 1991); Curl v. State, 843 P.2d 1244 (Alaska Ct. App. 1992); Boerma v. State, 843 P.2d 1246 (Alaska Ct. App. 1992); Nunn v. State, 845 P.2d 435 (Alaska Ct. App. 1993); State v. Angaiak, 847 P.2d 1068 (Alaska Ct. App. 1993); Haire v. State, 877 P.2d 1302 (Alaska Ct. App. 1994); Beltz v. State, 895 P.2d 513 (Alaska Ct. App. 1995); Plate v. State, 925 P.2d 1057 (Alaska Ct. App. 1996); State v. Simpson, 946 P.2d 890 (Alaska Ct. App. 1997); Gwalthney v. State, 964 P.2d 1285 (Alaska Ct. App. 1998); Krack v. State, 973 P.2d 100 (Alaska Ct. App. 1999); Harmon v. State, 11 P.3d 393 (Alaska Ct. App. 2000); Schumacher v. State, 11 P.3d 397 (Alaska Ct. App. 2000); Jack C. v. State, 68 P.3d 1274 (Alaska 2003); Parker v. State, 90 P.3d 194 (Alaska Ct. App. 2004); Wholecheese v. State, 100 P.3d 14 (Alaska Ct. App. 2004); Bryant v. State, 133 P.3d 690 (Alaska Ct. App. 2006); State v. Parker, 147 P.3d 690 (Alaska 2006); Zemljich v. Municipality of Anchorage, 151 P.3d 471 (Alaska Ct. App. 2006); Garland v. State, 172 P.3d 827 (Alaska Ct. App. 2007); Doe v. State, 189 P.3d 999 (Alaska 2008); Holden v. State, 190 P.3d 725 (Alaska Ct. App. 2008); Davison v. State, 282 P.3d 1262 (Alaska 2012).

Sec. 11.41.436. Sexual abuse of a minor in the second degree. (a) An offender commits the crime of sexual abuse of a minor in the second degree if,

(1) being 17 years of age or older, the offender engages in sexual penetration with a person who is 13, 14, or 15 years of age and at least four years younger than the offender, or aids, induces, causes, or encourages a person who is 13, 14, or 15 years of age and at

least four years younger than the offender to engage in sexual penetration with another person;

(2) being 16 years of age or older, the offender engages in sexual contact with a person who is under 13 years of age or aids, induces, causes, or encourages a person under 13 years of age to engage in sexual contact with another person;

(3) being 18 years of age or older, the offender engages in sexual contact with a person who is under 18 years of age, and the offender is the victim's natural parent, stepparent, adopted parent, or legal guardian;

(4) being 16 years of age or older, the offender aids, induces, causes, or encourages a person who is under 16 years of age to engage in conduct described in AS 11.41.455(a)(2) — (6);

(5) being 18 years of age or older, the offender engages in sexual contact with a person who is under 16 years of age, and

(A) the victim at the time of the offense is residing in the same household as the offender and the offender has authority over the victim; or

(B) the offender occupies a position of authority in relation to the victim;

(6) being 18 years of age or older, the offender engages in sexual penetration with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim; or

(7) being under 16 years of age, the offender engages in sexual penetration with a person who is under 13 years of age and at least three years younger than the offender.

(b) Sexual abuse of a minor in the second degree is a class B felony. (§ 2 ch 78 SLA 1983; am § 4 ch 66 SLA 1988; am § 2 ch 151 SLA 1990; am § 1 ch 14 SLA 2006; am § 1 ch 88 SLA 2006)

Cross references. — For punishment, see AS 12.55.125(i) for imprisonment and AS 12.55.035 for fines.

Editor's notes. — Section 13, ch. 14, SLA 2006, provides that the 2006 amendment of (a) of this section applies "to offenses committed on or after April 25, 2006." Section 3, ch. 88, SLA 2006 provides that the amendment to (a)(6) made by sec. 1, ch. 88, SLA 2006 applies "to offenses occurring on or after October 4, 2006."

Legislative history reports. — For House letter of intent on ch. 66, SLA 1988 (CSHB 237 (Jud)), which amended this section, see 1988 House Journal 2330-2337.

For legislative letter of intent in connection with the amendment of subsection (a) by § 2, ch. 151, SLA 1990 (HCS CSSB 355 (Jud)), see 1990 House Journal, p. 4199.

NOTES TO DECISIONS

Prior law. — For cases decided under prior law, see notes to AS 11.41.434, Notes to Decisions.

"Female breast." — The legislature intended that the term "female breast," as used in the statutory definition of "sexual contact" contained in AS 11.81.900(b)(53) (now (b)(58)), be applied according to its plain meaning — referring to all females regardless of age or degree of development. Stephan v. State, 810 P.2d 564 (Alaska Ct. App. 1991).

"Crime of violence." — Defendant's conviction for sexual abuse constituted a crime of violence for purposes of a sentence enhancement under the Armed Career Criminal Act, 18 U.S.C.S. § 924(e). United States v. Melton, 344 F.3d 1021 (9th Cir. 2003), cert. denied, 541 U.S. 953, 124 S. Ct. 1696, 158 L. Ed. 2d 386 (2004).

No culpable mental state required. — Under the current statutory definition of "sexual contact," the offense of sexual abuse of a minor in the second degree may properly be established by evidence proving knowing conduct within the scope of AS 11.81.900(b)(52)(A) (now (b)(58)(A)); no secondary culpable mental state need be established with respect to surrounding circumstances. Van Meter v. State, 743 P.2d 385 (Alaska Ct. App. 1987).

In a prosecution for sexual abuse of a minor in the second degree, there was no need for the jury to find that defendant acted with the specific intent of achieving sexual satisfaction. Braun v. State, 911 P.2d 1075 (Alaska Ct. App. 1996).

Burden of proving exclusions. — If some evidence of justification is advanced in the record, the state must bear the additional burden of establishing that the defendant's conduct did not fall within the exclusions of AS 11.81.900(b)(52)(B) (now (b)(58)(B)). Van Meter v. State, 743 P.2d 385 (Alaska Ct. App. 1987).

Defense of misunderstanding as to victim's age. — Defendant was entitled to defend on the ground that he reasonably believed the thirteen year old victim was sixteen years of age or older, where most of the information he knew about her came from a telephone conversation with her in which he claimed she discussed her prior sexual history and experience in detail. Bibbs v. State, 814 P.2d 738 (Alaska Ct. App. 1991).

Separate counts arising from single episode. — Defendant was properly convicted of four counts of second-degree sexual abuse of a minor where the

(Alaska Ct. App. 1990); Nunn v. State, 845 P.2d 435 (Alaska Ct. App. 1993); Heath v. State, 849 P.2d 786 (Alaska Ct. App. 1993); Kolkman v. State, 857 P.2d 1202 (Alaska Ct. App. 1993); Steve v. State, 875 P.2d 110 (Alaska Ct. App. 1994); Mullin v. State, 886 P.2d 1323 (Alaska Ct. App. 1994); State v. Fremgen, 889 P.2d 1083 (Alaska Ct. App. 1995); Cole v. State, 923 P.2d 820 (Alaska Ct. App. 1996); Plate v. State, 925 P.2d 1057 (Alaska Ct. App. 1996); Williams v. State, 928 P.2d 600 (Alaska Ct. App. 1996); Beaver v. State, 933 P.2d 1178 (Alaska Ct. App. 1997); State v. Simpson, 946 P.2d 890 (Alaska Ct. App. 1997); Scroggins v. State, 951 P.2d 442 (Alaska Ct. App. 1998); Schumacher v. State, 11 P.3d 397 (Alaska Ct. App. 2000); Wholecheese v. State, 100 P.3d 14 (Alaska Ct. App. 2004); Kelly v. State, 116 P.3d 602 (Alaska Ct. App. 2005); Labrake v. State, 152 P.3d 474 (Alaska Ct. App. 2007); Garland v. State, 172 P.3d 827 (Alaska Ct. App. 2007); Malutin v. State, 198 P.3d 1177 (Alaska Ct. App. 2009); Thompson v. State, 210 P.3d 1233 (Alaska Ct. App. 2009).

Sec. 11.41.438. Sexual abuse of a minor in the third degree. (a) An offender commits the crime of sexual abuse of a minor in the third degree if being 17 years of age or older, the offender engages in sexual contact with a person who is 13, 14, or 15 years of age and at least four years younger than the offender.

(b) Sexual abuse of a minor in the third degree is a class C felony. (§ 2 ch 78 SLA 1983; am § 3 ch 151 SLA 1990; am § 14 ch 124 SLA 2004; am § 2 ch 14 SLA 2006)

Cross references. — For punishment, see AS 12.55.125(i) for imprisonment and AS 12.55.035 for fines.

Editor's notes. — Section 32(a), ch. 124, SLA 2004, provides that the 2004 amendment of (a) of this section applies "to offenses committed on or after July 1, 2004."

Section 13, ch. 14, SLA 2006, provides that the 2006 amendment of (a) of this section applies "to offenses committed on or after April 28, 2006."

Legislative history reports. — For legislative letter of intent in connection with the amendment of subsection (a) by § 3, ch. 151, SLA 1990 (HCS CSSB 355 (Jud)), see 1990 House Journal, p. 4199.

NOTES TO DECISIONS

Prior law. — For cases decided under prior law, see notes to AS 11.41.434, Notes to Decisions.

Merger of counts. — Defendant's convictions for sexual abuse of a minor in the second degree for digital penetration, sexual abuse of a minor in the third degree for touching the victim's breasts, and sexual abuse of a minor in the second degree for cunnilingus merged, and he should have been sentenced only on a single count of sexual abuse of a minor in the second degree. Newsome v. State, 782 P.2d 689 (Alaska Ct. App. 1989).

Conviction for lesser degree of offense. — The legislature intended AS 11.81.615 to permit a court or jury to convict a sexual offender of a lesser degree of offense, in this case, third-degree sexual abuse, despite the fact that the evidence reasonably (or even convincingly) demonstrated that the defendant committed a greater degree of offense because the victim was younger than alleged. Thiessen v. State, 844 P.2d 1137 (Alaska Ct. App. 1993).

Position of authority. — Whether the live-in boyfriend of the minor's mother was in a position of authority was a question of fact for the jury; and because defendant assumed authority over the victim as her stepfather and primary caretaker, the jury reasonably concluded that he was in a position of authority over her for purposes of this statute. Wurthmann v. State, 27 P.3d 762 (Alaska Ct. App. 2001).

Applicability of motor vehicle insurance. — Where taxi driver was found to have knowingly engaged in sexual penetration and sexual contact with a minor, his sexual contact with the minor was deliberate rather than accidental, and because his motor vehicle insurance agreement only covered injuries "caused by an accident," there was no coverage under this provision. Kim v. National Indem. Co., 6 P.3d 264 (Alaska 2000), overruled on other grounds, Shaw v. State Farm Mut. Auto Ins. Cos., 19 P.3d 588 (Alaska 2001).

Quoted in Toney v. Fairbanks N. Star Borough Sch. Dist., 881 P.2d 1112 (Alaska 1994).

Stated in State v. Williams, 855 P.2d 1337 (Alaska Ct. App. 1993).

Cited in State v. Ridgway, 750 P.2d 362 (Alaska Ct. App. 1988); M.C. v. Northern Ins. Co., 1 P.3d 673 (Alaska 2000); Kelly v. State, 116 P.3d 602 (Alaska Ct. App. 2005); Malutin v. State, 198 P.3d 1177 (Alaska Ct. App. 2009).

Sec. 11.41.440. Sexual abuse of a minor in the fourth degree. (a) An offender commits the crime of sexual abuse of a minor in the fourth degree if

(1) being under 16 years of age, the offender engages in sexual contact with a person who is under 13 years of age and at least three years younger than the offender; or

(2) being 18 years of age or older, the offender engages in sexual contact with a person who is 16 or 17 years of age and at least three years younger than the offender, and the offender occupies a position of authority in relation to the victim.

(b) Sexual abuse of a minor in the fourth degree is a class A misdemeanor. (§ 3 ch 166 SLA 1978; am § 9 ch 102 SLA 1980; am § 3 ch 78 SLA 1983; am § 4 ch 151 SLA 1990; am § 15 ch 124 SLA 2004)