

- (1) reasonably believed the victim to be that age or older; and
- (2) undertook reasonable measures to verify that the victim was that age or older. (§ 3 ch 166 SLA 1978; am § 2 ch 43 SLA 1985; am § 1 ch 83 SLA 2002)

NOTES TO DECISIONS

Constitutionality of mistake of age defense. — In promulgating subsection (b), the Alaska legislature balanced society's interest in deterring sexual abuse of minors against the policy of allowing defendants to show that they did everything reasonably possible to ascertain the age of their sexual partners; such a balancing — and, in particular, the decision to allocate the burden of proof to the defendant — is within the constitutional bounds of legislative action and does not violate the Federal Constitution's guarantee of due process. *Steve v. State*, 875 P.2d 110 (Alaska Ct. App. 1994).

Because the defendant's belief concerning the victim's age is a matter of defense, not an element of the crime, the legislature can constitutionally allocate the burden of proof where it sees fit, in light of the societal interests involved; therefore, subsection (b) is constitutional. *Steve v. State*, 875 P.2d 110 (Alaska Ct. App. 1994).

Burden of proof in mistake of age defense. —

Sec. 11.41.450. Incest. (a) A person commits the crime of incest if, being 18 years of age or older, that person engages in sexual penetration with another who is related, either legitimately or illegitimately, as

- (1) an ancestor or descendant of the whole or half blood;
- (2) a brother or sister of the whole or half blood; or
- (3) an uncle, aunt, nephew, or niece by blood.

(b) Incest is a class C felony. (§ 3 ch 166 SLA 1978)

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

NOTES TO DECISIONS

Separate sentences for incest and second-degree assault. — Where the two statutes required proof of different conduct and the social interests to be vindicated or protected by each statute were different, separate sentences on defendant's convictions for incest and second-degree sexual assault did not violate double jeopardy. *Harmon v. State*, 11 P.3d 393 (Alaska Ct. App. 2000).

Collateral references. — Consent as element of incest, 36 ALR2d 1299.

Sexual intercourse between persons related by half blood, 72 ALR2d 706, 34 ALR5th 723.

Subsection (b) creates a mistake-of-age defense to relieve defendants from strict liability for sexual relations with children older than 13 and younger than 16; however, the defendant must prove this exculpatory mistake by a preponderance of the evidence. *Steve v. State*, 875 P.2d 110 (Alaska Ct. App. 1994).

Allowance of affirmative defense not required.

— In prosecution for sexual abuse of minor in first degree, trial court was required to allow defendant to present an affirmative defense that he reasonably believed that at the time that he engaged in sexual penetration with victim, she was sixteen years of age or older. *State v. Fremgen*, 889 P.2d 1083 (Alaska Ct. App. 1995).

Applied in *Jager v. State*, 748 P.2d 1172 (Alaska Ct. App. 1988).

Cited in *Peters v. State*, 943 P.2d 418 (Alaska Ct. App. 1997); *Kelly v. State*, 116 P.3d 602 (Alaska Ct. App. 2005); *Doe v. State*, 189 P.3d 999 (Alaska 2008).

Death of defendant abated prosecution under former section. *Hartwell v. State*, 423 P.2d 282 (Alaska 1967) (decided under former AS 11.40.110).

Cited in *Theodore v. State*, 692 P.2d 987 (Alaska Ct. App. 1985); *Bingaman v. State*, 76 P.3d 398 (Alaska Ct. App. 2003); *Alaska Civ. Liberties Union v. State*, 122 P.3d 781 (Alaska 2005); *Davison v. State*, 282 P.3d 1262 (Alaska 2012).

Prosecutrix as accomplice or victim, 74 ALR2d 705.
Rape, incest as included within charge of, 76 ALR2d 484.

Sec. 11.41.452. Online enticement of a minor. (a) A person commits the crime of online enticement of a minor if the person, being 18 years of age or older, knowingly uses a computer to communicate with another person to entice, solicit, or encourage the person to engage in an act described in AS 11.41.455(a)(1) — (7) and

- (1) the other person is a child under 16 years of age; or
- (2) the person believes that the other person is a child under 16 years of age.