

SEB

242

FISCAL NOTE

STATE OF ALASKA
1996 LEGISLATIVE SESSION

BILL NO. SB 242

Revision Date: _____ Dept. Affected: Department of Law
 Title: "An Act relating to sentencing felony offenses." BRU: Criminal Division
 Component: Criminal Division

Sponsor: Senator Pearce
 Requester: Senate Judiciary Committee COMPONENT SERIAL NO. 2085

Expenditures/Revenues (Thousands of Dollars)

OPERATING EXPENDITURES	FY 97	FY 98	FY 99	FY 00	FY 01	FY 02
PERSONAL SERVICES						
TRAVEL						
CONTRACTUAL						
SUPPLIES						
EQUIPMENT						
LAND & STRUCTURES						
GRANTS, CLAIMS						
MISCELLANEOUS						
TOTAL OPERATING	0.0	0.0	0.0	0.0	0.0	0.0

CAPITAL EXPENDITURES						
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CHANGE IN REVENUES ()						
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FUND SOURCE (Thousands of Dollars)

1002 Federal Receipts						
1003 GF Match						
1004 GF						
1005 GF/Program Receipts						
1006 GF/MHTIA						
Other						
TOTAL	0.0	0.0	0.0	0.0	0.0	0.0

Estimate of any current year (FY96) cost: \$ 0.0

POSITIONS

FULL-TIME	0.0	0.0	0.0	0.0	0.0	0.0
PART-TIME						
TEMPORARY						

ANALYSIS: (Attach a separate page if necessary)

This bill amends Alaska's felony presumptive sentencing laws (AS 12.55.125) to increase the presumptive terms of imprisonment if the defendant possessed a firearm during the commission of the offense. The increased sentences range from one to three years depending on the severity of the offense, or if the defendant is a repeat felony offender. The minimum presumptive sentences range from two to twenty-five years if the offense does not involve possession of a firearm. The Department of Law takes 40 to 50 of these offenses to trial each year. We expect that the incremental sentencing increases proposed in the bill will result in some additional trials; however, the number is not quantifiable. For this reason, the fiscal note shows a zero impact. However, there will be an impact on the department's prosecutors as they attempt to handle an over increasing caseload without any additional resources.

Richard I. Pegues

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 Division: Administrative Services Division Date: 1/30/96
 Approved by Commissioner: Bruce M. Botelho, Attorney General Date: 1/30/96
 Agency: Department of Law

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Drue Pearce
President of the Senate

Sponsor Statement for Senate Bill 242

2/6/96

Senate Bill 242 would increase the penalty a criminal receives for committing a felony with a firearm. Society recognizes that using a firearm to threaten the life of another person is one of the gravest crimes a person can commit. Many Alaskans seek to punish those who commit such life threatening crimes by ensuring they receive harsher penalties.

Currently, Alaska's felony sentencing statutes give judges sentencing guidelines for specific crimes. This bill increases some "presumptive sentencing guidelines" and thus augments the time certain felons would spend in prison by expanding the sentence for crimes committed with guns. Inmates would still get time off for "good behavior." This allows our prison system continued use of this behavioral tool. However, criminals will soon know that if they use guns during the commission of their crime they will receive harsher sentences. This bill does not affect misdemeanors. Increased terms would apply to all acts committed on or after the effective date of this bill.

Criminal Felony Sentencing in Alaska January 24, 1996

Felony Committed	Minimum Sentence	Maximum Sentence	Current Presumptive Sentence	Presumptive Sentence after passage of SB-???
Unclassified Felonies, <i>AS 12.55.125(a)-(b), (i).</i> First Degree Murder, <i>AS 11.41.100.</i>	20 years.	99 years.	No presumptive term. There is a mandatory term of 99 years for those convicted of torture murders and certain other murders, including murder of a police officer.	No change.
2nd Degree Murder, <i>AS 11.41.110.</i> Kidnapping, <i>AS 11.41.300.</i> 1st Degree Misconduct w/Controlled Substance, <i>AS 11.71.010: et al.</i>	5 years.	99 years.	No presumptive term.	No change.
1st Degree Sex Assault, <i>AS 11.41.410.</i> 1st Degree Sex Abuse of a Minor, <i>AS 11.41.434.</i>	No minimum.	30 years.	1st felony conviction - 8 years. 1st felony conviction & possessed firearm, etc. - 10 years. 2nd felony conviction - 15 years. 3rd felony conviction - 25 years.	No change. 11 years. 18 years. 28 years.
Class A Felonies, <i>AS 12.55.125(c).</i> Examples include: 1st Degree Assault, <i>AS 11.41.200.</i> 1st Degree Arson, <i>AS 11.46.400.</i> 1st Degree Robbery, <i>AS 11.41.500.</i> 1st Degree Promoting Prostitution, <i>AS 11.66.110.</i> 2nd Degree Misconduct Involving Controlled Substance, <i>AS 11.71.020: et al.</i>	No minimum.	20 years.	1st felony conviction - 5 years. 1st felony conviction & possessed firearm - 7 years. 1st felony conviction & offense directed at a police officer, firefighter, or other listed person - 7 years. 2nd felony conviction - 10 years 3rd felony conviction - 15 years.	No change. 8 years. No change. 13 years. 18 years.
Class B felonies, <i>AS 12.55.125(d).</i> Examples include: 2nd Degree Assault, <i>AS 11.41.210.</i> 2nd Degree Sex Assault, <i>AS 11.41.420.</i> 2nd Degree Sex Abuse of Minor, <i>AS 11.41.436.</i> 2nd Degree Robbery, <i>AS 11.41.510.</i> 1st Degree Burglary, <i>AS 11.46.300.</i> 1st Degree Forgery, <i>AS 11.46.500.</i> 2nd Degree Escape, <i>AS 11.56.310.</i> 2nd Degree Misconduct Involving Weapons, <i>AS 11.61.195.</i> 3rd Degree Misconduct w/Controlled Substance, <i>AS 11.71.030: et al.</i>	No minimum.	10 years.	1st felony conviction - no presumptive term. 1st felony conviction & offense directed at a police officer, firefighter, or other listed person - 2 years. 2nd felony conviction - 4 years 3rd felony conviction - 6 years.	No change. No change. 6 years. 8 years.

SUPPORTING DOCUMENTS

Felony Committed	Minimum Sentence	Maximum Sentence	Current Presumptive Sentence	Presumptive Sentence after passage of SB-???
<p>Class C felonies, <i>AS 12.55.125(e)</i>. Examples include: Criminally negligent homicide, <i>AS 11.41.130</i>. 3rd Degree Assault, <i>AS 11.41.220</i>. 1st Degree Stalking, <i>AS 11.41.260</i>. 3rd Degree Sex Assault, <i>AS 11.41.425</i>. 3rd Degree Sex Abuse of Minor, <i>AS 11.41.438</i>. Incest, <i>AS 11.41.450</i>. 2nd Degree Theft, <i>AS 11.46.130</i>. Obtaining Credit Card Fraudulently, <i>AS 11.46.290</i>. 2nd Degree Burglary, <i>AS 11.46.310</i>. Commercial Bribery, <i>AS 11.46.670</i>. 3rd Degree Escape, <i>AS 11.56.320</i>. 1st Degree Harming Police Dog, <i>AS 11.56.705</i>. Riot, <i>AS 11.61.100</i>. 3rd Degree Misconduct w/Weapons, <i>AS 11.61.200</i>. 4th Degree Misconduct w/Controlled Substances, <i>AS 11.71.040</i>. and a host of others</p>	No minimum.	5 years.	1st felony conviction - no presumptive term. 1st felony conviction & offense directed at police officer, firefighter, or other listed person - 1 year. 1st felony conviction & guide outfit without a license - 1 year. 2nd felony conviction - 2 years. 3rd felony conviction - 3 years.	No change. No change. No change. 3 years. 4 years.
All Misdemeanor Crimes				No change.

Pertinent Alaska Felony Statutes

Unclassified Felonies:

Sec. 12.55.125. SENTENCES OF IMPRISONMENT FOR FELONIES.

(a) A defendant convicted of murder in the first degree shall be sentenced to a definite term of imprisonment of at least 20 years but not more than 99 years. A defendant convicted of murder in the first degree shall be sentenced to a mandatory term of imprisonment of 99 years when

(1) the defendant is convicted of the murder of a uniformed or otherwise clearly identified peace officer, fire fighter, or correctional officer who was engaged in the performance of official duties at the time of the murder;

(2) the defendant has been previously convicted of

(A) murder in the first degree under AS 11.41.100 or former AS 11.15.010 or 11.15.020;

(B) murder in the second degree under AS 11.41.110 or former AS 11.15.030; or

(C) homicide under the laws of another jurisdiction when the offense of which the defendant was convicted contains elements similar to first degree murder under AS 11.41.100 or second degree murder under AS 11.41.110; or

(3) the court finds by clear and convincing evidence that the defendant subjected the murder victim to substantial physical torture.

(b) A defendant convicted of murder in the second degree, attempted murder in the first degree, conspiracy to commit murder in the first degree, kidnapping, or misconduct involving a controlled substance in the first degree shall be sentenced to a definite term of imprisonment of at least five years but not more than 99 years.

(i) A defendant convicted of sexual assault in the first degree or sexual abuse of a minor in the first degree may be sentenced to a definite term of imprisonment of not more than 30 years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

(1) if the offense is a first felony conviction and does not involve circumstances described in

(2) of this subsection, eight years;

(2) if the offense is a first felony conviction, and the defendant possessed a firearm, used a dangerous instrument, or caused serious physical injury during the commission of the offense, 10 years;

(3) if the offense is a second felony conviction, 15 years;

(4) if the offense is a third felony conviction, 25 years.

First Degree Murder: Sec. 11.41.100.

(a) A person commits the crime of murder in the first degree if

(1) with intent to cause the death of another person, the person

(A) causes the death of any person; or

(B) compels or induces any person to commit suicide through duress or deception; or

(2) the person knowingly engages, under circumstances manifesting extreme indifference to the value of human life, in a pattern or practice of assault or torture of a child under the age of 16, and one of the acts of assault or torture results in the death of the child; for purposes of this paragraph, a person "engages in a pattern or practice of assault or torture" if the person inflicts serious physical injury to the child by at least two separate acts, and one of the acts results in the death of the child.

(b) Murder in the first degree is an unclassified felony and is punishable as provided in AS 12.55.

Kidnapping: Sec. 11.41.300.

- (a) A person commits the crime of kidnapping if
- (1) the person restrains another with intent to
 - (A) hold the restrained person for ransom, reward, or other payment;
 - (B) use the restrained person as a shield or hostage;
 - (C) inflict physical injury upon or sexually assault the restrained person or place the restrained person or a third person in apprehension that any person will be subjected to serious physical injury or sexual assault;
 - (D) interfere with the performance of a governmental or political function;
 - (E) facilitate the commission of a felony or flight after commission of a felony; or
 - (2) the person restrains another
 - (A) by secreting and holding the restrained person in a place where the restrained person is not likely to be found; or
 - (B) under circumstances which expose the restrained person to a substantial risk of serious physical injury.
- (b) In a prosecution under (a)(2)(A) of this section, it is an affirmative defense that
- (1) the defendant was a relative of the victim;
 - (2) the victim was a child under 18 years of age or an incompetent person; and
 - (3) the primary intent of the defendant was to assume custody of the victim.
- (c) Except as provided in (d) of this section, kidnapping is an unclassified felony and is punishable as provided in AS 12.55.
- (d) In a prosecution for kidnapping, it is an affirmative defense which reduces the crime to a class A felony that the defendant voluntarily caused the release of the victim alive in a safe place before arrest, or within 24 hours after arrest, without having caused serious physical injury to the victim and without having engaged in conduct described in AS 11.41.410(a) or 11.41.420.

1ST Degree Misconduct w/Controlled Substance: Sec. 11.71.010.

- (a) Except as authorized in AS 17.30, a person commits the crime of misconduct involving a controlled substance in the first degree if the person
- (1) delivers any amount of a schedule IA controlled substance to a person under 19 years of age who is at least three years younger than the person delivering the substance;
 - (2) delivers any amount of a schedule IIA or IIIA controlled substance to a person under 19 years of age who is at least three years younger than the person delivering the substance; or
 - (3) engages in a continuing criminal enterprise.
- (b) For purposes of this section, a person is engaged in a "continuing criminal enterprise" if
- (1) the person commits a violation of this chapter which is punishable as a felony; and
 - (2) that violation is a part of a continuing series of five or more violations of this chapter
 - (A) which the person undertakes in concert with at least five other persons organized, supervised, or otherwise managed by the person; and
 - (B) from which the person obtains substantial income or resources.
- (c) Misconduct involving a controlled substance in the first degree is an unclassified felony and is punishable as provided in AS 12.55

1st Degree Sex Assault: Sec. 11.41.410.

- (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 entrusted to 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 Department of Health and Social Services; 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.

1st Degree Sex Assault of a Minor: Sec. 11.41.434.

- (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.

Class A Felonies:

1st Degree Assault: Sec. 11.41.200.

- (a) A person commits the crime of assault in the first degree if
- (1) that person recklessly causes serious physical injury to another by means of a dangerous instrument;
 - (2) with intent to cause serious physical injury to another, the person causes serious physical injury to any person;
 - (3) the person knowingly engages in conduct that results in serious physical injury to another under circumstances manifesting extreme indifference to the value of human life; or
 - (4) that person recklessly causes serious physical injury to another by repeated assaults using a dangerous instrument, even if each assault individually does not cause serious physical injury.
- (b) Assault in the first degree is a class A felony.

1st Degree Arson: Sec. 11.46.400.

- (a) A person commits the crime of arson in the first degree if the person intentionally damages any property by starting a fire or causing an explosion and by that act recklessly places another person in danger of serious physical injury. For purposes of this section, "another person" includes but is not limited to fire and police service personnel or other public employees who respond to emergencies, regardless of rank, functions, or duties being performed.
- (b) Arson in the first degree is a class A felony.

1st Degree Robbery: Sec. 11.41.500.

- (a) A person commits the crime of robbery in the first degree if the person violates AS 11.41.510 and, in the course of violating that section or in immediate flight thereafter, that person or another participant
- (1) is armed with a deadly weapon or represents by words or other conduct that either that person or another participant is so armed;
 - (2) uses or attempts to use a dangerous instrument or a defensive weapon or represents by words or other conduct that either that person or another participant is armed with a dangerous instrument or a defensive weapon; or
 - (3) causes or attempts to cause serious physical injury to any person.
- (b) Robbery in the first degree is a class A felony.

1st Degree Promoting Prostitution: Sec. 11.66.110.

- (a) A person commits the crime of promoting prostitution in the first degree if the person
- (1) induces or causes a person to engage in prostitution through the use of force;
 - (2) as other than a patron of a prostitute, induces or causes a person under 16 years of age to engage in prostitution, or
 - (3) induces or causes a person in that person's legal custody to engage in prostitution.
- (b) In a prosecution under (a)(2) of this section, it is not a defense that the defendant reasonably believed that the person induced or caused to engage in prostitution was 16 years of age or older.
- (c) Except as provided in (d) of this section, promoting prostitution in the first degree is a class B felony.
- (d) A person convicted under (a)(2) of this section is guilty of a class A felony.

2nd Degree Misconduct Involving Controlled Substance: Sec. 11.71.020.

- (a) Except as authorized in AS 17.30, a person commits the crime of misconduct involving a controlled substance in the second degree if the person manufactures or delivers any amount of a schedule IA controlled substance or possesses any amount of a schedule IA controlled substance with intent to manufacture or deliver.
- (b) Misconduct involving a controlled substance in the second degree is a class A felony.

Class B Felonies:

(d) A defendant convicted of a class B felony may be sentenced to a definite term of imprisonment of not more than 10 years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

- (1) if the offense is a second felony conviction, four years;
- (2) if the offense is a third felony conviction, six years;
- (3) if the offense is a first felony conviction, and the defendant knowingly directed the conduct constituting the offense at a uniformed or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, two years.

2nd Degree Assault: Sec. 11.41.210.

- (a) A person commits the crime of assault in the second degree if
- (1) with intent to cause physical injury to another person, that person causes physical injury to another person by means of a dangerous instrument;
 - (2) that person recklessly causes serious physical injury to another person; or
 - (3) that person recklessly causes serious physical injury to another by repeated assaults, even if each assault individually does not cause serious physical injury.
- (b) Assault in the second degree is a class B felony.

2nd Degree Sex Assault: Sec. 11.41.420.

- (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 entrusted to 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 Department of Health and Social Services;
 - (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.

2nd Degree Sex Abuse of a Minor: Sec. 11.41.436.

- (a) An offender commits the crime of sexual abuse of a minor in the second degree if
- (1) being 16 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 three 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 three 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); or
 - (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.
- (b) Sexual abuse of a minor in the second degree is a class B felony.

2nd Degree Robbery: Sec. 11.41.510.

- (a) A person commits the crime of robbery in the second degree if, in the course of taking or attempting to take property from the immediate presence and control of another, the person uses or threatens the immediate use of force upon any person with intent to
- (1) prevent or overcome resistance to the taking of the property or the retention of the property after taking; or
 - (2) compel any person to deliver the property or engage in other conduct which might aid in the taking of the property.
- (b) Robbery in the second degree is a class B felony.

1st Degree Burglary: Sec. 11.46.300.

- (a) A person commits the crime of burglary in the first degree if the person violates AS 11.46.310 and
- (1) the building is a dwelling; or
 - (2) in effecting entry or while in the building or immediate flight from the building, the person
 - (A) is armed with a firearm
 - (B) causes or attempts to cause physical injury to a person, or
 - (C) uses or threatens to use a dangerous instrument.
- (b) Burglary in the first degree is a class B felony.

1st Degree Forgery: Sec. 11.46.500.

- (a) A person commits the crime of forgery in the first degree if the person violates AS 11.46.510 and the written instrument is or purports to be
- (1) part of an issue of money, securities, postage, revenue stamps, or other valuable instruments issued by a government or governmental agency; or
 - (2) part of an issue of stock, bonds, or other instruments representing interests in or claims against an organization or its property.
- (b) Forgery in the first degree is a class B felony.

2nd Degree Escape: Sec. 11.56.310.

- (a) One commits the crime of escape in the second degree if, without lawful authority, one
- (1) removes oneself from
 - (A) a correctional facility while under official detention;
 - (B) official detention for a felony or for extradition; or
 - (C) official detention and during the escape, or at any time before being restored to official detention, one possesses on or about oneself a firearm; or
 - (2) violates AS 11.56.340 and during the time of the unlawful evasion, or at any time before being restored to official detention, one possesses on or about oneself a firearm.
- (b) Escape in the second degree is a class B felony.

2nd Degree Misconduct Involving Weapons: Sec. 11.61.195.

- (a) A person commits the crime of misconduct involving weapons in the second degree if the person knowingly
- (1) possesses a firearm during the commission of an offense under AS 11.71.010 - 11.71.040; or
 - (2) violates AS 11.61.200(a)(1) and is within the grounds of or on a parking lot immediately adjacent to
 - (A) a public or private preschool, elementary, junior high, or secondary school without the permission of the chief administrative officer of the school or district or the designee of the chief administrative officer, or
 - (B) a center, other than a private residence, licensed under AS 47.33 or AS 47.35 or recognized by the federal government for the care of children.
- (b) Misconduct involving weapons in the second degree is a class B felony.

3rd Degree Misconduct w/Controlled Substance: Sec. 11.71.030.

- (a) Except as authorized in AS 17.30, a person commits the crime of misconduct involving a controlled substance in the third degree if the person
- (1) manufactures or delivers any amount of a schedule IIA or IIIA controlled substance or possesses any amount of a schedule IIA or IIIA controlled substance with intent to manufacture or deliver;
 - (2) delivers any amount of a schedule IVA, VA, or VIA controlled substance to a person under 19 years of age who is at least three years younger than the person delivering the substance; or
 - (3) possesses any amount of a schedule IA or IIA controlled substance
 - (A) with reckless disregard that the possession occurs
 - (i) on or within 500 feet of school grounds; or
 - (ii) at or within 500 feet of a recreation or youth center; or
 - (B) on a school bus.
- (b) It is an affirmative defense to a prosecution under (a)(3)(A) of this section that the prohibited conduct took place entirely within a private residence located within 500 feet of the school grounds or recreation or youth center, and that the prohibited conduct did not involve distributing, dispensing, or possessing with the intent to distribute or dispense a controlled substance for profit. Nothing in this subsection precludes a prosecution under any other provision of this section or any other section of this chapter.
- (c) Misconduct involving a controlled substance in the third degree is a class B felony.

Class C Felonies:

(e) A defendant convicted of a class C felony may be sentenced to a definite term of imprisonment of not more than five years, and shall be sentenced to the following presumptive terms, subject to adjustment as provided in AS 12.55.155 - 12.55.175:

- (1) if the offense is a second felony conviction, two years;
- (2) if the offense is a third felony conviction, three years;
- (3) if the offense is a first felony conviction, and the defendant knowingly directed the conduct constituting the offense at a uniformed or otherwise clearly identified peace officer, fire fighter, correctional officer, emergency medical technician, paramedic, ambulance attendant, or other emergency responder who was engaged in the performance of official duties at the time of the offense, one year;
- (4) if the offense is a first felony conviction, and the defendant violated AS 08.54.520(a), (7) - (10), one year.

Criminally Negligent Homicide: Sec. 11.41.130.

(a) A person commits the crime of criminally negligent homicide if, with criminal negligence, the person causes the death of another person.

(b) Criminally negligent homicide is a class C felony.

3rd Degree Assault: Sec. 11.41.220.

(a) A person commits the crime of assault in the third degree if that person

(1) recklessly

(A) places another person in fear of imminent serious physical injury by means of a dangerous instrument;

(B) causes physical injury to another person by means of a dangerous instrument, or

(C) while being 18 years of age or older

(i) causes physical injury to a child under 10 years of age and the injury reasonably requires medical treatment;

(ii) causes physical injury to a child under 10 years of age on more than one occasion;

(2) with intent to place another person in fear of death or serious physical injury to the person or the person's family member makes repeated threats to cause death or serious physical injury to another person; or

(3) while being 18 years of age or older, knowingly causes physical injury to a child under 16 years of age but at least 10 years of age and the injury reasonably requires medical treatment

(b) In a prosecution under (a)(3) of this section, it is an affirmative defense that, at the time of the alleged offense, the defendant reasonably believed the victim to be 16 years of age or older, unless the victim was under 13 years of age at the time of the alleged offense.

(c) In this section, "the person's family member" means

(1) a spouse, child, grandchild, parent, grandparent, sibling, uncle, aunt, nephew, or niece, of the person, whether related by blood, marriage, or adoption;

(2) a person who lives or has lived, in a spousal relationship with the person;

(3) a person who lives in the same household as the person; or

(4) a person who is a former spouse of the person or is or has been in a dating, courtship, or engagement relationship with the person

(d) Assault in the third degree is a class C felony.

1st Degree Stalking: Sec. 11.41.260.

- (a) A person commits the crime of stalking in the first degree if the person violates AS 11.41.270 and
- (1) the actions constituting the offense are in violation of an order issued under AS 25.35.010(b) or 25.35.020;
 - (2) the actions constituting the offense are in violation of a condition of probation, release before trial, release after conviction, or parole;
 - (3) the victim is under 16 years of age;
 - (4) at any time during the course of conduct constituting the offense the defendant possessed a deadly weapon;
 - (5) the defendant has been previously convicted of a crime under this section, AS 11.41.270, or AS 11.56.740, or a law or ordinance of this or another jurisdiction with elements similar to a crime under this section, AS 11.41.270, or AS 11.56.740; or
 - (6) the defendant has been previously convicted of a crime, or an attempt or solicitation to commit a crime, under (A) AS 11.41.100 - 11.41.250, 11.41.300 - 11.41.460, AS 11.56.810, AS 11.61.120, or (B) a law or an ordinance of this or another jurisdiction with elements similar to a crime, or an attempt or solicitation to commit a crime, under AS 11.41.100 - 11.41.250, 11.41.300 - 11.41.460, AS 11.56.810, or AS 11.61.120, involving the same victim as the present offense.
- (b) In this section, "course of conduct" and "victim" have the meanings given in AS 11.41.270(b).
- (c) Stalking in the first degree is a class C felony.

3rd Degree Sex Assault: Sec. 11.41.425.

- (a) An offender commits the crime of sexual assault in the third degree if the offender engages in sexual contact with a person who the offender knows is
- (1) mentally incapable;
 - (2) incapacitated; or
 - (3) unaware that a sexual act is being committed.
- (b) Sexual assault in the third degree is a class C felony.

3rd Degree Sex Abuse of Minor: Sec. 11.41.438

- (a) An offender commits the crime of sexual abuse of a minor in the third degree if
- (1) being 16 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 three years younger than the offender; or
 - (2) 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.
- (b) Sexual abuse of a minor in the third degree is a class C felony.

Incest: Sec. 11.41.450.

- (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.

2nd Degree Theft: Sec. 11.46.130.

(a) A person commits the crime of theft in the second degree if the person commits theft as defined in AS 11.46.100 and

- (1) the value of the property or services is \$500 or more but less than \$25,000;
- (2) the property is a firearm or explosive;
- (3) the property is taken from the person of another;
- (4) the property is taken from a vessel and is vessel safety or survival equipment;
- (5) the property is taken from an aircraft and the property is aircraft safety or survival equipment; or
- (6) the value of the property is \$50 or more but less than \$500 and within the preceding five years the person has been convicted and sentenced on two or more separate occasions in this or another jurisdiction of
 - (A) AS 11.46.120, or an offense under another law or ordinance with similar elements;
 - (B) a crime set out in this subsection or an offense under another law or ordinance with similar elements;
 - (C) AS 11.46.140(a)(1) or (2), or an offense under another law or ordinance with similar elements; or
 - (D) AS 11.46.220(c)(1) or (c)(2)(A), or an offense under another law or ordinance with similar elements.

(b) In this section,

- (1) "aircraft" means a contrivance used or designed for navigation of flight in air;
- (2) "aircraft safety or survival equipment" means equipment required to be carried on an aircraft under AS 02.30.010 or AS 02.35.110;
- (3) "vessel" means every description of watercraft, other than a seaplane on water, used or capable of being used as a means of transportation on water;
- (4) "vessel safety or survival equipment" means personal flotation devices; immersion suits; personal flotation device lights; survival craft; equipment necessary for the proper operation of survival craft, emergency position indicating radio beacons; fire extinguishers and supporting equipment; firefighters' outfits; and self contained breathing apparatuses; in this subparagraph, "survival craft" means a device designed to enable a person to survive the loss of a vessel, and includes buoyant apparatuses, inflatable buoyant apparatuses, life floats, inflatable life rafts, and auxiliary craft, including skiffs, usable as survival craft.

(c) Theft in the second degree is a class C felony.

Obtaining Credit Card Fraudulently: Sec. 11.46.290.

(a) A person commits the crime of obtaining a credit card by fraudulent means if

- (1) the person buys a credit card from a person other than the issuer or, as other than the issuer, the person sells a credit card,
- (2) with intent to defraud, the person obtains control of a credit card as a security for debt; or
- (3) with intent to defraud, the person makes a false statement in an application for a credit card.

(b) Obtaining a credit card by fraudulent means under (a)(1) or (2) of this section is a class C felony. Obtaining a credit card by fraudulent means under (a)(3) of this section is a class A misdemeanor.

2nd Degree Burglary: Sec. 11.46.310.

(a) A person commits the crime of burglary in the second degree if the person enters or remains unlawfully in a building with intent to commit a crime in the building.

(b) Burglary in the second degree is a class C felony.

Commercial Bribery: Sec. 11.46.670.

(a) A person commits the crime of commercial bribery if, knowing that another is subject to a duty described in AS 11.46.660(a) and with intent to influence the other to violate that duty, the person confers, offers to confer, or agrees to confer a benefit on the other.

(b) Commercial bribery is a class C felony.

3rd Degree Escape: Sec. 11.56.320.

(a) One commits the crime of escape in the third degree if one

(1) removes oneself from official detention during any lawful movement or activity incident to confinement within a correctional facility for a misdemeanor; or

(2) violates AS 11.56.340 and leaves or attempts to leave the state.

(b) Escape in the third degree is a class C felony.

1st Degree Harming Police Dog: Sec. 11.56.705.

(a) A person commits the crime of harming a police dog in the first degree if the person intentionally kills or causes serious physical injury to a police dog, knowing the dog to be a police dog.

(b) Harming a police dog in the first degree is a class C felony.

Riot: Sec. 11.61.100.

(a) A person commits the crime of riot if, while participating with five or more others, the person engages in tumultuous and violent conduct in a public place and thereby causes, or creates a substantial risk of causing damage to property or physical injury to a person.

(b) Riot is a class C felony.

3rd Degree Misconduct w/Weapons: Sec. 11.61.200.

- (a) A person commits the crime of misconduct involving weapons in the third degree if the person
- (1) knowingly possesses a firearm capable of being concealed on one's person after having been convicted of a felony or adjudicated a delinquent minor for conduct that would constitute a felony if committed by an adult by a court of this state, a court of the United States, or a court of another state or territory;
 - (2) knowingly sells or transfers a firearm capable of being concealed on one's person to a person who has been convicted of a felony by a court of this state, a court of the United States, or a court of another state or territory;
 - (3) manufactures, possesses, transports, sells, or transfers a prohibited weapon;
 - (4) knowingly sells or transfers a firearm to another whose physical or mental condition is substantially impaired as a result of the introduction of an intoxicating liquor or controlled substance into that other person's body;
 - (5) removes, covers, alters, or destroys the manufacturer's serial number on a firearm with intent to render the firearm untraceable;
 - (6) possesses a firearm on which the manufacturer's serial number has been removed, covered, altered, or destroyed, knowing that the serial number has been removed, covered, altered, or destroyed with the intent of rendering the firearm untraceable;
 - (7) violates AS 11.46.320 and, during the violation, possesses on the person a firearm when the person's physical or mental condition is impaired as a result of the introduction of an intoxicating liquor or controlled substance into the person's body;
 - (8) violates AS 11.46.320 or 11.46.330 by entering or remaining unlawfully on premises or in a propelled vehicle in violation of a provision of an order issued under AS 25.35.010(b) or 25.35.020 and, during the violation, possesses on the person a defensive weapon or a deadly weapon, other than an ordinary pocketknife;
 - (9) communicates in person with another in violation of AS 11.56.740 and, during the communication, possesses on the person a defensive weapon or a deadly weapon, other than an ordinary pocketknife;
 - (10) resides in a dwelling knowing that there is a firearm capable of being concealed on one's person or a prohibited weapon in the dwelling if the person has been convicted of a felony by a court of this state, a court of the United States, or a court of another state or territory, unless the person has written authorization to live in a dwelling in which there is a concealable weapon described in this paragraph from a court of competent jurisdiction or from the head of the law enforcement agency of the community in which the dwelling is located; or
 - (11) discharges a firearm from a propelled vehicle while the vehicle is being operated.

(b) It is an affirmative defense to a prosecution

- (1) under (a)(1) of this section that
 - (A) the person convicted of the prior offense on which the action is based received a pardon for that conviction;
 - (B) the underlying conviction upon which the action is based has been set aside under AS 12.55.085 or as a result of post-conviction proceedings; or
 - (C) a period of 10 years or more has elapsed between the date of the person's unconditional discharge on the prior offense or adjudication of juvenile delinquency and the date of the violation of (a)(1) of this section, and the prior conviction or adjudication of juvenile delinquency did not result from a violation of AS 11.41 or of a similar law of the United States or of another state or territory;
- (2) under (a)(2) or (10) of this section that
 - (A) the person convicted of the prior offense on which the action is based received a pardon for that conviction;
 - (B) the underlying conviction upon which the action is based has been set aside under AS 12.55.085 or as a result of post-conviction proceedings; or
 - (C) a period of 10 years or more has elapsed between the date of the person's unconditional discharge on the prior offense and the date of the violation of (a)(2) or (10) of this section, and the prior conviction did not result from a violation of AS 11.41 or of a similar law of the United States or of another state or territory.

(c) It is an affirmative defense to a prosecution under (a)(3) of this section that the manufacture, possession, transportation, sale, or transfer of the prohibited weapon was in accordance with registration under 26 U.S.C. 5801-5872 (National Firearms Act).

(d) It is an affirmative defense to a prosecution under (a)(11) of this section that the person was using a firearm while hunting, trapping, or fishing in a manner not prohibited by statute or regulation.

(e) The provisions of (a)(3) and (11) of this section do not apply to a peace officer acting within the scope and authority of the officer's employment.

(f) As used in this section,

(1) "prohibited weapon" means any

(A) explosive, incendiary, or noxious gas

(i) mine or device that is designed, made, or adapted for the purpose of inflicting serious physical injury or death;

(ii) rocket, other than an emergency flare, having a propellant charge of more than four ounces;

(iii) bomb; or

(iv) grenade;

(B) device designed, made, or adapted to muffle the report of a firearm;

(C) firearm that is capable of shooting more than one shot automatically, without manual reloading, by a single function of the trigger; or

(D) rifle with a barrel length of less than 16 inches, shotgun with a barrel length of less than 18 inches, or firearm made from a rifle or shotgun which, as modified, has an overall length of less than 26 inches;

(2) "unconditional discharge" has the meaning ascribed to it in AS 12.55.185.

(g) Misconduct involving weapons in the third degree is a class C felony.

4th Degree Misconduct w/Controlled Substances: Sec. 11.71.040.

(a) Except as authorized in AS 17.30, a person commits the crime of misconduct involving a controlled substance in the fourth degree if the person

- (1) manufactures or delivers any amount of a schedule IVA or VA controlled substance or possesses any amount of a schedule IVA or VA controlled substance with intent to manufacture or deliver;
- (2) manufactures or delivers, or possesses with the intent to manufacture or deliver, one or more preparations, compounds, mixtures, or substances of an aggregate weight of one ounce or more containing a schedule VIA controlled substance;
- (3) possesses
 - (A) any amount of a schedule IA or IIA controlled substance;
 - (B) 25 or more tablets, ampules, or syrettes containing a schedule IIIA or IVA controlled substance;
 - (C) one or more preparations, compounds, mixtures, or substances of an aggregate weight of three grams or more containing a schedule IIIA or IVA controlled substance;
 - (D) 50 or more tablets, ampules, or syrettes containing a schedule VA controlled substance;
 - (E) one or more preparations, compounds, mixtures, or substances of an aggregate weight of six grams or more containing a schedule VA controlled substance;
 - (F) one or more preparations, compounds, mixtures, or substances of an aggregate weight of one pound or more containing a schedule VIA controlled substance; or
 - (G) 25 or more plants of the genus cannabis;
- (4) possesses a schedule IIIA, IVA, VA, or VIA controlled substance
 - (A) with reckless disregard that the possession occurs
 - (i) on or within 500 feet of school grounds; or
 - (ii) at or within 500 feet of a recreation or youth center; or
 - (B) on a school bus;
- (5) knowingly keeps or maintains any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place that is used for keeping or distributing controlled substances in violation of a felony offense under this chapter or AS 17.30;
- (6) makes, delivers, or possesses a punch, die, plate, stone, or other thing which prints, imprints, or reproduces a trademark, trade name, or other identifying mark, imprint, or device of another or any likeness of any of these upon a drug, drug container, or labeling so as to render the drug a counterfeit substance;
- (7) knowingly uses in the course of the manufacture or distribution of a controlled substance a registration number that is fictitious, revoked, suspended, or issued to another person;
- (8) knowingly furnishes false or fraudulent information in or omits material information from any application, report, record, or other document required to be kept or filed under AS 17.30;
- (9) obtains possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge; or
- (10) affixes a false or forged label to a package or other container containing any controlled substance.

(b) It is an affirmative defense to a prosecution under (a)(4)(A) of this section that the prohibited conduct took place entirely within a private residence located within 500 feet of the school ground, or recreation or youth center. Nothing in this subsection precludes a prosecution under any other provision of this section or any other section of this chapter.

(c) Nothing in (a)(5) or (6) of this section precludes a prosecution or civil proceeding brought under any other provision of this section or any other section of this chapter or under AS 17.

(d) Misconduct involving a controlled substance in the fourth degree is a class C felony.

victed of first-degree robbery and the trial court enhanced the defendant's sentence pursuant to AS 12.55.125(c)(2). The defendant appealed, asserting that use of the enhancement statute in conjunction with a crime that required use of a deadly weapon as an element violated the prohibition against double jeopardy. This court rejected that argument, finding that the enhanced presumptive terms operate independently of the elements of the underlying offenses. *Burks* thus foreclosed Chapin's double jeopardy argument. *Id.* at 1192.

(2) - Chapin next argues that the use of a dangerous instrument element in AS 12.55.125(c)(2) must be found by a jury before it can be used to enhance a sentence. He cites *State v. Wedge*, 293 Or. 598, 652 P.2d 773, 778 (1982), which held that the question of whether a defendant used a firearm during the commission of a crime should be decided by a jury. This argument is foreclosed by both fact and law. Here, because the jury had to find that a dangerous instrument or deadly weapon was used in order to convict Chapin of AS 11.41.500, Chapin has been given his jury finding on the issue. Such a finding is not required by Alaska law, however. In *Huf v. State*, 675 P.2d 268 (Alaska App. 1984), the defendant was convicted of first-degree sexual assault and first-degree burglary and was sentenced under the enhancement statute for possessing or using a firearm. The defendant requested that the question be decided by a jury. This court held that the question was a question for the court, not the jury. *Id.* at 271. Thus, *Huf* forecloses Chapin's right to jury trial argument.

CONCLUSION

We AFFIRM both Abdulbaqui's and Chapin's convictions. We also AFFIRM Chapin's sentence. However, we VACATE and REMAND Abdulbaqui's sentence for further proceedings consistent with this opinion.

BRYNER, C.J., not participating.

Russell S. BOWELL, Appellant,

STATE of Alaska, Appellee.

No. A-1175.

Court of Appeals of Alaska.

Dec. 5, 1986.

Defendant was convicted in the Superior Court, Fourth Judicial District, Fairbanks, Mary E. Greene, J., of kidnapping and first-degree sexual assault, and he appealed. The Court of Appeals, Singleton, J., held that: (1) to convict defendant as aider and abettor to first-degree sexual assault, State was required to prove that defendant recklessly disregarded victim's lack of consent; (2) jury instruction that was incomplete regarding required mens rea for accomplice liability was not plain error; (3) evidence was sufficient to sustain conviction; and (4) defendant was properly found to have possessed firearm, for purposes of enhanced presumptive term.

Affirmed and remanded.

1. Rape \S 19

To convict defendant as accomplice of perpetrator's first-degree sexual assault of victim, State must prove that defendant knew that perpetrator intended to engage in sexual intercourse with victim, that he intentionally engaged in conduct facilitating perpetrator's efforts, and that, at the time he aided perpetrator, he recklessly disregarded victim's lack of consent. AS 11.16.110(2)(B), 11.41.410(a)(1).

2. Criminal Law \S 1038.1(4)

Jury instruction which was incomplete regarding required mens rea for accomplice liability to first-degree sexual assault was not plain error, where other instructions given, coupled with parties' argument, adequately presented issue of intent to jury. AS 11.16.110(2)(B), 11.41.410(a)(1).

3. Rape \S 51(1)

Evidence that defendant drove car while perpetrator engaged in nonconsensual

al sexual intercourse with victim, that defendant assisted perpetrator by giving him gun, and that defendant was aware of lack of consent by victim was sufficient to sustain conviction for aiding and abetting first-degree sexual assault. AS 11.41.410(a)(1).

4. Criminal Law §1208.6(2)

Where accomplice furnishes firearm to his principal to aid and abet in sexual assault, trial court may properly find that accomplice possessed firearm for purposes of enhanced presumptive term. AS 12.55.120(i), (i)(2).

William A. Davies, Asst. Public Defender, Fairbanks, and Dana Fabe, Public Defender, Anchorage, for appellant.

Cynthia M. Hora, Asst. Atty. Gen., Office of Special Prosecutions and Appeals, Anchorage, and Harold M. Brown, Atty. Gen., Juneau, for appellee.

Before BRYNER, C.J., and COATS and SINGLETON, JJ.

OPINION

SINGLETON, Judge.

Russell S. Bowell was convicted by a jury of kidnapping in violation of AS 11.41.300(a)(1), and first-degree sexual assault in violation of AS 11.41.410(a)(1). Bowell appeals, challenging his conviction. We affirm Bowell's conviction, but remand to permit the trial court to consider Bowell's motion for a new trial.

FACTS

James D. Thomas, Bowell's codefendant, sexually assaulted B.S. in the back of a vehicle driven by Bowell. B.S. testified that she had been walking when she observed two men she later learned to be Bowell and Thomas in a Toyota driving slowly by her. Thomas asked her if she wanted a ride, and she accepted. The vehicle apparently had no rear seats. B.S. entered it and sat on the floor where she observed a pit bull, whose name she later learned was "Crusher." Thomas got into the back with her and put the dog in the

passenger seat. B.S. testified that Thomas told her that she would have to pay for her ride, and asked her if she knew how to "give a good blow job." B.S. asked to be let out of the vehicle, but was not permitted to leave.

B.S. testified that Thomas forced her to engage in vaginal, oral and anal intercourse during the following three hours. She also testified that Thomas told Bowell that when he (Thomas) was through, it would be Bowell's turn. Bowell then told Thomas to hurry up because they were running low on "octane." Thomas also threatened B.S. with a gun, as well as threatening that he was going to get a chainsaw, cut off her arms and legs and leave her in a snowbank. Bowell corroborated B.S.'s testimony in part, by testifying that he remembered hearing Thomas mention something about a chainsaw.

In B.S.'s view, Bowell assisted Thomas in coercing the intercourse by responding to Thomas' request to stop and start the car, by obtaining a gun for Thomas to use to overcome B.S.'s resistance, and by keeping "Crusher" out of the back of the car. The most pointed example of this assistance occurred when Thomas told Bowell that B.S. was not cooperating, and asked him to hand back the gun. B.S. testified that Bowell took the gun out of the glove compartment, loaded it, and handed it back to Thomas who placed it against B.S.'s neck.

DISCUSSION

The theory of the prosecution identified Bowell as a principal to B.S.'s kidnapping, reasoning that his driving the vehicle and ignoring her pleas to be released, constituted the restraint required for a conviction of kidnapping. AS 11.41.300(a)(1)(C) (a person commits the crime of kidnapping if [he] restrains another person with intent to ... sexually assault the restrained person or place the restrained person ... in apprehension that any person will be subjected to ... sexual assault). Bowell does not challenge his conviction for kidnapping on appeal.

The state also theorized that Bowell was an accomplice to Thomas' first-degree sexu-

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al assault of B.S. Howell vigorously attacks his conviction on this count. He reasons that the accomplice statute is constitutionally defective for failing to require a culpable mental state. Alternatively, he argues, that if a culpable mental state is required by the statute, that fact was not sufficiently communicated to the jury in the relevant jury instructions. Howell concedes that he did not object to the instructions at trial, and therefore must establish plain error in order to prevail on this part of his argument. Alaska R.Crim.P. 47(b). Finally, Howell argued that the trial court should have granted a judgment of acquittal on this issue. We will address each of Howell's arguments in turn.

Howell reasons that AS 11.16.110(2)(B) creates a legal accountability for a person who aids or abets another person in the commission of a criminal offense, but is deficient in failing to provide a "mental element" for "aiding or abetting."

Alaska Statute 11.16.110 provides as follows:

Legal accountability based upon the conduct of another: Complicity.

A person is legally accountable for the conduct of another constituting an offense if

... (2) with intent to promote or facilitate the commission of the offense, the person

... (B) aids or abets the other in planning or committing the offense.

The state counters that Howell has misread the statute, and that the introductory language to AS 11.16.110(2)(B), "with intent to promote or facilitate the commission of the offense" supplies the *mens rea* for accomplice liability, while "aids or abets" describes the *actus reus* of the offense. The state's position finds support in the 1977 Commentary to the Tentative Draft of the Alaska Criminal Code Revision Part II at

1. The culpable mental state "intentionally" is defined as follows:

AS 11.81.900. Definitions.

(a) For purposes of this title, unless the context requires otherwise,

(1) a person acts "intentionally" with respect to a result described by a provision of

25, and in the Commentary to the Model Penal Code provision from which our statute is derived, A.L.I., *Model Penal Code and Commentaries* Part I § 2.01 (1985). The Commentary states in relevant part:

Subsection (3)(a) requires that the actor have the purpose of promoting or facilitating the commission of the offense, i.e., that he have as his conscious objective the bringing about of conduct that the Code has declared to be criminal. This is not to say that he must know of the criminality of the conduct; there is no more reason here to require knowledge of the criminal law than there is with the principal actor. But he must have the purpose to promote or facilitate the particular conduct that forms the basis for the charge, and thus he will not be liable for conduct that does not fall within this purpose.

Id. § 2.06 at 310-11 (footnote omitted).¹

In summary, in order to be liable as an accomplice for Thomas' sexual assault on B.S., it was necessary that the state prove beyond a reasonable doubt that Howell was aware that Thomas intended to have sexual intercourse with B.S. and, intending to facilitate Thomas in achieving his goal, performed some act of aid or encouragement. While the statute interpreted in this way will adequately provide both the *mens rea* and an *actus reus* for most offenses, it does present certain difficulties in connection with crimes such as first-degree sexual assault, which include the circumstances surrounding an offender's conduct as an element of the offense. The Commentary to the Model Penal Code discusses this problem as follows:

There is a deliberate ambiguity as to whether the purpose requirement [the requirement that in order to be guilty as an accomplice, the actor have the purpose of promoting or facilitating the commission of the offense] extends to cir-

law defining an offense when the person's conscious objective is to cause that result; when intentionally causing a particular result is an element of an offense, that intent need not be the person's only objective....

Cite as 728 P.2d 1220 (Alaska App. 1986)

cumstance elements of the contemplated offense or whether, as in the case of attempts, the policy of the substantive offense on this point should control. The reasoning is the same as in the case of conspiracy, which is set forth in some detail in Section 5.03 Comment 2(c)(ii). The result, therefore, is that the actor must have a purpose with respect to the proscribed conduct or the proscribed result, with his attitude towards the circumstances to be left to resolution by the courts. His attitude towards the criminality of the conduct, *see* Section 2.02(9), is irrelevant here as it is in the other cases, subject of course to the limitation of Section 2.04(3) (ignorance or mistake of fact or law).

A.L.I., *Model Penal Code and Commentaries* Part I § 2.06 n. 37, at 311 (1985).²

[1] Under current law, the state's burden to establish a culpable mental state in order to convict a person as an accomplice is a matter of first impression. *See Hensel v. State*, 604 P.2d 222 (Alaska 1979) (considering the issue of the requisite mental

state for accomplice liability under prior law). In *Reynolds v. State*, 664 P.2d 621 (Alaska App.1983), we held that the state must prove a culpable mental state regarding the "circumstance"—lack of consent—in order to convict a principal of the offense of first-degree sexual assault. "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." 664 P.2d at 625. Similar reasoning leads us to conclude that the state must prove the same element in order to convict a person of first-degree sexual assault as an accomplice. In other words, in order to convict *Bowell* as an accomplice of *Thomas*' first-degree sexual assault of *B.S.*, the state was required to prove that *Bowell* knew that *Thomas* intended to engage in sexual intercourse with *B.S.*, that he intentionally engaged in conduct facilitating *Thomas*' efforts, and that at the time he aided *Thomas*, he recklessly disregarded *B.S.*'s lack of consent to *Thomas*' overtures.³

2. As indicated, the commentary to Model Penal Code § 2.06 discusses a problem which is also discussed in the commentary to Model Penal Code § 5.03, dealing with criminal conspiracy. There the commentators state:

The conspiracy provision in the Code does not attempt to solve the problem (whether culpability with respect to circumstance elements is required) by explicit formulation, nor have the recent legislative revisions. Here, as in the section on complicity, it was believed that the matter is best left to judicial resolution as cases that present the question may arise and that the formulations proposed afford efficient flexibility for satisfactory decision. Under Subsection (1) of Section 5.03 it is enough that the object of the agreement is "conduct that constitutes the crime," which can be held to import no more than the mental state required for the substantive offense into the agreement to commit it. Although the agreement must be made "with the purpose of promoting or facilitating the commission of the crime," it is arguable, though by no means certain, that such a purpose may be proved although the actor did not know of the existence of a circumstance, which did exist in fact, when knowledge of the circumstance is not required for the substantive offense. Rather than press the matter further in this section, the Institute deliberately left the matter to interpretation in the context in which

the issue is presented. Too many variations, many of which cannot be foreseen with any confidence, could otherwise be expected to arise and undermine any more rigid formula. A.L.I., *Model Penal Code and Commentaries* Part I § 5.03, at 413-19 (1985) (footnotes omitted).

3. At *Bowell*'s request, the trial court instructed the jury that *Bowell*'s culpability depended in part upon a finding that *Thomas* recklessly disregarded *B.S.*'s lack of consent. We express no opinion as to whether *Bowell*'s culpability required a finding of this element. As we noted in *Reynolds*, a claim by one charged with sexual assault that he reasonably or unreasonably disregarded his victim's lack of consent is akin to a defense of mistake of fact. 664 P.2d at 624-25. Such a defense might be personal to the actor. Thus, a jury might find that *A* with the active assistance of *B* engaged in sexual intercourse with *C* and that *C* in fact did not consent. The jury might further find that *B*, the accomplice, was aware of and disregarded a substantial risk of *C*'s lack of consent but that *A*, the principal, honestly but unreasonably believed that she consented. We express no opinion as to whether *B* could be properly convicted on such facts. Compare AS 11.16.110(3) [a person is legally accountable for the conduct of another constituting an offense if ... acting with the culpable mental state that is sufficient for the commission of the offense, the person causes an inn-

Bowell next argues that the jury instructions were inadequate in describing the culpable mental state necessary for a finding of accomplice liability to first-degree sexual assault. The jury was instructed that in order to find Russell Bowell guilty of first-degree sexual assault, it had to find:

As to Russell Scott Bowell:

1. That the event in question occurred at or near Fairbanks, in the Fourth Judicial District, State of Alaska, and on or about the 4th day of February, 1985;
2. That the defendant, James D. Thomas, knowingly engaged in sexual penetration with B.S.;
3. That the penetration occurred without the consent of B.S.;
4. That Russell Scott Bowell aided or abetted James D. Thomas in the sexual penetration; and
5. That James D. Thomas recklessly disregarded B.S.'s lack of consent to the sexual penetration.⁴

Bowell claims error because this instruction does not specify a mental state for Bowell's acts. Rather, the only mental state for the jury to consider under this instruction is whether or not Thomas recklessly disregarded B.S.'s nonconsent to intercourse.

[2] Bowell is correct that this instruction is incomplete regarding the required *mens rea* for accomplice liability. Since he did not object to this instruction at trial, he must establish plain error in order to prevail. Alaska R.Crim.P. 47(b). We note that Bowell did more than fail to object to the instruction at trial. It was his counsel who suggested that the mental state as to Bowell should be that Thomas recklessly disregarded B.S.'s lack of consent to the intercourse. Under the totality of the circumstances, we are satisfied that no plain error occurred. We are also satisfied that the other instructions given, coupled with the parties' arguments, adequately present-

cent person or a person who lacks criminal responsibility to engage in the proscribed conduct] with AS 11.16.120(a)(2)(C) [in a prosecution for an offense in which legal accountability is based on the conduct of another person, it is

ed the issue to the jury. See, e.g., *Reynolds v. State*, 664 P.2d at 627-28. See also *Cupp v. Naughten*, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973) (single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge). The other instructions given informed the jury on accomplice liability:

An accomplice is one who in some manner, knowingly and with criminal intent, aids, abets, assists or participates in a criminal act.

A person need not commit every element of the offense in order to be guilty as an accomplice. However, it is necessary that he in some ways [sic] associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his actions to make it succeed....

"Aid and abet" means to help, assist, or facilitate the commission of a crime, promote the accomplishment thereof, help in advancing or bringing about, or induce, counsel, or incite as to its commission.

Under the laws of Alaska a person need not directly commit each act constituting the offense charged to be guilty thereof. A person who, with intent to promote or facilitate the commission of the offense, aids or abets another in planning or committing the offense is as guilty as the person or persons who commit the offense personally....

Furthermore, the parties' arguments at closing both expressed the correct legal standard regarding Bowell's culpability. The prosecutor stated:

And then you have to consider, if you found these four things [establishing Thomas' guilt] beyond a reasonable doubt, whether you believe beyond a reasonable doubt that Mr. Bowell aided or abetted and that sexual penetration—in other words, did he know what was hap-

not a defense that the other person is not guilty of the offense].

4. Bowell does not complain of element no. 5 of the instruction on appeal. (See n. 3, *supra*.)

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pening, was he in agreement with it, was it [sic] doing things to help it along, to make it possible for Mr. Thomas to do what he was doing, was he a part of it and was he a participant in the whole situation.

Bowell's counsel argued to the jury without objection by the state:

Now the law is going to be completely read to you. Under the law of the State of Alaska somebody can be guilty as a principal if he aids or abets. Okay? And if a person intends to promote or facilitate the commission of an offense, aids and abets—aids and abets, he is guilty as the person or persons who commit the offense.... In order to aid and abet another to commit a crime it is necessary that the defendant willfully associate himself in some way with the criminal avenger, that he willfully participated in something that he wishes to bring about, that he willfully seeks by some action to make it succeed.... You have to find that he intended to aid and abet Mr. Thomas. And a person acts intentionally with respect to a result when his conscious objective is to cause that result.

We conclude therefore, that Bowell has failed to establish plain error.

Bowell next argues that there was insufficient evidence to convict him of aiding and abetting first-degree sexual assault. Bowell stresses B.S.'s testimony that she would not have been able to escape Thomas' sexual assault even if Bowell had not been present. On review, we must view the evidence and the inferences that may be drawn therefrom in the light most favorable to the prosecution to determine whether there is substantial evidence to support the conviction against Bowell. *Dorman v. State*, 622 P.2d 448, 453 (Alaska 1981). Substantial evidence is defined as such relevant evidence as is adequate to support the conclusion by a reasonable mind that there is no reasonable doubt as to Bowell's guilt. *Id.* at 453 (citations omitted).

[3] Applying this standard, we are satisfied that there is sufficient evidence in the record to enable reasonable jurors to

determine beyond a reasonable doubt that Powell was guilty of aiding and abetting Thomas' sexual assault of B.S. B.S. testified that Thomas was speaking loudly enough for Bowell to hear when he said, "Little girls shouldn't be out hitchhiking in the middle of the night [sic] unless they're asking for something." B.S. asked Bowell to stop and please let her out; Bowell did not stop. When Thomas asked Bowell for the gun, B.S. testified that Bowell retrieved the gun from the glove box, loaded it, and handed it to Thomas. According to B.S., Thomas told Bowell that when Thomas was finished with B.S., it was Bowell's turn. Bowell said, "Hurry up then." B.S. testified that Bowell assisted Thomas in the sexual assault by driving the car, without slowing the rate of speed, to prevent her escape.

We recognize that B.S. testified to a multiplicity of sexual assaults during the approximately three hours that she was in the company of Thomas and Bowell. Given B.S.'s testimony about her actions, and those of Thomas and Bowell, we are satisfied that a reasonable jury could conclude beyond a reasonable doubt that Bowell, at some point, was aware that Thomas was engaging in sexual intercourse with B.S. without her consent, and knowing that, he aided and abetted Thomas. The trial court did not err in denying Bowell's motion for a directed verdict of acquittal.

[4] We will now briefly address Bowell's arguments regarding his sentence. A first offender convicted of first-degree sexual assault is subject to presumptive sentencing. AS 12.55.125(i). If the offense is a first felony conviction and the defendant possessed a fire arm, the presumptive term is ten years. *Id.* (i)(2). Judge Greene found that Bowell's passing a loaded fire arm to Thomas constituted "possession of a fire arm." Bowell argues that only Thomas possessed the fire arm in connection with the offense. *See, e.g., Dailley v. State*, 675 P.2d 657, 661 (Alaska App. 1984). We disagree. Where an accomplice furnishes a fire arm to his principal in order to aid and abet a sexual assault, the trial court may properly find that

See, e.g., *Reyn-*
27-28. See also
.S. 141, 94 S.Ct.
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e n. 3, supra.]

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the accomplice possessed a fire arm for purposes of the enhanced presumptive term. AS 12.55.125(i)(2). Judge Greene's conclusion was not clearly erroneous. *McClain v. State*, 519 P.2d 811, 813-14 (Alaska 1974).

The judgment of the superior court is **AFFIRMED**. The case is **REMANDED**.

3. *Bowell* raises other issues which we briefly address. First, he contends that the trial court erred in concluding that it had no jurisdiction to consider his motion for new trial based upon newly discovered evidence filed on the same day that he filed his notice of appeal. The parties are in agreement that Judge Greene could have considered the motion and denied it without a remand from this court, but would have needed to request a remand in order to grant the motion. See, e.g., *State v. Salinas*, 362 P.2d 298, 301 (Alaska 1961). It is unnecessary for us to pursue this issue, however, because our affirmance of *Bowell's* conviction will permit the trial court to address his motion for new trial on remand.

Bowell also challenges Judge Greene's rejection of a mitigating factor that he committed the

offense under some degree of duress, coercion, threat or compulsion, insufficient to constitute a complete defense but which significantly affected his conduct. AS 12.55.155(d)(3). Since Judge Greene's decision on this issue might be influenced by the so-called newly discovered evidence that *Bowell* seeks to present in support of his motion for a new trial, we will permit reconsideration of this issue on remand. See, e.g., *Hart v. State*, 702 P.2d 651 (Alaska App. 1985). See also *Bynum v. State*, 708 P.2d 1293 (Alaska App. 1985); *Lee v. State*, 673 P.2d 892, 896 (Alaska App. 1983).

Finally, *Bowell* appealed Judge Greene's imposition of consecutive sentences for kidnapping and first-degree assault. However, the lower court has since modified the sentence on appeal and *Bowell* has abandoned this issue.

