



STATE OF NEW JERSEY

NEW JERSEY LAW REVISION COMMISSION

Revised Tentative Report

Relating to

Title 2C—Sexual Offenses

April 08, 2013

This Revised Tentative Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments.

Comments should be received by the Commission no later than June 07, 2013.

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Title 2C – Sexual Offenses

Introduction

The Commission has approved a project to revise the provisions of Title 2C that pertain to sexual offenses, *N.J.S. § 2C:14-1 – 2C:14-12* in response to case law. This memorandum is a draft of the first part of the project, to revise the law to reflect the concept of force as established by *State in Interest of M.T.S.*, 129 *N.J.* 422 (1992) and *State v. Triestman*, 416 *N.J. Super.* 195 (App. Div. 2010). Staff has investigated the evolution of the pertinent sections of the law as a result of legislative reform and common law development.

Historically, rape was defined as “unlawful carnal knowledge of a woman by force and against her will,” and exempted a husband if the crime was against his wife. Stacy Futter & Walter R. Mebane, Jr., *The Effects of Rape Law Reform on Rape Case Processing*, 16 *Berkeley Women's L.J.* 72, 74 (2001). Rape laws essentially put the victim on trial, requiring corroboration and utmost or reasonable resistance for conviction. *Id.* at 75. Whether the woman consented to sex, and whether force was used, were determinations essential to conviction. *Ibid.* However, juries often reacted cynically to a woman’s allegations, and suspiciously judged her character and sexual history, rather than the facts at trial. Richard Klein, *An Analysis of Thirty-five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 *Akron L. Rev.* 981, 982-84 (2008). This patriarchal system made it difficult to convict accused rapists, and increased women’s fear of rape. *Ibid.*

Beginning in the 1970’s, the country mobilized a “national attack” on crime, and women’s groups allied with anti-crime groups to reform rape law and change societal perception of the crime. *Ibid.* Rape law reform focused on the definition of rape, evidentiary rules, the age of consent, and penalty structures. *Ibid.* The reforms redefined the crime as sexual assault to recognize that rape is a violent crime, rather than a crime of passion. Ronald J. Berger, Patricia Searles, W. Lawrence Neuman, *The Dimensions of Rape Reform Legislation*, 22 *Law & Soc’y Rev.* 329, 331 (1988). Additionally, analogizing rape to assault was an attempt to remove the difficulties of consent including the need to prove resistance. *Ibid.* Another redefinition involved broadening rape to include oral and anal penetration and making the crime gender neutral. *Id.* at 331-32. Evidentiary reform included removing resistance requirements and creating rape shield laws to limit evidence of victims’ sexual history. *Id.* at 332. Statutory reform removed mistake of age defenses and created graded offenses for rape of particular ages. *Ibid.* Penalty reform created minimum sentences and graded penalties based on the seriousness of the crime. *Ibid.*

Since 1980, every state has passed or considered rape reform legislation. Leigh Bienen, *Rape III—National Developments in Rape Reform Legislation*, 6 *Women's Rts. L. Rep.* 170, 171 (1980). The modern reform movement considers how states should define the boundary line between sex and rape, and whether to emphasize consent or force.

New Jersey Background

Sexual assault law in New Jersey is applied in the court system using the New Jersey Supreme Court’s interpretation of *N.J.S. § 2C:14-2* in the case *State in Interest of M.T.S.*, 129 *N.J.* 422 (1992). In *M.T.S.*, the issue was whether penetration without consent and without force

beyond penetration, satisfied the elements for conviction under § 2C:14-2. *Id.* at 425. The Court held that the only requirement for conviction under the sexual assault statute is proof “beyond a reasonable doubt that there was sexual penetration and that it was accomplished without the affirmative and freely-given permission of the alleged victim.” *Id.* at 449. Thus, physical force in addition to the act of penetration is not necessary for a conviction under § 2C:14-2, if penetration occurred without the permission of the victim. *See ibid.*

Originally, conviction of rape required a showing of force and penetration against a woman’s will. *Id.* at 432. However, because force depended on the response of the victim, whether the victim consented to intercourse was integral to whether force was used against her will. *Ibid.* Therefore, the law relied heavily on whether the victim consented to intercourse, which in turn depended on her credibility and whether she resisted. *Id.* at 432-33. Initially, resistance required showing that the victim resisted force to the utmost of her ability, but by the 1960’s the New Jersey courts began to use a lesser reasonableness standard. *Id.* at 433-34. However, the force element still depended on the amount of resistance offered, so the victim needed to resist enough to show that the perpetrator used “more force than was necessary for penetration.” *Id.* at 435. This often required visible signs of resistance like torn clothing. *Ibid.*

As part of the reform effort of the 1970’s, women’s groups emphasized research that indicated that victims who resisted during forcible intercourse suffered more as a result. *Id.* at 437. Reformers argued that the law should shift away from the behavior of the victim and concentrate on the defendant’s assaultive conduct. *Id.* at 438. The goal of the reform was to eliminate the burden on victims to prove non-consent and give independent significance to the use of force instead of relying on the victim’s reaction. *Id.* at 438-39. In 1978, the Legislature amended New Jersey’s rape law, labeling the crime sexual assault, and focusing on the assaultive nature of the crime. *Id.* 440-41. The Legislature did not attempt to define force, and therefore force did not necessarily rely on the old understanding of overcoming the will of the victim, or physically overpowering the victim. *Id.* at 442.

Recent New Jersey Cases Regarding Physical Force in Application to Sexual Assault and Sexual Contact

In M.T.S., the Court found the words “physical force” in § 2C:14-2 ambiguous, and analyzed the legislative history of sexual assault to ascertain the intent of the Legislature. *Id.* at 430-31. The Court found that “by eliminating all references to the victim’s state of mind and conduct...the Legislature emphasized the affinity between sexual assault and other forms of assault and battery.” *Id.* 442-43. The *M.T.S.* Court concluded that “just as any unauthorized touching is a crime under traditional laws of assault and battery,...so is any unauthorized sexual penetration a crime under the reformed law of sexual assault.” *Id.* at 443.

Because the *M.T.S.* Court held that the Legislature did not intend the crime of sexual assault to center on the victim’s state of mind or the amount of resistance offered, it held “that any act of sexual penetration engaged in by the defendant without the affirmative and freely-given permission of the victim to the specific act of penetration constitutes the offense of sexual assault.” *Id.* at 444. The Court applied a reasonable person standard to determine what constitutes affirmative and freely-given consent, holding that “[p]ermission may be inferred

either from acts or statements reasonably viewed in light of the surrounding circumstances. *Id.* at 444-45. Such permission “may be physical actions rather than words.” *Id.* at 445. The Court held that the term physical force “qualif[ies] the nature and character of the ‘sexual penetration,’” and all that is necessary for force is unpermitted touching. *Ibid.* Thus, the court redefined rape law as a violation of autonomy, privacy, and bodily control. *Id.* at 446.

The fact finder must decide “whether the defendant’s belief that the alleged victim had freely given affirmative permission was reasonable.” *Id.* at 448. The victim’s state of mind or reasonableness of her actions is not relevant, and the victim may only be questioned about the circumstances of the act to determine whether the defendant was reasonable in believing the victim consented. *Ibid.* Therefore, the Court held that in a case where there is no force beyond the sexual penetration, the state must prove “that there was sexual penetration and that it was accomplished without the affirmative and freely-given permission of the alleged victim.” *Ibid.* Proof is based on the surrounding circumstances and a reasonable person standard is used to decide whether the defendant believed that the victim affirmatively consented. *Id.* at 448-49.

In reaching its conclusion, the *M.T.S.* Court essentially re-read consent into the statute for situations where the defendant did not use additional force. The Court, however, emphasized the state of mind of the defendant, using a reasonable person standard, rather than emphasizing the state of mind of the victim.

The Appellate Division, in *State v. Triestman*, 416 *N.J. Super.* 195 (App. Div. 2010), clarified the force standard, and extended the ruling in *M.T.S.* to circumstances where a defendant was alleged to have committed sexual contact under *N.J.S.* 2C:14-3(b), but did not use physical force beyond the unauthorized sexual contact itself. The court found that unauthorized sexual contact without additional force is sufficient to uphold a conviction of criminal sexual contact. *Id.* at 220.

In *Triestman*, the sexual contact occurred at a furniture store in Newark, where the actor was the victim’s boss. *Triestman, supra*, 416 *N.J. Super.* at 198. The actor asked the victim to prepare a bed so he could take pictures of it and sell it online. *Ibid.* As the victim changed the bedding, the actor told her it would look better with her naked, and moved closer, “plac[ing] his left hand on her shoulder¹, put[ting] his right hand on her breast over her clothes, and tr[ying] to kiss her.” *Ibid.* The victim immediately left and contacted help. *Ibid.* In considering this case, the court was concerned with the term “physical force” found in Subsection (1) of the statute because the State conceded that the actor was not coercive. *Id.* at 210. The court agreed that the Code of Criminal Justice does not define “physical force,” so, for guidance, the court looked to the legislative history of the section at issue, as well as the *M.T.S.* decision. *Ibid.*

The *Triestman* court found that “the only distinguishing feature between criminal sexual assault and criminal sexual contact is the presence or absence of penetration.” *Id.* at 213. The court relied on the holding in *M.T.S.* that “just as any unauthorized touching is a crime under

¹ The court, in dicta, mentioned that the force of the actor placing his hand on the victim’s shoulder could have amounted to a level of physical force beyond that of the sexual contact itself, but the binding decision rested solely on whether sexual contact without additional force could satisfy the elements of criminal sexual contact. *See State v. Triestman, supra*, 416 *N.J. Super.* at 221.

traditional laws of assault and battery, so is *any unauthorized sexual contact a crime under the reformed law of criminal sexual contact*, and so is any unauthorized sexual penetration a crime under the reformed law of sexual assault.” *Ibid.* (quoting *M.T.S.*, *supra* at 443 (emphasis added)). As discussed above, because the Legislature did not intend the crime of sexual penetration to center on the victim’s state of mind or amount of resistance offered, the Court found that unauthorized physical penetration satisfies the element of physical force. *M.T.S.*, *supra* at 444.

The New Jersey Supreme Court again examined physical force in *State v. Thomas*, 166 *N.J.* 560 (2001). In *Thomas*, the Court considered the level of physical force necessary for sexual contact to trigger the No Early Release Act (“NERA” or “Act”). *Id.* at 568. The Court recognized that it is acceptable to interpret an imprecise term differently in two different sections of a statute where those sections have different purposes. *Id.* at 568. Because NERA enhances the severity of punishments for particular offenses where as *M.T.S.* focused on defining an element of a charged offense, the Court “believed the Legislature intended to ascribe a different meaning to “physical force” as used in NERA than provided in *M.T.S.*” *Triestman*, *supra*, 416 *N.J. Super.* at 220 (citing *Thomas*, *supra*, 166 *N.J.* at 568-69). In the context of NERA, sexual contact without an additional independent act of force is not enough to satisfy the NERA factor. *Thomas*, *supra*, 166 *N.J.* at 574. However, where the State is not seeking a NERA factor like in *Triestman*, but instead defining an element of a charged offense, a component of physical force in addition to sexual contact is not necessary for the sexual contact to be criminal. *Triestman*, *supra*, 416 *N.J. Super.* at 220.

The court in *Triestman* agreed with the legislative interpretation in *M.T.S.*, and concluded that ““sexual contact is criminal when ‘physical force’ demonstrates that it is unauthorized and offensive, and any unauthorized sexual contact is a crime under the law of criminal sexual contact.”” *Triestman*, *supra*, 416 *N.J. Super.* at 220 (quoting *M.T.S.*, *supra*, 129 *N.J.* at 443). Therefore, because the only difference between the crime of sexual contact and sexual assault is the act of penetration, and unauthorized and offensive penetration satisfies the physical force element for sexual assault, physical force in additional to sexual contact is not necessary for the sexual contact to be criminal. *Id.* at 217, 220. Additionally, the *Triestman* court reinforced the standard for force established in the *M.T.S.* decision—whether “a reasonable person would have believed the act unauthorized and offensive to the victim.” *Id.*

Issue and Purpose of Project

Since the last major change to Title 2C:14, in 1978, the New Jersey courts have issued several opinions interpreting the sexual crime statutes. After the recent *Triestman* decision, the time has come to modify the statutes to reflect the way they are interpreted in New Jersey’s decisional law. Staff has drafted proposed changes to Title 2C:14 in an effort to realize that goal. First, *N.J.S.* § 2C:14-2 is modified by: 1) removing the ambiguous term “force” from the section; 2) codifying the *M.T.S.* decision so that the concept of force reflects whether “a reasonable person would not have believed the act of sexual penetration authorized by the victim”; 3) clarifying which kinds of sexual assault require that the act be unauthorized and which consent was irrelevant to; and 4) updating pronoun usage in an attempt to render the statute gender neutral and reinforce its application to both males and females.

In addition, *N.J.S.* § 2C:14-3 is modified to reflect the *Triestman* decision, by: 1) mirroring the *M.T.S.* Court's interpretation of force for sexual contact; and 2) updating the statutory references to § 2C:14-2.

In relation to sexual assault and its affect on persons with intellectual and developmental disabilities, *N.J.S.* § 2C:14-2(a)(7) is removed and a new § 2C:14-2(c) provides criteria relating to ability to consent, ability to refuse, and understanding of the sexual conduct.

DRAFT

2C:14-2. Sexual assault

a. An actor is guilty of aggravated sexual assault if he commits an act of sexual penetration with another person under any one of the following circumstances regardless of whether the victim consented to the act:

- (1) The victim is less than 13 years old;
- (2) The victim is at least 13 but less than 16 years old; and
 - (A) The actor is related to the victim by blood or affinity to the third degree, or
 - (B) The actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional, or occupational status, or
 - (C) The actor is a resource family parent, a guardian, or stands in loco parentis within the household;

b. An actor is guilty of aggravated sexual assault if the actor commits an act of sexual penetration with another person, if a reasonable person would not have believed the act authorized by the victim, under any one of the following circumstances:

- ~~(3)~~ (1) The act is committed during the commission, or attempted commission, whether alone or with one or more other persons, of robbery, kidnapping, homicide, aggravated assault on another, burglary, arson or criminal escape;
- ~~(4)~~ (2) The actor is armed with a weapon or any object fashioned in such a manner as to lead the victim to reasonably believe it to be a weapon and threatens by word or gesture to use the weapon or object;
- ~~(5)~~ (3) The actor is aided or abetted by one or more other persons ~~and the actor uses physical force or coercion~~;
- ~~(6)~~ (4) ~~The actor uses physical force or coercion and~~ Severe personal injury is sustained by the victim;
- ~~(7)~~ (5) ~~The victim is one whom the actor knew or should have known was physically helpless, mentally incapacitated, or had a mental disease or defect which rendered the victim temporarily or permanently incapable of understanding his nature of the conduct, including, but not limited to, being incapable of providing consent.~~

c. An actor is guilty of aggravated sexual assault if the actor commits an act of sexual penetration with a person the actor knew or should have known had an intellectual or developmental disability that rendered the victim:

(1) Incapable of understanding the right to refuse the act, including the ability to resist and exercise the right to refuse; or

(2) Incapable of understanding the nature of the sexual conduct; or

(3) Incapable of the exercising the capacity to consent when the sexual conduct occurred.

This provision shall not be interpreted to deprive a person with an intellectual or developmental disability from engaging in consensual sexual activity.

Aggravated sexual assault is a crime of the first degree.

~~e.~~ d. An actor is guilty of sexual assault if he the actor commits an act of sexual contact with a victim who is less than 13 years old and the actor is at least four years older than the victim regardless of whether the victim consented to the act.

~~d.~~ e. An actor is guilty of sexual assault if he the actor commits an act of sexual penetration with another person under any one of the following circumstances regardless of whether the victim consented to the act:

~~(1) The actor uses physical force or coercion, but the victim does not sustain severe personal injury;~~

~~(2) (1) The victim is on probation or parole, or is detained in a hospital, prison or other institution and the actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional or occupational status;~~

~~(3) (2) The victim is at least 16 but less than 18 years old and:~~

~~(A) The actor is related to the victim by blood or affinity to the third degree; or~~

~~(B) The actor has supervisory or disciplinary power of any nature or in any capacity over the victim; or~~

~~(C) The actor is a resource family parent, a guardian, or stands in loco parentis within the household;~~

~~(4) (3) The victim is at least 13 but less than 16 years old and the actor is at least four years older than the victim.~~

f. An actor is guilty of sexual assault if a reasonable person would not have believed the act authorized by the victim even if the victim does not sustain severe personal injury.

Sexual assault is a crime of the second degree.

COMMENT

While much of the language and substance of this section remains unaltered, the Court's interpretation of "force" in *State in Interest of M.T.S.*, 129 N.J. 422 (1992), has been incorporated into the section. In light of the *M.T.S.* case, this section now distinguishes between sexual assault to which consent was not a defense, what was once called statutory rape, and sexual assault premised on the concept of force. When the act involves a forbidden age or relationship; or if the victim is incapable of providing consent by physical helplessness, mental

incapacitation, or mental defect; the issues of whether the victim consented to the act or the actor used force are irrelevant. All that is required for conviction in such a case is proof of the knowing sexual act. However, when force is at issue, this section clarifies its focus. While careful not to change the intent of the 1978 Amendment, which focused on the assaultive nature of the crime, rather than the consent of the victim, this section removes the ambiguous term “force” from the statute. In its place, this section codifies the interpretation of the *M.T.S.* Court that “any act of sexual penetration engaged in by the defendant without the affirmative and freely-given permission of the victim to the specific act of penetration constitutes the offense of sexual assault.” *M.T.S., supra*, 129 *N.J.* at 444.

The concept of force, a requirement of the crimes of sexual assault and aggravated sexual assault under subsections b. e. and f., is derived from the following passage from the *M.T.S.* decision:

[J]ust as any unauthorized touching is a crime under traditional laws of assault and battery, so is any unauthorized sexual contact a crime under the reformed law of criminal sexual contact, and so is any unauthorized sexual penetration a crime under the reformed law of sexual assault. . . . The definition of “physical force” is satisfied under N.J.S.A. 2C:14-2c(1) if the defendant applies any amount of force against another person in the absence of what a reasonable person would believe to be affirmative and freely-given permission to the act of sexual penetration. Under the reformed statute, permission to engage in sexual penetration must be affirmative and it must be given freely, but that permission may be inferred either from acts or statements reasonably viewed in light of the surrounding circumstances. . . . Persons need not, of course, expressly announce their consent to engage in intercourse for there to be affirmative permission. Permission to engage in an act of sexual penetration can be and indeed often is indicated through physical actions rather than words. Permission is demonstrated when the evidence, in whatever form, is sufficient to demonstrate that a reasonable person would have believed that the alleged victim had affirmatively and freely given authorization to the act. . . . Hence, as a description of the method of achieving “sexual penetration,” the term “physical force” serves to define and explain the acts that are offensive, unauthorized, and unlawful.
[*Id.* at 443-45.]

Based on the *M.T.S.* Court’s interpretation of “force,” this section determined that the issue in these crimes of sexual assault and aggravated assault is whether reasonable person would not have believed the act of sexual penetration authorized by the victim.

Changes to subsection cc were made that removed the terms “mentally incapacitated” and “mental disease or defect” in order to clarify the criteria for deeming a victim unable to consent to sexual activity due to an intellectual or developmental disability and to reflect a more modern description of persons with intellectual or developmental disabilities. The modified language reflects the courts’ interpretation of the mental capacity required to engage in sexual activity as discussed in *State v. Olivio*, 123 *N.J.* 550 (1991). In *Olivio*, the defendant admitted having intercourse with the victim, but denied that she was mentally disabled under the criminal statute. The Court elaborated on the Code’s definition of “mentally defective,” holding that a person is mentally defective “if, at the time of sexual activity, the mental defect rendered him or her unable to comprehend the distinctively sexual nature of the conduct, or incapable of understanding or exercising the right to refuse to engage in such conduct with another.” See *Olivio, supra*, 123 *N.J.* at 553. This change in the statute delineates the meaning of an important portion of the statute that is not clearly explained.

The draft statutory language in subsection c. reflects the inclusion, and subsequent removal, of a single sentence originally included to clarify that the ability of persons with intellectual and developmental disabilities to engage in consensual sexual activity would not be limited by statutory language. Ultimately, the sentence proved to be a cause for concern among knowledgeable commenters who suggested that it might cause additional problems, confusion or prosecutorial difficulties. It was removed as a result.

Additionally, non-substantive changes were made to pronoun usage in an attempt to make the language gender neutral and reinforce this section’s application to both males and females.

2C:14-3. Criminal sexual contact

a. An actor is guilty of aggravated criminal sexual contact if ~~he~~ the actor commits an act of ~~sexual contact~~ unauthorized and offensive sexual touching with the on a victim under any of the ~~circumstances set forth in 2C:14-2a. (2) through (7)~~ following circumstances:

(1) The victim is at least 13 but less than 16 years old and the actor is related to the victim by blood or affinity to the third degree; or the actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional, or occupational status; or the actor is a resource family parent, a guardian, or stands in loco parentis within the household;

(2) The act is committed during the commission, or attempted commission, whether alone or with one or more other persons, of robbery, kidnapping, homicide, aggravated assault on another, burglary, arson, or criminal escape;

(3) The actor is armed with a weapon or any object fashioned in such a manner as to lead the victim to reasonably believe it to be a weapon and threatens by word or gesture to use the weapon or object;

(4) The actor is aided or abetted by one or more other persons; or

(5) Severe personal injury is sustained by the victim.

Aggravated criminal sexual contact is a crime of the third degree.

b. An actor is guilty of criminal sexual contact if ~~he~~ the actor commits an act of ~~sexual contact~~ unauthorized and offensive sexual touching with the on a victim under any of the ~~circumstances set forth in 2C:14-2e (1) through (4)~~ following circumstances:

(1) The victim is on probation or parole, or is detained in a hospital, prison or other institution and the actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional, or occupational status;

(2) The victim is at least 16 but less than 18 years old and the actor is related to the victim by blood or affinity to the third degree; or the actor has supervisory or disciplinary power of any nature or in any capacity over the victim; or the actor is a resource family parent, a guardian, or stands in loco parentis within the household;

(3) The victim is at least 13 but less than 16 years old and the actor is at least four years older than the victim; or

(4) If a reasonable person would not have believed the act was authorized by the victim even if the victim does not sustain severe personal injury.

Criminal sexual contact is a crime of the fourth degree.

COMMENT

This section is fundamentally unaltered. This section adopts the *M.T.S.* Court's interpretation of force for sexual contact. This reference codifies the interpretation of force in relation to sexual contact by the Appellate Division in *State v. Triestman*, 416 *N.J. Super.* 195 (App. Div. 2010). There, the court affirmed the *M.T.S.* Court's interpretation of force, and held that "sexual contact is criminal when 'physical force' demonstrates that it is unauthorized and offensive, and any unauthorized sexual contact is a crime under the law of criminal sexual contact." *Triestman, supra*, 416 *N.J. Super.* at 220 (quoting *M.T.S., supra*, 129 *N.J.* at 443). In addition, the section

explicitly lists the circumstances in which an actor would be found guilty third or fourth degree criminal sexual contact in order to improve efficiency.