

General Provisions of Sexual Violence Crimes

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2.1 CHAPTER OVERVIEW

This chapter discusses offenses from the Pennsylvania Crimes Code, as well as related statutory definitions, regarding crimes of sexual violence and of a sexual nature. The chapter is divided into twelve sections. Section 2.2 lists the statutory definitions of terms typically found in sexual offenses, including:

- complainant;
- deviate sexual intercourse;
- forcible compulsion;
- indecent contact;
- serious bodily injury; and
- sexual intercourse.

Section 2.3 explains the law in Pennsylvania when the alleged assailant is a minor.

The remaining sections discuss the sexual offenses, including the statutory definitions, elements, penalties, and, when appropriate, pertinent case law. The offenses are:

- Rape, Section 2.4;
- Statutory Sexual Assault, Section 2.5;
- Involuntary Deviate Sexual Intercourse, Section 2.6;
- Sexual Assault, Section 2.7;
- Aggravated Indecent Assault, Section 2.8;
- Indecent Assault, Section 2.9;
- Indecent Exposure, Section 2.10;
- Incest, Section 2.11; and
- Invasion of Privacy, Section 2.12.

Offenses specifically against children are addressed in Chapter 3.

The standard of judicial construction for both crimes and provisions is well settled: when the language of a statute is clear and unambiguous, it must be given effect in accordance with its plain and common meaning. 18 PA. CONS. STAT. § 105 (provisions of the Crimes Code must be construed “according to the fair import of their terms”); 1 PA. CONS. STAT. § 1921(b) (“when the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.”); *Commonwealth v. Kelley*, 569 Pa. 179, 801 A.2d

551 (2002). Finally, penal statutes are to be strictly construed in favor of the accused. 1 PA. CONS. STAT. § 1928(b)(1); *Commonwealth v. Booth*, 564 Pa. 228, 766 A.2d 843 (2001).

2.2 DEFINITIONS

A. Complainant

1. Definition

18 PA. CONS. STAT. ANN. § 3101 defines “complainant” as: “An alleged victim of a crime under this chapter.”

2. Credibility

The credibility of testimony by a complainant is to be evaluated in the *same manner* as the complainant of any other crime. 42 PA. CONS. STAT. ANN. § 3106.

18 PA. CONS. STAT. ANN. § 3106.

Testimony of Complainants

The credibility of a complainant of an offense under this chapter shall be determined by the same standard as is the credibility of a complainant of any other crime. The testimony of a complainant need not be corroborated in prosecutions under this chapter. No instructions shall be given cautioning the jury to view the complainant’s testimony in any other way than that in which all complainants’ testimony is viewed.

Impeachment of the complainant is permissible. *See In Interest of Lawrence J.*, 456 A.2d 647, 649-650 (Pa. Super. 1983): evidence of victim’s reputation in community for truth and veracity is admissible to impeach the victim’s credibility; *See also, Commonwealth v. Berry*, 513 A.2d 410, 416 (Pa. Super. 1986).

(a) Corroboration

No corroboration is necessary.¹

(b) Jury Instructions

No instruction is permitted that cautions the jury to view complainant’s testimony any differently than others.²

¹ *Commonwealth v. Kunkle*, 623 A.2d 336, 338 (Pa. Super. 1993), *appeal denied*, 536 Pa. 621, 637 A.2d 281 (1993). *See* 31 A.L.R.4th 120, MODERN STATUS OF RULE REGARDING NECESSITY FOR CORROBORATION OF VICTIM’S TESTIMONY IN PROSECUTION FOR SEXUAL OFFENSE.

² *Commonwealth v. Barnosky*, 400 A.2d 168, 171 (Pa. Super. 1979).

3. Rape shield law

Complainant’s Past Sexual Conduct Not Admissible: Evidence of specific instances, opinions, or reputation of the complainant’s past sexual conduct is generally not admissible. 18 PA. CONS. STAT. ANN. § 3104 (a).

18 Pa.Cons.Stat.Ann § 3104.

Evidence of Victim’s Sexual Conduct

(a) General Rule.—Evidence of specific instances of the alleged victim’s past sexual conduct, opinion evidence of the alleged victim’s past sexual conduct, and reputation evidence of the alleged victim’s past sexual conduct shall not be admissible in prosecutions under this chapter except evidence of the alleged victim’s past sexual conduct with the defendant where consent of the alleged victim is at issue and such evidence is otherwise admissible pursuant to the rules of evidence.

(b) Evidentiary Proceedings.—A defendant who proposes to offer evidence of the alleged victim’s past sexual conduct pursuant to subsection (a) shall file a written motion and offer of proof at the time of trial. If, at the time of trial, the court determines that the motion and offer of proof are sufficient on their faces, the court shall order an in camera hearing and shall make findings on the record as to the relevance and admissibility of the proposed evidence pursuant to the standards set forth in subsection (a).

(a) Exception: Complainant’s Past Sexual Conduct With Defendant

Evidence of the complainant’s past sexual conduct with the defendant is admissible if:

- *Consent* of the complainant is at issue, and
- Such evidence is otherwise admissible pursuant to the rules of evidence.

Commonwealth v. Beltz, 829 A.2d 680, 684 (Pa. Super. 2003): the trial court correctly refused to admit evidence that victim had sex with another man earlier in the day because it was irrelevant as to whether she had consensual sex with defendant later in the same day.

At trial, the procedure is as follows:

- (i) A defendant who wishes to introduce evidence of the complainant’s past sexual conduct must file a written motion and offer of proof at the time of trial. 18 PA. CONS. STAT. ANN. § 3104 (b)³

³ ***Commonwealth v. Beltz***, 829 A.2d 680, 684 (Pa. Super. 2003).

The proffers of evidence relating to the past sexual conduct of the alleged victim must not be vague, conjectural, or speculative. **Commonwealth v. Fink**, 791 A.2d 1235, 1242 (Pa. Super. 2002).

- (ii) If the court determines that the motion and offer present a prima facie right to present the evidence, the court must hold an in camera hearing. 18 PA.CON.S. STAT. ANN. § 3104 (b)
- (iii) The court must make findings on the record as to the admissibility of the proposed evidence pursuant to the standard contained in § 3104 (a).

(b) Exception: Bias Against Defendant

Evidence of the victim’s prior sexual activity with someone other than the defendant, or of sexual activity with the defendant when consent is not at issue, is admissible on the issue of her bias against the defendant. **Commonwealth v. Black**, 487 A.2d 396, 400-401 (Pa. Super. 1985)(*en banc*); **Commonwealth v. Fink**, 791 A.2d 1235 (Pa. Super. 2002).⁴ Admission conditioned upon:

- whether the proposed evidence is relevant to show bias or motive or to attack credibility;
- whether the probative value of the evidence outweighs its prejudicial effect; and
- whether there are alternative means of proving bias or motive or to challenge credibility.

At trial, the procedure is as follows:

- (i) in camera hearing similar to that outlined in 18 PA. CONS. STAT. ANN. § 3104.⁵
- (ii) evidence will be excluded if “it would so inflame the minds of the jurors that its probative value is outweighed by unfair prejudice.”⁶

⁴ In **Commonwealth v. Black**, 487 A.2d 396 (Pa. Super. 1985)(*en banc*), the defendant sought to offer evidence that the victim, the defendant’s daughter, was having a sexual relationship with her brother whom the defendant had ejected from the house. The defendant argued that this prior instance of sexual conduct was relevant to his defense, i.e., that the victim had fabricated the allegation of abuse in order to remove her father from the home; that way her brother could return and resume the sexual relations with her. The Superior Court held that a defendant has a right to confrontation under the Sixth Amendment of the United States Constitution; therefore, the Rape Shield Law could not be used to exclude relevant evidence that shows the *bias of a witness or attacks the credibility of the witness*. Thus, relevant evidence of such past sexual conduct would be admissible as long as it would not “so inflame the minds of the jurors that its probative value is outweighed by unfair prejudice.”

⁵ **Commonwealth v. Black**, 487 A.2d 396, 401 (Pa. Super. 1985); **Commonwealth v. Fink**, 791 A.2d 1235 (Pa. Super. 2002).

⁶ **Commonwealth v. Black**, 487 A.2d 396, 401 (Pa. Super. 1985)(*en banc*); **Commonwealth v. Stewart**, 450 A.2d 732 (Pa. Super. 1982).

Limitation: The decision of the Superior Court in *Commonwealth v. Black*, 487 A.2d 396, 400-401 (Pa. Super. 1985)(*en banc*), has been applied narrowly in a number of subsequent decisions, and “only where the victim’s credibility was allegedly affected by bias against or hostility toward the defendant, or the victim had a motive to seek retribution.” *Commonwealth v. Boyles*, 595 A.2d 1180, 1186 (Pa. Super. 1991); *Commonwealth v. Gaddis*, 639 A.2d 462, 466 (Pa. Super. 1994), *appeal denied*, 538 Pa. 665, 649 A.2d 668 (1994).

(c) **Exclusion: Prior Sexual Assault**

If the prior sexual conduct used to impeach the alleged victim was a prior sexual assault, then 18 PA. CONS. STAT. ANN. § 3104 does not apply, and the evidence is evaluated under the general evidentiary rules.

In *Commonwealth v. Johnson*, 536 Pa. 153, 638 A.2d 940 (1994), the Supreme Court of Pennsylvania held that the Rape Shield Law did not prohibit the admission of evidence regarding a prior sexual assault suffered by the ten-year old victim when the defendant sought introduction of the testimony to establish that the victim was blaming him for the assault at the instigation of another individual who had sexually assaulted her on a prior occasion. Evidence of prior sexual assaults was not considered to be conduct of the victim that would reflect upon her reputation for chastity, so the Rape Shield Law did not apply. “Evidence that (the victim) had been subject to a previous sexual assault would not reflect upon (her) reputation for chastity. To be a victim is not “conduct” of the person victimized. It would be illogical to conclude that the Rape Shield Law intended to prohibit this type of testimony.” *Id.* at 942.⁷

4. Prompt Report

There is no requirement that a complainant promptly report allegations to a public authority. 18 PA. CONS. STAT. ANN. § 3105.

18 PA. CONS. STAT. ANN. § 3105.

Prompt Complaint

Prompt reporting to public authority is not required in a prosecution under this chapter: Provided, however, That nothing in this section shall be construed to prohibit a defendant from introducing evidence of the complainant’s failure to promptly report the crime if such evidence would be admissible pursuant to the rules of evidence.

⁷ See also *Commonwealth v. Holder*, 815 A.2d 1115, 1118-1119 (Pa. Super. 2003), *appeal denied*, 573 Pa. 703, 827 A.2d 430 (2003).

(a) **Evidence of Failure to Report Promptly**

If otherwise admissible, this section does not preclude the admission of evidence of a failure to promptly report the allegations.⁸ The Pennsylvania Supreme Court stated in *Commonwealth v. Lane*, 521 Pa. 390, 398, 555 A.2d 1246, 1250 (1989), “The lack of a prompt complaint by a victim of a crime, although not dispositive of the merits of the case, may justifiably produce a doubt as to whether the offense indeed occurred, or whether it was a recent fabrication by the complaining witness.”

If a complaint is delayed substantially without any reasonable explanation, an inference can be drawn regarding the credibility of that complaint and against whether the incident in fact occurred. *Commonwealth v. Thomas*, 904 A.2d 964, 969-970 (Pa.Super. 2006), quoting *Commonwealth v. Snoke*, 525 Pa. 295, 300, 580 A.2d 295, 297 (1989).

Exception: There is an exception to the general rule of admissibility if the victim was unable to comprehend the sexual attack. Although a defendant may customarily use the failure to make a prompt complaint to question the veracity of the victim’s testimony, an exception is when the victim did not comprehend the offensiveness of the contact at the time of its occurrence. In that case, the absence of an immediate complaint may not be used to question whether the conduct did in fact occur. For example, see:

- *Commonwealth v. Snoke*, 525 Pa. 295, 302, 580 A.2d 295, 298 (1989)(victim was five years old and alleged attacker was victim’s father).
- *Commonwealth v. Lane*, 521 Pa. 390, 398, 555 A.2d 1246, 1250 (1989)(maturity of victim is key to determine relevancy of lack of prompt complaint).

(b) **Hue and Cry Doctrine**

Under the “hue and cry” doctrine, a prompt complaint allows for an inference that the allegations are credible because there has been less time for fabrication, while a complaint delayed without reasonable explanation allows for the opposite inference. *Commonwealth v. Snoke*, 525 Pa. 295, 580 A.2d 295 (1990).

(c) **Jury Instructions**

An instruction regarding prompt complaint is allowed when the fact of a sexual assault is at issue and the complainant comprehends the offensiveness of the assaults at the time of the conduct.

⁸ *Commonwealth v. Jones*, 672 A.2d 1353, 1358 (Pa. Super. 1996).

Commonwealth v. Ables, 590 A.2d 334 (Pa. Super. 1991), *appeal denied*, 528 Pa. 620, 597 A.2d 1150(1991). The Pennsylvania Supreme Court stated in ***Commonwealth v. Snoke***, 525 Pa. 295, 580 A.2d 295 (1989), “Specifically, where the actual occurrence of the assault is at issue in the case, the trial judge is required to charge the jury as to the **relevance of a delay in disclosure and the significance of a prompt complaint.**” *Id.* at 302, 580 A.2d at 198 (emphasis added). *See also*, ***Commonwealth v. Thomas***, 904 A.2d 964, 970 (Pa. Super. 2006)

(d) Special Considerations Involving Minor Victims

Consideration should be given to factors inherent in cases involving minor victims that may explain the delay without reflecting unfavorably on the minor witness’s credibility:⁹

- Immaturity of the victim that would cause the child victim not to appreciate the offensiveness of the encounter and the need for prompt disclosure;
- The lack of a prompt complaint might be made in order to protect the truly guilty party, as in the case of a child blaming an innocent party for the wrongdoing of a parent;
- When a parent tells a child to keep a secret and the child is of tender years with no reason to question the parent;
- The age of the victim;
- The mental and physical condition of the victim;
- The atmosphere and physical setting in which the incidents were alleged to have taken place;
- The extent to which the accused may have been in a position of authority, domination or custodial control over the victim;
- Whether the victim was under duress.

B. Deviate Sexual Intercourse

1. Definition

18 PA. CONS. STAT. ANN. § 3101 defines “deviate sexual intercourse” as “Sexual intercourse per os or per anus between human beings and any form of sexual intercourse with an animal. The term also includes penetration, however slight, of the genitals or anus of another person with a foreign object for any purpose other than good faith medical, hygienic or law enforcement procedures.”

⁹ These factors are set forth in ***Commonwealth v. Ables***, 590 A.2d 334 (Pa. Super. 1991), *appeal denied*, 528 Pa. 620, 597 A.2d 1150(1991), and in ***Commonwealth v. Snoke***, 525 Pa. 295, 302, 580 A.2d 295, 298 (1989).

2. Types

(a) **Oral and Anal Intercourse**

- 1 – sexual intercourse per os or per anus,
- 2 – between human beings;

Intercourse: the physical sexual contact between two individuals that involves the genitalia of at least one person. *Commonwealth v. Kelley*, 569 Pa. 179, 186, 801 A.2d 551, 555 (Pa. 2002).

Per Os or Per Anus: these terms describe oral and anal sex, i.e., intercourse “through or by means of the mouth or posterior opening of the alimentary canal.” *Commonwealth v. Kelley*, 569 Pa. 179, 186, 801 A.2d 551, 555 (Pa. 2002).

Oral Sex: “deviate sexual intercourse includes oral sex.” *Commonwealth v. Jacob*, 867 A.2d 614, 617 (Pa. Super. 2005); *Commonwealth v. Wilson* 825 A.2d 710, 714 (Pa. Super. 2003) (insertion of testicles into victim’s mouth clearly constituted oral intercourse).

Vaginal Oral Sex: “Deviate sexual intercourse is considered to have occurred if one’s mouth or tongue penetrates the vaginal area of another.” *In Interest of J.R.*, 648 A.2d 28, 33 (Pa. Super. 1994), *appeal denied*, 540 Pa. 584, 655 A.2d 515 (Pa. 1995).

Contrasted with Sexual Intercourse: Sexual intercourse is distinct from deviate sexual intercourse in that sexual intercourse “also includes intercourse in ‘its ordinary meaning.’” *Commonwealth v. Kelley*, 569 Pa. 179, 185, 801 A.2d 551, 555 (Pa. 2002).

(b) **Bestiality**

- 1 – any form of sexual intercourse,
- 2 – with an animal;

(c) **Penetration With a Foreign Object**

- 1 – penetration, however slight,
- 2 – of the genitals or anus of another person,
- 3 – with a foreign object for any purpose other than good faith medical, hygienic or law enforcement procedures.

Foreign object: 18 PA. CONS. STAT. ANN. § 3101 defines “foreign object” as “[i]nclud[ing] any physical object not a part of the actor’s body.”

Digital penetration: Digital penetration of the vagina, i.e., by a finger, is not deviate sexual intercourse. *Commonwealth v. Kelley*, 569 Pa. 179, 186, 801 A.2d 551, 555 (Pa. 2002) (must be with a foreign object, not a part of the human body).

3. Penetration

(a) Oral Penetration Sufficient

It has been held that oral contact with the female genitalia is sufficient to support the penetration requirement for IDSI.¹⁰

(b) Oral Penetration – Mouth or Tongue

An assailant can penetrate by use of the mouth or tongue.

Commonwealth v. Wilson, 825 A.2d 710, 714 (Pa. Super. 2003).¹¹ Some form of oral contact with the genitalia is all that is required.¹²

C. Forcible Compulsion

1. Definition

18 PA. CONS. STAT. ANN. § 3101 defines “forcible compulsion” as “[c]ompulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied. The term includes, but is not limited to, compulsion resulting in another person’s death, whether the death occurred before, during or after sexual intercourse.”

2. Moral, Psychological or Intellectual Force

Forcible Compulsion “includes not only physical force or violence but also moral, psychological, or intellectual force used to compel a person to engage in sexual intercourse against that person’s will.”

Youthful victims: The appellate courts have recognized the influence an adult has over a child. In **Commonwealth v. Rhodes**, 510 Pa. 537, 556, 510 A.2d 1217, 1227 (1986), the Pennsylvania Supreme Court stated:

There is an element of forcible compulsion, or the threat of forcible compulsion that would prevent resistance by a person of reasonable resolution, inherent in the situation in which an adult who is with a child who is younger, smaller, less psychologically and emotionally mature, and less sophisticated than the adult, instructs the child to submit to the performance of sexual acts. This is especially so where the child knows and trusts the adult. In such cases, forcible compulsion or the threat of forcible compulsion derives from the respective capacities of the child and the adult sufficient to induce the child to submit to the wishes of the adult (“prevent resistance”), without

¹⁰ **Commonwealth v. Trimble**, 615 A.2d 48, 50 (Pa. Super. 1992); **Commonwealth v. Ziegler**, 550 A.2d 567, 569 (Pa. Super. 1988).

¹¹ *See also, In the Interest of J.R.*, 648 A.2d 28, 33 (Pa. Super. 1994) *appeal denied*, 540 Pa. 584, 655 A.2d 515 (1995): “Deviate sexual intercourse is considered to have occurred if one’s mouth or tongue penetrates the vaginal area of another”; **Commonwealth v. L.N.**, 787 A.2d 1064, 1070 (Pa. Super. 2001), *alloc. denied*, 569 Pa. 680, 800 A.2d 931 (2002).

¹² **Commonwealth v. Trimble**, 615 A.2d 48, 50 (Pa. Super. 1992).

the use of physical force or violence or the explicit threat of physical force or violence.

The Pennsylvania Supreme Court again recognized the forcible compulsion is demonstrated by an adult's clear influence over an inexperienced child in ***Commonwealth v. Fears***, 575 Pa. 281, 305, 836 A.2d 52, 66 (2003), *cert. denied*, 545 U.S. 1141 (2005), which involved a 32 year old man and a twelve-year-old child.

3. Actual Force

The force needs to be such as to demonstrate an absence of consent, inducing submission without further resistance.¹³

The “forcible compulsion” component requires the Commonwealth to establish beyond a reasonable doubt that the defendant used either physical force, a threat of physical force, or psychological coercion, since the mere showing of a lack of consent does not support a conviction for Rape and/ or IDSI by forcible compulsion. ***Commonwealth v. Brown***, 556 Pa. 131, 136, 727 A.2d 541, 544 (1999).

For example, in a rape prosecution, the evidence was sufficient for the jury to find forcible compulsion, or threat of force, where evidence showed that defendant physically assaulted victim; hit the victim in her face with a pillow; held down the victim's shoulders before and during intercourse; and removed victim's clothing. ***Commonwealth v. Jones***, 672 A.2d 1353, 1354 (Pa. Super. 1996).

For example, in a rape prosecution, the evidence was sufficient for jury to find forcible compulsion or threat of forcible compulsion, where the defendant pinned victim against table and removed her pants and undergarments; the victim failed to physically resist because of fear of physical retribution. ***Commonwealth v. Richter***, 676 A.2d 1232, 1234 (Pa. Super. 1996), *affirmed*, 551 Pa. 507, 711 A.2d 464 (1998).

(a) Degree of Force

Pennsylvania courts have not drawn bright line rules regarding the degree of force required; instead “the degree of that force is relative and depends on the totality of the facts and circumstances of the particular case.” See ***Commonwealth v. Riley***, 643 A.2d 1090, 1091 (Pa. Super. 1994).

Factors to determine compulsion include:

- (i) the respective ages of the victim and the accused;
- (ii) the respective mental and physical conditions of the victim and the accused;

¹³ ***Commonwealth v. Buffington***, 574 Pa. 29, 42, 828 A.2d 1024, 1031 (2003).

- (iii) the atmosphere and physical setting in which the incident was alleged to have taken place;
- (iv) the extent to which the accused may have been in a position of authority, domination or custodial control over the victim;
- (v) whether the victim was under duress.

See e.g., Commonwealth v. Ruppert, 579 A.2d 966 (Pa. Super. 1990).

(b) Resistance

The prosecution does not have to show that the complainant offered any resistance towards the actor. 18 PA. CONS. STAT. ANN. § 3107.

18 PA. CONS. STAT. ANN. § 3107. Resistance Not Required

The alleged victim need not resist the actor in prosecutions under this chapter: Provided, however, That nothing in this section shall be construed to prohibit a defendant from introducing evidence that the alleged victim consented to the conduct in question.

As stated in the aforesaid section, the defense may introduce evidence of non-resistance to demonstrate that the alleged victim consented. As stated by the Pennsylvania Supreme Court in *Commonwealth v. Rhodes*, 510 Pa. 537, 557 n. 14, 510 A.2d 1217, 1227 n. 14, (1986):

It is not necessary to prove that the victim actually resisted in order to prove that the act of sexual intercourse was against the victim's will and/or without consent. Section 3107 provides that the "victim need not resist the actor in prosecutions under" chapter 31 and makes it clear that lack of consent is not synonymous with lack of resistance. 18 PA. CONS. STAT. ANN. § 3107.

Therefore, the prosecution does not have to prove that the alleged victim resisted the attack in order to prove that the sexual conduct was against the victim's will or without the victim's consent.

D. Indecent Contact

1. Definition

18 PA. CONS. STAT. ANN. § 3101 defines "indecent contact" as "[a]ny touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire, in either person."

2. Genitals

This sections' plain meaning is that "indecent contact" occurs when there is proscribed contact with the female or male genitals.

- ***Commonwealth v. Gordon***, 543 Pa. 513, 520, 673 A.2d 866, 869 (1996): defendant rubbed his penis against "buttocks/thigh/legs" of victim.
- ***In re J.R.***, 648 A.2d 28, 33 (Pa. Super. 1994), *appeal denied*, 540 Pa. 584, 655 A.2d 515 (1995): defendant licked vaginal area of victim.

3. Other Intimate Parts

Phrase "other intimate parts" does not refer solely to genitalia.¹⁴

- ***Commonwealth v. Capo***, 727 A.2d 1126(Pa. Super. 1999), *appeal denied*, 561 Pa. 667, 749 A.2d 465 (1999): non-consensual attempt to kiss victim on the mouth, and rubbing of her shoulders, back and stomach considered indecent contact.

4. Touching

Not limited to hand or foot: The term touching is not limited to the hand or foot; rather, the courts look to either the defendant's body or the victim's body to determine if there has been a "touching" within the statute.¹⁵

- if any part of a victim's body is brought into contact with a sexual or intimate part of the defendant's body, without the victim's consent, for the purpose of arousing or gratifying the sexual desire in either person, such contact constitutes indecent contact.¹⁶
- if a sexual or intimate part of the victim's body is brought into contact with any part of the defendant's body, without the victim's consent, for the purpose of arousing or gratifying the sexual desire in either person, such contact constitutes indecent contact.¹⁷

No Direct Skin-to-Skin Contact Necessary: Touching occurs even though there is no skin-to-skin contact.

- ***Commonwealth v. Ricco***, 650 A.2d 1084 (Pa. Super. 1994): touching occurred when defendant placed victim's hand on his genitals, even though he was wearing underwear.

¹⁴ ***Commonwealth v. Capo***, 727 A.2d 1126(Pa. Super. 1999), *appeal denied*, 561 Pa. 667, 749 A.2d 465 (1999).

¹⁵ ***Commonwealth v. Grayson***, 549 A.2d 593, 596 (Pa. Super. 1988).

¹⁶ *Id.*

¹⁷ *Id.*

E. Serious Bodily Injury

1. Definition

18 PA. CONS. STAT. ANN. § 2301 defines “serious bodily injury” as: bodily injury which creates:

- a substantial risk of death or,
- causes serious, permanent disfigurement,
- results in a protracted loss or impairment of the function of any bodily member or organ.

2. Types

(a) Substantial Risk of Death

- ***Commonwealth v. Caterino***, 678 A.2d 389, 392-393 (Pa. Super. 1996), appeal denied, 546 Pa. 652, 684 A.2d 555 (Pa. 1996): physical assault which resulted in victim’s broken nose and severed artery constituted “serious bodily injury” when victim could have bled to death. Note: broken nose and minor facial lacerations alone are insufficient to constitute “serious bodily injury”.

(b) Impairment of the Function of a Bodily Member

- ***Commonwealth v. Nichols***, 692 A.2d 181, 184 (Pa. Super. 1997): suffering a broken jaw and being confined to a liquid diet constitute impairment of the function of a bodily member.
- ***Commonwealth v. Cassidy***, 668 A.2d 1143, 1146 (Pa. Super. 1995), alloc. denied, 545 Pa. 660, 681 A.2d 176 (1996): victim’s wearing of removable braces on her wrist and back for two months comprised impairment of function of a bodily member.
- ***Commonwealth v. Phillips***, 410 A.2d 832, 834 (Pa. Super. 1979): gunshot wound to leg, requiring two week stay in hospital and resulting in inability to walk for one month, considered serious bodily injury – protracted impairment of function of a bodily member.

3. Injuries that Do Not Constitute “Serious Bodily Injury”

(a) Facial Injuries

Broken nose, two black eyes and facial lacerations not considered serious bodily injury. ***Commonwealth v. Alexander***, 477 Pa. 190, 194, 383 A.2d 887, 889 (1978).

(b) **Blow to Head**

Evidence that victim was struck on the head by a door, knocking her to the floor, but not unconscious, was deemed insufficient to prove serious bodily injury. *Commonwealth v. Adams*, 482 A.2d 583, 587 (1984).

F. Sexual Intercourse

1. Definition

18 PA. CONS. STAT. ANN. § 3101 defines “sexual intercourse” as “In addition to its ordinary meaning, includes intercourse per os or per anus, with some penetration however slight; emission is not required.”

(a) **Intercourse - Ordinary Meaning**

The plain meaning of “intercourse” is “physical sexual contact between individuals that involves the genitalia of at least one person . . .” In accord with Webster’s Third New International Dictionary 1177 (unabridged 1986).¹⁸

(b) **Penetration Requirement**

The requirement is “penetration, however, slight”; there is no requirement that penetration reach the vagina or “farther reaches of the female genitalia...” *Commonwealth v. Trimble*, 615 A.2d 48, 50 (Pa. Super. 1992), citing *Commonwealth v. McIlvaine*, 560 A.2d 155, 159 (Pa. Super. 1989); *In re A.D.*, 771 A.2d 45, 49 (Pa. Super. 2001).¹⁹

Oral Penetration Sufficient: It has been held that oral contact with the female genitalia is sufficient to support the penetration requirement for IDSI.²⁰ Both “deviate sexual intercourse” and “sexual intercourse” include the phrase “penetration, however slight.” 18 PA. CONS. STAT. ANN. § 3101.

Oral Penetration – Mouth or Tongue: An assailant can penetrate by use of the mouth or tongue. *Commonwealth v. Wilson*, 825 A.2d 710, 714 (Pa. Super. 2003).²¹ Some form of oral contact with the genitalia is all that is required.²²

¹⁸ *Commonwealth v. Kelley*, 569 Pa. 179, 186-187, 801 A.2d 551, 555 (2002).

¹⁹ *See generally*, What constitutes penetration in prosecution for rape or statutory rape, 76 A.L.R.3d 163, § 3 (1977).

²⁰ *Commonwealth v. Trimble*, 615 A.2d 48, 50 (Pa. Super. 1992); *Commonwealth v. Ziegler*, 550 A.2d 567, 569 (Pa. Super. 1988).

²¹ *See also, In the Interest of J.R.*, 648 A.2d 28, 33 (Pa. Super. 1994) *appeal denied*, 540 Pa. 584, 655 A.2d 515 (1995): “Deviate sexual intercourse is considered to have occurred if one’s mouth or tongue penetrates the vaginal area of another”; *Commonwealth v. L.N.*, 787 A.2d 1064, 1070 (Pa. Super. 2001), *alloc. denied*, 569 Pa. 680, 800 A.2d 931 (2002).

²² *Commonwealth v. Trimble*, 615 A.2d 48, 50 (Pa. Super. 1992).

Digital Penetration: Digital penetration of the vagina is not sexual intercourse. *Commonwealth v. Kelley*, 569 Pa. 179, 186, 801 A.2d 551, 555 (2002) (penetration must be with a foreign object, not a part of the human body).

Testimony of Victim Sufficient: The uncorroborated testimony of a rape victim as to penetration, if believed by the jury, is sufficient to support a rape conviction, and no medical testimony is needed to corroborate a victim's testimony. *Commonwealth v. Poindexter*, 646 A.2d 1211, 1214 (Pa. Super. 1994); *Commonwealth v. Price*, 616 A.2d 681, 685 (Pa. Super. 1992).

Penetration Proven Circumstantially: Circumstantial evidence may be used to prove the element of penetration. *Commonwealth v. Stambaugh*, 512 A.2d 1216, 1219 (Pa. Super. 1986) (gynecologist testified that the complainant's hymen was no longer intact). *Commonwealth v. Usher*, 371 A.2d 995, 997-998 (1977). In *Commonwealth v. Xiong*, 630 A.2d 446 (Pa. Super. 1993) (en banc), *appeal denied*, 537 Pa. 609, 641 A.2d 309 (1994), the Superior Court ruled that evidence that the victim's hymen was no longer intact was admissible as circumstantial evidence of penetration, but alone insufficient to prove penetration. 630 A.2d at 454.

(c) **Emission not required**

Sexual intercourse occurs "with some penetration however slight; emission is not required." *Commonwealth v. Fiebiger*, 570 Pa. 583, 590, n.4, 810 A.2d 1233, 1237, n.4 (2002).

2.3 AGE OF ACCUSED

A. Age of Accused: Generally

If an accused is of eighteen years of age or older at the time of the commission of the sexually violent crime, the prosecution is under the criminal law and procedures. However, the Juvenile Act, 42 PA.CON.S.TAT.ANN. § 6301 et seq., allows the prosecution of a juvenile²³ in criminal court under two separate circumstances. The first is a direct file under Section 6302 of the Juvenile Act,

²³ The Juvenile Act defines child as: [a]n individual who: (1) is under the age of 18 years; (2) is under the age of 21 years who committed an act of delinquency before reaching the age of 18 years; or (3) was adjudicated dependent before reaching the age of 18 years and who, while engaged in a course of instruction or treatment, requests the court to retain jurisdiction until the course has been completed, but in no event shall a child remain in a course of instruction or treatment past the age of 21 years. 42 PA.CON.S.TAT.ANN. § 6302. Additionally, to fall under the definition of a "delinquent child" a juvenile must be at least 10 years of age: "Delinquent child. A child ten years of age or older whom the court has found to have committed a delinquent act and is in need of treatment, supervision or rehabilitation." *Id.* The juvenile court is divested of jurisdiction when an individual reaches 21 years of age: "Juvenile court jurisdiction terminates at 21, regardless of whether or not appellants continue to pose a threat to society." *Commonwealth v. Zoller*, 498 A.2d 436, 440 (Pa. Super. 1985).

42 PA.CON.S.STAT.ANN. § 6302, and the second is a discretionary transfer pursuant to Section 6355 of the Juvenile Act, 42 PA.CON.S.STAT.ANN. § 6355(a).

B. Excluded Offenses from Jurisdiction of Juvenile Court

1. Direct File Crimes

Pursuant to 42 PA.CON.S.STAT.ANN. § 6322(a), when a juvenile has committed a crime, which includes murder, or any of the other offenses listed under paragraph (2)(ii) or (iii) of the definition of “delinquent act” in 42 PA.CON.S.STAT.ANN. § 6302, the criminal division of the Court of Common Pleas is vested with jurisdiction. Similarly, 42 PA.CON.S.STAT.ANN. § 6355(e) states that charges of murder, or any of the other offenses listed under paragraph (2)(ii) or (iii) of the definition of “delinquent act” in 42 PA.CON.S.STAT.ANN. § 6302, requires that the offense be prosecuted in the criminal division.

Under 42 PA.CON.S.STAT.ANN. § 6302 (definition of “Delinquent Act”), the direct filing of adult criminal charges against a juvenile of age 15 years or older is required for specified sexually violent felonies, as well as other violent felonies, if a deadly weapon is used in the commission of the sexually violent offense(s) stated below:

- (i) Rape as defined in 18 PA.CON.S.STAT.ANN. § 3121;
- (ii) Involuntary deviate sexual intercourse as defined in 18 PA.CON.S.STAT.ANN. § 3123;
- (iii) Aggravated indecent assault as defined in 18 PA.CON.S.STAT.ANN. § 3125;
- (iv) An attempt, conspiracy or solicitation to commit any of these crimes, as provided in 18 PA.CON.S.STAT.ANN. §§ 901, 902 and 903.

42 PA.CON.S.STAT.ANN. § 6302, Delinquent Act (2)(ii)

Furthermore, the direct filing of adult criminal charges against a juvenile of age 15 years or older is required if the juvenile is currently charged and has a previous adjudication of any of the following sexually violent crimes, among other violent crimes:

- (i) Rape as defined in 18 PA.CON.S.STAT.ANN. § 3121;
- (ii) Involuntary deviate sexual intercourse as defined in 18 PA.CON.S.STAT.ANN. § 3123;
- (iii) Aggravated indecent assault as defined in 18 PA.CON.S.STAT.ANN. § 3125;
- (iv) An attempt, conspiracy or solicitation to commit any of these crimes, as provided in 18 PA.CON.S.STAT.ANN. §§ 901, 902 and 903.

42 PA.CON.S.STAT.ANN. § 6302, Delinquent Act (2)(iii).

If the circumstances of the offender’s age, prior juvenile history and current offense(s) fall under Section 6302, then the offense(s) must be prosecuted under the criminal law and procedures because the offense(s) do not qualify as “delinquent acts” and therefore do not fall under the Juvenile Act. In such cases, the juvenile court lacks subject matter jurisdiction *ad initio*. **Commonwealth v. D.S.**, 903 A.2d 582, 586 (Pa.Super. 2006); **Commonwealth v. Sanders**, 814 A.2d 1248, 1250 (Pa.Super. 2003), **appeal denied**, 573 Pa. 704, 827 A.2d 430 (2003); 42 PA.CON.S.TAT.ANN. § 6322(a).

In a direct file case, the juvenile has the option of requesting treatment within the juvenile system through a transfer process known as “decertification.” **See Commonwealth v. Aziz**, 724 A.2d 371, 373 (Pa.Super. 1999), **appeal denied**, 563 Pa. 670, 759 A.2d 919 (2000). In determining whether to transfer such a case from criminal division to juvenile division, “the child shall be required to establish by a preponderance of the evidence that the transfer will serve the public interest.” 42 PA.CON.S.TAT.ANN. § 6322(a). Pursuant to § 6322(a) the trial court must consider the factors contained in 42 PA.CON.S.TAT.ANN. § 6355(a)(4)(iii) in determining whether the child has established that the transfer will serve the public interest. The statutorily set factors are listed below.

The decision whether to grant decertification will not be overturned absent a gross abuse of discretion. **Commonwealth v. Aziz**, 724 A.2d 371, 378, (Pa.Super. 1999), **appeal denied**, 563 Pa. 670, 759 A.2d 919 (2000).

2. Discretionary Certification

(a) Certification to Criminal Court

The transfer of juvenile matters to an adult court for prosecution is governed by statute, and applies to offenders age 14 years or older. The Juvenile Court, pursuant to 42 PA.CON.S.TAT.ANN. § 6355, must review numerous factors:

42 PA.CON.S.TAT.ANN. § 6355

Transfer to Criminal Proceedings, provides:

(a) **General Rule.**—After a petition has been filed alleging delinquency based on conduct which is designated a crime or public offense under the laws, including local ordinances, of this Commonwealth, the court before hearing the petition on its merits may rule that this chapter is not applicable and that the offense should be prosecuted, and transfer the offense, where appropriate, to the division or a judge of the court assigned to conduct criminal proceedings, for prosecution of the offense if all of the following exist:

- (1) The child was 14 or more years of age at the time of the alleged conduct.

- (2) A hearing on whether the transfer should be made is held in conformity with this chapter.
- (3) Notice of writing of the time, place, and purpose of the hearing is given to the child and his parents, guardian, or other custodian at least three days before the hearing.
- (4) The court finds:
 - (i) that there is a prima facie case that the child committed the delinquent act alleged;
 - (ii) that the delinquent act would be considered a felony if committed by an adult;
 - (iii) that there are reasonable grounds to believe that the public interest is served by the transfer of the case for criminal prosecution. In determining whether the public interest can be served, the court shall consider the following factors:
 - (A) the impact of the offense on the victim or victims;
 - (B) the impact of the offense on the community;
 - (C) the threat to the safety of the public or any individual posed by the child;
 - (D) the nature and circumstances of the offense allegedly committed by the child;
 - (E) the degree of the child's culpability;
 - (F) the adequacy and duration of dispositional alternatives available under this chapter and in the adult criminal justice system; and
 - (G) whether the child is amenable to treatment, supervision or rehabilitation as a juvenile by considering the following factors:
 - (I) age;
 - (II) mental capacity;
 - (III) maturity;
 - (IV) the degree of criminal sophistication exhibited by the child;

- (V) previous records, if any;
 - (VI) the nature and extent of any prior delinquent history, including the success or failure of any previous attempts by the juvenile court to rehabilitate the child;
 - (VII) whether the child can be rehabilitated prior to the expiration of the juvenile court jurisdiction;
 - (VIII) probation or institutional reports, if any;
 - (IX) any other relevant factors; and
- (iv) that there are reasonable grounds to believe that the child is not committable to an institution for the mentally retarded or mentally ill.

(b) Chapter Inapplicable Following Transfer.—The transfer terminates the applicability of this chapter over the child with respect to the delinquent acts alleged in the petition.

(c) Transfer at Request of Child.—The child may request that the case be transferred for prosecution in which event the court may order this chapter not applicable.

The emphasis of the court’s review is on what best serves the public interest. To avoid certification when it is requested by the prosecution, the juvenile must establish his amenability to the juvenile system, rather than on the Commonwealth to prove a lack of amenability. *In re J.B.*, 909 A.2d 393, 396 (Pa.Super. 2006). The juvenile’s amenability to treatment is one of several factors in determining whether the public interest is served by transferring the case for criminal prosecution. *See Commonwealth v. Burley*, 715 A.2d 430, 433 (Pa.Super. 1998), *appeal denied*, 558 Pa. 606, 736 A.2d 602 (1999); 42 PA.CON.S.TAT.ANN. § 6355(a)(4)(iii).

(b) Appellate Review

When reviewing a trial court’s decision to certify a juvenile for trial as an adult, the appellate court will not disturb the juvenile court’s determination, absent a gross abuse of discretion. *Commonwealth v. McGinnis*, 675 A.2d 1282 (Pa. Super. 1996). A gross abuse of discretion is shown by “an exercise of manifestly unreasonable judgment based upon partiality, prejudice or ill will.” *Commonwealth v. Potts*, 673 A.2d 956, 959 (Pa.Super. 1996).

Appellate court will review the record to ensure that trial court gave equal concern for the *public interest* with the rehabilitation of the child. Trial court may not ignore the public interest determination required by the Juvenile Act in 42 PA.CONS.STAT.ANN. § 6355(a)(4) and focus solely or primarily on the rehabilitative needs of the juvenile. *In re J.B.*, 909 A.2d 393 (Pa.Super. 2006).

2.4 RAPE

Types of Rape: Elements

- 1) Engaging in sexual intercourse with a complainant;²⁴
- 2) In one of the following circumstances:
 - a) By forcible compulsion²⁵ (18 PA. CONS. STAT. ANN. § 3121(a)(1));
 - b) By threat of forcible compulsion that would prevent resistance by a person of reasonable resolution (18 PA. CONS. STAT. ANN. § 3121(a)(2));
 - c) The complainant is unconscious or where the person knows that the complainant is unaware that the sexual intercourse is occurring (18 PA. CONS. STAT. ANN. § 3121(a)(3));
 - d) The person has substantially impaired the complainant's power to appraise or control his or her conduct by administering or employing without the knowledge of the complainant, drugs, intoxicants or other means for the purpose of preventing resistance (18 PA. CONS. STAT. ANN. § 3121(a)(4));
 - e) The complainant suffers from a mental disability which renders the complainant incapable of consent (18 PA. CONS. STAT. ANN. § 3121(a)(5));
 - f) The person engages in sexual intercourse with a complainant who is less than 13 years of age. (18 PA. CONS. STAT. ANN. § 3121 (c));
 - g) The person violates Section 3121 and the complainant is under 13 years of age and suffers serious bodily injury in the course of the offense. (18 PA. CONS. STAT. ANN. § 3121 (d)).

A. Rape by Forcible Compulsion

1. Statutory

18 PA. CONS. STAT. ANN. § 3121(a)(1).

2. Forcible Compulsion

The force necessary to support a conviction of rape ... need only be such as to establish lack of consent and to induce the [victim] to submit without

²⁴ "Sexual intercourse" and complainant" are defined in Chapter 2, section 2.2.

²⁵ "Forcible Compulsion" is defined in Chapter 2, section 2.2.

additional resistance. *Commonwealth v. Berkowitz*, 537 Pa. 143, 148, 641 A.2d 1161, 1163 (1994).

(a) **Type of Force**

There must be a showing of either physical force, a threat of physical force, or psychological coercion, to satisfy the “forcible compulsion” requirement under 18 PA. CONS. STAT. ANN. § 3121. *Commonwealth v. Berkowitz*, 537 Pa. 143, 149, 641 A.2d 1161, 1164 (1994).

(b) **Degree of Force**

The degree of force required to constitute rape is relative and depends on the facts and particular circumstances of the case. *Commonwealth v. Berkowitz*, 537 Pa. 143, 148, 641 A.2d 1161, 1163 (1994).

Statement of non-consent: A statement of non-consent, such as when a victim says “no” throughout the sexual encounter, is relevant to the issue of consent, but not relevant to the issue of force. *Commonwealth v. Berkowitz*, 537 Pa. 143, 149, 641 A.2d 1161, 1164 (1994).

3. Consent

The essence of the criminal act of rape is involuntary submission to sexual intercourse. *Commonwealth v. Karkaria*, 533 Pa. 412, 420, 625 A.2d 1167, 1170 (Pa. 1993). Therefore, effective consent to sexual intercourse will negate a finding of forcible compulsion. *Commonwealth v. Rhodes*, 510 Pa. 537, 554, 510 A.2d 1217, 1225 (Pa. 1986).

(a) **Mistake of Fact**

In Rape or IDSI prosecutions, there is no reasonable mistake of fact defense as to consent. *Commonwealth v. Fischer*, 721 A.2d 1111 (Pa. Super. 1998), *appeal dismissed as improvidently granted*, 560 Pa. 410, 745 A.2d 1214 (2000); *Commonwealth v. Farmer*, 758 A.2d 173 (Pa. Super. 2000), *appeal denied*, 565 Pa. 637, 771 A.2d 1279 (2001)

(b) **Post-rape Trauma**

Evidence of a victim’s post-rape trauma is admissible in order to prove lack of consent. *Commonwealth v. Pickford*, 536 A.2d 1348, 1351-1352 (Pa. Super. 1987), *appeal dismissed*, 522 Pa. 506, 564 A.2d 158 (1989).

4. Rape Trauma Syndrome

An expert’s testimony concerning the effect of “rape trauma syndrome” on a victim, i.e., her failure to identify the assailant

shortly after the sexual assault because of an acute phase of “rape trauma syndrome,” making ordinary functions difficult, improperly enhanced the victim’s credibility in the eyes of jury, and, as such, was inadmissible. *Commonwealth v. Gallagher*, 519 Pa. 291, 297, 547 A.2d 355, 358 (1988). The Court found equally inadmissible the same expert’s opinion that the victim’s in-court identification five years later was credible.

In *Commonwealth v. Pickford*, 536 A.2d 1348, 1351 n. 2 (Pa. Super. 1987), *appeal dismissed*, 522 Pa. 506, 564 A.2d 158 (1989), the Superior Court described rape trauma syndrome as follows:

Rape trauma syndrome is one kind of post-traumatic stress disorder. The essential feature of post-traumatic stress disorder is the development of characteristic symptoms after a psychologically traumatic incident that is usually beyond the range of ordinary human experience. Those symptoms typically involve reexperiencing the traumatic incident; numbing of responsiveness to, or lessened involvement with, the external world; and a variety of autonomic, dysphoric, or cognitive symptoms.

Its relevance to the issue of consent is that if the victim exhibits the symptomology of rape trauma syndrome, it is likely that she was in fact raped and that she did not consent. *Gallagher*, 353 Pa. Super. at 456-457, 510 A.2d at 751, (Cavanaugh, J., dissenting).

B. Rape by Threat of Forcible Compulsion

1. Statutory

18 PA. CONS. STAT. ANN. § 3121(a)(2).

2. “Forcible Compulsion”

“Forcible compulsion” defined in Chapter 2, section 2.2.

3. Objective Standard

An objective standard is used in determining whether this circumstance is present. *Commonwealth v. Rhodes*, 510 Pa. 537, 510 A.2d 1217 (1986).

4. Verbal Threats Sufficient

Verbal threats are sufficient to establish threat of forcible compulsion. *Commonwealth v. Montgomery*, 687 A.2d 1131 (Pa. Super. 1996). (Opinion by Olszewski, J., with Judges concurring in result.)

5. Implied Threats

If a physical assault occurs “shortly before sexual intercourse” and the physical assault is unrelated to a desire to have sex, then there may be an implied threat that not submitting to sexual intercourse will result in further physical abuse. “[I]f the complainant acquiesced in the sexual relations out of fears generated by the earlier assault, then she did not ‘consent’ to the sexual intercourse.” See **Commonwealth v. Harvey**, 27 Pa. D & C.4th 171, 175-176 (Crawford Cty. 1994).

C. Rape When the Complainant is Unconscious or Unaware

1. Statutory

18 PA. CONS. STAT. ANN. § 3121(a)(3).

2. Purpose of Section

This subsection proscribing intercourse with “unconscious” persons was enacted to proscribe intercourse with persons unable to consent because of their physical condition. **Commonwealth v. Price**, 616 A.2d 681 (Pa. Super. 1992).

3. Sleeping Victim

A sleeping victim is unconscious for purposes of rape statute. **Commonwealth v. Price**, 616 A.2d 681 (Pa. Super. 1992). This circumstance is present so long as the complainant was unconscious when sexual intercourse was initiated. *Id.* See also, **Commonwealth v. Widmer**, 560 Pa. 308, 744 A.2d 745 (Pa. 2000).

4. Unconscious Victim

A complainant is unconscious when she lacks the conscious awareness she would possess in the normal waking state. **Commonwealth v. Widmer**, 560 Pa. 308, 744 A.2d 745 (2000).

5. Constructively Unconscious

A complainant may be constructively unconscious if his or her awareness is severely impaired. **Commonwealth v. Erney**, 548 Pa. 467, 698 A.2d 56 (1997). The Pennsylvania Supreme Court has held that the statutory elements of section 3121(a)(3) are established if the victim was intermittently conscious and unconscious throughout an assault and was “at all relevant times in such impaired physical and mental condition so as to be unable to knowingly consent[.]” *Id.*, 548 Pa. at 473, 698 A.2d at 59. In such cases, the victim’s submission to sexual intercourse is deemed involuntary, and intercourse with her constitutes rape of an unconscious individual. *Id.* See also, **Commonwealth v. Lungin**, 77 Pa. D. & C.4th 267 (Bucks Cty. 2005)

D. Rape When the Assailant has Impaired the Complainant's Power to Resist

1. Statutory

18 PA. CONS. STAT. ANN. § 3121(a)(4).

2. Additional penalty

An *additional penalty* of up to ten years imprisonment and a fine of up to \$100,000 may be imposed on persons convicted under 18 PA. CONS. STAT. ANN. § 3121(a)(4).

E. Rape When a Mental Disability Renders the Complainant Incapable of Consent

1. Statutory

18 PA. CONS. STAT. ANN. § 3121(a)(5).

2. Commonwealth's Burden of Proof

The Commonwealth must prove the defendant acted intentionally, knowingly, or recklessly regarding the victim's mental disability for every material element of the statutory provision.²⁶

F. Rape of a Child

1. Statutory

18 PA. CONS. STAT. ANN. § 3121 (c).

2. Elements of offense

A person commits the offense of rape of a child when the person engages in sexual intercourse with a complainant who is less than 13 years of age.

3. Mistake as to age

It is no defense that the perpetrator did not know the age of the child or reasonably believed that child to be the age of 13 years or older.

18 PA. CONS. STAT. ANN. § 3102

Mistake as to Age

Except as otherwise provided, whenever in this chapter the criminality of conduct depends on a child being below the age of 14 years, it is no defense that the defendant did not know the age of the child or reasonably believed the child to be the age of 14 years or older. When criminality depends on the child's being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age.

²⁶ See *Commonwealth v. Thomson*, 673 A.2d 357 (Pa. Super. 1996), *appeal denied*, 546 Pa. 679, 686 A.2d 1310(1996).

Commonwealth v. Dennis, 784 A.2d 179, 181 (Pa. Super. 2001), *appeal denied*, 568 Pa. 733, 798 A.2d 1287 (2002): Victim of 12 years of age deemed incapable of consenting, therefore defendant was criminally liable for rape, regardless of the victim's consent or of defendant's purported belief that victim was 14 or 16.

G. Rape of a Child Resulting in Serious Bodily Injury

1. Statutory

18 PA. CONS. STAT. ANN. § 3121 (d).

2. Elements of Offense

A person commits the offense of rape of a child resulting in serious bodily injury when the person violates this section, and the complainant is under 13 years of age and suffers serious bodily injury in the course of the offense.

Commonwealth v. Kerrigan, ___ A.2d ___, 2007 WL 695292 (Pa. Super. 2007): the transmission of HPV and genital warts satisfies the *serious bodily injury* requirement because of the permanent nature of the disease, the fact that the victim risks passing the virus to future sexual partners or children she may choose to have through the birth canal, and because there is a strong link between HPV and cervical and other genital cancers.

3. Mistake as to Age

It is no defense that the perpetrator did not know the age of the child or reasonably believed that child to be the age of 13 years or older.

18 PA. CONS. STAT. ANN. § 3102

Mistake as to Age

Except as otherwise provided, whenever in this chapter the criminality of conduct depends on a child being below the age of 14 years, it is no defense that the defendant did not know the age of the child or reasonably believed the child to be the age of 14 years or older. When criminality depends on the child's being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age.

H. Key Provisions

1. Fundamental Nature of Rape

The essence of the criminal act of rape is involuntary submission to sexual intercourse. **Commonwealth v. Karkaria**, 533 Pa. 412, 420, 625 A.2d 1167, 1170 (1993).

2. Penetration Necessary

Some degree of penetration, which, however slight, is sufficient to fulfill the “penetration” element of rape. *Commonwealth v. Fiebiger*, 570 Pa. 583, 590, n.4., 810 A.2d 1233, 1237, n.4 (2002). See discussion *Section 2.2(G)(1)(b)*.

3. Time of Offense

A criminal prosecution also requires proof beyond a reasonable doubt that the accused committed the offense charged at the time specified within the indictment. *Commonwealth v. Karkaria*, 533 Pa. 412, 420, 625 A.2d 1167, 1170 (1993).

4. No Resistance Necessary

“The victim of a rape need not resist.” *Commonwealth v. Berkowitz*, 537 Pa. 143, 148, 641 A.2d 1161, 1163 (1994); 18 PA. CONS. STAT. ANN. § 3107. See discussion *Section 2.2(D)(3)(b)*.

I. Penalties

Merger: Counts of rape and involuntary deviate sexual intercourse do not merge for sentencing purposes if the convictions were supported by separate facts, i.e., separate acts. *Commonwealth v. Snyder* 870 A.2d 336, 349 (Pa.Super. 2005).

1. Rape

Any offense listed under 18 PA. CONS. STAT. ANN. § 3121(a) is graded as a Felony of the First Degree. In accordance with 18 PA. CONS. STAT. ANN. § 1103, in the case of a felony of the first degree, a term of imprisonment shall be fixed by the court at not more than 20 years, and in accordance with 18 PA. CONS. STAT. ANN. § 1101, a fine not to exceed \$ 25,000.

An *additional penalty* of up to ten years imprisonment and a fine of up to \$100,000 may be imposed on persons convicted where the person engaged in sexual intercourse with a complainant and substantially impaired the complainant’s power to appraise or control his or her conduct by administering or employing, without the knowledge of the complainant, any substance for the purpose of preventing resistance through the inducement of euphoria, memory loss and any other effect of this substance. 18 PA. CONS. STAT. ANN. § 3121(b).

2. Rape of a Child

The offense of rape of a child under 18 PA. CONS. STAT. ANN. § 3121(c) is graded as a Felony of the First Degree.

Notwithstanding the general provisions regarding sentencing for a Felony of the First Degree, a person convicted of rape of a child “shall be sentenced to a term of imprisonment which shall be fixed by the court at no more than 40 years.” 18 PA. CONS. STAT. ANN. § 3121(e)(1).

3. Rape of a child resulting in serious bodily injury

The offense of rape of a child resulting in serious bodily injury under 18 PA. CONS. STAT. ANN. § 3121(d) is graded a Felony of the First Degree.

Notwithstanding the general provisions regarding sentencing for a Felony of the First Degree, a person convicted of rape of a child resulting in serious bodily injury “shall be sentenced to a maximum term of *life imprisonment*.” 18 PA. CONS. STAT. ANN. § 3121(e)(2).

2.5 STATUTORY SEXUAL ASSAULT

A. Statutory

18 PA. CONS. STAT. ANN. § 3122.1

B. Elements of Offense

In the absence of additional circumstances sufficient to satisfy the requirements of 18 PA. CONS. STAT. ANN. § 3121 (Rape), a person is guilty of statutory sexual assault if that person engages in sexual intercourse with a complainant and:

- 1) The complainant is under 16 years of age;
- 2) The defendant is four or more years older than the complainant; and
- 3) The complainant and the defendant are not married to each other.

C. Consent Not a Defense

Consent is not a defense to statutory sexual assault. *Commonwealth v. Duffy*, 832 A.2d 1132 (Pa. Super. 2003), *appeal denied*, 577 Pa. 694, 845 A.2d 816 (2004).

Statutory sexual assault and sexual assault are not greater and lesser included offenses as lack of consent is a required element of sexual assault.

D. Mistake as to Age

When the criminal liability of the perpetrator depends on the victim being a child who is below a critical age **older** than 14 years, it is a defense if the defendant can show, by the standard of the preponderance of the evidence, that the perpetrator reasonably believed that the child was above the critical age.

18 PA. CONS. STAT. ANN. § 3102

Mistake as to Age

Except as otherwise provided, whenever in this chapter the criminality of conduct depends on a child being below the age of 14 years, it is no defense that the defendant did not know the age of the child or reasonably believed the child to be the age of 14 years or older. When criminality depends on the child’s

being below a critical age older than 14 years, it is a defense for the defendant to prove by a preponderance of the evidence that he or she reasonably believed the child to be above the critical age.

E. Penalty

Statutory sexual assault is a felony of the second degree and the maximum incarceration sentence is 10 years, and the maximum fine is \$ 25,000.

2.6 INVOLUNTARY DEVIATE SEXUAL INTERCOURSE

Types of IDSI: Elements

- 1) Engaging in deviate sexual intercourse with a complainant;²⁷
- 2) In one of the following circumstances:
 - a) By forcible compulsion²⁸ (18 PA. CONS. STAT. ANN. § 3123(a)(1)); or
 - b) By threat of forcible compulsion that would prevent resistance by a person of reasonable resolution (18 PA. CONS. STAT. ANN. § 3123(a)(2)); or
 - c) The complainant is unconscious or the defendant knows that the complainant is unaware of the fact that sexual intercourse is occurring (18 PA. CONS. STAT. ANN. § 3123(a)(3)); or
 - d) The defendant has substantially impaired the complainant’s ability to control his or her conduct through the use of drugs, intoxicants or other means without the complainant’s knowledge (18 PA. CONS. STAT. ANN. § 3123(a)(4)); or
 - e) The complainant suffers from a mental disability which renders the complainant incapable of consent (18 PA. CONS. STAT. ANN. § 3123(a)(5)); or
 - f) The complainant is less than 16 years of age and the defendant is four or more years older than the complainant and the complainant and person are not married to each other (18 PA. CONS. STAT. ANN. § 3123(a)(7)); or
 - g) The person engages in deviate sexual intercourse with a complainant who is less than 13 years of age (18 PA. CONS. STAT. ANN. § 3123(b)); or
 - h) The person violates section 3123 and the complainant is less than 13 years of age and suffers serious bodily injury in the course of the offense (18 PA. CONS. STAT. ANN. § 3123(c)).

²⁷ “Deviate sexual intercourse” and “complainant” are defined in Chapter 2, section 2.2.

²⁸ “Forcible Compulsion” is defined in Chapter 2, section 2.2.

A. IDSI By Forcible Compulsion

1. Statutory

18 PA. CONS. STAT. ANN. § 3123(a)(1).

“The crime of involuntary deviate sexual intercourse occurs when the actor, by physical compulsion or threats thereof, coerces the victim to engage in acts of anal and/or oral intercourse.” *Commonwealth v. Snyder*, 870 A.2d 336, 351 (Pa.Super. 2005), quoting *Commonwealth v. Zingarelli*, 839 A.2d 1064, 1070 (Pa.Super. 2003), *appeal denied*, 579 Pa. 692, 856 A.2d 834 (2004).

2. Forcible compulsion

“Forcible compulsion” is discussed in Chapter 2, sections 2.2(D) and 2.4(B)(2).

B. IDSI By Threat of Forcible Compulsion

1. Statutory

18 PA. CONS. STAT. ANN. § 3123(a)(2).

2. Objective Standard

An objective standard is used in determining whether this circumstance is present. *Commonwealth v. Rhodes*, 510 Pa. 537, 510 A.2d 1217 (1986).

Verbal threats are sufficient to establish “forcible compulsion”.

Commonwealth v. Montgomery, 687 A.2d 1131 (Pa. Super. 1996) (Per opinion of Olszewski, J., with Judges concurring in result.).

C. IDSI When the Complainant is Unconscious or Unaware

1. Statutory

18 PA. CONS. STAT. ANN. § 3123(a)(3).

2. Lack of Consent

While neither rape involving an unconscious person nor involuntary deviate sexual intercourse with an unconscious person references a lack of consent as an element, “in either circumstance, the absence of consent is assumed from the state of the victim.” *Commonwealth v. Buffington*, 574 Pa. 29, 42, 828 A.2d 1024, 1032 (Pa. 2003).

D. IDSI When the Assailant has Impaired the Complainant’s Power to Resist

1. Statutory

18 PA. CONS. STAT. ANN. § 3123(a)(4).

E. IDSI When a Mental Disability Renders the Complainant Incapable of Consent

1. Statutory

18 PA. CONS. STAT. ANN. § 3123(a)(5).

2. Intent

In *Commonwealth v. Thomson*, 673 A.2d 357 (Pa.Super. 1996), *appeal denied*, 546 Pa. 679, 686 A.2d 1310 (1996), a forensic psychiatrist testified that the victim was incapable of consenting to sexual intercourse because she was mildly mentally retarded. The psychiatrist further testified that the victim's retardation was of the type noticeable by a lay person. There was no rebuttal evidence by the defense as to the victim's incapability to consent. The Superior Court affirmed the trial court's determination that the evidence was sufficient to support the guilty verdict to Rape under former section 3121(4): "[a] person commits a felony of the first degree when he engages in sexual intercourse with another person not his spouse: who is so mentally deranged or deficient that such person is incapable of consent." The Superior Court further held that the prosecution must prove that the defendant "acted intentionally, knowingly or recklessly as to the victim's mental deficiency." 673 at 359. *See also, Commonwealth v. Carter*, 418 A.2d 537 (Pa.Super. 1980).

E. IDSI With a Child

1. Statutory

18 PA. CONS. STAT. ANN. § 3123(b).

2. Elements of Offense

A person commits the offense of involuntary deviate sexual intercourse with a child when the person engages in deviate sexual intercourse with a complainant who is less than 13 years of age.

3. Mistake as to Age

It is no defense that the perpetrator did not know the age of the child or reasonably believed that child to be the age of 13 years or older. 18 PA. CONS. STAT. ANN. § 3102.

G. IDSI With a Child Resulting in Serious Bodily Injury

1. Statutory

18 PA. CONS. STAT. ANN. § 3123(c).

2. Elements of Offense

A person commits the offense of involuntary deviate sexual intercourse with a child resulting in serious bodily injury when the person engages in deviate sexual intercourse with a complainant who is less than 13 years of

age and the complainant suffers serious bodily injury in the course of the offense.

Commonwealth v. Kerrigan, ___ A.2d ___, 2007 WL 695292 (Pa.Super. 2007): the transmission of HPV and genital warts satisfies the serious bodily injury requirement because of the permanent nature of the disease, the fact that the victim risks passing the virus to future sexual partners or children she may choose to have through the birth canal, and because there is a strong link between HPV and cervical and other genital cancers.

3. Mistake as to Age

It is no defense that the perpetrator did not know the age of the child or reasonably believed that child to be the age of 13 years or older. 18 PA. CONS. STAT. ANN. § 3102.

H. Penalties

1. IDSI

Any offense listed under 18 PA. CONS. STAT. ANN. § 3123(a) is graded as a Felony of the First Degree. In accordance with 18 PA. CONS. STAT. ANN. § 1103, in the case of a felony of the first degree, a term of imprisonment shall be fixed by the court at not more than 20 years, and in accordance with 18 PA. CONS. STAT. ANN. § 1101, a fine not to exceed \$ 25,000.

2. IDSI with a Child

Notwithstanding the general provisions regarding sentencing for a Felony of the First Degree, a person convicted of involuntary deviate sexual intercourse with a child “shall be sentenced to a term of imprisonment which shall be fixed by the court at no more than 40 years.” 18 PA. CONS. STAT. ANN. § 3123(d)(1).

3. IDSI with a Child with Serious Bodily Injury

Notwithstanding the general provisions regarding sentencing for a Felony of the First Degree, a person convicted of involuntary deviate sexual intercourse with a child resulting in serious bodily injury “shall be sentenced to a maximum term of *life imprisonment*.” 18 PA. CONS. STAT. ANN. § 3123(d)(2).

2.7 SEXUAL ASSAULT

A. Statutory

18 Pa. Cons. Stat. Ann. § 3124.1.

B. Elements of Offense

- 1) Engaging in sexual intercourse or deviate sexual intercourse with a complainant;²⁹
- 2) Without the complainant's consent.

C. Evidence

Victim's uncorroborated testimony is sufficient evidence to support a sexual assault conviction. *Commonwealth v. Shaffer*, 763 A.2d 411 (Pa. Super. 2000).

Circumstantial evidence may be used to show intent to commit sexual assault. *Commonwealth v. Pasley*, 743 A.2d 521 (Pa. Super. 1999), *appeal denied*, 563 Pa. 674, 759 A.2d 922 (2000).

D. No Requirement of "Forcible Compulsion"

This section of the Crimes Code, 18 PA. CONS. STAT. ANN. § 3124.1, was enacted in response to the Pennsylvania Supreme Court's decision in *Commonwealth v. Berkowitz*, 537 Pa. 143, 641 A.2d 1161 (1994). The statute was intended to fill the loophole left by the Rape and IDSI statutes by criminalizing non-consensual sex where the perpetrator employs little or no force.³⁰ *See also Commonwealth v. Buffington*, 574 Pa. 29, 42 n.13, 828 A.2d 1024, 1032 n.13 (2003).

In order to sustain a sexual assault conviction, resistance is not required. *Commonwealth v. Andrulewicz*, 911 A.2d 162, 165 (Pa. Super. 2006).

E. Institutional Sexual Assault

1. Statutory

18 PA. CONS. STAT. ANN. 3124.2.

2. Elements of Offense

- 1) defendant who is an employee or agent of any of the following:
 - a) the Department of Corrections,
 - b) county correctional authority,
 - c) youth development center,
 - d) youth forestry camp,
 - e) state or county juvenile detention facility,
 - f) other licensed residential facility serving children or youth, or
 - g) mental health or mental retardation facility or institution.

²⁹ To be convicted under this section, a defendant must act intentionally, knowingly, or recklessly. *Commonwealth v. Mayfield*, 832 A.2d 418 (Pa. Super. 2003).

³⁰ Theresa A. McNamara, Act 10: *Remedying Problems of Pennsylvania's Rape Laws or Revisiting Them?*, 10 Dick.L.Rev. 203, 210-214 (1996).

- 2) who engages in sexual intercourse, deviate sexual intercourse or indecent contact *with an inmate, detainee, patient or resident*.

The defendant must “intentionally, knowingly or recklessly” engage in conduct with an inmate, detainee, patient, or resident. ***Commonwealth v. Mayfield***, 574 Pa. 460, 475, 832 A.2d 418, 427 (2003).

F. Penalties

1. Sexual Assault

Sexual Assault is a Felony of the Second Degree, and the maximum incarceration sentence is 10 years, and the maximum fine is \$ 25,000.

2. Institutional Sexual Assault

Institutional Sexual Assault is a Felony of the Third Degree, and the maximum incarceration sentence is 7 years, and the maximum fine is \$ 10,000.

2.8 AGGRAVATED INDECENT ASSAULT

A. Statutory

18 PA. CONS. STAT. ANN. § 3125.

B. Elements of Offense

- 1) engaging in penetration, however slight, of the genitals or anus of a complainant with any part of a person’s body;
- 2) for any purpose other than good faith medical, hygienic or law enforcement procedures;
- 3) under one of the following circumstances:
 - a) without consent from the complainant; or
 - b) forcible compulsion;³¹
 - c) threat of forcible compulsion that would prevent resistance by a person of reasonable resolution; or
 - d) the complainant is unconscious or other circumstances where the defendant is aware that the complainant does not realize penetration is occurring; or
 - e) the defendant has substantially impaired the complainant’s ability to control his or her conduct through the use of intoxicants or other means without the complainant’s knowledge; or
 - f) the complainant suffers from a mental disability which renders the complainant incapable of consent; or
 - g) the complainant is less than 13 years old; or

³¹ “Forcible compulsion” is defined in Chapter 2, section 2.2.

- h) the complainant is less than 16 years old, the defendant is four or more years older than the complainant, and the defendant and the complainant are not married to each other.

C. Digital Penetration

Aggravated indecent assault includes evidence of digital penetration.

Commonwealth v. Kelley, 569 Pa. 179, 801 A.2d 551 (2002).

D. Victim's Testimony

Victim's uncorroborated testimony is sufficient evidence to support an aggravated indecent assault conviction. ***Commonwealth v. Shaffer***, 763 A.2d 411 (Pa. Super. 2000).

E. Aggravated Indecent Assault of a Child

1. Statutory

18 PA. CONS. STAT. ANN. § 3125 (b).

2. Elements

- 1) Violation of subsections (a)(1)-(6); and
- 2) The complainant is under 13 years old.

F. Penalties

1. Aggravated Indecent Assault

Aggravated indecent assault is a Felony of the Second Degree, and the maximum incarceration sentence is 10 years, and the maximum fine is \$ 25,000.

2. Aggravated Indecent Assault of a Child

Aggravated indecent assault of a child is a Felony of the First Degree, and the maximum incarceration sentence is 20 years, and the maximum fine is \$ 25,000.

2.9 INDECENT ASSAULT

A. Statutory

18 PA. CON. STAT. ANN. § 3126

B. Elements of Offense

- 1) having indecent contact with a complainant or causing the complainant to have indecent contact with the defendant
- 2) in one of the following circumstances:
 - a) the absence of the complainant's consent; or
 - b) forcible compulsion; or

- c) threat of forcible compulsion that would prevent resistance by a person of reasonable resolution; or
- d) the complainant is unconscious or other circumstances exist where the defendant is aware that the complainant does not realize that indecent contact is occurring; or
- e) the defendant has impaired the complainant's ability to control the complainant's conduct through the use of intoxicants or other means without the complainant's knowledge; or
- f) the complainant suffers from a mental disability which renders the complainant incapable of consent; or
- g) the complainant is less than 13 years old; or
- h) the complainant is less than 16 years old, the defendant is four or more years older than the complainant, and the complainant and the defendant are not married to each other.

C. Evidence

Indecent contact occurs when any part of the victim's body comes into contact with a sexual or intimate part of the defendant's body, without the victim's consent, for the purpose of arousing or gratifying sexual desire in either person. *See Commonwealth v. Grayson*, 549 A.2d 593 (Pa. Super. 1988).

Indecent contact includes contact over clothing, no matter how thick, and indecent assault is not entirely dependant upon the defendant's success. *Commonwealth v. Capo*, 727 A.2d 1126 (Pa. Super. 1999); *Commonwealth v. Ricco*, 650 A.2d 1084 (Pa. Super. 1994).

Mental Disability: When the complainant has a mental disability which makes her incapable of consent, the Commonwealth has no burden of proving defendant knew the victim's mental status. *Commonwealth v. Crosby*, 791 A.2d 366 (Pa. Super. 2002).

Victim's uncorroborated testimony is sufficient evidence to support an indecent assault conviction. *Commonwealth v. Shaffer*, 763 A.2d 411 (Pa. Super. 2000).

Youthful victim: Evidence supported conviction for indecent assault based upon six year old victim's testimony that "defendant, her father, pulled her pajamas down while she was in his room, told her his pee-pee hurt, put his penis in her bottom, and told her not to tell anybody." *Commonwealth v. Cesar*, 911 A.2d 978, 986 (Pa. Super. 2006).

D. Penalties

1. Complainant Under 13 Years

Indecent assault when the complainant is under the age of 13 is Misdemeanor of the First Degree, and the maximum incarceration sentence is 5 years, and the maximum fine is \$ 10,000.

2. Other Categories

All other categories of Indecent assault are Misdemeanors of the Second Degree, and the maximum incarceration sentence is 2 years, and the maximum fine is \$ 5,000.

2.10 INDECENT EXPOSURE

A. Statutory

18 PA. CONS. STAT. ANN. § 3127

B. Elements of Offense

- 1) exposure of genitals in any public place; or
- 2) exposure of genitals in any place where there are other persons present whom the defendant should know this conduct is likely to offend, affront, or alarm.

C. Evidence

The Commonwealth must establish that the defendant intended to arouse or gratify sexual desire of himself or someone else. *Commonwealth v. Rodriguez*, 442 A.2d 803 (Pa. Super. 1982).

It is not necessary for the Commonwealth to prove intent to offend, affront, or alarm. *Commonwealth v. Back*, 389 A.2d 141 (Pa. Super. 1978).

D. Penalties

1. **Children Involved:** If the defendant should have known that any of the persons present were under the age of 16, indecent exposure is Misdemeanor of the First Degree, and the maximum incarceration sentence is 5 years, and the maximum fine is \$ 10,000.
2. **Other Cases:** In all other circumstances, indecent exposure is a Misdemeanor of the Second Degree, and the maximum incarceration sentence is 2 years, and the maximum fine is \$ 5,000.

2.11 INCEST

A. Statutory

18 PA. CONS. STAT. ANN. § 4302

B. Elements of Offense

- 1) The defendant knowingly either:
 - a) marries,
 - b) cohabits, or

- c) has sexual intercourse with
- 2) Any of the following:
 - a) an ancestor of the whole or half blood,
 - b) a descendant of the whole or half blood,
 - c) a brother or sister of the whole or half blood,
 - d) an uncle or aunt of the whole blood, or
 - e) a nephew or niece of the whole blood.

The relationships referred to in this section include blood relationships without regard to legitimacy, and relationship of parent and child by adoption.

C. Definitions

“Cohabit” is defined in 18 PA. CONS. STAT. ANN. § 103 as “To live together under the representation or appearance of being married.”

“Sexual Intercourse” refers to the definition of sexual intercourse in 18 PA. CONS. STAT. ANN. § 3101, which includes vaginal, anal and oral intercourse. ***Commonwealth v. Fouse***, 612 A.2d 1067, 1069 (Pa.Super. 1992), ***appeal denied***, 535 Pa. 614, 629 A.2d 1376 (1993).

The incest statute is gender neutral crime which proscribes the stated conduct against males and females. ***Commonwealth v. K.M.***, 680 A.2d 1168, 1171 (Pa.Super. 1996).

D. Penalties

1. **No Merger:** “Since the crimes of rape and incest have different elements that do not necessarily involve one another, and protect different societal interests, we conclude that . . . they do not merge for sentencing purposes, even if one crime was committed during the perpetration of the other.” ***Commonwealth v. White***, 491 A.2d 252, 268 (Pa.Super. 1985).
2. **Grading:** Incest is a Felony of the Second Degree, and the maximum incarceration sentence is 10 years, and the maximum fine is \$ 25,000.

2.12 INVASION OF PRIVACY

This section is Pennsylvania’s response to the increasingly prevalent act of voyeurism, and proscribes the secret viewing, photographing or otherwise filming/ recording of a person dressing or undressing or of the sexual or other intimate parts of a person at a place and time when the other person has a reasonable expectation of privacy. For more detailed information, see Marjorie A. Shields, *Criminal Prosecution of Video or Photographic Voyeurism*, 120 A.L.R.5th 337 (2004).

A. Statutory

18 PA. CONS. STAT. ANN. § 7507.1.

B. Elements

1. Secretly Viewing or Recording of Full or Partial Nude Person

- 1) A person viewed, photographed, videotaped, electronically recorded or otherwise records;
- 2) For the purposes of arousing or gratifying the sexual desire of any person;
- 3) Another person
 - a) without that person's knowledge and consent;
 - b) while that person is in a state of full or partial nudity;
 - c) at a place where that person would have a reasonable expectation of privacy.

“Full or Partial Nudity” means a display of:

- all or any part of the human genitals or pubic area or buttocks;
- any part of the nipple of the breast of any female, with less than a fully opaque covering.

2. Secretly Viewing or Recording of Intimate Parts of Another Person

- 1) A person viewed, photographed, videotaped, electronically recorded or otherwise records;
- 2) For the purposes of arousing or gratifying the sexual desire of any person;
- 3) The intimate parts of another person
 - a) whether or not covered by clothing
 - b) without that person's knowledge and consent.

“Intimate parts” means parts of the body not intended to be visible by normal public observation, including:

- The human genitals, pubic area or buttocks;
- The nipple of a female breast.

3. Transfer of Image

- 1) A person transfers or transmits an image obtained in violation of either section above;
- 2) For the purposes of arousing or gratifying the sexual desire of any person;
- 3) By any of the following:
 - a) live or recorded telephone message,
 - b) electronic mail,
 - c) the Internet, or
 - d) by any other transfer of the medium on which the image is stored.

C. Multiple Violations

A separate violation of this section occurs for:

Multiple Victims: each victim of an offense defined herein pursuant to one scheme or course of conduct whether of the same or different times; or

Multiple Occasions: each occasion that a person is a victim during a separate course of conduct either individually or otherwise.

D. Penalties

1. **Multiple Violations:** Invasion of privacy is a misdemeanor of the second degree if there is more than one violation, and the maximum incarceration sentence is 2 years, and the maximum fine is \$5,000. 18 PA. CONS. STAT. ANN. § 7507.1(b).

2. **Other Cases:** All other categories of Invasion of privacy are misdemeanors of the third degree, and the maximum incarceration sentence is 1 year, and the maximum fine is \$2,500. 18 PA. CONS. STAT. ANN. § 7507.1(b).

E. Exclusions for Legitimate Law Enforcement Conduct

This section does not apply if the conduct is done by any of the following:

- Law enforcement officers during a lawful criminal investigation; or
- Law enforcement officers or by personnel of the Department of Corrections or a local correctional facility, prison or jail for security purposes or during investigation of alleged misconduct by a person in the custody of the department or local authorities.

F. Commencement of Prosecution

Notwithstanding the above noted provisions regarding the commencement of the limitations period for most crimes, a prosecution for a violation of 18 PA. CONS. STAT. ANN. § 7507.1, Invasion of Privacy, must be commenced within the following periods:

- Typical commencement date: two years from the date the offense occurred.
- Tolling of commencement date: if the victim did not realize at the time that there was an offense, within three years of the time the victim first learns of the offense.

