

CHAPTER 14

14.01.01 – Definition of “Oral Sexual Contact”

“Oral sexual contact” means oral contact with the penis, vulva or anus.

14.01.02 – Definition of “Position of Trust”

Position of trust” means a person who is or was any of the following:

1. The minor’s parent, stepparent, adoptive parent, legal guardian, foster parent, grandparent, aunt, or uncle.
2. The minor’s teacher.
3. An employee or volunteer at the minor’s school who is eighteen years of age or older.
4. The minor’s coach or instructor, whether the coach or instructor is an employee or volunteer.
5. The minor’s clergyman or priest.
6. Any person who is eighteen years of age or older and worked or volunteered for a religious organization that hosted events or activities where the minor was in attendance.
7. Engaged in a sexual or romantic relationship with the minor’s parent, adoptive parent, grandparent, aunt, uncle, legal guardian, foster parent, stepparent, step-grandparent, or sibling.
8. Related to the minor by blood or marriage within the third degree and is at least ten years older than the minor.
9. The minor’s employer.
10. An employee of a group home or residential treatment facility where the minor resides or has previously resided.

SOURCE: A.R.S. 13-1401(A)(2) (effective September 29, 2021)

USE NOTE: For subsection (2) of this instruction, the term “teacher” means a certified teacher as defined in A.R.S. § 15-501 or any other person who provides instruction to pupils in any school district, charter school, or accommodation school, the Arizona state schools for the deaf and the blind, or a private school in this state. A.R.S. § 13-1401(A)(6).

USE NOTE: For subsection (7) of this instruction, the following factors may be considered in determining whether a relationship is currently or was previously a sexual or romantic relationship:

1. The type of relationship.
2. The length of the relationship.
3. The frequency of the interaction between the two persons.
4. If the relationship has terminated, the length of time since the termination

A.R.S. § 13-1401(B).

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USE NOTE: For subsection (j) of this instruction, the term “group home” means a child welfare agency that receives for care and maintenance a child who has been adjudicated dependent or a community residential setting as defined in A.R.S. § 36-551. A.R.S. § 13-1401(A)(2)(h).

14.01.03 – Definition of “Sexual Contact”

“Sexual contact” means any direct or indirect touching, fondling or manipulating of any part of the genitals, anus or female breast by any part of the body or by any object or causing a person to engage in such contact. It does not include direct or indirect touching or manipulating during caretaking responsibilities, or interactions with a minor or vulnerable adult that an objective, reasonable person would recognize as normal and reasonable under the circumstances.

SOURCE: A.R.S. 13-1401(A)(3) (effective August 3, 2018)

14.01.04 – Definition of “Sexual Intercourse”

“Sexual intercourse” means penetration into the penis, vulva or anus by any part of the body or by any object or masturbatory contact with the penis or vulva.

14.01.05 – Definition of “Spouse”

“Spouse” means a person who is legally married and cohabiting.

14.01.06 – Definition of “Teacher”

“Teacher” means a certificated teacher or any person who provides instruction to pupils in any school district, charter school or accommodation school, the Arizona state schools for the deaf and the blind or a private school in this state.

14.01.07 – Definition of “Without Consent”

“Without consent” includes any of the following:

1. The victim is coerced by the immediate use or threatened use of force against a person or property.
2. The victim is incapable of consent by reason of mental disorder, mental defect, drugs, alcohol, sleep or any other similar impairment of cognition and such condition is known or should have reasonably been known to the defendant. “Mental defect” means the victim is unable to comprehend the distinctively sexual nature of the conduct or is incapable of understanding or exercising the right to refuse to engage in the conduct with another.
3. The victim is intentionally deceived as to the nature of the act.

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4. The victim is intentionally deceived to erroneously believe that the person is the victim's spouse.

SOURCE: A.R.S. § 13-1401 (statutory language as of July 3, 2015).

COMMENT: Simulated sexual intercourse by defendant rubbing his penis back and forth between victim's legs involved "manual masturbatory contact with the penis" was "sexual intercourse" within meaning of prohibition against sexual conduct with minor. *State v. Crane*, 166 Ariz. 3, 8 (App. 1990), *review denied*.

In interpreting A.R.S. § 13-612, which defined the offense of rape, the court wrote that "the slightest penetration of vulva is sufficient" to constitute sexual intercourse. *State v. Kidwell*, 27 Ariz. App. 466, 467 (App. 1976).

Prescribed mental state for crime of sexual abuse is "intentionally or knowingly," and since no contrary legislative purpose plainly appears, "intentionally or knowingly" applies to all elements of sexual abuse statute, including "without consent." *State v. Witver*, 175 Ariz. 305 (App. 1993).

In a case of lack of consent based on a mental disorder, the State must prove that the mental disorder was an impairment of such a degree that it precluded the victim from understanding the act of intercourse and its possible consequences. *State v. Johnson*, 155 Ariz. 23 (1987).

USE NOTE: "Certificated Teacher" is defined in A.R.S. § 15-501.

14.02 – Indecent Exposure

The crime of indecent exposure requires proof of the following:

1. The defendant exposed [his or her genitals or anus] [the areola or nipple of her breast or breasts]; *and*
2. Another person was present; *and*
3. The defendant was reckless about whether the other person, as a reasonable person, would be offended or alarmed by the exposure.

[Indecent exposure does not include breast-feeding by a mother.]

SOURCE: A.R.S. § 13-1402 (statutory language as of September 21, 2006).

USE NOTE: A verdict form must indicate the age of the victim in order to classify the offense as a misdemeanor or felony.

[Complete this section of the verdict form if you find the defendant "guilty" of the charged offense.]

We the jury, duly impaneled in the above-entitled action, find that the other person present was:

_____ Fifteen years of age or older

_____ Under the age of fifteen

14.03 – Public Sexual Indecency to a Minor

The crime of public sexual indecency to a minor requires proof of the following:

1. The defendant intentionally or knowingly engaged in an act of [sexual contact] [oral sexual contact] [sexual intercourse] [bestiality]; *and*
2. The defendant was reckless about whether a minor under the age of fifteen years was present.

SOURCE: A.R.S. § 13-1403(B) (statutory language as of September 21, 2006).

USE NOTE: The court shall instruct on the culpable mental state.

“Intentionally” is defined in A.R.S. § 13-105.

“Knowingly” is defined in A.R.S. § 13-105.

“Recklessly” is defined in A.R.S. § 13-105.

“Sexual contact” is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.03).

“Oral sexual contact” is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.01).

“Sexual intercourse” is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.04).

“Bestiality” is defined in A.R.S. § 13-1411 (Statutory Definition Instruction 14.11.01).

14.03.A.1 – Public Sexual Indecency

The crime of public sexual indecency requires proof of the following:

1. The defendant intentionally or knowingly engaged in an act of [sexual contact] [oral sexual contact] [sexual intercourse] [bestiality]; *and*
2. Another person was present; *and*
3. The defendant was reckless about whether such other person, as a reasonable person, would be offended or alarmed by the act.

SOURCE: A.R.S. § 13-1403(A)(1) (statutory language as of September 21, 2006).

USE NOTE: Use language in brackets as appropriate to the facts.

The court shall instruct on the culpable mental state.

“Intentionally” is defined in A.R.S. § 13-105 (Statutory Definition Instructions 1.0510(a)(1) and 1.0510(a)(2)).

“Knowingly” is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0510(b)(1)).

“Recklessly” is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0510(c)).

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“Sexual contact” is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.03).

“Oral sexual contact” is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.01).

“Sexual intercourse” is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.04).

“Bestiality” is defined in A.R.S. § 13-1411 (Statutory Definition Instruction 14.11.01).

14.04.01 – Sexual Abuse (Victim 15 or Older) (No Position of Trust)

The crime of sexual abuse requires proof that the defendant:

1. Intentionally or knowingly engaged in sexual contact with another person; *and*
2. Engaged in the act without the consent of the other person; *and*
3. Knew the act was without the consent of the other person.

SOURCE: A.R.S. § 13-1404 (statutory language as of January 1, 1994).

USE NOTE: The court shall instruct on the culpable mental state.

“Intentionally” is defined in A.R.S. § 13-105.

“Knowingly” is defined in A.R.S. § 13-105.

“Sexual contact” is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.03).

COMMENT: The State must prove that the defendant knew the victim had not consented. *State v. Witwer*, 175 Ariz. 305 (App. 1993).

14.04.02 – Sexual Abuse (Victim 15, 16 or 17) (Position of Trust)

The crime of sexual abuse requires proof of the following:

4. The defendant intentionally or knowingly engaged in sexual contact with another person; *and*
5. The other person was fifteen, sixteen, or seventeen years of age; *and*
6. The defendant was or had been in a position of trust.

SOURCE: A.R.S. § 13-1404 (statutory language as of January 1, 1994).

USE NOTE: The court shall instruct on the culpable mental state.

“Intentionally” is defined in A.R.S. § 13-105.

“Knowingly” is defined in A.R.S. § 13-105.

“Position of trust” is defined in A.R.S. § 13-1401 (Statutory Criminal Instruction 14.01.02)

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“Sexual contact” is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.03).

COMMENT: If the defendant was in a position of trust, it is not a defense to a prosecution for a violation of this section that the other person consented if the other person was fifteen, sixteen or seventeen years of age. A.R.S. § 13-1404(B).

14.04.03 – Sexual Abuse (Victim Under 15)

The crime of sexual abuse requires proof of the following:

7. The defendant intentionally or knowingly engaged in sexual contact with another person; *and*
8. The other person was fifteen years of age; *and*
9. The sexual contact involved only the female breast.

SOURCE: A.R.S. § 13-1404 (statutory language as of January 1, 1994).

USE NOTE: The court shall instruct on the culpable mental state.

“Intentionally” is defined in A.R.S. § 13-105.

“Knowingly” is defined in A.R.S. § 13-105.

“Sexual contact” is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.03).

COMMENT: Sexual abuse is not a lesser included offense of the crime of child molestation. *State v. Patton*, 136 Ariz. 243 (App. 1983).

14.05.01 – Sexual Conduct with a Minor

The crime of sexual conduct with a minor requires proof that the defendant intentionally or knowingly engaged in [sexual intercourse] [oral sexual contact] with a person under eighteen years of age.

[If the minor was under the age of fifteen, the State is not required to prove that the defendant knew the minor’s age.]

SOURCE: A.R.S. § 13-1405 (statutory language as of July 21, 1997); *State v. Falcone*, 228 Ariz. 168 (App. 2011).

USE NOTE: The court shall instruct on the culpable mental state.

“Intentionally” is defined in A.R.S. § 13-105.

“Knowingly” is defined in A.R.S. § 13-105.

“Sexual intercourse” is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.03).

“Oral sexual contact” is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.01).

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If the defendant raises the affirmative defense of lack of knowledge of the age of the minor and the minor is 15, 16, or 17, refer to Statutory Criminal 14.07.02 or 14.07.05.

The jury will need to determine the age of the victim and the defendant for sentencing purposes. *See* A.R.S. §§ 13-1406(B) and 13-705. *See* 7.05 Verdict Form.

COMMENT: If the conduct was masturbatory contact, then the mandatory life sentence under A.R.S. § 13-604.01(A) does not apply, but a life sentence may be imposed under A.R.S. § 13-604.01(B). *See* A.R.S. § 13-1405.

Defendant's placing his finger in his minor daughter's vagina and placing his penis in vagina were separate acts of "intercourse" that could serve as basis for separate convictions and sentences. *State v. McCuin*, 167 Ariz. 447 (App. 1991), *review granted, affirmed in part, vacated in part*, 171 Ariz. 171 (1992).

Charge of single count of sexual misconduct with minor was duplicitous, creating real possibility of nonunanimous jury verdict and thereby constituting reversible error, where offense was alleged in indictment to have occurred "on or about" January 18, victim testified she had sex with defendant twice, once around middle of January and once on last weekend of January, doctor testified that physical examination of victim revealed signs consistent with sexual intercourse at end of January, defendant offered alibi offense regarding last weekend of January and also denied ever having sexual intercourse with victim, and jury was instructed that exact dates were not important. *State v. Davis*, 206 Ariz. 377 (2003), *cert. den.*, 541 U.S. 1037 (2004).

Evidence that defendant propositioned television reporter posing as 14-year-old boy in computer chat room, arranged a meeting, and came to the park as agreed, where he again offered to engage in sexual conduct with actor hired by reporter to play part of boy, that reporter and actor had both told defendant several times that boy was only 14 years old, and that defendant acknowledged that he was offering to do something that could have gotten him into trouble was sufficient to support conviction for attempted sexual conduct with a minor. *State v. Carlisle*, 198 Ariz. 203 (App. 2000).

14.05.02 – Sexual Conduct with a Minor – Special Relationship

The crime of sexual conduct with a minor requires proof of the following:

1. The defendant intentionally or knowingly engaged in [sexual intercourse] [oral sexual contact] with another person; *and*
2. The other person was fifteen, sixteen or seventeen years of age; *and*
3. The defendant was or had been in a position of trust.

["Teacher" means a teacher certified by the Arizona State Board of Education or any other person who directly provides academic instruction to pupils in any school district, charter school, accommodation school, the Arizona state schools for the deaf and the blind or a private school in this state.]

SOURCE: A.R.S. § 13-1405 (statutory language as of July 20, 2011).

USE NOTE: The court shall instruct on the culpable mental state.

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Use the bracketed language as appropriate for the facts of the case.

“Intentionally” is defined in A.R.S. § 13-105 (Statutory Definitional Instruction 1.0510(a)).

“Knowingly” is defined in A.R.S. § 13-105 (Statutory Definitional Instruction 1.0510(b)).

“Sexual intercourse” is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.03).

“Oral sexual contact” is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.01).

“Position of trust” is defined in A.R.S. § 13-1401 (Statutory Criminal Instruction 14.01.02).

The following factors may be considered in determining whether a relationship is currently or was previously a sexual or romantic relationship:

1. The type of relationship,
2. The length of the relationship.
3. The frequency of the interaction between the two persons.
4. If the relationship has terminated, the length of time since the termination.

(A.R.S. § 13-1401(B)).

14.06.01 – Sexual Assault

The crime of sexual assault requires proof that the defendant:

1. Intentionally or knowingly engaged in sexual intercourse or oral sexual contact with another person; *and*
2. Engaged in the act without the consent of the other person.
3. The defendant knew the act was without the consent of the other person.

SOURCE: A.R.S. § 13-1406 (statutory language as of January 1, 2009); *State v. Kemper*, 227 Ariz. 452 ¶ 5 (App. 2011).

USE NOTE: The court may need to determine the age of the victim and the defendant for sentencing purposes. *See* A.R.S. §§ 13-1406(B) and 13-705. If that determination is needed, use of the following verdict form is suggested:

[Complete this portion of the verdict form only if you find the defendant guilty of the offense.]

We the jury, duly impaneled in above-entitled action, find that the other person was (check only one):

- _____ 15 years of age or older.
- _____ 13 or 14 years of age.
- _____ 12 years of age.
- _____ under 12 years of age.

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[Complete this portion of the verdict form only if you find that the other person was 12 years of age or younger.]

We the jury, duly impaneled in above-entitled action, find that the defendant was (check only one):

_____ 18 years of age or older.

_____ under 18 years of age.

The court shall instruct on the culpable mental state.

“Intentionally” is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0510(a)(1)).

“Knowingly” is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0510(b)).

“Sexual intercourse” is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.03).

“Oral sexual contact” is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.01).

“Without consent” is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.05).

COMMENT: The court of appeals in *State v. Kemper*, 227 Ariz. 452 ¶ 5 (App. 2011) (holding that an instruction that omitted the *mens rea* element that the conduct was conducted without the consent of the victim was fundamental error).

14.06.02 – Sexual Assault – Aggravation Instruction if Use of Drugs Alleged

If you find the defendant guilty of sexual assault, you must then determine whether the defendant intentionally or knowingly administered flunitrazepam, gamma hydroxy butyrate or ketamine hydrochloride to other person without the other person’s knowledge.

“Intentionally” and “knowingly” have the same meanings previously set forth in these instructions.

The State has the burden of proving this allegation beyond a reasonable doubt. Your decision must be set forth in a separate verdict form. Your decision regarding this allegation must be unanimous.

SOURCE: A.R.S. § 13-1406(B) (statutory language as of August 6, 1999).

USE NOTE: This instruction should be used in conjunction with the sexual assault instruction if the State has alleged the use of a drug listed in the statute.

When this allegation is made by the State, the following addition to the standard “guilty”/”not guilty” verdict form is suggested:

[Complete this portion of the verdict form only if you find the defendant guilty of sexual assault.]

We the jury find on the allegation that the defendant intentionally or knowingly administered flunitrazepam, gamma hydroxy butyrate or ketamine

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hydrochloride to other person without the other person's knowledge as follows (check only one):

_____ Was not proven.

_____ Was proven beyond a reasonable doubt.

14.06.03 – Sexual Assault – Aggravation Instruction for the Allegation of Serious Physical Injury

If you find the defendant guilty of sexual assault, you must then determine whether the defendant intentionally or knowingly inflicted serious physical injury upon the person.

“Serious physical injury” means physical injury which created a reasonable risk of death, or which caused serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb.

“Intentionally” and “knowingly” have the same meanings previously set forth in these instructions.

The State has the burden of proving this allegation beyond a reasonable doubt. Your decision must be set forth in a separate verdict form. Your decision regarding this allegation must be unanimous.

SOURCE: A.R.S. §§ 13-1406(D) (statutory language as of August 6, 1999) and 13-105 (statutory language as of September 21, 2006).

USE NOTE: This instruction should be used in conjunction with the sexual assault instruction if the State has alleged that the defendant inflicted serious physical injury on the victim.

When this allegation is made by the State, the following addition to the standard “guilty”/“not guilty” verdict form is suggested:

[Complete this portion of the verdict form only if you find the defendant guilty of sexual assault.]

We the jury find on the allegation that the defendant intentionally or knowingly inflicted serious physical injury upon the person as follows (check only one):

_____ Was not proven.

_____ Was proven beyond a reasonable doubt.

If the victim is twelve years of age or under and the defendant is eighteen years of age or older, a mandatory life sentence must be imposed. If this is an issue, the court should include the verdict form suggested in the sexual assault instruction use note.

14.07.01 – Defense to Sexual Abuse

It is a defense to sexual abuse with a minor if:

1. The act was done in furtherance of lawful medical practice; *or*

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2. At the time of the act, the defendant was the spouse of the victim.

SOURCE: A.R.S. § 13-1407(A) and (D) (statutory language as of August 12, 2005).

USE NOTE: The “affirmative defense” instruction should be used. *See* Standard Criminal Instruction 2.025.

COMMENT: A.R.S. § 13-1407(B) provides an additional defense to sexual contact as follows:

The victim’s lack of consent is based on incapacity to consent because the victim was fifteen, sixteen, or seventeen years of age, if at the time the defendant engaged in the conduct constituting the offense the defendant did not know and could not reasonably have known the age of the victim.

The statutory definition of “without consent” does not include the lack of capacity to consent based on being the age of fifteen, sixteen or seventeen. Therefore, this defense has not been included in the instruction because the defense could be construed to mean that lack of consent can be based solely on the fact that the victim was fifteen, sixteen or seventeen years of age. This affirmative defense cannot be used to prove lack of consent under A.R.S. § 13-1404 based on age alone; the State must prove that the victim did not give consent. *See State v. Getz*, 189 Ariz. 561, 565-66 (1997) (the sixteen-year-old victim consented to the touching of her breasts and, therefore, the sexual abuse count should have been dismissed).

14.07.02 – Defense to Sexual Conduct with a Minor

It is a defense to sexual conduct with a minor if:

1. The act was done in furtherance of lawful medical practice; *or*
2. The victim was fifteen, sixteen, or seventeen years of age and, at the time the defendant engaged in the conduct constituting the offense, the defendant did not know and could not reasonably have known the age of the victim; *or*
3. At the time of the act, the defendant was the spouse of the victim.

SOURCE: A.R.S. § 13-1407(A), (B), and (D) (statutory language as of August 12, 2005).

USE NOTE: The “affirmative defense” instruction should be used. *See* Standard Criminal Instruction 2.025.

COMMENT: Paragraph 2 is based on A.R.S. § 13-1407(B) that provides a defense to sexual conduct with a minor. However, “consent” is not an element of the offense of sexual conduct with a minor. In an attempt to reconcile the defense to the elements of the offense, the consent language has been deleted from the instruction. Whether this defense is viable in view of *State v. Getz*, 189 Ariz. 561 (1997), the lack of consent as an element of the offense, and because § 13-1407(B) is premised on the lack of consent, this is an issue left for the trial judge to decide.

14.07.03 – Emergency Occurrence Defense to Indecent Exposure, Sexual Abuse, Sexual Conduct with a Minor, or Sexual Assault

It is a defense to [indecent exposure] [sexual abuse] [sexual conduct with a minor] [sexual assault] if:

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1. The act was done by the defendant who [was a duly licensed physician] [was a registered nurse] [was acting under the direction of a physician or nurse] [rendered emergency care at the scene of an emergency occurrence]; *and*
2. The act consisted of administering a recognized and lawful form of treatment which was reasonably adapted to promoting the physical or mental health of the patient and the treatment was administered in an emergency; *and*
3. The defendant reasonably believed that no one competent to consent could be consulted and that a reasonable person, wishing to safeguard the welfare of the patient, would consent.

SOURCE: A.R.S. § 13-1407(C) (statutory language as of September 26, 2008).

USE NOTE: The “affirmative defense” instruction should be used. *See* Standard Criminal Instruction 2.025.

14.07.04 – Lack of Sexual Interest Defense to Sexual Abuse and Molestation of Child (To Be Used for Crimes Committed Prior to August 3, 2018)

It is a defense to [sexual abuse] [molestation of a child] if the defendant was not motivated by a sexual interest.

SOURCE: A.R.S. § 13-1407(E) (statutory language prior to August 3, 2018).

USE NOTE: The defense applies to sexual abuse of both a minor and an adult.

The “affirmative defense” instruction should be used. *See* Standard Criminal Instruction 2.025.

COMMENT: In *State v. Simpson*, 217 Ariz. 326 ¶ 19 (App. 2007), Division One of the Court of Appeals held (1) sexual motivation is not an element of the crime of child molestation under A.R.S. § 13-1410, and (2) the “lack of sexual interest” provision is an affirmative defense. But in *State v. Holle*, 238 Ariz. 218 ¶¶ 6-26 (App. 2015), Division Two reviewed statutory history and reached the conclusion that *Simpson* was wrongly decided. Under *Holle*, the defendant has the burden of proving beyond a reasonable doubt that the defendant had a sexual motivation. “To conclude otherwise would force defendants to negate a “fact[s] of the crime which the State is to prove in order to convict.”” *Id.* ¶ 25 (quoting *State v. Farley*, 199 Ariz. 542 ¶ 11 (App. 2001), quoting in turn *Patterson v. New York*, 432 U.S. 197, 207 (1977)).

14.07.05 – Defense Based on Age to Sexual Conduct with a Minor or Aggravated Luring a Minor for Sexual Exploitation

It is a defense to [sexual conduct with a minor] [aggravated luring a minor for sexual exploitation] if:

1. The minor was fifteen, sixteen or seventeen years of age; *and*
2. The defendant was under nineteen years of age or attending high school and was no

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more than twenty-four months older than the minor; *and*

3. The conduct was consensual.

SOURCE: A.R.S. § 13-1407(F) (statutory language as of September 26, 2008).

USE NOTE: The “affirmative defense” instruction should be used. *See* Standard Criminal Instruction 2.025.

14.09 – Unlawful Sexual Conduct by Probation Department Employees

The crime of Unlawful Sexual Conduct by Probation Department Employee requires proof of the following:

1. The defendant was [an adult probation department] [juvenile court] employee; and
2. The defendant knowingly coerced the victim to engage in [sexual contact], [oral sexual contact] or [sexual intercourse]; and
3. The coercion was accomplished by [threatening to negatively influence the victim’s supervision or release status] [offering to positively influence the victim’s supervision or release status].

“Adult probation department employee” or “juvenile court employee” means an employee of an adult probation department or the juvenile court who either:

- (a) Through the course of employment, directly provides treatment, care, control or supervision to a victim; or
- (b) Provides presentence or predisposition reports directly to a court regarding the victim.

“Victim” means a person who is either of the following:

- (a) Subject to conditions of release or supervision by a court.
- (b) A minor who has been referred to the juvenile court.

SOURCE: A.R.S. § 13-1409 (statutory language as of July 20, 2011).

USE NOTE: The court needs to determine the age of the victim for sentencing purposes. *See* §§ 13-1409(B). Therefore, use of the following verdict form is suggested:

[Complete this portion of the verdict form only if you find the defendant guilty of the offense.]

We the jury, duly impaneled in above-entitled action, find that the other person was (check only one):

- ___ 18 years of age or older.
- ___ At least 15 years of age, but under 18.
- ___ Under 15 years of age.

The court shall instruct on the culpable mental state.

“Knowingly” is defined in A.R.S. § 13-105 (Statutory Definitional Instruction 1.0510(b)).

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“Sexual intercourse” is defined in A.R.S. § 13-1401 (Statutory Criminal Instruction 14.01.03).

“Oral sexual contact” is defined in A.R.S. § 13-1401 (Statutory Criminal Instruction 14.01.01).

“Sexual contact” is defined in A.R.S. § 13-1401 (Statutory Criminal Instruction 14.01.03).

14.10 – Molestation of Child

The crime of molestation of a child requires proof of the following:

1. The defendant intentionally or knowingly [engaged in] [caused a person to engage in] any direct or indirect touching, fondling or manipulation of any part of the genitals or anus by any part of the body or by any object or causing a person to engage in such contact with a child; *and*
2. The child was under 15 years of age.

SOURCE: A.R.S. § 13-1410 (statutory language as of January 1, 1994).

USE NOTE: The court shall instruct on the culpable mental state.

“Intentionally” is defined in A.R.S. § 13-105.

“Knowingly” is defined in A.R.S. § 13-105.

COMMENT: “Sexual contact” is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.03). A.R.S. § 13-1410 excludes from the definition of “sexual contact” the female breast. In order to avoid the possibility of confusing the jurors with differing definitions of “sexual contact,” the instruction is written to eliminate the words “sexual contact.”

In a case addressing the predecessor statute to A.R.S. § 13-1410, the court held that a good faith belief that the victim was over the age of eighteen was not a defense to rape in the second degree. *State v. Superior Court of Pima County*, 104 Ariz. 440 (1969). Also, lack of knowledge of the child’s age is not a defense listed in A.R.S. § 13-1407. Therefore, it is likely not a defense to molestation of a child that the defendant did not know the child was under the age of fifteen.

14.11.01 – Bestiality

The crime of bestiality requires proof of that the defendant knowingly engaged in oral sexual contact, sexual contact or sexual intercourse with an animal.

“Animal” means a nonhuman mammal, bird, reptile or amphibian, either dead or alive.

SOURCE: A.R.S. § 13-1411 (statutory language as of September 21, 2006).

USE NOTE: The court shall instruct on the culpable mental state.

“Knowingly” is defined in A.R.S. § 13-105.

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“Sexual contact” is defined in A.R.S. §13-1401 (Statutory Definition Instruction 14.01.03).

“Oral sexual contact” is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.01).

“Sexual intercourse” is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.03).

COMMENT: There are three exceptions that apply to insemination of animals by the same species, veterinarian medical practices and animal husbandry. A.R.S. § 13-1411(C).

14.11.02 – Bestiality

The crime of bestiality requires proof of that the defendant knowingly caused another person to engage in oral sexual contact, sexual contact or sexual intercourse with an animal.

“Animal” means a nonhuman mammal, bird, reptile or amphibian, either dead or alive.

SOURCE: A.R.S. § 13-1411 (statutory language as of September 21, 2006).

USE NOTE: A verdict form must indicate the age of the victim to classify the offense:

[Complete this portion of the verdict form only if you find the defendant guilty of the offense.]

We the jury, duly impaneled in above-entitled action, find that the other person was:

_____ under 15 years of age.

_____ 15 years of age or older.

The court shall instruct on the culpable mental state.

“Knowingly” is defined in A.R.S. § 13-105.

“Sexual contact” is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.03).

“Oral sexual contact” is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.01).

“Sexual intercourse” is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.04).

COMMENT: There are three exceptions that apply to insemination of animals by the same species, veterinarian medical practices and animal husbandry. A.R.S. § 13-1411(C).

14.17 – Continuous Sexual Abuse of a Child

The crime of continuous sexual abuse of a child requires proof of the following:

1. The defendant intentionally or knowingly, over a period of three months or more, engaged in three or more acts of sexual conduct, sexual assault or molestation of a child; *and*

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2. The other person was under fourteen years of age.

The State must prove that three or more acts were committed by the defendant. However, you do not need to agree on the same act.

SOURCE: A.R.S. § 13-1417 (statutory language as of July 17, 1993).

“Sexual assault” is defined in A.R.S. § 13-1406 (Statutory Definition Instruction 14.06.01).

“Molestation of a child” is defined in A.R.S. § 13-1410 (Statutory Definition Instruction 14.10).

COMMENT: The trier of fact shall unanimously agree that the requisite number of acts occurred but does not need to agree on which acts constitute the requisite number. A.R.S. § 13-1417(C); *State v. Ramsey*, 211 Ariz. 529 (App. 2005).

A.R.S. § 13-1417(D) states that any other felony sexual offense involving the victim shall not be charged in the same proceeding with a charge under this section unless the other charged felony sexual offense occurred outside the time period charged under this section or the other felony sexual offense is charged in the alternative. A defendant may be charged with only one count under this section unless more than one victim is involved. If more than one victim is involved, a separate count may be charged for each victim.

14.18 – Sexual Misconduct by Licensed Behavioral Health Professional

The crime of sexual misconduct by a licensed behavioral health professional requires proof of the following:

1. The defendant was a licensed [behavioral health professional] [psychologist] [psychiatrist]; *and*
2. The defendant intentionally or knowingly engaged in sexual intercourse with another person; *and*
3. The other person was a client who was under the defendant’s care or supervision at the time of the sexual intercourse.

SOURCE: A.R.S. § 13-1418 (statutory language as of July 1, 2004).

Use Note: The court shall instruct on the culpable mental state.

“Intentionally” is defined in A.R.S. § 13-105.

“Knowingly” is defined in A.R.S. § 13-105.

“Sexual intercourse” is defined in A.R.S. § 13-1401 (Statutory Definition Instruction 14.01.03).

This statute only applies to a defendant licensed pursuant to A.R.S. §§ 32-3251 *et seq.*, 32-1401 *et seq.*, 32-1800 *et seq.*, or 32-2061 *et seq.*

14.19.1 – Unlawful Sexual Conduct by Correctional Employee

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The crime of unlawful sexual conduct by a correctional employee requires proof of the following:

1. The defendant was employed by or contracted to provide services to [the state department of corrections] [the department of juvenile corrections] [a private prison facility] [a juvenile detention facility] [a city or county jail];

or

1. The defendant was [an official visitor] [a volunteer] [an agency representative] of [the state department of corrections] [the department of juvenile corrections] [a private facility] [a juvenile detention facility] [a city or county jail];

and

2. The defendant intentionally or knowingly engaged in any act of sexual nature with another person; *and*
3. The other person was in the custody of [the state department of corrections] [the department of juvenile corrections] [a private prison facility] [a juvenile detention facility] [a city or county jail] or an offender under the supervision of the state department of corrections, the department of juvenile corrections or a city or county.

“Any act of a sexual nature” means [any completed, attempted, threatened or requested touching of the genitalia, anus, groin, breast, inner thigh, pubic area or buttocks with the intent to arouse or gratify sexual desire] [any act of exposing the genitalia, anus, groin, breast, inner thigh, pubic area or buttocks with the intent to arouse or gratify sexual desire] [any act of photographing, videotaping, filming, digitally recording or otherwise viewing, with or without a device, a prisoner or offender with the intent to arouse or gratify sexual desire, either while the prisoner or offender is in a state of undress or partial dress or while the prisoner or offender is urinating or defecating].

SOURCE: A.R.S. § 13-1419 (statutory language as of July 20, 2011).

USE NOTE: The court shall instruct on the culpable mental state.

“Intentionally” is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0510(a)(1)).

“Knowingly” is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0510(b)).

“Sexual intercourse” is defined in A.R.S. § 13-1401 (Statutory Criminal Instruction 14.01.04).

“Oral sexual contact” is defined in A.R.S. § 13-1405 (Statutory Criminal Instruction 14.01.01).

“Sexual contact” is defined in A.R.S. § 13-1401 (Statutory Criminal Instruction 14.01.03).

A verdict form must indicate the age of the victim in order to classify the offense. The following addition to the verdict form is suggested:

[Complete this section of the verdict form if you find the defendant “guilty” of the charged offense.]

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We the jury, duly impaneled in the above-entitled action, find that the other person was:

- _____ At least 15 years of age, but not yet 18 years of age
- _____ Under the age of 15
- _____ 18 years of age or over
- _____ 18 years of age or over

14.23 – Violent Sexual Assault

The crime of violent sexual assault requires proof that the defendant:

1. committed [sexual abuse] [sexual conduct with a minor] [sexual assault] [molestation of a child]; *and*
2. discharged, used or committed the threatening exhibition of a deadly weapon or dangerous instrument or intentionally or knowingly inflicted serious physical injury to another; *and*
3. was previously convicted of a historical prior felony for a sexual offense, (name of offense).

[Include a definition of “historical prior felony” that is appropriate for each of the alleged prior felonies.]

SOURCE: A.R.S. § 13-1423 (statutory language as of August 12, 2005).

USE NOTE: The court will need to give an instruction on the underlying offense in addition to this instruction.

The court shall instruct on the culpable mental state.

“Intentionally” is defined in A.R.S. § 13-105.

“Knowingly” is defined in A.R.S. § 13-105.

“Sexual abuse” is defined in A.R.S. § 13-1404 (Statutory Definition Instruction 14.04).

“Sexual conduct with a minor” is defined in A.R.S. § 13-1405 (Statutory Definition Instruction 14.05.01 or 14.05.02).

“Sexual assault” is defined in A.R.S. § 13-1406 (Statutory Definition Instruction 14.06.01–03).

“Molestation of a child” is defined in A.R.S. § 13-1410 (Statutory Definition Instruction 14.01.01).

The court will need to include a definition of “historical prior felony” in the jury instruction. A.R.S. § 13-105 provides:

“Historical prior felony conviction” means:

- (a) Any prior felony conviction for which the offense of conviction:

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- (i) Mandated a term of imprisonment except for a violation of chapter 34 of this title involving a drug below the threshold amount; or
 - (ii) Involved the intentional or knowing infliction of serious physical injury; or
 - (iii) Involved the use or exhibition of a deadly weapon or dangerous instrument; or
 - (iv) Involved the illegal control of a criminal enterprise; or
 - (v) Involved aggravated driving under the influence of intoxicating liquor or drugs, driving while under the influence of intoxicating liquor or drugs with a suspended, canceled, revoked or refused driver license or driving under the influence of intoxicating liquor or drugs with two or more driving under the influence of intoxicating liquor or drug convictions within a period of sixty months; or
 - (vi) Involved any dangerous crime against children as defined in section 13-705.
- (b) Any class 2 or 3 felony, except the offenses listed in subdivision (a) of this paragraph, that was committed within the ten years immediately preceding the date of the present offense. Any time spent on absconder status while on probation or incarcerated is excluded in calculating if the offense was committed within the preceding ten years. If a court determines a person was not on absconder status while on probation that time is not excluded.
 - (c) Any class 4, 5 or 6 felony, except the offenses listed in subdivision (a) of this paragraph, that was committed within the five years immediately preceding the date of the present offense. Any time spent on absconder status while on probation or incarcerated is excluded in calculating if the offense was committed within the preceding five years. If a court determines a person was not on absconder status while on probation that time is not excluded.
 - (d) Any felony conviction that is a third or more prior felony conviction.

State ex rel. Thomas v. Talamante, 214 Ariz. 106 (App. 2006) held that A.R.S. § 13-1423 established the crime of violent sexual assault and that a historical prior felony conviction for a sexual offense is an element of that crime. Accordingly, the State is allowed to offer evidence of the defendant's prior conviction for a sexual offense.

COMMENT: If the prior conviction is from a foreign jurisdiction, the court must first conclude that the elements of the foreign prior conviction include every element that would be required to prove an enumerated Arizona offense, before the allegation may go to the jury. *State v. Cramford*, 214 Ariz. 129, 131 ¶ 7 (2007); *State v. Roque*, 213 Ariz. 193, 216-17 (2006) (refusing to “look beyond the language of the [foreign] statutes” to the complaint describing the defendant's conduct in determining whether prior California robbery conviction constituted a “serious offense” under A.R.S. § 13-751); *State v. Schaaf*, 169 Ariz.

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323, 334 (1991) (reviewing Nevada attempted murder statute to determine if that crime involved violence and holding that sentencing courts “may consider only the statute that the defendant [was] charged with violating; it may not consider other evidence”).

14.24.01 – Voyeurism

The crime of voyeurism requires proof that the defendant knowingly invaded the privacy of another person without the knowledge of the other person for the purpose of sexual stimulation.

A person’s privacy is invaded if both of the following apply:

1. The person had a reasonable expectation that the person would not be photographed, videotaped, filmed, digitally recorded or otherwise viewed or recorded.
2. The person was photographed, videotaped, filmed, digitally recorded or otherwise viewed, with or without a device, either:
 - (a) while the person was in a state of undress or partial dress.
 - (b) while the person was engaged in sexual intercourse or sexual contact.
 - (c) while the person was urinating or defecating.
 - (d) in a manner that directly or indirectly captured or allowed the viewing of the person’s genitalia, buttock or female breast, whether clothed or unclothed, that was not otherwise visible to the public.

SOURCE: A.R.S. § 13-1424(A) (statutory language as of September 21, 2006).

USE NOTE: The court shall instruct on the culpable mental state.

“Knowingly” is defined in A.R.S. § 13-105 (Statutory Definition Instruction 1.0510(b)).

COMMENT: The statute contains a number of exceptions. Those are set forth in A.R.S. § 13-1424(D)(1) through (4).

14.24.02 – Voyeurism

The crime of voyeurism requires proof that the defendant disclosed, displayed, distributed or published a photograph, videotape, film or digital recording that when taken knowingly invaded the privacy of another person without the consent or knowledge of the person depicted for the purpose of sexual stimulation.

A person’s privacy is invaded if both of the following apply:

1. The person had a reasonable expectation that the person would not be photographed, videotaped, filmed, digitally recorded or otherwise viewed or recorded.
2. The person was photographed, videotaped, filmed, digitally recorded or otherwise viewed, with or without a device, either:
 - (a) while the person was in a state of undress or partial dress.

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- (b) while the person was engaged in sexual intercourse or sexual contact.
- (c) while the person was urinating or defecating.
- (d) in a manner that directly or indirectly captured or allowed the viewing of the person's genitalia, buttock or female breast, whether clothed or unclothed, that was not otherwise visible to the public.

SOURCE: A.R.S. § 13-1424(B) (statutory language as of September 21, 2006).

COMMENT: This portion of the statute does not expressly set forth a culpable mental state for the defendant. It will fall to the trial court to decide whether to include a mental state in the instruction. A.R.S. § 13-202(B) provides that if a statute omits a mental state, the offense is one of strict liability. However, the court in *State v. Slayton*, 214 Ariz. 511 (App. 2007) noted that strict liability offenses are not favored.

“Knowingly” was included in the instruction because subsection A requires that the recording “knowingly invade[d] the privacy of the person.”

The statute contains a number of exceptions. Those are set forth in A.R.S. § 13-1424(D)(1) through (4).

14.25.01 – Unlawful Distribution of Recognizable Images

The crime of unlawful distribution of recognizable images requires proof that defendant intentionally disclosed an image of another person who is identifiable from the image itself or from information displayed in connection with the image if:

1. the person in the image is depicted in a state of nudity or engaged in specific sexual activities; and
2. that depicted person has a reasonable expectation of privacy; and
3. the image is disclosed with the intent to harm, harass, intimidate, threaten or coerce the depicted person.

Evidence that a person has sent an image to another person using an electronic device does not, on its own, remove the person's reasonable expectation of privacy for that image. Whether the depicted person has a reasonable expectation of privacy is a fact that you must determine in light of all of the other evidence.

SOURCE: A.R.S. § 13-1425) (statutory language as of March 11, 2016).

USE NOTE: Use statutory definition instruction defining “intentionally” and “knowingly.”

“Disclose” means display, distribute, publish, advertise or offer.

“Disclosed by electronic means” means delivery to an email address, mobile device, tablet or other electronic device and includes disclosure on a website.

“Harm” means physical injury, financial injury or serious emotional distress.

“Image” means a photograph, videotape, film or digital recording.

“Specific sexual activities” has the same meaning prescribed in A.R.S. § 11-811, subsection d, paragraph 18, subdivisions (a) and (b).

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“State of nudity” has the same meaning prescribed in A.R.S. § 11-811, subsection d, paragraph 14, subdivision (a).

This section does not apply to any of the following:

1. The reporting of unlawful conduct.
2. Images involving voluntary exposure in a public or commercial setting.
3. An interactive computer service, as defined in 47 U.S.C. § 230(f)(2), or an information service, as defined in 47 U.S.C. § 153, with regard to content wholly provided by another party.
4. Any disclosure that is made with the consent of the person who is depicted in the image.

14.28 – Sexual Extortion

The crime of “sexual extortion” requires proof that defendant knowingly communicated a threat with the intent to coerce another person to [engage in sexual contact or sexual intercourse] [allow the other person’s genitals, anus or female breast to be photographed, filmed, videotaped or digitally recorded] [exhibit the other person’s genitals, anus or female breast].

“Communicating a threat” means a threat to [damage the property of the other person] [harm the reputation of the other person] [produce or distribute a photograph, film, videotape or digital recording that depicts the other person engaged in sexual contact or sexual intercourse or the exhibition of the other person’s genitals, anus, or female breast.]

SOURCE: A.R.S. § 13-1428 (statutory language as of August 3, 2018).

USE NOTE: The court shall instruct on the culpable mental state.

“Knowingly” is defined in A.R.S. § 13-105.

“Sexual contact” is defined in A.R.S. § 13-1401. Statutory Criminal Instruction 14.01.02.

“Oral sexual contact” is defined in A.R.S. § 13-1401. Statutory Criminal Instruction 14.01.01.

“Sexual intercourse” is defined in A.R.S. § 13-1401. Statutory Criminal Instruction 14.01.03.

An aggravation phase verdict form must indicate the age of the victim in order to classify the offense. The following addition to the verdict form is suggested:

[Complete this section of the verdict form if you find the defendant “guilty” of the charged offense.]

We the jury, duly impaneled in the above-entitled action, find that the other person was:

_____ At least 15 years of age, but not yet 18 years of age

_____ Under the age of 15

_____ 18 years of age or over