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OPINION
OF
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Opinion No. 88-69

BY: Elizabeth Major
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TO: Chet Walter
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QUESTION:

Does Section 30-9-11(D) NMSA 1978 (Cum. Supp. 1988) prohibit consensual sexual intercourse with a child thirteen to sixteen years of age when the perpetrator is at least eighteen years of age and is at least four years older than the child?

CONCLUSION:

Yes.

ANALYSIS:

Section 30-9-11 NMSA 1978 (Cum. Supp. 1988) contains the following provisions:

> Criminal sexual penetration is the unlawful and intentional causing of a person, other than one's spouse, to engage in sexual intercourse, cunnilingus, fellatio or anal intercourse, or the causing of penetration, to any extent and with any object, of the genital or anal openings of another, whether or not there is any emission.

A. Criminal sexual penetration in the first degree consists of all sexual penetration perpetrated:

(1) on a child under thirteen years of age; or

(2) by the use of force or coercion which results in great bodily harm or great mental anguish to the victim.

Whoever commits criminal sexual penetration in the first degree is guilty of a first degree felony.

B. Criminal sexual penetration in the second degree consists of all criminal sexual penetration perpetrated:

(1) on a child thirteen to sixteen years of age when the perpetrator is in a position of authority over the child and uses this authority to coerce the child to submit;

(2) by the use of force or coercion which results in personal injury to the victim;

(3) by the use of force or coercion when the perpetrator is aided or abetted by one or more persons;

(4) in the commission of another other felony; or

(5) when the perpetrator is armed with a deadly weapon.

Whoever commits criminal sexual penetration in the second degree is guilty of a second degree felony.

C. Criminal sexual penetration in the third degree consists of all criminal sexual penetration perpetrated through the use of force of coercion.

Whoever commits criminal sexual penetration in the third degree is guilty of a third degree felony.

> D. Criminal sexual penetration in the fourth degree consists of all criminal sexual penetration not defined in Subsection A, B or C of this section perpetrated on a child thirteen to sixteen years of age when the perpetrator is a least eighteen years of age and is at least four years older then the child.
>
> Whoever commits criminal sexual penetration in the fourth degree is guilty of a fourth degree felony.

The statute sets out four degrees of criminal sexual penetration. Subsection D was added to the statute in 1987. The prohibited conduct described in subsection D is the lowest degree of criminal sexual penetration, a fourth degree felony. The question under consideration is whether the criminal acts described in subsection D encompass consensual sexual penetration, or whether they are limited to nonconsensual sexual penetration.

In interpreting a statute, the entire statute is to be read as a whole so that each provision is considered in relation to the other parts of the statute. Westgage Families v. County Clerk of Los Alamos, 100 N.M. 146, 667 P.2d 453 (1983); State ex rel. Newsome v. Alarid, 90 N.M. 790, 568 P.2d 1236 (1977). A statute is to be construed in accord with common sense and reason. State ex rel. Newsome v. Alarid. It must be interpreted so that the application of the statute is not rendered absurd or unreasonable and so that it does not defeat the object of the legislature. City of Las Cruces v. Garcia, 102 N.M. 25, 690 P.2d 1019 (1984); State v. Santillanes, 99 N.M. 89, 654 P.2d 542 (1982); State ex rel. Newsome v. Alarid. Also, a statute must be construed so that no part of it is rendered surplusage or superfluous. Katz v. New Mexico Dept. of Human Services, Income Support Division, 95 N.M. 530, 624 P.2d 39 (1981); Vaughn v. State Taxation and Revenue Dept., 98 N.M. 362, 648 P.2d 820 (Ct.App. 1982).

Subsection D must be considered in conjunction with the other provisions of the criminal sexual penetration statute. When the statute is read as a whole, the only reasonable interpretation of subsection D is that it prohibits consensual sexual penetration between a thirteen-to-sixteen-year-old child and a person who is at least eighteen years old and at least four years older than the child.

The language of subsection D does not include a requirement of the use of force of coercion. The term "force or coercion," as

used in other provisions of the criminal penetration statute, means:

> (1) the use of physical force or physical violence;
>
> (2) the use of threats to use physical violence or physical force against the victim or another when the victim believes that there is a present ability to execute such threats;
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> (3) the use of threats, including threats of physical punishment, kidnapping, extortion or retaliation directed against the victim or another when the victim believes that there is an ability to execute such threats; or
>
> (4) perpetrating criminal sexual penetration or criminal sexual conduct [contact] when the perpetrator knows or has reason to know that the victim is unconscious, asleep or otherwise physically helpless, or suffers from a mental condition which renders the victim incapable of understanding the nature or consequences of the act. Physical or verbal resistance of the victim is not an element of force or coercion;....

Section 30-9-10 NMSA 1978 (Repl. Pamph. 1984). If the legislature had intended for subsection D to apply only to nonconsensual sexual penetration, it could have included a requirement of force or coercion.

Subsection D specifically states that it prohibits criminal sexual penetration not covered by subsections A, B and C. Since subsections A, B and C cover all sexual penetration through the use of force or coercion, or nonconsensual sexual penetration, subsection D does not cover that. Also, subsection D would be surplusage if it were limited to nonconsensual sexual penetration, because it would prohibit behavior already prohibited in other provisions of the statute.

The term "unlawful and intentional causing," used in the first sentence of the statute, does not conflict with the conclusion that subsection D prohibits consensual sexual intercourse. Webster's New International Dictionary (2nd Edition, 1959) defines the verb "cause" as "[t]o be the cause or occasion of; to effect as an agent; to bring about; to bring into existence; to make."

That term does not include an element of force or coercion within its definition. The wording of subsection D indicates that the unlawfulness of the conduct arises from age restrictions rather than from nonconsent of the victim. Under that provision, the perpetrator may "unlawfully and intentionally" cause the thirteen-to-sixteen-year-old child to engage in sexual penetration by being at least eighteen years old and four years older than the child when the sexual penetration occurs.

Subsection D does not include an element of force or coercion, and there is no basis for construing it to require nonconsent by the child as an element of the crime.

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