

LEGISLATIVE BILL 943

Approved by the Governor April 15, 2004

Introduced by Thompson, 14; Cunningham, 40; Combs, 32; Mossey, 3

AN ACT relating to crimes and offenses; to amend sections 28-318, 28-1463.05, and 29-110, Reissue Revised Statutes of Nebraska, sections 28-322, 28-322.01, and 29-4003, Revised Statutes Supplement, 2002, and section 28-101, Revised Statutes Supplement, 2003; to create the offense of strangulation; to prohibit the use of a computer as prescribed; to provide and change penalties; to redefine the term sexual contact for purposes of sexual assault of a child; to change the Sex Offender Registration Act; to change provisions relating to statutes of limitations and sexual abuse of an inmate or parolee; to eliminate obsolete provisions; to harmonize provisions; to repeal the original sections; and to declare an emergency.

Be it enacted by the people of the State of Nebraska,

Section 1. Section 28-101, Revised Statutes Supplement, 2003, is amended to read:

28-101. Sections 28-101 to 28-1350 and sections 2 and 3 of this act shall be known and may be cited as the Nebraska Criminal Code.

Sec. 2. (1) A person commits the offense of strangulation if the person knowingly or intentionally impedes the normal breathing or circulation of the blood of another person by applying pressure on the throat or neck of the other person.

(2) Except as provided in subsection (3) of this section, strangulation is a Class IV felony.

(3) Strangulation is a Class III felony if:

(a) The person used or attempted to use a dangerous instrument while committing the offense;

(b) The person caused serious bodily injury to the other person while committing the offense; or

(c) The person has been previously convicted of strangulation.

(4) It is an affirmative defense that an act constituting strangulation was the result of a legitimate medical procedure.

Sec. 3. (1) No person shall knowingly solicit, coax, entice, or lure (a) a child sixteen years of age or younger or (b) a peace officer who is believed by such person to be a child sixteen years of age or younger, by means of a computer as that term is defined in section 28-1343, to engage in an act which would be in violation of section 28-319 or 28-320.01 or subsection (1) or (2) of section 28-320. A person shall not be convicted of both a violation of this subsection and a violation of section 28-319 or section 28-320.01 or subsection (1) or (2) of section 28-320 if the violations arise out of the same set of facts or pattern of conduct and the individual solicited, coaxed, enticed, or lured under this subsection is also the victim of the sexual assault under section 28-319 or section 28-320.01 or subsection (1) or (2) of section 28-320.

(2) A person who violates this section is guilty of a Class IIIA felony. If a person who violates this section has previously been convicted of a violation of this section or section 28-308, 28-309, 28-310, 28-311, 28-313, 28-314, 28-315, 28-319, or 28-320.01 or subsection (1) or (2) of section 28-320, the person is guilty of a Class III felony.

Sec. 4. Section 28-318, Reissue Revised Statutes of Nebraska, is amended to read:

28-318. As used in sections 28-317 to 28-321, unless the context otherwise requires:

(1) Actor means a person accused of sexual assault;

(2) Intimate parts means the genital area, groin, inner thighs, buttocks, or breasts;

(3) Past sexual behavior means sexual behavior other than the sexual behavior upon which the sexual assault is alleged;

(4) Serious personal injury means great bodily injury or disfigurement, extreme mental anguish or mental trauma, pregnancy, disease, or loss or impairment of a sexual or reproductive organ;

(5) Sexual contact means the intentional touching of the victim's sexual or intimate parts or the intentional touching of the victim's clothing covering the immediate area of the victim's sexual or intimate parts. Sexual contact shall also mean the touching by the victim of the actor's sexual or intimate parts or the clothing covering the immediate area of the actor's

sexual or intimate parts when such touching is intentionally caused by the actor. Sexual contact shall include only such conduct which can be reasonably construed as being for the purpose of sexual arousal or gratification of either party. Sexual contact shall also include the touching of a child with the actor's sexual or intimate parts on any part of the child's body for purposes of sexual assault of a child under section 28-320.01;

(6) Sexual penetration means sexual intercourse in its ordinary meaning, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of the actor's or victim's body or any object manipulated by the actor into the genital or anal openings of the victim's body which can be reasonably construed as being for nonmedical or nonhealth purposes. Sexual penetration shall not require emission of semen;

(7) Victim means the person alleging to have been sexually assaulted;

(8) Without consent means:

(a) (i) The victim was compelled to submit due to the use of force or threat of force or coercion, or (ii) the victim expressed a lack of consent through words, or (iii) the victim expressed a lack of consent through conduct, or (iv) the consent, if any was actually given, was the result of the actor's deception as to the identity of the actor or the nature or purpose of the act on the part of the actor;

(b) The victim need only resist, either verbally or physically, so as to make the victim's refusal to consent genuine and real and so as to reasonably make known to the actor the victim's refusal to consent; and

(c) A victim need not resist verbally or physically where it would be useless or futile to do so; and

(9) Force or threat of force means (a) the use of physical force which overcomes the victim's resistance or (b) the threat of physical force, express or implied, against the victim or a third person that places the victim in fear of death or in fear of serious personal injury to the victim or a third person where the victim reasonably believes that the actor has the present or future ability to execute the threat.

Sec. 5. Section 28-322, Revised Statutes Supplement, 2002, is amended to read:

28-322. For purposes of sections 28-322 to 28-322.03:

(1) Inmate or parolee means any individual confined in a facility operated by the Department of Correctional Services or a city or county correctional or jail facility or under parole supervision; and

(2) Person ~~or person~~ means ~~(1)~~ (a) an individual employed by the Department of Correctional Services or by the Office of Parole Administration, ~~which includes, but is not limited to, individuals~~ including any individual working in central administration of the department, any individual working under contract with the department, and any individual, other than an inmate's spouse, to whom the department has authorized or delegated control over ~~inmates or inmates'~~ an inmate or an inmate's activities, (b) ~~and~~ ~~(2)~~ an individual employed by a city or county correctional or jail facility, ~~which includes, but is not limited to, individuals~~ including any individual working in central administration of the city or county correctional or jail facility, any individual working under contract with the city or county correctional or jail facility, and any individual, other than an inmate's spouse, to whom the city or county correctional or jail facility has authorized or delegated control over ~~inmates or inmates'~~ an inmate or an inmate's activities, and (c) an individual employed by the Office of Probation Administration who performs official duties within any facility operated by the Department of Correctional Services or a city or county correctional or jail facility.

Sec. 6. Section 28-322.01, Revised Statutes Supplement, 2002, is amended to read:

28-322.01. A person commits the offense of sexual abuse of an inmate or parolee if such person subjects an ~~individual who is confined in a correctional institution or a city or county correctional or jail facility or under parole supervision~~ inmate or parolee to sexual penetration or sexual contact as those terms are defined in section 28-318. It is not a defense to a charge under this section that the inmate or parolee consented to such sexual penetration or sexual contact.

Sec. 7. Section 28-1463.05, Reissue Revised Statutes of Nebraska, is amended to read:

28-1463.05. (1) It shall be unlawful for a person to knowingly possess with intent to rent, sell, deliver, distribute, trade, or provide to any person any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers.

(2) Any person who violates this section shall be guilty of a Class ~~IV~~ IIIA felony for each offense.

Sec. 8. Section 29-110, Reissue Revised Statutes of Nebraska, is amended to read:

29-110. (1) Except as otherwise provided by law, ~~in subsections (2) and (3) of this section,~~ no person ~~or persons~~ shall be prosecuted for any felony, ~~excepting only treason, murder, arson, and forgery,~~ unless the indictment ~~for the same shall be~~ is found by a grand jury within three years next after the offense ~~shall have~~ has been done or committed or unless a complaint for the same ~~shall be~~ is filed before the magistrate within three years next after the offense ~~shall have~~ has been done or committed and a warrant for the arrest of the defendant ~~shall have~~ has been issued.

(2) Except as otherwise provided by law, no person shall ~~nor shall any person~~ be prosecuted, tried, or punished for any misdemeanor or other indictable offense below the grade of felony or for any fine or forfeiture under any penal statute unless the ~~indictment, information, or action suit, information, or indictment~~ indictment, information, or action suit, information, or indictment for the same ~~shall be~~ is instituted or found ~~or instituted~~ within one year and six months from the time of committing the offense or incurring the fine or forfeiture or within one year for any offense the punishment of which is restricted by a fine not exceeding one hundred dollars and to imprisonment not exceeding three months. ~~This section shall not extend to any person fleeing from justice. When any suit, information, or indictment for any crime or misdemeanor is limited by any statute to be brought or exhibited within any other time than is limited by this section, then the same shall be brought or exhibited within the time limited by such statute. If any indictment, information, or suit is quashed or the proceedings in the same set aside or reversed on writ of error, the time during the pendency of such indictment, information, or suit so quashed, set aside, or reversed shall not be reckoned within this statute so as to bar any new indictment, information, or suit for the same offense.~~

~~(2) No~~ (3) Except as otherwise provided by law, no person or persons shall be prosecuted for sexual assault in the first degree, second degree, or third degree ~~pursuant to under section 28-319 or 28-320, sexual assault of a child pursuant to section 28-320.01,~~ kidnapping ~~pursuant to under section 28-313,~~ false imprisonment ~~pursuant to under section 28-314 or 28-315,~~ child abuse ~~pursuant to under section 28-707,~~ pandering ~~pursuant to under section 28-802,~~ debauching a minor ~~pursuant to under section 28-805,~~ or an offense ~~pursuant to under section 28-813, 28-813.01, or 28-1463.03~~ when the victim is under sixteen years of age at the time of the offense (a) unless the indictment for the same ~~shall be~~ is found by a grand jury within seven years next after the offense has been committed or within seven years next after the victim's sixteenth birthday, whichever is later, or (b) unless a complaint for the same ~~shall be~~ is filed before the magistrate within seven years next after the offense has been committed or within seven years next after the victim's sixteenth birthday, whichever is later, and a warrant for the arrest of the defendant ~~shall have~~ has been issued. ~~The limitations prescribed in this subsection shall include all inchoate offenses pursuant to the Nebraska Criminal Code and compounding a felony pursuant to section 28-301.~~

~~(3)~~ (4) No person or persons shall be prosecuted for a violation of the Securities Act of Nebraska ~~pursuant to under section 8-1117~~ unless the indictment for the same ~~shall be~~ is found by a grand jury within five years next after the offense ~~shall have~~ has been done or committed or unless a complaint for the same ~~shall be~~ is filed before the magistrate within five years next after the offense ~~shall have~~ has been done or committed and a warrant for the arrest of the defendant ~~shall have~~ has been issued.

(4) ~~The changes made to this section by Laws 1990, LB 1246, shall apply to offenses which occurred prior to April 15, 1990, or which occur on or after such date.~~

(5) ~~The changes made to this section by Laws 1993, LB 216, shall apply to offenses which occurred prior to September 9, 1993, or which occur on or after such date~~

(5) There shall not be any time limitations for prosecution or punishment for treason, murder, arson, forgery, sexual assault of a child under section 28-320.01, or any of the following offenses when the victim is under sixteen years of age at the time of the offense: Sexual assault in the first degree, second degree, or third degree under section 28-319 or 28-320.

(6) The time limitations prescribed in this section shall include all inchoate offenses pursuant to the Nebraska Criminal Code and compounding a felony pursuant to section 28-301.

(7) The time limitations prescribed in this section shall not extend to any person fleeing from justice.

(8) When any suit, information, or indictment for any crime or misdemeanor is limited by any statute to be brought or exhibited within any other time than is limited by this section, then the suit, information, or

indictment shall be brought or exhibited within the time limited by such statute.

(9) If any suit, information, or indictment is quashed or the proceedings set aside or reversed on writ of error, the time during the pendency of such suit, information, or indictment so quashed, set aside, or reversed shall not be reckoned within this statute so as to bar any new suit, information, or indictment for the same offense.

(10) The changes made to this section by this legislative bill shall apply to offenses committed prior to the effective date of this act for which the statute of limitations has not expired as of such date and to offenses committed on or after such date.

Sec. 9. Section 29-4003, Revised Statutes Supplement, 2002, is amended to read:

29-4003. (1) Except as provided in subsection (2) of this section, the Sex Offender Registration Act shall apply to any person who on or after January 1, 1997:

(a) Pleads guilty to or is found guilty of:

(i) Kidnapping of a minor pursuant to section 28-313, except when the person is the parent of the minor and was not convicted of any other offense in this section;

(ii) False imprisonment of a minor pursuant to section 28-314 or 28-315;

(iii) Sexual assault pursuant to section 28-319 or 28-320;

(iv) Sexual assault of a child pursuant to section 28-320.01;

(v) Sexual assault of a vulnerable adult pursuant to subdivision (1) (c) of section 28-386;

(vi) Incest of a minor pursuant to section 28-703;

(vii) Pandering of a minor pursuant to section 28-802;

(viii) Visual depiction of sexually explicit conduct of a child pursuant to section 28-1463.03 or 28-1463.05;

(ix) Knowingly possessing any visual depiction of sexually explicit conduct which has a child as one of its participants or portrayed observers pursuant to section 28-813.01;

(x) Criminal child enticement pursuant to section 28-311; ~~or~~

~~(*)~~ (xi) Child enticement by means of a computer pursuant to section 3 of this act; or

(xii) Attempt, solicitation, or conspiracy to commit an offense listed in subdivisions (1) (a) (i) through ~~(1) (a) (ix)~~ (1) (a) (xi) of this section;

(b) Enters the state and has pleaded guilty to or has been found guilty of any offense that is substantially equivalent to a registrable offense under subdivision (1) (a) of this section by any state, territory, commonwealth, or other jurisdiction of the United States, by the United States Government, or by court martial or other military tribunal; or

(c) Is incarcerated in a jail, a penal or correctional facility, or any other public or private institution or is under probation or parole as a result of pleading guilty to or being found guilty of a registrable offense under subdivision (1) (a) or (b) of this section prior to January 1, 1997.

(2) In the case of a person convicted of a violation of section 28-311, 28-313, 28-314, or 28-315, the convicted person shall be subject to the Sex Offender Registration Act, unless the sentencing court determines at the time of sentencing, in light of all the facts, that the convicted person is not subject to the act. The sentencing court shall make such determination part of the sentencing order.

(3) A person appealing a conviction of a registrable offense under this section shall be required to comply with the act during the appeals process.

Sec. 10. Original sections 28-318, 28-1463.05, and 29-110, Reissue Revised Statutes of Nebraska, sections 28-322, 28-322.01, and 29-4003, Revised Statutes Supplement, 2002, and section 28-101, Revised Statutes Supplement, 2003, are repealed.

Sec. 11. Since an emergency exists, this act takes effect when passed and approved according to law.