S T A T E  O F  N E W  Y O R K

753

2011-2012 Regular Sessions

I N  S E N A T E

(PREFILED)

January 5, 2011

Introduced by Sens. YOUNG, BONACIC, JOHNSON, MAZIARZ, RANZENHOFER -- read twice and ordered printed, and when printed to be committed to the Committee on Codes

AN ACT to amend the penal law, in relation to aggravated sexual offenses; and to amend the criminal procedure law, in relation to youthful offender status

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Paragraphs (a), (b) and (c) of subdivision 1 of section 70.02 of the penal law, paragraph (a) as amended by chapter 320 of the laws of 2006, and paragraphs (b) and (c) as amended by chapter 405 of the laws of 2010, are amended to read as follows:

(a) Class B violent felony offenses: an attempt to commit the class A-I felonies of murder in the second degree as defined in section 125.25, kidnapping in the first degree as defined in section 135.25, and arson in the first degree as defined in section 150.20; manslaughter in the first degree as defined in section 125.20, aggravated manslaughter in the first degree as defined in section 125.22, rape in the first degree as defined in section 130.35, criminal sexual act in the first degree as defined in section 130.50, aggravated sexual abuse in the [first] SECOND degree as defined in section 130.70, course of sexual conduct against a child in the first degree as defined in section 130.75; assault in the first degree as defined in section 120.10, kidnapping in the second degree as defined in section 135.20, burglary in the first degree as defined in section 140.30, arson in the second degree as defined in section 150.15, robbery in the first degree as defined in section 160.15, incest in the first degree as defined in section 255.27, criminal possession of a weapon in the first degree as defined in section 265.04, criminal use of a firearm in the first degree as defined in section 265.09, criminal sale of a firearm in the first

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

LBD02703-01-1

degree as defined in section 265.13, aggravated assault upon a police officer or a peace officer as defined in section 120.11, gang assault in the first degree as defined in section 120.07, intimidating a victim or witness in the first degree as defined in section 215.17, hindering prosecution of terrorism in the first degree as defined in section 490.35, criminal possession of a chemical weapon or biological weapon in the second degree as defined in section 490.40, and criminal use of a chemical weapon or biological weapon in the third degree as defined in section 490.47.

(b) Class C violent felony offenses: an attempt to commit any of the class B felonies set forth in paragraph (a) of this subdivision; aggravated criminally negligent homicide as defined in section 125.11, aggravated manslaughter in the second degree as defined in section 125.21, aggravated sexual abuse in the [second] THIRD degree as defined in section 130.67, assault on a peace officer, police officer, fireman or emergency medical services professional as defined in section 120.08, gang assault in the second degree as defined in section 120.06, strangulation in the first degree as defined in section 121.13, burglary in the second degree as defined in section 140.25, robbery in the second degree as defined in section 160.10, criminal possession of a weapon in the second degree as defined in section 265.03, criminal use of a firearm in the second degree as defined in section 265.08, criminal sale of a firearm in the second degree as defined in section 265.12, criminal sale of a firearm with the aid of a minor as defined in section 265.14, soliciting or providing support for an act of terrorism in the first degree as defined in section 490.15, hindering prosecution of terrorism in the second degree as defined in section 490.30, and criminal possession of a chemical weapon or biological weapon in the third degree as defined in section 490.37.

(c) Class D violent felony offenses: an attempt to commit any of the class C felonies set forth in paragraph (b); reckless assault of a child as defined in section 120.02, assault in the second degree as defined in section 120.05, menacing a police officer or peace officer as defined in section 120.18, stalking in the first degree, as defined in subdivision one of section 120.60, strangulation in the second degree as defined in section 121.12, rape in the second degree as defined in section 130.30, criminal sexual act in the second degree as defined in section 130.45, sexual abuse in the first degree as defined in section 130.65, course of sexual conduct against a child in the second degree as defined in section 130.80, aggravated sexual abuse in the [third] FOURTH degree as defined in section 130.66, facilitating a sex offense with a controlled substance as defined in section 130.90, criminal possession of a weapon in the third degree as defined in subdivision five, six, seven or eight of section 265.02, criminal sale of a firearm in the third degree as defined in section 265.11, intimidating a victim or witness in the second degree as defined in section 215.16, soliciting or providing support for an act of terrorism in the second degree as defined in section 490.10, and making a terroristic threat as defined in section 490.20, falsely reporting an incident in the first degree as defined in section 240.60, placing a false bomb or hazardous substance in the first degree as defined in section 240.62, placing a false bomb or hazardous substance in a sports stadium or arena, mass transportation facility or enclosed shopping mall as defined in section 240.63, and aggravated unpermitted use of indoor pyrotechnics in the first degree as defined in section 405.18.

S 2. The penal law is amended by adding three new sections 130.36, 130.51 and 130.71 to read as follows:

S 130.36 AGGRAVATED RAPE.

A MALE IS GUILTY OF AGGRAVATED RAPE WHEN HE ENGAGES IN SEXUAL INTERCOURSE WITH A FEMALE BY FORCIBLE COMPULSION AND WHEN, IN THE COURSE OF THE COMMISSION OF THE CRIME OR OF IMMEDIATE FLIGHT THEREFROM, HE OR ANOTHER PARTICIPANT IN THE CRIME:

1. IS ARMED WITH A DEADLY WEAPON; OR

2. USES OR THREATENS THE USE OF A DANGEROUS INSTRUMENT; OR

3. CAUSES PHYSICAL INJURY TO ANY PERSON WHO IS NOT A PARTICIPANT IN THE CRIME; OR

4. DISPLAYS WHAT APPEARS TO BE A FIREARM.

AGGRAVATED RAPE IS A CLASS A-II FELONY.

S 130.51 AGGRAVATED CRIMINAL SEXUAL ACT.

A PERSON IS GUILTY OF AGGRAVATED CRIMINAL SEXUAL ACT WHEN HE OR SHE ENGAGES IN ORAL SEXUAL CONDUCT OR ANAL SEXUAL CONDUCT WITH ANOTHER PERSON BY FORCIBLE COMPULSION AND WHEN, IN THE COURSE OF THE COMMISSION OF THE CRIME OR OF IMMEDIATE FLIGHT THEREFROM, HE, SHE OR ANOTHER PARTICIPANT IN THE CRIME:

1. IS ARMED WITH A DEADLY WEAPON; OR

2. USES OR THREATENS THE USE OF A DANGEROUS INSTRUMENT; OR

3. CAUSES PHYSICAL INJURY TO ANY PERSON WHO IS NOT A PARTICIPANT IN THE CRIME; OR

4. DISPLAYS WHAT APPEARS TO BE A FIREARM.

AGGRAVATED CRIMINAL SEXUAL ACT IS A CLASS A-II FELONY.

S 130.71 AGGRAVATED SEXUAL ABUSE IN THE FIRST DEGREE.

1. A PERSON IS GUILTY OF AGGRAVATED SEXUAL ABUSE IN THE FIRST DEGREE WHEN HE OR SHE INSERTS A FINGER OR FOREIGN OBJECT IN THE VAGINA, URETHRA, PENIS OR RECTUM OF ANOTHER PERSON BY FORCIBLE COMPULSION CAUSING PHYSICAL INJURY TO SUCH PERSON AND WHEN, IN THE COURSE OF THE COMMISSION OF THE CRIME OR OF IMMEDIATE FLIGHT THEREFROM, HE, SHE OR ANOTHER PARTICIPANT IN THE CRIME:

(A) IS ARMED WITH A DEADLY WEAPON; OR

(B) USES OR THREATENS THE USE OF A DANGEROUS INSTRUMENT; OR

(C) CAUSES PHYSICAL INJURY TO ANY PERSON WHO IS NOT A PARTICIPANT IN THE CRIME; OR

(D) DISPLAYS WHAT APPEARS TO BE A FIREARM.

2. CONDUCT PERFORMED FOR A VALID MEDICAL PURPOSE DOES NOT VIOLATE THE PROVISIONS OF THIS SECTION.

AGGRAVATED SEXUAL ABUSE IN THE FIRST DEGREE IS A CLASS A-II FELONY.

S 3. Section 130.65-a of the penal law, as added by chapter 1 of the laws of 2000, subdivision 1 as amended by chapter 485 of the laws of 2009, is amended to read as follows:

S 130.65-a Aggravated sexual abuse in the [fourth] FIFTH degree.

1. A person is guilty of aggravated sexual abuse in the [fourth] FIFTH degree when:

(a) He or she inserts a foreign object in the vagina, urethra, penis, rectum or anus of another person and the other person is incapable of consent by reason of some factor other than being less than seventeen years old; or

(b) He or she inserts a finger in the vagina, urethra, penis, rectum or anus of another person causing physical injury to such person and such person is incapable of consent by reason of some factor other than being less than seventeen years old.

2. Conduct performed for a valid medical purpose does not violate the provisions of this section.

Aggravated sexual abuse in the [fourth] FIFTH degree is a class E felony.

S 4. Section 130.66 of the penal law, as added by chapter 181 of the laws of 1996, subdivisions 1 and 2 as amended by chapter 485 of the laws of 2009, subdivision 3 as renumbered by chapter 1 of the laws of 2000, is amended to read as follows:

S 130.66 Aggravated sexual abuse in the [third] FOURTH degree.

1. A person is guilty of aggravated sexual abuse in the [third] FOURTH degree when he or she inserts a foreign object in the vagina, urethra, penis, rectum or anus of another person:

(a) By forcible compulsion; or

(b) When the other person is incapable of consent by reason of being physically helpless; or

(c) When the other person is less than eleven years old.

2. A person is guilty of aggravated sexual abuse in the [third] FOURTH degree when he or she inserts a foreign object in the vagina, urethra, penis, rectum or anus of another person causing physical injury to such person and such person is incapable of consent by reason of being mentally disabled or mentally incapacitated.

3. Conduct performed for a valid medical purpose does not violate the provisions of this section.

Aggravated sexual abuse in the [third] FOURTH degree is a class D felony.

S 5. Section 130.67 of the penal law, as added by chapter 450 of the laws of 1988, the opening paragraph of subdivision 1 as amended by chapter 485 of the laws of 2009, is amended to read as follows:

S 130.67 Aggravated sexual abuse in the [second] THIRD degree.

1. A person is guilty of aggravated sexual abuse in the [second] THIRD degree when he or she inserts a finger in the vagina, urethra, penis, rectum or anus of another person causing physical injury to such person:

(a) By forcible compulsion; or

(b) When the other person is incapable of consent by reason of being physically helpless; or

(c) When the other person is less than eleven years old.

2. Conduct performed for a valid medical purpose does not violate the provisions of this section.

Aggravated sexual abuse in the [second] THIRD degree is a class C felony.

S 6. Section 130.70 of the penal law, as amended by chapter 450 of the laws of 1988, the opening paragraph of subdivision 1 as amended by chapter 485 of the laws of 2009, is amended to read as follows:

S 130.70 Aggravated sexual abuse in the [first] SECOND degree.

1. A person is guilty of aggravated sexual abuse in the [first] SECOND degree when he or she inserts a foreign object in the vagina, urethra, penis, rectum or anus of another person causing physical injury to such person:

(a) By forcible compulsion; or

(b) When the other person is incapable of consent by reason of being physically helpless; or

(c) When the other person is less than eleven years old.

2. Conduct performed for a valid medical purpose does not violate the provisions of this section.

Aggravated sexual abuse in the [first] SECOND degree is a class B felony.

S 7. Subdivisions 2 and 3 of section 720.10 of the criminal procedure law, subdivision 2 as amended by chapter 416 of the laws of 1986, paragraph (a) of subdivision 2 as amended by chapter 316 of the laws of 2006 and subdivision 3 as amended by chapter 264 of the laws of 2003, are amended to read as follows:

2. "Eligible youth" means a youth who is eligible to be found a youthful offender. Every youth is so eligible unless:

(a) the conviction to be replaced by a youthful offender finding is for (i) a class A-I or class A-II felony, or (ii) an armed felony as defined in subdivision forty-one of section 1.20, except as provided in subdivision three, or (iii) rape in the first degree, criminal sexual act in the first degree, or aggravated sexual abuse IN THE SECOND DEGREE, except as provided in subdivision three, or

(b) such youth has previously been convicted and sentenced for a felony, or

(c) such youth has previously been adjudicated a youthful offender following conviction of a felony or has been adjudicated on or after September first, nineteen hundred seventy-eight a juvenile delinquent who committed a designated felony act as defined in the family court act.

3. Notwithstanding the provisions of subdivision two, a youth who has been convicted of an armed felony offense or of rape in the first degree, criminal sexual act in the first degree, or aggravated sexual abuse IN THE SECOND DEGREE is an eligible youth if the court determines that one or more of the following factors exist: (i) mitigating circumstances that bear directly upon the manner in which the crime was committed; or (ii) where the defendant was not the sole participant in the crime, the defendant's participation was relatively minor although not so minor as to constitute a defense to the prosecution. Where the court determines that the eligible youth is a youthful offender, the court shall make a statement on the record of the reasons for its determination, a transcript of which shall be forwarded to the state division of criminal justice services, to be kept in accordance with the provisions of subdivision three of section eight hundred thirty-seven-a of the executive law.

S 8. This act shall take effect on the first of November next succeeding the date on which it shall have become a law.