MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION
SFN 2053 (2/85) 5M

ROLL NUMBER

1392

DESCRIPTION

2003 HOUSE EDUCATION

HB 1392

2003 HOUSE STANDING COMMITTEE MINUTES
BILL/RESOLUTION NO. HB 1392

House Education Committee

☐ Conference Committee

Hearing Date February 10, 2003

Tape Number	Side A	Side B	Meter #
1	x		4000-end
1		x	00-3190

Committee Clerk Signature Linda Fischer

Minutes: **Chairman Kelsch** opened HB 1392

Rep. Delmore, District 43, SW Grand Forks

In 2001 755 victims of sexual assault contacted the crisis centers throughout the state for services. This is not the total number of assaults, this is only those that are reported. Drug facilitated sexual assaults occur in 55-76% of all sexual assault cases. In 93% drug facilitated sexual assaults the alcohol or drugs used by victims were used voluntarily. Do to the impairment of the drugs, evidence is rarely gathered, because victims do not have the wherewithal to report their assault, or they don't recognize the signs of assault until after the forensic evidence of drugs has left their system. By adding lines 15 and 19 to HB 1392, ND laws would be consistent for prosecution on these assaults, like most other states around the country.

Jessica McSparron, Sexual Assault Program/Policy Coordinator for ND Council on Abused Women's Services and ND Coalition Against Sexual Assault. See Attached Testimony

Ashley Walters, young lady who is victim of such assault, See Attached Testimony

(5842) Rep. Herbel Looking at some of the language, Unable to make reasonable judgment. That gets kind of difficult to determine what a reasonable judgment after one drink or two, three. Where does reasonable come in?

McSparron: Under the sexual assault statute, Reasons for sexual assault offense, is that the conduct is considered offensive. In the section on consent, those terms are not defined in statute. However it would be my determination, I'm not an attorney, that would be something for the jury to decide, on a case by case basis. Because again we don't have victims that show up at the hospital after an assault so that we can take a blood alcohol level and say .08 you are to intoxicated and that you can not consent to sex. At what point is a person unable to make a judgment, considered by the jury, and something that would be established in case law.

Rep. Williams Certainly a gray area, page 2 of testimony, only 3% using GHG and date rape drugs. At what point is the person unaware/unwilling to participate in a sexual act and secondly, is the perpetrator (flip tape). I'm told that drugs increase the promiscuity. This bill, unfortunately, is pointed towards the male gender. There has to be responsibility on the part of the boy and the girl. And Prom parties where parents are also responsible when these things happen. I don't know how to state the question. Why is it that at the point when alcohol is involved and the female participants are probably guilty of being willing to do it. I will use the word guilt.

McSparron: When you take about sexual assault we do usually take in terms of females being victims and males being perpetrators, because 96% females are victims and 98% are male perpetrators by statistics. When a women is in a room or alone with a man, she most likely has an instinct of fear. Whether she knows you as a friend or not. When a man is in a room alone with a

female, he is not afraid. Now there is no statement in this criminal code which would not allow for parents to take civil action. If parents wanted to find justice in the civil realm and they can do so, this bill doesn't address that in any way. Consent and the definition of consent is ' positive action' not passive. And I can with draw my consent at any time during any action. If an individual is making sexual advances, flirting with someone, at any point during that time either party can withdraw consent if they no longer want to be involved. It is the responsibility of the other person to not violate their right. If they violate their right, that person committed the crime. under the influence of a drug and unable to defend myself, the withdrawal of my consent is not diminished because of the other factors. When I withdraw my consent that should be the end. That person should not have the right to assault.

Rep. Mueller What is the difference between the her (Walter) circumstance and a rape? She was raped. Now it seems to me that we have laws on the books about this. In that instance it doesn't seem to me the state of mind has a whole lot to do with it, she was raped. She didn't want to have that happened, it happened, it is rape. I'm not drawing a close connection to the issue having to do with drugs.

McSparron: The perception of sexual assault that most of society has in which the act is truly offensive, is the masked perpetrator in the ally that jumps out and pulls the victim into the ally and assaults them. That is what society's version of rape is. That is not what the case in 99% of the time. Rape is a coercive act that happens over time. The perpetrator manipulates and maneuvers them, to make them more comfortable with being alone, to allow them access to the assault. Often times the perpetrator is not going to use a drug like GHB, because they already have victims that will voluntarily intoxicate themselves. As a society, especially the age ranges

18-24 years old, alcohol consumption is one of the major factors in socialization. So you have an individual who in order to fit in with their peers, go out and drink, and you have perpetrators that know this, so they will go to bars to select and stock victims that are already intoxicated. How does this law go above and beyond what is already there? In the law the way that sexual assault and the way gross sexual imposition are defined, the very comprehensive, however, when it comes to prosecution, you have to be able to prove beyond a reasonable doubt the things that are listed in there.

Rep. Sitte Why would that not be rape in the case you have told us?

McSparron: The circumstances of all cases are difficult. The judgment of investigator and prosecutor in the process, varies on each case. This is a juvenile case, we can't get specifics on this case, it is sealed. I can talk in general terms of the circumstances of what happens in a sexual assault. In an instance like this, you have underage victim, who is intoxicated. Prosecution stand point, having to have someone get up on a stand, I rely on the believability of the victim to make that jury believe what happened. In cases of drug induced sexual assault in which the victim is passing in and out of a conscious state, may not be able to recall every thing that happened, and didn't report until months later. How do I explain all those things to a jury. In an instance to make them understand what has happened. With this law and expanding the ability to have another avenue to explain what happened to the jury.

Rep. Herbel We already have laws in place that address those situations. It appears to me that if we enact this, it puts all of the responsibility on the man completely. Am I reading that in this law, or not? It removes the consent issue if someone so decides, based on case laws. They need to address the consumption of the drugs and alcohol more so than this.

McSparron: Unde the current law, gross sexual imposition, read bill. Gave more examples of situations.

Rep. Mueller You have concern, this new section, sending a message that we don't want sent. That is that the consumption of alcohol is to longer going to be a deterrent in the court of law in being responsible, Does this open it up a little wider that what you want to about responsible drinking on the part ladies, in this instance?

McSparron: I the event of a sex assault, when sexual activity occurs, for it to be legal between two people there has to be consent. If not it is illegal. By adding this section to the law, which specifically states that the perpetrator knew that the victim was rendered mentally incapacitated or physically helpless by being under the influence of an intoxicant. If both parties are responsibility to have consent before engaging in an act, would that perpetrator not have to have consent from the other party to have that act be considered legal.

Jonathon Beyers, Attorney General's Office

The attorney General's office is in support of this bill.

(2057) Rep. Sitte In the matter of two people who are both intoxicated, girls are offering themselves to men.

Beyer: This is to gender specific, if both are intoxicated that they both can be charged with the offense.

Rep. Hawken: If they are under aged, intoxicated individuals will not report it.

Beyer: Reporting of one could lead to prosecution on the other. I do want to point out that all of the questions relate to the fact that there is something short of someone being passed out that we would agree, that if a person gets to that point, we would look at them and say they are not

capable of giving consent if someone had intercourse with them. Once you step back from being totally passed out where is that line drawn. It is going to be a gray area. The reason that we support the bill, it will at least plant the sed for someone in this situation, that they do need to take in to fact that the victim is to intoxicated and that they ought to be thinking is it to such a level that they can't give consent if they have intercourse.

Rep. Williams How many states have this verb age in their law?

Beyer: At least the new part of this, adding the word 'knowingly' as a definition and standard.

Rep. Williams Why are you supporting this, is there a hole in the current language.

Beyer: When I first started reviewing this with Jessica, I was aware that it would create a lot of questions, and this line drawn will be hard to grasp.

Rep. Norland In your experience with people that drink, is it not uncommon that people that drink and pass out don't remember what happened. Not just in a sexual act, drinking I general.

Beyer: That is true, this bill is not a cure all for the problem. Because they won't be able to recall any supporting testimony. This is where other people at the party would come in a testify what the situation was.

Rep. Norland What is the difference of just sleeping. unless you give them an alcohol test of some kind.

Beyer: That is the proof beyond a reasonable doubt.

Rep. Meier What is the maximum penalty for a juvenile rapist in law?

Beyer: In Juvenile, if you call them rapist, forcible gross sexual imposition, is one of those crimes that transfer to adult court, with a maximum of 20 years or 1,000 penalty.

Rep. Hunskor As I listen to the discussion, even though there are many gray areas, it just seems that young or old, having knowledge of responsibility that type of information before prom, that will be a deterrent for sexual activity.

Beyer: I do some talks area high schools about the ramifications of sexual assault crimes and how they can get into trouble. Alcohol responsibility should be added to that.

Rep. Mueller My concern to those people, have we not reduced the responsibility of the person of the victim and the perpetrator?

Beyer: Small part of that message.

OPPOSITION: none

2003 HOUSE STANDING COMMITTEE MINUTES
BILL/RESOLUTION NO. HB 1392
House Education Committee

☐ Conference Committee

Hearing Date February 11, 2003

Tape Number	Side A	Side B	Meter #
1		x	1929-2300
Committee Clerk Signature	Linda Fiechtner		

Minutes: **Chairman Kelsch** opened HB 1392

Rep. Herbel moved a DO NOT PASS, Rep. Sitte second the motion.

Rep. Herbel Right now we do have law that prohibit this and I am also concerned about someone yelling rape and have the burden fall on one person when there is alcoholl involved. The real issue is to address the use of alcohol and drugs.

Roll vote: passed a DO NOT PASS 9-5-0, Rep. Herbel will carry to the floor.

Date: 2/11/03
Roll Call Vote #: 1

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 1392

House **HOUSE EDUCATION** Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken DNP

Motion Made By Herbel Seconded By Sitte

Representatives	Yes	No	Representatives	Yes	No
Chairman Kelsch		✓			
Rep. Johnson	✓				
Rep. Nelson	✓				
Rep. Haas	✓				
Rep. Hawken		✓			
Rep. Herbel	✓				
Rep. Meier		✓			
Rep. Norland	✓				
Rep. Sitte	✓				
Rep. Hanson		✓			
Rep. Hunskor	✓				
Rep. Mueller	✓				
Rep. Solberg		✓			
Rep. Williams	✓				

Total (Yes) 9 No 5

Absent 0

Floor Assignment Herbel

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
February 11, 2003 12:05 p.m.

Module No: HR-26-2265
Carrier: Herbel
Insert LC: . Title: .

REPORT OF STANDING COMMITTEE

HB 1392: Education Committee (Rep. R. Kelsch, Chairman) *recommends* **DO NOT PASS** (9 YEAS, 5 NAYS, 0 ABSENT AND NOT VOTING). HB 1392 was placed on the Eleventh order on the calendar.

2003 TESTIMONY

HB 1392

BISMARCK
Abused Adult Resource Center
222-8370
BOTTINEAU
Family Crisis Center
228-2028
[illegible]LS LAKE
[illegible]rnatives for
[illegible]amilies
1-888-662-7378
DICKINSON
Domestic Violence and
Rape Crisis Center
225-4506
ELLENDALE
Kedish House
349-4729
FARGO
Rape and Abuse Crisis Center
800-344-7273
FORT BERTHOLD RESERVATION
Coalition Against
Domestic Violence
627-4171
FORT YATES
854-3861 Ext. 228
GRAFTON
Tri-County Crisis
Intervention Center
352-4242
GRAND FORKS
Community Violence
Intervention Center
746-0405
[illegible]STOWN
[illegible]Shelter
8[illegible]-7233
McLEAN COUNTY
McLean Family
Resource Center
800-651-8643
MERCER COUNTY
Women's Action and
Resource Center
873-2274
MINOT
DV Center
852-2258
RANSOM COUNTY
Abuse Resource Network
683-5061
FORT TOTTEN
Spirit Lake
766-4231
STANLEY
DV Program, NW, ND
628-3233
VALLEY CITY
Abused Persons Outreach
Center
845-0078
WAHPETON
[illegible]Rivers Crisis Center
[illegible]T
W[illegible]N
Family Crisis Shelter
572-0757

Chairperson Kelsch and Members of the House Education Committee

Testimony in Support of HB 1392

Monday, February 10, 2003

For the record, I am Jessica McSparron, Sexual Assault Program and Policy Coordinator for the North Dakota Council on Abused Women's Services/Coalition Against Sexual Assault in North Dakota. I am here to provide testimony in support of HB 1392, on drug-facilitated sexual assault.

The impetus for the introduction of this bill came about while our coalition was working with national trainers on the issues of campus sexual assault and investigation of sexual assault allegations: Sue Welch, consultant for the National Training Center on Domestic and Sexual Violence with 14 years experience with the Urbana Police Department, and Joanne Archambault of the Sexual Assault Training Institute, with 21 years of experience with the San Diego Police Department. After reviewing of the North Dakota Sexual Assault Evidence Collection Protocol produced by the Attorney General's Office in conjunction with the North Dakota Council on Abused Women's Services, they noted that while our sexual offense criminal code was extremely comprehensive, our drug facilitated sexual assault statute was inconsistent with laws in surrounding states and very limited in its application to the reality of sexual assault cases.

4462

North Dakota Council on Abused Women's Services • Coalition Against Sexual Assault in North Dakota
418 East Rosser #320 • Bismarck, ND 58501 • Phone: (701) 255-6240 • Toll Free 1-888-255-6240
Fax: (701)255-1904 • Email: ndcaws@btinet.net
National DV Hotline 1-800-799-7233 • 800-787-3224 TTY

In North Dakota in 2001, 755 sexual assault victims reported to crisis intervention agencies throughout the state. Often times alcohol or drugs are used prior to these assaults. In fact, alcohol and marijuana are the most commonly encountered substances in alleged cases of sexual assault according to a study done by the New Mexico Department of Health. In a study of over 2000 victims, nearly 2/3 of the urine specimens contained these two drugs, while date rape drugs like GHB and Flunitrazepam accounted for 4550 less then 3%.

The use of drugs like alcohol, marijuana, and other club drugs such as ecstasy or ketamine are often used voluntarily. Use of these types of drugs appears to be concentrated among populations that are also at the highest risk for sexual assault, including middle and high school students, and college age students, according to a study commissioned by the U.S. Attorney General's Office and the Department of Justice in April 2000. The Bureau of Justice Statistics found in December 2000 that the top reason for increased risk of sexual assault on campus was frequently drinking enough to get drunk. A study of 4633 North Dakota college students in 1994 found that 39% of all victims acknowledged their own use of alcohol at the time of the sexual assault. Obviously, drinking and drugs make it much more difficult to get out of dangerous situations as a result of impaired perception. Victims who are under the influence are more often blamed and this interferes with reporting the crime.

One final complicating issue is the difficulty of measuring the use of alcohol or drugs. Investigation of drug facilitated sexual assault often turns out to be inconclusive because many victims do not seek assistance until hours or days later, in part because the drugs impair recall and in part because victims may not recognize the signs of assault immediately. By the time they do report, 4744 conclusive forensic evidence is most likely lost.

Under current state law, prosecution of drug facilitated sexual assault can only occur if the "person (perpetrator) substantially impaired the victim's power to appraise or control the victim's conduct by administering or employing without the victims knowledge a controlled substance." However, as the previous statistics show, only about 3% of drug facilitated sexual assaults occur in situations in which the victim is unaware of the consumption of a controlled substance. The most common mode of operation for a perpetrator is to select a victim already impaired through alcohol or drugs and to take advantage of this vulnerable state. An intoxicated victim makes it easy for a 4858 rapist to gain control over their victim.

Line 15 to 19 page 1 and lines 16 to 19 page 2 in HB 1392 expand the ability to prosecute drug facilitated sexual assault by holding perpetrators accountable for unwanted sexual activity with a victim who is incapacitated due to intoxication. Once again, in the most common scenarios of sexual

assault, alcohol or drugs are used voluntarily, and we believe perpetrators should be held accountable for engaging in sexual activity with a victim who 5000 is mentally incapacitated or "a person who by reason of intoxication is manifestly unable or known to the actor to be unable to make a reasonable judgment" (NDCC 12.1-17-08).

Secondly, the addition of lines 15 through 19 page 1 and lines 16 to 19 page 2 correlates with section 12.1-17-08 related to consent as a defense. Under this section, "Assent does not constitute consent if it is given by a person who by reason of youth, mental disease or defect, or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged."

The addition of lines 15 through 19 page 1 and lines 16 to 19 on page 2 also makes North Dakota's laws consistent with those used throughout the rest of the country. For example, Michigan's sexual assault statute states "first degree criminal sexual conduct is sexual penetration if the victim is aided by another person and with victim incapacity (mentally incapable, mentally incapacitated, and or physically helpless). Iowa's Code under section 709.4 states "A person commits sexual abuse in the third degree when the person performs a sex act and the other person is suffering from mental incapacity 5130 which precludes giving consent, or the act is performed while the other person in under the influence of a controlled substance and it prevents the other

person from consenting to the act, the person performing the act knows or reasonably should have known that the other person was under the influence of a controlled substance, and the other person is mentally incapacitated." In 5150 Washington, second degree rape occurs "when a person engages in sexual intercourse with another person, when the victim is incapable of consent by reason of being physically helpless or mentally incapacitated." Colorado's statute includes "Any actor who knowingly inflicts sexual intrusion or penetration on a victim commits sexual assault if the actor knows that the victim is incapable of appraising the nature of the victim's conduct or the victim is physically helpless and the actor knows the victim is physically helpless and the victim has not consented." And in Montana's code, the definitions used in the sexual assault code state "without consent means mentally defective or incapacitated or physically helpless."

This change proposed in HB 1392 will strengthen our current statute to hold perpetrators accountable for taking advantage of victims who are under the 5190 influence of alcohol or drugs. For these reasons the North Dakota Council on Abused Women's Services/Coalition Against Sexual Assault in North Dakota supports a do pass on HB 1392.

I have with me today Ashley Walters who is brave enough to put into words what I have tried to convey in statistics. The events of the sexual assault she endured are indicative of thousands of assaults that occur each year which slip

5275 through the system of prosecution because of the limits of North Dakota's current law.

Respectfully.

Jessica McDaniels, LSW

For the record I am Ashley Walters and I am here to testify on HB 1392.

On prom night—April of 2001 I was raped. After the prom, I attended an after-prom party at the Days Inn in Bismarck, North Dakota. Multiple rooms had been rented at the Days Inn by students to host the after-prom parties. My date and I went to the hotel together and he stayed in the lobby talking to friends that were working there. I went up to where the parties were to visit with friends. Alcohol was available in a designated room. My friends and I started drinking alcohol. I began drinking wine coolers, some beer and rum with coke—all were consumed in a short amount of time, approximately 2 hours. My prom date came up to the rooms and told me he was planning to leave. I decided to stay.

About 15-20 people were coming in and out of the party rooms. The drinking continued after my prom date left for a couple of hours. Some of the people at the party were beginning to pass out—we were in one of the rooms watching movies and I also passed out for a short time until other friends came and knocked on the door. They asked me to join them in their suite. There was a hot-tub in the suite and several of the seniors then picked me up and put me in the hot-tub with my clothes on—even though I protested that I didn't have a suit. They then said, since your wet you might as well take your clothes off to get naked. One of the seniors in the hot tub kept pushing me to drink more and eventually forced me to drink more. Dave came in during this time and said he wanted to join in the hot tub but he didn't have any trunks. I said I also needed my suit and that I had one in my car. Dave said he would help me find it. I went outside with Dave but I was too intoxicated to find my vehicle. So Dave and I went back to the party. Dave left then to get his trunks. I got back into the hot tub. Dave came back with his trunks and all of rest of the seniors then got out of the hot tub and left Dave and I alone in the tub.

During the time in the hot tub I was very tired due to the alcohol and being in the tub. I was feeling exhausted. Dave started making sexual advances in the tub; he was kissing and groping me. I told Dave I was really tired and I wanted to get out. I went to lie on a bed in the room and Dave followed me. Dave continued making sexual advances. One of the other seniors encouraged Dave to take me to another room.

Dave told me, he had his own room and that I could go and sleep there, so I went with him. Dave took me to his truck and drove us to his motel where there were no other parties going on. At the motel I continued to tell Dave I wanted to sleep. Dave continued to make sexual advances while I was passing in out. Dave began insisting that I perform oral sex and tried to coerce me by saying I had agreed to do it. Dave began removing my clothes against my protests. Dave then raped me.

Shortly after the rape Dave forced me to wake up and he drove me back to the Days Inn and dropped me off outside the door. I was still so intoxicated at that point that I could not find my room. I found some friends in the breakfast area. One of my girlfriends drove me home and she was the first person I told that I had been raped.

Months later during a medical exam, I disclosed that I had been assaulted. I was referred to the Abused Adult Resource Center. With their advocacy I made a report to the Bismarck Police Department. No charges were ever filed.

District court properly did not give instruction on lesser included offense of sexual assault, since the only issue was the consent of the victim, and the evidence would not permit the jury to rationally convict the defendant of the lesser offense and acquit him of the greater. State v. McDonell, 550 N.W.2d 62 (N.D. 1996).

Mental Deficiency.

Absent expert medical testimony, prosecution, nevertheless, minimally met its burden of presenting a prima facie case that defendant's victims must, by reason of mental disease or defect, be incapable of understanding the nature of the conduct involved. State v. Kingsley, 383 N.W.2d 828 (N.D. 1986).

Multiple Counts.

—In General.

Defendant in resident child molester case was not denied the right to prepare his defense by the state's inability to be more specific as to the time of the commission of the offenses; when multiple acts of molestation are alleged by a minor child, specificity as to the time of the offense may be impossible and an alibi defense is not likely to be viable since the defendant did not claim that he was not alone with the child. State v. Vance, 537 N.W.2d 545 (N.D. 1995).

Although the state's decision to charge one count of gross sexual imposition for each month that "resident child molester" resided with child does not create an additional burden upon the state to prove beyond a reasonable doubt that an offense occurred specific to each month, there must nonetheless be sufficient evidence to support each count for which the defendant was found guilty. State v. Vance, 537 N.W.2d 545 (N.D. 1995).

—Double Jeopardy.

Where defendant was convicted of two counts of gross sexual imposition, because each conviction arose from evidence of a different sexual act, i.e., oral and vaginal sex, his convictions rested on two separate sexual acts and his double jeopardy argument was meritless. State v. Sievers, 543 N.W.2d 491 (N.D. 1996).

Probable Cause.

Defendant's admissions of touching nine-year-old victim inside her sweatpants and having his hand under her shirt provided evidence for a finding of probable cause that he had commited the offense of gross sexual imposition for purposes of preliminary hearing, despite his denial that he received gratification from the sexual contact. From the details of the incident, the defendant's admission, and his acknowledgment that what he had done was wrong and stupid, the magistrate could draw the inference that the touching was for the purpose of gratifying or arousing sexual desire. Schiermeister v. Riskedahl, 449 N.W.2d 566 (N.D. 1989).

Nine-year-old victim's statement that defendant "rubbed around my private spots" and touched her on the chest established probable cause for magistrate to believe the offense of gross sexual imposition had been committed by defendant and to bind him over for trial. Schiermeister v. Riskedahl, 449 N.W.2d 566 (N.D. 1989).

Psychiatric Examination of Complaining Witness in Sex Offense.

The trial court has discretion to order a psychiatric examination of a complaining witness in a sex offense based upon compelling reasons established on the record, but not for a mere fishing expedition. State v. Buckley, 325 N.W.2d 169 (N.D. 1982).

DECISIONS UNDER PRIOR LAW

In General.

An act of sexual intercourse accomplished with a female under the age of eighteen years and not the wife of the perpetrator, was always rape; but the act could be rape in the first, second or third degree, depending solely upon the age of the defendant. State v. Running, 53 N.D. 896, 208 N.W. 231 (1926).

Age of Defendant.

In a prosecution for the statutory offense of rape without force the age of the defendant going to the degree of the crime, as distinguished, from the age going to his capacity to commit the crime at all, was an essential fact to be established by the evidence and to be considered by the jury in fixing the degree of the crime. It was a question of fact to be submitted to and determined by the jury. State v. Running, 53 N.D. 896, 208 N.W. 231 (1926).

Consent.

If the act was committed with a female under the age of consent by a male over the age of seventeen and under the age of twenty years, whether or not she willingly participated in the act was immaterial except in determining the degree of the offense. State v. Nagel, 75 N.D. 495, 28 N.W.2d 665 (1947).

Where the statute fixed the age of consent of the female, under that age she could not consent. Her willingness to participate constituted only an apparent consent and in such case the female was to be regarded as resisting no matter what the actual state of her mind at the time, since the law resisted for

her. State v. Nagel, 75 N.D. 495, 28 N.W.2d 665 (1947).

Failure to cry out for help did not give rise to presumption of consent by victim who was elderly, had had recent heart attack, and was much smaller than her assailant, where her chances of receiving help as a result of crying out were few. State v. Champagne, 198 N.W.2d 218 (N.D. 1972).

Even if complaining witness who was under eighteen years of age had cooperated with defendant in every way, his act of intercourse with her would nevertheless have been rape. State v. Klein, 200 N.W.2d 288 (N.D. 1972).

Defenses.

Impotency was a sufficient defense to an indictment for the consummated offense of rape. Territory v. Keyes, 5 Dak. 244, 38 N.W. 440 (1888), distinguished, State v. Fisk, 15 N.D. 589, 108 N.W. 485, 11 Ann. Cas. 1061 (1906).

Error in Instructions.

In a prosecution for statutory rape, the omission of instructions on a minor degree of the offense was not error in the absence of request. State v. Martin, 54 N.D. 840, 211 N.W. 585 (1926).

Evidence Sufficient.

Defendant was guilty of rape in the first degree of a six-year-old child where the evidence showed penetration. State v. Oliver, 78 N.D. 396, 49 N.W.2d 564 (1951).

Prosecutrix's testimony of penetration, corroborated by defendant's witness who walked into bedroom and observed prosecutrix's pants unzipped and her attempt to close them as she left the room, plus defendant's statement before entering room with victim that he was going to "make" her, was sufficient evidence to sustain guilty verdict convicting accused of an act of sexual intercourse with female under the age of eighteen years. State v. Klein, 200 N.W.2d 288 (N.D. 1972).

Testimony of two eyewitnesses that they had observed defendant perform what appeared to be sexual intercourse with the complainant, and testimony by physician that complainant's hymen was bruised and torn was sufficient evidence to sustain conviction of rape, despite the complainant's inability to identify her attacker since her eyes were covered during the assault. State v. Kirk, 211 N.W.2d 757 (N.D. 1973).

Uncorroborated testimony of victim was sufficient to establish any or all elements of the crime of rape. State v. Olmstead, 246 N.W.2d 888 (N.D. 1976), cert. denied, 436 U.S. 918, 98 S. Ct. 2264, 56 L. Ed. 2d 759 (1978).

Information Sufficient.

If the information properly charged rape in the first degree, and the evidence of defendant's guilt thereof was sufficient, the verdict stood, although the information also charged rape in the second degree. State v. Rhoades 17 N.D. 579, 118 N.W. 233 (1908).

The particular acts constituting the allegec rape had to be set forth in the information ir a manner sufficient to apprise the accused ir which one of the different ways it was claimec he had committed the offense. State v Rhoades, 17 N.D. 579, 118 N.W. 233 (1908).

Under an information charging defendant with the crime of rape in the first degree by force and violence, a verdict of guilty of assault with intent to commit rape could be returned. State v. Becker, 74 N.D. 293, 21 N.W.2d 552 (1945).

An information alleging facts and circumstances constituting an offense under the law was not fatally defective because it designated the offense by a wrong name. State v Hefta, 88 N.W.2d 626 (N.D. 1958).

An information which charged rape in the first degree and then set out all of the elements of such charge correctly except that it stated defendant's age as twenty years or over instead of twenty-four years as necessary to constitute first degree rape under former section, was not fatally defective, where defendant admitted at the trial and before pronouncement of sentence that he was thirty-three years old, and the information could have been amended to show age as thirty-three had the defendant raised any objection. State v. Hefta, 88 N.W.2d 626 (N.D. 1958).

Lesser Included Offenses.

Under an information charging the commission of rape in the first degree a verdict could be returned finding the defendant guilty of a lesser degree. State v. Bancroft, 23 N.D. 442, 137 N.W. 37 (1912).

A verdict of rape in the second degree or of assault with intent to commit rape was returnable under an information charging rape in the first degree. State v. Bancroft, 23 N.D. 442, 137 N.W. 37 (1912).

On a charge of second degree rape if it did not certainly appear that the act was committed by overcoming the female's resistance by force and violence, the jury could return only a verdict of rape in the third degree. State v. Nagel, 75 N.D. 495, 28 N.W.2d 665 (1947).

Second degree and third degree rape both were included offenses within the crime of rape in the first degree, and were differentiated only by reason of the ages of the parties thereto. State v. Nagel, 75 N.D. 495, 28 N.W.2d 665 (1947).

Third degree rape was included in the offense of second degree rape. State v. Nagel, 75 N.D. 495, 28 N.W.2d 665 (1947).