

LEGISLATIVE BILL 613

Approved by the Governor April 15, 2004

Introduced by Bourne, 8; Synowiecki, 7; Bromm, 23; Aguilar, 35

AN ACT relating to crimes and offenses; to amend sections 29-404.02 and 42-903, Reissue Revised Statutes of Nebraska; to provide for confidential communications in cases of domestic violence and sexual assault as prescribed; to create the offense of domestic assault; to change provisions relating to arrest and sentencing procedures; to provide duties for law enforcement; to redefine terms; and to repeal the original sections.

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

Section 1. The Legislature finds that because of the fear and stigma that often results from crimes of sexual assault or domestic violence, and because of the risk of retaliatory violence by the perpetrator, many victims hesitate to seek help even when it is available at no cost to them. Without assurances that communications made while receiving assistance in overcoming the adverse effects of a sexual assault or domestic violence situation will be confidential and protected from disclosure, victims will be even more reluctant to seek assistance or to confide openly to their advocates and to explore legal and social remedies fully. As a result, victims may fail to receive needed vital care and counseling and thus lack the support, resources, and information necessary to recover from the crime, to report the crime, to assist in the prosecution of the crime, to participate effectively in the justice system, to achieve legal protections, and to prevent future sexual assaults and domestic violence. This is a matter of statewide concern, and the prevention of violence is for the protection of the health, safety, and welfare of the public.

Sec. 2. For purposes of sections 1 to 4 of this act:

(1) Advocate means any employee or supervised volunteer of a domestic violence and sexual assault victim assistance program or of any other agency, business, or organization that is not affiliated with a law enforcement or prosecutor's office, whose primary purpose is assisting domestic violence and sexual assault victims;

(2) Victim means a person who communicates with an advocate for assistance in overcoming the adverse effects of domestic violence or sexual assault; and

(3) Confidential communication means any written or spoken information exchanged between a victim and an advocate in private or in the presence of a third party who is necessary to facilitate communication or further the advocacy process and which is disclosed to the advocate for the purposes of overcoming the adverse effects of domestic violence or sexual assault.

Sec. 3. (1) A victim, an advocate without the consent of the victim, a third party as described in subdivision (3) of section 2 of this act without the consent of the victim, or a minor or incapacitated victim without the consent of a custodial guardian or a guardian ad litem appointed upon application of either party, shall not be compelled to give testimony or to produce records concerning a confidential communication for any purpose in any criminal, civil, legislative, administrative, or other proceeding, except as follows:

(a) The party seeking disclosure of a confidential communication shall, in a criminal, civil, or administrative proceeding, file a motion that sets forth specifically the issues on which disclosure is sought and enumerates the reasons why the party is seeking disclosure and why disclosure is necessary, accompanied by an affidavit or affidavits containing specific information which establishes that the confidential communication constitutes relevant and material evidence in the case; and

(b) If the party seeking disclosure has complied with subdivision (a) of this subsection, the court or a hearing officer shall review the confidential communication in camera and out of the presence and hearing of all persons, except the victim, the advocate, and any other person the victim is willing to have present, to determine whether a failure to disclose the confidential communication would violate the constitutional rights of the party seeking disclosure.

(2) An advocate, a victim, or a third party as described in subdivision (3) of section 2 of this act cannot be compelled to provide testimony in any criminal, civil, legislative, administrative, or other

proceeding that would identify the name, address, location, or telephone number of a safe house, abuse shelter, or other facility that provided temporary emergency shelter to the victim of the offense that is the subject of the proceeding unless the facility is a party to the proceeding.

Sec. 4. (1) A victim does not waive the protections afforded by sections 1 to 4 of this act by testifying in court about the offense, except that:

(a) If the victim partially discloses the contents of a confidential communication in the course of testifying, then either party may request the court to rule that justice requires the protections afforded by sections 1 to 4 of this act be waived to the extent the protections apply to that portion of the confidential communication; and

(b) Any waiver shall apply only to the extent necessary to require any witness to respond to counsel's questions concerning a confidential communication that is relevant to the case.

(2) An advocate cannot waive the protections afforded a victim under sections 1 to 4 of this act. However, if a victim brings suit against an advocate or the agency, business, or organization in which the advocate was employed or served as a volunteer at the time of the advocacy relationship, the advocate may testify or produce records regarding confidential communications with the victim and is not in violation of sections 1 to 4 of this act.

(3) Sections 1 to 4 of this act shall not relieve an advocate of any duty to report suspected adult abuse or neglect as required by section 28-372 or suspected child abuse or neglect as required by section 28-711 or any other legal duty to report a criminal or unlawful act.

(4) Sections 1 to 4 of this act shall not be construed to limit any other testimonial privilege available to any person under the laws of this state.

Sec. 5. (1) A person commits the offense of domestic assault in the third degree if he or she:

(a) Intentionally and knowingly causes bodily injury to his or her intimate partner; or

(b) Places, by physical menace, his or her intimate partner in fear of imminent bodily injury.

(2) A person commits the offense of domestic assault in the second degree if he or she intentionally and knowingly causes bodily injury to his or her intimate partner with a dangerous instrument.

(3) A person commits the offense of domestic assault in the first degree if he or she intentionally and knowingly causes serious bodily injury to his or her intimate partner.

(4) Violation of subsection (1) of this section is a Class I misdemeanor, except that for any second or subsequent violation of such subsection within twelve years after the date of the current conviction, any person so offending against the same intimate partner is guilty of a Class IV felony.

(5) Violation of subsection (2) of this section is a Class IIIA felony, except that for any second or subsequent violation of such subsection within twelve years after the date of the current conviction, any person so offending against the same intimate partner is guilty of a Class III felony.

(6) Violation of subsection (3) of this section is a Class III felony, except that for any second or subsequent violation under such subsection within twelve years after the date of the current conviction, any person so offending against the same intimate partner is guilty of a Class II felony.

(7) For purposes of this section, intimate partner means a spouse; a former spouse; persons who have a child in common whether or not they have been married or lived together at any time; and persons who are or were involved in a dating relationship. For purposes of this subsection, dating relationship means frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement, but does not include a casual relationship or an ordinary association between persons in a business or social context.

Sec. 6. Section 29-404.02, Reissue Revised Statutes of Nebraska, is amended to read:

29-404.02. (1) Except as provided in section 42-928, a peace officer may arrest a person without a warrant if the officer has reasonable cause to believe that such person has committed:

{1} (a) A felony;

{2} (b) A misdemeanor, and the officer has reasonable cause to believe that such person either {a} (i) will not be apprehended unless immediately arrested, {b} (ii) may cause injury to himself or herself or

others or damage to property unless immediately arrested, ~~(e)~~ (iii) may destroy or conceal evidence of the commission of such misdemeanor, or ~~(d)~~ (iv) has committed a misdemeanor in the presence of the officer; or

~~(3) (c)~~ One or more of the following acts to one or more household members, whether or not committed in the presence of the peace officer:

~~(a) (i)~~ Attempting to cause or intentionally, and knowingly, or recklessly causing bodily injury with or without a deadly weapon dangerous instrument; or

~~(b) (ii)~~ Threatening another in a menacing manner Placing, by physical menace, another in fear of imminent bodily injury; or

~~(c) (iii)~~ Engaging in sexual contact or sexual penetration without consent as defined in section 28-318.

(2) For purposes of this section:

(a) Household - household members shall include spouses or former spouses, children, persons who are presently residing together or who have resided together in the past, persons who have a child in common whether or not they have been married or have lived together at any time, and other persons related by consanguinity or affinity, and persons who are presently involved in a dating relationship with each other or who have been involved in a dating relationship with each other; and

(b) Dating relationship means frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement, but does not include a casual relationship or an ordinary association between persons in a business or social context.

Sec. 7. (1) If a peace officer receives complaints under section 5 of this act from two or more opposing persons, the officer shall evaluate each complaint separately to determine who was the predominant aggressor. If the officer determines that one person was the predominant aggressor, the officer need not arrest the other person believed to have committed an offense. In determining whether a person is the predominant aggressor, the officer shall consider, among other things:

(a) Prior complaints under section 5 of this act;

(b) The relative severity of the injuries inflicted on each person;

(c) The likelihood of future injury to each person; and

(d) Whether one of the persons acted with a justified use of force under sections 28-1406 to 28-1416.

(2) In addition to any other report required, a peace officer who arrests two or more persons with respect to such a complaint shall submit a detailed, written report setting forth the grounds for arresting multiple parties.

Sec. 8. (1) Incident to an arrest under section 5 of this act, a peace officer:

(a) Shall seize all weapons that are alleged to have been involved or threatened to be used; and

(b) May seize any firearm and ammunition in the plain view of the officer or that is discovered pursuant to a search authorized or consented to by the person being searched or in charge of the premises being searched, as necessary for the protection of the officer or any other person.

(2) Weapons seized under this section shall be stored according to the policies and procedures implemented by the seizing law enforcement agency.

(3) Disposition of weapons under this section shall be determined by court order.

Sec. 9. (1) When any person is found guilty of a crime involving abuse as defined in section 42-903, the judge shall order a presentence investigation to be completed and returned to the court for consideration at the time of sentencing.

(2) At the time of sentencing, the court shall consider the safety and protection of the victim of abuse and any member of the victim's family or household when suspending a sentence or granting probation.

(3) The court may order the convicted person to complete a domestic abuse intervention program at the convicted person's expense in addition to any other penalties.

Sec. 10. When a person is found guilty of a crime involving abuse as defined in section 42-903, a court shall not order house arrest for the person in the residence of the victim, regardless of the ownership of the residence.

Sec. 11. On or before July 1, 2005, all law enforcement agencies, prosecuting attorneys, and the Office of Probation Administration shall develop, adopt, promulgate, and implement written policies and procedures regarding crimes between intimate partners as defined in section 5 of this act.

Sec. 12. Section 42-903, Reissue Revised Statutes of Nebraska, is

amended to read:

42-903. For purposes of the Protection from Domestic Abuse Act, unless the context otherwise requires:

(1) Abuse means the occurrence of one or more of the following acts between household members:

(a) Attempting to cause or intentionally, and knowingly, or recklessly causing bodily injury with or without a deadly weapon dangerous instrument; or

(b) Placing, by physical menace, another person in fear of imminent bodily injury; or

(c) Engaging in sexual contact or sexual penetration without consent as defined in section 28-318;

(2) Department means the Department of Health and Human Services;

(3) Family or household members includes spouses or former spouses, children, persons who are presently residing together or who have resided together in the past, persons who have a child in common whether or not they have been married or have lived together at any time, and other persons related by consanguinity or affinity, and persons who are presently involved in a dating relationship with each other or who have been involved in a dating relationship with each other. For purposes of this subdivision, dating relationship means frequent, intimate associations primarily characterized by the expectation of affectional or sexual involvement, but does not include a casual relationship or an ordinary association between persons in a business or social context; and

(4) Law enforcement agency means the police department or town marshal in incorporated municipalities, and the office of the sheriff in unincorporated areas, and the Nebraska State Patrol.

Sec. 13. Original sections 29-404.02 and 42-903, Reissue Revised Statutes of Nebraska, are repealed.