

1975 Senate Bill 233

Date published: March 26, 1976

CHAPTER 184, Laws of 1975

AN ACT to repeal 942.02, 944.01, 944.02, 944.10 and 944.11; to renumber and amend 972.11; to amend 901.04 (1) and (3), 904.04 (1) (b), 904.06 (1), 906.08 (1) and (2) and 970.03 (4); to create 940.225, 971.31 (11) and 972.11 (2) of the statutes, relating to revision of rape laws and providing penalties.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 901.04 (1) and (3) of the statutes are amended to read:

901.04 (1) QUESTIONS OF ADMISSIBILITY GENERALLY. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to sub. (2) and ss. 971.31 (11) and 972.11 (2).

In making his determination he is bound by the rules of evidence only with respect to privileges.

(3) HEARING OF JURY. Hearings on the admissibility of confessions and, in actions under s. 940.225, of the prior sexual conduct or reputation of a complaining witness, shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require.

SECTION 2. 904.04 (1) (b) of the statutes is amended to read:

904.04 (1) (b) *Character of victim.* ~~Evidence~~ Except as provided in s. 972.11 (2), evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

SECTION 3. 904.06 (1) of the statutes is amended to read:

904.06 (1) ADMISSIBILITY. ~~Evidence~~ Except as provided in s. 972.11 (2), evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

SECTION 4. 906.08 (1) and (2) of the statutes are amended to read:

906.08 (1) OPINION AND REPUTATION EVIDENCE OF CHARACTER. ~~The~~ Except as provided in s. 972.11 (2), the credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to these limitations: ~~(a)~~ the evidence may refer only to character for truthfulness or untruthfulness, and ~~(b)~~, except with respect to an accused who testifies in his own behalf, evidence of truthful

character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(2) **SPECIFIC INSTANCES OF CONDUCT.** Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crimes as provided in s. 906.09, may not be proved by extrinsic evidence. They may, however, subject to s. 972.11 (2), if probative of truthfulness or untruthfulness and not remote in time, be inquired into on cross-examination of the witness himself or on cross-examination of a witness who testifies to his character for truthfulness or untruthfulness.

SECTION 5. 940.225 of the statutes is created to read:

940.225 Sexual assault. (1) **FIRST DEGREE SEXUAL ASSAULT.** Whoever does any of the following shall be fined not more than \$15,000 or imprisoned not more than 15 years or both:

(a) Has sexual contact or sexual intercourse with another person without consent of that person and causes pregnancy or great bodily harm to that person.

(b) Has sexual contact or sexual intercourse with another person without consent of that person by use or threat of use of a dangerous weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a dangerous weapon.

(c) Is aided or abetted by one or more other persons and has sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence.

(d) Has sexual contact or sexual intercourse with a person 12 years of age or younger.

(2) **SECOND DEGREE SEXUAL ASSAULT.** Whoever does any of the following shall be fined not more than \$10,000 or imprisoned not more than 10 years or both:

(a) Has sexual contact or sexual intercourse with another person without consent of that person by use or threat of force or violence.

(b) Has sexual contact or sexual intercourse with another person without consent of that person and causes injury, illness, disease or loss or impairment of a sexual or reproductive organ, or mental anguish requiring psychiatric care for the victim.

(c) Has sexual contact or sexual intercourse with a person who suffers from a mental illness or deficiency which renders that person temporarily or permanently incapable of appraising his conduct, and the defendant knows of such condition.

(d) Has sexual contact or sexual intercourse with a person who the defendant knows is unconscious.

(e) Has sexual contact or sexual intercourse with a person who is over the age of 12 years and under the age of 18 years without consent of that person, as consent is defined in sub. (4).

(3) **THIRD DEGREE SEXUAL ASSAULT.** Whoever has sexual intercourse with a person without the consent of that person shall be fined not more than \$5,000 or imprisoned not more than 5 years or both.

(3m) **FOURTH DEGREE SEXUAL ASSAULT.** Whoever has sexual contact with a person without the consent of that person shall be fined not more than \$500 or imprisoned not more than one year in the county jail or both.

(4) **CONSENT.** "Consent", as used in this section, means words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact. A person under 15 years of age is incapable of consent as a matter of law. The following persons are presumed incapable

of consent but the presumption may be rebutted by competent evidence, subject to the provisions of s. 972.11 (2):

(a) A person who is 15 to 17 years of age.

(b) A person suffering from a mental illness or defect which impairs his capacity to appraise his conduct.

(c) A person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

(5) DEFINITIONS. In this section:

(a) "Intimate parts" includes the breast, buttock, anus, penis, vagina or pubic mound of a human being.

(b) "Sexual contact" means any intentional touching of the intimate parts, clothed or unclothed, of a person to the intimate parts, clothed or unclothed, of another, or the intentional touching by hand, mouth or object of the intimate parts, clothed or unclothed, of another, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification or if such touching contains the elements of actual or attempted battery as defined in s. 940.20.

(c) "Sexual intercourse" includes the meaning assigned under s. 939.22 (36) as well as cunnilingus, fellatio, anal intercourse or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal opening of another, but emission of semen is not required.

(6) NO PROSECUTION OF SPOUSE. No person may be prosecuted under this section if the complainant is his or her legal spouse, unless the parties are living apart and one of them has filed for an annulment, legal separation or divorce.

SECTION 6. 942.02 of the statutes is repealed.

SECTION 7. 944.01 and 944.02 of the statutes are repealed.

SECTION 8. 944.10 and 944.11 of the statutes are repealed.

SECTION 9. 970.03 (4) of the statutes is amended to read:

970.03 (4) If the defendant is accused of a crime ~~against chastity or morality or decency~~ under s. 940.225, the judge ~~may shall, at the request of the complaining witness, exclude from the hearing all persons not officers of the court, members of the witness's or defendant's families or others deemed by the court to be supportive of them, or otherwise required to attend. The judge may exclude all such persons from the hearing in any case where the defendant is accused of a crime under s. 940.225 or a crime against chastity, morality or decency.~~

SECTION 10. 971.31 (11) of the statutes is created to read:

971.31 (11) In actions under s. 940.225, evidence which is admissible under s. 972.11 (2) must be determined by the court upon pretrial motion to be material to a fact at issue in the case and of sufficient probative value to outweigh its inflammatory and prejudicial nature before it may be introduced at trial.

SECTION 11. 972.11 of the statutes is renumbered 972.11 (1) and amended to read:

972.11 (1) ~~The~~ Except as provided in sub. (2), the rules of evidence and practice in civil actions shall be applicable in all criminal proceedings unless the context of a section or rule manifestly requires a different construction. No guardian ad litem need be appointed for a defendant in a criminal action. Title XLIII, except ss. 887.05 to 887.12, 887.23 to 887.29, 889.22, 895.29 and 895.30, shall apply in all criminal proceedings.

SECTION 12. 972.11 (2) of the statutes is created to read:

972.11 (2) (a) In this subsection, "sexual conduct" means any conduct or behavior relating to sexual activities of the complaining witness, including but not limited to prior experience of sexual intercourse or sexual contact, use of contraceptives, living arrangement and life-style.

(b) If the defendant is accused of a crime under s. 940.225, any evidence concerning the complaining witness's prior sexual conduct or opinions of the witness's prior sexual conduct and reputation as to prior sexual conduct shall not be admitted into evidence during the course of the hearing or trial, nor shall any reference to such conduct be made in the presence of the jury, except the following, subject to s. 971.31 (11):

1. Evidence of the complaining witness's past conduct with the defendant.
2. Evidence of specific instances of sexual conduct showing the source or origin of semen, pregnancy or disease, for use in determining the degree of sexual assault or the extent of injury suffered.
3. Evidence of prior untruthful allegations of sexual assault made by the complaining witness.

SECTION 13. Cross reference changes. In the sections of the statutes listed in Column A, the cross references shown in Column B are changed to the cross references shown in Column C:

A	B	C
Statute Section	Old cross references	New cross references
49.02 (7)	ch. 944	ch. 944 or s. 940.225
343.06 (11)	944.01, 944.02, 944.10 (2) and (3), 944.11, 944.12 and 944.17	940.225, 944.12 and 944.17
343.30 (2d)	944.01, 944.02, 944.10 (2) and (3), 944.11, 944.12 and 944.17	940.225, 944.12 and 944.17
975.01	944.01, 944.02 or 944.11	940.225 (1) to (3)
975.01	944.01 or 944.02	940.225 (1) to (3)