

CHAPTER 944

CRIMES AGAINST SEXUAL MORALITY

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SEXUAL CRIMES WHICH AFFECT THE FAMILY.

944.05 Bigamy. (1) Whoever does any of the following is guilty of a Class E felony:

(a) Contracts a marriage in this state with knowledge that his prior marriage is not dissolved; or

(b) Contracts a marriage in this state with knowledge that the prior marriage of the person he marries is not dissolved; or

(c) Cohabits in this state with a person whom he married outside this state with knowledge that his own prior marriage had not been dissolved or with knowledge that the prior marriage of the person he married had not been dissolved.

(2) In this section "cohabit" means to live together under the representation or appearance of being married.

History: 1977 c. 173.

944.06 Incest. Whoever marries or has nonmarital sexual intercourse with a person he or she knows is a blood relative and such relative is in fact related in a degree within which the marriage of the parties is prohibited by the law of this state is guilty of a Class C felony.

History: 1977 c. 173.

SEXUAL CRIMES WHICH INVOLVE CHILDREN.

944.12 Enticing a child for immoral purposes. Any person 18 years of age or over, who, with intent to commit a crime against sexual morality, persuades or entices any child under 18 years of age into any vehicle, building, room or secluded place is guilty of a Class C felony.

History: 1977 c. 173.

See note to 904.04, citing State v. Tarrell, 74 W (2d) 647, 247 NW (2d) 696.

SEXUAL CRIMES BETWEEN ADULTS WITH CONSENT.

944.15 Fornication. Whoever has sexual intercourse with a person not his or her spouse is guilty of a Class A misdemeanor.

History: 1977 c. 173.

The defendant had no standing to challenge the fornication statute as an unconstitutional invasion of privacy of individuals when intercourse occurs between consenting adults because the act of intercourse was clearly not consensual. *Byrd v. State*, 65 W (2d) 415, 222 NW (2d) 696.

944.16 Adultery. Whoever does either of the following is guilty of a Class E felony:

(1) A married person who has sexual intercourse with a person not his spouse; or

(2) A person who has sexual intercourse with a person who is married to another.

History: 1977 c. 173.

944.17 Sexual perversion. Whoever does either of the following is guilty of a Class A misdemeanor:

(1) Commits an abnormal act of sexual gratification involving the sex organ of one person and the mouth or anus of another; or

(2) Commits an act of sexual gratification involving his sex organ and the sex organ, mouth or anus of an animal.

History: 1977 c. 173.

Sub. (1) is not unconstitutionally vague or overbroad. *Jones v. State*, 55 W (2d) 742, 200 NW (2d) 587.

Sub. (1) does not apply to married persons engaging in consensual sexual intimacies in private. *Mentek v. State*, 71 W (2d) 799, 238 NW (2d) 752.

Trial court was not obliged to instruct jury that a conviction must be based upon a finding of nonconsent. *Gossett v. State*, 73 W (2d) 135, 242 NW (2d) 899.

Sub. (1) is not void for vagueness or overbreadth. *Swikert v. Cady*, 381 F Supp. 988.

OBSCENITY

944.20 Lewd and lascivious behavior.

Whoever does any of the following is guilty of a Class A misdemeanor:

(1) Commits an indecent act of sexual gratification with another with knowledge that they are in the presence of others; or

(2) Publicly and indecently exposes a sex organ; or

(3) Openly cohabits and associates with a person he knows is not his spouse under circumstances that imply sexual intercourse.

History: 1977 c. 173.

See note to Art. I, sec. 1, citing *Reichenberger v. Warren*, 319 F Supp. 1237.

944.21 Lewd, obscene or indecent matter, pictures and performances. (1) Whoever intentionally does any of the following is guilty of a Class D felony:

(a) Imports, prints, advertises, sells, has in his possession for sale, or publishes, exhibits, or transfers commercially any lewd, obscene or indecent written matter, picture, sound recording, or film; or

(b) Advertises, produces or performs in any lewd, obscene or indecent performance; or

(c) Has in his possession, with intent to transfer or exhibit to a person under the age of 18 years, any matter prohibited by this section.

(2) Whoever requires, as a condition to the purchase of periodicals, that a retailer accept material known by the distributor to be lewd, obscene or indecent is guilty of a Class D felony.

History: 1977 c. 173, 272.

Tests of obscenity discussed. *State v. Amato*, 49 W (2d) 638, 183 NW (2d) 29.

Obscenity tests and the scope of appellate review discussed. *Court v. State*, 51 W (2d) 683, 188 NW (2d) 475.

The manner in which the store was operated and the publications displayed can be used to show knowledge by the defendant. "Pandering" includes more than active solicitation through advertising. *Orito v. State*, 55 W (2d) 161, 197 NW (2d) 763.

Sufficiency of obscenity complaint and correctness of jury instructions discussed. *State v. Simpson*, 56 W (2d) 27, 201 NW (2d) 558.

See note to 968.01, citing *State v. Schneider*, 60 W (2d) 563, 211 NW (2d) 630.

Definition of obscenity restated and may be retroactively applied. *State ex rel. Chobot v. Circuit Court*, 61 W (2d) 354, 212 NW (2d) 690.

Scope and nature of independent appellate review discussed. Statewide community standards adopted. *Court v. State*, 63 W (2d) 570, 217 NW (2d) 676.

Federal constitution does not mandate that juries be instructed to apply standards of hypothetical statewide community. *Jenkins v. Georgia*, 418 US 153.

This section, which proscribes the sale of materials which are "lewd, obscene or indecent" but does not specifically define sexual conduct prohibited, does not meet the constitutionally required standard of providing fair notice to a dealer in such materials that his public and commercial activities might bring prosecution. *Amato v. Divine*, 496 F (2d) 441.

Sub. (1) (a) meets First Amendment standards and is not unconstitutionally vague. *Amato v. Divine*, 558 F (2d) 364.

A motion picture cannot be seized without prior adversary hearing. *Detco, Inc. v. Neelen*, 356 F Supp. 289.

Order temporarily restraining state from enforcing the statute would not be vacated in light of U.S. Supreme Court's *Miller* decision on obscenity, since the probability that the ex-

press wording of this statute would be held unconstitutional was in fact greater after *Miller*, and its specificity requirement, than before. *Detco, Inc. v. McCann*, 365 F Supp. 176.

This statute as construed prior to May 8, 1974, was unconstitutional. Prosecutions under this statute for conduct occurring prior to such date are unconstitutional as violative of due process requirements of "fair notice." *Detco, Inc. v. McCann*, 380 F Supp. 1366.

From *Ulysses to Portnoy: A pornography primer*. Eich, 53 MLR 155.

944.23 Making lewd, obscene or indecent drawings. Whoever makes any lewd, obscene or indecent drawing or writing in public or in a public place is guilty of a Class C misdemeanor.

History: 1977 c. 173.

944.25 Exposing minors to harmful materials. (1) DEFINITIONS. In this section:

(a) "Minor" means any person under the age of 18 years.

(b) "Nudity" means the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top of the nipple, or the depiction of covered male genitals in a discernibly turgid state.

(c) "Sexual conduct" means acts of masturbation, homosexuality, sexual intercourse or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person is a female, breast.

(d) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(e) "Sadomasochistic abuse" means flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed.

(f) "Harmful to minors" means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse, when it:

1. Predominantly appeals to the prurient, shameful or morbid interest of minors; and

2. Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

3. Is utterly without redeeming social importance for minors.

(g) "Knowledge of the nature of the material" means:

1. Knowledge of the character and content of any material described herein, or

2. Knowledge or information that the material described herein has been adjudged to be harmful to minors in a proceeding instituted under sub. (2) or (10), or is the subject of a

pending proceeding instituted under sub. (2) or (10).

(h) "Knowledge of the minor's age" means:

1. Knowledge or information that the person is a minor, or

2. Reason to know, or a belief or ground for belief which warrants further inspection or inquiry of the age of the minor.

(i) "Person" means any individual, partnership, firm, association, corporation or other legal entity.

(j) "Harmful material" means:

1. Any picture, photograph, drawing, sculpture, motion picture film, or similar visual representation or image of a person or portion of the human body which depicts nudity, sexual conduct or sadomasochistic abuse, and which is harmful to minors, or

2. Any book, pamphlet, magazine, printed matter however reproduced, or sound recording which contains any matter enumerated in subd. 1, or explicit and detailed verbal descriptions or narrative accounts of sexual excitement, sexual conduct or sadomasochistic abuse, and which, taken as a whole, is harmful to minors.

(2) COMMENCEMENT OF CIVIL PROCEEDING. Whenever the attorney general or a district attorney has reasonable cause to believe that any person is engaged in selling or exhibiting harmful material to minors, or may become engaged in selling or exhibiting harmful material to minors, the attorney general or the district attorney for the county in which such material is offered for sale or exhibition shall institute an action in the circuit court for that county for adjudication of the question of whether such material is harmful to minors.

(3) FILING AND FORM OF COMPLAINT. The action under sub. (2) shall be commenced by the filing of a complaint to which shall be attached as an exhibit a true copy of the allegedly harmful material. The complaint shall:

(a) Be directed against such material by name or description;

(b) Allege that such material is harmful to minors;

(c) Designate as respondents and list the names and addresses, if known, of any person in this state preparing, selling or commercially distributing or exhibiting such material to minors, or giving away or offering to give away such material to minors, or possessing such material with the apparent intent to sell or commercially distribute or give away or offer to give away such material to minors;

(d) Seek an adjudication that such material is harmful to minors; and

(e) Seek a permanent injunction against any respondent prohibiting him from selling, commercially distributing or exhibiting or giving

away such material to minors or from permitting minors to inspect such material.

(4) EXAMINATION BY THE COURT. (a) Upon the filing of the complaint described in sub. (3), the attorney general or the district attorney shall present the same, together with the material attached thereto, as soon as practicable to the court for its examination and reading.

(b) If after such examination and reading the court finds no probable cause to believe such material to be harmful to minors, the court shall cause an endorsement to that effect to be placed and dated upon the complaint and shall thereupon dismiss the action.

(c) If after such examination and reading the court finds probable cause to believe such material to be harmful to minors, the court shall cause an endorsement to that effect to be placed and dated upon the complaint whereupon it shall be the responsibility of the attorney general or the district attorney, promptly to request the clerk of the court to issue summons and to copy such endorsement upon such number of duplicates of such complaint as are needed for the service of summons, to each copy of which summons shall be attached a copy of such complaint as so endorsed. Service of such summons and endorsed complaint shall be made upon the respondents thereto in any manner provided by law.

(5) APPEARANCE, ANSWER AND TRIAL DATE.

(a) On or before the return date specified in the summons issued under sub. (4), or within 15 days after receiving notice of the issuance of such summons, the author, publisher or any person interested in sending or causing to be sent, bringing or causing to be brought, into this state for sale or commercial distribution or exhibition, or any person in this state preparing, selling, exhibiting or commercially distributing, or possessing with intent to sell or commercially distribute or exhibit, the material exhibited to the endorsed complaint, may appear and may intervene as a respondent and file an answer.

(b) If, after service of summons has been effected upon all respondents, no person appears and files an answer on or before the return date specified in the summons, the court may forthwith adjudge whether the material so exhibited to the endorsed complaint is harmful to minors and enter an appropriate final judgment.

(c) Upon the expiration of the time for filing answers by all respondents, the court shall, upon its own motion, or upon the application of any party who has appeared and filed an answer, set a date for the trial of the issues joined.

(6) PUBLIC POLICY, PROCEDURE AND EVIDENCE. (a) The public policy of this state requires that all proceedings prescribed in this

section, other than criminal actions under sub. (10), be heard and disposed of with the maximum promptness and dispatch commensurate with constitutional requirements, including due process, freedom of the press and freedom of speech. The rules of civil procedure pertaining to equity cases shall be applicable, except as hereinafter provided, to the trial of the issues framed by the complaint and answers.

(b) Every person appearing and answering shall be entitled, upon request, to a trial of any issue with an advisory jury and the court, with the consent of all parties, may order a trial of any issue with a jury whose verdict shall have the same effect as in cases at law.

(7) **JUDGMENT.** If the court or jury finds the material exhibited to the complaint not to be harmful to minors, the court shall enter judgment accordingly and shall dismiss the complaint. If the court or jury finds the material exhibited to the complaint to be harmful to minors, the court shall enter judgment to such effect and may, in such judgment or in subsequent orders of enforcement thereof, enter a permanent injunction against any respondent prohibiting him from selling, commercially distributing or giving away such material to minors or from permitting minors to inspect such material.

(8) **INJUNCTIONS.** (a) In any action in which an injunction is sought under this section, any respondent named in the complaint, or any person who becomes a respondent by virtue of intervention under sub. (5), shall be entitled to a trial of the issues within one day after joinder of issue, and a decision shall be rendered by the court or jury within 2 days of the conclusion of the trial. If the issues are being tried before a jury and the jury is not able to render a decision within 2 days of the conclusion of the trial, then notwithstanding any other provision of this section, the jury shall be dismissed and a decision shall be rendered by the court within 2 days of the conclusion of the trial.

(b) No preliminary injunction shall be issued without at least 2 days' notice to the respondents.

(c) If the court, pursuant to sub. (4), finds probable cause to believe the exhibited material to be harmful to minors, and so endorses the complaint, the court may, upon the motion of the attorney general or the district attorney, issue a temporary restraining order against any respondent prohibiting him from selling, commercially distributing or exhibiting or giving away such material to minors or from permitting minors to inspect such material. No temporary restraining order shall be granted without notice to the respondents unless it clearly appears from specific facts shown by affidavit or

by the verified complaint that one or more of the respondents are engaged in the sale or exhibition of harmful material to minors and that immediate and irreparable injury to the morals and general welfare of minors in this state will result before notice can be served and a hearing had thereon. Every temporary restraining order shall be endorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its own terms within such time after entry, not to exceed 3 days, as the court fixes unless within the time so fixed the respondent against whom the order is directed consents that it may be extended for a longer period. If a restraining order is granted without notice, a motion for a preliminary injunction shall be set down for hearing within 2 days after the granting of such order and shall take precedence over all matters except older matters of the same character; and when the motion comes on for hearing, the attorney general or the district attorney shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order.

(9) **CONTEMPT.** Any respondent, or any officer, agent, servant, employe or attorney of such respondent, or any person in active concert or participation by contract or arrangement with such respondent, who receives actual notice, by personal service or otherwise, of any injunction or restraining order entered under sub. (7) or (8), and who disobeys any of the provisions thereof, shall be guilty of contempt of court and upon conviction is guilty of a Class A misdemeanor.

(10) **CRIMINAL PROVISIONS CONCERNING REGULAR SALES OF HARMFUL MATERIAL TO MINORS.** (a) Subject to par. (b), no person with knowledge of the nature of the material, and with knowledge of the minor's age, may sell, exhibit or loan for monetary consideration to a minor any material which is harmful to minors. Upon conviction thereof such person is guilty of a Class A misdemeanor.

(b) No criminal proceeding shall be commenced against any person pursuant to par. (a) unless, prior to the sale or loan which is the subject of such proceeding, such person:

1. Had written notice from the attorney general or the district attorney that the material which is the subject of such proceeding has been adjudged harmful to minors under sub. (7) or (10), or

2. Has been subject to an order entered under sub. (7) prohibiting such person from selling,

commercially distributing or exhibiting or giving away to minors, or from permitting minors to inspect the harmful material which is the subject of such criminal proceeding, or any other harmful material.

(11) DEFENSES AND EXCEPTIONS. No person shall be guilty of contempt under sub. (9) or shall be subject to prosecution under this section:

(a) For any sale or exhibition to a minor where such person had reasonable cause to believe that the minor involved was 18 years old or more, and such minor exhibited to such person a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor was 18 years old or more;

(b) For any sale or exhibition where a minor is accompanied by a parent or guardian, or accompanied by an adult and such person has no reason to suspect that the adult accompanying the minor is not the minor's parent or guardian;

(c) Where such person is a bona fide school, museum or public library or is acting in his capacity as an employe of such organization or as a retail outlet affiliated with and serving the educational purposes of such organization.

(12) EXTRADITION. If any person is convicted of contempt under sub. (9) or convicted under sub. (10) and cannot be found in this state, the governor or any person performing the functions of governor by authority of the law, shall, unless such person shall have appealed from the judgment of contempt or conviction and such appeal has not been finally determined, demand his extradition from the executive authority of the state in which such person is found.

History: 1971 c. 40; 1973 c. 12; 1977 c. 173.

Constitutionality of a bill prohibiting dissemination of obscene materials to minors discussed. 58 Atty. Gen. 214, 230.

PROSTITUTION

944.30 Prostitution. Any person who intentionally does any of the following is guilty of a Class A misdemeanor:

(1) Has or offers to have or requests to have nonmarital sexual intercourse for any thing of value;

(2) Commits or offers to commit or requests to commit an act of sexual perversion for any thing of value;

(3) Is an inmate of a place of prostitution; or

(4) Masturbates a person or offers to masturbate a person or requests to be masturbated by a person for any thing of value.

History: 1977 c. 173.

This section is not unconstitutional as applying only to women. *State v. Mertes*, 60 W (2d) 414, 210 NW (2d) 741.

See note to Art. I, sec. 1, citing *State v. Johnson*, 74 W (2d) 169, 246 NW (2d) 503.

944.31 Patronizing prostitutes. Any person who enters or remains in any place of prostitution with intent to have nonmarital sexual intercourse with a prostitute or with intent to commit an act of sexual perversion with a prostitute is guilty of a Class A misdemeanor.

History: 1977 c. 173.

944.32 Soliciting prostitutes. Whoever intentionally solicits or causes any person to practice prostitution or establishes any person in a place of prostitution is guilty of a Class D felony. If the person is under the age of 18, the defendant is guilty of a Class C felony.

History: 1977 c. 173.

944.33 Pandering. (1) Whoever does any of the following is guilty of a Class A misdemeanor:

(a) Solicits another to have nonmarital sexual intercourse or to commit an act of sexual perversion with a person the solicitor knows is a prostitute; or

(b) With intent to facilitate another in having nonmarital intercourse or committing an act of sexual perversion with a prostitute, directs or transports him to a prostitute or directs or transports a prostitute to him.

(2) If the person received compensation from the earnings of the prostitute, such person is guilty of a Class C felony.

(3) In a prosecution under this section, it is competent for the state to prove other similar acts by the accused for the purpose of showing his intent and disposition.

History: 1977 c. 173.

944.34 Keeping place of prostitution. Whoever intentionally does any of the following is guilty of a Class D felony:

(1) Keeps a place of prostitution; or

(2) Grants the use or allows the continued use of a place as a place of prostitution.

History: 1977 c. 173.

Conviction under (2) requires proof that defendant has authority to exclude those engaging in prostitution from use of place for prohibited acts. *Shillcutt v. State*, 74 W (2d) 642, 247 NW (2d) 694.

Under (2), "grants the use" requires the prosecution to prove a single affirmative approval of the use of the premises as a place of prostitution, while "allows the continued use of" requires proof of intentional but passive acquiescence or toleration of such use on more-than-one occasion. *Johnson v. State*, 76 W (2d) 672, 251 NW (2d) 834.

944.36 Solicitation of drinks prohibited. Any licensee or bartender of a retail liquor establishment licensed under ch. 176 or retail fermented malt beverage establishment licensed under s. 66.054 who permits the solicitation by

any entertainer or employe of a drink of intoxicating liquor, fermented malt beverage or other drink from any customer in the licensed premises, and any entertainer or employe who solicits

such drinks from any customer, is guilty of a Class B misdemeanor.

History: 1975 c. 39, 199; 1977 c. 173.