MONTANA CRIMINAL CODE OF 1973
ANNOTATED

Produced under Federal Grant No. 73-6114

by

The Montana Criminal Law Commission
Hon. Wesley Castles, Chairman

Project Director and Editor-in-Chief:
Prof. William F. Crowley

Editor and Chief Annotator:
Joel E. Guthals

Annotators:

John W. Forsythe
Michael Sehestedt

Editorial Consultant:
Prof. Larry M. Elison

Research Associate:
H. John Balyeat

Funded by A.B.A. and Montana Board of Crime Control

MONTANA CRIMINAL CODE OF 1973, ANNOTATED

TABLE OF CONTENTS

(1-1

AN ACT CREATING A MONTANA CRIMINAL CODE, TO CODIFY AND GENERALLY REVISE THE STATUTES CONCERNING CRIMINAL OFFENSES; AND PROVIDING AN EFFECTIVE DATE.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF THE STATE OF MONTANA:

Section 1. There is hereby created the Montana Criminal Code which is title 94, R.C.M. 1947, and reads as follows:

Enacted: Sec. 1, Ch. 513 Laws of Montana, 1973.

CHAPTER 1: GENERAL PRELIMINARY PROVISIONS.

94-1-101. Short Title. This act shall be known and may be cited as the "Criminal Code of 1973."

Historical Note

Enacted: M.C.C., 1973 § 94-1-101, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. Crim. Code (Ill. C.C.), 1961, Title 38, § 1-1.

Annotator's Note

J. Guthals

The Criminal Code of 1973 represents the second phase of the revisions to Title 94, R.C.M. 1947 by the Montana Criminal Law Commission. The Commission, created by Sec. 1, Ch. 103, Laws of Montana 1963 (March 1, 1963), first submitted a draft on Criminal Procedure in 1966 which was enacted as Title 95, R.C.M. 1947 in 1967. While some states use the term Criminal Code to refer to both substantive and procedural law, in Montana the new Code contains only substantive law and definitions. Much of the Code was taken from the Illinois Criminal Code of 1961. Other sources include the Michigan, Wisconsin and New York Criminal Codes and the Model Penal Code (1962). The decision notes and law review references which follow relate to those jurisdictions which have similar provisions to the Criminal Code of 1973. For purposes of identification the Code will be referred to throughout the Annotations as Montana Criminal Code of 1973 and abbreviated as M.C.C. 1973.

Notes of Decisions

Construction and Application

The Illinois courts have stated that because the Criminal Code of 1961 was adopted by the legislature following a long period of study by eminent scholars and lawyers, the published comments regarding the various articles and paragraphs of the Code deserve consideration and interpretation of the intent contained in the Code. People v. Miller, 204 N.E.2d 305, 307, reversed in part on other grounds, vacated in part 219 N.E.2d 475, 55 Ill. App.2d 146 (1965).

94-1-102. General Purposes And Principles Of Construction.

(1) The general purposes of the provisions governing the definition of offenses are:

(a) to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens harm to individual or public interests;

(b) to safeguard conduct that is without fault from condemnation as criminal;

(c) to give fair warning of the nature of the conduct declared to constitute an offense;

(d) to differentiate on reasonable grounds between serious and minor offenses.

(2) The rule of the common law, that penal statutes are to be strictly construed, has no application to this code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its object and to promote justice.

Historical Note

Enacted: M.C.C. 1973, § 94-1-102, Sec. 1, Ch. 513, Laws of Montana 1973.

Source: Ill. C.C. 1961, Title 38, § 1-2, R.C.M. 1947, § 94-101.

Prior Law: En. Sec. 6, Mont. Pen. C. 1895; re-en. Sec. 8098, Rev.C. 1907; re-en. Sec. 10712, R.C.M. 1921. Cal. Pen. C. Sec. 6, R.C.M. 1947, § 94-101 repealed Sec. 32, Ch. 513, Laws of Montana 1973.

Annotator's Note

J. Guthals

Paragraph (1) and clauses (a) through (d) are taken verbatim from Ill. § 1-2. Paragraph (2) comes directly

from R.C.M. 1947, § 94-101. Attention is therefore directed to decisions from both jurisdictions regarding the appropriate section.

Summarized Criminal Law Commission Comment

By J. Guthals

The object of this section is to collect certain of the generally recognized purposes of the substantive criminal law, to express the legislative purpose of the Code and provide a convenient reference for the interpretation of its more specific provisions. Attention is directed to the preventive considerations without placing undue emphasis upon any one purpose. Note that various provisions of the Bill of Rights of the Montana Constitution point out certain principles of criminal law and contain a general statement of purpose.

Cross References

Criminal Act and Mental State M.C.C. 1973, § 94-2-103
Criminal Procedure Purpose R.C.M. 1947, § 95-102
Sentence and Judgment R.C.M. 1947 §§ 95-2201, 95-2202

Law Review Commentaries

27 Mont. L. Rev. 98 (1965)

Library References

Crim. Law Key #13
Statutes Key #241(1)
C.J.S. Crim. Law §§ 1-24
C.J.S. Statutes §§ 389, 390

In General

The rule that statutes in derogation of common law must be strictly construed has been held not to apply to code provisions, including penal code provisions, liberal construction being the rule as to all. Continental Supply Co. v. Abell, 95 M. 148, 163, 24 P.2d 133 (1933). However, the Illinois courts have held that criminal statutes must be construed strictly against the state. People v. Hughes, 260 N.E.2d 34, 37, 123 Ill. App.2d 115 (1970). In determining legislative intent in this Code, the entire criminal code and each of its sections is to be considered. People v. Hairston, 263 N.E.2d 840, 846, 46 Ill. App.2d 348 (1970).

Legislative Authority

The legislature has the inherent power, within its constitutional limits, to prohibit any act as criminal and to fix punishment for the commission of crimes, to determine the manner of executing punishment, to provide penological systems and to establish rules and regulations for government and discipline of inmates. People ex rel. Kubala v. Kinney, 185 N.E.2d 337, 388, 25 Ill.2d 491 (1962). In determining whether a penal statute is adequate the test is whether it is sufficiently definite and certain to enable those who read it to know what acts are proscribed and what conduct will make them liable for criminal punishment. People v. Jackson, 214 N.E.2d 316, 318, 66 Ill. App.2d 276 (1966). An act is criminal where the statute either makes such conduct unlawful or imposes a punishment for its commission. People v. Graf, 235 N.E.2d 886, 889, 93 Ill. App.2d 43 (1968).

94-1-103. Application To Offenses Committed Before And After Enactment.

(1) The provisions of this code shall apply to any offense defined in this code and committed after the effective date thereof.

(2) Unless otherwise expressly provided, or unless the context otherwise requires, the provisions of this code shall govern the construction of and punishment for any offense defined outside of this code and committed after the effective date thereof, as well as the construction and application of any defense to a prosecution for such an offense.

(3) The provisions of this code do not apply to any offense defined outside of this code and committed before the effective date thereof. Such an offense must be construed and punished according to the provisions of law existing at the time of the commission thereof in the same manner as if this code had not been enacted.

Historical Note

Enacted:	M.C.C. 1973, § 94-1-103, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	N.Y. Pen. C., § 5.05. See also R.C.M. 1947, § 94-103
Prior Law:	R.C.M. 1947, § 94-103, repealed Sec. 32, Ch. 513, Laws of Montana 1973; N.Y. Penal Law 1909, §§ 22, 38.

Annotator's Note

J. Guthals

This section is taken directly from N.Y. Pen. Code § 5.05. Paragraph two (2) applies to offenses defined outside of the code (e.g., Fish and Game violations, etc.) which are to be governed by the provisions of the new Code

insofar as definitions of mental state, accountability, and liability, and with regard to the application of affirmative defenses. While the new Code generally does not provide substantive elements for offenses outside the code, when outside provisions conflict with the Code, the Code is to prevail.

Commission Comment

This section sets forth the method of transition from the existing Criminal Code to the proposed Criminal Code, i.e., all of the provisions of the proposed Criminal Code apply only to offenses committed after its effective date.

Cross References

M.C.C. 1973, §§ 94-1-104 through 94-1-108
M.C.C. 1973, §§ 94-2-101 through 94-2-111
M.C.C. 1973, §§ 94-3-101 through 94-3-112

Library References

Criminal Law Key #12
C.J.S. Crim. Law. § 23

Notes of Decisions

In General

If a statute carries a penalty making its violation a crime, the provision should be expressed with a degree of certainty in order that it may be understood without having to rely on inferences. State v. Galina, 116 Mont. 478, 482, 154 P.2d 484 (1944).

94-1-104. Other Limitations On Applicability.

(1) This code does not bar, suspend, or otherwise affect any right or liability to damages, penalty, forfeiture, or other remedy authorized by law to be recovered and the civil injury is not merged into the offense.

(2) No conduct constitutes an offense unless it is described as an offense in this code or in another statute of this state. However this provision does not affect the power of a court to punish for contempt or to employ any sanction authorized by law for the enforcement of an order, civil judgment or decree.

Historical Note

Enacted:	M.C.C. 1973, § 94-104, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	R.C.M. 1947, §§ 94-106, 94-108; Ill. C.C., 1961, Title 38, §§ 1-3, 1-4
Prior Law:	R.C.M. 1947, § 94-106, 94-108, repealed Sec. 32 Ch. 531, Laws of Montana 1973; Ill. Rev. Stat. 1961, Ch. 38, §§ 600, 601

Annotator's Note

J. Guthals

The text for this section comes directly from Ill. C.C. 1961, Title 38, § 1-3, 1-4 and preserves most of the provisions of the prior Montana law. The absence of references concerning court martial proceedings is conspicuous. The code, however, preserves the authority of a court-martial to impose military penalties by the clause "employ any sanction authorized by law."

Summarized Criminal Law Commission Comment

J. Guthals

Subsection (1) relates to an early English rule that a civil action cannot be maintained until after prosecution of the criminal offense. Legislatures in numerous states have resolved this problem by declaring the criminal and civil actions to be independent. Montana has had such a provision since 1895. Subsection (1) is primarily a rule

(4)-2

of evidence (see American Law Institute Model Code of Evidence, Rule 251, and Comment). Subsection (2) completes the process of replacing common law definitions of offenses with statutory definitions. The supression of all common law definitions does not mean, however, that the large mass of interpretive rules is superseded. These rules are still of value and would be difficult to replace.

Cross References

R.C.M. 1947, § 95-2206

Library References

Crim. Law Key #10
CJS Crim. Law § 18
Action Key #5
Statutes Key # 241(1)
CJS Actions § 11
CJS Statutes §§ 389,390

Law Review Commentaries

59 N.W.L.Rev. 687
24 Ill.L.Rev. 598

Notes of Decisions

Civil actions and criminal prosecutions

Criminal prosecutions and civil actions are separate actions which may be based upon the same factual situations. Prosecution of the criminal action against the defendant has been ruled not to be a bar to the complaining witness's right to institute a civil action. People v. Stacy, 64 Ill. App.2d 157, 212 N.E.2d 286, 288 (1965). Ordinarily, acquital in a criminal case is no bar to a civil suit. People v. Small, 319 Ill. 437, 150 N.E. 435 (1926). Similarly, acquital in a criminal prosecution has been held not to be res judicata in civil case based on the same facts. Simon v. Nitzberger, 327 Ill. App. 553, 64 N.E.2d 396 (1946).

Admissibility of criminal prosecutions in civil actions

As a general rule, judgment of conviction for assault and battery is inadmissible as evidence to establish the facts on which the judgment was rendered in a subsequent civil action. Doyle v. Glore, 15 Mont. 212, 213 (1895). However, both the Montana and Illinois courts have indicated that a plea of guilty to a criminal charge may be admitted in a subsequent civil action as an admission against interest of the party making the plea. Sikora v. Sikora, ____ Mont. ____, 499 P.2d 808, 812 (1972); Smith v. Andrews, 54 Ill. App.2d 51, 203 N.E.2d 160, 164 (1964).

Applicability of common law

Under this code, conduct is not an offense unless proscribed by statute. In addition, it has been held that the elements of the common law crimes, such as burglary, have no application. See People v. Blair, 1 Ill. App.3d 6, 272 N.E.2d 404, 406 (1971), aff'd. 52 Ill. 2d 371, 288 N.E.2d 443. In regard to the new section on Theft (M.C.C. 1973, § 94-6-302), that provision was held by the Illinois courts to encompass all forms of theft and did not conflict with this section. People v. Jackson, 66 Ill.App.2d 276, 214 N.E.2d 316, 318 (1966).

Power to punish contempt

It is a fundamental right of courts to punish for contempt. State v. District Court of Tenth Jud. Dist., 92 Mont. 94, 99, 10 P.2d 586 (1932). The court may imprison or fine those in contempt, but may not recompense an injured party for damages. Eberle v. Greene, 71 Ill. App.2d 85, 217 N.E.2d 6, 10 (1966). "Direct contempt" has been defined by the Illinois courts as any conduct committed in the presence of a judge during the course of a judicial hearing which is calculated to embarrass, hinder, or obstruct the administration of justice or which is designed to undermine the court's dignity or authority and which has the tendency of bringing the administration of justice into disrepute and encouraging public disrespect. People v. Gilliam, 83 Ill. App.2d 251, 227 N.E.2d 96, 99 (1967).

(5)-1

94-1-105. Classification Of Offenses.

(1) For the determination of the court's jurisdiction at the commencement of the action and for the determination of the commencement of the period of limitations, the offense shall be designated a felony or misdemeanor based upon the maximum potential sentence which could be imposed by statute.

(2) An offense defined by any statute of this state other than this code shall be classifed as provided in this section and the sentence that may be imposed upon conviction thereof shall be governed by this code.

Historical Note

Enacted: M.C.C. 1973, § 94-1-105, Sec. 1, Ch. 513, Laws of Montana, 1973.

Source: New

Prior Law: R.C.M. 1947, §§ 94-112, 94-113, 94-114, Repealed Sec. 32, Ch. 513, Laws of Montana, 1973.

Annotator's Note

J. Guthals

This section represents a considerable change in the classification of offenses from prior law. The section must be read in conjunction with the new definitions for felony and misdemeanor located in 94-2-101. The two sections when taken together emphasize that the potential sentence determines jurisdiction, prosecution, and the running of the statute of limitations while actual classification of the offense will not occur until judgment and sentencing. This position is intentionally opposite State v. Atlas, 75 Mont. 547, 551, 244 P. 477 (1926) and the federal court position that the potential sentence determines the grade of the crime. However, the section is in accord with Gransberry v. State, 149 Mont. 158, 162, 423 P.2d 853: "Whether [act] is felony or misdemeanor is not determined until sentence is imposed." Subsection (2) is similar to M. C. C., 1973,

§ 94-1-103(2) and provides that offenses outside the Code are to be governed by the provisions of the new Code insofar as the classification of offenses.

Cross References

M.C.C. 1973, §§ 94-1-103(2), 94-1-106, 94-1-107
M.C.C. 1973, § 94-2-101(15), (31)
M.C.C. 1973, § 94-5-102
M.C.C. 1973, § 94-5-303
M.C.C. 1973, § 94-6-204
M.C.C. 1973, § 94-7-305

Library References

Crim. Law Key #27
22 C.J.S. Crim. Law § 6,7

94-1-106. General Time Limitations.

(1) A prosecution for criminal homicide may be commenced at any time.

(2) Except as otherwise provided in this code, prosecutions for other offenses are subject to the following periods of limitation:

(a) a prosecution for any felony must be commenced within five (5) years after it is committed;

(b) a prosecution for a misdemeanor must be commenced within one (1) year after it is committed.

(3) The period prescribed in subsection (2) is extended in a prosecution for theft involving a breach of fiduciary obligation to an aggrieved person as follows:

(a) If the aggrieved person is a minor or incompetent, then during the minority or incompetency or within one (1) year after the termination thereof.

(b) In any other instance, within one (1) year after the discovery of the offense by the aggrieved person, or by a person who has legal capacity to represent an aggrieved person, or has a legal duty to report the offense, and is not himself a party to the offense; or in the absence of such discovery, within one (1) year after the prosecuting officer becomes aware of the offense.

(4) An offense is committed either when every element occurs, or when the offense is based upon a continuing course of conduct, at the time when the course of conduct is terminated. Time starts to run on the day after the offense is committed.

(5) A prosecution is commenced either when an indictment is found or an information or complaint is filed.

(6)-2

Historical Note

Enacted:	M.C.C. 1973, § 94-1-106, Sec. 1, Ch. 513, Laws of Montana 1973.
Source:	R.C.M. 1947, §§ 94-5701, 94-5702, 94-5703, 94-5705. Ill.C.C. 1961, Title 38, §§ 3-5, 3-6, 3-8.
Prior Law:	R.C.M. 1947, §§ 94-5701 through 94-5703 repealed Sec. 32, Ch. 513, Laws of Montana 1973; Ill. Rev. Stat. 1961, Ch. 38, § 632a.

Annotator's Note

J. Guthals

Subsection (1) of this section comes from R.C.M. 1947, § 94-5701. A major distinction between the new code and the older law is the substitution of the word homicide for the antiquated terms "murder and manslaughter." These terms have been entirely removed from the new code. Subsection (2) must be taken in conjunction with M.C.C. 1973, § 94-1-105 which defines misdemeanors and felonies for purposes of time limitations in regard to potential penalties for the alleged offense. Subsection (3), which extends the time limitation for thefts involving breaches of fiduciary duty is taken from Ill.C.C., Title 38, § 3-6(a). However, a difference between the Illinois source and the Code provision is the absence in Montana of a maximum period of time after commission of the offense inwhich actions must be brought. Several other states have similar provisions extending time limitations for thefts difficult to detect, including: Alabama, Georgia, Mississippi, New York, and Nevada. Subsection (3)(a) suspends the running of the statute during the period of the victim's incompetence. Subsection (4) comes from Ill.C.C., 1961, Title 38, § 3-8, and refers both to continuing offenses within the Code and to those outside the Code. Subsection (5) embodies R.C.M. 1947, § 94-5705 and adds the clause "or an information or complaint is filed."

Summarized Criminal Law Commission Comment

J. Guthals

This section describes general time limitations on prosecutions and the extension and exclusion of certain periods.

Subsection (1) continues the present Montana provision that no time limit exists with respect to homicide. Subsection (2) preserves the present general time limitations in Montana of five (5) years for all other felonies and one year for misdemeanors. Subsection (3) increases the time limitation with respect to certain offenses which are capable of being readily concealed. Subsection (4) provides that the period of limitation does not begin in the case of a continuing offense until the last act of the offense is performed. This rule is applicable to a series of related acts constituting a single course of conduct, as in embezzlement, nuisance, etc. When the limitation period has run on a lesser included offense but not on the offense charged, the general rule is that the defendant cannot be convicted of the lesser offense. State v. Chevlin, 284 S.W.2d 563 (Mo. 1955).

Cross References

M.C.C. 1973, §§ 94-5-101 through 94-5-105
M.C.C. 1973, § 94-1-105
M.C.C. 1973, § 94-2-102(15), (31)
M.C.C. 1973, §§ 94-6-301 through 94-6-313
R.C.M. 1947, § 64-101
R.C.M. 1947 §§ 91-4701 through 91-4706
R.C.M. 1947, §§ 95-1301 through 95-1303
R.C.M. 1947, § 94-1410

Library References

Criminal Law Key #145, 147, 151, 157
C.J.S. Crim. Law §§ 225-237

Law Review Commentary

32 Chicago-Kent L. Rev. 164

Notes of Decisions

Construction and Application

In a general statute of limitations an exception cannot be enlarged beyond that which its plain language imports, and whenever the exception is invoked the case must unequivocally fall within it. State v. Clemens, 40 Mont. 567, 569, 107 P. 896 (1910). Because statutes of limitation are only measures of public policy, and are therefore entirely subject to the legislature's will, they may be changed or repealed in any case where a right to acquittal has not been absolutely acquired by the completion of the original period of limitations. People v. Isaacs, 37 Ill.2d 205, 226 N.E.2d 38, 52 (1967).

Requirements as to Time

The Montana courts have held that unless time is a material ingredient in the offense or in charging the offense, it is necessary only to prove that the offense was committed prior to the findings or to the filing of the information or the indictment. State v. Rogers, 31 Mont. 1, 4 77 P.293 (1904). However, it should be noted that a complaint is subject to dismissal where the criminal complaint alleges a date that the crime was allegedly committed beyond the statute of limitations. People v. Hill, 68 Ill. App.2d 369, 376, 216 N.E.2d 212 (1966).

Continuing Offenses

As provided by subsection (4) of this section, statute of limitation begins running when the course of the conduct is terminated. See, for example, People v. Konkowski, 378 Ill. 616, 39 N.E.2d 13, 16 (1941); People v. Haycraft, 3 Ill. App.3d 974, 278 N.E.2d 877, 885 (1972). It should be noted, however, that two punishments are not to be imposed for a single act, even though different ingredients are involved in the two crimes. People v. Dushewycz, 27 Ill.2d 257, 189 N.E.2d 299, 301 (1963).

Right to Speedy Trial

The Illinois courts have held that it is only under most unusual circumstances that the beginning of a prosecution which is not barred by the statute of limitations under this section would constitute a deprivation of a right to speedy trial. People v. Plazewski, 2 Ill. App. 3d 378, 276 N.E.2d 459, 462 (1971).

94-1-107. Periods Excluded From Limitation.

The period of limitation does not run:

(1) during any period in which the offender is not usually and publicly resident within this state or is beyond the jurisdiction of this state; or

(2) during any period in which the offender is a public officer and the offense charged is theft of public funds while in public office; or

(3) during a prosecution pending against the offender for the same conduct, even if the indictment, complaint or information which commences the prosecution is dismissed.

Historical Note

Enacted:	M.C.C. 1973, § 94-1-107, Sec. 1, Ch. 513 Laws of Montana 1973
Source:	Ill.C.C. 1961, Title 38, § 3-7
Prior Law:	R.C.M. 1947, §§ 94-5704, 94-5706, repealed Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

The exclusions contained in this section come directly from Ill.C.C. 1961, Title 38, § 3-7. Subsection (1) excludes the offender who is absent from the state. Additionally, the statute has been interpreted to exclude the offender who, although remaining in the state, absents himself from his residence with an effort to conceal himself. People v. Ross, 325 Ill. 417, 156 N.E. 303 (1927). This subsection also embodies R.C.M. 1947, § 94-5704. Subsection (2) tolls the statute for public officials with regard to larceny of public funds. The language of this subsection appears broad enough to prevent running of the statute while the offender continues to hold any public office. This exclusion should be read along with M.C.C. 1973, § 94-1-106(3) if the offense is one which is difficult to discover. Subsection (3) preserves the substance of R.C.M. 1947, § 94-5706 which tolls the statute

(1)-2

while proceedings are pending. The phrase "for the same conduct" is broad and is designed to cover the case in which the initial prosecution is dismissed because of a substantial variance between allegation and proof. The earlier Illinois law which this section changed had the language "for the same offense"--terminology thought to be too narrow by the revisors of the Illinois code.

Cross References

M.C.C. 1973, § 94-1-106
M.C.C. 1973, § 4-2-201(36)
R.C.M. 1947, § 83-303
R.C.M. 1947, §§ 95-1301 through 95-1303
R.C.M. 1947, § 94-1410

Library References

Criminal Law Key No. 151, 152, 160
C.J.S. Crim. Law §§ 228, 229, 237

Notes of Decisions

Absence from State

In interpreting the prior Montana law, R.C.M. 1947, § 94-5704, the Montana Supreme Court held that the state's burden of proving that the defendant, who had left the state with the intention of going to Ireland, was outside of the state for a period of at least 20 days was met by testimony which provided a legitimate inference that such a trip must have involved an absence from the state for at least that length of time. State v. Knilans, 69 Mont. 8, 17, 220 P. 91 (1923).

Pending proceedings

It is a general rule that once an indictment is returned the statute of limitations is tolled. Such a rule was held even where the indictment was not on the docket for part of the time because it had been stricken with leave to reinstate. People v. Johnson, 363 Ill. 45, 1 N.E.2d 386, 388 (1936). For a discussion of pending proceedings in a conspiracy indictment see People v. Link, 365 Ill. 266, 6 N.E.2d 201, 207, cert. den. 302 U.S. 690 (1937).

Pleadings

In a case in which the statute of limitations had been tolled by the filing of a first indictment which was later dropped, the Illinois court held that the state was not required to allege in a new indictment the particular disposition of the original indictment, but the state was required to allege the tolling of the statute of limitations on the basis of pendency of prior proceedings against the same defendant for the same conduct. People v. Isaacs, 37 Il12d 205, 226 N.E.2d 38, 52 (1967). See also, People v. Rochola, 339 Ill. 474, 171 N.E.559, 560 (1930).

CHAPTER 2: GENERAL PRINCIPLES OF LIABILITY.

94-2-101. General Definitions.

Unless otherwise specified in the statute all words will be taken in the objective standard rather than in the subjective.

(1) "Acts" has its usual and ordinary grammatical meaning and includes any bodily movement, any form of communicatation, and, where relevant, includes a failure or omission to take action.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(1), Sec. 1, Ch. 513, Laws of Montana 1973

Source: New and Ill.C.C. 1961, Title 38, § 2-2

Prior Law: None

Annotator's Note

J. Guthals

Because the term "act" is so central to the construction and operation of the new Code, the drafters chose the broadest possible definition in this subsection. Both the Illinois code and the Model Penal Code define act as "including a failure to take action." To ensure that there was no ambiguity or possibility that the usual meaning of "act" was eliminated the first clause of the definition was developed and added to the Illinois wording. For case notes see M.C.C. 94-2-101(8).

Cross References

M.C.C. 1973, § 94-2-102
M.C.C. 1973, § 94-2-103
R.C.M. 1947, § 94-1504

(2) "Another" means a person or persons as defined in this code other than the offender.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(2), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill.C.C. 1961, Title 38, § 2-3

Prior Law: None

(8)-V

Cross References

M.C.C. 1973, § 94-2-106

(3) "Administrative proceeding" means any proceeding the outcome of which is required to be based on a record or documentation prescribed by law, or in which a law or a regulation is particularized in its application to an individual.

Historical Note

Enacted:	M.C.C. 1973, § 94-2-101(3), Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Model Penal Code (M.P.C.) 1962, § 240.0(8)
Prior Law:	None

Annotator's Note

J. Guthals

As discussed in Tentative Draft No. 8 of the Model Penal Code, May 1958: "Administrative proceeding is defined so as to include quasi judicial proceedings and, also, some proceedings directed toward formulation of regulations, if the law contemplates that the outcome shall be based on evidence and findings. The definition will also cover some actions that might be called 'executive' or 'administrative,' where the official action applies a general rule to an individual, e.g., in granting or revoking a license."

Cross References

M.C.C. 1973, Chapter 7

(4) "Benefit" means gain or advantage, or anything regarded by the beneficiary as gain or advantage, including benefit to any other person or entity in whose welfare he is interested, but not an advantage promised generally to a group or class of voters as a consequence of public measures which a candidate engages to support or oppose.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(4), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 240.0(1)

Prior Law: None

Annotator's Note

J. Guthals

This subsection and the new section on corrupt influences prohibits the giving or receiving of any non-pecuniary benefit such as political support, honoraries, etc. to influence official discretionary functions. The wording is taken directly from the Model Penal Code.

Cross References

M.C.C. 1973, § 94-2-101(44)
M.C.C. 1973, §§ 94-7-102, 94-7-105

(5) "Bodily injury" means physical pain, illness or any impairment of physical condition and includes mental illness or impairment.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(5), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 210.0(2)

Prior Law: None

Annotator's Note

This definition is designed to provide a broadened replacement for the term "bodily harm" used in the old Criminal Code. "Bodily harm" or "physical harm" as used in the new Code are synonomous with the term bodily injury.

Cross References

M.C.C. 1973, §§ 94-3-101 through 94-3-106
M.C.C. 1973, §§ 94-5-201, 94-5-202, 94-5-203
M.C.C. 1973, § 94-5-401
M.C.C. 1973, § 94-5-503
M.C.C. 1973, §§ 94-6-103, 94-6-104

(6) "Co-habit" means to live together under the representation of being married.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(6), Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: None

Cross References

M.C.C. 1973, § 94-5-606

(7) "Common scheme" means a series of acts or omissions motivated by a purpose to accomplish a single criminal objective, or by a common purpose or plan and which resulted in the repeated commission of the same offense or affects the same person or the same persons or the property thereof.

(8.5

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(7), Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: None

Annotator's Note

J. Guthals

This definition as applied in the new bad check and forgery statutes imposes higher penalties for elaborate plans which result in the illegal obtaining of property or services than penalties imposed for single fraudulent acts.

Cross References

M.C.C. 1973, §§ 94-6-309, 94-6-310

(8) "Conduct" means an act or series of acts, and the accompanying mental state.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(8), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill.C.C. 1961, Title 38, § 2-4

Prior Law: None

Annotator's Note

J. Guthals

Because this definition and many of the statutes making references to the word "conduct" come from Illinois, attention is directed to decisions from that jurisdiction. Perhaps the most important use of the term in Montana law occurs in the statute on Multiple Prosecutions: R.C.M. 1947, § 95-1711, which comes from Ill.C.C. 1961, §§ 3-3, 3-4.

Attention is also directed to the recent decision of the Supreme Court in Ashe v. Swenson, 397 U.S. 436 (1970) which has an important impact upon multiple prosecution for the same conduct.

Cross References

M.C.C. 1973, §§ 94-2-105 through 94-2-110
M.C.C. 1974, § 94-2-113
M.C.C. 1974, § 94-2-101(1)
R.C.M. 1947, § 95-1711

Law Review Commentaries

1965 Univ. of Ill. Law Forum 927

Notes of Decisions

In General

The United States Supreme Court has recently ruled that where the defendant was acquitted of robbing one of four men who were robbed in the same transaction, the Fifth Amendment guarantee against double jeopardy and the doctrine of collateral estoppel prohibited the prosecution for robbing another of the men when prosecution was based upon the same conduct as previously litigated. Ashe v. Swenson, 397 U.S. 436, 443 (1970). However, when several offenses are based upon the "same conduct" of the defendant, he may be convicted of each but only concurrent sentences may be imposed; when several offenses are not based upon the same conduct they may be prosecuted separately and sentence may be concurrent or consecutive. People v. Lerch, 131 Ill. App.2d 900, 268 N.E.2d 901, 904 (1971). The word "conduct" is used in the same sense as the "same transaction." People v. Weaver, 93 Ill. App.2d 31, 236 N.E.2d 362, 364 (1968). See also, People v. Limauge, 89 Ill. App.2d 307, 231 N.E.2d 599, 601 (1967), in which the court held that prosecution and conviction of defendant for driving while his license was revoked did not prevent subsequent prosecution of the defendant for reckless homicide.

Single Act

It is often difficult to determine at which point one course of conduct ends and another begins. The Illinois courts have ruled that aggravated battery and an ensuing rape resulted from the same conduct so that imposition of separate sentences for the two crimes was improper and conviction for the lesser crime of aggravated battery had to be reversed. People v. Weaver, 93 Ill. App.2d 31, 236 N.E.2d 362, 365 (1968). Similarly, concurrent sentences on charges of rape and burglary with intent to commit rape were held to be not authorized, where burglary with intent to commit rape was held to be a lesser included offense. People v. Ritchie, 66 Ill.App.2d 302, 213 N.E.2d 651, 657 (1966), affd, 36 Ill.2d 392, 222 N.E.2d 479. However, in a bar hold-up where the defendant's companion shot the bartender after the bartender sought to prevent the robbery, firing of a fatal shot represented the commencement of a new, distinct and separable course of action from the attempted robbery. People v. Tolliver, 273 N.E.2d 274, 278 (1971). See also People v. Gates, 123 Ill. App.2d 50, 259 N.E.2d 631, 635 (1970), in which the Illinois court held that where the three offenses charged involved three different mental states, the offenses did not result from the same conduct and the defendant's conviction did not improperly amount to convictions of several offenses arising from the same transaction.

(9)-1

(9) "Conviction" means a judgment of conviction or sentence entered upon a plea of guilty or upon a verdict or finding of guilty of an offense, rendered by a legally constituted jury or by a court of competent jurisdiction authorized to try the case without a jury.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(9), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill.C.C. 1961, Title 38, § 2-5

Prior Law: None

Annotator's Note

J. Guthals

Former section 94-4809 provided that no person could be convicted except upon a verdict or judgment. Because this section did not specifically define the point at which a conviction occurred problems arose in determining when a person could be said to have been placed in double jeopardy. See, for example, Petition of Williams, 145 Mont. 45, 57 (1965). Under the new Code, a conviction occurs either when a jury or judge of proper jurisdiction finds the defendant guilty or when sentence is imposed upon a plea of guilty entered by the defendant. Attention is directed to R.C.M. 1947, § 95-2200 et seq. which sets forth procedure for sentencing and judgment. The wording for this subsection defining "conviction" comes directly from the Illinois source.

Cross References

R.C.M. 1947, § 95-204
R.C.M. 1947, §§ 95-2202, 95-2206
R.C.M. 1947, § 95-2601 et seq.

Notes of Decisions

The term "conviction" means the finding of guilt by court or jury and an adjudication of that fact. That occurred here. There was a finalized judgment of conviction in the trial court.

If the term "conviction" means anything at all, it means a conviction finalized on the trial court level. People v. Spears, 83 Ill. App.2d 18, 226 N.E. 2d 67, 71 (1967).

(10) "Correctional institution" means the state prison, county or city jail, or other institution for the incarceration or custody of persons under sentence for offenses or awaiting trial or sentence for offenses.

Historical Note

Enacted:	M.C.C. 1973, § 94-2-101(10), Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Ill.C.C. 1961, Title 38, § 2-14
Prior Law:	None

Annotator's Note

J. Guthals

This definition is adopted from the Illinois definition of "penal institution."

(11) "Deception" means knowingly to:

(a) create or confirm in another an impression which is false and which the offender does not believe to be true; or

(b) fail to correct a false impression which the offender previously has created or confirmed; or

(c) prevent another from acquiring information pertinent to the disposition of the property involved; or

(d) sell or otherwise transfer or encumber property, failing to disclose a lien, adverse claim, or other legal impediment to the enjoyment of the property, whether such

impediment is or is not of value or is not a matter of official record; or

(e) promise performance which the offender does not intend to perform or knows will not be performed. Failure to perform standing alone is not evidence that the offender did not intend to perform.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(11), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill.C.C. 1961, Title 38, § 15-4

Prior Law: None

Annotator's Note

J. Guthals

This subsection defines a term essential to the new sections on Theft and Deceptive Practices (M.C.C. 1973, § 94-6-301 et seq.). The definition supplants and simplifies a variety of former laws relating to fraudulent practices such as false pretenses, larceny by trick, fraudulent conveyances, etc. The objective of the commission in replacing the old theft sections was to remove any reference to the old common law elements which encumbered the former Code. Subsection 11(e) makes the false promise of future performance punishable under the new theft act, although such promises were not punishable under the common law or under prior Montana statutes. The wording for this definition comes directly from the Illinois source.

Cross References

M.C.C. 1973, § 94-2-101(28)
M.C.C. 1973, §§ 94-6-302, 94-6-307, 94-6-308

Library References

Larceny Key No. 14
C.J.S. Larceny, §§ 7, 20, 23, 36, 44

Notes of Decisions

In General

In applying this definition to the Illinois theft section, which is substantially the same as the new Montana theft law, the Illinois courts have ruled that the theft section prohibits obtaining goods or property by false promises of future payments. People v. Kamsler, 67 Ill. App.2d 33, 214 N.E.2d 562, 565 (1966). In People v. Earles, 130 Ill. App.2d 695, 264 N.E.2d 550, 551 (1970), the Illinois court ruled that where the defendant had continually represented to the complaining witness that he was conducting a business in order to deceive the complaining witness and induce him to invest in such business, the indictment charged a crime although the first misrepresentation and the only investment occurred before the law making such an activity an offense was enacted, where the misrepresentation had continued after the statute was in effect.

Instructions

The Illinois appellate court has held that instructions which define deception in language of this section were not erroneous because they failed to contain part of the section which stated that failure to perform standing alone was not evidence that the offender did not intend to perform, where, the evidence showed eight failures to perform. People v. Kamsler, 67 Ill. App.2d 33, 214 N.E.2d 562, 567 (1966).

(10)-1

(12) "Defamatory matter" means anything which exposes a person or a group, class or association to hatred, contempt, ridicule, degradation or disgrace in society, or injury to his or its business or occupation.

Historical Note

Enacted:	M.C.C. 1973, § 94-2-101(12), Sec. 1, Ch. 513, Laws of Montana 1973
Source:	40A Minn. Stat. Anno., § 609.765
Prior Law:	R.C.M. 1947, § 94-2801 et. seq., repealed Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

This definition was taken directly from the Minnesota law, which in turn comes from Wisconsin Stat. § 942.01(2). The definition and the new statute on Criminal Defamation replaces numerous provisions in the old Code on libel, giving false information for publication, etc. The definition recognizes criminal liability for defamation of a group--a protection not found in prior Montana law. For case notes see M.C.C. 1973, § 94-8-111.

Cross References

M.C.C. 1973, § 94-8-111

Library References

Libel and Slander Key No. 141, 148, 149, 156
C. J. S. Libel & Slander, §§ 281, 288, 289, 300

Law Review Commentaries

53 Minn. Law Rev, 211

(10)-2

(13) "Deprive" means to withhold property of another:

(a) permanently; or

(b) for such a period as to appropriate a portion of its value; or

(c) with the purpose to restore it only upon payment of reward or other compensation; or

(d) to dispose of the property and use or deal with the property so as to make it unlikely that the owner will recover it.

Historical Note

Enacted:	M.C.C. 1973, § 94-2-101(13), Sec. 1, Ch. 513, Laws of Montana 1973
Source:	M.P.C. 1962, § 223.0(1)
Prior Law:	None

Annotator's Note

J. Guthals

This definition is taken without significant change from the Model Penal Code, proposed official draft, 1962. The definition is designed to cover both permanent and prolonged withholding of property from the rightful owner. The definition intentionally avoids any distinction to "possession," "custody," or "title"--concepts which have provided much confusion in the prior law on larceny and false pretenses.

Cross References

M.C.C. 1973, §§ 94-6-302 through 94-6-305

Library References

Larceny Key No. 2
C.J.S. Larceny, §§ 1, 82

(14) "Deviate sexual relations" means sexual contact or sexual intercourse between two (2) persons of the same sex, or any form of sexual intercourse with an animal.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(14), Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: R.C.M. 1947, 94-4118, repealed, Sec. 1, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

This definition replaces the prior law concerning "crime against nature," which was quite ambiguous in defining which conduct was prohibited. When read in conjunction with the new provision on deviate sexual conduct (M.C.C. 1973, § 94-505), this definition prohibits homosexuality and bestiality but does not outlaw acts between consenting adults of the opposite sex.

Cross References

M.C.C. 1973, § 94-5-505

Library References

Sodomy Key No. 1
C.J.S. Sodomy, § 1

(15) "Felony" means an offense in which the sentence imposed upon conviction is death or imprisonment in the state prison for any term exceeding one (1) year.

D-4

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(15), Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: R.C.M. 1947, §§ 94-112, 94-113, 94-114, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

Under prior law, the determination of whether an offense was a felony depended solely upon where the maximum punishment was to be served. Under the new definition, both the length of the sentence and the jail in which the sentence is served are determining factors. When read with M.C.C. 1973, § 94-1-105 the new section on classification of offenses, the Code emphasizes that while potential sentence determines jurisdiction, including the classification of any offense necessary to the definitions of the principal offense, and the determination of the commencement of any period of limitations.

Cross References

M.C.C. 1973, §§ 94-1-103(2), 94-1-105, 94-1-106, 94-1-107
M.C.C. 1973, § 94-2-101(31)
M.C.C. 1973, § 94-5-102
M.C.C. 1973, § 94-5-303
M.C.C. 1973, § 94-6-204
M.C.C. 1973, § 94-7-305

Library References

Crim. Law Key No. 27
C.J.S. Crim. Law, §§ 6,7

(16) "A frisk" is a search by an external patting of a person's clothing.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(16), Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: None

Annotator's Note

J. Guthals

The term "frisk" is distinguished from the term "search" in that the objective of a search is to protect the officer, prevent escape and obtain evidence while the objective of a frisk is the detection of concealed weapons in order to protect the officer. Under the new Stop and Frisk law (R.C.M. 1947, § 95-719), a peace officer may detain and frisk a person who he believes may have been connected with the commission of an offense or be of aid in investigation of an offense provided that the officer has reasonable cause to suspect the presence of a dangerous weapon.

Cross References

R.C.M. 1947, § 95-719

Library References

Words and Phrases
C.J.S. Searches, § 1

(17) "Forcible felony" means any felony which involves the use or threat of physical force or violence against any individual.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(17), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill.C.C. 1961, Title 38, § 2-8

Prior Law: None

Annotator's Note

J. Guthals

This definition is taken from the last clause of the Illinois source. Forcible felonies include such offenses as homicide, assault, kidnapping, robbery, sexual assault, arson, burglary, etc. As applied in the new Code, one who is committing a forcible felony has no right to use force to defend himself (M.C.C. 1973, § 94-3-105).

Cross References

M.C.C. 1973, §§ 94-3-101, 94-3-105

Notes of Decisions

Threat of violence

Defendant's advice to victim that defendant had been hired to kill the victim, but if given a certain sum would leave the city, was reasonably construed as a "threat of physical force or violence" under this section, despite its conditional character. People v. Rhodes, 38 Ill. App.2d 389, 231 N.E.2d 400, 404 (1967).

(18) "Government" includes any branch, subdivision or agency of the government of the state or any locality within it.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(18), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 240.0(2)

Prior Law: None

Annotator's Note

J. Guthals

This definition and the new provisions on Offenses Against Public Administration (M.C.C. 1973, § 94-7-101, et. seq.) are taken directly from the Model Penal Code.

Cross References

M.C.C. 1973, §§ 94-7-101 through 94-7-105

(19) "Harm" means loss, disadvantage or injury, or anything so regarded by the person affected, including loss, disadvantage or injury to any person or entity in whose welfare he is interested.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(19), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 240.0 (19)

Prior Law: None

Annotator's Note

J. Guthals

This definition and the corresponding section on Threats and Other Improper Influence in official and public matters (M.C.C. 1973, § 94-7-103) are taken verbatim from the Model

(1)-3

Penal Code. These sections and the new Bribery section provide an all inclusive prohibition of the corrupt influencing of governmental processes.

Cross References

M.C.C. 1973, § 94-7-103

(20) "He, she, it". The singular term shall include the plural and the masculine gender the feminine except where a particular context clearly requires a different meaning.

Historical Note

Enacted:	M.C.C. 1973, § 94-2-101(20), Sec. 1, Ch. 513, Laws of Montana 1973
Source:	R.C.M. 1947, § 19-103
Prior Law:	R.C.M. 1947, § 19-103

Annotator's Note

J. Guthals

This definition supplements the current Montana provisions found in R.C.M. 1947, § 19-103. Similar definitions are also found in the Montana Legislative Council Bill Drafter's Manual.

Notes of Decisions

Masculine and feminine gender

It has been Montana law for many years that words used in the codes in the masculine gender included the feminine gender. Kosonen v. Waara, 87 Mont. 24, 32, 285 P. 668 (1930).

(21) "A house of prostitution" means any place where prostitution or promotion of prostitution is regularly carried on by one (1) person under the control, management or supervision of another.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(21), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 251.2

Prior Law: R.C.M. 1947, § 94-3607, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

Under prior law, a "house of prostitution" was referred to as a "house of ill fame" and the crime of prostitution was punishable on a public nuisance theory. Under the new provisions, any form of prostitution is outlawed, as is any house of prostitution--whether it be discreet or indiscreet. The definition is taken directly from the Model Penal Code.

Cross References

M.C.C. 1973, § 94-5-603

Library References

Prostitution Key No. 1 et. seq.
C.J.S. Prostitution, § 1 et. seq.

(22) "Human being" means a person who has been born and is alive.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(22), Sec. 1, Ch. 513, Laws of Montana 1973

(11).5

Source: M.P.C. 1962, § 210.0(1)

Prior Law: None

Annotator's Note

J. Guthals

Under this definition, which is supported by both the Model Penal Code and the majority of commentators, unborn children and deceased persons are not human beings for the purposes of offense against the person.

Cross References

M.C.C. 1973, § 94-5-101

Library References

Homicide Key No. 7
C.J.S. Homicide, § 1 et. seq.

(23) "An illegal article" is an article or thing which is prohibited by statute, rule regulation or order from being in the possession of a person subject to official detention.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(23), Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: R.C.M. 1947, §§ 94-4208, 94-35-264, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

This definition and the new section on Transferring Illegal Articles (M.C.C. 1973, § 94-7-307) consolidates the prior law

(1)-16

listed above and expands the definition to include not only articles to aid escape and alcoholic beverages but also any other article prohibited by governmental regulation to be in the possession of a prisoner. To complete the offense, the offender must have had reasonable knowledge that the item was illegal and have had the purpose to convey it.

Cross References

M.C.C. 1973, § 94-7-307

Library References

Prisons Key No. 17-1/2
C.J.S. Prisons, § 22

(24) "Inmate" means a person who engages in prostitution in or through the agency of a house of prostitution.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(24), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 251.2(1)

Prior Law: None

Annotator's Note

J. Guthals

This definition and the corresponding section on Promoting Prostitution (M.C.C. 1973, § 94-5-603) are taken directly from the Model Penal Code.

Cross References

M.C.C. 1973, § 94-5-603

Library References

Prostitution Key No. 1 et. seq.
C.J.S. Prostitution, § 1 et. seq.

(25) "Intoxicating substance" means any substance having an hallucinogenic, depressant, stimulating, or narcotic effect, taken in such quantities as to impair mental or physical capability including but not limited to any beverage containing one-half of one per centum (1/2 of 1%) or more of alcohol by volume; provided, that the foregoing definition shall not extent to dealcoholized wine, nor to any beverage or liquid produced by the process by which beer, ale, port or wine is produced, if it contains less than one-half of one per centum (1/2 of 1%) of alcohol by volume.

Historical Note

Enacted:	M.C.C. 1973, § 94-2-101(25), Sec. 1, Ch. 513, Laws of Montana 1973
Source:	R.C.M. 1947, § 94-35-107
Prior Law:	R.C.M. 1947, § 94-35-107, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

This subsection replaces the prior law listed above which defined "intoxicating liquor." The only significant change from the prior law is the reference to hallucinogenic drugs. The statutes in the new Code referring to unlawful transactions with children and unlawful possession of intoxicating substance by children are merely recodifications of prior law. This definition will have no affect on definitions of beer and liquor found in the various control acts.

(11)-8

Cross References

M.C.C. 1973, §§ 94-5-609, 94-5-610
M.C.C. 1973, § 94-5-506

Library References

Intoxicating Liquors Key No. 134
C.J.S. Intoxicating Liquors, §§ 10, 57, 217

Notes of Decisions

Vodka

In interpreting prior Montana law (R.C.M. 1947, § 94-35-107) the Montana court held that while the statutory definition of intoxicating liquor did not contain the word vodka, the definition did make any beverage containing more than one-half of one per cent alcohol an intoxicating liquor, and the court therefore took judicial notice of commonly accepted and generally understood definition of the word "vodka." State v. Wild, 130 Mont. 476, 492, 305 P.2d 325 (1956).

(26) "An involuntary act" means any act which is:

(a) a reflex or convulsion; or

(b) a bodily movement during unconsciousness or sleep; or

(c) conduct during hypnosis or resulting from hypnotic suggestion; or

(d) a bodily movement that otherwise is not a product of the effort or determination of the actor, either conscious or habitual.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(26), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 2.01

Prior Law: None

Annotator's Note

J. Guthals

The minimum elements of an offense (unless absolute liability is imposed) usually are said to be a voluntary act and a certain mental state as prescribed by law. Under the new provision on Voluntary Act, a person is not guilty of an offense (other than one in which absolute liability is provided for the act alone) unless his liability is based on conduct which includes a voluntary act or the omission to perform an act required by law of which the person is capable of performing. The wording for this definition is taken from the Model Penal Code, but a number of states including Illinois, Wisconsin and Louisiana have spelled out the same theory within their Criminal Code.

Cross References

M.C.C. 1973, §§ 94-2-102, 94-2-103, 94-2-104

Library References

Criminal Law Key No. 26
C.J.S. Crim. Law, § 37

(17)

(27) "Juror" means any person who is a member of any jury, including a grand jury, impaneled by any court in this state in any action or proceeding or by any officer authorized by law to impanel a jury in any action or proceeding. The term juror also includes a person who has been drawn or summoned to attend as a prospective juror.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(27), Sec. 1, Ch. 513, Laws of Montana 1973

Source: N.Y. Pen. L. 1965, § 10.00(16)

Prior Law: None

Annotator's Note

J. Guthals

This definition is taken directly from the New York Penal Law. Because of the all inclusiveness of this definition any attempt to influence a juror or prospective juror is prohibited.

Cross References

M.C.C. 1973, § 94-2-101(52)
M.C.C. 1973, §§ 94-7-101 through 94-7-103

(28) "Knowingly" — A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware of his conduct or that the circumstance exists. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence. Equivalent terms such as "knowing" or "with knowledge" have the same meaning.

(12).3

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(28), Sec. 1, Ch. 513, Laws of Montana, 1973

Source: M.P.C. 1962, §§ 2.02, 1.13(13)

Prior Law: R.C.M. 1947, § 94-118, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

Under the new Code, the concepts of "knowingly" and "purposely," replace the old term "intentionally." The terms, however, are not synonomous. "Knowingly" refers to an awareness of the nature of one's conduct or of the existence of specified facts or circumstances. "Purposely" refers to the actor's objective or intended result. The definition for "knowingly" is taken primarily from the Model Penal Code, but a significant departure from the source is the substitution of the phrase "high probability" for "practically certain." Thus, the drafters of the new Code chose to substitute a less rigid requirement. Several states, including New York and Illinois, have enacted similar although not identical provisions.

Cross References

M.C.C. 1973, § 94-2-101(53)
M.C.C. 1973, § 94-2-103

Library References

Criminal Law Key No. 32, 33
C.J.S. Crim. Law, §§ 47, 48

(129) - 1

(29) "Mentally defective" means that a person suffers from a mental disease or defect which renders him incapable of appreciating the nature of his conduct.

Historical Note

Enacted:	M.C.C. 1973, § 94-2-101(29), Sec. 1, Ch. 513, Laws of Montana 1973
Source:	N.Y. Pen. L. 1965, § 130.00(5)
Prior Law:	R.C.M. 1947, §§ 94-118, 94-4101(2), repealed Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

"Mentally defective" as used in the substantive code is an element employed to determine the validity of consent to the sexual offenses. A person who is incapable of appreciating the nature of his conduct is legally incapable of giving consent to a sexual act. The defense of insanity is preserved under Montana law but is covered in the Code of Criminal Procedure rather than in the new Criminal Code. The wording for both sections is similar and interpretations developed in the Procedure section are applicable to this definition. The definition is taken verbatim from the New York source.

Summarized Criminal Law Commission Comment

J. Guthals

Under the prior Montana rape law, R.C.M. 1947, § 94-4101, a woman was said to be mentally incompetent to assent to sexual advances if she was "incapable of giving legal consent." Under the new Code, any formulation in terms of capacity to give legal consent is rejected. The new definition requires that the mental disease be so serious as to render the woman incapable of appreciating the nature of her act. Conditions affecting only the woman's capacity to "control herself sexually" where there is no mental defect will not involve criminal liability. The typical criminal case is the case of intercourse with a woman known to be seriously deranged.

(120)-2

Cross References

M.C.C. 1973, §§ 94-2-101(28), (53)
M.C.C. 1973, §§ 94-2-103, 94-2-111
M.C.C. 1973, § 94-5-503
R.C.M. 1947, § 95-501 et. seq.

Library References

Criminal Law Key No. 47, et. seq.
Mental Health Key No. 431, et. seq.
C.J.S. Criminal Law, §§ 55 et. seq.
C.J.S. Insane Persons, § 127

(30) "Mentally incapacitated" means that a person is rendered temporarily incapable of appreciating or controlling his conduct as result of the influence of an intoxicating substance.

Historical Note

Enacted:	M.C.C. 1973, § 94-2-101, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	N.Y. Pen. L. 1965, § 130.00(6)
Prior Law:	R.C.M. 1947, § 94-4101, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

Intoxication as a defense is covered by the new section on Responsibility (M.C.C. 1973, § 94-2-109). This definition, which is taken directly from the New York source is a determinant in the validity of consent to sexual acts. When a person is rendered temporarily incapacitated to give consent this definition applies. When a person is rendered completely unconscious by an intoxicating substance, the term "physically helpless" (M.C.C. 1973, § 94-2-101(46)) is used to define his condition. That the defendant did not administer the intoxicating substance is immaterial as long as the substance was administered by someone without the victim's voluntary consent.

Criminal Law Commission Comment

The intent of this definition is to cover the situation where the defendant undermined the judgment and will of the victim by, for example, administering drugs. The victim need not be unconscious.

Cross References

M.C.C. 1973, §§ 94-2-103, 94-2-109, 94-2-111
M.C.C. 1973, § 94-5-503
M.C.C. 1973, § 94-2-101(68)

(13)-1

(31) "Misdemeanor" means an offense in which the sentence imposed upon conviction is imprisonment in the county jail for any term, or fine, or both or the sentence imposed is imprisonment in the state prison for any term of one year or less.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(31), Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: R.C.M. 1947, §§ 94-112, 94-113, 94-114, 94-116, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

A misdemeanor under prior law was defined as any crime punishable by imprisonment in the county jail or for which only a fine was imposed. The determination of whether an offense was a misdemeanor came at the beginning of proceedings depending upon the maximum sentence prescribed in the Code. Under the new definition and the corresponding section on Classification of Offenses (M.C.C. 1973, § 94-1-105), the maximum potential sentence determines certain jurisdictional and other but the final classification of the offense does not occur until the time sentence is imposed. Any crime for which the sentence finally imposed is less than one year or in which the sentence is to be served in a county jail is a misdemeanor.

Cross References

M.C.C. 1973, §§ 94-1-103(2), 94-1-105, 94-1-106, 94-107
M.C.C. 1973, § 94-2-101(15)

Library References

Crim. Law Key No. 27, 1208
C.J.S. Crim. Law, §§ 6,7,1986

(32) "Negligently" — A person acts negligently with respect to a result or to a circumstance described by a statute defining an offense when he consciously disregards a risk that the result will occur or that the circumstance exists; or if he disregards a risk of which he should be aware that the result will occur or that the circumstance exists. The risk must be of such a nature and degree that to disregard it involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation. Gross deviation means a deviation that is considerably greater than lack of ordinary care. Relevant terms such as "negligent" and "with negligence" have the same meaning.

Historical Note

Enacted:	M.C.C. 1973, § 94-2-101(32), Sec. 1, Ch. 513, Laws of Montana 1973
Source:	N.Y. Pen.L. 1965, § 15.05(4), M.P.C. 1962, §§ 1.13(15), 2.02(2)(d)
Prior Law:	None

Annotator's Note

J. Guthals

Under prior law, the concept of "criminal negligence" occurred most commonly in the area of involuntary manslaughter. R.C.M. 1947, § 94-2507 contained the clause "without due caution and circumspection," which was held to be synonomous with criminal negligence. State v. Powell, 114 Mont. 571, 576, 138 P.2d 949 (1943). Because the old manslaughter section required an unlawful act not amounting to a felony and because the common law required that the act be more than merely malum prohibitum, the Montana courts developed the concept that if an act was done with criminal negligence the act became malum in se to allow a conviction under that section. The new Code deletes all references to these concepts in order to avoid the definitional problems which they produced. The

(13-3

term "negligence," which is a lesser mental state than "knowingly" or "purposely" is found in the lower categories of assault and homicide in the new Code. The inclusion of the term in these sections is necessary to cover such frequent offenses as motor vehicle homicide and fire arm mishaps--crimes which were problem areas under prior law. The wording of the definition comes primarily from the New York source, but also borrows language from the Model Penal Code. It should be noted that this definition includes the concept of "recklessness" with the phrase "consciously disregards..." Under the New York law, recklessness is a higher mental state than negligence. Since the distinction between negligence and recklessness is often difficult for juries to make, it has been avoided in the Montana Code.

Cross References

M.C.C. 1973, §§ 94-2-101(25), (53)
M.C.C. 1973, § 94-2-105
M.C.C. 1973, § 94-5-104
M.C.C. 1973, § 94-5-201
M.C.C. 1973, § 94-6-103

Library References

Criminal Law Key No. 19 et. seq.
C.J.S. Crim. Law, § 29 et. seq.

Law Review Commentaries

63 Col. L. Rev. 632

(33) "Obtain" means:

(a) in relation to property, to bring about a transfer of interest or possession, whether to the offender or to another; and

(b) in relation to labor or services, to secure the performance thereof.

(13)-4

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(33), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 223.0(5), Ill.C.C. 1961, Title 38, § 15-7

Prior Law: None

Annotator's Note

J. Guthals

Under prior statutes concerning false pretenses and larceny by trick it was necessary to distinguish between the transferring of title and the transferring of possession. This definition and the sections on Theft and Related Offenses (M.C.C. 1973, § 94-6-301 et. seq.) avoid these confusing and often impossible distinctions and instead provide a more general description "interest or possession"--which should include any fraudulent transfer. The definition is taken directly from the Model Penal Code and is identical to the Illinois provision.

Cross References

M.C.C. 1973, § 94-6-301 et. seq.

Library References

False Pretenses Key No. 7
Larceny Key No. 1, 2
C.J.S. False Pretenses, § 1 et. seq.
C.J.S. Larceny, §§ 1, 4, 7, 9, 82

Notes of Decisions

In general

Where the defendant had allegedly moved around a ticket agent and entered transit authority train platform without paying his fare, the Illinois court held that the defendant could not be convicted of the crime of theft of services before he had boarded the train. People v. Davis, 5 Ill.App.3d 95, 283 N.E.2d 317, 318 (1972).

(34) "Obtains or exerts control" includes but is not limited to the taking, carrying away, or the sale, conveyance, or transfer of title to, or interest in, or possession of property.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(34), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill.C.C. 1961, Title 38, § 15-8

Prior Law: None

Annotator's Note

J. Guthals

This definition which is central to the new section on Theft eliminates the distinctions which existed under prior law between obtaining title and obtaining possession. The fraudulent transfer of either title or possession is covered by the new sections and the old distinction is of no importance. This definition and much of the new section on Theft come directly from Illinois. More annotations will be found in the Theft section (M.C.C. 1973, § 94-6-301 et. seq.).

Cross References

M.C.C. 1973, § 94-2-101(33)
M.C.C. 1973, § 94-6-301 et. seq.

Library References

Words and Phrases

Notes of Decisions

In general

The Illinois Supreme Court has ruled that the term "unauthorized control" in Theft section, which is substantially the same as the Montana theft law, was not unconstitutionally vague by failing to define what conduct was proscribed, in view of this definition and the requirement of a "knowing" mental state. People v. Harden, 42 Ill.2d 301, 247 N.E.2d 404, 406 (1969).

(35) "Occupied structure" means any building, vehicle or other place suited for human occupancy or night lodging of persons or for carrying on business, whether or not a person is actually present. Each unit of a building consisting of two (2) or more units separately secured or occupied is a separate occupied structure.

Historical Note

Enacted:	M.C.C. 1973, § 94-2-101(35), Sec. 1, Ch. 513, Laws of Montana 1973
Source:	M.P.C. 1962, § 220.1(4)
Prior Law:	R.C.M. 1947, §§ 94-501, 94-502, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

This definition and the terms "premises" and "vehicle" provide a comprehensive treatment of such offenses against property as Criminal Trespass, Burglary, Criminal Mischief and Arson (M.C.C. 1973, §§ 94-6-102, 94-6-201, et. seq.). These offenses are graded according to the type of structure against which the crime was committed and whether the act created a potential danger to human life. Prior law on arson included an exhaustive listing of different types of structures to allow the offense to be graded. This definition replaces that catalogue. The wording for this subsection comes from but is not identical to the Model Penal Code source. Included within the definition are such items as house trailers, house boats, etc. which are not ordinarily considered to be "structures." It is important to note that the structure need not be occupied to be the subject of arson or burglary--under this definition the building need only be suited for human habitation.

Cross References

M.C.C. 1973, §§ 94-2-101(48), (65)
M.C.C. 1973, § 94-6-101 et. seq.
M.C.C. 1973, § 94-6-201 et. seq.

Library References

Arson Key No. 2 et. seq.
C.J.S. Arson, § 1 et. seq.
Burglary Key No. 4, 5, 6
C.J.S. Burglary, § 1 et. seq.

(36) "Offender" means a person who has been or is liable to be arrested, charged, convicted or punished for a public offense.

Historical Note

Enacted:	M.C.C. 1973, § 94-2-101(36), Sec. 1, Ch. 513, Laws of Montana 1973
Source:	New
Prior Law:	None

Annotator's Note

J. Guthals

The term "offender" is used extensively in the Code. This general definition indicates that the Code provisions apply to persons who have been involved in any criminal activity for which legal action may be taken. In the Montana Code of Criminal Procedure reference is made to "defendants," indicating those who are charged with a crime.

(37) "Offense" means a crime for which a sentence of death or of imprisonment or fine is authorized. Offenses are classified as felonies or misdemeanors.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(37), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 1.04(1)

Prior Law: R.C.M. 1947, § 94-112, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

This definition is merely a recodification of the prior law through adaptation of Model Penal Code wording. Under prior law an offense was defined as including those activities for which punishment was removal from office or disqualification to hold office. Because all offenses against public administration are now punishable with fines and/or imprisonment, reference in this subsection to removal from office is not necessary.

Cross References

M.C.C. 1973, §§ 94-2-101(15), (31)

Library References

Criminal Law Key No. 1
C.J.S. Crim. Law, §2,3

Notes of Decisions

In general

The Montana court has held that contempt of court, which is punishable by fine or imprisonment, or both, is a public offense under prior Montana law R.C.M. 1947, § 94-112. State ex rel Flynn v. District Court, 24 Mont. 33, 35, 6 P. 493 (1900). Again in interpreting prior Montana law, the court held that the threatened violation of a town ordinance was not a "public offense" within the meaning of § 94-112. State ex rel. Streit v. Justice Court, 45 Mont. 375, 380, 123 P. 405 (1912).

(38) "Official detention" means imprisonment which resulted from a conviction for an offense, confinement for an offense, confinement of a person charged with an offense, detention by a peace officer pursuant to arrest, detention for extradition or deportation, or any lawful detention for the purpose of the protection of the welfare of the person detained or for the protection of society; but "official detention" does not include supervision of probation or parole, constraint incidental to release on bail, or an unlawful arrest unless the person arrested employed physical force, a threat of physical force, or a weapon to escape.

Historical Note

Enacted:	M.C.C. 1973, § 94-2-101(38), Sec. 1, Ch. 513, Laws of Montana 1973
Source:	M.P.C. 1962, § 242.6(1)
Prior Law:	R.C.M. 1947, § 94-4203, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

(14)-3

Annotator's Note

J. Guthals

This subsection defines a term that is used in the new statute on Escape (M.C.C. 1973, § 94-7-306). Prior law punished escapees from custody being held for charges of felonies or misdemeanors but did not clearly delineate that it is an offense to escape from any lawful detention. Under the new Code, the crime of escape is graded according to the degree of offense for which the escapee was being held. A person who violates parole is not an escapee under this subsection. The wording for the definition comes directly from the Model Penal Code source.

Cross References

M.C.C. 1973, § 94-7-306

Library References

Escape Key No. 4, 13
C.J.S. Escape, § 14-17, 28

(39) "Official proceeding" means a proceeding heard or which may be heard before any legislative, judical, administrative or other governmental agency or official authorized to take evidence under oath, including any referee, hearing examiner, commissioner, notary or other person taking testimony or deposition in connection with such proceeding.

Historical Note

Enacted:	M.C.C. 1973, § 94-2-101(39), Sec. 1, Ch. 513, Laws of Montana 1973
Source:	M.P.C. 1962, § 240.0(4)
Prior Law:	None

Annotator's Note

J. Guthals

This subsection defines a term used in the new section on

(14)-4

Perjury (M.C.C. 1973, § 94-7-202). Under prior law perjury was covered by separate sections on witnesses before legislative assemblies and those before other government bodies. This subsection encompasses all testimony before any governmental proceedings. The definition and the section on perjury come directly from the Model Penal Code.

Cross References

M.C.C. 1973, § 94-7-202

Library References

Perjury Key No. 1
C.J.S. Perjury, § 1 et. seq.

(40) "Other state" means any state or territory of the United States, the District of Columbia and the Commonwealth of Puerto Rico.

Historical Note

Enacted:	M.C.C. 1973, § 94-2-101(40), Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Ill.C.C. 1962, Title 38, § 2-21
Prior Law:	None

Annotator's Note

J. Guthals

This definition contains the same wording as the Illinois source.

Cross References

M.C.C. 1973, § 94-2-101(58)

(41) "Owner" means a person, other than the offender, who has possession of or any other interest in the property involved, even though such interest or possession is unlawful, and without whose consent the offender has no authority to exert control over the property.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(41), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill.C.C. 1961, Title 38, § 15-2

Prior Law: None

Annotator's Note

J. Guthals

This definition and the new section on Theft (M.C.C. 1973, § 94-6-302) are taken directly from the Illinois source. The definition is comprehensive and includes such interests in property as possession, title and custody--either actual or constructive.

Cross References

M.C.C. 1973, § 94-6-301 et. seq.

Library References

Words and Phrases

Notes of Decisions

Validity

The Illinois Court has held that this definition and the Illinois section on Theft which is substantially similar to M.C.C. 1973, § 94-6-302 defining theft, were not repugnant or vague by providing that an owner can never be an offender. People v. Kamsler, 78 Ill. App.2d 349, 223 N.E.2d 237 (1966).

Sufficiency of evidence

In general, Illinois courts have been liberal in allowing that evidence which indicates that the ownership of stolen property was in one other than the defendant is sufficient to support a conviction under indictment charging theft. See, for example, People v. Demos, 3 Ill. App.3d 284, 278 N.E.2d 89, 90 (1971); People v. Insolata, 112 Ill. App.2d 269, 251 N.E.2d 73, 74 (1969); People v. Kurtz, 69 Ill. App.2d 282, 216 N.E.2d 254, rev. in part on other grounds in 37 Ill.2d 103, 224 N.E.2d 817 (1966); People v. Tomaszek, 54 Ill. App.2d 254, 204 N.E.2d 30, 33 (1965), cert. den. 382 U.S. 827.

Construction and Application

The Illinois courts have given this definition a broad interpretation. For example, the resident manager of a hotel was held to have sufficient control over the hotel's property and thus was an "owner" within the definition of this section. People v. Smith, 90 Ill. App.2d 388, 234 N.E.2d 161, 166 (1967). Similarly, the payee of an allegedly stolen check was found to have sufficient interest in the check and the proceeds of the check to meet the requirements of this definition. People v. Jones, 123 Ill. App.2d 389, 259 N.E. 2d 393 (1970). However, a defendant in possession of stolen drugs was held not to be "an owner" as defined by this section. People v. Marino, 95 Ill. App.2d 369, 238 N.E.2d 245, 254 (1968).

Indictment and Information

It is necessary in every indictment or information charging theft that the ownership of the stolen property be set forth with accuracy. People v. Baskin, 119 Ill. App.2d, 18, 255 N.E.2d 42, 43 (1969). However, slight variations between the actual ownership of the property and the ownership of the property as listed in the complaint is not fatal to the indictment. See, for example, People ex rel. Insolata v. Pate, 46 Ill. 2d 268, 263 N.E.2d 44, 45 (1970); People v. Harden, 42 Ill. 2d 301, 247 N.E.2d 404, 406 (1969); People v. Tomaszek, 54 Ill. App.2d 254, 204 N.E.2d 30, 34 (1964), cert. den. 382 U.S. 827.

Proof of Ownership

The Illinois court has ruled that the requirement that ownership of property which is alleged to have been stolen be alleged in the information and proved in the trial is necessary to safeguard the accused against double jeopardy. People v. Insolata, 112 Ill. App. 2d, 269, 251 N.E.2d 73, 74 (1969). Despite that general rule, however, an earlier court held that proof that corporate owner of burglarized building was the owner of money stolen from that building was not necessary to convict the party taking the money of burglary. People v. Griffin, 48 Ill. App.2d 148, 198 N.E.2d 115, 119 (1964).

(15)

(42) "Party official" means a person who holds an elective or appointive post in a political party in the United States by virtue of which he directs or conducts, or participates in directing or conducting party affairs at any level of responsibility.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(42), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 240.0(5)

Prior Law: None

Annotator's Note

J. Guthals

Prior Montana law did not cover attempts to bribe political party officers. This definition and the new chapter on Offenses Against Public Administration (M.C.C. 1973, § 94-7-101 et. seq.) acknowledge the important public trust placed in party officials and the undermining affect that attempts to corruptly influence such persons can have on the political process. This definition and the sections on Bribery and Corrupt Influences are broad enough to cover all political workers regardless of position. The wording is taken directly from the Model Penal Code.

Cross References

M.C.C. 1973, §§ 94-7-102, 94-7-103

Library References

Bribery Key No. 1
C.J.S. Bribery, § 1 et. seq.

(43) "Peace officer" means any person who by virtue of his office or public employment is vested by law with a duty to maintain public order or to make arrests for offenses while acting within the scope of his authority.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(43), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill.C.C. 1961, Title 38, § 2-13

Prior Law: None

Annotator's Note

J. Guthals

This definition is taken directly from Illinois. All persons who are granted authority to maintain order or make arrests within the state are peace officers as defined by the state. As peace officers, such individuals are permitted certain privileges and defenses under the new Code such as the power to detain, the right to use force, and the privilege to require aid from members of the public (M.C.C. 1973, § 94-7-301 et. seq.).

Cross References

M.C.C. 1973, § 94-3-101 et. seq.
M.C.C. 1973, §§ 94-7-301, through 94-7-304

(44) "Pecuniary benefit" is benefit in the form of money, property, commercial interests or anything else the primary significance of which is economic gain.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(44), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 240.0(6)

Prior Law: None

Annotator's Note

J. Guthals

This subsection when read in conjunction with the new chapter on Corrupt Influences (M.C.C. 1973, § 94-7-101 et. seq.)

unqualifiedly prohibits the giving or receiving of any pecuniary benefit to influence official discretion. Offers of non-pecuniary benefit such as political support, honoraries, etc. are penalized under M.C.C. 1973, § 94-7-102. The wording comes directly from the Model Penal Code.

Cross References

M.C.C. 1973, § 94-2-101(4)
M.C.C. 1973, §§94-7-102 et. seq.

(45) "Person" includes an individual, business associaton, partnership, corporation, government, or other legal entity, and an individual acting or purporting to act for or on behalf of any government or subdivision thereof.

Historical Note

Enacted:	M.C.C. 1973, § 94-2-101(45), Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Ill.C.C. 1961, Title 38, § 2-15
Prior Law:	R.C.M. 1947, § 19-102

Annotator's Note

J. Guthals

Under present law, "person" means a corporation as well as a natural person. Under this subsection, the term has been expanded for the purposes of criminal law to include unincorporated associations and government agencies. This definition does not create problems with the new Robbery section (M.C.C. 1973, § 94-5-401) because that section requires actual or threatened "bodily injury" as defined in M.C.C. 1973, § 94-2-101(5). Bodily injury necessarily refers only to natural persons as defined in the Code. The wording for this section is taken with only minor changes from the Illinois source.

Library References

Words and Phrases

(15)-4

Notes of Decisions

In general

Although the term "person" ordinarily refers to a living human being, it has long been the law in Montana that the definition of person includes corporations as well as natural persons. In re Becks Estate, 44 Mont. 561, 572, 121 P. 784 (1912). Notwithstanding the broad language of this section, the Illinois court has recently ruled that this section did not alter the existing law concerning whether or not an unincorporated association could be sued in its own name in a civil action. Boozer v. U.A.W., A.F.L.-C.I.O., Local 457, 4 Ill. App.3d 611, 279 N.E.2d 428, 432 (1972).

(46) "Physically helpless" means that a person is unconscious or is otherwise physically unable to communicate unwillingness to act.

Historical Note

Enacted:	M.C.C. 1973, § 94-2-101(46), Sec. 1, Ch. 513, Laws of Montana 1973
Source:	N.Y. Pen. L. 1965, § 130.00(7)
Prior Law:	None

Annotator's Note

J. Guthals

This definition is used in conjunction with the new section describing when a person is deemed to be incapable of consenting to a sexual act. The term should be compared to other states of incapacity defined in the Code such as "mentally defective" (M.C.C. 1973, § 94-2-101(28)) and "mentally incapacitated" (M.C.C. 1973, § 94-2-101(29)). Under this definition a person who is paralytic or drugged to unconsciousness is deemed helpless. The definition is taken directly from New York law as is much of the new chapter on sexual offenses (M.C.C. 1973, § 94-5-501 et. seq.).

(15).5

Cross References

M.C.C. 1973, § 94-2-101(29), (30)
M.C.C. 1973, § 94-2-111
M.C.C. 1973, § 94-5-501 et. seq.

(47) "Possession" is the knowing control of anything for a sufficient time to be able to terminate control.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(47), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 2.01(4)

Prior Law: None

Annotator's Note

J. Guthals

"Possession" with reference to such crimes as Theft (M.C.C. 1973, § 94-6-302) and Possession of Burglary Tools (M.C.C. 1973, § 94-6-205) refers to the exertion of control over an item with the purpose of controlling it and for a period of time long enough to allow the possessor's control to be terminated by another. The definition specifically excludes unconscious possession of property such as contraband abandoned by another or strayed animals. The definition is broad enough to include the concepts of constructive possession. The wording has been adapted from the Model Penal Code.

Cross References

M.C.C. 1973. § 94-2-101(33), (34)
M.C.C. 1973, § 94-6-205
M.C.C. 1973, § 94-6-302(3)
M.C.C. 1973, § 94-6-312

Library References

Words and Phrases

(15-6

(48) "Premises" includes any type of structure or building and any real property.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(48), Sec. 1, Ch. 513, Laws of Montana 1973

Source: N.Y. Pen. L. 1965, § 140.0(1)

Prior Law: None

Annotator's Note

J. Guthals

This subsection and the companion terms of "occupied structure" (M.C.C. 1973, § 94-2-101(35)) and "vehicle" (M.C.C. 1973, § 94-2-101(65)) allow for a comprehensive treatment of such crimes against property as Criminal Trespass and Burglary (M.C.C. 1973, § 94-6-201 et. seq.) and Criminal Mischief and Arson (M.C.C. 1973, § 94-6-102 et. seq.). These offenses are graded according to the type of structure against which the crime was committed and to whether there was a potential danger to human life. This definition of "premises" includes structures suitable for occupancy to allow prosecution for the lesser included offense of Criminal Trespass when an offender has committed the crime of Burglary. While this definition is taken directly from the New York source, the drafters of the new Code specifically avoided adopting the New York definitions of "building" and "real property" due to differences in the substantive provisions. Since these terms have not been defined, they take on their ordinary grammatical and legal meanings.

Cross References

M.C.C. 1973, § 94-2-101(35), (65)
M.C.C. 1973, § 94-6-101 et. seq.
M.C.C. 1973, § 94-6-201 et. seq.

Law Review Commentaries

1 Houston L. Rev. 21 (1963)
39 N.C. L. Rev. 121 (1961)
100 U. Pa. L. Rev. 411 (1951)

(49) "Property" means anything of value. Property includes, but is not limited to, real estate, money, commercial instruments, admission or transportation tickets, written instruments representing or embodying rights concerning anything of value, labor, or services, or otherwise of value to the owner; things growing on or affixed to, or found on land, or part of or affixed to any building; electricity, gas and water; birds, animals and fish, which ordinarily are kept in a state of confinement; food and drink, samples, cultures, microorganisms, specimens, records, recordings, documents, blueprints, drawings, maps, and whole or partial copies, descriptions, photographs, prototypes or models thereof, or any other articles, materials, devices, substances and whole or partial copies, descriptions, photographs, prototypes, or models thereof which constitute, represent, evidence reflect or record secret scientific, technical, merchandising production or management information, designed process, procedure, formula, invention or improvement.

Historical Note

Enacted:	M.C.C. 1973, § 94-2-101(49), Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Ill.C.C. 1961, Title 38, § 15-1
Prior Law:	None

Annotator's Note

J. Guthals

This definition is taken almost verbatim from Illinois and recodifies the separate definition of property found in various sections throughout the old code.

(15)-8

Cross References

R.C.M. 1947, §§ 19-103(1), (2), (3)

(50) "Property of another" means real or personal property in which a person other than the offender has an interest which the offender has not authority to defeat or impair, even though the offender himself may have an interest in the property.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(50), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 223.0(7)

Prior Law: None

Annotator's Note

J. Guthals

This subsection defining "property of another" relates to Theft and Associated Offenses (M.C.C. 1973, § 94-6-301 et. seq.). The wording has been adapted from a similar definition in the Model Penal Code. The subsection permits prosecution for Theft of jointly-owned property, such as that owned by husband and wife, where each co-owner has an interest in the property but neither has the right to dispose of the other co-owner's interest.

Cross References

M.C.C. 1973, § 94-6-301 et. seq.

(51) "Public place" means any place to which the public or any substantial group thereof has access.

(15)-9

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(51), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 251.2(1)

Prior Law: None

Annotator's Note

J. Guthals

This definition is employed in the new sections on Disorderly Conduct (M.C.C. 1973, § 94-8-101), Public Intoxication (M.C.C. 1973, § 94-8-105), and Prostitution (M.C.C. 1973, § 94-5-602). The criminality of Disorderly Conduct and Public Intoxication depend largely upon the disruption that such behavior causes when done in public areas and the offensiveness of such conduct to most people. The new section on Prostitution prohibits both public and private solicitation, replacing the former law which punished prostitution on a public nuisance theory and instead incorporates the modern concept that prostitution, regardless of how carried on, ought to be suppressed. This definition of "public place" was taken directly from the Model Penal Code.

Cross References

M.C.C. 1973, § 94-8-101 et. seq.
M.C.C. 1973, § 94-5-602

(52) "Public servant" means any officer or employee of government, including but not limited to, legislators, judges, and firemen, and any person participating as a juror, advisor, consultant, administrator, executor, guardian or court appointed fiduciary; but the term does not include witnesses. The term public servant includes one who has been elected or designated to become a public servant.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(52), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 240.0(7), N.Y. Pen. L. 1965, § 10.00(15)

Prior Law: None

(15)-10

Annotator's Note

J. Guthals

This subsection defines a term of importance and utility in the new Criminal Code. Under prior law relating to bribery, there was no clear definition of "government official" and consequently numerous sections were required to cover the corrupt influence offenses. Furthermore, these sections did not include persons who had been elected or appointed but who had not yet taken office. This definition permits a consolidation of law to replace the numerous former sections and allows for simplification in language. The wording for the first sentence of the definition is adapted from the Model Penal Code. The last sentence is taken directly from the New York source.

Cross References

M.C.C. 1973, § 94-2-101(27)
M.C.C. 1973, § 94-7-101 et. seq.
R.C.M. 1947, § 95-206

(53) "Purposely" -- A person acts purposely with respect to a result or to conduct described by a statute defining an offense if it is his conscious object to engage in that conduct or to cause that result. When a particular purpose is an element of an offense, the element is established although such purpose is conditional, unless the condition negatives the harm or evil sought to be prevented by the law defining the offense. Equivalent terms such as "purpose" and "with the purpose" have the same meaning.

Historical Note

Enacted:	M.C.C. 1973, § 94-2-101(53), Sec. 1, Ch. 513, Laws of Montana 1973
Source:	M.P.C. 1962, §§ 2.02(2)(a), (6)
Prior Law:	None

(15)-11

Annotator's Note

J. Guthals

A major problem of prior Montana criminal law was the use in the code of numerous terms affecting culpability that were largely undefined. Under the new Code, the mental states required for various degrees of culpability are defined carefully in a hierarchy. "Purposely" is the most culpable mental state and implies a design. This term replaces a term frequently used in the old code, "intentionally." It should be noted that a person need not act toward a particular result; he need act only with the object to engage in certain conduct. Although a person's intentions may be conditional, his mental state is still culpable under this definition, unless the condition negates the specific intent required by statute. Completing the hierarchy of mental states in the new Code are the terms "knowingly" and "negligently," each defined in this section. The wording for this subsection has been taken directly from the two Model Penal Code provisions listed above.

Cross References

M.C.C. 1973, § 94-2-101(28), (32)
M.C.C. 1973, § 94-2-103

Library References

Criminal Law Key No. 20
C.J.S. Crim. Law, § 29 et. seq.

(16)

(54) "Serious bodily injury" means bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement, or protracted loss or impairment of the function or process of any bodily member or organ and includes serious mental illness or impairment.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(54), Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 210.0(3)

Prior Law: None

Annotator's Note

J. Guthals

The new sections on Aggravated Kidnapping (M.C.C. 1973, § 94-5-303(2)) and Assault (M.C.C. 1973, § 94-5-201 et. seq.) are graded in part by the degree of bodily harm threatened or inflicted. Serious bodily injury differs from bodily injury (M.C.C. 1973, § 94-2-101(5)) in the substantiality of pain, risk, disfigurement or impairment which is created. This definition replaces the ambiguous and narrow phrase found in the prior section on Assault in the First Degree (R.C.M. 1947, § 94-601) "likely to produce death." The wording for the definition is nearly identical to the Model Penal Code source and to N.Y. Pen. L. 1965, § 10.00(15). The final clause of the definition concerning serious mental illness as a type of bodily injury is a new addition by the Criminal Law Commission. The clause applies to those situations in which the victim's mental functions are impaired as a result of a physical attack but in which no substantial physical injury has been manifested.

Cross References

M.C.C. 1973, § 94-2-101(5)
M.C.C. 1973, § 94-5-201
M.C.C. 1973, § 94-5-303(2)

(55) "Sexual contact" means any touching of the sexual or other intimate parts of the person of another for the purpose of arousing or gratifying the sexual desire of either party.

(16)-2

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(55), Sec. 1, Ch. 513, Laws of Montana 1973

Source: N.Y. Pen. L. 1965, § 130.00(3)

Prior Law: None

Annotator's Note

J. Guthals

This subsection is used in defining the crime of Sexual Assault (M.C.C. 1973, § 94-5-502). Under prior Montana law, the offense was not specifically listed but was covered by numerous vague sections none of which defined the proscribed sexual conduct. The wording is changed from the New York source only by the addition of the word "arousing" in the final clause. The term "sexual contact" as defined includes any manipulation, fondling, or penetration of the male or female genital or anal areas and any handling of the female breast to arouse sexual desire. Under prior New York law, the term "sexual parts" was held not to include the anus. People v. Grazman-Bograti, 202 N.Y.S.2d 572 (1960). Consequently, the wording was changed to the broader term "intimate parts." Under the new code, the inadvertent touching of intimate parts is not an offense.

Cross References

M.C.C. 1973, § 94-5-502

Library References

Rape Key No. 1
Sodomy Key No. 1
C.J.S. Rape, § 1 et. seq.
C.J.S. Sodomy, § 1

Notes of Decisions

Constitutionality

A New York court has recently held that the term "intimate parts" used in this definition providing that sexual contact means any touching of the sexual or intimate parts of the person for the purpose of gratifying sexual desire of either party, was neither uncertain or vague. People v. Blodgett, 326 N.Y.S.2d 14, 37 A.D.2d 1035 (1971).

(56) **"Sexual intercourse" means penetration of the vulva anus or mouth of one person by the penis of another person, or penetration of the vulva or anus of one person by any body member of another person or penetration of the vulva, or anus of one person by any foreign instrument or object manipulated by another person for the purpose of arousing or gratifying the sexual desire of either party. Any penetration, however slight, is sufficient.**

Historical Note

Enacted:	M.C.C. 1973, § 94-2-101(56), Sec. 1, Ch. 513, Laws of Montana 1973
Source:	N.Y. Pen. L. 1965, §§ 130.00(1), (2), (3)
Prior Law:	R.C.M. 1947, § 94-4103, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

This subsection on "sexual intercourse" defines a term used throughout the new chapter on Sexual Crimes (M.C.C. 1973, § 94-5-501). The wording for the definition combines the New York definitions of "sexual intercourse," "deviate sexual intercourse," and "sexual contact." Under prior law, the term "sexual intercourse" was used frequently but was not defined. The drafters of the new Code decided not only to specifically define the term but to provide a broad meaning to allow the punishment of sex offenders who do not inflict "normal" acts upon their victims. In Montana, the essence of sex crimes has always been the element of outrage to the person (R.C.M. 1947, § 94-4103, repealed, Sec. 32, Ch. 513, Laws of Montana 1973). Thus, while any penetration is sufficient to complete the offense, the new Code does not prohibit acts between consenting adults of the opposite sex.

Criminal Law Commission Comment

This definition includes abnormal intercourse, either homosexual or heterosexual, by mouth or anus, as well as normal genital copulation. In this respect the definition is broader than prior law, although the "infamous crime against nature"

of R.C.M. 1947, § 94-4118 covers the same situation. This definition also adheres to "the slight penetration" rule of R.C.M. 1947, § 94-4103.

Cross References

M.C.C. 1973, § 94-2-101(55)
M.C.C. 1973, § 94-5-501 et. seq.

Library References

Rape Key No. 1, 7
Sodomy Key No. 1
C.J.S. Rape, § 1 et. seq.
C.J.S. Sodomy, § 1 et. seq.

Law Review Commentaries

32 Brooklyn L. Rev. 275 (1966)
63 Col. L. Rev. 669 (1971)
64 Col. L. Rev. 1539 (1972)

(57) "Solicit" or "solicitation" means to command, authorize, urge, incite, request, or advise another to commit an offense.

Historical Note

Enacted:	M.C.C. 1973, § 94-2-101(57), Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Ill.C.C. 1961, Title 38, § 2-20
Prior Law:	None

Annotator's Note

J. Guthals

This subsection defines a term used in the new section on When Accountability Exists (M.C.C. 1973, § 94-2-107). Under former Montana law, one who solicited the commission of a crime was criminally liable only if the planned crime was

eventually committed. This definition and the sections on Accountability continue the solicitor's liability as a principal if the crime has been committed and broaden that liability by the use of the term "facilitate" which includes any action that aids a criminal activity in the slightest. The new Code adds the crime of Solicitation (M.C.C. 1973, § 94-4-101) which provides that one who solicits may be prosecuted whether or not the planned offense was completed. Because the crime of Solicitation is completely defined within its own section as is the new offense of Soliciting Suicide (M.C.C. 1973, § 94-5-106), this definition is not applicable to those crimes, which have their own specific and individual variations of the term solicit. The wording for this definition is identical to the Illinois source.

Library References

Crim. Law Key No. 45
C.J.S. Crim. Law, § 73, 78

(58) "State" or "this state" means the state of Montana, and all the land and water in respect to which the state of Montana has either exclusive or concurrent jurisdiction, and the air space above such land and water.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(58), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill.C.C. 1961, Title 38, § 2-21

Prior Law: None

Annotator's Note

J. Guthals

This subsection is primarily applicable to the jurisdictional provisions of the Code (M.C.C. 1973, § 94-1-103 et. seq.). Code provisions are in force in areas in which the state shares concurrent jurisdiction such as in National Forest areas and on certain Indian lands as defined by Acts of Congress. Additionally,

(16)-6

jurisdiction extends to water and to air spaces in which the state shares jurisdiction with regulatory agencies of other states or of the Federal government. The definition is taken directly from the Illinois source.

(59) "Statute" means any act of the legislature of this state.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(59), Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: None

Annotator's Note

J. Guthals

This subsection excludes from the definition of statute under this Code such laws as Constitutional provisions, local ordinances, and administrative regulations.

(60) "Stolen property" means property over which control has been obtained by theft.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(60), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill.C.C. 1961, Title 38, § 15-6

Prior Law: None

Annotator's Note

J. Guthals

Under former law, receiving of stolen property was an offense separate from larceny. While an essential element of the offense has always been the stolen character of the property, no definition

(16)-1

of the term was provided. The new Code makes receiving of stolen property a form of Theft (M.C.C. 1973, § 94-6-302(3)). Because the new section on Theft also encompasses such forms of larceny as false pretenses, larceny by trick, deceptive practices, and embezzlement, property which has been stolen by virtually any means is included within this definition. Property acquired through burglary and robbery is also stolen property as defined by this subsection. Robbery (M.C.C. 1973, § 94-5-401) is a crime against the person. Burglary (M.C.C. 1973, § 94-6-204) prohibits "breaking and entering." Although theft may be a basis for each crime, the stealing of property during the commission of the principal offense is a separate act. By using the word "obtain," this subsection eliminates former distinctions concerning whether the property interest acquired was title or possession. (See M.C.C. 1973, § 94-2-101(33).) The wording for the definition comes directly from the Illinois source.

Cross References

M.C.C. 1973, § 94-5-401
M.C.C. 1973, § 94-6-204
M.C.C. 1973, § 94-6-301 et. seq.
M.C.C. 1973, § 94-2-108(33)

Library References

Words and Phrases

(61) "A stop" is the temporary detention of a person that results when a peace officer orders the person to remain in his presence.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(61), Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: None

(16).8

Annotator's Note

J. Guthals

The new Stop and Frisk statute (R.C.M. 1947, § 95-719), allows a peace officer to detain a person for thirty (30) minutes upon reasonable cause to suspect the person has committed an offense or may be of aid in the investigation of an offense. As defined in this subsection, a "stop" differs significantly from the term "arrest" which is a taking into custody (R.C.M. 1947, § 95-601(a)). Attention is directed to R.C.M. 1947, § 95-719 for analysis and case annotations to the Stop and Frisk law.

Cross References

M.C.C. 1973, § 94-2-101(16)
R.C.M. 1947, § 95-601 et. seq.
R.C.M. 1947, § 95-719

(62) "Tamper" means to interfere with something improperly, meddle with it, make unwarranted alterations in its existing condition, or deposit refuse upon it.

Historical Note

Enacted:	M.C.C. 1973, § 94-2-101(62). Sec. 1, Ch. 513, Laws of Montana 1973
Source:	New
Prior Law:	None

Annotator's Note

J. Guthals

This subsection defines a term used in the Criminal Mischief section (M.C.C. 1973, § 94-6-102). It must be shown under that section that the offender engaged in the tampering conduct with the intent to cause danger or substantial interference to a person who had an interest in the property. Illustrative of the conduct which would come within this definition are such acts as meddling with public utility equipment and the malicious disarrangement of papers and files. It should also be noted that "depositing refuse" is by this definition made criminal

(10)-9

mischief. In this way the Criminal Mischief sections not only cover traditional meddling and destruction, but also the offense of "littering" which was formerly covered by R.C.M. 1947, §§ 94-3335 through 94-3344, repealed, Sec. 32, Ch. 513, Laws of Montana 1973. More serious interferences with property interests are proscribed by the sections on Arson (M.C.C. 1973, § 94-6-103 et. seq.) and the provisions relating to Criminal Trespass (M.C.C. 1973, § 94-6-201 et. seq.).

Cross References

M.C.C. 1973, § 94-6-102

(63) "Threat" means a menace, however communicated to:

(a) inflict physical harm on the person threatened or any other person or on property; or

(b) subject any person to physical confinement or restraint; or

(c) commit any criminal offense; or

(d) accuse any person of criminal offense; or

(e) expose any person to hatred, contempt or ridicule; or

(f) harm the credit or business repute of any person; or

(g) reveal any information sought to be concealed by the person threatened; or

(h) take action as an official against anyone or anything, or withhold official action, or cause such action or withholding; or

(i) bring about or continue a strike, boycott, or other similar collective action if the property is not demanded or received for the benefit of the groups which he purports to represent; or

(j) testify or provide information or withhold testimony or information with respect to another's legal claim or defense.

(16)-10

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(63), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill.C.C. 1961, Title 38, § 15-5

Prior Law: R.C.M. 1947, § 94-1602, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

Under prior law, the act of threatening another was made an offense in various sections on Assault and Extortion. Under the new Code, a person is guilty of assault if he knowingly places another in apprehension of a physical contact (M.C.C. 1973, § 94-5-201 et. seq.) but the term "threat" is no longer used in that section. This subsection, instead, defines a term used in the new provisions on Theft (M.C.C. 1973, § 94-6-302), Influencing Official and Political Matters (M.C.C. 1973, § 94-7-103), and Intimidation (M.C.C. 1973, § 94-5-203). Under those sections and the sections on Attempt (M.C.C. 1973, § 94-4-101 et. seq.) any obtainment of or attempted obtainment of property, services, political influence, or official favors or any threat to inflict harm, confinement, the commission of a crime, etc. on another are prohibited. The wording for this definition comes directly from Illinois.

Cross References

M.C.C. 1973, § 94-5-203
M.C.C. 1973, § 94-6-302
M.C.C. 1973, § 94-7-103

Library References

Larceny Key No. 12
C.J.S. Larceny, § 4 et. seq., 33 et. seq.
Words and Phrases

(64) (a) "Value" means the market value of the property at the time and place of the crime, or if such cannot be satisfactorily ascertained, the cost of the replacement of the property within a reasonable time after the crime. If the offender appropriates a portion of the value of the property, the value shall be determined as follows:

(i) The value of an instrument constituting an evidence of debt, such as a check, draft or promissory note, shall be deemed the amount due or collectible thereon or thereby, such figure ordinarily being the face amount of the indebtedness less any portion thereof which has been satisfied.

(ii) The value of any other instrument which creates, releases, discharges, or otherwise affects any valuable legal right, privilege or obligation shall be deemed the amount of economic loss which the owner of the instrument might reasonably suffer by virtue of the loss of the instrument.

(b) When it cannot be determined if the value of the property is more or less than one hundred fifty dollars ($150) by the standards set forth in subsection (64) (a) above, its value shall be deemed to be an amount less than one hundred fifty dollars ($150).

(c) Amounts involved in thefts committed pursuant to a common scheme or the same transaction, whether from the same person or several persons, may be aggregated in determining the value of the property.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(64), Sec. 1, Ch. 513, Laws of Montana 1973

Source: Michigan Proposed Crim. Code, 1967, § 3201

Prior Law: None

Annotator's Note

J. Guthals

While the value of property has always been an important determinant in grading theft and related offenses, under prior law there was no statutory pronouncement concerning how value was to be ascertained. Under the new sections on Theft (M.C.C. 1973, § 94-6-301 et. seq.) and Criminal Mischief (M.C.C. 1973, § 94-6-102), if the value of the property interest invaded exceeds $150, the offense is classified as a felony--increased from $50 in the old Code. Part (a) of this definition adheres to the traditional position that most items, both tangibles and intangibles, have a market value or replacement value which can be ascertained readily to determine the value of stolen property. Subparagraphs (i) and (ii) are to be used only when a portion of an item's value has been appropriated, as would occur when a chattel is taken and then returned or where the stolen item is a partially paid or discounted chose in action. In such cases, the value shall be either the economic loss suffered by the victim or the face amount of the instrument. In those instances where the stolen chattel has no value in the market place and has produced no ascertainable loss to the victim, the item is deemed to be worth less than $150 making the offense a misdemeanor. Paragraph (c) continues the rationale of In re Jones, 46 Mont. 122, 125, 126 P. 929 (1912), by allowing aggregation when several thefts have resulted from a common scheme--a series of acts motivated by a single criminal purpose (M.C.C. 1973, § 94-2-101(7)). It should be noted that valuation is not necessary in livestock thefts. The value of livestock is deemed always to be in excess of $150. The wording for this section is taken from the Proposed Michigan Code, but significant changes in terminology have been made.

Cross References

M.C.C. 1973, § 94-2-101(7)
M.C.C. 1973, § 94-6-102
M.C.C. 1973, § 94-6-301 et. seq.
R.C.M. 1947, § 95-1211(1)

Library References

Larceny Key No. 6
C.J.S. Larceny, § 2

(65) "Vehicle" means any device for transportation by land, water or air, or mobile equipment with provision for transport of an operator.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(65), Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: None

Annotator's Note

J. Guthals

This definition is of importance in determining the nature of criminal trespasses (M.C.C. 1973, 94-6-201 et. seq.) which are classified according to the type of property interest invaded and by the potential danger to human life. Included within this definition are all those transportation devices defined by the Motor Vehicle Code (R.C.M. 1947, § 32-2101) as vehicles, including automobiles, motorcycles, motor driven cycles, emergency vehicles, busses, bicycles, farm and construction equipment, plus numerous vehicles not included within the Motor Vehicle Code such as railroad equipment, acquatic vessels, and aircraft. Any device which transports persons whether self-propelled or driven by motor or animal is a vehicle. A person who enters a vehicle without authority is punishable under Criminal Trespass to Vehicles (M.C.C. 1973, § 94-6-202), while Theft of Vehicles is governed by the new comprehensive Theft section (M.C.C. 1973, § 94-6-301 et. seq.). This definition is also applicable to the phrase "motor-propelled vehicle" in M.C.C. 1973, § 94-6-305.

Cross References

M.C.C. 1973, §§ 94-2-101(48), (49)
M.C.C. 1973, § 94-6-201 et. seq.
M.C.C. 1973, § 94-6-301 et. seq.

(66) "Weapon" means any instrument, article or substance which, regardless of its primary function, is readily capable of being used to produce death or serious bodily injury.

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(66), Sec. 1, Ch. 513, Laws of Montana 1973

Source: N.Y. Pen. L. 1965, § 10.00(13)

Prior Law: None

Annotator's Note

J. Guthals

The use of a "weapon" determines in part whether an offender has committed simple or Aggravated Assault (M.C.C. 1973, § 94-5-201 et. seq.). Under prior law, assault was similarly graded by the use of a weapon, but because the term was not defined continual problems arose in determining whether an instrument was a weapon and whether it could produce injury as used. According to this definition and the Aggravated Assault section (M.C.C. 1973, § 94-5-202), the intentional use of anything capable of producing bodily injury--vehicle, fire arm (loaded or unloaded), drug, poison, chemical, etc., which either places a person in reasonable apprehension of serious bodily injury or results in bodily injury of any degree, makes the actor criminally responsible. The wording for this subsection was adopted with some changes from the New York source. Attention is also directed to the renumbered section on Carrying Concealed Weapons (M.C.C. 1973, § 94-8-210 et. seq.) which also employs this definition.

Cross References

M.C.C. 1973, § 94-2-101(5), (54)
M.C.C. 1973, § 94-5-201 et. seq.
R.C.M. 1947, § 94-8-210 et. seq.

Library References

Weapons Key No. 4, 6
C.J.S. Weapons, § 1 et. seq.

(67) "Witness" means a person whose testimony is desired in any proceeding or in any investigation by a grand jury or in a criminal action, prosecution or proceeding.

(16)-15

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(67), Sec. 1, Ch. 513, Laws of Montana 1973

Source: R.C.M. 1947, § 94-9001, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Prior Law: R.C.M. 1947, § 94-9001, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

This subsection is a recodification of the term "witness" as defined in former section 94-9001. In the new Criminal Code, the term is used in the section on Tampering With Witnesses and Informants (M.C.C. 1973, § 94-7-207) and the renumbered section on Witnesses From Without State (R.C.M. 1947, § 95-1809, 1810). This definition, when taken with the substantive provision on Tampering, prohibits any attempts to induce anyone about to give any testimony at an "official proceeding" (see M.C.C. 1973, § 94-2-101(39)) to give false testimony, to withhold testimony, to elude legal process, or to absent himself from any governmental proceeding.

Cross References

M.C.C. 1973, § 94-7-207
R.C.M. 1947, § 95-1809 et. seq.
M.C.C. 1973, § 94-2-101(39)

Library References

Witnesses Key No. 6
C.J.S. Witnesses, § 1

(68) "Without consent" means:

(a) the victim is compelled to submit by force or by threat of imminent death, bodily injury, or kidnapping, to be inflicted on anyone; or

(b) the victim is incapable of consent because he is:

(i) mentally defective or incapacitated; or

(ii) physically helpless; or

(iii) less than sixteen (16) years old.

(16)-16

Historical Note

Enacted: M.C.C. 1973, § 94-2-101(68), Sec. 1, Ch. 513, Laws of Montana 1973

Source: N.Y. Pen. L. 1965, § 130.05

Prior Law: None

Annotator's Note

J. Guthals

It is an element of every sexual offense, except for deviate sexual conduct, that the sexual act was committed without consent. This definition details when consent will be lacking. Paragraph (a) covers forcible compulsion. Paragraph (b) covers those instances when, regardless of acquiescence, the victim is deemed incapable of consent. The terms mentally defective, mentally incapacitated, and physically helpless refer to varying degrees of incapacity as defined in M.C.C. 1973, §§ 94-2-101(29), (30), (46) respectively. A person who has not reached the age of sixteen is legally incapable of consenting to a sexual act. The wording for this definition, while based upon the New York source, has been changed considerably. Consent as a defense is covered in M.C.C. 1973, § 94-2-111.

Cross References

M.C.C. 1973, § 94-5-501 et. seq.
M.C.C. 1973, §§ 94-2-101(29), (30), (46)
M.C.C. 1973, § 94-2-111

Library References

Rape Key No. 8
C.J.S. Rape, § 11 et. seq.

Law Review Commentaries

32 Brooklyn L. Rev. 274, 276 (1966)

(14)-1

94-2-102. Voluntary Act.

A material element of every offense is a voluntary act, which includes an omission to perform a duty which the law imposes on the offender and which he is physically capable of performing. Possession is a voluntary act if the offender knowingly procured or received the thing possessed, or was aware of his control thereof for a sufficient time to have been able to terminate his control.

Historical Note

Enacted:	M.C.C. 1973, § 94-2-102, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Ill.C.C. 1961, Title 38, §§ 4-1, 4-2
Prior Law:	R.C.M. 1947, § 94-117, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

This section on "voluntary act" has been taken directly from the Illinois source. The provision recodifies former Montana law R.C.M. 1947, § 94-117. Because criminal liability requires a voluntary act, except in certain statutes where absolute liability is imposed, it is a defense that act was done involuntarily (M.C.C. 1973, § 94-2-101(26)), such as during a seizure. A thorough discussion of this section is included in the Commission Comments below. Other provisions which are relevant to this section include the sections on Act (M.C.C. 1973, § 94-2-101(1)), Conduct (M.C.C. 1973, § 94-2-101(8)), and Absolute Liability (M.C.C. 1973, § 94-2-104).

Revised Criminal Law Commission Comment

L. Elison

The minimum elements of any offense (other than one in which absolute liability for an act alone is imposed) are described as a voluntary act and a specified state of mind. See R.C.M. 1947, § 94-117.

(17)

The word "act" is sometimes used loosely to describe not only the person's physical movement, but also certain attendant circumstances and the consequence of the movement. However, in the interest of accurate expression these three components should be separately designated, and "act" should be limited to the relevant physical movements. A further narrowing of the use of the term in a criminal code arises from the fact that a muscular movement may be voluntary ("willed") or involuntary--a physical reflex or compelled motion which is not accompanied by the volition of the person making the motion. Only the voluntary act gives rise to criminal liability. In this Code, "act" is used in the narrow sense and with the accompanying mental state, is referred to as "conduct." An "omission" to take some action required by law is distinguished sometimes from an "act," since it denotes lack of physical movement. However, an omission necessarily is defined by describing the act of commission which is omitted; and if the distinction is made, then the phrase "act or omission" must be used each time reference is made to a person's physical behavior, unless the reference is only to a positive movement, or only to the lack of required movement. Consequently, the use of "act" to include "omission" seems reasonable, and clearly is more convenient. Perkins, "Negative Acts in Criminal Law," 22 Iowa L. Rev. 95 at 107 (1934). This usage, of course, does not preclude the specific reference to an omission when the failure to perform a duty imposed by law is the substance of a particular offense. The criminal law is concerned only with the voluntary phase--the purposeful or negligent omission to perform a duty which the person is capable of performing.

Possession is another aspect of behavior which, while it does not necessarily involve a physical movement, is conveniently brought within the definition of "act" when it refers to maintaining control of a physical object. Again, only the voluntary aspect is significant--a consciousness of purpose, derived from knowingly procuring or receiving the thing possessed, or awareness of control thereof for a sufficient time to enable the person to terminate his control. An examination of the present Montana statutory provisions prohibiting possession indicates the suitability of this usage. Some of the provisions in the present law flatly prohibit possession of specified objects, without reference to any accompanying mental state. (E.g., § 94-8-211 Concealed Firearm; § 54-133 Narcotics; § 94-8-404, Gambling Device; § 94-8-202 Machine Gun.) Others denounce possession with intention to accomplish a specified purpose, such as sale or the commission of another offense. (E.g., § 94-6-205, Possession of Burglary Tools; § 94-8-110 Obscenity.) A few analogous situations involve the ownership or possession of real property used for prohibited purposes.

(11)-3

Cross References

M.C.C. 1973, §§ 94-2-101(1), (8), (26), (47)
M.C.C. 1973, § 94-2-104

Library References

Criminal Law Key No. 1, 20, 26
C.J.S. Crim. Law, § 2, 3, 26 et. seq.

Notes of Decisions

In general

Generally, if a person voluntarily commits an unlawful act, and while so doing inflicts personal injury, he is held to be criminally liable. People v. Allen, 117 Ill. App.2d 20, 254 N.E.2d 103, 107 (1969). It is a material element of virtually every criminal offense that the act be done voluntarily. People v. Ball, 126 Ill. App.2d 9, 261 N.E.2d 417, 418 (1970). Because this section defining a voluntary act includes the omission of the performance of a duty imposed by law, it has been held that the contention of a tax collecter that he could not be found guilty of official misconduct because he was not shown to have done any act was ineffectual. People v. Haycraft, 3 Ill. App.3d 974, 278 N.E.2d 877, 883 (1972). While there has been no ruling to date defining in broad terminology when conduct becomes involuntary, it has been held that evidence that a defendant was a homosexual who used homosexuality as a way of dealing with his problems, and that therefore he had limited control over his impulses, did not support the defendant's contention that his admitted deviate sexual assault was involuntary. People v. Jones, 43 Ill.2d 113, 251 N.E.2d 195, 197 (1969).

Due process

The Illinois Supreme Court has held that a defendant was not denied due process by failure of the court to raise sua sponte the issue of the voluntariness of deviant sexual assault by the defendant, when it later became known to the court that defendant was a homosexual, where there was no evidence of the defendant's insanity or his lack of competence to stand trial. People v. Jones, 43 Ill.2d 113, 251 N.E.2d 195, 198 (1969).

Possession as a voluntary act

This section provides that physical possession which gives the defendant immediate and exclusive control of contraband is sufficient to show possession; however, the Illinois courts have ruled that possession need not always be actual possession. Constructive possession is sufficient where it can be shown that the defendant had the property under his dominion and control. People v. Archibald, 3 Ill. App.3d 591, 279 N.E.2d 84, 87 (1972); People v. Cogwell, 8 Ill. App.3d 15, 288 N.E.2d 729, 730 (1972). See also, People v. Szymezak, 116 Ill. App.2d 384, 253 N.E.2d 894 (1969).

Instructions

Where there is no evidence to indicate that the defendant's drugged condition was involuntarily produced, his requested instruction to the effect that a person in a drugged condition is not responsible for his conduct was properly refused. People v. Espenscheid, 109 Ill. App.2d 107, 249 N.E.2d 866, 869 (1969).

94-2-103. General Requirements Of Criminal Act And Mental State.

(1) A person is not guilty of an offense, other than an offense which involves absolute liability unless, with respect to each element described by the statute defining the offense, he acts while having one (1) of the mental states described in sections 94-2-101 (28), 94-2-101 (32) and 94-2-101 (53).

(2) If the statute defining an offense prescribed a particular mental state with respect to the offense as a whole, without distinguishing among the elements thereof, the prescribed mental state applies to each such element.

(3) Knowledge that certain conduct constitutes an offense, or knowledge of the existence, meaning, or application of the statute defining an offense, is not an element of the offense unless the statute clearly defines it as such.

(4) A person's reasonable belief that his conduct does not constitute an offense is a defense if:

(a) the offense is defined by an administrative regulation or order which is not known to him and has not been published or otherwise made reasonably available to him, and he could not have acquired such knowledge by the exercise of due diligence pursuant to facts known to him; or

(b) he acts in reliance upon a statute which later is determined to be invalid; or

(c) he acts in reliance upon an order or opinion of the Montana supreme court or a United States appellate court later overruled or reversed; or

(d) he acts in reliance upon an official interpretation of the statute, regulation or order defining the offense, made by public officer or agency legally authorized to interpret such statute.

(5) If a person's reasonable belief is a defense under subsection (4) of this section, nevertheless he may be convicted of an included offense of which he would be guilty if the law were as he believed it to be.

(6) Any defense based upon this section is an affirmative defense.

Historical Note

Enacted:	M.C.C. 1973, § 94-2-103, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Ill.C.C. 1961, Title 38, §§ 4-3, 4-8; M.P.C. 1962, § 2.04
Prior Law:	None

Annotator's Note

J. Guthals

Except in cases where absolute liability is imposed (M.C.C. 1973, § 94-2-104), the new Criminal Code requires for guilt to be established that the act be done voluntarily with one of the three defined mental states--"purposely" (M.C.C. 1973, § 94-2-101(53)), "knowingly" (M.C.C. 1973, § 94-2-101(28)), or "negligently" (M.C.C. 1973, § 94-2-101(32)). This subsection, which is substantially similar to the Illinois and Model Penal Code sources, lists in subsections (1) and (2) the requirements for mental states in the new Code and how these requirements are to be applied to the individual provisions. Subsections (3) and (4) delineate those instances in which mistake of law will be allowed as a defense. Attention is directed to the new "Montana Administrative Procedure Act," R.C.M. 1947, §82-4201 et. seq. for the effectiveness of unpublished administrative rules.

Summarized Criminal Law Commission Comment

J. Guthals

The accurate description of mental states which are elements

of various offenses is one of the most difficult problems in the preparation of a Criminal Code. The new Code follows the lead of other states (Illinois, New York) which have simplified the description of mental states, by defining a small number of terms and using them uniformly throughout the Criminal Code. Subsection (2) provides a general rule for interpretation of statutory references to mental state in defining specific offenses. Often, a single mental state word is placed in a position where gramatically it may apply to all elements of the offense. To so apply it for purposes of legal interpretations seems logical, since different sentence structure may be employed to express that the element shall not apply. Subsection (3) states the general rule that knowledge that conduct constitutes an offense is not an element of mens rea. Subsection (4) states that, while criminal liability does not generally depend upon the offender's knowledge that conduct is illegal, a reasonable reliance upon a statute later determined to be invalid, or upon an interpretation later held to be incorrect is a defense. Clearly the state should not punish as criminal, conduct which according to a formally expressed statement of its duly authorized agents is not illegal. Proof of the facts and determination of the reasonableness of the defendant's reliance should not be difficult to establish. Since the proceeding relied upon would be of a public and official nature, collusion to avoid liability seems unlikely. When ignorance or mistake is recognized as a defense the defendant may be convicted of an included offense which does not involve the mental state negatived by the ignorance or mistake.

Cross References

M.C.C. 1973, §§ 94-2-101(28), (32), (53)
M.C.C. 1973, § 94-2-104
R.C.M. 1947, § 82-4201 et. seq.

Library References

Criminal Law Key No. 20 et. seq., 32, 33
C.J.S. Criminal Law, §§ 29 et. seq., 47, 48

Law Review Commentaries

33 U. Chicago L. Rev. 229 (1966)

Notes of Decisions

Construction and Application

As a general rule criminal liability requires one of three culpable mental states--knowingly, purposely, or negligently. However, the event of driving a motor vehicle while operator's license is suspended has been held to involve absolute liability and mental state is not involved in the offense. People v. Espenschied, 109 Ill. App.2d 107, 249 N.E.2d 866, 868 (1969). Because a defendant's mental state is often difficult to determine, it has been held that in a homicide prosecution the defendant's mental state could be deduced from the facts surrounding the killing when the defendant did not testify as to his thoughts, intuition, or fears. People v. Woods, 131 Ill. App.2d 54, 268 N.E.2d 246 (1971).

Indictment and Information

As a general rule, an indictment which fails to allege the required mental state as prescribed by statute or to describe the acts which indicate such mental state is fatally defective. People v. Matthews, 122 Ill. App.2d 264, 258 N.E.2d 378, 382 (1970). Thus, where conduct alleged in the indictment may itself be wholly innocent, it is essential that the unlawfulness of the conduct be stated either by an express allegation or by the use of terms or facts which clearly imply such unlawfulness. People v. Campbell, 3 Ill. App.3d 984, 279 N.E.2d 123, 124 (1972). However, it was held to be unnecessary that a mental state defined by statute for the choate offense be alleged in specific terminology in an indictment for attempt to commit that offense. People v. Sanders, 7 Ill. App.3d 848, 289 N.E.2d 110 (1972). Where the offense is one for which absolute liability is provided, such as driving a motor vehicle while operator's license is suspended, it is not necessary for the mental state to be alleged in the information. People v. Espenschied, 109 Ill. App.2d 107, 249 N.E.2d 866, 868 (1969).

Instructions

The giving of an instruction that it is unlawful for a person to sell any narcotic drug except if authorized by the Uniform Narcotics Drug Act (same as R.C.M. 1947, § 54-101 et. seq.) inadequately instructed jurors regarding the elements of the crime of unlawful sale of a narcotic drug, because it omitted the element of the crime relating to the defendant's mental state. People v. Lewis, 112 Ill. App.2d 1, 250 N.E.2d 812, 817 (1969). Where the defendant was being tried for an offense for which absolute liability was imposed, instructions relating to mental state and condition of the defendant who was being tried for driving a motor vehicle while his operator's license was suspended were properly refused. People v. Espenschied, 109 Ill. App.2d 107, 249 N.E.2d 866, 869 (1969).

(M)-1

94-2-104. Absolute Liability.

A person may be guilty of an offense without having, as to each element thereof, one of the mental states described in 94-2-101 (28), 94-2-101 (32) and 94-2-101 (53) only if the offense is punishable by a fine not exceeding five hundred dollars ($500), and the statute defining the offense clearly indicates a legislative purpose to impose absolute liability for the conduct described.

Historical Note

Enacted:	M.C.C. 1973, § 94-2-104, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Ill.C.C. 1961, Title 38, § 4-9
Prior Law:	None

Annotator's Note

J. Guthals

Under the new Criminal Code, most offenses require some degree of culpability, either "purposely," "knowingly," or "negligently" (M.C.C. 1973, §§ 94-2-101 (53), (28), (32)), for criminal liability to be imposed. This section provides that when all that is required by a statute is the commission of a specified act without any mental state, such a "strict liability" offense can be no more than a misdemeanor. The wording for this section is quite similar to the Illinois source.

Summarized Criminal Law Commission Comment

J. Guthals

This section is intended to establish strict limitations upon the elimination of a mental state as an element of an offense. Most states, including Montana under the old Code, have numerous statutes which fail to specify the required mental state. Such laws place the burden on the courts to determine as to each crime whether or not culpability is an element. In Montana no adequate rule existed for determining whether a particular provision, not interpreted by the court was to be regarded as implying a particular mental state or as imposing absolute liability. (See Remington, "Liability

(19)

Without Fault Criminal Statutes," 1956 Wis. L. Rev. 625).

Section 94-2-104 represents a partial solution to the problem of undefined mental states--a restrictive rule of interpretation. Another part of the solution is the rephrasing of Code provisions to define mental states and to indicate clearly within each offense which mental state is required.

Absolute liability is authorized under this section only for those offenses in which incarceration is not part of the penalty, and the fine is less than $500. Many such offenses appearing outside the new Code and within the old Code are included within such a classification such as the sale of specified kinds of property to certain classes of persons, criminal nuisances, motor vehicle laws, and fish and game laws. The difficulty of enforcing such provisions if a mental state must be proved may justify the conclusion that the omission of a mental state requirement is intended to create absolute liability. (See M.P.C., Draft No. 4, comment on § 2.05, Sayre, "Public Welfare Offenses," 33 Col. L. Rev. 55 at 68 to 72, 78 and 79 (1933).)

Cross References

M.C.C. 1973, § 94-2-101(28), (32), (53)
M.C.C. 1973, §§ 94-2-102, 94-2-103

Library References

Criminal Law Key No. 20 et. seq.
C.J.S. Crim. Law, § 29 et. seq.

Notes of Decisions

In general

To support a conviction under most sections of this Code proof of a mens rea is required. For example, the section on deceptive practice (§ 94-6-308), requires an intent to defraud. People v. Billingsley, 67 Ill. App.2d 292, 213 N.E.2d 765, 768 (1966). However, certain offenses, such as the violation of some vehicle code provisions, involve absolute liability without requiring any mental state. People v. Espenscheid, 109 Ill. App.2d 107, 249 N.E.2d 866, 868 (1969).

94-2-105. Causal Relationship Between -- Conduct And Result.

(1) Conduct is the cause of a result if:

(a) without the conduct the result would not have occurred; and

(b) any additional causal requirements imposed by the specific statute defining the offense are satisfied.

(2) If purposely or knowingly causing a result is an element of an offense, and the result is not within the contemplation or purpose of the offender, either element can nevertheless be established if:

(a) the result differs from that contemplated only in the respect that a different person or different property is affected, or that the injury or harm caused is less than contemplated; or

(b) the result involves the same kind of harm or injury as contemplated but the precise harm or injury was different or occurred in a different way, unless the actual result is too remote or accidental to have a bearing on the offender's liability or on the gravity of the offense.

(3) If negligently causing a particular result is an element of an offense, and the result is not within the risk of which the offender is aware, or should be aware, either element can nevertheless be established if:

(a) the actual result differs from the probable result only in the respect that a different person or different property is affected, or that the actual injury or harm is less; or

(b) the actual result involves the same kind of injury or harm as the probable result, unless the actual result is too remote or accidental to have a bearing on the offender's liability or on the gravity of the offense.

Historical Note

Enacted: M.C.C. 1973, § 94-2-104, Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 2.03

Prior Law: None

Annotator's Note

J. Guthals

This section is substantially the same as the Model Penal Code source. While the principle set forth in this section on Causal Relationships is generally thought to be common knowledge, there was in fact no statutory provision concerning the subject in the old Code. The mental state terms used in this section are defined in M.C.C. 1973, § 94-2-101 as follows: "Conduct" (8), "knowingly" (28), "purposely" (53), and "negligently" (32).

Revised Criminal Law Commission Comment

L. Elison

This section is concerned with offenses that are so defined that causing a particular result is a material element of the offense. Subsection (1)(a) treats cause-in-fact as the causal relationship normally regarded as sufficient to create culpability. When concepts of "proximate cause" disassociate the offender's conduct and the result which was cause-in-fact, the reason for limiting culpability is the conclusion that the actor's culpability with reference to the result, i.e., his purpose, knowledge, or negligence, was such that it would be unjust to permit the result to influence his liability or the gravity of the offense. Problems of this kind should be faced as problems of the culpability required for conviction and not as problems of causation.

Subsection (1)(b) contemplates that the general rule of (1)(a) may be unacceptable when dealing with particular offenses. In this event additional causal requirements may be imposed explicitly.

Subsections (2) and (3) are drafted on the theory that there is a need to systematize rules that have developed when there is a variance between the actual result and the result sought, contemplated or probable under the circumstances. These subsections assume that liability requires purpose, knowledge or negligence with respect to the result which is an element of the offense.

Subsection (2)(b) and (3)(b) make no attempt to catalogue possibilities like intervening or concurrent causes, etc. They set out an ultimate criterion, whether the result was too accidental to have a bearing on the actor's liability or the gravity of the offense. Since the actor has sought a criminal result or has been negligent with respect to that result, he will be guilty of some offense even if he is not held for the actual result. There is an advantage to permit the jury to face the issue squarely with their own sense of justice, e.g., where the defendant shoots his wife and in the hospital she contracts a disease and dies. Her death may be thought to have been rendered substantially more probable by the defendant's conduct, yet a jury could regard it as too remote to convict the defendant of murder. It should be noted that the maximum potential punishment for attempt is the same as for the underlying offense, thus placing greater emphasis on purpose than result. See R.C.M. 1947, § 94-4-103.

Cross References

M.C.C. 1973, § 94-2-101(8), (28), (32), (53)

94-2-106. Accountability For Conduct Of Another.

A person is responsible for conduct which is an element of an offense, if the conduct is either that of the person himself, or that of another and he is legally accountable for such conduct as provided in section 94-2-107, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-2-106, Sec. 1, Ch. 513 Laws of Montana 1973

Source: Ill.C.C. 1961, Title 38, § 5-1

Prior Law: None

Annotator's Note

J. Guthals

This section and the companion section 94-2-107 describe those circumstances when liability may be based upon conduct of another. Both sections are taken with minor changes from

(19)-6

the Illinois code.

Revised Criminal Law Commission Comment

L. Elison

This section states the general principle that criminal liability is based on conduct and that the conduct may be that of another person.

Cross References

M.C.C. 1973, § 94-2-107

Library References

Crim. Law Key No. 59
C.J.S. Crim. Law, § 79.80

Notes of Decisions

In general

It is the general rule that in order to impose accountability on a defendant for the conduct of another, the state must prove beyond a reasonable doubt that the defendant facilitated commission of the offense by another with the intent that such an offense be committed. People v. Brumbeloe, 97 Ill. App.2d 370, 240 N.E.2d 150 (1968); People v. Washington, 121 Ill. App.2d 174, 257 N.E.2d 190, 194 (1970). Whether a person is accountable for the conduct of another and guilty of an offense charged may be proved by circumstantial evidence. People v. Manley, 104 Ill. App.2d 271, 244 N.E.2d 373 (1971).

(29)

94-2-107. When Accountability Exists.

A person is legally accountable for the conduct of another when:

(1) having a mental state described by the statute defining the offense, he causes another to perform the conduct, regardless of the legal capacity or mental state of the other person; or

(2) the statute defining the offense makes him so accountable; or

(3) either before or during the commission of an offense, and with the purpose to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense. However, a person is not so accountable if:

(a) he is a victim of the offense committed unless the statute defining the offense provides otherwise; or

(b) before the commission of the offense, he terminates his effort to promote or facilitate such commission and does one of the following: wholly deprives his prior efforts of effectiveness in such commission, or gives timely warning to the proper law enforcement authorities, or otherwise makes proper effort to prevent the commission of the offense.

Historical Note

Enacted:	M.C.C. 1973, § 94-2-107, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Ill.C.C. 1961, Title 38, § 5-2
Prior Law:	R.C.M. 1947, §§ 94-204, 94-205, 94-206, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

(20)-2

Annotator's Note

J. Guthals

While former sections 94-6424 and 94-6425 allowed an indictment to be brought against an accessory as though he were a principal, older provisions of the Code retained common-law distinctions between persons who aided and abetted in the commission of crimes. This section replaces all prior law regarding accessories. Under this section, any person who assists in the commission of a crime, either before or during the occurrence, other than the victim, is liable as a principal offender. One who aids an offender after a crime has been committed would be punished under Compounding a Felony (M.C.C. 1973, § 94-7-305). It should be noted that a person who aids in the preparation or perpetration of an offense also may be prosecuted for one of the Inchoate Offenses (M.C.C. 1973, § 94-4-101 et. seq.), but the new section on Multiple Prosecutions (R.C.M. 1947, § 95-1711) prohibits a conviction for both a principal and an associated inchoate offense. The wording for this section is taken without substantial change from the Illinois source.

Summarized Criminal Law Commission Comment

J. Guthals

This section covers the principles of "accessoryship." While not employing any of the older terminology regarding this area of the law, the section embodies the traditional approach toward parties to crimes and endeavors to develop it in a full and systematic fashion.

Subsection (1) would apply to those situations in which one person encourages another, such as a child or mentally defective individual, to commit a crime. Thus, while the primary offender may be legally incapable of a criminal offense, the instigator cannot hide behind this shield under this subsection.

Subsection (2) provides that a person may be legally accountable for another in circumstances not otherwise covered in this section. For example, a tavern owner may share vicarious criminal liability for the acts of his employee which result in the sale of liquor to minors.

Subsection (3) is a comprehensive statement of liability based on counseling, aiding and abetting which include those situations that, at common law, involved liability as principals of the second degree and accessories before the fact--although former sections 94-6423 and 94-6425 also sought to eliminate such distinctions. Liability requires proof of a "purpose to promote or facilitate commission of the substantive offense." "Conspiracy" is not of itself made the

basis of accountability, although acts of conspiring may in many cases satisfy the requirements of this subsection. (See, Pinkerton v. U.S., 328 U.S. 640 (1946), Commentary, A.L.I., M.P.C. Tentative Draft No. 1, 1953, 20-26).

Subsection (3)(a) states the rule that victims are not liable as principal offenders if there is no specific provision making the victim liable. This is true even though the person is a "willing" victim who counselled in the commission of the crime--such as one who pays blackmail or an under age girl who consents to sexual intercourse. The subsection does not prevent the extension of criminal liability to the victim if the particular statute so provides.

Subsection (3)(b) covers the situation in which a party to a crime seeks to extricate himself from its commission and relieve himself from liability. It appears desirable to provide an escape route in order to induce the disclosure of crimes before they occur. Under this subsection the person must terminate his affirmative efforts toward the commission of the crime. Additionally, he may be relieved of liability if he can deprive his contribution to the crime of its effectiveness. If timely warning is given, the person should be relieved of responsibility even if through negligence or an act of God the police fail to prevent the crime. The final clause "otherwise makes proper effort..." is included to cover those instances requiring an interpretation of the facts of the case.

This section should not conflict with the substance of Montana case law that knowledge that a crime is about to be committed does not make the accused an accomplice (State v. Mercer, 114 Mont. 143, 152, 133 P.2d 358); and one who knows a felony has been committed but does nothing to conceal it or harbor or protect the offender, is not an accessory to the commission of that felony (State v. McComas, 85 Mont. 428, 433, 278 P. 993).

Cross References

M.C.C. 1973, § 94-2-106
M.C.C. 1973, § 94-4-101 et. seq.

Library References

Criminal Law Key No. 59 et. seq.
C.J.S. Crim. Law, §§ 79, 80

Law Review Commentaries

31 U. Chicago L. Rev. 137 (1963)

Construction and application

Under this section it has been held that the fact that one co-defendant who was jointly indicted for a crime and who was found not guilty by the trial court did not render it improper to find the other co-defendant guilty, even though both defendants were identified as having participated in the crime, where evidence as to the two co-defendants was not identical. People v. Jones, 132 Ill. App.2d 623, 270 N.E.2d 288, 290 (1971).

Elements of Accountability

One is legally accountable for a crime committed by another when he, with the intent to facilitate the commission thereof, effects the commission of the crime by another. People v. Nelson, 33 Ill.2d 48, 210 N.E.2d 212, 214 (1965), cert. den. 383 U.S. 918. In applying this general rule to specific factual circumstances, it has been held that if a defendant knowingly drove a getaway car then he could be held legally responsible as a principal for the crime of robbery. People v. Richardson, 132 Ill. App.2d 712, 270 N.E.2d 568, 570 (1971). However, a defendant who did not strike the complaining witness or make any physical contact but merely watched while another co-defendant struck the complaining witness could not be convicted as a principal in the battery. People v. Bowman, 132 Ill. App.2d 744, 270 N.E.2d 285, 287 (1971).

Solicitation

Under the Illinois code (and under the new Montana Criminal Code) solicitation is a separate and distinct offense. It is punishable and triable as a distinct offense and acquittal of the choate offense and an attempt to commit the choate offense does not operate as a bar to conviction under charges of solicitation. See People v. Hairston, 46 Ill.2d 348, 263 N.E.2d 840, 841 (1970).

Common Design

When two or more persons have a common design to accomplish an unlawful purpose, the act of one is the act of all and all are guilty of whatever crime is committed, even if circumstances show that one of the participants was not actively involved in assisting in the commission of the offense. People v. Smith, 8 Ill. App.3d 270, 290 N.E.2d 261, 263 (1972); People v. Hubbard, 4 Ill. App.3d 729, 281 N.E.2d 767 (1972); People v. Harris, 105 Ill. App.2d 305, 245 N.E.2d 80, 85 (1969). See also, People v. Walton, 6 Ill. App.3d 17, 284 N.E.2d 508 (1972); People v. Hairston, 46 Ill. App.2d 348, 263 N.E.2d 840 (1970), cert. den. 402 U.S. 972; People v. Morris, 1 Ill. App.3d 566, 274 N.E.2d 898 (1971); People v. Bracey, 110 Ill. App.2d 329, 249 N.E.2d 224

(1969); People v. Novak, 84 Ill. App.2d 276, 228 N.E.2d 139 (1967); People v. Chavis, 79 Ill. App.2d 10, 223 N.E.2d 196 (1967). Illinois courts have held that the proof of common purpose need not be supported by words of agreement or by direct evidence, but can be drawn from the circumstances surrounding the commission of an act by a group of individuals. People v. Hubbard, 4 Ill. App.3d 729, 281 N.E.2d 767, 770 (1972); People v. Roldan, 100 Ill. App.2d 81, 241 N.E.2d 591 (1968); People v. Norvak, 45 Ill.2d 158, 258 N.E.2d 313 (1970); People v. Williams, 104 Ill. App.2d 329, 244 N.E.2d 347 (1968); People v. Johnson, 35 Ill.2d 624, 221 N.E.2d 662 (1966). In applying these general rules to factual circumstances the Illinois courts have ruled that evidence in a murder prosecution of co-defendants who returned to a tavern with weapons which they then held on the patrons in the tavern while a fatal blow was inflicted was sufficient to show common design among the defendants. People v. Spagnola, 123 Ill. App.2d 171, 260 N.E.2d 20, 27 (1970), cert. den. 402 U.S. 911. Similarly, it was held that evidence that a person voluntarily attached himself to a group which was bent on illegal activities with the knowledge of its design supported an inference that the defendant shared the common purpose and thus sustained a conviction as a principal for the crime committed by the other members of the group in furtherance of the venture. People v. Johnson, supra at 663.

Mere presence

It is a settled rule that mere presence at the scene of a crime or "negative acquiescence" is insufficient to make a defendant accountable for the acts of another. However, one may aid and abet without actively participating in the overt acts and presence at the scene of the crime without disapproving or approving of the commission of the crime is a factor which may be considered with other circumstances in determining whether the defendant aided and abetted in the commission of the offense. People v. Barnes, 2 Ill. App.3d 461, 276 N.E.2d 509, 511 (1971); People v. Woodell, 1 Ill. App.3d 257, 274 N.E.2d 105 (1971); People v. Winchell, 100 Ill. App.2d 149, 241 N.E.2d 200 (1968); People v. Bracken, 68 Ill. App.2d 466, 216 N.E.2d 176 (1966); People v. Richardson, 32 Ill.2d 472, 207 N.E.2d 478 (1965), cert. den. 384 U.S. 1021; People v. Harris, 105 Ill. App.2d 305, 245 N.E.2d 80, 85 (1969); People v. Washington, 26 Ill.2d 207, 186 N.E.2d 259 (1969); People v. Cole, 30 Ill.2d 375, 196 N.E.2d 691 (1964); People v. Tillman, 130 Ill. App.2d 743, 265 N.E.2d 904, 909 (1971); People v. Washington, 121 Ill. App.2d 174, 257 N.E.2d 190, (1970); People v. Ramirez, 93 Ill. App.2d 404, 236 N.E.2d 284 (1968). While negative acquiescence may be a factor which may be considered in determination of guilt, it is generally held that to prove common design, aiding, abetting, or assisting the state must show some conduct of an affirmative nature. People v. Williams, 104 Ill. App.2d 329, 244 N.E.2d 347, 351 (1968).

Withdrawal from the crime

One who encourages the commission of an unlawful act cannot escape responsibility for that act by quietly withdrawing from the scene. To be timely, his withdrawal must be sufficient to give the other co-con-

spirators reasonable opportunity, if they desire, to follow the withdrawing person's example and refrain from further action before the crime is committed. Trial court must be able to say that the accused had wholly and effectively detached himself from the criminal enterprise. People v. Lacey, 49 Ill. App.2d 301, 200 N.E.2d 301, 200 N.E.2d 11, 14 (1964).

Accountability for specific offenses

The cases which are listed below should be examined for their application of the general principles stated above to specific factual circumstances.

Homicide: People v. Ramirez, 93 Ill. App.2d 404, 236 N.E.2d 284 (1968); People v. Jordan, 38 Ill.2d 83, 230 N.E.2d 161, (1967); People v. Nelson, 33 Ill.2d 48, 210 N.E.2d 212 (1965), cert. den. 383 U.S. 918; People v. Robinson, 113 Ill. App.2d 89, 251 N.E.2d 766 (1969); People v. Bracey, 110 Ill. App.2d 329, 249 N.E.2d 224 (1969); People v. Hill, 39 Ill.2d 125, 233 N.E.2d 367 (1968), cert. den., 392 U.S. 936; People v. Chavis, 79 Ill. App.2d 10, 223 N.E.2d 196 (1967).

Robbery: People v. Williams, 3 Ill. App.3d 1, 279 N.E.2d 100, 103 (1971); People v. Sanders, 129 Ill. App.2d 444, 263 N.E.2d 615 (1970); People v. Knell, 129 Ill. App.2d 9, 262 N.E.2d 291; People v. Embery, 69 Ill. App.2d 269, 216 N.E.2d 24 (1966).

Burglary: People v. Gore, 64 Ill. App.2d 309, 211 N.E.2d 757 (1965).

Theft: People v. Hasty, 127 Ill. App.2d 330, 262 N.E.2d 292 (1970).

Narcotics sale: People v. Meid, 130 Ill. App.2d 482, 264 N.E.2d 209 (1970); People v. Van Riper, 127 Ill. App.2d 394, 262 N.E.2d 141 (1970).

Punishment as principals

As provided by this section there is no longer a distinction between accessory before the fact and principal. Both offenders may be punished in the same manner. See People v. Clements, 28 Ill.2d 534, 192 N.E.2d 923, 926 (1963).

Indictment

Since this section eliminates the distinction between accessories and principals an accused may be properly charged as a principal even though he was only an accessory to the crime. People v. Heuton, 2 Ill. App.3d 427, 276 N.E.2d 8, 9 (1971). Inasmuch as this section eliminates any distinction between an act performed by the accused himself and the act of another for which he is legally accountable, an indictment charging two or more persons jointly and individually with a crime has been held not to be invalid for its failure to state whether the defendant was being charged as a principal or as an

accessory. People v. Nicholls, 42 Ill.2d 91, 245 N.E.2d 771, 777 (1969) cert. den. 396 U.S. 1016. Where an indictment charges two or more defendants with an offense, dismissal as to one co-defendant does not necessitate dismissal of the charge against the other co-defendant. People v. Bodine, 114 Ill. App.2d 205, 252 N.E.2d 234, 235 (1969); People v. Jones, 132 Ill. App.2d 623, 270 N.E.2d 288, (1971). It has been held that an indictment against an accessory is not required to describe the circumstances of the accessory's contact as they actually occurred. It is sufficient if the accessory is charged with the legal effect of the acts performed by him. People v. Ruscitti, 27 Ill.2d 545, 190 N.E.2d 314 (1963). See also People v. Allen, 132 Ill. App.2d 1015, 270 N.E.2d 54 (1971); People v. Touby, 31 Ill.2d 236, 201 N.E.2d 425 (1964).

Burden of Proof

In order for a person to be held legally accountable for the conduct of another, the state must prove beyond a reasonable doubt: 1) that the defendant solicited, aided, abetted, agreed, or attempted to aid another person in the planning or commission of an offense; 2) that participation took place either before or during commission of the offense; and 3) that it was with the concurrent specific intent to promote or facilitate the commission of an offense. People v. Tillman, 130 Ill. App.2d 743, 265 N.E.2d 904, 909 (1971). Accord, People v. Ramirez, 93 Ill. App.2d 404, 236 N.E.2d 284 (1968); People v. Brumbeloe, 97 Ill. App.2d 370, 240 N.E.2d 150 (1968). It is not necessary that the defendant be shown to have participated in each element of the offense, rather it is sufficient if the defendant is shown to have aided, abetted, or assisted in the commission of the crime. People v. Harris, 70 Ill. App.2d 173, 217 N.E.2d 503, 506 (1966).

Sufficiency and admissibility of evidence

Evidence that a defendant voluntarily attaches himself to a group which is bent on illegal acts with knowledge of its design will support an inference that he shares in the common purpose and will sustain his conviction as a principal for the crime committed by another in furtherance of the venture. People v. Bracey, 110 Ill. App.2d 329, 249 N.E.2d 224, 228 (1969). Although the proof tending to show that one is an accessory before the fact generally would be of the events occurring before the ultimate commission of the offense, evidence of subsequent acts is competent to be considered as proof of guilt of aiding and abetting. People v. Winchell, 100 Ill. App.2d 149, 241 N.E.2d 200 (1968); People v. Bracken, 68 Ill. App.2d 466, 216 N.E.2d 176 (1966); People v. Kolep, 29 Ill.2d 116, 193 N.E.2d 753 (1963); People v. Smith, 25 Ill.2d 428, 185 N.E.2d 150 (1962). For decisions on the sufficiency or admissibility of certain specific evidence see the following cases: People v. McClelland, 96 Ill. App.2d 410, 238 N.E.2d 597 (1968); People v. Morgan, 20 Ill.2d 437, 170 N.E.2d 529 (1961); People v. Lawrence, 132 Ill. App.2d 513, 270 N.E.2d 510 (1971); People v. Gant, 121 Ill. App.2d 222, 257 N.E.2d 181 (1970); People v. Womack, 73 Ill. App.2d 317, 219 N.E.2d 592, (1966); People v. Brumbeloe, 97 Ill. App.2d 370, 240 N.E.2d 150 (1968); People v. Richardson, 132 Ill. App.2d 712, 270 N.E.2d 568 (1971).

Instructions

An instruction that a person is responsible for the conduct of another when he aids and abets another in the commission of a crime should not be submitted to a jury unless instructions on accompanying issues are also given. People v. Hatfield, 5 Ill. App.3d 996, 284 N.E.2d 708, 713 (1972). The giving of an instruction defining an accessory in a case in which the defendant was indicted as a principal was held not to be prejudicial. People v. Weaver, 68 Ill. App.2d 240, 215 N.E.2d 675 (1966). The giving of instructions based upon this section was discussed in the following cases: Homicide--People v. Hexum, 83 Ill. App.2d 192, 226 N.E.2d 877, cert. den., 391 U.S. 907 (1967); People v. Kolep, 29 Ill.2d 116, 193 N.E.2d 753 (1963); People v. Coddington, 123 Ill. App.2d 351, 259 N.E.2d 382 (1970); Robbery--People v. Steptore, 51 Ill.2d 208, 281 N.E.2d 642 (1972); People v. Hampton, 44 Ill.2d 41, 253 N.E.2d 385 (1969); Assault--People v. Harris, 132 Ill. App.2d 801, 270 N.E.2d 232 (1971); Burglary--People v. Umphers, ____ Ill. ____, 272 N.E.2d 278 (1971). See also, People v. Rollins, 119 Ill. App.2d 116, 255 N.E.2d 471 (1970).

Judgment and Sentence

Equality of sentence between two participants in a criminal offense is not required. People v. Winchell, 100 Ill. App.2d 149, 241 N.E.2d 200, 201 (1968).

(2)-1

94-2-108. Separate Conviction Of Person Accountable.

A person who is legally accountable for the conduct of another which is an element of an offense may be convicted upon proof that the offense was committed and that he was so accountable, although the other person claimed to have committed the offense has not been prosecuted or convicted, or has been convicted of a different offense or is not amenable to justice, or has been acquitted.

Historical Note

Enacted:	M.C.C. 1973, § 94-2-108, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Ill.C.C. 1961, Title 38, § 5-3
Prior Law:	R.C.M. 1947, § 94-6425, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

Sections 94-2-106 and 94-2-107 of the new Code discuss the general principles of accountability for conduct of others and eliminate distinctions made in the common law and continued under former Montana law between different types of accomplices. Under the new Code any person who aids in the commission of a crime, with the purpose to facilitiate the offense, either before or during its occurrence is liable as a principal. This section completes the task of eliminating common law categorizations of parties to crime by allowing the conviction of an accomplice before the conviction of the principal. Additionally, the section ensures that the immunity or incapacity of one co-offender shall not be imputed to another. In effect, this section is merely a recodification of R.C.M. 1947, § 94-6425 and the leading Montana case interpreting the responsibility of co-conspirators, State v. Alton, 139 Mont. 379, 365 P.2d 527. The only significant change from the prior law is the elimination of references to "principals" and "accessories." The wording for this section was taken directly from the Illinois source.

Revised Criminal Law Commission Comment

L. Elison

Even at common law two persons, both principals in the first degree could be tried separately and although one was acquitted, the state was not precluded from proceeding to trial and obtaining a conviction against the second. The same result is possible under the new Code but the classification of principals and accessories is eliminated.

Cross References

M.C.C. 1973, §§ 94-2-106, 94-2-107

Library References

Crim. Law Key No. 78 et. seq.
C.J.S. Crim. Law, § 100 et. seq.

Notes of Decisions

Acquittal of Principal

The general rule is that acquittal of other parties in the same cause is not grounds to relieve a particular co-defendant of his responsibility. See People v. Spears, 106 Ill. App.2d 430, 245 N.E.2d 544 (1969); People v. Quinn, 96 Ill. App.2d 382, 238 N.E.2d 619 (1968).

Instructions

For cases interpreting instructions based upon this section see People v. Winchell, 100 Ill. App.2d 149, 241 N.E.2d 200 (1968); People v. Rosenfeld, 25 Ill.2d 473, 185 N.E.2d 236, (1962).

94-2-109. Responsibility.

(1) No person is capable of committing any offense unless he has attained his sixteenth birthday at the time the act in question was committed. Any person who has not yet attained his eighteenth birthday shall be subject to the law as provided in title 10, chapter 6, R.C.M. 1947.

(2) A person who is in an intoxicated or drugged condition is criminally responsible for conduct unless such condition is involuntarily produced and deprives him of his capapcity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law. An intoxicated or drugged condition may be taken into consideration in determining the existance of a mental state which is an element of the offense.

Historical Note

Enacted:	M.C.C. 1973, § 94-2-109, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Ill.C.C. 1961, Title 38, § 6-3
Prior Law:	R.C.M. 1947, §§ 94-119, 94-201, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

This section on responsibility defines the applicability of the Code to juvenile offenders and sets forth the limits of intoxication as a defense. Subsection (1) replaces R.C.M. 1947, § 94-201 which conflicted with the Juvenile Code (R.C.M. 1947, § 10-601 et. seq.) by adhering to the common law formula that only children under seven years of age were conclusively presumed to be incapable of criminal responsibility. Under subsection (1) and Juvenile Code section 10-602 persons under the age of sixteen years have no criminal responsibility and are within the exclusive jurisdiction of the juvenile courts. Offenders between the ages of sixteen and eighteen are covered by the Criminal Code only for certain enumerated

felonies listed in section 10-602. Because the titles of these felonies have been changed in the new Code, it will be necessary to associate the list of felonies in section 10-602 with the chapters which have incorporated those felonies in the new Code. Subsection (1) does not affect the question of whether the juvenile courts will have jurisdiction over persons between eighteen and twenty-one years of age whose offenses were committed before they reached the age of eighteen after the granting of adult status to eighteen-year-old persons by the Montana Constitution. Subsection (2) contains two principles of law concerning intoxication as a defense. The first sentence states the general rule that voluntary intoxication is not a defense and limits the defense of involuntary intoxication only to those situations in which the intoxication has rendered the accused mentally incompetent. Sentence two states the exception to the general rule to intoxication as a defense, by providing that where an offense requires a specific mental state, the intoxicated state of the offender may be considered as a factor in determining whether that required mental state has been established. For example, voluntary intoxication would not be a defense for Negligent Homicide (M.C.C. 1973, § 94-5-104) caused by drunk driving because the crime does not require a specific mental state but instead provides that responsibility stems from the negligent act itself--driving while intoxicated. Voluntary intoxication could be a factor in Deliberate Homicide to determine whether the required mental state of "knowingly" or "purposely" has been established. This subsection is somewhat narrower than prior law concerning involuntary intoxication by requiring proof of mental incompetency before a complete defense is raised. Since intoxication may be taken into consideration in determining the existence of a mental state which is an element of the offense, proof of intoxication might reduce the grade of some offenses. However, because the concept of specific intent is deleted from the law, the defendant's intoxication would have to be so debilitating that he was 1) "deprived of the capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law [see 95-601 et seq.], or 2) unaware of his conduct or existing circumstances [see 94-2-101(28)]. In the offense of deliberate homicide, premeditation, deliberation and malice aforethought have been deleted. Further, there is no concept of second degree murder and consequently the rule of law found in State v. Palen, 119 Mont. 600, 178 P.2d 862 that voluntary intoxication may be a defense in a murder case where specific intent is an essential element of the crime charged would no longer be applicable.

Cross References

M.C.C. 1973, §§ 94-2-101(25), (68)
R.C.M. 1947, § 10-601 et. seq.
R.C.M. 1947, § 95-501 et. seq.

Library References

Infants Key No. 16, 18
C.J.S. Infants, §§ 6-8, 93, 98-100
Criminal Law Key No. 46, 53 et. seq.
C.J.S. Crim. Law, §§ 55, 66, 621

(22)-3

Law Review Commentaries

1966 Univ. of Ill. Law Forum 767
1963 Univ. of Ill. Law Forum 273
1961 Univ. of Ill. Law Forum 1
17 DePaul L. Rev. 365 (1968)
53 A.B.A.J. 43 (1967)

Notes of Decisions

Construction and application--juveniles

The Montana Supreme Court has ruled that when trying juvenile offenders, it is the duty of the courts to first determine if they have jurisdiction in the case. Dahl v. Dist. Ct., 134 Mont. 395, 400, 333 P.2d 495 (1958).

Intoxication as a defense

As developed by the cases cited below, voluntary intoxication in Montana is generally no defense to a criminal charge. See State v. Warrick, 152 Mont. 94, 446 P.2d 916 (1968); Alden v. State, 234 F. Supp. 661 (D. Mont. 1964); State v. Brooks, 150 Mont. 399, 436 P.2d 91 (1967); State v. Palen, 119 Mont. 600, 178 P.2d 862 (1947).

94-2-110. Substitutes For Negligence And Knowledge.

When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.

Historical Note

Enacted:	M.C.C. 1973, § 94-2-110, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	M.P.C. 1962, § 2.02(5)
Prior Law:	None

Revised Criminal Law Commission Comment

L. Elison

This section, which is substantially similar to the Model Penal Code source, is intended to obviate any possible misunderstanding as to what mental state will satisfy the requirements of each statutory provision. Proof of the higher or more specific mental states will satisfy any lesser mental state that may be required by a particular statute.

Cross References

M.C.C. 1973, §§ 94-2-101 (28), (32), (53)
M.C.C. 1973, § 94-2-103

94-2-111. Consent As A Defense.

(1) The consent of the victim to conduct charged to constitute an offense or to the result thereof is a defense.

(2) Consent is ineffective if:

(a) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense; or

(b) by reason of youth, mental disease or defect or intoxication is unable to make a reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or

(c) it is induced by force, duress or deception; or

(d) it is against public policy to permit the conduct or the resulting harm, even though consented to.

Historical Note

Enacted: M.C.C. 1973, § 94-2-111, Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: None

Annotator's Note

J. Guthals

It is an element of the sexual offenses of Sexual Assault and Sexual Intercourse Without Consent (M.C.C. 1973, § 94-5-502, 94-5-503) that the sexual act was committed without the consent of the victim. Thus, consent is a defense which may eliminate criminal responsibility. Subsection (2)(a) provides that certain persons are deemed to be legally incapable of giving consent regardless of actual acquiescence. Subsection (2)(b) protects the young and the helpless from their own incapacities. Subsection (2)(c) provides that consent which is forcibly compelled is ineffective. Subsection (2)(d) covers those situations when for reasons of public policy such as in "statutory rape," now covered by M.C.C. 1973, § 94-5-503, certain conduct is prohibited irrespective of consent.

Cross References

M.C.C. 1973, § 94-2-101(68)
M.C.C. 1973, § 94-5-501 et. seq.

Library References

Rape Key No. 8 et. seq.
C.J.S. Rape, § 11 et. seq.

(23)-3

Law Review Commentaries

32 Brooklyn L. Rev. 274 (1966)

94-2-112. Criminal Responsibility Of Corporations.

(1) A corporation may be prosecuted for the commission of an offense if, but only if:

(a) the offense is a misdemeanor, and is defined by sections 94-6-307, 94-6-308, 94-6-311, 94-6-312, 94-6-313, 94-8-108, 94-8-109, 94-8-111, 94-8-112, 94-8-113 of this code, or is defined by another statute which clearly indicates a legislative purpose to impose liability on a corporation; and an agent of the corporation performs the conduct which is an element of the offense while acting within the scope of his office or employment and in behalf of the corporation, except that any limitation in the defining statute, concerning the corporation's accountability for certain agents or under certain circumstances, is applicable; or

(b) the commission of the offense is authorized, requested, commanded, or performed, by the board of directors or by a high managerial agent who is acting within the scope of his employment in behalf of the corporation.

(2) A corporation's proof, that the high managerial agent having supervisory responsibility over the conduct which is the subject matter of the offense exercised due diligence to prevent the commission of the offense, is a defense to a prosecution for any offense to which subsection (1) (a) refers, other than an offense for which absolute liability is imposed. This subsection is inapplicable if the legislative purpose of the statute defining the offense is inconsistent with the provisions of this subsection.

(3) For the purposes of this section:

(a) "Agent" means any director, officer, servant, employee, or other person who is authorized to act in behalf of the corporation.

(b) "High managerial agent" means an officer of the corporation, or any other agent who has a position of comparable authority for the formulation of corporate policy or the supervision of subordinate employees in a managerial capacity.

Historical Note

Enacted: M.C.C. 1973, § 94-2-112, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill.C.C. 1961, Title 38, § 5-4

Prior Law: None

Annotator's Note

J. Guthals

The wording for this section is identical to the Illinois source. The meaning of the provision is explained fully in the Committee Comment below.

Revised Criminal Law Commission Comment

L. Elison

Section 94-2-112 deals with the criminal responsibility of private corporate bodies.

Subsection (1)(a) deals with the corporate liability for misdemeanor offenses, such other offenses as may be expressly included, and those which clearly indicate a legislative purpose to impose corporate liability where the offense is defined by a statute not included in the Criminal Code. In dealing with regulatory offenses, the broadest scope of liability is provided. The corporation is made criminally responsible for criminal conduct performed by any corporate employee acting within the scope of his office or employment and in behalf of the corporation. The chief justification for such broad liability in this class of cases is to provide an inducement for high managerial officers in the corporation

(21)-3

to supervise the behavior of minor employees in such a way as to avoid criminal conduct on the part of corporate employees. In many of the regulatory offenses, the corporation which violates a criminal statute is not confronted by the threat of tort liability growing out of the same act. Thus, if the corporation is required to file a corporate report and fails to do so, the liability it will suffer may be criminal only. These provisions do not relieve the individual corporate employee from criminal liability for his own act. In many cases, criminal prosecution of the individual will prove more effective in enforcing the regulatory policy of the statute. There may be times, however, in which, while it is clear that someone in the corporate employ has committed the criminal act, it is impossible to identify the particular employee guilty of criminal behavior. In such case, the only sanction available is the imposition of a fine on the corporate body. There may also be cases in which the criminal act is committed by a corporate employee of a foreign corporation residing outside the jurisdiction. In such a case the only feasible course open to the Montana prosecutor would be a criminal action against the corporation.

Since the major purpose of subsection (1)(a) is to encourage diligence on the part of managerial personnel to prevent criminal conduct on the part of corporate employees, it seems appropriate to permit the corporation to defend by proof that the criminal conduct occurred despite the exercise of due diligence on the part of supervisory personnel. Consequently, subsection (2) provides that proof of due diligence is a defense to the criminal charge against the corporation. The burden of proof in this case, is placed upon the corporate defendant. This defense is further qualified by the provision that if the statute in question clearly intends that the defense of due diligence should not be available to the corporation, the particular provision of the statute shall prevail over the language of subsection (2).

Subsection (1)(b) relates to the scope of liability of corporations for criminal offenses of a more serious character. It provides that when a corporation is indicted for a felony such as embezzlement or involuntary manslaughter, the corporation may not be held liable unless the criminal conduct was performed or participated in by the Board of Directors or by a high-managerial agent. The restriction on the scope of corporate liability in this class of cases is justified by the consideration that before the stigma of serious criminality attaches to a corporate body, the conduct should involve someone close to the center of corporate power. Moreover, in these cases, the argument for the necessity of corporate fines to stimulate diligent supervision of minor employees is considerably less persuasive. This is true because most of the serious felonies also involve the possibility of corporate tort liability and this possibility should provide sufficient inducement for the exercise of proper super-

vision by managerial officials. The restriction of corporate liability in the case of serious felonies to acts of participating high-managerial officials is supported by the case law of some American states and appears to be consistent with the English law on the same point (e.g., People v. Canadian Fur Trappers, 248 N.Y. 159, 161, N.E. 455 (1928); Rex. v. I.C.R. Haulage Ltd. (1944) 1 K.B. 551; Welsh, "The Criminal Liability of Corporations," 62 L. Q. Rev. 345 (1946). The definitions of "agent" and "high-managerial agent" defies precise definition because of the infinite variations in the organizational schemes of corporate bodies. The definition here provided, is probably more precise than that which has emerged from the case law. (See especially, People v. Canadian Fur Trappers, 248 N.Y. 159, 161 N.E. 455 (1928).)

Cross References

M.C.C. 1973, § 94-2-113
R.C.M. 1947, § 95-615

Library References

Corporations Key No. 526
C.J.S. Corporations, § 1358 et. seq.

Notes of Decisions

Agents

The Illinois courts have held that a corporate officer, when so named, may be sued for the acts or omissions of the corporation. People v. King, 5 Ill. App.3d 357, 283 N.E.2d 294 (1972).

94-2-113. Accountability For Conduct Of Corporation.

(1) A person is legally accountable for conduct which is an element of an offense and which, in the name or in behalf of a corporation, he performs or causes to be performed, to the same extent as if the conduct were performed in his own name or behalf.

(2) An individual who has been convicted of an offense by reason of his legal accountability for the conduct of a

(24)-5

corporation is subject to the punishment authorized by law for an individual upon conviction of such offense, although only a lesser or different punishment is authorized for the corporation.

Historical Note

Encated: M.C.C. 1973, § 94-2-113, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill.C.C. 1961, Title 38, § 5-5

Prior Law: None

Annotator's Note

J. Guthals

The wording for this section was taken directly from the Illinois source. The section complements M.C.C. 1973, § 94-2-112, to which attention is directed for case notes. The purpose of the statute is to prevent an offender from insulating himself from criminal liability by performing criminal acts through a corporation which itself cannot be liable due to the inapplicability of the assigned penalty. Subsection (1) makes it clear that an individual acting for a corporation is fully responsible for his acts, regardless of the responsibility of the corporation. Subsection (2) allows punishment for such criminal acts whether or not the corporation can be punished.

Cross References

M.C.C. 1973, § 94-2-113

CHAPTER 3: JUSTIFIABLE USE OF FORCE: EXONERATION.

94-3-101. Definitions.

(1) "Forcible felony" means any felony which involves the use or threat of physical force or violence against any individual.

(2) "Force likely to cause death or serious bodily harm" within the meaning of this chapter includes but is not limited to:

(a) the firing of a firearm in the direction of a person, even though no purpose exists to kill or inflict serious bodily harm; and

(b) the firing of a firearm at a vehicle in which a person is riding.

Historical Note

Enacted:	M.C.C. 1973, § 94-3-101, Sec. 1, Ch. 513, Laws of Montana, 1973
SOURCE:	Ill.C.C. 1961, Title 38, §§ 2-8, 7-8
Prior Law:	None

Annotator's Note

J. Guthals

This section defines terms used in this chapter which delineate the extent of force which may be used in self defense, defense of property, and defense of others. Subsection (1) defining forcible felony comes from § 2-8 of the Illinois source. The term is also defined in M.C.C. 1973, § 94-2-101(17). Under the section in this chapter on Use of Force by Aggressor (M.C.C. 1973, § 94-3-105), a person who is committing a forcible felony, such as assault, kidnapping, homicide, etc., has no right to use force to defend himself. Subsection (2) is substantially similar to section 7-8 of the Illinois Code. Under the provision of this chapter, a person may use deadly force only if he reasonably believes that such force is necessary to prevent imminent death or bodily harm, or to prevent the commission of a forcible felony as defined above.

(2)-2

Cross References

M.C.C. 1973, § 94-2-101(17)
M.C.C. 1973, Chapter 3

Library References

Arrest Key No. 68
Assault and Battery Key No. 64
Homicide Key No. 105
C.J.S. Arrest, § 11 et. seq.
C.J.S. Assault and Battery, § 97
C.J.S. Homicide, §§ 102, 137

Law Review Commentaries

48 Chicago-Kent L. Rev. 252 (1971)
1966 Univ. of Ill. Law Forum 247

Notes of Decisions

Threat of physical force

It has been held that it was a "threat of physical force and violence" within the meaning of this section defining forcible felony where the defendant advised the victim that he and another had been hired to kill the victim, but if given a sum of money they would leave the city, regardless of the conditional character of the threat. People v. Rhodes, 38 Ill. App.2d 389, 231 N.E.2d 400 (1967).

94-3-102. Use Of Force In Defense Of Person.

A person is justified in the use of force or threat to use force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force likely to cause death or serious bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or serious bodily harm to himself or another, or to prevent the commission of a forcible felony.

Historical Note

Enacted:	M.C.C. 1973, § 94-3-102, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Ill.C.C. 1961, Title 38, § 7-1
Prior Law:	R.C.M. 1947, §§ 94-2512, 94-2513, 94-5002, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

The wording for this section on self-defense and defense of others is substantially similar to the Illinois source. However, the phrase "threat to use force" has been added by the Criminal Law Commission to allow a person to commit acts which otherwise would be assaults in defense of person. The clause "when and to the extent he reasonably believes" pertains to the proper occasion for the use of force which is a question of fact for the jury. "Is necessary to defend himself or another" refers to the proper amount of force which may be used and remain justified--again a question to be determined by the jury. As indicated in the Commission Comment below "imminent use of unlawful force" refers to those situations where the means of accomplishing the unlawful act are near at hand with the ability to inflict the threatened act.

Revised Criminal Law Commission Comment

L. Elison

The law of self-defense has been interpreted in a large number of judicial decisions, agreeing in principle though differing somewhat in defining the borderlines such as the minimum situation in which the use of deadly force may be authorized. (The history of self-defense is traced in Perkins, "Self-Defense Re-examined," 1 U.C.L.A. L. Rev. 133 at 137 to 142 [1954].) This section presents the general rule as to defense of person contemplating the simplest and probably most common situation--that in which a person who has done nothing to provoke the use of force against himself is confronted immediately with unlawful force under such circumstances that he believes that he must use force to defend himself, and his belief is reasonable. This statement contains several propositions:

(1) The person must not be the aggressor(the situation considered in 94-3-105);

(2) The danger of harm must be a present one, not merely threatened at a future time, or without the present ability of carrying out the threat;

(3)-4

(3) The force threatened must be unlawful--either criminal or tortious;

(4) A person must actually believe that the danger exists, that his use of force is necessary to avert the danger, and that the kind and amount of force which he uses is necessary; and

(5) His belief, in each of the aspects described, is reasonable even if it is mistaken. The privilege extends to the protection not only of the person using the force, but of another individual unlawfully threatened with harm; and in determining whether the use of force is necessary, a person need not consider whether the danger might be avoided if he were to give up some legal right or privilege. If a person under these circumstances uses only non-deadly force for protection, no further legal restriction should be necessary. (See Perkins, supra, at pages 133 to 137).

The privilege of using force likely to cause death or serious bodily harm (often called deadly force) is limited to cases in which the force imminently threatened apparently will cause death or serious bodily harm, or in which a violent offense is being committed which in its nature involves serious risk of serious bodily harm, such as rape, robbery, burglary, arson or kidnapping.

This section is intended to codify prior Montana law in which the right of self-defense is measured by what a reasonable person would have done under like or the same circumstances. (State v. Houk, 34 Mont. 418, 423, 87 P. 175). A person attacked can act upon appearances and might justifiably kill his attacker, though not in actual peril if the circumstances are such that a reasonable man would be justified in acting the same way. Further, a person attacked with apparent murderous intent need not retreat and seek a place of safety before using deadly force on his attacker (State v. Merk, 53 Mont. 454, 460, 164 P. 655). However, whether the circumstances attending a homicide claimed to have been committed in self-defense, are such as to justify a defendant's fears, as a reasonable person, in the belief that he was in imminent danger of losing his life or suffering serious bodily harm at the hands of the deceased, is a question of fact for the jury; bare fear of an assault does not justify the killing (State v. Harkins, 85 Mont. 585, 602, 281 P. 551).

Cross References

M.C.C. 1973, § 94-3-101

Construction and Application

This section which describes those situations where force may be justified under the theory which is commonly known as self-defense has been held to have no application where the alleged aggressor is not the party who has suffered harm at the hand of the accused. People v. Benson, 132 Ill. App.2d 786, 270 N.E.2d 181 (1971). A person who comes to the aid of the victim of a battery has the right to use deadly force if the assailants attack him and if the other requirements of self-defense have been met. People v. Williams, 56 Ill. App.2d 159, 205 N.E.2d 749, 754 (1965). See also People v. Bowman, 132 Ill. App.2d 806, 270 N.E.2d 285 (1971).

Elements of self-defense

The elements justifying use of force in self-defense are: 1) that the force is threatened against the person; 2) that the person threatened is not the aggressor; 3) that the danger of harm is imminent; 4) that force threatened is unlawful; 5) that the person threatened must actually believe that danger exists; 6) that the use of force is necessary to avert danger; 7) that the kind and amount of force which he uses is necessary; and 8) that such beliefs are reasonable. People v. Brumbeloe, 97 Ill. App.2d 370, 240 N.E.2d 150, 154 (1968); People v. Williams, 56 Ill. App.2d 159, 205 N.E.2d 749, (1965). A person is justified in using force against another if and to the extent that he reasonably believes that such conduct is necessary to defend himself against another person's use of unlawful force. It is not necessary that blood be first drawn before the right of self-defense arises. People v. Speed, 52 Ill.2d 141, 284 N.E.2d 636, 639 (1972); People v. Fort, 119 Ill. App.2d 350, 256 N.E.2d 63 (1970).

Defender committing crime

It has been held that a trespasser who is a carrying a gun without a permit did not lose his right of self-defense to use such a weapon when he was confronted by imminent danger of death and great bodily harm. People v. Dillard, 5 Ill. App.3d 896, 284 N.E.2d 490, 494 (1972).

Duty to retreat

The general rule is that if one is not the first assailant and is in a place he has a lawful right to be and is put in apparent danger of his life or of suffering great bodily harm, he need not attempt to escape but may lawfully stand his ground and use any reasonable force in self-defense even to the taking of his assailant's life. People

v. Taylor, 3 Ill. App.3d 734, 279 N.E.2d 143 (1972); People v. Martinez, 4 Ill. App.3d 1072, 283 N.E.2d 268 (1972); People v. Millet, 60 Ill. App.2d 22, 208 N.E.2d 670 (1965); People v. Williams, 56 Ill. App.2d 159, 205 N.E.2d 749 (1965). The right to defend one's self does not permit pursuit and injuring of aggressor after aggressor abandons quarrel.

Nature of self-defense

Self-defense relates to the use of force which a person reasonably believes necessary to defend or to protect himself. By its very nature self-defense relates to knowingly and intentionally using force to deter another and not to accidental use of force. People v. Joyner, 50 Ill.2d 302, 278 N.E.2d 756, 760 (1972). It is a general rule that the right of self-defense does not permit the use of force in retaliation or revenge. People v. Welsch, 110 Ill. App.2d 450, 249 N.E.2d 714 (1969); People v. Peery, 81 Ill. App.2d 372, 225 N.E.2d 730 (1967); People v. Thornton, 26 Ill.2d 218, 186 N.E.2d 239 (1963); People v. Dulakis, 45 Ill. App.2d 128, 195 N.E.2d 402 (1964); People v. McBride, 130 Ill. App.2d 201, 264 N.E.2d 446, 450 (1970). A peace officer is held to the same standard as a private person with respect to killing in self-defense. Schnepf v. Grubb, 125 Ill. App.2d 432, 261 N.E.2d 47, 49 (1970).

Reasonable belief

The law allows a defender who has reasonable ground to believe himself in danger of suffering bodily harm to protect himself by the use of reasonable force. People v. Hill, 116 Ill. App.2d 157, 253 N.E.2d 617, 619 (1969). Thus, a killing is justified if the person had reasonable ground to believe himself in danger of losing his life or of suffering great bodily harm even though the danger was apparent only and not real. People v. Lockett, 85 Ill. App.2d 410, 229 N.E.2d 150 (1968). A belief that circumstances necessitated the use of deadly force is reasonable even if the defendant is mistaken. People v. Williams, 56 Ill.2d 159, 205 N.E.2d 749, 753 (1965). The rules stated in the Illinois decisions above have long been a part of Montana law. See, for example, State v. Daw, 99 Mont. 232, 43 P.2d 240 (1935).

The use of deadly force

As provided by this section, one may use force against another when and to the extent that he reasonably believes that force is necessary to defend himself against another's imminent use of unlawful force. He may use such force as is likely to cause death or great bodily harm to another if and only if he reasonably believes it is necessary to prevent imminent death or great bodily harm to himself or to another. People v. Knox, 116 Ill. App.2d 427, 252 N.E.2d 549, 554 (1969); People v. Fort, 119 Ill. App.2d 350, 256 N.E.2d 63 (1970); People v. Williams, 95 Ill. App.2d 421, 237 N.E.2d 740 (1968); People v. Knox, 94 Ill. App.2d 36, 236 N.E.2d 384 (1968); People v. Lockett, 85 Ill. App.2d 410, 229 N.E.2d 386 (1967); People v. Pirovolos, 116 Ill. App.2d 73, 253 N.E.2d 481 (1969), supplemented

261 N.E.2d 701, 126 Ill. App.2d 361; People v. Williams, 56 Ill. App.2d 159, 205 N.E.2d 749 (1965). Because it is the appearance of danger rather than actual danger, whether such danger of great bodily harm is actual or apparent so as to justify killing in self-defense, does not depend upon the assailant's use of a deadly weapon or actually having one in his possession. Schnepf v. Grubb, 125 Ill. App.2d 432, 261 N.E.2d 47 (1970); People v. Brumbeloe, 97 Ill. App.2d 370, 240 NE.2d 150 (1968). A recent decision has held that a shotgun is per se a deadly weapon and the use of such a weapon allows a victim to use deadly force in self-defense. Ewurs v. Pakenham, _____ Ill. _____, 290 N.E.2d 319, 321 (1972).

94-3-103. Use Of Force In Defense Of Occupied Structure.

A person is justified in the use of force or threat to use force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's unlawful entry into or attack upon an occupied

structure. However, he is justified in the use of force likely to cause death or serious bodily harm only if:

(1) the entry is made or attempted in violent, riotous, or tumultuous manner, and he reasonably believes that such force is necessary to prevent an assault upon, or offer of personal violence to him or another then in the occupied structure; or

(2) he reasonably believes that such force is necessary to prevent the commission of a forcible felony in the occupied structure.

Historical Note

Enacted:	M.C.C. 1973, § 94-3-103, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Ill.C.C. 1961, Title 38, § 7-2
Prior Law:	R.C.M. 1947, §§ 94-2513, 94-5002, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

This section defines the extent to which force may be used to defend an occupied structure. Since the definition of occupied structure is broad (see, M.C.C. 1973, § 94-2-101(35)) the privilege granted by this section extends to virtually any vehicle or building suited for human habitation whether or not occupied. Under this section, a person is allowed to use non-deadly force to protect a dwelling from unlawful entry. This privilege to protect unoccupied structures is covered by M.C.C. 1973, § 94-3-104.

Subsections (1) and (2) continue the privilege to use deadly force to protect an occupied structure when the intruder enters with violence as provided under former law R.C.M. 1947, § 94-2513(2). Because the clause "offer of personal violence" extends to forces which are not likely to inflict great bodily harm the privilege to use deadly force in defense of dwellings is broad. However, justified use of deadly force does not include killing or severely injurying a person merely because that person trespasses when his presence is without violence. The wording for this section is substantially the same as the Illinois source.

Revised Criminal Law Commission Comment

L. Elison

This aspect of justification seems to be rather well-settled: a person may prevent or repel with force another's unlawful entry into a dwelling, whether the dwelling is occupied by the person using such force or by someone else, and whether the trespasser uses force or enters without force, but the use of deadly force is limited to instances of violent or forcible felonies and violent entries with apparent threat of personal violence to someone in the occupied structure. The reasonable-belief and no-retreat principles apply.

Cross References

M.C.C. 1973, § 94-2-101(35)
M.C.C. 1973, § 94-6-201
M.C.C. 1973, § 94-6-203(1)(a)

Library References

Assault and Battery Key No. 69
Homicide Key No. 98
C.J.S. Assault and Battery, § 94 et. seq.
C.J.S. Homicide, § 94

Notes of Decisions

In general

This section which provides that a person is justified in using force to prevent or terminate another's unlawful entry into or attack upon a dwelling is for the benefit of not only the tenant or occupant of the dwelling but for guests as well. People v. Stombaugh, 52 Ill. 2d 130, 284 N.E.2d 640 (1972). See also People v. Daulikis, 45 Ill. App.2d 128, 195 N.E.2d 402 (1964).

Instructions

The defendant has the responsibility of tendering instructions which are based upon this section. People v. Davis, 74 Ill. App.2d 450, 221 N.E.2d 63, 66 (1966). An instruction on defense of dwelling is inappropriate where the evidence indicates that the defendant was acting in defense of himself and not of a dwelling. People v. Stombaugh, 52 Ill.2d 130, 284 N.E.2d 640 (1972).

94-3-104. Use Of Force In Defense Of Other Property.

A person is justified in the use of force or threat to use force against another when and to the extent that he reasonably believes that such conduct is necessary to prevent or terminate such other's trespass on or other tortious or criminal interference with either real property (other than an occupied structure) or personal property, lawfully in his possession or in the possession of another who is a member of his immediate family or household or of a person whose property he has a legal duty to protect. However, he is justified in the use of force likely to cause death or serious bodily harm only if he reasonably believes that such force is necessary to prevent the commission of a forcible felony.

Historical Note

Enacted:	M.C.C. 1973, § 94-3-104, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Ill.C.C. 1961, Title 38, § 7-3
Prior Law:	R.C.M. 1947, § 94-5002, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

(3)-B

Annotator's Note

J. Guthals

This section defining the extent of force which may be used to defend unoccupied structures, land, and personal property must be read in conjunction with sections 94-6-201 and 94-6-203 which set out the offenses of Criminal Trespass. Under section 94-6-201, a person is privileged to enter land unless he is given personal notice or posting that he is a trespasser. Section 94-6-203 enlarges the category of persons criminally liable for knowing trespasses to anyone who knowingly enters or remains unlawfully on the premises of another. Under former law, criminal trespass generally extended only to those who engaged in some prohibited act after entering upon the premises. When taken together, these sections clearly indicate that the landowner has no right to use or threaten force against an unknowing trespasser. After a person has been notified that he is trespassing he must leave or be found guilty of a misdemeanor, regardless of whether he does some unlawful act on the property. By making the knowing trespasser a misdemeanant, the property owner can call for official aid in expelling the trespasser rather than using self-help. While the new Code seeks to prevent violent confrontations between trespassers and property owners, this section does not preclude the landowner from using force to expell a knowing trespasser if law enforcement help is not available. It should be noted that deadly force may only be used to prevent the commission of a forcible felony (M.C.C. 1973, § 94-2-101(17)). The wording for this section is substantially similar to the Illinois source.

Revised Criminal Law Commission Comment

L. Elison

The general principles of justification concerning the defense of person and occupied structure (M.C.C. 1973, §§ 94-3-102, 94-3-103) are applicable to a limited extent to the defense of real property other than occupied structures and personal property lawfully in the person's possession (or the possession of certain other persons); he may use force which he reasonably believes to be necessary to protect the property, but he may not use deadly force except to prevent the commission of a forcible felony.

The right of a person to use force in preventing a trespass upon or interference with another person's property is limited to property in the possession of the immediate family or household of the person using the preventive force, or is property the person using the force has a legal duty to protect. The right of a private person to arrest one who commits or attempts a criminal offense in his presence supplements the right to use force in the defense of other property (see R.C.M. 1947, § 95-611).

Cross References

M.C.C. 1973, § 94-2-101(17)
M.C.C. 1973, §§ 94-6-201, 94-6-202(b)
R.C.M. 1947, § 95-611

Library References

Assault and Battery Key No. 69
Homicide Key No. 124
C.J.S. Assault and Battery, § 94 et. seq.
C.J.S. Homicide, § 110, 111

Law Review Commentary

66 N.W.L. Rev. 805 (1972)

Notes of Decisions

Trespass

The owner of property or his representative has the right under this section to use reasonable force to terminate a trespass. But, in the absence of preventing a forcible felony, neither the owner nor his representative is entitled to use such force as was intended or likely to cause death or great bodily harm. People v. Dillard, 5 Ill. App.3d 896, 284 N.E.2d 490 (1972). The fact that a person has a mistaken belief as to his authority to enter land of another does not alter his status as a trespasser nor terminate the landowner's right to use force in deterring the trespass. People v. Raber, 130 Ill. App.2d 813, 264 N.E.2d 274,275 (1970).

Burden of Proof

As is the general rule in Illinois with regard to all affirmative defenses, where the defendant raises an issue of justification as an affirmative defense by presenting some evidence upon it, the state must sustain the burden of proving guilt beyond a reasonable doubt as to that issue together with all other elements of the offense. People v. Raber, 130 Ill. App.2d 813, 264 N.E.2d 274, 275 (1970).

Instructions

The defendant has the responsibility of tendering instructions based upon this section which necessarily bear favorably upon some aspect of his defense. People v. Davis, 74 Ill. App.2d 450, 221 N.E.2d 63, 66 (1966). A defendant's instruction based upon this section, however, was held to be inappropriate where it appeared that the defendant was using force in making a citizen's arrest rather than in defense of his property. People v. Fort, _____ Ill. App.2d _____, 273 N.E.2d 439, 448 (1971).

94-3-105. Use Of Force By Aggressor.

The justification described in the preceding sections of this chapter is not available to a person who:

(1) is attempting to commit, committing, or escaping after the commission of a forcible felony; or

(2) purposely or knowingly provokes the use of force against himself, unless:

(a) such force is so great that he reasonably believes that he is in imminent danger of death or serious bodily harm, and that he has exhausted every reasonable means to escape such danger other than the use of force which is likely to cause death or serious bodily harm to the assailant; or

(b) in good faith, he withdraws from physical contact with the assailant and indicates clearly to the assailant that he desires to withdraw and terminate the use of force, but the assailant continues or resumes the use of force.

Historical Note

Enacted:	M.C.C. 1973, § 94-3-105, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Ill.C.C. 1961, Title 38, § 7-3

(3)-16

Prior Law: None

Annotator's Note

J. Guthals

This subsection is primarily the same as the parent Illinois source. The application of the section is discussed fully in the comment below.

Summarized Criminal Law Commission Comment

J. Guthals

Each of the preceding sections of this chapter has assumed that the person using force in defense has not committed an unlawful act which has inspired the use or threat of force against him, or otherwise provoked such force. This section concerns the much more limited right which a person has to defend himself when he has provoked the use of force. Subsection (1) states the general rule that a person has no right of defense if he is attempting or committing a forcible felony (M.C.C. 1973, § 94-2-101(17)), or is escaping from such an act. Subsection (2) begins with the principle that one who provokes the use of force has no right of defense. The following subsections describe how the right of defense may be reinstated to the aggressor. Subsection (2)(a) covers those situations where the aggressor, not using deadly force, is suddenly confronted with deadly force. The original aggressor may defend himself only after he has used every means to avoid the use of deadly force including "retreating to the wall," and only if he reasonably believes that he must use deadly force to prevent death or serious bodily harm to himself. The second case is that in which the aggressor in good faith withdraws from the conflict and effectively communicates to the victim his intention to withdraw, but the victim continues or resumes the conflict. In such cases, the aggressor becomes the victim. Note that in the latter situation, only non-deadly force may be used. (See Perkins, "Self-Defense Re-examined," 1 U.C.L.A. L. Rev. 133 at 147 (1954); State v. Merk, 53 Mont. 454, 460, 164 P. 655 (1916)).

Cross References

M.C.C. 1973, § 94-2-101(17)
M.C.C. 1973, § 94-3-101(2)

Library References

Assault and Battery Key No. 67
Homicide Key No. 112(1) et. seq.
C.J.S. Assault and Battery, § 92
C.J.S. Homicide, § 117

Notes of Decisions

In general

As provided by this section, an aggressor may not prevail in a prosecution for battery by asserting self-defense even though victim may have struck first blow. People v. Bowman, 132 Ill. App.2d 285, 287 (1971).

Sufficiency and admissibility of evidence

Even if the victim were an aggressor in an earlier quarrel with a defendant, this does not in itself prove that he was an aggressor just prior to a subsequent quarrel. People v. Wilson, 3 Ill. App.3d 481, 278 N.E.2d 473, 476 (1972). But, where evidence indicates that defendant first fought with victim, then left to arm himself, such evidence supports the determination that the claim of self-defense is not justified. People v. Hill, 116 Ill. App.2d 157, 253 N.E.2d 617, 618 (1969). Similarly, evidence which indicates prior aggressive behavior of a defendant toward his alleged victim is admissible to determine the defendant's attitude and aggressiveness toward the victim. People v. Smythe, 132 Ill. App.2d 685, 270 N.E.2d 431, 434 (1971).

Instructions

An instruction that defense of self-defense is not available to a person who initially provokes the use of force against himself except in special circumstances is not error. People v. McBride, 130 Ill. App.2d 201, 264 N.E.2d 446, 450 (1970); People v. Day, 2 Ill. App.3d 811, 277 N.E.2d 745 (1972).

94-3-106. Use Of Force To Prevent Escape.

(1) A peace officer or other person who has an arrested person in his custody is justified in the use of such force to prevent the escape of the arrested person from custody as he would be justified in using if he were arresting such person.

(2) A guard or other peace officer is justified in the use of force, including force likely to cause death or serious bodily harm, which he reasonably believes to be necessary to prevent the escape from a correctional institution of a person whom the officer reasonably believes to be lawfully detained in such institution under sentence for an offense or awaiting trial or commitment for an offense.

Historical Note

Enacted:	M.C.C. 1973, § 94-3-106, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Ill.C.C. 1961, Title 38, § 7-9
Prior Law:	R.C.M. 1947, §§ 94-605, 94-2512, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

While this section on use of force to prevent escape is identical to the Illinois source, when interpreted by the courts the laws may be significantly different. This section defines the amount of force which may be used to prevent escape in terms of the amount of force necessary in making an arrest, which is set forth in R.C.M. 1947, § 95-602, and is different from the comparable Illinois statute.

Summarized Criminal Law Commission Comment

J. Guthals

An attempted escape by a person in custody after arrest and before being placed in confinement or from a place of confinement, requires the authorization of force to recapture him.

(3)-141

Subsection (1) concerns the use of force to prevent escape from custody prior to imprisonment of the accused or at other times when the accused is in custody but not confined. It must be noted that there must be an arrest and custody before there can be an escape, otherwise there is only a fleeing to which this section does not apply. The usual statement concerning the use of force seems to be that a person lawfully arrested may be killed in order to prevent escape. This section makes clear that there is justification of only that force which could be used if the officer were making an arrest at the time the escape occurred. Thus, if a person was arrested for a forcible felony and subsequently disarmed, the officer would not be allowed to use deadly force in his recapture. Conversely, if the offender was not armed when arrested, but in escaping seizes a weapon, deadly force may be justified.

Subsection (2) concerns escape from a place of confinement. Because the officer does not have time to determine the reason for the escapee's confinement or of the escapee's possession of weapons, a less restrictive rule as to the use of deadly force is provided as compared to the rule in subsection (1) concerning escapes from custody. The purpose of this subsection is to allow the officer to react immediately to escapes which are often desperate and violent and which if successfuly could encourage other such attempts. "Correctional institution" includes any place where prisoners are held after sentencing or before trial as defined by M.C.C. 1973, § 94-2-101(10).

Cross References

M.C.C. 1973, § 94-2-101(10)
M.C.C. 1973, §§ 94-7-301, 94-7-306
R.C.M. 1947, § 95-602(b)
R.C.M. 1947, § 95-719

Library References

Assault and Battery Key No. 64
Homicide Key No. 105
C.J.S. Assault and Battery, § 97
C.J.S. Homicide, §§ 102, 137

94-3-107. Use Of Force By Parent.

A parent or an authorized agent of any parent or a guardian, master, or teacher is justified in the use of such force as is reasonable and necessary to restrain or correct his child, ward, apprentice or pupil.

Historical Note

Enacted:	M.C.C. 1973, § 94-3-107, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	R.C.M. 1947, § 94-605(4), repealed, Sec. 32 Ch. 513, Laws of Montana 1973
Prior Law:	R.C.M. 1947, §§ 94-605(4), 94-2511 repealed Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

Under former law, assault was said to be justified and homicide excusable if done in lawfully correcting a child. This section which is a rewording of former section 94-605(4) makes the use of "reasonable and necessary force" a justification in the form of an affirmative defense. But the correction of a child which results in the child's death is no longer excused. The leading Montana case on the subject is State v. Straight, cited below.

Cross References

M.C.C. 1973, § 94-5-101 et. seq.
M.C.C. 1973, § 94-5-201 et. seq.

Library References

Assault and Battery Key No. 63 et. seq.
Homicide Key No. 101, 125
C.J.S. Assault and Battery, § 86 et. seq.
C.J.S. Homicide, § 1, 97-99, 102, 106 et. seq.

(2)-21

Notes of Decisions

In general

Where a parent uses force to correct his child, it is up to the jury to determine from the facts and circumstances of each individual case whether the manner of punishment is reasonable and the degree moderate. State v. Straight, 136 Mont. 255, 347 P.2d 482, 490 (1959).

94-3-108. Use Of Force In Resisting Arrest.

A person is not authorized to use force to resist an arrest which he knows is being made either by a peace officer or by a private person summoned and directed by a peace officer to make the arrest, even if he believes that the arrest is unlawful and the arrest in fact is unlawful.

Historical Note

Enacted:	M.C.C. 1973, § 94-3-108, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Ill.C.C. 1961, Title 38, § 7-7
Prior Law:	None

Annotator's Note

J. Guthals

The purpose of this section on use of force in resisting arrest is to change the common-law rule that an illegal arrest could be resisted lawfully. That rule encouraged resistance and breaches of the peace. This section requires submission to arrest. If the arrest is illegal (a determination which few citizens can make while being arrested), the arrestee should pursue civil and criminal remedies rather than resort to self-help. In applying this section a number of caveats are in order: First, the section has no application to persons fleeing from a possible arrest or from a stop under the new Stop and Frisk statute (R.C.M. 1947, § 95-719). Second, the arresting officer must identify himself to the arrestee. If the arrestee does not know that the person making the arrest is authorized to do so, he may justifiably defend himself. Third, the section has been interpreted by the Illinois courts as not preventing

(3)-22

an arrestee from protecting himself from unlawful and excessive force by the arresting officer. The wording for this section is identical to the Illinois source.

Revised Criminal Law Commission Comment

L. Elison

Section 94-3-108 states a corollary to the justification accorded to an officer in using force to make an arrest. Even if the arrest is unlawful, the person arrested is not privileged to resist the arrest with force. A resort to force invites the officer to use greater force to accomplish the arrest. The public interest in discouraging violence and insisting upon the use of peaceable methods for obtaining release from unlawful arrest clearly outweighs the right of self-help or any momentary individual satisfaction. (This was the view of the Uniform Arrest Act, § 6; see Warner, "The Uniform Arrest Act," 28 Va. L. Rev. 316 at 330, 331 (1942).) A partial recognition of the inadvisability of sanctioning resistance in the case of an unlawful arrest appears in the old rule that a person who kills an officer attempting an unlawful arrest is not justified, but is guilty of manslaughter rather than murder, in the absence of express malice. (1 Wharton's Criminal Law (12th ed.), § 542 and 853; 1 Bishop on Criminal Law (9th ed.), § 868 and 1 Bishop's New Criminal Procedure (3rd ed.), § 162.)

Cross References

M.C.C. 1973, § 94-3-102
M.C.C. 1973, § 94-7-301
R.C.M. 1947, § 95-602

Library References

Assault and Battery Key No. 67
Homicide Key No. 116
Obstructing Justice Key No. 8
C.J.S. Assault and Battery, § 92
C.J.S. Homicide, § 137
C.J.S. Obstructing Justice, § 16

In general

When a person is known to be a policeman in the performance of his lawful duties, it is the duty of persons being arrested by him to submit peacefully. People v. Gnatz, 8 Ill. App.3d 396, 290 N.E.2d 392, 395 (1972). Even if a probable cause for arrest is lacking, the arrestee has no right to resist. People v. Suriwha, 2 Ill. App.3d 384, 276 N.E.2d 490, 496 (1971). See also, People v. Carroll, ____ Ill. App.2d ____, 272 N.E.2d 822 (1971); People v. Franks, 108 Ill. App.2d 438, 247 N.E.2d 811 (1969); People v. Fort, 91 Ill. App.2d 212, 234 N.E.2d 384 (1968), cert den. 393 U.S. 1014; People v. Shinn, 5 Ill. App.3d 468, 283 N.E.2d 502 (1972).

Burden of Proof

To sustain a charge of resisting arrest, the prosecution must show that the defendant knowingly resisted performance of an authorized act by a person known to the defendant to be a peace officer acting within his official capacity. People v. Royer, 101 Ill. App.2d 44, 242 N.E.2d 288, 290 (1968).

Instructions

Refusal of an instruction on use of force in making arrest is proper where such an instruction is not accompanied by an instruction on use of force in defense of person. People v. Shinn, 5 Ill. App.3d 468, 283 N.E.2d 502 (1972).

94-3-109. Execution Of Death Sentence.

A public servant who, in the exercise of his official duty, puts a person to death pursuant to a sentence of a court of competent jurisdiction, is justified if he acts in accordance with the sentence pronounced and the law prescribing the procedure for execution of a death sentence.

Historical Note

Enacted: M.C.C. 1973, § 94-3-109, Sec. 1, Ch. 513 Laws of Montana 1973

Source: Ill.C.C. 1961, Title 38, § 7-10

Prior Law: R.C.M. 1947, § 94-2512, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

This section preserves the former Montana provision listed above. The wording is identical to the Illinois source.

Revised Criminal Law Commission Comment

L. Elison

This section states an obvious aspect of justification for homicide. It is included for the sake of completeness, and because it is one of the more commonly described statutory instances of justification. This section is intended to state the essentials of the present provision in language similar to that of the other sections of this chapter. However, in view of the deliberate nature of the homicide, the explicit legal instructions concerning the execution and the much more relaxed time element involved in an execution as compared with self-defense, arrest, or escape, no need exists for recognizing a reasonable but mistaken belief of the executioner as to his authority for or method of performing his duty.

Cross References

R.C.M. 1947, § 95-2302
R.C.M. 1947, § 95-2206.1

Library References

Homicide Key No. 104
C.J.S. Homicide, § 106, 137

94-3-110. Compulsion.

A person is not guilty of an offense, other than an offense punishable with death, by reason of conduct which he performs under the compulsion of threat or menace of the imminent infliction of death or serious bodily harm, if he reasonably

believes that death or serious bodily harm will be inflicted upon him if he does not perform such conduct.

Historical Note

Enacted:	M.C.C. 1973, § 94-3-110, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Ill.C.C. 1961, Title 38, § 7-11
Prior Law:	None

Annotator's Note

J. Guthals

The wording for this section is substantially similar to the first paragraph of the Illinois source. The meaning of the section is explained fully below.

Revised Criminal Law Commission Comment

L. Elison

Compulsion, coercion, or duress is another long-recognized basis for finding a person not guilty of an offense charged, although his conduct appears to be within the definition of the offense. The justification does not extend to action under threat of damage to property, or of injury less than serious bodily harm or even of death or serious bodily harm which is not imminent; but the person's reasonable fear of imminent death or serious bodily harm if mistaken, is within the principle. (See 1 Bishop on Criminal Law (9th ed.), § 346 to 348.)

This established type of formulation has been criticized. However, to broaden the defense to accord completely with the "free will" theory would be to invite routine contentions of some kind of pressure, such as "threats of harm to property, reputation, health, general safety, and to acts done under the orders," with accompanying assertion of individual personality weakness. (Newman and Weitzer, supra at 334. Prof. Wharton, after stating the established restrictions upon the defense, comments:

> 'It would be a most dangerous rule if a defendant could shield himself from prosecution for crime by merely setting up a fear from or because of threat of a third person.' (1 Wharton's Criminal Law (19th ed.), § 384.)

Library References

Criminal Law Key No. 38
C.J.S. Criminal Law, § 44, 49

Law Review Commentaries

2 DePaul L. Rev. 245 (1953)
1951 Univ. of Ill. Law Forum 189
33 Chicago-Kent L. Rev. 278 (1955)

Notes of Decisions

In general

An alleged threat to a public official by his superiors that he would lose his position if he did not cooperate with state's attorney's office was ruled not to constitute compulsion sufficient to provide a defense for official's false testimony. People v. Ricker, 45 Ill.2d 562, 262 N.E.2d 456, 460 (1970). See also, People v. Lightning, 83 Ill. App.2d 430, 228 N.E.2d 104 (1967).

94-3-111. Entrapment.

A person is not guilty of an offense if his conduct is incited or induced by a public servant, or his agent for the purpose of obtaining evidence for the prosecution of such person. However, this section is inapplicable if a public servant or his agent, merely affords to such person the opportunity or facility for committing an offense in furtherance of criminal purpose which such person has originated.

Historical Note

Enacted: M.C.C. 1973, § 94-3-111, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill.C.C. 1961, Title 38, § 7-12

(3-27

Prior Law: None

Annotator's Note

J. Guthals

This section has been taken directly from the Illinois source. It should be noted that if the officer only affords the opportunity to commit the offense after the offender himself originated the criminal purpose, entrapment has not occurred.

Revised Criminal Law Commission Comment

L. Elison

The defense of entrapment generally follows the rule stated by the majority in Sorrell's case (see "The Doctrine of Entrapment and Its Application in Texas," 9 S.W.L.J. 456 (1955); Note, 28 N.Y.U. L. Rev. 1180 (1953)), recognizing three principal elements: (1) The idea of committing an offense originates, not with the suspect, but with the enforcement authorities, who (2) actively encourage the suspect to commit the offense, (3) for the purpose of obtaining evidence for his prosecution.

Most of the cases in which entrapment has been alleged involved a course of conduct, resulting apparently in repeated offenses of the same type or in a continuing offense, such as violation of the Medical Practice Act, illegal sale of liquor or narcotics or explosives, larceny, and ticket scalping.

Library References

Criminal Law Key No. 37
C.J.S. Criminal Law, § 45

Law Review Commentaries

31 U. Chicago L. Rev. 137 (1963)
1964 Univ. of Ill. Law Forum 821
13 De Paul L. Rev. 287 (1964)
3 De Paul L. Rev. 100 (1953)

In general

Entrapment is a valid defense for those instances in which police officers inspire, incite, persuade, or lure a defendant to commit a crime which he otherwise had no intention of perpetrating. People v. Toler, 24 Ill.2d 100, 185 N.E.2d 874, 875 (1962); People v. Gassaway, 65 Ill. App.2d 244, 212 N.E.2d 689 (1965); People v. McSmith, 178 N.E.2d 641, 23 Ill.2d 87 (1962); People v. Lewis, 26 Ill.2d 542, 187 N.E.2d 700 (1963). But, the law of entrapment distinguishes between trap for the unwary criminal and a trap set to ensnare the innocent and law abiding into committing a crime. People v. Gonzales, 125 Ill. App.2d 225, 260 N.E.2d. 234, 237 (1970); People v. Jackson, 116 Ill. App.2d 304, 253 N.E.2d 527, 531 (1969).

Elements of Entrapment

"Entrapment" exists where officers of the law have conceived and planned the commission of a criminal activity and thus have incited, induced, instigated or lured the accused in the commission of an offense which he had no prior intention of committing except for the persuasion of the entrapper. People v. Wright, 27 Ill.2d 557, 190 N.E.2d 318 (1963); People v. Lewis, 26 Ill.2d 542, 187 N.E.2d 700 (1963); People v. McSmith, 23 Ill.2d 87, 178 N.E.2d 641 (1962); People v. Strong, 21 Ill.2d 320, 172 N.E.2d 765 (1961); People v. Cazaux, 119 Ill. App.2d 11, 254 N.E.2d 797, 799 (1969); People v. Gassaway, 65 Ill. App.2d 244, 212 N.E.2d 689, 692 (1965); People v. Cash, 26 Ill.2d 595, 188 N.E.2d 20, cert. den. 374 U.S. 813 (1968); People v. Hall, 25 Ill.2d 297, 185 N.E.2d 143, 145 (1962); U.S. v. Millpax, Inc., 313 F2d 152, 156 (7th Cir. 1963). Thus, entrapment exists only when criminal intent originates in the mind of the entrapping officer and the accused otherwise had no criminal intent. People v. Dollen, 2 Ill. App.3d 567, 275 N.E.2d 446, 449 (1971); People v. Clay, 32 Ill.2d 608, 210 N.E.2d 221, 222 (1965). But, there is no entrapment where law enforcement officers merely provide an opportunity for the commission of a crime by one who is already so predisposed and in such cases it is proper for the police to use artifices to catch criminals. People v. McCloskey, 2 Ill. App.3d 892, 270 N.E.2d 126, supp. 274 N.E.2d 358 (1971); People v. Johnson, 66 Ill. App.2d 465, 214 N.E.2d 354 (1966); People v. Morgan, 98 Ill. App.2d 435, 240 N.E.2d 286 (1968); People v. Clay, 32 Ill.2d 608, 210 N.E.2d 221 (1965); People v. McSmith, 23 Ill.2d 87, 178 N.E.2d 641 (1962). An appeal to sympathy and friendship, without the necessary elements of culpability, does not constitute entrapment. People v. Washington, 81 Ill. App.2d 162, 225 N.E.2d 673 (1967), cert. den. 390 U.S. 991; People v. Hatch, 49 Ill. App.2d 177, 199 N.E.2d 81, 85 (1964); People v. Luna, 69 Ill. App.2d 291, 216 N.E.2d 473 (1966), rev. on other grounds 37 Ill.2d 299, 226 N.E.2d 586.

For application of the general principles stated above, attention is directed to the following additional cases: narcotics--

People v. Hall, 25 Ill.2d 297, 185 N.E.2d 143, 145 (1962); People v. Brown, 95 Ill. App.2d 66, 238 N.E.2d 102, 104 (1968); People v. Toler, 26 Ill.2d 100, 185 N.E.2d 874, 875 (1962); People v. Wells, 25 Ill.2d 146, 182 N.E.2d 689 (1962); unlicensed professional practice--People ex rel. Ill. State Dental Soc. v. Taylor, 131 Ill. App.2d 492, 268 N.E.2d 463 (1971); gambling--People v. Hornstein, 64 Ill. App.2d 319, 211 N.E.2d 756 (1965); unauthorized sale of liquor--Roberts v. Illinois Liquor Control Commission, 58 Ill. App.2d 171, 206 N.E.2d 799, 803 (1965).

Intent as negating entrapment

The defense of entrapment is not available to one who has the intention and design to commit a criminal offense and who does commit the offense merely because a law officer for the purpose of securing evidence has afforded such a person the opportunity to commit the act. People v. Gassaway, 65 Ill. App.2d 244, 212 N.E.2d 689 (1965); People v. Gonzales, 125 Ill. App.2d 225, 260 N.E.2d 234 (1970); People v. Johnson, 66 Ill. App.2d 465, 214 N.E.2d 354 (1966); People v. Outten, 13 Ill.2d 21, 147 N.E.2d 284 (1958); People v. Wells, 25 Ill.2d 146, 182 N.E.2d 689 (1962); People v. McSmith, 23 Ill.2d 87, 178 N.E.2d 641, 642 (1962).

Denial of offense

The defense of entrapment is incompatible with a claim that the defendant did not commit the acts with which he is charged. People v. Banks, 103 Ill. App.2d 180, 243 N.E.2d 669, 673 (1968); People v. Morgan, 98 Ill. App.2d 435, 240 N.E.2d 286 (1968); People v. Washington, 81 Ill. App.2d 162, 225 N.E.2d 673 (1967), cert. den. 390 U.S. 991; People v. Lewis, 80 Ill. App.2d 101, 224 N.E.2d 647 (1967).

Sufficiency and admissibility of evidence

In determining whether there has been entrapment of defendant, the court should consider both the conduct of law enforcement officials and evidence regarding the defendant's predisposition and criminal design to commit the crime involved. People v. Lewis, 26 Ill.2d 542, 187 N.E.2d 700, 701 (1963); People v. Gonzales, 125 Ill. App.2d 225, 260 N.E.2d 234, 237 (1970). Thus, in a prosecution for unlawful sale of narcotics, evidence that defendants were ready to make quick sale, negated defense of entrapment. People v. Gonzales, supra. Similarly, evidence that the defendant was able to supply illegal drugs within a matter of hours defeated the defense of entrapment. People v. McSmith, 23 Ill.2d 87, 178 N.E.2d 641, 645 (1962).

Instructions

If any evidence exists in support of entrapment theory, defendant is entitled to instruction thereon. People v. Luna, 69 Ill. App.2d 291, 216 N.E.2d 473 (1966), rev. on other grounds 37 Ill.2d 299, 226 N.E.2d 586. See also, People v. Cash, 26 Ill.2d 595, 188

N.E.2d 20, 21 (1963); People v. Jackson, 116 Ill. App.2d 304, 253 N.E.2d 527, 532 (1969).

Review

Entrapment is an affirmative defense which may not be raised for the first time on appeal. People v. Lewis, 80 Ill. App.2d 101, 224 N.E.2d 647 (1967); People v. Morgan, 98 Ill. App.2d 435, 240 N.E.2d 286 (1968); People v. Johnson, 66 Ill. App.2d 465, 214 N.E.2d 354 (1966); People v. Redding, 28 Ill.2d 305, 192 N.E.2d 341 (1963). See also, U.S. ex. rel. Hall v. People of State of Illinois, 329 F.2d 354 (7th Cir. 1964), cert. den. 379 U.S. 391.

(117)

94-3-112. Affirmative Defense.

A defense of justifiable use of force, based on the provisions of this chapter is an affirmative defense.

Historical Note

Enacted: M.C.C. 1973, § 94-3-112, Sec. 1, Ch. 513, Laws of Montana, 1973

Source: Ill.C.C. 1961, Title 38, § 7-14

Prior Law: None

Annotator's Note

J. Guthals

Montana law requires that the prosecution prove the defendant guilty of each element of the offense charged beyond all reasonable doubt. R.C.M. 1947, § 95-2901 (renumbered from § 94-7203). But, the prosecution is not required to negate in the first instance all possible defenses which might be raised by the defendant. After the prosecution has developed a prima facie case, the defense has the burden of going forward with evidence to raise doubt as to the defendant's guilt. The amount of evidence which the defendant must submit in raising an affirmative defense is not stated in this section. It seems clear, however, that while even a slight amount of evidence can raise a defense in a particular case (People v. Raber, 131 Ill. App.2d 813 , 264 N.E.2d 274 (1971), the defendant's evidence, to be of value, must be sufficient to create a reasonable doubt of his guilt in the minds of the jurors. Montana law on the burden of raising and sustaining an affirmative defense has centered almost exclusively around R.C.M. 1947, § 94-7212, repealed, Sec. 32, Ch. 513, Laws of Montana 1973, a statute applicable to murder prosecutions. There is no reason to believe, however, that the rule of law interpreting that section is confined merely to murder cases. In State v. Fisher, 23 Mont. 540, 546, 59 P. 919 (1900), the court discussed the section in terms of "...the application of recognized principles of law to the evidence." This case and others such as State v. Peel, 23 Mont. 358, 59 P. 168 (1899); State v. Felker, 27 Mont. 451, 71 P. 668 (1903); State v. Crean, 43 Mont. 47, 114 P. 603 (1911); and State v. Powell, 54 Mont. 217, 169 P. 46 (1917) make it clear that all affirmative defenses, including alibi, insanity and justification must (1) be raised by the defendant and (2) be supported by a sufficient quantity and quality of evidence to raise a reasonable doubt. Of course, the burden of persuasion never shifts from the prosecution, although the burden of going forward may change frequently. Thus, when an

affirmative defense is raised, the prosecution must treat that defense as it would any element of the offense and overcome it by proof establishing guilt beyond a reasonable doubt. Note however, that the Montana Code of Criminal Procedure enacted in 1967 obligates the defendant to prove the affirmative defense of mental disease or defect (insanity) by a preponderance of the evidence. The wording for this section has been taken directly from the Illinois source. While the Illinois cases interpreting this section may differ slightly in terminology from Montana decisions, in actuality there is little, if any, substantive difference between the approaches taken by the two jurisdictions. Compare State v. Powell, supra, with People v. Williams, 56 Ill. App.2d 159, 205 N.E.2d 749 (1965). It should be noted, however, that Montana has not adopted Ill.C.C. 1961, Title 38, § 3-2 which sets forth the Illinois theory on affirmative defenses.

Cross References

R.C.M. 1947, § 95-2901

Library References

Assault and Battery Key NO. 82
Criminal Law Key No. 330
Homicide Key No. 151(3)
C.J.S. Assault and Battery, § 114
C.J.S. Crim. Law, § 573
C.J.S. Homicide, § 195

Notes of Decisions

Burden of proof

In order to use an affirmative defense, such as self-defense, after the prosecution has sustained its burden of proving a prima facie case, the defendant bears the burden (under prior statute, R.C.M. 1947, § 94-7212) of furnishing sufficient evidence to raise a reasonable doubt as to his guilt. State v. Powell, 54 Mont. 217, 220, 169 P. 46 (1917). However, the burden of proof is never shifted upon the defendant to disprove the facts of the crime with which he is charged. State v. Halk, 49 Mont. 173, 175, 141 P. 149 (1914). Once affirmative defense is interposed by the introduction of "some evidence," burden of proving guilt beyond a reasonable doubt as to such an issue, as well as other necessary elements of offense, is on the state. People v. Graham, 2 Ill. App.3d 1022, 279 N.E.2d 41, 43 (1971); People v. Adams, 113 Ill. App.2d 205, 252 N.E.2d 35 (1969). See also, State v. Moorman, 133 Mont. 148, 321 P.2d 236, 238 (1957).

When defense is raised

Self-defense was held not to be placed at issue until raised by direct testimony of defendant during trial. State v. Logan, 156 Mont. 48, 65, 473 P.2d 833 (1970).

Sufficiency and admissibility of evidence

Statements and testimony indicating defendant's predisposition and other circumstances surrounding the use of force in self-defense are admissible and relevant in establishing the validity of such an affirmative defense. See, for example, People v. Sylvester, 70 Ill. App.2d 200, 217 N.E.2d 110, 111 (1966); People v. Herron, 125 Ill. App.2d 18, 260 N.E.2d 428, 430 (1970); People v. Honey, 69 Ill. App.2d 429, 217 N.E.2d 371, 373 (1966).

CHAPTER 4: INCHOATE OFFENSES.

94-4-101. Solicitation.

(1) A person commits the offense of solicitation when, with the purpose that an offense be committed, he commands, encourages or facilitates the commission of that offense.

(2) A person convicted of soliciation shall be punished not to exceed the maximum provided for the offense solicited.

Historical Note

Enacted: M.C.C. 1973, § 94-4-101, Sec. 1, Ch. 513, Laws of Montana 1973.

Source: Ill.C.C. 1961, Title 38, § 8-1

Prior Law: None

Annotator's Note

M. Sehestedt

The purpose of this section is to render criminal conduct evidencing a criminal design or purpose which falls short of either conspiracy or attempt. The significant change from the Illinois source is the substitution of "facilitates" for "requests" as an alternative element in the offense. The effect of this change would appear to be a broadening of the types of conduct which are included in the offense of solicitation. Solicitation remains distinct from attempt in that it punishes conduct which because of lack of proximity in time cannot be punished as an attempt. It is also distinct from conspiracy in that solicitation renders criminal both attempting to enlist co-conspirators and an agreement to commit an offense even when no overt act has taken place. It should also be noted that since this section completely defines the offense, the general definition of solicitation (§94-2-101(57)) is inapplicable.

Revised Criminal Law Commission Comment

L. Elison

Solicitation was not a separate statutory offense under the old code. It seems desirable to include solicitation as an offense in the traditional triad of inchoate offenses as other states have done. In all cases the actor must have the requisite "purpose" of "promoting or facilitating" commission of

an offense.

Subsection (2) provides the same maximum penalty for solicitation as may be imposed for the principal offense solicited.

Cross References

Offense defined, see M.C.C. 1973, § 94-2-101(37)
Purpose defined, see M.C.C. 1973, § 94-2-101(53)

Law Review Commentaries

31 U. Chicago L. Rev. 137 (1963)

Library References

Criminal Law Key No. 45
C.J.S. Criminal Law, § 73, 78

Notes of Decisions

Construction and application

Under this section solicitation is a separate and distinct crime, punishable and chargeable as such. Thus, acquittal of charges of murder and attempted murder were ruled not to operate as a bar to later conviction under charges of solicitation. People v. Hairston, 46 Ill.2d 348, 263 N.E.2d 840 (1970) cert. den. 402 U.S. 972.

Double Jeopardy

Because solicitation is a separate offense, double jeopardy concepts cannot be employed to relieve a defendant who is acquitted on charges of a principal offense of consequences arising from his conviction of solicitation. People v. Hairston, 46 Ill.2d 348, 263 N.E.2d 840 (1970) cert. den. 402 U.S. 972.

94-4-102. Conspiracy.

(1) A person commits the offense of conspiracy when, with the purpose that an offense be committed, he agrees with another to the commission of that offense. No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement has been committed by him or by a coconspirator.

(2) It shall not be a defense to conspiracy that the person or persons with whom the accused has conspired:

(a) has not been prosecuted or convicted; or

(b) has been convicted of a different offense; or

(c) is not amenable to justice; or

(d) has been acquitted; or

(e) lacked the capacity to commit the offense.

(3) A person convicted of the offense of conspiracy shall be punished not to exceed the maximum sentence provided for the offense which is the object of the conspiracy.

Historical Note

Enacted:	M.C.C. 1973, § 94-4-102, Sec. 1, Ch. 513, Laws of Montana 1973.
Source:	Ill.C.C. 1961, Title 38, § 8-2.
Prior Law:	R.C.M. 1947, § 94-1101, 94-7211, repealed by Sec. 32, Ch. 513, Laws of Montana 1973.

Annotator's Note

M. Sehestedt

This section is drawn almost verbatim from the Illinois statute defining conspiracy and represents an expansion of prior law to include combination for the commission of any offense. The purpose of this section is to render criminal any combination which has the purpose of committing an offense and which has

proceeded so far that an action in furtherance of the commission of the offense has been taken by one member of the combination. Section (1) also eliminates the old rule which excepts from the conspiracy statutes crimes which by their very nature require more than one person for their commission. Section (2) retains the current rule that legal incapacity or other procedural bar to the prosecution of a co-conspirator will not provide a defense (see State v. Alton, 139 Mont. 479, 365 P.2d 527) and eliminates the technical defense that requires the acquittal of a conspirator following a finding that his co-conspirators are not guilty of conspiracy.

Summary of Revised Criminal Law Commission Comment

M. Sehestedt

The purpose element in conspiracy differs from the purpose element in the offense which is the object of the conspiracy. The purpose element in the offense of conspiracy is two-fold in that there must be (1) a purpose to agree, and (2) the agreement must be accomplished with a purpose that the offense which is the object of the agreement be committed.

The committee has expressly rejected the technical defense which requires at least two guilty parties and requires acquittal of a conspirator following the acquittal of his co-conspirators. Similarly the so-called "Wharton Rule," which excepts from conspiracy, offenses which by their very nature require the agreement of two or more persons, has been expressly rejected and any agreement with the purpose of committing an offense has been rendered criminal. The commission has continued present law by refusing an accused the defense of his co-conspirator's legal incapacity or privilege.

Cross References

Act defined, see M.C.C. 1973, § 94-2-101(1)
Offense defined, see M.C.C. 1973, § 94-2-101(37)
Purpose defined, see M.C.C. 1973, § 94-2-101(53)
Accountability for the conduct of another, M.C.C. 1973, § 94-2-107

Law Review Commentaries

14 De Paul L. Rev. 138 (1964)
43 Chicago Bar Rc. 123 (1961)

Library References

Conspiracy Key No. 23 et. seq.
C.J.S. Conspiracy Sec. 34, 35, 47, 54, 59, 60, 62
Am.Jur.2d Conspiracy Sec. 1 et. seq.

Notes of Decisions

Elements of Offense

"Conspiracy" has been defined as the confederacy of two or more persons to accomplish an unlawful purpose. People v. Brinn, 32 Ill.2d 232, 204 N.E.2d 724 (1965) cert. den. 382 U.S. 827. A person commits "conspiracy" when, with the intent that the principal offense be committed, he agrees with another to commit that offense and he or a co-conspirator commits an act in furtherance of the conspiracy. People v. Hoffmann, 124 Ill. App.2d 192, 260 N.E.2d 351 (1970). To constitute conspiracy the state must show criminal intent between two or more persons to accomplish an unlawful result. Worden v. State Police Merit Bd., 30 Ill. App.2d 323, 174 N.E.2d 407 (1961). Although intent to commit conspiracy is a matter of fact and cannot be implied as a matter of law, criminal intent may be shown by circumstantial evidence. People v. Perry, 23 Ill.2d 147, 177 N.E.2d 323 (1961) cert. den. 369 U.S. 868. Common design is the essence of a conspiracy. But, it is not necessary to prove such design by direct evidence of an agreement between the co-conspirators. The state need only show that conspiractors pursued a course tending toward accomplishment of the offense upon which the complaint is based. People v. Perry, supra. See also, People v. Gates, 29 Ill.2d 586, 195 N.E.2d 161 (1964); People v. Edwards, 74 Ill. App.2d 225, 219 N.E.2d 382 (1966). Of course, the crime of conspiracy does not require that the contemplated offense actually be completed, and since conspiracy is a separate and distinct crime, persons who conspire to commit unlawful acts may be convicted notwithstanding the fact that the contemplated offense was actually completed, since conspiracy to commit a crime does not merge into the principal crime itself. People v. DeStefano, 85 Ill. App.2d 274, 229 N.E.2d 325 (1967) cert. den. 390 U.S. 997; People v. Brouillette, 92 Ill. App.2d 168, 236 N.E.2d 12 (1968). See also, People v. Hansen, 28 Ill.2d 322, 192 N.E.2d 359 (1963).

Persons Liable

Once a conspiracy is entered into, each co-conspirator then becomes liable for the acts of his other co-conspirators done in furtherance of the object of the conspiracy. People v. Olivier, 279 N.E.2d 363, App. 1972; People v. McGuire, 29 Ill. App.2d 117, 172 N.E.2d 523 (1961); People v. Kroll, 4 Ill. App.3d 203, 280 N.E.2d 528 (1972); People v. Hall, 38 Ill.2d 308, 231 N.E.2d 416 (1967).

Indictment and Information

An indictment for conspiracy need not allege all of the elements of the substantive offense which is the object of the conspiracy. People v. Williams, 52 Ill.2d 455, 288 N.E.2d 406 (1972). The indictment need only designate the felony intended to be committed by such description as will apprise the defendant of the exact charge upon which he will be tried. People v. Peppas, 24 Ill.2d 483, 182 N.E.2d 228 (1962). Accord, People v. Radford, 81 Ill. App.2d 417, 226 N.E.2d 472 (1967).

Limitations

Every act in furtherance of a conspiratorial agreement is a renewal of the conspiracy, and the statute of limitations begins to run from the date of the commission of the last overt act. People v. Isaacs, 37 Ill.2d 205, 226 N.E.2d 38 (1967).

Proof of Conspiracy

Direct evidence of an agreement between conspirators is unnecessary to prove a common design. The state need only show the conspirators pursued a course tending toward accomplishment of the object of the conspiracy. People v. Graham, 1 Ill. App.3d 749, 274 N.E.2d 370 (1971). The proof of acts in furtherance of a common design may be drawn from circumstances surrounding the commission of the act by the group and need not be supported by evidence of an express agreement between the parties. People v. Richardson, 270 N.E.2d 568, App. 1971; People v. Chandler, 78 Ill. App.2d 397, 223 N.E.2d 259 (1966); People v. Edwards, 74 Ill. App.2d 225, 219 N.E.2d 382 (1966). The state need prove only one overt act in carrying out a conspiracy to support a conviction of conspiracy. People v. Kroll, 4 Ill. App.3d 203, 280 N.E.2d 528 (1972). See also, People v. Sarelli, 34 Ill. App.2d 380, 180 N.E.2d 722 (1962).

Admissibility and Sufficiency of Evidence

Because it is difficult to acquire direct evidence with regard to a conspiracy, it has been held that great latitude should be granted to the trial court in assessing the admissibility of circumstantial evidence when such evidence is offered to establish factors pointing towards involvement in a conspiratorial agreement. People v. Bravos, 114 Ill. App.2d 298, 252 N.E.2d 776 (1969) cert. den. 397 U.S. 919. Thus, it has been held that evidence taken from one co-conspirator is admissible against his co-conspirators. People v. Babitsch, 82 Ill. App.2d 299, 226 N.E.2d 469 (1967). Similarly, it is permissible to prove conspiracy by showing common actions of two defendants. People v. Savage, 84 Ill. App.2d 73, 228 N.E.2d 215 (1967). However, a conspiracy cannot be shown by evidence of a mere relationship or transaction between the parties. People v. Gates, 29 Ill.2d 586, 195 N.E.2d 161 (1964). And only such declarations as may fairly be said to be in furtherance of the conspiracy are admissible as declarations of the co-conspirator. People v. Hal, 25 Ill.2d 577, 185 N.E.2d 680 (1962). See also, People v. Olivier, _____ Ill. _____,

279 N.E.2d 363 (1972); People v. Trigg, 97 Ill. App.2d 291, 240 N.E.2d 130 (1968); People v. Edwards, 74 Ill. App.2d 225, 219 N.E.2d 382 (1966).

Co-conspirators--Effect of Acquittal

A co-conspirator may be found guilty of a crime committed by his fellow conspirator whether or not the fellow conspirator is dead or alive, competent or incompetent at the time of his trial. State v. Alton, 139 Mont. 479, 365 P.2d 527 (1961).

Questions for Jury

Whether or not certain conduct constitutes a conspiracy is generally a question of fact for the jury to consider. People v. Gallegos, 80 Ill. App.2d 105, 224 N.E.2d 631 (1967). See also, People v. Brinn, 32 Ill.2d 232, 204 N.E.2d 724 (1965) cert. den. 382 U.S. 827.

94-4-103. Attempt.

(1) A person commits the offense of attempt when, with the purpose to commit a specific offense, he does any act toward the commission of such offense.

(2) It shall not be a defense to a charge of attempt that because of a misapprehension of the circumstances it would have been impossible for the accused to commit the offense attempted.

(3) A person convicted of the offense of attempt shall be punished not to exceed the maximum provided for the offense attempted.

(4) A person shall not be liable under this section, if under circumstances manifesting a voluntary and complete renunciation of his criminal purpose, he avoided the commission of the offense attempted by abandoning his criminal effort.

(5) Proof of the completed offense does not bar conviction for the attempt.

Historical Note

Enacted:	M.C.C. 1973, § 94-4-103 by Sec. 1, Ch. 513, Laws of Montana 1973.
Source:	R.C.M. 1947, § 94-4710 and R.C.M. 1947, § 94-4711.
Prior Law:	R.C.M. 1947, §§ 94-4710, 94-4711 repealed by Sec. 32, Ch. 513, Laws of Montana 1973.

Annotator's Note

M. Sehestedt

The purpose of this section is to punish conduct which, while not representing a completed offense is undertaken with the purpose of committing a specific offense. It should be noted, however, that in accordance with present law even though the evidence shows the crime was completed, a conviction for attempt is proper (State v. Benson, 91 Mont. 21, 25, 5 P.2d 223) and

that attempt is an "included offense" for purposes of the "Double Jeopardy" statute.

To convict there must be a showing of "purpose to commit a specific offense" and of "any act toward the commission." It would seem that the "act toward the commission" must, as was the rule at common law, be in the nature of a perpetrating act and not merely "preparation" for the commission of an offense.

Section (2) establishes the general rule that factual or legal impossibility provides no defense to attempt and supercedes the current Montana rule enunciated in State v. Porter, 125 Mont. 503, 242 P.2d 503.

Section (4) continues present law and indicates that a complete and voluntary renunciation which avoids the commission of the offense will be a defense to attempt.

Summarized Criminal Law Commission Comment

M. Sehestedt

The statute includes many of the existing concepts of criminal attempt and is intended to replace all of the special attempt sections in the old code.

Cross References

Purpose defined, see M.C.C. 1973, § 94-2-101(53)
Offense defined, see M.C.C. 1973, § 94-2-101(37).

Library References

Criminal Law Key No. 44, § 1208(7)
C.J.S. Criminal Law, §§ 73, 75-77, 1987

Notes of Decisions

In general

To support a conviction for attempt there must be proof of a "purpose to commit a specific offense." In applying this rule, the Montana Supreme Court has held that evidence that the defendant had solicited the commission of the offense six days before its commission, was too remote to supply the basis for an inference of the specific intent required. State v. Hanson, 49 Mont. 361, 368, 141 P. 669 (1914). One charged with an attempt to commit a crime may be convicted even though the evidence shows that the crime has been completed. State v. Benson, 91 Mont. 21, 5 P.2d 223 (1931).

CHAPTER 5: OFFENSES AGAINST THE PERSON.

Part One: Homicide.

94-5-101. Criminal Homicide.

(1) A person commits the offense of criminal homicide if he purposely, knowingly or negligently causes the death of another human being.

(2) Criminal homicide is deliberate homicide, mitigated deliberate homicide, or negligent homicide.

Historical Note

Enacted:	M.C.C. 1973, § 94-5-101, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	M.P.C. 1962, § 210.1(1)
Prior Law:	R.C.M. 1947, § 94-2501, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

The sections covering Criminal Homicide replace the traditional crimes of murder in the first and second degree and voluntary and involuntary manslaughter. Under former law, these offenses had become encumbered with interpretations and words of art which had caused constant difficulty for the courts. Consequently, the Criminal Law Commission has avoided any reference to former terminology and has adopted an entirely new approach to Homicide. The wording for subsection (1) of this section which lists the mental states required for culpability has been taken directly from the Model Penal Code. See M.C.C. 1973, § 94-2-101 for definitions of these mental states. Subsection (2), setting forth the offenses which constitute Criminal Homicide, has been patterned after the Model Penal Code. However, a major change in this section and the following sections from the source material is the elimination in the Montana Code of the traditional names for the Homicide offenses.

Revised Criminal Law Commission Comment

L. Elison

The Criminal Homicide section represents a complete departure from former Montana law especially with regard to the concept of

"malice aforethought." In an effort to eliminate this unsatisfactory terminology, the varying degrees of criminal homicide are differentiated by use of terms "deliberate homicide," "mitigated deliberate homicide" and "negligent homicide." This serves two purposes. First, these terms are more descriptive of the conduct proscribed. Second, judges, jurors and attorneys will not be misled as to the weight of prior law construing instructions on murder and manslaughter.

The language used attempts to isolate the character of the offender's conduct and to differentiate the offenses according to the differing elements of that conduct. It is clear, for example, that causing death purposely, knowingly or negligently must, in the absence of justification, establish criminality. This section also eliminates the traditional distinction between first and second degree murder, deriving from the Pennsylvania reform of 1794, under which the determinants of capital or potentially capital murder are deliberate and premeditated purpose to kill, or specific felony-murders. Part One, on Homicide, in this regard includes the following features: (1) the exclusion from the capital class of certain murders where a clear ground of mitigation is established; (2) a specification of aggravating circumstances, at least one of which must be established before a capital sentence is possible; (3) a final determination by the court as to the existence of mitigating circumstances.

There is no requirement that death must occur within any stated period of time. Time will be limited only by the need to prove a causal relation between conduct and the resulting death. (See M.C.C. 1973, § 94-2-105.)

Cross References

Purposely defined, M.C.C. 1973, § 94-2-101(53)
Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Negligently defined, M.C.C. 1973, § 94-2-101(32)
Causal relationships, M.C.C. 1973, § 94-2-105

Library References

Homicide Key No. 7
C.J.S. Homicide, § 13

94-5-102. Deliberate Homicide.

(1) Except as provided in section 94-5-103 (1) (a), criminal homicide constitutes deliberate homicide if:

(a) it is committed purposely or knowingly; or

(b) it is committed while the offender is engaged in or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual intercourse without consent, arson, burglary, kidnapping, felonious escape or any other felony which involves the use or threat of physical force or violence against any individual.

(2) A person convicted of the offense of deliberate homicide shall be punished by death as provided in section 94-5-105, or by imprisonment in the state prison for any term not to exceed one hundred (100) years.

Historical Note

Enacted:	M.C.C. 1973, § 94-5-102, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	M.P.C. 1962, § 210.2
Prior Law:	R.C.M. 1947, §§ 94-2501, 94-2502, 94-2503, 94-2504, 94-2505, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

This section on Deliberate Homicide encompasses the former offenses of first degree and second degree murder. Under former law, murder was defined as the unlawful killing of a human being with malice aforethought. First degree murder required the element of premeditation; while second degree murder was any other type of murder without premeditation. The new Code eliminates all references to malice, employing instead the more precisely defined mental states of "knowingly" and "purposely." Purposely, as defined in M.C.C. 1973, § 94-2-101(53) is the most culpable mental state and implies an objective or design to engage in certain conduct, although not particularly toward some ultimate

result. Knowingly, M.C.C. 1973, § 94-2-101(28), refers to a state of mind in which a person acts, while not toward a certain objective, at least with full knowledge of relevant facts and circumstances. Together, these terms replace the concepts of malice and intent. Premeditation, the distinguishing factor between first degree and second degree murder, has presented a continuing definitional problem for the courts. Many states require that the offender have had some time to think and reflect about the nature of his forthcoming act before premeditation can be said to have occurred. Montana, in State v. Palen, 119 Mont. 600, 17 P.2d 862 (1947), held that premeditation and deliberation can be formed in an instant; thus, in effect, eliminating the traditional distinction between first degree and second degree murder. See 12 Mont. L. Rev. 72 (1951). Under the new Code, premeditation is no longer an element of homicide, nor is there any delineation between degrees of murder. Subsection (b) of this section sets forth the felony-murder rule but broadens that rule (see R.C.M. 1947, § 94-2503, repealed, Sec. 32, Ch. 513, Laws of Montana 1973) by including within those acts in which deliberation is presumed all forcible felonies not specifically enumerated. Attention is directed toward the definition of "felony" in M.C.C. 1973, § 94-2-101(15) which allows classification of offenses by potential sentence for trial purposes.

Subsection (2) of this section, which provides that a person convicted of deliberate homicide shall suffer death or be imprisoned for any period up to 100 years expands the sentencing latitude of the court and completes the task of encompassing the two former degrees of murder which under prior law had different sentencing requirements. The wording for this section has been adapted with considerable change from the Model Penal Code with the intention of removing any similarities to the traditional elements of murder.

Cross References

Purposely defined, M.C.C. 1973, § 94-2-101(53)
Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Causal relationships, M.C.C. 1973, § 94-2-105
Felony defined, M.C.C. 1973, § 94-2-101(15)
Robbery, M.C.C. 1973, § 94-5-401
Sexual intercourse without consent, M.C.C. 1973, § 94-5-503
Arson, M.C.C. 1973, § 94-6-104
Burglary, M.C.C. 1973, § 94-6-204
Kidnapping, M.C.C. 1973, § 94-5-302
Felonious escape, M.C.C. 1973, § 94-7-306
Burden in Homicide Trial, R.C.M. 1947, § 94-3004

Library References

Homicide Key Nos. 7, 8, 12, 13
C.J.S. Homicide, § 1, et. seq.

94-5-103. Mitigated Deliberate Homicide.

(1) Criminal homicide constitutes mitigated deliberate homicide when a homicide which would otherwise be deliberate homicide is committed under the influence of extreme mental or emotional stress for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a reasonable person in the actor's situation.

(2) A person convicted of mitigated deliberate homicide shall be imprisoned in the state prison for any term not to exceed forty (40) years.

Historical Note

Enacted:	M.C.C. 1973, § 94-5-103, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	M.P.C. 1962, § 210.3
Prior Law:	R.C.M. 1947, § 94-2507(1) repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

This section replaces the former offense of voluntary manslaughter. Traditionally, voluntary manslaughter has been defined as the unlawful killing of a human being without malice upon sudden quarrel or in the heat of passion. The crime customarily applied to cases in which the actor killed intentionally but because he did so in the heat of passion could not be said to have deliberated his act. This section continues the coverage of former law by finding guilt for Mitigated Deliberate Homicide where the actor has killed knowingly or purposely (defined in § 94-2-101) but in which mitigating circumstances in the form of extreme emotional distress can be shown. The section follows former law additionally by providing both a lesser included offense for deliberate homicide when mitigating evidence is presented by the defense and a principal offense when the prosecution has conclusive evidence of mitigation before the trial. The section seeks, however, to avoid many of the definitional

problems which pervaded the traditional approach to manslaughter by eliminating the terms "malice," "heat of passion," "sudden provocation," and by changing the title of the offense. It should be noted that the factor of mitigation is not an element which the prosecution must prove but is a defense which the defendant must raise. The wording for this section has been adapted from the Model Penal Code.

Cross References

Criminal Homicide, M.C.C. 1973, § 94-5-101
Deliberate Homicide, M.C.C. 1973, § 94-5-102

Library References

Homicide Key No. 31
C.J.S. Homicide, §§ 37, 39, 40, 43, 44

94-5-104. Negligent Homicide.

(1) Criminal homicide constitutes negligent homicide when it is committed negligently.

(2) A person convicted of negligent homicide shall be imprisoned in the state prison for any term not to exceed ten (10) years.

Historical Note

Enacted:	M.C.C. 1973, § 94-5-104, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	M.P.C. 1962, § 210.4
Prior Law:	R.C.M. 1947, § 94-2507(2), repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

This section on Negligent Homicide replaces the offense of Involuntary Manslaughter which was defined as the unlawful killing of a human being without malice, in the commission of an unlawful act not amounting to a felony, or in the commission

(105)-1

of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. In interpreting this statute, many states including Montana required that for criminal liability to be imposed, the act must have been malum in se, bad in itself, rather than merely malum prohibitum. Montana solved the problem of determining when an act was malum in se by requiring the showing of criminal negligence in all cases. See State v. Powell, 114 Mont. 571, 138 P.2d 949 (1943); State v. Pankow, 134 Mont. 519, 333 P.2d 1017 (1959); State v. Bosch, 125 Mont. 566, 242 P.2d 477 (1952). It may be concluded, therefore, that this section is a codification of the approach taken by the Montana courts which equated involuntary manslaughter with criminal negligence. Of course, this section avoids the tortuous and confusing language of the former law and provides a simpler solution to such negligent homicides as motor vehicle deaths, hunting mishaps and death which results from professional malpractice. Negligence, as defined in § 94-2-101(32), requires that for culpability the homicidal risk be of such a nature and degree that to disregard it involves a "gross deviation" from the standard of conduct that a reasonable person would observe in the actor's situation. Clearly, if the evidence does not make out a case for criminal negligence, there is no reason for creating criminal liability for an event which is an unfortunate accident. By providing broad language, the section obviates the necessity of having numerous statutes to handle the different types of negligent homicides which occur. The language for this section is substantially similar to the Model Penal Code and as with the other sections on Criminal Homicide has been drafted in a manner designed to avoid all earlier distinctions and interpretations.

Cross References

Negligently defined, M.C.C. 1973, § 94-2-101(32)

Library References

Homicide Key No. 34
C.J.S. Homicide, §§ 55 et. seq.

94-5-105. Sentence Of Death For Deliberate Homicide.

(1) When a defendant is convicted of the offense of deliberate homicide the court shall impose a sentence of death in the following circumstances, unless there are mitigating circumstances:

(a) The deliberate homicide was committed by a person serving a sentance of imprisonment in the state prison; or

(b) The defendant was previously convicted of another deliberate homicide; or

(c) The victim of the deliberate homicide was a peace officer killed while performing his duty; or

(d) The deliberate homicide was committed by means of torture; or

(e) The deliberate homicide was committed by a person lying in wait or ambush; or

(f) The deliberate homicide was committed as a part of a scheme or operation which, if completed, would result in the death of more than one person.

Historical Note

Enacted:	M.C.C. 1973, § 94-5-105, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	New
Prior Law:	R.C.M. 1947, § 94-2505, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Revised Criminal Law Commission Comment

L. Elison

Section 94-5-105 is an attempt to satisfy apparently conflicting objectives: First, the electorate of Montana voted to retain the death penalty; and second, the U.S. Supreme Court in the case of Furman v. Georgia, 408 U.S. 238, held the Georgia and Texas capital punishment statutes unconstitutional. However, the case is composed of nine separate opinions, including four dissents and it is almost impossible to be certain as to the precise meaning of the decision. A best guess indicates that if any capital punishment statute is to achieve constitutional approval it must be both mandatory and specific. Section (1) purports to establish mandatory capital punishment by use of the term "shall." This is followed by a humanistic escape valve in the phrase, "unless there are mitigating circumstances."

The terms are apparently contradictory--but in fact, the mandatory language is subject to the exception and ultimately only a test case in the United States Supreme Court can ascertain the constitutionality of the provision.

The listed circumstances, (a) through (f) attempt to isolate the most objectionable and the most socially frightening forms of criminal homicide. These should be sufficiently specific to satisfy a majority of the United States Supreme Court as well as comprehensive enough to satisfy a majority of the Montana electorate.

Cross References

Deliberate Homicide, M.C.C. 1973, § 94-5-102

Library References

Homicide Key No. 354
C.J.S. Homicide, §§ 433-436

94-5-106. Aiding Or Soliciting Suicide.

(1) A person who purposely aids or solicits another to commit suicide, but such suicide does not occur commits the offense of aiding or soliciting suicide.

(2) A person convicted of the offense of aiding or soliciting a suicide shall be imprisoned in the state prison for any term not to exceed ten (10) years.

Historical Note

Enacted:	M.C.C. 1973, § 94-5-106, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	New
Prior Law:	R.C.M. 1947, § 94-35-215, repealed Sec. 32, Ch. 513, Laws of Montana 1973

(102)-2

Annotator's Note

J. Guthals

This section makes it a felony to aid or solicit a suicide attempt which does not result in the death of the victim. Under the new sections on Causal Relationship Between--Conduct and Result, M.C.C. 1973, § 94-2-105, and Accountability, M.C.C. 1973, § 94-2-107(1), a person may be convicted of Criminal Homicide, M.C.C. 1973, § 94-5-101, for causing another to commit suicide--notwithstanding the consent of the victim. The reason for making aiding or soliciting suicide a separate offense is that such an act indicates a low and dangerous disregard for human life.

Cross References

Purposely defined, M.C.C. 1973, § 94-2-101(53)
Causal relationships, M.C.C. 1973, § 94-2-105
Accountability, M.C.C. 1973, § 94-2-107(1)
Criminal Homicide, M.C.C. 1973, § 94-5-101

Library References

Suicide Key No. 3
C.J.S. Suicide, § 3
C.J.S. Homicide, § 150

94-5-201. Assault.

(1) A person commits the offense of assault if he:

(a) purposely or knowingly causes bodily injury to another; or

(b) negligently causes bodily injury to another with a weapon; or

(c) purposely or knowingly makes physical contact of an insulting or provoking nature with any individual; or

(d) purposely or knowingly causes reasonable apprehension of bodily injury in another. The purpose to cause reasonable apprehension or the knowledge that reasonable apprehension would be caused shall be presumed in any case in which a person knowingly points a firearm at or in the direction of another whether or not the offender believes the firearm to be loaded.

(2) A person convicted of assault shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

Historical Note

Enacted:	M.C.C. 1973, § 94-5-201, by Sec. 1, Ch. 513, Laws of Montana 1973.
Source:	M.P.C., § 211.1
Prior Law:	R.C.M. 1947, § 94-603, repealed by Sec. 32, Ch. 513, Laws of Montana 1973.

Annotator's Note

M. Sehestedt

This is the simple assault section of the new criminal code. As such it replaces the prior law of simple assault contained in R.C.M. 1947, § 94-603. This section represents a change from prior law in that it specifically enumerates the elements of the offense rather than relying on a common law definition of assault limited only by the exclusion of conduct assigned to the

more serious forms of assault.

This provision differs from prior law in a number of substantive particulars. Actual physical contact or "battery" is required as an element of the offense except under subsection (d) and the apprehension which constitutes an element of the offense under that subsection is an apprehension of bodily injury, not mere apprehension of physical contact. Similarly, state of mind is made an explicit element of the offense with knowledge or purpose required under subsections (a), (c) and (d) and negligence required under subsection (b). Another significant change is the addition of the presumption that knowingly pointing a firearm at another is either with the purpose of creating reasonable apprehension of bodily injury or with the knowledge that reasonable apprehension of bodily injury will result.

Cross References

Bodily injury defined, M.C.C. 1973, § 94-2-101(5)
Knowledge defined, M.C.C. 1973, § 94-2-101(28)
Purpose defined, M.C.C. 1973, § 94-2-101(53)
Negligence defined, M.C.C. 1973, § 94-2-101(32)
Weapon defined, M.C.C. 1973, § 94-2-101(66)

Library References

Assault and Battery Key No. 47 et. seq.
C.J.S. Assault and Battery, Sec. 57-72.

94-5-202. Aggravated Assault.

(1) A person commits the offense of aggravated assault if he purposely or knowingly causes:

(a) serious bodily injury to another; or

(b) bodily injury to another with a weapon; or

(c) reasonable apprehension of serious bodily injury in another by use of a weapon; or

(d) bodily injury to a peace officer.

(2) A person convicted of aggravated assault shall be imprisoned in the state prison for any term not to exceed twenty (20) years.

Historical Note

Enacted:	M.C.C. 1973, § 94-5-202 by Sec. 1, Ch. 513, Laws of Montana 1973
Source:	M.P.C., Sec. 211.1(2)
Prior Law:	R.C.M. 1947, § 94-601 and R.C.M. 1947, § 94-602 repealed by Sec. 32, Ch. 513, Laws of Montana 1973.

Annotator's Note

M. Sehestedt

This section of the new criminal code deals with the more serious forms of assault. As such it replaces the old crimes of First Degree Assault (R.C.M. 1947, § 94-601) and Second Degree Assault (R.C.M., § 94-602). This section requires that the acts be done with purpose or knowledge. In all but subsection (1)(c) an actual physical contact or "battery" is a required element and in subsection (1)(c) the required element is a reasonable apprehension of serious bodily injury caused by use of a weapon. The aggravating factor which distinguishes each of these from simple assault is, respectively, the infliction of serious bodily injury as opposed to mere bodily injury, the use of a weapon to inflict the bodily injury, or the fact that the bodily injury is inflicted on a peace officer. In subsection (1)(c) the aggravating factor is that the apprehension is of serious bodily injury rather than mere bodily injury and that the apprehension is caused by the use of a weapon. It should be noted in this context that the use of any weapon, a length of pipe

as well as the more obvious firearm, is sufficient aggravation to invoke the heavier penalties of this section if bodily injury or a reasonable apprehension of serious bodily injury results.

Revised Criminal Law Commission Comment

L. Elison

This section covers assaults committed under circumstances of aggravation. The elements of assault generally must be present in addition to the aggravating factor of causing serious bodily injury with purpose or knowledge. It should be noted that the crime of battery is merged within the assault provisions by direct reference to bodily injury and serious bodily injury in § 94-5-202(1)(a), (b) and (d). Classical assault in the tort sense is included in § 94-5-202(1)(c).

Cross References

Bodily injury defined, M.C.C. 1973, § 94-2-101(5)
Serious bodily injury defined, M.C.C. 1973, § 94-2-101(54)
Knowledge defined, M.C.C. 1973, § 94-2-101(28)
Purpose defined, M.C.C. 1973, § 94-2-101(53)
Weapon defined, M.C.C. 1973, § 94-2-101(66)

Library References

Assault and Battery Key No. 47 et. seq.
Homicide, Key No. 84
C.J.S. Assault and Battery, Sec. 57-72
C.J.S. Homicide, Sec. 73, 74, 85, 84.

(101)

94-5-203. Intimidation.

(1) A person commits the offense of intimidation when, with the purpose to cause another to perform or to omit the performance of any act, he communicates to another a threat to perform without lawful authority any of the following acts:

(a) inflict physical harm on the person threatened or any other person or on property; or

(b) subject any person to physical confinement or restraint; or

(c) commit any criminal offense; or

(d) accuse any person of an offense; or

(e) expose any person to hatred, contempt, or ridicule; or

(f) take action as a public official against anyone or anything or withhold official action, or cause such action or withholding.

(2) A person commits the offense of intimidation if he knowingly communicates a threat or false report of a pending fire, explosion, or disaster which would endanger life or property.

(3) A person convicted of the offense of intimidation shall be imprisoned in the state prison for any term not to exceed ten (10) years.

Historical Note

Enacted:	M.C.C. 1973, § 94-5-203 by Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Ill.C.C. 1961, Title 38, § 12-6
Prior Law:	None

Annotator's Note

M. Sehestedt

Subsection (1) of this section is drawn almost verbatim from Ill. C.C. 1961, Title 38, § 12-6, while subsection (2) is new.

Subsection (1) defines and prohibits as intimidation a wide range of acts and conduct. To constitute the offense of intimidation under subsection (1) there must be the purpose to cause another to perform "or omit the performance" of any act and the threat must be "communicated" with that purpose. Further, it is also required that act threatened, if performed, would be "without lawful authority." This section is anticipatory in that it contemplates apprehension of the malefactor before the harm threatened occurs. If the threatened harm has occured, it would seem that intimidation is not necessarily a lesser included offense, thus the offender could be subject to both the penalty for intimidation and the penalty for the actual offense.

Subsection (2) deals with the problem of terroristic threats. To constitute an offense under this subsection there must be a "knowing" communication of a threat or false report of fire, explosion, or disaster. This subsection differs from subsection (1) in that there need be no showing of attempt to influence the acts of another, mere knowing communication of a threat or false report is sufficient to complete the offense. Accordingly this subsection reaches such diverse acts as turning in a false fire alarm or threatening to bomb an airliner or public building.

It should be noted the statutory definition of "threat" (§ 94-2-101(63)) is inapplicable to this section since the term as there defined includes various communications that are substantive elements of this offense. Because of the range of conduct dealt with by these two subsections the maximum sentence is relatively harsh to provide adequate punishment for the more severe forms of conduct covered, but since there is no minimum the judge is able to fix the penalty to suit the crime.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Purpose defined, M.C.C. 1973, § 94-2-101(53)
Offense defined, M.C.C. 1973, § 94-2-101(37)

Library References

Threats Key No. 1 et seq.
C.J.S. Threats and Unlawful Communication § 1 et seq.

Notes of Decisions

Validity

In ruling on the constitutionality of this section, a three-judge U.S. district court has held that sub-section (1)(c) making it an offense to threaten to commit any "criminal offense" is an over broad restriction on freedom of speech and is invalid. The remainder of this statute was held not to deny substantive due process and was therefore upheld as valid. Landry v. Daley, 280 F. Supp. 938 (D.C. 1968), probable jurisdiction noted 89 S.Ct. 442, 393 U.S. 974, appeal dismissed, 393 U.S.220, reversed on other grounds (1971).

Part Three: Kidnapping.

94-5-301. Unlawful Restraint.

(1) A person commits the offense of unlawful restraint if he knowingly or purposely and without lawful authority restrains another so as to interfere substantially with his liberty.

(2) A person convicted of the offense of unlawful restraint shall be fined not to exceed five hundred dollars ($500), or be imprisoned in the county jail for any term not to exceed six (6) months or both.

Historical Note

Enacted:	M.C.C. 1973, § 94-5-301, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	M.P.C. 1962, § 212.3
Prior Law:	R.C.M. 1947, § 94-3576, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

Under this part of Chapter 5, the kidnapping related offenses are arranged in a hierarchy with overlapping provisions to allow a comprehensive treatment of these crimes. Unlawful restraint is the lowest form of interference with the liberty of another. Under this section, which replaces the former crime of False Imprisonment, any intentional interference with another's freedom of movement without lawful authority, even a temporary detention, by which the victim is deprived of his liberty is prohibited. Because false imprisonment is more commonly thought of as a tort, the offense has been renamed. Additional changes from the former law include the use of the mental states "knowingly" and "purposely" (M.C.C. 1973, § 94-2-101) for a previously undefined mental state and a reduction in penalty. The phrase "without lawful authority" is included to prevent peace officers from being punished for performing their official duties. The language for this section has been adopted from the Model Penal Code.

(302)

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Purposely defined, M.C.C. 1973, § 94-2-101(53)

Library References

False Imprisonment Key No. 43
C.J.S. False Imprisonment § 71

94-5-302. Kidnapping.

(1) A person commits the offense of kidnapping if he knowingly or purposely and without lawful authority restrains another person by either secreting or holding him in a place of isolation, or by using or threatening to use physical force.

(2) A person convicted of the offense of kidnapping shall be imprisoned in the state prison for any term not to exceed ten (10) years.

Historical Note

Enacted:	M.C.C. 1973, § 94-5-302, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	New
Prior Law:	R.C.M. 1947, §§ 94-2601, 94-2602, 94-2603, 94-2604, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

In drafting this section on kidnapping the Criminal Law Commission examined the approaches which have been taken by other jurisdictions. Most codes, such as the Illinois Criminal Code and the Model Penal Code, contain several categories of kidnapping related offenses each pertaining to carefully detailed statements of the circumstances required for each offense. Such a detailed approach, however, leads to difficulty in treating cases in which classic kidnapping has not occurred, but in which the abduction

has certainly been criminal in nature. Consequently the offenses of Kidnapping and Unlawful Restraint have been given broad definitions designed to encompass any conceivable type of abduction or unlawful detention. Where the character of the conduct is thought too ambiguous or less culpable, leniency may be expressed in the imposition of sentence, which is given a broad range under the new Code. One problem that this section and the following provision on Aggravated Kidnapping seek to solve is the treatment of prisoners who hold hostages during escape or for coercive purposes. Because former law required the victim to be "secretly confined" before a kidnapping charge was possible, the courts were forced to use tortuous logic to apply the kidnapping statute to such conduct. The legislature reacted by passing R.C.M. 1947, § 94-2604 providing a separate crime for such conduct. The final clause of subsection (1), therefore, covers such "hostage" situations where the victim is openly held by providing criminal liability whenever force or threat of force has occurred. It should be noted that there is an overlap between this subsection and subsection (a) of the provision on aggravated kidnapping to allow the punishment of offenders who use hostages under different types of factual situations and degrees of culpability. The clause "holding him in a place of isolation" in this section on kidnapping conforms with prior law by providing that a showing of actual violence or threat of injury is not required when the victim has been isolated. See State v. Walker, 139 Mont. 276, 362 P.2d 548, 550 (1961). Attention is directed to the difference between kidnapping which requires either isolation or use of forceful restraint and Unlawful Restraint (M.C.C. 1973, § 94-5-301) which is a lesser offense requiring only unlawful detention.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Purposely defined, M.C.C. 1973, § 94-2-101(53)

Library References

Criminal Law Key No. 112(1)
Kidnapping Key No. 1
C.J.S. Kidnapping § 2
C.J.S. Crim. Law § 177

94-5-303. Aggravated Kidnapping.

(1) A person commits the offense of aggravated kidnapping if he knowingly or purposely and without lawful authority restrains another person by either secreting or holding him in a place of isolation, or by using or threatening to use physical force, with any of the following purposes:

(a) to hold for ransom or reward, or as a shield or hostage; or

(b) to facilitate commission of any felony or flight thereafter; or

(c) to inflict bodily injury on or to terrorize the victim or another; or

(d) to interfere with the performance of any governmental or political function; or

(e) to hold another in a condition of involuntary servitude.

(2) A person convicted of the offense of aggravated kidnapping shall be punished by death as provided in section 94-5-304, or be imprisoned in the state prison for any term not to exceed one hundred (100) years unless he has voluntarily released the victim, alive, in a safe place, and not suffering from serious bodily injury, in which event he shall be imprisoned in the state prison for any term not to exceed ten (10) years.

Historical Note

Enacted:	M.C.C. 1973, § 94-5-303, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	M.P.C. 1962, § 212.1
Prior Law:	R.C.M. 1947, § 94-2601 et seq., repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

This section on Aggravated Kidnapping enumerates those situations when the crime of kidnapping may be punished by lengthy prison sentences or by death. The crimes of Kidnapping and Unlawful Restraint, supra, are the lesser included offenses within the Kidnapping hierarchy and provide flexibility in punishing behavior which is often factually diverse and difficult to categorize. This section covers both the classic form of kidnapping wherein the victim is abducted and held for ransom as well as the increasingly common situations where a person is held against his will to coerce the accomplishment of some illegal act.

Subsection (2) seeks to maximize the kidnapper's incentive to return the victim alive by providing a much more lenient sentence if the victim is released alive, in a safe place, and not suffering from serious bodily injury. If these conditions are not met the maximum penalty may be imposed--death if the victim has been killed or up to 100 years imprisonment if death has not occurred.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Purposely defined, M.C.C. 1973, § 94-2-101(53)
Unlawful Restraint, M.C.C. 1973, § 94-5-301
Kidnapping, M.C.C. 1973, § 94-5-302
Sentence of death, M.C.C. 1973, § 94-5-304

94-5-304. Sentence Of Death For Aggravated Kidnapping.

A court shall impose the sentence of death following conviction of aggravated kidnapping if it finds that the victim is dead as the result of the criminal conduct unless there are mitigating circumstances.

Historical Note

Enacted: M.C.C. 1973, § 94-5-304, Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: R.C.M. 1947, § 94-2505, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

This section which sets forth the instances in which the death sentence is to be given for kidnapping parallels section 94-5-105 which lists the general provisions for application of capital punishment. Under § 94-5-303, above, punishments up to 10 years in the penitentiary may be given to kidnappers whose victims are returned alive and who have been released in accordance with the other provisions of that chapter. If the victim is killed as a result of the kidnapping, the death sentence is mandatory under this provision, unless there are mitigating circumstances. Although the section's language may appear contradictory it attempts to harmonize the recent Supreme Court decision of Furman v. Georgia, 408 U.S. 238 (1973) and the recent Montana vote favoring capital punishment.

Cross References

Aggravated Kidnapping, M.C.C. 1973, § 94-5-303
Causal Relationship, M.C.C. 1973, § 94-2-105
Sentence and Judgment, R.C.M. 1947, § 95-2201 et seq.
Sentence of Death, M.C.C. 1973, § 94-5-105

94-5-305. Custodial Interference.

(1) A person commits the offense of custodial interference if, knowing that he has no legal right to do so, he takes, entices or withholds from lawful custody any child, incompetent person, or other person entrusted by authority of law to the custody of another person or institution.

(2) A person convicted of the offense of custodial interference shall be imprisoned in the state prison for any term not to exceed ten (10) years. A person does not commit an offense under this section if he voluntarily returns such person to lawful custody prior to trial.

Historical Note

Enacted:	M.C.C. 1973, § 94-5-305, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	New
Prior Law:	R.C.M. 1947, § 94-2603, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

This section on Custodial Interference provides criminal liability for the abduction of a child or incompetent person in the custody of an institution or person where the offender has knowledge that he has no legal right to have custody of the person. Both the situation in which two parents are fighting for custody of a child and the situation where an individual committed to an institution is taken are covered by this provision. The clause "knowing that he has no legal right to do so" is equivalent to a general mental state of "knowingly" as provided in M.C.C. 1973, § 94-2-101(28). Subsection (2) allows the conduct to be excused if the person taken is returned before the trial for the offense commences. See the Comment below for further discussion of this section.

Revised Criminal Law Commission Comment

L. Elison

Violation of lawful custody, especially of children, requires special legislation notwithstanding its similarity in some respects to kidnapping. The interest protected is not freedom from physical danger or terrorization by abduction, since that is adequately covered by sections 94-5-302 and 94-5-303, supra, but rather the maintenance of parental custody against all unlawful interruption, even when the child is a willing, undeceived participant in the attack on the parental interest. The problem is further distinguishable from kidnapping by the fact that the offender will often be a parent or other person favorably disposed toward the child. One should be especially cautious in providing penal sanctions applicable to estranged parents struggling over the custody of their children, since such situations are better regulated by custody orders enforced through contempt proceedings. Despite these distinctive aspects of child-stealing and the existence of special provisions on the subject in most jurisdictions, the problem is frequently covered by kidnapping and the penalties and exceptions do not adequately reflect the special circumstances.

Cross References

Kidnapping, M.C.C. 1973, § 94-5-302
Aggravated Kidnapping, M.C.C. 1973, § 94-5-303
Knowingly defined, M.C.C. 1973, § 94-2-101(28)

Part Four: Robbery.

94-5-401. Robbery.

(1) A person commits the offense of robbery if, in the course of committing a theft, he:

(a) inflicts bodily injury upon another; or

(b) threatens to inflict bodily injury upon any person or purposely or knowingly puts any person in fear of immediate bodily injury; or

(c) commits or threatens immediately to commit any felony, other than theft.

(2) A person convicted of the offense of robbery shall be imprisoned in the state prison for any term not to exceed forty (40) years.

(3) "In the course of committing a theft" as used in this section includes acts which occur in an attempt to commit or in the commission of theft, or in flight after the attempt or commission.

Historical Note

Enacted:	M.C.C. 1973, § 94-5-401 by Sec. 1, Ch. 513, Laws of Montana 1973
Source:	M.P.C., Sec. 222.1
Prior Law:	R.C.M. 1947, § 94-4301 to 94-4303 repealed by Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

M. Sehestedt

The crime of robbery has always been treated as a "hybrid" offense against both person and property. Under the common law as previously codified in Montana, the crime required establishment of a number of rather technical elements constituting an offense against property in addition to the man-endangering

(0)-2

element of force or putting in fear. These elements were a "felonious taking," a taking with intent to steal of personal property in the possession of another, and the taking from the person or his immediate presence. The new section replaces these elements with the inclusive term "in the course of committing a theft" which is broadly defined by subsection (3) to include "acts which occur in an attempt to commit or the commission of theft, or in flight after the attempt or commission." This provision effectively eliminates the prior law's requirements that the offender succeed in taking the property, that the property be in the possession of the person robbed and that it be taken from his person or immediate presence. All that is required as an offense against property under the new code is that there be a theft or attempt to commit theft. The effect of these changes is to make the gravemen of robbery more clearly the threat to the person.

Prior law made the threat to the person element of robbery hinge on either the actual application of force or a putting in fear. The new code has retained both of these elements, although in a somewhat changed form. The new law requires that there be the infliction of bodily injury, or a threat to inflict bodily injury, or a knowing placing in fear of bodily injury, or the commission or threat of commission of any felony other than theft. These elements are in large measure objective since, with the exception of knowingly placing in fear, none depend on the victim's state of mind, rather all depend solely on the acts of the offender. The commission or threat to commit any other felony is an expansion of prior law and reflects the continued concern with the aggravating factors which justify the classification of robbery as a separate offense.

This section includes armed robbery and encompasses the use of a toy or unloaded gun to threaten serious injury.

Cross References

Bodily injury defined, M.C.C. 1973, § 94-2-101(5)
Felony defined, M.C.C. 1973, § 94-2-101(15)
Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Theft, M.C.C. 1973, § 94-6-302
Threaten defined, M.C.C. 1973, § 94-2-101(63)

Library References

Robbery Key Nos. 1, 7, 30
C.J.S. Robbery Sec. 1 et seq., 10, 51 et seq.

Part Five: Sexual Crimes.

94-5-501. Definitions.

In this part, unless a different meaning plainly is required, the definitions given in chapter 2, 94-2-101 apply.

Historical Note

Enacted: M.C.C. 1973, § 94-5-501, Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: None

Annotator's Note

J. Forsythe

This part of Chapter 5 dealing with Sexual Crimes focuses upon nonconsensual sexual activity between unmarried persons and sexual activity between persons of immature age (under 16), indecent exposure of the genitals, and deviate sexual conduct. "Deviate sexual relations" is defined at M.C.C. 1973, § 94-2-101(14). None of these offenses may be committed upon a spouse. All of the offenses, except Deviate Sexual Conduct, involve a likely physical or mental harm to a human victim. Also, all except Deviate Sexual Conduct were derived from the Model Penal Code (1961). The four substantive offenses in this part replace the following offenses in the old Code: § 94-4101, Rape; § 94-4106, Lewd and Lascivious Acts Upon Children; § 94-4118, Crime Against Nature; and § 94-3603, Indecent Exposures, Exhibitions, and Pictures.

There is no counterpart to the old crimes of seduction, adultery, and fornication, although such activities are still offenses if nonconsensual and involving other than one's spouse.

94-5-502. Sexual Assault.

(1) A person who knowingly subjects another not his spouse to any sexual contact without consent commits the offense of sexual assault.

(2) A person convicted of sexual assault shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the

county jail for any term not to exceed six (6) months.

(3) If the victim is less than sixteen (16) years old and the offender is three (3) or more years older than the victim, or if the offender inflicts bodily injury upon anyone in the course of committing sexual assault, he shall be imprisoned in the state prison for any term not to exceed twenty (20) years.

(4) An act "in the course of committing sexual assault" shall include an attempt to commit the offense or flight after the attempt or commission.

Historical Note

Enacted:	M.C.C. 1973, § 94-5-502, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	M.P.C. 1962, § 213.4
Prior Law:	None

Annotator's Note

J. Forsythe

This section provides sanctions for nonconsensual sexual contact which falls short of sexual intercourse. There is no counterpart under old law. The section deals with acts of sexual aggression which do not involve the element of "penetration" which is covered by M.C.C. 1973, § 94-5-503. The central terms are defined: sexual intercourse, § 94-2-101(56); sexual contact, § 94-5-101(55); and without consent, § 94-2-101(68). This offense may be committed by either a male or female.

Subsection (1) describes the substantive offense and provides that it must be done "knowingly," defined at § 94-2-101 (28). This requirement eliminates the possibility of prosecution for inadvertent or accidental touching. The definition of "without consent," supra, greatly limits the applicability of the section and precludes prosecution for elicited or solicited physical approaches which are subsequently found to be offensive. "Without consent," in addition to use of force or threat of force, includes the incapacity to give consent because the victim is physically helpless, under sixteen years old, or mentally defective or incapacitated. Mentally defective is defined at § 94-2-101(29); mentally incapacitated at § 94-2-101(30).

The definition of "sexual contact," supra, imposes the requirement of a physical touching. Further, such touching must be done with the purpose of sexual arousal or gratification. "Purpose" is defined at M.C.C. 1973, § 94-2-101(53).

Subsection (2) provides the lesser maximum penalty for the situation where the victim is over sixteen and has suffered no bodily injury.

The much more severe maximum penalty in subsection (3) is reserved for cases of infliction of "bodily injury," defined at § 94-2-101(5) and for cases where a male exploits a juvenile female three or more years younger than himself. This age differential protects any person less than sixteen years old from exploitation by anyone over eighteen years old whether or not force is used. If the offender is between the ages of sixteen and eighteen, he will ordinarily be subject to juvenile court jurisdiction. However, a child between these ages may be prosecuted in criminal court if he commits a forcible rape. R.C.M. 1947, § 10-602(2)(b). In no other cases will a person between the ages of sixteen and eighteen be subject to the greater penalty of this subsection. Thus this subsection applies to the adult male over eighteen who is three or more years older than the under sixteen year old female and to the male over sixteen years old who uses force in connection with an assault upon a female of any age.

Subsection (4) extends the applicability of the more severe penalty of subsection (3) by broadly defining the time period during which the infliction of bodily injury will cause that penalty to apply. Thus the offender may be subject to the more severe penalty whether or not the assault is completed by a touching and even if the bodily injury is inflicted subsequent to the commission of the offense or the attempt.

Summarized Criminal Law Commission Comment

J. Forsythe

The range of activity covered by this section extends from unauthorized fondling of a woman's breasts to homosexual manipulation of a boy's genitals. The old law did not differentiate sexual from other assault with the exception of assault in connection with rape or lewd and lascivious acts upon children. Several considerations favor the separate treatment of indecent assault within the sexual offense category: 1) protection of the young and immature from the sexual advances of older and more mature individuals, 2) societal concern with indecent assault focuses on the outrage, disgust, or shame engendered in the victim whether or not sexual intercourse has been accomplished, and 3) protection of the individual from forcible acts.

Although contact must be made with the victim it need not be contact between the offender and the victim. Thus one who subjects another to sexual contact with a third person commits the offense.

The rationale behind much heavier punishment of "lewd acts upon children" or statutory rape is victimization of immaturity. Consistent with the victimization rationale, an age differential of three years is required. Thus, a youth who had sexual contact with a fifteen year-old girl would have to be eighteen years or older before such act is a criminal event.

Cross References

Purposely defined, M.C.C. 1973, § 94-2-101(53)
Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Sexual contact defined, M.C.C. 1973, § 94-2-101(55)
Without consent defined, M.C.C. 1973, § 94-2-101(68) and § 94-5-506(3)
Bodily injury defined, M.C.C. 1973, § 94-2-101(5)
Mentally defective defined, M.C.C. 1973, § 94-2-101(29)
Mentally incapacitated defined, M.C.C. 1973, § 94-2-101(30)

Library References

Assault and Battery Key No. 96(5)
C.J.S. Assault and Battery, § 75

94-5-503. Sexual Intercourse Without Consent.

(1) A male person who knowingly has sexual intercourse without consent with a female not his spouse commits the offense of sexual intercourse without consent.

(2) A person convicted of sexual intercourse without consent shall be imprisoned in the state prison for any term not to exceed twenty (20) years.

(3) If the victim is less than sixteen (16) years old and the offender is three (3) or more years older than the victim, or if the offender inflicts bodily injury upon anyone in the course of committing sexual intercourse without consent, he shall be imprisoned in the state prison for any term not to exceed forty (40) years.

(4) An act "in the course of committing sexual intercourse without consent" shall include an attempt to commit the offense or flight after the attempt or commission.

Historical Note

Enacted: M.C.C. 1973, § 94-5-503, Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 213.0

Prior Law: R.C.M. 1947, § 94-4101, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Forsythe

This section provides sanctions against the sexual offender who goes beyond a touching and accomplishes at least a slight penetration of the vulva, anus, or mouth of the victim. The "slight penetration" requirement of R.C.M. 1947, § 94-4103 has been retained by incorporation in the definition of "sexual intercourse," M.C.C. 1973, § 94-2-101(56). The more serious effect this act has upon the victim justifies the increased severity of possible punishment.

The definition of "without consent," M.C.C. 1973, § 94-2-101(68), includes all but one of the situations in which the old offense of rape, found at R.C.M. 1947, § 94-4101, could be committed. It does not include submission by the victim under a false belief that the actor is her husband. "Without consent" includes incapacity to give legal consent because the victim is "mentally defective," defined at M.C.C. 1973, § 94-2-101(29), or "mentally incapacitated," defined at M.C.C. 1973, § 94-2-101 (30). The old Code attempted to describe the mental incapacity to give legal consent as "lunacy or other unsoundness of mind" and "unconsciousness of the nature of the act", but it did not define these terms. Another change from the old Code is that the age limit for statutory rape has been reduced from eighteen years to sixteen years. This change is consistent with the realities of a more sexually permissive society.

Revised Criminal Law Commission Comment

L. Elison

The section provides no age limit on the male offender, but § 94-2-109 and the juvenile law R.C.M. 1947, Chapter 10 provide jurisdictional limitations. Deviate forms of sexual intercourse

are included by definition (see R.C.M., 1947, § 94-2-101(56)) since these forms of sexual aggression are equally abhorrent. Sexual relations between married people are excluded. The section imposes an increased penalty if bodily injury occurs or there is a three or more year variation between the age of an under sixteen (16) year old victim and the actor.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Sexual Intercourse defined, M.C.C. 1973, § 94-2-101(56)
Without Consent defined, M.C.C. 1973, § 94-2-101(68) and § 94-5-506(3)
Mentally Defective defined, M.C.C. 1973, § 94-2-101(29)
Mentally Incapacitated defined, M.C.C. 1973, § 94-2-101(30)

Library References

Rape Key No. 1, 6, 9-13
C.J.S. Rape, § 1 et. seq.

94-5-504. Indecent Exposure.

(1) A person who, for the purpose of arousing or gratifying sexual desire of himself or of any person other than his spouse, exposes his genitals under circumstances in which he knows his conduct is likely to cause affront or alarm commits the offense of indecent exposure.

(2) A person convicted of the offense of indecent exposure shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

Historical Note

Enacted:	M.C.C. 1973, § 94-5-504, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	M.P.C. 1962, § 213.5
Prior Law:	R.C.M. 1947, § 94-3603, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

(3)-1

Summarized Criminal Law Commission Comment

J. Forsythe

The special case of genital exposure for sexual gratification is another type of sexual aggression. Display of one's genitals to anyone under the age of eighteen is also prohibited by the Obscenity statute, M.C.C. 1973, § 94-8-110(d). That offense does not require a purpose of sexual gratification, nor does it require knowledge in the actor of possible affront or alarm, as does this section.

This section is not meant to include "indecent" brevity of attire, but rather it is concerned with "lewdness" which requires an awareness of the likelihood of affronting observers. The acts prohibited by this section are often a threat of or prelude to overt sexual aggression.

Cross References

Obscenity, M.C.C. 1973, § 94-8-110
Purpose defined, M.C.C. 1973, § 94-2-101(53)
Causal Relationship, M.C.C. 1973, § 94-2-105

Library References

Obscenity Key Nos. 3, 6
C.J.S. Obscenity, § 5

94-5-505. Deviate Sexual Conduct.

(1) A person who knowingly engages in deviate sexual relations, or who causes another to engage in deviate sexual relations commits the offense of deviate sexual conduct.

(2) A person convicted of the offense of deviate sexual conduct shall be imprisoned in the state prison for any term not to exceed ten (10) years.

(3) A person convicted of deviate sexual conduct without consent shall be imprisoned in the state prison for any term not to exceed twenty (20) years.

Historical Note

Enacted: M.C.C. 1973, § 94-5-505, Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: R.C.M. 1947, § 94-4118, repealed, Sec. 1, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Forsythe

This section prohibits both bestiality and homosexuality. (See the definition of "deviate sexual relations," § 94-2-101(14).)

The common law crime of sodomy, embodied in R.C.M. 1947, § 94-4118, is replaced by this section and is far different from it. At common law sodomy required some penetration. By definition "deviate sexual relations" may consist of a "sexual contact," defined at M.C.C. 1973, § 94-2-101(55). "Sexual contact" requires only a touching and not a penetration. Thus this section prohibits a broader range of deviate sexual acts between persons of the same sex and between persons and animals than did the old law.

Revised Criminal Law Commission Comment

L. Elison

There has been a reduction in the penalty for this offense because it was felt that the severe penalty was more a product of revulsion than the social harm in fact committed. The Model Penal Code recommends that bestiality be made a misdemeanor. The Illinois Code contains no provision on the subject. Subsection (3) increases the penalty if the human victim participant in the bestiality or homosexuality acts without consent.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Deviate sexual relations defined, M.C.C. 1973, § 94-2-101(14)
Without consent defined, M.C.C. 1973, § 94-2-101(68) and § 94-5-506(3)
Sexual contact defined, M.C.C. 1973, § 94-2-101(55)

Library References

Sodomy Key No. 1
C.J.S. Sodomy, § 1 et seq.

94-5-506. Provisions Generally Applicable To Sexual Crimes (94-5-501 to 94-5-505).

(1) When criminality depends on the victim being less than sixteen (16) years old, it is a defense for the offender to prove that he reasonably believed the child to be above that age. Such belief shall not be deemed reasonable if the child is less than fourteen (14) years old.

(2) Whenever the definition of an offense excludes conduct with a spouse, the extension shall be deemed to extend to persons living as man and wife, regardless of the legal status of their relationship. The exclusion shall be inoperative as respects spouses living apart under a decree of judicial separation. Where the definition of an offense excludes conduct with a spouse, this shall not preclude conviction of a spouse in a sexual act which he or she causes another person, not within the exclusion, to perform.

(3) In a prosecution under the preceding sections on sexual crimes (94-5-502 to 94-5-504) in which the victim's lack of consent is based solely upon his incapacity to consent because he was mentally incapacitated, it is a defense to such prosecution that the victim was a voluntary social companion of the defendant, and the intoxicating substance was voluntarily and knowingly taken.

Historical Note

Enacted: M.C.C. 1973, § 94-5-506, Sec. 1, Ch. 513, Laws of Montana 1973

Source: The source of subparts (1) and (2) is M.P.C. 1962, § 213.6. Subpart (3) is new.

Prior Law: None

Annotator's Note

J. Forsythe

Subsection (1) represents a complete turnabout from prior law in Montana and elsewhere as to the effect of mistake of age upon liability for "statutory rape." The prevailing view has been that it has no effect and that there is absolute liability for carnal knowledge of the under-age girl. This is the case even where both her appearance and her positive statement indicated she was older than the age specified in the statute. State v. Duncan, 82 Mont. 170, 266 P. 400 (1928). The view adopted by this subsection is that an honest and reasonable belief in the existence of circumstances which, if true, would make the act an innocent one is a good defense. This view has been accepted by at least one court. People v. Hernandez, 39 Cal. Rptr. 361, 393 P.2d 673 (1964). There is still absolute liability if the child is less than fourteen (14) years.

Revised Criminal Law Commission Comment

L. Elison

This section rejects the concepts of "virtue," "chastity," and "good repute" as possible defenses in sex crimes, but does envision cases of precocious fourteen (14) year old girls and even very young prostitutes who might be the "victimizers," rather than the victims.

Subsection (2) precludes a prosecution for rape where the woman is living with the accused as his wife, regardless of the legal validity of their marital status. Nor is it possible to prosecute where the spouses have been living apart without benefit of a judicial order. There is the possibility of consent in the resumption of sexual relations, as well as the special danger of fabricated accusations.

Subsection (3) establishes that conditions affecting a woman's capacity to "control" herself sexually will not involve criminal liability if her own actions were voluntary in bringing about the result.

Cross References

Sexual Assault, M.C.C. 1973, § 94-5-502
Sexual Intercourse Without Consent, M.C.C. 1973, § 94-5-503
Indecent Exposure, M.C.C. 1973, § 94-5-505
Mentally incapacitated defined, M.C.C. 1973, § 94-2-101(30)
Without consent defined, M.C.C. 1973, § 94-2-101(68)
Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Intoxicating substance defined, M.C.C. 1973, § 94-2-101(25)

Library References

Rape Key Nos. 17 and 52
C.J.S., § 28

Part Six: Offenses Against The Family.

94-5-601. Definitions.

In this part, unless a different meaning plainly is required, the definitions given in chapter 2, 94-2-101 apply.

Historical Note

Enacted: M.C.C. 1973, § 94-5-601, Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: None

94-5-602. Prostitution.

(1) A person commits the offense of prostitution if such person:

(a) engages in or agrees or offers to engage in sexual intercourse with another person for compensation; or

(b) loiters in or within view of any public place for the purpose of being hired to engage in sexual intercourse.

(2) A person convicted of prostitution shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-5-602 by Sec. 1, Ch. 513, Laws of Montana 1973.

Source: None

Prior Law: R.C.M. 1974, § 94-3607 and 94-3610, repealed by Sec. 32, Ch. 513, Laws of Montana 1973.

Annotator's Note

M. Sehestedt

The purpose of this section is the control of all aspects of prostitution. In this it exceeds in scope the provisions of prior law which were directed only toward the public nuisance aspects of open solicitation and houses of ill fame. Thus subsection (1)(a) renders criminal professional prostitution carried on in private while subsection (1)(b) continues the old law in rendering criminal public solicitation for the purpose of prostitution. The offense remains a misdemeanor as it was under prior law.

Summarized Criminal Law Commission Comment

M. Sehestedt

The prior law reflects the common law concern with the public nuisance aspects of open solicitation. This view is at odds with the modern conception that prostitution, no matter how carried on, ought to be controlled. Accordingly subsection (1)(a) of the

new code reflects the position that private professional prostitution is criminal while subsection (1)(b) adopts the idea that prostitution should be controlled when it manifests itself in public solicitation. The penalty is a misdemeanor, the same as prior law.

Cross References

Public place defined, M.C.C. 1973, § 94-2-101(51)
Sexual intercourse defined, M.C.C. 1973, § 94-2-101(56)

Library References

Prostitution Key No. 1 et seq.
C.J.S. Prostitution Sec. 1, 2, 4

94-5-603. Promoting Prostitution.

(1) A person commits the offense of promoting prostitution if he purposely or knowingly commits any of the following acts:

(a) owns, controls, manages, supervises, resides in or otherwise keeps, alone or in association with others, a house of prostitution or a prostitution business; or

(b) procures an inmate for a house of prostitution or a place in a house of prostitution for one who would be an inmate; or

(c) encourages, induces, or otherwise purposely causes another to become or remain a prostitute; or

(d) solicits a person to patronize a prostitute; or

(e) procures a prostitute for a patron; or

(f) transports a person into or within this state with the purpose to promote that person's engaging in prostitution, or procures or pays for transportation with that purpose; or

(g) leases or otherwise permits a place controlled by the offender alone or in association with others, to be regularly used for prostitution or for the procurement of prostitution, or fails to make reasonable effort to abate such use by ejecting the tenant, notifying law enforcement authorities, or using other legally available means; or

(h) lives in whole or in part, upon the earnings of a person engaging in prostitution, unless the person is the prostitute's minor child or other legal dependent incapable of self support.

(2) A person commits the offense of aggravated promotion of prostitution if he purposely or knowingly commits any of the following acts:

(a) Compels another to engage in or promote prostitution.

(b) Promotes prostitution of a child under the age of eighteen (18) years, whether or not he is aware of the child's age.

(c) Promotes the prostitution of his wife, child, ward or any person for whose care, protection or support he is responsible.

(3) A person convicted of promoting prostitution shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both. A person convicted of aggravated promotion of prostitution shall be imprisoned in the state prison for any term not to exceed twenty (20) years.

(4) Evidence.

On the issue whether a place is a house of prostitution the following, in addition to all other admissible evidence, shall be admissible:

(a) Its general repute; the repute of the persons who reside in or frequent the place; or the frequency, timing and duration of visits by nonresidents.

(b) Testimony of a person against his spouse shall be admissible under this section.

Historical Note

Enacted:	M.C.C. 1973, § 94-5-603 by Sec. 1, Ch. 513, Laws of Montana 1973
Source:	New
Prior Law:	R.C.M. 1947, § 94-3607, 94-3610, 94-3608, 94-4110, 94-4111, 94-4112, 94-4113, 94-4114, 94-4115, and 94-4117 repealed by Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

M. Sehestedt

The purpose of this section is the creation of a single comprehensive offense which includes various aspects of collaboration with, promotion of, or exploitation of prostitutes. In general this section is based on prior law. Subsection (1)(a) is drawn from prior sections 94-3607 and 94-3608. Subsections (1)(b) and (1)(c) replace prior sections 94-4110, 94-4111, 94-4112, 94-4113 and 94-4115 and continue the prior law prohibiting both procuring individuals for houses of prostitution and encouraging or causing prostitution. Subsection (1)(d) replaces and expands 94-3610. Subsection (1)(a) continues the old law contained in 94-4114 and expands it by eliminating the need to show the offender received payment. Subsection (f) is new and deals with problem of intrastate transportation of women for immoral purposes. Subsection (1)(g) adopts the principle of 94-3608 and makes a landlord criminally responsible for knowingly allowing the use of property for purposes of prostitution. It should be noted that liability is imposed only if the landlord acts purposely or knowingly and that the landlord is not placed under a duty to inquire or made criminally liable for a negligent failure to prevent the prohibited use. Subsection (1)(h) is drawn from 94-4117 and provides punishment for those who derive their livelihood from prostitution with the exception of helpless dependants. These offenses are now uniformly treated as misdemeanors which represents a reduction in some instances.

Subsection (2) indicates that if the promotion of prostitution occurs with specified aggravating circumstances the offense may be punished as a felony. The aggravating circumstances are use of compulsion in the promotion of prostitution, the prostitution of a child, or the prostitution of any dependant.

Subsection (4) adopts special rules allowing the introduction of evidence regarding general reputation of a place and the incriminating testimony of a spouse on the issue of whether or not a place is a house of prostitution.

Cross References

House of prostitution defined, M.C.C. 1973, § 94-2-101(21)
Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Inmate defined, M.C.C. 1973, § 94-2-101(24)
Prostitution, offense of, see M.C.C. 1973, § 94-5-502
Purposely defined, M.C.C. 1973, § 94-2-101(53)
Solicits defined, M.C.C. 1973, § 94-2-101(57)

Library References

Prostitution Key Nos. 1, 4
C.J.S. Prostitution Sec. 1, 2, 4

94-5-604. Bigamy.

(1) A person commits the offense of bigamy if, while married, he knowingly contracts or purports to contract another marriage, unless at the time of the subsequent marriage:

(a) the offender believes on reasonable grounds that the prior spouse is dead; or

(b) the offender and the prior spouse have been living apart for five (5) consecutive years throughout which the prior spouse was not known by the offender to be alive; or

(c) a court has entered a judgment purporting to terminate or annul any prior disqualifying marriage, and the offender does not know that judgment to be invalid; or

(d) the offender reasonably believes that he is legally eligible to remarry.

(2) A person convicted of bigamy shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

Historical Note

Enacted:	M.C.C. 1973, § 94-5-604, by Sec. 1, Ch. 513, Laws of Montana 1973
Source:	M.P.C., § 230.1
Prior Law:	R.C.M. 1947, § 94-701, 94-702 repealed by Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

M. Sehestedt

This section replaces 94-701, 94-702 and 94-703 and continues the prior policy of discouraging plural marriage. On its face the new law is somewhat broader than the prior provisions in that it applies to anyone who "contracts or purports to contract" another marriage while married, while the old law condemned anyone who "married" while having a husband or wife living. The expansion would, however, seem intended to work no substantive change

in current Montana law since State v. Crosby, 148 Mont. 307, 420 P.2d 431 established the Montana rule that a marriage will not be considered void for the purposes of bigamy unless it has been pronounced void, annulled or dissolved by a competent court. Accordingly under both old and new law an individual could be guilty of bigamy even though his first marriage was a legal nullity or there was some legal impediment (other than his own prior marriage) which rendered the subsequent marriage void.

Subsections (1)(a), (b), (c) and (d) set out the exceptions to the bigamy. Section 94-702(1) created a presumption of death after a 5-year absence without any indication that the prior spouse was still alive and 94-702(2) excepted those whose marriage had been dissolved by a court of competent jurisdiction. These exceptions have been continued by the new statute in subsections (1)(b) and (1)(c) respectively. In addition the new section adds as exceptions subsection (1)(a) which requires a reasonable belief in the death of the prior spouse and subsection (1)(d) which requires a reasonable belief in legal eligibility to remarry. The offense has also been reduced from a felony to a misdemeanor.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)

Library References

Bigamy Key No. 1, 2, 17
C.J.S. Bigamy, Sec. 1, 7, 23

94-5-605. Marrying A Bigamist.

(1) A person commits the offense of marrying a bigamist if he contracts or purports to contract a marriage with another knowing that the other is thereby committing bigamy.

(2) A person convicted of the offense of marrying a bigamist shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any period not to exceed six (6) months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-5-605 by Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: R.C.M. 1947, § 94-704 repealed by Sec. 32, Ch. 1, Laws of Montana 1973

Annotator's Note

M. Sehestedt

This section continues prior law by penalizing knowing participation in a bigamous marriage. This section is also apparently expanded in its coverage in that it applies to "contracting or purporting to contract" a marriage instead of the old section's "marries." The punishment has been reduced to a misdemeanor which should provide sufficient deterrent.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Bigamy offense of, M.C.C. 1973, § 94-5-604

Library References

Bigamy Key No. 1
C.J.S. Bigamy, §§ 1, 2, 4-6, 8

94-5-606. Incest.

(1) A person commits the offense of incest if he knowingly marries or cohabits or has sexual intercourse with an ancestor, a descendant, a brother or sister of the whole or half blood. "Cohabit" means to live together under the representation of being married. The relationships referred to herein include blood relationships without regard to legitimacy, and relationships of parent and child by adoption.

(2) A person convicted of incest shall be imprisoned in the state prison for any term not to exceed ten (10) years.

Historical Note

Enacted: M.C.C. 1973, § 94-5-606 by Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: R.C.M. 1947, § 94-705 repealed by Sec. 1, Ch. 513, Laws of Montana 1973

Annotator's Note

M. Sehestedt

While this section retains the basic purpose of prior law, it has restricted criminal incest to narrower limits than did the preceding incest statute. The old incest law could be interpreted only by reference to R.C.M. 1947, § 48-105 which indicated within which degrees of consanguinity marriages were incestous and void. The use of § 48-105 resulted in the inclusion in the old law of marriage, cohabitation and fornication with "parents and children, ancestors and descendants of every degree, and between brothers and sisters of half as well as the whole blood, and between nieces and uncles, and between aunts and nephews, and between first cousins." Under the new law this has been limited so that marriage, cohabitation and sexual intercourse with an "ancestor, a descendant, a brother, or sister of whole or half blood" are considered criminally incestous.

The penalty for incest has been retained at the same level.

Revised Criminal Law Commission Comment

L. Elison

This section is patterned after the Model Penal Code. The aunt-uncle-niece-nephew cases are excluded from the category of "felonious incest," in view of the severity of the penalty.

The marriage regulations of R.C.M. 1947, § 48-105 circumscribe marriage more strictly than the criminal incest law, but different considerations justify a more limited scope in criminal incest vis-a-vis a marriage contract. Relations between uncles and under-age nieces would be "Sexual Intercourse Without Consent." "Ancestor" and "descendant" include all persons in lineal ascent and descent from one body.

Cross References

Co-habits defined, M.C.C. 1973, § 94-2-101(6)
Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Sexual intercourse defined, M.C.C. 1973, § 94-2-101(56)

Library References

Incest Key Nos. 1, 5
C.J.S. Bigamy, §§ 1, 3

94-5-607. Endangering Welfare Of Children.

(1) A parent, guardian, or other person supervising the welfare of a child less than sixteen (16) years old commits the offense of endangering the welfare of children if he knowingly endangers the child's welfare by violating a duty of care, protection or support.

(2) A person convicted of endangering welfare of children shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

(3) Evidence. On the issue of whether there has been a violation of the duty of care, protection, and support, the following in addition to all other admissible evidence, shall be admissible: cruel treatment, abuse, infliction of unnecessary and cruel punishment, abandonment, neglect, lack of proper medical care, clothing, shelter and food; evidence of past bodily injury.

(4) The court may order, in its discretion, any fine levied or any bond forfeited upon a charge of endangering welfare of children paid to or for the benefit of the person or persons whose welfare the defendant has endangered.

Historical Note

Enacted:	M.C.C. 1973, § 94-5-607 by Sec. 1, Ch. 513, Laws of Montana 1973
Source:	New
Prior Law:	R.C.M. 1947, § 94-303, 94-304 and 94-306 repealed by Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

M. Sehestedt

The purpose of this section is the punishment of a limited

class of misbehavior by parents or guardians. This section expands the coverage of the criminal law in that any breach of duty owed to a child by his parent or guardian is made a criminal offense. Criminal sanctions are thus made applicable to situations which under prior law could be remedied only by the civil law. In this context it should be noted that this section is in a sense "quasi-civil" in that subsection (4) allows the court to use a criminal fine levied under this section to aid the wronged child.

This section is applicable to any act or omission by a parent or guardian which is in violation of a legal duty to a child. The duty can be created by either a civil or criminal statute or by the common law. It is applicable even though the legal duty which is breached does not itself carry with it a criminal penalty.

Subsection (3) adopts expanded rules for the admissibility of evidence which allow the introduction of evidence bearing not only on the violation charged but also on the general treatment of the child and the parents' course of conduct toward him.

Summary of Revised Criminal Law Commission Comment

M. Sehestedt

Although the commission recognizes that prosecution of parents will seldom be a constructive solution to intra-family problems, it seems worthwhile to retain a penal sanction for gross breach of parental responsibility. The age designation is arbitrary but consistent with the other provisions in the code intended to protect children.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)

Library References

Parent and Child, Key Nos. 3, 17
C.J.S. Parent and Child, §§ 1, 91 et seq.

94-5-608. Nonsupport.

(1) A person commits the offense of nonsupport if he fails to provide support which he can provide and which he knows he is legally obliged to provide to a spouse, child, or other dependent.

(2) A person commits the offense of aggravated nonsupport if:

(a) the offender has left the state to avoid the duty of support;

(b) the offender has been previously convicted of the offense of nonsupport.

(3) A person convicted of nonsupport shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both. A person convicted of aggravated nonsupport shall be imprisoned in the state prison for any term not to exceed ten (10) years.

(4) The court may order, in its discretion, any fine levied or any bond forfeited upon a charge of nonsupport paid to or for the benefit of person or persons that the defendant has failed to support.

Historical Note

Enacted: M.C.C. 1973, § 94-5-608 by Sec. 1, Ch. 513, Laws of Montana 1973.

Source: New

Prior Law: R.C.M. 1947, §§ 94-301, 94-304 repealed by Sec. 32, Ch. 513, Laws of Montana 1973.

Annotator's Note

M. Sehestedt

This section represents a change from prior law in that the criminal offense of non-support is limited to those situations in which the defendant fails to provide support which he knows he is legally obligated

to provide. Under old law an accused could be found guilty of non-support without showing that he knew he was legally obligated to provide support.

The purpose of this section remains the same as that of prior law, that is, the section is designed to enforce the support obligation rather than punish the offender. As under prior law there must be a showing that the accused has the ability to provide support. To further the enforcement of the support obligation the court is given the authority in subsection (4) to order any fine or forfeit be paid to or for the benefit of the persons to whom the accused owed the duty of support.

Another change from prior law is in the penalty for non-support. Under prior law non-support of a wife was a misdemeanor and non-support of children was a felony. Under this section both are misdemeanors unless the aggravating factors listed in subsection (2) are present, in which case non-support of either a wife or child is punishable as a felony.

Summary of Revised Criminal Law Commission Comment

M. Sehestedt

The purpose of this section is to compel performance of duty to support rather than to punish. Exemplary punishment is of doubtful efficacy in complex family situations, where many forces, both social and economic, may combine to excuse the behavior. The fact that non-support can be prosecuted lays the basis for intervention by the county attorney, who can thus provide legal aid to indigent families and coerce the accused's support of his family. While the Uniform Reciprocal Enforcement of Support Act offers a possible solution to the problem of enforcing the support obligations of individuals who flee to another state, the power of extradition is retained under the aggravating circumstances of subsection (2) in the event U.R.E.S.A. measures fail to compel the required support.

Cross References

Knows defined, M.C.C. 1973, § 94-2-101(28)

Library References

Husband and Wife Key No. 302
Parent and Child Key No. 17
C.J.S. Husband and Wife, §§ 631, 632, 634, 653, 655
C.J.S. Parent and Child, § 91 et seq.

94-5-609. Unlawful Transactions With Children.

(1) A person commits the offense of unlawful transactions with children if he knowingly:

(a) sells or gives explosives to a child under the age of majority except as authorized under appropriate city ordinances; or

(b) sells or gives intoxicating substances to a child under the age of majority; or

(c) being a junk dealer, pawnbroker or second hand dealer he receives or purchases goods from a child under the age of majority without authorization of the parent or guardian.

(2) A person convicted of the offense of unlawful transactions with children shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both. A person convicted of a second offense of unlawful transactions with children shall be fined not to exceed one thousand dollars ($1,000) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-5-609 by Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: R.C.M. 1947, § 94-35-106 to 94-35-106.2 and § 94-3702 repealed by Sec. 32, Ch. 513, Laws of Montana 1973. R.C.M. 1947, § 69-1902

Annotator's Note

M. Sehestedt

This section is essentially a recodification of certain statutes

on unlawful transactions with children. Although R.C.M. 1947, § 69-1902 was not repealed, subsection (1)(a) repeats the prohibition therein contained on the sale of explosives to individuals under the age of eighteen. The same subsection also adds a penalty for such a transaction thus filling a gap resulting from the apparently inadvertent repeal of the penalties section of Title 69, Chapter 19. The area covered by this subsection remains uncertain in the absence of an applicable statutory definition of the word explosives, but the exception which allows municipalities to permit, under appropriate ordinances, the sale of explosives to minors, suggests that the framers intended to include even fireworks within the section's coverage.

Subsection (1)(b) replaces R.C.M. 1947, § 94-35-106 and expands the prior law's prohibition on the sale or gift of intoxicating liquor to minors to include the sale or gift of any intoxicating substance. The term "intoxicating substance" is defined by M.C.C. 1973, § 94-2-101(28) to include both the alcoholic beverages described by R.C.M. 1947, § 94-35-107 and any other substance having an hallucinogenic, depressant, stimulating or narcotic effect.

Subsection (1)(c) reenacts the prohibition on the purchase or acceptance of property from minors by pawnbrokers, second-hand dealers and junk dealers contained in R.C.M. 1947, § 94-3704. This section also lowers the age limit on the prohibition to 18 from 21 in accordance with the Constitutional requirement in Art. II, Sec. 14.

Revised Criminal Law Commission Comment

L. Elison

This section is merely a recodification of a number of statutes on unlawful transactions with children. Other statutes relating to children were repealed. (See R.C.M. 1947, § 94-35-138, 94-35-137, and 94-35-208). The substance of still other statutes relating to children were placed elsewhere in the code.

Cross References

Age of majority defined, Mont. Const. Art. II, Sec. 14 (1973)
Intoxicating substance defined, M.C.C. 1973, § 94-2-101(25)
Knowingly defined, M.C.C. 1973, § 94-2-101(28)

Library References

Explosives Key Nos. 1-5
C.J.S. Explosives, §§ 1,2,3,6
Intoxicating Liquors Key Nos. 159, 242
C.J.S. Intoxicating Liquors, §§ 259, 380
Pawn Brokers and Money Lenders Key No. 11
C.J.S. Pawn Brokers, § 15

94-5-610. Unlawful Possession Of Intoxicating Substance By Children.

(1) A person who has not reached the age of majority commits the offense of possession of intoxicating substance if he knowingly has in his possession an intoxicating substance.

(2) A person convicted of the offense of possessing an intoxicating substance shall be fined not to exceed fifty dollars ($50) or be imprisoned in the county jail for any term not to exceed ten (10) days, or both.

Historical Note

Enacted:	M.C.C. 1973, § 94-5-610 by Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Substantially the same as R.C.M. 1947, § 94-35-106.2
Prior Law:	R.C.M. 1947, § 94-35-106.2 repealed by Sec. 32, Ch. 513, Laws of Montana 1973.

Annotator's Note

M. Sehestedt

This section is a recodification of the present statute on the subject and continues the current policy of preventing the exposure of minors to intoxicating substances. The penalty has been reduced from a possible maximum of 6 months or $500 or both to a possible maximum of 10 days or $50 or both.

Cross References

Age of majority, Mont. Const. Art. II, Sec. 14 (1973)
Intoxicating substance defined, M.C.C. 1973, § 94-2-101(25)
Knowingly defined, M.C.C. 1973, § 94-2-101(28)

Library References

Intoxicating Liquors Key Nos. 159, 242
C.J.S. Intoxicating Liquors, §§ 259, 380

CHAPTER 6: OFFENSES AGAINST PROPERTY.

Part One: Criminal Mischief And Arson.

94-6-101. Definitions.

In this part, unless a different meaning plainly is required, the definitions given in chapter 2, 94-2-101 apply.

Historical Note

Enacted: M.C.C. 1973, § 94-6-101, Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: None

Annotator's Note

J. Guthals

This part of Chapter 6 dealing with Criminal Mischief and Arson has been drafted to provide within its four substantive sections a comprehensive treatment of activities which either intentionally or negligently destroy or damage personal or real property. Under the old Code there were six sections in Chapter 5 which dealt with arson and at least thirty-four sections in Chapter 33 dealing with malicious mischief. In addition, this part encompasses numerous sections contained in Chapter 35 of the old code on "Miscellaneous Offenses." Because the offenses in this part of the new Code are closely interrelated and heavily dependent upon precise construction and application of the terminology in the various subsections, attention is directed to M.C.C. 1973, § 94-2-101 in which the key words and phrases are defined.

94-6-102. Criminal Mischief.

(1) A person commits the offense of criminal mischief if he knowingly or purposely:

(a) injures, damages or destroys any property of another without consent; or

(b) without consent tampers with property of another so as to endanger or interfere with persons or property or its use; or

(c) damages or destroys property with the purpose to defraud an insurer; or

(d) fails to close a gate previously unopened which he has opened, leading in or out of any inclosed premises. This does not apply to gates located in cities or towns.

(2) A person convicted of the offense of criminal mischief shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both. If the offender commits the offense of criminal mischief and causes pecuniary loss in excess of one hundred fifty dollars ($150), or injures or kills a commonly domesticated hoofed animal, or causes a substantial interruption or impairment of public communication, transportation, supply of water, gas, or power, or other public services, he shall be imprisoned in the state prison for any term not to exceed ten (10) years.

Historical Note

Enacted:	M.C.C. 1973, § 94-6-102, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	New
Prior Law:	R.C.M. 1947, § 94-3301 et. seq., repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

This section on Criminal Mischief is the lowest offense in the hierarchy of crimes which deal with behavior that harms or threatens to harm property. While each subsection has its own requirements for culpability, in general the prosecution under this section must establish: (1) that the prohibited conduct occurred--damage, destruction, tampering, etc.; (2) that the defendant possessed the required mental states of knowingly or purposely, as defined in § 94-2-101; and (3) that the defendant had no reasonable ground to believe he was right

as indicated by the phrase "without consent," defined in § 94-2-101(68). Negligent or inadvertent damage to property is not covered by this section.

Under the definitions of "property of another" and "without consent" (M.C.C. 1973, § 94-2-101) the defense could raise as an affirmative defense that the actor had an interest in the property or believed that he had authority for the act. Similarly, the U.S. Supreme Court has ruled that a person who intentionally destroys property of another, but held an honest belief that it was abandoned, cannot be convicted. See Morisette v. U.S., 342 U.S. 246 (1952).

Subsection (1)(a) which proscribes actual harm to property of another, corresponds to traditional malicious mischief. "Property of another," M.C.C. 1973, § 94-2-101(50) includes both real and personal property. The subsection is intentionally broad to eliminate the need for having a number of offenses which define more specific types of behavior such as the destruction of art, literature, crops, livestock, etc. This subsection would also include forms of arson which may not fit into the more exacting requirements of the arson statutes which follow. For example, if a person intentionally sets fire to a shack, to livestock housing or to any other articles which do not meet the criteria of an "occupied structure" as required in the Arson statute, M.C.C. 1973, § 94-6-104, he may be prosecuted under subsection (1)(a) of this statute.

Subsection (1)(b), which deals with tampering, encompasses numerous offenses such as the meddling with and disarrangement of papers, files, and records, and the breaking or obstruction of public utility equipment. "Tampering" as defined by § 94-2-101(62) implies meddling, interfering, or altering property. The definition of "tampering" also includes depositing refuse--thus allowing prosecution for littering under this section.

Subsection (1)(c), which prohibits the destruction of property with the intent to defraud an insuror, encompasses former section 94-506. Since the offense defined in this subsection is ordinarily occasioned upon the offender's property, it is not necessary that the property destroyed belong to another. The offense does, however, require a purpose to defraud as well as the purpose to perform the act. Property, as defined in § 94-2-101(49) includes any tangible or intangible of value.

Subsection (1)(d) provides a criminal penalty for the failure to close gates previously unopened. It should be noted that this subsection only prohibits intentional acts. Negligent or accidental failure to close a gate is not a criminal act. The provision only applies to rural areas where the danger to livestock from such acts is generally high. This subsection replaces former section 94-35-116.

Subsection (2) classifies Criminal Mischief as either a felony or misdemeanor depending upon the value of the injured

property. The sentencing provision is broad to allow use of this section as an alternative or lesser included offense in arson prosecutions. Attention is directed to M.C.C. 1973, § 94-2-101(64), which defines the manner in which the value of property is to be ascertained.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Purposely defined, M.C.C. 1973, § 94-2-101(53)
Property defined, M.C.C. 1973, § 94-2-101(49)
Property of another defined, M.C.C. 1973, § 94-2-101(50)
Tamper defined, M.C.C. 1973, § 94-2-101(62)
Value defined, M.C.C. 1973, § 94-2-101(64)

Library References

Criminal Mischief Key No. 1, et. seq.
C.J.S. Criminal Mischief, § 1, et. seq.

94-6-103. Negligent Arson.

(1) A person commits the offense of negligent arson if he purposely or knowingly starts a fire or causes an explosion, whether on his own property or property of another and thereby negligently:

(a) places another person in danger of death or bodily injury; or

(b) places property of another in danger of damage or destruction.

(2) A person convicted of the offense of negligent arson shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both. If the offender places another person in danger of death or bodily injury, he shall be imprisoned in the state prison for any term not to exceed ten (10) years.

Historical Note

Enacted:	M.C.C. 1973, § 94-6-103, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	M.P.C. 1962, § 220.1(2)
Prior Law:	R.C.M. 1947, § 94-501 et. seq., repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

This section on Negligent Arson and the complementary section on Arson (M.C.C. 1973, § 94-6-104) replace the former Model Arson Law. Under the new Code, arson is classified by the mental state of the actor rather than by the class of property destroyed as under the old Code. Negligent Arson requires three elements: (1) the offender must purposely or knowingly start a fire or cause an explosion; (2) this conduct must then be followed by a negligent act or omission, which (3) places either a person or some property in danger of injury. The action has two important features. First, it prohibits the use of fire or explosives which endanger persons or property whether or not injury or damage result. Second, it prohibits the burning of one's own property where there is high probability that adjoining property will be damaged. This section requires an initial affirmative intentional act and does not cover failures to report or control fires not started by the actor. If a person starts a fire negligently he is not guilty under this provision. Similarly, if a person purposely allows a fire to spread to adjoining property he may be guilty of either Criminal Mischief or Arson, but not Negligent Arson. Damage which results from misuse of campfires is dealt with in R.C.M. 1947, § 28-115 rather than with this provision. Similarly, damage from fires negligently started is punished under R.C.M. 1947, § 82-1236. The wording for this section on Negligent Arson has been adapted from the Model Penal Code provision on reckless arson.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Purposely defined, M.C.C. 1973, § 94-2-101(53)
Property defined, M.C.C. 1973, § 94-2-101(49)
Property of another defined, M.C.C. 1973, § 94-2-101(50)
Bodily injury defined, M.C.C. 1973, § 94-2-101(5)
Penalty for setting or leaving fire, R.C.M. 1947, § 82-1236
Failure to extinguish campfire, R.C.M. 1947, § 28-115

Library References

Arson Key No. 1, et. seq.
C.J.S. Arson, § 1, et. seq.

94-6-104. Arson.

(1) A person commits the offense of arson when, by means of fire or explosives, he knowingly or purposely:

(a) damages or destroys an occupied structure of another without consent; or

(b) places another person in danger of death or bodily injury.

(2) A person convicted of the offense of arson shall be imprisoned in the state prison for any term not to exceed twenty (20) years.

Historical Note

Enacted:	M.C.C. 1973, § 94-6-104, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	New
Prior Law:	R.C.M. 1947, § 94-501 et. seq., repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

This section on Arson is the highest offense in the hierarchy of crimes involving the destruction of property. Together with the section on Negligent Arson, this provisions replaces the Model Arson Law which classified offenses according to the class of property destroyed rather than by the criminality of the offender's conduct. Under this section the prosecution must show: (1) that the offender knowingly or purposely started a fire or explosion; (2) which either damaged an occupied structure or placed a person other than the actor in danger of being injured. Under the definition of occupied structure (M.C.C. 1973, § 94-2-101(35)), the property need not be inhabited; it

is only necessary that the structure be capable of habitation. Thus, the purposeful burning of any building in which a person conceivably could lodge would be sufficient for conviction. Since the definitions of knowingly and purposely (M.C.C. 1973, §§94-2-101(28), 94-2-101(53)) do not require initial knowledge of the final result, actual knowledge that the person injured was present in the building is not necessary. This section also covers burning of any occupied structure to defraud an insuror. Burning of an unoccupied structure with intent to defraud an insuror is punishable under M.C.C. 1973, § 94-6-102, Criminal Mischief. Since the burning of the property must be without consent, it would be the burden of the defense to bring forth evidence raising an affirmative defense of authority to act. Together with the section on Causal Relationships (M.C.C. 1973, § 94-2-105), this section would be applicable to a person who purposely starts a fire on his own property in order to destroy the property of his neighbor. Attention is directed to the other arson related offenses in this part of Chapter 6 which may provide alternative or lesser included offenses for Arson.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Purposely defined, M.C.C. 1973, § 94-2-101(53)
Occupied structure defined, M.C.C. 1973, § 94-2-101(35)
Without consent defined, M.C.C. 1973, § 94-2-101(68)
Bodily injury defined, M.C.C. 1973, § 94-2-101(5)
Causal relationships, M.C.C. 1973, § 94-2-105

Library References

Arson Key No. 1, et. seq.
C.J.S. Arson, § 1, et. seq.

94-6-105. Possession Of Explosives.

(1) A person commits the offense of possession of explosives if he possesses, manufactures or transports any explosive compound or timing or detonating device for use with any explosive compound or incendiary device, and:

(a) has the purpose to use such explosive or device to commit any offense; or

(b) knows that another has the purpose to use such explosive or device to commit any offense.

(2) A person convicted of the offense of possession of explosives shall be imprisoned in the state prison for any term not to exceed twenty (20) years.

Historical Note

Enacted:	M.C.C. 1973, § 94-6-105, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Ill.C.C. 1961, Title 38, § 20-2
Prior Law:	R.C.M. 1947, § 94-3804, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

This section on Possession of Explosives replaces former section 94-3304 which punished the destruction of buildings by explosives and incorporates the provisions of R.C.M. 1947, § 69-1901 et. seq., which deals with the manufacture, storage, and sale of explosive materials. The offense of Possession of Explosives, as prescribed by this section consists of two elements: (1) possession, manufacturing or transporting any explosive compound, with (2) either the intent to use the material to commit a crime or the knowledge that someone else has the purpose to use the material to commit a crime. The first element--possession--would be established when it is shown that the defendant has physical possession or otherwise exerted dominion and control over the article (M.C.C. 1947, § 94-2-101(47)) for a sufficient time to allow the offenders control to be terminated by another. The terms "manufacture" and "transport" are not defined in the code and thus take on their ordinary grammatical meanings. The second element of this offense requires a showing of a purpose to perform a certain prohibited act. Mere possession without the requisite purpose to commit an offense is not sufficient for guilt. Attention is directed to R.C.M. 1947, § 69-1901 et. seq. for a listing of explosive devices and regulations pertaining to the use of such material. It should be noted that this section may provide the only punishment for violation of §§ 69-1901 - 69-1914 of the Explosives Chapter since the repeal of the

penalty provision § 69-1915. The wording for this section on Possession of Explosives is substantially the same as the Illinois source.

Cross References

Offense defined, M.C.C. 1973, § 94-2-101(37)
Possession defined, M.C.C. 1973, § 94-2-101(47)
Purposely defined, M.C.C. 1973, § 94-2-101(53)
Regulation of Explosives, R.C.M. 1947, § 69-1901 et. seq.

Library References

Explosives Key No. 2
C.J.S. Explosives, § 1

Notes of Decisions

Specific Intent

Evidence which indicated that the defendant had stated the extent of damage which would occur from an explosive device which he was carrying was sufficient if believed by the jury to indicate that the defendant knew the purpose to which the dynamite and blasting caps were to be put and to convict of possession of explosives. People v. Thomas, 3 Ill. App.3d 1079, 279 N.E.2d 784 (1972). See also, People v. Gee, 121 Ill. App.2d 22, 257 N.E.2d 212 (1970).

Part Two: Criminal Trespass And Burglary.

94-6-201. Definitions.

"Enter Or Remain Unlawfully." A person enters or remains unlawfully in or upon any vehicle, or occupied structure or premises when he is not licensed, invited, or otherwise privileged to do so. A person who enters or remains upon land does so with privilege unless notice is personally communicated to him by an authorized person, or unless such notice is given by posting in a conspicuous manner.

In no event shall civil liability be imposed upon the owner or occupier of premises by reason of any privilege created by this action.

Historical Note

Enacted: M.C.C. 1973, § 94-6-201 by Sec. 1, Ch. 513, Laws of Montana 1973.

Source: New

Prior Law: See R.C.M. 1947, § 94-901 and 94-904, repealed by Sec. 32, Ch. 513, Laws of Montana 1973.

Annotator's Note

M. Sehestedt

The purpose of this section is to provide a definition for the term "enter or remain unlawfully" which is an essential element of the offenses of criminal trespass to property and burglary contained in this part of Chapter 6. Essentially this section makes any entry in or upon any vehicle, occupied structure or premises without license, invitation or other privilege unlawful. There is, however, an exception relating to land which creates a privilege to enter or remain unless notice to the contrary is given either personally or by posting to the person entering or remaining.

Unlawfully entering or remaining either in an occupied structure or in or upon the premises of another constitutes criminal trespass to property under the provisions of M.C.C. 1973, § 94-6-203. This represents a substantial departure from prior law since it makes mere unprivileged entry an offense

(201)-2

while under prior law in addition to an unauthorized entry the intruder had to perform some specifically forbidden act before the offense was complete.

Conversely the application of this definition of unlawful entry to the offense of burglary will result in little change since Montana has already indicated that to constitute an element of the offense of burglary the entry must be unprivileged. (See State v. Starkweather, 89 Mont. 381, 385-386, 297 P. 497 (1931)).

Revised Criminal Law Commission Comment

L. Elison

The core of common law concept of burglary was breaking and entering a dwelling house at night with intent to commit a felony therein. The scope of the offense has enlarged until under prevailing law, the offense may be committed by entry alone, in day time as well as by night, in any building, structure, or "vehicle."

In this code, the "occupied structure" is narrowly defined to include buildings where people can live or work and where instrusions are most alarming and dangerous. For example, the definition does not include barns, or abandoned buildings unsuited for human occupancy. In the case of a mine or ship, for example, fitness for occupancy would have to be proved. "Entering or remaining unlawfully" is a concept which takes a middle ground between prevailing law which requires a breaking and its complete elimination in some modern legislation.

Cross References

Occupied structure defined, M.C.C. 1973, § 94-2-101(35)
Premises defined, M.C.C. 1973, § 94-2-101(48)
Vehicle defined, M.C.C. 1973, § 94-2-101(65).

Library References

Trespass Key No. 76 et. seq.
C.J.S. Trespass Sec. 140 et. seq.

94-6-202. Criminal Trespass To Vehicles.

(1) A person commits the offense of criminal trespass to vehicles when he purposely or knowingly and without authority enters any vehicle or any part thereof.

(2) A person convicted of the offense of criminal trespass to vehicles shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-6-202 by Sec. 1, Ch. 513, Laws of Montana 1973.

Source: Ill.C.C. 1961, Title 38, § 21-2

Prior Law: None

Annotator's Note

M. Sehestedt

There was no prior provision covering criminal trespass to vehicles. This section is intended to deal with that troublesome area of criminal activity. The conduct forbidden by this section is limited to trespass to vehicles which are defined by § 94-2-101(65) as including aircraft and watercraft as well as conventional vehicles. If the trespass involves damage to a vehicle, the separate offense of Criminal Mischief (§ 94-6-102) is committed. Similarly, if the trespasser takes possession of the vehicle or steals from it he will have committed either the separate offense of unauthorized use of a motor vehicle (§ 94-6-305) or the separate offense of theft (§ 94-6-302). This section is designed to deal with the prowler or the persons who knowingly accompany an unauthorized user.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Purposely defined, M.C.C. 1973, § 94-2-101(53)
Vehicle defined, M.C.C. 1973, § 94-2-101(65)

Library References

Automobiles Key No. 339
C.J.S. Motor Vehicles, § 691 et. seq.

Notes of Decisions

Elements of Offense

The Illinois courts have ruled that identity of the property and criminal knowledge are two material elements of the offense of criminal trespass to vehicles. See People v. Acevedo, 5 Ill. App.3d 968, 284 N.E.2d 488 (1972); People v. Owes, 5 Ill. App.3d 936, 284 N.E.2d 465 (1972).

Indictment and Information

The following two cases ruled on specific language in indictment for criminal trespass to vehicles: People v. Harvey, 270 N.E.2d 80,, App. 1971; People v. Pantoja, 7 Ill. App.3d 847, 288 N.E.2d 687 (1972).

Sufficiency of Evidence

Because criminal knowledge is an important element of the offense of criminal trespass to vehicles the Illinois courts have overturned three verdicts which were based upon inferences that the defendant knew that the automobile he was driving was stolen. See People v. Acevedo, 5 Ill. App.3d 968, 284 N.E.2d 488 (1972); People v. Kelly, 84 Ill. App.2d 431, 228 N.E.2d 561 (1967); People v. Chandler, 84 Ill. App.2d 231, 228 N.E.2d 588 (1967).

Verdict and Sentence

Only one sentence for the greater offense of automobile theft may be imposed in prosecution for automobile theft and criminal trespass to vehicles when the prosecution is based upon a single act. People v. Torello, 109 Ill. App.2d 433, 248 N.E.2d 725 (1969). But because these two offenses are separate and distinct there is no inconsistency in a jury returning a verdict which convicts a defendant of criminal trespass to vehicles and acquits him of theft. People v. Johnson, 102 Ill. App.2d 443, 243 N.E.2d 310 (1968). See also, People v. Webb, 131 Ill. App.2d 206, 268 N.E.2d 161 (1971).

94-6-203. Criminal Trespass To Property.

(1) A person commits the offense of criminal trespass to property if he knowingly:

(a) enters or remains unlawfully in an occupied structure; or

(b) enters or remains unlawfully in or upon the premises of another.

(2) A person convicted of the offense of criminal trespass to property shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-6-203 by Sec. 1, Ch. 513, Laws of Montana 1973.

Source: Ill.C.C. 1961, Title 38, § 21-3.

Prior Law: See R.C.M. 1947, § 94-3308 repealed by Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

M. Sehestedt

This section substantially expands prior law by making individuals criminally liable for knowing trespass. Under former law trespass was not criminal unless the trespasser did some prohibited act, such as hunting, building fires or injuring the realty, and it was these acts, not the trespass itself, which constituted the criminal conduct.

A consideration of the combined effect of M.C.C. 1973, § 94-3-104 (Use of Force in Defense of Property), § 94-6-201 (Definition of "Enter of Remain Unlawfully") and this section indicates that a landowner has no right to use force against an individual who innocently and unknowingly trespasses, since until he is given notice he has committed no offense. M.C.C. 1973, § 94-3-104 does give the landowner the right to use force to remove a trespasser who has been given notice. It is, however, hoped that the effect of this group of statutes will

be to encourage the landowner to call in peace officers. Previously since mere trespass was not an offense a landowner could not call in peace officers and was, as a result, often placed in a situation in which his only remedy was self help. It should also be noted that the landowner is limited in any event to the use of reasonable force and can use deadly force or force likely to cause serious bodily injury only to prevent the commission of a forcible felony.

Revised Commission Comment

L. Elison

This section covers criminal trespass to land without regard to the nature, use or location of the land. Criminal trespass is committed only if the offender, immediately prior to entry, receives oral or written notice that such entry is forbidden, or he remains upon the land after being notified to leave. Section 94-6-203 differs substantially from R.C.M. 1947, § 94-3308, "Malicious Injuries to Freehold," in that no specific act causing damage need be alleged, only the unlawful presence of the offender. Should damage occur during the trespass, the offender could be prosecuted under § 94-6-102, Criminal Mischief.

Cross References

Enter or remain unlawfully defined, M.C.C. 1973, § 94-6-201
Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Occupied structure defined, M.C.C. 1973, § 94-2-101(35)
Premises defined, M.C.C. 1973, § 94-2-101(48)

Library References

Trespass Key No. 76
C.J.S. Trespass, § 140 et. seq.

Notes of Decisions

Validity

This section has been ruled not to violate Amendments One and Fourteen of the United States Constitution. People v. Jackson, _____ Ill. _____, 271 N.E.2d 672 (1971).

Construction and Application

This section creates two distinct offenses: the first, to enter on land of another despite warning that entry is forbidden, and, the

second, to remain on land of another after being notified to depart. People v. Spencer, 131 Ill. App.2d 551, 268 N.E.2d 192 (1971). The purpose of this section, which makes certain acts of trespass illegal, is to deter violence and threats of violence. People v. Hoskins, 5 Ill. App.3d 831, 284 N.E.2d 60 (1972). Thus, convictions under this section have been upheld where a teacher failed to comply with an order of dismissal and where a defendant distributed leaflets in a completely enclosed private shopping mall. People v. Spencer, supra; People v. Sterling, 52 Ill.2d 287, 287 N.E.2d 711 (1972). However, a conviction based on this section was overturned where the defendant was not given sufficient time to leave the premises after being informed that his presence thereon was unlawful. People v. Mims, 8 Ill. App.3d 32, 288 N.E.2d 891 (1972). See also, City of Chicago v. Rosser, 47 Ill.2d 10, 264 N.E.2d 158 (1970), in which the court discussed in general terms the rights of an owner of private property to operate and maintain his premises. See also, People v. Vazquez, 270 N.E.2d 229, ____ Ill. _____ (1971); People v. Hoskins, 5 Ill. App.3d 831, 284 N.E.2d 60 (1972); People v. Spencer, 131 Ill. App.2d 551, 268 N.E.2d 192 (1971).

94-6-204. Burglary.

(1) A person commits the offense of burglary if he knowingly enters or remains unlawfully in an occupied structure with the purpose to commit an offense therein.

(2) A person commits the offense of aggravated burglary if he knowingly enters or remains in an occupied structure with the purpose to commit a felony therein, and

(a) in effecting entry or in the course of committing the offense or in immediate flight thereafter, he or another participant in the offense is armed with explosives or a weapon; or

(b) in effecting entry or in the course of committing the offense, or in immediate flight thereafter he purposely, knowingly, or negligently inflicts or attempts to inflict bodily injury upon anyone.

(3) A person convicted of the offense of burglary shall be imprisoned in the state prison for any term not to exceed ten (10) years. A person convicted of the offense of aggravated burglary shall be imprisoned in the state prison for any term not to exceed forty (40) years.

Historical Note

Enacted: M.C.C. 1973, § 94-6-204 by Sec. 1, Ch. 513, Laws of Montana 1973.

Source: New

Prior Law: R.C.M. 1947, §§ 94-901, 94-902, 94-903, 94-904, 94-905, 94-906, and 94-907 repealed by Sec. 32, Ch. 513, Laws of Montana 1973.

Annotator's Note

M. Sehestedt

This section substantially changes prior law. The common law offense of burglary required the breaking and entering of the dwelling house of another in the night time with the purpose of committing a felony. Under prior law burglary required only entry into a structure or vehicle with the purpose of committing petit larceny or any felony. The new code has adopted a position between these two views.

While the new code eliminates the need for a "breaking" in any physical sense, it retains explicitly in the definition of enter or remain unlawfully (§ 94-6-201) the requirement that the entry be unprivileged. A literal reading of the prior statute would seem to require mere entry with intent and other courts in interpreting identical statutes have reached that conclusion. The Montana Court has however expressly rejected that view in State v. Starkweather 89 Mont. 381, 297 P. 497 and indicated that an entry to be burglarious must be unprivileged.

Perhaps the most significant of the changes introduced by the new code is the retreat from the prior view that any building or vehicle could be the object of burglary to the view that to constitute burglary the acts must be directed against an occupied structure. This change reflects a return to the common law view that the gravemen of burglary was the threat to person resulting from the wrongful intrusion. While the new code is not as technically restrictive it does require that the structure intruded into be either actually occupied or "suited for human occupancy or night lodging of persons or for carrying on business" (see § 94-2-101(35)). In effect this limits burglary to those situations in which the intrusion is most alarming and the threat to human life the greatest.

The new code rejects both the common law's requirement that the acts occur in the night time and the prior law's division of burglary in first and second degree based on the time of the act. It has also rejected the felony or petit larceny requirements of the common and prior laws. The new code retains the prior law in that burglary can occur at any time, day or night, but classifies the offense as either burglary or aggravated burglary by referring solely to the defendant's conduct. Simple burglary is made more inclusive by requiring only the purpose to commit any offense instead of the intent to commit any felony or petit larceny requirement of the old law. Aggravated burglary requires both the purpose to commit a felony and either the infliction of bodily injury or the carrying of explosives or a weapon.

The penalties under the new code have also been modified so that it is possible to more accurately match punishment to conduct.

.3

Revised Criminal Law Commission Comment

L. Elison

The definition of a burglarious entry, i.e., "unprivileged entry" takes a middle ground between the common law requirement of "breaking" and the complete elimination of that requirement in some modern statutes. The basic concept of "breaking" seems to be an unlawful intrusion, or as defined in § 94-6-201, "entering or remaining unlawfully." This definition is meant to exclude from burglary the servant who enters his employer's house meaning to steal silver; the shoplifter who enters a store during business hours to steal from the counter; the fireman who forms the intent, as he breaks down the door of a burning house, to steal some of the householder's belongings and similar acts in which the defendant is lawfully on the premises.

Where breaking is not required there has been a tendency to hold that guilt may be established by proof that the proscribed intent was secretly entertained in the mind of the entrant although apart from this secret intent the entrance at that time and place would have been authorized. The commission rejects this view and approves of the decision of State v. Starkweather, 89 Mont. 381, 297 P. 497 as a more practical result.

Cross References

Bodily injury defined, M.C.C. 1973, § 94-2-101(5)
Enter or remain unlawfully defined, M.C.C. 1973, § 94-6-201
Felony defined, M.C.C. 1973, § 94-2-101(15)
Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Negligently defined, M.C.C. 1973, § 94-2-101(32)
Occupied structure defined, M.C.C. 1973, § 94-2-101(35)
Offense defined, M.C.C. 1973, § 94-2-101(37)
Purpose defined, M.C.C. 1973, § 94-2-101(53)
Weapon defined, M.C.C. 1973, § 94-2-101(66)

Library References

Burglary Key No. 3, 9, 10, 49
C.J.S. Burglary, § 1, 7, 10, 27, 68.

94-6-205. Possession Of Burglary Tools.

(1) A person commits the offense of possession of burglary tools when he knowingly possesses any key, tool, instrument, device, or any explosive, suitable for breaking into an occupied structure or vehicle or any depository designed for the safekeeping of property, or any part thereof with the purpose to commit an offense therewith.

(2) A person convicted of possession of burglary tools shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-6-205 by Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill.C.C. 1961, Title 38, Sec. 19-2

Prior Law: R.C.M. 1947, § 94-908 repealed by Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

M. Sehestedt

This section, while drawn from Illinois, does not represent a substantial change from prior law, R.C.M. 1947, § 94-908 which also prohibited possession of burglary tools. The only real change is the elimination of the old law's prohibition of making, altering or repairing burlary tools.

Summary of Criminal Law Commission Comment

M. Sehestedt

The purpose of the changes made is first, to reconstruct the language of R.C.M. 1947, § 94-908 to conform with that of the other burglary statutes in this chapter, and second, to eliminate the concept of altering a tool or instrument for the purpose of committing a felony or misdemeanor, since possession of an altered instrument or tool with the intent to use

it to commit a crime, cannot logically be distinguished from possession of an unaltered burglarious tool. The new provision does not change the penalty for the crime.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Occupied structure defined, M.C.C. 1973, § 94-2-101(35)
Offense defined, M.C.C. 1973, § 94-2-101(37)
Possession defined, M.C.C. 1973, § 94-2-101(47)
Purpose defined, M.C.C. 1973, § 94-2-101(53)
Vehicle defined, M.C.C. 1973, § 94-2-101(65)

Library References

Burglary Key No. 12
C.J.S. Burglary, § 69.

Notes of Decisions

Elements of Offense

To sustain a conviction under this section, it must be proved that tools are adapted and designed for breaking and entering, that defendant possessed them with knowledge of their character, and that he intended to use them for breaking and entering. Proof of an intent to commit a burglary of some place of vehicle is necessary. People v. Matthews, 122 Ill. App.2d 264, 258 N.E.2d 378 (1970); People v. Ray, 3 Ill. App.3d 517, 278 N.E.2d 170 (1972). Possession of keys designed for entering a vending machine and proof of intent to commit a crime therein was held to constitute the crime of possession of burglary tools. People v. Oliver, 129 Ill. App.2d 83, 262 N.E.2d 597, 45 A.L.R.3d 1279 (1970). See also, People v. Johnson, 88 Ill. App.2d 265, 232 N.E.2d 554 (1967).

Nature of Burglary Tools

In a prosecution for unlawful possession of burglary tools, the fact that tools in defendant's possession were suitable for lawful purposes was held to be immaterial when these tools were also suitable for breaking and entering. People v. Johnson, 88 Ill. App.2d 265, 232 N.E.2d 554 (1967). Conviction for possession of burglary tools does not require that the tools be intended for breaking into traditional

entrances of vehicles. Tools which are suitable for entering any integral portion of a mechanism, such as a transmission, are sufficient. People v. Matthews, 122 Ill. App.2d 264, 258 N.E.2d 378 (1970).

Indictment and Information

Attention is directed to the following cases which discuss the sufficiency of indictments charging possession of burglary tools: People v. Stafford, 4 Ill. App.3d 606, 279 N.E.2d 395; People v. Matthews, 122 Ill. App.2d 264, 258 N.E.2d 378 (1970); People v. Hall, 55 Ill. App.2d 255, 204 N.E.2d 473 (1965).

Admissibility of Evidence

Stolen property and crowbar were properly admitted into evidence where there was ample showing that shop was burglarized by co-defendant and that the articles were found in the path taken by the fleeing suspect. People v. Bryan, 27 Ill.2d 191, 188 N.E.2d 692 (1963). Similarly, burglary tools were held to be admissible where defendants were seen fleeing from burglarized premises by police officer and the burglary tools were found by the owner of the business in the premises shortly after defendants fled. People v. Craddock, 30 Ill.2d 348, 196 N.E.2d 672 (1964). See also, People v. Johnson, 88 Ill. App.2d 265, 232 N.E.2d 554 (1967).

Sentence and Punishment

Where attempted burglary and unlawful possession of burglary tools arise from the same course of conduct, the defendant may be convicted and sentenced for only one of such offenses. People v. Hambreck, 6 Ill. App.3d 739, 286 N.E.2d 557 (1972); People v. Blahuta, 131 Ill. App.2d 200, 264 N.E.2d 819 (1970); People v. Myles, 271 N.E.2d 62, App. 1971. Accord, People v. Beall, 290 N.E.2d 410, App. 1972.

Part Three: Theft And Related Offenses.

94-6-301. Definitions.

In this part, unless a different meaning plainly is required, the definitions given in chapter 2, 94-2-101 apply.

Historical Note

Enacted: M.C.C. 1973, § 94-6-301, Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: None

Annotator's Note

J. Guthals

This part of the new Criminal Code dealing with Theft and Related Offenses comprises a comprehensive treatment of crimes which have presented numerous problems to courts and attorneys. The thirteen substantive provisions of this part encompass the former offenses of larceny, larceny by trick, embezzlement, false pretenses, confidence games, fraudulent checks, receiving stolen property and many other crimes which were the subject of at least four chapters in the old Code. The approach taken by the new Code eliminates the troublesome technical distinctions traditionally made between different forms of theft and avoids entirely any reference to prior statutory or common law terminology. Illinois Criminal Code, Title 38, Chapters 16 and 17 are the source for most of the provisions in this part of Chapter 6.

94-6-302. Theft.

(1) A person commits the offense of theft when he purposely or knowingly obtains or exerts unauthorized control over property of the owner, and:

(a) has the purpose of depriving the owner of the property; or

(b) purposely or knowingly uses, conceals, or abandons the property in such manner as to deprive the owner of the property; or

(c) uses, conceals, or abandons the property knowing such use, concealment or abandonment probably will deprive the owner of the property.

(2) A person commits the offense of theft when he purposely or knowingly obtains by threat or deception control over property of the owner, and:

(a) has the purpose of depriving the owner of the property; or

(b) purposely or knowingly uses, conceals, or abandons the property in such manner as to deprive the owner of the property; or

(c) uses, conceals, or abandons the property knowing such use, concealment or abandonment probably will deprive the owner of the property.

(3) A person commits the offense of theft when he purposely or knowingly obtains control over stolen property knowing the property to have been stolen by another, and:

(a) has the purpose of depriving the owner of the property; or

(b) purposely or knowingly uses, conceals or abandons the property in such manner as to deprive the owner of the property; or

(c) uses, conceals, or abandons the property knowing such use, concealment or abandonment probably will deprive the owner of the property.

(4) A person convicted of the offense of theft of property not exceeding one hundred fifty dollars ($150) in value shall be fined not to exceed five hundred dollars ($500) or be imprisoned

in the county jail for any term not to exceed six (6) months, or both. A person convicted of the offense of theft of property exceeding one hundred fifty dollars ($150) in value or theft of any commonly domesticated hoofed animal shall be imprisoned in the state prison for any term not to exceed ten (10) years.

Historical Note

Enacted: M.C.C. 1973, § 94-6-302, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill.C.C. 1961, Title 38, § 16-1

Prior Law: R.C.M. 1947, §§ 94-1801 et seq., 94-2801 et seq., repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

This section on Theft encompasses the traditional crimes of larceny, larceny by trick, false pretenses, embezzlement, receiving stolen property as well as numerous associated offenses. The Montana Criminal Law Commission intended that this section cover every conceivable form of theft and in so doing, eliminate the common law distinctions which encumbered virtually every one of the theft related offenses.

Perhaps the greatest problems found in the traditional approach to the theft related offenses are the definitional dilemmas found in the terms property, possession, custody, and title. The nature of the property acquired has always been a determinant of which offense could be charged. To avoid this problem in the former code, the statutes contained long lists of different types of property, choses in action, etc. which were included in the coverage of the provision. The technical distinctions concerning the type of property interest acquired by the offender played the central role in deciding which offense, if any, had been committed. In Montana, these technical distinctions were twisted and juxtaposed to apply the statutes to activities which did not fit precisely into the common law categories. For example, in State v. Dickinson, 21 Mont. 595, 55 P. 539 (1898), the Montana court held, contra to the traditional position, that both possession and title must be acquired to charge larceny by trick. In State v. Love, 151 Mont. 190, 440 P.2d 275 (1968), the court held, again in opposition to the common law, that only possession may be acquired in order to sustain a charge of false pretenses. These problems have been solved in the new Code by the use of the phrase "obtains or exerts control" which includes every possible property interest which may be acquired and by reference

to the broadly defined term "property" which means "anything of value." See M.C.C. 1973, §§ 94-2-101(34), (49), respectively. Thus, any possible interest in any kind of property is covered by this section.

Subsection (1) is the key provision of this section and should prohibit most if not all forms of theft. The subsection requires that the obtainment of control be either purposeful (§ 94-2-101(53)), with some design, or knowing (§ 94-2-101(28)), with knowledge of facts and circumstances. Inadvertent or negligent exertion of control is not punishable. Subsection (1)(a) requires proof of a purpose to deprive--the mental state prevalent in most thefts. This mental state is ordinarily implied from the offender's disposition or handling of the property. Subsections (1)(b) and (1)(c) are designed to cover those situations in which the purpose to deprive is more difficult to prove, such as the taking and subsequent abandonment of vehicles. Subsection (1)(b) makes such conduct an offense if the property has been used by the offender in a manner which would deprive the owner of the property of its use, while (1)(c) allows conviction in the alternative situation where the offender has knowledge that his activities will deprive the owner of his property. It should be noted that none of the provisions in subsection (1) require an intent to permanently deprive, as required under former law. Only obtainment of control for a sufficient period of time to indicate that the offender himself had dominion over the property is necessary under this section. Because subsection (1) makes no distinction concerning the way with which the property was obtained, the subsection should cover all conceivable forms of theft including receiving of stolen property. Because only two elements must be proved under this subsection, a knowing exertion of control and a purpose to deprive, the provision represents a considerable simplification from the traditional approach.

Subsections (2) and (3) cover the specific offenses of theft by threat or deceit and the receiving of stolen property. While these crimes are included within subsection (1), the Criminal Law Commission felt the concise approach of subsection (1) might create problems of application, in view of the bulk of offenses embodied in that section.

Subsection (2) prohibits the intentional acquisition of property of another by threat (M.C.C. 1973, § 94-2-101(63)) or deception (M.C.C. 1973, § 94-2-101(11)) when either the purpose to deprive can be shown or when, as in subsection (1), the purpose to deprive can be implied from the offenders' use of the property or knowledge of his conduct. "Deception," as defined in § 94-2-101, no longer distinguishes between representations of past, present, and future facts--thus, eliminating a problem which had plagued the prior law on false pretenses and larceny by trick. "Deception," as defined, includes any knowingly false misrepresentation or promise. "Threat," as provided in section 94-2-101 includes virtually any form of extortion.

Subsection (3) deals with the offense of receiving stolen property. This particular subsection has been interpreted by the Illinois courts as requiring in addition to the basic elements of subsection (1) the

proof that 1) the property was stolen by someone other than the accused receiver; and, (2) that the defendant knew that the property was stolen at the time he took possession. People v. Berg, 91 Ill. App.2d 166, 234 N.E.2d 400 (1968). Because of these difficult proof requirements it seems advisable to charge under subsection (1)(a) where possible. There only the receipt of possession with a purpose to deprive is required for conviction. People v. Nunn, 63 Ill. App.2d 465, 212 N.E.2d 342 (1965).

Subsection (4) imposes penalties depending upon the value of the property. If the value of the property stolen, as defined in § 94-2-101(64), exceeds $150 the offense is punishable as a felony. Lesser thefts are misdemeanor offenses. The determinative value has been raised from $50 in the old Code to reflect the change in prices and philosophy about the seriousness of minor thefts. The wording for this section has been adapted from substantially similar language from the Illinois source.

Note also that thefts arising from a common scheme or the same transaction may be aggregated to meet the $150 requirement (§ 94-2-101(64)(c).

Cross References

Purposely defined, M.C.C. 1973, § 94-2-101(53)
Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Property defined, M.C.C. 1973, § 94-2-101(49)
Obtains or exerts control defined, M.C.C. 1973, § 94-2-101(34)
Threat defined, M.C.C. 1973, § 94-2-101(63)
Deception defined, M.C.C. 1973, § 94-2-101(11)
Owner defined, M.C.C. 1973, § 94-2-101(41)
Value defined, M.C.C. 1973, § 94-2-101(64)

Library References

Larceny Key No. 1
C.J.S. Larceny, §§ 1, 4, 7, 9

Law Review Commentaries

15 De Paul L. Rev. 474 (1966)
64 N.W. L. Rev. 277 (1969)

Notes of Decisions

Validity

The constitutionality of this section has been challenged in four

cases. In ruling on these challenges the Illinois courts have held that the section as a whole is not unconstitutionally vague or uncertain and that various terms used within this section such as "unauthorized control" and "owner" are sufficiently definite to be valid. See People v. Harden, 42 Ill.2d 301, 247 N.E.2d 404, 406 (1969); People v. Cleveland, 104 Ill. App.2d 415, 244 N.E.2d 212, 214 (1969), cert. den. 90 S. Ct. 479; People v. Kamsler, 78 Ill. App.2d 349, 223 N.E.2d 237, 237 (1966); People v. Thompson, 75 Ill. App.2d 289, 221 N.E.2d 120 (1966).

Construction and Application

In applying the terminology of this section to specific factual circumstances, the Illinois courts have generally held that the statute is broad enough to encompass virtually all forms of theft and all types of fraudulent acquisitions of property interests. See People v. Henderson, 72 Ill. App.2d 89, 218 N.E.2d 795, 797 (1966); People v. Nunn, 63 Ill. App.2d 465, 212 N.E.2d 342, 344 (1965); People v. Marino, 44 Ill.2d 562, 256 N.E.2d 770, 778 (1970); People v. Bullock, 123 Ill. App.2d 30, 259 N.E.2d 641, 643 (1970).

Elements of Offense

Under this section two elements are necessary to constitute the offense of theft: a proscribed act--knowingly obtaining or exerting unauthorized control over property, and the requisite mental state--the purpose to deprive the owner of the use or benefit of the property. People v. Jordan, 115 Ill. App.2d 307, 252 N.E.2d 701 (1969); People v. Jackson, 66 Ill. App.2d 276, 214 N.E.2d 316 (1966). Identity of the owner is an essential element of the offense of theft. However, because of the term "unauthorized control," it has been held sufficient if the owner of the property named in the indictment can be shown to have had some possessory interest in the property at the time of the offense. People v. Dell, 77 Ill. App.2d 318, 222 N.E.2d 357, 360 (1966), cert. den. 389 U.S. 826; People v. Moyer, 1 Ill. App.3d 245, 273 N.E.2d 210, 213 (1971). Thus, a payee of an allegedly stolen check was held to have had sufficient interest in the check and the proceeds of the check to meet the definition of "owner" of the property under this section. People v. Jones, 123 Ill. App.2d 389, 259 N.E.2d 393 (1970); People v. Demos, 3 Ill. App.3d 284, 278 N.E.2d 89, 90 (1971). See also, People v. Nunn, 63 Ill. App.2d 465, 212 N.E.2d 342, 346 (1965); People v. Baddeley, 106 Ill. App.2d 154, 245 N.E.2d 593, 595 (1969).

Defenses

In general, restitution, promised or performed, is not a defense to theft; nor is the fact that the owner of the stolen property eventually recovers it. People v. Green, 74 Ill. App.2d 308, 218 N.E.2d 840, 841 (1966), cert. den. 387 U.S. 930, rehearing den., 389 U.S. 390; People v. Gant, 121 Ill. App.2d 222, 257 N.E.2d 181, 183 (1970).

Indictment and Information

In order to correctly charge a theft, there must be alleged in the indictment both an act and a mental state of the defendant. An indictment which fails to allege either of these two elements is fatally defective. People v. Hayn, 116 Ill. App.2d 241, 253 N.E.2d 575, 577 (1969); People v. Nunn, 63 Ill. App.2d 465, 212 N.E.2d 342, 346 (1965). Ownership of property allegedly stolen is a necessary averment in an indictment for theft. People v. Berndt, 101 Ill. App.2d 29, 242 N.E.2d 273, 274 (1968); People v. Jones, 7 Ill. App. 3d 183, 287 N.E.2d 206 (1972). The primary purpose for this requirement that the ownership of the property be alleged in the indictment is to protect the accused from a possible subsequent trial for the same offense. People v. Harden, 42 Ill.2d 301, 247 N.E.2d 404, 406 (1969). See also, State v. Akers, 106 Mont. 43, 74 P.2d 1138 (1938); State v. Grimsley, 96 Mont. 327, 30 P.2d 85 (1934). An indictment is not defective if it fails to list the specific place and time of theft. People v. Orndoff, 39 Ill.2d 96, 233 N.E. 2d 378, 381 (1968); People v. Patrick, 38 Ill.2d 255, 230 N.E.2d 843, 846 (1967). See also, People v. Stevenson, 107 Ill. App.2d 441, 246 N.E.2d 309, 312 (1969); People v. Slaughter, 67 Ill. App.2d 314, 214 N.E.2d 20 (1966). Minor variances between allegations in a complaint and the facts as finally proved at trial are not fatal to the validity of the indictment. People v. Jordan, 115 Ill. App.2d 307, 252 N.E.2d 701 (1969); People v. Kaye, 112 Ill. App.2d 141, 251 N.E.2d 306 (1969); People v. Harden, 42 Ill.2d 301, 247 N.E.2d 404, 406 (1969).

Admissibility and Sufficiency of Evidence

Circumstantial evidence surrounding theft and the possession of stolen property is admissible in a prosecution under this section and may give rise to inferences of guilt to support a conviction. People v. Bixler, 49 Ill.2d 328, 275 N.E.2d 392, 396 (1971), cert. den. 405 U.S. 1066; People v. Canaday, 49 Ill.2d 416, 275 N.E.2d 356, 361 (1971); People v. Moore, 130 Ill. App.2d 266, 264 N.E.2d 582, 584 (1970). See also, People v. Smith, 107 Ill. App.2d 267, 246 N.E.2d 880, 881 (1969); People v. Curtis, 116 Ill. App.2d 298, 254 N.E.2d 87, 89 (1969). As with other elements of the offense of theft, the required mental state may be deduced by the trial court from facts and circumstances surrounding the alleged criminal act. People v. McClinton, 4 Ill. App.3d 253, 280 N.E.2d 795, 798 (1972). See also, People v. Williams, 75 Ill App.2d 342, 221 N.E.2d 28 (1966).

Instructions

The Illinois appellate court has held that once a trial court gave instructions defining the crime of theft and the essential elements to be proved to sustain the charge, the court had no further responsibility to instruct the jury as to specific definitions of the mental states required in the statute. People v. Wick, 125 Ill. App.2d 297, 260 N.E.2d 487, 488 (1970). If the defendant fails to make objections to instructions given by the trial court, any error in instructions is waived. People v. Wooff, 120 Ill. App.2d

225, 256 N.E.2d 881, 882 (1970).

Reversible Error

Attention is directed to the following cases which examined whether the use of specific evidence constituted reversible error in trial court theft: People v. Adams, 106 Ill. App.2d 396, 245 N.E.2d 904, 909 (1969); People v. Hyde, 97 Ill. App.2d 43, 239 N.E. 2d 466, 470 (1968).

Theft of Motor Vehicle

While M.C.C. 1973, § 94-6-305 covers the specific offense of theft of motor vehicles, prosecution for such activities are possible under this section. For decisions interpreting the application of this section to such conduct attention is directed to the following cases: People v. Bullock, 123 Ill. App.2d 30, 259 N.E.2d 641, 643 (1970); People ex rel. Insolata v. Pate, 46 Ill.2d 268, 263 N.E.2d 44 (1970); People v. Schumacher, 90 Ill. App.2d 385, 234 N.E.2d 574, 575 (1968); People v. Torello, 109 Ill. App.2d 433, 248 N.E.2d 725, 728 (1969); People v. Nunn, 63 Ill. App.2d 465, 212 N.E.2d 342, 345 (1965); People v. Davis, 69 Ill. App.2d 120, 216 N.E.2d 490 (1966); People v. Smith, 107 Ill. App.2d 267, 246 N.E.2d 880, 882 (1969); People v. Walker, 54 Ill. App.2d 365, 204 N.E.2d 141, 143 (1965).

Theft of Entrusted Property

This section encompasses the prior offense of embezzlement. It was held, however, that this section does not apply to a landlord's refusal to return a portion of a security deposit. People v. Mattingly, 106 Ill. App.2d 74, 245 N.E.2d 647, 648 (1969). Where a charge of embezzlement under this section was adequately proved and established by evidence received in the trial court, it was held to be immaterial that the total amount proven to have been embezzled fell short of the amount alleged in the indictment. People v. Brown, 68 Ill. App.2d 17, 214 N.E.2d 465, 469 (1966).

Fraud or Deception

Prosecution for theft through fraud or deception is possible under this section as well as under M.C.C. 1973, § 94-6-307. Because the elements of the offense if prosecuted under this section are simpler to apply than the elements of the deceptive practices statute, this section seems preferable and has received considerably more use in Illinois, which is the source for both statutes. In applying this statute on Theft it has been held that the acquisition of property through false promise of future payment was indictable--a considerable change from prior law. People v. Kamsler, 78 Ill. App.2d 349, 223 N.E.2d 237 (1966). In applying this section to the acquisition of property by threat, the courts have held that

where there has been a threat of force prosecution for robbery would be more appropriate than prosecution for theft by deception. People v. Denman, 69 Ill. App.2d 306, 217 N.E.2d 457, 459 (1966). This section has been applied to defrauding an insurance company by burning insured property, obtainment of property by false claims that the property was to go for charitable purposes, purchasing property with a forged check, securing a fur coat by using a false driver's license and social security card. See People v. Elmore, 128 Ill. App.2d 312, 261 N.E.2d 736, 737 (1970), affirmed 50 Ill.2d 10, 276 N.E.2d 325; People v. Nickey Chevrolet Sales, Inc., 41 Ill. App. 2d 50, 190 N.E.2d 154, 155 (1963); People v. Cassman, 7 Ill. App.3d 786, 288 N.E.2d 667, 668 (1972); People v. Jones, 4 Ill. App.3d 927, 282 N.E.2d 283, 284 (1972); People v. Neary, 109 Ill. App.2d 302, 248 N.E.2d 695, 696 (1969). However, a conviction based on this section was overturned when the complaining witnesses were shown to be experienced investors who fully understood the nature of the defendant's scheme. People v. Warren, 2 Ill. App.3d 983, 276 N.E.2d 92, 93 (1971). In regard to admissibility of evidence, evidence indicating a subsequent scheme similar to the one with which the defendant is charged is proper. People v. Hill, 98 Ill. App.2d 352, 240 N.E.2d 801, 805 (1968), cert. den. 395 U.S. 984.

Receiving Stolen Property

The necessary elements of receiving stolen property are 1) that the property was stolen; 2) that the defendant bought it or received it knowing it to have been stolen; and 3) that he did so for his own gain or to prevent the owner from regaining possession of it. State v. Watkins, 156 Mont. 456, 481 P.2d 689, 692 (1971). Accord, People v. Baxa, 50 Ill.2d 111, 277 N.E.2d 876, 878 (1971). Because there is no longer a distinction between theft and receiving stolen property, one cannot be guilty of both offenses. People v. Horton, 126 Ill. App.2d 401, 261 N.E.2d 693, 695 (1970). For further interpretations of this section with regard to receiving stolen property see the following cases: People v. Marino, 95 Ill. App.2d 369, 238 N.E.2d 245, 253 (1968); People v. McCormick, 92 Ill. App.2d 6, 235 N.E.2d 832, 836 (1968); People v. Sanders, 75 Ill. App.2d 422, 220 N.E.2d 487, 490 (1966); People v. Malone, 1 Ill. App.3d 860, 275 N.E.2d 236, 237 (1971); People v. Everett, 117 Ill. App.2d 411, 254 N.E.2d 659, 661 (1969); People v. LaValley, 7 Ill. App.3d 1051, 289 N.E.2d 45, 47 (1972); People v. Hansen, 28 Ill.2d 322, 192 N.E.2d 359, 369 (1963); People v. Dell, 77 Ill. App.2d 318, 222 N.E.2d 357, 363 (1966), cert. den. 389 U.S. 826; People v. Gates, 29 Ill.2d 586, 195 N.E.2d 161, 163 (1964).

Value of Property

The value of stolen property is a material element of the offense of theft which must be proved by the state to determine the degree of punishment for the offense. People v. Dell, 52 Ill.2d 393, 288 N.E. 2d 459, 461 (1972); People v. Jordan, 115 Ill. App.2d 307, 252 N.E.2d 701, 702 (1969). In the absence of contrary evidence, testimony as to the worth of stolen property is the proper proof of its value.

People v. Newton, 117 Ill. App.2d 232, 254 N.E.2d 165, 167 (1969). While judicial notice may be taken of the fact that certain property has value, the court may not conclude that value exceeds $150. People v. Tassone, 41 Ill.2d 7, 241 N.E.2d 419, 422 (1968), cert. den. 394 U.S. 965; People v. Kelly, 66 Ill. App.2d 204, 214 N.E.2d 290, 293 (1966). Ordinarily, however, expert testimony should be used in ascertaining the value of stolen goods. People v. Dell, 77 Ill. App.2d 318, 222 N.E.2d 357, 361 (1966) cert. den. 389 U.S. 826; People v. Webb, 131 Ill. App.2d 206, 268 N.E.2d 161, 164 (1971). See also, People v. Nelson, 117 Ill. App.2d 431, 254 N.E.2d 529, 530 (1969); People v. Briseno, 2 Ill. App.3d 814, 277 N.E.2d 743, 744 (1972); People v. Styles, 75 Ill. App.2d 481, 220 N.E.2d 885, 888 (1966).

94-6-303. Theft Of Lost Or Mislaid Property.

(1) A person who obtains control over lost or mislaid property commits the offense of theft when he:

(a) knows or learns the identity of the owner or knows, or is aware of, or learns of a reasonable method of identifying the owner; and

(b) fails to take reasonable measures to restore the property to the owner; and

(c) has the purpose of depriving the owner permanently of the use or benefit of the property.

(2) A person convicted of theft of lost or mislaid property shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a period not to exceed six (6) months.

Historical Note

Enacted:	M.C.C. 1973, § 94-6-303, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Ill.C.C. 1961, Title 38, § 16-2
Prior Law:	R.C.M. 1947, § 94-2709, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

This section restates former Montana law concerning theft of lost property in a manner which should eliminate the common law distinctions which made enforcement of the statute difficult. The prosecution must establish each of the three elements set forth in the statute: (1) that the finder had some "clue" to the identity of the owner either through actual or constructive knowledge at the time of finding or afterwards; (2) that the finder failed to use reasonable measures to restore the property to the owner; and, (3) that the finder had the purpose, with a conscious objective, to permanently deprive the owner of the found property. As written, the statute avoids the traditional requirement of an initial

trespassory taking which prevented the honest finder who later misappropriated the goods from being prosecuted. The statute also eliminates the former distinction between lost property and mislaid property which held that mislaid property was presumed to have a clue to ownership, while lost property was the subject of no presumptions. The above difficulties are avoided by subsection (1) which provides, in effect, that the clue to owernship may occur at any time and that the trespassary taking may thus occur whenever the clue is discovered and not acted upon. Subsection (3) retains the traditional mental state of a purpose to permanently deprive. Ordinarily, this mental state may be implied from the offender's use of the property. The wording for the substantive part of this section is identical to the Illinois source, but the penalty provision has been completely changed.

Cross References

Obtains control defined, M.C.C. 1973, § 94-2-101(34)
Property defined, M.C.C. 1973, § 94-2-101(49)
Owner defined, M.C.C. 1973, § 94-2-101(41)
Knowledge defined, M.C.C. 1973, § 94-2-101(28)
Purposely defined, M.C.C. 1973, § 94-2-101(53)

Library References

Larceny Key No. 10
C.J.S. Larceny, § 49

94-6-304. Theft Of Labor Or Services Or Use Of Property.

(1) A person commits the offense of theft when he obtains the temporary use of property, labor or services of another which are available only for hire, by means of threat or deception or knowing that such use is without the consent of the person providing the property, labor or services.

(2) A person convicted of theft of labor or services or use of property shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-6-304, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill.C.C. 1961, Title 38, § 16-3

Prior Law: R.C.M. 1947, § 94-1805, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

While the provisions of the general Theft section (94-6-302) are sufficiently broad to include the theft of labor or services, this section provides a more specific alternative misdemeanor offense which may be charged. The prosecution must establish two elements for conviction: (1) the obtainment (M.C.C. 1973, § 94-2-101(33)) of use of the property, labor, or services, and (2) by means of threat (M.C.C. 1973, § 94-2-101(63)) or deception (M.C.C. 1973, § 94-2-101(11)) or with knowledge (M.C.C. 1973, § 94-2-101(28)) that the use was without consent (M.C.C. 1973, § 94-2-101(68)). As with section 94-6-302, a permanent deprivation is not required. The wording for this provision in Theft of Labor or Services is identical to the substantive subsection of the Illinois source.

Cross References

Deception defined, M.C.C. 1973, § 94-2-101(11)
Obtain defined, M.C.C. 1973, § 94-2-101(33)
Property defined, M.C.C. 1973, § 94-2-101(49)
Theft, M.C.C. 1973, § 94-6-302
Threat defined, M.C.C. 1973, § 94-2-101(63)

Notes of Decisions

Purpose

An Illinois court has held that by enacting this statute, the legislature intended to protect all types of businesses from the unscrupulous practices of prospective customers. People v. Dillon, 93 Ill. App.2d 151, 236 N.E.2d 411, 412 (1968). However, it should be noted that such conduct is also effectively prohibited under M.C.C. 1973, § 94-6-302 which is the general Theft statute.

94-6-305. Unauthorized Use Of Motor Vehicles.

(1) A person commits the offense of unauthorized use of motor vehicles if he knowingly operates the automobile, airplane, motorcycle, motorboat, or other motor-propelled vehicle of another without his consent.

(2) A person convicted of unauthorized use of motor vehicles shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both. It is an affirmative defense that the offender reasonably believed that the owner would have consented to the operation had he known of it.

Historical Note

Enacted: M.C.C. 1973, § 94-6-305, Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 223.9

Prior Law: R.C.M. 1947, § 94-3305, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

The conduct prohibited in this section is effectively covered by the Theft section 94-6-302. This provision, however, provides an alternative and more advantageous theory for prosecuting such conduct as joy riding and unauthorized use of a vehicle by a bailee. First, the elements which must be proved for conviction place a lesser burden on the state than the theft section requires. The elements are (1) knowing operation of the vehicle, (2) without the consent of the owner. Secondly, this section permits the prosecutor to charge a misdemeanor for the prohibited conduct, rather than a felony as would be required in most cases under the Theft section. The third advantage to using this section is the affirmative defense of constructive consent, which is especially useful in situations where the vehicle has been used as a necessity in emergency situations. "Knowing" is defined in § 94-2-101(28); "without consent" is defined by § 94-2-101(68). While this section defines most commonly misappropriated motor vehicles, the word "vehicle," as defined in § 94-2-101(65), provides a broad catch-all in the phrase "any other motor propelled vehicle." The wording for this section has been

adapted with substantial changes from the Model Penal Code source.

Cross References

Knowing defined, M.C.C. 1973, § 94-2-101(28)
Without consent defined, M.C.C. 1973, § 94-2-101(68)
Vehicle defined, M.C.C. 1973, § 94-2-101(65)
Motor Vehicle Code, R.C.M. 1947, § 32-2101 et seq.

Library References

Automobiles Key No. 6
C.J.S. Motor Vehicles, § 688

94-6-306. Offender's Interest In The Property.

(1) It is no defense to a charge of theft of property that the offender has an interest therein, when the owner also has an interest to which the offender is not entitled.

(2) It is no defense that theft was from the offender's spouse, except that misappropriation of household and personal effects, or other property normally accessible to both spouses, is theft only if it occurs after the parties have ceased living together.

Historical Note

Enacted:	M.C.C. 1973, § 94-6-306, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Ill. C.C. 1961, Title 38, § 16-4
Prior Law:	None

Annotator's Note

J. Guthals

This section setting forth those instances in which the offender's interest in the property taken will be a defense to a theft related

crime has been taken without significant change from the Illinois source. The section is explained fully in the comment below.

Revised Criminal Law Commission Comment

L. Elison

Subsection (1) is substantially the same as Model Penal Code, Tent. Draft No. 2, § 206-11. The provision removes any doubt regarding the commission of theft by a co-owner, such as a partner, joint tenant or tenant in common, or any other type of co-owner who exercises unauthorized control with the purpose to permanently deprive a co-owner of his interest in the property.

Subsection (2) recognizes that unless the husband and wife have separated and are living in separate abodes when the supposed theft occurs, the criminal law should not intrude into what is a civil fight over property, the true ownership of which is dubious at best. The divorce court should be better informed regarding the relationship between the parties and should determine the proper distribution of the property. If, however, the parties have separated and are living in separate abodes and theft occurs, there seems to be no good reason why such conduct should not be punished.

Cross References

Owner defined, M.C.C. 1973, § 94-2-101(41)
Property defined, M.C.C. 1973, § 94-2-101(49)
Theft, M.C.C. 1973, § 94-6-302

Library References

Larceny Key No. 26
C.J.S. Larceny, § 1, 3

Law Review Commentary

15 De Paul L. Rev. 474 (1966)

94-6-307. Deceptive Practices.

(1) A person commits the offense of deceptive practices when he purposely or knowingly:

(a) causes another, by deception or threat, to execute a document disposing of property or a document by which a pecuniary obligation is incurred; or

(b) makes or directs another to make a false or deceptive statement addressed to the public or any person for the purpose of promoting or procuring the sale of property or services; or

(c) makes or directs another to make or knowingly accepts a false or deceptive statement to any person respecting his financial condition for the purpose of procuring a loan or credit; or

(d) obtains, or attempts to obtain property, labor or services by any of the following means:

(i) Using a credit card which was issued to another, without the other's consent.

(ii) Using a credit card that has been revoked or cancelled.

(iii) Using a credit card that has been falsely made, counterfeited, or altered in any material respect.

(iv) Using the pretended number or description of a fictitious credit card.

(v) Using a credit card which has expired provided that credit card clearly indicates the expiration date.

(2) A person convicted of the offense of deceptive practices shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months or both. If the deceptive practices are part of a

common scheme or the value of any property, labor, or services obtained, or attempted to be obtained exceeds one hundred fifty dollars ($150) then the offender shall be imprisoned in the state prison for any term not to exceed ten (10) years.

Historical Note

Enacted: M.C.C. 1973, § 94-6-307 by Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill. C.C. 1961, Title 38, § 17-1

Prior Law: See Chapters 18 and 21 of Title 94, R.C.M. 1947, repealed by Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

M. Sehestedt

The purpose of this section is the punishment of a wide variety of deceptive conduct in which either the act or the mental state does not fall within § 94-6-302. As such this section should be considered supplementary to § 94-6-302. Perhaps the most significant difference between this section and § 94-6-302 is that 94-6-302 requires in addition to the purposeful or knowing act that there be a purpose to deprive the owner of the property.

Subsection (1)(a) requires that the state show only that the defendant by "deception or threat" caused the execution of a document disposing of property or incurring an obligation. The defendant's purpose in causing the execution is irrelevent, i.e., he need not have a purpose to deprive. It should be noted that this subsection is applicable to salesmen who go beyond a mere "puffing" of their wares.

Subsection (1)(b) is essentially a ban on false or misleading advertising, replacing R.C.M. 1947, § 94-1818, 94-1819, 94-1821. The gist of the offense is a statement made purposely or knowingly for "the purpose of promoting or procuring" a sale. This section is directed to the public statement. It should be noted that there need be no proof of "purpose to deprive" or an actual sale to support a conviction under this subsection.

Subsection (1)(c) replaces prior law R.C.M. 1947, § 94-1803 and continues the prohibition of false statements to obtain a loan or credit. It should be noted under this subsection that there is no requirement of "purpose to deprive" and it is not necessary that the individual charged with making the false statement actually obtain credit or a loan.

Subsection (1)(d) makes the wrongful use of a credit card which belongs to another or which is forged or expired specifically punishable. While in most instances the conduct which this subsection covers will also be punishable as theft, this section will offer an answer to those situations in which it is not possible to show a purpose to deprive, as for example, when a credit card is used by an individual who claims he planned to repay the holder prior to the billing date on the credit account. It also offers an alternative to the invocation of the higher penalties of the theft section for those situations which do not merit felony treatment.

Summarized Criminal Law Commission Comment

M. Sehestedt

The four subsections of this section are intended to cover deceptive practices which might not fall under the prohibition of § 94-6-302, Theft.

Section 94-6-307 is designed to cover a greater variety of deceptive practices than were formerly proscribed by Montana law. See Title 94, Chapter 18, which contains such offenses as: obtaining property or services by false pretenses; confidence games; sale without the consent of holder; deception in the sale of land, etc., and Chapter 21, Fraudulent conveyances. See also R.C.M. 1947, § 94-1803, False statement respecting financial condition and § 94-35-256 Workmen-false representation to procure.

Cross References

Deception defined, M.C.C. 1973, § 94-2-101(11)
Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Property defined, M.C.C. 1973, § 94-2-101(49)
Purpose, purposely defined, M.C.C. 1973, § 94-2-101(53)
Threat defined, M.C.C. 1973, § 94-2-101(63)

Library References

False Pretenses Key Nos.7 et seq.
Larceny Key No. 14(4)
C.J.S. False Pretenses, § 8 et seq.
C.J.S. Larceny, §§ 7, 23, 36

Notes of Decisions

Construction and Application

As with the general section on Theft, § 94-6-302, which overlaps

with the provisions of this section, it has been held that absolute liability is not provided for the conduct described herein. To impose liability, an intent to defraud is necessary. People v. Billingsley, 64 Ill. App.2d 292, 213 N.E.2d 765 (1966). This section has been generally applied to fraudulent acquisitions of property by use of credit cards, while section 94-6-302 has been used for more traditional forms of theft. See People v. Enright, 1 Ill. App.3d 654, 275 N.E.2d 294 (1971); People v. Adornetto, 3 Ill. App.3d 647 (1972).

94-6-308. Deceptive Business Practices.

(1) A person commits the offense of deceptive business practices if in the course of engaging in a business, occupation, or profession he purposely or knowingly:

(a) uses or possesses for use a false weight or measure, or any other device for falsely determining or recording any quality or quantity; or

(b) sells, offers, or exposes for sale, or delivers less than the represented quantity of any commodity or service; or

(c) takes or attempts to take more than the represented quantity of any commodity or service when as buyer he furnished the weight or measure; or

(d) sells, offers or exposes for sale adulterated commodities; or

(e) sells, offers or exposes for sale mislabeled commodities; or

(f) makes a deceptive statement regarding the quantity or price of goods in any advertisement addressed to the public.

(2) "Adulterated" means varying from the standard of composition or quality prescribed by statute or lawfully promulgated administrative regulation, or if none, as set by established commerical usage.

(3) "Mislabeled" means:

(a) varying from the standard of truth or disclosure in labeling prescribed by statute or lawfully promulgated administrative regulation, or if none, as set by established commercial usage; or

(b) represented as being another person's produce, though otherwise labeled accurately as to quality and quantity.

(4) A person convicted of the offense of deceptive business practices shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-6-307 by Sec. 1, Ch. 513, Laws of Montana 1973.

Source: Proposed Michigan Code 4105

Prior Law: See R.C.M. 1947, §§ 94-1814, 94-1815, 94-1816, 94-1817, 94-1818, 94-1819, 94-1820, 94-1821, 94-1901, 94-1902, 94-1903, 94-1904, 94-3502, 94-3503, 94-3505, 94-35-145, 94-35-146, 94-35-147, 94-35-217, 94-35-227, 94-35-270, 94-35-271, 94-35-271.1, 94-35-271.2, 94-35-271.3 and 94-271.4 repealed by Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

M. Sehestedt

The purpose of this section is the punishment of a wide variety of deceptive conduct which might not be within the purview of the general section on theft. This section replaces a number of sections of the prior law dealing with the contents of goods, labeling, and the use of false weights and measures. This section provides a single, simple definition for false weights and measures, short weight sales and purchases, adulteration, mislabeling of commodities, and false advertising.

It should also be noted that under this section there need be no showing of a "purpose to deprive" state of mind. All that need be shown is the knowing or purposeful doing of one of the prohibited acts. Subsections (3) and (4) provide definitions of "adulterated" and "mislabeled" for use when applicable with the subparagraphs of subsection (1).

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Purposely defined, M.C.C. 1973, § 94-2-101(53)

Library References

Druggist Key No. 12
C.J.S. Druggist Sec. 5, 12, 14, 36A
False Pretenses Key Nos. 3 et seq.
C.J.S. False Pretenses, §§ 8 et seq.
Food Key Nos. 5, 6, 11 et seq.
C.J.S. Food, §§ 18, 21, 22, 24, 26-28
Trade Regulation Key No. 339
C.J.S. Trade-Marks, Trade-Names and Unfair Competition, §§ 66 et. seq., 219 et seq.
Weights and Measures Key Nos. 5, 10
C.J.S. Weights and Measures, §§ 4, 9

94-6-309. Issuing A Bad Check.

(1) A person commits the offense of issuing a bad check when, with the purpose of obtaining control over property or to secure property, labor or services of another, he issues or delivers a check or other order upon a real or fictitious depository for the payment of money, knowing that it will not be paid by the depository.

(2) If the offender has an account with the depository, failure to make good the check or other order within five (5) days after written notice of nonpayment has been received by the issuer is prima facie evidence that he knew that it would not be paid by the depository.

(3) A person convicted of issuing a bad check shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both. If the offender has engaged in issuing bad checks which are part of a common scheme, or if the value of any property, labor or services obtained, or attempted to be obtained exceeds one hundred fifty dollars ($150), he shall be imprisoned in the state prison for any term not to exceed ten (10) years.

Historical Note

Enacted: M.C.C. 1973, § 94-6-309 by Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill.C.C. 1961, Title 38, § 17-1(d)

Prior Law: R.C.M. 1947, § 94-2-702 and 94-2007 repealed by Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

M. Sehestedt

This section replaces R.C.M. 1947, § 94-2007, Making, Passing

or Uttering Fictitious Bills, etc. and R.C.M. 1947, § 94-2702, Uttering Fraudulent Checks or Drafts. The principal change is the consolidation of the fictitious depository section (94-2007) and the no funds/insufficient funds section (94-2702). In the consolidation the 5-day notice provision (subsection (2) of the new code) of R.C.M. 1947, § 94-2702 has been carried over. This provision, which is applicable only to those cases in which the accused has an account with the depository on which the check or other order is drawn, does not require that the offender be given five days notice of dishonor but does provide that failure to make the check good within five days after receiving notice of dishonor is prima facie evidence of knowledge that it would not be paid. Of course, in cases in which the defendant did not have an account or the depository is non-existent the inference that he did not expect the check or order to be paid is so overwhelming that no presumption would seem necessary. An exception under prior law would also appear to be continued, although not explicitly, in that there would seem to be no offense if the individual accepting the check knows that it is not valid or will not be paid, in which case the defense of consent could be interposed (see M.C.C. 1973, § 94-2-111). Similarly, this section does not change Montana law which held a post-dated check did not fall within the bad check provisions of prior law in that it was in the nature of a promissory note and not an order. (See State v. Patterson, 75 Mont. 315 (1926)).

It should also be noted that it will be possible in most cases to apply either the provisions of this section or of the general section on Theft, M.C.C. 1973, § 94-6-302, to bad check activities. The decision as which section should be applied is essentially one of prosecutorial discretion and should hinge on both the circumstance surrounding the offense and the character of the accused.

In the event the check is passed as part of a common scheme or the property obtained exceeds in value $150, subsection (3) provides for an increased penalty; in all other cases the punishment has been reduced to a misdemeanor. The term "common scheme" is defined by § 94-2-101(7) and would allow the imposition of increased penalties whenever it can be established that a series of bad checks was cashed with a limited time frame.

Summarized Revised Criminal Law Commission Comment

M. Sehestedt

Bad check laws, in addition to eliminating the doubt as to liability on false pretenses, accomplish two other things which seem worth preserving: (a) they eliminate the requirement of proof of obtaining property by means of false pretense; and (b) they create a presumption of knowledge that the check would not be paid under certain circumstances. The presumption of knowledge is probably the most important practical reason for maintaining special bad check provisions.

Cross References

Common scheme defined, M.C.C. 1973, § 94-2-101(7)
Knowing, knowingly defined, M.C.C. 1973, § 94-2-101(28)
Property defined, M.C.C. 1973, § 94-2-101(49)
Value defined, M.C.C. 1973, § 94-2-101(64)

Library References

Forgery Key No. 16
C.J.S. Forgery, § 37

Notes of Decisions

Caution should be used in considering the elements of this offense as set out in the Illinois decisions. While the Montana provisions are drawn directly from Illinois, the Illinois bad check provisions are a part of a general statute dealing with deceptive practices (Title 38, § 17-1) which is prefaced with the general requirement that each of acts proscribed in the subsections be done with the intent to defraud. Montana has adopted for its bad check provision only subsection (d) of Ill.C.C. 1961, Title 38, § 17-1 and did not include the preliminary requirement that the acts be done with the intent or purpose to defraud. Accordingly, in Montana there is no need to either allege or prove that the check was drawn with intent to defraud. It is only necessary to allege and prove that the check or order was drawn with the purpose of obtaining property or services and that the accused knew that it would not be paid. See, People v. Lanners, 122 Ill. App.2d 290, 258 N.E.2d 390 (1970); First Nat. Bank of Decatur v. Insurance Co. of North America, C.A., 424 F.2d 312 (1970), cert. den. 90 S.Ct. 1844, 398 U.S. 939; People v. Tenen, 270 N.E.2d 179 (App. 1971).

94-6-310. Forgery.

(1) A person commits the offense of forgery when, with purpose to defraud, he knowingly:

(a) without authority makes or alters any document or other object apparently capable of being used to defraud another in such manner that it purports to have been made by another or at another time, or with different provisions, or of different composition; or

(b) issues or delivers such document or other object knowing it to have been thus made or altered; or

(c) possesses with the purpose of issuing or delivering any such document or other object knowing it to have been thus made or altered; or

(d) possesses with knowledge of its character any plate, die, or other device, apparatus, equipment or article specifically designed for use in counterfeiting or otherwise forging written instruments.

(2) A purpose to defraud means the purpose of causing another to assume, create, transfer, alter or terminate any right, obligation or power with reference to any person or property.

(3) A document or other object capable of being used to defraud another includes, but is not limited to, one by which any right, obligation, or power with reference to any person or property may be created, transferred, altered or terminated.

(4) A person convicted of the offense of forgery shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months or both. If the forgery is part of a common scheme or if the value of the property, labor or services obtained or attempted to be

obtained, exceeds one hundred fifty dollars ($150) the offender shall be imprisoned in the state prison for any term not to exceed twenty (20) years.

Historical Note

Enacted: M.C.C. 1973, § 94-6-310 by Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill.C.C. 1961, Title 38, § 17-3

Prior Law: R.C.M. 1947, § 94-2001, 94-2002, 94-2005, 94-2006 and 94-35-226 to 94-35-236 repealed by Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

M. Sehestedt

This section replaces a number of prior provisions proscribing various forms of forgery including § 94-2001, Forgery of Wills; § 94-2002, Making False Entries in Records or Returns; § 94-2003, Forgery of Public or Corporate Seal; § 94-2005, Forging Telegraphic Messages; § 94-2006, Possessing or Receiving Forged or Counterfeit Bills or Notes With Intent to Defraud; and various sections dealing with trademarks, § 94-35-226 to 94-35-236. To avoid one of the sources of trouble under prior forgery laws "a purpose to defraud" is broadly defined in subsection (2) and subsection (3) gives a broad definition of "document or other subject capable of being used to defraud" which is illustrative but not limited to any object which affects any right.

Transactions covered by this section are also largely covered by the section on Theft, § 94-6-302. However, subsections (1)(c) and (1)(d) extend the prohibition to possession of such documents and devices with the purpose of issuance or use. The offense has been reduced to a misdemeanor although an increased penalty has been retained for those cases involving either a common scheme or property worth in excess of $150.

Revised Criminal Law Commission Comment

L. Elison

There is doubt that a specific forgery law is necessary because the provisions dealing with theft by deception (§ 94-6-302(2)) should be adequate to cover forgery. Forgery is retained as a distinct offense partly because the concept is so embedded in popular understanding that it would be unlikely that any legislature would completely abandon it, and partially in recognition of the special effectiveness of forgery as a means of undermining

public confidence in important symbols of commerce, and in perpetrating large scale frauds.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Purpose defined, M.C.C. 1973, § 94-2-101(53)

Library References

Forgery Key No. 1
C.J.S. Forgery, § 1

Notes of Decisions

Elements of offense

The essential elements of forgery are false writing or an alteration of an instrument which as written is apparently capable of defrauding coupled with an intent to defraud. People v. Dauphin, 53 Ill. App.2d 433, 203 N.E.2d 166 (1965). A common instance of forgery is the use by an offender of a fictitious person as a purported maker of a bank draft. People v. Lanners, 122 Ill. App.2d 290, 258 N.E.2d 390 (1970). However, this section is broad enough to incorporate all forms of forgery within its coverage. People v. Merchant, 5 Ill. App.3d 636, 283 N.E.2d 724 (1972).

Instruments capable of forgery

Despite the fact that technically an instrument is void or not payable, it may still be the subject of a forgery prosecution if the necessary elements of culpability are present. See, for example, People v. Marks, 63 Ill. App.2d 384, 211 N.E.2d 548, cert. den. 385 U.S. 876 (1965); People v. Dauphin, 53 Ill. App.2d 433, 203 N.E.2d 166 (1965); People ex rel. Miller v. Pate, 42 Ill.2d 283, 246 N.E.2d 225 (1969).

Indictment and information

For discussions of various indictments and informations based on this section attention is directed to the following decisions: People v. Marks, 63 Ill. App.2d 384, 211 N.E.2d 548, cert. den. 385 U.S. 876 (1965); People v. Broverman, 4 Ill. App.3d 929, 282 N.E.2d 279 (1972); People v. Moyer, 1 Ill. App.3d 245, 273 N.E.2d 210 (1971); People v. Dzielski, 130 Ill. App.2d 581, 264 N.E.2d 426 (1970); People v. Merchant, 5 Ill. App.3d 636, 283 N.E.2d 724 (1972); People v. White, 130 Ill. App.2d 775, 267 N.E.2d 129 (1971),

app. after remand. 3 Ill. App.3d 792, 279 N.E.2d 87; People v. Meeks, 55 Ill. App.2d 437, 205 N.E.2d 62 (1965).

Description of Instrument

In a forgery indictment, the instrument may be described in two ways, either by its purport description or by its tenor description. If both descriptions are used, however, they must be compatible. People v. Addison, 75 Ill. App.2d 358, 220 N.E.2d 511 (1966).

Evidence

Evidence concerning subsequent forgeries may be properly admitted in a prosecution under this section for the purpose of establishing identity, intent, knowledge, or a common scheme or plan. People v. Clark, 104 Ill. App.2d 12, 244 N.E.2d 842 (1969). In forgery prosecutions, proof must often be by circumstantial evidence. People v. Dauphin, 53 Ill. App.2d 433, 203 N.E.2d 166 (1965). Where proof of a forged instrument is established, an intent to defraud is presumed. People v. Dauphin, supra; People v. Bailey, 15 Ill.2d 18, 153 N.E.2d 548 (1958).

Sentence and punishment

Forgery and theft are separate offenses. When a conviction for both crimes arises out of the same transaction, however, only the greater of two sentences should be imposed--the lesser to run concurrently. People v. Rose, 7 Ill. App.3d 374, 287 N.E.2d 195 (1972). The purpose of the forgery may be examined to determine the seriousness of the offense. People v. Palmer, 2 Ill. App.3d 934, 274 N.E.2d 658 (1971).

94-6-311. Obscuring The Identity Of A Machine.

(1) A person commits the offense of obscuring the identity of a machine if he:

(a) removes, defaces, covers, alters, destroys or otherwise obscures the manufacturer's serial number or any other distinguishing identification number or mark upon any machine, vehicle or electrical device, with the purpose to conceal, misrepresent or transfer any such machine, vehicle or electrical device; or

(b) possesses with the purpose to conceal, misrepresent or transfer any such machine, vehicle or device knowing that such serial number or other identification number or mark has been removed or otherwise obscured.

(2) A person convicted of obscuring the identity of a machine shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

Historical Note

Enacted:	M.C.C. 1973, § 94-6-311 by Sec. 1, Ch. 513, Laws of Montana 1973
Source:	N.Y. 170.65
Prior Law:	See R.C.M. 1947, § 94-35-262 repealed by Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

M. Sehestedt

This section is aimed at the professional automobile thief and his allied professional brethren who deal in stolen machinery and equipment. While an individual who is in violation of this section will almost certainly be in violation of either § 94-6-302(3) which forbids knowing possession of stolen property, or § 94-6-310, Forgery, this section provides an alternative directed specifically

to the problem and may be useful in certain circumstances. It should be noted that the conduct specifically condemned by this section is characteristic of organized criminal activity and accordingly when possible prosecution should be brought under the general section on theft with its higher penalties.

Possession of a vehicle or machine with an obscured or altered identity is made a violation, but the ordinary citizen is protected in that there must be both knowledge that the identity is obscured and a purpose to misrepresent. The burden of proving knowledge and purpose is the state's.

This section also represents an expansion of prior law which had offered protection to farm machinery only (see R.C.M. 1947, § 94-35-262). The offense is punishable as a misdemeanor as it was under prior law.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Purposely defined, M.C.C. 1973, § 94-2-101(53)

94-6-312. Illegal Branding Or Altering Or Obscuring A Brand.

(1) A person commits the offense of illegal branding or altering or obscuring a brand if he marks or brands any commonly domesticated hoofed animal or removes, covers, alters or defaces any existing mark or brand on any commonly domesticated hoofed animal with the purpose to obtain or exert unauthorized control over said animal or with the purpose to conceal, misrepresent, transfer or prevent identification of said animal.

(2) A person convicted of the offense of illegal branding or altering or obscuring a brand shall be imprisoned in the state prison for any term not to exceed ten (10) years.

Historical Note

Enacted: M.C.C. 1973, § 94-6-312 by Sec. 1, Ch. 513, Laws of Montana 1973.

Source: R.C.M. 1947, § 94-3504, 94-3514

Prior Law: R.C.M. 1947, § 94-3504 and 94-3514 repealed by Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

M. Sehestedt

This section is essentially a recodification of the prior law contained in R.C.M. 1947, § 94-3504 and 94-3514. While situations which would give rise to this offense will also fall within the general provisions of the forgery and theft sections, it was felt advisable to retain this as a separate offense in view of the special problems faced by Montana law enforcement officers in this area. Since there is no purpose to alter existing law, prior Montana cases should still be considered applicable.

Cross References

Purpose defined, M.C.C. 1973, § 94-2-101(53)

Library References

Animals Key Nos. 11, 12
C.J.S. Animals, §§ 30, 31

Notes of Decisions

Unauthorized brand

An unauthorized brand or mark does not have to touch, alter or deface a former brand on an animal to be in violation of this section. State v. Johnson, 155 Mont. 351, 472 P.2d 287 (1970).

94-6-313. Defrauding Creditors.

(1) A person commits the offense of defrauding secured creditors if he destroys, conceals, encumbers, transfers, removes from the state, or otherwise deals with property subject to a security interest with the purpose to hinder enforcement of that interest.

(2) "Security interest" means an interest in personal property or fixtures as defined in section 87-1-201 (37) of the Uniform Commercial Code.

(3) A person convicted of the offense of defrauding secured creditors shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-6-313 by Sec. 1, Ch. 513, Laws of Montana 1973.

Source: M.P.C. 224.10

Prior Law: R.C.M. 1947, § 94-1811 and 94-1812 repealed by Sec. 32, Ch. 513, Laws of Montana 1973. See also R.C.M. 1947, § 52-318

Annotator's Note

M. Sehestedt

This section retains criminal penalties for mortgagors and conditional vendees who hinder the enforcement of a security interest by destruction, concealment or removal from the state of property subject to the security interest. Both § 94-1811 dealing with the removal or concealment of mortgaged property and § 94-1811 dealing with the removal or concealment of property encumbered by lease or conditional sales contract are replaced by this section.

While the basic scope of prior law has been retained, certain changes should be noted. The prior law requirement that the acts be done with the "intent to defraud" (§ 94-1811) or the "intent to deprive" (§ 94-1812) has been replaced with the more inclusive "purpose to hinder enforcement" of the security interest. The

detailed description contained in each of the prior law sections of the interests protected has been replaced by reference to U.C.C. 1-201 (37) for an inclusive definition of "security interest" which indicates that fundamentally a security interest is "an interest in personal property or fixtures which secures payment or the performance of an obligation." It is no longer a criminal offense, as it was under § 94-1811, to remove encumbered property from the county but the prohibition on removing encumbered property from the state has been retained. It should also be noted that this section deals with conduct which is outside the scope of the general theft section since in these cases the property cannot be properly considered "property of another."

The offense is classified as a misdemeanor regardless of the amount involved. The difference between this section and the section on theft which provides for increased penalties when the value of the property involved exceeds $150 is justified in that offenders against this section pose a lesser social threat than out right thieves who take property to which they have no claim. In addition, this type of conduct can be better guarded against by care on the part of the vendor.

Cross References

Property defined, M.C.C. 1973, § 94-2-101(49)
Purpose defined, M.C.C. 1973, § 94-2-101(53)
Security interest defined, R.C.M. 1947, § 81-1-201(37)

Library References

Chattel Mortgages Key No. 230
C.J.S. Chattel Mortgages, §§ 280, 281

94-6-314. Effect Of Criminal Possession Of Stolen Property. Possession of stolen property shall not constitute proof of the commission of the offense of theft; such fact shall place a burden on the possessor to remove the effect of such fact as a circumstance to be considered with all other evidence pointing to his guilt.

Historical Note

Enacted: M.C.C. 1973, § 94-6-314 by Sec. 1, Ch. 513, Laws of Montana, 1973

Source: State v. Gray, 152 Mont. 145, 447 P.2d 475, 478 (1968)

Prior Law: R.C.M. 1947, § 94-2704.1 repealed by Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

M. Sehestedt

This section represents a substantial change in the currently codified theory concerning possession of stolen property. The only statute dealing with the subject, R.C.M. 1947, § 94-2704.1, Possession of Stolen Livestock as Evidence of Larceny, makes possession of recently stolen livestock prima facie evidence of larceny. Instructions based on this statute have been approved in both State v. Perkins, 153 Mont. 361, 457 P.2d 465 and State v. Gloyne, 156 Mont. 94, 476 P.2d 511.

Montana case law, however, has allowed the extension of the principle to cases not involving livestock. State v. Gray, 152 Mont. 145, 447 P.2d 475, took the position that possession of stolen jewelry and coins, if not explained, was a circumstance to be considered along with all the other facts and circumstances in determining guilt. In reaching this conclusion the court considered and rejected the defendant's claim that allowing such a consideration deprived him of the right to a presumption of innocence and of his right to remain silent. This rule was subsequently affirmed in State v. Branch, 155 Mont. 22, 465 P.2d 821 with the court observing that possession of stolen property is "a circumstance to be considered in connection with all of the other circumstance in determining guilt." In both of these cases the court was careful to point out that mere possession without more is not sufficient to sustain a conviction. This view is expressly retained by the new code. What is accomplished by proof of the defendant's possession of stolen property is a shift in the burden of going forward with the evidence from the

state to the defendant. This does not mean that the burden of proof has been shifted to the defendant, merely that if he does not wish to have an unfavorable inference drawn from the fact of his possession he must introduce some form of evidence to account for it (see State v. Gloyne, supra).

It should be pointed out that given the much more inclusive language of the new code's theft sections, e.g., "obtains or exerts unauthorized control," this presumption may not be needed as frequently as it was under prior larceny law. However, the section is available for those situations which do require it.

Cross References

Stolen property defined, M.C.C. 1973, § 94-2-101(60)
Possession defined, M.C.C. 1973, § 94-2-101(47)

Library References

Larceny Key No. 64
C.J.S. Larceny Sec. 105 et. seq.

Notes of Decisions

Validity

Instructions in what is essentially the language of this section were approved despite lack of specific statutory authorization. See State v. Gray, 152 Mont. 145, 447 P.2d 475; State v. Branch, 155 Mont. 22, 465 P.2d 821.

Similar statute

Instruction authorized by prior law section which made possession of recently stolen livestock prima facie evidence of larceny approved in State v. Perkins, 153 Mont. 361, 457 P.2d 465 and State v. Gloyne, 156 Mont. 94, 476 P.2d 511.

Mere possession insufficient

Possession of stolen property without more evidence is insufficient to sustain a conviction for larceny. Territory v. Doyle, 7 Mont. 245, 14 P.671; State v. Sullivan, 9 Mont. 174, 22 P. 1088; State v. Sparks, 40 Mont. 82, 105 P. 87; State v. Gray, 152 Mont. 145, 447 P.2d 475; State v. Branch, 155 Mont. 22, 465 P.2d 821.

CHAPTER 7: OFFENSES AGAINST PUBLIC ADMINISTRATION.

Part One: Bribery And Corrupt Influence.

94-7-101. Definitions.

In this part, unless a different meaning plainly is required, the definitions given in chapter 2, 94-2-101 apply.

Historical Note

Enacted:	M.C.C. 1973, § 94-7-101, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	New
Prior Law:	None

94-7-102. Bribery In Official And Political Matters.

(1) A person commits the offense of bribery if he purposely or knowingly offers, confers, or agrees to confer upon another, or solicits, accepts or agrees to accept from another:

(a) any pecuniary benefit as a consideration for the recipient's decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter; or

(b) any benefit as consideration for the recipient's decision, vote, recommendation or other exercise of official discretion in a judicial or administrative proceeding; or

(c) any benefit as consideration for a violation of a known duty as a public servant or party official.

It is no defense to prosecution under this section that a person whom the offender sought to influence was not qualified to act in the desired way whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason.

(2) A person convicted of the offense of bribery shall be imprisoned in the state prison for any term not to exceed ten (10) years, and shall forever be disqualified from holding any public office in this state.

Historical Note

Enacted: M.C.C. 1973, § 94-7-102 by Sec. 1, Ch. 513, Laws of Montana 1973.

Source: M.P.C. 240-1

Prior Law: R.C.M. 1947, §§ 94-801, 94-802, 94-803, 94-805, 94-808, 94-810, 94-3523, 94-1418, 94-2916, 94-2917, 94-2918, 94-2919, 94-3904, 94-3903, 94-3909, 94-3910, 94-3913, repealed by Sec. 32, Ch. 513, Laws of Montana 1973.

Annotator's Note

M. Sehestedt

The purpose of this section on Bribery is to prohibit and to provide punishment for the improper influencing of any official or governmental action. To this end the section replaces a number of repetitive, overlapping statutes which create numerous narrow offenses with sweeping provisions designed to deal with all situations involving improper influence of official or public actions. This section is applicable both to the individual who "offers, confers, or agrees to confer" and to the individual who "solicits, accepts or agrees to accept" a bribe. Subsection (1)(a) prohibits the giving or receiving of pecuniary benefit to influence official or political discretion. As far as it concerns elections, this section may overlap sections 23-4723 and 23-4711, R.C.M. 1947. Offers of nonpecuniary gain, e.g., political support, honorific appointments, are penalized under subsection (1)(b) but limited to judicial and administrative proceedings. Thus it is not an offense under this section to threaten to withhold political support or to campaign against an individual in the course of legislative or other political battles or to offer appointive office in return for political support, but it is an offense under § 23-4716, R.C.M. 1947. Subsection (1)(c) deals with the known duty situations and punishes the offer or acceptance of any benefit as consideration for the duty's violation by a public servant or party official.

The defense of lack of jurisdiction or of lack of qualification to act in the desired manner is expressly eliminated by subsection (1). This represents an apparent change from current Montana law which indicates that it is a defense that person attempted to be improperly influenced is no longer capable of acting (see State v. Porter, 125 Mont. 503, 242 P.2d 984, 987).

It should be noted that subsection (2) which provides for permanent disqualification from public office on conviction may be in conflict with Mont. Const. Art. II, Sec. 28 (1973) which mandates full restoration of rights on discharge from supervision for "any offense against the state."

Cross References

Administrative proceeding defined, M.C.C. 1973, § 94-2-101(3)
Benefit defined, M.C.C. 1973, § 94-2-101(4)
Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Pecuniary benefit defined, M.C.C. 1973, § 94-2-101(44)
Party official defined, M.C.C. 1973, § 94-2-101(42)
Public servant defined, M.C.C. 1974, § 94-2-101(52)
Purpose, purposely defined, M.C.C. 1973, § 94-2-101(53)
Solicits defined, M.C.C. 1974, § 94-2-101(57)
Defrauding electors, R.C.M. 1947, § 23-4711
Bribery, R.C.M. 1947, § 23-4723

Library References

Bribery Key Nos. 1, 16
C.J.S. Bribery, §§ 1,2,3,20
Elections Key No. 315
C.J.S. Elections, § 332
Embracery Key No. 1
C.J.S. Embracery, §§ 1, 3
Extortion Key No. 1
C.J.S. Extortion, § 1
Officers Key Nos. 27, 64, 121
C.J.S. Officers, §§ 24, 57, 133

94-7-103. Threats And Other Improper Influence In Official And Political Matters.

(1) A person commits an offense under this section if he purposely or knowingly:

(a) threatens unlawful harm to any person with the purpose to influence his decision, opinion, recommendation, vote or other exercise of discretion as a public servant, party official or voter; or

(b) threatens harm to any public servant with the purpose to influence his decision, opinion, recommendation, vote or other exercise of discretion in a judicial or administrative proceeding; or

(c) threatens harm to any public servant or party official with the purpose to influence him to violate his duty; or

(d) privately addresses to any public servant who has or will have an official discretion in a judicial or administrative proceeding any representation, entreaty, argument or other communication designed to influence the outcome on the basis of considerations other than those authorized by law. It is no defense to prosecution under this section that a person whom the offender sought to influence was not qualified to act in the desired way, whether because he had not yet assumed office, or lacked jurisdiction, or for any other reason; or

(e) as a juror, or officer in charge of a jury, receives or permits to be received any communication relating to any matter pending before such jury, except according to the regular course of proceedings.

(2) A person convicted under this section shall be fined

not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both, unless the offender threatened to commit an offense or made a threat with the purpose to influence a judicial or administrative proceeding, in which case the offender shall be imprisoned in the state prison for any term not to exceed ten (10) years.

Historical Note

Enacted: M.C.C. 1973, § 94-7-103 by Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C., § 240.2

Prior Law: R.C.M. 1947, §§ 94-804, 94-805, 94-807, 94-1911, and 94-3905. Repealed by Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

M. Sehestedt

This section concerning improper influencing of official matters prohibits conduct not covered by the preceding section on Bribery and is directed toward the improper influencing of public servants, party officials, jurors or voters by threat or private communication. The effect of this section is to broaden prior law to cover classes of persons who were not previously clearly protected against attempts to exert improper influence by these means. Subsection (1)(a) is all inclusive in prohibiting the use of threats to influence the exercise of discretion by any public servant or party official or to influence a private citizen in the exercise of his franchise. Subsection (1)(b) is a narrower class drawn from those included in subsection (1)(a) for the imposition of additional penalties as provided under subsection (2) for those who use threats to influence judicial or administrative proceedings. Subsections (1)(d) and (1)(e) provide criminal sanctions for unauthorized private communications with purpose of influencing the decision of a public servant having official discretion in a matter or juror with regard to a matter pending before the jury.

The offenses under this section are generally punished as misdemeanors but if the threat is to commit an offense or the threat is intended to influence a judicial or administrative proceeding the punishment may be any term up to ten years. It should be noted that the facts justifying the increased penalty would have to be found by the jury. It should be also noted that many, if not all, of the situations involving threats which

are punishable under this section are also punishable under M.C.C. 1973, § 94-5-203, Intimidation. Consideration should be given to charging under that section in those situations since the penalties are heavier and elements of proof required are no greater.

Revised Commission Comment

L. Elison

Penal legislation against the use of intimidation to influence the behavior of public officials is much rarer than legislation against bribery, although there are many statutes relating to jurors, legislators and law enforcement officers.

Cross References

Administrative proceeding defined, M.C.C. 1973, § 94-2-101(3)
Party official defined, M.C.C. 1973, § 94-2-101(42)
Public servant defined, M.C.C. 1973, § 94-2-101(52)
Purpose defined, M.C.C. 1973, § 94-2-101(53)
Threat defined, M.C.C. 1973, § 94-2-101(53)
Intimidating electors, R.C.M. 1947, § 23-4711
Intimidation, M.C.C. 1973, § 94-5-203

Library References

Elections Key Nos. 316, 319
C.J.S. Elections, §§ 330, 332
Embracery Key No. 1
C.J.S. Embracery, §§ 1,3
Obstructing Justice Key No. 7
C.J.S. Obstructing Justice, § 5
Officers Key No. 121
C.J.S. Officers, § 133

94-7-104. Compensation For Past Official Behavior.

(1) A person commits an offense under this section if he knowingly solicits, accepts or agrees to accept any pecuniary benefit as compensation for having, as public servant, given a decision, opinion, recommendation or vote favorable to another, or for having otherwise exercised a discretion in his favor, or for having violated his duty. A person commits an offense under this section if he knowingly offers, confers or agrees to confer compensation, acceptance of which is prohibited by this section.

(2) A person convicted under this section shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-7-104 by Sec. 1, Ch. 32, Laws of Montana 1973

Source: M.P.C., § 240.13

Prior Law: Not explicitly dealt with.

Annotator's Note

M. Sehestedt

The purpose of this section on Compensation for Past Official Behavior is the elimination of a problem occasionally encountered in bribery prosecution when the defendant claims he did not solicit or receive anything until after the transaction in question had been completed. It should be noted that while this section is limited to pecuniary benefits to public servants it punishes both the public servant who "solicits, accepts or agrees to accept" and the individual who "offers, confers or agrees to confer" such benefits.

Compensation for past action which implies a promise of similar compensation for future favor undermines public confidence in the integrity of government quite as effectively as the payment in advance. It is made punishable by the new code on those grounds.

Cross References

Administrative proceeding defined, M.C.C. 1973, § 94-2-101(3)
Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Pecuniary benefit defined, M.C.C. 1973, § 94-2-101(44)
Public servant defined, M.C.C. 1973, § 94-2-101(52)
Solicit defined, M.C.C. 1973, § 94-2-101(57)

Library References

Bribery Key No. 1
C.J.S. Bribery, §§ 1-3

94-7-105. Gifts To Public Servants By Persons Subject To Their Jurisdiction.

(1) No public servant in any department or agency exercising regulatory function, or conducting inspections or investigations, or carrying on a civil or criminal litigation on behalf of the government, or having custody of prisoners, shall solicit, accept or agree to accept any pecuniary benefit from a person known to be subject to such regulation, inspection, investigation or custody, or against whom such litigation is known to be pending or contemplated.

(2) No public servant having any discretionary function to perform in connection with contracts, purchases, payments, claims or other pecuniary transactions of the government shall solicit, accept or agree to accept any pecuniary benefit from any person known to be interested in or likely to become interested in any such contract, purchase, payment, claim or transaction.

(3) No public servant having judicial or administrative authority and no public servant employed by or in a court or other tribunal having such authority or participating in the enforcement of its decision, shall solicit, accept, or agree to accept any pecuniary benefit from a person known to be interested in or likely to become interested in any matter before such public servant or tribunal with which he is associated.

(4) No legislator or public servant employed by the legislature or by any committee or agency thereof shall solicit, accept or agree to accept any pecuniary benefit from a person known to be interested in or likely to become interested in any matter before the legislature or any committee or agency thereof.

(5) Exceptions. This section shall not apply to:

(a) fees prescribed by law to be received by a public servant, or any other benefit for which the recipient gives legitimate consideration or to which he is otherwise entitled; or

(b) trivial benefits incidental to personal, professional or business contacts and involving no substantial risk of undermining official impartiality.

(6) No person shall knowingly confer, or offer, or agree to confer, any benefit prohibited by the foregoing subsections.

(7) A person convicted of an offense under this section shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-7-105 by Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C., § 240.5

Prior Law: No sections dealing specifically with gifts to public officials.

Annotator's Note

M. Sehestedt

This section on Gifts to Public Servants proscribes conduct which, while suspect, was beyond the scope of prior law. Prior law provisions dealing with bribery required an element of showing of purpose to affect as well as to transfer or offer to transfer property or other considerations. Under this section all that need be shown is the jurisdiction or probable jurisdiction and the transfer, offer to transfer, agreement to transfer or solicitation of a pecuniary benefit. The section is limited in that the benefit must be pecuniary in nature. Pecuniary benefit is defined as being a "benefit in the form of money, property, commercial interests or anything else the primary significance of which is economic gain." (M.C.C. 1973, § 94-2-101(44)) This would seem to exclude from the scope of this section such gifts as the traditional Christmas bottle of Scotch or advertising gifts such as pens, note pads, or calendars.

The various subsections are broadly inclusive as to what public servants are barred from the acceptance of pecuniary benefits. Subsection (1) bars those engaged in regulatory functions or legal representation from the acceptance of gifts from persons known to be subject to regulation or likely to be involved in a legal struggle with the state. Subsection (2) bars the acceptance of gifts by purchasing agents and others dealing in claims or other similar transactions from accepting gifts offered by other parties interested in the transaction. Subsection (3) is aimed at the protection of the judiciary and its employees and subsection (4) prohibits gifts to legislators and legislative employees when the donor is either involved or likely to be involved in a matter pending before the court or legislature respectively. Subsection (5) offers as exceptions to the foregoing such benefits as are allowed by law and trivial benefits which involve no substantial risk of undermining official impartiality.

It should be noted that this section makes it an offense to either "solicit, accept or agree to accept" or to "confer, offer or agree to confer" a prohibited gift. Accordingly, either party to the transaction can be subject to criminal sanction.

Summary of Revised Commission Comment

M. Sehestedt

In some cases a non-criminal sanction against a public servant would be preferred, but there is difficulty in arriving at satisfactory generalizations for all classes of persons and conduct covered by this section.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Pecuniary benefit defined, M.C.C. 1973, § 94-2-101(44)
Public servant defined, M.C.C. 1973, § 94-2-101(52)
Solicit defined, M.C.C. 1973, § 94-2-101(57)

Library References

Bribery Key No. 1
C.J.S. Bribery, §§ 1-7

Part Two: Perjury And Other Falsification In Official Matters.

94-7-201. Definitions.

In this part, unless a different meaning plainly is required, the definitions given in chapter 2, 94-2-101 apply.

Historical Note

Enacted: M.C.C. 1973, § 94-7-201, Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: None

94-7-202. Perjury.

(1) A person commits the offense of perjury if in any official proceeding he knowingly makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material.

(2) A person convicted of perjury shall be punished by imprisonment in the state prison for any term not to exceed ten (10) years.

(3) Falsification is material, regardless of the admissibility of the statement under rules of evidence, if it could have affected the course or outcome of the proceeding. It is no defense that the declarant mistakenly believed the falsification to be immaterial. Whether a falsification is material in a given factual situation is a question of law.

(4) It is not a defense to prosecution under this section that the oath or affirmation was administered or taken in an irregular manner or that the declarant was not competent to make the statement. A document purporting to be made upon oath or affirmation at any time when the offender presents it as being so verified shall be deemed to have been duly sworn or affirmed.

(5) No person shall be guilty of an offense under this section if he retracted the falsification in the course of the proceeding in which it was made before it became manifest that the falsification was or would be exposed and before the falsification substantially affected the proceeding.

(6) Where the defendant made inconsistent statements under oath or equivalent affirmation, both having been made within the period of the statute of limitations, the prosecution may proceed by setting forth the inconsistent statements in a single count alleging in the alternative that one or the other was false and

not believed by the defendant. In such case it shall not be necessary for the prosecution to prove which statement was false but only that one or the other was false and not believed by the defendant to be true.

(7) No person shall be convicted of an offense under this section where proof of falsity rests solely upon the testimony of a single person other than the defendant.

Historical Note

Enacted: M.C.C. 1973, § 94-7-202 by Sec. 1, Ch. 513, Laws of Montana 1973

Source: Adapted from M.P.C., § 241.1

Prior Law: R.C.M. 1947, § 94-3801, 94-3804, 94-3805, 94-3806, 94-3807, 94-3808, 94-3811, 94-3813 repealed by Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

M. Sehestedt

Under the common law perjury was narrowly defined as a false oath in a judicial proceeding in regard to a material matter. A companion crime, false swearing, prohibited conduct similar to perjury occurring in official proceedings in which an oath was required but which were not classed as judicial proceedings. Prior Montana law followed a fairly common pattern in extending the scope of perjury until it covered the entire field, including "any case in which an oath may by law be administered." The prior Montana provisions also reflect a divergence from the common law offence of perjury in that the gist of the offense was knowing the falseness of the information given under oath. The common law made the gist of the offense a false oath for which criminal sanctions could be imposed even though the information given turned out to be accurate.

This section of the new code represents a partial retreat to the common law concept of perjury. Subsection (1) limits perjury to false statements made under oath in official proceedings. A false statement within the meaning of subsection (1) may be made either by giving a statement or by swearing that a statement previously made is true, when the person so doing does not believe the statement to be true. The second phrase in subsection (1) which penalizes a person for swearing that a statement previously made is true will provide punishment when either the statement was untrue when made and is still untrue or the statement was true when made but has since become untrue and the declarant is aware of the fact. It

should be noted that this represents a change from the prior law which provided punishment for a statement made when the declarant did not know whether the statement was true or false even when the statement was shown to be true (§ 94-3810). Under the new code an unknowing statement is punishable only if it is shown to be false.

Subsection (3) continues the prior law requirement that materiality be determined by reference to the possible effect on the proceedings. Inadmissibility and the defendant's belief of immateriality are expressly eliminated as possible defenses. The determination of materiality in any given fact situation is expressly made a matter of law.

Subsection (4) continues the prior law position that an irregularity in the administration of the oath or defendant's incompetence to take an oath is not a defense to a perjury charge. This subsection also provides that presentation of a document which is purportedly verified by oath is sufficient to establish the oath or affirmation element of perjury.

Subsection (5), which makes retraction a defense, is new. It should be noted that to establish an effective defense of retraction the defendant would have to show both that the retraction was made before it became manifest that the falsehood would be exposed and that the retraction occurred before the proceedings had been substantially affected by the falsehood. The section was included as an incentive to correct falsehoods without impairing the compulsion to tell the truth.

Subsection (6) is also new in allowing both accusation and proof in the alternative. The effect of this provision is to allow conviction without requiring proof of falsehood in one of the specific statements. In these situations the state still has the burden of showing that the defendant at the time he made one of the statements could not have believed it to be true.

The common law rule that falsehood be established by two witnesses is adopted in part by subsection (7). At the common law this rule was adopted to deal with the problem of an oath against an oath. The modern rationale is a policy determination based on a balancing of the need for protection of witness and the need to maintain the sanctions for false testimony. In adopting the requirement of more than one witness Montana has followed the majority of states in affording additional protection to the witness at the possible cost of being unable to convict an apparent perjurer. This section requires that at a minimum there be circumstances which will serve to corroborate the testimony of the prosecuting witness.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Official proceeding defined, M.C.C. 1973, § 94-2-101(39)
Statutes of Limitation, M.C.C. 1973, §§ 94-1-106 and 94-1-107

Library References

Perjury Key, Nos. 1-12, 41
C.J.S. Perjury, §§ 1, 3-17, 24, 51

94-7-203. False Swearing.

(1) A person commits the offense of false swearing if he knowingly makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of such a statement previously made when he does not believe the statement to be true, and:

(a) the falsification occurs in an official proceeding; or

(b) the falsification is purposely made to mislead a public servant in performing his official function; or

(c) the statement is one which is required by law to be sworn or affirmed before a notary or other person authorized to administer oaths.

(2) Subsections (4) to (7) of section 94-7-202 apply to this section.

(3) A person convicted of false swearing shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-7-202 by Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C., § 241.2

Prior Law: See generally Title 94, Chapter 38, R.C.M. 1947, repealed by Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

M. Sehestedt

False swearing was the common law crime of giving a false oath in official proceeding other than a judicial proceeding or in a matter in which an oath is required by law. As such it had no precise counterpart in prior Montana law but was in general treated as a species of perjury. Accordingly, the addition of this section marks in some measure a return to the common law. The area covered

by this section is however broader than the area covered by the common law crime of false swearing and deals with those situations not amounting to perjury under the preceding section.

Thus, a false statement made in an official proceeding, which is not material is punishable under subsection (1)(a). A material false statement not made in an official proceeding but under oath and made with the purpose of misleading a public servant in performing his official function is punishable under subsection (1)(b). Subsection (1)(c) allows the application of sanctions for falsification of any statement required by law to be under oath. It should be noted that subsection (c) does not apply to statements which while made under oath are not required by law to be so made.

Subsection (2) adopts the requirements of M.C.C. 1973, § 94-7-202 subsections (4), (5), (6) and (7) thus eliminating irregularities in the oath as defense, providing for a defense of retraction, allowing pleading and proof in the alternative and requiring proof by at least one witness and corroborating circumstances.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Official proceeding defined, M.C.C. 1973, § 94-2-101(39)
Public servant defined, M.C.C. 1973, § 94-2-101(52)
Purpose defined, M.C.C. 1973, § 94-2-101(53)

Library References

Perjury Key Nos. 1-12, 41
C.J.S. Perjury, §§ 1-17

94-7-204. Unsworn Falsification To Authorities.

(1) A person commits an offense under this section if, with purpose to mislead a public servant in performing his official function, he:

(a) makes any written false statement which he does not believe to be true; or

(b) purposely creates a false impression in a written application for any pecuniary or other benefit by omitting information necessary to prevent statements therein from being misleading; or

(c) submits or invites reliance on any writing which he knows to be forged, altered or otherwise lacking in authenticity; or

(d) submits or invites reliance on any sample, specimen, map, boundary mark or other object which he knows to be false.

(2) A person convicted of an offense under this section shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

Historical Note

Enacted:	M.C.C. 1973, § 94-7-204 by Sec. 1, Ch. 513, Laws of Montana 1973
Source:	M.P.C., § 241.3
Prior Law:	R.C.M. 1947, § 94-1507 repealed by Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

M. Sehestedt

This section is almost entirely new. The only similar provision of prior law was limited to false statements made with regard to taxes. While this section is directly based on the Model Penal Code, its ultimate source is 18 U.S.C., § 1001 which provides penalties

for knowing misstatements of material fact in "any matter within the jurisdiction of any agency of the U.S." The section requires that there be a purpose to mislead a public servant in the performance of his official duties. It is also required to establish an offense under 3 of the subsections that there be a writing. Subsection (1)(d) extends the section's coverage to non-written matters involving samples, boundary marks or other objects. It should be noted that in addition to punishing the submission of writings either known to be false or forged, sanctions are provided for the submission of a writing which, because of omission, is misleading.

If pecuniary benefits or other property obtained as a result of the false or misleading statements, the conduct may also be punishable under the provisions of § 94-6-302(2) relating to theft by deception.

Cross References

Benefit defined, M.C.C. 1973, § 94-2-101(4)
Pecuniary benefit defined, M.C.C. 1973, § 94-2-101(44)
Public servant defined, M.C.C. 1973, § 94-2-101(52)
Purpose defined, M.C.C. 1973, § 94-2-101(53)

Library References

Fraud key Nos. 68, 69
C.J.S. Fraud, §§ 154-158

94-7-205. False Alarms To Agencies Of Public Safety.

(1) A person commits an offense under this section if he knowingly causes a false alarm of fire or other emergency to be transmitted to or within any organization, official or volunteer, which deals with emergencies involving danger to life or property.

(2) A person convicted of an offense under this section shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-7-205 by Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C., § 241.4

Prior Law: None

Annotator's Note

M. Sehestedt

This section is new and offers a remedy for the recurring problem of nuisance alarms which pose a danger that equipment needed to deal with a true emergency will be unavailable and which results in a waste of government resources. To establish an offense under this section it is necessary to prove knowing communication of a report or alarm, known to be false, to an organization which deals with emergencies. It should be noted that this section overlaps M.C.C. 1973, § 94-5-203(2), Intimidation. The offense of Intimidation, which requires knowing communication of a threat or false report of pending disaster, is aimed at the far more social destructive conduct involved in terrorist threats. Accordingly, despite the overlap between the sections, it is urged that care be taken in making the determination of which section to charge under, particularly so since Intimidation is a felony while this section provides only for misdemeanor penalties. It should also be noted that this section cannot be treated as a lesser included offense under intimidation since to establish this offense there must be proof of communcation to an organization whose purpose it is to deal with emergencies, a requirement that in intimidation is of mere communication.

Revised Criminal Law Commission Comment

L. Elison

This section covers all dangerous emergency alarms, e.g., floods, hurricanes, landslides, civil defense. The police force would qualify as an emergency organization. The provision is justifiable on the ground of waste of government resources and the likelihood that the actor will cause personnel or equipment to be unavailable to deal with real emergencies.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Intimidation, offense of, M.C.C. 1973, § 94-5-203

94-7-206. False Reports To Law Enforcement Authorities.

(1) A person commits an offense under this section if he knowingly:

(a) gives false information to any law enforcement officer with the purpose to implicate another; or

(b) reports to law enforcement authorities an offense or other incident within their concern knowing that it did not occur; or

(c) pretends to furnish such authorities with information relating to an offense or incident when he knows he has no information relating to such offense or incident.

(2) A person convicted under this section shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-7-206 by Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C., § 241.5

Prior Law: None

Annotator's Note

M. Sehestedt

This section deals with a problem area in which there has been little legislation. The purpose of the section is to deter and punish the giving of false information to law enforcement authorities. To this end subsection (1)(a) prohibits the giving of false information with the purpose of implicating another, subsection (1)(b) prohibits the report of an incident known not to have occurred and subsection (1)(c) deals with the problem of an individual supplying information which he does not really possess. It should be noted that knowingly giving false information is sufficient to complete the offense; there need be no action taken in reliance on it. While perhaps not a common problem the purposeful giving of false information merits the imposition of sanction because such behavior creates a probability of asocial consequences both in terms of the individual against whom the information is supplied

and the public which must foot the bill for the fruitless investigation which may follow.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Offense defined, M.C.C. 1973, § 94-2-101(37)

94-7-207. Tampering With Witnesses And Informants.

(1) A person commits the offense of tampering with witnesses and informants if, believing that an official proceeding or investigation is pending or about to be instituted, he purposely or knowing attempts to induce or otherwise cause a witness or informant to:

(a) testify or inform falsely; or

(b) withhold any testimony, information, document or thing; or

(c) elude legal process summoning him to tesify or supply evidence; or

(d) absent himself from any proceeding or investigation to which he has been summoned.

(2) A person convicted of tampering with witnesses or informants shall be imprisoned in the state prison for any term not to exceed ten (10) years.

Historical Note

Enacted: M.C.C. 1973, § 94-7-207 by Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C., § 241.6

Prior Law: R.C.M. 1947, § 94-1702, 94-1705 and 94-1706 repealed by Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

M. Sehestedt

This section on Tampering with Witnesses replaces a number of prior provisions and is directed toward the prevention of any interference with testimonial evidence. The section is broad in scope and penalizes any attempt to induce by any means a witness or potential witness to testify falsely, to withhold testimony, to elude service of process or to fail to attend any proceeding to which he has been summoned. It should be noted that all that is required to complete this offense is purposely or knowingly attempting

to influence the witness. There need be no showing of success in altering the witness's testimony or conduct. Also any inducement is sufficient whether an offer of pecuniary benefit or an appeal to friendship if it is offered with the purpose of influencing the witness's testimony or availability.

Revised Criminal Law Commission Comment

L. Elison

This section covers "informants" and "witnesses." Under prior law most such offenses were misdemeanors. This section gives the judge discretion to impose a sentence of up to ten (10) years if the circumstances justify.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Purposely defined, M.C.C. 1973, § 94-2-101(53)
Official proceeding defined, M.C.C. 1973, § 94-2-101(39)
Witness defined, M.C.C. 1973, § 94-2-101(67)

Library References

Obstructing Justice Key Nos. 4-6
C.J.S. Obstructing Justice, §§ 7-10

94-7-208. Tampering With Or Fabricating Physical Evidence.

(1) A person commits the offense of tampering with or fabricating physical evidence if, believing that an official proceeding or investigation is pending or about to be instituted, he

(a) alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such proceeding or investigation; or

(b) makes, presents or uses any record, document or thing knowing it to be false and with purpose to mislead any person who is or may be engaged in such proceeding or investigation.

(2) A person convicted of tampering with or fabricating physical evidence shall be imprisoned in the state prison for a term not to exceed ten (10) years.

Historical Note

Enacted: M.C.C. 1973, § 94-7-208 by Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C., § 241.7

Prior Law: R.C.M. 1947, § 94-1702, 94-1703, and 94-1704, repealed by Sec. 32, Ch. 513, Laws of Montana 1973.

Annotator's Note

M. Sehestedt

This section is a necessary companion to the preceding section on Tampering with Witnesses. The purpose of this section is the protection of physical evidence. To this end the section prohibits the alteration, destruction, concealment or removal of physical evidence and the making or presentation of physical evidence known to be false. To establish the offense it must be shown that the accused believed an official proceeding or investigation was pending or imminent and that he acted either with the purpose of impairing the availability or verity of physical evidence or that he knowingly presented false evidence with the purpose of misleading. It should be noted that to complete the offense the accused need merely do the proscribed acts with the requisite mental state--he need not succeed in making the evidence unavailable or in misleading the investigation. The most significant

differences between this section and prior law are the increase in scope to include investigations as well as trials and other formal proceedings and the increase in penalties from punishment as a misdemeanor to punishment by up to ten years.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Official proceeding defined, M.C.C. 1973, § 94-2-101(39)
Purpose defined, M.C.C. 1973, § 94-2-101(53)

Library References

Obstructing Justice Key Nos. 4-6
C.J.S. Obstructing Justice, §§ 7-10

94-7-209. Tampering With Public Records Or Information.

(1) A person commits the offense of tampering with public records or information if he:

(a) knowingly makes a false entry in, or false alteration of, any record, document, legislative bill or enactment, or thing belonging to, or received or issued, or kept by the government for information or record, or required by law to be kept by others for information of the government; or

(b) makes, presents or uses any record, document or thing knowing it to be false, and with purpose that it be taken as a genuine part of information or records referred to in paragraph (a); or

(c) purposely destroys, conceals, removes or otherwise impairs the verity or availability of any such record, document or thing.

(2) A person convicted of the offense of tampering with public records or information shall be imprisoned in the state prison for any term not to exceed ten (10) years.

Historical Note

Enacted: M.C.C. 1973, § 94-7-209 by Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C., § 241.8

Prior Law: R.C.M. 1947, §§ 94-1501(6), 94-1507, 94-1517, 94-1802, 94-2722, 94-2724, 94-2725, 94-2726, 94-2903 and 94-2904, repealed by Sec. 32, Ch. 513, Laws of Montana 1973.

Annotator's Note

M. Sehestedt

The purpose of this section on Tampering with Public Records is the protection of the integrity of government records and of

records required by the government to be kept by private individuals. This section consolidates a number of prior law provisions into one unitary statute which prohibits false entries and alterations in presentations, as genuine, of records or documents known to be false for inclusion in, and destruction of "any record, document, legislative bill or enactment, or thing belonging to, or received or issued or kept by the government for information or record, or required by law to be kept by others for information of government." The only addition to prior law appears to be subsection (1)(b) which prohibits the presentation or fabrication of records for inclusion as genuine and even this may have been a part of the more general prohibitions contained in prior law. It should be noted that this section does not protect private records unless such private records are required to be kept by the government.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Purposely defined, M.C.C. 1973, § 94-2-101(53)

Library References

Forgery Key Nos. 15, 16
C.J.S. Forgery, § 29
Records Key Nos. 21, 22
C.J.S. Records, §§ 72-76

94-7-210. Impersonating A Public Servant.

(1) A person commits the offense of impersonating a public servant if he falsely pretends to hold a position in the public service with purpose to induce another to submit to such pretended official authority or otherwise to act in reliance upon that pretense to his prejudice.

(2) A person convicted of impersonating a public servant shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

Historical Note

Enacted:	M.C.C. 1973, § 94-7-210 by Sec. 1, Ch. 513, Laws of Montana 1973
Source:	M.P.C., § 241.9
Prior Law:	R.C.M. 1947, §§ 94-35-149, 94-35-253, 94-3901 and 94-3911 repealed by Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

M. Sehestedt

This section on Impersonating a Public Servant consolidates a number of prior law provisions including § 94-35-149, Impersonating an Officer, § 94-35-253, Wearing Certain Uniforms Prohibited, § 94-3901, Acting in A Public Capacity Without Having Qualified, and § 94-3911, Exercising Functions of Office Wrongfully. This section represents an improvement over prior law in that it is specifically directed toward harmful conduct. To establish an offense under this section it is necessary to show that the accused falsely pretended to be a public servant and that he did so with the purpose of causing another to act on that basis. It should be noted that these provisions apply to all public offices and would include any actions made under color of that office by a pretender.

Revised Criminal Law Commission Comment

L. Elison

Legislation prohibiting impersonation of some or all public officials is found in most penal codes. The object is to prevent

imposition on people by the pretense of authority, and partly to ensure proper respect for genuine authority by suppressing discreditable imitations. These objectives are regarded as especially important in relation to law enforcement officers.

Cross References

Act defined, M.C.C. 1973, § 94-2-101(1)
Public servant defined, M.C.C. 1973, § 94-2-101(52)
Purposely defined, M.C.C. 1973, § 94-2-101(53)

Library References

False Personation Key No. 1
C.J.S. False Personation, §§ 1-4
Officers Key Nos. 86, 87, 89
C.J.S. Officers, §§ 80, 82

Part Three: Obstructing Governmental Operations.

94-7-301. Resisting Arrest.

(1) A person commits the offense of resisting arrest if he knowingly prevents or attempts to prevent a peace officer from effecting an arrest by:

(a) using or threatening to use physical force or violence against the peace officer or another; or

(b) using any other means which creates a risk of causing physical injury to the peace officer or another.

(2) It is no defense to a prosecution under this section that the arrest was unlawful, provided the peace officer was acting under color of his official authority.

(3) A person convicted of the offense of resisting arrest shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for any term not to exceed six (6) months, or both.

Historical Note

Enacted:	M.C.C. 1973, § 94-7-301, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Mich. Rev. C.C. 1967, § 4625
Prior Law:	R.C.M. 1947, § 94-35-169, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Forsythe

Until the passage of this section, Montana had no provision dealing specifically with resistance to an arrest. Subsection (1) is narrower than the repealed statute which concerned resistance to the discharge by public officers of their duties (§ 94-35-169, R.C.M. 1947). The old law specifically applied not only to interference with arrest made by a peace officer, but to the discharge by any public officer of any duty of his office. Also, this subsection, unlike the repealed statute, requires the use or threat of force or the risk of injury in connection with the interference with the

peace officer. "Peace officer" is defined at M.C.C. 1973, § 94-2-101(43).

Subsection (2) was not a part of the repealed law. This subsection is in opposition to the common law theory that an officer undertaking an unlawful arrest was deemed to be not acting in the line of duty. Under this theory the intended arrestee had the privilege to use reasonable force to prevent the unlawful deprivation of his liberty. Subsection (2) takes the often complicated decision as to the lawfulness of the arrest away from the arrestee, thereby allowing such decision to be decided ultimately in court rather than by force. This is also the position taken by the Model Penal Code, § 3.04(2)(a)(1).

Subsection (3) reduces the maximum penalty allowed under the prior law

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Peace officer defined, M.C.C. 1973, § 94-2-101(43)

Library References

Obstructing Justice Key Nos. 7, 9, 21
C.J.S. Obstructing Justice, §§ 5, 6, 22

94-7-302. Obstructing A Peace Officer Or Other Public Servant.

(1) A person commits the offense of obstructing a peace officer or public servant if he knowingly obstructs, impairs or hinders the enforcement of the criminal law, the preservation of the peace, or the performance of a governmental function.

(2) It is no defense to a prosecution under this section that the peace officer was acting in an illegal manner, provided he was acting under color of his official authority.

(3) A person convicted of the offense of obstructing a peace officer or other public servant shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-7-302, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Mich. Rev. C.C. 1967, § 4506

Prior Law: R.C.M. 1947, § 94-35-169, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Revised Criminal Law Commission Comment

L. Elison

Subsection (1) is designed to deal generally with the obstruction of governmental activities. It protects both peace officers and public servants in the administration of their respective duties. "Peace officer" is defined at M.C.C. 1973, § 94-2-101(43); "public servant" at M.C.C. 1973, § 94-2-101(52). Generally, the section seeks to retain the coverage of the old law (see R.C.M. 1947, § 94-35-169) to encompass protection of all governmental functions. The section imposes a uniform mens rea requirement for all illegal obstruction, i.e., knowingly, defined at M.C.C. 1973, § 94-2-101(28). The old law required a "wilful" obstruction.

In subsection (2) the commission has followed the basic premise that a person should not take the law into his own hands when faced with illegal police activity.

Cross References

Peace officer defined, M.C.C. 1973, § 94-2-101(43)
Public servant defined, M.C.C. 1973, § 94-2-101(52)
Knowingly defined, M.C.C. 1973, § 94-2-101(28)

Library References

Obstructing Justice Key Nos. 7, 9, 21
C.J.S. Obstructing Justice, §§ 5, 6, 22

94-7-303. Obstructing Justice.

(1) For the purpose of this section "an offender" means a person who has been or is liable to be arrested, charged, convicted or punished for a public offense.

(2) A person commits the offense of obstructing justice if, knowing a person is an offender, he purposely:

(a) harbors or conceals an offender; or

(b) warns an offender of impending discovery or apprehension, except this does not apply to a warning given in connection with an effort to bring an offender into compliance with the law; or

(c) provides an offender with money, transportation, weapon, disguise or other means of avoiding discovery or apprehension; or

(d) prevents or obstructs, by means of force, deception or intimidation anyone from performing an act that might aid in the discovery or apprehension of an offender; or

(e) suppresses by act of concealment, alteration or destruction any physical evidence that might aid in the discovery or apprehension of an offender; or

(f) aids an offender who is subject to official detention to escape from such official detention.

(3) A person convicted of obstructing justice shall be:

(a) imprisoned in the state prison for a term not to exceed ten (10) years if the offender has been or is liable to be charged with a felony; or

(b) fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both, if the offender has been or is liable to be chaged with a misdemeanor.

Historical Note

Enacted: M.C.C. 1973, § 94-7-303, Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: R.C.M. 1947, §§ 94-205, 94-206, 94-4201, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Forsythe

Prior law provided that a person who concealed his knowledge of a felony or who harbored or protected one charged or convicted of a felony was an "accessory." R.C.M. 1947, § 94-205. At common law such a person was an "accessory after the fact." These terms encompassed all of the specific activities in subsections (2)(a) through (2)(e). These subsections are broader than previous law in two respects. Prior law applied to helping felons, whereas this section applies also to obstruction of justice in connection with misdemeanors. Second, R.C.M. 1947, § 94-205 required that the aider have "full knowledge" of the crime, whereas under this section he may not know what crime has been committed.

Subsection (2)(f) applies to a person who aids another to commit the offense of escape, M.C.C. 1973, § 94-7-306. The subsection covers the old crime of Rescue, R.C.M. 1947, § 94-4201. The subsection is more comprehensive than prior law in that it covers not only violent jailbreaks and aiding the rescue or escape of a person "from an officer having him in lawful custody," but it applies also to the person who aids a person to depart from any lawful custody. See the definition of "official detention," M.C.C. 1973, § 94-2-101 (38). "Aids" in this subsection is more inclusive than "rescues" under prior law. The maximum penalty for the offense is reduced from felony to misdemeanor.

Revised Criminal Law Commission Comment

L. Elison

This section is based on the theory that a person who aids another to elude apprehension is obstructing justice and interfering with the processes of government. It is his willingness to interfere and the harm threatened by such interference that constitutes the offense rather than any fiction that equates helping the aider with the original offense.

Knowledge or reason to believe that the putative offender is guilty of or chargedwith a crime is simply evidence of the purpose to aid the putative offender to elude justice. Such knowledge is not a necessary element of the offense. A purpose to aid the offender to avoid arrest is not proved merely by showing that the defendant

gave succour to one who was in fact a fugitive. When a fugitive seeks help from friends and relatives there may be other motivations in addition to the objective of impeding law enforcement. Such other motivations are not taken into consideration by way of exception of certain classes of near kin, but could possibly be a ground for mitigating sentence after conviction. Subsection (2)(b) contains an exception to take care of cases like fellow-motorists warning a speeder to slow down, or a lawyer advising a client to discontinue illegal activities.

Cross References

Knowing defined, M.C.C. 1973, § 94-2-101(28)
Purposely defined, M.C.C. 1973, § 94-2-101(53)
Offender defined, M.C.C. 1973, § 94-2-101(36)
Official detention defined, M.C.C. 1973, § 94-2-101(38)'

Library References

Criminal Law Key No. 75 et seq.
C.J.S. Criminal Law, § 98

94-7-304. Failure To Aid A Peace Officer.

(1) Where it is reasonable for a peace officer to enlist the cooperation of a person in

(a) effectuating or securing an arrest of another (pursuant to R.C.M. 95-609), or

(b) preventing the commission by another of an offense, a peace officer may order such person to cooperate. A person commits the offense of failure to aid a peace officer if he knowingly refuses to obey such an order.

(2) A person convicted of the offense of failure to aid a peace officer shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

Historical Note

Enacted:	M.C.C. 1973, § 94-7-304, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	New
Prior Law:	R.C.M. 1947, § 94-35-177, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Forsythe

Subsection (1)(a) refers to R.C.M. 1947, § 95-609, which states that in securing an arrest the peace officer may command cooperation from male persons over the age of eighteen. A further limitation on the power to so command is imposed by subsection (1). Unlike prior law, it requires that the request be reasonable. The power to so command is limited to "peace officers," defined at M.C.C. 1973, § 94-2-101(43).

In subsection (2) the penalty has been increased to provide a possibility of imprisonment.

Cross References

Peace officer defined, M.C.C. 1973, § 94-2-101(43)
Another defined, M.C.C. 1973, § 94-2-101(2)
Offense defined, M.C.C. 1973, § 94-2-101(37)

Library References

Arrest Key No. 69
C.J.S. Obstructing Justice, § 4

94-7-305. Compounding A Felony.

(1) A person commits the offense of compounding a felony if he knowingly accepts or agrees to accept any pecuniary benefit in consideration for:

(a) refraining from seeking prosecution of a felony; or

(b) refraining from reporting to law enforcement authorities the commission or suspected commission of any felony or information relating to a felony.

(2) A person convicted of compounding a felony shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-7-305, Sec. 1, Ch.513,Laws of Montana 1973

Source: M.P.C. 1962, § 242.5

Prior Law: R.C.M. 1947, § 94-3535, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Forsythe

Subsection (1) retains most of the coverage of prior law concerning Compounding a Felony. The significant difference between this section and previous law is that there is now no offense of compounding a "misdemeanor," defined at M.C.C. 1973, § 94-2-101(31). The old law graded the offense according to whether the crime was punishable by death or life imprisonment, was punishable by less than death or life imprisonment, or was a misdemeanor. The section has not gone as far as the Model Penal Code which expressly authorizes the compromise of a misdemeanor for which the injured person has a civil action.

The omission of misdemeanors does not leave unregulated the event of a person taking a reward to forbear or stifle a criminal prosecution for a misdemeanor. This is covered by Bribery in Official and Political Matters, M.C.C. 1973, § 94-7-102 and Gifts to Public Servants by Persons Subject to Their Jurisdiction, § 94-7-105.

To an extent subsection (1)(a) overlaps in coverage with these sections.

Subsection (2) authorizes a maximum penalty which is the same as that provided for the lowest grade of the offense under old law.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Felony defined, M.C.C. 1973, § 94-2-101(15)
Misdemeanor defined, M.C.C. 1973, § 94-2-101(31)
Bribery in Official and Political Matters, M.C.C. 1973, § 94-7-102
Gifts to Public Servants by Presons Subject to Their Jurisdiction, M.C.C. 1973, § 94-7-105.

Library References

Compounding Offenses Key No. 1
C.J.S. Compounding Offenses, §§ 1, 2, 3

94-7-306. Escape.

(1) "Official detention" means imprisonment which resulted from a conviction for an offense, confinement for an offense, confinement of a person charged with an offense, detention by a peace officer pursuant to arrest, detention for extradition or deportation, or any lawful detention for the purpose of the protection of the welfare of the person detained or for the protection of society; but "official detention" does not include supervision of probation or parole, constraint incidental to release on bail, or an unlawful arrest unless the person arrested employed physical force, a threat of physical force, or a weapon to escape.

(2) A person subject to official detention commits the offense of escape if he knowingly or purposely removes himself from official detention or fails to return to official detention following temporary leave granted for a specific purpose or limited time.

(3) A person convicted of the offense of escape shall be:

(a) imprisoned in the state prison for a term not to exceed twenty (20) years if he escapes from a state prison, county jail or city jail by the use or threat of force, physical violence, weapon or simulated weapon; or

(b) imprisoned in the state prison for a term not to exceed ten (10) years if he:

(i) escapes from a state prison, county jail or city jail; or

(ii) escapes from another official detention by the use or threat of force, physical violence, weapon or simulated weapon; or

(c) fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both if he commits escape under circumstances other than (a) and (b) of this subsection.

Historical Note

Enacted: M.C.C. 1973, § 94-7-306, Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 242.6

Prior Law: R.C.M. 1947, § 94-4203 et. seq., repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Forsythe

This section on Escape covers any unauthorized departure from legal custody. The definition of subsection (1) is not limited to confinements upon a charge or conviction of a crime, but also includes imprisonment or detention for some purpose in connection with a civil case such as a sanity hearing. The portion of the definition concerning the use of force during an unlawful arrest is consistent with the rule that an unlawful arrest is no defense to a prosecution on the charge of Resisting Arrest. M.C.C. 1973, § 94-7-101(2). One may not use force either to resist an unlawful arrest or to escape from one.

Subsection (2) describes the offense of escape. Notably, the offense may be committed even where the physical departure from official detention has been authorized. A person who fails to return to official detention when required commits the offense.

Revised Criminal Law Commission Comment

L. Elison

Subsection (3) classifies escapes according to the risk they create. Punishment is more severe for the offense when committed by the use of or threat of force, physical violence, weapon or simulated weapon. The grading of the offense by relying on the prisoner's use of force is actually a return to common law, since early common law clearly distinguished between escapes with and without use of force. The grading scheme implicit in the old code by which punishment is provided in reference to the type of confinement, is not entirely abandoned by § 94-7-306. For example, use of force in escaping from a non-institutional detention calls for a lesser punishment than escape from a prison or county or city jail. Further,

an escape without use of force from a non-institutional detention as provided in sub-paragraph (3)(e) removes the offense from the felony category altogether.

Another grading method for escapes is based on the seriousness of the crime causing the detention. The proposed section includes this grading indirectly in that the seriousness of the crime causing the detention is indicated by the institution in which the detention is made. For example, persons held in the state prison will usually be felons while those in city or county jails will be misdemeanants.

Cross References

Offense defined, M.C.C. 1973, § 94-2-101(37)
Peace officer defined, M.C.C. 1973, § 94-2-101(43)
Official detention defined, M.C.C. 1973, § 94-2-101(38)
Weapon defined, M.C.C. 1973, § 94-2-101(66)
Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Purposely defined, M.C.C. 1973, § 94-2-101(53)
Threat defined, M.C.C. 1973, § 94-2-101(63)
Resisting Arrest, M.C.C. 1973, § 94-7-101

Library References

Escape Key No. 1 et seq.
C.J.S. Escape, § 1 et seq.

94-7-307. Transferring Illegal Articles Or Unauthorized Communication.

(1) Transferring Illegal Articles.

(a) A person commits the offense of transferring illegal articles if he knowingly or purposely transfers any article or thing to a person subject to official detention or is transferred any article or thing by a person subject to official detention.

(b) A person convicted of transferring illegal articles shall be:

(i) imprisoned in the state prison for a term not to exceed twenty (20) years if he conveys a weapon to a person subject to official detention; or

(ii) fined not to exceed one hundred dollars ($100) if he conveys any other article or thing to a person subject to official detention or be imprisoned in the county jail for any term not to exceed ten (10) days, or both. This shall not apply unless the offender knew or was given sufficient notice so that he reasonably should have known that the article or thing he conveyed was an illegal article.

(2) Unauthorized Communication.

(a) A person commits the offense of unauthorized communication if he knowingly or purposely communicates with a person subject to official detention without the consent of the person in charge of such official detention.

(b) A person convicted of the offense of unauthorized communication shall be fined not to exceed one hundred dollars ($100) or be imprisoned in the county jail for any term not to exceed ten (10) days, or both.

Historical Note

Enacted:	M.C.C. 1973, § 94-7-307, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	R.C.M. 1947, §§ 94-35-241, 94-35-264, 94-4208
Prior Law:	R.C.M. 1947, §§ 94-35-241, 94-35-264, 94-4208, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Forsythe

This section on Illegal Transactions with Prisoners retains the coverage of prior law. Additionally, subsection (1) applies to the transfer of any illegal article, whereas previous law applied to an enumerated list of articles (R.C.M. 1947, § 94-35-264) and to articles useful in making an escape (R.C.M. 1947, § 94-4208). The prohibition of communication in subsection (2) is the same as that of prior law, R.C.M. 1947, § 94-35-241. Both subsections are broader than prior law in that they apply to all "official detention," defined at M.C.C. 1973, § 94-2-101(38) rather than just to the state prison. The maximum penalty for transfer of any illegal article other than a "weapon," defined at M.C.C. 1973, § 94-2-101(66), is reduced to ten days or $100 from ten years or $10,000.

Revised Criminal Law Commission Comment

L. Elison

The section does not require proof of an intent to assist an inmate to escape, but requires only that the actor intend to convey the article involved, i.e., something that he is prohibited from conveying to the inmate by statute, regulation or institutional rule. The offense is graded on the basis of the nature of the article or thing introduced, i.e., if the thing be a deadly weapon, the offense is a felony.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Purposely defined, M.C.C. 1973, § 94-2-101(53)
Official detention defined, M.C.C. 1973, § 94-2-101(38)
Weapon defined, M.C.C. 1973, § 94-2-101(66)

Library References

Prisons Key No. 17-1/2
C.J.S. Prisons, § 22

94-7-308. Bail-Jumping.

(1) A person commits the offense of bail-jumping if, having been set at liberty by court order, with or without security, upon condition that he will subsequently appear at a specified time and place, he purposely fails without lawful excuse to appear at that time and place.

(2) This section shall not interfere with the exercise by any court of its power to punish for contempt.

(3) This section shall not apply to a person set at liberty by court order upon condition that he will appear in connection with a charge of having committed a misdemeanor, except it shall apply where the judge has released the defendant on his own recognizance.

(4) A person convicted of bail-jumping in connection with a felony shall be imprisoned in the state prison for a term not to exceed ten (10) years. In all other cases he shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-7-308, Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 242.8

Prior Law: None

Annotator's Note

J. Forsythe

Bail-jumping was not a crime under the old code under which the penalty for jumping bail was forfeiture of the money or property which was posted as bail. Many recent studies have shown that the great majority of offenders may safely be released on bail, and federal appellate courts are tending toward requiring release on

bail that is very moderate in amount. The Montana Code of Criminal Procedure (Title 95, Ch. 11) has attempted to encourage this trend by making bail easier to secure and lower in amount, and, where possible, to allow release on the prisoner's own recognizance with no bail at all. However, when bail is nominal or non-existent, forfeiture is no real penalty and provides no incentive to the offender to appear for trial. This statute is intended to provide a penalty for anyone who (1) jumps bail and is accused of a felony, or (2) has been released without bail on a misdemeanor charge. The section is intended to work together with Ch. 11, Title 95 to encourage release on little or no bail, but it enables the courts to deal with those who violate their trust.

Because the definition of "official detention," M.C.C. 1973, § 94-2-101(38), expressly excludes "restraint incidental to release on bail," bail-jumping is not covered by the section on escape. The creation of a second offense allows a different treatment of forfeiture of bonds on misdemeanor charges. This is accomplished by subsection (3). Unless otherwise required by the court, it is lawful to forfeit bond on a misdemeanor, but it is not lawful to remove oneself from "official detention" resulting from a misdemeanor charge or conviction. "Misdemeanor" is defined at M.C.C. 1973, § 94-2-101(31).

Subsection (2) establishes that the fact that bail-jumping may be punished as an independent offense does not prevent it from being punished as a contempt of court.

Revised Criminal Law Commission Comment

L. Elison

Statutes on "bail-jumping" are of comparatively recent origin. The first such statute was passed in New York in 1928, and a generation later the federal provision was enacted in 1954. Under prior law Montana had no statute making it a separate punishable crime to fail to comply with a condition of a bail bond or recognizance.

Subsection (4) is graded on the basis of the seriousness of the crime. Bail-jumping in connection with a felony is a potential felony. All other cases of bail-jumping are misdemeanors. "Felony" is defined at M.C.C. 1973, § 94-2-101(15).

Cross References

Purposely defined, M.C.C. 1973, § 94-2-101(53)
Misdemeanor defined, M.C.C. 1973, § 94-2-101(31)

Library References

Bail Key No. 75
C.J.S. Bail, § 51(2)

94-7-309. Criminal Contempt.

(1) A person commits the offense of criminal contempt when he knowingly engages in any of the following conduct:

(a) disorderly, contemptuous, or insolent behavior, committed during the sitting of a court, in its immediate view and presence and directly tending to interrupt its proceedings or to impair the respect due to its authority; or

(b) breach of the peace, noise, or other disturbance, directly tending to interrupt a court's proceeding; or

(c) purposely disobeying or refusing any lawful process or other mandate of a court; or

(d) unlawfully refusing to be sworn as a witness in any court proceeding or, after being sworn, refusing to answer any legal and proper interrogatory; or

(e) purposely publishing a false or grossly inaccurate report of a court's proceeding; or

(f) purposely failing to obey any mandate, process or notice relative to juries issued pursuant to title 93, chapters 12, 13, 14, 15, 16, 17 and 18, R.C.M. 1947.

(2) A person convicted of the offense of criminal contempt shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-7-309, Sec. 1, Ch. 513, Laws of Montana 1973

Source: N.Y. Pen.L. 1967, § 215.50

Prior Law: R.C.M. 1947, § 94-3540, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Forsythe

This section is substantially the same as prior law. The mental state requirements, "knowingly" and "purposely" are new. Subsection (1)(f) is also new.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Purposely defined, M.C.C. 1973, § 94-2-101(53)

Library References

Contempt Key No. 1 et seq.
C.J.S. Contempt, § 1 et seq.

Law Review Commentaries

32 Mont. L. Rev. 183 (1971)

Notes of Decisions

Constitutionality

The Montana court has held that, although a citizen has a right to publish decisions of the supreme court, comment upon them freely and discuss their correctness, there is no constitutional right of freedom of speech to do so by false and defamatory publications which dispose the public to disregard the judgments or orders of the court. In re Nelson, 103 Mont. 43, 60 P.2d 365 (1936). However, such false publication is punishable as a contempt of court only when published while the cause is still pending. Ibid. See also, Bridges v. California, 314 U.S. 252 (1941). Thus, the publication of an article in a newspaper, charging a judge with wrongdoing in a cause disposed of by him six months previously, did not constitute contempt of court under this section. State ex rel. Metcalf v. District Court, 52 Mont. 46, 155 P. 278 (1916).

Criminal and Civil Contempt Distinguished

A criminal contempt is conduct that is directed against the dignity and authority of the court; a civil contempt consists of failure to obey the order of the court to do something for the benefit of the opposing party in a civil action. Pelletier v. Glacier

County, 107 Mont. 221, 82 P.2d 595 (1938).

False Report on Dissenting Opinion

Otherwise contemptuous language concerning a dissenting opinion does not constitute contempt of court, since it is the view of an individual justice and not the opinion of the court, but the remedy for such language is an action for libel. In re Nelson, 103 Mont. 43, 60 P.2d 365 (1936).

Inherent Power in the Court to Punish for Contempt

The power to punish for contempt is inherent in the courts of record of this state, is a necessary incident to the exercise of judicial functions, exists independently of statutes, and cannot be taken away or abridged by the legislature. State ex rel Metcalf v. District Court, 52 Mont. 46, 155 P. 278 (1916). Accord, Territory v. Murray, 7 Mont. 251, 15 P. 145 (1887); State ex. rel. Boston & Montana Consol, Copper and Silver Min. Co. v. Judges, 30 Mont. 193, 76 P. 10 (1904); In re Mettler, 50 Mont. 299, 146 P. 747 (1915). Thus, although the publication of a contemptuous report of a court proceeding is punishable as a misdemeanor under this section, this does not deprive the court of the power to punish such act as a contempt. State ex rel. Haskell v. Faulds, 17 Mont. 140, 42 P. 285 (1895).

Part Four: Official Misconduct.

94-7-401. Official Misconduct.

(1) A public servant commits the offense of official misconduct when, in his official capacity, he commits any of the following acts:

(a) purposely or negligently fails to perform any mandatory duty as required by law or by a court of competent jurisdiction; or

(b) knowingly performs an act in his official capacity which he knows is forbidden by law; or

(c) with the purpose to obtain advantage for himself or another, he performs an act in excess of his lawful authority; or

(d) solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law.

(2) A public servant convicted of the offense of official misconduct shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

(3) The district court shall have exclusive jurisdiction in prosecutions under this section, and any action for official misconduct must be commenced by an information filed after leave to file has been granted by the district court or after a grand jury indictment has been found.

(4) A public servant who has been charged as provided in subsection (3) shall be suspended from his office without pay pending final judgment. Upon final judgment of conviction he shall permanently forfeit his office. Upon acquittal he shall be reinstated in his office and shall receive all back pay.

(5) This section does not affect any power conferred by law to impeach or remove any public servant or any proceeding authorized by law to carry into effect such impeachment or removal.

Historical Note

Enacted: M.C.C. 1973, § 94-7-401, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Ill.C.C. 1961, § 33-3

Prior Law: R.C.M. 1947, §§ 94-802, 94-803, 94-805, 94-3523, 94-35-141, 94-2906, 94-3910, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Forsythe

This section codifies a variety of provisions of similar import found under prior law. It applies to "public servants," defined at M.C.C. 1973, § 94-2-101(52).

The section provides criminal sanctions for failure of a public servant to perform specific mandatory duties set forth outside the criminal code. It also provides sanctions for failure to comply with mandatory duties set forth within the provisions of the criminal code.

To an extent subsection (1)(d) overlaps in coverage with Bribery in Official and Political Matters, M.C.C. 1973, § 94-7-102 and Gifts to Public Servants by Persons Subject to Their Jurisdiction, § 94-7-105. However, this section goes far beyond the offenses of bribery and accepting gifts to encompass any act by a public servant contrary to either statute or regulation. It encompasses acts done in excess of authority (subsection (1)(c)) and failures to perform a mandatory duty (subsection (1)(a)). Notably, the failure to perform in subsection (1)(a) is punishable even though the omission is "negligently" done. "Negligently" is defined at M.C.C. 1973, § 94-2-101(32). Affirmative actions are not punishable unless done "knowingly" or "with a purpose" contrary to law. "Knowingly" is defined at M.C.C. 1973, § 94-2-101(28); "purposely" at M.C.C. 1973, § 94-2-101(53).

The existence of the section does not dispute the fundamental premise that inadequate performance in public office should be regulated by civil service. However, the section does provide an additional means of discouraging misfeasance or malfeasance of public officers.

Cross References

Public servant defined, M.C.C. 1973, § 94-2-101(52)
Purposely defined, M.C.C. 1973, § 94-2-101(53)
Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Negligently defined, M.C.C. 1973, § 94-2-101(32)
Bribery in Official and Political Matters, M.C.C. 1973, § 94-7-102
Gifts to Public Servants by Persons Subject to Their Jurisdiction, M.C.C. 1973, § 94-7-105

Library References

Officers Key No. 121
C.J.S. Officers, § 133 et seq.

Law Review Commentaries

59 N.W. L. Rev. 611

Notes of Decisions

Indictment and Information

An indictment which charged that a police officer solicited a fee to have a charge of petty theft and possession of fictitious license plates dismissed when charge came up for hearing and which charged that he knew he was not authorized to solicit the fee was sufficient to charge the offense of "official misconduct." People v. Smith, 57 Ill. App.2d 74, 206 N.E.2d 463, cert. den. 383 U.S. 910 (1965). An indictment which did not set forth some act constituting malfeasance of office was not sufficient in view of the fact that the statute does not specifically set out what conduct constitutes malfeasance in office. People v. Crosson, 30 Ill. App.2d 57, 173 N.E.2d 552 (1961). Use of word "corruptly" in indictment purporting to charge malfeasance in office was merely conclusion of law on part of pleader and added nothing to accusation. Id.

Part Five: Treason, Flags and Related Offenses.

94-7-502. Desecration Of Flags.

(1) In this section "flag" means anything which is or purports to be the official flag of the United States, the United States shield, the United States coat of arms, the Montana state flag, or a copy, picture, or representation of any of them.

(2) A person commits the offense of desecration of flags if he purposely or knowingly:

(a) publicly mutilates, defiles, or casts contempt upon the flag; or

(b) places on or attaches to the flag any work, mark, design, or advertisement not properly a part of such flag or exposes to public view a flag so altered; or

(c) manufactures or exposes to public view an article of merchandise or a wrapper or receptacle for merchandise upon which the flag is depicted; or

(d) uses the flag for commercial advertising purposes.

(3) A person convicted of the offense of desecration of flags shall be imprisoned in the state prison for any term not to exceed ten (10) years.

(4) This section does not apply to flags depicted on written or printed documents or periodicals or on stationery, ornaments, pictures, or jewelry, provided there are not unauthorized words or designs on such flags and provided the flag is not connected with any advertisement.

Historical Note

Enacted: M.C.C. 1973, § 94-7-502, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Prop. Minn. Crim. Code, 1962, § 609.40

Prior Law: R.C.M. 1947, § 94-3581 et seq. repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

This section is a more concise statement of the former Montana law on Desecration of Flags. For a conviction under this section the state must prove that one of the four overt acts described in subsection (2) was committed by the defendant, that the act was done purposely or knowingly, and that the item desecrated fit the definition of flag as provided by subsection (1). The statute varies from the prior Montana law as follows:

(1) It pertains to the Montana flag as well as the flag of the United States;
(2) It does not except flag treatment under military regulations from its purview;
(3) It explicitly permits in subsection (4) the depiction of flags for ornamental purposes under certain conditions.

The wording for this section is identical to the Minnesota source.

Revised Criminal Law Commission Comment

L. Elison

This section is not intended to prevent giving away flags to customers of a business enterprise or placing the names of donors on flags by the Red Cross. U. S. Code Title 36, Sections 170 and 171 and subsequent sections prescribe the formalities of using and displaying the flag on various occasions.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Purposely defined, M.C.C. 1973, § 94-2-101(53)

Library References

C.J.S. Flags, § 2
United States Key No. 5-1/2, et seq.

94-7-503. Criminal Syndicalism.

(1) "Criminal syndicalism" means the advocacy of crime or malicious damage or injury to property, or violence or other unlawful methods of terrorism as a means of accomplishing industrial or political ends.

(2) A person commits the offense of criminal syndicalism if he purposely or knowingly:

(a) orally or by means of writing advocates or promotes the doctrine of criminal syndicalism; or

(b) organizes or becomes a member of any assembly, group, or organization which he knows is advocating or promoting the doctrine of criminal syndicalism; or

(c) for or on behalf of another who purposely thereby to advocate or promote the doctrine of criminal syndicalism, distributes, sells, publishes, or publicly displays, any writing advocating or advertising such doctrine.

(3) A person convicted of the offense of criminal syndicalism shall be imprisoned in the state prison for a term not to exceed ten (10) years.

(4) Whoever, being the owner or in possession or control of any premises knowingly permits any assemblage of persons to use such premise for the purpose of advocating or promoting the doctrine of criminal syndicalism shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months; or both.

Historical Note

Enacted: M.C.C. 1973, § 94-7-503, Sec. 1, Ch.513, Laws of Montana 1973

Source: Prop. Minn. Crim. Code, 1962, § 709.405

Prior Law: R.C.M. 1947, § 94-4401 et. seq., repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

This section on Criminal Syndicalism encompasses 26 former statutes on the subject in the old Criminal Code. The statute was intended to provide a concise approach to dealing with activities which have a tendency to promote violence and disrupt traditional governmental and political processes. To sustain a conviction under this section, the state must show that the defendant committed one of the three acts listed in subsection (2) and that he did so purposely or knowingly. Subsection (4) provides misdemeanor punishment for the owner of premises who allows criminal syndicalism to occur on his property. The wording for this section is substantially the same as the Minnesota source.

Cross References

Purposely defined, M.C.C. 1973, § 94-2-101(53)
Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Possession defined, M.C.C. 1973, § 94-2-101(47)
Offense defined, M.C.C. 1973, § 94-2-101(37)

Library References

Insurrection and Sedition Key No. 1
C.J.S. Insurrection and Sedition, § 1

94-7-504. Bringing Armed Men Into The State.

(1) A person commits the offense of bringing armed men into the state when he knowingly brings, or aids in bringing, into this state an armed person or armed body of men for the purpose of engaging in criminal or socially disruptive activities or to usurp the powers of law enforcement authorities.

(2) A person convicted of the offense of bringing armed men into the state shall be imprisoned in the state prison for a term not to exceed ten (10) years.

Historical Note

Enacted: M.C.C. 1973, § 94-7-504, Sec. 1, Ch. 513, Laws of Montana 1973

Source: R.C.M. 1947, §§ 94-3524, 94-3920

Prior Law: R.C.M. 1947, §§ 94-3524 and 94-3920, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

H. J. Balyeat

This section on Bringing Armed Men Into the State substantively varies from both R.C.M. 1947, § 94-3524 and 94-3920 in that it covers all situations where the purpose of such importation is criminal or socially disruptive. The previous sections covered only importation for the purpose of discharging duties of peace officers in preserving the peace or suppressing violence. Also, this new section omits the exception in R.C.M. 1947, § 94-3524 for situations where the governor or legislature solicits and permits such importation.

Revised Criminal Law Commission Comment

L. Elison

This section is intended to deal with those individuals who would bring criminal elements into Montana to carry on criminal or socially disruptive activities, or to take over duties of law enforcement authorities.

Cross References

Offense defined, M.C.C. 1973, § 94-2-101(37)
Knowingly defined, M.C.C. 1973, § 94-2-101(28)

Library References

Insurrection and Sedition Key No. 2
46 C.J.S. Insurrection and Sedition, § 3

CHAPTER 8: OFFENSES AGAINST PUBLIC ORDER.

94-8-101. Disorderly Conduct.

(1) A person commits the offense of disorderly conduct if he knowingly disturbs the peace by:

(a) quarreling, challenging to fight or fighting; or

(b) making loud or unusual noises; or

(c) using threatening, profane or abusive language; or

(d) discharging firearms; or

(e) rendering vehicular or pedestrian traffic impassable; or

(f) rendering the free ingress or egress to public or private places impassable; or

(g) disturbing or disrupting any lawful assembly or public meeting; or

(h) transmitting a false report or warning of a fire, impending explosion or other catastrophe in such a place that its occurence would endanger human life; or

(i) creating a hazardous or physically offensive condition by any act that serves no legitimate purpose.

(2) A person convicted of the offense of disorderly conduct shall be fined not to exceed one hundred dollars ($100) or be imprisoned in the county jail for a term not to exceed ten (10) days, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-8-101, Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: R.C.M. 1947, §§ 94-1420, 94-2901, 94-2902, 94-3560, 94-3561, 94-3562, 94-3563, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

H. J. Balyeat

This section gathers the former Montana laws related to the public peace into one place, and provides a more concise statement of those laws. It overlaps to some extent with § 94-8105 on Public Intoxication. Read together the two sections attempt to cover the entire range of minor breaches of the public peace.

Revised Criminal Law Commission Comment

L. Elison

There appears to have been no distinct crime known as disorderly conduct at common law. Some of the acts now included by statute in this category fell under the general heading of breaches of the peace such as fighting or causing a disturbance which would tend to provoke fighting among those present.

In many jurisdictions statutes have developed which go beyond merely preventing breaches of the peace. Included generally are acts which offend others or annoy them or create resentment without necessarily leading to a breach of peace. In Montana, R.C.M. 1947, §§ 94-1420.

The crime of disorderly conduct appears to be directed at curtailing that kind of behavior which disrupts and disturbs the peace and quiet of the community by various kinds of annoyances. These acts standing alone may not be criminal under other categories such as theft, or assault and battery, or libel, etc. The difficulty is in defining the conduct which falls within these objectives, for a given act under some circumstances is not objectionable, while under others it is. Thus sounding a horn at a carnival is not objectionable. But sounding it at midnight in a residential section might be.

The intent of the provision is to use somewhat broad, general terms to establish a foundation for the offense and leave the application to the facts of a particular case. Two important qualifications are specified in making the application, however. First, the offender must knowingly make a disturbance of the enumerated kind, and second, the behavior must disturb "the peace."

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)

Library References

Breach of the Peace Key No. 1

94-8-102. Failure Of Disorderly Persons To Disperse.

(1) Where two (2) or more persons are engaged in disorderly conduct, a peace officer, judge or mayor may order the participants to disperse. A person who purposely refuses or knowingly fails to obey such an order commits the offense of failure to disperse.

(2) A person convicted of the offense of failure to disperse shall be fined not to exceed one hundred dollars ($100) or be imprisoned in the county jail for a term not to exceed ten (10) days, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-8-102, Sec. 1, Ch. 513, Laws of Montana 1973

Source: M.P.C. 1962, § 250.1

Prior Law: R.C.M. 1947, § 94-35-244, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

H. J. Balyeat

This section on Failure to Disperse is basically a restatement of the former Montana law on the subject. However, it requires "disorderly conduct" while previous law prohibited remaining at the place of a "riot, rout, or unlawful assembly" after being warned to leave. Also, the new section enumerates the persons having power to order dispersement. The new law, therefore, is broader as to the circumstances under which an order to disperse may be given, and narrower as to the persons who may give such an order so as to bring the assembled persons within the statute.

Revised Criminal Law Commission Comment

L. Elison

State statutes commonly penalize refusal to disperse when ordered to do so by those in authority and present at the scene of an unlawful assembly. The elements of the offense are that at least two persons be involved and that the group members must purposely refuse or fail to dispers when they are ordered to do so by an officer of the law or one given authority by law.

Cross References

Offense defined, M.C.C. 1973, § 94-2-101(37)
Purposely defined, M.C.C. 1973, § 94-2-101(47)
Knowingly defined, M.C.C. 1973, § 94-2-101(28)

94-8-103. Riot.

(1) A person commits the offense of riot if he purposely and knowingly disturbs the peace by engaging in an act of violence or threat to commit an act of violence as part of an assemblage of five (5) or more persons, which act or threat presents a clear and present danger of, or results in, damage to property or injury to persons.

(2) A person convicted of the offense of riot shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-8-103, Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: R.C.M. 1947, §§ 94-35-181, 94-35-182, 94-35-183, 94-35-242, 94-35-243, and 94-35-244, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Forsythe

At common law there were three substantive offenses involving group disorders: unlawful assembly, rout, and riot. "Unlawful assembly" was the gathering of three or more persons with a common plan which, if carried out, would result in riot. "Rout" was the movement of these people toward the commission of acts which would constitute riot when committed. Former law incorporated this common law scheme, but the former sections on rout and unlawful assembly have been repealed, and riot has been changed.

This section on Riot covers all group acts of violence and threats of violence. To be in violation of this section the assemblage must have proceeded to or beyond the point of threatening damage to property or injury to persons. The acts of the group must constitute at least a "clear and present danger" of causing such result. Under former Montana law, Riot covered only threats "accompanied by immediate power of execution." R.C.M. 1947, § 94-35-181. The new definition does away with the almost impossible task of defining or determining what is "immediate power of execu-

tion'." It also does away with the problem of determining what is an "attempt" at riot or an "advance toward the commission of an act which would be riot." The latter constituted the old offense of Rout, R.C.M. 1947, § 94-35-183. These problems culminate in what under old law would be a conceivable situation, of a group of persons advancing toward a threat to use violence, thereby committing the offense of Rout.

There are other important differences between this section and prior law and the common law. The required number of persons is five rather than two, as under R.C.M. 1947, § 94-35-181, or three as under common law; the concept of malice has been replaced with the mental states "knowingly" and "purposely," defined in § 94-2-101; and the penalty for the offense has been lowered from felony punishment to a misdemeanor.

This chapter, like all of the new code, attempts to define crimes in terms of objective and observable acts. The new code, like the old one, presents a hierarchy of offenses, but the progression proceeds on a different basis. The individual members of an assemblage may be guilty of disorderly conduct if they are loud, quarrelsome or abusive, or if they make streets, sidewalks or building entrances impassible. M.C.C. 1973, § 94-8-101. This is the manner in which the new code deals with most conduct which is thought of as "riotous," and there are only a few individuals who can be dealt with individually. If the assembly is so large that individual identification is impossible or very difficult, the members can be ordered to disperse and be arrested for that offense, M.C.C. 1973, § 94-8-102, if they do not. If the assemblage goes beyond disorderly conduct and threatens or commits violence, then the offense of riot is committed. This is a more serious offense, as is reflected in the penalties. Further, the leaders or inciters can be charged under M.C.C. 1973, § 94-8-104.

Cross References

Purposely defined, M.C.C. 1973, § 94-2-101(53)
Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Threat defined, M.C.C. 1973, § 94-2-101(63)
Act defined, M.C.C. 1973, § 94-2-101(1)
Property defined, M.C.C. 1973, § 94-2-101(49)
Failure of Disorderly Persons to Disperse, M.C.C. 1973, § 94-8-102

Library References

Riot Key No. 1 et seq.
C.J.S. Riot, § 1

94-8-104. Incitement To Riot.

(1) A person commits the offense of incitement to riot if he purposely and knowingly commits an act or engages in conduct that urges other persons to riot. Such act or conduct shall not include the mere oral or written advocacy of ideas, or expression of belief, which advocacy or expressions does not urge the commission of an act of immediate violence.

(2) A person convicted of the offense of incitement to riot shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-8-104, Sec. 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: None

Summarized Criminal Law Commission Comment

J. Forsythe

Inciting to riot is the employment of words, signs, or actions and movements with the purpose of provoking a riot. The concept is new to Montana criminal law. The rationale behind the section is that preventing a riot before substantial injury to property or persons has occurred is the best method of dealing with such social unrest. While the substantive offense of riot is in progress, normal law enforcement procedures are generally unworkable, and law enforcement officials may overreact, increasing the level of violence. The section contemplates precluding riots by discouraging their immediate and proximate cause. It thereby provides the possibility of more effective law enforcement.

This section defines an offense which would likely be covered under the inchoate offense of solicitation. M.C.C. 1973, § 94-4-101. The purpose of a single statute specifically prohibiting incitement to riot is to focus upon a method of preventing an offense which has been committed increasingly in the general social upheaval in many jurisdictions.

Cross References

Purposely defined, M.C.C. 1973, § 94-2-101(53)
Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Act defined, M.C.C. 1973, § 94-2-101(1)
Solicitation, M.C.C. 1973, § 94-4-101
Riot, M.C.C. 1973, § 94-8-103

Library References

Riot Key No. 1 et seq.
C.J.S. Riot, § 1 et seq.

94-8-105. Public Intoxication.

(1) A person commits the offense of public intoxication if he appears in a public place in a state of visible intoxication as a result of the use of alcohol or any dangerous drug and is

(a) creating a risk to himself or others, or

(b) conducting himself in an offensive manner.

(2) A person convicted of the offense of public intoxication shall be fined not to exceed fifty dollars ($50) or be imprisoned in the county jail for a term not to exceed ten (10) days, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-8-105

Source: M.P.C. 1961, § 250.5

Prior Law: R.C.M. 1947, §§ 94-35-248 and 94-3560, repealed Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Forsythe

This section partially replaces Montana's vagrancy statute (R.C.M. 1947, § 94-35-248), which was probably unconstitutional. The old vagrancy statute made it a crime to be a "common drunkard." This sort of status crime in a Florida vagrancy statute was struck down as fundamentally unfair and unconstitutional. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). The Supreme Court found that the Florida law was unconstitutionally vague, over broad, and lacking in fairness and equality of application.

This section seeks to avoid these problems which also existed in the old Montana law. It is no longer an offense to have a certain status, such as that of a "common drunkard." There is no liability for public intoxication in the absence of a specific objective act. There is considerable specificity as to what is prohibited. The act must be done in a "public place," defined at M.C.C. 1973, § 94-2-101(51); the actor must create a risk to himself or another or conduct himself in an offensive manner.

This section in conjunction with the section on disorderly conduct, M.C.C. 1973, § 94-8-101, attempts to provide a comprehensive treatment of breaches of the public peace. These sections prohibit

the same activities formerly described in Disturbing the Peace, R.C.M. 1947, § 94-3560. However, the enumeration of unlawful activities under these sections is more complete than under previous law. These sections are broader also than the collection of offenses described at common law as "breach of the peace," because they deal not only with activities which disturb the public tranquility, but deal also with acts which endanger the persons of individuals.

Cross References

Public place defined, M.C.C. 1973, § 94-2-101(51)
Disorderly conduct, M.C.C. 1973, § 94-8-101

Library References

Breach of the Peace Key No. 1
C.J.S. Breach of the Peace, §§ 1-6

94-8-106. Cruelty To Animals.

(1) A person commits the offense of cruelty to animals if without justification he knowingly or negligently subjects an animal to mistreatment or neglect by:

(a) overworking, beating, tormenting, injuring or killing any animal; carrying any animal in a cruel manner; or

(b) failing to provide an animal in his custody with proper food, drink, or shelter; or

(c) abandoning any helpless animal or abandoning any animal on any highway, railroad or in any other place where it may suffer injury, hunger or exposure or become a public charge; or

(d) promoting, sponsoring, conducting or participating in a horse race of more than two (2) miles; or promoting, sponsoring, or conducting or participating in any fight between any animals.

(2) A person convicted of the offense of cruelty to animals shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-8-106, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Mich. Rev. C.C. 1967, § 5565; M.P.C. 1962, § 250.11; R.C.M. 1947, § 94-35-258

Prior Law: R.C.M. 1947, §§ 94-1201, 94-1202, 94-1203, 94-1204, 94-1205, 94-1206, 94-1207, 94-1208, 94-1209, 94-35-258 and 94-35-259, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Forsythe

This section consolidates an entire chapter plus two sections of prior law. The section is nearly identical in coverage with the

old law. Notably, the mens rea for the offense may be either "knowingly" or "negligently," defined at M.C.C. 1973, § 94-2-101.

Revised Criminal Law Commission Comment

L. Elison

Subsection (1)(c) covers, among other things, instances in which a person knowingly or negligently releases or abandons a wild or semi-wild animal in a populated area where it will not be able to fend for itself.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Negligently defined, M.C.C. 1973, § 94-2-101(32)

Library References

Animals Key No. 40 et seq.
C.J.S. Animals, § 7 et seq.

94-8-107. Public Nuisance.

(1) "Public nuisance" means:

(a) a condition which endangers safety or health, is offensive to the senses, or obstructs the free use of property, so as to interfere with the comfortable enjoyment of life or property by an entire community or neighborhood, or by any considerable number of persons; or

(b) any premises where persons gather for the purpose of engaging in unlawful conduct; or

(c) a condition which renders dangerous for passage, any public highway or right of way, or waters used by the public.

(2) A person commits the offense of maintaining a public nuisance if he knowingly creates, conducts or maintains a public nuisance.

(3) Any act which affects an entire community or neighborhood, or any considerable number of persons (as specified in subsection (1) (a) of this section), is no less a nuisance because the extent of the annoyance or damage inflicted upon individuals is unequal.

(4) A person convicted of maintaining a public nuisance shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both. Each day of such conduct constitutes a separate offense.

(5) Action to abate a public nuisance.

(a) Every premise upon which a public nuisance is being maintained may be abated, and the persons maintaining such nuisance and the possessor who permits the same to be maintained

may be enjoined from such conduct by an action in equity in the name of the state of Montana by the county attorney, or any resident of the state.

(b) Upon the filing of the complaint in such action the judge may issue a temporary injunction.

(c) In such action evidence of the general reputation of the premises shall be admissible for the purpose of proving the existence of such nuisance.

(d) If the existence of the nuisance be established an order of abatement shall be entered as part of the judgment in the case. The judge issuing such order may, in his discretion:

(i) confiscate all fixtures used on the premises to maintain the nuisance and either sell them and transmit the proceeds to the county general fund, or destroy them or return them to their rightful ownership; or

(ii) close the premises for any period not to exceed one (1) year and during such period the premises shall remain in the custody of the court; or

(iii) allow the premises to be opened upon posting bond sufficient in amount to assure compliance with the order of abatement. The bond shall be forfeited if the nuisance is continued or resumed. The procedure for forfeiture and/or discharge of the bond shall be as provided in section 95-1116.

(iv) any combination of the above.

Historical Note

Enacted:	M.C.C. 1973, § 94-8-107, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Cal. Pen. Code 1970, § 370 et seq.
Prior Law:	R.C.M. 1947, §§ 94.1001 through 94-1011, 94-35-120, repealed, Sec. 32, Ch. 513, Laws of Montana 1973; R.C.M. 1947, § 57-101, et seq. (not repealed)

Annotator's Note

J. Guthals

The abatement of nuisances and punishment for creating such conditions have presented continuing difficulty for law enforcement authorities. Certain activities, such as operating gambling establishments and houses of prostitution, have long been treated as criminal nuisances against which public officials could bring legal actions (see R.C.M. 1947, Chapter 10). The criminal status of other activities and conditions has been less clear, although civil actions have been allowed. R.C.M. 1947, § 94-35-120, which did provide misdemeanor penalties for maintaining a nuisance was unsatisfactorily vague in defining what type of nuisance could be so punished. This new provision on public nuisance, which is quite similar to the California provision upon which it is based, should alleviate many of the prior difficulties. The definition of "public nuisance," as provided in subsection (1) is sufficiently broad to encompass all activities specifically outlawed under prior statutes as well as conditions, such as noisy installations, polluting septic tanks, etc., which while offensive may be less certain in offensiveness than the activities traditionally banned. The remaining subsections provide that both civil and criminal penalties may be utilized and that anyone, public officer or private individual may bring the action. This provision permits the county attorney to bring an action in the name of the state where the general public interest is involved without depriving the individual of a remedy if the county attorney feels the situation is too limited or personal to require state intervention. It should be noted that this section does not repeal any of the portions of Code Chapter 57 which specifically provide civil remedies for nuisances.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Nuisances Public and Private, R.C.M. 1947, § 57-101 et seq.

Library References

Nuisance Key No. 1, et seq.
C.J.S. Nuisances, § 1 et seq.

94-8-108. Creating A Hazard.

(1) A person commits the offense of creating a hazard if he knowingly:

(a) discards in any place where it might attract children, a container having a compartment of more than one and one-half (1 1/2) cubic feet capacity and a door or lid that locks or fastens automatically when closed and cannot easily be opened from the inside, and fails to remove the door, lid, or locking or fastening device; or

(b) being the owner of otherwise having possession of property upon which there is a well, cistern, cesspool, mine shaft or other hole of a depth of four (4) feet or more and a top width of twelve (12) inches or more, and he fails to cover or fence it with a suitable protective construction; or

(c) tampers with an aircraft without the consent of the owner; or

(d) being the owner or otherwise have possession of property upon which there is a steam engine or steam boiler, he continues to use a steam engine or steam boiler which is in an unsafe condition; or

(e) being a person in the act of game hunting, he acts in a negligent manner or knowingly fails to give all reasonable assitance to any person whom he has injured; or

(f) deposits any hard substance upon or between any railroad tracks, which will tend to derail railroad cars or other vehicles.

(2) A person convicted of the offense of creating a hazard shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

Historical Note

Enacted: M.C.C. 1973, § 94-8-108, Sec. 1, Ch. 513, Laws of Montana 1973

Source: Mich. Rev. C.C. 1967, § 7505; R.C.M. 1947, §§ 94-35-269, 94-35-272

Prior Law: R.C.M. 1947, §§ 94-35-125, 94-35-211, 94-35-214, 94-35-265, 94-35-269, 94-35-271, 94-35-272, and 94-3569, repealed, Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Forsythe

This section encompasses offenses which were covered by eight prior Montana statutes. Subsection (b) is a recodification and expansion of R.C.M. 1947, § 94-35-125. Subsection (d) is a consolidation of R.C.M. 1947, §§ 94-35-211 and 35-214. Subsection (d) covers conditions which may also be regulated by the boiler regulations in Title 69, Chapter 15. Subsection (a) is much broader than the prior law on attractive nuisances. R.C.M. 1947, § 94-35-265 applied to only ice boxes and refrigerators which are dangerous to children, whereas this subsection applies to all dangerous containers. Subsection (f) is also much broader than prior law, which made it an offense to drive cattle onto railroad tracks. R.C.M. 1947, § 94-3569.

The purpose of the section is to prevent the creation or maintenance of conditions which are dangerous to people. Subsection (a) is designed primarily to protect children. Subsection (b) deals with conditions which are dangerous to unsuspecting or handicapped adults and children. The section deals with several unrelated problems in imposing criminal liability on aircraft tamperers, railroad derailers, and possessors of steam engines and steam boilers. Subsection (e) imposes criminal liability upon hunters who fail to aid a person whom they have injured. The mens rea requirement for each offense is "knowingly," defined at M.C.C. 1973, § 94-2-101(28).

The section covers situations which may also entail civil tort liability. The penalty for each offense is a misdemeanor.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Tamper defined, M.C.C. 1973, § 94-2-101(62)
Without consent defined, M.C.C. 1973, § 94-2-101(68)
Possession defined, M.C.C. 1973, § 94-2-101(47)
Negligent defined, M.C.C. 1973, § 94-2-101(32)

94-8-109. Failure To Yield Party Line.

(1) Any person who fails to relinquish a telephone party line or public pay telephone after he has been requested to do so to permit another to place an emergency call to a fire department or police department, or for medical aid or ambulance service, shall be imprisoned for a term not to exceed ten (10) days or fined not to exceed twenty-five dollars ($25), or both.

(2) It is a defense to prosecution under subsection (1) that the accused did not know or did not have reason to know of the emergency in question, or that the accused was himself using the telephone party line or public pay telephone for such an emergency call.

(3) Any person who requests another to relinquish a telephone party line or public pay telephone on the pretext that he must place an emergency call knowing such pretext to be false, shall be imprisoned for a term not to exceed (10) days or fined not to exceed twenty-five dollars ($25), or both.

(4) Every telphone company doing business in this state shall print a copy of subsections (1), (2) and (3) of this section in each telephone directory published by it after the effective date of this section.

Historical Note

Enacted:	M.C.C. 1973, § 94-8-109, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	R.C.M. 1947, §§ 94-35-221.1, 94-35-221.2, 94-35-221.3, § 94-35-221.4
Prior Law:	R.C.M. 1947, §§ 94-35-221.1, 94-35-221.2, 94-35-221.3, 94-35-221.4, repealed Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Forsythe

This section is a recodification of old laws dealing with emergency telephone calls. The only change from prior law is the omission of "spiritual aid" as a basis for making an emergency call which is privileged.

Cross References

Knowing defined, M.C.C. 1973, § 94-2-101(28)

94-8-110. Obscenity.

(1) A person commits the offense of obscenity when, with knowledge of the obscene nature thereof, he purposely or knowingly:

(a) Sells, delivers or provides, or offers or agrees to sell, deliver or provide any obscene writing, picture, record or other representation or embodiment of the obscene any one under the age of eighteen (18); or

(b) Presents or directs an obscene play, dance or other performance or participates in that portion thereof which makes it obscene to anyone under the age of eighteen (18); or

(c) Publishes, exhibits or otherwise makes available anything obscene to anyone under the age of eighteen (18); or

(d) Performs an obscene act or otherwise presents an obscene exhibition of his body to anyone under the age of eighteen (18); or

(e) Creates, buys, procures or possesses obscene matter or material with the purpose to disseminate it to anyone under the age of eighteen (18); or

(f) Advertises or otherwise promotes the sale of obscene material or materials represented or held out by him to be obscene.

(2) A thing is obscene if:

(a) the dominant theme of the material taken as a whole appeals to a prurient interest, that is, a shameful or morbid interest in violence, nudity, sex or excretion; and

(b) the material is patently offensive because it affronts contemporary community standards relating to the description or

representation of sexual matters; and

(c) the material is utterly without redeeming social value.

(3) In any prosecution for an offense under this section evidence shall be admissible to show:

(a) The predominant appeal of the material, and what effect if any, it would probably have on the behavior of people;

(b) The artistic, literary, scientific, educational or other merits of the material;

(c) The degree of public acceptance of the material in this state;

(d) Appeal to prurient interest, or absence thereof, in advertising or other promotion of the material; or

(e) Purpose of the author, creator, publisher or disseminator.

(4) A person convicted of obscenity shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months, or both.

Historical Note

Enacted:	M.C.C. 1973, § 94-8-110, Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Ill.C.C. 1961, Title 38, § 11-20
Prior Law:	R.C.M. 1947, §§ 94-3601 through 94-3619, repealed Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

J. Guthals

This section on Obscenity is substantially the same as the Illinois provision after which it was patterned and is essentially the proposal of the Model Penal Code 1962, § 251.4. The statute is intended to bring the Montana approach to prosecutions for distributing obscene materials in line with the tests established by the U.S. Supreme Court. Thus, the definition of obscene materials adopts the tripartite test of Memoirs v. Massachusetts, 383 U.S. 413 (1965)

in subsection (2). A recent Supreme Court ruling has indicated, however, that the Memoirs test is no longer appropriate. Miller v. California, 93 S.Ct. 2607, 2614 (1973). Instead, the Court appears now to require that statutes set forth definitive descriptions of exactly what materials are being prohibited. The test which will then be applied to determine whether the material so described is obscene will be:

(1) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to prurient interests;
(2) whether the work depicts or otherwise describes, in a patently offensive way, sexual conduct specifically defined by the state law; and
(3) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. Miller v. California, supra at 2615.

The determination of whether the new Montana law is constitutionally defective must await an authoritative ruling in light of the new guidelines outlined above. Additional interpretative difficulty may occur, however, since the Montana law is directed in subsections (1)(a) through (1)(d) toward distributors who aim their materials at minors. Only in subsection (1)(f) is the law designed to apply to distributions to the adult community--and then, only if for common pandering.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)

Library References

Obscenity Key No. 1 et seq.
C.J.S. Obscenity, §§ 1-3

Law Review Commentaries

12 De Paul L. Rev. 337 (1963)
34 U. Chicago L. Rev. 385 (1967)
43 Chicago Bar Rec. 373 (1962)
58 N.W. L. Rev. 664 (1963)
55 Ill. Bar J. 463 (1967)
34 U. Chicago L. Rev. 373 (1967)
47 Chicago Bar Rec. 344 (1966)
47 Chicago Bar Rec. 398 (1966)
46 Chicago Bar Rec. 405 (1965)
46 Chicago Bar Rec. 161 (1965)
66 N.W. L. Rev. 849 (1972)

Notes of Decisions

Validity

While this section has been held to be valid by both Illinois and Federal Courts as listed below, these cases should be read in conjunction with the U.S. Supreme Court rulings on the subject. See Miller v. California, 93 S. Ct. 2607 (1973); Memoirs v. Massachusetts, 383 U.S. 413 (1965); Roth v. U.S., 345 U.S. 476 (1957); City of Blue Island v. DeVilbiss, 41 Ill.2d 135, 242 N.E.2d 761 (1968); People v. Sikora, 32 Ill.2d 260, 204 N.E.2d 768 (1965); Movies Inc. v. Conlisk, 345 F. Supp. 780 (D. Ill. 1972).

Construction and Application

The following cases have construed the Illinois obscenity statute, upon which the Montana provision has been based, in accordance with U.S. Supreme Court opinions which may no longer be authoritative after the recent decision in Miller v. California, 93 S. Ct. 2607 (1973). See People v. Butler, 275 N.E.2d 400 (1971); People v. Brocic, 80 Ill. App.2d 65, 224 N.E.2d 572 (1967).

Obscene materials

The test to be used in determining whether material is obscene has been significantly altered by the U.S. Supreme Court in Miller v. California, 93 S. Ct. 2607 (1973), and may affect the value of the decisions listed below which applied older Supreme Court guidelines to determine the obscenity of various types of material: People v. Brocic, 80 Ill. App.2d 65, 224 N.E.2d 572 (1967); City of Chicago v. Universal Pub. & Distributing Corp., 34 Ill.2d 250, 214 N.E.2d 251 (1966); People v. Sikora, 32 Ill.2d 260, 204 N.E.2d 768 (1965); People v. Bruce, 31 Ill.2d 459, 202 N.E.2d 497 (1965); City of Chicago v. Geraci, 46 Ill.2d 576, 264 N.E.2d 153 (1970); Movies, Inc. v. Conlisk, 345 F. Supp. 780 (D. Ill. 1972); People v. Ridens, 51 Ill.2d 410, 282 N.E.2d 691 (1972); People v. Price, 8 Ill. App.3d 158, 289 N.E.2d 280 (1972).

94-8-111. Criminal Defamation.

(1) Defamatory matter is anything which exposes a person or a group, class or association to hatred, contempt, ridicule, degradation or disgrace in society, or injury to his or its business or occupation.

(2) Whoever with knowledge of its defamatory character, orally, in writing or by any other means, communicates any defamatory matter to a third person without the consent of the person defamed commits the offense of criminal defamation and may be sentenced to imprisonment for not more than six (6) months in the county jail or a fine of not more than five hundred dollars ($500), or both.

(3) Violation of subsection (2) is justified if:

(a) the defamatory matter is true and is communicated with good motives and for justifiable ends; or

(b) the communication is absolutely privileged; or

(c) the communication consists of fair comment made in good faith with respect to persons participating in matters of public concern; or

(d) the communication consists of a fair and true report or a fair summary of any judicial, legislative or other public or official proceedings; or

(e) the communication is between persons each having an interest or duty with respect to the subject matter of the communication and is made with the purpose to further such interest or duty.

(4) No person shall be convicted on the basis of an oral communication of defamatory matter except upon the testimony of at least two (2) other persons that they heard and understood the oral statement as defamatory or upon a plea of guilty.

Historical Note

Enacted:	M.C.C. 1973, § 94-8-111 by Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Prop. Minn. Crim. Code, § 609.765
Prior Law:	R.C.M. 1947, Title 94, Ch. 28, repealed by Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

M. Sehestedt

Defamation was a criminal offense both at common law and under prior statutory law. In the past, the law of criminal defamation was based on two competing and often divergent policy considerations. The first of these was protection of personal reputations by punishing the communication of scandalous matter and the second was the prevention of breaches of the peace caused by communication of such materials. This section has taken as its main function the protection of personal reputations by adding to the common law requirement of communication the requirement that such communication be to a third party.

The definition of defamatory matter has remained essentially the same as it was under both the common law and prior Montana law in that the communication will be considered defamatory if it exposes a person to "hatred, contempt, ridicule, degradation or disgrace in society, or injury to his or its business or occupation." The new law represents a departure from the old law in that it specifically provides for the application of criminal sanctions to individuals who communicate defamatory matters concerning "a group, class or association" as well as those who defame individuals. This section is more limited than common or prior law in that it does not provide for the punishment of an individual who "blackens the memory of one who is dead."

As noted above, this section has modified the publication requirements of the common law with regard to criminal defamation. Under the common law there was no requirement of communication to a third party and under prior Montana law there was no need to show that there had been an actual communication, only that the defendant had parted with libel under such circumstances that it was "exposed to be read or seen by any person other than himself." This section also expands prior law by expanding coverage to include any communication "orally, in writing, or by any other means" while prior law required a writing, printing or similar means to achieve publication. It should be noted in this context that while both written and oral defamation are treated alike for purposes of establishing the offense, the quantum of proof required to establish an oral defamation is specifically set out in subsection (4) as at least two witnesses or a plea of guilty.

Criminal defamation differs from the civil law torts of libel and slander in that the truth of the statement is not in and of itself a defense. To avoid punishment as an offense, a defamatory statement must be shown to fall within one of the specifically established exceptions to criminal defamation. These exceptions are set out in subsection (3). Subsection (3)(a) provides that if the material is true and communicated with "good motives and for justifiable ends" it will not be treated as criminal defamation. This defense has no precise counterpart in prior law although it was allowable under § 94-2804 to introduce the motive of the matter asserted as a factor for the jury's consideration in order to counteract the malice presumed from the fact of publication (§ 94-2803). Subsection (3)(b) tightens the common law exception for statements which are privileged to except only those statements which are absolutely privileged. This defense was also included in the prior law exception of privileged communications contained in § 94-2809. The third exception contained in subsection (3) is (3)(c) which preserves the constitutional right of free speech by excepting communications which are fair comment made in good faith with respect to individuals involved in public affairs. Part (d) of subsection (3) reenacts the privilege contained in § 94-2807 that a fair report of an event in which the public is interested is also privileged. Subsection (3)(e) continues the privilege extended to those having an interest or duty with regard to the subject matter of the communication when the communication is made in furtherance of that interest or duty--such as communications by parents concerning misbehavior of their children.

This section has reduced the penalties for criminal defamation to six months or $500 or both from the prior maximum of imprisonment for up to one year or a fine of five thousand dollars. The wording for the provision is substantially the same as the proposed Minnesota statute from which it was taken.

Cross References

Defamatory matter defined, M.C.C. 1973, § 94-2-101(12)
Knowledge defined, M.C.C. 1973, § 94-2-101(28)
Person defined, M.C.C. 1973, § 94-2-101(45)
Official proceeding defined, M.C.C. 1973, § 94-2-101(39)

Library References

Libel and Slander Key No. 1 et seq.
C.J.S. Libel and Slander, § 1 et seq.

94-8-112. Bribery In Contests.

(1) A person commits the offense of bribery in contests if he purposely or knowingly offers, confers, or agrees to confer upon another, or solicits, accepts, or agrees to accept from another:

(a) any pecuniary benefit as a consideration for the recipient's failure to use his best efforts in connection with any professional or amateur athletic contest, sporting event or exhibition; or

(b) any benefit as consideration for a violation of a known duty as a person participating in, officiating or connected with any professional or amateur athletic contest, sporting event or exhibition.

(2) A person convicted of the offense of bribery in contests shall be fined not to exceed five thousand dollars ($5,000) or be imprisoned in the state prison for a term not to exceed ten (10) years, or both.

Historical Note

Enacted:	M.C.C. 1973, § 94-8-112 by Sec. 1, Ch. 513, Laws of Montana 1973
Source:	Ill.C.C. 1961, Title 38, § 29-1
Prior Law:	None

Annotator's Note

M. Sehestedt

This section is included on the theory that bribery of participants in sporting events is an activity sufficiently deceitful to justify the imposition of criminal sanctions. The general principles of this offense are the same as those involved in other bribery offenses which relate to public servants. The section prohibits both offering, conferring or agreeing to confer and soliciting, accepting or agreeing to accept thus providing for the punishment of both the payor or potential payor and the payee or potential payee.

The phrase "failure to use his best efforts" in subsection (1)(a) is intended to cover any conduct which could affect either the outcome or the margin of victory. Subpart (1)(b) which prohibits the violation of a known duty as a participant or official is directed toward both the player who fails to perform and toward the official who deliberately misjudges, dishonestly referees or supervises, or otherwise unfairly attempts to influence the outcome of the contest. It should be noted that this section applies only to those directly involved in a sporting event and those individuals who deal with them directly. It would not, for example, cover an unrelated individual who is paid to slip into the barn and drug a race horse. It would reach the conduct if a trainer were paid to do so.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Pecuniary benefit defined, M.C.C. 1973, § 94-2-101(44)
Purposely defined, M.C.C. 1973, § 94-2-101(53)
Benefit defined, M.C.C. 1973, § 94-2-101(4)

Library References

Bribery Key No. 1(1)
C.J.S. Bribery, §§ 1, 2

94-8-113. Mistreating Prisoners.

(1) A person commits the offense of mistreating prisoners if, being responsible for the care of custody of a prisoner, he purposely or knowingly:

(a) assaults or otherwise injures a prisoner; or

(b) intimidates, threatens, endangers or withholds reasonable necessities from the prisoner with the purpose to obtain a confession from him, or for any other purpose; or

(c) violates any civil right of a prisoner.

(2) A person convicted of the offense of mistreating prisoners shall be removed from office or employment and imprisoned in the state prison for a term not to exceed ten (10) years.

Historical Note

Enacted: M.C.C. 1973, § 94-8-113 by Sec 1, Ch. 513, Laws of Montana 1973

Source: New

Prior Law: R.C.M. 1947, § 94-3917 and 94-3918, repealed by Sec. 32, Ch. 513, Laws of Montana 1973

Annotator's Note

M. Sehestedt

While including all conduct that was prohibited by prior law, this section is both more concise and more comprehensive. Prior law, § 94-3917, R.C.M. 1947, condemned "wilful inhumanity or oppression" toward prisoners. While those terms are undoubtedly included within the law's terms "assault," "otherwise injures," "intimidates," "threatens," "endangers" and "withholds reasonable necessities," they may not have been as inclusive and were in any event so unclear as to offer no real indication as to exactly what conduct was prohibited. By increasing the clarity of the terms describing the conduct prohibited the new section should both more effectively deter the objectionable conduct and provide for a surer application of sanctions in the event of a violation.

Summary of Revised Criminal Law Commission Comment

M. Sehestedt

The maximum punishment under this section is ten (10) years and removal from office or employment. The severity of the punishment is based on two premises: one, the relatively helpless circumstances of a prisoner subjected to such treatment and two, the policy that a sentence to imprisonment should be rehabilitative in nature. Clearly, little rehabilitation or reorientation to social norms can be accomplished when those responsible for the control of the prisoners mistreat them.

Cross References

Knowingly defined, M.C.C. 1973, § 94-2-101(28)
Purposely defined, M.C.C. 1973, § 94-2-101(53)
Threat defined, M.C.C. 1973, § 94-2-101(63)

Library References

Officers Key Nos. 66, 121
C.J.S. Officers, § 133
Sheriffs and Constables Key Nos. 13, 153
C.J.S. Sheriffs and Constables, §§ 10, 18, 26, 209

94-8-114. Privacy In Communications.

(1) A person commits the offense of violating privacy in communications if he knowingly or purposely:

(a) Communicates with any person by telephone with the intent to terrify, intimidate, threaten, harass, annoy or offend, or use any obscene, lewd or profane language or suggest any lewd or lascivious act, or threaten to inflict injury or physical harm to the person or property of any person.

(b) Uses a telephone to attempt to extort money or any other thing of value from any person, or to disturb by repeated telephone calls the peace, quiet or right of privacy of any person at the place where the telephone call or calls were received. The use of obscene, lewd or profane language or the making of a threat or lewd or lascivious suggestions shall be prima facie evidence of an intent to terrify, intimidate, threaten, harass, annoy or offend.

(c) Records or causes to be recorded by use of any hidden electronic or mechanical device which reproduces a human conversation without the knowledge of all parties to the conversation. Subsection (c) shall not apply to duly elected or appointed public officials or employees when such transcription or recording is done in the performance of official duty; nor to persons speaking at public meetings or persons given warning of such recording.

(d) Attempts by means of any machine, instrument, contrivance, or in any other manner, reads, or attempts to read any message or learn the contents thereof, while the same is being sent over any telegraph line, or learns or attempts to learn the contents of any message, whilst the same is in any telegraph office or is being

received thereat or sent therefrom, or who uses or attempts to use, or communicate to others, any information so obtained.

(e) Discloses the contents of a telegraphic message or any part thereof, addressed to another person without the permission of such person, unless directed to do so by the lawful order of a court.

(f) Opens or reads or causes to be read any sealed letter not addressed to himself, without being authorized to do so by either the writer of such letter or by the person to whom it is addressed, and every person who, without the like authority, publishes any of the contents of such letters knowing the same to have been unlawfully opened.

(2) A person convicted of the offense of violating the privacy in communications shall be fined not to exceed five hundred dollars ($500) or be imprisoned in the county jail for a term not to exceed six (6) months or both.

Historical Note

Enacted: M.C.C. 1973, § 94-8-114 by Sec. 1, Ch. 513, Laws of Montana 1973

Source: See prior law

Prior Law: R.C.M. 1947, §§ 94-35-221.5, 94-35-274, 94-35-275, 94-35-220, 94-3322, 94-3323, 94-3320, repealed by Sec. 32, Ch.513, Laws of Montana 1973

Annotator's Note

M. Sehestedt

This section is merely a recodification of prior Montana law. Subsections (1)(a) and (1)(b) reenact R.C.M. 1947, § 94-35-221.5 and continue the prohibition of obscene or harassing telephone calls. The use of obscene or threatening language is continued as prima facie evidence of an intent to "terrify, intimidate, threaten, harass, annoy or offend." It should be noted that these two sections continue to use the term "intent." The context indicates that the term "intent" has the same meaning as "with the purpose to" as

used in the new code.

Subsection (1)(c) continues the blanket prohibition of R.C.M. 1947, § 94-35-274 on recording conversations without the consent of all the parties and the exceptions contained in R.C.M. 1947, § 94-35-275 for public officials in the course of their official duties and for public meetings.

Subsections (1)(d) and (1)(e) prohibit the interception of telegraph messages both by tapping the lines and by inspection in the telegraph office. Disclosure of a telegraphic message addressed to another without the other's permission is also prohibited. These provisions parallel prior law provisions R.C.M. 1947, §§ 94-3322, 94-3323, 94-35-220 and 94-3321.

Opening, reading or causing to read a sealed letter addressed to another without that other's authorization is prohibited by subsection (1)(f) which replaces prior law section R.C.M. 1947, § 94-3320. Also made punishable in conformity with prior law are those individuals who without authority publish the contents of an unlawfully opened letter.

The penalties for these various offenses have been made uniform as misdemeanors. This represents a reduction in most cases since under prior law penalties could range as high as 5 years in some instances (94-35-221.5, 94-3321, 3322, 3323, 94-35-220).

Cross References

Knowingly, M.C.C. 1973, § 94-2-101(28)
Purposely, M.C.C. 1973, § 94-2-101(53)
Threat, M.C.C. 1973, § 94-2-101(63)

Library References

Telecommunications Key Nos. 362, 491 et seq.
C.J.S. Telegraphs, Telephones, Radio & Television, §§ 115, 117, 121, 122

INDEX TO THE MONTANA CRIMINAL CODE OF 1973, ANNOTATED

Forcible felony, § 94-2-101(17)
Force likely to cause death or serious bodily harm, § 94-3-101
Frisk, § 94-2-101(16)
Government, § 94-2-101(18)
Harm, § 94-2-101(19)
He, she, it, § 94-2-101(20)
High managerial agent, § 94-2-112
House of prostitution, § 94-2-101(21)
Human being, § 94-2-101(22)
Illegal article, § 94-2-101(23)
Inmate, § 94-2-101(24)
Intoxicating substance, § 94-2-101(25)
In the course of committing a theft, § 94-5-401
Involuntary act, § 94-2-101(26)
Juror, § 94-2-101(27)
Knowingly, § 94-2-101(28)
Mentally defective, § 94-2-101(29)
Mentally incapacitated, § 94-2-101(30)
Misdemeanor, § 94-2-101(31)
Negligently, § 94-2-101(32)
Obscene materials, § 94-8-110
Obtain, § 94-2-101(33)
Obtains or exerts control, § 94-2-101(34)
Occupied structure, § 94-2-101(35)
Offender, § 94-2-101(36)
Offense, § 94-2-101(37)
Official detention, § 94-2-101(38)
Official proceeding, § 94-2-101(39)
Other state, § 94-2-101(40)
Owner, § 94-2-101(41)
Party official, § 94-2-101(42)
Peace officer, § 94-2-101(43)
Pecuniary benefit, § 94-2-101(44)
Person, § 94-2-101(45)
Physically helpless, § 94-2-101(46)
Possession, § 94-2-101(47)
Premises, § 94-2-101(48)
Property, § 94-2-101(49)
Property of another, § 94-2-101(50)
Public nuisance, § 94-8-107
Public place, § 94-2-101(51)
Public servant, § 94-2-101(52)
Purposely, § 94-2-101(53)
Secuirty interest, § 94-6-312
Serious bodily harm, § 94-2-101(54)
Sexual contact, § 94-2-101(55)
Sexual intercourse, § 94-2-101(56)
Solicit, § 94-2-101(57)
State, § 94-2-101(58)
Statute, § 94-2-101(59)
Stolen property, § 94-2-101(60)
Stop, § 94-2-101(61)
Tamper, § 94-2-101(62)
Threat, § 94-2-101(63)
Value, § 94-2-101(64)