35.681 Rape and sexual assault generally.

(1) Any person subject to this code is guilty of rape and shall be punished as a court-martial may direct who commits a sexual act upon another person by:

(a) Using unlawful force against another person;

(b) Using force causing or likely to cause death or grievous bodily harm to any person;

(c) Threatening or placing that other person in fear that any person will be subject to death, grievous bodily harm, or kidnapping;

(d) First rendering that other person unconscious; or

(e) Administering to that other person by force or threat, or without the knowledge or consent of that person, a drug, intoxicant, or other similar substance and thereby substantially impairing the ability of that other person to appraise or control conduct.

(2) Any person subject to this code is guilty of sexual assault and shall be punished as a court-martial may direct who:

(a) Commits a sexual act upon another person by:

1. Threatening or placing that other person in fear;

2. Causing bodily harm to that other person;

3. Making a fraudulent representation that the sexual act serves a professional purpose; or

4. Inducing a belief by an artifice, pretense, or concealment that the person is another person;

(b) Commits a sexual act upon another person when the person knows or reasonably should know that the other person is asleep, unconscious, or otherwise unaware that the sexual act is occurring; or

(c) Commits a sexual act upon another person when the other person is incapable of consenting to the sexual act due to:

1. Impairment by any drug, intoxicant, or other similar substance, and that condition is known or reasonably should be known by the person; or

2. A mental disease or defect, or physical disability, and that condition is known or reasonably should be known by the person.

(3) Any person subject to this code who commits or causes sexual contact upon or by another person, if to do so would violate subsection (1) of this section had the sexual contact been a sexual act, is guilty of aggravated sexual contact and shall be punished as a court-martial may direct.

(4) Any person subject to this chapter who commits or causes sexual contact upon or by another person, if to do so would violate subsection (2) of this section had the sexual contact been a sexual act, is guilty of abusive sexual contact and shall be punished as a court-martial may direct.

(5) In a prosecution under this section, in proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the

ability to carry out the threat.

(6) An accused may raise any applicable defenses available under this code or the Rules for Court-Martial. Marriage is not a defense for the conduct in issue in any prosecution under this section.

(7) In this section:

(a) "Sexual act" means:

1. Contact between the penis and the vulva or anus or mouth, and, for purposes of this subparagraph, contact involving the penis occurs upon penetration, however slight; or

2. The penetration, however slight, of the vulva or anus or mouth of another by any part of the body or by any object, with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person;

(b) "Sexual contact" means:

1. Touching, or causing another person to touch, either directly or through the clothing, the genitalia, anus, groin, breast, inner thigh, or buttocks of any person, with an intent to abuse, humiliate, or degrade any person; or

2. Any touching, or causing another person to touch, either directly or through the clothing, any body parts of another person, if done with an intent to arouse or gratify the sexual desire of any person. Touching may be accomplished by any part of the body;

(c) "Bodily harm" means any offensive touching of another, however slight, including any nonconsensual sexual act or nonconsensual sexual contact;

(d) "Grievous bodily harm" means serious bodily injury. It includes fractures or dislocated bones, deep cuts, torn members of the body, serious damage to internal organs, and other severe bodily injuries. It does not include minor injuries such as a black eye or a bloody nose;

(e) "Force" means:

1. The use of a weapon;

2. The use of such physical strength or violence as is sufficient to overcome, restrain, or injure a person; or

3. Inflicting physical harm sufficient to coerce or compel submission by the victim;

(f) "Unlawful force" means an act of force done without legal justification or excuse;

(g) "Threatening or placing that other person in fear" means a communication or action that is of sufficient consequences to cause a reasonable fear that noncompliance will result in the victim or another person being subjected to the wrongful action contemplated by the communication or action; and

(h) "Consent":

1. The term "consent" means a freely given agreement to the conduct at

issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.

2. A sleeping, unconscious, or incompetent person cannot consent. A person cannot consent to force causing or likely causing death or grievous bodily harm or to being rendered unconscious. A person cannot consent while under threat or fear or under the circumstances described in subsection (2)(a)3. and 4. of this section.

3. Lack of consent may be inferred based on the circumstances of the offense. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions.

Effective: June 25, 2013

History: Created 2013 Ky. Acts ch. 32, sec. 122, effective June 25, 2013.