

**RAPE FIRST DEGREE  
(B Felony)  
(Physical Helplessness)  
PENAL LAW 130.35(2)  
(Committed on or after February 1, 2001)**

The \_\_\_\_\_ count is Rape in the First Degree.

Under our law, a person is guilty of Rape in the First Degree when he or she engages in sexual intercourse with another person who is incapable of consent by reason of being physically helpless.

Some of the terms used in this definition have their own special meaning in our law. I will now give you the meaning of the following terms used in that definition: "sexual intercourse," "incapable of consent" and "physically helpless."

**SEXUAL INTERCOURSE** means any penetration, however slight, of the penis into the vaginal opening. In other words, any penetration of the penis into the vaginal opening, regardless of the distance of penetration, constitutes an act of sexual intercourse. Sexual intercourse does not necessarily require erection of the penis, emission, or orgasm. <sup>1</sup>

A person is **INCAPABLE OF CONSENT** when that person is physically helpless.<sup>2</sup>

**PHYSICALLY HELPLESS** means that a person is unconscious or for any other reason is physically unable to

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<sup>1</sup> The statutory definition has been amplified in accord with case law. See Penal Law § 130.00(1) and *People v. Liberta*, 64 NY2d 152, 169 (1984); *People v. Edwards*, 173 A.D. 375 (2d Dept. 1916); *People v. Berardicurti*, 167 A.D.2d 840 (4<sup>th</sup> Dept. 1990); *People v. White*, 185 A.D.2d 472 (3<sup>rd</sup> Dept. 1992); *People v. Williams*, 259 A.D.2d 509 (2d Dept. 1999).

<sup>2</sup> Penal Law § 130.05(3)(d).

communicate unwillingness to an act.<sup>3</sup>

Thus, sexual intercourse with such a person is always, under our law, deemed to be without that person's consent.

In order for you to find the defendant guilty of this crime, the People are required to prove, from all the evidence in the case, beyond a reasonable doubt, both of the following two elements:

1. That on or about (date), in the county of (county), the defendant, (name of defendant), engaged in sexual intercourse with (name of complainant); and
2. That (name of complainant) was incapable of consent by reason of being physically helpless.

Therefore, if you find that the People have proven beyond a reasonable doubt both of those elements, you must find the defendant guilty of the crime of Rape in the First Degree as charged in the \_\_\_\_\_ count.

On the other hand, if you find that the People have not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of the crime of Rape in the First Degree as charged in the \_\_\_\_\_ count.

*[NOTE: If the affirmative defense set forth in Penal Law § 130.10(1) applies, omit the final two paragraphs of the above charge, and substitute the charge at the end of this article.]*

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<sup>3</sup> Penal Law § 130.00(7).