

**RAPE FIRST DEGREE
(B Felony)
(Complainant Less Than 11 Years Old)
PENAL LAW 130.35(3)
(Committed on or after Feb. 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 less than eleven (11) years old.

Under our law, it is also an element of this offense that the sexual intercourse was committed without the consent of that other person.¹ Sexual intercourse takes place without a person's consent when that person is deemed by law to be incapable of consent. Under our law, a person is deemed incapable of consenting to sexual intercourse when he or she is less than eleven (11) years old.² Thus, sexual intercourse with such a person is always deemed to be without that person's consent, even if in fact that person did consent.

It is not a defense to this charge that the actor did not know that the person with whom the actor had sexual intercourse was less than eleven (11) years old, or that the actor believed that such person was eleven (11) years old or more on the date of the crime.³

The term, "sexual intercourse," used in the definition of this crime has its own special meaning in our law. I will now give you the meaning of that term.

SEXUAL INTERCOURSE means any penetration, however slight, of the penis into the vaginal opening. In other words, any

¹ See Penal Law § 130.05(1).

² Penal Law § 130.05(3)(a).

³ See Penal Law §15.20(3).

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. ⁴

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 (complainant's name) was less than eleven (11) years old.

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.

⁴ 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 (4th Dept. 1990); *People v. White*, 185 A.D.2d 472 (3rd Dept. 1992); *People v. Williams*, 259 A.D.2d 509 (2d Dept. 1999).