

**RAPE IN THE THIRD DEGREE**  
**(Lack of Consent - Totality of Circumstances)**  
**Penal Law § 130.25(3)**  
**(Committed on or after February 1, 2001)**

The (*specify*) count is Rape in the Third Degree.

Under our law, a person is guilty of Rape in the Third Degree, when he or she engages in sexual intercourse with another person without such person's consent.<sup>1</sup>

The following terms used in that definition have a special meaning:

**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>2</sup>

A person engages in sexual intercourse with another person **WITHOUT SUCH PERSON'S CONSENT** when there is a lack of consent to the act.

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<sup>1</sup> At this point, the statutory definition continues: "where such lack of consent is by reason of some factor other than incapacity to consent." There are two such factors, forcible compulsion [Penal Law § 130.05(2) (a)] and the conduct set forth in Penal Law §130.05(2)(d). The conduct set forth in Penal Law §130.05(2)(d) is the focus of this charge and that factor is set forth in the definition of the term "without such person's consent." If a "forcible compulsion" charge is required, adapt the charge provided for rape in the first degree by forcible compulsion.

<sup>2</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).

Lack of consent results from circumstances under which, at the time of the act of intercourse, the complainant clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood the complainant's words and acts as an expression of lack of consent to such act under all the circumstances.<sup>3</sup>

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 (*defendant's name*), engaged in sexual intercourse with (*complainant's name*); and,
2. That the defendant did so without (*complainant's name*) consent.

If you find the People have proven beyond a reasonable doubt both of those elements, you must find the defendant guilty of this crime.

If you find the People have not proven beyond a reasonable doubt either one or both of those elements, you must find the defendant not guilty of this crime.

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