AGGRAVATED SEXUAL ABUSE
FIRST DEGREE
(B Felony)
(Inserts a Foreign Object;
Physical Helplessness)
PENAL LAW 130.70 (1) (b)
(Committed on or after Nov. 1, 1988)[1]

The _____ count is Aggravated Sexual Abuse in the First Degree.

Under our law, a person is guilty of Aggravated Sexual Abuse in the First Degree when he or she inserts a foreign object in the vagina [*or* urethra] [*or* penis] [*or* rectum] [*or* anus] of another person causing physical injury to such person and when the other person is incapable of consent by reason of being physically helpless.

Conduct performed for a valid medical purpose does not violate the provisions of this law. [2]

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: "foreign object," "physical injury," "incapable of consent," and "physically helpless."

FOREIGN OBJECT means any instrument or article which, when inserted in the vagina [*or* urethra] [*or* penis] [*or* rectum] [*or* anus], is capable of causing physical injury.[3]

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[1] The terminology “or anus” was added to the definition of this crime in 2010. Thus, the definition, with that term included, is applicable to a crime committed on or after January 7, 2010, pursuant to the laws of 2009, chapter 45. For crimes committed on or after November 1, 1988 and before January 7, 2010, omit that terminology.

[2] Penal Law § 130.65-a (2).

[3] Penal Law § 130.00 (9).

PHYSICAL INJURY means impairment of physical condition or substantial pain.[4]

A person is INCAPABLE OF CONSENT when that person is physically helpless.[5]

PHYSICALLY HELPLESS means that a person is unconscious or for any other reason is physically unable to communicate unwillingness to an act.[6]

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

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[4] Penal Law § 10.00 (9); *See People v Chiddick*, 8 NY3d 445 (2007).

[5] Penal Law § 130.05 (3) (d).

[6] Penal Law § 130.00 (7); *See People v Teicher*, 52 NY2d 638 (1981) (Where victim responded negatively to a command to stand and was mentally aware but had no control over her body there was sufficient proof of physical helplessness); *People v Bjork*, 105 AD3d 1258 (3d Dept 2013) ("a person who is asleep or unable to communicate as a result of voluntary intoxication is considered to be physically helpless"); *P v Perkins*, 27 AD3d 890, 892 (3d Dept 2006) ("the victim's testimony that she blacked out and 'was so drunk [she] didn't know what was going on,' is sufficient to establish the element of physical helplessness"); *People v Sensourichanh*, 290 AD2d 886 (3d Dept 2002) ("it is well settled that the definition of physically helpless is broad enough to cover a sleeping victim, particularly where, as here, there is strong evidence that the victim's sleep was drug and alcohol induced") (internal citations omitted); *P v Himmel*, 252 AD2d 273 (3d Dept 1999) (victim's testimony that although he was aware of what was going on, he was very intoxicated and unable to speak was sufficient to show that he was physically helpless); *People v Thiessen*, 158 AD2d 737, 740 (3d Dept 1990) ("there was proof that [the victim] was asleep and therefore helpless and unable to consent"); *People v Cirina*, 143 AD2d 763 (2d Dept 1988) (13-year-old complainant was physically helpless because of her voluntary intoxication leading to her "generally weakened condition"); *But see People v Clyburn*, 212 AD2d 1030, 1031 (4th Dept 1995) ("the fact that the victim was afflicted with Huntington's Chorea did not render her physically helpless, i.e., 'unconscious or for any other reason...unable to communicate unwillingness to act'").

1. That on or about *(date)*, in the county of *(County)*, the defendant, *(name of defendant)*, without a valid medical purpose, inserted a foreign object into the vagina [*or* urethra] [*or* penis] [*or* rectum] [*or* anus] of *(name of complainant)*, causing him/her physical injury; 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 Aggravated Sexual Abuse 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 Aggravated Sexual Abuse 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 applicable charge from the "additional charges" section at the end of this article.