

CRIMINAL SEXUAL ACT IN THE SECOND DEGREE
(Defendant 18 or More;
Complainant Less than 15)
Penal Law § 130.45 (1)
(Committed on or after Nov.1, 2003)

The (*specify*) count is Criminal Sexual Act in the Second Degree.

Under our law, a person is guilty of Criminal Sexual Act in the Second Degree when, being eighteen years (18) old or more, he or she engages in

Select applicable alternative(s):
oral sexual conduct [or]
anal sexual conduct

with another person less than fifteen (15) years old.

Under our law, it is also an element of this offense that the [oral (or) anal] sexual conduct was committed without the consent of that other person.¹ [Oral (or) anal] sexual conduct 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 [oral (or) anal] sexual conduct when he or she is less than fifteen (15) years old.² Thus, the law deems [oral (or) anal] sexual conduct with such a person 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 engaged in [oral (or) anal] sexual conduct was less than fifteen (15) years old, or that the actor believed that such person was fifteen (15) years old or more

¹ See Penal Law § 130.05 (1).

² Penal Law § 130.05 (3) (a).

on the date of the crime.³

[Add if applicable:

It is a defense to this charge that the defendant was married to the victim.⁴ "Married" means the existence of the relationship between the defendant and the victim as spouses which was recognized by law at the time of the alleged commission of this charge crime.^{5]}

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

Select applicable alternative(s):

[ORAL SEXUAL CONDUCT means conduct between persons consisting of contact between the mouth and the penis, the mouth and the anus, or the mouth and the vulva or vagina.^{6]}

[ANAL SEXUAL CONDUCT means conduct between persons consisting of contact between the penis and anus.^{7]}

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, each of the following (three/four) elements:

³ See Penal Law § 15.20 (3).

⁴ See Penal Law § 130.10 (4).

⁵ See Penal Law § 130.00 (4). See Domestic Relations Law §§ 15 and 15-a.

⁶ Penal Law § 130.00 (2) (a).

⁷ Penal Law § 130.00 (2) (b).

1. That on or about (*date*), in the county of (*County*) the defendant (*defendant's name*), engaged in

Select applicable alternative(s):

oral sexual conduct [or]
anal sexual conduct

with (*name of complainant*); and

2. That the defendant was eighteen years old or more; and,
3. That (*complainant's name*) was less than fifteen (15) years old.

[Add if applicable:

4. That the defendant was not married to (*name of complainant*).]

[NOTE: If the affirmative defense does not apply, conclude as follows:

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

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

If the affirmative defense set forth in Penal Law § 130.45 applies, continue as follows:

If you find that the People have not proven beyond a reasonable doubt any one or more of those elements, you must find the defendant not guilty of the crime of Criminal Sexual Act in the Second Degree as charged in the _____ count.

On the other hand, if you find that the People have proven beyond a reasonable doubt each of those elements, you must consider an affirmative defense the defendant has raised. Remember, if you have already found the defendant not guilty of Criminal Sexual Act in the Second Degree you will not consider the affirmative defense.

Under our law, it is an affirmative defense to a prosecution for this crime that the defendant was less than four (4) years older than the victim at the time of the act.

Under our law, the defendant has the burden of proving an affirmative defense by a preponderance of the evidence.

In determining whether the defendant has proven the affirmative defense by a preponderance of the evidence, you may consider the evidence presented by the People or by the defendant.

A preponderance of the evidence means the greater part of the believable and reliable evidence, not in terms of the number of witnesses or the length of time taken to present the evidence, but in terms of its quality and the weight and the convincing effect it has. For the affirmative defense to be proved by a preponderance of the evidence, the evidence that supports the affirmative defense must be of such convincing quality as to outweigh any evidence to the contrary.

Therefore, if you find that the defendant has not proven the affirmative defense by a preponderance of the evidence, then, based upon your initial determination that the People have proven beyond a reasonable doubt the elements of Criminal Sexual Act in the Second degree, you must find the defendant guilty of that crime as charged in the _____ count.

On the other hand, if you find that the defendant has proven the affirmative defense by a preponderance of the evidence, then you must find the defendant not guilty of the crime of Criminal

Sexual Act in the Second Degree as charged in the _____
count.]