

ROBBERY IN THE FIRST DEGREE
(Displays Weapon)
Penal Law § 160.15(4)
(Committed on or after Sept. 1, 1973)

[NOTE: Before instructing a jury on any specific robbery charge, read once the introductory Robbery charge found at the beginning of this chapter.]

The (*specify*) count is Robbery in the First Degree.

Under our law, a person is guilty of Robbery in the First Degree when that person forcibly steals property and when, in the course of the commission of the crime [*or of immediate flight therefrom*], that person [*or another participant in the crime*] displays what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm.¹

The element that the person *display what appears to be a pistol, revolver, rifle, shotgun, machine gun or other firearm* does not require the People to prove that the object displayed was actually a firearm. What the People are required to prove is that the person consciously displayed, or manifested the presence of, something that could reasonably be perceived as a pistol, revolver, rifle, shotgun, machine gun or other firearm and that the person, to whom the item was displayed or manifested, perceived it as a pistol, revolver, rifle, shotgun, machine gun or other firearm.²

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

¹The words "rifle, shotgun, machine gun" were added effective September 1, 1973.

²See, *People v Lopez*, 73 NY2d 214 (1989); *People v Baskerville*, 60 NY2d 374 (1983).

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), forcibly stole property from (specify); and
2. That in the course of the commission of the crime [*or* of immediate flight therefrom], the defendant [*or* another participant in the crime] displayed what appeared to be a pistol, revolver, rifle, shotgun, machine gun or other firearm.

[NOTE: If the affirmative defense does not apply:

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.

[NOTE: If the affirmative defense applies:

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 Robbery in the First Degree as charged in _____ count.

On the other hand, if you find that the People have proven beyond a reasonable doubt both of the elements, you must consider an affirmative defense the defendant has raised. That defense, if proved, does not relieve the defendant from responsibility for the robbery, but, under our law, it does reduce the seriousness of the crime from Robbery in the First Degree to Robbery in the Second Degree. Remember, if you have already found the defendant not guilty of Robbery in the First Degree, you will not consider the affirmative defense.

Under our law, it is an affirmative defense to this charge of

Robbery in the First Degree that the pistol, revolver, rifle, shotgun, machine gun or other firearm displayed was not a loaded weapon from which a shot, readily capable of producing death or other serious physical injury, could be discharged.

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 evidence introduced 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 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 had proven beyond a reasonable doubt both of the elements of Robbery in the First Degree, you must find the defendant guilty of that crime as charge 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 Robbery in the first degree as charged in the _____ count, but you must find the defendant guilty of the reduced charge of Robbery in the Second Degree.]