

**ENDANGERING THE WELFARE OF
A VULNERABLE ELDERLY PERSON OR
AN INCOMPETENT OR PHYSICALLY DISABLED PERSON
IN THE SECOND DEGREE¹
(E Felony)
(No Acquiescence)
PENAL LAW 260.32(4)
(Committed on or after Nov. 1, 1998
for Vulnerable Elderly Person)
(Committed on or after May 22, 2010
for Incompetent or Physically Disabled Person)**

The ____ count is Endangering the Welfare of a Vulnerable Elderly Person, Or An Incompetent or Physically Disabled Person in the Second Degree.

Under our law, a person is guilty of Endangering the Welfare of a Vulnerable Elderly Person, Or An Incompetent or Physically Disabled Person in the Second Degree when, being a caregiver for

Select appropriate alternative(s):

a vulnerable elderly person

¹ The crime of “endangering the welfare of a vulnerable elderly person” was added by the Laws of 1998, chapter 381, effective Nov. 1, 1998. Effective February 1, 2001, subdivision four was amended by substituting the term “mental disability” for the term “mental defect” and by substituting the term “mentally disabled” for “mentally defective.” L. 2000, ch. 1, eff. Feb. 1, 2001. In 2010, the crime was renamed to add the words "Or An Incompetent or Physically Disabled Person" and the definition of the crime was amended to include "an incompetent or physically disabled person." L. 2010, ch. 14, effective May 22, 2010. This charge was thereafter revised to account for the 2010 amendments. Thus, with respect solely to the crime of “endangering the welfare of a vulnerable elderly person,” this charge is applicable to any such crime committed on or after February 1, 2001. With respect to the crime of “endangering the welfare of a vulnerable elderly person” and/or “an incompetent or physically disabled person,” this charge is applicable to any such crime committed on or after May 22, 2010.

[or]

an incompetent or physically disabled person

he or she subjects such person to sexual contact without such person's consent.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: ["vulnerable elderly person,"] ["incompetent or physically disabled person,"] "caregiver," "sexual contact" and "without a person's consent."

[VULNERABLE ELDERLY PERSON means a person sixty years of age or older who is suffering from a disease or infirmity associated with advanced age and manifested by demonstrable physical, mental or emotional dysfunction to the extent that the person is incapable of adequately providing for his or her own health or personal care.³]

[INCOMPETENT OR PHYSICALLY DISABLED PERSON means an individual who is unable to care for himself or herself because of physical disability, mental disease or defect.⁴]

CAREGIVER means a person who assumes responsibility for the care of a vulnerable elderly person, or an incompetent or physically disabled person pursuant to a court order or receives monetary or other valuable consideration for providing care for a

² The statute reads "he or she subjects such person to sexual contact without the latter's consent." The language in the charge has been modified for clarity.

³ Penal Law § 260.30(3).

⁴ Penal Law § 260.31(4).

vulnerable elderly person, or an incompetent or physically disabled person.⁵

SEXUAL CONTACT means any touching of the sexual or other intimate parts of a person for the purpose of gratifying the sexual desire of either party. It includes the touching of the actor by the victim as well as the touching of the victim by the actor, whether directly or through clothing, as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed.⁶

Sexual contact takes place WITHOUT A PERSON'S CONSENT when it results from any circumstances in which a person does not expressly or impliedly acquiesce in the actor's conduct.⁷

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, each of the following three elements:

1. That on or about (date), the defendant (defendant's name) was a caregiver for (specify);
2. That, on or about that date, (specify) was:

Select appropriate alternative(s):

a vulnerable elderly person

⁵ Penal Law § 260.30(1).

⁶ Penal Law § 130.00(3), as amended by the L.2010, c. 193, effective October 13, 2010, which struck the phrase “not married to the actor” after the word “person,” and added the concluding phrase “as well as the emission of ejaculate by the actor upon any part of the victim, clothed or unclothed.”

⁷ Penal Law § 130.05(2)(c).

[or]

an incompetent or physically disabled person;

3. That on or about that (date), in the county of (county), the defendant subjected (specify) to sexual contact without his/her consent in that he/she did not expressly or impliedly acquiesce to the defendant's conduct.⁸

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

Therefore, if you find that the People have proven beyond a reasonable doubt each of those elements, you must find the defendant guilty of the crime of Endangering the Welfare of a Vulnerable Elderly Person, Or an Incompetent or Physically Disabled Person in the Second Degree as charged in the _____ count.

On the other hand, 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 Endangering the Welfare of a Vulnerable Elderly Person, Or an Incompetent or Physically Disabled Person in the Second Degree as charged in the _____ count.]

⁸ See Penal Law § 130.10(1). If victim's lack of consent is based solely upon his or her incapacity to consent because he or she was mentally disabled, mentally incapacitated or physically helpless, insert the appropriate instruction as found in the "Additional Charges" section at the end of this article.

[NOTE: If the affirmative defense applies, conclude as follows:

Therefore, 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 Endangering the Welfare of a Vulnerable Elderly Person, Or an Incompetent or Physically Disabled Person in the Second Degree as charged in _____ 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 Endangering the Welfare of a Vulnerable Elderly Person, Or an Incompetent or Physically Disabled Person in the Second Degree, you will not consider the affirmative defense.

Under our law, it is an affirmative defense to this charge of Endangering the Welfare of a Vulnerable Elderly Person, Or an Incompetent or Physically Disabled Person in the Second Degree that the defendant, at the time he/she engaged in the conduct constituting the offense, did not know of the facts or conditions responsible for (*specify's*) incapacity to consent.

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 the elements of Endangering the Welfare of a Vulnerable Elderly Person, Or an Incompetent or Physically Disabled Person in the Second 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 Endangering the Welfare of a Vulnerable Elderly Person, Or an Incompetent or Physically Disabled Person in the Second Degree as charged in the _____ count.]