

RAPE FIRST DEGREE
(B Felony)
(Complainant Less Than
Eleven [11] Years Old)
PENAL LAW 130.35(3)
(Committed on or after July 15, 1983)¹

The ____ count is Rape in the First Degree.

Under our law, a person is guilty of Rape in the First Degree when he or she engages in sexual intercourse with another person, to whom he or she is not married, and that person is incapable of consent by reason of being less than eleven (11) years old.²

I will now give you the meaning of the following terms used in that definition: "sexual intercourse" and "incapable of consent."

SEXUAL INTERCOURSE has its ordinary meaning, and occurs upon any penetration, however slight.³

Under New York law, a person is **INCAPABLE OF CONSENTING** to sexual intercourse when that person is less than eleven (11) years old.⁴

[NOTE: Add where appropriate:

It is not a defense to a charge of Rape in the First Degree that the actor did not know that the person with whom the actor had sexual intercourse was less than eleven (11) years old, or that

¹*People v. Liberta*, 64 NY2d 152 (1984), decided December 20, 1984, eliminated the gender exemption for rape and sodomy. Therefore, if a female is charged as a principal, the effective date of the statute is December 20, 1984. The definition of the crime has been modified to make it gender-neutral in accordance with *Liberta*, without eliminating the marital exemption originally incorporated in this section through the definition of "female" in Penal Law § 130.00(4).

²For the definition of "not married," see Penal Law § 130.00(4).

³See, Penal Law § 130.05(2)(a).

⁴See, Penal Law § 130.05(3)(a).

the actor believed that such person was eleven (11) years old or more on the date of the crime.^{5]}

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, (name of defendant), engaged in sexual intercourse with (name of complainant), to whom the defendant was not married; and
2. That (name of complainant) was incapable of consent because he/she was less than eleven (11) years old.

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 Rape 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 Rape in the First Degree as charged in the _____ count.

⁵See, Penal Law § 15.20(3).