

SEXUAL ABUSE THIRD DEGREE
(B Misdemeanor)
(Sexual Contact Without Consent;
Complainant Less than Seventeen[17])
PENAL LAW 130.55
(Committed on or after July 27, 1984)¹

The _____ count is Sexual Abuse in the Third Degree.

Under our law, a person is guilty of Sexual Abuse in the Third Degree when he or she subjects another person to sexual contact without the latter's consent.

I will now give you the meaning of the following terms used in that definition: "sexual contact" and "without a person's consent."

SEXUAL CONTACT means any touching of the sexual or other intimate parts of a person not married to the actor 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.²

Sexual contact takes place **WITHOUT A PERSON'S CONSENT** when that person is incapable of consenting to sexual contact.³

Under New York law, a person is **INCAPABLE OF CONSENTING** to sexual contact when he or she is less than seventeen (17) years old.⁴

[NOTE: Add where appropriate:

It is not a defense to a charge of Sexual Abuse in the Third Degree that the actor did not know that the person with whom the actor had sexual contact was less than seventeen (17) years old, or that the actor believed that such person was seventeen (17) years old or more on the date of the crime.]⁵

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 accordingly.

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

³See, Penal Law § 130.05(2)(b).

⁴See, Penal Law § 130.05(3)(a).

⁵See, Penal Law § 15.20(3).

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), subjected (name of complainant) to sexual contact, in that he/she (specify nature of contact) for the purpose of sexual gratification; and**
- 2. That (name of complainant) was incapable of consent because he/she was less than seventeen (17) years old.**

[NOTE: If the affirmative defense does not apply:

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 Sexual Abuse in the Third 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 Sexual Abuse in the Third Degree as charged in the _____ count.]

[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 Sexual Abuse in the Third Degree as charged in the _____ count.

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

Under our law, it is an affirmative defense to this charge of Sexual Abuse in the Third Degree that, at the time of the sexual contact, (a) the complainant's lack of consent was due solely to his/her incapacity to consent by reason of being less than seventeen (17) years old, and (b) the complainant was more than fourteen (14) years old, and (c) the defendant was less than five (5) years older than the complainant.

Under New York law, the defendant has the burden of proving each element of an affirmative defense by a preponderance of the evidence.

In determining whether the defendant has proven an element of 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 an element of the affirmative defense to be proved by a preponderance of the evidence, the evidence that supports such element must be of such convincing quality as to outweigh any evidence to the contrary.

In order for you to find the affirmative defense, the defendant must prove, by a

preponderance of the evidence, each of the following three elements:

1. That (name of complainant) 's lack of consent was due solely to his/her incapacity to consent by reason of being less than seventeen (17) years old at the time of the sexual contact;
2. That (name of complainant) was more than fourteen (14) years old at that time; and
3. That the defendant, (name of defendant), was less than five (5) years older than (name of complainant).

Therefore, if you find that the defendant has not proven each element of 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 Sexual Abuse in the Third 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 each element of the affirmative defense by a preponderance of the evidence, then you must find the defendant not guilty of Sexual Abuse in the Third Degree as charged in the _____ count.