

RAPE SECOND DEGREE
(D Felony)
(Defendant 18 or More; Complainant Less than 15)
PENAL LAW 130.30(1)
(Committed on or after February 1, 2001)

The _____ count is Rape in the Second Degree.

Under our law, a person is guilty of Rape in the Second Degree when, being eighteen years (18) old or more, he or she engages in sexual intercourse with another person less than fifteen (15) years old.

Under our law, it is also an element of this offense that the sexual intercourse was committed without the consent of that other person.¹ Sexual intercourse 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 sexual intercourse when he or she is less than seventeen (17) years old.² Thus, sexual intercourse with such a person is always deemed 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 had sexual intercourse was less than fifteen (15) years old, or that the actor believed that such person was fifteen (15) years old or more on the date of the crime.³

The term, "sexual intercourse," used in the definition of this crime has its own special meaning in our law. I will now give you the meaning of that term.

SEXUAL INTERCOURSE means any penetration, however slight, of the penis into the vaginal opening. In other

¹ See Penal Law § 130.05(1).

² See Penal Law § 130.05(3)(a).

³ See Penal Law §15.20(3).

words, any penetration of the penis into the vaginal opening, regardless of the distance of penetration, constitutes an act of sexual intercourse. Sexual intercourse does not necessarily require erection of the penis, emission, or orgasm.⁴

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*), in the county of (*county*) the defendant (*defendant's name*), engaged in sexual intercourse with (*complainant's name*); and,
2. That the defendant was eighteen years old or more ; and,
3. That (*complainant's name*) was less than fifteen (15) years old.

[NOTE: If the affirmative defense of Penal Law § 130.30 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 Rape 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 Rape in the Second Degree as charged in the _____ count.]

⁴ The statutory definition has been amplified in accord with case law. See Penal Law § 130.00(1) and *People v. Liberta*, 64 NY2d 152, 169 (1984); *People v. Edwards*, 173 A.D. 375 (2d Dept. 1916); *People v. Berardicurti*, 167 A.D.2d 840 (4th Dept. 1990); *People v. White*, 185 A.D.2d 472 (3rd Dept. 1992); *People v. Williams*, 259 A.D.2d 509 (2d Dept. 1999).

[NOTE: If the affirmative defense of Penal Law § 130.30 does apply, 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 Rape 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 Rape 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 complainant 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 Rape 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 Rape in the Second Degree as charged in the _____ count.]