

RAPE SECOND DEGREE
(D Felony)
(Incapable of Consent - Mentally Disabled or Incapacitated)
PENAL LAW 130.30(2)
(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 he or she engages in sexual intercourse with another person who is incapable of consent by reason of being mentally disabled [*or* mentally incapacitated].

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: “sexual intercourse,” “incapable of consent,” and “mentally disabled” [*or* “mentally incapacitated”].

SEXUAL INTERCOURSE means any penetration, however slight, of the penis into the vaginal opening. In other 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. ¹

It is an element of this crime that the sexual intercourse takes place without consent.² 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

¹ 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, cert den 471 US 1020 (1984); *People v. Edwards*, 173 A.D. 375 (2d Dept. 1916); *People v. White*, 185 A.D.2d 472 (1992); *People v. Berardicurti*, 167 A.D.2d 840 (4th Dept. 1990); *People v. Williams*, 259 A.D.2d 509 (2d Dept. 1999).

² See Penal Law § 130.05(1).

she is mentally disabled [*or* mentally incapacitated].³

MENTALLY DISABLED means that a person suffers from a mental disease or defect which renders him or her incapable of appraising the nature of his or her conduct.⁴

[MENTALLY INCAPACITATED means that a person is rendered temporarily incapable of appraising or controlling his or her conduct owing to the influence of a narcotic or intoxicating substance administered to him or her without his or her consent, or to any other act committed upon him without his or her consent.⁵]

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.

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 (*defendant's name*), engaged in sexual intercourse with (*complainant's name*); and,
2. That (*complainant's name*) was incapable of consent by reason of being mentally disabled [*or* mentally incapacitated].

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 Second Degree as

³ Penal Law §130.05(3)(b) and (c).

⁴ Penal Law §130.00(5).

⁵ Penal Law §130.00(6).

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 Second Degree as charged in the _____ count.]

[NOTE: If the affirmative defense set forth in Penal Law § 130.10(1) applies, omit the final two paragraphs of the above charge, and substitute the charge at the end of this article.]

[NOTE: Where lack of consent results solely from incapacity to consent because of the alleged victim's mental disability or mental incapacity, a charge on corroboration is required. Penal Law § 130.16. See charge at the end of this article].