

AGGRAVATED SEXUAL ASSAULT IN THE COURSE OF A FELONY:
CONSENT ALLEGED¹
N.J.S.A. 2C:14-2a(3)

Count _____ of the indictment charges the defendant with aggravated sexual assault.

[READ COUNT OF INDICTMENT]

That section of our statutes provides in pertinent part:

A person is guilty of aggravated sexual assault if he commits an act of sexual penetration with another person during the commission, or attempted commission, whether alone or with one or more other persons, of **[choose appropriate]** robbery, kidnapping, homicide, aggravated assault on another, burglary, arson or criminal escape.

In order to convict defendant of this charge, the State must prove the following elements beyond a reasonable doubt:

1. That the defendant committed an act of sexual penetration with another person in the absence of the victim's freely and affirmatively given permission.
2. That the defendant acted knowingly.
3. That the penetration occurred during the commission, or attempted commission, whether alone or with one or more other persons, of **[choose appropriate]** robbery, kidnapping, homicide, aggravated assault on another, burglary, arson or criminal escape.

The first element that the State must prove beyond a reasonable doubt is that defendant committed an act of sexual penetration with **(name of victim)**. According to the law, **[choose appropriate]** vaginal intercourse, cunnilingus, fellatio or anal intercourse between persons or

¹ This charge should be given only when there is evidence of consensual sexual activity which would be relevant to the issue of force used to commit the act of penetration. See State v. Jones, 308 N.J. Super. 174, 187 (App. Div.), certif. denied, 156 N.J. 380 (1998); State v. Cuni, 303 N.J. Super. 584, 597-98 (App. Div. 1997), aff'd o.g., 159 N.J. 584 (1999).

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insertion of the hand, finger or object into the anus or vagina, either by the defendant or by another person upon the defendant's instruction, constitute(s) “sexual penetration.” Any amount of insertion, however slight, constitutes penetration; that is, the depth of insertion is not relevant.

[Choose the appropriate definition(s)]

The definition of “vaginal intercourse” is the penetration of the vagina, or [**where appropriate**] of the space between the labia majora or outer lips of the vulva.²

The definition of “cunnilingus” is oral contact with the female sex organ.³

The definition of “fellatio” is oral contact with the male sexual organ.⁴

The definition of “anal intercourse” is penetration, of any depth, into the anus.⁵

The State must further prove beyond a reasonable doubt that defendant committed the act of sexual penetration without the victim’s freely and affirmatively given permission to the specific act of penetration alleged to have occurred.⁶ The State alleges that (**describe sexual penetration alleged**). You must decide whether the defendant’s alleged act of penetration was undertaken in circumstances that led the defendant reasonably to believe that the victim had freely given affirmative permission to the specific act of sexual penetration. Simply put, affirmatively given permission means the victim did or said something which would lead a reasonable person to believe

² State v. J.A., 337 N.J. Super. 114 (App. Div. 2001). The Appellate Division upheld the charge given by the trial court in that case which included the following language which can be used if the circumstances of the specific case are appropriate: “This means that if you find from all of the evidence presented beyond a reasonable doubt that there was [penile] penetration to the outer area of the vaginal opening, what is commonly referred to as the vaginal lips, that is sufficient to establish penetration under the law.”

³ State v. Fraction, 206 N.J. Super. 532, 535-36 (App. Div. 1985), certif. denied, 104 N.J. 434 (1986). Penetration is not necessary for this act.

⁴ State in the Interest of S.M., 284 N.J. Super. 611, 616-19 (App. Div. 1995). Penetration is not necessary for this act.

⁵ State v. Gallagher, 286 N.J. Super. 1, 13 (App. Div. 1995), certif. denied, 146 N.J. 569 (1996).

⁶ State in the Interest of M.T.S., 129 N.J. 422 (1992).

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(he/she) was agreeing to engage in the act of sexual penetration, and freely given permission means the victim agreed of (his/her) own free will to engage in the act of sexual penetration. Freely and affirmatively given permission can be indicated either through words or through actions that, when viewed in light of all the surrounding circumstances, would demonstrate to a reasonable person that affirmative and freely given permission for the specific act of sexual penetration had been given.

Persons need not, of course, expressly announce their consent to engage in an act of sexual intercourse for there to be affirmative permission. Permission to engage in an act of sexual penetration can be and indeed often is indicated through physical actions rather than words. Permission is demonstrated when the evidence, in whatever form, is sufficient to demonstrate that a reasonable person would have believed that the alleged victim had affirmatively and freely given authorization to the act.

Proof that the act of sexual penetration occurred without the victim's permission can be based on evidence of conduct or words in light of surrounding circumstances, and must demonstrate beyond a reasonable doubt that a reasonable person would not have believed that there was affirmative and freely given permission. If there is evidence to suggest that the defendant reasonably believed that such permission had been given, the State must demonstrate either that the defendant did not actually believe that such permission had been freely given, or that such a belief was unreasonable under all of the circumstances.

In determining the reasonableness of defendant's belief that the victim had freely given affirmative permission, you must keep in mind that the law places no burden on the alleged victim to have expressed non-consent or to have denied permission.

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[CHARGE IF APPROPRIATE]

You should not speculate as to what the alleged victim thought or desired or why (he/she) did not resist or protest. The State is not required to prove that the victim resisted, or resisted to the utmost or reasonably resisted the sexual assault.

[CHARGE IN ALL CASES]

The second element that the State must prove beyond a reasonable doubt is that defendant acted knowingly. A person acts knowingly with respect to the nature of his/her conduct or the attendant circumstances if he/she is aware that the conduct is of that nature or that such circumstances exist or the person is aware of a high probability of their existence. A person acts knowingly with respect to a result of the conduct if he/she is aware that it is practically certain that the conduct will cause such a result. “Knowing,” “with knowledge,” or equivalent terms have the same meaning.

Knowledge⁷ is a condition of the mind. It cannot be seen. It can only be determined by inferences from defendant’s conduct, words or acts. A state of mind is rarely susceptible of direct proof but must ordinarily be inferred from the facts. Therefore, it is not necessary that the State produce witnesses to testify that an accused said that he/she had a certain state of mind when he/she did a particular thing. It is within your power to find that such proof has been furnished beyond a reasonable doubt by inferences which may arise from the nature of his/her acts and conduct and from all he/she said and did at the particular time and place and from all surrounding circumstances established by the evidence.

⁷ The underlying offense(s) charged, e.g., robbery, kidnapping, homicide, burglary, may feature different states of mind. In that case, the court should include those states of mind in this portion of the charge.

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The third element that the State must prove beyond a reasonable doubt is that the penetration occurred during the commission or attempted commission, whether alone or with one or more other persons, of [**choose appropriate**] robbery, kidnapping, homicide, aggravated assault on another,⁸ burglary, arson or criminal escape. [**Instruct the jury on the elements of the appropriate crime or attempted crime or, if already charged, remind jurors of instructions**].⁹

If you find that the State has proven every element beyond a reasonable doubt, then you must find the defendant guilty of aggravated sexual assault. If you find that the State has failed to prove any of these elements beyond a reasonable doubt, then you must find the defendant not guilty of aggravated sexual assault.

⁸ Note that under this statute aggravated assault on another refers to a situation in which an aggravated assault is committed or attempted upon a third person (not the victim) to compel a victim to submit to a sexual assault. State v. Rangel, 422 N.J. Super. 1 (App. Div. 2011), certif. granted, 209 N.J. 233 (2012). Where appropriate, the jury should be so charged.

⁹ If the court intends to instruct the jury on lesser offenses of these felonies, it should advise the jury that convictions on these lesser offenses will not support a conviction of aggravated sexual assault in the course of an enumerated felony. For example, if defendant were charged with aggravated sexual assault in the course of a burglary and the jury convicted defendant of the lesser offense of trespass, that would not support a conviction of aggravated sexual assault in the course of a felony. Cf. State v. Gray, 147 N.J. 4, 15 (1996) (defendant's felony murder conviction reversed because the underlying felony found by the jury was conspiracy to commit arson, which is not one of the enumerated felonies in the statute).