

CRIMINAL SEXUAL CONTACT
N.J.S.A. 2C:14-3b [2C:14-2c(1) through (4)]

Count _____ of the indictment charges defendant with criminal sexual contact.

[READ COUNT OF INDICTMENT]

That section of our statutes provides in pertinent part:

An actor is guilty of criminal sexual contact if he commits an act of sexual contact with the victim and

[CHOOSE APPROPRIATE]

the actor uses physical force or coercion but the victim does not sustain severe personal injury

OR

the victim is on probation or parole, or is detained in a hospital, prison or other institution and the actor has supervisory or disciplinary power over the victim by virtue of the actor's legal, professional or occupational status

OR

the victim is at least 13 but less than 16 years old and the actor is at least four years older than the victim

OR

the victim is at least 16 but less than 18 years old and

(1) the actor is related to the victim by blood or affinity to the third degree;

OR

(2) the actor has supervisory or disciplinary power of any nature or in any capacity over the victim;

OR

(3) the actor is a resource family parent, a guardian, or stands in loco parentis within the household.

CRIMINAL SEXUAL CONTACT
N.J.S.A. 2C:14-3b [2C:14-2c(1) through (4)]

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

- (1) That defendant purposely committed an act of sexual contact with another person;

OR

- (1) That defendant purposely committed an act of sexual contact by touching himself/herself and the touching was in the view of **(name of victim)** who defendant knew was present;

[CHOOSE APPROPRIATE]

- (2) That defendant used physical force or coercion but the victim did not sustain severe personal injury.

OR

- (2) That the victim was [on probation] [on parole] detained in a [hospital] [prison] [institution] and the actor had [supervisory] [disciplinary] power over the victim by virtue of the defendant's legal, professional or occupational status.

OR

- (2) That the victim is at least 13 but less than 16 and the defendant is at least four years older than the victim.

OR

- (2) That the victim was at least 16 but less than 18 years old and

- (1) the defendant is related to the victim by blood or affinity to the first, second or third degree.¹

OR

- (2) the defendant had [supervisory] [disciplinary] power of any nature or in any capacity over the victim.

¹ First degree--parents and children; Second degree--grandparents, grandchildren, brothers and sisters; Third degree--uncles, aunts, nieces, nephews, great grandparents, great grandchildren. See generally, Smith v. Gaines, 36 N.J. Eq. 297 (E. & A. 1882).

CRIMINAL SEXUAL CONTACT
N.J.S.A. 2C:14-3b [2C:14-2c(1) through (4)]

OR

- (3) the defendant is a resource family parent, a guardian or stands in loco parentis within the household.

The first element that the State must prove beyond a reasonable doubt is that defendant purposely committed an act of sexual contact with **(name of victim)**.

Sexual contact means an intentional touching by **(name of victim)** or by the defendant, either directly or through clothing, of **(name of victim's)** or defendant's intimate parts for the purpose of degrading or humiliating **(name of victim)** or sexually arousing or gratifying defendant.

Intimate parts means **[CHOOSE APPROPRIATE]** sexual organs, genital area, anal area, inner thigh, groin, buttock or breast of a person.

To find that defendant committed an act of criminal sexual contact, you must find beyond a reasonable doubt both that the touching was intentional and that it was done with the purpose of degrading or humiliating **(name of victim)** or sexually arousing or gratifying the defendant.

Intentional means purposeful. A person acts purposely with respect to the nature of his/her conduct or a result thereof if it is his/her conscious object to engage in conduct of that nature or to cause such a result. A person acts purposely with respect to the attendant circumstances if he/she is aware of the existence of such circumstances or believes or hopes that they exist.

[WHEN DEFENDANT IS CHARGED WITH TOUCHING HIMSELF/HERSELF, ADD THE FOLLOWING: The State must prove beyond a reasonable doubt that the touching was in view of the victim whom the defendant knew to be present.² The State is not required to prove that **(name of victim)** actually observed or witnessed the alleged sexual contact. Rather, the State must prove that the alleged sexual contact occurred in the view of **(name of victim)**. “Field of vision” is not limited to the visual direction in which the alleged victim is focused upon at the particular time when the alleged sexual contact is said to have occurred. Field of vision

² State v. Zeidell, 154 N.J. 417 (1998).

CRIMINAL SEXUAL CONTACT
N.J.S.A. 2C:14-3b [2C:14-2c(1) through (4)]

includes the areas that **(name of victim)** was capable of viewing.³ The State must prove beyond a reasonable doubt that **(name of victim)** was present.

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 a result. “Knowing,” “with knowledge,” or equivalent terms have the same meaning.

Purpose [and knowledge] is/are [a] condition[s] of the mind. [It] [They] cannot be seen. Often, [it] [they] can only be determined by inference 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 inference 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.

Here, the State alleges that defendant committed an act of sexual contact by **(describe conduct alleged)**.

The second element that the State must prove beyond a reasonable doubt is that:

[CHOOSE APPROPRIATE]

Defendant used physical force or coercion but the victim did not sustain severe personal injury.⁴ Physical force is defined as the commission of the act of sexual contact without the victim's freely and affirmatively given permission to the specific act of contact alleged to have occurred. You must decide whether the defendant's alleged act of contact 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 contact. Simply put, affirmatively given

³ State v. Breitweiser, 373 N.J. Super. 271, 276, 286-87 (App. Div. 2004).

⁴ Note that where a defendant's sexual contact is with his own intimate parts in view of an adult victim, a conviction on a charge of criminal sexual contact requires proof of physical force or coercion beyond defendant's act of touching himself; in the absence of such evidence of force or coercion, defendant's conduct may constitute the lesser included offense of lewdness. State v. Lee, 417 N.J. Super. 219 (App. Div. 2010), certif. denied, 206 N.J. 64 (2011). In an appropriate case, the court must (1) decide which charge(s) to submit to the jury and (2) tailor its instructions accordingly.

CRIMINAL SEXUAL CONTACT
N.J.S.A. 2C:14-3b [2C:14-2c(1) through (4)]

permission means the victim did or said something which would lead a reasonable person to believe (he/she) was agreeing to engage in the act of sexual contact, and freely given permission means the victim agreed of (his/her) own free will to engage in the act of sexual contact. Freely and affirmatively given permission can be indicated either through words or through actions that, when viewed in the light of all the surrounding circumstances, would demonstrate to a reasonable person that affirmative and freely given permission for the specific act of sexual contact 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 contact 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 contact 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. 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 contact.⁵

To find that the defendant used coercion, you must find that defendant, with the purpose, that is, with the conscious object, to unlawfully restrict (**name of victim**) freedom of action to

⁵ N.J.S.A. 2C:14-5a.

CRIMINAL SEXUAL CONTACT
N.J.S.A. 2C:14-3b [2C:14-2c(1) through (4)]

engage in or refrain from engaging in the act of sexual contact, threatened to:⁶

[Charge applicable language]

- (1) inflict bodily injury on anyone or any other offense;
- (2) accuse anyone of an offense;
- (3) expose any secret which would tend to subject any person to hatred, contempt or ridicule, or to impair his or her credit or business repute;
- (4) take or withhold action as an official, or cause an official to take or withhold action;
- (5) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or
- (6) perform any other act which would not in itself substantially benefit the actor but which is calculated to substantially harm another person with respect to his or her health, safety, business, calling, career, financial condition, reputation or personal relationships.

In other words, to find that the defendant used coercion, you must find that the defendant's purpose, that is, conscious object, was to compel **(name of victim)** to engage in an act of sexual contact by threatening (him/her). Severe personal injury means severe bodily injury, disfigurement, disease, incapacitating mental anguish or chronic pain.⁷

OR

The victim was on probation or parole, or was detained in a hospital, prison or other institution and the actor had supervisory or disciplinary power over the victim by virtue of the defendant's legal, professional or occupational status. In this case, the State alleges that defendant had [supervisory] [disciplinary] power over **(name of victim)** because of defendant's status as **(insert allegation)**. In determining whether defendant had [supervisory] [disciplinary] power over **(name of victim)**, you must examine the entire context of the relationship between

⁶ See N.J.S.A. 2C:14-1j and 2C:13-5.

⁷ N.J.S.A. 2C:14-1f.

CRIMINAL SEXUAL CONTACT
N.J.S.A. 2C:14-3b [2C:14-2c(1) through (4)]

the defendant and **(name of victim)**. To do so, you should consider the nature of the relationship between the defendant and the victim and whether the relationship was so unequal as to vest [supervisory] [disciplinary] power in the defendant. Among the factors you may consider are whether there was a significant disparity in ages and/or maturity level between the defendant and victim, whether the defendant offered advice and guidance to the **(name of victim)** on questions and issues outside the defendant's role as _____ and the power or ability of the defendant to affect the **(name of victim)** future participation or success.⁸

OR

(Name of victim) was at least 13 but less than 16 years old and defendant was at least four years older than (he/she). The State must prove only the age of the **(name of victim)** at the time of the offense beyond a reasonable doubt. It does not have to prove that defendant knew or reasonably should have known that **(name of victim)** was between 13 and 16 years old.⁹

OR

(Name of victim) was at least 16 but less than 18 years old and

(Choose appropriate)

- (1) defendant is related to **(name of victim)** by blood or affinity to the first, second or third degree. Here, the State alleges that defendant is **(name of victim)** **(type of relationship)**. The State must prove only the age of the **(name of victim)** at the time of the offense beyond a reasonable doubt. It does not have to prove that defendant knew or reasonably should have known that **(name of victim)** was at least 16 but less than 18 years old.¹⁰
- (2) defendant had [supervisory] [disciplinary] power of any nature or in any capacity over **(name of victim)**. In determining whether defendant had [supervisory] [disciplinary] power over **(name of victim)**, you must examine the entire context

⁸ These factors are suggested by State v. Buscham, 360 N.J. Super. 346, 362 (App. Div. 2003), where the issue was defendant's role as a coach. The parties should identify factors in their particular case which would be significant for the jury to consider in determining whether the defendant had supervisory or disciplinary power over the victim.

⁹ State v. Perez, 177 N.J. 540, 555 (2003); N.J.S.A. 2C:14-5c.

¹⁰ State v. Perez, 177 N.J. 540, 555 (2003); N.J.S.A. 2C:14-5c.

CRIMINAL SEXUAL CONTACT
N.J.S.A. 2C:14-3b [2C:14-2c(1) through (4)]

of the relationship between the defendant and **(name of victim)**. To do so, you should consider the nature of the relationship between the defendant and the victim and whether the relationship was so unequal as to vest [supervisory] [disciplinary] power in the defendant. Among the factors you may consider are whether there was a significant disparity in ages and/or maturity level between the defendant and victim, whether the defendant offered advice and guidance to the **(name of victim)** on questions and issues outside the defendant's role as _____ and the power or ability of the defendant to affect the **(name of victim)** future participation or success.¹¹ The State must prove only the age of the **(name of victim)** at the time of the offense beyond a reasonable doubt. It does not have to prove that defendant knew or reasonably should have known that **(name of victim)** was at least 16 but less than 18 years old.¹²

- (3) Defendant is a [resource family parent] [guardian] [stands in loco parentis within the household] of the **(name of victim)**.

Defendant is a [resource family parent], [guardian] [stands in loco parentis within the household] of **(name of victim)**. "Resource family parent" means any person other than a natural or adoptive parent with whom a child in the care, custody or guardianship of the Department of Children and Families is placed by the department, or with its approval, for care, and shall include any person with whom a child is placed by the Division of Youth and Family Services for the purpose of adoption until the adoption is finalized.¹³

An in loco parentis relationship occurs when a person acts as a temporary guardian or caregiver of a child, taking on all or some of the responsibilities of a parent. Among the factors

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¹² State v. Perez, 177 N.J. 540, 555 (2003); N.J.S.A. 2C:14-5c.

¹³ N.J.S.A. 30:4C-26.4.

CRIMINAL SEXUAL CONTACT
N.J.S.A. 2C:14-3b [2C:14-2c(1) through (4)]

you may consider to determine whether defendant stood in loco parentis during the relevant period are whether defendant took on the responsibility to maintain, rear and educate **(name of victim)** as well as the duties of supervision, care and rehabilitation of **(name of victim)**.¹⁴

The State must prove only the age of the **(name of victim)** at the time of the offense beyond a reasonable doubt. It does not have to prove that defendant knew or reasonably should have known that **(name of victim)** was at least 16 but less than 18 years old.¹⁵

[CHARGE IN ALL CASES]

If you find that the State has proven every element beyond a reasonable doubt, then you must find the defendant guilty of criminal sexual contact. 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 criminal sexual contact.

¹⁴ These factors are suggested by Hardwicke v. American Boychoir School, 188 N.J. 69, 91 (2006).
¹⁵ State v. Perez, 177 N.J. 540, 555 (2003); N.J.S.A. 2C:14-5c.