

**AGGRAVATED SEXUAL ASSAULT
(N.J.S.A. 2C:14-2a(5))**

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

[READ COUNT OF INDICTMENT]

That section of our statutes provides in pertinent part:

An actor is guilty of aggravated sexual assault if he commits an act of sexual penetration with another person and the actor is aided or abetted by one or more other persons and the actor uses physical force or coercion.

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.
2. That the defendant acted knowingly.
3. That at the time of the penetration the defendant was aided by one or more other persons.
4. That the defendant used physical force or coercion.

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 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.¹

¹ 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."

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The definition of “cunnilingus” is oral contact with the female sex organ.²

The definition of “fellatio” is oral contact with the male sexual organ.³

The definition of “anal intercourse” is penetration of any depth into the anus.⁴

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

Knowledge 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.

The third element that the State must prove beyond a reasonable doubt is that at the time of the penetration, defendant was aided or abetted by one or more other persons. To aid means to assist, support or supplement the efforts of another. To abet means to encourage, counsel, incite or instigate the commission of the crime. The State does not need to prove aiding or abetting by direct evidence of a formal plan to commit the crime or by a verbal agreement from all who were charged or involved. Rather, the proof can be circumstantial and can be established from conduct as well as spoken words. However, a person cannot be an aider or abettor unless you find as a fact that he/she shared the same purpose required to be proven against the person who actually committed the act of penetration.

² 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.

³ State in the Interest of S.M., 284 N.J. Super. 611, 616-19 (App. Div. 1995). Penetration is not necessary for this act.

⁴ State v. Gallagher, 286 N.J. Super. 1, 13 (App. Div. 1995), certif. denied, 146 N.J. 569 (1996).

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The fourth element that the State must prove beyond a reasonable doubt is that defendant used physical force or coercion.

Physical force is defined as the commission of the act of sexual penetration without the victim's freely and affirmatively given permission to the specific act of penetration alleged to have occurred. 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 (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 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 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 beyond a reasonable doubt 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

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to prove that the victim resisted.⁵

To find that the defendant used coercion, you must find that defendant, with the purpose to unlawfully restrict (**name of victim**) freedom of action to engage in or refrain from engaging in the act of sexual penetration, threatened to:⁶

[Charge applicable language]

- (1) inflict bodily injury on anyone or commit 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.

To find that the defendant used coercion, you must find that the defendant's purpose was to compel (**name of victim**) to engage in an act of sexual penetration by threatening (him/her). A person acts purposely with respect to the nature of his/her conduct or the result of that conduct 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 attendant circumstances if the person is aware of the existence of such circumstances or believes or hopes that they exist. "With purpose," "designed," "with design," or equivalent terms have the same meaning.

Knowledge [and purpose]⁷ is [are] [a] condition[s] of the mind. It [they] cannot be seen. It [they] 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

⁵ State in the Interest of M.T.S., 129 N.J. 422, 444-49 (1992).

⁶ See N.J.S.A. 2C:14-1j and 2C:13-5.

⁷ Purpose only applies if coercion is charged.

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certain state of mind when he 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.

If you find that the State has proven beyond a reasonable doubt each of these four elements, then you must find the defendant guilty of the crime of aggravated sexual assault. On the other hand, 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.

(Continue to lesser included offenses where required.)