

ASSAULT IN THE SECOND DEGREE
(Felony Assault; Physical Injury)
Penal Law § 120.05(6)
(Committed on or after Sept. 1, 1967)

The (specify) count is Assault in the Second Degree.

Under our law, a person is guilty of Assault in the Second Degree when, in the course of and in furtherance of the commission [*or attempted commission*] of a felony [*or of immediate flight therefrom*], that person [*or another participant if there be any*], causes physical injury to a person other than one of the participants.

[*NOTE: Add if multiple participants in the underlying felony:*

Under that law, when, in the course of and in furtherance of the commission (*or attempted commission*) of a felony (*or of immediate flight therefrom*), a participant in the commission (*or attempted commission*) of that felony causes physical injury to a non-participant, all the participants – the one who caused the physical injury as well as the other participants in the felony – are guilty of Assault in the Second Degree.]

The following terms used in that definition have a special meaning:

PHYSICAL INJURY means impairment of physical condition or substantial pain. If you find that physical injury was caused by the defendant [*or by a participant in the crime*], then it does not matter that the physical injury was caused unintentionally or accidentally, rather than with an intention to cause physical injury, or that it resulted from the victim's fear or fright.¹

(Specify name of felony) is a felony. A person is guilty of (specify name and definition of felony).

NOTE: If the predicate felony of felony murder has been separately charged, the jury should be instructed on that count first and that instruction should be cross-

¹ Penal Law § 10.00(9); See *People v. Chiddick*, 8 NY3d 445 (2007).

*referenced here. If it has not been separately charged, then here read the statutory definition of the applicable crime and any necessary defined terms as set forth in CJI2d for that offense.*²

[NOTE: Add where appropriate:

In determining whether a person is in IMMEDIATE FLIGHT from the commission (or attempted commission) of (name of felony), you may consider: (1) the distance, if any, between the location of the (name of felony) and the location where physical injury was caused; (2) the interval of time, if any, between the commission (or attempted commission) of the (name of felony) and the causing of physical injury; (3) whether (police, security personnel, citizens) were in close pursuit at the time physical injury was caused; (4) whether that ~~such~~ person possessed fruits of the (name of felony) at the time physical injury was caused; and (5) whether that person ~~such person(s)~~ had reached a place of temporary safety before the physical injury was caused.]³

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:

² See *People v. Wroblewski*, 109 A.D.2d 39 (1985), *aff'd. for the reasons stated in the opinion* at the Appellate Division, 67 N.Y.2d 933 (1986) (when an indictment charges a defendant with felony murder by using the generic name of the alleged felony, without reference to its degree (e.g., “arson,” instead of “arson in the first degree”), the court may charge the jury on the definition and elements of the lowest degree of the alleged felony, irrespective of whether that degree is charged in the indictment or of whether it is separately charged to the jury as a lesser included offense of an indicted offense; *People v. Kelly*, 170 A.D.2d 537, 537–38 (2d Dept. 1991) (holding that the trial court properly instructed the jury on robbery as the predicate felony “rather than attempted robbery as was charged in the indictment ... was proper as the evidence revealed the existence of the underlying predicate felony”).

³ See *People v. Gladman*, 41 NY2d 123, 129 (1976). The factors which are inapplicable to the case should be omitted in the charge to the jury.

1. That on or about (date), in the county of (county), the defendant, (defendant's name), committed [*or attempted to commit*] (name of felony); and

2. That, in the course of and in furtherance of the commission [*or attempted commission*] of (name of felony) [*or of immediate flight therefrom*], the defendant [*or another participant in the commission (or attempted commission) of that felony*] caused physical injury to (specify) and that (specify) was not a participant in the felony.

If you find that the People have proven beyond a reasonable doubt both of those elements, you must find the defendant guilty of this crime.

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 this crime.