

**RAPE IN THE SECOND DEGREE**  
**(Incapable of Consent -**  
**Mentally Disabled or Incapacitated)**  
**Penal Law § 130.30 (2)**  
**(Committed on or after Nov. 1, 2003)**

The (*specify*) 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*].

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

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.<sup>1</sup>

It is an element of this crime that the sexual intercourse takes place without consent.<sup>2</sup> 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 she is mentally disabled [*or mentally incapacitated*].<sup>3</sup>

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<sup>1</sup> The statutory definition has been amplified in accord with case law (see Penal Law § 130.00 [1]; *People v Liberta*, 64 NY2d 152, 169 [1984]; *People v Williams*, 259 AD2d 509 [2d Dept 1999]; *People v White*, 185 AD2d 472 [3d Dept 1992]; *People v Berardicurti*, 167 AD2d 840 [4th Dept 1990]; *People v Edwards*, 173 AD 375 [2d Dept 1916]).

<sup>2</sup> See Penal Law § 130.05 (1).

<sup>3</sup> Penal Law §§ 130.05 (3) (b) and (c).

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.<sup>4</sup>

*[Add if applicable:*

It is a defense to this charge that the defendant was married to the victim.<sup>5</sup> "Married" means the existence of the relationship between the defendant and the victim as spouses which was recognized by law at the time of the alleged commission of this charge crime.<sup>6]</sup>

[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. <sup>7]</sup>

Thus, the law deems sexual intercourse with such a person 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 of the evidence in the case, beyond a reasonable doubt, (both/each) of the following (two/three) elements:

1. That on or about (date), in the county of (County) the

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<sup>4</sup> Penal Law § 130.00 (5).

<sup>5</sup> See Penal Law § 130.10 (4).

<sup>6</sup> See Penal Law § 130.00 (4). See Domestic Relations Law §§ 15 and 15-a.

<sup>7</sup> Penal Law § 130.00 (6).

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].

*[Add if applicable:*

3. That the defendant was not married to (name of complainant).]

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

If you find the People have not proven beyond a reasonable doubt [either one / any one or more] of those elements, you must find the defendant not guilty of this crime.

*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 applicable charge in the "additional charges" section from 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, and that charge is in the "additional charges" section of this article. Penal Law § 130.16.*