

GANG ASSAULT IN THE SECOND DEGREE
Penal Law § 120.06
(Committed on or after Nov. 1, 1996)

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

Under our law, a person is guilty of Gang Assault in the Second Degree when, with intent to cause physical injury to another person and when aided by two or more other persons actually present, he or she causes serious physical injury to such person [or to a third person].

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

PHYSICAL INJURY means impairment of physical condition or substantial pain. ¹

SERIOUS PHYSICAL INJURY means impairment of a person's physical condition which creates a substantial risk of death, or which causes death, or serious and protracted disfigurement, or protracted impairment of health or protracted loss or impairment of the function of any bodily organ. ²

INTENT means conscious objective or purpose. Thus, a person acts with intent to cause physical injury to another when that person's conscious objective or purpose is to cause physical injury to another. ³

[NOTE: In a case of "transferred intent," add the following paragraph:

Under our law, it is not required that the person who is injured be the same person who was intended to be injured.]

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

² Penal Law § 10.00(10).

³ See Penal Law § 15.05(1). If necessary, an expanded definition of "intent" is available in the section on Instructions of General Applicability under Culpable Mental States.

A person is ACTUALLY PRESENT when such person is in a position to render immediate assistance to a person participating in the assault and is ready, willing, and able to do so. ⁴

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, each of the following three elements:

1. That on or about (date), in the county of (County), the defendant, (defendant's name), caused serious physical injury to (specify);
2. That the defendant did so with the intent to cause physical injury to (specify); and
3. That the defendant was aided by two or more persons actually present.

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

⁴ See *People v. Dennis*, 75 NY2d 821 (1990); *People v. Hedgeman*, 70 NY2d 533,543 (1987). The two or more persons who are actually present and aid a defendant in the commission of “gang assault” may do so without sharing the culpable mental state of the crime and may accordingly not be an

accessory of the defendant in the commission of the crime. *People v. Sanchez*, 13 N.Y.3d 554 (2009). In that instance, charging that the defendant acted in concert with an individual actually present and aiding will increase the prosecution's burden of proof. See *People v Bishop*, 117 A.D.3d 430, 430 (1st Dept 2014) ("Because gang assault does not require that the "aiders" share the mens rea of the principal, but only that they render aid . . . the court erred in instructing the jury that its acting in concert charge applied to the gang assault counts. However, the error was plainly harmless because the errant instruction increased the People's burden of proof rather than lessening it, and the evidence satisfied this additional burden."); *People v Smith*, 187 A.D.3d 941 [2d Dept 2020] ["the effect of the error (in charging acting in concert) was to impose a higher burden on the People, requiring them to show not just that the second person who approached the car . . . knowingly aided the defendant . . . but shared the defendant's intent to forcibly rob the complainant. Thus, the error did not prejudice the defendant"]. Notably, *Sanchez* did not "define the exact intent needed, if any, of the persons aiding the defendant." *Sanchez* at 566. But see *Smith* indicating that the People need prove that the other individual(s) "knowingly" aided the defendant.