

CRIMINAL SEXUAL ACT IN THE THIRD DEGREE
(Lack of Consent - Totality of Circumstances)
Penal Law § 130.40(3)
(Committed on or after November 1, 2003)
(Revised July, 2018)¹

The (*specify*) count is Criminal Sexual Act in the Third Degree.

Under our law, a person is guilty of Criminal Sexual Act in the Third Degree, when he or she engages in

Select applicable alternative(s):

oral sexual conduct, [or]
anal sexual conduct

with another person without such person's consent.²

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

Select applicable alternative(s):

[ORAL SEXUAL CONDUCT means conduct between persons consisting of contact between the mouth and the penis, the mouth and the anus, or the mouth and the vulva or vagina.³]

[ANAL SEXUAL CONDUCT means conduct between

¹ The 2018 revision was for the purpose of adding the text to footnote six.

² At this point, the statutory definition continues: “where such lack of consent is by reason of some factor other than incapacity to consent.” There are two such factors, forcible compulsion [Penal Law § 130.05(2)(a)] and the conduct set forth in Penal Law § 130.05(2)(d). The latter factor is the focus of this charge and that is set forth in the definition of the term “without such person's consent.” If “forcible compulsion” is the charged conduct, adapt the charge provided for Criminal Sexual Act in the First Degree by forcible compulsion.

² Penal Law § 130.00(2)(a).

persons consisting of contact between the penis and anus.^{4]}

A person engages in [oral (or) anal] sexual conduct with another person WITHOUT SUCH PERSON'S CONSENT when there is a lack of consent to the act.

Lack of consent results from circumstances under which, at the time of the act of [oral (or) anal] sexual conduct, the complainant clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood the complainant's words and acts as an expression of lack of consent to such act under all the circumstances.⁵ If a reasonable person in the actor's situation would have so understood, it does not matter whether the actor thought otherwise.⁶

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:

1. That on or about (*date*), in the County of (*County*) the defendant (*defendant's name*), engaged in

Select applicable alternative(s):

oral sexual conduct [or]
anal sexual conduct

with (*name of complainant*); and

2. That the defendant did so without (*complainant's name*) consent.

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

⁴ Penal Law § 130.00(2)(b).

⁵ See Penal Law § 130.05(2)(d).

⁶ *People v. Newton*, 8 NY3d 460, 464 (2007)

of this crime.

If you find 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.