

RAPE IN THE FIRST DEGREE
(Oral Sexual Contact - Physical Helplessness)
Penal Law § 130.35 (2)(b)
(Committed on or after Sept 1, 2024)

The (specify) count is Rape in the First Degree.

Under our law, a person is guilty of Rape in the First Degree when he or she engages in oral sexual contact with another person who is incapable of consent by reason of being physically helpless.

A person is INCAPABLE OF CONSENT when that person is physically helpless.¹

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

ORAL SEXUAL CONTACT 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.²

PHYSICALLY HELPLESS means that a person is unconscious or for any other reason is physically unable to

¹ Penal Law § 130.05 (3) (d).

² Penal Law § 130.00(2)(a).

communicate unwillingness to an act.³

Under our law, oral sexual contact with A PHYSICALLY HELPLESS person is deemed to be without that person's 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 of the following two elements:

1. That on or about (date), in the county of (County), the defendant, (name of defendant), engaged in oral sexual contact with (name of complainant); and
2. That (name of complainant) was incapable of consent by reason of being physically helpless.

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

³ Penal Law § 130.00 (7); See *People v Teicher*, 52 NY2d 638 (1981) (Where victim responded negatively to a command to stand and was mentally aware but had no control over her body there was sufficient proof of physical helplessness); *People v Bjork*, 105 AD3d 1258 (3d Dept 2013) (“a person who is asleep or unable to communicate as a result of voluntary intoxication is considered to be physically helpless”); *People v Perkins*, 27 AD3d 890, 892 (3d Dept 2006) (“the victim’s testimony that she blacked out and ‘was so drunk [she] didn’t know what was going on,’ is sufficient to establish the element of physical helplessness”); *People v Sensourichanh*, 290 AD2d 886 (3d Dept 2002) (“it is well settled that the definition of physically helpless is broad enough to cover a sleeping victim, particularly where, as here, there is strong evidence that the victim’s sleep was drug and alcohol induced”) (internal citations omitted); *People v Himmel*, 252 AD2d 273 (3d Dept 1999) (victim’s testimony that although he was aware of what was going on, he was very intoxicated and unable to speak was sufficient to show that he was physically helpless); *People v Thiessen*, 158 AD2d 737, 740 (3d Dept 1990) (“there was proof that [the victim] was asleep and therefore helpless and unable to consent”); *People v Cirina*, 143 AD2d 763 (2d Dept 1988) (13-year-old complainant was physically helpless because of her voluntary intoxication leading to her “generally weakened condition”); *But see People v Clyburn*, 212 AD2d 1030, 1031 (4th Dept 1995) (“the fact that the victim was afflicted with Huntington’s Chorea did not render her physically helpless, i.e., ‘unconscious or for any other reason...unable to communicate unwillingness to act’”).

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.

[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 charge at the end of this article.]