

AGGRAVATED DRIVING WHILE INTOXICATED
(Intoxication, With a Child)
Vehicle & Traffic Law 1192 (2-a) (b)
(Committed on or after December 18, 2009)
(Revised Dec. 2014)¹

The (*specify*) count is Aggravated Driving While Intoxicated.

Under our law, no person shall operate a motor vehicle² while in an intoxicated condition³ while a child who is fifteen years of age or less is a passenger in such motor vehicle.

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

MOTOR VEHICLE means every vehicle operated or driven upon a public highway [private road open to motor vehicle traffic] [parking lot] which is propelled by any power other than muscular power.⁴

To OPERATE a motor vehicle means to drive it.

¹ The revision was for the purpose of incorporating an instruction to accord with the holding of *People v Fratangelo*, 23 NY3d 506 (2014). See footnote 7.

² At this point, the statute continues “in violation of subdivision two, three, four or four-a of this section while a child who is fifteen years of age or less is a passenger in such motor vehicle.” This charge addresses a violation of subdivision three.

³ Vehicle and Traffic Law § 1192 (3).

⁴ The term “motor vehicle” is defined in Vehicle and Traffic Law § 125. That definition contains exceptions which are not set forth in the text of the charge. The term “public highway” appearing in the definition of “motor vehicle” is itself separately defined in Vehicle and Traffic Law § 134. Further, while the definition of “motor vehicle” is restricted to a vehicle operated or driven on a “public highway,” the provisions of Vehicle and Traffic Law § 1192 expressly apply to “public highways, private roads open to motor vehicle traffic and any other parking lot” (Vehicle and Traffic Law § 1192 [7]). The term “parking lot” is also specially defined by Vehicle and Traffic Law § 1192 (7) (*see also People v Williams*, 66 NY2d 659 [1985]). The definition of “motor vehicle” has been modified to accord with its meaning as applied to Vehicle and Traffic Law § 1192.

[NOTE: Add the following if there is an issue as to operation:

A person also OPERATES a motor vehicle when such person is sitting behind the wheel of a motor vehicle for the purpose of placing the vehicle in motion, and when the motor vehicle is moving, or even if it is not moving, the engine is running.^{5]}

A person is in an INTOXICATED condition when such person has consumed alcohol to the extent that he or she is incapable, to a substantial extent, of employing the physical and mental abilities which he or she is expected to possess in order to operate a vehicle as a reasonable and prudent driver.⁶

The law does not require any particular chemical or physical test to prove that a person was in an intoxicated condition. To determine whether the defendant was intoxicated you may consider all the surrounding facts and circumstances, including, for example:

the defendant's physical condition and appearance, balance and coordination, and manner of speech;

the presence or absence of an odor of alcohol;

the manner in which the defendant operated the motor vehicle;

[opinion testimony regarding the defendant's sobriety];

[the circumstances of any accident];

⁵ See *People v Alamo*, 34 NY2d 453, 458 (1974); *People v Marriott*, 37 AD2d 868 (3d Dept 971); *People v O'Connor*, 159 Misc 2d 1072, 1074-1075 (Suffolk Dist Ct 1994); see also *People v Prescott*, 95 NY2d 655, 662 (2001).

⁶ See *People v Ardila*, 85 NY2d 846 (1995); *People v Cruz*, 48 NY2d 419, 428 (1979).

[the results of any test of the content of alcohol in the defendant's blood].

[NOTE: If there is evidence of blood-alcohol content, add as applicable:⁷

In this case, the device used to measure blood alcohol content was (*specify*). That device is a generally accepted instrument for determining blood alcohol content. Thus, the People are not required to offer expert scientific testimony to establish the validity of the principles upon which the device is based.]

[Note: if alcohol content is claimed to be less than .08, select appropriate paragraph. The first paragraph applies if such evidence is not by a chemical test, e.g. evidence is given by an expert; The second paragraph applies if such evidence is by a chemical test:⁸

If you find from the evidence that there was less than .08 of one percentum by weight of alcohol in defendant's blood while [he/she] was operating the motor vehicle, you may, but are not required to, find that [he/she] was not in an intoxicated condition.

Or

Evidence by a chemical test of breath, blood, urine, urine or saliva that there was less than .08 of one per centum by weight of alcohol in the

⁷ This paragraph may be used only when the device employed is included on the Department of Health schedule (see 10 NYCRR § 59.4 [b]) of those devices satisfying its criteria for reliability (see 10 NYCRR § 59.4 [a]). Absent evidence to the contrary, such instruments are sufficiently reliable to permit the admissibility of test results without expert testimony (see *People v Hampe*, 181 AD2d 238, 241 [3d Dept 1992]).

⁸ *People v Fratangelo*, 23 NY3d 506 (2014).

defendant's blood is *prima facie* evidence that the defendant was not in an intoxicated condition.^{9]}

In considering the accuracy of the results of any test given to determine the alcohol content of defendant's blood you must consider:

the qualifications and reliability of the person who gave the test;

the lapse of time between the operation of the motor vehicle and the giving of the test;

whether the device used was in good working order at the time the test was administered; and

whether the test was properly given.^{10]}

[Evidence that the test was administered by a person possessing a valid New York State Department of Health permit to administer such test allows, but does not require, the inference that the test was properly given.^{11]}

[NOTE: If there was an improper refusal to submit to a test, add:

Under our law, if a person has been given a clear and unequivocal warning of the consequences of refusing to submit to a chemical test and persists in refusing to submit to such test, and there is no innocent explanation for such refusal, then the jury may, but is not required to, infer that the defendant refused to submit to a chemical test because

⁹ Vehicle and Traffic Law § 1195 (2) (c).

¹⁰ See *People v Freeland*, 68 NY2d 699, 701 (1986).

¹¹ See *People v Mertz*, 68 NY2d 136, 148 (1986); *People v Freeland*, 68 NY2d 699, 701 (1986).

he or she feared that the test would disclose evidence of the presence of alcohol in violation of law.^{12]}

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, each of the following three elements:

1. That on or about (date), in the county of (County), the defendant, (defendant's name), operated a motor vehicle;
2. That the defendant did so while in an intoxicated condition; and
3. That the defendant did so while a child who was fifteen years of age or less was a passenger in that motor vehicle.

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.

¹² See *People v Thomas*, 46 NY2d 100 (1978), appeal dismissed for want of a substantial federal question, 444 US 891 (1979).