

**AGGRAVATED SEXUAL ASSAULT
(MENTALLY INCAPACITATED)
(N.J.S.A. 2C:14-2a(7)) (Offenses arising after March 17, 2012)**

Count _____ of the indictment charges the defendant with aggravated sexual assault.

[READ COUNT OF INDICTMENT]

That section of our statutes provides in pertinent part:

An actor is guilty of aggravated sexual assault if he commits an act of sexual penetration with another person whom the actor knew or should have known was **[choose appropriate]** physically helpless, mentally incapacitated, or had a mental disease or defect which rendered the victim temporarily or permanently incapable of understanding the nature of his conduct, including, but not limited to, being incapable of providing consent.

In order to convict defendant of this charge, the State must prove the following elements beyond a reasonable doubt:

1. That the defendant committed an act of sexual penetration with another person.
2. That defendant acted knowingly.
3. That at the time of the penetration the victim was **[choose appropriate]** physically helpless, mentally incapacitated, or had a mental disease or defect which rendered the victim temporarily or permanently incapable of understanding the nature of (his/her) conduct, including, but not limited to, being incapable of providing consent.¹
4. That defendant knew or should have known that at the time of the penetration the victim was **[choose appropriate]** physically helpless, mentally incapacitated, or had a mental disease or defect which rendered the victim temporarily or permanently incapable of understanding the nature of (his/her) conduct, including, but not limited to, being incapable of providing consent.

The first element that the State must prove beyond a reasonable doubt is that defendant committed an act of sexual penetration with **(name of victim)**.

According to the law, **[choose appropriate]** vaginal intercourse, cunnilingus, fellatio or anal intercourse between persons or insertion of the hand, finger or object into the anus or vagina, either by the defendant or by another person upon the defendant's instruction, constitute(s) "sexual penetration." Any amount of insertion, however slight, constitutes penetration; that is, the depth of insertion is not relevant.

¹ P.L. 2011, c. 232, effective March 17, 2012, eliminated the term "mentally defective."

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[Choose the appropriate definition(s)]

The definition of “vaginal intercourse” is the penetration of the vagina, or **[where appropriate]** of the space between the labia majora or outer lips of the vulva.²

The definition of “cunnilingus” is oral contact with the female sex organ.³

The definition of “fellatio” is oral contact with the male sexual organ.⁴

The definition of “anal intercourse” is penetration of any depth into the anus.⁵

The second element that the State must prove beyond a reasonable doubt is that defendant acted knowingly. A person acts knowingly with respect to the nature of his/her conduct or the attendant circumstances if he/she is aware that the conduct is of that nature or that such circumstances exist or the person is aware of a high probability of their existence. A person acts knowingly with respect to a result of the conduct if he/she is aware that it is practically certain that the conduct will cause a result. “Knowing,” “with knowledge,” or equivalent terms have the same meaning.

Knowledge is a condition of the mind. It cannot be seen. It can only be determined by inferences from defendant’s conduct, words or acts. A state of mind is rarely susceptible of direct proof but must ordinarily be inferred from the facts. Therefore, it is not necessary that the State produce witnesses to testify that an accused said that he/she had a certain state of mind when he/she did a particular thing. It is within your power to find that such proof has been furnished beyond a reasonable doubt by inferences which may arise from the nature of his/her acts and conduct and from all he/she said and did at the particular time and place and from all surrounding circumstances established by the evidence.

The third element that the State must prove beyond a reasonable doubt is that at the time of the penetration, **(name of victim)** was **[choose appropriate]** physically helpless, mentally incapacitated, or had a mental disease or defect which rendered the victim temporarily or permanently incapable of understanding the nature of (his/her) conduct, including, but not limited to, being

² State v. J.A., 337 N.J. Super. 114 (App. Div. 2001). The Appellate Division upheld the charge given by the trial court in that case which included the following language which can be used if the circumstances of the specific case are appropriate: “This means that if you find from all of the evidence presented beyond a reasonable doubt that there was [penile] penetration to the outer area of the vaginal opening, what is commonly referred to as the vaginal lips, that is sufficient to establish penetration under the law.”

³ State v. Fraction, 206 N.J. Super. 532, 535-36 (App. Div. 1985), certif. denied, 104 N.J. 434 (1986). Penetration is not necessary for this act.

⁴ State in the Interest of S.M., 284 N.J. Super. 611, 616-19 (App. Div. 1995). Penetration is not necessary for this act.

⁵ State v. Gallagher, 286 N.J. Super. 1, 13 (App. Div. 1995), certif. denied, 146 N.J. 569 (1996).

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incapable of providing consent.

Physically helpless means that condition in which a person is unconscious or is physically unable to flee or is physically unable to communicate unwillingness to act.⁶

Mentally incapable means that condition in which a person has a mental disease or defect which renders that person temporarily or permanently incapable of understanding the nature of (his/her) conduct, including but not limited to, being incapable of providing consent.⁷ A person is mentally incapable if, at the time of the sexual activity, the mental disease or defect rendered (him/her) unable to comprehend the distinctively sexual nature of the conduct, or incapable of understanding or exercising the right to refuse to engage in such conduct with another. It includes both the capacity to understand and the capacity to consent with respect to personal sexual activity. The capacity to consent involves knowing that one's body is private and is not subject to the physical invasions of another and that one has the right and ability to refuse to engage in sexual activity. The capacity to understand, which is part of the idea of the capacity to consent, involves the knowledge that the conduct is distinctively sexual. Here, that knowledge extends only to the physical or physiological aspects of sex; it does not extend to an awareness that sexual acts may be morally right or wrong and have probable serious consequences, such as pregnancy and birth, disease, infirmities, adverse psychological or emotional disorders.⁸

Mentally incapacitated means that condition in which a person is rendered temporarily incapable of understanding or controlling (his/her) conduct due to the influence of a narcotic, anesthetic, intoxicant, or other substance administered to that person without (his/her) prior knowledge or consent, or due to any other act committed upon that person which rendered that person incapable of appraising or controlling (his/her) conduct.⁹

The fourth element that the State must prove beyond a reasonable doubt is that defendant knew or should have known that the **(name of victim)** was **[choose appropriate]** physically helpless, mentally incapacitated, or had a mental disease or defect which rendered the victim temporarily or permanently incapable of understanding the nature of (his/her) conduct, including, but not limited to, being incapable of providing consent.

If you find that the State has proven beyond a reasonable doubt each of these four elements, then you must find the defendant guilty of the crime of aggravated sexual assault. On the other

⁶ N.J.S.A. 2C:14-1g.

⁷ N.J.S.A. 2C:14-1h.

⁸ State v. Olivio, 123 N.J. 550, 563-64 (1991).

⁹ N.J.S.A. 2C:14-1i.

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hand, if you find that the State has failed to prove any of these elements beyond a reasonable doubt,
then

you must find the defendant not guilty of aggravated sexual assault.

(Continue to lesser included offenses where required)