

CONSENT
(WHICH NEGATES AN ELEMENT OF THE OFFENSE)
(N.J.S.A. 2C:2-10)

As part of (his/her) defense to the charge of _____, the defendant contends that the State has not proven each element of the offense beyond a reasonable doubt because the victim consented to the alleged criminal activity. In considering this contention you should understand that consent of the victim can be a complete defense to a criminal charge only under certain limited circumstances which I will describe for you.

First, you should know that consent in the law has a meaning very similar to its everyday meaning. It is the victim's voluntary and serious agreement or submission to the alleged criminal conduct or the result of that conduct. In order for consent to give rise to a valid defense it must, of course, be given freely and it must be legally effective.

Consent can never be legally effective in providing a defense to a criminal charge if:

(CHOOSE APPROPRIATE FACTOR (S))¹

(a) the victim was not legally competent to authorize the conduct charged to constitute the offense; or

(b) the victim was by reason of (his/her) (choose appropriate factor) youth, mental disease or defect or intoxication either known by the defendant to be unable or was manifestly unable to make a reasonable judgement as to the nature of harmfulness of the conduct charged to constitute an offense; or

(c) the victim's consent was induced by force, duress or deception of a kind that the law defining the offense seeks to prevent.

In determining whether the consent of the victim was freely and voluntarily given, you are advised that consent may be openly expressed, implied, or apparent from the victim's willing participation in the activity in question. Further, you may consider all that (he/she) said and did at the particular time and place, all of the surrounding circumstances and whether a normal competent person would freely and seriously consent to the conduct with which the defendant is charged.²

¹ Supplemental instructions regarding individual factors and code definitions of key terms should be provided where appropriate.

² State v. Brown 143 N.J. Super. 571, 577 (Law Div. 1976), aff'd 154 N.J. Super. 511 (App. Div. 1977).

In this case, as I have already explained to you the State must prove the following elements beyond a reasonable doubt:

LIST ELEMENTS OF OFFENSE

Thus, in considering whether the State has met its burden of proof, you must determine whether the consent of the victim has negated or made it impossible for the State to prove any one of these elements. For example:

(Here discuss factual context of case, i.e., consent of victim in forgery case negates "without authorization" element.)

(IN CASES INVOLVING BODILY HARM INCLUDE THE FOLLOWING)

Because this case involves conduct which caused (or threatened to cause) bodily harm as I have previously defined that term for you, there is an additional requirement that must be satisfied before consent can be legally effective and give rise to a valid defense.

(CHOOSE APPROPRIATE FACTOR)

- (1) The bodily harm consented to (or threatened by the conduct consented to) is not serious; or
- (2) The conduct and the harm are reasonable foreseeable hazards of joint participation in a concerted activity of a kind not forbidden by law; or
- (3) The consent establishes justification for the conduct under Chapter 3 of the code.³

As you consider these questions and the extent to which consent of the victim may have negated or nullified any of the elements of the offense, you are reminded that the burden remains on the State to prove each element of the offense beyond a reasonable doubt. Therefore, in this case it is also the State's burden to prove beyond a reasonable doubt that the victim did not give legally effective consent as I have defined that term which negated any elements of the offense.

In conclusion then, if you find that the legally effective consent of the victim has prevented the State from proving each element of the offense beyond a reasonable doubt, then you must find (him/her) not guilty.

If, on the other hand, you are satisfied beyond a reasonable doubt that the State has proven each element of the offense because the victim did not consent or because (his/her) consent was not legally effective then you must find the defendant guilty as charged.

³ Supplemental instructions regarding justification should be furnished where appropriate.