Publication Date: June 16, 2026

Rape of a Child Aggravated by [Age Difference or Mandated Reporter][1]

Dft is charged with rape of a child aggravated by [the age difference between Dft and Avm **or** Dft being a mandated reporter]. To prove Dft guilty of this offense, the Commonwealth must prove the following three elements beyond a reasonable doubt:

[If the indictment alleges aggravated by age difference where the alleged victim was UNDER the age of TWELVE, instruct as follows:

1. Dft engaged in sexual intercourse with Avm;
2. Avm was under twelve years old at the time; and
3. Dft was more than five years older than Avm at the time.**]**

[If the indictment alleges aggravated by age difference where the alleged victim was BETWEEN the ages of TWELVE and SIXTEEN, instruct as follows:

1. Dft engaged in sexual intercourse with Avm;
2. Avm was between twelve and sixteen years old at the time; and
3. Dft was more than ten years older than Avm at the time.**]**

[If the indictment alleges aggravated by mandated reporter, instruct as follows:

1. Dft engaged in sexual intercourse with Avm;
2. Avm was under sixteen years old at the time; and
3. Dft was a mandated reporter at the time.**]**

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[1] G. L. c. 265, § 23A, provides: "Whoever unlawfully has sexual intercourse or unnatural sexual intercourse, and abuses a child under 16 years of age and:

(a) there exists more than a 5 year age difference between the defendant and the victim and the victim is under 12 years of age;

(b) there exists more than a 10 year age difference between the defendant and the victim where the victim is between the age of 12 and 16 years of age; or

(c) at the time of such intercourse, was a mandated reporter as defined in [G. L. c. 119, § 21] . . . shall be punished . . . ."

The first element the Commonwealth must prove beyond a reasonable doubt is that Dft engaged in sexual intercourse with Avm. There are several types of sexual intercourse; all of them involve penetration of a bodily opening, however slight.[2] **[If a specific act is charged, the judge should instruct the jury:** Here, the Commonwealth alleges that Dft raped Avm by [specify charged manner of penetration].**]**

[Select whichever of the following is charged:

> Sexual intercourse occurs when the penis **[insert as applicable:** or a finger, another body part, or foreign object**]** penetrates the female genital opening. In addition to the vagina, the female genital opening includes the parts known as the vulva and labia. Penetration into the vagina itself is not required.[3]
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> Sexual intercourse [also] includes oral sex, which occurs when a tongue [or other part of a person's mouth] penetrates the female genital opening,[4] or when a penis penetrates another person's mouth.
>
> Sexual intercourse [also] includes anal sex, which occurs when **[insert as relevant:** a penis, tongue, finger, or other body part, or a foreign object under the defendant's control**]** penetrates another person's anus. It is not enough to penetrate the groove between the buttocks; penetration of the anal opening is necessary.[5]**]**

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[2] "Penetration may be of the vagina, the mouth, or the anus and may be by penis, finger, tongue or other animate or inanimate object." *Commonwealth* v. *Gallant*, 373 Mass. 577, 584 (1977). "[I]t is well settled that penetration, however slight, of a person's genital opening is sufficient" to constitute sexual intercourse. *Commonwealth v. Todd*, 87 Mass. App. Ct. 780, 783 (2015), citing *Commonwealth v. Lopez*, 433 Mass. 722, 726-727 (2001).

[3] *Commonwealth v. Centeno*, 87 Mass. App. Ct. 564, 568 (2015), citing, *inter alia*, *Commonwealth v. Donlan*, 436 Mass. 329, 336 (2002).

[4] *Commonwealth v. Edward*, 34 Mass. App. Ct. 521, 523 (1993) (rape established by defendant's lips contacting victim's vagina, vulva, or labia).

[5] *Commonwealth* v. *Nylander*, 26 Mass. App. Ct. 784, 788–789 (1989).

The second element the Commonwealth must prove beyond a reasonable doubt is that Avm was [under twelve / between twelve and sixteen / under sixteen] years old at the time of the sexual intercourse. The Commonwealth does not have to prove that Dft knew Avm's actual age at the time[6] **[add if appropriate:** even if Avm lied to Dft about Avm's age[7]**]**.

Under Massachusetts law, children under the age of sixteen cannot consent to sexual intercourse. Therefore, if you find Avm was under the age of sixteen at the time of the alleged sexual intercourse, then you may not consider whether Avm was willing to have sexual intercourse. If Avm is under sixteen years old, it is irrelevant whether Avm agreed to have sexual intercourse.

[If alleged aggravation is by age difference: The third element the Commonwealth must prove beyond a reasonable doubt is that Dft was more than [five / ten] years older than Avm at the time of the sexual intercourse.**]**

[If alleged aggravation is by mandated reporter: The third element the Commonwealth must prove beyond a reasonable doubt is that Dft was a mandated reporter[8] of suspected child abuse or neglect at the time of the

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[6] *Commonwealth* v. *Harris*, 74 Mass. App. Ct. 105, 110 (2009), quoting *Commonwealth* v. *Miller*, 385 Mass. 521, 522 (1982) ("'[I]t has long been the law of this Commonwealth that it is no defense that the defendant did not know that the victim was under the statutory age of consent. Further it is immaterial that the defendant reasonably believed that the victim was sixteen years of age or older or that he may have attempted to ascertain her age.'"). See also *Commonwealth* v. *Dunne*, 394 Mass. 10, 18 (1985) (Commonwealth need not prove defendant knew victim was younger than sixteen; whether defendant was aware of victim's age "is irrelevant").

[7] *Dunne*, 394 Mass. at 19 n.17 ("Even if the victim had so convincingly misrepresented her age as to give rise to a reasonable belief that she was older than sixteen, a consideration of the reasonableness of the defendant's belief would circumvent the rule that consent is no defense.").

[8] A "'mandated reporter" includes any "person who is: (i) a physician, medical intern, hospital personnel engaged in the examination, care or treatment of persons, medical examiner, psychologist, emergency medical technician, dentist, nurse, chiropractor, podiatrist, optometrist, osteopath, allied mental health and human services professional licensed under section 165 of chapter 112, drug and alcoholism counselor, psychiatrist or clinical social

sexual intercourse. Under the law, a [insert appropriate designation] is a mandated reporter. If you find beyond a reasonable doubt that Dft was a [insert appropriate designation] at the time of the sexual intercourse, the Commonwealth has proven this element.]

Rape of a Child – Lesser-Included Offense[9, 10]

If you find Dft not guilty of rape of a child aggravated by [the age difference between Dft and Avm **or** Dft being a mandated reporter], then you must consider the lesser-included offense of rape of a child. To prove Dft guilty of the lesser-included offense of rape of a child, the Commonwealth must prove the following two elements beyond a reasonable doubt:

1. Dft engaged in sexual intercourse with Avm; and
2. Avm was under sixteen years old at the time.

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worker; (ii) a public or private school teacher, educational administrator, guidance or family counselor, child care worker, person paid to care for or work with a child in any public or private facility, or home or program funded by the commonwealth or licensed under chapter 15D that provides child care or residential services to children or that provides the services of child care resource and referral agencies, voucher management agencies or family child care systems or child care food programs, licensor of the department of early education and care or school attendance officer; (iii) a probation officer, clerk-magistrate of a district court, parole officer, social worker, foster parent, firefighter, police officer or animal control officer; (iv) a priest, rabbi, clergy member, ordained or licensed minister, leader of any church or religious body, accredited Christian Science practitioner, person performing official duties on behalf of a church or religious body that are recognized as the duties of a priest, rabbi, clergy, ordained or licensed minister, leader of any church or religious body, accredited Christian Science practitioner, or person employed by a church or religious body to supervise, educate, coach, train or counsel a child on a regular basis; (v) in charge of a medical or other public or private institution, school or facility or that person's designated agent; or (vi) the child advocate." G. L. c. 119, § 21.

[9] Rape of a child, sometimes referred to as "statutory rape," is prohibited by G. L. c. 265, § 23, which provides: "Whoever unlawfully has sexual intercourse or unnatural sexual intercourse, and abuses a child under 16 years of age, shall be punished . . . ."

[10] *Commonwealth v. Claudio*, 484 Mass. 203, 204 n.2 (2020) (statutory rape is lesser-included offense of rape aggravated by age difference).

For the first element, you should refer to my earlier instruction on sexual intercourse.

For the second element, the Commonwealth must prove beyond a reasonable doubt that Avm was under sixteen years old at the time of the sexual intercourse. As I explained earlier, the Commonwealth does not have to prove that Dft knew Avm's actual age at the time [add if appropriate: even if Avm lied to Dft about Avm's age].

Under Massachusetts law, children under the age of sixteen cannot consent to sexual intercourse. Therefore, if you find Avm was under the age of sixteen at the time of the alleged sexual intercourse, then you may not consider whether Avm was willing to have sexual intercourse. If Avm is under sixteen years old, it is irrelevant whether Avm agreed to have sexual intercourse.