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Rape of a Child by Force[1]

Dft is charged with rape of a child by force.[2] To prove Dft guilty of this offense, the Commonwealth must prove the following four elements beyond a reasonable doubt:

1. Dft engaged in sexual intercourse with Avm;[3]
2. Avm was under sixteen years old at the time;
3. Dft used force or the threat of force or bodily injury, actual or implied, to engage in the sexual intercourse; and
4. the sexual intercourse was against Avm's will.

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[1] G. L. c. 265, § 22A, states: "Whoever has sexual intercourse or unnatural sexual intercourse with a child under 16, and compels such child to submit by force and against his will or compels such child to submit by threat of bodily injury, shall be punished . . . ."

[2] The distinction between rape of a child **by force** and rape of a child is that rape of a child by force requires proof of force (or threat of force) and that the intercourse occurred against the child's will. *Campbell* v. *Commonwealth*, 494 Mass. 750, 761 (2024). Although, under Massachusetts law, a child under sixteen cannot legally consent to sexual intercourse, if the child actually "consented" (agreed to have sexual intercourse), then the sexual intercourse would not be rape of a child by force but would be rape of a child. The model instructions reflect this distinction. To avoid confusion between legal and factual consent, and to reflect the language of G. L. c. 265, § 22A, the fourth element of the instruction on rape of a child by force uses the phrase "against the child's will" instead of "without the child's consent."

[3] This instruction does not use the phrase "unnatural sexual intercourse." The phrase is anachronistic and legally superfluous. In some cases, however, the phrase appears in the indictment and, therefore, may require some explanation. For example, a judge could instruct the jury:

> "You heard the phrase 'unnatural sexual intercourse' when the clerk read the indictment. That term used to be used to refer to any type of intercourse other than penile/vaginal intercourse. In determining whether the Commonwealth has proved the element of sexual intercourse, you must consider my instructions on the definition of sexual intercourse."

The first element that the Commonwealth must prove 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.[4] **[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.[5]
>
> Sexual intercourse [also] includes oral sex, which occurs when a tongue [or other part of a person's mouth] penetrates the female genital opening,[6] 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.[7]**]**

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[4] "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).

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

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

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

The second element that the Commonwealth must prove is that Avm was under sixteen years old at the time of the sexual intercourse. The Commonwealth does not have to prove that Dft knew Avm was under sixteen at the time[8] **[add if appropriate:** even if Avm lied to Dft about Avm's age[9]**]**.

The third element the Commonwealth must prove is that Dft used force or threat of force or bodily injury, actual or implied, to engage in the sexual intercourse. To prove that Dft used actual force to penetrate Avm, the Commonwealth must prove that Dft used enough physical force to overcome Avm's ability to resist.[10] To prove that Dft used the threat of force or bodily injury to penetrate Avm, the Commonwealth must prove that Dft used the threat to engage in the sexual intercourse.[11]

The fourth element the Commonwealth must prove is that the sexual intercourse was against Avm's will. This means that Avm did not want to engage in sexual intercourse. The question is whether Avm chose freely. If Avm submitted to sexual intercourse because of fear or intimidation, it was against Avm's will. The law does not require Avm to resist the intercourse.[12] In deciding whether the Commonwealth has proved that the intercourse

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[8] *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").

[9] *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.").

[10] *Commonwealth v. Eldridge*, 28 Mass. App. Ct. 936, 937 (1990).

[11] See *Campbell,* 494 Mass. at 754, quoting *Commonwealth* v. *Caracciola*, 409 Mass. 648, 651 (1991) ("the penetration must occur 'by means of physical force; nonphysical, constructive force; or threats of bodily harm, either explicit or implicit' and without consent . . . .").

[12] *Caracciola*, 409 Mass. at 651; *Commonwealth* v. *Sherry*, 386 Mass. 682, 688 (1982).

was against Avm's will, you should consider all the surrounding circumstances. A person may demonstrate his or her will by words, physical gestures, or other actions. Dft has no burden to prove that Avm wanted to engage in the sexual intercourse. Instead, the Commonwealth has the burden of proving beyond a reasonable doubt that the intercourse was against Avm's will, that is, that Avm did not want to participate in the sexual intercourse.

Supplemental Instructions

(a) Aggravated Rape of a Child by Force[13]

[If the indictment alleges the offense of aggravated rape of a child by force, the judge will instruct on a fifth element – the presence of the aggravating factor.]

5. The sexual intercourse **[select all that apply**:

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[13] G. L. c. 265, § 22B, provides:

"Whoever has sexual intercourse or unnatural sexual intercourse with a child under 16, and compels such child to submit by force and against his will or compels such child to submit by threat of bodily injury and:

(a) the sexual intercourse or unnatural sexual intercourse is committed during the commission or attempted commission of any of the following offenses: (1) armed burglary as set forth in section 14 of chapter 266; (2) unarmed burglary as set forth in section 15 of said chapter 266; (3) breaking and entering as set forth in section 16 of said chapter 266; (4) entering without breaking as set forth in section 17 of said chapter 266; (5) breaking and entering into a dwelling house as set forth in section 18 of said chapter 266; (6) kidnapping as set forth in section 26 of chapter 265; (7) armed robbery as set forth in section 17 of said chapter 265; (8) unarmed robbery as set forth in section 19 of said chapter 265; (9) assault and battery with a dangerous weapon or assault with a dangerous weapon as set forth in sections 15A and 15B of said chapter 265; (10) home invasion as set forth in section 18C of said chapter 265; or (11) posing or exhibiting child in state of nudity or sexual conduct as set forth in section 29A of chapter 272;

(b) the sexual intercourse or unnatural sexual intercourse results in, or is committed by means of an act or acts resulting in, substantial bodily injury as defined in section 13J;

(c) the sexual intercourse or unnatural sexual intercourse is committed while the victim is tied, bound or gagged;

- occurred during the commission [or attempted commission] of certain specified offenses; and/or
- resulted in, or occurred by means of an act or acts resulting in, substantial bodily injury; and/or
- occurred while Avm was tied, bound, or gagged; and/or
- occurred after Dft administered, or caused to be administered, alcohol or a controlled substance to Avm without Avm's consent; and/or
- occurred by a joint enterprise; and/or
- occurred in a way Avm could contract a sexually transmitted disease or infection of which Dft knew or should have known he was a carrier.**]**

I will now explain this fifth element to you in more detail. Rape of a child by force is aggravated if the intercourse **[select all that apply**:

- occurred during the commission [or attempted commission] of certain specific offenses. In this case, Dft is charged with rape of a child by force during **[specify applicable offense]**. To find that the Commonwealth has proved this element, therefore, you must find that the sexual intercourse occurred while Dft was committing, or attempting to commit, **[specify applicable offense]**.

  [If the aggravating offense is charged in a separate count of the indictment, instruct as follows:] Dft is charged with **[specify the**

(d) the sexual intercourse or unnatural sexual intercourse is committed after the defendant administered, or caused to be administered, alcohol or a controlled substance by injection, inhalation, ingestion, or any other means to the victim without the victim's consent;

(e) the sexual intercourse or unnatural sexual intercourse is committed by a joint enterprise; or

(f) the sexual intercourse or unnatural sexual intercourse was committed in a manner in which the victim could contract a sexually transmitted disease or infection of which the defendant knew or should have known he was a carrier, shall be punished . . . ."

aggravating offense] in Count __ of the indictment. I will instruct you [already have instructed you] on that offense separately.

[If the aggravating offense is NOT charged in a separate count of the indictment, instruct as follows:] To decide whether the Commonwealth has proved this element, you have to know the elements of **[specify the aggravating offense]**. I will now instruct you on those elements. **[Instruct the jury on the elements of the aggravating offense.]**

If you find that Dft committed [or attempted to commit] the offense of **[specify the aggravating offense]** and that the sexual intercourse occurred during Dft's commission [or attempted commission] of that offense, then the Commonwealth has established this fifth element. If, however, you have a reasonable doubt as to whether Dft committed [or attempted to commit] **[specify the aggravating offense]** or that the sexual intercourse occurred during the commission [or attempted commission] of **[specify the aggravating offense]**, then the Commonwealth has not proved this element.

[If the case raises the issue of an attempt to commit the offense that constitutes the aggravating factor, instruct on attempt here.]

- resulted in, or was committed by means of an act or acts resulting in, substantial bodily injury. "Substantial bodily injury" is injury to the body that creates: a permanent disfigurement; a protracted loss or impairment of a bodily function, limb or organ; or a substantial risk of death.[14]
- occurred while the victim was tied, bound, or gagged. As to this element, you may give the words "tied," "bound," and "gagged" their ordinary meaning.
- occurred after the defendant administered, or caused to be administered, alcohol or a controlled substance to Avm without Avm's consent.[15] Alcohol or a controlled substance may be

[14] G. L. c. 265, § 13J.

[15] If the indictment specifies a specific substance, the judge may need to explain that the substance is a "controlled substance."

administered by injection, inhalation, ingestion, or any other means.[16]

- was committed by a joint enterprise. **[Instruct on joint enterprise.]**[17]
- was committed in a way in which Avm could contract a sexually transmitted disease or infection. The Commonwealth must also prove that Dft knew or should have known that he was carrying the disease or infection and could transmit it to another through sexual intercourse.**]**

(b) Implied (or Constructive) Force

Implied force is the use of threatening words, gestures, actions, or other circumstances to overcome another person's will. Implied force operates to instill fear and to make someone have intercourse against their will.[18] In deciding whether Dft used implied force, you may consider all the circumstances, including each person's age and size, and the entire relationship between them (if any), including whether Dft was an authority figure.[19]

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[16] See *Commonwealth v. LeBlanc*, 73 Mass. App. Ct. 624, 629–630 (2009) ("[A]dminister to" in G. L. c. 272, § 3 (drugging for sexual intercourse) "require[s] some forceful action or deceit or trickery on the part of the defendant that amount[s] to more than merely supplying drugs or alcohol to a willing individual. . . . [It] encompass[es] the conduct of a person who, for example, by trickery slips a . . . 'date rape pill' into a drink.").

[17] *Commonwealth v. Jansen*, 459 Mass. 21, 27 (2011) (aggravated rape by joint enterprise requires "united act" of two or more people in committing the rape; evidence insufficient to prove aggravating factor of rape by joint enterprise where "[t]here was no evidence that any sexual act committed by the defendant was done in the presence of or with the knowledge of [either of two codefendants], or that [either codefendant was] willing and available to assist the defendant at the time of any sexual intercourse between him (the defendant) and the [complainant]").

[18] *Commonwealth v. Vasquez*, 462 Mass. 827, 846 (2012); *Caracciola*, 409 Mass. at 652.

[19] *Caracciola*, 409 Mass. at 651 ("[A]n examination of the circumstances or fear in which the victim is placed, the impact of those circumstances or fear on the victim's power to resist and the defendant's conduct are all relevant to the determination of whether conduct complained of by the victim was accomplished by force and against the victim's will."); *Commonwealth v. Newcomb*, 80 Mass. App. Ct. 519, 521–526 (2011) (rape charge permits jury to look at entire relationship between defendant and victim in evaluating force). See also *Commonwealth v.*

In considering how much force was necessary to compel the sexual intercourse against Avm's will, you may consider Avm's ability to resist under the circumstances.[20]

Rape of a Child – Lesser-Included Offense[21, 22]

If you find Dft not guilty of rape of a child by force, then you must consider the lesser-included offense of rape of a child. To prove the defendant guilty of the lesser-included offense of rape of a child, the Commonwealth must prove the first two elements of forcible rape of a child beyond a reasonable doubt: (1) Dft engaged in sexual intercourse with Avm; and (2) Avm was under sixteen years old at the time. In making these determinations, you should refer to my instructions on the first two elements of rape of a child by force.

Moniz, 87 Mass. App. Ct. 532, 535–536 (2015); *Commonwealth* v. *Wallace*, 76 Mass. App. Ct. 411, 418 n.11 (2010). The critical issue is whether "the defendant's 'course of conduct . . . was designed to instill fear in order to achieve . . . [the defendant's] goal.'" *Commonwealth v. Dumas*, 83 Mass. App. Ct. 536, 539 (2013), quoting *Wallace*, 76 Mass. App. Ct. at 418 n.11.

[20] If the evidence raises questions about whether Avm withdrew consent, whether Avm was unable to consent, whether Dft took advantage of a third party's force against Avm, or whether Dft used force to compel Avm to submit to intercourse with a third party, refer to the supplemental instructions on these topics in the model instructions on adult rape.

[21] 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 . . . ."

[22] *J.H.* v. *Commonwealth*, 479 Mass. 285, 289 (2018) ("It is well established that statutory rape is a lesser included offense of rape of a child with force.").