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Rape of a Child[1]

Dft is charged with rape of a child. To prove Dft guilty of this offense, 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.

The first element 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. **[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.[2]
>
> Sexual intercourse [also] includes oral sex, which occurs when a tongue [or other part of a person's mouth] penetrates the female genital opening,[3] or when a penis penetrates another person's mouth.

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

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

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

> 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.[4]**]**

The second element 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[5] **[add if appropriate:** even if Avm lied to Dft about Avm's age[6]**]**.

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.

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

[5] *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").

[6] *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.").