

## Rape

DFT is charged with rape.<sup>1</sup> To prove DFT guilty of rape, the Commonwealth must prove three elements<sup>2</sup> beyond a reasonable doubt:

1. DFT had sexual intercourse with AVM;
2. DFT compelled AVM to submit to sexual intercourse by force or threat of force or violence, actual or implied; and
3. the sexual intercourse was against AVM's will, that is, without [his/her] consent.

The first element that the Commonwealth must prove is that DFT had sexual intercourse with AVM. There are several types of sexual intercourse; all of them involve penetration.<sup>3</sup> [*If a specific act or acts are charged, then the judge should instruct the jury:*> "[H]ere, the Commonwealth alleges that DFT raped AVM by [cite charged theory(ies) of rape.]

<*Select whichever of the following is/are charged.*>

Sexual intercourse is complete when the penis penetrates, that is enters, the female genital opening, however slightly.<sup>4,5</sup>

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<sup>1</sup> G. L. c. 265, § 22, states: "[w]hoever has sexual intercourse . . . with a person, and compels such person to submit by force and against his will, or compels such person to submit by threat of bodily injury . . . shall be punished."

<sup>2</sup> This instruction separates the traditional second element of rape "'by force and against his will,' . . . [into] two separate elements each of which must independently be satisfied." *Commonwealth v. Lopez*, 433 Mass. 722, 727 (2001), citing, *inter alia*, *Commonwealth v. Caracciola*, 409 Mass. 648, 653-654 (1991). See also *Commonwealth v. Sherman*, 481 Mass. 464, 471 (2019) (same).

<sup>3</sup> "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).

<sup>4</sup> "[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).

<sup>5</sup> If the case presents a question of the degree of penetration into the female genital opening, the judge should instruct the jury that, "[i]n addition to the vagina, the female genital

Intercourse [also] occurs when a person penetrates the female genital opening, however slightly, with a finger or other body part, or with a foreign object.

Sexual intercourse [also] includes oral sex, which occurs when a tongue [or other part of a person's mouth] enters the female genital opening, however slightly,<sup>6</sup> or when a penis enters another person's mouth, however slightly.

Intercourse [also] includes anal sex, which occurs when a penis, or tongue, or finger, or other body part, or a foreign object under the defendant's control enters another person's anus, however slightly. Penetration of the anal opening is necessary for intercourse; it is not enough simply to penetrate the groove between the buttocks.<sup>7</sup>

The second element the Commonwealth must prove is that DFT used force or threat of force or bodily injury, actual or implied, to compel AVM to submit to 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.<sup>8</sup> To prove that DFT used the threat of force to penetrate AVM, the Commonwealth must prove that DFT used a threat of bodily harm to compel AVM to submit to penetration.

**[Supplemental Instruction (a) – Implied (or Constructive) Force:** To prove that DFT used implied force to compel AVM to submit to intercourse, the Commonwealth must convince you that AVM submitted to intercourse because she was afraid of, or intimidated by, DFT. Implied force is the use of threatening words, gestures, actions, or other circumstances to overcome

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opening includes the . . . parts known as the vulva and labia. Penetration into the vagina itself is not required." *Commonwealth v. Centeno*, 87 Mass. App. Ct. 564, 568 (2015), citing, *inter alia*, *Commonwealth v. Donlan*, 436 Mass. 329, 336 (2002).

<sup>6</sup> *Commonwealth v. Edward*, 34 Mass. App. Ct. 521, 523 (1993) held that the crime of rape was established by the defendant's lips contacting the victim's vagina, vulva, or labia.

<sup>7</sup> See *Commonwealth v. Nylander*, 26 Mass. App. Ct. 784, 788-789 (1989).

<sup>8</sup> See *Commonwealth v. Eldridge*, 28 Mass. App. Ct. 936, 937 (1990).

another person's will. Implied force operates to instill fear and to make someone have intercourse without that person's consent.<sup>9</sup> To establish that DFT used implied force, the Commonwealth must prove that AVM submitted to the sexual intercourse because [she/he] was afraid of or intimidated by DFT's words, gestures, or actions. You may consider all the circumstances – including each person's age and size, and the whole relationship between them (if any), including whether DFT was an authority figure<sup>10</sup> – in deciding whether DFT used implied force.]

In considering how much force was necessary to compel the unwanted intercourse, you may consider AVM's ability to resist under the circumstances.<sup>11</sup>

The third element the Commonwealth must prove is that the sexual intercourse was against AVM's will. This means that AVM did not consent to sexual intercourse. To consent, a person must be able to choose freely. If a person submits to sexual intercourse because of fear or intimidation, it is not consensual. The law does not require AVM to resist the intercourse.<sup>12</sup> In deciding whether the Commonwealth has proved that AVM did not consent, you should consider all the surrounding circumstances. Consent or

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<sup>9</sup> *Commonwealth v. Vasquez*, 462 Mass. 827, 846 (2012); *Commonwealth v. Caracciola*, 409 Mass. 648, 652 (1991).

<sup>10</sup> *Commonwealth v. Newcomb*, 80 Mass. App. Ct. 519, 521-526, *review denied*, 461 Mass. 1101 (2011) (rape charge permits jury to look at entire relationship between defendant and victim in evaluating force). *Commonwealth v. Moniz*, 87 Mass. App. Ct. 532, 535-536, *review denied*, 472 Mass. 1108 (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, *review denied*, 466 Mass. 1106 (2013), quoting *Commonwealth v. Wallace*, 76 Mass. App. Ct. at 418 n. 11).

<sup>11</sup> *Commonwealth v. Caracciola*, 409 Mass. 648, 651 (1991) ("[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.").

<sup>12</sup> *Commonwealth v. Caracciola*, 409 Mass. 648, 651 (1991); *Commonwealth v. Sherry*, 386 Mass. 682, 688 (1982).

lack of consent may be expressed by words, physical gestures, or other actions.<sup>13</sup> As with the question whether DFT used force, you may consider all the circumstances and the entire sequence of events in evaluating AVM's ability to resist as well as in deciding whether the sexual intercourse happened without AVM's consent.<sup>14</sup> DFT has no burden to prove that AVM *did* consent. Instead, the Commonwealth has the burden of proving BRD that AVM did *not* consent.

**[Supplemental Instruction (c) – Withdrawal of consent.** Although a sexual encounter may begin consensually, either party has the right to stop. A person can use words, gestures, or actions to communicate to the other person in a way that an ordinary, reasonable person would understand, that [he/she/they] no longer wishes to participate in intercourse.<sup>15</sup> If the Commonwealth alleges that AVM withdrew [her/his] consent, the Commonwealth must prove that AVM reasonably communicated [her/his] withdrawal of consent to DFT before or during intercourse. The Commonwealth must also prove that DFT did not stop after AVM reasonably communicated [her/his] withdrawal of consent.]

**[Supplemental Instruction (d) – Alleged Victim Unconscious or in a Stupor:<sup>16</sup>** If a person is unable to consent to intercourse because of the consumption of alcohol or drugs or for some other similar reason and a defendant knows or reasonably should know that, then any resulting intercourse is without

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<sup>13</sup> In *Commonwealth v. Sherman*, 481 Mass. 464, 474 (2019), the Supreme Judicial Court held that, to withdraw consent to consensual intercourse that began consensually, the victim must communicate that withdrawal. Such withdrawal can be communicated by words and/or physical gestures/actions. See *id.* See also *Commonwealth v. Scott*, 98 Mass. App. Ct. 843, 855 (2020) (same), citing *Sherman*, 481 Mass. at 474.

<sup>14</sup> *Commonwealth v. Caracciola*, 409 Mass. 648, 651 (1991); *Commonwealth v. Sherry*, 386 Mass. 682, 688 (1982).

<sup>15</sup> See *Commonwealth v. Sherman*, 481 Mass. 464, 473-475 (2019).

<sup>16</sup> Supplemental Instruction (d) – Alleged Victim Unconscious or in a Stupor – is based closely on the instruction promulgated by the Supreme Judicial Court in *Commonwealth v. Blache*, 450 Mass. 583, 595 n.19 (2008), as elucidated by *Commonwealth v. Mountry*, 463 Mass. 80, 90-92 (2012).

the person's consent. In this case, there has been evidence that AVM [had consumed alcohol / had consumed drugs / was unconscious/ and/or insert relevant circumstances here]. If, because of the consumption of alcohol or drugs or for some other reason (for example, sleep, unconsciousness, intellectual disability, or helplessness), a person is so impaired as to be incapable of consenting to sexual intercourse, then intercourse that happens while the person is unable to consent is not consensual.<sup>17</sup> It is not enough for the Commonwealth to prove that AVM was intoxicated or under the influence of alcohol or drugs to some degree. Instead, to prove that AVM was incapable of consenting to intercourse, the Commonwealth must prove that [she/he] was so impaired that [she/he] was **unable** to consent.<sup>18</sup>

If you find that the intercourse happened while AVM was so impaired as to be incapable of consenting to sexual intercourse, then the only force required to prove that DFT raped AVM is the force necessary to accomplish the act of intercourse – that is, only the force necessary to effect penetration.<sup>19</sup>

If you find that AVM was so impaired as to be unable to consent, then you have to decide whether the Commonwealth has proved that DFT knew or reasonably should have known that.<sup>20</sup> To decide this, you must consider whether DFT actually knew, or a reasonable person, under the circumstances, would have known, that AVM was unable to consent.<sup>21</sup> [*< /if*

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<sup>17</sup> *Commonwealth v. Blache*, 450 Mass. 583, 591-592 (2008); *Commonwealth v. Urban*, 450 Mass. 608, 612-614 (2008).

<sup>18</sup> *Commonwealth v. Blache*, 450 Mass. 583, 590 (2008) (“[W]here drugs or alcohol are concerned . . . consumption or even intoxication is not the issue. . . . The question instead, is whether, as a result of the complainant’s consumption of drugs, alcohol, or both, [the complainant] . . . was unable to give or refuse consent.”). *Commonwealth v. Urban*, 450 Mass. 608, 613-614 (2008).

<sup>19</sup> *Commonwealth v. Blache*, 450 Mass. 583, 589 (2008).

<sup>20</sup> *Commonwealth v. Blache*, 450 Mass. 583, 592-593 (2008).

<sup>21</sup> *Commonwealth v. Mountry*, 463 Mass. 80, 91-92 (2012) (“[I]n a rape prosecution in which the Commonwealth must prove that a defendant knew or reasonably should have known that a victim’s condition rendered him or her incapable of consenting, and where there is credible

**Applicable:**> In this regard, you may consider any evidence of DFT's state of intoxication or impairment in determining what DFT knew or should have known about AVM's inability to consent.]<sup>22</sup>

To summarize then, the Commonwealth can prove that the intercourse was against AVM's will by proving either that AVM did not consent or that [she/he] could not consent because of impairment and the defendant knew or should have known that.]

**[Supplemental Instruction (e) – Force by a Third Person:** In this case, the Commonwealth alleges DFT took advantage of force, or the threat of force, used against AVM by a third person(s), [third person's/persons' name(s)], to compel AVM to submit to sexual intercourse with DFT. For DFT to be legally responsible for the force applied by [third person's/persons' name(s)], the Commonwealth must prove that DFT *knew* that [third person(s)] [was/were] using force, or the threat of force, against AVM *and* that DFT took advantage of that force to have sexual intercourse without AVM's consent.<sup>23</sup>]

**[Supplemental Instruction (f) – Forced Intercourse with Another:** In this case, the Commonwealth alleges that DFT used force [and/or the threat of force] to compel AVM to submit to sexual intercourse with [identify alleged third-party perpetrator[s] here]. For DFT to be legally responsible for these alleged act[s] of another person [other persons], the Commonwealth must prove that DFT used force [and/or the threat of force] to compel AVM to

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evidence of a defendant's mental impairment, a defendant is entitled to the jury's consideration of his mental condition as it relates to his ability to possess the requisite knowledge.").

<sup>22</sup> *Commonwealth v. Mountry*, 463 Mass. 80, 91-92 (2012)

<sup>23</sup> *Commonwealth v. Therrien*, 383 Mass. 529, 538-539 (1981); *Commonwealth v. Coleman*, 30 Mass. App. Ct. 229, 233 (1991).

submit to sexual intercourse with [identify alleged third-party perpetrator[s] here] against [her/his] will.<sup>24,25]</sup>

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<sup>24</sup> “[T]here is no requirement that the sexual contact involve penetration of the victim by the perpetrator.” *Commonwealth v. Prado*, 94 Mass. App. Ct. 253, 258 (2018), quoting *Commonwealth v. Guy*, 24 Mass. App. Ct. 783, 786-787 (1987). See also *Commonwealth v. Davidson*, 68 Mass. App. Ct. 72, 74 (2007). A defendant can be convicted of rape for compelling the victim to engage in sexual intercourse with another. See *Commonwealth v. Nuby*, 32 Mass. App. Ct. 360, 362 (1992) (defendant convicted of rape for forcing girlfriend’s son to penetrate her genital opening); *Guy*, 24 Mass. App. Ct. at 784-787 (defendants convicted of rape for forcing victim to perform oral sex on two consenting females).

<sup>25</sup> Occasionally, a defendant is alleged to have raped a victim by using force, or the threat of force, to compel the victim to penetrate her-/himself against the victim’s will. In this circumstance, the judge should instruct the jury that “[F]or the Commonwealth to prove the defendant guilty of rape in this situation, the Commonwealth must prove that the defendant used force, or the threat of force, to compel AVM to penetrate [her/his] genital [and/or anal] opening with a part of [her/his] own body [and/or with an object] without [her/his] consent.” See *Commonwealth v. Prado*, 94 Mass. App. Ct. 253, 258 (2018).