

SEXUAL ASSAULT AND RELATED OFFENSES

RSA 632-A:2, I(a): AFSA Overcoming by physical force

DRAFT

The defendant is charged with the crime of aggravated felonious sexual assault. The definition of this offense has three parts or elements. The State must prove each element beyond a reasonable doubt. Thus, the State must prove that:

1. The defendant engaged in sexual penetration with another person; and
2. The defendant overcame the other person through the actual application of physical force, physical violence, or superior physical strength; and
3. The defendant acted knowingly¹.

These are the elements of the crime of aggravated felonious sexual assault. Certain words in the definition need to be further defined.

“Sexual penetration” means (see the instruction for the means of penetration alleged.)

“Knowingly” means [see definition of knowingly.]

¹ *State v Ayer*, 136 N.H. 191 (1992)

RSA 632-A:2, I(b): AFSA Victim physically helpless to resist

The defendant is charged with the crime of aggravated felonious sexual assault. The definition of this offense has three parts or elements. The State must prove each element beyond a reasonable doubt. Thus,, the State must prove that:

1. The defendant engaged in sexual penetration with another person; and
2. The other person was physically helpless to resist; and
3. The defendant acted knowingly¹.

These are the elements of the crime of aggravated felonious sexual assault. Certain words in the definition need to be further defined.

“Sexual penetration” means [see the instruction for the means of penetration alleged.]

“Knowingly” means [see definition of knowingly.]

¹ *State v. Ayer*, 136 N.H. 191 (1992)

RSA 632-A:2, I(c):AFSA Coercion by threats of force

The defendant is charged with the crime of aggravated felonious sexual assault. The definition of this offense has four parts or elements. The State must prove each element beyond a reasonable doubt. Thus, the State must prove that:

1. The defendant engaged in sexual penetration with another person; and
2. The defendant coerced the other person to submit by threatening to use physical violence or superior physical strength on the other person; and¹
3. The other person believed that the defendant had the present ability to execute these threats; and
4. The defendant acted knowingly.²

These are the elements of the crime of aggravated felonious sexual assault. Certain words in the definition need to be further defined.

“Sexual penetration” means [see the instruction for the means of penetration alleged.]

“Knowingly” means [see definition of knowingly].

¹ See *State v. Kulikowski*, 132 N.H. 281 (1989); *State v. Johnson*, 130 N.H. 578 (1988).

² *State v. Ayer*, 136 N.H. 191 (1992)

RSA 632-A:2, I(d):AFSA Coercion by threats of retaliation

The defendant is charged with the crime of aggravated felonious sexual assault. The definition of this offense has four parts or elements. The State must prove each element beyond a reasonable doubt. Thus, the State must prove that:

1. The defendant engaged in sexual penetration with another person; and
2. The defendant coerced that person to submit to sexual penetration by threatening to retaliate against [that person] [a third person]; and ¹
3. The person threatened believed that the defendant had the ability to execute the threats in the future; and
4. The defendant acted knowingly.²

These are the elements of the crime of aggravated felonious sexual assault. Certain words in the definition need to be further defined.

“Sexual penetration” means [see the instruction for the means of penetration alleged].

“Knowingly” means [see definition of knowingly].

¹ *State v. Johnson*, 130 N.H. 578, 581 (1988)

² *State v. Ayer*, 136 N.H. 191 (1992)

RSA 632-A:2, I(e): AFSA Victim submits under circumstances involving false imprisonment, kidnapping or extortion

The defendant is charged with the crime of aggravated felonious sexual assault. The definition of this offense has three parts or elements. The State must prove each element beyond a reasonable doubt. Thus, the State must prove that:

1. The defendant engaged in sexual penetration with another person; and
2. The other person submitted under circumstances involving [false imprisonment], [kidnapping] [extortion]; and
3. The defendant acted knowingly.¹

These are the elements of the crime of aggravated felonious sexual assault. Certain words in the definition need to be further defined.

“Sexual penetration” means [see the instruction for the means of penetration alleged].

“False imprisonment” means [insert the appropriate criminal code definition, RSA 633:3].

“Kidnapping” means [insert the appropriate criminal code definition, RSA 633:1].

“Extortion” means [insert the appropriate criminal code definition, RSA 637:5].

“Knowingly” means [see definition of knowingly.]

The State must also prove all of the elements of the crime of [kidnapping] [extortion].²

¹ *State v Ayer*, 136 N.H. 191 (1992)

² *State v Bussiere*, 118 .H. 659 (1978)

RSA 632-A:2, I(f):AFSA Administering an Intoxicating Substance

The defendant is charged with the crime of aggravated felonious sexual assault. The definition of this crime has five parts or elements. The State must prove each element beyond a reasonable doubt. Thus, the State must prove that:

1. The defendant engaged in sexual penetration with another person; and
2. The defendant [administered an intoxicating substance to the alleged victim] [had knowledge that another person had administered an intoxicating substance to the alleged victim]; and
3. [The defendant][the other person] administered the intoxicating substance without the prior knowledge or consent of the alleged victim; and
4. The alleged victim was mentally incapacitated as a result of [the defendant's actions][the actions of the another person];and
5. The defendant acted knowingly¹.

These are the elements of the crime of aggravated felonious sexual assault. Certain words in the definition need to be further defined. "Sexual penetration" means [see the instruction for the means of penetration alleged].

"Knowingly" means [see definition of knowingly].

¹ *State v. Ayer*, 136 N.H. 191 (1992)

RSA 632-A:2, I(g) AFSA Therapeutic or Treating Relationship

The defendant is charged with the crime of aggravated felonious sexual assault. The definition of this crime has four parts, or elements. The State must prove each element beyond a reasonable doubt. Thus, the State must prove that:

1. The defendant engaged in sexual penetration with another person; and
2. The defendant did so [at the time and in the course of providing therapy, or medical treatment or examination to the alleged victim] [within one year of terminating therapy or medical treatment of the alleged victim]; and
3. The defendant [thereby acted in a manner or for purposes that are not professionally recognized as ethical or acceptable] [used his/her position as a provider of therapy or medical treatment to coerce the victim to submit]; and
4. The defendant acted knowingly.

These are the elements of the crime of aggravated felonious sexual assault. Certain words need to be further defined.

“Sexual penetration” means (see definition in RSA 632-A:1, V).

“Therapy” means (see definition in RSA 632-A:1, VI).¹

“Knowingly” means (refer to jury instruction on “knowingly”).

¹ In State v. Flodin, 159 N.H. 358, 363-365 (2009) the Court held that the defendant, who provided “spiritual counseling” to inmates, did not provide “therapy” as that term is defined in this statute

RSA 632-A:2, I(h): AFSA Mental Defect

The defendant is charged with the crime of aggravated felonious sexual assault. The definition of this offense has five parts or elements. The State must prove each element beyond a reasonable doubt. Thus, the State must prove that:

1. The defendant engaged in sexual penetration with another person; and
2. The other person was not the defendant's legal spouse; and
3. The other person was mentally defective; and
4. The defendant knew or had reason to know that the other person was mentally defective; and
5. The defendant acted knowingly.¹

These are the elements of the crime of aggravated felonious sexual assault. Certain words in the definition need to be further defined.

“Sexual penetration” means [see the instruction for the means of penetration alleged.]

You may find the person mentally defective only if he/she suffered from a mental disease or defect and was incapable of freely arriving at an independent choice whether or not to engage in sexual conduct.

In determining whether someone was capable of making an independent choice, you should focus on the person's capacity to appraise in a meaningful way the physical nature and consequences of his/her sexual conduct and the person's capacity to make a decision that is legitimately his/her own.

A person is not mentally defective merely because he/she does not in fact take any action to learn about the consequences of his/her conduct or fails to consider alternatives before choosing a particular course of action.²

“Knowingly” means [see definition of knowingly].

¹ *State v. Ayer*, 136 N.H. 191 (1992).

² *State v. Frost*, 141 N.H. 493 (1996).

RSA 632-A:2, I(i):AFSA Through Concealment or the Element of Surprise

The defendant is charged with the crime of aggravated felonious sexual assault. The definition of this offense has three parts or elements. The State must prove each element beyond a reasonable doubt. Thus, the State must prove that:

1. The defendant engaged in sexual penetration with another person; and
2. The defendant used concealment or the element of surprise to accomplish penetration, before the other person had an adequate chance to flee or resist; and
3. The defendant acted knowingly.¹

These are the elements of the crime of aggravated felonious sexual assault. Certain words in the definition need to be further defined.

“Sexual penetration” means [see the instruction for the means of penetration alleged.]

“Knowingly” means [see definition of knowingly].

¹ *State v Ayer*, 135 N.H. 191 (1992).

RSA 632-A:2, I(j): AFSA – Same Household/Blood or Affinity

The defendant is charged with the crime of aggravated felonious sexual assault. The definition of this offense has four parts or elements. The State must prove each element beyond a reasonable doubt. Thus, the State must prove that:

1. The defendant engaged in sexual penetration with another person; and
2. The [other person] was 13 years of age or older but under the age of 16 and was not legally married to the defendant at the time; and
3. [The [other person] and the defendant were members of the same household] [the [other person] and the defendant were related by [blood] [affinity]]; and
4. The defendant acted knowingly.

These are the elements of the crime of aggravated felonious sexual assault. Certain words in the definition need to be defined:

“Knowingly” means [see definition of knowingly.]

RSA 632-A:2, I(k): AFSA Use of Authority to Coerce

The defendant is charged with the crime of aggravated felonious sexual assault. The definition of this offense has six parts or elements. The State must prove each element beyond a reasonable doubt. Thus, the State must prove that:

1. The defendant engaged in sexual penetration with another person; and
2. The defendant was in a position of authority over the other person; and
3. The defendant used this position of authority to coerce the person to submit to sexual penetration;¹ and
4. The person was 13 years of age or older and under 18 years of age; and
5. The person was not legally married to the defendant; and
6. The defendant acted knowingly.

These are the elements of the crime of aggravated felonious sexual assault. Certain words in the definition need to be further defined.

“Sexual penetration” means [see the instruction for the means of penetration alleged].

“Knowingly” means [see definition of knowingly].

¹ *State v. Johnson*, 130 N.H. 578, 581 (1988), [citing BLACK’S LAW DICTIONARY]; see also *State v. Collins*, 129 N.H. 488, 490 (1987).

RSA 632-A:2, I(1):AFSA Victim Under 13 Years of Age

The defendant is charged with the crime of aggravated felonious sexual assault. The definition of this offense has three parts or elements. The State must prove each element beyond a reasonable doubt. Thus, the State must prove that:

1. The defendant engaged in sexual penetration with another person; and
2. The other person was under 13 years of age; and
3. The defendant acted knowingly.¹
4. These are the elements of the crime of aggravated felonious sexual assault. Certain words in the definition need to be further defined.

“Sexual penetration” means [read the instruction for the means of penetration alleged].

“Knowingly” means [see definition of knowingly].

¹ *Goodnow v Perrin*, 119 N.H. 483 (1979) (defendant’s knowledge of victim’s age not an element).

RSA 632-A:2, I(m): AFSA Non-Consent Indicated by Speech or Conduct

The defendant is charged with the crime of aggravated felonious sexual assault. The definition of this offense has three parts or elements. The State must prove each element beyond a reasonable doubt. Thus, the State must prove that:

1. The defendant engaged in sexual penetration with another person; and
2. The other person indicated by speech or conduct that she/he did not freely consent to the performance of the sexual act¹; and
3. The defendant acted knowingly².

These are the elements of the crime of aggravated felonious sexual assault. Certain words in the definition need to be further defined.

“Sexual penetration” means [see the instruction for the means of penetration alleged].

Lack of consent is part of the definition of this crime. Lack of consent may be proved in a variety of ways, including but not limited to an attempt to escape, outcry, or offer of resistance. Lack of consent may also be proved by showing that the alleged victim was restrained by fear of violence. You are not required to infer consent from the alleged victim’s failure to physically resist a sexual assault.³

“Knowingly” means [see definition of knowingly].

¹ See separate instruction on consent, 632-A:6, III.

² *State v. Ayer*, 136 N.H. 191 (1992)

³ RSA 632-A:6, III; *State v. Hunter*, 132 N.H. 556, 560 (1989); *State v. Lemire*, 115 N.H. 526, 532 (1975).

RSA 632-A:2, I(n) AFSA Position of authority incarceration or probation

The defendant is charged with the crime of aggravated felonious sexual assault. The definition of this crime has four parts, or elements. The State must prove each element beyond a reasonable doubt. Thus, the State must prove that:

DRAFT

1. The defendant engaged in sexual penetration with another person; and

[2. The defendant was in a position of authority over the other person, in that [he] [she] had direct supervisory or disciplinary authority over the alleged victim because the alleged victim was incarcerated in a [correctional institution] [the secure psychiatric unit] [a juvenile detention facility] where the defendant was employed; and]

[2. The defendant was a [probation or parole officer] [juvenile probation and parole officer] who had direct supervisory authority over the alleged victim while the alleged victim was on [parole or probation] [juvenile probation]; and]

3. The defendant used [his] [her] authority to coerce the alleged victim to submit; and¹

4. The defendant acted knowingly.

The consent of the victim to the act of sexual penetration under the circumstances outlined above is not a defense.

These are the elements of the crime of aggravated felonious sexual assault. Certain words need to be further defined.

“Sexual penetration” means (see definition in RSA 632-A:2, V).

“Knowingly” means (refer to jury instruction on “knowingly”).

¹ *State v Fortier* 146 N.H. 784 (2001) (Subtle persuasion associated with position of authority constitutes sufficient evidence to prove coercion).

State v. Foss 148 N.H. 209 (2002) (Conviction of correctional officer reversed where there was insufficient evidence of coercion)

RSA 632-A:2, II: AFSA Without Penetration; Person Under Age 13

The defendant is charged with aggravated felonious sexual assault. The definition of this offense has four parts or elements. The State must prove each element beyond a reasonable doubt. Thus, the State must prove that:

1. The defendant touched the genitalia of another person¹; and
2. The other person was under 13 years of age at the time; and
3. The touching was under circumstances that can be reasonably construed as being for the purposes of sexual arousal or gratification; and
4. The defendant acted purposely.²

These are the elements of the crime of aggravated felonious sexual assault. Certain words in the definition need to be further defined.

“Purposely” means [see definition of purposely].

¹ *State v Dickson*, 116 N.H. 175 (1976); *State v Barnett*, 147 N.H. 334 (2001)

² *State v Goodwin*, 140 N.H. 672 (1996); *State v Pond*, 132 N.H. 47 (1989)

RSA 632-A:6, I. Corroboration

DRAFT

The law does not require that the testimony of the alleged victim be corroborated. This means that if you find that the alleged victim's testimony is credible—in other words, if you believe her/his testimony—then you may return a verdict of guilty without additional evidence.

This does not mean that simply because the alleged victim took an oath to tell the truth you must accept her/his testimony as true. In deciding whether the State has proved one or more of the charges against the defendant beyond a reasonable doubt, you must decide the credibility of the alleged victim just as you must decide the credibility of every other witness. You must apply the same factors to decide her/his credibility as you apply to all the other witnesses.

RSA 632-A:6, III: Consent

Evidence has been presented that the other person consented to the acts of the defendant that constitute the crime of [aggravated felonious sexual assault, felonious sexual assault]. Consent is a complete defense to the crime charged.

The defendant is not required to prove consent. Instead, the State must prove that there was no consent. Thus, you must decide whether the State has proved beyond a reasonable doubt that there was no consent. If you decide that the State has not proved that there was no consent, then you must find the defendant not guilty. If, however, you decide that the State has proved lack of consent and the other elements of the definition of the crime charged, then you should find the defendant guilty.

Lack of consent may be proved in a variety of ways, including but not limited to an attempt to escape, outcry, or offer of resistance. Lack of consent may also be proved by showing that the alleged victim was restrained by fear of violence. You are not required to infer consent from the alleged victim's failure to physically resist a sexual assault¹.

¹ RSA 632-A:6, III; *State v. Hunter*, 132 N.H. 556, 560 (1989); *State v. Lemire*, 115 N.H. 526, 532 (1975).

RSA 632-A: 10 I Prohibition from Child Care Service of Persons Convicted of Certain Offenses

DRAFT

The defendant is charged with the crime of prohibition from child care service of persons convicted of certain offenses. The definition of this crime has three parts or elements. The State must prove each element beyond a reasonable doubt. Thus, the state must prove that:

1. The defendant was convicted of the crime of [child pornography] [second degree assault on a minor] [sexual assault] [on [date] in the [name of court]]; and
2. Subsequent to the date of said conviction, the defendant undertook [employment] [volunteer service] as a [teacher] [coach] [boy or girl scout leader]; and
3. The defendant acted knowingly.

RSA 632-A:10 II or III Prohibition from Child Care Service of Persons Convicted of Certain Offenses

DRAFT

The defendant is charged with the crime of prohibition from child care service of persons convicted of certain offenses. The definition of this crime has four parts or elements. The state must prove each element beyond a reasonable doubt. Thus, the state must prove that:

1. The defendant was convicted of the crime of [child pornography] [second degree assault on a minor] [sexual assault], on [date] in the [name of court]; and
2. Subsequent to the date of said conviction, the defendant [applied for employment] [made initial application for teacher certification] [volunteered for service] as a [teacher] [coach] [boy or girl scout leader]; and
3. In connection with [applying for such employment or certification] [volunteering for such service] the defendant failed to provide information of said prior conviction to the agency to which the defendant was applying or volunteering; and
4. The defendant acted knowingly.