

NOTE 5: Constructive force by intimidation or threats. Where the evidence raises the issue of constructive force by threat or intimidation, give the following instructions:

Both force and lack of consent are necessary to the offense. In the law of rape, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent active resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that “constructive force” has been applied, thus satisfying the requirement of force. Hence, when the accused’s (actions and words) (conduct), coupled with the surrounding circumstances, create a reasonable belief in the victim’s mind that death or physical injury would be inflicted on her and that (further) resistance would be futile, the act of sexual intercourse has been accomplished by force.

If the alleged victim consents to the act of sexual intercourse, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is in possession of her mental and physical faculties, fails to make her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (state the name of the alleged victim) consented.

If (state the name of the alleged victim) submitted to the act of sexual intercourse (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because she was unable to resist due to mental or physical inability) (_____), sexual intercourse was done without consent.

NOTE 6: Constructive force—abuse of military power. When there is some evidence the accused employed constructive force based upon his military position, rank, or authority, give the following instructions:

Both force and lack of consent are necessary to the offense. In the law of rape, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent active resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that “constructive force” has been applied, thus satisfying the requirement of force. Hence, when the accused’s (actions and words) (conduct), coupled with the surrounding circumstances, create a reasonable belief in the victim’s mind that death or physical injury would be inflicted on her and that (further) resistance would be futile, the act of sexual intercourse has been accomplished by force.

If the alleged victim consents to the act of sexual intercourse, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is in possession of her mental and physical faculties, fails to make her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (state the name of the alleged victim) consented.

If (state the name of the alleged victim) submitted to the act of sexual intercourse (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because she was unable to resist due to mental or physical inability) (_____), sexual intercourse was done without consent.

There is evidence which, if believed, indicates that the accused (used) (abused) his (military) (_____) (position) (and) (or) (rank) (and) (or) (authority) (_____) in order to (coerce) (and) (or) (force) (state the name of the alleged victim) to have sexual intercourse. Specifically, I draw your attention to (summarize the evidence concerning the accused's possible use or abuse of his position, rank, or authority). You may consider this evidence in deciding whether (state the name of the alleged victim) had a reasonable belief that death or great bodily harm would be inflicted on her and that (further) resistance would be futile. This evidence is also part of the surrounding circumstances you may consider in deciding whether (state the name of the alleged victim) consented to the act of sexual intercourse.

NOTE 7: Constructive force—parental, or analogous compulsion. When the evidence raises the issue of constructive force based upon a child's acquiescence because of duress or a coercive atmosphere created by a parent or one acting in loco parentis, give the following instructions. If parental, or analogous compulsion AND consent issues involving

a child of tender years are also involved, give the instructions following NOTE 9 instead of the instructions below:

Both force and lack of consent are necessary to the offense. In the law of rape, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent active resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that “constructive force” has been applied, thus satisfying the requirement of force. Hence, when the accused’s (actions and words) (conduct), coupled with the surrounding circumstances, create a reasonable belief in the victim’s mind that death or physical injury would be inflicted on her and that (further) resistance would be futile, the act of sexual intercourse has been accomplished by force.

If the alleged victim consents to the act of sexual intercourse, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is in possession of her mental and physical faculties, fails to make her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she consented. Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (state the name of the alleged victim) consented.

If (state the name of the alleged victim) submitted to the act of sexual intercourse (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because she was unable to resist due to mental or physical inability) (_____), sexual intercourse was done without consent.

Sexual activity between a (parent) (stepparent) (_____) and a minor child is not comparable to sexual activity between two adults. The youth and vulnerability of children, when coupled with a (parent's) (step parent's) (_____) position of authority, may create a situation in which explicit threats and displays of force are not necessary to overcome the child's resistance. On the other hand, not all children invariably accede to (parental) (_____) will. In deciding whether the victim (did not resist) (or) (ceased resistance) because of constructive force in the form of (parental) (_____) (duress) (compulsion) (_____), you must consider all of the facts and circumstances, including but not limited to (the age of the child when the alleged abuse started) (the child's ability to fully comprehend the nature of the acts involved) (the child's knowledge of the accused's parental power) (any implicit or explicit threats of punishment or physical harm if the child does not obey the accused's commands) (state any other evidence surrounding the parent-child, or similar, relationship from which constructive force could reasonably be inferred). If (state the name of the alleged victim) (did not resist) (or) (ceased resistance) due to the (compulsion) (or) (duress) of (parental) (_____) command, constructive force has been established and the act of sexual intercourse was done by force and without consent.

circumstances, create a reasonable belief in a child's mind that death or physical injury would be inflicted on her and that (further) resistance would be futile, an act of sexual intercourse has been accomplished by force.

When a victim is incapable of consenting because she lacks the mental capacity to understand the nature of the act, no greater force is required than that necessary to achieve penetration.

If the alleged victim consents to the act of sexual intercourse, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is in possession of her mental and physical faculties, fails to make her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she consented.

Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (state the name of the alleged victim) consented.

If (state the name of the alleged victim) submitted to the act of sexual intercourse (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great bodily harm) (because she was unable to resist due to mental or physical inability) (_____), sexual intercourse was done without consent. If (state the name of the alleged victim) was incapable, due to her (tender age) (and) (lack of) mental development, of giving consent, then the act was done by force and without consent. A child (of tender years) is not capable of consenting to an act of sexual intercourse until she understands the act, its motive, and its possible consequences. In deciding whether (state the name of the alleged victim) had, at the time of the sexual intercourse, the requisite knowledge and mental (development) (capacity) (ability) to consent you should consider all the

evidence in the case, including but not limited to: (state any lay or expert testimony relevant to the child's development) (state any other information about the alleged victim, such as the level and extent of education, and prior sex education and experiences, if any).

If (state the name of the alleged victim) was incapable of giving consent, and if the accused knew or had reasonable cause to know that (state the name of the alleged victim) was incapable of giving consent, the act of sexual intercourse was done by force and without consent.

NOTE 9: Constructive force (parental, or analogous compulsion) AND consent issues involving children of tender years. When the evidence raises the issue of constructive force based upon a child's acquiescence because of duress or a coercive atmosphere created by a parent or one acting in loco parentis, AND also the issue of consent by children of tender years, give the following instructions:

Both force and lack of consent are necessary to the offense. In the law of rape, various types of conduct are sufficient to constitute force. The most obvious type is actual physical force, that is, the application of physical violence or power, which is used to overcome or prevent active resistance. Actual physical force, however, is not the only way force can be established. Where intimidation or threats of death or physical injury make resistance futile, it is said that "constructive force" has been applied, thus satisfying the requirement of force. Hence, when the accused's (actions and words) (conduct), coupled with the surrounding circumstances, create a reasonable belief in the victim's mind that death or physical injury would be inflicted on her and that (further) resistance would be futile, the act of sexual intercourse has been accomplished by force.

Sexual activity between a (parent) (stepparent) (_____) and a minor child is not comparable to sexual activity between two adults. The youth and vulnerability of children, when coupled with a (parent's) (stepparent's) (_____) position of authority, may create a situation in which explicit threats and displays of force are not necessary to overcome the child's resistance. On the other hand, not all children invariably accede to (parental) (_____) will. In deciding whether

the victim (did not resist) (or) (ceased resistance) because of constructive force in the form of (parental) (_____) (duress) (compulsion) (_____), you must consider all of the facts and circumstances, including but not limited to (the age of the child when the alleged abuse started) (the child's ability to fully comprehend the nature of the acts involved) (the child's knowledge of the accused's parental power) (any implicit or explicit threats of punishment or physical harm if the child does not obey the accused's commands) (state any other evidence surrounding the parent-child, or similar relationship, from which constructive force could reasonably be inferred). If (state the name of the alleged victim) (did not resist) (or) (ceased resistance) due to the (compulsion) (or) (duress) of (parental) (_____) command, constructive force has been established and the act of sexual intercourse was done by force and without consent.

When a victim is incapable of consenting because she lacks the mental capacity to understand the nature of the act, no greater force is required than that necessary to achieve penetration.

If the alleged victim consents to the act of sexual intercourse, it is not rape. The lack of consent required, however, is more than mere lack of acquiescence. If a person, who is in possession of her mental and physical faculties, fails to make her lack of consent reasonably manifest by taking such measures of resistance as are called for by the circumstances, the inference may be drawn that she consented.

Consent, however, may not be inferred if resistance would have been futile under the totality of the circumstances, or where resistance is overcome by a reasonable fear of death or great bodily harm, or where she is unable to resist because of the lack of mental or physical faculties. You must consider all the surrounding circumstances in deciding whether (state the name of the alleged victim) consented.

If (state the name of the alleged victim) submitted to the act of sexual intercourse (because resistance would have been futile under the totality of the circumstances) (because of a reasonable fear of death or great

bodily harm) (because she was unable to resist due to mental or physical inability) (_____), sexual intercourse was done without consent.

If (state the name of the alleged victim) was incapable, due to her (tender age) (and) (lack of) mental development, of giving consent, then the act was done by force and without consent. A child (of tender years) is not capable of consenting to an act of sexual intercourse until she understands the act, its motive, and its possible consequences. In deciding whether (state the name of the alleged victim) had, at the time of the sexual intercourse, the requisite knowledge and mental (development) (capacity) (ability) to consent you should consider all the evidence in the case, including but not limited to: (state any lay or expert testimony relevant to the child's development) (state any other information about the alleged victim, such as the level and extent of education, and prior sex education and experiences, if any).

If (state the name of the alleged victim) was incapable of giving consent, and if the accused knew or had reasonable cause to know that (state the name of the alleged victim) was incapable of giving consent, the act of sexual intercourse was done by force and without consent.