

### 3–45–14. SEXUAL ASSAULT (ARTICLE 120)

**NOTE 1: Applicability of this instruction. Use this instruction for offenses occurring on and after 28 June 2012.**

a. **MAXIMUM PUNISHMENT:** DD, TF, 30 years, E-1. A dishonorable discharge or a dismissal is a mandatory minimum sentence for sexual assault occurring on or after 24 June 2014.

b. **MODEL SPECIFICATION:**

In that (personal jurisdiction data), did, (at/on board—location), on or about \_\_\_\_\_, commit (a) sexual act(s) upon \_\_\_\_\_, by causing penetration of \_\_\_\_\_'s (vulva) (anus) (mouth) with his/her/a (list body part or object) [by causing bodily harm to him/her, to wit: \_\_\_\_\_] [by threatening or placing him/her in fear] [by making a fraudulent representation that the sexual act(s) served a professional purpose] [by inducing a belief by artifice, pretense, or concealment that the accused was another person] [when the accused knew or reasonably should have known that \_\_\_\_\_ was asleep, unconscious, or otherwise unaware that the sexual act was occurring] [when \_\_\_\_\_ was incapable of consenting to the sexual act(s) due to (impairment by a drug, intoxicant, or other similar substance,) (a mental disease or defect, or physical disability,) and that condition was known or reasonably should have been known by the accused] [with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person].

c. **ELEMENTS:**

**Sexual Assault by Causing Bodily Harm:**

(1) That (state the time and place alleged), the accused committed (a) sexual act(s) upon (state the name of the alleged victim), by causing penetration, however slight, of (state the name of the alleged victim)'s (vulva) (anus) (mouth) by (the accused's (penis) (state other body part)) (a (state object));

(2) That the accused did so by causing bodily harm to (state the name of the alleged victim), to wit: (state the bodily harm alleged); (and)

**NOTE 2: Lack of consent as an element. When the same physical act is alleged as both the *actus reus* and the bodily harm for the charged sexual assault, include this as a final element:**

[(3)] That the accused did so without the consent of (state the name of the alleged victim); (and)

***NOTE 3: Penetration by object or body part other than penis. If the penetration occurs by something other than the Accused's penis, add the following element.***

[(3) or (4)] That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

**Sexual Assault by Threat/Fear, Fraudulent Representation, or Artifice:**

(1) That (state the time and place alleged), the accused committed (a) sexual act(s) upon (state the name of the alleged victim), by causing penetration, however slight, of (state the name of the alleged victim)'s (vulva) (anus) (mouth) by (the accused's (penis) (state other body part)) (a (state object)); (and)

(2) That the accused did so by

(a) threatening or placing (state the name of the alleged victim) in fear;

(b) making a fraudulent representation that the sexual act served a professional purpose;

(c) inducing a belief by artifice, pretense, or concealment that the accused was another person; (and)

***NOTE 4: Penetration by object or body part other than penis. If the penetration occurs by something other than the Accused's penis, add the following element.***

[(3)] That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

**Sexual Assault When Victim Asleep, Unconscious, or Otherwise Unaware:**

(1) That (state the time and place alleged), the accused committed (a) sexual act(s) upon (state the name of the alleged victim), by causing penetration, however slight, of (state the name of the alleged victim)'s (vulva) (anus) (mouth) by (the accused's (penis) (state other body part)) (a (state object));

(2) That the accused did so when (state the name of the alleged victim) was asleep, unconscious, or otherwise unaware that the sexual act was occurring; (and)

(3) That the accused knew or reasonably should have known that (state the name of the alleged victim) was asleep, unconscious, or otherwise unaware that the sexual act was occurring; (and)

***NOTE 5: Penetration by object or body part other than penis. If the penetration occurs by something other than the Accused's penis, add the following element.***

[(4)] That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

#### **Sexual Assault When the Victim is Incapable of Consenting:**

(1) That (state the time and place alleged), the accused committed (a) sexual act(s) upon (state the name of the alleged victim), by causing penetration, however slight, of (state the name of the alleged victim)'s (vulva) (anus) (mouth) by (the accused's (penis) (state other body part)) (a (state object));

(2) That the accused did so when (state the name of the alleged victim) was incapable of consenting to the sexual act(s) due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability,) (and)

(3) That the accused knew or reasonably should have known (state the name of the alleged victim) was incapable of consenting to the sexual act(s) due to (impairment by drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability); (and)

***NOTE 6: Penetration by object or body part other than penis. If the penetration occurs by something other than the Accused's penis, add the following element.***

[(4)] That the accused did so with an intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person.

**d. DEFINITIONS AND OTHER INSTRUCTIONS:**

***NOTE 7: Lack of penetration in issue. If lack of penetration is in issue, the military judge should further define what is meant by the “vulva.” The instruction below may be helpful.***

The “vulva” is the external genital organs of the female, including the entrance of the vagina and the labia majora and labia minora. “Labia” is the Latin and medically correct term for “lips.”

***NOTE 8: Marriage. Marriage is not a defense for any conduct in issue in any prosecution under Article 120.***

***NOTE 9: By threat or placing in fear. When the sexual act is alleged by threat or by placing in fear, include the following instruction:***

“Threatening or placing a person in fear” means a communication or action that is of sufficient consequence to cause a reasonable fear that non-compliance will result in the alleged victim or another person being subjected to the wrongful action contemplated by the communication or action.

In proving that a person made a threat, it need not be proven that the person actually intended to carry out the threat or had the ability to carry out the threat.

The threat or fear in this case must be that the alleged victim or another person would be subjected to the wrongful action.

***NOTE 10: By causing bodily harm. When the sexual act is alleged by causing bodily harm, include the following instruction:***

“Bodily harm” means any offensive touching of another, however slight (, including any nonconsensual sexual act or nonconsensual sexual contact).

***NOTE 11: Fraudulent representation. When the sexual act is committed by making a fraudulent representation that it serves a professional purpose, the following may be appropriate:***

A “fraudulent representation” is a representation of fact, which the accused knows to be untrue, which is intended to deceive, which does in fact deceive, and which causes the other person to engage in the sexual act(s).

(The fraudulent representation that the sexual act served a professional purpose need not have been made by the accused to (state the name of the alleged victim). It is sufficient if the accused made such a fraudulent representation to any person, which thereby caused (state the name of the alleged victim) to engage in the sexual act.)

***NOTE 12: Instructing on consent. The issue of “consent” may arise in two ways. First, lack of consent is an element when the accused is charged with sexual assault by causing bodily harm, and the alleged bodily harm is the same as the alleged sexual act (i.e., the charge alleges a nonconsensual sexual act). Lack of consent is not an element when the accused is charged with sexual assault by any other method. Second, evidence of the alleged victim’s consent to the sexual conduct might be introduced with respect to any sexual assault allegation in order to negate the elements of the offense. Generally, the elements of an Article 120(b) offense require the accused to have committed sexual conduct “by” a certain method or “when” the alleged victim was in a certain state. Stated another way, “by” means the sexual conduct occurred because of that method, and “when” means the sexual conduct occurred while the alleged victim was in a state that precluded consent. Consent to the sexual conduct logically precludes these causal links; when the alleged victim consented, the sexual conduct occurred because of the consent, not because of the charged method. Accordingly, evidence that the alleged victim consented to the sexual conduct may be relevant to negate an element, even though lack of consent may not be a separate element. If consent evidence has been introduced to negate other elements of the charged offense, give the parenthetical below, along with the appropriately tailored definitions of consent. If lack of consent is an element in a charged offense of sexual assault by causing bodily harm, give the appropriately tailored definition of consent.***

IF CONSENT EVIDENCE HAS BEEN INTRODUCED TO NEGATE OTHER ELEMENTS OF THE CHARGED OFFENSE, GIVE THE FOLLOWING INSTRUCTION:

(The evidence has raised the issue of whether (state the alleged victim’s name) consented to the sexual conduct listed in (The) Specification(s) (\_\_\_\_\_) of (The) (Additional) Charge (\_\_\_\_). All of the evidence concerning consent to the sexual conduct is relevant and must be considered in determining whether the government has proven (the elements of the offense) (that the sexual conduct was done by/when state the applicable element). Stated another way, evidence the alleged victim consented to the sexual conduct, either alone or in conjunction with the other evidence in this case, may cause you to have a reasonable doubt as to whether the government has proven (every

element of the offense) (that the sexual conduct was done by/when state the applicable element).

“Consent” means a freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent.

(A sleeping, unconscious, or incompetent person cannot consent.)

(A person cannot consent to force causing or likely to cause death or grievous bodily harm.)

(A person cannot consent to being rendered unconscious.)

(A person cannot consent while under threat or fear.)

(A person cannot consent to a sexual act when believing, due to a fraudulent representation, that the sexual act served a professional purpose.)

(A person cannot consent to a sexual act when believing, due to artifice, pretense, or concealment, that the accused was another person.)

Lack of consent may be inferred based on the circumstances. All the surrounding circumstances are to be considered in determining whether a person gave consent, or whether a person did not resist or ceased to resist only because of another person's actions.

***NOTE 13: Additional definitions related to consent. In US v. Pease, 75 MJ 180 (CAAF 2016), CAAF approved certain non-statutory definitions related to the issue of consent. Pease did not require that these definitions be provided to members. However, in the military judge's discretion, the below definitions may be given to the members when appropriate.***

(A “competent person” is a person who possesses the physical and mental ability to consent.)

(An “incompetent person” is a person who lacks either the mental or physical ability to consent because he or she is: (1) asleep or unconscious; (2) impaired by a drug, intoxicant or other similar substance; or (3) suffering from a mental disease or defect or a physical disability.)

(To be able to freely make an agreement, a person must first possess the cognitive ability to appreciate the nature of the conduct in question and then possess the mental and physical ability to make and to communicate a decision regarding that conduct to the other person. However, if the person has the ability to appreciate the conduct and communicate lack of consent, but does not do so out of fear or because of some other external influence counteracting voluntariness, the sexual conduct is not voluntary.)

(A person is “incapable of consenting” when (he/she) lacks the cognitive ability to appreciate the sexual conduct in question or the physical or mental ability to make or to communicate a decision about whether (he/she) agrees to the conduct.)

***NOTE 14: Ignorance or mistake of fact generally. Under the 28 June 2012 version of Article 120, there is no statutory mistake of fact defense. Mistake of fact is a defense in RCM 916(j). Mistake of fact under RCM 916(j) is only a defense when it negates an element. When the element goes to premeditation, specific intent, willfulness or knowledge of a particular fact, the mistake must only be honest. When the element requires only general intent or knowledge, the mistake must be honest and reasonable. When the accused's intent or knowledge is immaterial to an element (that is, strict liability), mistake of fact is not a defense.***

***Accordingly, the military judge must first determine the elements of an offense. Second, the military judge must determine whether the evidence has reasonably raised the accused's mistake which negates an element. Finally, the military judge must determine into which of the above three categories that element falls.***

***Strict liability offenses are “disfavored.” Absent some indication Congress intended to impose strict liability (and the starting point for determining intent is statutory construction), courts have applied a “presumption” of mens rea to criminal offenses. Silence by Congress regarding mens rea for the offense generally does not alone suggest Congress intended strict***

**liability. See, generally, *US v. Zachary*, 61 MJ 813 (ACCA, 2005), affirmed 63 MJ 438 (CAAF 2006); *Staples v. US*, 511 US 600 (1994); *Liparota v. US*, 471 US 419 (1994); and (for a good general discussion of this topic) *US v. Burwell*, 690 F3d 500 (DC Cir., 2012) (Kavanagh, J., dissenting).**

***RCM 916(j) has been interpreted to apply not only to situations where if the facts were as the accused mistakenly believed them the accused would be absolved of all criminal liability, but also to situations where the accused would be absolved of criminal liability for the charged offense, but not necessarily for a lesser-included offense. See Zachary, supra.***

***While a commonly encountered ignorance or mistake of fact instruction is below, it is not exclusive. The military judge must carefully follow the analytical methodology above to determine if mistake of fact may be applicable in other situations. In those situations, the military judge should use appropriately tailored versions of Instructions 5-11-1 or 5-11-2.***

***NOTE 15: Mistake of fact as to consent to the sexual conduct. When the evidence has reasonably raised mistake of fact as to consent to the sexual conduct, include the following instruction on honest and reasonable mistake of fact as to consent. (Note that even for offenses under Article 120(b)(1)(C) and 120(b)(1)(D), evidence of consent to the sexual conduct may preclude the causal link between the sexual conduct and the charged method. The judge must carefully evaluate the evidence presented by both sides in such cases to determine the applicability of the following instruction.) If instructing on an attempted offense, the honest mistake of fact instruction in Instruction 5-11-1 should be given instead of this instruction.***

The evidence has raised the issue of mistake of fact in relation to the offense(s) of (state the alleged offense(s)), as alleged in (the) specification(s) (\_\_\_\_) of (the) (additional) Charge (\_\_\_\_).

There has been (evidence) (testimony) tending to show that, at the time of the alleged offense(s), the accused mistakenly believed that (state the name of the victim) consented to the sexual conduct alleged concerning (this) (these) offense(s).

Mistake of fact is a defense to (that) (those) charged offense(s). "Mistake of fact" means the accused held, as a result of ignorance or mistake, an incorrect belief that the other person consented to the sexual conduct.



The ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. To be reasonable, the ignorance or mistake must have been based on information, or lack of it, that would indicate to a reasonable person that the other person consented to the sexual conduct. (Additionally, the ignorance or mistake cannot be based on the negligent failure to discover the true facts. “Negligence” is the absence of due care. “Due care” is what a reasonably careful person would do under the same or similar circumstances.)

You should consider the inherent probability or improbability of the evidence presented on this matter. You should consider the accused’s (age) (education) (experience) (\_\_\_\_\_), along with the other evidence in this case (including, but not limited to (here the military judge may specify significant evidentiary factors bearing on the issue and indicate the respective contentions of counsel for both sides)).

The prosecution has the burden of proving beyond a reasonable doubt that the defense of mistake of fact did not exist. If you are convinced beyond a reasonable doubt that, at the time of the charged offense(s), the accused did not believe that the alleged victim consented to the sexual conduct, the defense does not exist. Furthermore, even if you conclude the accused was under a mistaken belief that the alleged victim consented to the sexual conduct, if you are convinced beyond a reasonable doubt that at the time of the charged offense(s) the accused’s mistake was unreasonable, the defense does not exist.

***NOTE 16: Voluntary intoxication and mistake of fact. If the above mistake of fact instruction is given, and there is evidence of the accused’s voluntary intoxication, the following instruction is appropriate.***

There has been some evidence concerning the accused’s state of intoxication at the time of the alleged offense(s). On the question of whether the accused’s (ignorance) (belief) was reasonable, you may not consider the accused’s intoxication, if any, because a reasonable (ignorance) (belief) is one that an ordinary, prudent, sober adult would have under the circumstances of this case. Voluntary intoxication does not permit what would be an unreasonable (ignorance) (belief) in the mind of a sober person to be considered reasonable because the person is intoxicated.

***NOTE 17: Voluntary intoxication and “knew or reasonably should have known.” When the accused is charged with sexual assault of a person who was asleep, unconscious, or otherwise unaware that the sexual act was occurring, or a person who was incapable of consenting to the sexual act, and there is evidence that the accused was intoxicated, the following instruction may be appropriate with respect to whether the accused “knew or reasonably should have known” the alleged victim’s state.***

The evidence has raised the issue of voluntary intoxication in relation to the offense(s) of (state the alleged offense(s)). With respect to (that) (those) offense(s), I advised you earlier that the government is required to prove that [the accused knew or reasonably should have known that (state the name of the person alleged) was asleep, unconscious, or otherwise unaware that the sexual act was occurring] [(state the name of the alleged victim) was incapable of consenting to the sexual act(s) due to (impairment by a drug, intoxicant, or other similar substance,) (a mental disease or defect, or physical disability,) and that condition was known or reasonably should have been known by the accused].

In deciding whether the accused had such knowledge, you should consider the evidence of voluntary intoxication.

The law recognizes that a person’s ordinary thought process may be materially affected when he/she is under the influence of intoxicants. Thus, evidence that the accused was intoxicated may, either alone or together with other evidence in the case, cause you to have a reasonable doubt that the accused had the required knowledge.

On the other hand, the fact that the accused may have been intoxicated at the time of the offense(s) does not necessarily indicate that he/she was unable to have the required knowledge because a person may be drunk yet still be aware at that time of his/her actions and their probable results.

In deciding whether the accused had the required knowledge, you should consider the effect of intoxication, if any, as well as the other evidence in the case.

The burden of proof is on the prosecution to establish the guilt of the accused. If you are convinced beyond a reasonable doubt that the accused in fact had the required

knowledge, the accused will not avoid criminal responsibility because of voluntary intoxication.

However, on the question of whether the accused “reasonably should have known” that (state the name of the person alleged) was [asleep, unconscious, or otherwise unaware that the sexual act was occurring] [incapable of consenting to the sexual act(s) due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability)], you may not consider the accused’s intoxication, if any, because what a person reasonably should have known refers to what an ordinary, prudent, sober adult would have reasonably known under the circumstances of this case.

In summary, voluntary intoxication should be considered in determining whether the accused had actual knowledge that (state the name of the person alleged) was [asleep, unconscious, or otherwise unaware that the sexual act was occurring] [incapable of consenting to the sexual act(s) due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability)]. Voluntary intoxication should not be considered in determining whether the accused “reasonably should have known” that (state the name of the person alleged) was [asleep, unconscious, or otherwise unaware that the sexual act was occurring] [incapable of consenting to the sexual act(s) due to (impairment by a drug, intoxicant, or other similar substance) (a mental disease or defect, or physical disability)].

***NOTE 18: Other instructions. Instruction 7-3, Circumstantial Evidence (Intent), Instruction 6-5, Partial Mental Responsibility, Instruction 5-17, Evidence Negating Mens Rea, and Instruction 5-12, Voluntary Intoxication, may be appropriate, as bearing on the issue of intent, if the intent to abuse, humiliate, harass, or degrade any person or to arouse or gratify the sexual desire of any person is in issue.***

**e. REFERENCES:** Definition of “vulva.” See US v Williams, 25 MJ 854 (AFCMR 1988) pet. denied, 27 MJ 166 (CMA 1988) and US v. Tu, 30 MJ 587 (ACMR 1990) ; Definition of “competent person.” See US v. Pease, 75 MJ 180 (CAAF 2016).