

Ala. Code 1975, § 13A-6-67(a)(1)

Sexual Abuse Second Degree
(Incapable of Consent)

The defendant is charged with sexual abuse in the second degree.

A person commits the crime of sexual abuse in the second degree if he/she subjects to sexual contact another person who is incapable of consent by reason of some factor other than being less than 16 years old.

To convict, the State must prove beyond a reasonable doubt each of the following elements:

- (1) The defendant subjected another person, **[Insert Victim's name]**, to sexual contact;
- (2) **[Insert Victim's name]** was incapable of consent by reason of some factor other than being less than 16 years old **[Describe factor such as mentally defective]; (AND)**
- (3) The defendant acted **[Insert appropriate mens rea element - See Use Note]**.

Sexual contact means any touching of the sexual or other intimate parts of a person, done for the purpose of gratifying the sexual desire of either party. [13A-6-60(3)]

[Read as appropriate] *Mentally defective* means that a person suffers from a mental disease or defect which renders him/her incapable of appraising the nature of his/her conduct. [13A-6-60(5)]

Consent is no defense to a prosecution for this offense. [13A-6-70(c)(2)]

If you find from the evidence that the State has proved beyond a reasonable doubt each of the above elements of sexual abuse in the second degree, then you shall find the defendant guilty of sexual abuse in the second degree.

If you find that the State has failed to prove any one or more of the elements of the offense of sexual abuse in the second degree, then you cannot find the defendant guilty of sexual abuse in the second degree.

[If lesser-included offenses are included, the Court should instruct on those offenses at this point.]

Use Notes

The statute does not state a specific mens rea element. The Court of Criminal Appeals has concluded that "intent" is not an element of sodomy or sexual abuse. *Allen v. State*, 624 So. 2d 650 (Ala. Crim. App. 1993). Moreover, in interpreting the rape in the first degree statute which also does not establish a specific mens rea element, the courts have concluded that rape in the first degree does not include "specific intent" as an element. *Anonymous v. State*, 507 So.2d 972 (Ala. 1987); *Toler v. State*, 623 So. 2d 408 (Ala. Crim. App.), cert. denied, No. 1921231 (Ala. 1993).

Insert the appropriate mens rea element considering the indictment and the evidence before the court. There are few, if any, strict liability offenses in the Code. See Commentary for 13A-2-3 and 13A-2-4(b). There are four mens rea elements in the Alabama Code: intentionally, knowingly, recklessly and with criminal negligence. See 13A-2-2.

1. A person acts *intentionally* with respect to a result or to conduct described by a statute defining an offense when his/her purpose is to cause that result or to engage in that conduct. [13A-2-2(1)]
2. A person acts *knowingly* with respect to conduct or to a circumstance described by a statute defining an offense he/she is aware that his/her conduct is of that nature or that the circumstance exists. [13A-2-2(2)]
3. A person acts *recklessly* with respect to a result or to a circumstance when he/she is aware of and consciously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. [13A-2-2(3)]
4. A person acts with *criminal negligence* with respect to a result or to a circumstance when he/she fails to perceive a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation. A court or jury may consider statutes or ordinances regulating the defendant's conduct as bearing upon the question of criminal negligence. [13A-2-2(4)]

The "marital exemption" for the offense of forced sodomy contained in the statutory definition of deviate sexual intercourse (13A-6-60(2)) was declared unconstitutional and was severed from the definition in *Williams v. State*, 494 So. 2d 819 (Ala. Crim. App. 1986). This instruction, therefore, omits the severed statutory language.

Sexual abuse, if supported by the evidence, may be a lesser-included offense of rape. *Welch v. State*, 630 So.2d 145 (Ala. Crim. App.), cert. denied, No. 1930191 (Ala. 1993). By analogy sexual abuse may be a lesser included offense of sodomy.

NOTE: The language of Sexual Abuse I, 13A-6-66(a)(2), also encompasses the elements of this offense including physically helpless or mentally incapacitated. See Instruction for it. It does not include mentally defective.

[Approved 9-2-15.]