

Ala. Code 1975, § 13A-6-64(a)(1)

Sodomy Second Degree
(Victim 12-16)

The defendant is charged with sodomy in the second degree.

A person commits the crime of sodomy in the second degree if he/she, being 16 years or older, engages in deviate sexual intercourse with another person who is less than 16 and more than 12 years old.

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

- (1) The defendant engaged in deviate sexual intercourse with **[Insert Victim's name]**;
- (2) The defendant was 16 years old or older;
- (3) **[Insert Victim's name]** was less than 16 and more than 12 years old;
(AND)
- (4) The defendant acted **[Insert appropriate mens rea element - See Use Note]**.

Deviate sexual intercourse means any act of sexual gratification involving the sex organs of one person and the mouth or anus of another. [13A-6-60(2)]

Consent is no defense to a prosecution for this offense. [13A-6-70(c)(1)]

If you find from the evidence that the State has proved beyond a reasonable doubt each of the above elements of sodomy in the second degree, then you shall find the defendant guilty of sodomy 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 sodomy in the second degree, then you cannot find the defendant guilty of sodomy 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). Moreover, because of the age requirement, factually the marital exemption would likely be inapplicable. This instruction, therefore, omits the severed statutory language.

The Court of Criminal Appeals has held that this offense is not a lesser included offense of rape in the first degree of a victim under 12. *Ross v. State*, 529 So. 2d 1074 (Ala. Crim. App. 1988) (overruled on other grounds by *Ex parte Seymour*, 946 So. 2d 536 (Ala. 2006)); and *Allen v. State*, 472 So. 2d 1122 (Ala. Crim. App. 1985). By analogy, sodomy in the second degree may not be a lesser included offense of sodomy in the first

degree. Rape in the second degree based on age is a lesser included offense of rape in the first degree based on force. *Washington v. State*, 571 So. 2d 1062, 1064 (Ala. 1990). By analogy, sodomy in the second degree based on age is a lesser included offense of sodomy in the first degree based on force.

[Approved 9-2-15.]