

1 14-954. Criminal sexual penetration in the second degree; commission of a felony; essential
2 elements.

3 For you to find the defendant guilty of criminal sexual penetration while committing
4 another felony [as charged in Count _____],¹ the state must prove to your satisfaction
5 beyond a reasonable doubt each of the following elements of the crime:

6 1. The defendant²

7 [caused _____ (*name of victim*) to engage in _____;³]

8 [OR]

9 [caused the insertion, to any extent, of a[n] _____⁴ into the _____⁵ of
10 _____ (*name of victim*);]

11 [2. The defendant's act was unlawful;]⁶

12 3. The defendant committed the act during the commission of _____⁷;

13 4. The commission of _____⁷ was against _____ (*name of victim*);

14 5. The commission of _____⁷ assisted the defendant in

15 [causing _____ (*name of victim*) to engage in _____³];

16 [OR]

17 [causing the insertion, to any extent, of a[n] _____⁴ into the _____⁵ of
18 _____ (*name of victim*);] and

19 6. This happened in New Mexico on or about the _____ day of _____,
20 _____.

21

22 USE NOTES

23 1. Insert the count number if more than one count is charged.

- 1 2. Use only the applicable alternatives.
- 2 3. Name the sexual act or acts: i.e., “sexual intercourse”, “anal intercourse”,
3 “cunnilingus”, or “fellatio”. The applicable definition or definitions from [~~Instruction~~] UJI 14-982
4 NMRA must be given after this instruction.
- 5 4. Identify the object used.
- 6 5. Name the part or parts of the body: i.e., “vagina”, “penis”, or “anus”. The applicable
7 definition or definitions from [~~Instruction~~] UJI 14-981 NMRA must be given after this instruction.
- 8 6. Use the bracketed element if the evidence raises a genuine issue of the unlawfulness
9 of the defendant’s actions. If this element is given, UJI 14-132 NMRA, “unlawful defined,” must
10 be given after this instruction.
- 11 7. Identify the felony, and give the essential elements unless they are covered in an
12 essential element instruction for the substantive offense. To instruct on the elements of an
13 uncharged offense, UJI 14-140 NMRA must be used.
- 14 8. Age of the victim is not an essential element of the *offense*. However, where the
15 state has not charged a violation of Section 30-9-11(E)(1), NMSA 1978, and is seeking the
16 mandatory three-year minimum sentence because the victim is 13 to 18, the victim’s age is an
17 essential sentencing fact that must be determined by the jury beyond a reasonable doubt, using UJI
18 14-6019A NMRA. *See State v. Stevens*, 2014-NMSC-011, ¶ 40, 323 P.3d 901.
19 [As amended, effective January 20, 2005; as amended by Supreme Court Order No. 15-8300-004,
20 effective for all cases pending or filed on or after December 31, 2015; as amended by Supreme
21 Court Order No. 21-8300-025, effective for all cases pending or filed on or after December 31,
22 2021.]

1 **Committee commentary.** — This instruction contains the essential elements of criminal sexual
2 penetration perpetrated in the commission of any other felony. Note that the essential elements of
3 the accompanying felony must be given, unless they are covered in another instruction.

4 To avoid double jeopardy, the felony must be other than a violation of NMSA 1978,
5 Sections 30-9-11 through 30-9-14. It also might have to be other than an aggravated assault or
6 battery on the victim. *Cf.* the commentary to UJI 14-202 NMRA, felony murder.

7 Note the language that the felony must be “in the commission of any other felony”. The
8 felony must *both* be committed against the victim of the unlawful sexual penetration *and* assist in
9 the accomplishment of the unlawful sexual penetration. *See State v. Stevens*, 2014-NMSC-011, ¶
10 39, 323 P.3d 901. It is not enough that otherwise lawful sexual activity simply occurs at the same
11 time or has been facilitated or caused by the commission of a felony not committed against the
12 victim; the jury must find both. *Id.* ¶ 37.

13 *See also* the commentary to UJI 14-941 NMRA.

14 [As amended by Supreme Court Order No. 15-8300-004, effective for all cases pending or filed
15 on or after December 31, 2015.]