

## Judicial Council Of California Criminal Jury Instruction 935

Judicial Council Of California Criminal Jury Instructions November 2019

Update By the Judicial Council of California Advisory Committee on Criminal Jury Instructions

Assaultive and Battery Crimes

E. Battery

(ii) Sexual Battery

935 Sexual Battery: Felony (Pen. Code, §§ 242, 243.4(a) & (d))

The defendant is charged [in Count \_\_\_\_] with sexual battery [in violation of [Penal Code section 243.4](#)].

To prove that the defendant is guilty of this crime, the People must prove that:

1. The defendant [or an accomplice] unlawfully restrained \_\_\_\_\_ <insert name of complaining witness>;  
<Alternative 2A—defendant touched>

[2. While \_\_\_\_\_ <insert name of complaining witness> was restrained, the defendant touched an intimate part of \_\_\_\_\_ <insert name of complaining witness>;]  
<Alternative 2B—caused complaining witness to touch

[2. While \_\_\_\_\_ <insert name of complaining witness> was restrained, the defendant (caused \_\_\_\_\_ <insert name of complaining witness> to touch (his/her) own intimate part/ [or] caused \_\_\_\_\_ <insert name of complaining witness> to touch the intimate part of defendant [or someone else]);]

3. The touching was done against \_\_\_\_\_'s <insert name of complaining witness> will;

AND

4. The touching was done for the specific purpose of sexual arousal, sexual gratification, or sexual abuse.

An *intimate part* is a female's breast or the anus, groin, sexual organ or buttocks of

anyone.

Contact must have been made with \_\_\_\_\_'s <*insert name of complaining witness*> bare skin. This means that:

1. The defendant must have touched the bare skin of \_\_\_\_\_'s <*insert name of complaining witness*> intimate part;

OR

2. \_\_\_\_\_'s <*insert name of complaining witness*> bare skin must have touched the defendant's [or \_\_\_\_\_'s <*insert name or description of third person*>] intimate part either directly or through (his/her) clothing.

Someone is *unlawfully restrained* when his or her liberty is controlled by words, acts, or authority of another and the restraint is against his or her will. Unlawful restraint requires more than just the physical force necessary to accomplish the sexual touching. [A person does not unlawfully restrain someone if he or she only uses lawful authority for a lawful purpose.]

[A touching is done *against a person's will* if that person does not consent to it. To *consent*, a person must act freely and voluntarily and know the nature of the touching.]

[A person is an *accomplice* if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if:

1. He or she knew of the criminal purpose of the person who committed the crime;

AND

2. He or she intended to, and did in fact, (aid, facilitate, promote, encourage, or instigate the commission of the crime/ [or] participate in a criminal conspiracy to commit the crime).]

<*Defense: Reasonable Belief in Consent*>

[The defendant is not guilty of sexual battery if (he/she) actually and reasonably, even if mistakenly, believed that the other person consented to the touching [and actually and reasonably believed that (he/she) consented throughout the act of touching]. The People have the burden of proving beyond a reasonable doubt that

the defendant did not actually and reasonably believe that the other person consented. If the People have not met this burden, you must find the defendant not guilty.]

*New January 2006; Revised February 2016*

## BENCH NOTES

### *Instructional Duty*

The court has a sua sponte duty to give an instruction defining the elements of the crime.

The court has a sua sponte duty to instruct on the defense of mistaken but honest and reasonable belief in consent if there is substantial evidence of equivocal conduct that would have led a defendant to reasonably and in good faith believe consent existed where it did not. (See [People v. Andrews \(2015\) 234 Cal.App.4th 590, 602 \[184 Cal.Rptr.3d 183\]](#); following [People v. Williams \(1992\) 4 Cal.4th 354, 362 \[14 Cal.Rptr.2d 441, 841 P.2d 961\]](#); [People v. Mayberry \(1975\) 15 Cal.3d 143, 153–158 \[125 Cal.Rptr. 745, 542 P.2d 1337\]](#).)

Give either alternative 2A or 2B depending on the evidence in the case. The committee has concluded that the direct touching requirement for felony sexual battery is satisfied when (1) the defendant forces the alleged victim to touch the defendant's intimate parts through the defendant's clothing with the alleged victim's bare skin; (2) the defendant forces the alleged victim to touch any part of the defendant with the victim's unclothed intimate part, whether the defendant's body is clothed or not; or (3) the defendant touches the alleged victim's bare intimate part either directly or through clothing. If a defendant is only charged under [Penal Code section 243.4\(a\)](#), the defendant must touch the victim's intimate part, not the other way around. ([People v. Elam \(2001\) 91 Cal.App.4th 298, 309–310 \[110 Cal.Rptr.2d 185\]](#).)

The committee omitted the word “masturbate” from the elements because the plain language of [Penal Code section 243.4\(d\)](#) requires only that the victim be compelled to touch him- or herself, and a further finding of whether that act of touching was actually masturbation is unnecessary.

Give the bracketed definition of “against a person's will” on request.

If the court gives the bracketed phrase “or an accomplice” in element 1, the court

must also give the bracketed definition of “accomplice.” ([People v. Verlinde \(2002\) 100 Cal.App.4th 1146, 1167–1168 \[123 Cal.Rptr.2d 322\]](#).) Additional paragraphs providing further explanation of the definition of “accomplice” are contained in [CALCRIM No. 334, Accomplice Testimony Must Be Corroborated: Dispute Whether Witness Is Accomplice](#). The court should review that instruction and determine whether any of these additional paragraphs should be given.

## AUTHORITY

- Elements. [Pen. Code, §§ 242, 243.4\(a\) & \(d\)](#).
- Intimate Part. [Pen. Code, § 243.4\(g\)\(1\)](#).
- Touches Defined. [Pen. Code, § 243.4\(f\)](#).
- Otherwise Lawful Restraint for Unlawful Purpose. [People v. Alford \(1991\) 235 Cal.App.3d 799, 803–804 \[286 Cal.Rptr. 762\]](#).
- Sexual Abuse Defined. [People v. White \(1986\) 179 Cal.App.3d 193, 205 \[224 Cal.Rptr. 467\]](#) [discussing [Pen. Code, § 289](#)].
- Specific Intent Crime. [People v. Chavez \(2000\) 84 Cal.App.4th 25, 29 \[100 Cal.Rptr.2d 680\]](#).
- Caused to Masturbate. [People v. Reeves \(2001\) 91 Cal.App.4th 14, 50 \[109 Cal.Rptr.2d 728\]](#).
- Accomplice Defined. See [Pen. Code, § 1111](#); [People v. Verlinde \(2002\) 100 Cal.App.4th 1146, 1167–1168 \[123 Cal.Rptr.2d 322\]](#); [People v. Stankewitz \(1990\) 51 Cal.3d 72, 90–91 \[270 Cal.Rptr. 817, 793 P.2d 23\]](#).

## LESSER INCLUDED OFFENSES

- Assault. [Pen. Code, § 240.](#)
- Misdemeanor Sexual Battery. [Pen. Code, § 243.4\(e\)\(1\).](#)

#### COMMENTARY

In a case addressing the meaning of “for the purpose of ... sexual abuse” in the context of [Penal Code section 289](#), one court stated, “when a penetration is accomplished for the purpose of causing pain, injury or discomfort, it becomes sexual abuse, even though the perpetrator may not necessarily achieve any sexual arousal or gratification whatsoever.” ([People v. White \(1986\) 179 Cal.App.3d 193, 205 \[224 Cal.Rptr. 467\]](#).) If the court concludes it this reasoning applies to the crime sexual battery and a party requests a definition of “sexual abuse,” the following language can be used:

*Sexual abuse* means any touching of a person's intimate parts in order to cause pain, injury, or discomfort. The perpetrator does not need to achieve any sexual arousal or sexual gratification.

#### SECONDARY SOURCES

[1 Witkin & Epstein, California Criminal Law \(4th ed. 2012\) Crimes Against the Person, §§ 26, 81-83.](#)

6 Millman, Sevilla & Tarlow, California Criminal Defense Practice, Ch. 142, *Crimes Against the Person*, § 142.22[1] (Matthew Bender).

#### WEST'S EDITORIAL REFERENCES

#### Related References:•

See [CALJIC 10.37](#), [10.37.1](#)

#### Secondary References:•

Levenson and Ricciardulli, Expert Series: California Criminal Law § 6:9  
(2010–2011 ed.)

Research References:•

West's Key Number Digest, [Assault and Battery](#) 48, 100

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[C.J.S., Assault § 76](#)

Westlaw Databases:•

[California State Criminal Jury Instruction Filings \(CA-CRJIF\)](#)

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[California State Criminal Trial Court Filings and Jury Instruction Filings  
\(CA-CRFILING-JIF\)](#)

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[California State and Federal Criminal Jury Instruction Filings \(CA-CRJIF-  
ALL\)](#)

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