

A man and a woman dated for several weeks. During that time, the man repeatedly asked the woman to have sex. Each time, the woman responded that she would not have sex with the man unless they were married. One evening, the man promised the woman that they would elope the following weekend if she would agree to have sex. The woman agreed and the couple had sex. The following weekend, the man told the woman that he had no intention of eloping and only made that promise to get the woman's consent. The woman reported the man to the police, who later arrested and charged the man with rape.

Is the man guilty of rape?

- A. No, because fraud in factum did not negate the woman's consent.
- B. No, because fraud in the inducement did not negate the woman's consent.
- C. Yes, because the woman's consent was obtained by fraud in factum.
- D. Yes, because the woman's consent was obtained by fraud in the inducement.

## Explanation:

### Consent to sexual intercourse obtained by fraud

Type of fraud	Definition	Effect
<b>In factum</b>	Fraud pertains to <i>nature</i> of act—eg, doctor convinces patient that sexual act is part of medical exam Victim is <i>unaware</i> that he/she is consenting to sexual intercourse	Negates victim's consent
<b>In inducement</b>	Fraud pertains to what victim <i>knows</i> is an act of sexual intercourse—eg, defendant promises marriage in exchange for sex Victim is <i>aware</i> that he/she is consenting to sexual intercourse	Does not negate victim's consent

In most modern jurisdictions, **rape** is defined as sexual intercourse with another without that person's consent.\* This means that rape did not occur if the victim consented to sexual intercourse. However, a victim's **consent** may be ineffective if it was **obtained by fraud**. There are two types of fraud:

**Fraud in factum** – when consent is obtained by fraud regarding the **nature of the act** itself, leaving the **victim unaware** that he/she consented to sexual intercourse and **negating the victim's consent**

**Fraud in the inducement** – when consent is obtained by fraud regarding what the **victim knows** is an act of sexual intercourse, which **does not negate the victim's consent**

As a result, consent obtained by fraud in factum *is not* a valid defense to rape, but consent obtained by fraud in the inducement *is* a valid defense.

Here, the man falsely promised the woman that they would elope if she agreed to have sex with him. Since the woman knew that the act to which she consented was sexual intercourse, her consent was obtained by fraud in the inducement (**Choices A & C**). This type of fraud did not negate the woman's consent, so the man is not guilty of rape (**Choice D**).

\*At common law, rape was defined as (1) unlawful sexual intercourse (2) with a female who is not the defendant's wife (3) against her will by force or threat of force.

### Educational objective:

Fraud in factum occurs when the fraud pertains to the nature of the act itself and negates a rape victim's consent. In contrast, fraud in the inducement occurs when fraud is used to

gain consent to what the victim knows is an act of sexual intercourse and does not negate the victim's consent.

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