
207.25 SECOND DEGREE FORCIBLE RAPE—ALLEGED VICTIM MENTALLY DISABLED, MENTALLY INCAPACITATED OR PHYSICALLY HELPLESS. (OFFENSES PRIOR TO DEC. 1, 2015) FELONY.

NOTE WELL: This instruction is valid for offenses committed before December 1, 2015. For offenses committed on or after December 1, 2015, use N.C.P.I.—Crim. 207.25A.

The defendant has been charged with second degree rape.

For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt.

First, that the defendant engaged in vaginal intercourse with the alleged victim. [Vaginal intercourse is penetration, however slight, of the female sex organ by the male sex organ. The actual emission of semen is not necessary.]

Second, that the alleged victim was

- (A) [mentally disabled. A person is mentally disabled if the person suffers from [mental retardation] [mental disorder] and this [mental retardation] [mental disorder] temporarily or permanently renders the person substantially incapable of [appraising the nature of the person's conduct] [resisting the act of vaginal intercourse] [communicating unwillingness to submit to the act of vaginal intercourse] [resisting a sexual act].]^{1,2}
- (B) [mentally incapacitated. A person is mentally incapacitated when, due to any act committed upon the person, the person is rendered substantially incapable of [appraising the nature of the person's conduct] [resisting the act of vaginal intercourse] [resisting a sexual act].]³

(C) [physically helpless. A person is physically helpless if the person is [unconscious] [physically unable to resist an act of vaginal intercourse] [physically unable to communicate unwillingness to submit to an act of vaginal intercourse] [physically unable to resist a sexual act].]⁴

And Third, that the defendant knew or should reasonably have known that the alleged victim was [mentally disabled] [mentally incapacitated] [physically helpless.]

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant engaged in vaginal intercourse with the alleged victim and at that time

- A) [the alleged victim suffered from [mental retardation] [mental disorder] and as a result was [temporarily] [permanently] rendered so substantially incapable of [appraising the nature of the alleged victim's conduct] [resisting an act of vaginal intercourse] [communicating unwillingness to submit to an act of vaginal intercourse] [resisting a sexual act] as to be mentally disabled,]
- B) [the alleged victim was so substantially incapable of [appraising the nature of her conduct] [resisting an act of vaginal intercourse] [resisting a sexual act] as to be mentally incapacitated,]
- C) [the alleged victim was so physically unable to [resist an act of vaginal intercourse] [communicate unwillingness to submit to an act of vaginal intercourse] [resist a sexual act] as to be physically helpless]

and that the defendant knew or should reasonably have known that the alleged victim was [mentally disabled] [mentally incapacitated] [physically helpless], it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.⁵

NOTE WELL: In an appropriate case the judge should use N.C.P.I.—Crim. 201.10 to charge on attempted second degree rape as a lesser included offense under this charge, and the judge should similarly use N.C.P.I.—Crim. 208.70 (Assault on a Female) where appropriate.

NOTE WELL: N.C. Gen. Stat. § 15-144.1 provides that an indictment for rape in the first degree will support a verdict of guilty of rape in the first degree, rape in the second degree, attempted rape or assault on a female.

But see, S. v. Wortham, 318 N.C. 669 (1987), where the defendant was indicted for attempted second degree rape, the North Carolina Supreme Court held that assault on a female is not a lesser included offense of attempted rape, because:

- (1) An assault on a female is not legally the same as the overt act required in attempted rape; and*
- (2) The defendant in the crime of assault on a female must be first, a male, and second, at least 18 years old. Neither of these is an element of attempted rape.*

Simple Assault may still be an appropriate lesser included offense. If so, use N.C.P.I.—Crim. 208.40.

1. N.C. Gen. Stat. § 14-27.1(4).

2. N.C. Gen. Stat. § 14-27.1(1).

3. N.C. Gen. Stat. § 14-27.1(2).

4. N.C. Gen. Stat. § 14-27.1(3).

5. If there are lesser included offenses, the last phrase should be, “. . . you would not return a verdict of second degree rape, but would consider whether the defendant is guilty of”

