
207.40 FIRST DEGREE SEXUAL OFFENSE—WEAPON, SERIOUS INJURY OR MULTIPLE ASSAILANTS, COVERING SECOND DEGREE SEX OFFENSE AS A LESSER INCLUDED OFFENSE. (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. 207.40B.

The defendant has been charged with first degree sexual offense.

For you to find the defendant guilty of first degree sexual offense, the State must prove four things beyond a reasonable doubt:

First, that the defendant engaged in a sexual act with the victim. A sexual act means

- (A) [cunnilingus, which is any touching, however slight, by the lips or tongue of one person to any part of the female sex organ of another.]¹
- (B) [fellatio, which is any touching by the lips or tongue of one person and the male sex organ of another.]
- (C) [analingus, which is any touching by the lips or tongue of one person and the anus of another.]
- (D) [anal intercourse, which is any penetration, however slight, of the anus of any person by the male sexual organ of another.]²
- (E) [any penetration, however slight, by an object into the [genital] [anal] opening of a person's body.]³

NOTE WELL: N.C. Gen. Stat. § 14-27.1(4) provides that it shall be an affirmative defense to the fifth type of sexual act in (E) above that the penetration was for an accepted medical purpose. If there is evidence of such a purpose, instruct accordingly at the end of the charge and in

the mandate. See N.C.P.I. Crim. 306.10 for an instruction on Accepted Medical Purpose.

Second, that the defendant used or threatened to use force sufficient to overcome any resistance the alleged victim might make. (The force necessary to constitute sexual offense need not be actual physical force. Fear or coercion may take the place of physical force.)

Third, that the alleged victim did not consent and it was against the alleged victim's will. (Consent induced by fear is not consent at law).⁴

And Fourth, that the defendant

(A) [[employed] [displayed]

(1) [a dangerous or deadly weapon.] [(Name weapon) is a dangerous or deadly weapon.] [A dangerous or deadly weapon is a weapon which is likely to cause death or serious bodily injury. (In determining whether the particular object is a dangerous or deadly weapon, you should consider the nature of the object, the manner in which it was used, and the size and strength of the defendant as compared to the alleged victim.)]]

(2) [an object that the alleged victim reasonably believed was a dangerous or deadly weapon.³ A dangerous or deadly weapon is a weapon which is likely to cause death or serious bodily injury. (In determining whether the particular object is a dangerous or deadly weapon, you should consider the nature of the object, the manner in which it was used, and

the size and strength of the defendant as compared to the alleged victim.)]]

- (B) [inflicted serious personal injury^a upon the [the alleged victim] [another person.]
- (C) [was aided or abetted by one or more other persons. A defendant would be aided or abetted by another person if that person [was present at the time the sexual offense was committed and knowingly [advised] [encouraged] [instigated] [aided] *the defendant* to commit the crime] (or) [though not physically present at the time the sexual offense was committed, shared the defendant's criminal purpose and, to the defendant's knowledge, was aiding or was in a position to aid *the defendant* at the time the sexual offense was committed.]

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant engaged in a sexual act with the alleged victim and that the defendant did so by [force] [threat of force] and that this was sufficient to overcome any resistance which the alleged victim might make, that the alleged victim did not consent and it was against the alleged victim's will, and that the defendant

- (A) [employed] [displayed] a [weapon] [an object] (and that [this was] [the alleged victim reasonably believed that this was] a dangerous or deadly weapon).]
- (B) [inflicted serious personal injury upon [the alleged victim] [another person]].

(C) [was aided and abetted by [another person] [other persons].]

it would be your duty to return a verdict of guilty of first degree sexual offense. If you do not so find or have a reasonable doubt as to one or more of these things, you would not return a verdict of guilty of first degree sexual offense but would consider whether the defendant is guilty of second degree sexual offense. Second degree sexual offense differs from first degree sexual offense only in that it is not necessary for the State to prove beyond a reasonable doubt that the defendant

(A) [[employed] [displayed] a [dangerous or deadly weapon] [an object which the alleged victim reasonably believed was a dangerous or deadly weapon]]

(B) [inflicted serious personal injury upon [the alleged victim] [another person]

(C) [was aided and abetted by [another person] [other persons].]

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant engaged in a sexual act with the alleged victim and that the defendant did so by force or threat of force and that this was sufficient to overcome any resistance which the alleged victim might make, and that the alleged victim did not consent and it was against the alleged victim's will, it would be your duty to return a verdict of guilty of second degree sexual offense. 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. 207.40A to charge on attempted first and second degree sexual offense as lesser included offenses under this charge.

NOTE WELL: If a party requests an instruction on Assault on a Female, see State v. Martin, 222 N.C. App. 213 (2012), where the defendant was convicted of two counts of first-degree sexual offense, and the North Carolina Court of Appeals held that assault on a female is not a lesser included offense of first-degree sexual offense, because to convict for first-degree sexual offense, it need not be shown that the victim is a female, that the defendant is a male, or that the defendant is at least 18 years of age.

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

1. *S v. Ludlum*, 303 N.C. 666 (1981), held that penetration of the female sex organ is not required to complete the act of cunnilingus under Sexual Offense Statutes, N.C. Gen. Stat. § 14.27.4 *et seq.* However, the Court did specifically adhere to the rule of earlier cases that penetration is required to complete the offense of Crime Against Nature (N.C. Gen. Stat. § 14-177; N.C.P.I.-Crim. 226.10).

2. *S v. Warren*, 309 N.C. 224 (1983) held that Crime Against Nature is not a lesser included offense of first or second degree sexual offense, but when the bill charges anal intercourse *Warren* infers that Crime Against Nature is a lesser included offense.

3. See *State v. Williams*, 335 N.C. 518, regarding a mandatory presumption of dangerous or deadly weapon in certain factual situations.

4. Note that N.C. Gen. Stat. § 14-27.4 includes serious mental injury, as well as physical or bodily injury. *State v. Boone*, 307 N.C. 198 (1982), held that, "proof of the element of infliction of 'serious personal injury' . . . may be met by the showing of mental injury as well as bodily injury," but that, "in order to support a jury finding of serious personal injury because of injury to the mind or nervous system, the State must ordinarily offer proof that such injury was not only caused by the defendant but that the injury extended for some appreciable time beyond the incidents surrounding the crime itself." If the state relies on such a theory of personal injury, the judge should instruct the jury in accordance with the rule set forth in *Boone*, above.

5. If there are other lesser included offenses, the last phrase should be, "You would not return a verdict of guilty of second degree sexual offense, but would consider whether the defendant is guilty of"

