

239.55B FELONIOUS CHILD ABUSE BY A SEXUAL ACT BY A [PARENT] [LEGAL GUARDIAN]. FELONY.

The defendant has been charged with felonious child abuse by a sexual act by a [parent] [legal guardian].

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

First, that the defendant was the [parent] [legal guardian] of the child.<sup>1</sup>

Second, that at the time that child had not yet reached the child's sixteenth birthday.

And Third, that the defendant [committed] [allowed the commission of] a sexual act upon that child. A sexual act<sup>2</sup> includes

- 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.]<sup>3</sup>
- 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.]
- e. [vaginal intercourse, which is penetration, however slight, of the female sex organ by the male sex organ. (The actual emission of semen is not necessary.)]

f. [any penetration, however slight, by an object into the [genital] [anal] opening of a person's body.]

Further, a sexual act is an [immoral, improper or indecent [touching] [act] by the defendant upon the child] (or) [inducement by the defendant of an immoral or indecent touching by the child for the purpose of arousing or gratifying sexual desire].

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant was [the parent] [the legal guardian] of the child, that child had not reached the child's sixteenth birthday, and that the defendant [committed] [allowed the commission of] a sexual act upon the child, 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.

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1. Where a legal guardian is involved, the State must prove legal guardianship, that is defendant was a legally appointed guardian. See N.C. Gen. Stat. § 35A.

2. N.C.G.S. § 14-318.4(a2) does not define the term "sexual act" for purposes of felonious child abuse. In *State v. Alonzo*, 373 N.C. 437, 838 S.E.2d 354(2020), the defendant challenged the trial court's instruction to the jury, taken from this instruction, which defined "sexual act" as "an [immoral, improper or indecent [touching] [act] by the defendant upon the child] (or) [inducement by the defendant of an immoral or indecent touching by the child for the purpose of arousing or gratifying sexual desire]." The defendant argued that the appropriate definition of "sexual act" was the one in N.C.G.S. § 14-27.1(4), which explains that the term "sexual act" includes "cunnilingus, fellatio, anilingus, or anal intercourse, but does not include vaginal intercourse". The Supreme Court affirmed the trial court and refused to hold that the trial court's challenged instruction was improper. For that reason, this instruction retains the language challenged by the defendant in *Alonzo* and quoted in the first sentence of this footnote.

In rejecting the defendant's argument in *Alonzo*, the Supreme Court explained that the definition of "sexual act" in N.C.G.S. § 14-27.1(4), which is contained in Article 7A, is not applicable to offenses under N.C.G.S. § 14-318.4(a2), which is contained in a separate article, Article 39. The Court in *Alonzo*, while explaining that the definition of "sexual act" in

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N.C.G.S. § 14-27.1(4) did not apply and refusing to overturn the trial court’s instruction, did not set out a definition of the term for purposes of felonious child abuse. While the Supreme Court in *Alonzo* did not specifically define “sexual act,” the Pattern Jury Committee reads that decision, as well as prior decisions from the Court of Appeals, to mean that the definition of “sexual act” for purposes of felonious child abuse would include all of the sexual conduct described in N.C.G.S. § 14-27.1(4), as well as vaginal intercourse. See *State v. McLamb*, 234 N.C. App. 753, 760 S.E.2d 337 (2014) (holding that the “the General Assembly intended the term ‘sexual act,’ as it is used in section 14-318.4(a2) of Article 39, to include vaginal intercourse”). Accordingly, this instruction’s definition of “sexual act” now includes the general description challenged by the defendant in *Alonzo*, as well as the specifically delineated conduct included in N.C.G.S. § 14-27.1(4), plus vaginal intercourse.

