207.11A ATTEMPTED FIRST DEGREE FORCIBLE RAPE (WEAPON, SERIOUS INJURY OR MULTIPLE ASSAILANTS) COVERING ATTEMPTED SECOND DEGREE FORCIBLE RAPE AS A LESSER INCLUDED OFFENSE. (OFFENSES ON OR AFTER DEC 1, 2015) FELONIES.

NOTE WELL: This instruction is valid for offenses committed on or after December 1, 2015. For offenses occurring before December 1, 2015, use N.C.P.I.—Crim. 207.11.

Marriage is not a defense to this offense. N.C. Gen. Stat. § § 14-27.34 (2015).

The defendant has been charged with attempted first degree forcible rape.

Under the law and the evidence in this case, it is your duty to return one of the following verdicts:

(1) guilty of attempted first degree forcible rape;

(2) guilty of attempted second degree forcible rape; or

(3) not guilty.

For you to find the defendant guilty of attempted first degree forcible rape, the State must prove three things beyond a reasonable doubt:

First, that the defendant intended to engage in vaginal intercourse with the alleged victim by force without the alleged victim's consent and against the alleged victim's will. (Consent induced by fear is not consent at law). 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 at the time the defendant had this intent, the defendant performed an act which was calculated and designed to bring about vaginal intercourse by force and against the will of the alleged victim and which came so close to bringing it about that in the ordinary and likely course of things the defendant would have completed such intercourse had the defendant not been stopped or prevented from completing his apparent course of action.

(Mere preparation or planning is not enough to constitute such an act, but the act need not necessarily be the last act required to complete the offense.)

And Third, 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 a 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.[1] A dangerous or deadly weapon is a weapon which is likely to cause death or serious bodily injury. (In determining whether a particular object is a dangerous or deadly weapon you should consider its nature,

the manner in which it was used, and the size and strength of the defendant as compared with the alleged victim).]]

(B) [inflicted serious personal[2] injury upon the alleged victim or any other person injured.]

(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 rape was attempted and knowingly [advised] [encouraged] [instigated] [aided] him to commit the crime] (or) [though not physically present at the time the rape was attempted, shared the defendant's criminal purpose and to the defendant's knowledge was aiding or was in a position to aid him at the time the rape was attempted.]

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant intended to have vaginal intercourse with the alleged victim by force and against the alleged victim’s will and that the defendant performed [an act] [acts] which [was] [were] calculated and designed to bring about vaginal intercourse by force and against the victim's will and would have resulted in such intercourse had the defendant not been [stopped] [prevented] from completing his apparent course of action, and that the defendant

(A) [employed] [displayed] a [weapon] [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(s).]

it would be your duty to return a verdict of guilty of attempted first degree forcible rape. 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 attempted first degree forcible rape but would determine whether the defendant is guilty of attempted second degree forcible rape which differs from attempted first degree forcible rape 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(s)].

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant intended to have vaginal intercourse with the alleged victim by force and against the alleged victim’s will and that the defendant performed [an act] [acts] which [was] [were] calculated and designed to bring about vaginal intercourse by force and against the victim's will and would have resulted in such intercourse had the defendant not been [stopped] [prevented] from completing his apparent course of action it would

be your duty to return a verdict of guilty of attempted second degree forcible rape. 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.[3]

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1. See State v. Williams, 335 N.C. 518 (1994), regarding a mandatory presumption of dangerous or deadly weapon in certain factual situations.

2. Note that N.C. Gen. Stat. § 14-27.2 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.

3. 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.