Trying a B1 Sexual Assault Case

Jury Instructions

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I have been asked to speak to the conference about the pattern jury instructions that should be given as a result of the fact pattern which is presented. The fact pattern indicates that Randall Sorghum has been charged with first degree statutory rape, first degree statutory sex offense, statutory rape of a 13, 14 or 15-yearold, statutory sex offense of 13, 14, or 15-year-old, incest, and six counts of engaging in indecent liberties with a minor.

He's also charged with one count of first degree statutory sex offense against Kayla Winston, a child age four years. I first should give you the caveat that as of December 1, 2015 many of the statutes that are applicable to this fact pattern have changed. I suggest that you take a look at those statutes that have been recodified in lieu of the old statutes. The old statutes still would be applicable to offenses occurring prior to December 1, 2015.

The first case charges Randall Sorghum first degree statutory rape. In looking at the pattern jury instructions I do not believe that Pattern Jury Instruction - Criminal Number 207.15 is applicable as to Ashley Millingham. Hereinafter PJI Criminal Number ____. This is because this pattern instruction requires that the victim to be a child under the age of 13 years. The fact pattern shows that Ashley was 13 or 14 years of age at the time of the acts. You should know that General Statute 14-27.2A has been recodified as General Statutes Section 14-27.25 and the new statute requires that the victim be 15 years of age or less, and the defendant at least 12 years of age and at least six years older than the victim. (Thus, the new statute would be applicable both to Ashley and Kayla). Therefore, pattern instruction number 207.15 would not be applicable as to Ashley Millingham. However, this pattern instruction 207.15 would be applicable as to the minor child Kayla Winston because she was four years of age at the time of the alleged acts.

Also PJI Criminal number 207.15.1 deals with first degree rape of a female under the age of 13 years. This instruction has the elements of vaginal intercourse with a child under the age

of 13 years with the defendant at least 12 years of age and at least four years older than the victim. Therefore this instruction would not be applicable as to Ashley, but could be utilized in the prosecution of the defendant for the acts perpetrated upon Kayla Winston.

The pattern jury criminal instruction that I believe does have applicability as to the acts perpetrated upon Ashley Millingham is PJI Criminal number 207.15.2 which is entitled "Statutory Rape Against a Victim Who Was 13, 14, Or 15 Years of Age." Again this instruction has as its elements vaginal intercourse with a victim that was 13, 14, or 15 years old at the time and a defendant that was at least six years older than the victim and the defendant was not lawfully married to the victim. This instruction would be applicable to the prosecution of the defendant as to acts perpetrated upon Ashley, but would not be applicable as to the prosecution of the defendant as to acts perpetrated upon Kayla because Kayla was not 13, 14, or 15 years of age at the time of the acts.

The defendant is also charged with first degree statutory sex offense. PJI Criminal number 207.40 is entitled "First Degree Sexual Offense - Weapon, Serious Injury Or Multiple Assailants." I do not believe that this instruction covers our fact pattern because the fact pattern does not indicate that force was utilized to overcome any resistance the victim may make. Furthermore the fact pattern does not indicate that the defendant employed or displayed a deadly or dangerous weapon or inflicted serious personal injury or was aided or abetted by more than one person; therefore, I do not believe that this instruction has applicability to this fact pattern.

PJI Criminal number 207.15.3 is entitled "Statutory Sex Offense Against a Victim Who Was 13, 14 Or 15 Years Old." This instruction has as its elements that the defendant engaged in a sexual act with the victim, that the victim was 13, 14 or 15 years old and that the defendant was (at least six) (more than four but less than six) years older than the victim and the defendant was not married to the victim. Because of the different ages of Ashley and Kayla, I

believe this instruction would have applicability as to Ashley, but not as to Kayla because of the ages of the children. Again it should be noted that effective December 1, 2015 the statute has been recodified as General Statute Section 14-27.25 to include statutory sex offense of a person 15 years of age or younger. The new statute would have applicability as to both children.

PJI Criminal number 207.45 is entitled "Sexual Offense With a Child." This requires that the defendant perpetrate a sexual act upon the child when the child is under the age of 13 years. Therefore I do not believe it has applicability as to Ashley but it would be applicable as to Kayla.

PJI Criminal number 207.45.1 is entitled First Degree Sexual Offense – Child Under the Age of 13 Years. The statute or the instruction requires the perpetration of a sexual act by a defendant at least twelve years old and at least four years older that the child and the child is under the age of 13. Thus it could be utilized in the prosecution of the defendant for acts perpetrated upon Kayla, but not Ashley.

Next, the defendant is charged with incest. From the fact pattern it appears that the defendant could be held criminally responsible for acts perpetrated against both Ashley and Kayla.

PJI Criminal number 226.20 deals with incest and requires vaginal intercourse by a defendant with a person who is his child or step-child (or certain other relatives) with the defendant at the time having knowledge of this relationship. Since Krista Sorghum is married to Randall Sorghum, and since both of the children, Ashley and Kayla are the biological children of Krista then they are legally the step-children of Randall Sorghum. Therefore, PJI Criminal number 226.20 could be utilized for the prosecution of Randall Sorghum for incest with either Ashley or Kayla.

PJI Criminal number 226.20A deals with incest with the step-child(or certain other relatives) when the defendant knew that relationship and the victim was a child under the age

of 13 years. Therefore, it is my opinion that this instruction could be used in the prosecution of Randall Sorghum for acts perpetrated upon Kayla Winston, but not as to Ashley Millingham.

PJI Criminal number 226.20B deals with incest with a person thirteen, fourteen or fifteen years of age. It requires vaginal intercourse by a defendant with his child, stepchild (or certain other relatives) and the defendant, at the time of the act, knew the relationship. Since the victim of the incest must have been a child of the age of thirteen, fourteen or fifteen this instruction would have applicability as to Ashley but not Kayla.

General Statute 14-178 prescribes different punishments for incest. It is a B1 Felony if the child is under thirteen years of age and the defendant is at least twelve years of age and at least four years older than the child when it occurred. It also is a B1 Felony if the child is 13, 14 or 15 years old and the defendant is at least 6 years older than the child. It is a Class C Felony if the child is 13, 14 or 15 years old and the defendant is at least 4 but less than 6 years older than the child. All other cases of incest are a Class F Felony.

Finally the defendant, Randall Sorghum is charged with taking an indecent liberty with a child. I believe that pattern jury instruction criminal number 226.85 should be utilized. This instruction is entitled "Taking an Indecent Liberty With a Child." It requires that the defendant took indecent liberties with a child that had not reached her 16th birthday and the defendant was at least five years older than the child and had reached his sixteenth birthday at the time of the acts. Therefore, it is my opinion that this instruction could be utilized for the prosecution of Randall Sorghum as to the indecent liberties taken either with Ashley or Kayla.

N.C.P.I.-Crim 207.15
RAPE OF A CHILD. FELONY.
JUNE 2009
N.C. Gen. Stat. § 14-27.2A

207.15 RAPE OF A CHILD. FELONY.

The defendant has been charged with rape of a child.

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 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 at the time of the acts alleged, the victim was a child under the age of thirteen years.[1]

And Third, that at the time of the acts alleged, the defendant was at least eighteen years of age.

If you find from the evidence beyond reasonable doubt that on or about the alleged date, the defendant engaged in vaginal intercourse with the victim and that at that time the victim was a child under the age of thirteen years and that the defendant was at least eighteen years of age, 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.[2]

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1. A child would be under the age of thirteen if she had not yet reached her thirteenth birthday. *In re Robinson*, 120 N.C. App. 874 (1995).

2. N.C. Gen. Stat. § 14-27.2A provides that N.C. Gen. Stat. § 14-27.2(a)(1) is a lesser included offense. Caution should be used in considering whether a lesser included offense instruction is warranted. For example, N.C. Gen. Stat. § 14-27.2(a)(1) differs from this offense in that the State need not prove that the defendant is 18 or older. If there are lesser included offenses, change the last phrase to ". . . you would not return a verdict of guilty of rape of a child."

N.C.P.I.-Crim 207.15.1
FIRST DEGREE RAPE-FEMALE UNDER THE AGE OF THIRTEEN YEARS. FELONY.
JANUARY 2002
N.C. Gen. Stat. § 14-27.2(a)(1)

207.15.1 FIRST DEGREE RAPE - FEMALE UNDER THE AGE OF THIRTEEN YEARS. FELONY.

NOTE WELL: Use the following instruction when the alleged crime was committed between April 18, 1983 and July 10, 1983 or on or after October 1, 1983.

The defendant has been charged with first 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 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 at the time of the acts alleged, the victim was a child under the age of thirteen years.[1]

And Third, that at the time of the acts alleged, the defendant was at least twelve years old and was at least four years older than the victim.

If you find from the evidence beyond reasonable doubt that on or about the alleged date, the defendant engaged in vaginal intercourse with the victim and that at that time the victim was a child under the age of thirteen years and that the defendant was at least twelve years old and was at least four years older than the victim, 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.[2]

N.C.P.I.-Crim 207.15.1
FIRST DEGREE RAPE-FEMALE UNDER THE AGE OF THIRTEEN YEARS. FELONY.
JANUARY 2002
N.C. Gen. Stat. § 14-27.2(a)(1)

NOTE WELL: If the indictment alleges both forcible and statutory rape, and if there is any question as to the age of the victim, and if there is evidence of a forcible rape, give either N.C.P.I.-Crim. 207.10 or 207.20 as an alternative instruction.

In an appropriate case the judge should use N.C.P.I.-Crim. 207.15A.1 to charge on attempted first degree (statutory) rape as a lesser included offense.

Taking Indecent Liberties with a Child, N.C. Gen. Stat. § 14-202.1, Assault on a Female, N.C. Gen. Stat. § 14-33(c)(2), and Assault on a Child Under Twelve, N.C. Gen. Stat. § 14-33(c)(3), are still crimes. However, in State v. Weaver, *306 N.C. 629 (1983), the North Carolina Supreme Court held that none of those crimes is a lesser included offense of N.C. Gen. Stat. § 14-27.2(a)(1).*

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1. A child would be under the age of thirteen if she had not yet reached her thirteenth birthday. *In re Robinson*, 120 N.C. App. 874 (1995).

2. If there are lesser included offenses, change the last phrase to ". . . you would not return a verdict of guilty of first degree rape."

N.C.P.I.-Crim 207.15.2
STATUTORY RAPE AGAINST A VICTIM WHO WAS THIRTEEN, FOURTEEN, OR FIFTEEN YEARS OLD. FELONY.
MARCH 2002
N.C. Gen. Stat. § 14-27.7A

207.15.2 STATUTORY RAPE AGAINST A VICTIM WHO WAS THIRTEEN, FOURTEEN, OR FIFTEEN YEARS OLD. FELONY.

NOTE WELL: Use this instruction for offenses occurring on or after December 1, 1995.

The defendant has been charged with statutory rape of a victim who was [thirteen], [fourteen], [fifteen] years old at the time of the offense.

For you to find the defendant guilty of statutory rape of a victim who was [thirteen] [fourteen] [fifteen] years old, the State must prove four things beyond a reasonable doubt:

First, that the defendant engaged in vaginal intercourse with the 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 at the time of the act, the victim was [thirteen] [fourteen] [fifteen] years old.

Third, that at the time of the act, the defendant was [at least six] [more than 4 but less than six] years older than the victim.

And Fourth, that at the time of the act, the defendant was not lawfully married to the victim.

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 victim when the victim was [thirteen] [fourteen] [fifteen] years old, and that the defendant was [at least six] [more than four but less than six] years older than the victim and was not lawfully married to the victim, 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.

N.C.P.I.-Crim 207.40
FIRST DEGREE SEXUAL OFFENSE-WEAPON, SERIOUS INJURY OR MULTIPLE ASSAILANTS, COVERING SECOND DEGREE SEX OFFENSE AS A LESSER INCLUDED OFFENSE. FELONY.
MAY 2001
N.C. Gen. Stat. §§ 14-27.4, 14-27.5

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

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.][2]

(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) [any penetration, however slight, by an object into the [genital] [anal] opening of a person's body.][3]

Second, that the defendant used or threatened to use force sufficient to overcome any resistance the 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 victim did not consent and it was against her will. (Consent induced by fear is not consent at law.)

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 victim.)]]

(2) [an object that the victim reasonably believed was a dangerous or deadly weapon.[4] 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 victim.)]]

(B) [inflicted serious personal injury[5] upon the [the 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] *him* 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 *him* 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 victim and that *he* did so by [force] [threat of force] and that this was sufficient to overcome any resistance which the victim might make, that the victim did not consent and it was against her will, and that the defendant

(A) [employed] [displayed] a [weapon] [an object] (and that [this was] [the victim reasonably believed that this was] a dangerous or deadly weapon).]

(B) [inflicted serious personal injury upon [the 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 victim reasonably believed was a dangerous or deadly weapon]]

(B) [inflicted serious personal injury upon [the 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 victim and that *he* did so by force or threat of force and that this was sufficient to overcome any resistance which the victim might make, and that the victim did not consent and it was against her 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.[6]

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.

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

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

N.C.P.I.-Crim 207.40
FIRST DEGREE SEXUAL OFFENSE-WEAPON, SERIOUS INJURY OR MULTIPLE ASSAILANTS, COVERING SECOND DEGREE SEX OFFENSE AS A LESSER INCLUDED OFFENSE. FELONY.
MAY 2001
N.C. Gen. Stat. §§ 14-27.4, 14-27.5

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5. 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.

6. 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."

N.C.P.I.-Crim 207.15.3
STATUTORY SEXUAL OFFENSE AGAINST A VICTIM WHO WAS THIRTEEN, FOURTEEN, OR FIFTEEN YEARS OLD. FELONY.
MARCH 2002
N.C. Gen. Stat. § 14-27.7A

207.15.3 STATUTORY SEXUAL OFFENSE AGAINST A VICTIM WHO WAS THIRTEEN, FOURTEEN, OR FIFTEEN YEARS OLD. FELONY.

NOTE WELL: Use this instruction for offenses occurring on or after December 1, 1995.

The defendant has been charged with statutory sexual offense against a victim who was [thirteen] [fourteen] [fifteen] years old at the time of the offense.

For you to find the defendant guilty of this 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.][2]

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

N.C.P.I.-Crim 207.15.3
STATUTORY SEXUAL OFFENSE AGAINST A VICTIM WHO WAS THIRTEEN, FOURTEEN, OR FIFTEEN YEARS OLD. FELONY.
MARCH 2002
N.C. Gen. Stat. § 14-27.7A

Second, that at the time of the act[s], the victim was [thirteen] [fourteen] [fifteen] years old.

Third, that at the time of the act[s], the defendant was [at least six] [more than four but less than six] years older than the victim.

And Fourth, that at the time of the act[s], the defendant was not lawfully married to the victim.

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 victim who was [thirteen] [fourteen] [fifteen] years old, and that the defendant was [at least six] [more than four but less than six] years older than the victim, and was not lawfully married to the victim, 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. *State 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.P.I.-Crim. 226.10).

2. *State 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.

N.C.P.I.-Crim 207.45
SEXUAL OFFENSE WITH A CHILD. FELONY.
JUNE 2009
N.C. Gen. Stat. § 14-27.4A

207.45 SEXUAL OFFENSE WITH A CHILD. FELONY.

The defendant has been charged with sexual offense with a child.

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 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.][2]

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

Second, that at the time of the act[s], the victim was a child under the age of thirteen years.

And Third, that at the time of the act[s], the defendant was at least eighteen years of age.

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 victim

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who was a child under the age of thirteen years, and that the defendant was at least eighteen years of age 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.[3]

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1. *State 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.P.I.-Crim. 226.10).

2. *State 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. N.C. Gen. Stat. § 14-27.4A provides that N.C. Gen. Stat. § 14-27.4(a)(1) is a lesser included offense. Caution should be used in considering whether a lesser included offense instruction is warranted. For example, N.C. Gen. Stat. § 14-27.4(a)(1) differs from this offense in that the State need not prove that the defendant is 18 or older. If there are lesser included offenses, change the last phrase to ". . . you would not return a verdict of guilty of sexual offense with a child."

N.C.P.I.-Crim 207.45.1
FIRST DEGREE SEXUAL OFFENSE-CHILD UNDER THE AGE OF THIRTEEN YEARS. FELONY.
JANUARY 2004
N.C. Gen. Stat. § 14-27.4

207.45.1 FIRST DEGREE SEXUAL OFFENSE - CHILD UNDER THE AGE OF THIRTEEN YEARS. FELONY.

NOTE WELL: N.C. Gen. Stat. § 14.27.4 covers sexual acts other than vaginal intercourse and applies regardless of the gender of the defendant or the victim. Use this instruction only for crimes committed between April 18, 1983 and July 10, 1983 or on or after October 1, 1983. See the Directory of Rape and Sexual Offense Instructions preceding N.C.P.I.-Crim. 207.10 for crimes committed during other periods.

The defendant has been charged with first degree sexual offense.

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 a sexual act with the victim. A sexual act means

(A) [cunnilingus, which is any touching, however slight, by the lips or the 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.][2]

(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) [any penetration, however slight, by an object into the [genital] [anal] opening of a person's body.][3]

Second, that at the time of the acts alleged, the victim was a child under the age of thirteen.

And Third, that, at the time of the alleged offense the defendant was at least twelve years old, and was at least four years older than the victim.

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 victim and that at that time the victim was a child under the age of thirteen years, and that the defendant was at least twelve years old and was at least four years older than the victim it would be your duty to return a verdict of guilty. If you do not so find or if you have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty.[4]

NOTE WELL: In an appropriate case the judge should use N.C.P.I.-Crim. 207.45A.1 to charge on attempted first degree sexual offense against a child.

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1. *State 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 the Sexual Offense Statutes set out in 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. *State 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 (fellatio).

3. N.C. Gen. Stat. § 14-27.1(d) provides that it shall be an affirmative defense to the final type of sexual act that the penetration was for accepted medical purposes. If there is evidence of such a purpose, instruct accordingly at the end of this charge.

4. If there are lesser included offenses, the last phrase should read, ". . . you would not return a verdict of guilty of first degree sexual offense."

N.C.P.I.-Crim 226.20
INCEST. FELONY.
MARCH 2003
N.C. Gen. Stat. § 14-178

226.20 INCEST. FELONY.

NOTE WELL: Use this instruction for any incest alleged to have occurred before December 1, 2002. For offenses occurring after December 1, 2002, use this instruction or, if applicable, N.C.P.I.-Crim. 226.20A (victim under age 13) and 226.20B (victim 13, 14, 15 years of age).

The defendant has been charged with incest.

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

First, that the defendant had vaginal intercourse with another person. Vaginal intercourse is penetration, however slight, of the female sex organ by the male sex organ.

Second, that the person with whom *he* had vaginal intercourse was the defendant's [child] [stepchild] [legally adopted child] [grandchild] [parent] [grandparent] [uncle] [aunt] [nephew] [niece] [brother] [sister] of the [half] [whole] blood].

And Third, that the defendant knew the person was (*state relationship*).

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant had vaginal intercourse with a person who was (*state relationship*), and that the defendant knew the person was (*state relationship*), 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, then it would be your duty to return a verdict of not guilty.

N.C.P.I.-Crim 226.20A
INCEST WITH A PERSON UNDER THE AGE OF THIRTEEN YEARS. FELONY.
MARCH 2003
N.C. Gen. Stat. § 14-178

226.20A INCEST WITH A PERSON UNDER THE AGE OF THIRTEEN YEARS. FELONY.

NOTE WELL: Use this instruction for offenses occurring on or after December 1, 2002. For offenses occurring before that date, use N.C.P.I.-Crim. 226.20.

The defendant has been charged with incest with a person under the age of thirteen years.

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

First, that the defendant had vaginal intercourse with another person. Vaginal intercourse is penetration, however slight, of the female sex organ by the male sex organ.

Second, that the person with whom the defendant had vaginal intercourse was the defendant's [child] [stepchild] [legally adopted child] [grandchild] [parent] [grandparent] [[brother] [sister] of the [half] [whole] blood] [uncle] [aunt] [nephew] [niece].

Third, that the defendant knew the person was (*state relationship*).

Fourth, that at the time of the acts alleged, the victim was a child under the age of thirteen years.

And Fifth, that at the time of the acts alleged, the defendant was at least twelve years old and was at least four years older than the victim.[1]

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant had vaginal intercourse with a person who was the defendant's [child] [stepchild] [legally adopted child] [grandchild] [parent] [grandparent] [[brother] [sister] of the [half] [whole]

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blood] [uncle] [aunt] [nephew] [niece], that the defendant knew the person was (*state relationship*), and that at the time of the acts alleged the victim was a child under the age of thirteen years and the defendant was at least twelve years old and was at least four years older than the victim, then 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. No child under the age of 16 is liable under this section if the other person is at least four years older when the incest occurred. N.C. Gen. Stat. § 14-178(c).

N.C.P.I.-Crim 226.20B
INCEST WITH A PERSON [THIRTEEN] [FOURTEEN] [FIFTEEN] YEARS OF AGE. FELONY.
MARCH 2003
N.C. Gen. Stat. § 14-178

226.20B INCEST WITH A PERSON [THIRTEEN] [FOURTEEN] [FIFTEEN] YEARS OF AGE. FELONY.

NOTE WELL: Use this instruction for offenses occurring on or after December 1, 2002. For offenses occurring before that date, use N.C.P.I.-Crim. 226.20.

The defendant has been charged with incest with a person [thirteen] [fourteen] [fifteen] years of age.

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

First, that the defendant had vaginal intercourse with another person. Vaginal intercourse is penetration, however slight, of the female sex organ by the male sex organ.

Second, that the person with whom the defendant had vaginal intercourse was the defendant's [child] [stepchild] [legally adopted child] [grandchild] [parent] [grandparent] [[brother] [sister] of the [half] [whole] blood] [uncle] [aunt] [nephew] [niece].

Third, that the defendant knew the person was (state relationship).

Fourth, that at the time of the act, the victim was [thirteen] [fourteen] [fifteen] years old.

And Fifth, that at the time of the act, the defendant was [at least six][1] [more than 4 but less than six][2] years older than the victim.[3]

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant had vaginal intercourse with a person who was the defendant's [child] [stepchild] [legally adopted child]

N.C.P.I.-Crim 226.20B
INCEST WITH A PERSON [THIRTEEN] [FOURTEEN] [FIFTEEN] YEARS OF AGE. FELONY.
MARCH 2003
N.C. Gen. Stat. § 14-178

[grandchild] [parent] [grandparent] [[brother] [sister] of the [half] [whole] blood] [uncle] [aunt] [nephew] [niece], that the defendant knew the person was (*state relationship*), and that at the time of the acts alleged the victim was [thirteen] [fourteen] [fifteen] years old and that the defendant was [at least six] [more than 4 but less than six] years older than the victim, then 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, then it would be your duty to return a verdict of not guilty.

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1. A defendant who commits this offense and is at least six years older than the victim when the incest occurs is guilty of Class B1 Felony. N.C. Gen. Stat. § 14-178(b)(1)(b).

2. A defendant who commits this offense and is more than 4 but less than six years older than the victim when the incest occurs is guilty of Class C Felony. N.C. Gen. Stat. § 14-178(b)(2).

3. No child under the age of 16 is liable under this section if the other person is at least four years older when the incest occurred. N.C. Gen. Stat. § 14-178(c).

N.C.P.I.-Crim 226.85
TAKING AN INDECENT LIBERTY WITH A CHILD. FELONY.
APRIL 2003
N.C. Gen. Stat. § 14-202.1

226.85 TAKING AN INDECENT LIBERTY WITH A CHILD. FELONY.

The defendant has been charged with taking an indecent liberty with a child.

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

First, that the defendant willfully

a. [took (or attempted to take[1]) an indecent liberty with a child for the purpose of arousing or gratifying sexual desire. An indecent liberty is an [immoral, improper or indecent [touching] [act][2] by the defendant upon the child] (or) [inducement by the defendant of an immoral or indecent touching by the child].[3]

b. [committed (or attempted to commit) a lewd or lascivious act upon a child.]

Second, that the child had not reached *his* sixteenth birthday at the time in question.

And Third, that the defendant was at least five years older than the child and had reached *his* sixteenth birthday at that time.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant willfully [took (or attempted to take)] an indecent liberty with a child for the purpose of arousing or gratifying sexual desire] [committed (or attempted to commit) a lewd or lascivious act upon the child], and that at that time the defendant was at least five years older than the child and had reached *his* sixteenth birthday, but the child

had not reached *his* sixteenth birthday, 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. An appropriate instruction on attempt should be given in a case in which there has been some evidence that the defendant attempted to take an indecent liberty.

2. The N.C. Court of Appeals held that it is not necessary that there by a touching of the child by the defendant in order to constitute an indecent liberty within the meaning of N.C. Gen. Stat. § 14-202.1. *State v. Turman*, 52 N.C. App. 376 (1981) (masturbated in front of the child); *State v. Kistle*, 59 N.C. App. 724 (1982) (defendant took a photograph of a nude child).

3. *S. v. Hartness*, 326 N.C. 561 (1990), held that the trial court's instruction that an indecent liberty is an immoral, improper or indecent touching or act by defendant upon the child or an inducement by defendant of an immoral or indecent touching by the child did not violate defendant's right to a unanimous verdict since the crime of indecent liberties is a single offense which may be proved by evidence of the commission of any one of a number of acts; and the requirement of unanimity is met even if some jurors find that one type of sexual conduct occurred and others find that another transpired.