207.20 SECOND DEGREE RAPE—FORCE. (OFFENSES PRIOR TO DEC. 1, 2015) FELONY.

NOTE WELL: Where there are facts supporting the conclusion that the alleged victim was asleep or similarly incapacitated, force can be implied. In such cases, use N.C.P.I.—Crim. 207.20A.

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. 207.20B.

The defendant has been charged with second degree rape.

For you to find the defendant guilty of this offense, the state must prove three (four) 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 defendant used or threatened to use force sufficient to overcome any resistance the alleged victim might make. (The force necessary to constitute rape need not be actual physical force. Fear or coercion may take the place of physical force.)

(And) Third, that the alleged victim did not consent and it was against the alleged victim's will. (Consent induced by fear is not consent in law.)[1]

NOTE WELL: Marriage is no longer a defense where the alleged crime was committed after July 5, 1993. N.C. Gen. Stat. § 14-27.8 (1993). Do not give the fourth element for offenses occurring after July 5, 1993.

(And Fourth, that the defendant and the alleged victim were married but were living separate and apart.)

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 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, (and that the defendant and the alleged victim were married but were living separate and apart), 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]

NOTE WELL: In an appropriate case the judge should use N.C.P.I.—Crim. 201.10 to charge on an attempted second degree rape as lesser included offense under this charge. See N.C.P.I.—Crim. 207.10 for guidance.

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.

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1. *See State v. Moorman*, 320 N.C. 387, 358 S.E.2d 502 (1987); *State v. Smith*, 360 N.C. 341, 626 S.E.2d 258 (2006).

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