

210.25 FIRST DEGREE KIDNAPPING TO COMMIT [FELONY] [SERIOUS BODILY HARM] COVERING SECOND DEGREE KIDNAPPING AS A LESSER INCLUDED OFFENSE. FELONY.

NOTE WELL:

(1) Use this instruction when the indictment alleges that a purpose of kidnapping was to facilitate a felony or inflict serious bodily harm.¹ Use N.C.P.I.—Crim. 210.20 when the indictment does not so allege.

(2) Use this instruction when there is evidence that the victim was not released in a safe place, or was seriously injured, or was sexually assaulted. When there is no evidence of any of these three things, use N.C.P.I.—Crim. 210.35.

The defendant has been charged with first degree kidnapping.

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

First, that the defendant unlawfully²

1. [confined a person, that is, imprisoned [him] [her] within a given area.]
2. [restrained a person, that is restricted [his] [her] freedom of movement.]
3. [removed a person from one place to another.]³

Second, that [the person did not consent] [the person had not reached [his] [her] sixteenth birthday and [his] [her] [parent] [guardian] did not consent] to this [confinement] [restraint] [removal].⁴ (Consent (obtained) (induced) by (fraud) (fear) is not consent.)

Third, that the defendant [confined] [restrained] [removed] that person for the purpose of

1. [facilitating [defendant's] [another person's] [commission of] [flight after committing] (*name and define felony*).]
2. [doing serious bodily harm⁵ to that person.]

Fourth, that this [confinement] [restraint] [removal] was a separate, complete act, independent of and apart from the [(*name felony*)] [injury].

And Fifth, that the person [was not released by the defendant in a safe place]⁶ [had been sexually assaulted]⁷ [had been seriously injured].

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant unlawfully

1. [confining a person]
2. [restraining a person]
3. [removing a person from one place to another]

and that the person [did not consent] [had not reached his sixteenth birthday and his [parent] [guardian] did not consent] to this [confinement] [restraint] [removal]] and that this was done for the purpose of

1. [facilitating [the defendant's] [another person's] [commission of] [flight after committing] (*name felony*)]
2. [doing serious bodily harm to the person [confining] [restraining] [removing]].

and that this [confinement] [restraint] [removal] was a separate, complete act, independent of and apart from the [(*name felony*)] [injury], and that the person [confining] [restraining] [removing] [was not released by the defendant in a safe place] [had been sexually assaulted] [had been seriously injured], it would be your duty to return a verdict of guilty of first degree kidnapping. 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 kidnapping.⁸

If you do not find the defendant guilty of first degree kidnapping, you must determine whether defendant is guilty of second degree kidnapping. Second degree kidnapping differs from first degree kidnapping only in that it is unnecessary for the State to prove that the person [was not released by the defendant in a safe place] [had been sexually assaulted] [had been seriously injured].

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant unlawfully

1. [confined a person]
2. [restrained a person]
3. [removed a person from one place to another]

and that the person [did not consent] [had not reached [his] [her] sixteenth birthday and his [parent] [guardian] did not consent] to this [confinement] [restraint] [removal] and that this was done for the purpose of

1. [facilitating [the defendant's] [another person's] [commission of] [flight after committing] (*name felony*)]
2. [doing serious bodily harm to the person]

and that this [confinement] [restraint] [removal] was a separate, complete act, independent of and apart from the intended [(name felony)] [injury],⁹ it would be your duty to return a verdict of guilty of second degree kidnapping. 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.¹⁰

NOTE WELL: When there is evidence of restraint which may have been without any of the purposes required to constitute kidnapping, give

N.C.P.I.—Crim. 210.40, Felonious Restraint, and/or N.C.P.I.—Crim. 210.15, False Imprisonment, as a lesser included offense instruction.

1. In cases where the defendant is accused of both kidnapping and the felony which was the purpose of the kidnapping, see *S. v. Fulcher*, 294 N.C. 501 (1978) and *S. v. Williams*, 295 N.C. 655 (1978).

2. There will seldom be any need to state separately or elaborate on the “unlawfully” element. It means “without justification or excuse” and in most cases any facts which would establish a justification or excuse would also negate the purposes necessary to establish kidnapping under N.C. Gen. Stat. § 14-39. However, if the facts should call for further elaboration, the “unlawfully” element should be set out as a separate element.

3. See *State v. Bell*, 166 N.C. App. 261 (2004) (concluding that it was plain error for the judge to instruct the jury on restraint and removal theories of kidnapping when the indictment alleged confinement and restraint theories).

4. N.C. Gen. Stat. § 14-39 proscribes the confinement, restraint or removal of any “... person 16 years of age or over without the consent of such person, or any other person under the age of 16 years without the consent of a parent or legal custodian of such person.” Use the first bracketed alternative if the person kidnapped was 16 years of age or over and use the second bracketed phrase if the person kidnapped was under 16.

5. Serious bodily harm may be defined as “such physical injury as causes great pain or suffering.” Serious bodily harm and serious bodily injury have been used synonymously by our appellate courts in the kidnapping context. See *State v. Bonilla*, 706 S.E.2d 288, 295 (N.C. App. 2011) (holding that the definition of “serious bodily injury” provided in N.C.P.I.-Crim. 210.25, was an appropriate definition for “serious bodily harm”); *State v. Boozer*, 707 S.E.2d 756, 761-62 (N.C. App. 2011) (using “harm” and “injury” interchangeably). See also *State v. Grimes*, 874 S.E.2d 647 (N.C. App. 2022) (relying on *Bonilla* to conclude that there was no plain error in the trial court’s use and failure to define the phrase serious bodily injury in its instruction). If there is evidence as to injuries which could not conceivably be considered anything but serious, the trial judge may instruct the jury as follows: “(Describe harm) would be a serious harm.” *S. v. Johnson*, 320 N.C. 746, 751 (1987).

6. Releasing a kidnap victim when the kidnapper is aware he is cornered and outnumbered by law enforcement officials is not “voluntary” and sending her out into the focal point of their weapons is not a “safe place.” See *State v. Heatwole*, 333 N.C. 156, 423 S.E.2d 735 (1992). See also *State v. Corbett*, 168 N.C. App 117, 607 S.E.2d 281 (2005).

7. The defendant cannot be sentenced for both first degree kidnapping and sexual offense/rape if the sole basis for escalating second degree kidnapping to first degree kidnapping is the sexual offense/rape. However, in the above situation, the defendant can be sentenced for both second degree kidnapping and sexual offense/rape. See *State v. Belton*, 318 N.C. 141 (1986).

8. If no lesser included offense instructions are to be given, the last phrase should be “it would be your duty to return a verdict of not guilty.”

9. Note that it is not necessary that the felony be committed or the injury actually occur-only that such was the purpose of the defendant.

10. If there is to be an instruction on felonious restraint and/or false imprisonment, the last sentence should read “. . . you would not return a verdict of guilty of second degree kidnapping.”