

N.C.P.I.—Crim 207.40A.1

ATTEMPTED FIRST DEGREE FORCIBLE SEXUAL OFFENSE

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

CRIMINAL VOLUME

JUNE 2016

N.C. Gen. Stat. §§ 14-27.26, 14-27.27, 14-27.34

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OFFENSE. (OFFENSES ON OR AFTER DEC. 1, 2015) FELONY.

*NOTE WELL: This instruction is valid for offenses committed on  
or after December 1, 2015. For offenses committed before  
December 1, 2015, see N.C.P.I.—Crim. 207.40A.*

The defendant has been charged with attempted first degree forcible sexual offense.

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 sexual offense;
- (2) guilty of attempted second degree forcible sexual offense;
- (3) not guilty.

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

First, that the defendant intended to engage in a sexual act with the alleged victim by force and against the alleged victim's will. 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.]
- (B) [fellatio, which is any touching by the lips or tongue of one

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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) [any penetration, however slight, by an object into the [genital] [anal] opening of a person's body.]<sup>1</sup>

Second, that at the time the defendant had this intent, the defendant performed an act which was calculated and designed to bring about a sexual act by force and against the victim's will, and which came so close to bringing it about that in the ordinary and likely course of things the defendant would have completed the sexual act had the defendant not been stopped or prevented from completing the defendant's apparent course of action.

(Mere preparation or mere 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 the particular object is a dangerous or deadly weapon, you should consider the nature of

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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 alleged victim reasonably believed was a dangerous or deadly weapon.<sup>2</sup> 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 alleged victim.))]

(B) [inflicted serious personal injury<sup>3</sup> upon [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] the defendant 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 the defendant 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 intended to engage in a sexual act 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

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designed to bring about a sexual act by force and against the victim's will  
and would have resulted in such an act had the defendant not been  
[stopped] [prevented] from completing *the defendant's* apparent course of  
action, and that the defendant

- (A) [employed] [displayed] a [weapon] [an 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] [other persons].]

it would be your duty to return a verdict of guilty of attempted first degree  
forcible 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  
attempted first degree forcible sexual offense but would consider whether  
the defendant is guilty of attempted second degree forcible sexual offense.  
Attempted second degree forcible sexual offense differs from attempted first  
degree forcible sexual offense 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]]

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(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 intended to engage in a sexual act 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 a sexual act by force and against the alleged victim's will and would have resulted in such an act had the defendant not been [stopped] [prevented] from completing the defendant's apparent course of action, it would be your duty to return a verdict of guilty of attempted second degree forcible 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.<sup>4</sup>

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1 N.C. Gen. Stat. § 14-27.20 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.

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

3 Note the term "serious personal injury" includes serious mental injury, as well as physical or bodily injury. *State v. Boone*, 307 N.C. 198 (1982), held in relation to N.C. Gen. Stat. § 14-27.2, the predecessor to N.C. Gen. Stat. § 14-27.21, 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.

4 In *S v. Wortham*, 318 N.C. 669 (1987), the North Carolina Supreme Court held that assault on a female is not a lesser included offense of attempted rape, because, *inter alia*, the defendant in the crime of assault on a female must be first, a male, and second, at

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least 18 years old. Neither of these is an element of sexual offense.

Simple assault may still be an appropriate lesser included offense. If so, use  
N.C.P.I.-Crim. 208.40.