

N.C.P.I.—Crim 207.70

FELONIOUS SEXUAL ACTIVITY WITH A PERSON IN DEFENDANT'S CUSTODY.
(OFFENSES PRIOR TO DEC. 1, 2015) FELONY.

CRIMINAL VOLUME

REPLACEMENT JUNE 2016

N.C. Gen. Stat. § 14-27.7

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NOTE WELL: N.C. Gen. Stat. § 14-27.7 involves a alleged victim who was in the defendant's custody. Consent is no defense to a charge under this section.

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. 207.70A.

The defendant has been charged with feloniously engaging in [vaginal intercourse] [a sexual act] with a [person over whom [*the defendant*] [the defendant's employer] had assumed custody] [minor over whom the defendant had assumed the position of a parent residing in the home].

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

First, that the defendant

- a) [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.)]
- b) [engaged in a sexual act with the alleged victim. A sexual act means [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
 - [fellatio, which is any touching, by the lips or tongue of one person and the male sex organ of another.]²
 - [analingus, which is any contact between the tongue or lips of one person and the anus of another.]

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- [anal intercourse, which is any penetration, however slight, of the anus of one person by the male sex organ of another.]
- [any penetration, however slight, by an object into the [genital] [anal] opening of a person's body.]]³

NOTE WELL: The remaining elements of this crime are set forth in this instruction in three separate options, each containing a different number of elements. Use Option A when the alleged victim was in the defendant's personal custody. Use Option B when the alleged victim was in the custody of the defendant's employer. Use Option C when the alleged victim was a minor and the defendant had assumed the position of parent in the alleged victim's home.

[OPTION A:

And Second, the defendant had custody⁴ of the alleged victim. Custody is the care, keeping or control of one person by another.]

[OPTION B:

And Second, that the defendant's employer had custody of the alleged victim. Custody is the care, keeping or control of one person by another.]

[OPTION C:

Second, that the alleged victim was a minor. A minor is someone who has not attained the age of eighteen years (or who has not otherwise been emancipated).

And Third, that the defendant had assumed the position of a parent in the home where the alleged victim resided.]

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NOTE WELL: Options end; continue here in all cases.

(Consent is no defense to this charge.)

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant engaged in [vaginal intercourse] [a sexual act] with the alleged victim and that at that time

- a) [the defendant had custody of the victim.]
- b) [the defendant's employer had custody of the alleged victim.]
- c) [the alleged victim was less than eighteen years of age and had not been emancipated and was thereby a minor, and that the defendant had assumed the position of a parent in the home where the alleged victim resided.]

it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable doubt about one or more of these things, it would be your duty to return a verdict of not guilty.

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), but when the bill of indictment charges anal intercourse, Warren infers that crime against nature is a lesser included offense of anal intercourse.

3 N.C. Gen. Stat. § 14-27.1(d) 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 "Custody" of the alleged victim is the only extra element the State must prove under this variation of N.C. Gen. Stat. § 14-27.7. The statute does not define custody. The concept evidently goes beyond quasi-parental custody of minors, since such custody of minors is covered by another variation under N.C. Gen. Stat. § 14-27.7. It appears to be intended to make criminal all sexual activity of persons having legal custody, such as guardians, jailers, or employees of mental institutions, with their wards.

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For the purposes of this statute, the word custody also applies to voluntary patients in private hospitals. See *State v. Raines*, 319 N.C. 258 (1987).