

217.20 ROBBERY WITH A FIREARM.¹ FELONY.

The defendant has been charged with robbery with a firearm, which is taking and carrying away the personal property of another from his/her person or in his/her presence without his/her consent by endangering or threatening a person's life with a firearm, the taker knowing that he/she was not entitled to take the property and intending to deprive another of its use permanently.

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

First, that the defendant took property from the person of another or in the person's presence.²

Second, that the defendant carried away the property.³

Third, that the person did not voluntarily consent to the taking and carrying away of the property.

Fourth, that the defendant knew that defendant was not entitled to take the property.

Fifth, that at the time of taking the defendant intended to deprive that person of its use permanently.⁴

Sixth, that the defendant had a firearm in defendant's possession at the time defendant obtained the property (or that it reasonably appeared to the victim that a firearm was being used, in which case you may infer that the said instrument was what the defendant's conduct represented it to be).⁵

And Seventh, that the defendant obtained the property by endangering or threatening the life of [that person] [another person] with the firearm.⁶

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant had in defendant's possession a firearm

and took and carried away property from the person or presence of a person without that person's voluntary consent by endangering or threatening [that person] [another person's] life with the use or threatened use of a firearm, the defendant knowing that defendant was not entitled to take the property and intending to deprive that person of its use permanently, 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.⁷

1 This instruction is to be used when the robbery was completed. If there may have been only an attempt, which is also punishable under N.C. Gen. Stat. § 14-87, N.C.P.I.-Crim. 217.25 should be used. If there is conflicting evidence on this point, both instructions may be appropriate.

2 If there is evidence of conduct which would constitute "taking" but there is also evidence that the defendant's conduct fell short of what would constitute "taking," add the following to this element: "To constitute a taking the defendant must have the property in his possession or under his control, if only for an instant. There must be a severance of the property from the owner's possession." See *State v. Carswell*, 296 N.C. 101 (1978) and *State v. Barnes*, 345 N.C. 146, 478 S.E.2d 188 (1996).

3 If there is some dispute as to asportation, the jury should be told that the slightest movement is sufficient.

4 In the event there is some dispute as to permanent deprivation, the jury should be told that temporary deprivation will not suffice. *But, cf. S. v. Smith*, 268 N.C. 167 (1966).

5 See *State v. Williams*, 335 N.C. 518 (1994), regarding a mandatory presumption of dangerous or deadly weapon in certain factual situations.

6 Where use of the firearm is in issue, give the following charge:

"Mere possession of the firearm does not, by itself, constitute endangering or threatening the life of the victim." *State v. Gibbons*, 303 N.C. 484 (1981).

Where this fact is in issue, an instruction on the lesser included offense of common law robbery should also be given.

7 If there is to be instruction on lesser included offenses, the last phrase should be: "... you will not return a verdict of guilty of robbery with a firearm." In *State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988), the North Carolina Supreme Court *overruling State v. Hurst*, 320 N.C. 589 (1987), held that larceny and common law robbery are lesser-included offense of armed robbery. N.C. Gen. Stat. § 14-87(a1) provides that attempted armed robbery with a dangerous weapon is a lesser-included offense of armed robbery. Accordingly, instructions on these and other lesser-included offenses should be given when raised by the evidence.