

207.20A.1 SECOND DEGREE FORCIBLE RAPE (ALLEGED VICTIM ASLEEP OR SIMILARLY INCAPACITATED). (OFFENSES ON OR AFTER DEC. 1, 2015) FELONY.

NOTE WELL: This instruction is intended for use where there is some evidence that the alleged victim was asleep or similarly incapacitated. Where there are no facts supporting the conclusion that the alleged victim was asleep or otherwise incapacitated, use N.C.P.I.—Crim. 207.20.

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. 207.20A.

NOTE WELL: For offenses committed on or after December 1, 2019, N.C.G.S. § 14-27.20 defines "against the will of the other person" as either: (1) without the consent of the other person or (2) after consent is revoked by the other person, in a manner that would cause a reasonable person to believe consent is revoked. For the period between December 1, 2015 and December 1, 2019, the consent element of these offenses would use the following language: "that the alleged victim did not consent, and it was against the alleged victim's will."

The defendant has been charged with second degree forcible rape.

For you to find the defendant guilty of this offense, the state must prove three 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 at this time, the alleged victim was asleep or similarly incapacitated.

NOTE WELL: With regard to the Third element below, for offenses committed before December 1, 2019, delete the italicized language.

And Third, that the alleged victim did not consent and it was against the alleged victim's will, *that is, that the intercourse was [without consent of the alleged victim] [after consent was revoked by the alleged victim, in a manner that would cause a reasonable person to believe consent was revoked]* (Consent induced by fear is not consent in law.)¹

NOTE WELL: Marriage is not a defense to this offense. N.C. Gen. Stat. § 14-27.34 (2015).

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, that at that time the alleged victim was asleep or similarly incapacitated, and that the alleged victim did not consent and it was against the alleged victim's will, 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.*

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 rape, but would consider whether the defendant is guilty of"

