

207.25A SECOND-DEGREE FORCIBLE RAPE—ALLEGED VICTIM HAS A MENTAL DISABILITY, IS MENTALLY INCAPACITATED OR PHYSICALLY HELPLESS. (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, use N.C.P.I.—Crim. 207.25.

*NOTE WELL: For offenses committed on or after December 1, 2019, N.C.G.S. § 14-27.20(2) defines "mentally incapacitated" as a victim who due to **any act** is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting the act of vaginal intercourse or a sexual act. For the period between December 1, 2018 and December 1, 2019, "mentally incapacitated" is defined as a victim who due to **(i) any act committed upon the victim or (ii) a poisonous or controlled substance provided to the victim without the knowledge or consent of the victim** is rendered substantially incapable of either appraising the nature of his or her conduct, or resisting the act of vaginal intercourse or sexual act.*

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 the alleged victim

- (A) had a mental disability. A person has a mental disability if the person suffers from [an intellectual disability] [a mental disorder] and this [intellectual disability] [mental disorder] temporarily or permanently

renders the person substantially incapable of [appraising the nature of the person's conduct] [resisting the act of vaginal intercourse] [communicating unwillingness to submit to the act of vaginal intercourse] [resisting a sexual act]^{1.}²

NOTE WELL: With regard to element (b) below, for offenses committed on or after December 1, 2018 and before December 1, 2019, delete "any act" and substitute the following language: [any act committed upon the person] [a poisonous³ or controlled substance provided to the person without their knowledge or consent].

- (B) [was mentally incapacitated. A person is mentally incapacitated when, due to any act, the person is rendered substantially incapable of [appraising the nature of the person's conduct] [resisting the act of vaginal intercourse] [resisting a sexual act].]⁴
- (C) [was physically helpless. A person is physically helpless if the person is [unconscious] [physically unable to resist an act of vaginal intercourse] [physically unable to communicate unwillingness to submit to an act of vaginal intercourse] [physically unable to resist a sexual act].]⁵

And Third, that the defendant knew or should reasonably have known that the alleged victim [had a mental disability] [was mentally incapacitated] [was physically helpless.]

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 and at that time

- (A) [the alleged victim suffered from [an intellectual disability] [a mental disorder] and as a result was [temporarily] [permanently] rendered so substantially incapable of [appraising the nature of the alleged victim's conduct] [resisting an act of vaginal intercourse] [communicating unwillingness to submit to an act of vaginal intercourse] [resisting a sexual act] as to be mentally disabled,]
- (B) [the alleged victim was so substantially incapable of [appraising the nature of the alleged victim's conduct] [resisting an act of vaginal intercourse] [resisting a sexual act] as to be mentally incapacitated,]
- (C) [the alleged victim was so physically unable to [resist an act of vaginal intercourse] [communicate unwillingness to submit to an act of vaginal intercourse] [resist a sexual act] as to be physically helpless]

and that the defendant knew or should reasonably have known that the alleged victim [had a mental disability] [was mentally incapacitated] [was physically helpless], 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.⁶

NOTE WELL: In an appropriate case the judge should use N.C.P.I.—Crim. 201.10 to charge on attempted second degree rape as a lesser included offense under this charge, and the judge should similarly use N.C.P.I.—Crim. 208.70 (Assault on a Female) where appropriate.

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. N.C. Gen. Stat. § 14-27.20(4).

2. N.C. Gen. Stat. § 14-27.20(2a).

3. If the substance used to cause incapacitation of the alleged victim was unusual or not commonly known or thought to be poisonous, use the following statement: "It is not necessary that a substance be widely known as a poison for the purposes of this crime; just as arsenic and cyanide are poisonous substances which will cause death to a human being, so also is sugar to the acute diabetic, or dust to the acute asthmatic. In determining the poisonous nature of a substance, you must look to the peculiar weakness or sensibility of the victim to that particular substance." See N.C.P.I.—Crim. 206.12.

4. N.C. Gen. Stat. § 14-27.20(2).

5. N.C. Gen. Stat. § 14-27.20(3).

6. If there are lesser included offenses, the last phrase should be, ". . . you would not return a verdict of second degree rape."