

ATTEMPTED FIRST DEGREE SEXUAL OFFENSE (WEAPON, SERIOUS INJURY OR MULTIPLE ASSAILANTS) COVERING ATTEMPTED SECOND DEGREE SEX OFFENSE AS A LESSER INCLUDED OFFENSE. (OFFENSES PRIOR TO DEC. 1, 2015) FELONY.

REPLACEMENT JUNE 2020

N.C. Gen. Stat. §§ 14-27.4(2), 14-27.5(2), 14-27.8

207.40A ATTEMPTED FIRST DEGREE SEXUAL OFFENSE (WEAPON, SERIOUS INJURY OR MULTIPLE ASSAILANTS) COVERING ATTEMPTED SECOND DEGREE SEX OFFENSE AS A LESSER INCLUDED OFFENSE. (OFFENSES PRIOR TO DEC. 1, 2015) FELONY.

NOTE WELL: This instruction is valid for offenses committed before December 1, 2015. For offenses committed on or after December 1, 2015, use 207.40A.1.

The defendant has been charged with attempted first degree 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 sexual offense;
- (2) guilty of attempted second degree sexual offense; or
- (3) not guilty.

For you to find the defendant guilty of attempted first degree 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 without the alleged victim's consent and against the alleged victim's will (Consent induced by fear is not consent at law). 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 person and the male sex organ of another.]

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- (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.]

NOTE WELL: N.C. Gen. Stat. § 14-27.1(4) provides that it shall be an affirmative defense to the fifth type of sexual act in (E) above that the penetration was for an accepted medical purpose. If there is evidence of such a purpose, instruct accordingly at the end of the charge and in the mandate. See N.C.P.I. Crim. 306.10 for an instruction on Accepted Medical Purpose.

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 the object, the manner in which it was used, and the size and strength of the defendant as compared to the alleged victim.)]]

(2) [an object that the alleged victim reasonably believed was a dangerous or deadly weapon.¹ 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 injury² upon [the alleged 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 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, 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 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 sexual offense but would consider whether the defendant is guilty of attempted second degree sexual offense. Attempted second degree sexual offense differs from attempted first degree 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]]
- (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 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.

NOTE WELL: If a party requests an instruction on Assault on a Female, see State v. Martin, 222 N.C. App. 213 (2012), where the defendant was convicted of two counts of first-degree sexual offense, the North Carolina Court of Appeals held that assault on a female is not a lesser included offense of first-degree sexual offense, because to convict for first-degree sexual offense, it need not be shown that the victim is a female, that the defendant is a male, or that the defendant is at least 18 years of age.

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

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

2. Note that N.C. Gen. Stat. § 14-27.4 includes serious mental injury, as well as physical or bodily injury. *State v. Boone*, 307 N.C. 198 (1982), held 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.