6
Homicide

Murder

First-Degree Murder

Statute

§14-17. Murder in the first and second degree defined; punishment.

A murder which shall be perpetrated by means of a nuclear, biological, or chemical weapon of mass destruction as defined in G.S. 14-288.21, poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree, a Class A felony, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000, except that any such person who was under 18 years of age at the time of the murder shall be punished with imprisonment in the State's prison for life without parole. All other kinds of murder, including that which shall be proximately caused by the unlawful distribution of opium or any synthetic or natural salt, compound, derivative, or preparation of opium, or cocaine or other substance described in G.S. 90-90(1)d., or methamphetamine when the ingestion of such substance causes the death of the user, shall be deemed murder in the second degree, and any person who commits such murder shall be punished as a Class B2 felon.

Elements

A person guilty of this offense

(1) kills
(2) another living human being
(3) (a) (i) with malice *and*
(ii) with a specific intent to kill formed after premeditation and deliberation,
(b) by poisoning, lying in wait, imprisonment, starvation, or torture,
(c) while committing or attempting arson, rape, sex offense, robbery, burglary, kidnapping, or any felony in which a deadly weapon is used, *or*
(d) by means of a nuclear, biological, or chemical weapon of mass destruction as defined in G.S. 14-288.21.

Punishment

Class A felony punishable by death or imprisonment for life without possibility of parole. G.S. 14-17.

Before the jury may impose the death penalty, it must find beyond a reasonable doubt that one or more of the aggravating circumstances listed in G.S. 15A-2000 (for example, that the murder was heinous, atrocious, or cruel or was committed during a robbery) exist and that the aggravating circumstance or circumstances outweigh any mitigating circumstance or circumstances (for example, the defendant's age or lack of significant prior criminal history). This determination of the sentence takes place in a separate hearing after the defendant is found guilty of first-degree murder. For a discussion of capital law, see Robert L. Farb, North Carolina Capital Case Law Handbook (UNC School of Government, 2d ed. 2004).

G.S. 14-17 provides that if a defendant under age 18 is convicted of first-degree murder, the mandatory sentence is life imprisonment without parole. This provision is consistent with *Roper v. Simmons*, 543 U.S. 551 (2005), which held that the Eighth Amendment prohibits a death sentence for a defendant who is convicted of a capital offense committed before his or her 18th birthday.

No person who is mentally retarded may be sentenced to death. Atkins v. Virginia, 536 U.S. 304 (2002); G.S. 15A-2005(b). If convicted of first-degree murder, such a person receives a punishment of life imprisonment without parole. G.S. 15A-2005(h).

Notes

Elements (1) and (2). To kill oneself is suicide, which is not a crime in North Carolina. G.S. 14-17.1. To shoot someone who is already dead is not murder; the victim must be living in order for the act to be murder. 2 W. LaFave & A. Scott Jr. , Substantive Criminal Law 419 (2d ed. 2003).

Under the doctrine of transferred intent, a defendant who intended to kill one person but mistakenly killed another is still guilty of murder. See "Transferred intent" in Chapter 1 (States of Mind.)

Element (3)(a)(i). The law of homicide recognizes three forms of malice:

(1) the express emotions of hatred, ill will, and spite, State v. Stinson, 297 N.C. 168 (1979);
(2) the commission of an inherently dangerous act (or omission to act when there is a legal duty to do so) in such a reckless and wanton manner "as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief," State v. Rich, 351 N.C. 386 (2000); State v. Snyder, 311 N.C. 391 (1984); State v. Trott, 190 N.C. 674 (1925); State v. Liner, 98 N.C. App. 600 (1990); State v. Byers, 105 N.C. App. 377 (1992); and
(3) a condition of the mind which prompts a person to take the life of another intentionally, or to intentionally inflict serious bodily injury which proximately results in death, without just cause, excuse, or justification, State v. Reynolds, 307 N.C. 184 (1982); see "Maliciously" in Chapter 1 (States of Mind).

The second form of malice—commission of an inherently dangerous act—was found when the defendant, knowing that two people became violently ill after using certain drugs, supplied the same drugs to the victim, who later died. *Liner,* 98 N.C. App. 600.

The third form of malice can be inferred from the intentional infliction of a wound with a deadly weapon. State v. Patterson, 297 N.C. 247 (1979); *Reynolds*, 307 N.C. 184; State v. Bondurant, 309 N.C. 674 (1983); State v. Hunter, ___ N.C. App. ___, 703 S.E.2d 776 (2010) (sufficient evidence of malice when the victim was stabbed in the torso with a golf club shaft; shaft entered her back near the neck and was moved downward and forward toward her chest to a depth of 8 inches, where it perforated her aorta, causing death). This is the case even if the alleged homicide involved a mercy killing. State v. Forrest, 321 N.C. 186 (1987). Malice

also may be inferred from the use of hands alone to inflict a fatal injury when an adult assaults an infant. State v. Perdue, 320 N.C. 51 (1987). See the discussion of what constitutes a deadly weapon under the offense "Assault with a Deadly Weapon" in Chapter 7 (Assaults).

For an extensive discussion of the term "malice" as used in second-degree murder, see the note on Element (3) to "Second-Degree Murder," below.

Element (3)(a)(ii). "Specific intent to kill" means that the defendant intended his or her actions to result in the victim's death; the fact that the defendant committed an intentional act that resulted in the victim's death is not enough to satisfy this element. State v. Keel, 333 N.C. 52 (1992); State v. Pittman, 174 N.C. App. 745, 750 (2005). For cases in which there was sufficient evidence of a specific intent to kill, see, for example, *State v. Teague*, ___ N.C. App. ___, 715 S.E.2d 919, 924–25 (2011) (the defendant attacked the sleeping victims, stabbing them in their throats); *Pittman*, 174 N.C. App. at 750–51 (in order to avoid paying child support, the defendant abandoned an infant in 30-degree weather in a remote, dilapidated shed where she would not likely be found), and *State v. Kirby*, 187 N.C. App. 367 (2007) (the defendant, who had a history of beating the victim, hit the victim without provocation on the day of the killing, told others to tell him good-bye, and told the victim to say his prayers; the cause of death was strangulation and blunt trauma; and the defendant attempted to conceal the body and evidence).

"Premeditation" means thinking about something beforehand, for some length of time, however short; "deliberation" refers to an intention to kill formed while defendant was in a "cool state of blood." State v. Bullock, 326 N.C. 253 (1990); State v. Ruof, 296 N.C. 623 (1979); State v. Blue, ___ N.C. App. ___, 699 S.E.2d 661, 665–66 (2010) (the defendant's statement that he formed the intent to kill and contemplated whether he would be caught before he began the attack was sufficient evidence that he formed the intent to kill in a cool state of blood). A cool state of blood does not mean absence of passion and emotion; a person may be capable of forming murderous intent, premeditating and deliberating, yet be prompted and to a large extent controlled by passion at the time of the offense. State v. Vause, 328 N.C. 231 (1991). Rather, it means that a killing was committed with a fixed design to kill, regardless of whether the defendant was angry or gripped with passion at the time of the act. *Bullock*, 326 N.C. 253; *Ruof*, 296 N.C. 623. It also means that the defendant's anger or emotion was not so strong as to overcome his or her reason. State v. Hunt, 330 N.C. 425 (1991). Premeditation and deliberation need not last for any perceptible length of time. State v. Walters, 275 N.C. 615 (1969); State v. Bynum, 175 N.C. 777 (1918).

Circumstantial evidence, rather than direct evidence, generally proves premeditation and deliberation. State v. Bell, 338 N.C. 363 (1994). Circumstances showing premeditation and deliberation include:

- lack of provocation, State v. Corn, 303 N.C. 293 (1981),
- the defendant's conduct before and after killing, State v. Walker, 332 N.C. 520 (1992); State v. Lane, 328 N.C. 598 (1991); State v. Freeman, 326 N.C. 40 (1990),
- the defendant's statements of ill will toward the victim, State v. Gallagher, 313 N.C. 132 (1985),
- the defendant's previous assault of the victim, State v. Simpson, 327 N.C. 178 (1990),
- previous difficulties between the defendant and the victim, State v. Bullock, 326 N.C. 253, 258 (1990),
- threats before and during the killing, *id.,*
- the brutal nature of the killing (such as by strangulation), State v. Richardson, 328 N.C. 505 (1991); State v. Greene, 332 N.C. 565 (1992),
- blows dealt after the victim is helpless, *Bullock*, 326 N.C. at 258, and
- the nature and number of the victim's wounds, State v. Watson, 338 N.C. 168 (1994); State v. Montgomery, 331 N.C. 559 (1992); State v. Vause, 328 N.C. 231 (1991).

For general lists and discussions of these circumstances, see *State v. Smith*, 357 N.C. 604 (2003), *State v. Sweatt,* 333 N.C. 407 (1993), *State v. Small*, 328 N.C. 175 (1991), and *State v. Myers,* 309 N.C. 78 (1983). For cases in which the evidence sufficiently established premeditation and deliberation, see *State v. Bonilla*, ___ N.C. App. ___, 706 S.E.2d 288 (2011) (in a first-degree murder case, there was sufficient evidence of premeditation, deliberation, and intent to kill; after the defendant and an accomplice beat and kicked the victim, they hog-tied him so severely that his spine was fractured and put tissue in his mouth; due to the severe arching of his back, the victim suffered a fracture in his thoracic spine and died from a combination of suffocation and strangulation); *State v. Bass*, 190 N.C. App. 339, 345 (2008) (the defendant had time to contemplate his actions, threatened the victim, was not provoked, shot the victim in the back, and did not surrender), *State v. Forrest,* 168 N.C. App. 614, 626 (2005) (the defendant attacked an unsuspecting victim and made statements suggesting an intent to kill), and *State v. Dennison*, 171 N.C. App. 504, 509–10 (2005) (the wounds were brutal, the blows multiple, the victim had harassed the defendant, and the defendant left the crime scene).

For cases in which the evidence was insufficient to establish premeditation and deliberation, see *State v. Corn,* 303 N.C. 293, 297–98 (1981) (the victim entered the defendant's home while highly intoxicated, approached the sofa on which the defendant was lying, and insulted the defendant; the defendant immediately jumped up, grabbed a nearby rifle, and shot the victim several times in the chest; the incident lasted only a few moments; there was no evidence that the defendant acted with a fixed design, had sufficient time to weigh the consequences of his actions, previously threatened the victim, or exhibited conduct indicating that he formed any intent to kill before to the incident; there was no significant history of arguments or ill will between the parties and although the defendant fired several shots, there was no evidence that he shot or hit the victim once the victim fell), and *State v. Williams*, 144 N.C. App. 526, 531 (2001) (there was no evidence of animosity, that the defendant and the victim knew each other before incident, or that defendant threatened the victim; when the victim provoked the defendant by assaulting him, the defendant immediately retaliated by firing one shot; the defendant's actions did not show planning or forethought; although the defendant left the scene, he turned himself in the next day).

For a discussion of when accident, voluntary intoxication, and other failure of proof defenses can negate the specific intent to kill required for first-degree murder, see "Failure of Proof or 'Negating' Defenses" in Chapter 2 (Bars and Defenses).

Element (3)(b). If the defendant killed the victim by poison, lying in wait, imprisonment, starving, or torture, and if the defendant's act was the proximate cause of death, the crime of first-degree murder has occurred. Neither specific intent to kill nor premeditation and deliberation are elements of this category of first-degree murder. State v. Roper, 328 N.C. 368 (1991); State v. Brown, 320 N.C. 179 (1987); State v. Johnson, 317 N.C. 193 (1986). Nor is malice an element of this kind of first degree murder. State v. Smith, 351 N.C. 251 (2000); State v. Phillips, 328 N.C. 1 (1991); State v. Crawford, 329 N.C. 466 (1991).

Lying in wait requires ambush and surprise of the victim. State v. Lynch, 327 N.C. 210 (1990). It may mean stationing oneself in advance or lying in ambush to attack a victim, but a defendant can be lying in wait even though not concealed. State v. Allison, 298 N.C. 135 (1979). A victim may even be aware of the attacker's presence; there would be adequate surprise in such a circumstance if the victim does not expect to be attacked. State v. Leroux, 326 N.C. 368 (1990). Lying in wait does not require that an attacker wait at the site of the killing for some period of time; "a moment's deliberate pause" before killing a victim unaware of the impending assault, and consequently without an opportunity for self-defense, satisfies the definition of murder by lying in wait. *Id.*

Torture is the act or process of inflicting great, severe, or extreme pain, usually by more than a single act. State v. Lee, 348 N.C. 474 (1998); State v. Phillips, 328 N.C. 1 (1991).

Element (3)(c). Murder perpetrated under this prong is referred to as felony murder. Evidence of this type of first-degree murder consists of evidence of commission or attempt of one of the

listed felony offenses and an act that was the proximate cause of the victim's death. This prong does not require proof of premeditation or deliberation, State v. Mays, 225 N.C. 486 (1945), or proof that the killing was intentional, State v. Streeton, 231 N.C. 301 (1949). Additionally, the State is not required to prove malice under the felony murder theory because malice is implied from the underlying felony or the use of a deadly weapon. State v. Crawford, 329 N.C. 466 (1991); State v. Gardner, 315 N.C. 444 (1986); State v. Womble, 292 N.C. 455 (1977).

The fact that the killing was accidental is no defense if it was committed in the course of one of the named felonies. State v. Phillips, 264 N.C. 508 (1965).

Self-defense is a defense to felony murder only if it is a defense to the underlying felony supporting the felony murder charge. State v. Jacobs, 363 N.C. 815, 822 (2010).

In addition to listing specific crimes that can qualify as the underlying felony for felony murder (arson, rape, sex offense, robbery, burglary, and kidnapping), the statute includes a catch-all category covering any "other felony committed or attempted with the use of a deadly weapon." G.S. 14-17. Crimes that have qualified under this catch-all category include discharging a firearm into an occupied vehicle or structure, felonious escape, armed felonious breaking and entering and larceny, sodomy under threat of deadly weapon, assault with a deadly weapon with intent to kill or with intent to inflict serious injury, felonious child abuse, State v. Jones, 353 N.C. 159 (2000) (citing cases), and sale or attempted sale of a controlled substance, State v. Squires, 357 N.C. 529 (2003); State v. Freeman, ___ N.C. App. ___, 690 S.E.2d 17, 20–21 (2010) (attempted sale). Felonious child abuse can support a felony murder charge when the defendant's hands constitute the deadly weapon. State v. Pierce, 346 N.C. 471 (1997); State v. Krider, 145 N.C. App. 711 (2001).

A defendant may not be convicted of first-degree felony murder when the underlying felonies (in this case, felonious assaults of the surviving occupants in a vehicle struck by the impaired defendant's vehicle) are committed through culpable negligence only. *Jones*, 353 N.C. 159. A defendant may not be convicted of first-degree felony murder involving vehicular homicide when the underlying felony is operating a motor vehicle to elude arrest. State v. Woodard, 146 N.C. App. 75 (2001).

The continuous transaction doctrine applies to felony murder. Under this doctrine, a person may commit felony murder when the felony (a sexual assault or arson, for example) occurs before, during, or soon after the victim's death, as long as the felony and the murder form one continuous transaction. State v. Campbell, 332 N.C. 116 (1992); State v. Thomas, 329 N.C. 423 (1991); State v. Hutchins, 303 N.C. 321 (1981); *Freeman*, ___ N.C. App. ___, 690 S.E.2d 17, 20–21 (one week after the defendant delivered cocaine to the victim, he went to the victim's residence to collect payment; the attempted sale of the controlled substance and the murder were part of a continuous transaction); State v. Lowry, 198 N.C. App. 457, 470–71 (2009) (evidence that a murder victim's pocketbook was missing, her credit card bills and statements were strewn about, a person matching the defendant's description tried to use her ATM card, and her credit cards were found near a house frequented by the defendant was sufficient to show that a robbery occurred at the same time as a murder). Thus, a defendant may be convicted under the felony murder theory when the death occurs during the defendant's escape or flight from the scene of the felony. State v. Doyle, 161 N.C. App. 247 (2003). A defendant also may be convicted under the felony murder theory when the underlying felony is armed robbery and the defendant used the object of the robbery as the murder weapon. State v. McMillan, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 2, 2011) (the underlying felony was armed robbery and the defendant used the stolen item—a .357 Glock handgun—to commit the murder; the two crimes occurred during a continuous transaction). A time interval of three-and-one-half hours between a murder and an arson of the murder victim's dwelling did not defeat application of the continuous transaction doctrine. State v. Jaynes, 342 N.C. 249 (1995). For a fuller discussion of the continuous transaction doctrine, see Farb, North Carolina Capital Case Law Handbook, cited in full *supra*, at 17–18 & 149–52.

Although the felony and the homicide must be part of a continuous transaction, they cannot be the same offense. The underlying felony must be a separate offense from the act that

causes death. In a case where the defendant committed a nonfatal assault on the victim with a machete and then killed her by strangulation, the felony assault with a machete was held to be a separate offense from the strangulation and was properly used as a felony to support felony murder. State v. Carroll, 356 N.C. 526 (2002).

The prosecution need not elect for submission to a jury between theories of felony murder and murder with specific intent formed after premeditation and deliberation if its proof supports both types of murder. State v. Greene, 314 N.C. 649 (1985).

One who aids and abets another in the commission of felony murder is guilty as a principal. State v. Lane, 328 N.C. 598, 610 (1991). For a more detailed discussion of aiding and abetting and related doctrines, see Chapter 3 (Participants in Crimes).

The prosecution may attempt to prove first-degree murder by felony murder based on the commission of more than one felony. For example, a jury may find a defendant guilty of first-degree murder based on predicate felonies of both armed robbery and felonious breaking and entering. However, if an appellate court finds insufficient evidence to support one of the felonies on which felony murder was based and it is impossible to determine if the jury convicted the person based on the erroneously submitted felony, a new trial may be ordered. State v. Pakulski, 326 N.C. 434 (1990). *But see* State v. Oglesby, 174 N.C. App. 658 (2005). This problem can be solved with a special verdict sheet on which the jury indicates its verdict as to each of the underlying felonies.

Under the "merger rule," a defendant convicted of first-degree murder based only on the felony murder theory may not also be sentenced for a conviction on the underlying felony. State v. Barlowe, 337 N.C. 371 (1994). Exceptions to the rule exist. For example, in *State v. Cunningham*, 140 N.C. App. 315 (2000), the court held that an attempted armed robbery conviction did not merge with first-degree felony murder when the underlying felony was first-degree burglary and attempted armed robbery was the intended felony of first-degree burglary. For a fuller discussion of the merger rule, see Farb, North Carolina Capital Case Law Handbook, cited in full *supra*, at 17–18 & 149–52.

For felony murder to apply, the defendant, co-conspirators, aiders, or others acting in concert with the defendant must have committed the homicide. A defendant may not be held responsible on this theory for a homicide committed by an adversary (a law enforcement officer, for example) or a victim. State v. Bonner, 330 N.C. 536 (1992); State v. Williams, 185 N.C. App. 318, 331 (2007). However, a defendant may be convicted of first-degree felony murder for shooting and killing an accomplice during the commission of the crime. State v. Torres, 171 N.C. App. 419 (2005).

Proximate cause. To constitute this offense (and, indeed, to constitute any form of homicide), the defendant's act must be the proximate cause of the death. Proximate cause does not require the State to prove that a defendant's act was the sole or immediate cause of death. Rather, the act need only be a contributing cause of death if the direct cause is "a natural result of the criminal act." State v. Cummings, 301 N.C. 374 (1980); State v. Jones, 290 N.C. 292 (1976); State v. Minton, 234 N.C. 716, 722 (1952) ("An accused who wounds another with intent to kill him and leaves him lying out of doors in a helpless condition on a frigid night is guilty of homicide if his disabled victim dies as the result of exposure to the cold. This is true because the act of the accused need not be the immediate cause of the death. He is legally accountable if the direct cause is the natural result of his criminal act."). Thus, if the defendant inflicts a dangerous wound that is a contributing cause of death, he or she is liable for murder. *Minton*, 234 N.C. at 722. Proximate cause exists even if a victim died from negligent medical treatment after an assault, unless the negligent treatment was the sole cause of death. *Jones*, 290 N.C. at 298–99 (1976); State v. Lane, 115 N.C. App. 25 (1994). Proximate cause also exists when the defendant's criminal act was a contributing cause of the victim's death, even if a victim chose surgery against medical advice and died, State v. Gilreath, 118 N.C. App. 200 (1995), refused on religious grounds to accept blood transfusions and died, State v. Welch, 135 N.C. App. 499 (1991), or there was a voluntary decision by family members to remove the victim from

life support systems, State v. Garcia-Lorenzo, 110 N.C. App. 319 (1993). For acts of others to insulate the defendant from criminal liability, those acts must "break the causal chain" and constitute the sole proximate cause of death. State v. Hollingsworth, 77 N.C. App. 36, 39–40 (1985); State v. Tioran, 65 N.C. App. 122, 123–25 (1983); *see also* State v. Pierce, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 18, 2011) (in a case in which a second officer got into a vehicular accident and died while responding to a first officer's communication about the defendant's flight from a lawful stop, the defendant's flight from the first officer was the proximate cause of the second officer's death; the evidence was sufficient to allow a reasonable jury to conclude that the second officer's death would not have occurred had the defendant not fled and that the second officer's death was reasonably foreseeable; the court rejected the defendant's argument that the second officer's contributory negligence broke the causal chain); State v. Norman, ___ N.C. App. ___, 711 S.E.2d 849 (2011) (there was sufficient evidence that the defendant's actions were the proximate cause of death in a homicide case arising out of a vehicle accident; the defendant argued that two unforeseeable events proximately caused the victims' deaths: a third-party's turn onto the road and the victims' failure to yield the right-of-way; the court found that the first event was foreseeable; as to the second, it noted that the defendant's speeding and driving while impaired were concurrent proximate causes).

For cases involving a death caused by ingestion of a controlled substance and issues of proximate cause, see *In re Z.A.K.*, 189 N.C. App. 354, 358–60 (2008) (the defendant's failure to aid the victim after giving her a drug that made her ill and failure to act appropriately after undertaking aid was a proximate cause of the victim's death), and *State v. Parlee,* ___ N.C. App. ___, 703 S.E.2d 866 (2011) (the defendant was charged with second-degree murder for having proximately caused a death by the unlawful distribution and ingestion of Oxymorphone; there was sufficient evidence that the defendant's sale of the pill was a proximate cause of death where the defendant unlawfully sold the pill to the two friends, who split it in half and consumed it; the victim was pronounced dead the next morning, and cause of death was acute Oxymorphone overdose).

It is not a defense that a victim's pre-existing physical condition (for example, alcoholism) made the victim peculiarly vulnerable to an assault; the defendant's assault is considered to be the proximate cause of death, even if the assault would not have been fatal without the pre-existing condition. State v. Atkinson, 298 N.C. 673 (1979); State v. Hargett, 255 N.C. 412 (1961).

Although some cases reject the notion that forseeability of death is a component of proximate cause, State v. Woods, 278 N.C. 210, 219 (1971) ("The crucial question is whether a wound inflicted by an unlawful assault proximately caused the death—not whether death was a natural and probable result of such a wound and should have been foreseen. Foreseeability is not an element of proximate cause in a homicide case where an intentionally inflicted wound caused the victim's death."); State v. Lane, 115 N.C. App. 25, 29–30 (1994) (rejecting the defendant's argument that he was not the proximate cause of the victim's death due to the unforeseeable consequences of the assault; "[r]esponsibility cannot be avoided due to a preexisting condition of a decedent [here, chronic alcoholism that made the victim more susceptible to brain swelling and subdural hematomas] which renders him less able to withstand an assault"), as discussed below, at least one case holds that forseeability is required for involuntary manslaughter; see "Proximate cause" under "Involuntary Manslaughter," below.

The common law rule that a person could not be convicted of murder if the victim died more than a year and a day after the criminal act has been abolished. State v. Vance, 328 N.C. 613 (1991).

Charging issues. G.S. 15-144 prescribes a short-form indictment for murder and manslaughter. The United States Supreme Court's ruling in *Ring v. Arizona,* 536 U.S. 584 (2002), did not render the short-form murder indictment under G.S. 15-144 unconstitutional. State v. Hunt, 357 N.C. 257 (2003). For a more detailed discussion of charging issues in connection with homicide offenses, see Jessica Smith, *The Criminal Indictment: Fatal Defect, Fatal Variance,*

and Amendment, Admin. of Just. Bull. No. 2008/03 (UNC School of Government, July 2008) (online at www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0803.pdf).

Greater and lesser-included offenses. Second-degree murder is a lesser-included offense of premeditated and deliberate first-degree murder. State v. Stevenson, 327 N.C. 259, 263 (1990). Voluntary manslaughter is a lesser-included of first-degree murder. State v. Simonovich, ___ N.C. App. ___, 688 S.E.2d 67, 71 (2010). Involuntary manslaughter is a lesser-included offense of first- and second-degree murder and voluntary manslaughter. State v. Shook, 327 N.C. 74, 81 (1990); State v. Greene, 314 N.C. 649 (1985). Misdemeanor and felony assaults are not lesser-included offenses of murder involving assault when the short-form murder indictment is used. State v. Collins, 334 N.C. 54 (1993). For a more detailed discussion of the lesser-included offenses of first-degree murder, see Farb, North Carolina Capital Case Law Handbook, cited in full *supra,* at 139–43.

Multiple convictions and punishments. When a defendant is convicted of first-degree murder under the felony murder theory only, the merger rule prevents punishment for the first-degree murder and the underlying felony supporting the felony murder charge; in this instance, the proper procedure is to arrest judgment on the underlying felony. See the discussion of the "merger rule" in the note on Element (3)(c), above.

For a discussion of when a defendant may be convicted of attempted murder and other crimes, see the note entitled "Attempted homicide" under "Attempt" in Chapter 5 (General Crimes).

Attempted first-degree murder. An attempt to commit this offense is a Class B2 offense. G.S. 14-2.5. Neither assault with a deadly weapon inflicting serious injury, State v. Rainey, 154 N.C. App. 282 (2002), nor assault with a deadly weapon with intent to kill inflicting serious injury, State v. Tirado, 358 N.C. 551 (2004); State v. Bethea, 173 N.C. App. 43 (2005); State v. Peoples, 141 N.C. App. 115 (2000), are lesser-included offenses of attempted first-degree murder. A defendant may be convicted and punished for both attempted first-degree murder and assault with a firearm on a law enforcement officer based on the same conduct. State v. Haynesworth, 146 N.C. App. 523 (2001).

Constitutionality. The murder by torture provision is not unconstitutionally vague. State v. Crawford, 329 N.C. 466 (1991).

Related Offenses Not in This Chapter

See patient abuse (various offenses) in Chapter 9 (Abuse and Neglect).
Producing miscarriage. G.S. 14-45 and 14-45.1
Concealment of death; disturbing human remains; dismembering human remains. G.S. 14-401.22.

Second-Degree Murder

Statute

See G.S. 14-17, reproduced under "First-Degree Murder," above.

Elements

A person guilty of this offense

(1) kills
(2) another living human being
(3) with malice.