

N.C.P.I.—CRIM 206.30A

SECOND DEGREE MURDER WHERE A DEADLY WEAPON IS USED, NOT INCLUDING SELF-DEFENSE, COVERING ALL LESSER INCLUDED HOMICIDE OFFENSES. FELONY.

CRIMINAL VOLUME

JUNE 2014

N.C. Gen. Stat. §§ 14-17, 14-18

206.30A SECOND DEGREE MURDER WHERE A DEADLY WEAPON IS USED, NOT INCLUDING SELF-DEFENSE, COVERING ALL LESSER INCLUDED HOMICIDE OFFENSES.¹ FELONY.

NOTE WELL: Effective December 1, 1997, Voluntary Manslaughter is a Class D felony. For offenses occurring before December 1, 1997, Voluntary Manslaughter is a Class F felony.

Refer to Punishment Chart for Homicides N.C.P.I.—Crim. 206 Series.

The defendant has been charged with second degree murder.

Under the law and the evidence in this case, it is your duty to return one of the following verdicts:

- (1) guilty of second degree murder, or
- (2) guilty of voluntary manslaughter, or
- (3) guilty of involuntary manslaughter, or
- (4) not guilty.

Second degree murder is the unlawful killing of a human being with malice.

Voluntary manslaughter is the unlawful killing of a human being without malice.

Involuntary manslaughter is the unintentional killing of a human being by an unlawful act not amounting to a felony or by an act done in a criminally negligent way.

¹ This instruction is intended to serve as a model for combining other homicide charges. It should be given as drafted only in a case where there is a charge of second degree murder where all lesser included homicide offenses are possible verdicts under the evidence and where the evidence would support a finding that a deadly weapon was used.

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For you to find the defendant guilty of second degree murder, the state must prove three things beyond a reasonable doubt:

First, that the defendant wounded the victim with a deadly weapon. A deadly weapon is a weapon which is likely to cause death or serious injury. In determining whether the instrument was a deadly weapon, you should consider the nature of the instrument, the manner in which it was used, and the size and strength of the defendant as compared to the victim.

Second, that the defendant acted intentionally² and with malice.

Intent is a mental attitude which is seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom.

Malice means not only hatred, ill will, or spite, as it is ordinarily understood—to be sure, that is malice—but [it also means that condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict serious bodily harm which proximately results in the another's death, without just cause, excuse or justification.] [malice also

² Neither second-degree murder or voluntary manslaughter has as an essential element an intent to kill. In connection with these two offenses, the phrase 'intentional killing' refers not to the presence of a specific intent to kill, but rather to the fact that the act which resulted in death is intentionally committed and is an act of assault which in itself amounts to a felony or is likely to cause death or serious bodily injury. Such an act committed in the heat of passion suddenly aroused by adequate provocation or in the imperfect exercise of the right of self-defense is voluntary manslaughter. But such an act can never be involuntary manslaughter. This is so because the crime of involuntary manslaughter involves the commission of an act, whether intentional or not, which in itself is not a felony or likely to result in death or great bodily harm." *S. v. Ray*, 299 N.C. 151, 158 (1980). See also *State v. Jordan*, 140 N.C. App. 594 (2000); *State v. Coble*, 351 N.C. 448 (2000).

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arises when an act which is inherently dangerous to human life is intentionally done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief].³

If the State proves beyond a reasonable doubt, (or it is admitted,)⁴ that the defendant intentionally killed the victim with a deadly weapon or intentionally wounded the victim with a deadly weapon that proximately caused the victim's death, you may infer first, that the killing was unlawful, and second, that it was done with malice, but you are not compelled to do so.⁵ You may consider this along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice. If the killing was unlawful and was done with malice, the defendant would be guilty of second degree murder.

And Third, the State must prove that the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred,⁶ and one that a reasonably careful and prudent person could foresee would probably

³ *State v. Snyder*, 311 N.C. 391, 393-94 (1984), quoting *State v. Reynolds*, 307 N.C. 184 (1982).

⁴ Use the parenthetical only if defendant admits in open court to an intentional shooting. See *State v. McCoy*, 303 N.C. 1, at 28-29 (1981).

⁵ In *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965 (1985) the U.S. Supreme Court held that a mandatory presumption violates the Due Process clause, if it relieves the State of its burden of persuasion on an element of the offense. This raises questions concerning the validity of the mandatory presumption of malice required in *State v. Reynolds*, 307 N.C. 184 (1982).

⁶ Where there is a serious issue as to proximate cause, further instructions may be helpful, e.g., "The defendant's act need not have been the last cause or the nearest cause. It is sufficient if it concurred with some other cause acting at the same time, which in combination with it, proximately caused the death of (*name victim*)."

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 produce such [injury] [damage] or some similar injurious result. (The defendant's act need not have been the only cause, nor the nearest cause. It is sufficient if it occurred with some other cause acting at the same time, which, in combination with, caused the death of the victim.) (A child has been killed if the child was born alive, but died as a result of injuries inflicted prior to being born alive.)⁷

Voluntary manslaughter is the unlawful killing of a human being without malice. A killing is not committed with malice if the defendant acts in the heat of passion upon adequate provocation.

The heat of passion does not mean mere anger. It means that at the time the defendant acted, the defendant's state of mind was so violent as to overcome reason, so much so that the defendant could not think to the extent necessary to form a deliberate purpose and control the defendant's actions. Adequate provocation may consist of anything which has a natural tendency to produce such passion in a person of average mind and disposition,⁸ and the defendant's act took place so soon after the provocation that the passion of a person of average mind and disposition would not have cooled.

The burden is on the State to prove beyond a reasonable doubt that the defendant did not act in the heat of passion upon adequate provocation, but rather that the defendant acted with malice. If the State fails to meet this burden, the defendant can be guilty of no more than voluntary

⁷ This sentence is only to be provided if the offense involved the killing of a child.

⁸ If some evidence tends to show legally sufficient provocation (*e.g.*, assault), but other evidence tends to show that the provocation, if any, was insufficient (*e.g.*, mere words), the jury should be told the kind of provocation that the law regards as insufficient, *e.g.*, "Words and gestures alone, however insulting, do not constitute adequate provocation when no assault is made or threatened against the defendant."

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manslaughter.

For you to find the defendant guilty of voluntary manslaughter, the State must prove three things beyond a reasonable doubt:

First, that the defendant killed the victim by an intentional⁹ and unlawful act.

And Second, that the defendant's act was a proximate cause¹⁰ of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred.

If you do not find the defendant guilty of second degree murder or voluntary manslaughter, you must consider whether the defendant is guilty of involuntary manslaughter. Involuntary manslaughter is the unintentional killing of a human being by an unlawful act not amounting to a felony, or by an act done in a criminally negligent way.

For you to find the defendant guilty of involuntary manslaughter, the State must prove two things beyond a reasonable doubt:

9 "Neither second-degree murder nor voluntary manslaughter has as an essential element an intent to kill. In connection with these two offenses, the phrase 'intentional killing' refers not to the presence of a specific intent to kill, but rather to the fact that the act which resulted in death is intentionally committed and is an act of assault which in itself amounts to a felony or is likely to cause death or serious bodily injury. Such an act committed in the heat of passion suddenly aroused by adequate provocation or in the imperfect exercise of the right of self-defense is voluntary manslaughter. But such an act can never be involuntary manslaughter. This is so because the crime of involuntary manslaughter involves the commission of an act, whether intentional or not, which in itself is not a felony or likely to result in death or great bodily harm." *S. v. Ray*, 299 N.C. 151, 158 (1980). See also *S. v. Jordan*, 140 N.C. App. 594 (2000); *S. v. Coble*, 351 N.C. 448 (2000).

10 Where there is a serious issue as to proximate cause, further instructions may be helpful, e.g., "The defendant's act need not have been the last cause or the nearest cause. It is sufficient if it concurred with some other cause acting at the same time, which in combination with it, proximately caused the death of the victim."

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First, that the defendant acted a) [unlawfully] (or) b) [in a criminally negligent way]. a) [The defendant's act was unlawful if (*define crime e.g. defendant recklessly discharged a gun, killing the victim*).] b) [Criminal negligence is more than mere carelessness. The defendant's act was criminally negligent, if, judging by reasonable foresight, it was done with such gross recklessness or carelessness as to amount to a heedless indifference to the safety and rights of others.]

And Second, the defendant's [unlawful] (or) [criminally negligent] act proximately caused the victim's death.

(If the victim died by accident or misadventure, that is, without wrongful purpose or criminal negligence on the part of the defendant, the defendant would not be guilty. The burden of proving accident is not on the defendant. The defendant's assertion of accident is merely a denial that the defendant has committed any crime. The burden remains on the State to prove the defendant's guilt beyond a reasonable doubt.)

FINAL MANDATE ON ALL CHARGES AND DEFENSES

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant acting intentionally and with malice, wounded the victim with a deadly weapon, thereby proximately causing the victim's death, it would be your duty to return a verdict of guilty of second degree murder. If you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of second degree murder. If you do not find the defendant guilty of second degree murder, you must consider whether the defendant is guilty of voluntary manslaughter.

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If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally wounded the victim with a deadly weapon but the state has failed to satisfy you beyond a reasonable doubt that defendant did not act in the heat of passion upon adequate provocation, it would be your duty to return a verdict of guilty of voluntary manslaughter.

If you do not find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of voluntary manslaughter. You must then determine whether the defendant is guilty of involuntary manslaughter.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant (*name crime, e.g. recklessly discharged a gun, killing the victim*), (or) [acted in a criminally negligent way] thereby proximately causing the victim's death, it would be your duty to return a verdict of guilty of involuntary manslaughter. 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.

