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Voluntary Intoxication, Mental Capacity, and Defensive Force: Eight Principles on Instructing the Jury

1. The defendant has the burden of production to obtain an instruction on a defense.

Voluntary Intoxication	*Diminished Capacity*	*Defensive Force*
Utterly incapable test—that is, sufficient evidence that the defendant was utterly incapable of forming the specific intent required for the offense.	Reasonable inference test—that is, sufficient evidence to cause a reasonable doubt in the mind of a rational trier of fact as to whether the defendant was capable of forming the specific intent required for the offense.	Any evidence test—that is, any evidence that it was necessary or reasonably appeared to be necessary for the defendant to use defensive force.

See State v. Clark, 324 N.C. 146, 161-63 (1989) (contrasting the burden of production for these defenses).

2. The proof requirements when a judge determines whether a defendant is entitled to an instruction on a defense differ from the proof requirements when the jury decides the issues raised by the defense.

Voluntary Intoxication	*Diminished Capacity*	*Defensive Force*
The State must prove beyond a reasonable doubt that the defendant formed the specific intent required for the offense despite voluntary intoxication.	The State must prove beyond a reasonable doubt that the defendant formed the specific intent required for the offense despite diminished mental capacity	The State must prove beyond a reasonable doubt that the defendant acted without justification—that is, not in self-defense or other lawful exercise of defensive force.

See State v. Mash, 323 N.C. 339 (1988) (describing the State's burden of persuasion in cases involving the voluntary intoxication defense and by implication the diminished capacity defense); *State v. Hankerson,* 288 N.C. 632, 641–52 (1975) (describing the State's burden of persuasion in cases involving self-defense and by implication other uses of defensive force), *rev'd on other grounds,* 432 U.S. 233 (1977).

Beware of introducing ambiguities in the instructions about the burden of proof. *See State v. McArthur,* 186 N.C. App. 373 (2007) (noting ambiguity in 2003 version of NCPI—Crim. 308.45); *compare* NCPI—Crim.308.45, 308.45A (containing similar language in optional parenthetical when weapon is not deadly per se).

3. In determining whether the defendant has met the burden of production for a defense, the judge must consider all of the evidence, both the defendant's and the State's, in the light most favorable to the defense.

See Mash, 323 N.C. at 536-37 (stating basic principle in voluntary intoxication case); *State v. Bush,* 307 N.C. 152, 159 (1982) (applying principle to self-defense case).

To meet the burden of production for the defenses discussed here, the defendant is not required to admit committing the acts charged. *Compare State v. Neville,* 302 N.C. 623 (1981) (discussing requirements for entrapment defense). Nor must the defendant take the stand. *See State v. Alston,* 161 N.C. App. 367 (2003) (so holding). As a practical matter, however, the lack of testimony by the defendant may weaken his or her grounds for obtaining an instruction and, if obtained, for obtaining a favorable verdict from the jury on that basis.

4. Because a defense is a substantial feature of the case, the judge must instruct on a defense that is sufficiently raised by the evidence even without a request.

See State v. Dooley, 285 N.C. 158 (1974) (recognizing that the judge must instruct on all substantial features of the case without a special request and that defenses supported by the evidence are substantial features).

If the defendant does not request an instruction, the failure to give the instruction is reviewed under the plain error standard. *State v. Thomas,* 350 N.C. 315 (1999). Under the invited error doctrine, a defendant who requests that an instruction *not* be given cannot complain on appeal about the lack of an instruction. *State v. Sierra,* 335 N.C. 753 (1994) (so holding when the defendant requested that the judge not instruct on any lesser included offenses of first-degree murder).

An instruction on a defense not supported by the evidence may warrant reversal of a conviction if it conflicts with and prejudices the defendant's theory of defense. *See, e.g., State v. Tillman,* 36 N.C. App. 141 (1978).

5. The defendant is entitled to instructions on all defenses that arise from the evidence.

See generally State v. Todd, 264 N.C. 524 (1965) ("The defendant's plea of not guilty entitled him to present evidence that he acted in self-defense, that the shooting was accidental, or both. Election is not required. The defendant may rely on more than one defense.").

Although a defendant is generally not precluded from raising inconsistent defenses, evidence in support of one defense—for example, voluntarily intoxication—may be inconsistent with or unavailable to support the requirements of another defense—for example, automatism or insanity. *See, e.g., State v. Morganherring,* 350 N.C. 701, 733 (1999) (holding that the defendant is not entitled to an instruction on automatism as a result of voluntary intoxication). The defendant therefore would have to supply or point to other evidence to establish the additional defense.

6. If an instruction on a defense is required, it must be comprehensive.

See State v. Brown, 117 N.C. App. 239 (1994) (holding that trial court erred in failing to instruct on the defendant's right not to retreat within the home).

The pattern jury instructions include an instruction that the defendant does not have a duty to retreat within his or her home or business. NCPI—Crim. 308.10 (June 2009). North Carolina appellate decisions also recognize that a defendant does not have a duty to retreat from a felonious assault. *See State v. Davis,* 177 N.C. App. 98 (2006) (finding that the defendant was entitled to a no-duty-to-retreat instruction in that instance); *but cf. State v. Wilson,* 197 N.C. App. 154 (2009) (finding no plain error in the trial judge's failure to instruct the jury that the defendant did not have a duty to retreat from an assault with murderous intent where the defendant did not request the instruction and the issue of duty to retreat was not a substantial feature of the case). Other cases suggest that a defendant does not have a duty to retreat if he or she uses nondeadly force against a nondeadly assault. *See State v. Pearson,* 288 N.C. 34, 39 (1975) (recognizing that when faced with an assault with nondeadly force, a person may "repel force by force and give blow for blow").

7. Instructions may need to be modified to accommodate the evidence in the case.

Compare, e.g., NCPI—Crim. 206.10 n. 4 (June 2009) (stating that the defendant must have believed in the need to kill, but directing that belief in the need for deadly force be substituted if the defendant intended to disable but not to kill); NCPI—Crim. 308.45 (June 2008) (requiring that the defendant have believed in the need for the assault in a case in which the defendant is charged with an assault with deadly force); NCPI—Crim. 308.40 (June 2008) (requiring that the defendant have believed in the need for the action taken in a case in which the defendant is charged with an assault with nondeadly force).

8. Aspects of the defense that do not arise from the evidence should be omitted from the instructions.

Compare, e.g., State v. Effler, ___ N.C. App. ___, 698 S.E.2d 547 (2010) (finding sufficient evidence to warrant inclusion of the aggressor component of the self-defense instruction), *with State v. Jenkins,* ___ N.C. App. ___, 688 S.E.2d 101 (2010) (finding the evidence insufficient to warrant instructing the jury that the defendant could not avail himself of self-defense if he was the aggressor).

All but one of the pattern jury instructions on defensive force include an aggressor component in the instruction. If not supported by the evidence, the aggressor component should be omitted. One instruction, NCPI—Crim. 308.70 (June 2008) (self-defense to sexual assault—homicide), does not include an aggressor component and directs the judge to add aggressor language if supported by the evidence.

The pattern instruction on homicide reflects the requirement that the defendant not have

aggressively and willingly entered into the fight without legal excuse or provocation. *See State v. Norris,* 303 N.C. 526, 530 (1981) (recognizing this component of self-defense); NCPI—Crim. 206.10 (June 2009) (requiring that the defendant have entered the fight voluntarily *and* without provocation). Judges should be sure to incorporate such language into instructions not involving homicide.