

ATTEMPTED FIRST DEGREE MURDER¹ (WHERE A DEADLY WEAPON IS USED)
INCLUDING SELF-DEFENSE--FELONY.

NOTE WELL: *Unless a statute provides otherwise, the punishment is one class lower than the offense being attempted.*

The defendant has been charged with attempted first degree murder.

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

First, that the defendant intended² to commit first degree murder, and,

And Second, that at the time the defendant had this intent, he performed an act which was calculated and designed to accomplish the crime [but which fell short of the completed crime] [and which came so close to bringing it about that in the ordinary and likely course of things would have proximately resulted in the death of the victim had he not been stopped or prevented from completing his apparent course of action]. (Mere preparation or mere planning is not enough to constitute such an act, but the act need not be the last act required to complete the crime.)

¹ State v. Coble, ___ N.C. ___, 527 S.E.2d 45 (7 April 2000); State v. Cozart, 131 N.C. App. 199, 505 S.E.2d 906 (1998); State v. Collins, 334 N.C. 54, 431 S.E.2d 188 (1993).

² See N.C.P.I.--Crim. 120.10 for expanded definition of intent.

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First degree murder is the unlawful killing of a human being with malice, with premeditation, and with deliberation.

Malice means not only ill will or spite, as it is ordinarily understood--to be sure, that is malice--but it also means the 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 his death without just cause, excuse, or justification.

NOTE WELL: Use the following parenthetical if a deadly weapon was used.

(If the State proves beyond a reasonable doubt (or it is admitted)³ that the defendant intentionally inflicted a wound upon the victim with a deadly weapon, you may infer first, that the defendant acted unlawfully and second, that it was done with malice, but you are not compelled to do so.⁴ You may consider this along with all other facts and circumstances in determining whether the defendant acted unlawfully and with malice. [A firearm is a deadly weapon.] [A deadly weapon is a weapon which is likely to cause death

³ Use the parenthetical only if defendant admits to an intentional shooting in open court. See State v. McCoy, 303 N.C. 1, 28-29 (1981).

⁴ In Francis v. Franklin, 471 U.S. 307, 105 S. Ct. 1965 (1985), the Supreme Court held that a mandatory presumption, if it relieves the State of its burden of persuasion on an element of the offense, violates the Due Process Clause. This raises questions concerning the validity of the mandatory presumption of malice required in S. v. Reynolds, 307 N.C. 184 (1982).

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or serious injury. In determining whether the instrument involved was a deadly weapon, you should consider its nature, the manner in which it was used, and the size and strength of the defendant as compared to the victim.])

Premeditation means that the defendant formed the intent to kill over some period of time, however short, before he acted.

Deliberation means that the defendant acted while he was in a cool state of mind. This does not mean that there had to be a total absence of passion or emotion. If the intent to kill was formed with a fixed purpose, not under the influence of some suddenly aroused violent passion, it is immaterial that the defendant was in a state of passion or excited when the intent was carried into effect.

Neither premeditation nor deliberation are usually susceptible of direct proof. They may be proved by circumstances from which they may be inferred, such as [lack of provocation by the victim] [conduct of the defendant before, during and after the attempted killing] [threats and declarations of the defendant] [use of grossly excessive force] [infliction of wounds after the victim is felled] [the

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manner or means by which the killing was attempted].⁵

The defendant would not be guilty of attempted first degree murder on the ground of self-defense⁶ if:

First, it appeared to the defendant and he believed it to be necessary to use potentially deadly force against the victim in order to save himself from death or great bodily harm, and

Second, the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness. It is for you the jury to determine the reasonableness of the defendant's belief from the circumstances as they appeared to him at the time. In making this determination, you should consider the circumstances as you find them to have existed from the evidence, including (the size, age, and strength of the defendant as compared to the victim), (the fierceness of the

⁵ If there is evidence of lack of mental capacity to premeditate or deliberate, see S. v. Shank, 322 N.C. 243, 250-251 (1988), S. v. Weeks, 322 N.C. 152 (1988), and S. v. Rose, 323 N.C. 455 (1988), and N.C.P.I.--Crim. 305.11.

⁶ A crime denominated as 'attempted second degree murder' does not exist under North Carolina law. State v. Coble, ___ N.C. ___, 527 S.E.2d 45 (7 April 2000). While Coble would seem to indicate that a crime denominated as 'attempted voluntary manslaughter' does not exist under North Carolina law, the Court of Appeals has indicated that, at least in the case of heat of passion voluntary manslaughter, attempted voluntary manslaughter is a cognizable offense under North Carolina law. State v. Rainey, ___ N.C. App. ___, 574 S.E.2d 25 (2002) (concluding that, while the offense did exist, the evidence did not support finding that defendant acted in the heat of passion so as to entitle him to jury instruction on the lesser-included offense of attempted voluntary manslaughter).

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assault, if any, upon the defendant) (whether or not the victim had a weapon in his possession), (and the reputation, if any, of the victim for danger and violence).

Therefore, in order for you to find the defendant guilty of attempted first degree murder the State must prove beyond a reasonable doubt, among other things, that the defendant did not act in self-defense. If the State fails to prove that the defendant did not act in self-defense, you must find the defendant not guilty.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally, and not in self defense, attempted to kill the victim (with a deadly weapon) and performed an act designed to bring this about [but which fell short of the completed crime] [and which in the ordinary and likely course of things would have proximately resulted in the death of the victim had he not been stopped or prevented from completing his apparent course of action] and that in performing this act, the defendant acted with malice, with premeditation and with deliberation, it would be your duty to return a verdict of guilty of attempted first degree murder.

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.

