

206.22 FIRST-DEGREE MURDER INVOLVING DOMESTIC VIOLENCE,
COVERING ALL LESSER INCLUDED HOMICIDE OFFENSES AND SELF-
DEFENSE. FELONY.

NOTE WELL: In the event the State proceeds on both the theory of premeditation and deliberation and the theory of domestic violence, then the instruction should be adapted accordingly.

NOTE WELL: If self-defense is at issue and the assault occurred in defendant's home, place of residence, workplace or motor vehicle, see N.C.P.I.-Crim. 308.80, Defense of Habitation.

NOTE WELL: N.C. Gen. Stat. §§ 15-176.4; 15A-2000(a): When the defendant is indicted for first degree murder the court shall, upon request by either party, instruct the jury as follows:

"In the event that the defendant is convicted of murder in the first degree, the court will conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment (without parole).¹ If that time comes, you will receive separate sentencing instructions. However, at this time your only concern is to determine whether the defendant is guilty of the crime charged or any lesser included offenses about which you are instructed.²"

NOTE WELL: In the event the defendant raises accident as an affirmative defense, then give N.C.P.I.—Criminal 307.10 and edit the language of the instruction as necessary.

NOTE WELL: If the defendant has admitted to a prior conviction, the instruction should be adapted to reflect the admission of the conviction. A transcript of plea should be completed before the State rests their case.

The defendant has been charged with first-degree murder involving domestic violence.

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

1. guilty of first-degree murder involving domestic violence, or
2. guilty of second-degree murder,³ or
3. guilty of voluntary manslaughter, or
4. guilty of involuntary manslaughter, or
5. not guilty.

First degree murder involving domestic violence is the unlawful killing of a human being who was [the defendant's spouse] [the defendant's former spouse] [a person with whom the defendant (had) lived as if married] [a person with whom the defendant (was) (had been) in a dating relationship] [a person with whom the defendant shares a child in common].

Second-degree murder is the unlawful killing of a human being with malice, but without premeditation and deliberation.

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

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.

The defendant would be excused of first-degree murder and second-degree murder on the ground of self-defense if:

First, the defendant believed it was necessary to kill the alleged victim⁴ in order to save the defendant 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. In determining the reasonableness of the defendant's belief, 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 alleged victim), (the fierceness of the assault, if any, upon the defendant), (whether the alleged victim had a weapon in the alleged victim's possession), (and the reputation, if any, of the alleged victim for danger and violence) (describe other circumstances, as appropriate, from the evidence),

The defendant would not be guilty of any murder or manslaughter if the defendant acted in self-defense, and if the defendant (was not the aggressor in provoking the fight and) did not use excessive force under the circumstances.

NOTE WELL: Instructions on aggressors and provocation should only be used if there is some evidence presented that defendant provoked the confrontation. See N.C. Gen. Stat. § 14-51.4(2). If no such evidence is presented, the preceding parenthetical and reference to the aggressor throughout this instruction would not be given. In addition, the remainder of the instruction, including the mandate, would need to be edited accordingly to remove references to the aggressor.

(One enters a fight voluntarily if one uses toward one's opponent abusive language, which, considering all of the circumstances, is calculated and intended to provoke a fight. If the defendant voluntarily and without provocation entered the fight, the defendant would be considered the aggressor unless the defendant thereafter attempted to abandon the fight and gave notice to the deceased that the defendant was doing so. In other words, a person who uses defensive force is justified if the person withdraws, in good

faith, from physical contact with the person who was provoked, and indicates clearly that [he] [she] desires to withdraw and terminate the use of force, but the person who was provoked continues or resumes the use of force. A person is also justified in using defensive force when the force used by the person who was provoked is so serious that the person using defensive force reasonably believes that [he] [she] was in imminent danger of death or serious bodily harm, (the person using defensive force had no reasonable means to retreat)⁵, and the use of force likely to cause death or serious bodily harm was the only way to escape the danger. (The defendant is not entitled to the benefit of self-defense if the defendant was the aggressor⁶ with the intent to kill or inflict serious bodily harm upon the deceased.⁷))

NOTE WELL: Instructions on aggressors and provocation should only be used if there is some evidence presented that defendant provoked the confrontation. See N.C. Gen. Stat. § 14-51.4(2). If no such evidence is presented, the preceding parenthetical and reference to the aggressor throughout this instruction would not be given. In addition, the remainder of the instruction, including the mandate, would need to be edited accordingly to remove references to the aggressor.

A defendant does not have the right to use excessive force. A defendant uses excessive force if the defendant uses more force than reasonably appeared to the defendant to be necessary at the time of the killing. It is for you the jury to determine the reasonableness of the force used by the defendant under all of the circumstances as they appeared to the defendant at the time.

Furthermore, the defendant has no duty to retreat in a place where the defendant has a lawful right to be.⁸ (The defendant would have a lawful right to be in the defendant's [home⁹ [own premises] [place of residence] [workplace]¹⁰ [motor vehicle]¹¹.)

NOTE WELL: The preceding parenthetical should only be given where the place involved was the defendant's [home] [own premises] [place of residence] [workplace] [motor vehicle].¹²

Therefore, in order for you to find the defendant guilty of first-degree murder or second-degree murder, the State must prove beyond a reasonable doubt, among other things, that the defendant did not act in self-defense, (or, failing in this, that the defendant was the aggressor with the intent to kill or to inflict serious bodily harm upon the deceased.) If the State fails to prove that the defendant did not act in self-defense (or was the aggressor with intent to kill or to inflict serious bodily harm), you may not convict the defendant of either first or second-degree murder. However, you may convict the defendant of voluntary manslaughter if the State proves that the defendant (was the aggressor without murderous intent in provoking the fight in which the deceased was killed) (used excessive force).¹³

For you to find the defendant guilty of first-degree murder involving domestic violence, the state must prove six things beyond a reasonable doubt:

First, that the defendant with malice killed the alleged victim.

For this purpose, malice arises when an act which is an inherently dangerous act or omission is done 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.

Second, that the alleged victim was [defendant's spouse] [defendant's former spouse] [a person with whom the defendant (had) lived as if married] [a person with whom the defendant (was) (had been) in a dating relationship. A dating relationship is one in which the parties are romantically involved over time and on a continuous basis during the course of the relationship] [a person with whom the defendant shares a child in common].

Third, that the defendant's act was a proximate cause of the alleged victim's death. A proximate cause is a real cause, a cause without which the alleged victim's death would not have occurred,¹⁴ and one that a reasonably careful and prudent person could foresee would probably produce such [injury] [damage] or some similar injurious result. (The defendant's act need not have been the only cause, nor the last or 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 alleged victim.)

Fourth, that the defendant acted intentionally.¹⁵ Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proven by circumstances from which it may be inferred.

Fifth, that the defendant acted with premeditation, that is, that the defendant formed the intent to kill the alleged victim over some period of time, however short, before the defendant acted.

Sixth, that the defendant acted with deliberation, which means that the defendant acted while the defendant 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 is usually susceptible of direct proof. They may be proved by circumstances from which they may be inferred, such as the [lack of provocation by the alleged victim] [conduct of the defendant before, during and after the killing] [threats and declarations of the defendant] [use of grossly excessive force] [infliction of lethal wounds after the alleged victim is felled] [brutal or vicious circumstances of the killing]

[manner in which or means by which the killing was done]¹⁶ [ill will between the parties].¹⁷ You may find, but you are not compelled to do so, that a killing is a willful, deliberate, and premeditated killing if the defendant has previously been convicted of [an act of domestic violence involving the same alleged victim¹⁸] [a violation of a domestic violence protective order when the same alleged victim is the subject of the domestic violence protective order¹⁹] [communicating threats involving the same alleged victim²⁰] [stalking involving the same alleged victim²¹] [cyberstalking involving the same alleged victim²²] [domestic criminal trespass involving the same alleged victim²³].²⁴

NOTE WELL: If the defendant has admitted to a prior conviction, the following language should be adapted to reflect the admission of the conviction. A transcript of plea should be completed before the State rests their case.

You may find that a person has been previously convicted of [this] [these] offense(s), if you find from the evidence beyond a reasonable doubt that:

1. On (name date) in (name court) the defendant was convicted of an act of domestic violence²⁵ involving the same alleged victim as this case.] (Notice: Read Endnote 31)
2. On (name date) in (name court) the defendant was convicted of a violation of a domestic violence protective order²⁶ when the same alleged victim as this case is the subject of the domestic violence protective order.] (Notice: Read Endnote 31)
3. On (name date) in (name court) the defendant was convicted of communicating threats²⁷ involving the same alleged victim as this case.] (Notice: Read Endnote 31)

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4. On (name date) in (name court) the defendant was convicted of stalking²⁸ involving the same alleged victim as this case.] (Notice: Read Endnote 31)
 5. On (name date) in (name court) the defendant was convicted of cyberstalking²⁹ involving the same alleged victim as this case.] (Notice: Read Endnote 31)
 6. On (name date) in (name court) the defendant was convicted of domestic criminal trespass³⁰ involving the same alleged victim as this case.].³¹ (Notice: Read Endnote 31)

You may consider this along with all other facts and circumstances in determining whether the killing was unlawful and whether it was committed with premeditation and deliberation.

And Seventh, that the defendant did not act in self-defense or that the defendant was the aggressor in provoking the fight with the intent to kill or inflict serious bodily harm upon the deceased.

Second Degree Murder differs from first degree murder involving domestic violence in that the State does not have to prove specific intent to kill, premeditation, or deliberation. For you to find the defendant guilty of second degree murder, the State must prove beyond a reasonable doubt that the defendant unlawfully, intentionally³² and with malice wounded the alleged victim with a deadly weapon, proximately causing the alleged victim's death. For this purpose, malice means not only hatred, ill will, or spite, as it is ordinarily understood, 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 another's death, without just

cause, excuse or justification.] [malice also 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.³³] (The State must also prove that the defendant did not act in self-defense, or if the defendant did act in self-defense, the State must prove that the defendant was the aggressor in provoking the fight with the intent to kill or inflict serious bodily harm.)

Voluntary Manslaughter is the unlawful killing of a human being without malice, premeditation, and deliberation. 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 means anything that has a natural tendency to produce such passion in a person of average mind and disposition.³⁴ Also, the defendant's act must have taken 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 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 alleged victim by an intentional³⁵ and unlawful act.

Second, that the defendant's act was a proximate cause³⁶ of the alleged victim's death. A proximate cause is a real cause, a cause without which the alleged victim's death would not have occurred.

And Third, that the defendant [did not act in self-defense] (or) [though acting in self-defense [was the aggressor] [though acting in self-defense used excessive force]].

Voluntary manslaughter is also committed if the defendant kills in self-defense but [uses excessive force under the circumstances] [was the aggressor without murderous intent in provoking the fight in which the killing took place].

The burden is on the State to prove beyond a reasonable doubt that the defendant did not act in self-defense. However, if the State proves beyond a reasonable doubt that the defendant, though otherwise acting in self-defense, [used excessive force] [was the aggressor, though the defendant had no murderous intent when the defendant entered the fight], the defendant would be guilty of voluntary manslaughter.³⁷

If you do not find the defendant guilty of 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 that is not a felony] [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:

First, that the defendant acted

-
- a. [unlawfully. The defendant's act was unlawful if (define crime alleged to have been violated, e.g., defendant recklessly discharged a gun, killing the alleged victim).]

 - b. [in a criminally negligent way.³⁸ 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 State must prove that this [unlawful] [criminally negligent] act proximately caused the alleged victim's death.

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 with malice and not in self-defense, wounded the alleged victim with a deadly weapon thereby proximately causing the alleged victim's death, that the defendant acted intentionally to kill the alleged victim, that the alleged victim was [defendant's spouse] [defendant's former spouse] [a person with whom the defendant (had) lived as if married] [a person with whom the defendant (was) (had been) in a dating relationship] [a person with whom the defendant shares a child in common] and that the defendant acted after premeditation and with deliberation, it would be your duty to return a verdict of guilty of first 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 first degree murder involving domestic violence, but will determine whether the defendant is guilty of second degree murder.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant intentionally and with malice but not in self-defense wounded the alleged victim with a deadly weapon thereby proximately causing the alleged victim's death, it would be your duty to return a verdict of guilty of second-degree murder. (In the event you find the defendant guilty of second-degree murder, your foreperson must indicate on the verdict sheet upon which theory of malice this is based, and your decision on this theory must be unanimous.) 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, but will determine whether the defendant is guilty of voluntary manslaughter.

NOTE WELL: If this is a Second-Degree Murder case involving multiple theories of malice, then refer to the special verdict form attached herein.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant intentionally wounded the alleged victim with a deadly weapon and thereby proximately caused the alleged victim's death, and that the defendant was the aggressor in provoking the fight or used excessive force, it would be your duty to find the defendant guilty of voluntary manslaughter even if the state has failed to prove that the defendant did not act in self-defense.

Or, 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 wounded the alleged victim with a deadly weapon and thereby proximately caused the alleged victim's death, 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 so 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, but will 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 [committed the offense of (name crime)] [acted in a criminally negligent way] thereby proximately causing the alleged victim's death, it would be your duty to return a verdict of guilty of involuntary manslaughter. However, 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.

And finally, if the State has failed to satisfy you beyond a reasonable doubt that the defendant did not act in self-defense, that the defendant was the aggressor, or that the defendant used excessive force, then the defendant's action would be justified by self-defense; and it would be your duty to return a verdict of not guilty.

APPENDIX A

NOTE WELL: This verdict form is an example and must be adapted based on the facts of your case. For example, some cases may not involve the felony murder rule or second lesser included offenses.

STATE OF NORTH CAROLINA

IN THE GENERAL COURT
OF JUSTICE
SUPERIOR COURT DIVISION

No. _____

STATE OF NORTH CAROLINA

Plaintiff)

)

vs.)

)

V E R D I C T

(Name Defendant))

)

Defendant)

)

We, the jury, return the unanimous verdict as follows:

1. Guilty of First-Degree Murder Involving Domestic Violence

ANSWER: _____

If you find the Defendant Guilty of First-Degree Murder stop here.

2. Guilty of Second-Degree Murder

ANSWER: _____

If you find defendant Guilty of Second-Degree Murder you must
unanimously find one or more of A, B, or C below.

A. Is it malice meaning hatred, ill will, or spite?

ANSWER: _____

B. Is it malice defined as 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 another's death,
without just cause, excuse or justification?

ANSWER: _____

C. Is it malice that 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?

ANSWER: _____

If you find the Defendant Guilty of Second-Degree Murder stop here.

3. Guilty of (state second lesser included offense)

ANSWER: _____

If you find the Defendant Guilty of (state second lesser included
offense) stop here.

4. Not Guilty.

ANSWER: _____

This, the _____ day of _____, 20____.

Foreperson of the Jury (must be signed)

1 The parenthetical phrase, without parole, must be used for offenses occurring on or after October 1, 1994.

2 N.C. Gen. Stat. § 14-5.2 (effective July 1, 1981) abolished all distinctions between accessories before the fact and principals to felonies as to both trial and punishment, except that if a person who would have been guilty and punishable as an accessory before the fact is convicted of a capital felony, and the jury finds that his conviction was based solely on the uncorroborated testimony of one or more principals, co-conspirators or accessories to the crime, he shall be guilty of a Class B felony. The act applies to all offenses committed on or after July 1, 1981. See N.C.P.I.—Crim. 202.30.

As to felonies allegedly committed before that date, accessories before the fact should be tried (and punished) according to previously existing law. See N.C.P.I.—Crim. 202.20, 202.30 and *State v. Small*, 301 N.C. 407, 272 S.E.2d 128 (1980).

See N.C.P.I.—Crim. 206.10A for suggested procedure and instruction where an accessory before the fact is convicted of first-degree murder.

3 “If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is no evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second-degree murder.” *State v. Strickland*, 307 N.C. 274, 293 (1983), overruling *State v. Harris*, 290 N.C. 718 (1976).

4 Substitute "to use deadly force against the alleged victim" for "to kill the alleged victim" when the evidence tends to show that the defendant intended to use deadly force to disable the alleged victim, but not to kill the alleged victim. *See State v. Watson*, 338 N.C. 168 (1994).

5 If there is a question of whether the defendant was in a place that the defendant had a lawful right to be, then the instruction should be amended to add this parenthetical.

6 N.C. Gen. Stat. § 14-51.4(2).

7 Pursuant to N.C. Gen. Stat. § 14-51.4(1), self-defense is also not available to a person who used defensive force and who was [attempting to commit] [committing] [escaping after the commission of] a felony. If evidence is presented on this point, then the instruction should be modified accordingly to add this provision.

8 *See* N.C.P.I.—Crim. 308.10.

9 N.C. Gen. Stat. § 14-51.2 (a) (1) states that a home is a “building or conveyance of any kind, to include its curtilage, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed as a temporary or permanent residence.” Curtilage is the area “immediately surrounding and associated with the home,” which may include “the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings.” *State v. Grice*, 367 N.C. 753, 759 (2015) (citations and quotations omitted) (defining curtilage in a Fourth Amendment case).

10 N.C. Gen. Stat. § 14-51.2 (a) (4) states that a workplace is a “building or conveyance of any kind, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, which is being used for commercial purposes.”

11 N.C. Gen. Stat. § 14-51.2 (a) (3); which incorporates N.C. Gen. Stat. § 20-4.01 (23), defines “motor vehicle” as “Every vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle. This shall not include mopeds as defined in N.C. Gen. Stat. § 20-4.01(27)d1.”

12 “[W]herever an individual is lawfully located—whether it is his home, motor vehicle, workplace, or any other place where he has the lawful right to be—the individual may stand his ground and defend himself from attack when he reasonably believes such force is necessary to prevent imminent death or great bodily harm to himself or another.” *State v. Bass*, ___ N.C. ___, 819 S.E.2d 322, 326 (2018). “[A] defendant entitled to *any* self-defense instruction is entitled to a *complete* self-defense instruction, which includes the relevant stand-your-ground provision.” *Id.*

13 This instruction should be adapted to include one or both of these options if supported by the evidence.

14 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).” This language was approved in *State v. Messick*, 159 N.C. App. 232 (2003), per curium affirmed, 358 N.C. 145 (2004). (“Defendant’s act does not have to be the sole proximate cause of death. It is sufficient that the act was a proximate cause which in combination with another possible cause resulted in [the alleged victim’s] death.”).

15 If a definition of intent is required, see N.C.P.I.—Crim. 120.10. If a further definition of general intent or specific intent is required, you may consider giving the following additional instruction: [Specific Intent is a mental purpose, aim or design to accomplish a specific harm or result] [General Intent is a mental purpose, aim or design to perform an act, even though the actor does not necessarily desire the consequences that result] Black’s Law Dictionary, 825-26 (Bryan A. Garner, 8th ed. 2004).

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

17 See *State v. Battle*, 322 N.C. 114 (1988).

18 N.C. Gen. Stat. § 50B-1(a).

19 N.C. Gen. Stat. § 50B-4.1 (a) (f) (g) (g1)

20 N.C. Gen. Stat. § 14-277.1

21 N.C. Gen. Stat. § 14-277.3A

22 N.C. Gen. Stat. § 14-196.3

23 N.C. Gen. Stat. § 14.134.3

24 N.C. Gen. Stat § 16-17(a1) provides “there shall be a rebuttable presumption” of premeditation and deliberation where there is a prior domestic violence conviction. The constitutionality of this burden shifting aspect of N.C. Gen. Stat. § 14-17(a1) and the “rebuttable presumption” of a “willful, deliberate, and premeditated killing” is at question. See Jeff Welty’s blog post “Many Questions and a Few Answers about Britny’s Law” [sog.unc.edu/blogs/nc-criminal-law/many-questions-and-few-answers-about-britny’s-law](http://sog.unc.edu/blogs/nc-criminal-law/many-questions-and-few-answers-about-britny-s-law).

25 An act of domestic violence is the commission of one or more of the following acts upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense: attempting to cause bodily injury, or intentionally causing bodily injury; or placing the aggrieved party or a member of the aggrieved party’s family or household in fear of imminent serious bodily injury or continued harassment that rises to such a level as to inflict substantial emotional distress; or under N.C.G.S. § 14-27.21 through N.C.G.S. § 14-27.33).

26 N.C.G.S. § 50-B4.1(a), (f), (g), or (g1) or G.S. § 14-269.8.

27 Communicating threats is willfully threatening to physically injure the person or that person’s child, sibling, spouse, or dependent or willfully threatening to damage the

property of another; the threat is communicated to the other person orally, in writing, or by any other means; the threat is made in a manner or under circumstances which would cause a reasonable person to believe that the threat is likely to be carried out; and the person threatened believes that the threat will be carried out.

28 Stalking is defined as when the defendant willfully on more than one occasion harasses another person without legal purpose or willfully engages in a course of conduct directed at a specific person without legal purpose and the defendant knows or should know that the harassment or the course of conduct would cause a reasonable person to do any of the following: (1) fear for the person's safety or the safety of the person's immediate family or close personal associates (2) suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment.

29 N.C.G.S. § 14-196.3.

30 N.C.G.S. § 14-134.3.

31 In the event the defendant elects to admit the prior conviction, then a transcript of plea should be completed. Care should be used to edit the instruction to reflect the admission of the prior conviction.

32 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. *State 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).

33 *See State v. Mosley*, ___ N.C. App. ___, 806 S.E.2d 365 (2017). The jury should only be instructed on the theories of malice applicable to the facts of the case. This is important because the theory or theories of malice will determine the class of the offense.

34 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."

35 "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." *State 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).

36 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 alleged victim."

37 Where the evidence raises the issue of retreat, see N.C.P.I.—Crim. 308.10.

38 Note that the trial court must choose either "unlawfully" or "in a criminally negligent way." Jurors should not be given both options.