

206.24 FIRST DEGREE MURDER INVOLVING DOMESTIC VIOLENCE,
COVERING ALL LESSER INCLUDED HOMICIDE OFFENSES NOT INVOLVING
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: 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.—Crim 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 murder³ 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.

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.

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.

[A firearm is a deadly weapon.] [A deadly weapon is a weapon which is likely to cause death 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 alleged victim.]

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,⁴ 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.⁵ 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.

And 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]⁶ [ill will between the parties].⁷ 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 victim⁸] [a violation of a domestic violence protective order when the same alleged victim is the subject of the domestic violence protective order⁹] [communicating threats involving the same alleged victim¹⁰] [stalking involving the same alleged victim¹¹] [cyberstalking involving the same alleged victim¹²] [domestic criminal trespass involving the same alleged victim¹³].¹⁴

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 violence¹⁵ involving the same alleged victim as this case.] (Notice: Read Endnote 21)
- 2) On (name date) in (name court) the defendant was convicted of a violation of a domestic violence protective¹⁶ order when the same alleged victim as this case was the subject of the domestic violence protective order.] (Notice: Read Endnote 21)
- 3) On (name date) in (name court) the defendant was convicted of communicating threats¹⁷ involving the same alleged victim as this case.] (Notice: Read Endnote 21)
- 4) On (name date) in (name court) the defendant was convicted of stalking¹⁸ involving the same alleged victim as this case.] (Notice: Read Endnote 21)
- 5) On (name date) in (name court) the defendant was convicted of cyberstalking¹⁹ involving the same alleged victim as this case.] (Notice: Read Endnote 21)
- 6) On (name date) in (name court) the defendant was convicted of domestic criminal trespass²⁰ involving the same alleged victim as this case.].²¹ (Notice: Read Endnote 21)

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.

Second Degree Murder differs from first degree murder 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, intentionally²² 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.]²³

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.²⁴ 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 two things beyond a reasonable doubt:

First, that the defendant killed the alleged victim by an intentional²⁵ and unlawful act.

And Second, that the defendant's act was a proximate cause²⁶ 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.

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] [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:

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.²⁷ 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

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant, acting with malice, 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, 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 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, it would be your duty to find the defendant guilty of voluntary manslaughter.

Or, 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, 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.

FIRST DEGREE MURDER INVOLVING DOMESTIC VIOLENCE, COVERING ALL
LESSER INCLUDED HOMICIDE OFFENSES NOT INVOLVING SELF DEFENSE.
FELONY.

GENERAL CRIMINAL VOLUME

JUNE 2018

N.C. Gen. Stat. §§ 14-17, 14-18, 14-51.2, 14-51.3, 14-51.4

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 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 curiam 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.”).

5 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).

6 If there is evidence of lack of mental capacity to premeditate or deliberate, see *State 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.

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

8 N.C. Gen. Stat. § 50B-1(a).

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

10 N.C. Gen. Stat. § 14-277.1

11 N.C. Gen. Stat. § 14-277.3A

12 N.C. Gen. Stat. § 14-196.3

13 N.C. Gen. Stat. § 14.134.3

14 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

15 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.

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

17 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.

18 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.

19 N.C.G.S. § 14-196.3.

20 N.C.G.S. § 14-134.3.

21 In the event the defendant elects to admit the prior conviction, then a transcript of plea should be completed before the State rests their case. Care should be used to edit the instruction to reflect the admission of the prior conviction.

22 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).

23 See *State v. Mosley*, ___ N.C. App. ___, 806 S.E.2d 365 (Oct. 17, 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.

24 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."

25 "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).

26 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."

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

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: _____

FIRST DEGREE MURDER INVOLVING DOMESTIC VIOLENCE, COVERING ALL
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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)

