

N.C.P.I.—CRIM 206.30

SECOND DEGREE MURDER WHERE A DEADLY WEAPON IS USED, COVERING ALL LESSER INCLUDED HOMICIDE OFFENSES AND SELF-DEFENSE. FELONY.
GENERAL CRIMINAL VOLUME
JUNE 2014

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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.

The defendant has been charged with second degree murder.¹

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 an act done in a criminally negligent way.

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

¹ This instruction is intended to serve as 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 as well as acquittal upon the grounds of self-defense or accident are possible verdicts under the evidence and where the evidence would support a finding that a deadly weapon was used.

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First, it appeared to the defendant and the defendant believed it to be necessary to kill the victim 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. It is for you the jury to determine the reasonableness of the defendant's belief from the circumstances as they appeared to the defendant 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 assault, if any, upon the defendant), (whether or not the victim had a weapon in the victim's possession), (and the reputation, if any, of the 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.

(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

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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, 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 aggressor² with the intent to kill or inflict serious bodily harm upon the deceased.³)

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

² N.C. Gen. Stat. § 14-51.4(2).

³ 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.

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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.⁴ (The defendant would have a lawful right to be in the defendant's [home] [own premises] [place of residence] [workplace] [motor vehicle].⁵)

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].

Therefore, in order for you to find the defendant guilty of murder in the second degree 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 inflict serious bodily harm upon the deceased. If the state fails to prove either that the defendant did not act in self-defense or was the aggressor, with intent to kill or inflict serious bodily harm, you may not convict the defendant of second degree murder, but you may convict the defendant of voluntary manslaughter if the state proves that the defendant was simply the aggressor without murderous intent in bringing on the fight in which the deceased was killed, or that the defendant used excessive force.

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

First, that the defendant wounded the victim with a deadly weapon. [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 was a deadly weapon, you should consider the nature of the instrument, the

⁴ See N.C.P.I.—Crim. 308.10.

⁵ N.C. Gen. Stat. § 14-51.3 (a).

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manner in which it was used, and the size and strength of the defendant as compared to the victim.]

Second, that the defendant acted intentionally⁶ 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 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].⁷

6 "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 *State v. Jordan*, 140 N.C. App. 594, (2000); *State v. Coble*, 351 N.C. 448 (2000).

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

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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,⁸ 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 or 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.)⁹

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

If the State proves beyond a reasonable doubt,¹⁰ 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.

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, and not in self defense, the defendant would be guilty of second degree murder.

⁸ 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."

⁹ This sentence is only to be provided if the offense involved the killing of a child.

¹⁰ See *State v. McCoy*, 303 N.C. 1, 28-29 (1981).

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Voluntary manslaughter¹¹ 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,¹² 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 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 intentional¹³ and

¹¹ See *State v. McArthur*, 662 S.E.2d 579 (N.C. App. 2008) (holding error not to instruct on the element of proximate cause but error was harmless because element had been instructed on in elements of second degree murder).

¹² 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."

¹³ "Neither second-degree murder nor voluntary manslaughter has as an essential

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unlawful act.

Second, that the defendant's act was a proximate cause¹⁴ of the victim's death. A proximate cause is a real cause, a cause without which the 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] (or) [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 or was the aggressor without murderous intent in bringing on the fight in which the killing took place.

Again, 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] (or) [was the aggressor, though the defendant had no murderous intent when the defendant entered the fight],

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).

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 the victim."

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the defendant would be guilty of voluntary manslaughter.¹⁵

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:

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, that this [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.¹⁶ 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.)

¹⁵ Where the evidence raises the issue of retreat, see N.C.P.I.—Crim. 308.10.

¹⁶ In the event that the evidence shows that there was an accident, *give* N.C.P.I.—Crim. 307.10.

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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 but not in self-defense, 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.

[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 and that the defendant [was the aggressor in bringing on 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 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 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. You must then determine whether the defendant is guilty of involuntary manslaughter.

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If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant (*committed 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.

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; therefore, you would return a verdict of not guilty.

