

N.C.P.I. —Crim 208.81
MODEL INSTRUCTION—ASSAULT ON A LAW ENFORCEMENT OFFICER—
ARREST SITUATIONS. MISDEMEANOR.
CRIMINAL VOLUME
JUNE 2015
N.C. Gen. Stat. § 15A-401

208.81 MODEL INSTRUCTION—ASSAULT ON A LAW ENFORCEMENT
OFFICER—ARREST SITUATIONS.

NOTE WELL: This instruction is to be used as a model instruction for this offense. It incorporates all of the scenarios found in the N.C.P.I. 208.81 series of instructions.

The defendant is charged with assault on a law enforcement officer while the officer was performing or attempting to perform a duty of the officer's office.

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

First, that the defendant assaulted (*name officer*) by intentionally (*describe assault, e.g., striking him*).

Second, that (*name officer*) was a law enforcement officer and the defendant knew or had reasonable grounds to know that (*name officer*) was a law enforcement officer. A (*state alleged victim's position, e.g., a city police officer*) is a law enforcement officer. A person was a law enforcement officer even though the officer was out of uniform and [off duty]¹ [working under cover] [(*state other reason for being out of uniform*)]. Whether the defendant knew or had reasonable grounds to know that (*name officer*) was a law enforcement officer is a fact to be determined by you from all the facts and circumstances surrounding the encounter between (*name officer*) and the defendant.

Third, that the defendant (*describe conduct, e.g., struck*) (*name officer*), while (*name officer*) was making or attempting to make an arrest.

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An officer makes or attempts to make an arrest when the officer indicates by words or conduct that the officer is taking a person into custody to answer a criminal charge.²

NOTE WELL: Choose whichever fourth element is applicable.

(And Fourth, that (*name officer*) had in the officer's possession a [warrant] [order] for arrest [[naming] [describing]] [the defendant] [name other person being arrested].)

NOTE WELL: Use the following paragraphs only if the officer made an arrest without a warrant in the officer's possession.

(And Fourth, that (*name officer*) made a lawful arrest without a warrant³. The arrest would be lawful if, at the time (*name officer*) made it, the officer [had knowledge that a warrant has been issued and may arrest the person named in the warrant]⁴ [had probable cause to believe that (*name defendant or other person being arrested*) had

[a. committed a felony. (*Name felony*) is a felony.]⁵

[b. committed any criminal offense in his presence. (*Name criminal offense*) is a criminal offense.]⁶

[c. committed a misdemeanor and would not be apprehended or might cause [physical injury to [himself] [herself] [others]] [damage to property] unless immediately arrested. (*Name misdemeanor*) is a misdemeanor.]⁷

[d. violated a pretrial release order]⁸.]

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Such probable cause⁹ would exist if the facts and circumstances within the officer's knowledge or of which the officer had reasonably trustworthy information which was sufficient to cause a prudent person to believe that the suspect had committed or was committing (*name offense*).¹⁰

NOTE WELL: Give the following paragraph regardless of which fourth element applies.

If you find from the evidence (*name officer*) was making or attempting to make a lawful arrest, then the defendant had a duty to submit to that arrest. If you find from the evidence the defendant (*describe conduct, e.g., struck*) (*name officer*) while (*name officer*) was making the arrest, the defendant would be guilty of an assault upon a law enforcement officer while the officer was discharging or attempting to discharge a duty of the officer's office.

*NOTE WELL: Give the following paragraphs only when there is an issue to whether the arrest was lawful.*¹¹

(If the arrest was not a lawful arrest, then the defendant had a right to resist the unlawful arrest. In doing so the defendant was justified in using such force as reasonably appeared to the defendant to be necessary under the circumstances to prevent the unlawful restraint of the defendant's liberty. The resisting force by the defendant cannot have been excessive. In making this determination, you should consider the circumstances as you find them to have existed from the evidence. You should also include in your consideration ((the size, age and strength of the defendant as compared to (*name officer*)), (the fierceness of the assault, if any, upon the defendant),

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(the number of officers involved), (whether or not (*name officer*) had a weapon in (*name officer's*) possession), (and the reputation, if any, of (*name officer*) for danger and violence)). You, the jury, determine the reasonableness of the defendant's belief from the circumstances then appearing to defendant.)

NOTE WELL: Give the following paragraphs only when there is an issue to whether the officer used reasonable or excessive force to effect the arrest, and if the officer used excessive force, whether the defendant acted within the defendant's right of self defense.

(A law enforcement officer is justified in using force against another person when the officer reasonably believes that the Defendant_has committed a criminal offense¹² and the force is necessary to effect the arrest. If the officer uses more force than reasonably appears necessary at the time to effect the arrest, that is excessive force, and the defendant has a right to defend [himself] [herself]. You, the jury, determine the reasonableness of the officer's force from the circumstances then appearing to the officer.

The defendant would be justified in using force to defend [himself] [herself] if, when the defendant acted, the circumstances would have created in the mind of a person of ordinary firmness a reasonable belief that the defendant's action was necessary or apparently necessary to protect [himself] [herself] from the officer's excessive force and if the circumstances did create such a belief in the defendant's mind.

Nevertheless, the defendant cannot have used excessive force. The defendant had the right to use only such force as reasonably appeared

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necessary to the defendant under the circumstances to protect [himself] [herself] from the officer's excessive force. In making this determination, you should consider the circumstances as you find them to have existed from the evidence. You should also consider (the size, fierceness of the assault, if any, upon the defendant), (the number of officers involved), (whether or not (*name officer*) had a weapon in the officer's possession), (and the reputation, if any, of (*name officer*) for danger and violence)). You, the jury, determine the reasonableness of the defendant's belief from the circumstances then appearing to the defendant.)

NOTE WELL: Give the following paragraph only when the evidence suggests that the defendant used or threatened to use force before the officer attempted to arrest the defendant, or before the officer used any force to effect the arrest.

(Finally, the defendant's actions would be justified only if the defendant was not the aggressor. If the defendant used or threatened to use force against the officer before the officer [attempted to arrest the defendant] [used any force to effect the arrest], the defendant would be the aggressor. The defendant's force or threat of force would itself constitute an unjustified assault upon the officer. Additionally, if the defendant's initial use or threat of force provoked the officer to use excessive force, the defendant would still be the aggressor. As the aggressor, the defendant would not be justified in defending [himself] [herself], even against that excessive force, unless the defendant first withdrew and gave notice that the defendant would submit to the arrest. If the defendant did not withdraw, however, and

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the officer continued to use excessive force, the defendant would be entitled to defend [himself] [herself] against that excessive force.

If the state proves beyond a reasonable doubt that (*name officer*) used only reasonable force to effect the arrest, the defendant would be guilty of an assault upon a law enforcement officer while the officer was discharging or attempting to discharge a duty of the officer's office. If the state proves beyond a reasonable doubt that the defendant was not reasonable in the defendant's belief that the defendant's action was necessary or apparently necessary to protect [himself] [herself] from the officer's excessive force, or that the defendant used excessive force (or was the aggressor), the defendant would be guilty of assault upon a law enforcement officer while the officer was discharging or attempting to discharge a duty of the officer's office. If the State fails to prove at least one of these elements, the defendant would be not guilty.)

MANDATE

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally (*describe assault, e.g., struck*) (*name officer*) and that (*name officer*) was a (*describe officer's position, e.g., a city police officer*) and that the defendant knew or had reasonable grounds to know that (*name officer*) was a (*describe officer's position*), and that (*name officer*) was making or attempting to make an arrest when the defendant (*describe conduct, e.g., struck*) (*name officer*), and that (*name officer*) [had in (*name officer's*) possession a [warrant] [order] for arrest [naming] [describing] (*name defendant or other person being arrested*),] [made a lawful arrest without a warrant], it would be your

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duty to return a verdict of guilty. 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.

NOTE WELL: Only give the following additional mandate if self-defense is applicable.

SELF-DEFENSE MANDATE

(If the State has satisfied you beyond a reasonable doubt that (*name officer*) used reasonable force to effect the arrest, you would find that the defendant acted without justification or excuse. Even if the State has not satisfied you that the officer used reasonable force, you would find that the defendant acted without justification or excuse if the State has satisfied you beyond a reasonable doubt that the defendant did not act in self-defense. Therefore, if [the defendant did not reasonably believe that (*describe assault, e.g., striking*) (*name officer*) [was necessary] [appeared to be necessary] to protect the defendant from (*name officer's*) (*describe force, e.g. spraying him with pepper spray*)] [the defendant used excessive force] [the defendant was the aggressor], the defendant's acts would not be excused or justified in defense of the defendant.

If you do not so find or have a reasonable doubt that the State has proven any of these things, then the defendant's action would be justified by self-defense and it would be your duty to return a verdict of not guilty.)

¹ This instruction assumes that an off-duty police officer is still a law enforcement officer for purposes of N.C. Gen. Stat. § 14-33(b)(4) as long as he is assaulted while

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performing what would be a duty of his office if he were on duty. *Cf., S. v. Polk*, 29 N.C. App. 360 (1975).

2 *Cf., S. v. Sanders*, 295 N.C. 361, 365 (1978).

3 N.C. Gen. Stat. § 15A-401 sets forth grounds upon which an officer may make an arrest without having a warrant in the officer's possession.

4 N.C. Gen. Stat. § 15A-401(a)(2)

5 N.C. Gen. Stat. § 15A-401(b)(2)(a)

6 N.C. Gen. Stat. § 15A-401(b)(1)

7 N.C. Gen. Stat. § 15A-401(b)(2)(b). Other grounds set forth to when an officer may arrest any person whom the officer has probable cause to believe has committed a misdemeanor includes committing a misdemeanor under N.C. Gen. Stat. §§ 14-72.1, 14-134.4, 20-138.1, or 20-138.2, N.C. Gen. Stat. § 15A-401(b)(2)(c); N.C. Gen. Stat. §§ 14-33(a), 14-33(c)(1), 14-33(c)(2), or 14-34 when the offense was committed by a person with whom the alleged victim has a personal relationship as defined in G.S. 50B-4.1(a), N.C. Gen. Stat. § 15A-401(b)(2)(d); or G.S. 50B-4.1(a), N.C. Gen. Stat. § 15A-401(b)(2)(e).

8 G.S. 15A-534 or G.S. 15A-534.1(a)(2), N.C. Gen. Stat. § 15A-401(b)(2)(f).

9 Under this formula, a finding of probable cause requires two separate determinations. First, it must be determined what facts and circumstances were in fact within the officer's knowledge and information at the time he initiated the arrest. If there is conflicting evidence as to this, the jury must determine what the officer had seen, heard or been told. The second determination is whether the facts proved by the evidence most favorable to the State would indeed warrant a "prudent person in believing that the defendant had committed a criminal offense." This involves a question of law, which the court must decide. Therefore, this instruction does not explain the "prudent person" test to the jury, but rather tells them only (1) that probable cause is a necessary element of a

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lawful arrest without a warrant and (2) which of the conflicting facts would constitute probable cause. *See, S. v. Bradley*, 32 N.C. App. 666 (1977).

10 *Beck v. Ohio*, 379 U.S. 89 (1964); *S. v. Streeter*, 283 N.C. 203, 207 (1973).

11 Provide an instruction on the lesser-included offense of simple assault if the jury determines that the defendant intentionally assaulted the officer and the arrest was unlawful.

12 N.C. Gen. Stat. § 15A-401(d)(1) provides: "A law enforcement officer is justified in using force upon another person when and to the extent that he reasonably believes it necessary: (a) to prevent the escape from custody or to effect an arrest of a person who he reasonably believes has committed a criminal offense, unless he knows that the arrest is unauthorized; or (b) to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while effecting or attempting to prevent an escape. N.C. Gen. Stat. § 15A-401(d)(2) further provides: "A law enforcement officer is justified in using deadly force upon another person for a purpose specified in subdivision (1) of this subsection only when it is or appears to be reasonably necessary thereby: (a) to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly force; (b) to effect an arrest or to prevent the escape from custody of a person who he reasonably believes is attempting to escape by means of a deadly weapon, or who by his conduct or any other means indicates that he presents an imminent threat of death or serious physical injury to others unless apprehended without delay; or (c) to prevent the escape of a person from custody imposed upon him as a result of a conviction for a felony. Subsection (d) provides that "[n]othing in this subdivision constitutes justification for willful, malicious or criminally negligent conduct by any person which injures or endangers any person or property, nor shall it be construed to excuse or justify the use of unreasonable or excessive force."

