

N.C.P.I.—Crim 208.81C

ASSAULT ON AN OFFICER AND SIMPLE ASSAULT—ARREST SITUATIONS
(ISSUES AS TO LAWFULNESS OF ARREST WITHOUT A WARRANT, AND AS
TO FORCE USED BY OFFICER AND DEFENDANT). MISDEMEANOR.

CRIMINAL VOLUME

REPLACEMENT JUNE 2015

N.C. Gen. Stat. § 14-33(c)(4)

208.81C ASSAULT ON AN OFFICER AND SIMPLE ASSAULT—ARREST
SITUATIONS (ISSUES AS TO LAWFULNESS OF ARREST WITHOUT A
WARRANT, AND AS TO FORCE USED BY OFFICER AND DEFENDANT).

*NOTE WELL: See N.C.P.I. 208.80 for an index to other factual
situations involving assaults on arresting officers.*

*NOTE WELL: N.C.P.I. 208.81 provides a model instruction for the
offense of assault on a law enforcement officer in arrest
situations. The instruction incorporates all of the various
scenarios presented in the index set forth in N.C.P.I. 208.80 into
one instruction.*

*An assault on an officer can involve a variety of issues
depending on whether or not the officer is in uniform, acted with
or without a warrant, the lawfulness of the arrest, the force used
by the officer, or the force used by the defendant.*

*Use this instruction when it is undisputed that the officer in
uniform was making an arrest without a warrant, and the issues
are:*

- (1) Whether the arrest was a lawful arrest without a
warrant;*
- (2) If the arrest was lawful, whether*
 - (a) the officer used reasonable or excessive
force to effect the arrest, and*
 - (b) if the officer used excessive force, whether
the defendant acted within the defendant's
right of self defense, and*
- (3) if the arrest was not lawful, whether the
defendant acted within the defendant's right
to resist an unlawful, warrantless arrest.*

*This instruction is appropriate for situations such as the
road side arrest of an impaired driver who struggles before
being taken into custody by a uniformed state trooper.*

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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.

Your duty is to return one of the following verdicts:

(1) guilty of assault upon a law enforcement officer while the officer was discharging or attempting to discharge a duty of the officer's office,

(2) guilty of simple assault, or

(3) not guilty.

For you to find the defendant guilty of assault upon a law enforcement officer while the officer was discharging or attempting to discharge a duty of the officer's office, the State must prove four elements beyond a reasonable doubt:

First, that the defendant assaulted (*name officer*) by intentionally¹ and without justification or excuse (*describe assault, e.g., striking*) (*name officer*).

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 officer's position, e.g., a highway patrolman*) is a law enforcement officer.

Third, that the defendant (*describe conduct, e.g., struck*) (*name officer*), (*name officer*) was making or attempting to make an arrest. A (*state officer's position, e.g., a highway patrolman*) makes or attempts to

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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

And Fourth, that this arrest was a lawful arrest.³ The arrest would be lawful if, at the time (*name officer*) made it, the officer had probable cause to believe that [the defendant] [(*name other person being arrested*)] had committed

- a. [a felony. (*Name felony*) is a felony.]
- b. [a criminal offense in the officer's presence. (*Name criminal offense*) is a criminal offense.]
- c. [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.]

Such probable cause would exist if (*describe facts which would constitute probable cause*).⁴

If (*name officer*) was making or attempting to make a lawful arrest, then [the defendant] [(*name arrestee*)] had a duty to submit to that arrest. If 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.

A law enforcement officer is justified in using force against another person when the officer reasonably believes it necessary to effect the arrest

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of a person whom the officer reasonably believes has committed a criminal offense.⁵ If the officer uses more force than reasonably appears necessary at the time to effect the arrest, that is excessive force, the defendant has a right to defend [*himself*] [*herself*].⁶ 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 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 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), (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.

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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, the defendant's resistance to the officer's excessive force would constitute a continuing assault. If the defendant did withdraw, however, and 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 officer's belief that the officer's action was necessary or apparently

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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.

If you find that the defendant intentionally (*describe conduct, e.g., struck*) (*name officer*) but do not find that the arrest was a lawful arrest, you must determine whether the defendant is guilty of simple assault.

For you to find the defendant guilty of simple assault, the State must prove two elements beyond a reasonable doubt:

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

And Second, that the defendant acted without justification or excuse.

If the arrest was not a lawful arrest, then the defendant had a right to resist the unlawful arrest. In so doing, the defendant was justified in using such force as reasonably appeared to the defendant to be necessary under the circumstances to prevent the defendant's unlawful restraint.⁷ The resisting force cannot have been excessive. 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 (*name officer*)). You should also consider (the fierceness of the assault, if any, upon the defendant), (the number of officers involved),

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(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.

If the State proves beyond a reasonable doubt that the defendant used excessive force or did not reasonably believe that the defendant's action was necessary or apparently necessary to prevent the defendant's unlawful restraint, the defendant would be guilty of simple assault. If the State fails to prove one or the other 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*), that (*name officer*) was a (*describe officer's position, e.g., a highway patrolman*), that the defendant knew or had reasonable grounds to know that (*name officer*) was a (*describe officer's position*), that (*name officer*) was making or attempting to make an arrest when (*name defendant*) (*describe conduct, e.g., struck*) the officer, that (*name officer*) had probable cause to believe that the defendant had committed (*name felony, criminal offense, or misdemeanor*) ([in the officer's presence] [and would not be apprehended or might cause physical injury to [[*himself*] [*herself*] [others]] [damage to property] unless immediately arrested]),⁸ and that, in (*describe conduct, e.g., striking*) (*name officer*), the defendant acted without justification or excuse, your duty would be to return a verdict of

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guilty of assault on a law enforcement officer while the officer was discharging or attempting to discharge a duty of the officer's office. If you do not so find, or have a reasonable doubt as to one or more of these elements, you would not return a verdict of guilty of assault on a law enforcement officer while the officer was discharging or attempting to discharge a duty of the officer's office.

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

(1) that the defendant did not reasonably believe that (*describe assault, e.g., striking*) (*name officer*) was necessary to protect [*himself*] [*herself*] from (*name officer*)'s (*describe force, e.g., hitting the defendant with a nightstick*), or

(2) that the defendant used excessive force (,or

(3) that the defendant was the aggressor).

If you do not find at least one of these elements, or if you have a reasonable doubt as to all of them, your duty would be to return a verdict of not guilty.

If you find that the arrest was not lawful, you must determine whether the defendant is guilty of simple assault.

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If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally (*describe conduct, e.g., struck*) (*name officer*) and that the defendant did so without justification or excuse, your duty would be to return a verdict of guilty of simple assault. If you do not so find or have a reasonable doubt as to one or more of these elements, your duty would be to return a verdict of not guilty.

You would find that the defendant acted without justification or excuse if the State has satisfied you beyond a reasonable doubt

(1) that the defendant did not reasonably believe that (*describe conduct, e.g., striking*) (*name officer*) was necessary to prevent the unlawful restraint of *his* liberty, or

(2) that the defendant used excessive force (,or

(3) that the defendant was the aggressor).

If you do not so find or have a reasonable doubt that the State has proved 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 If there is an issue as to whether the defendant intended the assault itself, incorporate N.C.P.I.-Crim. 120.10 at this point.

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

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

- an officer who has knowledge that a warrant has been issued may arrest the

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person named in the warrant, N.C. Gen. Stat. § 15A-401(a)(2);

- an officer may arrest any person whom he has probable cause to believe has committed a felony, N.C. Gen. Stat. § 15A-401(b)(2)(a);
- an officer may arrest any person whom he has probable cause to believe has committed any criminal offense in his presence, N.C. Gen. Stat. § 15A-401(b)(1);
- an officer may arrest any person whom he has probable cause to believe has committed a misdemeanor and will not be apprehended or will cause physical injury to himself or others or damage to property unless immediately arrested, N.C. Gen. Stat. § 15A-401(b)(2)(b).

If the State relies on the first of these grounds, substitute for the fourth element the following: ". . . that a warrant for arrest naming (*name defendant*) had been issued and (*name officer*) knew that it had." If the State relies on one of the other three grounds, select the corresponding bracketed phrase above.

4 "Whether probable cause exists depends upon 'whether at that moment the facts and circumstances within their knowledge or of which they have reasonably trustworthy information were sufficient to warrant a prudent person in believing that the [suspect] had committed or was committing an offense.' *Beck v. Ohio*, 379 U.S. 89 . . . (1964)." *S. v. Streeter*, 283 N.C. 203, 207 (1973).

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

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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 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).

IF THE COURT RULES THAT THE EVIDENCE MOST FAVORABLE TO THE STATE DOES NOT, AS A MATTER OF LAW, PROVE FACTS WHICH COULD CONSTITUTE PROBABLE CAUSE, THE COURT SHOULD NOT USE THIS PATTERN INSTRUCTION BUT SHOULD USE INSTEAD N.C.P.I.-Crim. 208.81D. On the other hand, even if the evidence is not in dispute, and it proves facts which, as a matter of law, do constitute probable cause, the jury must still be instructed, as in any case involving undisputed evidence of an element of the State's case, on the need to find the relevant facts. This instruction does so.

5 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 conviction for a felony." Subsection (d) provides that "[n]othing in this subdivision constitutes

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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.”

6 See N.C.P.I.-Crim. 208.81.

7 See N.C.P.I.-Crim. 208.81.

8 See notes 2 and 3, and text of Fourth Element.