

N.C.P.I.-Crim 208.81E

ASSAULT ON AN OFFICER—ARREST SITUATIONS (ISSUES AS TO OFFICER STATUS OR VICTIM, FACT OF ARREST AND LAWFULNESS OF ARREST—NEITHER OFFICER'S NOR DEFENDANT'S FORCE IN DISPUTE).  
MISDEMEANOR.

CRIMINAL VOLUME

REPLACEMENT JUNE 2015

N.C. Gen. Stat. § 14-33(c)(4)

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208.81E ASSAULT ON AN OFFICER—ARREST SITUATIONS (ISSUES AS TO OFFICER STATUS OR VICTIM, FACT OF ARREST AND LAWFULNESS OF ARREST—NEITHER OFFICER'S NOR DEFENDANT'S FORCE IN DISPUTE).

*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 the officer was NOT in uniform; there is no dispute as to the reasonableness of any force used by the officer and the defendant in their encounter; and the issues are:*

- (1) whether the defendant knew or had reasonable grounds to know that the officer was a law enforcement officer;*
- (2) whether the officer was making an arrest; and*
- (3) whether the arrest was a lawful arrest without a warrant.*

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 elements beyond a reasonable doubt:

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First, that the defendant assaulted (*name officer*) by intentionally<sup>1</sup> 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 city police officer*) is a law enforcement officer. A person remains a law enforcement officer for purposes of the crime of assault upon a law enforcement officer even though the officer is out of uniform<sup>2</sup> and [off duty]<sup>3</sup> [working under cover] [(*state other reason for being out of uniform*)]. However, if the defendant did not know or have reasonable grounds to know that (*name officer*) was a law enforcement officer, the defendant would not be guilty of an assault upon a law enforcement officer.<sup>4</sup> 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. 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.<sup>5</sup>

And Fourth, that this arrest was a lawful arrest.<sup>6</sup> The arrest would be lawful if, at the time (*name officer*) made it, the officer had probable cause

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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]] or [damage to property] unless immediately arrested. (*Name misdemeanor*) is a misdemeanor.]

Such probable cause would exist if (*describe facts which would constitute probable cause*).<sup>7</sup>

#### MANDATE

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally and without justification or excuse (*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 (*describe the facts which would give defendant reason to know that the victim was an officer, e.g., (name officer) stated that the officer was a police officer and attempted to show the defendant the officer's credentials*) and that the defendant knew or had reasonable grounds to know that (*name officer*) was a law enforcement officer and that (*name officer*) was making or attempting to make an arrest when the defendant (*describe assault, e.g., struck*) *the officer*, and that (*name officer*) had probable cause to believe

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that the defendant had committed (*name felony, criminal offense or misdemeanor, e.g., an attempt to take and operate a motor vehicle without the consent of the owner*) ([*in the officer's presence*] [and would not be apprehended or might cause physical injury to *himself* or others or damage to property unless immediately apprehended]),<sup>8</sup> your duty would be to return a verdict of guilty.

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.

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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 If the officer was in uniform, it would seem that, as a matter of law, the defendant had reason to know that he was an officer.

3 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 performing what would be a duty of his office if he were on duty. *Cf., S. v. Polk*, 29 N.C. App. 360 (1976).

4 This statement of the law is included on the assumption that a "mistake of fact" as to the officer's status is, if "reasonable", a defense to the crime of assault on an officer, though not to simple assault. *Cf. S. v. Irick*, 291 N.C. 480, 500 (1977). *Contra, U.S. v. Feola*, 420 U.S. 671 (1975).

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

6 N.C. Gen. Stat. § 15A-401 sets forth 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).
  - an officer may arrest any person whom he has probable cause to believe has committed a misdemeanor under G.S. 14-72.1, 14-134.3, 20-138.1, or 20-138.2, N.C. Gen. Stat. § 15A-401(b)(2)(c).
  - an officer may arrest any person whom he has probable cause to believe has committed a misdemeanor under G.S. 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-1, N.C. Gen. Stat. § 15A-401(b)(2)(d).
  - an officer may arrest any person whom he has probable cause to believe has committed a misdemeanor under G.S. 50B-4.1(a), N.C. Gen. Stat. § 15A-401(b)(2)(e).
  - an officer may arrest any person whom he has probable cause to believe has violated a pretrial release order entered under G.S. 15A-534 or G.S. 15A-534.1(a)(2), N.C. Gen. Stat. § 15A-401(b)(2)(f).

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

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(*name officer*) knew that it had." If the State relies on one of the other three grounds, select the corresponding bracketed phrase above.

7 "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 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.

8 *See*, Notes 6 and 7, and text of Fourth Element.