

N.C.P.I.—Crim 208.81F
ASSAULT ON AN OFFICER AND SIMPLE ASSAULT—ARREST SITUATIONS
(ALL ISSUES IN DISPUTE). MISDEMEANOR.
CRIMINAL VOLUME
REPLACEMENT JUNE 2015
N.C. Gen. Stat. § 14-33(c)(4)

208.81F ASSAULT ON AN OFFICER AND SIMPLE ASSAULT—ARREST
SITUATIONS (ALL ISSUES 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, and there is conflicting evidence as to all the following issues:

- (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;*
- (3) whether that arrest was a lawful arrest without a warrant;*
- (4) if the defendant knew the officer was a law enforcement officer making an arrest and 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 consistently with the defendant's right of self-defense; and*
- (5) if the defendant did not know the victim was an officer making an arrest, or if the arrest was not lawful, whether the defendant acted consistently with the defendant's right of self-defense or the defendant's right to resist an unlawful, warrantless arrest.*

This instruction is appropriate for an arrest by an under-cover

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narcotics agent when a struggle occurs before the arrest is effected.

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 *his* 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 the officer was a law enforcement officer. A (*state officer's position, e.g., a member of the police vice squad*) 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 uniform² and [off duty]³

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[working under cover] [(state other reason for being out of uniform)]. 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.⁴ 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 of the encounter between (*name officer*) and the defendant.

Third, that when the defendant (*describe conduct, e.g., struck*) (*name officer*), (*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.⁵

And Fourth, that this arrest was a lawful arrest.⁶ The arrest would be lawful if, at the time (*name officer*) made it, (*name 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*

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constitute probable cause).⁷

If (*name officer*) was a law enforcement officer and the defendant knew or had reasonable grounds to know this, and if (*name officer*) was making or attempting to make an arrest, and if the arrest was lawful, 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 the force that the officer reasonably believes is necessary to arrest a person whom the officer reasonably believes has committed a criminal offense.⁸ 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*].⁹ You, the jury, to determine the reasonableness of any force used by (*name officer*) from the circumstances then appearing to the officer.

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

Nevertheless, the force used by the defendant cannot have been

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excessive. The defendant had the right to use only such force that reasonably appeared to the defendant to be necessary 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 to have existed from the evidence, *(including (the size, age, and strength of the defendant as compared to (name officer)). You should consider (the fierceness of the assault, if any, upon the defendant), (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 *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

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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, 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 did not reasonably believe 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 that the defendant 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 defendant knew or had reasonable grounds to know that (*name officer*) was a law enforcement officer, or do not find that (*name officer*) was making or attempting to make an arrest, or do not find that the arrest was a lawful arrest, then you must determine whether the defendant is guilty of simple assault.

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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 defendant did not know and had no reasonable grounds to know that (*name officer*) was a law enforcement officer, or if (*name officer*) was not making an arrest, then the defendant had a right of self-defense. Even if the defendant knew or had reasonable grounds to know that (*name officer*) was a law enforcement officer, and (*name officer*) was making an arrest, the defendant had a right to resist the arrest if it was not a lawful arrest.¹⁰

If the circumstances were such that would create in the mind of a person of ordinary firmness a reasonable belief that the person's action was necessary or apparently necessary to protect [*himself*] [*herself*] from bodily injury or offensive physical contact or to prevent the unlawful restraint of the person's liberty, and if the circumstances did create such a belief in the defendant's mind at the time the defendant acted, the defendant would be justified in using force in self-defense to resist the unlawful arrest.

The force used by the defendant cannot have been excessive. 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 bodily injury or offensive physical contact or to prevent the unlawful restraint of the defendant's liberty. In making this determination,

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you should consider the circumstances that you find 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), (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 *the defendant*.

(Finally,¹¹ the defendant must not [*himself*] [*herself*] have been the aggressor in bringing on the encounter with (*name officer*). If the defendant voluntarily entered into a fight with (*name officer*), the defendant was the aggressor unless the defendant thereafter attempted to abandon the fight and gave notice to (*name officer*) that the defendant was doing so.)

If the State proves beyond a reasonable doubt that the defendant did not reasonably believe that the defendant's action was necessary or apparently necessary to protect [*himself*] [*herself*] from bodily injury or offensive physical contact or to prevent the unlawful restraint of the defendant's liberty, or if the State proves that the defendant used excessive force (or was the aggressor) the defendant would be guilty of simple assault. If the State does not prove at least one of the foregoing 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.,*

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struck) (*name officer*) and that (*name officer*) was a (*describe officer's position, e.g., a member of the police vice squad*) and that (*describe the facts which would give defendant reason to know that the officer was an officer, e.g., (name officer) stated that the officer was a member of the vice squad 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 that the defendant had committed (*name felony, criminal offense, or misdemeanor, e.g., and attempt to sell or deliver a controlled substance*) ([*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)],¹² and that the defendant acted without justification or excuse, it would be your duty to return a verdict of 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 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 as to this, you would find that the defendant acted without justification or excuse if the State has satisfied you beyond a reasonable

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doubt either

(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 do not find that the defendant knew or had reasonable grounds to know that (*name officer*) was a law enforcement officer, or that (*name officer*) was making an arrest, or that the arrest was lawful, you must determine whether the defendant is guilty of simple assault.

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*

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conduct, e.g., striking) (name officer) was necessary to protect [himself] [herself] from bodily injury or offensive physical contact or to prevent the unlawful restraint of the defendant's 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 If the officer was in uniform, it would seem that the defendant had, as a matter of law, reasonable grounds to know 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 person named in the warrant, N.C. Gen. Stat. § 15A-401(a)(2);

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- 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 this element the following: ". . . that a warrant for arrest naming the defendant had been issued and (*name officer*) knew that it had." If the State relies on one of the other three grounds, select the

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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 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

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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 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.”

9 See, N.C.P.I.-Crim. 208.81.

10 If the defendant did not know or have reasonable grounds to know that the victim was an officer, or if the officer was not making an arrest, the defendant's justification for using force against him is determined by the rules of ordinary self-defense. If the victim was an officer making an arrest, but the arrest was unlawful, the defendant could "use such force as reasonably appeared to him to be necessary to prevent the unlawful restraint of his liberty." See, N.C.P.I.-Crim. 208.81. However, apart from the use of different language to describe the threat which the defendant is acting to avoid, there is little difference between the two justifications, and they are explained together in the next part of this instruction.

11 Give this paragraph only when the defendant defends on the ground that he did not know that the officer was an officer, and there is evidence that he attacked the officer before the officer used or attempted to use any force against him.

12 See, notes 6 and 7, and text of fourth element.