

308.40 SELF-DEFENSE—ASSAULTS NOT INVOLVING DEADLY FORCE.

*NOTE WELL: Use only with N.C.P.I.—Crim. 208.40, 208.40A, 208.70, 208.70A, 208.75, and 208.60 when no evidence of deadly force.<sup>1</sup>*

*NOTE WELL: The trial judge is reminded that this instruction must be combined with the substantive offense instruction in the following manner: (1) the jury should be instructed on the elements of the charged offense; (2) the jury should then be instructed on the definition of self-defense set out in this instruction below; (3) the jury should then be instructed on the mandate of the charged offense; and (4) the jury should be instructed on the mandate for self-defense as set out below in this instruction. **THE FAILURE TO CHARGE ON ALL OF THESE MATTERS CONSTITUTES REVERSIBLE ERROR.***

*NOTE WELL: If the assault occurred in defendant's home, place of residence, workplace or motor vehicle, use N.C.P.I.—Crim. 308.80, Defense of Habitation.*

If the State has satisfied you beyond a reasonable doubt that the defendant assaulted the victim then you would consider whether the defendant's actions are excused and the defendant is not guilty because the defendant acted in self-defense. The State has the burden of proving from the evidence beyond a reasonable doubt that the defendant's action was not in self-defense.

Even if you find beyond a reasonable doubt that the defendant assaulted the victim, the assault would be justified by self-defense under the following circumstances:

- (1) If the circumstances, at the time the defendant acted, would cause a person of ordinary firmness to reasonably believe that such action was necessary or apparently necessary to protect that person from bodily injury or offensive physical contact, and

- (2) The circumstances created such belief in the defendant's mind. You determine the reasonableness of the defendant's belief from the circumstances appearing to the defendant at the time.<sup>2</sup>

Furthermore, the defendant has no duty to retreat in a place where the defendant has a lawful right to be.<sup>3</sup> (The defendant would have a lawful right to be in the defendant's [home]<sup>4</sup> [own premises] [place of residence] [workplace]<sup>5</sup> [motor vehicle]<sup>6</sup>.)

*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].<sup>7</sup>*

Additionally, even if the defendant believed there was a right to use force, the amount of force would be limited to reasonable force- not excessive force. The right to use force extends only to such force reasonably appearing to the defendant under the circumstances, necessary to protect the defendant from bodily injury or offensive physical contact. In so determining, you should consider the circumstances you find to have existed from the evidence. You should consider (the size, age and strength of the defendant as compared to the victim), (the fierceness of the assault, if any, upon the defendant), (whether the victim possessed a weapon), (the reputation, if any, of the victim for danger and violence) (and) (*describe other circumstances supported by the evidence*). Again, you determine the reasonableness of the defendant's belief from the circumstances appearing to the defendant at the time.

(Furthermore, self-defense is justified only if the defendant was not the aggressor.<sup>8</sup> Justification for defensive force is not present if the person who used defensive force voluntarily entered into the fight or, in other words, initially provoked the use of force against [himself] [herself]. If one uses abusive language toward one's opponent which, considering all of the

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circumstances, is calculated and intended to bring on a fight, one enters a fight voluntarily. However, if the defendant was the aggressor, the defendant would be justified in using defensive force if the defendant thereafter attempted to abandon the fight and gave notice to the defendant's opponent that the defendant was doing so. In other words, a person who uses defensive force is justified if the person 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.<sup>9)</sup>

*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.*

*NOTE WELL: The following self-defense mandate must be given after the mandate on the substantive offense(s). **INCLUDING THE SELF-DEFENSE MANDATE IS REQUIRED BY STATE V. WOODSON**, 31 N.C. APP. 400 (1976). Cf. State v. Dooley, 285 N.C. 158 (1974).*

#### SELF-DEFENSE MANDATE

Even if you are satisfied beyond a reasonable doubt that the defendant committed (*name offense*) you may return a verdict of guilty only if the State has also satisfied you beyond a reasonable doubt that the defendant did not act in self-defense. Therefore, if the defendant did not reasonably believe that the defendant's action was necessary or appeared to be necessary to protect the defendant from bodily injury or offensive physical contact, or the

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defendant used excessive force, or 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 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.

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1 Deadly force is force likely to cause death or great bodily harm. *S. v. Clay*, 297 N.C. 555, 563 (1979). For any assault involving deadly force, use N.C.P.I.—Crim. 308.45 to charge on self-defense. Such assaults include all felonious assaults, misdemeanor assaults such as assault with a deadly weapon, assault by pointing a gun, and may include assault inflicting serious injury.

2 In self-defense, action need only be apparently necessary, not actually. *See, e.g., State v. Jennings*, 276 N.C. 157 (1970).

3 *See* N.C.P.I.—Crim. 308.10.

4 N.C. Gen. Stat. § 14-51.2 (a) (1) states that a home is a "building or conveyance of any kind, to include its curtilage, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed as a temporary or permanent residence." Curtilage is the area "immediately surrounding and associated with the home," which may include "the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings." *State v. Grice*, 367 N.C. 753, 759 (2015) (citations and quotations omitted) (defining curtilage in a Fourth Amendment case).

5 N.C. Gen. Stat. § 14-51.2 (a) (4) states that a workplace is a "building or conveyance of any kind, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, which is being used for commercial purposes."

6 N.C. Gen. Stat. § 14-51.2 (a) (3); which incorporates N.C. Gen. Stat. § 20-4.01 (23), defines "motor vehicle" as "Every vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle. This shall not include mopeds as defined in N.C. Gen. Stat. § 20-4.01(27)d1."

7 "[W]herever an individual is lawfully located—whether it is his home, motor vehicle, workplace, or any other place where he has the lawful right to be—the individual may stand his ground and defend himself from attack when he reasonably believes such force is necessary to prevent imminent death or great bodily harm to himself or another." *State v. Bass*, \_\_\_ N.C. \_\_\_, 819 S.E.2d 322, 326 (2018). "[A] defendant entitled to *any* self-defense instruction is entitled to a *complete* self-defense instruction, which includes the relevant stand-your-ground provision." *Id.*

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8 N.C. Gen. Stat. § 14-51.4(2). *See also* N.C. Gen. Stat. § 14-51.3 (b), which provides that a person who uses force as permitted by the statute is justified in using such force and is immune from civil or criminal liability, unless the person against whom force was used is a law enforcement officer or bail bondsman “who was lawfully acting in the performance of his or her official duties and the officer or bail bondsman identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer or bail bondsman in the lawful performance of his or her official duties.”

9 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.

