

N.C.P.I.—Criminal 308.45A

SELF-DEFENSE EXAMPLE WITH 208.10—ALL ASSAULTS INVOLVING DEADLY FORCE.

GENERAL CRIMINAL VOLUME

REPLACEMENT JUNE 2012

G.S. 14-51.2, 14-51.3, 14-51.4

SELF-DEFENSE EXAMPLE WITH 208.10—ALL ASSAULTS INVOLVING DEADLY FORCE.

NOTE WELL: This charge is intended for use with N.C.P.I. Crim. 208.09, 208.10, 208.15, 208.16, 208.25, 208.50, 208.55, 208.85, and 208.60 where the evidence shows that the defendant used deadly force.¹

*NOTE WELL: This example instruction combines the assault instruction with the self-defense 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.

The defendant has been charged with assault with a deadly weapon with intent to kill inflicting serious injury.

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

¹ Deadly force is any force likely to cause death or great bodily harm. S. v. Clay, 297 N.C. 555, 563 (1979).

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First, that the defendant assaulted the victim by intentionally² (and without justification or excuse)³ (*describe assault*).

Second, that the defendant used a deadly weapon. A deadly weapon is a weapon which is likely to cause death or serious bodily injury. [(*Name object*) is a deadly weapon]. [In determining whether (*name object*) was a deadly weapon, you should consider the nature of (*name object*), the manner in which it was used, and the size and strength of the defendant as compared to the victim.]⁴

Third, the State must prove that the defendant had the specific intent to kill the victim.

And Fourth, that the defendant inflicted serious injury.⁵

If the State has satisfied you beyond a reasonable doubt that the defendant assaulted the victim with a deadly weapon with intent to cause death or serious bodily injury, 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.

² If a definition of intent is required, see N.C.P.I.—Crim. 120.10.

³ The parenthetical phrase should be used only where there is evidence of justification or excuse, such as self-defense.

⁴ Use appropriate bracketed statement. In the event that there is a dispute as to which weapon was used and one of the weapons is non-deadly as a matter of law, e.g., a real pistol and a toy pistol, state what would not be a deadly weapon.

⁵ Serious injury may be defined as "such physical injury as causes great pain and suffering." See *S. v. Jones*, 258 N.C. 89 (1962), or *S. v. Ferguson*, 261, N.C. 558 (1964). If there is evidence as to injuries which could not conceivably be considered anything but serious, the trial judge may instruct the jury as follows: "(Describe injury) would be a serious injury." *S. v. Davis*, 33 N.C. App. 262 (1977).

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If the circumstances would have created a reasonable belief in the mind of a person of ordinary firmness that the assault was necessary or appeared to be necessary to protect that person from imminent death or great bodily harm, and the circumstances did create such belief in the defendant's mind at the time the defendant acted, such assault would be justified by self-defense.⁶ You, the jury, determine the reasonableness of the defendant's belief from the circumstances appearing to the defendant at the time. Furthermore, the defendant has no duty to retreat in a place where the defendant has a lawful right to be.⁷ (The defendant would have a lawful right to be in the defendant's [home] [own premises] [place of residence] [workplace] [motor vehicle].⁸)

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].

A defendant does not have the right to use excessive force. The defendant had the right to use only such force as reasonably appeared necessary to the defendant under the circumstances to protect the defendant from death or great bodily harm. 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*

⁶ This instruction is intended to cover the rule of law that action in self-defense need only be apparently, not actually, necessary. See, e.g., *State v. Jennings*, 276 N.C. 157 (1970).

⁷ See N.C.P.I.—Crim. 308.10.

⁸ G.S. 14-51.3 (a).

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compared to the victim), (the fierceness of the assault, if any, upon the defendant), (whether the victim possessed a weapon), (and the reputation, if any, of the victim for danger and violence) (describe other circumstances as appropriate from the evidence). Again, you, the jury, 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.⁹ 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 circumstances, is calculated and intended to bring on a fight, one enters a fight voluntarily. However, if the defendant was the aggressor, the defendant is 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. A person is also justified in using defensive force when the force used by the person who

⁹ G.S. 14-51.4(2). See also G.S. 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."

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was provoked is so serious that the person using defensive force reasonably believes that [he] [she] was in imminent danger of death or serious bodily harm, the person using defensive force had no reasonable means to retreat, and the use of force likely to cause death or serious bodily harm was the only way to escape the danger.¹⁰⁾

NOTE WELL: Instructions on aggressors and provocation should only be used if there is some evidence presented that defendant provoked the confrontation. See G.S. 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: If the defendant used a weapon which is a deadly weapon "per se," do not give the following paragraph, or the paragraph on page 6-7. If the weapon is not a deadly weapon per se, give the following paragraph and the paragraph on p. 6-7. State v. Clay, 297 N.C. 555, 566 (1979).

(If you find from the evidence beyond a reasonable doubt that the defendant assaulted the victim, but not with a deadly weapon or other deadly force, that the circumstances would create a reasonable belief in the mind of a person of ordinary firmness that the action was necessary or appeared to be necessary to protect that person from bodily injury or

¹⁰ Pursuant to G.S. 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.

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offensive physical contact, and the circumstances did create such belief in the defendant's mind at the time the defendant acted, the assault would be justified by self-defense--even though the defendant was not thereby put in actual danger of death or great bodily harm; however, the force used must not have been excessive. Furthermore, self-defense is an excuse only if the defendant was not the aggressor.)

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant intentionally (*describe assault*) the victim with a (*name object*) (and that (*name weapon*) was a deadly weapon)¹¹ and that the defendant intended to kill the victim and did seriously injure him, it would be your 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.¹²

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).*

¹¹ This parenthetical phrase should be used only where the weapon is not deadly per se.

¹² If there is to be instruction on lesser included offenses, the last phrase should be: ". . . you will not return a verdict of guilty of assault with a deadly weapon with intent to kill inflicting serious injury." See *State v. Hannah*, 149 N.C. App. 713, 563 S.E.2d 1 (2002) (holding that assault inflicting serious bodily injury pursuant to G.S. 14-32.4 is not a lesser-included offense of assault with a deadly weapon with intent to kill inflicting serious injury).

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SELF-DEFENSE MANDATE

Therefore I instruct you, if you are satisfied beyond a reasonable doubt that the defendant committed (*name offense, including appropriate lesser included offenses*),¹³ you may return a verdict of guilty only if the State has satisfied you beyond a reasonable doubt that the defendant's action was not in self-defense; that is, that the defendant did not reasonably believe that the assault was necessary or appeared to be necessary to protect the defendant from death or serious bodily injury, or that the defendant used excessive force, or that the defendant was the aggressor.

If you do not so find or have a reasonable doubt that the State has proved any one or more 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.

NOTE WELL: *Do not give the following paragraph if the defendant used a weapon which is a deadly weapon "per se."*

(Therefore I instruct you, if you are satisfied beyond a reasonable doubt that the defendant committed (*name offense, including appropriate lesser included offenses*)¹⁴ you may return a verdict of guilty only if the State has satisfied you beyond a reasonable doubt that the defendant did not reasonably believe that the assault was necessary or appeared to be

¹³ Name all offenses which involve the use of deadly force.

¹⁴ Name only those lesser included offenses which do not involve the use of a deadly weapon force, e.g., those covered in N.C.P.I.--208.40, 208.60, 208.70, and 208.75.

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necessary to protect the defendant from bodily injury or offensive physical contact, or that the defendant used excessive force, or was the aggressor. If you do not so find or have a reasonable doubt that the State has proved one or more 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.)