

308.47 ASSAULT IN LAWFUL DEFENSE OF A [FAMILY MEMBER] [THIRD PERSON]—(DEFENSE TO 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 there is no evidence of deadly force.*

*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 defense of a family member or third person 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 defense of a family member or third person as set out below in this instruction. **THE FAILURE TO CHARGE ON ALL OF THESE MATTERS CONSTITUTES REVERSIBLE ERROR.***

*NOTE WELL: Defense of a [family member] [third person] is only justified if the [family member] [third person] would have been justified in using self-defense. If this is an issue, modify accordingly.<sup>1</sup>*

*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 defendant assaulted the victim in lawful defense of another person, the defendant's actions would be excused, and the defendant would be not guilty. The State has the burden of proving from the evidence beyond a reasonable doubt that the defendant did not act in the lawful defense of another person.

If from the evidence you find beyond a reasonable doubt that the defendant assaulted the victim and that the circumstances would have created a reasonable belief in the mind of a person of ordinary firmness that the

assault was necessary or apparently necessary to protect a [family member] [third person] from bodily injury or offensive physical contact, and the circumstances did create such belief in the defendant's mind at the time the defendant acted, such assault would be justified by defense of a [family member] [third person]. 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.<sup>2</sup> (The defendant would have a lawful right to be in the defendant's [home]<sup>3</sup> [own premises] [place of residence] [workplace]<sup>4</sup> [motor vehicle]<sup>5</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].*

A defendant may only do in defense of a [family member] [third person] what that other person might do in that person's own defense. Further, a defendant does not have the right to use excessive force. This means that the defendant had the right to use only such force as reasonably appeared to the defendant to be necessary under the circumstances to protect that [family member] [third person] from bodily injury or offensive physical contact. 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 and the [family member] [third person] as compared to the victim), (the fierceness of the assault, if any, upon the [family member] [third person]), (whether the victim had a weapon in the victim's possession), (and) (the reputation, if any, of the victim for danger and violence). Again, it is for you, the jury, to determine whether the defendant's

belief was reasonable from the circumstances as they appeared to the defendant at the time.

(Furthermore, defense of a [family member] [third person] is justified only if the [defendant] [family member] [third person] was not the aggressor.<sup>6</sup> Justification for defensive force is not present if a person voluntarily enters into the fight or, in other words, initially provokes 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] [family member] [third person] was the aggressor, the defendant is justified in using defensive force only if the [defendant] [family member] [third person] thereafter attempted to abandon the fight and gave notice to the opponent that the [defendant] [family member] [third person] 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>7</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: Add the following to the final mandate:*

Although you are satisfied beyond a reasonable doubt that the defendant assaulted the victim, you may return a verdict of guilty only if the State has satisfied to you beyond a reasonable doubt that the defendant did not act in the lawful defense of a [family member] [third person]; that is, that the defendant did not reasonably believe that the assault of the victim was necessary or apparently necessary to protect [the defendant's family member] [the third person] 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 would be justified by defense of a [family member] [third person]; therefore, your duty would be to return a verdict of not guilty.

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1 See *State v. McLawhorn*, 270 N.C. 622, 629 (1967).

2 See N.C.P.I.—Crim. 308.10. “[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.*

3 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).

4 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.”

5 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.”

6 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.”

7 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.

