

308.50 ASSAULT IN LAWFUL DEFENSE OF A [FAMILY MEMBER] [THIRD PERSON]—(DEFENSE TO 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 defendant used deadly force.¹

*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 as 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.²

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 (with deadly force), then you would consider whether the defendant's actions are excused and the defendant is not guilty because the defendant acted in defense of a [family member] [third person]. The State has the burden of proving from the evidence beyond a reasonable doubt that the defendant's action was not in defense of a [family member] [third person].

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 a [family member] [third 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 defense of a [family member] [third person].³ 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.⁴ (The defendant would have a lawful right to be in the defendant's [home]⁵ [own premises] [place of residence] [workplace]⁶ [motor vehicle]⁷.)

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 a [family member] [third person] 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 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). You, the jury, determine the reasonableness of the defendant's belief from the circumstances appearing 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.⁸ 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. However, if the [defendant] [family member] [third person] was the aggressor, the defendant would be 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. A person is also justified in using defensive force when the force used by the person who 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. 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.⁹)

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: If the defendant used a weapon which is a deadly weapon "per se," do not give the following paragraph, or the paragraph on page 5-6. If the weapon is not a deadly weapon per se, give the following paragraph and the paragraph on p. 5-6. 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 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 defense of [family member] [third person] 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, defense of a [family member] [third person] is an excuse only if neither the defendant nor the [family member] [third person] was the aggressor.)

DEFENSE OF [FAMILY MEMBER] [THIRD PERSON] MANDATE

Therefore, I instruct you, if you are satisfied beyond a reasonable doubt that the defendant committed (name offense, including appropriate lesser included offenses),¹⁰ 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 defense of a [family member] [third person]; that is, that the defendant did not reasonably believe that the assault was necessary or appeared to be necessary to protect a [family member] [third person] 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 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 assaulted the victim, 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 necessary to protect a [family member] [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's action would be justified by defense of a [family member] [third person] and it would be your duty to return a verdict of not guilty.)

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

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

3 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).

4 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.*

5 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).

6 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.”

7 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.”

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.

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