

308.70 SELF-DEFENSE TO SEXUAL ASSAULT—HOMICIDE.

*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 defendant acted in self-defense defending against a sexual assault,<sup>1</sup> the defendant's actions are excused and the defendant would be not guilty. The State has the burden to prove beyond a reasonable doubt that the defendant did not act in self-defense.

A killing would be excused if:

First, it appeared to the defendant and the defendant reasonably believed it to be necessary to kill the victim in order to save the defendant from death, great bodily harm or sexual assault. (*Define appropriate sexual assault involved.*)

Second, the circumstances as they appeared to the defendant at the time were sufficient to create such a belief in the mind of a person of ordinary firmness. It is for you the jury to determine the reasonableness of the defendant's belief from the circumstances as they appeared to the defendant at the time. 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 compared with that of the

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victim) (the fierceness of the assault, if any, upon the defendant), (whether or not the victim possessed a weapon in his possession) (the reputation, if any, of the victim for danger, violence and/or sexual attacks (and) (*describe any other circumstances supported by the evidence*). 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].*

And Third, the defendant did not use excessive force; that is, more force than reasonably appeared to be necessary to the defendant at the time. 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 compared to the victim), (the fierceness of the assault, if any, upon the defendant), (whether the victim had a weapon in the victim's possession), (and) (the reputation, if any, of the victim for danger and violence) (*describe other circumstances as appropriate from the evidence*). Again, it is for you, the jury, to determine the reasonableness of the force used by the defendant under all of the circumstances as they appeared to the defendant at the time.<sup>6</sup>

*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).*

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SELF-DEFENSE MANDATE

Although you are satisfied beyond a reasonable doubt that the defendant killed 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 act in self-defense; that is, that the defendant did not reasonably believe that the killing of the victim was necessary to save the defendant from death, great bodily harm or sexual assault, or that the defendant used excessive force. If you do not so find or have a reasonable doubt that the State has proved any of these things, then the defendant would be justified by self-defense to sexual assault and it would be your duty to return a verdict of not guilty.

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1 Sexual assault would include rape, sexual offense, or forcible crime against nature or attempts thereof. This charge would be applicable to either sex. *S v. Hunter*, 305 N.C. 106 (1982).

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.”

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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 Where appropriate, charge as to the defendant being the aggressor. The mandate should thus be modified accordingly. See *e.g.*, N.C.P.I.—Crim. 308.50 for appropriate language regarding the aggressor determination.