

206.14 FIRST DEGREE MURDER—MURDER COMMITTED IN PERPETRATION OF A FELONY¹ OR MURDER WITH PREMEDITATION AND DELIBERATION WHERE A DEADLY WEAPON IS USED. CLASS A FELONY (DEATH OR LIFE IMPRISONMENT); CLASS C FELONY.

NOTE WELL: N.C. Gen. Stat. §§ 15-176.4, 15A-2000(a). When the defendant is indicted for first degree murder, the court shall, upon request by either party, instruct the jury as follows:

"In the event that the defendant is convicted of murder in the first degree, the court will conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment (without parole).²

If that time comes, you will receive separate sentencing instructions. However, at this time your only concern is to determine whether the defendant is guilty of the crime charged or any lesser included offenses about which you are instructed."³

The defendant has been charged with first degree murder.

Under the law and the evidence in this case, it is your duty to return one of the following verdicts:

- (1) Guilty of first degree murder
- (2) Guilty of second degree murder^{4,5}
- (3) Not guilty.

You may find the defendant guilty of first degree murder either on the basis of malice, premeditation and deliberation, or under the first degree felony murder rule, or both. First degree murder on the basis of malice, premeditation and deliberation is the intentional and unlawful killing of a human being with malice and with premeditation and deliberation. First degree murder under the first degree felony murder rule is the killing of a human being in the [perpetration of] (or) [attempt to perpetrate] [arson] [rape] [sexual offense] [robbery] [kidnapping] [burglary] [(name felony) with a deadly weapon].

For you to find the defendant guilty of first degree murder on the basis of malice, premeditation and deliberation, the State must prove five things beyond a reasonable doubt:

First, that the defendant intentionally and with malice killed the victim with a deadly weapon.

Malice means not only hatred, ill will, or spite, as it is ordinarily understood—to be sure, that is malice—but it also means that condition of mind that prompts a person to take the life of another intentionally or to intentionally inflict a wound with a deadly weapon upon another which proximately results in *his* death, without just cause, excuse or justification. If the State proves beyond a reasonable doubt,⁶ that the defendant intentionally killed the victim with a deadly weapon or intentionally inflicted a wound upon the victim with a deadly weapon that proximately caused the person's death, you may infer first, that the killing was unlawful, and second, that it was done with malice, but you are not compelled to do so.⁷ You may consider the inference along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice.

[A firearm is a deadly weapon.] [A deadly weapon is a weapon which is likely to cause death or serious injury. In determining whether the instrument was a deadly weapon, you should consider its nature, the manner in which it was used, and the size and strength of the defendant as compared to the victim.]

Second, the State must prove that the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred,⁸ and one that a reasonably careful and prudent person could foresee would probably produce such

[injury] [damage] or some similar injurious result. (The defendant's act need not have been the only cause, nor the last or nearest cause. It is sufficient if it occurred with some other cause acting at the same time, which, in combination with, caused the death of the victim.) (A child has been killed if the child was born alive, but died as a result of injuries inflicted prior to being born alive.)⁹

Third, that the defendant intended to kill the victim. Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. An intent to kill may be inferred from the nature of the assault, the manner in which it was made, the conduct of the parties and other relevant circumstances.

Fourth, that the defendant acted after premeditation, that is, that the defendant formed the intent to kill the victim over some period of time, however short, before the defendant acted.

And Fifth, that the defendant acted with deliberation, which means that the defendant acted while the defendant was in a cool state of mind. This does not mean that there had to be a total absence of passion or emotion. If the intent to kill was formed with a fixed purpose, not under the influence of some suddenly aroused violent passion, it is immaterial that the defendant was in a state of passion or excited when the intent was carried into effect.

Neither premeditation nor deliberation is usually susceptible of direct proof. They may be proved by proof of circumstances from which they may be inferred, such as the [lack of provocation by the victim] [conduct of the defendant before, during and after the killing] [threats and declarations of the defendant] [use of grossly excessive force] [infliction of lethal wounds after the victim is felled] [brutal or vicious circumstances of the killing] [manner in

which or means by which the killing was done].¹⁰

I further charge that for you to find the defendant guilty of first degree murder under the first degree felony murder rule, the State must prove [three] [four] things beyond a reasonable doubt:

First, that the defendant [committed] (or) [attempted to commit] (*name felony, e.g., robbery*). (*Define the felony and enumerate its elements, using the Pattern Jury Instruction for that felony.*)

Second, that while [committing] (or) [attempting to commit] (*name felony*), the defendant killed the victim with a deadly weapon.¹¹

[And Third] [Third], that the defendant's act was a proximate cause of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred.¹²

NOTE WELL: Where there is evidence that the defendant, though not committing or attempting to commit arson, rape or a sex offense, robbery, kidnapping or burglary, was committing or attempting to commit some other felony with the use of a deadly weapon, add the following:

[And Fourth, that (*name felony, e.g., felonious escape*) was committed or attempted with the use of a deadly weapon. A deadly weapon is a weapon which is likely to cause death or serious bodily injury. In determining whether the instrument is a deadly weapon, you should consider its nature, the manner in which it was used, and the size and strength of the defendant as compared with the victim.]

NOTE WELL: If there is evidence that defendant committed the underlying felony in concert with others, but that he may not have actually committed the killing, instructions should be given, as appropriate, on acting in concert (N.C.P.I.—Crim. 202.10) and/or aiding and abetting (N.C.P.I.—Crim. 202.20).

If there was evidence that defendant was not present, and there was testimony by one or more accomplices, N.C.P.I.—Crim. 206.10A should be considered at this point.

The Enmund v. Florida instruction should not be given during the guilt determination phase. It has been incorporated in N.C.P.I.—Crim. 150.10, the death penalty hearing instruction.

FINAL MANDATE ON ALL CHARGES AND DEFENSES

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant, acting with malice, killed the victim with a deadly weapon thereby proximately causing the victim's death, that the defendant intended to kill the victim, and that the defendant acted after premeditation and with deliberation, it would be your duty to return a verdict of guilty of first degree murder on the basis of malice, premeditation and deliberation. If you do not so find or have a reasonable doubt as to one or more of these things, you would not return a verdict of guilty of first degree murder on the basis of malice, premeditation and deliberation.

Whether or not you find the defendant guilty of first degree murder on the basis of malice, premeditation and deliberation, you will also consider whether the defendant is guilty of first degree murder under the first degree felony murder rule.

NOTE WELL: Here give the mandate for the felony, up to "it would be your duty . . ." and then continue as follows:

. . . and that while [committing] (or) [attempting to commit] (*name felony*), the defendant killed the victim and that the defendant's act was a proximate cause of the victim's death, (and that the defendant [committed] [attempted to commit] (*name felony*) with the use of a deadly weapon),¹³ it would be your duty to return a verdict of guilty of first degree murder under the felony murder rule.¹⁴

If you do not so find, or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of first degree murder under the felony murder rule.

If you do not find the defendant guilty of first degree murder on the basis of malice, premeditation and deliberation, and if you do not find the defendant guilty of first degree murder under the felony murder rule, you must determine whether the defendant is guilty of second degree murder.

Second degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation.¹⁵

Second degree murder differs from first degree murder in that the State need not prove a specific intent to kill, premeditation, deliberation or that the killing was committed in the perpetration of a felony. In order for you to find the defendant guilty of second degree murder, the State must prove beyond a reasonable doubt that the defendant intentionally and with malice wounded the victim (with a deadly weapon) thereby proximately causing the victim's death.

If the State proves beyond a reasonable doubt that the defendant intentionally inflicted a wound upon the victim (with a deadly weapon) that proximately caused the victim's death, you may infer first, that the killing was unlawful, and second, that it was done with malice,¹⁶ but you are not compelled to do so. You may consider the inferences along with all other facts and circumstances in determining whether the killing was unlawful and whether it was done with malice. If the killing was unlawful and was done with malice, the defendant would be guilty of second degree murder.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant intentionally and with malice (and

without justification or excuse) wounded the victim with a deadly weapon and that this proximately caused the victim's death, it would be your duty to return a verdict of guilty of second degree murder. 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.¹⁷

The verdict form sets out first degree murder both on the basis of malice, premeditation and deliberation and first degree murder under the felony murder rule (and second degree murder on the basis of malice without premeditation and deliberation). In the event that you should find the defendant guilty of first degree murder, please have your foreman indicate whether you did so on the basis of malice, premeditation and deliberation or under the felony murder rule or both.

APPENDIX A

NOTE WELL: This verdict form is an example and must be adapted based on the facts of your case. For example, some cases may not involve the felony murder rule or second lesser included offenses.

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

No. _____

STATE OF NORTH CAROLINA

Plaintiff)

vs.)

(Name Defendant))

Defendant)

V E R D I C T

We, the jury, return the unanimous verdict as follows:

- 1. Guilty of First Degree Murder

ANSWER: _____

IF YOU ANSWER "YES", IS IT:

- A. On the basis of malice, premeditation and deliberation?

ANSWER: _____

- B. Under the first degree felony murder rule?

ANSWER: _____

If you find the Defendant Guilty of First Degree Murder stop here.

2. Guilty of Second Degree Murder

ANSWER: _____

If you find defendant Guilty of Second Degree Murder you must unanimously find one or more of A, B, or C below.

A. Is it malice meaning hatred, ill will, or spite?

ANSWER: _____

B. Is it malice defined as condition of mind which prompts a person to take the life of another intentionally or to intentionally inflict serious bodily harm which proximately results in another's death, without just cause, excuse or justification?

ANSWER: _____

C. Is it malice that arises when an act which is inherently dangerous to human life is intentionally done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief?

ANSWER: _____

If you find the Defendant Guilty of Second Degree Murder stop here.

3. Guilty of (state second lesser included offense)

ANSWER: _____

If you find the Defendant Guilty of (state second lesser included offense) stop here.

4. Not Guilty.

ANSWER: _____

This, the _____ day of _____, 20____.

Foreperson of the Jury

(must be signed)

1. See also *Enmund v. Florida*, 102 S.Ct. 3368 (1982), as modified by *Cabana v. Bullock*, 474 U.S. 376 (1986) and *Tison v. Arizona*, 481 U.S. 137 (1987), holding that the death penalty for this offense violates the Constitution unless the defendant killed, attempted to kill or intended to kill the victim, or intended that deadly force would be used in the course of the felony, or was a major participant in the underlying felony and exhibited reckless indifference to human life. These cases did not change the substantive law on felony murder. Accordingly, no changes in this instruction arising from *Enmund* are suggested. N.C.P.I.—Crim. 150.10 and the jury verdict form at the end thereof have been amended to incorporate the *Enmund* requirements.

2. The parenthetical phrase, without parole, must be used for offenses occurring on or after October 1, 1994.

3. N.C. Gen. Stat. § 14-5.2 (effective July 1, 1981) abolished all distinctions between accessories before the fact and principals to felonies as to both trial and punishment, except that if a person who would have been guilty and punishable as an accessory before the fact is convicted of a capital felony, and the jury finds that his conviction was based solely on the uncorroborated testimony of one or more principals, co-conspirators or accessories to the crime, he shall be guilty of a Class B felony. The act applies to all offenses committed on or after July 1, 1981. See N.C.P.I.—Crim. 202.20, 202.30, 202.40.

As to felonies allegedly committed before that date, accessories before the fact should be tried (and punished) according to previously existing law. See *State v. Small*, 301 N.C. 407, 272 S.E.2d 128 (1980).

See N.C.P.I.—Crim. 206.10A for suggested procedure and instruction where an accessory before the fact is convicted of first degree murder.

4. If there are other lesser included offenses, list them before "not guilty."

5. "If the evidence is sufficient to fully satisfy the State's burden of proving each and every element of the offense of murder in the first degree, including premeditation and deliberation, and there is no evidence to negate these elements other than defendant's denial that he committed the offense, the trial judge should properly exclude from jury consideration the possibility of a conviction of second degree murder." *S. v. Strickland*, 307 N.C. 274, 293 (1983), overruling *S. v. Harris*, 290 N.C. 718 (1976).

6. See *S. v. McCoy*, 303 N.C. 1, at 28-29 (1981).

7. In *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965 (1985), the Supreme Court held that a mandatory presumption, if it relieves the State of its burden of persuasion on an

element of the offense, violates the Due Process Clause. This raises questions concerning the validity of the mandatory presumption of malice required in *S. v. Reynolds*, 307 N.C. 184 (1982).

8. Where there is a serious issue as to proximate cause, further instructions may be helpful, *e.g.*:

"The defendant's act need not have been the only cause, nor the last and nearest cause. It is sufficient if it concurred with some other cause acting at the time which, in combination with it, proximately caused the death of (*name victim*)."

9. This sentence is only to be provided if the offense involved the killing of a child.

10. If there is evidence of lack of capacity to premeditate or deliberate, *see S. v. Shank*, 322 N.C. 243 (1988), 322 N.C. 152 (1988) and *S. v. Rose*, 323 N.C. 455 (1988). N.C.P.I.—Crim. 305.11.

11. In the appropriate case, the hands and feet of the defendant may be considered a "deadly weapon." *See State v. Steen*, 376 N.C. 469, 852 S.E.2d 14 (2020) (holding that the hands and feet of the defendant could be considered a deadly weapon used to commit the underlying felony, where evidence showed that the defendant attempted to murder the alleged victim using his hands and feet).

12. *See note 7.*

13. Use the parenthetical between the "11s" only when there is evidence of a felony other than arson, rape or a sex offense, robbery, kidnapping or burglary.

14. If the evidence indicates that someone other than defendant may have actually committed the homicide, parts of this instruction should be modified to reflect the facts in evidence.

15. In *State v. Davis*, 305 N.C. 400, 290 S.E.2d 574 (1982), the North Carolina Supreme Court stated that in this State there is no crime of second degree felony murder. This instruction has been modified accordingly.

16. *See note 6.*

17. If manslaughter instructions are to be given, the last phrase should be, "you will not return a verdict of guilty of second degree murder."

