

206.57D AGGRAVATED FELONY SERIOUS INJURY BY VEHICLE. FELONY.

*NOTE WELL: This instruction applies to offenses occurring on or after December 1, 2006. See N.C. Gen. Stat. § 15A-928 for provisions regarding indictment, bifurcated trial, verdict, and judgment.*

*NOTE WELL: If a separate charge of driving while impaired is submitted, then the jury may only convict the defendant of this offense if it also convicts the defendant of driving while impaired. See State v. Mumford, 2010 No. COA09-300, N.C. App. LEXIS 35, (Jan. 5, 2010).*

*CAUTION: If the jury convicts the defendant of this offense and driving while impaired, the court should arrest judgment on the driving while impaired offense. If the jury finds the defendant not guilty of driving while impaired, the court must arrest judgment on this offense.*

The defendant has been charged with aggravated felony serious injury by vehicle.

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

First, that the defendant was driving<sup>1</sup> a [vehicle]<sup>2</sup> [commercial vehicle].<sup>3</sup>

Second, that the defendant was driving that [vehicle] [commercial vehicle] upon a [highway] [street] [public vehicular area] within the state.<sup>4</sup>

Third, that at the time the defendant was driving that [vehicle] [commercial vehicle] the defendant:

*NOTE WELL: If the evidence supports submission of the case under alternatives (A), (B) and (C), instructions on each alternative should be given.*

(A) [was under the influence of an impairing substance. (Name substance involved) is an impairing substance.<sup>5</sup> The defendant is under the influence of an impairing substance when the defendant

has taken (or consumed) a sufficient quantity of that impairing substance to cause the defendant to lose the normal control of the defendant's bodily or mental faculties, or both, to such an extent that there is an appreciable impairment<sup>6</sup> of either or both of these faculties.<sup>7]</sup>

- (B) [had consumed sufficient alcohol that at any relevant time after driving the defendant had an alcohol concentration<sup>8</sup> of [0.08] ][0.04]<sup>9</sup> or more grams of alcohol [per 210 liters of breath] [per 100 milliliters of blood]. A relevant time is any time after driving that the driver still has in the driver's body alcohol consumed before or during driving].<sup>10</sup> The results of a chemical analysis<sup>11</sup> are deemed sufficient evidence to prove a person's alcohol concentration.<sup>12</sup>
- (C) [Had any amount of a [Schedule I controlled substance] [metabolites of a Schedule I controlled substance] in the defendant's [blood] [urine] [breath]]. (*Name substance*) is a Schedule I controlled substance or is a metabolite<sup>13</sup> of a Schedule I controlled substance.].<sup>14</sup>

(If the evidence tends to show that [a chemical test known as a(n) [intoxilizer] [breathalyzer] [blood test] [urine test]<sup>15</sup> was offered to the defendant by a law enforcement officer and that the defendant refused to take the test] [the defendant refused to perform a field sobriety test at the request of an officer], you may consider this evidence together with all other evidence in determining whether the defendant was under the influence of an impairing substance at the time *he* (allegedly) drove a motor vehicle.)<sup>16</sup>

Fourth, that the victim was seriously injured.<sup>17</sup>

Fifth, that defendant's driving proximately but unintentionally caused the victim's serious injury. Proximate cause is a real cause, a cause without which the victim's serious injury would not have occurred, 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(s) need not have been the last, or nearest cause. It is sufficient if [it] [they] concurred with some other cause acting at the same time which, in combination with [it] [them], proximately caused the victim's serious injury.)

And Sixth, that on (*name date*) in (*name court*) defendant was convicted of (*name offense*) which involved impaired driving and this conviction was within seven years of the defendant's driving.<sup>18</sup>

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant drove a [vehicle] [commercial vehicle] on a [highway] [street] [public vehicular area] in this state and that when doing so the defendant [was under the influence of an impairing substance] [had consumed sufficient alcohol that at any relevant time after driving the defendant had an alcohol concentration of [0.08] [0.04] or more grams of alcohol [per 210 liters of breath] [per 100 milliliters of blood]] [had any amount of [a Schedule I controlled substance] [metabolites of a Schedule I controlled substance] in the defendant's [blood] [urine] [breath]], that defendant's driving proximately but unintentionally caused the victim's serious injury, and that defendant had been convicted within the past seven years of an offense involving impaired driving, then 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, you would not return a verdict of guilty, but would consider whether the defendant is guilty of Felony Serious Injury by Vehicle. Felony Serious Injury by Vehicle differs from Aggravated Felony Serious Injury by Vehicle in that the State need not prove that at the time the defendant was

driving while impaired, the defendant had been convicted within the past seven years of an offense involving impaired driving.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant drove a vehicle on a [highway] [street] [public vehicular area] in this state and that when doing so the defendant [was under the influence of an impairing substance] [had consumed sufficient alcohol that at any relevant time after driving the defendant had an alcohol concentration of [0.08] [0.04] or more grams of alcohol [per 210 liters of breath] [per 100 milliliters of blood]] [had any amount of [a Schedule I controlled substance] [metabolites a Schedule I controlled substance] in the defendant's [blood] [urine] [breath], and that defendant's impaired driving proximately but unintentionally caused the victim's serious injury, then it would be your duty to return a verdict of guilty of felony serious injury by vehicle. 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.

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1. N.C. Gen. Stat. § 20-4.01 defines the driver as the operator of a vehicle.
  2. If there is any doubt, define "vehicle" under N.C. Gen. Stat. § 20-4.01(49), or "motor vehicle" under § 20-4.01(23).
  3. N.C. Gen. Stat. § 20-4.01(3d) a and b defines commercial vehicle. *See also State v. Jones*, 140 N.C. App. 691, 538 S.E.2d 228 (2000).
  4. If there is any doubt, define "highway" or "street" in accordance with N.C. Gen. Stat. § 20-4.01(13). "Public vehicular area" is defined in N.C. Gen. Stat. § 20- 4.01(32).
  5. An impairing substance includes alcohol, controlled substance under Chapter 90 of the General Statutes, or any other drug or psychoactive substance capable of impairing a person's physical or mental faculties, or any combination of these substances. N.C. Gen. Stat. § 20-4.01(14a).
  6. The phrase "appreciable impairment" is not defined in N.C. Gen. Stat. § 20-4.01 or other subsequent statutes. However, appellate case law has defined appreciable to mean the effect of the impairing substance "must be...sufficient to be recognized and estimated." *State v. Harrington*, 78 N.C. App. 39, 45, 336 S.E.2d 852, 855 (1985). This additional language may be provided to the jury, if requested.
  7. N.C. Gen. Stat. § 20-4.01(48b).

8. N.C. Gen. Stat. § 20-4.01(1b) defines alcohol concentration as “the concentration of alcohol in a person, expressed either as (a) grams of alcohol per 100 milliliters of blood; or (b) grams of alcohol per 210 liters of breath.

9. Use 0.04 where a commercial vehicle is involved.

10. N.C. Gen. Stat. § 20-4.01(33a).

11. N.C. Gen. Stat. § 20-4.01(3a) defines chemical analysis as “a chemical analysis of the breath or blood of a person to determine his alcohol concentration, performed in accordance with N.C. Gen. Stat. § 20-139.1. The term ‘chemical analysis’ includes duplicate or sequential analyses when necessary or desirable to insure the integrity of test results.”

12. The term “deemed sufficient” is not defined in N.C. Gen. Stat. § 20-141.4, other statutes or any appellate court decisions. Absent a specific definition, it can be presumed that the legislature intended the words to be given their ordinary meaning.

13. A metabolite is any substance produced or used during metabolism (digestion). In drug use, the term usually refers to the end product that remains after metabolism.

14. Driving with any Schedule I controlled substance or its metabolites in one’s blood or urine is a *per se* violation of impaired driving offense.

15. Note that if the offense occurred between December 1, 2006 and June 27, 2007, there was no statutory provision during this time that required the defendant to take a urine test.

16. N.C. Gen. Stat. § 20-139.1(f).

17. Serious injury may be defined as “such physical injury as causes great pain and suffering.” See *S. v. Jones*, 258 N.C. 89 (1962), and *S. v. Ferguson*, 261 N.C. 558 (1964).

18. See N.C. Gen. Stat. § 20-4.01(24a). If the prior conviction would not obviously involve impaired driving, *e.g.* death by vehicle, first or second degree murder, or involuntary manslaughter, then additional facts will have to be found by the jury and the elements of these offenses should be included in the instruction at this point.

