

270A.27D REPEAT DEATH BY IMPAIRED BOATING. FELONY.

*NOTE WELL: This instruction is to be used for offenses occurring on or after December 1, 2016. See N.C. Gen. Stat. § 75A-10.3. Use N.C.P.I 270A.25 where the defendant was operating a vessel while under the influence of an impairing substance and did not cause [death] [serious] injury to another.*

*Use N.C.P.I.—Crim 270A.27C where the defendant has a previous conviction of impaired boating that did not cause [death] [serious injury] to another occurring within seven (7) years of committing the offense of causing [death] [serious] injury by impaired boating<sup>1</sup>.*

*If the defendant admits to a previous conviction of either [death] [serious injury] to another person by impaired boating<sup>2</sup> or [murder] [manslaughter] and the basis of the conviction was the unintentional death of another person while engaged in the offense of impaired boating, occurring within 7 years of the current violation, those elements of the offense are established and no evidence in support thereof may be adduced by the State. In such case, a transcript of plea is required for the admission of the previous conviction.*

*If the defendant denies a previous conviction of [death] [serious injury] to another person by impaired boating or [murder] [manslaughter] and the basis of the conviction was the unintentional death of another person while engaged in the offense of impaired boating occurring within seven (7) years of the current violation or remains silent, the State must prove the previous conviction in the fifth and sixth elements of the offense below. See N.C. Gen. Stat. § 15A-928.*

The defendant has been charged with repeat [death] [serious injury] by impaired boating.

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

First, that on or about the alleged date, the defendant unintentionally caused [the death of] [serious injury to] the alleged victim.

Second, that the defendant was engaged in the offense of impaired boating<sup>3</sup>; that is the defendant was [operating a [motorboat] [vessel]]

[manipulating [water skis] [a surfboard] [nonmotorized vessel] [(*describe similar device*)]].

- (a) [was under the influence of an impairing substance.] (*Name substance involved*) is an impairing substance.<sup>4</sup> The defendant is under the influence of an impairing substance when the defendant has [taken] [consumed] a sufficient quantity of that impairing substance to cause the defendant to lose the normal control of the defendant's [bodily] [mental faculties] [both], to such an extent that there is an appreciable impairment<sup>5</sup> of [either] [both of these faculties].<sup>6</sup>]
- (b) [after having consumed sufficient alcohol that at any relevant time after the boating, the defendant had an alcohol concentration<sup>7</sup> of [0.08] [more than 0.08] of alcohol [per 210 liters of breath] [per 100 milliliters of blood].<sup>8</sup> A relevant time is any time after the boating that the driver still has in the body alcohol consumed [before] [during] the boating]<sup>9</sup> the results of a chemical analysis are deemed sufficient evidence to prove a person's alcohol concentration.<sup>10</sup>

Third, that the defendant was [operating that [motorboat] [vessel]] [manipulating the [water skis] [surfboard] [nonmotorized vessel] [similar device (*describe device*)]] on the waters of this State.<sup>11</sup>

Fourth, that the defendant's impaired boating was the proximate cause of the [death] [serious injury] to the alleged victim.

Fifth, that the defendant did so knowingly.

Sixth, that the defendant had previously been convicted of an impaired boating offense, in that:

- a) [On (name date) in (name court) the defendant [was convicted of] [pled guilty to] [death] [serious injury] to another person by impaired boating, that was committed on (name date) in violation of the law of the state of North Carolina]]
  
- b) [On (name date) in (name court) the defendant [was convicted of] [pled guilty to] [[murder] [manslaughter] and the basis of the conviction was the unintentional death of another person while engaged in the offense of impaired boating, that was committed on (name date) in violation of the law of the state of North Carolina]<sup>12</sup>

And Seventh, that the previous conviction was within seven (7) years of the current offense (name date of current offense).

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant unintentionally caused [the death of] [serious injury to] the alleged victim, that the defendant was engaged in the offense of impaired boating, that is the defendant [operated a [motorboat] [vessel]] [manipulated [water skis] [a surfboard] [nonmotorized vessel] [(describe similar device)]] while underway on the waters of this State [while under the influence of an impairing substance] [after having consumed sufficient alcohol that the defendant has, at any relevant time after the boating, an alcohol concentration of [0.08] [more than 0.08] of alcohol [per 210 liters of breath] [per 100 milliliters of blood]], that defendant's impaired boating was the proximate cause of [the death of] [serious injury to] the alleged victim, that the defendant did so knowingly, that the defendant had previously been convicted of [[death] [serious injury] to another person by impaired boating, that was committed on (name date)]] [[murder] [manslaughter] and the basis of the conviction was the unintentional death of another person while engaged in the offense of impaired boating, that was

committed on (name date)]], and that the previous conviction occurred within seven (7) years of the date of the current offense, 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, it would be your duty to return a verdict of not guilty.

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1. See N.C. Gen. Stat. §§75A-10.3(c), 75A-10.3(d).
  2. See N.C. Gen. Stat. §§75A-10.3(a), 75A-10.3(b).
  3. See N.C. Gen. Stat. §75A-10(b1).
  4. 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).
  5. 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.
  6. N.C. Gen. Stat. § 20-4.01(48b).
  7. 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."
  8. The fact that a person charged with this violation is or has been legally entitled to use alcohol or a drug is not a defense. See N.C. Gen. Stat. §75A-10(b1).
  9. N.C. Gen. Stat. § 20-4.01(33a).
  10. The term "deemed sufficient" is not defined in N.C. Gen. Stat. § 20.138.1 or 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.
  11. See N.C. Gen. Stat. § 75A-2(6). "Waters of this State" means any waters within the territorial limits of this State, and the marginal sea adjacent to this State and the high seas when navigated as a part of a journey or ride to or from the shore of this State, but does not include private ponds as defined in N.C. Gen. Stat. § 113-129.
  12. See N.C. Gen. Stat. §14-17 and §14-18 for definitions of murder in the first and second degree, and voluntary manslaughter.