

### 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.*

*NOTE WELL: If the State contends that the defendant is not entitled to the use of defensive force because the defendant was attempting to commit, committing, or escaping after the commission of a felony, and that felony offense was immediately causally connected to the circumstances giving rise to the use of such defensive force, the jury should be instructed pursuant to N.C.P.I.—Crim. 308.90. If the felony offense alleged was immediately causally connected to the circumstances giving rise to the defensive forced use, the defendant would be disqualified from the benefit of using such defensive force.*

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 use deadly force against 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 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>

(Furthermore, self-defense is justified only if the defendant was not the aggressor.<sup>6</sup> 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 against [himself] [herself]. 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. However, if defendant was the aggressor, the defendant would be justified in using defensive force if the defendant thereafter attempted to abandon the fight and gave notice to the defendant's opponent that the defendant 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.<sup>7</sup>)

*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. **It is reversible error to instruct the jury on the aggressor doctrine if the record lacks***

***evidence from which the jury could infer that the defendant was an aggressor at the time the defendant allegedly acted in self-defense. State v. Hicks, 2022-NCCOA-263.***

See *State v. Holloman*, 369 N.C. 615 (2017), reversing, 247 N.C. App. 434, 786 S.E.2d 328 (2016). The Supreme Court in *Holloman* explained that G.S. 14-51.4(2)(a), allowing an aggressor to regain the right to utilize defensive force under certain circumstances, does not apply where the aggressor initially uses deadly force against the person provoked. Accordingly, the trial court did not err by instructing that a defendant who was the aggressor using deadly force had forfeited the right to use deadly force and that a person who displays a firearm to his opponent with the intent to use deadly force against him or her and provokes the use of deadly force in response is an aggressor. See also *State v. Corbett*, 839 S.E. 2d 361 (N.C. Ct. App. 2020).

**NOTE WELL:** The following self-defense mandate must be given after the mandate on each substantive offense instructed upon. **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).

## 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*, 371 N.C. 535,542, 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.”

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. N.C. Gen. Stat. § 14-51.4(2).

7. 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, or escaping after the commission of a felony. If evidence is presented on this point, then the instruction should be modified accordingly pursuant to N.C.P.I.—Crim. 308.90 to add this provision at this point in the substantive instruction.

