

N.C.P.I.-Crim. 206.13

FIRST DEGREE MURDER WHERE A DEADLY WEAPON IS USED, NOT INVOLVING SELF-DEFENSE, COVERING ALL LESSER INCLUDED HOMICIDE OFFENSES. CLASS A FELONY (DEATH OR LIFE IMPRISONMENT); CLASS C, F, AND H FELONIES (LESSER OFFENSES).

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REPLACEMENT JUNE 2018

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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

If you have a case of second degree murder involving multiple theories of malice then refer to the special verdict form attached herein.

Effective December 1, 1997, Voluntary Manslaughter is a Class D felony. For offenses occurring before December 1, 1997, Voluntary Manslaughter is a Class E felony.

Refer to Punishment Chart for Homicides N.C.P.I.-Crim. 206 Series.

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, or
- 2) guilty of second degree murder,⁴ or
- 3) guilty of voluntary manslaughter, or

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4) guilty of involuntary manslaughter, or

5) not guilty.

First degree murder is the unlawful killing of a human being with malice and with premeditation and deliberation.

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

Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation.

Involuntary manslaughter is the unintentional killing of a human being by an unlawful act not amounting to a felony or by an act done in a criminally negligent way.

For you to find the defendant guilty of first degree murder, 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 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. If the state proves beyond a reasonable doubt,⁵ 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 victim'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.⁶ You may consider this along with all other facts and circumstances

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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 involved 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,⁷ 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 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 has been born alive, but died as a result of injuries inflicted prior to being born alive.)⁸

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

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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 are usually susceptible of direct proof. They may be proved by 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 the means by which the killing was done].⁹

Second Degree Murder differs from first degree murder in that neither specific intent to kill, premeditation, nor deliberation are necessary elements. In order for you to find the defendant guilty of second degree murder, the State must prove beyond a reasonable doubt that the defendant unlawfully, intentionally¹⁰ and with malice wounded the victim with a deadly weapon, thereby proximately causing the victim's death.

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 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.] [malice also

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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.]]¹¹

[The verdict form sets out second degree murder on the basis of multiple theories of malice. In the event that you should find the defendant guilty of second degree murder, please have your foreperson indicate which theory or theories of malice you have found. You may find one or more of these theories of malice, but must do so unanimously.]

Voluntary Manslaughter is the unlawful killing of a human being without malice and without premeditation and without deliberation. A killing is not committed with malice if the defendant acts in the heat of passion upon adequate provocation.

The heat of passion does not mean mere anger. It means that the defendant's state of mind was at the time so violent as to overcome reason, so much so that the defendant could not think to the extent necessary to form a deliberate purpose and control the defendant's actions. Adequate provocation may consist of anything which has a natural tendency to produce such passion in a person of average mind and disposition,¹² and the defendant's act took place so soon after the provocation that the passion of a person of average mind and disposition would not have cooled.

The burden is on the State to prove beyond a reasonable doubt that the defendant did not act in the heat of passion upon adequate provocation, but rather that the defendant acted with malice. If the State fails to meet this burden, the defendant can be guilty of no more than voluntary manslaughter.

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For you to find the defendant guilty of voluntary manslaughter, the State must prove two things beyond a reasonable doubt:

First, that the defendant killed the victim by an intentional¹³ and unlawful act.

And Second, that the defendant's act was a proximate cause¹⁴ 1314 of the victim's death. A proximate cause is a real cause, a cause without which the victim's death would not have occurred.

If you do not find the defendant guilty of murder or voluntary manslaughter, you must consider whether he is guilty of involuntary manslaughter. Involuntary manslaughter is the unintentional killing of a human being by an unlawful act not amounting to a felony, or by an act done in a criminally negligent way.

For you to find the defendant guilty of involuntary manslaughter, the State must prove two things beyond a reasonable doubt:

First, that the defendant acted a) [unlawfully] (or) b) [in a criminally negligent way].

a) [The defendant's act was unlawful if (define crime alleged to have been violated, e.g., defendant recklessly discharged a gun, killing the victim.)]

b) [Criminal negligence is more than mere carelessness. The defendant's act was criminally negligent, if judging by reasonable foresight, it was done with such gross recklessness or carelessness as to amount to a heedless indifference to the safety and rights of others.]

And Second, the State must prove that this [unlawful] (or) [criminally negligent] act proximately caused the victim's death.

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(If the victim died by accident or misadventure, that is, without wrongful purpose or criminal negligence on the part of the defendant, the defendant would not be guilty. The burden of proving accident is not on the defendant. The defendant's assertion of accident is merely a denial that the defendant has committed any crime. The burden remains on the State to prove the defendant's guilt beyond a reasonable doubt.)

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. 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.

If you do not find the defendant guilty of first degree murder, you must determine whether the defendant is 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 wounded the victim with a deadly weapon, thereby proximately causing 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, you will not return a verdict of guilty of second degree murder. If you do not find the defendant guilty of second degree murder, you must consider whether the defendant is guilty of voluntary manslaughter.

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If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally wounded the victim with a deadly weapon, thereby proximately causing the victim's death, but the State has failed to satisfy you beyond a reasonable doubt that the defendant acted with malice, it would be your duty to return a verdict of guilty of voluntary manslaughter.

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 voluntary manslaughter. You must then determine whether the defendant is guilty of involuntary manslaughter.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant [*(name crime)*] (or) [acted in a criminally negligent way] thereby proximately causing the victim's death, it would be your duty to return a verdict of guilty of involuntary manslaughter. 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.

¹ This instruction is intended to serve as a model for combining other homicide charges. It should be given as drafted here only in a case where there is a charge of first degree murder (not involving the felony-murder rule), where all lesser included homicide offenses are possible verdicts under the evidence.

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. 202.20A.

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As to felonies allegedly committed before that date, accessories before the fact should be tried (and punished) according to previously existing law. See N.C.P.I.-Crim. 202.20, 202.30 and *S. 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 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).

⁵ See *S. v. McCoy*, 303 N.C. 1, at 28-29 (1981).

⁶ 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).

⁷ 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 last cause or the nearest cause. It is sufficient if it concurred with some other cause acting at the same time, which in combination with it, proximately caused the death of the victim."

⁸ This sentence is only to be provided if the offense involved the killing of a child.

⁹ If there is evidence of lack of capacity to premeditate or deliberate, see *S. v. Shank*, 322 N.C. 243 (1988) and N.C.P.I.-Crim. 305.11.

¹⁰ "Neither second-degree murder or voluntary manslaughter has as an essential element an intent to kill. In connection with these two offenses, the phrase 'intentional killing' refers not to the presence of a specific intent to kill, but rather to the fact that the act which resulted in death is intentionally committed and is an act of assault which in itself amounts to a felony or is likely to cause death or serious bodily injury. Such an act committed in the heat of passion suddenly aroused by adequate provocation or in the imperfect exercise of the right of self-defense is voluntary manslaughter. But such an act can never be involuntary manslaughter. This is so because the crime of involuntary manslaughter involves the commission of an act, whether intentional or not, which in itself is not a felony or likely to result in death or great bodily harm." *S. v. Ray*, 299 N.C. 151, 158 (1980). See *also S. v. Jordan*, 140 N.C. App. 594 (2000); *S. v. Coble*, 351 N.C. 448 (2000).

¹¹ See *State v. Mosley*, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 17, 2017). The jury should only be instructed on the theories of malice applicable to the facts of the case. This is important because the theory or theories of malice will determine the class of the offense.

¹² If some evidence tends to show legally sufficient provocation (e.g., assault), but other evidence tends to show that the provocation, if any, was insufficient (e.g., mere

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words), the jury should be told the kind of provocation that the law regards as insufficient, *e.g.*, "Words and gestures alone, however insulting, do not constitute adequate provocation when no assault is made or threatened against the defendant."

¹³ "Neither second-degree murder nor voluntary manslaughter has as an essential element an intent to kill. In connection with these two offenses, the phrase 'intentional killing' refers not to the presence of a specific intent to kill, but rather to the fact that the act which resulted in death is intentionally committed and is an act of assault which in itself amounts to a felony or is likely to cause death or serious bodily injury. Such an act committed in the heat of passion suddenly aroused by adequate provocation or in the imperfect exercise of the right of self-defense is voluntary manslaughter. But such an act can never be involuntary manslaughter. This is so because the crime of involuntary manslaughter involves the commission of an act, whether intentional or not, which in itself is not a felony or likely to result in death or great bodily harm." *S. v. Ray*, 299 N.C. 151, 158 (1980). *See also S. v. Jordan*, 140 N.C. App. 594 (2000); *S. v. Coble*, 351 N.C. 448 (2000).

¹⁴ 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 last cause or the nearest cause. It is sufficient if it concurred with some other cause acting at the same time, which in combination with it, proximately caused the death of the victim."