206.17A ATTEMPTED FIRST DEGREE MURDER[1] (WHERE A DEADLY WEAPON IS USED) INCLUDING SELF-DEFENSE. FELONY.

NOTE WELL: Unless a statute provides otherwise, the punishment is one class lower than the offense being attempted.

NOTE WELL: If self-defense is at issue and the assault occurred in defendant's home, place of residence, workplace or motor vehicle, see 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 force used, the defendant would be disqualified from the benefit of using such defensive force.

The defendant has been charged with attempted first degree murder.

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

First, that the defendant intended[2] to commit first degree murder.

And Second, that at the time the defendant had this intent, he performed an act which was calculated and designed to accomplish the crime [but which fell short of the completed crime] [and which came so close to bringing it about that, in the ordinary and likely course of things, it would have proximately resulted in the death of the victim[3] had the defendant not been stopped or prevented from completing the defendant's apparent course of action]. (Mere preparation or mere

planning is not enough to constitute such an act, but the act need not be the last act required to complete the crime.)

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

Malice means not only hatred, ill will, or spite, as it is ordinarily understood-to be sure, that is malice—but it also means the 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 that person's death without just cause, excuse, or justification.

> *NOTE WELL: Use the following parenthetical if a deadly weapon was used.*
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> (If the State proves beyond a reasonable doubt (or it is admitted)[4] that the defendant intentionally inflicted a wound upon the victim with a deadly weapon, you may infer first, that the defendant acted unlawfully and second, that it was done with malice, but you are not compelled to do so.[5] You may consider this along with all other facts and circumstances in determining whether the defendant acted unlawfully and 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.])

Premeditation means that the defendant formed the intent to kill over some period of time, however short, before the defendant acted.

Deliberation 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 [lack of provocation by the victim] [conduct of the defendant before, during and after the attempted killing] [threats and declarations of the defendant] [use of grossly excessive force] [infliction of wounds after the victim is felled] [the manner or means by which the killing was attempted].[6]

The defendant would not be guilty of attempted first degree murder on the ground of self-defense[7] if:

First, the defendant believed it was necessary to use deadly force against the victim[8] in order to save the defendant from death or great bodily harm.

And 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. In determining the reasonableness of the defendant's belief, 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 or not 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).

Therefore, in order for you to find the defendant guilty of attempted first degree murder the State must prove beyond a reasonable doubt, among other things, that the defendant did not act in self-defense. If the State fails to prove that the defendant did not act in self-defense, you must find the defendant not guilty.

The defendant would not be guilty of attempted first degree murder if the defendant acted in self-defense, and if the defendant (was not the aggressor in provoking the fight and) did not use excessive force under the circumstances.

(One enters a fight voluntarily if one uses toward one's opponent abusive language, which, considering all of the circumstances, is calculated and intended to provoke a fight. If the defendant voluntarily and without provocation entered the fight, the defendant would be considered the aggressor unless the defendant thereafter attempted to abandon the fight and gave notice to the victim 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 the person 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 the person 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. The defendant is not entitled to the benefit of self-defense if the defendant was the aggressor[9] with the intent to kill or inflict serious bodily harm upon the victim.[10]*)*

> *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.***

A defendant does not have the right to use excessive force. A defendant uses excessive force if the defendant uses more force than reasonably appeared to the defendant to be necessary at the time of the attempted killing. 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.

Furthermore, the defendant has no duty to retreat in a place where the defendant has a lawful right to be.[11] (The defendant would have a lawful right to be in the defendant's [home][12] [own premises] [place of residence] [workplace][13] [motor vehicle][14].)

> *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].*[15]

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally, and not in self-defense, attempted to kill the victim (with a deadly weapon) and performed an act designed to bring this about [but which fell short of the completed crime] [and which in the ordinary and likely course of things would have proximately resulted in the death of the victim had the defendant not been stopped or prevented from completing the defendant's apparent course of action] and that in performing this act, the defendant acted with malice, with premeditation and with deliberation, it would be your duty to return a verdict of guilty of attempted first degree murder.

If you do not so find or have a reasonable doubt as to one or more of these things, or if the State fails to prove that the defendant did not act in self-defense, that the defendant was the aggressor, or that the defendant used excessive force, then the defendant's action would be justified by self-defense, and it would be your duty to return a verdict of not guilty.

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[1]. *State v. Coble*, 351 N.C. 448, 527 S.E.2d 45 (2000); *State v. Cozart*, 131 N.C. App. 199, 505 S.E.2d 906 (1998); *State v. Collins*, 334 N.C. 54, 431 S.E.2d 188 (1993).

[2]. *See* N.C.P.I.—Crim. 120.10 for expanded definition of intent.

[3]. See N.C.P.I—Crim. 002.95, Memorandum on the Use of "Victim" Language.

[4]. Use the parenthetical only if defendant admits to an intentional shooting in open court. *See State v. McCoy*, 303 N.C. 1, 28-29 (1981).

[5]. 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).

[6]. If there is evidence of lack of mental capacity to premeditate or deliberate, *see S. v. Shank*, 322 N.C. 243, 250-251 (1988), *S. v. Weeks*, 322 N.C. 152 (1988), and *S. v. Rose*, 323 N.C. 455 (1988), and N.C.P.I.—Crim. 305.11.

[7]. A crime denominated as "attempted second degree murder" does not exist under North Carolina law. *State v. Coble*, 351 N.C. 448, 527 S.E.2d 45 (2000). While *Coble* would seem to indicate that a crime denominated as "attempted voluntary manslaughter" does not exist under North Carolina law, the Court of Appeals has indicated that, at least in the case of heat of passion voluntary manslaughter, attempted voluntary manslaughter is a cognizable offense under North Carolina law. *State v. Rainey*, 154 N.C. App. 282, 574 S.E.2d 25 (2002) (concluding that, while the offense did exist, the evidence did not support finding that defendant acted in the heat of passion so as to entitle him to jury instruction on the lesser-included offense of attempted voluntary manslaughter).

[8]. N.C. Gen. Stat. § 14-51.3.

[9]. N.C. Gen. Stat. § 14-51.4(2).

[10]. 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.

[11]. *See* N.C.P.I.—Crim. 308.10.

[12]. 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).

[13]. 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."

[14]. 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."

[15]. "[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. 456, 541, 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.*