

N.C.P.I.-Crim. 206.35  
SECOND DEGREE MURDER (CHILD BEATING) COVERING INVOLUNTARY  
MANSLAUGHTER AS A LESSER INCLUDED OFFENSE. FELONY.  
GENERAL CRIMINAL VOLUME  
JUNE 2014  
N.C. Gen. Stat. §§ 14-17, 14-18, 14-318.2, 14-318.4  
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206.35 SECOND DEGREE MURDER (CHILD BEATING)<sup>1</sup> COVERING  
INVOLUNTARY MANSLAUGHTER AS A LESSER INCLUDED OFFENSE.  
FELONY.

*NOTE WELL: This instruction is designed primarily for use in cases where the State seeks to establish second degree murder on the theory that the victim died as a result of child beating by the defendant, and where there is little or no direct evidence of the precise manner of the victim's death or of the defendant's intent. In such cases, the chief factual issues will usually be whether the victim died as a result of intentionally inflicted wounds and not accidentally, whether those wounds were inflicted by the defendant and not someone else and whether the defendant acted with sufficient "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences and mind regardless of social duty and deliberately bent on mischief" to supply the malice necessary for murder. This instruction is designed to emphasize those issues as they are likely to be raised by circumstantial evidence in a child beating case.*

*If the State charges first degree murder, or relies primarily on direct evidence of the defendant's behavior and intent in a second degree murder case, a specially drafted instruction is probably unnecessary and the standard first or second degree murder charges may be used instead of this one. Similarly, if the State charges only involuntary manslaughter, N.C.P.I.-Crim. 206.50 may be used.*

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

The defendant has been charged with second 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 second degree murder, or
- (2) guilty of involuntary manslaughter, or

(3) not guilty.<sup>2</sup>

Second degree murder is the unlawful killing of a human being with malice.

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

For you to find the defendant guilty of second degree murder the State must prove five things beyond a reasonable doubt:

First, that the victim received a fatal injury.

Second, that this injury 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,<sup>3</sup> 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 last or 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 was born alive, but died as a result of injuries inflicted prior to being born alive.)<sup>4</sup>

Third, that this injury was inflicted intentionally (and not by accident or misadventure). An injury is inflicted intentionally when the person who caused it intended to apply the force by which it was caused.

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 apply force to the body of another may be inferred from [the act itself] [the nature of the injury] [the conduct or declarations of the person who applied it] [other relevant circumstances].

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*NOTE WELL: Where there is evidence that the victim displayed the "battered child syndrome" or similar injuries, the judge should include the following paragraph:*

(If you find from the evidence beyond a reasonable doubt that at the time when the victim died, the victim had sustained multiple injuries at different locations on the victim's body, and that those injuries were at different stages of healing, (and, if you find that the physical condition of the victim's body was inconsistent with any explanation as to the cause of the victim's injuries given at or about the time of ~~his~~ the victim's death), you may consider such facts along with all other facts and circumstances in determining whether the injury which caused the victim's death was intentionally inflicted and not the product of accident or misadventure.)<sup>5</sup>

Fourth, that the person who inflicted this injury was the defendant and not some other person. (If you find that the victim was in the exclusive care or custody of the defendant during the [time] [times] when the victim's injuries were sustained, you may consider this fact along with all other facts and circumstances in determining whether those injuries were inflicted by the defendant.)

And Fifth, that the defendant acted with malice. Malice is the chief element which distinguishes second degree murder from involuntary manslaughter.

Malice means not only hatred, ill will, spite or particular animosity as they are ordinarily understood, though these are malice to be sure. Any act evidencing a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences and a mind regardless of social duty and deliberately bent on mischief is sufficient to supply the malice necessary for second degree murder. To find that the defendant acted

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with malice, you need not find that the defendant intended to kill the victim, but you must find beyond a reasonable doubt that the defendant's acts were so reckless or wantonly done as to indicate a total disregard of human life.<sup>6</sup>

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

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 [in a criminally negligent way] (or) [unlawfully].

[Criminal negligence is distinguished from malice in that it does not necessarily require an act which evidences a heart devoid of a sense of social duty or which is done so recklessly or wantonly as to manifest depravity of mind and disregard for human life. On the other hand, criminal negligence is more than mere carelessness. Criminal negligence requires such reckless or careless behavior as shows a thoughtless disregard of the consequences of that behavior or a heedless indifference to the safety and rights of others.]

[The defendant acted unlawfully if the victim was less than 16 years of age and the defendant was [the parent of] [providing care to or supervision of] the victim and if the defendant inflicted physical injury on the victim or allowed physical injury to be inflicted on the victim or created a substantial risk that the victim would suffer physical injury by other than accidental means.]

And Second, that the defendant's [criminally negligent] (or)

[unlawful] conduct proximately caused the victim's death.

(If the victim died by accident or misadventure, that is, without [criminal negligence] (or) [an unlawful act] 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

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the victim sustained a fatal injury, and that this injury proximately caused the death of the victim and that this injury was inflicted intentionally (and not by accident), and that it was the defendant who intentionally inflicted this injury and that in so doing the defendant acted with malice, 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 would not return a verdict of guilty of second degree murder. If you do not find the defendant guilty of second degree murder, you must determine whether ~~he~~ the defendant is guilty of involuntary manslaughter.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date,

- a) [the defendant acted in a criminally negligent way]
- b) [the victim was less than 16 years of age and the defendant was [the victim's parent] [a person providing for the victim's care or supervision] and the defendant [inflicted physical injury] [allowed physical injury to be inflicted] on the victim] (or) [created a substantial risk that the victim would suffer physical injury by other than accidental means] and if you find that the defendant's conduct was a proximate

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cause of 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 any of these things, it would be your duty to return a verdict of not guilty.

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1 *S. v. Wilkerson*, 295 N.C. 559 (1978) is the leading case on child beating homicide and should be carefully reviewed by the judge before trying such a case.

2 Do not submit a possible verdict of voluntary manslaughter when there is no evidence that the defendant killed under the heat of passion raised by sudden provocation and nothing that raises the issue of self-defense. *S. v. Wilkerson*, 295 N.C. 559, 583 (1978).

3 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."

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

5 See *State v. Smith*, 150 N.C. App. 138, 564 S.E.2d 237 (2002) holding that the parenthetical language of the third element in this instruction is a correct statement of the law in the appropriate case.

6 *S. v. Wilkerson*, 295 N.C. 559, 581 (1978). This instruction contains no language concerning the use of a deadly weapon, since it is designed for use primarily in cases where there is no direct evidence as to what the defendant may have used to beat the victim. If there is such evidence, consult N.C.P.I.-Crim. 206.30.