

206.40 VOLUNTARY MANSLAUGHTER INCLUDING SELF-DEFENSE (IN THE HEAT OF PASSION OR IMPERFECT SELF-DEFENSE), ALSO INCLUDING INVOLUNTARY MANSLAUGHTER. FELONY.

*NOTE WELL: This instruction is designed for use in those cases in which the most serious homicide charged is voluntary manslaughter. It should be used only in cases where there is evidence that the defendant killed intentionally, but did so in the heat of passion or in "imperfect" self-defense. It should not be used in cases, such as child abuse, where the killing is unintentional, but may have been with malice in that it was done in wanton disregard of human life, S. v. Wilkerson, 295 N.C. 559, 583 (1978), nor should it be used in any other case where there is no evidence of heat of passion, provocation or self-defense. Cf. S. v. Wetmore, 298 N.C. 743, 750 (1979); S. v. Montague, 298 N.C. 759 (1979). In all such cases, consult N.C.P.I.—Crim. 206.31, 206.35 or 206.50<sup>1</sup>. Where self-defense is not an issue, use N.C.P.I.—Crim. 206.41.*

*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.*

The defendant has been charged with voluntary manslaughter.

Under the law and the evidence in this case, it is your duty to return one of the following verdicts:

- 1) guilty of voluntary manslaughter
- 2) guilty of involuntary manslaughter
- 3) not guilty

Voluntary manslaughter is the unlawful killing of a human being by an intentional act.

A killing would be excused entirely on the ground of self-defense if:

First, it appeared to the defendant and the defendant believed it to be necessary to kill the victim 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 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 to the victim), (the fierceness of the assault, if any, upon the defendant), (whether or not the victim had a weapon in *his* possession), (and) (the reputation, if any, of the victim for danger and violence) (*describe other circumstances, as appropriate from the evidence*).

The defendant would not be guilty of manslaughter if the defendant acted in self-defense, as I have just defined it to be, and if the defendant (was not the aggressor in bringing on 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 deceased 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

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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. The defendant is not entitled to the benefit of self-defense if the defendant was the aggressor<sup>2</sup> in bringing on the fight.<sup>3</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.*

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 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.<sup>4</sup> (The defendant would have a lawful right to be in the defendant's [home]<sup>5</sup> [own premises] [place of residence] [workplace]<sup>6</sup> [motor vehicle<sup>7</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].<sup>8</sup>*

The burden is on the State to prove beyond a reasonable doubt that the defendant did not act in self-defense.

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

First, that the defendant killed the victim by an intentional<sup>9</sup> and unlawful act.

Second, 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.<sup>10</sup>

And Third, that the defendant [did not act in self-defense] or [though acting in self-defense was the aggressor] (or) [though acting in self-defense used excessive force].

If you do not find the defendant guilty of voluntary manslaughter you must consider whether the defendant 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 (*describe crime, e.g., "defendant assaulted the victim"*) (*define assault*)] 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. A proximate cause is a real cause, a cause without which the victim's death would not have occurred, 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.)

(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.<sup>11</sup> 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, by [his] [her] intentional and unlawful act proximately caused the victim's death, and the defendant was [the aggressor in bringing on the fight] (or) [used excessive force], it would be your duty to find the defendant guilty of voluntary manslaughter whether or not the defendant was otherwise acting in self-defense.

Or, if you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant by [his] [her] intentional and unlawful act, and not in self-defense, proximately caused the victim's death, 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.

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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 [(describe 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. However, 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.

And finally, if the State has failed to satisfy you beyond a reasonable doubt 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; therefore, you would return a verdict of not guilty.

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1. The state by charging at the voluntary manslaughter level concedes that it has no evidence of malice. This may seem to place the traditional definitions of voluntary manslaughter into an awkward context, since at first blush it would appear that the state would have to prove heat of passion, which it usually has to negate when trying to obtain a murder conviction. On closer analysis, however, the real issue in a case involving evidence of heat of passion will be whether the defendant killed the victim intentionally, as the state must prove to establish voluntary manslaughter, or unintentionally, in which case the crime would at most be involuntary manslaughter. Alternatively, if there is evidence of self-defense, the issues will be whether the defendant was acting in response to provocation and not in self-defense, or whether the defendant, if acting in self-defense, used excessive force or was the aggressor. If the state establishes any of these three things, the crime would be voluntary manslaughter; otherwise the defendant would be not guilty.

2. N.C. Gen. Stat. § 14-51.4(2).

3. 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] [escaping after the commission of] a felony. If evidence is presented on this point, then the instruction should be modified accordingly to add this provision.

4. See N.C.P.I.—Crim. 308.10.

5. 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

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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).

6. 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."

7. 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."

8. **"[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*, \_\_\_ N.C. \_\_\_, 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.***

9. "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).

10. 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."

11. In the event that the evidence shows that there was an accident, give N.C.P.I.—Crim. 307.10.