

N.C.P.I.-Crim. 208.81B  
ASSAULT ON AN OFFICER AND SIMPLE ASSAULT-ARREST SITUATIONS  
(ISSUES AS TO LAWFULNESS OF ARREST AND DEFENDANT FORCE).  
MISDEMEANOR.  
GENERAL CRIMINAL VOLUME  
JUNE 2015  
N.C. Gen. Stat. §§ 14-33(c)(4); 15A-401; 15A-402  
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208.81B ASSAULT ON AN OFFICER AND SIMPLE ASSAULT - ARREST  
SITUATIONS (ISSUES AS TO LAWFULNESS OF ARREST AND DEFENDANT  
FORCE).

*NOTE WELL: See N.C.P.I. 208.80 for an index to other  
factual situations involving assaults on arresting  
officers.*

*NOTE WELL: N.C.P.I. 208.81 provides a model  
instruction for the offense of assault on a law  
enforcement officer in arrest situations. The instruction  
incorporates all of the various scenarios presented in  
the index set forth in N.C.P.I. 208.80 into one  
instruction.*

*An assault on an officer can involve a variety of issues  
depending on whether or not the officer is in uniform,  
acted with or without a warrant, the lawfulness of the  
arrest, the force used by the officer, or the force used  
by the defendant.*

*Use this instruction when it is undisputed that the officer  
was in uniform, made an arrest without a warrant, used  
reasonable force to do so, and the issues are:*

- (1) Was the arrest a lawful arrest without a warrant;  
and*
- (2) If not, did the defendant act within his right to  
resist an unlawful, warrantless arrest.*

The defendant is charged with assault on a law enforcement officer  
while the officer was performing or attempting to perform a duty of his  
office.

Your duty is to return one of the following verdicts:

- (1) Guilty of assault upon a law enforcement officer while the

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officer was discharging or attempting to discharge a duty of his office,

(2) Guilty of simple assault, or

(3) Not guilty.

For you to find the defendant guilty of assault upon a law enforcement officer while the officer was discharging or attempting to discharge a duty of his office, the State must prove four elements beyond a reasonable doubt:

First, that the defendant assaulted (*name officer*) by intentionally<sup>1</sup> and without justification or excuse (*describe assault, e.g., striking*) (*name officer*).

Second, that (*name officer*) was a law enforcement officer and the defendant knew or had reasonable grounds to know that (*name officer*) was a law enforcement officer. A (*state officer's position, e.g., a highway patrolman*) is a law enforcement officer.

Third, that when the defendant (*describe conduct, e.g., struck*) (*name officer*), (*name officer*) was making or attempting to make an arrest. A (*state officer's position, e.g., a highway patrolman*) makes or attempts to make an arrest when the officer indicates by words or conduct that the officer is taking a person into custody to answer a criminal charge.<sup>2</sup>

And Fourth, that this arrest was a lawful arrest.<sup>3</sup> The arrest would be lawful if, at the time (*name officer*) made it, the officer had probable cause to believe that (*name defendant or other person being arrested*) had committed

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- a. [a felony. (*Name felony*) is a felony.]
  
- b. [a criminal offense in the officer's presence. (*Name criminal offense*) is a criminal offense.]
  
- c. [a misdemeanor and would not be apprehended or might cause [physical injury to [himself] [herself] [others]] [damage to property] unless immediately arrested. (*Name misdemeanor*) is a misdemeanor.]

Such probable cause would exist if (*describe facts which would constitute probable cause*).<sup>4</sup>

If (*name officer*) was making or attempting to make a lawful arrest, then the defendant to had the duty to submit to that arrest. If the defendant (*describe conduct, e.g., struck*) (*name officer*) while (*name officer*) was making the arrest, the defendant would be guilty of an assault upon a law enforcement officer while the officer was discharging or attempting to discharge a duty of the officer's office.

If you find that the defendant intentionally (*describe conduct, e.g., struck*) (*name officer*), and the arrest was unlawful, you then determine if the defendant is guilty of a simple assault.

To find the defendant guilty of simple assault, the State must prove two elements beyond a reasonable doubt:

First, that the defendant assaulted (*name officer*) by intentionally (*describe conduct, e.g., striking*) (*name officer*).

And Second, that the defendant acted without justification or excuse.

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If the arrest was not a lawful arrest, then the defendant had a right to resist the unlawful arrest. In doing so the defendant was justified in using such force as reasonably appeared to the defendant to be necessary under the circumstances to prevent the unlawful restraint of the defendant's liberty.<sup>5</sup> The resisting force by the defendant cannot have been excessive. In making this determination, you should consider the circumstances as you find them to have existed from the evidence. You should also include in your consideration (the size, age and strength of the defendant as compared to *(name officer)* (the fierceness of the assault, if any, upon the defendant), (the number of officers involved), (whether or not *(name officer)* had a weapon in *(name officer's)* possession), (and the reputation, if any, of *(name officer)* for danger and violence)). You, the jury, determine the reasonableness of the defendant's belief from the circumstances then appearing to the defendant.

If the State proves beyond a reasonable doubt that the defendant used excessive force or did not reasonably believe that the defendant's action was necessary or apparently necessary to prevent the defendant's unlawful restraint, the defendant would be guilty of simple assault. If the State fails to prove excessive force or absence of reasonable belief by the defendant, you would return a verdict of not guilty.

MANDATE

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally and without justification or excuse (*describe assault, e.g., struck*) *(name officer)*, that *(name officer)* was a (*describe officer's position, e.g., highway patrolman*), that the defendant knew or had reasonable grounds to know

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that (*name officer*) was a (*describe officer's position*), that (*name officer*) was making or attempting to make an arrest when the defendant (*describe conduct, e.g., struck*) the officer, and that (*name officer*) had probable cause to believe that the defendant had committed (*name felony, criminal offense or misdemeanor*) ([in the officer's presence] [and would not be apprehended or might cause [physical injury to [*himself*] [*herself*] [others]] [damage to property] unless immediately arrested]),<sup>6</sup> your duty would be to return a verdict of guilty of assault on a law enforcement officer while the officer was discharging or attempting to discharge a duty of the officer's office. If you do not so find, or have a reasonable doubt as to one or more of the elements, you would not return a verdict of guilty of assault on a law enforcement officer while the officer was discharging or attempting to discharge a duty of the officer's office.

If you find the arrest was unlawful, you must determine whether the defendant is guilty of simple assault.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally (*describe conduct, e.g., struck*) (*name officer*), and that the defendant did so without justification or excuse, your duty would be to return a verdict of guilty of simple assault. If you do not so find or have a reasonable doubt as to one or more of the elements, your duty would be to return a verdict of not guilty.

You would find that the defendant acted without justification or excuse if the State has satisfied you beyond a reasonable doubt:

- (1) that the defendant did not reasonably believe that (*describe*

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*conduct, e.g., striking*) (name officer) was necessary to prevent the unlawful restraint of the defendant's liberty, or

(2) that the defendant used excessive force (, or

(3) that the defendant was the aggressor).

If you do not so find or have a reasonable doubt that the State has proved any of these things, 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 If there is an issue as to whether the defendant intended the assault itself, incorporate N.C.P.I.-Crim. 120.10 at this point.

2 *Cf., S. v. Sanders*, 295 N.C. 361, 365 (1978).

3 N.C. Gen. Stat. § 15A-401 sets forth grounds upon which an officer may make an arrest without having a warrant in his possession:

- an officer who has knowledge that a warrant has been issued may arrest the person named in the warrant, N.C. Gen. Stat. § 15A-401(a)(2);
- an officer may arrest any person whom he has probable cause to believe has committed a felony, N.C. Gen. Stat. § 15A-401(b)(2)(a);
- an officer may arrest any person whom he has probable cause to believe has committed any criminal offense in his presence, N.C. Gen. Stat. § 15A-401(b)(1);
- an officer may arrest any person whom he has probable cause to believe has committed a misdemeanor and will not be apprehended or will cause physical injury to himself or others or damage to property unless immediately arrested, N.C. Gen. Stat. § 15A-401(b)(2)(b).
- an officer may arrest any person whom he has probable cause to believe has committed a misdemeanor under N.C. Gen. Stat. §§ 14-72.1, 14-134.3, 20-138.1, or 20-138.2, N.C. Gen. Stat. § 15A-401(b)(2)(c).
- an officer may arrest any person whom he has probable cause to believe has committed a misdemeanor under N.C. Gen. Stat. §§ 14-33(a), 14-33(c)(1), 14-33(c)(2), or 14-34 when the offense was committed by a person with whom the alleged victim has a personal relationship as defined in N.C. Gen. Stat. § 50B-1, N.C. Gen. Stat. § 15A-401(b)(2)(d).
- an officer may arrest any person whom he has probable cause to believe has

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committed a misdemeanor under N.C. Gen. Stat. § 50B-4.1(a), N.C. Gen. Stat. § 15A-401(b)(2)(e).

- an officer may arrest any person whom he has probable cause to believe has violated a pretrial release order entered under N.C. Gen. Stat. § 15A-534 or N.C. Gen. Stat. § 15A-534.1(a)(2), N.C. Gen. Stat. § 15A-401(b)(2)(f).

If the State relies on the first of these grounds, substitute for the fourth element the following: ". . . that a warrant for arrest naming the defendant had been issued and (*name officer*) knew that it had." If the State relies on one of the other three grounds, select the corresponding bracketed phrase in the fourth element.

4 "Whether probable cause exists depends upon 'whether at that moment the facts and circumstances within their knowledge or of which they have reasonably trustworthy information were sufficient to warrant a prudent person in believing that the [suspect] had committed or was committing an offense.' *Beck v. Ohio*, 379 U.S. 89 . . . (1964)." *S. v. Streeter*, 283 N.C. 203, 207 (1973).

Under this formula, a finding of probable cause requires two separate determinations. First, it must be determined what facts and circumstances were in fact within the officer's knowledge and information at the time he initiated the arrest. If there is conflicting evidence as to this, the jury must determine what the officer had seen, heard or been told. The second determination is whether the facts proved by the evidence most favorable to the State would indeed warrant a "prudent person in believing that the defendant had committed a criminal offense." This involves a question of law, which the court must decide. Therefore, this instruction does not explain the "prudent person" test to the jury, but rather tells them only (1) that probable cause is a necessary element of a lawful arrest without a warrant and (2) which of the conflicting facts would constitute probable cause. *See, S. v. Bradley*, 32 N.C. App. 666 (1977).

IF THE COURT RULES THAT THE EVIDENCE MOST FAVORABLE TO THE STATE DOES NOT, AS A MATTER OF LAW, PROVE FACTS WHICH COULD CONSTITUTE PROBABLE CAUSE, THE COURT SHOULD NOT USE THIS PATTERN INSTRUCTION BUT SHOULD USE INSTEAD N.C.P.I.-Crim. 208.81D. On the other hand, even if the evidence is not in dispute, and it proves facts which, as a matter of law, do constitute probable cause, the jury must still be instructed, as in any case involving undisputed evidence of an element of the State's case, on the need to find the relevant facts. This instruction does so.

5 *See*, N.C.P.I.-Crim. 208.81.

6 *See* notes 3 and 4 and text of Fourth element.