

215.12 SECOND DEGREE ARSON. FELONY.

NOTE WELL: N.C. Gen. Stat. § 14-58 divides common law arson into two degrees: first degree arson for the burning of an "occupied" dwelling and second degree arson for the burning of an "unoccupied" dwelling. Use this instruction when there is evidence that the defendant burned a house that was used as a home by someone, but in which no one was present at the time of the burning.

The defendant has been charged with second degree arson.

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

First, that the defendant burned¹ (*describe structure*).

Second, that this (*describe structure*) was a dwelling house. (A dwelling house is a house that is inhabited, that is, a house that is the permanent, temporary or seasonal residence of some person.)²

Third, that this (*describe structure*) was the dwelling house of someone other than the defendant.³

And Fourth, that the defendant did so maliciously, that is, that *he* intentionally and without justification or excuse

a. [burned the (*describe structure*)]

b. [burned another structure and that as a proximate result of *his* act, the fire spread to the (*describe structure*)].⁴

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant burned (*describe structure*) and

that this (*describe structure*) was a dwelling house, and that it was the dwelling house of some person other than the defendant and that the defendant) burned

a. [(*describe structure*) maliciously]

b. [(*describe other structure or place*) maliciously, and that as a proximate result of *his* act, the fire spread to the (*describe structure*)]

it would be your duty to return a verdict of guilty. 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.⁵

1. If there is some question as to burning, the jury may be told that a partial burning or the slightest charring is sufficient, but that a mere discoloration does not constitute a burning. The trial judge is advised that it is not appropriate to instruct the jury that a person "burns" a dwelling house when he "sets fire to" it, since these terms have different meanings under the law of arson in North Carolina. See, *S. v. Hall*, 93 N.C. 573 (1885).

2. If there is an issue as to whether the structure burned was a dwelling house, add the following to this element. A house is not a dwelling house if it is [under construction and no one has yet moved in] [between tenants] [abandoned]." *S. v. Long*, 243 N.C. 393 (1956).

The malicious burning of any mobile home or manufactured-type house or recreational trailer which is the dwelling house of another also constitutes the crime of arson. N.C. Gen. Stat. § 14-58.2.

Note also that "inhabited" does not mean "occupied." A house can be inhabited and therefore a "dwelling house" even though its inhabitants are temporarily absent at the time the burning occurred. See *S. v. Vickers*, 306 N.C. 90 (1982).

3. When dealing with a single unit dwelling house and there is evidence that the defendant inhabited the dwelling along with others, add the following:

"If this (*describe structure*) was the dwelling house of the defendant as well as that of (an)other person(s), it would be the dwelling house of someone other than the defendant."

When a landlord burns a house rented to a tenant, the landlord does commit arson, but when the tenant burns it, he does not, unless another person also lives there. *S. v.*

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Shaw, 305, N.C. 327 (1982). When one spouse sets fire to a house exclusively occupied by the other, he commits arson even though title to the house is only in his name; but when the other spouse sets fire to that house she does not commit arson. When the defendant shares a single unit dwelling house with other persons (whether spouse, children, relatives, boarders, or roommates), the defendant would commit arson by burning that house, since the dwelling is inhabited by others. *S. v. Shaw*, 305 N.C. 327 (1982).

When dealing with a multi-unit dwelling, and there is evidence that all units other than the defendant's were uninhabited, give the following:

"However, if all the other units in (*describe structure*) were uninhabited, the defendant would not be guilty of first degree arson. Therefore the State must satisfy you that at least one other unit in (*describe structure*) was inhabited by someone."

The tenant of one of the apartments in a multi-unit dwelling commits arson when he sets fire to his own apartment, even if the fire does not spread to any other part of the building, as long as there are occupied units in the building. *S. v. Jones*, 296 N.C. 75 (1978).

4. A person can burn a dwelling "maliciously" in one of two ways: a) he may intentionally and without justification or excuse burn the dwelling itself, or b) he may intentionally and without justification or excuse burn some structure or place that is not a dwelling which creates an unreasonable danger of fire to the dwelling.

"For a burning to be 'willful and malicious' in the law of arson, it must simply be done voluntarily, without excuse or justification, and without any bona fide claim of right. An intent or animus against either the property itself or its owner is not an element of common law arson." *S. v. Allen*, 322 N.C. 176 (1988).

5. If lesser included offense instructions are to be given, the last phrase should read, "you would not return a verdict of guilty of second degree arson."