

N.C.P.I.—Crim 270.15  
AGGRAVATING FACTORS FOR IMPAIRED DRIVING.  
REPLACEMENT JUNE 2016  
N.C. Gen. Stat. § 20-179  
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270.15 AGGRAVATING FACTORS FOR IMPAIRED DRIVING.

*(This document has an attachment. See Instruction References.)*

*NOTE WELL: In a 2005 decision, the North Carolina Supreme Court concluded that any fact that increases the penalty for a crime beyond the prescribed presumptive range, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt. See State v. Speight, 359 N.C. 602 (1 July 2005), modifying and affirming, 602 S.E.2d 4 (N.C. Ct. App. 2004). In 2006, the General Assembly amended N.C. Gen. Stat. § 20-179 (Session Law 2006-253). This amendment made the statute largely conform to the Speight decision; however, there are some differences which are explained in Note Wells below.*

*The court has several options on how to proceed, including adding the aggravating factor as an element of the offense, bifurcating the proceeding, or in the absence of the jury arraigining the defendant upon the special indictment or information and advising him that he may admit the aggravating factor alleged, deny it, or remain silent. For procedural guidance, see, e.g., N.C. Gen. Stat. § 15A-928. In the event the defendant admits the aggravating factor(s), a record of the plea should be made and preserved. See N.C. Gen. Stat. § 15A-1026.*

In the event you find (have found) the defendant guilty of impaired driving, you must then consider and answer the following question:

Do you find from the evidence beyond a reasonable doubt the existence of the following aggravating factor(s)?

*NOTE WELL: Submit to the jury the aggravating factors supported by the evidence. N.C. Gen. Stat. § 20-179(c). Some of these aggravating factors are self-explanatory and require no further definition. If a factor requires additional explanation, relevant pattern jury instructions, such as the capital sentencing instruction, may be consulted.*

*The factors listed in N.C. Gen. Stat. § 20-179(c)(1)(a) and (c)(1)(b) are not included below, because the statute specifically notes that "whether a prior conviction exists under subdivision (1) of the subsection shall be a matter to be determined by the*

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*judge, and not the jury.” See also State v. Allen, 359 N.C. 425 (1 July 2005), modifying and affirming, 601 S.E.2d 299 (N.C. Ct. App. 2004); Blakely v. Washington, 124 S. Ct. 2531 (2004).*

- (01) At the time of the offense, the defendant's license was revoked pursuant to N.C. Gen. Stat. § 20-28(a1) because of [impaired driving] [violating an ignition interlock restriction].<sup>1 2</sup>
- (02) There was serious injury to another person caused by the defendant's impaired driving at the time of the offense.
- (03) At the time of the offense, the defendant was driving while a [child under the age of eighteen years] [a person with the mental development of a child under the age of eighteen years] [a person with a physical disability preventing unaided exit from the vehicle] was in the vehicle.

*NOTE WELL: The factors listed in (01) through (03) above are grossly aggravating factors. Pursuant to N.C. Gen. Stat. § 20-179(c), the court must impose the Level One punishment under N.C. Gen. Stat. § 20-179(g) if the jury determines that (3) above or two other grossly aggravating factors apply. The court must impose the Level Two punishment under N.C. Gen. Stat. § 20-179(h) if the jury does not find (3) above and determines that only one of the grossly aggravating factors applies. In imposing a Level One or Two punishment, the judge may consider the aggravating and mitigating factors in N.C. Gen. Stat. § 20-179(d), (e) in determining the appropriate sentence.*

*NOTE WELL: Below are listed additional aggravating factors. Submit to the jury the aggravating factors supported by the evidence. N.C. Gen. Stat. § 20-179(d). In contrast to N.C. Gen. Stat. § 20-179(c)(1)(a) and (c)(1)(b), subsection (d) of the statute does not specifically provide that prior convictions should be determined by the judge. Accordingly, the factor listed in N.C. Gen. Stat. § 20-179(d)(5), dealing with prior convictions, is included as (09) below. While it is certainly acceptable to have the jury determine the factor, it would seem that a judge could also determine the existence of this factor, given the treatment of prior convictions in subsection (c) and recent case law. See*

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*State v. Allen, 359 N.C. 425 (1 July 2005), modifying and affirming, 601 S.E.2d 299 (N.C. Ct. App. 2004); Blakely v. Washington, 124 S. Ct. 2531 (2004). See also State v. Speight, 359 N.C. 602 (1 July 2005), modifying and affirming, 602 S.E.2d 4 (N.C. Ct. App. 2004).*

*NOTE WELL: For aggravating factors (04), and (06) through (12) below, N.C. Gen. Stat. § 20-179 specifically provides that "the conduct constituting the aggravating factor shall occur during the same transaction or occurrence as the impaired driving offense." The instruction's reference to "at the time of the offense" should be suitable for most circumstances, but can be amended if necessary to fit the circumstances of a particular case.*

- (04) At the time of the offense, the defendant's faculties were grossly impaired while driving.
- (05) The defendant had an alcohol concentration of .16 or more at the time of the offense or within a relevant time of the driving involved in this offense.
- (06) At the time of the offense, the defendant was driving especially [recklessly] [dangerously].
- (07) At the time of the offense, the defendant's negligent driving led to a reportable accident.<sup>3</sup>
- (08) At the time of the offense, the defendant was driving while defendant's driver's license was revoked.<sup>4</sup>
- (09) The defendant has [two or more prior convictions of a motor vehicle offense not involving impaired driving for which at least three points are assigned under N.C. Gen. Stat. § 20-16 or for which the convicted person's license is subject to revocation, if the convictions occurred within five years of the date of the offense for which the defendant is being sentenced] [one or more prior convictions of an offense

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involving impaired driving that occurred more than seven years before the date of the offense for which the defendant is being sentenced].

- (10) The defendant was convicted under N.C. Gen. Stat. § 20-141.5 for speeding while [fleeing] [attempting to elude apprehension] at the time of the offense.
- (11) The defendant was convicted under N.C. Gen. Stat. § 20-141 for speeding by at least 30 miles per hour over the legal limit at the time of the offense.
- (12) At the time of the offense, the defendant was passing a stopped school bus in violation of N.C. Gen. Stat. § 20-217.

*NOTE WELL: If alleged in the indictment and supported by the evidence, N.C. Gen. Stat. § 20-179(d)(9) provides for the allegation of additional factors that aggravate the seriousness of the offense.*

*NOTE WELL: If the jury finds the existence of the aggravating factors listed in (04) through (12), the judge must consider whether any mitigating factors are present and, if so, then perform the weighing and balancing contemplated in N.C. Gen. Stat. § 20-179.*

If you find from the evidence beyond a reasonable doubt that (insert aggravating factor(s) supported by the evidence), then you will write "yes" in the space after the(se) aggravating factor(s) on the verdict sheet. If you have found the existence of (one or more of) the aggravating factor(s) and have written "yes" in the space after the(se) aggravating factor(s), then you will also answer Issue One "yes" and write "yes" in the space after Issue One on the verdict sheet.

**Verdict Sheet found in attached PDF.**

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1 For the requirements of proving revocation and knowledge, see N.C.P.I. 271.10. See *also* N.C. Gen. Stat. § § 20-28 and 20-28.2(a).

2 Because of the nature of the aggravating factor alleged, the proceeding may have to be bifurcated.

3 See N.C. Gen. Stat. § 20-4.01 for a definition of a reportable accident.

4 Because of the nature of the aggravating factor alleged, the proceeding may have to be bifurcated.

