

N.C.P.I.—Crim 270.25

HABITUAL IMPAIRED DRIVING-INCLUDING CHEMICAL TEST. FELONY.

CRIMINAL VOLUME

REPLACEMENT JUNE 2015

N.C. Gen. Stat. § 20-138.5

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270.25 HABITUAL IMPAIRED DRIVING - INCLUDING CHEMICAL TEST. FELONY.

*NOTE WELL: This instruction applies to offenses committed before December 1, 2006. For offenses committed on or after that date, use N.C.P.I.-Crim. 270.25A.*

*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, arraigning the defendant upon the special indictment or information and advising the defendant that the defendant 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.*

*Use this instruction only if the defendant denies a previous conviction or remains silent. If the defendant admits the previous convictions, use N.C.P.I.-Crim. 270.20. (And see N.C. Gen. Stat. § 15A-928).*

*If the defendant admits to having been convicted within the preceding seven years of three or more offenses involving impaired driving, that element of the offense is established and no evidence in support thereof may be adduced by the State. If the defendant denies having been convicted within the past seven years of three or more offenses involving impaired driving or remains silent, the State must prove the fourth element of the offense charged before the jury as part of its case. (N.C. Gen. Stat. § 15A-928)*

The defendant has been charged with (habitual)<sup>1</sup> impaired driving.

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

First, that the defendant was driving<sup>2</sup> a vehicle.<sup>3</sup>

Second, that the defendant was driving that vehicle upon a [highway]

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[street] [public vehicular area] within the State.<sup>4</sup>

Third, that at the time the defendant was driving that vehicle the defendant:

*NOTE WELL: If the evidence supports submission of the case under both alternatives (A) and (B), instructions on both alternatives should be given.*

- (A) [was under the influence of an impairing substance.<sup>5</sup> (*Name substance involved*) is an impairing substance. The defendant is under the influence of an impairing substance when the defendant has taken (or consumed) a sufficient quantity of that impairing substance to cause the defendant to the normal control of the defendant's bodily or mental faculties, or both, to such an extent that there is an appreciable impairment of either or both of these faculties.<sup>6</sup>]
- (B) [had consumed sufficient alcohol that at any relevant time after driving the defendant had an alcohol concentration<sup>7</sup> of 0.08 or more grams of alcohol [per 210] liters of breath] [per 100 milliliters of blood]. A relevant time is any time after driving that the driver still has in the driver's body alcohol consumed before or during driving].<sup>8</sup>

(Evidence in this case tends to show that a chemical test known as a(n) [intoxilizer] [blood test] was offered to the defendant by a law enforcement officer and that the defendant refused to take the test. You may consider this evidence together with all other evidence in determining whether the defendant was under the influence of an impairing substance at

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the time the defendant drove a motor vehicle.)

And Fourth, that at the time the defendant was driving while impaired, the defendant had been convicted of the following three (or more) offenses, which all involve impaired driving, within the past ten years of the date of this offense:

1. On *(name date)*, the defendant in *(name court)* [was convicted of] [plead guilty to] the offense of *(name offense involving impaired driving)*, that was committed on *(name date)*; and
2. On *(name date)*, the defendant in *(name court)* [was convicted of] [plead guilty to] the offense of *(name offense involving impaired driving)*, that was committed on *(name date)*; and
3. On *(name date)*, the defendant in *(name court)* [was convicted of] [plead guilty to] the offense of *(name offense involving impaired driving)*, that was committed on *(name date)*.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant drove a vehicle on a [highway] [street] [public vehicular area] and that when the defendant did so the defendant [was under the influence of an impairing substance] [had consumed sufficient alcohol that at any relevant time after driving the defendant had an alcohol concentration of 0.08 or more] and that:

1. On *(name date)*, the defendant in *(name court)* [was convicted of] [plead guilty to] the offense of *(name offense involving impaired driving as defined in N.C. Gen. Stat. § 20-4.01(24a))*, that was committed on *(name date)*; and

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2. On *(name date)*, the defendant in *(name court)* [was convicted of] [plead guilty to] the offense of *(name offense involving impaired driving as defined in N.C. Gen. Stat. § 20-4.01(24a))*, that was committed on *(name date)*; and
3. On *(name date)*, the defendant in *(name court)* [was convicted of] [plead guilty to] the offense of *(name offense involving impaired driving as defined in N.C. Gen. Stat. § 20-4.01(24a))*, that was committed on *(name date)*, and that all of these convictions occurred within the past ten years of this offense for which the defendant is currently charged, 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, you will not return a verdict of guilty of habitual impaired driving, but would consider whether the defendant is guilty of impaired driving which differs from habitual impaired driving in that the State need not prove that the defendant [was convicted of] (or) [plead guilty to] an offense involving impaired driving at least three times.

If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant drove a vehicle on a [highway] [street] [public vehicular area] in this state and that when doing so the defendant [was under the influence of an impairing substance] [had consumed sufficient alcohol that at any relevant time after the driving the defendant had an alcohol concentration of 0.08 or more], it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable

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doubt as one or more of these things, it would be your duty to return a verdict of not guilty.

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1 Only charge the defendant with a habitual impaired driving offense if the defendant did not admit to the prior convictions. In the absence of an inquiry by the trial court to establish a record of a guilty plea, a stipulation to a habitual felon status is not tantamount to a guilty plea. *State v. Gilmore*, 542 S.E.2d 694, 699 (N.C. Ct. App. 2001).

2 N.C. Gen. Stat. § 20-4.01 defines the driver as the operator of the vehicle.

3 If there is any doubt, define 'vehicle' under N.C. Gen. Stat. § 20-4.01(49), or 'motor vehicle' under N.C. Gen. Stat. § 20-4.01(23).

4 If there is any doubt, define 'highway' or 'street' under N.C. Gen. Stat. § 20-4.01(13). 'Public vehicular area' is defined in N.C. Gen. Stat. § 20-4.01(32). "It is evident from the examples listed that the definition of a public vehicular area set out in N.C. Gen. Stat. § 20-4.01(32)(a) contemplates areas generally open to and used by the public for vehicular traffic as a matter of right or areas used for vehicular traffic that are associated with places generally open to and used by the public, such as driveways and parking lots to institutions and businesses open to the public. Furthermore, N.C. Gen. Stat. § 20-4.01(32)(d) provides that 'private property used by vehicular traffic and designated by the private property owner as a public vehicular area' is a public vehicular area." *State v. Ricks*, \_\_\_\_ N.C. App. \_\_\_\_ (2014).

5 An impairing substance includes alcohol, controlled substance under Chapter 90 of the General Statutes, or any other drug or psychoactive substance capable of impairing a person's physical or mental faculties, or any combination of these substances. N.C. Gen. Stat. § 20-4.01(14a).

6 N.C. Gen. Stat. § 20-4.01(48a).

7 N.C. Gen. Stat. § 20-4.01(0.2) defines alcohol concentration as 'the concentration of alcohol in a person, expressed either as (a) grams of alcohol per 100 milliliters of blood; or (b) grams of alcohol per 210 liters of breath.'

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8 N.C. Gen. Stat. § 20-4.01(33a).