

N.C.P.I.-Crim. 270.25A
HABITUAL IMPAIRED DRIVING—INCLUDING CHEMICAL TEST. FELONY
GENERAL CRIMINAL VOLUME
REPLACEMENT JUNE 2022
N.C. Gen. Stat. § 20-138.2A

270.25A HABITUAL IMPAIRED DRIVING—INCLUDING CHEMICAL TEST.
FELONY.

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

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. 270.20A. (And see N.C. Gen. Stat. § 15A-928).

If the defendant admits to having been convicted within the preceding 10 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 ten 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. (See N.C. Gen. Stat. § 15A-928).

The defendant has been charged with (habitual)¹ 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 driving² a vehicle.³

Second, that the defendant was driving that vehicle upon a [highway] [street] (or) [public vehicular area] within the state.⁴

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

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

- a.[Was under the influence of an impairing substance. (*Name substance involved*) is an impairing substance.⁵ 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 lose the normal control of the defendant's bodily or mental faculties, or both, to such an extent that there is an appreciable impairment⁶ of either or both of these faculties.⁷]
- b.[Had consumed sufficient alcohol that at any relevant time after the driving the defendant had an alcohol concentration⁸ 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 the driving that the driver still has in the driver's body alcohol consumed before or during driving].⁹ The results of a chemical analysis are deemed sufficient evidence to prove a person's alcohol concentration.¹⁰
- c.[Had any amount of a [Schedule I controlled substance] [metabolites of a Schedule I controlled substance] in his/her blood or urine]. (*Name substance*) is a Schedule I controlled substance or is a metabolite¹¹ of a Schedule I controlled substance.].¹²

(If the evidence tends to show that [a chemical test known as a(n) [intoxilizer] [breathalyzer] [blood test] [urine test]¹³ was offered to the defendant by a law enforcement officer and that the defendant refused to take the test] [the defendant refused to perform a field sobriety test at the request of an officer], you may consider this evidence together with all other evidence in determining whether the defendant was under the influence of an impairing substance at the time the defendant (allegedly) drove a motor vehicle.)¹⁴

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 10 years of the dates 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] (or) [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 driving the defendant had an alcohol concentration of 0.08 or more] [had any amount of a [Schedule I controlled substance] [metabolites of a Schedule I controlled substance] in the defendant's [blood] [urine] 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)*, 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)*,

and that all of these convictions occurred within the past 10 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] (or) [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 driving the defendant had an alcohol concentration of 0.08 or more] [had any amount of a [Schedule I controlled substance] [metabolites of a Schedule I controlled substance] in the defendant's [blood] [urine], it would be your duty to return a verdict of guilty. If you do not so find or have a reasonable 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 a 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). The Safe Roads Act of 1983 makes this offense applicable to drivers of vehicles owned or operated by the State or any political subdivision thereof while engaged in maintenance or construction work on the highways. N.C. Gen. Stat. § 20-168(b), effective December 1, 2006, lawnmowers and bicycles are no longer exempt. Horses remain exempt.

⁴. If there is any doubt, define "highway" or "street" in accordance with N.C. Gen. Stat. § 20-4.01(13). "Public vehicular area" is defined in N.C. Gen. Stat. § 20-4.01(32).

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. The phrase "appreciable impairment" is not defined in N.C. Gen. Stat. § 20-4.01 or other subsequent statutes. However, appellate case law has defined appreciable to mean the effect of the impairing substance "must be...sufficient to be recognized and estimated." *State v. Harrington*, 78 N.C. App. 39, 45, 336 S.E.2d 852, 855 (1985). This additional language may be provided to the jury, if requested.

⁷. N.C. Gen. Stat. § 20-4.01(48b).

⁸. N.C. Gen. Stat. § 20-4.01(1b) 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."

⁹. N.C. Gen. Stat. § 20-4.01(33a).

¹⁰. The term "deemed sufficient" is not defined in N.C. Gen. Stat. § 20-138.5 or N.C. Gen. Stat. § 20-141.4, other statutes or any appellate court decisions. Absent a specific definition, it can be presumed that the legislature intended the words to be given their ordinary meaning.

¹¹. A metabolite is any substance produced or used during metabolism (digestion). In drug use, the term usually refers to the end product that remains after metabolism.

¹². Driving with any Schedule I controlled substance, or its metabolites in one's blood or urine is a *per se* violation of impaired driving offense.

¹³. Note that for offenses occurring between December 1, 2006 and June 27, 2007, there was no statutory provision during this time that required the defendant to take a urine test.

¹⁴. N.C. Gen. Stat. § 20-139.1(f).