32.3 Explanation of the Law

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32.3 Explanation of the Law

A. Pattern Jury Instructions

In instructing the jury, trial judges ordinarily use the North Carolina Pattern Jury Instructions for Criminal Cases, prepared by the North Carolina Conference of Superior Court Judges Committee on Pattern Jury Instructions. The N.C. appellate courts have encouraged trial judges to use the Pattern Jury Instructions "given the danger of distraction and prejudice and the desirability of uniform jury instructions for all trials, despite the unique features of each." *See State v. Morgan*, 359 N.C. 131, 169 (2004) (internal quotation marks and citation omitted); *see also Caudill v. Smith*, 117 N.C. App. 64, 70 (1994) (stating generally that the use of the Pattern Jury Instructions is "the preferred method of jury instruction"). The "Guide to the Use of this Book" that prefaces the Pattern Jury Instructions adds that judges should review the pattern instructions and make adaptations as necessary before giving any instructions to the jury.

Practice note: The Pattern Jury Instructions are a good starting point in preparing instructions for the charge conference; however, counsel should always carefully review the pattern instructions to see if they need modification or clarification to fit the needs of the particular case. Do not rely on the judge to do it for you.

B. Substantial Features of the Case

The trial judge has considerable discretion in the manner in which the jury is charged, but he or she is always required to instruct the jury "on all substantial and essential features of the case embraced within the issue and arising on the evidence." *State v. Higginbottom*, 312 N.C. 760, 764 (1985); *State v. Young*, 16 N.C. App. 101 (1972). This is true regardless of requests by the parties. *State v. Harris*, 306 N.C. 724 (1982); *State v. McHone*, 174 N.C. App. 289 (2005). Under this principle, the trial judge must instruct not only on the crime charged in the indictment but also on lesser included offenses (discussed in subsection D., below), defenses (discussed in subsection E., below), and the identification of the defendant as the perpetrator when warranted by the evidence. *See State v. Shaw*, 322 N.C. 797, 803–04 (1988); *State v. Kinard*, 54 N.C. App. 443 (1981).

The trial judge must also explicitly instruct the jury that it must find the defendant not guilty if the State failed to satisfy its burden of proving the defendant's guilt beyond a reasonable doubt. *McHone*, 174 N.C. App. 289, 299 (finding that even though "the jury could not have genuinely misunderstood its role in passing on the guilt or innocence of defendant[,]" the trial judge's inadvertent omission of a not guilty option may have "tipped the scales of justice in favor of conviction and impermissibly suggested that the defendant must have been guilty of first degree murder on some basis").

C. Subordinate Features of the Case

Instructions as to the significance of evidence not relating to the elements of the crime itself or to the defendant's criminal responsibility have been considered subordinate or nonessential features of the case. *State v. Hunt*, 283 N.C. 617 (1973). Absent a request by the defendant, the judge is not required to give instructions on these features. *State v. Lester*, 289 N.C. 239 (1976). However, when a defendant requests an instruction on a nonessential feature of a case and that instruction is correct in law and supported by the evidence, the judge must give the instruction in substance. *State v. Monk*, 291 N.C. 37, 54 (1976); *see also infra* § 32.4B, Requests for Special Instructions. A judge may elect to instruct on a subordinate feature even without a request by counsel. *State v. Harris*, 306 N.C. 724, 727 (1982).

Examples. Some examples of subordinate features are:

- Alibi. *See State v. Hunt*, 283 N.C. 617 (1973); N.C. Pattern Jury Instruction—Crim. 301.10 (Mar. 2003); *see also infra* § 32.3E, Defenses (discussing practical considerations regarding alibi instruction and possible inconsistencies in case law).
- Accomplice testimony. *State v. Brinson*, 277 N.C. 286 (1970); N.C. Pattern Jury Instruction—Crim. 104.25 (June 2011).
- The absence of motive. *State v. Elliott*, 344 N.C. 242, 273 (1996); N.C. Pattern Jury Instruction—Crim. 104.10 (Apr. 2005).
- The credibility of an interested or biased witness. *State v. Dale*, 343 N.C. 71 (1996); N.C. Pattern Jury Instruction—Crim. 104.20 (June 2011).
- Evidence of the defendant's character for law-abidingness or other pertinent character trait. *See State v. Bogle*, 324 N.C. 190, 199–200 (1989); N.C. Pattern Jury Instruction—Crim. 105.30 (June 2011).
- Flight by the defendant. *State v. Lester*, 289 N.C. 239 (1976); N.C. Pattern Jury Instruction—Crim. 104.35, 104.36 (Feb. 1994).
- Impeachment or corroboration of a witness by a prior statement. *State v. Detter*, 298 N.C. 604, 630–31 (1979); *State v. Borkar*, 173 N.C. App. 162 (2005); N.C. Pattern Jury Instruction—Crim. 105.20 (June 2011).
- The effect of the defendant's decision not to testify. *State v. Paige*, 272 N.C. 417 (1968); N.C. Pattern Jury Instruction—Crim. 101.30 (May 2005).
- Impeachment of defendant by evidence of prior convictions if elicited by the State. *State v. Jackson*, 161 N.C. App. 118 (2003) (defendant not entitled to limiting instruction where he voluntarily testified to prior convictions on direct examination); *State v.*

Gardner, 68 N.C. App. 515 (1984), *aff'd*, 315 N.C. 444 (1986) (same); N.C. Pattern Jury Instruction—Crim. 105.40 (June 2011).

Reasonable doubt. Although "reasonable doubt" is not technically categorized as a subordinate feature of a criminal case, a trial judge need define it only if it is specifically requested by the defendant. *See infra* "Practice note" in § 32.4B, Special Instructions.

Practice note: Whether to request an instruction on a subordinate feature of the case is a tactical decision. Counsel should consider the effect of the instruction on the jury since giving an instruction on a particular nonessential feature of the case may so concentrate attention on that subject "as to divert attention from unrelated weaknesses in the State's case." *State v. Hunt*, 283 N.C. 617, 624 (1973). For example, if a prosecution witness has an emotional outburst during trial, counsel may decide not to request an instruction regarding the outburst because the instruction may further highlight the witness's emotional state. *See, e.g., State v. Blackstock*, 314 N.C. 232 (1985).

D. Lesser Included Offenses

Right to instruction. State and federal principles of due process require that a lesser included offense instruction be given when the evidence warrants such an instruction. *See Hopper v. Evans*, 456 U.S. 605 (1982); *State v. Arnold*, 329 N.C. 128 (1991); *State v. Ledwell*, 171 N.C. App. 328 (2005); *see also State v. Conner*, 335 N.C. 618 (1994) (when there is evidence of a lesser included offense, the trial judge *must* instruct the jury on it). This is true even in the absence of a special request for such instruction. *State v. Lawrence*, 352 N.C. 1 (2000); *State v. Montgomery*, 341 N.C. 553 (1995); *see also* G.S. 15-170 (when a defendant is indicted for a criminal offense, he or she may be convicted of the charged offense or of a lesser included offense). This rule applies even when the defendant does not present any evidence but the State's evidence is conflicting. *State v. Smallwood*, 78 N.C. App. 365 (1985).

However, if the State's evidence is positive as to each and every element of the crime charged and there is no conflicting evidence relating to any element, submission of a lesser included offense is not required. *See, e.g., Evans*, 456 U.S. 605, 611; *State v. Millsaps*, 356 N.C. 556 (2002); *State v. Harvey*, 281 N.C. 1 (1972). This is true even though it is a well established principle of criminal law that "when a defendant is indicted for a criminal offense he may be convicted of the offense charged or of a lesser included offense when the greater offense in the bill includes all the essential elements of the lesser offense." *State v. Snead*, 295 N.C. 615, 622 (1978); *see also State v. McGee*, 197 N.C. App. 366, 371–72 (2009) (noting that a "[a] lesser-included offense is '[a] crime that is composed of some, but not all, of the elements of a more serious crime and that is necessarily committed in carrying out the greater crime[.]") (citing Black's Law Dictionary 1111 (8th ed. 2004)).

The "all or nothing" doctrine. In accordance with the legal principles discussed above, the State may try a case on an "all or nothing" basis, seeking a conviction only on the greater offense as long as the State's evidence is not conflicting and the defendant has not presented

evidence of a lesser included offense. *See, e.g., State v. Bullard*, 97 N.C. App. 496, 498 (1990). Although the court in *Bullard* invited legislative intervention after noting that this practice "is an outmoded absurdity" and "encourages jurors to convict a defendant of a greater offense by not permitting them to consider its lesser elements . . . and [is] inconsistent with the precept that jurors are at liberty to believe all, none, or part of the evidence as they see fit," the law remains unchanged. *See id.* at 498. For an in-depth discussion of *Bullard* and the "all or nothing" approach, see Tracy L. Hamrick, Note, *Looking at Lesser Included Offenses on an "All or Nothing" Basis: State v. Bullard and the Sporting Approach to Criminal Justice*, 69 N.C. L. REV. 1470 (1991) (arguing that criminal defendants are denied a crucial procedural safeguard and therefore a fair trial when trial judges refuse to instruct juries on lesser included offenses).

As a matter of trial strategy, a defendant may prefer that an instruction on a lesser included offense not be given and go for "all or nothing." However, it appears that under North Carolina law, the defendant has no right to preclude an instruction on a lesser included offense if the evidence warrants an instruction. *See State v. Jones*, 149 N.C. App. 977 (2002) (unpublished); *see also State v. Gorham*, 212 N.C. App. 236 (2011) (unpublished) (declining defendant's request to disavow *Jones* and noting that defendant had failed to supply, and the court could not find any authority to support, the proposition that defendant had a right to require the trial judge to refrain from instructing on a lesser included offense when the instruction was supported by the evidence). Nor can the defendant preclude the giving of an instruction by not requesting it if there is evidence supporting the instruction. *State v. Harris*, 306 N.C. 724 (1982).

No "acquittal first" requirement in North Carolina. G.S. 15A-1237(e) states that "[i]f there are two or more offenses for which the jury could return a verdict, it may return a verdict with respect to any offense, including a lesser included offense on which the judge charged, as to which it agrees." Under the plain language of this statute, a jury is not required to return a unanimous verdict acquitting the defendant of a greater offense before it considers whether the defendant is guilty of a lesser included offense. *State v. Mays*, 158 N.C. App. 563 (2003) (finding error where trial judge instructed jury that it must unanimously agree to acquit defendant of first-degree murder before it could consider whether defendant was guilty of second-degree murder); *see also State v. Sanders*, 81 N.C. App. 438 (1986) (trial judge did not coerce a verdict when he correctly instructed the jury that it could return a unanimous verdict on a lesser offense without unanimously rejecting the greater offense). A judge is permitted to instruct the jury to consider the greater offense "first before continuing onto the lesser included offense" as long as the judge does not mandate a unanimous acquittal of the first offense before the jury may consider the lesser offense. *Mays*, 158 N.C. App. at 575.

If a jury expresses confusion with regard to whether it must unanimously acquit a defendant of a greater charge before considering lesser charges, the trial judge should give a "reasonable efforts" instruction informing the jury that it "should first consider the primary offense, but it is not required to determine unanimously that the defendant is not guilty of that offense before it may consider a lesser included offense;" and "that if the jury's verdict as to the primary offense is not guilty, or if, after all reasonable efforts, the

jury is unable to reach a verdict as to that offense, then it may consider whether the defendant is guilty of the lesser included offense." *Id.*; *see also* N.C. Pattern Jury Instruction—Crim. 101.39 (June 2015) (noting that the "reasonable efforts" instruction should only be provided if a question about unanimity on the principal charge is raised by the jury).

Waiver. To preserve the issue of the trial judge's failure to instruct on a lesser included offense that is supported by the evidence, a defendant must have requested such an instruction or he or she must have objected to the charge as given. *See State v. Collins*, 334 N.C. 54 (1993) (finding waiver under N.C. R. App. P. 10(b)(2) [now, N.C. R. App. P. 10(a)(2)] where defendant failed to object to trial judge's failure to instruct on lesser included offense of attempted murder); *see generally State v. Smith*, 311 N.C. 287 (1984) (because defendant's written request for instruction regarding the State's identification testimony had been previously denied, he did not have to repeat his objection to the jury instructions, after the fact, to preserve the issue for appellate review). Without proper preservation of the issue at trial, appellate counsel is limited to seeking review of the issue under the rigorous "plain error" standard of review. *State v. Thomas*, 350 N.C. 315, 348 (1999); *see also infra* § 32.9, Preservation of Issues for Appeal.

Invited error. A defendant may not decline an opportunity for an instruction on a lesser included offense and then claim on appeal that failure to instruct on the lesser included offense was error. *State v. Sierra*, 335 N.C. 753 (1994).

Practice note: Be sure to specifically constitutionalize your objection to the trial judge's instruction or omission of an instruction on a lesser included offense; otherwise, appellate counsel will be precluded from arguing a due process violation on appeal. *See infra* § 32.9A, Necessity of Specific Objection. State on the record that the giving (or omission) of the instruction violates the Fourteenth Amendment to the U.S. Constitution as well as article I, section 19 of the N.C. Constitution.

E. Defenses

Generally. Defenses raised by the evidence constitute substantial features of the case; thus, where the evidence, if accepted, discloses facts sufficient in law to constitute a defense to the crime for which the defendant is indicted, the judge is required to instruct the jury on the legal principles applicable to that defense. *See State v. Fields*, 324 N.C. 204 (1989) (new trial granted where defendant's evidence merited an instruction on unconsciousness or automatism and trial judge failed to give the requested instruction); *State v. Deck*, 285 N.C. 209 (1974) (where the State's evidence was sufficient to require the trial judge to instruct on the law of self-defense, the trial judge's failure to so do constituted prejudicial error).

When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense, the trial judge must consider the evidence in the light most favorable to the defendant. *State v. Oliver*, 334 N.C. 513, 520 (1993); *see also State v. Marshall*, 105 N.C. App. 518, 522 (1992) (finding that the trial judge must instruct on a defense if "the defendant's or the State's evidence when viewed in the light most

favorable to the defendant discloses facts which are 'legally sufficient' to constitute a defense to the charged crime") (citations omitted). What weight, if any, is to be given such evidence of a defense, is for determination by the jury." *Fields*, 324 N.C. 204, 210 (citations omitted).

Practice note: While the judge has a duty, notwithstanding the absence of a request, to instruct on defenses that are supported by the evidence (*State v. Loftin*, 322 N.C. 375 (1988)), always file a written request when you want an instruction on an applicable defense. This will ensure that the issue is properly preserved for appeal in the event that the judge fails or refuses to instruct on the defense. *See State v. Smith*, 311 N.C. 287 (1984).

In some circumstances, the giving of an instruction on a defense when not supported by the evidence may warrant reversal of a conviction—for example, in cases in which the judge gives an instruction on a defense not raised by the evidence and the instruction conflicts with the defendant's theory of defense. *See, e.g., State v. Tillman*, 36 N.C. App. 141 (1978) (defendant did not rely on and presented no evidence of entrapment; instruction conflicted with defendant's theory of defense and required new trial); *State v. Ransom*, 2 N.C. App. 613 (1968) (to same effect); *cf. State v. Bland*, 19 N.C. App. 560 (1973) (trial judge instructed on entrapment although not requested by defendant; not error to give instruction in light of State's evidence and argument by defendant's counsel during trial).

Invited error. A defendant may not decline an opportunity for an instruction on a defense supported by the evidence and then claim on appeal that the failure to instruct on the defense was error. *See State v. Hope*, 223 N.C. App. 468 (2012) (finding that defendant waived his right to appellate review of issue pertaining to self-defense where he requested an incorrect instruction, objected to the trial judge's offer to give the correct instruction, and chose to forego any self-defense instruction at all when the trial judge refused to give the instruction requested).

Alibi. Although alibi is often referred to as a defense, this is "inexact." *State v. Hunt*, 283 N.C. 617, 624 (1973) (overruling cases that held that a defendant is entitled to an instruction on alibi if the evidence supported it even in the absence of a specific request). Unlike evidence of "true" defenses, evidence that the defendant was elsewhere when the crime was committed should be considered a subordinate feature of the case because it has "nothing to do with the elements of or criminal responsibility for the crime for which the defendant is indicted." *Id.* at 624. *But cf. State v. Alston*, 294 N.C. 577, 590 (1978) (stating in passing that the defendant's "alibi defense" was a "substantial feature[] of the case" [this general comment by court likely does not affect ruling in *Hunt*]). In crimes requiring a defendant's personal presence at the scene of its commission, alibi evidence is "simply evidence contradictory of the State's evidence that defendant committed the alleged crime." *Hunt*, 283 N.C. 617, 624. Since alibi evidence is a subordinate feature of the case, a trial judge is not required to instruct the jury on alibi unless the defendant specifically requests it. *See State v. Williams*, 355 N.C. 501, 582 (2002).

Practice note: Counsel should carefully consider whether to request a specific instruction on alibi or whether to just rely on the instructions of burden of proof and reasonable doubt. Use of the term "alibi" may harm a defendant's case, as the jury may view it not as a reason for finding that the defendant was not involved in the crime but rather as an artifice to conceal the defendant's alleged involvement.

Additional resources. For further information regarding select defenses and instructions thereon, see School of Government publications authored by John Rubin entitled:

- *The Voluntary Intoxication Defense*, ADMINISTRATION OF JUSTICE MEMORANDUM NO. 93/01 (Apr. 1993);
- *The Diminished Capacity Defense*, ADMINISTRATION OF JUSTICE MEMORANDUM NO. 92/01 (Sept. 1992);
- THE ENTRAPMENT DEFENSE IN NORTH CAROLINA (2001); and
- THE LAW OF SELF-DEFENSE IN NORTH CAROLINA (1996).

See also JESSICA SMITH, NORTH CAROLINA CRIMES: A GUIDEBOOK ON THE ELEMENTS OF CRIME 18–24 (UNC School of Government, 7th ed. 2012).

F. Words of Common Usage or Meaning

In the absence of a request for special instructions, it is not error for a trial judge to fail to define and explain words of common usage or meaning to the general public. This is true even if the word at issue is an essential element of the crime charged. *State v. Jones*, 300 N.C. 363 (1980) (finding no error in the trial judge's failure to define "intent" because the word is self-explanatory). However, if the meaning of the word is not clear, the judge must define it in order to give the jury proper guidance. *See State v. Patton*, 18 N.C. App. 266 (1973) (finding in a "public intoxication" case that the trial judge's failure to define the words "drunk" or "intoxicated" was error entitling defendant to a new trial).

G. Use of Term "Victim"

The use of the term "victim" by the State and especially by the trial judge "is conclusive in nature and connotes a predetermination that the person referred to had in fact been wronged." *See State v. Nomura,* 903 P.2d 718, 721–22 (Haw. Ct. App. 1995) (holding that "the reference to a complaining witness as 'the victim' in criminal jury instructions is inaccurate and misleading where the jury must yet determine from the evidence whether the complaining witness was the object of the offense and whether the complaining witness was acted upon in the manner required under the statute to prove the offense charged"). "A judicial reference to the jury that a complaining witness is a 'victim' implicitly tells the jury that the judge believes that a crime has been committed." *See Fritzinger v. Delaware*, 10 A.3d 603, 610 (Del. 2010). Nevertheless, the N.C. Supreme Court has held that the use of the term "victim" in the charge to the jury is not improper and does not intimate an opinion that the defendant committed the crime. *See State v. Hill*, 331 N.C. 387 (1992); *see also State v. Gaines*, 345 N.C. 647 (1997) (citing *Hill* and holding that trial judge did not impermissibly express an opinion in violation of G.S. 15A-1222, G.S. 15A-1232, or

the Fourteenth Amendment when he referred to the deceased as the "victim" during the jury charge). While the defendant has no absolute right to the use of an alternative term such as "prosecuting witness" or "complainant," the trial judge always has the discretion to do so and in some instances, the failure to do so might be considered prejudicial error.

In *State v. Walston*, 367 N.C. 721 (2014), approximately twenty years after the incidents allegedly occurred, the defendant was charged with first degree rape, first degree sexual offense, and taking indecent liberties with two minor sisters. At trial, the defendant objected to the trial judge's use of the pattern jury instructions that included the term "victim" and asked the judge to substitute the phrase "alleged victim" during the charge to the jury. The judge refused to modify the pattern instructions. The N.C. Court of Appeals found error in the judge's failure to modify the pattern instructions "because whether the prosecuting witnesses were victimized 'was a disputed issue of fact for the jury to resolve,' given the lack of physical evidence." *Id*. at 730. The N.C. Supreme Court, after reviewing its decisions in *Hill* and *Gaines,* reversed the court of appeals' decision and held that "in this case . . . the trial court did not err in using the word 'victim' in the pattern instructions to describe the complaining witness." *Id*. at 732. However, the court stressed that "when the State offers no physical evidence of injury to the complaining witness and no corroborating eyewitness testimony, the best practice would be for the trial court to modify the pattern jury instructions at defendant's request to use the phrase 'alleged victim' or 'prosecuting witness' instead of 'victim.'" *Id.* The court noted that the pattern instructions themselves state that "all pattern instructions should be carefully read and adaptions made, if necessary, before any instruction is given to the jury." *Id*. (citing 1 N.C.P.I.—Crim. at xix ("Guide to the Use of this Book") (2014)) (emphasis omitted).

Practice note: Since *Walston* stresses that there are circumstances where the best practice would be for the trial judge to modify the pattern instructions to use a neutral term to describe the deceased or the complaining witness, counsel should consider submitting proposed jury instructions reflecting that modification whenever the alleged victim's status as a victim is at issue. A trial judge may be particularly inclined to grant a defendant's request to modify the instructions in cases where the defendant asserts that that no crime ever occurred, the complaining witness was the aggressor and that defendant acted in self-defense, or that the victim consented to sexual activity. *See generally Fritzinger v. Delaware*, 10 A.3d 603, 610 (Del. 2010) (stating that "[f]or a judge to communicate to the jury that witnesses were victimized, in a case where the defense is that the conduct about which the complaining witness testified never occurred, prejudices that defendant unfairly"); *State v. Devey*, 138 P.3d 90, 95 (Utah Ct. App. 2006) (agreeing with defendant "that in cases such as this—where a defendant claims that the charged crime did not actually occur, and the allegations against that defendant are based almost exclusively on the complaining witness's testimony—the trial court, the State, and all witnesses should be prohibited from referring to the complaining witness as "the victim"); *State v. Cortes*, 885 A.2d 153, 158 n.4 (Conn. 2005) (finding that State's contention that the judge's seventy-six references to the complainant as the "victim" in his jury charge was harmless error was "at best, dubious," and agreeing with other courts "that have deemed references to the complainant as the 'victim' inappropriate where the

very commission of a crime is at issue."); *Talkington v. Texas*, 682 S.W.2d 674, 675 (Tex. Ct. App. 1984) (reference to complainant in a rape case as "victim" in the jury charge violated statutory prohibition against expression of opinion as to the weight of the evidence and constituted reversible error where sole issue was whether the sexual intercourse was consensual or not; "[i]f the complainant consented . . . as testified by appellant . . ., she was not the object of a crime, and she was not a 'victim'"); *People v. Davis*, 423 N.Y.S.2d 229, 230 (N.Y. App. Div. 1979) (trial judge's referral to complainant as the "victim" and to the defendant as the "perpetrator" "impermissibly insinuated to the jury that the complainant was the victim of injuries resulting from acts committed by the defendant"; this error "patently deprived the defendant of a fair trial"); *see also* N.C. Pattern Jury Instruction—Crim. 0002.95 (Memorandum from PJI Committee on the Use of "Victim" Language) (June 1, 2015) (acknowledging that in light of *Walston*, the best practice is for trial judges to modify the pattern jury instructions to use a neutral term instead of "victim" in cases when the State offers no physical evidence of injury to the complaining witness and no corroborating eyewitness testimony).