7.04
Issues Where Jury Instructed On Both First Degree Murder And Second Degree Murder—Provocation

To sustain either the charge of first degree murder or the charge of second degree murder, the State must prove the following propositions:

First Proposition: That the defendant performed the acts which caused the death of ____; and

Second Proposition: That when the defendant did so,

[1] he intended to kill or do great bodily harm to ____;

[or]

[2] he knew that such acts would cause death to ____;

[or]

[3] he knew that such acts created a strong probability of death or great bodily harm to ____.

If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, your deliberations [on these charges] should end, and you should return a verdict of not guilty [of first degree murder].

If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, then you should go on with your deliberations to decide whether a mitigating factor has been proved so that the defendant is guilty of the lesser offense of second degree murder instead of first degree murder.

You may not consider whether the defendant is guilty of the lesser offense of second degree murder until and unless you have first determined that the State has proved beyond a reasonable doubt each of the previously stated propositions.

The defendant has the burden of proving by a preponderance of the evidence that a mitigating factor is present so that he is guilty of the lesser offense of second degree murder instead of first degree murder. By this I mean that you must be persuaded, considering all the evidence in this case, that it is more probably true than not true that the following mitigating factor is present: that the defendant, at the time he performed the acts which caused the death of ____, acted under a sudden and intense passion resulting from serious provocation by [(the deceased) (some other person he endeavors to kill, but he negligently or accidentally kills the

deceased)].

If you find from your consideration of all the evidence that the defendant has proved by a preponderance of the evidence that a mitigating factor is present so that he is guilty of the lesser offense of second degree murder instead of first degree murder, you should find the defendant guilty of second degree murder.

If you find from your consideration of all the evidence that the defendant has not proved by a preponderance of the evidence that a mitigating factor is present so that he is guilty of the lesser offense of second degree murder instead of first degree murder, you should find the defendant guilty of first degree murder.

Committee Note

Instruction and Committee Note Approved January 30, 2015

720 ILCS 5/9-1, 9-2(a)(1) and 9-2(b) (West 2013).

Give Instruction 7.01.

Pursuant to Section 9-2(a), as amended by P.A. 84-1450, the offense of second degree murder may not be based upon first degree murder under Section 9-1(a)(3) (felony murder). When first degree murder is charged under only Section 9-1(a)(3), Instruction 7.02 should be used. When first degree murder under Section 9-1(a)(3) and first degree murder under Section 9-1(a)(1) or 9-1(a)(2) are both charged and the court is also instructing on the lesser offense of second degree murder, Instruction 7.02 should be used for the count under Section 9-1(a)(3), and Instruction 7.04 should be used for the other first degree murder counts upon which second degree murder may be based. *See* Instructions 7.01X and 7.02X.

When an affirmative defense instruction is to be given, combine this instruction with the appropriate instruction from Chapter 24-25.00.

Insert in the blanks the name of the victim. When the intended victim is someone other than the deceased, modify this instruction to fit the transferred intent situation. *See People v. Forrest*, 133 Ill.App.2d 70, 272 N.E.2d 813 (1st Dist. 1971).

Use bracketed language "[of first degree murder]" and "[on these charges]" when the jury will be instructed on other offenses in addition to first degree murder and second degree murder.

This instruction—and only one of this instruction—should be given to the jury to explain the issues in first degree murder. Do *not* give separate issues instructions for each of the different ways first degree murder can be charged under 720 ILCS 5/9-1(a)(1) through (a)(4). Instead, use the appropriate paragraphs within the Second Proposition. *People v. Johnson*, 250 Ill.App.3d

887, 620 N.E.2d 506 (4th Dist. 1993).

Use applicable paragraphs and bracketed material.

The brackets and numbers are present solely for the guidance of court and counsel and should not be included in the instruction submitted to the jury.

When accountability is an issue, ordinarily insert the phrase “or one for whose conduct he is legally responsible” after the word “defendant” in each proposition. Give Instruction 5.03.

For an example of the use of this instruction, see Sample Set 27.04B.