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**West Virginia Criminal Jury Instructions**  
**6th Edition (2003)**

**West Virginia Criminal Law Research Center || West Virginia Public Defender Services**

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**First Degree Murder:** “First Degree Murder” is committed when any person does willfully, intentionally, deliberately, premeditatedly, maliciously and unlawfully slay, kill and murder another person. Therefore, in order to prove the commission of the offense of “First Degree Murder,” the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, \_\_\_\_\_,
2. on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_;
3. in \_\_\_\_\_ County, West Virginia;
4. did willfully,
5. intentionally,
6. deliberately,
7. premeditatedly,
8. maliciously
9. and unlawfully
10. slay, kill and murder \_\_\_\_\_.

**First Degree Murder (Intent):** To constitute “First Degree Murder,” it is not necessary that an intention to kill exist for any particular length of time prior to the actual killing. It is only necessary that such intention come into existence for the first time at the time of the killing or at any previous time thereto.

[This instruction is merely intended to convey the notion that it is possible for deliberation and premeditation to precede the formation of the actual intent to kill. It refers primarily to the intention to kill not existing for any particular time and arising at the moment of the killing. This means the specific intent to kill and is to be distinguished from the elements of deliberation and premeditation which are the state of mind conveying the characteristics of reflection.]

**First Degree Murder (Deliberation):** To deliberate is to reflect, with a view to making a choice. If a person reflects even for a moment before he acts it is sufficient deliberation.

**First Degree Murder (Premeditation):** The Court instructs the jury that “First Degree Murder” consists of an intentional, deliberate and premeditated killing which means that the killing is done after a period of time for prior consideration. The duration of that period cannot be arbitrarily fixed. The time in which to form a deliberate and premeditated design varies as the minds and temperaments of people differ, and according to the circumstances in which they may be placed. Any interval of time between the forming of the intent to kill and the execution of that

intent, which is of sufficient duration for the accused to be fully conscious of what he intended, is sufficient to support a conviction for “First Degree Murder.”

**First Degree Murder (Malice):** Malice appears when the circumstances show such a reckless disregard for human life as necessarily to include a formed design against the life of a person slain.

“Malice” is defined as an action flowing from a wicked and corrupt motive, a thing done with wrongful intent, under circumstances as carry in them the plain indication of a heart heedless of social duty and fatally bent on mischief.

It is not essential that malice exist for any length of time before the killing. It is sufficient if malice springs into the mind before the accused did the killing.

Malice is a species of criminal intent 4 and must be shown to exist against the deceased in a homicide case.

**Inference of Malice from Intentional Use of a Deadly Weapon:** The Court instructs the jury that malice may be inferred from the defendant’s intentional use of a deadly weapon under circumstances which you believe do not afford the defendant excuse, justification or provocation for his conduct.

You are prohibited from finding any inference of malice from the use of a weapon unless you are satisfied that the State of West Virginia has proven beyond a reasonable doubt that the defendant did in fact use a deadly weapon. If the State has proven beyond a reasonable doubt that the defendant intentionally used a deadly weapon, then you may find the existence of malice from the use of such weapon and other surrounding circumstances, unless there are explanatory or mitigating circumstances surrounding the case which you believe afford the defendant excuse, justification or provocation for his conduct. If you believe that there was legal justification, excuse or provocation for the defendant’s conduct, you may not infer malice from the use of a deadly weapon. If you have found there was legal justification, excuse or provocation for the defendant’s conduct, the State must prove malice beyond a reasonable doubt independently and without the aid of the inference. You are not obliged to find, however, and you may not find the defendant guilty unless you are satisfied that the State has proven the element of malice beyond a reasonable doubt.

**Felony Murder:** The Court instructs the jury that a death which occurs during the commission of arson, kidnapping, sexual assault, robbery, burglary, breaking and entering, escape from lawful custody, or a felony offense of manufacturing or delivering a controlled substance, is First Degree Murder. 1 This type of murder is commonly known as “Felony Murder,” because the death has occurred during the commission of one of these felony offenses.

Therefore, in order to prove the commission of the offense of “First Degree Murder,” the State of

West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, \_\_\_\_\_,
2. on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_;
3. in \_\_\_\_\_ County, West Virginia;
4. participated in the commission of \_\_\_\_\_ 3  
(list relevant enumerated felony offense)
5. and during the commission of the said \_\_\_\_\_,
6. the death of \_\_\_\_\_ resulted as a direct result of injuries received in the commission of the \_\_\_\_\_ in which the defendant participated therein.

**Felony Murder–Proof of Underlying Felony:** The Court instructs the jury that in order to prove the commission of “Felony Murder,” the State of West Virginia must prove, beyond a reasonable doubt, that the defendant was engaged in the commission of (or the attempted commission of) the felony offense of \_\_\_\_\_ [state underlying felony].

The Court instructs the jury that in order to prove the commission of \_\_\_\_\_ [underlying felony], the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. [list elements of underlying felony]

**Felony Murder–Accident:** The Court instructs the jury that the crime of “Felony Murder” in this state does not require proof of the elements of malice, premeditation or specific intent to kill. It is deemed sufficient if the homicide occurs by “accident” during the commission of, or the attempt to commit, one of the enumerated felonies.

**Felony Murder–Continuous Transaction:** The Court instructs the jury that the “Felony Murder” statute applies where the initial felony and the homicide were parts of one “continuous transaction,” and were closely related in point of time, place, and causal connection.

**2<sup>nd</sup> Degree Murder:** “Second Degree Murder” is committed when any person does intentionally, maliciously and unlawfully slay, kill and murder another person.

Therefore, in order to prove the commission of the offense of “Second Degree Murder,” the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, \_\_\_\_\_,
2. on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_;
3. in \_\_\_\_\_ County, West Virginia;
4. did intentionally, 2

5. maliciously 3
6. and unlawfully
7. slay, kill and murder \_\_\_\_\_.

**Voluntary Manslaughter:** “Voluntary Manslaughter” is committed when any person does intentionally, unlawfully and feloniously kills another person, without premeditation, deliberation or malice.

Therefore, in order to prove the commission of the offense of “Voluntary Manslaughter,” the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, \_\_\_\_\_,
2. on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_;
3. in \_\_\_\_\_ County, West Virginia;
4. did intentionally, 2
5. unlawfully
6. and feloniously
7. kill \_\_\_\_\_.

**Voluntary Manslaughter (Intent as an Element):** The Court instructs the jury that “Voluntary Manslaughter” requires a specific “intent” on the part of the defendant to kill another person. It is not necessary that this intention to kill exist for any particular length of time prior to the actual killing. It is only necessary that such intention come into existence for the first time at the time of the killing or at any previous time thereto.

**Voluntary Manslaughter (Lack of Malice):** The Court instructs the jury that in a prosecution for “Voluntary Manslaughter,” it is not necessary that the State of West Virginia prove the existence of malice. Malice is not an element of voluntary manslaughter. Thus, it is the element of malice which forms the critical distinction between Second Degree Murder and Voluntary Manslaughter.

**Involuntary Manslaughter:** “Involuntary Manslaughter” is committed when a person, while engaged in an unlawful act, unintentionally causes the death of another, or where a person engaged in a lawful act, unlawfully [and with a reckless disregard of the safety of others] causes the death of another.

To prove the commission of “Involuntary manslaughter,” the State of West Virginia must overcome the presumption of innocence and prove, beyond a reasonable doubt, each of the following elements:

1. The defendant, \_\_\_\_\_,
2. on the \_\_\_\_ day of \_\_\_\_\_, 20\_\_;

3. in \_\_\_\_\_ County, West Virginia;
4. while engaged in an unlawful act
5. unintentionally
6. [and with a reckless disregard of the safety of others]
7. caused the death of
8. \_\_\_\_\_ (deceased).

OR

1. The defendant, \_\_\_\_\_,
2. on the \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_;
3. in \_\_\_\_\_ County, West Virginia;
4. while engaged in a lawful act,
5. unlawfully,
6. [and with a reckless disregard of the safety of others]
7. caused the death of
8. \_\_\_\_\_ (deceased).

**Involuntary Manslaughter (No Intent to Kill or Produce Death or Great Bodily Harm):** The Court instructs the jury that the absence of an intention to kill or to commit any unlawful act which might reasonably produce death or great bodily harm is the distinguishing feature between Voluntary and Involuntary Manslaughter.

**Involuntary Manslaughter (Causation):** An essential element or ingredient of the crime of “Involuntary Manslaughter” is that the accused caused the unintentional death of the victim.

**Attempt:** The Court instructs the jury that in order to constitute the crime of “attempt,” two requirements must be met: (1) a specific intent to commit the underlying substantive crime; and (2) an overt act toward the commission of that crime, which falls short of completing the underlying crime.

**Direct and Circumstantial Evidence:** The Court instructs the jury that direct evidence is evidence, usually in the form of testimony from a witness, who actually saw, heard, or touched the subject of questioning. In other words, direct evidence may be described as the testimony of a person who has perceived the existence of a fact, sought to be proved or disproved, by means of his or her senses.

By contrast, circumstantial evidence is evidence which is not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions may be made, showing indirectly the facts sought to be proved. In other words, circumstantial evidence is evidence that, while not directly proving the existence of a fact, gives rise to a logical inference that such fact does exist.

**Drawing Reasonable Inferences:** While you should consider only the evidence in this case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in this case.

## DEFENSES

**Self-Defense:** If the defendant was not the aggressor, and had reasonable grounds to believe and actually did believe that he or she was in imminent danger of death or serious bodily harm from which he or she could save him or herself only by using deadly force against his or her assailant, he or she had the right to employ deadly force in order to defend him or herself. By ‘deadly force’ is meant force which is likely to cause death or serious bodily harm. In order for the defendant to have been justified in the use of deadly force in self-defense, he or she must not have provoked the assault on him or her or have been the aggressor. Mere words, without more, do not constitute provocation or aggression.

The circumstances under which he acted must have been such as to produce in the mind of a reasonably prudent person, similarly situated, the reasonable belief that the other person was then about to kill him her or to do him or her serious bodily harm. In addition, the defendant must have actually believed that he or she was in imminent danger of death or serious bodily harm and that deadly force must be used to repel it.

If evidence of self-defense is present, the State of West Virginia must prove beyond a reasonable doubt that the defendant did not act in self-defense. If you find that the State has failed to prove beyond a reasonable doubt that the defendant did not act in self defense, you must find the defendant not guilty. 5 In other words, if you have a reasonable doubt whether or not the defendant acted in self-defense, your verdict must be not guilty.

**Defenses–Intoxication/Drug Use:** Voluntary intoxication is generally never an excuse for a crime. However, where a certain state of mind or intent is an essential element of the crime, an accused is not guilty if, at the time of the commission of the alleged criminal act, he was so intoxicated that he was unable to form the essential intent or have the essential mental state. In this case, the defendant is charged with \_\_\_\_\_. One of the essential elements of \_\_\_\_\_ is \_\_\_\_\_ (e.g. specific intent to kill, acting with malice, premeditation, or deliberation). The defendant contends at the time of the alleged offense, he was unable to \_\_\_\_\_, because he was intoxicated.

If you find the defendant was incapable of \_\_\_\_\_ because he was intoxicated, then you must find the defendant not guilty of \_\_\_\_\_. If you have any reasonable doubt as to whether or not the defendant was so intoxicated that he was unable to \_\_\_\_\_, you

must find the defendant not guilty of \_\_\_\_\_.

**Diminished Capacity:** The Court instructs the jury that you may consider any evidence, whether in the form of expert testimony or otherwise, which may show that the defendant, at the time of the offense alleged herein, was suffering from a mental disease or defect which rendered the defendant incapable of forming a mental state which is an element of the offense alleged herein. If a defendant, due to a mental disease or defect, is unable to formulate a specific state of mind at the time of an alleged offense, it may be said that the defendant is suffering from a “diminished capacity.” Such a finding means that the defendant is not guilty of the offense charged, because this finding negates an essential element of the offense. In other words, the State has alleged in this case that the defendant, at the time of the offense herein, acted with [specify particular mental state, i.e., premeditation, specific intent, malice, etc.]. You may consider, in light of all of the evidence presented in this case, whether the defendant was, at the time of the alleged commission of the act herein, incapable of forming a mental state which is an element of the offense alleged in the indictment herein.

[If applicable] Because such a finding means that one of the essential elements of the offense charged cannot be proven, you may still find that the defendant guilty of [state lesser included offense].

**Insanity:** One of the issues to be determined by you in this case is whether or not the defendant was sane or insane at the time the alleged offense was committed. A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks capacity either to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law.

If you believe from the evidence beyond a reasonable doubt that the defendant committed all of the elements of the alleged offense, but have a reasonable doubt as to whether or not the defendant, at the time of the commission of the act, was suffering from a mental disease or defect causing him or her to lack the capacity to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law, you should find the defendant not guilty by reason of insanity.

**Insanity (Burden of Proof):** There exists in the trial of an accused a presumption that the accused was sane at the time of the alleged commission of the alleged offense. If, however, any evidence introduced by the accused or by the State of West Virginia fairly raises doubt upon the issue of the accused’s sanity at that time, the presumption of sanity ceases to exist and the State then has the burden to establish the sanity of the accused beyond a reasonable doubt. If the whole proof upon that issue leaves the jury with a reasonable doubt as to the accused’s sanity at that time, the jury must accord the accused the benefit of the doubt and acquit him or her.

**Not Guilty by Reason of Insanity:** (*Note:* To be given at request of the defendant or in response to questions by jurors.)

If you return a verdict of “not guilty by reason of insanity,” the law provides that the Court shall determine on the record the offense of which the defendant otherwise would have been convicted, and the maximum sentence he or she could have received. The law further provides the Court shall commit the defendant to a mental health facility under the jurisdiction of the Department of Health, with the Court retaining jurisdiction over the defendant for the maximum sentence period. 4 If the defendant is released from an inpatient mental health facility while under the jurisdiction of the Court, the Court may impose such conditions as are necessary to protect the safety of the public.

No later than thirty days prior to the release of a defendant because of the expiration of the court’s jurisdiction, if the defendant’s supervising physician believes that the defendant’s mental illness or mental retardation or addiction causes the defendant to be dangerous to self or others, the supervising physician shall notify the prosecuting attorney in the county of the Court having jurisdiction of such opinion and the basis therefor. Following this notification, the prosecuting attorney shall file a civil commitment application against the defendant.

The Court may discharge a mentally ill or addicted defendant from the court’s period of jurisdiction prior to the expiration of the period specified only when the Court finds that the person is no longer mentally ill or addicted and that the person is no longer a danger to self or others. The Court may discharge a mentally retarded defendant from the court’s period of jurisdiction prior to the expiration of the period specified only when the Court finds that the person is no longer a danger to self or others. However, a defendant may not be released from the jurisdiction of the Court when the defendant’s mental illness is in remission solely as a result of medication or hospitalization or other mode of treatment if it can be determined within a reasonable degree of medical certainty that without continued therapy or hospitalization or other mode of treatment, the defendant’s mental illness will make him or her a danger to self or others.

A person found “not guilty by reason of insanity” may be released or discharged from an in-patient mental health facility only upon entry of an order from the Court which committed the defendant finding that the defendant will not be a danger to self or others if so released based upon evidence introduced at a hearing.

The Court shall promptly conduct a hearing after receipt of the physicians notification. The prosecuting attorney and the victim or next of kin of the victim of the offense for which the defendant was committed shall be notified of the hearing.