

FELONY MURDER - SLAYER PARTICIPANT
(N.J.S.A. 2C:11-3a(3))

The defendant is charged in count _____ with felony murder in violation of N.J.S.A. 2C:11-3. The indictment reads in pertinent part as follows:

(Read indictment or appropriate count, if indictment contains more than one count.)
(Continue with basic charge.)

The State contends that on (date), while the defendant was engaged in the commission of¹ or attempt to commit or flight after committing or attempting to commit the crime of (insert appropriate crime, e.g., robbery),² as charged in count _____ of the indictment he/she shot and killed³ **(name of victim)**.

The section of the statute applicable to this case reads in pertinent part as follows:

...[C]riminal homicide constitutes murder when:

It is committed when the actor ... is engaged in the commission of or attempt to commit or flight after committing or attempting to commit ... (insert predicate crime), and in the course of such crime or the immediate flight therefrom ... causes the death of a person other than one of the participants....

Generally, it does not matter that the act which caused death was committed recklessly, or unintentionally or accidentally.⁴ The perpetrator is as guilty of felony murder as he/she would be if he/she had purposely or knowingly committed the act which caused death.

In order for you to find the defendant guilty of felony murder, the State is required to prove beyond a reasonable doubt, from all the evidence in the case, all of the essential elements of the crime charged. Accordingly, before you can find the defendant guilty of felony murder, the State must prove beyond a reasonable doubt:

1. That on or about **(insert date)** the defendant was engaged in the commission of or attempt to commit or flight after committing or

¹ Delete language relating to attempt or flight throughout charge if not applicable. On flight, see State in the Interest of J.R., 234 N.J. Super. 388 (Ch. Div. 1988), and cases cited therein.

² The crimes enumerated in N.J.S.A. 2C:11-3a(3) are robbery, sexual assault, arson, burglary, kidnapping and criminal escape. It is assumed that the indictment would contain a separate count or counts charging defendant with the predicate crime(s) or attempted crime(s).

³ If the death was caused in some other manner, so indicate.

⁴ The same result would follow if the death were the result of the victim's fear or fright. See State v. McKeiver, 89 N.J. Super. 52 (Law Div. 1965) so long as the requirements of the causation statute, N.J.S.A. 2C:2-3, were charged and satisfied. See State v. Smith, 210 N.J. Super. 43 (App. Div. 1986).

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attempting to commit the crime of **(name of predicate crime)**, as charged in count _____ of the indictment;⁵

2. That the death of **(name of victim)** was caused by the defendant.
3. That the death of **(name of victim)** was caused at some time within the course of the commission of that crime, including its aftermaths of flight and concealment efforts.⁶

[And if applicable:

4. that **(name of victim)** was not a participant in the **(predicate crime).**]

The first element requires the State to prove beyond a reasonable doubt that the defendant was engaged in the commission of or attempt to commit or flight after committing or attempting to commit the crime of **(name of predicate crime)**. I have already defined the elements of **[predicate crime]**, which defendant is accused of having engaged in committing (or attempting to commit) in my instructions concerning count _____. You cannot find the defendant guilty of felony murder unless you first find him/her guilty beyond a reasonable doubt of having committed (or attempted to commit) the crime charged in count _____.⁷

[NOTE: Where the defendant has been charged with conspiracy to commit a predicate crime as well as the predicate crime itself, add:

I have also previously defined for you the elements of conspiracy to commit **(predicate crime)**, as charged in count _____ of the indictment. Conspiracy to commit **(predicate crime)** is a separate offense from **(predicate crime)** and cannot be a basis for a conviction of felony murder. Therefore, if you find defendant guilty beyond a reasonable doubt of conspiracy to commit **(predicate crime)** as charged in count _____, but you find the defendant not guilty of

⁵ If the facts indicate an attempted crime, see appropriate charge on attempt elsewhere herein and modify to the extent necessary. And if defendant's involvement was or may have been as an accomplice (N.J.S.A. 2C:2-6), see appropriate charges elsewhere herein including, if also applicable, the defense of renunciation (N.J.S.A. 2C:2-6(e)). In this regard, the Commentary on the New Jersey Penal Code points out that subsection c of 2C:2-6, in defining "accomplice," replaces the "aiding and abetting" language of N.J.S.A. 2A:85-14.

⁶ Where the issue is whether the predicate crime had terminated when the killing occurred, see State v. Holland, 59 N.J. 451, 458 (1971).

⁷ State v. Grey, 147 N.J. 4, 17 and 40 (1996). Where defendant is accused of being engaged in the commission of more than one predicate crime (and, presumably, is so charged in the individual counts of the indictment), the jury should be instructed that they must unanimously agree that defendant has committed (or attempted to commit) at least one of the offenses charged. Grey, 147 N.J. at 17 n. 2, discussing State v. Harris, 141 N.J. 525, 561-564 (1995). In appropriate cases, and when specifically requested by counsel, the jury should be instructed that it must agree unanimously on which predicate crime or crimes defendant was engaged in committing when the death was caused. Harris, 141 N.J. at 563; State v. Parker, 124 N.J. 628, 636-637 (1991).

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(predicate crime) as charged in count _____, you must find him/her not guilty of felony murder.^{8]}

The second and third elements require the State to establish that the victim's death was caused by the defendant and was caused during the commission of or attempt to commit or flight after committing or attempting to commit the **(insert predicate crime)**. In order to meet its burden of proof as to the second and third elements, the State must prove beyond a reasonable doubt the following:

1. That but for defendant's conduct in the commission of, or attempt to commit, or flight after committing or attempting to commit **(the predicate crime)** the victim would not have died. In other words, that the victim's death would not have occurred without the commission of the **(insert predicate crime)**.⁹
2. That the victim's death was a probable consequence of the commission of, or attempt to commit or flight after committing or attempting to commit **(insert predicate crime)**. In order for the death to be a "probable consequence" of the **(insert predicate crime)** the death must not have been too remote, or too accidental in its occurrence, or too dependent on another's volitional acts to have a just bearing on the defendant's liability or the gravity of his/her offense. In other words, you must decide if the State has proven beyond a reasonable doubt that, under all the circumstances, the death did not occur in such an unexpected or unusual manner that it would be unjust to find the defendant responsible for the death.¹⁰

[NOTE: In cases where Causation - Removal of Life Support is an issue, the jury should be instructed as follows:

You have heard testimony that on [date], **(insert victim's name)** was taken off life support and that he/she died at some point after this was done. Should you find beyond a reasonable doubt that **(insert victim's name)** died from medical complications that resulted from

⁸ Grey, 147 N.J. at 15.

⁹ State v. Martin, 119 N.J. 2, 11, 19-34 (1990).

¹⁰ Where divergent factual versions give rise to different theories of causation, the trial court must provide the jury with appropriate instructions to apply, depending on which version it chooses to accept. Thus, in appropriate cases the court must fashion its charge to instruct the jury how to deal with the defendant's (as well as with the State's) factual contentions. State v. Martin, 119 N.J. 2, 16-18 (1990).

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injuries caused by defendant's actions, the removal of life support, in this case (method of removal), is not an intervening cause that relieves defendant of any criminal liability for those actions.¹¹ That is, if defendant's actions set in motion (**insert victim's name**) need for life support, without which death would result naturally, then the causal link between defendant's action and the death of (**insert victim's name**) was not broken by an unforeseen, extraordinary act when (**insert victim's name**) was removed from life support and then expired, unless there was an intervening volitional act of another.]¹²

(NOTE: Where there is an issue of whether the decedent was a participant in the crime or attempted crime, add:

The State must also prove beyond a reasonable doubt that (name of victim) was not a participant in the (predicate crime or attempted crime). A participant is one who participates in or shares in that crime.)

[CHARGE IN ALL CASES]

In conclusion, if you find, after a consideration of all the evidence, that the State has proven to your satisfaction beyond a reasonable doubt each of these elements, as I have just explained them: (1) that the defendant was engaged in the commission of or attempt to commit or flight after committing or attempting to commit the crime of (predicate felony), as charged in count _____ of the indictment, (2) that the death of (name of victim) was caused by defendant, (3) that the death of that person was caused at some time within the course of the commission of that crime including its aftermath of flight and concealment efforts, [and, if applicable, (4) that (name of victim) was not a participant in that crime,] then you must find the defendant guilty of felony murder.

On the other hand, if you find that the State has failed to prove to your satisfaction beyond a reasonable doubt any one or more of these elements, then you must find the defendant not guilty of felony murder.¹³

NOTE: In the event that purposeful or knowing murder, aggravated manslaughter or manslaughter is charged in the indictment the jury should be advised that if the State has failed to prove beyond a reasonable doubt that the defendant caused the death of the victim then the defendant should be found not guilty of all charged homicide offenses. The jury should be

¹¹ State v. Pelham, 176 N.J. 448, 455-456 and n. 2 (2003).

¹² Pelham, 176 N.J. at 467.

¹³ It is assumed that the indictment would contain a separate count charging defendant with the predicate crime or attempted crime.

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further advised with appropriate instructions that if they find beyond a reasonable doubt that the defendant did cause the death of the victim but that the State has failed to prove that the defendant was then engaged in the course of the commission of or attempt to commit or flight after committing or attempting to commit the (predicate crime) then they should proceed to consider whether the defendant purposely, knowingly or recklessly caused the death of the victim.¹⁴

(See appropriate charges elsewhere herein.)

¹⁴ In the rare event the facts are such that the jury might find the defendant not guilty of felony murder solely because of its conclusion that the victim's death was not caused by the defendant quaere: should the predicate crime, e.g., robbery or attempted robbery, be charged as a lesser included offense, where, contrary to the assumption in footnote 2 supra, the indictment does not contain a separate count for the offense? See 2C:1-8(d).