

CR 421.211 Defense of another against danger of death or great bodily harm – use of deadly force R.C. 2901.05 (effective 3/28/19) [Rev. 11/16/19]

COMMENT

Effective 3/28/19, R.C. 2901.05 shifted the burden of proof from a defendant having to prove self-defense, defense of another, or defense of a residence by a preponderance of the evidence to the state having to disprove the same beyond a reasonable doubt. The General Assembly did not express a clear intent whether R.C. 2901.05, which shifted the burden of proof of self-defense, applies to offenses that were committed before and tried after 3/28/19. The court must decide as a threshold matter whether R.C. 2901.05 is retroactive. At least two appellate courts have decided that R.C. 2901.05 should not be applied retroactively to cases tried before 3/28/19. *State v. Koch*, 2d Dist. Montgomery No. 28000, 2019-Ohio-4099; *State v. Whitman*, 5th Dist. Stark No. 2019CA94, 2019-Ohio-4140.

If there is a factual question about whether the force used was deadly or non-deadly, the court should give the full instruction on deadly force as well as non-deadly force contained in OJI-CR 421.191. See *State v. Triplett*, 8th Dist. Cuyahoga No. 97522, 2012-Ohio-3804.

This instruction applies only to cases involving the use of deadly force in defense of another. For cases involving self-defense and the use of deadly force, see OJI-CR 421.21.

1. GENERAL. The defendant is allowed to use deadly force in defense of another. Evidence was presented that tends to support a finding that the defendant used the deadly force in defense of another. In order to prove that the defendant did not act in defense of another, the state must prove beyond a reasonable doubt at least one of the following:

(A) *(insert name of the person defended)* was at fault in creating the situation giving rise to *(describe the event in which the use of deadly force occurred)*; or

(B) *(insert name of the person defended)* was not in (imminent) (immediate) danger of death or great bodily harm; or

(C) *(insert name of the person defended)* had reasonable means of (retreat) (escape) without the defendant's use of deadly force and *(insert name of the person defended)* violated a duty to (retreat) (escape) to avoid the danger; or

(D) the defendant did not use reasonable force.

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Drawn from *State v. Williford*, 49 Ohio St.3d 247 (1990); *State v. Wenger*, 58 Ohio St.2d 336 (1979); *State v. Marsh*, 71 Ohio App.3d 64 (11th Dist.1990).

A defendant may be entitled to a defense-of-another instruction even if the person being defended is unaware of the danger or necessity for using force.

The right to defend another does not depend upon a family relationship, *State v. Wenger*, 58 Ohio St.2d 336 (1979), and a family relationship between the defendant and the person defended (such as son and father) does not give the defendant any greater right to use force. *Sharp v. State*, 19 Ohio 379 (1850).

2. DEADLY FORCE. “Deadly force” means any force that carries with it a substantial risk that it will proximately result in the death of a person.

COMMENT

Drawn from R.C. 2901.01; *State v. Dale*, 2d Dist. Champaign No. 1012 CA 20, 2013-Ohio-2229. “Deadly force” is based on the type or degree of force used, not the result of the force. Absent other circumstances, a punch is “non-deadly force,” even if it results in death or great bodily injury or harm. *State v. Davis*, 10th Dist. Franklin No. 17AP-438, 2018-Ohio-58. On the other hand, use of a weapon or other object that could cause death or great bodily harm, including a small knife, may be considered “deadly force.” *State v. Brown*, 5th Dist. Stark No. 2018CA107, 2019-Ohio-2187.

If there is a factual question about whether the force used was deadly or non-deadly, the court should give the full instruction on deadly force as well as non-deadly force contained in OJI-CR 421.191. See *State v. Triplett*, 8th Dist. Cuyahoga No. 97522, 2012-Ohio-3804.

3. NON-DEADLY FORCE (ADDITIONAL). OJI-CR 421.191.

4. SUBSTANTIAL RISK. “Substantial risk” means a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist.

COMMENT

R.C. 2901.01.

5. AT FAULT. The defendant stands in the shoes of the person he/she defended. If the state proved beyond a reasonable doubt that (*insert name of the person defended*) was the one at fault, the defendant was not justified in his/her use of force. (*Insert name of the person defended*) was at fault when he/she was the initial aggressor and

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State v. Wilson, 2d Dist. Montgomery No. 22581, 2009-Ohio-525.

(Use appropriate alternative[s])

(A) *(insert name of [victim(s)])* did not escalate the (situation) (incident) (argument) to (non-deadly force) (great bodily harm) (deadly force).

COMMENT

Drawn from *State v. Hendrickson*, 4th Dist. Athens No. 08CA12, 2009-Ohio-4416; *State v. Galluzzo*, 2d. Dist. Champaign No. 99CA25 (Mar. 30, 2001).

(or)

(B) *(insert name of the person defended)* provoked *(insert name of [victim(s)])* into using force.

COMMENT

Drawn from *State v. Gillespie*, 172 Ohio App.3d 304, 2007-Ohio-3439 (2d Dist.).

(or)

(C) *(insert name of the person defended)* did not withdraw from the (situation) (incident) (argument).

COMMENT

Drawn from *State v. Melchior*, 56 Ohio St.2d 15 (1978).

(or)

(D) *(insert name of the person defended)* withdrew from the (situation) (incident) (argument) but did not (inform) (reasonably indicate by words or acts to) *(insert name of [victim(s)])* of his/her withdrawal.

COMMENT

Drawn from *State v. Melchior*, 56 Ohio St.2d 15 (1978).

Self-defense is not precluded because the defendant was engaged in criminal activity when he/she was attacked. *State v. Stevenson*, 10th Dist. Franklin No. 17AP-512, 2018-Ohio-5140; *State v. Turner*, 171 Ohio App.3d 82, 2007-Ohio-1346 (2d Dist.).

6. TEST FOR REASONABLENESS. In deciding whether the defendant had reasonable grounds to believe and an honest belief that (*insert name of person defended*) was in (imminent) (immediate) danger of bodily harm, you must put yourself in the position of the defendant, with his/her characteristics, his/her knowledge or lack of knowledge, and under the circumstances and conditions that surrounded him/her at the time. You must consider the conduct of (*insert name of victim*) and decide whether his/her acts and words caused the defendant to reasonably and honestly believe that (*insert name of person defended*) was about to receive great bodily harm.

COMMENT

Drawn from *State v. Koss*, 49 Ohio St.3d 213 (1990).

7. WORDS (ADDITIONAL). Words alone do not justify the use of force. Resort to deadly force is not justified by abusive language, verbal threats, or other words, no matter how provocative.

COMMENT

State v. Shane, 63 Ohio St.3d. 630 (1992); *State v. Howard*, 10th Dist. Franklin No. 16AP-226, 2017-Ohio-8742.

8. EXCESSIVE FORCE (ADDITIONAL). A person is allowed to use force that is reasonably necessary under the circumstances to protect another from an apparent danger. For you to find the defendant guilty, the state must prove beyond a reasonable doubt that the defendant used more force than reasonably necessary and that the force used was greatly disproportionate to the apparent danger.

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State v. Roddy, 10th Dist. Franklin No. 81 AP-499 (Nov. 17, 1981); *State v. Hendrickson*, 4th Dist. Athens No. 08CA12, 2009-Ohio-4416; *State v. Dull*, 3d Dist. Seneca No. 13-12-33, 2013-Ohio-1395; *State v. Gray*, 2d Dist. Montgomery No. 26473, 2016-Ohio-5869.

9. GREATLY DISPROPORTIONATE (ADDITIONAL). In deciding whether the force used was greatly disproportionate to the apparent danger, you may consider whether the force used shows revenge or a criminal purpose.

COMMENT

State v. Hendrickson, 4th Dist. Athens No. 08CA12, 2009-Ohio-4416; *State v. Waller*, 4th Dist. Scioto No. 15CA3683-15CA3684, 2016-Ohio-377.

This instruction should be given only if the instruction on excessive force is given to the jury.

10. DUTY TO RETREAT. The *(insert name of person defended)* had a duty to retreat if he/she

(Use appropriate alternative[s])

(A) was at fault in creating the situation giving rise to *(describe the event in which the deadly force was used)*;

(or)

(B) did not have reasonable grounds to believe and an honest belief that he/she was in (imminent) (immediate) danger of death or great bodily harm;

(or)

(C) had a reasonable means of escape from that danger other than by the use of deadly force.

COMMENT

Drawn from *State v. Reid*, 3 Ohio App.2d 215 (3d Dist.1965).

The Committee believes that the duty to retreat will not apply in situations involving defense of another in the defendant's residence or a vehicle. R.C. 2901.09.

See Presumption-self-defense/defense of another – when in residence or vehicle, use of deadly force R.C. 2901.05 (effective 3/28/19). OJI-CR 421.23; R.C. 2901.05(B)(2).

11. BATTERED PERSON SYNDROME (ADDITIONAL). OJI-CR 417.43; R.C. 2901.06.

12. CONCLUSION. If you find that the state proved beyond a reasonable doubt all of the elements of *(insert name of applicable offense[s])* and that the state proved beyond a reasonable

doubt that the defendant did not act in defense of another, you must find the defendant guilty according to your findings.

If you find that the state failed to prove beyond a reasonable doubt any of the elements of (*insert name of applicable offense[s]*) or if you find that the state failed to prove beyond a reasonable doubt that the defendant did not act in defense of another, you must find the defendant not guilty according to your findings.