

**CR 421.21 Self-defense of person or residence 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.

R.C. 2901.05 does not define self-defense. Therefore, the Committee believes that the common-law elements of self-defense are applicable.

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 421.19. 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 self. For cases involving the use of deadly force in defense of another, see OJI-CR 421.211. In a case where defensive force is used in a residence or vehicle, a presumption of self-defense may apply. R.C. 2901.05(B)(2). In such a case, the instruction in OJI-CR 421.23 may be applicable.

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

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

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

(C) the defendant violated a duty to (retreat) (escape) to avoid the danger; or

(D) the defendant did not use reasonable force.

COMMENT

State v. Williford, 49 Ohio St.3d 247 (1990); *State v. Jackson*, 22 Ohio St.3d 281 (1986); *State v. Robbins*, 58 Ohio St.2d 74 (1979), citing *State v. Melchior*, 56 Ohio St.2d 15 (1978); *State v. Gray*, 2d Dist. Montgomery No. 26473, 2016-Ohio-5869.

If self-defense is an issue, the defendant may not introduce evidence of prior instances of a victim's conduct to prove that the victim was the initial aggressor. *State v. Barnes*, 94 Ohio St.3d 21, 2002-Ohio-68; see also *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426. The Committee believes that evidence of prior instances of a victim's conduct is admissible for other purposes, such as the defendant's reasonable belief in acting in self-defense. For example, see "Battered Person" at OJI-CR 417.41 and Evid.R. 404(B).

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 421.19. See *State v. Triplett*, 8th Dist. Cuyahoga No. 97522, 2012-Ohio-3804.

3. NON-DEADLY FORCE (ADDITIONAL). OJI-CR 421.19.

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 did not act in (self-defense) (defense of his/her residence) if the state proved beyond a reasonable doubt that the defendant was at fault in creating the (situation)

(incident) (argument) that resulted in the (injury) (death). The defendant was at fault when the defendant was the initial aggressor and

(Use appropriate alternative[s])

(A) *(insert name of [victim(s)])* did not escalate the (situation) (incident) (argument) to 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) 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) did not withdraw from the (situation) (incident) (argument).

COMMENT

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

(or)

(D) 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 or defense of his/her residence 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 SELF-DEFENSE. In deciding whether the defendant had reasonable grounds to believe and an honest belief that he/she was in (imminent) (immediate) danger of (being killed) (receiving great 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(s)]*) and decide whether his/her acts and words caused the defendant to reasonably and honestly believe that the defendant was about to (be killed) (receive great bodily harm).

COMMENT

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

The Committee believes that the test for reasonableness is limited to the use of deadly force in self-defense or defense of another and does not apply to defense of the residence without threat to person(s).

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 (himself/herself) (his/her residence) 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.

COMMENT

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. RESIDENCE. "Residence" means a dwelling in which a person resides either temporarily or permanently or is visiting as a guest.

COMMENT

R.C. 2901.05(D)(3).

11. DWELLING. "Dwelling" means a (building) (*specify conveyance of any kind*) that has a roof over it and that is designed to be occupied by people lodging in the (building) (*specify conveyance*) at night, regardless of whether the (building) (*specify conveyance*) is temporary or permanent or is mobile or immobile. (A [building] [*specify conveyance*] includes, but is not limited to, an attached porch, and a [building] [*specify conveyance*] with a roof over it includes, but is not limited to, a tent.)

COMMENT

Drawn from R.C. 2901.05(D)(2).

12. DUTY TO RETREAT. The defendant 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).

13. NO DUTY TO RETREAT.

(A) GENERAL. The defendant (did not have) (no longer had) a duty to retreat if

- (1) he/she ([retreated] [escaped] from the situation) (reasonably indicated his/her intention to [retreat] [escape] from the situation and no longer participate in it); and
- (2) he/she then had reasonable grounds to believe and an honest belief that he/she was in (imminent) (immediate) danger of death or great bodily harm; and
- (3) the only reasonable means of escape from that danger was by the use of deadly force, even though he/she was mistaken as to the existence of that danger.

COMMENT

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

R.C. 2901.09 provides circumstances under which a person has no duty to retreat in his/her residence or vehicle. R.C. 2901.09 does not change the common law rule concerning the duty to retreat in a business as pronounced in *Graham v. State*, 98 Ohio St. 77 (1918).

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).

(B) DEFENSE IN RESIDENCE. A person who is lawfully in his/her residence has no duty to retreat before using deadly force in (self-defense) (defense of his/her residence).

COMMENT

Drawn from R.C. 2901.09; *State v. Williford*, 49 Ohio St.3d 247 (1990); *State v. Thomas*, 77 Ohio St.3d 323, 1997-Ohio-269; *State v. Dale*, 2d Dist. Champaign No. 2012 CA 20, 2013-Ohio-20.

(C) DEFENSE IN VEHICLE. A person who lawfully is an occupant (of his/her vehicle) (in a vehicle owned by his/her immediate family member) has no duty to retreat before using deadly force in self-defense.

COMMENT

Drawn from R.C. 2901.09; *State v. Bundy*, 4th Dist. Pike No. 11CA818, 2012-Ohio-3934.

14. VEHICLE. "Vehicle" means a conveyance of any kind, whether or not motorized, that is designed to transport people or property.

COMMENT

R.C. 2901.05(D)(4).

15. IMMEDIATE FAMILY. "Immediate family" means a person's spouse, parents, brothers and sisters of the whole or the half blood, and children, including adopted children.

COMMENT

Drawn from R.C. 2905.21 and R.C. 2930.01.

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

17. 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 (self-defense) (defense of his/her residence), 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 (self-defense) (defense of his/her residence), you must find the defendant not guilty according to your findings.