

**CR 421.19 Self-defense against danger of harm to person - use of non-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 the 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.

This instruction applies only to cases involving the use of non-deadly force in defense of self. There is no duty to retreat in Ohio for cases involving non-deadly force. *State v. Perez*, 72 Ohio App.3d 468 (10th Dist. 1991). For cases involving the use of non-deadly force in defense of another, see OJI-CR 421.191.

The statute does not define self-defense, and 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 contained in OJI-CR 421.21 as well as non-deadly force. See *State v. Triplett*, 8th Dist. Cuyahoga No. 97522, 2012-Ohio-3804.

1. **GENERAL.** The defendant is allowed to use non-deadly force in self-defense. Evidence was presented that tends to support a finding that the defendant used non-deadly force in self-defense. In order to prove that the defendant did not act in self-defense, 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 non-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 harm.

**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. NON-DEADLY FORCE. "Non-deadly force" means any force that does not carry 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. Hale*, 2d Dist. Montgomery No. CA-11473 (Oct. 13, 1989). 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 contained in OJI-CR 421.21 as well as non-deadly force. *See State v. Triplett*, 8th Dist. Cuyahoga No. 97522, 2012-Ohio-3804.

3. DEADLY FORCE (ADDITIONAL). OJI-CR 421.21.

#### 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.

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 contained in OJI-CR 421.21 as well as non-deadly force. *See State v. Triplett*, 8th Dist. Cuyahoga No. 97522, 2012-Ohio-3804.

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. A defendant did not act in self-defense 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 (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, (March 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 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 he/she 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(s)]*) and decide whether his/her acts and words caused the defendant to reasonably and honestly believe that the defendant was about to receive 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 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 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. 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, 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, you must find the defendant not guilty according to your findings.