

**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. 11/5/22]**

**COMMENT**

R.C. 2901.09 abolishes the duty to retreat for any person who was in a place where he/she lawfully had a right to be when he/she used force in self-defense, defense of another, or defense of his/her residence for offenses committed on and after 4/6/21. *State v. Parker*, 1st Dist. Hamilton No. C-210440, 2022-Ohio-3831; *State v. Degahson*, 2d Dist. Clark No. 2021-CA-35, 2022-Ohio-2972. Although *State v. Duncan*, 8th Dist. Cuyahoga No. 110784, 2022-Ohio-3665, also held that R.C. 2901.09 does not apply retroactively, there is a dissent on the issue of retroactivity. Therefore, the court should check whether there is a contrary ruling in its appellate district.

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 at least one of the elements of self-defense, defense of another, or defense of a residence beyond a reasonable doubt. Under the amended statute, if, at the trial of the person accused of an offense that involved the person's use of force against another, there is evidence presented that tends to support that the accused person used the force in self-defense, defense of another, or defense of a residence, the prosecution must prove beyond a reasonable doubt that the accused person did not use the force in self-defense, defense of another, or defense of a residence. Evidence presented that tends to support that the accused person used the force in self-defense, defense of another, or defense of a residence may come from whatever source. *State v. Parrish*, 1st Dist. Hamilton No. C-190379, 2020-Ohio-4807. Once self defense is at issue, the burden shifts to the state to prove beyond a reasonable doubt that the defendant did not act in self-defense, defense of another, or defense of a residence. *State v. Hoskin*, 8th Dist. Cuyahoga Nos. 111119, 111120, and 111121, 2022-Ohio-3917.

See Crim.R. 12.2 regarding notice of self-defense that the defendant who proposes to offer evidence or argue self-defense must file.

R.C. 2901.05, which shifted the burden to the state, applies to all trials occurring on and after 3/28/19, regardless of when the underlying alleged criminal conduct occurred. *State v. Brooks*, Slip Opinion No. 2022-Ohio-2478.

A trial court is not required to instruct the jury on self-defense in every situation in which the presentation is attempted; rather, a court need only instruct the jury on self-defense if sufficient evidence is introduced that, if believed, would raise a question in the minds of reasonable jurors concerning the existence of such issue. See *State v. Hatfield*, 9th Dist. Summit No. 23716, 2008-Ohio-2431; *State v. Bitting*, 9th Dist. Summit No. 29238, 2019-Ohio-2304, *appeal not allowed*, 157 Ohio St.3d 1407, 2019-Ohio-3731.

A trial court may not refuse a requested instruction if it is a "correct, pertinent statement of the law" and "appropriate to the facts." *Smith v. Lessin*, 67 Ohio St.3d 487 (1993). It is within the sound discretion of the trial court to determine whether the evidence is sufficient to require a jury instruction. *State v. Mitts*, 81 Ohio St.3d 223, 1998-Ohio-635; see also *State v. Wolons*, 44 Ohio St.3d 64 (1989). The trial court cannot give a jury instruction on the affirmative defense of self-defense if there is insufficient evidence. See *Stateten v. Schwendeman*, 4th Dist. Athens No. 17CA7, 2018-Ohio-240. In deciding whether the evidence was sufficient, the trial court neither resolves evidentiary conflicts nor assesses the credibility of witnesses, as both are functions reserved for the trier of fact. *State v. Jones*, 1st Dist. Hamilton Nos. C-120570 and C-120571, 2013-Ohio-4775, citing *State v. Williams*, 197 Ohio App.3d 505, 2011-Ohio-6267 (1st Dist.). See

also *State v. Berry*, 3d Dist. Defiance No. 4-12-03, 2013-Ohio-2380 (“Sufficiency of the evidence is a test of adequacy rather than credibility or weight of the evidence.”).

The Fourth District held that the phrase “tends to support” as used in R.C. 2901.05(B)(1) does not create a new standard for determining whether a defendant is entitled to a self-defense instruction. *State v. Tolle*, 4th Dist. Adams No. 19CA1095, 2020-Ohio-935. The evidence must be sufficient to raise a question in the mind of a reasonable juror, as is already required under the existing standard. *State v. Melchior*, 56 Ohio St.2d 15 (1978). The Eleventh District held that in order for evidence to “tend to support” that force was used in self-defense, it must “serve, contribute, or conduce in some degree or way” to support that the force was used in self-defense. *State v. Petway*, *supra*. See also *State v. Parrish*, 1st Dist. Hamilton No. C-190379, 2020-Ohio-4807.

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. A person is allowed to use deadly force in defense of another. The state must prove beyond a reasonable doubt that the defendant, when using deadly force, did not act in defense of another.
2. STATE’S PROOF. To prove that the defendant’s use of deadly force was not in defense of another, the state must prove beyond a reasonable doubt at least one of the following:
  - (A) (*insert name of 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) the defendant did not have reasonable grounds to believe that (*insert name of person defended*) was in (imminent) (immediate) danger of death or great bodily harm; or
  - (C) the defendant did not have an honest belief, even if mistaken, that (*insert name of person defended*) was in (imminent) (immediate) danger of bodily harm; or
  - (D) (*insert name of person defended*) violated a duty to retreat to avoid the danger; or
  - (E) the defendant used unreasonable force.

#### COMMENT

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).

The defendant is presumed to have acted in defense of another when the person defended was in the defendant’s residence or vehicle. See OJI-CR 421.23; R.C. 2901.05(B)(2).

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. *See State v. Harris*, 129 Ohio App.3d 527 (10th Dist.1998).

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).

3. DEADLY FORCE. OJI-CR 421.19 § 5.

4. PROXIMATE CAUSE. OJI-CR 417.23.

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

6. AT FAULT. The defendant stands in the shoes of the person he/she defended. The defendant did not act in defense of another if the state proved beyond a reasonable doubt that (*insert name of person defended*) was the one at fault in creating the (situation) (incident) (argument) that resulted in the (injury) (death). (*Insert name of person defended*) was at fault if he/she was the initial aggressor and

#### COMMENT

Drawn from *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) by being the first to (use) (attempt to use) 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 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 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 person defended*) withdrew from the (situation) (incident) (argument) but did not (inform [*insert name of victim(s)*]) (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).

7. TEST FOR REASONABLE GROUNDS AND HONEST BELIEF. 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 (death) (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/their acts and words caused the defendant to reasonably and honestly believe that (*insert name of person defended*) was about to (be killed) (receive great bodily harm).

**COMMENT**

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

8. DETERMINING REASONABLE BELIEF (ADDITIONAL). In determining whether the defendant, in using force in defense of another, reasonably believed that the force was necessary

to prevent injury, loss, or risk to life or safety, you may not consider the possibility of retreat by *(insert name of person defended)*.

**COMMENT**

Drawn from R.C. 2901.09(C).

9. NO DUTY TO RETREAT (ADDITIONAL). *(Insert name of person defended)* had no duty to retreat if he/she was in a place in which he/she lawfully had a right to be.

**COMMENT**

Drawn from R.C. 2901.09(B).

10. LAWFULLY RIGHT TO BE. “Lawfully right to be” means that *(insert name of person defended)* was not trespassing when the defendant used deadly force in defense of *(insert name of person defended)*.

**COMMENT**

If there is an issue of fact as to whether the person defended was trespassing, the court must instruct on the elements of trespass. *See* OJI-CR 511.21.

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

**COMMENT**

Drawn from R.C. 2901.01.

12. 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**

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

13. UNREASONABLE 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.

**COMMENT**

Drawn from *State v. Roddy*, 10th Dist. Franklin No. 81AP-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.

14. 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**

Drawn from *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 unreasonable force is given to the jury.

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

**COMMENT**

There is no duty to retreat from the home of the person defended before resorting to force in defense of that person against a cohabitant with an equal right to be in the home. *See State v. Thomas*, 77 Ohio St.3d 323 (1997).

16. 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.

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.