CR 421.21 Self-defense, defense of residence – use of deadly force R.C. 2901.05 (effective 4/6/21) *[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 (self-defense) (defense of his/her residence). The state must prove beyond a reasonable doubt that the defendant, when using deadly force, did not act in (self-defense) (defense of his/her residence).

2. STATE'S PROOF. To prove that the defendant's use of deadly force was not 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 that he/she 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 he/she was in (imminent) (immediate) danger of death or great bodily harm; or

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

(E) the defendant used unreasonable force.

COMMENT

The defendant is presumed to have acted in self-defense when in his/her residence or vehicle. *See* OJI-CR 421.23; R.C. 2901.05(B)(2).

The statute does not define self-defense, and therefore the Committee believes that the common-law elements of self-defense are applicable. *See 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 417.43 and Evid.R. 404(B).

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 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 if the defendant was the initial aggressor and

(*Use appropriate alternative[s]*)

(A) (*insert name of victim[s]*) did not escalate the (situation) (incident) (argument) by being the first to use or attempt to use (non-deadly force) (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) the defendant 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) the defendant did not withdraw from the (situation) (incident) (argument);

COMMENT

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

(or)

(D) the defendant 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).

Self-defense or defense of his/her residence is not precluded because the defendant was engaged in criminal activity when he/she was attacked. *See 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.).

7. TEST FOR REASONABLE GROUNDS AND HONEST BELIEF. In deciding whether the defendant had reasonable grounds to believe and an honest belief that he/she 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 the defendant 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 (self-defense) (defense of his/her residence), 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 the defendant.

COMMENT

Drawn from R.C. 2901.09(C).

9. NO DUTY TO RETREAT (ADDITIONAL). The defendant had no duty to retreat before using force in (self-defense) (defense of his/her residence) if the defendant was in a place in which he/she lawfully had a right to be.

COMMENT

Drawn from R.C. 2901.09(B).

10. LAWFULLY HAD A RIGHT TO BE. "Lawfully had a right to be" means that the defendant was not trespassing when he/she used force in (self-defense) (defense of his/her residence).

COMMENT

If there is an issue of fact as to whether the defendant 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 (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

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. 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).

16. 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).

17. 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, R.C. 2930.01.

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

COMMENT

There is no duty to retreat from one's own home before resorting to deadly force in self-defense against a cohabitant with an equal right to be in the home. *See State v. Thomas*, 77 Ohio St.3d 323 (1997).

19. 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.

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.