

CR 417.27 Affirmative defense R.C. 2901.05(C) [Rev. 4/13/19]

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 HB 228, which shifted the burden of proof of self-defense, applies to offenses before 3/28/19. The court must decide as a threshold matter whether HB 228 is retroactive. If the court decides that it is not retroactive, see this Committee's prior instruction on the same subjects.

1. CLAIM. The defendant claims that (*describe affirmative defense*).

COMMENT

See Chapter 411 dealing with defenses, some of which are affirmative defenses. R.C. 2901.05(A) places the burden of going forward with the evidence of an affirmative defense and the burden of proof by a preponderance of the evidence upon the accused. R.C. 2901.05(D) defines two types of affirmative defenses:

1. A defense expressly designated as affirmative (for example, renunciation or abandonment in a conspiracy charge under R.C. 2923.01[I]);
2. A defense involving an excuse or justification peculiarly within the knowledge of the accused, on which the accused can fairly be required to adduce supporting evidence (for example, that the defendant acted for specified lawful purposes in a charge of abusing harmful intoxicants under R.C. 2925.31).

Intoxication (rendering a defendant incapable of forming the criminal purpose in question), duress, and insanity are affirmative defenses.

Diminished capacity is not a recognized defense in Ohio. A blackout, however, was recognized as an affirmative defense. *State v. Ireland*, 155 Ohio St.3d.287, 2018-Ohio-4494.

The defenses of accident and alibi are not affirmative defenses.

2. BURDEN. The burden of going forward with the evidence of (*describe affirmative defense*) and the burden of proving this defense are upon the defendant. He/she must establish such a defense by a preponderance of the evidence.

3. PREPONDERANCE OF THE EVIDENCE. OJI-CR 417.29.