

JUSTIFICATION - SELF DEFENSE

In Self Protection

(N.J.S.A. 2C:3-4)

The indictment charges that the defendant has committed the crime of (i.e., aggravated assault or homicide).

The defendant contends that if the State proves (he/she) used or threatened to use force upon the other person(s), that such force was justifiably used for (his/her) self protection.

The statute reads:

"The use of force upon or toward another person is justifiable when the actor reasonably believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion."

In other words, self defense is the right of a person to defend against any unlawful force. Self defense is also the right of a person to defend against seriously threatened unlawful force that is actually pending or reasonably anticipated. When a person is in imminent danger of bodily harm, the person has the right to use force or even deadly force when that force is necessary to prevent the use against (him/her) of unlawful force. The force used by the defendant must not be significantly greater than and must be proportionate to the unlawful force threatened or used against the defendant.

Unlawful force is defined as force used against a person without the person's consent in such a way that the action would be a civil wrong or a criminal offense.

If the force used by the defendant was not immediately necessary for the defendant's protection or if the force used by the defendant was disproportionate in its intensity, then the use of such force by the defendant was not justified and the self defense claim falls.

There are different levels of force that a person may use in (his/her) own defense to prevent unlawful harm.

The defendant can only use that amount or degree of force that (he/she) reasonably believes is necessary to protect (himself/herself) against harm. If the defendant is attempting to protect (himself/herself) against exposure to death or the substantial danger of serious bodily harm, (he/she) may resort to the use of deadly force. Otherwise, (he/she) may only resort to non-deadly force.

Deadly Force

The use of deadly force may be justified only to defend against force or the threat of force of nearly equal severity and is not justifiable unless the defendant reasonably believes that such force is necessary to protect (himself/herself) against death or serious bodily harm. Deadly force

is defined as force that the defendant uses with the purpose of causing or which (he/she) knows to create a substantial risk of causing death or serious bodily harm. By serious bodily harm we mean an injury that creates a substantial risk of death or which causes serious permanent disfigurement or which causes a protracted loss or impairment of the function of any bodily member or organ.¹ For example, if one were to purposely fire a firearm in the direction of another person, that would be an example of deadly force. A mere threat with a firearm, however, intended only to make the victim of the threat believe that the defendant will use the firearm if necessary is not an example of deadly force.

One cannot respond with deadly force to a threat of or even an actual minor attack. For example, a slap or an imminent threat of being pushed in a crowd would not ordinarily justify the use of deadly force to defend against such unlawful conduct. Therefore, you must first determine whether the defendant used deadly force. If you find that the defendant did so, then you must determine if the defendant reasonably believes (he/she) had to use deadly force to defend against the unlawful conduct of another.

A reasonable belief is one which would be held by a person of ordinary prudence and intelligence situated as this defendant was. Self defense exonerates a person who uses force in the reasonable belief that such action was necessary to prevent his or her death or serious injury, even though (his/her) belief was later proven mistaken. Accordingly, the law requires only a reasonable, not necessarily a correct, judgment.

Even if you find that the use of deadly force was reasonable, there are limitations on the use of deadly force. If you find that the defendant, with the purpose of causing death or serious bodily harm to another person, provoked or incited the use of force against (himself/herself) in the same encounter, then the defense is not available to (him/her).

If you find that the defendant knew that (he/she) could avoid the necessity of using deadly force by retreating, provided that the defendant knew (he/she) could do so with complete safety, then the defense is not available to (him/her).²

In your inquiry as to whether a defendant who resorted to deadly force knew that an opportunity to retreat with complete safety was available, the total circumstances including the attendant excitement accompanying the situation must be considered.

Non-Deadly Force

A person may also use non-deadly force in (his/her) own defense. If you find that this defendant did use non-deadly force to defend (himself/herself), then you must determine whether that force was justified.

The same reasonable belief standard that I explained to you when discussing deadly force applies.

A person may use non-deadly force to protect (himself/herself) if the following conditions exist:

1. The person reasonably believes (he/she) must use force and
2. The person reasonably believes that the use of force was immediately necessary and
3. The person reasonably believes (he/she) is using force to defend (himself/herself)

against unlawful force, and

4. The person reasonably believes that the level of the intensity of the force (he/she) uses is proportionate to the unlawful force (he/she) is attempting to defend against.

Remember, only if you conclude that in using force or deadly force the defendant reasonably believed (he/she) was defending against unlawful force is the defense available to (him/her).

Burden of Proof

The State has the burden to prove to you beyond a reasonable doubt that the defense of self defense is untrue. This defense only applies if all the conditions or elements previously described exist. The defense should³ be rejected if the State disproves any of the conditions beyond a reasonable doubt.

The same theory applies to the issue of retreat. Remember that the obligation of the defendant to retreat only arises if you find that the defendant resorts to the use of deadly force. If the defendant does not resort to the use of deadly force, one who is unlawfully attacked may hold (his/her) position and not retreat whether the attack upon (him/her) is by deadly force or some lesser force. The burden of proof is upon the State to prove beyond a reasonable doubt that the defendant knew (he/she) could have retreated with complete safety. If the State carries its burden then you should⁴ disallow the defense. If the State does not satisfy this burden and you do have a reasonable doubt, then it must be resolved in favor of the defendant and you must allow the claim of self defense and acquit the defendant.

1 If appropriate, charge the following: "Serious bodily injury may also mean bodily harm that results from aggravated sexual assault or sexual assault."

2 An exception to the rule of retreat, however, is that a person need not retreat from his or her own dwelling unless he or she was the initial aggressor. N.J.S.A. 2C:3-4b(2)(b)(i).

3 Utilization of "should" is dependent upon decision in State v. Ragland.

4 Ibid.