

Aligning Jury Instructions with the Justification Defense

Linley Wilson, Assistant Attorney General
Office of the Arizona Attorney General

Welcome

- Overview
- Disclaimers
 - Citation of memorandum decisions is not for persuasive value, but to illustrate concepts with case-specific examples
 - Emphasis is placed on justification defenses that have been modified or recently added, and defenses that have received significant amount of attention by Arizona appellate courts

General Principles & Law Applicable to all Justification Defenses

- “A defendant who disclaims any assaultive behavior on his part is not entitled to a self-defense instruction.” *State v. Ruggiero*, 211 Ariz. 262, ¶13 (App. 2005) (defendant not entitled to any justification instruction “because she unequivocally denied having shot” victim)
- Defendant is entitled to justification defense if supported by “slightest evidence.” *Ruggiero*, ¶10
 - But evidence is required, not merely an “inference” making an argument possible, because speculation cannot substitute for evidence. *State v. Vassell*, 238 Ariz. 281, ¶12 (App. 2015) (defendant not entitled to self-defense instruction because no evidence was presented to show that defendant believed home invaders sometimes impersonate police or that he thought SWAT team members were home invaders when he fired two shots).
 - Defendant need not necessarily testify.
 - Example: In a road rage case between two drivers, defendant and victim, defendant and his fiancé were in one car and defendant’s “version of the events came primarily from his statements to police shortly after the incident and from his fiancé’s testimony.” *State v. Almeida*, 238 Ariz. 77, ¶10 (App. 2015)
 - See also *Vassell*, ¶13 (“Our concurring colleague suggests that a defendant will always have to testify at trial to be entitled to a justification instruction. We disagree.”)
 - If instruction is refused, appellate court views evidence in light most favorable to proponent of the instruction (i.e., defendant). *Almeida*, ¶9

- Justification defenses are unavailable if defendant recklessly injures or kills innocent third person. A.R.S. § 13-401.
- Since 2006, State has been required to disprove justification beyond a reasonable doubt once defendant presents evidence supporting a justification defense. A.R.S. § 13-205(A).
- "The court shall award reasonable attorney fees, costs, compensation for lost income and all expenses incurred by a defendant in the defense of any civil action based on conduct otherwise justified pursuant to this chapter if the defendant prevails in the civil action." A.R.S. § 13-420 (added in 2006).

A.R.S. § 13-402: Execution of Public Duty Defense

- Unless inconsistent with other statutes, conduct which would otherwise constitute an offense is justifiable when it is required or authorized by law.

A.R.S. § 13-403: Use of Physical Force in Specific Circumstances is not Criminal

- Five circumstances:
 - (1) Parent, guardian, or teacher using reasonable and appropriate physical force on minor or incompetent person when reasonably necessary and appropriate to maintain discipline
 - (2) Correctional officers using physical force to maintain order or discipline or prevent crimes
 - (3) Person who is responsible for maintaining order in a place where "others are assembled or on a common motor carrier of passengers"
 - (4) Person acting under reasonable belief to prevent someone from committing suicide or seriously injuring himself
 - (5) Licensed physician, RN, or person acting under direction to render emergency care, i.e., "a recognized and lawful form of treatment reasonably adapted to promoting physical or mental health"

A.R.S. § 13-404: Self-defense (physical force)

A. Except as provided in subsection B of this section, a person is justified in threatening or using physical force against another when and to the extent a reasonable person would believe that physical force is immediately necessary to protect himself against the other's use or attempted use of unlawful physical force.

B. The threat or use of physical force against another is not justified:

1. In response to verbal provocation alone; or

2. To resist an arrest that the person knows or should know is being made by a peace officer or by a person acting in a peace officer's presence and at his direction, whether the arrest is lawful or unlawful, unless the physical force used by the peace officer exceeds that allowed by law; or

3. If the person provoked the other's use or attempted use of unlawful physical force, unless:

(a) The person withdraws from the encounter or clearly communicates to the other his intent to do so reasonably believing he cannot safely withdraw from the encounter; and

(b) The other nevertheless continues or attempts to use unlawful physical force against the person.

A.R.S. § 13-405: Self-defense (deadly physical force)

A. A person is justified in threatening or using deadly physical force against another:

1. If such person would be justified in threatening or using physical force against the other under section 13-404, and

2. When and to the degree a reasonable person would believe that deadly physical force is immediately necessary to protect himself against the other's use or attempted use of unlawful deadly physical force.

B. A person has no duty to retreat before threatening or using deadly physical force pursuant to this section if the person is in a place where the person may legally be and is not engaged in an unlawful act. (added in 2010)

A.R.S. § 13-406: Defense of a Third Person

A person is justified in threatening or using physical force or deadly physical force against another to protect a third person if, under the circumstances as a reasonable person would believe them to be, such person would be justified under section 13-404 or 13-405 in threatening or using physical force or deadly physical force to protect himself against the unlawful physical force or deadly physical force a reasonable person would believe is threatening the third person he seeks to protect.

A.R.S. § 13-407: Use of Physical Force in Defense of Premises to Prevent Criminal Trespass

A. A person or his agent in lawful possession or control of premises is justified in threatening to use deadly physical force or in threatening

or using physical force against another when and to the extent that a reasonable person would believe it immediately necessary to prevent or terminate the commission or attempted commission of a criminal trespass by the other person in or upon the premises.

B. A person may use deadly physical force under subsection A only in the defense of himself or third persons as described in sections 13-405 and 13-406.

C. In this section, "premises" means any real property and any structure, movable or immovable, permanent or temporary, adapted for both human residence and lodging whether occupied or not.

A.R.S. § 13-408: Use of Physical Force in Defense of Property to Prevent Theft or Criminal Damage

A person is justified in using physical force against another when and to the extent that a reasonable person would believe it necessary to prevent what a reasonable person would believe is an attempt or commission by the other person of theft or criminal damage involving tangible movable property under his possession or control, but such person may use deadly physical force under these circumstances as provided in sections 13-405, 13-406 and 13-411.

A.R.S. § 13-409: Use of Physical Force in Law Enforcement

A person is justified in threatening or using physical force against another if in making or assisting in making an arrest or detention or in preventing or assisting in preventing the escape after arrest or detention of that other person, such person uses or threatens to use physical force and all of the following exist:

1. A reasonable person would believe that such force is immediately necessary to effect the arrest or detention or prevent the escape.
2. Such person makes known the purpose of the arrest or detention or believes that it is otherwise known or cannot reasonably be made known to the person to be arrested or detained.
3. A reasonable person would believe the arrest or detention to be lawful.

- Note: *State v. Flores*, 227 Ariz. 509 (App. 2011)
 - Defendant charged and convicted with resisting arrest after bench trial; he appealed and his counsel filed an *Anders* brief.
 - On appeal, court of appeals considered "whether the police applied unreasonable force or unlawfully entered (defendant)'s residence."

- o Court of Appeals stated that this statute "dictates the appropriate amount of force which may be applied by an officer during an arrest," and requires that a reasonable person would believe the arrest to be lawful and that the force used must seem immediately necessary to effect arrest.
 - o BUT this is a justification defense that contemplates the officer, or someone assisting the officer, is the defendant. This statute does not measure whether *any* officer in *any* case is applying an appropriate amount of force
- Instead, if a claim of excessive force by police is raised in a self-defense case, see the RAJI Use Note accompanying self-defense instruction:
 - o "In cases asserting a defense based upon excessive force by police, the court may also choose to instruct on "arrest" and "method of arrest by officer" with and without a warrant as defined in A.R.S. §§ 13-3881, -3887, and -3888

A.R.S. § 13-410: Use of Deadly Physical Force in Law Enforcement

A. The threatened use of deadly physical force by a person against another is justified pursuant to section 13-409 only if a reasonable person effecting the arrest or preventing the escape would believe the suspect or escapee is:

1. Actually resisting the discharge of a legal duty with deadly physical force or with the apparent capacity to use deadly physical force; or
2. A felon who has escaped from lawful confinement; or
3. A felon who is fleeing from justice or resisting arrest with physical force.

B. The use of deadly physical force by a person other than a peace officer against another is justified pursuant to section 13-409 only if a reasonable person effecting the arrest or preventing the escape would believe the suspect or escapee is actually resisting the discharge of a legal duty with physical force or with the apparent capacity to use deadly physical force.

C. The use of deadly force by a peace officer against another is justified pursuant to section 13-409 only when the peace officer reasonably believes that it is necessary:

1. To defend himself or a third person from what the peace officer reasonably believes to be the use or imminent use of deadly physical force.
2. To effect an arrest or prevent the escape from custody of a person whom the peace officer reasonably believes:

(a) Has committed, attempted to commit, is committing or is attempting to commit a felony involving the use or a threatened use of a deadly weapon.

(b) Is attempting to escape by use of a deadly weapon.

(c) Through past or present conduct of the person which is known by the peace officer that the person is likely to endanger human life or inflict serious bodily injury to another unless apprehended without delay.

(d) Is necessary to lawfully suppress a riot if the person or another person participating in the riot is armed with a deadly weapon.

D. Notwithstanding any other provisions of this chapter, a peace officer is justified in threatening to use deadly physical force when and to the extent a reasonable officer believes it necessary to protect himself against another's potential use of physical force or deadly physical force.

A.R.S. § 13-411: Use of Force in Crime Prevention

A. A person is justified in threatening or using both physical force and deadly physical force against another if and to the extent the person reasonably believes that physical force or deadly physical force is immediately necessary to prevent the other's commission of arson of an occupied structure under section 13-1704, burglary in the second or first degree under section 13-1507 or 13-1508, kidnapping under section 13-1304, manslaughter under section 13-1103, second or first degree murder under section 13-1104 or 13-1105, sexual conduct with a minor under section 13-1405, sexual assault under section 13-1406, child molestation under section 13-1410, armed robbery under section 13-1904 or **aggravated assault** under section 13-1204, subsection A, paragraphs 1 and 2.

B. There is no duty to retreat before threatening or using physical force or deadly physical force justified by subsection A of this section.

C. A person is presumed to be acting reasonably for the purposes of this section if the person is acting to prevent what the person reasonably believes is the imminent or actual commission of any of the offenses listed in subsection A of this section. (added in 1983; underlined portion added in 2011)

D. This section includes the use or threatened use of physical force or deadly physical force in a person's home, residence, place of business, land the person owns or leases, conveyance of any kind, or any other place in this state where a person has a right to be. (added in 2006)

- *State v. Korzep*, 165 Ariz. 490 (1990)
 - Three general differences between crime prevention justification defense and other justification defenses:
 - (1) Imposes “no duty to retreat before using deadly physical force”
 - (2) presumption in subsection (C) is not available for other defenses
 - (3) “the only limitation upon the use of deadly force is the reasonableness of the response,” but other defenses “require an immediate threat to personal safety before deadly force may be used”

- *State v. Garfield*, 208 Ariz. 275, ¶15 (App. 2004)
 - Crime prevention is a “unique defense.”
 - Held: failure to give this instruction was not harmless even though the trial court instructed jury on defense of a third person

- But crime prevention defense is no longer unique for the reasons described in *Korzep*:
 - In 2010, Legislature added “no duty to retreat” to self-defense statute.
 - Presumption of reasonableness:
 - is “rebuttable” and “vanishes when the State provides contradictory evidence.” *State v. Arellano*, 213 Ariz. 474, ¶¶11–13 (2006).
 - is no longer significant in light of Legislature’s amendment of A.R.S. § 13–205 in 2006. This offers defendants with a *greater* presumption of reasonableness because State cannot merely contradict evidence of justification, but must disprove justification beyond a reasonable doubt.
 - was changed in 2011 from a subjective standard to an objective one, which resulted in another parallel to self-defense statute, because self-defense also requires *reasonable* use of deadly physical force.

- Yet Court of Appeals continues to rely on *Korzep* and *Garfield* to conclude that refusal to instruct on crime-prevention when requested amounts to reversible error:
 - *State v. Martin* (Ariz. App. 2014) (mem. dec.) (review denied)
 - Defendant fatally shot neighbor from 47 feet away with a shotgun when neighbor was walking up defendant’s driveway, and defendant claimed he did so because he thought he saw a “bulge” under his neighbor’s shirt and thought his neighbor looked “determined, like nothing was

going to stop him," as he advanced toward defendant's house

- Jurors instructed on self-defense and defense of premises
- *State v. Benson* (Ariz. App. 2014) (mem. dec.) (review denied)
 - Defendant fatally stabbed victim in defendant's girlfriend's residence; claimed at trial that he believed victim would have killed or severely injured him if he did not take immediate action; he would have his "head beaten" or "tore off something stuck through my eye" and victim would hurt him "until he couldn't."
 - Jurors instructed on self-defense
- *State v. Brothers* (Ariz. App. 2012) (mem. dec.)
 - Defendant convicted of second-degree murder for killing his roommate in their apartment; he claimed his roommate stated, "I'm going to cut your f-ing throat"
 - Jurors instructed on self-defense
- *State v. Hellard* (Ariz. App. 2012) (mem. dec.) (review denied)
 - Defendant convicted of manslaughter for fatally shooting his wife during a physical struggle in their home; he claimed at trial that victim was reaching for a gun and that he needed to take it from her because he was worried about her and "the baby getting hurt"
 - Jurors instructed on self-defense and defense of a third person
- *State v. Almeida* (opinion) (review denied)
 - Road rage case
 - The Arizona Supreme Court's "precedents suggest that the denial of a properly requested jury instruction under § 13-411 will usually be reversible error."
- If defendant does *not* request the instruction, however, court of appeals has consistently held that the lack of crime prevention instruction does not amount to fundamental error because other justification instructions given adequately covered the crime prevention defense

A.R.S. § 13-412: Duress

A. Conduct which would otherwise constitute an offense is justified if a reasonable person would believe that he was compelled to engage in the proscribed conduct by the threat or use of immediate physical force against his person or the person of another which resulted or could result in serious physical injury which a reasonable person in the situation would not have resisted.

B. The defense provided by subsection A is unavailable if the person intentionally, knowingly or recklessly placed himself in a situation in which it was probable that he would be subjected to duress.

C. The defense provided by subsection A is unavailable for offenses involving homicide or serious physical injury.

A.R.S. § 13-415: Defendant who has been a victim of domestic violence (added in 1992)

If there have been past acts of domestic violence as defined in section 13-3601, subsection A against the defendant by the victim, the state of mind of a reasonable person under sections 13-404, 13-405 and 13-406 shall be determined from the perspective of a reasonable person who has been a victim of those past acts of domestic violence.

A.R.S. § 13-417: Necessity

A. Conduct that would otherwise constitute an offense is justified if a reasonable person was compelled to engage in the proscribed conduct and the person had no reasonable alternative to avoid imminent public or private injury greater than the injury that might reasonably result from the person's own conduct.

B. An accused person may not assert the defense under subsection A if the person intentionally, knowingly or recklessly placed himself in the situation in which it was probable that the person would have to engage in the proscribed conduct.

C. An accused person may not assert the defense under subsection A for offenses involving homicide or serious physical injury.

A.R.S. § 13-418: Use of force in residential structure or occupied vehicles (added in 2006)

A. Notwithstanding any other provision of this chapter, a person is justified in threatening to use or using physical force or deadly physical force against another person if the person reasonably believes himself or another person to be in imminent peril of death or serious physical injury and the person against whom the physical force or deadly physical force is threatened or used was in the process of unlawfully or forcefully entering, or had unlawfully or forcefully entered, a residential structure or occupied vehicle, or had removed or was attempting to remove another person against the other person's will from the residential structure or occupied vehicle.

B. A person has no duty to retreat before threatening or using physical force or deadly physical force pursuant to this section.

C. For the purposes of this section:

1. "Residential structure" has the same meaning prescribed in section 13-1501.

2. "Vehicle" means a conveyance of any kind, whether or not motorized, that is designed to transport persons or property.

A.R.S. § 13-419: Presumptions for defense in § 13-418 for occupied vehicles or residential structures (added in 2006, amended in 2011)

A. A person is presumed to reasonably believe that the threat or use of physical force or deadly force is immediately necessary for the purposes of sections 13-404 through 13-408, section 13-418 and section 13-421 if the person knows or has reason to believe that the person against whom physical force or deadly force is threatened or used is unlawfully or forcefully entering or has unlawfully or forcefully entered and is present in the person's residential structure or occupied vehicle.

B. For the purposes of sections 13-404 through 13-408, section 13-418 and section 13-421, a person who is unlawfully or forcefully entering or who has unlawfully or forcefully entered and is present in a residential structure or occupied vehicle is presumed to pose an imminent threat of unlawful deadly harm to any person who is in the residential structure or occupied vehicle.

C. The presumptions in subsections A and B of this section do not apply if:

1. The person against whom physical force or deadly physical force was threatened or used has the right to be in or is a lawful resident of the residential structure or occupied vehicle, including an owner, lessee, invitee or titleholder, and an order of protection or injunction against harassment has not been filed against that person.

2. The person against whom physical force or deadly physical force was threatened or used is the parent or grandparent, or has legal custody or guardianship, of a child or grandchild sought to be removed from the residential structure or occupied vehicle.

3. The person who threatens or uses physical force or deadly physical force is engaged in an unlawful activity or is using the residential structure or occupied vehicle to further an unlawful activity.

4. The person against whom physical force or deadly physical force was threatened or used is a law enforcement officer who enters or attempts to enter a residential structure or occupied vehicle in the performance of official duties.

D. For the purposes of this section:

1. "Residential structure" has the same meaning prescribed in section 13-1501.
2. "Vehicle" means a conveyance of any kind, whether or not motorized, that is designed to transport persons or property.

A.R.S. § 13-421: Defensive Display of a Firearm (added in 2009)

- A. The defensive display of a firearm by a person against another is justified when and to the extent a reasonable person would believe that physical force is immediately necessary to protect himself against the use or attempted use of unlawful physical force or deadly physical force.
 - B. This section does not apply to a person who:
 1. Intentionally provokes another person to use or attempt to use unlawful physical force.
 2. **Uses a firearm during the commission of a serious offense** as defined in section 13-706 or **violent crime** as defined in section 13-901.03.
 - C. This section does not require the defensive display of a firearm before the use of physical force or the threat of physical force by a person who is otherwise justified in the use or threatened use of physical force.
 - D. For the purposes of this section, "defensive display of a firearm" includes:
 1. Verbally informing another person that the person possesses or has available a firearm.
 2. **Exposing or displaying a firearm** in a manner that a reasonable person would understand was meant to protect the person against another's use or attempted use of unlawful physical force or deadly physical force.
 3. Placing the person's hand on a firearm while the firearm is contained in a pocket, purse or other means of containment or transport.
- But "serious offense" under § 13-706 is defined as follows:
 1. "Serious offense" means any of the following offenses if committed in this state or any offense committed outside this state that if committed in this state would constitute one of the following offenses:
 - (a) First degree murder.
 - (b) Second degree murder.
 - (c) Manslaughter.

(d) Aggravated assault resulting in serious physical injury or involving the discharge, use or **threatening exhibition** of a deadly weapon or dangerous instrument.

(e) Sexual assault.

(f) Any dangerous crime against children.

(g) Arson of an occupied structure.

(h) Armed robbery.

(i) Burglary in the first degree.

(j) Kidnapping.

(k) Sexual conduct with a minor under fifteen years of age.

(l) Child prostitution.

- Note: *State v. Morris* (App. 2015) (mem. dec.)
 - Held (under fundamental error review): because defendant was *charged* with aggravated assault committed by *discharging* a deadly weapon, the defensive *display* of a firearm defense does not apply and defendant was not entitled to it.
 - But this is a case where “the gun went off” during a struggle, and under defendant’s version of facts, he did not discharge the weapon.