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SELF-DEFENSE

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A number of affirmative defenses sanction the use of force. Self defense is the most common and the most important of these defenses. Related defenses include defense of others, defense of a dwelling, and defense of property. Generally, these defenses are controlled by the common law. Burdens of proof, however, are specified by statute. In addition, the legislature has enacted a provision on the admissibility of evidence of the battered woman syndrome in self-defense cases.

ELEMENTS OF SELF-DEFENSE

A claim of self-defense is typically raised in crimes against the person — murder, manslaughter, attempted murder, aggravated assault, and assault. See also United States v. Panter, 688 F.2d 268 (5th Cir. 1982) (defense of self-protection valid where convicted felon who reasonably feared for his safety took possession of a firearm and was charged with a statute making it a crime for a convicted felon to possess a firearm).

The basis of self-defense is the perceived necessity of the use of force to protect oneself. An 1876 Ohio case observes that "the taking of life in defense of one's person cannot be either justified or excused, except on the ground of necessity; and that such necessity must be imminent at the time; and . . . no man can avail himself of such necessity if he brings it upon himself." Erwin v. State, 29 Ohio St. 186, 199 (1876).

The genesis of the law of self-defense in Ohio can be traced back to the 19th Century. In Marts v. State, 26 Ohio St. 162, 167-68 (1875), the Ohio Supreme Court established the requirements for self-defense:

> Homicide is justifiable on the ground of self-defense, where the slayer, in the careful and proper use of his faculties, bona fide believes, and has reasonable ground to believe, that he is in imminent danger of death or great bodily harm, and that his only means of escape from such danger will be by taking the life of his assailant, although in fact he is mistaken as to the existence or imminence of the danger. The fact of the existence of such danger is not an indispensable requirement.

Over 100 years later, in State v. Melchior, 56 Ohio St.2d 15, 20-21, 381 N.E.2d 195 (1978), the Court again set forth the elements of self-defense:

> To establish self-defense, the following elements must be shown: (1) the slayer was not at fault in creating the situation giving rise to the affray; (2) the slayer has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) the slayer must not have violated any duty to retreat or avoid the danger.

The Court has consistently adhered to the *Melchior* statement of the elements of self-defense in later cases. E.g., State v. Williford, 49 Ohio St.3d 247, 249, 551 N.E.2d 1279 (1990); State v. Jackson, 22 Ohio St.3d 281, 283, 490 N.E.2d 893 (1986), cert denied, 480 U.S. 917 (1987); State v. Robbins, 58 Ohio St.2d 74, 80, 388 N.E.2d 755 (1979).

The elements of self-defense specified in *Melchior,* however, differ from the elements in *Marts* in some important respects. The second element of the *Melchoir* definition does not require that the defendant's belief be "reasonable," as does *Marts.* Similarly, *Marts* fails to specify a duty to retreat, which is the third element of *Melchoir.* These differences are discussed below.

NONDEADLY FORCE

A person who is without fault may defend himself with the use of nondeadly force. 1 LaFave & Scott, Substantive Criminal Law § 5.7(b), at 651 (1986). The degree of force depends on what appears reasonably necessary to protect that person from the imminent use of unlawful force. "Therefore, even when faced with less than impending death or great physical harm, one may use reasonable force in order to protect oneself." State v. Fox, 36 Ohio App.3d 78, 80, 520 N.E.2d 1390 (1987). See also City of Akron v. Dokes, 31 Ohio App.3d 24, 507 N.E.2d 1158 (1986) ("[O]ne may use such force as the circumstances require to protect oneself against such danger as one has good reason to apprehend. Thus, even when faced with less than impending death or great physical harm, one may use reasonable force in order to protect oneself against a perceived danger.");

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State v. Morris, 8 Ohio App.3d 12, 19, 455 N.E.2d 1352 (1982) ("Defense counsel argued self-defense for each of the assaults, and the trial judge expressly acquitted defendant of . . . the charge relating to the first assaultive involvement on that ground."); State v. McLeod, 82 Ohio App. 155, 157, 80 N.E.2d 699 (1948) (assault & battery case) ("In general, every man has the right to defend himself and his property by the use of such force as circumstances require to protect himself against such danger as he has good reason to apprehend.").

Thus, in a simple assault case, an accused is justified in using force "against the imminent use of unlawful force as long as it was not likely to cause death or great bodily harm." Columbus v. Dawson, 33 Ohio App.3d 141, 142, 514 N.E.2d 908 (1986).

DEADLY FORCE

The use of deadly force, of course, requires greater justification. The defendant must reasonably believe that he is in danger of death or great bodily injury. In State v. Stewart, 1 Ohio St. 66, 75 (1852), the Ohio Supreme Court rejected the view that deadly force could be used to repel any attack, even a nonlethal one: "If this is so, a man upon whom an ordinary assault and battery is committed may pierce his assailant with a sword, or knock him down with an axe, for each of these is a weapon 'sufficient to resist the force employed.' We do not think such is the law." In short, a person may generally use deadly force to repel deadly force. However, deadly force may be justified even when the assailant is unarmed — for example, a small woman may be justified in using deadly force against an unarmed attacker who is much larger. 1 LaFave & Scott, § 5.7(b), at 653 ("[A]ccount must be taken of the respective sizes and sex of the assailant and defendant, of the presence of multiple assailants, and the especially violent nature of the unarmed attack.").

The key is the reasonableness of the defender's conduct: "[I]t is only when one uses a greater degree of force than is necessary under all the circumstances that it is not justifiable on the ground of self-defense . . . . The law does not require of the defendant any nice distinction as to the least amount of force necessary, but whether the force used was excessive is a question for the trier of facts." State v. McLeod, 82 Ohio App. 155, 157, 80 N.E.2d 699 (1948) (assault & battery case).

REASONABLE BELIEF IN NECESSITY OF FORCE

The majority rule in this country requires the defendant to have an honest and *reasonable* belief in the existence and imminence of the danger. As the United States Supreme Court commented, "[T]he question for the jury was whether, without fleeing from his adversary, he had, at the moment he struck the deceased, reasonable grounds to believe, and in good faith believed, that he could not save his life or protect himself from great bodily harm except by doing what he did." Beard v. United States, 158 U.S. 550, 560 (1895). In other words, it is not enough that the belief be held in good faith (a subjective belief); the belief also must be reasonable, which incorporates an objective standard. "[T]he case law and statutory law on self-defense generally require that the defendant's belief in the necessity of using force to prevent harm to himself be a reasonable one, so that one who honestly though unreasonably believes in the necessity of using force in self-protection loses the defense." 1 LaFave & Scott, § 5.7(c), at 653-54.

Subjective test

The drafters of the Model Penal Code, however, disagreed with the majority view; they required only an honest (subjective) belief. Model Penal Code § 3.04(1). The Code's drafters believed that a defendant who had an honest but mistaken belief (even an unreasonable one) should not be held liable for murder, although the defendant might be guilty of a lesser offense, such as manslaughter.

> Compare, for example, the actor who purposely kills in order to reap financial reward and the actor who purposely kills while believing in the existence of circumstances that would, if they actually existed, exonerate on self-defense grounds. If the second actor was mistaken — if the circumstances were not in fact as he believed them to be — it is unjust to view him as having the same level of culpability as the first actor. It is unjust to put him at that level even if he was negligent [unreasonable] or reckless in forming his belief, though to be sure in that case it would be appropriate to view him as culpable . . . . If the actor was reckless or negligent as to the existence of circumstances that would justify his conduct, he should then be subject to conviction of a crime for which recklessness or negligence, as the case may be, is otherwise sufficient to establish culpability. American Law Institute, Model Penal Code and Commentaries 36 (1985).

Few jurisdictions follow this purely subjective approach, although some other jurisdictions recognize what is described as "imperfect self-defense." 1 LaFave & Scott, § 5.7(c), at 655. Under this concept, an unreasonable but sincere (good faith) belief in the necessity of the use of deadly force mitigates the crime from murder to manslaughter. 1 LaFave & Scott, § 5.7(i), at 663.

Ohio Rule. The early Ohio cases followed the objective rule. In Marts v. State, 26 Ohio St. 162, 167 (1875), the Ohio Supreme Court held that the defender must have a "reasonable ground to believe" that he is in danger. Ohio Jury Instruction 411.33 reflects this position.

Inexplicably, the Ohio Supreme Court has omitted the reasonableness requirement in outlining the elements of self-defense in recent cases. These cases state the requirement as follows: "the slayer had a bona fide belief that he was in imminent danger of death or great bodily harm." State v. Jackson, 22 Ohio St.3d 281, 282, 490 N.E.2d 893 (1986), cert. denied, 480 U.S. 917 (1987). Accord State v. Williford, 49 Ohio St.3d 247, 249, 551 N.E.2d 1279 (1990); State v. Robbins, 58 Ohio St.2d 74, 80, 388 N.E.2d 755 (1979); State v. Melchior, 56 Ohio St.2d 15, 21, 381 N.E.2d 195 (1978).

Accordingly, in State v. Thomas, 13 Ohio App.3d 211, 213 468 N.E.2d 763 (1983), the appellate court wrote that "the test is a subjective one, relating to the particular defendant seeking to prove the defense." In that case the court reversed the murder conviction of a woman because the testimony of her psychologist regarding her paranoid personality was erroneously excluded at trial. The court commented:

> [I]t is not difficult to perceive that a paranoid personality, who viewed everything negatively, might interpret the danger presented by an advancing individual differently than an ordinary person would interpret such danger. To that extent, some of the testimony would be an aid to the jury in regard to the determination it was required to make regarding this particular defendant's mind.

Citing *Thomas,* the Supreme Court in State v. Koss, 49 Ohio St.3d 213, 215, 551 N.E.2d 970 (1990), wrote: "Thus, Ohio has adopted a subjective test in determining whether a particular defendant properly acted in self defense." The Court, however, went on to say that the trial judge had properly instructed the jury. That instruction commenced with the phrase: "In determining whether the Defendant had reasonable grounds for an honest belief that she was in imminent danger." Id. at 216. The term "reasonable grounds" is the key aspect of an objective standard. In addition, *Marts* which adopted the objective approach is often cited approvingly in recent Supreme Court cases, as is State v. Champion, 109 Ohio St. 281, 283, 142 N.E. 141 (1924). In *Champion* the Court wrote that the defendant "must have 'reasonable grounds' for such bona fide belief."

Recently, the Court once again cited the subjective factor but then added the following sentence: "The defendant is privileged to use that force which is reasonably necessary to repel the attack." State v. Williford, 49 Ohio St.3d 247, 249, 551 N.E.2d 1279 (1990).

The confusion on this issue may result from failing to recognize a middle ground between a purely subjective state of mind and a totally objective (reasonable person) standard. The intermediate position would require evaluation of the reasonableness of the belief from the defendant's point of view. As one court has written, the test is "not reasonable as to a reasonable man, but reasonable as to the slayer." State v. Reid, 3 Ohio App.2d 215, 223, 210 N.E.2d 142 (1965). This would appear to be the Supreme Court's position in State v. Sheets, 115 Ohio St. 308, 310, 152 N.E. 664 (1926), in which an instruction concerning "any man of ordinary prudence" was found to be defective. The *Sheets* Court noted: "In the *Marts* case . . . [the] self-defense justification is placed on the grounds of the bona fides of defendant's belief, and reasonableness therefor, and whether, under the circumstances, he exercised a careful and proper use of his own faculties." Thus, a later court interpreting *Sheets* wrote:

> [T]he conduct of any individual is to be measured by that individual's equipment mentally and physically. He may act in self-defense, not only when a reasonable person would so act, but when one with the particular qualities that the individual himself has would so do. A nervous, timid, easily frightened individual is not measured by the same standard that a stronger, calmer, and braver man might be. Nelson v. State, 42 Ohio App. 252, 254, 181 N.E. 448 (1932) (The defendant was 60 years of age and quite infirm).

See also State v. Cope, 78 Ohio App. 429, 437, 67 N.E.2d 912 (1946) ("The true test is whether the particular person on trial believed and had reasonable grounds to believe that he was in danger.").

This intermediate position is perhaps best captured in Ohio Jury Instruction 411.33(2):

> In determining whether the defendant had reasonable grounds for an honest belief that he was in imminent danger, you must put yourselves in the position of this defendant, with his characteristics, his knowledge or lack of knowledge, and under the circumstances and conditions that surrounded him at that time. You must consider the conduct of [the victim] and determine if his acts and words caused the defendant to reasonably and honestly believe that he was about to be killed or to receive great bodily injury.

There are, however, limitations on this approach. For example, voluntary intoxication is not recognized as a legitimate consideration in this context. "One who because of voluntary intoxication thinks that he is in danger of imminent attack, though a sober man would not have thought so, does not have the reasonable belief which the law requires." 1 LaFave & Scott, § 5.7(c), at 654.

EVIDENCE ISSUES: STATE OF MIND

Threats

In raising a self-defense claim, "the defendant may introduce proof of the victim's threats against her in order to establish her belief that she was in danger at the time of the killing." State v. Randle, 69 Ohio App.2d 71, 73, 430 N.E.2d 951 (1980) ("Inherent within the right to offer evidence of threats of violence putting the defendant in fear of her life is proof of the reason for the threats to be made.").

Communicated character. In addition to threats, evidence of the victim's violent character is relevant to show that the accused reasonably believed that he was in danger of death or grievous bodily injury:

> On the trial of an indictment for murder, the prisoner may, for the purpose of showing that the homicide was justifiable on the ground of self-defense, prove that the deceased was a person of violent, vicious, and dangerous character, and that character was known to the prisoner at the time of the recontre between them. Marts v. State, 26 Ohio St. 162 (1875) (syllabus, para. 1).

Accord McGaw v. State, 123 Ohio St. 196, 201, 174 N.E. 741 (1931) (approving *Marts*); State v. Roderick, 77 Ohio St. 301, 307, 82 N.E. 1082 (1907) ("It is conceded that in cases of self-defense it is competent for the defendant to prove the violent and dangerous character of the deceased at the time of the commission of the crime, if such character was then known to him."); Upthegrove v. State, 37 Ohio St. 662, 662 (1882) (syllabus) ("[I]t is competent for the defense to prove that the general reputation of the prosecuting witness was that of a violent and dangerous man, and that such general reputation was known to the accused at the time of the assault, as tending to support the plea of self-defense.").

The law is summarized in State v. Smith, 10 Ohio App.3d 99, 101 460 N.E.2d 693 (1983):

> The deceased's admission to defendant that he had killed a person, her personal knowledge of violent attacks by the deceased upon others, and her knowledge through hearsay that the deceased had committed an unprovoked act of violence upon another, were all evidence relevant to defendant's belief that she was in imminent danger of death or great bodily harm and were admissible to prove her state of mind.

Evidence concerning the victim's violent character (reputation, opinion, or specific acts) is admissible if known to the accused. See State v. Carlson, 31 Ohio App.3d 72, 73, 508 N.E.2d 999 (1986) ("A defendant, when arguing self-defense, may testify about specific instances of the victim's prior conduct in order to establish the defendant's state of mind. These events . . . tend to show why the defendant believed that victim would kill or severely injure him."); 1 Giannelli & Snyder, Ohio Evidence § 404.6 (3d ed 1996).

Character evidence may also be admissible for a different purpose — to establish the victim as the first aggressor, a subject discussed later in this article.

MISTAKEN BELIEF

The necessity perceived by the defender need not be actual; it is sufficient that the defender demonstrate reasonable grounds for this perception. "When his belief is reasonable, however, he may be mistaken in his belief and still have the defense." 1 LaFave & Scott, § 5.7(c), at 654. As an early Ohio case observed:

> It is not . . . necessary that the danger should prove real, or in fact exist, for, whether real or apparent, if the circumstances are such as to induce a belief, reasonable and well grounded, that life is in peril, or that grievous bodily harm is impending, the party threatened with the danger may act upon appearances and slay his assailant. Darling v. Williams, 35 Ohio St. 58, 62-63 (1898).

See also Marcoguiseppe v. State, 114 Ohio St. 299, 301, 151 N.E. 182 (1926) (Self-defense is a valid defense "although in fact he is mistaken as to the existence or imminence of the danger."); Marts v. State, 26 Ohio St. 162, 167-68 (1875) ("Homicide is justifiable on the ground of self defense ... although in fact he is mistaken as to the existence or imminence of the danger. The fact of the existence of such danger is not an indispensable requirement.").

This position is often justified by citing Justice Holmes' famous expression: "Detached reflection cannot be demanded in the presence of an uplifted knife." Brown v. United States, 256 U.S. 335, 343 (1921).

ACCIDENTAL KILLING OF A THIRD PARTY

A person who is exercising the right to self-defense is not criminally responsible for the accidental injury to a third party. See 1 LaFave & Scott, § 5.7(g). The test for culpability is "whether the killing would have been justifiable if the accused had killed the person whom he intended to kill, as the unintended act derives its character from the intended." State v. Clifton, 32 Ohio App.2d 284, 287, 290 N.E.2d 921 (1972) ("[T]he court erred in refusing to include an instruction that if the jury found that the accused was acting in self-defense when he fired the shot that killed James Hargrove, he would be entitled to acquittal even though Hargrove was not the assailant.").

IMMINENCE REQUIREMENT

A claim of self-defense requires an imminent attack. See Marts v. State, 26 Ohio St. 162 (1875) (syllabus, para. 2) ("Homicide is justifiable on the ground of self-defense, where the slayer . . ., in the careful and proper use of his faculties, bona fide believes, and has reasonable ground to believe, that he is in imminent danger of death or great bodily harm."); Erwin v. State, 29 Ohio St. 186, 199 (1876) ("such necessity must be imminent at the time"); Stewart v. State, 1 Ohio St. 66, 73 (1852) ("We find no evidence tending to prove that Stewart, when he slew Dotey, was in danger of loss of life, or limb, or of great bodily harm, or that he apprehended such danger.").

Unless the threat is imminent, the necessity for resorting to force is absent. For example, in State v. Rogers, 43 Ohio St.2d 28, 31, 330 N.E.2d 674 (1975), cert. denied, 423 U.S. 1061 (1976), the Court held that a self-defense instruction was not required because the record was devoid of any evidence "that the decedent committed an overt act by which appellant could reasonably, and in good faith, believe that he was in imminent danger of death or great bodily harm. Rather, appellant . . . failed to present evidence that he feared assault from decedent."

Generally, the reasonable ground requirement is not satisfied by threats of future harm as distinguished from imminent harm. Also, "[v]ile or abusive language, or verbal threats, no matter how provocative, do not justify an assault or the use of a deadly weapon." Ohio Jury Instructions § 411.33(1).

Battered Woman Syndrome

The battered woman syndrome (BWS) describes a pattern of violence inflicted on a woman by her mate. See generally 1 Giannelli & Imwinkelried, Scientific Evidence ch. 9 (2d ed. 1993). Dr. Lenore Walker, a leading researcher in this field, describes a battered woman as follows:

> A battered woman is a woman who is repeatedly subjected to any forceful physical or psychological behavior by a man in order to coerce her to do something he wants her to do without any concern for her rights. Battered women include wives or women in any form of intimate relationships with men. Furthermore, in order to be classified as a battered woman, the couple must go through the battering cycle at least twice. Any woman may find herself in an abusive relationship with a man once. If it occurs a second time, and she remains in the situation, she is defined as a battered woman. Walker, The Battered Woman xv (1979).

The violence associated with this type of relationship is neither constant nor random. Instead, it follows a pattern. Dr. Walker has identified a three stage cycle of violence. The first stage is the "tension building" phase, during which small abusive episodes occur. These episodes gradually escalate over a period of time. The tension continues to build until the second stage — the "acute battering" phase — erupts. During this phase, in which most injuries occur, the battering is out of control. Psychological abuse in the form of threats of future harm is also prevalent. The third phase is a calm loving period in which the batterer is contrite, seeks forgiveness, and promises to refrain from future violence. This phase provides a positive reinforcement for the woman to continue the relationship in the hope that the violent behavio will not recur. The cycle then repeats itself. Id. at 65-70.

In State v. Thomas, 66 Ohio St.2d 518, 521-22, 423 N.E.2d 137 (1981), the Ohio Supreme Court, one of the firs courts to consider the issue, rejected BWS evidence.

> Expert testimony on the "battered wife syndrome" by a psychiatric social worker to support defendant's claim of self-defense is inadmissible herein because (1) it is irrelevant and immaterial to the issue of whether defendant acted in self-defense at the time of the shooting; (2) the subject of the expert testimony is within the understanding of the jury; (3) the "battered wife syndrome" is not sufficiently developed, as a matter of commonly accepted scientific knowledge, to warrant testimony under the guise of expertise; and (4) its prejudicial impact outweighs its probative value.

Most courts in other jurisdictions that considered the issue after *Thomas* adopted the opposing view. According to one court, "[o]nly by understanding these unique pressures that force battered women to remain with their mates, despite their long-standing and reasonable fear of severe bodily harm and the isolation that being a battered woman create: can a battered woman's state of mind be accurately and fairly understood." State v. Kelly, 478 A.2d 364, 372 (N.J. 1984). Another court wrote:

> [T]he theory underlying the battered woman's syn-

drome has indeed passed beyond the experimental stage and gained a substantial enough scientific acceptance to warrant admissibility. . . . [N]umerous articles and books have been published about the battered woman's syndrome; and recent findings of researchers in the field have confirmed its presence and thereby indicated that the scientific community accepts its underlying premises. People v. Torres, 488 N.Y.S.2d 358, 363 (Sup. Ct. 1985).

In State v. Koss, 49 Ohio St.3d 213, 217, 551 N.E.2d 970 (1990), the Supreme Court reversed *Thomas:* "We believe that the battered woman syndrome has gained substantial scientific acceptance to warrant admissibility." The Court noted that the "admission of expert testimony regarding the battered woman syndrome does not establish a new defense or justification. Rather, it is to assist the trier of fact in determining whether the defendant acted out of an honest belief that she was in imminent danger of death or great bodily harm and that the use of such force was her only means of escape."

Adopted in 1990, R.C. Section 2901.06 provides for the admission of evidence of the battered woman syndrome. Subdivision (B) provides that a self-defense claim may be supported by "expert testimony of the 'battered woman syndrome' and expert testimony that the person suffered from that syndrome as evidence to establish the requisite belief of an imminent danger of death or great bodily harm." See also R.C. 2945.392 (admissibility of battered woman syndrome evidence in insanity cases).

DUTY TO RETREAT

A majority of American jurisdictions do not require a defender to retreat, even if he can do so safely, before resorting to the use of deadly force. 1 LaFave & Scott, § 5.7(f), at 659. A strong minority, however, impose such a requirement, often stated as the duty to "retreat to the wall." The rationale underlying the retreat requirement was succinctly stated by the drafters of the Model Penal Code:

> It rests, of course, upon the view that the protection of life has such a high place in a proper scheme of social values that the law should not permit conduct that places life in jeopardy, when the necessity for doing so can be avoided by the sacrifice of the much smaller value that inheres in standing up to an aggression. To the argument that retreat is cowardly and dishonorable, the answer embraced has been that of Beale: "A really honorable man, a man of truly refined and elevated feeling, would perhaps always regret the apparent cowardice of a retreat, but he would regret ten times more, after the excitement of the contest was past, the thought that he had the blood of a fellow-being on his hands." American Law Institute, Model Penal Code and Commentaries 54 (1985).

The early Ohio cases did not appear to require retreat. In Erwin v. State, 29 Ohio St. 186, 99-100 (1876), the Ohio Supreme Court wrote:

> Does the law hold a man who is violently and feloniously assaulted responsible for having brought such necessity upon himself, on the sole ground that he failed to fly from his assailant when he might have done so? . . . [A] true man, who is without fault, is not obliged to fly from an assailant, who, by violence or surprise maliciously seeks to take his life or do him enormous bodily harm.

See also Graham v. State, 98 Ohio St. 77, 79, 120 N.E. 232 (1918) ("[I]f the defendant did not provoke the assault, but while in the lawful pursuit of his business was suddenly and violently assaulted with a deadly weapon and placed in danger of loss of life or great bodily harm, under the current modern authority he was not required to retreat.").

By 1975, however, the retreat rule was cited as an element of self defense. In State v. Melchior, 56 Ohio St.2d 15, 21, 381 N.E.2d 195 (1978), the Court set forth a retreat requirement as an element of self-defense: "the slayer must not have violated any duty to retreat or avoid the danger." This requirement was repeated in State v. Robbins, 58 Ohio St.2d 74, 80, 388 N.E.2d 755 (1979) ("[A]ppellant had many opportunities to retreat and avoid danger, which he failed to do."), and applied in State v. Jackson, 22 Ohio St.3d 281, 283-84, 490 N.E.2d 893 (1986), cert. denied, 480 U.S. 917 (1987), where the Court stated:

> [A]ppellant's proposed instruction states in essence that as long as a person is in any place where he has a right to be, there is no duty to retreat from an attack. . . . [U]nder appellant's instruction any one in a public place, or any invitee or licensee, would be in a place where he has a right to be and would thus have no duty to retreat. This instruction is clearly an overbroad and incorrect statement of law on the duty to retreat as set forth in Robbins . . . which incorporates exceptions to the duty to retreat only when one is in his home or business.

See also Ohio Jury Instructions § 411.31(2).

More recently, in State v. Williford, 49 Ohio St.3d 247, 250, 551 N.E.2d 1279 (1990), the Court noted that in "most circumstances, a person may not kill in self-defense if he has available a reasonable means of retreat from the confrontation." The Court went on to say, that in "the instant case, there was testimony that the confrontation took place inside appellee's house and on appellee's porch. Because the jury was not instructed on the *Peacock* rule [see infra], it might have believed that appellee was under a duty to retreat from his home. It was therefore error for the court to fail to give this instruction." Id. The Court went on to declare, however, that "there is no duty to retreat from one's home." Id. at 250.

State v. Peacock

State v. Peacock, 40 Ohio St. 333, 334 (1883), has been cited both as requiring a duty to retreat and for recognizing an exception to that duty for an attack in the defender's home. *Peacock,* however, does not explicitly impose a duty to retreat. Thus, the Court in *Williford* noted that such a duty was "implicit" in *Peacock.* Williford, 49 Ohio St.3d at 250. As noted above, however, cases both before and after *Peacock,* explicitly rejected the retreat rule. E.g., *Ervin* (1876); *Graham* (1918).

See also State v. Jackson, 22 Ohio St.3d 281, 283, 490 N.E.2d 893 (1986) ("The *Peacock* and *Graham* cases state, respectively, that one has no duty to retreat if he is assaulted in his home or business."), cert. denied, 480 U.S. 917, (1987); State v. Reid, 3 Ohio App.2d 215, 221, 210 N.E.2d 142 (1965) ("In Ohio it is the law that where one is assaulted in his home, or the home itself is attacked, he may use such means as are necessary to repel the assailant from the house, or to prevent his forcible entry, or material injury to his home, even to the taking of life.").

Exceptions

Even in a retreat jurisdiction, however, certain exceptions

are recognized. The retreat rule applies only to the use of deadly force; a defender may use nondeadly force without retreating. See Columbus v. Dawson, 33 Ohio App.3d 141, 142, 514 N.E.2d 908 (1986) ("[U]nder Ohio law, there is no requirement that a person retreat, although possible, before using non-deadly force."). Further, retreat is required only when the defendant can do so in complete safety.

In addition, the courts have recognized several exceptions. First, a defender need not retreat in his home or business, except perhaps when he is the first aggressor or the victim is a co-occupant. 1 LaFave & Scott, § 5.7(f), at 660. This rule has been extended to a tent at a camp site. "Although this issue has not previously been addressed in Ohio, it is the opinion of this court that, for purposes of a duty to retreat, a tent and a home are the logical equivalent of each other. The campsites that appellant and his family occupied and paid to use on the weekend in question were their homes for that time period." State v. Marsh, 71 Ohio App.3d 64, 69, 593 N.E.2d 35 (1990) ("It is well established that a person has no duty to retreat if attacked in his home.").

Second, a police officer in the performance of his duty is not required to retreat. 1 LaFave & Scott, § 5.7(f), at 661.

FIRST AGGRESSOR RULE

Only a defendant who "was not at fault in creating the situation giving rise to the affray" may resort to the use of force. State v. Melchior, 56 Ohio St.2d 15, 20, 381 N.E.2d 195 (1978). Accord State v. Morgan, 100 Ohio St. 66, 71, 125 N.E. 109 (1919) ("In respect to the defendant's claim of self-defense, it is observed that he was wholly at fault."); State v. Stewart, 1 Ohio St. 66, 74 (1852) ("Now it does seem clear to us that Stewart sought to bring on the affray, that he desired to be assaulted, and intended, if assaulted, to make good his previous threats of using his knife.").

The "not-at-fault" requirement means that the defendant must not have been the first aggressor in the incident. See State v. Robbins, 58 Ohio St.2d 74, 80, 388 N.E.2d 755 (1979) ("[A]ppellant admitted striking the first blow and being the aggressor."); State v. Melchior, 56 Ohio St.2d 15, 21, 381 N.E.2d 195 (1978) ("Defendant was clearly the aggressor."); State v. Doty, 94 Ohio St. 258, 268, 113 N.E. 811 (1916) ("It is difficult to see how the question of self-defense arises in this case, since the testimony disclosed that the defendant was the aggressor."); Stoffer v. Scoffer, 15 Ohio St. 47, 51 (1864) ("[W]hile the party who first commences a malicious assault continues in the combat, ... although he may be so fiercely pressed that he can not retreat or is thrown upon the ground, or driven to the wall, he can not justify taking the life of his adversary, however necessary it may be to save his own; and must be deemed to have brought it upon himself the necessity of killing his fellow man.").

Evidence

The Ohio Rules of Evidence permit a defendant to introduce evidence of the deceased's character to establish that the deceased was the first aggressor. See 1 Giannelli & Snyder, Ohio Evidence § 404.6 (3d ed 1995). Evidence Rule 404(A) generally precludes the admission of character evidence to prove conduct on a particular occasion. The Rule, however, recognizes several exceptions. For example, Rule 404(A)(2) reads:

> Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor is admissible ....

This provision must be read in conjunction with Evidence Rule 405(A), which governs the permissible methods of proving character; only reputation and opinion evidence is permitted to prove character.

As noted earlier, evidence of the victim's violent character may also be relevant to show that the accused acted reasonably, an element of self-defense that is different from the first aggressor issue. The "reasonable belief" issue, however, does not involve the circumstantial use of character to prove the conduct of the victim, but rather involves the use of character to prove the defendant's state of mind, and thus is not controlled by Rules 404 and 405. Thus, the defendant is not limited to reputation and opinion evidence when establishing his state of mind.

If character evidence is introduced to show its effect on the accused's state of mind, its relevance obviously depends on whether the accused was familiar with the victim's character. In contrast, if character evidence is introduced to show that the victim acted in conformity with his violent character and was therefore the first aggressor, it is irrelevant whether the accused was aware of the victim's character. In State v. Marsh, 71 Ohio App.3d 64, 70, 593 N.E.2d 35 (1990), the court wrote:

> It is clear that a defendant may not introduce evidence of a victim's prior specific instances of conduct to show the defendant's state of mind unless the defendant had knowledge of that conduct. If the defendant was not aware of the victim's prior conduct, that conduct is irrelevant as it could not have affected the defendant's state of mind at the time of the incident. ...
>
> However, in the case sub judice, appellant attempted to introduce evidence of the victim's propensity for violence to show who was the aggressor.

See also State v. Debo, 8 Ohio App.2d 325, 328, 222 N.E.2d 656 (1966) ("The evidence of communicated threats did not preclude the admissibility of uncommunicated threats to show animus of the deceased toward accused, the probability of his aggression; and made it admissible to corroborate the communicated threats."); State v. Schmidt, 65 Ohio App.2d 239, 243, 417 N.E.2d 1264 (1979) ("Where competent evidence of character is offered for the purpose of showing that the deceased victim was the aggressor, such evidence is admissible, regardless of the extent of the accused's knowledge of such character or of the particular evidence in question.").

Wigmore stated it this way: "[The] additional element of communication is unnecessary, for the question is what the deceased probably did, not what the accused probably thought the deceased was going to do. The inquiry is one of objective occurrence, not of subjective belief." 1A Wigmore, Evidence § 63, at 1369 (Tillers rev. 1983).

REVIVAL OF RIGHT OF SELF-DEFENSE

There are some circumstances under which a first aggressor's right of self-defense is restored.

Withdrawal

First, an aggressor who effectively withdraws from the encounter may defend himself if subsequently attacked. In State v. Reid, 3 Ohio App.2d 215, 220, 210 N.E.2d 142 (1965), the court stated:

> While one who first makes a malicious assault upon another continues in the conflict which ensues, he can not justify taking the life of his adversary, however necessary it may be to save his own, or to whatever extremity he may be reduced. But when he has succeeded in wholly withdrawing from the conflict, and in good faith, has retreated to a place of apparent security, his right of self-defense is fully restored.

Similarly, in State v. Melchior, 56 Ohio St.2d 15, 21, 381 N.E.2d 195 (1978), the Supreme Court acknowledged this "well-recognized" exception and quoted from Wharton's Criminal Law text:

> "Even though the accused may in the first instance have intentionally brought on the difficulty and provoked the occasion, yet his right of self-defense will revive and his actions will be held justifiable upon the ground of self-defense in all cases where he has withdrawn from the affray or difficulty in good faith as far as he possibly can, and clearly and fairly announced his desire for peace."

See also Stoffer v. State, 15 Ohio St. 47, 53 (1864) ("But when he has succeeded in wholly withdrawing himself from the contest . . . he is again remitted to his right of self-defense, and may make it effectual by opposing force to force."); State v. Davis, 8 Ohio App.3d 205, 208, 456 N.E.2d 1256 (1982) ("The trial judge did not say self-defense is never available to an aggressor. The court's instruction clearly explained that an aggressor's action may be justified as self-defense if he previously withdrew from the confrontation in good faith.").

Escalation to deadly force

Some jurisdictions recognize a second circumstance where self-defense is revived for a first aggressor: "A nondeadly aggressor (i.e., one who begins an encounter, using only his fist or some nondeadly weapon) who is met with deadly force in defense may justifiably defend himself against the deadly attack. This is because the aggressor's victim, by using deadly force against nondeadly aggression, uses unlawful force." 1 LaFave & Scott, § 5.7, at 658. Whether Ohio follows this approach is unclear.

BURDEN OF PRODUCTION

The term "burden of proof' encompasses both the burden of production (i.e., the burden of coming forward with evidence), and the burden of persuasion (i.e., the burden of convincing the trier of fact of the truth of the assertion by the quantum of evidence that the law demands). State v. Robinson, 47 Ohio St.2d 103, 107, 351 N.E.2d 88 (1976).

The burden of production for an affirmative defense is on the defendant. R.C. 2901.05(A). Indeed, the very concept of an affirmative defense implies that the burden of production is on the defendant and that such a defense will not be an issue at trial unless sufficient evidence on the issue is admitted at trial. Of course, this evidence may be introduced through the prosecution's case-in-chief. Graham v. State, 98 Ohio St. 77, 81-82, 120 N.E. 232 (1918) ("The evidence of self-defense may come wholly from the state; but whether the evidence comes from the defense, or from the state supporting his lawful right of self defense, it is the duty of the court to charge that feature of the law.").

R.C. Section 2901.05(C) defines an affirmative defense as one that is either (1) "expressly designated" as an affirmative defense, or (2) involves "an excuse or justification peculiarly within the knowledge of the accused, on which he can fairly be required to adduce supporting evidence." Self-defense is an affirmative defense, not by statutory definition, but rather because the justification is peculiarly within the knowledge of the defendant. See State v. Williford, 49 Ohio St.3d 247, 249, 551 N.E.2d 1279 (1990) ("Under Ohio law, self-defense is an affirmative defense."); State v. Martin, 21 Ohio St.3d 91, 93-94, 488 N.E.2d 166 (1986) ("This court has long determined that self-defense is an affirmative defense. . . . [and] is one peculiarly within the knowledge of the defendant, which he, not the state, may fairly be required to prove."), aff'd, 480 U.S. 228 (1987); State v. Seliskar, 35 Ohio St.2d 95, 96, 298 N.E.2d 582 (1973) ("[T]he elements of self-defense can best be established by testimony of a defendant as none is in better position than defendant to provide evidence to aid the jury in determining whether defendant's acts were justified.").

JURY INSTRUCTIONS

If a defendant fails to meet the burden of production, the jury should not be instructed on self-defense. For example, in State v. Rogers, 43 Ohio St.2d 28, 31, 330 N.E.2d 674 (1975), cert. denied, 423 U.S. 1061 (1976), the Supreme Court rejected the defendant's claim that an instruction was required because "the record [was] devoid of evidence that [defendant], out of concern for his safety, intended to shoot the decedent . . . or that the decedent committed an overt act by which [defendant] could reasonably, and in good faith, believe that he was in imminent danger of death or great bodily harm."

The test for determining when a jury instruction is required is "whether the defendant introduced sufficient evidence, which, if believed, would raise a question in the minds of reasonable men concerning the existence of such issues." State v. Robbins, 58 Ohio St.2d 74, 80, 388 N.E.2d 755 (1979) (quoting State v. Melchior, 56 Ohio St.2d 15, 20, 381 N.E.2d 195 (1978) (syllabus, para. 1) ("If the evidence generates only a mere speculation or possible doubt, such evidence is insufficient to the affirmative defense, and submission of the issue to the jury will be unwarranted.").

The Court has "repeatedly held that a failure to object before the jury retires in accordance with the second paragraph of Crim. R. 30(A), absent plain error, constitutes a waiver." Williford, 49 Ohio St.3d at 251.

Once an objection is made, however, the defense is not required to proffer an instruction of the issue; an accused has a right to expect that the trial court will give complete jury instructions on all issues raised by the evidence. "[W]e hold that, where the trial court fails to give a complete or correct jury instruction on the elements of the offense charged and the defenses thereto which are raised by the evidence, the error is preserved for appeal when the defendant objects in accordance with the second paragraph of Crim. R. 30(A), whether or not there has been a proffer of written jury instructions in accordance with the first paragraph of Crim. R. 30(A)." Williford, 49 Ohio St.3d at 252. "Additionally, it is not realistic to expect counsel to anticipate errors of omission or misstatements of the law in the trial court's instructions and proffer written instructions in order to preserve possible errors for appeal." Id.

The jury should never be instructed on the burden of production, which is a decision for the judge alone. The jury need only be instructed on the burden of persuasion.

BURDEN OF PERSUASION

In Ohio, the burden of persuasion for self-defense falls

upon the accused, and the standard of proof is a preponderance of evidence. At one time, however, the allocation of the burden of persuasion was controversial. Prior to 1974 the common law placed the burden of persuasion with respect to self-defense on the defendant. The standard of proof was a preponderance of the evidence. E.g., State v. Robinson, 47 Ohio St.2d 103, 109-110, 351 N.E.2d 88 (1976) ("Ohio common law has consistently followed the traditional rule that self-defense must be proved by a preponderance of the evidence."); State v. Seliskar, 35 Ohio St.2d 95, 96, 298 N.E.2d 582 (1973); State v. Poole, 33 Ohio St.2d 18, 19, 294 N.E.2d 888 (1973) ("Affirmative defenses [such as self-defense] must be proved by a preponderance of the evidence."); Szalkai v. State, 96 Ohio St. 36, 39, 117 N.E. 12 (1917); State v. Vancak, 90 Ohio St. 211, 214, 107 N.E. 511 (1914) ("The accused was required to establish this plea of self defense by a preponderance of the evidence.").

In 1974 the legislature enacted R.C. Section 2901.05(A), which stated:

> Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof is on the prosecution. The burden of going forward with the evidence of an affirmative defense . . . is upon the accused.

The second sentence, governing affirmative defenses, mentioned only the burden of production; it was silent on the burden of persuasion. In State v. Robinson, 47 Ohio St.2d 103, 113, 351 N.E.2d 88 (1976), the Supreme Court held that the defendant did not bear the burden of proving an affirmative defense by a preponderance of the evidence.

Since the defendant did not have the burden of persuasion on self-defense, it would seem to follow that the burden therefore must fall on the prosecution. That, however, was not the case. In State v. Abner, 55 Ohio St.2d 251, 253, 379 N.E.2d 228 (1978), the Court stated: "The holding in *Robinson* does not mandate instruction that the prosecution must carry the burden of proving an absence of self-defense."

In sum, neither party had the burden of persuasion, a rather troublesome result should the jury find the evidence evenly balanced. In response, the General Assembly amended the statute to assign explicitly the burden of persuasion to the defendant. Effective November 1, 1978, the statute reads:

> Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is on the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

Subsequent cases have held that the burden of persuasion for an affirmative defense is on the defendant and that the standard of proof is a preponderance of the evidence. State v. Martin, 21 Ohio St.3d 91, 94, 488 N.E.2d 166 (1986) ("[T]he state may constitutionally require a defendant to prove, by a preponderance of the evidence, the affirmative defense of self-defense."), aff'd, 480 U.S. 228 (1987); State v. Jackson, 22 Ohio St.3d 281, 283, 490 N.E.2d 893 (1986) ("Due process is not offended by placing the burden of going forward with the affirmative defense of self-defense on the accused pursuant to R.C. 2901.05."), cert. denied, 480 U.S. 917 (1987); State v. Marsh, 71 Ohio App.3d 64, 68, 593 N.E.2d 35 (1990) ("In Ohio, self-defense is an affirmative defense which the defendant has the burden of proving.").

"If the defendant fails to prove any one of [the] elements by a preponderance of the evidence he has failed to demonstrate that he acted in self-defense." State v. Jackson, 22 Ohio St.3d 281, 284, 490 N.E.2d 893 (1986), cert. denied, 480 U.S. 917 (1987).

Constitutionality

In Martin v. Ohio, 480 U.S. 228 (1987), the U.S. Supreme Court upheld the constitutionality of the Ohio statute that allocates to the defendant the burden of persuasion on self-defense. Martin challenged the statute on due process grounds. The Supreme Court rejected this argument. In re Winship, 397 U.S. 358, 364 (1970), held that the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

However, in Patterson v. New York, 432 U.S. 197 (1977), the Court ruled that *Winship* was not violated by a law that assigned to the defendant the burden of proving "extreme emotional disturbance," which reduced murder to manslaughter. According to the Court, *Patterson* controlled. An affirmative defense, whether self-defense or insanity, was not an essential element of the charged crime and, thus, the burden of persuasion could be allocated to the defendant. It did not matter that only Ohio and a few other states had chosen to allocate this burden to the defendant.

INCONSISTENT DEFENSES

In State v. Champion, 109 Ohio St. 281, 286-87, 142 N.E. 141 (1924), the Ohio Supreme Court held that the defense of accident is inconsistent with self-defense. The Court reasoned:

> Self-defense presumes intentional, willful use of force to repel force or escape force. Accidental force or shooting is exactly the contrary, wholly unintentional and unwillful. . . . If the evidence warrants, the defendant has a right to one request or the other. By no manner of logic, law, or legerdemain is he entitled to both.

Accord Twiman v. State, 13 Ohio Law Abs 459 (App 1933).

Nevertheless, it is possible that both defenses could come into play. In State v. Armbrust, 35 Ohio Law Abs 554, 558, 42 N.E.2d 214 (App. 1941), the accused claimed that his "possession and drawing of a weapon may be in self-defense, but the actual infliction of the mortal wound may be an accident." The *Armbrust* court noted that although the *Champion* holding "is very broad in its terms and apparently is all-inclusive of any conditions," the case was distinguishable on its facts. Thus, there is some support for instructing on both self-defense and accident, given the appropriate factual circumstances. Accord State v. Lovejoy, 48 Misc. 20 357 N.E.2d 424 (Muni. 1976).

In another case, the Ohio Supreme Court indicated that inconsistent defenses are permissible: "When the defendant entered his plea of not guilty, he could avail himself of all the defenses which the evidence disclosed. It would be perfectly proper for him to say (a) I did not fire the shot; (b) Whatever I did, I did in my own defense." Graham v. State, 98 Ohio St. 77, 81-82, 120 N.E. 232 (1918).

REFERENCES

American Law Institute, Model Penal Code and Commentaries (1985).

1 LaFave & Scott, Criminal Law § 5.7 (1986).

2 Robinson, Criminal Law Defenses § 132 (1984).