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Self-Defense in Colorado

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The appellate courts in Colorado have issued a number of decisions in the past few years dealing with self-defense. While these decisions did not make significant breaks with prior case law, they did clarify some issues relating to the defense. This article reviews the basic law of self-defense and these recent decisions.

The Basic Principles

The law of self-defense has been codified, along with affirmative defenses generally, in CRS § 18-1-701 *et seq.* CRS § 18-1-704 reads:

> A person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose.[1]

Subsequent sections establish the "make-my-day law,"[2] the right to defend premises,[3] the right to defend property[4] and the right to use force in making an arrest.[5]

Self-defense is an affirmative defense[6] —that is, one that generally admits the doing of the act but offers a legal justification for it.[7] This means that unless the prosecution's case-in-chief raises evidence of self-defense, a defendant who wishes to raise self-defense has the burden of presenting "some credible evidence" on the issue.[8] Once such evidence is raised, the burden shifts back to the prosecution to disprove self-defense beyond a reasonable doubt.[9] The determination of whether an affirmative defense has been raised by the evidence is made by the trial court.[10]

In Colorado, a person is entitled to act on appearances when exercising self-defense: a reasonable belief that you are in danger entitles you to defend yourself, even to the extent of taking human life, even though it may later turn out that you were mistaken about the danger.[11] It also is true in Colorado that a person who is under attack need not retreat in the face of that attack before lawfully exercising the right of self-defense,[12] even to the extent of using deadly force.[13]

In certain circumstances, an individual may lawfully use self-defense even if he or she started the fight. An initial aggressor who withdraws from the fight and communicates this intention to the other person has the right to lawfully exercise self-defense if the other person, despite knowledge of the initial aggressor's intent to withdraw, continues the fight. The initial aggressor must retreat, however, because the no-retreat doctrine has generally not been extended to initial aggressors.[14] It is for the jury to determine whether the initial aggressor adequately communicated his or her intention to withdraw.[15]

Self-defense may be used to defend against most homicide and assault charges. One exception to this general proposition is that self-defense is not available against a charge of felony murder.[16] Other exceptions are discussed below. With the right facts, self-defense may be used against a charge of resisting arrest[17] and menacing.[18] The Colorado Supreme Court has not decided whether self-defense can be used to defend against the charge of prohibited use of weapons[19] or criminal mischief.[20] In certain circumstances, when more than two people are involved in a fight, aggressive acts by one person may justify the use of force against another person.[21]

Raising the Defense

As noted, unless the prosecution's case-in-chief raises evidence of self-defense, the defendant is obligated to present "some credible evidence" of self-defense.[22] The Colorado Supreme Court has consistently held that where there is any evidence tending to establish self-defense, the defendant is entitled to have the jury instructed with respect to that defense.[23]

However, in the recent case of *People v. Wilner*,[24] the Supreme Court appeared to retreat from this principle, at least on the subsidiary issue of the no-retreat doctrine. The defendant shot and killed a man who was repossessing his car. The defendant testified that he heard his car backing out of the driveway and ran outside with a gun, that the car began to drive toward him and that he retreated and fired warning shots before firing the fatal shot. Other evidence contradicted these claims.

The Supreme Court found that the no-retreat doctrine did not apply here because the record did not support the defendant's claim that he was not the initial aggressor or, that if he was, he withdrew and communicated his withdrawal to the victim. The dissenting justice argued that the defendant's testimony was all that was required to make applicable the no-retreat doctrine and mandate an instruction on the issue.

While the burden on the defendant to present "some evidence" is a low burden,

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it is not a meaningless one. The evidence in *People v. Williams*[25] established that the defendant's brother was involved in a fight and that the defendant put a knife to the throat of an onlooker and warned him not to interfere, then got involved in the fight himself. When the onlooker tried to break up the fight, the defendant put the knife to his throat again. The Court of Appeals found this record devoid of "any indication that the defendant could have held a reasonable belief that the man he threatened with the knife was engaged in the imminent use of unlawful physical force against the defendant's brother."[26] Therefore, no self-defense instruction was required.

Imminent Danger

As noted, a person claiming self-defense must be responding to what the person reasonably believes to be the use or imminent use of unlawful physical force against himself or herself. The Colorado Court of Appeals has held that self-defense is not available in a contract murder case. At first glance, this seems like an obvious and easy result to reach: if an individual took the time to hire someone to do the killing, it is hard to imagine that the individual was in imminent danger. This is not the time or place to discuss contract law, but everyone knows how difficult and protracted contract negotiations can be. This is particularly true with hired killers. Obviously, any threat would be long over well before the actual hit took place.

However, when this issue was raised in *People v. Yaklich*,[27] it was not quite as simple as it seemed. The defendant was the wife of a police officer who was shot to death in the driveway of the family home while she lay sleeping inside. A pair of young men who lived nearby were subsequently arrested, and these men told the police they had been hired by the defendant to kill her husband. The defendant admitted she had hired the men, but claimed that she hired them because she was in great fear for her life. She claimed that her husband beat her regularly and that she was afraid to go to the police because her husband was, after all, a police officer.

The defendant was allowed to present evidence of self-defense, including expert testimony about the battered wife syndrome. The expert testimony suggested that a woman[28] who suffers from the syndrome can quite reasonably be in fear for her safety even if she is not under attack at that moment because of the cyclical nature of the violence by the batterer. The jury acquitted the defendant of murder but found her guilty of conspiracy.

The prosecution appealed the trial court rulings that allowed the defendant to present self-defense to the jury. The Court of Appeals disapproved the rulings and held that self-defense is simply unavailable in the context of a contract murder. While sympathetic to the battered woman syndrome, and while recognizing that such evidence is appropriate and important in many cases, the court refused to stretch the meaning of "imminent danger" to include this situation.

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Retreat to the Wall

The Colorado Supreme Court considered the retreat-to-the-wall doctrine in *Idrogo v. People*,[29] in which the defendant was accosted by two drunken men outside a liquor store who asked for drugs. The defendant and his companion refused and attempted to leave. When the men followed them, the defendant pulled a knife and warned the men to go away. They did not, a fight ensued, and the defendant stabbed one of the men to death. The defendant was convicted of reckless manslaughter.

On appeal, all parties agreed that a general self-defense instruction was appropriate. All parties also agreed that a general retreat-to-the-wall instruction was appropriate. However, the prosecution argued that the instruction that was given to the jury went too far. The prosecution argued that while there is no general duty to retreat, there is a duty to retreat before employing deadly force, and that the jury should be so instructed.

The Supreme Court rejected this argument and concluded that "an innocent victim of an assault is not bound to retreat before using deadly force when the use of such force is reasonable under the circumstances."[30] The principle that there is no duty to retreat applies regardless of the level of force an individual uses to defend himself or herself. It is important to remember that there is always a requirement that the amount of force used be appropriate. A person must be in fear of imminent serious bodily injury or death before he or she can use deadly force to defend. However, a person who is in fear of serious bodily injury or death need not retreat before using deadly force.

Apparent Necessity

The question in *Hare v. People*[31] and *Beckett v. People*[32] was whether the standard self-defense instruction adequately conveyed to the jury the "apparent necessity" doctrine. The apparent necessity doctrine holds that an apparent need to defend oneself, if reasonably grounded, justifies the use of self-defense to the same extent as actual necessity.[33] A four-person majority of the Supreme Court reached the conclusion that an instruction that tracks CRS § 18-1-704 adequately instructs the jury on the doctrine.

The court in *Hare* held that the self-defense statute takes into account the reasonable belief of an individual who has exercised force in self-defense. It encompasses the apparent necessity doctrine and allows the "jury to consider from the defendant's viewpoint whether the defendant was justified in using physical force in self-defense. . . ."[34] Thus, the trial court did not abuse its discretion in rejecting the more detailed instruction tendered by the defendant. The three dissenters argued that the instruction that was given did not clearly inform the jury of the defendant's right to act on appearances.

The *Mens Rea* Issue

The self-defense statute justifies the use of force only if a person reasonably believes there is imminent danger and only to the extent that the person uses a reasonable degree of force. Therefore, a person who is properly using force to defend himself or herself is, by definition, acting reasonably. At the same time, the analysis should take into account the fact that "detached reflection cannot be demanded in the presence of an uplifted knife."[35] If the *mens rea* requirement of a particular offense is less than reasonableness—such as recklessness, negligence or strict liability—should a defendant still be allowed to claim self-defense?

The Supreme Court has held that self-defense is not available against a charge

of reckless manslaughter or criminally negligent homicide because a finding of recklessness or negligence necessarily precludes a finding that the defendant acted reasonably.[36] Recklessness involves a conscious disregard of a substantial and unjustifiable risk; negligence involves a gross deviation from a reasonable standard of care resulting in a failure to perceive a substantial and unjustifiable risk.[37] Both states of mind are inconsistent with reasonableness. Even though a defendant who is charged with a reckless or negligent offense is not entitled to a self-defense instruction, evidence of self-defense may still be presented in an effort to persuade the jury that the conduct was not reckless or negligent.

Similarly, the Court of Appeals has held that self-defense is not available against a charge of extreme indifference murder.[38] Extreme indifference murder requires evidence of universal malice manifesting an extreme indifference toward human life generally. This *mens rea* requirement has been interpreted to mean aggravated or extremely reckless conduct.[39] A finding of such conduct necessarily precludes a finding that the defendant acted reasonably in self-defense.

On the other hand, the Supreme Court has held that self-defense is available against charges of heat of passion manslaughter[40] and attempted heat of passion manslaughter.[41] Distinguishing reckless manslaughter from heat of passion manslaughter, the court noted that even a reasonable person may react instinctively and passionately to a great provocation.[42] The heat of passion principle simply recognizes this human frailty.

The "Make My Day" Defense

The "make my day" statute creates certain additional rights of self-defense. CRS § 18-1-704.5 provides that the occupant of a dwelling is justified in using any degree of physical force against a person who has unlawfully entered the dwelling, if the occupant reasonably believes that the intruder has committed, is committing, or is about to commit a crime in addition to the unlawful entry, and also reasonably believes that the intruder might use any physical force against any occupant.

The statute goes further than other forms of self-defense by providing for immunity from prosecution (as well as from civil liability), rather than merely establishing an affirmative defense. Based on this difference, the Supreme Court held that the burden of proving the applicability of the statute rests on the defendant, who must prove applicability by a preponderance of the evidence.[43] Resolution of the issue should be conducted by way of a pretrial hearing. Conflicting evidence as to the applicability of the statute must be resolved by the trial court, and appellate courts will defer to the trial court's findings.[44] A defendant who loses at the pretrial hearing may still present self-defense to the jury.[45]

It is generally assumed that the "make my day" defense is available against the full range of charges in which self-defense is available, as discussed above. Appellate decisions have held the defense available against charges of first-degree murder,[46] second-degree murder,[47] first-degree assault,[48] second- and third-degree assault[49] and heat of passion manslaughter.[50]

Several of the terms in the statute have been litigated. The term "dwelling" is defined in CRS § 18-1-901(3)(g) as "a building which is used, intended to be used, or usually used by a person for habitation." In *People v. Cushinberry*,[51] the Court of

Appeals held that a defendant sitting on a windowsill in his apartment building was not entitled to the protection of the statute because the stairwell, which was a common area and not part of the defendant's apartment, did not constitute a dwelling for the purposes of the statute.

The phrase "unlawful entry" also has been the subject of litigation. The Court of Appeals has held that a person who invited another into his home could not claim the protection of the statute because an invitee does not make an unlawful entry.[52] The trial court had interpreted the phrase "unlawful entry" to include the concept, familiar from burglary cases, of remaining unlawfully after an initially proper entry. However, the Court of Appeals noted that the legislature did not include the "remain lawfully" language in the "make my day" statute.

In *People v. Malczewski*,[53] the defendant used force against a police officer who was attempting to enter the defendant's home to follow up on a report of a baby in danger inside the home. The trial court found that the officer's entry was illegal and that the defendant could reasonably have believed that the officer was about to commit the crime of kidnapping. The Supreme Court reversed, ruling that the entry was lawful under the exigent circumstances exception to the warrant requirement and finding no evidence to support a reasonable belief that the officer was about to commit a crime.

The most recent Supreme Court discussion of the "unlawful entry" language occurred in *People v. McNeese*.[54] The issue was whether an entry in violation of an oral agreement in a lease constituted an unlawful entry. The trial court granted the defendant immunity from prosecution on the ground that the entry was unlawful, but the Supreme Court reversed and remanded. A majority of the court held that the appropriate question is whether the entry was "a knowing violation of the criminal law." The court also held that the appearance of an unlawful entry does not satisfy this standard: there must be an actual unlawful entry.

While the court suggested that this entry, in violation of the lease agreement, did not meet this standard, the court remanded the case for further proceedings on the question. The concurring opinion argued that the appropriate definition of unlawful entry was "an entry into a dwelling in violation of criminal law." The dissent argued that the majority was ignoring the plain language of the statute and engaging in judicial legislation.

All three opinions contain significant discussions of the statute and should be read by anyone with a "make my day" case.

Conclusion

The right of self-defense has strong roots in both history and the law. The basic parameters of the defense, set out by statute, have remained unchanged for some time. Perhaps reflecting this state's frontier history, Colorado does not impose a duty to retreat, even when deadly force is employed; analyzes self-defense from the point of view of the person being attacked; and has created special exemptions from liability for self-defense exercised in the home. Nonetheless, there are limits on the use of this defense, and practitioners on both sides of a case must familiarize themselves with the case law to prosecute and defend these cases properly. Finally, there are a number of evidentiary issues that commonly arise in self-defense cases, and counsel must review this law as well.

NOTES

1. CRS § 18-1-704(1).
2. CRS § 18-1-704.5.
3. CRS § 18-1-705.
4. CRS § 18-1-706.
5. CRS § 18-1-707.
6. CRS § 18-1-710.
7. *People v. Huckleberry*, 768 P.2d 1235 (Colo. 1989).
8. CRS § 18-1-407.
9. *People v. Fincham*, 799 P.2d 419 (Colo. App. 1990).
10. *Id.*
11. *People v. Tapia*, 515 P.2d 453 (Colo. 1973); *Chacon v. People*, 488 P.2d 56 (Colo. 1971).
12. *Enyart v. People*, 67 Colo. 434, 180 P. 722 (1919).
13. *Idrogo v. People*, 818 P.2d 752 (Colo. 1991).
14. *Id.* at 755-56.
15. *People v. Duran*, 577 P.2d 307 (Colo. App. 1978).
16. *People v. Burns*, 686 P.2d 1360 (Colo. App. 1984); CRS § 18-3-102(2).
17. *People v. Fuller*, 781 P.2d 647 (Colo. 1989).
18. *Beckett v. People*, 800 P.2d 74 (Colo. 1990).
19. *Id.* at 75, n.1; *but see People v. Beckett*, 782 P.2d 812 (Colo.App. 1989).
20. *People v. Smith*, 754 P.2d 1168, 1169, n.2 (Colo. 1988).
21. *People v. Jones*, 675 P.2d 9 (Colo. 1984); *People v. Auldridge*, 724 P.2d 87 (Colo.App. 1986).
22. CRS § 18-1-407.
23. *Idrogo, supra*, note 13 at 754.
24. 879 P.2d 19 (Colo. 1994).
25. 827 P.2d 612 (Colo.App. 1992).
26. *Id.* at 614.
27. 833 P.2d 758 (Colo.App. 1991).
28. A man may suffer from the syndrome as well, but the overwhelming majority of victims are women.
29. *Idrogo, supra*, note 13.
30. *Id.* at 755.
31. 800 P.2d 1317 (Colo. 1990).
32. 800 P.2d 74 (Colo. 1990).
33. *People v. LaVoie*, 395 P.2d 1001 (Colo. 1964); *Young v. People*, 107 P. 274 (Colo. 1910).
34. *Hare, supra*, note 31 at 1319.
35. *People v. Young*, 825 P.2d 1004, 1008 (Colo.App. 1991), *quoting Brown v. United States*, 256 U.S. 335 (1921).
36. *Case v. People*, 774 P.2d 866 (Colo. 1989); *People v. Fink*, 574 P.2d 81 (Colo. 1978).
37. CRS § 18-1-501(3) and (8).
38. *People v. Fernandez*, 883 P.2d 491 (Colo. App. 1994).
39. *People v. Jefferson*, 748 P.2d 1223 (Colo. 1988).
40. *Sanchez v. People*, 820 P.2d 1103 (Colo. 1991).
41. *Thomas v. People*, 820 P.2d 656 (Colo. 1991).
42. *Sanchez, supra*, note 40 at 1109-10.
43. *People v. Guenther*, 740 P.2d 971 (Colo. 1987).
44. *Young, supra*, note 35.
45. *People v. Malczewski*, 744 P.2d 62 (Colo. 1987); *Guenther, supra*, note 43 at n.1.
46. *Young v. District Court*, 740 P.2d 982 (Colo. 1987).
47. *People v. McNeese*, 892 P.2d 304 (Colo. 1995).
48. *People v. Arrellano*, 743 P.2d 431 (Colo. 1987).
49. *Malczewski, supra*, note 45.
50. *Young, supra*, note 35.
51. 855 P.2d 18 (Colo.App. 1992).
52. *People v. Drennon*, 860 P.2d 589 (Colo. App. 1992).
53. *Supra*, note 45.
54. *Supra*, note 47.