

PROSECUTING THE SELF-DEFENSE CASE

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I. Background

The right of self-defense is ancient and recognized in most societies. *McDonald v. City of Chicago*, –S.Ct.–, 2010 WL 2555188, page 1, footnote 15. Relying on Jewish, Greek, and Roman law, Blackstone observed that a person who kills his attacker, " '...is in no fault whatsoever, not even in the minutest degree; and therefore is to be totally acquitted and discharged, with commendation rather than blame.' " *Id.*, citing 4 W. Blackstone, *Commentaries on the Laws of England*, 182 (reprint 1922). Ultimately, self-defense is one of the primary justifications for otherwise unlawful conduct. *Martin v. Ohio*, 480 U.S. 228, 243 (1987) (J. Powell, dissenting), citing *Beard v. United States*, 158 U.S. 550, 562 (1895). The same rationale that permits a person to employ force in his own defense also justifies the use of force in defense of another person. See, e.g., *State v. Cook*, 204 W. Va. 591, 597-98, 515 S.E. 2d 127, 133-34 (1999).

II. Present State And Federal Law.

A. Self-defense or defense of another is alive and well as a defense in federal prosecutions. See, *United States v. Sanchez-Lima*, 161 F.3d 545, 589 (9th Cir. 1998). Under federal law, a defendant has an initial burden to produce sufficient evidence that establishes "any foundation" for a self-defense instruction. *Id.* Once that burden of production is met, the burden of persuasion shifts to the prosecution, which must prove beyond a reasonable that the defendant did not act in self-defense. *United States v. Keiser*, 57 F.3d 847, 850-52 (9th Cir. 1995).

Under federal law a person acts lawfully in defense of himself or another if: (1) he reasonably believes it necessary for the defense of himself or another against the immediate use of unlawful force; and (2) he uses no more force than appears reasonably necessary under the circumstances; and (3), in the event force likely to cause death or great bodily harm is employed, the person reasonably believes force is likely to prevent death or great bodily harm. See, Ninth Circuit Pattern Instruction 6.7 (2003). Although a person is not required to retreat before resorting to force, the availability of retreat is a factor a jury may consider in evaluating a self-defense claim. *United States v.*

Loman, 551 F.2d 164, 168 (7th Cir.1977).

B. Self-defense or the defense of another is also available under Montana law as a justifiable use of force. See, Mont. Code Ann. § 45-3-101, *et. seq.* Pursuant to Mont. Code Ann. § 45-3-115, the defense is an affirmative defense. As such, the prosecution need only prove the elements of the charged offense beyond a reasonable doubt. *State v. Henson*, 2010 WL 2492179, pages 9 and 10 (Mont. June 22, 2010). The defendant bears the burdens of production and persuasion to produce sufficient evidence to raise a reasonable doubt that he acted in self-defense. *Id.*

A defendant employs justifiable force where: (1) he is not the aggressor²; (2) the danger of harm to the defendant is a present one; (3) the threatened force is unlawful; (4) the defendant actually believes the danger exists, that is, use of force is necessary to avert the danger and the kind and amount of force used is necessary; (5) the defendant's belief is reasonable³, even if mistaken; and (6) in the event force likely to cause death or serious bodily injury is employed, the defendant must reasonably believe such force is necessary to prevent imminent death or serious bodily injury to himself or to prevent the commission of a forcible felony. *Id.* at page 10. All statutory elements of the defense must be present in order to assert the defense. *City of Helena v. Lewis*, 260 Mont. 421, 428, 860 P.2d 698, 702 (1993). Under Montana law a defendant who acts in self-defense has no duty to retreat from a place where the defendant is lawfully located, provided the defendant is not the initial aggressor. See, Mont. Code Ann. § 45-3-110.

²Mont. Code Ann. § 45-3-105(2).

³As in every other jurisdiction, the reasonableness of the necessity to use force and the quantum of force employed is measured objectively, i.e., by a reasonable person standard. See, e.g., *State v. Collins*, 178 Mont. 36, 45, 582 P.2d 1179, 1184 (1978) and *State v. Sunday*, 187 Mont. 292, 304, 609 P.2d 1188, 1195 (1980).

III. Defeating The Defense Before It Ever Starts–The Investigative Stage.

A. Most claims of self-defense can be defeated by adequate police work done early in the investigative stage and before the defendant begins to concoct a claim of self-defense.

1. This requires the police to look beyond the simple elements of the crime and proactively eliminate the defense by probing the reasons for the crime by:

- a. interviewing all witnesses and confirming no circumstance justified the use of force;
- b. if possible, interviewing the defendant about the crime and learning why he committed it, not simply the fact he committed it;
- c. documenting and photographing any injuries (or lack thereof) to the defendant or his associates;
- d. documenting and photographing the crime scene with an eye to obtaining evidence to use at trial and that can be used to neutralize a claim of self-defense;
- e. if the defendant is arrested, listen to any recorded jail calls he makes, particularly immediately after the arrest. He may make statements that are contrary to a claim of self-defense or fail to attribute the crime to an act of self-defense. For the same reason, preserve any 911 calls;
- h. if the defendant and the victim know each other, explore their history. This step is particularly important in the context of domestic violence prosecutions, where a defendant may seek to contrive a battered victim defense.

B. Good police officers take these steps naturally. If the prosecutor doesn't have the luxury of working with a good officer, the

prosecutor will need to force the officer to take these steps.⁴

1. Even where the police have done a good job, the prosecutor may be dealing with recalcitrant witnesses. In those cases employ a grand jury or the investigative subpoena process to lock-in witness accounts of the crime.

IV. Shaping And Limiting The Defense—The Pretrial Stage.

A. Knowledge is power. Knowing that a defendant intends to pursue a self-defense case, and how he will likely present it, permits a prosecutor to craft the prosecution case in order to defeat the self-defense case. Montana law allows prosecutors to learn a great deal through the discovery process.

1. Mont. Code Ann. § 46-15-323(2) provides that a defendant shall provide the prosecutor with notice of his intent to rely on the defense of justifiable use of force within 30 days of arraignment or at a later time, if permitted by the court. Likewise, Mont. Code Ann. § 45-15-323(6) requires a defendant to provide the prosecutor within 30 days of arraignment (or at a later time if permitted by the court) with the names, addresses, and statements of his witnesses, as well as tangible objects the defendant may use at trial. Failure to comply with these provisions can result in the discretionary imposition of sanctions, including the preclusion of a defense at trial, under Mont. Code Ann. § 45-15-329.

2. While these provisions appear to be self-executing, the prosecutor should file a formal, written request for discovery at the arraignment. By doing so, the prosecutor begins the process of laying a foundation that the defendant's failure to comply with his discovery obligations was willful, and therefore more likely to warrant the extreme sanction of a defense preclusion.

⁴This should not be too difficult, since Mont. Code Ann. § 45-3-112 requires the authorities to investigate incidents that may involve the justifiable use of force.

B. Motions *in limine* and trial briefs. Motions *in limine* and trial briefs are effective tools to school the court on the defense and prevent the defendant from confusing the jury or prejudicing the jury with inadmissible evidence.

1. Such tools can prevent or limit:

a. admission of evidence of the victim's bad character in general, e.g., the old "he needed killing or maiming" defense. Such evidence typically consists of a character trait of a victim not pertinent to the charged offense or the claim of self-defense (offered under Mont. R. Evid. 404(a)(2)) or evidence of other crimes committed by the victim (offered under Mont. R. Evid. 404(b)).

b. the method by which to prove a pertinent character trait of the the victim under Mont. R. Evid. 404(a)(2). Generally, Mont. R. Evid. 405(a) limits the presentation of such evidence on direct examination by testimony via reputation or opinion evidence. While Mont. R. Evid.405(b) permits the use of specific instances of a victim's conduct to prove a character trait that is an essential element of a defense or relates to the reasonableness of force used by an accused in self-defense, the Montana Supreme Court strictly limits this method of proof even in self-defense cases. Thus, for Mont. R. Evid. 405(b), evidence of a victim's violent character is not an essential element of the defense of justifiable use of force. *State v. Montgomery*, 327 Mont. 138, 141, 112 P.3d 1014, 1016 (2005), citing *State v. Sattler*, 288 Mont. 79, 98, 956 P.2d 54, 64 (1998). Nor does such evidence relate to the reasonableness of a defendant's use of force, unless the defendant can demonstrate he knew of the specific acts of conduct by the victim at the time he employed force and that knowledge led to the use of force. *Henson*, 2010 WL 2492179 at pages 9 and 10 (collecting cases).

2. Such tools can also limit the ability of a defendant to admit at trial his own self-serving account of the crime to the police in an effort to avoid testifying as a witness and evade the crucible of cross-

examination, provided the limitation does not violate the "rule of completeness" regarding admission of recorded or written statements. *United States v. Ortega*, 203 F.3d 675, 682 (9th Cir. 2000) (such statements, when offered by a defendant, do not qualify under Fed. R. Evid. 801(d)(2) as a statement of a party opponent). Accord, *Williamson v. United States*, 512 U.S. 594, 600-01 (1994). (specific non-inculpatory statements by a defendant within a broadly inculpatory statement do not qualify as statements against penal interest).

V. Overcoming The Defense At Trial.

A. *Voir Dire*.

Although under Montana law justifiable use of force is a true, non-burden shifting affirmative defense that the defendant must prove at trial, the prosecution needs to attack any hint of the defense from the trial's inception, which starts with *voir dire*. As in every trial, lawyers should attempt to develop critical themes in *voir dire*. This is particularly important in a self-defense case, since the defense evokes visceral reactions from almost everyone and a great deal of misinformation exists about the defense. Try to obtain information about the following during *voir dire*:

1. Has anyone on the venire panel ever been the victim of a violent crime? If so, how did they react?

2. Has anyone ever had to use force to protect themselves, their property, or another person? If so, what led them to believe it was necessary to use force? How much force did they use? Did they use a weapon? At what point did they decide it was no longer necessary to use force?

Then try to develop themes with the jury:

1. Often a self-defense case that goes to trial is one that turns on the degree of force used, such as the commission of a homicide stemming from a simple bar fight or the use of a dangerous weapon against an unarmed aggressor. In these cases its important very early

on to educate the jury about the limits placed on the use of deadly force. Ask the jury if they've ever heard the expression about someone "taking a gun to a fistfight" and attempt to elicit a consensus that there are limits on the degree of force a person can reasonably use.

2. Other self-defense cases turn on who the initial aggressor was. If the defendant was the initial aggressor, of course, he is not generally entitled to act in self-defense. Try to develop themes that underscore the good sense of that rule. For example, if your older son hits his younger sister, and she attempts to defend herself, is he entitled to continue to beat her up simply because she tried to protect herself against his initial aggression? Put another way, after Germany invaded Poland on September 1, 1939, and Poland sought to defend itself, was Germany entitled to justify sacking Poland for remainder of the war simply because Poland sought to defend itself from Germany's initial assault?

B. Opening statements.

As with any opening statement, don't promise anything you can't deliver later. However, the opening statement should address the issue of self-defense. How to address the issue varies with each case, but at the very least the prosecutor can note in the opening statement that the use of force was not justifiable because it was unnecessary, or unreasonable or excessive. In other words, simply preview for the jury why self-defense does not apply in the case.

C. The Prosecution's Case-In-Chief.

1. The devil is in the details, particularly in self-defense cases, which turn on facts that establish who was the initial aggressor, whether force was necessary, how much force was necessary, and how events would have been perceived by a reasonable person. These details typically go hand-in-hand with the elements of the charged offense the prosecution must prove beyond a reasonable doubt. Accordingly, as the prosecutor puts on his or her case-in-chief to prove the elements of the charge offense, the details related to self-defense can also be addressed.

2. Make use of witnesses, crime scene photographs, and diagrams to set the scene and to limit the ability of witnesses offered by the defendant to claim that certain events occurred in a certain manner. For example, in the case of a barroom brawl where a defense witness will claim the victim attacked the defendant with a pool cue, admit crime scene photographs that show the bar had no pool table or cues. Ask the prosecution witnesses who were in the bar if they observed any pool cues.

3. Use crime scene photographs, autopsy photographs, and other photographs of injuries to the victim to demonstrate the nature, gravity, and manner of the crime. Where a victim has four stab wounds in the his back, and no wounds to his front, the defendant's claim that he stabbed the victim while the victim was strangling him will not have much force. Note that often times the defendant will offer to stipulate to a legal element of the charged offense, (e.g, that he killed the victim in homicide case) in an effort to prevent the prosecution from admitting highly probative evidence, such as crime scene or autopsy photographs that not only document the fact of the crime or force employed, but the *manner*, in which it occurred. Don't accept such a stipulation.⁵

4. Consider not admitting a defendant's self-serving statement to law enforcement in order to compel him to testify in the defense case-in-chief.

5. Admit any evidence of post-offense flight to avoid apprehension, since it is a matter of proverbial commonsense that an innocent person does not flee. *California v. Hodari D.*, 499 U.S. 621, 624, footnote 1 (1991), citing Proverbs 28:1 ("the wicked flee when no man pursueth).

⁵A prosecutor must accept a stipulation to a fact where the sole reason for otherwise admitting the evidence is to prove the fact to which the defendant is willing to stipulate. *Old Chief v. United States*, 519 U.S. 172, 174 (1997). That rule should not govern an instance where a defendant is willing to stipulate to the cause of death, but the evidence is relevant to prove other matters still in dispute, such as the manner of death or whether reasonable force was employed.

D. Defense Case-In-Chief.

1. Again, use photographs and diagrams when crossing defense witnesses to force them to justify their accounts of the use of force within the limits of time, space, and the crime scene.

2. If the defendant testifies, take your time in cross-examining him. Recall that the devil does indeed reside within the details. Make him prove he acted reasonably.

3. *Doyle v. Ohio*, 426 U.S. 610, 618-19 (1976) bars a prosecutor from using a defendant's post-*Miranda* silence against him, since the tactic penalizes the defendant for invoking his right to remain silent despite *Miranda's* implicit promise that he will not be punished for invoking the privilege against self-incrimination. However, *Doyle* is not violated by commentary on inconsistencies between a defendant's statement given post-arrest, post-*Miranda* and his trial testimony, since the defendant did not rely on his right to remain silent. *Anderson v. Charles*, 447 U.S. 404, 408 (1980). Likewise, a defendant may be impeached by prearrest, pre-*Miranda* silence (*Jenkins v. Anderson*, 447 U.S. 231, 239 (1980)) or post-arrest, pre-*Miranda*, silence (*Fletcher v. Weir*, 455 U.S. 603, 606-07 (1982)), since the defendant could not have relied on the implicit assurances of *Miranda*. Thus, in an appropriate case, a prosecutor may be able to cross-examine a defendant about the fact he made statements on prior occasions that did not mention self-defense as an explanation for his conduct. These are very perilous waters, however, that require great caution before entering.

4. The defendant may introduce evidence of his character for peacefulness under Mont. R. Evid. 404(a)(1). Depending on the purpose for which the evidence is offered (i.e. to establish an element⁶ of the

⁶Recall that evidence of a *victim's* violent character is not an essential element of the defense of justifiable use of force that permits the use of specific acts evidence under Mont. R. Evid. 405(b). *Montgomery*, 327 Mont. at 141, 112 P.3d at 1016. One can make an equally plausible argument that the peacefulness of the *defendant* is not an element of the defense of justifiable use of force, a fact bolstered

defense of justifiable use of force or the reasonableness of the force used) proof may be made by specific acts evidence on direct examination of the witness. In any event, however, cross-examination of the witness may probe specific acts of conduct by the defendant

5. The defendant may introduce evidence of the victim's character for violence. Again, recall that the evidence must be reputation or opinion evidence, unless it meets the standards of Mont. R. Evid. 405(b). Cross-examination may inquire into specific instances of relevant conduct by the victim. See, Mont. R. Evid. 405(a).

E. Rebuttal.⁷

1. In the event the defendant admitted evidence about his peaceful character during his case-in-chief, the evidence can be rebutted by contrary evidence at this stage.

2. In the event the defendant admitted evidence about the victim's character, that evidence can be rebutted at this stage.

3. If the defendant admitted evidence that the victim was the first aggressor in a homicide case or the first aggressor in an assault case where the victim is incapable of testifying, the prosecution can admit character evidence to rebut the evidence that the victim was the first aggressor. See, Mont. R. Evid. 404(a)(2).

by Montana's pattern jury instructions on the essential elements of the defense, which do not require a showing that the defendant has a character for peacefulness. See, also, *Keiser*, 57 F.3d at 856-57 (a character trait must necessarily prove an element to permit the use of specific acts evidence under Fed. R. Evid. 405(b)).

⁷Generally, rebuttal is limited to rebut new evidence proffered in the defense case-in-chief. *Benedict v. United States*, 822 F.2d 1426, 1428 (6th Cir. 1987). Thus, if a defendant develops evidence during the prosecution's case-in-chief that is relevant to self-defense, that discrete evidence should be rebutted in the prosecution's case-in-chief.

F. Closing Arguments

1. Since the defense is wholly an affirmative defense under Montana law, a prosecutor may consider not addressing any aspect of the defense until the rebuttal closing argument. Such a tactic forces defense counsel to address the matter first and does not permit him to respond to the prosecutor's argument.

2. Wherever the prosecutor chooses to address the issue, the prosecutor needs to argue the evidence as it relates to the jury instruction in detail. Self-defense is a technical defense with many requirements and any failure to establish an element is fatal to the defense. The prosecutor must continually remind the jury that the defendant bears the burden to establish a reasonable doubt that he acted in self-defense.

3. While arguing the instruction and putting the defendant to his burden, don't contest clearly established elements of the defense. If a victim was the initial aggressor, don't argue to the contrary. If the initial use of force was reasonable, but then escalated to unreasonable use of force motivated by anger rather than self-defense, don't contest the nature of the initial use of force. Instead concentrate on the fact that a reasonable use of force at some point became an unreasonable use of force wholly out of proportion to what the situation required.

4. Don't try to make an angel out of a victim who was, in fact, a jerk. Where the victim starts a fistfight and is beaten to death by the defendant who acted out of anger rather than self-defense, argue that the victim may not have been the nicest person, but his sins didn't merit the death penalty.

5. Ensure that the jury understands the reasonableness of the force used is measured under a reasonable person standard, not the defendant's subjective standard. Defendants have all sorts of subjective justifications for their conduct that are by no means reasonable by objective standards.