

SELF-DEFENSE: USE OF NON-DEADLY FORCE

[Use this instruction if the level of force used by the defendant was non-deadly as a matter of law. For additional detail on non-deadly versus deadly force, see Note 4 to Instruction 9.260A.]

As I told you, because this case raises a question as to whether the defendant lawfully used force to defend against an attack, the Commonwealth has the burden to prove beyond a reasonable doubt both the elements of the offense and that the defendant did not act in lawful self-defense when using that force.

To prove that the defendant did not act in self-defense when using force, the Commonwealth must prove at least one of the following things beyond a reasonable doubt:

***One*, that the defendant did not actually have a concern for their immediate personal safety.**

***Two*, that a reasonable person in the same circumstances as the defendant would not have had a concern for their immediate personal safety.**

***Three*, that the defendant did not take all reasonable steps to avoid physical combat before resorting to force. (or)**

***Four*, that the defendant used more force to defend themselves than was reasonably necessary in the circumstances. (or)**

[Where there is evidence that the defendant was the first aggressor:]

(Five, that the defendant was the first to use or threaten to use force and did not withdraw from the conflict in good faith and clearly communicate by words or conduct their intention to end the confrontation without any further use of force.)

I will now explain each of the ways in which the Commonwealth can disprove that the defendant acted in self-defense in more detail, and remind you that the Commonwealth may satisfy its burden of proving that the defendant did not act in self-defense by proving at least one of these things beyond a reasonable doubt.

**Propositions One & Two:
Actual and Reasonable Concern for Immediate Personal Safety**

One way that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt the defendant did not *actually* have a concern for their immediate personal safety. Another way that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt that a reasonable person in the same circumstances as the defendant would not have had a reasonable concern for their immediate personal safety.

A person cannot act in lawful self-defense unless they are attacked or are immediately about to be attacked. Therefore, there must be an overt act—words, a gesture, or some other action—that could give rise to an actual and reasonable concern for immediate personal safety. The Commonwealth may prove that there was not an actual or reasonable concern for immediate personal safety by proving beyond a reasonable doubt that there was no overt act that gave rise to those concerns.

The right to self-defense ends when the necessity ends. This means that a person does not act in lawful self-defense when they use force to pursue their attacker to retaliate, or out of anger after an attacker has been neutralized or disarmed, or to prevent a future attack. The Commonwealth may prove that there was not an actual or reasonable concern for immediate personal safety by proving beyond a reasonable doubt that the defendant was no longer in any immediate danger and instead used force against their attacker for revenge or to ward off any possibility of attack in the indefinite future.

In considering whether the defendant had a concern for their immediate personal safety and the reasonableness of that concern,

you may consider all the evidence relating to the defendant's state of mind at the time.

SUPPLEMENTAL INSTRUCTIONS

If there is evidence of alleged victim's prior threats or violence against defendant.

To determine the defendant's state of mind, you may consider any threats or acts of violence committed by (the alleged victim), but only if the defendant knew of those threats or acts of violence.

Commonwealth v. Pidge, 400 Mass. 350, 353 (1987); *Commonwealth v. Edmonds*, 365 Mass. 496, 499-501 (1974). While these were homicide cases, the principle is applicable to any self-defense claim. Admission and use of evidence that the defendant has been the victim of abuse and of expert testimony regarding the consequences of abuse is governed by G.L. c. 233, § 23F.

If there is evidence of alleged victim's reputation for violence or quarreling.

To determine the defendant's state of mind, you may consider whether (the alleged victim) had a reputation for violence or quarreling. However, you may only consider it if the defendant knew about that reputation.

"When self-defense is at issue, 'evidence of the "character of [the victim] as a powerful, dangerous, quarrelsome or violent person, if known to the defendant, may be admitted" as evidence of the defendant's "apprehension of his own safety, and the reasonableness of that apprehension."'"
Commonwealth v. Williams, 450 Mass. 879, 891-892 (2008), quoting *Commonwealth v. Edmonds*, 365 Mass. 496, 501 (1974); see also *Commonwealth v. Clemente*, 452 Mass. 295, 308 (2008).

Reputation evidence is admissible only if known to the defendant, in contrast to specific acts of violence, which are admissible regardless of whether known to the defendant, pursuant to *Commonwealth v. Adjutant*, 443 Mass. 649, 664-665 (2005).

In a criminal proceeding, in support of a claim of self-defense, "a defendant may offer evidence known to the defendant prior to the incident in question of the victim's reputation for violence, of specific instances of the victim's violent conduct, or of statements made by the victim that caused

reasonable apprehension of violence on the part of the defendant.” Mass. G. Evid. § 404(a)(2)(C) (2023); *Commonwealth v. Sok*, 439 Mass. 428, 434 (2003). Admission of such evidence “is limited to acts that are not too remote, lest the trial turn into a distracting and prejudicial investigation of the victim’s character.” *Commonwealth v. Kartell*, 58 Mass. App. Ct. 428, 432 (2003); accord *Commonwealth v. Fontes*, 396 Mass. 733, 735-737 (1986). Admission of evidence of specific acts of violence is preferred over more general evidence of the victim’s reputation for violence. *Adjutant*, 443 Mass. at 665.

Once the defense has raised the issue of the victim’s allegedly violent character, the prosecution may rebut by offering evidence of the victim’s reputation for peacefulness. *Adjutant*, 443 Mass. at 666 n.19, citing *Commonwealth v. Lapointe*, 402 Mass. 321, 325 (1988).

If there is evidence that the defendant was mentally impaired or under the influence of alcohol or drugs at time of offense.

There has been evidence of the defendant’s mental condition at the time of the offense, including (evidence of mental impairment) (or) (evidence of the effect on the defendant of their consumption of alcohol or drugs).

As I have told you, among the ways that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt either that the defendant did not actually have a concern for their immediate personal safety, or that a reasonable person in the defendant’s circumstances would not have had that concern.

Evidence of the defendant’s mental condition at the time of the offense is relevant to determining the defendant’s subjective belief about the harm they faced, but such evidence is not relevant to determining whether the defendant’s belief was

objectively reasonable. So, in determining whether the defendant actually had a concern for their immediate personal safety, you may consider any evidence of the defendant's mental condition. However, in determining whether a reasonable person in the defendant's position would have had such a concern, the defendant's mental condition is not relevant and you may not consider it.

See Note 7 to Instruction 9.260A for further detail on the use of evidence of the defendant's mental condition in a self-defense case.

If there is evidence defendant had a mistaken belief about their concern for personal safety.

A person with a mistaken belief about having a concern for immediate personal safety may use force to defend themselves, if that mistaken belief was reasonable based on all the circumstances.

Commonwealth v. Pike, 428 Mass. 393, 396-397 (1998); Commonwealth v. Glass, 401 Mass. 799, 808-809 (1988).

**Proposition Three:
Reasonable Steps to Avoid Combat**

Another way that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt that the defendant did not use or attempt to use all

proper and reasonable means under the circumstances to avoid physical combat before resorting to force.

A person may use physical force in self-defense only if they could not get out of the situation in some other way that was available and reasonable at the time. The Commonwealth may prove that the defendant did not act in self-defense by proving beyond a reasonable doubt that the defendant resorted to force without using avenues of escape that were reasonably available and which would not have exposed the defendant to further danger.

In determining whether the defendant exhausted all reasonable alternatives to using force, you may consider any evidence about where the incident took place, whether the defendant might have been able to escape by getting away or otherwise getting to safety or by summoning help if that could have been done in time, or by holding their attacker at bay if the means were available, or by some other method. You may consider whether the use of force seemed to be the only means of protection in the circumstances. You may consider that a person who has a reasonable concern for their immediate personal safety may have to decide what to do quickly and while under emotional strain.

SUPPLEMENTAL INSTRUCTION

If there is evidence that victim was injury-prone.

If a person has exhausted all proper means to avoid physical combat, they may use appropriate force in self-defense if they reasonably believe that their personal safety is in danger, even against someone who is known to be susceptible to injury (such as a person under the influence of alcohol or drugs).

Commonwealth v. Bastarache, 382 Mass. 86, 104-105 (1980).

**Proposition Four:
Proportional Use of Force**

(Another) (A final) way that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt that the defendant used more force than was reasonably necessary under all the circumstances. How much force is necessary may vary with the situation. The question of what force is needed in self-defense, however, is to be considered with due regard for human impulses and passions. In considering whether the force used by a person was reasonable under the circumstances, you may consider evidence of the relative physical capabilities of the combatants, the number of persons who were involved on each side,

(whether any weapons were used, when, and by whom,) (the characteristics of any weapons used), the availability of room to maneuver, the manner in which the force was used, the scope of the threat presented, whether the defendant had to decide how to respond quickly, or any other evidence you deem relevant to the reasonableness of the person’s conduct under the circumstances.

**Proposition Five:
Evidence of Defendant as First Aggressor**

[Where there is evidence that the defendant was the first aggressor.]

The final way that the Commonwealth may prove that the defendant did not act in self-defense is by proving beyond a reasonable doubt both: one, that the defendant was the first to use or threaten to use force; and two, that the defendant did not withdraw in good faith from the conflict and clearly communicate by words or conduct their intention to withdraw and end the confrontation without any (further use of) force. Generally, the first aggressor has no right to use self-defense unless they withdraw from the conflict in good faith and clearly communicate their intention to abandon the conflict.

Commonwealth v. Chambers, 465 Mass. 520, 528 (2013), quoting *Commonwealth v. Maguire*, 375 Mass. 768, 772 (1978) (“[A] criminal defendant who is found to have been the first aggressor loses the right to claim self-defense unless he ‘withdraws in good faith from the conflict and announces his intention to retire.’”); see *Commonwealth v. Barbosa*, 463 Mass. 116, 136 (2012); *Commonwealth v. Pring-Wilson*, 448 Mass. 718, 733 (2007); see also *Commonwealth v. Harris*, 464 Mass. 425, 433-436 & nn.11, 12 (2013) (noting that instruction that “[a] person who provokes

or initiates an assault ordinarily cannot claim the right of self-defense” is “potentially overbroad because it does not define what constitutes provocation of the type that results in the forfeiture of a self-defense claim,” and advising judges to “make clear that conduct involving only the use of nonthreatening words will not be sufficient to qualify a defendant as a first aggressor”).

SUPPLEMENTAL INSTRUCTIONS

Where the identity of the first aggressor is in dispute and there is evidence about the alleged victim’s prior acts of violence pursuant to Commonwealth v. Adjutant, 443 Mass. 649 (2005).

For the purpose of determining who attacked whom first in the altercation, you may consider evidence of the past violent conduct of the alleged victim (or by a third party acting with the alleged victim), whether known or unknown to the defendant. You may not consider that evidence for any other purpose.

“[W]here the identity of the first aggressor or the first to use deadly force is in dispute, a defendant may offer evidence of specific incidents of violence allegedly initiated by the victim, or by a third party acting in concert with or to assist the victim, whether known or unknown to the defendant, and the prosecution may rebut the same with specific incidents of violence by the defendant” Mass. G. Evid. § 404(a)(2)(B) (2023); *accord Commonwealth v. Pring-Wilson*, 448 Mass. 718, 737 (2007); *Commonwealth v. Adjutant*, 443 Mass. 649, 664 (2005). The term “first aggressor” includes “both the person who started the fight and the person who first escalated a nondeadly fight into a deadly one by either the threat or use of deadly force.” *Commonwealth v. Souza*, 492 Mass. 615, 622 (2023).

“The admission of *Adjutant* evidence is subject to the careful discretion of the trial judge, who ‘must carefully examine the particular circumstances of the case, and weigh the probative value of such evidence against its prejudicial effect.’” *Souza*, 492 Mass. at 626, quoting *Commonwealth v. Morales*, 464 Mass. 302, 312 n.16 (2013). The alleged acts must be more probative than prejudicial. Admission of specific acts of violence is preferred over more general evidence of a victim’s reputation for violence. *Adjutant*, 443 Mass. at 665.

Adjutant evidence focuses on the victim’s prior violent behavior. *Souza*, 492 Mass. at 625. Once a defendant satisfies the requirement to show that proposed *Adjutant* evidence involves an instance “where the victim initiated the violence . . . the entirety of the violent event or incident initiated by the victim is potentially admissible.” *Souza*, 429 Mass. at 625-626. Such evidence must be otherwise admissible under the rules of evidence, and the judge has discretion to limit additional cumulative evidence. *Commonwealth v. Clemente*, 452 Mass. 295, 306 & n.18 (2008).

Where the identity of the first aggressor is in dispute and there is evidence about the alleged victim's prior threats of violence against the defendant, regardless of whether the defendant was aware of the threats.

In considering who was being attacked by whom, you may take into account whether any threats of violence were made by (the alleged victim) against the defendant and whether (the alleged victim) was trying to carry out those threats during this incident.

“Evidence of the victim's threats of violence against the defendant, even if unknown by a defendant asserting self-defense, is admissible as tending to show that the victim was attempting to carry out his threat and that the defendant was in danger.” *Commonwealth v. Fontes*, 396 Mass. 733, 735 (1986), citing *Commonwealth v. Rubin*, 318 Mass. 587, 588-589 (1945).

I will now briefly summarize the instruction on self-defense that I have just given you. Since this case raises a question as to whether the defendant lawfully used force to defend against an attack, the Commonwealth has the additional burden to prove that the defendant did not act in self-defense by proving at least one of the following things beyond a reasonable doubt:

One, that the defendant did not actually have a concern for their immediate personal safety.

Two, that a reasonable person in the same circumstances as the defendant would not have had a concern for their immediate personal safety.

Three, that the defendant did not take all reasonable steps to avoid physical combat before resorting to force. (or)

Four, that the defendant used more force to defend themselves than was reasonably necessary in the circumstances. (or)

[Where there is evidence that the defendant was the first aggressor.]

(Five, that the defendant was the first to use or threaten to use force and did not withdraw from the conflict in good faith and clearly communicate by words or conduct their intention to end the confrontation without any use or additional use of force.)

If each element of the crime has been proved beyond a reasonable doubt and it has also been proved beyond a reasonable doubt that the defendant did not act in self-defense, you should return a verdict of guilty. If any element of the crime has not been proved beyond a reasonable doubt, or the Commonwealth did not prove beyond a reasonable doubt that the defendant did not act in self-defense, you must find the defendant not guilty.