

DEFENSE OF ANOTHER

The issue of defense of another generally arises where there is also an issue of self-defense, and therefore the Defense of Another instruction presumes that the jury will also be given the Self-Defense instruction (Instructions 9.260 through 9.263). The Defense of Another instruction may be given before or after the Self-Defense instruction.

Where an issue of defense of another arises without an issue of self-defense, the judge may still need to explain the law of self-defense to assist the jury in understanding the law of defense of another because the jury are required to determine whether, based on the circumstances known to the defendant, a reasonable person would believe that the other person was justified in using force (non-deadly or deadly) to protect themselves.

A person is not guilty of [charged crime(s)] if they acted in lawful defense of another. It is the Commonwealth's burden to prove beyond a reasonable doubt that the defendant did not act in lawful defense of another. The defendant does not have the burden to prove that they acted in lawful defense of another. If the Commonwealth fails to prove beyond a reasonable doubt that the defendant did not act in lawful defense of another, then you must find the defendant not guilty.

The Commonwealth may satisfy its burden of proving that the defendant did not act in lawful defense of another by proving at least one of the following three things beyond a reasonable doubt:

[The three propositions below include alternatives depending on whether the force at issue was non-deadly ("concern for their immediate personal safety") or deadly ("immediate danger of death or serious bodily harm"). Where the evidence, viewed in the light most favorable to the defendant, would permit the jury to find that the force used by the defendant was either non-deadly or deadly force, the defendant is entitled to instructions on the use of both non-deadly and deadly force in defense of another, and the jury must decide on the type of force used. For further discussion, see Note 3 infra and Instruction 9.263 (Self-Defense: Level of Force Is a Matter of Fact for the Jury).]

The first way that the Commonwealth may prove that the defendant did not act in lawful defense of another is by proving beyond a reasonable doubt that the defendant did not actually believe that the other person (had a concern for their immediate personal safety) (was in immediate danger of death or serious bodily harm from which the other person could save themselves only by using deadly force). You do not need to determine whether the other person actually (had a concern for their immediate personal safety) (believed themselves to be in immediate danger of death or serious bodily harm); you must focus instead on whether the defendant actually had that belief.

See Commonwealth v. Barbosa, 463 Mass. 116, 135-36 (2012); *Commonwealth v. Young*, 461 Mass. 198, 209 & n.19 (2012); *Commonwealth v. Martin*, 369 Mass. 640, 649 (1976).

The second way that the Commonwealth may prove that the defendant did not act in lawful defense of another is by proving beyond a reasonable doubt that a reasonable person in the circumstances known to the defendant would not have believed that the other person (had a concern for their immediate personal safety) (was in immediate danger of death or serious bodily harm from which the other person could save themselves only by using deadly force). You do not need to determine whether a reasonable person in the circumstances known to the other person would have (had a concern for their immediate personal safety) (believed themselves to be in immediate danger of death or serious bodily

harm); you must focus instead on what a reasonable person in the circumstances known to the defendant would have believed.

See Commonwealth v. Young, 461 Mass. 198, 209 & n.19 (2012) (noting that the proper perspective of the circumstances is that of the intervening defendant and not the third party; “whether the third party was, in retrospect, actually entitled to use self-defense is not a consideration”); *see also Commonwealth v. Barbosa*, 463 Mass. 116, 135-36 (2012).

The third way that the Commonwealth may prove that the defendant did not act in lawful defense of another is by proving beyond a reasonable doubt that a reasonable person in the circumstances known to the defendant would not have believed that the other person was justified in using (non-deadly) (deadly) force to protect themselves.

See Commonwealth v. Young, 461 Mass. 198, 208 (2012) (quoting *Commonwealth v. Martin*, 369 Mass. 640, 649 (1976)); *see also Commonwealth v. Barbosa*, 463 Mass. 116, 135-36 (2012)..

(In determining whether the defendant actually or reasonably believed that the other person was in danger and whether the defendant reasonably believed that the other person was justified in using (non-deadly) (deadly) force, you must apply the law of self-defense as I (instructed) (will instruct) you.)

NOTES:

- 1. Defense of another is a complete exoneration.** “[S]elf-defense and defense of another, if warranted by the circumstances and carried out properly, constitute a complete defense and not merely a mitigating circumstance.” *Commonwealth v. Carlino*, 429 Mass. 692, 694 (1999).
- 2. When defense of another instruction must be given.** “A judge must instruct the jury on defense of another where the evidence when viewed in the light most favorable to the defendant could support a finding that the use of force was justified on this basis.” *Commonwealth v. Okoro*, 471 Mass. 51, 68 (2015); *accord Commonwealth v. Barbosa*, 463 Mass. 116, 135 (2012).
- 3. Non-deadly force and deadly force involve two different standards.** The right to use non-deadly force arises at a “somewhat lower level of danger” than the right to use deadly force. *Commonwealth*

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v. Abubardar, 482 Mass. 1008, 1010 (2019) (quoting *Commonwealth v. Baseler*, 419 Mass. 500, 502 (1995)). For that reason, the standards for self-defense using non-deadly force and deadly force “are mutually exclusive.” *Commonwealth v. Walker*, 443 Mass. 213, 217 (2005). For the standard for using non-deadly force in self-defense, see, e.g., *Commonwealth v. King*, 460 Mass. 80, 83 (2011). For the standard for using deadly force in self-defense, see, e.g., *Commonwealth v. Ng*, 491 Mass. 247, 258 (2023).

It is reversible error for a judge to give self-defense instructions related to deadly force when the judge should charge on self-defense related to non-deadly force, since doing so lowers the Commonwealth’s burden in proving that the defendant did not act in self-defense. *Baseler*, 419 Mass. at 503-04.

Deadly force is “force intended or likely to cause death or great bodily harm. “This tracks our long-standing definition of a ‘dangerous weapon’ viz. an instrument that is likely to produce death or serious bodily injury.” *Commonwealth v. Klein*, 372 Mass. 823, 827 (1977). “Deadly force” refers to the level of force used, not the seriousness of the resulting injury. *Commonwealth v. Noble*, 429 Mass. 44, 46 (1999) (use of fist is non-deadly force even if death results); *Commonwealth v. Pike*, 428 Mass. 393, 396 n.3 (1998) (judge should instruct on standard for non-deadly force if force generally considered non-deadly results in death in particular case); see *Commonwealth v. Grassie*, 476 Mass. 202, 209 & n.6 (2017) (use of a knife is deadly force); see also *Pike*, 428 Mass. at 395-98 (assault with overt threat to cause serious bodily injury sufficient to warrant instruction on deadly force in self-defense). When the only force used was deadly force, the defendant is not entitled to a non-deadly force instruction. *Commonwealth v. Lopes*, 440 Mass. 731, 740 (2004).

Where the level of force cannot be determined as a matter of law, it is a jury issue, and the defendant is entitled to instructions on the use of both deadly and non-deadly force in self-defense. *Walker*, 443 Mass. at 217; e.g., *Noble*, 429 Mass. at 46-47 (whether wrestling headlock was deadly or non-deadly force was question of fact for jury). Where a weapon which may be dangerous was not used in its intended deadly manner, the jury must determine if that use constituted deadly force. *Commonwealth v. Cataldo*, 423 Mass. 318, 322-23 (1996) (where evidence was conflicting whether defendant drew gun and pointed it or did not draw gun or reached for gun in waistband, it was for jury to determine whether defendant has used deadly force).

4. **Defense of another and self-defense involving a police officer.** Refer to Resisting Arrest (Instruction 7.460) when these issues arise in the context of an interaction with a police officer.