

54 From the Committee on Model Criminal Jury Instructions

The Committee solicits comment on the following proposal by August 1, 2019. Comments may be sent in writing to Samuel R. Smith, Reporter, Committee on Model Criminal Jury Instructions, Michigan Hall of Justice, P.O. Box 30052, Lansing, MI 48909-7604, or electronically to MCrimJI@courts.mi.gov.

PROPOSED

The Committee proposes amending components of the self-defense instructions found in M Crim JI 7.15, 7.16, 7.21, and 7.22 to correct and clarify amendments to the instructions adopted by the State Bar of Michigan Standing Committee on Criminal Jury Instructions in response to the enactment of the Self-Defense Act, MCL 780.971 *et seq.* The self-defense instructions were amended in 2007 pursuant to language in MCL 780.972(1) regarding a person “not engaged in the commission of a crime at the time” when deadly force was used. They direct that self-defense is only available where the defendant was not committing a crime. MCL 780.972(1) actually addresses the duty to retreat before using deadly force. MCL 780.974 states that the common law right to self-defense was not diminished by the Act. *People v Townes*, 391 Mich 578, 593; 218 NW2d 136 (1974), states that a defendant does not necessarily lose the right to self-defense while committing another offense if that other offense was not likely to lead to the other person’s assaultive behavior. The current instructions state that self-defense is barred if the defendant is committing any crime, even one not likely to lead to assaultive behaviors, and would also appear to bar self-defense when the defendant is charged with, *inter alia*, being a felon in possession of a firearm, contrary to holdings in *People v Dupree*, 486 Mich 693 (2010), and *People v Guajardo*, 300 Mich App 26 (2013). The proposal amends the Use Note to M Crim JI 7.15, eliminates language in M Crim JI 7.21 and 7.22 that bars self-defense when the defendant is engaged in a criminal act, and combines acts using deadly and non-deadly force in M Crim JI 7.16.

[AMENDED USE NOTE] M Crim JI 7.15 Use of Deadly Force in Self-Defense

(1) The defendant claims that [he/she] acted in lawful self-defense. A person has

the right to use force or even take a life to defend [himself/herself] under certain circumstances. If a person acts in lawful self-defense, that person’s actions are justified and [he/she] is not guilty of [state crime].

(2) You should consider all the evidence and use the following rules to decide whether the defendant acted in lawful self-defense. Remember to judge the defendant’s conduct according to how the circumstances appeared to [him/her] at the time [he/she] acted.

(3) First, at the time [he/she] acted, the defendant must have honestly and reasonably believed that [he/she] was in danger of being [killed/seriously injured/sexually assaulted]. If the defendant’s belief was honest and reasonable, [he/she] could act immediately to defend [himself/herself] even if it turned out later that [he/she] was wrong about how much danger [he/she] was in. In deciding if the defendant’s belief was honest and reasonable, you should consider all the circumstances as they appeared to the defendant at the time.

(4) Second, a person may not kill or seriously injure another person just to protect [himself/herself] against what seems like a threat of only minor injury. The defendant must have been afraid of [death/serious physical injury/sexual assault]. When you decide if the defendant was afraid of one or more of these, you should consider all the circumstances: [the condition of the people involved, including their relative strength/whether the other person was armed with a dangerous weapon or had some other means of injuring the defendant/the nature of the other person’s attack or threat/whether the defendant knew about any previous violent acts or threats made by the other person].

(5) Third, at the time [he/she] acted, the defendant must have honestly and reasonably believed that what [he/she] did was immediately necessary. Under the law, a person may only use as much force as [he/she] thinks is necessary at the time to protect [himself/herself]. When you decide whether the amount of force used seemed to be necessary, you may consider whether the defendant knew about any other ways of protecting [himself/herself], but you may also consider how the excitement of the moment affected the choice the defendant made.

Use Note

Use this instruction when requested where some evidence of self-defense has been introduced or elicited. Where there is evidence that, at the time that the defendant used deadly force, he or she was engaged in the commission of some other crime, the Committee on Model Criminal Jury Instructions believes that circumstances of the case may provide the court with a basis to instruct the jury that the defendant does not lose the right to self-defense if the commission of that other offense was not likely to lead to the other person’s assaultive behavior. See *People v Townes*, 391 Mich 578, 593; 218 NW2d 136 (1974). The Committee expresses no opinion regarding the availability of self-defense where the other offense may lead to assaultive behavior by another.

[AMENDED] M Crim JI 7.16 Duty to Retreat to Avoid Using Force or Deadly Force

(1) A person can use [force/deadly force] in self-defense only where it is necessary to do so. If the defendant could have safely retreated but did not do so, you may consider that fact in deciding whether the defendant honestly and reasonably believed [he/she] needed to use [force/deadly force] in self-defense.*

(2) However,* a person is never required to retreat if attacked in [his/her] own home, nor if the person reasonably believes that an attacker is about to use a deadly weapon, nor if the person is subject to a sudden, fierce, and violent attack.

(3) Further, a person is not required to retreat if ~~the person~~ he or she:

(a) has not or is not engaged in the commission of a crime at the time the [force/deadly force] is used, and

(b) has a legal right to be where ~~the person~~ he or she is at that time, and

(c) has an honest and reasonable belief that the use of [force/deadly force] is necessary to prevent imminent [death/great bodily harm/sexual assault] of [himself/herself] ~~person~~ or another person.

Use Notes

*Paragraph (1) and “However” should not be given if ~~the duty to retreat is not in dispute~~ there is no dispute that the defendant

had no duty to retreat. See *People v Richardson*, 490 Mich 115; 803 NW2d 302 (2011).

Use this instruction when requested where some evidence of self-defense has been introduced or elicited. Where there is evidence that, at the time that the defendant used force or deadly force, he or she was engaged in the commission of some other crime, the Committee on Model Criminal Jury Instructions believes that circumstances of the case may provide the court with a basis to instruct the jury that the defendant does not lose the right to self-defense if the commission of that other offense was not likely to lead to the other person's assaultive behavior. See *People v Townes*, 391 Mich 578, 593; 218 NW2d 136 (1974). The Committee expresses no opinion regarding the availability of self-defense where the other offense may lead to assaultive behavior by another.

[AMENDED] M Crim JI 7.21 Defense of Others—Deadly Force

(1) The defendant claims that [he/she] acted lawfully to defend _____. A person has the right to use force or even take a life to defend someone else under certain circumstances. If a person acts in lawful defense of another, [his/her] actions are justified and [he/she] is not guilty of [state crime].

(2) You should consider all the evidence and use the following rules to decide whether the defendant acted in lawful defense of another. Remember to judge the defendant's conduct according to how the circumstances appeared to [him/her] at the time [he/she] acted.

(3) First, ~~at the time [he/she] acted, the defendant must not have been engaged in the commission of a crime.~~

~~(4) Second~~, when [he/she] acted, the defendant must have honestly and reasonably believed that _____ was in danger of being [killed/seriously injured/sexually assaulted]. If [his/her] belief was honest and reasonable, [he/she] could act at once to defend _____, even if it turns out later that the defendant was wrong about how much danger _____ was in.

(54) ~~Third~~ Second, if the defendant was only afraid that _____ would receive a minor injury, then [he/she] was not justified

in killing or seriously injuring the attacker. The defendant must have been afraid that _____ would be [killed/seriously injured/sexually assaulted]. When you decide if [he/she] was so afraid, you should consider all the circumstances: [the conditions of the people involved, including their relative strength/whether the other person was armed with a dangerous weapon or had some other means of injuring _____ / the nature of the other person's attack or threat/whether the defendant knew about any previous violent acts or threats made by the attacker].

(65) ~~Fourth~~ Third, at the time [he/she] acted, the defendant must have honestly and reasonably believed that what [he/she] did was immediately necessary. Under the law, a person may only use as much force as [he/she] thinks is needed at the time to protect the other person. When you decide whether the force used appeared to be necessary, you may consider whether the defendant knew about any other ways of protecting _____, but you may also consider how the excitement of the moment affected the choice the defendant made.

(76) The defendant does not have to prove that [he/she] acted in defense of _____. Instead, the prosecutor must prove beyond a reasonable doubt that the defendant did not act in defense of _____.

[AMENDED] M Crim JI 7.22 Use of Non-deadly Force in Self-Defense or Defense of Others

(1) The defendant claims that [he/she] acted in lawful [self-defense/defense of _____. A person has the right to use force to defend [himself/herself/another person] under certain circumstances. If a person acts in lawful [self-defense/defense of others], [his/her] actions are justified and [he/she] is not guilty of [state crime].

(2) You should consider all the evidence and use the following rules to decide whether the defendant acted in lawful [self-defense/defense of _____. Remember to judge the defendant's conduct according to how the circumstances appeared to [him/her] at the time [he/she] acted.

(3) First, ~~at the time [he/she] acted, the defendant must not have been engaged in the commission of a crime.~~

~~(4) Second~~, when [he/she] acted, the defendant must have honestly and reasonably believed that [he/she] had to use force to protect [himself/herself/ _____] from the imminent unlawful use of force by another. If [his/her] belief was honest and reasonable, [he/she] could act at once to defend [himself/herself/ _____], even if it turns out later that [he/she] was wrong about how much danger [he/she _____] was in.

(54) ~~Third~~ Second, a person is only justified in using the degree of force that seems necessary at the time to protect [himself/herself/the other person] from danger. The defendant must have used the kind of force that was appropriate to the attack made and the circumstances as [he/she] saw them. When you decide whether the force used was what seemed necessary, you should consider whether the defendant knew about any other ways of protecting [himself/herself/ _____], but you may also consider how the excitement of the moment affected the choice the defendant made.

(65) ~~Fourth~~ Third, the right to defend [oneself/another person] only lasts as long as it seems necessary for the purpose of protection.

(76) ~~Fifth~~ Fourth, the person claiming self-defense must not have acted wrongfully and brought on the assault. [However, if the defendant only used words, that does not prevent (him/her) from claiming self-defense if (he/she) was attacked.]

JUST RELEASED

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