

CHAPTER THREE

JUSTIFIABLE USE OF FORCE

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INSTRUCTION NO. 3-101

Use of Force in Defense of a Person

A person is justified in the use of force or threat to use force when and to the extent that he/she reasonably believes that such conduct is necessary to defend [himself/herself] [another] against the imminent use of unlawful force.

[However, a person is justified in the use of force which is intended or likely to cause death or serious bodily harm only if he/she reasonably believes that such force is necessary to prevent (imminent death or serious bodily harm) to (himself/herself) (another) or (commission of a forcible felony)].

SOURCE: MCA § 45-3-102 (1997).

AUTHORITY: *Martin v. Ohio*, 480 U.S. 228 (1987); *State v. Cartwright*, 200 Mont. 91, 650 P.2d 758 (1982).

COMMENT: Cite as MCJI 3-101. If the "forcible felony" is used in the second paragraph, give the instruction from Chapter 2 defining the term.

INSTRUCTION NO. 3-102

Use of Force in Defense of Occupied Structure

A person is justified in the use of force or threat to use force when and to the extent that the person reasonably believes that such conduct is necessary to [prevent] [terminate] another's unlawful [entry into] [attack upon] an occupied structure.

However, a person is justified in the use of force which is likely to cause death or serious bodily harm only if:

the entry is made or attempted in a violent, riotous or tumultuous manner and he/she reasonably believes that such force is necessary to prevent an [assault upon] [offer of personal violence to] himself/herself or another then in the occupied structure;

or

he/she reasonably believes that such force is necessary to prevent the commission of a forcible felony in the occupied structure.

SOURCE: MCA § 45-3-103 (1997).

COMMENT: Cite as MCJI 3-102. The second paragraph should be used only where there is some evidence that the force used by the Defendant was likely to cause death or serious bodily harm. Identical definitions of "forcible felony" are provided in MCA § 45-2-101 and § 45-3-101; See also the definition instruction in Chapter 2.

INSTRUCTION NO. 3-103

Use of Force in Defense of Property

A person is justified in the use of force or threat to use force when and to the extent that he/she reasonably believes such conduct is necessary to [prevent] [terminate] another's [trespass on] [wrongful interference with] [real property other than an occupied structure] [personal property] lawfully [in his/her possession] [in the possession of another who is a member of his/her (immediate family) (household)] [in the possession of a person whose property he/she has a legal duty to protect].

However, he/she is justified in the use of force which is likely to cause death or serious bodily harm only if he/she reasonably believes that such force is necessary to prevent the commission of a forcible felony.

SOURCE: MCA § 45-3-104 (1997).

COMMENT: Cite as MCJI 3-103. Use second paragraph only if there is some evidence that the force used by the Defendant was likely to cause death or serious bodily harm. "Forcible felony" is defined in MCA § 45-2-101 and § 45-3-101, and in the definitions instructions in Chapter 2.

See *State v. Claric*, 271 Mont 141, 894 P.2d 946 (1995), in which the Court affirmed the denial by the district court of the Defendant's offered instruction on justifiable use of force in defense of property when Defendant was unable to establish lawful ownership of the property.

INSTRUCTION NO. 3-104

Use of Force by Aggressor

The use of force in defense of a person is not available to a person who purposely or knowingly provokes the use of force against himself/herself unless [such force is so great that he/she reasonably believes that he/she has exhausted every reasonable means to escape such danger other than the use of force which is likely to cause death or serious bodily harm to the assailant.]

[in good faith he/she withdraws from physical contact with the assailant and indicates clearly to the assailant that he/she desires to withdraw and terminate the use of force but the assailant continues or resumes the use of force.]

SOURCE: MCA § 45-3-105 (1997).

AUTHORITY: *State v. Gonzales*, 278 Mont 525, 926 P.2d 705(1996); *State v. Cartwright*, 200 Mont. 91, 650 P.2d 758 (1982); *State v. Sorenson*, 190 Mont. 155, 619 P.2d 1185 (1980).

COMMENT: Cite as MCJI 3-104. In preparing this instruction the appropriate bracketed alternative should be selected based upon the defense asserted.

INSTRUCTION NO. 3-105

Use of Force to Prevent Escape from Custody

A [peace officer] [person] who has an arrested person in his/her custody is justified in the use of such force as is necessary and reasonable to prevent the escape of the arrested person.

SOURCE: MCA § 45-3-106(1) (1997).

COMMENT: Cite as MCJI 3-105. MCA § 45-3-106(1) (1997) limits the amount of force which will be justified in preventing an escape to the amount of force that would be justified if the person having custody of the arrested person were making an arrest. Reference should be made to MCA, Title 46, Ch. 6, for relevant sections on "arrest" and a definition of "custody" should be provided.

INSTRUCTION NO. 3-106

Peace Officer's Use of Force to Prevent Escape from Institution

A guard or other peace officer is justified in the use of force, including force likely to cause death or serious bodily harm, which he/she reasonably believes to be necessary to prevent the escape from a correctional institution of a person whom the officer reasonably believes to be lawfully detained in such institution [under sentence for an offense] or [awaiting trial for an offense] or [awaiting commitment for an offense].

SOURCE: MCA § 45-3-106(2) (1997).

COMMENT:Cite as MCJI 3-106(2).

INSTRUCTION NO. 3-107

Use of Force by Parent, Guardian, or Teacher

[A parent] [An authorized agent of any parent] [A guardian] [A master] [A teacher] is justified in the use of force as is reasonable and necessary to restrain or correct his/her [child] [ward] [apprentice] [pupil]. In determining whether or not the force used is justified as reasonable and necessary you should consider along with all other evidence:

[1] the age of the child; and whether he/she is old enough to understand the punishment and benefit by it;

[2] the nature and degree of seriousness of the act for which the punishment was inflicted;

[3] the instrument used to inflict the punishment; and

[4] the nature of the injuries resulting from the punishment.

SOURCE: MCA § 45-3-107 (1997); *State v. Straight*, 136 Mont. 255, 347 P.2d 482 (1959).

COMMENT: Cite as MCJI 3-107. The first sentence of the proposed instruction is the statutory language. The factors to be considered are drawn from *State v. Straight*, 136 Mont. 255, 347 P.2d 482 (1959).

INSTRUCTION NO. 3-108

Private Person's Use of Force in Resisting Arrest

A person is not authorized to use force to resist an arrest which he/she knows is being made by a [peace officer] [private person summoned and directed by a peace officer to make the arrest], even if he/she believes that an arrest is unlawful and the arrest in fact is unlawful.

SOURCE: MCA § 45-3-108 (1997).

COMMENT: Cite as MCJI 3-108.

INSTRUCTION NO. 3-109

Justifiable Use of Force as a Defense

The defense of justifiable use of force is an affirmative defense and the Defendant has the burden of producing sufficient evidence on the issue to raise a reasonable doubt of his/her guilt.

If you find that he/she was justified in the use of force, you must find him/her not guilty.

SOURCE: MCA § 45-3-115 (1997).

AUTHORITY: *State v. Enfinger*, 222 Mont. 438, 722 P.2d 1170 (1986); *United States ex rel. Collins v. Blodgett*, 513 F. Supp 1056 (Mont. D.C. 1981).

COMMENT: Cite as MCJI 3-109.

INSTRUCTION NO. 3-110

Issues--Justifiable Use of Force as a Defense

The Defendant has pleaded justification in the use of force in this case. As such, the Defendant has the burden of producing sufficient evidence of justification in the use of force to raise a reasonable doubt of guilt. You are to consider the following requirements of the law in determining whether the use of force claimed by Defendant was justified:

1)The Defendant must not be the aggressor;

or

[The use of force in defense of a person is not available to a person who purposely or knowingly provokes the use of force against himself/herself unless such force is so great that the person reasonably believes that every reasonable means to escape such danger other than the use of force which is likely to cause death or serious bodily harm to the assailant has been exhausted.]

2)The danger of harm to the Defendant must be a present one [and not threatened at a future time] [and not made by a person without the present ability to carry out the threat.];

3)The force threatened against the Defendant must be unlawful;

4)The Defendant must actually believe that the danger exists, that is, use of force is necessary to avert the danger and that the kind and amount of force which defendant uses is necessary;

5)The Defendant's belief, in each of the aspects described, is reasonable even if it is mistaken.

You are further instructed that even if you determine the use of force by Defendant was not justified, the state still has the duty to prove each of the elements of the crime charged beyond a reasonable doubt.

SOURCE: MCA § 45-3-115 (1997).

AUTHORITY: *State v. Graves*, 191 Mont. 81, 622 P.2d 203 (1981) (concurring opinion of Justice Sheehy); *State v. Stone*, 266 Mont. 345, 880 P.2d 1296 (1994).

COMMENT: Cite as MCJI 3-109. In *State v. Stone*, the Court suggested that the bracketed language be given in those cases in which the Defendant is the initial aggressor so that the language of subsection (1) is not inconsistent with the language of Instruction No. 3-104 or MCA § 45-3-105.