

ARIZONA SUPREME COURT: JUSTIFICATION DEFENSE STATUTE APPLIES ONLY TO DEFENDANT'S CONDUCT, NOT TO VICTIM'S

Ja



State v. Ewer

Arizona Supreme Court

January 20, 2023

JSH Attorneys: [Justin Ackerman](#) & [Arcangelo S. Cella](#)

Arizona's self-defense statute (A.R.S. § 13-404(A)) provides that "a person is justified" in threatening or using physical force where reasonably necessary for self-defense. In a unanimous opinion, the Arizona Supreme Court has clarified that this language applies only to the use of force by a criminal defendant and cannot be invoked by prosecutors to argue that a victim's use of force was justified, and therefore that the defendant's was not.

The case arose from a pair of violent altercations related to a disputed drug transaction. During the first confrontation, as the defendant attempted to drive away, the victim struck his car with a rock and punched one of the occupants. A few hours later, the defendant and two other individuals returned to the victim's home. When the victim and his girlfriend came outside, the girlfriend saw that the defendant was holding a gun and told him to put it away, threatening him with physical violence. The defendant and his companions began backing away, but the victim and his girlfriend followed them. The defendant responded by firing his gun multiple times in the victim's direction, inflicting one fatal wound in his back.

The State charged the defendant with second degree murder, among other gun-related crimes. The defendant requested that the judge instruct the jury in accordance with the Revised Arizona Jury Instruction ("RAJI") regarding self-defense, which states that "[a] defendant is justified" in using force in self defense in certain circumstances. The State proposed that the word "defendant" in the RAJI be replaced with the word "person." Over the defendant's objection, the judge granted the State's request. In its closing argument, the State argued that the justification instruction applied equally to the defendant's and the victim's conduct, and that if the victim's conduct was lawful and justified, then the defendant's conduct was not. The jury returned a guilty verdict. The defendant appealed.

The Court of Appeals vacated the defendant's conviction. Relying on case law examining the legislative history of A.R.S. § 13-404(A), the Court of Appeals concluded that the legislature did not intend the self-defense justification to apply to a victim's conduct and that the trial judge's instruction and the State's argument in closing therefore were improper. The Court of Appeals further concluded that the error was not harmless because it had a strong likelihood of misleading the jury.

The Arizona Supreme Court granted review and affirmed the reversal of trial court judgment, but on different reasoning. The Court acknowledged that the language of A.R.S. § 13-404(A), referring to "a person" throughout, appears to apply to more than just the defendant, unlike the language of the RAJI, which refers only to "a defendant." To discern its proper scope, the Court considered § 13-404(A) in the context of related statutory provisions providing for justification defenses in criminal cases. While these provisions likewise referred to conduct by "a person," they either made clear that each justification was "a defense" in "a prosecution," or otherwise suggested that the "person" referred to was the putative defendant in a criminal action (A.R.S. §§ 13-401 to 13-403, 13-405 to 13-411). Another statute (A.R.S. § 13-205(A)) specified that when "a defendant" raises a justification defense, the State has the burden of proving

that “the defendant did not act with justification.” The Court criticized the Court of Appeals’ reliance on legislative intent, finding that it was unnecessary where the language of the statute and the context of related provisions yielded the appropriate interpretation.

The Court therefore concluded that the self-defense justification provided for in A.R.S. § 13-404(A) applies only to the conduct of the defendant and not to that of the victim. Thus, the trial judge’s modifying the RAJI to refer to “a person” was error. The Court also observed that the error impermissibly altered the jury’s analysis by asking whether the victim’s conduct was justified, when the only question at issue in a criminal prosecution involving self-defense is whether the defendant’s conduct is justified. The Court rejected the State’s argument that the reasonableness of the victim’s conduct is a factor in judging that of the defendant’s conduct. The legality of the victim’s conduct, the Court stated, is immaterial to the justification analysis, as where a defendant reasonably but mistakenly believes that the use of force against the victim is necessary. Thus, the Court determined, the State’s argument that the defendant could not prevail if the victim’s conduct was legal and justified was incorrect as a matter of law.

The Court emphasized that its holding does not mean that a victim’s behavior is irrelevant, and that self-defense cases often rightly subject a victim’s actions to scrutiny. The Court observed that the State can meet its burden of showing that a defendant’s actions were not justified by showing that the defendant provoked the victim or that a reasonable person in the defendant’s position would not have thought the use of physical force immediately necessary.

[Justin Ackerman](#) represents clients in federal and state appellate matters in cases involving excessive force, wrongful death, personal injury, bad faith, and premises liability. After graduating as the valedictorian of his class from Phoenix School of Law, Justin worked as a law clerk for the Hon. Michael J. Brown in Division One of the Arizona Court of Appeals. Following his clerkship, Justin has handled over 75 appeals, successfully arguing before the Arizona Court of Appeals, Arizona Supreme Court, and U.S. Court of Appeals for the Ninth Circuit. Justin has spoken at many seminars on appellate preservation topics and is recognized as a *Southwest Super Lawyers* Rising Star and Best Lawyers Ones to Watch in the area of Appellate Practice.

jackerman@jshfirm.com | 602.263.4552 | jshfirm.com/jackerman

[Arcangelo S. Cella](#) brings a wealth of experience to Jones, Skelton & Hochuli’s appellate group. Arcangelo works closely with JSH trial attorneys to assist with critical motions, and provides guidance from the pleading stage through the trial and post-trial stages in state and federal courts. Arcangelo’s practice includes insurance defense and bad faith, medical and legal malpractice, civil rights, governmental liability, product liability, school law, and wrongful death and personal injury.

acella@jshfirm.com | 602.263.4456 | jshfirm.com/arcangelo-s-cella