

S.184; Meaning of Necessary When Using Force in Self Defense

The Vermont Supreme Court has issued several decisions elaborating on the meaning of the term “necessary defense of self or others.” The general standard is reasonableness: self- defense is just and necessary when the defendant’s belief of imminent peril and the need to repel that peril with deadly force is reasonable (cases below). The Court has held that even if the apprehension of death or great bodily harm is reasonable, the person may not use force if the person “has other means of avoiding the assault that appear to him at the time as sufficient and available, and which are in fact sufficient and available.” *State v. Rounds*, 104 Vt. 442 (1932). Similarly the Court appeared to state that “the law of self-defense” is that “if the party assaulted has other means of avoiding the assault that appear to him at the time as sufficient and available and which are in fact sufficient and available, he must resort to them and cannot use force in self–defense.” *State v Tubbs*, 101 Vt. 5 (1928). On the other hand, if there are no other sufficient and available means of avoiding the assault, such as when it is immediately necessary to use deadly force to protect one’s self from harm, then there is no duty to retreat ad force may be used. See *State v. Hatcher*, 167 Vt. 338, 348 (1997).

It seems based on these cases that there is no unqualified right to stand your ground, and that if retreating or avoiding the assault is reasonably available, that is the course that must be taken.

State v. Rounds, 104 Vt. 442 (1932)

The rule as to the right to use force to repel an assault and battery is that the assailed may beat his assailant so far as to make him desist; but he cannot inflict great bodily harm or take the life of the assailant, unless he reasonably apprehends death or great bodily harm to himself, and then he may not do so if he has other means of avoiding the assault that appear to him at the time as sufficient and available, and which are in fact sufficient and available. [State v. Patterson](#), 45 Vt. 308, 12 Am. Rep. 200; [State v. Roberts](#), 63 Vt. 139, 21 A. 424; [State v. Tubbs](#), 101 Vt. 5, 23, 139 A. 769 :

State v. Wheelock, 158 Vt 302 (1992)

The well-established doctrine of self-defense provides that a defendant who “kills or wounds another ... [i]n the just and necessary defense of his own life ... shall be guiltless.” [13 V.S.A. § 2305\(1\)](#). Our case law requires that self-defense is “just and necessary” when the defendant’s belief of imminent peril and of the need to repel that peril with deadly force is reasonable. [State v. Darling, 141 Vt. 358, 361, 449 A.2d 928, 929 \(1982\)](#).

3 The right of self-defense does not require that one be actually assaulted, so long as the defendant’s belief that he is in danger is founded on reasonably perceived circumstances. [State v. Wood, 53 Vt. 560, 561, 567 \(1881\)](#). In [State v. Doherty, 72 Vt. 381, 396-97, 48 A. 658, 663 \(1900\)](#), the reasonableness of defendant’s belief was described as follows:

[A]lthough it might not have been necessary to have killed [the victim], *if in view of his fear, fright, nervousness, or cowardice, it reasonably seemed to him*, he could not be convicted of murder.... It is not whether the necessity actually existed, but *whether in fact it reasonably seemed so to the respondent, under all the circumstances of the case*, and ... the court [properly instructed] “If the **976 circumstances were such as reasonably to lead the respondent to think that he was in danger of being killed or of great bodily harm by an assault from [the victim], he had a right to defend himself...”

(Emphases added). A jury, then, must assess the reasonableness of a defendant’s apprehension, taking into account not only the circumstances with which he is confronted, but his individual attributes as well. Our law does not hold a nervous coward *308 and a fearless bully to an identical reasonable person standard. See, e.g., [State v. Rounds, 104 Vt. 442, 451, 160 A. 249, 251 \(1932\)](#) (justification depends on whether jury finds that necessity reasonably appeared to the defendant); [State v. Tubbs, 101 Vt. 5, 23, 139 A. 769, 776 \(1928\)](#) (defendant may lawfully take a life if it “reasonably appear[s] to him” to be necessary); [McQuiggan v. Ladd, 79 Vt. 90, 105-06, 64 A. 503, 507 \(1906\)](#) (justification requires more than honest belief; proper inquiry for jury is whether necessity “reasonably appeared to [defendant]”).

State v. Bolaski, 196 Vt. 277 (2014)

Self-defense in the context of a homicide prosecution is defined in [13 V.S.A. § 2305\(1\)](#) as a circumstance that renders guiltless a person who kills or wounds another “[i]n the just and necessary defense of his or her own life” or the lives of certain others. We clarified the “just and necessary defense” requirement in [State v. Wheelock, 158 Vt. 302, 307, 609 A.2d 972, 975 \(1992\)](#), explaining that self-defense is just and necessary when the “defendant’s belief of imminent peril and of the need to repel that peril with deadly force is reasonable.” The jury “must assess the reasonableness of a defendant’s apprehension, taking into account not only the circumstances with which he is confronted, but his individual attributes as well.” *Id.*

State v. Buckley, 202 Vt 371 (2016)

I. *Self-Defense and Defense of Others*

5 ¶ 17. To establish defendant’s guilt of aggravated assault with a deadly weapon, the State needed to show that defendant was “armed with a deadly weapon and threaten[ed] to use the deadly weapon on another person,” [13 V.S.A. § 1024\(a\)\(5\)](#), and that he “subjectively intend[ed] to threaten another person with a deadly weapon,” *381 [State v. Bourn, 2012 VT 71, ¶ 17, 192 Vt. 270, 58 A.3d 236](#).

By statute, no crime is committed if someone threatens to use a deadly weapon “in the just and necessary defense” of his life or the life of other relatives, including a brother. *Id.* § 1024(d)(1). This statutory provision does not preclude a defendant from raising “defenses granted at common law.” *Id.* § 1024(e).

¶ 18. The common law defenses available to defendant are similar to those set forth by statute though slightly more expansive.³ As to self-defense, it is established **934 that “[o]ne who is not the aggressor in an encounter is justified in using a reasonable amount of force against his adversary when he reasonably believes (a) that he is in *immediate* danger of unlawful bodily harm from his adversary and (b) that the use of such force is necessary to avoid this danger.” 2 W. LaFave, [Substantive Criminal Law § 10.4, at 142 \(2d ed. 2003\)](#) (emphasis added) (noting that “[i]t is never reasonable to use deadly force against [an adversary’s] nondeadly attack”); see also [Jacobs v. State, 32 Md.App. 509, 363 A.2d 257, 259 \(Md.Ct.Spec.App.1976\)](#) (“It is unquestioned that one is privileged to use force, even deadly force, in self-defense if legitimately and reasonably in fear of suffering death or serious bodily harm.”).

6 ¶ 19. Defense of others is “essentially an extension of the self-defense instruction, in that the actor may do in another’s defense anything the person himself may have lawfully done in the circumstances.” [State v. Bolden, 371 S.W.3d 802, 805 \(Mo.2012\)](#) (en banc). Thus, “[t]he prevailing rule is that one is justified in using reasonable force in defense of another person, even a stranger, when he reasonably believes that the other is in *immediate* danger of unlawful bodily harm from his adversary and that the use of such force is necessary to avoid this danger.” 2 LaFave, *supra*, § 10.5, at 161 (emphasis added). As with self-defense, even if the actor “entertains these reasonable beliefs, he may not use more force than he reasonably believes necessary to relieve the risk of harm.” *Id.* § 10.5(b), at 161–62. See [State v. Hoadley, 147 Vt. 49, 54, 512 A.2d 879, 881 \(1986\)](#) (stating that *382 essential requirements of defense-of-others are that: (1) reasonable person in defendant’s position would believe his intervention necessary for defense of third person, and (2) in such circumstances as that reasonable person would take them to be, third person would have right to use such force to protect himself).