

1 **14-5181. Self defense; nondeadly force by defendant.**¹

2 An issue in this case is whether the defendant acted in self-defense.

3 The defendant acted in self-defense if

4 1. There was an appearance of immediate danger of bodily harm to the defendant as
5 a result of _____²; and

6 2. The defendant was in fact put in fear of immediate bodily harm and
7 _____³ because of that fear; and

8 3. The defendant used an amount of force that the defendant believed was reasonable
9 and necessary to prevent the bodily harm; and

10 [4. The force used by defendant ordinarily would not create a substantial risk of death
11 or great bodily harm; and]⁴

12 5. The apparent danger would have caused a reasonable person in the same
13 circumstances to act as the defendant did.

14 The burden is on the state to prove beyond a reasonable doubt that the defendant did not
15 act in self-defense. If you have a reasonable doubt as to whether the defendant acted in self-
16 defense, you must find the defendant not guilty.

17 USE NOTES

18 1. For use in cases when the self-defense theory is based on necessary defense of self
19 against any unlawful action; reasonable grounds to believe a design exists to commit an unlawful
20 act; or reasonable grounds to believe a design exists to do some bodily harm. If this instruction is
21 given, add to the essential elements instruction for the offense charged, [“]“The defendant did not
22 act in self-defense.[“]”

1 2. Describe unlawful act which would result in some bodily harm as established by
2 the evidence. Give at least enough detail to put the act in the context of the evidence.

3 3. Describe the act of defendant, [~~e.g.~~] e.g., [“]“struck [Richard] Roe,[“]” [“]“choked
4 [Richard] Roe.[“]”

5 4. Use bracketed material only if the [~~defendant's~~] defendant's action resulted in death
6 or great bodily harm. If bracketed material is used, the definition of great bodily harm, UJI 14-131
7 NMRA, must be given if not already given.

8 [As amended, effective January 1, 1997; as amended by Supreme Court Order No. 09-8300-028,
9 effective September 16, 2009; as amended by Supreme Court Order No. 18-8300-012, effective
10 for all cases pending or filed on or after December 31, 2018; as amended by Supreme Court Order
11 No. S-1-RCR-2025-00126, effective for all cases pending or filed on or after December 31, 2025.]

12 **Committee commentary.** — NMSA 1978, Section 30-2-7(A), [~~and~~] (B) (1963) [~~provide~~]
13 provides that a person may act in self-defense if necessarily or reasonably defending [~~himself or~~
14 ~~herself~~] against any unlawful action, felony, or great personal injury. [“]“A defendant is not entitled
15 to a self-defense instruction unless it is justified by sufficient evidence on every element of self-
16 defense.[“]” *State v. Rudolfo*, 2008-NMSC-036, ¶ 17, 144 N.M. 305, 187 P.3d 170. Sufficient
17 evidence means [“]“enough evidence to raise a reasonable doubt in the mind of a juror about
18 whether the defendant lawfully acted in self-defense.[“]” *Id.* ¶ 27. [“]“If any reasonable minds
19 could differ, the instruction should be given.[“]” *Id.* It is never reasonable to use deadly force
20 against a nondeadly attack. A person may use a deadly force in self-defense only if defending
21 [~~himself or herself~~] against an attack which creates a substantial risk of death or great bodily harm.
22 See [~~commentary to~~] UJI 14-5171 NMRA comm. cmt.; 2 Wayne R. LaFave, *Substantive Criminal*
23 *Law* § 10.4 (3d ed. Oct. 2017 update).

1 Element 4 is bracketed and is to be used only if there is evidence that the defendant used a force
2 which ordinarily would not cause death or great bodily harm but which resulted in death or great
3 bodily harm. A person is not guilty of homicide if [~~he or she~~] that person unintentionally kills a
4 third person in self-defense. *State v. Sherwood*, 1935-NMSC-082, 39 N.M. 518, 50 P.2d 968. *See*
5 *generally*[~~, Annot.,~~] Ferdinand S. Tinio, Annotation, Unintentional Killing of or Injury to Third
6 Person During Attempted Self-Defense, 55 A.L.R.3d 620 (1974).

7 NMSA 1978, Sections 30-3-2 (Aggravated assault) and 30-3-4 (Battery) (1963) provide that an
8 aggravated assault or a battery must be unlawful. The term [“unlawfully”] means simply that
9 the action is not authorized by law. *State v. Mascarenas*, 1974-NMCA-100, 86 N.M. 692, 526 P.2d
10 1285. The words [“without excuse or justification”] have been held to be [“clearly equivalent

11 to the word unlawful.”] *Territory v. Gonzales*, 1907-NMSC-007, ¶ 19, 14 N.M. 31, 89 P. 250.
12 *Cf. State v. Parish*, 1994-NMSC-073, 118 N.M. 39, 878 P.2d 988 (once the defense raised a self-
13 defense theory, unlawfulness became a necessary element of voluntary manslaughter). The phrase
14 [“without excuse or justification”] identifies a defense theory, [~~i.e.~~] i.e., even if all of the acts
15 constituting the crime were committed, the act is otherwise excusable or justifiable. *Cf. NMSA*
16 *1978, § 30-2-8 (1963); State v. Woods*, 1971-NMCA-026, ¶ 4, 82 N.M. 449, 483 P.2d 504 (noting
17 that unlawfulness includes [“without legal excuse or justification”]).

18 Unlawfulness is generally present in an assault or a battery if the other elements are proved. *Cf.*
19 *Parish*, 1994-NMSC-073, ¶ 5 ([“It seems tautological to stress that unlawfulness is an essential
20 aspect of any crime. Indeed, it is not an element which must be proven unless a defense which
21 justifies the homicide is raised.”]). It is, of course, possible for the state to proceed with a
22 prosecution when the defense is based on some theory of lawfulness other than self-defense. *See,*
23 *e.g.* [;], Rollin M. Perkins, Perkins [~~;~~] on Criminal Law 987 (2d ed. 1969). In the event that the case

1 does go to the jury and there is evidence to establish the defense of a lawful assault, an instruction
2 must be drafted for that purpose. The burden on the defendant is only to produce evidence which
3 raises a reasonable doubt in the minds of the jurors. *See State v. Harrison*, 1970-NMCA-071, 81
4 N.M. 623, 471 P.2d 193. The burden is then on the state to prove beyond a reasonable doubt that
5 the assault or battery was not justifiable. *Cf. Mullaney v. Wilbur*, 421 U.S. 684 (1975).

6 The [~~committee~~] Committee revised this instruction in 1981 to resolve the problem presented in
7 *State v. Brown*, 1979-NMCA-038, 93 N.M. 236, 599 P.2d 389, where the defendant is charged
8 with a nondeadly assault. Previously, the instruction failed to adequately address the use of
9 nondeadly force against the threat of nondeadly force.

10 In 2018, the [~~committee~~] Committee removed the use note language limiting nondeadly force
11 instructions to “nonhomicide” cases, recognizing that the instruction is intended to be used in some
12 cases where death does result. *See State v. Romero*, 2005-NMCA-060, ¶ 13, 137 N.M. 456, 112
13 P.3d 1113 (recognizing the non-deadly force instruction is appropriate in some homicide cases
14 where [“][t]he force used by defendant ordinarily would not create a substantial risk of death or
15 great bodily harm,[”] but where death nevertheless results); *State v. Gallegos*, 2001-NMCA-021,
16 ¶ 12, 130 N.M. 221, 22 P.3d 689 ([“][“It is entirely plausible that a person could act intentionally
17 in self-defense and at the same time achieve an unintended result.[”]).

18 *See* UJI 14-5185 NMRA and UJI 14-5186 NMRA if the victim is a law enforcement officer.

19 [As amended by Supreme Court Order No. 09-8300-028~~], effective September 16, 2009~~]; as
20 amended by Supreme Court Order No. 18-8300-012~~], effective for all cases pending or filed on or~~
21 ~~after December 31, 2018~~]; as amended by Supreme Court Order No. S-1-RCR-2025-00126.]