

1 **14-5191. Self defense; limitations; aggressor.**¹

2 Before you consider whether the defendant acted in self defense, you must first decide
3 whether the defendant was the first aggressor. The defendant was the first aggressor if the
4 defendant

5 [started the fight with _____ (*name of victim*)]²

6 [or]

7 [agreed to fight with _____ (*name of victim*)]

8 [or]

9 [intentionally provoked a fight in order to harm _____ (*name of victim*)]

10 [or]

11 [committed the act of _____ (*describe defendant's conduct that*
12 *constituted the alleged crime*), in response to _____'s (*name of victim*) act of
13 _____ (*describe conduct of victim giving rise to an appearance of immediate*
14 *danger of harm to defendant*), where _____'s (*name of victim*) act was the [lawful and]³
15 foreseeable result of _____ (*describe defendant's alleged unlawful act that resulted*
16 *in victim's conduct*)]⁴.

17 The burden is on the state to prove beyond a reasonable doubt that the defendant was the
18 first aggressor. [If the defendant was the first aggressor, the defendant cannot claim self defense.
19 If the defendant was not the first aggressor, you should proceed to decide whether the defendant
20 acted in self defense.]⁵ [If you find that the defendant was the first aggressor, you must then decide
21 whether _____ (*name of victim*) became the aggressor. If _____ (*name of*
22 *victim*) became the aggressor, the defendant may claim self defense even though the defendant was
23 the first aggressor.]⁶

USE NOTES

1
2 1. This instruction must be given in all self defense cases in which first aggressor is
3 an issue.

4 2. Use only applicable bracketed element or elements established by the evidence.

5 3. If the lawfulness of the victim’s conduct is at issue, e.g., may have been privileged
6 or justified, give appropriate definition.

7 4. This alternative should be used when the defendant provoked the victim through an
8 unlawful act and the victim responded in a lawful manner. *See State v. Denzel B.*, 2008-NMCA-
9 118, 144 N.M. 746, 192 P.3d 260; *see also* committee commentary, *infra*.

10 5. Use this bracketed alternative in cases where UJI 14-5191A NMRA will not be
11 given.

12 6. Use this bracketed alternative in cases where UJI 14-5191A will be given. If UJI
13 14-5191A will be given, it should immediately follow this instruction.

14 [As amended by Supreme Court Order No. 19-8300-016, effective for all cases pending or filed
15 on or after December 31, 2019.]

16 **Committee commentary.** — A defendant’s “claim of self defense may fail if the defendant was
17 the aggressor or instigator of the conflict.” *State v. Lucero*, 1998-NMSC-044, ¶ 7, 126 N.M. 552,
18 972 P.2d 1143 (internal quotation marks and citation omitted). In *State v. Chavez*, 1983-NMSC-
19 037, 99 N.M. 609, 661 P.2d 887, the defendant was a first aggressor when [~~he~~] they entered a
20 convenience store with a knife intending to rob the store and subsequently stabbed and killed a
21 patron who tried to stop the robbery. *Id.* ¶ 6. The Supreme Court held that it is “well established
22 in this jurisdiction that a defendant who provokes an encounter, as a result of which [~~he~~] the
23 defendant] finds it necessary to use deadly force to defend [~~himself~~] themselves], is guilty of an

1 unlawful homicide and cannot avail [~~himself~~] [themselves] of the claim that [~~he was~~] [they were]
2 acting in self-defense.” *Id. Lucero* then clarified that if the defendant was an aggressor or instigator
3 of the conflict, self-defense is still available if the “defendant was using force which would not
4 ordinarily create a substantial risk of death or great bodily harm; and [the] . . . victim responded
5 with force which would ordinarily create a substantial risk of death or great bodily harm[[-]].”
6 1998-NMSC-044, ¶ 7 (internal quotation marks and citation omitted). Thus, the right of self-
7 defense can be reinstated if the victim responds by escalating the conflict or pursues the conflict
8 after the defendant attempts to disengage. *See* 2 Wayne R. LaFave, *Substantive Criminal Law* §
9 10.4(e) (3d ed. Oct. 2017 update); *see also Territory v. Clarke*, 1909-NMSC-005, ¶ 8, 15 N.M. 35,
10 99 P. 697 (upholding conviction where jury was instructed that defendant could claim self defense
11 if[-] “defendant in reality and in good faith endeavored to decline any further struggle before the
12 fatal shot was fired”).

13 The state bears the burden of proving that the defendant was the first aggressor beyond a reasonable
14 doubt. *See State v. Pruett*, 1918-NMSC-062, ¶ 9, 24 N.M. 68, 172 P. 1044.

15 The bracketed “lawful” term in this instruction should be used and defined if there is an issue about
16 whether the victim’s use of force may have been a lawful response to the defendant’s conduct. *See*
17 Use Note 3. For example, *State v. Southworth* held that the self-defense instruction was improper
18 because it did not require the jury to determine whether the victim acted reasonably in defense of
19 her home when she used potentially deadly force against the trespassing defendant. *See* 2002-
20 NMCA-091, ¶¶ 18-19, 132 N.M. 615, 52 P.3d 987 (“The trial court should instruct the jury that
21 [the defendant] had the right to stand his ground and did not need to retreat unless he was
22 threatened with lawful force. In order to determine whether the force used by [the victim] was
23 lawful, the jury must conclude that [~~she~~] the victim] acted reasonably in defending her home

1 against the perceived threat of the commission of a felony (similar to the elements of defense of
2 habitation set ~~[for]~~ forth in UJI 14-5170).”).

3 Similarly, *State v. Denzel B.* held that the self-defense instruction was improper because it failed
4 to instruct the jury that the victim’s conduct, grabbing the defendant by the shirt after the defendant
5 pushed him, may have been protected by the parental privilege. *See* 2008-NMCA-118, ¶¶ 3-4, 17,
6 144 N.M. 746, 192 P.3d 260 (“We therefore hold that when a child asserts self-defense as
7 justification for battery against ~~[his]~~ [a] parent, the jury must first determine whether the parent’s
8 use of physical discipline was reasonable under the circumstances.”). In both *Southworth* and
9 *Denzel B.*, the ~~[court]~~ Court held that the jury must be instructed that the state must prove that the
10 defendant did not act in self-defense, taking into account whether the victim’s response to the
11 defendant’s conduct was lawful under the particular circumstances of the case. *Accord State v.*
12 *Lara*, 1989-NMCA-098, ¶¶ 7-9, 109 N.M. 294, 784 P.2d 1037, *overruled on other grounds by*
13 *State v. Tollardo*, 2012-NMSC-008, 275 P.3d 110 (explaining the defendant had no right to defend
14 against store employees who had a lawful right to seize defendant for shoplifting).

15 [As amended by Supreme Court Order No. 19-8300-016~~], effective for all cases pending or filed~~
16 ~~on or after December 31, 2019~~]; as amended by Supreme Court Order No. S-1-RCR-2025-00126.]