

ELEMENTS OF A SELF-DEFENSE CLAIM IN NEVADA

BY MICHAEL G. GILES, ESQ.

Your phone rings at 3 a.m. Your client calls you to say that he just shot, and possibly killed, another man. In a calm voice, he says he was minding his own business, when out of nowhere the other man attacked him. Fearing for his life, he drew his firearm and used it to shoot the other man. Now fully awake, you prepare to advise your client on his situation when he says: “Don’t worry, I have called the police and paramedics, but won’t say a word to them until you arrive. But what do you think? Was I justified?”

Of course such a call is unlikely to take place in this manner, if at all. Most likely, you will hear from your client well after the fact – after the police have investigated; after your client has given a long and detailed statement to the police and possibly the media; and after the decedent’s family and friends have publicly weighed in with “what really happened!”

In fact, your client likely did not know you existed before the shooting and contacted you only after he was charged with a crime or served with a civil complaint. Only then did he call you to discuss his issue.

A more useful conversation with your client will take place if he or she calls to tell you they have decided to purchase a firearm for self-defense and would like some direction on when, where and how they are legally allowed to use deadly force. In the wake of the *Florida vs. George Zimmerman* trial, these conversations are occurring quite often, especially when the issue of concealed firearms permits is added to the mix. I find that often my clients want to throw a “what if this happens” scenario at me, hoping my answer will support their right to use deadly force in self-defense. Without giving in to what are occasionally far-fetched scenarios, I explain that the rights they do have are simple, consistent and, if adhered to, will protect them regardless of the specific facts of their case.

I find that these conversations tend to follow the common pattern of: “Can I use deadly force at all? When can I, and how?”



Is There a Right to Use Deadly Force for Self-Defense?

Simply put, yes. Arguably the Second Amendment to the United States Constitution was written to ensure citizens could possess firearms specifically for self-defense. In clarifying this issue, the Supreme Court held in *District of Columbia v. Heller* that the Second Amendment protects possession of firearms for the “core lawful purpose of self-defense.”¹

The Nevada Constitution did not include a right to possess firearms until 1982. In that year, the right was included so that, “[e]very citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes.” *Nev. Const. Art. 1 § 11.*



What Are the Elements of a Justifiable Use of Deadly Force?

There are many issues to take into account in any self-defense-related case or question, but in general, Nevada law allows the use of deadly force for self defense or defense of another when an individual comes under a violent threat to life and safety, whether in their home or not.

NRS 200.120 states that three elements are necessary to justify the use of deadly force.

1. The person using deadly force cannot have been the original aggressor in a situation that gave rise to the need to use that force;
2. The person using the deadly force must have a legal right to be in the location where the force is being used; and

3. The person using deadly force must not be actively committing a criminal act or otherwise acting in furtherance of a criminal activity when the deadly force is used.

NRS 200.120(2) also provides that, so long as the above three requirements are met, there is no duty to retreat before using deadly force. It surprises most people that this relatively recent addition to the NRS (2011) has been case law in Nevada since 1872. On an appeal from a murder conviction following a fairly typical gunfight in Pioche, Nevada, the court held that when a person has a justifiable belief that another intends to kill them, they are justified in standing their ground and using deadly force in self-defense.² This case happened in the streets of town and stands for the proposition that the right to use deadly force in self-defense applies to locations outside, as well as inside, the home.

There Are Added Protections in the Home

Clearly the real question in any self-defense case, once the three main questions have been satisfied, will be: was there a justifiable fear that permitted the use of deadly force? Harkening back to the well-tested principle that a person's home is their castle, many states have enacted Castle Doctrine law, shielding those who use deadly force inside the home from prosecution. Nevada has not adopted a Castle Doctrine per se, but has given some additional protections to those who use self-defense in the home.

NRS 41.095, which was added to the statutes in 1989, establishes that a person in his or her home or "transient lodging" is presumed to have a reasonable fear of death or imminent bodily injury in the face of a burglary or home invasion. The person who uses deadly force in that situation must have known, or "had reason to believe," the burglary or home invasion was happening in order for the statute to apply. Interestingly, the statute's definition includes any building or vehicle intended for lodging. There is additional protection against civil liability under this statute, unless the "presumption" of a reasonable fear is overcome by clear and convincing evidence.

Conclusion

Setting aside the more convoluted "what if" scenarios, the law pertaining to the use of deadly force in self-defense is fairly straightforward. It does not matter if your client uses a firearm, knife, club or bare hands in defending their life, so long as the client had a reasonable fear, was not the original aggressor, had a legal right to be there and was not committing a crime. For that matter, it does not really matter if the other person was armed either; it may make it a slightly closer call and will require a little additional support as to why your client's fear was reasonable but, in the end, the common sense reasoning used by the Nevada Supreme Court in 1872, is still good today, even if it took more than a hundred years for the statutes to catch up. ■

1. 554 U.S. 570, 630 (2008).

2. *State v. Kennedy*, 7 Nev. 375, 377 (Nev. 1872).



MICHAEL G. GILES is a partner in Creed & Giles, Ltd. and a frequent legal commentator on Second Amendment issues. His practice is primarily dedicated to criminal defense.