

## Self Defense In the Age of Not So Peaceful Protests and Wild Riots

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With reports of growing, violent, sustained protests without any sort of government push-back during the summer of 2020, and then amidst claims of insurrection as the new year 2021 dawned with a mob storming the Capitol, the ordinary citizen in the State of Indiana needs to be aware of his or her rights and duties in defense of property, in defense of others, and in defense of self (I shall call these collectively the “rights of defense”). This short paper provides an overview, a summary, of the law and its sources as it pertains to defense of self, others, and property in the State of Indiana according to Indiana law.

### *In general*

Citizens are allowed to exercise their rights of defense however the standards differ depending on the location of the threat and the type of threat. The Indiana General Assembly has recognized “robust self defense rights that citizens of this state have always enjoyed.” (IC 35-41-3-2(a)). If the rights of defense are properly exercised, then the person so exercising them are absolved of criminal liability (generally, see IC 35-41-3-1) and also civil liability (generally, see IC 34-30-31 et seq and IC 35-41-3-2(a) and with IC 35-41-3-2(c)(2)).

The standard for using force and the proper level of force is determined by the following: the place in which an attack occurs and whether a person or property is being protected. While statutes and cases may set forth the law, how that law is applied and whether or not the privilege of self-defense even exists in a particular situation is fact sensitive. Remember, each situation is unique and highly dependent on the facts.

### *In home or motor vehicle*

First, a citizen may find himself or herself in their home or motor vehicle when another person unlawfully attempts to enter or does enter the home or motor vehicle. In such a situation, the law permits a person to use “reasonable force” which includes “deadly force”.<sup>1</sup> The person in the home or motor vehicle “does not have a duty to retreat” if the person “reasonably believes that the force is necessary to prevent or terminate” the other’s “unlawful entry of or attack” on the person’s “dwelling, curtilage or occupied motor vehicle.”<sup>2</sup>

The Indiana Supreme Court explained the elements of self-defense in *Wilson v. State* 770 N.E.2d 799, 800 (Ind. 2002). These elements are: the person “(1) was in a place where he had a right to be; (2) did not provoke, instigate, or participate willingly in the violence; and (3) had a reasonable fear of death or great bodily harm or had a reasonable belief that force is necessary to prevent or terminate an unlawful entry of or attack on his dwelling, curtilage or occupied motor vehicle.”

The courts apply a reasonable standard to the use of force in these situations. (See, *McDonald v. State*, 14 N.E.3d 135 (Ind.App.2014) (Memorandum Decision) Defendant struck victim twice

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<sup>1</sup> IC 35-41-3-2(d)(1).

<sup>2</sup> IC 35-41-3-2(d)(2).

with vehicle as victim was walking away or retreating, and victim had not touched either the defendant nor had the victim struck defendant's automobile.) This means that the decision on whether self-defense is warranted is fact sensitive. If the defendant uses more force than is necessary to repel the attack then self-defense is not a defense to the charge. *Hollowell v. State*, 707 N.E.2d 1014, 1021 (Ind.Ct.App. 1999); *Brand v. State*, 766 N.E.2d 772, 777 (Ind.App.2002).

The factor of "reasonable fear of death or great bodily harm or had a reasonable belief that force is necessary to prevent or terminate an unlawful entry of or attack on his dwelling, curtilage or occupied motor vehicle" is also one that is subject to a factual inquiry. The jury determines whether the elements of self-defense have been met and how credible the witnesses are (*Dayhuff v. State*, 545 N.E.2d 1100, 1102-1103 (Ind.Ct.App. 1989)), and the courts review the findings on appeal. In *Lacey v. State*, 670 N.E.2d 1299, 1303-1304 (Ind.App.1996), the Court did not find that there was a reasonable fear of death or great bodily harm when the victim approached the defendant with a baseball bat, there was just a war of words, and the victim did not strike defendant. In *Upp v. State*, 473 N.E.2d 1030 (Ind.Ct.App. 1985) self-defense was denied the defendant who fired shots at the victim as the latter was crossing the defendant's yard without saying a word and after the defendant had started a physical fight at a local restaurant.

#### *In a place other than home or motor vehicle*

Second, a citizen may find himself or herself in a place other than their home or motor vehicle (e.g., a business or business premises) and be confronted with a situation in which another person or persons is or are attempting to trespass or have trespassed. In that situation, the Indiana statute states:

"a person is justified in using reasonable force against any other person if the person reasonably believes that the force is necessary to immediately prevent or terminate the other person's trespass on or criminal interference with property lawfully in the person's possession, lawfully in possession of a member of the persons immediate family, or belonging to a person whose property the person has authority to protect."<sup>3</sup>

The defending person "is justified in using deadly force" and "does not have a duty to retreat" provided that the force is justified under subsection (c) of IC 35-41-3-2. Deadly force is defined as "force that creates a substantial risk of serious bodily injury." IC 35-31.5-2-85; *Taylor v. State*, (Memorandum Decision) 26 NE3d 1076 (Ind.App.2015).

"The amount of force a person may use to protect himself depends on the urgency of the situation...When a person uses more force than is reasonably necessary under the circumstances, the right of self-defense is extinguished..." *Harmon v. State*, 849 N.E.2d 726, 730-731 (Ind.Ct.App. 2006). The force used must be "reasonably believed to be necessary to prevent or terminate an attack on his dwelling, cartilage, or occupied vehicle." *Dixson v. State*, 22 N.E.3d 836, 839 (Ind. Ct. App. 2014); IC 35-41-3-2(d). "Any force employed must be reasonable in light of the urgency of the situation." *Cf. Mateo v. State*, 981 N.E.2d 59, 72

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<sup>3</sup> IC 35-41-3-2(e).

(Ind.Ct.App. 2012), trans denied.” *Birge v. State*, (Memorandum Decision) 25 N.E.3d 826 (Ind.App.2014).

We shall now examine that section as that section applies to all other situations in which a person may find himself or herself when confronted with a possible need to exercise self-defense rights.

#### *Protection from imminent use of unlawful force*

Third, every person under the statute may use “reasonable force” against “any other person” so as to protect the “person or a third person” from what the person “reasonably believes” is the “imminent use of unlawful force.”<sup>4</sup> One is “justified in using deadly force” and “does not have a duty to retreat” if the following conditions are met: the “person reasonably believes that force is necessary to prevent serious bodily injury to the person or a third person or the commission of a forcible felony.” “Forcible felony” is defined in IC 35-31.5-2-138 as “a felony that involves the use or threat of force against a human being, or in which there is imminent danger of bodily injury to a human being.”

The Indiana Supreme Court in *Davis v. State*, 456 N.E.2d 405, 408 (Ind. 1983) held that

“Where one has taken the life of another human being, and thereafter contends that he did so in self-defense, he can only be successful in his contention if: (1) he acted without fault, (2) he was in a place where he had a right to be, and (3) he was in real danger of death or great bodily harm, or in such apparent danger as caused him in good faith to fear death or great bodily harm.’ *King v. State*, (1968) 249 Ind. 699, 705...”

#### *Proof issues and some specific instances*

The Indiana Supreme Court has weighed in on the issue of self-defense. In *Wilson v. State* 770 N.E.2d 799, 800 (Ind. 2002) the Indiana Supreme court held that “when the claim of self-defense is raised and finds support in the evidence, then the State has the burden of negating at least one of the necessary elements.” If convicted despite the self-defense instruction, the conviction will be reversed only “if no reasonable person could say that the State negated self-defense beyond a reasonable doubt.” *Wilson*, 800-801. The State must disprove the defense beyond a reasonable doubt. *Wooley v. State*, 716 N.E.2d 919, 926 (Ind. 1999).

The Indiana Supreme Court has repeatedly held that “When a claim of self-defense is interposed, [a]ny fact which reasonably would place a person in fear or apprehension of death or great bodily injury is admissible.’ *Russell v. State*, 577 N.E.2d 567, 568 (Ind. 1991).” *Hirsch v. State*, 697 N.E.2d 37, 40-41 (Ind. 1998). Also, “a claim of self defense `includes both subjective and objective components.’ ....Specifically, one must demonstrate a `subjective belief that force was necessary to prevent serious bodily injury and that such actual belief was one that reasonable person would have under the circumstances’.” *Littler v. State*, 871 N.E.2d 276, 279 (Ind. 2007). Someone may have a mistake of fact if that mistake of fact lead the defendant to commit the charged offense, and the State must disprove that mistake of fact beyond a reasonable doubt. *Huls v. State*, 971 N.E.2d 739, 746 (Ind. App. 2012). It is “not an acceptable standard of conduct

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<sup>4</sup> IC 35-41-3-2(c).

to fire a handgun into the night without determining who is there or whether the person poses a threat.” *Id.*

The jury is supposed to look at the evidence from the defendant’s point of view. *Davis v. State*, 456 N.E.2d 405, 408 (Ind. 1983).

Jury instructions are an important part of any trial, and in the proper case the following is allowed: “[F]airness seems to demand [a self-defense instruction] be balanced with an advisement that one who is not the aggressor is not required to retreat.” *French v. State*, 273 Ind. 251, 256-257 (1980).

#### *When self-defense is not available*

The Indiana statute states when the defense of self-defense is not available:

“Notwithstanding subsections (c) through (e), a person is not justified in using force if:

- (1) The person is committing or is escaping after the commission of a crime;
- (2) The person provokes unlawful action by another person with intent to cause bodily injury to the other person; or
- (3) The person has entered into combat with another person or is the initial aggressor unless the person withdraws from the encounter and communicates to the other person the intent to do so and the other person nevertheless continues or threatens to continue the unlawful action.” IC 35-41-3-2(g)

Additionally, a “mutual combatant, whether or not the initial aggressor, must declare an armistice before he may claim self-defense.” *Wilson*, at 801.

The Indiana Supreme Court has also explained the meaning of the statute when it comes to initial aggressors or those willfully entering into combat:

“The legislature has chosen to require both an ‘initial aggressor’ and those who ‘enter into combat’ (i.e. mutually willing combatants) to declare an armistice before they may claim self-defense.” *Wooley v. State*, 716 N.E.2d 919, 926 (Ind. 1999).

Self-defense is not available where the accused is the initial aggressor. *Rozika v. State*, 520 N.E.2d 1267, 1270 (Ind. 1988). In that case, the defendant came to the victim’s home asking for his property and collateral for a loan. After being allowed in, the defendant attacked the victim with a can of mace. The victim then struck defendant and a struggle ensued after which defendant fled.

Self defense is not available if one is committing a robbery or a burglary. *Gage v. Hunt*, 505 N.E. 2d 430, 434 (Ind. 1987). In that case, after initially lawfully coming into the premises, one of the defendants waved a shotgun and announced a stickup. He discharged the shotgun into the wall when another person who he believed may have had a gun and was believed to have killed someone else before, entered into a struggle and argument with the defendant.

Self defense is not available when escaping from a crime. *Debose v. State*, 450 N.E.2d 71, 72 (Ind. 1983).

*Effecting an arrest, preventing a hijacking, protecting public servant*

Finally, persons other than law enforcement may use “reasonable force” against another “to effect an arrest” or to “prevent the other person’s escape.”<sup>5</sup> In order to be justified, a private person must use the force to “effect an arrest” or to “prevent the other person’s escape” provided that 1) “a felony has been committed” and 2) there is “probable cause to believe” that person committed the felony.<sup>6</sup>

There are a number of other situations in which a person may use force and be absolved of criminal and civil liability. These are to prevent or terminate a hijacking of an aircraft<sup>7</sup> and against a public servant in limited situations.<sup>8</sup> These are not addressed in this paper.

*A good guide*

As this article was being completed, a special report appeared in the local media entitled “Examining ‘Stand Your Ground’ Laws.”<sup>9</sup> The St. Joseph County Indiana Prosecutor Ken Cotter and NRA Instructor Daniel Siemeck summarized the state of the law in Indiana:

“If at the time you’re in a place unlawfully engaged in criminal activity, in mutual combat or are the initial aggressor. `In that situation, you are not afforded the right of stand your ground. You’ve got to run. You’ve got to retreat.’

“You also CANNOT

- lure or provoke someone to come onto your property and then kill them.
- shoot someone who’s running away.
- or use deadly force to prevent an action that hasn’t happened.

“‘You can’t think oh he might have a gun so I’m going to shoot,’ said Cotter.”

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<sup>5</sup> IC 35-41-3-3(a).

<sup>6</sup> IC 35-41-3-3(a)(1) and (2).

<sup>7</sup> IC 35-41-3-2(f).

<sup>8</sup> IC 35-41-3-2(i), (j), (k).

<sup>9</sup> Caroline Torie, “Special Report: Examining ‘Stand Your Ground’ laws,” *WSBT*, [www.wsbt.com](http://www.wsbt.com) as accessed February 8, 2021.