

VIRGINIA LAW ON SELF-DEFENSE

Self-defense in Virginia is an affirmative defense, the absence of which is not an element of murder. In making this plea a defendant implicitly admits the killing was intentional and assumes the burden of introducing evidence of justification or excuse that raises a reasonable doubt in the minds of the jurors.

The law of self-defense is the law of necessity, and the necessity relied upon must not arise out of defendant's own misconduct. Accordingly, a defendant must reasonably fear death or serious bodily harm to himself at the hands of his victim. It is not essential to the right of self-defense that the danger should in fact exist. If it reasonably appears to a defendant that the danger exists, he has the right to defend against it to the same extent, and under the same rules, as would obtain in case the danger is real. A defendant may always act upon reasonable appearance of danger, and whether the danger is reasonably apparent is always to be determined from the viewpoint of the defendant at the time he acted.

McGhee v. Commonwealth, 219 Va. 560, 562, 248 S.E.2d 808, ___ (1978).

The "bare fear" of serious bodily injury, or even death, however well-grounded, will not justify the taking of human life. . . . "There must [also] be some overt act indicative of imminent danger at the time." (citations omitted). In other words, a defendant "must wait till some overt act is done[,] . . . till the danger becomes imminent." (citation omitted). In the context of a self-defense plea, "imminent danger" is defined as "[a]n immediate, real threat to one's safety" (citation omitted). "There must be . . . some act menacing present peril . . . [and] [t]he act . . . must be of such a character as to afford a reasonable ground for believing there is a design . . . to do some serious bodily harm, and imminent danger of carrying such design into immediate execution."

Commonwealth v. Sands, 262 Va. 724, 729, 553 S.E.2d 733, ___ (2001).

USE OF FORCE AGAINST TRESPASSER

The common law in this state has long recognized the right of a landowner to order a trespasser to leave, and if the trespasser refuses to go, to employ proper force to expel him, provided no breach of the peace is committed in the outset. . . . Absent extreme circumstances, however, such force may not endanger human life or cause great bodily harm.

Pike v. Commonwealth, 24 Va. App. 373, 375-376, 482 S.E.2d 839, ___ (1997).

JUSTIFIABLE AND EXCUSABLE HOMICIDE

Justifiable homicide in self-defense occurs where a person, without any fault on his part in provoking or bringing on the difficulty, kills another under reasonable apprehension of death or great bodily harm to himself. . . .

Excusable homicide in self-defense occurs where the accused, although in some fault in the first instance in provoking or bringing on the difficulty, when attacked retreats as far as possible, announces his desire for peace, and kills his adversary from a reasonably apparent necessity to preserve his own life or save himself from great bodily harm.

Bailey v. Commonwealth, 200 Va. 92, 96, 104 S.E.2d 28, ___ (1958).

VIRGINIA LAW ON DEADLY FORCE TO PROTECT PROPERTY

The threat to use deadly force by brandishing a deadly weapon has long been considered an assault.

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[T]he owner of land has no right to assault a mere trespasser with a deadly weapon. (citation omitted). . . . [A] deadly weapon may not be brandished solely in defense of personal property.

Commonwealth v. Alexander, 260 Va. 238, 241, 242, 531 S.E.2d 567, ____ (2000).

BRANDISHING

Morris was charged with pointing, holding, or brandishing a firearm in such a manner as to reasonably induce fear in the mind of another, pursuant to Code § 18.2-282. . . .

Morris says that although Peter Molina saw the flare gun in Morris's waistband, he never testified that he was in fear of the gun. Morris asserts that Molina, solely out of concern for his wife, insisted that they should leave the area where Morris was sitting. Indeed, Morris states, Molina indicated in his testimony that he "may have stayed where he was had his wife not been there."

Morris says further that he "never touched the gun in the presence" of Molina or his wife and there is no evidence that "he pointed the flare gun." . . .

"Brandish" means "to exhibit or expose in an ostentatious, shameless, or aggressive manner." *Webster's Third New International Dictionary*, 268 (1993). When Morris looked at Ms. Molina, said "[he'd] like that," and then pulled up his shirt to uncover the flare gun, he exhibited or exposed the weapon in a shameless or aggressive manner. And Morris brandished the weapon in such a manner as to reasonably induce fear in the mind of Peter Molina. Although Molina may not have said he was in fear for his own safety, he stated unequivocally that he feared for the safety of his wife, and that is sufficient to prove the "induced fear" element of a conviction for brandishing a firearm under Code § 18.2-282.

Morris v. Commonwealth, 269 Va. 127, 134-135, 607 S.E.2d 110, ____ (2005)