

Document: C.R.S. 18-1-704.5

C.R.S. 18-1-704.5

Copy Citation

Statutes current through all 2021 Regular Session legislation, as compiled and edited by the Colorado Office of Legislative Legal Services.

Colorado Revised Statutes Annotated Title 18. Criminal Code (Arts. 1 — 26) Article 1. Provisions Applicable to Offenses Generally (Pts. 1 — 11) Part 7. Justification and Exemptions from Criminal Responsibility (§§ 18-1-701 — 18-1-714)

18-1-704.5. Use of deadly physical force against an intruder.

- (1) The general assembly hereby recognizes that the citizens of Colorado have a right to expect absolute safety within their own homes.
- (2) Notwithstanding the provisions of section 18-1-704, any occupant of a dwelling is justified in using any degree of physical force, including deadly physical force, against another person when that other person has made an unlawful entry into the dwelling, and when the occupant has a reasonable belief that such other person has committed a crime in the dwelling in addition to the uninvited entry, or is committing or intends to commit a crime against a person or property in addition to the uninvited entry, and when the occupant reasonably believes that such other person might use any physical force, no matter how slight, against any occupant.
- (3) Any occupant of a dwelling using physical force, including deadly physical force, in accordance with the provisions of subsection (2) of this section shall be immune from criminal prosecution for the use of such force.
- (4) Any occupant of a dwelling using physical force, including deadly physical force, in accordance with the provisions of subsection (2) of this section shall be immune from any civil liability for injuries or death resulting from the use of such force.
- (5) As used in this section, unless the context otherwise requires, "dwelling" does not include any place of habitation in a detention facility, as defined in section 18-8-211 (4).

History

Source: L. 85:Entire section added, p. 662, § 1, effective June 6. L. 2016:(5) added,(HB 16-1190), ch. 87, p. 245, § 1, effective August 10.

▼ Annotations

Research References & Practice Aids

Hierarchy Notes:

C.R.S. Title 18

C.R.S. Title 18, Art. 1

State Notes

ANNOTATION

Law reviews.

For article, "Self-Defense in Colorado", see 24 Colo. Law. 2717 (1995). For article, "POWPO and Gun Rights After Carbajal", see 44 Colo. Law. 31 (Sept. 2015).

Prerequisite for immunity under this section

is an unlawful entry into the dwelling, meaning a knowing, criminal entry. *People v. McNeese*, 892 P.2d 304 (Colo. 1995); *People v. Jones*, 2018 COA 112, 434 P.3d 760.

To be immune from prosecution under this section

a defendant must establish by a preponderance of the evidence that he or she had a reasonable belief that the intruder was committing or intended to commit a crime against a person or property in addition to the uninvited entry. This inquiry focuses on the reasonable belief of the occupant, not on the actual conduct of the intruder. *People v. McNeese*, 892 P.2d 304 (Colo. 1995).

Sufficient evidence existed to support trial court's denial of defendant's pre-trial motion to dismiss on the basis defendant had not met his burden as established by the supreme court. *People v. Janes*, 962 P.2d 315 (Colo. App. 1998).

Trial court is authorized to dismiss criminal prosecution

at pretrial stage when conditions of statute are satisfied, and this does not infringe upon prosecution's discretion to file charges. *People v. Guenther*, 740 P.2d 971 (Colo. 1987); *Young v. District Court*, 740 P.2d 982 (Colo. 1987).

Defendant bears burden of establishing right to immunity

by preponderance of evidence when issue of immunity is raised at pre-trial stage. *People v. Guenther*, 740 P.2d 971 (Colo. 1987); *People v. Eckert*, 919 P.2d 962 (Colo. App. 1996).

Fact that a homicide victim was on the defendant's porch does not permit the defendant to claim immunity from prosecution

for unlawful entry to defendant's dwelling unless the court finds that defendant believed that the victim intended to commit a crime or use physical force against the defendant. *People v. Young*, 825 P.2d 1004 (Colo. App. 1991).

Defendant may still raise immunity as defense at trial

when pretrial motion to dismiss is denied. *People v. Guenther*, 740 P.2d 971 (Colo. 1987).

For purposes of this section, the common areas of an apartment building do not constitute a dwelling.

People v. Cushinberry, 855 P.2d 18 (Colo. App. 1993).

However, the basement of an apartment building that is accessible to all tenants for the purpose of managing utilities in the tenant's individual apartment is considered part of the tenant's "dwelling". *People v. Rau*, 2020 COA 92, ___ P.3d ___.

Where pretrial motion to dismiss on grounds of statutory immunity provided in this section is denied,

defendant may raise it as an affirmative defense at trial. In such case, the burden of proof which is generally applicable to affirmative defenses would apply. *People v. Malczewski*, 744 P.2d 62 (Colo. 1987).

Section does not authorize an appeal from a pretrial order denying immunity.

An order denying defendant's pretrial motion to dismiss under this section is not a final judgment and therefore not subject to appeal. In general, the jury's verdict subsumes the trial court's pretrial ruling. A defendant may, however, seek review prior to trial under C.A.R. 21. *Wood v. People*, 255 P.3d 1136 (Colo. 2011).

Because this section creates an immunity defense as well as an affirmative defense, and because the burden of proof for each defense is different,

when raised at trial, this section poses special problems when instructing a jury. In such a case, instruction based on language from *People v. McNeese*, which dealt with pretrial immunity, must be put into context so as not to confuse or mislead the jury about the burden of proof with respect to an affirmative defense raised at trial. *People v. Janes*, 982 P.2d 300 (Colo. 1999).

Defendant did not establish by a preponderance of the evidence

that he was entitled to immunity under this section where he could not show the struggle and wounding of the victim took place in defendant's bedroom of the house he shared with the victim. *People v. Eckert*, 919 P.2d 962 (Colo. App. 1996).

Trial court did not commit reversible error

by refusing to instruct the jury that it need only determine whether the victim made an unlawful entry into a part of a dwelling that was occupied by defendant, as defendant failed to show that the bedroom was exclusively his province and that the victim's entry into the bedroom was unlawful. *People v. Eckert*, 919 P.2d 962 (Colo. App. 1996).

An instruction clarifying the meaning of “unlawful entry” is necessary when the evidence supports a theory that the defendant accidentally entered the dwelling

or otherwise entered without the requisite mental state. People v. Jones, 2018 COA 112, 434 P.3d 760.

Trial court erred in failing to instruct the jury that this section requires a “knowingly” unlawful entry into the home. Because the jury could have found defendant’s entry to be mistaken or accidental, it could have further determined that the homeowners did not have the exclusive right to use force during the encounter. People v. Jones, 2018 COA 112, 434 P.3d 760.

Instruction requiring jury to find that defendant had a reasonable belief that victim “had committed” a crime and omitting “was committing or intended to commit” a crime was erroneous but did not constitute plain error.

There was no evidence that the victim’s entry into defendant’s house was unlawful and, therefore, no basis on which a reasonable jury could have otherwise acquitted defendant under this section. People v. Phillips, 91 P.3d 476 (Colo. App. 2004).

Jury instructions in error.

Jury instruction that states that entry into a dwelling “must have been made in knowing violation of the law” could mislead the jury and thus is in error. Language is misleading in that it could be taken to mean that an intruder must know his or her conduct violates a criminal statute rather than that the intruder must not have a reasonable belief that his or her entry is licensed, invited, or otherwise privileged. People v. Zukowski, 260 P.3d 339 (Colo. App. 2010).

Jury instruction that states “[a]n entry made in the good faith belief that it is lawful, is not an entry made in knowing violation of the criminal law” allows an interpretation that the entry would not be unlawful under the make-my-day statute, and, thus, the instruction is also in error. An intruder may act under a mistaken belief of fact that he or she was lawfully on the premises and that this type of entry would not be unlawful under the make-my-day statute. A mistaken belief that an entry, although uninvited, is lawful does not make it lawful. People v. Zukowski, 260 P.3d 339 (Colo. App. 2010).

Trial court erred in interpreting subsection (2) as including the concept of “remain lawfully” within the statutory phrase “unlawful entry”.

Defendant failed to establish the legal elements of this section to bar prosecution where the victim was initially invited into defendant’s residence and, after arguing, was later asked to leave. People v. Drennon, 860 P.2d 589 (Colo. App. 1993).

The reference to “uninvited entry” in subsection (2)

refers back to the term “unlawful entry” used in the same subsection. People v. McNeese, 892 P.2d 304 (Colo. 1995).

Victim’s entry was unlawful and uninvited for the purposes of statute providing immunity for use of force

where wife of murder victim did not have authority to invite the decedent into defendant’s apartment and was staying with the defendant on the condition that she not invite the victim into defendant’s apartment. People v. McNeese, 865 P.2d 881 (Colo. App. 1993).

When this section is being used as an affirmative defense,

it is error for a jury instruction to place the burden on the defendant to prove the affirmative defense. People v. Janes, 962 P.2d 315 (Colo. App. 1998).

Applied

in People v. Arellano, 743 P.2d 431 (Colo. 1987).

Research References & Practice Aids

Cross references:

For limitations on civil suits against persons using physical force in defense of a person or to prevent the commission of a felony, see § 13-80-119.

Colorado Revised Statutes Annotated

Copyright © 2021 COLORADO REVISED STATUTES All rights reserved.

Content Type:

Terms:

Narrow By: -None-

Date and Time: Nov 02, 2021 03:30:40 a.m. EDT



[Print](#)

[Cookie Policy](#)

[Terms & Conditions](#)