



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**STATE v. EWER
CR-21-0059-PR
250 Ariz. 561 (App. 2021)**

PARTIES:

Petitioner: The State of Arizona

Respondent: Jordan Christopher Ewer

FACTS:

In July 2017, Ewer and his companions Jeffrey and Eric went to Gilbert’s house to confront Gilbert about a dispute concerning payment for drugs. There was an argument outside the house. Someone threw a rock. Jeffrey and Ewer retreated to their car, and Gilbert followed, managing to punch Jeffrey in the head through the open car window. Ewer then pulled a gun, and Gilbert retreated.

The next day, Jeffrey, Ewer, and Ewer’s stepbrother returned the house. Gilbert met them outside on the sidewalk. When Gilbert’s fiancée saw that Ewer had his firearm drawn, she told him to put it away or she would “smack him in the face with a golf club.” Ewer’s stepbrother threw a rock toward the house, and someone from the house threw rocks back. Gilbert eventually walked back through his gate, and Ewer shot three times in his direction, hitting him once in the back, which ultimately resulted in his death.

At trial, Ewer testified that he had heard of several violent acts by Gilbert, who he described as an aggressive “tweaker” or habitual methamphetamine user. Ewer also testified, consistent with photographic evidence, that he observed shells and a gun safe in Gilbert’s yard. Further, before Gilbert went through the gate, Ewer said he thought he saw Gilbert make a movement like he was cocking a pistol. Once Gilbert entered the gate, Ewer yelled, “[D]on’t come out of your gate. Don’t do it, [expletive]; don’t do it.” Ewer testified he then fired shots only after he saw the gate begin to move, believing Gilbert would emerge with the gun and shot him.

Ewer requested standard Revised Arizona Jury Instructions on self-defense, defense of a third person, crime prevention, and defensive display of a firearm, which all used the word “defendant” in reference to whose conduct was to be considered. The State requested that these instructions be modified to use the word “person,” in accord with the language of justification statutes, so the jury could also consider whether Gilbert’s conduct was justified.

The State explained that its theory was that even if Gilbert was threatening force, it was justified, lawful force. Therefore, Ewer’s conduct was not justified because he was not facing “unlawful” force, as the justification statutes require. Over Ewer’s objection, the trial court granted the State’s request. Of the justification instructions the jury received, only the crime prevention instruction included a presumption: “A person is presumed to be acting reasonably if the person is acting to prevent the commission of aggravated assault with a deadly weapon/dangerous instrument.”

During closing argument, the prosecutor relied on the justification instructions to argue that if the jury found that Gilbert was justified in any use or threat of force, then Ewer was not justified, and the jury would not need to move on to consider whether Ewer may have acted reasonably. The jury ultimately convicted Ewer of second-degree murder involving a firearm, disorderly conduct involving a firearm, and discharge of a firearm within city limits.

On appeal, Ewer argued that the trial court erred in modifying the justification instructions to generically use the word “person” rather than “defendant.” The court of appeals agreed. It found that although the justifications statutes generically use the word “person,” the legislature intended the justification instructions apply only to a defendant’s conduct. Further, relying on its decision in *State v. Abdi*, 226 Ariz. 361 (App. 2011), the court determined that the change in phrasing unconstitutionally shifted the burden of proof because the crime prevention instruction included a presumption.

The court of appeals next reasoned that the State’s closing argument did not state the “correct standard” because proof that the victim’s force was justified and lawful from the victim’s perspective does not mean the defendant was not justified from his perspective. And because the State’s incorrect argument was applicable to each charge, the erroneous instructions compounded the error, and the evidence of guilt was not otherwise overwhelming. Therefore, the court of appeals could not conclude that the instruction modification was harmless beyond a reasonable doubt. It vacated Ewers’ convictions and remanded his case for a new trial.

ISSUE:

Whether a jury instruction on the justification defense of self-defense may incorporate the use of force by both the defendant and the victim as suggested by the language of A.R.S. sec. 13-404(A) or refer only to the defendant as set forth in RAJI Ch. 4?

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