EVIDENTIARY ISSUES IN SELF-DEFENSE CASES

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I.

COMMON THEORIES IN SELF-DEFENSE IN ASSAULT CASES

A. Introduction

Unfortunately, assault is an every day occurrence in California. In 2007, there were 101,838 felony arrests and 91,150 misdemeanor arrests for assault in this state. In 2008, there were 104,793 arrests for aggravated assault.[1] Many of these cases end up on our desks. When they do, it is our job to determine whether the facts indicated a defense; whether trial counsel advocated for that defense; and whether the trial court properly instructed the jury regarding that defense. The purpose of this article is to discuss some common theories of self-defense that arise in assault cases and their evidentiary foundations.

B. When is Self-Defense a Viable Theory?

"To justify an act of self-defense [for an assault charge under Penal Code section 245], the defendant must have an honest and *reasonable* belief that bodily injury is about to be inflicted on him. [Citations.]" (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064, citing *People v. Goins* (1991) 228 Cal.App.3d 511, 516, italics in original; *People v. Flannel* (1979) 25 Cal.3d 668, 674.) The threat of bodily injury must be imminent. (*In re Christian S.* (1994) 7 Cal.4th 768, 783.) Any right of self-defense, however, is limited to the use of such force as is reasonable under the circumstances.

[1] http://ag.ca.gov/crime.

(*People v. Pinholster* (1992) 1 Cal.4th 865, 966; see also *People v. Clark* (1982) 130 Cal.App.3d 371, 380; Civ. Code, sec. 50 ["Any necessary force may be used to protect from wrongful injury the person . . . of oneself . . ."]; Pen. Code, secs. 692 ["Lawful resistance to the commission of a public offense may be made: 1. By the party about to be injured . . ."], 693 ["Resistance sufficient to prevent the offense may be made by the party about to be injured: 1. To prevent an offense against his person . . ."].) The elements of the defense are discussed in more detail below.

1. The Requisite State of Mind

As stated above, the defendant must have had an honest and reasonable belief that bodily injury is about to be inflicted on him or her. If the belief subjectively exists but is objectively unreasonable, there is "imperfect self-defense." (*Christian S., supra,* 7 Cal.4th at p. 783.) To exonerate the defendant completely, the belief must also be objectively reasonable. (*Ibid*; *People v. Aris* (1989) 215 Cal.App.3d 1178, 1186.) In either case, the fear must be of imminent harm. (*Christian S., ibid.*)

Whether a person reasonably believes he or she is in imminent danger of death or bodily injury is normally a question of fact. (*People v. Clark* (1982) 130 Cal.App.3d 371, 378.) The standard is that of the force and means that appear to a reasonable person in the same or similar circumstances to be necessary to prevent injury that appears imminent. (*People v. Jefferson* (2004) 119 Cal.App.4th 508 [even a mentally ill person is held to the standard of a reasonable person and not a reasonable mentally ill person].)

The reasonableness of a defendant's fear may arise from a number of factors, for example: the assailant's reputation for violence, if known to the defendant (*People v. Keys* (1944) 62

Cal.App.2d 903, 912); a third party threat made by a member of a group that in the defendant's mind is reasonably associated with the victim (*Minifie, supra,* 13 Cal.4th 1055 [victim was close friend of person whom defendant had killed in self-defense and whose family and friends had made threats against defendant]); or ongoing domestic abuse. (Evid. Code, sec. 1107; *People v. Humphrey* (1996) 13 Cal.4th 1073; *Aris, supra,* 215 Cal.App.3d 1178.) However, the defendant must have acted in self-defense based on the reasonable fear of bodily injury or death only, and not for some other motive such as revenge, even if danger is in fact real and imminent. (See, e.g. *People v. Trevino* (1988) 200 Cal.App.3d 874, 879.)

The reasonableness requirement was considered in the context of a murder charge in *Humphrey, supra,* 13 Cal.4th 1073. There, the Supreme Court There, the defendant shot her husband to death. Upon her arrest, she stated to police, "I shot him. That's right, I shot him. I just couldn't take him beating on me no more." (*Humphrey, supra,* 13 Cal.4th at p. 1077.) She repeatedly told officers that the victim had beaten her repeatedly, that she could not take it any more, and that she had warned him she would shoot him if he ever beat her again. (*Ibid.*) She stated that her husband had shot at her the previous day and threatened to kill her. On the day of the shooting, he began beating her again. The defendant picked up the gun, pointed it at him and told him "You're not going to hit me anymore." (*Ibid.*) When the victim went to pick up something, the defendant believed he was going to hit her with it, so she shot him. (*Ibid*.) The *Humphrey* Court stated that "[a]lthough the belief in the need to defend must be objectively reasonable, a jury must consider what 'would appear to be necessary to a reasonable person in a similar situation and with similar

knowledge . . .' [Citation.] It judges reasonableness 'from the point of view of a reasonable person in the position of defendant . . .' [Citation.] To do this, it must consider all the 'facts and circumstances . . . in determining whether the defendant acted in a manner in which a *reasonable [person]* would act in protecting his own life or bodily safety.' [Citation.]." (*Humphrey, supra,* 13 Cal.4th at pp. 1082-1083.) The *Humphrey* Court summarized that " . . . in assessing reasonableness, the question is whether a reasonable person in the defendant's circumstances would have perceived a threat of imminent injury or death", and not whether the defendant's response was merely an understandable response to the provocation. (*Id*., at p. 1088.)

2. What Must the Defendant Have Feared?

As stated above, to justify use of deadly force in self-defense the defendant's belief must be in the need to defend against imminent danger "to life or great bodily injury." (*Christian S., supra*, 7 Cal.4th at p. 783; *Humphrey, supra,* 13 Cal.4th at p. 1082.) Anything less is not sufficient. For example, mere sexual overtures would not alone suffice to support a self-defense claim. (See *People v. Valencia* (2008) 43 Cal.4th 268, 286.)

The danger to life or great bodily injury must be imminent. (*Aris, supra,* 215 Cal.App.3d at pp. 1192-1193.) The fear of future harm is not enough. For example, in *People v. Rodriguez* (1997) 53 Cal.App.4th 1250, the defendant shot Contreras. He stated he had known Contreras for about two years, during which Contreras regularly humiliated him in front of defendant's friends. About two months before his death, Contreras had beaten the defendant n front of defendant's friends. Two days before Contreras's death, Contreras asked defendant to obtain some

methamphetamine for him while both were in a motel room with a friend of defendant. When defendant refused, Contreras told him, "you do not want to become my enemy." Defendant perceived this statement as a threat against his life, and left. After this incident, defendant made his decision to kill Contreras. (*Rodriguez, supra,* 53 Cal.App.4th at p. 1258.)

Defendant obtained a gun from a friend, put on some dark clothing, and went to Contreras's apartment complex. Defendant stayed at the apartment complex for two days looking for Contreras, asking residents where he could find Contreras. Eventually, defendant saw Contreras arrive at the complex and approached him. Defendant told him he had obtained the drugs. Contreras appeared pleased and invited defendant to his apartment. As Contreras arrived at the top of the stairs, he looked back. Defendant withdrew the handgun he had secreted in his waistband and shot Contreras in his face. Contreras fell and yelled for his girlfriend. Defendant began to flee, but fired again as Contreras's girlfriend tried to help him up. Defendant was concerned that Contreras would retaliate, so he went back up, broke a glass panel with his foot, and fired another shot at Contreras. (*Rodriguez, supra,* 53 Cal.App.4th at p. 1258.) In holding that Rodriguez was not entitled to a self-defense theory, the *Rodriguez* Court stated that there was no evidence defendant killed Contreras because defendant believed he was in imminent danger of being killed by him. (*Id.,* at p. 1270.)

As these authorities show, the fear of danger of death or great bodily injury may not merely be the fear of some future attack. Self-defense does not entitle a defendant to a pre-emptive strike. Rather, it is only available in response to an honest and reasonable belief of imminent infliction of bodily injury or death.

3. Must the Defendant's Fear be of Real Danger, or is Apparent Danger Sufficient?

While the defendant's fear must be honest and reasonable, it does not have to be *real.* Either an actual or an apparent danger may justify the use of force in self-defense. (*People v. Ranson* (1953) 119 Cal.App.2d 380, 386-387.) If the defendant's beliefs were reasonable, the danger does not need to have actually existed. (CALCRIM No. 3470.) Essentially, the right of self-defense is the same whether the perceived danger is real or only apparent, so long as the defendant entertains an honest and reasonable belief in the necessity for self-defense. (*People v. Crandell* (1988) 46 Cal.3d 833, 873.) Again, the key is the reasonableness of the fear.

4. Did the Defendant Have a Duty to Retreat?

A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of death or bodily injury has passed. This is so even if safety could have been achieved by retreating. (*People v. Hughes* (1951) 107 Cal.App.2d 487, 493; *People v. Hatchett* (1942) 56 Cal.App.2d 20, 22; see CALCRIM No. 3470.) For example, in *People v. Rhodes* (2005) 129 Cal.App.4th 1339, the defendant got into an argument with another man named Demetrius Factory over a rental car. Three days later, Factory and his cousin Wright approached Rhodes. Another argument ensued because Factory believed Rhodes had used his name when receiving a traffic citation. The argument was broken up, but as Rhodes drove home, he saw Wright and Factory driving in the opposite direction. They turned around and pulled up beside Rhodes at a stop sign. A fresh argument began. Wright got out of the car, walked around the back of his car and then between his car and Rhodes's. Rhodes

picked up his gun and fired, hitting Wright in the torso. As his car moved forward, he fired the gun at Factory who was still seated in his car. (*Rhodes, supra,* 129 Cal.App.4th at pp. 1341-1342.) Rhodes testified that Wright had a gun in his hand when he got out of the car. He stated further that he tried to drive away, but saw Wright take aim. Rhodes said he "frantically" fired the gun. (*Id.,* at p. 1342.) The Court of Appeal found that Rhodes's testimony that he was going to drive away, but fired his gun because Wright had a gun and was so close to the car, was sufficient evidence to at least warrant an instruction that Rhodes did not have the duty to retreat. (*Id.,* at p. 1346.)

5. How Much Force is Too Much?

The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful self-defense. (CALCRIM No. 3470.) The general long-established rule is that a person who is justified in using self-defense may use all force and means which he or she believes to be necessary and which would appear to a reasonable person in the same or similar circumstances to be necessary to prevent an injury which appears to be imminent. (*People v. Walker* (1950) 99 Cal.App.2d 238, 243-244; see also Pen. Code, sec. 693.) The amount of force that can be used must be reasonable under the circumstances. (*Minifie, supra,* 13 Cal.4th at pp. 1064–1065; *People v. Myers* (1998) 61 Cal.App.4th 328, 334–335.) When a victim responds to an assailant with deadly force, the assailant is not entitled to use deadly force in self-defense as a response if the victim has acted with a reasonable belief that his or her life was in danger. If the victim has acted unreasonably, then the aggressor is entitled to use deadly force, but only to the extent that the victim

becomes disabled. (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1056-1057; *People v. Gleghorn* (1987) 193 Cal.App.3d 196, 202.) The degree of force may not be clearly disproportionate to the nature of the injury threatened or inflicted. (*Hatchett, supra,* 63 Cal.App.2d at pp. 157-158.) Whether the use of force was excessive in a given situation is ordinarily a question of fact for the jury to determine. (*People v. Harris* (1971) 20 Cal.App.3d 534, 537.)

II.

EVIDENTIARY ISSUES IN SELF-DEFENSE CASES

A. Introduction

Because "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense[]" (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302 [35 L.Ed.2d 297, 312, 93 S.Ct. 1038]), a criminal defendant has " . . . a *constitutional right* to present such material and relevant evidence in his favor, as was not otherwise disallowed by statute." (*People v. Mizchele* (1983) 142 Cal.App.3d 686, 691, italics in original.) "Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, sec. 351.) "Relevant evidence" is defined as " . . . evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, sec. 210.)

Clearly, it is "of consequence" that a person believed that self-defense was necessary. "A person claiming self-defense is required to 'prove his own frame of mind,' and in so doing is 'entitled to corroborate his testimony that he was in fear for his life by proving the reasonableness of such

fear.'" (*People v. Davis* (1965) 63 Cal.2d 648, 656.) When reviewing the record in an assault case, appellate counsel should obviously make sure that any theories of self-defense that were suggested by the facts of the case were in fact presented. This entails determining what evidence was available that tended to show that the defendant was reasonably in fear, and how trial counsel could have persuaded the court that it was admissible. The following are discussions of some common evidentiary issues in self-defense cases.

B. Antecedent Threats

Whether a defendant was sufficiently in fear of injury to justify the use of force in self-defense is not measured by an abstract standard of reasonableness but one based on the *defendant's* perception of imminent bodily injury or death. Because his state of mind is a critical issue, he may explain his actions in light of his knowledge concerning the victim. (*Davis, supra,* 63 Cal. 2d at p. 656; see *People v. Lee Chuck* (1887) 74 Cal. 30, 34-35.) "Evidence of antecedent threats is admissible when the threats are followed by some 'overt act' that has placed the defendant in immediate danger. [Citations.] . . . [Defendant] was entitled to show how a reasonable person in his position would have evaluated the extent of that danger . . . 'In making that evaluation, the defendant is entitled to consider prior threats, assaults, and other circumstances relevant to interpreting the attacker's behavior.' [Citation]." (*Minifie, supra,* 13 Cal.4th at p. 1069; *People v. Pena* (1984) 151 Cal.App.3d 462, 475.)

Antecedent threats as well as the victim's reputation for violence, prior "assaults, and other circumstances [are] relevant to interpreting the attacker's behavior." (*Aris, supra*, 215 Cal.App.3d

at p. 1189; see *People v. Moore* (1954) 43 Cal. 2d 517, 527-529; *Lee Chuck, supra*, 74 Cal. at pp. 34-35; *People v. Brophy* (1954) 122 Cal. App. 2d 638, 647-648.) These considerations do not by themselves establish a right of self-defense. (See *People v. Fitch* (1938) 28 Cal. App. 2d 31, 45-46.) However, they illuminate and reflect on the reasonableness of defendant's perception of both the imminence of danger and the need to resist with the degree of force applied. (See *Moore, supra*, at p. 528.) They may also justify the defendant "in acting more quickly and taking harsher measures for his or her own protection in the event of assault, whether actual or threatened, than would a person who had not received such threats." (*People v. Bush* (1978) 84 Cal. App. 3d 294, 302-303.)

A previous threat, unaccompanied by any demonstration of an immediate intention and ability to carry it out, will not justify an assault. The threat of harm must be imminent. The defendant is, however, "entitled to corroborate his testimony that he was in [immediate or imminent] fear for his life by proving the reasonableness of such fear" through evidence of "his own frame of mind." (*Davis, supra*, 63 Cal. 2d at p. 656.) The jury must evaluate such perceptions in context, i.e., the "same or similar circumstances" as those in which the defendant acted. (See *People v. Kermott* (1939) 33 Cal. App. 2d 236, 242-243.) "Therefore, if they would 'induce a well founded belief in the mind of a reasonable person that his adversary was on the eve of executing the threat' and that immediate defense against the impending danger was the only means of escape from great bodily injury or death, the law of self-defense justifies use of whatever force is necessary to 'avert the threatened peril.' [Citations]".) (*Humphrey, supra,* 13 Cal.4th at p. 1094.)

Antecedent threats need not have been made by the victim personally to be admissible on

the issue of the reasonableness of the defendant's fear of imminent bodily injury or death. In *Minifie*, *supra,* 13 Cal.4th 1055, one Tino Afamasaga was sitting at a table with several others when Minifie entered the bar. Tino was disabled by a broken foot and was unarmed. Though he did not know Minifie by sight, someone pointed him out to Tino, who disliked him because Minifie had killed Tino's friend Jackie Knight. (*Minifie, supra,* 13 Cal.4th at p. 1060.) The two made eye contact and approached each other. After a few words were exchanged, Tino punched Minifie in the face, knocking him to the ground. When Tino turned to grab his crutches, Minifie pulled a gun and fired twice, hitting Tino and another patron of the bar. (*Id.,* at pp. 1060-1061.) The defense made an offer of proof, stating that the defense evidence was to include testimony that after Minifie killed Knight, he had been threatened both directly and indirectly and had been attacked while serving time in jail on an unrelated matter. (*Id.,* at p. 1061.) Minifie's wife had heard threats. The Knight family had a reputation for violence in the community. (*Id.,* at p. 1062.) The trial court excluded evidence of the violent reputation of the Knight family and associates, concluding it was inadmissible under Evidence Code section 1100 et. seq. and that even if the evidence was admissible under these statutes, it was more prejudicial than probative within the meaning of Penal Code section 352. (*Id.,* at pp. 1062-1063.)

The Supreme Court thought otherwise, stating:

> "The defendant's perceptions are at issue, and threats from a family and its friends may color a person's perceptions of that group no less than threats from an individual may color a person's perceptions of that individual. A defendant who testifies that he acted from fear of a clan united against him is entitled to corroborate that testimony with evidence 'tend[ing] in reason to prove' that the fear was reasonable. [Citation.] Threats from the group on the defendant's life would certainly tend in

> reason to make the defendant fearful. This is especially true where the group has a reputation for violence, and that reputation is known to the defendant. Such threats are relevant to the defendant's state of mind -- a matter 'of consequence to the determination of the action' [citation] -- and the trier of fact is entitled to consider those threats along with other relevant circumstances in deciding whether the defendant's actions were justified."

(*Minifie, supra,* 13 Cal.4th at pp. 1065-1066.) Thus, antecedent threats made not only by the victim but by his or her associates, are admissible not to show that the victim is a violent person, but that the defendant's fear of imminent death or bodily injury was reasonable under the circumstances. (See *People v. Garvin* (2003) 110 Cal.App.4th 484, 488.) Thus, trial counsel can overcome a prosecution objection under Evidence Code section 1101, subdivision (a) or Evidence Code section 352 by explaining that he or she is not seeking to have the evidence admitted to show that the victim had a particular character trait, but rather to show that the defendant's state of mind was reasonable under the circumstances. Appellate counsel should be alert to the reasons advanced by trial counsel to ensure that he or she sought admission under the appropriate theory.

C. Prior Assaultive Conduct

1. The Relevance of Prior Conduct of the Defendant to a Self-Defense Theory

Ordinarily, evidence of prior misconduct is inadmissible to prove a defendant's conduct on a specific occasion or to prove his or her predisposition to commit a crime. (Evid. Code, sec. 1101, subd. (a).) The reason for excluding such evidence is not that it is irrelevant. Rather, the danger is that it has a tendency to bear too heavily on the jury's assessment of the defendant's guilt. "It may almost be said that it is because of the indubitable relevancy of specific bad acts showing the character of the accused that such evidence is excluded. It is objectionable not because it has no

appreciable probative value but because it has too much." (1A Wigmore, Evidence (Tillers rev. 1983) sec. 58.2, p. 1212.) The Supreme Court has recognized this principle, noting that such evidence is excluded not because it is irrelevant, but for extrinsic policy reasons, including prejudice to the defendant and jury confusion and distraction. (*People v. Demetrulias* (2006) 39 Cal.4th 1, 21.)

Evidence of other crimes is admissible only if relevant to prove a material fact at issue, separate from criminal propensity. (*People v. Daniels* (1991) 52 Cal.3d 815, 856.) Evidence of a prior assault by the defendant occurring under similar circumstances may be admitted to prove some intent or motive other than the need to defend oneself. (*Demetrulias, supra*, 39 Cal.4th at pp. 9, 15 [evidence of knife assault on another elderly man and robbery of his home properly admitted to show that stabbing death of elderly man also involving theft just hours before was motivated by need for money]; *People v. Wells* (1949) 33 Cal.2d 330, 341-343 [prisoner's prior assaults on guard who had initiated disciplinary action against him admitted to prove malice in subsequent assault on another guard who also initiated disciplinary action]; *People v. Simon* (1986) 184 Cal.App.3d 125, 129-130 [prior assault on man found in defendant's girlfriend's apartment held admissible to negate self-defense in defendant's trial for killing a man found in his girlfriend's apartment if the jury found the motive in both cases was jealousy].)

In *Demetrulias, supra,* the defendant was being tried for murdering Robert Miller in the course of a robbery. The evidence showed that Demetrulias and Miller frequented the same bar which was not far from Miller's residence. One evening, a neighbor of Miller's was awakened by

the sound of someone running up the stairs. He heard someone loudly demand, "Give me your wallet." Less than a minute later, the neighbor heard footsteps descending the stairs. He then saw Miller come out of his room saying, "He stabbed me in the heart. He's killed me." (*Demetrulias, supra,* 39 Cal.4th at p. 6.) Miller died of a stab wound to the chest. Outside his door, police found a bloody knife. Miller's wallet was in a fanny pack on the dresser in his room. There was no money in the wallet, but there were approximately $35 in his pants pocket. The next morning, a police investigator assigned to the case saw Demetrulias walking near Miller's home. He was very intoxicated and resembled a sketch based on observations of one of the neighbors. Demetrulias was detained and searched, revealing bloodstained clothing, $1,274 in cash, two knives, numerous coins, four .38-caliber cartridges, and a wallet and drug prescription bottle with identification for Clarence Wissel. (*Id.,* at pp. 6-7.)

Police went to Wissel's home which was less than a mile away, and found that the house had been ransacked. Wissel's belongings were strewn about, some in plastic bags, in the doorway, on the driveway, and across the street. The 82-year-old Wissel was found tied up in a bedroom with a heavy dresser placed on top of him. In the same room, police found a wallet with Demetrulias's identification and a revolver with the cylinder removed. Wissel had suffered stab wounds to his neck, elbow, and chest, as well as brain injuries. (*Demetrulias, supra,* 39 Cal.4th at p. 7.) Shoe prints matching Demetrulias's shoes were found in and around Wissel's house. (*Ibid*.)

At trial, the court ruled that the uncharged assault on Wissel was admissible to show evidence of intent, motive, common design or plan. On appeal, Demetrulias argued that the Wissel

evidence was relevant only as character evidence and was therefore inadmissible under Evidence Code section 1101, subdivision (a). The California Supreme Court noted that both intent and lack of justification were at issue since during motions in limine defense counsel stated his expectation the trial evidence would put into question whether Demetrulias went to Miller's home with the intent of robbing Miller, or only responded to Miller's attack on him. In his opening statement, defense counsel explained how the evidence would show that Demetrulias stabbed Miller in self-defense, rather than in an attempt to rob him. (*Demetrulias, supra,* 39 Cal.4th at p. 14.) The Court explained that the Wissel incident tended to show that Demetrulias "felt a strong need for Wissel's money . . . and acted out of that motive rather than merely to defend himself against Wissel. A trier of fact could rationally infer that defendant had also felt a strong need for money a short time earlier on the same night, when he confronted Miller, and therefore that he stabbed Miller in order to take his money rather than to defend himself against Miller." (*Ibid.*) That Demetrulias had the intent to rob Wissel and a motive to do so tended to show that he had the same intent and motive with respect to Miller a short time earlier the same night. The Supreme Court emphasized "the close proximity in place and time" between the two incidents. (*Ibid*.)

These cases demonstrate the need for substantial similarity in the circumstances of any prior assault sought to be admitted and the circumstances of the charged assault. Appellate counsel should carefully consider whether an argument can be made that the evidence was inadmissible due to lack of sufficient similarity, and that it was more prejudicial than probative within the meaning of Evidence Code section 352. Of course, if no such objections were made in the trial court, a claim

of ineffective assistance of counsel will need to be explored.

2. Prior Conduct of the Victim

"In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted is not made inadmissible by Section 1101 if the evidence is: (1) offered by the defendant to prove conduct of the victim in conformity with the character or trait of character." (Evid. Code, sec. 1103, subd. (a).) In a prosecution for assault where self-defense is raised, therefore, evidence of the victim's violent character shown through past conduct is admissible to show the victim was more likely the aggressor. (*People v. Shoemaker* (1982) 135 Cal.App.3d 442, 446-447; *People v. Rowland* (1968) 262 Cal.App.2d 790, 797; *People v. Smith* (1967) 249 Cal.App.2d 395, 404-405.) However, without some showing of the defendant's state of mind to support a claim of self-defense, evidence of the victim's past violent conduct is irrelevant and should be excluded. (Evid. Code, sec. 350; *Smith, supra*, at pp. 404-405.) Therefore, appellate counsel should make sure that trial counsel sought admission appropriately either by making an offer of proof or by putting on evidence that the victim was the likely aggressor.

The admissibility of prior assaultive conduct by the victim, of course, can be a double-edged sword. " . . . [E]vidence of the defendant's character for violence or trait of character for violence (in the form of an opinion, evidence of reputation, or evidence of specific instances of conduct) is not made inadmissible by Section 1101 if the evidence is offered by the prosecution to prove conduct of the defendant in conformity with the character or trait of character and is offered after

evidence that the victim had a character for violence or a trait of character tending to show violence has been adduced by the defendant under paragraph (1) of subdivision (a)." (Evid. Code, sec. 1103, subd. (b).) Thus, if the defendant has a record of prior assaultive conduct of his or her own, it will be admissible to show a propensity for violence if the defense has introduced evidence of prior assaultive acts by the victim. This would of course severely damage a claim of self-defense. This is an issue that appellate counsel should examine carefully in each case to determine whether trial counsel had a valid tactical reason for failing to request admission of the victim's prior assaultive conduct.

D. Aggressor or Victim?

The availability of a theory of self-defense often turns on which party is the aggressor. A person who engages in mutual combat or who is the initial aggressor has a right to self-defense only if he or she actually and in good faith tries to stop fighting *and* he or she indicates, by word or by conduct, to his or her opponent, in a way that a reasonable person would understand, that he or she wants to stop fighting and he or she has stopped fighting *and* he or she gives his opponent a chance to stop fighting. If a person meets those requirements, he or she has a right to self-defense if the opponent continues to fight. (CALCRIM No. 3471; *People v. Hernandez* (2003) 111 Cal.App.4th 582, 588.) The right to self-defense is not available to a defendant who instigates a confrontation with the intention of creating the necessity for an assault or if the defendant has encouraged the confrontation. (*People v. Garnier* (1950) 95 Cal.App.2d 489, 496.) If the defendant started the fight using non-deadly force and the opponent suddenly escalates to deadly force, the defendant may

defend himself or herself using deadly force. (*People v. Quach* (2004) 116 Cal.App.4th 294; *People v. Sawyer* (1967) 256 Cal.App.2d 66, 75.)

Appellate counsel should read the record carefully to determine whether the defendant was indeed the initial aggressor, and if at any time the roles reversed. If there appears to be a mutual combat situation, it would be prudent to contact trial counsel for his or her investigative reports to see whether a theory of self-defense could have been developed based on the premise that the defendant, even if he or she was the initial aggressor, was at some point entitled to self-defense.

III.

DEVELOPING SELF-DEFENSE THEORIES POST-JUDGMENT

There are several ways in which appellate counsel may handle self-defense claims. First, of course, is on direct appeal where trial counsel litigated the issues in the trial court. In such cases, it will be necessary to ensure that defense counsel sought admission or exclusion of evidence under the appropriate theory. If evidence tending to show that the client acted in self-defense was excluded, you will need to argue on appeal that had the jury heard the evidence it would have acquitted the defendant or convicted him or her of a lesser crime.

The role of appellate counsel becomes more complicated when trial counsel failed to raise a viable self-defense claim and where such failure resulted in the withdrawal of a potentially meritorious defense. (See *People v. Pope* (1979) 23 Cal.3d 412, 425.) Because the issue was not presented to the finder of fact in the trial court, it will be necessary for appellate counsel to raise the issue in a petition for a writ of habeas corpus. This requires careful investigation. The first source

of information in most cases will be the client. If he or she testified, scrutinize that testimony carefully to determine whether there might be a self-defense claim. Regardless of whether the client testified, contact him or her immediately. Find out his or her side of the story in detail, including whether trial counsel was apprised of all potentially useful information, and if not, why not. Ask your client whether there might be any witnesses that should have been called who could have supported his or her claim.

After you have gathered as much information as possible from your client, request trial counsel's file. If trial counsel does not cooperate, remind him or her that trial counsel does have a continuing duty to the client, which includes the duty of cooperating with appellate counsel. (See State Bar of California Standing Committee on Professional Responsibility and Conduct Formal Opinion No. 1992-127.) If it becomes necessary, do not hesitate to contact the attorney's supervisor if he or she has one. Upon obtaining the file, carefully read all police reports and any investigative reports. If appropriate given your review of the file, interview trial counsel regarding whether a theory of self-defense was investigated, and if not, why not. After you have discussed the case with trial counsel, it may be prudent to speak with your client again.

Succinctly stated, in order to develop this issue in post-judgment proceedings, it is vital to carefully examine and consider not only the evidence that was presented at trial, but also the evidence that *could have been* presented. This can only be accomplished by communicating with your client and trial counsel as extensively as possible to determine whether facts that could have been used to develop a self-defense theory were explored.

CONCLUSION

As the statistics at the beginning of this article demonstrate, assault is a common offense. What the statistics do not demonstrate is that very often, there is a story behind the act that explains its occurrence. As appellate counsel, it is our duty to determine whether the defendant's story was even heard by trial counsel, and whether that story provided a legal defense that should have been developed and presented to the trier of fact.