



JURY SHOULD HAVE BEEN INSTRUCTED ON THE JUSTIFICATION DEFENSE AND LAWFUL TEMPORARY POSSESSION OF A WEAPON.

The Second Department, reversing defendant's assault and weapons convictions, determined the defendant's testimony alleged facts which required that the jury be instructed on the justification defense and the lawful temporary possession of a weapon. Defendant testified he was attacked by the complainant from behind and he grabbed an object from defendant and started swinging at the complainant to protect himself as they rolled on the ground. The fact that defendant did not testify he stabbed the complainant did not preclude the applicability of the justification defense:

... [V]iewing the evidence in the light most favorable to the defendant, there was a reasonable view of the evidence that the complainant was the aggressor, that the defendant could not safely retreat, that the defendant's actions during the fight caused the complainant's injuries, and that the defendant's actions were justified. The fact that the defendant did not testify that he stabbed the complainant did not preclude a charge as to a justification defense, since the evidence, viewed as a whole, supported such a charge
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... [W]e agree with the defendant that he was entitled to a jury charge on the defense of temporary and lawful possession of a weapon with respect to that count of the indictment Although this contention was not preserved for appellate review, we review it in the exercise of our interest of justice jurisdiction

In some circumstances, a person may possess an unlicensed or proscribed weapon and still not be guilty of a crime because of the innocent nature of the possession To warrant a jury instruction on the defense of temporary and lawful possession, "there must be proof in the record showing a legal excuse for [the defendant's possession of] the weapon . . . as well as facts tending to establish that, once possession has been obtained, the weapon had not been used in a dangerous manner" A person may be found to have had temporary and lawful possession of a weapon if he or she took the weapon from an assailant in the course of a fight Viewing the evidence in the light most favorable to the defendant, there was a reasonable view of the evidence supporting this defense. The defendant testified that he only possessed the knife, if at all, when he attempted to disarm the complainant during the fight. Further, although the defendant's use of the knife thereafter resulted in the complainant being stabbed, should a jury believe that the defendant's use of the knife was justified, such use would have been lawful ... , and not "utterly at odds with [the defendant's] claim of innocent possession . . . temporarily and incidentally [resulting] from . . . disarming a wrongful possessor" [People v Sackey-El, 2017 NY Slip Op 03198, 2nd Dept 4-26-17](#)

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