

Plagued by neighborhood youths who had been stealing lawn furniture from his backyard, a man remained awake nightly watching for them. One evening the man heard noises in his backyard. He yelled out, warning intruders to leave. Receiving no answer, he fired a shotgun filled with nonlethal buckshot into bushes along his back fence, where he believed the intruders might be hiding. A six-year-old boy was hiding in the bushes and was struck in the eye by some of the pellets, causing loss of sight. The man is charged with second-degree assault, which is defined in the jurisdiction as "maliciously causing serious physical injury to another."

What verdict should the jury render at the man's trial?

- A. Guilty, because the man recklessly caused serious physical injury.
- B. Guilty, because there is no privilege to use force against a person who is too young to be criminally responsible.
- C. Not guilty, because the child was trespassing and the man was using what he believed was nondeadly force.
- D. Not guilty, because the man did not intend to kill or to cause serious physical injury.

Explanation:

Justifications for criminal acts

Necessity	Reasonable belief that conduct was necessary to avoid imminent & substantial harm No reasonable legal alternative Harm caused < harm avoided
Self-defense	Actual & reasonable belief that harm is imminent Reasonable force used to prevent harm Not initial aggressor
Defense of others	Actual & reasonable belief that force is necessary to protect victim from imminent harm Reasonable force used to protect victim
Defense of property	Force reasonably necessary to prevent imminent & unlawful interference with possessed property Nondeadly force used
Law enforcement	Prevent imminent crime Make lawful arrest <i>or</i> Prevent suspect's escape from custody
Resisting arrest	Reasonable force permitted to resist unlawful arrest or arrest by unknown police officer

This jurisdiction defines **second-degree assault** as maliciously causing serious physical injury to another. **Malice** requires proof of either:

intent – conscious desire or practical certainty that one's act will cause a particular result
or

recklessness – conscious disregard of a substantial and unjustifiable risk of harm.

Here, the man did not intend to kill or cause serious injury when he fired a shotgun filled with nonlethal buckshot into the bushes where he believed intruders might be hiding **(Choice D)**. But he recklessly (ie, maliciously) disregarded the substantial and unjustifiable risk that this would cause serious physical injury. And since some of the pellets struck the boy in the eye, causing loss of sight, the man committed second-degree assault.

However, an assault committed in **defense of property** may be justified if the person (1) **reasonably believed** that property in his/her possession was in danger of **imminent unlawful interference** (eg, trespass) and (2) used **reasonable, nondeadly force** to prevent such interference. Here, although the boy was trespassing and the man believed he was using nondeadly force, it was *unreasonable* to fire a shotgun into the bushes **(Choice**

C). As a result, the man's use of force was not justified and he should be found guilty of second-degree assault.

(Choice B) The privilege to use force against another, whether in defense of one's self or property, does not turn on that person's age. But the person's age and characteristics may be considered in determining whether the use of force was reasonable.

Educational objective:

An assault committed in defense of property may be justified if the person (1) reasonably believed that property in his/her possession was in danger of imminent unlawful interference and (2) used reasonable, nondeadly force to prevent such interference.

Copyright © 1997 by the National Conference of Bar Examiners. All rights reserved.

Copyright © UWorld. All rights reserved.