Transcript: Speaking with the Police After a Self-Defense Incident, Part 2

0:00 · Don West I'm Don West, National Trial Counsel for CCW Safe and a practicing criminal defense trial lawyer. I'm here with Andrew Branca, the foremost expert in the country on the law of self-defense. Welcome, Andrew.

Andrew Branca Very happy to be here, Don.

Don West Let's talk a little bit about your background and what you're doing these days.

0:15 · Andrew Branca Well, as you say, I'm an attorney who specializes exclusively in use-of-force law. At my practice, Law of Self Defense, our motto is: "You carry a gun so you're hard to kill. Know the law so you're hard to convict." And we help people know the law primarily through educational efforts: books, DVDs, courses and so forth.

Don West How can they find you?

Andrew Branca LawOfSelfDefense.com, or just about anywhere on the internet.

Don West All good things start there.

Andrew Branca Yes, sir.

0:40 · Don West Great. Let's talk a little more about interacting with the police after a self-defense incident. The question is, how much should you cooperate? At what point do you interact with the police without doing yourself more harm than good? I know this is a fluid, dynamic situation, and well-meaning people can vary. But let's pick it up at the point where the investigating officer comes. Someone has been shot, or perhaps killed, and the police officer says, "What happened?"

1:17 · Andrew Branca Sure. So, I think, again, there's a very specific number of items you'll want to share with the officers that cannot hurt you, because you're going to have to share this information anyway. Things like your name, the fact that you acted in self-defense (that's why this person's been shot), and if there's any witnesses or evidence that's favorable to you, you want to make sure that evidence and those witnesses are known to the police so they can capture that. If it's not in evidence, it doesn't exist for purposes of your legal defense. So, if it's helpful to your defense, you want to make sure that's captured.

1:52 · Don West So when you're claiming self-defense, right off the bat, you are admitting that you were the person that fired the gun, that you shot someone, who may have died as a result of being shot, on purpose.

2:00 · Andrew Branca Yeah. So, self-defense in that sense is very different than many other legal defenses. If your legal defense were, say, an alibi defense, you'd be saying, "Well, it wasn't me. I was someplace else. I have proof I couldn't have done it." That's not what you're saying when you're claiming self-defense. When you're claiming self-defense, you're saying the opposite of that. You're saying, "I did it. I fired the shot that killed that person, but I did it with the legal justification of self-defense." So, you'd better hope that legal justification of self-defense holds up, because if that

disappears, all that's left of your statement is essentially a confession to having committed the underlying act of violence.

Don West So you're all-in right at the beginning.

2:43 · Andrew Branca Absolutely. And by the way, if you deny that it was you, if you try to say you weren't involved, and then later you want to try to claim the justification of self-defense, well, you've got a serious problem now, because you've made two inconsistent statements. In fact, even if you're just completely silent and simply don't say anything about the events at the scene, the fact that you didn't mention self-defense at the scene can potentially be used against you later. You could end up with a prosecutor telling a jury, "Sure, the defendant's claiming self-defense here in court, but at the scene he never said a word about self-defense to the responding officers." And it really undermines the credibility of your claim of self-defense. Even if the act itself was in fact lawful, it doesn't look that way, because it looks like you tried to escape responsibility for the use of force.

3:35 · Don West So that's not the time to try to explain it away, to say, "Well, maybe it was an accident," anything that would undermine the very straightforward claim: "Yes, I shot that person. I shot that person because I was being attacked. I shot that person in self-defense."

3:58 · Andrew Branca Absolutely. You want that to be a very explicit statement up front. And by the way, especially anything that sounds like accident can be terribly devastating to a claim of self-defense. A lot of people do it, because we've all been taught since we were children, "Well, if something was an accident, you're not really responsible," right? Accidents happen. But accident is a legal defense. There is a legal defense of accident, but that's not the same thing as the legal defense of self-defense. A legal defense of accident is intrinsically something you did not intend to have happen; it happened accidentally. An act of self-defense is something you did deliberately.

4:38 · Andrew Branca And you typically can't claim both, or at least you can't claim both with any kind of coherency. You can't say, "Well, you know, the gun just went off. I didn't mean to shoot that person. But if you don't buy that one, I shot him in self-defense." Maybe from a technical legal perspective, you'll be allowed to make those inconsistent legal arguments, but a jury's not going to buy that. If it was actual self-defense, a jury wants to hear you say why you had to kill that person, and they want to hear that it was self-defense.

5:05 · Don West How many cases have you read (I know I've been in the middle of some) where there's a statement made at the scene in an attempt to deflect, perhaps, responsibility, and by the time you get to trial, there is only one defense, and that's self-defense? And it may have in fact been fully justified, supported by the law and the facts, except there's this statement out there that the prosecutor has a heyday with.

5:27 · Andrew Branca Absolutely. And you know, the prosecutor's in the game to win.

Don West Yes.

Andrew Branca And that's not a knock against the prosecutor. That's his job. That's what we hire him to do. That's his professional responsibility. And given that's his professional responsibility, and he's not doing that job because he doesn't like doing that job, if you give him fuel to burn you at trial, he's going

to use that fuel. That's simply the nature of his job. It's our responsibility not to provide that kind of evidence to make it easy for him to do that.

6:02 · Don West So when the police respond, I take it from what you're saying, it's almost always, well, it's always better to say less than more. If more becomes something like that, as you try to explain too much, and if you don't fully accept responsibility for your own actions and begin the process of showing how they were justified.

6:25 · Andrew Branca So there's kind of a fine line in interacting with the police, in that you don't want to deny it was you, right? You want to accept responsibility, that it was you who used force, but you're going to claim legal justification for the use of force. And you don't want to establish a hostile relationship with law enforcement when they respond.

6:40 · Andrew Branca Now, that may not keep them from arresting you. I always tell all my clients, just assume you'll be arrested. It's the least of your concerns. But being arrested is not an act of hostility by the police. They're just either securing the scene, or they think they have probable cause to make the arrest. They're just doing their job. But if you create a hostile environment, while it may not change so much the legal nuts and bolts of what's going to happen at the scene, it can greatly influence how those officers go about investigating the scene, gathering evidence, talking to witnesses.

7:16 · Andrew Branca There was a famous case in Florida, the Michael Dunn case, where he shot somebody in a car next to him at a convenience store, and then he fled the scene. Later he would claim, "Well, I shot that person because they pointed a shotgun at me."

Don West That's the famous loud music case. One many may know about.

Andrew Branca Exactly right.

7:34 · Don West And he fled the scene, went home, ordered pizza, and I don't think in any way volunteered information to the police until they knocked on his door.

7:43 · Andrew Branca Right. So unbeknownst to him, a homeless person living in their car in the parking lot of the convenience store got his plate number. So, when he finally got home, the police were there waiting for him. So he didn't call the police; the police had to go to him.

7:53 · Don West So the police already had a pretty fully formed narrative of the sequence of events before they talked to him.

8:02 · Andrew Branca Well, they had a narrative. They didn't have his narrative. They had the other party's narrative, and the other party's narrative was, "Some crazy dude shot my friend and drove off." That's what the police had, and they had that narrative and only that narrative until they arrested him the next day at his home elsewhere in Florida, because he was visiting the area. But what that meant was, that whole first night at the scene, when the police were gathering evidence and talking to witnesses, it was never in their heads that the shooter might have been acting in self-defense.

8:35 · Andrew Branca Because there was no one making that claim.

8:40 · Don West They had no idea what the shooter claimed to have seen, no description, nothing that would help the police with their investigation or tell them what to look for.

8:51 · Andrew Branca They had none of that. It simply looked like a shooting that had no connection to self-defense at all. So later, Michael Dunn would say, "Well, they pointed a shotgun at me. That's why I shot them. Did you recover the shotgun?" And the police just laughed. They said, "Well, how could we recover a shotgun? We didn't even know we were supposed to be looking for one."

9:05 · Don West Well, obviously, the point would be, if you're involved in a situation like that, you need to be the one who calls the police. You need to sort of stake your claim of self-defense. Whether Michael Dunn had a good-faith belief, when it all settled out, that he truly acted in self-defense, when you see what he did after the fact, the prosecution was open season on him. All of those things would be argued as a consciousness of guilt.

9:23 · Andrew Branca Absolutely. And by the way, none of us knows what actually happened, right? None of us were there. None of us were witnesses. All we can do is look at the evidence and make reasonable inferences from the evidence. So, for all we know, Michael Dunn is telling the truth. For all we know, a shotgun was pointed at him. But if that was true, the only reason that shotgun was not in evidence is because he fled the scene and did not call the police and report the act himself.

9:55 · Don West It's fascinating, that case in particular. I imagine a lot of people know bits and pieces about it, but there were two trials. In the first trial, first of all, Michael Dunn shot his firearm and killed one of the occupants of the vehicle but also fired several other shots as the vehicle was leaving. So, he had the first-degree murder charge, and then he had several other charges of attempted murder, all of them carrying very, very lengthy prison sentences, potentially. The fascinating thing to me was, notwithstanding his conduct (failing to stay, failing to report, doing all of the things we would urge people not to do), the jury still was not able to reach a unanimous verdict on the murder charge. It was a mistrial on that because the jury hung. Who knows how doing the things that we've talked about may have changed the outcome of that case, frankly.

10:48 · Andrew Branca Yeah, we don't know. So, we know the jury hung in the first trial on the murder charge, which tells us that at least one juror believed that the state had failed to disprove the claim of self-defense beyond a reasonable doubt with respect to the murder charge. If Dunn had claimed self-defense at the scene from the beginning, would that have been enough to take murder completely off the table as far as the other jurors were concerned as well?

11:12 · Andrew Branca Because Dunn ended up retried on the murder charge—

Don West That's right.

Andrew Branca —Because it was a hung trial the first time, and he got convicted the second time around.

Don West Those other shots were a lot less supportable, even under his own statements, as the vehicle was leaving, firing the additional rounds into the back of the vehicle.

11:30 · Andrew Branca Right, because there was no reasonable narrative under which those shots, as the vehicle was fleeing the parking lot, could have been self-defense.

11:38 · Don West Sure. Since we're talking about that case, and we're talking about interacting with the police: we know that he didn't, but let's say he had, and the police arrived and he was there. I've heard people give the advice, and I'm one of them, that sometimes says you don't give a detailed statement on the scene after having gone through that event and not having counsel. At the same time, you don't simply shut down and not provide the kind of information that you've been talking about. I've suggested that you can say to the police, "I'd be glad to cooperate with you. I acted in self-defense, but I'd like to have the opportunity to talk with a lawyer first," and then not answer questions. You may disagree with me that those are good words to say.

12:23 · Don West Let me preface my comment by saying, though, the purpose of that is to have that positive connection with the police: even though you may not answer all of their questions, you were the person acting in self-defense, and you need an opportunity to pull yourself together and have the benefit of counsel before you enter into their investigative world. Now, not everyone may be able to do that. They may not have the wherewithal; they may not be collected enough to go through those steps. But do you generally agree that you shouldn't give a detailed statement, and that you should seek the advice of counsel?

13:10 · Andrew Branca Absolutely, on both of those. You cannot give a detailed statement that's going to be accurate, because your brain will not have captured the details in an accurate way. There's a reason that every law enforcement officer, for example, is not required to give a formal statement if they've been involved in a use-of-force event for 24, 36, 72 hours (it varies by department), because those departments have that experience. Until the brain chemistry is settled, we're not going to have a single, cohesive, detailed narrative that's consistent. What people will remember an hour after the event is different than what they'll remember 12 hours later, 24 hours later, 48 hours later.

13:52 · Andrew Branca I've spoken with cops who've been in deadly-force events, and they'll tell me two or three years later, suddenly some detail will pop into their head that they'd completely forgotten that entire time. They'll just wake up in the middle of the night remembering the color of somebody's shirt.

14:07 · Don West And notwithstanding all of those problems with being able to effectively and accurately explain what happened, once you're being interviewed by the police, your statement is being recorded for all time, and it becomes Exhibit Number One if you're prosecuted. And you are then navigating those waters, which everyone I know, including lawyers, is essentially ill-equipped to handle on their own. Everybody needs a lawyer when they're going to be interviewed by the police.

14:36 · Andrew Branca Absolutely, with no question. You have little idea of the words that might come out of your mouth that could devastate your legal defense. Frankly, if I, as an expert in self-defense law, were involved in a use-of-force event, one of the first things I would demand would be legal counsel.

14:57 · Don West Right. I can tell you, having tried a number of self-defense cases, that if I'm going to pick one thing that is the biggest obstacle to overcome, and usually the most important obstacle to overcome, in defending someone, it is explaining the statement that they made to the police, if it is in any way inconsistent with the trial evidence or their own testimony at trial. And no one needs to put themselves in that situation.

15:25 · Don West Let me mention, just sort of anecdotally, I've been involved in some cases where my client, or the accused in a case I've consulted on, has done what I suggested (maybe not those words, "I'll cooperate, but I want to talk to a lawyer first") but not given a detailed statement, and then was contacted by law enforcement a few days later and asked to come in for an interview. By then, as CCW Safe members, they all have lawyers. At that point, they have met with their lawyers, they've talked with their lawyers, and oftentimes the lawyer will have also talked with law enforcement. They may have talked with the prosecutor's office.

16:05 · Don West They'll have a lot more information about the direction this is headed, additional information about evidence, maybe even other witness statements, and can make an intelligent, informed decision about whether to submit to an additional interview. And the lawyer can assess the ability of the client to be able to withstand that kind of thing. Frankly, there are very truthful witnesses that are just terrible, that just can't seem to express themselves effectively and become their own worst enemy. So even though you know they're going to tell the truth, you can't put them in that setting where one misstep could sink their case.

16:48 · Andrew Branca Absolutely.

16:50 · Don West Great. Andrew, again, thanks for talking today. We'll pick this up again soon, I hope. I'm Don West, National Trial Counsel for CCW Safe. Thanks for watching.