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855 P.2d 18

## [Judges and Attorneys](#)

Colorado Court of Appeals,  
Div. I.  
The PEOPLE of the State of Colorado, Plaintiff-Appellee,  
v.  
Paul L. CUSHINBERRY, Defendant-Appellant.

No. 91CA0300.  
Dec. 31, 1992.  
Rehearing Denied Feb. 4, 1993.  
Certiorari Denied July 6, 1993.

Defendant was convicted in the District Court, Denver County, [H. Jeffrey Bayless, J.](#), of second-degree murder, and he appealed. The Court of Appeals, [Briggs, J.](#), held that: (1) evidence did not warrant instruction on use of deadly physical force against intruder, and (2) common areas of apartment building do not constitute a dwelling for purposes of statute authorizing use of deadly physical force against intruder.

Affirmed.

## West Headnotes

[1]  [KeyCite Citing References for this Headnote](#)

↳ [203](#) Homicide

↳ [203XII](#) Instructions

↳ [203XII\(E\)](#) Excuses and Justifications

↳ [203k1491](#) k. Defense of Dwelling or Habitation. [Most Cited Cases](#)  
(Formerly 203k302)

Evidence in murder prosecution did not warrant instruction on "make-my-day" statute authorizing use of deadly physical force against intruder in dwelling; defendant was sitting on window sill in stairwell landing in his apartment building when victim confronted him demanding money and stairwell was not part of defendant's apartment, but was common area used by other tenants and their guests. [West's C.R.S.A. §§ 18-1-704.5, 18-1-901\(3\)\(g\)](#).

[2]  [KeyCite Citing References for this Headnote](#)

↪ [110](#) Criminal Law

↪ [110XX](#) Trial

↪ [110XX\(G\)](#) Instructions: Necessity, Requisites, and Sufficiency

↪ [110k770](#) Issues and Theories of Case in General

↪ [110k770\(2\)](#) k. Necessity of Instructions. [Most Cited Cases](#)

There must be evidence in record to support instruction embodying defendant's theory of case.

[3]  [KeyCite Citing References for this Headnote](#)

↪ [203](#) Homicide

↪ [203VI](#) Excusable or Justifiable Homicide

↪ [203VI\(A\)](#) In General

↪ [203k759](#) Defense of Dwelling or Habitation

↪ [203k760](#) k. In General. [Most Cited Cases](#)  
(Formerly 203k123)


Common areas of apartment building do not constitute a “dwelling” for purposes of “make-my-day” statute authorizing use of deadly physical force against intruder. [West's C.R.S.A. §§ 18-1-704.5, 18-1-901\(3\)\(g\)](#).


**\*18** [Gale A. Norton](#), Atty. Gen., Raymond T. Slaughter, Chief Deputy Atty. Gen., [Timothy M. Tymkovich](#), Sol. Gen., [Roger G. Billotte](#), Asst. Atty. Gen., Denver, for plaintiff-appellee.

[David F. Vela](#), State Public Defender, [Kristin Giovanini](#), Deputy State Public Defender, Thomas K. Carberry, Deputy State Public Defender, Denver, for defendant-appellant.

Opinion by Judge [BRIGGS](#).

Defendant, Paul L. Cushinberry, appeals the judgment of conviction entered upon a jury verdict finding him guilty of second degree murder. We affirm.


[1]  Defendant's sole contention on appeal is that the trial court erred in refusing to instruct the jury on the affirmative defense set out in [§ 18-1-704.5, C.R.S.](#) (1986 Repl.Vol. 8B), the “make-my-day” statute. We find no error.

[2]  There must be evidence in the record to support an instruction embodying a defendant's theory of the case. See [People v. Dillon, 655 P.2d 841 \(Colo.1982\)](#). Thus, for defendant to be entitled to an instruction on the affirmative defense defined in [§ 18-1-704.5](#), he was required to present some credible evidence that (1) another

person made an unlawful entry into the defendant's dwelling; (2) the defendant had a reasonable belief that such other person had committed a crime in the dwelling in addition to the uninvited entry, or was committing or intended to commit a crime against a person or property in addition to the uninvited entry; (3) the defendant reasonably believed that such other person might use physical force, no matter how slight, against any occupant of the dwelling; and (4) the defendant used force against the person who actually made the unlawful entry into the dwelling. [People v. Guenther, 740 P.2d 971 \(Colo.1987\)](#).

**\*19** The trial court concluded the evidence did not support giving an instruction on the "make-my-day" affirmative defense. We agree.

The defendant was sitting on a window sill in a stairwell landing in his apartment building when the victim confronted him demanding money. An altercation ensued during which the defendant shot the decedent.

[3]  "Dwelling" is defined as a building which is used, intended to be used, or usually used by a person for habitation. [Section 18-1-901\(3\)\(g\), C.R.S.](#) (1986 Repl.Vol. 8B). The stairwell was not part of the defendant's apartment, but was a common area used by other tenants and their guests. We conclude that, for purposes of the "make-my-day" statute, the common areas of an apartment building do not constitute a dwelling. See [People v. Marshall, 196 Colo. 381, 586 P.2d 41 \(1978\)](#); [§§ 18-4-502](#) and [18-4-503, C.R.S.](#) (1986 Repl.Vol. 8B); cf. [People in Interest of D.G.P., 194 Colo. 238, 570 P.2d 1293 \(1977\)](#). The court therefore did not err in rejecting defendant's tendered instruction.

Judgment affirmed.

[NEY](#) and [DAVIDSON](#), JJ., concur.

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Judges

- **Bayless, Hon. H. Jeffery**

State of Colorado District Court, 2nd Judicial District  
Denver, Colorado 80202

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- **Briggs, Hon. Steve C.**

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- **Davidson, Hon. Janice B.**

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- **Ney, Hon. Peter H.**

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- **Tymkovich, Hon. Timothy M.**

United States Court of Appeals, Tenth Circuit  
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