17 So.3d 804
District Court of Appeal of Florida,
First District.

Jimmy HAIR, Petitioner,
v.
STATE of Florida, Respondent.

No. 1D09-2501. | Aug. 19, 2009.
| Rehearing Denied Sept. 24, 2009.

Synopsis

Background: Defendant charged with first-degree murder petitioned for writ of prohibition, on the ground that he was immune from prosecution based on "Stand Your Ground" law.

[Holding:] The District Court of Appeal held that the "Stand Your Ground" law applied to give defendant immunity to prosecution for first-degree murder.

Petition granted.

West Headnotes (3)

[1] **Criminal Law**
Motions

Homicide
Self-defense

The "Stand Your Ground" statutory immunity claim is resolved by the Circuit Court after a pretrial evidentiary hearing, at which the defendant bears the burden to prove entitlement to the immunity by a preponderance of the evidence. West's F.S.A. § 776.013(1).

2 Cases that cite this headnote

[2] **Criminal Law**
Defenses

Appellate review of the Circuit Court's ruling on a "Stand Your Ground" statutory immunity claim is governed by the same standard which applies in an appeal from an order denying a motion to suppress, that is, the court's findings of fact must be supported by competent substantial evidence. West's F.S.A. § 776.013(1).

1 Cases that cite this headnote

[3] **Homicide**
Circumstances and events constituting danger

"Stand Your Ground" law applied to give defendant immunity to prosecution for first-degree murder after the gun he was using as a club in an attempt to repel the victim accidentally fired, although victim may have been exiting the vehicle at the time of the shooting; victim unlawfully and forcibly entered vehicle and any move he made toward exiting was involuntary if it occurred at all, he was still inside the vehicle when he was shot, and the statute made no exception from immunity if the victim was in retreat when the defensive force was employed. West's F.S.A. § 776.013(1).

1 Cases that cite this headnote

Attorneys and Law Firms

***804** Edward T. Bauer of Brooks, LeBoeuf, Bennett, Foster & Gwartney, P.A., Tallahassee, for Petitioner.

Bill McCollum, Attorney General, and Thomas H. Duffy, Assistant Attorney General, Tallahassee, for Respondent.

Opinion

PER CURIAM.

Jimmy Hair petitioned this court for a writ of prohibition, contending that he is immune from prosecution on charges of first-degree murder under section 776.032(1), Florida Statutes (2007). We previously granted the petition by unpublished ***805** order and ordered Hair's release. Our reasons for doing so are set forth herein.

FACTS

An evidentiary hearing was held on defense counsel's motion to dismiss the indictment. Hair and Rony Germinal visited a nightclub on the evening of July 20, 2007. Germinal

and Charles Harper exchanged harsh words in the club. In the early morning hours of July 21, after the club closed, Germinal was driving a vehicle and Hair was in the passenger seat as they departed the area. Harper was in the immediate vicinity and the men spoke to each other. Harper came over to the car and entered it but was pulled away by Frye, his friend. Harper, however, escaped Frye's grasp and reentered the vehicle on the driver's side. Hair, who held a permit to carry a concealed weapon, had a handgun on his seat. Hair and Harper "tussled" within the interior of the vehicle. Frye tried to pull Harper from the vehicle again but Harper was shot and killed by Hair. According to Hair, he was attempting to strike Harper with the handgun when it discharged.

After considering this evidence, the circuit court denied the motion to dismiss. It reasoned that the statutory immunity was inapposite where the defendant was attempting to use the weapon as a club and it accidentally discharged. The court also found that there were disputed issues of fact which precluded granting of pretrial immunity.

ANALYSIS

In *Peterson v. State,* 983 So.2d 27 (Fla. 1st DCA 2008), this court addressed Florida's "Stand Your Ground" law, enacted by the Florida Legislature in 2005 and codified at sections 776.013 through 776.032, Florida Statutes. Section 776.032(1) states that a person using force as permitted in section 776.013, with certain exceptions not applicable here, is immune from criminal prosecution and civil action. Section 776.013(1) provides:

> (1) A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if:
>
> (a) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, a residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and
>
> (b) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

[1] **[2]** The "Stand Your Ground" statutory immunity claim is resolved by the circuit court after a pretrial evidentiary hearing. The defendant bears the burden to prove entitlement to the immunity by a preponderance of the evidence. *Peterson v. State,* 983 So.2d at 29. Our review of the circuit court's ruling is governed by the same standard which applies in an appeal from an order denying a motion to suppress. That is, the court's findings of fact must be supported by competent substantial evidence. Conclusions of law, however, are subject to *de novo* review. *Hines v. State,* 737 So.2d 1182 (Fla. 1st DCA 1999).

[3] The material facts of this case are not in dispute. Harper, the victim, had unlawfully and forcibly entered a vehicle occupied by Germinal, Hair, and a third ***806** person in the back seat. While Harper may have been exiting the vehicle at the time of the shooting, the action was involuntary if it occurred at all. The physical evidence was clear that Harper was still inside the vehicle when he was shot. The statute makes no exception from the immunity when the victim is in retreat at the time the defensive force is employed. The trial court's denial based on disputed issues of material fact was therefore incorrect. That holding was also directly contrary to our express holding in *Peterson* that a motion to dismiss based on "Stand Your Ground" immunity cannot be denied because of the existence of disputed issues of material fact.

The circuit court's other basis for denial of the motion, that the handgun accidentally fired while being used as a club, is erroneous as a matter of law. *See Williams v. State,* 588 So.2d 44 (Fla. 1st DCA 1991); *McInnis v. State,* 642 So.2d 831 (Fla. 2d DCA 1994); *Fowler v. State,* 492 So.2d 1344 (Fla. 1st DCA 1986); *Diaz v. State,* 387 So.2d 978 (Fla. 3d DCA 1980).

CONCLUSION

Petitioner was aware that Harper, the victim, had unlawfully and forcibly entered the vehicle when he was shot. Hair was therefore authorized by section 776.013(1), Florida Statutes, to use defensive force intended or likely to cause death or great bodily harm and was immune from prosecution for that action under 776.032(1). The motion to dismiss should have been granted and we therefore issued the writ of prohibition.

PETITION GRANTED.

DAVIS, BROWNING, and THOMAS, JJ., concur.

Parallel Citations

34 Fla. L. Weekly D1669

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24 So.3d 654
District Court of Appeal of Florida,
Second District.

Harold McDANIEL, Appellant,
v.
STATE of Florida, Appellee.

No. 2D08–4144. | Dec. 11, 2009.

Synopsis

Background: Defendant was convicted in the Circuit Court, Lee County, Thomas S. Reese, J., of aggravated battery with a deadly weapon. Defendant appealed.

[Holding:] The District Court of Appeal, Morris, J., held that defendant was entitled to a new hearing on his motion to dismiss based on statutory immunity from prosecution for the justified use of force.

Reversed and remanded.

West Headnotes (5)

[1] **Assault and Battery**
Questions for jury
Criminal Law
Special pleas in bar in general

When statutory immunity from prosecution for the justified use of force is properly raised by a defendant, the trial court must decide the matter by confronting and weighing only factual disputes; the court may not deny a motion simply because factual disputes exist. West's F.S.A. § 776.032(1).

[2] **Criminal Law**
Special pleas in bar in general

When statutory immunity from prosecution for the justified use of force is properly raised by a defendant, the trial court must determine whether the defendant has shown by a preponderance of the evidence that the immunity attaches. West's F.S.A. § 776.032(1).

[3] **Assault and Battery**
Questions for jury
Criminal Law
Special pleas in bar in general

When a defendant's motion to dismiss on the basis of statutory immunity from prosecution for the justified use of force is denied, the defendant may still assert the issue to the jury as an affirmative defense. West's F.S.A. § 776.032(1).

[4] **Criminal Law**
Special pleas in bar in general

Defendant who was convicted of aggravated battery with a deadly weapon was entitled to a new hearing on his motion to dismiss based on statutory immunity from prosecution for the justified use of force; trial court gave no reason for its original denial of defendant's motion to dismiss, and it was not clear from the record whether trial court applied the preponderance of the evidence standard, as was proper, or whether it denied the motion on the ground that factual disputes existed, as argued by the State in opposition to the motion. West's F.S.A. § 776.032(1); West's F.S.A. RCrP Rule 3.190(c)(4).

1 Cases that cite this headnote

[5] **Criminal Law**
Special pleas in bar in general
Criminal Law
Evidence on Motions

Given that the burden of proof is on the defendant to establish his entitlement to immunity at a hearing on a motion to dismiss based on statutory immunity from prosecution for the justified use of force, hearsay is not admissible to prove a material fact for the court's consideration, unlike at a motion to suppress hearing where the admissibility of certain evidence sought to be introduced at trial is in issue. West's F.S.A. § 776.032(1).

Attorneys and Law Firms

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Bill McCollum, Attorney General, Tallahassee, and Tonja Rene Vickers and Danilo Cruz–Carino, Assistant Attorneys General, Tampa, for Appellee.

Opinion

MORRIS, Judge.

Harold McDaniel appeals his conviction entered after a jury trial for aggravated battery with a deadly weapon. We reverse McDaniel's conviction and remand for further proceedings consistent with this opinion.

Prior to trial, McDaniel filed a motion to dismiss pursuant to Florida Rule of Criminal Procedure 3.190(b). He claimed in his motion that he is immune from criminal prosecution pursuant to section 776.032(1), Florida Statutes (2007), because he has a valid defense of justifiable use of force under section 776.013, commonly known as the *castle doctrine,* and section 776.031, the defense of others statute. McDaniel further alleged that although the victim had been a houseguest at McDaniel's mother's house, where McDaniel was also living, the victim had not stayed at the house for several days prior to the incident at issue. On the day of the incident, McDaniel alleged, he and the victim got into a physical altercation during which the victim beat and attempted to strangle McDaniel. McDaniel escaped and returned home. According to McDaniel, the victim arrived at McDaniel's house later that night and asked to enter to retrieve some clothing he had left there. McDaniel's mother attempted to prevent the victim's entry, but the victim forced his way into McDaniel's home. McDaniel then struck the victim twice with a machete, causing lacerations to his scalp and left forearm.

The State filed a traverse to McDaniel's motion to dismiss, alleging that the victim had lived at McDaniel's house prior to the incident and that the record was unclear as to whether the victim was still living there. The State claimed that the evidence does not establish that McDaniel had a right in the residence exceeding that of the victim. The State also alleged that the evidence does not conclusively establish that the victim unlawfully entered the house because there was some evidence that McDaniel's mother opened the door for the victim and that McDaniel invited the victim into the home to retrieve his clothes. The State further argued in its traverse that there was no evidence that the victim intended to commit a forcible felony such that McDaniel's use of deadly force was necessary in the defense of others.

McDaniel filed a response to the State's traverse, alleging that his motion to dismiss "is not based on the Rule 3.190(c)(4) grounds that there are no material disputed facts, [but] rather on the grounds that [McDaniel] is immune from prosecution pursuant to [section] 776.032."

The trial court held an evidentiary hearing on March 10, 2008. After the evidence was presented, the State argued—still proceeding on the theory that the motion was *656 one for dismissal pursuant to rule 3.190(c)(4)—that "there is enough disputed evidence ... where it is appropriate for jury consideration." The defense argued—continuing to advance its position that the motion was not one for dismissal pursuant to rule 3.190(c)(4) but one for immunity pursuant to section 776.032—that McDaniel was immune from prosecution because the evidence showed that the victim was attempting to commit a forcible felony against McDaniel's mother and that McDaniel was acting in defense of his mother and his home. The trial court denied the motion without explanation or any indication as to whether the trial court treated the motion as one for dismissal pursuant to rule 3.190(c)(4)—as the statE was treating it—and denied it on the basis that there were disputed issues of material fact or whether the trial court treated the motion as one for dismissal based on section 776.032 immunity--as the defense was treating it—and denied it on the basis that McDaniel had not established his entitlement to immunity pursuant to section 776.032.

McDaniel proceeded to jury trial, at which he asserted the defense of justifiable use of deadly force in defense of his mother and to prevent the victim's forcible entry into his home. McDaniel was found guilty and sentenced to ten years in prison followed by five years' probation.

On appeal, McDaniel argues that the trial court erred in denying his motion to dismiss because he presented evidence establishing immunity under section 776.032. He also argues that it is not clear if the trial court applied the proper standard for a motion to dismiss based on immunity from prosecution under section 776.032. He claims that even though he argued in his response to the State's traverse that the standard of rule 3.190(c)(4) should not be applied, the State proceeded on the theory that the motion to dismiss should not be granted because there are material disputed facts.

[1] [2] [3] Section 776.032(1) provides that "[a] person who uses force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force." "[W]hen immunity under this law is properly raised by a defendant, the trial court must decide the matter by confronting and weighing only factual disputes." *Peterson v. State,* 983 So.2d 27, 29 (Fla. 1st DCA 2008). "The court may not deny a motion simply because factual disputes exist." *Id.* "[T]he trial court must determine whether the defendant has shown by a preponderance of the evidence that the immunity attaches." *Id.; see also Gray v. State,* 13 So.3d 114, 115 (Fla. 5th DCA 2009) (on motion for certification) (agreeing with *Peterson*). *But see Velasquez v. State,* 9 So.3d 22, 24 (Fla. 4th DCA 2009) (holding that a motion to dismiss based on section 776.032 immunity is governed by rule 3.190(c)(4) and should be denied if factual disputes exist; certifying conflict with *Peterson*). This court has agreed with *Peterson* and held that the rule 3.190(c)(4) standard, which provides for a dismissal when "[t]here are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant," is not appropriate for a motion or petition to determine immunity under section 776.032. *Horn v. State,* 17 So.3d 836 (Fla. 2d DCA 2009) (agreeing with *Peterson*). When a defendant's motion to dismiss on the basis of immunity is denied, the defendant may still assert the issue to the jury as an affirmative defense. *Peterson,* 983 So.2d at 29.

[4] Because the trial court gave no reason for denying McDaniel's motion to dismiss either in its oral ruling or in a written ***657** order, it is not clear from the record whether the trial court applied the preponderance of the evidence standard or whether the trial court denied McDaniel's motion to dismiss because factual disputes exist. Even though McDaniel argued the basis that was later held to be the law in this district, the trial court did not have the benefit of *Peterson* or *Horn* at the time of the hearing. Therefore, we reverse McDaniel's conviction and remand for a new hearing on McDaniel's motion to dismiss at which the trial court shall apply the appropriate standard. If the trial court concludes after a new hearing that McDaniel is entitled to immunity under section 776.032, it shall enter an order to that effect and dismiss the information with prejudice. If the trial court concludes that McDaniel is not entitled to immunity, the trial court shall enter an order to that effect and reinstate McDaniel's conviction. As this court did in *Horn,* we certify conflict with *Velasquez.*

[5] The remaining issues raised by McDaniel on appeal are without merit, with the exception of his argument that the trial court improperly admitted hearsay evidence at the hearing on his motion to dismiss. While the rules of evidence are inapplicable or relaxed in certain proceedings, we have been unable to find—and the parties have not cited—any authority holding that hearsay evidence is admissible at a pretrial evidentiary hearing on a motion to dismiss based on immunity. *Cf.* Charles W. Ehrhardt, *Ehrhardt's Florida Evidence* § 103.1, at 5–7 (2009) (listing certain proceedings in which strict evidentiary rules are inapplicable). We note, however, that many of the objected-to statements [1] were admissible for the limited purpose of impeaching a witness's testimony with prior inconsistent statements. *See* § 90.614, Fla. Stat. (2007); *Varas v. State,* 815 So.2d 637, 640 (Fla. 3d DCA 2001) ("It is well-settled [sic] that a witness may be impeached by a prior inconsistent statement, including an omission in a previous out-of-court statement about which the witness testifies at trial, if it is of a material, significant fact rather than mere details and would naturally have been mentioned."). Otherwise, given that the burden of proof is on the defendant to establish his entitlement to immunity, hearsay is not admissible to prove a material fact for the court's consideration, unlike at a motion to suppress hearing where the admissibility of certain evidence ***658** sought to be introduced at trial is in issue. *Cf. Lara v. State,* 464 So.2d 1173, 1177 (Fla.1985) (holding that hearsay evidence is admissible to establish consent to search at a hearing on a motion to suppress physical evidence based on the rationale that an affidavit for a search warrant may be based on hearsay).

Reversed and remanded; conflict certified.

WHATLEY and KELLY, JJ., Concur.

Parallel Citations

34 Fla. L. Weekly D2548

Footnotes

1 The defense presented the testimony of McDaniel's mother. She testified that after her son returned home on the night of the offense, she heard the victim banging on the door to her house. She opened the door about one or two feet, and the victim yelled that "he was gonna kill all of [them] and burn the house down." On cross-examination, McDaniel's mother stated that she did tell the investigating

detective that the victim threatened to burn the house down and that the victim threatened to kill her. She also testified that her son did not unlock the door, but she could not recall whether she told the investigating detective that her son unlocked the door.

The State presented the testimony of the investigating detective, Robert Gizzi, who testified that he interviewed McDaniel's mother after the incident. The prosecutor asked Detective Gizzi what she told him happened on the night of the incident, and defense counsel objected on the basis of hearsay. The prosecutor responded: "It does call for hearsay, Your Honor. I believe hearsay's admissible on a motion to dismiss." The court overruled the objection and allowed the hearsay testimony, stating that hearsay was admissible in this type of hearing. Detective Gizzi was permitted to testify that McDaniel's mother told him that her son unlocked the door for the victim and that she opened the door. He also testified that she never told him that the victim threatened to kill her or burn the house down. He also stated, over a hearsay objection, that the victim told him that McDaniel hit the victim with the machete two times.

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51 So.3d 456
Supreme Court of Florida.

Clarence DENNIS, Petitioner,
v.
STATE of Florida, Respondent.

No. SC09–941. | Dec. 16, 2010.

Synopsis

Background: After denial of defendant's motion to dismiss, under the "Stand Your Ground" statute relating to justified use of force, the charge of attempted first-degree murder, and after the State reduced the charge to aggravated battery, defendant was convicted, at a jury trial in the Circuit Court, 19th Judicial Circuit, Okeechobee County, Sherwood Bauer, Jr., J., of the lesser included offense of felony battery. Defendant appealed. The District Court of Appeal, 17 So.3d 305, affirmed, and later denied rehearing and certified a conflict, 17 So.3d 310.

Holdings: The Supreme Court, Canady, C.J., held that:
[1] Where a criminal defendant files a motion to dismiss on the basis of the "Stand Your Ground" statute, which relates to justified use of force, the trial court should conduct a pretrial evidentiary hearing and decide the factual question of the applicability of the statutory immunity, and
[2] error was harmless, in the case at bar, as to trial court's failure to hold a pretrial evidentiary hearing on defendant's motion to dismiss.

Reasoning of District Court of Appeal disapproved.

West Headnotes (7)

[1] **Statutes**
Intention of Legislature

The cardinal rule of statutory construction is that a statute should be construed so as to ascertain and give effect to the intention of the Legislature as expressed in the statute.

[2] **Statutes**
Policy and purpose of act

Statutory enactments are to be interpreted so as to accomplish rather than defeat their purpose.

[3] **Criminal Law**
Dismissal or nonsuit

Where a criminal defendant files a motion to dismiss on the basis of the "Stand Your Ground" statute, which relates to justified use of force, the trial court should conduct a pretrial evidentiary hearing and decide the factual question of the applicability of the statutory immunity. West's F.S.A. § 776.032; West's F.S.A. RCrP Rule 3.190(b).

8 Cases that cite this headnote

[4] **Statutes**
Giving effect to entire statute

Statutes
Other matters

It is a basic rule of statutory construction that the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.

[5] **Criminal Law**
Preliminary Proceedings

The erroneous denial of a motion to dismiss may be harmless error.

[6] **Criminal Law**
Prejudice to Defendant in General

An error is "harmless error" if the error complained of did not contribute to the verdict or, alternatively stated, there is no reasonable possibility that the error contributed to the conviction.

[7] **Criminal Law**
Preliminary Proceedings

Error was harmless as to trial court's summary denial, without holding a pretrial evidentiary hearing, as to defendant's motion to dismiss on the

basis of the "Stand Your Ground" statute, which related to justified use of force; defendant did not assert that at a pretrial evidentiary hearing he would have presented evidence different from or additional to the evidence he presented at trial, and defendant presented self-defense evidence at trial. West's F.S.A. § 776.032.

5 Cases that cite this headnote

Attorneys and Law Firms

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Bill McCollum, Attorney General, Tallahassee, FL, Celia Terenzio, Bureau Chief, Diana K. Bock and Melanie Dale Surber, ***458** Assistant Attorneys General, West Palm Beach, FL, for Respondent.

Opinion

CANADY, C.J.

In this case we consider whether a trial court should conduct a pretrial evidentiary hearing and resolve issues of fact when ruling on a motion to dismiss asserting immunity from criminal prosecution pursuant to section 776.032, Florida Statutes (2006), commonly known as the "Stand Your Ground" statute. We have for review the decision of the Fourth District Court of Appeal in *Dennis v. State,* 17 So.3d 305 (Fla. 4th DCA 2009), which held that the existence of disputed issues of material fact required the denial of Dennis's motions to dismiss. The Fourth District certified that its decision is in direct conflict with the decision of the First District Court of Appeal in *Peterson v. State,* 983 So.2d 27 (Fla. 1st DCA 2008), which held that the existence of disputed issues of material fact did not warrant denial of a motion to dismiss asserting immunity under section 776.032. We have jurisdiction. *See* art. V, § 3(b)(4), Fla. Const.

We conclude that where a criminal defendant files a motion to dismiss on the basis of section 776.032, the trial court should decide the factual question of the applicability of the statutory immunity. Accordingly, we disapprove the Fourth District's reasoning in *Dennis* and approve the reasoning of *Peterson* on that issue. However, because we conclude that the trial court's error in denying Dennis a pretrial evidentiary hearing on immunity was harmless, we do not quash the Fourth District's decision affirming Dennis's conviction and sentence.

I. BACKGROUND

Clarence Dennis was charged by information with the attempted first-degree murder of Gloria McBride. The charge arose from an incident of domestic violence in August 2006. Dennis filed two motions to dismiss the information pursuant to section 776.032(1), Florida Statutes (2006), asserting that he was immune from criminal prosecution because his actions were a justified use of force. One motion was designated as being filed pursuant to Florida Rule of Criminal Procedure 3.190(c)(4) and alleged that there were "no material facts in dispute and the undisputed facts do [not] establish a prima facie case of guilt against the Defendant." The other motion was designated as being filed pursuant to Florida Rule of Criminal Procedure 3.190(c)(3) and asserted that the preponderance of the evidence established that Dennis was entitled to immunity because his use of force was justified. The State filed a traverse and demurrer, asserting that material facts were in dispute.

The trial court denied the rule 3.190(c)(4) motion on the basis that the State asserted with specificity the existence of disputed material facts. After expressing uncertainty about whether it had authority to conduct an evidentiary hearing, the trial court rejected Dennis's request for an evidentiary hearing and summarily denied the rule 3.190(c)(3) motion. The trial court concluded that in enacting section 776.032, the Legislature did not intend to take the question of immunity away from the jury.

Before proceeding to trial, the State amended the information, reducing the charge against Dennis to aggravated battery. During the trial, after the State rested its case, Dennis moved for a judgment of acquittal. The trial court denied Dennis's motion, finding that the State had "proved the charge of aggravated battery and [had] established a prima facie case of guilt against the defendant." After the defense presented its evidence and rested, Dennis renewed his motion for a judgment ***459** of acquittal. The trial court denied the renewed motion and submitted the case to the jury. When charging the jury, the trial court expressly instructed that an "issue in this case [was] whether the defendant acted in self defense" and gave detailed instructions on when deadly or nondeadly force is legally justified. Ultimately, the jury convicted Dennis of the lesser included offense of felony battery, and the trial court sentenced Dennis to sixty months of imprisonment.

Dennis appealed his conviction and sentence, raising two issues. The Fourth District discussed only one issue in its opinion:

> Only one of the issues warrants discussion; that is, whether the trial court erred in denying Dennis's motion to dismiss on his claim of statutory immunity brought under section 776.032, Florida Statutes, because there were disputed issues of material fact. We find no error in the trial court's decision to deny the motion to dismiss. As we recognized in *Velasquez v. State,* 9 So.3d 22 (Fla. 4th DCA 2009), a motion to dismiss based on statutory immunity is properly denied when there are disputed issues of material fact. Accordingly, we affirm.

Dennis v. State, 17 So.3d 305, 306 (Fla. 4th DCA 2009). The Fourth District denied Dennis's motion for rehearing or clarification but did certify conflict with *Peterson.*

In *Peterson,* the State charged the defendant with attempted first-degree murder, and the defendant moved to dismiss the information on the ground that he was immune from criminal prosecution pursuant to section 776.032, Florida Statutes (2006). After conducting an evidentiary hearing, the trial court denied the motion to dismiss on the basis that the defendant had not established immunity "as a matter of fact or law." *Peterson,* 983 So.2d at 28. The trial court recognized that no procedure had yet been enacted for deciding claims of immunity under section 776.032(1).

Peterson then filed a petition for a writ of prohibition, challenging the denial of his motion to dismiss. In response, the State argued that the motion should have been considered under rule 3.190(c)(4) and was properly denied because "any factual dispute should defeat a claim of statutory immunity" under that rule. *Peterson,* 983 So.2d at 28. The First District rejected the State's argument that a motion to dismiss based on section 776.032 immunity must be denied whenever there are disputed material facts. Based upon its conclusion that the Legislature "intended to establish a true immunity and not merely an affirmative defense," the First District outlined a procedure for use in ruling on motions to dismiss pursuant to section 776.032. *Id.* at 29. The First District explained:

> We now hold that when immunity under this law is properly raised by a defendant, the trial court must decide the matter by confronting and weighing only factual disputes. The court may not deny a motion simply because factual disputes exist. Here, the trial court did what was required. Petitioner is not precluded from submitting the matter to the jury as an affirmative defense in his criminal trial.
>
> In the absence of a procedure for handling these matters, we find guidance from the Colorado Supreme Court's decision in *People v. Guenther,* 740 P.2d 971 (Colo.1987). In that case, the court decided that Colorado's similar immunity statute authorized a trial court to dismiss a criminal prosecution at the pretrial stage and did not merely create an affirmative defense for adjudication at trial. *Id.* at 976. The court further determined that a defendant raising the immunity would have the burden of establishing ***460** the factual prerequisites to the immunity claim by a preponderance of the evidence. *Id.* at 980. The court imposed the same burden of proof as it would in motions for postconviction relief or motions to suppress. *Id.*
>
> Likewise, we hold that a defendant may raise the question of statutory immunity pretrial and, when such a claim is raised, the trial court must determine whether the defendant has shown by a preponderance of the evidence that the immunity attaches. As noted by the trial court, courts have imposed a similar burden for motions challenging the voluntariness of a confession. *See, e.g., McDole v. State,* 283 So.2d 553, 554 (Fla.1973). We reject any suggestion that the procedure established by rule 3.190(c) should control so as to require denial of a motion whenever a material issue of fact appears.

Peterson, 983 So.2d at 29–30. The First District ultimately denied Peterson's petition for a writ of prohibition, concluding that the trial court did not err in finding that Peterson had failed to establish immunity.

We accepted jurisdiction based on the certified conflict on the question of whether the trial court should conduct a pretrial evidentiary hearing and resolve disputed issues of material fact to rule on a motion to dismiss asserting immunity from criminal prosecution pursuant to section 776.032. On this issue, Dennis contends that this Court should adopt the position taken by the First District in *Peterson.* He asserts that the trial court erred in summarily denying his motions to dismiss and that the trial court should have conducted an evidentiary hearing on his claim of immunity. The State contends that the trial court correctly found that a claim of immunity pursuant to section 776.032 is properly raised and resolved under rule 3.190(c)(4), which requires that the

motion to dismiss be denied where there are disputed material facts. The State further asserts that to proceed to trial, section 776.032 requires only a showing that there is probable cause to believe that the defendant's use of force was unlawful.

II. ANALYSIS

In the analysis that follows, we first explain why we approve the *Peterson* procedure for ruling on motions to dismiss filed pursuant to section 776.032. We then explain why Dennis is not entitled to relief despite the trial court's denial of an evidentiary hearing on his motions to dismiss.

Dennis and Peterson both filed motions to dismiss the charges against them on the basis of section 776.032, Florida Statutes (2006). Section 776.032, which became effective October 1, 2005, provides:

> (1) A person who uses force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom force was used is a law enforcement officer, as defined in s. 943.10(14), who was acting in the performance of his or her official duties and the officer identified himself or herself in accordance with any applicable law or the person using force knew or reasonably should have known that the person was a law enforcement officer. As used in this subsection, the term "criminal prosecution" includes arresting, detaining in custody, and charging or prosecuting the defendant.
>
> (2) A law enforcement agency may use standard procedures for investigating the use of force as described in subsection (1), but the agency may not arrest the person for using force unless it determines that there is probable ***461** cause that the force that was used was unlawful.
>
> (3) The court shall award reasonable attorney's fees, court costs, compensation for loss of income, and all expenses incurred by the defendant in defense of any civil action brought by a plaintiff if the court finds that the defendant is immune from prosecution as provided in subsection (1).

§ 776.032, Fla. Stat. (2006).

Florida Rule of Criminal Procedure 3.190 sets out procedures for the filing and consideration of a motion to dismiss in a criminal proceeding. The relevant provisions of the rule state:

> **(a) In General.** Every pretrial motion and pleading in response to a motion shall be in writing and signed by the party making the motion or the attorney for the party....
>
> **(b) Motion to Dismiss; Grounds.** All defenses available to a defendant by plea, other than not guilty, shall be made only by motion to dismiss the indictment or information, whether the same shall relate to matters of form, substance, former acquittal, former jeopardy, or any other defense.
>
> **(c) Time for Moving to Dismiss.** Unless the court grants further time, the defendant shall move to dismiss the indictment or information either before or at arraignment. The court in its discretion may permit the defendant to plead and thereafter to file a motion to dismiss at a time to be set by the court. Except for objections based on fundamental grounds, every ground for a motion to dismiss that is not presented by a motion to dismiss within the time hereinabove provided shall be considered waived. However, the court may at any time entertain a motion to dismiss on any of the following grounds:
>
> (1) The defendant is charged with an offense for which the defendant has been pardoned.
>
> (2) The defendant is charged with an offense for which the defendant previously has been placed in jeopardy.
>
> (3) The defendant is charged with an offense for which the defendant previously has been granted immunity.
>
> (4) There are no material disputed facts and the undisputed facts do not establish a prima facie case of guilt against the defendant. The facts on which the motion is based should be alleged specifically and the motion sworn to.
>
> **(d) Traverse or Demurrer.** The state may traverse or demur to a motion to dismiss that alleges factual matters. Factual matters alleged in a motion to dismiss under subdivision (c)(4) of this rule shall be considered admitted unless specifically denied by the state in the traverse. The court may receive evidence on any issue of fact necessary to the decision on the motion. A motion to dismiss under subdivision (c)(4) of this rule shall be denied if the state files a traverse that, with specificity, denies under oath the material fact or facts alleged in the motion to dismiss. The demurrer or traverse shall be filed a reasonable time before the hearing on the motion to dismiss.

[1] **[2]** The "cardinal rule" of statutory construction is "that a statute should be construed so as to ascertain and give effect

to the intention of the Legislature as expressed in the statute." *Reeves v. State,* 957 So.2d 625, 629 (Fla.2007) (quoting *City of Tampa v. Thatcher Glass Corp.,* 445 So.2d 578, 579 (Fla.1984)). "[S]tatutory enactments are to be interpreted so as to accomplish rather than defeat their purpose." *Reeves,* 957 So.2d at 629 (quoting ***462** *Lewis v. Mosley,* 204 So.2d 197, 201 (Fla.1967)). In resolving the conflict issue, we conclude that the plain language of section 776.032 grants defendants a substantive right to assert immunity from prosecution and to avoid being subjected to a trial. We further conclude that the procedure set out by the First District in *Peterson* best effectuates the intent of the Legislature.

Section 776.032(1) provides, in part, that a "person who uses force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in using such force and is immune from criminal prosecution and civil action for the use of such force, unless the person against whom force was used is a law enforcement officer ... who was acting in the performance of his or her official duties." Section 776.032(1) defines "criminal prosecution" as including "arresting, detaining in custody, and charging or prosecuting the defendant." Similarly, the preamble of the law creating section 776.032 states that "the Legislature finds that it is proper for law-abiding people to protect themselves, their families, and others from intruders and attackers *without fear of prosecution* or civil action for acting in defense of themselves and others." Ch.2005–27, at 200, Laws of Fla. (emphasis added).

[3] While Florida law has long recognized that a defendant may argue as an affirmative defense at trial that his or her use of force was legally justified, section 776.032 contemplates that a defendant who establishes entitlement to the statutory immunity will not be subjected to trial. Section 776.032(1) expressly grants defendants a substantive right to not be arrested, detained, charged, or prosecuted as a result of the use of legally justified force. The statute does not merely provide that a defendant cannot be convicted as a result of legally justified force.

This plain reading of section 776.032 compels us to reject the State's contention that a defendant must raise a pretrial claim of immunity only in a rule 3.190(c)(4) motion to dismiss. To be entitled to dismissal under rule 3.190(c)(4), "the defendant must 'demonstrate that the undisputed facts fail to establish a prima facie case.' " *Dorelus v. State,* 747 So.2d 368, 373 (Fla.1999) (quoting *State v. Pollock,* 600 So.2d 1313, 1314 (Fla. 3d DCA 1992)). If the State specifically alleges that the material facts are in dispute or that the facts refute the defendant's claim, the motion to dismiss must be denied. *State v. Kalogeropolous,* 758 So.2d 110, 112 (Fla.2000). Section 776.032 does not limit its grant of immunity to cases where the material facts are undisputed. Thus, treating motions to dismiss pursuant to section 776.032 in the same manner as rule 3.190(c)(4) motions would not provide criminal defendants the opportunity to establish immunity and avoid trial that was contemplated by the Legislature.

Florida Rule of Criminal Procedure 3.190(b)—rather than rule 3.190(c)(4)—provides the appropriate procedural vehicle for the consideration of a claim of section 776.032 immunity. Rule 3.190(b) provides generally that "[a]ll defenses available to a defendant by plea, other than not guilty, shall be made only by motion to dismiss the indictment or information." Dennis's failure to identify the pertinent subdivision of rule 3.190 in his motions to dismiss did not foreclose Dennis's argument that section 776.032 required the trial court to make a pretrial evidentiary determination concerning the applicability of the statutory immunity. *See, e.g., Steinhorst v. State,* 636 So.2d 498, 500 (Fla.1994) (concluding that trial court should have treated criminal defendant's motion, improperly designated as being filed pursuant to Florida Rule of Civil Procedure 1.540, as being properly filed ***463** pursuant to Florida Rule of Criminal Procedure 3.850); *cf. Barrett v. State,* 965 So.2d 1260, 1261 (Fla. 2d DCA 2007) ("Article V, section 2(a) of the Florida Constitution requires that no cause be dismissed because an improper remedy has been sought. Accordingly, the trial court should have considered whether Barrett had alleged sufficient facts to warrant relief and, if so, treated his motion as if the proper remedy had been sought.").

The Florida appellate courts have interpreted rule 3.190—in a variety of contexts—as granting trial courts authority to receive evidence to assist in ruling on motions to dismiss. For example, the appellate courts have approved the trial courts' use of evidentiary hearings to rule on motions to dismiss on the basis of transactional or use immunity, prosecutorial misconduct, and selective prosecution. *See, e.g., State ex rel. Hough v. Popper,* 287 So.2d 282, 285 (Fla.1973) (issuing writ to compel trial court to hold an evidentiary hearing to determine if the transactional immunity or use immunity provisions of section 914.04, Florida Statutes, were applicable); *Owen v. State,* 443 So.2d 173, 175 (Fla. 1st DCA 1983) (holding that trial court had discretion to conduct an evidentiary hearing on a motion to dismiss alleging prosecutorial misconduct and selective prosecution); *State v. Yatman,* 320 So.2d 401, 402 (Fla. 4th DCA 1975) (directing trial court to allow defendant to file a written motion to

dismiss and to "hold a hearing to determine the issues created by said motion").

[4] We also reject the State's contention that the pretrial hearing on immunity in a criminal case should test merely whether the State has probable cause to believe the defendant's use of force was not legally justified. Prior to the enactment of chapter 2005–27, Laws of Florida (2005), Florida law defined certain types of justified force, *see* §§ 776.12, 776.031, Fla. Stat. (2004), and the Florida Rules of Criminal Procedure mandated that a trial judge make a pretrial nonadversarial probable cause determination either before or shortly after a defendant was taken into custody, *see* Fla. R.Crim. P. 3.133 (2004). "It is a basic rule of statutory construction that 'the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless.' " *Martinez v. State,* 981 So.2d 449, 452 (Fla.2008) (quoting *State v. Bodden,* 877 So.2d 680, 686 (Fla.2004)). Accordingly, the grant of immunity from "criminal prosecution" in section 776.032 must be interpreted in a manner that provides the defendant with more protection from prosecution for a justified use of force than the probable cause determination previously provided to the defendant by rule.

In summary, we conclude that the procedure set out by the First District in *Peterson* best effectuates the intent of the Legislature and that the trial court erred in denying Dennis an evidentiary hearing on his claim of statutory immunity.

[5] [6] We do not, however, quash the Fourth District's decision affirming Dennis's conviction and sentence. The erroneous denial of a motion to dismiss may be harmless error. *See, e.g., John W. Campbell Farms, Inc. v. Zeda,* 59 So.2d 750, 751 (Fla.1952) (applying harmless error statute to trial court's error in denying a motion to dismiss due to misjoinder of plaintiffs). An error is harmless if "the error complained of did not contribute to the verdict or, alternatively stated, ... that there is no reasonable possibility that the error contributed to the conviction." *State v. DiGuilio,* 491 So.2d 1129, 1135 (Fla.1986). The record in Dennis's case demonstrates that the trial court's summary denial of his motions to dismiss was harmless.

*464 [7] Dennis does not contend that his trial itself was unfair or that his ability to present his claim of self-defense was limited in any way by the trial court's pretrial ruling. Dennis also does not assert that at a pretrial evidentiary hearing he would have presented evidence different from or additional to the evidence he presented at trial. At trial, Dennis testified on his own behalf and called witness George Daniels, who testified that victim McBride instigated the physical altercation by hitting Dennis with a beer bottle. The State introduced testimony contradicting Dennis's claim of self-defense. The trial court denied Dennis's motion for judgment of acquittal, and the jury determined that the evidence established beyond a reasonable doubt that Dennis committed the lesser included offense of felony battery. Based on the record before us, there is no reasonable possibility that the trial court's failure to make a pretrial evidentiary determination regarding Dennis's immunity claim contributed to Dennis's conviction. *See Parrish v. AmSouth Bank, N.A.,* 657 So.2d 1189, 1190 (Fla. 4th DCA 1995) (concluding that trial court's erroneous denial of motion to dismiss challenging plaintiff's jurisdictional allegations was harmless where the evidence presented at trial established jurisdiction over the defendant). Because the trial court's error in this case was harmless beyond a reasonable doubt, Dennis is not entitled to relief.

III. CONCLUSION

We conclude that where a criminal defendant files a motion to dismiss pursuant to section 776.032, the trial court should decide the factual question of the applicability of the statutory immunity. A motion to dismiss on the basis of section 776.032 immunity is not subject to the requirements of rule 3.190(c)(4) but instead should be treated as a motion filed pursuant to rule 3.190(b). While the error in *Dennis* was harmless, we disapprove the Fourth District's reasoning and approve the reasoning of *Peterson* on the conflict issue.

It is so ordered.

PARIENTE, LEWIS, QUINCE, POLSTON, LABARGA, and PERRY, JJ., concur.

Parallel Citations

35 Fla. L. Weekly S731, 36 Fla. L. Weekly S18

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54 So.3d 1067
District Court of Appeal of Florida,
Fourth District.

Julio CRUZ, Appellant,
v.
STATE of Florida, Appellee.

No. 4D09–3595. | Feb. 23, 2011.

Synopsis

Background: Defendant who was charged with aggravated assault with a deadly weapon, and whose motion to dismiss alleging immunity under the Stand Your Ground law was denied, filed petition for writ of prohibition seeking to prevent the Seventeenth Judicial Circuit Court, Broward County, John J. Murphy, III, J., from proceeding to trial until the Florida Supreme Court determined the proper procedure for deciding immunity claims. The District Court of Appeal held the petition in abeyance pending Supreme Court's resolution of the issue.

Holding: The District Court of Appeal, held that trial court could not deny defendant's motion to dismiss on the basis that there were factual issues in dispute.

Petition granted.

West Headnotes (1)

1 **Assault and Battery**
Questions for jury
Criminal Law
Dismissal or nonsuit

Trial court could not deny defendant's motion to dismiss charge of aggravated assault with a deadly weapon, in which defendant claimed immunity under the Stand Your Ground law, on the basis that there were factual issues in dispute; rather, trial court was required to determine whether defendant had shown entitlement to immunity by a preponderance of the evidence. West's F.S.A. § 776.032.

Attorneys and Law Firms

*1068 Michael Minardi of Michael Minardi, P.A., Stuart, for appellant.

Pamela Jo Bondi, Attorney General, Tallahassee, and Joseph A. Tringali, Assistant Attorney General, West Palm Beach, for appellee.

Opinion

PER CURIAM.

In September 2009, Julio Cruz (Defendant) filed an emergency petition for writ of prohibition with this court, seeking to prohibit the Broward County circuit court from proceeding to trial until the Florida Supreme Court determines the proper procedure for deciding immunity from prosecution pursuant to section 776.032, Florida Statutes (2009) (the "Stand Your Ground" law, enacted by chapter 2005–27, section 5, at 202, Laws of Florida). We grant the petition.

Defendant, who was charged with aggravated assault with a deadly weapon, filed a motion to dismiss based on a claim of immunity under the statute. The state's traverse denied defendant's allegations, and, without holding an evidentiary hearing, the trial court denied the motion, relying on our decision in *Velasquez v. State,* 9 So.3d 22 (Fla. 4th DCA 2009) (explaining that trial court had properly denied a similar motion because, under Rule 3.190(c)(4), a motion to dismiss has to be denied when the facts are in dispute).

In *Velasquez,* we certified conflict with *Peterson v. State,* 983 So.2d 27 (Fla. 1st DCA 2008), which set forth the following procedure for such motions:

> We now hold that when immunity under this law is properly raised by a defendant, the trial court must decide the matter by confronting and weighing only factual disputes. The court may not deny a motion simply because factual disputes exist. Here, the trial court did what was required. Petitioner is not precluded from submitting the matter to the jury as an affirmative defense in his criminal trial.
>
> In the absence of a procedure for handling these matters, we find guidance from the Colorado Supreme Court's decision in *People v. Guenther,* 740 P.2d 971 (Colo.1987). In that case, the court decided that Colorado's similar immunity statute authorized a trial court to dismiss a

> criminal prosecution at the pretrial stage and did not merely create ***1069** an affirmative defense for adjudication at trial. *Id.* at 976. The court further determined that a defendant raising the immunity would have the burden of establishing the factual prerequisites to the immunity claim by a preponderance of the evidence. *Id.* at 980. The court imposed the same burden of proof as it would in motions for postconviction relief or motions to suppress. *Id.*
>
> Likewise, we hold that a defendant may raise the question of statutory immunity pretrial and, when such a claim is raised, the trial court must determine whether the defendant has shown by a preponderance of the evidence that the immunity attaches. As noted by the trial court, courts have imposed a similar burden for motions challenging the voluntariness of a confession. *See, e.g., McDole v. State,* 283 So.2d 553, 554 (Fla.1973). We reject any suggestion that the procedure established by rule 3.190(c) should control so as to require denial of a motion whenever a material issue of fact appears.

Peterson, 983 So.2d at 29–30.

We held defendant's petition in abeyance pending the supreme court's resolution of the issue, which was presented on review of *Dennis v. State,* 17 So.3d 305 (Fla. 4th DCA 2009) (affirming conviction on direct appeal), *reh'g denied,* 17 So.3d 310 (Fla. 4th DCA 2009) (certifying conflict). In *Dennis,* we stated, "We find no error in the trial court's decision to deny the motion to dismiss. As we recognized in *Velasquez v. State,* 9 So.3d 22 (Fla. 4th DCA 2009), a motion to dismiss based on statutory immunity is properly denied when there are disputed issues of material fact." 17 So.3d at 306.

The supreme court recently resolved the conflict, rejecting our position in *Dennis* and approving that of the first district in *Peterson. Dennis v. State,* 51 So.3d 456 (Fla.2010). Accordingly, we grant the petition and direct the trial court to follow the procedure set forth in *Peterson* and approved in *Dennis.*

Petition Granted.

POLEN, TAYLOR and LEVINE, JJ., concur.

Parallel Citations

36 Fla. L. Weekly D410

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51 So.3d 474
District Court of Appeal of Florida,
Third District.

The STATE of Florida, Appellant/Respondent,
v.
Nadim YAQUBIE, Appellee/Petitioner.

Nos. 3D09–999, 3D09–2093. |
June 16, 2010. | Rehearing and
Rehearing En Banc Denied Feb. 9, 2011.

Synopsis

Background: Defendant was convicted in the Circuit Court, Miami–Dade County, Daryl E. Trawick, J., of manslaughter. Defendant petitioned for writ of prohibition claiming immunity from prosecution, and State sought review of order reducing the original second degree murder charge to manslaughter.

Holdings: The District Court of Appeal, Wells, J., held that:
[1] *Peterson v. State* standard applied to question whether defendant was immune from prosecution under Stand Your Ground Law, and
[2] whether defendant had ill-will or evil intent essential to second degree murder was issue for jury.

Petition granted; reversed and remanded.

West Headnotes (4)

[1] **Homicide**
Self-defense in general

In considering whether a homicide defendant is immune from prosecution under the Stand Your Ground law, a trial court is required to apply the standard of *Peterson v. State*, which requires a court to adjudicate disputed fact issues rather than passing them on to a jury as it would an affirmative defense. West's F.S.A. § 776.032.

[2] **Homicide**
Intent or mens rea

Whether defendant had ill-will or evil intent essential to second degree murder was issue for jury, and thus dismissal was not warranted on ground of there being no disputed material facts and undisputed facts not establishing prima facie case of guilt; defendant's characterization of his actions as defensive was not determinative, and facts, concerning defendant's stabbing of victim after dispute regarding defendant's purchase or rental of driver's license from victim, were equivocal and could be characterized as defensive or as spiteful, hateful, or evil. West's F.S.A. RCrP Rule 3.190(c)(4).

[3] **Criminal Law**
Dismissal or nonsuit

The purpose of a motion to dismiss on the ground that there are no disputed material facts and the undisputed facts do not establish a prima facie case of guilt is to test the legal sufficiency of the charges brought by the State; it is not to require the State to demonstrate that it will secure a conviction at trial. West's F.S.A. RCrP Rule 3.190(c)(4).

[4] **Criminal Law**
Elements of offenses

Criminal Law
Dismissal or nonsuit

Intent or state of mind is not an issue to be decided on a motion to dismiss on the ground that there are no disputed material facts and the undisputed facts do not establish a prima facie case of guilt; instead, it is usually inferred from the circumstances surrounding the defendant's actions and, since the trier of fact has the opportunity to weigh the evidence and judge the credibility of the witnesses, it should determine intent or state of mind. West's F.S.A. RCrP Rule 3.190(c)(4).

Attorneys and Law Firms

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Hersch & Talisman and Richard Hersch, Coconut Grove, FL, for appellee/petitioner.

Before WELLS, ROTHENBERG and LAGOA, JJ.

Opinion

WELLS, Judge.

Nadim Yaqubie seeks a writ of prohibition claiming immunity from prosecution under section 776.032 of the Florida Statutes (2008). The State of Florida seeks review of an order reducing the original second degree murder charge filed against Yaqubie to manslaughter. We grant the writ and remand for an evidentiary hearing to determine whether Yaqubie's immunity claim is supported by the preponderance of the evidence. We also find that the second degree murder charge must be reinstated should the court below determine that Yaqubie is not immune from prosecution.

Undisputed Facts

The essential facts involved here are not disputed. In the early hours of May 18, 2008, in an alley in Miami Beach, nineteen-year-old Nadim Yaqubie stabbed fifty-year-old Robert Camacho multiple times with a seven-inch knife. Two of these wounds were sufficiently serious to cause Camacho's death.

Petition for Writ of Prohibition (Immunity)

On May 19, Yaqubie was arrested and charged with second degree murder. Yaqubie does not deny that he stabbed Camacho to death, but claims that the stabbing occurred while Camacho was assaulting, battering, or robbing him, making him immune from prosecution under section 776.032 of the Florida Statutes. *See* § 776.032, Fla. Stat. (2008) (commonly referred to as the "Stand Your Ground" law and providing that a person who uses force as authorized in sections 776.012, 776.013, or 776.031, "is immune from criminal prosecution and civil action for use of such force"); § 776.012, Fla. Stat. (2008) (providing that use of deadly force is justified where an individual "reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a forcible felony"); § 776.08, Fla. Stat. (2008) (defining "forcible felony" as including aggravated assault, aggravated battery, and robbery).

[1] The court below, applying the standard enunciated in *Velasquez v. State,* 9 So.3d 22 (Fla. 4th DCA 2009), essentially treated Yaqubie's immunity claim as an affirmative defense and denied the motion to dismiss because "material facts [were] at issue in the case." Yaqubie claims that the court below applied the incorrect standard and should have applied the standard enunciated in *Peterson v. State,* 983 So.2d 27 (Fla. 1st DCA 2008), to determine whether a preponderance of the evidence shows that he is immune from prosecution under section 776.032. We agree with Yaqubie and therefore grant the instant writ.

In *Velasquez,* the Fourth District Court of Appeal addressed the procedure to be followed in handling section 776.032 motions. Looking to Florida Rule of Criminal Procedure 3.190(c)(4), the court concluded that a motion to dismiss on section 776.032 immunity grounds must be denied when, on no more than a specific denial in a traverse, a material disputed fact issue is made to appear, in effect treating such a claim as an affirmative defense:

> Rule 3.190(c)(4) of the Florida Rules of Criminal Procedure provides for the filing of a motion to dismiss when "[t]here are no material disputed facts and the undisputed facts do not establish ***476** a prima facie case of guilt against the defendant." Subsection (d) allows for the state to traverse or demur the motion and for the court to receive evidence on any issue of fact. It then provides that "[a] motion to dismiss under subdivision (c)(4) of this rule shall be denied if the state files a traverse that, with specificity, denies under oath the material fact or facts alleged in the motion to dismiss." Fla. R. Civ. P. 3.190(d).

Velasquez, 9 So.3d at 23–24.

In *Peterson,* the First District Court of Appeal decided that section 776.032 is a true immunity provision, not merely an affirmative defense, which requires a trial court to adjudicate disputed fact issues rather than passing them on to a jury as it would an affirmative defense:

> We now hold that when immunity under this law is properly raised by a defendant, the trial court must decide the matter by confronting and weighing only factual disputes. The court may not deny a motion simply because factual disputes exist.
>
> ....

> Likewise we hold that a defendant may raise the question of statutory immunity pretrial and, when such a claim is raised, the trial court must determine whether the defendant has shown by a preponderance of the evidence that the immunity attaches.... We reject any suggestion that the procedure established by rule 3.190(c) should control so as to require denial of a motion whenever a material issue of fact appears.

Peterson, 983 So.2d at 29–30.

Florida's Second and Fifth District Courts of Appeal have now adopted the standard and procedure enunciated in *Peterson,* as we do now by virtue of this decision. *See Horn v. State,* 17 So.3d 836, 839 (Fla. 2d DCA 2009) ("We agree with the First District—that our legislature intended to create immunity from prosecution rather than an affirmative defense and, therefore, the preponderance of the evidence standard applies to immunity determinations."); *Gray v. State,* 13 So.3d 114, 115 (Fla. 5th DCA 2009) ("In our prior opinion, which was issued virtually simultaneously with *Velasquez,* we adopted the procedure described in *Peterson.* Now, with the benefit of *Velasquez,* we see no reason to alter our opinion."). The petition for writ of prohibition is, therefore, granted with this matter remanded to the court below for an evidentiary hearing applying the standard enunciated in *Peterson.* To the extent this decision conflicts with the Fourth District's decision in *Velasquez,* we certify conflict.

Motion to Dismiss

We also reverse the order granting Yaqubie's Rule 3.190(c)(4) motion to dismiss which reduced the original second degree murder charge filed against him to a charge of manslaughter. Second degree murder is defined as the "unlawful killing of a human being, when perpetrated by an act imminently dangerous to another and evincing a depraved mind regardless of human life...." § 782.04(2), Fla. Stat. (2008). As the Standard Jury Instruction on second degree murder confirms, an act is "imminently dangerous to another and demonstrating a depraved mind" if it is one that:

1. A person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury to another, and
2. is done from ill will, hatred, spite, or an evil intent, and
3. is of such a nature that the act itself indicates an indifference to human life.

Fla. Std. Jury Instr. (Crim.) 7.4 Murder.

Yaqubie does not claim that stabbing someone in the abdomen and chest so hard ***477** that it actually results in death is either not an act that a person of ordinary judgment would know is reasonably certain to kill or do serious bodily injury or is not an act indicative of an indifference to human life. Rather he claimed below that because he was acting in self-defense, ill will, hatred, spite, or evil intent could not be demonstrated requiring either dismissal of the second degree murder charge against him or reduction of that charge to manslaughter. The court below agreed with Yaqubie, concluding that the facts leading up to Camacho's death were "insufficient as a matter of law to prove the evil intent or ill will necessary to rebut the defendant's claim of self-defense to the charge of second-degree murder." We cannot agree with this determination.

The facts largely come from a statement made by Yaqubie to the police following his arrest. According to Yaqubie, who was nineteen years old at the time, he travelled to Miami a few days before the stabbing took place "[b]ecause nobody liked [him] in New York," and because he needed a mini-vacation. He ultimately was going to Tampa to "get stronger" so that "people [would] stop picking on [him]." [1]

On the evening of May 18, Yaqubie took a bus from his hotel to Washington Avenue and 16th Street on Miami Beach. As he exited the bus, one of three black men offered to sell drugs and fake identification to him. Although he declined the offer of drugs and initially the offer of fake identification, Yaqubie later returned to purchase fake identification so that he could "get into like the good nightclubs."

To make this purchase, Yaqubie accompanied one of the men down Washington Avenue where Yaqubie withdrew $60 from an ATM. After waiting almost an hour, Yaqubie and the man were joined by four or five more black men and a "Mexican" and "they" offered to sell identification to him for $50. Yaqubie agreed and purchased what turned out to be Camacho's (whom Yaqubie referred to as the "Mexican") expired Virginia driver's license. According to Yaqubie, almost as soon as this transaction was completed, the black men left with his money and Camacho demanded return of the identification, claiming it to have been merely rented and not sold to Yaqubie. When Yaqubie refused to return the identification, Camacho threatened to "[f___] [Yaqubie] up."

Yaqubie admitted that at this juncture he was not frightened by Camacho or his threats because he was too busy concentrating on getting into a nightclub:

> He said that's my ID, ... and I told him I already bought it. He said no, no, like you're just going to use it to get into the nightclub and then you're going to give it back to me. And then he started threatening me if I don't, he'll [f____] me up, he'll do this and that. He said he knows those black people, they're probably a gang and stuff and he will get them on me and stuff. I wasn't paying attention at first. Mostly I was just focusing on getting to the nearest nightclub....

And although Yaqubie claims that later, while waiting in line to get into a nightclub, he got scared when he noticed Camacho staring at him, Yaqubie did nothing to secure assistance. Rather, Yaqubie left the line and engaged Camacho in conversation. When Yaqubie was unable to convince the older, heavier man to let him keep the identification, Yaqubie decided to lose him:

> *478 I walked, I was getting farther away from the club, towards 16th Street and like I really wanted to keep the ID and I asked him how much he wants for it. He said no, I need it, I don't care how much. I asked him if he can help me find another and he said no, [f____] you, you wasted too much time, you wasted too much of my time.
>
> ....
>
> And I basically didn't want ... I just lost sixty dollars for nothing so I tried to run for it and like, I tried to lose him.
>
> ....
>
> I went into a dark alley. I didn't think he would run fast enough considering how old he is and his physique.

Yaqubie was, however, surprised that the significantly older and heavier man caught up with him in the alley where Yaqubie sought to hide. And, when Camacho shouted threats at Yaqubie and grabbed his arm with both hands, Yaqubie "panicked," his "instincts took over" and he pulled a seven-inch knife from his pocket and began to stab Camacho in the abdomen:

> He catches up, and like he started screaming, I'll [f____] you up, I'll [f____] you up, in a very loud tone because nobody was around he didn't held [sic] back his voice. He grabbed my, my right arm, upper arm with both his hands, and like he started pulling very hard and he scared me. I thought I was, he was going to do something on me because like, I don't know, I just like, I panicked.
>
> ....
>
> ... I thought maybe he was going to kill me for like trying to run off on him.
>
> ....
>
> I grew too frightened. I just, I don't know, like instincts take, took over. I just quickly took the knife ... [a]nd like, I took three jabs on him ... [a]round his abdominal.

According to Yaqubie, Camacho then let go of his arm and said, "You want a piece of me? Fine" and threw a book bag he had been carrying at Yaqubie. The book bag "didn't do much" other than cut Yaqubie's middle finger "a little." Then, not seeing a weapon in Camacho's possession because "[i]t was too dark to tell," but thinking that Camacho "might have like pulled like some kind of like weapon" because the man had not immediately run away after being stabbed three times in the abdomen, Yaqubie "rushed" Camacho, stabbing him so violently in the chest with the knife that he believed that Camacho was going to die.

Yaqubie then stuck the knife in his pocket and ran. He did not, however, run for help either for himself or for the man he believed he had just stabbed to death. Rather, he hailed a taxi and had it drop him of at a Domino's pizzeria. Because the pizzeria was closed, he returned to his hotel where he was directed to a nearby restaurant where he went to eat. After a meal, he returned to his room where he went to sleep until a little after noon the following day.

The following day, Yaqubie relaxed. He had a light snack, exercised, took a bus to Lincoln Road and Aventura Mall, returned to his hotel and dressed for clubbing that night. To avoid entanglement with the black men from the night before, he wore a hooded jacket and made sure to take his knife along. Although he was able to get into a club without showing identification, he was rousted by club security for disturbing another patron. He was searched and the knife and Camacho's expired Virginia driver's license were found. The police were called, Yaqubie was arrested and he made a voluntarily statement.

*479 Although there were no other witnesses to these events, two women staying at a hotel adjacent to the alleyway where the stabbing occurred advised the police that, while hearing no loud threats coming from the alley at the time of the incident, they both heard a male voice say, "Don't do that! Don't do that!" One of the women stated that when she heard the male voice yell, she looked out of her hotel room window to see two men disengage from one another in the alleyway and head in opposite directions. Alarmed, she went into the alley where she found Camacho collapsed on the ground, unconscious and bleeding heavily. No weapons were found on Camacho, in his backpack or anywhere in the alleyway. Camacho died of fatal stab wounds to the heart and the right lung.

[2] According to Yaqubie, these facts establish that he acted in self-defense, thereby negating the State's ability to prove the ill-will or evil intent essential to a second degree murder charge. We disagree.

[3] As this court on more than one occasion has stated, the purpose of a Rule 3.190(c)(4) motion is to test the legal sufficiency of the charges brought by the State, it is not to require the State to demonstrate that it will secure a conviction at trial. *See State v. Arnal,* 941 So.2d 556, 558 (Fla. 3d DCA 2006) (stating that "[t]o avoid dismissal under this rule, the State is not obligated to pre-try its case, only to provide sufficient facts, when viewed in a light most favorable to the State, to show that a reasonable jury could rule in its favor"); *State v. Ortiz,* 766 So.2d 1137, 1142 (Fla. 3d DCA 2000) (to counter a Rule 3.190(c)(4) motion to dismiss, the State "need not adduce evidence sufficient to sustain a conviction"). In this case, Yaqubie convinced the court below that the State could not demonstrate the ill-will, spite, hatred, or evil intent essential to a second degree murder charge because he was acting in self-defense when he stabbed Camacho. But Yaqubie's characterization of his actions as defensive is not determinative. To the contrary, the facts are equivocal[2] and may be characterized as defensive or as spiteful, hateful, or evil and whether Yaqubie was acting in self-defense or as an aggressor out of hatefulness or spite is for a jury, not for the defendant or the court, to decide. *See Arnal,* 941 So.2d at 558–59 (confirming that it is not proper on a Rule 3.190(c)(4) motion to determine factual issues, to weigh evidence, or to determine credibility); *State v. Stewart,* 404 So.2d 185, 186 (Fla. 5th DCA 1981) (finding that the trial court erred in assuming that the defendant's version of the victim's death had to be accepted and in dismissing a second degree murder charge under Rule 3.190(c)(4) for a fatal stabbing where "[t]he type of wound and direction of the blow are sufficient alone to cast considerable doubt on the defendant's stories concerning an accidental cutting"); *State v. Milton,* 488 So.2d 878, 879 (Fla. 1st DCA 1986) (concluding that it was improper for the trial judge to consider the issues of self-defense and premeditation in a(c)(4) *480 motion to dismiss since they were questions for a jury not a judge to decide).

[4] As was aptly stated by the Second District Court of Appeal in *State v. Rogers,* 386 So.2d 278, 280 (Fla. 2d DCA 1980), where the trial court similarly resolved the issue of whether the defendant's actions "evinc [ed] a depraved mind regardless of human life":

> [I]ntent or state of mind is not an issue to be decided on a motion to dismiss under Rule 3.190(c)(4). Instead, it is usually inferred from the circumstances surrounding the defendant's actions. Since the trier of fact has the opportunity to weigh the evidence and judge the credibility of the witnesses, it should determine intent or state of mind.

See also Arnal, 941 So.2d at 559 (finding that "[w]hile intent or state of mind may, as the trial court correctly noted, be difficult to establish, it is not, as we have stated 'an issue to be decided on a motion to dismiss under Rule 3.190(c)(4).' " (quoting *State v. Book,* 523 So.2d 636, 638 (Fla. 3d DCA 1988))).

The motion to dismiss should, therefore, have been denied.

Accordingly, the petition for writ of prohibition is granted and conflict with *Velasquez* certified. The order granting the motion to dismiss and reducing the second degree murder charge to manslaughter is reversed.

Parallel Citations

35 Fla. L. Weekly D1342

Footnotes

1 Yaqubie described himself as a loser who was picked on in high school and community college. While he denied picking fights with others, he admitted that he had "probably broken fingers and ... bruised up people...."

2 Yaqubie candidly admitted that when he initially ran from Camacho he did so not out of fear, but because he wanted to keep Camacho's identification. Yaqubie also confirmed that when Camacho caught up with him in the alley, Camacho posed no greater threat than he had when Yaqubie ran from him as Camacho was unarmed. Yaqubie nonetheless began stabbing Camacho when Camacho grabbed his arm, finally stabbing Camacho to death when he continued to resist. These actions are as capable of being characterized as a hateful, spiteful, and evil attempt to get rid of this bothersome man, as they are of being construed as defensive actions against an aggressor.

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983 So.2d 27
District Court of Appeal of Florida,
First District.

Zack PETERSON, Petitioner,
v.
STATE of Florida, Respondent.

No. 1D07-3943. | April 23, 2008.
| Rehearing Denied June 9, 2008.

Synopsis

Background: Defendant in underlying criminal case brought original proceeding seeking writ of prohibition to review an order denying his motion to dismiss first-degree murder charges against him based on statutory immunity for on justifiable use of force.

[Holding:] The District Court of Appeal, Kahn, J., held that defendant was not entitled to statutory immunity on basis of justifiable use of force.

Writ denied.

West Headnotes (3)

[1] **Homicide**
Self-defense in general

First-degree murder defendant was not entitled to statutory immunity based on justifiable use of force solely because a factual dispute existed as to the use of force, but rather, trial court applied the correct standard in denying defendant's immunity-based motion to dismiss where his right to immunity was not established as a matter of fact or law. West's F.S.A. § 776.032(1).

10 Cases that cite this headnote

[2] **Criminal Law**
Special pleas in bar in general

Homicide
Self-defense in general

When immunity under justifiable use of force law is properly raised by a defendant, trial court must decide matter by confronting and weighing only factual disputes; court may not deny a motion to dismiss on basis of such immunity simply because factual disputes exist. West's F.S.A. § 776.032(1).

12 Cases that cite this headnote

[3] **Criminal Law**
Special pleas in bar in general

Defendant may raise question of statutory immunity based on justifiable use of force pretrial and, when such a claim is raised, trial court must determine whether defendant has shown by a preponderance of evidence that the immunity attaches. West's F.S.A. § 776.032(1).

17 Cases that cite this headnote

Attorneys and Law Firms

*28 Anabelle Dias of Anabelle Dias Associates, P.A., Tallahassee, for Petitioner.

Bill McCollum, Attorney General, and Philip W. Edwards, Assistant Attorney General, Tallahassee, for Respondent.

Opinion

KAHN, J.

Petitioner seeks a writ of prohibition to review an order denying his motion to dismiss based on the statutory immunity established by section 776.032(1), Florida Statutes (2006). We deny the petition and hold that a criminal defendant claiming protection under the statute must demonstrate by a preponderance of the evidence that he or she is immunized from prosecution. Here, the trial court applied the correct standard.

The State charged petitioner with one count of attempted first-degree murder, alleging that petitioner shot his brother with a firearm. Petitioner moved to dismiss the information on the ground that he was immune from criminal prosecution pursuant to section 776.032, Florida Statutes (2006), because the shooting occurred when petitioner's brother assaulted him after having been asked to leave petitioner's home.

The trial court conducted a hearing at which the parties did not present live evidence but, instead, presented the deposition of an eyewitness-petitioner's and the victim's sister-as well as the deposition of the alleged victim. After consideration of the evidence and the arguments, the trial court entered an order denying petitioner's motion to dismiss. The trial court correctly observed that no rule or procedure had yet been enacted to guide trial courts in deciding a claim of immunity brought under section 776.032(1). The court nevertheless proceeded to recognize its role as finder of fact at this stage of the proceedings, "much in the same way that it does when deciding whether the state has proved a confession is voluntary." The court then determined that the testimony of the alleged victim was clear and reasonable, and "prosecution for attempted murder [would not be] precluded as a matter of law because the facts do not establish a self-defense immunity." The trial court further found that immunity had not been established as a matter of fact or law, and denied the motion to dismiss.

Petitioner now seeks a writ of prohibition, arguing he was entitled to immunity as a matter of law. The State responds, suggesting, among other things, that any factual dispute should defeat a claim of statutory immunity, and further suggesting that a motion under section 776.032 should be treated as having been brought ***29** under Florida Rule of Criminal Procedure 3.190(c)(4). We reject the State's suggestions and hold that the trial court correctly handled the motion below.

In a much-publicized move, the Florida Legislature enacted in 2005 what has been popularly (*e.g.* http://en.wikipedia.org/wiki/Castle_Doctrine_# Stand-your-ground) referred to as the "Stand Your Ground" law. Ch.2005-27, § 5, at 202, Laws of Fla. This law, as codified, provides that a person who uses force as permitted in section 776.013 is justified in using such force and is immune from criminal prosecution as well as civil action for the use of such force. § 776.032, Fla. Stat. (2006). Section 776.013, Florida Statutes (2006), states:

> (1) A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or great bodily harm to another if:
>
> (a) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcefully entered, a dwelling, a residence, or occupied vehicle, or if that person had removed or was attempting to remove another against that person's will from the dwelling, residence, or occupied vehicle; and
>
> (b) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

The wording selected by our Legislature makes clear that it intended to establish a true immunity and not merely an affirmative defense. In particular, in the preamble to the substantive legislation, the session law notes, "[T]he Legislature finds that it is proper for law-abiding people to protect themselves, their families, and others from intruders and attackers without fear of prosecution or civil action for acting in defense of themselves and others." Ch.2005-27, at 200, Laws of Fla.

[1] **[2]** We now hold that when immunity under this law is properly raised by a defendant, the trial court must decide the matter by confronting and weighing only factual disputes. The court may not deny a motion simply because factual disputes exist. Here, the trial court did what was required. Petitioner is not precluded from submitting the matter to the jury as an affirmative defense in his criminal trial.

In the absence of a procedure for handling these matters, we find guidance from the Colorado Supreme Court's decision in *People v. Guenther,* 740 P.2d 971 (Colo.1987). In that case, the court decided that Colorado's similar immunity statute authorized a trial court to dismiss a criminal prosecution at the pretrial stage and did not merely create an affirmative defense for adjudication at trial. *Id.* at 976. The court further determined that a defendant raising the immunity would have the burden of establishing the factual prerequisites to the immunity claim by a preponderance of the evidence. *Id.* at 980. The court imposed the same burden of proof as it would in motions for postconviction relief or motions to suppress. *Id.*

[3] Likewise, we hold that a defendant may raise the question of statutory immunity pretrial and, when such a claim is raised, the trial court must determine whether the defendant has shown by a preponderance of the evidence that the immunity attaches. As noted by the trial court, courts have imposed a similar burden for motions challenging the voluntariness of a confession. *See, e.g., McDole v. State,* 283 So.2d 553, 554 (Fla.1973). We reject any suggestion that the procedure established by rule 3.190(c) should control ***30** so as to require denial of a motion whenever a material issue of fact appears.

DENIED.

WOLF and VAN NORTWICK, JJ., concur.

Parallel Citations

33 Fla. L. Weekly D1104

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IN THE THIRTEENTH JUDICIAL CIRCUIT COURT
FOR HILLSBOROUGH COUNTY, FLORIDA
Criminal Justice Division

STATE OF FLORIDA **CASE NUMBER: 11-CF-007984** ✓

v.

CARLOS A. CATALAN-FLORES, **DIVISION: D**
Defendant.
_____/

ORDER GRANTING MOTION TO INVOKE AND ESTABLISH IMMUNITY PURSUANT TO SECTION 776.032, FLORIDA STATUTES (2011)

THIS MATTER is before the Court on Defendant's Motion to Invoke and Establish Immunity Pursuant to section 776.032, Florida Statutes (2011), filed on September 26, 2011, pursuant to Florida Rule of Criminal Procedure 3.190(b) (2011). After considering Defendant's motion; testimony and evidence presented during the October 28, 2011, evidentiary hearing; arguments of counsel; and applicable case law, the Court finds as follows:

FACTS

On May 21, 2011, in case 11-CF-007984, Defendant, CARLOS A. CATALAN-FLORES, shot Uriel Peña-Gutierrez, resulting in a charge of Aggravated Battery (Great Bodily Harm or Deadly Weapon). In his Motion, Defendant Requests the Court grant him immunity from prosecution pursuant to Florida Statute § 776.032 (2011).

At the October 28, 2011, evidentiary hearing, the State presented six witnesses: victim Uriel Peña-Gutierrez; the brother of the victim, Luis Manuel Delgado-Garcia; Tampa Police Department Detectives Steven Prebich and John Columbia; crime-scene technician Donna Boyle; and George Vera. The defense presented two witnesses: Leonard Timothy Vera and Defendant, Carlos Catalan-Flores.

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Defendant testified that on the night of the shooting he had been working as a security guard at Flash Dancers club, located at the intersection of West Cayuga Street and Lois Avenue, for approximately three to four months. He was licensed by the State of Florida as a security guard and licensed to carry a weapon while working as a security guard. He had taken classes training him on how to use his firearm. He also testified that the club had no policy of checking for weapons, and that anyone who entered the club could have been armed.

On the night of the incident, Defendant was the only security guard on duty at the club. Shortly after 2 a.m., Mr. Peña and two friends arrived at the club after spending the evening at a restaurant where he consumed two beers. Mr. Peña testified that he and his friends met up with a larger group of between five and ten people at the club, and that he consumed about two beers before the club closed at 3 a.m. On the way out of the club, Defendant told Mr. Peña and his group that they could not take their drinks outside. Mr. Peña threw away the beer in his hand, but went outside with two full beer bottles concealed in his front pants' pockets. Mr. Peña's friends also took beers with them into the parking lot. According to George Vera, Defendant took a bottle from the hands of one of the men as they were exiting and poured it out. The entire group, all of whom appeared to be intoxicated according to witnesses, was upset about having to dump out their beers while leaving. Once the club was empty, Defendant testified he went outside and noticed Mr. Peña and his friends were still in the parking lot with beers. They appeared rowdy and were being loud. Defendant told the group they could not drink in the parking lot and had to leave. He then began taking the bottles from the men.

All of the witnesses agree that when Defendant approached the men in the parking lot, an argument ensued. Mr. Peña claims that Defendant had his gun pointed at the group and that he argued with Defendant about whether it was legal for him to have the gun out. George Vera,

Leonard Vera, and Defendant claim that Defendant went to the group of men to tell them to throw away their beers and leave the premises. At this point, Defendant's back was toward the wall of the club with the group of men standing in front of him. According to George Vera, Defendant was trying to lighten the mood, and he said the argument appeared to be sarcastic until Mr. Peña suddenly became belligerent. Defendant and Leonard Vera testified that the group of men appeared hostile and aggressive, and Leonard Vera described the group as "brewing up trouble." Defendant also testified that Mr. Peña balled his hands into fists and went into "attack mode" while the rest of the men appeared to try to surround him.

At some point in the argument, Mr. Peña began cursing at Defendant. Mr. Peña claims he called Defendant an "asshole" because he felt threatened and was offended by Defendant's actions. Mr. Peña says he took a beer bottle out of his pocket and threw it toward Defendant. Defendant, George Vera, and Leonard Vera testified that Mr. Peña was upset Defendant was taking the beer from the men in the parking lot, and told Defendant, "You ain't gonna take shit from me," and then threw a full beer at Defendant. Mr. Peña threw the beer bottle from approximately 10–14 feet away from Defendant, and threw the bottle with enough force that it shattered next to Defendant. Defendant, George Vera, and Leonard Vera all testified that Defendant had to duck or move his head to avoid being hit with the bottle.

Defendant testified that he feared for his life at that point, believing that if he got hit with the bottle he would be knocked down, and that Mr. Peña and the group would disarm and kill him. Defendant testified that he did have a baton and pepper spray at his disposal, but felt using the firearm was the only way to prevent Mr. Peña and his friends from hurting or killing him.

When Defendant dodged the first bottle, Mr. Peña pulled a second bottle from his pocket, according to Defendant, George Vera, and Leonard Vera. Defendant testified that after he

dodged the first bottle, he looked up and saw Mr. Peña with a second bottle in his hand and he appeared ready to throw it. Leonard Vera testified Mr. Peña immediately threw the second bottle while George Vera testified Defendant told Mr. Peña to drop the second bottle, and then Mr. Peña threw it at Defendant. Mr. Peña denies throwing a second bottle.

After Defendant dodged the first bottle and saw Mr. Peña with the second bottle, he ducked his head behind one arm and fired six shots in rapid succession at Mr. Peña. Mr. Peña, after throwing the bottle or bottles, immediately turned to run across the street and was struck by several bullets. All of the witnesses testified that the entire incident—from the time Mr. Peña threw the bottle to the time Defendant finished shooting—happened very quickly.

Defendant followed Mr. Peña across the street to where he laid shot. According to Mr. Peña, Defendant still had his gun drawn and said, "You got what you want." Defendant claims he was going to put away his gun and call 911 when he saw he had shot Mr. Peña, but the group of men had followed him and he believed they were going to attack. Defendant testified that two of the men said to him in Spanish, "You're a dead man. We're going to kill you for what you did." Defendant told them to step back, called 911, and stayed at the scene until the ambulance and police arrived.

When police arrived that night, Defendant told Detective John Columbia that he was in fear for his life after Mr. Peña threw the beer bottle, and that Mr. Peña "was gonna throw [another] bottle at me so I shot him." Homicide Detective Steven Prebich testified to finding two broken bottles at the scene.

LEGAL ANALYSIS

Section 776.032(1), Florida Statutes, allows a person to avoid criminal prosecution so long as the use of force is justified and states, in pertinent part, that "[a] person who uses force as permitted in s. 776.012, s. 776.013 or s. 776.031 is justified in using force and is immune from criminal prosecution and civil action for the use of such force . . . ." Fla. Stat. § 776.032(1) (2011). This law has been given the title of "Stand Your Ground," and allows a citizen to use force when such force is necessary to protect themselves or another person, or to stop the commission of a forcible felony. Fla. Stat. §§ 776.012, 776.013, 776.031 (2011). The user of force may use any force, including deadly force, when he reasonably believes that such force is necessary to prevent imminent death or great bodily harm or to prevent the imminent commission of a forcible felony. *Id.*

This Court adheres to the holding of *Horn v. State*, 17 So. 3d 836, 839 (Fla. 2d DCA 2009), which held that a defendant claiming protection under this statute must demonstrate by a preponderance of the evidence that he or she is immune from prosecution. "When immunity under this law is properly raised by a defendant, the trial court must decide the matter by confronting and weighing only factual disputes." *McDaniel v. State*, 24 So.3d 654, 656 (Fla. 2d DCA 2009) (quoting *Peterson v. State*, 983 So.2d 27, 29 (Fla. 1st DCA 2008)).

This Court finds that Defendant is immune from prosecution. Being hit with a full beer bottle constitutes aggravated battery, a forcible felony. *See Cloninger v, State*, 846 So. 2d 1192 (Fla. 4th DCA 2003) (holding that a beer bottle does not have to be broken to constitute a deadly weapon); Fla. Stat. § 776.08 (2011). It is undisputed that Mr. Peña threw a full beer bottle at Defendant from a short distance away, and that it was thrown with such force that it shattered next to Defendant. Defendant and two club patrons testified that Defendant was forced to duck

or dodge to avoid being hit by the bottle. There was also testimony that Defendant had his back to the wall of the club, and that there was a group of between six and ten belligerent and aggressive men directly in front of him. Additionally, Defendant and two patrons testified that Mr. Peña had already thrown a second bottle or was about to throw a second bottle when Defendant fired six shots in rapid succession. Defendant testified that he feared he would be disarmed if hit by the bottle, and hurt or killed by the group of men. As such, Defendant's actions fall within the protection of using force in defense of self or to prevent commission of a forcible felony. *See* Fla. Stat. §§ 776.012, 776.032.

The State argues that Defendant is not entitled to immunity because Mr. Peña was running away when Defendant shot him in the back. *See State v. Heckman*, 993 So. 2d 1004 (Fla. 2d DCA 2007) (holding that a defendant is not entitled to immunity when the party against whom force is used is in retreat). However, after considering the testimony of the witnesses, including Mr. Peña, this Court cannot conclude Defendant believed Mr. Peña was in retreat when Defendant discharged his firearm. With Defendant's back to the wall, Mr. Peña and others standing a short distance away, and becoming rowdy and aggressive toward Defendant, Mr. Peña threw a full beer bottle at Defendant. The court finds that as Mr. Peña either grabbed a second beer bottle or as Mr. Peña was throwing the second bottle, Defendant ducked his head and began firing his weapon at Mr. Peña. Mr. Peña's actions did not indicate that he intended to retreat prior to Defendant taking a defensive posture to protect himself, grabbing his weapon, and quickly firing shots. Defendant's actions were justified considering the threatening circumstances presented. A person in Defendant's position would have reasonably believed that the use of deadly force was necessary to protect himself from imminent death or great bodily

harm or the imminent commission of a forcible felony. As such, Defendant is entitled to statutory immunity from prosecution.

It is **ORDERED AND ADJUDGED** that Defendant's motion is hereby **GRANTED** and the charge against Defendant is **DISMISSED.**

DONE AND ORDERED in Chambers in Hillsborough County, Florida this 16 day of December, 2011.

ASHLEY B. MOODY, Circuit Judge

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Assistant State Attorney, Division D

16 Fla. Jur 2d Criminal Law—Substantive Principles and Offenses § 523

Florida Jurisprudence, Second Edition
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Criminal Law—Substantive Principles and Offenses
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IV. Crimes Against Person and Public Decency
E. Homicide
4. Defenses to Homicide
b. Self-Defense
(2) Necessity to Take Life
(c) Avoidance of Necessity for Killing; Duty to Retreat

Topic Summary Correlation Table References

§ 523. Generally; statutory abolishment of common-law duty to retreat

West's Key Number Digest

West's Key Number Digest, Homicide ⇨798 to 804

A.L.R. Library

Homicide: duty to retreat where assailant and assailed share the same living quarters, 67 A.L.R.5th 637

Homicide: duty to retreat where assailant is social guest on premises, 100 A.L.R.3d 532

Homicide: duty to retreat as condition of self-defense when one is attacked at his office, or place of business or employment, 41 A.L.R.3d 584

Trial Strategy

Self-Defense in Homicide Cases, 42 Am. Jur. Trials 151 § 25 (The law of retreat)

By statute, a person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to

prevent the commission of a forcible felony.[FN1]

> **Practice Tip:** The statute expanding the right of self-defense by abolishing the common-law duty to retreat before using deadly force was a substantive, rather than a procedural/remedial change in the law, and, thus, a presumption existed against retroactive application to cases pending on the effective date; the statute established a "no duty to retreat" rule in a broad context that had not previously existed and altered the circumstances criminalizing use of deadly force.[FN2]

Prior to the enactment of the statute, a person could not use deadly force in self-defense without first using every reasonable means within his or her power to avoid the danger, including retreat.[FN3] As was sometimes said, a combatant had to "retreat to the wall" before using deadly force.[FN4] The duty to retreat before using self-defense emanated from the common law, rather than from statute.[FN5]

Further, prior to the enactment of the statute, deadly force was justifiable if retreat would have been futile.[FN6] Thus, where the defendant's testimony demonstrated that, under the doctrine of retreat, he or she had done all that he or she could reasonably have done to avoid the taking of the victim's life in defense of his or her person, self-defense may have justified the killing.[FN7]

CUMULATIVE SUPPLEMENT

Statutes:

Created to eliminate the need to retreat under specified circumstances, the "Stand Your Ground" statute authorizes the immunity determination to be made by law enforcement officers, prosecutors, judges, and juries; in enacting the statute, however, the legislature did not restrict the time frame for determining immunity, but rather provided a time continuum stretching across the entire criminal process, including the arrest, detention, charging, and prosecution. West's F.S.A. § 776.032. Velasquez v. State, 9 So. 3d 22 (Fla. Dist. Ct. App. 4th Dist. 2009).

Cases:

Legislature's creation of "Stand Your Ground" law expanded the right of self-defense and abolished the common law duty to retreat when a person uses deadly force in self-defense to prevent imminent great bodily harm or death; in other words, "Stand Your Ground" law creates a new affirmative defense for situations in which one may use deadly force without first retreating. West's F.S.A. § 776.013(3). Dorsey v. State, 74 So. 3d 521 (Fla. Dist. Ct. App. 4th Dist. 2011).

Possession of a firearm by a convicted felon qualifies as "unlawful activity" within the meaning of the Stand Your Ground law, providing that the "no duty to retreat" applies only where a person is not engaged in an unlawful activity. West's F.S.A. § 776.013(3). Dorsey v. State, 74 So. 3d 521 (Fla. Dist. Ct. App. 4th Dist. 2011).

Where a defendant was engaged in an unlawful activity or was in a place where he did not have a right to be at the time he was attacked, the common law duty to retreat still applies, given that Stand Your Ground law provides that the "no duty to retreat" applies only where a person is not engaged in an unlawful activity. West's F.S.A. § 776.013(3). Dorsey v. State, 74 So. 3d 521 (Fla. Dist. Ct. App. 4th Dist. 2011).

Defendant, the owner of a tow truck company charged with second-degree murder for his conduct in shooting and killing a person who was attempting to recover his vehicle after confronting defendant at the location where the vehicle had been towed, was not entitled to immunity under "Stand Your Ground" law; defendant fired shot when the vehicle was passing him, and thus was no longer in the zone of uncertainty, and at the time he fired the shot, defendant could not be reasonably certain that the employee he also claimed to be defending was in immediate danger of death or great bodily harm. West's F.S.A. § 776.032. Montanez v. State, 24 So. 3d 799 (Fla. Dist. Ct. App. 2d Dist. 2010).

Before a person is justified in discharging a weapon in defense of others, for purposes of immunity under "Stand Your Ground" law, that person must be reasonably certain that the person whom they are defending is in immediate danger of death or great bodily harm. West's F.S.A. § 776.032. Montanez v. State, 24 So. 3d 799 (Fla. Dist. Ct. App. 2d Dist. 2010).

The legislature intended, through the "Stand Your Ground" law, to create immunity from

prosecution rather than an affirmative defense and, therefore, the preponderance of the evidence standard applies to immunity determinations under the statute. West's F.S.A. § 776.032. Horn v. State, 17 So. 3d 836 (Fla. Dist. Ct. App. 2d Dist. 2009).

Appellate review of the Circuit Court's ruling on a "Stand Your Ground" statutory immunity claim is governed by the same standard which applies in an appeal from an order denying a motion to suppress, that is, the court's findings of fact must be supported by competent substantial evidence. West's F.S.A. § 776.013(1). Hair v. State, 17 So. 3d 804 (Fla. Dist. Ct. App. 1st Dist. 2009).

"Stand Your Ground" law applied to give defendant immunity to prosecution for first-degree murder after the gun he was using as a club in an attempt to repel the victim accidentally fired, although victim may have been exiting the vehicle at the time of the shooting; victim unlawfully and forcibly entered vehicle and any move he made toward exiting was involuntary if it occurred at all, he was still inside the vehicle when he was shot, and the statute made no exception from immunity if the victim was in retreat when the defensive force was employed. West's F.S.A. § 776.013(1). Hair v. State, 17 So. 3d 804 (Fla. Dist. Ct. App. 1st Dist. 2009).

[END OF SUPPLEMENT]

[FN1] § 776.013(3), Fla. Stat.
- Under the law on use of force in self-defense in effect at the time of the alleged murder, the defendant was not required to retreat from the confrontation before he could lawfully use deadly force in self-defense; the defendant was neither involved in any unlawful activity nor in a place where he did not have a right to be. Williams v. State, 982 So. 2d 1190 (Fla. Dist. Ct. App. 4th Dist. 2008).
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[FN2] Smiley v. State, 966 So. 2d 330 (Fla. 2007); Mitchell v. State, 965 So. 2d 246 (Fla. Dist. Ct. App. 4th Dist. 2007), review denied, 978 So. 2d 160 (Fla. 2008).
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[FN3] Weiand v. State, 732 So. 2d 1044 (Fla. 1999); State v. Bobbitt, 415 So. 2d 724 (Fla. 1982); Rasley v. State, 878 So. 2d 473 (Fla. Dist. Ct. App. 1st Dist. 2004); State v. James, 867 So. 2d 414 (Fla. Dist. Ct. App. 3d Dist. 2003).
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[FN4] Jenkins v. State, 942 So. 2d 910 (Fla. Dist. Ct. App. 2d Dist. 2006), review denied, 950 So. 2d 414 (Fla. 2007); Hunter v. State, 687 So. 2d 277 (Fla. Dist. Ct. App. 5th Dist. 1997); Cannon v. State, 464 So. 2d 149 (Fla. Dist. Ct. App. 5th Dist. 1985).
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[FN5] Weland v. State, 732 So. 2d 1044 (Fla. 1999).
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[FN6] Thompson v. State, 552 So. 2d 264 (Fla. Dist. Ct. App. 2d Dist. 1989); Brown v. State, 454 So. 2d 596 (Fla. Dist. Ct. App. 5th Dist. 1984).
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[FN7] Rodriguez v. State, 550 So. 2d 81 (Fla. Dist. Ct. App. 3d Dist. 1989).
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