REL: September 7, 2018

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2017-2018

CR-17-0825

Latasha Nicole Smith

v.

State of Alabama

Appeal from Shelby Circuit Court
(CC-16-695)

WINDOM, Presiding Judge.

Latasha Nicole Smith appeals her conviction for murder, see § 13A-6-2, Ala. Code 1975, and her resulting sentence as a habitual felony offender to life in prison.

On the evening of June 6, 2016, Smith and other acquaintances were outside Charlene Doak's mobile home. Donna Green and Keith Fulgham were talking when, "all of a sudden, [Smith] hollered out and said something" to Fulgham.[1] (R. 149.) According to Smith, Fulgham had told others that she had stolen $15 from him and that he was "going to do something to her." (R. 223.) Green, realizing that they were all intoxicated and not wanting any altercation, told Smith that she was taking her home. Green drove Smith to Smith's mobile home, which was a short distance from Doak's mobile home.

When the women arrived at Smith's mobile home, Smith realized that she had left her cell phone at Doak's mobile home. Green told her that the cell phone was "dead" and that they would get it the next day. (R. 151.) Green walked Smith to the door and told Smith's nephew not to let her out of the home because of "the rage she was in." (R. 151.) Green left Smith's house and returned to Doak's mobile home.

Reginald Smith, Smith's son, testified that when his mother returned to the mobile home that night she asked for him to go with her to get her cell phone. Reginald agreed to

[1]Fulgham is referred to as "Briarfield," his nickname, in parts of the record.

accompany her. Reginald acknowledged that his mother had a knife in the waistband of her pants. Reginald described his mother as being intoxicated and agitated, cursing and referring to people "messing with her." (R. 178.)

A few minutes after Green had returned to the mobile-home park, she saw Smith and Reginald arriving at Doak's mobile home. Smith walked up to Doak, who was talking with Fulgham, and asked Doak for her cell phone. Doak told Smith that Smith could get her cell phone tomorrow. Green testified that Fulgham walked away and, when he did, Smith and her son "jumped him." (R. 154.) Green testified that she could not see what Smith had in her hand but that "her hand was going up and down." (R. 155.) Fulgham fell to the ground.

According to Reginald, Smith arrived before he did because he had stopped to urinate. When he arrived at Doak's mobile home, he saw that Smith was on the ground and that Fulgham was walking away. Reginald approached Fulgham and tried to get him to leave the area to prevent further conflict. Reginald tripped and fell, though, which caused Fulgham to fall. Smith came over to the men and swung the knife, mistakenly stabbing Reginald in his buttocks. Reginald

testified that Fulgham got up and started walking away when Smith started stabbing Fulgham with the knife. Reginald ran back to his house to get his grandmother and his aunt. When Reginald returned to Doak's mobile home, he noticed that his mother's mouth had been cut, which he assumed was likely an accidental, self-inflicted wound.

The State read into evidence the transcript of Smith's testimony from the pretrial immunity hearing. In that hearing, Smith testified to Fulgham's accusation of theft against her and his alleged threat. Smith admitted to arming herself with a knife before returning to Doak's mobile home with her son. Smith stated that when she and Reginald arrived at Doak's mobile home, Reginald went onto the porch to get Smith's phone. Smith testified that she was standing just off the porch when she saw "somebody's hand come straight across [her] lip." (R. 227.) Reginald said, "[Y]ou cut my mama." (R. 227.) Smith fell to the ground; her lip was cut and bleeding. Smith got up, grabbed her knife from her pants, and started stabbing Fulgham, who was on the ground.

In total Fulgham was stabbed 15 times. Fulgham died as a result of multiple stab wounds.

On appeal, Smith argues that the circuit court erred: 1) by denying her motion for immunity from prosecution; 2) by refusing to give a stand-your-ground jury instruction; and 3) by denying her motion for a judgment of acquittal.

I.

Smith argues that the circuit court erred by denying her motion for immunity from prosecution. Specifically, she argues that the preponderance of the evidence presented at her pretrial immunity hearing supported her claim of self-defense; thus, the circuit court should have granted her immunity from prosecution.

The State asserts that by failing to challenge the circuit court's ruling on the pretrial motion for immunity before trial, by way of a petition for a writ of mandamus, Smith waived this claim on appeal.

In Wood v. People, 255 P.3d 1136 (Colo. 2011), the Colorado Supreme Court held that the proper method of challenging a pretrial ruling denying a motion for immunity is to file an extraordinary writ before trial. In arriving at its holding, that Court stated:

> "A pretrial determination of 'make-my-day' [use of deadly physical force against an intruder]

> immunity is also similar to a preliminary hearing in that the issues raised in such proceedings are resolved by the fact finder at trial under a higher burden of proof. We have held that the issue of whether the prosecution established probable cause at the preliminary hearing to bind a defendant over for trial becomes moot once the defendant has been found guilty beyond a reasonable doubt. See People v. Nichelson, 219 P.3d 1064, 1067 (Colo. 2009). Similarly, the issue of whether a defendant established the existence of the statutory conditions of 'make-my-day' immunity by a preponderance of the evidence becomes moot once a jury concludes the prosecution proved beyond a reasonable doubt that the same statutory conditions did not exist. In short, the jury's verdict subsumes the trial court's pretrial ruling regarding 'make-my-day' immunity under section 18-1-704.5."

Wood, 255 P.3d at 1141.

In Harrison v. State, 203 So. 3d 126 (Ala. Crim. App. 2015), this Court stated:

> "'Immune' is defined as '[h]aving immunity; exempt from a duty or liability.' Black's Law Dictionary (10th ed. 2014). 'Criminal prosecution' is defined as '[a] criminal proceeding in which an accused person is tried.' Id. Thus, by using the phrase 'immune from criminal prosecution' in § 13A-3-23(d), the legislature intended to exempt from trial an accused who uses force as justified in § 13A-3-23, unless the accused's conduct is 'determined to be unlawful.' When read together, those phrases lead to the conclusion that a determination must be made, prior to the commencement of trial, as to whether a defendant's conduct was justified or whether it was unlawful. The only available mechanism for such a determination is a pretrial hearing.

> "Submitting the question of immunity to a jury, as the State suggested, would render a defendant's right to immunity illusory. As noted in Ex parte Auburn University, [6 So. 3d 478 (Ala. 2008)], the right to immunity 'is effectively lost if a case is erroneously permitted to go to trial.' Additionally, Alabama law has always allowed a defendant to argue self-defense at trial. Thus, treating the right to immunity under § 13A-3-23(d) as an affirmative defense would make that subsection redundant. We must presume that the legislature did not, in enacting § 13A-3-23(d), create a meaningless provision. See Ex parte Wilson, 854 So. 2d 1106, 1110 (Ala. 2002), quoting Ex parte Welch, 519 So. 2d 517, 519 (Ala. 1987) ('"A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error."')."

Harrison, 203 So. 3d at 129-30. See Judge Joiner's dissent to this Court's order in Ex parte Watters, 220 So. 3d 1088 (Ala. Crim. App. 2015). This Court has considered an immunity issue after a defendant pleaded guilty and raised the claim on appeal. See Malone v. State, 221 So. 3d 1153 (Ala. Crim. App. 2016). However, in Malone, the defendant had been deprived of a pretrial hearing on the issue of immunity.

We agree with the State that once a pretrial hearing on the issue of immunity has been conducted and the circuit court has ruled on that issue, but the defendant elects to proceed

to trial instead of challenging that ruling by a petition for a writ of mandamus, any claim of immunity from prosecution is moot. See Wood, supra.

II.

Smith argues that the circuit court erred by failing to give a requested jury instruction on Alabama's stand-your-ground-law.

> "'A trial court has broad discretion in formulating its jury instructions, provided they are an accurate reflection of the law and facts of the case. United States v. Padilla-Martinez, 762 F.2d 942 (11th Cir. 1985). However, a "defendant is entitled to have the court instruct the jury on his defense theory, 'assuming that the theory has foundation in the evidence and legal support.' United States v. Conroy, 589 F.2d 1258, 1273 (5th Cir. 1979)." United States v. Terebecki, 692 F.2d 1345, 1351 (11th Cir. 1982). In order to determine whether the evidence is sufficient to necessitate an instruction and allow the jury to consider the defense, "we must accept the testimony most favorably to the defendant." (Citations omitted.) United States v. Lewis, 592 F.2d 1282, 1286 (5th Cir. 1979).'
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> "Coon v. State, 494 So. 2d 184, 186 (Ala. Crim. App. 1986)."

George v. State, 159 So. 3d 90, 93 (Ala. Crim. App. 2014).

The circuit court charged the jury on self-defense. It, however, denied Smith's request for an instruction on the stand-your-ground law. In denying Smith's request for the instruction, the circuit court found that Smith was engaged in the unlawful activity of public intoxication. Smith argues on appeal that "there was no credible testimony that [she] was publicly intoxicated pursuant to the language of § 13A-11-10, Ala. Code 1975.

Alabama's stand-your-ground law is found in 13A-3-23(b), Ala. Code 1975, which states:

> "A person who is justified ... in using physical force, including deadly physical force, and who is not engaged in an unlawful activity and is in any place where he or she has the right to be has no duty to retreat and has the right to stand his or her ground."

Section 13A-11-10, Ala. Code 1975, provides the following:

> "(a) A person commits the crime of public intoxication if he appears in a public place under the influence of alcohol, narcotics or other drug to the degree that he endangers himself or another person or property, or by boisterous and offensive conduct annoys another person in his vicinity."

The evidence presented at trial was sufficient to establish that Smith was publicly intoxicated; moreover,

evidence was presented indicating that Smith was not "in any place where ... she had a right to be. Even if Smith was originally invited to Doak's mobile home, there was no evidence presented indicating that Smith was invited to the property at the time of the fatal encounter. After Smith began yelling at Fulgham, Green took Smith home and told her not to come out of her house. Green testified that Smith was in a rage. Smith armed herself and returned to Doak's mobile home. Other than Smith's self-serving statement, there was no evidence presented indicating that Fulgham hit Smith. Even if Fulgham did hit Smith, testimony was presented, including Smith's, indicating that Fulgham was walking away or was on the ground when Smith began stabbing him. "[T]he defendant who is not required to retreat because of the location of the attack must not have brought on the difficulty, i.e., was the original aggressor." Commentary to § 13A-3-23, Ala. Code 1975.

Even accepting the testimony most favorable to Smith, there was no evidence presented indicating that she was lawfully at Doak's mobile home at the time Fulgham was killed. Further, evidence indicated that Smith was the aggressor. As

such, the circuit court did not abuse its discretion in denying Smith's requested jury instruction on the stand-your-ground law.

III.

Smith also contends that the circuit court erred by denying her motion for a judgment of acquittal. Specifically, Smith argues that the State presented insufficient evidence to sustain Smith's conviction for murder and insufficient evidence to show that she did not act in self-defense.

> "'"In determining the sufficiency of the evidence to sustain a conviction, a reviewing court must accept as true all evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider all evidence in a light most favorable to the prosecution."' Ballenger v. State, 720 So. 2d 1033, 1034 (Ala. Crim. App. 1998), quoting Faircloth v. State, 471 So. 2d 485, 488 (Ala. Crim. App. 1984), aff'd, 471 So. 2d 493 (Ala. 1985). '"The test used in determining the sufficiency of evidence to sustain a conviction is whether, viewing the evidence in the light most favorable to the prosecution, a rational finder of fact could have found the defendant guilty beyond a reasonable doubt."' Nunn v. State, 697 So. 2d 497, 498 (Ala. Crim. App. 1997), quoting O'Neal v. State, 602 So. 2d 462, 464 (Ala. Crim. App. 1992). '"When there is legal evidence from which the jury could, by fair inference, find the defendant guilty, the trial court should submit [the case] to the jury, and, in such a case, this court will not disturb the trial court's decision."' Farrior v. State, 728 So. 2d 691, 696 (Ala. Crim. App. 1998), quoting Ward v. State, 557 So. 2d 848, 850 (Ala. Crim. App. 1990).

> 'The role of appellate courts is not to say what the facts are. Our role ... is to judge whether the evidence is legally sufficient to allow submission of an issue for decision [by] the jury.' Ex parte Bankston, 358 So. 2d 1040, 1042 (Ala. 1978).
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> > "'The trial court's denial of a motion for judgment of acquittal must be reviewed by determining whether there was legal evidence before the jury at the time the motion was made from which the jury by fair inference could find the defendant guilty. Thomas v. State, 363 So. 2d 1020 (Ala.Cr. App. 1978). In applying this standard, this court will determine only if legal evidence was presented from which the jury could have found the defendant guilty beyond a reasonable doubt. Willis v. State, 447 So. 2d 199 (Ala.Cr.App. 1983). When the evidence raises questions of fact for the jury and such evidence, if believed, is sufficient to sustain a conviction, the denial of a motion for judgment of acquittal does not constitute error. McConnell v. State, 429 So. 2d 662 (Ala.Cr.App. 1983).'"

Gavin v. State, 891 So. 2d 907, 974 (Ala. Crim. App. 2003), cert. denied, 891 So. 2d 998 (Ala. 2004)(quoting Ward v. State, 610 So. 2d 1190, 1191 (Ala. Crim. App. 1992)).

A person commits murder if "[w]ith intent to cause the death of another person, he or she causes the death of that person or of another person." § 13A-6-2, Ala. Code 1975.

When a defendant raises a claim of self-defense, the burden is on the State to prove beyond a reasonable doubt that

the defendant did not act in self-defense. See Wilson v. State, 484 So. 2d 562, 563-64 (Ala. Crim. App. 1986). This Court has repeatedly held that the claim of self-defense is an issue to be decided by the jury. See Chestang v. State, 837 So. 2d 867, 871 (Ala. Crim. App. 2001)("'"Where ... the killing was admitted, the question of whether or not it was justified under the theory of self- defense was a question for the jury."'" (quoting Quinlivan v. State, 627 So. 2d 1082, 1087 (Ala. Crim. App. 1992), quoting in turn Townsend v. State, 402 So. 2d 1097, 1098 (Ala. Crim. App. 1981)); see also Worthington v. State, 652 So. 2d 790, 794 (Ala. Crim. App. 1994) ("'The issue of self-defense invariably presents a question for the jury whose verdict will not be disturbed on appeal. "[E]ven if the evidence of self-defense is undisputed, the credibility of the defendant with respect to the evidence of self-defense is for the jury, and [it] may, in [its] discretion, accept it as true or reject it."'" (quoting Brooks v. State, 630 So. 2d 160, 162 (Ala. Crim. App. 1993), quoting from other cases)).

Section 13A-3-23, Ala. Code 1975, provides, in pertinent part:

"(a) A person is justified in using physical force upon another person in order to defend himself or herself or a third person from what he or she reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he or she may use a degree of force which he or she reasonably believes to be necessary for the purpose. A person may use deadly physical force, and is legally presumed to be justified in using deadly physical force in self-defense or the defense of another person pursuant to subdivision (5), if the person reasonably believes that another person is:

"(1) Using or about to use unlawful deadly physical force."

"(2) Using or about to use physical force against an occupant of a dwelling while committing or attempting to commit a burglary of such dwelling.

"(3) Committing or about to commit a kidnapping in any degree, assault in the first or second degree, burglary in any degree, robbery in any degree, forcible rape, or forcible sodomy.

"....

"(b) A person who is justified under subsection (a) in using physical force, including deadly physical force, and who is not engaged in an unlawful activity and is in any place where he or she has the right to be has no duty to retreat and has the right to stand his or her ground.

"(c) Notwithstanding the provisions of subsection (a), a person is not justified in using physical force if:

"(1) With intent to cause physical injury or death to another person, he or

> she provoked the use of unlawful physical force by such other person.
>
> "(2) He or she was the initial aggressor, except that his or her use of physical force upon another person under the circumstances is justifiable if he or she withdraws from the encounter and effectively communicates to the other person his or her intent to do so, but the latter person nevertheless continues or threatens the use of unlawful physical force."

The evidence was undisputed that Smith stabbed Fulgham and that Fulgham died as a result of his injuries. Smith was upset with Fulgham at the party, and Green took Smith home to avoid an altercation. Smith, intoxicated, in a rage, and armed with a knife, returned to the mobile home to get her cell phone. Testimony was produced indicating that Fulgham tried to walk away from Smith. Although Smith stated that Fulgham hit her, causing her to fall and cut her lip, other testimony indicated that Fulgham walked away from Smith and that Smith's injury may have been the result of her own knife. Any conflicts created by this testimony were for the jury to resolve. See Gargis v. State, 998 So. 2d 1092, 1097 (Ala. Crim. App. 2007) ("Inconsistencies, contradictions, and conflicts in the evidence go to the weight of the evidence and

create fact questions that must be resolved by the jury."). When Smith got up from the ground, she pursued Fulgham and stabbed him multiple times. According the State all legitimate inferences, the evidence offered at trial was sufficient to show that Smith did not act in self-defense when she intentionally stabbed and killed Fulgham. Therefore, we cannot say that the circuit court erred in denying Smith's motion for a judgment of acquittal, and Smith is entitled to no relief on this claim.

Accordingly, the judgment of the circuit court is affirmed.

AFFIRMED.

Welch, Burke, and Joiner, JJ., concur. Kellum, J., concurs, with opinion.

KELLUM, Judge, concurring specially.

In its opinion, the majority holds that Smith waived her right to challenge the circuit court's pretrial ruling on immunity because she did not challenge that ruling before trial by way of a petition for a writ of mandamus. The majority concludes that Smith's decision to challenge the circuit court's ruling on appeal after proceeding to trial rendered any challenge moot.

Ordinarily, a pretrial motion, such as Smith's motion for immunity from prosecution, is not reviewable through mandamus. "'Subject to certain narrow exceptions ..., we have held that, because an 'adequate remedy' exists by way of an appeal, the denial of a motion to dismiss or a motion for a summary judgment is not reviewable by petition for writ of mandamus.'" Ex parte Kohlberg Kravis Roberts & Co., 78 So. 3d 959, 966 (Ala. 2011), quoting Ex parte Liberty Nat'l Life Ins. Co., 825 So. 2d 758, 762 (Ala. 2002). An assertion of immunity, however, is one of those narrow exceptions. See Ex parte Hampton, 189 So.3d 14, 16 (Ala. 2015).

While I understand, and agree with, the general principle that a finding of guilt following a criminal trial renders the

question of immunity moot, I write specially to express my concern in limiting a defendant's ability to challenge a pretrial ruling on immunity solely to petitions for a writ of mandamus.

> "Before a writ of mandamus may issue, the petitioner must show (1) a clear legal right in the petitioner to the relief sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) no adequate remedy at law; and (4) the properly invoked jurisdiction of the reviewing court. State v. Williams, 679 So. 2d 275 (Ala. Cr. App. 1996)."

State v. Reynolds, 819 So. 2d 72, 79 (Ala. Crim. App. 1999). Because a writ of mandamus is an extraordinary remedy that places on a petitioner a particularly heavy burden, I question whether a petitioner would ever be successful in challenging a circuit court's pretrial immunity ruling by mandamus. The better option, but one that is unfortunately not currently available under Alabama law, would be to allow the defendant to file a pretrial appeal of the circuit court's immunity ruling. By allowing a defendant to file a pretrial appeal as opposed to a petition for a writ of mandamus, this Court could review the judgment of the circuit court without first requiring the defendant to overcome the extraordinary requirements necessary for mandamus relief. Therefore, I

encourage the legislature to consider amending § 13A-3-23(d), Ala. Code 1975, to include a right to appeal a circuit court's pretrial ruling on an immunity defense in a criminal prosecution.