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Alabama Court of Criminal Appeals

OCTOBER TERM, 2022-2023

CR-21-0117

Ex parte Kendall Tewayne Johnson

PETITION FOR WRIT OF MANDAMUS

(In re: State of Alabama

v.

Kendall Tewayne Johnson)

(Montgomery Circuit Court: CC-21-93)

PER CURIAM.

Kendall Tewayne Johnson has petitioned this Court for a writ of mandamus ordering the Montgomery Circuit Court to grant his motion for pretrial immunity under § 13A-3-23(d), Ala. Code 1975. Johnson

argues that he is entitled to mandamus relief because, he says, the circuit court's decision that he is not immune from criminal prosecution under § 13A-3-23(d) is based on a misunderstanding of Alabama law and is not supported by the facts as stipulated to by the parties. The State argues that Johnson is not entitled to mandamus relief because, it says, Johnson did not satisfy his burden of proving that he is entitled to immunity under § 13A-3-23(d). For the following reasons, we deny the writ.

Facts and Procedural History

In February 2021, Johnson was indicted for murder for shooting and killing Cedric Lee Hubbard. (Johnson's petition, Ex. A.) On July 5, 2021, Johnson moved the circuit court to hold "an evidentiary hearing to determine if he is entitled to immunity from prosecution pursuant to Alabama Code section 13A-3-23." (Johnson's petition, Ex. B.) In his motion, Johnson alleged that

"multiple witnesses state that [Johnson] and his cousin Ayindae Brown arrived at Mr. Hubbard's home, at which time Mr. Hubbard, while armed with a pistol, approached them and asked them to leave. After Mr. Brown turned his back to leave, Mr. Hubbard opened fire, and Mr. Johnson returned fire in defense of himself and Mr. Brown.

"Multiple witnesses also state that Mr. Hubbard was highly intoxicated and threatened to shoot Ms. Latoya Brown within an hour prior to this incident.

"While several witnesses state that they did not see who fired initially, not a single witness interviewed by police claimed that [Johnson] shot first. Furthermore, none of the witnesses claimed that either [Johnson] or Mr. Brown threatened or menaced Mr. Hubbard prior to the shooting."

(Johnson's petition, Ex. B (paragraph numbering omitted).)

In its response to his motion, the State agreed that Johnson was entitled to the opportunity to prove that he is immune from prosecution. The State conceded that "no witness interviewed by law enforcement during its investigation provided information that [Johnson] fired his weapon first." (Johnson's petition, Ex. D.) The State, however, argued that Johnson was not immune from prosecution because "all of the witnesses who state that [Hubbard] shot his weapon first are related either by blood or by being in some sort of relationship" with Johnson; that Johnson "did not have a valid pistol permit at the time of the shooting" and was, thus, engaged in unlawful activity; and that Johnson was the initial aggressor and "did not effectively communicate to [the] Victim his intent to withdraw from the encounter." (Johnson's petition, Ex. D.)

On July 22, 2021, Johnson and the State filed a joint stipulation of fact as to the evidence that would be presented at an immunity hearing.

The joint stipulation of fact included an agreement as to what Dekerria Johnson, Shaliya Brown, Michael Robinson, Ventrelya Smith, Dezi Jefferson, and Ayindae Brown would testify to at Johnson's immunity hearing.¹ It also included the following stipulation:

"Law enforcement recovered two 9mm shell casings from the scene that [the Alabama Department of Forensic Sciences ('DFS')] determined were fired from Mr. Robinson's gun.

"Law enforcement recovered six .40 caliber shell casings that DFS determined were fired from a gun Mr. Kendall Johnson pawned after this incident.

"Law enforcement recovered eight .45 caliber shell casings.

"Mr. Cedric Hubbard was shot one time in the chest. A .40 caliber bullet was recovered from his body. It was too damaged to compare to the weapon Mr. Kendall Johnson pawned.

"Law enforcement recovered a .25 caliber weapon from Mr. Hubbard's person. No .25 caliber casings were found at the scene.

"Law enforcement never recovered a .45 caliber weapon.

"Mr. Kendall Johnson has never had a valid pistol permit."

¹The joint stipulation of fact included as attachments the statements that five of these witnesses provided to law enforcement. (See Johnson's petition, Exs. F, G, H, I, and J.)

(Johnson's petition, Ex. E (paragraph numbering omitted).)

On July 28, 2021, the parties filed a "Revised Joint Immunity Hearing Stipulation of Facts," in which they agreed to the following facts:

"On May 12, 2019, at --- Capri Street, Hubbard and the mother of one of their children, Latoya Brown, engaged in an argument regarding their daughter. At some point during the argument, Hubbard threatened to kill Latoya Brown. Latoya Brown left the scene and did not return that day. After leaving, Latoya Brown telephoned her son, Ayindae Brown (hereinafter, 'Mr. Brown'), and told him about the argument and the nature of it.

"Later that day, Mr. Brown and [Johnson] drove to Hubbard's Capri Street residence, along with two passengers. At some point after arriving at the residence, Mr. Brown asked Hubbard if he threatened to shoot his mother. Hubbard admitted that he did. Hubbard then directed Mr. Brown and [Johnson] to leave.

"Four of the eyewitnesses interviewed by the Montgomery Police Department (hereinafter, 'MPD'), including Mr. Brown, state that when Mr. Brown turned to go back to his vehicle, Hubbard fired a weapon in their direction.¹ [Johnson] -- who was standing in the street in front of Hubbard's residence and who had brought a pistol with him to Capri Street -- returned fire hitting Hubbard and ultimately Hubbard died from one of [Johnson's] gunshots, which was not contradicted by any witness.

"Four of the witnesses interviewed by MPD said [Hubbard] appeared to be intoxicated at the time of the shooting.

"Defendant has never owned a legally valid pistol permit.

" _____

"¹The remaining witnesses interviewed by MPD did not see who fired first."

(Johnson's petition, Ex. M (paragraph numbering omitted).)

On October 3, 2021, the circuit court issued an order denying Johnson's motion for pretrial immunity. (Johnson's petition, Ex. P.) The circuit court found as follows:

"Having considered the facts as stipulated by the parties, and the argument of counsel, this Court finds that [Johnson] has failed meet his burden of proving beyond a preponderance of the evidence that he is entitled to a self-defense immunity from prosecution pursuant to § 13A-3-23(d), Ala. Code 1975. [Johnson] was one member of a group that initiated the aggression on May 12, 2019. [Johnson] was unlawfully in possession of a pistol, thus he was required to retreat from the altercation. The fact that [Johnson] was armed with a pistol and had no valid permit to possess it is prima facie evidence of his intent to commit the murder. Because [Johnson] was not entirely free from fault, he should not be entitled to the benefit of a self-defense immunity from prosecution. Accordingly, [Johnson's] motion is due to be and is hereby DENIED."

(Johnson's petition, Ex. P.) Johnson then timely petitioned this Court.

Standard of Review

It is well settled that a petition for a writ of mandamus is the proper means to challenge a circuit court's denial of a defendant's claim to

pretrial immunity under § 13A-3-23(d), Ala. Code 1975. See, e.g., Gordon v. State, 322 So. 3d 549, 550 (Ala. Crim. App. 2020) (recognizing that "the proper method for challenging a pretrial ruling denying a motion for immunity under § 13A-3-23 is to file a petition for a writ of mandamus").

""""A writ of mandamus is an extraordinary remedy, and it will be issued only when there is: 1) a clear legal right in the petitioner to the order sought; 2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; 3) the lack of another adequate remedy; and 4) properly invoked jurisdiction of the court.' Ex parte United Serv. Stations, Inc., 628 So. 2d 501, 503 (Ala. 1993). A writ of mandamus will issue only in situations where other relief is unavailable or is inadequate, and it cannot be used as a substitute for appeal. Ex parte Drill Parts & Serv. Co., 590 So. 2d 252 (Ala. 1991)."

""[Ex parte Miles, 841 So. 2d 242, 243-44 (Ala. 2002)] ([q]uoting Ex parte Empire Fire & Marine Ins. Co., 720 So. 2d 893, 894 (Ala. 1998).) Moreover, '[t]he burden is on the petitioner who seeks a writ of mandamus to show that each element required for issuance of the writ has been satisfied.' Ex parte Patterson, 853 So. 2d 260, 263 (Ala. Civ. App. 2002) (citing Ex parte Consolidated Publ'g Co., 601 So. 2d 423 (Ala. 1992))."

""Ex parte Serio, 893 So. 2d 1148, 1150 (Ala. 2004)."

Dees v. State, 351 So. 3d 567, 570 (Ala. Crim. App. 2021) (quoting Harris v. Owens, 105 So. 3d 430, 433 (Ala. 2012)).

Discussion

In his petition, Johnson argues that the circuit court erred "when it denied his motion for immunity from prosecution because multiple witnesses provided that Johnson did not fire his weapon first but only returned fire after being fired upon." (Johnson's petition, p. 13.) Johnson contends that "there are no facts to support the [circuit] court's conclusion that [he], or a member of his group, [was] the initial aggressor[]" (Johnson's petition, p. 21); that "even if [he] was involved in criminal activity -- carrying a pistol without a permit -- it would only require that [he] follow the common law rules on his duty to retreat" and the stipulated evidence shows that he satisfied this common-law duty (Johnson's petition, p. 18); and that the circuit court erred in concluding that Johnson's being armed with a pistol when he had no valid permit to possess the pistol is prima facie evidence of his intent to commit the murder. The State, on the other hand, argues that "the stipulation [of fact] did not describe in detail what Johnson was doing when the shooting occurred, failed to address whether Johnson could safely retreat, and the

witnesses who said Hubbard shot first had evident bias." Thus, the State concludes that "the [circuit] court acted properly to defer the question of self-defense to a jury." (State's response, p. 7.)

I. Alabama's Self-Defense and Immunity Statute

We begin our analysis of Johnson's petition with an examination of Alabama's self-defense statute, which provides, in relevant part, that

"[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."

§ 13A-3-23(a)(1), Ala. Code 1975. Yet, a person is never justified in using

"physical force" in defense of self or a third person 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.

§ 13A-3-23(c), Ala. Code 1975.

This statute also provides that, when a person is "not engaged in an unlawful activity and is in any place where he or she has the right to be," that person may stand his or her ground when defending him- or herself or a third person. § 13A-3-23(b), Ala. Code 1975. A person who is justified in using force under § 13A-3-23(a) but who is either engaged in an unlawful activity or who is in any place where he or she does not have the right to be cannot "stand their ground." But the inability to stand one's ground does not preclude that person from seeking immunity from criminal prosecution or presenting a self-defense theory at trial. Rather, to show that a person who cannot stand his or her ground acted in self-defense and is therefore immune from prosecution, that person must show that he or she complied with the common-law duty to retreat before acting in self-defense. See Malone v. State, 221 So. 3d 1153, 1156 (Ala. Crim. App. 2016) ("[A]n accused who claims to have been justified in using deadly force under § 13A-3-23 must have complied with the common-law rules regarding the duty to retreat unless he or she meets the requirements of § 13A-3-23(b).").

In sum, if a person (1) is justified in using physical force, including deadly physical force, under § 13A-3-23(a), (2) is not engaged in the behavior described in § 13A-3-23(c), and (3) can either stand his or her ground under § 13A-3-23(b) or complies with the common-law duty to retreat, that person "is immune from criminal prosecution and civil action for the use of such force." § 13A-3-23(d)(1), Ala. Code 1975. When a person claims that he or she is entitled to immunity under § 13A-3-23(d)(1), the burden rests solely on that person to "show by a preponderance of the evidence that he or she is immune from criminal prosecution." § 13A-3-23(d)(2), Ala. Code 1975.

Here, the circuit court found that Johnson failed to satisfy his burden of proving that he is immune from criminal prosecution, in part, because: Johnson "was one member of a group that initiated the aggression" against Hubbard on May 12, 2019, and, thus, his actions ran afoul of § 13A-3-23(c). The circuit court also determined that Johnson was "unlawfully in possession of a pistol, thus he was required to retreat from the altercation" and that Johnson's illegal possession of the pistol was "prima facie evidence of his intent to commit murder." (Johnson's petition, Ex. P.)

We agree with the State's assertion at the trial level, and on appeal, that Johnson is not entitled to pretrial immunity from prosecution. As previously noted, on July 22, 2021, the State and Johnson filed with the circuit court a Joint Immunity Hearing Stipulation of Facts. (Johnson's petition, Ex. K.) This filing includes witness summaries from statements made to investigators, and, indeed, the four witnesses who addressed the subject all identified Hubbard as the first person to fire his weapon. Yet the State stipulated only to the notion that those witnesses, if called in an immunity hearing, would testify in accordance with their earlier statements. The State did not stipulate to the credibility of the witnesses, and the circuit court was not required to find the witnesses to be credible. The distinction between a stipulation as to the proposed testimony of the witnesses, versus the credibility of those witnesses, is made clear in the parties' Revised Joint Immunity Hearing Stipulation of Facts, filed on July 28, 2021, wherein the State stipulated that "[f]our of the eyewitnesses interviewed by the Montgomery Police Department (hereinafter, 'MPD'), including [Ayindae] Brown, state that when Brown turned to go back to his vehicle, Hubbard fired a weapon in their direction." (Johnson's petition, Ex. M.) The State could have stipulated

that Hubbard was the first to fire his weapon, but it did not. Rather, the State stipulated only to the content of the witnesses' statements. The credibility of the witnesses was plainly placed before Judge Hardwick by the State in its Response to Defendant's Motion for Pretrial Determination of Immunity from Prosecution, filed on July 21, 2021, in which the State asserted:

"The State concedes that no witness interviewed by law enforcement during its investigation provided information that [Johnson] fired his weapon first. The State expects the evidence to show that all of the witnesses who state that [Hubbard] shot his weapon first are related either by blood or by being in some sort of relationship, e.g. boyfriend/girlfriend."

(Johnson's petition, Ex. D) (emphasis added). The evidence did show the witnesses' potential for bias, as the parties' joint stipulation included information about the witnesses' relationships with Johnson. (Johnson's petition, Ex. K.)

Further, the joint stipulation included information about physical evidence recovered from the scene. (Johnson's petition, Ex. K.) Investigators recovered shell casings from Michael Robinson's 9mm pistol and from the .40 caliber pistol believed to have been wielded by Johnson. Hubbard was killed by a bullet fired by a .40 caliber pistol.

Investigators recovered a .25 caliber pistol from Hubbard's person, yet no .25 caliber casings were recovered. One view of the evidence would be that shell casings from Hubbard's weapon were simply too difficult to find, while another would be that no shell casings were found because, contrary to the witnesses' statements, Hubbard did not fire his weapon.

The circuit court was not obligated to accept the expected testimony, drawn from the witnesses' statements to investigators, at face value. That court was free to examine the stipulated testimony and to consider the witnesses' potential for bias as well as the physical evidence, which could be viewed as casting doubt on the witnesses' stipulated testimony. If the circuit court believed that Hubbard did not fire his weapon, then the finding that Johnson was the initial aggressor would be perfectly consistent with the law.

"For the writ of mandamus to issue "[t]he right sought to be enforced by mandamus must be clear and certain with no reasonable basis for controversy about the right to relief. The writ will not issue where the right in question is doubtful." Goolsby v. Green, 431 So. 2d 955, 958 (Ala. 1983) (quoting Ex parte Dorsey Trailers, Inc., 397 So. 2d 98, 102 (Ala. 1981))."

Ex parte Vance, 900 So. 2d 394, 398-99 (Ala. 2004). Because there was a view of the evidence consistent with Judge Hardwick's denial of

immunity, Johnson has not demonstrated a clear right to mandamus relief.

Conclusion

Accordingly, Johnson's petition for a writ of mandamus is due to be denied. Even though Johnson did not meet his burden of proving that he was entitled to immunity at the pretrial hearing, he may pursue the defense of self-defense at trial. See § 13A-3-24(d)(4), Ala. Code 1975.

PETITION DENIED.

Windom, P.J., and Kellum and McCool, JJ., concur. Cole, J., dissents, with opinion, which Minor, J., joins.

COLE, Judge, dissenting.

Kendall Tewayne Johnson has petitioned this Court to issue a writ of mandamus ordering the Montgomery Circuit Court to grant his motion for pretrial immunity under § 13A-3-23(d), Ala. Code 1975. Johnson argues that he is entitled to mandamus relief because, he says, the circuit court's decision that he is not immune from criminal prosecution under § 13A-3-23(d), Ala. Code 1975, is based on a misunderstanding of Alabama law and is not supported by the facts as stipulated to by the parties. The State argues that Johnson is not entitled to mandamus relief because, it says, Johnson did not satisfy his burden of proving that he is entitled to immunity under § 13A-3-23(d). Because I believe the writ should be granted, I respectfully dissent.

Standard of Review

The main opinion correctly outlines the facts and procedural history of this case. Although the main opinion also states when a writ of mandamus will issue and the petitioner's burden of proof, the majority does not give the standard that this Court should follow in reviewing the evidence presented to the trial court. Typically, a motion for pretrial immunity under § 13A-3-23(d) is ruled on after a circuit court conducts a

pretrial evidentiary hearing at which live testimony is presented. Thus, usually, this Court applies the "[t]he ore tenus rule ... to review ... a trial court's decision regarding a motion filed pursuant to § 13A-3-23(d)." Ex parte Smith, 282 So. 3d 831, 837 (Ala. 2019) (citing State v. Watson, 221 So. 3d 497 (Ala. Crim. App. 2016)). In my opinion, because Johnson and the State asked the circuit court to resolve the question whether Johnson was immune from criminal prosecution under § 13A-3-23(d) based on a joint stipulation of fact, our standard of review in this case is de novo.

"'[W]here there are no disputed facts and where the judgment is based entirely upon documentary evidence, [appellate] review is de novo.' E.B. Invs., L.L.C. v. Pavilion Dev., L.L.C., 212 So.3d 149, 162 (Ala. 2016). See also McCulloch v. Roberts, 292 Ala. 451, 454, 296 So. 2d 163, 164 (1974) (noting that, when the trial court does not take oral testimony, no favorable presumption applies to the resulting judgment; '[t]his is in effect the negative expression of the ore tenus rule'); Body Max Fitness Ctr. v. Sheffield, 775 So.2d 836, 836 (Ala. Civ. App. 2000) ('This case was submitted to the trial court on an agreed statement of facts. Thus, no presumption of correctness attaches to the trial court's findings.')."

Great Bend Yacht Club, Inc. v. MacLeod, 280 So. 3d 413, 414-15 (Ala. Civ. App. 2019). Thus, contrary to the main opinion, I believe it is appropriate to review the circuit court's application of the law to the stipulated facts in this case de novo, according the circuit court's findings no presumption of correctness.

Discussion

In addition to correctly summarizing the arguments presented on appeal by Johnson and the State, the main opinion accurately outlines Alabama's self-defense statute, § 13A-3-23, Ala. Code 1975.

The circuit court found that Johnson failed to satisfy his burden of proving that he is immune from criminal prosecution for three reasons:

(1) Johnson "was one member of a group that initiated the aggression" against Hubbard on May 12, 2019, and, thus, his actions ran afoul of § 13A-3-23(c).

(2) Johnson "was unlawfully in possession of a pistol; thus, he was required to retreat from the altercation" as is required by § 13A-3-23(b).

(3) Johnson's being "armed with a pistol and [having] no valid permit to possess it is prima facie evidence of his intent to commit the murder."

(Johnson's petition, Ex. P.)

Before addressing the circuit court's conclusions, there appears to be no dispute that everyone who witnessed the first shot agreed that Hubbard fired his weapon first, that Johnson returned fire at Hubbard, and that Johnson killed Hubbard. Thus, it seems difficult to dispute that Johnson's shooting Hubbard, on its face, falls within the parameters of § 13A-3-23(a)(1), Ala. Code 1975, and that Johnson would be justified in

the use of deadly physical force as long as he satisfies the remaining requirements of § 13A-3-23.

But as to the question of "who shot first," the main opinion agrees with the State's argument to this Court that the witnesses who told law enforcement that Hubbard shot first are biased, even though the circuit court made no such credibility determination in its order denying Johnson's motion for immunity. See Brooks v. State, 929 So. 2d 491, 495-96 (Ala. Crim. App. 2005) (recognizing that ""the question of the credibility of the witnesses is within the sound discretion of the trier of fact""") (quoting Calhoun v. State, 460 So. 2d 268, 269-70 (Ala. Crim. App. 1984), quoting in turn State v. Klar, 400 So. 2d 610, 613 (La. 1981)). Even so, the evidence agreed upon by Johnson and the State was undisputed that everyone who witnessed the first shot agreed that Hubbard fired first. Thus, the credibility of the witnesses was not at issue.

The main opinion disagrees and says that "[t]he credibility of the witnesses was plainly placed before" the circuit court. ___ So. 3d at ___. The main opinion further concludes that, because credibility was a question before the circuit court, the circuit court was free to determine

that the witnesses were biased and free to determine that, because law enforcement did not find a .25 caliber shell casing, which would have come from Hubbard's gun, at the scene, the witnesses were lying about Hubbard's having shot first. I find this view to be problematic for numerous reasons.

First, the standard of review discussed previously is of vital importance. Under ordinary circumstances, this Court would give the circuit court the freedom to make the credibility determinations that the main opinion says we should recognize here. But this is not an ordinary situation. As set out above, the State and Johnson stipulated to the facts that would be presented at an immunity hearing and decided to forgo presenting live testimony to the circuit court. When the parties decided to do that, this Court no longer applies an ore tenus standard of review to the circuit court's judgment. Rather, when a circuit court makes its decision based on reading documents placed before it by the parties, the circuit court is "in no better position than [is] an appellate court to make the determination it made" and we must apply a de novo standard of review. Ex parte Hinton, 172 So. 3d 348, 352-53 (Ala. 2012). So, whether the circuit court could have made the credibility determinations that the

main opinion says it did, those determinations are of no consequence to this Court's review of the circuit court's reading of the jointly stipulated facts here.

Second, assuming that we should defer to the circuit court's alleged credibility determinations about disregarding witness testimony that Hubbard shot first, the majority's view still fails because such credibility determinations are not supported by the record. Indeed, Hubbard's step-daughter, Dekerria Johnson, said that Hubbard shot first. Furthermore, the alleged "bias" of the witnesses that was highlighted by the State applies with equal force to Hubbard. The record reflects that the only witnesses who did not see who shot first were "biased" to make that assertion in Hubbard's favor. For example, both Hubbard's friend (Michael Robinson) -- who also shot at Johnson -- and his daughter (Shaliya Brown) told law enforcement that they did not see who shot first. Regardless, there was no stipulated testimony disputing the fact that Hubbard shot first. Additionally, although the State noted below that the witnesses who said Hubbard shot first were allegedly biased, there was no stipulated evidence that they were, in fact, biased. See State v. \$223,205.86, 203 So. 3d 816, 825 (Ala. 2016) ("The arguments of counsel

are not evidence.' Deng v. Scroggins, 169 So. 3d 1015, 1028 (Ala. 2014).").

Although the witnesses' relationships with Johnson and Hubbard could cause them to be biased, the possibility of bias is not evidence of bias.

What is more, the "physical evidence" does not dispute the testimony that Hubbard shot first. The main opinion says that because law enforcement did not find a .25 caliber shell casing at the scene, the circuit court could have concluded that, "contrary to the witness statements, Hubbard did not fire his weapon." But law enforcement's failure to find a shell casing does not directly conflict with the witness's statements that Hubbard shot. Rather, law enforcement's failure to find a shell casing merely proves that they failed to find a shell casing. Furthermore, the record does not reflect whether the gun used by Hubbard was a type that was capable of ejecting shell casings. But, assuming that the majority is correct that the circuit court could have concluded that Hubbard did not shoot first because no shell casing matching his weapon was found, there is still a problem with the main opinion's conclusion that the evidence was undisputed that Hubbard both possessed a firearm and that he pointed it first at Brown and Johnson. Hubbard's physical act of pointing a firearm at someone (even without

firing a shot) is enough to cause a person to "reasonably believe[] that another is ... [u]sing or about to use unlawful deadly physical force." § 13A-3-23(a)(1), Ala. Code 1975 (emphasis added). In short, the undisputed testimony that the State stipulated to showed that Hubbard was the first person to present a firearm during the events that occurred that afternoon.

With this in mind, I now address the circuit court's conclusions concerning the reasons it found that Johnson was not entitled to immunity -- i.e., Johnson's being the initial aggressor, his duty to retreat, and his possession of a firearm without a license being prima facie evidence of intent to murder.

I. Initial Aggressor

First, the circuit court concluded that Johnson was not entitled to immunity because either Johnson or a member of his group "initiated the aggression" and thus his actions ran afoul of § 13A-3-23(c). As set out in the main opinion, Alabama's self-defense statute provides that a person who is an "initial aggressor" is not justified in using deadly physical force unless that person "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." § 13A-3-23(c)(2), Ala. Code 1975.

Although Alabama's self-defense statute does not define the phrase "initial aggressor," this Court has explained that the word "[a]ggressor" is defined as 'one that commits or practices aggression,' Merriam-Webster's Collegiate Dictionary 25 (11th ed. 2003), and 'aggression' is defined as 'a forceful action or procedure (as an unprovoked attack) esp. when intended to dominate or master.' Id. at 24." Gaines v. State, 137 So. 3d 357, 361 (Ala. Crim. App. 2013). In other words, an "initial aggressor" is someone who is the first to engage in a forceful or unprovoked act against another person. The phrase "initial aggressor" connotes that a person did something more than merely start an argument or controversy with another person. Alabama's self-defense statute "clearly indicates that self-defense is not available to the initial aggressor, but does not limit the defense to one who might have started an argument or controversy." Id. at 361.

Here, the undisputed evidence shows that neither Johnson nor Brown were "initial aggressors," as that phrase is used in § 13A-3-23(c)(2), so as to preclude Johnson from being granted immunity from

prosecution. Indeed, the agreed-upon evidence established that, on May 12, 2019, Latoya Brown got into an argument with her daughter, Shaliya Brown, at Hubbard's house on Capri Street. (Johnson's petition, Ex. K.) After the argument and while Latoya was outside the Capri Street house, Hubbard, who was "angry and drunk" and armed with a "little gun," got into an argument with Latoya and he told her that he was going to kill her. (Id.) Thereafter, Latoya left the Capri Street house and telephoned her son, Brown, and told him about the argument she had with Shaliya and Hubbard. (Johnson's petition, Ex. M.) Hubbard then went inside the Capri Street house, retrieved "the big gun," and, thereafter, walked across the street to Michael Robinson's house. (Id.)

Brown telephoned his sister, Dekerria, and told her that he was coming over to the Capri Street house to talk to Shaliya about the argument she had with their mother. (Johnson's petition, Ex. K.) A short time later, Brown and Johnson, along with Brown's girlfriend (Ventrelya Smith), and her child drove to the Capri Street house in Brown's vehicle. (Id.) When they arrived at the Capri Street house, Brown spoke with Dekerria, but Shaliya would not come outside. (Id.) At that point, Hubbard, who was intoxicated, walked over from Robinson's house to

confront Brown. (Id.) Brown asked Hubbard if Hubbard had threatened to kill Latoya, and Hubbard admitted that he did. (Id.) Hubbard then told Brown to leave the property. (Id.) As Brown turned to leave, Hubbard shot in Brown's direction. (Id.)

Although it is clear that Brown and Johnson went to the Capri Street house to speak with Shaliya (or even possibly to start an argument with her) about the fight she had with Latoya, there was no evidence indicating that either Brown or Johnson was an "initial aggressor" as that term is used in § 13A-3-23(c)(2), Ala. Code 1975, so as to preclude Johnson from being granted immunity under § 13A-3-23(d). See, e.g., Gaines, 137 So. 3d at 361 (holding that a jury instruction that equated "creating the controversy" with being an "initial aggressor" was erroneous). Rather, the agreed-upon evidence established that it was Hubbard, and not Brown or Johnson, who engaged in a forceful and unprovoked act when he pulled out a firearm and shot in Brown's direction when Brown had only tried to speak (or argue) with Shaliya and had only asked Hubbard if he had threatened to kill Latoya. While Brown talked to Hubbard, Johnson remained in or at the car and was not part of the conversation. Unlike Johnson or Brown in this case, ""[a]n

initial aggressor is one who first attacks or threatens to attack another.'" State v. Walton, 166 S.W.3d 95, 100 (Mo. App. S.D. 2005) (quoting State v. Hughes, 84 S.W.3d 176, 179 (Mo. App. S.D. 2002))." State v. Anthony, 319 S.W.3d 524, 530 (Mo. Ct. App. 2010).

Because the agreed-upon evidence showed that neither Brown nor Johnson was an "initial aggressor," the circuit court's finding that Johnson was not entitled to immunity because he "was one member of a group that initiated the aggression" against Hubbard is incorrect, and it was not a proper basis on which the circuit court could deny Johnson immunity under § 13A-3-23(d). In other words, the undisputed evidence showed that neither Johnson nor Brown was the initial aggressor, nor was either engaged in any behavior under § 13A-3-23(c) that would render Johnson's actions unjustified.

II. Duty to Retreat

Next, I turn to the circuit court's conclusion that Johnson's actions ran afoul of § 13A-3-23(b) because he had a duty to retreat. The circuit court held that Johnson was not entitled to immunity because he "was unlawfully in possession of a pistol; thus, he was required to retreat from the altercation." (Johnson's petition, Ex. P.) In his petition, Johnson

concedes that he was engaged in an unlawful activity and that he had a duty to retreat. But Johnson argues that the agreed-upon evidence shows that he complied with that duty when "Johnson only returned fire in defense of himself and Brown and both attempted to safely retreat." (Johnson's petition, pp. 22-23.) Although the circuit court concluded that Johnson was engaged in an unlawful activity and that he had a duty to retreat, the circuit court made no express finding whether Johnson complied with that duty.

As explained above, a person who is justified in using force under § 13A-3-23(a), but who is either engaged in unlawful activity or who is in any place where he or she does not have the right to be, cannot "stand their ground." Rather, that person must comply with the common-law duty to retreat before acting in self-defense. See Malone, 221 So. 3d at 1156 ("[A]n accused who claims to have been justified in using deadly force under § 13A-3-23 must have complied with the common-law rules regarding the duty to retreat unless he or she meets the requirements of § 13A-3-23(b)."). Chief Justice Parker has explained the common-law duty to retreat as follows:

"Alabama's common-law rule has long been that '[t]he right to kill in self-defense does not arise until the defendant

has offered or attempted to retreat, or to decline the offered combat, provided, however, there be open to him a reasonably safe mode, and that retreat would not increase his danger.' Oldacre v. State, 196 Ala. 690, 693, 72 So. 303, 304 (1916) (emphasis added). Under Alabama's common law, before a person had the right to use deadly force to defend himself, he was required to retreat if retreat was reasonable; if the person failed to retreat he was not entitled to use deadly force. Obviously, if a person has an opportunity to retreat, that opportunity to retreat exists in a moment in time prior to there no longer being an opportunity to retreat and the use of deadly force becomes justifiable to defend on[e]self."

Ex parte Fuller, 231 So. 3d 1222, 1225 n.1 (Ala. 2017) (Parker, J., dissenting). See also Hill v. State, 194 Ala. 11, 26, 69 So. 941, 947 (1915) ("The law requires retreat if it is reasonably apparent that it can be done without increasing the danger."). So, in sum, a person who is engaged in unlawful activity under § 13A-3-23(b), Ala. Code 1975, cannot act in self-defense without first retreating, but a person does not have to retreat when it cannot be done so safely or without increasing danger to that person. Here, the agreed-upon evidence showed that Johnson satisfied his common-law duty to retreat before shooting and killing Hubbard.

As explained above, Brown and Johnson, along with Ventrelya Smith and her child, drove to the Capri Street house in Brown's vehicle to confront Shaliya. (Johnson's petition, Ex. K.) While Brown was attempting to speak with Shaliya, Hubbard walked over from Michael

Robinson's house to confront Brown. (Id.) At that time, Brown asked Hubbard if Hubbard had threatened to kill Latoya; Hubbard admitted that he did. (Id.) Hubbard then told Brown to leave the property. (Id.) Brown attempted to comply, but, as he turned to leave, Hubbard shot at Brown. (Id.) Smith said that, when Hubbard started shooting at Brown, both Brown and Johnson started running away from Hubbard. (Id.) Smith said that, when Hubbard started shooting, she got into the front seat of Brown's car and drove off, leaving Brown and Johnson behind. According to Robinson, who saw the shooting and who also shot at Brown and Johnson, when Hubbard started shooting, Johnson was "backing up across the street to a neighbor's yard" and "Hubbard went into the street while shooting." (Id.) Shaliya said that when Hubbard was shooting at Johnson, Johnson was hiding behind a tree and returned fire at Hubbard. (Id.) When Hubbard collapsed in a neighbor's yard, the shooting stopped, and Brown and Johnson ran away from the Capri Street house. (Id.) Smith picked up Brown and Johnson "at a nearby street when the shooting was over." (Id.)

In sum, the agreed-upon evidence showed that Johnson retreated to a nearby yard when Hubbard began shooting, that Hubbard pursued

him, and that Johnson hid behind a tree. Thus, the evidence showed that Johnson retreated to the point where he could no longer safely retreat without putting himself in greater peril. Moreover, once Hubbard began shooting at Brown at a point where Brown could not safely retreat, Johnson could lawfully act in defense of Brown without retreating further.

Because Johnson conceded he was acting unlawfully by possessing a firearm and because the agreed-upon evidence showed that Johnson satisfied his common-law duty to retreat before he acted in self-defense, the circuit court's finding that Johnson was not entitled to immunity from prosecution because he had a duty to retreat is not a proper basis on which the circuit court could deny Johnson immunity under § 13A-3-23(d).

III. Possession of a Pistol without a Permit as Prima Facie Evidence of Intent to Murder

Finally, I turn to the circuit court's conclusion that Johnson was not entitled to immunity because, it reasoned, Johnson was "armed with a pistol and [that having] no valid permit to possess it is prima facie evidence of his intent to commit the murder." (Johnson's petition, Ex. P.)

The circuit court's denial of Johnson's request for immunity under § 13A-3-23(d) on this basis is incorrect.

Section 13A-11-71, Ala. Code 1975, which is the statute on which the circuit court based its conclusion to deny Johnson immunity, provided, in relevant part, as follows: "In the trial of a person for committing or attempting to commit a crime of violence, the fact that he was armed with a pistol and had no license to carry the same shall be prima facie evidence of his intention to commit said crime of violence." This statute created a "mandatory presumption" that a person had the intent to carry out the charged offense. Put differently, § 13A-11-71, Ala. Code 1975, relieved the State of its obligation to prove intent when a person is armed with a pistol and has no license to carry that pistol.

Without commenting on the validity of this mandatory presumption, the statute that created it having been repealed, the presumption has no application to pretrial-immunity claims when a defendant, like Johnson, claims that he or she acted in self-defense and is immune from prosecution, and, in so admitting, concedes that he or she intended to kill the victim. See, e.g., Manuel v. State, 711 So. 2d 507, 512 (Ala. Crim. App. 1997) ("Reviewing the instruction on its face, we

find that proof of a defendant's possession of a pistol without a license is clearly insufficient to support the presumption that the defendant had the criminal intent to commit murder where self-defense has been injected as a defense."). This is because, when a person acts in self-defense and admits to killing another person, that person's intent to kill is not in issue. Rather, the only question in an immunity hearing is whether the person's actions are proper under § 13A-3-23.

Here, by admitting that he shot and killed Hubbard and by claiming that he did so while acting in self-defense, Johnson admitted that he intended to kill Hubbard. Thus, Johnson's intent to kill Hubbard was not at issue in this case and had no bearing on whether he acted properly under § 13A-3-23. Accordingly, the circuit court's finding that Johnson was not entitled to immunity under § 13A-3-23(d) because his possession of a pistol without a permit is prima facie evidence of his intent to murder Hubbard is not a proper basis on which to deny a claim of immunity under § 13A-3-23(d).

Conclusion

Because the agreed-upon evidence showed that Johnson was justified in acting in self-defense when he shot and killed Hubbard, that

Johnson was not the initial aggressor, and that Johnson complied with the common-law duty to retreat, Johnson has demonstrated that he has a clear legal right to mandamus relief in this case. Accordingly, I would grant Johnson's petition for a writ of mandamus, instruct the circuit court to set aside its order denying his motion for pretrial immunity under § 13A-3-23(d), and would direct the circuit court to issue an order granting Johnson immunity from prosecution under § 13A-3-23(d). Thus, I respectfully dissent.

Minor, J., concurs.