IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

JOHN DEROSSETT,

Petitioner,

v. Case No. 5D19-0802

STATE OF FLORIDA,

Respondent.

_____/

Opinion filed November 7, 2019

Petition for Writ of Prohibition,
Robin C. Lemonidis, Judge.

Michael Panella, of Panella Law Firm, Orlando, for Petitioner.

Ashley Moody, Attorney General, Tallahassee, and Douglas T. Squire, Assistant Attorney General, Daytona Beach, for Respondent.

LAMBERT, J.

In 1892, the Florida Supreme Court explained that

> one's home is the castle of defense for himself and his family, and that an assault upon it with an intent to injure him, or any of them, may be met in the same way as an assault upon himself, or any of them, and that he may meet the assailant at the threshold, and use the necessary force for his and their protection against the threatened invasion and harm . . . .

Wilson v. State, 11 So. 556, 561 (Fla. 1892). Under this common law "castle doctrine," a person's home was his or her ultimate sanctuary. If violently attacked there, an individual had no duty to retreat, could stand his or her ground, and could use such force, even deadly force, as necessary to avoid death or great bodily harm or to prevent the commission of a felony. *Falco v. State*, 407 So. 2d 203, 208 (Fla. 1981); *Danford v. State*, 43 So. 593, 596–97 (Fla. 1907). The applicability of these more-than-century-old principles, as now broadened and codified in Florida's present "Stand Your Ground" laws,[1] is before us today.

WHAT HAPPENED IN THIS CASE—

Petitioner, John Derossett, a sixty-five-year-old retired General Motors autoworker, owned a home in Brevard County, Florida. Derossett's adult niece, Mary Ellis, lived with him in this home. Derossett had no criminal record, worked part-time as a security guard at Port Canaveral, and lawfully possessed a concealed weapons permit. He had also apparently taken a firearms training course.

On August 20, 2015, at approximately 9:30 p.m., Ellis answered a knock on the front door. As she opened the door, a man reached inside the threshold of the house, grabbed her arm, and began pulling Ellis out of the home and onto the covered front porch. Ellis struggled to resist her apparent abduction and screamed to her uncle (Derossett) that she needed help. At this point, two other men approached to physically assist the first man in pulling Ellis off the porch of the home and into the front yard.

Derossett, having heard his niece's screams for help, hurried from his bedroom to

[1] *See* §§ 776.012, 776.013, 776.031, 776.032, 776.041, Fla. Stat. (2015).

the front porch. He was armed. One of the three men saw Derossett rapidly advancing to the front door with his firearm and announced to the other two men that a man with a gun was approaching. The three men abruptly released Ellis, pushing her towards the front door, and scattered on the front lawn. Derossett immediately came out of his front door and stood under "the canopy part of the porch."

At this point, Derossett raised his gun, called out to the men, and fired a warning shot up in the air. The three men, now at diverse points on Derossett's front yard, and likewise armed, immediately shot their respective firearms at him. Derossett fired back. In total, more than forty rounds were exchanged. Despite being fairly close to each other, because it was dark at the time, none of the four men engaged in this incident had a clear view of the others. Derossett and his niece were both struck by gunfire, as was one of the three men in Derossett's front yard, who was severely wounded in the abdomen.

DEROSSETT'S RIGHTS THAT EVENING UNDER FLORIDA'S STATUTORY "STAND YOUR GROUND" LAWS—

In 2005, the Florida Legislature enacted a number of statutes that codified and strengthened individuals' right to defend themselves and their families.[2] Section 776.013 specifically addressed the right to defend one's self and family from attack at home. At the time of the above-described incident, this statute provided, in pertinent part:

> **776.013. Home protection; use or threatened use of deadly force; presumption of fear of death or great bodily harm.**
>
> (1) A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or

[2] *See State v. Smiley*, 927 So. 2d 1000, 1001–02 (Fla. 4th DCA 2006) (recognizing that the Legislature passed Chapter 2005-27, Laws of Florida, to provide for an expanded right of self-defense under Florida law).

> herself or another when using or threatening to use 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 or threatened was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, 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 or threatens to use defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.
>
> . . . .
>
> (4) A person who unlawfully and by force enters or attempts to enter a person's dwelling, residence, or occupied vehicle is presumed to be doing so with the intent to commit an unlawful act involving force or violence.
>
> (5) As used in this section, the term:
>
> (a) "Dwelling" means a building or conveyance of any kind, including any attached porch, whether the building or conveyance is temporary or permanent, mobile or immobile, which has a roof over it, including a tent, and is designed to be occupied by people lodging therein at night.
>
> (b) "Residence" means a dwelling in which a person resides either temporarily or permanently or is visiting as an invited guest.

The plain language of the above-cited portions of section 776.013 arguably evinces that the actions taken by Derossett that evening were well within his statutory right to stand his ground. Notably, Derossett was in his dwelling with his niece, Ellis, who was also a resident there. The first man reached inside the threshold of the front door and forcibly removed Ellis from the home. The three men were then standing immediately on the attached front porch where they removed Ellis onto the yard against her will. Thus,

these men had just been in Derossett's dwelling, as that term is defined in section 776.013(5)(a), and had removed Ellis. *See id.* § 776.013(1)(a). Moreover, their collective actions in first reaching inside the threshold of the front door and forcibly removing Ellis from the home, and in then physically removing Ellis off the front porch, were presumed to have been done with the intent to commit an unlawful act involving force or violence. *See id.* § 776.013(4).

Next, under section 776.013(1)(b), Derossett, as the person using the defensive force, had reason to believe that an unlawful and forcible act had just occurred to his niece. Thus, under subparagraph (1) of this statute, Derossett was entitled to the presumption that he had a reasonable fear of imminent peril of death or great bodily harm to his niece when he first fired his warning shot as part of a rapid sequence of ongoing events beginning with the removal of Ellis from his dwelling against her will. Lastly, and not insignificantly, assuming for the sake of argument that the alleged abduction or kidnapping of Ellis had "ended" when the three men, cognizant that Derossett was quickly coming to his front door with a firearm, released her and scattered onto the front yard, Derossett had no duty to retreat. He was within his rights to use the deadly defensive force[3] that he used seconds later because the three men *had removed* his niece from the home against her will and Derossett knew or had reason to believe that this unlawful or forcible act against his niece *had occurred*. *See* § 776.013(1)(a)–(b).

[3] The firing of a warning shot into the air constitutes an act of deadly force. *See Hosnedl v. State*, 126 So. 3d 400, 404–05 (Fla. 4th DCA 2013).

SO WHY IS DEROSSETT BEING PROSECUTED?—

Although section 776.013 was seemingly written both to justify and authorize the actions Derossett took that evening based on the circumstances that he faced, he is presently being prosecuted. The State filed an information charging Derossett with one count of attempted premeditated first-degree murder of a law enforcement officer while discharging a firearm and inflicting great bodily harm and two separate counts of attempted premeditated first-degree murder of a law enforcement officer while discharging a firearm.[4]

The three men who came to Derossett's home that night were, in fact, deputy sheriffs with the Brevard County Sheriff's Office Special Investigations Unit conducting a "sting" operation directed at Ellis, whom they believed had been performing acts of prostitution in Derossett's home. They arrived at the home in unmarked vehicles and parked on the street away from the home.[5] The deputy who first approached the home posed as Ellis's customer and was in plain clothes. He had made arrangements with Ellis earlier that day to meet and engage in a sexual act with her for money. This deputy was the individual whom Ellis first greeted at the door as her anticipated customer and who then entered the home by grabbing Ellis by the arm inside the threshold and pulling her

[4] If convicted as charged, Derossett faces sentences of life in prison. *See* §§ 782.04(1)(a)1., 782.065, Fla. Stat. (2015).

[5] The deputies would later testify that it was extremely rare for this type of undercover operation to be conducted at a home due to concerns for officer safety. However, because Ellis had been arrested for prostitution approximately one month earlier without incident, the deputy in charge of the operation was not as concerned that the situation would turn violent.

out of the dwelling.[6] The other two deputies were not in uniform and were the individuals who assisted the first deputy in attempting to subdue the now-screaming Ellis in order to make the warrantless, late-night arrest for solicitation of prostitution.[7] As previously indicated, the three deputies removed Ellis from the porch and into the front yard, but scattered into the yard when one of the deputies noticed that Derossett was rapidly approaching with his gun. The consistent testimony at the later evidentiary hearing from Ellis, Derossett, and the three deputies was that Derossett's warning shot and the immediate exchange of gunfire between Derossett and the three deputies thereafter essentially took place within seconds after the deputies had scattered onto the lawn.

Although Derossett was at his home, he is being prosecuted because a person's authority to stand his or her ground at home with defensive, deadly force under section 776.013 is not absolute. Significantly, the presumptions contained in section 776.013(1) in favor of a person, such as Derossett, using deadly force at his dwelling against a person or persons who had just forcibly entered and removed a family member from the dwelling do not apply under subparagraph (2) of this statute if, for among other reasons:

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[6] *See Kyllo v. United States*, 533 U.S. 27, 37 (2001) (recognizing that under the Fourth Amendment to the United States Constitution, a law enforcement officer's whole body does not have to be physically inside the threshold of a dwelling to constitute entrance—any part of the body that crosses the entrance of the home is an entry); *Steagald v. United States*, 451 U.S. 204, 212 (1981) ("In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980))).

[7] Section 796.07(4), Florida Statutes (2015), provides that solicitation of prostitution is a misdemeanor, unless it is for a third or subsequent violation, at which point it becomes a third-degree felony.

> (c) The person who uses or threatens to use defensive force is engaged in a criminal activity or is using the dwelling, residence, or occupied vehicle to further a criminal activity; or
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> (d) The person against whom the defensive force is used or threatened is a law enforcement officer, as defined in s. 943.10(14), who enters or attempts to enter a dwelling, residence, or vehicle 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 or threatening to use force knew or reasonably should have known that the person entering or attempting to enter was a law enforcement officer.

See id. § 776.013(2). Stated more plainly, Derossett was not justified in using deadly force against the three men whom he believed had just seconds earlier forcibly abducted his niece from the home if he knew or should have known them to be law enforcement officers. Nor was he entitled to use such deadly force if he was using his home to further his niece's prostitution activity.

THE STAND YOUR GROUND MOTION AND HEARING, AND THE TRIAL COURT'S ORDER—

After taking a number of depositions, Derossett filed what is commonly referred to as a Stand Your Ground motion under Florida Rule of Criminal Procedure 3.190(b) and section 776.032, Florida Statutes, to dismiss the information filed and to grant him immunity from further prosecution in this case. In pertinent part, this statute states:

> A person who uses or threatens to use force as permitted in s. 776.012, s. 776.013, or s. 776.031 is justified in such conduct and is immune from criminal prosecution . . . for the use or threatened use of such force . . . , unless the person against whom force was used or threatened 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 or threatening to use 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.

§ 776.032(1), Fla. Stat. (2015).

In other words, if Derossett's use of deadly force was done in compliance with section 776.013, Florida Statutes, then, under section 776.032(1), he is not criminally liable for his actions that night. The trial court held a five-day evidentiary hearing on Derossett's motion, with Derossett, Ellis, and the three deputies, along with many other law enforcement officers, testifying at this hearing. Derossett's position in his motion and his testimony at the hearing were clear: when he fired the first warning shot and thereafter fired back at the individuals who were shooting at him, he had no idea that the men were law enforcement officers.[8]

Preliminarily, Derossett readily concedes that a person is not entitled to immunity from prosecution under section 776.032(1) for knowingly shooting at law enforcement officers. Derossett testified that it was very dark when the shooting occurred[9] and that neither prior to his warning shot nor after the deputies started shooting at him did any of them ever identify themselves to him as law enforcement officers.[10] Ironically, one of

[8] As an aside, Derossett's blood was subsequently tested and analyzed to determine whether he was under the influence of alcohol or drugs at the time of the shooting. All test results were negative.

[9] The testimony from the three deputies and numerous other later-arriving law enforcement officers on the scene consistently confirmed how dark it was at the house that evening.

[10] Derossett does not suggest that the deputies were acting outside of their official duties as law enforcement officers. His testimony was that he did not know that they were law enforcement officers at the time.

Derossett's neighbors is a higher-ranking law enforcement officer with the Brevard County Sheriff's Office who came outside from his own house after he heard the gunfire. After the shooting had ended, this neighbor was the individual who took Derossett to the ground after Derossett and his niece came out of the home to surrender to law enforcement. This puzzled Derossett, as he repeatedly asked his neighbor why he was taking such action when there were three individuals who were "trying to kidnap his niece." Thereafter, during the trip to the hospital to treat his injuries, Derossett pointedly told one of the deputies in the ambulance, "I shot in self-defense. Who would shoot a cop?" Finally, at least two of the three deputies confirmed in their respective testimony at the hearing that they had not announced to Derossett that they were law enforcement officers. The two also testified that they did not hear the third deputy make such an announcement, if he did at all.

In the written order now before us, the trial court held that Derossett was not entitled to the statutory presumption under section 776.013 of being in reasonable fear of death or great bodily harm at the time he fired his warning shot because the deputies "had not entered [Derossett's] home, nor were they in the process of doing so" and they had not "removed Ms. Ellis from her home nor were they in the process of attempting to do so when [Derossett] entered the picture with his firearm." Relying upon these findings, as well as the facts that the three deputies had "scattered" onto the front yard prior to Derossett firing his warning shot into the air and that Derossett, in a post-arrest statement to law enforcement, said that his niece was inside the home when he first shot,[11] the court

[11] The statement made by Derossett that was apparently relied upon by the trial court in making this finding was fairly equivocal. Derossett was asked by a law

denied the motion, finding that Derossett had "used deadly force in response to a non-existent threat."

As a result, the court separately determined in its order that it was unnecessary to address the exceptions under section 776.013(2)(c) or (d) as to whether, at the time of the shooting, Derossett had been using the dwelling to further a criminal activity or if he knew or reasonably should have known that the three men that he shot at that evening were law enforcement officers.

THE INSTANT PROCEEDING/STANDARD OF REVIEW—

Presently before this court is Derossett's petition for writ of prohibition challenging the trial court's denial of his motion to dismiss and for Stand Your Ground immunity from prosecution. *See Mederos v. State*, 102 So. 3d 7, 11 (Fla. 1st DCA 2012) ("A writ of prohibition is the proper vehicle for challenging a trial court's denial of a motion to dismiss a charge made on the ground of immunity from prosecution pursuant to the Stand Your Ground Law." (citing *Hair v. State*, 17 So. 3d 804, 806 (Fla. 1st DCA 2009))). Prohibition is the appropriate remedy to address the trial court's denial of such a motion on the merits

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enforcement agent where Ellis had gone once she had been released by the three men. He responded:

> Derossett: You know, I --- she went inside the house I believe.
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> Agent: Okay.
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> Derossett: But then I believe she came back out.

In contrast, Ellis testified that she was outside the home when Derossett fired the warning shot. None of the three deputies testified to seeing Ellis in the house when the shooting started.

because the trial court lacks the authority to proceed against an immunized defendant. *See Jefferson v. State*, 264 So. 3d 1019, 1023 (Fla. 2d DCA 2018) (citing *Little v. State*, 111 So. 3d 214, 216 n.1 (Fla. 2d DCA 2013)).

Our standard of review of a trial court's denial of a pretrial motion claiming immunity from prosecution under the Stand Your Ground statutes is the same as that which is applied to the denial of a motion to suppress. *Mobley v. State*, 132 So. 3d 1160, 1161 (Fla. 3d DCA 2014) (citing *Mederos*, 102 So. 3d at 11). The trial court's legal conclusions are reviewed de novo, while its factual findings are "presumed correct and can be reversed only if they are not supported by competent substantial evidence." *Id.* at 1162 (quoting *State v. Vino*, 100 So. 3d 716, 719 (Fla. 3d DCA 2012)).

ANALYSIS—

For the following reasons, we conclude that certain factual findings made by the court in its order were not supported by competent substantial evidence and that its legal conclusions were erroneous.

First, the court's findings that the deputies had neither entered the home nor removed Ellis from the home were not supported by any evidence. The testimony from Ellis and the deputies at the hearing conclusively showed that the first deputy reached into the home and pulled Ellis out and that the deputies thereafter physically engaged with the now-screaming and agitated Ellis on the covered front porch to eventually remove her to the front lawn within seconds of Derossett coming onto his porch with a firearm. No evidence was presented at the hearing that either refutes this sequence of events or suggests otherwise. Therefore, under section 776.013(5)(a) and (b), and directly contrary

to the trial court's factual findings, these actions of the deputies did constitute an entry into Derossett's dwelling and a removal of Ellis from it.

Second, these unsupported factual findings led the trial court to its legal conclusion that Derossett was not entitled to the statutory presumption under section 776.013(1) of having a reasonable fear of imminent peril of death or great bodily harm to his niece at the time he fired the warning shot. The trial court essentially determined that the imminent threat of Ellis being abducted or kidnapped had dissipated because Ellis and the deputies testified that the deputies had released her and pushed her towards the front door just prior to scattering onto the front yard. Thus, the court found that Derossett's firing of his warning shot at that precise moment after the deputies had scattered was "completely unprovoked" and, therefore, "unjustified."

We conclude that the court's apparent interpretation of subsections 776.013(1)(a) and (b) does not comport with the statute's plain language. The statute directs a court to presume that a person held a reasonable fear of imminent peril of death or great bodily harm to himself, herself, or another when using deadly force against a person if, among other things, that person had just removed another from the dwelling and the person using the deadly force knew that the abduction had occurred. Here, the three men clearly *had just removed* Derossett's niece against her will from his dwelling. Derossett, as the person using the defensive deadly force, knew that this apparently unlawful and forcible act (his niece's abduction) *had just occurred*. Thus, under these circumstances, Derossett was statutorily entitled to the presumption of having held a reasonable fear of imminent peril of death or great bodily harm to his niece at the time that he used the

defensive deadly force.[12] The trial court's conclusion that Derossett was not entitled to this presumption was incorrect.

The undisputed, rapid events that happened and were happening at Derossett's home that night did not occur in a vacuum. There was no other evidence presented at this hearing other than that the forcible taking of Ellis from the home *had just occurred*, and that Derossett knew, or at the very least had reason to know, that it *had just occurred*. Accordingly, we hold that the trial court's factual findings were not supported by competent substantial evidence and its legal conclusion was inconsistent with the plain language of the statute. However, for reasons more fully discussed below, we presently withhold the issuance of a writ of prohibition and relinquish jurisdiction to the trial court with directions that the court specifically address at a subsequent hearing whether either of the two exceptions under section 776.013(2)(c) or (d), Florida Statutes (2015), apply to preclude Derossett from being entitled to immunity from prosecution under section 776.032(1) for his otherwise justified use of deadly force.[13]

RETROACTIVITY OF SECTION 776.032(4), FLORIDA STATUTES—

Lastly, and pertinent to the subsequent hearing that we have now ordered, we

[12] Because the events in this case happened within a matter of seconds, and the apparent assailants were still located on the property not far from the front door, we find it unnecessary to address how long after the removal of an individual against his or her will from a dwelling the person using defensive force may be presumed to have held a reasonable fear of imminent peril of death or great bodily harm under section 776.013(1).

[13] Contrary to one of Derossett's assertions here, the trial court did not already find that he was unaware that the three men at his home that night were law enforcement officers. Rather, the court wrote in its order that "for purposes of this [immunity] hearing, the court will take this statement at face value." The trial court found in its order that it was unnecessary to address whether Derossett knew or reasonably should have known that these men were law enforcement officers.

discuss the retroactive application of the 2017 amendment to section 776.032, Florida Statutes. The Florida Legislature amended this statute effective June 9, 2017, to provide that:

> (4) In a criminal prosecution, once a prima facie claim of self-defense immunity from criminal prosecution has been raised by the defendant at a pretrial immunity hearing, the burden of proof by clear and convincing evidence is on the party seeking to overcome the immunity from criminal prosecution provided in subsection (1).

Put differently, once a defendant raises a prima facie claim of self-defense immunity under this statute, the State bears the burden at the pretrial immunity or Stand Your Ground hearing of proving, by clear and convincing evidence, why the defendant is not entitled to immunity from further prosecution.

The incident at Derossett's home that led to the instant prosecution occurred on August 20, 2015, which predates the 2017 amendment to section 776.032 that added the aforementioned sub-paragraph (4). The evidentiary hearing on Derossett's Stand Your Ground motion for immunity from prosecution did not take place until August 2018, after this statutory amendment. At the time of this hearing, two of our sister courts had ruled that section 776.032(4) applied prospectively only; thus, for immunity claims under the statute that had occurred prior to June 9, 2017, the defendant continued to bear the burden of establishing his or her entitlement to immunity under the preponderance of the evidence standard as previously determined by the Florida Supreme Court in *Bretherick v. State*, 170 So. 3d 766, 779 (Fla. 2015). *See Hight v. State*, 253 So. 3d 1137, 1143 (Fla. 4th DCA 2018); *Love v. State*, 247 So. 3d 609, 612–13 (Fla. 3d DCA 2018). Our other two sister courts had held otherwise, concluding that section 776.032(4) applied retroactively. *See Commander v. State*, 246 So. 3d 1303, 1303–04 (Fla. 1st DCA 2018);

Martin v. State, 43 Fla. L. Weekly D1016 (Fla. 2d DCA May 4, 2018).[14]

Shortly after the trial court held the evidentiary hearing in this case and issued its order now under review, our court aligned itself with the First and Second District Courts, ruling that the amendment to section 776.032 was to be applied retroactively in pending cases. *See Fuller v. State*, 257 So. 3d 521, 537 (Fla. 5th DCA 2018). To the trial court's credit, while it believed that the statutory amendment did not apply retroactively, it recognized the split of authority on this issue and that our court had not yet ruled. To that end, it stated in its order that "in an abundance of caution," it would evaluate Derossett's motion "pursuant to both versions of the statute." Despite this good intention, it appears that the court failed to do this.

Under section 776.032(4), Derossett's sole burden at the pretrial immunity hearing was simply to *raise a prima facie claim* of self-defense immunity. The Second District Court has recently explained that, under this statute, a prima facie claim of immunity is "an assertion that, at first glance, is sufficient to establish a fact or right but is yet to be *disproved* or rebutted by someone." *Jefferson*, 264 So. 3d at 1027. Further, the language in this statute requiring that the self-defense immunity claim be "raised" by the defendant merely requires the defendant "[t]o bring up for discussion or consideration; to introduce or put forward." *Id.* (quoting *Raise*, Black's Law Dictionary (10th ed. 2014)). In other words, Derossett was not required to prove his immunity claim at the Stand Your Ground hearing. We conclude that Derossett's motion to dismiss, together with the numerous deposition transcripts that he filed in support of the motion, easily met the requirements

[14] The Florida Supreme Court has granted review in *Love* to determine whether this statute is to be applied retroactively. *See Love v. State*, No. SC18-747, 2018 WL 3147946 (Fla. June 26, 2018). The court has not yet ruled.

under section 776.032(4) of raising a facially sufficient prima facie claim of self-defense immunity.

The burden was on the State to proceed first at the hearing and prove by clear and convincing evidence that Derossett was not entitled to immunity. *Martin*, 43 Fla. L. Weekly at D1016. Derossett properly raised the argument at the hearing that the State had the burden of producing evidence to negate his self-defense immunity claim. However, the trial court elected to place the burden on Derossett to produce evidence first at the hearing in support of his motion.[15] This flaw permeated the hearing. As we noted in *Fuller*, "the issue of who bears the burden of proof may well be significant where the case is an extremely close one, or where only limited evidence is presented for the trial court's consideration," 257 So. 3d at 539 (quoting *Bretherick v. State*, 135 So. 3d 337, 341 (Fla. 5th DCA 2013), *aff'd*, 170 So. 3d 766 (Fla. 2015)), because the burden of proof at an immunity hearing "is an aspect of procedure that carries a profound influence over the tenor, tone, and tactics in a legal proceeding." *Id.* (quoting *Martin*, 43 Fla. L. Weekly at D1017); *see also Lavine v. Milne*, 424 U.S. 577, 585 (1976) ("Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application.").

That the tenor and tone of this hearing was affected by the shifting of the burden of proof is arguably reflected in the trial court's written order. The court found that Derossett failed to show by a preponderance of the evidence his entitlement to self-

[15] In defense of the trial court, at the time of the hearing our court had not yet released the opinion in *Fuller*. Faced with the split of authority from our sister courts, the trial court elected to follow the decisions from the Third and Fourth District Courts, which it was entitled to do.

defense immunity, which, under *Fuller*, was not his burden to establish. It made no separate finding and, for that matter, did not mention in its order whether the State had proved by clear and convincing evidence[16] that Derossett was not entitled to immunity under section 776.032(1). *Cf. Mayers v. State*, 43 Fla. L. Weekly D2800 (Fla. 1st DCA Dec. 17, 2018) (granting writ of prohibition where the trial court denied immunity to the defendant following a hearing when applying section 776.032(4) prospectively but separately determining in its order that, had the burden of proof been on the State, it failed to prove by clear and convincing evidence that the defendant was not entitled to immunity).

The trial court also separately found that Derossett failed to state a prima facie claim of immunity. This was erroneous for two reasons. First, after Derossett had presented his evidence for self-defense immunity at the hearing, the trial court in fact found that he had made a prima facie claim for immunity. The State then put on evidence at the hearing to rebut the claim. If Derossett had failed to present a sufficient basis for immunity, the trial court arguably would have denied his motion without the need to receive and consider evidence from the State. Second, as we have previously

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[16] Clear and convincing evidence is an exacting standard that

> requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Acevedo v. State, 787 So. 2d 127, 130 (Fla. 3d DCA 2001) (quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

determined, Derossett's motion and the supporting pretrial evidence and deposition transcripts filed sufficiently raised a prima facie claim of self-defense immunity.

Accordingly, because the trial court did not apply the correct burden of proof, under *Fuller*, Derossett is entitled to a new Stand Your Ground evidentiary hearing. *See* 257 So. 3d at 539. As previously indicated, we have relinquished jurisdiction to the trial court to hold this hearing, at which the court shall specifically address whether the State can establish, by clear and convincing evidence, that: (1) Derossett knew or should have known at the time that he fired his warning shot that he was shooting at law enforcement officers, or (2) Derossett was using his home to further criminal activity.[17] Ultimately, if, following the hearing, the court finds that the State has failed to meet the clear and convincing standard of proof that Derossett's actions fall under one of these exceptions under section 776.013(2)(c) and (d), then it shall enter an order granting Derossett's motion and then discharge him from the crimes charged.[18]

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[17] We are mindful that the previous evidentiary hearing on Derossett's motion lasted five days and covered more than 1500 pages of transcript, including numerous witnesses and exhibits. We therefore do not preclude the court, with the consent of the parties at the hearing, from determining on the present record whether the State, if it had been required to proceed first, produced sufficient evidence that clearly and convincingly showed that, under section 776.013(2)(c) and (d) at the time of the shooting, Derossett was using his dwelling in furtherance of a criminal activity or knew or should have known that these three men were law enforcement officers. If the parties do not consent or the trial court is unable to make this determination simply from the record, then, under *Fuller*, it shall receive additional evidence at this hearing on these two issues.

[18] Our directive here presupposes that the Florida Supreme Court has not ruled in the interim that section 776.032(4) is to have prospective effect only. If the court does hold that section 776.032(4) is to be only applied prospectively, then a new evidentiary hearing would not be required; but the trial court would still be required to address in a written order whether Derossett showed by a preponderance of the evidence that under section 776.013(2)(c) and (d), he was not using his dwelling to further a criminal activity and he did not know or reasonably should have known that the men who entered his dwelling that evening were law enforcement officers. Under this scenario, if Derossett

JURISDICTION RELINQUISHED for the trial court to hold a hearing consistent with this opinion. The court shall issue its order within sixty days of this opinion and contemporaneously transmit its order to this court.

EVANDER, C.J., and GROSSHANS, J., concur.

meets this burden of proof on both of these exceptions, then the trial court shall grant his motion and discharge him.