IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

NICHOLAS RUDIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

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NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D15-0297

Opinion filed December 22, 2015.

Petition for Writ of Prohibition.

Matt Shirk, Public Defender, and Chris A. Clayton, Assistant Public Defender, Yulee, for Petitioner.

Pamela Jo Bondi, Attorney General, and Justin D. Chapman, Assistant Attorney General, Tallahassee, for Respondent.

MARSTILLER, J.

Nicholas Rudin petitions this court for a writ of prohibition to prevent the circuit court from conducting criminal proceedings against him on a charge of aggravated battery with a deadly weapon. He argues he is immune from prosecution under section 766.032, Florida Statutes, and the lower court erred by denying his motion to dismiss. We conclude the court ruled correctly.

Rudin used deadly force against his father—stabbed him with a knife—when, during an argument, the father swung a stick at Rudin's head. The father testified that the argument began at his home, and that during the argument, he armed himself with a stick for protection because Rudin had punched him in a previous altercation. The stick was about two inches wide and four feet long. The argument broke off when Rudin left his father's house. But as he left he ripped the canvas cover on the father's truck. Seeing this, the father, still armed with his stick, drove after Rudin down the street to the home of Jackie Sykes, Rudin's paternal grandmother. The father testified that he went there intending only to retaliate by damaging Rudin's vehicle. Before he could do so, however, Rudin started coming toward him and he swung the stick at Rudin's head to stop the approach. He testified "[Rudin's] a big kid, and he was yelling, he was very mad at the time so, you know, I didn't know what he was going to do, actually." Rudin blocked the swing, then grabbed the stick and simultaneously stabbed his father. In the process, Rudin sustained minor injuries to his left hand and wrist. Without making any specific factual findings, the trial court determined that Rudin failed to establish immunity from prosecution under section 776.032 by a preponderance of the evidence.

Florida law on the justifiable use of deadly force provides:

> A person is justified in using or threatening to use deadly force if he or she reasonably believes that using or threatening to use such force is necessary to prevent imminent death or great bodily harm to himself or herself or another or to prevent the imminent commission of a

> forcible felony. A person who uses or threatens to use deadly force in accordance with this subsection does not have a duty to retreat and has the right to stand his or her ground if the person using or threatening to use the deadly force is not engaged in a criminal activity and is in place where he or she has a right to be.

§ 776.012(2), Fla. Stat. (2014). Section 776.032 provides further that a person who uses deadly force as permitted in section 776.012 is justified in such conduct and is immune from criminal prosecution so long as the person against whom the force was used was not a law enforcement officer. § 776.032(1), Fla. Stat. (2014). When a defendant raises a claim of statutory immunity before trial, the trial court must determine whether the defendant has shown by a preponderance of the evidence that the immunity attaches. *Peterson v. State*, 983 So. 2d 27, 29 (Fla. 1st DCA 2008).

To establish he is immune from prosecution for using deadly force against his father, Rudin had to show such force was necessary (1) to prevent imminent death or great bodily harm to himself, or (2) to prevent the imminent commission of a forcible felony. We see nothing in the father's testimony to support a finding that Rudin was at risk of imminent death or great bodily harm when he stabbed his father. Indeed, the force with which the father wielded the two-inch wide, four-foot long stick was such that it only caused minor injuries to Rudin's hand and wrist. *See Smith v. State*, 969 So. 2d 452, 455 (Fla. 1st DCA 2007) (distinguishing great bodily harm from "slight, trivial, minor, or moderate harm"). Moreover, Rudin did not testify at the motion hearing, and thus, there is no evidence he thought he was in

danger of imminent death or great bodily harm.

Rudin also argues he was justified in using deadly force because father was about to commit a forcible felony—specifically, aggravated battery. *See* § 776.08, Fla. Stat. (2014) (designating aggravated battery as a forcible felony). A person commits aggravated battery when, in committing a battery, he or she (1) intentionally or knowingly causes great bodily harm, permanent disability or permanent disfigurement, or (2) uses a deadly weapon. § 784.045(1)(a), Fla. Stat. (2014). As we've said, the father caused only minor injuries to Rudin. And he testified he intended only to keep Rudin at bay when he swung the stick, not to seriously hurt his son. Thus, the evidence does not show actual or intended infliction of great bodily harm. As to whether the father's stick was a deadly weapon, an item is considered a deadly weapon for purposes of the aggravated battery statute if it is likely to cause great bodily harm when used in the ordinary manner contemplated by its design and construction or because of the way it is used during a crime. *Smith*, 969 So. 2d 454-55. "Whether or not an object is a deadly weapon is not to be determined upon its capability of producing death but rather on its likelihood to produce death or great bodily injury." *Forchion v. State*, 214 So. 2d 751, 752 (Fla. 3d DCA 1968). Importantly, the determination of whether an item is a deadly weapon is an issue for the trier of fact. *Dale v. State*, 703 So. 2d 1045, 1047 (Fla. 1997); *D.C. v. State*, 567 So. 2d 998, 1000 (Fla. 1st DCA 1990). And the competent, substantial evidence in the record supports the trial court's implicit finding that the

stick as used by the father against Rudin was not a deadly weapon.

For these reasons, the trial court did not err in denying Rudin's motion to dismiss. The petition for writ of prohibition is therefore DENIED, but without prejudice to Rudin asserting justifiable use of deadly force as a defense at trial. *See Peterson*, 983 So. 2d at 29.

THOMAS, J., CONCURS; BILBREY, J., CONCURS WITH OPINION.

BILBREY, J., concurring.

In a "Stand Your Ground" immunity hearing, the trial court resolves contested issues of fact in determining whether a defendant is immune from prosecution under section 766.032, Florida Statutes. Peterson v. State, 983 So. 2d 27, 29 (Fla. 1st DCA 2008), app'd sub. nom. Dennis v. State, 51 So. 3d 456 (Fla. 2010). Here the trial court heard testimony, had the stick wielded by Rudin's father admitted into evidence, and also had photographs showing the injury to Rudin's hand where he was struck by his father. The trial court, as finder of fact, was permitted to determine that the stick used by Rudin's father was not a deadly weapon and therefore Rudin was not entitled to immunity when he used deadly force against his father.[1]

The determination of whether an item is a deadly weapon is an issue for the trier of fact. Dale v. State, 703 So. 2d 1045, 1047 (Fla. 1997); D.C. v. State, 567 So. 2d 998 (Fla. 1st DCA 1990). As we stated in D.C.,

> A deadly weapon is 1) any instrument which, when it is used in the ordinary manner contemplated by its design and construction, will or is likely to cause death or great bodily harm, or 2) any instrument likely to cause great bodily harm because of the way it is used during a crime.

Id. at 1000.[2]

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[1] The order denying Rudin's motion to dismiss does not explicitly state that the stick was not a deadly weapon, but the issue was argued at the Stand Your Ground hearing.

[2] The "deadliness" of some weapons is readily apparent like a firearm or a large knife. Lee v. State, 100 So. 3d 1183, 1185 (Fla. 2d DCA 2012). Many objects that are not readily apparent as deadly can be deadly weapons depending on the circumstances such as the composition of the object, how it is used, and who it is used against. See Lee, 100 So. 3d 1186 (upholding a jury's finding that "big tennis

An appellate court reviews the factual findings on whether an item is a deadly weapon by reviewing only whether competent, substantial evidence supports the determination. See Dale; Coronado v. State, 654 So. 2d 1267, 1270 (Fla. 2d DCA 1995) (finding that competent, substantial evidence supported a jury's determination that the stick used by the defendant was a deadly weapon). It has long been settled that a large stick can be a deadly weapon. Lindsay v. State, 67 Fla. 111, 64 So. 501 (1914). A broomstick has been found to be and to not be a deadly weapon by different courts depending on the evidence. Compare E.M.M. v. State, 836 So. 2d 1125 (Fla. 3d DCA 2003), with Brown v. State, 86 So. 3d 569 (Fla. 5th DCA 2012).

The ability of the fact finder to view the purported deadly weapons is a key consideration in an appellate court's evaluation of whether competent, substantial evidence supports the finding. See Dale. Whether a stick is deadly depends on physical property of the stick (ebony or balsa wood, steel rod or plastic?), the person wielding the stick, the force and frequency of the blows, and the relative physical abilities and capabilities of the defendant and the victim. See Fla. Std. Jury Instr. (Crim.) 3.6(f) & 8.4. Because competent, substantial evidence supports the trial court's finding (the trial court having seen the actual stick and the wound inflicted

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shoe" was a deadly weapon); Smith v. State, 969 So. 2d 452 (Fla. 1st DCA 2007) (bleach); V.M.N. v. State, 909 So. 2d 953 (Fla. 4th DCA 2005) (blow gun and darts); Nguyen v. State, 858 So. 2d 1259 (Fla. 1st DCA 2003) (stun gun); Martin v. State, 747 So. 2d 474 (Fla. 5th DCA 1999) (pocketknife); A.H. v. State, 577 So. 2d 699 (Fla. 3d DCA 1991) (baseball-sized rock).

with the stick by his father on Rudin), the trial court's determination that Rudin was not entitled to immunity must be affirmed.