NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

COLLEEN CUMMINGS,	)	
Petitioner,	)	
v.	)	Case No. 2D20-2080
STATE OF FLORIDA,	)	
Respondent.	)	

Opinion filed January 22, 2021.

Petition for Writ of Prohibition to the Circuit Court for Manatee County; Gilbert A. Smith, Jr., Judge.

Leland M. Taylor of Leland M. Taylor, Esq., PL, Bradenton, for Petitioner.

Ashley Moody, Attorney General, Tallahassee, and Helene S. Parnes, Assistant Attorney General, Tampa, for Respondent.

LUCAS, Judge.

Colleen Cummings is charged with aggravated battery. She shot the victim, Mr. Cottrill,[1] after he attacked her boyfriend, Mr. Blankenship, in the trailer home that she and Mr. Blankenship share. Ms. Cummings filed a motion to dismiss the charge, asserting that she is immune from prosecution under section 776.032(1),

[1]For the sake of preserving anonymity while relaying events in a readable fashion, we are referring to the various individuals involved in these events (other than the defendant) by their surnames only.

Florida Statutes (2018). She claims that shooting Mr. Cottrill was justified under sections 776.012(2) and 776.013(1)(b) because she reasonably believed it was necessary to prevent imminent death or great bodily harm to Mr. Blankenship or to prevent the imminent commission of a forcible felony. The circuit court denied Ms. Cummings' motion, and she now seeks review of that order in this proceeding. For the reasons that follow, we grant her petition for a writ of prohibition.

I.

We will briefly recount the pertinent events as they were relayed during the evidentiary hearing below. On the evening of November 9, 2018, Mr. Blankenship, a fifty-eight-year-old retiree with several health problems,[2] and his longtime girlfriend, Ms. Cummings, went to a bar called Peggy's Coral. There they met another couple, Mr. Cottrill and his girlfriend, Ms. Elmo. Mr. Cottrill was thirty-three and worked as a stone and tile installer. Despite their difference in age, Mr. Blankenship and Mr. Cottrill appeared to get along very well. They spent approximately two hours together at the bar, during which, according to Ms. Elmo, Mr. Blankenship and Mr. Cottrill drank "a lot," Ms. Cummings drank some lesser amount, while she, Ms. Elmo, had one beer and "maybe a few sips" of another. When the band stopped playing, Mr. Cottrill suggested that they go elsewhere, and Ms. Cummings and Mr. Blankenship invited Mr. Cottrill and Ms. Elmo to their home, a single-wide trailer in Palmetto.

The two couples arrived at Mr. Blankenship and Ms. Cummings' trailer and sat down around a table. Mr. Blankenship made everyone a drink. Mr. Cottrill was

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[2]Ms. Cummings recounted Mr. Blankenship's various maladies, which included a weak heart muscle, for which he carries nitroglycerin, and one functioning lung.

already on the verge of passing out. At this point, recollections begin to differ. But it is undisputed that (1) a dispute between Messrs. Blankenship and Cottrill turned into a fight; (2) both Ms. Cummings and Mr. Blankenship told Mr. Cottrill to leave the trailer; (3) Ms. Elmo also encouraged Mr. Cottrill to leave; (4) Mr. Cottrill continued to fight with Mr. Blankenship; (5) as the two men wrestled on the floor, Ms. Cummings retrieved a shotgun, pumped it, fired two warning shots, and demanded Mr. Cottrill to stop; and (6) when Mr. Cottrill did not stop fighting Mr. Blankenship and leave the trailer, Ms. Cummings shot Mr. Cottrill in the torso. Perhaps not surprisingly, given the amount of alcohol consumption throughout the evening, the precise details varied between the witnesses, but those six preceding points were undisputed in the record, and the State does not dispute them now.[3]

At the conclusion of the evidentiary hearing, the circuit court denied Ms. Cummings' motion. It explained that "the facts material to the issue of whether Defendant is entitled to immunity are not in dispute." The court found:

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[3]According to Mr. Blankenship, after Mr. Cottrill called his girlfriend, Ms. Cummings, a "fucking bitch," he and Mr. Cottrill began pushing a drink glass back and forth, Mr. Cottrill then charged into his chest, and the two wrestled and threw punches. At some point in the melee, Mr. Cottrill ripped off Mr. Blankenship's necklace and grasped him by the neck. He remembered hearing Ms. Cummings ordering Mr. Cottrill to leave, and then he heard a shot. He heard Ms. Cummings again tell Mr. Cottrill to leave and heard a second shot. Finally, Mr. Blankenship recalled Ms. Cummings warning Mr. Cottrill that if he did not leave, she would shoot him, but Mr. Cottrill still did not stop. As Mr. Cottrill was choking him, Ms. Cummings yelled at Mr. Blankenship to get out of the way, and Mr. Blankenship heard a third shot. Ms. Cummings' version of events largely aligned with Mr. Blankenship's. She added that she was very afraid for her boyfriend's safety given his poor health. Ms. Elmo, on the other hand, described the fight as "really sloppy," "[l]ike a drunken wrestling match." She confirmed that Mr. Blankenship told Mr. Cottrill to leave, but Mr. Cottrill kept fighting instead. "[S]omehow," according to Ms. Elmo, Mr. Blankenship was able to "pin [Mr. Cottrill] down" when they "were going over each other on the floor." For his part, Mr. Cottrill remembered few details about the fight, other than being shot.

> [E]ven though Defendant was upset and probably angry that [Mr. Cottrill] would not stop fighting with [Mr. Blankenship] and wanted him to leave her house, she was not threatened with death or great bodily injury from [Mr. Cottrill] and it does not appear that [Mr. Blankenship] was threatened with imminent death or great bodily harm from [Mr. Cottrill]. In fact, it appears that before the Defendant discharged the shotgun, [Mr. Blankenship] actually had the upper hand on [Mr. Cottrill] and was winning the fight.

The court rejected Ms. Cummings' assertion that Mr. Blankenship's health and the differences between his and Mr. Cottrill's ages and sizes made Mr. Blankenship vulnerable to death or great bodily injury:

> While the Court is sympathetic to [Mr. Blankenship's] poor health problems, it does not appear that his poor health prevented him from participating on a night on the town. Accordingly, using [Mr. Blankenship's] medical condition as the reason [Mr. Blankenship] was more vulnerable to the danger of death or great bodily injury from wrestling with [Mr. Cottrill] is not convincing. Therefore, this Court rejects the Defendant['s] assertions that she was justified in using deadly force against [Mr. Cottrill] under § 776.012, § 776.013(1) & (2), Fla. Stat. based on the age and physical difference between [Mr. Blankenship] and [Mr. Cottrill] and [Mr. Blankenship's] poor health.

The circuit court observed: "If there are any circumstances where it would be reasonable for an intoxicated person to be handling and discharging a shotgun," this case "does not appear to be one of those limited circumstances." It concluded that "[t]he Defendant had an alternative that would have been reasonable"; however, the court did not explain what reasonable alternative she should have used. It also did not address Ms. Cummings' claim that her use of force was justified by Mr. Cottrill's commission of a forcible felony.

We now turn to that claim.

II.

Section 776.032(1) states generally that any person who uses or threatens to use force as permitted in sections 776.012 and 776.013 is immune from prosecution. Pertinent here, sections 776.012(2) and 776.013(1)(b) authorize the use of deadly force if a person "reasonably believes that using or threatening to use such force is necessary . . . to prevent the imminent commission of a forcible felony."

"The determination of whether the use of force is justified under section 776.012(2) is to be made 'in accord with the objective, reasonable person standard by which claims of justifiable use of deadly force are measured.' " Bouie v. State, 292 So. 3d 471, 481 (Fla. 2d DCA 2020) (quoting Montanez v. State, 24 So. 3d 799, 803 (Fla. 2d DCA 2010)).

> The question under this objective evaluation of a defendant's conduct is whether, based on the circumstances as they appeared to the defendant at the time of the altercation, a reasonable and prudent person in the same position as the defendant would believe that the use of deadly force is necessary to prevent imminent death or great bodily harm or the imminent commission of a forcible felony.

Id.

The burden of proof is on the State. That is, the State was required to present clear and convincing evidence that Ms. Cummings was not immune from prosecution. See § 776.032(4); see also Bouie, 292 So. 3d at 483 ("The legislature has directed that a defendant who files a sufficient motion to dismiss on grounds of immunity is entitled to it unless the State clearly and convincingly establishes that he is not."). "[C]lear and convincing evidence is 'evidence making the truth of the facts asserted

"highly probable." ' " Id. at 480 (quoting Slomowitz v. Walker, 429 So. 2d 797, 799 (Fla. 4th DCA 1983)).

Without question, burglary is a forcible felony for purposes of the statute's immunity. See § 776.08; Cook v. State, 192 So. 3d 681, 683 (Fla. 2d DCA 2016). Ms. Cummings argues she is entitled to immunity because the State failed to prove by clear and convincing evidence that Mr. Cottrill was not committing a burglary when she shot him. On this record, we must agree.

Section 810.02(1)(b)(2)(b), Florida Statutes (2018), provides the following as the definition for what is sometimes referred to as "remaining in" burglary: "Notwithstanding a licensed or invited entry, remaining in a dwelling, structure, or conveyance . . . [a]fter permission to remain therein has been withdrawn, with the intent to commit an offense therein." The permission to remain may be withdrawn expressly by the property owner. See State v. Herron, 70 So. 3d 705, 707 (Fla. 4th DCA 2011). Permission to remain can also be deemed revoked if the invitee commits a subsequent criminal act against the owner. See Sparre v. State, 164 So. 3d 1183, 1200-01 (Fla. 2015) (holding the defendant's invitation to enter the victim's home was effectively rescinded when he attacked her therein).

The record below reflects both kinds of revocation. Again, it was undisputed that Mr. Cottrill was told, expressly and repeatedly, to leave the trailer prior to when Ms. Cummings fired the shotgun, twice in warning and once in earnest, at Mr. Cottrill. He did not comply with that demand. And there was no competent, substantial evidence (or even argument) that he could not comply with it. The uncontroverted evidence below also demonstrated that Mr. Cottrill—for reasons he was unable to

meaningfully articulate—battered Mr. Blankenship in the trailer. Having committed that battery, Mr. Cottrill could not lawfully remain inside to further wrestle and batter Mr. Blankenship because his invitation to remain in the trailer was implicitly withdrawn as a matter of law. See Id. at 1201 ("Sparre was no longer an invitee at the point in time he began his fatal attack on Pool, and she began futilely attempting to defend herself."). Either way, Mr. Cottrill's permission to be in the trailer as an invitee had been withdrawn. He battered and continued to batter Mr. Blankenship for some appreciable length of time after that withdrawal and was thus committing a forcible felony for purposes of sections 776.012(2) and 776.013(1)(b).

III.

The State fell short of the high mark of proving by clear and convincing evidence that Mr. Cottrill was not committing a forcible felony inside the trailer when Ms. Cummings shot him. Indeed, it appears the circuit court simply failed to consider that aspect of her defense. That was error. Cf. Garcia v. State, 286 So. 3d 348, 352 (Fla. 2d DCA 2019) (issuing writ of certiorari, in part, because the trial court failed to "make any findings regarding whether Mr. Garcia reasonably believed his use of force was necessary to defend against the imminent commission of a forcible felony").[4]

Since the State did not meet its burden of proof, Ms. Cummings acted justifiably under sections 776.012(2) and 776.013(1)(b). She is entitled to immunity

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[4]Although we also have reservations about the circuit court's conclusion that Ms. Cummings' use of force was not necessary to prevent imminent death or great bodily injury to Mr. Blankenship (given the heightened burden of proof the State bore), we need not resolve that issue in light of our holding. We would caution trial courts, however, to remain mindful that the legislature has placed a heightened burden of proof *on the State*, not the defendant, for Stand Your Ground proceedings.

from prosecution for this offense. We, therefore, grant her petition for a writ of prohibition.

Petition granted.

LaROSE and SLEET, JJ., Concur