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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

ROBERT BOUIE, Petitioner, v. STATE OF FLORIDA, Respondent.	)	Case No. 2D18-2705

Opinion filed February 26, 2020.

Petition for Writ of Prohibition to the Circuit Court for Hillsborough County; Mark R. Wolfe, Judge.

Lee Pearlman of The Law Offices of Denmon Pearlman, St. Petersburg, for Petitioner.

Ashley Moody, Attorney General, Tallahassee, and Michael Schaub, Assistant Attorney General, Tampa; and C. Todd Chapman, Assistant Attorney General, Tampa (substituted as counsel of record), for Respondent.

SALARIO, Judge.

This is a case involving Florida's "Stand Your Ground" law. §§ 776.012, .032, Fla. Stat. (2017). Robert Bouie shot Jeno Favors in a South Tampa parking lot and was charged with attempted second-degree murder, aggravated battery, and

shooting at a vehicle. Mr. Bouie says he was defending his brother, Jermaine McGee, and filed a motion to dismiss asserting that he is immune from prosecution under the stand-your-ground law. After an evidentiary hearing, the trial court denied the motion, concluding that the State proved by clear and convincing evidence that Mr. Bouie was not entitled to immunity because (1) he "initially provoke[ed]" the confrontation under section 776.041(2) and (2) he did not "reasonably believe[]" that the use of deadly force was "necessary to prevent imminent death and great bodily harm to himself, herself, or another" under section 776.012(2). Mr. Bouie petitions for a writ of prohibition arguing that both reasons are erroneous. We agree and grant the petition.

The Stand-Your-Ground Law

It is helpful to understand the statutory provisions that govern Mr. Bouie's claim of immunity before diving into the case. As a starting point, everyone in this case agrees that Mr. Bouie used deadly force against Mr. Favors. Section 776.012(2) regulates the use of deadly force and provides that a person's use of such force is justified "if he . . . reasonably believes that [it] 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." The statute also says that when those circumstances exist, the person using deadly force "does not have a duty to retreat and has the right to stand his . . . ground if [he] is not engaged in a criminal activity and is in a place where he . . . has a right to be." No one in this case has contended that Mr. Bouie was engaged in criminal activity or not entitled to be where he was when he shot Mr. Favors.

The justification for the use of deadly force provided by section 776.012(2) is subject to statutory exceptions. One of those exceptions is contained in section 776.041(2), which states that "[t]he justification described in [section 776.012(2)] is not

available to a person who . . . [i]nitially provokes the use or threatened use of force against himself." Here, it is undisputed that Mr. Bouie was not responding to force used against himself, but rather was responding to force used against his brother.

Section 776.032 provides that a person who is justified in using deadly force under section 776.012(2) is "immune from criminal prosecution and civil action for the use . . . of such force." (Emphasis added.) This provision "effectively 'grants defendants a substantive right to assert immunity from prosecution and to avoid being subjected to a trial.' " State v. Gallo, 76 So. 3d 407, 409 (Fla. 2d DCA 2011) (quoting Dennis v. State, 51 So. 3d 456, 462 (Fla. 2010)).

Prior to 2017, a criminal defendant asserting that immunity was required to make a motion to dismiss under Florida Rule of Criminal Procedure 3.190(b), after which the trial court would hold an evidentiary hearing where the defendant would be required to prove his entitlement to the immunity—i.e., that his use of deadly force was justified—by a preponderance of the evidence. See Bretherick v. State, 170 So. 3d 766, 768 (Fla. 2015) (dealing with the burden of proof); Dennis, 51 So. 3d at 462 (dealing with the appropriate procedural vehicle for asserting immunity). During its 2017 session, however, the legislature amended the stand-your-ground law to provide that "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." § 776.032(4). Our court has held that a pretrial assertion of immunity under the statute requires that (1) the defendant file a rule 3.190(b) motion to dismiss that makes allegations that establish a prima facie claim to immunity and that (2) if the defendant makes a sufficient motion, the trial court must hold an evidentiary hearing at

which the State must prove by clear and convincing evidence that the defendant is not entitled to immunity. Jefferson v. State, 264 So. 3d 1019, 1029 (Fla. 2d DCA 2018). Here, everyone agrees that Mr. Bouie filed a sufficient motion. The question is whether the State proved by clear and convincing evidence that Mr. Bouie was not entitled to immunity.

The Proceedings In The Trial Court

The charges in this case stem from a late-night incident that ended with Mr. Bouie shooting Mr. Favors in the parking lot of a shopping center. Mr. Bouie, Mr. McGee, and Mr. Favors each arrived at the parking lot in separate vehicles. Mr. McGee's girlfriend, Christina Zocchi, was in Mr. Bouie's truck. A juvenile we refer to as B.J. rode in Mr. Favors' car. After the shooting, a bystander found Mr. Favors lying in the parking lot and called 911. He had been shot six times and run over by his own car. The police discovered twelve shell casings and a black, eight-inch-long can of mace in the parking lot. Mr. Bouie admits shooting Mr. Favors but says he did so because he reasonably believed Mr. Favors was going to attack Mr. McGee with a gun.

The defense version of events: At the evidentiary hearing on Mr. Bouie's motion to dismiss, Mr. McGee and Ms. Zocchi testified that they were targeted by Mr. Favors in a harrowing high-speed pursuit in the hours before the shooting. Mr. McGee and Ms. Zocchi—who was pregnant at the time—were driving on Oklahoma Avenue when they noticed another car following them. Mr. McGee testified that he pulled into someone's driveway to see if the car would pass. When the trailing car came to a stop and blocked them in, Mr. McGee and Ms. Zocchi feared trouble. They recognized the driver as Mr. Favors. Mr. McGee and Mr. Favors had known each other since they were children, and the two men had a history of acrimony and violent confrontations.

Mr. McGee pulled through the front yard of the residence where he was parked and made his way to Wyoming Avenue and then Wisconsin Avenue, reaching speeds upwards of eighty miles per hour and trying to elude Mr. Favors. From Wisconsin, the cars turned onto South Dale Mabry Highway, heading north. When both vehicles were at a red light at Dale Mabry and Gandy Boulevard, Mr. Favors got out of his vehicle and approached Mr. McGee's vehicle wielding what appeared to be a gun. Mr. McGee took off and sped through the red light, turning left onto Gandy. Mr. Favors got back in his car, crossed a lane of traffic, turned right, and drove the other direction.

Mr. McGee and Ms. Zocchi sought refuge at the home of Mr. McGee's mother, Dolores McGee. Mr. Bouie was there when they arrived. They told Mr. Bouie and Ms. McGee that Mr. Favors had been chasing them around the neighborhood and that he had approached their car with a gun when they were at a stoplight.

After an hour or so, it was decided that Mr. Bouie would drive Ms. Zocchi home while Mr. McGee drove his car separately. But as the two vehicles traveled west on Bay Avenue, Mr. Favors was waiting for them in a grassy area off a side street with his headlights off. Mr. Favors flipped his headlights on and gave chase. The three vehicles traveled single file for a short distance before they separated. Mr. McGee and Mr. Bouie turned right onto Sterling Avenue while Mr. Favors continued straight.

According to Mr. McGee, when he turned onto Wisconsin from Sterling, Mr. Favors drove straight at him from the other direction. Mr. McGee cut through a grass median to avoid a collision and pulled into the parking lot of a shopping center on Dale Mabry where he saw Mr. Bouie's pickup truck. He parked behind the truck, facing north. Mr. Favors pulled into the parking lot about five seconds later and parked next to Mr. McGee's vehicle, facing the opposite direction (driver's door to driver's door).

Mr. Favors got out of his vehicle and began banging on Mr. McGee's window with a black object and shouting threats. According to Ms. Zocchi, Mr. Bouie went into a panic, exclaiming repeatedly "[h]e's going to hurt my brother!" Mr. Bouie testified that fearing for his brother's life, he took his gun out of its lockbox, exited his truck, and fired seven or eight rounds at Mr. Favors. Mr. Bouie described what happened when he started shooting:

> He was facing my brother's car first and he was banging on the window and when he started banging, that's when I started shooting. That's when he turned and went back to his car and dove in. I seen [sic] the car drive off so I didn't think I hit Mr. Favors.

Believing Mr. Favors had fled, Mr. Bouie, Mr. McGee, and Ms. Zocchi left.

The State's version of events: Mr. Favors and B.J. testified that they went out at about 11:00 p.m. to take some food to B.J.'s grandmother. B.J. is the nephew of Mr. Favors' girlfriend and had been staying with her and Mr. Favors during the summer. According to Mr. Favors and B.J., Mr. McGee started following them as they were making their way back to Mr. Favors' house. Mr. Favors said that he turned into a parking lot off Dale Mabry and Mr. McGee followed. By his own admission, he was ready to fight with Mr. McGee.

Mr. Favors stepped out of his car with a can of mace. However, before he could even approach Mr. McGee's car, Mr. Bouie began firing at him without warning. According to Mr. Favors, he never touched Mr. McGee's vehicle. When the shooting began, he looked straight at Mr. Bouie and then turned to dive for cover in front of his own car. B.J. said that he thought he saw Mr. Favors run off when Mr. Bouie started shooting. When the shooting stopped, he crawled into the driver's seat and pulled

away. Unbeknownst to B.J., Mr. Favors was lying in front of the car such that when B.J. started to drive away, he ran over Mr. Favors.

The trial court's order: The trial court did not make any findings as to which version of the events leading up to the shooting it believed. It did, however, make the following key findings of historical facts:

- Mr. McGee and Mr. Favors "had a history of animosity which had resulted in several past violent confrontations."
- Notwithstanding the conflicting accounts of the events of what preceded the altercation, Mr. Bouie, Mr. Favors, and Mr. McGee "all independently decided to arrive at this parking lot to engage in a mutual confrontation."
- Mr. Favors' car and Mr. McGee's car parked "with driver-side windows facing one another."
- Mr. McGee and Mr. Bouie "were not seeking to evade the victim, but were instead actively seeking to engage him."
- Mr. Favors "stepped out of his vehicle with a can of pepper-spray or mace in his hand."
- Mr. Bouie fired at least twelve shots at Mr. Favors, six of which hit Mr. Favors and some number of which hit his car.
- Mr. Bouie "continued to fire an additional number of shots at what appears to be a retreating target"—i.e., Mr. Favors.

From these findings, the trial court made two conclusions. First, it determined that the State proved by clear and convincing evidence that Mr. Bouie "initially provoke[d]" Mr. Favors' use of force and, as provided in section 776.041(2), his use of force was therefore not justifiable. Second, it determined that although Mr. Bouie "may possibly have believed that" Mr. Favors had "a weapon to be used against Mr. McGee" and "may possibly have believed that he needed to defend his brother," the State proved by clear and convincing evidence that any such belief ceased to be

reasonable because "after [Mr. Bouie] initially fired at the victim, he continued to fire an additional number of shots at what appears to be a retreating target."

Mr. Bouie has timely petitioned for a writ of prohibition and challenges both of the circuit court's conclusions.[1]

The Initial Provocation Exception Does Not Apply Where Deadly Force Is Used In Defense Of A Third Person

Mr. Bouie's first argument is that the trial court's conclusion that he was not entitled to immunity under the "initial provocation" exception created by section 776.041(2) was in error. He asserts that by its terms, section 776.041(2) does not apply where, as here, the defendant uses deadly force in defense of another (here, Mr. McGee) and not himself. That is a question of statutory interpretation—whether the statutory exemption can apply in such circumstances—and our review is de novo. See Kumar v. Patel, 227 So. 3d 557, 558 (Fla. 2017); Bretherick, 170 So. 3d at 771.

Our analysis of this question starts, and in this case also ends, with the plain language of section 776.041(2). See Diamond Aircraft Indus., Inc. v. Horowitch, 107 So. 3d 362, 367 (Fla. 2013). When a statute is not ambiguous, its unambiguous meaning is dispositive and resolves the case. See Holly v. Auld, 450 So. 2d 217, 219

[1]When a trial court determines on the merits that a defendant is not entitled to immunity under the stand-your-ground law, the defendant may file a petition for a writ of prohibition to seek review in this court. Jefferson, 264 So. 3d at 1023; see also Garcia v. State, No. 2D18-4541, 2019 WL 6333790 (Fla. 2d DCA Nov. 27, 2019) (discussing the availability of prohibition but stating that certiorari is an appropriate vehicle where "the trial court erred in its construction of the Stand Your Ground statute [and] we are unable to determine whether Mr. Garcia is entitled to immunity on the merits"). Although a prohibition petition proceeds under our writ jurisdiction, in the stand-your-ground context, we review the merits of the motion to dismiss as though this were a direct appeal under our appellate jurisdiction. See Little, 111 So. 3d 214, 217 (Fla. 2d DCA 2013) (citing Sutton v. State, 975 So. 2d 1073, 1077-78 (Fla. 2008)).

(Fla. 1984). Here, the statute is not ambiguous—as we shall explain, it has only one reasonable meaning—so our analysis stops there. See English v. State, 191 So. 3d 448, 450 (Fla. 2016); Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 455 (Fla. 1992).

The text of section 776.041(2) provides that justification for the use of deadly force—and by extension the immunity provided by section 776.032—does not exist when the person asserting justification "[i]nitially provokes the use or threatened use of force against himself or herself." (Emphasis added.) By its express terms, the statute contemplates a defendant claiming justification to use deadly force to respond to a threat "against himself or herself" and says that the defendant does not get to claim justification when he or she initially provoked that threat. Simply translated, then, the statute says that a person does not get to claim that he was acting in self-defense if he is defending himself from violence that he provoked in the first instance. Cf. Martinez v. State, 981 So. 2d 449, 452 (Fla. 2008) (stating that "[s]ubsection (2) precludes the initial aggressor from asserting self-defense where he or she is the individual who provoked the use of force" (emphasis added)); Stoddart v. Secretary, DOC, No. 2:14-cv-182-FtM-29CM, 2017 WL 1196569, *6 (M.D. Fla. Mar. 31, 2017) (same).

What the statute does not say is that justification for the use of deadly force and its corresponding immunity under the stand-your-ground-law are also unavailable when the defendant provokes a threat to a third-person as distinguished from himself. To make the statute achieve that outcome, we would have to rewrite it to say that justification and immunity are not available when the defendant initially provokes the actual or threatened use of force "against himself or herself or another." Because a court interpreting a statute is "not at liberty to add words . . . that were not

placed there by the Legislature," Hayes v. State, 750 So. 2d 1, 4 (Fla. 1999), we do not enjoy the freedom to make this kind of tweak—even if we thought it desirable.

Furthermore, if the legislature had thought it desirable to have the initial-provocation exception apply when a defendant provokes the use of force against a third person, it would not have required editorial heavy lifting to make that happen. After all, in section 776.012(2) the legislature said that a defendant is justified in using deadly force when it is reasonably believed to be necessary to protect "himself or herself or another." (Emphasis added.) If the legislature really wanted the result the trial court achieved here, all it needed to do was copy the words "or another" from section 776.012(2) and paste them in the parallel location in section 776.041(2). That it did not do that implies a choice to afford immunity for the defense of a third person even when the defendant provoked the use of force against that person and thus confirms that the statute's text unambiguously reaches that result. See Cason v. Fla. Dep't of Mgmt. Servs., 944 So. 2d 306, 315 (Fla. 2006) ("[W]e have pointed to language in other statutes to show that the Legislature 'knows how to' accomplish what it has omitted in the statute in question." (quoting Rollins v. Pizzarelli, 761 So. 2d 294, 298 (Fla. 2000))); Nat'l Auto Serv. Ctrs., Inc. v. F/R 550, LLC, 192 So. 3d 498, 506 (Fla. 2d DCA 2016) (confirming that statute of repose meant what it said because, had the legislature desired a different meaning, "it could have said so.").

The State asserts that interpreting the statute as we have defeats the statute's purpose, which, according to the State, is "to prevent the initial provokers of the violence from claiming immunity." Because broad appeals to purpose do not permit us to ignore the unambiguous language of a statute, see Nat'l Auto, 192 So. 3d at 507-08, we interpret this as an argument that we should add defense of third persons to the

initial-provocation exception because not doing so would be "absurd" or "clearly contrary to legislative intent." See Debaun v. State, 213 So. 3d 747, 752 (Fla. 2017).

The purpose that the text of the statute conveys is one to prevent those who provoke violence from claiming self-defense. At least one reason why the legislature might have chosen that policy—instead of a broader policy that would prevent a defendant in such circumstances from claiming either self-defense or defense of a third person—is not too hard to envision. It is one thing to say a defendant cannot claim justification when he provokes violence against himself. It is quite another to say the defendant cannot claim justification when he provokes an altercation that risks violence against a third person. The legislature might have determined that denying justification to a defendant who uses force to defend a third person, even where the defendant has initiated a confrontation, unreasonably deters action in defense of the third person—placing that third person at greater risk of harm—and that that risk outweighs the potential consequences of affording immunity to the defendant.

Thus, section 776.041(2)'s declination to exclude defense of third persons from the initial-provocation exception appears to be supported by a rationale a legislature could reasonably have adopted. It does not require testing the limits of the absurdity doctrine to know that these circumstances are a far cry from those in which we would depart from the plain language of the statute because it is "absurd" or "clearly contrary" to what the legislature meant. See State v. Hackley, 95 So. 3d 92, 95 (Fla. 2012) ("[T]he absurdity doctrine is not to be used as a freewheeling tool for courts to second-guess and supplant the policy judgments made by the Legislature. It has long been recognized that the absurdity doctrine 'is to be applied to override the literal terms

of a statute only under rare and exceptional circumstances.' " (quoting Crooks v. Harrelson, 282 U.S. 55, 60 (1930))).

The State Did Not Prove By Clear And Convincing Evidence That Mr. Bouie Was Not Entitled To Immunity

Mr. Bouie's second argument is that the trial court erred in concluding that Mr. Bouie did not "reasonably believe[]" that the use of deadly force against Mr. Favors was "necessary to prevent imminent death or great bodily harm" to Mr. McGee as provided in section 776.012(2). To address it, we must first determine what standard of review applies to a trial court's ultimate conclusion that a defendant's use of force does not meet the statutory standard—a question we have not previously answered.[2]

Starting with first principles, we think that the question of whether a defendant is entitled to immunity under the statute is a mixed question of law and fact because to answer it one must determine the governing law as stated in the statute, find the operative facts, and apply the law to those facts. See generally Jarrard v. Jarrard, 157 So. 3d 332, 337-38 (Fla. 2d DCA 2015) (describing mixed questions of law and fact). When an appellate court reviews a trial court's decision on a mixed question, it evaluates the trial court's legal conclusions de novo and its findings of historical facts for competent

[2]In Little, we may have applied the competent substantial evidence standard to this question, but that is because that is the standard the defendant argued was applicable. 111 So. 3d at 218 ("Little argues that the circuit court's ruling is erroneous because it is not supported by competent, substantial evidence."). We do not read Little as holding that the ultimate question under section 776.012(2) is reviewed for competent substantial evidence. We note, however, that some decisions of other courts appear to have applied the competent substantial evidence standard without explaining why that standard is the one that should be applied or explicitly holding that competent substantial evidence is the appropriate standard. See, e.g., Arauz v. State, 171 So. 3d 160, 162 (Fla. 3d DCA 2015); State v. Wonder, 162 So. 3d 59, 61-62 (Fla. 4th DCA 2014). We analyze this question in the text and conclude that the de novo standard applies.

substantial evidence. See, e.g., Allen v. State, 261 So. 3d 1255, 1286 (Fla. 2019) (discussing standards applicable to mixed question of law and fact under Giglio v. United States, 405 U.S. 150 (1972)); State v. Murray, 262 So. 3d 26, 37 (Fla. 2018) (discussing standards applicable to mixed questions of law and fact under Strickland v. Washington, 466 U.S. 668 (1984)). And this is how the appellate decisions considering legal conclusions and factual findings under the stand-your-ground law have reviewed them, both before and after the 2017 amendments to the law. See Little, 111 So. 3d 214, 217 (Fla. 2d DCA 2013) (stating in a pre-statutory-amendment decision that "we review the court's legal findings de novo and we review the court's factual findings for competent, substantial evidence"); see also Fletcher v. State, 273 So. 3d 1187, 1189 (Fla. 1st DCA 2019) (applying in a post-statutory-amendment decision the same standards).

That we review legal questions de novo and factual questions for competent substantial evidence does not necessarily tell us what standard applies to the ultimate question of whether a defendant's use of deadly force is "reasonably believe[d]" to be necessary to prevent "imminent death or great bodily harm to . . . another" as provided in section 776.012(2). On its face, however, that question involves the application of the statute to the facts as found by the trial court. And although our court's stand-your-ground cases have not analyzed this question, the governing precedents addressing our review of mixed questions generally have. They say that the application of the law to the facts is reviewed de novo. See Hurst v. State, 18 So. 3d 975, 991 (Fla. 2009) (holding, in the context of reviewing the mixed question under Giglio, that an appellate court "review[s] the application of the law to the facts de novo"); P.G. v. E.W., 75 So. 3d 777, 780 n.1 (Fla. 2d DCA 2011) ("[W]e review de novo the trial court's application of the statute to those facts."); see also Davis v. Gilchrist County Sheriff's

Office, 280 So. 3d 524, 529 (Fla. 1st DCA 2019) ("The application of the . . . statute to the facts . . . [is] reviewed de novo."); Gregory v. Gregory, 128 So. 3d 926, 927 (Fla. 5th DCA 2013) (holding that the trial court's determination of whether a former spouse is in a "supportive relationship" under section 61.14(1)(b) is an "application of the law [that] should be reviewed de novo"). We see no reason why we should use a different standard of review to assess a trial court's application of the law to the facts in a stand-your-ground case than we would in any other case involving such an exercise.

On the contrary, the use of the de novo standard to review a trial court's conclusion on whether the use of deadly force is justified under section 776.012(2) comports with what prior cases have said about how we should look at denials of stand-your-ground immunity. Both before and since the 2017 amendments, the courts have said that an order denying a motion to dismiss under the stand-your-ground law should be reviewed in the same way as an order denying a motion to suppress. See, e.g., Derossett v. State, 44 Fla. L. Weekly D2713 (Fla. 5th DCA Nov. 7, 2019); Spires v. State, 180 So. 3d 1175, 1176 (Fla. 3d DCA 2015). And the ultimate questions on a motion to suppress—whether a confession is voluntary or whether there is probable cause to arrest, for example—are reviewed de novo. See, e.g., Ross v. State, 45 So. 3d 403, 414 (Fla. 2010) (reviewing de novo questions of whether a defendant was in custody for Miranda purposes and whether Miranda waiver and subsequent statements were voluntarily given); Coney v. State, 820 So. 2d 1012, 1015 (Fla. 2d DCA 2002) (reviewing whether probable cause supported an arrest de novo, as a question involving "the application of the law to the facts").

Consistent with these precedents, then, we should review a trial court's ultimate conclusion that the defendant did not reasonably believe that the use of force

was necessary to prevent imminent death or great bodily harm under the de novo standard. With regard to our de novo review, the legislature's decision in 2017 to move the burden of proof from the defendant to the State and to raise the standard of proof from a preponderance of the evidence to clear and convincing evidence is significant. While the preponderance of the evidence is simply " 'the greater weight of the evidence' or evidence that 'more likely than not' tends to prove a certain proposition," Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000) (citation omitted) (first quoting Black's Law Dictionary 1201 (7th ed. 1999), then quoting Am. Tobacco Co. v. State, 697 So. 2d 1249, 1254 (Fla. 4th DCA 1997)), clear and convincing evidence is "evidence making the truth of the facts asserted 'highly probable,' " Slomowitz v. Walker, 429 So. 2d 797, 799 (Fla. 4th DCA 1983) (quoting Colorado v. Taylor, 618 P.2d 1127, 1136 (Colo. 1980)). In other words,

> [c]lear and convincing evidence 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.

Merritt v. OLMHP, LLC, 112 So. 3d 559, 561 (Fla. 2d DCA 2013) (quoting Westinghouse Elec. Corp. v. Shuler Bros., 590 So. 2d 986, 988 (Fla. 1st DCA 1991)).

We now turn to the trial court's decision in this case that Mr. Bouie did not reasonably believe that the use of deadly force was necessary to protect Mr. McGee from imminent death or great bodily harm at the hands of Mr. Favors. 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." Montanez v. State, 24 So. 3d 799, 803 (Fla. 2d DCA 2010); see also Fla. Std. Jury Instr. (Crim) 3.6(f). 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. See Garcia, No. 2D18-4541, 2019 WL 6333790; see also Mobley v. State, 132 So. 3d 1160, 1164-65 (Fla. 3d DCA 2014). Applying that standard to the facts before it, the trial court concluded in substance (1) that the State failed to prove by clear and convincing evidence that Mr. Bouie had no objectively reasonable basis to use deadly force against Mr. Favors during their encounter at all[3] but (2) that the State did prove that any basis for using deadly force against Mr. Favors ceased to exist at some point between the first and twelfth shots when Mr. Favors retreated toward his car.

Applying a de novo standard of review, we agree with the trial court's conclusion that the State failed to prove by clear and convincing evidence that Mr. Bouie never had a justification for the use of deadly force. The trial court found as historical facts that the parties had an acrimonious history including prior violent

[3]The trial court did not say explicitly that the State failed to prove by clear and convincing evidence that Mr. Bouie never had an objectively reasonable belief that deadly force was necessary to protect Mr. McGee from imminent death or great bodily harm. But we do not see any other reasonable way to interpret its statements that "the Defendant may possibly have believed that this can of mace may have constituted a weapon to be used against Mr. McGee" and that "Defendant possibly believed that he needed to defend his brother from an alleged attack by Mr. Favors with an unknown weapon."

confrontations, that they arrived at the parking lot expecting a confrontation, and that Mr. Bouie saw Mr. Favors emerge from his car and head toward Mr. McGee's car carrying an eight-inch can of mace that may have been a weapon to be used against Mr. McGee.[4] The facts found by the trial court's order thus show that the State had not clearly and convincingly proved that Mr. Bouie at no point ever during the events had a reasonable belief that deadly force was necessary to prevent imminent death or great bodily harm to Mr. McGee.

Furthermore, the trial court did not resolve the differing accounts of how the altercation transpired and the evidence adduced at the stand-your-ground hearing was highly uncertain and conflicting, leaving the State unable to meet its burden. The parties' stories about the events leading to the encounter in the parking lot were diametrically opposed—with the defense telling a story of threatening and stalking behavior by Mr. Favors over a period of hours and the State telling a story of Mr. McGee following Mr. Favors. The physical evidence and eyewitness testimony in this case left only a rough idea of how the events leading up to and during the shooting unfolded. It is clear that Mr. McGee's and Mr. Favors' cars were parked adjacent to each other on the driver's side a few feet apart and that Mr. Favors got out of his car to confront Mr. McGee. According to the defense witnesses, Mr. Favors was banging on Mr. McGee's window with a black object that looked like a gun and shouting threats at him. Mr. Favors, by contrast, says that he barely exited his car before Mr. Bouie started shooting. The trial court did not, either expressly or by fair implication, find that either side's version of the events on the evening in question was any more or less credible than the

[4]These findings were supported by competent substantial evidence at the evidentiary hearing. Kalisz v. State, 124 So. 3d 185, 201 (Fla. 2013).

other's. See In re Guardianship of Browning, 543 So. 2d 258, 273 (Fla. 2d DCA 1989) ("[C]lear and convincing evidence requires that the evidence must be found to be credible . . . ." (alteration in original) (quoting Slomowitz, 429 So. 2d at 800)). Given that state of affairs, one cannot say that the State showed that it was highly probable that Mr. Bouie never reasonably believed that deadly force was necessary to protect Mr. McGee from death or great bodily harm.

We disagree, however, with the trial court's conclusion that Mr. Bouie's belief that deadly force was necessary ceased to be reasonable when Mr. Bouie continued firing shots while Mr. Favors appeared to be retreating. That conclusion rests on the fact that Mr. Favors may have sought cover after Mr. Bouie fired his first shot or shots. But this does not mean that the threat to Mr. McGee that Mr. Bouie at first reasonably apprehended necessarily dissipated. An armed man can continue to pose a threat of death or imminent bodily harm even when he is seeking cover behind or inside a car. Cf. Gallo, 76 So. 3d at 408-09 (affirming order granting immunity where the defendant was a participant in a parking-lot shootout with "[m]en ducking behind cars and firing over their shoulders as they ran for cover"). And the State did not produce any evidence to show that the threat of imminent death or great bodily harm which the trial court indicated was initially reasonable to believe Mr. Favors posed would have appeared to a reasonable person to have evaporated after Mr. Favors used a car for cover. Nor does anything in the record show that Mr. Favors ceased to pose that threat after diving in front of his car. Thus, although some aspects of the evidence might support the State's case, the State did not clearly and convincingly demonstrate that Mr. Bouie ceased to have a reasonable belief that Mr. Favors posed an imminent threat of death or great bodily harm to Mr. McGee.

We do not mean to say that a defendant's reasonable belief that deadly force was necessary can never become unreasonable as the situation changes. But the State has simply not met its burden to prove by clear and convincing evidence that that was the case here. No matter whose account of the evening one believes, the testimony uniformly described an episode that unfolded very rapidly, and nothing in the trial court's order suggests anything different. Mr. Favors exited his car holding a can of mace moving toward Mr. McGee's car. Mr. Bouie testified without material contradiction that he believed Mr. Favors had a gun. Mr. McGee testified that after Mr. Favors struck the driver's window the first time, he ducked, heard gunshots, and then looked back up to see Mr. Favors' vehicle driving away. Mr. Favors stated that once the shots began, he looked directly at Mr. Bouie, turned to dive in front of his car, and was then run over as the car pulled away. B.J.'s testimony that he jumped into the driver's seat of Mr. Favors' car to drive away "as the shooting stopped" suggests that the entire episode unfolded quickly. For his part, Mr. Bouie testified that he began firing as Mr. Favors was winding up to strike the window a second time and remarked about how quickly the events unfolded. Nothing in the record demonstrates that at some point in the seconds that followed his first shot, Mr. Bouie ceased reasonably to perceive Mr. Favors as posing an imminent threat of death or great bodily harm to Mr. McGee.

Conclusion

One can reasonably look at the facts of this case and say that it is not one in which the defendant deserves in a moral or public policy sense to be immune from a criminal prosecution. Whether the defendant deserves immunity in a moral or public policy sense, however, is not the question that the stand-your-ground law requires us to answer. 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. Here, the State failed to do so both because the initial-provocation exception does not apply on these facts and because the evidence did not otherwise meet the State's burden of proof. Accordingly, we grant Mr. Bouie's petition for a writ of prohibition.

Petition granted.

LUCAS and ATKINSON, JJ., Concur.