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.

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Opinion filed April 15, 2020

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

Michael Panella, of Panella Law Firm, Orlando, and Donald R. West, of Don West Law Group, Orlando, for Petitioner.

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

LAMBERT, J.

The parties are before this court for a second time on the petition filed by John Derossett seeking a writ to prohibit the continued prosecution of the three charges pending against him, each for attempted premeditated first-degree murder of a law enforcement officer while discharging a firearm regarding an incident that occurred at his home on the night of August 20, 2015. Derossett argues that the trial court erred in denying what is commonly referred to as a Stand Your Ground motion that he filed under

Florida Rule of Criminal Procedure 3.190(b) and section 776.032(1), Florida Statutes (2018), seeking immunity from criminal prosecution and to dismiss the information charging him with these crimes.

As more fully discussed below, in our earlier decision, we had withheld the issuance of the writ of prohibition and relinquished jurisdiction back to the trial court with directions that the court resolve at a subsequent hearing two issues that it had specifically declined to address in its prior order. The first issue for consideration was whether the State proved, by clear and convincing evidence, that at the time Derossett used deadly force, he knew or reasonably should have known that the persons against whom he was using such force were law enforcement officers. *Derossett v. State*, 44 Fla. L. Weekly D2713, 2716 (Fla. 5th DCA Nov. 7, 2019). Second, we directed the court to determine whether the State had established by clear and convincing evidence that Derossett was using his dwelling or residence to further a criminal activity at the time that he used deadly force. *Id.*[1]

[1] After our earlier opinion in the present case issued, the Florida Supreme Court resolved a dispute amongst the District Courts of Appeal as to whether the 2017 addition of subparagraph (4) to section 776.032, Florida Statutes, which placed the evidentiary burden of proof on the State at these immunity hearings, applied retroactively. In *Love v. State*, 286 So. 3d 177, 179 (Fla. 2019), it held that section 776.032(4) "applies to pending cases involving criminal conduct alleged to have been committed prior to the effective date of the statute." Because we had concluded in our prior opinion that Derossett's motion had sufficiently raised a prima facie case of self-defense immunity from criminal prosecution, *Derossett*, 44 Fla. L. Weekly at 2716, and since his Stand Your Ground hearing had occurred after the statute's effective date, the State bore the burden at this subsequent hearing of proving by clear and convincing evidence that Derossett was not entitled to immunity. *See Love*, 286 So. 3d at 180 (holding that the amendment shifting the burden of proof to the State applies only for "those immunity hearings taking place on or after the statute's effective date").

The parties thereafter appeared before the trial court and agreed that a further evidentiary hearing was not needed. Instead, they stipulated that the court could address these two issues by relying on the voluminous record produced from the earlier five-day evidentiary hearing held on Derossett's Stand Your Ground motion.

Following additional briefing by the parties, the trial court entered its order finding that the State had not established by clear and convincing evidence that Derossett knew or should have known that when he fired his weapon, he was shooting at law enforcement officers. The court did, however, find that the State established by clear and convincing evidence that Derossett was using his home to further criminal activity, thus effectively denying, for a second time, Derossett's Stand Your Ground motion to dismiss.

For the following reasons, we grant Derossett's petition for writ of prohibition,[2] quash the trial court's orders denying his motion to dismiss, and direct that Derossett be discharged.

To provide some context to our present analysis, we set forth the following relevant facts from our earlier opinion describing Derossett's use of deadly force:

> 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.
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> 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

[2] We have jurisdiction. *See Bretherick v. State*, 135 So. 3d 337, 339–40 (Fla. 5th DCA 2013) ("[T]he appropriate vehicle to obtain review before trial of the denial of a 'Stand Your Ground' motion invoking self-defense immunity is by petition for writ of prohibition." (citations omitted)).

> 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.
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> Derossett, having heard his niece's screams for help, hurried from his bedroom to 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."
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> 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, 44 Fla. L. Weekly at 2713. It was only after the exchange of gunfire was concluded and Derossett was shortly thereafter taken into custody that he learned:

> 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. 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 out of the dwelling. 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.

Id. at 2714. (footnotes omitted).

In our earlier opinion, we concluded that the trial court had erred in its conclusion that, under the above described facts, Derossett was not entitled to the presumption under section 776.013(1), Florida Statutes (2015), of being in reasonable fear of imminent death or great bodily harm to his niece at the time that he used deadly defensive force at his home. *Id* at 2716. That statute, which is titled "Home protection; use or threatened use of deadly force; presumption of fear of death or great bodily harm" provided, in pertinent part:

> (1) A person is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself or 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:
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> (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
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> (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.

§ 776.013(1), Fla. Stat. (2015).

The significance of the presumption described in section 776.013(1) is that under section 776.032(1), Florida Statutes, a person, such as Derossett, using force as allowed in section 776.013, is justified in his conduct and is thus immune from criminal

prosecution. However, the presumption of being in reasonable fear of imminent death or great bodily harm under section 776.013(1) is not absolute. Significant here, subsection (2)(c)–(d) of the applicable version of this statute[3] states that this presumption does not apply if:

> (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.[4]

§ 776.013(2)(c)–(d), Fla. Stat. (2015).

In its earlier denial order, the trial court specifically found it unnecessary to address either of these exceptions because it determined that Derossett was not entitled to the presumption under section 776.013 of being in reasonable fear of imminent death or great bodily harm at the time that he fired his weapon. After concluding that the trial court was incorrect and that Derossett was entitled to this statutory presumption, we relinquished jurisdiction for the trial court to address whether either exception contained in section

[3] Effective July 1, 2017, subsection (2)(a)–(d) of section 776.013 was renumbered as subsection (3)(a)–(d).

[4] This latter subsection is also similar to that found within section 776.032(1), under which Derossett's motion was filed. Under section 776.032(1), a person who is otherwise justified under section 776.013 in the use of deadly force is not immune from criminal prosecution if he or she knew or reasonably should have known that the person against whom his or her force was being used was a law enforcement officer.

776.013(2)(c) or (2)(d) applied so as to preclude Derossett's entitlement to the presumption. *Derossett*, 44 Fla. L. Weekly at 2716–17.

The court has now entered its second order on Derossett's motion, which is before this court. The trial court's finding that the State did not prove, by clear and convincing evidence, that Derossett knew or should have known that he was discharging his firearm at law enforcement officers that evening at his home is amply supported by the record. However, as previously mentioned, the trial court did find that the State had shown by clear and convincing evidence that, at the time, Derossett was using his dwelling to further criminal activity. Thus, it did not alter its earlier ruling denying Derossett's Stand Your Ground motion, resulting in Derossett filing the present amended petition for writ of prohibition.

In analyzing the trial court's current order, we begin with the premise that "[t]he 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." *Bouie v. State*, 45 Fla. L. Weekly D415, 419 (Fla. 2d DCA Feb. 26, 2020). Having previously determined that Derossett filed a sufficient Stand Your Ground motion to dismiss on grounds of immunity, *Derossett*, 44 Fla. L. Weekly at 2716, the dispositive questions before us are whether the trial court's factual findings in its order, as discussed below, were clearly and convincingly proven by the State and, if so, whether the facts as found by the court support its subsequent legal conclusion that under section 776.013(2)(c), Derossett was using his dwelling or residence to further a criminal activity.[5]

[5] Section 776.013(2)(c) is written in the disjunctive. It provides that the statutory presumption under subsection (1) does not apply if the person using the defensive force was either "engaged in criminal activity" or was using the dwelling "to further a criminal

The standard of review applicable here is that we defer to factual findings made by the trial court, if they are supported by competent substantial evidence, but we review de novo the trial court's application of the statute to those facts. *See P.G. v. E.W.*, 75 So. 3d 777, 780 n.1 (Fla. 2d DCA 2011). Applying this principle, we accept the trial court's primary factual findings in its order that Derossett knew that his niece had been working as a prostitute and that she had committed acts of prostitution in her room at his house, as there is some record evidence to support these findings. From these facts, the trial court then wrote in its order that "[l]ogically, if [Derossett] allowed illegal activity to take place in his home, his home was being used to further illegal activity." It is this conclusion of law (that is, from these facts, Derossett was "furthering a criminal activity"[6] under section 776.013(2)(c) when he discharged his firearm to prevent his niece from being abducted from his home by unknown individuals) that we review de novo. *See also Kumar v. Patel*, 227 So. 3d 557, 558 (Fla. 2017) (recognizing an appellate court's de novo review on a question of statutory interpretation).

Section 776.013 does not define the term "to further a criminal activity." Accepting that Derossett's niece's acts of prostitution constitute "a criminal activity," the next step in our analysis is determining the meaning of "further" in this statute. We accomplish this by referring to a dictionary. *See Green v. State*, 604 So. 2d 471, 473 (Fla. 1992) ("If

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activity." The trial court separately found in its order that Derossett was not engaged in criminal activity. To the extent that the State here is challenging this determination, its argument lacks merit, and we decline to further address it.

[6] We place no significance on the trial court's use of the term "further illegal activity" as opposed to the statute's language of "to further a criminal activity." Contextually, it has the same meaning or application.

necessary, the plain and ordinary meaning of [a] word can be ascertained by reference to a dictionary." (citing *Gardner v. Johnson*, 451 So. 2d 477, 478 (Fla. 1984))).

The term "further" is defined as to "[h]elp on, assist, promote, favour (an undertaking, movement, cause, etc.)." *Shorter Oxford English Dictionary*, 1053 (5th ed. 2002). Applying this definition to the evidence presented at the Stand Your Ground evidentiary hearing leads us to conclude that the trial court's finding of Derossett's knowledge that his niece had committed acts of prostitution in her room at his home, without more, does not rise to the level of Derossett using his residence "to further a criminal activity" under section 776.013(2)(c). *Cf. Garcia v. State*, 899 So. 2d 447, 450 (Fla. 4th DCA 2005) (recognizing that "[m]ere knowledge that an offense is being committed and mere presence at the scene of the crime are insufficient to establish participation in the offense" as a principal).

The evidence presented at the Stand Your Ground hearing showed that Derossett's niece had a long history of drug addiction and that, as a favor to his sister, Derossett allowed her to move into his home. Law enforcement testimony at the hearing indicated that they did not consider Derossett to be involved, at all, with his niece's prostitution activity as they had no plans to arrest him as part of the "sting" operation that they attempted to conduct that evening. The State did not present evidence that Derossett participated, in any fashion, in arranging for his niece's customers or clients. Nor was there evidence that Derossett provided his niece with physical protection during her engagements with clients or that he financially benefitted from his niece's prostitution.

The State did not show that Derossett promoted[7] or directly assisted his niece in her criminal activities.

Accordingly, because the trial court erred in determining that Derossett's awareness of his niece's random acts of prostitution committed in her room equated to him using his home to further a criminal activity, we conclude that Derossett used defensive force as permitted under section 776.013(1) and that the State failed to overcome his immunity from criminal prosecution under section 776.032(1) with clear and convincing evidence. Therefore, we grant Derossett's amended petition for writ of prohibition, quash the order denying his motion to dismiss, and remand for the trial court to discharge Derossett.[8]

AMENDED PETITION FOR WRIT OF PROHIBITION GRANTED.

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

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[7] The term "promote," which, as previously indicated, is included in the definition of "further," is defined as to "[f]urther the development, progress, or establishing of (a thing); encourage, help forward, or support actively (a cause, process, etc)." *Shorter Oxford English Dictionary,* 2365 (5th ed. 2002).

[8] In reaching our decision, we are mindful that Derossett's actions endangered the lives of three law enforcement officers. However, as found by the trial court and as discussed both in this opinion and in our prior opinion in this case, the State did not meet its burden of proof to show that Derossett knew or reasonably should have known that he was discharging his firearm at law enforcement officers. As a result, our analysis necessarily required that we consider whether, under the facts of the case, Derossett was entitled to immunity from criminal prosecution for shooting at non-law enforcement individuals who had just tried to abduct his niece from his home. Had the State been able to establish by clear and convincing evidence that Derossett either knew or reasonably should have known that he was shooting at law enforcement officers at his home that night, the result in this case would have been different.