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SC20-1164

IN THE SUPREME COURT OF FLORIDA

ROY P. BOSTON,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S ANSWER BRIEF

ON PETITION FOR DISCRETIONARY REVIEW OF A DECISION OF THE FIRST DISTRICT COURT OF APPEAL
CASE NO. 1D17-5190

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STATEMENT OF THE CASE AND FACTS

A. LEGAL BACKGROUND

The issue presented on appeal involves Stand Your Ground immunity. The statutory scheme governing Stand Your Ground immunity is set forth in Fla. Stat. § 776.032. That section provides immunity for "[a] person who uses force as permitted in s. 776.012, s. 776.013, or s. 776.031." *Id.* As relevant, section 776.012 provides:

> (2) 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 . . . .

Id.

The Stand Your Ground issue presented here regards the remedy for the application of an incorrect burden of proof. In 2015, this Court held that "the defendant bears the burden of proof, by a preponderance of the evidence, to demonstrate entitlement to Stand Your Ground immunity at the pretrial evidentiary hearing." *Bretherick v. State*, 170 So. 3d 766, 775 (Fla. 2015). After *Bretherick*

was decided, the Legislature added the following subsection to § 776.032:

> (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).

See Ch. 2017-72, Laws of Fla. The amendment provided that it would "take effect upon becoming a law"—on June 9, 2017. *Id.* Thus, instead of the defendant having to prove he acted in self-defense by a preponderance of the evidence, he need only make out a prima facie claim; at that point, to defeat immunity, the State must prove by clear and convincing evidence that he did not act in self-defense.

In 2019, this Court decided *Love v. State*, 286 So. 3d 177 (Fla. 2019), in which the Court held that the 2017 amendment applied in immunity hearings taking place on or after the statute's effective date.

B. FACTS[1]

The incident in this case occurred on June 17, 2016, before the Legislature amended § 776.032. R2, 33.[2] On that day, four men were working on a construction project in Leon County, Florida—Roy Boston, the defendant and crew supervisor (R2, 33); Timothy Tucker, the victim and Boston's boss (*id.*); and two coworkers who witnessed the incident, Fabian Miller and Francisco Salisch (*id.*). The incident began with an argument about work: Tucker testified that Boston became increasingly upset and started yelling at him, shouting obscenities at him and threatening him. R2, 35, 56, 60. Eventually, Tucker became frustrated with Boston's obscenities and threats, and informed Boston that he was fired. R2, 36. He then told Boston, who kept a tool trailer at the job site in which other members of the

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[1] "[T]he State, as appellee, is entitled to a view of any conflicting evidence in the light most favorable to the jury's verdict." *Peterka v. State*, 640 So. 2d 59, 68 (Fla. 1994).

[2] This brief employs the same record citation convention as the Initial Brief: All references to the record on appeal are referred to as "R," followed by the volume number and page number, which are separated by a comma.

construction crew kept tools, to remove the company's tools from the trailer, and they both went over to that trailer, still arguing as they went. R2, 36. Boston began to remove company tools from his trailer, handing them to Tucker through the trailer's side door as he did so, while Tucker pointed out tools that did not belong to Boston. R2, 38.

While Boston was going through the tools in the trailer, Tucker walked around to the back of the trailer, which had a fold-down ramp. R2, 38. As he stood on the ramp, but without entering the trailer, he saw a level that he believed belonged to the company, and he picked up the level. R2, 39, 103, 110. As he did so, Boston picked up a hammer with one claw broken off of it and, with the remaining claw facing towards Tucker, swung the hammer repeatedly at Tucker. R2, 39, 40, 83, 111. On his first swing, Boston was able to land a blow that punctured Tucker's side just below his armpit. R2, 40, 84, 111. Tucker was able to fend off further blows with the level as he stumbled back down the ramp, and the two men separated. R2, 40, 84, 112. Tucker suffered what was about a one-inch-diameter

puncture on his right ribcage below his armpit, and later received eight stitches. R2, 40, 76.

Salichs witnessed the incident from a distance of about 10 to 15 feet (R2, 108); Miller from about 25 feet (R2, 98). Within 20 seconds of Boston grabbing the hammer, Miller called 911. R2, 85. During the call, he stated that "[o]ne of my guys is attacking my boss with a hammer," and that "[m]y boss and my supervisor got into an argument and my supervisor attacked my boss with a hammer," identifying the attacker as Boston. R2, 86, 87. He also requested that paramedics come to the scene, noting that Tucker's wound was "pretty deep" (R2, 89); later, a paramedic arrived and treated Tucker for his injury (R2, 132).

A police officer arrived at the scene and took statements from all four men. R2, 78. When she spoke to Boston, "[h]e stated pretty immediately," before "any mention that anyone was going to jail," that "if I've got to go to jail for this," he wanted to lock up his trailer to protect his tools. R2, 76-77. After speaking with all of the witnesses, the officer arrested Boston; she testified at trial that the version of

events offered by Tucker, Miller, and Salichs "did not match up with what the defendant was telling [her]." R2, 79.

C. PROCEDURAL HISTORY

1. Boston was charged by information with aggravated battery with a deadly weapon. R1, 10. On October 10, 2017, Boston moved to dismiss, arguing that he was entitled to Stand Your Ground immunity. R1, 29. The parties "agreed that [the trial court] would hear" Boston's immunity motion "during the trial." R2, 4. Before the trial began, the court heard argument regarding whether to apply the burden-shifting amendment retroactively. R2, 6-10. The court held that the pre-amendment standard, i.e., *Bretherick*, would apply: that Boston, not the State, bore the burden of proof, and that he was required to establish his entitlement to immunity by a preponderance of the evidence. R2, 10.

The trial lasted one day, with four witnesses testifying for the prosecution and two for the defense, including Boston himself. Once the prosecution rested, Boston moved for a judgment of acquittal based on insufficient evidence; the trial court denied the motion. R2,

123. After the defense rested, but before the case was submitted to the jury, the court heard argument on the merits of Boston's Stand Your Ground motion. R2, 157-166. The court found that

> Mr. Tucker and Mr. Salichs' testimony was credible as far as Mr. Tucker not being the aggressor in the situation and related to the testimony with the swinging of the hammer, even if the angle that they testified to was a little bit different, to some extent Mr. Miller's testimony is consistent with that as well, including the statement that he made on the 911 tape which was that the defendant was attacking Mr. Tucker.

R2, 165. The court highlighted that the statement Miller "made at the time of the incident was that the defendant was attacking the victim," and "found [Tucker and Salichs] the most credible related to this motion." R2, 165-66. It then denied the motion. R2, 166.

The jury was instructed that to reject Boston's self-defense claim, it had to conclude beyond a reasonable doubt that he was not acting in self-defense.[3] The jury convicted Boston of misdemeanor

[3] R2, 183 ("If in your consideration of the issue of self-defense you have a reasonable doubt on the question of whether the defendant was justified in the use of deadly force, you should find the defendant not guilty. However, if from the evidence you are convinced beyond a reasonable doubt that the defendant was not justified in the use of deadly force, you should find him guilty, if all

battery—a lesser-included offense—and the court sentenced Boston to 11 months and 29 days in county jail, with credit for two days served. R2, 236.

2. Boston appealed, arguing that the trial court erred in denying his motion for a mistrial and in applying the wrong standard in ruling on his motion for Stand Your Ground immunity. He did not challenge the sufficiency of the evidence supporting his conviction. The First District affirmed the denial of Boston's motion for mistrial "without further comment," and that issue is not relevant here. *Boston v. State*, 260 So. 3d 445, 446 (Fla. 1st DCA 2018), *rev. granted, decision quashed*, No. SC18-2130, 2020 WL 970644 (Fla. Feb. 28, 2020). As for the Stand Your Ground issue, the First District reversed the trial court's ruling, holding that it should have applied

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the elements of the charge have been proved."); R2, 187 ("If in your consideration of the issue of self-defense you have reasonable doubt on the question of whether the defendant was justified in the use of non-deadly force, you should find the defendant not guilty. However, if from the evidence you are convinced beyond a reasonable doubt that the defendant was not justified in the use of non-deadly force, then you should find him guilty, if all the elements of the charge have been proved.").

the standard in the 2017 amendment and that Boston was therefore entitled to a new immunity hearing. *Id.* The court did not, however, "address whether the jury's finding of guilt beyond a reasonable doubt cured the trial court's failure to apply the correct burden when considering Boston's immunity claim." *Boston v. State*, 296 So. 3d 580, 582 (Fla. 1st DCA 2020) ("*Boston II*").

3. After the State sought review in this Court, the Court decided *Love v. State*, 286 So. 3d 177 (Fla. 2019). As a result, the Court granted the State's petition, quashed the decision below, and remanded to the First District for reconsideration in light of *Love*. *State v. Boston*, No. SC18-2130, 2020 WL 970644, at *1 (Fla. Feb. 28, 2020).

Applying *Love*, the First District concluded that, because Boston's immunity hearing took place after the amendment's effective date, the trial court erred in failing to apply the 2017 amendments in that hearing. But because Boston was subsequently convicted at trial, the First District considered on remand "whether a defendant convicted at trial by proof beyond a reasonable doubt is

entitled to a new immunity hearing if the trial court applies the wrong standard at a hearing conducted after the effective date of the amendment to the Stand-Your-Ground statute." *Boston II*, 296 So. 3d at 582.

The court held that "under those circumstances, a defendant is not entitled to a new immunity hearing." *Id.* Because "[t]he State's trial burden of overcoming the defendant's self-defense claim by proof beyond reasonable doubt is heavier than its pretrial burden of overcoming the defendant's self-defense immunity claim by clear and convincing evidence," a trial court's error "in applying the correct burden at the immunity hearing can be cured if the State establishes the defendant's guilt at trial by proof beyond a reasonable doubt." *Id.* at 583. And "[b]ecause the State overcame Boston's self-defense claim by meeting the heavier trial burden of proof beyond a reasonable doubt, the trial court's failure to require the State to overcome Boston's immunity claim with clear and convincing evidence was cured." *Id.* at 583-84. The court therefore affirmed Boston's judgment and sentence.

The First District also certified conflict with *Nelson v. State*, 295 So. 3d 307 (Fla. 2d DCA 2020) (Mem.), in which the Second District had held that a defendant was entitled to a new immunity hearing even though he had been convicted by a jury after the trial court erroneously applied the pre-amendment burden of proof in his Stand Your Ground hearing.

Subsequently, in *Little v. State*, the Fourth District agreed with the First District that an error "with respect to the burden of proof at the SYG hearing can be 'cured if the State establishes the defendant's guilt at trial by proof beyond a reasonable doubt,'" and likewise certified conflict with *Nelson*. 302 So. 3d 396, 407 (Fla. 4th DCA Aug. 19, 2020) (quoting *Boston II*, 296 So. 3d at 582).

This Court accepted jurisdiction.

SUMMARY OF ARGUMENT

Boston is not entitled to a new Stand Your Ground immunity hearing because the jury rejected his self-defense claim beyond a reasonable doubt. Requiring the State to prove, by the lesser standard of clear and convincing evidence, that Boston did not act in

self-defense in a new hearing would be a futile waste of judicial resources. That is particularly so because Boston does not identify any way in which the evidence—that either he or the State would introduce—would differ from the evidence at trial. And any argument based on the fact that his Stand Your Ground hearing was held concurrently with his trial constitutes, at most, invited error, as he agreed to that procedure (and does not now assert that holding the proceedings simultaneously was error).

ARGUMENT

BECAUSE THE JURY REJECTED BOSTON'S SELF-DEFENSE CLAIM AT TRIAL, HE IS NOT ENTITLED TO A NEW STAND YOUR GROUND IMMUNITY HEARING.

It is important to note at the outset what this case is and isn't about. Boston asks only for this Court to remand for "the trial court to convene a new Stand Your Ground hearing under the statute as amended." Br. 23. He does *not* argue that the trial court's application of an erroneous standard to his Stand Your Ground motion

contributed in any way to his conviction or that his conviction should be reversed based on that error.[4]

With that clarification, this is a simple case. In *Dennis v. State*, the Court explained that "[t]he erroneous denial of a motion to dismiss may be harmless error." 51 So. 3d 456, 463 (Fla. 2010). There, the trial court rejected the defendant's request for an evidentiary hearing on his motion to dismiss based on Stand Your Ground immunity. *Id.* at 458. After concluding that the trial court erred in doing so, the Court held that the error was harmless because there was "no reasonable possibility that the trial court's failure to make a pretrial evidentiary determination regarding Dennis's immunity claim contributed to Dennis's conviction." *Id.* at 464. After

[4] Nor could Boston make this argument: Any harm flowing from the fact that his Stand Your Ground hearing and jury trial were concurrently held constitutes invited error, as Boston stipulated to that procedure. *See Universal Ins. Co. of N. Am. v. Warfel*, 82 So. 3d 47, 65 (Fla. 2012). He has never argued, moreover, that holding the proceedings simultaneously was erroneous. And Boston did not advance any argument below (or here) that the trial court's procedure in assessing his claim of immunity somehow affected the jury's verdict. Thus, the Court should not consider that issue as Boston waived it.

all, he presented his claim of self-defense at trial, and "the jury determined that the evidence established beyond a reasonable doubt that Dennis committed the lesser included offense of felony battery." *Id.*

In other words, when a jury determines that the defendant is guilty beyond a reasonable doubt, notwithstanding his self-defense claim, that determination cures even an error arising out of the trial court's failure to hold a Stand Your Ground hearing; it thus also cures the trial court's erroneous application of a less stringent standard of proof at such a hearing. *See also* Br. 21 (acknowledging that "harmless error analysis has been applied . . . when [the defendant] avails himself of his right to trial" after the denial of a Stand Your Ground immunity motion).

As a result, the First District correctly held that the jury's rejection of Boston's self-defense claim at trial beyond a reasonable doubt cured—or rendered harmless—the trial court's erroneous application of the pre-amendment Stand Your Ground standard. The State has already proven beyond a reasonable doubt that Boston did

not act in self-defense; nothing requires that it again prove the same thing by the lesser standard of clear and convincing evidence. *See Love v. State*, 286 So. 3d 177, 180 (Fla. 2019) (describing the trial burden of proof beyond a reasonable doubt as more exacting than the clear and convincing burden of proof). Thus, under this Court's decision in *Dennis*, Boston is not entitled to a new Stand Your Ground hearing.

This rule, that a trial court's application of an erroneous burden of proof to a defendant's Stand Your Ground motion is cured when the defendant raises a self-defense claim at trial and is nevertheless convicted, is also fair and administrable because defendants have the option to seek a writ of prohibition before going to trial in that circumstance. *See Tsavaris v. Scruggs*, 360 So. 2d 745, 747 (Fla. 1977); *Rosario v. State*, 165 So. 3d 852, 854-55 (Fla. 1st DCA 2015).

Boston vaguely asserts that the jury's verdict did not cure the error because "tactical strategy changes significantly between the pretrial immunity hearing and trial as to what evidence is presented to the judge vers[u]s the jury." Br. 18. But he does not identify any

evidence that the trial court's ruling prevented him from presenting at his Stand Your Ground hearing. *See Dennis*, 51 So. 3d at 464 (observing that the defendant "does not assert that at a pretrial evidentiary hearing he would have presented evidence different from or additional to the evidence he presented at trial"). Nor does he identify any additional evidence that he would present in a new Stand Your Ground hearing on remand, or contend that the State would present less evidence than it did at trial.

What is more, he does not even contend that the jury's verdict was not supported by the evidence, *see id.* ("[t]he trial court denied [the defendant's] motion for judgment of acquittal" and "the jury determined that the evidence established beyond a reasonable doubt that [he] committed the . . . offense"), and thus that on remand, the State's evidence would not even meet the clear and convincing standard.

Boston does not and cannot assert that he would have presented more evidence if the trial court had required the State to overcome his claim of immunity by clear and convincing evidence.

And for good reason: If anything, the trial court's placement of the burden on Boston for purposes of the immunity determination presumably caused him to present *more* evidence of self-defense than he might otherwise have presented at his Stand Your Ground hearing.

Put another way, a remand here would be an exercise in futility and a waste of judicial resources. The State could—and presumably would—introduce the same evidence that the jury relied on in rejecting Boston's self-defense claim beyond a reasonable doubt, and Boston does not contend that his evidentiary presentation would differ in any way. Thus, in light of the jury's verdict and the evidence presented by the State at trial, the trial court would undoubtedly conclude at a new Stand Your Ground hearing that the State proved by clear and convincing evidence that Boston did not act in self-defense. *See Dennis*, 51 So. 3d at 463-64.

Boston next argues that he lost the benefit of immunity from trial, contending that he should have been "shielded from prosecution once a prima facie claim of self defense has been

established until the party seeking to overcome that burden has done so by clear and convincing evidence." Br. 19. This argument ignores what happened in this case. The parties "agreed that [the trial court] would hear" Boston's immunity motion "during the trial." R2, 4. In other words, by agreeing that the Stand Your Ground hearing and trial would occur simultaneously, Boston forfeited any argument that he lost the benefit of a ruling on his Stand Your Ground motion before trial. *Sheffield v. Superior Ins. Co.*, 800 So. 2d 197, 202 (Fla. 2001) (explaining that "a party may not make or invite error at trial and then take advantage of the error on appeal").

Had he not stipulated to simultaneous proceedings, he could have sought a writ of prohibition from the trial court's denial of his motion before trial. Because he forewent that option, he cannot now complain that his trial occurred. *Id.* And in any event, the State overcame any prima facie claim of self-defense that he had established by proving beyond a reasonable doubt that he did not act in self-defense—and his Stand Your Ground motion was denied after the State rested but before the case was submitted to the jury. If

Boston's losing the benefit of immunity (through his own actions) was truly harmful error, *Dennis* would have been decided differently, as Dennis did not receive an immunity hearing at all.

Similarly, Boston complains in passing that he was "forced to waive his [F]ifth [A]mendment right to remain silent when the burden was placed on him to establish his right to immunity" and as a result "the jury heard that he was a three-time convicted felon." Br. 18. But the fact that he testified at trial was the result of his own agreement to hold the Stand Your Ground hearing and trial simultaneously, and Boston may not now invoke his own trial strategy as a basis for reversing the judgment below. *See Sheffield*, 800 So. 2d at 202. In addition, Boston does not explain how his testimony or the jury's hearing of his convictions changed the outcome of the trial court's resolution of his Stand Your Ground motion.[5] After all, it was the trial judge, not the jury, who decided his entitlement to immunity.

[5] As noted, Boston does not assert any error in his trial. But even to the extent he suggests that the trial court's immunity ruling influenced his decision to testify at trial, and that the jury might have considered the fact of his prior convictions for an improper purpose,

* * *

In short, Boston's argument here ignores both his own conduct below and this Court's decision in *Dennis*. If he wanted an opportunity to establish his entitlement to immunity before trial, including an opportunity to seek a writ of prohibition, he should not have agreed to simultaneous proceedings. And because the jury concluded that the State presented evidence sufficient to prove beyond a reasonable doubt that Boston did not act in self-defense, the trial court's ruling concerning the burden of proof applicable to his motion for Stand Your Ground immunity was cured because the State presented evidence meeting that higher standard of proof. Put differently, Boston *did* "receiv[e] the benefit the Legislature intended of having the State overcome his claim of immunity by clear and convincing evidence before the jury could weigh in" (Br. 19)—the trial

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he could simply have requested a limiting instruction telling the jury that it could consider the convictions only for their impeachment value. *See* § 90.107, Fla. Stat.; Charles W. Ehrhardt, 1 Fla. Prac., Evidence § 610.6 (2020 ed.). His failure to do so waived that issue. *See, e.g.*, *Lightfoot v. State*, 591 So. 2d 305, 307 (Fla. 1st DCA 1991).

court ruled on his Stand Your Ground motion after hearing all of the State's evidence and before submitting the case to the jury. That evidence, the jury confirmed, established beyond a reasonable doubt that Boston did not act in self-defense. Remanding to the trial court would thus be a futile waste of judicial resources.

CONCLUSION

For the foregoing reasons, the Court should approve the decision below.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing brief has been furnished via the E-Filing Portal on this 29th day of January, 2021, to the following:

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CERTIFICATE OF COMPLIANCE

I certify that this brief was prepared in Bookman Old Style, 14-point font, in compliance with Rule 9.045(b) of the Florida Rules of Appellate Procedure; and that it contains 3,551 words, in compliance with Rule 9.210(a)(2)(B) of the Florida Rules of Appellate Procedure.

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