**IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA**

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| **STATE OF OKLAHOMA,** | ) | |
| | ) | |
| **Appellant,** | ) | **NOT FOR PUBLICATION** |
| | ) | |
| **v.** | ) | **Case No. S-2014-961** |
| | ) | |
| **THOMAS ANTHONY COOPER,** | ) | |
| | ) | |
| **Appellee.** | ) | |



**OPINION**

**LUMPKIN, VICE-PRESIDING JUDGE:**

Appellee, Thomas Anthony Cooper, was charged by Information May 2, 2014, in the District Court of Tulsa County, Case No. CF-2014-1986, with Shooting With Intent to Kill (21 O.S.2011, § 652). At a hearing held October 30, 2014, the Honorable Mark Barcus, District Judge, sustained Appellee's Motion to Quash Evidence Adduced at Preliminary Hearing. The State announced its intent to appeal in open court.

The State timely filed its Amended Notice of Intent to Appeal seeking to appeal pursuant to 22 O.S.2011, § 1053(4).[1] The State raises the following propositions of error:

I: The District Court's Order sustaining Defendant's motion to quash constitutes clear error as it ignores the plain language of the statute.

II. The District Court's Order sustaining Defendant's motion to quash constitutes clear error as it ignores prior decisions of this Court.

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[1] In its Notice of Intent to Appeal the state claimed to appeal pursuant to both paragraphs 1 and 5 of 21 O.S.2011, § 1053. (O.R. 22).

III. The District Court's Order sustaining Defendant's motion to quash constitutes clear error as it ignores the simple facts of the case.

After thorough consideration of these propositions and the entire record before us on appeal including the original records, transcripts, and briefs of the parties, we find that the District Court's Order granting the motion to quash the evidence should be reversed and the case remanded to the District Court for further proceedings consistent with this opinion.

**STATEMENT OF FACTS**

The State presented the testimony of Houston Brown and Brittany Matthews at the preliminary hearing. Both Brown and Matthews related the events of February 6, 2013. Appellee and Brown got into an altercation at 8325 North 120th East Avenue in Owasso. The altercation ended when Appellee shot Brown with a .40 caliber handgun.

Cat Farrow owned the home where the shooting took place. Farrow had rented out rooms in the home to different individuals. Both Matthews and her boyfriend, Casey Cole, were roommates in the home. Cole rented the master bedroom located on the first floor of the home. Matthews usually stayed with him but she also had the other upstairs bedroom and stayed in it at times. Brown was not a resident of the home. Instead, he was Matthews' invited guest.

Appellee was in the process of moving into the home. The day before the shooting, Appellee had rented one of the two upstairs bedrooms. Stephen

Gaffney helped Appellee move his belongings. Brown knew both Appellee and Gaffney from high school and helped them move some items into the home.

Appellee and Gaffney left the house to retrieve more of Appellee's belongings. With Appellee's permission Brown took a shower in the upstairs bath. He went into Appellee's room, put on some of Appellee's clothes and placed his own clothes in the wash.

While in Appellee's room, Brown observed both a shotgun and a handgun. Brown knew that Cole had just got out of prison and was not permitted to be around firearms. Brown took the handgun downstairs and showed it to Cole. Appellee returned with another load of his belongings at about the same time and an argument broke out. Appellee demanded the return of his belongings. Brown informed Appellee that he had used Appellee's clothes but would give them back as soon as his clothing was done washing. Brown also gave Appellee his handgun back and explained that Cole could not be around guns. Cole reiterated this fact. Appellee demanded that Brown leave the house.

The argument between the two men caused Brittany Matthews to have a panic attack. She asked Appellee and Brown to stop. When the two men continued, Matthews went into the master bedroom to lie down on the bed.

Brown agreed to leave. Before he left, he asked Cole to get a rag for Matthews but Cole did not comply with the request. Brown went into the master bedroom; he got a rag and attended to Matthews at the side of the bed. Appellee entered the room in a fury. He yelled that Brown needed to leave and

cussed him. Matthews stood up and asked Appellee to leave the room because he was making her anxiety worse. Brown worked his way in between Appellee and Matthews. Appellee then charged at Brown with his fist raised. Brown defended himself. He grabbed Appellee by the throat and punched him with his fists.

Matthews screamed for the two men to stop. Brown looked over at her and Appellee grabbed the handgun out of the back of his pants and pistol-whipped him. Brown's foot was tangled in the comforter and he fell stomach first onto the bed. Brown's upper body was on the bed but his legs were wrapped up in the comforter on the floor. Appellee shot Brown in the back 5 or 6 times.

Brown suffered gunshot wounds to the back of his head, neck, upper back, lower back, hip, and buttocks. He did not have any injuries to the front of his body.

**AVAILABILITY OF APPELLATE REVIEW**

Effective November 1, 2006, the Legislature modified the provisions of 21 O.S.2001, § 1289.25. Prior to that modification, this statute was popularly known as the "Make My Day" law, but because of the provisions added by the 2006 amendment, it became popularly known as the "Stand Your Ground" law. *Dawkins v. State,* 2011 OK CR 1, ¶¶ 6, 9, 252 P.3d 214, 218. Because a person whose use of force is justified according to the statute is immune from criminal prosecution and civil action, we must determine whether the State may properly appeal the District Court's Order pursuant to § 1053(4). *See Id.*; 21

O.S.2011, § 1289.25(F). Therefore, we address the basis for appellate review in this matter.

The right to an appeal is a statutory right and exists only when expressly authorized. *City of Elk City v. Taylor*, 2007 OK CR 15, ¶ 7, 157 P.3d 1152, 1154. The State's right to appeal in any case solely rests on statutory authority. *State v. Campbell*, 1998 OK CR 38, ¶ 6, 965 P.2d 991, 992; *State v. Shepherd*, 1992 OK CR 69, ¶ 9, 840 P.2d 644, 647. Title 22 O.S.2011, § 1053 provides that the State may appeal to this Court in the following circumstances:

> 1. Upon judgment for the defendant on quashing or setting aside an indictment or information;
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> 2. Upon an order of the court arresting the judgment;
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> 3. Upon a question reserved by the state or a municipality;
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> 4. Upon judgment for the defendant on a motion to quash for insufficient evidence in a felony matter;
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> 5. Upon a pretrial order, decision, or judgment suppressing or excluding evidence where appellate review of the issue would be in the best interests of justice; and
>
> 6. Upon a pretrial order, decision or judgment suppressing or excluding evidence in cases alleging violation of any provisions of Section 13.1 of Title 21 of the Oklahoma Statutes.

We have previously determined that § 1053(4) expressly authorizes the State to appeal following the trial court's sustaining of a motion to quash for insufficient evidence. *State v. Davis*, 1991 OK CR 123, ¶ 4, 823 P.2d 367, 369.

> Title 22 O.S.2011, § 504.1(A) allows a defendant to file a motion to quash for insufficient evidence in felony cases after preliminary hearing. The defendant must establish beyond the face of the indictment or information that there is insufficient evidence to

> prove any one of the necessary elements of the offense for which the defendant is charged. Title 22 O.S.2011, § 1053(4), establishes an appeal by the State upon a judgment for the defendant on a motion to quash for insufficient evidence in a felony matter.

*State v. Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1192, 1193-94.

To determine whether § 1053 affords the State an appeal, we review the nature of the judgment or order to ascertain if it falls within the language of § 1053. *Campbell*, 1998 OK CR 38, ¶ 7, 965 P.2d at 992. In the present case, the District Court determined that the State had not overcome the presumption within § 1289.25, and granted Appellee's motion to quash the evidence. To resolve the nature of this order, we look to the specific request which Appellee made before the District Court. *See Id.*, (finding District Court's order was not entered as result of motion to quash or set aside information); *Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d at 1193 (finding motion to dismiss was essentially motion to quash for insufficient evidence); *State v. Thomason*, 2001 OK CR 27, ¶ 14, 33 P.3d 930, 934 (finding State's appeal pursuant to § 1053(3) where motion to quash, set aside, and dismiss charge best characterized as demurrer). In ascertaining the requested relief, this Court does not solely rely upon the title of the motion or pleading but instead reviews the substance of the request for relief. *Id.*; *Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d at 1193; *Thomason*, 2001 OK CR 27, ¶ 14, 33 P.3d at 934.[2]

Appellee's pleading in the present case was titled "Motion to Quash Evidence Adduced at Preliminary Hearing and Memorandum of Law in Support." Within his memorandum, Appellee cited to 21 O.S.2011, § 504.1

[2] Nonetheless, we caution trial court practitioners to appropriately title their pleadings.

(authorizing "Motion to Quash for Insufficient Evidence"). Appellee's sole request for relief was for the District Court "to quash the evidence adduced at preliminary hearing as being insufficient to establish probable cause." Although he asserted that the State was precluded from filing the charge unless it had sufficient evidence to overcome the presumption within Oklahoma's "Stand Your Ground" law, he did not request that the District Court dismiss the charge based upon "Stand Your Ground" immunity. It was this motion that the District Court sustained at the hearing. The District Court announced on the record: "I will grant the motion to quash the evidence." Thus, the District Court did not determine the issue of immunity.

We further note that Appellee does not challenge the State's authority to proceed on appeal pursuant to § 1053(4) in this matter. He asserts that the applicable standard of review is that which is employed when a district judge sustains a motion to quash evidence as being insufficient to establish that a crime was committed. Because the District Court did not determine the issue of immunity under § 1289.25, we find that the State's appeal properly proceeds pursuant to § 1053(4).

In appeals brought to this Court pursuant to § 1053, this Court reviews the trial court's decision to determine if the trial court abused its discretion. *Delso*, 2013 OK CR 5, ¶ 5, 298 P.3d 1193-94; *State v. Hooley*, 2012 OK CR 3, ¶ 4, 269 P.3d 949, 950. An abuse of discretion is any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue and has also been described as a clearly erroneous conclusion

and judgment, one that is clearly against the logic and effect of the facts presented. *Id.*; *Neloms v. State*, 2012 OK CR 7, ¶ 35, 274 P.3d 161, 170.

**DISCUSSION**

The State raises three separate challenges to the District Court's Order granting Appellee's motion to quash. In its first proposition of error, the State argues that the District Court's determination that the presumption within 21 O.S.2011, § 1289.25(B) applied to Appellee was contrary to the plain language of the statute because there was no evidence that Houston Brown had unlawfully and forcefully entered the residence. In its second proposition of error, the State argues that the District Court improperly concluded that Brown was an intruder for the purposes of the statute because he was an invited guest and was legally inside the residence. In its third proposition of error, the State argues that Appellee was not entitled to the benefit of the presumption within § 1289.25(B) because Appellee did not act in self-defense.

Each of the State's claims requires us to construe the provisions of Section 1289.25. The rules of statutory construction are well settled. *State ex rel. Mashburn v. Stice*, 2012 OK CR 14, ¶ 11, 288 P.3d 247, 250.

> 'Statutes are to be construed to determine the intent of the Legislature, reconciling provisions, rendering them consistent and giving intelligent effect to each. *Lozoya v. State*, 1996 OK CR 55, ¶ 17, 932 P.2d 22, 28; *State v. Ramsey*, 1993 OK CR 54, ¶ 7, 868 P.2d 709, 711. It is also well established that statutes are to be construed according to the plain and ordinary meaning of their language. *Wallace v. State*, 1997 OK CR 18, ¶ 4, 935 P.2d 366, 369-370; *Virgin v. State*, 1990 OK CR 27, ¶ 7, 792 P.2d 1186, 1188. We also recognize that the fundamental principle of statutory construction is to ascertain and give effect to the intention of the Legislature as expressed in the statute. *Wallace v.*

> *State*, 1996 OK CR 8, ¶ 4, 910 P.2d 1084, 1086; *Thomas v. State*, 1965 OK CR 70, ¶ 4, 404 P.2d 71, 73. However, it is not our place to interpret a statute to address a matter the Legislature chose not to address, even if we think that interpretation might produce a reasonable result.'

*Id.*; *quoting State v. Young*, 1999 OK CR 14, ¶ 27, 989 P.2d 949, 955. Each part of the various statutes must be given intelligent effect. *Id.* This Court avoids any statutory construction which would render any part of a statute superfluous or useless. *Id.*; *State v. Doak*, 2007 OK CR 3, ¶ 17, 154 P.3d 84, 87.

In enacting 21 O.S.2011, § 1289.25, the Legislature expressly provided that it intended to provide individuals within the State with the right to expect absolute safety within their own homes or places of business. *See Dawkins*, 2011 OK CR 1, ¶ 10, 252 P.3d at 218. Section 1289.25(B) creates a legal presumption which the State must overcome. *See Dawkins*, 2011 OK CR 1, ¶¶ 6-7 252 P.3d at 217. Under this statutory provision:

> A person or an owner, manager or employee of a business 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 defensive force that is intended or likely to cause death or great bodily harm to another if:
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> 1. The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a dwelling, residence, occupied vehicle, or a place of business, or if that person had removed or was attempting to remove another against the will of that person from the dwelling, residence, occupied vehicle, or place of business; and
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> 2. The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.

Applying the rules of statutory construction, we find that it is clear that the Legislature intended for the presumption within § 1289.25(B) to apply in only certain limited circumstances. First, the presumption is only available for the use of "defensive force." *Dawkins*, 2011 OK CR 1, ¶ 6 252 P.3d at 217. Second, the person whom the force is used against must; (1) have unlawfully and forcefully entered the dwelling, residence, place of business or occupied vehicle of the individual using the force, (2) be in the process of unlawfully and forcibly entering such location; or (3) have removed or be attempting to remove another against the will of that person from such location. Third, the person who uses the defensive force must know or have had reason to believe that an unlawful and forcible entry act was occurring or had occurred.

We note that even when those requirements have been met, the statute further limits the applicability of the presumption. Subsection C provides that:

> The presumption set forth in subsection B of this section does not apply if:
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> 1. The person against whom the defensive force is used has the right to be in or is a lawful resident of the dwelling, residence, or vehicle, such as an owner, lessee, or titleholder, and there is not a protective order from domestic violence in effect or a written pretrial supervision order of no contact against that person;
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> 2. The person or persons sought to be removed are children or grandchildren, or are otherwise in the lawful custody or under the lawful guardianship of, the person against whom the defensive force is used; or
>
> 3. The person who uses defensive force is engaged in an unlawful activity or is using the dwelling, residence, occupied vehicle, or place of business to further an unlawful activity.

We have found that this language excludes persons actively committing a crime from the benefit of the presumption in § 1289.25(B). *Dawkins*, 2011 OK CR 1, ¶ 11, 252 P.3d at 218. We further find that Subsection C excludes application of the presumption to persons who use force against a person who has the right to be in the dwelling, residence or vehicle.

Subsection E of § 1289.25 creates a separate legal presumption. It provides:

> A person who unlawfully and by force enters or attempts to enter the dwelling, residence, occupied vehicle of another person, or a place of business is presumed to be doing so with the intent to commit an unlawful act involving force or violence.

As with § 1289.25(B), it is apparent from the plain language of the statute that the Legislature intended for the presumption within § 1289.25(E) to only apply when the person against whom force is used either unlawfully and forcefully enters or unlawfully and forcefully attempts to enter a dwelling, residence, occupied vehicle or place of business.

Turning to the present case, the District Court granted Appellee's motion to quash the evidence finding that the presumption within § 1289.25 applied because Appellee's numerous requests for Brown to leave made Brown an "intruder."[3] We find that the District Court's conclusion is contrary to the plain language of the statute.

The evidence was that Brown lawfully and peacefully gained entry into the dwelling. Appellee conceded at both of the hearings held in this matter that

[3] Appellee did not set forth in his motion to quash which presumption within § 1289.25 the State allegedly failed to overcome. The District Court did not state which presumption it found applicable.

the evidence at preliminary hearing established that Brown was the invited guest of one of the other residents. Brown was inside the room of co-tenant, Casey Cole, caring for co-resident, Brittany Matthews, at the time of Appellee's use of force. Appellee's numerous requests that Brown leave made Brown, at best, a trespasser. *See Jones v. State*, 2009 OK CR 1, ¶ 66, 201 P.3d 869, 886 ("[A] person is a trespasser if that person has refused to leave the land of another after a lawful request to leave has been made to him."). However, the presumptions in § 1289.25 do not apply to mere trespassers. *See Dawkins*, 2011 OK CR 1, ¶ 11, 252 P.3d at 219 ("Legislature intended the 'stand your ground' provisions to protect, law abiding citizens from intruders bent on criminal activity."). Instead, the presumptions only apply when the person against whom the force was used: (1) had unlawfully and forcefully entered the dwelling, (2) was in the process of unlawfully and forcibly entering the dwelling, or (3) removed or was attempting to remove another against the will of that person from the residence. As Brown's refusal to leave did not rise to the level of a forcible removal event or an unlawful and forcible entry, Appellee was not entitled to the benefit of either of the presumptions within § 1289.25.

We further find that the District Court's determination was clearly against the weight and effect of the facts at preliminary hearing. There was no evidence that Appellee's use of deadly force was "defensive." *See Jones v. State*, 2009 OK CR 1, ¶ 64, 201 P.3d 869, 886 ("[S]elf-defense is not available to a person who was the aggressor or provoked another with the intent to cause the altercation . . . ."). Brittany Matthews provided the sole evidence concerning the

physical altercation between Appellee and Brown. Matthews testified that Brown came in to the master bedroom and rendered aid to her, Appellee entered the room yelling and cussing. Matthews asked Appellee to leave the room and Brown stepped between Appellee and her. Appellee "charged" Brown with his fist raised. Brown "defended" himself, grabbed Appellee by the throat, and struck him with his fist. When Matthews screamed for the two men to stop, Appellee used the distraction to retrieve the handgun from his pants and pistol whipped Brown. After Brown fell face first on the bed with both of his feet tangled in the comforter on the floor, Appellee shot him in the back 5 or 6 times. Matthews related that Brown was unarmed.

Generally, a person is entitled to use reasonable force to eject a trespasser. *Turpen v. State*, 1949 OK CR 32, 89 Okla.Crim. 6, 15-16, 204 P.2d 298, 303. However, a mere trespass upon land of another, even after the trespasser has been warned to depart does not justify use of deadly force. *Id.*; *Marshall v. State*, 1914 OK CR 121, 11 Okla. Cr. 52, 52, 142 P. 1046, 1046 ("A landowner is not justified in making an assault upon another with a dangerous or deadly weapon in resisting a trespass on his premises, when no felony is attempted."). Clearly, Appellee was not entitled to use deadly force against Brown under the facts presented at preliminary hearing. Appellee's act of shooting Brown in the back 5 or 6 times after he rendered Brown prone on the bed did not constitute defensive force. *Davis v. State*, 2011 OK CR 29, ¶ 95, 268 P.3d 86, 114-15 (finding self-defense cannot be invoked by an aggressor).

As neither of the presumptions within § 1289.25 applied to Appellee's act of shooting Brown, we find that the District Court's Order sustaining the motion to quash was clearly erroneous. There was sufficient evidence presented at preliminary hearing that Appellee unjustifiably shot Brown with the intent to kill. *Heath v. State*, 2011 OK CR 5, ¶ 7, 246 P.3d 723, 725 ("[T]he State is required to present sufficient evidence to establish (1) probable cause that a crime was committed, and (2) probable cause to believe that the defendant committed the crime."); *Primeaux v. State*, 2004 OK CR 16, ¶ 20, 88 P.3d 893, 900 ("The burden of proof at preliminary hearing is probable cause.").

We note that our determination in this matter that the evidence at preliminary hearing was sufficient is limited in scope. *See* 22 O.S.2011, § 258(Eighth) (noting limited purpose of preliminary hearing). A criminal defendant has limited means in developing testimony at preliminary hearing. *See* 22 O.S. § 258 (Sixth) (granting magistrate authority to limit evidence at preliminary hearing). "A person who uses force, as permitted pursuant to the provisions of subsections B and D of this section, is justified in using such force and is immune from criminal prosecution and civil action for the use of such force." 21 O.S.2011, § 1289.25(F) (emphasis added). As this statutory provision both justifies and provides immunity, a criminal defendant may seek to have a determination of the issue of immunity prior to trial. *See State v. Hammond*, 1989 OK CR 25, ¶ 3, 775 P.2d 826, 829 (Lumpkin, J., Dissenting) (recognizing that criminal defendant may file motions encompassing wide variety of matters which may not be specifically enumerated in the statutes).

The defense of justifiable use of deadly force is also available to a criminal defendant at trial regardless of any determination of immunity in pretrial proceedings. *See* Inst. No. 8-15, OUJI-CR(2d) (Supp.2014) (adopting justifiable use of deadly force against intruder instruction for use with 21 O.S.2011, § 1289.25 (B), (C), (F)); *Dawkins*, 2011 OK CR 1, ¶ 14, 252 P.3d at 219 (finding error in instructions on "stand your ground" law harmless). Therefore, our determination does not bar Appellee from asserting any right or defense that he may possess under § 1289.25 at a later hearing or trial.

As the District Court's determination was clearly erroneous based upon the facts and law pertaining to the matter, we find that the Order sustaining Appellee's motion to quash must be reversed.

**DECISION**

The order of the District Court of Tulsa County quashing the evidence is **REVERSED**. The matter is **REMANDED** to the District Court for further proceedings consistent with this Opinion. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF TULSA COUNTY
THE HONORABLE MARK BARCUS, DISTRICT JUDGE

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**OPINION BY: LUMPKIN, V.P.J.**
SMITH, P.J.: CONCUR IN RESULT
JOHNSON, J.: CONCUR IN RESULT
LEWIS, J.: CONCUR IN RESULT
HUDSON, J: CONCUR

RB

**LEWIS, J., CONCURRING IN RESULTS:**

I concur in the judgment reversing the trial court's order granting Appellee's motion to quash for insufficient evidence. However, I would defer any discussion of the application of the Stand Your Ground law to the facts of this case. A defendant seeking the immunity from criminal prosecution guaranteed by the Stand Your Ground law should file a pre-trial motion to dismiss the indictment or information pursuant to the procedure established by this Court in *State v. Ramos,* Case No. S-2013-509.

Nothing in today's opinion can, or should, preclude Appellee on remand from filing a proper motion to dismiss the information and request for evidentiary hearing on Stand Your Ground immunity under the *Ramos* procedure. In the event of a denial of Appellee's motion to dismiss the indictment, Appellee may invoke this Court's original jurisdiction by petition for the writ of prohibition to review the denial of immunity pursuant to *Ramos. See also, Nation v. Musseman,* No. MA-2015-162 (Lewis, concurring in the result). I have been authorized to state that Judge Johnson joins me in this opinion.