IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DAVID EDWARD BLOEBAUM,	)	
	)	
Appellant,	)	**NOT FOR PUBLICATION**
	)	
v.	)	**No. F-2014-989**
	)	
STATE OF OKLAHOMA,	)	
	)	
Appellee.	)	

OPINION

HUDSON, JUDGE:

Appellant David Edward Bloebaum was tried by jury in the District Court of Oklahoma County, Case No. CF-2012-6233, and convicted of Murder in the First Degree (Count 1), in violation of 21 O.S.2011, § 701.7(A); and Carrying a Firearm Unlawfully (Count 2), in violation of 21 O.S.2011, § 1272.[1] The jury recommended Bloebaum be sentenced to life imprisonment without the possibility of parole for Count 1 and thirty (30) days imprisonment and a $250.00 fine for Count 2. The Honorable Timothy R. Henderson, District Judge, sentenced Bloebaum in accordance with the jury's recommendation and ordered the sentences run concurrently. Bloebaum now appeals. We affirm.

BACKGROUND

Shortly before 4:30 p.m. on September 28, 2012, Appellant and Jasen Yousif were each driving westbound on the Kilpatrick Turnpike in Oklahoma City. Appellant was driving a gray Chevrolet S-10 pickup truck. Yousif was

[1] The State also charged Appellant with a second count of Carrying a Firearm Unlawfully (Count 3) but dismissed this count prior to resting.

driving a yellow Ford F-250 pickup truck. Both Appellant and Yousif were driving very aggressively, speeding and swerving between lanes. Yousif's truck was in the lead with Appellant following closely behind. Andrea Lechtenberger, a witness to this dangerous behavior, testified "it looked like bumper cars on the highway but they never seemed to hit each other, which . . . was so shocking to me. . . . I mean, it was crazy." Just prior to reaching the exit to Pennsylvania Avenue, Yousif swerved his truck at the last minute and exited off the turnpike. Continuing his pursuit of Yousif, Appellant sped around and cut off Dustin Willoughby in order to also take the Pennsylvania exit. As Appellant sped past, Willoughby observed Appellant was "intently focused on what he was doing" and "completely oblivious to [Willoughby]."

Appellant continued to follow Yousif as Yousif turned right off of Memorial Road onto Pennsylvania Avenue and then into the parking lot in front of Target. Yousif parked his truck and Appellant followed suit, parking parallel to Yousif's truck approximately two parking spaces away. Both trucks were facing north. The driver's side of Yousif's truck was facing the passenger's side of Appellant's truck. Yousif promptly jumped out of his truck and moved toward the passenger's side of Appellant's truck. As Yousif approached Appellant's truck, Appellant rolled down the passenger's side window of his truck. Thereafter, Appellant shot Yousif a total of four (4) or five (5) times. Yousif died within seconds at the scene.

Appellant exited his truck just moments after the shooting and called 911 on his cell phone. While talking on his phone, Appellant paced around the

crime scene, including the area where a knife had fallen. During the 911 call, Appellant stated "there's been a shooting . . . he just pulled a knife on me!" Appellant, however, refused to identify himself as the shooter and was evasive—dodging the 911 operator's questions regarding the location of the shooter and the gun. When asked repeatedly by the 911 operator to provide his name, Appellant gave only his first name, David, and then promptly terminated the phone call. In his statement to police at the scene, Appellant stated Yousif approached his truck shortly after he had pulled into the Target parking lot. As he did so, Appellant claimed Yousif was yelling at him, was irate, took out a knife and stabbed it into his seat. In response, Appellant stated he pulled out a gun and shot Yousif. Appellant admitted to not having a concealed carry permit for the gun.

As discussed more fully below in relation to Appellant's first two propositions of error, Appellant's statements to police indicating Yousif had invaded his truck were not corroborated by the evidence presented at trial. In particular, no damage demonstrating Appellant's seat had been penetrated by a knife was observed. Additionally, eyewitness and physical evidence showed Yousif was multiple feet from Appellant's truck when he was fatally shot.

Video from a closed circuit camera showed the shooting took place within ten seconds after Yousif stopped his truck. Appellant initially shot Yousif once or possibly twice in the front.[2] As Yousif turned and was retreating, Appellant shot him three (3) more times in the back. Sherise Brannon, a Target patron,

[2] Yousif had what appeared to be five gunshot wounds; however, the medical examiner testified the wounds to Yousif's neck and arm may have been caused by the same bullet.

heard the gunshots as she was driving away from Target and turned to see Yousif running from Appellant's truck, spin around, drop a knife, and collapse to the ground onto his stomach. Brannon never saw Yousif brandish or do anything else with the knife. She immediately returned to the parking lot in an attempt to render aid. However, when Brannon approached Yousif, Appellant instructed her to step back away from the victim. According to Brannon, Appellant was talking on his cellphone in what appeared to be a very calm manner—"like [the situation] did not phase (sic) him at all."

Only two eyewitnesses—James Spitz and Cherie Poertner—observed the interaction between Appellant and Yousif in the seconds between Yousif exiting his truck and Appellant firing his gun. James Spitz, an employee at Target, had just gotten off work and was in the parking lot preparing to get into his car when he witnessed the interaction between Yousif and Appellant. Spitz observed the exchange while looking over the top of his vehicle and the hood of Yousif's truck. From Spitz's viewpoint, he was only able to see Yousif from his chest up. His vision of Yousif's torso was blocked. Spitz saw Yousif exit his truck and move quickly toward Appellant's truck. Spitz heard the two men cursing and arguing. As Yousif neared Appellant's truck, Spitz saw the passenger window in Appellant's truck come down and observed "movement" in Yousif's head and shoulder area. Yousif never raised his hands high enough for Spitz to view them. Spitz further testified that he never saw Yousif with any kind of weapon. Five or six gunshots were fired shortly thereafter. Spitz

ducked, and when he looked up the next time, Yousif was collapsing to the ground.[3]

Cherie Poertner, an employee at Chick-fil-A, was the second eyewitness to the events leading up to the shooting. Target and Chick-fil-A each have store locations near Pennsylvania and Memorial and the two businesses share the same parking lot. Poertner was sitting in her vehicle in the parking lot eating some food before she had to report for work. Poertner's vehicle was parked just to the north of where the shooting ultimately took place. While sitting in her vehicle, she noticed Yousif and Appellant's trucks pull into the parking lot and watched as they parked behind her. She then observed Yousif exit his yellow truck and proceed to walk toward Appellant's truck. Yousif was gesturing with his arms stretched out, palms open, and was saying "what, what". Yousif's hands were empty. From Poertner's vantage point, Yousif was approximately eight feet from Appellant's truck when Appellant began shooting.

Additional facts relevant to Appellant's propositions of error will be presented as needed in the discussion below.

I. Immunity

In his first proposition of error, Appellant contends he was immune from criminal prosecution pursuant to 21 O.S.2011, § 1289.25—commonly known as the "Stand Your Ground" law—and "should have never been prosecuted". In his quest for immunity, Appellant filed a pre-trial application for § 1289.25

[3] Spitz's trial testimony was consistent with a phone call he made to 911 following the shooting.

immunity. Following a two-day hearing, the trial court denied Appellant's application.

Section 1289.25 provides in pertinent part:

> B. A person . . . is presumed to have held a reasonable fear of imminent peril of death or great bodily harm to himself . . . when using defensive force that is intended or likely to cause death or great bodily harm to another if:
>
> 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 . . . [an] occupied vehicle [ ]; and
>
> 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.
>
> C. The presumption set forth in subsection B of this section does not apply if:
>
> * * * *
>
> 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.
>
> D. A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force, if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm to himself or herself or another or to prevent the commission of a forcible felony.
>
> * * * *
>
> F. 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. As used in this subsection, the term "criminal prosecution" includes charging or prosecuting the defendant.

In support of his contention, Appellant argues he satisfied the requisite conditions set forth in § 1289.25(B) as Yousif was "in the process of unlawfully and forcefully entering, or had unlawfully and forcefully entered" Appellant's vehicle. Appellant thus contends he was entitled to the § 1289.25(B) presumption that he held a "reasonable fear of imminent peril of death or great bodily harm" when he shot and killed the victim. He further asserts this presumption was not forfeited by one of the exceptions set forth in subsection C. Therefore, having satisfied the conditions of subsection B, Appellant argues he was justified in using deadly force and should have been found immune from criminal prosecution pursuant to § 1289.25(F).[4]

This Court has yet to rule in a published case on the proper allocation of the burden of proof and the standard of proof on a pre-trial § 1289.25 immunity evidentiary hearing. Section 1289.25 was originally patterned after Colorado's "Make My Day" law. *State v. Anderson*, 1998 OK CR 67, ¶ 7, 972 P.2d 32, 34. In *People v. Guenther*, the Colorado Supreme Court determined the defendant should bear the burden of proving, by a preponderance of the evidence, his entitlement to immunity. 740 P.2d 971, 980-81 (Colo. 1987) (en banc). The *Guenther* court reasoned:

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[4] Notably, pursuant to § 1289.25(F), the force utilized by a defendant seeking immunity must comport with both subsections B and D. Subsection D limits § 1289.25 immunity to persons who are *not* engaged in an unlawful activity. As charged in the information and stipulated to by Appellant at the immunity hearing, Appellant was unlawfully carrying the handgun used to kill Yousif, without a concealed carry permit in violation of 21 O.S.2011, § 1272. Appellant, however, does not specifically address the parameters of subsection D in his brief, but merely states he "was engaged in no illegal activity" when he shot and killed Yousif. In making this argument, Appellant references subsection "I" of § 1289.25 which provides the Act "shall not be construed to require any person using a pistol pursuant to [the Act] to be licensed in any manner." Because of the highly debatable nature of this point of contention and the fact the trial court did not base its pre-trial immunity ruling on this ground, we do not address this issue herein.

> [W]e believe it reasonable to require the accused to prove his entitlement to an order of dismissal on the basis of statutory immunity. . . . We have often imposed on a criminally accused the burden of establishing his entitlement to dismissal of criminal charges at the pretrial stage of the case[,] . . . and we find it appropriate to impose that same burden on the defendant in connection with a pretrial claim for statutory immunity[.] Furthermore, the accused presumably has a greater knowledge of the existence or nonexistence of the facts which would call into play the protective shield of the statute and, under these circumstances, should be in a better position than the prosecution to establish the existence of those statutory conditions which entitle him to immunity.
>
> While we conclude that the burden of proof should be placed on the defendant, we decline to require that the defendant prove his entitlement to immunity beyond a reasonable doubt. We believe that the "preponderance of the evidence" is the appropriate standard of proof applicable to a defendant's pretrial motion to dismiss [.] We have . . . placed a similar burden on defendants in regard to certain issues raised at suppression hearings. . . . The preponderance of evidence standard, in our view, is more consistent with that expressed legislative intent than is the more rigorous reasonable doubt standard of proof.

Id. (internal citations omitted).[5]

We find this reasoning persuasive and adopt the *Guenther* court's rationale. Thus, a defendant seeking pre-trial immunity from criminal prosecution pursuant to § 1289.25(F), bears the burden of demonstrating, by a preponderance of the evidence, that their use of allegedly defensive force was

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[5] Notably, in his written order denying Appellant's pre-trial application for immunity, Judge Henderson acknowledged § 1289.25 "does not give the [c]ourt guidance on the burden of proof nor the procedure for the [c]ourt to follow when a claim of immunity is raised pursuant to the statute." Judge Henderson further advised he was "unaware of any Oklahoma case that would give guidance to the [c]ourt." Thus, Judge Henderson sought guidance from Florida and South Carolina—each state having enacted similar immunity statutes. Judge Henderson specifically reviewed *Darling v. State*, 81 So. 3d 574 (Fla. Dist. Ct. App. 2012) and *State v. Duncan*, 392 S.C. 404, 709 S.E.2d 662 (2011). Both states, after construing their respective statutes, have determined the defendant bears the burden of proving, by a preponderance of the evidence, that immunity is legally warranted. Persuaded by these decisions, Judge Henderson likewise "plac[ed] upon the Defendant the burden to prove that he should be immune from criminal prosecution pursuant to 21 O.S. § 1289.25 by a preponderance of the evidence".

legally justified. The trial court's ruling on such a motion clearly involves the finding of facts. A trial court's resolution of § 1289.25 immunity is comparable to a motion to suppress. Thus, we find the resolution of a pre-trial § 1289.25 motion falls within the trial court's sound discretion, which when challenged on appeal will be reviewed by this Court for an abuse of discretion. *See Terry v. State*, 2014 OK CR 14, ¶ 6, 334 P.3d 953, 955, *cert. denied,* 135 S. Ct. 2053, 191 L. Ed. 2d 958 (2015) ("This Court reviews a trial court's decision denying a defendant's motion to suppress for an abuse of discretion."). Accordingly, we defer to the trial court's findings of fact unless they are clearly erroneous, and review the trial court's legal conclusions *de novo. State v. Alba,* 2015 OK CR 2, ¶ 4, 341 P.3d 91, 92.

Moreover, we find review of a § 1289.25 claim of pre-trial immunity should be limited to the record of the pre-trial hearing. A pre-trial claim of immunity is distinctively different than a self-defense claim pursued at trial. The defendant bears the burden of proving § 1289.25 immunity if raised prior to trial; whereas, at trial the State bears the burden of proving beyond a reasonable doubt that the defendant was not acting in self-defense. Once a defendant proceeds to trial, their immunity claim is essentially subsumed by the evidence relating to their claim of self-defense. *See Wood v. People,* 255 P.3d 1136, 1139, 1141 (Colo. 2011) (en banc) (a trial court's pre-trial denial of immunity pursuant to Colorado's "Make My Day" law is subsumed by the jury's verdict). In other words, immunity is not a trial issue. At trial, the issue becomes whether the defendant, acting in self-defense with consideration of the

Stand Your Ground provisions, was justified in using deadly force. The trial evidence is only germane to an appellate sufficiency of the evidence claim. Likewise, the evidence presented at a pre-trial immunity hearing is relevant only to determine whether the trial court abused its discretion in deciding the immunity claim itself.[6] Hence, the evidence presented at trial cannot be used to bolster a pre-trial claim of immunity. *See Leaf v. State*, 1983 OK CR 167, ¶ 2, 673 P.2d 169, 170 ("In considering this contention, we must look to the record at the suppression hearing. The trial on the merits is a separate and distinct proceeding, and the evidence therein does not relate back to bolster up the evidence on the motion to suppress.").

Based on the foregoing, Appellant fails to adequately develop his challenge to the trial court's pre-trial denial of immunity. *See* Rule 3.5(A)(5), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2015) (arguments presented in an appellant's brief should be "supported by citations to the authorities, statutes and parts of the record."). As noted by the State, Appellant does not support his claim with any argument in his opening brief which relates to Judge Henderson's detailed findings of fact as contained in his August 24, 2014 written Order nor with citations to Appellant's two day pre-trial immunity hearing held on August 12 and August 14, 2014. Instead, Appellant relies solely on the transcript of the jury trial. Appellant accurately responds in his reply brief, however, that "nothing in the Court's current case law requires that a claim of immunity under § 1289.25 be limited to the record

[6] Notably, Appellant attempts to raise both issues. Appellant's sufficiency of the evidence claim is presented in Proposition II.

of the immunity hearing". Appellant further asserts "[t]he relevant facts argued in [his] Brief in Chief were identical in both the immunity hearing and the trial". Thereafter, Appellant briefly references in his reply brief the following excerpt from eyewitness Jimmy Spitz's testimony on the first day of the pre-trial immunity hearing:

> [DEFENSE COUNSEL]: Do you remember Detective Whitebird asking if you ever saw the driver of the yellow truck lunge into the smaller vehicle?
>
> [SPITZ]: I believe I said that it was possible but I couldn't be for sure.

Appellant also makes reference to the following testimony of Officer Kyle Maly, who spoke with Appellant at the scene:

> [DEFENSE COUNSEL]: What did [Appellant] tell you?
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> [MALY]: He said—I asked him what had happened. He said that he had parked in the parking lot. Another man approached his vehicle, had taken out a knife and stabbed it into his seat through an open window. And he pulled the firearm and fired at the subject.

Even when combined with the legal argument contained in his Brief in Chief, Appellant's references to the above outlined testimony in his reply brief are insufficient to properly develop his contention that the trial court abused its discretion when it denied Appellant's pre-trial immunity motion. Despite the deficiencies in Appellant's argument, we nonetheless find the record of Appellant's pre-trial immunity hearing fully supports the trial court's detailed and well-reasoned ruling. Citing to §§ 1289.25(B)(1), Judge Henderson specifically found as follows:

> [T]he Defendant has not provided credible evidence that the Decedent was in the process of "unlawfully and forcefully entering or had unlawfully and forcibly entered" the Defendant's vehicle.

Judge Henderson further concluded pursuant to § 1289.25(D):

> Nor has the Defendant proved to this Court by a preponderance of the evidence that the Decedent "attacked" the Defendant as he sat in his vehicle.

The following competent evidence presented during the immunity hearing supports the trial court's finding that Yousif never reached or entered Appellant's truck: (1) Yousif was located on the passenger's side of Appellant's truck when he was shot; (2) Yousif's gunshot wounds were all categorized as distance wounds, indicating Yousif was at least twenty-four inches (two feet) away from Appellant's gun when he was shot; (3) there was no blood found on the passenger's side door or on the inside of Appellant's truck; (4) no damage demonstrating Appellant's passenger seat had been penetrated by a knife was observed; (5) the dirt and dust on the passenger's side door of Appellant's truck had not been disturbed; and (6) no blood spatter evidence was found on the passenger's side door of Appellant's truck, thus showing Yousif was standing at least four feet away from Appellant's truck when he was shot. This physical evidence clearly controverts Appellant's statements to Officer Maly that Yousif stabbed Appellant's seat with a knife and Appellant's statement to the 911 operator that Yousif had pulled a knife on him. Appellant thus fails to demonstrate the trial court abused its discretion when it denied Appellant's request for immunity. Appellant's Proposition I is denied.

II. Sufficiency of Evidence

In his second proposition of error, Appellant challenges the sufficiency of the evidence to prove, beyond a reasonable doubt, that he did *not* act in self-defense. As discussed in relation to Appellant's first proposition of error, Appellant's pre-trial § 1289.25 immunity claim was subsumed at trial by the evidence relating to his self-defense claim. *Wood*, 255 P.3d at 1139, 1141. That being so, Appellant's pre-trial claim of immunity does not alter the manner in which this Court reviews his sufficiency of the evidence claim.

"We review sufficiency of the evidence claims in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Davis v. State*, 2011 OK CR 29, ¶ 74, 268 P.3d 86, 111, *as corrected* (Feb. 7, 2012) (citing *Jackson v. Virginia*, 443 U.S. 307, 316, 99 S. Ct. 2781, 2787, 61 L. Ed. 2d 560, 571 (1979) and *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04). This analysis requires examination of the entire record. *Young v. State*, 2000 OK CR 17, ¶ 35, 12 P.3d 20, 35. In evaluating the evidence presented at trial, we accept the fact-finder's resolution of conflicting evidence as long as it is within the bounds of reason. *See Day v. State*, 2013 OK CR 8, ¶ 12-13, 303 P.3d 291, 298; *Gilson v. State*, 2000 OK CR 14, ¶ 77, 8 P.3d 883, 910. This Court also accepts "all reasonable inferences and credibility choices that tend to support the verdict." *Davis*, 2011 OK CR 29, ¶ 74, 268 P.3d at 111; *Coddington v. State*, 2006 OK CR 34, ¶ 70, 142 P.3d 437, 456. The law makes no distinction between direct and circumstantial evidence and either, or

any combination of the two, may be sufficient to support a conviction. *Miller v. State*, 2013 OK CR 11, ¶ 84, 313 P.3d 934, 965.

To support a conviction for first degree malice murder the State bore the burden of proving Appellant caused, with deliberate intent to kill, Yousif's unlawful death. 21 O.S.2011, § 701.7(A). Appellant claimed, from his arrest through trial, that he acted in self-defense. "Self-defense is an affirmative defense which admits the elements of the charge, but offers a legal justification for conduct which would otherwise be criminal." *Davis*, 2011 OK CR 29, ¶ 95, 268 P.3d at 114; 21 O.S.2011, § 733. Pursuant to Oklahoma law, a person is justified in using deadly force when he has reasonable grounds to believe he is in imminent danger of death or great bodily harm. *Id.* Although Appellant did not testify at trial, evidence was presented that indicated Yousif may have threatened Appellant with a knife just prior to the shooting. From this the trial court determined there was sufficient evidence to submit the issue to the jury and instructed the jury on the law of self-defense and the Stand Your Ground law. Consequently, the State was obligated to prove, beyond a reasonable doubt, that Appellant did not act in self-defense. *Robinson v. State*, 2011 OK CR 15, ¶ 17, 255 P.3d 425, 432.

The jury was properly instructed that "[s]elf-defense is not available to a person who is the aggressor or who enters into mutual combat." *West v. State*, 1990 OK CR 61, ¶ 7, 798 P.2d 1083, 1085 (citing *Ruth v. State*, 1978 OK CR 79, ¶ 7, 581 P.2d 919, 921–22). *See also Davis*, 2011 OK CR 29, ¶ 95, 268 P.3d at 115 ("The right of self-defense cannot be invoked by an aggressor or by

one who voluntarily enters into a situation armed with a deadly weapon."); *Allen v. State*, 1994 OK CR 13, ¶ 31, 871 P.2d 79, 93 ("If a person by provocative behavior initiates a confrontation, even with no intention of killing the other person, [he] loses the right of self-defense."). "[A] person is an aggressor when that person by his wrongful acts provokes, brings about, or continues an altercation." *Jones v. State*, 2009 OK CR 1, ¶ 64, 201 P.3d 869, 886.

Here, Appellant clearly initiated the confrontation. In what can be described as a dangerous high-speed car chase, Appellant pursued Yousif on the Kilpatrick Turnpike. When Yousif exited the turnpike, Appellant continued his pursuit following Yousif into the parking lot at Target. Appellant did so knowing the possibility of a confrontation was strong. Although Yousif exited his vehicle to confront Appellant, Appellant did not relent, consciously protracting the confrontation by deliberately rolling down his window and arming himself with a gun. Appellant could have easily neutralized the situation by keeping his window closed or by withdrawing entirely from the fight by simply driving away. Had he done so, Appellant likely would have lost his status as the aggressor. *See Allen,* 1994 OK CR 13, ¶ 30, 871 P.2d at 92 ("[I]f a party who was the attacker withdraws and the other party pursues more than is necessary to ensure [his] safety, the pursuing party can take on the status of attacker"). While granted the act of driving away would have equated to retreat, only a person that was not the aggressor or did not voluntarily enter into mutual combat can stand firm and defend themselves. *See West,* 1990 OK

CR 61, ¶ 7, 798 P.2d at 1085; Instruction No. 8-52, OUJI-CR 8-52 (2d) (defense of self-defense—no duty to retreat). Moreover, even if a party has no duty to retreat from a confrontation, the possibility of escape is a factor in determining whether deadly force was necessary to avoid death or great bodily harm. *Allen*, 1994 OK CR 13, ¶ 32, 871 P.2d at 93. As the confrontation played out here, however, Appellant—by continuing the altercation—remained the aggressor thus barring his claim of self-defense.

Furthermore, even assuming arguendo that Yousif did wield a knife at Appellant as he approached Appellant's truck and that such act altered Appellant's status as the aggressor, Appellant's actions clearly demonstrated his voluntary entrance into mutual combat with Yousif, which again foreclosed a claim of self-defense. Additionally, eyewitness and physical evidence showed Yousif was multiple feet from Appellant's truck when he was fatally shot. Taking this into consideration along with Appellant's ability to neutralize the situation, no rational jury would find Appellant had reasonable grounds to believe he was in imminent danger of death or great bodily harm. Thus, the State presented sufficient evidence to disprove Appellant's self-defense claim beyond a reasonable doubt.

Moreover, taking the evidence in the light most favorable to the State, any rational trier of fact could find beyond a reasonable doubt that Appellant killed Yousif with malice aforethought. The evidence presented at trial overwhelmingly showed Appellant was the aggressor. Appellant relentlessly pursued Yousif in an aggressive and dangerously reckless manner down the

Kilpatrick Turnpike and eventually into the Target parking lot. Thereafter, Appellant fatally shot Yousif as he approached but was still multiple feet away from the passenger's side of Appellant's truck. Appellant initially shot Yousif once or twice in the front and then an additional three times in the back as Yousif turned and was retreating. In addition, evidence of Appellant's involvement in five (5) prior altercations[7] demonstrated Appellant pursued Yousif into the Target parking lot with no intention of backing down. Appellant's Proposition II is denied.

III. Other Crime or Bad Act Evidence

Appellant contends in his third and final proposition of error that the trial court abused its discretion by allowing evidence of multiple prior bad acts to be admitted at trial. "This Court reviews a trial court's decision to allow introduction of evidence of other crimes for an abuse of discretion." *Neloms v. State*, 2012 OK CR 7, ¶ 12, 274 P.3d 161, 164. "An abuse of discretion has been defined as a conclusion or judgment that is clearly against the logic and effect of the facts presented." *Pullen v. State*, 2016 OK CR 18, ¶ 4, ___ P.3d ___. As this claim was properly preserved, the State must demonstrate on appeal that admission of the challenged evidence "did not result in a miscarriage of justice or constitute a substantial violation of a constitutional or statutory right." *Welch v. State*, 2000 OK CR 8, ¶ 10, 2 P.3d 356, 366.

On March 14, 2014, the State provided written notice of its intention to offer evidence of other crimes or bad acts pursuant to 12 O.S.2011, §§ 2404(B)

[7] The admission of this evidence is the subject of Appellant's third and final proposition of error.

& 2406 and related case law. Specifically, the State sought to introduce eight prior incidents. An *in camera* hearing was conducted on October 20, 2014, just prior to the commencement of trial. At the conclusion of the hearing, the trial court found five of the eight prior incidents involving bad acts or other crimes were admissible pursuant to § 2404(B), concluding these incidents were relevant to "malice, intent and possibly may go to discrediting an affirmative defense that may or may not be brought about [during trial]."

Appellant renewed his objection to this challenged evidence prior to the State calling each witness related to the five incidents. Appellant has therefore properly preserved this issue for appellate review. Moreover, the trial court gave the jury a limiting instruction—both upon the admission of testimony concerning each prior bad act and in its final charge—that prior bad acts evidence should be considered only as to the defendant's intent, purpose, malice, or justification.

The trial court specifically allowed testimony regarding the following five incidents that occurred in the Oklahoma City area involving Appellant: (1) an August 16, 1998 road rage incident that originated near the intersection of 39th Street and May; (2) a March 2003 altercation that occurred in a Home Depot parking lot; (3) a November 27, 2005 road rage incident that originated on the Lake Hefner Parkway; (4) a June 8, 2010 incident that occurred at Appellant's residence; and (5) an April 24, 2012 road rage incident that originated at the intersection of 39th Street and Pennsylvania.

> The basic law is well established—when one is put on trial, one is to be convicted—if at all—by evidence which shows one guilty of

> the offense charged; and proof that one is guilty of other offenses not connected with that for which one is on trial must be excluded. *Burks v. State*, 1979 OK CR 10, ¶ 2, 594 P.2d 771, 772, *overruled in part on other grounds, Jones v. State*, 1989 OK CR 7, 772 P.2d 922, 924. . . . However, evidence of other crimes is admissible where it tends to establish absence of mistake or accident, common scheme or plan, motive, opportunity, intent, preparation, knowledge and identity. *Burks*, 1979 OK CR 10, ¶ 2, 594 P.2d at 772. To be admissible, evidence of other crimes must be probative of a disputed issue of the crime charged, there must be a visible connection between the crimes, evidence of the other crime(s) must be necessary to support the State's burden of proof, proof of the other crime(s) must be clear and convincing, the probative value of the evidence must outweigh the prejudice to the accused and the trial court must issue contemporaneous and final limiting instructions. *Welch v. State*, 2000 OK CR 8, ¶ 8, 2 P.3d 356, 365, *cert. denied*, 531 U.S. 1056, 121 S. Ct. 665, 148 L. Ed. 2d 567 (2000).

Lott v. State, 2004 OK CR 27, ¶ 40, 98 P.3d 318, 334–35.

It is undisputed that Appellant shot and killed Yousif. The principal issue in this case was whether Appellant acted justifiably in self-defense or with malice aforethought—the State bearing the burden of proving beyond a reasonable doubt that Appellant did not act in self-defense. The evidence of Appellant's prior bad acts was probative of this disputed issue, *i.e.*, whether Appellant "acted with a deliberate intention to take the life of the victim without justification." *Davis v. State*, 2004 OK CR 36, ¶ 23, 103 P.3d 70, 78. Appellant specifically challenges the admissibility of this evidence, however, arguing: (1) there was no visible connection between Yousif's killing and the prior bad acts; and (2) the challenged evidence was more prejudicial than probative.

To show a visible connection, the prior incidents or misconduct need only be similar, not identical. *See Lott*, 2004 OK CR 27, ¶¶ 43-44, 98 P.3d at

335-36 (despite differences between the crimes, Court found the degree of similarities was sufficient to show a visible connection). Here, the multiple similarities or common elements found in the five prior incidents and circumstances of Yousif's death show a visible connection sufficient to be probative on the issue of intent. *Cf. Lowery v. State*, 2008 OK CR 26, ¶ 14, 192 P.3d 1264, 1270 (common elements of the four cases showed visible connection sufficient to be probative of the perpetrator's identity); *see also Lott*, 2004 OK CR 27, ¶¶ 43-44, 98 P.3d at 335-36. Each of these incidents similarly involved encounters with strangers that quickly became confrontational. A common thread between all the events is Appellant's aggressive and hostile emotions that escalated each of the encounters.

Four of the five prior incidents involved driving related disputes or altercations. Three of these incidents specifically involved road rage in which Appellant's aggressive conduct nearly caused collisions. Appellant's aggressive driving in these instances is akin to Appellant's aggressive and dangerous driving as he chased Yousif on the Kilpatrick Turnpike. Additionally, the November 27, 2005 driving confrontation concluded with Appellant threatening the other driver, Rodney Shoup, with a gun as Shoup approached Appellant's truck with empty hands—a strikingly similar conclusion to the events that transpired in this case.

The fourth driving related event occurred in a Home Depot parking lot and again involved Appellant's anger toward another driver, which stemmed from the manner in which that driver had parked his truck. This incident

escalated—as did the encounter with Yousif—with Appellant and the other driver exchanging words and threats of violence, and concluded with the other driver brandishing a pocketknife—just as he asserts Yousif did in the present case. Moreover, frustrated by Sergeant Gray's determination that the other driver's actions did not constitute an assault, Appellant stated, "he doesn't back down for nothing and next time he'll just shoot them." Appellant further advised Sergeant Gray that he had been to a "concealed carry class and [] what the black male did was deadly force."

The fifth incident occurred at Appellant's home and involved a heated confrontation with a stranger over the price of a ladder. Although not a driving related incident, the ladder incident similarly provides another version of Appellant escalating an oppositional encounter with a stranger. And again, the conflict essentially concluded with Appellant threatening to shoot the potential buyer.

These similarities, along with the overlapping theme of anger and aggression displayed by Appellant in each of the incidents, demonstrate a visible connection sufficient to be probative on the issue of intent. Moreover, we find the probative value of these prior bad acts was not substantially outweighed by the danger of unfair prejudice. "When balancing the relevancy of evidence against its prejudicial effect, the trial court should give the evidence its maximum reasonable probative force and its minimum reasonable prejudicial value." *Welch*, 2000 OK CR 8, ¶ 14, 2 P.3d at 367. Again, that Appellant shot and killed Yousif was uncontroverted. Whether Appellant

justifiably shot Yousif in self-defense or did so with malice aforethought was the pivotal issue. The challenged evidence was relevant to Appellant's intent, malice and justification and was properly admitted pursuant to 12 O.S.2011, § 2404(B) for this limited purpose,[8] *i.e.*, to discredit Appellant's defense as opposed to proving action in conformity with his past character. *See Cole v. State*, 2007 OK CR 27, ¶ 23 n. 5, 164 P.3d 1089, 1102 n. 5 (evidence of prior crimes was admitted "more as a matter of discrediting a defense than proving action in conformity with past character.").

Thus, under the circumstances presented in this case, the probative value of the challenged evidence clearly outweighed its prejudicial effect and was necessary to support the State's burden of proof. Appellant has failed to demonstrate the trial court abused its discretion, i.e. took "an unreasonable or arbitrary action . . . without proper consideration of the facts and law pertaining to the matter at issue." *Neloms*, 2012 OK CR 7, ¶ 35, 274 P.3d at 170. And, for the reasons discussed above, admission of the challenged evidence "did not result in a miscarriage of justice or constitute a substantial violation of a constitutional or statutory right." *Welch*, 2000 OK CR 8, ¶ 10, 2 P.3d at 366. Appellant's final proposition of error is denied.

DECISION

The Judgment and Sentence of the district court is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title

[8] As previously noted, the trial court properly instructed the jury—immediately prior to testimony regarding Appellant's prior misconduct as well as during the trial court's closing charge—that the evidence could only be considered for this limited purpose.

22, Ch. 18, App. (2016), the **MANDATE** is **ORDERED** issued upon delivery and filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE TIMOTHY R. HENDERSON, DISTRICT JUDGE

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OPINION BY: HUDSON, J.
LUMPKIN, P.J.: SPECIALLY CONCURRING
LEWIS, V.P.J.: CONCURS IN PART/DISSENTS IN PART
SMITH, J.: CONCURS IN PART/DISSENTS IN PART
JOHNSON, J.: CONCURS IN PART/DISSENTS IN PART

LUMPKIN, PRESIDING JUDGE: SPECIALLY CONCURRING

I compliment my colleague on a well-reasoned opinion based on the facts of this case and concur in the affirmance of the judgment and sentence in this case.

Regrettably, some of my other colleagues apparently do not want to be bound by the law and facts presented in this case. Instead, they desire to function as a super-legislature and create an interlocutory appeal in complete disregard for the fact that the Oklahoma Legislature has not seen fit to provide such an appeal within the Stand Your Ground Act. They base this super-legislative act on the fact that the Oklahoma Legislature used the word "immunity" within the context of the Act. However, the issue of immunity or the right to appeal from a decision to deny immunity was not raised in this case.

It is a very basic tenet of the law in Oklahoma that the right of appeal is a creature of statute and is not a Constitutional mandate. *Burnham v. State*, 2002 OK CR 6, ¶ 6, 43 P.3d 387, 389; *White v. Coleman*, 1970 OK CR 133, ¶ 11, 475 P.2d 404, 406. While it appears that all of the members of this Court believe that there "should" be a right to appeal from a district court's decision on the issue of immunity for both the State and the defendant, the Legislature has not chosen to provide for such an appeal at this time.

What the separate writing of my colleague seeks to do is legislate a right of appeal where none exists. Neither the Oklahoma Constitution nor the Oklahoma Statutes give this Court the right to legislate just because we feel a

mechanism for review should have been afforded. Such an action would be a violation of the separation of powers doctrine under our Constitution. Okla. Const. Art. 4, § 1. And each of us has taken an oath to uphold the Constitution and follow the law.

My colleague seeks to violate over one hundred years of precedent by way of granting a right of appeal through the writ process. To do so would change the entire body of law regarding the use of writs for extraordinary relief in a case. The principles of which preclude addressing the discretion of the trial judge to grant immunity. In fact, the use of the term "immunity" is not totally appropriate since only the executive branch of the government, *i.e.*, the prosecutor, can propose a grant of immunity. *See Mills v. State*, 1985 OK CR 58, ¶ 12, 733 P.2d 880, 882 ("[T]he immunity provision in Art. II, § 27 of the Oklahoma Constitution [] extends the privilege only to witnesses testifying for the State."); *United State v. Apperson*, 441 F.3d 1162, 1203-04 (10th Cir. 2006) (holding courts have no inherent authority to grant a witness use immunity in absence of prosecution's deliberate attempt to distort fact finding process); *United State v. LaHue*, 261 F.3d 993, 1014 (10th Cir. 2001) ("[T]he district court did not abuse its discretion in refusing to grant immunity to the twelve unnamed defense witnesses, because use immunity is the sole prerogative of the executive branch . . . ."). The court's role is only to confirm the immunity which the prosecution has granted. *See Harris v. State*, 1992 OK CR 74, ¶ 17, 841 P.2d 587, 601 (holding immunity attaches after hearing before court reporter, when court approves written immunity agreement with written order).

This Court's unpublished decision in *State v. Ramos*, No. S-2013-509 (Okl. Cr. June 9, 2015), ran afoul of the same constraints. The opinion did not simply resolve the issue before the Court but went far afield and attempted to resolve future procedural questions and other issues not related to the adjudication of the appeal. The "fashion[ing]" of these pre-trial judicial review procedures constituted dicta.[1]

This Court does not engage in interlocutory review of an issue unless there is constitutional, statutory, or clear legal precedent establishing the circumstance. *Smith v. State*, 2013 OK CR 14, ¶ 24, 306 P.3d 557, 567. Absent a special right to interlocutory appeal, a criminal defendant must hold his complaint unless and until he has been convicted of, and sentenced for, the crime with which he is charged. *Id.*

The Legislature has not provided specific procedures for invoking or enforcing in the district courts the immunity granted within 22 O.S.Supp.2006, § 1289.25(F). Additionally, it has not created any special right of appeal to this Court should a trial court, in a criminal case, deny a pre-trial claim of immunity under § 1289.25(F). There are no published decisions by this Court or the United States Supreme court requiring pre-trial appellate review of a denied claim of immunity.

To the contrary, this Court has held that appellate review of a trial court's denial of immunity is reviewed on direct appeal. *Scribner v. State*, 1913 OK CR 131, 9 Okla. Crim. 465, 132 P. 933, 949.

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[1] "Dicta" is defined as: "Opinions of a judge which do not embody the resolution or determination of the specific case before the court." Black's Law Dictionary 454 (6th ed. 1990).

> If the judge denies the plea of immunity, the evidence in support thereof can be preserved in a bill of exceptions and incorporated in the record in case of a conviction and appeal, and can be reviewed by this court. If the judge should sustain the plea of immunity and discharge the defendant the state could appeal directly as in cases in which a demurrer to an indictment or information has been sustained. In this way the rights of both sides can be presented, which cannot be done in any other way.

Id. Similarly, the United States Supreme Court has determined that the grant of immunity in a statute does not require a right of review before final judgment.

> [T]he effect of the immunity statute in question is not to change the system of appellate procedure in the Federal Courts, and give a right of review before final judgment in a criminal case, but was intended to provide an effectual defense against further prosecution, which, if denied, may be brought up for review after a final judgment in the case.

Heike v. United States, 217 U.S. 423, 433, 30 S. Ct. 539, 543, 54 L. Ed. 821 (1910). The federal statute which the Supreme Court examined in *Heike* is indistinguishable from § 1289.25. Therefore, there is no right to interlocutory review of a trial court's denial of a pre-trial claim of immunity under § 1289.25(F).

Section X of the *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016), controls this Court's exercise of its original jurisdiction. For a writ of prohibition the appellant must establish: (1) a court, officer or person has or is about to exercise judicial or quasi-judicial power; (2) the exercise of said power is unauthorized by law; and (3) the exercise of said power will result in injury for which there is no other adequate remedy. *Office of State Chief Medical Examiner ex rel. Pruitt v. Reeves*, 2012 OK CR 10, ¶ 11,

280 P.3d 357, 359; Rule 10.6(A), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016). For a writ of mandamus, the petitioner has the burden of establishing (1) he or she has a clear legal right to the relief sought; (2) the respondent's refusal to perform a plain legal duty not involving the exercise of discretion; and (3) the adequacy of mandamus and the inadequacy of other relief. *State, ex rel. Lane v. Bass*, 2004 OK CR 14, ¶ 5, 87 P.3d 629, 631 (*overruled on other grounds by Blonner v. State*, 2006 OK CR 1, 127 P.3d 1135); *Woolen v. Coffman*, 1984 OK CR 53, ¶ 6, 676 P.2d 1375, 1377; Rule 10.6(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2015).

Because the determination of the applicability of § 1289.25 involves the finding of facts, a trial court would have discretion in its resolution of a pre-trial claim of immunity. *See State v. Salathiel*, 2013 OK CR 16, ¶ 7, 313 P.3d 263, 266 (Applying abuse of discretion standard to review of district court's ruling on motion to dismiss); *Neloms v. State*, 2012 OK CR 7, ¶ 25, 274 P.3d 161, 167 (holding this Court reviews trial court's evidentiary rulings for abuse of discretion); *Gomez v. State*, 2007 OK CR 33, ¶ 5, 168 P.3d 1139, 1142–43 (holding this Court reviews trial court's ruling on suppression motion for abuse of discretion); *Jackson v. State*, 2006 OK CR 45, ¶ 11, 146 P.3d 1149, 1156 (holding review of trial court's ruling on motion for mistrial is for abuse of discretion); *Patterson v. State*, 2002 OK CR 18, ¶ 19, 45 P.3d 925, 930 (finding abuse of discretion review applicable when district court makes findings on an issue). This Court has often noted that writs of mandamus and prohibition are

not appropriate to interfere in matters wholly within a district court's discretion. *Hamill v. Powers*, 2007 OK CR 26, ¶ 5, 164 P.3d 1083, 1085. Therefore, issuance of a writ of prohibition following a trial court's denial of a pre-trial motion asserting Stand Your Ground immunity would be inappropriate, and unauthorized by our Rules and case precedent.

As the Legislature has not expressly set forth the right of interlocutory or pre-trial appellate review of a trial court's denial of a motion asserting Stand Your Ground immunity, no such right to appeal exists. *Ultra posse non potest esse, et vice versa.*[2] This is especially true in this case where the particular issue was not raised either in the trial court or in this appeal. The law does not give the Court the ability to "reach out and touch"[3] any issue it has a whim to address.

[2] "What is beyond possibility cannot exist, and reverse [what cannot exist is not possible]." Black's Law Dictionary 1522 (6th ed. 1990) (blocks in original)

[3] Akin to a telephone company advertisement to "Reach out and touch someone".

LEWIS, V.P.J, CONCURRING IN PART AND DISSENTING IN PART:

I concur in the judgment affirming the conviction and sentence, and thus agree that Appellant failed to establish Stand Your Ground immunity by a preponderance of the evidence.[1] But to the extent that today's opinion would establish a precedent for appellate review of Stand Your Ground immunity claims on direct appeal from a criminal conviction, I must dissent, and instead urge the Court to now publish the pre-trial judicial review procedures established in *State v. Ramos*. Withholding this Court's review of immunity claims until direct appeal from a conviction at trial would effectively nullify the Stand Your Ground law.

The Stand Your Ground law confers qualified immunity from criminal prosecution and civil suit, protections "effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 2815, 86 L. Ed. 2d 411 (1985). This immunity is "an entitlement not to stand trial or face the other burdens of litigation, conditioned on the resolution of the essentially legal question whether the conduct of which the plaintiff complains violated clearly established law." *Id.* An erroneous *denial* of immunity is therefore "effectively unreviewable on appeal from a final judgment." *Id.*, 105 S. Ct. at 2816; *McLin v. Trimble*, 1990 OK 74, 795 P.2d 1035, 1040, 1043.

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[1] This Court endorsed the preponderance of the evidence standard and allocation of the burden of proof to the defendant for Stand Your Ground claims in *State v. Ramos*, Nos. S-2013-509 & 2013-510 (Okl.Cr., June 9, 2015)(unpublished). Appellant's immunity claim was litigated before the *Ramos* decision. I consider *his* claim preserved for review on appeal for that reason. Defendants who seek Stand Your Ground immunity after *Ramos* must petition for pre-trial review of the trial's court denial in this Court or the claim is waived.

State v. Ramos fashioned a hearing procedure for Stand Your Ground immunity claims with *pre-trial* judicial review through this Court's constitutional and statutory powers to issue common law writs of prohibition.[2] Our dissenting colleagues in *Ramos,* one of whom authors today's opinion, maintained there that Stand Your Ground immunity claims were reviewable on direct appeal from a conviction, and denounced the procedure at the time as "dicta," "over-reaching," "ill-conceived," and "legislating by judicial fiat." I respond that *Ramos* utilized traditional common law jurisprudence to enforce a *new* statutory right; something legislators, trial judges, and counsel may rightly expect this Court to do.

For almost eighteen months now, the *Ramos* procedure has afforded prompt adjudication of Stand Your Ground immunity claims, without the need for a new appeal statute from the Legislature. I will not join an opinion today that would quietly overrule *Ramos* and condemn persons erroneously denied immunity to suffer illegal criminal trials without recourse to this Court. We should now publish *Ramos* and continue to fully adjudicate Stand Your Ground immunity

[2] Article 7, § 4 of the Oklahoma Constitution authorizes the Court of Criminal Appeals, "in criminal matters ... to issue, hear and determine writs of ... prohibition." Title 22 O.S.2011, § 9 provides that "[t]he procedure, practice and pleadings . . . in criminal actions or in matters of criminal nature, *not specifically provided for in this code,* shall be in accordance with the procedure, practice and pleadings of the common law." (emphasis added). Prohibition was the common law writ by which a superior court commanded a halt to unlawful proceedings in a lower court. III W. Blackstone, *Commentaries on the Laws of England* 112 (1769); *Pulliam v. Allen,* 466 U.S. 522, 532-33, 104 S. Ct. 1970, 1976, 80 L. Ed. 2d 565 (1984); *Oklahoma ex rel. Wester v. Caldwell,* 1947 OK CR 66, 181 P.2d 843, 847.

claims *before* trial, rather than years later on direct appeal.[3] I have been authorized to state that Judge Johnson and Judge Smith join me in this opinion.

[3] *See also, Wood v. People*, 255 P.3d 1136, 1141-42 (Colo. 2011); *Bretherick v. State*, 170 So. 3d 766, 778 (Fla. 2015)(pre-trial original proceeding or petition for writ of prohibition are proper methods to challenge denial of Stand Your Ground immunity).

JOHNSON, JUDGE, CONCURRING IN PART AND DISSENTING IN PART:

We all agree that Bloebaum's Judgment and Sentence should be affirmed and that the district court correctly found that Bloebaum was not entitled to Stand Your Ground Immunity. I, however, agree with and join Judge Lewis' special opinion concurring in part and dissenting in part. A defendant must be allowed to appeal an adverse ruling on a pre-trial Stand Your Ground immunity claim before a trial on the merits. *See State v. Ramos,* Case Nos. S-2013-509 and S-2013-510 (June 9, 2015)(unpublished). The very reason for immunity is to protect a defendant from the burdens of trial, and that right is irretrievably lost if its denial is not immediately appealable. The right to immunity from prosecution is one that simply cannot be vindicated once a trial has taken place.

SMITH, J., CONCURRING IN PART AND DISSENTING IN PART:

I agree that Bloebaum's conviction and sentence should be affirmed, and that at a pretrial immunity hearing, the defendant bears the burden of establishing his immunity from prosecution by a preponderance of the evidence. However, I dissent to any implication from the majority's opinion that claims of immunity from prosecution, pursuant to 21 O.S. § 1289.25, must wait until direct appeal for review by this Court. That statute does not just amend the affirmative defense of self-defense; it declares that a person who uses force under the circumstances provided is "immune from criminal prosecution," and that the courts are authorized to decide the immunity issue. 21 O.S.2011, § 1289.25(F), (H). I believe that a right of immunity delayed (until review on direct appeal) is a right denied. For the right to have any meaning, judicial review must occur *before* the defendant is subjected to a full trial. Once twelve jurors have determined, unanimously and beyond a reasonable doubt, that the defendant's conduct is *not* protected by § 1289.25, appellate review of the *pretrial* record to decide if the *defendant* proved (by a preponderance of evidence) that his conduct *was* protected, is a useless gesture. The majority recognizes this, when it states that any pretrial ruling on immunity is "subsumed" by a guilty verdict's implicit rejection of the defense at trial. And that is precisely why the Colorado Supreme Court, in *Wood v. People*, 255 P.3d 1136, 1141 (Colo. 2011), concluded that to give effect to the concept of "immunity from prosecution," a pretrial ruling rejecting the

defendant's immunity claim should be reviewable by extraordinary writ. I therefore join Vice Presiding Judge Lewis's separate opinion concurring in part and dissenting in part.