

**Online Reference: FLWSUPP 2708ARCI**

**Criminal law -- Immunity -- Stand Your Ground law -- Defendant charged with domestic battery for striking minor son of defendant's girlfriend in the head during altercation over use of girlfriend's EBT card -- Defendant's requests for immunity and dismissal pursuant to section 776.032 are granted -- State failed to prove that defendant was not entitled to immunity by clear and convincing evidence -- Court rejects argument that defendant did not have the authority to demand return of EBT card or otherwise discipline minor son where state chose to charge defendant with domestic battery, not battery**

STATE OF FLORIDA, Plaintiff, v. PAUL ARCIOLA, Defendant. County Court, 10th Judicial Circuit in and for Polk County. Case No. 2019MM-004521-LD. September 11, 2019. Susan L. Barber, Judge. Counsel: Karlee Janigian, Assistant State Attorney, for Plaintiff. Latravia Smith, Assistant Public Defender, for Defendant.

**ORDER GRANTING DEFENDANT'S REQUEST****FOR IMMUNITY AND FOR DISMISSAL**

THIS MATTER was before the Court on September 6, 2019 for evidentiary hearing on Defendant's Request for Immunity and Motion to Dismiss Information, filed pursuant to 776.032 *Fla. Stat.* and 3.190(b) *Fla. R. Crim. P.* At hearing, the state was represented by assistant state attorney Karlee Janigian. The defendant was present and represented by assistant public defender Latravia Smith. The defendant is charged by Information filed June 11, 2019 with Domestic Battery, a first degree misdemeanor. No objections were raised to the timeliness of the motion or to the fact that the motion was not verified.

*Florida Statute 776.032(4)* reads as follows:

In a criminal prosecution, once a *prima facie* claim of self-defense immunity from criminal prosecution is 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. . .

The statute plainly states that a defendant must first raise a *prima facie* claim of self-defense immunity, and the court finds that unsworn statements of an attorney in a motion do not meet the defendant's initial burden. *See State v. Brugman*, 588 So.2d 279 (Fla. 2d DCA 1991) which holds, "An attorney's unsworn statement does not establish a fact in absence of a stipulation." *See also Olson v. Olson*, 260 So. 3d 367, 369 (Fla. 4th DCA 2018) [43 Fla. L. Weekly D2527a], wherein the district court stated, in part:

It is essential that attorneys conduct themselves as officers of the court; but their unsworn statements do not establish facts in the absence of stipulation. Trial judges cannot rely upon these unsworn statements as the basis for making factual determinations. . .

Therefore, at hearing the defense was required to attempt to meet that initial threshold. The defense presented, *inter alia*, the following sworn testimony of the defendant:

1. Paul Arciola, the defendant, is 39 years old, 5 ft. 8 in. tall, and weighs 165 lbs. He has multiple medical issues, including blood clots, previous strokes, high blood pressure, and vision issues.
2. D.M. is the defendant's live-in girlfriend. The alleged victim is Z.M. [initials substituted for minor's name throughout], who is D.M.'s son. Z.M. is 15 years old and is slightly smaller than the defendant.
3. The defendant believes this alleged incident occurred maybe in May (the state's Information alleges the event occurred on or about June 4, 2019).

4. The defendant heard argument outside between Z.M. and D.M. about D.'s EBT (food stamp) card.

5. The defendant went outside to get the food stamp card back. Z.M. emptied his pockets, placed the items on the floor, and approached the defendant with his hands up in a fighting stance. The defendant put his hands up to defend himself. Specifically, the defendant testified, "I thought he was going to hit me. My blood pressure was going up and I was losing vision at that moment." "I saw his hand move in a threatening movement and I more or less swung to block it and he got caught on the side of his head with my hand." "I immediately backed up, went inside and called 911."

6. Defendant was arrested that night but they took him to the hospital because his heart was racing and he lost vision. Defendant stayed in the hospital 2 days.

The Court finds that Mr. Arciola has met the initial threshold of making a prima facie showing of self-defense immunity from prosecution, thus shifting the burden of proof to the state to overcome the immunity from criminal prosecution by clear and convincing evidence.

The State then presented the testimony of the alleged victim, Z.M., and his 19 year old sister, A.M. The court briefly inquired as to Z.M.'s competence to testify. The state represented that Z. had the permission of his father to testify in these proceedings. This court informed the attorneys that she is familiar with Z., as he has testified on several occasions in the past before the undersigned as a participant of juvenile drug court. Z. was referred to juvenile drug court as a result of a domestic violence battery charge, wherein substance abuse issues were identified. Z. is no longer in drug court. Z. understands the difference between the truth and a lie, and understands there are consequences for not telling the truth in court. Z. promised to tell the truth. He is competent to testify. Z.M. testified as follows:

1. Z.M. has known the defendant for about a year. He was living with his mother and the defendant at the time of alleged event.

2. He asked his mother for the food stamp card to go get some food because he was hungry. He acknowledged on cross examination that he asked for it multiple times. He specifically testified that his mother handed him the card. He was going to the store to get hot dog buns. He testified, "I was on my way to the store and here comes Paul yelling give me the food stamp card and approaching me not viciously but violently." "He was mad." "I could see it in his face because it was red." "He was speed walking toward me."

3. Z. was about 50 feet from the room at the hotel. All were residing together in a hotel room as their principal residence.

4. Z. testified further, "I put my stuff down because my pockets were loose and I didn't want the stuff to fall out." "He put up his fighting stance and I put up my fighting stance." "He hit me." "Then my mom approached and broke us up."

A.M. testified as follows:

1. A.M. is 19 years old. Z.M. is her brother. She was living with Z., the defendant, and her mother at the time of the alleged incident.

2. It was her "understanding" that her mother gave Z. permission to use the EBT card; however, she did not see her mother give Z. the card.

3. She was sitting outside with her mother. She saw her brother come out and he was walking away.

4. Paul came outside and was demanding return of the card. She saw her brother turn around and put his things down on the ground. Paul was still yelling at Z. and she saw Paul put his hands up. She

saw her brother put his hands up. She saw Paul hit Z.

The Defense then presented D.M., who testified as follows:

1. Z.M. is her son. A.M. is her daughter. Paul Arciola is her boyfriend. They all resided together at the time of the alleged incident.
2. She did not give Z.M. permission to use the EBT card. Z. demanded the card. She did not give him the card. She did not see Z.M. take her card.
3. She was sitting outside when the alleged event occurred.
4. She is aware of defendant's medical condition because she took him to the hospital when he had a stroke in November, 2018. She also took defendant to the hospital after this alleged event where he stayed for two days.
5. She lives separate from her children at this time because she is afraid of her son.

The court has considered the testimony, the inconsistencies in the testimony, and has considered and weighed the credibility of all the witnesses in this matter. The defense asserts that Z.M. stole his mother's EBT card and was attempting to walk to the store to use it without permission, which in itself is a criminal offense. The state asserts Z.M. had permission to use the card. Through all the inconsistencies in the testimony provided, each witness did agree that the defendant was demanding that Z.M. hand over the EBT card. The state, however, argues that Z. is not the defendant's son and thus, the defendant did not have authority to demand return of the card or otherwise discipline this minor child. Frankly, the court finds this argument a bit disingenuous. The state charged the defendant with domestic battery, not battery. The state, therefore, asserts to the court, in accordance with the statutory definition of domestic violence, that the defendant and Z.M. were residing together "as if a family". *See 741.28 Fla. Stat.* To now suggest that the defendant did not have, at the very least, some authority over a 15 year old residing in his home as if a member of his family is, in this court's view, not persuasive.

A.M.'s testimony somewhat corroborated the testimony of her brother, Z. D.M.'s testimony somewhat corroborated the testimony of the defendant and was in direct contradiction to the testimony of Z. Did Z. have permission to use his mother's EBT card? His mother says no. Was the defendant acting as an authority figure while directing Z. to return the card which he had taken without permission? Did the defendant "speed walk" towards Z. or did Z. empty his pockets and approach the defendant with his hands up in a fighting stance? As stated above, clear and convincing evidence is the standard to be applied in this case. The Court does not find that the state proved by clear and convincing evidence that Mr. Arciola is not entitled to immunity.

Accordingly, it is **ORDERED AND ADJUDGED** that the Defendant's Requests for Immunity and for Dismissal are hereby **GRANTED**. Mandatory docketing and jury selection scheduled in this cause are canceled.

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