

2013 WL 2645517 (Fla.Cir.Ct.) (Trial Order)
Circuit Court of Florida,
Eleventh Judicial Circuit.
Miami-dade County

State of Florida, Plaintiff,

v.

Alexis CANTO, Defendant.

No. F10-36620.

June 12, 2013.

Order Denying Defendant's Motion to Dismiss

Miguel De La O, Judge.

***1 SECTION 15**

THIS CAUSE came before this Court on Defendant, Alexis Canto's ("Canto"), Motion to Dismiss ("Motion") pursuant to [Florida Statute section 776.032](#) (colloquially known as the "Stand Your Ground" law).

The Florida Legislature enacted Stand Your Ground in 2005. Stand Your Ground significantly modified the common law right of self-defense by abolishing the duty to retreat¹ before using deadly force, and bestowing immunity from prosecution on a defendant who acts in lawful self-defense.

While Florida law has long recognized that a defendant may argue as an affirmative defense at trial that his or her use of force was legally justified, [section 776.032](#) contemplates that a defendant who establishes entitlement to the statutory immunity will not be subjected to trial. [Section 776.032\(1\)](#) expressly grants defendants a substantive right to not be arrested, detained, charged, or prosecuted as a result of the use of legally justified force.

[Dennis v. State, 51 So. 3d 456, 462 \(Fla. 2010\)](#)

It is undisputed that on December 27, 2010, Canto drew a firearm in Luis Sainz's ("Sainz") presence.² The State of Florida ("State") alleges he did so intentionally, and without legal justification, and has therefore charged Canto with Battery and Aggravated Assault with a Firearm. Canto asserts he acted in lawful self-defense, and is therefore entitled to the statutory immunity provided by Stand Your Ground against these charges. To establish such entitlement, Canto must prove, by a preponderance of the evidence, that he used force as permitted in [section 776.012](#) and [776.013](#). See [Peterson v. State, 983 So. 2d 27, 29 \(Fla. 1st DCA 2008\)](#) (approved of by [Govoni v. State, 67 So. 3d 1048 \(Fla. 2011\)](#)). In determining whether Canto has met his burden of proof, the Court must weigh and resolve factual disputes regarding Canto's use of force. *Id.* at 29.

The Court held an evidentiary hearing (the "Hearing") to determine if the preponderance of the evidence warranted granting Canto immunity from prosecution. See [Yaquibie v. State, 51 So. 3d 474, 475 \(Fla. 3d DCA 2010\)](#). The Court held the Hearing over two days. The parties introduced the testimony of nine (9) witnesses: Rosa Echevarria ("Echevarria"), Beatrice Zaldivar, Enriqueta Zaldivar ("Zaldivar"), Julio Ramos ("Ramos"), Canto, Sainz, Christine Sainz ("Christine"), Christopher Sainz ("Christopher"), and Officer Raymond Suescun ("Of. Suescun"). In addition, the parties relied on Court Exhibits 1 and 2.

Having heard the testimony of the witnesses, and reviewed the exhibits introduced, the Motion, and the State's response to it, the Court denies the Motion.

FINDINGS OF FACT³

*2 In December 2010, Sainz and Zaldivar had been divorced for three years, following 18 years of marriage. Zaldivar was dating and living with Canto, and Sainz had remarried. Sainz and Zaldivar have two children in common: Christine, 10 years old at the time, and Christopher, 18 years old at the time. Sainz and Zaldivar had shared custody of Christine and a visitation schedule.⁴ During the holidays in December 2010, Sainz and Zaldivar agreed (or were required by a visitation agreement) to alternate weeks with Christine. It is undisputed that the morning of December 25, 2010, Sainz made arrangements to return Christine to her mother's house. What should be a routine act, transferring custody of a child between divorced parents, can be fraught with peril depending on the individuals involved. And so it was here.

The witnesses spent considerable time recounting the events of December 25 and 27, 2010. Canto asserts he feared for his life on December 27th, and therefore armed himself, because: (1) Sainz had attacked him without provocation on December 25th; (2) Sainz ran to his car on the 27th and crouched in the driver's door as if reaching for an object; and (3) everyone in Zaldivar's family warned him that Sainz was armed and dangerous.

The December 25th Incident

The morning of December 25, 2010, Sainz pulled up to Zaldivar's house. His daughter exited his car, walked up to her mother's door, and knocked. Sainz was expecting Zaldivar to open the front door and receive their daughter. Instead, Canto, whom Sainz had never met, opened the door to allow Christine entry to the home.

Sainz claims he was concerned because he did not see Zaldivar's car parked outside the house, and now his daughter was in the home with a complete stranger. There was no testimony, however, that Christine expressed any surprise when Canto opened the door. Nevertheless, Sainz - in what was either an abundance of caution or an attempt to start a disagreement with Zaldivar - called Zaldivar to find out if she was home. She confirmed she was, and Sainz reproached her for not answering the door to receive their daughter.

Zaldivar claims that at this point Sainz became extremely verbally abusive and threatened to break the door down and kill everyone in the house. Christine was present during this telephone call and could hear Sainz on the phone talking to her mother about the fact she did not answer the door.⁵ This Court gives great weight to Christine's testimony that her father did not threaten to kill her mother during that call. In fact, Christine's testimony - which the Court finds is consistent with the events which subsequently transpired - is that it was Zaldivar who became angry and was yelling at Sainz.

Canto and Zaldivar claim that immediately after the call ended, there was a knock on the front door of the house. The door has a window and Canto could tell it was a man he did not know. Canto claims - rather remarkably - that it never occurred to him that the stranger might be Sainz coming to kill him and Zaldivar. Canto opened the door and claims Sainz immediately attacked him and the two men began fighting. Their fight, which began in the door threshold of the home, spilled all the way to the street. Christine testified that there was no knock on the door. Rather, either during the call from Sainz to Zaldivar, or immediately after it ended, Canto ran out the front door. Christine followed him shortly thereafter to see what was happening. She did not witness most of the physical encounter between Canto and Sainz, but did witness Canto "flip" Sainz to the ground. Contrary to Sainz's testimony, Christine did not witness Canto repeatedly punch and kick Sainz. To be sure, however, she found the event extremely upsetting and it caused her great emotional turmoil.

*3 The Court finds that Sainz did not initiate an attack on Canto, for the following reasons: (1) Christine completely contradicts the sequence of events to which Canto testified; (2) Sainz had no motivation for attacking Canto; and (3) Canto did have

motivation for attacking Sainz because he claims to have overheard the conversation between Sainz and Zaldivar, and heard Sainz insult Zaldivar, and threaten to kill and emasculate Canto. Ultimately, however, it is irrelevant who initiated the December 25th incident. The existence of the violent encounter could serve as justification for Canto's fear that Sainz would hurt him on December 27th, either as an extension of Sainz's attack on the 25th or in retribution for Canto's attack.

The events of December 25th, and the witnesses' testimony about them, do aid the Court in evaluating the relative credibility of the parties. Neither Canto nor Sainz acted consistent with the events each alleges transpired that day. Canto opened the door to a man he was afraid was going to kill him and Zaldivar; a man whom he claims Zaldivar's entire family has repeatedly warned him is exceedingly aggressive and violent. Then, after Sainz lived up to his advance billing, Canto decided not to press charges against his attacker so as to not upset Christine, who spent the better part of two days crying about what she already witnessed.

Sainz's story does not fare much better. Sainz claims Canto savagely attacked him, to the point where he lost consciousness. Yet, he refused medical care at the scene from an EMS team that was present, drove away without calling the police (and never called them about this attack), did not later seek medical care for his serious injuries, and took no picture of his injuries. Christine contradicts Sainz's account of his beating in material respects.

Although the Court finds that Sainz exaggerated the injuries inflicted on him by Canto, the Court does find that, on balance, Sainz testified far more truthfully than Canto and Zaldivar. Also, Sainz was the only one who appreciated and appeared genuinely moved by the impact this drama had on Christine. Although the Court has no doubt Sainz has made mistakes in his post-divorce dealings with Zaldivar, on this occasion he acquitted himself well as a father.

The December 27th Incident

Because of the incident on the 25th, Christine placed a number of calls to her father that day and on December 26th pleading to see him so she could see for herself that he was fine following his physical encounter with Canto. Sainz told his daughter he would see her on the 27th. That morning, he called Zaldivar and asked if he could see his daughter. Importantly, Zaldivar never said "no." Rather, she asked him to wait until she finished with her errands.⁶ Sainz says she asked him to wait two hours, which he did. Around noon, Sainz again called Zaldivar asking to pick up Christine. It is unclear exactly how Sainz learned, or from whom, that his daughter was at Echevarria's house, her maternal grandmother. Regardless, Zaldivar again told him to wait, but did not say she was not going to allow Christine to see her father that day.⁷

*4 Frustrated at Zaldivar giving him the runaround, Sainz took matters into his own hands and asked Christopher to pick Christine up from Echevarria's house so the three of them could go to lunch. Christopher proceeded to Echevarria's house and asked his grandmother to let him take Christine to have lunch with their father. Echevarria refused after speaking to Zaldivar (who presumably instructed her not to allow Sainz to take Christine). Christopher left the house and informed Sainz, who was standing by his parked car on the street in front of Echevarria's house. Echevarria claims that Sainz began hurling horrible insults at her, screaming and threatening to kill everyone in the house. Echevarria testified that she absolutely believed Sainz would kill everyone in the house, but she - inexplicably - did not call the police.

Christopher, who was standing outside with his father at the time, testified that Sainz did not insult Echevarria in any way, and - in fact - it was Echevarria who began screaming at Sainz. Rather, Sainz told her that if she did not allow Christine to go to lunch with Christopher and him, he would call the police. Echevarria continued to refuse, and Sainz called the police. This Court gives great weight to Christopher's testimony, especially in light of the fact that three days prior to testifying at the Hearing he moved in with Zaldivar and Canto.

Sainz, again to his credit as a father, advised Christopher to leave before the police arrived so he would not be involved in the family drama. Christopher did so. Beatrice Zaldivar (Zaldivar's sister) arrived next on the scene, with her husband. Beatrice Zaldivar testified that Echevarria called her to the scene because she was frightened that Sainz was going to kill everyone.

Beatrice Zaldivar testified that as she walked from her car into the house Sainz screamed obscenities at her and her husband and threatened to kill everyone in the house. Beatrice Zaldivar testified that she feared Sainz and the violence of which he was capable. Yet, she too - inexplicably - did not call the police.⁸

On the critical issue before this Court, the circumstances surrounding Canto pointing a firearm at Sainz, Beatrice Zaldivar claims to have a front seat to the action. Beatrice Zaldivar testified she and the officers heard a noise outside.⁹ Beatrice Zaldivar claims to have looked through the window as the officers ran out the front door. She claims to have seen more than the police officers did but (1) Ofr. Suescun testified he opened the front door as soon as he heard yelling outside, and (2) the amount of activity Beatrice Zaldivar claims to have witnessed could *not* have occurred in the “fractions of seconds”¹⁰ which lapsed between her looking through the window and Ofr. Suescun opening the front door. Beatrice Zaldivar claims she saw Sainz and Canto arguing in the driveway of Echevarria's house when suddenly Sainz started running to his car and Canto ran after him. When he reached his car, Sainz ducked his head inside the car. When Canto saw this, he turned around and ran to his own car. When Sainz stood up after ducking inside his car, he saw the police officer, while Canto did not because he had his back to the officer. Sainz then jumped in his car and drove off.

*5 This account is contradicted in nearly every material respect by Ofr. Suescun and Ramos (Beatrice Zaldivar's brother-in-law who lives in Echevarria's house and was present throughout).¹¹ The officer testified that he ran out the front door immediately upon hearing a man¹² and a woman yelling. On opening the front door, Ofr. Suescun saw Canto at Sainz's car. The car was between Canto and the officer. Canto was facing towards the officer. Canto was aiming his gun at Sainz who was sitting in the driver's seat gunning the engine. As Sainz sped off, Ofr. Suescun drew down on Canto and ordered him to drop the weapon and get on the ground. Canto complied with the officer's command.

When Sainz returned minutes later, he gave the police consent to search his automobile. The police found no gun in his car.¹³ The witnesses spent much time at the Hearing discussing a lake that is east of Echevarria's house, in the direction Sainz drove when he sped away from Canto and his gun. Canto insinuates, and some of his witnesses flat-out assert without evidence, that Sainz threw his gun in the lake.

The lake is a red-herring. Even if Sainz had a gun in the car, it is undisputed that *no one* saw a gun on December 27th in Sainz's hands or near his person. Canto's justification in drawing his weapon rises or falls solely on the reasonableness of his actions in light of Sainz's actions. Because Canto did not see Sainz with a gun, it is irrelevant whether Sainz had one in the car which he disposed of in the lake.¹⁴ Moreover, to believe Sainz ditched a gun in the lake is to believe Sainz (whom Canto and his witnesses describe as exceptionally and unvaryingly aggressive and violent) passed up the opportunity to shoot Canto in self-defense. After all, it is undisputed that it was Canto who stood outside Sainz's car door with a firearm pointed at Sainz's head.¹⁵ Canto's hypothesis is that instead of taking a “free shot” (so to speak) at Canto, Sainz instead drove a few hundred feet down the street - remaining in full view of the officer - to dispose of a gun that could send him to prison (rather than driving far away, out of sight, to get rid of the gun). This claim lacks credibility.

*6 With these accounts by the least interested witnesses out of the way, all that remains are the accounts of the critical events by Sainz, Zaldivar, and Canto. The Court will not attempt to reconcile the irreconcilable.¹⁶ For purposes of this Order, it is sufficient to note that Canto and Zaldivar claim Sainz threatened to kill them when they pulled up to Echevarria's house, and Sainz denies having threatened anyone. The Court credits the testimony of Ofr. Suescun, and to a lesser extent Sainz's, and give little to no credit to Canto and Zaldivar's.

The Court finds that a preponderance of the evidence established at the Hearing that Canto and Sainz exchanged words when Canto and Zaldivar arrived at Echevarria's house. The Court cannot conclude what exactly the two men said to each other with any confidence. However, one or both of the men were yelling, as was Zaldivar, loud enough to attract the attention of people inside Echevarria's house. It is undisputed that Canto retrieved a gun from his car.¹⁷ He ran up to Sainz's car, while Sainz was

sitting in the driver's seat with his car door closed, and aimed the loaded ¹⁸ firearm at Sainz. The gun was within its holster, but Ofr. Suescun testified without contradiction that Canto's gun could still be fired while in its holster. ¹⁹

CONCLUSIONS OF LAW

To be eligible for immunity under Stand Your Ground, Canto must show by a preponderance of the evidence that he used force as permitted in sections 776.012, 776.013, and/or 776.031. We begin with the fundamental truism that Stand Your Ground provides defendants immunity from prosecution only when the defendant uses force to *defend*. The statute is replete with references to a person using force to defend from an attacker. *See, e.g., Fla. Stat. § 776.012* (person justified in using force to “defend”); *Fla. Stat. § 776.013(1)* (“using defensive force”); *Fla. Stat. §§ 776.013(1)(a)*, 2(a), (b) & (d) (“person against whom the defensive force [] used”); *Fla. Stat. § 776.013(1)(b) & (2)(c)* (“person who uses defensive force”); and *Fla. Stat. § 776.013(3)* (person “who is attacked” has no duty to retreat “and has the right to stand his or her ground and meet force with force”).

*7 It is not dispositive that Canto did not see Sainz with a gun. If he reasonably feared Sainz was attempting to arm himself and presented a threat of harm to Canto or Zaldivar, Canto is entitled to immunity for his use of non-deadly force. “The use-of-force statute looks to the amount of force which is actually used. Pointing a firearm (without firing it) amounts to the use of nondeadly force.” *Rivero v. State*, 871 So. 2d 953, 953 (Fla. 3d DCA 2004). *See Stewart v. State*, 672 So. 2d 865, 868 (Fla. 2d DCA 1996) (waving gun in the air is not use of deadly force).

However, Canto failed to prove, by a preponderance of the evidence, that he was defending himself when he armed himself and ran up to Sainz's car. Quite the contrary, the preponderance of the evidence presented at the hearing established that Canto either began the encounter as the aggressor, or quickly turned into the aggressor. While Stand Your Ground removes the duty to retreat, it does not provide a right to advance.

The Court rejects Canto's testimony that he armed himself with a gun - and *ran towards the imminent danger he feared* - because he felt threatened by Sainz. The Court does not intend to imply that Canto had a duty to retreat when he saw Sainz. To the contrary, at that point in time Canto was acting lawfully and had a right to be at the Echevarria property. Rather, the Court finds Canto's testimony that he feared Sainz was going to kill him is unworthy of belief because rational people generally retreat from danger; not because the law requires it, but because the instinct for self-preservation is strong. Canto did the opposite. Canto testified that he feared Sainz had run back to his car to retrieve a gun, therefore Canto ran to his car to retrieve his own gun. Then, despite the fact he was “terrorized,” he left the relative safety of his own car and ran straight to Sainz's car and stood a foot away from the driver's window where Sainz could have shot him easily (if Sainz had been armed and so disposed).

If Canto had remained by his automobile, and not advanced on Sainz, the Court would likely find he qualifies for the immunity afforded by Stand Your Ground. ²⁰ But he did not. Even if this Court accepted Canto's testimony that Sainz threatened to kill him, Canto's own testimony reveals that Sainz was in retreat when Canto became the aggressor. By Canto's own account, he is not entitled to the statutory immunity provided by Stand Your Ground. *See State v. Heckman*, 993 So. 2d 1004, 1006 (Fla. 2d DCA 2007) (reversing order granting motion to dismiss based on Stand Your Ground where defendant shot man who had vandalized his car and had been in defendant's dwelling, but was in process of retreating to his car at the time defendant shot him); *Montanez v. State*, 24 So. 3d 799, 803 (Fla. 2d DCA 2010) (“at the time Montanez fired the shot, the vehicle was passing him. Thus we are not persuaded that he was still in the zone of uncertainty such that he was entitled to discharge the weapon in self-defense”).

Canto's Self-Serving, Exculpatory Hearsay Statement To The Police

Ramos was also present at Echevarria's house on the 27th. He did not add much to the tale, except one bit of potentially critical hearsay. Ramos testified that he heard one of the officers talking to Canto. The officer asked Canto why he drew the gun, and Canto immediately said: “When he arrived from court, there was an exchange of words with him and Sainz.” According to

Ramos, Canto told the officer “he had pulled out the weapon because Sainz told him he was going to kill him.” The State objects to the Court considering this statement because it is hearsay. Canto argues the Court can admit the testimony pursuant to Florida Rule of Evidence 803(3)(a). *See Fla. Stat. § 90.803(3)(a)*.

*8 Courts traditionally treat self-serving exculpatory statements by a defendant as inadmissible hearsay. *Moore v. State*, 530 So. 2d 61, 63 (Fla. 1st DCA 1988). They are certainly not admissible under [section 90.803\(18\)](#), which relates to admissions of a party. *Lott v. State*, 695 So. 2d 1239, 1243 (Fla. 1997).

In *Cotton v. State*, 763 So. 2d 437 (Fla. 4th DCA 2000), the appellant argued - as Canto argues here - that his statement to the police immediately after his arrest was admissible as evidence of his “state of mind” concerning a lack of knowledge that the package he possessed contained cocaine. *Id.* at 439. The court rejected the claim because defendant's statements to the police could not be “construed as a statement of then-existing state of mind offered for the reasons contemplated by [section 90.803\(3\)](#).” *Id.* at 441.

This Court declines to admit the self-serving statement of Canto. Nevertheless, the Court notes that admission of this statement would not change the Court's ruling on the Motion. In other circumstances, the Court might find such an exculpatory statement probative because it was given so close in time to the use of force. Here, however, the evidence concerning Canto's use of force overwhelms the probative value of his self-serving statement about his purported state of mind.

Sainz's Character

Much of the testimony introduced by Canto concerned Sainz's character, specifically his alleged propensity for violence and aggression. The testimony came from Zaldivar's family, which this Court finds is lacking in credibility for the reasons previously discussed. Sainz also admitted he is a convicted felon.²¹

Generally, evidence concerning the character of a crime victim is inadmissible. *See Fla. Stat. 90.404(1)*. There are two exceptions to this general rule. The first is where the victim's character is an essential element of the charged offense. *See Munoz v. State*, 45 So. 3d 954, 956 (Fla. 3d DCA 2010). The second is where the defendant asserts he acted in self-defense. *See E.B. v. State*, 531 So. 2d 1053, 1054 (Fla. 3d DCA 1988).

A defendant who asserts that he acted in self-defense must, however, lay a proper foundation before he may present evidence of the victim's character, and that evidence must be relevant to resolve an issue as to either the victim's conduct or as to the reasonableness of the defendant's fear at the time of the incident. *E.B.*, 531 So. 2d at 1054. As part of that foundation, the defendant must establish that the victim committed some overt act at or about the time of the incident that reasonably indicated a need for action by the defendant in self-defense. *Id.*; *Sanchez v. State*, 445 So. 2d 1, 2 (Fla. 3d DCA 1984); *Hager v. State*, 439 So. 2d 996, 997 (Fla. 4th DCA 1983).

Munoz, 45 So. 3d at 956.

*9 If a defendant properly lays this foundation, then the defendant can introduce evidence showing the victim's reputation and/or specific instances of the victim's conduct. Because “[Reputation evidence is offered to show that the victim acted in conformity with a known character trait,” Canto need not have knowledge of Sainz's reputation in order to introduce evidence of it. *Id.*; *see Dwyer v. State*, 743 So. 2d 46, 48 (Fla. 5th DCA 1999) (“A defendant's prior knowledge of the victim's reputation for violence is irrelevant, because the evidence is offered to show the conduct of the victim, rather than the defendant's state of mind.”).

The Court finds that Canto failed to establish with credible testimony that Sainz had a reputation for violence. The testimony introduced during the Hearing leads the Court to the opposite conclusion, that it was Canto who displayed a penchant for violence and aggression during the two days at issue. In the face of this aggression, Sainz responded by getting away from Canto at the earliest opportunity each time.

In addition, a defendant can introduce specific acts of violence by a victim to demonstrate the reasonableness of the defendant's fear at the time of the incident. See *State v. Smith*, 573 So. 2d 306 (Fla. 1990). “Because the defendant's state of mind is at issue, before the defendant may introduce specific acts allegedly committed by the victim, he must show that he had prior knowledge of these acts.” *Mumoz*, 45 So. 3d at 957.

The testimony introduced at the Hearing as to Canto's knowledge of specific acts of violence consisted of:

(1) General and vague conversations with Echevarria and Beatrice Zaldivar.²² This Court does not credit this testimony because of its lack of specificity, and because both witnesses displayed a lack of candor before the Court.

(2) Conversations with Zaldivar. The Court accepts these conversations occurred, even though the Court has serious doubts that the tales of violence occurred, or occurred in the way Zaldivar recounted them. For example, Zaldivar testified that some years ago Sainz shot at her in their bedroom, and missed *only* because she “moved.” Besides the obvious improbability that Zaldivar possesses the reflexes necessary to dodge a bullet in an enclosed space the size of a bedroom, Zaldivar did not explain why Sainz did not simply shoot her again if he was trying to kill her. These are the less obvious gaps in her story, most glaring is the inexplicability of Zaldivar having never reported this attempt on her life to *anyone*. Had she reported this crime to the police, Sainz would have been hard-pressed to explain a bullet hole in his bedroom wall. Nevertheless, true or not, the Court accepts that Zaldivar likely did relate her stories of Sainz's legendary aggression to Canto. This testimony would provide powerful justification *if* Canto had acted defensively in the face of the threat he perceived Sainz presented in light of Zaldivar's warnings. But Canto did not; he was the aggressor and, therefore, the testimony regarding his knowledge of Sainz's alleged specific acts of violence is irrelevant.

(3) The December 25th incident. This evidence undercuts Canto's efforts to justify drawing his weapon on the 27th, because this Court finds that Canto was the actual aggressor on the 25th.

CONCLUSION

Canto admits drawing his weapon on Sainz, but claims to have done so in self-defense pursuant to [section 776.013\(3\)](#). He seeks statutory immunity pursuant to Stand Your Ground. However, Canto has failed to meet his burden of proof that he was acting in lawful self-defense at the time he pointed his firearm at Sainz. Therefore, the Court denies the Motion.

***10** DONE and ORDERED in Miami-Dade County, Florida this 12th day of June, 2013.

<<signature>>

Miguel M. de la O Circuit Court Judge

cc:

Lisa Riddle (email: lisariddle@miamisao.com)

Carlos Ziegenhirt (email: carlos@delzignlaw.com)

Jeannine Rodriguez (email: Jeannine@delzignlaw.com)

Footnotes

- 1 See generally *Russell v. State*, 54 So. 360, 361 (Fla. 1911).
- 2 Canto disputes (1) having pointed the gun directly at Sainz, (2) whether the weapon was capable of firing because it was both holstered and unloaded, and (3) his motivation for having drawn the weapon.
- 3 The parties hotly dispute nearly every fact concerning nearly every issue. This Order will not recite every factual assertion made by the witnesses. The Court bases its findings of fact on its observation of the witnesses and their demeanor, the Court's attempt to reconcile their testimony where possible, and the Court's conclusions about which testimony is more credible and believable. Where facts are undisputed, this Order will so indicate.
- 4 Neither side introduced any divorce, custody, or visitation documents into evidence, but they are unnecessary to the resolution of the Motion.
- 5 Canto, too, claims to have overheard the conversation. He claims Sainz was yelling insults at Zaldivar, and threatening to knock the door down and kill her and Canto.
- 6 Canto and Zaldivar testified they were actually in the courthouse at that very moment seeking an injunction against domestic violence due to the events of December 25th. In light of the fact it was Canto who attacked Sainz on December 25th, this is a textbook example of the best defense being a good offense. Nevertheless, there was no testimony or documentary evidence introduced to support this claim, other than Canto and Zaldivar's statements. Given Canto and Zaldivar's lack of credibility, it may or may not be true, but it is irrelevant to the resolution of this Motion.
- 7 This Court's finding that Zaldivar's testimony is unworthy of belief is further supported by her testimony that she and Canto decided while driving to Echevarria's house to allow Sainz to take Christine for a few days - but did not communicate this fact to anyone. In light of the drama allegedly unfolding at Echevarria's home (Zaldivar received numerous calls from her family claiming Sainz was outside the home screaming and threatening to kill everyone), it would take a willful suspension of disbelief for this Court to accept Zaldivar's contention that she and Canto drove to Echevarria's home to end matters peacefully. If she and Canto were truly afraid of Sainz and his legendary violent disposition, they would have called the police to protect Echevarria and Christine from Sainz's murderous rampage, or would have told Echevarria to go ahead and allow Christine to leave with Sainz so as to defuse the situation. They did neither, because they had no intention of allowing Sainz to see Christine that day.
- 8 Beatrice Zaldivar testified that she later learned Sainz had called the police claiming that Christine was kidnapped in Echevarria's house. This claim was contradicted by Ofr. Suescun.
- 9 When the officers arrived on the scene, they spoke briefly to Sainz to ascertain the situation. They then proceeded to go inside Echevarria's house to interview Echevarria and Christine.
- 10 Although some statements are in quotes, the Court has drafted the Order on the basis of its detailed notes, without aid of a transcript. Quoted statements may not be exactly verbatim, but the quotes reflect what the witnesses testified to in sum and substance at the Hearing.
- 11 Beatrice Zaldivar testified that Sainz was a violent, aggressive man about whom she constantly warned Canto to be wary. Because of the lack of credibility Beatrice Zaldivar exhibited during the Hearing, this Court does not credit this testimony with any weight.
- 12 Ofr. Suescun could not say with certainty if he heard one or two men's voices, but he definitely heard a female voice yelling. This testimony is consistent with Sainz's claim that when Canto ran up to him with his gun, Zaldivar yelled to Canto: "not here, not here!"
- 13 Canto points out that Sainz did have a baseball bat in his car. Sainz testified he did not have a baseball bat in his car, but Ofr. Suescun testified that police did find a bat in the back of Sainz's car. Other than striking at Sainz's credibility, for the reasons discussed in this section of the Order, the bat, too, is a red herring because no one saw the bat in Sainz's hands or near his person.
- 14 If it were relevant, the evidence adduced at the Hearing would fall woefully short of establishing this fact - even under a preponderance of the evidence standard. To begin, no one saw Sainz throw anything in the lake. Second, the witnesses (including, Ofr. Suescun) place Sainz's car at a distance sufficiently away from the lake that it is impossible for Sainz to have thrown the gun from his car into the lake. See Court Exhibits 1 and 2. Third, no one saw Sainz exit his car until he returned to the scene.
- 15 Indeed, had Sainz shot Canto at this point in time, Sainz's claim to statutory immunity would be far stronger than Canto's has proven to be.
- 16 A factual dispute does not end this Court's review of the Motion, even where the factual disputes are as complete and fundamental as the one here. The State cannot defeat Canto's Motion merely by traversing it. "The court may not deny a motion simply because factual disputes exist." *Peterson*, 983 So. 2d at 29. Consequently, this Court, as required by *Petersen* and approved of by the Florida Supreme Court in *Govoni v. State*, 67 So. 3d 1048 (Fla. 2011), has "decide[d] the matter by confronting and weighing [the] factual disputes." *Peterson*, 983 So. 2d at 29.

- 17 Incredibly, Canto and Zaldivar ask this Court to believe that Zaldivar brought Canto to her mother's house, a chaotic scene if she believed her family's telephone reports, without knowing Canto had a gun in the car. In fact, both testified Zaldivar had no knowledge Canto even owned a gun. It is difficult for this Court to accept that after dating Canto for three years, and living with him for over a year, Zaldivar had no idea he carried a firearm.
- 18 There was some discussion at the Hearing about whether the gun was "loaded." Canto asserts that the gun (a 9 mm) is "loaded" if there is a round in the chamber. The Court disagrees and finds that the gun is "loaded" if the clip (with bullets) is inserted. Regardless, the Court's ruling does not turn on whether the gun was loaded.
- 19 The holster and bullet issue is yet another red herring. It is not Sainz's duty to pre-determine if Canto's gun is loaded and/or capable of firing. "If [a] firearm is discharged or it is used to put the victim in fear to commit an aggravated assault or a robbery, it is a deadly weapon as a matter of law. This is true regardless of whether the firearm is loaded or capable of being fired." *State v. Williams*, 10 So. 3d 1172, 1174 (Fla. 3d DCA 2009).
- 20 Of course, it is also likely that had Canto acted so rationally, the police would likely not have arrested him nor the State charged him.
- 21 Other than some unspecific hearsay testimony from Zaldivar and her family, this Court is unaware of the exact crime for which Sainz was convicted. Sainz may, or may not have, committed an armed robbery almost 20 years ago. No one asked Sainz himself, and the parties did not introduce any documents concerning his conviction. Sainz implicitly acknowledged it involved a gun when he testified he had to forfeit the gun to the State.
- 22 Canto also attempted to introduce this testimony through Ramos, but Ramos admitted he never had any conversations with Canto about Sainz.

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