**IN THE CIRCUIT COURT OF**
**THE NINTH JUDICIAL CIRCUIT,**
**IN AND FOR ORANGE COUNTY, FLORIDA**

**MELVIN ISMAEL RODRIGUEZ,**

**Appellant,**

**vs.**

**STATE OF FLORIDA,**

**Appellee.**

_____/

**APPELLATE CASE NO: 2012-AP-60-A-O**
**Lower Case No.: 2012-MM-49-A-O**

Appeal from the County Court
for Orange County, Florida
Jeanette D. Bigney, County Court Judge

Robert Wesley, Public Defendant
and Mary Masterson, Assistant Public Defendant
for Appellant

No Appearance by Appellee

Before S. KEST, BLACKWELL, G. ADAMS

**PER CURIAM**.

**FINAL ORDER REVERSING TRIAL COURT**

Appellant was charged with misdemeanor battery, resisting an officer without violence, and disorderly conduct. At the close of the State's case at trial, the trial court dismissed the battery charge. The jury acquitted Appellant of resisting an officer and convicted him of disorderly conduct. He seeks review of the trial court's denial of his motion for judgment of acquittal on this charge. Although he also asserts other errors, the alleged error regarding the motion for judgment of acquittal is dispositive and the Court addresses only it.

Three police officers testified that they came upon an altercation in progress late one night in downtown Orlando. Two persons were on the ground, with Appellant on top of the

alleged victim, choking him. The officers could not get Appellant's attention and had to kick him in the head to get him to release his hold. All three officers testified that Appellant was substantially smaller and lighter than the alleged victim.

After the trial court denied his motion for judgment of acquittal on the disorderly conduct charge, Appellant took the stand and testified that the alleged victim had provoked the fight. He testified that this person, who was a friend of his, started yelling at him, ripped off Appellant's necklace, and twice tried to punch him. Appellant said he grabbed the person to protect himself; the two fell and began wrestling. Appellant testified that he would not have attacked his friend, given the disadvantage of his size. The motion for judgment of acquittal was renewed at the close of the defense's case and was again denied.

Self-defense is a defense to the charge of disorderly conduct "provided that the person charged did not provoke the fight." *D.M.L. v. State*, 773 So.2d 1216, 1217 (Fla. 3d DCA 2000). Likewise, *S.D.G. v. State*, 919 So. 2d 704, 705 (Fla. 5th DCA 2006). If a defendant presents evidence of self-defense, the State must prove beyond a reasonable doubt that he did not act in self-defense:

> When self-defense is asserted, the defendant has the burden of producing enough evidence to establish a prima facie case demonstrating the justifiable use of force. . . *[S]ee Murray v. State*, 937 So.2d 277, 282 (Fla. 4th DCA 2006) (holding that law does not require defendant to prove self-defense to any standard measuring assurance of truth, exigency, near certainty, or even mere probability; defendant's only burden is to offer facts from which his resort to force could have been reasonable). Once the defendant makes a prima facie showing of self-defense, the State has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense.

*Falwell v. State*, 88 So. 3d 970, 972 (Fla. 5th DCA 2012). Where there is no evidence contrary to a defendant's *prima facie* case, the defendant is entitled to discharge. *State v. Rivera*, 719 So. 2d 335, 337 (Fla. 5th DCA 1998).

Appellant testified that he was attacked by his friend and acted only to defend himself. The State presented no evidence to the contrary. Presumably it could have called the alleged victim or other witnesses to the fight, but it did not. The State's witnesses came upon the fight in progress and it certainly appeared that Appellant had the upper hand. However, if a person is legally allowed to defend oneself from attack, his claim of self-defense is not negated solely by virtue of the fact that he won the fight or had fewer injuries than the alleged victim. *Sloss v. State*, 45 So. 3d 66, 69 (Fla. 5th DCA 2010). As the State failed to provide proof beyond a reasonable doubt negating Appellant's *prima facie* case, the motion for judgment of acquittal should have been granted.

**THEREFORE, the conviction for disorderly conduct is REVERSED and Appellant is DISCHARGED.**

**DONE AND ORDERED** in Chambers at Orlando, Orange County, Florida, this 19th day of February, 2014.

/S/_____
**SALLY D. M. KEST**
**Presiding Circuit Judge**

BLACKWELL and G. ADAMS, J.J., concur.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing order was furnished to **Mary Masterton, Assistant Public Defender,** mmasterton@circuit9.org, 435 N Orange Ave Orlando, Florida 32801-1526 and **Office of the State Attorney, Appeals Unit,** 415 N. Orange Avenue, Ste. 200, Orlando, Florida 32802-1673, this 19th day of February, 2014.

/S/_____
Judicial Assistant