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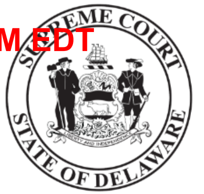

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL HASTINGS,	)	
	)	
Appellant,	)	
	)	No. 93, 2022
v.	)	
	)	
STATE OF DELAWARE,	)	
	)	
Appellee.	)	

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY
DUC 2010000511

APPELLANT'S OPENING BRIEF

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NATURE OF PROCEEDINGS

Appellant was convicted after a jury trial of two offenses: Reckless Endangering First Degree and Possession of a Firearm During the Commission of the Felony of Reckless Endangering First Degree. This is Appellant's direct appeal of those convictions. Appellant prays this Honorable Court **VACATE** Appellant's convictions and remand the matter to the Superior Court for entry of **JUDGMENT OF AQUITTAL**.

SUMMARY OF THE ARGUMENT

I. The Superior Court erred as a matter of law by providing the jury with the wrong jury instruction as to the definition of the element of "substantial risk of death" within the offense of Reckless Endangering First Degree – requiring that Appellant's convictions be vacated and the matter be remanded for new trial.

II. The Superior Court erred as a matter of law by denying Appellant's Motion for Judgment of Acquittal because evidence in this case was insufficient to support a conviction by a reasonable jury on the charge of Reckless Endangering First Degree and PFDCF – requiring that Appellant's convictions be vacated and that the State be precluded from further prosecution.

III. As a result of both of the foregoing errors, the cumulative effect of the error prejudiced Appellant's substantial rights and eliminated the fairness and integrity of the trial – requiring the convictions to be vacated and that the State be precluded from further prosecution.

STATEMENT OF FACTS

The September 24, 2020 Incident

Michael Hastings (Appellant) attended a political rally in New Castle County, Delaware in support of then Republican candidate for United States Senate Lauren Witzke. Also present, across the street from the rally, were counter-protesters in support of Black Lives Matter. This occurred on September 24, 2020,[1] in the aftermath of the George Floyd killing in Minneapolis, Minnesota which sparked national outrage.[2]

While at the rally, Mr. Hastings was open-carrying his firearm. Counter-protesters Diana Trumbull, ToriAnn Parker, and Shannon Diaz reported that they felt in danger as a result.[3] Mr. Hastings was not arrested and departed the scene at the conclusion of the rally.[4]

Subsequently, Mr. Hastings was Indicted by a Grand Jury[5] for one count of Reckless Endangering First Degree[6] and one count of Possession of a Firearm During the Commission of the Felony[7] of Reckless Endangering First Degree.[8] He was arrested on a corresponding Superior Court Criminal Rule 9 Warrant.[9] As to

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[1] A-112
[2] https://en.wikipedia.org/wiki/George_Floyd
[3] See *Infra*
[4] See *Infra*
[5] Superior Court Criminal Rule 6
[6] 11 Del. C. § 604
[7] 11 Del. C. § 1447A
[8] A-1
[9] A-3

the count of reckless endangering, it was alleged that Appellant "did recklessly engage in conduct that created a substantial risk of death to others in the vicinity, including persons across the street, by unholstering his loaded firearm, pointing his loaded firearm, or leaving his loaded firearm unattended on the ground."[10]

Trial Evidence

Trial commenced on September 28, 2021 following a single day of jury selection.[11] Trial concluded upon entry of a verdict by the jury on September 30, 2021.[12] Appellant was convicted of both counts in the Indictment.[13]

Officer Tavis Miller of the Wilmington Police Department was on duty and operating a surveillance drone in the area of the rally.[14] Officer Miller was not targeting any specific subjects – but instead conducting general surveillance and zooming in on any activity of interest.[15] Two drone video segments were entered into evidence through this first witness as State Exhibit 1 and State Exhibit 2.[16] Officer Miller testified that, while he was watching the drone monitor live, he did not observe anything out of the ordinary at the rally and he did not observe or hear gunshots.[17] He testified that he did not observe anybody running from the scene as

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[10] A-1
[11] A-11
[12] A-11
[13] A-14
[14] A-13
[15] A-14
[16] A-117
[17] A-121

if a gun had been pointed at them.[18] He testified that, had he seen anything like that, he would have immediately notified the officers on scene.[19]

Diane Trumbull attended the rally to protest – not to support - Lauren Witzke.[20] “She was running for the Senate and she had posted a bunch of vulgar things, some racist posts, comments and just…”[21] She was there with a group of 10 or 11 people.[22] She estimated that there were about 50 people present in support of Lauren Witzke.[23] The protesters were across the street from where Mr. Hastings was with the rally supporters.[24] She held a sign that said something in regard to Witzke making racist comments.[25] People on both sides were yelling nasty things back and forth.[26] One of the protestors called Mr. Hastings a “fat white MF.”[27]

Asked to testify about her observation of Mr. Hastings, Diane Trumbull testified:[28]

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[18] A-121
[19] A-121
[20] A-122
[21] A-122
[22] A-123
[23] A-123
[24] A-136
[25] A-132
[26] A-132
[27] A-133
[28] A-123

- “So, Mr. Hastings, he – everyone noticed that he was open carrying his gun, which is fine because that’s legal in Delaware, but he – at that time I was standing next to someone that was videoing the – everything that was going on, in general. He pulled out his gun from the holster.”[29]
- “He pulled the gun out and, at first, he was talking to the guy that he was talking to in front of him that I recognized. And then from my angle where I was there was like a car right in front of the person that was filming and I was standing on the side and another woman was with me on the other side and it was pointed in our direction, in that way.”[30]

Asked how many times Mr. Hastings unholstered the firearm, she said twice:[31]

- As to the first time, when asked where the gun was pointed, she said “to the – to our direction, so to our side, it actually looked like it was directly pointed in my direction, but that was where I was standing. Again, he was talking to someone but the weapon was pointed in our

[29] A-123
[30] A-124
[31] A-124

direction."[32] She testified that she felt scared and nervous and that she didn't know if the gun was loaded or if the safety was on.[33] The gun was not pointed in her direction for long.[34]

- As to the second time, Ms. Trumbull went on to testify that at one point Mr. Hastings placed the firearm on the ground – walking away from it and toward her and the members of her caucus.[35] Another individual retrieved the gun from the ground and returned it to Mr. Hastings after Mr. Hastings walked back.[36]

Ms. Trumbull did not leave the area. Someone did draw on-scene officers' attention to Mr. Hastings but the officers did not take action.[37]

Ms. Trumbull testified that State's Exhibit 3, admitted into evidence, was a fair and accurate depiction of what she saw.[38] She said that "he removed it from the holster, was playing with it and then it was pointed in our direction as you just saw in the video."[39] She said that as shown in the video, the gun was only pointed in her direction for a few seconds.[40]

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[32] A-125
[33] A-125
[34] A-136
[35] A-127
[36] A-127
[37] A-126
[38] A-128
[39] A-138
[40] A-140

ToriAnn Parker also attended the rally as a protester of Lauren Witzke.[41] Ms. Parker is a campaign staffer and has run political campaigns.[42] She testified that approximately 8 to 12 protesters were on one side of the street, dozens of supporters were on the opposite side of the street at the rally, and traffic flowed between the two sides.[43] Ms. Parker held a sign that said "Eisenhower didn't fight the Nazis so that one could run for U.S. Senate."[44] Like Ms. Trumbull, Ms. Parker testified about 2 times the firearm was unholstered:

- As to the first time, she testified that she was alarmed when she saw Mr. Hastings unholster his firearm.[45] She said that Mr. Hastings was showing the firearm to someone: "when he unholstered it, it did appear at that moment as though he was just showing the weapon to whoever he was talking to. The folks that were on my side of the road became alarmed by that."[46] She went on to say that she became alarmed when the firearm was "pointed at our side of the road and pointed at us."[47] She said that the firearm was pointed in her direction for "just a couple of seconds."[48] Like

[41] A-143
[42] A-153
[43] A-143
[44] A-153
[45] A-145
[46] A-146
[47] A-146
[48] A-146

Ms. Trumbull, Ms. Parker did not know if the gun was loaded.[49] Ms. Parker did not flee the scene.[50]

- Later, Mr. Hastings walked over to the group and puffed his chest and "kind of put his gun on the ground and was kind of like what is the big deal, it's on the ground, why are you upset that it was unholstered in the first place."[51] The person who picked up the gun was an adult.

Ms. Parker testified to her opinion that Mr. Hastings did not exercise proper gun safety based on her experience at a concealed carry course.[52] She also testified that a gun cannot be fired unless someone is holding it and if someone pulls the trigger.[53]

Shannon Diaz, who is Ms. Parker's husband, provided similar testimony about the positioning and composition of the two groups at the scene and that they were screaming back and forth.[54] He attended the rally as part of a protest organized by a group called "Disrupt the Focus" which was maybe associated with Black Lives Matter.[55]

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[49] A-146
[50] A-158
[51] A-149
[52] A150
[53] A-155 and A-162
[54] A-166
[55] A-167

Mr. Diaz testified that he observed "Mr. Hastings had this weapon unholstered and was flagging a couple people on his side of the street."[56] He testified that Mr. Hastings turned 90 degrees towards the road and pointed the gun in the direction of the counter protestors.[57] Mr. Diaz told the police about these observations but testified that they did not seem to care so he returned to be with the protesters.[58]

Mr. Diaz provided his opinion that Mr. Hastings was not exercising responsible gun ownership.[59] He testified that a person does not unholster their gun unless they intend to use it.[60] He said that "you always point your firearm in a safe direction no matter what, if it's loaded, unloaded, you never point it in a direction that could possibly cause serious harm or death. The other thing is you keep your finger off the trigger, always keep it on the safety, all of that kind of stuff, but with that kind of distance I can't see if it's on the safety, I can't see whether his finger is on the trigger. It's completely inexcusable. You should only, only, if you are a responsible gun owner, take out your firearm if you are intending to protect yourself from serious harm or injury, or if you are going to the shooting range, those are the two times that you should do that."[61]

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[56] A-165
[57] A-167
[58] A-169
[59] A-168
[60] A-168
[61] A-171

Officer Edward Larney of the Delaware State Police testified as the chief investigating officer.[62] Officer Larney was pre-stationed near the rally and counter protesters as a member of the Tactical Control Unit.[63] The Unit is trained to disperse crowds, make multiple arrests, and provide general security at political rallies where there may be protest.[64] In this particular instance, the Unit had an operations plan in place for this rally ahead of time.[65]

Officer Larney testified that "Shannon Diaz, the last witness, had approached my group and said that there was a subject displaying a handgun in an unsafe manner. So, we obtained the suspect's description from what Mr. Diaz gathered and we passed that on to our communication center and as we knew we had a drone up in the sky, so we asked our command post to get eyes on that subject to see if the subject was indeed displaying a handgun in an unsafe manner."[66]

"The command post operators had informed us other [sic] the radio that they did have eyes on the subject and that he was open carry."[67] Because it had only been relayed by Diaz to officers that the gun was being displayed in an unsafe

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[62] A-196
[63] A-197
[64] A-221
[65] A-222
[66] A-198
[67] A-198

manner, officers maintained a visual on Mr. Hastings with a drone and binoculars to see what his actions actually were.[68]

Subsequently, Ms. Trumbull and Ms. Parker approached Officer Larney's group and said that someone had pointed a gun at them.[69] Those witnesses, along with Mr. Diaz, told Officer Larney "that they were standing on the opposite side of the road from the Republican protest and had indicated that Mr. Hastings had pointed a gun in the direction at them, at a direction of them towards this protest."[70]

Officers searched for other "victims" and also searched the area for businesses with surveillance.[71] Surveillance from the Cadillac Center was identified for evidence as State's Exhibit 7.[72] The video was then admitted into evidence as Exhibit 7.[73]

The officer described the footage: "Mr. Hastings has his handgun in his right hand, he's extended it to his right side, while speaking to a male and a female that were driving in that Nissan and Audi, right next to them."[74] When asked if he could tell "who was in that direction of where his gun is pointed," he stated: "I

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[68] A-199
[69] A-200
[70] A-201
[71] A-201
[72] A-202
[73] A-211
[74] A-203

would describe it as that counter protest group. So, if you look at this, looking at the picture, the stop-sign where the road barriers are, you had groups of protestors lined up by those barriers."[75] There were approximately 95 feet between Mr. Hastings and the protestors.[76]

Next, Officer Larney described the video admitted as State's Exhibit 1.[77] While State's Exhibit 1 is drone footage,[78] he describes this moment as the one seen on the Facebook Video which was also admitted to evidence.[79] "So, looks like at this point Mr. Hastings hands the gun to the male, black shirt, black baseball cap. Looks like he hands it back to Mr. Hastings who then re-holsters it."[80] "At this point he takes the weapon out of his holster, faces it toward the ground briefly, looks like he pulls it parallel with the ground and re-holsters it." "He briefly takes the firearm out of his holster and appears he extends it toward his right side and immediately re-holsters it afterwards."[81]

Then, Officer Larney described the video admitted as State's Exhibit 2.[82] "Mr. Hastings here on the other side of the bus, and I believe this was the point where we saw the second Facebook video where the crowd, the counter protest crowd

[75] A-203
[76] A-231
[77] A-211
[78] A-114 and Appendix Item Number 20 (USB Drive)
[79] A-213
[80] A-203
[81] A-213
[82] A-213

was making statements directed at him and this is where he unholsters his weapon and approaches the roadway. At this moment you can see him lay the gun on the ground. Subject picks up the firearm, later returns it to Mr. Hastings when he walks back."[83]

Officer Larney testified that he took a statement from Mr. Hastings over the phone a few days after the incident.[84] The interview was recorded and admitted as State's Exhibit 5.[85] "He explained to me that he did have a gun, he stated that he was discussing the weapon with another person whom he did not know at the time, he stated that they had just met that night. He claimed they discussed the firearm because I think they used it in special forces, it was a special forces weapon, the other gentleman had a similar type model gun, so that's how they sparked up a conversation. He added that he was just showing the gun and discussing it with that individual. He advised that he only pointed the gun at the ground. I asked him if the firearm was loaded, he said 'yes.' I asked him if his finger was on the trigger, he said 'no.' I asked him if he had any access to any other firearms. He advised that this was the only gun he owned. And he denied pointing it at the protestor, he said it was angled down, he was showing this male he was talking to

[83] A-214
[84] A-217
[85] A-218

how he would shoot somebody coming from a paratrooper's perspective is how he put it, so he said that he did not point it at the protestors."[86]

The Tactical Control Unit was present for the entire event.[87] The Tactical Control Unit, the flying Surveillance Drone, other officers on scene – none of them observed Mr. Hastings do anything wrong.[88] Further, nothing was brought to their attention by anyone prior to Mr. Diaz.[89] There were no gunshots.[90] There was nobody running in fear.[91] Nobody but the three witnesses who testified at trial even approached the officers to make a complaint – instead, they all merely went home.[92]

Officer Larney described the three "victim" statements as inconsistent; specifically, he said that the videos did not show Mr. Hastings waving the gun around in a shooting motion as described by Ms. Trumbull.[93] He also said that it did not appear that Mr. Diaz and Ms. Parker, who are husband and wife, were in the direct path of where the firearm was pointed.[94] Further, he describes the gun as

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[86] A-217
[87] A-223
[88] A-221
[89] A-222
[90] A-222
[91] A-222 and A-232
[92] A-231
[93] A-229
[94] A-235

"slightly dipped lowered" saying that "it does not look like its parallel with the ground at flat level."[95]

The jury received eight State exhibits into evidence:[96]

- Drone video footage on flash drive [10:48a];[97]
- Drone video footage on flash drive [11:06a];[98]
- Drone video footage on flash drive [11:20a];[99]
- Drone video footage on flash drive [11:22a];[100]
- Audio recording of Sergeant Larney's phone interview of Defendant [2:45p];[101]
- Cellphone image of Defendant [12:10p];[102]
- Drone image of Defendant w/ gun in hand [2:00p];[103] and
- Glock handgun [2:58p].

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[95] A-241
[96] A-11
[97] Appendix Item Number 20 (USB Drive)
[98] Appendix Item Number 20 (USB Drive)
[99] Appendix Item Number 20 (USB Drive)
[100] Appendix Item Number 20 (USB Drive)
[101] Appendix Item Number 20 (USB Drive)
[102] Appendix Item Number 20 (USB Drive)
[103] Appendix Item Number 20 (USB Drive)

Prayer Conference, Jury Instructions and Jury Note

The trial court conducted a brief, informal prayer conference.[104] Appellant asked the trial court to define "substantial risk of death" as meaning "a strong possibility as contrasted with a remote or significant possibility that a certain result may occur."[105] Initially, the trial court stated that it would limit the definition of substantial risk to "a strong possibility that a certain result may occur."[106]

Subsequently, the court, *sua sponte* and without citing and specific authority, suggested language that included the words "imminent threat."[107] The State asked to include the "imminent threat" language.[108] And the court did so without further meaningful discussion.[109]

Final Jury Instructions published to the jury defined Reckless Endangerment First Degree. The trial court told the jury that there were two elements: (1) that the defendant acted recklessly; and (2) that the Defendant engaged in conduct which created a substantial risk of death to others.[110]

The trial court defined "recklessly" as meaning "that the defendant was aware of and consciously disregarded a substantial and unjustifiable risk that the

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[104] A-187 to A-195
[105] A-193
[106] A-195
[107] A-207
[108] A-208
[109] A-208 and A-253
[110] A-322

death of another person would result from his conduct. The risk must have been of such a nature and degree that disregard of it constituted a gross deviation from the standard of conduct that a reasonable person would observe in the situation."[111]

Ultimately, the Final Jury Instructions defined "substantial risk" as meaning "a strong possibility or imminent threat that a certain result may occur."[112] The trial court read these instructions to the jury before deliberations.[113]

During deliberations, the jury asked the court: "what would constitute a strong possibility or imminent threat that a certain result may occur? Could you supply a clearer definition of substantial risk referenced on page ten?"[114] The jury was instructed to apply the definitions already given.[115]

Denial of Appellant's Motions for Judgment of Acquittal

On September 29, 2021, prior to submission of the case to the jury, Appellant made an oral application for judgment of acquittal pursuant to Superior Court Criminal Rule 29(a).[116] Appellant argued that the State had failed to meet its prima facie burden as to the elements of "recklessness" and "substantial risk."[117] The State argued in opposition to the motion relying upon *Thornton v. State*, 647

[111] A-322
[112] A-322
[113] A-286
[114] A-305
[115] A-305
[116] A-243
[117] A-243

A.2d 382 (Del. 1994) and *Britt v. State*, 113 A.3d 1080 (Del. 2015).[118] The Court denied the oral application – finding that that neither *Thornton* nor *Britt* requires the discharge of a firearm and finding that Appellant's argument goes only to the weight of the evidence.[119]

After Appellant was convicted, pursuant to Superior Court Criminal Rule 29(c), he re-raised his Motion for Judgment of Acquittal in writing.[120] Again, Appellant argued that the State failed to establish *prima facie* evidence of "recklessness" and "substantial risk."[121] "Defendant asserts that no legally sufficient evidentiary basis exists for a reasonable jury to find that he had reckless state of mind and his conduct created a strong possibility of death to other persons."[122] Appropriately and for reasons discussed herein *infra*, Appellant distinguished *Thornton* from the instant case for the trial court.[123] In its written response, the State again relied upon *Thornton* and *Britt* and asked the Court to deny the motion.[124]

The Court again denied Appellant's application – finding that "in the instant case, the evidence presented by the State was overwhelming."[125] Further, the trial

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[118] A-246
[119] A-249
[120] A-8 and A-345
[121] A-345
[122] A-347
[123] A-348
[124] A-351
[125] A-362

court held that “the weakness of Defendant’s motion is further manifested by his attempt to contort the concept of substantial risk and his selective silence concerning the imminent threat of death he created. The jury was properly instructed that “substantial risk” is defined as a ‘strong possibility or imminent threat that a certain result may occur.”[126]

[126] A-368

ARGUMENT

I. TRIAL COURT ERRED AS MATTER OF LAW BY INSTRUCTING THE JURY ON THE WRONG DEFINITION OF "SUBSTANTIAL RISK OF DEATH"

QUESTION PRESENTED

Did the trial court make an error of law when it provided the jury with an erroneous definition of "substantial risk of death" thereby denying Appellant his unqualified trial right to an accurate statement of the law in jury instructions? *(Error Preserved in the Record at A-193 to A-195, A-207, A-208 and A-253).*

STANDARD OF REVIEW

The Delaware Supreme Court reviews the denial of a requested jury instruction *de novo*.[127] A jury instruction is ground for reversal where it is not reasonably informative, where it is misleading, and where it undermines the jury's ability to intelligently perform its duty.[128]

MERITS OF THE ARGUMENT

Jury instructions are governed by Superior Court Criminal Rule 30. "In evaluating the propriety of a jury charge, the jury instructions must be viewed as a whole. A jury instruction is not a ground for reversal if 'it is reasonably informative, not misleading and does not undermine the jury's ability to

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[127] *Lloyd v. State*, 152 A.3d 1266 (Del. 2016).
[128] *Lloyd v. State*, 152 A.3d 1266 (Del. 2016).

intelligently perform its duty. Although a party is not entitled to a particular jury instruction, a party does have the unqualified right to have the jury instructed with a correct statement of the substance of the law. An instruction which tracks the statutory language is adequate to inform the jury."[129]

In this case, Appellant's jury was not instructed with an accurate version of the law – an essential element of his trial to which Appellant enjoys an unqualified right. Rather, they were instructed on an incorrect statement of the law and asked to apply a wholly irrelevant standard to define "substantial risk of death." Because this was an error of law and because it is a violation of an unqualified trial right, this requires both of Appellant's convictions to be vacated.

"A person is guilty of reckless endangering in the first degree when the person recklessly engages in conduct which creates a substantial risk of death to another person."[130] The Superior Court Criminal Pattern Jury Instructions define the element of "recklessness" consistently with 11 Del. C. § 231(e): "Recklessly means Defendant was aware of and consciously disregarded a substantial and unjustifiable risk that death would result from Defendant's conduct. The State must demonstrate the risk was of such a nature and degree that Defendant's disregard of the risk was a gross deviation from the standard of conduct a

[129] *Lloyd v. State,* 152 A.3d 1266 (Del. 2016).
[130] 11 Del. C. § 604.

reasonable person would observe under the same circumstances." This exact definition has been applied by the Delaware Supreme Court throughout case law including but not limited to *Britt v. State,*[131] *Bryant v. State,*[132] *Thornton v. State*,[133] *Jones v. State*,[134] *White v. State*,[135] and *Hassan-El v. State*.[136]

In this case, rather than apply the correct law, the trial judge, *sua sponte*, defined "substantial risk" as meaning "a strong possibility or imminent threat that a certain result may occur."[137] It is unclear in the record what caused the trial judge to adopt the words "imminent threat" or "strong possibility" because it was not stated on the record. Nowhere in the case law does the Court apply the phrase "imminent threat" to the jury's definition of "substantial risk of death." Nowhere do the statutes nor the pattern instructions apply the phrase "imminent threat."

The word "imminent" does appear in statute and instructions related to the offense of Aggravated Menacing. "A person is guilty of the offense of aggravated menacing when by displaying what appears to be a deadly weapon that person intentionally places another person in fear of imminent physical injury."[138] "The State is not required to prove Defendant actually had or used a deadly weapon.

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[131] 113 A.3d 1080 at HN 2 (Del. 2015).
[132] 862 A.2d 385 (Del. 2004).
[133] 657 A.2d 382 (Del. 1994).
[134] 227 A.3d 1097 (Del. 2020).
[135] 85 A.3d 89 (Del. 2014).
[136] 841 A.2d 307 (Del. 2003).
[137] A-322
[138] 11 Del. C. § 602(b) and A-342

However, the State must prove Defendant intentionally intimidated [victim], by threat, gesture, or deed, with what appeared to the victim to be a deadly weapon."[139] "'Intentionally' means it was Defendant's conscious objective or purpose to cause [victim] to fear imminent physical injury."[140]

The words "actual danger or substantial imminent risk" are applied in the context of civil Dependency and Neglect proceedings in Family Court. In that context, Family Court evaluates whether or not a child is in "actual danger" or "substantial imminent risk" to determine whether to remove a child from a parent's custody on an emergency basis and whether reunification is appropriate.[141] There, the Family Court looks for probable cause of "substantial imminent risk" of actual physical, mental or emotional danger to child.[142]

It may be that the trial judge crafted the "imminent threat" language from *People v. Brown,*[143] cited by the trial court in its Order denying Appellant's Motion for Judgment of Acquittal.[144] In *People v. Brown*, the Massachusetts Supreme Court applied the phrase "imminent threat" when determining whether or not the defendant's use of force was justifiable. In *Brown*, the victim testified to their subjective belief that the defendant had threatened imminent use of deadly force by

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[139] A-342
[140] A-342
[141] See *Division of Family Services v. L.C.*, 2002 WL 1932501 (Del. Fam. Ct. Jan. 17, 2002).
[142] 13 Del. C. § 2512
[143] 33 N.Y.3d 316 (N.Y. Ct. App. 2019).
[144] A-371

drawing his weapon. The *Brown* court stated that the display of a firearm was a threat of imminent force – making the defendant the initial aggressor and nullifying the claim of self-defense.[145] In Delaware, the Superior Court also applies the word "imminent" in jury instructions on self-defense.[146] None of this applies to Reckless Endangering. It applies instead to justification defenses.

Appellant has an absolute right to an accurate statement of the law. Moreover, prejudice in this case is pervasive and the error is not harmless. Obviously, Appellant was convicted. In response to the incorrect statement of the law, the jury asked the trial court to provide a further explanation of its erroneous instruction. In a note to the trial court, the jury asked: "what would constitute a strong possibility or imminent threat that a certain result may occur? Could you supply a clearer definition of substantial risk referenced on page ten?"[147] It can be inferred from the jury note that the jury wrestled with the definition of substantial risk. Further, the civilian witnesses at trial gave biased testimony that they felt threatened. While providing their opinions on gun safety, they testified to their subjective interpretations of Appellant's conduct. The witnesses testified that they felt threatened by Appellant. Then, the trial court instructed the jury to apply the words "imminent threat" to the definition of "substantial risk of death."

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[145] *People v. Brown,* 445 Mass. 529 at HN 5 (Mass. 2005).
[146] A-344 and 11 Del. C. § 471
[147] A-305

Because there was an erroneous definition of the law, the conviction of Reckless Endangering First Degree must be overturned. This Court has repeatedly reversed convictions where the jury could not perform its duty as a result of being provided an incorrect statement of the law.[148] For instance, in *Comer v. State*, the Court held that the trial court failed to accurately define agency theory for felony murder requiring reversal.[149] In *Gallman v. State*, the Court held that a reversal was required because the jury had been provided an incorrect definition on the requisite state of mind required for guilt. [150] As in those cases, Appellant's jury was given a substantively erroneous definition on "substantial risk" which applies to his state of mind. The jury was not able to perform its duty because it was not able to consider whether the actual elements of the offense of Reckless Endangering were met. The jury was misled because they were instructed to apply a definition of "substantial risk" that has no precedent in Delaware law and is, in fact, incorrect. For the same reasons, the jury was not reasonably informed.

By extension, because the charge of Reckless Endangering First Degree is the underlying felony of Possession of a Firearm During Commission of a Felony as Appellant was convicted, the PFDCF conviction must be vacated, too.

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[148] See *Gallman v. State*, 14 A.3d 502 (Del. 2011) and *Comer v. State*, 977 A.2d 334 (Del. 2009).
[149] 977 A.2d 334 (Del. 2009).
[150] 14 A.3d 502 (Del. 2011)

II. THE TRIAL COURT ERRED AS A MATTER OF LAW BY DENYING APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL

QUESTION PRESENTED

Did the trial court abuse its discretion or commit error of law when it denied Appellant's two motions for judgment of acquittal? *(Error Preserved in the Record at Exhibit 2 to this Opening Brief, A-249 and A-360).*

STANDARD OF REVIEW

The Court reviews the sufficiency of the evidence in the record *de novo*.[151] "The standard of review in assessing an insufficiency of evidence claim is 'whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find [a] defendant guilty beyond a reasonable doubt.'"[152]

MERITS OF THE ARGUMENT

In any prosecution for an offense, a *prima facie* case for the State consists of some credible evidence tending to prove the existence of each element of the offense. No person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt.[153] The beyond a reasonable doubt

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[151] *Grayson v. State,* 210 A.3d 724 (Del. 2109).
[152] *Jones v. State*, 227 A3d 1097 (Del. 2020).
[153] 11 Del. C. § 301.

standard is guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by Article I § 8 of the Delaware Constitution.[154]

In this case, no rational trier of fact, viewing the evidence in the light most favorable to the State, could find [a] defendant guilty beyond a reasonable doubt.'"[155] That is because there is no evidence to support a finding that Appellant consciously disregarded a substantial and unjustifiable risk that death would result from his conduct and because Appellant did not grossly deviate from the standard of conduct a reasonable person would observe under the same circumstances – the correct legal standard for "substantial risk."

A diligent review of Delaware case law reveals no cases supporting a conviction of Reckless Endangering where the fact pattern involves possession or display of a firearm without some other element of unjustifiable risk. Nearly exclusively, the fact patterns supporting such convictions involve a firearm that was discharged.

For example, in *Britt v. State,*[156] the defendant was convicted of Reckless Endangering First Degree because the defendant covered his face while concealing a gun, pulled the gun out of his pants and reached the gun into a house, struggled with the occupant for entry to the house, and discharged the firearm into the house

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[154] See *In Re Winship*, 397 U.S. 358 (1970).
[155] *Jones v. State*, 227 A3d 1097 (Del. 2020).
[156] 113 A.3d 1080 at HN 2 (Del. 2015).

during the struggle.[157] In *Bryant v. State,*[158] the defendant was so convicted after he fired a gun through the door of an apartment in which he knew two individuals were located. In *Jones v. State*,[159] the defendant was acting erratically and waiving a gun around when he fired shots on the victim's property. In *White v. State*,[160] the Court found the conviction to be supported by the act of firing a gun indiscriminately in a residential neighborhood. In *Boyer v. State*,[161] the Court found a reckless endangering indictment to be supported by the allegation of firing a gun around a child. In *Grayson v. State*,[162] the Court found sufficient evidence to support a conviction where an officer heard gunshots, located spent shell casings, and recovered gunshot residue after a defendant fired into a shopping center.

Thornton v. State[163] is the only case where this Court has found a conviction of Reckless Endangering to be supported where a firearm was displayed but not fired. However, the trial court's reliance upon *Thornton* was misplaced and wrong. Appellant's facts are vastly different than *Thornton*. The Motion for Judgment of Acquittal should have been granted.

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[157] 113 A.3d 1080 (Del. 2015).
[158] 862 A.2d 385 (Del. 2004).
[159] 227 A.3d 1097 at HN 4 (Del. 2020).
[160] 85 A.3d 89 (Del. 2014).
[161] 436 A.2d 1118 (Del. 1981).
[162] 210 A.3d 724 (Del. 2019).
[163] 657 A.2d 382 (Del. 1994).

In *Thornton*, the defendant was found to have created a "substantial risk" of death because, while riding in a van on a busy highway, he pointed a loaded weapon at the driver of another vehicle, with the intention, at the very least, to frighten that person."[164] The *Thornton* Court highlighted the risk posed under those unique circumstances, even though the gun in that case was never fired. "Not only does this action involve the possibility of intentional or accidental discharge resulting in death, but a natural and foreseeable consequence of appellant's conduct is the loss of control of the victim's automobile creating a substantial risk of death. Such a reaction to a gun being aimed at a driver is not simply a 'personal and subjective reaction,' but an objective reaction raising to the level of risk to that of death."[165]

In *Thornton*, the Court held that displaying a firearm from a moving vehicle on a busy highway placed everyone on the highway at substantial risk of death. The *Thornton* Court was particularly concerned about the danger posed by the victim driver's reaction to the display of the weapon. The Court noted the substantial risk of loss of control and motor vehicle accident as a result of the victim driver's reaction to the display of the gun. The Court has found sufficient

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[164] 657 A.2d 382 at HN 2 (Del. 1994).
[165] 657 A.2d 382 at HN 2 (Del. 1994).

evidence of substantial risk in other cases involving moving vehicles.[166] No such element of risk exists in Appellant's case.

Moreover, the Delaware Code tells us that the legislature does not intend the definition of "substantial risk of death" – as in the Reckless Endangering statute - to encompass conduct such as that in which Appellant engaged in this case. Defining words related to justification defenses, "Deadly force" is defined as force which…the defendant knows creates a "substantial risk of causing death" or seriously physical injury.[167] That exact section goes on to say "purposely firing a firearm in the direction of another person or at a vehicle in which another person is believed to be constitutes deadly force. A threat to cause death or serious bodily harm, by the production of a weapon or otherwise, so long as the defendant purpose is limited to creating an apprehension that deadly force will be used, if necessary, does not constitute deadly force."[168]

In other words, Delaware's legislature has specifically stated that the display of a weapon without firing same does not constitute a "substantial risk of death." This is consistent with other jurisdictions. The Model Penal Code states that the production of a weapon, so long as the purpose of its production is limited to creating an apprehension, is not deadly force. The MPC defines deadly force as a

[166] See *Landis v. State*, 882 A.2d 761 (Del. 2005).
[167] 11 Del. C. § 471
[168] 11 Del. C. § 471

force the actor uses with the purpose of causing or knowing will create a substantial risk of causing death.[169] Similarly, the mere display of a weapon has been specifically excluded from the category of "deadly force" in states including Maine,[170] Michigan,[171] and Florida.[172] "It is the nature of the force that must be evaluated and the mere display of a gun without more does not constitute deadly force."[173]

Substantial risk of death did not exist in Appellant's case at all. None of the parties in this case were in moving vehicles. Nobody discharged a firearm. Firearms do not discharge unless the trigger is pulled. Appellant told police his finger was not on the trigger. Appellant told police he pointed the firearm on a downward angle - as testified to by Larney and seen on video. Officer Larney said he did not see Appellant waiving the gun around. Officer Larney said that he did not think Parker or Diaz were in the firearm's line of sight.

Appellant's convictions on these facts violate his fundamental United States and Delaware constitutional rights to bear arms. As applied in this case, the convictions are an undue burden on Appellant's right to bear arms without adequate justification by the government.[174]

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[169] Model Penal Code § 3.11.
[170] *State v. Cannell*, 916 A.2d 231 (Me. 2007).
[171] *People v. Ogilvie*, 2022 Mich. App. LEXIS 1099 (Mich. App. Mar. 3, 2022).
[172] *Stewart v. State*, 672 So. 2d 865 (Fla. 2d Dist. Ct. of App. Apr. 10, 1996).
[173] *Stewart v. State*, 672 So. 2d 865 (Fla. 2d Dist. Ct. of App. Apr. 10, 1996).
[174] See *Doe v. Wilmington Housing Authority,* 88 A.3d 654 (Del. 2015).

In *New York State Rifle & Pistol Association v. Bruen*,[175] the United States Supreme Court held that when the Second Amendment's plain text covers an individual's conduct, the conduct of presumptively protected and regulation of the conduct by the government must be consistent with the nation's historical tradition of firearm regulation. In *Bridgeville Rifle & Pistol Club, Ltd. v. Small*[176] and in *Doe v. Wilmington Housing Authority*,[177] this Court recognized that Delaware has a long history of allowing responsible citizens to lawfully and publicly open carry and use firearms.

Appellant was open carrying his firearm – a fundamental right[178] guaranteed explicitly by the Second and Fourteenth Amendments to the *United States Constitution* and to Article I § 20 of the *Delaware Constitution*. Appellant was showing the firearm to other gun enthusiasts at the rally and describing its use for paratroopers in the military. Appellant made no threats. The only time he did interact with counter-protesters, he placed the gun on the ground with other adults - where it was safely retrieved by one of his colleagues – so that it is not present during the conversation.

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[175] 2022 U.S. LEXIS 3055 at *29 (2022).
[176] 176 A.3d 632 (Del. 2017).
[177] 88 A.3d 654 (Del. 2015).
[178] *Doe v. Wilmington Housing Authority,* 88 A.3d 654 (Del. 2015).

The civilian witnesses were permitted to testify to their subjective feelings that they felt threatened. While this testimony may have been appropriate in an Aggravated Menacing or self-defense trial, neither were part of the Indictment. Aggravated Menacing prohibits conduct intending to cause a victim fear and apprehension – subjective, perceived danger. The jury combined the witnesses' subjective feeling of being threatened, applied them to the erroneous jury instruction given by the trial court, and convicted Appellant. Self-defense requires the apprehension of imminent harm. However, that evidence would not and does not support a conviction by any reasonable juror on the offense of Reckless Endangering First Degree. Reckless Endangering prohibits the objective, actual risk created by the conduct.[179] Appellant's conduct did not create risk. Further, Appellant's conduct was not a gross deviation from the standard of conduct of a reasonable person. There is no case law – not even *Thornton* – that supports a conviction under these facts.

As a result, the conviction of Reckless Endangering First Degree must be overturned. By extension, because the charge of Reckless Endangering First Degree is the underlying felony of Possession of a Firearm During Commission of a Felony as Appellant was convicted, the PFDCF conviction must be vacated, too.

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[179] See *Minor v. State*, 326 Md. 436 (Ct. App. Md. 1991).

Further prosecution is prohibited because there is insufficient evidence to warrant a conviction.[180] Under the Double Jeopardy Clause of the Fifth and Fourteenth Amendments to the *United States Constitution* and Article I § 8 of the *Delaware Constitution*, the State cannot retry Appellant for the underlying conduct and the matter must be remanded for entry of judgment of acquittal.[181]

[180] 11 Del. C. § 207

[181] *Grayson v. State,* 210 A.3d 724 (Del. 2109).

III. THE CUMULATIVE EFFECT OF THE ERRORS IN THE TRIAL COMBINE TO PREJUDICE APPELLANT'S SUBSTANTIAL RIGHTS REQUIRING THE CONVICTIONS TO BE VACATED

QUESTION PRESENTED

Did the cumulative effect of the errors prejudice substantial rights and jeopardize the fairness and integrity of the trial process? *(Errors preserved as noted, supra).*

STANDARD OF REVIEW

The Court utilizes a plain error standard of review to assess cumulative error.[182] "When there are multiple errors in a trial, this Court weighs their cumulative effect to determine if, combined, they are 'prejudicial to substantial rights so as to jeopardize the fairness and integrity of the trial process.'"[183]

MERITS OF THE ARGUMENT

"When there are multiple errors in a trial, this Court weighs their cumulative effect to determine if, combined, they are 'prejudicial to substantial rights so as to jeopardize the fairness and integrity of the trial process.'"[184] The Court utilizes a plain error standard of review to assess cumulative error.[185]

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[182] *Hoskins v. State*, 102 A.3d 724 (Del. 2014).
[183] *Crump v. State*, 204 A.3d 114 (Del. 2019).
[184] *Crump v. State*, 204 A.3d 114 (Del. 2019).
[185] *Hoskins v. State*, 102 A.3d 724 (Del. 2014).

Here, the assignments of error have merit. Their combined effect was prejudicial to Appellant's substantial trial rights, eliminated the integrity of the trial and the trial was not fair. Appellant was charged with Reckless Endangering. The trial judge instructed the jury on the wrong standard of the law for the definition of "substantial risk." Instead, the trial judge applied the term "imminent threat" which has never been used to charge a jury on Reckless Endangering. That language has been used to charge a jury on Aggravated Menacing. In retrospect, this error paved the way for convictions based upon the witnesses' bias, unreliable, opinion testimony about proper gun safety and subjective feelings of being in fear due to the display of a firearm. Rather than focus on the objective threat created by Appellant's actions (or the lack thereof), the jury was instead focused upon the witness' subjective interpretations of Appellant's actions. In a trial for Reckless Endangering, the jury was permitted to hear testimony relevant to Aggravated Menacing and was then instructed on the charge of Reckless Endangering using the Aggravated Menacing language "imminent threat." From there, the Reckless Endangering conviction was applied to support a conviction of Possession of a Firearm During the Commission of a Felony.

CONCLUSION

Wherefore, Appellant prays this Honorable Court **VACATE** Appellant's convictions for the reasons stated herein. Upon the Court finding insufficient evidence to sustain the convictions, Appellant prays that this Court **REMAND FOR ENTRY OF JUDGMENT OF AQUITTAL** pursuant to Appellant's constitutional double jeopardy rights and 11 Del. C. § 207.

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