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Case Number 93,2022

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 REPLY BRIEF

HUDSON JONES JAYWORK & FISHER

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STATEMENT OF FACTS

Appellant herein relies upon the Statement of Facts set forth in the Opening Brief. However, in this Reply Brief, Appellant also relies upon the following additional facts, all of which are included in the record submitted as Appendix To Appellant's Opening Brief.

Appellant asked the Court to define "substantial risk" as "a strong possibility as contrasted with [a] remote or significant possibility that a certain result would occur."[1] "That's my request. If the Court denies it, I understand." The trial court responded to trial counsel: "I understand."[2]

After further discussion, Appellant re-stated the requested definition of "substantial risk:" "The definition that I would ask the Court, substantial risk means a strong possibility as contrasted with a remote or significant possibility that a certain result may occur."[3] Then, trial counsel and the trial court engaged in the following exchange:

> "**THE COURT**: I think that goes a little bit far afield. I don't have a problem with 'substantial risk means a strong possibility that something will occur.'

[1] A-190
[2] A-191
[3] A-193

[TRIAL COUNSEL]: Well, again Your Honor, I think the definition, if Your Honor wants to leave out 'as contrasted with remote or significant possibility?'

THE COURT: Yes.

[TRIAL COUNSEL]: Then it would just be 'substantial risk means a strong possibility that a certain result may occur.'

THE COURT: Yes.

[TRIAL COUNSEL]: If that's the Court's ruling, I would ask to leave the contrasted part in, but obviously if that's the Court's ruling, so be it."[4]

Subsequently, while proposing the language "imminent threat" *sua sponte*, the trial court said "does anyone want that added? I think what we have now is sufficient."[5] Trial counsel responded saying: "Your Honor, I am good with what we have."[6]

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ARGUMENT

I. THE "IMMINENT THREAT" JURY INSTRUCTION ARGUMENT IS NOT WAIVED BECAUSE IT WAS FAIRLY PRESENTED TO THE TRIAL COURT, BECAUSE APPELLANT HAS AN UNQUALIFIED RIGHT TO AN ACCURATE STATEMENT OF THE LAW, AND BECAUSE REVIEW IS IN THE INTEREST OF JUSTICE. *DE NOVO* REVIEW APPLIES BECAUSE THE INSTRUCTION WAS OBJECTED TO AT TRIAL.

Factually, and in accord with Supreme Court Rule 8, this jury instruction issue on appeal was fairly presented to the trial court and is not waived. In lieu of applying the commonly accepted meaning of "substantial risk,"[7] Appellant asked the Court to define "substantial risk" as "a strong possibility as contrasted with [a] remote or significant possibility that a certain result would occur."[8] "That's my request. If the Court denies it, I understand." The trial court responded to trial counsel: "I understand."[9] As pointed out by the State, the requested jury instruction is nearly identical to the definition of "substantial risk" in Ohio Revised Code § 2901(A)(8). The Delaware Code does not define substantial risk.

After discussion, Appellant re-stated his requested definition of "substantial risk:" "The definition that I would ask the Court, 'substantial risk means a strong possibility as contrasted with a remote or significant possibility that a certain result

[7] See *Britt v. State*, 113 A.3d 1080 at *6 (Del. Apr. 28, 2015) ("'Substantial risk of death is not defined in the Delaware Criminal Code but is accorded its commonly accepted meaning.'")
[8] A-190
[9] A-191

may occur.'"[10] Then, trial counsel and the trial court engaged in the following exchange:

> "**THE COURT**: I think that goes a little bit far afield. I don't have a problem with 'substantial risk means a strong possibility that something will occur.'
>
> **[TRIAL COUNSEL]**: Well, again Your Honor, I think the definition, if Your Honor wants to leave out 'as contrasted with remote or significant possibility?'
>
> **THE COURT**: Yes.
>
> **[TRIAL COUNSEL]**: Then it would just be 'substantial risk means a strong possibility that a certain result may occur.'
>
> **THE COURT**: Yes.
>
> **[TRIAL COUNSEL]**: If that's the Court's ruling, I would ask to leave the contrasted part in, but obviously if that's the Court's ruling, so be it."[11]

Subsequently, while proposing the language "imminent threat" *sua sponte*, the trial court said "does anyone want that added? I think what we have now is sufficient."[12] In other words, the trial judge indicated that Her Honor was not going to use "imminent threat." Trial counsel responded saying: "Your Honor, I

[10] A-193
[11] A-193 to A-195
[12] A-207

am good with what we have."[13] In other words, trial counsel said not to include "imminent threat" in the definition of "substantial risk."

In fact, and in accord with Superior Court Criminal Rule 30, Appellant did object to the language "imminent threat." Trial counsel's statement, "I am good with what we have," must be read in the context of his colloquy with the judge. After all the discussion about the instruction Appellant requested, the trial judge asked about including "imminent threat" but indicated that Her Honor was not inclined to included it. When trial counsel said, "I am good with what we have," he was telling the trial court Appellant objected to the language "imminent threat." Her Honor included the language anyway after the State simply asked for it.

Alternatively, even if Appellant did not comply with Supreme Court Rule 8 and Superior Court Rule 30, which he did, the "imminent threat" jury instruction not waived because it infringed on Appellant's unqualified and substantial rights and because review is in the interest of justice. In its Answering Brief, State has conspicuously disregarded this Court's language in *Flamer v. State*,[14] *Culver v. Bennett*[15] and *Lloyd v. State*:[16] "although a party is not entitled to a particular jury

[13] A-208
[14] *Flamer v. State*, 490 A.2d 104, 128 (Del. 1984)
[15] *Culver v. Bennett*, 588 A.2d 1094 (Del. 1991)
[16] *Lloyd v. State*, 152 A.3d 1266 (Del. 2016)

instruction, a party does have the unqualified right to have the jury instructed with a correct statement of the substance of the law."

In *Culver v. Bennett,*[17] this Court held that failure to object to a jury instruction at trial is excused where the jury instruction is erroneous as a matter of law and the errors affect the litigant's substantial rights.[18] This holding is consistent with *Bullock v. State,*[19] cited by the State. In *Bullock*, this Court held that "implicit in every jury instruction is the fundamental principle that the instruction applies to the specific facts in that particular case and contains an accurate statement of the law. Simply because the parties in a case agree on a particular set of instructions, does not excuse the trial judge's duty to give proper instructions."[20] As in *Bullock*, the unique factual circumstances in Appellant's case justify review.

Moreover, Merriam-Webster Dictionary defines "unqualified" as "not modified or restricted by reservations."[21] Merriam-Webster Thesaurus lists synonyms to "unqualified" including "absolute, all-out, categorical, complete, outright, and unconditional."[22] Applying these commonly accepted meanings and

[17] *Culver v. Bennett*, 588 A.2d 1094 (Del. 1991)
[18] *Probst v. State*, 547 A.2d 114, 119 (Del. 1988); *Culver v. Bennett*, 588 A.2d 1094, 1096 (Del. 1991); *Lloyd v. State*, 152 A.3d 1266, 1271 (Del. 2016).
[19] *Bullock v. State*, 775 A.2d 1043 (Del. 2001).
[20] *Bullock v. State*, 775 A.2d 1043, 1053 (Del. 2001).
[21] https://www.merriam-webster.com/dictionary/unqualified
[22] https://www.merriam-webster.com/thesaurus/unqualified

synonyms, it is apparent that a litigant's right to an accurate statement of the law cannot be conditional.

In Appellant's case, the "imminent threat" jury instruction was erroneous as a matter of law. The issue was fairly presented to the trial court and, as a result, the argument is not waived. Moreover, the phrase "imminent threat" was specifically objected to, in context, during the informal prayer conference conducted by the trial court. Accordingly, the Court should apply a *de novo* review on appeal.

II. EVEN UNDER A PLAIN ERROR STANDARD OF REVIEW, THE ERRONEOUS JURY INSTRUCTION WAS SO CLEARLY PREJUDICIAL THAT IT VIOLATED APPELLANT'S SUBSTANTIAL RIGHTS AND JEOPARDIZED THE FAIRNESS AND INTEGRITY OF THE TRIAL PROCESS.

Whether the Court reviews the jury instruction *de novo* or for plain error, the result is the same. The trial judge made an error of law that was not harmless because it improperly influenced the jury's verdict.[23] Under a *de novo* standard, the jury instruction given was misleading and misinformative on its face. There is no way that the jury could performed its duty in a reckless endangering case where the trial court allowed testimony that would have been more relevant in an aggravated menacing case, only to instruct them erroneously that the definition of "substantial risk" includes "imminent threat."

Even under a plain error standard, the erroneous jury instruction was so clearly prejudicial that it violated Appellant's substantial rights and jeopardized the integrity of the trial process. The language "imminent threat" has never been applied to the definition of "substantial risk" in a Reckless Endangering case that diligent research can find. Although the State argues that the jury instruction given "tracks the commonly accepted meaning" of "substantial risk," that argument is factually wrong. The definition in Ohio does not include the language "imminent

[23] See *Williams v. State*, 301 A.2d 88 (Del. 1973).

threat." Appellant did not ask the trial court to apply the phrase. The phrase "imminent threat" does not appear in the Reckless Endangering statute.[24]

To the contrary, the correct definition of "substantial risk" has been applied by the Delaware Supreme Court throughout case law including but not limited to *Britt v. State*,[25] *Bryant v. State*,[26] *Thornton v. State*,[27] *Jones v. State*,[28] *White v. State*,[29] and *Hassan-El v. State*.[30] A tacit admission that the jury was erroneously instructed, the State does not address the jury instructions given in those cases.[31] The State makes no effort to distinguish the jury instruction in Appellant's case or justify the use of the language "imminent threat." The State presents no authority to support that "imminent threat" is an accurate statement of the law. Instead, the State attempts to contort the definition of "substantial risk" to include the erroneous language. This is ironic because, in denying his Motion for Judgment of Acquittal, the trial judge accused Appellant of contorting the definition of

[24] 11 *Del. C.* § 604
[25] 113 A.3d 1080 at HN 2 (Del. 2015).
[26] 862 A.2d 385 (Del. 2004).
[27] 657 A.2d 382 (Del. 1994).
[28] 227 A.3d 1097 (Del. 2020).
[29] 85 A.3d 89 (Del. 2014).
[30] 841 A.2d 307 (Del. 2003).
[31] On page 19 of the Answering Brief, the State suggests that Appellant does not cite authority to support the argument that the given jury instruction was erroneous. Appellant did present authority – however, the State chose not to address the cases.

"substantial risk" to *exclude* the "imminent threat" language – as if it should have been included in the first place.[32]

The error violated Appellant's substantial rights and eviscerated the integrity of the trial because, rather than measure the objective danger, or lack thereof, created by Appellant, the jury was instructed to measure the subjective interpretations of the civilian witnesses. Prejudicially, the civilian witnesses had testified about their subjective responses to Appellant. They told the jury their opinions on firearm safety and that they felt scared, nervous, and alarmed by Appellant's display of the firearm. It matters not that Appellant did not object to their testimony at trial on a relevance basis. The argument here addresses the jury instructions and the judgment of acquittal. And, when Appellant did not object, he was presuming that the trial court would instruct the Her Honor and the judge accurately according to the law.

In other words, the civilian witnesses told the jury about what they perceived to be threatening conduct. Then the trial judge told the jury that threatening conduct is part of the definition of "substantial risk of death" when it is not. The phrase imminent threat did not protect Appellant. Instead, it gave the jury a basis to convict for threatening conduct even when no substantial risk of death was present.

[32] A-368

The prejudice is obvious, but it is also evidenced by the jury note question to the judge during deliberations: "what would constitute a strong possibility **or** imminent threat that a certain result may occur?" "Or." The jury was told that substantial risk of death includes an "imminent threat that a certain result may occur." But for the inclusion of the erroneous language, Appellant would not have been convicted.

III. THE TRIAL COURT ERRONEOUSLY DENIED THE MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE, LIKE THE STATE IN ITS ANSWERING BRIEF, IT APPLIES THE WRONG LEGAL DEFINITION AND IGNORES ESTABLISHED DELAWARE PRECEDENT.

In his Opening Brief, Appellant cited a series of cases that support his contention that no reasonable juror could have convicted him of Reckless Endangering beyond a reasonable doubt:[33] *Thornton v. State,*[34] *Britt v. State,*[35] *Bryant v. State,*[36] *Jones v. State,*[37] *White v. State,*[38] *Boyer v. State,*[39] and *Grayson v. State*.[40] All of those cases included circumstances that created a substantial risk of death. Except for *Thornton,* all those cases involved the discharge of a firearm. In its Answer, the State completely ignored five of the cases - addressing only *Thornton* and *Britt*.

Just like at the trial court level, the State's application of *Thornton v. State*[41] is misplaced. In fact, *Thornton* supports the granting of the motion for judgment of acquittal. In *Thornton,* the appellant contended "that a substantial risk of death is not a foreseeable outcome of the act of pointing a gun at a driver on a busy

[33] Opening Brief page 32
[34] *Thornton v. State,* 647 A.2d 382 (Del. 1994).
[35] *Britt v. State,* 113 A.3d 1080 at HN 2 (Del. 2015).
[36] *Bryant v. State,* 862 A.2d 385 (Del. 2004)
[37] *Jones v. State,* 227 A.3d 1097 at HN 4 (Del. 2020).
[38] *White v. State,* 85 A.3d 89 (Del 2014)
[39] *Boyer v. State,* 436 A.2d 1118 (Del. 1981)
[40] *Grayson v. State,* 210 A.3d 724 (Del. 2019)
[41] *Thornton v. State,* 647 A.2d 382 (Del. 1994).

highway" and that the Reckless Endangering charge should be limited to *his* conduct only and not the potential harm created by that conduct. In *Thornton*, the appellant argued that he did nothing to encourage the subsequent conduct of the other driver. This Court called that reasoning fallacious because it ignored the fact that the appellant was riding in a van on a busy highway when he pointed the gun at another driver – creating a foreseeable consequence of loss of control of the victim vehicle creating a substantial risk of death.[42]

Appellant's case is substantially different than *Thornton*. The trial exhibit videos, submitted to the jury and on a USB Drive with the Appendix on appeal, show that Appellant did not create a substantial risk of death. No such risk existed in Appellant's case whatsoever. Here, the only possible risk would have been if Appellant's firearm was discharged in the direction of any person. However, there was uncontested evidence at trial that his finger was never on the trigger[43] and that firearms cannot fire unless the trigger is pulled.[44] Appellant denied that he pointed the gun at anyone.[45] Even when he placed the firearm down on the ground, he did so in a controlled environment of adults.[46] In fact, a responsible adult picked the gun up and brought it to Appellant after he tried to speak to the protestors.[47]

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[42] *Thornton v. State*, 647 A.2d 382, HN 2 (Del. 1994).
[43] A-217 and Audio Recording of Appellant's Statement on USB Drive
[44] A-155 and A-162
[45] Audio Recording of Appellant's Statement on USB Drive
[46] State's Exhibit 4 on USB Drive
[47] State's Exhibit 4 on USB Drive

Seemingly tracing the contents of the trial court's written denial of judgment of acquittal, the State mentions *Britt v. State*[48] simply for the proposition that "this Court has reiterated that we have found sufficient evidence of a substantial risk of death where the defendant merely pointed, but did not fire, a loaded weapon at another person."[49] However, that *Britt* language refers to the *Thornton* case only.[50] In fact, in *Britt*, a firearm was discharged.[51]

Neither the State nor the trial court gave any weight to the fact that other circumstances, in addition to the display of a firearm, exist in all the case law. Instead, the trial court and the State assert that the mere display of the firearm in this case created a "substantial risk of death." That is an illogical conclusion. Even viewing the evidence in a light most favorable to the State, the firearm was pointed for a brief second in the general direction of a group of people down and across the street. There was never a finger on a trigger. It was handled in a controlled manner. No police officers were alarmed – including the drone officer. The witnesses remained at the scene. When the gun was placed on the ground it was not pointed at any person's direction. There was never a "substantial risk of death."

[48] *Britt v. State,* 113 A.3d 1080 at HN 2 (Del. 2015).
[49] Answering Brief Page 23.
[50] *Britt v. State,* 113 A.3d 1080 at FN 14 (Del. 2015).
[51] 113 A.3d 1080 (Del. 2015).

Further, as noted, *supra*, the trial judge relied upon the "imminent threat" language when Her Honor denied Appellant's Motion for Judgment of Acquittal.[52] Applying the wrong standard, the trial judge described the evidence produced by the State as "overwhelming."[53] The State makes the same mistake in its Answering Brief. Applying the correct definition of "substantial risk," there was no evidence to support a conviction. No reasonable juror would have found Appellant guilty beyond a reasonable doubt.

[52] A-368
[53] A-362

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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