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Case Number 521,2017

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAMIAN THOMAS,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 521, 2017
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

Abby Adams (ID No. 3596)
Deputy Attorney General
Department of Justice
114 East Market Street
Georgetown, DE 19947
(302) 856-5353

DATE: September 19, 2018

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NATURE AND STAGE OF THE PROCEEDINGS

On July 18, 2016, Damian Thomas ("Thomas"), was arrested and charged by Indictment with Murder in the First Degree, Possession of a Firearm During the Commission of a Felony ("PFDCF"), Possession of a Firearm by a Person Prohibited ("PFBPP"), and Carrying a Concealed Deadly Weapon ("CCDW"). Super. Ct. Docket Item ("DI") 1, 3. (A1, 10-12). Initially, the parties disagreed whether the Office of Defense Services could represent Thomas due to a potential conflict of interest, however, the disagreement resolved. (DI 5, 6, 8; A2). There were no pretrial motions.

Prior to trial, Thomas would not agree to stipulate that he was a person prohibited or to sever the charge. Prior to jury selection, the parties agreed the PFBPP charge would be tried separately, but left decisions about the form of that trial until after the first trial concluded (B8).

On September 19, 2017, after a five-day jury trial, a New Castle County jury found Thomas guilty of murder, PFDCF and CCDW. (DI 34; A7-8). Thomas waived his right to a jury trial on the PFBPP charge, and the Superior Court found him guilty. *Id.*

On November 20, 2017, the Superior Court sentenced Thomas to spend the balance of his natural life in prison at Level V for murder, and to serve 21 years at Level V for the other three charges. Sent. Trans. at 6-7. (B32-33).

Thomas appealed, and on August 17, 2018, filed his Opening Brief. This is the State's Answering Brief.

SUMMARY OF ARGUMENT

I. **DENIED**. The Superior Court did not abuse its discretion in ruling that the chief investigating officer's lay opinion that Thomas was the person pictured in the pizzeria surveillance video was admissible pursuant to Delaware Rule of Evidence 701. The testimony was based on his own perception, helpful to the jury, and not based on specialized knowledge. The testimony did not improperly bolster the testimony of the eyewitnesses to the point of plain error, because the CIO did not imply he based his opinion on information outside the record, and he did not testify to the veracity of the eyewitnesses. Any error was harmless given the extensive evidence against Thomas.

II. **DENIED**. Viewed in the light most favorable to the State, there was ample direct and circumstantial evidence that Thomas was concealing the gun before he pulled it out and shot the victim. Thomas was captured on surveillance cameras moments before the shooting, with no weapon visible. The Superior Court did not commit plain error in failing to *sua sponte* grant a motion for judgment of acquittal for Carrying a Concealed Deadly Weapon.

STATEMENT OF FACTS

On the evening of April 14, 2015, after 9 p.m., Etta Reid and her son, Deshannon Reid ("Reid"), were sitting on the porch of their home on West 27th Street in Wilmington. (A13, 17). Reid lived in the downstairs apartment, and his mother lived in the upstairs apartment. (A14). Reid was on the phone with S.B., the mother of his daughter, about bringing his daughter to see them. (A13; 9/12 at 7-9).

They were joined by Damian Thomas ("Thomas"), whom Etta Reid knew as "Mutt." (A18). Thomas greeted Etta Reid with a hug and said "Hey Mom" when he arrived. (A14). "Mom" was a nickname everyone used for Etta Reid. Etta Reid sat on the opposite side of the porch from the two men. *Id.*

Reid was upset with S.B., who had fallen asleep and missed several messages from Reid. (B9). Reid was waiting for her to bring over their daughter. *Id.* S.B. talked on the phone with Reid, and heard him also upset with someone on his end of phone. *Id.* Reid was saying things like, "I got a 2-month old daughter I have to worry about." *Id.* According to Reid's mother, Thomas was talking in Reid's ear, but she could not hear what they were saying. (A15). According to S.B., Reid yelled at her to bring him their daughter, and hung up the phone. (B9).

Thomas got up from his seat, and Reid told him, "I'm going through something right now." (A15). The two men started arguing. Thomas said "I'll be

back" and walked away, towards Market Street. (A15).

Thomas went to his long-time girlfriend's apartment, No. 101 in Crestview Apartments. (A52). Thomas entered Crestview Apartments at about 9:36 p.m., spent about 30 seconds in the apartment, and left at about 9:38 p.m. (A37-38).

Thomas walked back toward the Reid's house and up to the porch. (A15-16). Thomas sat in the same chair and started whispering in Reid's ear. (A16). Reid was angry, got up, and said, "Man, I told you I don't have anything for you." (A16-17). Etta Reid did not know if Reid was talking about drugs or money or something else—she knew he sold drugs. (A17). The two men walked toward Moore Street, arguing. (A17, 26). Reid said to Thomas that he "keep[s] coming short," or being short of money he was supposed to have for drugs. (A27, 31). Reid was ahead of Thomas, waiving his hands in the air angrily. (A17, 27). At one point, Reid said, "Man, we can go," gesturing as if the two could fight. (A22). There were a lot of people on the corner talking, so Etta Reid did not hear everything being said. (A17). As Reid turned to cross the street away from Thomas, Etta Reid heard a lot of people saying, "No, Man, No." (A17, B11-12, 15). Thomas pulled out a gun and shot Reid at least once. (A17, 28-29). Reid fell and Thomas stood over him, shooting him twice more in the back. (A17).

People crowded around Reid and told him not to move. (B16). Reid struggled back toward his house, and collapsed on the sidewalk. (A18, 32). He

said to Etta Reid, "Mom, call 911." (A18). She was already making the call. *Id.* Thomas ran away. (B12).

Police received a report of shots fired at 9:44 p.m. One of the first two officers to arrive at the scene assessed Reid and called for paramedics. (B17). Paramedics took Reid to the Christiana Hospital. (B30). Police collected evidence from the scene, including four spent ammunition cartridges. (A21-22; St. Ex. 18-21). Police did not find the gun. (B18).

Reid died in the hospital on April 17, 2015. (B21, 24). The Chief Medical Examiner ("CME") performed an autopsy on Reid that day. (B19, 21). Reid had two gunshot wounds to his body. (B21). One bullet entered his back, traveled through his abdomen, and was recovered from the soft tissue on the right side of his chest. (B21-22; St. Ex. 22). The other bullet went entirely through his body, entering through his buttocks. (B22-23). The CME testified that these wounds would not be immediately debilitating, and it would be possible for the victim to move until he lost consciousness from blood loss. (B23). The cause of death was listed as "sequelae of gunshot wounds to the torso," meaning that Reid died as a result of the consequences of his gunshot injuries. (B24). The manner of death was homicide. *Id.*

Police retrieved video surveillance recordings from two sources. A pizzeria on the corner of 27th and Market Streets has a DVR-based system that had about 6-

8 cameras. (A34, B25). The time on that system was about 59 minutes behind real time, and the system was limited in the number of cameras that could record at the same time. (A34). Crestview Apartments had numerous video cameras, including several in its front lobby, and one in its first floor hallway. (A37). Police also received the visitor sign in book from the security desk at Crestview Apartments, which shows Thomas signing in at 21:36 and signing out at 21:38. (A36). Police walked the distance between Crestview and the crime scene at a normal pace, and it took them about 90 seconds. (A38).

More than a year later, on July 6, 2016, two officers from the Cherry Hill, New Jersey police department responded to a call of a suspicious person. The person gave them a false name and date of birth, and tried to flee while the officer ran the information on the computer in his patrol car. (B27). Police apprehended him, he identified himself correctly, and told police he was wanted for murder in Delaware. (B27). According to a former cellmate, Thomas admitted that he got into an argument with a man over marijuana, that the man tried to fight him, and he went home, got his gun, and killed the man. (A41, B28-29).

I. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING THE DETECTIVE TO GIVE HIS OPINION.

Question Presented

Whether the Superior Court abused its discretion in allowing a police officer to testify that Thomas was the person visible in a surveillance video, walking on the sidewalk.

Scope and Standard of Review

The Court reviews evidentiary rulings and application of the discovery rules for abuse of discretion.[1] "An abuse of discretion occurs when 'a court has . . . exceeded the bounds of reason in view of the circumstances," [or] . . . so ignored recognized rules of law or practice . . . to produce injustice."[2] Issues not adequately raised below are reviewed only for plain error.[3] "Plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."[4]

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[1] *Horsey v. State*, 2006 WL 196438, at *1 (Del. Jan. 24, 2006) (citation omitted); *Hopkins v. State*, 893 A.2d 922, 927 n.5 (Del. 2006).

[2] *Lilly v. State*, 649 A.2d 1055, 1059 (Del. 1994) (quoting *Firestone Tire & Rubber Co. v. Adams*, 541 A.2d 567, 570 (Del. 1988)).

[3] Supr. Ct. R. 8.

[4] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

Argument

Thomas argues that the Superior Court abused its discretion and violated his state and federal due process rights by allowing the State to introduce the Chief Investigating Officer's ("CIO's") lay opinion that identified Thomas as the individual captured in surveillance footage near the murder scene. Thomas's argument fails because the police officer's opinion testimony aided the jury to understand the video evidence and complied with the rules of evidence. The Superior Court correctly found that the opinion went to the weight of the evidence, and not its admissibility. Thompson was free to cross-examine the officer about his opinion, and the jury could discount it entirely if they did not agree.

For the first time on appeal, Thomas argues that the testimony was improper vouching in violation of his due process rights. Thomas has waived any argument under the Delaware Constitution by failing to adequately brief it.[5] There was no plain error where the testimony did not imply the officer had superior knowledge about the evidence, and no other witness testified to the identity of the person on the surveillance video. There was no plain error; any error was harmless.

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[5] *Wallace v. State*, 956 A.2d 630, 637-38 (Del. 2008).

1. CIO's identification of Thomas was admissible lay opinion.

Lay opinions are addressed in Delaware Rule of Evidence 701, which provides:

> [A] lay witness may testify in the form of an opinion or inference if that opinion or inference is "rationally based on the perception of the witness," "helpful to a clear understanding of the witness' testimony or the determination of a fact in issue," "and not based on scientific, technical, or other specialized knowledge."[6]

The officer's opinion met these requirements.

The day before the prosecutor questioned the CIO, the prosecutor introduced the pizzeria surveillance videos, the Crestview Apartments videos and the Crestview visitor sign-in sheets through Detective Puit, the officer who collected that evidence. (A34-39; St. Ex. 38-45). That officer described defendant's actions in the Crestview Apartments video. Defense counsel did not object to the officer identifying Thomas in those videos, which were taken moments before the murder when Thomas went to get his gun, and confirmed the person was Thomas through questioning. (A39).

The pizzeria surveillance video in question shows a person walking past the pizzeria away from Etta Reid's porch and toward Crestview Apartments, and walking back toward the area moments before the murder, from the direction of

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[6] *Jackson v. State*, 2018 WL 936845, at *3 (Del. Feb. 16, 2018).

Crestview Apartments. Unlike the Crestview video, the pizzeria video was dark and the person at question in the video is not readily identifiable. On cross-examination, defense counsel asked the officer who collected the surveillance video for his opinion regarding whether two individuals depicted in different surveillance videos, including the one in question, were the same person (and thus not Thomas). (A40). Defense counsel questioned, "So, it's looking like a duck, walking like a duck, smelling like a duck, and you're going to call it a platypus at this point," and the officer testified that he could not "say with certainty that it's the same individual." (A40). The State addressed the issue on redirect without asking the officer to identify anyone in the video.

When reviewing the pizzeria videos with the CIO, the prosecutor asked him whether Damian Thomas was the individual seen in dark clothing passing through a portion of the video on two separate occasions, stating, "In your opinion, is that Damian Thomas?" The CIO responded, "Yes." (A51). Defense counsel objected:

> DEFENSE COUNSEL: Your Honor, that is an improper question. They can ask him what he sees. They can't ask him is that my client. He has no idea that's my client. That's a totally improper question.
> PROSECUTOR: Your Honor, . . . I asked what his opinion was. He's viewed it. He's a lay person. He can give an opinion to the court. It doesn't go to a material fact in the case . . . .
> THE COURT: I think the objection really goes to weight, rather than admissibility, and you're free to cross-examine.

(A51). Defense counsel, however, did not take the opportunity to address the

CIO's opinion on cross-examination.

The Superior Court did not abuse its discretion in admitting the opinion. The CIO here did provide an opinion that was: (1) rationally based on his perception, (2) helpful in determining a fact in issue, and (3) not based on specialized knowledge. The CIO had watched the video "many times." The CIO's opinion is helpful to the jury to the extent he had reviewed the video "many times" to determine if Thomas was the figure. (A51).[7] The jury could give whatever weight it deemed appropriate.

Defense counsel opened the door for this opinion evidence through his extensive cross-examination of Detective Puit, who had collected the video evidence. "Generally, when a party opens up a subject, he cannot object if the opposing party introduces evidence on the same subject."[8] The Superior Court did not abuse its discretion where defense counsel (a) sought Detective Puit's opinion about the identity of this individual, (b) did not object to Detective Puit identifying Thomas in the Crestview video, and (c) sought the Detective's lay opinion about handwriting in the Crestview visitor log.

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[7] The CIO also had observed Thomas independent of the video and trial—he met with Thomas in person and interviewed him (or attempted to interview him). With a September 26, 2016, discovery response, the State enclosed a "[c]opy of Defendant's audio interview by Det. Curley of the Wilmington Police Department on July 7, 2016." (DI 10; B1).

[8] *Tucker v. State*, 1986 WL 17446, *1 (Del. Sept. 12, 1986) (citing *United States v. Lum*, 466 F.Supp. 328, 334 (D. Del. 1979)).

Thomas cites numerous cases where courts have found lay opinion evidence inadmissible, Op. Br. at 12-16, however, the cases are factually distinguishable. For example, in *Washington v. State*, this Court reversed Washington's conviction based on irreconcilable conflicts in the testimony of accomplices, however, the case does not involve surveillance video, police testimony, or DRE 701.[9] In *Weber v. State*, the defendant tried to argue that the officer's identification of him on surveillance video was inadmissible because the video spoke for itself, however, the identification was based on the fact that the officer had known Weber for over 20 years, not merely looking at the tape.[10]

In *United States v. Fulton*, the defendant argued that an FBI agent's lay opinion about phone records, from which he concluded that a former suspect could not have committed the robbery, was inadmissible because he misinterpreted the phone records, which the court found to be clear—his lay opinion "was the antithesis of helpful—it was dead wrong."[11] Nonetheless, the court found no plain error because defense counsel was able to exploit the error on cross-examination, and there was other credible evidence that the former suspect was not at the scene at the time of the crime.[12] Here, the video does not speak for itself, and there is no

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[9] 4 A.3d 375, 378-79 (Del. 2010).

[10] 971 A.2d 135, 155 (Del. 2009).

[11] 837 F.3d 281, 292 (3d Cir. 2016).

[12] *Id.*

showing that the CIO misled the jury.

Thomas cites *People v. Brown*,[13] which supports the Superior Court's ruling. In that case, the officer narrated a portion of the surveillance footage and identified the defendant and victim in the same footage.[14] The court noted that the detective's:

> testimony concerning the interactions and movements of particular subjects shown in the parking lot footage was helpful to the jury due to a certain lack of clarity of the recording. Specifically, [the detective's] testimony helped the jury focus on the relevant action because numerous people entered and exited the parking lot area, their faces were too distant from the camera to be discernible, their outdoor winter clothing somewhat concealed their identities, and the color of their clothing was muted.[15]

The *Brown* court, however, found it was error for the trial court to admit the detective's identification, because, *inter alia*, "[n]othing in the record indicates how long [the detective] reviewed the recording in order to discern defendant." Like *Brown*, in this case the surveillance footage from the pizzeria is not clear—it is dark, there are several cameras capturing different views, other individuals appear in some frames, Thomas is wearing dark clothing, he is seen for a few

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[13] 82 N.E.3d 148 (Ill. App. 2017).

[14] *Id.* at 167.

[15] *Id.* (citing *United States v. Begay*, 42 F.3d 486, 502 (9th Cir. 1994) ("law officer's testimony narrating portions of a video of a protest involving about 200 demonstrators and identifying the defendants' movements helped the jury evaluate the recording where an array of events occurred simultaneously and the officer spent over 100 hours viewing the recording.")).

moments walking on the sidewalk the upper portion of the video, and it is difficult to discern what area is depicted in the video.[16] The CIO's testimony helped the jury by identifying Reid's home and orienting them with respect to the crime scene. But, unlike *Brown*, in this case the CIO had watched the video "many times." Reviewing the video several times would have allowed him to consider the content of the video, compare it with the Crestview video, and note that Thomas's clothing was consistent in both video recordings. The CIO also met Thomas in person prior to trial, when he attempted to interview him. Following the rationale in *Brown*, his lay opinion testimony is admissible because it was helpful to the jury—the CIO had the opportunity to examine the video at length, and provide an opinion based on his multiple views of the video.

2. CIO's identification of Thomas is not improper vouching.

Thomas argues that the CIO's lay testimony was improper vouching that "directly or indirectly provide[d] an opinion on the veracity of a particular witness." Op. Br. at 12, 17. Rather than alleging vouching with respect to a particular witness, Thomas argues that the lay opinion improperly bolstered the testimony of each of the State's witnesses who identified Thomas, in particular Etta Reid. This argument is reviewed for plain error because Thomas did not raise

[16] The CIO identified Etta Reid's home as having a white post, which is visible in the video; however, the video is too dark to see her home. (A51).

it below.[17]

This Court has "defined improper vouching as a prosecutor's comment implying personal knowledge of the truth of a witness' statement 'beyond that logically inferred from the evidence presented at trial.' The . . . Court was particularly concerned that such remarks amount to an official endorsement of the witness' testimony." Here, the officer did not improperly vouch for Etta Reid or any other eyewitness. He stated his opinion about Thomas being the individual in the surveillance video based on having viewed the video "many times." His opinion was not based on information the jury did not possess. The video was in evidence, and the jury could have taken the time to view it as many times as they wished, and accepted or rejected the officer's opinion.

The cases Thomas cites in support of his argument are factually distinguishable. In *Neno v. Clinton*, the police officer improperly testified to hearsay statements made by eyewitnesses to an accident, provided his lay opinion regarding who was at fault in the accident based on those hearsay statements.[18] None of the cases cited address a lay opinion on an issue for which no other witness had given an opinion. The opinion at evidence here did not improperly bolster another witness's testimony—it was no different than any other

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[17] Supr. Ct. R. 8.

[18] 772 A.2d 899, 902-03 (N.J. Super. 2001).

corroborating evidence introduced in this case or any other case.

3. Any error is harmless.

Etta Reid told police immediately after the shooting that "Mutt" shot her son. Thomas, known as "Mutt," was known to Reid and her son, had just spent time with them on the porch before he and Reid's son started arguing. Thomas left, went to his girlfriend's apartment to get his gun, came back and argued with Reid's son again before shooting him multiple times. Clear video from Crestview Apartments showed Thomas enter his girlfriend's apartment, stay for about 30 seconds, and leave again. Thomas's former cellmate, who obtained no benefit by cooperating, testified that Thomas told him he went and got his gun and killed someone. Etta Reid watched the entire interaction between the two men. Thomas attacked Etta Reid's recount of the events, but has identified no bias, motivation, or other reason for Etta Reid to misidentify Thomas as the shooter. Thomas fled Delaware after the shooting, leaving his longtime girlfriend behind. He was not found until a year later, in New Jersey, where he admitted he was wanted in Delaware for Murder. Should the Court determine that the Superior Court abused its discretion in allowing the CIO to testify that Thomas is the person seen on the video walking between points where he is clearly identified, the error is harmless in light of the overwhelming evidence against Thomas.

The opinion was offered consistent with DRE 701, and did not imply that

the CIO had additional information the jury did not know. The Superior Court did not abuse its discretion in admitting the opinion, and Thomas has failed to show plain error.

II. THERE WAS NO PLAIN ERROR IN THOMAS'S CONVICTION FOR CARRYING A CONCEALED DEADLY WEAPON WHERE HE WAS CAPTURED ON VIDEO AND NO GUN IS VISIBLE.

Question Presented

Whether there was sufficient evidence that Thomas concealed his gun on his person prior to shooting Reid.

Scope and Standard of Review

Generally, this Court reviews a claim of insufficient evidence "to determine '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.'"[19] A defendant who failed to make a motion for judgment of acquittal waives the claim unless the court finds plain error.[20] "Plain error is limited to material defects which are apparent on the face of the record; which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which clearly show manifest injustice."[21]

Argument

Thomas argues that the Superior Court committed plain error by failing to, *sua sponte*, grant a judgment of acquittal for Carrying a Concealed Deadly Weapon. Thomas argues that "[n]one of the witnesses had a perspective from

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[19] *Williamson v. State*, 113 A.3d 155, 158 (2015) (citation omitted).

[20] *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995); Supr. Ct. R. 8.

[21] *Wainwright v. State*, 504 A.2d at 1100.

which they could testify that the gun was hidden from the casual and ordinary sight of another in a normal association of life." Op. Br. at 24. Thomas's position ignores the circumstantial evidence, as well as the videotape of him leaving his girlfriend's apartment moments after retrieving his gun.

Section 1442 of Title 11, Carrying a Concealed Deadly Weapon, states:

> A person is guilty of carrying a concealed deadly weapon when the person carries concealed a deadly weapon upon or about the person without a license to do so as provided by § 1441 of this title.[22]

In *Dubin v. State*, this Court explained:

> The purpose of the General Assembly, in enacting this Statute originally in 1881 (when, as now, carrying a deadly weapon *unconcealed* seemed no criminal offense) was to remove the "temptation and tendency" to use concealed deadly weapons under conditions of "excitement." The legislative purpose, originally and presently, seems to be the avoidance of a deadly attack against another by surprise.[23]

The homicide in this case is exactly what the legislature wished to avoid.

Thomas does not contest his convictions for murder, for possessing a firearm while committing murder, or being in possession of a firearm while a person

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[22] 11 *Del. C.* § 1442.

[23] 397 A.2d 132, 134 (Del. 1979) (citations omitted) (emphasis added). The 1973 Code Commentary to section 1441 explains that the sections were "an attempt to discourage the then prevalent habit of carrying a deadly weapon." *Delaware Criminal Code with Commentary*, at 461 (1973). The Commentary to section 1442 states, "It is no offense to carry any such weapon unless it is concealed . . . ." *Id.* at 463; *see* 16 *Del. Laws ch.* 548 (1881). The history of the statute is discussed in *State v. Menge*, 29 Del. (6 Boyce) 174 (Ct. Gen. Sess. 1916).

prohibited. Thomas does not contest that the gun was "upon or about his person."[24] Where Thomas does not contest that there was sufficient evidence for a jury to find him guilty beyond a reasonable doubt for these other offense or that he had the gun, then it is a fair inference that the jury accepted the State's allegation that, when captured on video leaving his girlfriend's apartment, Thomas possessed a concealed gun. On that video, Thomas is clearly visible, but no gun can be seen—it is concealed. (A37-38; St. Ex. 36 (Crestview video)).

"Concealed" is not defined in the Code. Where undefined, a word "has its commonly accepted meaning, and may be defined as appropriate to fulfill the purposes of [the criminal code] as declared in [11 *Del. C.*] §201."[25] The American Heritage Dictionary defines "conceal" as "[t]o hide or keep from observation, discovery, or understanding; keep secret. See Synonyms at hide."[26] With those synonyms, the dictionary states:

> *Synonyms: hide, conceal, secrete, cache, screen, bury, cloak.* These verbs mean to keep from the sight or knowledge of others. *Hide* and *conceal* refer both to putting physical things out of sight and to withholding information or disguising one's feelings or thoughts. *Conceal* often implies deliberate intent to keep from sight or knowledge, whereas *hide* also can refer to natural phenomena: *The thief hid (or concealed) the stolen money. Night hides the city's*

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[24] *See Dubin,* 397 A.2d at 134-35 (explaining that bodily contact is not required, but that the gun must be "available and accessible").

[25] 11 *Del. C.* § 221(c); *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1245 (Del. 1985) (citations omitted).

[26] *American Heritage Dictionary*, at 275 (5th Ed. 1979).

ugliness.[27]

Under the plain meaning of the terms of statute, Thomas's gun was concealed because it was not visible by someone looking at Thomas, for example, from the perspective of one of the other persons with Thomas in the lobby, seen on the videotape.

Thomas cites *Robertson v. State*.[28] In *Robertson*, the police stopped Robertson's vehicle at night, the officer shined his flashlight in the vehicle and saw the butt of Robertson's gun protruding from under the passenger seat.[29] The Court distinguished "concealed" for purposes of CCDW from the cases in which a weapon is found to be in plain view.[30] The Court "adopt[ed] the majority rule requiring that a concealed weapon be 'hidden from the ordinary sight of another person . . . [meaning] the casual and ordinary observation of another in the normal associations of life.'"[31] The Court affirmed Robertson's conviction for Carrying A Concealed Deadly Weapon, even though the gun was partly visible.[32]

Thomas discounts the video of him leaving his girlfriend's apartment after he retrieved the gun, stating that none of them "provided any hint that there may be

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[27] *Id.* at 621.

[28] 704 A.2d 267 (Del. 1997).

[29] *Id.* at 268.

[30] *Id.* at 268-69.

[31] *Id.* at 268.

[32] *Id.* at 269.

a gun hidden on Thomas." Op. Br. at 23. He also argues that because the eyewitnesses observed the scene from a distance and in the dark, they did not observe Thomas in "ordinary sight." *Id.* Both of these arguments are contrary to the plain meaning of the statute.

The Superior Court instructed Thomas's jury on the elements of CCDW, including that:

> [a] weapon is concealed if it is located on or about the person carrying it so as not to be discernable by those who would come near enough to see it in the usual associations of life by ordinary observation. Absolute invisibility is not required.

(B31). Immediately after the CCDW instruction, the jury was instructed on direct and circumstantial evidence:

> The other [type of evidence] is indirect or circumstantial evidence, that is, the proof of facts [or] circumstances from which the existence or nonexistence of other facts may reasonably be inferred. . . . The law makes no distinction between the weight or value to be given to either direct or circumstantial evidence. To warrant a conviction based on circumstantial evidence, the circumstances must lead you to conclude beyond a reasonable doubt that the accused committed the offense charged.

(B31). Thomas's trial attorneys did not object to the jury instruction. Thomas argues, however, that the eyewitnesses' testimony is insufficient because none of them testified how or where Thomas concealed the gun. Op. Br. at 23-24. Contrary to Thomas's argument, the fact that none of the eyewitnesses saw the gun before Thomas "reached for something . . . [o]n his waist," and then shot the

victim, is circumstantial evidence that Thomas concealed the gun. Unless he was wearing a holster that displays the weapon, which is not visible on the videotape, reaching for a gun at one's waist is evidence that the gun was at least partly concealed in the waistband. Partial concealment is concealment.[33] In addition, the fact that the victim, unarmed, argued loudly with Thomas over drug money is circumstantial evidence that Thomas had the gun concealed—it is a fair inference that the victim would have approached the disagreement differently and would not have turned his back on Thomas, if Thomas had the weapon in plain view.

Thomas's reliance on *Clemons v. State* is misplaced. In that case, the Court of Special Appeals of Maryland overturned defendant's conviction for carrying a concealed weapon where "the only evidence concerning the manner in which appellant was carrying the gun was the testimony of another victim that as appellant 'came in the door he pulled a pistol from his belt.'"[34] The court reasoned:

> While one may speculate that when appellant 'pulled a gun' or 'pulled a pistol from his belt', the weapon had previously been concealed upon his person, such an interpretation of the evidence would be pure conjecture. One could conclude, under the circumstances here, with even more justification that the pistol carried in appellant's belt was discernable or visible, at least in part, by ordinary observation.[35]

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[33] *See Parsons v. State*, 2017 WL 5900954, at *2-3 (Nov. 29, 2017) (citing *Robertson v. State*, 704 A.2d at 268.)).

[34] *Clemons v. State*, 262 A.2d 786, 788 (Md. Ct. Spec. App. 1970).

[35] *Id.*

The Maryland court did not consider the evidence in the light most favorable to the State, as required here. Further, this case had additional direct and circumstantial evidence that Thomas concealed the gun.

Three years after *Clemons*, the Maryland Court of Special Appeals decided *Smith v. State*, wherein the court upheld a conviction for carrying a concealed deadly weapon for a man who concealed a gun in his waistband while driving.[36] In that case, the Maryland court reasoned:

> We conclude also that it is reasonable to infer that when the driver's door was opened, the courtesy light, which is standard equipment on all modern cars, came on and illuminated the inside of the vehicle. In these circumstances, we hold that the trial judge was justified in finding that while the pistol was discernible to Detective Rush by ordinary observation after the courtesy light came on, it was not so discernible prior to that time and was therefore concealed.
>
> Although concealment is ordinarily a situation entirely brought about by the deliberate acts of the accused, it may be assisted by existing conditions not caused, but utilized, by him. The appellant in this case, of course, had no responsibility for the darkness; nevertheless, he permitted the weapon to remain in a position where it could not be discerned by ordinary observation under the existing dark conditions. We think such conduct on his part makes him equally responsible with one who personally creates all of the conditions that bring about the concealment. In either situation the concealment would not exist but for the conduct of the accused, irrespective of whether such conduct caused all or only a part of the conditions necessary for the concealment.[37]

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[36] *Smith v. State*, 308 A.2d 442 (Md. Ct. Spec. App. 1973).

[37] *Id.* at 445.

Following the *Smith* court's rationale, Thomas's argument that none of the eyewitnesses saw him under ordinary circumstances because it was dark fails.

The video provided direct evidence that Thomas concealed the gun, and the eyewitnesses, the actions of the victim, and the shooting itself provided circumstantial evidence that the firearm was concealed. Thomas has failed to establish that no reasonable factfinder, viewing the facts in the light most favorable to the State, could have found him guilty beyond a reasonable doubt. Thomas cannot establish plain error.

CONCLUSION

The judgment of the Superior Court should be affirmed.

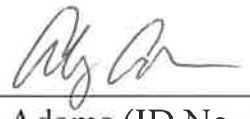
Abby Adams (ID No. 3596)
Deputy Attorney General
Department of Justice
114 East Market Street
Georgetown, DE 19947
(302) 856-5353

DATE: September 19, 2018

CERTIFICATE OF SERVICE

I, Abby Adams, being a member of the Bar of the Supreme Court of Delaware, hereby certify that on September 19, 2018, I caused the attached document to be served by File and Serve to:

Nicole M. Walker, Esq.
Office of Public Defender
Carvel State Office Building
820 N. French Street
Wilmington, Delaware 19801



Abby Adams (ID No. 3596)
Deputy Attorney General
Delaware Department of Justice
114 E. Market Street
Georgetown, DE 19947

IN THE SUPREME COURT OF THE STATE OF DELAWARE

DAMIAN THOMAS,	)	
	)	
Defendant Below,	)	
Appellant,	)	
	)	
v.	)	No. 521, 2017
	)	
STATE OF DELAWARE,	)	
	)	
Plaintiff Below,	)	
Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENT AND TYPE-VOLUME LIMITATION

1. This brief complies with the typeface requirement of Rule 13(a)(i) because it has been prepared in Time New Roman 14-point typeface using Microsoft Word 2016.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 5,785 words, which were counted by Microsoft Word 2016.

Dated: September 19, 2018

/s/ Abby Adams

Abby Adams (ID No. 3596)
Deputy Attorney General
Department of Justice
114 East Market Street
Georgetown, Delaware 19947
(302) 856-5353