



IN THE SUPREME COURT OF THE STATE OF DELAWARE

KASHIEM THOMAS, )  
 )  
 Defendant Below, )  
 Appellant, ) Case No. 99, 2019  
 )  
 v. )  
 )  
 STATE OF DELAWARE, )  
 )  
 Plaintiff Below, )  
 Appellee. )

ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF DELAWARE

**STATE OF DELAWARE'S ANSWERING BRIEF**

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DATE: November 6, 2019

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## NATURE AND STAGE OF THE PROCEEDINGS

On June 12, 2017, a New Castle County grand jury indicted Appellant Kashiem Thomas for first degree murder, possession of a firearm during the commission of a felony (PFDCF), and possession of a firearm by a person prohibited (PFBPP). A015-16; DI 5.<sup>1</sup> The Superior Court held trial over seven days from April 23, 2018 to May 1, 2018. DI 63. Before opening statements, the State informed the court that it intended to enter a *nolle prosequi* as to the PFBPP charge.<sup>2</sup> B3. At the close of the State's case, Thomas made a motion for judgment of acquittal, which the court denied. A084-92; B72-80; Ex. A to Op. Br. The jury convicted Thomas of first degree murder and PFDCF. DI 63; A094. On May 7, 2018, Thomas filed a Motion for Judgment of Acquittal After Discharge of the Jury under Superior Court Criminal Rule 29(c). DI 67; A097-98. The State responded. DI 68; A100-02. The court then directed Thomas to provide specific citations to the record evidence and issued a supplemental briefing schedule that allowed time for the parties to obtain the trial transcripts. DI 70, 76. After the parties filed their supplemental memoranda, on February 8, 2019, the Superior Court denied Thomas's renewed motion for

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<sup>1</sup> "DI \_\_\_" refers to the Superior Court criminal docket items in *State v. Kashiem Thomas*, I.D. # 1703001172 (A001-14).

<sup>2</sup> The *nolle prosequi* was filed on February 18, 2019. DI 87.

judgment of acquittal. DI 79, 82, 84; A105-18; Ex. B to Op. Br.<sup>3</sup> The court sentenced Thomas that same day as follows: (i) for first-degree murder, to his natural life in prison; and (ii) for PFDCF, to 15 years of Level V incarceration. DI 83; Ex. C to Op. Br. Thomas appealed and filed his opening brief. This is the State's Answering Brief.

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<sup>3</sup> The court issued its written decision on February 18, 2019. *Thomas v. State*, 2019 WL 669934 (Del. Super. Ct. Feb. 18, 2019).

## **SUMMARY OF THE ARGUMENT**

I. Appellant's claim is DENIED. Viewing the evidence in the light most favorable to the State, the State presented sufficient evidence for the jury to have found Thomas guilty beyond a reasonable doubt of first degree murder and possession of a firearm during the commission of a felony. From the eyewitness testimony, circumstantial evidence, and forensic evidence presented, the jury could have reasonably concluded that Thomas walked to Keeven Hale's house, while concealing a gun on his person; he fired shots at Hale from in front of Hale's house; Hale fired back, wounding Thomas; Hale succumbed to his wounds; and one of the men gathered around Thomas while waiting for paramedics took the gun from Thomas. The Superior Court did not err in denying Thomas's motions for judgment of acquittal.

## STATEMENT OF FACTS

In 2014, the City of Wilmington installed an acoustic gunshot detection and location system, called ShotSpotter, to provide police with rapid notification and accurate location of gunfire throughout the city. B19-20, 23. Beginning at seven seconds after 8 p.m. on February 23, 2017, ShotSpotter sensors detected 10 gunshots at 602 East 23<sup>rd</sup> Street. A052; B24. At about one minute and 39 seconds after 8 p.m., the first officer, Corporal Thomas Kavanagh of the Wilmington Police Department, arrived at the address. A021; B21. He found an injured man, lying on his back on the sidewalk in front of the yard between 602 and 606 East 23<sup>rd</sup> Street, trying unsuccessfully to get up.<sup>4</sup> A022, 25, 47. That man was later identified as Thomas. A025.

Corporal Kavanagh initially saw no one other than Thomas. A025. Kavanagh tried to help Thomas, but Thomas said, “Don’t touch me, get off of me.” A023. Then a man wearing a yellow traffic vest with reflective strips on it walked up and told Corporal Kavanagh not to touch Thomas, saying, “Yo man, get the fuck off of him, just let the paramedics touch him.” A027. The man told Thomas, “Yo, don’t

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<sup>4</sup> 602 East 23<sup>rd</sup> Street is one in a series of row houses. Heading southeast on East 23<sup>rd</sup> Street from Pine Street, a pedestrian would first pass, on her right, the side of a row house facing onto Pine Street. After the back yard of that house ends, the 600 block of row houses facing onto East 23<sup>rd</sup> Street begins. 602 is the second row house and shares its front steps with 600. Just southeast of 602 are 604 and 606, which also share front steps. See State’s Exs. 48 & 58; B35, 38.



answer his questions, don't tell the cops shit." A023. A crowd started to form around Corporal Kavanagh and Thomas and tried to interfere with Corporal Kavanagh's assessment of Thomas's injuries. A023, 28. The body-worn cameras of officers who arrived after Corporal Kavanagh showed three or four men squatted around Thomas with the Corporal. State's Exs. 20 & 21; A042. A woman with a scarf tied around her head also stood nearby. *See* State's Exs. 68 & 69. Because Thomas was uncooperative, Corporal Kavanagh was unable to provide him with basic medical care or determine how he was injured; however, he stayed with Thomas until the paramedics arrived. A0028-29. It was later determined that Thomas had suffered a single gunshot wound to his right lower back and the bullet had lodged in his lower spine. A054.

Additional Wilmington Police Department officers responded to assist Corporal Kavanagh. A024. Officer Jahlil Akil and his partner arrived a couple of minutes after Kavanagh. A046-47. As Officer Akil walked past Thomas lying on the sidewalk, a woman came out of 602 East 23<sup>rd</sup> Street and said her son was inside the residence and was dying from a gunshot wound. A048. Officer Akil went inside and saw a man, Keeven Hale, lying on the floor in the living room. *Id.* The officer held Hale's hand until paramedics arrived. *Id.* Hale later died at the hospital. A073. He had been shot between four and six times in the torso and upper extremities with

.410 shotshells<sup>5</sup> containing #5 or #6 pellets. A018, 20; State's Ex. 50. A number of pellets had entered the left ventricle of Hale's heart and his left lung, fatally injuring him. B4, 6. After paramedics arrived, Officer Akil went back outside, where he recognized Thomas's brother, Michael Thomas, walking around the scene. B9-10.

Hale lived at 602 East 23<sup>rd</sup> Street with his mother Sheila Hale ("Sheila"), his sister Shavontai Hale ("Shavontai"), and five of Shavontai's six children. B57. Thomas lived a block northwest of Hale, at 314 East 23<sup>rd</sup> Street. B9, 38, 48.<sup>6</sup> On the evening of the shooting, Hale had been out on the front porch, drinking a beer Shavontai had brought him. A032; B58-59. Haile Omar Baird ("Omar"), was also outside standing on the steps at 600 East 23<sup>rd</sup> Street, talking with Hale. A032; B59. Shavontai was watching a basketball game in the living room with her children, and

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<sup>5</sup> Although witnesses referred to the ammunition used in this case as shotgun shells, and while the term "shotgun shell" is in common usage, that term is misleading. The plastic shell contains shot, and for that reason ammunition manufacturers advertise shell cases containing a primer, gunpowder, wadding, and shot as "shotshells." See, e.g., <https://www.remington.com/ammunition/shotshell> (last visited Nov. 5, 2019) and <https://winchester.com/Products/Ammunition/Shotshell> (last visited Nov. 5, 2019). Shotshells may be discharged from a variety of firearms, including pistols, rifles, and shotguns.

<sup>6</sup> A pedestrian walking northwest on East 23<sup>rd</sup> Street from Hale's house, would first walk past, on his left, the row houses facing onto Pine Street, would crossover Pine Street, and would then pass a convenience store with an entrance right at the corner of Pine and East 23<sup>rd</sup> Streets. See State's Exs. 48(a) – (d). After walking the length of the convenience store, the pedestrian would pass an open area, which is not quite a driveway, and then come to Thomas's house on the left, the first in a series of row houses on the 300 block. *Id.*; B53-54. There is no 400 or 500 block on East 23<sup>rd</sup> Street. B51-52.

Sheila was upstairs in her bedroom when they heard a mix of what they described as booms and gunfire. A032, 70; B60. Hale fell through the front door, bleeding, and Shavontai's son, Jahmere, helped him into the living room. A032-33, 70. Sheila called 911. A033.

Soon after the shooting, Sheila ran out the front door. A033. On the porch, she saw a gun, which she picked up. *Id.* The gun was still hot. *Id.* Shavontai took it from her. *Id.* Sheila also saw a man, dressed all in black, lying at the bottom of the hill between two houses. *Id.* There were people surrounding him. A033-34. Shavontai too looked outside and she recognized the man lying on the sidewalk with people around him to be Thomas. A070; B61. She saw Thomas's brother, Mike, and recognized a man in a red hoody, named Anwar, who was leaning over Thomas. *Id.* She also saw a woman coming down the street. *Id.*

Officers searching for evidence the night of the shooting found four Smith & Wesson .40 caliber cartridge casings on the front lawn near the steps and on the steps to 602 East 23<sup>rd</sup> Street. B14-15, 17; State's Exs. 32(r), (s), (t), (u), (v), & 50. They also found a broken beer bottle and Hale's cellphone on the steps near two of the casings. B48; State's Ex. 32(r). From the bottom of the passenger's side door of a silver Kia parked in the street in front of 602 East 23<sup>rd</sup> Street, officers recovered a discharged .40 caliber copper bullet jacket fragment. B11, 14; State's Exs. 50, 32(o) & (p). Officers searching the Hale home found a Walther PPS .40 caliber Smith &

Wesson handgun underneath a couch armrest in the living room. B18. The rack on the gun was back, and there were no bullets in the magazine. A051; B16. Shavontai later admitted that she had hidden the gun there after Sheila had given it to her. A071-72.

A spray of projectile holes peppered the left side of the front door frame of 600 East 23<sup>rd</sup> Street, and the glass door to 602 East 23<sup>rd</sup> Street had been shattered. B13; State's Exs. 32(e) – (m). Officers found three plastic shotshell wads consistent with 410 bore at the top of the yard next to the stairs of 602 East 23<sup>rd</sup> Street. B15; State's Exs. 50 & 32(w) – (bb).

The next morning, the Chief Investigating Officer, Wilmington Police Department Detective Mary Quinn, returned to the scene with another officer. B33, 36. In front of 604 East 23<sup>rd</sup> Street, near where Thomas had been laying the night before, they found a black ski mask on the sidewalk.<sup>7</sup> B33-34, 36. The officers also obtained surveillance footage from the eight cameras located inside and outside of the convenience store at the corner of Pine and East 23<sup>rd</sup> Streets. A058.

The surveillance cameras revealed that at a little before 7:45 p.m. on February 23, 2017, Thomas walked to the convenience store from the direction of his home.

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<sup>7</sup> The mask can actually be seen in photographs taken the night of the shooting by the Evidence Detection Unit, but the officers did not see it then and did not find it until the next morning. B36.

A059-60; State's Ex. 62. He was dressed all in black, with what appeared to be a black ski cap on his head, and he wore a North Face jacket with the hood down. A060; State's Ex. 45(b). Thomas entered the convenience store, stood in line, and bought one cigarette. A061; State's Ex. 63. He then went outside, talked with a couple of guys for a minute while he smoked his cigarette, and headed back towards his house. A060; State's Ex. 45(h). Rather than going inside his home, Thomas walked out into the street and stood between two cars for a while. State's Ex. 45(h).

At about 7:52:18 p.m., a car briefly stopped next to where Thomas had been waiting. State's Ex. 45(a); A059. The car then moved forward and pulled over next to the curb in front of the convenience store. *Id.* A man in a yellow traffic vest<sup>8</sup> exited the front passenger seat of the car and went into the store. *Id.* At about 7:55 p.m., the man in the traffic vest left the store and walked up towards the 300 block of East 23<sup>rd</sup> Street. *Id.* He appeared to turn left at the entrance to Thomas's house. *Id.*

At 7:57:34 a dark figure could be seen walking across the street from the general vicinity of Thomas's house towards an alleyway. State's Exs. 45(a) & 70; A059-60. Just before 7:59, a dark figure exited the alleyway, crossed the street, and walked towards the convenience store. *Id.* The figure was recognizably Thomas,

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<sup>8</sup> Corporal Kavanaugh identified that man as the same man who approached him and told him not to touch Thomas. B7.

because he was dressed exactly as before, all in black with the North Face jacket, except his hood was up and a ski mask covered his face. *Id.*; State's Ex. 45(h). Thomas's right hand was in his right pocket and remained there the entire time he could be seen on the store's surveillance. State's Ex. 45(a) & (h); A063-64. Thomas walked past the convenience store, across Pine Street towards the 600 block of East 23<sup>rd</sup> Street, and at 7:59:36 could no longer be seen on camera. State's Ex. 45(h); A064. Forty-one seconds later, the ShotSpotter sensors picked up the gunshots at 602 East 23<sup>rd</sup> Street. A052.

The surveillance video showed the first responding officer driving past at 8:01:39 p.m. B49. The man in the traffic vest was the first civilian to head towards the 600 block past the convenience store surveillance cameras just after the police vehicle drove by. *Id.* Shortly thereafter, a man in a light-colored jacket and a woman with a scarf tied around her head followed. State's Ex. 45(h). A little bit later, a man in a red sweatshirt with a hood also walked past the store towards the crime scene. *Id.*

Less than a minute after walking towards the crime scene, the woman with the scarf on her head ran back past the convenience store, towards the 300 block of East 23<sup>rd</sup> Street, losing her scarf. *Id.* Less than a minute after that, after the second arriving officers drove past at 8:03:31, the same woman ran back towards the crime scene, picking up her scarf as she went. *Id.*; B49. Just before five minutes after 8

p.m., the man in the traffic vest walked up to the convenience store door from the direction of the crime scene, then turned around and took off running northeast on Pine Street. State's Ex. 45(h); B49-50. As he ran away, more and more people headed to the scene. State's Ex. 45(h).

Detective Quinn sent the ski mask to the Delaware Division of Forensic Science for DNA testing. B37. Test results revealed a DNA profile consistent with being a mixture of three individuals, with the major contributor matching Thomas's DNA profile. State's Ex. 44. No conclusions could be made regarding the minor contributors. *Id.*

Investigator's swabbed both Hale's and Thomas's hands, and the right cuff and pocket of Thomas's jacket for gunshot residue ("GSR"). A077-79. All swabs revealed sufficient GSR particles to conclude both Thomas and Hale had either discharged a firearm, been in close proximity to a firearm discharge, or picked up GSR particles through transfer. A078-79. There were also GSR particles on the right cuff of Thomas's jacket, and a small population of particles in the jacket pocket. A079.

A ballistics examination revealed that the four .40 caliber discharged cartridge cases had been discharged from the same firearm, but there were insufficient microscopic marks to determine whether they had been fired from the Walther PPS handgun found in the Hale home. State's Ex. 50. No conclusions were

drawn about what type of weapon had fired the 410 bore shotshell wads. *Id.* No firearm capable of firing those rounds was recovered.<sup>9</sup>

A ShotSpotter analyst prepared a report showing the locations from which the shots were fired. B23; State's Ex. 18. Based on his analysis, the first five shots were fired from the sidewalk directly in front of 602 East 23<sup>rd</sup> Street. B26; State's Ex. 18. Three shots were then fired from the lawn in front of 602 and two more were fired from the lawn in front of 604 East 23<sup>rd</sup> Street. State's Ex. 18. The analyst noted, however, that his conclusions were not perfect and should be corroborated with other evidentiary sources.<sup>10</sup> B27.

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<sup>9</sup> Both long guns and handguns are capable of firing 410 gauge shotshells. *See, e.g.,* Richard Johnson, *410 Bore Revolvers: 5 Top-Notch 'Pocket Shotguns'*, Personal Defense World (2016), at <https://www.personaldefenseworld.com/2016/12/410-bore-revolvers/> (last visited Nov. 5, 2019). In fact, between 2007 and 2009 the Taurus Model 4510, commonly called "The Judge," with a five-shot capacity and chambered for both .45 cartridge and .410 shotshell, was Taurus's top selling firearm. *See Taurus Big-Bore Double Feature*, Shooting Times (2010), at [https://www.shootingtimes.com/editorial/handgun\\_reviews\\_st\\_taurusbigbored/blft\\_200812/100176](https://www.shootingtimes.com/editorial/handgun_reviews_st_taurusbigbored/blft_200812/100176) (last visited Nov. 5, 2019). However, neither party was permitted to present expert testimony regarding the type of gun used to shoot the shotshells in this case, because neither party had given sufficient notice of their intent to present such expert testimony. B2, 68, 70.

<sup>10</sup> A junior ShotSpotter analyst had previously prepared a report in which she had estimated that the first five shots were fired from an area ranging from the street to the lawn in front of 602 East 23<sup>rd</sup> Street. State's Ex. 19. Two or three shots were then fired from the lawn in front of 602 and two or three more were fired from the sidewalk in front of 606 East 23<sup>rd</sup> Street. *Id.* The junior analyst was not available for trial, so the later analyst, Paul Greene, prepared his own report without referencing or relying upon the junior analyst's report. B22, 27-28. He later tried to recreate her conclusions, but was unable to do so. B28.



A couple of months after the shooting, Detective Quinn found Omar, the man who had been speaking with Hale just before he was shot. B62. He came to the police station to speak with her.<sup>11</sup> Omar informed Detective Quinn he had just left Hale to go buy a beer when he passed a man dressed all in black and wearing a mask. B66. He heard the shots and turned around to see the man he had just passed lying on the sidewalk and trying to get up. He saw Hale slide down the hill. He heard glass shatter and saw Hale run into his house. Omar saw no one other than Hale and the man in the mask who ended up lying on the sidewalk. Omar then ran off around the corner because he had drugs on him and he did not want the police to think he had shot Hale. B66.

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<sup>11</sup> Omar's redacted interview was played for the jury as a statement under 11 *Del. C.* § 3507. B64.

## ARGUMENT

### I. THE STATE PRESENTED SUFFICIENT EVIDENCE FOR THE JURY TO HAVE FOUND THOMAS GUILTY BEYOND A REASONABLE DOUBT OF FIRST DEGREE MURDER AND POSSESSION OF A FIREARM DURING THE COMMISSION OF A FELONY.

#### Question Presented

Whether the State presented sufficient evidence for a rational jury, viewing the evidence in the light most favorable to the State, to find Thomas guilty beyond a reasonable doubt of the crimes of first degree murder and PFDCF.

#### Standard and Scope of Review

This Court reviews *de novo* a trial judge's denial of a motion for judgment of acquittal "to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the defendant guilty beyond a reasonable doubt of all the elements of a crime."<sup>12</sup>

#### Merits of the Argument

Thomas claims the State failed to present sufficient evidence that would have allowed a rational trier of fact to conclude that he possessed a firearm or that he shot Hale. Op. Br. at 9-10. He asserts "the record contains no evidence, circumstantial or otherwise, that Thomas possessed the intent, desire or means with which to kill

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<sup>12</sup> *Weber v. State*, 971 A.2d 135, 155 (Del. 2009) (quoting *Flonnory v. State*, 893 A.2d 507, 526-27 (Del. 2006)).

Hale with a firearm.” *Id.* at 10. He claims the State had no eyewitness testimony or forensic evidence that Thomas shot Hale, and that Hale died from a shotgun wound, but no shotgun was ever found and the surveillance did not show Thomas carrying a shotgun. *Id.* Thomas’s claim is unavailing.

Thomas made a motion for judgment of acquittal both at the close of the State’s case and after the jury verdict. The Superior Court denied both motions. Thus, as mentioned above, this Court reviews the court’s denials *de novo* to determine whether a rational jury, viewing the evidence in the light most favorable to the State, could have found Thomas guilty beyond a reasonable doubt of the elements of first degree murder and PFDCF. In making an inquiry into the sufficiency of the evidence, “the [C]ourt does not distinguish between direct and circumstantial evidence.”<sup>13</sup> Moreover, “it is the sole province of the fact finder to determine witness credibility, resolve conflicts in testimony and draw any inferences from the proven facts.”<sup>14</sup>

Here, the evidence, as viewed in the light most favorable to the State, established that about eight minutes before the shooting, Thomas made contact with

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<sup>13</sup> *Robinson v. State*, 953 A.2d 169, 173 (Del. 2008) (citing *Skinner v. State*, 575 A.2d 1108, 1121 (Del.1990)).

<sup>14</sup> *Poon v. State*, 880 A.2d 236, 238 (Del. 2005). *See also Mitchell v. State*, 2012 WL 112602, at \*2 (Del. Jan. 12, 2012) (finding jury had discretion to believe victim’s in-court identification of defendant as her assailant).

a man in a yellow traffic vest with reflective tape on it. Then, about a minute before the shooting, Thomas walked towards Hale's house with his right hand in his pocket and his hood up and his face covered with a ski mask. Earlier he had been walking around without his face covered and both hands out of his pockets. The temperature outside was 59 degrees. B12. Thomas's right hand remained in his pocket the whole time he could be seen on camera. GSR was later detected on both of Thomas's hands and on the right sleeve of his jacket.

As he walked towards Hale's house, Thomas passed Omar, who was on his way to buy a beer. Omar heard shots fired and turned around to see Thomas lying on the ground and Hale sliding down the hill in front of his house. Omar saw no one other than Hale and Thomas. Thomas points out that two cars also drove down the street in front of Hale's house at around the same time (Op. Br. at 12), but Omar did not see shots fired from a car. In addition, no brake lights could be seen on either car as they drove down the street. B55.

Hale was shot multiple times with .410 shotshells. Thomas argues the State cannot prove he shot Hale because he was never seen with a shotgun and no shotgun was ever found. But Thomas cannot now argue that he was not seen with a shotgun, because he was prohibited from making that argument at trial. The State sought to present evidence that firearms other than shotguns, including handguns, can fire .410 shotshells. *See* B29-31, 40-46. Because the State did not provide advanced notice

of its intent to present such testimony, however, the court prohibited *both* parties from identifying what type of firearm, “that is, size, weight, length,” that was used to fire the .410 shotshells. B70.

Thomas was shot with a .40 caliber round. Discharged .40 caliber casings were found near and on the steps to Hale’s home, and next to a broken beer bottle and his cellphone. A .40 caliber bullet jacket fragment had pierced the bottom of the passenger’s side door of the silver Kia parked in the street in front of Hale’s house and near where Thomas was found lying on the sidewalk. Hale’s mother found a .40 caliber gun on the porch. Officers also found a magazine with additional .40 caliber ammunition in it in a jacket belonging to Hale that was hanging on a hook in Hale’s house. A033; B18. Hale too had GSR on his hands. From that evidence and Omar’s statement, a rational jury could reasonably have inferred that Hale shot back at his shooter, successfully hitting him, which is how Thomas ended up wounded on the sidewalk in front of Hale’s house.

In addition, the ShotSpotter analyst, Paul Greene, concluded that the first shots were fired from the sidewalk in front of Hale’s house. Although another ShotSpotter analyst reached a slightly different conclusion (which would still support the conclusion that Thomas was the first shooter), it was appropriate for the jury to resolve any conflicts in the evidence and to conclude that Thomas initiated the gunfire by shooting at Hale from a position in front of Hale’s house.

After the shooting, the first officer on the scene, Corporal Kavanagh, found Thomas lying on the sidewalk, unable to get up. Thomas would not let him touch him. The first person Corporal Kavanagh encountered after Thomas was the man in the yellow traffic vest, who also would not let Kavanagh touch Thomas and who told Thomas not to tell the cops anything. Thomas heeded that advice. Moments later, the man in the traffic vest ran away from the scene as other people moved towards it.

As Corporal Kavanagh sat with Thomas, several other men squatted, sat, and leaned over Thomas. And at least one of Thomas's family members, his brother, Mike, was seen hanging around the crime scene. The jury could have reasonably concluded that one of the men secreted away the gun while tending to Thomas. At no time was Corporal Kavanagh able to handle Thomas to even figure out how he was wounded.

Contrary to Thomas's assertions, the State presented sufficient eyewitness testimony, circumstantial evidence, and forensic evidence to establish that Thomas shot Hale. To the extent there were contradictions in testimony or inferences to be made from the facts, it was squarely within the province of the jury to make those inferences, to judge the credibility of witnesses, and to resolve conflicts in

testimony.<sup>15</sup> The fact that Thomas was not seen with a gun, or that a gun that could have shot .410 shotshells was never recovered does not relieve Thomas of criminal culpability.<sup>16</sup> Thomas concealed his hand in his pocket as he walked towards Hale's house; Hale was shot by someone moments after Thomas was recorded on video wearing a mask and walking towards Hale's house; Omar saw Thomas just before and just after the shots were fired, and he saw no one else; and Thomas had GSR on his hands and on his right jacket sleeve.<sup>17</sup> A rational jury could have reasonably inferred from those facts that Thomas shot Hale with a gun he concealed on his person as he walked down the street and that he then passed the gun to one of the people surrounding him while he was down on the ground.

Viewing the evidence in the light most favorable to the State, there was sufficient evidence for a rational trier of fact to have found the essential elements of

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<sup>15</sup> See *Cooper v. State*, 1996 WL 313501, at \*3 (Del. May 31, 1996) (“[I]n a jury trial, the jury is responsible for determining witness credibility, resolving conflicts in testimony, and for drawing any inferences from the proven facts.”). See also *Poon*, 880 A.2d at 238 (holding the Court will not substitute its judgment for the fact finder's of credibility).

<sup>16</sup> See, e.g., *Poon*, 880 A.2d at 239 (finding recovery and testing of a weapon to determine it is operable is not required to convict someone of PFDCF).

<sup>17</sup> Cf. *Cruz-Urvina v. State*, 2015 WL 5824796, at \*2 (Del. Oct. 2, 2015) (“Mere testimony, even when it is conflicting, has been sufficient to allow a jury to find that a defendant possessed a firearm while committing a felony.”); *Carter v. State*, 2014 WL 7010032, at \*2 (Del. Nov. 12, 2014) (finding evidence was sufficient to support conviction for PFDCF when neighbors heard gunshots, girlfriend reported to police in 911 call that the defendant had fired a gun into the air, and the defendant's statement to police confirmed that he had had a gun and had shot it).

the charges of first degree murder and PFDCF. The Superior Court did not err in denying Thomas's motions for judgment of acquittal.



## CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be affirmed.

*/s/ Kathryn J. Garrison*

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DATED: November 6, 2019

**CERTIFICATION OF MAILING/SERVICE**

The undersigned certifies that on November 6, 2019, she caused the attached *State's Answering Brief* and *Appendix to State's Answering Brief* to be delivered to the following persons in the form and manner indicated:

Nicole M. Walker, Esq.  
Office of the Public Defender  
Carvel State Office Building  
820 N. French St.  
Wilmington, DE 19801  
*Attorney for Appellant*

X via File and Serve Xpress.

STATE OF DELAWARE  
DEPARTMENT OF JUSTICE

/s/ Kathryn J. Garrison (No. 4622)

Deputy Attorney General  
102 West Water Street  
Dover, DE 19904  
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DATE: November 6, 2019