EFiled: Aug 25 2022 03:19PM EDT
Filing ID 67974814
Case Number 93,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL HASTINGS,	:	
	:	
Defendant-below	:	
Appellant,	:	
	:	
v.	:	No.: 93, 2022
	:	
STATE OF DELAWARE	:	
	:	
Plaintiff-below,	:	
Appellee.	:	

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

David C. Skoranski (ID# 5662)
Nicole M. Mozee (ID# 6443)
Deputy Attorneys General
Division of Civil Rights and Public Trust
Delaware Department of Justice
900 N. King Street
Wilmington, DE 19801

Dated: August 25, 2022

TABLE OF CONTENTS

TABLE OF CITATIONS

STATUTES AND OTHER AUTHORITIES

NATURE OF THE PROCEEDINGS

Defendant was charged via indictment on October 5, 2020 with two counts, Reckless Endangering First Degree 11 *Del.C.* § 604 and Possession of a Firearm During the Commission of a Felony ("PFDCF") 11 *Del.C.* § 1447A.[1] He proceeded to trial by jury on September 28, 2021.[2] He was convicted of both offenses by a jury of his peers on September 30, 2021.[3] Defendant was sentenced on February 17, 2022 to four (4) years of Level V incarceration on the Possession of a Firearm During the Commission of a Felony followed by decreasing levels of supervision.[4] On March 17, 2022 the defendant filed notice of appeal to this Court.

Defendant filed an Opening Brief on July 1, 2022. This is the State's Answering Brief on Appeal. The State prays this Honorable Court **AFFIRM** defendant's convictions.

[1] A-8 [D.I. 1].

[2] A-9 [D.I. 14].

[3] A-9 [D.I. 17].

[4] A-10 [D.I. 23].

SUMMARY OF THE ARGUMENT

I. Argument I is denied. The Defendant did not object to the jury instructions and the Superior Court provided the jury with a sufficient definition of "substantial risk" for the offense of Reckless Endangering First Degree.

II. Argument II is denied. The Superior Court correctly denied the Defendant's Motions for Judgment of Acquittal because a rational juror could find the Defendant guilty on the facts.

III. Argument III is denied. The Superior Court did not err in the rulings and there was no cumulative error.

STATEMENT OF FACTS

On September 24, 2020, the defendant attended a political rally in New Castle County, Delaware.[5] Across the street from where the defendant gathered was a group of counter-protesters.[6] Due to high political tensions, the two sides jeered and yelled at each other.[7] The defendant attended this rally armed with a loaded firearm which he open-carried in a holster on his hip. While present at the rally and surrounded by people, the defendant unholstered his loaded firearm four times.[8]

First, the defendant unholstered his firearm and showed it to two people who were talking to him.[9] Second, the defendant unholstered his firearm and held the gun parallel to his waist in front of the same two people.[10] Third, the defendant unholstered his firearm, held the gun in his right hand, and raised his right hand with the loaded firearm pointed in the direction of the crowd of counter-protesters across the street.[11] After re-holstering the loaded firearm, the defendant relocated

---

[5] A-102.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] A-212.

[10] A-213.

[11] *Id.*

closer to the street that divided him from the counter-protesters.[12] On the fourth and final time, the defendant unholstered the firearm, placed it on the ground and walked away to personally confront the counter-protesters, leaving the loaded firearm unattended.[13] The defendant exchanged words with the group across the street before turning around to see someone walking towards him, cautiously carrying the defendant's firearm with an index and thumb finger, to give the gun back to the defendant.[14]

At trial, three witnesses from the counter-protester crowd testified. Diana Trumbell testified that at one point, she saw the defendant point his firearm directly in her direction.[15] Ms. Trumbell further testified that upon seeing the gun pointed in her direction, "I felt scared, I felt nervous, my heart started racing just because to be honest … I didn't know if the weapon was loaded, if the safety was on … ."[16] She also testified that ". . . I was scared because of the fact that, you know, it being there's many things that could have happened at that moment with having a gun out of your holster."[17] ToriAnn Parker testified that she was alarmed when she saw the defendant unholster "his weapon", and later when the defendant

[12] A-214.

[13] A-214.

[14] *Id.*

[15] A-124.

[16] A-125-126.

[17] A-126.

pointed the gun in her direction, her "stomach kind of got in a knot, my throat kind of tightened a little bit. It was very nerve racking."[18] Shannon Diaz testified that he saw the defendant point his firearm, "the barrel", in the direction of where he stood with the counter-protesters.[19] Mr. Diaz further testified that he "… was initially worried why are we unholstering a firearm at a political rally in our time and especially responsible gun ownership would say that you would not take a gun out of a holster unless you intended to use it… ."[20] In response, all of these witnesses reported the defendant's conduct to law enforcement officers who were present at the time.

In addition to the witnesses' testimony, the State produced drone surveillance footage through Officer Tavis Miller of the Wilmington Police Department.[21] The surveillance depicted the rally where the defendant was seen moving around and confronting the counter-protesters. The State also produced cell phone videos depicting the defendant unholstering and pointing the firearm at the group of counter-protesters.[22] Finally the State admitted the statement of the

[18] A-146-147.

[19] A-166-167.

[20] A-168.

[21] A-117 State's Exhibits 1 and 2.

[22] A-128 State's Exhibits 3 and 4.

defendant, through Officer Edward Larney of the Delaware State Police.[23] The defendant admitted having a gun and that the gun did not need to be "racked" to fire, but denied having his finger on the trigger or pointing it at anyone.[24]

At the close of the State's case, the defendant moved for a judgment of acquittal on the grounds that the State had failed to make a *prima facie* case of Reckless Endangerment First Degree.[25] Specifically, that the State had not shown evidence of recklessness or substantial risk of death because pointing a loaded gun does not create a risk of death and is not reckless.[26] The State countered that prior case law supported the State's position that pointing a loaded gun could be reckless and create a substantial risk of death and that the issue is one of weight.[27] The Court denied the motion.[28]

During the trial, the Court held a prayer conference to discuss the jury instructions.[29] The defendant requested a specific definition of "substantial risk of death" and suggested the definition be: "a strong possibility, as contrasted with a

[23] A-218 State's Exhibit 5.

[24] State's Exhibit 5.

[25] A-243.

[26] *Id.*

[27] A-246-248.

[28] A-249.

[29] A-187-195.

remote or significant possibility that a certain result may occur."[30] The Court indicated that it would accept this definition, but would remove the language "as contrasted with a remote or significant possibility." The defendant objected to the removal of this language, but offered no other objection to the remaining language.[31] The Court returned after a break and suggested the phrase "imminent threat", but noted that the Court believed "what we have now is sufficient."[32] The defendant responded, "I'm good with what we have."[33] The State then requested the inclusion of the phrase "imminent threat."[34] The defendant offered no objection to the inclusion of the phrase "imminent threat."[35] After the reading of the instructions, the Court asked the parties if there were "[a]ny tweaks or anything you'd like me to add or take away."[36] The defendant responded, "[n]o, Your Honor."[37]

During deliberations, the jury sent a note asking, "what would constitute a strong possibility or imminent threat that a certain result may occur? Could you

---

[30] A-190.

[31] A-194.

[32] A-207.

[33] A-208.

[34] *Id.*

[35] *Id.*

[36] A-302.

[37] *Id.*

supply a clearer definition of substantial risk reference on page ten?"[38] The Court instructed the jury that "where I have not defined a word, that word has it's commonly accepted meaning" and that the jury would "have to work with the instructions that have been given to you."[39]

After the close of the case, the defendant filed a written motion for judgment of acquittal pursuant to Superior Court Criminal Rule 29(c).[40] The defendant again argued that the State failed to establish a *prima facie* case of recklessness or substantial risk.[41] The Court again denied the motion finding, "in the instant case, the evidence presented by the State was overwhelming."[42]

[38] A-305.

[39] *Id.*

[40] A-10 [D.I. 20].

[41] A-345.

[42] A-362 [D.I. 22].

ARGUMENT

I. THE DEFENDANT DID NOT OBJECT TO THE JURY INSTRUCTIONS AND THE SUPERIOR COURT PROVIDED THE JURY WITH A SUFFICIENT DEFINITION OF "SUBSTANTIAL RISK" FOR THE OFFENSE OF RECKLESS ENDANGERING FIRST DEGREE.

QUESTION PRESENTED

Whether the Court provided the jury with a sufficient definition of "substantial risk" so that the jury could intelligently perform their duty.

STANDARD OF REVIEW

Where the defendant did not preserve the record, the Delaware Supreme Court will generally decline to "review contentions not raised below and not fairly presented to the trial court for decision."[43] The Court may review the contention raised if it "finds that the trial court committed plain error requiring review in the interests of justice."[44]

Where the defendant has preserved the record, the Delaware Supreme Court will review jury instructions *de novo*.[45] The Court will not overturn a jury decision

[43] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (citing Del. Supr. Ct. R. 8; and *Jenkins v. State*, 305 A2d 610 (Del. 1973)).

[44] *Turner v. State*, 5 A.3d 612, 615 (Del. 2010) (citing Del. Supr. Ct. R. 8; and *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995)).

[45] *Lloyd v. State*, 152 A.3d 1266, 1271 (Del. 2016).

where the instructions are "reasonably informative, not misleading and [do] not undermine the jury's ability to intelligently perform its duty."[46]

MERITS OF THE ARGUMENT

As a threshold matter the defendant failed to preserve the record below by not objecting to the definition of "substantial risk" and this Court should either deem the argument waived or alternatively apply a plain error standard of review.[47] Contrary to the defendant's contention that it is "unclear" what prompted the Court to issue the instruction, it was in fact the defendant who suggested that "substantial risk" be defined for the jury.[48] The defendant further urged the Court to use the definition of "a strong possibility, as contrasted with a remote or significant possibility that a certain result may occur or that certain circumstances may exist."[49] The Court indicated it would remove the portion of the definition, "as contrasted with a remote or significant possibility."[50] The defendant only objected

[46] *Id.* at 1272.

[47] Del. Supr. Ct. R. 8; Del. Super. Ct. Crim. R. 30.

[48] Op. Brf. at p. 27 "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. *Contra* A-190 "Mr. Wilson: Your Honor, my other request would have been to give a definition for substantial risk which is not defined that I'm aware of in the code, and a substantial risk and what that means. There is a legal definition that talks about it means a strong possibility as contrasted with remote or significant possibility that a certain result would occur."

[49] A-194

[50] *Id.*

to the removal of that specific portion.[51] The defendant did not otherwise object to the definition given, indeed he suggested the inclusion of the phrase "a strong possibility that a certain result may occur."[52]

The defendant also did not object to the inclusion of the phrase "imminent threat."[53] The Court asked the parties if the phrase should be included and the defendant responded, "I'm good with what we have."[54] After the defendant's comment, the State then asked for it to be included.[55] The defendant made no motion or objection after the State's request, and presumably acquiesced to its inclusion.[56] After the reading of the instructions, the Court again asked the parties if there were "[a]ny tweaks or anything you'd like me to add or take away."[57] To which the defendant responded, "[n]o, Your Honor."[58]

Pursuant to Supreme Court Rule 8 "[o]nly questions fairly presented to the trial court may be presented for review . . . ."[59] The defendant did not present this question for review of the trial court. Additionally, the vague comment of "I'm

[51] *Id.*

[52] *Id.*

[53] A-207-208.

[54] *Id.*

[55] *Id.*

[56] *Id.*

[57] A-302.

[58] *Id.*

[59] Supr. Ct. R. 8.

good with what we have" by the defendant regarding the instructions is insufficient to preserve the issue for appeal pursuant to Superior Court Criminal Rule 30 which states that "[n]o party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before or at a time set by the court immediately after the jury retires to consider its verdict, *stating distinctly the matter to which that party objects and the grounds of the objection.*"[60] The defendant did not do this, instead stating only that they approved of the current instructions. This reasoning has been endorsed by the United States Supreme Court and their nearly identical Federal Rule 30,

> "[n]or does a request for an instruction before the jury retires preserve an objection to the instruction actually given by the court. Otherwise, district judges would have to speculate on what sorts of objection might be implied through a request for an instruction and issue rulings on "implied" objections that a defendant never intends to raise. Such a rule would contradict Rule 30's mandate that a party state distinctly his grounds for objection."[61]

Because the defendant narrowly objected only to the exclusion of a single phrase, and did not distinctly state any other objection to the instructions, this Court should deem the argument waived, or apply a plain error review to the claims now raised.

The Court's inclusion of the phrases "strong possibility" and "imminent threat", without an objection from the defendant, was not plain error. This Court

---

[60] Del. Super. Ct. Crim. R. 30; emphasis added.

[61] *Jones v. U.S.*, 527 U.S. 373, 388 (1999).

has repeatedly found that a "failure to object at trial usually constitutes a waiver of a defendant's right to raise the issue on appeal unless the error is plain."[62] Under a plain error review the Court inquires into whether "the error complained of [was] so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[63] "Furthermore, the doctrine of 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."[64] As discussed *infra* the definition of "substantial risk" which was given closely mirrors the commonly accepted meaning and was not clearly prejudicial nor did it effect the fairness and integrity of the trial process.

It is necessary here to discuss the Court's prior ruling in *Bullock* when examining plain error and jury instructions.[65] The procedural posture of *Bullock* is similar to the instant case; however, the substantive facts differ greatly. In *Bullock*, two instructions were erroneous: one was not given when statutorily it should have

[62] *Probst v. State*, 547 A.2d 114, 119 (Del. 1988).

[63] *Turner v. State*, 5 A.3d 612, 615 (Del. 2010), *quoting* Del. Supr. Ct. R. 8; *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995).

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

[65] *Bullock v. State*, 775 A.2d 1043 (Del. 2001).

been given, and the other was an incorrect statement of law.[66] Despite this, the defendant below had not objected and had in fact agreed to these instructions.[67] In *Bullock* a drunk driver went through an intersection and hit another vehicle, injuring the driver.[68] The victim in the other car however had run a red light and was therefore partially the cause of the accident.[69] The issue at trial was whether the actions of the victim created an intervening cause.[70] The trial court failed to give an instruction for reckless causation, which this Court determined should have been given.[71] The other instruction which was given but was incorrect concerned an instruction for unavoidable accident when the facts at trial established that the accident may have been avoidable.[72] The procedural facts are similar in that in both cases the defendant failed to object and preserve the record, but the substantive facts are demonstrably different from those present here.

While a majority of the Justices found the instructions in *Bullock* to be plainly in error, a majority of the Justices also cautioned against expanding the doctrine of plain error review, and noted the specific factual circumstances that

---

[66] *Id.*

[67] *Id.*

[68] *Id.* at 1045.

[69] *Id.*

[70] *Id.*

[71] *Id.* at 1052.

[72] *Id.* at 1053.

spurred them to act.[73] Chief Justice Veasy, writing separately in a concurrence said, "I share the dissent's concern regarding undue expansion of the plain error rule."[74] He summed up the issue succinctly, stating:

> "there is tension between the plain error rule, which limits our review of objections not made at trial, and the principle that a defendant is entitled to a correct statement of the law. Application of the plain error rule will continue to rest on the specific facts and circumstances of each case. It is pertinent to note, however, as the majority does, that the trial judge has an "obligation to research the law and craft an appropriate charge." This obligation is independent of a party's obligation to request instructions or make specific objections.[75]

This independent obligation of the court below to craft an instruction which is appropriate remains, even if the parties agree to the instruction. Here, the Court honored that obligation and crafted an instruction which was not "erroneous as a matter of law."[76]

In their dissent, Justices Walsh and Berger stated that they believed the ruling created an "unfortunate precedent."[77] They cautioned that a ruling that the instructions were plain error would render "[r]ule 30 [] meaningless, but its violation, as here, will provide the very basis for appeal." They further opined that

---

[73] *Id. (See* Veasy, C.J., concurring; Walsh, J. and Berger, J., dissenting).

[74] *Id.* at 1054 (Veasy, C.J., concurring).

[75] *Id.* at 1057 (Veasy, C.J., concurring).

[76] *Id.* at 1056 (Veasy, C.J., concurring).

[77] *Id.* at 1059 (Walsh, J. and Berger, J., dissenting).

as a practical matter "a trial judge attempting to craft jury instructions acceptable to the parties, and reflecting a correct statement of the law, will be at a serious disadvantage. Counsel's acquiescence in proposed instructions and failure to object before the jury retires will not serve to insulate the result from a claim of plain error."[78] The dissent suggests that when a party below fails to object to an instruction, and that instruction was incorrect, the appropriate remedy is a claim of plain error on appeal or a later claim of ineffective assistance of counsel.[79]

Regardless of the review the Court applies, whether plain error or assuming *arguendo de novo* review, the definition of "substantial risk" given by the Court permitted the jury to intelligently perform its duty and was not erroneous as a matter of law. Under a *de novo* review this Court will only overturn a jury verdict if the instructions were not "reasonably informative, not misleading and [did] not undermine the jury's ability to intelligently perform its duty."[80] The definition which is provided to the jury should be "the commonly accepted meaning of the brief language [of the statute] under which the defendant was convicted."[81] Substantial risk is not defined in Delaware Code and in the absence of a defined

---

[78] *Id.* at 1062 (Walsh, J. and Berger, J., dissenting).

[79] *Id. (*Walsh, J. and Berger, J., dissenting).

[80] *Lloyd v. State*¸152 A.2d 1266, 1271 (Del. 2016), *quoting Koutoufaris v. Dick*, 604 A.2d 390, 399 (Del. 1992).

[81] *Waters v. State*, 443 A.2d 500, 506 (Del. 1982).

word the court would normally instruct the jury that they are to give a word its commonly accepted meaning.[82] The Court originally intended to do this with regard to "substantial risk" and only at the defendant's prompting was a specific definition included.[83] The definition which was ultimately given tracks the commonly accepted meaning and, under either review by this Court, would not warrant a reversal.

Examining the specific facts and circumstances here, as Chief Justice Veasy's concurrence in *Bullock* advises, leads to the conclusion that the court below did not issue an erroneous instruction and was not plain error. The definition of "substantial risk" supplied to the jury conforms with the commonly accepted meaning of "substantial risk." Substantial is defined by Merriam-Webster as "being largely but not wholly that which is specified."[84] Merriam-Webster defines risk as a "possibility of loss or injury."[85] Taken together the commonly accepted meaning would appear to be "largely but not wholly a possibility of injury", in this case death. This is not an eloquent definition, nor is it particular elucidative, if anything it would serve to confuse a jury. While it does

---

[82] 11 Del.C. § 221(c).

[83] A-190-194.

[84] "Substantial", *Merriam-Webster*.com *Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/function. Accessed 2 Aug. 2022.

[85] "Risk", *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/function. Accessed 2 Aug. 2022.

sufficiently explain the concept, the Court agreed with the defendant that a more specific definition was warranted.[86] Rather than merely informing the jury that a substantial risk is a "largely but not wholly a possibility of death", the Court instructed the jury that they had to find the possibility of death to be either strong or imminent.

The definition suggested by the defendant and used by the Court appears to be drawn from another State's definitions. Ohio defines "substantial risk" as "a strong possibility, as contrasted with a remote or significant possibility that a certain result may occur or that certain circumstances may exist."[87] This definition is in line with the commonly accepted meaning of "largely but not wholly a possibility of death." The Ohio definition is more specific in that it calls for a "strong possibility", not merely a "largely but not wholly" possible outcome. The Ohio definition also includes the phrase, "as contrasted with a remote or significant possibility. . ." which was not included in the instant case. This additional phrase is meant to distinguish the definition of "substantial risk" from their definition of "risk" which they defined as a "significant possibility, as contrasted with a remote possibility."[88] Delaware does not include these definitions, so distinguishing

[86] A-194.

[87] Ohio Rev. Code § 2901(A)(8).

[88] Ohio Rev. Code § 2901(A)(7).

between them is unnecessary.[89] The inclusion of the word "strong" signals to the jury that a mere possibility is insufficient, the possibility of death must be strong.

The Court also included the phrase, "imminent threat", which suggests that the possibility of death must be contemporaneous and not hypothetical. When the Court suggested the inclusion of the phrase "imminent threat", the defendant indicated that he was "good with what we have."[90] The State then requested it to be included and the defendant did not object.[91] The phrase "imminent threat" is more restrictive language than would be suggested by the commonly accepted meaning, but afforded the defendant additional protection. The threat could not be too distant in time or space, it had to be contemporaneous and immediate. The jury could not have found the defendant guilty of Reckless Endangering First Degree unless they believed there was a strong possibility of death or an imminent threat of death. Both of these findings are sufficient to establish a substantial risk as opposed to a remote or a hypothetical one.

Tellingly, the defendant suggests no alternative definition in their Opening Brief. The defendant also does not advance the argument that they did at trial, namely that the exclusion of the phrase "as opposed to a remote or significant

---

[89] The defendant also does not argue that the definition given should have included this phrase.

[90] A-208.

[91] *Id.*

possibility" effected the outcome.[92] Instead, the defendant argues for the first time on appeal, and without any citation, that the definition used was incorrect.

Both parties agree that the term "substantial risk" is not defined under Delaware law and where a term is not defined, it has its commonly accepted meaning. The Court crafted a definition, at the defendant's urging, to assist the jury in determing whether the risk was substantial. That definition required the jury to find the risk to be "strong" or "imminent", which conforms to the commonly accepted meaning of "substantial risk". Therefore, the Court below committed no error, and the jury was able to use that instruction to intelligently perform their duty.

[92] A-194.

II. THE SUPERIOR COURT CORRECTLY DENIED THE DEFENDANT MOTIONS FOR JUDGMENT OF ACQUITTAL BECAUSE A RATIONAL JUROR COULD FIND THE DEFENDANT GUILTY ON THE FACTS.

QUESTION PRESENTED

Whether the Superior Court correctly denied the defendant's motions for judgment of acquittal.

STANDARD OF REVIEW

This Court reviews sufficiency of the evidence claims *de novo*.[93] The standard of review is whether "any rational trier of fact, viewing the evidence and all reasonable inferences to be drawn therefrom in the light most favorable to the State, could find [a] defendant guilty beyond a reasonable doubt of all the elements of the crime."[94] The Court "does not distinguish between direct and circumstantial evidence" and "the State need not disprove every possible innocent explanation."[95]

MERITS OF THE ARGUMENT

The evidence at trial established that the defendant recklessly engaged in conduct that created a substantial risk of death to others by pointing his loaded firearm at a crowd and leaving his firearm on the ground unattended. The evidence

[93] *Cushner v. State*, 214 A.3d 443 (Del. 2019).

[94] *Id.* at 446.

[95] *Id.*

at trial consisted of witness testimony describing the defendant's actions,[96] drone video showing his conduct,[97] and cell phone footage showing his conduct.[98] He admitted to an Officer that he possessed the firearm, that the firearm was loaded, and that he did not need to "rack" the firearm in order for it to fire.[99] The witnesses testified that the defendant pointed the firearm at them.[100] The videos corroborated this testimony and also depicted the defendant leaving the firearm on the ground unattended during a highly contentious political event. As this Court has stated, pointing a loaded gun at someone "involve[s] the possibility of intentional or accidental discharge resulting in death."[101] Applying the standard of review to these facts, a rational juror could, and in fact unanimously did find, when viewing the facts in a light most favorable to the State, that the defendant engaged in conduct creating a substantial risk of death.

This Court has previously found that pointing a firearm at someone, without firing, was reckless conduct that created a substantial risk of death. In *Thornton* this Court found that pointing a gun at someone did create a substantial risk of

[96] A-124; A-146-147; A-166-167.

[97] State's Exhibit 1 and 2.

[98] State's Exhibit 3 and 4.

[99] State's Exhibit 5.

[100] A-124; A-146-147; A-166-167.

[101] *Thornton v. State*, 647 A.2d 382, *2 (Del. 1994).

death.[102] The defendant suggests that the Court only made this determination because the defendant in that case pointed the gun at someone who was driving and therefore the risk was heightened.[103] While the Court noted the risk was heightened because of the driving, it did not limit its ruling to that fact. The Court specifically stated "*[n]ot only* does [pointing a gun at someone] involve the possibility of intentional or accidental discharge resulting in death, but a natural and foreseeable consequence of defendant's conduct is the loss of control of the victim's automobile creating a substantial risk of death."[104] The Court specifically rejected the defendant's argument in *Thornton* that ". . . merely pointing a loaded weapon does not *per se* create a substantial risk of death . . ." finding that reasoning to be "fallacious."[105] More recently, 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."[106]

The defendant suggests that the legislature never intended that "merely" pointing a gun at someone to constitute creating a substantial risk of death under

---

[102] *Id.*

[103] Op. Brf. at p. 34.

[104] *Thornton*, 647 A.2d at *2, Emphasis added.

[105] *Id.*

[106] *Britt v. State*, 113 A.3d 1080, *3 (Del. 2015).

Reckless Endagerment First Degree, but no such limitiation is in the statute.[107] The defendant cites to a definition of "deadly force" in relation to a justification defense which states that "*production* of a weapon or otherwise, so long as the defendant's purpose is limited to creating an apprehension that deadly force will be used if necessary, does not constitute deadly force."[108] This does not support the defendant's contention. Production of a weapon and pointing a loaded weapon directly at someone are two separate and distinct actions. The statute even clearly states that producing a weapon is not deadly force "so long as the defendant's purpose is limited to creating an apprehension that deadly force will be used . . ." Here, the defendant has established no such limitiation based on the actions depicted in the video; and, in fact, the jury rejected that argument and found his state of mind to be reckless. The defendant did not "produce" or "display" his firearm in apprehension of deadly force being used -- he unholstered it and pointed it at a crowd of protesters. In addition, this definition only applies when the defendant raises a self-defense justification claim, which is not even at issue here.

The defendant makes a number of additional arguments, seemingly unrelated to the argument regarding the sufficiency of the evidence. None of these arguments were made below, and thus were not preserved for review. First, the

[107] Op. Brf. at p. 35.

[108] 11 Del.C. § 471(a), emphasis added.

defendant suggests that a conviction of Reckless Endangering First Degree is violative of the defendant's Second Amendment right to bear arms pursuant to the United States Constitution -- this is not true.[109] This argument was not raised pre-trial or during trial and was not briefed below. In any event, the defendant was not prosecuted for legally possessing a firearm, or for open-carrying a firearm. He was specifically prosecuted for, and the facts supported, pointing a loaded firearm at a crowd of people. Moreover, the defendant then left his loaded firearm unattended on the ground, leaving it for anyone to grab during a tense political event, just moments after pointing the firearm at the crowd. Those actions, and his recklessness is performing those actions, are what led to his conviction. Pointing a loaded firearm at someone is not a protected action, and as stated multiple times during trial, a responsible and lawful gun owner would never engage in those actions.[110]

Second, the defendant suggests that the testimony of the witnesses about their subjective feelings at having a loaded weapon pointed at them was prejudicial.[111] Similar to the defendant's argument regarding the jury instructions, no objection to this testimony was raised at trial. The defendant actually pointed out the relevance of this testimony during their motion for judgment of acquittal at

[109] Opening Brf. at p. 36.

[110] A-171.

[111] Opening Brf. at p. 38.

the close of the State's evidence, "[as opposed to *Thornton*] there was no reaction so there was unlikely to be a secondary injury, it didn't create a panic of people running where somebody could have been trampled . . ."[112] While the defendant's argument was that there was no secondary reaction, like there was in *Thornton* where the victim was driving, the relevance of their subjective feelings was to establish that there were in fact reactions to the behavior of the defendant. Those reactions establish not just that there was a risk of death, but that these secondary reactions could have heightened the risk of the death, just as the victim's reaction in *Thornton* was relevant to determining risk of death.[113] As the Court below noted in its order on the motion for judgment of acquittal, "[p]ointing a loaded gun created a foreseeable risk of death – by intention, accident, or reaction."[114] Since the defendant's larger argument pertains to a motion for a judgment of acquittal, the fact that they felt threatened is one that may be considered since it was introduced at trial without objection. The Court correctly noted that those facts, and their reaction or lack thereof, go to weight and may be considered by the jury.[115]

---

[112] A-251.

[113] 647 A.2d at *2.

[114] A-269; Superior Court Order Denying Motion for Judgment of Acquittal, p. 10.

[115] A-251.

III. THE SUPERIOR COURT DID NOT ERR IN THE RULINGS AND THERE WAS NO CUMULATIVE ERROR.

QUESTION PRESENTED

Whether the alleged errors below created a cumulatively prejudicial effect.

STANDARD OF REVIEW

This Court reviews cumulative error by a plain error standard of review.[116] When there are "multiple errors in a trial, this Court weights 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.""[117]

MERITS OF THE ARGUMENT

As argued *supra* the Court below did not commit any error as alleged and therefore there is no cumulative effect. Furthermore, the defendant only contends there was one alleged error below, and by definition for cumulative error to apply there must be multiple errors. "Cumulative error must derive from *multiple errors* that causes "actual prejudice.""[118] Under a plain error review the Court inquires into whether "the error[s] complained of [were] so clearly prejudicial to substantial

[116] *Hoskins v. State*, 102 A.3d 724 (Del. 2014).

[117] *Crump v. State*, 204 A.3d 114, *6 (Del. 2019), *quoting Johnson v. State*, 2015 WL 8528889, at *3 (Del. 2015).

[118] *Michaels v. State*, 970 A.2d 223, 231 (Del. 2009), Emphasis Added.

rights as to jeopardize the fairness and integrity of the trial process."[119] "Furthermore, the doctrine of 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."[120]

The defendant only complains of a single error on appeal, namely the jury instruction regarding "substantial risk." The defendant's second argument concerns a motion for a judgment of acquittal which appeals a ruling of the Court below regarding the sufficiency of the facts, not alleged error below. While the defendant attempts to shoehorn in a number of different arguments regarding prejudice, specifically on the Second Amendment and the testimony of the witnesses to their perception of events, none of those were preserved for appeal. Nor does the defendant argue those alleged errors on appeal, instead subsuming them into a broader argument regarding the sufficiency of the evidence. No other error is brought to this Court for consideration, nor was preserved for appeal below.

---

[119] *Turner v. State*, 5 A.3d 612, 615 (Del. 2010), *quoting* Del. Sup. Ct. Rule 8; *Monroe v. State*, 652 A.2d 560, 563 (Del. 1995).

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

CONCLUSION

For the foregoing reasons, the Superior Court correctly instructed the jury on the definition of "substantial risk" and correctly denied the defendant's motion for judgment of acquittal. There were no errors below, and therefore no cumulative effect. The State respectfully requests that this Court **AFFIRM** the Superior Court's decision.

Respectfully submitted,

/s/ David C. Skoranski
David C. Skoranski (ID# 5662)
Nicole M. Mozee (ID# 6443)
Deputy Attorneys General
Division of Civil Rights and Public Trust
Delaware Department of Justice
900 N. King Street
Wilmington, DE 19801

Dated: August 25, 2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

MICHAEL HASTINGS,	:	
	:	
Defendant-below	:	
Appellant,	:	
	:	
v.	:	No.: 93, 2022
	:	
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 Times New Roman 14-point typeface using Microsoft Word.

2. This brief complies with the type-volume limitation of Rule 14(d)(i) because it contains 5,730 words, which were counted by Microsoft Word.

Dated: August 25, 2022 /s/ *David C. Skoranski*