IN THE SUPREME COURT OF THE STATE OF VERMONT
DOCKET NO. 2019-029

STATE OF VERMONT, APPELLEE

v.

CHAVIS MURPHY, APPELLANT

APPEAL FROM CHITTENDEN SUPERIOR COURT, CRIMINAL DIVISION
Docket No. 4791-12-15 Cncr

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# Brief for Appellee State of Vermont

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STATE OF VERMONT

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## ISSUES PRESENTED

Whether Mr. Murphy's constitutional rights were violated by the police's acquisition of his real-time cell site location information?

Whether the omission of a jury instruction on flight evidence, where flight evidence was admitted at trial, was plain error?

Whether the evidence presented at trial, when viewed in the light most favorable to the State and excluding any modifying evidence, fairly and reasonably tends to convince a reasonable trier of fact that the defendant is guilty beyond a reasonable doubt?

Whether the trial court abused its discretion in denying the motion for a new trial based on allegedly new evidence?

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## STATEMENT OF THE CASE

This case involves the fatal shooting of Obafemi Adedapo on December 27, 2015, at 2:15 AM, on Church Street in Burlington. PC 88. Though he was not detained at the scene, several witnesses placed Chavis Murphy, the defendant, at the scene of the shooting, and interacting with Mr. Adedapo immediately before the shooting. PC 89 – 94. The police tried to locate Defendant at his known addresses without success. PC 94 – 95. Using his real-time cell site location information (CSLI), the police located and arrested Defendant on December 29th in West Springfield, Massachusetts. PC 113. Defendant was subsequently charged with first-degree murder. PC 85. Prior to trial, Defendant filed a motion to suppress his CSLI and any evidence gathered after his arrest, arguing that the police's receipt of his real-time CSLI was a warrantless search in violation of his state and federal constitutional rights. PC 66 – 71. The State opposed the motion, arguing that a warrant was not necessary because Defendant had no reasonable expectation of privacy in his real-time CSLI, and even if he did, the search was justified under the exigent circumstances exception to the warrant requirement. PC 75 – 81. After a hearing, the trial court denied the motion, holding that Defendant had no expectation of privacy in his real-time CSLI, that the search was justified by exigent circumstantial evidence, and that suppression wasn't warranted because of the police's good-faith reliance on a federal statute. PC 46 – 65.

After a six-day trial, a jury found Defendant guilty of second-degree murder. AV 17. Thereafter, Defendant filed a motion for judgment of acquittal and for a new

trial, arguing that there was insufficient evidence that Defendant fired the shots that killed Mr. Adedapo, and that there was insufficient evidence of Defendant's intent. PC 14 – 36. The State opposed the motion, arguing the evidence was sufficient to support the jury's verdict. PC 37 – 45. On May 18, 2018, the trial court denied the motion, finding the evidence sufficient to support the verdict. PC 3 – 13.

On September 30, 2019, Defendant filed another motion for a new trial based on newly discovered evidence. AV 23 – 54. In the motion, Defendant claims to have found two witnesses to the shooting who would testify that the shooter was not Defendant. AV 23 – 54. After a hearing, the trial court denied the motion, finding the two witnesses not credible, and in any event, that their testimony would have been cumulative to the testimony presented at trial. AV 1236 – 1251.

## I. Investigators request real-time cell site location information (CSLI) of Defendant's cell phone.

On May 5, 2017, after a hearing on Defendant's motion to suppress, the trial court denied the motion, holding that Defendant did not have an expectation of privacy in his real-time CSLI, and even if he did, that the search was reasonable due to the exigent circumstances. PC 46 – 65. Defendant does not contest the trial court's factual findings with regard to the motion to suppress, so they are presented here in full:

> This case concerns a fatal shooting in Burlington that occurred on December 27, 2015 at 2:15 a.m. That same day, Defendant became known as a person of interest and a potential suspect. Witnesses on the scene identified Defendant as present during the shooting. Law enforcement researched and visited addresses which may have been

associated with Defendant. No contact was made with Defendant on December 27, 2015.

During further conversations with witnesses on December 28, 2015 it was determined that Defendant matched the description of the alleged shooter. No witness indicated that Defendant was seen shooting a gun.

Because law enforcement concluded that Defendant was a "good alleged suspect," on December 28, 2015, a request was made of AT&T, Defendant's cell phone carrier, for an emergency exigent "ping" of Defendant's cell phone. …. The lead detective on the case, Detective Nash, contacted AT&T's law enforcement compliance center and served a subpoena request. AT&T requires that a handwritten form be submitted in order to make an exigent request for a "ping" of a cell phone supported by a brief synopsis for the request. AT&T then makes a judgment as to whether to comply with the request pursuant to their own guidelines.

The factors that justified the exigent request here included information that there had been a bar fight, an active shooter, and a victim who was unfamiliar with the suspect, and that the person who shot could be unreasonable or "in some sort of mental state" and in possession of a firearm. Law enforcement also had some information about a rental car that the suspect may be driving. No judicial warrant was requested at that time.

Once a request for a "ping" is made, a document is received by AT&T when the phone is within range of and has connected with a cell tower, revealing the time of the connection. More explicitly, State's Exhibit 6, admitted during the prior Bail Review Hearing, which purports to document the "Historical Precision Location Information" representing "AT&T's best estimate of the location of the target number," lists the phone number, the "Connection Date," the "Connection Time," the longitude and latitude, and the "Location Accuracy," which varies from "Location accuracy unknown" to "Location accuracy likely better than 25 meters," or "better than 10000 meters" and several distances in between. (Bail Review• Hearing, State's Ex. 6 at 1).

AT&T complied with the exigent request but initially informed Detective Nash that Defendant's phone was turned off on December 27, 2015, and because of that they possessed no information about the phone.

Because law enforcement was aware that Defendant had rented a car, an investigation was begun regarding the kind of car, a BMW with New York plates. Law enforcement attempted to locate the car the rental car by requesting license plate reader (LPR) information throughout Vermont on December 28, 2015. Police cars are outfitted with cameras which capture pictures, dates, and times when license plate information is captured. That information is stored and only available upon request during an investigation.

Defendant was not located on December 28, 2015, but a response to the license plate reader request was received on December 29, 2015, prior to receipt of information regarding Defendant's cell phone. The LPR response revealed that a photograph of the BMW associated with Defendant's license plate was collected previously on Main Street, in Burlington, Vermont, perhaps five minutes after the shooting, driving eastbound on Main Street.

On December 29, 2015 Detective Nash applied for a judicial search warrant of Defendant's cell phone records held by AT&T. The warrant was issued at 4:50 p.m. The warrant application covered a number of items, including subscriber names and addresses, as well as contact lists on the phone and detailed records about the dates and times of calls. GPS data, including the "pings," was also requested.

At 6:30 p.m. on December 29, 2015, AT&T contacted Detective Nash and informed him that Defendant's phone had been turned back on and was located in West Springfield, Massachusetts. From the ping information, law enforcement assumed that Defendant still had the phone so they contacted the Springfield Police Department.

According to the affidavit of Daniel Spaulding, Detective Bureau Captain of the West Springfield Police Department, admitted as State's Exhibit 17 at the Bail Review Hearing, on December 29, 2015 West Springfield police were alerted that a homicide suspect's cell phone had been pinged as being located within "several feet from the Residence Inn, located at 64 Border Way, West Springfield MA." Captain Spaulding and other officers searched that area for the rental car alleged to be the suspect's, but found nothing. They were then informed that a second ping to the cell phone placed the suspect "in the area of Chilli's Restaurant on Riverdale Street." (Id. ¶ 3). As Captain Spaulding drove through the parking lot of "Five Guys" restaurant, assumedly moving toward the location of the second ping, he spotted a person fitting the suspect's description standing in line at Five Guys and ordered officers to watch the egresses of the building. (Id. ¶ 4). The suspect was observed

> to leave the building, and then the Captain received a call that a third ping placed the suspect "in the area of Five Guys," and that an arrest warrant had been issued. (Id. ¶ 5). The suspect, who was later identified as Defendant, was arrested shortly thereafter. (Id. at 2, ¶ 7).
>
> The judicial search warrant was executed by fax to AT&T on December 31, 2015. A response was received on January 21, 2016. AT&T provided law enforcement with the account holder's subscriber name, contact lists, GPS and identification. Some of the information produced in response to the search warrant also included location information about the phone relative to pings on AT&T's cell towers.

PC 46 – 48.

In a footnote, the trial court clarified that its analysis only applied to the first ping, explaining that

> [o]nly the first ping raises privacy issues, as Defendant was observed in public thereafter as matching the description and picture of the suspect in question. While driving from the location of the first ping to the location of a second ping, Defendant was spotted by police in a public location. Police observed him at and around that location and then received a third ping, which confirmed that the suspect they were seeking was in that area and that an arrest warrant had been issued for Defendant.

The trial court's conclusions regarding the exigency of the circumstances include the following:

> In this case, the exigency was determined based on the nature of the crime, here, a murder where the victim was unfamiliar with the subject. In particular, the police were concerned that Defendant, given the seemingly random nature of the crime, could be unreasonable or suffering from some mental health condition which made him dangerous to the general public. …

> The suspect was reasonably believed to be armed, or as Detective Nash put it, was an "active shooter." Evidence at the scene showed that [Mr. Adedapo] had been shot several times ….[1]
>
> The police believed Defendant to be a "good alleged suspect." Interviews of several witnesses placed Defendant at the scene of the crime and one witness identified a 6'5" person as the shooter (Defendant was described as being 6'6"), and video surveillance footage from the area showed a person wearing the clothes a witness identified Defendant as having been wearing at the time running down Church St. away from the location of the shooting. Though no testimony was adduced that the police thought they had probable cause to arrest Defendant at the time of the ping request, a finding of probable cause was made by a judge the next day prior to the receipt of the ping information.
>
> This case did not involve the police entering premises; however, the police did have reasonable information to believe that the cell phone "pinged" was Defendant's. As a result, they had strong reason to believe Defendant would be located in the proximity of the phone.
>
> Evidence also showed that the shooter, described as matching a description of Defendant, had fled the scene; that Defendant was not locatable at any of his known addresses in the Burlington area; and that he was driving a rental car. …
>
> Finally, the ping was an extremely peaceful and non-intrusive means of performing a search. …

PC 60 – 61. (internal record citation and legal discussion omitted). The trial court also noted that the need to preserve evidence supported a finding of exigency:

> Here, the police had a suspect fleeing the scene of a murder allegedly with the murder weapon, and wearing clothes which may have had relevant evidence including blood spatter, all of which is the kind of

[1] It appears that Mr. Alexander did not reveal that he saw Mr. Murphy with a silver-black gun before the exigent ping request. As Mr. Murphy points out, this was not in the affidavit submitted in support of the warrant. Apl. Br. 10. The affidavit does indicate, however, that at the time of the ping, Mr. Reed had told investigators that Mr. Murphy had exchanged words with Mr. Adedapo and then made a quick movement with his hands immediately before Mr. Reed heard gunshots. PC 101 – 102. The affidavit also states that when Mr. Reed was directly asked if Mr. Murphy shot Mr. Adedapo, Mr. Reed said "I think it was Chav." PC 102.

> evidence the "ready destructibility" of which supports a finding of exigency.

PC 61.

**II. A jury finds Defendant guilty of second-degree murder.**

The testimony about the moments surrounding the shooting revolved around two groups of men, one consisting of Defendant, Samuel Alexander, Justin Reed, and Anthony Farmer; the other consisting of Mr. Adedapo and Leon Delima. The State called Mr. Alexander, Mr. Reed, Mr. Farmer and Mr. Delima as witnesses.

The trial court found that the State presented evidence

> that the gunshots that killed Adedapo were fired at relatively close range and came from within the immediate vicinity of the group outside on Church Street, which included Defendant Murphy; that Murphy was the only person within that group who was seen holding a handgun; that Defendant had advanced towards Adedapo, who had turned and was walking away; that Adedapo was killed by multiple gunshots, at least one of which entered from the rear and exited the front of his body; that the shooter was standing near Leon Delima and next to Samuel Alexander; and that the shooter was taller than 5 feet — 11 inches, and other than Adedapo, only Defendant Murphy was that tall (or taller).

PC 11.

The trial testimony supported these findings. Mr. Alexander is a close friend of Defendant. 2/6/2018 Tr. 26. He testified that on the night of the murder he left Zen Lounge at closing time and regrouped with his friends on the corner of Church Street and King Street in Burlington where Defendant was in an argument with their friend, Anthony Farmer. *Id.* at 30. Defendant was arguing with Mr. Farmer about the fight inside Zen Lounge and how Defendant was upset about how people

had acted in the club. *Id*. At 59 – 61. During this argument, the Defendant discussed Mr. Adedapo. *Id*. At 30.

Mr. Alexander testified that he, Defendant, Mr. Reed and Mr. Farmer began walking north on Church Street toward Zen Lounge. *Id*. at 31. He testified that as they were walking north, the group encountered Mr. Adedapo and his friend, later identified as Mr. Delima. *Id*. At 31. Defendant purposely bumped Mr. Adedapo's friend, saying "you owe me money." *Id*. at 31. Mr. Adedapo responded, "I got a gun, I got a gun," while "scuffling" through his pants. *Id*. at 31, 33. After this exchange, Mr. Adedapo then walked away. *Id*. at 31. Defendant then got more angry and chased after Mr. Adedapo, taking four steps toward Mr. Adedapo. *Id*. at 31 – 32. As Defendant was making this movement, Mr. Alexander testified that he saw a silver-black gun in Defendant's right hand. *Id*. at 32. Mr. Alexander observed this while he was very close to Defendant. *Id*. at 32. Mr. Alexander then heard gunshots and ran away. *Id*. at 32. Mr. Alexander did not see anyone else with a gun. *Id*. at 32. Mr. Alexander testified that the gunshots he heard were loud, so they must have been close. *Id*. at 35.

The State also called Justin Reed, another close friend of the Defendant, who corroborated much of Samuel Alexander's testimony. Mr. Reed testified that after he left Zen Lounge, he regrouped with. Defendant, Mr. Alexander, and Mr. Farmer at the corner of Church Street and King Street. *Id*. at 73 – 74. That group then began walking back up Church Street, where they encountered Leon Delima. *Id*. at 74 – 75. He saw Defendant and Mr. Delima talking. *Id*. at 76. He then saw Mr.

Adedapo walk away, then come back. *Id*. at 81. He then saw Defendant make a movement toward Mr. Adedapo, heard gunshots, and started running. *Id*. at 76 – 78. He testified that he was unable to see Defendant's hands at the time he heard the gunshots. *Id.* at 78. He testified that the shots were loud, so they were probably coming from around where he was standing. *Id*. at 101. He did not see anyone with a gun. Id. at 95.

Mr. Delima, the victim's close friend, who was with Mr. Adedapo when he was shot, also testified. *Id*. at 157, 176. He testified that he was unable to see the shooter's face, *Id*. at 176; however, Mr. Delima did see that the shooter was tall. *Id.* at 171. He testified that he is 5 feet 11, and the shooter was "a few inches" taller than him. *Id*. at 165, 171.

Mr. Farmer testified that he had been drinking heavily the night of the shooting, could only remember hearing shots and running, and otherwise could not provide any other meaningful information. 2/7/2018 Tr. 86 – 95.

At trial, the State argued that there was evidence that Defendant's fled, and so should be considered evidence of Defendant's consciousness of guilt. This included testimony that Defendant was found in West Springfield, Massachusetts, with all of his belongings, that he switched cars with his girlfriend, that he bought prepaid phones, and that he tore up his W-2 form, social security card, and birth certificate. 2/9/2018 TR 56 – 57. Defendant argued it would take a "tremendous amount" of speculation to connect torn-up documents to whether Defendant shot Mr. Adedapo. 2/9/2018 TR 73. Defense Counsel did not request a jury instruction on the weight

that should be given any flight evidence, did not object to the lack of such an instruction in the jury instructions, and the trial court did not give any instruction about flight evidence.

The Jury found Defendant guilty of second-degree murder.

## III. Defendant files a motion for a new trial based on allegedly new evidence.

After trial, Defendant filed a motion for a new trial based on allegedly new evidence. He asserted that two witness had been found that would testify that Mr. Defendant was not the shooter. He presented the testimony of Robert Robidoux, Jabez Bean, and Sara Vizvarie. On appeal, Defendant does not challenge the trial court's findings of fact, other than its determination that Mr. Robidoux and Mr. Bean's testimony was cumulative and not credible.

In its denial of the new trial motion the trial court summarized Mr. Robidoux and Mr. Bean's testimony regarding the shooting as follows:

> [n]either Mr. Bean nor Mr. Robidoux saw the shooting. They did not see a gun. Rather, after the shots were fired, they looked in the direction of the gun fire and they saw many people running from the scene. Inexplicably, Mr. Robidoux believed that due to the direction one person was running that that person must have been the shooter, although he saw persons running in various directions. Mr. Bean described the same general scene, though he believed a person running in a different direction was the shooter.

AV 1239. The trial court did not find Mr. Robidoux and Mr. Bean's testimony "particularly credible":

> Both made statements inconsistent with prior sworn statements, including as to whether they actually viewed the shooting, the

> description of the person they identified as the shooter, and whether they had actually seen [Defendant] that night. Both expressed a bias in favor of [Defendant], as they felt [Defendant] was not the type of person who could commit such a crime. While it is understandable that one would not recall all details of events that occurred years earlier, both Mr. Robidoux and Mr. Bean gave at least four prior statements where they were asked to essentially repeat the most important events of the evening. Yet, even with the benefit of having that testimony read to them to recall events, neither were able to provide a consistent narrative of the incident.

AV 1241. The trial court also found that Mr. Robidoux and Mr. Bean's testimony would have limited relevance and weight, considering the other testimony at trial:

> Mr. Bean and Mr. Robidoux saw [Defendant] at the Lift Bar the night of the shooting; they did not see [Defendant] on Church Street at the time of the shooting. They were standing at least thirty feet away from the shooting, and perhaps even farther away, based upon the testimony of Sara Vizvarie. It was dark. They did not see the shooting, or the shooter. They did not see a gun or anyone appearing to be pointing a gun. They did not hear the conversation between Defendant and the victim of the shooting. They could not identify the person who they claim to be the shooter.

AV 1241. Based on these findings, the trial court denied the motion for a new trial. AV 1250.

This appeal followed.

## STANDARD OF REVIEW

In reviewing a denial of a motion to suppress, this Court "accepts the trial court's findings of fact unless clearly erroneous," but "review[s] the question of whether the facts meet the proper legal standard without deference." *State v. Calabrese*, 2021 VT 76, ¶ 19, 268 A.3d 565, 574 (Vt. 2021), reargument denied (Nov. 19, 2021).

Jury instructions are reviewed in their entirety to determine if the jury was misled and a conviction is reversible only if the charge undermines confidence in the jury's verdict. *State v. Sullivan*, 2017 VT 24, ¶ 22, 204 Vt. 328, 167 A.3d 876.

When reviewing the denial of a motion for judgment of acquittal, this Court examines "whether the evidence, when viewed in the light most favorable to the State and excluding any modifying evidence, fairly and reasonably tends to convince a reasonable trier of fact that the defendant is guilty beyond a reasonable doubt." *State v. Kuhlmann*, 2021 VT 52, ¶ 12, 260 A.3d 1115, 1120 (Vt. 2021), reargument denied (Aug. 25, 2021). Importantly, a motion for judgment of acquittal should only be granted "when there is no evidence to support a guilty verdict." *Id.*

This Court reviews the denial of a motion for a new trial pursuant to V.R.Cr.P. 33 for abuse of discretion. *State v. Bruno*, 2012 VT 79, ¶ 16, 192 Vt. 515, 523, 60 A.3d 610, 616 (2012).

**ARGUMENT**

Defendant's conviction for second-degree murder should be affirmed for the following reasons: First, the trial court correctly denied the motion to suppress because the police acquired Defendant's real-time cell site location information (CSLI) under exigent circumstances and therefore did not need a warrant; second, that the omission of a jury instruction on the admitted flight evidence was not plain error; third, taking the evidence in the light most favorable to the State, there was sufficient evidence to convict Defendant of second-degree murder; and fourth, the trial court did not abuse its discretion in denying the motion for a new trial based

on Defendant's proffered new evidence. As explained below, Defendant's arguments should be rejected, and his conviction affirmed.

## IV. The denial of the motion to suppress Defendant's real-time CSLI, and the evidence that flowed from it, was consistent with the law and the evidence.

### A. Defendant did not have a reasonable expectation of privacy in his real-time CSLI.

The denial of Defendant's motion to suppress the evidence produced as a result of the "ping" of his cell phone, which produced real-time CSLI, should be affirmed. In arguing that the trial court's denial of the motion to suppress should be reversed, Defendant relies heavily on *Carpenter v. United States*, 138 S. Ct. 2206 (2018), for the proposition that he had an expectation of privacy in the information accessed here. However, *Carpenter* is inapplicable to this matter. As the United States Supreme Court explained, the decision in *Carpenter* was a narrow one: "We do not express a view on matters not before us: real-time CSLI …" *Id*. at 2220, *see also United States v. Hammond*, 996 F.3d 374, 387 (7th Cir. 2021), cert. denied, No. 21-752, 2022 WL 1205839 (U.S. Apr. 25, 2022)("The 'narrow' Carpenter decision did not determine whether the collection of real-time CSLI constitutes a Fourth Amendment search.").

As Defendant points out in his brief, some courts have found an expectation of privacy in real-time CSLI. There are, however, other courts that have declined to find an expectation of privacy in real-time CSLI, even post-*Carpenter*. For example, in *United States v. Hammond*, 996 F.3d 374 (7th Cir. 2021), the court declined to

find a Fourth Amendment search when law enforcement acquired real-time CSLI without a warrant because the pings lasted only for a few hours, only revealed the defendant's location, and only collected location information that the defendant had already exposed to public view while traveling in public. *Id*. at 389. The court distinguished the facts from *Carpenter*, explaining that the limited information acquired in *Hammond* did not provide a window in the defendant's private life as it did in *Carpenter*. *Id*.

Here, as in *Hammond*, the pings only lasted a very short time, they only revealed his location, and only provided location information he had already exposed to public view while being out in public. As such, though there is jurisprudence on both sides, the State argues that *Hammond* is most persuasive, and that the Court should find that Defendant did not have an expectation of privacy in his real-time CSLI.

### B. Even if the acquisition Defendant's real-time CSLI was a "search," it was reasonable under the circumstances.

#### 1. The police request to "ping" Defendant's cell phone did not violate Defendant's Fourth Amendment and Article 11 rights because it was made under exigent circumstances.

Even if the ping of Defendant's cell phone was a warrantless "search," the existence of exigent circumstances made the search reasonable, and therefore not violative of Defendant's Fourth Amendment of Article 11 rights.

This Court has made it clear that some warrantless searches are not prohibited by constitutional protections. *See e.g. State v. Edelman*, 2018 VT 100, ¶ 6 (quotation

omitted) (probable cause and a search warrant are not required when consent to search is voluntarily given by one authorized to do so). This Court has also recognized as an exception to the warrant requirement where a search is conducted under exigent circumstances. *State v. Petruccelli*, 170 Vt. 51, 61, 743 A.2d 1062, 1069 (1999). When determining whether exigent circumstances are present and sufficient to justify a warrantless search, this Court consider the totality of the circumstances. *Id.* at 61, 743 A.2d 1069–70. In finding the search of Defendant's real-time CSLI justified by exigent circumstances, the trial court cited to the list of factors in *Petruccelli,* which consider whether:

> (1) a grave offense, particularly a crime of violence, is involved; (2) the suspect "is reasonably believed to be armed"; (3) police had "a clear showing of probable cause ... to believe that the suspect committed the crime"; (4) police had "strong reason to believe that the suspect is in the premises being entered"; (5) there is "a likelihood that the suspect will escape if not swiftly apprehended"; and (6) the entry was made peaceably.

*Id.* at 61. The trial court also noted that these factors were not exclusive, and that "there may be circumstances in which the presence of one factor alone can justify a warrantless entry." *Id.* at 62, quoting *United States v. Alexander*, 923 F. Supp. 617, 623 (D. Vt. 1996).

Here, the totality of the circumstances clearly support a finding of exigent circumstances. As the trial court found, the shooting of Mr. Adedapo was a violent crime, investigators had probable cause (and a warrant had been issued) prior to receiving Defendant's location information, Defendant had the phone associated with the number pinged and would likely be in close proximity to it. Also,

Defendant would escape if not apprehended because Defendant was not at any of his known addresses in the Burlington area, and that a ping of a cell phone for its location information was a peaceful entry. PC 60 – 61. The trial court further found that the need to obtain and preserve evidence supported a finding of exigent circumstances. PC 61.

Though the police did not have a witness report that Mr. Alexander saw Defendant with a gun until after the exigent ping request and Defendant's arrest, that fact is not fatal to the trial court's analysis. The totality of the circumstances support a conclusion that Defendant was armed: Mr. Adedapo was fatally shot; a witness reported that Defendant exchanged words with Mr. Adedapo and moved toward him immediately before the shooting (this witness also told police he "[thought] it was Chav."); another witness saw Defendant moving towards the victim when gunshots were heard. Considering all of the circumstances, it was reasonable for the police to believe Defendant was still armed. And even if this belief wasn't reasonable, the other factors amply support a finding of exigency.

Defendant argues that the exigency is somehow mitigated by length of time between the shooting and when the police requested the exigent ping. This assumes that the dangerousness of someone suspected of shooting and killing another person with apparently little provocation lessens the more time passes since their last shooting. Locating a person who might have shot and killed another person, at little provocation, is of the utmost urgency regardless of how much time has passed.

Defendant also makes the point that a warrant could have been granted quickly. But the analysis must include the time it takes the cell service provider to return useful information. Here, the evidence demonstrates it would have taken weeks to receive a response to a warrant. Defendant speculates that the cell service provider would have responded to an exigent ping request, accompanied by a warrant, in the same manner as an exigent ping request without one. The record, however, shows that the call service provider took two weeks to respond to a warrant. Such a delay would have allowed the risk to the public from an active shooter who had been neither located nor apprehended to continue.

The trial court's denial of the motion to suppress was, therefore, consistent with the law and the evidence before it. As such, the denial of the motion to suppress must be affirmed.

**2. The Search was reasonable under the Article 11 of the Vermont Constitution.**

The trial court also found that the search did not violate Article 11 of the Vermont Constitution, which permits warrantless searches

> only in those extraordinary circumstances which make the warrant and probable-cause requirement impracticable. Exceptions to the warrant requirement must be factually and narrowly tied to exigent circumstances and reasonable expectations of privacy.

*State v. Petruccelli*, 170 Vt. 51, 62, 743 A.2d 1062, 1070 (1999)(internal citations and quotations omitted). In this regard, the trial court reasonably found that warrant requirement was impracticable because the warrants issued for Defendant's phone

records took over two weeks to receive a response from the cell phone provider. PC 61. The trial court found that the circumstances were factually and narrowly tied to exigent circumstances of having "an armed murder suspect who attacked a stranger in a crowd on a public street, who fled the scene, and who was not locatable at any known address in the area." PC 62. The search was narrowly tailored to acquire only Defendant's location, a suspect in a deadly shooting. As such, the "search" was consistent with Defendant's Article 11 rights, and the denial of the motion to suppress should be affirmed.

**C. Exclusionary rule should not apply.**

In reasoning that the exclusion was not a remedy for any violation of the Fourth Amendment, the trial court concluded that the police were acting in good faith reliance on the Federal Stored Communications Act when they requested Defendant's real-time CSLI. PC 62 – 63. The Court also concluded that suppression of evidence was not appropriate because there was a valid warrant for his arrest before his arrest on a public street, and valid warrant to search his hotel room, neither of which Defendant challenged. PC 63. The trial court does not appear to address suppression as a remedy for any violation of Article 11.

In any event, Defendant's location information, and the evidence derived from the receipt of that information, should not be suppressed. Critically, as found by the trial court and argued by the State below, at the time that investigators received Defendant's real-time CSLI, the trial court had issued a search warrant for that

exact information. Defendant argues that the police should have attached the warrant to the exigent ping request, implicitly conceding that this procedure would not have violated Defendant's constitutional rights. The only shortcoming of the procedure used by the police here, therefore, is their failure to renew the exigent ping request and attach the warrant.

Suppressing Defendant's real-time CSLI, and the evidence that flowed from it, for failing to follow this procedure would elevate form over function. This Court has emphasized that "the focus in an exclusionary-rule analysis should be on the individual constitutional rights at stake." *State v. Walker-Brazie*, 2021 VT 75, ¶ 37 (Vt. Sept. 24, 2021)(internal quotation omitted). Even if Defendant had a right to privacy in the real-time CSLI, by the time his real-time CSLI was acquired by police, the police had a warrant for that information. Suppressing his real-time CSLI, and the evidence that flowed from it, would only serve to protect a particular procedure, rather than do anything to protect any privacy right held be Defendant.

As such, this evidence should not be suppressed.

## V. The omission of a jury instruction on evidence of flight was not plain error.

Defendant contends that the trial court committed plain error when it failed to, sua sponte, instruct the jury on the permitted use of flight evidence as consciousness of guilt. Defendant did not request a limiting instruction on flight evidence, and so this Court's review is only whether the trial court's omission of the instruction constituted plain error. *State v. Stephens*, 2020 VT 87, ¶ 35, 250 A.3d

601, 614 (Vt. 2020). Plain error requires Defendant to "show that there was an obvious and prejudicial error affecting his substantial rights and the fairness of his trial." *Id*. at ¶ 17. This Court only finds plain error "in rare and extraordinary cases where the error is obvious and strikes at the heart of defendant's constitutional rights or results in a miscarriage of justice." *State v. Bruno*, 2012 VT 79, ¶ 43, 192 Vt. 515, 60 A.3d 610 (quotation omitted). Defendant makes no such showing.

On appeal, Defendant does not ask this Court to review the admission of the flight evidence. The evidence of Defendant's flight, and therefore evidence of his consciousness of guilt, were as follows: that someone matching Defendant's description was seen on video running from the scene wearing a distinctive sweatshirt; that a car rented to Defendant was identified leaving the scene shortly after the shooting; that Defendant was found in West Springfield, Massachusetts two days after the shooting; that he had two new cell phones that had been purchased in Massachusetts with cash, that when arrested he asked something to the effect of "how did you find me? Who was it? I know who;" that Defendant had apparently had possession of his girlfriend's car in West Springfield, rather than the one rented to him; and that Defendant's torn up identifying documents including his W-2, social security card, birth certificate, along with the distinctive sweatshirt, were found in Defendant's hotel room.

This Court has never held that a trial court's failure to include a limiting instruction after admitting evidence of flight as consciousness of guilt, absent a request for such an instruction, constitutes plain error as a matter of law requiring

the reversal of the underlying conviction. *See*, *State v. Stephens*, 2020 VT 87, ¶ 37, 250 A.3d 601, 615 (Vt. 2020). In *Stephens*, flight evidence was admitted, but there was no instruction on flight, nor any objection to the omission by the defense. This Court concluded in *Stephens* that, because there was ample other evidence to support the jury's verdict, the omission of the limiting instruction did not raise doubts about the fairness of the criminal proceeding or undermine confidence in the jury's verdict, and so did not constitute plain error. *Id.* at ¶ 37, *see also State v. Welch,* 2020 VT 74, ¶¶ 18-19, 213 Vt. 114, 249 A.3d 319, 325–26 (2020) (Finding no plain error where, in part, there was ample other evidence supporting the jury's verdict, so any error in the flight instruction had no prejudicial impact on the jury's deliberations.).

Similarly, there is ample evidence to support the jury's verdict that Defendant was guilty of second-degree murder. Two witnesses for the State, Mr. Reed and Mr. Alexander, had known Defendant for a long time. 2/6/2018 Tr. 26, 68 – 69. Both testified they were physically close to Defendant in the moments before the shooting. 2/6/2018 Tr. at 32, 75. They both testified that Defendant and Mr. Adedapo passed each other on the sidewalk. 2/6/2018 Tr. at 31 – 32, 90 – 91. Both testified that Defendant made some motion toward Mr. Adedapo immediately before they heard gunshots. 2/6/2018 Tr. at 32 – 33, 76. Mr. Alexander testified that he saw Defendant with a silver-black gun in his right hand immediately before seeing Defendant move toward Mr. Adedapo and hearing gunshots. 2/6/2018 Tr. at 32 – 33. Defendant died of multiple gunshot wounds. Indeed, the trial court found the flight

evidence was not necessary for the State to prove its case, and that the verdict could stand without it. PC 12.

Though circumstantial, the evidence presented amply supports the jury's verdict, and the absence of a limiting instruction does not constitute plain error. Accordingly, the conviction should be affirmed.

## VI. There was sufficient evidence to convict Defendant of second-degree murder.

When reviewing the denial of a motion for judgment of acquittal, this Court examines "whether the evidence, when viewed in the light most favorable to the State and excluding any modifying evidence, fairly and reasonably tends to convince a reasonable trier of fact that the defendant is guilty beyond a reasonable doubt." *State v. Kuhlmann*, 2021 VT 52, ¶ 12, 260 A.3d 1115, 1120 (Vt. 2021), reargument denied (Aug. 25, 2021). Importantly, a motion for judgment of acquittal should only be granted "when there is no evidence to support a guilty verdict." *Id.* As Defendant concedes, circumstantial evidence alone can support a guilty verdict. *State v. Durenleau*, 163 Vt. 8, 12, 652 A.2d 981, 983 (1994).

In his motion for a new trial, Defendant argued that there was insufficient evidence of two of the elements of second-degree murder: first, that there was insufficient evidence that he had the requisite state-of-mind for second-degree murder, and second, that there was insufficient evidence that Defendant shot the gun that killed Mr. Adedapo. PC 16 – 19. On appeal, Defendant does not argue any specific element lacked sufficient evidence, but merely argues generally that the

evidence presented was insufficient to convict Defendant of second-degree murder. Defendant, therefore failed to preserve any argument that the State did not present sufficient evidence of the other elements of second-degree murder, and so they are waived.

### A. There was sufficient evidence that Defendant shot Mr. Adedapo.

Though circumstantial, the State presented ample evidence that the jury could conclude that Defendant shot Mr. Adedapo, including his exclusive opportunity to commit the crime (by virtue of the only person any witness testified had a gun), and his statements and actions before and after the shooting. Defendant was physically close to Mr. Adedapo at the time of the shooting, he had just had an argumentative exchange with Mr. Adedapo and Mr. Adedapo's friend, Defendant was the only person seen with a gun, and Defendant moved towards, if not chased, Mr. Adedapo as Mr. Adedapo walked away immediately before the shooting. This is adequate evidence for the jury to conclude, beyond a reasonable doubt, that Defendant shot Mr. Adedapo.

### B. There was sufficient evidence that Defendant had the requisite intent for second-degree murder.

Evidence of intent "… is rarely proved by direct evidence; it must be inferred from a person's acts and proved by circumstantial evidence." *State v. Discola*, 2018 VT 7, ¶ 24, 207 Vt. 216, 229, 184 A.3d 1177, 1187 (2018), quoting *State v. Cole*, 150 Vt. 453, 456, 554 A.2d 253, 255 (1988). The manner in which a person is shot can be circumstantial evidence of the shooter's intent. *See State v. Gibney*, 2003 VT 26, ¶ 3,

175 Vt. 180, 182, 825 A.2d 32, 36 (2003). Here, there was no dispute that Mr. Adedapo died of multiple gunshot wounds that were not self-inflicted. The evidence that Defendant was the shooter also provided circumstantial evidence that Defendant must have, and did, act intentionally. If the jury found that Defendant shot Mr. Adedapo multiple times at close range, this is circumstantial evidence that he acted with, at the very least, an intent to do great bodily harm, or a wanton disregard of the likelihood that his behavior may cause death or great bodily harm. Furthermore, there was no evidence of mistake, accident, or immediate provocation. As such, there was sufficient evidence that Defendant shot Mr. Adedapo with the requisite intent for second-degree murder.

## VII. The trial court did not abuse its discretion in denying the motion for a new trial based on new evidence.

This Court reviews the denial of a motion for a new trial pursuant to V.R.Cr.P. 33 for abuse of discretion. *State v. Bruno*, 2012 VT 79, ¶ 16, 192 Vt. 515, 523, 60 A.3d 610, 616 (2012). To be entitled to a new trial based on new evidence, a defendant must establish the following:

> (1) new evidence would probably change the result on retrial; (2) the evidence was discovered only subsequent to trial; (3) the evidence could not have been discovered earlier through the exercise of due diligence; (4) the evidence is material; and (5) the evidence is not merely cumulative or impeaching.

*Id.* at ¶ 9.

Defendant argues that the trial court abused its discretion in denying the motion for a new trial based on new evidence because the trial court improperly found that

the two primary witnesses that provided the allegedly new evidence were not credible. Defendant argues that the trial court should have credited this allegedly new evidence, and if it had, then it should have found that the allegedly new evidence would probably change the result on retrial. Defendant's argument appears to take issue with the trial court's conclusions with regard to *Bruno* element (1), and generously reading his argument, elements (4), and (5). Defendant does not appear to contest the trial court's findings that he failed to establish elements (2) and (3), and, as such, the trial court's denial of the motion should be affirmed on that basis alone.

Nevertheless, the trial court's denial of the motion for a new trial should be affirmed because of the deference given to the trial court's assessment of the allegedly new evidence. "A trial court's assessment of the credibility of both a witness who offers newly discovered testimony and the testimony itself is simply part of the evaluation of the quality of the evidence" that the trial court must undertake in a motion for a new trial based on newly discovered evidence. *Id.* at ¶ 16, quoting *State v. Charbonneau*, 2011 VT 57, ¶ 18, 190 Vt. 81, 87, 25 A.3d 553, 558. "The trial court is afforded great discretion in making factual findings because it is in the best position to assess the credibility of witnesses and the weight to be given to evidence." *State v. Young*, 2010 VT 97, ¶ 23, 189 Vt. 37, 12 A.3d 510.

Here, the trial court adequately explained why it did not find either Mr. Robidoux's and Mr. Bean's testimony credible, noting prior inconsistent sworn statements, their express bias in favor of Defendant, and their inability to provide a

consistent narrative of the incident. AV 1241. The trial court also adequately explained the limited impact Mr. Robidoux's and Mr. Bean's testimony would have had given the other eye-witness testimony presented at trial. The trial court noted that neither Mr. Robidoux or Mr. Bean saw Defendant on the street just before the shooting, that Mr. Robidoux and Mr. Bean were standing much further from the area of the shooting than Mr. Reed and Mr. Alexander, that neither Mr. Robidoux nor Mr. Bean saw the shooting or the shooter (only assumed who was the shooter based on which a person ran), neither saw a gun, nor could they identify who they thought was the shooter. AV 1241 – 1242.

Because the trial court's assessment of the credibility of the testimony is more than adequately supported by the record, and because its findings in this regard are entitled to great deference, Defendant has failed to demonstrate the trial court abused its discretion, and the denial of the motion for a new trial should be affirmed.

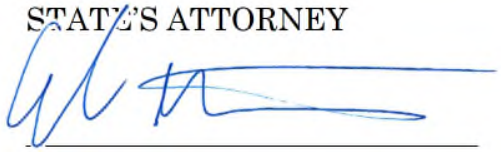
## CONCLUSION

For the reasons stated above, the State respectfully request this Court affirm Defendant's conviction for second degree murder.

Dated: 4/29/2022

STATE OF VERMONT

SARAH F. GEORGE
STATE'S ATTORNEY

by: 

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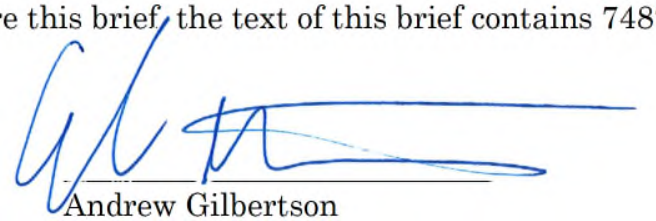
## CERTIFICATE OF COMPLIANCE

Andrew Gilbertson, Deputy State's Attorney and Counsel of Record for the Appellee, State of Vermont, certifies that this brief complies with the word count limit in V.R.A.P. 32(a)(7)(A). According to the word count of the Microsoft Word processing software used to prepare this brief, the text of this brief contains 7487 words.



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