IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

CASE NO.: 4D12-3525
L.T. CASE NO.: 562012MM000530A

DALE LEE NORMAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

APPELLEE'S ANSWER BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR ST. LUCIE COUNTY, FLORIDA CRIMINAL DIVISION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Appellant was the Defendant and Appellee was the Prosecution in the Criminal Division of the County Court of the Nineteenth Judicial Circuit, in and for St. Lucie County, Florida. In this brief, the Defendant shall be referred to as the "Appellant" and the Prosecution shall be referred to as the "State."

References to the record on appeal will be designated as follows: ("Vol." volume number, "R." page number). References to the transcripts on appeal will be designated as follows: ("Vol." volume number, "T." page number). References to the video tape on appeal will be designated as follows: ("Supp. R, State's Ex. A").

STATEMENT OF THE CASE AND FACTS

On February 19, 2012, while responding to a citizen's 911 call about Appellant's open carrying of a firearm, police observed Appellant walking northbound on U.S. 1 in Ft. Pierce, Florida, carrying his .38 caliber revolver. (Vol. 3, T. 237, 242, 245, 258, 259, 260, 268, 273, 275). The gun was in a black holster, on Appellant's hip, strapped to his right belt line, completely exposed to public view for at least five minutes. (Vol. 3, T. 248-50, 255, 258, 259, 260, 327). According to the testimony of two police officers, which was substantiated by the video of Appellant before his arrest, the gun was in "open view" in its holster and not covered by Appellant's white tight-fitting t-shirt. (Vol. 3, T. 242, 258; Supp. R., State's Ex. A). The officers also noted that both the handle and the cylinder of the gun were visible inside the gun's holster. (Vol. 3, T. 246, 247, 258-59).

At trial, Appellant testified that he received his concealed weapons license earlier on the day of his arrest. (Vol. 3, T. 250-51, 323, 324, 326). He also noted that when he left his apartment that afternoon, the holstered black gun was completely "concealed" under his t-shirt on his back right hip. (Vol. 3, T. 323, 326, 327). Appellant further explained that it took him seven or eight minutes to walk from his apartment to the location of his arrest. (Vol. 3, T. 324). Lastly,

Appellant testified that he was wearing a white, tight fitting t-shirt[1] at the time of his arrest. (Vol. 3, T. 326-27).

Appellant did not assert—and did not offer evidence—that he was "engaged in fishing, camping, or lawful hunting or going to or returning from a fishing, camping, or lawful hunting expedition" or engaged in any other exception listed under section 790.25, Florida Statutes.[2]

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[1] The defendant at trial described the t-shirt he wore that day as a "wife beater" t-shirt, a term repeated by defense counsel in his closing argument. *See also Miriam Webster Online Dictionary*, 2013 at http://www.merriam-webster.com/dictionary/wife%20beater (defining "wifebeater" as "a man's white tank top").

[2] §790.25(3), Florida Statutes, entitled "LAWFUL USES," states:

> The provisions of ss. 790.053 and 790.06 do not apply in the following instances, and, despite such sections, it is lawful for the following persons to own, possess, and lawfully use firearms and other weapons, ammunition, and supplies for lawful purposes:
> (a) Members of the Militia, National Guard, Florida State Defense Force, Army, Navy, Air Force, Marine Corps, Coast Guard, organized reserves, and other armed forces of the state and of the United States, when on duty, when training or preparing themselves for military duty, or while subject to recall or mobilization;
> (b) Citizens of this state subject to duty in the Armed Forces under s. 2, Art. X of the State Constitution, under chapters 250 and 251, and under federal laws, when on duty or when training or preparing themselves for military duty;
> (c) Persons carrying out or training for emergency management duties under chapter 252;
> (d) Sheriffs, marshals, prison or jail wardens, police officers, Florida highway patrol officers, game wardens, revenue officers, forest officials, special officers appointed under the provisions of chapter 354, and other peace and law enforcement officers and their deputies and assistants and full-time paid peace officers of other states and of

the Federal Government who are carrying out official duties while in this state;

(e) Officers or employees of the state or United States duly authorized to carry a concealed weapon;

(f) Guards or messengers of common carriers, express companies, armored car carriers, mail carriers, banks, and other financial institutions, while actually employed in and about the shipment, transportation, or delivery of any money, treasure, bullion, bonds, or other thing of value within this state;

(g) Regularly enrolled members of any organization duly authorized to purchase or receive weapons from the United States or from this state, or regularly enrolled members of clubs organized for target, skeet, or trap shooting, while at or going to or from shooting practice; or regularly enrolled members of clubs organized for modern or antique firearms collecting, while such members are at or going to or from their collectors' gun shows, conventions, or exhibits;

(h) A person engaged in fishing, camping, or lawful hunting or going to or returning from a fishing, camping, or lawful hunting expedition;

(i) A person engaged in the business of manufacturing, repairing, or dealing in firearms, or the agent or representative of any such person while engaged in the lawful course of such business;

(j) A person firing weapons for testing or target practice under safe conditions and in a safe place not prohibited by law or going to or from such place;

(k) A person firing weapons in a safe and secure indoor range for testing and target practice;

(l) A person traveling by private conveyance when the weapon is securely encased or in a public conveyance when the weapon is securely encased and not in the person's manual possession;

(m) A person while carrying a pistol unloaded and in a secure wrapper, concealed or otherwise, from the place of purchase to his or her home or place of business or to a place of repair or back to his or her home or place of business;

(n) A person possessing arms at his or her home or place of business;

(o) Investigators employed by the several public defenders of the state, while actually carrying out official duties, provided such investigators:

Appellant was charged by Information with Open Carrying of a Weapon (a firearm) in violation of section 790.053, Florida Statutes (2012). (Vol. 1, R. 1). Pretrial, Appellant filed five motions to dismiss, challenging the statute's constitutionality. (Vol. 1, R. 79-84; 85-96; 97-98; 99-101; 102-03). The county court reserved ruling on Appellant's motions and the jury found Appellant guilty. (Vol. 1, R. 71; Vol. 3, T. 207, 212). After the verdict, the county court denied Appellant's motions to dismiss, making the following written findings of fact:

> 1. On February 19, 2012, in the early afternoon hours, Defendant was observed by citizens carrying a firearm *in plain view* in a holster on his waist, while walking down a city sidewalk.
>
> 2. Defendant was duly licensed to carry a concealed firearm.

> 1. Are employed full time;
> 2. Meet the official training standards for firearms established by the Criminal Justice Standards and Training Commission as provided in s. 943.12(5) and the requirements of ss. 493.6108(1)(a) and 943.13(1)-(4); and
> 3. Are individually designated by an affidavit of consent signed by the employing public defender and filed with the clerk of the circuit court in the county in which the employing public defender resides.
>
> (p) Investigators employed by the capital collateral regional counsel, while actually carrying out official duties, provided such investigators:
> 1. Are employed full time;
> 2. Meet the official training standards for firearms as established by the Criminal Justice Standards and Training Commission as provided in s. 943.12(1) and the requirements of ss. 493.6108(1)(a) and 943.13(1)-(4); and
> 3. Are individually designated by an affidavit of consent signed by the capital collateral regional counsel and filed with the clerk of the circuit court in the county in which the investigator is headquartered.

> 3. A member of the public called 911 and officers from the Fort Pierce Police Department responded to the scene and made the same observations.
>
> 4. One responding officer videotaped a view of Defendant just before his encounter with the officers.
>
> 5. Officers arrested Defendant for a violation of 790.053.
>
> 6. At trial, *there was no credible evidence presented* that the *firearm had been concealed* before Defendant's arrest, *or that it could have been, considering his manner of dress*.

(Vol. 1, R. 116-17) (emphasis added). The county court also concluded, as to the legal issues, that:

> 1. Florida's Open Carry Law, 790.053, is constitutional in that the state may set reasonable limits and conditions on the right to bear arms, and the conditions set forth in Florida's law are reasonable.
>
> 2. The Court reads this statute in conjunction with 790.25, which sets forth specific persons, places, and activities where it is legal to "own, possess, and lawfully use" (and in some cases openly display), firearms without first obtaining any permit or license. This law specifically excludes prosecution for Open Carry violations in those instances. The court believes it is an affirmative defense on the part of any defendant prosecuted under the Open Carry law to assert that he/she fit within one of the clearly defined exceptions.
>
> 3. Although the court believes that the recent exception to the law, allowing those with concealed carry licenses to "briefly and openly display" the weapon, would be unconstitutionally vague under other fact patterns, in the case at bar it is not since *there was no credible evidence presented that this defendant at any time prior to his arrest attempted to conceal the firearm as required by the exception*, which is designed to protect those with concealed carry licenses who are carrying the weapon concealed prior to its display.

(Vol. 1, R. 116-17) (emphasis added). The county court then certified three questions of great public importance:

> 1. Is Florida's statutory scheme related to the open carry of firearms constitutional?
>
> 2. Do the exceptions to the prohibition against open carry constitute affirmative defenses to a prosecution for a charge of open carry or does the State need to prove beyond a reasonable doubt that a particular defendant is not conducting him/herself in the manner allowed?
>
> 3. Does the recent "brief and open display" exception unconstitutionally infect the Open Carry Law by its vagueness?

Thereafter, the county court orally sentenced Appellant, withholding adjudication and imposing a $300 fine, along with court costs. (Vol. 4, T. 493). The record reflects, however, that the county court did not subsequently sign a written judgment of conviction or sentence and file it with the clerk's office.

Appellant then filed his Notice of Appeal wherein he stated that he was appealing his "Judgment of Conviction and Sentence," which was "rendered . . . on August 14, 2012." However, no such order was filed with the clerk on that day or thereafter. The entirety of Appellant's appeal is thus a challenge to the county court's denial of his motion to dismiss the case based upon the alleged unconstitutionality of section790.053, Florida Statutes. (Vol. 1, R. 30; Vol. 2, R. 63).

SUMMARY OF THE ARGUMENT

The trial court correctly denied Appellant's motions to dismiss because, under precedent interpreting the Second Amendment and Article I, section 8 of the Florida Constitution, the challenged statute is constitutionally valid. The Legislature enacted section 790.053, Florida Statutes, consistent with the Legislature's authority to adopt reasonable regulations governing the manner of bearing firearms. Appellant's related overbreadth claim fails because the overbreadth doctrine is inapplicable in the Second-Amendment context and because the statute does not unconstitutionally burden any right. The law also does not violate equal protection because any legislative classification reasonably relates to a legitimate purpose. And Appellant's claim that the statute is invalid because it omits a *mens rea* element fails because none is required.

In addition, Appellant argues that the statute's exception for a "brief[] and open[] display" is unconstitutionally vague. Because competent and substantial evidence demonstrated that Appellant's weapon was openly displayed for the entire relevant time, he could not qualify for this exception under any reasonable interpretation of the language, so he lacks standing to present this vagueness challenge. In any event, the language is easily understood and far from being unconstitutionally vague.

Finally, Appellant argues that the statutory exceptions, found in a separate section, are not affirmative defenses but elements of the crime—and that the State must prove beyond reasonable doubt the inapplicability of each exception. But it is settled law that statutory exceptions in separate statutory sections do not constitute elements that the State must disprove.

STANDARD OF REVIEW

"Because a ruling on a motion to dismiss for failure to state a cause of action is an issue of law, it is reviewable on appeal by the de novo standard of review." *Bell v. Indian River Mem'l. Hosp.*, 778 So. 2d 1030, 1032 (Fla. 4th DCA 2001) (citations omitted). Likewise, the constitutional validity of a law is a legal issue subject to de novo review. *See Scott v. Williams*, 107 So. 3d 379, 384 (Fla. 2013). Finally, any factual findings made by the trial court should not be disturbed if they are supported by competent, substantial evidence. *Id.*

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION TO DISMISS, BECAUSE §790.053, FLORIDA STATUTES, IS CONSTITUTIONAL ON ITS FACE.

This Court should affirm because section 790.053, Florida Statutes, is consistent with the Legislature's authority to adopt reasonable regulations governing the manner of bearing firearms. To be sure, the United States Supreme Court has recognized that the Second Amendment right to keep and bear arms is a

fundamental right. *See McDonald v. City of Chicago, Ill.*, 130 S. Ct. 3020, 3042 (2010). But that recognition "does not imperil every law regulating firearms." *Id.* at 3047; *accord District of Columbia v. Heller*, 128 S. Ct. 2783, 2816-17 (2008) ("Like most rights, the right secured by the Second Amendment is not unlimited."). Instead, the Legislature retains the discretion to enact firearm regulations like the law at issue here. *Cf.* McDonald, 130 S. Ct. at 3047 ("It is important to keep in mind that *Heller*, while striking down a law that prohibited the possession of handguns in the home, recognized that the right to keep and bear arms is not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.") (citations omitted).

As for the Florida Constitution, the text itself expressly provides that "the manner of bearing arms may be regulated by law." Art. I, §8(a), Fla. Const. (1980). Thus, although the Florida Constitution clearly protects the right to bear arms, the Florida Supreme Court has held that "the legislature, nevertheless, is not so restricted that that body may not regulate the way in which the arms may be carried." *Davis v. State*, 146 So. 2d 892, 893 (Fla. 1962).

In enacting the regulation at issue here, however, the Florida Legislature has carefully sought to protect citizens' right to bear arms. In section 790.25(1), Florida Statutes, the Legislature enunciated this "Declaration of Policy" with

regard to the "Lawful ownership, possession, and use of firearms and other weapons:"

> The Legislature finds as a matter of public policy and fact that it is necessary to promote firearms safety and to curb and prevent the use of firearms and other weapons in crime and by incompetent persons without prohibiting the lawful use in defense of life, home, and property, and the use by United States or state military organizations, and as otherwise now authorized by law, including the right to use and own firearms for target practice and marksmanship on target practice ranges or other lawful places, and lawful hunting and other lawful purposes.

§790.25(1), Fla. Stat. (2012).

Rather than infringe the fundamental right to bear arms protected by the Second Amendment and by the Florida Constitution, the challenged law merely imposes a reasonable—and therefore constitutionally permissible—regulation of the manner of bearing firearms. Accordingly, there is no basis for this Court to overturn the Legislature's policy determination.[3]

A. Overbreadth

Appellant claims that the challenged statute is overbroad because it "prohibits the carry of firearms that are unconcealed even for those people to whom the state has issued a license to carry a concealed weapon or firearm." (Initial Br. at p. 42). But Appellant misunderstands the overbreadth doctrine.

[3] The Legislature did not restrict open carrying altogether, instead enacting many exceptions. *See* §790.25(3), Fla. Stat. (2012). Appellant has not asserted that he meets any of these exceptions.

Under the doctrine, parties to whom a statute is constitutionally applied can nonetheless challenge the statute based on its possible unconstitutional application to others. *See Granite State Outdoor Adver., Inc. v. City of Clearwater, Fla*., 351 F.3d 1112, 1116 (11th Cir. 2003). However, the party "must at least claim to *personally* suffer some harm." *See id.* (emphasis in original). The doctrine serves to protect against laws that might lead others "to refrain from constitutionally protected speech or expression." *Virginia v. Am. Booksellers Ass'n, Inc*., 484 U.S. 383, 393 (1988). The doctrine is inapplicable here.

First, the overbreadth doctrine applies only if the legislation "is susceptible of application to conduct protected by the First Amendment." *S.E. Fisheries Ass'n, Inc. v. Dep't of Nat. Resources*, 453 So. 2d 1351, 1353 (Fla. 1984) (citations omitted); *see also United States v. Salerno*, 481 U.S. 739, 745 (1987) (noting that overbreadth challenges are generally limited to the First Amendment context); *Munao v. State*, 939 So. 2d 125, 128-29 (Fla. 4th DCA 2006). Because this is a Second Amendment challenge, the doctrine does not apply. *See Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973) ("overbreadth claims, if entertained at all, have been curtailed when invoked against ordinary criminal laws that are sought to be applied to protected conduct"); *Montgomery v. State*, 69 So. 3d 1023 (Fla. 5th DCA 2011) (noting that when considering an overbreadth challenge, a court must determine whether the statute inhibits First Amendment rights, and, if so, whether

the impact on such rights is substantial; if the statute does not reach a substantial amount of constitutionally protected conduct, then the overbreadth claim fails).

After *Heller*, a number of courts have declined to import the overbreadth doctrine into the Second Amendment context. *See, e.g.*, *Kachalsky v. County of Westchester*, 701 F.3d 81, 101 (2d Cir. 2012) (refusing to consider Second Amendment overbreadth challenge because "[o]verbreadth challenges are generally limited to the First Amendment context," and even if "overbreadth analysis may apply to Second Amendment cases," it may be invoked only by plaintiffs with a valid as-applied challenge); *United States v. Decastro*, 682 F.3d 160, 169 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 838 (2013) ("There is no overbreadth argument that Decastro can make in the Second Amendment context."); *United States v. Barton*, 633 F.3d 168, 172 n.3 (3d Cir. 2011) (noting, in Second Amendment challenges, that "we do not recognize an 'overbreadth' doctrine outside the limited context of the First Amendment").

Finally, even if the doctrine were applicable in this context, the claim would fail because the challenged law, as detailed above, is a reasonable regulation and does not violate the constitutional rights of Appellant or others.

B. Equal Protection

Appellant also contends that the statute violates equal protection because it treats people differently depending upon where they are going and what they

intend to do. (Initial Br. at pgs. 44-45). But equal protection does not require that statutes apply equally and uniformly to all persons within the state, nor does it require that all persons be treated in an identical manner. *See Hendking v. Smith*, 781 F.2d 850, 851 (11th Cir. 1986) (citing *Stanton v. Stanton*, 421 U.S. 7, 14, 95 S. Ct. 1373, 1377, 43 L.Ed.2d 688 (1975)) (noting that equal protection "does not require that all persons be treated identically"). And because the law does not unconstitutionally impair any fundamental right, the classifications are subject only to minimal scrutiny:

> The rational basis or minimum scrutiny test generally employed in equal protection analysis requires only that a statute bear some reasonable relationship to a legitimate state purpose. *That the statute may result incidentally in some inequality or that it is not drawn with mathematical precision will not result in its invalidity.* Rather, the statutory classification *to be held unconstitutionally violative* of the equal protection clause under this test *must cause different treatments so disparate as relates to the difference in classification so as to be wholly arbitrary*.

McElrath v. Burley, 707 So. 2d 836, 839-40 (Fla. 1st DCA 1998) (emphasis added).

Here, the statutory exceptions in sections 790.053(1) and 790.25(3), Florida Statutes, are not arbitrary. For example, the Legislature could rationally conclude that a person hunting or target shooting (or returning from those activities) presents different considerations regarding open possession than, for example, a person

openly carrying a weapon at other times. Accordingly, there is no Equal Protection violation.

C. Failure to Provide a Mens Rea Requirement

Last, Appellant contends that because section 790.053, Florida Statutes, imposes an affirmative duty to act – i.e., conceal a weapon at all times (other than briefly) – and curtails the Second Amendment right to bear arms, the Legislature cannot proscribe this conduct without requiring a *mens rea* element. (Initial Br. at p. 46). "At common law, all crimes consisted of an act or omission coupled with a requisite mental intent or *mens rea*. Notwithstanding this common law requirement, it was long ago recognized that the legislature has the power to dispense with the element of intent and thereby punish particular acts without regard to mental attitude of the offender." *State v. Oxx*, 417 So. 2d 287, 288-89 (Fla. 5th DCA 1982); *accord State v. Adkins*, 96 So. 3d 412, 417 (Fla. 2012) ("Given the broad authority of the legislative branch to define the elements of crimes, the requirements of due process ordinarily do not preclude the creation of offenses which lack a guilty knowledge element."). Both the United States Supreme Court and the Florida Supreme Court "have repeatedly recognized that the legislative branch has broad discretion to omit a mens rea element from a criminal offense." *Adkins*, 96 So. 3d at 418. For example, the United States Supreme Court upheld a statute criminalizing the possession of unregistered

weapons, even though that law did not expressly include a mens rea element. *United States v. Freed*, 401 U.S. 601, 607 (1971). The Court explained that the law was "a regulatory measure in the interest of the public safety, which may well be premised on the theory that one would hardly be surprised to learn that possession of hand grenades is not an innocent act." *Id.* at 609.

Furthermore, Appellant mischaracterizes the law when he argues it imposes an affirmative duty to act and then penalizes the failure to comply. *Cf. Oxx*, 417 So. 2d at 290. Section 790.053, Florida Statutes, *precludes* conduct—openly carrying a firearm in public view. It does not impose a duty to carry or conceal a weapon.

Appellant's various facial constitutional challenges to section 790.053, Florida Statutes, lack merit and he therefore has failed to meet his burden. This Court must uphold the trial court's denial of his claim.

II. THE TRIAL COURT PROPERLY DENIED APPELLANT'S CLAIM AND FOUND, AS APPLIED TO HIM, THAT THE EXCEPTION WITHIN §790.053, FLORIDA STATUTES, REGARDING "TO BRIEFLY AND OPENLY DISPLAY," IS NOT UNCONSTITUTIONALLY VAGUE.

Appellant was charged with violating section790.053, Florida Statutes (2012), "Open carrying of weapons." It states:

> (1) Except as otherwise provided by law in subsection (2), it is unlawful for any person to openly carry on or about his or her person any firearm or electric weapon or device. *It is not a violation of this section for a person licensed to carry a concealed firearm as provided*

> *in s. 790.06(1), and who is lawfully carrying a firearm in a concealed manner, to briefly and openly display the firearm to the ordinary sight of another person, unless the firearm is intentionally displayed in an angry or threatening manner, not in necessary self-defense.*
>
> (2) A person may openly carry, for purposes of lawful self-defense:
>
> (a) A self-defense chemical spray.
>
> (b) A nonlethal stun gun or dart-firing stun gun or other nonlethal electric weapon or device that is designed solely for defensive purposes.
>
> (3) Any person violating this section commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

§790.053, Fla. Stat. (2012) (emphasis added). Appellant argues that the exception to the open carry statute emphasized above is unconstitutionally vague for two reasons: first, one cannot discern from this statute if a holstered gun would be considered a violation of the "open carry statute;" and second, the term "brief" is not sufficiently defined. The trial court refused to consider the merits of his claim because Appellant failed to present any evidence that the exception would ever have applied to him. Because the trial court's factual findings are supported by competent, substantial evidence, its legal conclusion on Appellant's lack of standing was correct.

Under the law, Appellant is precluded from bringing an "as applied" constitutional challenge because the factual findings made below demonstrate that Appellant **never** concealed his weapon during the relevant period. Because Appellant openly displayed his firearm at all times, the exception he seeks to

challenge does not apply to him, and therefore, he lacks standing to bring this claim. *See Shetler v. State*, 681 So. 2d 730, 732 (Fla. 2d DCA 1996); *see also Sieniarecki v. State*, 756 So. 2d 68, 75 (Fla. 2000); *McKenney v. State*, 388 So. 2d 1232, 1233 (Fla. 1980); *Broadrick*, 413 U.S. at 610 (noting that it is well settled "that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court").

The record evidence presented through witnesses and video unequivocally demonstrated that Appellant was walking down the street with a holstered gun strapped to his hip in plain view at all times. This is not a case where the defendant was carrying a permitted *concealed* weapon and the weapon was then briefly displayed, in such a manner that would constitute an exception to the open carry statute. To the contrary, the trial court found, that "there was no credible evidence presented that [] [Appellant] *at any time* prior to his arrest attempted to conceal the firearm. . . ." (Vol. 1, R. 117) (emphasis added).

This finding was supported by competent, substantial evidence. Two officers testified that they saw Appellant carrying a firearm in open view of the public on his right side hip as he was walking down U.S. 1. (Vol. 3, T. 242, 248-50, 258-59). These facts were corroborated by video evidence, along with the fact that Appellant's actions so alarmed a concerned citizen, a 911 call was made,

prompting the police to investigate. (*See* Supp. R, State's Ex. A). In addition, both officers confirmed that they were certain Appellant was carrying a gun because, when they observed Appellant walking on the side of the road, they could actually see the handle and the cylinder of the gun, hanging outside of the holster, which was strapped to Appellant's beltline. (Vol. 3, T. 243, 246-47, 258-59, 260). Thus, to the extent Appellant claims his holster "concealed" his gun, the evidence proved otherwise.[4]

Accordingly, even if "briefly and openly displayed" could be unconstitutionally vague in some hypothetical case, the exception was plainly inapplicable here. *See Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (noting that the court will look at the ordinance only as it was applied to the particular person challenging its constitutionality); *State v. Ginn*, 660 So. 2d 1118, 1120 (Fla. 4th DCA 1995) ("It is well established in Florida that a person to whom a statute can be constitutionally applied may not challenge the statute on the grounds that it may result in an impermissible application to someone else."). Appellant's holstered

[4] At trial, Appellant testified that he left his apartment with his shirt covering the gun and its holster. However, the State submitted competent, substantial evidence—and Appellant confirmed on the stand—that Appellant was wearing a white, tight-fitting t-shirt and, based on the size and the black color of the gun and its holster, the gun was not, and could not have been "concealed" within the meaning of the statute, even if Appellant had initially covered both by his t-shirt when he left his house. In any event, the trial court's finding that the weapon was not concealed was not supported by competent, substantial evidence.

gun was never concealed, so he does not fit into the exception he attempts to challenge.

But even if Appellant had standing to challenge this language, his claim would fail because the language is not unconstitutionally vague.

> The test of a statute insofar as vagueness is concerned is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practice.... "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

Alexander v. State, 477 So. 2d 557, 560 (Fla. 1985) (quoting *Zachary v. State*, 269 So. 2d 669, 670 (Fla. 1972) (citations and footnote omitted). Here, the language conveys a clear and definite meaning, so it is not unconstitutionally vague. Although the terms "openly" and "briefly" are not statutorily defined, they are commonly understood words with well known meanings. The plain and ordinary meaning of the terms "briefly" and "openly," as specified in the dictionary, provide a person of ordinary intelligence with fair notice of what conduct is prohibited. *See Chesebrough v. State*, 255 So. 2d 675, 678 (Fla. 1971) ("It is well settled that a criminal statute is sufficiently certain, though it may use general terms, if the offense is so defined as to convey to a person of ordinary understanding and

adequate description of the evil intended to be prohibited.").[5] Also, a person of ordinary understanding can easily appreciate that "openly" is the opposite of "concealed," i.e., carrying "in such a manner as to [NOT] conceal the firearm from the ordinary sight of another person." *See* §790.001(2), Fla. Stat. (2012) (defining "concealed firearm").

Ultimately, the trial court's denial of Appellant's motions to dismiss based on an as applied challenge to the statute was proper. Appellant does not have standing to bring this challenge. In the alternative, the plain and ordinary meaning of the terms, as found in the dictionary, the definition in section790.001(2), Florida Statutes, and case law, all put a person of ordinary intelligence on notice of what conduct is prohibited under the statute, rendering section790.053, Florida Statutes, not unconstitutionally vague.

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[5] Specifically, "briefly" is defined as "for a short duration." *See* Dictionary.com Unabridged, based on *Random House Dictionary*, 2013 at: http://dictionary.reference.com/browse/briefly; *see also L.B. v. State*, 700 So. 2d 370, 371 (Fla. 1997) (looking to the dictionary to ascertain the plain and ordinary meaning of "common pocketknife" in statute defining what constitutes a weapon which may not be possessed on school property). Likewise, "openly" is defined as "relatively free of obstructions to sight." *See* Dictionary.com Unabridged, based on *Random House Dictionary*, 2013 at:http://dictionary.reference.com/browse/openly.

III. THE TRIAL COURT DETERMINED CORRECTLY THAT THE EXCEPTIONS LISTED WITHIN §790.25(3), FLORIDA STATUTES, ARE AFFIRMATIVE DEFENSES RATHER THAN ELEMENTS OF THE OFFENSE.

Appellant next contends that the exceptions in sections 790.25, Florida Statutes, are elements that the State must prove to support a violation of section 790.053, Florida Statutes. But these exceptions are affirmative defenses that must initially be raised by and supported with evidence from the defendant, rather than negated in the first instance by the State.

Determining whether an exception is an element of the crime to be negated by the State or is in the nature of a defense that requires a defendant to come forward with evidence is an issue of law subject to *de novo* review. *See Hodge v. State*, 866 So. 2d 1270, 1271-72 (Fla. 4th DCA 2004). The law on this issue is settled:

> If the exception appears in the enacting clause, the burden lies with the State to prove that the defendant is not within the exception; but, *if the exception is contained in a subsequent* clause or *statute, that is a matter of defense requiring the defendant to put forth some evidence in support thereof.* Only then does the burden shift to the State, requiring it to disprove the defense beyond a reasonable doubt.

Id. at 1272 (emphasis added); *see also Wright v. State*, 442 So. 2d 1058, 1059 (Fla. 1st DCA 1983) (citing *Baeumel v. State*, 7 So. 371, 372 (Fla. 1890)) ("if there is an exception in the enacting clause, the party pleading must show that his adversary is not within the exception; but, *if there be an exception in a subsequent* clause, *or*

subsequent statute, *that is a matter of defense*, and is to be shown by the other party.") (emphasis added).

Here, the exceptions listed within section790.25(3), Florida Statutes, are not in the enacting clause of section 790.053, Florida Statutes, but are contained in a *separate statute altogether*. This resolves the issue, and any exception is a defense that must be initially supported by evidence proffered by the defendant. *See Hodge*, 866 So. 2d at 1272; *Mackey v. State*, 83 So. 3d 942, 946-47 (Fla. 3d DCA 2012); *Baeumel*, 7 So. at 372. To the extent Appellant wished to rely upon an exception, it was his obligation to raise the exception and support it with evidence. But, as noted above, Appellant at trial neither asserted nor proffered evidence to show that his conduct fell within any of the statutory exceptions.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited herein, Appellee respectfully requests this Court to uphold the trial court's order dismissing Appellant's motions to dismiss the case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished this 9th day of October, 2013, via electronic copy to: Eric Friday, Esq., at efriday@fletcherandphillips.com and familylaw@fletcherandphillips.com.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

s/Cynthia L. Comras
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