EFiled: Feb 22 2023 09:00AM EST
Filing ID 69192724
Case Number 281,2022

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAQUAN S. BROOKS,	§	
	§	No. 281, 2022
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	
	§	
STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellee.	§	

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF DELAWARE

STATE'S ANSWERING BRIEF

Julie (Jo) M. Donoghue (# 3724)
Deputy Attorney General
Delaware Department of Justice
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801
(302) 577-8500

Date: February 22, 2023

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases **Page(s)**

STATUTES AND RULES

NATURE OF PROCEEDINGS

On May 3, 2021, a Kent County grand jury indicted Jaquan S. Brooks ("Brooks") for Carrying a Concealed Deadly Weapon ("CCDW"), driving while suspended or revoked, and failing to signal an intention to turn while driving a motor vehicle.[1]

On April 6, 2022, Brooks was found guilty of all charges after a two-day trial.[2] On July 13, 2022, the Superior Court sentenced Brooks for CCDW to 8 years at Level V incarceration, suspended for 2 years at Level III, and ordered him to pay fines, surcharges, and fees for the two traffic violations.[3]

Brooks timely appealed and filed his opening brief.[4] This is the State's answering brief.

---

[1] A1 at D.I. 2; "D.I." refers to docket item numbers on the Superior Court Criminal Docket in *State v. Brooks*, I.D. No. 2008000887.

[2] A1 at D.I. 3; A4 at D.I. 25.

[3] A4 at D.I. 29; Sentencing Order (Ex. A to Opening Br.).

[4] A4 at D.I. 30.

SUMMARY OF ARGUMENT

I. Brooks' argument is **DENIED**. The State did not engage in prosecutorial misconduct because the prosecutor did not misstate the law regarding CCDW during closing argument. Rather, the prosecutor permissibly referenced the definition of a concealed weapon, stated how the facts of this case met that definition, and argued the State had shown Brooks violated the law beyond a reasonable doubt. In closing, the prosecutor commented that Brooks was not "open carrying," a legitimate inference that the jury could draw from the facts. Moreover, under plain error review, Brooks cannot show the prosecutor's allegedly improper comments were so prejudicial that they affected the outcome of his trial. The Superior Court instructed the jury on the correct law for CCDW after both parties' closing arguments. In addition, Brooks cannot show that he was deprived of his due process rights or a fair trial**.** Finally, Brooks' statement that "reversal is required" ignores precedent that prosecutorial misconduct alone does not require a new trial. Instead, in cases of alleged prosecutorial misconduct, the due process analysis focuses on the fairness of the trial rather than on the misconduct of a prosecutor.

STATEMENT OF FACTS

On August 2, 2022, Delaware State Police Trooper Trevor Pendleton, while patrolling Route 13,[5] received a dispatch about a Mazda6 with a temporary tag driving on the highway in an aggressive manner.[6] Trooper Pendleton then observed a green Mazda6 with a temporary tag driving northbound on Route 13, approaching the POW-MIA Parkway.[7] He saw the vehicle change lanes without signaling and turn onto the POW-MIA Parkway without signaling again.[8] He then activated his emergency lights and conducted a traffic stop.[9]

Whenever Trooper Pendleton makes a traffic stop, he approaches the vehicle and requests the driver's license, registration, and insurance.[10] During every traffic stop he is vigilant and looks for weapons and anything that could pose a risk to him or others in the area.[11] On that day, Trooper Pendleton approached the Mazda6 and initially did not observe anything he considered to be a risk.[12]

---

[5] A17-18; A23.

[6] A23-24.

[7] A23-24.

[8] A25-26; A33.

[9] A26; A28.

[10] A27.

[11] A20.

[12] A27.

Trooper Pendleton identified Jaquan Brooks as the driver of the vehicle. Brooks handed Trooper Pendleton an identification card instead of a driver's license.[13] When Brooks reached towards the passenger side of the vehicle to retrieve his registration and insurance, Trooper Pendleton saw the handle of a firearm in Brooks' left pocket.[14] Trooper Pendleton drew his firearm, called for backup, and held Brooks and his passenger until other officers arrived.[15] While waiting, Trooper Pendleton asked Brooks if he had a license or a permit to carry a concealed weapon.[16] Initially, Brooks said he had one, but then he admitted that he did not.[17] Once other units arrived, the officers handcuffed Brooks.[18] Trooper Pendleton removed a black handgun from Brooks' left pants pocket and secured the weapon as evidence.[19] Trooper Pendleton also checked the status of Brooks' driver's license and discovered that it had been suspended.[20] Trooper Pendleton arrested Brooks and placed him in the back of his patrol vehicle.[21]

---

[13] A28; A30-31.

[14] A28; A30-31.

[15] A28-29.

[16] A29.

[17] A29.

[18] A29.

[19] A29-30.

[20] A42-43.

[21] A30.

ARGUMENT

I. THE PROSECUTOR'S CLOSING REMARKS WERE NOT A MISSTATEMENT OF LAW, NOR DID THEY QUALIFY AS PLAIN ERROR.

Question Presented

Whether the prosecutor's remarks made during closing that Brooks was not "open carrying" amounted to plain error.

Scope of Review

This Court reviews claims of prosecutorial misconduct for plain error when defense counsel fails to raise a timely and pertinent objection below.[22] It first reviews the record *de novo* to determine whether the conduct was improper or prejudicial.[23] If no misconduct occurred, then the analysis ends.[24]

If this Court finds misconduct occurred, it considers whether the error is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of

---

[22] *Baker v. State*, 906 A.2d 139, 148, 151 (Del. 2006); *Saavedra v. State*, 225 A.3d 364, 372 (Del. 2020); Supr. Ct. R. 8. This Court has clarified the standard of review for prosecutorial misconduct: "For the sake of maintaining clarity in our law, we think it prudent to abandon the '*sua sponte* intervention' standard entirely in favor of the *Wainwright* standard." *Baker*, 906 A.2d at 150-151.

[23] *Baker*, 906 A.2d at 150; *Saavedra*, 225 A.3d at 372; *Kurzmann v. State*, 903 A.2d 702, 709 (Del. 2006); *Flonnory v. State*, 893 A.2d 507, 538 (Del. 2006).

[24] *Seeney v. State*, 2022 WL 1485484, at *3 (Del. Oct. 20, 2022); *Baker*, 906 A.2d at 150.

the trial process" (the "*Wainwright* standard").[25] This review is limited to material defects that (1) "are apparent on the face of the record;" (2) "are basic, serious, and fundamental in their character;" and (3) "clearly deprive an accused of a substantial right" or "clearly show manifest injustice."[26] To qualify as plain error, "the alleged error must affect substantial rights, generally meaning that it must have affected the outcome of [the defendant's] trial."[27] The burden of persuasion lies on the defendant to demonstrate a forfeited error is prejudicial.[28]

If reversal is not compelled under the *Wainwright* standard, this Court considers whether reversal is required nonetheless because the misconduct entails a "persistent pattern of prosecutorial misconduct" over different trials such that failure to reverse would comprise the integrity of the judicial process.[29]

---

[25] *Id.* (*citing Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986), *cert. denied*, 479 U.S. 869 (1986)).

[26] *Id.*

[27] *Brown v. State*, 897 A.2d 748, 753 (Del. 2006). *See United States v. Olano*, 507 U.S. 725, 732-34 (1993); *Wainwright*, 504 A.2d at 1100; *Floray v. State*, 720 A.2d 1132, 1137 (Del. 1998).

[28] *Brown*, 897 A.2d at 753 n.22; *Olano*, 507 U.S. at 734 (federal plain error rule). *See also Brown v. State*, 729 A.2d 259, 265 (Del. 1999); *Stevenson v. State*, 709 A.2d 619, 633 (Del. 1998).

[29] *Saavedra*, 225 A.3d at 373; *Hunter v. State*, 815 A.2d 730 (Del. 2002).

Merits of Argument

Brooks claims that after his counsel discussed in opening statements Delaware law about "open carrying" and concealment as an element of CCDW,[30] the prosecutor engaged in misconduct by saying in rebuttal, "It's certainly not open carrying."[31] Brooks alleges the prosecutor's statement equated to misconduct because it misstated the law,[32] citing *Money v. State*.[33] He argues the Superior Court failed to cure this alleged misstatement of law *sua sponte*, causing the jury to believe the prosecutor had advised them correctly.[34] Brooks contends that "[r]eversal is required" because the Superior Court's failure to give appropriate instructions to the jury "undermined the jury's ability to intelligently perform its duty in returning a verdict."[35] Finally, Brooks asserts that the misstatement made by the prosecutor "was likely to influence the jury's verdict" and denied him a fair trial.[36] Brooks' arguments are unavailing.

---

[30] A15-16.

[31] Opening Br. at 6; Brooks argues that the prosecutor allegedly misstated the law in rebuttal argument, but the prosecutor made the statements only in his closing.

[32] Opening Br. at 6.

[33] 957 A.2d 2 (Del. 2008).

[34] Opening Br. at 6.

[35] Opening Br. at 7 (*citing Sirmans v. Penn*, 588 A.2d 1103, 1104 (Del. 1991)).

[36] Opening Br. at 7.

Brooks fails to establish prosecutorial misconduct here—let alone how this alleged misconduct qualified as a fundamental defect or prejudiced his trial.[37] In closing, the prosecutor recited definitions of legal terms included in the jury instructions, such as a "concealed" weapon. He referenced the evidence and the law to argue Brooks concealed a firearm in his pocket. Then he urged the jury to find Brooks guilty of CCDW based the logical conclusion drawn from the legal definitions and the evidence. His comments did not constitute prosecutorial misconduct. But even if they did equate to misconduct, they did not clearly deprive Brooks of any substantial rights. Brooks has failed to show how the alleged error affected the outcome of his trial.

A. No Prosecutorial Misconduct Occurred Here.

It is improper for counsel to make an erroneous statement of law.[38] However, "prosecutors are allowed to 'comment on evidence and the reasonable inferences therefrom,' provided they stay within the bounds of 'the facts of the case' and do not

[37] *Kurzmann*, 903 A.2d at 710 ("Because prosecutorial misconduct claims are very fact specific and sensitive, in the future, an appellant alleging improper prosecutorial comment in any context should quote in his opening brief the entire allegedly improper statement, specifically indicate the objectionable portions of that statement, and append to the brief all relevant portions of the transcript where the 'misconduct' can be confirmed.").

[38] *Spence v. State*, 129 A.3d 212, 223 (Del. 2015) ("The prosecutor may neither misstate the law nor express his or her personal opinion on the merits of the case or the credibility of witnesses."); *Shively v. Klein*, 551 A.2d 41, 44-45 (Del. 1988).

'misstate the evidence or mislead the jury as to the inferences it may draw.'"[39] Here, the prosecutor did not misstate the law for CCDW, nor did he make the allegedly erroneous statement in rebuttal as claimed by Brooks.[40] Rather, in his closing, the prosecutor told the jury that the judge would instruct it on the law that applied.[41] He referenced a portion of the jury instructions about what qualifies as a "concealed" deadly weapon.[42] Then he made an argument based on the evidence:

> You've seen all the evidence. You saw the failures to signal. You saw the evidence of the concealed firearm. You heard the testimony. You have heard from Trooper Pendleton. You've also heard defendant's statement on the recording. So his admission that he had no license to carry a concealed deadly weapon. That was basically what happened on August 2, 2020. An ordinary traffic violation. Failure to signal, driving with a suspended license. And then the more serious offense, knowingly carrying a firearm that was concealed. . . .
>
> [A]nd I'll show you from the instructions. So it says that a deadly weapon is concealed if it is located on or about the person carrying it so as not to be visible to an individual who came close enough to see it by ordinary observation. So when Trooper Pendleton came up to him, that's an ordinary observation. And standing right there he couldn't see it. He couldn't see it because it was in his pocket. He couldn't see it because his arm was covering it. That's sufficient. It's certainly not open carrying.[43]

---

[39] *Trala v. State*, 244 A.3d 989, 1000 (Del. 2020); *Escalera v. State*, 2018 WL 2406009, at *2 (Del. May 25, 2018) (*citing Daniels v. State*, 859 A.2d 1008, 1011 (Del. 2004) (*quoting Sexton v. State*, 397 A.2d 540, 545 (Del. 1979)).

[40] A54-56; Opening Br. at 6.

[41] A55.

[42] A55.

[43] A54-55.

This first reference to "open carrying" in the prosecutor's closing referenced Trooper Pendleton's uncontroverted observation that he could not initially see the firearm.[44] Despite his training and experience, the Trooper could not see it until Brooks shifted his positioning in the car.[45] The prosecutor explained, based on the facts and the law, that Brooks' actions did not constitute "open carrying;" rather, Brooks concealed the weapon in his pocket.[46]

Later, after referencing the jury instructions for a "concealed" weapon, the prosecutor highlighted the evidence and again argued Brooks was not "open carrying."

> So considering all the evidence, the State submits that you can look at the evidence, look at the fact that Trooper Pendleton is specially trained in conducting these traffic stops; that he's looking out for firearms; that he was in a position where he should have been able to see it if the defendant was open carrying. But the defendant wasn't open carrying.[47]

---

[44] A55. *See, e.g.*, *Ward v. State*, 2020 WL 5785338, at *4 (Del. Sept. 28, 2020) ("The prosecutor's alleged vouching [for complaining witness's credibility in sexual abuse case], if it was vouching, does not satisfy the demanding plain error standard," where the prosecutor had commented that, "[t]his case isn't definitely invented by [A.M.]."; "This is a single statement in the context of what is otherwise an unobjectionable argument concerning A.M.'s credibility.").

[45] A19; 20; A27-28.

[46] *See Morgan v. State*, 922 A.2d 395, 402–3 (Del. 2007) ("Closing statements are the opportunity for the prosecutor to argue to the jury what the State has established, based upon the evidence that was admitted during trial. Proper analogies that are based upon common knowledge have long been recognized as a proper form of effective and persuasive oral advocacy.").

[47] A56.

The prosecutor continued to reference the evidence and argued Brooks was carrying a concealed weapon beyond a reasonable doubt:

> He had the firearm in his pocket. It wasn't in a holster at his side. It wasn't sitting out on the front seat of the car. It was in his pocket covered with his arm. So that is sufficient, the State submits, for you to find beyond a reasonable doubt that the defendant was carrying concealed.[48]

In the context of his closing, the prosecutor used "open carrying" in these arguments to characterize the evidence based on the law.

Brooks did not object. Rather, he focused on the alleged confusion about the law and the Trooper's testimony about whether the firearm was concealed.[49] Brooks noted that on first approach, the Trooper did not see the firearm, "[s]o it's concealed...."[50] Brooks pointed out that on cross examination, the Trooper also said he could not see, upon first approach, different parts of Brooks' car.[51] Brooks argued the law was confusing[52] and urged the jurors to find him not guilty beyond a reasonable doubt.[53] At no time, however, did Brooks object to the prosecutor's

---

[48] A56.

[49] A58 ("Do you see the confusion here? The State argues that is it was concealed upon the first approach of the police officer.").

[50] A58.

[51] A58-61.

[52] A59 ("Do you see the problem in the law as you're going to read it in this instruction and how it absolutely applies to this case?").

[53] A62.

comments about how he was not "open carrying." Nor has Brooks shown how the prosecutor's statements were material defects apparent on the face of the record and basic, serious, and fundamental in character.[54] Accordingly, Brooks has not met the clear error standard, and his appeal must fail.[55]

The prosecutor's statements that Brooks was not "open carrying" also qualify as legitimate inferences drawn from the facts and not a misstate of the law. "In a criminal case, the State has the burden to prove to the jury's satisfaction that the defendant committed the crime beyond a reasonable doubt."[56] To meet this burden, the State cannot intentionally "misstate the evidence or mislead the jury as to the inferences it may draw."[57] But, the prosecution can argue "all legitimate inferences that follow from the evidence."[58] "The inferences, however, must flow from the

---

[54] *Seeney*, 2022 WL 1485484, at *3; *Baker*, 906 A.2d at 150; *Wainwright*, 504 A.2d at 1100.

[55] *See State v. McGee*, 848 S.W.2d 512, 513-14 (Mo. Ct. App. 1993) ("Relief should rarely be granted on assertion of plain error to matters contained in closing argument, because trial strategy looms as an important consideration and, in the absence of the specific request for relief, the trial court's options are narrowed to uninvited interferences with summation and a corresponding increase of error by such intervention.").

[56] *Hughes v. State*, 437 A.2d 559, 567 (Del. 1981).

[57] *Id.* at 567.

[58] *Seeney*, 2022 WL 11485484, at *3; *Burns v. State*, 76 A.3d 780, 789 (Del. 2013); *Kirkley v. State*, 41 A.3d 372, 377 (Del. 2012); *Daniels*, 859 A.2d at 1011 (*quoting Hooks v. State*, 416 A.2d 189, 204 (Del. 1980)); *Hughes*, 437 A.2d at 570. *See also Hooks*, 416 A.2d at 204 ("The prosecutor in his final summation should not be confined to a repetition of the evidence presented at trial.").

evidence presented."[59] Here, the prosecutor's arguments in closing flowed directly from the record evidence and the jury instructions and did not qualify as prosecutorial misconduct.[60]

The prosecutor properly recited the law and the evidence, then asked the jury to reasonably infer from the facts that Brooks knowingly had concealed the firearm in his pocket. First, the prosecutor talked about the law on CCDW in the jury instructions.[61] He explained that a deadly weapon is concealed if it is located on or about a person in a way that would not be visible to an individual who came close enough to see it by ordinary observation.[62] Next, he explained that when Trooper Pendleton approached Brooks, "that's an ordinary observation."[63] Trooper Pendleton stood next to Brooks while Brooks sat in a car, but the Trooper could not see the firearm initially.[64] If the firearm was not visible from a person standing next to Brooks—a person who was trained to seek firearms during traffic stops[65]—a

---

[59] *Burns*, 76 A.3d at 789 (citations omitted).

[60] *See, e.g.*, *Boyde v. California*, 494 U.S. 370, 384 (1990) ("[A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence . . . and are likely viewed as the statements of advocates. . . .").

[61] A55.

[62] A55.

[63] A55.

[64] A55.

[65] A19.

reasonable juror could conclude that the firearm was concealed. The prosecutor then urged the jury to conclude that Brooks had knowingly concealed the firearm by carrying it in his left pants pocket and covering it with his arm.[66] This conduct was permissible because the prosecutor encouraged the jury to infer Brooks was guilty based on the evidence.

"The Court will not find a plain error" where a prosecutor "suggest[ed] a logical inference from the evidence presented at trial" and did not imply "awareness of other information outside the record."[67] The prosecutor in this case did not imply that he knew of any information outside the record, nor did he misstate the law. He simply encouraged the jury to logically conclude Brooks was guilty based on the facts he presented to them. In closing a prosecutor "is allowed and expected to explain all the legitimate inferences of the [defendant's] guilt that flow from [the] evidence."[68]

---

[66] A29; A55.

[67] *White v. State*, 258 A.3d 147, 160 (Del. 2021); *Trala*, 244 A.3d at 999 (*citing Derose v. State*, 840 A.2d 615, 621 (Del. 2003); *Booze v. State*, 919 A.2d 561, 2007 WL 445969, at *4 (Del. Feb. 13, 2007)).

[68] *Benson v. State*, 105 A.3d 979, 984 (Del. 2014) (*quoting Hooks*, 416 A.2d at 204; *State v. Mayberry*, 245 A.2d 481 (N.J. 1968), *cert. denied*, 393 U.S. 1043 (1969)). *See State v. Kent*, 2019 WL 4723823, at *5 (Del. Sept. 25, 2019) (finding a prosecutor is allowed to explain legitimate inferences that can be drawn from the evidence and is not confined to repeat the evidence that was presented at trial).

Brooks contends this Court should be guided by *Money v. State*.[69] Not so. In *Money*, the prosecutor misstated the law about lesser included offenses during his closing arguments.[70] Defense counsel did not object or request a curative instruction.[71] The trial court judge, *sua sponte*, admonished the prosecutor, but failed to issue a curative instruction or order a retraction before the jury.[72] On appeal, this Court found no plain error and affirmed the decision.[73] It reasoned that statements made by counsel in closing are argument, not factual evidence or legal pronouncements.[74] Even though the prosecutor misstated the law, "that error does not necessarily undermine the jury's ability to perform its duty in returning a verdict."[75] This Court expressed confidence that the jury could follow the judge's

---

[69] Opening Br. at 6; 2008 WL 3892777 (Del. Aug. 22, 2008).

[70] *Money*, 2008 WL 3892777, at *1. Notably, the defendant in that case did not assert that the prosecutor's statement was prosecutorial misconduct, and this Court did not see anything in the record to indicate this qualified as misconduct. *Id.*, at *2 n.9.

[71] *Id.*, at *1.

[72] *Id.*

[73] *Id.*

[74] *Id.*, at *2; *see Taylor v. State*, 777 A.2d 759, 766 n. 23 (Del. 2001) ("Arguments made by counsel during opening statements and summation are not evidence and thus cannot be said to raise an affirmative defense."); s*ee also Mills v. State*, 2007 WL 4245464, at *3 (Del. Dec. 3, 2007) ("A prosecutor is not only an advocate, but also a 'minister of justice,' and must therefore avoid improper suggestions, insinuations, and assertions of personal knowledge.").

[75] *Money*, 2008 WL 3892777, at *2.

clear and correct final instructions and concluded that the jury "intelligently perform[ed] its duty in returning a verdict."[76]

Here, the prosecutor cited record evidence to support a finding that Brooks was guilty beyond a reasonable doubt.[77] He also couched his comments with the reminder that the jury had "to be left firmly convinced of the defendant's guilt."[78] And, the judge instructed the jury that after presenting all of the evidence, both parties' attorneys would make closing arguments; however, "[c]losing arguments are not evidence."[79]

After closing arguments, the judge instructed the jury that "what an attorney states in opening or closing argument is not evidence."[80] The judge stressed that "[a]rguments are merely made to assist you in organizing the evidence and to suggest the logical conclusion that may be reached from the evidence presented."[81] The judge also told the jury she would instruct it on the applicable principles of law

---

[76] *Id*., at *3 (*citing Sirmans*, 588 A.2d at 1104).

[77] A55-56.

[78] A56.

[79] B5; B28.

[80] B28 ("An attorney may argue all reasonable inferences from evidence in the record; however, what an attorney states in opening or closing argument is not evidence.").

[81] B28.

governing the case—which she did.[82] Importantly, the judge said, "It is your duty to determine the facts and to determine them only from the evidence presented in this case. You are to apply the law to the facts and in this way decide the case."[83] Between the prosecutor's reminder that the evidence satisfied the State's burden of proof and the judge's clear instructions, any alleged prejudicial impact dissipated and allowed the jury to perform its duty intelligently.[84]

Brooks also relies on *Hooks v. State*[85] to argue misstatements by a prosecutor can equate to plain error even in the absence of an objection.[86] But *Hooks* upheld the trial court's decision to deny a motion for a mistrial despite finding instances of prosecutorial misconduct during closing.[87] There, this Court heavily weighed the length of the closing, the force of other arguments, the strength of the evidence, and the trial court's curative jury instructions.[88] Those instructions emphasized the jury's duty to determine the facts, apply the law to the facts, and reach a verdict

---

[82] B15-32.

[83] B15-16.

[84] *See White*, 258 A.3d at 158 (finding no misconduct where prosecutor reminded jury of the evidence that allegedly proved defendant's guilt, repeated that the State had the burden of proof, and jury instructions stated the State had burden of proof for each element of the charged crime).

[85] 416 A.2d 189, 204 (Del. 1980).

[86] Opening Br. at 6.

[87] *Hooks*, 416 A.2d at 208.

[88] *Id.* at 207.

based on the evidence and on no other considerations.[89] And, this Court stressed repeatedly that the allegedly improper comments had to be judged on whether they prejudiced the defendants' right to a fair trial.[90]

Similarly, in this case the prosecutor's closing was brief.[91] Brooks argued the law was confusing, he did not knowingly possess a concealed deadly weapon, and reasonable doubt existed to find him not guilty.[92] The evidence against Brooks was strong—the testimony of Trooper Pendleton that he could not see the firearm until Brooks leaned across his car[93] and the recordings/MVRs showing Brooks' actions and his conversation with the Trooper,[94] including Brooks' admission that he did not have a permit to carry a concealed weapon.[95] And, the trial court gave detailed jury instructions about the charges against Brooks and the elements of CCDW as well as the State's burden of proof.[96] Moreover, the instructions clarified that the jury's duty was to determine the facts only from the evidence presented, "apply the law to the

---

[89] *Id.* at 208.

[90] *Id.* at 205-7.

[91] A54-58.

[92] A58-62.

[93] A27-29.

[94] A32-35.

[95] A29.

[96] B15-32.

facts[,] and in this way decide the case."[97] Thus, *Hooks* does not support Brooks' arguments here.

B. Brooks Cannot Show the Allegedly Prejudicial Remarks Deprived Him of Either Due Process Rights or a Fair Trial.

Brooks argues the prosecutor's misstatement of law "was likely to influence the jury's verdict and deny him a fair trial."[98] But under plain error review, Brooks must demonstrate the alleged error was so prejudicial that it affected the outcome of his trial.[99] "Not every improper remark, however, requires reversal."[100] "Only comments that prejudicially affect the 'substantial rights' of the accused compromise the integrity of the verdict and the fairness of the trial."[101] Moreover, "[t]he burden of persuasion is on the defendant to demonstrate that a forfeited error is prejudicial."[102] Brooks cannot meet this burden here.

---

[97] B15-16.

[98] Opening Br. at 7.

[99] *Mills v. State*, 732 A.2d 845, 849 (Del. 1999); *Stevenson*, 709 A.2d at 633, *cert. denied*, 525 U.S. 967 (1998).

[100] *Daniels*, 859 A.2d at 1011.

[101] *Jones v. State*, 2015 WL 6941516, at *4 (Del. Nov. 9, 2015) ("To find that mistakes at trial qualify as plain error, they must be 'so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.'"); *Blake v. State*, 65 A.3d 557, 562 (Del. 2013) (*citing Turner v. State*, 5 A.3d 612, 615 (Del. 2010)).

[102] *Swan v. State*, 248 A.3d 839, 871 (Del. 2021); *Booker v. State*, 2017 WL 3014360, at *5 (Del. July 14, 2017); *Spence*, 129 A.3d at 223.

In *Spence v. State*, this Court found that the State had engaged in prosecutorial misconduct by, *inter alia*, misstating the law of justification as a defense in a PowerPoint slideshow to the jury.[103] The misstatement in the slides created the potential for jury confusion.[104] Nevertheless, this Court concluded that the misconduct did not amount to plain error.[105] Importantly, the Superior Court properly instructed the jury on the law of self-defense and use of force to protect another.[106] In addition, neither party objected to the jury instructions.[107] Based on these facts, this Court held the error did not jeopardize the fairness and integrity of the trial.[108]

In *Swan v. State*, this Court held in a post-conviction case involving Rule 61 that despite a prosecutor's improper comment during closing, the defendant did not suffer substantial prejudice to warrant a new trial.[109] The prosecutor there stated in closing the correct standard of proof for a criminal case, but then added, "Remember, your job is to search for the truth, no doubt."[110] This Court found the comment to

---

[103] *Spence*, 129 A.2d at 229.

[104] *Id.* at 228.

[105] *Id.* at 229-30.

[106] *Id.*

[107] *Id.*

[108] *Id.* at 230.

[109] *Swan*, 248 A.3d at 870-71.

[110] *Id.* at 871.

be improper[111] and applied the *Hughes*[112] test to determine if the misconduct prejudicially affected the defendant's right to a new trial.[113] The burden of proof was a central issue there. The Superior Court did not give curative instructions because the defendant did not object.[114] But, substantial evidence against the defendant existed, and the judge instructed the jury on the correct standard of review before and after the improper comment. In addition, the defense responded to the comments in his closing by saying, "If you search for the truth[,] you are going to find reasonable doubt."[115] For these reasons, this Court found no prejudice from the prosecutor's improper statements.[116]

Here, none of the prosecutor's allegedly prejudicial remarks deprived Brooks of either his due process rights or a fair trial. The prosecutor referred to record evidence and argued that the State had met its burden of proof.[117] Brooks responded

---

[111] *Id.* at 870; *Thompson v. State*, 2005 WL 2878167, at *2 (Del. Oct. 28, 2005) (holding it was improper for a prosecutor to state in closing that "[t]he State asks that you go back not seeking to find reasonable doubt, but to seek the truth.").

[112] 437 A.2d 559 (Del. 1981).

[113] *Swan*, 248 A.3d at 871.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] A55-56.

in his closing by focusing on the alleged confusion regarding the law[118] and whether the firearm was concealed.[119] As in *Swan* and *Spence*, the Superior Court judge accurately instructed the jury on the correct law for CCDW after the prosecutor's allegedly improper comments.[120] Brooks has the burden of persuasion here to demonstrate that the alleged misconduct was prejudicial.[121] But, Brooks has failed to show exactly how the prosecutor's comments influenced the jury's verdict or deprived him of a fair trial. Because Brooks has failed to meet that burden, his claims fail.[122]

Finally, Brooks argues that "[r]eversal is required" because the Superior Court failed to give appropriate instructions to the jury.[123] And, he claims this error undermined the jury's ability to perform its duty in returning a verdict.[124] But, this

---

[118] A59 ("Do you see the problem in the law as you're going to read it in this instruction and how it absolutely applies to this case?").

[119] A58 ("Do you see the confusion here? The State argues that is it was concealed upon the first approach of the police officer.").

[120] B19-22.

[121] *Swan*, 248 A.3d at 871; *Booker*, 2017 WL 3014360, at *5; *Spence*, 129 A.3d at 223.

[122] *Sullivan v. State*, 636 A.2d 931, 942 (Del. 1994) ("To establish plain error, [the defendant] has the burden of showing that the improper arguments by the prosecutor 'not only created the possibility of prejudice, but that the errors worked to his actual substantial disadvantage.'") (*quoting Saunders v. State*, 602 A.2d 623, 625 (Del. 1984)).

[123] Opening Br. at 7.

[124] Opening Br. at 7.

conclusory assertion does not state how or why the instructions were inappropriate or how this alleged error undermined the jury's ability to perform its duty. Moreover, these statements ignore U.S. Supreme Court precedent, which focuses on the fairness of the trial rather than on alleged prosecutorial misconduct.[125] Prosecutorial misconduct by itself does not guarantee a new trial for a defendant,[126] nor does it require that this Court reverse the Superior Court.[127] The prosecutor's remarks were not improper. And, the Superior Court properly instructed the jury on the correct law regarding CCDW after the closing arguments.[128] Under a plain error analysis, this Court should uphold the verdict obtained at trial in the Superior Court.

---

[125] *Smith v. Phillips*, 455 U.S. 220, 219 (1982); *United States v. Agurs*, 427 U.S. 97, 110 (1976) ("If the suppression of the evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.") (footnotes and citations omitted); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (recognizing the goal of due process "is not punishment of society for the misdeeds of the prosecutor, but avoidance of an unfair trial to the accused.").

[126] *Smith*, 455 U.S. at 220.

[127] *Baker*, 906 A.2d at 148 ("No prosecution is tried with flawless perfection; if every slip is to result in reversal, we shall never succeed in enforcing the criminal law at all."); *Kurzmann*, 903 A.2d at 713–14 ("Before making a claim of prosecutorial misconduct on appeal, defense counsel should be sure that there are ample grounds for the claim, because accusing a prosecutor of prosecutorial misconduct has potentially serious implications."); *Daniels*, 859 A.2d at 1011 (*citing and parenthetically quoting United States v. Sherman*, 171 F.2d 619, 625 (2d Cir. 1948)); *see Price v. State*, 858 A.2d 930 (Del. 2004).

[128] B19-22.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the Superior Court.

Respectfully submitted,

/s/ Julie M. Donoghue

Julie (Jo) M. Donoghue (# 3724)
Deputy Attorney General
Delaware Department of Justice
Carvel State Office Building
820 N. French Street
Wilmington, DE 19801
(302) 577-8500

Date: February 22, 2023

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JAQUAN S. BROOKS,	§	
	§	No. 281, 2022
Defendant Below,	§	
Appellant,	§	
	§	
v.	§	
	§	
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 **5,331** words, which were counted by Microsoft Word.

Date: February 22, 2023

/s/ Julie M. Donoghue
Julie (Jo) M. Donoghue (# 3724)
Deputy Attorney General