



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JARREAU AYERS,)
)
Defendant Below-)
Appellant,) No. 436, 2019
) ON APPEAL FROM
) THE SUPERIOR COURT OF THE
v.) STATE OF DELAWARE
) ID No. 1710003395
STATE OF DELAWARE,)
)
Plaintiff Below-)
Appellee.)

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
DELAWARE IN AND FOR NEW CASTLE COUNTY

OPENING BRIEF

COLLINS & ASSOCIATES

Patrick J. Collins, ID No. 4692
8 East 13th Street
Wilmington, DE 19801
(302) 655-4600

Attorney for Appellant

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NATURE OF THE PROCEEDINGS

Appellant Jarreau Ayers was one of 18 defendants charged in connection with the inmate takeover of the C Building of James T. Vaughn Correctional Center (JTVCC) on February 1 and 2, 2017. At the time of the incident, Mr. Ayers was serving two life sentences for prior convictions.¹

Indictment and pretrial matters

On October 17, 2017, a grand jury returned an indictment against Mr. Ayers and the other defendants.² The indictment charged Mr. Ayers with eleven offenses:

- I. Riot
- II. Murder First Degree (Steven Floyd, intentionally caused death)
- III. Murder First Degree (Steven Floyd, during commission of Riot)
- IV. Murder First Degree (Steven Floyd, a corrections officer in line of duty)
- V. Assault First Degree (Joshua Wilkinson, during commission of Riot)
- VI. Assault First Degree (Winslow Smith, during commission of Riot)
- VII. Kidnapping First Degree (Steven Floyd)
- VIII. Kidnapping First Degree (Joshua Wilkinson)
- IX. Kidnapping First Degree (Winslow Smith)
- X. Kidnapping First Degree (Patricia May)
- XI. Conspiracy Second Degree (as to Riot)³

The Honorable William C. Carpenter, Jr. presided over this case.⁴ Due to the unwieldy number of defendants, the case would be tried in separate trial

¹ A2295-2296.

² A21-33.

³ *Id.*

⁴ A2; D.I. 7.

groupings.⁵ Two office conferences occurred to discuss trial logistics, trial groupings, the dissemination of discovery, and protective orders regulating disclosure of non-Rule 16 material.⁶ At the next office conference on May 2, 2018, the Court approved a protective order to get trial preparation materials to the defense.⁷

On August 17, 2018, the Group 1 attorneys met to discuss the upcoming October trial. Group 1 consisted of Jarreau Ayers (at that time represented by the undersigned attorney), Dwayne Staats, who proceeded *pro se*, and defendants Roman Shankaras and Deric Forney, represented by counsel.⁸ Further discussions were had about the disclosure of *Jencks* material, witness lists, and the like.⁹ It was further decided that the protective order would sunset two weeks before trial to facilitate counsels' discussions with their clients.¹⁰

Mr. Ayers elects to proceed pro se

Because the witness statements provided by the State did not include any names, it was not until the State furnished its witness list on August 30, 2018 that the defense became aware of any witness names. On that date, the undersigned

⁵ A41-43.

⁶ A34-61, A62-110.

⁷ A115.

⁸ A119.

⁹ A124-125.

¹⁰ A128.

attorney wrote to the judge to inform him that one of the witnesses was a former capital murder client, and the witness directly implicated Mr. Ayers.¹¹

On September 20, 2018, the Court convened a hearing to discuss the conflict issue. Mr. Ayers had expressed an interest in going *pro se* with the undersigned attorney as standby counsel.¹² The Court indicated it would be appointing a different attorney, Phillip Renzulli, Esquire, to act as standby counsel, however.¹³ The Court conducted a colloquy with Mr. Ayers as to his desire to proceed *pro se*.¹⁴ Mr. Ayers inquired whether the undersigned attorney could assist him if he waived any right to ask standby counsel to step in and take over the representation.¹⁵ At that time, the Court explained that was not an option.¹⁶

After some further consideration, the trial judge reconvened the parties on September 28, 2018, given Mr. Ayers' comment that if he could not be represented by the undersigned attorney, he would rather proceed on his own.¹⁷ The Court conducted a colloquy with the conflicting witness, Wade Smith, who elected to not waive any privilege arising out of confidential information arising from the

¹¹ A133-134.

¹² A137.

¹³ A138.

¹⁴ A140-142.

¹⁵ A145.

¹⁶ A145-146.

¹⁷ A246.

undersigned attorney's prior representation.¹⁸ Then the Court indicated that after consideration and discussion, the undersigned attorney could act as an advisory counsel to Mr. Ayers.¹⁹ The undersigned attorney then applied to be Mr. Ayers's standby counsel but only for advisory purposes, with the understanding that he could not step in and take over representation.²⁰ The Court pointed out an alternative where the undersigned attorney could be advisory standby counsel to Mr. Ayers, for all witnesses except Wade Smith.²¹

After discussion, the State did not oppose the proposed solution.²² Mr. Renzulli was appointed as standby counsel as to the one witness Wade Smith and the undersigned attorney as standby counsel for the rest of the trial.²³

Trial

Trial began on October 22, 2018. On October 29, 2018, Jason Antoine, Esquire, counsel for Shankaras, moved to withdraw as counsel.²⁴ According to Mr. Antoine, irreconcilable differences had progressed to the point where the attorney client relationship was no longer salvageable.²⁵ Along with the other defendants,

¹⁸ A248.

¹⁹ A250-251.

²⁰ A252-255.

²¹ A258-259.

²² A260.

²³ A261-264.

²⁴ A1125.

²⁵ A1130.

Mr. Ayers moved for a mistrial.²⁶ The Court granted Mr. Antoine's request to withdraw²⁷ and denied the other defendants' requests for a mistrial.²⁸ Trial was paused for the day, to resume the following morning.²⁹ After hearing from the parties, the trial judge gave a detailed supplemental instruction to the jury regarding Shankaras' absence.³⁰

Mr. Ayers elected to testify.³¹ Closing arguments occurred on November 15, 2018. The jury began deliberating on November 16, 2018. During deliberations, the jury passed out several notes, which were addressed by the Court. On the afternoon of November 20, 2018, the jury reached its verdict.³² The jury acquitted Mr. Ayers of the Murder First Degree charges.³³ The jury returned guilty verdicts as to Mr. Ayers' other charges.³⁴

²⁶ A1132.

²⁷ A1134.

²⁸ A1134-1135.

²⁹ A1136.

³⁰ A1150-1152.

³¹ A2295-2357.

³² A2714.

³³ A2716-2717; A2774-2776.

³⁴ A2716-2718; A2774-2776.

Sentencing

Sentencing was delayed for a time because the other defendants' cases were still ongoing. On September 13, 2019, the Court sentenced Mr. Ayers to 123 years of unsuspended prison time.³⁵

Appeal

On October 10, 2019, the trial judge granted Mr. Ayers' request for the appointment of counsel for his appeal. The Court appointed the undersigned attorney.³⁶ On October 11, 2019, counsel filed a timely Notice of Appeal. This is Mr. Ayers' Opening Brief.

³⁵ Exhibit A; A2784-2786.

³⁶ A2793.

SUMMARY OF THE ARGUMENT

CLAIM I: THE TRIAL JUDGE ERRED BY NOT CURING PROSECUTORIAL MISCONDUCT IN THE STATE’S REBUTTAL WHEN THE PROSECUTOR IMPROPERLY ASKED THE JURY TO CONSIDER MR. AYERS’ CHARACTER AND BEHAVIOR DURING THE TRIAL.

Central to the jury’s deliberations was whether Mr. Ayers was a participant in the planning and execution of the attacks, or whether he was in fact excluded from participation by the organizer, Dwayne Staats, and stayed out in the recreation yard during the attacks. In rebuttal closing, the prosecutor improperly urged the jury to consider Mr. Ayers’ behavior and demeanor as a *pro se* defendant over the nearly four week trial. The prosecutor directly asked the jury to consider that demeanor to determine that Mr. Ayers is the sort of person who is “going to do exactly what he wants to do,” which in the prosecutor’s view, was go inside and join the attacks.

This was an improper call for the jury to consider character evidence of Mr. Ayers’ courtroom demeanor. There was no character evidence presented at trial. Nor could Mr. Ayers cross-examine this attack on his character.

Mr. Ayers timely objected to the prosecutor’s remark, but the judge overruled the objection. By application of the test articulated in *Hughes v. State*,³⁷

³⁷ 437 A.2d 559 (Del. 1981).

this Court should find that Mr. Ayers was prejudiced by the prosecutor's improper comment and the trial judge's decision not to cure it.

STATEMENT OF FACTS

Generally, the State presented the evidence in a chronological narrative; the trial witnesses were the surviving victims, the responders, the investigators, and the cooperating inmates.

The victims

Correctional officer (CO) Winslow Smith was working an 8 to 4 shift in C Building on February 1, 2017.³⁸ His colleagues that day were Sergeant Floyd,³⁹ Officer Joshua Wilkinson, and Officer Robert Ferguson.⁴⁰ It was a normal morning. But as he was reopening the A Tier door⁴¹ to let some inmates in from recreation or “rec,”⁴² someone hit Smith from behind in the back of the head.⁴³ Smith was attacked by four or five inmates.⁴⁴ He also saw Wilkinson and Floyd being attacked, and Floyd being pushed into a mop closet by several inmates.⁴⁵

³⁸ A581.

³⁹ Sergeant Floyd was posthumously promoted to Lieutenant, but is referred to in this brief as Sergeant to comport with most of the testimony.

⁴⁰ A583.

⁴¹ Evidence showed that C Building was organized in three tiers: A, B, and C.

⁴² Witnesses explained that about halfway through rec, inmates had the option to come in to take showers; COs called “first yard” or “half yard” when it was time to do so. *See, e.g.*, A585-586.

⁴³ A584.

⁴⁴ A625.

⁴⁵ A587.

Smith was handcuffed and put in a supply closet next to the mop room along with Wilkinson.⁴⁶ Soon he heard fire alarms.⁴⁷ He heard inmates attacking Sergeant Floyd in the room next door. Floyd was screaming.⁴⁸ Sometime during the afternoon, Smith was released by the inmates.⁴⁹ Smith sustained physical and emotional injuries which were ongoing as of the date of his testimony.⁵⁰

CO Joshua Wilkinson had only been on the job about a month when the riot occurred.⁵¹ It was only his second full day in C Building.⁵² After locking the door to B Tier, Wilkinson was attacked by 8-12 inmates.⁵³ Some had their faces covered.⁵⁴ The blows to the head knocked him briefly unconscious.⁵⁵ When he came to, he heard a Code One being called for assault on an officer.⁵⁶ Then Wilkinson was dragged to the supply closet.⁵⁷ Smith was soon put in there too.⁵⁸ Wilkinson could hear Floyd in the next room being cursed at and struck.⁵⁹ Burning

⁴⁶ A590.

⁴⁷ *Id.*

⁴⁸ A594.

⁴⁹ A591.

⁵⁰ A598-599.

⁵¹ A637.

⁵² A639.

⁵³ A643.

⁵⁴ A646.

⁵⁵ *Id.*

⁵⁶ A644.

⁵⁷ A648.

⁵⁸ A651.

⁵⁹ A653-654.

objects were thrown into the supply closet; Smith and Wilkinson were able to extinguish them.⁶⁰

Wilkinson was kept much longer than Smith. He was released around 8:30 PM.⁶¹ Like Smith, Wilkinson sustained physical and mental injuries which were ongoing as of the trial.⁶²

Patricia May was a master counselor employed by DOC.⁶³ She was meeting with an inmate in C building when an unmasked inmate came rushing in with a knife.⁶⁴ The inmate wanted her to call the News Journal.⁶⁵ Ms. May knocked the phone off the hook because she knew it would trigger an alert at the central station.⁶⁶ The inmate's attempts to phone and email the News Journal were unsuccessful.⁶⁷

May saw "a very extremely violent fight" occurring outside the counselor's office door.⁶⁸ Inmates covered May's head and brought her to a cell and sat her down on a locker box.⁶⁹ She believes she was put on the phone with the police

⁶⁰ A656.

⁶¹ A658.

⁶² A659-660.

⁶³ A772.

⁶⁴ A774.

⁶⁵ A775.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ A777.

negotiators.⁷⁰ May stayed for the duration and was finally released when the CERT⁷¹ team rushed the building.⁷²

In addition to the victims listed in the indictment, there were three other people besides inmates in C Building the morning of February 1, 2017. Justin “Kyle” Tuxward, Owen Hammond, and Matthew McCall were there to perform maintenance on the boilers in the basement.⁷³ Then they came back upstairs, still wearing breathing masks because of the chemicals they used in the boilers.⁷⁴ They encountered an inmate who said, “Don’t go out there, it’s crazy out there. You should probably go back downstairs.”⁷⁵ As they walked further into the vestibule, the workers saw blood on the floor. They saw Floyd in a closet asking for help.⁷⁶ Then an inmate came around the corner and put a knife to Tuxward’s face.⁷⁷ The inmate said, “if you move, I’ll kill you.”⁷⁸ But Tuxward gestured to the bucket of chemicals in his hand and told the inmate he would die if he breathed it in.⁷⁹ The inmate backed off and the workers retreated to the basement.⁸⁰

⁷⁰ A778.

⁷¹ Crisis Emergency Response Team. A984.

⁷² A779.

⁷³ A862-863.

⁷⁴ A872.

⁷⁵ A871.

⁷⁶ A873.

⁷⁷ *Id.*

⁷⁸ A876.

⁷⁹ A877.

⁸⁰ *Id.*

Once in the basement, they used a phone to contact JV Tower⁸¹ to advise what was happening.⁸² Eventually, late that night, the workers made their escape by accessing the roof and using a ladder to the ground.⁸³

DOC Incident Response

On February 1, 2017, Lieutenant Charles Sennett was on duty as the area supervisor for the portion of JTVCC that included C Building.⁸⁴ He heard a Code One over the radio. Along with other officers, he responded to C Building and entered. He immediately saw things were not right: blood on the floor, locker boxes strewn about, and the door to A Tier wide open.⁸⁵ He saw no one on the tiers and noticed smoke in the building.⁸⁶ The fire suppression sprinklers were active.⁸⁷

Sergeant Floyd shouted from the closet, “They took over the building. It’s a setup, get out.”⁸⁸ Sennett and the other responders left the building and called a Code Three, which means “major disturbance.”⁸⁹ From the outside, he was able to see some of the interior of C Building by standing in the “pillbox,” a disused three

⁸¹ JV Tower, referred to by several witnesses, is the control center that oversees operations at JTVCC. *See*, A720.

⁸² A880.

⁸³ A892.

⁸⁴ A718.

⁸⁵ A721.

⁸⁶ A721-722.

⁸⁷ A722.

⁸⁸ *Id.*

⁸⁹ *Id.*

sided windowed access for distribution of medicine.⁹⁰ He saw Dwayne Staats through the window.⁹¹ Later, he saw two other inmates.⁹² Then the inmates began covering the windows.⁹³

The response team began engaging in negotiations with the inmates. In addition to other duties, Brett Smith served as a member of the JTVCC crisis negotiation team and had done so since 2011.⁹⁴ Smith was also a member of the quick response team (QRT) and in that capacity he reported to C Building along with many other responders.⁹⁵ But when the takeover situation became apparent, the crisis negotiation team deployed.⁹⁶

All the negotiations took place by radio, which Smith testified was a suboptimal means of communicating.⁹⁷ Other methods were tried but rejected.⁹⁸ Smith handled the negotiations until 8:55 PM on February 1, 2017, when other negotiators took over.⁹⁹

⁹⁰ A723.

⁹¹ *Id.*

⁹² A725.

⁹³ A726.

⁹⁴ A976-977.

⁹⁵ A981-982.

⁹⁶ A982.

⁹⁷ A990.

⁹⁸ A991.

⁹⁹ A993.

The State played three clips from the very lengthy recordings of radio transmissions. The first clip captured the DOC response teams assembling outside C Building.¹⁰⁰ The next clip was discussions with an inmate, who Smith identified as Royal Downs.¹⁰¹ The inmate voice on the final clip was that of Mr. Ayers.¹⁰² The clips would be replayed during their testimony.

Brian Vanes was a CERT team leader at the time of the incident.¹⁰³ The Warden assigned him to be the on-site commander of the CERT response.¹⁰⁴ In coordination with the Delaware State Police, they quickly mustered and prepared.¹⁰⁵ For the remainder of February 1, 2017, they waited for approval to go in.¹⁰⁶ Approval came at 4:45 AM on February 2, 2017.¹⁰⁷

The team selected Tier B as the primary breach point because they had learned Ms. May was in a cell on B Tier.¹⁰⁸ They did not know Floyd's location.¹⁰⁹ Eschewing an explosive-based entry, the team decided to use a backhoe as they had received intel that water-filled locker boxes were blocking the entrance.¹¹⁰ The

¹⁰⁰ A999.

¹⁰¹ A1003.

¹⁰² A1038.

¹⁰³ A1570.

¹⁰⁴ A1572.

¹⁰⁵ A1575.

¹⁰⁶ A1575-1576.

¹⁰⁷ A1576.

¹⁰⁸ A1580.

¹⁰⁹ A1588.

¹¹⁰ A1580.

team made entry at about 5:05 AM.¹¹¹ They used “sting ball” nonlethal grenades which create a bright light flash and loud noise.¹¹²

The CERT team successfully extracted Ms. May from C Building.¹¹³ Then they found Sergeant Floyd’s body.¹¹⁴ A medic member of the team immediately performed an assessment and determined that Sergeant Floyd was deceased.¹¹⁵

The investigation

Gary Collins, MD performed the autopsy on Sergeant Floyd. Floyd died of blood loss due to blunt impact injuries and cuts by sharp objects.¹¹⁶ Collins also observed thermal burns that were administered after death.¹¹⁷ Dr. Collins was unable to approximate a time of death. None of the injuries to Sergeant Floyd were fatal;¹¹⁸ in fact, the wounds were “very superficial.”¹¹⁹ Rather, Sergeant Floyd died from a loss of blood over a long period of time.¹²⁰ Dr. Collins guessed based on the condition of the body that Sergeant Floyd had been deceased for six to eight hours when discovered at 5:05 AM on February 2, 2017.¹²¹

¹¹¹ A1582.

¹¹² A1587.

¹¹³ A1591.

¹¹⁴ A1592.

¹¹⁵ A1624-1626.

¹¹⁶ A2148.

¹¹⁷ A2152.

¹¹⁸ A2153.

¹¹⁹ A2155.

¹²⁰ A2153.

¹²¹ A2154.

Former State Police Sergeant David Weaver was a civilian investigator for the Department of Justice (DOJ) when the Building C takeover occurred.¹²² On February 2, 2017, once Sergeant Floyd was determined to be deceased, Weaver was assigned to be chief investigating officer.¹²³

Weaver was able to piece together a timeline of the incident. By obtaining phone recordings, he learned that an inmate told someone on the phone at 10:18 AM on February 1, 2017 that a CO was being assaulted.¹²⁴ The Code Three major incident call went out at 10:33.¹²⁵ Negotiations began later that morning. The comment, “Floyd’s down, he’s about to be cancelled” occurred at 11:57 AM.¹²⁶ CO Winslow Smith was released, alone, at 2:16 PM.¹²⁷ Nine inmates were released at 5:20 PM.¹²⁸ Twenty-seven more came out at 7:30 PM, along with CO Wilkinson.¹²⁹ The final release of inmates occurred at 12:25 AM, and included five indicted defendants.¹³⁰

On the afternoon of February 1, 2017, the negotiation team sent a cellphone into C Building by robot. The phone was not used, but the inmates used the robot

¹²² A378.

¹²³ A379.

¹²⁴ A2208.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ A2209.

¹³⁰ *Id.*

to send out a two-page list of “primary commands.”¹³¹ Apparently, this document was not noticed until after the breach on February 2, 2017.¹³²

Corporal Roger Cresto was the lead police crime scene investigator on the case. He arrived at C Building on the morning of February 2, 2017, in the aftermath of the just-concluded takeover.¹³³ The building had been flooded and there were 4-5 inches of standing water on the floor.¹³⁴ Cresto and his team focused on collecting items that could have been used as weapons¹³⁵ such as shanks, broom handles, and mop buckets.¹³⁶ He also took over 100 photographs that were admitted into evidence.¹³⁷ In addition to depicting the building in all its disarray, the photographs also showed the small room where Sergeant Floyd’s body was found. Numerous items of physical evidence were also entered by Cresto, including shanks, mop wringers, and the like.¹³⁸

The defense cross-examined Cresto vigorously on how certain items were sent to the DNA lab for testing, but others were not. Cresto testified that he collaborated with the CIO and the prosecutor.¹³⁹ They focused on potential

¹³¹ A2210.

¹³² *Id.*

¹³³ A401.

¹³⁴ A402.

¹³⁵ A406.

¹³⁶ A408-411.

¹³⁷ A414-458.

¹³⁸ A472-484.

¹³⁹ A507.

weapons like the mop wringers, fire extinguishers, and shanks, as well as the blood evidence.¹⁴⁰ Only a portion of the shanks and other potential weapons were sent for DNA analysis, however.¹⁴¹ Cresto guessed they tested shanks the medical examiner indicated were more consistent with Floyd's injuries.¹⁴² But Dr. Collins was never provided any weapons and never made any comparisons of the wounds with potential weapons.¹⁴³

Lauren Rothwell, the forensic DNA examiner, received reference samples from victims Floyd, Wilkinson, and Smith, as well as 29 suspects whose DNA had been taken.¹⁴⁴ Much of the identified DNA belonged to the victims. However, one item, a mop wringer, had both the DNA of Sergeant Floyd and codefendant Obadiah Miller.¹⁴⁵

Given the lack of significant forensic evidence, the investigation began to focus on inmate witnesses. Initial interviews with released inmates occurred as soon as the evening of February 1, 2017 by assisting State Police detectives.¹⁴⁶ After speaking with the detectives, Weaver noted that many inmates used only

¹⁴⁰ A508.

¹⁴¹ *See, e.g.*, 538-539.

¹⁴² A539.

¹⁴³ A2155.

¹⁴⁴ A1517-1518.

¹⁴⁵ A1529.

¹⁴⁶ A2204.

nicknames and did not know the given names of other inmates.¹⁴⁷ Weaver asked DOC to create a photo book of all 126 inmates housed in C Building on February 1, 2017.¹⁴⁸ The photo book listed the individuals by number rather than name so as not to taint the inmate interviews.¹⁴⁹ According to Weaver, 30 inmates refused to be interviewed, 72 gave statements but denied seeing anything, and 24 inmates went through the photo book with the detectives.¹⁵⁰

There were no cameras inside C Building and little forensic evidence, so the inmate interviews became crucial to the investigation.¹⁵¹ In fact, Weaver testified that suspects were identified and eliminated solely based on what cooperating inmates told the investigators.¹⁵² Weaver established a litmus test of sorts: if two inmates provided information implicating an inmate, that inmate became a suspect for further investigation.¹⁵³ However, the inmate interviews were conducted under flawed conditions.¹⁵⁴ After the incident, many were housed together, and they were brought to the interview rooms in groups. Weaver testified the interviews were rushed because the inmates felt they were being watched and timed by other

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ A2207.

¹⁵¹ *Id.*

¹⁵² A2216.

¹⁵³ A2216.

¹⁵⁴ A2205.

inmates.¹⁵⁵ After a while, the investigators changed their practice. They brought inmates to the New Castle County Courthouse separately for more in-depth interviews.¹⁵⁶

Codefendant Royal Downs

Royal Downs was the only defendant to cooperate with the State in exchange for a plea deal.¹⁵⁷ Downs was convicted of a murder charge in Maryland but was serving his sentence in Delaware.¹⁵⁸ The central premise of his testimony was that he was not part of the agreement to stage a riot, but once it did start, he had to step up and save lives. Downs knew something was going to happen, but thought it was a peaceful protest.¹⁵⁹ When the riot began, he figured the administration would storm the building and harm people.¹⁶⁰ Since no one was “stepping up,” he grabbed the radio and started negotiating.¹⁶¹ Downs testified, “had I not stepped up, I believe more lives would have been lost.”¹⁶²

Downs testified that a group of inmates including all defendants in Group One except for Forney participated in a meeting a week or two prior to the riot.¹⁶³

¹⁵⁵ *Id.*

¹⁵⁶ A2205-2206.

¹⁵⁷ A2794-2795.

¹⁵⁸ A1063-1064.

¹⁵⁹ A1066.

¹⁶⁰ A1067.

¹⁶¹ *Id.*

¹⁶² A1068.

¹⁶³ A1082-1083. Downs referred to Mr. Ayers by his nickname of “Ruk.”

Because of perceived poor treatment of inmates in C Building, the plan as Downs understood it was to just stay in the yard and refuse to come in after recreation.¹⁶⁴ According to Downs, there was no discussion of a building takeover at that time.¹⁶⁵ Downs was opposed to the idea of staying in the yard because the COs would come with physical force; he preferred everyone protesting by staying in their cells.¹⁶⁶

Although the conversation ended with an agreement that nothing was going to happen, word got to Downs that a takeover was being planned.¹⁶⁷ According to Downs, it started with Shankaras, but soon many people knew about it.¹⁶⁸ The takeover was supposed to happen after the Super Bowl, but was apparently moved up because word had gotten around.¹⁶⁹ Downs learned of the plan the night before, because Shankaras told Mr. Ayers, who told him.¹⁷⁰ There were few details given on how the takeover would occur, or how the COs were going to be overpowered.¹⁷¹

¹⁶⁴ A1085-1086.

¹⁶⁵ A1086.

¹⁶⁶ A1089.

¹⁶⁷ A1095.

¹⁶⁸ A1096-1097.

¹⁶⁹ A1097.

¹⁷⁰ A1101.

¹⁷¹ A1113.

Downs testified that he wrote a “kite” or prison letter about what was going to happen and tried to get it to a CO.¹⁷² Delivery of the kite was unsuccessful.¹⁷³ But Downs claims on the morning of February 1, 2017, he told Sergeant Floyd that something was “ready to go down.” Floyd responded, “I know,” and shook his head.¹⁷⁴

When it was time to go to the yard, Downs walked around with another inmate. He saw several inmates discussing what was about to occur, but the group did not include Mr. Ayers.¹⁷⁵ He saw this group preparing by checking their masks.¹⁷⁶

When “first yard” was called, the time for inmates to come in and shower if they chose, about half the inmates went inside.¹⁷⁷ He saw that group putting on their masks. Downs remained in the yard. The next thing he heard was Floyd calling the Code One.¹⁷⁸ After a short time, “Smoke” came out and told everyone to get inside.¹⁷⁹ Downs went to his cell.¹⁸⁰

¹⁷² A1118.

¹⁷³ A1122.

¹⁷⁴ A1122-1123

¹⁷⁵ A1153.

¹⁷⁶ A1156.

¹⁷⁷ A1156-1157.

¹⁷⁸ A1157.

¹⁷⁹ A1158. Smoke is the nickname of defendant Lawrence Michaels.

¹⁸⁰ A1159.

Inmates called out for everyone to put their locker boxes in the hallway, but Downs did not remember who made those calls.¹⁸¹ Downs started walking around and encountered Staats, who had a walkie-talkie in one hand and a shank in the other.¹⁸² The water, phones, and electricity had been turned off. Downs testified at that time he took the radio from Staats and began negotiating.¹⁸³ According to Downs, it was important to get the media involved to shed light on the situation.¹⁸⁴ He also decided to start communicating with the negotiators because “nobody else stepped up.”¹⁸⁵ He wanted to save lives.¹⁸⁶

Despite all Downs’ time on the radio, he said he was not the decision maker but that everything was decided by a “consensus” made up of Downs, Shankaras, and Staats.¹⁸⁷

Downs decided to cooperate with the police partly because he had been on the radio so much.¹⁸⁸ He testified, “I knew they was coming straight into that building to get me.”¹⁸⁹ But more importantly, he had a chance to get his murder conviction overturned and did not want to “risk going to court with this case when

¹⁸¹ A1161.

¹⁸² A1162-1163.

¹⁸³ *Id.*

¹⁸⁴ A1164.

¹⁸⁵ *Id.*

¹⁸⁶ A1165.

¹⁸⁷ A1171.

¹⁸⁸ A1183.

¹⁸⁹ A1196.

I'm ready to get another case back, a life sentence back.”¹⁹⁰ Downs testified that on his original murder case, a witness was recanting her testimony.¹⁹¹ He had drafted an affidavit for the witness to sign.¹⁹²

In what would become a familiar routine, the prosecutor brought out the photo book and asked Downs to identify people. Downs characterized Mr. Ayers as his “companion” and “walking buddy.”¹⁹³ Downs testified, “he was moving pretty much the way I was moving, but I don’t understand why he received the charges that he received.”¹⁹⁴ Going through the photo book, Downs implicated various other defendants for their roles in the takeover and assaults. He testified that Shankaras is the one who “initiated the whole situation,” but that Shankaras stayed in his cell the whole night.¹⁹⁵ Downs testified that it was both Staats and he on the radio most of the time, but that he did not see Staats do anything physical.¹⁹⁶

The defendants cross-examined Downs on his motivations for testifying and the accuracy of his testimony. Mr. Ayers elicited that despite Downs testifying that cooperating with the police was difficult,¹⁹⁷ he readily agreed to cooperate in the

¹⁹⁰ A1184.

¹⁹¹ A1319.

¹⁹² A1321.

¹⁹³ A1201.

¹⁹⁴ *Id.*

¹⁹⁵ A1212.

¹⁹⁶ A1214-1215.

¹⁹⁷ A1268-1269.

investigation.¹⁹⁸ Moreover, Downs had cooperated with Maryland authorities in a prior investigation, but his testimony was not required ultimately.¹⁹⁹

Inmate witnesses

Besides Royal Downs, eleven inmates testified. Their varying vantage points and recollections of who did what to whom lent a *Rashomon*-esque quality to the trial.

Anthony Morrow was the inmate on the phone when the attacks started, which permitted investigators to peg the start time of the riot.²⁰⁰ He saw the attacks from his vantage point at the phone.²⁰¹ He did not identify any of the assailants. At one point, inmates put a pillowcase over his head and had him call the News Journal to read demands.²⁰²

Morrow also testified that inmates from the incident were housed together after the incident and that there were many conversations among inmates about the incident.²⁰³

¹⁹⁸ A1270-1271.

¹⁹⁹ A1272-1273.

²⁰⁰ A1014.

²⁰¹ A1015.

²⁰² A1018.

²⁰³ A1029-1030.

Henry Anderson did not go to rec because he was tired from his maintenance job.²⁰⁴ His cellmate woke him up to tell him something was happening.²⁰⁵ Anderson heard Floyd call Code One but thought it was a joke at first.²⁰⁶ He saw Floyd being attacked by three inmates.²⁰⁷ Then he saw inmates attacking Wilkinson.²⁰⁸ He saw Smith being attacked by an inmate wielding a mop wringer.²⁰⁹ Of all the attacking inmates, he could only identify one – Obadiah Miller – who was attacking Sergeant Floyd.²¹⁰

Anderson identified Mr. Ayers as one of the people who told him to provide his locker box.²¹¹ He also testified that Mr. Ayers came to check on him due to his heart condition and got him some water.²¹² Mr. Ayers was aware that Anderson had a heart condition.²¹³ Later that evening, Anderson heard people were talking about getting people with medical issues out of C Building.²¹⁴ Anderson testified, “Mr. Ayers made sure that I got out.”²¹⁵

²⁰⁴ A1636-1637.

²⁰⁵ A1638.

²⁰⁶ A1639-1640.

²⁰⁷ A1648.

²⁰⁸ A1650.

²⁰⁹ A1653.

²¹⁰ A1656-1657.

²¹¹ A1669.

²¹² *Id.*

²¹³ A1675.

²¹⁴ A1678.

²¹⁵ A1679.

Larry Sartin came back from the infirmary on the morning of February 1, 2017 and was let out into the yard by Sergeant Floyd.²¹⁶ He stayed in the yard when the Code One was called. He heard screaming and commotion inside.²¹⁷ According to Sartin, it was Mr. Ayers who called for everyone to come inside from the yard.²¹⁸ Mr. Ayers established through cross-examination that in his prior statement to the police, Sartin did not identify the person who called everyone in from the yard.²¹⁹ On redirect, he testified that at the time of the police interview, he was uncomfortable giving names.²²⁰

Sartin also explained that he was housed with all the other inmates who were potential witnesses for the State²²¹ and that “you hear talk going around.”²²² Sartin testified that he did not identify other people from the photo book at trial because he thought he was only supposed to testify about the indicted inmates.²²³

Richard McCane did not go to the yard that morning; he stayed in his cell and worked on correspondence courses.²²⁴ While getting hot water for coffee in the

²¹⁶ A1755.

²¹⁷ A1757.

²¹⁸ A1757-1758.

²¹⁹ A1866-1867.

²²⁰ A1870.

²²¹ A1852.

²²² A1854.

²²³ A1857.

²²⁴ A1888-1889.

hallway, he saw the attacks.²²⁵ Like most of the inmate witnesses, he could not identify the attackers because they were wearing masks or hoods.²²⁶ He did see “OB,” Obadiah Miller, attacking Floyd, because OB’s mask slipped off.²²⁷ He saw defendant John Bramble, whom he misidentified as James Bramble, kicking Smith.²²⁸ McCane saw Staats change his shirt because it had blood on it.²²⁹

Word got out that people who had medical issues were to tie a rag around their arms so they would be marked for release.²³⁰ But McCane, who has a heart condition,²³¹ gave up his rag to another inmate; Royal “Diamond” Downs promised him there would be another group leaving and they would come get him later.²³²

McCane did not implicate Mr. Ayers; when the prosecutor displayed the page of the photo book with Mr. Ayers’ photo, he did not identify him.²³³

Wade Smith did not go to recreation. He heard a scuffle in the hallway and saw masked inmates hitting and kicking the COs.²³⁴ He did not identify any of the attackers or the inmates asking for locker boxes. During the day and night, he

²²⁵ A1892-1893.

²²⁶ A1895.

²²⁷ A1896-1897.

²²⁸ A1899.

²²⁹ A1900.

²³⁰ A1906.

²³¹ A1910-1911.

²³² A1906-1907.

²³³ A1912.

²³⁴ A1984-1987.

walked around C Building with a friend named Bart, and they would from time to time walk around with Ruk (Mr. Ayers).²³⁵ Smith testified that Ruk was “facilitating,” such as saying who could leave and who was going to stay in the building.²³⁶ Smith had the impression that the people in charge were Mr. Ayers, Royal Downs, and an inmate named Blaze.²³⁷ Smith asked Bart to ask Mr. Ayers if he could leave, but Mr. Ayers said to stand by, and eventually said that no one else was leaving until the morning.²³⁸

On cross-examination, Smith testified that he never saw Mr. Ayers with a mask or a weapon, nor did he see Mr. Ayers assault anyone.²³⁹ Smith testified that by “facilitator,” he did not know if Mr. Ayers was involved in planning the riot, but was a “shot caller” in terms of directing who was going to stay and who was allowed to leave.²⁴⁰ Smith testified that after Mr. Ayers eventually said no one else was leaving, he advised everyone should cherish their time together because they would all be “shipped anywhere.”²⁴¹

Eugene Wiggins heard Floyd call Code One while he was out in the yard. CO Ferguson, who was outside, did not react, so Wiggins thought it was a joke at

²³⁵ A1995.

²³⁶ A1996.

²³⁷ A1998.

²³⁸ A2002-2003.

²³⁹ A2014.

²⁴⁰ A2016.

²⁴¹ A2018.

first.²⁴² Wiggins came inside and saw Floyd being attacked; he identified one of the attackers as Obadiah Miller and another as “Capo.”²⁴³ Wiggins did not want to be involved, so he went back out to the yard.²⁴⁴ Wiggins identified Mr. Ayers as the inmate who called everyone from the yard inside.²⁴⁵ When he got inside, Wiggins saw Staats with a walkie-talkie and a shank.²⁴⁶

In the afternoon, Wiggins approached Staats and asked to leave.²⁴⁷ Then Mr. Ayers approached, and Wiggins asked him the same question. Mr. Ayers responded that everyone was going to leave.²⁴⁸ On cross-examination, he admitted he had told the police that the main conversations about leaving were with Staats and Downs, because “Diamond got a lot of influence.”²⁴⁹ He considered Mr. Ayers being part of the conversations a “small detail.”²⁵⁰

Wiggins also noticed a group congregating in Shankaras’ cell: Mr. Ayers, Obadiah Miller, Royal “Diamond” Downs, Staats, and Capo. Shankaras mentioned that Floyd was “cooked.”²⁵¹ Wiggins testified he asked Mr. Ayers who

²⁴² A2054.

²⁴³ A2055. Capo is defendant Alejandro Rodriguez-Ortiz.

²⁴⁴ A2056.

²⁴⁵ *Id.*

²⁴⁶ A2058.

²⁴⁷ A2061.

²⁴⁸ A2061-2062.

²⁴⁹ A2066.

²⁵⁰ *Id.*

²⁵¹ A2061.

would take the charges for what happened to Floyd; Mr. Ayers responded that those responsible were going to stand up and “bite that,” meaning take the charges.²⁵²

The night before the attack, Abdul As-Salafi heard Roman Shankaras tell three other inmates “be ready tomorrow morning.”²⁵³ Shankaras said this to Luis Sierra, Lawrence Michaels, and another inmate who was not charged.²⁵⁴ As-Salafi testified he was on the phone when he heard the Code One.²⁵⁵ (On cross-examination, he agreed the police told him they can find no record of this phone call.²⁵⁶) As-Salafi walked toward the sound, then turned around and hung up the phone.²⁵⁷ He saw inmates punching and stabbing Wilkinson; one inmate was hitting him with a mop wringer.²⁵⁸ He identified four attackers, one of which was defendant Deric Forney.²⁵⁹

As As-Salafi kept going down the hall, he saw the attack on Sergeant Floyd. Floyd was on the ground and four inmates were punching and stabbing him.²⁶⁰ Although all the attackers had masks or hoodies obstructing their faces, As-Salafi

²⁵² A2062.

²⁵³ A2080.

²⁵⁴ *Id.*

²⁵⁵ A2074.

²⁵⁶ A2093.

²⁵⁷ A2074.

²⁵⁸ *Id.*

²⁵⁹ A2075.

²⁶⁰ A2076-2077.

made identifications “by their mannerisms, by the complexion of their skin, I’ve been around these men long enough that I knew who I was looking at.”²⁶¹ He identified Mr. Ayers, Shankaras, Obadiah Miller, and Lawrence Michaels as the assailants.²⁶²

As-Salafi identified Royal Downs as being part of the planning, and then when the riot occurred, “giving all the orders and the commands out.”²⁶³ He described Staats as also being on the radio and negotiating with police.²⁶⁴ As-Salafi testified that Shankaras gave Staats and Michaels pieces of paper with demands written on them, apparently to read to the negotiators.²⁶⁵ He denied that he had written the list of demands.²⁶⁶ But when the documents were admitted into evidence, he admitted that he had in fact written the document entitled “Primary Commands.”²⁶⁷ But As-Salafi claimed this was a different document than the one he saw Shankaras give to Staats.²⁶⁸ Yet As-Salafi had no explanation as to how his handwritten document entitled “Primary Commands” were placed in the robot and sent out to the police.²⁶⁹

²⁶¹ A2077.

²⁶² *Id.*

²⁶³ A2081.

²⁶⁴ A2083.

²⁶⁵ A2088.

²⁶⁶ A2089.

²⁶⁷ A2093.

²⁶⁸ *Id.*

²⁶⁹ *Id.*

Antonio Guzman testified that Mr. Ayers recommended that he go outside to rec in the morning.²⁷⁰ As such, he was outside in the yard when he heard screaming inside.²⁷¹ He stayed outside for awhile until Mr. Ayers called everyone to come in.²⁷² Guzman identified several inmates who were engaged in the attacks on the correctional officers. He testified that Mr. Ayers told inmates to put their locker boxes in the hall.²⁷³ Guzman testified that Mr. Ayers was orchestrating things and telling people when they could leave.²⁷⁴

Guzman identified Royal Downs as the inmate who was on the walkie-talkie the entire time.²⁷⁵

Guzman agreed on cross-examination that he had immediately told the police on February 1, 2017 to get a prosecutor so that he could “capitalize” off the situation and go home.²⁷⁶ He had been hoping for a deal when he gave his statements, but learned about a week before the trial that he was not going to get any deals from the prosecution.²⁷⁷

²⁷⁰ A2112.

²⁷¹ A2109.

²⁷² *Id.*

²⁷³ A2112.

²⁷⁴ A2113.

²⁷⁵ *Id.*

²⁷⁶ A2117.

²⁷⁷ A2119.

Melvin Williams gave statements to police on February 1 and 2, 2017, but did not give the police any names or details.²⁷⁸ Then, after thinking about it and conferring with Guzman, he decided to come forward.²⁷⁹ Williams was out in the yard during recreation when he heard the Code One.²⁸⁰ He saw the attacks on the correctional officers, but could not identify any attackers because they were all wearing masks and wearing white from head to toe.²⁸¹ He did see defendants Kelly Gibbs and Johnny Bramble forcing Floyd into the closet.²⁸²

Williams testified that Royal Downs and Staats were on the radio conducting negotiations.²⁸³ Williams testified that Mr. Ayers had the key to the door and was letting people out to the yard.²⁸⁴

The final inmate to testify was Michael Rodriguez. He was not planning on going to rec but Royal Downs came to his cell window and told him to come outside, “because something’s bad about to happen.”²⁸⁵ He saw the attacks on Floyd and Wilkinson and identified the inmates he saw.²⁸⁶ Rodriguez proceeded to

²⁷⁸ A2122.

²⁷⁹ *Id.*

²⁸⁰ A2123.

²⁸¹ A2124.

²⁸² A2126.

²⁸³ A2128.

²⁸⁴ A2129.

²⁸⁵ A2158.

²⁸⁶ A2159-2162.

the yard. He saw Mr. Ayers, who asked him what was going on inside.²⁸⁷

Rodriguez told Mr. Ayers things were messy in there and there was blood everywhere.²⁸⁸ At that time, Rodriguez said an inmate said inmates were beating up Floyd, and Mr. Ayers responded that he better shut up or he would have them do the same to him.²⁸⁹

Rodriguez stayed in the yard and heard both Mr. Ayers and Staats calling everyone inside.²⁹⁰ Rodriguez testified that Mr. Ayers had the keys and was letting people out.²⁹¹ But Rodriguez asked Royal Downs if he and his “peoples” could leave.²⁹² Rodriguez testified that Downs had a discussion with Mr. Ayers and then Rodriguez and his group were let out.²⁹³ He admitted on cross-examination that he never told any of this to detectives when interviewed.²⁹⁴

Rodriguez testified that the inmate witnesses were housed together and talking about the incident as well as discussing newspaper articles about the case.²⁹⁵

²⁸⁷ A2162.

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ A2164.

²⁹¹ *Id.*

²⁹² A2165.

²⁹³ *Id.*

²⁹⁴ A2169.

²⁹⁵ A2170.

Prison kites and phone recordings

In addition to the inmate witnesses, the State introduced phone calls and documents. Of note was a prison “kite” that Staats wrote²⁹⁶ taking responsibility for the incident and expressing that he was trying to expose a system of oppression.²⁹⁷ Also admitted was a kite that Shankaras wrote to Royal Downs, which Downs furnished to the police. In that kite, Shankaras discusses details of the attacks and strategies for who would accept responsibility for the attacks.²⁹⁸ The State also admitted a phone call from Mr. Ayers in which he disclosed knowledge of the upcoming demonstration and his plan to get to the commissary before it occurred.²⁹⁹

Mr. Ayers’ defense case

Mr. Ayers called three witnesses and testified himself. Deshaun Drumgo testified that he was out in the yard with Mr. Ayers and others when he heard the commotion inside.³⁰⁰ Drumgo and some other inmates went to the corner of the yard to be seen by the camera attached to the infirmary building.³⁰¹ Drumgo testified that he only saw Mr. Ayers once during the standoff. Mr. Ayers was in

²⁹⁶ A2203; State’s Exhibit 302.

²⁹⁷ *Id.*

²⁹⁸ A2201-2202; State’s Exhibit 294.

²⁹⁹ A2213; State’s Exhibit 331.

³⁰⁰ A2258.

³⁰¹ A2259.

his cell because he had a bad leg; Drumgo thought it was from a previous surgery.³⁰² Drumgo did not cooperate with the police because he had been beaten when the building was overtaken.³⁰³

Luis Clark was out in the yard for rec with Mr. Ayers and others. He testified the inmate who called everyone in from the yard was not Mr. Ayers but a person with a wrap around his face.³⁰⁴ Clark asked Mr. Ayers if he could leave the building, and Mr. Ayers told him he would put him on a list to leave as soon as he could.³⁰⁵

William “Bart” Lewis went out to the yard and walked around with Mr. Ayers and a few others.³⁰⁶ He testified that it was two masked inmates who called the others in from the yard.³⁰⁷ Lewis contradicted Wade Smith’s testimony by testifying that Smith never asked him to ask Mr. Ayers if he could leave the building.³⁰⁸ As with the other witnesses, Lewis testified he never saw Mr. Ayers with a mask on, a weapon, blood on his clothes, or participating in assaults.³⁰⁹

³⁰² A2262.

³⁰³ A2263.

³⁰⁴ A2277.

³⁰⁵ A2279.

³⁰⁶ A2285.

³⁰⁷ A2286.

³⁰⁸ A2288-2289.

³⁰⁹ A2289.

Jarreau Ayers testified that he was moved to C Building, where he had heard there were problems.³¹⁰ But he did not have any issues, except when placed on a top bunk despite having a torn ACL. Sergeant Floyd did not change the bunk assignment to a lower bunk, but another sergeant did.³¹¹

After a prior peaceful protest regarding phone privileges, things calmed down. But tensions built again.³¹² Mr. Ayers, Royal Downs and others discussed another peaceful protest as a means of getting leadership to the building to discuss issues.³¹³ Since Mr. Ayers did not know how the COs were going to react, he called his sister and told her something was about to happen.³¹⁴ He was trying to get money for commissary so he could get one more trip to the store before the protest planned for the day after the Super Bowl.³¹⁵ Then that night he got word that it was going to happen the next day.³¹⁶

Mr. Ayers agreed to stay in the yard. But when the first call was made for inmates to come in for showers, many inmates went inside instead of engaging in the stay-in-the-yard protest. This disappointed Mr. Ayers.³¹⁷ When the Code One

³¹⁰ A2296.

³¹¹ A2297 .

³¹² A2298.

³¹³ A2299.

³¹⁴ A2300.

³¹⁵ A2301.

³¹⁶ *Id.*

³¹⁷ A2304.

was called, Downs told Mr. Ayers to stay out of it, which was “a hard pill to swallow,” but he had the torn ACL.³¹⁸ Mr. Ayers testified, “they chose for me not to be a part of that situation.”³¹⁹ Eventually, the masked inmate came to the door and called everyone in.³²⁰

Mr. Ayers began walking around and checking on people he knew.³²¹ He asked Downs what he was doing and Downs told him “they trying to get Carney on the line.”³²² Mr. Ayers did not know who Governor Carney was.³²³ Inmates began enjoying their freedom and walking around.³²⁴ Staats asked Mr. Ayers to go around and round up people with medical issues.³²⁵ Mr. Ayers led a group out the door. He explained the audio clip of him yelling at the negotiators was because the police rushed the door when he was trying to let people out.³²⁶ He was angry because he was trying to do the right thing.³²⁷

³¹⁸ A2306.

³¹⁹ *Id.*

³²⁰ A2307.

³²¹ A2308-2310.

³²² A2311.

³²³ *Id.*

³²⁴ A2313-2314.

³²⁵ A2315.

³²⁶ A2317.

³²⁷ A2318.

Mr. Ayers concluded by testifying that he knew something was going to happen but not exactly what.³²⁸ He reiterated that he did not assault, kidnap, or kill anyone.³²⁹

Dwayne Staats' testimony

Dwayne Staats testified and took responsibility for hatching the idea of the “uprising.”³³⁰ He wanted to call attention to problems at the prison.³³¹ Later, Staats felt vindicated by the investigator’s report, which addressed many of his issues.³³² Staats recruited six “lifers” to do the assaults – two per CO.³³³ He did not ask Mr. Ayers to participate because he had just gotten off crutches.³³⁴ Staats refused to name the six attackers.³³⁵ Staats testified his plan was “splintered off” the peaceful protest planned for that day.³³⁶

Staats was the one who went in Ms. May’s office with the knife, trying to get his demands out to the News Journal.³³⁷ Staats entering the office was the signal to the attackers to get started.³³⁸ He started negotiations on the radio, but

³²⁸ A2322.

³²⁹ *Id.*

³³⁰ A2397-2398.

³³¹ A2401-2402.

³³² A2408-2409.

³³³ A2408.

³³⁴ A2409.

³³⁵ A2422.

³³⁶ *Id.*

³³⁷ A2404.

³³⁸ A2434-2435.

soon gave the radio to Downs.³³⁹ Staats testified that once he got the walkie-talkie and started trying to reach the governor, his plan was done.³⁴⁰ While he did not plan that anyone would die, he agreed that it was his plan that resulted in Sergeant Floyd's death.³⁴¹

Closing arguments

The prosecutor tried to explain the many inconsistencies among the inmate witnesses by saying that people watch the same thing but come away with different versions.³⁴² As to Mr. Ayers, the State focused heavily on his culpability under the accomplice liability statute: "he didn't assault anyone, he didn't kidnap anyone, he didn't murder anyone. The evidence suggests that as an accomplice, Jarreau Ayers is liable for his conduct and the conduct of others in that violent takeover."³⁴³ The State cited his knowledge of a plan in advance as depicted in the phone call to his sister about getting commissary before the Super Bowl.³⁴⁴ Other evidence of Mr. Ayers' participation as an accomplice was having the keys to let people out and

³³⁹ A2406-2407.

³⁴⁰ A2427.

³⁴¹ A2431.

³⁴² A2518.

³⁴³ A2521.

³⁴⁴ A2490

witness testimony that he was among those who told inmates to put their locker boxes out.³⁴⁵ Otherwise, the State relied heavily on accomplice liability.³⁴⁶

Mr. Ayers focused his arguments on the inconsistencies in the testimony, not only among the inmates, but between the inmates' testimony and their prior statements. He insisted he was outside when the attacks occurred, which was difficult for him because he had close relationships with the people that were in the building.³⁴⁷ Mr. Ayers expressed frustration that the State wanted the jury to believe Royal Downs, but not the part where Downs testified he did not even know why Mr. Ayers got charged or that he was outside when the attacks occurred.³⁴⁸ He stressed that no witnesses testified that he planned the takeover.³⁴⁹

On rebuttal, the prosecutor argued that Mr. Ayers' protestations that he stayed outside while the attacks were occurring did not hold up in light of his character:

He heard the sounds from inside the building, the violent takeover had begun. But yet his testimony was that he was left to stay in the yard, he couldn't go inside. He was going to wait while his loved ones were inside doing what he knew, and endorsed, was happening.

You spent the better part of the last month with Jarreau Ayers. What about Mr. Ayers suggests that he is that person? That he is not going to do exactly what he wants to do, which is to go inside and join in

³⁴⁵ A2511-2512.

³⁴⁶ A2485-2486.

³⁴⁷ A2458.

³⁴⁸ A2550-2551.

³⁴⁹ A2552.

what's happening there. Ten minutes outside, just waiting, and then some other person comes to the door and now he can go inside? It just doesn't make sense.³⁵⁰

At the conclusion of the rebuttal, Mr. Ayers objected to this portrayal of his character.

Mr. Robertson stated to the jury that they've been sitting here watching me for four weeks, and that somehow, my character, you know – what about my character? No evidence was presented during this trial about my character. I don't understand – I feel as though some type of instructions should be given to the jury in regards to that. That, you know me sitting here, somehow, the way I portrayed myself or something, automatically makes me guilty.³⁵¹

The trial judge overruled the objection.³⁵²

³⁵⁰ A2591-2592.

³⁵¹ A2606.

³⁵² A2606-2607.

ARGUMENT

CLAIM I: THE TRIAL JUDGE ERRED BY NOT CURING PROSECUTORIAL MISCONDUCT IN THE STATE’S REBUTTAL WHEN THE PROSECUTOR IMPROPERLY ASKED THE JURY TO CONSIDER MR. AYERS’ CHARACTER AND BEHAVIOR DURING THE TRIAL.

A. Question Presented

Whether the prosecutor’s invitation to the jury to consider the character and behavior of Mr. Ayers, a *pro se* defendant, violated his right to a fair trial by an impartial jury. This issue was preserved by Mr. Ayers’ objection at the conclusion of the State’s rebuttal.³⁵³

B. Standard and Scope of Review

Because the improper comment drew a timely objection, this Court first reviews the record *de novo* to determine if the prosecutor’s actions were improper.³⁵⁴ Then this Court applies a harmless error standard to determine if the misconduct prejudicially affected the defendant.³⁵⁵ Harmless error is “an exacting standard that cannot be satisfied if the Court is left with a reasonable fear that an injustice has occurred that might have influenced the outcome at trial.”³⁵⁶

³⁵³ A350-351.

³⁵⁴ *Kirkley v. State*, 41 A.3d 372, 376 (Del. 2012).

³⁵⁵ *Baker v. State*, 906 A.2d 139, 148 (Del. 2006).

³⁵⁶ *Fowler v. State*, 194 A.3d 16, 23 (Del. 2018).

C. Merits of Argument

Applicable legal precepts

A defendant has a right under the federal and Delaware constitutions, to proceed *pro se* in a criminal trial.³⁵⁷ This Court has held that “prosecutorial misconduct that disparages a defendant for making the choice to proceed *pro se* interferes with his right to a fair trial and the right of self-representation.”³⁵⁸

A critical element of due process is that a jury’s verdict be based “solely on the evidence presented at trial.”³⁵⁹ A jury’s consideration of other information about the defendant that did not arise from the evidence establishes a due process violation.³⁶⁰

The demeanor of a defendant who has not testified is irrelevant, as it is outside the evidence. As such, it may not be argued to the jury.³⁶¹ In *Hughes v. State*, the prosecution argued in closing that the non-testifying defendant’s demeanor was unemotional and without remorse.³⁶² This Court found the argument improper, noting that commenting on the defendant’s demeanor is “suspect, because it assumes there is such a thing as a model of ‘normal’

³⁵⁷ U.S. Const. amend VI; Del. Const. art I, § 7.

³⁵⁸ *McCoy v. State*, 112 A.3d 239, 266 (Del. 2015).

³⁵⁹ *Hughes v. State*, 490 A.2d 1034, 1040 (Del. 1985).

³⁶⁰ *Flonnory v. State*, 778 A.2d 1044, 1055 (Del. 2001).

³⁶¹ *Hughes v. State*, 437 A.2d 559, 572 (Del. 1981).

³⁶² *Id.*

courtroom behavior.”³⁶³

Even when a defendant does testify, any prosecutor remarks regarding his or her demeanor must be confined to the defendant’s demeanor on the witness stand. In *Walls v. State*,³⁶⁴ the prosecutor invited the jury to consider the defendant’s demeanor throughout the trial, arguing that Walls seemed to think the trial was funny when he should “be sitting still, acting scared and quiet, respectful at all times.”³⁶⁵ On appeal, the State argued this was permissible, because Walls did in fact testify.³⁶⁶ But this Court found that the prosecutor’s argument was not limited to the context of his demeanor as a witness. As in *Hughes*, this Court noted that an inference that there is such a thing as normal courtroom behavior is improper.³⁶⁷

Our rules of evidence declare that evidence of a person’s character or trait is inadmissible to prove that the person acted in accordance with that character or trait.³⁶⁸

To determine if the prosecutor’s improper statements in closing argument prejudicially affected the defendant, this Court applies the test articulated in *Hughes v. State*: (1) the closeness of the case, (2) the centrality of the issue affected

³⁶³ *Id.*

³⁶⁴ 560 A.2d 1038 (Del. 1989).

³⁶⁵ *Id.* at 1051, fn. 21.

³⁶⁶ *Id.* at 1051.

³⁶⁷ *Id.*

³⁶⁸ D.R.E. 404(a)(1).

by the error, and (3) the steps taken to mitigate the error.³⁶⁹ This Court has held, “the factors in the *Hughes* test are not conjunctive and do not have the same impact in every case; for example, one factor may outweigh the other two.”³⁷⁰

This Court has admonished prosecutors to resist the urge to win at all costs; they must be especially careful to let the evidence speak for itself and “to choose their words in a closing argument with great care.”³⁷¹ Having said that, a prosecutor is not confined to merely repeating the evidence in a closing argument.³⁷² It is fair game for the prosecutor to argue legitimate inferences from the evidence.³⁷³ It is, however, “unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.”³⁷⁴

The prosecutor’s remarks were improper

In rebuttal closing, when there was no chance for Mr. Ayers to argue any further, the prosecutor invited the jury to consider the *pro se* defendant’s conduct throughout the trial as evidence. This was improper. As to Mr. Ayers, the crucial question for the jury was whether Staats excluded him from the group of attackers

³⁶⁹ *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981).

³⁷⁰ *Kirkley*, 41 A.3d at 376.

³⁷¹ *Trump v. State*, 753 A.2d 963, 969 (Del. 2000)(internal citation omitted).

³⁷² *Daniels v. State*, 859 A.2d 1008, 1012 (Del. 2004).

³⁷³ *Hooks v. State*, 416 A.2d 189, 204 (Del. 1980).

³⁷⁴ *Sexton v. State*, 397 A.2d 540, 545 (Del. 1979).

and told him to stay outside, or whether he was a full participant in the attack. The prosecutor urged the jury to consider Mr. Ayers' demeanor throughout the trial as proof that Mr. Ayers was not one to just sit on the sidelines:

He heard the sounds from inside the building, the violent takeover had begun. But yet his testimony was that he was left to stay in the yard, he couldn't go inside. He was going to wait while his loved ones were inside doing what he knew, and endorsed, was happening.

You spent the better part of the last month with Jarreau Ayers. What about Mr. Ayers suggests that he is that person? That he is not going to do exactly what he wants to do, which is to go inside and join in what's happening there. Ten minutes outside, just waiting, and then some other person comes to the door and now he can go inside? It just doesn't make sense.³⁷⁵

The prosecutor's appeal to the jury to factor in non-evidence which could not be cross-examined or be the subject of jury instructions was highly improper. The prosecutor sought to exploit the fact that Mr. Ayers, as a *pro se* defendant, was on display more than a represented defendant. He exhorted the jury to factor in Mr. Ayers' demeanor while defending himself to make a character evaluation, rather than to decide the case on the evidence and inferences from the evidence.

Although Mr. Ayers testified, the prosecutor's improper remarks had nothing to do with his demeanor while on the witness stand. The prosecutor specifically asked the jury to consider the "better part of a month with Mr. Ayers" to decide whether he is the sort of person not to join in the riot with his fellow

³⁷⁵ A2591-2592 (emphasis added).

inmates. The prosecutor implored the jury to decide that Mr. Ayers is the sort of person who does “exactly what he wants to do,” which in this case meant ignore his fellow inmates directives to stay in the yard, and rather, participate in the riot and attack.

On a *de novo* review, this Court should find prosecutorial misconduct.

The prosecutor’s remark prejudicially affected Mr. Ayers

Because Mr. Ayers objected at the conclusion of the rebuttal closing, the issue was fairly presented below. As such, this Court reviews for harmless error by applying the *Hughes* test.³⁷⁶ All *Hughes* militate in favor of a finding of prejudice.

As to Mr. Ayers, it was a close case. The jury did not find his role in the incident sufficient to warrant guilty verdicts on the murder charges. As to the other charges, there was wildly contradictory testimony presented by the hodgepodge of inmate witnesses.

It must be noted that the only inmate with whom the State made a deal in exchange for testimony, Royal Downs, did not implicate Mr. Ayers: “he was moving pretty much the way I was moving, but I don’t understand why he received the charges that he received.”³⁷⁷ Downs portrayed himself as the one who got on

³⁷⁶ *Kirkley v. State*, 41 A.3d 372, 376 (Del. 2012).

³⁷⁷ A1201.

the walkie-talkie in order to save lives. He implicated Staats and Shankaras as the main drivers of the violent riot.

Dwayne Staats took full responsibility for the planning and execution of the riot and attacks. His plan was “splintered off” from the peaceful protest that was planned for that day.³⁷⁸ He recruited six “lifers” to carry out the attacks – two per CO. He specifically did not involve Mr. Ayers, because he had just gotten off crutches. Staats held the knife to Ms. May and gave the signal for the attackers to commence their attacks. Staats along with Downs were the primary voices on the walkie-talkie, making demands and negotiating.

The State’s parade of inmate witnesses provided a confusing tapestry of narratives that did not weave together. Many inmates contradicted other inmates, and also contradicted their own prior statements. A fairly consistent narrative emerged that after the attacks, Mr. Ayers helped facilitate the release of certain inmates. Even on this point, it appeared from some inmate testimony that Downs was more in charge of who got released. His one angry tirade on the radio occurred because he believed the COs would back up when he brought out the first group, but they were advancing. However, there was no consistent evidence that Mr. Ayers participated in the planning, coordination, or execution of the attacks and the

³⁷⁸ A2422.

confinement of the COs. To the contrary, the main participants testified that Mr. Ayers was deliberately excluded from the action.

The foregoing establishes that this was a close case for Mr. Ayers – close enough that the prosecutor’s improper comment caused prejudice.

The prosecutor’s comment was central to the case. In fact, it went to very heart of the jury’s decision: which evidence of Mr. Ayers’ participation was worthy of credit. The prosecutor urged the jury to impermissibly consider Mr. Ayers’ demeanor as a *pro se* defendant over the course of four weeks as part of their determination of Mr. Ayers’ character. As such, the comment directly impacted, improperly so, the jury’s deliberations. Among the last things the jury heard before deliberating was to think about how Mr. Ayers behaved during the trial and whether he was not the sort of person who does exactly what he wants to do. This improper exhortation was central and crucial to the case.

There were no steps taken to mitigate the error. Mr. Ayers’ objection was well-stated. The judge responded that he thought the characterization being made referred to what other witnesses said about Mr. Ayers.³⁷⁹ Mr. Ayers responded, “he didn’t say nothing about the witnesses. He said ‘y’all been watching him.’”³⁸⁰ Nevertheless, the judge overruled the objection and the jury began its deliberations.

³⁷⁹ A2607.

³⁸⁰ *Id.*

It was error for the judge to fail to instruct the jury that their verdict should be based only on the evidence presented at trial and not on Mr. Ayers' demeanor or character as a *pro se* defendant.

Because all three *Hughes* factors have been established, this Court should find that the trial judge erred and that Mr. Ayers suffered prejudice as a result. His right to a fair trial was compromised by the prosecutor's improper comment and the trial court's decision not to mitigate. Mr. Ayers respectfully asks this Court to reverse the judgment of the Superior Court.

CONCLUSION

For the foregoing reasons, Appellant Jarreau Ayers respectfully requests that this Court reverse the judgment of the Superior Court.

COLLINS & ASSOCIATES

/s/ Patrick J. Collins

Patrick J. Collins, ID No. 4692

8 East 13th Street

Wilmington, DE 19801

(302) 655-4600

Attorney for Appellant

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