



IN THE SUPREME COURT OF THE STATE OF DELAWARE

JARREAU AYERS )  
)  
Defendant-Below, )  
Appellant, )  
)  
v. ) No. 436, 2019  
)  
)  
STATE OF DELAWARE, )  
)  
Plaintiff-Below, )  
Appellee. )

ON APPEAL FROM THE SUPERIOR COURT  
OF THE STATE OF DELAWARE

**STATE'S ANSWERING BRIEF**

Sean P. Lugg (No. 3518)  
Deputy Attorney General  
Delaware Department of Justice  
Carvel State Office Building  
820 North French Street, 7th Floor  
Wilmington, Delaware 19801  
(302) 577-8500

Dated: October 30, 2020

# TABLE OF CONTENTS

	<b>PAGE</b>
Table of Authorities .....	ii
Nature and Stage of the Proceedings .....	1
Summary of the Argument .....	5
Statement of Facts .....	6
Argument	
<b>I. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT</b> .....	<b>27</b>
Conclusion .....	37

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Baker v. State</i> , 906 A.2d 139 (Del. 2006) .....	27, 28, 29, 36
<i>Booze v. State</i> , 2007 WL 445969 (Del. Feb. 13, 2007) .....	29
<i>Bugra v. State</i> , 818 A.2d 964 (Del. 2003) .....	36
<i>DeAngelis v. Harrison</i> , 628 A.2d 77 (Del. 1993) .....	35, 36
<i>Flonnory v. State</i> , 778 A.2d 1044 (Del. 2001) .....	31
<i>Hughes v. State</i> , 437 A.2d 559 (Del. 1981) .....	5, 28, 32, 33, 36
<i>Hunter v. State</i> , 815 A.2d 730 (Del. 2002) .....	5, 25, 36
<i>Kirkley v. State</i> , 41 A.3d 372 (Del. 2012) .....	27, 28, 29, 30, 35, 36
<i>Kurzmann v. State</i> , 903 A.2d 702 (Del. 2006) .....	29
<i>McCoy v. State</i> , 112 A.3d 339 (Del. 2015) .....	31
<i>Michael v. State</i> , 529 A.2d 752 (Del. 1987) .....	33
<i>R.D. v. Shonhola, Inc.</i> , 2019 WL 3801455 (M.D. Penn. Aug. 13, 2019) .....	21
<i>Saavedra v. State</i> , 225 A.3d 364 (Del. 2020) .....	36
<i>Thompson v. State</i> , 2007 WL 594542 (Del. Feb. 27, 2007) .....	21
<i>Wainwright v. State</i> , 504 A.2d 1096 (Del. 1986) .....	27, 28
<i>Walls v. State</i> , 560 A.2d 1038 (Del. 1989) .....	32
<i>Whittle v. State</i> , 77 A.3d 239 (Del. 2013) .....	27, 28

## NATURE AND STAGE OF THE PROCEEDINGS

On February 1, 2017, inmates housed within “C Building” on the grounds of the James T. Vaughn Correctional Center (“JTVCC”) in Smyrna, Delaware, assaulted and incapacitated Department of Correction (“DOC”) staff assigned to oversee building operations and retained control of the building until shortly after 5:00 a.m. the following day.<sup>1</sup> Inmates brutally attacked three correctional officers – Sergeant Steven Floyd (“Sgt. Floyd”),<sup>2</sup> Correctional Officer Winslow Smith (“C.O. Smith”),<sup>3</sup> and Correctional Officer Joshua Wilkinson (“C.O. Wilkinson”)<sup>4</sup> – before placing them in storage closets, and restrained an institutional counselor, Patricia May (“May”), within a cell.<sup>5</sup> C.O. Smith and C.O. Wilkinson, seriously injured, were released later on February 1, 2017.<sup>6</sup> Members of a joint DOC and Delaware State Police (“DSP”) response team rescued May on February 2, 2017.<sup>7</sup> Soon thereafter, members of the response team found Sgt. Floyd in the building, dead.<sup>8</sup>

---

<sup>1</sup> A1585-86.

<sup>2</sup> A594; A620-21; A626; A653-54,

<sup>3</sup> A588-90; A597-599;

<sup>4</sup> A590; A642-644;

<sup>5</sup> A587-588; A774; A779

<sup>6</sup> A592; A656; A658.

<sup>7</sup> A789.

<sup>8</sup> A1591-92; A1626.

On October 16, 2017, a New Castle County grand jury returned a sealed indictment against Jarreau Ayers (“Ayers”) and seventeen other inmates.<sup>9</sup> The indictment charged Ayers with Riot, First Degree Murder (3 counts),<sup>10</sup> First Degree Assault (2 counts), First Degree Kidnapping (4 counts), and Second Degree Conspiracy.<sup>11</sup> On October 17, 2017, the Superior Court arraigned Ayers and unsealed the indictment.<sup>12</sup> On October 17, 2017 the Superior Court President Judge specially assigned the case to a Superior Court judge.<sup>13</sup>

Ayers’ Appellate Counsel was appointed to represent him for trial.<sup>14</sup> On December 8, 2017, the Superior Court judge established discovery deadlines and, recognizing that all defendants could not be tried together, directed the State to submit a trial “grouping plan” to the court.<sup>15</sup> The State proposed to try Ayers, together with Derek Forney (“Forney”), Roman Shankaras (“Shankaras”), and

---

<sup>9</sup> A1 at DI 1; A21-33.

<sup>10</sup> The indictment charged Ayers and fifteen other defendants with the murder of Sgt. Floyd under three theories: Count II (intentionally caused death); Count III (recklessly caused death during the felony of Riot); and Count IV (recklessly caused the death of a law enforcement officer). A23-25.

<sup>11</sup> A21-33. The indictment charged Ayers and fifteen others with the same eleven charges. Royal Downs and Pedro Chairez were not charged with Sgt. Floyd’s murder or the assaults committed upon C.O. Smith and C.O. Wilkinson. *Id.*

<sup>12</sup> A1 at D5; A1 at DI 1.

<sup>13</sup> A2 at DI 7.

<sup>14</sup> A2 at DI 10.

<sup>15</sup> A3 at DI 14.

Dwayne Staats (“Staats”) in the first trial grouping, and the Superior Court scheduled this trial to begin in October of 2018.<sup>16</sup>

Under a protective order imposed by the trial judge,<sup>17</sup> the State shared voluminous materials with the defendants; Ayers’ counsel served as “coordinating counsel” for all defendants to manage and organize materials provided by the State.<sup>18</sup>

On August 30, 2018, Ayers’ counsel informed the trial court that, under the protective order, “defense counsel were not permitted to know the names of the inmate witnesses,” and that the State’s recently released witness list included one of his former clients.<sup>19</sup> Citing a conflict of interest, counsel requested to withdraw from his representation of Ayers and further requested new counsel be appointed.<sup>20</sup> The Superior Court permitted counsel to withdraw,<sup>21</sup> permitted Ayers to represent himself,<sup>22</sup> and directed another attorney to serve as stand-by counsel.<sup>23</sup> On September 28, 2018, the Superior Court, with the agreement of Ayers and the State, instituted a plan whereby Ayers’ original counsel would serve as advisory standby

---

<sup>16</sup> A3-4 at DI 18.

<sup>17</sup> A115.

<sup>18</sup> A3 at DI 15.

<sup>19</sup> A11 at DI 61; A133.

<sup>20</sup> A134.

<sup>21</sup> A13 at DI 72; A138.

<sup>22</sup> A144.

<sup>23</sup> Id.

counsel except when his former client testified; alternate standby counsel was appointed for that witness.<sup>24</sup>

Ayers, together with Forney, Shankaras, and Staats, proceeded to trial on October 22, 2018.<sup>25</sup> On October 29, 2018, due to an irreconcilable conflict, the Superior Court granted Shankaras' counsel's motion to withdraw and removed Shankaras from the case.<sup>26</sup> At the conclusion of the sixteen day trial, on November 20, 2018, the jury found Ayers guilty of Riot, two counts of First Degree Assault, four counts of First Degree Kidnapping, and Second Degree Conspiracy.<sup>27</sup>

On September 13, 2019, following a pre-sentence investigation, the Superior Court sentenced Ayers to an aggregate one-hundred twenty-three years of incarceration followed by probation.<sup>28</sup>

On October 10, 2019, the Superior Court appointed stand-by trial counsel to represent Ayers on appeal.<sup>29</sup> Ayers filed a timely notice of appeal and an Opening Brief. This is the State's Answering Brief.

---

<sup>24</sup> A264-65.

<sup>25</sup> A16 at DI 104, 108.

<sup>26</sup> A1135.

<sup>27</sup> A16 at DI 108; A2716-2717. The jury found Staats guilty of all charges and acquitted Forney of all charges.

<sup>28</sup> A2785-2786; A2788-2792.

<sup>29</sup> A18 at DI 131; A2793.

## SUMMARY OF THE ARGUMENT

I. Appellant's Argument I is denied. The State did not commit prosecutorial misconduct in its rebuttal summation by making a single reference to Ayers' demeanor after Ayers, while testifying, invited the jury to consider his demeanor when assessing his actions during the uprising. And, if this Court finds further review warranted, the prosecutor's comment, when assessed under the *Hughes*<sup>30</sup> framework, does not support reversal. This was not a close case, the prosecutor's comment did not prejudicially impact an issue central to the case, and the trial judge properly informed the jury of its role in evaluating the trial evidence. Finally, the prosecutor's single comment does not constitute a pattern subject to review under *Hunter*.<sup>31</sup>

---

<sup>30</sup> *Hughes v. State*, 437 A.2d 559 (Del. 1981).

<sup>31</sup> *Hunter v. State*, 815 A.2d 730 (Del. 2002).

## STATEMENT OF FACTS

In the weeks preceding February 1, 2017, there was “common talk that C Building was going to explode.”<sup>32</sup> Institutional counselor May expressed concerns to colleagues that “I’m afraid I’m going to get killed in that building.”<sup>33</sup> Inmates, including defendants Ayers<sup>34</sup> and Staats, discussed organizing protests to address “the conditions and the treatment and respect level at the institution.”<sup>35</sup> They felt “[t]he inmates needed a voice.”<sup>36</sup> While the initial discussions involved forms of peaceful protests, talk shifted to a more aggressive plan to take over the building.<sup>37</sup> On January 31, 2017, Ayers informed his friend and fellow inmate,<sup>38</sup> Royal Downs, that the takeover was planned to occur the following day – February 1, 2017.<sup>39</sup> As Downs walked toward the yard on the morning of February 1, he spoke with Sgt. Floyd and asked, “Man, you know, you know what’s ready to go down? Floyd said, I know. . . . He shook his head and said, I know.”<sup>40</sup>

---

<sup>32</sup> A795.

<sup>33</sup> A795.

<sup>34</sup> Ayers is known colloquially within JTVCC as “Ruk.” A1083.

<sup>35</sup> A1082; A1086.

<sup>36</sup> A1086.

<sup>37</sup> A1116-17.

<sup>38</sup> A1201; A1257-58; A2299.

<sup>39</sup> A1111.

<sup>40</sup> A1122-23

### *The Takeover*

Shortly after 10:00 a.m., Sgt. Floyd “called yard” – a signal for inmates in the yard outside C Building to return inside the building.<sup>41</sup> A coordinated attack upon the correctional officers commenced.<sup>42</sup> Inmate Anthony Morrow, on the telephone in the area of the barbershop, looked up the tier and saw “a gang of guys just beating on Floyd.”<sup>43</sup> Others heard Floyd repeatedly screaming “Code 1.”<sup>44</sup> One inmate in the yard described Floyd’s voice getting “dimmer, and dimmer, and dimmer, like he went further and further in the building.”<sup>45</sup> Another inmate, Richard McCane, saw “two guys pulling [Sgt.] Floyd back from the entryway” then hit him in his side and back.<sup>46</sup> McCane heard Sgt. Floyd say, “I recognize your voices, I know who you are. When I’m done with you, you’ll never get out of jail.”<sup>47</sup>

As C.O. Wilkinson closed the B Tier door, he “heard a lot of footsteps coming from behind [him], [he] turned around and saw multiple offenders coming to attack

---

<sup>41</sup> A585; A1156-57.

<sup>42</sup> A646-47.

<sup>43</sup> A1017.

<sup>44</sup> A1157; A1640-41; A1756; A2054.

<sup>45</sup> A1756.

<sup>46</sup> A1895.

<sup>47</sup> A1895.

[him].”<sup>48</sup> Between 8 and 12 inmates attacked him.<sup>49</sup> As he attempted to shield himself from their punches, he “felt something hard hit the left side of [his] head and the next thing [he] remember[ed] is waking up on the floor.”<sup>50</sup> When he regained consciousness, he “had blood coming from multiple areas of [his] head.”<sup>51</sup> C.O. Wilkinson “heard Code 1 called, which is an assault on an officer.”<sup>52</sup> After being knocked to the ground, C.O. Wilkinson explained that inmates handcuffed him behind his back then dragged him to a closet.<sup>53</sup> A few minutes later, C.O. Smith was placed in the closet with him.<sup>54</sup>

A masked inmate attacked C.O. Smith as he stood at the A Tier door.<sup>55</sup> C.O.

Smith explained:

I remember getting hit by a lot of people. Then I remember looking up at one point and seeing [Sgt.] Floyd and Officer Wilkinson fighting by the Sergeant’s Office door other inmates. And then I remember at one point seeing [Sgt.] Floyd being pushed into the mop closet by a group of inmates. And I remember seeing a knife laying by the [mop closet] door.<sup>56</sup>

---

<sup>48</sup> A642-43.

<sup>49</sup> A643.

<sup>50</sup> A643.

<sup>51</sup> A644.

<sup>52</sup> A644.

<sup>53</sup> A648.

<sup>54</sup> A652.

<sup>55</sup> A586.

<sup>56</sup> A587.

C.O. Smith also “noticed the counselor had somebody grabbing her with a knife to her throat, so I ran into the Counselor’s Office; and right as I got past the door, I was grabbed, pulled back out and beaten some more. Then I was handcuffed in front and put into the closet right next to the mop closet.”<sup>57</sup> C.O. Wilkinson “was already in that room when [C.O. Smith] went in.”<sup>58</sup> While in the closet he heard “[Sgt.] Floyd screaming because they were assaulting him.”<sup>59</sup>

While C.O. Smith and C.O. Wilkinson were restrained in the storage closet, inmates “would slightly open the door and throw in burning objects on top of [them].”<sup>60</sup> Later in the afternoon, C.O. Smith was released from the closet and permitted to leave the building.<sup>61</sup> Still handcuffed, his captors covered his head and walked him to the yard.<sup>62</sup> An officer found him in the yard, opened the gate, and let him out.<sup>63</sup> After randomly assaulting C.O. Wilkinson throughout his captivity, and occasionally using him to negotiate or appear at a window as “proof of life,”<sup>64</sup>

---

<sup>57</sup> A587-88.

<sup>58</sup> A590.

<sup>59</sup> A594.

<sup>60</sup> A655; A590.

<sup>61</sup> A591-92.

<sup>62</sup> A591.

<sup>63</sup> A592.

<sup>64</sup> A657.

inmates released him from the building around 8:30 p.m.<sup>65</sup>

While inmates savagely beat Sgt. Floyd, C.O. Wilkinson, and C.O. Smith, a knife-wielding inmate, revealed at trial to be Staats, interrupted counselor Patricia May's meeting with another inmate in her office in C Building.<sup>66</sup> Staats threatened to stab May if she did not do everything he told her to do.<sup>67</sup> Hoping to trigger an emergency response by alerting the operator, May knocked the telephone off its hook.<sup>68</sup> Staats sought to use May's telephone or computer to contact the News Journal to convey his list of demands.<sup>69</sup> As they tried to contact the News Journal, May saw "a very extremely violent fight" between a correctional officer and an inmate go flying past her window.<sup>70</sup> She explained that these events occurred right after the inmates were called in from yard.<sup>71</sup> Staats then bound May's hands and feet and placed a hood over her head.<sup>72</sup> The hood was not drawn tightly around her

---

<sup>65</sup> A658.

<sup>66</sup> A774. Staats admitted during his examination of May (A807) and during his testimony (A2404) that he was the person armed with a knife who threatened May in her office on the morning of February 1, 2017.

<sup>67</sup> A774.

<sup>68</sup> A775.

<sup>69</sup> A775; A2404.

<sup>70</sup> A775-76.

<sup>71</sup> A776.

<sup>72</sup> A776; A2204.

neck allowing her to see “blood all over the floor” as Staats moved her to a cell.<sup>73</sup> Shortly after 5:00 a.m. the following day, CERT team members “came and got [her] out.”<sup>74</sup> May gave the team “a thumbs up just to let [them] know [she was] okay, and then they took [her] right to the ambulance.”<sup>75</sup>

In the midst of the attack upon him, Sgt. Floyd broadcast a “Code 1” – a radio signal announcing an assault on staff<sup>76</sup> – to alert others on the JTVCC grounds to the attack upon staff in C Building. Lt. Charles Sennett, Jr. (“Lt. Sennett”), area supervisor for the portion of the JTVCC campus including C Building,<sup>77</sup> responded to the call.<sup>78</sup> Lt. Sennett and a small team of officers entered C Building; “[he] saw locker boxes scattered throughout the foyer area, and [he] saw blood all over the floor.”<sup>79</sup> As the team carefully advanced into the building, Sgt. Floyd, through the closet screen window, warned, “[t]hey took over the building. It’s a setup, get out.”<sup>80</sup> Lt. Sennett immediately pulled his team back, secured the building, and announced

---

<sup>73</sup> A776-77.

<sup>74</sup> A779. “CERT” refers to the DOC “Crisis Emergency Response Team.” A983-84.

<sup>75</sup> A790.

<sup>76</sup> A719.

<sup>77</sup> A718.

<sup>78</sup> A719.

<sup>79</sup> A721.

<sup>80</sup> A722.

the takeover.<sup>81</sup> Lt. Sennett then re-entered the building through a disused “pillbox” and observed Staats moving about the building “as if a scout;”<sup>82</sup> from this vantage he also saw inmate locker boxes “staged as like an obstacle course [or] a hindrance to our response or a hindrance to our exit.”<sup>83</sup>

As the riot unfolded on the ground floor of Building C, three stationary firemen<sup>84</sup> – Matthew McCall, Owen Hammond, and Justin Tuxward<sup>85</sup> – were testing and adjusting chemicals in the building’s basement boiler system.<sup>86</sup> That day they “were adding a new chemical to the line to bring the pH up down the line for steam. [They] were having some trouble with heat, so [they] were carrying a new chemical.”<sup>87</sup> After completing their task, the three men came back upstairs and, as they opened the door to the ground floor, were greeted by an inmate who told them, “Don’t go out there, it’s crazy out there. You probably should go back downstairs.”<sup>88</sup>

Tuxward, carrying the chemicals and wearing a respirator mask,<sup>89</sup> led the

---

<sup>81</sup> A722.

<sup>82</sup> A723.

<sup>83</sup> A724.

<sup>84</sup> Stationary firemen, in other industries referred to as stationary engineers, are responsible for the maintenance and operation of JTVCC boilers. A859-61.

<sup>85</sup> A863; A941.

<sup>86</sup> A863-64; A917.

<sup>87</sup> A862.

<sup>88</sup> A871; A919.

<sup>89</sup> A946-47.

group forward into the building.<sup>90</sup> As they rounded a corner, they saw items and blood on the floor, then “saw [Sgt.] Floyd in the last closet on the right, had a little window there with like a little bit of a mesh on the front, a metal mesh, and he was asking for help, but there was a padlock on the door.”<sup>91</sup> Tuxward saw Sgt. Floyd’s face “through the metal grate of the door. He was busted up and just covered in blood . . . . All over his face, just running down, his whole face was covered.”<sup>92</sup> Sgt. Floyd said to Tuxward, “Get me out of here. They’re going to kill me. Please help me.”<sup>93</sup>

As Tuxward provided Sgt. Floyd assurances of help,<sup>94</sup> Staats<sup>95</sup> “put a knife in [Tuxward’s] face<sup>96</sup> and told him, “‘If you help him, I’ll kill you,’ or ‘if you help him, I’ll hurt you’ or something to that effect.”<sup>97</sup> With quick thinking, Tuxward gestured to the chemical bucket he was carrying and said, “[i]f you breathe this, you’ll die.”<sup>98</sup>

---

<sup>90</sup> A872.

<sup>91</sup> A873; A920.

<sup>92</sup> A955.

<sup>93</sup> A956.

<sup>94</sup> A956.

<sup>95</sup> Staats admitted during his testimony that while armed with a knife he encountered the three men in the hallway carrying chemicals. A2405.

<sup>96</sup> A873.

<sup>97</sup> A958.

<sup>98</sup> A876-77; A922.

Staats stepped back and the three men then retreated back into the basement.<sup>99</sup> McCall locked the door to the basement, then Tuxward “called JV Tower to relay the information about the building being taken over.”<sup>100</sup> McCall, standing at the top of the basement stairs looking through a window in the locked door, saw a masked inmate tell “everybody out in the yard to come on in we’re locking down for the day.”<sup>101</sup> McCall found it remarkable that nobody resisted this instruction.<sup>102</sup> For the next several hours, the three men communicated with institutional staff in JV tower.<sup>103</sup> Later that night, the three men climbed from the basement to the rooftop and escaped.<sup>104</sup>

### *Regaining Control*

Delaware State Police Department (“DSP”) specialists began working with DOC in response to the takeover of Building C.<sup>105</sup> DSP Cpl. Brian Crisman deployed a large robot as a surveillance platform to assess conditions at Building C.<sup>106</sup> The robot relayed video images to the multijurisdictional response team

---

<sup>99</sup> A877; A923.

<sup>100</sup> A880.

<sup>101</sup> A883.

<sup>102</sup> A883.

<sup>103</sup> A890.

<sup>104</sup> A892-96; A924.

<sup>105</sup> A1552.

<sup>106</sup> A1552.

stationed a safe distance away.<sup>107</sup>

DOC Lt. Brian Vanes learned of the hostage situation at JTVCC, and the warden assigned him to serve as on-scene commander for the Crisis Emergency Response Team (“CERT”) Team.<sup>108</sup> Lt. Vanes gathered information and briefed his team.<sup>109</sup> DSP Special Operations Response Team (“SORT”) operators soon joined his efforts.<sup>110</sup> At 4:45 a.m. on February 2, 2017 they were cleared to “make a multi-point entry” of Building C.<sup>111</sup> To circumvent locker boxes positioned as obstacles, Lt. Vanes, in consultation with DSP SORT operators, decided to employ a backhoe as a non-lethal tool to breach the building and clear the locker boxes out of the way.<sup>112</sup> Just after 5:00 a.m., the multijurisdictional team entered the building.<sup>113</sup> Lt. Vanes explained that, soon after entering the building, he found one of his team members frozen by the door to the sergeant’s office.<sup>114</sup> There they found Sgt. Floyd

---

<sup>107</sup> A1556-1567.

<sup>108</sup> A1572. “CERT” refers to the Department of Correction “Crisis Emergency Response Team.” A984.

<sup>109</sup> A1575.

<sup>110</sup> A1575. “SORT” refers to the Delaware State Police “Special Operations Response Team.” A1619.

<sup>111</sup> A1576.

<sup>112</sup> A1580.

<sup>113</sup> A1587.

<sup>114</sup> A1591-92.

on the floor, motionless, with mattresses stacked upon his body.<sup>115</sup>

### *The Aftermath: Death & Injury*

May did not sustain physical injuries, but retired from the DOC after the uprising and before trial.<sup>116</sup> A Christiana Care Health Systems (“Christiana Care”) Forensic Nurse Examiner (“FNE”) assessed C.O. Smith when he arrived at the Christiana Medical Center Emergency Department (“Christiana E.R.”) on the afternoon of February 1, 2017.<sup>117</sup> The FNE documented C.O. Smith’s injuries and testified that, in addition to bruises and abrasions, he suffered a cervical fracture and most likely had a concussion.”<sup>118</sup> Medical personnel discharged C.O. Smith with “information to follow up with a neurologist outpatient.”<sup>119</sup> At trial, C.O. Smith explained that he had not returned to work since his attack because he has Post Traumatic Stress Disorder (“PTSD”) and is “still having effects from the concussion.”<sup>120</sup> He suffers migraines and experiences paranoia in large groups.<sup>121</sup>

Another Christiana Care FNE assessed C.O. Wilkinson after he arrived at the

---

<sup>115</sup> A1592.

<sup>116</sup> A772.

<sup>117</sup> A752.

<sup>118</sup> A753-754.

<sup>119</sup> A754.

<sup>120</sup> A598.

<sup>121</sup> A598.

Christiana E.R. as a trauma alert on February 1, 2017.<sup>122</sup> After ensuring he was stable, the FNE collected evidence and documented C.O. Wilkinson's injuries; she explained that he sustained several lacerations and fractures to his face, a "depressed fracture of his nasal bones," a "complex facial fracture," considerable bruising to his head, a puncture wound to his arm, and injuries to his back and both wrists.<sup>123</sup> C.O. Wilkinson offered a lay explanation of his injuries and prolonged impairment:

My left orbital was totally cracked, broken in multiple places. My nose was broken. I had a fracture to the skull. I had puncture wounds to the throat and head. Pretty severe concussion. And otherwise than that [Post Traumatic Stress Disorder] PTSD.<sup>124</sup>

Nearly two years after the attack, Wilkinson had not returned to work and continued to receive treatment for nightmares, flashbacks and anxiety.<sup>125</sup>

A DSP paramedic, assigned to support the multijurisdictional effort to reclaim control of Building C on February 2, 2017, was directed to Sgt. Floyd's body in a storage closet.<sup>126</sup> He found Sgt. Floyd face down with "a lot of debris covered on top of him" in about an inch of water with "debris, trash, and newspapers, and everything."<sup>127</sup> The paramedic assessed Sgt. Floyd's condition, found his body to

---

<sup>122</sup> A744.

<sup>123</sup> A745.

<sup>124</sup> A658.

<sup>125</sup> A661.

<sup>126</sup> A1622.

<sup>127</sup> A1623.

be cool, lacking a pulse, and not breathing, and “determined that Sergeant Floyd was already dead.”<sup>128</sup> The paramedic observed several wounds to Sgt. Floyd’s body and noted he “sustained some kind of burning injury.”<sup>129</sup>

Delaware Chief Medical Examiner Dr. Gary L. Collins conducted a postmortem examination of Sgt. Floyd’s body on February 2, 2017.<sup>130</sup> Dr. Collins determined the cause of Sgt. Floyd’s death to be “multiple blunt impact injuries and injuries by sharp objects,” and ruled the manner of his death to be “homicide.”<sup>131</sup>

Reading from his report, he explained:

The blunt impact injuries and multiple wounds caused by sharp objects, in parenthesis, cuts and excise wounds, would result in significant bleeding. The pale organs – meaning that his organs were not as red, or don’t have the – I don’t want to use too many – doesn’t have the nice red color that most organs would have, so they were pale, which tells me that there was significant blood loss – the pale organs and decreased volumes are consistent with blood loss via hemorrhage.<sup>132</sup>

Dr. Collins noted that “a large majority” of Sgt. Floyd’s wounds, “in fact, the ones that were most significant were centered around his head and face.”<sup>133</sup> Dr. Collins also observed an “area of blackened skin which is consistent with the thermal

---

<sup>128</sup> A1623-26.

<sup>129</sup> A1625.

<sup>130</sup> A2147.

<sup>131</sup> A2148.

<sup>132</sup> A2148.

<sup>133</sup> A2148.

burn.”<sup>134</sup> Physical evidence accompanying these burns – the absence of a “vital reaction” evidenced by the lack of a red rim – caused Dr. Collins to conclude that Sgt. Floyd’s body was burned after he was killed.

### *The Investigation*

DSP Sgt. David Weaver<sup>135</sup> served as the Chief Investigating Officer, responsible for overseeing witness interviews, evidence collection, report drafting and the overall coordination of the investigation.<sup>136</sup> He explained that his investigation began with the 126 inmates housed in C Building and resulted in the indictment of 18 inmates for charges related to the February 1, 2017 crimes.<sup>137</sup> The investigation presented many challenges, and Sgt. Weaver endeavored to, where possible, remove taints to witnesses’ recollections.<sup>138</sup> He developed a photo book depicting all residents of C Building, but purposefully excluded individual inmate names.<sup>139</sup> Recognizing that inmates were less forthcoming when interviewed at JTVCC, Sgt. Weaver adjusted the interview process and scheduled less conspicuous

---

<sup>134</sup> A2152.

<sup>135</sup> On February 1, 2017, Sgt. Weaver “was the Sergeant assigned to [the] Delaware State Police Homicide Unit.” A377. He retired from the Delaware State Police on August 31, 2018 and was hired as a civilian investigator on September 4, 2018 to oversee cold case investigations. *Id.*

<sup>136</sup> A379.

<sup>137</sup> A381-82.

<sup>138</sup> A2204.

<sup>139</sup> A2204.

meetings at the New Castle County Courthouse.<sup>140</sup> To further avoid tainting the investigation, Sgt. Weaver purposefully did not present witnesses with evidence or photographs. He explained:

Early on, details about this investigation, because it was a high-profile case in Delaware, started to get released through the media, whether it was TV news, locally or nationally, and also through social media and newspapers. And details about it were getting released, so we knew when we conducted these interviews that it may be tainted because some inmates may have read about it. So when we would conduct interviews, we could go in and tell them, we want you to tell us what you saw, only what you saw, not what you read.

So if there's a comment in there where somebody says I read it in the paper, I saw it, we would explain to them, not what you read but what you saw. You know, we have no control of the details that are being released. There were two things that we had control of that we did not release, and we did not show photographs for a specific reason, and that is because we did not release any type of evidence we collected. We did not show photographs to anyone because we did not want that information to be tainted.

So if somebody is saying that they saw somebody holding a shank, we would ask them to describe it. We would not show them pictures because we did not want them to know these are the evidence items we collected, and we don't want you to go back, and if they go back and tell somebody they collected it, that we have a photograph of it. So we want to hear from them what they saw, we don't want to reveal that information.

Along with the autopsy report, that was the second thing that was not released, because those things that with the medical examiner's office we were able to help control that information from being released. So when somebody described an injury of where Sergeant Floyd may have been attacked, or what item might have been used, whether it's a mop ringer or a fire extinguisher, we know that that information was never

---

<sup>140</sup> A2205.

released, and so we can take that information as being credible.<sup>141</sup>

Of the 126 inmates housed at Building C on February 1, 2017, 30 refused to provide a statement, 72 informed investigators they did not see anything, and 24 provided an interview and reviewed the photo book.<sup>142</sup> Ultimately, 18 inmates were charged.<sup>143</sup>

### ***Inmate “Shot Callers”***

The investigation revealed varying levels of involvement by the charged inmates. By many accounts, Ayers, Staats, and Downs planned or led the February 1, 2017 prison takeover.<sup>144</sup> Downs pled guilty to riot<sup>145</sup> and agreed to testify about the Building C takeover, the assaults upon correctional officers, and the murder of

---

<sup>141</sup> A2210-11.

<sup>142</sup> A2207.

<sup>143</sup> A381-82.

<sup>144</sup> Ayers, in his opening brief, posits that the testimony of inmate witnesses, particularly “[t]heir varying vantage points and recollections of who did what to whom lent a *Rashomon*-esque quality to the trial.” Op. Brf. at 26. The State agrees that the trial presented “divergent recollections of a singular event [or multiple discrete events] by witnesses to that event [or those events].” *R.D. v. Shonhola, Inc.*, 2019 WL 3801455, at \*1 (M.D. Penn. Aug. 13, 2019) (describing the “Rashomon effect”). Understanding that this trial, like many criminal trials, involved the assessment of conflicting evidence, the State seeks to coalesce, as much as possible, the descriptions of events and actors within the C Building to present “one harmonious story out of all the evidence.” See *Thompson v. State*, 2007 WL 594542, at \*6 (Del. Feb. 27, 2007) (explaining the Delaware Supreme Court’s longstanding acceptance of instructions to juries to reconcile conflicting evidence); A2633 (Ayers jury instruction addressing conflicts in testimony).

<sup>145</sup> A1068.

Sgt. Floyd.<sup>146</sup> Downs testified that, in the weeks preceding February 1, he met with Shankaras, Ayers, Staats and others to discuss protesting prison conditions.<sup>147</sup> Shankaras later told Downs of a plan to take over the building.<sup>148</sup> The night before the uprising, Ayers informed him of the plan to take over the building the following day.<sup>149</sup> Downs disagreed with this plan from the start<sup>150</sup> and tried to warn correctional staff.<sup>151</sup> Downs knew something was going to happen; when the melee began he stepped up to quell the violence.<sup>152</sup> He believes that, “[h]ad [he] not stepped up . . . more lives would have been lost.”<sup>153</sup> After the inmates incapacitated the correctional officers, in the midst of the “chaos” and “anarchy,”<sup>154</sup> Downs assumed the role of inmate negotiator.<sup>155</sup> Despite this explanation, at least one witness described Downs as the orchestrator of the entire incident.<sup>156</sup>

In a meandering manifesto, Staats claimed responsibility for his role in

---

<sup>146</sup> A1077-78.

<sup>147</sup> A1082-83.

<sup>148</sup> A1095-96.

<sup>149</sup> A1101; A1111.

<sup>150</sup> A1117.

<sup>151</sup> A1118.

<sup>152</sup> A1067.

<sup>153</sup> A1068.

<sup>154</sup> A1169.

<sup>155</sup> A1163; A1170-1171.

<sup>156</sup> A2048.

planning and executing the uprising that “needed to happen.”<sup>157</sup> He described the surreal feeling “that everything that transpired started from one thought.”<sup>158</sup> He claimed that “[n]o more than six”<sup>159</sup> other inmates were involved in his plan and absolved Ayers of responsibility, explaining “he just got off crutches . . . [and] he was in the mix of some other stuff with Downs,”<sup>160</sup> so Staats “went a whole other route.”<sup>161</sup> But Staats refused to identify any of his accomplices.<sup>162</sup> Staats was prepared for the violence his plan inspired;<sup>163</sup> he didn’t need to “groom” other inmates because he felt they would know how to take care of business when the time came.<sup>164</sup> Staats acknowledged that Sgt. Floyd died as a result of his plan.<sup>165</sup>

Ayers walked around the building “facilitating.”<sup>166</sup> He called the remaining inmates in the yard into the building after Sgt. Floyd, C.O. Smith, and C.O.

---

<sup>157</sup> A2397; A2410; A2413.

<sup>158</sup> A2397.

<sup>159</sup> A2411; A2413.

<sup>160</sup> A2409.

<sup>161</sup> A2409.

<sup>162</sup> A2413.

<sup>163</sup> A2419.

<sup>164</sup> A2420.

<sup>165</sup> A2431.

<sup>166</sup> A1996; A2014.

Wilkinson were debilitated.<sup>167</sup> Then, he collected locker boxes from inmates.<sup>168</sup> He appeared to be solely responsible for granting or denying inmates permission to leave the building.<sup>169</sup> He appeared to be in charge,<sup>170</sup> and inmates went to him for instruction.<sup>171</sup> When cross examined by Ayers, Inmate Wade Smith, IV, clarified, “I don’t know if you planned it or not when I meant facilitator. And when I told [investigators] that you were a shot caller, it was like I seen you, you know, directing, you know, who was going to go and who was going to stay. That’s what I meant by facilitator and shot caller.”<sup>172</sup> When Smith asked to leave the building, Ayers told him “no one else was leaving; that no one is leaving until the morning, and that we should cherish the time we have with each other because we don’t know when we’re going to see each other again, we could be shipped anywhere.”<sup>173</sup>

On the night before the riot, Ayers informed his sister that something is going to happen.<sup>174</sup> The next morning, he went to the yard with Downs.<sup>175</sup> Ayers recounted

---

<sup>167</sup> A1758; A1864; A2056; A2065; A2109; A2163;

<sup>168</sup> A1669; A2112.

<sup>169</sup> A1679; A1996; A2021; A2129; A2165.

<sup>170</sup> A2005; A2113.

<sup>171</sup> A2114.

<sup>172</sup> A2016; A2031-32.

<sup>173</sup> A2018.

<sup>174</sup> A2300.

<sup>175</sup> A2302.

a level of annoyance and an expectation that some would “backpedal out of it.”<sup>176</sup> He explained that when he heard Sgt. Floyd call them in from yard he was “upset” because it looked like nothing was going to happen.<sup>177</sup> Then he heard someone call “Code 1.”<sup>178</sup> He claimed that he was excluded from participation due to his ACL injury and he was “pissed.”<sup>179</sup> Yet he testified that, once inside the building, he moved about freely to check on various acquaintances.<sup>180</sup> Then, at Staats’ direction, he went through the building to “find out on all the tiers who got medical issues” to prepare them for release.<sup>181</sup>

### *Conclusion*

After months of investigation, Sgt. Weaver presented corroborated evidence supporting criminal charges against 18 of the 126 inmates housed within C Building on February 1, 2017.<sup>182</sup> Navigating the myriad obstacles and challenges of a crime unprecedented in Delaware, prosecutors diligently and professionally marshalled the case against Ayers and his co-defendants. While little evidence established Ayers

---

<sup>176</sup> A2304.

<sup>177</sup> A2304.

<sup>178</sup> A2305.

<sup>179</sup> A2306.

<sup>180</sup> A2308-10.

<sup>181</sup> A2315-16.

<sup>182</sup> A381; Sgt. Weaver explained that only those individuals identified by two or more witnesses were further investigated for criminal charging. A2216.

as a direct assailant of Sgt. Floyd,<sup>183</sup> substantial evidence established his role as a leader and accomplice to Sgt. Floyd's, C.O. Smith's, C.O. Wilkinson's, and Counselor Mays' violent attackers. In closing the State argued: "[Ayers] 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 the others in that violent takeover."<sup>184</sup> Ayers' jury, in large part, agreed.<sup>185</sup>

---

<sup>183</sup> One witness identified Ayers as a member of the group of men attacking Floyd. A2077; 2081.

<sup>184</sup> A2521.

<sup>185</sup> A2716-18.

## I. THE STATE DID NOT COMMIT PROSECUTORIAL MISCONDUCT.

### Question Presented

Whether the trial prosecutor committed prosecutorial misconduct by making a single reference, during rebuttal summation at the conclusion of a sixteen-day trial, to the demeanor of a *pro se* defendant who testified at trial.

### Standard and Scope of Review

This Court reviews claims of prosecutorial misconduct to which there was no objection at trial for plain error.<sup>186</sup> Where defense counsel raises a “timely and pertinent objection,” or “the trial judge intervened and considered the issue *sua sponte*,” this Court reviews the claim for “harmless error.”<sup>187</sup> Under both standards, the Court will review the record *de novo* to determine whether prosecutorial misconduct occurred, and if the Court finds no error, the analysis ends.<sup>188</sup>

Under the plain error standard, “the error must be ‘so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process.’”<sup>189</sup> Moreover, plain error only exists where there are “material defects which are

---

<sup>186</sup> *Whittle v. State*, 77 A.3d 239, 243 (Del. 2013); *Baker v. State*, 906 A.2d 139, 148 (Del. 2006).

<sup>187</sup> *Kirkley v. State*, 41 A.3d 372, 376 (Del. 2012); *Baker*, 906 A.2d at 148.

<sup>188</sup> *Whittle*, 77 A.3d at 243; *Kirkley*, 41 A.3d at 376; *Baker*, 906 A.2d at 148.

<sup>189</sup> *Whittle*, 77 A.3d at 243 (citing *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986)).

apparent on the face of the record [,] which are basic, serious and fundamental in their character, and which clearly deprive an accused of a substantial right, or which show manifest injustice.”<sup>190</sup> Where the Court finds plain error, it will reverse with no further analysis, but where no plain error is found, the Court may still reverse on the grounds that the error was part of a pattern of misconduct that “cast[s] doubt on the integrity of the *judicial* process.”<sup>191</sup>

Under the harmless error standard, where a prosecutor has engaged in misconduct, the Court will “determine whether the misconduct prejudicially affected the defendant.”<sup>192</sup> To make this determination, the Court applies the three-factor *Hughes*<sup>193</sup> test, which assesses: “(1) the closeness of the case, (2) the centrality of the issue affected by the error, and (3) the steps taken to mitigate the effects of the error.”<sup>194</sup> This assessment is performed “in a contextual, factually specific manner.”<sup>195</sup> If this assessment mandates reversal, the assessment ends. The Court

---

<sup>190</sup> *Whittle*, 77 A.3d at 243 (quoting *Wainwright*, 504 A.2d at 1100).

<sup>191</sup> *Baker*, 996 A.2d at 150 (emphasis in original).

<sup>192</sup> *Kirkley*, 41 A.3d 372 at 376 (citing *Baker*, 996 A.2d at 148).

<sup>193</sup> *Hughes v. State*, 437 A.2d 559, 571 (Del. 1981).

<sup>194</sup> *Kirkley*, 41 A.3d 372 at 376 (citing *Baker*, 996 A.2d at 149).

<sup>195</sup> *Id.*

may still reverse if it finds a pattern of misconduct that “cast[s] doubt on the integrity of the *judicial* process.”<sup>196</sup>

### **Merits of the Argument**

Ayers argues that in rebuttal closing argument, “[t]he 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.”<sup>197</sup> Not so. This Court recognizes that “[w]hen deciding whether a comment is improper prosecutorial misconduct, our cases often turn on the nuances of the language and the context in which the statements were made.”<sup>198</sup> Context controls. The prosecutor’s comment did not amount to prosecutorial misconduct. And, assuming *arguendo* further analysis is warranted, reversal is not warranted under *Hughes*.<sup>199</sup>

In his rebuttal summation, the trial prosecutor argued:

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, happening.

---

<sup>196</sup> *Baker*, 996 A.2d at 150.

<sup>197</sup> Op. Brf. at 49.

<sup>198</sup> *Booze v. State*, 2007 WL 445969, at \*5 (Del. Feb. 13, 2007) (quoting *Kurzmann v. State*, 903 A.2d 702, 710 (Del. 2006); *Kirkley*, 41 A.3d at 377.

<sup>199</sup> Because Ayers objected “[i]mmediately after the prosecutor’s rebuttal argument . . . the defense raised a timely objection, [and] the conduct [should] be reviewed for harmless error.” *Kirkley*, 41 A.3d at 376.

You spent the better part of the last month with Jarreau Ayers. What about Mr. Ayers suggests that he is that person. That he's 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? That just doesn't make sense.<sup>200</sup>

During his own testimony, Ayers implored the jury to consider his demeanor throughout the trial when assessing his role in the uprising. When explaining “the clip on the walkie-talkie where [he] snap[s] out,” he explained, “*I mean, y'all been watching me at the trial, I can get emotional at times.* But I go into – I snap out. Because my thing is, like I said it – y'all go back and y'all get to listen to that clip. I'm pissed.”<sup>201</sup>

A prosecutor may argue “all legitimate inferences of the defendant's guilt that flow from the evidence[;] [t]he inferences, however, must flow from the evidence presented.”<sup>202</sup> Here, in rebuttal summation, the prosecutor merely repeated Ayers' testimonial assessment of his demeanor. Contrary to Ayers' argument, the prosecutor's comment neither exploited Ayers' *pro se* status, nor “exhorted the jury to factor in Mr. Ayers' demeanor while defending himself to make a character

---

<sup>200</sup> A2591-92

<sup>201</sup> A2317 (emphasis added).

<sup>202</sup> *Kirkley*, 41 A.3d at 377 (internal citations omitted).

evaluation.”<sup>203</sup> Rather, the prosecutor’s argument flowed from the evidence presented by Ayers and was not prosecutorial misconduct.

As an initial matter, Ayers’ reliance on *McCoy v. State*<sup>204</sup> and *Flonnory v. State*<sup>205</sup> in support of his argument is misplaced.<sup>206</sup> In *McCoy*, this Court found the trial prosecutor “made a number of disparaging remarks about McCoy throughout the trial.”<sup>207</sup> After setting forth a litany of remarks, this Court concluded “the prosecutor’s repetitive pattern of unprofessional conduct set a tone for the trial that is inconsistent with the due process rights of a capital murder defendant.”<sup>208</sup> Here, the trial prosecutor did not disparage Ayers’ decision to represent himself and, in stark contrast to *McCoy*, the prosecution team professionally engaged with Ayers throughout the trial.

In *Flonnory*, this Court addressed the propriety of a trial juror’s introduction of extraneous evidence in the deliberative process. A juror “became an unsworn and uncross-examined witness who presented inadmissible evidence to the other jurors

---

<sup>203</sup> Op. Brf. at 49.

<sup>204</sup> 112 A.3d 339 (Del. 2015).

<sup>205</sup> 778 A.2d 1044 (Del. 2001).

<sup>206</sup> Op. Br. at 46.

<sup>207</sup> *McCoy*, 112 A.3d at 264.

<sup>208</sup> *Id.* at 266.

that Flonnory had previously been accused of murder.”<sup>209</sup> Because the juror revealed information that Flonnory had previously been accused of “the exact same type of crime he stood trial for [there],” this Court concluded that the juror’s improper statement “presented a case of egregious circumstances so inherently prejudicial as to raise a presumption of prejudice.”<sup>210</sup> Here, the trial prosecutor suggested the jury accept Ayers’ invitation to consider what “y’all been watching.”<sup>211</sup>

Of course, “the courtroom demeanor of a defendant who has not testified is irrelevant . . . and, therefore, comment is beyond the scope of legitimate summary.”<sup>212</sup> But, this Court has recognized, “it is possible to make proper comments to a jury about the demeanor of a defendant who has testified.”<sup>213</sup> The scope of commentary, though, is not unlimited. In *Walls*, this Court found a prosecutor’s inference that a defendant who testified did not display a normal demeanor throughout the trial to be improper, yet concluded “the prosecutor’s remarks about Walls’ demeanor, ‘when viewed in the context of this case, [were] not such as to undermine the fundamental fairness, did not contribute to a

---

<sup>209</sup> *Id.* at 1055 (internal citation omitted).

<sup>210</sup> *Id.* at 1055-56.

<sup>211</sup> A2317.

<sup>212</sup> *Hughes*, 437 A.2d 559, 572 (Del. 1981) (internal citations omitted).

<sup>213</sup> *Walls v. State*, 560 A.2d 1038, 1051 (Del. 1989).

miscarriage of justice, and [were] not plain error.’’<sup>214</sup> Here, Ayers testified and, when doing so, encouraged the jury to focus on their observations of him at trial. It was not improper for the prosecutor to carry the baton offered by Ayers to conclusion in summation.

If, however, this Court concludes the prosecutor’s comment was improper, an application of the *Hughes* factors reveals Ayers was not prejudicially affected and his convictions should not be reversed. First, this was not a close case. Ayers actively involved himself in the takeover and retention of control of Building C. Witnesses identified Ayers as a facilitator of the revolt, moving inmates into the building from yard,<sup>215</sup> collecting storage boxes arranged as barriers to emergency response,<sup>216</sup> and unilaterally deciding who could leave the building and when.<sup>217</sup> The evidence established him to be in charge.<sup>218</sup> Ayers, in his testimony, evidenced his steadfast support for the uprising, yet sought to distance himself from the events of February 1.<sup>219</sup> But, consistent with witness observations, Ayers conceded that he did travel throughout the building after the takeover and assisted Staats in organizing

---

<sup>214</sup> *Id.* (quoting *Michael v. State*, 529 A.2d 752, 764 (Del. 1987)).

<sup>215</sup> A1758; A1864; A2056; A2065; A2109; A2163.

<sup>216</sup> A1669; A2112.

<sup>217</sup> A1679; A1996; A2021; A2129; A2165.

<sup>218</sup> A2005; A2113.

<sup>219</sup> A2305-2307.

injured inmates.<sup>220</sup> Witness testimony, including Ayers' admissions, cemented his role as an accomplice to the events within Building C on February 1, 2017.

Second, the prosecutor's comment that, "[y]ou spent the better part of the last month with Jarreau Ayers. What about Mr. Ayers suggests he is that person?"<sup>221</sup> was a logical rhetorical follow up to Ayers' testimonial statement that "y'all been watching me at the trial, I can get emotional at times."<sup>222</sup> While Ayers' role in the uprising was central to his guilt as an accomplice, his demeanor and character were not. Contrary to Ayers' argument on appeal, the trial prosecutor did not "urge[] 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."<sup>223</sup> Rather, the trial prosecutor argued a legitimate inference from the evidence Ayers offered during his testimony.

Third, Ayers is correct that there were no steps taken to mitigate the prosecutor's comment.<sup>224</sup> The trial court did not perceive the trial prosecutor's

---

<sup>220</sup> A2308-13.

<sup>221</sup> A2591.

<sup>222</sup> A2317.

<sup>223</sup> Op. Brf. at 52.

<sup>224</sup> Op. Brf. at 52.

argument as making an improper implication.<sup>225</sup> And, on the heels of Ayers' objection, the trial court instructed the jury:

In considering the credibility of witnesses and in considering any conflict in testimony, you should take into consideration each witness' means of knowledge, strength of memory, and opportunity for observation, the reasonableness or unreasonableness of the testimony, the consistency or inconsistency of the testimony, the motives influencing the witness, the fact, if it is a fact, that the testimony has been contradicted, a witness' bias or prejudice or interest in the outcome of this litigation, the witness' ability to acquire the knowledge of the facts to which they testify, the witness' manner and demeanor upon the witness stand, and the apparent truthfulness of the testimony, and all other facts and circumstances shown by the evidence which affect the credibility of the testimony.<sup>226</sup>

\*\*\*\*\*

Your verdict must be based solely and exclusively on the evidence presented during the trial. You may not be influenced by passion, prejudice, sympathy or any other motive except a fair and impartial consideration of the evidence. Your deliberations must not be influenced by any sympathy that you may feel for the individual involved in this case.<sup>227</sup>

The State recognizes that, in *Kirkley*, this Court commented that, "*DeAngelis v. Harrison* demands that we find a pattern jury instruction ineffective for curing

---

<sup>225</sup> A2306-07.

<sup>226</sup> A2633-34.

<sup>227</sup> A2642-43.

misconduct in closing arguments.”<sup>228</sup> But, as here, where no misconduct occurred, the instruction properly clarified the jury’s assessment of evidence against Ayers.

Finally, the prosecutor’s comment, is not part of a “persistent pattern of prosecutorial misconduct” and does not “cast doubt on the integrity of the judicial process.”<sup>229</sup> Unlike the prosecutor in *Hunter*, the prosecutor here made a singular comment in rebuttal closing at the conclusion of a sixteen-day trial.<sup>230</sup> The prosecutor’s comment logically flowed from Ayers’ testimonial statement and neither impugned Ayers’ decision to proceed *pro se* nor compelled the jury to assess Ayers’ character.

---

<sup>228</sup> *Kirkley*, 41 A.3d at 380 (citing *DeAngelis v. Harrison*, 628 A.2d 77 (Del. 1993)).

<sup>229</sup> *Baker*, 906 A.2d at 149 (explaining that the *Hunter* test is not “fourth factor in a single unified *Hughes-Hunter* four-factor test,” but only applies when the *Hughes* test does not lead to reversal *and* the prosecutor errs repetitively); *See also Saavedra v. State*, 225 A.3d 364, 382-83 (Del. 2020) (explaining that *Hunter* addresses misconduct that is a “persistent pattern of prosecutorial misconduct” occurring over several trials).

<sup>230</sup> *See Bugra v. State*, 818 A.2d 964, 969 (Del. 2003).

**CONCLUSION**

For the foregoing reasons, the State respectfully submits that this Court should affirm the judgment below.

**/s/ Sean P. Lugg**  
Sean P. Lugg (No. 3518)  
Deputy Attorney General  
Delaware Department of Justice  
Carvel Office Building  
820 North French Street, 7th Floor  
Wilmington, Delaware 19801  
(302) 577-8500

Dated: October 30, 2020

IN THE SUPREME COURT OF THE STATE OF DELAWARE

JARREAU AYERS	)	
	)	
Defendant-Below,	)	
Appellant,	)	
	)	
v.	)	No. 436, 2019
	)	
	)	
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 7,170 words, which were counted by Microsoft Word.

Dated: October 30, 2020

/s/ Sean P. Lugg