

Circuit Court for Baltimore County
Case No. 03-K-17-000469

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 198

September Term, 2018

DANTE TERRELL GARRISON

v.

STATE OF MARYLAND

Nazarian,
Arthur,
Eyler, James R.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Eyler, James R., J.

Filed: January 15, 2019

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

Following a non-jury trial, a judge in the Circuit Court for Baltimore County convicted appellant, Dante Terrell Garrison, of second-degree murder, first-degree assault, and use of a handgun in a crime of violence.¹ The trial court sentenced appellant to 20 years in prison, after which he timely noted this appeal, asking us to consider whether the trial court erred in finding that the evidence did not generate an issue as to whether he acted in hot-blooded response to legally adequate provocation. For the reasons that follow, we affirm the judgments of the trial court.

FACTS AND LEGAL PROCEEDINGS

On November 7, 2016, Isaiah Davis and Kabrien Clark were shot and killed during an attempted robbery at a BP gas station on Liberty Road, Baltimore County. Much of the incident was captured on five video cameras recording at or near the gas station, and based on the undisputed evidence, the parties stipulated to the following facts at trial:

1. On November 7, 2016, Isaiah Davis and Kabrien Clark approached a group of men—which included Robert Davis² and appellant—inside the BP station, with the intent to rob them of money and marijuana;
2. Upon realizing he was about to be robbed, Robert Davis produced a firearm and shot and killed Isaiah Davis just outside the gas station;
3. After Isaiah Davis was shot, the other men ran away; Clark took off through the gas station parking lot—leaping over a parked car—and across Liberty Road toward Tulsa Road;

¹ The court acquitted him of two counts of first-degree murder and one count of use of a firearm in the commission of a crime of violence.

² There was no indication that Robert Davis and Isaiah Davis were related to each other. Because they share a surname, however, we will refer to each by his full name for clarity.

4. After Clark ran away, appellant picked up the gun Isaiah Davis had dropped and also ran out of the gas station toward Tulsa Road;
5. Appellant encountered Clark on Tulsa Road and shot Clark, with the projectile entering the back of Clark’s neck;
6. Clark brandished no weapon while at the gas station, and when the police found his body, there were no weapons on or near him.

The compiled video evidence, with narration by the investigating detective, was played for the court and entered into evidence.

For the defense, Robert Davis testified that he often sold drugs at the Liberty Road BP station.³ On the evening of November 7, 2016, he observed Isaiah Davis and some other men pull up to the BP station to get gas. He asked if any of the men wanted to “buy weed,” but they declined and left the gas station.

A few minutes later, however, Isaiah Davis returned to the gas station with Kabrien Clark, asking to purchase marijuana. Clark produced some money, but Isaiah Davis pulled a gun, at which point “everything went sideways.”

Isaiah Davis grabbed Robert Davis and said, “get in here or I’ll kill you.” Robert Davis pulled away, and the two men stumbled out the door. Robert Davis reached into his pocket for his own gun and shot Isaiah Davis. Afterwards, he ran, unaware of what was happening in the gas station.

³ At the time of trial, Robert Davis was incarcerated for his part in the homicides of Isaiah Davis and Clark.

(Continued)

Appellant testified that he, too, was selling marijuana at the BP station on November 7, 2016, although not in a joint enterprise with Robert Davis.⁴ Appellant was inside counting his money and about to go home when Isaiah Davis and Kabrien Clark entered the gas station. As he turned around, appellant saw Isaiah Davis, with a gun, grab Robert Davis, and he heard gunshots. Not knowing who had been shot, and scared for his life, appellant, as an “instant reaction,” picked up a gun he saw on the floor for protection and ran out of the store to get away from the danger.⁵

As appellant ran, his fear turned into anger that he had almost been robbed or killed. On a scale of one being not angry at all and ten being very angry, he described his anger as an eight-and-a-half or nine.

Thinking he heard footsteps behind him, appellant turned, and in his fear and “pissed mood,” he fired the gun at the person without thinking and kept running. The person turned out to be Clark, but appellant acknowledged it just as easily could have been one of the men from the gas station or a bystander. He gave no thought to shooting Clark, instead characterizing his action as a “fight or flight situation.” He acknowledged that he acted first and then hoped he had made the right decision.

⁴ Appellant described Robert Davis as a “friend of a friend” with whom he had become close.

⁵ Appellant acknowledged that no one pointed a gun at him or demanded any of his possessions, but he believed that “if somebody comes and robs one person he’s robbing everybody,” and if someone shoots one person, “they come in and shoot everybody.”

After the shooting, appellant threw the gun away, ran to his house, and locked himself inside his car. He fled to North Carolina but returned to Maryland and turned himself into police on January 3, 2017.

The trial court granted appellant’s motion for judgment of acquittal as it pertained to all charges relating to the death of Isaiah Davis. Declining to find premeditation sufficient to support a conviction of first-degree murder of Kabrien Clark, but finding no factors sufficient to mitigate the charge of murder to manslaughter, the trial court convicted appellant of second-degree murder and related offenses.

DISCUSSION

The single issue raised by appellant is whether the trial court, as fact-finder, erred in determining that the facts presented did not generate a finding that he killed Clark in hot-blooded response to legally adequate provocation, which would have provided mitigation to reduce the charge of second-degree murder to manslaughter. In appellant’s view, he met the burden of producing *prima facie* evidence of adequate provocation, and the court should have shifted the burden to the State to prove that he did not act in hot-blooded response to that provocation.

During closing argument, the State took the position that appellant had failed to meet his burden of production on the issue of legally adequate provocation, with appellant contending that he had and that the State then failed to disprove mitigation. The court ruled, as follows:

THE COURT: ...But what was the act of provocation that was legally adequate in this case? Well, the evidence was that, and Mr. Garrison testified. The, and, and I, and his testimony I have to consider in connection

with what I watched on the video tape. So, Mr. Garrison is not in a position where he's endangered at all, from the standpoint of the act of robbery that was perpetrated by Isaiah Davis upon Robert Davis. I believe that Isaiah Davis' back was frankly or most of his back was frankly facing Mr. Garrison. Mr. Garrison was somewhat behind him. So, there's a robbery that takes place. And Isaiah Davis is robbing Robert Davis. He, the, the testimony that I heard from Mr. Garrison was that the words, bitch, get in here or I'm going to kill you. He indicated that that's what Isaiah Davis said to Robert Davis. Suggesting, as is confirmed and corroborated by my view of the film that at that point in time Robert Davis was closer to the entrance or exit to the store, to the BP station. And, and Isaiah Davis was inside the BP station. So, he, Mr. Garrison hears that. The gun gets pulled. I guess Robert Davis pulls his gun and shoots Isaiah Davis in the presence of Mr. Garrison, but not under circumstances where Mr. Garrison could reasonably have suggested that he was to be the next subject of a shooting by either of the two men. The, so then ultimately we find out that Isaiah Davis is shot. He goes down. The suggestion by Mr. Garrison that he alighted from the store and, and did not recognize that there was a body and did not recognize that it was Isaiah Davis is simply not worthy of any credibility whatsoever. I can't credit that testimony at all. The, the thing that happened in his presence. The shooting had happened in his presence. And this suggestion that he didn't know that Isaiah Davis was the one who was feld (phonetic) is simply unworthy of belief and, and I will not credit it all. So, there's a gun laying there in front of him. I do credit that. I mean, I, I think that Mr. Garrison leaves the store. The gun that belonged, as it turns out to Isaiah Davis is on the ground next to Isaiah Davis. Mr. Garrison picks up the gun and alights across the BP parking lot and then across Liberty Road and perpetrates this shooting. Now, I think I have to take into account as I indicated, that the law requires us to kind of pay close attention and to give thorough analysis to the mens rea that is being described by Mr. Garrison when he testifies in the case. He indicates that when he hears as it turns out Isaiah Davis say, bitch, get in here or I'm going to kill you he said, I went into shock and then the incident happened. Well, I, I just can't credit that with much sensibility from the standpoint of an accurate description of his thought process at that time. The, the next thing that he says is that he was scared for his life, because he indicated that Knot [previously identified as Isaiah Davis] grabs Robert Davis and pulls him to the ground. He hears these gunshots and she says [sic], I was scared for my life. He then indicated, I wanted protection, so I picked up the gun. So, now we've gone from I'm scared to I'm scared and I want to pick up this gun that just appeared in front of me so that I can protect myself. At one point he said, I didn't see anybody laying on the ground. Again, I can't credit anything that the defendant testified to about the body that was laying there in front of him as being honest or truthful. He indicated that he was terrified.

That he was scared. And then he used a phrase, pissed mood. He said, he was in a pissed mood. And he said, I guess I was kind of angry like a little bit. And that was the testimony that he gave. He, he at some point in time I guess elaborated on that by indicating that he was passionate. I think he used that word. And as [defense counsel] says, he described on this scale, this imaginary scale of being an eight and a half or nine of out of ten in terms of the fear he was experienced, experiencing. Well, I too have a problem with this. The, the killing in order to employ this mitigation defense has to be in the heat of passion. It has to result from words that have been described as rage or fury. I don't think the, the testimony rose to that level under the, under the circumstances. I don't think Mr. Garrison was in a rage. I don't think he was in a fury. And I don't think he was in the heat of passion. I too believe that the evidence fairly considered indicates that there was some level of revenge or retaliation in his mind at that point in time. There was a fair amount of ground to cover after he picked up the gun. Was it enough, was the timing of it such that I could conclude that it was a sudden act? I could. This was only a few seconds that elapsed between the time that he picked up the gun and the time that he crossed the parking lot and Liberty Road and perpetrated the shooting. And so, the suddenness element of whether or not this defense applied I think I could find that if I could find anything else, but I, I, I simply cannot. I do not believe that this was an act of provocation, that it was legally adequate. Um, again, I go back to analogizing this to a situation where Mr. Garrison might have just been an innocent customer in the BP store who witnessed this occurring. Does he have the right to pick up this gun and go chasing after somebody who was involved somehow in what preceded it? He absolutely does not. And I simply cannot determine that this was, that the act of provocation, whatever the words were between these parties, whatever anybody considered was an act of provocation that would be considered legally adequate. And I wrote down in my notes as I was listening to the evidence, how did Clark provoke Garrison? You know Clark, it may well have been that Garrison concluded that Clark was somehow involved in the robbery. But I believe that the law requires that the, as we have indicated before, that the victim must be the person who provoked the rage or fury in the person who is trying to avail themselves of this defense. And I don't find anything in this evidence to suggest that Clark independently did anything to provoke Garrison into this act that resulted in Clark's death. Accordingly, whether I phrase this in terms of the Defense having been unable to have met the burden of production as to Question #1, which was, was the act of provocation legally adequate? Or Question #2, was the killing in the heat of passion? I don't find that the Defense elicited sufficient credible evidence for me to conclude that this is a matter that had this been a jury trial would go to the jury. And in case the finding is necessary, having viewed the evidence and listened to the, the witnesses in

the case I would find that the State has met its burden of establishing that this killing was not a hot-blooded response to a legally adequate provocation.

The difference between murder and manslaughter is the presence or absence of malice. *Girouard v. State*, 321 Md. 532, 538 (1991). When an intentional killing stems from heat of passion, it is not considered the product of free will, so malice is negated, and the homicide may be mitigated from murder to manslaughter. *State v. Faulkner*, 301 Md. 482, 486 (1984). Our courts recognize certain legally adequate provocations that may mitigate what would normally be murder to manslaughter, but they have been traditionally limited to a few relatively narrow situations:

1. mutual affray;
2. response to a significant battery;
3. the sudden discovery of one’s spouse in an act of adultery;⁶
4. resistance to an unlawful arrest; and
5. possibly, injury to a close relative or friend.

Girouard, 321 Md. at 538.

In order to determine whether murder should be mitigated to manslaughter, we look to the circumstances surrounding the homicide. To invoke the Rule of Provocation, the following requirements must be met:

1. There must have been adequate provocation;
2. The killing must have been in the heat of passion;

⁶ The sudden discovery of one’s spouse in an act of adultery is no longer recognized as a legally adequate form of provocation to trigger the so-called “Rule of Provocation.” *Wilson v. State*, 195 Md. App. 647, 687 (2010), *vacated on other grounds*, 422 Md. 533 (2011); Md. Code (2012 Repl. Vol., 2018 Supp.), §2-207(b) of the Criminal Law Article (“The discovery of one’s spouse engaged in sexual intercourse with another does not constitute legally adequate provocation for the purpose of mitigating a killing from the crime of murder to voluntary manslaughter even though the killing was provoked by that discovery.”).

3. It must have been a sudden heat of passion—that is, the killing must have followed the provocation before there had been a reasonable opportunity for the passion to cool;
4. There must have been a causal connection between the provocation, the passion, and the fatal act.

Wilson, 195 Md. App. at 680–81. Maryland Pattern Jury Instruction-Criminal 4:17.4C adds a fifth requirement, that “the victim was the person who provoked the rage.” *See also Tripp v. State*, 36 Md. App. 459, 466 (1977) (Except for “rare instances of ‘transferred intent,’ . . . a defendant seeking to extenuate an intentional killing upon the theory that he killed in hot-blooded rage brought on by the provocative acts of his victim is limited to those killings where the victim is the provocateur.”).

“Although the ultimate burden of proving the absence of mitigation rests upon the State when that issue is properly in the case, the burden of initially producing ‘some evidence’ on that issue. . . sufficient to give rise to a jury issue with respect to mitigation, is properly cast upon the defendant.” *Sims v. State*, 319 Md. 540, 553 (1990). The defendant must produce evidence supporting a *prima facie* case as to each and every one of the elements of the defense; if proof of any of the elements is lacking, mitigation based on the Rule of Provocation will not be an issue for the fact-finder, here the court, to consider. *Wilson* 195 Md. App. at 681. *See also Scott v. State*, 64 Md. App. 311, 323 (1985) (“Failure to prove any one of the necessary four elements is fatal to establishing a theory of hot-blooded provocation.”).

Viewing the evidence in the light most favorable to appellant, we turn to a determination of whether the trial court could have found that appellant killed Clark in hot-blooded response to legally adequate provocation. Appellant testified that he was in the

BP station selling marijuana at the same time as, but not in association with, Robert Davis. With his back partially to the door, appellant turned to see Isaiah Davis grab Robert Davis and attempt to rob him. Robert Davis shot Isaiah Davis, and the group of men in the gas station—including Clark—ran.

Appellant, for his own protection, picked up the gun Isaiah Davis had dropped and ran out of the gas station. He claimed to be afraid initially, but then his fear turned to anger that he had almost been robbed or killed—an 8 ½ or 9 on a scale of 1 to 10. When he heard footsteps behind him, he assumed it was not a friend, and, in his “pissed mood,” turned and fired the gun without rational thought, in a fight or flight reaction. The whole incident occurred in less than a minute.

Prior to shooting Clark on the street, appellant did not interact or engage with Clark in any way. Although the parties stipulated that Isaiah Davis and Clark entered the gas station with the intent to rob the men inside of money and marijuana, the video recordings of the incident showed Clark with only money in his hand, as if to purchase marijuana from Robert Davis. There was no evidence that Clark, who was apparently unarmed, tried to rob or injure Robert Davis, appellant’s close friend and the target of Isaiah Davis’s attempted robbery, much less appellant. There was no mutual quarrel or battery between appellant and Clark, nor between Clark and Robert Davis, to reasonably provoke appellant to kill Clark. And, importantly, appellant admitted that when he fired the gun at the person he believed to be behind him on the street, he was not even sure that it was Clark.

In the absence of adequate provocation by Clark, the trial court properly found that appellant did not meet his burden of producing *prima facie* evidence of all the elements of

the Rule of Provocation.⁷ Therefore, the State bore no burden of persuasion to show that appellant did not act in hot-blooded response to legally adequate provocation, and the court did not err in declining to find mitigation of the charge of murder to manslaughter.⁸

**JUDGMENTS OF THE CIRCUIT COURT
FOR BALTIMORE COUNTY AFFIRMED;
COSTS ASSESSED TO APPELLANT.**

⁷ Appellant's failure to meet his burden of production with regard to any one of the elements of the Rule of Provocation is fatal to his appellate claim, but the trial court also determined that appellant had not adduced sufficient evidence to conclude that the killing of Clark was committed in the heat of passion.

⁸ Even had the court concluded that appellant met his burden of producing all the elements of hot-blooded response to legally adequate provocation, it specifically stated it would have found that the State met its burden of persuasion that the killing was not a hot-blooded response to legally adequate provocation.