

Circuit Court for Baltimore City  
Case No. 117178015

UNREPORTED  
IN THE COURT OF SPECIAL APPEALS  
OF MARYLAND

No. 2684

September Term, 2018

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JASON ALCINDOR

v.

STATE OF MARYLAND

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Fader, C.J.,  
Friedman,  
Gould,

JJ.

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Opinion by Friedman, J.  
Concurring Opinion by Fader, C.J.

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Filed: July 28, 2020

\*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.

A jury in the Circuit Court for Baltimore City convicted Jason Alcindor of second-degree murder. The trial court sentenced Alcindor to 30 years' incarceration. Now on appeal, Alcindor asks us to consider the following questions:

1. Did the trial court err in refusing to instruct the jury on voluntary manslaughter based on hot-blooded response to adequate provocation?
2. Did the trial court abuse its discretion by precluding an eyewitness from testifying about who started the fight?
3. Did the trial court abuse its discretion in allowing the State to argue facts not in evidence during closing argument?

Because we conclude that the trial court should have granted Alcindor's request for a jury instruction on voluntary manslaughter based on hot-blooded response to adequate provocation, we vacate the second-degree murder conviction and remand for a new trial. We will not reach Alcindor's other questions.<sup>1</sup>

### **FACTS AND LEGAL PROCEEDINGS**

In February 2016, Alcindor and Raquel Coore ended their romantic relationship. Shortly thereafter, Coore discovered she was pregnant with Alcindor's child, and their daughter was born in October 2016. By March 2017, Coore was dating another man, Timothy Campbell.

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<sup>1</sup> In light of our decision, and our lack of certainty that the same issues will arise during a new trial, we chose not to consider Alcindor's other claims of error. We note, however, that, we don't see any reason to curtail Raquel Coore's testimony about the origins of the acrimony between Alcindor and Timothy Campbell, or about her understanding of how the fight began, despite that she testified that she did not see the first punch thrown.

Alcindor and Campbell disliked each other. Alcindor called Campbell a “pedophile” because he was much older than Coore. Campbell told Coore that he wanted to fight Alcindor nearly every time Alcindor’s name came up—and it came up frequently because of the child Alcindor and Coore shared. Alcindor was aware of Campbell’s animosity toward him because Campbell had called and texted him on numerous occasions after Coore and Alcindor had argued, warning Alcindor that he was “never going to stop.” Despite the constant taunting by Campbell, however, no physical altercation between the two men had occurred prior to the incident we will describe.

*(1) Coore’s Testimony*

At trial, Coore testified that on the morning of June 4, 2017, Alcindor asked to take their baby to a party, promising to return her to Coore that night. That night, however, Coore and Alcindor argued over the phone because it was getting late and he had not returned the baby. Coore and Alcindor arranged to meet at a Royal Farms Store in Baltimore. Because of the time, the earlier argument with Alcindor, and her belief that this Royal Farms was not in a safe part of town, Coore brought Campbell with her, without alerting Alcindor that she intended to do so.

When Coore and Campbell arrived at the Royal Farms, Alcindor was asleep with the baby in his car. Coore took the baby from Alcindor, while Campbell moved “up in [Alcindor’s] face and ... was just like provoking him” about the fact that Coore was no longer Alcindor’s girlfriend.<sup>2</sup>

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<sup>2</sup> Alcindor and Coore’s arrivals at the Royal Farms, along with the entire fight between Alcindor and Campbell, was captured on the store’s video surveillance cameras,

After Coore placed the baby in her car, she turned around and saw that Alcindor and Campbell had begun “fist fighting.” Coore tried to get Campbell into her car, but he pushed her out of the way. A moment later, Coore saw that Alcindor’s shirt was ripped and that Campbell was wrapping a belt around his hand. Shortly thereafter, she saw Alcindor holding a knife. Coore intervened and was able to briefly gain control of the knife but dropped it when Alcindor slammed her to the ground. Alcindor retrieved the knife and continued “wrestling” with and repeatedly stabbing Campbell.

Coore testified that she tried to stop Alcindor by screaming and hitting him with her car, but he did not stop, even when Campbell tried to retreat. Eventually, Campbell made it to Coore’s car, and she drove him to the hospital. Campbell was conscious during the drive to the hospital, but he died shortly after arrival.<sup>3</sup>

*(2) Alcindor’s Testimony*

Alcindor testified in his own defense, explaining that he first met Campbell during a Christmas party in 2016, when Campbell made threatening gestures toward Alcindor and said he would beat him up. Alcindor stated that after that first meeting, Campbell called

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and a portion of the fight was recorded by a private citizen on his cell phone. Alcindor did not challenge the authenticity of either recording, and both were played for the jury and entered into evidence.

<sup>3</sup> The assistant medical examiner catalogued 11 cutting wounds and 15 stab wounds on Campbell’s body, along with numerous abrasions and bruises. In her expert opinion, three of the stab wounds were each independently fatal. The medical examiner listed Campbell’s cause of death as “multiple sharp force injuries.”

and texted him frequently, called him names, and threatened to have him deported (despite his American citizenship).

Alcindor testified that he picked his daughter up from Coore's house on June 4, 2017 and Campbell was there and he was cordial. That night, after he arrived at the Royal Farms, Alcindor fell asleep with the baby while waiting for Coore. Alcindor testified that when Coore arrived later, he was surprised to see Campbell with her. He further testified that Coore took the baby from him without speaking, while Campbell "blitzed" him—shoving him, calling him names, and reminding him that Coore was now Campbell's girlfriend.

Alcindor said that he and Campbell began fighting but before the fight began, he took his knife when he exited the car. Alcindor also stated that before any weapons came out he tried to walk away from the fight. Campbell ripped his shirt, and Alcindor said he tried to retreat, but Campbell kept coming toward him, eventually pulling off his belt and wrapping it around his hand. Campbell also tried to run him over with Coore's car. Alcindor agreed that the Royal Farms surveillance video showed that when he pulled out his knife, Campbell tried to retreat. Nonetheless, he continued to attack, even after Campbell was in Coore's car trying to get away. Alcindor said that, once the stabbing began, he was unaware of what was happening, but he was "definitely scared, [his] heart was beating."

Afterwards, Alcindor drove away from the Royal Farms and stopped nearby to clean the blood off himself. He then called and texted a friend, asking her to meet him "because

of something stupid that just happened” and to take him to the police station so he could turn himself in. He then fell asleep in his car when his head “started feeling like real heavy.”

When the police found him, Alcindor did not know that Campbell was dead, and he did not remember most of the fight, due to “a huge blow” he said he received to the back of his head, which caused him to see “stars.” Alcindor claimed he had acted in self-defense against Campbell because he was “very afraid” when the fight began. When questioned about his state of mind during the murder, Alcindor said that he remembered being in fear of his life but also that he was not enraged.

*(3) Baltimore Police Department Officer’s Testimony*

Sergeant Richard Patel of the Baltimore Police Department testified that approximately two hours after the stabbing, detectives from the Homicide Unit located Alcindor a short distance away from the Royal Farms, cleaning up with baby wipes. When asked what happened, Alcindor initially told the police officers that he was not hurt but then claimed injury, although the officers observed no obvious trauma. Alcindor was arrested without incident. Later, Alcindor was found to have suffered a small scratch on the back of his head.

**DISCUSSION**

Alcindor argues that the trial court erred in declining to instruct the jury on voluntary manslaughter based on hot-blooded response to adequate provocation. In his view, the “heated mutual combat” between him and Campbell qualified as adequate provocation to cause him to act from passion instead of reason, and the voluntary manslaughter jury instruction would have been appropriate.

Alcindor claimed that he suffered a head injury during the fist fight—before the knife came out—and that he did not remember anything that happened thereafter, until he drove away from the Royal Farms. He recalled being extremely afraid at the start of the fist fight but said he had no memory of his state of mind during the fight and specifically denied having become “enraged” before stabbing Campbell. While testifying, he added that, based on his review of the video of the attack, he “was in some sort of passion, some sort of fear of [his] life.”

After the jury had been dismissed for the day, the trial court discussed jury instructions with counsel, including what would be appropriate for “the murder instruction.” The prosecutor argued that an instruction on voluntary manslaughter based on hot-blooded response to adequate provocation would be inappropriate in light of Alcindor’s testimony that he did not feel enraged during the fight and that, for the most part, he could not remember his state of mind at the time. The trial court took the matter under advisement, so it could consider whether evidence of hot-blooded response to adequate provocation had been generated by some means other than Alcindor’s testimony.

The next morning, defense counsel argued that the video of the fight provided sufficient evidence of rage to generate the requested instruction on voluntary manslaughter based on hot-blooded response to adequate provocation. The trial court disagreed that the issue had been generated through circumstantial evidence, especially after Alcindor was “so definitive in his testimony,” and declined to give the instruction.<sup>4</sup> Defense counsel

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<sup>4</sup> The trial court agreed to give a self-defense instruction.

renewed his objection to the failure to give an instruction of voluntary manslaughter based on hot-blooded response to adequate provocation instruction after the trial court completed its instructions to the jury. Alcindor asserts that the failure to give the instruction was in error because there was enough evidence of his hot-blooded response to legally adequate provocation for the jury to be instructed on voluntary manslaughter.

We will take a brief moment to explain the context in which hot-blooded response to adequate provocation arises. 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 the 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 types of provocation that may mitigate what would normally be murder to manslaughter, but those are 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;<sup>5</sup>
4. injury to a close relative or friend; and possibly,
5. resistance to an unlawful arrest.

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<sup>5</sup> 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).



*Girouard*, 321 Md. at 538.

To claim hot-blooded response to adequate 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;
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 v. State*, 195 Md. App. 647, 680-81 (2010); *see also* CHARLES E. MOYLAN, JR., CRIMINAL HOMICIDE LAW 165 (2002) (“MOYLAN’S CRIMINAL HOMICIDE”). Maryland Pattern Jury Instruction-Criminal (“MPJI-Cr.”) 4:17.4C adds a fifth requirement: that “the victim was the person who provoked the rage.”<sup>6</sup>

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<sup>6</sup> MPJI-Cr. 4:17.4C reads, in pertinent part:

Killing in hot[-]blooded response to legally adequate provocation is a mitigating circumstance. .... [F]or this mitigating circumstance to exist in this case, the following five factors must be present:

- (1) the defendant reacted to something in a hot[-]blooded rage, that is, the defendant actually became enraged;
- (2) the rage was caused by something the law recognizes as legally adequate provocation, that is, something that would cause a reasonable person to become enraged enough to kill or inflict serious bodily harm. The only act that you can find to be adequate provocation under the evidence in this case is [a battery by the victim upon the defendant] [a fight between the victim and the defendant] [an

In Maryland, the defendant has the burden of initially producing “some evidence” on the issue of mitigation to warrant a jury instruction on hot-blooded response to adequate provocation. *Porter v. State*, 455 Md. 220, 240 (2017). The Court of Appeals in *Dykes v. State* fleshed out the meaning of “some evidence,” explaining that this standard “calls for no more than what it says—‘some,’ as that word is understood in common, everyday usage.” 319 Md. 206, 216-217 (1990). The Court added that “some evidence” “need not rise to the level of ‘beyond reasonable doubt’ or ‘clear and convincing’ or ‘preponderance.’” *Id.* at 217. And, it makes no difference if the evidence of mitigation “emanate[s] solely from the defendant” or is “overwhelmed by evidence to the contrary.” *Id.* The burden on the defendant is minimal— “[i]f there is any evidence relied on by the defendant which, if believed, would support his claim” of mitigation, he has met his burden. *Id.*

Here, Alcindor presented “some evidence” sufficient to warrant a jury instruction on manslaughter based on hot-blooded response to adequate provocation, even though his *testimony* focused on a theory of self-defense based on fear for his life. *See McKay v. State*, 90 Md. App. 204, 216 (1992) (“Our research uncovers no case [that] stands for the

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unlawful warrantless arrest of the defendant by the victim, which the defendant knew or reasonably believed was unlawful];

- (3) the defendant was still enraged when [he] [she] killed the victim, that is, the defendant’s rage had not cooled by the time of the killing;
- (4) there was not enough time between the provocation and the killing for a reasonable person’s rage to cool; and
- (5) the victim was the person who provoked the rage.

proposition that, simply because a defendant testifies he acted out of fear, he is thereby precluded from relying on the facts and circumstances as borne out by *all* of the evidence in the case [that] would support the assertion that he acted in the heat of passion.”).

The jury also had the video recordings of the actual fight, which showed Alcindor and Campbell engage in hand-to-hand combat, which suddenly escalated into a bloody knife fight with Alcindor stabbing Campbell 26 times. This Court has previously recognized this sort of “mutual affray” as a “source of adequate provocation” sufficient to warrant a mitigating jury instruction on voluntary manslaughter based on hot-blooded response to adequate provocation. *Adams v. State*, 192 Md. App. 469, 500-01 (2010). A jury viewing the video could have concluded not only that there was a causal connection between the adequate provocation—Campbell’s interference in Alcindor’s interaction with Coore and the subsequent fight—and Alcindor’s hot-blooded response, but also that there was no cooling off period between the provocation and the stabbing. *See* MPJI-Cr. 4:17.4C.<sup>7</sup>

We, therefore, hold that Alcindor met his burden of presenting “some evidence.” The trial court should have instructed the jury on hot-blooded response to adequate provocation. Because the jury was not given an opportunity to weigh and consider whether

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<sup>7</sup> Moreover, when the prosecutor questioned Alcindor about his lack of passion or rage, Alcindor responded, “Well, I was in some sort of passion.” That statement was also independently sufficient to meet the low standard of “some evidence” of hot-blooded response, even if, with the next breath Alcindor undermined the point. *See General v. State*, 367 Md. 475, 487 (2002) (“In evaluating whether competent evidence exists to generate the requested instruction, we view the evidence in the light most favorable to the accused.”).

the stabbing stemmed from a hot-blooded response to adequate provocation, Alcindor's murder conviction must be vacated and a new trial ordered.<sup>8</sup>

**JUDGMENT OF THE CIRCUIT COURT  
FOR BALTIMORE CITY VACATED AND  
CASE REMANDED TO THAT COURT  
FOR A NEW TRIAL; COSTS ASSESSED  
TO MAYOR AND CITY COUNCIL OF  
BALTIMORE.**

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<sup>8</sup> Recent scholarship has pointed out ways in which the common law rule of provocation, in Maryland and in our sister states, has failed to keep up with advances in modern life. Potentially relevant to Alcindor's new trial, Professor Michal Buchhandler-Raphael of Widener Commonwealth Law School, has pointed out that recent developments in psychology and neuroscience don't support the common law's sharp distinctions between emotional responses to fear, which supports self-defense, and anger, which supports the defense of provocation. Michal Buchhandler-Raphael, *Fear-Based Provocation*, 67 AM. U. L. REV. 1719, 1775-77 (2018) (distinguishing between legal theory, which treats anger and fear as distinct feelings with separate responses, and current scientific research, which suggests that anger and fear often overlap and can lead to similar emotional responses); Michal Buchhandler-Raphael, *Loss of Self-Control, Dual Process Theories, and Provocation*, 88 FORDHAM L. REV. 1815, 1852 (2020) ("While the traditional understanding was that emotions are static forces and direct products of certain stimuli, the contemporary view is that emotions are complex processes that integrate highly cognitive features."). Similarly, although probably not relevant to Alcindor, other commentators see implicit gender bias in the types of events that can generate a provocation defense. See, e.g., Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1386-89 (1997). On retrial (and in other appropriate cases), counsel is encouraged to build a record from which the Court of Appeals may consider modernizing our rule of provocation.

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I concur in the majority’s well-reasoned opinion except with respect to footnote 7. For two reasons, I do not think that Mr. Alcindor’s statement, “Well, I was in some sort of passion,” was, by itself, “some evidence” of hot-blooded response sufficient to generate the requested jury instruction. First, Mr. Alcindor’s statement was not from personal knowledge or recollection of his state of mind at the time. To the contrary, Mr. Alcindor steadfastly denied any recollection of his emotional state during the relevant time, due to an alleged head injury he sustained before he pulled out his knife. As was clear from context and contemporaneous clarification, Mr. Alcindor’s statement that he “was in some sort of passion” was based solely on his review of video of the incident during the trial, not from recollection. Second, read in full and in context, Mr. Alcindor’s testimony was clear and consistent that, to the extent he recalled the incident, he recalled being “scared and in fear of his life,” but not enraged.