UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0201

September Term, 2013

JASON KEITH HAMEL

v.

STATE OF MARYLAND

Hotten,
Nazarian,
Eyler, James R.
(Retired, Specially Assigned),

JJ.

Opinion by Nazarian, J.

Filed: November 14, 2014

A jury convicted Jason Hamel in the Circuit Court for Baltimore City of second-degree murder, use of a handgun in the commission of a felony or crime of violence, and wearing, carrying, and transporting a handgun. He argues that the trial court committed three errors: *first*, when it overruled defense counsel's objection to the prosecutor's mention of Mr. Hamel's wife in the State's opening statement and denied his motion for a mistrial; *second*, when it admitted, as substantive evidence, statements that a witness made to police; and *third*, when it refused to instruct the jury on voluntary manslaughter based on a "hot-blooded response" to legally adequate provocation. We find no error and affirm.

I. BACKGROUND

On June 20, 2008, at approximately 9:14 p.m., Keyva Bluitt was shot in the 800 block of Battery Avenue near Federal Hill Park in Baltimore City. Mr. Bluitt was immediately taken to Shock Trauma, but he died shortly after arriving. At Mr. Hamel's trial (which, for reasons we will discuss below, did not take place until January 31, 2013), the State produced ten witnesses: the medical examiner who performed Mr. Bluitt's autopsy, four bystanders to the shooting, two law enforcement officials, and three acquaintances of Mr. Hamel. The evidence did not, however, produce a uniform story. And because the discrepancies matter as we consider the issues before us, we start by walking

through the testimony of most of the witnesses who recounted the events of that night at trial.[1]

A. Bystanders

1. Joyce Setmeyer

Ms. Setmeyer witnessed the shooting from the front porch of her son's rowhouse on the corner of Battery Avenue and Montgomery Street.[2] She testified that she had seen a man pacing on the sidewalk of Battery Avenue, on the park side of the street, when she saw a small, dark blue, four-door sedan stop near a fire hydrant on the house side of the street and put on its flashers. She then saw the driver of the car exit the vehicle and greet the man who had been pacing; it appeared to Ms. Setmeyer "that they knew each other." Later, she saw the driver get back in the driver's seat of the car, and the man who had been pacing got in the seat behind him. At that point, she noticed four people in the car, including the man who had been pacing.

Ms. Setmeyer then saw the car pull forward a short distance before she heard what she thought was a firecracker. The man who had been pacing got out of the car, ran toward

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[1] We have omitted the testimony of Officer Scott Lawrence, who provided a general description of the crime scene that does not bear on any of the appellate issues.

[2] Battery Avenue is a one-way, southbound street adjacent to Federal Hill Park to the east (driver's left). Montgomery and Churchill are both one-way, eastbound streets that intersect Battery; Montgomery is one block north of Churchill. The end-rowhouses on Montgomery and Churchill abut Battery Avenue on the driver's right-hand side, opposite the Park.

Montgomery Street, and continued down Montgomery Street on the sidewalk opposite Ms. Setmeyer. The driver of the blue car and the man who had been sitting in the back on the passenger side exited the car and yelled at the man in the passenger seat to "wake up." Ms. Setmeyer saw the two men push the other man out of the passenger seat and heard them say "we just got to go."

Ms. Setmeyer described the man who had been pacing and who eventually ran past her down Montgomery Street as "very light-skinned." She originally described him as Caucasian, but decided later that "he had some black in him" because she noticed a "black dialect" when she heard him speak. She also described him as having a medium build and short black hair.

2. Stacy Winters

Ms. Winters was driving down Battery Avenue on the night of the shooting when she saw a dark, four-door car double-parked in the left lane (Park side) such that she had to go around it in the right lane (house side). As she drove around the double-parked car, she saw a man come from the park and around the front of the double-parked car, shoot into the passenger side, and "take[] off." She described the shooter as "a white man, . . . a big, strong guy. . . . Somewhere around 6 feet [tall]. He wasn't overweight. He was like a muscular guy." She also remembered that the shooter was wearing jean shorts and had brown hair.

3. Eva Stone

Ms. Stone testified that she was walking her dog on the corner of Churchill and Battery on June 20, 2008 when she heard "a loud noise." She saw a man standing near a small, dark blue, four-door car on Battery Avenue and heard him saying, "Get him out of the car." Ms. Stone, a nurse, asked the man if he needed help. The car came to the corner where Ms. Stone was standing, nearly ran over her and the dog, then sped off the wrong way down Churchill Street. Ms. Stone walked over to where she had originally seen the car and found a man lying in the road. While she performed chest compressions on him, she noticed what appeared to be a bullet wound on his right side.

4. Michael Brassert

Mr. Brassert was having dinner outside his home on Montgomery Street when he observed a double-parked car on Battery Avenue and a man walking from the park toward the car. The man leaned into the passenger side of the car and talked to the people inside. Mr. Brassert thought the car was a "sporty, . . . two-door Japanese car with a sort of hatchback." Moments later, he heard "a very loud noise" and saw the man who had been leaning into the car run past him, down Montgomery Street and away from Battery Avenue, with his left hand stationary at his side instead of moving freely. Mr. Brassert then walked down to the corner of Montgomery and Battery Streets and noticed that the double-parked car had moved a short distance up the road and "someone had been thrown out of the car."

Mr. Brassert described the man who ran past him as tall and slim with short, dark hair and wearing a striped, short-sleeved shirt and shorts. Three years after the shooting,

he was able to identify Mr. Hamel from a photo array as the man he had seen that night. At trial, he again identified Mr. Hamel as the man who had run past him.

B. Detective Corey Alston

Homicide Detective Alston responded to the site of the shooting the night it occurred. He obtained still photographs from a security camera that showed "the blurred image of what appears to be a Caucasian male right in the middle of Montgomery Street" and "a dark-colored sedan [that] looks as if it's trying to leave the area" on Churchill Street.[3] Detectives were unable to identify a suspect, though, and the case became "cold." Then, in April 2011, Detective Alston, who was by then assigned to the Cold Case Unit, received new information that led him to reopen the case. This information, which we discuss below in section II.A, ultimately led Detective Alston to interview three of Mr. Hamel's acquaintances.

C. Acquaintances of Mr. Hamel

1. David Bennett

Detective Alston first interviewed Mr. Bennett on the night of the shooting. Mr. Bennett told police that he had just parked his girlfriend's car, a 1999 Mitsubishi Eclipse, next to the park when he noticed a black car pull up beside him. Then he saw a man jump over the wall that separates the park from the sidewalk and pull a gun out of his waistband.

[3] These photographs were admitted into evidence.

Mr. Bennett dove out of the car as he heard a gunshot, then ran toward the Inner Harbor, leaving the car door open and the keys in the ignition. He described the shooter as "a tall white male [with] lighter hair,"[4] wearing jeans and "a blue and white shirt with stripes." He told police that he did not know the shooter's name and that he had never seen him prior to that day.

Detective Alston interviewed Mr. Bennett again in 2011 after the case had been reopened. This time, Mr. Bennett told police that he had been staying at Mr. Hamel's house on the night of the shooting and that he had given Mr. Hamel a ride to the park in his girlfriend's car. He identified Mr. Hamel from a photo array as the man that he had seen jumping over the wall and pulling out a gun. Mr. Bennett decided that the car that had pulled up beside him was green, not black. He also said that he returned to Mr. Hamel's house that night with his girlfriend and Mr. Hamel threatened him about talking to the police. Otherwise, his story about the shooter (Mr. Hamel) jumping over the wall and pulling a gun from his waistband remained essentially the same.

Mr. Bennett gave a third statement to police in January 2012, then stating that he found out after the incident that Mr. Hamel was going to the park that night to buy drugs.[5]

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[4] When presented with a transcript of his statement, Mr. Bennett remembered describing the shooter's hair as "[a] little bit darker than dirty blonde," but not brown and not black.

[5] There were inconsistencies in each of Mr. Bennett's three statements regarding his whereabouts prior to the shooting and how his girlfriend eventually got to the park to meet him.

2. Krystle Staggs[6]

Mr. Bennett's girlfriend, Ms. Staggs, testified that she also was staying at Mr. Hamel's house on June 20, 2008 and that Mr. Bennett had borrowed her car that night. Ms. Staggs remembered Mr. Bennett waking her up, acting "nervous, anxious, [and] scared," and telling her that they needed to go get her car because he didn't have it. Before she left the house, Mr. Hamel returned and apologized to her repeatedly, saying that he didn't want to get her involved, but he did not explain what had happened. When presented at trial with the statement she made to police three years after the shooting, Ms. Staggs remembered that she had heard Mr. Hamel and Mr. Bennett talking that night about "a drug deal gone bad . . . and something went wrong." Ms. Staggs also remembered that Mr. Hamel had shown her a bag with a white t-shirt inside, and explained that "the boys that they went to go meet had given Jason [Hamel] and Dave [Bennett] a shirt in a bag instead of whatever they had went to get." She testified that Mr. Bennett then led her to the park, where they found her 1999 Mitsubishi Eclipse surrounded by crime-scene tape and with the door still open.

When Ms. Staggs gave her statement to police, she identified Mr. Hamel from a photo array and wrote "Jason was with David Bennett on the night of the shooting. On the

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[6] Ms. Staggs's first name appears throughout the record as "Crystal" and occasionally "Krystal," but it is spelled out by Ms. Staggs in her police statement as "Krystle" so we adopt that spelling here.

night of the shooting, Jason kept apologizing to me for what had happened." Ms. Staggs identified Mr. Hamel again in court. When asked to describe the differences in appearance between Mr. Hamel and Mr. Bennett in 2008, Ms. Staggs testified that Mr. Bennett was shorter and "chunkier," had lighter hair, and that "[t]hey're like opposites every way around."

3. Daryl Robinson

a. Direct Examination

Mr. Robinson[7] testified that Mr. Hamel contacted him in June 2008 and asked to buy 4.5 ounces of cocaine for $5,000. Mr. Robinson and his acquaintances Mr. Bluitt and Jason Johnson decided that instead of selling Mr. Hamel the drugs, they would rob him of the money. Mr. Robinson testified that they planned to meet Mr. Hamel in the Park Heights area on the evening of June 20, but they changed the location to the Inner Harbor.[8] Mr. Bluitt drove Mr. Johnson and Mr. Robinson to the Inner Harbor that night and met Mr. Hamel. Mr. Robinson saw Mr. Johnson get out of the car, walk over to Mr. Hamel's car, put a gun in his face, take a bag full of cash, and run back to their car. Mr. Johnson jumped

[7] Mr. Robinson's first name appears throughout the record as "Darryl," but he spelled it in police statements as "Daryl."

[8] At first, Mr. Robinson could not remember who had decided to change the location for the deal, but admitted that Mr. Bluitt, Mr. Johnson, and he were unfamiliar with the Inner Harbor. When asked if Mr. Hamel was familiar with that area, Mr. Robinson answered, "It's a possibility." On cross-examination, he admitted that Mr. Hamel had asked to change the location because he was uncomfortable.

into the passenger seat of the car and told them to go. Mr. Bluitt hit the gas pedal, but the car didn't move because it was still in park. Mr. Robinson heard a gunshot, then noticed that Mr. Bluitt had been shot. He and Mr. Johnson pulled Mr. Bluitt out of the car, left him on the sidewalk, "and left the scene."

Mr. Robinson testified that Mr. Bluitt was driving a purple Toyota Corolla. When presented with his statement to police, he remembered describing the car as a blue Toyota Camry.

b. Cross-Examination

On cross-examination, Mr. Robinson testified that he in fact had gone from the first location in Park Heights to the new location in Federal Hill in Mr. Hamel's car, not with Mr. Bluitt and Mr. Johnson. He testified that once they got to Federal Hill, he got out of Mr. Hamel's car and got in the backseat of the other car with Mr. Bluitt and Mr. Johnson. He remembered that this car, the blue Toyota that Mr. Bluitt had been driving, was double-parked in the street.

Mr. Robinson elaborated on what happened after they realized Mr. Bluitt had been shot:

> [Mr. Robinson:] We transferred him to the . . . passenger side of the car. Jason [Johnson] started driving up the street a little bit, and we stopped a civilian, and we asked the civilian for help, and we left him with him.
>
> [Defense counsel:] So basically you took Mr. Bluitt out of the driver's seat, put him in the passenger seat. Mr. Johnson jumped into the driver's seat, started taking off, and then you took your friend and put him out on the street, correct?

[Mr. Robinson:] Correct.

Additional facts regarding Mr. Robinson's testimony will be discussed in Section II.B below.

D. Deputy Chief Medical Examiner Dr. Jack Titus

Dr. Titus testified that Mr. Bluitt died from a gunshot wound to the chest and that the manner of death was homicide. He determined that a single bullet entered the left side of Mr. Bluitt's chest, hit his pulmonary artery, traveled seven inches upward and to the right, exited his right side, and ended up in his right arm, where the bullet was recovered. Dr. Titus also testified that there was no evidence of soot or stippling on Mr. Bluitt, which suggested that the gun was more than 18 to 24 inches away from him when he was shot.

E. Verdict and Sentence

Mr. Hamel was charged with first-degree murder, second-degree murder, use of a handgun in the commission of a felony or crime of violence, and wearing, carrying, and transporting a handgun. He chose not to testify and presented no evidence in his defense. The jury deliberated for two days before it acquitted Mr. Hamel of first-degree murder and convicted him on the remaining charges. He received a sentence of 30 years for the murder count and 20 years for the use-of-a-handgun count, imposed consecutively to any other sentence that he might serve. The conviction for wearing, carrying, and transporting a handgun merged into the conviction for use of a handgun. This timely appeal followed.

II. DISCUSSION

Mr. Hamel argues that the trial court committed three errors. *First*, he claims that the circuit court erred in overruling defense counsel's objection to the prosecutor's mention of Mr. Hamel's wife in the State's opening statement and denying a subsequent request for a mistrial. *Second*, he contends that the court erred when it admitted, as substantive evidence, portions of Mr. Robinson's statements to police. *Third*, he argues that the court erred by refusing to instruct the jury on voluntary manslaughter based on hot-blooded response to legally adequate provocation. We disagree as to all three.

A. The Prosecutor's Mention Of Amber Hamel In Her Opening Statement Did Not Compel A Mistrial.

First, Mr. Hamel argues that the trial court erred in overruling defense counsel's objection when the prosecutor mentioned Mr. Hamel's wife, Amber Hamel, during her opening statement, then erred again when it denied his motion for a mistrial. The State responds that the trial court properly overruled defense counsel's objection and properly denied the request for a mistrial because the comment was not improper.[9]

[9] Actually, the State argues first that Mr. Hamel failed to preserve this issue for appeal because he never renewed his motion for a mistrial after the court denied it during opening statements. And had the State (or any of its witnesses) mentioned Ms. Hamel again without objection from the defense, the State might have a point. But the State did *not* mention her after opening statements, so we struggle to understand why the defense would be required to renew the mistrial motion, in the absence of a new mention, to preserve Mr. Hamel's right to appeal the decision the circuit court in fact made (in response to an indisputably timely objection and motion).

1. Background

During her opening statement, the prosecutor mentioned Amber Hamel, Mr. Hamel's wife (although she was not identified as such), in the course of explaining why the case took so long to get to trial. Defense counsel objected, the trial court overruled the objection, and the prosecutor continued her opening statement without any further reference to Amber Hamel:

> [Prosecutor:] Now, you might be thinking to yourself, June of 2008, that's a really long time ago. Why are we just selected now? Well, back in June of 2008 or thereabouts, sometime in October perhaps, detectives had run down every lead that they could possibly find with respect to this case. It became what the detectives will refer to as a cold case. There was nothing else they could do to investigate it. [No one] else came forward until April of 2011. Detective Corey Alston of the Baltimore City Police Department who happened to be the same investigator who was at the scene in June of 2008 received information that someone wanted to talk to him and so he made arrangements to bring that person to speak with him and *based on information that that person who you'll later find out who is Amber Hamel—*
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> [Defense counsel]: Objection, Your Honor.
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> THE COURT: Overruled.
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> [Prosecutor]: Based on information provided to him, he conducted a further investigation and you'll hear from the witnesses he spoke with based on that investigation.

(Emphasis added.)

At the conclusion of the prosecutor's opening statement, a bench conference took place and defense counsel requested a mistrial. The trial court denied the request, but

cautioned the State that it would need to provide the court with legal authority if it intended to bring up Ms. Hamel during Detective Alston's testimony:

> [Defense counsel]: Your Honor, my objection is the fact that Madam State's Attorney brought up Amber and she is the wife of my client. Um, under (inaudible), you cannot get into what happened in the course of the investigation and very clearly Madam State's Attorney got into that. She told me she was not going to be calling Amber Hamel. Uh, basically, it's a situation—
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> THE COURT: Was that correct she's not going to be called as a witness?
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> [Prosecutor]: She's not going to be called as a witness.
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> THE COURT: Then why is she referred to in opening?
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> [Prosecutor]: Your Honor, [Ms.] Hamel, we're not going to call her and we're not going to describe any of the information that [Ms.] Hamel provided. There is not a question about it. It's not hearsay information. The fact of the matter is—
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> THE COURT: You think the—is detective Alston going to testify that he talked to Amber Hamel?
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> [Prosecutor]: He will testify that he received a phone call from her, yes.
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> * * *
>
> THE COURT: But I don't see how, why the State needs to refer to a witness who has marital privilege who can't be called as a witness with the . . . implication to the jury that that person has something that they know in fact the implication is significant enough that it reopened up the case and . . . identified Mr. Hamel as the person.
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> * * *

[Prosecutor]: Your Honor, the State's position and, and that this is not a testimonial hearsay that it was a phone call made to him, similar to a 9-1-1- call. It doesn't implicate (inaudible). It doesn't indicate any such thing. The Detective will not say what he was told. It's merely (inaudible) with his investigation and the course that he took as the investigator in this matter.

THE COURT: Well, *unless you provide me with some case support for uh the ability to refer to statements made by a witness who can't testify in this case, uh through the detective, he will not testify, he will not refer in his testimony to Amber Hamel or anything that she said or the fact that she was the cause for reopening the investigation.*

[Prosecutor]: Yes, Your Honor.

THE COURT: He could say, generally, I received some information and started investigating, again, but uh, identifying her tends to suggest including her last name that she had some relationship to the Defendant and that she knew something.

[Defense counsel]: At this point, I have no point in the case, but to ask for a mistrial—

THE COURT: I'm sorry.

[Defense counsel]: A mistrial.

THE COURT: You are requesting a mistrial.

[Defense counsel]: I am asking, I am asking for a mistrial.

THE COURT: All right. At this point, it's been only a mention in the opening statements without any reference beyond that. *The motion is denied subject to the possible opportunity to renew it depending on how the case develops.* I think once the evidence develops, the potential prejudice of the statement may be diminished, but at this point with the mere mention by the State in the opening in this trial denied, but the State needs to provide the authority if you intend to go into it.

[Prosecutor]: I will, Your Honor.

(Emphasis added.)

Before Detective Alston testified on the third day of the trial, the State conceded that it could not have him mention Ms. Hamel during his testimony. The State assured the court that Detective Alston had been advised that he couldn't say her name, and in fact the detective did not mention her.

2. Analysis

The determination of whether a prosecutor's comments were prejudicial "'lies within the sound discretion of the trial court'" and should not be disturbed on review "'unless that court clearly abused the exercise of its discretion and prejudiced the accused.'" *Lawson v. State*, 389 Md. 570, 592 (2005) (quoting *Spain v. State*, 386 Md. 145, 158–59 (2005)). In evaluating the trial court's decision, we must first determine whether the comments were improper and, if so, their severity. *Id.* at 593, 600. Next, the court must assess "the strength of the case" against the defendant by evaluating "the weight of the evidence" against him. *Id.* at 592. Then, we consider "the trial court's actions addressing the prosecutor's remarks." *Id.* at 601. Finally, we determine whether "the prosecutor's remarks were harmless" beyond a reasonable doubt. *Id.* at 604.

a. The Prosecutor's Reference To Ms. Hamel Was Improper But Not Severe.

Opening statements cannot include facts that are plainly inadmissible or that counsel "cannot or will not be permitted to prove, or [that] he in good faith does not expect to

prove." *Wilhelm v. State*, 272 Md. 404, 412 (1974). And the prosecutor's reference to Ms. Hamel during her opening statement was improper: the fact that the defendant's wife gave information to police was plainly inadmissible, and the State would not have been permitted to prove it because of marital privilege. *Coleman v. State*, 281 Md. 538, 542 (1977). Indeed, the State later conceded that she would not be permitted to bring up Ms. Hamel during Detective Alston's testimony, so there is no dispute on this point.

That said, the comment was an isolated remark "that did not pervade the entire trial." *Spain*, 386 Md. at 159. The prosecutor referred only once to Ms. Hamel in any form, and after the opening argument her name never came up again. Moreover, it is not obvious from the remark itself that the State had referred to Mr. Hamel's wife—the remark did not place Ms. Hamel in relation to Mr. Hamel at all, nor distinguish her from any other female relative.

b. The Evidence Against Mr. Hamel Was Sufficient To Convict Him.

Ultimately, "'[t]he determining factor as to whether a mistrial is necessary is whether the prejudice to the defendant was so substantial that he was deprived of a fair trial.'" *Cooley v. State*, 385 Md. 165, 173 (2005) (quoting *Kosh v. State*, 382 Md. 218, 226 (2004)) (internal quotation marks omitted). Where the evidence against the defendant is sufficient to support his conviction, it is likely that he received a fair trial, despite the potential prejudice from an improper comment. *See Lawson*, 389 Md. at 600 ("We decided [in *Spain*] that in light of the fact that there remained sufficient evidence to convict, in spite

of the effect of the improper statement—that Spain nonetheless received a fair trial.") For example, in *Spain*, the Court of Appeals held that although the evidence against the defendant was not overwhelming, it was adequate to support his convictions, and therefore the prosecutor's improper comment was unlikely to have influenced the verdict. 386 Md. at 161. On the other hand, in *Lawson*, the Court determined that "this was a close case," so the prosecutor's improper comment was more likely to have been prejudicial than the remark in *Spain*. 389 Md. at 600–01.

The evidence against Mr. Hamel, while not overwhelming, was sufficient for the jury to convict him of second-degree murder and use of a handgun in the commission of a felony. Two acquaintances, Mr. Bennett and Mr. Robinson, testified that he went to Federal Hill to buy drugs on the night of the shooting. Ms. Staggs testified that he apologized to her for what had happened when he returned to his home that night. And although bystander accounts of the shooting contained some inconsistencies, their descriptions of the shooter remained relatively consistent and fit Mr. Hamel:

- Ms. Setmeyer described the shooter as "very light-skinned"; Ms. Winters described the shooter as "white."
- Ms. Setmeyer said the shooter had a "medium build"; Ms. Winters called him "a big, muscular guy," but not overweight; Mr. Brassert called him "slim."
- Both Ms. Winters and Mr. Brassert described the shooter as "tall."
- Ms. Setmeyer thought the shooter had short, black hair; Ms. Winters thought the shooter had brown hair; Mr. Brassert described his hair as short and dark.

- Both Ms. Winters and Mr. Brassert remembered that the shooter was wearing shorts.

- Mr. Brassert's description of the shooter's shirt (short-sleeved with stripes) was consistent with Mr. Bennett's description of Mr. Hamel's shirt that night ("a blue and white shirt with stripes").

The photo obtained from the private security camera showing a Caucasian male standing in the middle of Montgomery Street further corroborated these descriptions. Also, Mr. Brassert was able to identify Mr. Hamel as the shooter from a photo array three years after the shooting and identified him again at trial.

Another common thread among the witnesses' descriptions is that the majority remembered a small, dark car double-parked on Battery Avenue:

- Ms. Setmeyer, Ms. Winters, and Mr. Brassert all remembered seeing a double-parked car on Battery Avenue that night; Mr. Robinson corroborated this story when he said that the car that Mr. Bluitt was driving was double-parked.

- Ms. Setmeyer described the car as a small, dark blue, four-door sedan; Ms. Winters remembered a dark, four-door car; Ms. Stone saw a small, dark blue, four-door car; Mr. Brassert thought it was a "sporty, . . . two-door Japanese car with a sort of hatchback"; Mr. Bennett said the car was either black or green; Mr. Robinson testified that the car Mr. Bluitt was driving was a blue Toyota Camry.

To be sure, one description doesn't fit the others—Mr. Brassert's appears to describe Ms. Staggs's car that Mr. Bennett drove to the Park that night. We acknowledge the inconsistencies in these accounts, but find enough commonality in the bystanders' descriptions and Mr. Robinson's corroboration for the jury to have reasonably believed this aspect of his testimony.

c. The Trial Court Addressed The Improper Comment Appropriately.

Although the trial court overruled defense counsel's objection to the improper comment and did not instruct the jury to disregard it, the court addressed the remark during the subsequent bench conference when it cautioned the State that it would need to provide legal authority before referencing Ms. Hamel again during the trial.

In certain instances, curative instructions may highlight the prejudice of the improper remark rather than curing it. For example, in *Carter v. State*, two witnesses each made references during their testimony to prior criminal acts of the defendant that were unrelated to the charges for which he was on trial. 366 Md. 574, 579, 581 (2001). Both times, defense counsel objected and moved for a mistrial, and both times the trial court denied the motion but gave a curative instruction over the defense's objection. *Id.* at 579–80, 581. The Court of Appeals found that the "curative" instructions enhanced the prejudicial impact of the witnesses' comments:

> In instructing the jury to disregard the testimony about a prior arrest, the court mentioned the arrest four times. The instruction as given, rather than being curative, highlighted the inadmissible evidence and emphasized to the jury that petitioner had been arrested previously. The purported curative instruction was inadequate to cure the prejudice.

Id. at 591. So "a trial judge must use his discretion to weigh the prejudice caused by an improper remark against the effectiveness of a curative instruction." *Simmons v. State*, 436 Md. 202, 219 (2013).

A curative instruction here could well have highlighted the prejudice of the State's reference to Ms. Hamel, and we find no abuse of discretion in the trial court's decision not to risk making it worse. The court could reasonably have concluded under the circumstances that the jurors didn't notice the reference to Mr. Hamel's wife or might not have assumed that Ms. Hamel was his wife (or both), and we cannot quarrel with the court's judgment that a pointed remark from the court not to consider the one mention of "Amber Hamel" would have caused them to perk up their ears rather than curing the State's error.

d. The Prosecutor's Improper Remark Was Harmless Beyond A Reasonable Doubt And Did Not Warrant A Mistrial.

A mistrial is a big deal: "'[T]he declaration of a mistrial is an extraordinary act which should only be granted if necessary to serve the ends of justice.'" *Cooley v. State*, 385 Md. 165, 173 (2005) (quoting *Jones v. State*, 310 Md. 569, 587 (1987), *vacated on other grounds*, 486 U.S. 1050 (1988)). And because "[a] mistrial is no ordinary remedy… '[a] request for a mistrial in a criminal case . . . is reviewable on appeal to determine whether or not there has been an abuse of . . . discretion by the trial court.'" *Id.* (first alteration in original) (quoting *Wilhelm*, 272 Md. at 429). Here, because the prosecutor's improper comment was isolated and not particularly severe, the evidence against Mr. Hamel sufficed to convict him, and the trial court addressed the remark by cautioning the State not to bring up Ms. Hamel again, we find that the comment was harmless beyond a reasonable doubt. Although we disagree with the State's argument that the comment was

not improper, we find that the trial court did not abuse its discretion in denying the "extraordinary act" of granting a mistrial on the basis of this comment alone.

B. The Trial Court Did Not Err In Admitting Daryl Robinson's Statements To Police As Substantive Evidence.

Second, Mr. Hamel argues that the trial court erred by admitting, as substantive evidence, portions of Mr. Robinson's taped statement to police without finding first that he was "a *bona fide* 'turncoat witness.'" The State responds that the "turncoat witness" determination is inapplicable here and that the statements "were properly admitted as prior inconsistent statements."

1. Background

a. Direct Examination

Mr. Robinson identified Mr. Hamel at trial as the man he knew as "Jason," who had contacted him about buying drugs and had met him at the Inner Harbor on June 20, 2008, but denied that he had seen Mr. Hamel shoot Mr. Bluitt:

> [Prosecutor:] Okay. Do you know who shot your friend Mr. Bluitt?
>
> [Mr. Robinson:] *I didn't see who shot him*, but I believe that Jason could have shot him.
>
> [Prosecutor:] Okay. When you say Jason, which Jason do you mean?
>
> [Mr. Robinson:] Jason Hamel.
>
> * * *
>
> [Prosecutor:] Being the Jason present in the courtroom today?

> [Mr. Robinson:] Yes.

(Emphasis added.)

Mr. Robinson testified that after he saw Mr. Johnson take the money from Mr. Hamel, he put his head down in the back seat and heard a gunshot, but did not see who fired the gun:

> And I put my head down. And I just heard a shot. *I don't know who shot.* I just know it came from the left side of the car.

(Emphasis added.)

When he gave a statement to police in September 2011, however, Mr. Robinson expressed a specific and certain recollection. Rather than claiming not to know who fired the shot, Mr. Robinson identified Mr. Hamel from a photo array and wrote on the photo, "The person I seen in the photo was the shooter and my friend's killer. The guy who did the shooting name is Jason." When the State asked him at trial to read his statement to police to refresh his memory, Mr. Robinson denied seeing Mr. Hamel do anything:

> It doesn't help me remember because at the time *I didn't see him fire a shot.* I was assuming that he could have fired the shot. *I didn't see him shoot.*
>
> At all. At the time, whatever, regardless of what this [statement] is saying, what I'm telling you right now, *I did not see him shoot.*

(Emphasis added.)

b. Cross-Examination

On cross-examination, Mr. Robinson testified that, to his knowledge, Mr. Johnson was the only person who brought a gun to the meeting on June 20, 2008:

> [Defense counsel:] And it would be safe to say that you knew Mr. Johnson had a gun on him?
>
> [Mr. Robinson:] Yes.
>
> [Defense counsel:] *And did anyone else have a gun on them?*
>
> [Mr. Robinson:] *No.*

(Emphasis added.)

c. Re-Direct Examination

On re-direct examination, the prosecutor asked Mr. Robinson again if he knew whether anyone else involved in the drug deal that day had a gun, and Mr. Robinson again said no:

> [Prosecutor:] Mr. Robinson, you talked about on cross that Jason Johnson had a gun. Is that correct?
>
> [Mr. Robinson:] Yes. Correct.
>
> * * *
>
> [Prosecutor:] Was Jason Johnson the only person with a gun that day?
>
> [Mr. Robinson:] Yes.
>
> [Prosecutor:] *Do you have any information about Mr. Hamel having a gun?*
>
> [Mr. Robinson:] *Not that I can recall.*

* * *

[Prosecutor:] Mr. Robinson, I'm going to show you . . . State's Exhibit Number 12 which is the transcript of the taped statement you gave to Detective Alston on September 23rd, 2011.[10] Now let me just back up a second. You're saying you didn't know of anyone else to have a gun. Are you having a problem with your memory today, or you just did not see that happen today?

[Mr. Robinson:] *I'm just having a problem with my memory today.*

* * *

[Prosecutor:] Have you had a chance to look that over, Mr. Robinson?

[Mr. Robinson:] Yes.

[Prosecutor:] Does that help you refresh your recollection as to whether Jason Hamel had a gun on the night of June 20th, 2008?

[Mr. Robinson:] *I can't recall. Like this was years ago. Like it's not like I'm on trial for—so it's not like I'm trying to remember all these things because it's not like—it's not benefitting me or nothing. I'm trying to recall as best as I can.*

I really don't care. That's what I'm trying to say. There you go. That's the best way to describe it.

THE COURT: Next question.

[Prosecutor:] *Mr. Robinson, when you were asked on cross-examination whether Jason Hamel had a -- whether you saw a gun in Jason Hamel's hand, you said no. Is that correct?*

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[10] The prosecutor later corrected herself and referred Mr. Robinson to the transcript of his statement from November 22, 2011.

[Mr. Robinson:] *I can't recall.*

(Emphasis added.)

Following this exchange, the prosecutor asked (at the bench) to play for the jury selected portions of Mr. Robinson's taped statement to police, and to have those portions admitted as substantive evidence. The prosecutor proffered that during his second interview with police, Mr. Robinson said that Mr. Hamel showed him a gun while they were driving from Park Heights to Federal Hill. The prosecutor argued that, under *Nance v. State*, 331 Md. 549 (1993), the statements fell within the prior inconsistent statement exception to the hearsay rule. Defense counsel objected, but the court ruled that the statements were admissible either as prior inconsistent statements or as recorded recollections.

When the bench conference concluded, the prosecutor asked Mr. Robinson again whether he saw who fired the shot:

> [Prosecutor:] Mr. Robinson, when you were being questioned on cross-examination, you described that you didn't see who fired the shot, correct?
>
> [Mr. Robinson:] Correct.
>
> [Prosecutor:] Okay. And . . . that was because you were ducked down?
>
> [Mr. Robinson:] Correct.

Over defense objection, the prosecutor then played a portion of Mr. Robinson's taped statement to police:

> MR. ROBINSON: (Inaudible) shot him. And he's standing about ten feet away (inaudible) he's standing with his gun out about ten feet away. *He pointed the gun, and he shot one time.* The window were down. It ain't shattered no glass or nothing. The bullet hit him somewhere. I couldn't see. I just know it hit somewhere. I just heard him moaning. I was in the backseat on the floor. I really didn't -- the only -- I really didn't like -- *after I seen that shot*, I ain't want to. I ducked down because I ain't know if it was going to be more shots, if I was going to take any or not.
>
> (Whereupon, the tape was stopped.)

(Emphasis added.)

Next, the prosecutor returned to the subject of whether Mr. Robinson knew that Mr. Hamel had a gun that night when he gave the statement to police:

> [Prosecutor:] Mr. Robinson, you were then asked whether you had seen or known Mr. Hamel to have a gun on the night of June the 20th of 2008, correct?
>
> [Mr. Robinson:] Correct.
>
> [Prosecutor:] And you denied that. You said no, he had not?
>
> [Mr. Robinson:] I can't recall.

The prosecutor then played another portion of Mr. Robinson's taped statement to police—again over defense objection:

> DETECTIVE ALSTON: *Now the other Jason, the one that you were saying was robbed, did you see him with a gun that night?*
>
> MR. ROBINSON: *Yeah. I seen him when I was riding in the car he showed it to me.* He pulled it from under his seat. Said he didn't want no problems, but he's not going take nothing from him. So he must have said stuff already (inaudible). That's why I changed the location to his territory.

(Whereupon, the tape was stopped.)

(Emphasis added.)

The court later instructed the jury that these taped statements could be considered as substantive evidence.

2. Analysis

Prior statements by a witness that are inconsistent with the witness's trial testimony are not excluded by the general hearsay rule. Md. Rule 5-802.1(a). These statements may be admitted into evidence if they were "previously made by a witness who testifies at the trial . . . and who is subject to cross-examination concerning the statement" and if the statement was "recorded in substantially verbatim fashion by stenographic or electronic means contemporaneously with the making of the statement." Md. Rule 5-802.1[11] Mr. Robinson's taped statements to police satisfy these initial requirements of the Rule.

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[11] Rule 5-802.1 also provides an exception for prior recorded recollections:

> A statement that is in the form of a memorandum or record concerning a matter about which the witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, if the statement was made or adopted by the witness when the matter was fresh in the witness's memory and reflects that knowledge correctly.

Md. Rule 5-802.1(e). Although the trial court ruled that Mr. Robinson's statements were admissible "either as an inconsistent statement with his current testimony *or the prior recorded recollection*" (emphasis added), the State concedes that the latter exception does not apply because Mr. Robinson did not display "the requisite memory loss for a prior recorded recollection." Moreover, because Mr. Robinson gave his statement three years after the shooting, it was not made "when the matter was fresh in [his] memory."

Inconsistency with a prior statement may be inferred from "[a] witness who professes not to remember an event in an effort to avoid testifying about it . . . because by claiming that he does not remember an event that he does remember, the witness is denying, albeit indirectly, that the event occurred." *Corbett v. State*, 130 Md. App. 408, 425 (2000). Inconsistency can also be inferred "from partial testimony, *i.e.*, an omission, because it is reasonable to infer from the witness's ability to testify partially that he has the ability to testify fully but is unwilling to do so." *Id.* For example, in *Nance v. State*, three State witnesses implicated the defendants in police statements, grand jury testimony, and photo-array identifications. 331 Md. 549, 553-56 (1993). At trial, the witnesses recanted by claiming that "they remembered some parts of these earlier events [but] did not remember others, and [they] outright denied or repudiated other parts." *Id.* at 556, 572. The Court of Appeals described the case as "present[ing] the classic evidentiary problem of the turncoat witness," *id.* at 552, and held that "[w]hen witnesses display such a selective loss of memory, a court may appropriately admit their prior statements." *Id.* at 572 (citing *State v. Lenarchick*, 247 N.W.2d 80, 90-91 (Wis. 1976); *State v. Osby*, 793 P.2d 243, 250 (Kan. 1990)). The trial court has the discretion to determine "whether a witness's lack of memory is feigned or actual," *Corbett*, 130 Md. App. at 426, but this determination need not be explicit or on the record. *See McClain v. State*, 425 Md. 238, 252 (2012) ("Nowhere . . . does the *Corbett* Court require that such a finding [of whether the witness's memory loss is feigned or genuine] be made on the record. [¶] . . . [T]he facts of this case demonstrate

that the trial court made a finding, albeit implicitly, on the admissibility of [the witness's] audiotaped statement as a prior inconsistent statement.").

Mr. Hamel argues that because Mr. Robinson stated that he "[couldn't] recall" and was "having a problem with [his] memory," the trial court was required, under *Nance*, to make a preliminary determination "that his memory loss was feigned and not actual," *i.e.*, that he was "a *bona fide* 'turncoat witness,'" before ruling that his statements to police were admissible as prior inconsistent statements. The State responds that Mr. Robinson's testimony directly contradicted his prior statements, so *Nance* is inapplicable and the trial court was not required to evaluate Mr. Robinson's claim of forgetfulness.

We agree with the State. We note first that there is no inconsistency about whether Mr. Robinson saw who shot Mr. Bluitt. He stated five times during direct examination that he did not see who shot Mr. Bluitt. He reiterated this again on re-direct just before the prosecutor played his taped statement for the jury. But his trial testimony directly contradicts his police statement, in which he said, "He [Mr. Hamel] pointed the gun, and he shot one time. . . . *[A]fter I seen that shot*, I ain't want to. I ducked down because I ain't know if it was going to be more shots, if I was going to take any or not." So the trial court did not err in admitting this portion of Mr. Robinson's statement to police as a prior inconsistent statement.

As for whether Mr. Robinson saw or knew Mr. Hamel to have a gun on June 20, 2008, he first answered this question on cross examination with a simple and direct, "No." That answer unambiguously contradicted his statement to police, in which he said (in

response to Detective Alston's question about a gun) "Yeah. *I seen him [Mr. Hamel] when I was riding in the car he showed it to me.* He pulled it from under his seat." Although Mr. Robinson said on re-direct that he "[couldn't] recall" whether Mr. Hamel had a gun, that he was "just having a problem with [his] memory," and that he "really [didn't] care" to remember because "it's not like [he was] on trial" and "it's not benefitting [him] or nothing," Mr. Robinson's initial answer on cross rendered his testimony inconsistent with his prior statement. His subsequent explanation—that he didn't really care to remember because he wasn't benefitting from testifying—does not bear on whether the prior statement was inconsistent. *See Belton v. State*, 152 Md. App. 623, 632 (2003) ("A witness's motive or reason for changing his testimony is not relevant to whether a statement is inconsistent. . . . Recognition or acknowledgement by the witness of the inconsistency in the prior statement, and explanation of it, does not render the prior statement consistent with the present testimony."). As such, then, the trial court did not err in admitting the second portion of Mr. Robinson's taped statement as substantive evidence either.

C. The Trial Court Did Not Err In Refusing To Instruct The Jury On Voluntary Manslaughter Based On Hot-Blooded Response To Legally Adequate Provocation.

Finally, Mr. Hamel argues that the trial court erred in denying his request for a jury instruction on voluntary manslaughter based on hot-blooded response to legally adequate provocation. Mr. Hamel requested Criminal Pattern Jury Instruction 4:17.4, Subsection C: Voluntary Manslaughter (Hot Blooded Response to Legally Adequate Provocation). The trial court denied this request, finding that there was no evidence of legally adequate

provocation or that Mr. Hamel reacted in a hot-blooded rage. The State argues that the trial court correctly refused the instruction because there was no evidence that Mr. Hamel acted in "hot blood."

1. Standard Of Review

We review the trial court's refusal to give a requested jury instruction for an abuse of discretion. *Bazzle v. State*, 426 Md. 541, 548 (2012) (quoting *Stabb v. State*, 423 Md. 454, 465 (2011)). To determine whether the trial court abused its discretion in refusing to give a requested instruction, we consider "'(1) whether the requested instruction was a correct statement of the law; (2) whether it was applicable under the facts of the case; and (3) whether it was fairly covered in the instructions actually given.'" *Id.* at 549 (quoting *Stabb*, 423 Md. at 465). The State does not argue that the requested instruction was an incorrect statement of the law or that it was fairly covered in the instructions given. The only factor at issue is whether the requested instruction "was applicable under the facts of" this case.

This Court must "'determine whether the criminal defendant produced that minimum threshold of evidence necessary to establish a *prima facie* case that would allow a jury to rationally conclude that the evidence supports the application of the legal theory desired.'" *Id.* at 550 (quoting *Dishman v. State*, 352 Md. 279, 292-93 (1998)). That minimum "threshold is low, as a defendant needs only to produce 'some evidence' that supports the requested instruction." *Id.* at 551 (citing *Dykes v. State*, 319 Md. 206, 216-17 (1990)). In determining whether "some evidence" exists, "'we view the evidence in the

light most favorable to the accused.'" *Id.* (quoting *General v. State*, 367 Md. 475, 487 (2002)). The "some evidence" standard "'calls for no more than what it says—"some," as that word is understood in common, everyday usage.'" *Id.* (quoting *Dykes*, 319 Md. at 216-17).

> The source of the evidence is immaterial; it may emanate solely from the defendant. It is of no matter that the [requested instruction] is overwhelmed by evidence to the contrary. If there is *any evidence* relied on by the defendant which, if believed, would support his claim . . . the defendant has met his burden.

Id. (ellipsis in original) (emphasis added) (quoting *Dykes*, 319 Md. at 217). But that modicum of evidence must still rationally support the theory: "[i]t may take only slight evidence to generate a jury issue, but slight evidence must still be somewhat more than preposterous." *Wilson v. State*, 195 Md. App. 647, 668 (2010), *rev'd on other grounds*, 422 Md. 533 (2011).

2. Hot-Blooded Response To Legally Adequate Provocation

The Pattern Instruction nicely summarizes the five elements that must be present in order for a killing to be a hot-blooded response to legally adequate provocation:

> Killing in hot blooded response to legally adequate provocation is a mitigating circumstance. In order for 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 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.[12]

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[12] The Court of Appeals set forth the "test for determining when the defense of provocation may apply" in slightly different terms, but with the same required elements:

> "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."

Christian v. State, 405 Md. 306, 322–23 (2008) (quoting *Girouard v. State*, 321 Md. 532, 539 (1991)).

Because we are addressing Mr. Hamel's challenge to the circuit court's decision not to give this instruction, we will refer to the elements of the provocation defense as listed in the instruction. And although the instruction's faithfulness to the law is not in dispute, we recognize that this instruction tracks the law, but lists the elements in slightly different

MPJI-Cr 4:17.4(C) (brackets in original.) Mr. Hamel needed to show "some evidence" of all five of these factors in order to generate the instruction. *See Wilson*, 195 Md. App. at 681 ("[T]he burden of production is on the defendant to generate a *prima facie* case with respect to each and every one of the [five] elements of the defense."). And because he did not do so as to at least one of the elements, we agree that the instruction would not have been appropriate, let alone required.

3. Mr. Hamel Produced No Evidence That He Was Actually Enraged.

Mr. Hamel argues that, assuming the trial court did not err in admitting Mr. Robinson's taped statements as evidence (which we have found it did not), "the statements establish 'some evidence' to indicate that [Mr. Hamel] would be enraged if anything went amiss and that, in light of the totality of the circumstances, he was enraged when something did go amiss." He refers specifically to the taped portion of Mr. Robinson's statement, where he recalled that Mr. Hamel "[s]aid he didn't want no problems, but he's not going

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order. The first element of this "Rule of Provocation" corresponds to the second factor of MPJI-Cr 4:17.4(C); the second element of the Rule corresponds to the first factor of MPJI-Cr 4:17.4(C); the third element of the Rule contains both a subjective component, which corresponds to the third factor of MPJI-Cr 4:17.4(C), and an objective component, which corresponds to the fourth factor of MPJI-Cr 4:17.4(C), *see Wilson*, 195 Md. App. at 683–84 ("'The issue of whether the defendant's blood actually cooled is, of course, part of the subjective component of whether he acted in the heat of passion. . . .' When we turn, by contrast, to the distinct and autonomous criterion of whether enough time had elapsed for the hypothetical reasonable man's blood to have cooled, that specimen of 'coolness' is placed under an objective microscope." (citation omitted)); the fourth element of the Rule corresponds to the fifth factor of MPJI-Cr 4:17.4(C).

take nothing from him" as he showed Mr. Robinson his gun. The State responds that Mr. Hamel offered no evidence that he was "subjectively enraged" or that he was "acting under a sufficient provocation," but only argued that his "rage could be deduced" from the evidence.

The provocation defense depends on *subjective* rage on the part of the defendant. He must produce evidence that *he* actually was enraged at the critical moment, and it is not sufficient to show circumstances from which rage can be inferred:

> This element of the defense, the actual state of rage in the mind of the defendant, is a subjective requirement. It would not be enough that some legally adequate provocation had occurred. It would not be enough that, objectively speaking, the circumstances could have created hot-blooded rage in an average or reasonable person. *It must affirmatively be established that the defendant himself was actually acting in hot blood.*

Id. at 682-83 (emphasis added) (citations omitted).

The evidence adduced at trial did not affirmatively establish that Mr. Hamel was acting in "hot blooded response" to anything. Even if we were to accept Mr. Hamel's argument that Mr. Robinson's taped statement provides evidence from which one can infer that Mr. Hamel *would have become* enraged if something were to go wrong with the deal, he offered no evidence that he *actually became* enraged when he was robbed or ripped off. Mr. Hamel chose not to testify, so the record contained no input on his subjective state of mind when the shooting occurred. *See Sims v. State*, 319 Md. 540, 553 (1990) ("The blood must indeed be hot, and under some circumstances only the hot-blooded killer can attest to

that."). The witnesses who did testify also offered no insight into Mr. Hamel's subjective state at the time of the killing.[13]

The absence of evidence of his subjective rage precluded Mr. Hamel from making a *prima facie* case with respect to the first element of the provocation defense. Because he did not establish the onset of his rage, Mr. Hamel necessarily also failed to establish that he "was *still* enraged when he killed the victim, that is, [his] rage had not cooled by the time of the killing," as required by the third element of MPJI-Cr 4:17.4(C). And because "no evidence" is less than "some evidence," Mr. Hamel failed to meet this admittedly low threshold with respect to at least two of the required elements of the defense. That ends the inquiry: although Mr. Hamel raises some novel arguments about how the others' plot to rob him could be considered legally adequate provocation, the absence of any evidence that he was, in fact, provoked and enraged makes it unnecessary for us to address them.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

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[13] Ms. Staggs testified that Mr. Hamel repeatedly apologized to her when he returned home that night and said that he didn't want to involve her. Although this may qualify as evidence of Mr. Hamel's subjective state of mind *after the fact*, it neither establishes a hot-blooded rage nor provides any insight as to how he felt *at the time of the shooting*.