

BRIEF FOR APPELLEE

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DISTRICT OF COLUMBIA  
COURT OF APPEALS

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No. 24-CF-830

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MARCUS WALKER,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

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APPEAL FROM THE SUPERIOR COURT  
OF THE DISTRICT OF COLUMBIA  
CRIMINAL DIVISION

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## **ISSUES PRESENTED**

I. Whether the trial court plainly erred in its response to a jury note about the “adequate provocation” instruction, where this Court has repeatedly held the proportionality limitation on what qualifies as “adequate provocation” is assessed by reference to a defendant’s violent act, and not merely the emotions a defendant felt.

II. Whether some of Walker’s convictions are subject to merger.

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BRIEF FOR APPELLEE

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**COUNTERSTATEMENT OF THE CASE**

By indictment filed on May 11, 2023, Marcus Walker was charged with one count of first-degree murder while armed (D.C. Code §§ 22-2101, -4502); one count of assault with a dangerous weapon (ADW) (D.C. Code § 22-402); one count of ADW committed against a minor (D.C. Code §§ 22-402, -3611); three counts of possession of a firearm during a crime of violence or dangerous offense (PFCV) (D.C. Code § 22-4504(b)); one count of second-degree cruelty to children (D.C. Code § 22-1101(b)); and one count

of possession of a large capacity ammunition feeding device (PLCAFD) (D.C. Code § 7-2506.01(b)) (Record on Appeal (R) 185-86 (Indictment)).<sup>1</sup> These charges were based on Walker’s fatal shooting of Erik King on October 11, 2022, when King was in the same bed with his girlfriend, Moesha Pearce,<sup>2</sup> and Pearce’s six-year-old daughter, N.P. (*id.*).

On April 30, 2024, a jury trial began before the Honorable Robert Okun (4/30/24 Transcript (Tr.) 19). On May 7, 2024, the jury found Walker not guilty of first-degree murder while armed and guilty on all other charges, including second-degree murder while armed as a lesser-included offense (Appendix (A) 626-29; 5/7/24 Tr. 17-19). On September 6, 2024, Judge Okun sentenced Walker to consecutive terms of 240 months’ incarceration for second-degree murder while armed, 60 months for ADW (Pearce), and 60 months for ADW committed against a minor (N.P.), for an aggregate term of 360 months’ incarceration (A662-63). Judge Okun also sentenced Walker to concurrent terms of 60 months’

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<sup>1</sup> All page references to the record are to the PDF page numbers.

<sup>2</sup> Walker refers to Pearce in his brief as “Witness One” or “W1,” which is how she was identified in pretrial filings and at pretrial hearings in Superior Court. Pearce identified herself by name in open court at the trial, and we likewise use her name.

incarceration for each PFCV count, 18 months for second-degree cruelty to children, and 12 months for PLCAFD (*id.*). On September 11, 2024, Walker timely appealed (A664-65).

## **The Trial**

### ***The Government's Evidence***

Moesha Pearce dated Marcus Walker from March to June of 2022 (4/30/24 Tr. 59-60). Pearce had a six-year-old daughter, N.P., and Walker had two children (a one-year-old and a two-year-old), but they had no children in common (*id.* at 58, 60, 63). During their relationship, Walker and his children lived with Pearce in her one-bedroom apartment in the 800 block of 21st Street, NE (*id.* at 58-60, 173-74).

Pearce broke up with Walker after learning that, during their relationship, he had sexual relations with the mother of his children in Pearce's apartment (4/30/24 Tr. 60-61). Pearce nevertheless allowed Walker and his children to continue staying on an air mattress in her living room (*id.* at 61-63). Although Pearce at one point called the police to have Walker removed, she ultimately permitted him to stay because she feared that his children would otherwise have nowhere to live (*id.* at 61-62).

On October 10, 2022, Pearce spent the day with her new boyfriend, Erik King, and they returned to her apartment at 2 a.m. the next morning (4/30/24 Tr. 58, 64). They watched television with Walker in Pearce's bedroom until King asked Walker to go to the living room so that he and Pearce could go to bed (*id.* at 64-65). Walker got up and left, closing the door and walking to the living room where his children slept (*id.* at 65).<sup>3</sup>

Pearce and King began to have sexual intercourse (4/30/24 Tr. 68). At the time, Pearce's six-year-old daughter, N.P., was asleep in the same bed, positioned near the wall (*id.* at 81). Over the next hour, Walker sent Pearce multiple text messages, expressing increasing anger at her behavior (*id.* at 73-75, 77).<sup>4</sup> Around 4:50 a.m., Walker first texted:

You disrespectful as f\*\*\*. One, cause you just mad, Bruh, and you was f\*\*\*ing . . . with me and the kids up. Like sh\*\* different when we was doing it. They our kids. But that's all. That's a mutherf\*\*\*a, to be honest, don't know. Plus the funny sh\*\* you do when I'm around, like, where was all that when I was around. Sh\*\* not law, not mad, just sh\*\*. Goofy for real. Not a good look for the female you raising. Like how me mother f\*\*\*ers . . .

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<sup>3</sup> Pearce testified at trial that Walker was not upset when he left (4/30/24 Tr. 65-66). She was impeached with her grand-jury testimony, in which she testified that Walker "seem[ed] upset" and "ha[d] attitude," "but he still got up and left out and went into the living room" (*id.* at 67-68).

<sup>4</sup> Although Pearce expressed doubt on cross-examination about whether Walker could hear her and King's sexual activity from the living room (4/30/24 Tr. 119-20), his texts made clear he was aware of it (*id.* at 73-75).

f\*\*\*ed on them covers that ain't been washed and you child lay in that bed. Like, I looked at you better than that. You just getting beside yourself, no BS. I shouldn't be hearing stuff like that from your kid.

(*Id.* at 73-74.)

Pearce replied, "Like, what Marcus. Bye." (4/30/24 Tr. 74.) Walker responded, "Nah, I'm for real," and Pearce wrote back, "Okay" (*id.* at 74-75). Walker then sent Pearce a "crying emoji," followed by, "Yeah, you funny for real. Showed me your true colors. Ain't mad at you. Sh\*\* funny [ ] for real." (*Id.* at 75.) Later, he wrote, "You been on funny sh\*\* for what, trying to hurt me. That goofy." (*Id.*) His final text message read:

That's your whole daughter beside you. Type sh\*\* you on. Not law. I don't give a f\*\*\* what anyone says. It's not, and I'm in here. You real life disrespect me for what I could have stepped with my kids, but you want to be funny.

(*Id.*) Pearce, who had resumed having sex with King, did not respond to any of these later text message (*id.* at 75-76).

Around 5:50 a.m., soon after Walker sent his final text, he "barge[d] through" the locked door to Pearce's bedroom (4/30/24 Tr. 76).<sup>5</sup> Pearce and King were lying horizontally on the bed, with King on top (*id.* at 77-78).

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<sup>5</sup> Pearce acknowledged on cross-examination that the bedroom door "comes unlocked" if someone "pushes hard enough on the lock" (4/30/24 Tr. 123).

Walker wore a tank-top shirt and jeans, with a ski mask “[o]n top of his head” but not covering his face (*id.* at 81). Pearce noticed that Walker was holding “one hand behind his back” (*id.* at 80-81).

Walker told Pearce and King to stop having sex, and they both asked Walker to leave (4/30/24 Tr. 78). Walker refused (*id.* at 78-79). King began to get up, and Pearce tried to stop him by wrapping her arms around him in a “circle-like movement,” “hold[ing] on to him” (*id.*). Pearce “didn’t want them to fight,” and she was “trying to deescalate” the situation while continuing to tell Walker “to get out” (*id.* at 79).

Walker pulled a handgun from behind his back and shot King in the chest (4/30/24 Tr. 79-80; 5/1/24 Tr. 97-99). King said, “Ah, Bro, what the f\*\*\*,” and he fell back onto the bed (4/30/24 Tr. 80). Pearce’s right arm was close enough to the blast from Walker’s gun (within two-to-three feet) that it was struck by stippling—small fragments of gunpowder grain and metal from the barrel of the gun—which embedded in her skin and caused an injury (*id.* at 86-88; 5/1/24 Tr. 99-102).

Pearce climbed on top of King and tried to put pressure on his bleeding chest wound (4/30/24 Tr. 80). Meanwhile, Walker “started talking” and “rambling,” but Pearce did not listen to what he said (*id.*).

Walker then fired a second shot, striking King in the scrotum (*id.*; 5/1/24 Tr. 97, 107). Pearce was again close enough to the blast that her left thigh was injured by stippling (4/30/24 Tr. 86-88; 5/1/24 Tr. 99-102).

Pearce asked Walker why he would “do that,” especially when “[her] daughter was right there” in the same bed (4/30/24 Tr. 81). Walker replied, “I don’t care” (*id.*). Walker then returned to the living room, picked up both of his children, and left the apartment (*id.* at 81-82). D.C. Housing Authority video surveillance footage showed that a man holding two small children walked along 21st Street, away from the direction of Pearce’s apartment, shortly after 5:50 a.m. (*id.* at 158-66). Meanwhile, Pearce continued tending to King’s injuries and called 911 (*id.* at 82-83). King died as a result of the multiple gunshot wounds (5/1/24 Tr. 100).

In the aftermath of the shooting, police searched Pearce’s apartment (4/30/24 Tr. 178-99). In the bedroom, officers found a spent 9mm cartridge casing and an unfired 9mm bullet (*id.* at 186-88, 195-96). In the living room, they found Walker’s belongings, including his clothing and an identification card on a chair (*id.* at 177-78, 195-96). On the same chair, underneath Walker’s clothing, officers found an empty large-capacity drum magazine with a capacity of 50 rounds (*id.* at 179, 190-91, 196, 199). Walker’s DNA

was on both the fired cartridge casing in the bedroom and the drum magazine in the living room (5/1/24 Tr. 53-57).

### ***The Defense Evidence***

An expert in crime-scene reconstruction testified for the defense (5/2/24 Tr. 9). According to this expert, the first shot, which struck King's chest, was fired from "kind of above him, and off to the side" (*id.* at 11). The second shot, which struck King's groin, was fired from a different position, "down lower" "toward his feet" (*id.* at 12). Based on the expert's analysis of King's gunshot wounds and Pearce's stippling injuries, he "believ[ed] that [Pearce] was on top of Mr. King when both shots were fired" (*id.* at 18).

On cross-examination, however, the defense expert acknowledged that the bullet trajectories and Pearce's stippling injuries were fully consistent with Pearce's account (5/2/24 Tr. 25-28). Specifically, the expert agreed the evidence was consistent with the first shot being fired while King was getting up on his knees and Pearce had her arms wrapped around him (*id.* at 26-27). The expert similarly agreed the evidence was consistent with the second shot being fired after King fell backward onto the bed, Pearce straddled him to apply pressure to his chest wound, and the shooter moved to fire at King's scrotum (*id.* at 27-28).

## SUMMARY OF ARGUMENT

The trial court did not err, let alone plainly err, in its response to a jury note about the “adequate provocation” instruction. Walker’s instant challenge was not preserved at trial because his counsel never disputed the government’s position that the term “response” in the “adequate provocation” instruction referred to the violent act at issue in this case. In any case, the trial court’s response to the jury note accurately stated the law. This Court has repeatedly held that the proportionality limitation on what qualifies as “adequate provocation” to reduce a murder charge to manslaughter is assessed by reference to a defendant’s violent act, and not merely the emotions a defendant felt. *See, e.g., West v. United States*, 499 A.2d 860, 864 (D.C. 1985) (“It is well established that a trivial or slight provocation entirely disproportionate to the violence of the retaliation, is not adequate provocation.”) (quotation marks omitted).

Walker’s ADW conviction for assaulting Moesha Pearce does not merge with his second-degree murder conviction for killing Erik King. These convictions involved different crimes against different victims, and each required proof of at least one element that the other did not. The government agrees, however, that Walker’s conviction for ADW against

a minor merges with his ADW conviction for Pearce. The government also agrees that two of Walker’s three PFCV convictions merge.

## ARGUMENT

### **I. The Trial Court Did Not Err, Let Alone Plainly Err, in Its Response to the Jury’s Note About Adequate Provocation.**

#### **A. Standard of Review and Applicable Legal Principles**

This Court normally reviews de novo a claim challenging whether a jury instruction correctly stated the law. *See Alleyne v. United States*, 327 A.3d 472, 483 (D.C. 2024). Plain-error review applies, however, where the ground on which the instruction is challenged on appeal was not asserted in the trial court. *See id.*; *Robinson v. United States*, 649 A.2d 584, 586 (D.C. 1994). District of Columbia Superior Court Criminal Rule 30 provides: “No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto . . . stating distinctly the matter to which that party objects and the grounds for the objection.” This rule “is equally applicable to reinstructions.” *Robinson*, 649 A.2d at 586 (quotation marks omitted). The purpose of the rule’s specificity requirement is “to give the

trial court the opportunity to correct errors and omissions which otherwise might necessitate a new trial.” *Id.* (quotation marks omitted).<sup>6</sup>

To establish plain error, an appellant must show that (1) the trial court erred; (2) the error was “obvious or readily apparent, and clear under current law”; and (3) the error affected his substantial rights. *See Griffin v. United States*, 144 A.3d 34, 37 (D.C. 2016) (quotation marks omitted). This Court should not use its discretion to correct a forfeited error unless the error resulted in “a miscarriage of justice” or “seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.” *Id.* (quotation marks omitted). Only rarely will an unpreserved instructional error justify reversal under plain-error review. *See Wilson v. United States*, 785 A.2d 321, 326 (D.C. 2001).

A killing is voluntary manslaughter “where the perpetrator kills with a state of mind which, but for the presence of legally recognized

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<sup>6</sup> Walker claims (at 20-21) that this Court must review for constitutional error under *Chapman v. California*, 386 U.S. 18 (1967), because the reinstruction at issue purportedly involved a “controlling issue.” Even assuming for the sake of argument that *Chapman* would otherwise apply, Walker’s failure to assert at trial the same objection that he presses on appeal “restricts the scope of [this Court’s] review to plain error.” *Robinson*, 649 A.2d at 586. In any event, for the reasons set forth below, Walker’s instructional claim would fail under any standard of review.

mitigating circumstances, would render the killing murder.” *Comber v. United States*, 584 A.2d 26, 42 (D.C. 1990) (en banc). Such circumstances “mitigate[ ] culpability for certain acts where in the interest of social order we cannot altogether excuse those acts.” *High v. United States*, 972 A.2d 829, 836 (D.C. 2009). As relevant here, one such mitigating circumstance is where a defendant “acts in the heat of passion caused by adequate provocation.” *Id.* at 833.

“The test of sufficiency of such provocation is that which would cause an ordinary man, a reasonable man, or an average man, to become aroused as to kill another.” *High*, 972 A.2d at 836 (quoting *Brown v. United States*, 584 A.2d 537, 542-43 (D.C. 1990)). In other words, “[t]he provocation must be so serious” that “even an ordinarily law-abiding person of reasonable temperament might become sufficiently upset by the provocation to experience substantial impairment of his capacity for self-control and, as a consequence, to act violently.” *High*, 972 A.2d at 834 (quoting Joshua Dressler, *Why Keep the Provocation Defense?: Some Reflections on a Difficult Subject*, 86 Minn. L. Rev. 959, 974 (2002)). Thus, “[i]t is well established that a ‘trivial or slight provocation entirely disproportionate to the violence of the retaliation, is not adequate

provocation.” *West v. United States*, 499 A.2d 860, 864 (D.C. 1985) (quoting *Nicholson v. United States*, 368 A.2d 561, 565 (D.C. 1977)).

## **B. Additional Background**

Walker’s trial counsel requested a jury instruction on voluntary manslaughter while armed as a lesser-included offense of first-degree murder while armed based on the heat of passion caused by adequate provocation (5/2/24 Tr. 40-42). The government opposed giving such an instruction, arguing there was insufficient evidence of mitigating circumstances to warrant it (*id.* at 43-45). The trial court ruled that although there may not be “a lot of evidence” supporting the instruction, there was at least “some evidence” based on Walker “go[ing] into the bedroom and see[ing] his ex-girlfriend having sex with somebody else with a child right next to them” (*id.* at 46-47).

After instructing the jury on the elements of second-degree murder while armed—which required the jury to find, among other things, that “there were no mitigating circumstances”—the trial court gave the following instruction:

Mitigating circumstances can exist when a person acts in the heat of passion caused by adequate provocation.

Heat of passion includes such emotion as rage, resentment, anger, terror, and fear. Adequate provocation is conduct on the part of another that would cause an ordinary, reasonable person in the heat of the moment to lose his self-control and act on impulse and without reflection.

For a provocation to be considered adequate, the person's response must not be entirely out of proportion to the seriousness of the provocation. An act of violence or an immediate threat of violence may be adequate provocation, but mere words, no matter how offensive, are never adequate provocation.

The Government must prove beyond a reasonable doubt that there were no mitigating circumstances.

(5/2/24 Tr. 81-82.)

The jury began deliberations on the morning of Friday, May 3, 2024 (5/2/24 Tr. 154). At 4:50 p.m. that day, just before the close of court, the jury sent the following note:

When discussing "adequate provocation," should we define the response as heat of passion, "such emotions as rage, resentment, anger, terror, and fear" OR the acts you carried out because of heat of passion? We are working from the language on page 14 continued on page 15 of the "Jury Instructions" in section titled "Mitigating Circumstances."

Additionally, can we receive an alternative definition of mitigating circumstances that is more concrete or streamlined or plainspoken?

(A589.)

The government submitted its proposed response over the ensuing weekend (A590-94). As to the jury's first question, the government asserted that "the 'response' referenced in the instruction means the violent act that is at issue in the case" (A591). The government cited multiple decisions from this Court that "made clear that the analysis of proportionality is one that weighs the provocation against the *killing*, not just the development of emotions" (A591-92). Based on this authority, the government proposed the following response:

At page 14 of the Final Instructions, there is a sentence that reads: "for a provocation to be considered 'adequate,' the person's response must not be entirely out of proportion to the seriousness of the provocation." The word "response" refers in this case to the Defendant's alleged shooting of Mr. King. It does not merely refer to the Defendant's alleged development of emotions such as rage, resentment, anger, terror, or fear.

(A592.) As to the jury's second question, which requested an "alternative definition of mitigating circumstances" (A589), the government proposed the following response based on *High*, 972 A.2d at 833:

Mitigating circumstances "exist where [the] person acts in the heat of passion caused by adequate provocation." Provocation is adequate where it would "naturally induce a reasonable man in the passion of the moment to lose self-control and commit the act on impulse and without reflection." The circumstances must be such that "an ordinary person in the [defendant's] circumstances, even an ordinarily law-abiding person of reasonable temperament, might become sufficiently upset by

the provocation to experience substantial impairment of his capacity for self-control and, as a consequence, to act violently.”

(A593.)

On the morning of May 6, 2024, shortly before court resumed, Walker’s trial counsel submitted a proposed response to the jury note, based on *United States v. Alexander*, 471 F.2d 923, 944-45 (D.C. Cir. 1972) (A597-99). The defense proposal did not distinguish between the jury’s first and second questions (A599). Contrary to Walker’s claim (at 7, 14), the defense also did not “disagree” with the government about the meaning of the word “response” in the original jury instruction (A597-99). Indeed, the defense’s proposed reinstruction did not address the jury’s question about the term “response” at all (*id.*). It read as follows:

If a homicide is committed in the heat of passion caused by adequate provocation, then the defendant is not guilty of the offense of first or second degree murder. In addition to adequate provocation, there must be heat of passion caused by that provocation. Both the provocation and the passion must exist at the time the injury or injuries causing the death of the deceased are inflicted.

“Heat of passion” includes rage, resentment, anger, terror, and fear. Heat of passion may be produced by fear as well as by rage.

Provocation, in order to be adequate to acquit defendant of first or second degree murder, must be such as might naturally induce a reasonable man in the passion of the moment to lose self-control and commit the act on impulse and without reflection.

You are reminded that the burden is on the Government to prove beyond a reasonable doubt that defendant is guilty of murder. With regard to provocation, therefore, the Government must prove beyond a reasonable doubt that provocation did not occur, or that any provocation that did occur was not adequate as a matter of law, or that defendant was not in the heat of passion caused by that provocation. In other words, if you have a reasonable doubt whether or not the defendant acted in heat of passion caused by adequate provocation, the verdict must be not guilty of murder in the second degree.

(A599.)

During the hearing about the jury note, Walker's counsel objected to the government's proposed response on only one ground, arguing that it "improperly divorce[d] . . . heat of passion and adequate provocation as both have to be present" (5/6/24 Tr. 4-5). Walker's counsel elaborated that "both things . . . the heat of passion as well as the provocation must be present and the government's proposed instruction separates those to relying on the words specifically on response and makes them two separate things; whereas, the case law says that they are both being present" (*id.* at 9).

The government responded that the defense's proposed reinstruction was "an attempt to answer the [jury's] second [question], but it . . . [did] not in any way answer the juror[s'] actual confusion about the meaning of the word response" (5/6/24 Tr. 6). *See generally Alcindore v. United States*, 818

A.2d 152, 155 (D.C. 2003) (“When the jury explains specific difficulties, the trial court should clear them away with concrete accuracy.”) (quotation marks omitted). Referencing this Court’s decisions cited in the government’s written filing, government counsel reiterated that “the case law is very clear” that “response” refers to “the acts [the defendant] carried out because of that [purported] heat of passion” (5/6/24 Tr. 11-12).

The trial court agreed, “consistent with the case law,” that the “response” referenced in the original instruction was “the act that’s committed in the heat of passion” (5/6/24 Tr. 12). Walker’s counsel did not voice disagreement with that conclusion at any time during the hearing (*id.* at 2-24). Instead, defense counsel reiterated that the instruction must require “both heat of passion and provocation at the same time,” adding that the court’s proposal “answered the response, but you can’t divorce it from the heat of passion” (*id.* at 16). To address this concern, the trial court agreed to add the defense’s proposed language defining “heat of passion,” and to add a sentence reminding the jury that the government must prove beyond a reasonable doubt that Walker “was not acting in the heat of passion caused by adequate provocation” (*id.* at 18-19). Government counsel and defense counsel both indicated they were “fine” with the court’s

final language, although Walker’s counsel preserved an objection based on the court not fully adopting the proposed instruction that the defense had submitted earlier (*id.* at 20).

Around 10:40 a.m. on May 6, 2024, the trial court responded to the jury note as follows:

In response to your first question, Page 14 of the Final Instructions states “for a provocation to be considered ‘adequate,’ the person’s response must not be entirely out of proportion to the seriousness of the provocation.” In this case, the word “response” refers to Mr. Walker’s alleged shooting of Mr. King. “Heat of passion” includes such emotions as rage, resentment, anger, terror or fear.

I want to remind you that, for either first-degree murder while armed or second-degree murder while armed, the Government must prove beyond a reasonable doubt that Mr. Walker was not acting in the heat of passion caused by adequate provocation.

In response to your second question, mitigating circumstances exist where the person acts in the heat of passion caused by adequate provocation. Provocation is adequate when it would naturally induce a reasonable person in the passion of the moment to lose self-control and commit the act on impulse and without reflection. The circumstances must be such that an ordinary person in the defendant’s circumstances might become sufficiently upset by the provocation to experience a substantial impairment of his capacity for self-control and, as a consequence, to act violently.

(A600; 5/6/24 Tr. 21-22.)

The jury resumed deliberations and returned a verdict at 3 p.m. the following day (5/7/24 Tr. 16).

### C. Discussion

Walker's claim (at 22) that the trial court should have instructed the jury "that 'response' in the original instruction referred to a heat of passion such that a reasonable person might lose self-control and act on impulse or without reflection" is asserted for the first time on appeal and thus subject to plain-error review. *See Alleyne*, 327 A.3d at 483; *Robinson*, 649 A.2d at 586. Walker's contention (at 15) that this claim was preserved merely because his counsel raised "an objection" to the trial court's reinstruction is incorrect. "[N]ot any objection will suffice to ensure plenary appellate review." *Wheeler v. United States*, 930 A.2d 232, 241 (D.C. 2007). Rather, "[t]o preserve an argument of instructional error for appeal, a party must bring *that argument* to the trial court's attention." *Alleyne*, 327 A.3d at 483 (emphasis added); *see also Wheeler*, 930 A.2d at 240 ("[A]n instruction cannot be objected to on one ground in the trial court and attacked in the appellate court on a different ground.") (quoting 1 Kevin F. O'Malley et al., *Federal Jury Practice and Instructions* § 7.04 (5th ed. 2000)). The objection raised in the trial court "must be specific enough to direct the judge's attention to the correct rule of law and be made with

sufficient precision to indicate distinctly the party’s thesis.” *Alleyne*, 327 A.3d at 483 (quotation marks omitted).

At trial, Walker never disputed the government’s position that “the ‘response’ referenced in the instruction means the violent act that is at issue in the case” (A591). Nor did Walker’s counsel voice any disagreement when the trial court indicated it agreed, “consistent with the case law,” that the “response” referenced in the instruction was “the act that’s committed in the heat of passion” (5/6/24 Tr. 12). Furthermore, Walker never proposed instructing the jury—as he does on appeal—that the term “response” referred only to Walker’s emotions and not his violent act. Instead, Walker’s counsel consistently indicated his only concern was ensuring that the reinstruction emphasized the connection between “heat of passion” and “provocation” and did not risk “divorc[ing]” those concepts in the jury’s mind (*id.* at 4-5, 9, 16). When the court added additional language to address that concern, Walker’s counsel indicated the court’s proposal was “fine” (*id.* at 20). Although Walker’s counsel preserved his objection based on the defense’s earlier proposed language (*id.*), that earlier proposal did not address the jury’s question about the meaning of

the term “response” at all (A599). In other words, this preservation did not preserve an objection that Walker had never made.

Walker’s reliance (at 15) on *Evans v. United States*, 304 A.3d 211 (D.C. 2023), is misplaced. *Evans* found that an objection to a jury reinstruction was preserved—despite defense counsel ultimately agreeing with the trial court’s proposed language—where counsel had earlier sent the court an email that “clearly stated the position Evans [took] on appeal.” *Id.* at 219. Here, in contrast, Walker never asserted at trial that the term “response” in the original instruction referred to Walker’s emotions rather than his violent act.

In any case, the trial court’s response to the jury note was not error, let alone plain error, because it appropriately addressed the jury’s confusion and accurately stated the law. Consistent with this Court’s precedents, the trial court correctly instructed the jury that the “response” that “must not be entirely out of proportion to the seriousness of the provocation” referred to Walker’s alleged violent act—the “shooting of Mr. King” (A600). This Court has repeatedly held that the proportionality limitation on what qualifies as “adequate provocation” is assessed by reference to “the violence

of the [defendant's] retaliation,” not merely the emotions the defendant felt. *Nicholson*, 368 A.2d at 565; *West*, 499 A.2d at 864.

Most recently, in *High*, this Court defined a defendant's “response” for purposes of proportionality by reference to his behavior, not merely his emotions. In *High*, the defendant believed that his good friend and his step-sister “may have engaged in sexual relations.” 972 A.2d at 834. The Court “d[id] not doubt that High was extremely upset and perhaps even enraged” by this discovery. *Id.* “But,” the Court explained, “rage alone is insufficient to support a voluntary manslaughter instruction as a lesser-included offense because there must also be adequate provocation.” *Id.* Such adequate provocation exists “in only the most exceptional cases,” where “a deceased provoked a defendant by committing an offense that was so grave, and so heinous, that society partially excuses or justifies the defendant's *response* because people provoked so strongly *cannot be expected to behave any differently.*” *Id.* (emphasis added; quotation marks omitted). Applying this standard, the Court concluded that “a reasonable person would not have lost his self-control *and killed a close, childhood friend* merely because he believed that his friend had a sexual encounter with his adult step-sibling.” *Id.* at 836 (emphasis added). *See also* Joshua

Dressler, *Criminal Law: Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. Crim. L. & Criminology 421, 466 (1982) (“[I]f the ordinarily law-abiding person would be expected to be in sufficient control of his emotions so as to respond in an inner directed fashion, or to respond externally, but non-violently, then homicidal conduct by the actor may be fairly perceived as an unreasonable response to reasonable anger. This homicidal conduct would not be entitled to any mitigation.”).

Other courts have likewise recognized that adequate provocation must be measured in reference to the violence of the defendant’s response. For example, the Louisiana Supreme Court has noted that “where *the retaliatory act* is unreasonably excessive and out of proportion to the provocation, no mitigation will be recognized.” *State ex rel. Lawrence v. Smith*, 571 So. 2d 133, 138 (La. 1990) (emphasis added). In *State v. Ross*, the Utah Supreme Court explained that “[w]here the defendant asserts that he acted in the heat of passion, two variables must be weighed in relation to each other—the degree of provocation and the measures employed by the defendant in response to it.” 501 P.2d 632, 635 (Utah 1972) (quoting *People v. Catton*, 16 P. 902 (Utah 1888)). The Illinois Court of Appeals has similarly recognized that “[t]he provocation must be

proportionate to the manner in which the accused retaliated, and the crime is murder when the accused attacked the deceased with violence out of all proportion to the provocation[.]” *People v. Neal*, 466 N.E.2d 270, 274 (Ill. App. Ct. 1983). *See also, e.g., State v. O’Leary*, 903 A.2d 997, 1003 (N.H. 2006) (“His actions in response to her actions were so disproportionate that the only reasonable conclusion a jury could reach was that he was guilty of murder.”). And the Alaska Court of Appeals has explained:

The requirement of proportionality involves a common sense balancing of the seriousness of the defendant’s crime against the seriousness of the provocation. Even slight provocation may be significant when the offense committed is a minor one; conversely, for a more serious offense, more serious provocation would be required before significant provocation could properly be found.

*Roark v. State*, 758 P.2d 644, 647 (Alaska Ct. App. 1988).

Assessing proportionality by reference to a defendant’s violent act and not merely his emotions also makes sense as a logical matter. Heat of passion caused by adequate provocation is also a mitigating circumstance for other crimes requiring proof of malice, such as malicious destruction of property. *See Brown*, 584 A.2d at 539-40 & n.2. As with second-degree murder, “[f]or the provocation to be considered ‘adequate,’ the person’s response must not be entirely out of proportion to the seriousness of the

provocation.” 1 Criminal Jury Instructions for D.C., Instruction 5.400 (2025) (“Malicious Destruction of Property”). But no one would argue that what qualifies as “adequate provocation” for purposes of property destruction is necessarily “adequate provocation” for purposes of mitigating murder to manslaughter. In *Brown*, for example, the Court found sufficient evidence to warrant a jury instruction on heat of passion in a destruction-of-property case where the defendant “destroy[ed] windows and a door in an attempt to get into her mother’s house and retrieve her lost son,” who had been missing for 10 days but was not in any physical danger. 584 A.2d at 543-44. The Court based its holding on the specific nature of the defendant’s conduct, concluding that a reasonable juror could find that an ordinary person faced with such circumstances might “be so impassioned as to lose her self-control and act without reflection *to regain custody of the boy.*” *Id.* at 544 (emphasis added). Surely that same evidence, however, would have been insufficient for a mitigating-circumstances instruction if the defendant in *Brown* had instead been charged with murder for killing her mother. *Cf. High*, 972 A.2d at 836.

Walker offers no compelling explanation, and identifies no authority, to support his claim that the proportionality limitation on adequate

provocation must be assessed without any consideration of the defendant's actual conduct. Tellingly, Walker's premise (at 15) that the "sole difference between murder and voluntary manslaughter is the defendant's mental state" is not quite correct. As this Court explained in *Comber*, a defendant who commits voluntary manslaughter has the same "state of mind" as one who commits murder "but for the presence of legally recognized mitigating circumstances." 584 A.2d at 42. In other words, for both murder and voluntary manslaughter, a defendant has acted with the same mens rea: he has killed another person intentionally—or, for second-degree murder, at least acted in conscious disregard of an extreme risk of death or serious bodily injury to the victim. *See Dressler (1982), supra*, at 462 ("Provocation not only causes anger; it motivates the actor to want to kill the provoker. Proof, then, of adequate provocation does not negate intent. It magnifies it."). The difference between murder and voluntary manslaughter is the presence of "mitigating circumstances," which in turn are evaluated by reference to both the defendant's mental state and his actual conduct.

Walker (at 17-18) is correct that "adequate provocation" is defined as that which "induce[s] a reasonable man in the passion of the moment to lose self-control and commit the act on impulse and without reflection"

(quoting *High*, 972 A.2d at 833). The “act” the defendant committed, however, affects which provocations will qualify under this definition. The ultimate question is whether a “defendant’s response” (*i.e.*, act) is “partially excuse[d] or justifie[d]” because a person “provoked so strongly *cannot be expected to behave any differently.*” *High*, 972 A.2d at 834 (emphasis added; quotation marks omitted). The answer in a particular case will necessarily depend on *both* the seriousness of the provocation and how the defendant “behaved” in response. For this reason, “[i]t is well established that a trivial or slight provocation *entirely disproportionate to the violence of the retaliation*, is not adequate provocation.” *West*, 499 A.2d at 864 (emphasis added; quotation marks omitted).

Walker’s claim (at 17) that the trial court’s “definition of adequate provocation did not reference Mr. Walker’s mental state” mischaracterizes the jury’s question to which the court was responding. The jury note specifically asked how to define the term “response” in the “adequate provocation” instruction—not how to define “adequate provocation” more generally (A589). The trial court did properly instruct, and reinstruct, the jury that “[a]dequate provocation is conduct on the part of another that would cause an ordinary, reasonable person in the heat of the moment to

lose his self-control and act on impulse and without reflection” (5/2/24 Tr. 81-82; 5/6/24 Tr. 21-22; A600). Nothing in the record indicates the jury failed to understand or follow that definition. Indeed, Walker’s newly proposed response to the jury note (at 22)—“that ‘response’ in the original instruction referred to a heat of passion such that a reasonable person might lose self-control and act on impulse or without reflection”—would have been entirely redundant of this twice-given instruction.

To the extent there was any conceivable error in the trial court’s reinstruction, it was not plain or obvious, as Walker must show to prevail on his unpreserved challenge. Walker does not address, let alone rebut, this Court’s multiple cases—relied upon by the government and trial judge in Superior Court—that defined the proportionality limitation for “adequate provocation” by reference to a defendant’s violent act. Nor does Walker cite any authority that applied the proportionality limitation in the manner he proposes—*i.e.*, solely by reference to a defendant’s emotions. Any error was thus certainly not “obvious or readily apparent, and clear under current law.” *Griffin*, 144 A.3d at 37.

Finally, Walker has not shown a reasonable probability that, but for the trial court’s alleged error, he would have been acquitted of second-

degree murder and convicted only of voluntary manslaughter. As the government argued at trial (5/2/24 Tr. 43-45), it is questionable whether Walker was even entitled to an instruction for voluntary manslaughter based on the minimal evidence of provocation. This Court has recognized that “[p]rovocation mitigates murder to manslaughter in only the most exceptional cases.” *High*, 972 A.2d at 834. While Walker was no doubt upset at what he saw when he burst into Pearce’s bedroom, it was not the sort of “grave” or “heinous” provocation that would drive an ordinary man to commit murder. *Id.* at 834. Walker’s brief dating relationship with Pearce had been over for as long as it had lasted, and he was aware that Pearce and King were now a couple. His text messages indicated that, before he entered the bedroom, he had known for about an hour that King and Pearce were engaged in sexual activity in the same bed as N.P. *Cf. Nicholson*, 368 A.2d at 565 (finding, as a matter of law, that provocation was inadequate where a defendant’s suspicion that the deceased had an affair with her husband was not based on “a sudden discovery of adulterous conduct”). Under these circumstances, it was not reasonably probable that the jury would have concluded Pearce’s emotional “response” was not “entirely out of proportion to the seriousness of the provocation” (5/2/24 Tr. 81-82), but

that his violent acts caused by that emotional response were. In sum, even if the Court had responded to the jury's note as Walker now proposes, Walker has not shown a reasonable probability of a different verdict.

## **II. Some of Walker's Convictions Merge, but His ADW Conviction for Moesha Pearce Does Not.**

### **A. Standard of Review and Applicable Legal Principles**

This Court reviews de novo a claim that convictions merge under the Double Jeopardy Clause. *See Kaliku v. United States*, 994 A.2d 765, 787 (D.C. 2010). Merger claims may be raised at any time. *See Harris v. District of Columbia*, 991 A.2d 1199, 1202 (D.C. 2010).

The Double Jeopardy Clause protects against multiple punishments for the same offense, but it does not prohibit separate punishments for separate criminal acts. *See Sanchez-Rengifo v. United States*, 815 A.2d 351, 354 (D.C. 2002). It also does not prohibit separate punishments for "criminal acts perpetrated against different victims." *Snowden v. United States*, 52 A.3d 858, 872 (D.C. 2012) (quotation marks omitted).

"[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof

of a fact which the other does not.” *Blockburger v. United States*, 284 U.S. 299, 304 (1932). In applying the *Blockburger* test, this Court “compare[s] the statutorily-specified elements of the offenses involved, and not the facts of the case at hand.” *Simms v. United States*, 634 A.2d 442, 447 (D.C. 1993).

Where multiple assault convictions arise from “what is claimed to be a single assaultive episode,” this Court examines “the factual circumstances” of the case, including (1) whether the episode consisted of distinct, successive assaults; (2) the number of individuals injured; (3) whether the defendant took steps toward effectuating physical injury or merely engaged in conduct that could reasonably be expected to engender fear; and (4) whether the purpose of the relevant criminal statute is to proscribe specified conduct or to protect individuals from harm. *Graure v. United States*, 18 A.3d 743, 761 (D.C. 2011).

**B. Walker’s ADW Conviction for Pearce Does Not Merge with His Second-Degree Murder Conviction for King.**

Walker’s claim (at 26-27) that his ADW conviction for Moesha Pearce merges with his second-degree murder conviction for Erik King is meritless. Relying on cases that assessed whether multiple assault convictions could stand based on a defendant’s actions toward a single victim—*see Owens v.*

*United States*, 497 A.2d 1086 (D.C. 1985); *In re T.H.B.*, 670 A.2d 895 (D.C. 1996)—Walker argues that his murder of King and assault of Pearce merge because they were part of a single continuing course of assaultive conduct. Walker’s ADW and second-degree murder convictions, however, involved different crimes against different victims, and his merger claim fails under both the *Blockburger* test and the *Graure* factors.

At the government’s request, the jury was instructed only on an intent-to-frighten theory for both of Walker’s ADW charges (against Pearce and N.P.) (5/1/24 Tr. 144; 5/2/24 Tr. 84-87).<sup>7</sup> To prove an intent-to-frighten assault, the government must show “(1) that the defendant committed a threatening act that reasonably would create in another person a fear of immediate injury; (2) that, when he/she committed the act, the defendant had the apparent present ability to injure that person; and (3) that the defendant committed the act voluntarily, on purpose, and not by accident or mistake.” *Joiner-Die v. United States*, 899 A.2d 762, 765 (D.C. 2006). The

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<sup>7</sup> Although the evidence may have supported attempted-battery ADW convictions—especially with respect to Pearce, who suffered stippling injuries from each of Walker’s gunshots—the government does not rely on that theory of assault to support Walker’s ADW convictions on appeal because it was not submitted to the jury.

jury was properly instructed on those elements and, as relevant here, found Walker guilty of ADW against Pearce (5/2/24 Tr. 84-85; 5/7/24 Tr. 18).

To prove second-degree murder, the government must show (1) that the defendant caused the death of the victim, (2) that the defendant intended to kill or seriously injure the victim, or that he acted in conscious disregard of an extreme risk of death or serious bodily injury to the victim, and (3) that there were no mitigating circumstances. *See Comber*, 584 A.2d at 38-42. The jury was properly instructed on those elements and found Walker guilty of second-degree murder for killing King (5/2/24 Tr. 81-82; 5/7/24 Tr. 18).

These two crimes do not merge under the *Blockburger* test because each required proof of at least one element the other did not. The ADW conviction, unlike second-degree murder, required proof that Walker committed a threatening act that reasonably would create fear of an immediate injury in Pearce. *See Joiner-Die*, 899 A.2d at 765. The second-degree murder conviction, unlike ADW, required proof that Walker both caused the death of King and that he (at a minimum) acted in conscious disregard of an extreme risk of death or serious bodily injury to King. *See*

*Comber*, 584 A.2d at 38-39. Walker’s merger claim as to these convictions fails on this basis alone. *See Simms*, 634 A.2d at 447.

Furthermore, even if the Court were to apply the *Graure* factors to the facts of this case,<sup>8</sup> Walker’s second-degree murder conviction for King and ADW conviction for Pearce would not merge. First, Walker not only pointed his gun toward both King and Pearce, but he fired it twice in their direction (4/30/24 Tr. 79-89; 5/1/24 Tr. 97-99, 107). *See Ruffin v. United States*, 642 A.2d 1288, 1297 (D.C. 1994) (denying merger claim in part because the defendant “fired a number of shots,” even though the same bullet injured both victims). In between the two shots, King fell backward on the bed, Pearce climbed on top of him to put pressure on his wound, and Walker “started talking” before moving to a different position and firing again (4/30/24 Tr. 80; 5/2/24 Tr. 11-12, 25-28). Second, both King and Pearce were physically injured, as Pearce sustained stippling wounds from each

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<sup>8</sup> We note that in *Ruffin v. United States*, 642 A.2d 1288 (D.C. 1994), this Court engaged in a fact-based merger analysis with respect to murder and assault-with-intent-to-kill (AWIK) convictions for different victims. That case is distinguishable because the AWIK charge was based on the doctrine of transferred intent, meaning the government needed to prove only “a single assaultive intent” for both crimes. *Id.* at 1297. In this case, by contrast, the government had to prove different intent elements with respect to each victim, which precludes merger under *Blockburger*.

gunshot (4/30/24 Tr. 86-88; 5/1/24 Tr. 99-102). *See Ruffin*, 642 A.2d at 1298 (“[W]here a single assaultive act results in the criminal injury of multiple victims, there may be as many offenses as there are victims.”).<sup>9</sup> Third, Walker “took steps toward effectuating [the] physical injury” of King, and his acts also injured Pearce. *Graure*, 18 A.3d at 761. Fourth, the purpose of both murder and intent-to-frighten ADW is the protection of individuals from harm. *See Ruffin*, 642 A.2d at 1298 (finding it “beyond question” that murder focuses on “the protection of individuals”); *Snowden*, 52 A.3d at 872 (intent-to-frighten assault also “must focus on the individual”). On this basis, too, Walker’s merger claim fails as to these convictions.

### **C. The Government Agrees That Walker’s Conviction for ADW Against a Minor and Two of His PFCV Convictions Merge.**

The government agrees that the evidence in this case does not support separate intent-to-frighten ADW convictions for Moesha Pearce and the minor victim, N.P. For intent-to-frighten assaults, the unit of prosecution for purposes of merger is “the number of individuals exposed

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<sup>9</sup> Walker’s argument (at 26) that this factor is irrelevant because Walker did not intend to injure Pearce is unavailing. For intent-to-frighten assault, it is unnecessary to prove the defendant “intended to injure” the victim (5/2/24 Tr. 85). *See Joiner-Die*, 899 A.2d at 765.

to a threatening act targeted to the individual that reasonably induces fear of injury.” *Snowden*, 52 A.3d at 873. “Thus, where a group of individuals is exposed to a generalized threat of force, the assailant has committed a single assaultive act; however, where individuals in a group are targets of particularized threats of force, the assailant has committed successive assaultive acts.” *Id.* In *Snowden*, this Court found that two convictions for assault with intent to rob were supported where the defendant (i) shoved a gun into the side of one victim, and (ii) later pointed the gun toward both the first victim and a second victim. *Id.* at 873-74.

The evidence plainly supported an intent-to-frighten ADW conviction for Pearce, as Walker subjected her to multiple “threatening acts” that “reasonably induce[d] fear of injury.” *Snowden*, 52 A.3d at 873. At the time of the first shot, Pearce’s arms were wrapped around King, and at the time of the second shot, her legs were straddling his supine body (4/30/24 Tr. 78-80; 5/2/24 Tr. 25-28). Both shots were fired close enough to Pearce that she suffered stippling injuries to her right arm (from the first shot) and her left thigh (from the second shot) (4/30/24 Tr. 86-88; 5/1/24 Tr. 99-102).

We acknowledge, however, that there was no evidence Walker committed a discrete “threatening act” “targeted” toward N.P. *Snowden*, 52

A.3d at 873. Although N.P. was close enough to Walker’s gunshots to experience a reasonable fear of injury, there was no evidence that Walker pointed the gun in her direction or otherwise committed a “threatening act” toward her apart from those he directed toward King and Pearce. We thus agree that, under *Snowden*, Walker’s conviction for ADW against a minor should be vacated based on merger with his ADW conviction for Pearce.<sup>10</sup>

The government also agrees that two of Walker’s three PFCV convictions should be vacated based on merger because they were based on his “uninterrupted possession of a single weapon” during the same incident. *Matthews v. United States*, 892 A.2d 1100, 1106 (D.C. 2006).

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<sup>10</sup> Walker (at 25) correctly concedes that his conviction for second-degree child cruelty as to N.P. is not subject to merger. *See Speaks v. United States*, 959 A.2d 712, 716-17 (D.C. 2008) (the “unit of prosecution” for second-degree child cruelty is how many children were “exposed to injury by the offender,” not the number of “acts” committed by the defendant).

## CONCLUSION

WHEREFORE, the government respectfully submits the judgment of the Superior Court should be affirmed except for the ADW against a minor and PFCV convictions that are subject to merger, and this case should be remanded for resentencing.<sup>11</sup>

Respectfully submitted,  
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/s/

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<sup>11</sup> On remand, the trial court will be permitted to resentence Walker by “increas[ing] sentences” on his remaining convictions in order to “effectuate its original sentencing plan.” *Herring v. United States*, 169 A.3d 354, 359 (D.C. 2017). Furthermore, if—contrary to the government’s position—this Court vacates Walker’s second-degree-murder conviction, the trial court may (if the government consents) enter a judgment of conviction on the lesser-included offense of voluntary manslaughter, since Walker concedes (at 15-17) that the alleged instructional error did not affect the elements of that crime. *See Bailey v. United States*, 257 A.3d 486, 497 (D.C. 2021).

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Paul Hemmersbaugh, paul.hemmersbaugh@us.dlapiper.com, and Sergio Filipe Zanutta Valente, sergio.valente@us.dlapiper.com, on this 11th day of July, 2025.

*/s/*

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TIMOTHY R. CAHILL  
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