SECOND DIVISION
June 21, 2011

1-09-0405

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS Plaintiff-Appellee, v. VARRON WILSON, Defendant-Appellant.	)	Appeal from the Circuit Court of Cook County No. 06 CR 1047 Honorable Rosemary Grant-Higgins, Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Harris concurred in the judgment.

ORDER

Held : The State proved defendant guilty of first degree murder beyond a reasonable doubt; the trial court did not abuse its discretion in denying defendant's request for a jury instruction on provocation; the trial court did not erroneously calculate the number of presentence days of credit; and the mittimus should be corrected to reflect only one conviction for murder instead of two.

Following a jury trial, defendant Varron Wilson was convicted of first degree murder and sentenced to 55 years in prison. On appeal, defendant contends that (1) there was insufficient evidence presented to establish his guilt of first degree murder beyond a reasonable doubt due to

his unreasonable belief that he needed to defend himself from the victim, (2) the trial court erred in denying defendant's request for jury instructions on second degree murder based on a sudden and intense passion arising from serious provocation, and (3) the trial court erroneously calculated the number of days to credit defendant, and failed to issue a corrected mittimus. For the following reasons, we affirm the judgment of the trial court, but we order the mittimus to be corrected.

I. BACKGROUND

Defendant was arrested on December 5, 2005, in connection with the shooting death of Scott Williams ("Williams"), which occurred in the early morning hours of March 9, 2005. The following relevant facts were adduced at trial.

Tiffany Williams ("Tiffany"), Scott's estranged wife, testified that she and Williams had been married for over six years. At the start of 2005, Tiffany lived at 6253 South Michigan Avenue, in apartment 502, with Williams and her three sons. Tiffany testified that she had been a Chicago Transit Authority bus driver for eight years.

Tiffany first met defendant in January of 2005 at his sister Janet's apartment. Janet lived on the fourth floor of 6253 South Michigan Avenue. In 2005, defendant was temporarily living in Janet's daughter's room. A couple of days before February 24, 2005, Janet was beaten and stabbed by her boyfriend, and was hospitalized as a result. While she was in the hospital, Tiffany helped clean up her apartment. She found a gun case with a gun inside, in Janet's daughter's room.

Tiffany testified that her relationship with her husband was "rocky" at the time she met

defendant. On February 24, 2005, defendant's sister, Chunda, threw a party for both Tiffany and defendant at club Jaguar for their birthdays. Prior to the party, Tiffany was in Janet's apartment putting on makeup, when her husband, Williams, entered the apartment. Williams told Tiffany she was not going anywhere and pushed her. He grabbed her cell phone and went upstairs. Tiffany then went upstairs with Chunda and went into Tiffany and Williams' apartment. Williams cursed at Chunda, which escalated into an argument between Chunda and Williams.

Defendant then knocked on Williams' apartment door and told Williams that he could not talk to his sister like that, and that he already had one sister (Janet) in the hospital half dead. Defendant and Williams then argued, but were separated before the fight became physical.

Tiffany then drove herself, defendant, and Chunda to club Jaguar. When they got out of the car, Williams appeared and punched defendant with a closed fist. Defendant punched Williams back, and the two fought. Defendant and Williams were eventually pulled apart by Tiffany's family members and club security guards. No one went to the hospital, and the police were not called. Williams then went to his car and left the club parking lot. Everyone else went inside the club for the joint birthday party.

On March 8, 2005, Tiffany was in Janet's apartment with defendant, washing clothes. She received a telephone call from Chunda, asking to be picked up from work at McDonald's. Tiffany asked defendant to get Chunda, and defendant agreed. He left the building at approximately 11:10 p.m., and was driving Tiffany's nephew's Chevy Blazer.

Approximately 15 or 20 minutes after defendant left, Williams called Tiffany and asked to talk to her. He was outside in the parking lot. She went downstairs to meet him

approximately five minutes later. When she walked out of the building, she saw her nephew's Blazer, which defendant had been driving, in front of the building facing west toward the parking lot exit. Defendant was inside the car, and the car was running. Tiffany walked up to the Blazer's passenger side door and asked defendant why he did not pick up Chunda. As she was talking to defendant, Williams pulled up in front of the building and stopped in front of the Blazer. He was driving a silver Monte Carlo.

Tiffany went to the driver's side of the Monte Carlo and Williams asked her if she was letting defendant use the car now. He and Tiffany argued. Suddenly, Williams started backing the car up. Defendant had exited his car and was standing in front of the Blazer. He shot a gun at the Monte Carlo. Williams continued to back up and pulled out of the parking lot. Defendant continued to shoot at Williams' Monte Carlo as Williams attempted to escape. Williams turned left out of the parking lot and then the Monte Carlo started moving slowly and ran into a fence.

Defendant then ran out of the parking lot with the gun in his hand. Tiffany ran to the Monte Carlo and saw Williams laying back in his seat. His eyes were half open, and his fist was balled up, but nothing was in his hand. Williams was breathing fast and was unable to talk to Tiffany. Tiffany then used her cell phone to call the police.

Tiffany testified that Williams never got out of his Monte Carlo, and she did not see him with a gun or any other weapon.

Gene Chambers, a neighbor who lived in 6253 South Michigan Avenue, on the fourth floor, testified that shortly after midnight on March 9, 2005, he heard gunshots and looked out his window. He looked out his window at approximately the second shot. He testified that the

lighting was bright and he could see everyone's faces.

When Chambers looked out the window he saw defendant standing outside of Blazer, shooting at a silver Monte Carlo that was backing away. The two cars were facing each other, and the Monte Carlo was moving backwards as defendant shot a black gun at it. Defendant walked towards the Monte Carlo as it backed away. The Monte Carlo then turned and went forward out of the parking lot. Defendant then stopped shooting and the Monte Carlo slowly rolled into a fence. Defendant ran back to the Blazer, and then ran away with the gun in his hand.

Chambers testified that a woman, whom he knew to always wear a Chicago Transit Authority uniform, approached the Monte Carlo and then made a phone call. Police officers arrived approximately 10 minutes later.

James Shader, a forensic investigator for the Chicago Police Department, testified that in the early morning hours of March 9, 2005, he received an assignment for a homicide that had occurred at 6253 South Michigan Avenue. A gun box for a semi-automatic weapon was recovered from the scene. Shader testified that the Chevy Blazer had no bullet holes in it, while the back window of the Monte Carlo had a few bullet holes in it. There was also a bullet mark on the rear spoiler of the Monte Carlo's trunk, and one on the headrest of the driver's side seat. A knife was found in the passenger side door of the Monte Carlo. There were two bullet holes in the passenger side window and three bullet holes in the passenger side door of the Monte Carlo. Fifteen cartridge cases were recovered from the crime scene, and were lying on the ground in a way consistent with testimony that the shooter was moving toward Williams' car as he shot the

gun.

Doctor Eupil Choi, an expert in forensic pathology, testified that Williams received a gunshot wound to the right arm. The bullet then entered the chest cavity, and struck the right side of the lung, the heart, and the lung on the left side, and then exited out the chest cage. The bullet was recovered under the skin on the left mid-back area. Dr. Choi testified that the bullet wound did not result from close-range firing.

Tanya Brubaker, a forensic scientist specializing in the field of firearms identification, opined that the fired bullet she received from the medical examiner's office was a 9-millimeter bullet.

Janet Wilson, defendant's sister, testified first for the defense. She averred that she never saw a gun case in her daughter's room, and that she did not see defendant again after March 11, 2005.

Darrell Jones, a friend of defendant's, testified that he went to the party at club Jaguar on February 24, 2005. When he saw defendant, defendant was bleeding from the top of his head, and his shirt was torn.

Chunda Wilson, defendant's sister, testified that on February 24, 2005, as she, Tiffany, and defendant walked from the parking lot to the club, Williams approached them and poked defendant in the head. Then defendant and Williams proceeded to fight until other people stopped them. Defendant, Tiffany, and Chunda went into the club while Williams left the parking lot. Defendant had blood on his head, but he wiped it off and stayed at the party for about three hours.

Chunda testified that on March 8, 2005, she was working at McDonald's until 11 p.m. Defendant had agreed to pick Chunda up at McDonald's, but was not there when her shift ended. When she looked out the window, she saw Williams in the McDonald's parking lot, in his car. At approximately 11:45 p.m., defendant arrived in the parking lot and parked next to Williams. Defendant and Williams argued while they each remained in their own cars. Chunda never saw any weapons. She called the police, and waited inside McDonald's until two police officers arrived, just after midnight. Chunda told the officers what happened, and then took a cab home. She did not live at 6253 South Michigan Avenue at the time, so she did not see the events that occurred there shortly after midnight.

Defendant testified on his own behalf. He admitted to shooting and killing Williams. He stated that he shot multiple bullets at Williams' car, until the gun was empty.

On February 24, 2005, defendant rode with Tiffany and Chunda to club Jaguar. He testified that as he got out of Tiffany's car, Williams approached him and stabbed him. Defendant then punched Williams and they got into a fight. Williams then left the parking lot and defendant went inside the club. When he realized he was bleeding, he went to the bathroom and wiped off the blood.

On March 8, 2005, at approximately 11 p.m., he received a phone call to pick up Chunda from her job at McDonald's. He left 6253 South Michigan Avenue at approximately 11:30 p.m. When he pulled into the McDonald's parking lot, Williams was already there in his car. Defendant testified that Williams got out of his car, and tried to open defendant's car door while wielding a knife. Defendant then drove away. While he drove away, he saw Williams reach

under his seat, and thought Williams was getting a weapon.

Defendant testified that he then drove his car to the front of 6253 South Michigan Avenue. Tiffany came outside with a gun case under her coat. She put the gun in the Blazer, with the gun case open. Defendant testified that he had never seen the gun before. He then saw Williams pull into the building's parking lot, and Williams got out of his car. Defendant picked up the gun when Williams got out of his car. Defendant asked Williams to leave him alone, but Williams continued to walk towards defendant. Defendant then shot at Williams' car until the gun was empty. He then backed away and left the scene. He never shot at Williams, and Williams left the parking lot when he did.

During cross-examination, defendant testified that when Williams got out of the car, he walked toward him with a knife in his hand. Defendant shot at the "empty car" to scare Williams. After the shooting, defendant ran and tossed the gun near a factory across the street. He then went to Iowa from March 2005 to December 2005. The police arrested him when he returned to Chicago.

Defendant admitted that he met with Detective Tina Figueroa Mitchell on December 6, 2005, and that he told her he had never shot a gun a day in his life and that he was afraid of guns. He told her he did not know what happened on the night of the incident because he was in his house by 11:45 p.m. He told Detective Mitchell that he had no reason to shoot Williams, and that Tiffany's nephew shot Williams.

On rebuttal, Chicago Police Department Officer Philirick Hurnes testified that on March 8, 2005, he received an assignment to go to the McDonald's where Chunda worked. When he

arrived, Chunda came out but never told him that defendant was at the McDonald's that night with Williams.

At the close of evidence, defendant requested an instruction on self-defense, as well as instructions on both types of second degree murder: (1) an unreasonable believe in self-defense, and (2) a sudden and intense passion resulting from serious provocation. The trial court agreed to instruct the jury on self-defense, as well as an unreasonable belief in self-defense, but denied defendant's request for an instruction on a sudden and intense passion resulting from serious provocation. The jury found defendant guilty of first degree murder and personally discharging a firearm that proximately caused death to another person during the commission of first degree murder. He was sentenced to 30 years imprisonment for first degree murder, and 25 years imprisonment for discharging a firearm during commission of first degree murder. Defendant now appeals.

II. ANALYSIS

On appeal, defendant contends that (1) there was insufficient evidence presented to establish his guilt of first degree murder beyond a reasonable doubt due to his unreasonable belief that he needed to defend himself from the victim, (2) the trial court erred in denying defendant's request for jury instructions on second degree murder based on a sudden and intense passion arising from serious provocation, and (3) that the trial court erroneously calculated the number of days to credit defendant, and failed to issue a corrected mittimus. We will address each issue in turn.

A. Sufficiency of the Evidence

Defendant's first contention on appeal is that there was insufficient evidence presented to find him guilty of first degree murder beyond a reasonable doubt. Specifically, defendant argues that the facts of the case established the mitigating factor of an unreasonable belief in self-defense, and therefore the first degree murder conviction must be reduced to second degree murder. The State responds that the evidence, when viewed in the light most favorable to the State, proved defendant guilty of first degree murder beyond a reasonable doubt.

Due process requires proof beyond a reasonable doubt in order to convict a criminal defendant. *People v. Ross*, 229 Ill. 2d 255, 272 (2008); *People v. Cunningham*, 212 Ill. 2d 274, 278 (2004). When presented with a challenge to the sufficiency of the evidence, a reviewing court must determine whether "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *Ross*, 229 Ill. 2d at 272. Under this standard, we do not retry the defendant, and "the trier of fact remains responsible for making determinations regarding the credibility of witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence." *Ross,* 229 Ill. 2d at 272 (citing *People v. Emerson*, 189 Ill. 2d 436, 475 (2000)). However, "[a] conviction will be reversed where the evidence is so unreasonable, improbable, or unsatisfactory that there remains a reasonable doubt of defendant's guilt." *Id*. (citing *People v. Smith*, 185 Ill. 2d 532, 542 (1999)).

A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death, he either intends to kill or do great bodily harm

to that individual or another, or knows that such acts will cause death to that individual or another. 720 ILCS 5/9-1(a)(1) (West 2010). In the case at bar, there was sufficient evidence presented to support a finding of first degree murder beyond a reasonable doubt. Defendant admitted he shot at the victim's car multiple times until the gun was empty. One of those bullets killed the victim, as testified to by Dr. Choi. Both Tiffany and Chambers testified that on the night in question defendant was outside of his car, shooting at the victim's Monte Carlo, while the victim was in the car. The victim attempted to drive out of the parking lot, but defendant continued to shoot at him. No witnesses, except for defendant, ever saw the victim with a weapon at any time prior or during the incident. Evidence presented at trial showed that the Monte Carlo sustained significant bullet-hole damage, while the defendant's Blazer sustained no damage. Casings were found on the pavement in locations consistent with testimony that defendant walked towards the Monte Carlo while the victim was attempting to drive away.

After viewing the evidence in the light most favorable to the prosecution, we believe that a rational trier of fact could have found that defendant intended to kill or do great bodily harm to the victim, or knew that his acts would cause the victim's death, beyond a reasonable doubt. See *Ross*, 229 Ill. 2d at 272; 720 ILCS 5/9-1(a)(1) (West 2010).

Defendant contends, however, that he was acting in self-defense when he emptied his gun into the side of the victim's car. "A person is justified in the use of force against another when and to the extent that he reasonable believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force." 720 ILCS 5/7-1(a) (West 2010). "However, he is justified in the use of force which is intended or likely to cause death or great

bodily harm only if he reasonable believes that such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony." *Id*.

Where a defendant raises the affirmative defense of self-defense by presenting some evidence tending to prove the defense, it is the State's burden to disprove that defendant was acting in self-defense beyond a reasonable doubt. *People v. Woods*, 81 Ill. 2d 537, 542 (1980). "Whether a killing is justified under the law of self-defense depends upon the surrounding facts and circumstances and is to be determined by the trier of fact." *Id*.

The evidence in the record was sufficient to permit the jury to determine that the defendant's actions were not conducted in self-defense because the defendant did not reasonably believe the force he executed was necessary to prevent imminent death or great bodily harm to himself. Although the defendant testified that he had been injured by the victim in a fight involving a knife two weeks prior, and that the victim threatened him with a knife on the night of the incident, defendant is the only one who testified that he ever saw the victim with a knife in his hand, and there were other witnesses to both the fight outside the club, as well as the confrontation at McDonald's. Moreover, the victim did not have a gun, never approached defendant, and in fact was attempting to drive away when defendant began shooting at him.

Although defendant may have been agitated from the confrontation in McDonald's, this does not sanction shooting a gun at the victim while the victim is unarmed inside of a car, attempting to escape. The circumstances of the prior knife fight and the incident at McDonald's, as described by defendant, fail to buttress his defense of self-defense. Additionally, a trier of fact need not believe the defendant's version of events, even if it is the only version, but instead may

consider other facts and circumstances in the record which tend to contradict the defendant's story or at least raise serious questions about its probability. *People v. Peterson*, 202 Ill. App. 3d 33, 40 (1990).

Defendant's testimony supports the conclusion that he shot at the victim because the victim had cut him with a knife two weeks earlier, and had wielded a knife at some point on the evening in question. "The right of self-defense does not justify an act of retaliation or revenge." *Woods*, Ill. 2d at 543. The defendant's actions show a desire on his part to seek revenge rather than acting in self-defense. He arrived at the parking lot armed with a gun, and then proceeded to get out of his car and pursue the victim on foot as the victim drove away, while firing more than 15 shots towards the victim's car until his gun was empty. The totality of the evidence presented provided no basis upon which the jury could conclude that defendant reasonably believed the use of such overwhelming force was necessary to prevent great bodily harm to himself.

Defendant next argues that even if we find that he did not reasonably believe the use of overwhelming force was necessary to prevent great bodily harm, he nevertheless was only proved guilty of second-degree murder, not first degree murder, because he had an "unreasonable belief in self defense." Under Illinois law, a defendant commits second degree murder when he commits first degree murder and "[a]t the time of the killing believes the circumstances to be such that if they existed, would justify or exonerate the killing under the principles stated in Article 7 of this Code, but his belief is unreasonable." 720 ILCS 5/9-2(a)(2) (West 2010). If, however, the trier of fact concludes that a defendant had no such actual belief, albeit unreasonable, the defendant should be found guilty of murder. *Peterson*, 202 Ill. App. 3d at 41.

While the State must carry the burden to prove defendant guilty of first-degree murder beyond a reasonable doubt, the defendant carries the burden to prove any mitigating factors by a preponderance of the evidence. 720 ILCS 5/9-2(c) (West 2010). The standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the mitigating factor was not present. *People v. Blackwell*, 171 Ill. 2d 338, 358 (1996). It is in the province of the trier of fact to assess the credibility of the witnesses and determine the weight to be given their testimony. *Peterson*, 202 Ill. App. 3d at 41. The factfinder is not required to accept as true the defendant's evidence in support of his defense. *People v. Huddleston*, 243 Ill. App. 3d 1012, 1018-19 (1993).

In this case, defendant points to the following facts to support his unreasonable belief in self-defense: that the victim was the estranged spouse of Tiffany; that just weeks before the shooting the victim had "stalked" defendant by going to the club where upon the victim stabbed defendant; that the victim had again "stalked" defendant by going to McDonald's on the night in question; and that the victim again followed defendant to the apartment where a new confrontation occurred just prior to the shooting. We reject this argument.

Although defendant presented some evidence, which consisted entirely of his own testimony, that might support an unreasonable belief in self-defense, other more credible evidence presented at trial rebutted defendant's testimony. *Blackwell*, 171 Ill. 2d at 359; *People v. Garcia*, 407 Ill. App. 3d 195, 204 (2011). The State's evidence showed that defendant went to the parking lot on the night in question armed with a gun. The victim arrived in the parking lot, and defendant got out of his car and shot the victim's car 15 times as the victim tried to drive

away. Defendant sustained no injuries, and there were no bullet holes in defendant's car. Defendant fled the scene after the incident, discarded the weapon, and then fled the state of Illinois. We cannot say that the mitigating factor of an unreasonable belief of self-defense exists in this case. See *Blackwell,* 171 at 358-59 (evidence that defendant arrived at a party with a concealed weapon and fired his weapon 14 times as the victims were trying to escape did not support the mitigating factor of unreasonable belief in self-defense); see also *Garcia*, 407 Ill. App. 3d at 204 (State's evidence that defendant had a gun, pulled his shirt over his face before entering the alley, shot at the victim as the victim was driving away in his car, and tried to destroy evidence, all rebuts the theory of an unreasonable belief in self-defense).

Moreover, "a reviewing court will not reduce a conviction for murder to [second degree murder] where the trier of fact has reasonably concluded that the defendant had no basis whatsoever for his belief that deadly force was necessary for the protection of life." *People v. Kruger*, 236 Ill. App. 3d 65, 70 (1992). Here, we find the jury reasonably concluded that the defendant had no basis whatsoever for his belief, if he had such a belief, that deadly force was necessary for the protection of his life.

B. Provocation Instruction

Defendant's second contention on appeal is that the trial court abused its discretion when it denied his request to instruct the jury on second degree murder based on provocation. Specifically, defendant argues that there was sufficient evidence to support a finding of second degree murder based on provocation. The state responds that defendant failed to meet the standard required to show that the provocation instruction was warranted. We agree with the

State.

We review jury instructions for an abuse of discretion. *People v. Tatum*, 389 Ill. App. 3d 656, 673 (2009). "When deciding whether a trial court abused its discretion, a reviewing court will examine the jury instructions in their entirety, to determine whether they fairly, fully, and comprehensively informed the jury of the relevant law." *Tatum*, 389 Ill. App. 3d at 673. "An abuse of discretion occurs only where the trial court's ruling is 'arbitrary, fanciful, or unreasonable, or where no reasonable person could take the view adopted by the trial court.' " *Id*. (quoting *People v. Purcell*, 364 Ill. App. 3d 283, 293 (2006)).

A person commits second degree murder when he commits the offense of first degree murder, but at the time of the killing, he is (1) acting under a sudden and intense passion, (2) resulting form serious provocation by the individual killed. 720 ILCS 5/9-2(a)(1) (West 2010). Serious provocation is conduct sufficient to excite an intense passion in a reasonable person. 720 ILCS 5/9-2(a)(b) (West 2010). "The only categories of provocation recognized by this court are substantial physical injury or substantial physical assault, mutual quarrel or combat, illegal arrest, and adultery with the offender's spouse." *People v. Garcia*, 165 Ill. 2d 409, 429 (1995). Defendant argues that he was acting under a sudden and intense passion resulting from mutual quarrel or combat.

Concerning the first relevant requirement for a second degree murder instruction, the State argues that defendant could not have been acting under sudden and intense passion because the period of time between the confrontation at McDonald's and the shooting incident was sufficient to cool his passions. Defendant argues that the victim's actions on the night in

question "reflected the earlier confrontation, where [the victim] drew blood by stabbing him, and defendant naturally reacted based on that history." We do not believe that defendant was spurred into sudden and intense passion due to the physical assault that occurred two weeks prior. We also do not believe defendant was acting under sudden and intense passion from the confrontation in the parking lot, which had occurred 10 to 15 minutes before the shooting. Accordingly, we reject the argument that defendant was acting under a sudden and intense passion when he shot the victim. And even if we were to find he was acting under such passion, we still would find that it was not the result of serious provocation of mutual combat.

Concerning the second relevant requirement for a second degree murder instruction, our supreme court defines mutual combat as "a fight or struggle which both parties enter willingly or where two persons, upon a sudden quarrel and in hot blood, mutually fight upon equal terms and where death results from the combat." *People v. Austin*, 133 Ill. 2d 118, 125 (1989). Our supreme court has also stated: "[w]ords, in and of themselves, no matter how vile, can never constitute serious provocation such that second degree murder should be found instead of first degree murder." *Garcia*, 165 Ill. 2d at 429-430. "Rather, the words *** must be accompanied by mutual combat so serious that it mitigates against finding the defendant guilty of first degree murder." *Id*. at 430. We do not believe the instances defendant points to rise to this level.

The record contains no evidence of mutual combat between defendant and the victim that would warrant a second degree murder instruction based on provocation. Defendant testified that he was attacked with a knife by the victim outside of a club a couple weeks prior to the incident. He further stated that on the night in question, the victim had a knife with him in the McDonald's

parking lot. However, several witnesses testified as to the fight outside the club, and no one saw the victim with a knife. Furthermore, Chunda, a defense witness, testified that neither man exited their vehicles and she never saw either man with a weapon. We disagree with defendant's proposition that the jury could have reasonable believed that the two men willingly entered mutual combat when the victim came to Tiffany's building after seeing each other at McDonald's. There was no evidence of any sort of combat. Rather, the evidence shows that defendant pulled into the building's parking lot, parked his car, and got out to begin shooting at the victim. There was no evidence of the victim fighting back or engaging in any sort of mutual combat.

Finding insufficient evidence for either sudden and intense passion, or mutual combat, we cannot therefore find that the trial court abused its discretion in denying defendant's request for a second degree murder instruction based on serious provocation.

C. Sentencing

Defendant's final two contentions are based on his sentence. He argues that (1) he spent a leap year in custody and is therefore entitled to an additional day of credit against his sentence, and (2) the mittimus must be corrected to reflect only one murder conviction instead of two.

1. Credit

Defendant's first sentencing contention is that the sentencing order, which gave him 1,109 days of credit for incarceration, was incorrect. Defendant states that while it would be correct if there were 365 days in each year, the year 2008 was a leap year, and thus he should get

another day of credit for February 29, 2008, making his total days of credit amount to 1,110. The State responds that defendant was given credit for the leap year day, but that a defendant is not entitled to credit for the date of sentencing. Thus, the State claims that the trial court took into account the leap year, but excluded the date of sentencing, and thus the amount of 1,109 days of credit was correct. In his reply brief, defendant changes his argument and agrees with the State's reasoning, but then argues that he was given neither presentence or postentence credit for the date of sentencing and asks us to remand the case to correct that.

We note that this is a different argument than the one he initially raised on appeal, namely that the mittimus should be corrected to show 1,110 of credit instead of 1,109 days. Raising an argument for the first time in a reply brief is improper and thus the argument is waived. See *People v. Prante*, 147 Ill. App. 3d 1039, 1064 (1986) ("an argument not raised in the initial brief is deemed waived for purposes of review"). However, "issues raised in a reply brief may be addressed if a just result dictates consideration of all the issues." *Prante*, 147 Ill. App. 3d at 1064. Accordingly, we will address this issue.

Section 5-8-7(b) of the Unified Code of Corrections provides that an offender shall be given credit on the sentence of imprisonment for the time spent in custody. 730 ILCS 5/5-8-7(b) (West 2010). The date a defendant is sentenced and committed to the Department of Corrections ("Department") is to be counted as a day of sentence, and not as a day of presentence credit. *People v. Williams*, 239 Ill. 2d 503, 510 (2011). In this case, defendant was arrested on December 5, 2005. He was sentenced on December 18, 2008. The parties seem to be in agreement that the number of days from the date of his arrest, through December 17, 2008,

amount to 1,109, which includes the leap day. Thus, the mittimus reflects the correct number of credited presentence days that defendant spent in custody.

As our supreme court has noted, "a defendant's sentence 'shall commence on the date on which the offender is received by the Department.' " *Williams*, 239 Ill. 2d at 509 (quoting 730 ILCS 5/5-4.5-100(a) (West 2008)). "[S]ection 5-4.5-100 means that the sentence commences upon the issuance of the mittimus." *Id*. Thus, the defendant is deemed received by the Department on the date of the issuance of the mittimus, and that date is counted as part of the sentence, not as presentence credit. Accordingly, we find that the date defendant was received by the Department was on December 18, 2008, the date the mittimus was issued. Thus, the mittimus correctly reflects the amount of presentence credit, and December 18, 2008 was the beginning of his sentence.

2. Mittimus

Defendant's final contention on appeal is that despite the fact that there was only a single murder verdict, the Circuit Court initially imposed two distinct sentences arising from the victim's death. As defendant notes, the one-act, one-crime rule prohibits multiple convictions where more than once offense is carved from the same physical act. *People v. Crespo*, 203 Ill. 2d 335, 340-41 (2001). Also as noted by defendant, the trial judge realized the sentencing error and stated that she would like to correct the record. She stated "I believe I made the statement that Count 5 would be 30 years and Count 6 would be 25 years consecutive. *** I am giving the defendant 30 years on the murder and the statutory 25 for personally discharging that weapon for a total of 55 years on Count 5 and then Count 6 will merge."

The mittimus still reads that there are two murder convictions. As the State points out, it is well established that in a case of variance between the mittimus and the judgment, the judgment will prevail. Thus, we find, and both parties agree, that the mittimus should be corrected to reflect that the defendant was found guilty of one count of first-degree murder and sentenced to 55 years imprisonment. See *People v. Mitchell*, 234 Ill. App. 3d 912, 921 (1992) (mittimus can be corrected without remanding the case under Supreme Court Rule 615).

CONCLUSION

For the foregoing reasons we affirm the judgment of the circuit court of Cook County, but order the mittimus to be corrected in accordance with this order.

Affirmed. Mittimus corrected.