FIRST DIVISION
June 17, 2013

No. 1-11-1796

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit
	)	Court of Cook County
Plaintiff-Appellee,	)	
	)	
v.	)	No. 09 CR 20163
	)	
ARMANDO CRUZ,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE DELORT delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶ 1 ***Held:*** The evidence was sufficient to convict defendant of first degree murder despite lack of eyewitness testimony. The trial court did not commit reversible error by failing to question defendant regarding his attorney's choice to present an instruction on second degree murder based on unreasonable belief in self-defense. The trial court did not err in rejecting a second degree murder instruction based on sudden and intense provocation where the defendant testified that he acted in self-defense.

¶ 2 Following a jury trial, defendant, Armando Cruz, was convicted of first degree murder. Defendant appeals, arguing the state failed to prove him guilty beyond a reasonable doubt, the trial court erred in failing to determine whether defendant agreed with his attorney's request for an instruction on second degree murder based on unreasonable belief in self-defense, and the trial

court erred in refusing to instruct the jury as to second degree murder based on provocation. We affirm.

¶ 3 BACKGROUND

¶ 4 On May 6, 2002, the State filed a complaint charging the defendant, Armando Cruz, with two counts of first degree murder in that he killed Maria Ramirez-Cruz, his wife, by stabbing her in the chest. Although an arrest warrant for him was immediately issued, he was not apprehended. In 2009, federal agents in Mexico City, Mexico took defendant into custody on the Illinois warrant and transported defendant back to Chicago. Local police arrested the defendant on October 14, 2009 upon his return from Mexico. On November 10, 2009, a grand jury indicted defendant with two counts of first degree murder for the death of Maria Cruz.

¶ 5 The jury trial began on April 18, 2011. At the conclusion of the trial, during the jury instruction conference, the defense argued that there had been enough evidence that the jury could conclude that at the time of the killing, defendant acted under a sudden and intense passion resulting from serious provocation by the deceased. The defense argued that the provocation resulted from the deceased having an argument with defendant in which she accused him of infidelity, was angry, and came at defendant with a knife. The court refused to give this instruction. The court did, however, instruct the jury on second degree murder based on an unreasonable belief in the need to use deadly force in self-defense. The trial court instructed the jury that defendant had the burden to prove that at the time defendant performed the acts which caused the death of Maria Ramirez, he believed the circumstances to be such that they would justify the deadly force he used but his belief that such circumstances existed was unreasonable.

The court also instructed the jury that a person is justified in the use of force when and to the extent that he reasonably believes the such conduct is necessary to defend himself against imminent use of unlawful force; and a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself.

¶ 6 During deliberations, the jury sent the trial court a note requesting grand jury testimony of two witnesses who testified at the trial, Josephine Perez and Ildefonso Cruz. The court responded that the jury had heard all the evidence in the case and should continue deliberating. The jury then sent a second note. The second note stated the jurors could not agree on the "second degree murder charge." The note indicated the jury was confused and needed "clarification of mitigating circumstances and the decision needed." The trial court raised the possibility of a special instruction concerning mitigating factors. The court stated: "And that way we have to put down different elements, what force was used, whether he defendant was the aggressor, things of that nature." Defense counsel asked only that the jury continue deliberating, and the State agreed. The court responded to the jury in open court as follows:

> "There are some things I can define, some things I can't help, but the thought and guidance that I can give you right now is you do have the instructions I already gave you. All right. You do have all the facts that you're going to hear in this case already presented and you have to look at that mitigating instruction again, apply the facts that you have decided in this case to that instruction and the other

instructions that you have in arriving at your verdict. You have to continue to deliberate."

¶ 7 The jury found defendant guilty of first degree murder. The trial court merged counts 1 and 2. Defendant moved for a new trial on the grounds the trial court erred in refusing to instruct the jury on second degree murder based on provocation. The court denied defendant's motion for a new trial and sentenced him to 27 years' imprisonment on the merged count of first degree murder. This timely appeal followed.

¶ 8 ANALYSIS

¶ 9 The State charged defendant with both intentional and knowing first degree murder. 720 ILCS 5/9-1(a)(1), 9-1(a)(2) (West 2002). "A person who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death: (1) 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; or (2) he knows that such acts create a strong probability of death or great bodily harm to that individual or another ***." 720 ILCS 5/9-1(a)(1), 9-1(a)(2) (West 2002). "[B]ecause the jury returned a general verdict, we presume that they found defendant guilty of the most serious offense, intentional murder." *People v. Perry*, 2011 IL App (1st) 081228, ¶ 54 (2011).

¶ 10 Defendant raises three arguments on appeal. Defendant argues his conviction for first degree murder should be reversed because the State failed to prove him guilty beyond a reasonable doubt. Alternatively, defendant argues that his conviction should be reversed and the cause remanded for a new trial because the trial court failed to inquire as to whether he agreed

with his attorney's request to instruct the jury on second degree murder based on unreasonable belief in self-defense. Finally, defendant argues his conviction should be reversed and the cause remanded for a new trial because the trial court abused its discretion in denying a request to instruct the jury on second degree murder based on provocation.

¶ 11 1. SUFFICIENCY OF THE EVIDENCE

¶ 12 Defendant first challenges the sufficiency of the evidence to prove him guilty of first degree murder. Defendant argues the state failed to disprove that he initially acted in self-defense and that the stabbing was accidental. "For a defendant to be guilty of second degree murder, the State must first prove the defendant guilty of first degree murder beyond a reasonable doubt. The burden then shifts to the defendant to prove the existence of the mitigating factor by a preponderance of the evidence. The State is not required to prove the absence of the mitigating factor beyond a reasonable doubt." (Internal citations omitted.) *People v. Simon*, 2011 IL App (1st) 091197, ¶ 51 (2011). Defendant argues that because his testimony was not improbable and his testimony was not impeached, the jury was not permitted to reject his explanation for how the killing occurred.

> "When considering a challenge to a criminal conviction based upon the sufficiency of the evidence, this court will not retry the defendant. Rather, in such cases the relevant question is 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. Thus, it is our duty in the case at bar to carefully examine the evidence while giving due consideration to

> the fact that the court and jury saw and heard the witnesses." (Internal citations omitted.) *People v. Smith*, 185 Ill. 2d 532, 541 (1999).

"Under this standard, all reasonable inferences from the evidence must be allowed in favor of the State." *People v. Gonzalez*, 239 Ill. 2d 471, 478 (2011). "The trier of fact is *** in the best position to resolve any conflicting inferences produced by the evidence. *** Additionally, the trier of fact's findings of credibility are given greater weight because it saw and heard the witnesses." (Internal citations omitted.) *People v. Alvarez*, 2012 IL App (1st) 092119, ¶ 51 (2012). "[T]he trier of fact is not required to accept any possible explanation compatible with the defendant's innocence and elevate it to the status of reasonable doubt." *People v. Siguenza-Brito*, 235 Ill. 2d 213, 229 (2009).

¶ 13 A. The Evidence

¶ 14 We must recite the evidence in some detail to establish the factual framework for the legal issues argued in this appeal. Ana Mora testified that she was 23 years old at the time of the trial. Ana is Maria's daughter and lived in an apartment with her mother, defendant, two brothers and three sisters. One brother was one month old on March 17, 2002. That day, the family celebrated Ana's 14th birthday by having a party in their apartment. The party started at five in the afternoon. The defendant was not present when the party started but arrived later. According to Ana, defendant arrived alone. Between 6:00 and 6:30 p.m., defendant left to get Ana's birthday cake. Defendant left once again before the party ended at 10 p.m. Ana's aunt remained after the party and left at approximately 11:45 p.m. Ana walked her aunt outside and saw her family's truck. The family also owned a Crown Victoria passenger car. Ana spoke to her mother

before going to bed, and the last thing Ana heard was the shower. The defendant was not home. The door to the apartment was closed.

¶ 15 Sometime later, Ana's sister, Maria, woke Ana, telling Ana that something was wrong with their mother. Maria's room was next to the kitchen. As they ran toward their mother's room, Ana noticed that the door to the outside stood wide open. The lights in the apartment and Maria's room were on. Ana entered her mother's room to see her mother lying on the bed with a knife in her chest. Ana's one-month-old brother was next to her, wrapped around his mother. Maria was on the phone with defendant's aunt Josephine. Ana took the phone and called police. She told police that her mother had a knife in her chest. Ana testified she told police she took the knife out of her mother's chest and asked for instruction in CPR. Ana placed the knife on the kitchen table.

¶ 16 When the police arrived, Ana walked back toward the living room. She noticed that there were empty hangers in the closet and defendant's clothes were missing. She knew that his clothes were missing because just the day before, they had done the laundry and all of the hangers in the closet were full with clothes.

¶ 17 Maria Mora testified that she was 21 years old, but was 13 on the night of the birthday party. She went to bed around 10 p.m. The defendant was not home. Maria was awakened by a phone call from defendant's aunt Josephine Perez. Maria testified that Josephine asked Maria to check on Maria's mother. As Maria went to her mother's room, she noticed that the door to the outside stood open. Maria knocked on her mother's door. The light in the room was on and the door was slightly open, which was unusual. Maria testified her mother always locked her

bedroom door. Maria walked in and saw blood on her mother's neck. When Maria first saw her mother she was covered by a blanket. The blanket was almost up to her mother's neck but Maria could still see blood. The blood was on her mother's neck almost up to her mother's face. She testified she uncovered her mother and that is when she saw the knife in her mother's chest. Maria ran back to the room she shared with Ana to wake her. Maria was still on the phone with Josephina. Ana took the phone from Maria and called police. Maria spoke to police when they arrived. Maria told police that she found the door to the outside open.

¶ 18 Liaquat Qureshi is a cab driver who testified that he was working in the early morning hours of March 18, 2002. Qureshi had just dropped off a passenger at 51st and Kedzie when a man flagged him down. Qureshi saw a red truck that had struck a utility pole and was on the sidewalk. The man was standing next to the truck. When the man entered the cab, Qureshi asked him where he wanted to go and the man gave him an address. Qureshi asked the man if he was in the accident and the man did not respond. Qureshi asked if he wanted him to call police. The man said no.

¶ 19 Qureshi took the man to the address near 70th and Hamlin. The man asked Qureshi to wait while he checked if anyone was home. Qureshi saw a woman dressed in night clothing come to the door, and the man waved Qureshi on. An hour later, Qureshi received a notice to call his dispatcher. After speaking to the dispatcher, Qureshi went to the police station and spoke to police. Later, Qureshi viewed a lineup and identified defendant as the man he picked up from the scene of the accident.

¶ 20 Josephine Perez testified that she is married to Ildefonso Cruz, and defendant is her husband's nephew. Josephine, her husband, and their children attended Ana's birthday party. Defendant was not there when they arrived. Josephine testified that when defendant arrived, he had some ladies with him. The ladies were friends of Maria's. When Josephine left the party, she told defendant not to go out because he had been drinking beers at the party. She was concerned about him driving. Defendant told her he was fine. Josephine went to bed and was awakened in the night by a knock on her door. She looked out her window and saw defendant. Josephine opened the door for defendant, who told her he wanted to talk to his uncle. Josephine got Ildefonso Cruz, defendant's uncle, out of bed. He and defendant had a conversation.

¶ 21 Josephine could hear only bits and pieces of the conversation. Defendant appeared to be upset and looked as if he had been crying. Josephine did not see blood on his clothing. Defendant was not carrying any clothes when he came to the door. Josephine heard defendant tell Ildefonso that defendant had argued with Maria and that Maria was dead. Josephine testified that she heard defendant say: "Maria is dead, I killed Maria." Josephine told police defendant said "I think I killed Maria." Josephine called Maria's house and spoke to one of her daughters. Josephine asked if they were OK and if their mother was OK and the daughter responded yes, everything was fine. Josephine hung up and told defendant he was crazy and that he was lying. Josephine testified a girl called her back and told her "yes, it's true."

¶ 22 Defendant was still at Josephine and Ildefonso's home when Josephine received the call confirming that Maria was dead. Defendant left quickly after that and Ildefonso followed. When the police arrived at Josephine's home about an hour later, Josephine called her husband. At

some point after defendant arrived on the morning of March 18, 2002, Josephine heard defendant say "call the police."

¶ 23 Ildefonso Cruz testified that defendant is his nephew and that he, his wife, and his children attended the party. When they arrived, defendant was not at the party, but came later, bringing some of Maria's friends. The two drank 4 or 5 beers together. Ildefonso testified that nothing unusual happened at the party. Defendant walked Ildefonso and his family to their car. Ildefonso and his family went home and he went to sleep. Ildefonso testified his wife woke him and told him that defendant was knocking on their door. When Ildefonso first saw defendant, defendant appeared nervous and about to cry. Ildefonso did not see any blood on defendant's hands or clothing. Defendant did not have any other clothes with him. Ildefonso asked defendant what happened, and defendant said "I killed her." Ildefonso testified that was all defendant said and that defendant did not go into detail. Defendant said something like "I killed Maria, I think I killed Maria."

¶ 24 Ildefonso's wife called defendant's house and reported to Ildefonso that everything was fine. However, his wife received a call telling her that Maria was dead. Ildefonso thought that while defendant was at his house, defendant told Ildefonso to call the police. He thinks he told defendant to turn himself in. Defendant asked Ildefonso for a ride. Defendant asked Ildefonso for help and Ildefonso responded he could not help him. Ildefonso did give defendant a ride to 45th and Whipple. Defendant said nothing during the ride, particularly "I stabbed her," even though Ildefonso asked defendant what happened. He did not ask defendant how he killed Maria.

¶ 25 The state read a portion of Ildefonso's grand jury testimony which contradicted his trial testimony. Before the grand jury, when asked: "[D]id he tell you how he killed Maria," Ildefonso stated: "Yes, that he stabbed her with a knife." Ildefonso testified that when Ildefonso spoke to police at his home, he never told them that defendant said "I stabbed her."

¶ 26 On the way to 45th and Whipple, Ildefonso and defendant passed defendant's truck. Defendant told Ildefonso that he crashed. Ildefonso took defendant to the same block where defendant used to live. Ildefonso dropped off defendant and Josephina called him while he was driving home. Ildefonso arrived home to find a lot of police there. Ildefonso told police what defendant had said to him and took police to the location where Ildefonso dropped off defendant.

¶ 27 Jacqueline Delgado testified that she lives in the area of 45th and Whipple and that defendant came to her home in the early morning hours of March 18, 2002 looking for Jacqueline's husband. Delgado told defendant her husband was not home and defendant left. Shortly thereafter, police arrived at her home looking for defendant.

¶ 28 Phillip Jones is a detective with the Chicago Police Department. He testified that upon arriving at the scene, he observed a 10-inch long butcher knife on the kitchen table stained with what appeared to be blood. He proceeded to the bedroom and found Maria lying on her back on the bed with what appeared to be a 2-inch stab wound in the center of her chest. Detective Jones observed blood stains on her arms and hands, as well as on three pillows and the sheet. There were no signs of a struggle in the bedroom. Detective Jones interviewed Ana and Maria but does not recall them telling him the door to the outside was left open or that clothes were missing from the closet.

¶ 29 Cliff Gehrke testified that he is also a detective with the Chicago Police Department. As a result of the investigation into Maria's homicide, police were looking for defendant. On March 18, 2002, police visited several locations looking for defendant, including his former residence at 4537 South Whipple and his father's residence. By August 2002, police were specifically looking for defendant in Kumupa Quebla, Mexico. Police were still looking for defendant in Mexico in February 2003. On October 14, 2009, police took defendant into custody in Chicago.

¶ 30 Dr. Adrienne Segovia is an assistant medical examiner with the office of the Cook County medical examiner. Dr. Segovia testified as an expert in the area of forensic pathology. Dr. Segovia traced the wound through Maria's body. The wound was fairly straight, from front to back of the victim. Dr. Segovia found that the wound went through the sternum, the middle portion of the right lung, went through two different areas of the right side of the heart, those being the ventricle and the atria, and then hit the muscles between the ribs of the back above the sixth rib in two different areas. Dr. Segovia opined that significant force was required to make the stab wound Maria suffered. Dr. Segovia testified that significant force was required because the knife went through the breast bone, a lung, twice through the heart, and involved the muscles of the ribs and the back. Dr. Segovia testified that the amount of force required to make the wound would vary with the sharpness of the knife. Dr. Segovia testified that falling on a knife would cause a significant force.

¶ 31 The state and the defense stipulated that a forensic analyst at the Illinois State Police Crime Lab tested the knife and found no fingerprints suitable for comparison. The parties also

stipulated that blood taken from the knife found at the murder scene did belong to Maria Ramirez.

¶ 32 Defendant testified in his own defense, and stated that the stabbing was accidental. On March 17, 2002, defendant lived in an apartment at 4857 South Honore with his wife Maria, her children, and his month-old son. Defendant testified he was not home when the party started because he had gone to get Maria's guests. He made two trips to bring Maria's guests to the party. Nothing unusual happened at the party. Defendant testified he and Maria did not argue during the party, and she did not accuse him of anything during the party. Defendant sat with his uncle, and had 3 or 4 beers. After the party ended, defendant took the guests he brought to the party back home. Defendant used his wife's Crown Victoria to take the guests home then returned home himself at around midnight.

¶ 33 Defendant went to his bedroom. Defendant's son was on the bed near the wall and Maria was there. She was not in bed. Maria was wearing only her underwear, which was how she normally slept. Defendant testified that Maria asked defendant why it had taken him so long and why he had left her there alone. He told her he went to drop off the guests from the party. Defendant testified Maria knew that he had left to drop off her friends. Maria asked defendant why he was carrying another person's baby when he has his own son, and that he had taken too long to drop off the guests. Defendant described Maria's tone at that time as angry.

¶ 34 Defendant told Maria he was going to bed. He sat on the bed and started removing his shirt. Maria left and returned with a knife in her hand. Defendant testified that Maria said: "I want you to leave the house. I don't want you to be here, go 'cause you cheated on me with

another woman." Defendant testified that Maria walked toward him with the knife held high above her head. Defendant testified he thought she was going to kill him. Defendant testified he stood up quickly and took Maria's hand that was holding the knife. Defendant is a little taller than Maria. They struggled and defendant tried to take the knife away. Maria's hands were raised and they struggled. Defendant testified they both had their hands raised as they struggled for the knife.

¶ 35 Defendant stated "I went around her back and as I was going around her back, I was trying to take the knife from her and then as I was taking the knife from her, then she fell on the bed and then I fell on top of her." Defendant specifically stated that he was standing behind Maria when she fell on the bed. Defendant initially testified Maria fell face up on the bed then corrected himself to say face down. Defendant testified Maria stopped struggling. Her legs were hanging off of the bed but he put them up while trying to talk to her. Defendant testified he "said 'Maria,' because I turned her around." She did not respond. Defendant testified he did not know whether or not Maria was dead, but he did not call an ambulance before he left the apartment.

¶ 36 Defendant testified he was in a panic. He took his shirt and jacket and left the house to go to his uncle's house. Defendant took the family's truck but he was crying and shaking and lost control, crashing the truck. He saw a taxi and took it to his uncle's house.

¶ 37 Defendant testified that he told his uncle that: "I think something happened at home. I think I killed Maria." Defendant did not go into detail. Defendant told his uncle he was worried about his son and to call police. Defendant admitted he did not tell his uncle that Maria came at

him with a knife. He did not tell his uncle that while they struggled for the knife she fell on the knife she had been holding. Defendant admitted that at that time his only concern was getting as far away as he could because he was scared. Defendant's uncle drove him to Ms. Delgado's residence near 45th and Whipple. Defendant testified he went there looking for help. Specifically, defendant testified he was looking for help to get away from there. When she did not let him in, defendant went to a friend's house. Defendant called his mother in Mexico from his friend's house. After speaking with his mother, defendant went to take a bus to Mexico. Defendant used someone else's name to take the bus to Mexico. Defendant testified he used someone else's name so he could not be tracked. Defendant resided in his mother's hometown until his arrest.

¶ 38 B. Sufficiency of the Evidence to Prove Murder

¶ 39 Defendant argues that because his explanation for the killing was not improbable and was not impeached, the jury could not disregard his testimony and therefore the evidence is not sufficient to prove him guilty beyond a reasonable doubt. Defendant cites *People v. Wells*, 182 Ill. 2d 471 (1998), for the proposition that "[w]here the testimony of a witness is neither contradicted, either by positive testimony or by circumstances, nor inherently improbable, and the witness has not been impeached, that testimony cannot be disregarded even by a jury." (Internal quotation marks and citation omitted.) *Wells*, 182 Ill. 2d at 485 (citing *People ex rel. Brown v. Baker*, 88 Ill. 2d 81, 85 (1981)).

¶ 40 *Wells* does not stand for the proposition that probable, uncontradicted testimony that has not been impeached must be accepted by the trier of fact. In *Wells*, the defendant filed a motion

in 1993 to suppress evidence which had allegedly been seized pursuant to a search warrant on August 4, 1967. The defendant argued that the State could not prove the existence of a warrant or that a criminal complaint in support of a warrant had been filed. *Wells*, 182 Ill. 2d at 473. The trial court granted the motion to suppress, and the appellate court reversed and remanded for further evidentiary proceedings. *Id*., at 475. On remand, the trial court again granted the motion to suppress. The State appealed, and the appellate court reversed the trial court a second time, finding that "the evidence of the existence of a warrant was 'uncontradicted' and not 'inherently improbable.' " *Id*., at 484. Our supreme court reversed, holding that the appellate court had usurped the trial court's role as finder of fact. *Id*., at 483.

¶ 41 The *Wells* court cited *Quock Ting v. United States*, 140 U.S. 471, 420-21 (1891), in which the United States Supreme Court "held that even uncontradicted evidence does not always allow only one inference, particularly where witness testimony is inherently improbable, contains contradictions and omissions, or is incredible." *Wells*, 182 Ill. 2d at 485 (citing *Quock Ting*, 140 U.S. at 420-21). In *Quock Ting*, the United States Supreme Court affirmed the decision of the lower court discharging a writ of habeas corpus. The issue was whether the petitioner for the writ had been born in the United States. *Quock Ting*, 140 U.S. at 419. The Supreme Court wrote that:

> "Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; *but that rule admits of many exceptions*. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence,

> even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. *His manner, too, of testifying may give rise to doubts of his sincerity*, and create the impression that he is giving a wrong coloring to material facts." (Emphases added.) *Id*., at 420-21.

¶ 42 The weight and sufficiency of the evidence are always questions for the trier of fact. *People v. Nitz*, 143 Ill. 2d 82, 95 (1991) ("determinations of the credibility of witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence are the responsibility of the trier of fact"). Whether testimony is plausible or is not contradicted does not mandate a result, but are simply factors the trier of fact must *consider* in deciding what weight to afford the testimony. The court found that where testimony is unimpeached a jury cannot "*arbitrarily or capriciously* reject the testimony." (Emphasis added.) *Wells*, at 485 (quoting *People ex rel. Brown*, 88 Ill. 2d at 85).

¶ 43 The cases on which defendant relies before this court do not stand for the proposition that a trier of fact must accept a criminal defendant's unimpeached testimony. First, in *People v. Honey*, 69 Ill. App. 3d 429, 433 (1966), the trial court convicted the defendant of voluntary manslaughter. The appellant court reversed, finding that, considering the record as a whole, the State failed to prove the defendant guilty beyond a reasonable doubt. After recounting the evidence presented at the trial, the court found that the defendant "had introduced sufficient evidence to establish a plea of self-defense." *Honey*, 69 Ill. App. 3d at 433. *Honey* is inapposite

to this case because the *Honey* court does not state that the defendant's version of the events was unimpeached or not improbable, which is the basis of defendant's argument here. The court did note that the State's only witness said nothing of what had happened before the defendant fatally jabbed at the decedent with a bed rail. *Id*., at 431. But the *Honey* court never relied on any finding that the defendant's version of events was unimpeached in reaching its decision. See *Id.*

¶ 44 Next, in *People v. Hamilton*, 48 Ill. App. 3d 456, 458-59 (1977), the court reduced a conviction for voluntary manslaughter to involuntary manslaughter. *Hamilton* does not stand for the proposition asserted by defendant in this appeal, that a jury must accept an unimpeached, probable explanation from a criminal defendant as to how a killing occurred in determining whether the defendant proved mitigation. The *Hamilton* court specifically noted that "[a] reviewing court will not substitute its judgment for the judgment of the trier of fact with regard to either the credibility of the witnesses or the weight to be given their testimony. It is also not necessary that the trier of fact take the defendant's testimony as true ***." *Id*., at 458. As to the reason the court reduced the defendant's conviction in *Hamilton*, there is nothing in the court's opinion to suggest that it was because the defendant's testimony was probable or unimpeached. Rather, the court made the basis of its decision clear, stating that the "[d]efendant's explanation [of how the killing occurred] is consistent with those items of physical evidence relating to how the incident occurred." *Id*.,at 458. Thus, in *Hamilton*, not only was the defendant's explanation unimpeached, it was corroborated by physical evidence.

¶ 45 In this case, defendant has pointed to no physical evidence that is consistent with his explanation that he and Maria struggled over the knife, then she accidently fell on the knife

fatally stabbing herself. The testimony that falling on a knife would produce a significant amount of force does not necessarily support this contention. Dr. Segovia only testified that falling on a knife produces a significant amount of force. Dr. Segovia also testified that the amount of force required to make a particular wound would vary with several factors, including the sharpness of the knife used. Dr. Segovia did not specifically testify that if Maria did fall on the knife in question, it would have produced enough force to create the fatal wound. While this was a reasonable inference the jury could draw, the jury was not required to make that inference. On review, however, we must take every reasonable inference in support of the jury's verdict. *People v. Beauchamp*, 241 Ill. 2d 1, 8(2011) ("we must allow all reasonable inferences from the record in favor of the prosecution"). The jury could also reasonably infer that more force was required to cause the stab wound than falling on the knife. Further, defendant's testimony, even if believed, is not conclusive on whether the stabbing was an accident. Defendant testified that he and Maria struggled over the knife with the knife held above their heads, then they fell on the bed. Defendant did not testify that he or Maria brought the knife down as they fell. Again, while the jury could have reasonably drawn that inference, there is nothing in the testimony that required that conclusion, and we many not accept that inference now because it is contrary to the jury's verdict. The jury could reasonably find that the stabbing was not accidental.

¶ 46 In *People v. Harling*, 29 Ill. App. 3d 1053, 1060 (1975), the court reversed a conviction for voluntary manslaughter, finding that the state failed to prove the defendant guilty beyond a reasonable doubt. *Id*. The court did base its judgment, in part, on a finding that the "defendant's own testimony presented strong proof of self-defense" (*Id*., at 1060) and the defendant's

testimony was neither incredible or improbable (*Id*., at 1059). Most notably, however, the court found that the defendant's testimony was "corroborated in important particulars." *Id*., at 1059. The court found "a strong indication that [the defendant] used justifiable force in self-defense" in part because the evidence that the decedent struck the defendant without cause while his back was turned, in what was to become a second and fatal encounter between them, was "strongly corroborated by other testimony." *Id*., at 1058. The defendant's explanation as to why he would be in fear for his life from the decedent was also "supported somewhat" by the testimony of a bartender who observed the initial confrontation between the defendant and the deceased, during which the bartender "saw the victim holding [the] defendant by his neck ***." *Id*., at 1058. The *Harling* court said that the jury should not "disregard or reject testimony by defendant which is not improbable or contradicted in its material parts, especially where it is corroborated at least in part." *Id*. But the opinion in *Harling* still makes clear that a jury is not required to accept a defendant's unimpeached and probable explanation for a killing. *Id*., at 1059 ("the trier of fact is not obliged to accept, as true, testimony concerning self-defense presented by the accused").

¶ 47 Here, defendant's testimony that Maria attacked him with the knife is not corroborated. Defendant's implication that Maria was upset with him is not even "supported somewhat" by the evidence when viewed in the light most favorable to the prosecution. There is no evidence Maria displayed any animus toward defendant at any time, other than his own testimony regarding the time of the fatal encounter. To the extent defendant implies Maria was accusing him of infidelity, the testimony is at best conflicting. The witnesses, including defendant, all testified that nothing unusual occurred the night of the party. Defendant testified that Maria was upset

because defendant had taken too long to take guests home after the party and she did not know where defendant had gone. But defendant admitted that the women were Maria's friends and that she knew that defendant had to take them home after the party. The jury was not required to automatically infer that Maria was upset with defendant.

¶ 48 There is no doubt defendant stabbed Maria. The only question defendant raised with regard to the sufficiency of the evidence to convict defendant of first degree murder was whether the stabbing was an accident. Viewing the testimony in the light most favorable to the State, defendant's explanation for the events of the night in question is "contradicted in its material parts" (*Harling*, at 1059) and is not corroborated. The jury was not required to accept defendant's testimony regarding the events leading up to and including the fatal encounter. See *Id*.

¶ 49 B. Sufficiency of the Evidence to Prove Intent

¶ 50 Defendant also argued that the State failed to prove him guilty of murder because his statements to his relatives that he killed Maria do not constitute proof beyond a reasonable doubt that the killing was intentional. "A person is guilty of the offense of first degree murder when he kills an individual without lawful justification if, in performing the acts which cause the death he intends to kill or do great bodily harm ***." *People v. Leach*, 405 Ill. App. 3d 297, 311 (2010). "Determination of defendant's mental state may be inferred from circumstantial evidence, and this task is particularly suited to the jury." (Internal quotation marks and citations omitted.) *People v. Garcia*, 407 Ill. App. 3d 195, 201 (2011). "Because a defendant's mental state is not commonly proved by direct evidence, it may be inferred from the surrounding circumstances,

including the character of the defendant's acts and the nature of the victim's injuries." *People v. Jones*, 404 Ill. App. 3d 734, 744 (2010). "A defendant's intent is an issue of fact to be determined by the trier of fact. Intent can be inferred from the surrounding circumstances, including the character of the attack, use of a deadly weapon, and severity of the injury." *People v. Johnson*, 368 Ill. App. 3d 1146, 1162 (2006).

¶ 51 Defendant argues the jury could only speculate as to his intent because the only relevant testimony was that the stabbing was accidental. "[E]ven uncontradicted evidence should not serve as a basis for overturning a jury verdict if the jury might reasonably have doubted the credibility or accuracy of the witnesses who testified. Thus, while the jury is generally the sole judge of the weight and credibility of testimony, this rule is subject to the caveat that where the testimony of a witness is neither contradicted, either by positive testimony or by circumstances, nor inherently improbable, and the witness has not been impeached, that testimony cannot be disregarded by a jury." *Cockrell v. Koppers Industries, Inc.*, 281 Ill. App. 3d 1099, 1105 (1996). However, circumstances sufficient to contradict the testimony of a witness include the witness's self-interest in giving the testimony. See *Quock Ting*, 140 U.S. at 421. See also *People v. Luckett*, 339 Ill. App. 3d 93, 103 (2003) ("The credibility of the defendant, like that of any witness, is a fact question for the jury to decide, and the jury may reject or accept all or part of the defendant's testimony").

¶ 52 Defendant's own testimony that the stabbing was accidental is insufficient to require that his conviction be reversed. The circumstances in this case are such that the jury could have found that defendant's testimony was not credible. Defendant's motivation to lie about the

killing in the face of a charge of first degree murder notwithstanding, the jury had sufficient evidence to infer that defendant was not a victim of an attack by his wife that ended in tragedy. The evidence at trial was that defendant did not call for help, despite not knowing whether or not his wife was dead, after this alleged accident. He left his one-month-old baby to fend for himself when he fled. Defendant repeatedly testified how he sought to get away from the situation because he was afraid for himself. The evidence leaves unresolved what, if defendant was innocent, he was afraid of. The jury could have inferred that defendant had a fear of being unjustly accused of murdering his wife, but the jury could also reasonably infer that defendant was afraid because he knew he had just intentionally killed his wife.

¶ 53 Defendant testified inconsistently as to whether Maria fell on the bed face-up or face-down. The trier of fact was not required to accept defendant's explanation that he and Maria fell on the knife. *Luckett*, 339 Ill. App. 3d at 103. If we assume, as we must on review, that the trier of fact rejected that testimony, it then had sufficient evidence to find that defendant intended to murder Maria. The jury could have reasonably found that defendant intended to kill Maria because a deadly weapon was used and based on the amount the of force required to make the fatal wound.

¶ 54 2. SECOND DEGREE MURDER INSTRUCTION ADMONISHMENT

¶ 55 Defendant's attorney requested the trial court instruct the jury on second degree murder based on an unreasonable belief in the need for self defense and based on sudden and intense passion based on provocation. "Second-degree murder differs from first-degree murder because of the presence of a statutory mitigating factor such as a serious provocation or an unreasonable

belief in justification." (Internal citation omitted.) *People v. Izquierdo-Flores*, 367 Ill. App. 3d 377, 383 (2006). "A person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself or another against such other's imminent use of unlawful force. However, he is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably 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." 720 ILCS 5/7-1 (West 2002).

¶ 56 The court instructed the jury on second degree murder based on unreasonable belief in self-defense but not based on provocation. Defendant argues that the trial court committed reversible error because it did not question him to determine if he agreed with counsel's decision to request the second degree murder instruction, or whether defendant understood the consequences of giving the self-defense second degree murder instruction[1]. Defendant argues that the trial court must question a defendant to determine if he agrees with a request to tender an instruction on a lesser-included offense because requesting such an instruction is tantamount to an admission of guilt as to the offense and exposes the defendant to additional criminal liability. *People v. Medina*, 221 Ill. 2d 394, 409 (2006). Defendant argues that here, because he could not

[1] Defendant also argues that the trial court *should* have instructed the jury on second degree murder based on provocation, so we will assume that his argument that he was not properly questioned relates only to the instruction on second degree murder based on an unreasonable belief in self defense. It would be impermissibly contradictory for defendant to argue that the court committed error in failing to question him as to whether he wanted and understood an instruction which he now argues should have been given. See *Forest Preserve District of DuPage County v. First National Bank of Franklin Park*, 2011 IL 110759, ¶ 27 (2011) ("A party may not urge a trial court to follow a course of action, and then, on appeal, be heard to argue that doing so constituted reversible error").

be convicted of second degree murder without first being found guilty of first degree murder, requesting the instruction was also "in essence stipulating" that defendant was guilty of first degree murder. Defendant argues that the trial court's failure is reversible error because the decision to tender an instruction on a lesser-included offense belongs to the defendant as a matter of due process. *People v. Brocksmith*, 162 Ill. 2d 224, 229 (1994). Defendant alternatively argues that the failure to question him is plain error because the instruction given weakened his claim that the death was accidental without ensuring he agreed with that course in violation of a fundamental right, and because the evidence was closely balanced.

¶ 57 While briefing was ongoing in this appeal, our supreme court resolved the point in *People v. Wilmington*, 2013 IL 112938 (2013). In *Wilmington*, the defendant argued that his conviction for first degree murder and concealment of a homicidal death should be reversed because the trial court instructed the jury as to second degree murder based on unreasonable belief in self defense, but the court never asked the defendant if he agreed with the tender of the instruction and understood its consequences. *Id*., at ¶ 22, 25. The *Wilmington* court determined that no such inquiry was necessary, because "[s]econd degree murder is not a lesser-included offense of first degree murder; rather, it is more accurately described as a *lesser-mitigated offense* of first degree murder." (Emphasis in original) *Id*., at ¶ 48. The court reasoned that:

> "While a defendant who tenders a lesser-included offense instruction exposes himself to potential criminal liability, which he otherwise might avoid if neither the trial judge nor the prosecutor seeks the pertinent instruction, that is not the case with the tender of a second degree murder instruction, as a defendant can

> only be found guilty of second degree murder if the State has first proven all the elements of first degree murder. Clearly, he is not exposing himself to potential criminal liability which he might otherwise avoid. Thus, the rationale underpinning the decisions in *Brocksmith* and *Medina* does not apply ***." (Internal quotation marks and citations omitted.) *Id*., at ¶ 48.

¶ 58 As in this case, the defendant in *Wilmington* also argued that the request for the instruction undermined a defense strategy that was inconsistent with second degree murder. See *Id*., at ¶ 50. The *Wilmington* court did not find that the trial court committed any error by not inquiring whether the defendant consented to the tender of an instruction on second degree murder. *Id*., at ¶ 52. The court found that it was defense counsel's decision to pursue one strategy, while offering the jurors the option of second degree murder if that first strategy failed. *Id*., at ¶ 51.

¶ 59 In his reply brief, defendant succinctly concedes that *Wilmington* resolves the question of whether the trial court errs in failing to inquire whether a defendant consents to the tender of an instruction on second degree murder. We find that *Wilmington* resolves each of defendant's arguments in support of his second contention on appeal. First, the trial court did not violate defendant's due process rights because the decision whether to tender an instruction on second degree murder does not ultimately belong to a defendant. *Wilmington*, 2013 IL 112938, ¶ 46, 48.

¶ 60 Second, defendant was not denied a fair trial. "To determine whether defendant's right to a fair trial has been compromised, we *** ask whether a substantial right has been affected to such a degree that we cannot confidently state that defendant's trial was fundamentally fair."

(Internal quotation marks and citations omitted.") *People v. Blue*, 189 Ill. 2d 99, 138 (2000). Defendant argues that the instruction on second degree murder was "inconsistent with counsel's efforts to establish that Maria's death was accidental." However, defendant does not argue how counsel's strategy of offering the jury an alternative, if the jury did not accept that theory, affected any of defendant's substantial rights or denied him a fair trial. Counsel pursued a sound strategy of offering the jury an alternative if the jury believed the death did not result from an accident. *Wilmington*, 2013 IL 112938, at ¶ 51. Counsel's strategy did not deprive defendant of a fair trial. See, *e.g.*, *People v. Thomas*, 72 Ill. App. 3d 186, 202 (1979) (inference of prior criminality was attributable to defense trial strategy, accordingly, the defendant was not denied a fair trial).

¶ 61 Based on *Wilmington*, we hold the trial court did not commit any error by not inquiring whether defendant consented to the tender of the instruction on second degree murder based on unreasonable belief in self defense.

¶ 62 3. DENIAL OF PROVOCATION INSTRUCTION

¶ 63 Finally, defendant argues that the trial court erred in refusing to instruct the jury as to second degree murder based on serious provocation by a substantial physical assault.

> "A person commits second degree murder when he commits first degree murder while acting either under a sudden and intense passion resulting from serious provocation by the victim, or under the belief that the circumstances surrounding the killing would justify or exonerate its commission. Serious provocation is defined as conduct sufficient to excite an intense passion in a reasonable person.

> The four categories of provocation that courts recognize as sufficient to warrant a second degree murder instruction are mutual quarrel or combat, substantial physical injury or assault, illegal arrest, and adultery with the offender's spouse." (Internal quotation marks and citations omitted.) *People v. Lopez*, 371 Ill. App. 3d 920, 934-35 (2007).

"Although these categories were announced in connection with the predecessor offense of voluntary manslaughter, they *** apply equally to second degree murder ***. The elements of the two offenses are essentially the same ***." *People v. Tenner*, 157 Ill. 2d 341, 372 (1993). For that reason, cases applying these categories to prosecutions for voluntary manslaughter remain instructive[2]. "This court has held that very slight evidence upon a given theory of a case will justify the giving of an instruction." (Internal quotation marks and citation omitted.) *People v. Gomez*, 402 Ill. App. 3d 945, 958 (2010).

¶ 64 Defendant argues that his testimony that the deceased approached him holding a knife high in the air, angrily accusing him of infidelity, that he was afraid she would stab and kill him, and that they struggled over the knife before the victim was stabbed, provides the requisite evidence to support an instruction on second degree murder based on provocation. Defendant argues this evidence created a factual dispute for the jury to resolve as to whether he killed Maria upon serious provocation, and the trial court's error in taking that determination from the jury

[2] "In 1987, the Illinois General Assembly amended the Criminal Code of 1961 (Code) and replaced voluntary manslaughter with second-degree murder. However, the case law involved pertaining to voluntary manslaughter and murder under the old law is applicable to first-degree murder and second-degree murder under the new law." (Internal citations omitted.) *People v. Lewis*, 229 Ill. App. 3d 874, 879-80 (1992).

was not harmless. Defendant argues the alleged error was not harmless because the jury could have found serious provocation and, therefore, the result of the trial could have been different.

¶ 65 We need not determine whether an error was harmless because the trial court did not err in refusing to instruct the jury on second degree murder based on provocation by a substantial physical assault. "The decision to issue a jury instruction is within the discretion of the trial court, and a reviewing court will not reverse that decision absent an abuse of that discretion. An instruction on second degree murder based on serious provocation should be given only when there is some evidence of serious provocation in the record that, if believed by the jury, would reduce the crime to second degree murder." (Internal citations omitted.) *People v. Lopez*, 371 Ill. App. 3d 920, 934-35 (2007). "The question of whether sufficient evidence exists in the record to support the giving of a jury instruction is a question of law subject to *de novo* review." *People v. Washington*, 2012 IL 110283, ¶ 19 (2012). Defendant does not contend the stabbing occurred as a result of mutual combat, despite noting that he and Maria struggled over the knife before she was stabbed to death. Rather, defendant only argues that the evidence supported an instruction on second degree murder based on provocation by a substantial physical assault.

¶ 66 Even when a defendant was motivated by fear and claimed to have acted in self-defense, rather than in sudden and intense passion due to serious provocation, the trial court may decline to give an instruction on provocation. *People v. Slaughter*, 84 Ill. App. 3d 1103, 1110 (1980). See also *People v. Lewis*, 229 Ill. App. 3d 874, 881-82 (1992) (discussing mutual combat and finding that "[s]truggling with an attacker in an effort to ward off or defend one's self against an assault is not sufficient to warrant a provocation instruction"); *People v. Cox*, 121 Ill. App. 3d

118, 122 (1984) ("if the defendant's actions were merely defensive or motivated by fear and a desire to escape the victim, it has been held proper to refuse a voluntary manslaughter instruction based on provocation").

¶ 67 Second degree murder results from an act of aggression against another where, under limited and narrow circumstances, such an act of aggression is justified just *enough* that a death resulting therefrom will not result in a murder conviction. See *People v. Wilks*, 175 Ill. App. 3d 68, 75 (1988) ("voluntary manslaughter, like murder, is an intentional, unjustified killing yet the law acknowledges the mitigating effect of human weakness and intense passion and thereby reduces the charge from murder to voluntary manslaughter in two circumstances: (1) where the person killed an individual without lawful justification and has acted under a sudden and intense passion resulting from serious provocation sufficient to excite the passion of a reasonable person *** "); *People v. Austin*, 133 Ill. 2d 118, 127 (1989) ("The crime is murder when a defendant attacks a victim with violence out of all proportion to the provocation").

¶ 68 The court has found sufficient provocation to mitigate first degree murder to second degree murder where the defendant suffered serious injury from a physical assault. *People v. Bathea*, 24 Ill. App. 3d 460, 465 (1974) ("By defendant's own testimony, Charles Thompson struck her in the face several times, knocked her to the ground and kicked her leg. Defendant testified that, as she was pushed up against the car, she took a knife and stabbed Thompson once in the chest. *** Under these circumstances, the *** trier of fact, had ample evidence from which to conclude that the defendant was provoked by physical attack and was under a sudden and intense passion resulting from serious provocation by the deceased"). Conversely, the court

has found that "slapping and shoving of defendant did not amount to substantial physical injury or assault, as defendant sustained no injury from her behavior." *People v. Strader*, 278 Ill. App. 3d 876, 884 (1996). See also *People v. Eason*, 326 Ill. App. 3d 197, 208 (2001) ("Threats alone will not justify use of force in a killing"). In this case, although Maria's wielding a knife might be characterized as assault, defendant did not suffer any injuries from that assault. Defendant only testified that Maria held the knife above her head and that he believed she intended to stab him. More importantly, defendant did not testify to a sudden and intense passion from Maria's assault. Defendant consistently claimed that he acted in defense to stop Maria. In fact, the record is bereft of any evidence of provocation, which would be required to support giving the instruction. The trial court, therefore, properly limited the instructions to second degree murder based on an unreasonable belief in self-defense.

¶ 69 CONCLUSION

¶ 70 The State elicited sufficient evidence to prove that defendant intentionally stabbed his wife in the chest. The trial court did not err in failing to question defendant as to whether he agreed with his attorney's request that the jury be instructed on second degree murder based on unreasonable belief in self-defense. Second degree murder is not a lesser included offense of first degree murder, and so the decision to tender the instruction on second degree murder was a matter of trial strategy left to defendant's attorney. The trial court did not err in refusing to instruct the jury as to second degree murder based on provocation, where defendant consistently testified that he acted in self-defense. The judgment convicting defendant of first degree murder is affirmed.

¶ 71 Affirmed.