FOURTH DIVISION
September 3, 2015

1-13-1304

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 9348
	)	
ALBERT HERRON,	)	Honorable
	)	Maura Slattery-Boyle,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Justices Fitzgerald Smith and Ellis concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for first degree murder is affirmed; the circuit court of Cook County did not err in refusing to instruct the jury on second degree murder by reason of sudden provocation because there was no evidence of mutual quarrel or combat, and the jury could reasonably find the evidence did not prove by a preponderance of the evidence defendant unreasonably believed deadly force was required for self-defense.

¶ 2 The State charged defendant, Albert Herron, with first degree murder for the shooting of Nathaniel Hoover. Defendant admits he shot Nathaniel outside the home of a woman both he and Nathaniel dated but claimed Nathaniel threatened him earlier on the day of the shooting and was attacking defendant at the time of the shooting. The trial court instructed the jury on the mitigated offense of second degree murder based on an unreasonable belief in the need for self-defense but refused an instruction on second degree murder based on sudden provocation. The jury found defendant guilty of first degree murder. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 I. Introduction

¶ 5 We begin with an overview of the crime. The most pertinent witness testimony will be laid out in some detail.

¶ 6 Defendant was in a relationship and fathered a daughter with Candice Lemon. Defendant and Candice broke up and defendant moved to Iowa. Candice began dating the victim, Nathaniel Hoover. In April 2009 defendant returned to Chicago from Iowa for his daughter's birthday. Candice invited defendant, defendant's brothers and cousin, and defendant's friend to a party for her mother. At Candice's mother's party, defendant and Candice reconciled. The day after her mother's party, on April 26, 2009, Candice, defendant, their daughter, Candice's brother Joe Rico Parks, and Candice's niece were driving defendant's brother's vehicle from Candice's home to a store. They stopped at defendant's grandmother's house in Riverdale where they encountered the victim and the victim's brother, Brian Hoover. Nathaniel made a threatening statement to defendant. Nathaniel and

his brother left Riverdale first and defendant's group left sometime thereafter. Nathaniel and Brian went to Candice's home in Chicago to retrieve Nathaniel's clothing. Defendant's relatives and friend were already at Candice's home, as was Candice's sister, Cadisha Lemon. The victim entered Candice's home to retrieve his clothing but quickly left followed by defendant's relatives and friend. Defendant's brother Albert Allen and defendant's friend Larry were in that group.

¶ 7 Defendant, Candice, Parks, and the two children arrived while the victim was outside Candice's home. Defendant obtained a gun from Larry. As defendant and the victim came in physical proximity to each other defendant shot the victim twice. Someone took the gun he used away from defendant, and defendant walked away from the area. The victim returned to his brother's car and they began to drive to a hospital before being stopped by police, who summoned an ambulance. Police stopped defendant once but released him after failing to locate a weapon when defendant denied any involvement in the shooting. Defendant was arrested in the area on foot a few hours later. Neither defendant's brother nor his friend Larry testified at defendant's trial.

¶ 8 II. Defendant's Testimony

¶ 9 Defendant testified that he returned to Chicago from Iowa on April 24, 2009 for his daughter's birthday. The following day, defendant spent the day with his daughter while her mother, Candice Lemon, prepared for a surprise birthday party for Candice's mother. Candice told defendant to invite his brothers to the party. That night, Candice and defendant decided to rekindle their family and for defendant to return to Chicago to be a full-time father to their child. Candice invited defendant and his brothers to return the next day, April 26, to

have family time. On April 26, 2009, Candice revealed to defendant that while defendant was living in Iowa she was seeing someone else: Nathaniel Hoover. Defendant testified that Candice sent a text message to Nathaniel that she wanted to be with defendant. They left the house 15 minutes later in defendant's brother's truck.

¶ 10 Defendant, Candice, their daughter, and Candice's brother and niece left in defendant's brother's truck to go to the store. Candice drove. Defendant saw his grandmother's home and asked Candice to stop. Defendant learned his grandmother was not home but went inside briefly. When he exited his grandmother's home, defendant saw a man leaning on the driver's side of the truck. Defendant later learned the man was the victim, Nathaniel Hoover. Defendant later described Nathaniel as tall and muscular. Nathaniel was yelling at Candice and arguing. Defendant also noticed a maroon Impala parked inches from the front of the truck. Defendant went to the passenger side of the truck and asked Candice what was going on. Defendant testified Nathaniel said "None of your [expletive] business. I'll come over there and knock you the [expletive] out and kill you in front of your daughter." Defendant testified that caused him to become scared and he started backing away.

¶ 11 Defendant testified he backed away because Nathaniel was coming toward him. Defendant was scared and was trying to get to his grandmother's door while watching Nathaniel out of the corner of his eye. Defendant testified he kept an eye on Nathaniel because Nathaniel was coming at him "full speed and yelling" with an angry expression. Defendant got to the door and stood inside. On cross-examination, defendant testified Nathaniel came within feet of defendant before defendant got to the door. Defendant testified he did not call police because a male came walking over to calm things down. Defendant later

learned that man was Michael Young, who also testified at defendant's trial. Defendant did not know Young. After Young and Nathaniel spoke, Nathaniel got into the Impala and left.

¶ 12 Defendant returned to the truck. Defendant testified they were going to continue their shopping and Candice was driving toward her home when defendant noticed the same vehicle that had been parked inches from their truck following behind. On cross-examination, defendant testified that they decided to return to Candice's house when they saw the vehicle with Nathaniel and his brother inside following them. Defendant testified he felt terrified because he did not know why they were following him. He borrowed Candice's phone and called his brother. On cross-examination, defendant testified he wanted to call his brothers because he was terrified of the car following him but he did not call police. Defendant told his brother Albert Allen to "look out, because somebody just threaten [*sic*] my life is following us." Defendant testified he spoke to no one else and gave the phone back to Candice. The car with Nathaniel and his brother that had been following behind swerved over, got in front of the truck, and drove off at a higher rate of speed.

¶ 13 When they arrived at Candice's home defendant saw the same car parked in the lot and Nathaniel at the door to Candice's home. Nathaniel was screaming loudly at defendant's brothers and gesturing with his arms. On cross-examination defendant testified Nathaniel had nothing in his hands. Candice parked in the parking lot. On cross-examination, defendant testified he was not scared at this point because he saw that his brothers, cousin, and friend were there. Defendant testified that Nathaniel saw the vehicle and started walking "extra fast" toward the truck. Defendant did not hear Nathaniel saying anything. Defendant told Candice to take the children in the house.

¶ 14 They both got out of the truck. On cross-examination, defendant testified that when he and Candice first got out of the truck Nathaniel was not yet close enough to be threatening. When Nathaniel got to the truck, he started arguing with defendant and Candice. Defendant testified Nathaniel was saying: "You don't know who the [expletive] you are. I told you, I'm no [expletive] joke. You playin' these games, I'll kill you." Defendant exited the truck and told Nathaniel "You not going to touch me." Defendant testified he had never talked back to Nathaniel before that point, but at that moment he felt he could because his three brothers were around. On cross-examination, defendant testified that his brothers, cousin, and a friend (Larry) started toward the parking lot behind Nathaniel.

¶ 15 Defendant testified he started walking toward his brothers and Nathaniel followed behind defendant. Nathaniel was yelling "You think I'm a joke?" and came towards defendant. Now Nathaniel wore black gloves he did not have on earlier, defendant testified. Nathaniel still had nothing in his hands. Defendant testified he thought the gloves meant someone was going to hurt him. Defendant explained: "It mean that somebody was going to hurt me because it's hot outside, it's April, and you got on black gloves meaning where I'm from around, somebody is finnin' [*sic*] to get hurt." Defendant testified "I was afraid that he was going to kill me ***."

¶ 16 On cross-examination defendant testified he was walking toward his brother with his back to Nathaniel. He knew Nathaniel was still behind him but not close enough to harm defendant. On cross-examination defendant testified that when he was almost to his brother, defendant turned around and saw Nathaniel with gloves. When asked what he thought

Nathaniel was going to do with the gloves, defendant testified he thought Nathaniel was going to kill him. Defendant explained he thought Nathaniel was going to shoot him with a glove on his hand.

¶ 17 Nathaniel was approximately seven feet away from defendant. Nathaniel was coming toward him. Someone handed defendant a gun. There were five or six people around. Defendant was asked what he did after someone handed him the gun. He testified as follows:

> "A. I was holding it in the back, and he was steady yelling at me, and then he started my way.
>
> Q. When you say he started your way, describe what he did.
>
> A. He came towards my way speeding, speed walking.
>
> Q. Was he saying anything?
>
> A. Yes. He told me he was going to hurt me, like he said he was going to do, in front of my daughter.
>
> Q. How did you feel then?
>
> A. I feel [*sic*] threatened, scared for my life.
>
> Q. What happened next?
>
> A. I raised the gun and shot."

¶ 18 On cross-examination, the State asked defendant if he raised the gun and told Nathaniel to back off. Defendant testified he did not, saying: "It happened so quick that he almost got on me and I raised the gun and shot." When challenged as to the distance Nathaniel was to defendant (seven feet) defendant said Nathaniel was coming toward him at a

very quick pace, threatening to kill him. Defendant demonstrated how Nathaniel's hands were open and swinging front to back in a fast motion as Nathaniel was walking at a fast pace toward defendant.

¶ 19 Defendant fired two shots. On cross-examination, defendant testified he made a conscious decision to use the gun "when he [(Nathaniel)] got up close enough to do whatever he was going to do." Defendant initially testified that after he shot, Nathaniel ran to the car, and defendant fired no more shots as Nathaniel was going to the car. On cross-examination, defendant testified that after the first shot Nathaniel was still coming toward him.[1] Defendant testified on cross that was why he fired twice, after which the following exchange occurred between defendant and the assistant state's attorney:

> "Q. Again, he didn't pull out any weapons, correct?
>
> A. At that moment, he was lunging towards me with black gloves.
>
> Q. That's not my question, sir. Listen to my question. He didn't pull out any weapons after you shot him the first time, did he?
>
> A. No.
>
> Q. So you knew at that moment he did not have a weapon on him, isn't that correct?
>
> A. No.

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[1] "Q. Nathaniel Hoover is still coming at you after you shot him once?
A. Yes."

Q. You shot him twice, correct?

A. Yes."

¶ 20 Someone pulled defendant to the truck and drove away with defendant. He asked the driver to stop and let him out. Defendant testified he walked around the neighborhood because he was in shock. As he was walking around a police officer stopped him. Defendant admitted he lied to that officer because he was afraid he would not be believed. The officer let him go and defendant continued walking around the neighborhood. Defendant testified he continued walking around, from approximately 2:30 in the afternoon until 6:40 p.m. when police stopped and arrested him. Police questioned defendant at Area 2 headquarters. Defendant admitted he denied knowing anything about the shooting. He also lied to police about having been called away from the area prior to the shooting, hearing an argument he could not see, and getting into an argument with the man Candice had just broken up with. Defendant never told detectives he shot Nathaniel. Defendant testified he lied to police because he was scared.

¶ 21 III. Brian Hoover's Testimony

¶ 22 Brian Hoover testified that he and his brother were to attend Candice's mother's birthday party but did not because Candice would not answer her phone. The next day Nathaniel asked his brother to take him to the store. While en route they saw Candice driving defendant's brother's truck and followed them because Nathaniel wanted to give Candice a purse he purchased as a gift. Brian testified he parked behind the truck and that by the time Nathaniel reached the driver's side defendant had made his way to a house. He did hear a verbal exchange between Nathaniel and defendant but could not hear what was said.

The exchange lasted approximately five seconds and Nathaniel never left the side of truck. Brian heard Nathaniel say he (Nathaniel) wanted to get his things. Nathaniel returned to Brian's car and they proceeded to Candice's house to retrieve Nathaniel's clothing. Brian testified his brother had no weapons on him that day.

¶ 23 Brian testified Candice's porch was approximately 50 yards from the parking area. Nathaniel walked into Candice's home. He left the apartment and was followed by six or seven men. Nathaniel was walking back toward Brian's car when the truck with defendant arrived. Nathaniel was already on his way back to his car before the truck arrived. Brian testified defendant was driving the truck. Brian exited his vehicle to tell Candice they were just there to get Nathaniel's things. As Brian was talking to Candice defendant was walking toward Nathaniel. At that point the six or seven males were surrounding Nathaniel. Brian testified defendant was four to five feet in front of Nathaniel. Brian was 15 feet away and had a clear view. He testified he saw defendant take a gun from his waistband and shoot Nathaniel twice. Nathaniel did not have anything in his hands. Brian did not see Nathaniel lunge at defendant or get in a fist fight with anyone. They both returned to Brian's car and left.

¶ 24 IV. Cadisha Lemon's Testimony

¶ 25 Cadisha Lemon testified that when Nathaniel Hoover exited her sister's apartment, he started walking back toward his brother's car and was putting on gloves. She did not see anything in his hands at that time. Cadisha wrote in her statement to police and testified before the grand jury that when Nathaniel exited Candice's apartment he said "I'm going to beat all y'all asses." On re-direct examination, Cadisha testified Nathaniel exited the

apartment and *ran* off of the porch. He was followed by defendant's three brothers, his cousin, and his friend Larry. Cadisha testified Nathaniel Hoover seemed surprised to see the group inside. It was at that point, when five people followed him out of the house, that Nathaniel turned around and said he would be all of their asses.

¶ 26 When defendant, Candice Lemon, Joe Rico Parks, and the children pulled up, defendant's brothers surrounded Nathaniel as he was walking. Cadisha testified she never saw Nathaniel walk over to the truck as it pulled up. However, defense counsel impeached her with Cadisha's grand jury testimony during which she testified Nathaniel ran up to the truck when it pulled in and her written statement in which she stated that Nathaniel walked up to the driver's side of the truck and said something to the people inside. She testified she did not recall giving that testimony.

¶ 27 Cadisha testified defendant exited the truck and walked toward the crowd. She did not see any type of argument when defendant walked over toward Nathaniel and defendant's brothers. She testified that defendant was not arguing with Nathaniel when defendant got out of the truck and walked toward the group. But the State impeached Cadisha with a written statement to police and her grand jury testimony in which she stated both times that defendant and Nathaniel continued to argue after defendant got out of the truck. Cadisha's statement to police indicates that Nathaniel was "also walking in that direction." On cross-examination, Cadisha testified that Nathaniel was not walking with defendant. Rather, defendant and his group "basically like followed him and surrounded him."

¶ 28 Cadisha testified she did see Larry hand defendant a black gun. Cadisha saw defendant raise the gun. She initially testified she did not actually see defendant fire the gun because she

was going back into the house but she later testified she saw defendant fire twice. Cadisha did not see Nathaniel with a gun in his hand at any time prior to the shooting. She testified that she did not see Nathaniel approach the group or engage in any type of argument with anyone at any time prior to the shooting. She did not see Nathaniel Hoover punching or lunging at anyone prior to the shooting.

¶ 29 V. Joe Rico Parks' Testimony

¶ 30 Joe Rico Parks testified that on the day before the shooting, at his mother's birthday party, defendant's friend Larry showed him a black handgun. The next day, when he, his sister Candice, defendant, and the children were going to the store, they stopped at defendant's grandmother's house. Nathaniel and his brother Brian Hoover arrived. Brian was driving a red Impala. Brian pulled their car in front of the truck Parks and the others were in. Nathaniel was talking to Candice about a purse. Parks testified he heard Nathaniel say this was none of his (defendant's) business and he (Nathaniel) would come and hit defendant in the mouth. Defendant then went into his grandmother's house. Defendant did not walk over to where Nathaniel was standing at the driver's side window.

¶ 31 Parks testified Nathaniel asked Candice if he could come in the house to get his gloves. Parks testified that after defendant went into his grandmother's house Nathaniel continued to talk to Candice and asked if he could get his stuff from her house and she said yes. He later testified defendant did not hear that request and Candice did not tell that information to defendant. Ten minutes later, defendant returned. Defendant returned to the truck and borrowed Candice's phone. Parks testified defendant called his brother and asked for Larry. Defendant said something about a gun but Parks could not remember everything. On cross-

examination Parks testified he did not hear defendant ask Larry for a gun. Parks testified that when defendant disconnected the call defendant said he was going to kill Nathaniel Hoover with the gun. On cross-examination he agreed that in his written statement Parks said that defendant said he was going to shoot Nathaniel Hoover "right in the head" and that defendant made that statement before he was on the phone.

¶ 32 Parks testified the red Impala never chased them that day. They returned to Candice's house and Nathaniel and Brian were already there. Nathaniel was at Candice's door. Parks testified he heard Nathaniel say to Candice: "I'm just trying to get my clothes." Defendant then stated "That's all you want?" to which Nathaniel Hoover replied "Yeah," and "Come on." On cross-examination Parks testified consistently except that he stated defendant told Nathaniel Hoover to "Come on."

¶ 33 Parks testified they were walking toward Candice's house when defendant's group stopped Nathaniel five or six feet from the house. On cross-examination Parks testified Nathaniel was following defendant to Candice's house because defendant told Nathaniel "to come on to get his clothes." Parks was impeached with his written statement, in which Parks stated that defendant did say "Is that all you want," but Parks did not state in the written statement that defendant then said "Come on." Parks testified that he did say that defendant said "Come on" when he made his written statement and testified at trial that was what defendant said. Parks testified defendant then led Nathaniel toward Candice's house where Larry and the others were standing. Parks testified the men were surrounding Nathaniel. Brian was by his car but never approached. Parks testified he saw defendant grab the gun from Larry, raise it, and shoot Nathaniel twice in the side. Parks testified he did not see

Nathaniel with any weapons at any time. He did not see Nathaniel attack or punch defendant.

¶ 34 VI. Instructions and Verdict

¶ 35 The trial court instructed the jury on second degree murder based on an unreasonable belief in the need for self-defense but not on second degree murder based on sudden and intense provocation. The jury found defendant guilty of first degree murder and found that he personally discharged a firearm resulting in death. The court sentenced defendant to 30 years' imprisonment for first degree murder with a mandatory 25-year sentence enhancement.

¶ 36 This appeal followed.

¶ 37 ANALYSIS

¶ 38 Defendant argues his conviction should be reversed and the cause remanded for a new trial because the trial court erroneously refused to instruct the jury on second degree murder based on provocation; or his conviction for first degree murder should be reduced to second degree murder because the evidence proves he unreasonably believed he needed to use deadly force in self-defense. Before a jury may find a defendant guilty of second degree murder, the State must prove the defendant guilty of first degree murder beyond a reasonable doubt. *People v. Parker*, 358 Ill. App. 3d 371, 377 (2005) ("Only when a trier of fact has found that the State has proven each of the elements of first degree murder beyond a reasonable doubt may it then consider whether a mitigating factor has been established that would reduce first degree murder to second degree murder. [Citation.]"). "Once the State has proven all of the elements of first degree murder, the burden shifts to the defendant who wishes to mitigate the

offense to second degree murder, to prove the existence of one of the statutory mitigating factors by a preponderance of the evidence." *People v. Guyton*, 2014 IL App (1st) 110450, ¶ 37.

> "First degree murder may be reduced to second degree murder when either of the following mitigating factors is present:
>
> (1) [Provocation] At the time of the killing he is acting under a sudden and intense passion resulting from serious provocation by the individual killed or another whom the offender endeavors to kill, but he negligently or accidentally causes the death of the individual killed; or
>
> (2) [Imperfect self-defense] At the time of the killing he 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 [Justifiable Use of Force; Exoneration], but his belief is unreasonable. [Citation.]" *Guyton*, 2014 IL App (1st) 110450, ¶ 38; 720 ILCS 5/9–2(a)(1), (a)(2) (West 2012).

¶ 39 Defendant does not dispute the sufficiency of the evidence to prove his guilt of first degree murder beyond a reasonable doubt. The only issues defendant raised on appeal are whether the trial court properly instructed the jury and the sufficiency of the evidence to prove that crime should be mitigated to second degree murder based on imperfect self-defense.

¶ 40 I. Jury Instructions

¶ 41 Defendant argues the trial court applied an incorrect legal standard, and misstated the evidence, when it refused to instruct the jury on second degree murder based on sudden provocation. Defendant argues the trial court incorrectly applied a higher burden of proof for defendant to prove he was entitled to a provocation instruction than the burden that applied to an imperfect self-defense instruction. Defendant also argues that the trial court misstated the evidence in concluding defendant failed to show any provocation when the court found that the evidence showed only an exchange of words when in fact defendant testified that the victim lunged at him.

¶ 42 A. Standard for Instructing the Jury

¶ 43 Defendant had a right to a second degree murder instruction if there was any evidence to support the giving of the instruction. *People v. Jones*, 175 Ill. 2d 126, 131-32 (1997).

> "A defendant in a criminal case is entitled to have the jury instructed on any legally recognized defense theory which has some foundation in the evidence, however tenuous. [Citation.] An instruction should not be given without evidence to support it. [Citation.] *** The underlying decision regarding whether there is sufficient evidence in the record to warrant giving the jury a particular instruction, however, is a question of law and will be reviewed *de novo*. [Citation.]" (Internal quotation marks omitted.) *Lewis*, 2015 IL App (1st) 122411, ¶ 56.

¶ 44 In this case the trial court gave an instruction on imperfect self-defense, however it refused the second degree murder/provocation instruction. The trial court did not state what

burden the defendant was required to satisfy to justify the giving of a provocation instruction. The court stated only that said burden was different than the burden to justify an imperfect self-defense instruction and that the burden for an imperfect self-defense instruction was "very minimal" or "miniscule."

¶ 45 However, because our standard of review on the question of whether there is sufficient evidence in the record to warrant the giving of the instruction is *de novo*, we have no need to decide whether the trial court applied an incorrect standard. "*De novo* review is completely independent of the trial court's decision. [Citation.]" *People v. Robinson*, 2013 IL App (1st) 102476, ¶ 62. For clarity we note that the burden on the defendant to obtain an instruction on second degree murder based on serious provocation is the same as the burden to obtain an instruction on second degree murder based on imperfect self-defense, however the question of whether either instruction should be given is based on the evidence adduced at trial:

> "A defendant is entitled to an instruction on his theory of the case if there is some foundation for the instruction in the evidence, and if there is such evidence, it is an abuse of discretion for the trial court to refuse to so instruct the jury. [Citation.] Very slight evidence upon a given theory of a case will justify the giving of an instruction. [Citations.] *** 'In deciding whether to instruct on a certain theory, the court's role is to determine whether there is some evidence supporting that theory; it is not the court's role to weigh the evidence.' [Citations.]" *Jones*, 175 Ill. 2d at 131-32.

¶ 46 Moreover, "when there is evidence in the record to support 'unreasonable belief' *** as well as 'provocation' ***, the court must give instructions on both." *People v. Lewis*, 229 Ill. App. 3d 874, 880 (1992). A defendant should be held to the same burden of proof to obtain a provocation instruction as to obtain an imperfect self-defense instruction. That is, whether there is even slight evidence in the record of serious provocation as that term has been defined for purposes of second degree murder.

¶ 47 B. Definition of Serious Provocation

¶ 48 Defendant argues the evidence is sufficient to support the giving of an instruction for second degree murder/provocation arguing there was serious provocation based on "mutual quarrel or combat." Our courts have defined serious provocation:

> "Serious provocation is defined as conduct sufficient to excite an intense passion in a reasonable person. [Citation.] The defendant must be acting under a sudden and intense passion spurred from a serious provocation that the law recognizes as reasonable. [Citation.] The only 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, or adultery with one's spouse. [Citation.] Passion on behalf of the defendant, no matter how violent, will not relieve him of culpability for first-degree murder unless it is engendered by provocation that the law recognizes as reasonable. [Citation.]" *People v. Nitz*, 353 Ill. App. 3d 978, 987

(rev'd in part on other grounds, *People v. Nitz*, 219 Ill. 2d 400, 427 (2006)).

¶ 49 Defendant does not argue the trial court should have instructed the jury on second degree murder based on substantial physical injury or assault or adultery. The thrust of defendant's argument on this point is that "there was some evidence presented about a mutual quarrel which extended for some duration in multiple locations." "Mutual combat is 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." (Internal quotation marks omitted.) *People v. Lauderdale*, 2012 IL App (1st) 100939, ¶ 26 (citing *People v. Austin*, 133 Ill. 2d 118, 125 (1989)). "[T]he term implies a common intent to fight, but not necessarily an exchange of blows." *People v. Delgado*, 282 Ill. App. 3d 851, 857-58 (1996) (quoting 15 C.J.S. Combat, at 358 (1967)). The circumstances must "indicate a purpose, willingness, and intent on the part of both to engage mutually in a fight." 40 C.J.S. Homicide § 206 (2014).

¶ 50 In *Delgado*, the issue decided by the court was whether the term "mutual combat" encompasses attempts to defend oneself from an assault. *Delgado*, 282 Ill. App. 3d at 857. The *Delgado* court cited *People v. Matthews*, 21 Ill. App. 3d 249, 253 (1974), in which this court adopted the Corpus Juris Secundum (C.J.S.) definition of "mutual combat." *Delgado*, 282 Ill. App. 3d at 857. The discussion in C.J.S. of when mutual combat reduces a murder to second degree murder relies on a Georgia case, cited favorably in *Delgado*, which held "for true mutual combat, which would reduce the act from murder to [second-degree murder], to exist, it must appear that there was a readiness and intention on the part of both parties to engage in

immediate conflict with each other. Fighting to repel an unprovoked attack is self-defense and is authorized by the law, and should not be confused with mutual combat. [Citation.]" (Internal quotation marks omitted.) *Delgado*, 282 Ill. App. 3d at 858 (quoting *Colvin v. State*, 272 S.E.2d 516, 519 (1980)).

¶ 51 The *Delgado* court also cited with approval the court's holding in *Lewis*, 229 Ill. App. 3d at 881. In *Lewis*, the court held that to warrant a "provocation" instruction based upon mutual combat, the struggle must be mutual. *Lewis*, 229 Ill. App. 3d at 881. "Struggling 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." *Id.* (citing *People v. Slaughter*, 84 Ill. App. 3d 1103, 1109 (1980)). The *Slaughter* court upheld the trial court's decision not to give an instruction on provocation where the defendant testified he stabbed the victim because he was afraid that the victim would kill or seriously injure him. *Slaughter*, 84 Ill. App. 3d at 1110. The *Slaughter* court held that the "defendant was motivated by fear and claimed to have acted in self-defense, rather than motivated by sudden and intense passion due to serious provocation. Accordingly, the trial court's decision not to give an instruction on "provocation" *** was proper." *Slaughter*, 84 Ill. App. 3d at 1110.

¶ 52 In *Delgado*, the defendant had smoked cocaine he supplied with the victims. Later the defendant accused one of the victims of stealing some of his cocaine. The defendant testified that the male victim picked up a knife and came at the defendant. The defendant pushed him back once, the victim came at the defendant a second time but fell, and when the victim came at the defendant a third time, he grabbed the victim and they began to struggle. *Delgado*, 282 Ill. App. 3d at 855-56. The defendant stabbed the male victim during this struggle as the

female victim was hitting the defendant on the back. *Id.* at 856. After the defendant stabbed the male victim at least twice, the defendant turned to see the female victim heading toward a knife rack. *Id.* The defendant stabbed her in the back, she turned, and the defendant stabbed her in the chest "because he thought she might have a knife in her hands." *Id.* The court held that the defendant "was not entitled to a mutual combat instruction based on his testimony that he found himself the unwilling participant in a fight and acted only to defend himself from attack." *Delgado*, 282 Ill. App. 3d at 859.

¶ 53 C. Instructions in this Case

¶ 54 Defendant argues considering defendant's testimony that "a gloved man who had been pursuing him to different locations and threatening to kill him lunged at him," the trial court should have instructed the jury on second degree murder based on serious provocation. We find, even taking defendant's testimony and the evidence in a light most favorable to him (*People v. Garcia*, 165 Ill. 2d 409, 430 (1995)[2]), there is no evidence in the record to support a provocation instruction based on mutual quarrel or mutual combat. Accepting defendant's testimony as to the events of the killing, a provocation instruction was not warranted in this case and the trial court did not err in refusing to give the instruction.

¶ 55 The State argues "there was no evidence presented that defendant and Nathaniel had any physical contact or 'combat' prior to the shooting. Thus, defendant cannot establish that Nathaniel 'entered into the confrontation willingly.' " The State's argument misses the mark

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[2] "The evidence of mutual combat offered by the defendant, even when cast in the light most favorable to the defendant, is insufficient as a matter of law to justify an intense and sudden passion in a reasonable person."

because there is no evidence of mutual intent. First, there is evidence the victim was willing to have a confrontation with defendant. Defendant testified the victim was moving toward him aggressively after threatening defendant. This is more than "slight" evidence of intent by the decedent to enter into combat with defendant. Moreover, "mutual combat" does not require an exchange of blows if the intent to do so is manifested, as it was by the victim in this case. *Delgado*, 282 Ill. App. 3d at 857-58. What is missing in this case is a commonality of intent between the alleged combatants. It is clear from defendant's testimony that he was not willing to enter into a quarrel or fight with the victim. There was no evidence of a common intent to quarrel and there was no evidence of a common intent to fight. Defendant testified he was retreating from Nathaniel without quarrelling. After defendant told the victim "You not going to touch me," defendant walked away toward his brothers. Defendant testified he talked back to the victim once because he felt safe around his brothers, but there is no evidence defendant said more or ever had any intention of fighting the victim. At that point defendant had his back to the victim. When defendant did turn to face the victim, he saw the victim's black gloves and became afraid he was about to be hurt. Defendant testified that he was afraid of the victim. Immediately before shooting the victim, defendant testified he felt "threatened, scared for [his] life." Nothing in the evidence, particularly nothing in defendant's words or actions, indicates defendant had a purpose, willingness, or intent to engage mutually in a quarrel or fight. Even if, as in *Delgado*, defendant thought the victim was going for a weapon, he would, like the defendant in *Delgado*, not be entitled to a provocation instruction. Based on defendant's testimony his actions were purely defensive.

¶ 56 Defendant's testimony does not provide evidence of serious provocation for purposes of a second degree murder instruction. See *People v. Flores*, 282 Ill. App. 3d 861, 868 (1996) (holding defendant was not entitled to a mutual combat instruction based on his testimony he stabbed the victim because he feared for his life when, while defendant was fighting with another, the victim punched defendant and reached for what could have been a knife). The trial court properly refused to instruct the jury on second degree murder based on serious provocation.

¶ 57 II. Jury's Verdict

¶ 58 Next, defendant argues his conviction should be reduced to second degree murder because the evidence was sufficient to show by a preponderance of the evidence that he acted with an unreasonable belief in the need for self-defense.

¶ 59 A. Standard for Overturning Verdict

¶ 60 In this case, defendant is not challenging the jury's finding that the State proved him guilty of first degree murder beyond a reasonable doubt. Thus the State has proved that the murder was not carried out in self-defense and that defendant's use of force was not legally justified. *People v. Jeffries*, 164 Ill. 2d 104, 127 (1995). However, "the defendant's unreasonable belief is not necessarily an element the State must disprove in defeating a claim of self-defense." *Id.* at 128. The burden is on the defendant to prove the existence of the mitigating factor by a preponderance of the evidence. *People v. Simon*, 2011 IL App (1st) 091197, ¶ 51. "It is enough *** to produce evidence of an actual belief in the need for the use of force in self-defense. From that evidence, if the jury finds the defendant had a subjective belief, it may find

the belief to be objectively reasonable or objectively unreasonable." *People v. Washington*, 2012 IL 110283, ¶ 37 (citing *Jeffries*, 164 Ill. 2d at 129).

¶ 61 "The determination of whether a defendant is guilty of first degree murder or guilty of second degree murder *** is a question for the finder of fact." *Simon*, 2011 IL App (1st) 091197, ¶ 52. When a defendant argues on appeal that a conviction for first degree murder should be reduced to second degree murder because he acted with an actual, though unreasonable, belief in self-defense, the question for this court is "whether, viewing the facts in the light most favorable to the State, any rational trier of fact could have found that defendant failed to prove the mitigating factor by a preponderance of the evidence." *Id.*

¶ 62 B. Defendant's Arguments

¶ 63 Defendant cites *People v. Hawkins*, 296 Ill. App. 3d 830 (1998), in support of his argument his conviction should be reduced to second degree murder. In *Hawkins*, the defendant presented the only testimony about the events just prior to the stabbing death of the victim. *Id.* at 838. No evidence contradicted the defendant's testimony establishing the defendant's belief he was threatened with an imminent use of force that would cause death or great bodily harm. See *Hawkins*, 296 Ill. App. 3d at 836 ("The use of deadly force in self-defense is justified when the defendant is not the aggressor and the defendant reasonably believes that he is threatened with force that will cause death or great bodily harm and the danger of harm is imminent.").

¶ 64 In *Hawkins* the evidence was uncontroverted that the defendant refused to lend the victim money, the victim then punched the defendant knocking him to the ground, the victim threw a brick at the defendant's head, and the victim started toward the defendant

threatening to kill him. *Id.* at 838. The defendant tried to escape but the victim blocked his path, and the victim swung at the defendant with a closed fist. *Id.* The defendant testified he did not know if the victim had anything in his hand but the defendant was terrified and scared. *Id.* The court found the defendant's belief was unreasonable because there was no visible evidence the victim had a weapon, such that "deadly force was not threatened at that time," and there was no evidence the defendant or the victim had suffered any bodily harm in previous fights. *Id.* The court held that the defendant "had an actual, but unreasonable belief that he had the right to use self-defense against [the victim.]" *Hawkins*, 296 Ill. App. 3d at 837. The court found that the defendant "proved by a preponderance of the evidence that he believed that the circumstances justified using self-defense, but that his belief was unreasonable." *Id.*

¶ 65 Defendant also cites *People v. Ellis*, 107 Ill. App. 3d 603 (1982), in support of his position in this case. In *Ellis*, the court reduced the defendant's murder conviction to second degree murder (then voluntary manslaughter) based on unreasonable belief self-defense. *Ellis*, 107 Ill. App. 3d at 612. There, the defendant testified that the victim had been staying with the defendant for a few days but on the day of the killing the defendant asked him to leave. The victim refused. The defendant retrieved a gun, demanded the victim leave the defendant's apartment, and fired a warning shot into a wall. The victim made a lunge toward the defendant and the defendant shot him in the head. *Id.* at 608-09. Multiple police officers testified to statements the defendant made regarding the shooting. The defendant's statements to police were consistent with his testimony as to the events. *Id.* at 606-07. The only evidence offered by the State to dispute the defendant's self-defense theory was evidence of the absence

of gun powder residue implanted in the victim's skin which the State used to argue that the gun was not fired at close range. *Id.* at 607-08.

¶ 66 The defendant in *Ellis* argued on appeal that his conviction should be reversed because the evidence established that he was acting in self-defense. The court held as follows:

> "The defendant's version of the circumstances of the shooting was not improbable nor was it impeached by the State's evidence. The absence of evidence of 'tattooing' around the decedent's wound which might circumstantially infer evidence of an intentional killing from a distance, contrary to defendant's statements, was not conclusive to establish proof of murder beyond a reasonable doubt. The record is devoid of any other evidence to support a murder verdict." *Ellis*, 107 Ill. App. 3d at 611.

¶ 67 However, the *Ellis* court did not reverse the defendant's conviction, finding that the defendant's "belief that he was in danger of losing his life or suffering great bodily harm was unreasonable." *Ellis*, 107 Ill. App. 3d at 611. The court reasoned, in part, as follows:

> "The lunge made by the decedent toward the defendant who was holding a gun under the circumstances did not justify defendant's use of deadly force. 'A belief that the decedent, unarmed, might kill or greatly injure the defendant, while [he] had a loaded gun, was unreasonable.' ([Citation.])" *Ellis*, 107 Ill. App. 3d at 611-12.

¶ 68 In *Ellis*, the court reduced the defendant's conviction to voluntary manslaughter holding that "[s]ince the evidence presented by *both the State and the defendant* established that the decedent made a 'lunge' at [the] defendant, [the] defendant was entitled to use some force to repel the attack." (Emphasis added.) *Ellis*, 107 Ill. App. 3d at 611.

¶ 69 Defendant argues that in this case, as in those upon which he relies, defendant succeeded in showing by a preponderance of the evidence that he was justified in using some force against "a man who lunged at him with black gloves and who had been the aggressor in pursuing him to different locations and repeatedly threatening to kill him." Specifically, multiple witnesses testified to threats of physical violence at different locations at different times. Defendant testified Nathaniel chased him into his grandmother's house, and defendant "testified that [Nathaniel] came up to the car, followed [defendant] as [defendant] walked away, and lunged at him." Moreover, Cadisha testified Nathaniel wore black gloves on a hot day.

¶ 70 C. The Jury's Verdict

¶ 71 We find that a rational trier of fact could have found defendant failed to prove by a preponderance of the evidence that defendant had a subjective belief in the need for the use of force in self-defense that was objectively unreasonable. This case is distinguishable from both *Hawkins* and *Ellis*. We note parenthetically *People v. Beasley*, 2014 IL App (4th) 120774, ¶ 25, in which the court held the evidence presented provided some support for an involuntary manslaughter instruction and the trial court abused its discretion in failing to so instruct the jury, is inapposite.

¶ 72 In both *Hawkins* and *Ellis*, the pertinent evidence was undisputed. That is not the situation here, where defendant and several State witnesses testified to different versions of the events that led to Nathaniel's death. There was evidence from which a reasonable trier of fact could find that defendant did not believe the victim had a weapon. Defendant testified he thought Nathaniel had a gun because Nathaniel was wearing gloves. Cadisha, Brian, and Parks all provided testimony from which a reasonable trier of fact could find Nathaniel was unarmed. The evidence is undisputed defendant and Nathaniel were in close proximity. Thus unlike *Hawkins*, there was evidence to directly refute defendant's claim he thought Nathaniel was going to shoot him with a gun. The jury could have believed those witnesses who testified the victim was unarmed and reasonably inferred from the evidence that fact was known to defendant or defendant did not have a subjective belief Nathaniel was armed when he shot him.

¶ 73 In this case, unlike *Ellis*, the evidence presented by defendant and the State was not in agreement that Nathaniel was attacking defendant. The jury could reasonably find that defendant was not in imminent danger of death or great bodily harm from any attack by Nathaniel Hoover because there was evidence Nathaniel was not making threatening statements or movements toward defendant. Defendant was the only witness to testify that the victim was coming at defendant at a fast pace while making threats. "In determining which of these accounts to believe, the trier of fact does not have to accept as true the testimony presented by the defendant concerning self-defense, but, rather, in weighing such evidence must consider the probability or improbability of the testimony, the circumstances surrounding the killing and other witnesses' testimony. [Citation.]" (Internal quotation

marks omitted.) *People v. Lewis*, 2015 IL App (1st) 122411, ¶ 69. As for counter-evidence, Brian testified that it was defendant walking toward the victim, who was already surrounded by six or seven men, not the other way around as defendant testified. Cadisha similarly testified defendant and his group followed and surrounded Nathaniel and she did not see Nathaniel lunge at defendant. Parks testified Nathaniel was following defendant to Candice's house because defendant told Nathaniel "to come on to get his clothes" when Nathaniel was surrounded. Parks provides a far different account than defendant's claim Nathaniel was approaching defendant rapidly while making threatening statements. Moreover, Brian testified defendant shot the victim when defendant was four to five feet away from the victim. The credibility of the witnesses is for the jury to decide and it may accept or reject all or part of the testimony. *People v. Luckett*, 339 Ill. App. 3d 93, 103 (2003). Given the evidence, a reasonable jury could find defendant did not believe he was in danger of imminent death or great bodily harm from an unarmed man standing four feet away while surrounded by defendant's relatives and friend.

¶ 74 Further, there was evidence of an intentional killing. Candice testified she did not disclose her relationship with Nathaniel to defendant. Nathaniel tried to give Candice a gift after she text Nathaniel to end their relationship. Parks testified defendant stated he was going to shoot Nathaniel as asked about a gun. There was also evidence to refute defendant's claim someone just gave him a gun. Parks testified defendant grabbed the gun from Larry. "The weight to be given to the testimony of the witnesses, their credibility, and the reasonable inferences to be drawn from the evidence, are all matters to be determined by the trier of

fact." *People v. Brown*, 2015 IL App (1st) 131873, ¶ 12. A jury could reasonably find from the evidence defendant intentionally shot Nathaniel.

¶ 75 The trial court instructed the jury on second degree murder based on unreasonable belief self-defense and the jury rejected defendant's argument. The evidence was controverted and there was evidence from which a reasonable trier of fact could find that defendant failed to prove he subjectively believed he was in imminent danger of death or great bodily harm. The jury could have found defendant intentionally shot the victim based on testimony the victim had a relationship with defendant's girlfriend while defendant lived out of State, defendant professed an intention to shoot the victim, and defendant obtained a gun, approached the victim, and shot the victim from a distance of four to five feet.

¶ 76 Because we cannot find that no rational trier of fact could have found defendant failed to meet his burden to prove the mitigating factor by a preponderance of the evidence defendant's conviction is affirmed.

¶ 77 CONCLUSION

¶ 78 For the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 79 Affirmed.