

2019 IL App (1st) 171882-U

No. 1-17-1882

Order filed May 30, 2019

Fourth Division

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 11 CR 10477
)	
LAZARO ZAPATA,)	Honorable
)	Thomas V. Gainer Jr.,
Defendant-Appellant.)	Judge, presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice McBride and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not abuse its discretion in declining to instruct the jury on second degree murder based on provocation where there was insufficient evidence of mutual combat or other legally-recognized sources of provocation.

¶ 2 Following a jury trial, defendant Lazaro Zapata was found guilty of first degree murder and sentenced to 40 years in prison. On appeal, he argues that the trial court erred in refusing to instruct the jury on second degree murder based on sudden and intense provocation. We affirm.

¶ 3 Defendant was charged by indictment with first degree murder (720 ILCS 5/9-1(a) (West 2010)) arising from an incident in which he allegedly killed Raul Medina by striking him with a car and kicking him in the head.¹ As Raul and other individuals mentioned in this order have last names in common, we will use their first names as needed.

¶ 4 At trial, Carlos Galindo testified that he was at a gas station on South Kedzie Avenue in Chicago around midnight on June 1, 2011. As Galindo left the gas station, he saw defendant, a longtime friend, fighting a much larger “older guy,” later identified as Raul. A man Galindo knew by the nickname “Dukes” arrived and helped defendant in the fight, but Raul was “beating the s*** out of both of them.” Galindo ran over and “blindsided” Raul by punching him twice. Raul then stopped fighting and walked away down Kedzie.

¶ 5 Dukes left on a bicycle, and defendant got into a car that was parked in the middle of the street. Galindo entered the passenger’s seat. They drove away and made a right turn toward Raul, who was still walking down the street. As they passed him, Raul shouted “that’s why I took your b***” and threw something at the car. Defendant made a U-turn and told Galindo that he was “going to park.” Before defendant could park, Raul, who looked “aggressive” and “mad,” ran in front of the car. Defendant struck Raul, lost control of the vehicle, and crashed into a pole.

¶ 6 Galindo lost consciousness and woke up in the car alone several minutes later. He tried to run away, but realized that his leg was broken. Galindo called out to defendant, who was down the street. Defendant helped Galindo limp to a nearby gangway, where defendant’s girlfriend, Irene Ayala, was waiting. Defendant and Ayala helped Galindo hide under a porch, and left him

¹ Defendant was also charged in the same indictment with one count of possession of a stolen motor vehicle (625 ILCS 5/4-103(a)(1) (West 2010)) for allegedly possessing Raul’s car while knowing it to be stolen. The State dismissed the stolen vehicle charge prior to trial and proceeded on first degree murder.

with Ayala's cell phone. Galindo made several phone calls in search of a ride home before the phone died. He lost consciousness again, and woke up when he was found by emergency responders. On cross-examination, Galindo denied believing that defendant "snapped" before making the U-turn, but acknowledged that he testified to that effect before the grand jury.

¶ 7 Chicago police officer Nicholas Pronek testified that he and his partner, Officer Joe Considine, responded to the scene around 12:30 a.m. on June 2, 2011. Upon arrival, Pronek observed a car that had crashed into a pole. He learned that one person had already been taken to the hospital and another had fled the scene. Pronek walked eastbound down 40th Place and found Galindo lying beneath a porch.

¶ 8 Chicago police officer Jerry Duskocz testified that he was assigned to investigate the incident around 3:30 a.m. on June 2, 2011. He went to Mercy Hospital in search of defendant, who had been identified as a suspect, and arrested him in the emergency room waiting room.

¶ 9 Maria Sandoval testified that, around midnight on June 1, 2011, she was lying in bed in her apartment in the 4000 block of South Kedzie. She heard yelling outside, and went to her kitchen window to see what was happening. When she looked outside, she could tell that the noise was coming from a car parked on the corner of 40th Place and Kedzie. The car door pulled shut, but Maria could not see who was inside. Approximately one minute later, the tires screeched and the car "zoomed off." The car turned right onto Kedzie, and Maria headed toward her bedroom. She returned to the kitchen window "a few seconds" later because she heard tires screech again. Maria observed the car sideswipe a fence in front of her building and crash into a utility pole. She yelled for her mother and sister to call 911.

¶ 10 A man exited the driver's seat, walked to the front of the car, and "stomp[ed]" on something with "ferocity" more than five times. A woman exited the car, yelled at the driver, and then ran with him down 40th Place towards an alley. Another man exited the passenger's side of the car about a minute later, "hopping" and yelling for help. The driver and woman came to his aid, and took him back to the alley. On cross-examination, Maria acknowledged that she did not see the car turn around or hit anyone.

¶ 11 Graciela Sandoval, Maria's sister, testified that she and her mother were in the dining room when she heard screaming outside. Graciela went to the living room window overlooking Kedzie and saw a man walking from the sidewalk toward the middle of the street. As the man stood in the street, a car drove by and someone in the vehicle "exchanged words" with him before driving off at a "high speed." Graciela described the exchange as "not pleasant," but she could not hear what was said. The man walked back to the sidewalk closest to her building. Once he reached the sidewalk, she heard a "loud screech" and saw the car "coming very fast" toward her building at an angle.

¶ 12 Graciela ran to the kitchen to get a better view. When she looked out the kitchen window, she saw that the car had collided with a utility pole next to her building. The driver exited the car, walked around the front, and "stomp[ed] and kick[ed]" toward the ground several times. A woman exited the passenger's seat and screamed at the driver to stop. They ran down 40th Place. Then, a man exited the back seat "hopping" and "screaming" as if his leg was injured. The driver and the woman returned and helped the injured man into an alley on 40th Place.

¶ 13 Forensic investigator Eric Szwed testified that he was assigned to the case in the early hours of June 2, 2011. Szwed took video and photographs of the scene and the evidence. He

collected a deployed airbag and scrapings from the hood of a car on the sidewalk, both of which contained suspected blood. Szwed also met with defendant at a police station, where he collected his blood-stained shoes.

¶ 14 The State then proceeded by entering several stipulations. First, the parties stipulated that Michael DeLacy, an investigator for the Cook County State's Attorney's Office, collected a buccal swab from defendant and sent it to the Illinois State Police Crime Lab.

¶ 15 Second, the parties stipulated that forensic analyst Justin Camilo received defendant's buccal swab. Camilo also examined the air bag, shoes, and hood scrapings collected by Szwed. All three tested positive for blood.

¶ 16 Third, Chicago police detective James Anderson collected a sample of Raul's blood from the Cook County Medical Examiner's office. Anderson submitted the blood to the Illinois State Police Crime Lab for analysis.

¶ 17 Finally, Megan Neff, a forensic biologist for the Illinois State Police, identified DNA profiles from defendant's buccal swab and Raul's blood sample. Neff concluded that the blood scraped from the hood of the car matched Raul. Two of the three blood stains on defendant's right shoe also matched Raul, but the third did not match either defendant or Raul. The blood on the deployed airbag matched defendant.

¶ 18 The State concluded its case-in-chief by calling Dr. Lauren Moser Woertz, an assistant Cook County medical examiner. Woertz testified that, on June 3, 2011, she performed Raul's autopsy, which revealed numerous injuries to his head and torso. Woertz concluded that the cause of death was being struck by a vehicle.

¶ 19 The State rested, and the defense called Robert Kelenyi, a retired lieutenant in the Chicago Police Department. Kelenyi testified that he responded to a call of kidnapping in the 4100 block of South Albany Avenue on the night of June 1, 2011. He met with defendant, who was “highly agitated” and appeared to be under the influence of drugs or alcohol. Defendant first claimed that his girlfriend had been kidnapped and was being held somewhere in the building. Officers checked the building and found no one else present. Defendant then explained that his girlfriend was being held captive “somewhere out and about in a vehicle.” He “insisted” that he would call his girlfriend on the phone to prove it. Defendant dialed a number and put the phone on speaker. A woman answered the call, and said that she “wasn’t in any danger” and that defendant was “an asshole.” Kelenyi did not remember if the woman identified herself as defendant’s girlfriend. However, officers determined that there was no evidence of a kidnapping and left. On cross-examination, Kelenyi stated that defendant identified the woman on the phone as his girlfriend, Ayala.

¶ 20 Ayala testified that she and defendant were dating on June 1, 2011. The couple lived together in an apartment in the 4100 block of South Albany. At around 8 p.m., defendant told Ayala that he was going to “Jewels” to help Delilah Medina, their upstairs neighbor. Defendant left, and Delilah and Raul knocked on Ayala’s back door approximately 15 minutes later. Ayala and Delilah had a conversation before Delilah went upstairs to her apartment. Delilah returned sometime later and dragged Ayala outside by the hair. Delilah took Ayala up to her apartment, where Ayala noticed that there was no television in the living room. Delilah hit and choked Ayala, held half of her body out of the third-story window, and threatened to throw her out.

¶ 21 After that, Delilah made a phone call to an unknown person. Ayala could not hear what was said, but stated that Delilah sounded “[m]ad.” Delilah and Raul forced Ayala into the back seat of Raul’s car. Delilah sat in the backseat and Raul drove. As they pulled away, Ayala spotted defendant and yelled to him. Defendant entered a different car and followed them. Raul drove westbound down the expressway while Delilah hit Ayala in the face with the seatbelt buckle. Delilah continued to talk to someone on the phone.

¶ 22 After driving for approximately 40 minutes, Raul pulled over and forced Ayala into the trunk. They continued to drive around for “no more than an hour” until Raul stopped again and returned Ayala to the back seat. Raul pulled into a gas station, where he purchased gas and beer. They then drove back to the city with Delilah in the passenger’s seat and Ayala in the backseat. Delilah was still talking on the phone.

¶ 23 As they approached their apartment building, Raul slowed down, but did not stop. He pulled over two or three blocks later, and defendant arrived on a bicycle. Raul got out of the car and “exchanged words” with defendant, but they were not yelling. Delilah then exited the car, and she, defendant, and Raul started to yell at each other. As they were arguing, Galindo arrived and opened the car door for Ayala to get out. When Ayala exited, she saw defendant, Raul, Delilah, and “more people” fighting in the middle of the street. She screamed for the fighting to stop. When the fight ceased, defendant entered the driver’s seat of Raul’s car and told Ayala to get in the back seat. Galindo sat in the passenger’s seat.

¶ 24 Defendant pulled away and turned right onto Kedzie. He drove less than a block before turning around, but Ayala did not see anybody in the street as he did so. Ayala explained that she did not recall the car turning around, but could only remember that they crashed. After the crash,

Ayala left the car and ran down 40th Place. She ran alone and did not see Raul. Ayala returned to the car when she heard Galindo screaming. She and defendant, who was already with Galindo, helped him down the street.

¶ 25 Ayala and defendant left Galindo in a yard and returned to their apartment. Defendant briefly went inside, and they then “started walking.” Defendant talked to somebody they encountered along the way, and left with him. Some girls whom Ayala did not know picked her up in a car and drove her a couple blocks away, where defendant was waiting. The girls took them to “somebody’s house,” and defendant called his father. Defendant’s father picked them up and took them to a police station. After speaking to police, they went to Mercy Hospital, where Ayala was examined in the emergency room.

¶ 26 On cross-examination, Ayala stated that she did not remember the car turning around on Kedzie because she was scared, nervous, and “wasn’t paying attention.” She did not hear defendant tell Galindo that he was going to park after turning around. Ayala explained that she saw a body on the ground after the crash, but did not stop to see who it was. She acknowledged that she testified before the grand jury that she saw Raul lying on the sidewalk in front of the car.

¶ 27 Defendant testified that he was at home with Ayala on June 1, 2011, when he received a phone call from Delilah around 9 p.m. After taking the call, defendant went to a Jewel-Osco grocery store to help Delilah and Raul, her boyfriend, with some “gang-bangers” who were troubling them. Defendant knew Delilah as his neighbor, but had never met Raul. Defendant’s friends Galindo, Lee Ray, Dominick, and “Lalo” accompanied him to the grocery store. When they arrived, defendant did not see Delilah, Raul, or any gang members. Defendant left, and received another phone call from Delilah on the way home. Delilah told him that she was on the

expressway with Ayala in the trunk of her car. She threatened to “start chopping off [Ayala’s] ears” if defendant did not “get her stuff back.”

¶ 28 Defendant then returned home to find the door open and Ayala missing. His living room television was also gone. He went upstairs to Delilah’s apartment and noticed that her door was open as well. Nobody was inside the apartment and her television was missing. Defendant called 911 and reported that Ayala had been kidnapped. When Kelenyi and other police officers arrived at defendant’s apartment, he was talking on the phone with Delilah. Defendant put the phone on speaker for Kelenyi to hear, and asked to talk to Ayala. Delilah responded by saying that Ayala had not been kidnapped and was there on her own free will. Delilah added that Ayala did not want to talk to him because he was “an asshole,” and hung up the phone. Police searched the building and, upon finding it unoccupied, left. Defendant tried to explain the situation to the officers, but was told that he would go to jail if he called them again.

¶ 29 Defendant continued talking to Delilah on the phone after the police left. He was standing outside his apartment building when Raul, Delilah, and Ayala drove past. Defendant jumped on a bicycle and followed their car until it pulled over about three blocks later. When defense counsel asked defendant if he was “angry” at this time, he responded “Well, I was a lot of things, angry—I think it was more frustration at this time.”

¶ 30 Delilah and Raul exited the car and yelled at defendant about their missing property. Defendant explained that he had recovered their belongings, but they refused to let Ayala go. Instead, Delilah started “ranting and raving, talking crazy.” As defendant continued “begging” for Ayala’s release, his friend “Pipes” rode up on a bicycle. Defendant told Pipes to let Ayala out of the car. As Pipes went to open the door, Raul got back into the driver’s seat. Defendant

grabbed Raul and hit him, initiating a fistfight in the street. Defendant and Raul fought one-on-one for 10 to 20 seconds until Galindo hit Raul from behind. Then, Delilah came up behind defendant and “swung at” him. Defendant swung back and Delilah ran away.

¶ 31 When defendant turned his attention back to Raul, he was backing away as Galindo and Pipes approached him. However, Raul still had his hands raised in a “fighting position” as he retreated. Defendant noticed that Raul’s keys were still in the ignition, so he told Galindo and Pipes to enter the car. Defendant jumped in the driver’s seat, accompanied by Galindo and Ayala. Pipes left on a bicycle. Defendant pulled away and made a right turn to “avoid hitting” Raul, who was approaching the car. Raul chased after them, “shouted something along the lines [of] b***, m*** f***, I’m gonna kill you m*** f***,” and threw something at the car. Defendant turned the car around about 20 feet later because he wanted a “resolution to this situation because [he] knew [Raul] wasn’t going to stop.” As defendant turned around, he saw Raul standing near a light pole next to the sidewalk. Defendant crossed into the oncoming traffic lane with the intent to stop a “considerable distance in front of” Raul. However, defendant did not stop because he accidentally hit the clutch instead of the brake pedal. Defendant swerved to avoid hitting Raul, but was unsuccessful. The car struck Raul and crashed into the light pole, deploying the air bag into defendant’s face.

¶ 32 After the crash, defendant exited the car, walked around the front, and kicked Raul one time. Defendant explained that he kicked Raul because:

“It was just, you know, I mean at the time the way that everything had happened, I mean, it was just like I felt like, like, you know, it was just the way that everything had

happened. I just, you know, wanted this situation to be over. I didn't want, you know, this guy trying to come back for us or anything."

¶ 33 Defendant then ran down the street to catch up to Ayala, who had exited the car and walked past him. He heard Galindo calling for help, and returned to the car to assist him. Defendant and Ayala helped Galindo limp down the street and into an alley. They left Galindo with Ayala's cell phone and returned to their apartment. Defendant eventually went to a police station with his father and Ayala, where they spoke to the desk sergeant. At the sergeant's direction, they went to Mercy Hospital for treatment. Defendant was arrested at the hospital and taken to another police station, where he gave a videotaped interview with detectives.

¶ 34 On cross-examination, defendant acknowledged that Raul did not have anything in his hands during the fight. After Raul backed away from Galindo and Pipes, defendant left with Ayala because he considered the fight over.

¶ 35 The State played a video of defendant's statement to police made on June 2, 2011. In the video, defendant stated that, as he drove past Raul, Raul chased the car on foot and shouted "I'm going to kill you, m***." Defendant made a U-turn because he felt "threatened" that Raul was "going to come back another time" to hurt him. Raul was still "talking shit" as defendant drove towards him. When Raul "realized what [defendant] was about to do," he tried to run away, but it was too late.

¶ 36 Defendant described his mental state at the time he drove toward Raul as "full of anger and hatred and *** aggravation throughout the whole situation." He explained that the "one thing on [his] mind" was "to end this right now" because he "didn't want [Raul] coming back to haunt us." Galindo and Ayala told defendant to stop, but he drove into Raul because he was

“infuriated by the whole situation” and “felt like [he] had to do it to end this whole situation because he would always be a threat to us.”

¶ 37 At trial, defendant acknowledged that he made the statements depicted in the video. He also explained that he turned the car around to “resolve the situation,” but reiterated that he did not intend to strike Raul. He stated that “[i]t happened really fast” and that he “felt a lot of emotions,” including anger. After crashing the car, defendant got out and kicked Raul to ensure he was dead.

¶ 38 The defense rested, and the court conducted a jury instruction conference outside the jury’s presence. The defense requested that the jury be instructed on self-defense, second degree murder based on an unreasonable belief of self-defense, and second degree murder based on serious provocation. The court granted the defense’s request with respect to the first two instructions, but declined to instruct the jury on provocation. In reaching this decision, the court stated:

“[I]t’s very clear to me that the testimony that I heard today from this defendant was that he acted in the way he acted because they struck first and he was trying to protect himself and trying to protect Irene Ayala from what they did then and what they were going to do in the future.”

¶ 39 After closing arguments, the jury found defendant guilty of first degree murder. Defendant filed a posttrial motion challenging, *inter alia*, the court’s refusal to instruct the jury on serious provocation. The court denied the motion, and sentenced defendant to 40 years in prison.

¶ 40 Defendant now appeals, arguing that the trial court erred by refusing to instruct the jury on second degree murder based on sudden and intense provocation. In particular, he contends that there was evidence of provocation in that Raul kidnapped Ayala, engaged in mutual combat with defendant, and threatened to kill him. Thus, defendant argues that he was entitled to a provocation instruction because the totality of the circumstances would have inflamed the passions of a reasonable person.

¶ 41 Relevant here, a person commits first degree murder when, without lawful justification, he kills another while intending to cause death or great bodily harm. 720 ILCS 5/9-1(a) (West 2010).

¶ 42 A person commits second degree murder when he commits first degree murder and one of the following mitigating factors exists. 720 ILCS 5/9-2(a) (West 2010). The first factor is that the defendant acted under an unreasonable belief of self-defense. 720 ILCS 5/9-2(a)(2) (West 2010). As the trial court instructed the jury on this factor, it is not at issue in the present case. The second mitigating factor is that, at the time of the killing, the offender acted “under a sudden and intense passion resulting from serious provocation by the individual killed.” 720 ILCS 5/9-2(a)(1) (West 2010). The statute defines “serious provocation” as “conduct sufficient to excite an intense passion in a reasonable person.” 720 ILCS 5/9-2(b) (West 2010).

¶ 43 “Passion on the part of the slayer, no matter how violent,” does not reduce first degree murder to second degree murder “unless it is engendered by a provocation which the law recognizes as being reasonable and adequate.” *People v. Austin*, 133 Ill. 2d 118, 125 (1989). Illinois courts recognize only four categories of serious provocation: (1) substantial physical injury or assault, (2) mutual combat, (3) illegal arrest, and (4) adultery with the offender’s

spouse. *People v. McDonald*, 2016 IL 118882, ¶ 59. Even within these limited categories, mere words and gestures do not constitute serious provocation. *People v. Castillo*, 2018 IL App (1st) 153147, ¶ 36.

¶ 44 The defendant bears the burden of demonstrating that there was evidence of serious provocation. *Austin*, 133 Ill. 2d at 124. In deciding whether a defendant is entitled to a provocation instruction, a trial court must determine whether there is “*some evidence*” that, if believed by the jury, would reduce the offense to second degree murder. (Emphasis in original.) *McDonald*, 2016 IL 118882, ¶ 25. Where, as here, a trial court determines that there is insufficient evidence to justify instructing the jury, the refusal to give the instruction is reviewed for abuse of discretion. *Id.* ¶ 42.

¶ 45 Defendant first argues that there was some evidence of mutual combat, which is a source of serious provocation recognized by Illinois courts. See *McDonald*, 2016 IL 118882, ¶ 59. In this context, mutual combat occurs when two people willingly engage in a sudden, physical fight on equal terms and in hot blood. *Id.*; *Austin*, 133 Ill. 2d at 125. To demonstrate mutual combat, “[a] slight provocation is not enough, because the provocation must be proportionate to the manner in which the accused retaliated.” *Austin*, 133 Ill. 2d at 126-27. This is especially so where the murder is committed with a deadly weapon. *Id.* at 127. Consequently, Illinois courts have consistently held that mutual combat does not exist where a defendant responds with deadly force during an altercation with an unarmed victim. *McDonald*, 2016 IL 118882, ¶ 65 (victim stabbed after fighting with and hitting the defendant); *Austin*, 133 Ill. 2d at 127 (victim shot after striking the defendant on the hand and engaging in a “fairly even” fistfight with her); *People v. Melecio*, 2017 IL App (1st) 141434, ¶¶ 14, 17 (victim shot by the defendant after someone other

than the victim punched defendant from behind); *Randall*, 2016 IL App (1st) 143371, ¶ 49 (victim shot after repeatedly hitting the defendant and calling people to “come ‘F’ him up”); *People v. Lauderdale*, 2012 IL App (1st) 100939, ¶¶ 27, 34 (victim, who was larger than the defendant, shot after punching the defendant in the jaw); *People v. Sutton*, 353 Ill. App. 3d 487, 496 (2004) (victim stabbed repeatedly after hitting the defendant with a roller skate).

¶ 46 Mutual combat, as a form of serious provocation, is distinct from self-defense. Mutual combat applies only where an intense passion motivates the defendant to willingly participate in a fight. *Sutton*, 353 Ill. App. 3d at 496. Consequently, a defendant is generally not entitled to a mutual combat instruction where his trial theory was that he unwillingly engaged in a fight in order to protect himself. *Id.*

¶ 47 Here, there was no mutual combat. Defendant testified both that he struck Raul by accident after hitting the clutch instead of the brake pedal (a contention he repeats on appeal), and that he killed Raul intentionally to prevent Raul from threatening him and Ayala in the future. Neither of these theories entitled defendant to a second degree murder instruction based on serious provocation. See 720 ILCS 5/9-1(a)(1-2), 9-2(a) (West 2010) (second degree murder occurs only where the defendant knowingly or intentionally causes death or great bodily harm); *People v. Slaughter*, 84 Ill. App. 3d 1103, 1110 (1980) (provocation connotes “an act of passion or sudden act of revenge,” not an act motivated by fear or a desire to escape an attacker).

¶ 48 On appeal, defendant supports his provocation argument with isolated statements from his testimony in which he said that the murder “happened really fast” while he “was infuriated” and “felt a lot of emotions.” Even assuming, *arguendo*, that defendant willingly fought in hot blood, his mutual combat argument still fails for at least two reasons. First, the trial evidence

showed that defendant withdrew from the fight with Raul in order to engage with Delilah, who attempted to sneak up behind him. By the time Delilah fled, Raul was already retreating from Pipes and Galindo. Defendant's own testimony established that he got into a car and drove away because he considered the fight to be over. Thus, any mutual combat that might have existed had ceased. See *People v. Thompson*, 354 Ill. App. 3d 579, 589-590 (2004) (mutual combat ended once an intervener pushed the defendant away from the victim); see also *People v. Pugh*, 187 Ill. App. 3d 860, 868 (1989) (doubting the existence of mutual combat where victim was shot after interveners separated the combatants of a fistfight).

¶ 49 Second, defendant's use of deadly force was grossly disproportionate to Raul's actions. The evidence established that defendant fought Raul while both were unarmed. Although Galindo testified that Raul was winning the fight, defendant only fought Raul for 10 to 20 seconds before more people arrived. Defendant then disengaged, and the combatants dispersed shortly thereafter. Thus, defendant's retaliation—*i.e.* running over Raul with a car—was wholly out of proportion to the fistfight, and mutual combat does not apply. See, *e.g.*, *McDonald*, 2016 IL 118882, ¶ 65 (deadly force against unarmed victim negates mutual combat).

¶ 50 We are unpersuaded by defendant's citation to *People v. Johnson*, 4 Ill. App. 3d 249 (1972). In that case, the defendant was convicted of murder after stabbing an unarmed victim in the leg with a knife during a fistfight. *Johnson*, 4 Ill. App. 3d at 250. This court reduced the conviction to voluntary manslaughter, stating that there was no pause between the fight and the stabbing to show that the defendant acted out of malice or revenge, rather than passion. *Id.* at 252. In the present case, however, there was a significant pause between the end of the fight and the fatal blow. Thus, *Johnson* is factually distinguishable. Furthermore, unlike the line of post-

Johnson cases noted above, *Johnson* itself did not address whether grossly disproportionate retaliation negates the mutual combat aspect of serious provocation, and therefore does not control here.

¶ 51 Defendant next argues that he was entitled to a serious provocation instruction because the totality of his experiences on the night of Raul’s murder was sufficient to inflame the passions of a reasonable person. In particular, defendant notes that, “through no fault of his own,” Delilah and Raul kidnapped his girlfriend, threatened harm against her, physically fought with him, and threatened his life. However, as noted, the only categories of legally-sufficient provocation recognized by our supreme court are (1) substantial physical injury or assault, (2) mutual combat, (3) illegal arrest, and (4) adultery with one’s spouse. See *McDonald*, 2016 IL 118882 ¶ 59. We have already determined that there was no mutual combat in the present case, and the latter two categories are clearly inapplicable. Similarly, there was no evidence that defendant was enraged because of a physical injury, and he does not make such an argument on appeal. Instead, defendant acknowledges that his arguments fall outside of the four categories, but asks us to “look beyond” them to a broader conception of provocation. As our supreme court has been clear on this point, we decline defendant’s invitation to expand our analysis beyond the four categories.

¶ 52 We also find no support for defendant’s contention that the recent amendment to the second degree murder statute “evinces a recognition on the part of the legislature that there are categories outside of the four recognized categories where serious provocation could be found.” Effective January 1, 2018, the legislature amended the statutory definition of “serious provocation” to read as follows:

“Serious provocation is conduct sufficient to excite an intense passion in a reasonable person provided, however, that an action that does not otherwise constitute serious provocation cannot qualify as serious provocation because of the discovery, knowledge, or disclosure of the victim’s sexual orientation as defined in Section 1-103 of the Illinois Human Rights Act.” Pub. Act 100-460, § 5 (eff. Jan. 1, 2018) (amending 720 ILCS 5/9-2(b)).

¶ 53 Initially, we note that the version of the statute under which defendant was convicted did not contain language concerning the victim’s sexual orientation, and instead defined “serious provocation” only as “conduct sufficient to excite an intense passion in a reasonable person.” 720 ILCS 5/9-2(b) (West 2010). Thus, even if the legislature intended to expand its conception of serious provocation by amending the statute, the new language would not apply in defendant’s case. Moreover, nothing in the language of the amendment implies that the legislature intended for the prior version of the statute to apply more broadly than our supreme court has interpreted. Accordingly, we reject defendant’s provocation argument to the extent that it does not conform to the four judicially-recognized categories.

¶ 54 In short, the trial court did not abuse its discretion in refusing to instruct the jury on second degree murder based on serious provocation, as there was insufficient evidence of mutual combat or any other source of legally-significant provocation. Therefore, we will not disturb defendant’s conviction for first degree murder.

¶ 55 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 56 Affirmed.