THIRD DIVISION
June 17, 2020

No. 1-17-1439

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. 15 CR 13178
	)	
ADAM RUIZ,	)	Honorable
	)	Vincent M. Gaughan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ELLIS delivered the judgment of the court.
Justices McBride and Howse concur in the judgment.

ORDER

¶ 1 *Held*: Counsel was not ineffective for failing to move to suppress cell-site location information before *Carpenter v. United States*, 138 S. Ct. 2206 (2016) was decided, or for failing to request second-degree murder instruction based on mutual combat.

¶ 2 A jury convicted defendant Adam Ruiz of the murder of two of his roommates, Samantha Welch and Celia Cruz-Reyes. During a dispute about the rent, Samantha threw something at defendant and took a swing at him, missing both times. Defendant responded by choking both Samantha and Celia and setting the building on fire. At trial, the State introduced cell-site location information (CSLI), obtained without a warrant, to establish defendant's whereabouts during and immediately after the murders.

¶ 3 Defendant argues that his attorney was ineffective for two reasons. First, although the

United States Supreme Court had not yet decided *Carpenter v. United States*, 138 S. Ct. 2206 (2016), counsel should have moved to suppress the CSLI as the fruit of a warrantless and thus illegal search. Second, counsel should have requested a second-degree murder instruction based on his "mutual combat" with Samantha. Finding no merit in either argument, we affirm.

¶ 4 BACKGROUND

¶ 5 In the fall of 2014, five young adults shared a three-bedroom apartment in the basement of a three-flat building at 4529 West Parker Avenue in Chicago. Defendant and his girlfriend, Andrea Bobadilla, shared one bedroom. Samantha and Celia, also a couple, shared another. Defendant and Samantha were half-siblings. For a time, Jocelyn Luna, defendant's friend, lived in the third bedroom. After Jocelyn moved out, the remaining roommates could not agree on how to reallocate the rent amongst themselves.

¶ 6 Defendant's brother, Xavier Ruiz, testified to the details of that dispute. Defendant told Xavier that when Samantha and Celia refused to pay more rent, he took money from their room to cover what he believed to be their fair share. On October 10, 2014, six days before they were murdered, Samantha and Celia filed a police report, in which they alleged that cash was taken from their room earlier that day. No charges were filed.

¶ 7 Xavier visited the apartment several times in the week or two before the murders. He testified that defendant and his girlfriend, Andrea, grew annoyed with Samantha and Celia and hurled insults at them after they moved their belongings into what used to be Jocelyn's bedroom. Andrea said that she "felt like *** beating up" Samantha and Celia because they "underestimated" her. Andrea rubbed Samantha's and Celia's toothbrushes against the bathtub and toilet, and she told Xavier that she put oil (of some undisclosed variety) in their milk. After checking the milk, which looked filmy and smelled foul, Xavier threw it out.

¶ 8 Around 11 p.m. on October 16, 2014, the Chicago Fire Department responded to a call placed by an upstairs neighbor who noticed smoke in the building's rear stairwell. Firefighters arrived to find a fast-burning blaze in the rear bedroom of the basement apartment. They found Samantha's body in that bedroom, and Celia's body in the hallway just outside of it.

¶ 9 Investigation by the fire marshal and chemical analysis by the Illinois State Police crime lab revealed, in sum, that the fire was started in the rear bedroom by an open flame, consistent with an intentional act. The sofa in the living room had been doused with gasoline. There was no evidence of accelerants on any other samples taken from the apartment, but the chemist testified that they could have been present elsewhere and completely consumed by the fire.

¶ 10 The fire marshal found ceiling brackets throughout the apartment for mounting smoke detectors, but no smoke detectors were installed. The owner of the building at the time, Thomas Vitello, testified that there were smoke detectors in every bedroom and in a mechanical room six days before the fire, when he visited the property with prospective buyers for an inspection.

¶ 11 The medical examiner determined that Celia was strangled to death, and that she died before the fire was set. These determinations were based on her fractured hyoid bone; extensive petechiae on her face, eyes, and lips; an absence of soot in her airway; and low levels of carbon monoxide in her blood.

¶ 12 The cause of Samantha's death, however, was not so clear. She did not have a fractured hyoid bone or extensive petechiae, the classic findings in strangulation victims. She did have a foam cone in her nostrils, which is evidence of fluid in the lungs and is sometimes seen in strangulation victims. There were faint bruises on her neck, but they were difficult to observe because of the burns in the same area. The carbon monoxide levels in her blood were lower than would be expected if she had died from smoke inhalation; but there was some soot in her upper

airway, which could indicate that she was still breathing when the fire started. All in all, it was impossible to determine with certainty whether Samantha's death was due to strangulation or inhalation of superheated gas during the fire. But either way, it was a homicide.

¶ 13 Detective Marc Leavitt of the Chicago Police Department canvassed the area for witnesses the next morning. Defendant's foster father, Shawn LeFleur, approached him outside the apartment building and gave him defendant's phone number. After exchanging voice mails with defendant, who was staying with Andrea and her mother in Lake of the Hills, Detective Leavitt and three other detectives went to interview him.

¶ 14 Defendant told the detectives that on the day of the fire, he and Andrea visited his cousin Patrick. From there, they went directly to Adam's uncle Armando. They left around 9:00 p.m. and took the tollway to Lake of the Hills, stopping at a gas station along the way.

¶ 15 After the interview, defendant consented to a search of his car. Detective Leavitt noticed a strong smell of gasoline when defendant opened the door. Defendant attributed the smell to a faulty fuel injector.

¶ 16 Meanwhile, two of the other detectives reviewed security footage from the gas station where defendant claimed that he and Andrea stopped. The footage did not indicate that they were at the gas station at the relevant time.

¶ 17 At some point during the investigation, the grand jury issued a subpoena to Verizon to produce cell-phone records for defendant's number, spanning the days immediately before and after the fire. The account was in Andrea's name, but defendant and other witnesses at trial testified that they shared the phone. Detective Leavitt gave the records to the FBI for analysis.

¶ 18 Special Agent Joseph Raschke, of the FBI's Cellular Analyst Survey Team, analyzed the records and testified at trial as an expert in historical cell-site analysis, a method of determining

the approximate location of a phone at the time of a given call by analyzing records that indicate which cellular towers the phone used to make the call. The cell-site location information is known as CSLI. The State used Agent Raschke's findings, in summary, to contradict defendant's claims about when he was at the apartment on the day of the fire and to argue that he left the city shortly after the fire department was called.

¶ 19 After the interview in Lake of the Hills, the police did not question defendant any further. By June 2015, defendant and Andrea had broken up. Andrea moved to Mississippi. Defendant moved to Denver, Colorado. There, he stayed with John Harrington, his foster father's best friend, and John's husband, Robert Dunn.

¶ 20 On June 24, 2015, defendant and Robert stayed up late talking and drinking. Robert testified that the conversation centered on defendant's life and prospects. As the focus shifted to the past, defendant grew upset. He told Robert that he strangled Samantha. He then said that he "hurt" both Samantha and Celia, that he "burned the bodies and that it took a long time," and that he saw what Samantha and Celia had been writing about him on Facebook. Robert listened and hugged defendant as he cried.

¶ 21 The conversation wound down around 1:00 or 2:00 a.m. Robert went to bed and told John to wake him in the morning to discuss something important. Around 3:00 a.m., defendant posted this message on Facebook: "Finally was able to release a great truth – feeling relaxed."

¶ 22 The next morning, Robert told John about his conversation with defendant. They agreed that John would keep his commitment to chaperone a youth trip over the weekend, as the trip would have to be canceled without him; and that they would confront defendant when John returned at the end of the weekend.

¶ 23 They did just that. During their conversation, defendant called Shawn, his foster father.

Robert and John listened in. Shawn asked, "Did you do it?" Defendant paused before answering, "Yes, sir." Shawn told defendant that he needed to "man up."

¶ 24 Defendant called the Denver police and said that he wanted to turn himself in for the murder of his sister and her girlfriend. A recording of the call was published to the jury. Denver Police Officer Robert Foster responded to the call. Defendant reiterated to Officer Foster that he wanted to turn himself in for the murder of his sister and her girlfriend.

¶ 25 Defendant was arrested in Denver. While awaiting extradition to Chicago, he attempted suicide, leaving a note that read: "I have decided that I am not worth keeping on this earth and that everyone is better off without a guy that killed his own sister."

¶ 26 In addition to the trial evidence already summarized, defendant took the stand in his own defense. He acknowledged that a rent dispute arose after Jocelyn moved out, that he took money from Samantha's and Celia's room to help cover the rent, and that they filed a police report and threatened to "press charges." But defendant consulted with an attorney he was referred to by the Illinois National Guard, in which he served at the time. Based on that consultation, he was not concerned about the matter.

¶ 27 On the night of the fire, defendant and Andrea had dinner at Armando's house. They left around 8:30 or 9:00 p.m. and returned to their apartment. There, Samantha confronted defendant about the missing money, and defendant told her that he was not going to return it because it was needed to cover Samantha's and Celia's increased share of the rent.

¶ 28 Samantha went back to her room, grabbed an object, and threw it at defendant. Defendant could not identify or describe the object. Whatever it was, it did not hit defendant. But he grew upset, stepped up to Samantha, and told her "not to fuck with [him]." Samantha swung at him but missed. Defendant turned Samantha around and put her in a choke hold until she stopped

struggling, her body went limp, and she started "snoring." Defendant laid her down on the floor.

¶ 29 Defendant turned around and saw Celia on the floor in the hallway. Like Samantha, she was "snoring." Defendant assumed she had been in a fight with Andrea, as they had been yelling at each other, but he did not see what happened between them.

¶ 30 Defendant "freaked out" and told Andrea he was worried that this would ruin his military career. Andrea told him to relax while she took care of it. By that, he assumed, Andrea meant that she would talk to Samantha and Celia and convince them not to call the police. Defendant went out to the car to smoke a cigarette. Fifteen minutes later, Andrea came out, bag in hand, and they drove to Lake in the Hills in silence. Defendant did not learn about the fire until Xavier told him about it the next day.

¶ 31 Defendant testified that when he told Robert, John, and the Denver police that he killed Samantha and Celia, he did not literally mean that he murdered them, but rather that he "felt responsible" for their deaths because "his actions"—namely, fighting with Samantha—ultimately led to that outcome. That was also what he meant in his suicide note.

¶ 32 Defendant acknowledged that he lied to the Chicago detectives about his (and Andrea's) whereabouts on the night of the fire. But he never admitted to Robert that he started the fire. In particular, he did not tell Robert that he burned Samantha's and Celia's bodies; rather, he said, in the passive voice, "that their bodies were burned," but not by him. Lastly, he testified that he kept a spare can of gasoline in the storage closet in the bathroom, along with some other auto parts, and he reiterated that the gasoline smell in his car was caused by a bad fuel injector.

¶ 33 The jury was instructed on the first-degree murder of Samantha and Celia, on theories of intentional murder, strong-probability murder, and felony murder predicated on aggravated arson. As the jury was instructed, defendant was the principal in both charges; the trial court

denied the State's request to instruct the jury, in the alternative, that defendant could be found accountable for conduct (be it setting the fire or strangling Celia) that it might have attributed to Andrea. After the jury found defendant guilty of both murders, the trial court sentenced him to natural life in prison, the mandatory sentence for a double murder.

¶ 34 ANALYSIS

¶ 35 I. CSLI

¶ 36 Defendant argues that his attorney was ineffective for failing to move to suppress the CSLI for the cell phone he shared with Andrea, because that evidence was collected without a warrant.

¶ 37 Counsel may be found ineffective if the failure to move for the suppression of evidence was objectively unreasonable, given the state of the law at the time the motion would have been filed, and if that failure prejudiced defendant. *People v. Henderson*, 2013 IL 114040, ¶ 15; *People v. English*, 2013 IL 112890, ¶ 34; see *Strickland v. Washington*, 466 U.S. 668 (1984). To show prejudice in this context, defendant must show both that the suppression argument counsel failed to raise was meritorious, and that there is a reasonable probability that the outcome of the trial would have been different had the evidence been suppressed. *Henderson*, 2013 IL 114040, ¶ 15; *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986).

¶ 38 In *Carpenter*, 138 S. Ct. at 2217, the United States Supreme Court held that a person has a legitimate expectation of privacy in the record of his or her physical movements as captured through CSLI. Thus, law-enforcement's collection of CSLI is a "search," within the meaning of the fourth amendment, and so generally requires a warrant. *Id.* at 2220-21.

¶ 39 But that was not the law while this case was pending in the trial court. Defendant was tried and convicted before *Carpenter* was decided, and "prior to *Carpenter*, a warrant was not

required for the [CSLI] records." *United States v. Zodhiates*, 901 F.3d 137, 144 (2d Cir. 2018). Defendant does not cite a single pre-*Carpenter* authority, from any jurisdiction, requiring law enforcement to obtain a warrant before collecting CSLI. But even if that was not the state of fourth-amendment doctrine at the time, he contends, by applying fourth-amendment principles and precedents as the Court applied them in *Carpenter*, counsel could—and should—have made the argument that ultimately prevailed in that case. In short, counsel should have anticipated the holding of *Carpenter*. That is not a valid basis for an ineffective-assistance claim. Counsel "cannot be deemed deficient for failing to predict" future changes in the law. *English*, 2013 IL 112890, ¶ 35; *People v. Davis*, 2014 IL App (4th) 121040, ¶ 24.

¶ 40 Granted, at the time of defendant's trial, no Illinois court of review had decided whether the collection of CSLI required a warrant. See *People v. Strickland*, 2019 IL App (1st) 161098, ¶ 65. So in all fairness to defendant, his attorney could have moved to suppress the CSLI, without running afoul of any adverse binding authority. But that is not enough to show that counsel was objectively unreasonable or professionally incompetent for not filing the motion. And that point has particular force when, as here, the weight of (persuasive) legal authority at the time was overwhelmingly adverse to such a motion.

¶ 41 For one thing, a federal statute authorized the collection of CSLI without a warrant or the showing of probable cause required to obtain one. 18 U.S.C. § 2703(d) (Government may obtain disclosure order upon showing of "specific and articulable facts" showing "reasonable grounds to believe" records are relevant and material to ongoing criminal investigation); see *Carpenter*, 138 S. Ct. at 2221 (this "showing falls well short of the probable cause required for a warrant").

¶ 42 The five federal circuits that decided, before *Carpenter*, whether the fourth amendment required law enforcement to obtain a warrant—section 2703(d) notwithstanding—all held that it

did not. *United States v. Thompson*, 866 F.3d 1149, 1156 (10th Cir. 2017); *United States v. Graham*, 824 F.3d 421, 426 (4th Cir. 2016) (*en banc*); *United States v. Carpenter*, 819 F.3d 880, 890 (6th Cir. 2016), *rev'd*, 138 S. Ct. 2206; *United States v. Davis*, 785 F.3d 498, 511 (11th Cir. 2015) (*en banc*); *In re Application of the United States for Historical Cell Site Data*, 724 F.3d 600, 611-13 (5th Cir. 2013).

¶ 43 To be clear: We are not saying that counsel should *not* have filed a motion to suppress the CSLI. Although the lower courts widely concluded that the "third-party doctrine" (see *Smith v. Maryland*, 442 U.S. 735 (1979); *United States v. Miller*, 425 U.S. 435 (1976)) authorized the warrantless collection of CSLI, barring any ruling to the contrary from the Supreme Court itself, many jurists expressed concern about the practical consequences of denying cell-phone users a legitimate expectation of privacy in the CSLI they generate, given the sheer amount of sensitive information that data may reveal about their private lives. See, *e.g.*, *Carpenter*, 819 F.3d at 893 (Stranch, J., concurring).

¶ 44 Sometimes, as in *Carpenter* itself, such doubts about the novel application of an existing doctrine will carry the day, if only after the Supreme Court's intervention. By no means would we discourage the kind of vigorous advocacy that seeks to ultimately transform the law. But the competent representation guaranteed by the Sixth Amendment does not demand counsel with the wherewithal to usher in legal change of this magnitude.

¶ 45 Nor does it require counsel to scour every jurisdiction in search of legal authority—if there was any, and as far as defendant has told us, there was not—that would have supported a potential motion. Here, surveying the law at the time, and exercising reasonable professional judgment, counsel could have concluded that a motion to suppress the CSLI stood little or no chance of success. Thus, defendant cannot show either that counsel was deficient, or that he was

prejudiced by the failure to file a motion to suppress.

¶ 46 One final point. We have not decided whether *defendant* had a legitimate expectation of privacy in the CSLI collected from a cell phone listed in *Andrea*'s name. Defendant assumes, without argument, that the brief testimony that they "shared" the phone sufficed to establish *his* legitimate expectation of privacy in the location information generated by the phone. See *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978); *People v. Rosenberg*, 213 Ill. 2d 69, 78 (2004) (defendant's burden to establish legitimate expectation of privacy). That may or may not be true, depending on the details. See *Rosenberg*, 213 Ill. 2d at 78 (inquiry is fact-intensive). But because the issue has not been briefed, and because it is unnecessary to our resolution of the case, we leave it aside. Our holding should not be taken to imply anything about how this aspect of fourth-amendment doctrine applies in the context of "shared" cell phones.

¶ 47 II. Mutual combat

¶ 48 Defendant also argues that his attorney was ineffective for failing to request a second-degree murder instruction, based on his "mutual combat" with Samantha.

¶ 49 A person commits second-degree murder, as relevant here, if he commits first-degree murder while acting "under a sudden and intense passion resulting from a serious provocation by the individual killed." 720 ILCS 5/9-2(a)(1) (West 2018). A provocation is "serious" if it would excite such a passion "in a reasonable person." *Id.* § 9-2(b). One type of serious provocation is "mutual quarrel or combat," defined as (1) a fight or struggle that both parties enter willingly; or (2) where two people, "upon a sudden quarrel and in hot blood, mutually fight upon equal terms," resulting in death. *People v. McDonald*, 2016 IL 118882, ¶ 59.

¶ 50 Because second-degree murder is a lesser-mitigated offense, rather than a lesser-included offense, the decision whether to request a second-degree murder instruction lies within counsel's

strategic control of the case, with all of the deference that entails. *People v. Wilmington*, 2013 IL 112938, ¶¶ 44-48, 51-52; *People v. Edmonson*, 2018 IL App (1st) 151381, ¶ 40.

¶ 51 Although defendant pays lip service to this point, the crux of his argument is that counsel actually has *no* strategic control over this decision. His argument goes like this: Because the jury cannot find a defendant guilty of second-degree murder without finding that he committed first-degree murder, the defense has "nothing to lose and everything to gain" by giving the jury the option of finding a mitigating factor that reduces the crime to second-degree murder. Thus, there can be no strategic reason for failing to request a second-degree murder instruction when the evidence supports one. That failure always, and necessarily, amounts to deficient representation.

¶ 52 We reject this bright-line rule. It is not true that a defendant has "nothing to lose," as a matter of legal principle, by having the jury instructed on second-degree murder. Defendant's argument overlooks the reality that jury verdicts are sometimes the product of juror lenity and compromise. See *United States v. Powell*, 469 U.S. 57, 65 (1984) (defendant cannot challenge jury verdicts as inconsistent, because they may be product of "juror lenity"). The option to find a mitigated offense like second-degree murder gives the jury an opportunity to exercise its power of lenity and reach a compromise verdict. In some cases, that will be a prudent strategy that gives the defendant his best chance to cut his losses. But in other cases, the defendant may not want to give the jury a compromise option and may prefer an all-or-nothing verdict. See *People v. Barnard*, 104 Ill. 2d 218, 231–32 (1984); *People v. Walton*, 378 Ill. App. 3d 580, 589 (2007). Either way, it is counsel's role to make this calculation, exercising reasonable professional judgment, as a matter of trial strategy. *Barnard*, 104 Ill. 2d at 231-32.

¶ 53 Defendant would take that calculation out of counsel's hands, subsuming it instead under a bright-line rule that counsel is *per se* deficient for forgoing an available second-degree murder

instruction. This proposed rule, in other words, would effectively require counsel to have the jury instructed on any applicable theory of second-degree murder. Suppose, for argument's sake, that counsel was bound by this rule. And suppose counsel thinks the most promising trial strategy, or at least a reasonable trial strategy, is to argue for an outright acquittal. (That was the case here. More on this shortly.) Certainly, defendant does not mean that counsel, on pain of being deemed deficient, must always abandon a reasonable argument for a straight acquittal in favor of a theory of mitigation. So what is counsel to do in these circumstances?

¶ 54 One option is to argue theories of acquittal and mitigation in the alternative. For example: "Defendant did not commit the murder; but if he did, it was mitigated by his mutual combat with the victim." Counsel might reasonably pursue this strategy in a given case. But the strategy does run the risk of making the defense look "unprincipled" in the eyes of lay jurors, and of conceding elements of the prosecution's case that the defense may do well *not* to concede. *Edmonson*, 2018 IL App (1st) 151381, ¶ 43 (quoting *Wilson v. United States*, 414 F.3d 829, 831 (7th Cir. 2005)). Thus, counsel generally is not required to present incompatible theories in the alternative, and counsel generally may not be deemed deficient for declining to do so. *Id.* ¶¶ 42-46.

¶ 55 The other option is for counsel to request a second-degree murder instruction but argue exclusively for an outright acquittal, leaving the mitigated offense dangling, so to speak, as an unargued option for the jury to consider on its own. It might be reasonable for counsel to offer the jury this option in certain circumstances (see *id.* ¶ 41), but counsel is certainly not required to request an instruction that is incompatible with the defense's own theory of the case, and counsel can hardly be deemed incompetent for failing to do so. *Barnard*, 104 Ill. 2d at 231-32; *People v. White*, 2011 IL App (1st) 092852, ¶ 70; *Walton*, 378 Ill. App. 3d at 589.

¶ 56 In short, we cannot agree that it is always unreasonable for counsel to forgo a second-

degree murder instruction when the defendant is entitled to one. That bright-line rule would needlessly tie counsel's hands and might very well undermine a reasonable trial strategy that counsel has chosen. It is for reasons like this that the Supreme Court "has abjured bright-line rules under the sixth amendment * * *." *Wilson*, 414 F.3d at 831. Better to leave the matter to counsel's professional judgment.

¶ 57 It would be an entirely different matter if counsel argued a theory of mutual combat to the jury but failed to request a corresponding instruction; that *would* be deficient representation, because absent an instruction, the jury has no legal basis for finding in the defendant's favor on that issue. See, *e.g.*, *Edmonson*, 2018 IL App (1st) 151381, ¶ 44; *White*, 2011 IL App (1st) 092852, ¶ 69. But counsel did not argue this theory. Instead, counsel made the case for a straight acquittal, arguing that the State failed to prove, beyond a reasonable doubt, that defendant killed Samantha (or Celia).

¶ 58 That was a reasonable trial strategy. Counsel exploited the medical examiner's inability to determine the cause of Samantha's death. Defendant admitted that he strangled Samantha, or at least put her in a "choke hold," but he testified that she was still alive when he let go, and the medical examiner did not find otherwise. Thus, to prove that defendant murdered Samantha, the State had to prove that he set the fire.

¶ 59 The only eyewitness testimony on this point came from defendant himself, who testified, in so many words, that Andrea set the fire. And counsel pointed to evidence that Andrea had her own score to settle with Samantha and Celia; she had even stooped so low as to put oil in their milk and rub their toothbrushes in the toilet. What's more, Andrea was in the apartment at the time of the confrontation, raising the possibility not only that she started the fire, but also, as defendant suggested in his testimony, that she was the one who choked Celia. (In this context,

defendant emphasized Andrea's military-level fitness and strength, as a fellow member of the National Guard.) All of which, if believed by the jury, meant that defendant was not guilty of *either* murder.

¶ 60 To be sure, this strategy had its sticking points—most obviously, defendant's apparent admissions that he murdered Samantha and Celia and "burned their bodies," implying that he started the fire. But counsel pointed out that Robert acknowledged he had been drinking for several hours when defendant first made these admissions to him, and that defendant explained what he really meant in his testimony—not that he literally murdered anyone, but that he felt guilty for precipitating the fight that ultimately led to two deaths, especially the death of his half-sister.

¶ 61 While this all-or-nothing strategy was not successful, it was not unreasonable. Counsel's representation was vigorous and entirely competent. Counsel was not deficient for failing to request a second-degree murder instruction that was incompatible with a reasonable theory of defense.

¶ 62 This conclusion is further supported by the weakness of the mutual-combat theory that defendant says counsel should have presented, at least in the form of an instruction. As we have noted before, this point goes to both the deficiency and prejudice prongs of *Strickland*: Given the weakness of that theory, it was reasonable for counsel to argue exclusively for a full acquittal, based on reasonable doubt; and given its weakness, we are confident that the absence of a mutual-combat instruction did not affect the verdict. *Edmonson*, 2018 IL App (1st) 151381, ¶ 47.

¶ 63 This was not the classic case of mutual combat—a roughly evenly-matched bout of one-on-one fisticuffs, fought by two "willing" parties—that is, parties who shared a "common intent" to engage in such a fight. *McDonald*, 2016 IL 118882, ¶ 59; *People v. Flores*, 282 Ill. App. 3d

861, 867 (1996) (citing 40 C.J.S. *Homicide*, § 83, at 465 (1991)). Rather, this was a case of one party (defendant) wildly overreacting and physically dominating another party (Samantha). Because the provocation required for a finding of mutual combat must be enough to excite an "intense passion in a reasonable person," it must be "serious," not "slight"—serious enough, that is, to mitigate the defendant's culpability for killing the victim. 720 ILCS 5/9-2(a)(1), (b) (West 2018); *People v. Austin*, 133 Ill. 2d 118, 126-27 (1989). And the defendant's reaction, of killing the victim in an impassioned state, cannot be out of all proportion to the alleged provocation. *Austin*, 133 Ill. 2d at 167-27; *People v. Lauderdale*, 2012 IL App (1st) 100939, ¶ 26.

¶ 64 Noting that a defendant is entitled to a jury instruction if there is any evidence, however slight, to support it (*Edmonson*, 2018 IL App (1st) 151381, ¶ 58), defendant points to Samantha's conduct, at the outset of the confrontation, as sufficient evidence of mutual combat under this standard. For one thing, it is not enough for defendant to show that there was "slight" evidence of mutual combat, such that the instruction would have been given; he must show a reasonable probability that the jury would have convicted him on the lesser, uninstructed, offense only. *Id.* (instruction supported by evidence, but defendant could not meet "far more demanding" standard of *Strickland* prejudice); see *Strickland*, 466 U.S. at 694 (defendant must show that "result of proceeding," i.e., verdict, would have been different absent alleged deficiency).

¶ 65 But even more importantly, what defendant calls *slight evidence* of provocation is really evidence of *slight provocation*. True, Samantha threw something at defendant. But it did not hit him; and whatever it was, there was no evidence that it posed any danger, as defendant could not identify or even describe the object in the least. In response, defendant stepped up to Samantha, visibly angry and vaguely threatening. She threw a punch and missed again.

¶ 66 All told, Samantha never actually touched defendant. Yet defendant responded by killing

her. And not in the course of responding in kind, that is, by throwing a punch of his own. Rather than a bout of fisticuffs, what followed Samantha's initial conduct was a serious escalation of the confrontation, and a physical domination of Samantha, by defendant. He turned her around and choked her, at least to the point of unresponsiveness; and if that did not kill her, he finished the job by setting fire to the apartment.

¶ 67 (Recall that the medical examiner was unable to conclude that Samantha died as a result of being choked, and the trial court refused the State's request for an accountability instruction, in case the jury found that Andrea set the fire. Thus, it is hard to see how the jury could have found defendant guilty beyond a reasonable doubt of Samantha's murder unless it found that he set the fire.)

¶ 68 We are confident that the jury would have found defendant's reaction to be out of all proportion to the alleged provocation. A reasonable person does not react to someone throwing an unidentified object and a single punch, neither of which landed, by strangling that person and setting the house on fire. Not every fight—if there was a "fight" here at all, in the sense of a physical altercation—rises to the level of mutual combat. Indeed, if *this* were provocation enough to mitigate a killing, then virtually any confrontation, of the most minimally physical sort, would qualify. A reasonable jury would not have found mutual combat, or mitigation, here.

¶ 69 There are further reasons we could provide for this conclusion, but we will leave the matter at that. Defendant was not prejudiced by the absence of a mutual-combat instruction, and counsel was not ineffective for failing to request that instruction.

¶ 70 CONCLUSION

¶ 71 For these reasons, we affirm defendant's conviction and sentence.

¶ 72 Affirmed.