FIFTH DIVISION
February 10, 2011

No. 1-08-3454

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, Illinois,
	)	County Department,
	)	Criminal Division.
	)	
	)	No. 05 CR 13721
v.	)	
	)	
AMILCAR RODRIGUEZ,	)	Honorable
	)	Clayton J. Crane,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE JOSEPH GORDON delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Howse concurred in the judgment.

ORDER

HELD: The trial court did not err (1) when it barred defendant's expert witness from testifying as to his conclusion that defendant acted under a sudden and intense passion when he shot and killed the victim, and (2) when it barred defendant from raising a theory of second degree murder in his opening statement. Defendant's mittimus is corrected to properly reflect the time he served prior to sentencing.

Following a jury trial, defendant Amilcar Rodriguez was found guilty of first degree murder for the shooting death of the victim, Angel Rosario. Defendant was sentenced to 50 years imprisonment, and this appeal followed. On appeal, he now claims (1) that the trial court erred when it prohibited his expert witness from testifying that he acted under a sudden and intense passion when he shot and killed the victim, (2) that the trial court erred when it prohibited him from raising a theory of second degree murder in his opening statement, and (3) that his mittimus should be corrected to reflect an additional ten days credit for time spent incarcerated prior to sentencing. For the foregoing reasons, we affirm, but correct defendant's mittimus.

I. BACKGROUND

Following his arrest, but prior to the commencement of defendant's trial, the court conducted a fitness hearing and determined that defendant was fit to stand trial, provided he continued taking medication for his depression. Also prior to trial, the State filed two motions *in limine*. The first sought to preclude defendant from stating that he acted under sudden and intense passions or provocations, during opening statements because the evidence to be adduced at trial would not support such a theory. The court granted that motion, precluding defendant from making any reference to second degree murder in his opening statement. The court deferred its ruling on whether to give a second degree murder jury instruction until after it heard the evidence.

The State filed a second motion *in limine* seeking to preclude Dr. Carl Wahlstrom, defendant's expert witness, from testifying that defendant shot the victim while acting under a

sudden and intense passion. The court granted this motion as well, stating, "The ultimate question of sudden and intense passion is within the purview of the fact finder. I will allow Dr. Wahlstrom to testify as to his testing of [defendant] and his state of mind at the time he tested him. He may not testify as to the conclusion as to sudden and intense passion."

Defendant's trial commenced on September 23, 2008. During his opening statement, defendant made no mention of a sudden and intense passion, but did make repeated references to defendant's "major depression" which was "severe and recurrent."

Following opening statements, the State commenced presentation of its evidence. It first called Betsaida Rosario, the victim's daughter. She testified that on May 15, 2008, she was watching television in her home when she heard "a couple of pops." She proceeded out to her garage and saw the victim lying dead on the floor of the garage while Loida was in her automobile parked in the alley.

Loida Rodriguez, defendant's wife, testified next for the state. She indicated that as of May 2005, she and defendant had been married for 23 years, but had separated more than a year earlier due to changes in defendant's behavior. She and defendant worked with the victim, and they had known the victim for approximately three years prior to his death. Loida began seeing the victim romantically two months before his death.

On the afternoon of May 15, 2005, Loida was speaking to the victim near his home. She was sitting in the driver's seat of her vehicle outside the victim's home while the victim knelt beside it. The two were not touching. At that time, she noticed defendant approaching in his vehicle and instructed the victim to go inside his home. The victim walked into his garage and

defendant exited his vehicle and followed him with a revolver in hand. Defendant shot the victim twice and then came towards Loida, placing the revolver against her left temple. Defendant did not shoot her, but instead walked back into the garage and shot the victim four more times. He returned to Loida's car and placed the gun against her head again, but did not fire. Defendant then walked back to his vehicle and drove away.

On cross-examination, Loida indicated that defendant attempted suicide earlier that year in February 2005 by mixing pills and alcohol. She stated that she and her children visited defendant multiple times while he was hospitalized following that attempt.

The State subsequently called Chicago police officer Tracy Graffeo. Graffeo testified that she was patrolling the area at the time of the shooting when she heard six gunshots. As she drove towards the sound of the gunfire, she observed defendant driving the wrong way down a one-way street and followed him until he pulled over. Graffeo asked defendant to exit the vehicle and as he did, she noticed the butt of a handgun on the floor of the driver's side of the vehicle. She then handcuffed defendant and read him his *Miranda* rights and immediately thereafter, defendant stated, "I did it, I shot him." Defendant informed Graffeo "that the victim was in love with his wife and had put an order of protection against him, and that he wanted the victim to stay away from his wife and he didn't want her to have an affair with him anymore." Defendant also told her that he went to the victim's home "to tell him to stay away from his wife," but when he saw Loida there, he decided to shoot the victim.

Assistant State's Attorney Lawrence O'Reilly testified that on May 15, 2005, he spoke with defendant and obtained his consent to give a videotaped statement. The State then played

that video to the jury. In that statement, defendant stated that two days before the shooting, he saw a group of men fighting. During the fight, one of the men threw a gun to the ground, which defendant picked up and later placed in his vehicle. Defendant stated that he had talked to the victim previously about the victim's relationship with his wife, telling him to "[k]eep away from her. I love that woman and I, I gonna fight, you know, for, for her," and warning him to "keep away from her because you know it's dangerous to play that game." Defendant indicated that when he drove up to the victim's home, he observed the victim speaking to Loida while she sat in her car. When the victim saw defendant, he walked away from Loida towards his garage and defendant followed him with the gun he had found earlier in hand. According to his videotaped statement, defendant fired six shots at the victim and returned to his vehicle. He denied pointing the gun at Loida, but stated that he attempted to shoot himself, but the gun was out of bullets. Defendant was then arrested by officer Graffeo and placed in a police line-up with several other individuals. He told one of the men in the lineup that he "shot [the victim] because he was messing with [his] girl," and that he "didn't care what was gonna happen to [him], [he] would do 30, 40 or 50 years."

After the State rested, defendant first called his son, Amilcar Rodriguez, Jr., to testify. He stated that in 2004, he returned home to learn that his father had attempted suicide and "wasn't the same person." Defendant looked healthy, "[b]ut as far as mental wise, you could see he would, he looked confused as far as his relationship with [Loida]." Amilcar Jr. learned that his father again attempted suicide in February 2005, and observed drastic changes in defendant's appearance. At that time, defendant and Loida had been separated for several months.

Jacqueline Rodriguez, defendant's daughter, testified next on his behalf. She stated that defendant moved in with her in October 2004 after he and Loida separated because defendant "was going through a really bad depression." On February 7, 2005, Jacqueline informed defendant that Loida was seeing the victim romantically. The next morning defendant was taken to the hospital after attempting suicide. Jacqueline further testified that on the day of the shooting, defendant asked to use her vehicle. After learning of his arrest, she retrieved the vehicle and found groceries in the trunk.

Defendant called Dr. Carl Wahlstrom as his final witness. Wahlstrom was certified as an expert in forensic psychiatry without objection by the State. Wahlstrom testified that he examined defendant twice, in May and June 2006 for a total of three hours. Prior to those examinations, he spoke with defense counsel, reviewed defendant's hospital records, police reports, and videotaped statement. Based on those interviews, Wahlstrom opined that defendant "had been suffering from major depression, as well as alcohol dependence. And then to a lesser degree, periodic cocaine abuse." He also opined that defendant had a "life circumstances problem" due to his feelings of guilt for the decline of his marriage and his constant belief that Loida was having an affair. Defendant told Wahlstrom that on the day of the shooting, he drove by the victim's home as he often did, and observed the victim next to Loida's vehicle. Defendant became "extremely overwhelmed and extremely upset" and shot the victim as he was running in into his garage. Defendant then pointed the gun at his head and pulled the trigger, but it was out of bullets. Based on his evaluation of defendant, Wahlstrom opined that defendant's mental disorders were "acute stressors and were also chronic stressers and were important elements in

the commission of the offense itself." He further stated that those stressors "had profound affects on his thinking and judgment and behavior at the time of the offense."

Under cross-examination, Wahlstrom testified that although defendant's depression had a "profound" effect on his thinking and behavior, he believed that defendant "knew his actions were wrong" and appreciated the criminality of his conduct.

Defendant did not testify. The defense rested and the court, over the State's objection, instructed the jury on second degree murder based on a sudden and intense passion resulting from serious provocation by the victim. The jury found defendant guilty of first degree murder and further found that he personally discharged a firearm, causing the victim's death. The court denied defendant's motion for a new trial and sentenced him to 50 years' imprisonment, granting him 1279 days' credit for time already spent incarcerated. This appeal followed.

II. ANALYSIS

On appeal, defendant raises three claims, arguing (1) that the court erred when it barred him from eliciting testimony from Wahlstrom that he acted under a sudden and intense passion when he shot the victim, (2) that the court erred when it barred him from raising a theory of second degree murder in his opening statement, and (3) that his mittimus should be corrected to reflect 1289 days of incarceration rather than the 1279 the court awarded him. We will address these contentions in turn.

A. Alleged Error Relating to the Testimony of Wahlstrom

Defendant first contends that the court erred when it granted the State's motion *in limine* precluding Wahlstrom from testifying that defendant acted under a sudden and intense passion

when he killed the victim. He argues that this testimony was proper and would have aided the jury in deciding whether or not to find him guilty of second degree murder, his sole defense. Defendant further argues that we should review the court's decision *de novo* rather than under an abuse of discretion standard because its ruling "is solely dependent on a legal interpretation rather than matters of fact-finding or credibility."

The State, on the other hand, argues that the court was within its discretion when it granted the State's motion precluding testimony of Wahlstrom regarding defendant's state of mind at the time of the shooting.

At the outset, we agree with the State that we should review the court's decision for an abuse of discretion. While defendant concedes that generally the decision to grant or deny a motion *in limine* will not be reversed absent an abuse of discretion, (*People v. Kirchner*, 194 Ill. 2d 502, 538 (2000)) he argues that because the court's ruling was based solely on a question of law, our review should be *de novo*. See *People v. Aguilar*, 265 Ill. App. 3d 105, 109 (1994). Specifically, defendant contends that the court's decision regarding the admissibility of Wahlstrom's testimony was entirely legal in nature, and therefore it was not required to weigh facts or assess credibility, but instead simply apply the law. We disagree.

There is ample precedent stating that a court's ruling on a motion *in limine* will not be reversed "unless it is arbitrary, fanciful or unreasonable or no reasonable person could take the same view as the court or the court applied an impermissible legal standard." *People v. Hulitt*, 361 Ill. App. 3d 634, 637 (2005), citing *Kimble v. Earle M. Jorgenson Co.*, 358 Ill. App. 3d 400, 408 (2005). While it is true that a reviewing court may review an evidentiary decision *de novo*,

this exception only applies in situations where "a trial court's exercise of discretion has been frustrated by an erroneous rule of law." *People v. Williams*, 188 Ill. 2d 365, 369 (1999). Our supreme court dealt with a similar issue in *People v. Caffey*, 205 Ill. 2d 52 (2001). There the court rejected the defendant's contention that it should review the trial court's decision to exclude hearsay statements *de novo*, and instead reviewed the decision under an abuse of discretion standard, stating "The decision whether to admit evidence cannot be made in isolation. The trial court must consider a number of circumstances that bear on that issue, including questions of reliability and prejudice." *Coffey*, 205 Ill. 2d at 89.

Here, the decision to restrict Wahlstrom's testimony, as well, required the court to consider a number of factual circumstances, specifically whether expert testimony was necessary to help the jury to determine defendant's state of mind after witnessing the victim speaking to his wife. The court found that the jury was in a better position than Wahlstrom to determine defendant's mental state at the time of the shooting. That determination, the court stated, was "within the purview of the fact finder" and would therefore restrict the intervention of expert testimony on the matter.

In *Hulitt*, the trial court restricted the testimony of an expert witness who sought to testify as to the defendant's mental state at the time of the offense, finding it irrelevant and not outside the jury's understanding. The court reviewed that decision for an abuse of discretion. *Hulitt*, 361 Ill. App. 3d at 636-37. Here, we are faced with a similar situation where the court found the subject of Wahlstrom's testimony within the purview of the jury and therefore we will , as well, review the court's decision for an abuse of discretion.

The rules governing the admissibility of expert testimony in Illinois are well established. Our supreme court recently held that

> "expert testimony is only necessary when the subject is both particularly within the witness's experience and qualifications and beyond that of the average juror's, and when it will aid the jury in reaching its conclusion. [Citation.] Expert testimony is not admissible on matters of common knowledge unless the subject is difficult to understand and explain. [Citation.] A trial court does not err in barring expert testimony where the matter at issue is not beyond the ken of the average juror." *People v. Becker*, 2010 Ill. LEXIS 1563 at 28-29 (Dec. 2, 2010).

Furthermore, an expert may not testify "with respect to a key legal term in a case if the jury might look to the expert witness for legal guidance on the matter rather than the court."*People v. Munoz*, 348 Ill. App. 3d 423, 441 (2004), quoting *Sohaey v. Van Cura*, 240 Ill. App. 3d 266, 283 (1992).

With respect to an expert seeking to testify as to a defendant's mental state at the time of a crime, our courts have held that such an issue is "a question of fact to be determined by the jury." *Hulitt*, 361 Ill. App. 3d at 637, quoting *Raines*, 354 Ill. App. 3d at 220. Allowing expert testimony regarding that mental state would "usurp[] the province of the jury." *People v. Pertz*, 242 Ill. App. 3d 864, 903 (1993).

Furthermore, our law suggests that an expert witness who was not present with a defendant while he or she commits a crime, is incapable of opining that said defendant acted with a specific mental state. See *Pertz*, 242 Ill. App. 3d at 902 (because the expert did not observe the

defendant on the night of the victim's murder, "it would have been impossible for him to opine with a reasonable degree of medical and psychiatric certainty" whether the defendant acted intentionally) and *Hulitt*, 361 Ill. App. 3d at 639 (an expert not present during the commission of a crime "would only be able to testify to an opinion formed some three years after the offense rather than from personal observation at or near the time of the offense").

In the instant case, defendant claims that the court should have permitted Wahlstrom to testify that defendant was acting under a sudden and intense passion resulting from an extreme provocation when he shot the victim because "the interplay between [defendant's emotions] and [his] clinical diagnoses" are not within the common knowledge of the jury. That testimony, he contends, would have assisted the jury in determining whether he acted with the requisite provocation to mitigate first degree murder to second degree murder. We disagree.

Numerous Illinois cases have held that expert testimony is not required to explain the effects of a defendant's mental condition at the time of a crime to a jury. In *Elder*, the appellate court was faced with an almost identical situation. There, the defendant had a psychologist conduct numerous tests on him prior to trial and sough to have him testify that, at the time he killed the victim, he was suffering from a "dependent personality pattern" and acted "under a sudden and intense passion resulting from serious provocation." *People v. Elder*, 219 Ill. App. 3d 223, 225 (1991). Prior to trial, the State filed a motion *in limine* to exclude the psychologist from testifying. The court granted that motion in part, allowing him to testify as to the tests he conducted on the defendant, their results, and his opinions concerning the defendant's personality. He was restricted, however, from testifying as to the defendant's state of mind at the

time of the offense or that he acted under a sudden and intense passion as a result of serious provocation because such testimony "was not beyond the common understanding of the jury." *Elder*, 219 Ill. App. 3d at 225. On appeal, the reviewing court found that the trial court did not err in restricting the expert's testimony, stating that "[t]he question of fact of the defendant's mental condition at the time of the crime is a question of fact to be determined by the trier of fact. *** [A] jury is capable of determining whether the defendant was acting under a sudden and intense passion as a result of serious provocation." *Elder*, 219 Ill. App. 3d at 226.

In *Hulitt*, the defendant sought to introduce expert psychological testimony that she suffered from postpartum depression and was unable to appreciate the danger of her actions on the night of the offense. *Hulitt*, 361 Ill. App. 3d 636. The psychologist was not permitted to testify at trial and defendant subsequently appealed her conviction. Affirming the defendant's conviction, the appellate court held that the effects of defendant's postpartum depression, coupled with the stresses of extreme poverty and raising three children, were not outside the knowledge of the jury and thus did not warrant expert testimony. Specifically, the court stated, "[i]t does not require an expert to explain that defendant may have been depressed and had trouble coping with three children. It does not require an expert to explain that defendant was *** 'desperate in tragic circumstances' and unable to take care of one child, let alone three." *Hulitt*, 361 Ill. App. 3d at 638.

In *Ambro*, the defendant murdered his wife after she revealed that she was having an extramarital affair. Prior to her death, the defendant and his wife had been experiencing marital problems and he had attempted suicide, Defendant was convicted of first degree murder and

appealed, arguing, *inter alia*, that the trial court erred by refusing to permit expert testimony regarding his psychiatric condition at the time of the offense, which he contended would have supported his defense of voluntary manslaughter (now second degree murder). *People v. Ambro*, 153 Ill. App. 3d 1, 7 (1987), *rev'd on other grounds*, *People v. Chevalier*, 131 Ill. 2d 66 (1989). Affirming the lower court's decision, the appellate court held that, contrary to the defendant's contentions, the jury could have "arrived at its decision based on its knowledge without the help of expert testimony." *Ambro*, 153 Ill. App. 3d at 8.

Similarly, in *People v. Mertz*, 218 Ill. 2d 1 (2005), the defendant contested the admission of expert testimony regarding his mental state. At his murder trial, the trial court permitted the State to proffer expert psychological testimony regarding the defendant's anger towards women and his need for power and control at the defendant's murder trial. *Mertz*, 218 Ill. 2d at 75. Our supreme court held that this testimony should not have been admitted, finding that the subject of the expert testimony was "commonsense," "obvious to the jury," and that they could have reached the same conclusion without expert testimony. *Mertz*, 218 Ill. 2d at 75-76. The court went on to hold, however, that even if the admission of that testimony was in error, its admission was harmless beyond a reasonable doubt.

Here, the factual underpinnings from which Wahlstrom's testimony was gleaned were not so esoteric as to require an expert to connect them to his conclusion that defendant acted under a sudden and intense passion. As noted earlier, the court permitted Wahlstrom to testify that after interviewing and testing defendant, he determined that defendant was suffering from depression, alcohol and cocaine abuse, and a "life circumstances problem," all of which had profound effects

on defendant's thinking and behavior at the time of the offense. To establish the nexus between these facts and the likelihood that defendant acted under a sudden and intense passion did not require expert testimony, but could well have been within the common knowledge of the jury. As such, the preclusion of Wahlstrom's conclusion as to defendant's mental state at the time of the killing would have been well within the latitude of the court's discretion in its determination that no expert testimony was needed to interpret those facts and permit the jury to arrive at their own conclusion as to defendant's state of mind. This conclusion is consistent withthe line of authority represented by *Hulitt*, *Elder*, and *Ambro*, where the courts upheld restrictions on expert testimony which were not outside the common knowledge of the jury.

Defendant, however, contends that the aforementioned cases are inapplicable and instead insists that we instead rely on *People v. Strader*, 278 Ill. App. 3d 876 (1996). In that case, the defendant on trial for first degree murder sought to offer the expert testimony of Dr. Larry Taliana, a psychologist who examined him after his arrest. Taliana would have testified that, "based on a combination of factors, including defendant's background, his psychological makeup, and his intoxication at the time of the offense, defendant acted out of a sudden and intense passion." *Strader*, 278 Ill. App. 3d at 881. The trial court barred Taliana's testimony in its entirety. The defendant was subsequently convicted of first degree murder and appealed, arguing that the exclusion of Taliana's testimony denied him his right to a fair trial. On appeal, the appellate court found that the trial court erred by completely barring Taliana's testimony, holding that portions of his testimony would have been outside the common knowledge of the jury. This testimony, it stated, "would have covered his interviews of defendant, the numerous

psychological tests of defendant, and the results of those tests, as well as his conclusion that defendant was acting under a sudden and intense passion." *Strader*, 278 Ill. App. 3d at 883. The court held that the subject matter of this testimony, specifically Taliana's tests and interviews with the defendant, was not entirely within the common knowledge of the jury, and therefore was admissible. That erroneous exclusion notwithstanding, the appellate court went on to hold that the trial court's error was harmless and even if Taliana had been permitted to testify, the defendant was not entitled to a new trial in light of a lack of evidence of reasonable and adequate provocation and the overwhelming evidence of his guilt. *Strader*, 278 Ill. App. 3d at 885.

In *Strader*, the appellate court criticized the trial court's decision to *completely* bar the defendant's expert from testifying. Because the trial court not only prohibited testimony regarding defendant's mental state at the time of the offense, but also testimony regarding tests and interviews he conducted with the defendant, the appellate court found that defendant was denied a fair trial because portions of Taliana's testimony were outside the common knowledge of the jury. *Strader*, 278 Ill. App. 3d at 883.

Strader does not appear to challenge a trial court's discretion to preclude the admission of an expert's naked conclusion alone, devoid of any factual underpinnings. Instead, at best, it questions a court's discretion to exclude that conclusion if it is accompanied by testimony as to its technical bases that are beyond the ken of an average juror. *Strader* does not purport to sanction the overall admissibility of an expert's conclusion that a murder was committed under a sudden and intense passion where the underlying facts upon which that opinion is based are well within the understanding of an average jury based upon their common knowledge and

experience.

Consonantly, *Strader* distinguished between data which the jury can interpret based upon their common knowledge and data which would be more technical and esoteric in nature, stating "[w]hile the jurors in this case may have had vast amounts of common sense about the general subject of psychology, this court is not prepared to say that the entire field of psychology is a matter of knowledge common to all." *Strader*, 278 Ill. App. 3d at 883. In that regard, the basis for the psychological testimony in *Strader* appeared to be predominately technical and scientific, in that it consisted of "interviews of defendant, the numerous psychological tests of defendant, and the results of those tests," which the court described as "specialized tools designed to give the psychologist precise information regarding defendant's mental condition." *Strader*, 278 Ill. App. 3d at 883.

In this case, the basis for Wahlstrom's conclusion that defendant acted under a sudden and intense passion as a result of serious provocation by the jury was predicated upon factual observations which, on their face, were not beyond the common understanding of the jury, thus enabling the jury to form a connection between the results of these tests and the ultimate conclusion without hearing his ultimate opinion. We are not prepared to say that the jury required expert scientific testimony to understand how defendant's depression, the dissolution of his marriage, and his wife's extramarital affair may have effected him at the time of the killing. Illinois law indicates that this knowledge is not outside the common understanding of the jury,

and expert testimony was not required in order for the jury to convict him. See *Hulitt*, 361 Ill. App. 3d 634, *Ambro*, 153 Ill. App. 3d 1. In any event, even if we were to interpret *Strader* more liberally to permit an expert to state his conclusions, notwithstanding a jury's ability to reach that conclusion by itself, absent his testimony, we would adhere to the rulings of *Hulitt*, *Elder*, *Ambro*, and *Pertz*, which would allow a court to exercise its discretion in determining when allowing such testimony is required to assist the jury's understanding.

Regardless of the inadmissibility of Wahlstrom's conclusion that defendant acted under a sudden and intense passion when he killed the victim because it was within the common knowledge of the jury, that conclusion would remain inadmissible since it would not meet, as a matter of law, the statutory prerequisites for a finding of second degree murder based on provocation. The undisputed evidence indicates that defendant learned that his wife was having an extramarital affair with the victim three months prior to the shooting. On the day of the shooting, drove to the victim's home with a firearm in his vehicle, looking for the victim. Upon finding the victim speaking to his wife, who was seated in her vehicle and not touching the victim, defendant shot and killed the victim as he ran into his garage.

The law in Illinois clearly indicates that these circumstances do not support a finding of second degree murder. According to the Illinois Criminal Code of 1961, first degree murder may be reduced to second degree murder if, at the time of the killing, the defendant is "acting under a sudden and intense passion resulting from serious provocation by the individual killed." (720 ILCS 5/9-2 (2005)). While the Illinois Supreme Court has recognized adultery by a spouse as justifying a provocation defense, that defense is limited to situations where a defendant actually

discovers the parties in the act of adultery or immediately before or after its commission. *People v. Chevalier*, 131 Ill. 2d 66, 71 (1989). That discovery must be "sufficiently serious to incite intense passion on the part of a reasonable person." *People v. Bradley*, 220 Ill. App. 3d 890, 900 (1991). The *Chevalier* court went on to note that a history of marital discord would actually undermine a defendant's argument that he acted under a sudden and intense passion brought about by a sufficient provocation by the victim. *Chevalier*, 131 Ill. 2d at 75.

In *People v. Harris*, the defendant killed his wife after finding her at home with another man who claimed to be her boyfriend. He was convicted of murder and appealed, arguing that the trial court erred by not instructing his jury on voluntary manslaughter (now second degree murder) based on provocation. *People v. Harris*, 123 Ill. App. 3d 899, 903 (1984) Affirming the lower court's ruling, the appellate court found that the defendant was not entitled to a second degree murder instruction because he did not discover the couple engaged in an act of adultery, stating:

> "It is apparent in any event that the facts of this case do not fall with any recognized form of discovery-of-adultery provocation for [second degree murder]. The defendant never testified that he believed his wife was committing, had committed, or was about to commit adultery. He testified only that he believed she was in the house with her boyfriend. *** Under these circumstances we find no error in the trial court's determination that defendant was not entitled to a voluntary manslaughter instruction based on this form of provocation." *Harris*, 123 Ill. App. 3d at 906.

Other cases as well have held that mere words or gestures on the part of the victim are insufficient to reduce first degree murder to second degree murder. See *People v. Lopez*, 166 Ill. 2d 441, 459-60 (1995) and *People v. McCarthy*, 132 Ill. 2d 331, 340-41 (1989).

Here, defendant did not offer sufficient evidence to justify a defense of second degree murder. The evidence adduced at trial makes it clear that the victim and his wife were speaking to one another outdoors while she was in her vehicle with the door closed and he was outside the vehicle. Nothing in the record suggests that Loida and the victim were engaging in, had recently engaged in, or were about to engage in an act of adultery when defendant came upon them. Furthermore, the evidence indicates that defendant learned of his wife's infidelity months before he killed the victim, further undermining his claim of sudden and intense passion. Therefore, even if we accept defendant's contention that the trial court erred in restricting Wahlstrom's testimony on the grounds that it was not within the common knowledge of the jury, because the evidence at trial was insufficient to support a finding of second degree murder, this testimony was still likely inadmissible.

B. Alleged Error Relating to Defendant's Opening Statement

Defendant next contends that the trial court erred when it granted the State's motion *in limine* barring him from mentioning "sudden and intense passions" or "provocation" in his opening statement. He contends that he was therefore unable to articulate to the jury his sole defense, namely that he should be found guilty of second degree murder because he shot and killed the victim while under a sudden and intense passion. Thus, he claims he was prejudiced

because his jury did not become aware that it could find him guilty of second degree murder until closing argument.

The State, on the other hand, contends that the court was within its discretion when it granted its motion because defendant had offered no evidence to justify a defense of provocation prior to opening statements, and ultimately was not prevented from arguing that he acted under a sudden and intense passion. We agree with the State.

Here, there would be no error in precluding defendant from arguing sudden and intense passion in his opening statement since the evidence adduced at trial was insufficient to support, as a matter of law, a finding of second degree murder. As previously discussed at length, there is a substantial line of authority which has held that the instigating circumstances in the record before us would not support a defense of second degree murder based on provocation. See *Chevalier*, 131 Ill. 2d at 71, *Harris*, 123 Ill. App. 3d at 906.

Moreover, even if they were sufficient, the in this case, we need not consider whether the court abused its discretion by improperly limiting defendant's opening statement because any such error, if it occurred, would have been harmless beyond a reasonable doubt. See *People v. Hart*, 214 Ill. 2d 490, 517 (2005). Although defendant was precluded from using the phrase "sudden and intense passion" in his opening statement, this prohibition did not, as he suggests, deny him the opportunity to "articulate any actual defense" during his opening statement. Defense counsel, on the other hand, was not precluded from alerting the jury to the underlying date upon which that conclusion was based. As previously noted, it was well within the ken of the average juror to determine whether defendant acted under a sudden and intense passion based

on these data. Defense counsel was able to assert multiple times in opening statement that defendant "suffered from major depression that was recurrent and severe," that he twice attempted suicide before the shooting and once again immediately afterwards, and that he shot the victim, his friend, after discovering him speaking to his estranged wife outside the victim's home. Furthermore, defendant called two of his children, Amilcar Jr. and Jacquelyn, who testified as to his state of mind and suicide attempts following the breakup of his marriage. Defendant also proffered the expert testimony of Wahlstrom, who opined that, at the time of the shooting, defendant was "extremely overwhelmed and extremely upset," and further opined that he "had been suffering from major depression, as well as alcohol dependence. And then to a lesser degree, periodic cocaine abuse," as well as a "life circumstances problem" relating to the breakup of his marriage and his wife's extramarital affair. Finally, the court, in an exercise of caution, gave the jury a second degree murder instruction and permitted defendant to raise sudden and intense passion in closing. Defense counsel was able to explicitly argue to the jury that defendant killed the victim while acting under a sudden and intense passion and that he should be found guilty of second degree murder, and was given an instruction to that effect..

While he was unable to state that the acted under a sudden and intense passion in his opening statement, in light of these facts, defendant was able to present his theory of defense to the jury. Therefore, for the reasons stated above, even if the trial court improperly restricted defendant's opening statement, such an error was harmless beyond a reasonable doubt.

C. Alleged Error Relating to Defendant's Mittimus

Defendant finally contends, and the State agrees, that his mittimus incorrectly reflects the amount of time he spent incarcerated prior to sentencing. The record indicates that defendant was arrested on May 15, 2005 and remained in custody until he was sentenced on November 24, 2008. While the parties agree that trial court incorrectly awarded defendant 1279 days' credit, they dispute whether defendant's mittimus should reflect 1288 or 1289 days' credit. Defendant argues he should be credited for the day he was sentenced and thus should receive 1289 days, while the State contends that defendant should not be credited for the day he was remanded to the department of corrections, and is only entitled to 1288 days. We agree with the State.

Generally a defendant must receive credit against his sentence for all time spent in custody as a result of that offense, including credit for any part of a day spent in custody. *People v. Peterson*, 372 Ill. App. 3d 1010, 1019 (2007). A defendant will not, however, receive credit for the day he is remanded to the department of corrections. *People v. Foreman*, 361 Ill. App. 3d 896, 904 (2005). Defendant's contention is that he is entitled to credit for the day he was sentenced. Our supreme court recently decided this issue in *People v. Williams*, No. 10-9361 (Jan. 21, 2011). There, the court unequivocally held that "the date a defendant is sentenced and committed to the [department of corrections] is to be counted as a day of sentence and not as a day of presentence credit" *Williams*, No. 10-9361, slip op. at 6.

Defendant further urges us to take judicial notice of the Illinois Department of Corrections website, which indicates that defendant was admitted on November 25, 2008, and award defendant an extra day's credit for November 24. This same issue was recently addressed in *People v.*

Rinehart, 2010 Ill. App. LEXIS 1396 (Dec. 17, 2010). There, the defendant requested an additional day's credit because he was not transferred to the department of corrections until the day after he was sentenced. Rejecting this contention, the court held:

> "If we accept defendant's argument, we give every criminal defendant who is not transferred to DOC on the date of sentencing a sentence-credit issue for appeal. This action is inconsistent with the goal of judicial economy. Trial courts cannot predict or control when DOC will take custody of a criminal defendant after sentencing. They should determine sentencing as if DOC will take custody the day of sentencing. DOC then should add any additional days the defendant remained in custody at the county jail awaiting transfer to DOC's custody in determining the time-served credit to which the defendant is entitled." *Rinehart*, 2010 Ill. App. LEXIS 1396 at 20-21.

The court went on to hold that it was up to the department of corrections, not the courts, to factor the day spent between sentencing and transfer in the defendant's time-served calculation.

We therefore decline to award defendant an extra day's credit for November 24, 2008. Accordingly, pursuant to Supreme Court Rule 615(b)(1), we order the clerk of the circuit court to make the necessary corrections and award defendant 1288 days' credit. 134 Ill. 2d R. 615(b)(1) ("[o]n appeal the reviewing court may *** modify the judgment or order from which the appeal is taken"); see also *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995) ("[r]emandment is unnecessary since this court has the authority to directly order the clerk of the circuit court to make the necessary corrections); *People v. DeWeese*, 298 Ill. App. 3d 4, 13 (1998) (correcting the mittimus to reflect the proper conviction).

III. CONCLUSION

For the aforementioned reasons, we affirm defendant's conviction and direct the clerk of the circuit court to amend the mittimus to reflect that defendant earned 1288 days' credit for time served.

Affirmed.