

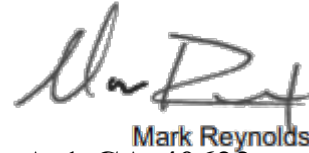
1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

Court of Appeals of New Mexico
Filed 8/29/2023 11:30 AM

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 v.



No. A-1-CA-40622

5 **GERARDO MARQUEZ,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF ROOSEVELT COUNTY**

8 **Donna J. Mowrer, District Court Judge**

9 Raúl Torrez, Attorney General

10 Maris Veidmanis, Assistant Attorney General

11 Santa Fe, NM

12 for Appellee

13 Lindsey Law Firm, LLC

14 Daniel R. Lindsey

15 Clovis, NM

16 for Appellant

17 **MEMORANDUM OPINION**

18 **BOGARDUS, Judge.**

19 {1} This case arises from the shooting death of Defendant Gerardo Marquez's
20 former girlfriend (Victim), which took place in Portales, New Mexico at the house
21 where Defendant and Victim lived together. Defendant appeals his conviction for
22 second degree murder, contrary to NMSA 1978, Section 30-2-1(B) (1994).
23 Defendant argues the district court erred by (1) limiting cross-examination of

1 Defendant’s cousin Pedro Peña, who testified for the State, and (2) admitting a video
2 recording of police officers executing a search warrant of Defendant. We affirm.

3 {2} Because this is a memorandum opinion and the parties are familiar with the
4 facts and procedural background, we reserve discussion of the pertinent facts within
5 the context of Defendant’s arguments.

6 **DISCUSSION**

7 **I. Limitations on Cross-Examination**

8 {3} Defendant argues that the district court erred by improperly limiting cross-
9 examination of Peña in two separate instances. In the first instance, defense counsel
10 sought to elicit details of a burglary Peña had previously committed, and the State
11 objected. A bench conference ensued, and the parties discussed whether, under Rule
12 11-608 NMRA, the details of the burglary were probative of Peña’s character for
13 truthfulness. In sustaining the objection, the district court stated it did not want
14 defense counsel to get into the facts of the burglary, noting that Peña had already
15 admitted to the burglary conviction on direct-examination.

16 {4} Regarding the second instance, after eliciting testimony relating to Peña’s use
17 of methamphetamine, defense counsel asked, “Where did you get [the
18 methamphetamine]?” The State objected on relevance grounds. A bench conference
19 ensued, and the parties discussed the relevance of “where [Peña] got the
20 methamphetamine.” Defense counsel argued there was another individual who

1 “[they] believe that [Peña] was with, and may be involved with the murder,” and
2 that “who [Peña] was with[, and] who he got the drugs from” was relevant. In
3 sustaining the State’s objection, the district court ruled that defense counsel could
4 not ask Peña “who he got the drugs from” but could “explore the other areas that
5 [defense counsel] mentioned—who [Peña] was with, etcetera.” Cross-examination
6 resumed, and defense counsel asked Peña when he bought the methamphetamine
7 (Peña responded that he already had it) and whether the person who sold Peña the
8 drug was present with Peña when he heard the gunshot (Peña responded in the
9 negative). Defense counsel then told the district court, “Judge, I think the person’s
10 name is relevant at this point.” The State again objected, and the district court
11 sustained the objection, stating that the court’s “ruling will stand.” Defense counsel
12 then asked Peña whether the seller was in Portales, and Peña responded that he
13 believed he purchased the methamphetamine in Clovis the night before he traveled
14 to Portales.

15 {5} Defendant contends these two rulings limiting cross-examination of Peña
16 constituted an abuse of discretion and violated the Confrontation Clause. We
17 examine these arguments in turn.

18 **A. Abuse of Discretion**

19 {6} Defendant has failed to persuade us that either ruling constituted an abuse of
20 discretion. *See State v. Campbell*, 2007-NMCA-051, ¶ 9, 141 N.M. 543, 157 P.3d

1 722 (stating that the district court abuses its discretion when its ruling is “obviously
2 erroneous, arbitrary and unwarranted,” or “clearly against the logic and effect of the
3 facts and circumstances before the court” (internal quotation marks and citation
4 omitted)); *State v. Aragon*, 1999-NMCA-060, ¶ 10, 127 N.M. 393, 981 P.2d 1211
5 (“There is a presumption of correctness in the district court’s rulings. Accordingly,
6 it is [the d]efendant’s burden on appeal to demonstrate any claimed error below.”
7 (alterations, internal quotation marks, and citation omitted)).

8 {7} To the extent Defendant argues the district court’s ruling excluding testimony
9 concerning details of Peña’s burglary constituted an abuse of discretion under Rule
10 11-608(B)(1), Defendant fails to develop an argument around this rule in his brief in
11 chief and in his reply brief asserts only that the details of the burglary were highly
12 probative of Peña’s character for truthfulness. *See* Rule 11-608(B)(1) (“[T]he court
13 may, on cross-examination, allow [specific instances of a witness’s conduct] to be
14 inquired into if they are probative of the [witness’s] character for truthfulness.”).
15 Defendant, however, fails to address the factors this Court analyzes to determine
16 whether a district court’s decision under Rule 11-608(B) constitutes an abuse of
17 discretion. *See State v. Patterson*, 2017-NMCA-045, ¶ 11, 395 P.3d 543 (listing five
18 factors that “inform a court’s exercise of discretion under Rule 11-608(B)” and
19 stating that “[w]e review the district court’s exercise of discretion through the prism
20 of those five factors”). We note, however, that the jury had already heard Peña admit

1 to his burglary conviction, and that the burglary occurred more than fifteen years
2 earlier. *See Patterson*, 2017-NMCA-045, ¶ 11 (listing “the relevancy of the act of
3 misconduct to truthfulness” and “the nearness or remoteness of the misconduct to
4 the time of trial” as two factors informing a court’s discretion under Rule 11-608(B)
5 (internal quotation marks and citation omitted)).

6 {8} To the extent Defendant contends the district court abused its discretion in
7 excluding Peña’s testimony as irrelevant by relating the name of the individual who
8 sold Peña methamphetamine, Defendant does not cite Rule 11-401 NMRA, much
9 less develop an argument based on the language of this rule. *See State v. Guerra*,
10 2012-NMSC-014, ¶ 21, 278 P.3d 1031 (recognizing that the appellate court does not
11 review undeveloped arguments). We therefore conclude Defendant has failed to
12 carry his burden of demonstrating these evidentiary rulings constituted an abuse of
13 discretion. *See State v. Trejo*, 1991-NMCA-143, ¶ 7, 113 N.M. 342, 825 P.2d 1252
14 (“[W]here it is evident that there existed reasons for and against the ruling, we may
15 indulge in the usual appellate presumptions to affirm the [district] court.”).

16 **B. Confrontation Clause**

17 {9} Defendant next argues the district court’s rulings limiting cross-examination
18 of Peña violated the Confrontation Clause. *See U.S. Const. amend. VI; see also*
19 *Davis v. Alaska*, 415 U.S. 308, 315-16 (1974) (“The main and essential purpose of
20 confrontation is to secure for the opponent the opportunity of cross-examination.”)

1 (internal quotation marks and citation omitted). “Although the extent of cross-
2 examination is within the sound discretion of the district court, we . . . review de
3 novo whether limits on cross-examination have violated the Confrontation Clause.”
4 *State v. Samora*, 2016-NMSC-031, ¶ 48, 387 P.3d 230. Defendant, however, failed
5 to preserve his Confrontation Clause argument. *See State v. Lucero*, 1986-NMCA-
6 085, ¶ 12, 104 N.M. 587, 725 P.2d 266 (“The issue of denial of the right to
7 confrontation may not be raised for the first time on appeal.”).

8 {10} “To preserve an issue for review, it must appear that a ruling or decision by
9 the [district] court was fairly invoked.” Rule 12-321(A) NMRA. Defendant failed to
10 invoke a ruling of the district court on the issue of whether prohibiting defense
11 counsel from inquiring into details of Peña’s burglary violated the Confrontation
12 Clause or alert the court to a constitutional error. Rather, following the State’s
13 objection, defense counsel argued that Rule 11-608 permitted the inquiry and that
14 the inquiry was probative of Peña’s character for truthfulness. *Cf. Lucero*, 1986-
15 NMCA-085, ¶¶ 16-17 (concluding that the confrontation issue was not preserved
16 because the defendant’s objection asked for an evidentiary ruling and did not alert
17 the district court to a constitutional error). This argument is thus unpreserved.

18 {11} Regarding the district court’s ruling preventing defense counsel from eliciting
19 from Peña the name of the individual who sold him methamphetamine, the State
20 objected on relevancy grounds, the parties discussed at a bench conference whether

1 the information was relevant, and the district court sustained the State’s objection.
2 Defense counsel did not invoke a ruling from the district court on the issue of
3 whether the exclusion of this testimony violated the Confrontation Clause or alert
4 the court to a constitutional error. *See id.* This argument is therefore also
5 unpreserved. Thus, we decline to consider this issue and turn to Defendant’s next
6 contention.

7 **II. Admission of the Video**

8 {12} Defendant argues that the district court erred by admitting a two-minute video
9 of police officers executing a search warrant for Defendant’s DNA and clothing at
10 the police station (the video). The video shows Defendant resisting the search and
11 the police finding a bullet in his sock. The State argued the video was relevant to
12 show consciousness of guilt. Defense counsel responded that the video did not show
13 consciousness of guilt but rather Defendant’s displeasure with police for not
14 providing him with an attorney, which he had requested. The district court agreed
15 with the State and admitted the video. Defendant argues that admission of the video
16 violated his *Miranda* and due process rights. We review each argument in turn.

17 **A. Defendant’s *Miranda* Rights**

18 {13} Defendant argues admission of the video violated his Fifth Amendment
19 *Miranda* rights because, having requested an attorney at the police station, the State
20 was obligated to provide him one before executing the search warrant. Defendant

1 asserts the search “necessitated speaking with . . . [D]efendant . . . and expecting
2 answers.” Defendant contends his objection at trial was, in essence, a request for the
3 district court to suppress the video, which showed Defendant’s conduct and
4 contained his statements made to police during the search. Even if it were
5 appropriate to review Defendant’s objection as a suppression motion, as Defendant
6 suggests, we are unpersuaded of any error.

7 {14} “The district court’s denial of [a d]efendant’s motion to suppress evidence
8 presents a mixed question of fact and law.” *State v. Almanzar*, 2014-NMSC-001,
9 ¶ 9, 316 P.3d 183. “This Court reviews factual matters with deference to the district
10 court’s findings if substantial evidence exists to support them, and it reviews the
11 district court’s application of the law de novo.” *Id.* “Suppression of an accused’s
12 statements made to a law enforcement officer prior to the giving of *Miranda*
13 warnings is only required when the statements are the product of a custodial
14 interrogation.” *State v. Fekete*, 1995-NMSC-049, ¶ 41, 120 N.M. 290, 901 P.2d 708;
15 *see also State v. Quiñones*, 2011-NMCA-018, ¶ 10, 149 N.M. 294, 248 P.3d 336
16 (stating that “when an accused has invoked his right to have counsel present during
17 a custodial interrogation,” the accused “is not subject to further interrogation by the
18 authorities until counsel has been made available to him” (alterations, internal
19 quotation marks, and citations omitted)). “The threshold inquiry when a defendant
20 alleges a violation of *Miranda* rights is whether there was an interrogation.” *Fekete*,

1 1995-NMSC-049, ¶ 41. “Interrogation occurs when an officer subjects an individual
2 to questioning or circumstances which the officer knows or should know are
3 reasonably likely to elicit incriminating responses.” *Id.* (internal quotation marks and
4 citation omitted).

5 {15} As to whether the search constituted an interrogation, Defendant does not cite
6 a specific portion of the video where he contends he was subjected to questioning
7 and fails to cite authority that execution of a search warrant constitutes a
8 circumstance which an officer knows or should know is reasonably likely to elicit
9 incriminating responses. *See id.* Defendant also fails to cite authority to support his
10 argument that he was entitled to an attorney before the police could execute a search
11 warrant. *See State v. Casares*, 2014-NMCA-024, ¶ 18, 318 P.3d 200 (“We will not
12 consider an issue if no authority is cited in support of the issue, because absent cited
13 authority to support an argument, we assume no such authority exists.”). We
14 therefore conclude admission of the video did not violate Defendant’s *Miranda*
15 rights.

16 **B. Defendant’s Due Process Rights**

17 {16} Defendant next argues the district’s decision to admit the video violated his
18 due process rights.¹ In support of this argument, Defendant points out that the full-

¹To the extent that the Defendant argues in a single sentence that admission of the video violated the Confrontation Clause, Defendant raises this argument for the first time in his reply brief. *See State v. Fairweather*, 1993-NMSC-065, ¶ 32, 116

1 length recording of the search shows Defendant requesting an attorney. Defendant
2 contends his conduct in the video does not demonstrate consciousness of guilt but
3 rather displeasure with police for not providing him with an attorney. Defendant
4 argues he could not defend against this evidence because the only way to disprove
5 the State’s narrative would have been to introduce the full video showing him
6 requesting an attorney, thereby impermissibly forcing him to surrender his Fifth
7 Amendment right against self-incrimination. *Cf. State v. McDowell*, 2018-NMSC-
8 008, ¶ 5, 411 P.3d 337 (“[E]liciting testimony or commenting on a defendant’s
9 exercise of [their] right to counsel is . . . reversible error.”). As a result, Defendant
10 contends he was precluded from presenting evidence providing justification for his
11 refusal to comply with the police, in violation of his due process right to present a
12 defense and contrary to Rule 11-106 NMRA. We conclude that even if we were to
13 assume the district court erroneously admitted the video, any error was harmless.

14 {17} Constitutional error is harmless when there is “no reasonable possibility the
15 error contributed to the jury’s decision to convict [the d]efendant.” *State v. Tollardo*,
16 2012-NMSC-008, ¶ 45, 275 P.3d 110; *see also State v. Gutierrez*, 2007-NMSC-033,
17 ¶ 18, 142 N.M. 1, 162 P.3d 156 (“The [s]tate has the burden of establishing that the
18 constitutional error was harmless beyond a reasonable doubt.” (internal quotation

N.M. 456, 863 P.2d 1077 (declining to address an issue the defendant raised for the first time in his reply brief); *Guerra*, 2012-NMSC-014, ¶ 21. We therefore decline to address this argument further.

1 marks and citation omitted)). In determining whether an error is harmless, we must
2 endeavor to determine the likely effect of the error on the jury’s verdict. *See*
3 *Tollardo*, 2012-NMSC-008, ¶ 43. In conducting our review, we analyze the error on
4 a case-by-case basis, “evaluat[ing] all of the circumstances surrounding the error,
5 including examining the error itself, the source of the error, the emphasis on the
6 error, and whether the error was cumulative or introduced new facts.” *State v.*
7 *Hernandez*, 2017-NMCA-020, ¶ 20, 388 P.3d 1016. Additionally, “evidence of a
8 defendant’s guilt separate from the error may often be relevant, even necessary, for
9 a court to consider, since it will provide context for understanding how the error
10 arose and what role it may have played in the trial proceedings.” *Tollardo*, 2012-
11 NMSC-008, ¶ 43. Such evidence, however, may not be “the singular focus of the
12 harmless error analysis.” *Id.*

13 {18} Here, the State was the source of the alleged error, having sought to introduce
14 the video. The State also placed at least some emphasis on the video, noting in its
15 closing argument that the video showed Defendant resisting the search.
16 Nevertheless, separate from the video, the jury heard evidence that Defendant
17 resisted the search through the testimony of a police officer who participated in the
18 search. *See Hernandez*, 2017-NMCA-020, ¶ 20 (considering whether the error was
19 cumulative or introduced new facts). The officer testified that Defendant refused to
20 cooperate with the search, stating that Defendant would not open his mouth for a

1 DNA swab, did not cooperate in the search of his clothing, and that officers
2 ultimately had to cut off Defendant's shirt using scissors.

3 {19} Moreover, the State introduced the video showing Defendant resisting the
4 search to demonstrate consciousness of guilt, but the jury received additional
5 evidence demonstrating Defendant's consciousness of guilt from other sources. *See*
6 *id.* A police officer who participated in the search testified that during the search
7 Defendant stated that he "wasn't gonna give us a fucking thing." The jury also heard
8 testimony that in a recording of a call Defendant made from jail several days after
9 the shooting, Defendant stated, "I fucked up. I fucked up bad." And on the day of
10 the shooting, Defendant, who lived with Victim in Portales and had children living
11 there, traveled to Clovis, where he stayed that night in a hotel.

12 {20} Finally, evidence of Defendant's guilt separate from the alleged error was
13 substantial. The jury heard testimony that Defendant possessed a motive to commit
14 the crime and was with Victim at the house where the shooting occurred on the day
15 Victim died. In that testimony, Peña stated that, on the day Victim died, Defendant
16 told Peña that Defendant and Victim were fighting. Peña also testified that he saw
17 and heard Victim yelling at Defendant from the front door of the house where
18 Defendant and Victim lived. Victim told Defendant to give her the keys to "[her]
19 house," that she had "papers," and that she wanted Defendant "out of [her] house."
20 Peña testified that he then saw Defendant and Victim go inside the house and heard

1 a gunshot. There was no sign of forced entry into the house. The jury heard
2 testimony that, in a jail call days after the murder, Defendant stated, “That fucking
3 bitch took my house. She changed the paperwork without me knowing it.”

4 {21} The jury also heard evidence tying Defendant to the gun used in the shooting.
5 The police found a .45 caliber handgun under a seat in Defendant’s truck, and a
6 firearm expert confirmed that the .45 caliber bullet and cartridge found at the crime
7 scene were fired from the gun found in Defendant’s truck. Two .45 caliber
8 magazines were also found in the truck, including one inside the gun, and one
9 magazine contained Defendant’s fingerprints. After a police officer transported
10 Defendant to the police station, the officer found four .45 caliber rounds on the floor
11 of his police car, which the officer testified were not there before transporting
12 Defendant. When police searched Defendant they found a live .45 caliber round in
13 his sock. Thus, evidence of Defendant’s guilt separate from the alleged error was
14 substantial.

15 {22} In sum, we conclude there is no reasonable possibility the alleged error in
16 admitting the video contributed to the jury’s decision to convict Defendant.
17 Accordingly, any error was harmless.

18 **CONCLUSION**

19 {23} Based on the foregoing, we affirm.

1 {24} IT IS SO ORDERED.

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KIRSTINA BOCARDUS, Judge

4 WE CONCUR:

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JENNIFER L. ATTREP, Chief Judge

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J. MILES HANISEE, Judge