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

2 **STATE OF NEW MEXICO,**

Court of Appeals of New Mexico  
Filed 2/8/2024 9:13 AM

3 Plaintiff-Appellee,



Cynthia A. Hernandez-Madrid  
Acting Chief Clerk

4 v.

**No. A-1-CA-39916**

5 **RICHARD MALISZEWSKI,**

6 Defendant-Appellant.

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

8 **Joseph Montano, District Court Judge**

9 Raúl Torrez, Attorney General

10 Santa Fe, NM

11 Michael J. Thomas, Assistant Attorney General

12 Albuquerque, NM

13 for Appellee

14 Bennett J. Baur, Chief Public Defender

15 Mary Barket, Assistant Appellate Defender

16 Santa Fe, NM

17 for Appellant

18 **MEMORANDUM OPINION**

19 **BOGARDUS, Judge.**

20 {1} Defendant Richard Maliszewski appeals his conviction for voluntary  
21 manslaughter, contrary to NMSA 1978, Section 30-2-3(A) (1994). Defendant  
22 contends that (1) the district court committed evidentiary errors that deprived  
23 Defendant of a fair trial; (2) the district court erred in denying Defendant's request

1 to include specific language in a jury instruction; and (3) the district court’s errors  
2 amounted to cumulative error. For the following reasons, we affirm Defendant’s  
3 conviction.

#### 4 **BACKGROUND**

5 {2} The State charged Defendant with second degree murder, contrary to NMSA  
6 1978, Section 30-2-1(B) (1994), along with the lesser included offense of voluntary  
7 manslaughter. At trial, Defendant did not dispute that he shot and killed Christopher  
8 Yazzie (Victim), but claimed that he did so in self-defense.

9 {3} The shooting was the culmination of an ongoing dispute between Defendant  
10 and Victim, who were neighbors. At first their relationship was amicable, but it  
11 degraded over time as Victim began to drink excessively and became unpredictable  
12 and violent. Defendant witnessed Victim engage in multiple violent altercations in  
13 the neighborhood over the coming years. On one occasion, Defendant witnessed  
14 Victim beating a man in his driveway. Defendant also witnessed numerous  
15 altercations between Victim and the police.

16 {4} Personal encounters between Defendant and Victim also became contentious.  
17 Victim threatened Defendant by showing him a modified baseball bat with knives  
18 duct-taped to the bat, and in 2017 the two got into an argument after Victim  
19 borrowed Defendant’s phone and would not return it. In 2018, Victim had his water  
20 cut off and began asking neighbors for help. Defendant initially agreed to allow

1 Victim to fill up water jugs from his hose but requested that Victim come ask him  
2 for permission before taking water. Despite Defendant's request, Victim "would  
3 come around and help himself to the water."

4 {5} On the day of the shooting, Defendant caught Victim with his girlfriend,  
5 Calvinlena Tso (Girlfriend), taking water from the main waterline leading to  
6 Defendant's house. Defendant told Victim that he did not want Victim or Girlfriend  
7 to come back on his property. A short time later, Girlfriend returned to Defendant's  
8 door asking for water and Defendant refused. Girlfriend warned Defendant that she  
9 was going to tell Victim that he refused to give her water. Victim came out into his  
10 front yard and started yelling at Defendant and challenged him to a fight yelling:  
11 "I'm gonna get water. I'm going to burn your house down. I'm going to beat your  
12 ass."

13 {6} Defendant retrieved his pistol from inside his house and approached the waist-  
14 level wall separating Defendant's driveway from Victim's front yard. Victim  
15 instructed Girlfriend to get the modified bat from the house. Defendant then moved  
16 closer with his gun raised until he was standing at the wall. Victim approached the  
17 wall unarmed and said, "It's time, [and] you need to die." Defendant testified that  
18 he had seen Victim jump the wall before and, upon hearing Victim's threat, felt in  
19 that moment that "it was going to be him or me, and I didn't want it to be me."

1 Defendant shot Victim before Victim reached for the wall and he fell to the ground  
2 and died. Defendant then called 911.

3 {7} Defendant claimed that he acted in self-defense—requiring acquittal—or,  
4 alternatively, that he acted with adequate provocation—requiring reduction of his  
5 conviction to voluntary manslaughter. *See* UJI 14-5171 NMRA (stating that if the  
6 jury finds “a reasonable doubt as to whether the defendant acted in self[-]defense [it]  
7 must find the defendant not guilty”); *see also* UJI 14-220 NMRA (“The difference  
8 between second degree murder and voluntary manslaughter is sufficient provocation  
9 . . . [s]ufficient provocation reduces second degree murder to voluntary  
10 manslaughter.”). The evidentiary disputes centered on the admission of character  
11 evidence and impeachment evidence critical to the elements of self-defense. *See*  
12 Rule 11-404(A)(2) NMRA (discussing when character evidence of the defendant’s  
13 or victim’s pertinent character trait is admissible in criminal trials); *see also* Rule  
14 11-405 NMRA (discussing in what form character evidence may be admitted). The  
15 jury convicted Defendant of voluntary manslaughter. With these facts in mind, we  
16 address each of Defendant’s arguments in turn.

## 17 **DISCUSSION**

### 18 **I. Evidentiary Errors**

19 {8} Defendant claims that the district court erred by (1) preventing him from  
20 impeaching multiple state witnesses regarding Victim’s character for violence,

1 including Girlfriend and Defendant’s neighbor; (2) excluding Officer Cadroy’s  
2 testimony of an encounter with Victim the day before the shooting, and excluding  
3 evidence of the precise amount of alcohol and fentanyl in Victim’s body at the time  
4 of his death; (3) excluding the audio of Officer Formento’s lapel video; and (4)  
5 admitting Detective Juarez’s opinion testimony regarding what was occurring in the  
6 surveillance video already in evidence. We conclude that any errors were harmless  
7 and affirm.

8 ¶ We review the district court’s admission or exclusion of evidence for an abuse  
9 of discretion. *See State v. Sarracino*, 1998-NMSC-022, ¶ 20, 125 N.M. 511, 964  
10 P.2d 72. “An abuse of discretion occurs [either] when the ruling is clearly against  
11 the logic and effect of the facts and circumstances of the case,” *State v. Rojo*, 1999-  
12 NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 (internal quotation marks and citation  
13 omitted), or when the trial court “applies an incorrect standard, incorrect substantive  
14 law, or its discretionary decision is premised on a misapprehension of the law.”  
15 *Aragon v. Brown*, 2003-NMCA-126, ¶ 9, 134 N.M. 459, 78 P.3d 913. We cannot  
16 conclude that “the trial court abused its discretion by its ruling unless we can  
17 characterize it as clearly untenable or not justified by reason,” *Rojo*, 1999-NMSC-  
18 001, ¶ 41 (internal quotation marks and citation omitted), or as a misapprehension  
19 or misapplication of the law. *See State v. Lymon*, 2021-NMSC-021, ¶ 12, 488 P.3d

1 610. Absent a clear abuse of discretion we will not reverse the ruling below.  
2 *Sarracino*, 1998-NMSC-022, ¶ 20.

### 3 **A. Impeachment**

4 {10} Defendant argues that the district court erred by limiting his impeachment of  
5 Girlfriend and his neighbor Sean Byram regarding their knowledge of Victim’s  
6 previous violent behavior. Defendant sought to impeach Girlfriend when she denied  
7 knowledge of Victim’s character for violence with a specific altercation during  
8 which she stabbed Victim in self-defense. Although the district court prohibited  
9 Defendant from directly eliciting testimony of the stabbing incident under Rule 11-  
10 405, the district court ruled that Defendant could use it for impeachment if Girlfriend  
11 opened the door to such testimony. Girlfriend, however, admitted that Victim was  
12 violent and unpredictable when he was drunk, and therefore did not open the door  
13 to impeachment with specific acts. *See* Rule 11-405(A) (stating that “the court may  
14 allow an inquiry into relevant specific instances of the [victim]’s conduct” on cross-  
15 examination). Therefore, Defendant was not prevented from impeaching Girlfriend  
16 and we see no error in the district court’s ruling.

17 {11} Defendant also sought to question Byram about whether he had witnessed  
18 Victim becoming violent when drinking, intending to impeach him with his  
19 knowledge of Victim’s previous violent acts. Defendant contended that Byram’s  
20 knowledge of Victim’s character was admissible as a prior inconsistent statement,

1 challenging the basis of his knowledge in support of the opinion he espoused, or  
2 illustrating his bias. The district court prevented Defendant from questioning Byram  
3 about Victim’s prior violent acts because they were inadmissible under Rule 11-405.  
4 Even if we assume the district court erred in preventing Defendant from impeaching  
5 Byram, such error was harmless.

6 {12} “We review improperly admitted [or excluded] evidence for  
7 non[ ]constitutional harmless error.” *State v. Serna*, 2013-NMSC-033, ¶ 22, 305 P.3d  
8 936. “[N]on[ ]constitutional error is harmless when there is no reasonable probability  
9 the error affected the verdict.” *State v. Tollardo*, 2012-NMSC-008, ¶ 36, 275 P.3d  
10 110 (emphasis, internal quotation marks, and citation omitted). Defendant bears the  
11 initial burden of establishing that the claimed evidentiary errors had a probable  
12 impact on the jury’s verdict. *See State v. Astorga*, 2015-NMSC-007, ¶ 43, 343 P.3d  
13 1245 (“Defendant bears the initial burden of demonstrating that he was prejudiced  
14 by the error.”). To determine whether the defendant established that the claimed  
15 evidentiary errors had a probable effect on the jury’s verdict, we “must evaluate all  
16 circumstances surrounding the error.” *State v. Leyba*, 2012-NMSC-037, ¶ 24, 289  
17 P.3d 1215. In doing so, we examine “the source of the error, the emphasis placed on  
18 [it], evidence of the defendant’s guilt apart from the error, the importance of the  
19 erroneously admitted [or excluded] evidence to the prosecution’s case, and whether  
20 the erroneously admitted evidence was merely cumulative.” *Serna*, 2013-NMSC-

1 033, ¶ 23. Such review necessarily requires a case-by-case analysis and thus the  
2 impact of an error in two factually analogous cases might in one case be harmful and  
3 be harmless in the other. *Tollardo*, 2012-NMSC-008, ¶ 44.

4 {13} We conclude that the district court’s error, if any, in preventing Defendant  
5 from impeaching Byram was harmless. *See Serna*, 2013-NMSC-033, ¶ 23. Although  
6 the source of the error stemmed from the State’s objection, all the other factors  
7 indicate the error was harmless. *See id.* First, the emphasis placed on Byram’s  
8 characterization of Victim as nonviolent and its importance to the State’s case was  
9 marginal. The State only once mentioned Byram’s testimony in closing arguments.  
10 Instead, the State focused on the surveillance video footage as the crucial evidence  
11 to rebut Defendant’s claim of self-defense, emphasizing the importance of videos  
12 thirty-three separate times during closing. The State also relied on Defendant’s own  
13 testimony to rebut whether his fear of Victim was reasonable. The State argued that  
14 Defendant’s prior interactions with Victim and his testimony that he shot Victim  
15 before Victim could “grab the fence” separating them indicated he was not afraid of  
16 Victim and was not acting out of fear. Therefore, Byram’s testimony of Victim’s  
17 character for peacefulness was not emphasized by the State and unimportant to the  
18 State’s case overall.

19 {14} Second, any impeachment of Byram regarding Victim’s character for violence  
20 would have been cumulative. Defense counsel elicited reputation and opinion



1 testimony regarding Victim's violent and unpredictable nature from nearly every  
2 witness: including Girlfriend, Officer Cadroy, Defendant, Defendant's son, Officer  
3 Bonet, and Skylar Rice. As well, defense counsel elicited testimony of specific acts  
4 of Victim's violence through multiple witnesses. The jury heard ample evidence  
5 establishing Victim's character for violence, and thus impeachment of Byram would  
6 have been cumulative.

7 {15} Finally, substantial evidence was presented that Defendant did not act in self-  
8 defense: (1) Defendant escalated a verbal altercation by retrieving a firearm from  
9 inside his home; (2) Defendant approached the fence separating his own property  
10 from Victim's property first, bringing the firearm he retrieved from inside; (3)  
11 Victim was unarmed during the course of the entire altercation; and (4) Defendant  
12 shot Victim before Victim had the opportunity to cross the property line. All of this  
13 evidence supports the conclusion that Defendant was not acting in self-defense.  
14 Therefore, the district court's error, if any, in preventing Defendant from impeaching  
15 Byram was harmless.

16 **B. Exclusion of Officer Cadroy's Testimony and the Amount of Alcohol and**  
17 **Fentanyl in Victim's Body**

18 {16} Defendant contends that the district court abused its discretion by excluding  
19 evidence of Officer Cadroy's encounter with Victim the day before the shooting and  
20 by excluding the amount of alcohol and fentanyl in Victim's body at the time of  
21 death. Because we presume that the trial court is correct and Defendant failed to

1 clearly demonstrate that the trial court erred, we are not persuaded. *See State v.*  
2 *Aragon*, 1999-NMCA-060, ¶ 10, 127 N.M. 393, 981 P.2d 1211 (“[I]t is [the  
3 d]efendant’s burden on appeal to demonstrate any claimed error below.”).

4 {17} The district court found that the relevance of Officer Cadroy’s encounter with  
5 Victim the day before the shooting was outweighed by its prejudicial effect by  
6 determining that the lapse of time between the incident and the shooting was too  
7 great for the interaction to be relevant to Victim’s level of intoxication. *See* Rule 11-  
8 403 NMRA. Defendant asserts that Officer Cadroy’s encounter with Victim is  
9 admissible to corroborate other evidence of Victim’s violent character but does not  
10 explain how the evidence is relevant to Victim’s intoxication at the time of the  
11 shooting nor how the corroborative effect of the testimony is not outweighed by its  
12 prejudicial effect. Therefore, we decline to consider the matter further. *See State v.*  
13 *Candelaria*, 2019-NMCA-032, ¶ 48, 446 P.3d 1205 (declining to review an  
14 undeveloped claim because “we will not review unclear arguments, or guess at what  
15 a party’s arguments might be” (alterations, internal quotation marks, and citation  
16 omitted)).

17 {18} Defendant contends that the district court also erred by excluding the levels  
18 of alcohol and fentanyl in Victim’s body at his time of death. The district court  
19 concluded that, without expert explanation regarding the effects and the amounts of  
20 alcohol and fentanyl found in Victim’s body would have had, the raw numbers could

1 confuse the jury. On appeal, Defendant does not address this rationale for exclusion  
2 either, and we therefore have no basis for concluding that the district court abused  
3 its discretion. *See Aragon*, 1999-NMCA-060, ¶ 10 (explaining it is appellant’s  
4 burden to show why the district court erred).

5 **C. Exclusion of Audio from Officer Formento’s Lapel Video**

6 {19} Defendant argues that the district court’s exclusion of the audio from Officer  
7 Formento’s lapel video was error. Defendant sought to play nine minutes of Officer  
8 Formento’s lapel video along with the accompanying audio to show the jury  
9 Defendant’s frail health and fear immediately after the shooting in order to  
10 corroborate the reasonableness of Defendant’s actions. The district court allowed  
11 Defendant to play six minutes of the lapel video but excluded the audio as  
12 cumulative and containing hearsay. We are not persuaded that this was an abuse of  
13 discretion.

14 {20} Although Defendant argues on appeal that the district court’s ruling that the  
15 audio contained hearsay was erroneous, he does not address the district court’s ruling  
16 related to the cumulative nature of the audio. The lapel video without the audio  
17 recording, along with Officer Formento’s testimony demonstrated the extent of  
18 Defendant’s medical conditions and physical demeanor after the shooting.  
19 Defendant also elicited testimony from other witnesses regarding Defendant’s  
20 demeanor after the shooting. Defendant does not explain, in light of this additional

1 evidence about Defendant’s demeanor after the shooting, how the district court  
2 abused its discretion in determining the audio was cumulative. We therefore decline  
3 to consider the matter further. *See Candelaria*, 2019-NMCA-032, ¶ 48 (declining to  
4 review an undeveloped claim because “we will not review unclear arguments, or  
5 guess at what a party’s arguments might be” (alterations, internal quotation marks,  
6 and citation omitted)).

7 **D. Admission of Detective Juarez’s Testimony and Impeachment Evidence**

8 {21} Lastly, Defendant argues that the district court’s admission of Detective  
9 Juarez’s opinion testimony and refusal to allow Defendant to impeach her with her  
10 prior grand jury testimony was error. We agree with Defendant that the district court  
11 erred in allowing Detective Juarez to opine on the content of the video, as she was  
12 in no better position than the jury to interpret the video. *See State v. Chavez*, 2022-  
13 NMCA-007, ¶ 42, 504 P.3d 541 (holding that it was error to allow an officer to  
14 testify as to what was shown in a video already in evidence because “she was no  
15 more likely than the jury to be able to accurately determine” what the video showed).  
16 Nevertheless, we conclude the error was harmless. Furthermore, we conclude that  
17 the district court properly exercised its discretion in preventing Defendant from  
18 impeaching Detective Juarez under Rule 11-403.

19 {22} The district court’s decision to allow Detective Jaurez to opine on the contents  
20 of the surveillance video was harmless. *See Serna*, 2013-NMSC-033, ¶ 23 (listing

1 the factors we consider when determining if an error is harmless). Again, the State's  
2 emphasis on Detective Juarez's opinion was minimal. Although it is true that the  
3 surveillance video footage of the altercation was critical to the State's case, the State  
4 did not mention Detective Juarez's description of what occurred in the video once  
5 during closing arguments. Instead, the State encouraged the jury to "[r]eview the  
6 video, and watch it all," arguing that the video itself was the only necessary evidence  
7 and "worth [more] than [the] testimony." Moreover, although it is true that the  
8 quality of the surveillance video footage is poor, and it's difficult to see whether  
9 Victim attempts to grab the fence before the shooting, and whether or not Victim  
10 attempted to jump the fence bears little on Defendant's guilt. Victim was unarmed  
11 and Defendant was the individual who escalated the verbal confrontation to deadly  
12 encounter. Defendant was also the individual who approached the fence first. Thus,  
13 whether or not Victim grabbed for the fence was unimportant to the State's case.

14 {23} Second, as stated above, the remaining evidence showing that Defendant did  
15 not act in self-defense is substantial. Therefore, Defendant failed to establish that the  
16 admission of Detective Juarez's opinion had a probable impact on the jury's verdict  
17 and thus we conclude that any error in admitting her opinion was harmless. *See*  
18 *Astorga*, 2015-NMSC-007, ¶ 43.

19 {24} Finally, impeaching Detective Juarez with prior grand jury testimony about a  
20 hearsay statement already in evidence was likely to confuse the jury and waste time.

1 *See State v. Barela*, 2019-NMCA-005, ¶ 26, 458 P.3d 501; *see also* Rule 11-403  
2 (stating that “[t]he court may exclude relevant evidence if its probative value is  
3 substantially outweighed by . . . wasting time”). Thus, even if admission of Detective  
4 Juarez’s opinion was error, the evidence was harmless and the refusal to allow  
5 impeachment was appropriate under Rule 11-403. *See State v. Patterson*, 2017-  
6 NMCA-045, ¶ 15, 395 P.3d 543.

## 7 **II. Jury Instruction**

8 {25} Defendant contends that the district court erred in failing to include the  
9 bracketed language regarding “defending property” from UJI 14-5190 NMRA in  
10 jury instruction No. 14, its duty to retreat instruction. Specifically, he argues that  
11 failing to include such language was error because there was sufficient evidence  
12 presented at trial to support including it. *See State v. Brown*, 1996-NMSC-073, ¶ 34,  
13 122 N.M. 724, 931 P.2d 69. Defendant also contends that omitting the requested  
14 language from the instruction could leave the jury with the erroneous understanding  
15 that as a matter of law either (1) Defendant became the first aggressor when he  
16 retrieved his gun and returned to his yard; or (2) it was unreasonable for Defendant  
17 not to retreat into his home. *See State v. Romero*, 2005-NMCA-060, ¶ 8, 137 N.M.  
18 456, 112 P.3d 1113.

19 {26} “The propriety of jury instructions given or denied is a mixed question of law  
20 and fact,” which this Court reviews de novo. *State v. Salazar*, 1997-NMSC-044,

1 ¶ 49, 123 N.M. 778, 945 P.2d 996. If the contended failure to provide a jury  
2 instruction was preserved below, we review the failure to do so for reversible error.  
3 *See State v. Benally*, 2001-NMSC-033, ¶ 12, 131 N.M. 258, 34 P.3d 1134. Although  
4 “we view the evidence [presented to the district court] in the light most favorable to  
5 the giving of the requested instruction,” *Romero*, 2005-NMCA-060, ¶ 8, failure to  
6 give a jury instruction on the defendant’s theory of the case is only reversible error  
7 if sufficient evidence has been presented at trial to “allow reasonable minds to differ  
8 as to all elements of the offense.” *State v. Skippings*, 2011-NMSC-021, ¶ 10, 150  
9 N.M. 216, 258 P.3d 1008 (internal quotation marks and citation omitted). Therefore,  
10 the district court need not provide a defendant’s requested language absent sufficient  
11 evidence supporting it. *See State v. Boyett*, 2008-NMSC-030, ¶ 12, 144 N.M. 184,  
12 185 P.3d 355. Moreover, although it is also reversible error if a given jury instruction  
13 would have confused or misdirected a reasonable juror, *Benally*, 2001-NMSC-033,  
14 ¶ 12, a given jury instruction is sufficient when, reading all the instructions as a  
15 whole, “they fairly and correctly state the applicable law.” *State v. Rushing*, 1973-  
16 NMSC-092, ¶ 20, 85 N.M. 540, 514 P.2d 297.

17 {27} The jury instruction at issue reads, “A person who is defending against an  
18 attack need not retreat. In the exercise of the right of self[-]defense, a person may  
19 stand the person’s ground and defend himself.” The district court determined that  
20 Defendant was not entitled to the “defending property” language because his

1 testimony about Victim uttering a threat against property before Victim approached  
2 the wall at the property line did not warrant giving the instruction. Considering  
3 Defendant’s testimony, the district court concluded that the defense’s theory was  
4 that Defendant acted in self-defense when he shot Victim at Defendant’s property  
5 line. Defendant argued that if the court did not add the “defending property  
6 language” to the instruction, it should prohibit the State from arguing that Defendant  
7 should have stayed in his home. The district court refused to limit the State’s  
8 argument.

9 {28} Even viewing the evidence in the light most favorable to including the  
10 additional language in the instruction, *see Romero*, 2005-NMCA-060, ¶ 8, we  
11 perceive no error. The requested language was not supported by Defendant’s theory  
12 of the case nor by evidence presented. Defendant testified that he shot Victim  
13 because Victim threatened to kill him. Moreover, Defendant failed to request a  
14 separate instruction on defending property or defending habitation despite his claim  
15 that including such language was critical to his case. *See UJI 14-5170 NMRA; UJI*  
16 *14-5180 NMRA*. Accordingly, we conclude that the district court did not err.

17 **III. Cumulative Error**

18 {29} Finally, Defendant contends that the cumulative effect of the claimed errors  
19 denied him a fair trial. *See State v. Lopez*, 2018-NMCA-002, ¶ 36, 410 P.3d 226  
20 (“Cumulative error requires reversal of a defendant’s conviction when the



1 cumulative impact of errors which occurred at trial was so prejudicial that the  
2 defendant was deprived of a fair trial.” (internal quotation marks and citation  
3 omitted)). Although we have found one error occurred and assumed another,  
4 Defendant has failed to develop an argument, with citation to persuasive authority,  
5 why these purported errors amounted to cumulative error such that he was deprived  
6 of a fair trial. *See State v. Martin*, 1984-NMSC-077, ¶ 17, 101 N.M. 595, 686 P.2d  
7 937 (“The doctrine cannot be invoked if no irregularities occurred, or if the record  
8 as a whole demonstrates that a defendant received a fair trial.” (citation omitted)).  
9 We therefore decline to review this argument further.

10 **CONCLUSION**

11 {30} We affirm.

12 {31} **IT IS SO ORDERED.**

13   
14 **KRISTINA BOGARDUS, Judge**

15 **WE CONCUR:**

16   
17 **JENNIFER L. ATTKER, Chief Judge**

18   
19 **ZACHARY A. IVES, Judge**