IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. **No. A-1-CA-41539**

ADAM GOLDEN,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY
Jeffrey Shannon, District Court Judge

Raúl Torrez, Attorney General
Felicity Strachan, Assistant Solicitor General
Santa Fe, NM

for Appellee

Bennett J. Baur, Chief Public Defender
Melanie C. McNett, Assistant Appellate Defender
Santa Fe, NM

for Appellant

MEMORANDUM OPINION

HANISEE, Judge.

{1} This matter was submitted to the Court on the brief in chief in the above-entitled cause, pursuant to this Court's notice of assignment to the general calendar with modified briefing. Following consideration of the brief in chief, the Court assigned this matter to Track 2 for additional briefing, pursuant to the Administrative Order in *In re Pilot Project for Criminal Appeals*, No. 2022-002, effective

November 1, 2022. Now having considered the brief in chief, answer brief, and reply brief, we affirm for the following reasons.

Prosecutorial Misconduct

{2} Defendant appeals his conviction, following a jury trial, for aggravated battery (great bodily harm). [RP 283, 291] Defendant argues that the prosecutor's statements during closing arguments constituted misconduct and resulted in reversible error. [BIC 20, 24-26] Specifically, Defendant contends that the prosecutor misstated the burden of proof by improperly suggesting that Defendant was required to prove that he acted in self-defense. [BIC 20, 23, 25-26] Defendant further asserts that the prosecutor's statements, coupled with the fact that the self-defense instruction did not include an explicit statement regarding the State's burden of proof, created potential confusion for the jury and denied Defendant a fair trial. [BIC 20, 22, 26]

{3} Because Defendant objected to the prosecutor's statements at issue [BIC 17], we review Defendant's prosecutorial misconduct claim for abuse of discretion. *See State v. Montgomery*, 2017-NMCA-065, ¶ 10, 403 P.3d 707 ("When a defendant has preserved, by a timely objection, an issue of prosecutorial misconduct, we review for abuse of discretion because the district court is in the best position to evaluate the significance of any alleged prosecutorial errors." (text only) (citations omitted)). The district courts are given wide discretion in controlling closing statements and a reviewing court will not find reversible error absent an abuse of discretion. *State v.*

Chamberlain, 1991-NMSC-094, ¶ 26, 112 N.M. 723, 819 P.2d 673. "Because trial judges are in the best position to assess the impact of any questionable comment, we afford them broad discretion in managing closing argument. Only in the most exceptional circumstances should [the reviewing court], with the limited perspective of a written record, determine that all the safeguards at the trial level have failed. Only in such circumstances should we reverse the verdict of a jury and the judgment of a trial court." *State v. Sosa*, 2009-NMSC-056, ¶ 25, 147 N.M. 351, 223 P.3d 348 (citation omitted).

{4} When reviewing whether questionable statements made during closing arguments constitute reversible error, we examine the following factors: "(1) whether the statement invades some distinct constitutional protection; (2) whether the statement is isolated and brief, or repeated and pervasive; and (3) whether the statement is invited by the defense." *Id.* ¶ 26. "In applying these factors, the statements must be evaluated objectively in the context of the prosecutor's broader argument and the trial as a whole." *Id.* In reviewing a claim of prosecutorial misconduct, "[o]ur ultimate determination . . . rests on whether [any prosecutorial] improprieties had such a persuasive and prejudicial effect on the jury's verdict that the defendant was deprived of a fair trial." *Montgomery*, 2017-NMCA-065, ¶ 11 (internal quotation marks and citation omitted).

{5} The prosecutor's statements at issue arose during the State's rebuttal to defense counsel's closing arguments. [BIC 17] Echoing defense counsel's closing argument, the prosecutor reiterated that the State was required "to prove that this was not self-defense. And it was not self-defense if any of these elements aren't met. Was there an appearance of immediate danger of great bodily harm just because [the victim is] walking through the door? If you don't believe that, then this wasn't self-defense. Was [D]efendant actually afraid of immediate bodily harm?" [BIC 17; 7/12/23 CD 11:47:16-51] Defense counsel then objected, arguing that the prosecutor's arguments constituted burden shifting and "was couched in terms of . . . that we had to show something, that we had to prove something," and "implicitly" placed the burden on Defendant. [BIC 17; 7/12/23 CD 11:47:50, 11:48:40-48, 11:49:30-41] In a sidebar conference with counsel, the district court overruled the objection, finding that the statements did not constitute burden shifting and noting that "the nature of the self-defense instruction" was such that although evidence of self-defense can come from either party, the "instruction imposes a burden on the State" to prove beyond a reasonable doubt that Defendant had not acted in self-defense. [BIC 18; 7/12/23 CD 11:49:39-50:02]

{6} The jury was provided the following instruction for self-defense, which counsel discussed and agreed upon in an off-record conference and to which Defendant did not object [BIC 16; 7/12/13 CD 10:11:20-13:47, 10:49:00-13]:

Defendant acted in self-defense if:

1. There was an appearance of immediate danger of bodily harm to Defendant as a result of: (a) [the victim] having expelled Defendant from [the] apartment; and (b) [the victim] later having returned to enter the apartment;

2. Defendant was in fact put in fear of immediate bodily harm and engaged in physical combat with [the victim] because of that fear;

3. . . . Defendant used an amount of force that Defendant believed was reasonable and necessary to prevent the bodily harm;

4. The force used by Defendant ordinarily would not create a substantial risk of death or great bodily harm; and

5. The apparent danger would have caused a reasonable person in the same circumstances to act as [Defendant] did.

[BIC 16; RP 195] As noted in Defendant's brief in chief [BIC 16], although the written instruction reflects conformance with UJI 14-5181 NMRA, the instruction as provided to the jury did not include the following UJI language: "The burden is on the State to prove beyond a reasonable doubt that [D]efendant did not act in self-defense. If you have a reasonable doubt as to whether [D]efendant acted in self-defense, you must find [D]efendant not guilty." [RP 195; 7/12/23 CD 11:12:05-]

{7} On appeal, Defendant argues that the prosecutor's statement "likely confused the jury about the State's burden to *disprove* self-defense and denied [Defendant] a fair trial." [BIC 20] Defendant contends that the prosecutor's reference to "elements" needing to be "met" in order for the jury to find that Defendant acted in self-defense implied that Defendant carried a burden of proof and was a misstatement of the law.

[BIC 23-24] Regarding the three factors outlined in *Sosa*, 2009-NMSC-056, ¶ 26, Defendant argues that (1) the prosecutor's comments "invited the jury to find that [Defendant] acted in self-defense only if it was proven beyond a reasonable doubt that he *did*, and not if the State failed to prove beyond a reasonable doubt that he *did not*," which "diminished [Defendant]'s constitutional right to present a defense"; (2) although the prosecutor's statements were isolated and brief, in the context of the trial as a whole—including the omission of the UJI's burden of proof language—the statements created potential confusion for the jury; and (3) the statements were not invited by Defendant. [BIC 25-26]

{8} We are not persuaded by Defendant's arguments. As an initial matter, we conclude that Defendant has failed to demonstrate that the prosecutor's statements were improper. The State was required to prove Defendant did not act in self-defense, which the prosecutor explicitly stated in the rebuttal, and we discern no error in the prosecutor's framing of the evidence through the instruction's elements. However, even if we were to assume without deciding that the prosecutor's statements constituted a misstatement of the law as to the State's burden of proof, such misstatement would not warrant reversal given the additional jury instructions reflecting the State's burden. *See State v. Armendarez*, 1992-NMSC-012, ¶ 13, 113 N.M. 335, 825 P.2d 1245 (holding that a prosecutor's isolated misstatement of the law in closing argument did not warrant reversal where the jury instructions

contained a correct statement of the law); *see also Sosa*, 2009-NMSC-056, ¶ 25 (providing that the district court can correct prosecutorial impropriety by offering curative instructions to the jury); *State v. Allen*, 2000-NMSC-002, ¶ 95, 128 N.M. 482, 994 P.2d 728 (stating that a single, isolated incident of prosecutorial misconduct does not constitute reversible error).

{9} Indeed, the instruction for aggravated battery with great bodily harm provided that, "the State must prove . . . beyond a reasonable doubt" that Defendant "did not act in self-defense." [RP 196] Additionally, the jury was instructed that "[t]he burden is always on the State to prove guilt beyond a reasonable doubt." [RP 189] "Juries are presumed to have followed the written instructions." *State v. Smith*, 2001-NMSC-004, ¶ 40, 130 N.M. 117, 19 P.3d 254. Even if we were to conclude that the prosecutor's statements constituted misconduct, "[w]e presume that the jury followed the instructions given by the trial court, not the arguments presented by counsel." *State v. Benally*, 2001-NMSC-033, ¶ 21, 131 N.M. 258, 34 P.3d 1134. Moreover, although Defendant does not explicitly assert instructional error as a result of the omitted UJI language [BIC 25-26], to the extent he asserts that the *combination* of the written instruction and the prosecutor's statements resulted in juror confusion, we emphasize that any such concern is plainly resolved by the additional instructions regarding the State's burden of proof. *See State v. Armijo*,

1999-NMCA-087, ¶ 26, 127 N.M. 594, 985 P.2d 764 (holding that "it is sufficient if the instruction is in the elements instruction, even if not in the defense instruction").

{10} For these reasons, we conclude that Defendant has failed to demonstrate that the prosecutor's statements constitute misconduct or reversible error, or that the district court abused its discretion in permitting the State's closing arguments.

Defendant's Right to Testify

{11} Defendant argues that he was prevented from testifying in his defense, which he asserts violated his constitutional rights and constituted fundamental error. [BIC 27-31] At sentencing, following Defendant's statements to the district court that he had acted in self-defense, the district court noted that "a self-defense claim was difficult to make given that [Defendant] did not testify." [BIC 18] Defendant responded that he wanted to testify. [BIC 18] After announcing Defendant's sentence and noting that Defendant's concerns about testifying may need to be pursued as a writ of habeas corpus matter or on appeal, the district court permitted Defendant to make a record about his wishes and efforts to testify during trial. [BIC 18-19] Defendant stated that he wanted to testify on "two occasions here in the courtroom," and that he "suggested to defense counsel that [he] wanted to testify, and he opposed it. And one time inside the jail when we were in an interview, [he] did want to testify." [BIC 19] When asked by the district court why we did not take

the stand during trial, Defendant stated that defense counsel would not let him. [BIC 19]

{12} Because Defendant's arguments on this issue center on his assertions that trial counsel prevented him from testifying, we construe this issue as ineffective assistance of counsel claim. "We review claims of ineffective assistance of counsel de novo." *State v. Bahney*, 2012-NMCA-039, ¶ 48, 274 P.3d 134. In order to establish a prima facie case of ineffective assistance of counsel on appeal, Defendant "must demonstrate that his counsel's performance fell below that of a reasonably competent attorney and that he was prejudiced by his counsel's deficient performance." *State v. Perez*, 2002-NMCA-040, ¶ 36, 132 N.M. 84, 44 P.3d 530. "We indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *State v. Hunter*, 2006-NMSC-043, ¶ 13, 140 N.M. 406, 143 P.3d 168 (internal quotation marks and citation omitted). We further note that "an assertion of prejudice is not sufficient to demonstrate that a choice caused actual prejudice." *State v. Sloan*, 2019-NMSC-019, ¶ 34, 453 P.3d 401 (internal quotation marks and citation omitted).

{13} As Defendant acknowledges, these facts—and the record as a whole—are insufficient to demonstrate the reasons why Defendant did not testify at trial. [BIC

27, 30] "When an ineffective assistance claim is first raised on direct appeal, we evaluate the facts that are part of the record." *State v. Roybal*, 2002-NMSC-027, ¶ 19, 132 N.M. 657, 54 P.3d 61. However, "[e]vidence of an attorney's constitutionally ineffective performance and any resulting prejudice to a defendant's case is not usually sufficiently developed in the original trial record." *State v. Crocco*, 2014-NMSC-016, ¶ 13, 327 P.3d 1068. We note that our Supreme Court has expressed a preference that ineffective assistance of counsel claims be adjudicated in habeas corpus proceedings, rather than on direct appeal. *See Duncan v. Kerby*, 1993-NMSC-011, ¶ 4, 115 N.M. 344, 851 P.2d 466; *see also State v. Grogan*, 2007-NMSC-039, ¶ 9, 142 N.M. 107, 163 P.3d 494 ("Habeas corpus proceedings are the preferred avenue for adjudicating ineffective assistance of counsel claims, because the record before the trial court may not adequately document the sort of evidence essential to a determination of trial counsel's effectiveness." (text only) (citation omitted)). As we are without a sufficient record to review Defendant's constitutional claims and Defendant has therefore not established a prima facie case of ineffective assistance of counsel, we emphasize that Defendant may pursue this issue in a habeas proceeding, as our courts prefer such proceedings so that "the defendant may actually develop the record with respect to defense counsel's actions." *See State v. Arrendondo*, 2012-NMSC-013, ¶ 38, 278

P.3d 517. Nothing in our determination prevents Defendant from pursuing a habeas corpus proceeding.

Denial of the Motion for Mistrial

{14} Defendant argues that the district court erred in denying his motion for mistrial, contending that testimony regarding Defendant's warrant in an unrelated matter was prejudicial. [BIC 34-35] "We review the trial court's denial of the motion for mistrial for abuse of discretion." *State v. Smith*, 2016-NMSC-007, ¶ 50, 367 P.3d 420. "The district court abuses its discretion in ruling on a motion for mistrial if it acts in an obviously erroneous, arbitrary, or unwarranted manner, or when the decision is clearly against the logic and effect of the facts and circumstances before the court." *State v. Hernandez*, 2017-NMCA-020, ¶ 14, 388 P.3d 1016 (internal quotation marks and citation omitted). "The power to declare a mistrial should be exercised with the greatest caution." *Smith*, 2016-NMSC-007, ¶ 69 (text only) (citation omitted). "An argument for mistrial must show that the error committed constituted legal error, and the error was so substantial as to require a new trial." *Id.*

{15} The testimony at issue was provided by the detective who interviewed Defendant following the incident that gave rise to Defendant's charges. [BIC 12] The detective volunteered that Defendant had been picked up on an unrelated warrant, and defense counsel objected and moved for a mistrial. [BIC 12-13; 7/11/23 CD 11:41:00-11:42:05] The district court denied the motion for a mistrial but

sustained the objection, instructing the jury to disregard the statement and admonishing the witness not to testify beyond the scope of Defendant's pending charges. [BIC 13; 7/11/23 CD 11:42:40-50, 11:45:31-46:33, 11:47:55-48:43]

{16} Under Rule 11-404(B)(1) NMRA, "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." The testimony regarding Defendant's unrelated warrant was inadmissible under this rule. This type of evidentiary error, however, does not necessarily constitute reversible error. When reviewing inadmissible remarks in witness testimony, this Court considers whether the remarks were intentionally elicited by the prosecutor. *See State v. Gonzales*, 2000-NMSC-028, ¶ 39, 129 N.M. 556, 11 P.3d 131, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, ¶ 37 n.6, 275 P.3d 110.

{17} Where, as here, the inadmissible testimony was not elicited by the prosecutor, but was instead an unsolicited comment by a witness, any resulting prejudice may be cured by the provision of a limiting instruction. *See State v. Samora*, 2013-NMSC-038, ¶ 22, 307 P.3d 328 ("In reviewing inadvertent remarks made by witnesses, generally, the trial court's offer to give a curative instruction, even if refused by the defendant, is sufficient to cure any prejudicial effect." (internal quotation marks and citation omitted)); *see also Hernandez*, 2017-NMCA-020, ¶ 17 ("[G]enerally, [the district court's] prompt admonition to the jury to disregard and

not consider inadmissible evidence sufficiently cures any prejudicial effect which might otherwise result." (omission, internal quotation marks, and citation omitted).

{18} Having reviewed the district court's curative instruction to the jury and admonishment of the witness, and there being no dispute as to the isolated and unsolicited nature of the testimony at issue, we conclude that the district court did not abuse its discretion in denying Defendant's motion for mistrial. *See Smith*, 2016-NMSC-007, ¶ 50; *Hernandez*, 2017-NMCA-020, ¶ 14.

{19} Based on the foregoing, we affirm.

{20} **IT IS SO ORDERED.**

J. MILES HANISEE, Judge

WE CONCUR:

SHAMMARA H. HENDERSON, Judge

JANE B. YOHALEM, Judge