IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v. **No. A-1-CA-42339**

JEREMY JACOB GARCIA,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY
Britt Baca-Miller, District Court Judge

Raúl Torrez, Attorney General
Santa Fe, NM
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for Appellee

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Kimberly Chavez Cook, Assistant Appellate Defender
Santa Fe, NM

for Appellant

MEMORANDUM OPINION

DUFFY, Judge.

{1} Defendant Jeremy Jacob Garcia appeals his convictions of second degree murder, contrary to NMSA 1978, Section 30-2-1(B) (1994), and aggravated assault (deadly weapon), contrary to NMSA 1978, Section 30-3-2(A) (1963). Defendant maintains: (1) multiple errors in the jury instructions caused juror confusion; (2) the

district court improperly allowed a detective to describe and interpret video evidence; (3) the prosecutor engaged in misconduct; and (4) the cumulative effect of the errors deprived Defendant of a fair trial. We affirm.

DISCUSSION

I. Jury Instructions

A. Voluntary Manslaughter Instruction

{2} Defendant argues that the district court erred in denying his request for a jury instruction on voluntary manslaughter as a lesser included offense of second degree murder. The district court denied Defendant's request because there was no evidence of sufficient provocation—the sole element that distinguishes voluntary manslaughter from second degree murder. *See State v. Salazar*, 1997-NMSC-044, ¶ 51, 123 N.M. 778, 945 P.2d 996 (stating that "provocation is the difference between second degree murder and voluntary manslaughter"); *see also* UJI 14-220 NMRA (instruction for voluntary manslaughter as a lesser included offense of second degree murder); UJI 14-211 NMRA (instruction for second degree murder). We agree with the district court's assessment and conclude the district court correctly ruled that the evidence did not warrant an involuntary manslaughter instruction.

{3} The propriety of denying a jury instruction is a mixed question of law and fact that we review de novo. *Salazar*, 1997-NMSC-044, ¶ 49. "A defendant is entitled to

an instruction on a theory of the case where the evidence supports the theory." *Id.* ¶ 50. "When considering a defendant's requested instructions, we view the evidence in the light most favorable to the giving of the requested instructions." *State v. Swick*, 2012-NMSC-018, ¶ 60, 279 P.3d 747 (alteration, internal quotation marks, and citation omitted). "Failure to instruct the jury on a defendant's theory of the case is reversible error only if the evidence at trial supported giving the instruction." *State v. Boyett*, 2008-NMSC-030, ¶ 12, 144 N.M. 184, 185 P.3d 355.

{4} "'Voluntary manslaughter consists of manslaughter committed upon a sudden quarrel or in the heat of passion.'" *State v. Gaitan*, 2002-NMSC-007, ¶ 11, 131 N.M. 758, 42 P.3d 1207 (quoting NMSA 1978, § 30-2-3(A) (1994)). "The difference between second degree murder and voluntary manslaughter is that voluntary manslaughter requires sufficient provocation." *Id.* ¶ 11. "Sufficient provocation is any action, conduct or circumstances which arouse anger, rage, fear, sudden resentment, terror or other extreme emotions and affect the ability to reason and to cause a temporary loss of self control in an ordinary person of average disposition." *State v. Jim*, 2014-NMCA-089, ¶ 12, 332 P.3d 870 (internal quotation marks and citation omitted); *see* UJI 14-222 NMRA (defining "[s]ufficient provocation" as "any action, conduct or circumstances which arouse anger, rage, fear, sudden resentment, terror or other extreme emotions"). "It is settled law that the victim must be the source of the provocation." *State v. Munoz*, 1992-NMCA-004, ¶ 12, 113 N.M.

489, 827 P.2d 1303. Thus, to determine whether Defendant was entitled to a voluntary manslaughter instruction in this case, "[t]he proper inquiry is whether sufficient evidence was introduced to support a determination that the victim individually provoked the defendant." *State v. Sloan*, 2019-NMSC-019, ¶ 61, 453 P.3d 401 (alterations, internal quotation marks, and citation omitted).

{5} Defendant argues there was sufficient evidence of provocation based on testimony that Defendant and Victim argued for several minutes before Defendant got into his truck and, about fifteen seconds later, ran Victim over. However, Defendant's own testimony was that he accidentally ran over Victim, he did not realize what happened at first, and he did not intend to kill Victim; "[h]ence, according to . . . Defendant's own testimony, the [killing] was accidental, not voluntary or intentional." *See Salazar*, 1997-NMSC-044, ¶ 53. Defendant did not testify that he killed Victim because Victim provoked him. *See id.* Indeed, the only other testimony Defendant relies upon in support of his provocation theory came from Victim's mother, who was an eyewitness to the events, and she stated that Victim did not provoke Defendant in any way. Under similar circumstances, our Supreme Court has stated that such testimony by the defendant "precludes the possibility that [they] acted out of provocation and therefore eliminates any reason to instruct on voluntary manslaughter." *Id.* ¶ 53; *see State v. Lopez*, 1968-NMSC-092, ¶ 14, 79 N.M. 282, 442 P.2d 594 (noting that "an accidental killing will not

support a conviction of voluntary manslaughter"). Neither Defendant's testimony or Victim's mother's testimony provided any evidence that Victim provoked Defendant or that Defendant killed Victim as a result of that provocation. Accordingly, "the evidence did not support a jury verdict of voluntary manslaughter, and thus, the [district] court's decision refusing the instruction was proper." *See Salazar*, 1997-NMSC-044, ¶ 53.

B. Provocation Instructions

{6} In light of the district court's decision not to allow the jury to consider involuntary manslaughter as a lesser included offense of second degree murder, Defendant argues that the district court erred in giving a version of the second degree murder instruction that included lack of provocation as an element, as well as a separate instruction defining sufficient provocation. *See* UJI 14-210 NMRA; UJI 14-222. We agree with Defendant on this point. Nevertheless, these issues were not preserved, and we conclude they do not amount to fundamental error.

{7} Our Supreme Court has adopted multiple uniform jury instructions for second degree murder, including, as relevant here, UJI 14-211, which is used when "second-degree murder is the lowest degree of homicide to be considered by the jury," *id.* use note 1,[1] and UJI 14-210, which by its title is used when voluntary manslaughter is a

[1]We note in this case that second degree murder was not the lowest degree of homicide considered by the jury—vehicular homicide was the lowest.

lesser included offense. The difference between these two instructions is that UJI 14-210 contains an additional element asking the jury to determine that "[t]he defendant did not act as a result of sufficient provocation."[2]

{8} Even though the jury in this case was not instructed on voluntary manslaughter, the jury still received UJI 14-210 for the second degree murder charge—the version used when voluntary manslaughter is instructed as a lesser included offense. The given instruction stated that in order to find Defendant guilty of second degree murder, the State must prove beyond a reasonable doubt that

> 1. [D]efendant killed [Victim];
>
> 2. [D]efendant knew that his acts created a strong probability of death or great bodily harm to [Victim];
>
> 3. [*D*]*efendant did not act as a result of sufficient provocation*;
>
> 4. This happened in New Mexico on or about the 8th day of June, 2020.

The jury also received UJI 14-222, which defined sufficient provocation. We agree with Defendant that neither of these instructions should have been given under the circumstances.

[2]When the jury is instructed on voluntary manslaughter as a lesser included offense of second degree murder, the voluntary manslaughter instruction contains a corresponding element asking the jury to determine if "[t]he defendant acted as a result of sufficient provocation." UJI 14-220.

{9} Because this issue was not preserved, our review is for fundamental error. "Fundamental error exists if it would shock the court's conscience to affirm the conviction, either because of the obvious innocence of the defendant, or because a mistake in the process makes a conviction fundamentally unfair notwithstanding the apparent guilt of the accused." *State v. Sivils*, 2023-NMCA-080, ¶ 9, 538 P.3d 126 (alteration, internal quotation marks, and citations omitted). In reviewing for fundamental error, "we first determine whether a reasonable juror would have been confused or misdirected by the jury instructions." *State v. Sandoval*, 2011-NMSC-022, ¶ 20, 150 N.M. 224, 258 P.3d 1016 (alteration, internal quotation marks, and citation omitted). "If we conclude that a reasonable juror would have been confused or misdirected, then we review the entire record, placing the jury instructions in the context of the individual facts and circumstance of the case, to determine whether the defendant's conviction was the result of a plain miscarriage of justice." *Id.* (alteration, internal quotation marks, and citation omitted).

{10} We are not persuaded that the second degree murder instruction and the separate provocation instruction caused juror confusion or misdirection. Both instructions are correct statements of the law; the given instruction for second degree murder in this instance merely contained an additional element that the State was not otherwise required to prove under the circumstances. *See State v. Ferran-Sandoval*, 2024-NMCA-066, ¶ 18, 556 P.3d 594 (stating that this Court did "not view [the

d]efendant's conviction as fundamentally unfair because the [s]tate had to prove an additional element beyond the scope of the statute to convict [the d]efendant"). Defendant suggests that the error created confusion about the State's burden. We reject this argument—the given instructions informed the jury that it was the State's burden to prove the elements of the offense. Defendant also argues that the instructions "created jury confusion regarding how or whether [Defendant] should be convicted of a lesser offense than second-degree murder." But the inclusion of the provocation element did not prevent the defense from advocating that vehicular homicide was the appropriate charge. *See Sandoval*, 2011-NMSC-022, ¶ 29 (observing that an error in the jury instructions did not preclude the defendant from presenting his theory to the jury). Indeed, the defense theory was to seek conviction for vehicular homicide. During closing argument, after discussing with the jury why the provocation element for second degree murder was not met, the defense continued by conceding that the elements of vehicular homicide *were* met and encouraged the jury to convict on the lesser offense, stating that the jury did not need to spend time discussing second degree murder because there was proof that Defendant operated the vehicle in a reckless manner. Accordingly, under the facts of this case, which were that there was no evidence of sufficient provocation, combined with the circumstances, primarily that Defendant was not precluded from presenting his theory that vehicular homicide was the appropriate charge *and why*,

we conclude "that Defendant's conviction was not a plain miscarriage of justice." *See id.*

C. Vehicular Homicide Instructions

{11} Lastly, Defendant contends that the jury instructions were prejudicial because they referred to the offense of vehicular homicide by different names. Here, too, Defendant did not preserve his claim of error, and our review is for fundamental error. After reviewing the instructions as a whole, we conclude there was no error. *See Sivils*, 2023-NMCA-080, ¶ 11 (noting that only "[i]f we conclude that the jury instruction was erroneous, [do] we move to step two, asking whether that error was fundamental").

{12} Defendant notes that the jury instructions inconsistently referred to the crime of vehicular homicide as "death by reckless driving," "vehicular manslaughter," "homicide by vehicle (reckless driving)," "homicide by vehicle," and "vehicular manslaughter (reckless driving)." Defendant asserts that because the instructions never cross-referenced each other, the jury was prevented from deliberating in an informed manner. But, as the State points out, even though the instructions used slightly varying terms for vehicular homicide, the district court informed the jury that reckless driving, vehicular homicide, and homicide by vehicle are used interchangeably throughout the instructions and all refer to the same thing. Our review of the record confirms the State's claim in this regard. As well, defense

counsel in closing argument asked the jury to convict Defendant of "vehicular manslaughter, or homicide by vehicle, or reckless driving resulting in death," further putting the jury on notice that the terms are used interchangeably and refer to the same offense. In light of the court and counsel's clarifying remarks, we find no merit to Defendant's claim of juror confusion or misdirection, and conclude there was no error, much less fundamental error resulting from the use of slightly varying terminology in this case. *See Sandoval*, 2011-NMSC-022, ¶ 21.

II. Detective Gonterman's Testimony

{13} We briefly address Defendant's argument that the district court abused its discretion by allowing Detective Gonterman, while watching a surveillance video of the events, to answer questions about where Victim was struck by Defendant's vehicle. The State challenges whether this issue was preserved in the district court, but for purposes of our discussion we will assume without deciding that Defendant's objection was sufficient to preserve the matter.

{14} Defendant primarily argues that the jury was in just as good a position to evaluate the video and draw its own conclusions. *See State v. Chavez*, 2022-NMCA-007, ¶ 39, 504 P.3d 541 (holding that the district court abused its discretion in allowing an officer to testify to her own interpretation of video evidence "because the jury was just as capable as the officer of determining what the video depicted and the officer's testimony was therefore unhelpful to the jury"). In this case,

however, Detective Gonterman's testimony was not based solely on what she observed in the video. *See id.* ¶ 42 (reasoning that the officer's testimony was unhelpful to the jury because there was no basis for concluding that the officer was more likely than the jury to determine what the video showed and "had no special familiarity" with the object at issue). Before answering questions about the video, Detective Gonterman had testified that she personally conducted interviews with witnesses and canvassed the crime scene to gather information to corroborate and verify the witnesses' statements and recollections of the incident. The State then asked Detective Gonterman the series of questions Defendant challenges on appeal: "Now, *based on the information that you were given*, when the vehicle makes that turn around the tree, is that the area you believe [Victim] was contacted by the vehicle?" She later testified about photographs of the scene, tire marks, and where Victim's body was located. The record thus demonstrates that Detective Gonterman, based on her investigation, had the sort of "special familiarity" with the events and the scene that rendered her testimony about the video helpful to the jury, and thus permissible. *See id.* ¶¶ 39-43. We accordingly conclude the district court did not abuse its discretion in allowing the State to question Detective Gonterman about where in the surveillance video Victim was located and when he was struck by Defendant's vehicle.

III. Prosecutorial Misconduct

{15} Defendant claims that the prosecutor committed misconduct during cross-examination and closing argument. Having reviewed the briefs and trial, we find Defendant's contentions to be without merit.

{16} With respect to the prosecutor's cross-examination, Defendant has not demonstrated that the prosecutor's questions and statements lacked a basis in the evidence. *See State v. Montgomery*, 2017-NMCA-065, ¶ 13, 403 P.3d 707 ("It is misconduct for a prosecutor to make prejudicial statements not supported by evidence. However, statements having their basis in the evidence, together with reasonable inferences to be drawn therefrom, are permissible and do not warrant reversal." (alteration, internal quotation marks, and citations omitted)). To the extent Defendant objected to some of the prosecutor's questions as argumentative, the district court sustained Defendant's objections and, in some instances, asked the prosecutor to rephrase his questions. Where "an improper statement is corrected by counsel or the court, reversible error is less likely." *State v. Sosa*, 2009-NMSC-056, ¶ 34, 147 N.M. 351, 223 P.3d 348. We also highlight that, after Defendant's third objection, the State chose to end its cross-examination, and did not persist in its questioning. *See id.* (noting that "if counsel persists when admonished to desist, the probability of error is greater"). Finally, Defendant has not established that the

State's attempt to discredit his testimony prejudiced him. For all of these reasons, we perceive no misconduct in the prosecutor's cross-examination.

{17} As for the prosecutor's closing argument, Defendant did not object, and Defendant has not established fundamental error under the factors articulated in *Sosa*. *See id.* ¶ 26.

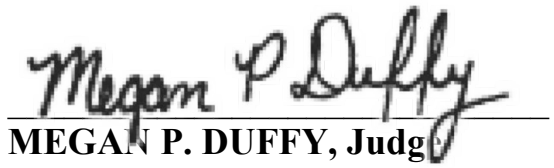
IV. Cumulative Error

{18} Finally, Defendant argues that the cumulative impact of errors in the jury instructions and of prosecutorial misconduct deprived him of a fair trial. "The doctrine of cumulative error applies when multiple errors, which by themselves do not constitute reversible error, are so serious in the aggregate that they cumulatively deprive the defendant of a fair trial." *State v. Salas*, 2010-NMSC-028, ¶ 39, 148 N.M. 313, 236 P.3d 32 (internal quotation marks and citation omitted). We strictly apply the doctrine of cumulative error and will not reverse a defendant's convictions if "the record as a whole demonstrates that the defendant received a fair trial." *Id.* (internal quotation marks and citation omitted). Because we have determined that there is only one error in this case—an error we concluded did not rise to the level of fundamental error—we reject Defendant's cumulative error claim. *See State v. Carrillo*, 2017-NMSC-023, ¶ 53, 399 P.3d 367 (concluding no cumulative error occurred where there was only one error at trial and it was harmless).

CONCLUSION

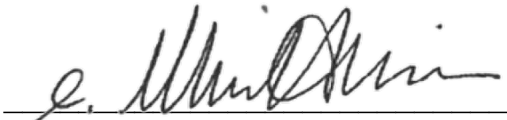
{19} For all the reasons stated, we affirm.

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



MEGAN P. DUFFY, Judge

WE CONCUR:



J. MILES HANISEE, Judge

SHAMMARA H. HENDERSON, Judge