

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

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Mark Reynolds

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No. A-1-CA-42289

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

**CHRISTOPHER DIETER
GERZYMISCH,**

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY

Douglas R. Driggers, District Court Judge

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

for Appellee

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for Appellant

1 **OPINION**

2 **HOUGHTON, Judge.**

3 {1} Christopher Dieter Gerzymisch (Defendant) appeals his convictions resulting
4 from a bout of road rage during which he shot a bicyclist (Victim) in the face. A jury
5 convicted Defendant of aggravated battery with a deadly weapon, contrary to NMSA
6 1978, Section 30-3-5(C) (1969); and battery, contrary to NMSA 1978, Section 30-
7 3-4 (1963). Defendant argues: (1) there was insufficient evidence to support his
8 convictions because the State failed to prove that he did not act in self-defense or in
9 defense of others; (2) the State improperly shifted the burden of proof on self-defense
10 and defense of others and thereby deprived him of a fair trial; (3) the district court
11 erred in failing to sua sponte cure improper statements made during the State's
12 opening; (4) the district court erred in admitting evidence that Defendant failed to
13 call 911 after shooting Victim; and finally, (5) the cumulative effect of these errors
14 requires reversal. We affirm Defendant's convictions in all respects.

1 **BACKGROUND**¹

2 {2} In October 2022, Defendant was driving his wife and children through Las
3 Cruces, New Mexico, to their home in El Paso, Texas. Traveling eastbound on
4 University Avenue in Las Cruces, Defendant closely passed Victim who was riding
5 his bicycle along the shoulder of the road. Soon after, Defendant came to a stop at
6 the intersection of University Avenue and Main Street. Victim, displeased with
7 Defendant's close pass, caught up to Defendant, approached his driver's side
8 window while still on his bicycle, and asked Defendant, "if he wanted to get a little
9 closer next time." Defendant argued with Victim, telling him, "You shouldn't be in
10 the fucking road." Victim asked, "Where am I supposed to ride my bike then?" To
11 which Defendant responded, "I don't fucking know" and "I don't fucking care about
12 you." Eventually, Defendant threatened, "I'm going to fucking shoot you."

13 {3} Victim then retreated behind Defendant's vehicle and called 911. As Victim
14 was speaking to 911, Defendant drove in reverse toward Victim, who was standing
15 astride his bicycle. Defendant stopped short of Victim, but then exited his vehicle,
16 and charged at Victim, asking, "What's your fucking problem?" Defendant then

¹This summary is based on the collective testimony of Victim and three eyewitnesses, viewed in the light most favorable to the verdict. *See State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176 ("In reviewing the sufficiency of the evidence, we must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict.").

1 shoved Victim off his bicycle. Victim maintained his balance however, and assumed
2 a fighting stance. Defendant rushed Victim again but this time Victim punched him
3 in the jaw. Defendant reeled back, then reached into his pocket and pulled out a
4 handgun.

5 {4} Defendant aimed the handgun at Victim and fired one shot, which struck
6 Victim in the face. The bullet entered Victim's right cheek, ricocheted off his jaw
7 bone, and exited behind his right ear. Victim ran from Defendant while bleeding
8 profusely. Bystanders who had been watching the altercation administered aid to
9 Victim and drove him to the nearest hospital. Meanwhile, Defendant returned to his
10 vehicle, waited for the light to turn green, then drove off. Two days later, Defendant
11 was arrested at his home in El Paso.

12 {5} At trial, Defendant argued that he acted in self-defense or in defense of others.
13 While Defendant did not testify, the State played for the jury a police interview of
14 Defendant recorded the same day of his arrest. During the interview, Defendant
15 explained his version of the event, including that he was defending himself and his
16 family, as well as why he did not contact law enforcement following the shooting.
17 Based on Defendant's account to police, the district court instructed the jury on self-
18 defense and defense of others. The jury convicted Defendant of both aggravated
19 battery with a deadly weapon and battery.

DISCUSSION

I. The State Disproved Self-Defense With Sufficient Evidence

{6} The parties agree that the State was required to prove that Defendant did not act in self-defense or in defense of others. Defendant argues that the State failed to meet its burden “beyond a reasonable doubt.” Because Defendant only challenges the sufficiency of the evidence as to self-defense and defense of others, we limit our analysis to that element of each of his convictions.

{7} “Appellate courts review sufficiency of the evidence from a highly deferential standpoint.” *State v. Haagenson*, 2026-NMCA-052, ¶ 7, 587 P.3d 887 (alteration, internal quotation marks, and citation omitted). “[W]e must view the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict.” *State v. Galindo*, 2018-NMSC-021, ¶ 12, 415 P.3d 494 (internal quotation marks and citation omitted). Viewing the evidence through that verdict-tinted lens, the question is whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* (internal quotation marks and citation omitted). We look to the jury instructions to define the essential elements against which we measure the evidence. *See State v. Holt*, 2016-NMSC-011, ¶ 20, 368 P.3d 409 (“The jury instructions become the law of the case against which the sufficiency of the evidence is to be measured.” (alterations, internal quotation marks, and citation omitted)).

1 {8} The jury instructions for battery and aggravated battery with a deadly weapon
2 required the State to prove that “Defendant did not act in self[-]defense or defense
3 of others.” *See* UJI 14-5183 NMRA use note 1 (outlining instruction for self-defense
4 by use of deadly force and explaining that an additional element must be inserted for
5 the offenses charged when self-defense is in issue); UJI 14-5184 NMRA use note 1
6 (requiring the same as to defense of others). The jury instructions provided that
7 Defendant acted in self-defense if:

- 8 1. There was an appearance of immediate danger of death or great
9 bodily harm to [D]efendant as a result of [Victim]’s aggressive actions;
- 10 2. [D]efendant was in fact put in fear of immediate death or great
11 bodily harm and shot [Victim] because of that fear; [and]
- 12 3. The apparent danger would have caused a reasonable person in
13 the same circumstances to act as [D]efendant did.

14 *See* UJI 14-5183. Similarly, the jury instructions also provided that Defendant acted
15 in defense of others if:

- 16 1. There was an appearance of immediate danger of death or great
17 bodily harm to [Defendant’s wife] and their children as a result of
18 [Victim]’s aggressive actions; and
- 19 2. [D]efendant believed that [his wife] and their children were in
20 immediate danger of death or great bodily harm from [Victim] and shot
21 [Victim] to prevent the death or great bodily harm; and
- 22 3. The apparent danger to [Defendant’s wife] and their children
23 would have caused a reasonable person in the same circumstances to
24 act as [D]efendant did.

1 See UJI 14-5184. Under the instructions presented to the jury, to effectively disprove
2 that Defendant acted in self-defense or in defense of others, the State needed to
3 negate just one of the required elements of the justifications. See *State v. Abeyta*,
4 1995-NMSC-051, ¶ 23, 120 N.M. 233, 901 P.2d 164 (“Self-defense is only a
5 justification for a [battery], and thus a lawful act, if *all* the elements necessary for
6 self-defense are met.” (emphasis added)), *abrogated on other grounds by State v.*
7 *Campos*, 1996-NMSC-043, ¶ 32 n.4, 122 N.M. 148, 921 P.2d 1266; see also *State*
8 *v. Jones*, 2020-NMCA-029, ¶ 6, 464 P.3d 1079 (“New Mexico case law and
9 commentary treat defense of another and self-defense as virtually identical for
10 purposes of analysis.” (text only) (citation omitted)).

11 {9} In this case, the State introduced sufficient evidence at trial for the jury to
12 conclude that Defendant did not act as a reasonable person would have, as required
13 by the third element of self-defense and defense of others. Viewing the evidence in
14 the light most favorable to the verdict, the record indicates that after Victim verbally
15 confronted Defendant about his driving, Defendant became enraged and threatened
16 to shoot Victim. After hearing Defendant’s threat, Victim physically retreated from
17 Defendant and called 911. Nonetheless, Defendant drove toward Victim, swiftly
18 exited his vehicle, yelled profanities at Victim, and—by his own admission—shoved
19 Victim who was visibly unarmed. Then finally, after being punched in the jaw by
20 Victim, Defendant reached in his pocket, took out his firearm, and fired one shot that

1 struck Victim in the face. None of the eyewitnesses described Victim as the
2 aggressor.

3 {10} Based upon these facts the jury was entitled to conclude that Defendant acted
4 unreasonably in battering (shoving) Victim because his use of force was
5 unreasonably disproportionate to the threat posed by Victim. *See State v. Johnson*,
6 1998-NMCA-019, ¶ 14, 124 N.M. 647, 954 P.2d 79 (“One requirement of self-
7 defense is that the force used must be reasonable in relation to the threat. If excessive
8 force is exerted, the entire action becomes unlawful.” (internal quotation marks and
9 citation omitted)). The evidence supported the conclusion that Victim retreated from
10 Defendant after being threatened by him and did not, in fact, pose any immediate
11 danger or physical threat to Defendant. Similarly, the record also demonstrates that
12 Victim did not pose a threat to Defendant’s family. Victim testified that he did not
13 even know that Defendant’s family was in the vehicle, and there was no evidence
14 that Victim threatened them. Under such circumstances, the jury could have
15 concluded that only an unreasonable person would have resorted to shoving Victim,
16 who had by then retreated and was talking to 911. Thus, sufficient evidence
17 demonstrates that Defendant did not act in self-defense or in defense of others while
18 committing the battery.

19 {11} As to the aggravated battery (the shooting), the jury was also entitled to
20 conclude that Defendant’s use of force was unreasonable as it was not only

1 disproportionate to, but unnecessarily escalated the existing physical conflict.
2 Victim punched Defendant just once. Defendant did not fall and there was no
3 testimony that Victim continued to pursue Defendant after striking him.
4 Nonetheless, Defendant immediately resorted to deadly force. Under New Mexico
5 law, “[i]t is well established that deadly force may not be used in a situation
6 involving simple battery or in a struggle in which there has been no indication that
7 death or great bodily harm could result.” *State v. Duarte*, 1996-NMCA-038, ¶ 4, 121
8 N.M. 553, 915 P.2d 309; *see also State v. Heisler*, 1954-NMSC-032, ¶ 31, 58 N.M.
9 446, 272 P.2d 660 (refusing to allow participants in hand-and-fist combat to resort
10 to deadly force simply because it appears one or the other is about to lose the fight).
11 {12} Moreover, the jury as trier of fact was free to completely reject Defendant’s
12 account to police that after Victim hit him, he “felt like [he] was going to black out”
13 and feared what Victim would do to him or his family if he lost consciousness. *See*
14 *UJI 14-5020 NMRA* (noting that jurors “alone are the judges of the credibility of the
15 witnesses and the weight to be given to the testimony of each”). The jury here
16 credited facts inconsistent with Defendant’s proclaimed fear for his family. *See State*
17 *v. Dickert*, 2012-NMCA-004, ¶ 42, 268 P.3d 515 (observing that it is the jury who
18 reconciles varying accounts and determines where the truth lies). In addition to the
19 facts pitting the Defendant as the aggressor, Defendant reversed his vehicle—with
20 his family inside it—toward Victim who had retreated. Moreover, Defendant fired

1 at Victim in the direction of his own vehicle, imperiling his own family. Upon the
2 testimony and evidence introduced in this case, the jury would have been well
3 supported in concluding that Defendant acted out of rage, not fear.

4 {13} We therefore conclude that sufficient evidence supported the jury's
5 conclusion that Defendant did not act in self-defense or in defense of others during
6 the battery or the aggravated battery.

7 **II. The State Did Not Improperly Shift the Burden of Proof**

8 {14} Defendant argues that the State committed prosecutorial misconduct during
9 opening statement and closing argument by improperly shifting the burden of proof
10 with respect to the issue of self-defense and defense of others. The parties agree that
11 this issue is unpreserved because Defendant did not timely object at trial. As a result,
12 we review only for fundamental error. *See State v. Lensegrav*, 2025-NMSC-016,
13 ¶ 27, 572 P.3d 924 (explaining unpreserved claims of prosecutorial misconduct are
14 reviewed for fundamental error). "The first step in reviewing for fundamental error
15 is to determine whether an error occurred. If that question is answered affirmatively,
16 we then consider whether the error was fundamental." *State v. Medema*, 2025-
17 NMCA-011, ¶ 25, 584 P.3d 846 (internal quotation marks and citation omitted).

18 {15} Defendant's argument is premised on two statements made by the State. First,
19 the State told the jury in opening statement, "Now you won't hear any evidence as
20 to what justified taking out a gun and shooting at [V]ictim." Second, the State

1 reiterated the point in closing argument, “[W]hat you didn’t see, is no evidence
2 pointing towards a self-defense claim made by [D]efendant.”

3 {16} Defendant argues that the prosecutor’s statements “carried the implication that
4 it was [Defendant’s] obligation to come forth with evidence, as if [self-defense] was
5 an affirmative defense.” That implication, Defendant continues, contradicts long
6 standing precedent holding that “when self-defense or the defense of others is at
7 issue, the absence of such justification is an element of the offense.” *See State v.*
8 *Parish*, 1994-NMSC-073, ¶ 8, 118 N.M. 39, 878 P.2d 988 (internal quotation marks
9 omitted).

10 {17} Defendant correctly places the State’s legal burden as to self-defense and
11 defense of others. But read in context, the State’s comments were not improper.
12 Turning to the first comment the prosecutor stated:

13 Now, the defense is gonna argue that [V]ictim punched him. Yeah,
14 you’ll hear that testimony. [V]ictim did punch him after he was pushed
15 off his bicycle. Now, you won’t hear any evidence as to what justified
16 taking out a gun and shooting at [V]ictim. That’s what you won’t hear.
17 There is no justification for a situation like this. Like I said, [V]ictim is
18 unarmed. That’s what the evidence will show.

19 Nothing in this comment implied Defendant carried the burden of proving self-
20 defense and defense of others. Rather, the State’s comment appropriately explained
21 what it believed the evidence would and would not show. *See State v. Garvin*, 2005-
22 NMCA-107, ¶ 32, 138 N.M. 164, 117 P.3d 970 (“An opening statement is intended
23 to serve as a preview of the evidence to be admitted by one or both of the parties.”

(internal quotation marks and citation omitted)). While the prosecutor strayed into argument when she stated, “There is no justification for a situation like this,” the thrust of this comment was that the State believed the evidence would show Victim was unarmed and would not show conduct of the Victim justifying Defendant’s use of a firearm. “We presume that the jury understood the prosecutor’s words according to their ordinary meaning.” *See State v. Allen*, 2000-NMSC-002, ¶ 98, 128 N.M. 482, 994 P.2d 728.

{18} Later in its opening statement, the State made clear that Defendant did not carry the burden of proof stating, “As we know, you do not have to hear from [D]efendant. You do not have to see any evidence presented by [D]efendant, and you cannot use that against him.” The State, in fact, embraced its burden when it stated, “The burden is with the State to prove this case beyond a reasonable doubt.” Thus, contrary to Defendant’s arguments, the prosecution’s first challenged comment made in opening statement was not improper.

{19} Neither was the second comment made in the State’s closing argument. In context, the second comment was as follows:

What you all saw, what you didn’t see, is no evidence pointing towards a self-defense claim made by Defendant. In fact, all of the evidence we presented shows that . . . it was [Victim] who was acting in self-defense.

Immediately following this comment, the prosecutor recounted the facts of the shooting and then explicitly argued why the evidence presented at trial did not

1 support the elements of self-defense as presented in the jury instructions. Exposing
2 the absence of menacing conduct by Victim that could have justified deadly force is
3 proper commentary on the state of the evidence, not improper shifting of the burden
4 of proof.

5 {20} Finally, the jury was properly instructed on the burden of self-defense and
6 defense of others. And both the district court and Defendant repeatedly emphasized
7 to the jury the State’s burden to prove beyond a reasonable doubt that Defendant did
8 not act in self-defense or in defense of others.

9 {21} To accept Defendant’s arguments, we would have to conclude “that the jury
10 took the comments made during [opening and] closing and applied them as the law
11 of the case, ignoring the written instructions.” *See State v. Armendarez*, 1992-
12 NMSC-012, ¶ 13, 113 N.M. 335, 825 P.2d 1245. We decline to do so. Instead, “[w]e
13 presume that the jury followed the written instructions and did not rely for its verdict
14 on one very brief part of the State’s closing remarks.” *See id.* We, therefore, reject
15 Defendant’s claim that the prosecution improperly shifted the burden on self-defense
16 and defense of others.

17 **III. The District Court Had No Obligation to Sua Sponte Cure Improper**
18 **Comments by the State in Opening**

19 {22} Defendant’s third argument challenges two additional comments made by the
20 State in opening. First, the State argued:

1 Now, when I was working on this case, I decided to do some
2 investigation, do some research on statistics. I looked into what we all
3 know is called road rage. I've seen it on the news. I'm sure we all have.
4 It's been increasing every year.

5 Defendant then objected and the district court sustained the objection stating, "Let's
6 go to the evidence that you propose to present in this case." Later, the State argued:

7 Now, I've met people in my life. I've had my own personal experiences
8 with road rage. I [was] born and raised in Chicago. There's a lot of
9 things that were close calls even for me personally on the road. I've
10 seen it . . . I've met people cool like water. And I've also met people
11 with this burning rage inside of them. Nothing triggers it.

12 Defendant again objected and the district court sustained the objection stating, "Let's
13 stay on the facts you intend to prove." Defendant did not otherwise ask the court to
14 take any specific curative measures.

15 {23} On appeal, Defendant argues that the district court erred by failing to go
16 beyond sustaining Defendant's objections and should have acted sua sponte to strike
17 the statements, to provide curative instructions, or to declare a mistrial. This issue is
18 unpreserved. While Defendant did object to the prosecutor's comments, neither the
19 district court nor the State were apprised of the issue now complained of: that the
20 district court should have done more than simply sustaining Defendant's objection.
21 *See State v. Sandoval*, 1975-NMCA-096, ¶ 4, 88 N.M. 267, 539 P.2d 1029 (holding
22 a defendant's claim that the trial court improperly admitted irrelevant evidence was
23 unpreserved because while the defendant did object to the relevancy of the evidence,
24 he did not move to strike the pertinent testimony or ask for a curative instruction);

1 *see also Hill v. Burnworth*, 1973-NMCA-135, ¶ 4, 85 N.M. 615, 514 P.2d 1312
2 (“The objection as worded did not call the trial court’s attention to the matter now
3 complained of. Hence it will be treated as if no objection had been made.”). As a
4 result, we review Defendant’s challenge for fundamental error. *See Lensegrav*,
5 2025-NMSC-016, ¶ 27; *see also State v. Johnson*, 2010-NMSC-016, ¶¶ 52-55, 148
6 N.M. 50, 229 P.3d 523 (reviewing a defendant’s claim that the district court should
7 have sua sponte granted a mistrial for fundamental error).

8 {24} To begin, we first determine whether error occurred at all. *See Medema*, 2025-
9 NMCA-011, ¶ 25. We agree, as the district court did below, that this commentary
10 was clearly improper. “It is improper for counsel, in an opening statement, to make
11 statements that will not or cannot be supported by proof, to claim that it will produce
12 evidence that is never submitted to the jury, or to comment about evidence that
13 counsel does not intend to prove.” *Lensegrav*, 2025-NMSC-016, ¶ 30 (text only)
14 (citation omitted). “The prosecutor’s opening statement in a criminal trial should
15 contain a capsulized version of the evidence that the prosecutor expects to present
16 and the claim that the prosecutor will make with reference to the evidence.” *Id.* ¶ 32
17 (alteration, internal quotation marks, and citation omitted). The State’s comments
18 plainly referred to matters which would not be and were not admitted in evidence:
19 the prosecutor’s ad hoc personal experiences with road rage and the claimed
20 statistical increase of road rage incidents year over year. To the extent the State’s

1 comments were designed to engender fear or anger in the jury about the phenomenon
2 of road rage, that too is improper. *See* UJI 14-6006 NMRA (“Neither sympathy nor
3 prejudice should influence your verdict.”).

4 {25} The crux of this issue, however, is not merely whether the State’s commentary
5 was improper. Rather, the issue is whether the district court erred by sustaining
6 Defendant’s valid objection while failing to do more on its own.² Our courts have
7 repeatedly recognized that it is the duty of the objecting party to request that the
8 district court strike improper comments or provide curative instructions. *See*
9 *Sandoval*, 1975-NMCA-096, ¶ 4 (recognizing “it [is] incumbent upon [the objecting
10 party] to move to strike the testimony complained of or to have asked for a curative
11 instruction”); *see also In re Crystal L.*, 2002-NMCA-063, ¶ 19, 132 N.M. 349, 48
12 P.3d 87 (“[The c]hild objected, and the court sustained the objection. The defense
13 obtained the relief they sought, and did not ask for more. We therefore deny [the
14 c]hild’s claim of error.”); *State v. Collins*, 2005-NMCA-044, ¶¶ 40-41, 43, 137 N.M.
15 353, 110 P.3d 1090 (holding, in part, that district courts do not have a sua sponte

²We note that the jurors received an introductory instruction from the district court directing them to ignore the subject of sustained evidentiary objections. *See* UJI 14-101 NMRA (“I will sustain objections if the question or evidence sought is improper for you to consider. If I sustain an objection to evidence, you must not consider such evidence”). While the sustained objections here concerned opening statements rather than “question[s] or evidence,” we believe the instruction is sufficiently similar for the jury to understand that it was also to ignore the substance of statements sustained on objection.

1 duty to provide curative instructions following an objection), *overruled on other*
2 *grounds by State v. Willie*, 2009-NMSC-037, ¶ 18, 146 N.M. 481, 212 P.3d 369.
3 Similarly, to the extent Defendant contends the district court should have declared a
4 mistrial for these errors, the district court had no obligation to do so sua sponte. *See*
5 *State v. Newman*, 1989-NMCA-086, ¶ 19, 109 N.M. 263, 784 P.2d 1006 (“[T]he
6 decision of whether to grant a mistrial rests within the sound discretion of the trial
7 court. A reviewing court will generally refuse to reverse a trial judge for failing to
8 grant a mistrial sua sponte.” (citation omitted)).

9 {26} Additionally, Defendant has not demonstrated that he was prejudiced by the
10 district court’s decision. Generally, “[i]n the absence of [a request for relief], or a
11 demonstration that prejudice resulted, the district court’s response to [the
12 d]efendant’s objection was sufficient to cure the error.” *State v. Salas*, 2017-NMCA-
13 057, ¶ 33, 400 P.3d 251. Defendant argues the comments may have prejudiced the
14 jury’s deliberations because “the evidence that [Defendant] did not act in self-
15 defense or defense of others was thin at best.” We disagree.

16 {27} First, the evidence was sufficient to support the jury’s determination that
17 Defendant did not act in self-defense. *See supra* Part I. Second, we are not convinced
18 that the prosecutor’s brief reference to her experience with road rage and her belief
19 in the statistical increase in road rage incidents were so prejudicial as to constitute
20 fundamental error. *See State v. Sosa*, 2009-NMSC-056, ¶ 35, 147 N.M. 351, 223

1 P.3d 348 (explaining that under the fundamental error analysis a jury verdict will
2 only be upset “(1) when guilt is so doubtful as to shock the conscience, or (2) when
3 there has been an error in the process implicating the fundamental integrity of the
4 judicial process”). The comments were brief, immediately corrected, and did not
5 introduce prejudicial information specific to Defendant. *Cf. Lensegrav*, 2025-
6 NMSC-016, ¶¶ 27-34 (finding fundamental error where the state’s opening
7 statement exposed the jury to allegations against the defendant made by a
8 nontestifying codefendant in violation of the Sixth Amendment of the United States
9 Constitution). Accordingly, we hold that the district court did not err in failing to sua
10 sponte strike the comments, issue curative instructions, or declare a mistrial.

11 **IV. The Admission of Defendant’s Failure to Call 911 After the Shooting Did**
12 **Not Constitute Plain Error**

13 {28} Defendant argues that the district court violated Rules 11-404(B) and 11-403
14 NMRA by erroneously admitting evidence that Defendant did not call 911 after
15 shooting Victim (911 evidence).³ At trial, Defendant did not object to the admission
16 of the 911 evidence and the parties agree that this issue is unpreserved. We therefore
17 review for plain error. *See State v. Chavez*, 2024-NMSC-023, ¶ 10, 562 P.3d 521

³We review Defendant’s challenge solely on evidentiary grounds as he has not advanced an argument under the Fifth Amendment of the United States Constitution or any other constitutional provision.

1 (“Unpreserved evidentiary errors are reviewable on appeal under a plain error
2 standard.”); *accord* Rule 11-103(E) NMRA.

3 {29} “To establish plain error, ‘there must be (1) error, that is (2) plain, and (3) that
4 affects substantial rights.’” *State v. Paglinawan*, 2026-NMCA-044, ¶ 11, 586 P.3d
5 346 (quoting *State v. Gwynne*, 2018-NMCA-033, ¶ 27, 417 P.3d 1157). “To find
6 plain error, the [appellate c]ourt must be convinced that admission of the testimony
7 constituted an injustice that created grave doubts concerning the validity of the
8 verdict.” *State v. Montoya*, 2015-NMSC-010, ¶ 46, 345 P.3d 1056 (internal
9 quotation marks and citation omitted).

10 {30} In this case, Defendant asserts that the 911 evidence was inadmissible under
11 Rules 11-404(B) and 11-403 and, notwithstanding the lack of objection, it was
12 reversible error for it to be admitted. Even assuming that the 911 evidence was
13 admitted in error, Defendant fails to establish that such an error was plain. *See State*
14 *v. Torres*, 2005-NMCA-070, ¶ 11, 137 N.M. 607, 113 P.3d 877 (determining that a
15 district court’s failure to sua sponte suppress evidence was not plain error because
16 such decision would not have been “obvious” or “clear”).

17 {31} Defendant does not cite a single case holding that a failure to call 911 after an
18 incident is inadmissible, nor has this Court found any in circumstances like these.
19 *See State v. Vigil-Giron*, 2014-NMCA-069, ¶ 60, 327 P.3d 1129 (explaining that
20 where a party fails to cite authority for a given proposition “we assume no such

authority exists”). To the contrary, sound arguments support the admissibility of the 911 evidence, either because Rule 11-404(B) does not apply, *see State v. Loza*, 2016-NMCA-088, ¶¶ 13-20, 382 P.3d 963 (explaining that Rule 11-404(B) does not apply to evidence intrinsic to the offense at issue), or because the 911 evidence would be probative of Defendant’s guilty conscience. *See Chavez*, 2024-NMSC-023, ¶ 31 (“Although not expressly listed in Rule 11-404(B)(2), it has long been recognized that consciousness of guilt has independent relevance and therefore constitutes a permissible use of other acts or wrongs under Rule 11-404(B).” (text only) (citation omitted)).

{32} In fact, other jurisdictions have held that a defendant’s failure to contact law enforcement is admissible to prove a guilty conscience. *See, e.g., State v. Lloyd*, 48,914 (La. App. 2 Cir. 1/14/15), 161 So.3d 879, 890 (finding that evidence of a defendant’s failure to call 911 after a fatal road rage related shooting was probative of his guilty conscience); *see also Bogart v. State*, 114 So.3d 316, 318 (Fla. Dist. Ct. App. 2013) (finding that evidence of a defendant’s failure to contact law enforcement was “relevant for the jury to infer consciousness of guilt”). Accordingly, Defendant has not shown that the admission of the 911 evidence was an obvious error. Under such circumstances, we conclude that the admission of the 911 evidence did not “infect[] the fairness or integrity of the judicial proceeding.” *See State v. Gutierrez*, 2003-NMCA-077, ¶ 19, 133 N.M. 797, 70 P.3d 787.

1 **V. Cumulative Error**

2 {33} Defendant claims that the issues raised on appeal constitute cumulative error
3 requiring reversal. “Cumulative error requires reversal of a defendant’s conviction
4 when the cumulative impact of errors which occurred at trial was so prejudicial that
5 the defendant was deprived of a fair trial.” *State v. Miera*, 2018-NMCA-020, ¶ 45,
6 413 P.3d 491 (internal quotation marks and citation omitted). “The doctrine of
7 cumulative error is to be strictly applied, and cannot be invoked if the record as a
8 whole demonstrates that the defendant received a fair trial.” *State v. Samora*, 2013-
9 NMSC-038, ¶ 28, 307 P.3d 328 (text only) (citation omitted). The only impropriety
10 we have identified at trial was the prosecution’s improper statements in opening, but
11 the effect of such error was adequately cured by the district court and cannot serve
12 as a basis for reversal here. Moreover, even assuming that the admission of the 911
13 evidence was in error, that lone error would be insufficient to require reversal under
14 the cumulative error standard. *See State v. Crawford*, 2026-NMCA-046, ¶ 47, 586
15 P.3d 382 (“[T]he cumulative error doctrine can apply only where there are multiple
16 errors.”), *cert. denied* (S-1-SC-41304, Feb. 26, 2026). Accordingly, the record as a
17 whole demonstrates that Defendant received a fair trial.

18 **CONCLUSION**

19 {34} For these reasons, we affirm.

1 {35} IT IS SO ORDERED

2
3 
KRISTOPHER N. HOUGHTON, Judge

4 WE CONCUR:

5 
6 JACQUELINE R. MEDINA, Chief Judge

7 
8 GERALD E. BACA, Judge