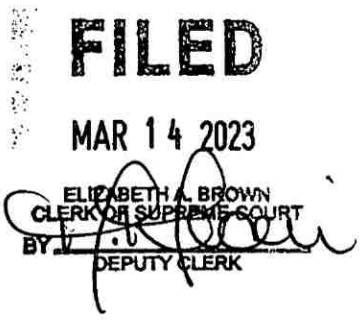
IN THE SUPREME COURT OF THE STATE OF NEVADA

GIOVANNI GONZALES-MARISCAL,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 83829



ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.[1]

Sufficiency of the evidence

Appellant Giovanni Gonzales-Mariscal argues that insufficient evidence supports his conviction because the evidence shows he acted in self-defense. When reviewing a challenge to the sufficiency of the evidence supporting a criminal conviction, this court considers "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

We conclude that sufficient evidence supports the conviction. The State presented evidence that Izaac Ferreyra and Conrad Ruiz agreed to meet at a park and resume a fistfight that had been broken up by a police officer. Gonzales-Mariscal, along with a group of people associated with Ruiz, arrived at the park first. Before the rest of the group associated with Ferreyra arrived, the victim and his brother pulled into the parking lot. The

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

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victim exited the vehicle and aggressively approached the Ruiz group and appeared ready to fight. The victim said that he had "something" for the Ruiz group and went back to his vehicle. When the victim reached into his vehicle, members of the Ruiz group thought he was grabbing a weapon, but he drove away instead and parked nearby. The victim's brother testified that neither of them had a weapon and they drove away because they were outnumbered.

David Munoz, a member of the Ruiz group, retrieved his handgun from a vehicle because he felt nervous. After the other members of the Ferreyra group arrived, the victim again pulled into the parking lot and approached the Ruiz group. Munoz brandished his handgun, and Gonzales-Mariscal told him to shoot the victim or pass the weapon. Munoz testified that there was no reason to shoot the victim because he was empty-handed and there was no danger. Gonzales-Mariscal then "ripped" the handgun from Munoz's hand and opened fire. Munoz testified that the third shot struck the victim, but Gonzales-Mariscal continued to fire in the direction of the Ferreyra group until the weapon was empty.[2] Gonzales-Mariscal returned the handgun to Munoz, fled the scene, and later fled the country. Gonzales-Mariscal admitted to shooting the victim because he believed the victim was reaching at his waist for a firearm. Although witnesses offered differing versions of the incident, none of the witnesses saw the victim with a firearm. Based on the evidence presented, a rational juror could find the essential elements of the charged crime and conclude that Gonzales-Mariscal did not act in self-defense. *See* NRS 193.165 (use of deadly weapon); NRS 200.010 (murder); NRS 200.130 (providing that a "bare fear" is not sufficient to justify killing in self-defense); NRS 200.200

[2]Other witnesses testified that they heard anywhere from 2 to 20 shots fired. Munoz testified that the weapon was loaded with 13 bullets.

(providing that lethal force in self-defense must appear "absolutely necessary").

Pretrial statements

Gonzales-Mariscal argues that the district court improperly admitted his statements during a video phone call interrogation because they were obtained in violation of his right to remain silent and right to counsel. To protect a suspect's right against self-incrimination, *Miranda v. Arizona* requires officers to inform suspects of their Fifth Amendment rights before conducting a custodial interrogation. 384 U.S. 436, 444 (1966). "A suspect's statements during a custodial interrogation are not admissible unless *Miranda*'s procedural requirements have been followed." *Dewey v. State*, 123 Nev. 483, 490, 169 P.3d 1149, 1153 (2007). Here, the parties agree that Gonzales-Mariscal was in custody when interrogated by Detective Joe Digesti.

First, Gonzales-Mariscal contends that his Fifth Amendment rights were violated because Det. Digesti waited several minutes before giving *Miranda* warnings. We disagree because during the pre-*Miranda* portion of the interrogation, Det. Digesti introduced himself, explained why they were speaking via a video phone call, and only asked Gonzales-Mariscal routine questions about his name, age, and physical and mental wellbeing. Such questions are normally attendant to arrest and custody and thus are exempt from *Miranda*'s coverage. *See Archanian v. State*, 122 Nev. 1019, 1038, 145 P.3d 1008, 1022 (2006). And Gonzales-Mariscal's statements made before being read his *Miranda* warnings—that he did not know anything about the shooting—came voluntarily when he interrupted Det. Digesti's explanation of why he wanted to speak with Gonzales-Mariscal. Those statements therefore do not implicate the Fifth

Amendment. *See Miranda*, 384 U.S. at 478 (explaining that "[v]olunteered statements of any kind are not barred by the Fifth Amendment").

Next, Gonzales-Mariscal contends that Det. Digesti improperly continued the interrogation after Gonzales-Mariscal invoked his right to remain silent and his right to counsel. We disagree. Before Det. Digesti asked any questions about the shooting, Gonzales-Mariscal said that he did not feel comfortable saying anything over the phone and mentioned his attorney. Det. Digesti asked "so you don't wanna talk to me?" Gonzales-Mariscal responded that "it doesn't hurt; you can talk." Accordingly, the record supports the district court's finding that Gonzales-Mariscal made an ambiguous invocation of his rights. *See Harte v. State*, 116 Nev. 1054, 1067-68, 13 P.3d 420, 429 (2000) (upholding trial court's ruling that defendant failed to unambiguously invoke right to counsel). And the district court properly excluded any statements made after Gonzales-Mariscal later unequivocally invoked his rights. Because the record supports the district court's determinations, we conclude that it did not err in admitting Gonzales-Mariscal's statements. *Maestas v. State*, 128 Nev. 124, 144-45, 275 P.3d 74, 87-88 (2012) (providing that this court "will not disturb a district court's determination of whether a defendant invoked his right to remain silent if that decision is supported by substantial evidence").

Admissibility of evidence

Gonzales-Mariscal argues that the district court abused its discretion in excluding evidence of the victim's prior firearm possession. "[E]vidence of specific acts showing that the victim was a violent person is admissible if a defendant seeks to establish self-defense *and was aware of those acts*." *Daniel v. State*, 119 Nev. 498, 515, 78 P.3d 890, 902 (2003). Although Gonzales-Mariscal asserts this evidence would have corroborated his belief that the victim had a firearm at the time of the shooting, he

concedes that he did not know the victim before the shooting. Accordingly, Gonzales-Mariscal has not shown that he was aware of the prior act, and thus the district court did not abuse its discretion in excluding the evidence. *See Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) (providing that the district court's decisions to admit or exclude evidence are reviewed for abuse of discretion).

Gonzales-Mariscal also argues that the district court abused its discretion in admitting a particular photograph that depicted Gonzales-Mariscal and his brother holding each other, smiling, and making a hand gesture toward the camera. The State sought to admit the photograph to rebut Gonzales-Mariscal's claims that he was too scared to return to the United States. Gonzales-Mariscal objected to the photograph, arguing that the hand gesture could be construed as a peace sign or as a gang sign. The district court determined that the photograph was admissible if the State laid a proper foundation. When the State questioned Gonzales-Mariscal, he could not remember when the photograph was taken and noted that it was posted on social media after his arrest. Because the State failed to lay a proper foundation as to when the photograph was taken, it was not relevant for the stated purpose. NRS 48.015. Therefore, the district court abused its discretion in admitting it. But we further conclude that the error was harmless given the tangential nature of the photograph and the substantial evidence supporting the conviction, including Gonzales-Mariscal's admission that he killed the victim and his subsequent flight out of the country. *See Zana v. State*, 125 Nev. 541, 545 n.3, 216 P.3d 244, 247 n.3 (2009) (reviewing the erroneous admission of evidence for harmless error).

Prosecutorial misconduct

Gonzales-Mariscal argues that the prosecutors engaged in several instances of misconduct. Because he did not object to any of the

challenged comments below, we review the comments for plain error affecting his substantial rights. *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008); *see also Martinorellan v. State*, 131 Nev. 43, 49, 343 P.3d 590, 593 (2015) ("To amount to plain error, the error must be so unmistakable that it is apparent from a casual inspection of the record." (internal quotation marks omitted)); NRS 178.602 (plain error rule).

First, we agree that the State violated a long-standing rule by improperly asking Gonzales-Mariscal which witnesses were lying. *See Daniel*, 119 Nev. at 519, 78 P.3d at 904 (adopting "a rule prohibiting prosecutors from asking a defendant whether other witnesses have lied or from goading a defendant to accuse other witnesses of lying, except where the defendant during direct examination has directly challenged the truthfulness of those witnesses"). As we have explained, "such questions can constitute in effect a misleading argument to the jury that the only alternatives are that the defendant or the witnesses are liars." *Id.* (quoting *State v. Flanagan*, 801 P.2d 675, 679 (N.M. Ct. App. 1990)). Despite this clear instance of misconduct, Gonzales-Mariscal has not shown that the error affected his substantial rights. In this case, the jurors heard inconsistent details about the altercation from numerous witnesses. Reasonable jurors could infer that the individual witnesses described the situation from their perspective. Thus, the jury was not presented with the misleading situation where either Gonzales-Mariscal or other witnesses must have lied. We conclude, in view of the trial as a whole, the error does not warrant relief.

Next, Gonzales-Mariscal contends that the State improperly allowed a witness to describe members of the Ruiz group as "look[ing] like gang bangers." Gonzales-Mariscal has not demonstrated misconduct as the witness made the statement unprompted, and the prosecutor informed the

district court that he would re-admonish witnesses to not reference anything gang related. Thus, Gonzales-Mariscal has not shown plain error.

Next, Gonzales-Mariscal alleges that the State improperly disparaged the defense by telling the jurors that members of the Ruiz group refused to meet pretrial with the prosecution and by asking a witness why he testified to details that he did not tell the police. We conclude these comments constitute fair impeachment and proper argument based on the evidence. *See* NRS 50.075. Therefore, Gonzales-Mariscal has not demonstrated plain error.

Finally, Gonzales-Mariscal contends that the State improperly argued that Gonzales-Mariscal had nine months out of the country to craft his story, that it was also the victim's and his family's day in court, and that Gonzales-Mariscal did not voluntarily meet with law enforcement, and the State commented on Gonzales-Mariscal's right to remain silent. After reviewing the record, we conclude that the State was properly rebutting Gonzales-Mariscal's testimony and closing argument. *See Moore v. State*, 116 Nev. 302, 306, 997 P.2d 793, 795 (2000) ("Prosecutors must be free to express their perceptions of the record, evidence, and inferences, properly drawn therefrom."); *Greene v. State*, 113 Nev. 157, 178, 931 P.2d 54, 67 (1997) ("The strongest factor against reversal on the grounds that the prosecutor made an objectionable remark is that it was provoked by defense counsel."), *receded from on other grounds by Byford v. State*, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000). Accordingly, Gonzales-Mariscal has not shown plain error.[3]

[3]To the extent Gonzales-Mariscal argues that the State only asked Hispanic witnesses if they left the country after the shooting, this claim is belied by the record.

Jury instruction

Gonzales-Mariscal argues that the district court erred in instructing the jury that "the amount of force used [in self-defense] must be in a proportionately reasonable amount to the threat." Because Gonzales-Mariscal failed to object to the instruction, plain error review applies. *See Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003). Gonzales-Mariscal has not shown that the instruction misstated the law. *See Runion v. State*, 116 Nev. 1041, 1046-47, 13 P.3d 52, 55-56 (2000) (including similar language in describing the common law as to self-defense and observing that Nevada's statutory scheme as to self-defense is consistent with the common law). Furthermore, the instructions as a whole accurately reflect Nevada's self-defense statutes. *See* NRS 200.120; NRS 200.130; NRS 200.160; NRS 200.200; *see also Tanksley v. State*, 113 Nev. 844, 849, 944 P.2d 240, 243 (1997). Therefore, this claim fails. *See* NRS 178.602 (plain error rule); *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018) (providing that a plain error must be "clear under current law from a casual inspection of the record").

Sentencing

Gonzales-Mariscal argues that the district court abused its discretion at sentencing and his sentence constitutes cruel and unusual punishment. We discern no abuse of discretion. Regardless of its severity, "[a] sentence within the statutory limits is not 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)). The sentence imposed—life with the possibility of parole after 28 years—is within the parameters provided by the relevant statutes, *see* NRS

193.165(1); NRS 200.030(4)(b)(2), and Gonzales-Mariscal does not allege that those statutes are unconstitutional. We conclude that the aggregate sentence imposed is not so grossly disproportionate so as to shock the conscience and constitute cruel and unusual punishment.[4]

Cumulative error

Finally, Gonzales-Mariscal argues that cumulative error warrants relief. Having considered the relevant factors, we are not convinced that the cumulative effect of the two errors discussed above—the admission of an irrelevant photograph and the prosecutor improperly asking Gonzales-Mariscal which witnesses were lying—violated Gonzales-Mariscal's right to a fair trial. *See Valdez*, 124 Nev. at 1195, 196 P.3d at 481 (stating that the court considers three factors to determine whether the cumulative effect of errors violated a defendant's right to a fair trial: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged" (internal quotation marks omitted)). Accordingly, we

ORDER the judgment of conviction AFFIRMED.

Stiglich, C.J.

Lee, J.

Bell, J.

[4]To the extent Gonzales-Mariscal asserts that the district court relied on suspect evidence at sentencing, he fails to point to any highly suspect or impalpable evidence that the district court considered. *See Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

cc: Hon. Scott N. Freeman, District Judge
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Attorney General/Carson City
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