IN THE SUPREME COURT OF THE STATE OF NEVADA

XAVIER ACOSTA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 86404

FILED

FEB 03 2025

ELIZABETH A. BROWN
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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. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

Angel Rodriquez was shot six times and succumbed to his wounds at the scene of the shooting.[1] A jury convicted appellant Xavier Acosta of first-degree murder in the killing of Rodriguez. On appeal, Acosta challenges his conviction and raises several evidentiary and trial procedure issues.

Sufficiency of the evidence

Evidence is sufficient to support a criminal conviction if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" when viewed in a light most favorable to the prosecution. *Belcher v. State*, 136 Nev. 261, 275, 464 P.3d 1013, 1029 (2020) (quoting *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992)). "The jury's verdict will not be disturbed on appeal when there is substantial evidence supporting it." *Brass v. State*, 128 Nev. 748, 754, 291 P.3d 145, 150 (2012).

[1]We do not recount the facts except as necessary to our disposition.

We conclude that the State presented sufficient evidence on which a rational jury could find Acosta guilty of first-degree murder with the use of a deadly weapon. *See* NRS 200.010 (defining murder); NRS 200.030 (defining first degree murder); NRS 193.165 (including a firearm as a deadly weapon). First, we determine that sufficient evidence was presented to support that the nature of the crime was first-degree murder. We then turn to the sufficiency of the evidence pointing to Xavier Acosta as the perpetrator.

The State presented evidence, including expert and eyewitness testimony, that: (1) Rodriguez's manner of death was homicide and the cause of death was six gunshot wounds fired from a single .40 caliber weapon; (2) a Cadillac with a broken taillight was parked across the street from Rodriguez's house for about eight minutes around the time of the shooting and an individual exited the vehicle, returned shortly thereafter, and drove away; and (3) witnesses to the shooting heard gunshots and saw the shooter firing a black gun at Rodriguez multiple times, including while standing over Rodriguez when Rodriguez was already on the ground. On these facts, a rational trier of fact could conclude that Rodriguez's death resulted from first degree murder under a lying-in-wait theory. *See Collman v. State*, 116 Nev. 687, 716, 7 P.3d 426, 445 (2000) (defining murder on the theory of lying in wait as "watching, waiting, and concealment from the person killed *with the intention* of inflicting bodily injury upon such person." (internal quotation marks omitted)). Additionally, the firing of at least six bullets is sufficient for the jury to find express malice as it shows that the perpetrator intended that their actions would result in Rodriguez's death. *Washington v. State*, 132 Nev. 655, 663, 376 P.3d 802, 808 (2016)

(concluding that firing multiple bullets into an occupied structure demonstrated the intent to kill).

As to Acosta being the perpetrator, the evidence included the following: location data showing that a phone linked to Acosta was near the crime scene when the crime occurred; a photo of the crime scene taken minutes before the murder and a photo of the interior of the car matching the suspect vehicle which was captured on security footage; and Acosta's DNA which was found on the driver's side of the suspect vehicle. Additionally, witnesses to the shooting described the shooter as having a similar build to Acosta, Acosta's brother-in-law Thomas Braun testified that Acosta has access to a .40 caliber handgun, and Acosta's mother-in-law testified that Acosta had confessed to the killing. Finally, testimony supports that Acosta was in a domestic dispute with his wife Rebecca after learning that Rodriguez had left her flowers. On these facts, a rational trier of fact could conclude that Acosta murdered Rodriguez with the use of a firearm by means of lying in wait. NRS 200.030; *Belcher*, 136 Nev. at 275, 464 P.3d at 1029; *see Buchanan v. State*, 119 Nev. 201, 217, 69 P.3d 694, 705 (2003) (explaining that circumstantial evidence alone may sustain a conviction). Acosta's arguments about alleged lack of eye-witness testimony and family bias do not change this analysis because these arguments pertain to the weight and credibility of the evidence as opposed to its sufficiency. *See Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008) ("This court will not reweigh the evidence or evaluate the credibility of witnesses because that is the responsibility of the trier of fact.").

Motion to suppress

Acosta argues that all the data from the cell phones seized at his brother-in-law Thomas Braun's house should have been suppressed because the phones were initially seized without a warrant and because the

subsequently obtained warrants were deficient for both cell phone and Google data.

"A motion to suppress presents mixed questions of law and fact." *State v. Lloyd*, 129 Nev. 739, 743, 312 P.3d 467, 469 (2013). While "[a] district court's legal conclusion regarding the constitutionality of a challenged search receives de novo review," *id.*, findings of fact are reviewed for clear error. *Somee v. State*, 124 Nev. 434, 441, 187 P.3d 152, 157 (2008). "[T]he issuing judge's determination of probable cause should be given great deference by a reviewing court." *Doyle v. State*, 116 Nev. 148, 158, 995 P.2d 465, 471 (2000). This court's duty "is simply to determine whether there is a substantial basis for concluding that probable cause existed." *Id.* at 158, 995 P.2d at 472.

Initial seizure of the cell phones

We conclude that the initial seizure of the cell phones was covered by the exigency exception to the warrant requirement. *Lloyd*, 129 Nev. at 743, 312 P.3d at 469 (observing that a few well-delineated exceptions, including exigency, may justify a warrantless search). Upon his arrest, Acosta was alerted to a potential police investigation into him and, under those circumstances, the initial warrantless seizure was justified to prevent potential imminent destruction of evidence. *See Smith v. State*, 140 Nev., Adv. Op. 19, 545 P.3d 716, 722 (2024) (concluding that the exigency exception justified a warrantless seizure of a defendant's cell phone after he was alerted to law enforcement's investigation); *Riley v. California*, 573 U.S. 373, 388 (2014) (recognizing the "sensible concession" that officers could, while seeking a warrant, seize a defendant's cell phone to prevent the destruction of evidence). We next turn to the validity of the warrant obtained to forensically download the contents of the cell phones.

Validity of the warrants

When Acosta was arrested on an unrelated charge, law enforcement seized two phones associated with him. Law enforcement subsequently obtained and executed a search warrant for all the digitally stored records and device created data which could constitute evidence of Acosta's involvement in Rodriguez's murder. This warrant was accompanied by a lengthy affidavit describing the existence of probable cause that Acosta murdered Rodriguez. However, the only specific justification for the search of the data stored on the phones was that the affiant had knowledge through their training and experience "that suspects often use their cellular phones before, during and after crimes . . . [and] cellular phones store GPS location data and other information that can aid in the investigation of this crime." The affidavit requested the search of all the contents of the listed devices "since it [was] unknown how long the relationship between the victim and the suspect was established and/or how long [Acosta] may have been planning to shoot [Rodriguez]." The affidavit and the warrant return were both signed by Detective Wells. Indeed, the return indicates that the entire digital contents of both phones were extracted pursuant to this warrant.

Through the execution of this warrant, law enforcement located a photo of Rodriguez's home, taken from the inside of a vehicle on the day of his murder, minutes before the murder took place. Law enforcement found the interior of the vehicle to be consistent with a Cadillac SRX—the suspect vehicle. This photo would form the basis, in part, for the warrants requesting the following from the providers for these phones:

> all stored communication or files, including voice mail, text messages, including numbers text [sic] to and received from and all related content, e-mail, digital images (e.g. pictures), contact lists, video calling, web activity (name of web site or

> application visited or accessed), domain accessed, data connections (to include Internet Service Providers (ISPs), Internet protocol (IP) addresses, (IP) Session data, (IP) Destination Data, bookmarks, data sessions, name of web sites and/or applications accessed), date and time when all web sites, applications, and/or third party applications were accessed and the duration of each web site, application, and/or third party application was accessed, and any other files including all cell site and sector information.

Beyond these electronically stored records, these subsequent warrants also encompassed contacts, call logs, text messages and any content associated with these messages "including audio, video, and image files, digital images and videos, and files or documents." These subsequent warrants were limited to records from 03/01/2021 to 06/26/2021. After execution of these warrants, law enforcement received call logs and cell tower information from the providers for Acosta's phones.

A warrant may issue only upon a showing of probable cause. *State v. Allen*, 119 Nev. 166, 170, 69 P.3d 232, 235 (2003). Probable cause exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). We agree with Acosta that probable cause to search the entire contents of the phones was lacking. The only justification for a full forensic download of the phones offered in the warrant application was that, through the detective's training and experience, he knew "suspects often use their cellular phones before, during, and after crimes." Although some crimes, such as child pornography, have a nexus to electronics for storage reasons, that type of nexus is not apparent here. *Cf. United States v. Lacy*, 119 F.3d 742, 746 (9th Cir. 1997); *United States v. Kvashuk*, 29 F.4th 1077, 1085 (2022) (acknowledging that cases involving cybercrime have a sufficient

nexus between the crime and electronic devices presented probable cause to search electronic devices at a defendant's home).

Here, the warrant application offers little reason to believe the phone data would contain evidence of the murder other than possibly identifying Acosta's whereabouts at the time of the crime. *See United States v. Schesso*, 730 F.3d 1040, 1042 (9th Cir. 2013) (admonishing courts "to exercise greater vigilance in protecting against the danger that the process of identifying seizable electronic evidence could become a vehicle for the government to gain access to a larger pool of data that it has no probable cause to collect." (internal quotation marks omitted)); *cf. United States v. Ramos*, 923 F.2d 1346, 1351 (9th Cir. 1991) ("[p]robable cause to believe that a suspect has committed a crime is not by itself adequate to secure a search warrant for the suspect's home." *overruled on other grounds by United States v. Ruiz*, 257 F.3d 1030, 1032 (9th Cir. 2001) (en banc)). The warrant application fails to offer any facts that would make it more likely than not that the contents of the phones or phone data would contain digital evidence of the murder. A warrant this broad is akin to permitting the search of every nook and cranny of an individual's home when the officers had probable cause to believe that individual stole a couch. We conclude that the warrant authorizing a search of all the phones' contents was insufficiently particularized and grossly overbroad because the complete download of Acosta's digital life contained on these two cell phones was justified only by a generalized statement that suspects use their phones around the time they commit crimes. However, even when a warrant is defective, suppression is not appropriate if the circumstances of the search show that the officer relied on the warrant in good faith.

Good faith exception to the exclusionary rule

Exclusion of improperly obtained evidence is not explicitly required by the Fourth Amendment. *Arizona v. Evans*, 514 U.S. 1, 10, (1995). Rather, exclusion is a judicial remedy designed to deter law enforcement from violating the Fourth Amendment. *United States v. Leon*, 468 U.S. 897, 906 (1984). In *Leon*, the United States Supreme Court recognized a good faith exception to the exclusionary rule under which evidence, obtained by an officer acting in objectively reasonable reliance on a search warrant issued by a neutral magistrate, will not be excluded even when the warrant is later invalidated. 468 U.S. at 919-20, 922; *see also State v. Kincade*, 129 Nev. 953, 957, 317 P.3d 206, 209 (2013). However, "the officer's reliance on the magistrate's probable-cause determination and on the technical sufficiency of the warrant he issues must be objectively reasonable." *Leon*, 468 U.S. at 922. Such reliance is not objectively reasonable, and suppression is warranted where an affidavit is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *Id.* at 923 (internal quotations omitted).

Here, the warrants were detailed and a neutral magistrate reviewed and issued them. While the affidavit included sufficient facts to show probable cause that Acosta murdered Rodriguez, it lacked an indicia of probable cause that Acosta's phones contained information or data pertinent to the murder because it failed to include facts that would support that evidence of the murder would be found on the phone. Nor does the crime of murder generally, or specifically here, create a nexus here such that normal inferences would support that Acosta was hiding evidence of the murder on his phone. *Cf. Kvashuk*, 29 F.4th at 1085. The lack of information creating a fair probability that evidence of the murder was on the phone renders the good faith exception inapplicable, as belief that

probable cause exists on this basis alone is entirely unreasonable. *United States v. Hove*, 848 F.2d 137, 139-140 (9th Cir. 1988) (concluding a district court abused its discretion where an affidavit failed to link the location of the search to the defendant or explain why the police wanted to search that location).

We conclude that suppression of the phone evidence here would serve the purpose of the exclusionary rule because it is not objectively reasonable to conclude that probable cause to search Acosta's cell phones existed solely because "suspects often use their cellular phones before, during, and after crimes." *Leon*, 468 U.S. at 916 ("[T]he exclusionary rule is designed to deter police misconduct."). This statement could support that law enforcement expected to find location data placing Acosta at the scene. However, the affidavit lacked any information that would suggest the phones would have digitally stored media that directly connected Acosta to the murder. The mere fact that one of the phones happened to contain a photo of the crime scene does not retroactively supply law enforcement with the probable cause that it would contain such a photo. Instead, this warrant permitted law enforcement to download the entirety of the phones' contents without connecting the probable cause to Acosta's use of the phone. While it is improper to refer to Detective Wells's application and execution of this warrant as misconduct, Wells failed to support his broad search into the entirety of Acosta's digital life with specific probable cause.

We conclude the district court abused its discretion in denying Acosta's motion to suppress. Outside of the law enforcement officer that applied for and executed this warrant, official belief that probable cause to access all the digital files on these phones without explaining what they expected to find beyond evidence of the murder is unreasonable. Because

official belief was unreasonable, the district court should have granted Acosta's motion to suppress. However, given the overwhelming evidence supporting Acosta's conviction outside of the evidence obtained through the searches of his phones, we conclude that this error was harmless. *See Allred v. State*, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004) ("An error is harmless when it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." (internal quotations omitted)).

Expert witness testimony

Acosta argues that the district court abused its discretion in permitting three expert witnesses to testify despite the State failing to properly notice the witnesses. A district court's decision to allow expert testimony is reviewed for an abuse of discretion. *Perez v. State*, 129 Nev. 850, 856, 313 P.3d 862, 866 (2013). We perceive no such abuse here. The State provided Acosta with notice that two officers would testify over a year before trial and the State provided Acosta with their respective CVs as soon as he objected to not being provided with such at trial. The record does not reveal that Acosta's ability to cross-examine these officers was impacted or that the State acted in bad faith in its alleged failure to timely provide Acosta with the CVs given that the officers' expected testimonies and their current positions were included in the first supplemental notice of witnesses. *Cf. Founts v. State*, 87 Nev. 165, 170, 483 P.2d 654, 656 (1971) (explaining that "the factor of surprise and its consequent prejudicial effect upon the defendant's investigation and cross-examination of witnesses" is relevant when a court is considering whether to exercise its discretion in allowing the introduction of improperly noticed witness testimony).

In rejecting Acosta's motion to exclude testimony from T-Mobile employee, TeeTee Williams, the district court correctly found that the State provided timely notice that a T-Mobile custodian of records would testify

and provided Williams's name as soon as it had that information. Acosta presents no argument and points to no evidence that the issues with Williams's disclosure prejudiced his cross-examination of her or his investigation of how cell towers and signals work. He also failed to point to evidence that the State acted in bad faith, given that the district court accepted the State's explanation that it did not have Williams's name until two weeks before trial due to T-Mobile procedures for assigning trial witnesses. *Cf. Founts*, 87 Nev. at 170, 483 P.2d at 657 (finding that as there was was no surprise or prejudice in the introduction of witness, strict compliance with a notice statute would defeat the ends of justice and fair play). Accordingly, we conclude that the district court did not abuse its discretion in allowing the testimony of these three expert witnesses.

Admission of evidence

Acosta complains that the district abused its discretion in admitting certain evidence. *See McLellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) (reviewing a district court's decision to admit or exclude evidence for an abuse of discretion). We address each of his arguments in turn.

Admission of letters between Acosta and his wife

Acosta maintains that letters that he sent to his wife were covered by spousal privilege and they therefore should not have been admitted. Whether the spousal privilege applies turns on expectations of confidentiality. NRS 49.295(1)(b) (providing that a spouse cannot be examined, without the consent of the other, as to any communication made by one to the other during the marriage); *Foss v. State*, 92 Nev. 163, 167, 547 P.2d 688, 691 (1976) (concluding the communications must be confidential for the NRS 49.295 privileges to apply).

Here, the letters were in sealed envelopes, addressed to Acosta's wife alone and their content suggests confidentiality; therefore, NRS 49.295's protections apply. We are not persuaded by the State's arguments that waiver or an exception to the privilege applies. Thus, the district court abused its discretion in admitting these privileged documents. *McLellan*, 124 Nev. at 267, 182 P.3d at 109. However, even absent admission of the letters, sufficient evidence supports the jury's guilty verdict beyond a reasonable doubt, such that the error in admitting the letters was harmless. *See Allred*, 120 Nev. at 415, 92 P.3d at 1250.

Admission of testimony regarding Acosta's access to a .40 millimeter firearm

Although Acosta asserts that evidence of his access to a .40 caliber handgun is irrelevant and prejudicial, a .40 caliber gun was used to kill Rodriguez, making Acosta's access to such a firearm relevant because it tends to prove that Acosta had the means to murder Rodriguez. *See United States v. Dorsey*, 677 F.3d 944, 952 (9th Cir. 2012) (holding that access to a gun similar to the one used to perpetrate a crime was relevant because it tended to prove that the defendant in that case had the means to commit the charged crimes and was the shooter). We are not persuaded by Acosta's unfair prejudice argument, as this evidence was unlikely to appeal to the jury's emotions and gun ownership is a protected constitutional right, which cuts against Acosta's claim that his access to a gun was improper prior bad act evidence. *Krause Inc. v. Little*, 117 Nev. 929, 935, 34 P.3d 566, 570 (2001) (describing unfairly prejudicial evidence as typically involving an appeal "to the emotional and sympathetic tendencies of a jury, rather than the jury's intellectual ability to evaluate evidence"). Thus, the district court did not abuse its discretion in admitting evidence that Acosta had access to the same type of gun as was used in the murder.

Admission of Acosta's prior domestic violence act

Acosta challenges the admission of evidence about his jealousy and a prior domestic violence act against his wife, arguing that it was improper character evidence, lacked probative value, was unfairly prejudicial, and was cumulative of other evidence. As confirmed at the *Petrocelli* hearing, the domestic violence incident occurred after Rodriguez left flowers on Rebecca's car, which happened two months before Rodriguez was killed. We perceive no abuse of discretion in the district court's conclusion that this evidence was admissible under NRS 48.045(2) as proof of both motive—Acosta's jealousy over his wife's relationship with Rodriguez, and his identity as the shooter, based on testimony that Acosta had access to and retained possession of his brother-in-law Braun's gun after the domestic violence incident. *McLellan*, 124 Nev. at 267, 182 P.3d at 109. Nor are we convinced by Acosta's arguments about unfair prejudice and needless cumulative evidence because the evidence was the only source tying Acosta to Rodriguz before the murder and was sufficiently unique to be highly probative of Acosta's motive and identity. *Id.*

Cellphone location map

Acosta argues that the trial exhibit depicting his cell phone data on a map prepared by Detective Wells and Wells's testimony in conjunction with this map impermissibly and inaccurately indicated directionality when Williams, the T-Mobile custodian of records, testified that the data did not indicate directionality, and was thus inconsistent. We conclude that Detective Wells's testimony was not inconsistent with that of Williams. Williams testified about the raw data from the cell phones—longitude and latitude coordinates—which she testified represented only the location of the cell tower. When asked about the direction of the device in relation to

the cell tower, Williams testified that a math formula called "azimuth" can provide information about whether a cell phone is north, east, south, or west of the tower to which it connected. Detective Wells then testified that azimuth could provide a directionality metric indicating the direction in which the cell phone connected to the tower. This was consistent with Williams's testimony about sectors and azimuth's capabilities.[2] Accordingly, the district court did not abuse its discretion in allowing Wells's testimony and the admission of the map he created. *Id.*

References to Rodriguez as "victim"

Acosta argues that the State's references to Rodriguez as a victim prejudiced the jury against him and impermissibly carried with it an indicia of guilt contrary to the presumption of innocence. We disagree. Acosta did not argue that the killing of Rodriguez was not a crime, rather his defense rested on his contention that he did not commit the crime. A person who died from six gunshot wounds, two to his face and two from behind him, fits within the definition of victim under both NRS 176.015(5)(d)(2) and Marsy's Law.[3] Accordingly, Acosta was not denied the presumption of innocence and was not improperly assigned an indicia of

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[2]As to Acosta's argument that the map was confusing or prejudicial, he failed to include a copy of the map in his appendix on appeal, which prevents us from meaningfully addressing this argument. *See Cuzze v. Univ. and Comm. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 135 (2007) (recognizing that it is the appellant's duty to make an adequate appellate record and that "[w]hen an appellant fails to include necessary documentation in the record, we necessarily presume that the missing portion supports the district court's decision").

[3]Article 1, Section 8A of the Nevada Constitution, also known as Marsy's Law, defines a "victim" as "any person directly and proximately harmed by the commission of a criminal offense under any law of this State." Nev. Const. art. 1 §8A.

guilt. *See Morgan v. State*, 134 Nev. 200, 206 n.8, 416 P.3d 212, 220 n.8 (2018) (noting that the record did not support that the defendant was denied the presumption of innocence where the district court properly instructed the jury and there was no evidence of disregard of those instructions).

Prosecutorial misconduct

Acosta argues that several comments made by the State constitute misconduct. Our review is confined to plain error because Acosta failed to object to these comments below. *Parker v. State*, 109 Nev. 383, 849 P.2d 1062 (1993) (holding that a defendant must raise a timely objection and seek corrective instruction to preserve the issue of prosecutorial misconduct for appeal); *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (reviewing claims of prosecutorial misconduct for plain error where the defendant fails to preserve the matter). Acosta carries the burden to demonstrate actual prejudice or a miscarriage of justice. *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003); *Thomas v. State*, 120 Nev. 37, 47, 83 P.3d 818, 825 (2004) (holding actual prejudice results where "a prosecutor's statements so infect[ ] the proceedings with unfairness as to make the results a denial of due process.").

This court employs a two-step process when considering prosecutorial misconduct. *Valdez*, 124 Nev. at 1188, 196 P.3d at 476. First, this court must determine whether the conduct is improper. *Id.* If the conduct is improper, the second step considers whether the conduct warrants reversal. *Id.* However, reversal is not mandated where there is overwhelming evidence to support the conviction. *Barron v. State*, 105 Nev. 767, 778, 783 P.2d 444, 451 (1989).

Comments about sympathy during the State's closing argument

Acosta argues that the State's comments that the guilt phase was not the time for the jury to make decisions based on sympathy

constituted misconduct. We disagree. These comments properly reflected the jury's duty to render a decision based on the evidence, not on any sympathy they might feel toward Acosta, and the comments did not serve to denigrate the defense. *See Lisle v. State*, 113 Nev. 540, 554, 937 P.2d 473, 482 (1997) (holding a prosecutor's comments to the jury concerning accountability did not constitute prosecutorial misconduct); *cf. Barron*, 105 Nev. at 780, 783 P.2d at 452 (finding that a prosecutor improperly belittled the defendant by arguing that if the jury believed his testimony, then he had "some ocean front property in Tonopah" to sell to them).

References to the killing as a murder

Acosta challenges both the district court's references to the killing as a murder during voir dire and the State referring to the killing as a murder throughout its questioning. We conclude that, in the context of the district court's question, it did not impermissibly imply that a murder occurred. *Browning v. State*, 124 Nev. 517, 533, 188 P.3d 60, 72 (2008) (observing that we consider challenged comments in context). Instead, the district court referred to the trial as a "murder case" after the information was read, indicating that Acosta had been charged with murder. This comment did not improperly imply that a murder had occurred, only that this was a case where the charge was murder. With respect to the State's references to the killing as a murder during questioning, we conclude that, while most of these comments assume a murder occurred, the comments were not improper because Acosta's defense does not rest on this killing not being a murder and the circumstances of the killing very strongly support that it was. While we agree that the State improperly asked Braun whether he knew the flower incident would "cause [Acosta] to murder" Rodriguez, when Acosta objected to this question, the State rephrased it to ask whether Braun knew "the relevance of the incident at the time," which is not

improper. Accordingly, Acosta does not identify any reversible error as to this question.

Other comments that Acosta claims improperly implied guilt

Acosta contends that the State's use of "no question" and "no doubt" during closing arguments with respect to whether a murder occurred or whether Acosta was guilty were improper and require reversal. Acosta also challenges the State's comment to the jury that they were "sitting in [a] room with a cold-blooded killer." We agree that these statements were improper because they impermissibly injected the State's opinion on Acosta's guilt. *Pantano v. State*, 122 Nev. 782, 793, 138 P.3d 477, 484 (2006) (concluding that statements like "there's no doubt he's guilty" are always improper). Referring to Acosta as a cold-blooded killer not only assumes Acosta is guilty, but also plays on the fears of the jury. *See Moser v. State*, 91 Nev. 809, 813 & n.4, 544 P.2d 424, 427 & n.4 (1975) (concluding statement in closing argument improperly inflamed the jury because the prosecutor, among other improper statements, stated that the defendant committed murder in cold blood); *Valdez*, 124 Nev. at 1191, 196 P.3d at 478 (referring to the search for the defendant as a "man hunt" was improper because it inflamed the jury). Similarly, the State's closing statement that the jury would get to the penalty phase the next day impermissibly injected the prosecutor's opinion on Acosta's guilt because it assumed that the jury would find Acosta guilty and proceed to the penalty phase. We next address whether the improper comments warrant reversal.

Reversal is not warranted based on the prosecutor's improper comments

"'[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone.'" *Hernandez v. State*, 118 Nev. 513, 525, 50 P.3d 1100, 1108 (2002) (quoting *United States v. Young*,

470 U.S. 1, 11 (1985)). While some of the State's comments were improper, Acosta fails to demonstrate that these comments affected his "substantial rights, by causing 'actual prejudice or a miscarriage of justice'" given the state of the evidence against him. *Valdez*, 124 Nev. at 1190, 196 P.3d at 477 (quoting *Green*, 119 Nev. at 545, 80 P.3d at 95); *Thomas*, 120 Nev. at 47, 83 P.3d at 825; *see Yates v. State*, 103 Nev. 200, 206, 734 P.2d 1252, 1256 (1987) ("When a guilty verdict is free from doubt, even aggravated prosecutorial remarks will not justify reversal."). That evidence included that Rodriguez was killed by someone who waited outside his house for eight minutes before exiting a vehicle and shooting him six times; Acosta's DNA in the driver's side of a stolen Cadillac which matching the model, broken taillight, and rims of the suspect vehicle captured on surveillance video; Acosta's access to the same caliber handgun used to kill Rodriguez; and witness testimony that Acosta confessed to the fatal shooting to his mother-in-law, that Acosta became jealous when Rodriguez left flowers for Rebecca, and that the shooter's body type matched that of Acosta. On these facts, we conclude that the guilty verdict is free from doubt. Thus, reversal based on the prosecutor's improper comments during closing arguments do not warrant reversal.

Voluntary manslaughter jury instruction

Acosta argues that the court should have given a jury instruction on voluntary manslaughter based on evidence that Rodriguez was having an affair with Rebecca. We disagree. We review a district court's jury instruction decision for an abuse of discretion or judicial error. *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). Acosta did not advance a manslaughter theory during closing and any contention that "an immediate emotional provocation" led to Rodriguez's shooting is belied by the record. NRS 200.050(1) (defining voluntary manslaughter as a

killing where there is "a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person"). While there is evidence that Acosta learned of a possible romantic connection between Rodriguez and Rebecca, Acosta learned of this connection two months before the killing, which undercuts a manslaughter theory. *See* NRS 200.060 ("[I]f there should appear to have been an interval between the assault or provocation given and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge and punished as murder."). The evidence supports that the shooter drove to Rodriguez's home, waited outside for eight minutes, exited the vehicle when Rodriguez came out of his house, shot Rodriguez six times, including while Rodriguez was already on the ground, and then fled. On these facts, the court did not err in declining to give a voluntary manslaughter instruction because there was no evidence presented at trial to suggest that Acosta committed this killing as a result of an irresistible passion. *Williams v. State*, 99 Nev. 530, 531, 665 P.2d 260, 262 (1983) (holding that a defendant is entitled to an instruction if there is some evidence to support it); *Crawford*, 121 Nev. at 748, 121 P.3d at 585.

Cumulative error

Acosta argues the number and extent of errors warrant a new trial. An appellant is not entitled to a perfect trial, but only a fair trial. *Ennis v. State*, 91 Nev. 530, 533, 539 P.2d 114, 115 (1975). This court looks to three factors to determine whether a defendant's right to a fair trial was violated: "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." *Valdez*, 124 Nev. at 1195, 196 P.3d at 481 (quoting *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000)). Turning to the first factor, the issue of guilt

was not close. As to the second factor, the following four errors occurred: (1) improper admission of the contents downloaded from Acosta's phone; (2) improper admission of the letters between Acosta and his wife; (3) improper admission of the location data and photographs from Acosta's phone; and (4) certain comments made by the State during its closing argument. Turning to the third factor, first-degree murder with the use of a deadly weapon is a grave crime, which weighs heavy on Acosta's right to a fair trial. Regardless, even if we cumulate these errors and remove them from the State's evidence entirely, the State still presented evidence that Acosta had the means, motive, and opportunity to commit this murder. Taken together, we conclude that these errors did not deny Acosta a fair trial because there was otherwise overwhelming evidence to support the conviction, even absent the improperly introduced evidence and State's comments. *Barron*, 105 Nev. at 778, 783 P.2d at 451.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

Stiglich, J.

Pickering, J.

Parraguirre, J.

cc: Hon. Tierra Danielle Jones, District Judge
Liberators Criminal Defense
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk