IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

NATHANIEL MALDONADO,
Appellant.

No. 2 CA-CR 2019-0098
Filed April 22, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pinal County
No. S1100CR201701435
The Honorable Delia R. Neal, Judge

AFFIRMED AS CORRECTED

COUNSEL

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MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

V Á S Q U E Z, Chief Judge:

¶1 After a jury trial, Nathaniel Maldonado was convicted of first-degree murder and attempted armed robbery. The trial court sentenced him to concurrent prison terms, the longest of which is life imprisonment without the possibility of release on any basis for twenty-five years. On appeal, Maldonado argues the court erred by admitting irrelevant and inadmissible evidence, "preclud[ing him] from eliciting exculpatory testimony" related to a prior consistent statement, and denying his motions for a mistrial on the ground of prosecutorial misconduct. Maldonado also contends we should correct the sentencing minute entry to reflect the court's oral pronouncement at the sentencing hearing. For the following reasons, we affirm Maldonado's convictions and his sentences as corrected.

Factual and Procedural Background

¶2 We view the evidence and all reasonable inferences therefrom in the light most favorable to affirming Maldonado's convictions. *See State v. Miles*, 211 Ariz. 475, ¶ 2 (App. 2005). One morning in May 2017, Maldonado and his girlfriend Gloria Alvarez left his grandparents' house "to go get gas." As Alvarez was driving, Maldonado suggested the two "go rob [T.S.] for weed," to which she agreed. Because Maldonado only had the five dollars his grandfather had given him for gas, he "pretended to put the money" for the marijuana inside some napkins to give to T.S.

¶3 Maldonado walked over to T.S.'s driver-side window, and when he reached inside "as though he was grabbing something," T.S. grabbed Maldonado. When T.S. opened the car door, Maldonado shot him. The two men fought, and Maldonado repeatedly hit T.S. over the head with the gun. Maldonado eventually fled, returning to where Alvarez had parked the vehicle.

¶4 A nearby homeowner, D.W., saw Maldonado running away, noted the vehicle's license plate number, and followed Maldonado and

Alvarez to his grandfather's house. D.W. later directed Pinal County Sheriff's deputies to the house and Maldonado and Alvarez were arrested.

¶5 A grand jury indicted Maldonado for first-degree murder and armed robbery. After trial, the jury found him guilty of first-degree murder and attempted armed robbery, and the trial court sentenced Maldonado as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Admission of Evidence

¶6 Maldonado argues the trial court erred by admitting a "Facebook conversation[] regarding the purchase of a gun, under Rules 401, 403, and 404(b), Arizona Rules of Evidence." We review a court's ruling on the admissibility of evidence for an abuse of discretion. *See State v. Foshay*, 239 Ariz. 271, ¶ 29 (App. 2016).

¶7 During his opening statement, Maldonado's counsel explained that Maldonado had carried a gun because he "dealt with . . . threats from other people" and "fear[ed] . . . being beat[en] up or attacked." He explained that on the day Maldonado had killed T.S., Maldonado "knew . . . he was in for an ass beating" once the "fraud went south" and T.S. "stepped out of the car," so Maldonado "pulled out a gun" to save his life, to save "his 16-year-old girlfriend's life, [and] to save his unborn baby's life."

¶8 During trial, the state sought to introduce a conversation between Maldonado and another man on Facebook about purchasing a firearm the week before the shooting. The man had informed Maldonado that he had a "[.22 caliber] Smith and Wesson" for 300 dollars. Maldonado responded that he was not interested in the firearm because "the caliber is for hunting squirrels" and it "would take 7 or 8 shots to take down a man." Maldonado further explained that he had "found a Glock 19 for the same price . . . with a[n] extendo," and was only interested in a similar firearm for Alvarez.

¶9 Maldonado objected to the admission of the conversation, arguing that "when and how he bought a gun, [was] irrelevant to . . . the counts . . . before this jury," the conversation was unduly prejudicial "under [a Rule 403] analysis," and was inadmissible as a "prior bad act" because it was "illegal[]" for Maldonado to "purchase a gun" as a juvenile. The state argued the conversation was relevant and "not unduly prejudicial" because it concerned "the gun used in this case," and revealed that Maldonado had "made the conscious decision to use a gun that was more powerful than a

.22 [caliber]." The state also argued the conversation was not other-act evidence because it was intrinsic to the offenses and because Maldonado had argued in his opening statement that he was "a scared kid, who's a victim of circumstances," so that the state should be permitted to "rebut that assertion."

¶10 The trial court noted that although Maldonado had specifically stated "that this was not a self-defense case," his counsel's comments could "open the door to allow the other side to rebut." The court pointed out that Maldonado had claimed in his opening statement that he did not mean to shoot the victim, but merely to defraud him, allowing the jury to conclude he had "perceiv[ed] the incident as a moment in which he would need to defend himself." Thus, the court concluded the evidence was admissible, and further determined its probative value on the issues of self-defense and mistake outweighed any undue prejudice.

¶11 On appeal, Maldonado argues the trial court erred in admitting the Facebook conversation because it was "irrelevant pursuant to Rules 401 and 403, Arizona Rules of Evidence[,] and inadmissible under Rule 404(b)."

¶12 Evidence must be relevant to be admissible. Ariz. R. Evid. 402. And evidence is relevant if it has "any tendency to make a fact more or less probable than it would be without the evidence." Ariz. R. Evid. 401(a). Relevant evidence, however, may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury." Ariz. R. Evid. 403; *see also State v. Butler*, 230 Ariz. 465, ¶ 33 (App. 2012) ("[U]nfair prejudice 'means an undue tendency to suggest decision on an improper basis,' such as emotion, sympathy or horror." (quoting *State v. Schurz*, 176 Ariz. 46, 52 (1993))).

¶13 Generally, "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Ariz. R. Evid. 404(b). Yet, such evidence may be admissible for other purposes, including to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.* Before admitting other-act evidence, a trial court must determine that a defendant committed the other acts "by clear and convincing evidence," the evidence is relevant, offered for its proper purpose, and its probative value is not substantially outweighed by the danger of unfair prejudice. *See State v. Hausner*, 230 Ariz. 60, ¶ 69 (2012). The state may offer other-act evidence to rebut a defendant's theory of the

case, including a self-defense claim. *See State v. VanWinkle*, 230 Ariz. 387, ¶ 22 (2012) ("[s]tate was entitled to present evidence of other indiscriminate acts of violence" to rebut defendant's self-defense claim); *State v. Andriano*, 215 Ariz. 497, ¶¶ 26-27 (2007) (explaining evidence of extramarital affairs admissible under Rule 404(b) to rebut defense theory that defendant was domestic-violence victim and killed her husband in self-defense), *abrogated on other grounds by State v. Ferrero*, 229 Ariz. 239 (2012).

¶14 Additionally, although opening statements do not constitute evidence, a party's opening statement may open the door to the admission of other-act evidence because "[t]he object of an opening statement is to apprise the jury of what the party expects to prove and prepare the jurors' minds for the evidence which is to be heard." *State v. Mincey*, 130 Ariz. 389, 405 (1981) (alteration in *Mincey*) (quoting *State v. Prewitt*, 104 Ariz. 326, 333 (1969)). Because jurors "ha[ve] the right to consider counsel's opening statement," the opposing party is permitted to present evidence to address it. *See id.* (quoting *State v. Adams*, 1 Ariz. App. 153, 155 (1965)).

¶15 In this case, the Facebook conversation was both relevant and admissible for three reasons. First, the conversation constituted probative evidence from which the jury reasonably could have inferred intent and absence of mistake. Maldonado purchased a firearm that could, as he had stated in the conversation, "take down a man" and brought that firearm to meet with T.S. even though he asserted he "only meant to obtain marijuana by fraud." *See* Ariz. R. Evid. 401, 404(b). Second, the conversation's probative value was not substantially outweighed by the danger of unfair prejudice because it showed, as the trial court stated, that Maldonado "did not have any misconceptions about . . . what the nine-millimeter would do," and aided the jury in "making a determination about . . . Maldonado's intent."[1] *See* Ariz. R. Evid. 403, 404(b). Third, Maldonado did not file a

[1] Although the trial court stated it would include a "limiting instruction to ensure that the jury [was] not to consider [the Facebook conversation] for any unfair or improper purpose," it does not appear the court did so. Any argument, however, is waived as Maldonado did not object to the jury instructions below, *see State v. Gallegos*, 178 Ariz. 1, 11 (1994) (failure to object at trial to error or omission in jury instructions waives issue on appeal for all but fundamental error), nor was this issue raised in Maldonado's opening brief, *see State v. Bolton*, 182 Ariz. 290, 298 (1995) (failure to develop argument on appeal constitutes waiver of that claim).

notice of defenses pursuant to Rule 15.2(b)(1), Ariz. R. Crim. P., prior to trial, and during his opening statement made what the jury could have reasonably interpreted as a self-defense claim, which opened the door for the state to present an other-act evidence rebuttal. *See Mincey*, 130 Ariz. at 405; *see also VanWinkle*, 230 Ariz. 387, ¶ 22; *Andriano*, 215 Ariz. 497, ¶¶ 26-27. Accordingly, the court did not abuse its discretion in admitting the Facebook conversation about purchasing a firearm the week before the shooting. *See Foshay*, 239 Ariz. 271, ¶ 29.

Hearsay Testimony

¶16 Maldonado contends the trial court erred by "preclud[ing him] from eliciting exculpatory testimony." He maintains he was "entitled to establish that [he] had made a prior consistent statement" about believing T.S. had "reached for a gun." We review evidentiary rulings for an abuse of discretion, *see State v. Lehr*, 227 Ariz. 140, ¶ 36 (2011), and Confrontation Clause issues de novo, *see State v. King*, 213 Ariz. 632, ¶ 15 (App. 2006).

¶17 Before trial, the parties stipulated that the recording of a police interview would not be admitted or mentioned because of "*Miranda* issues." Maldonado requested that witnesses "be instructed to not reference . . . the contents of the interview," which the state agreed to, unless Maldonado took the stand. The trial court ruled "that the interview w[ould] not be introduced in the [state's] case-in-chief" and "[n]o witnesses w[ould] reference that interview."

¶18 During trial, the state played a recording of a jail phone call between Maldonado and his brother. During his testimony, a detective briefly explained that at one point in the call, Maldonado had told his brother that he believed T.S. "was reaching" for something before Maldonado shot and killed him. After the state rested, Maldonado recalled the detective to again testify about the contents of the jail phone call. The detective restated that during the phone call, Maldonado had "talk[ed] about [T.S.] reaching." Maldonado then asked him whether it was "the first time that [he had] heard that." The detective refused to answer the question "based on [the] court order." During a discussion between the court and counsel, outside of the presence of the jury, Maldonado stated that the other time the detective had heard the statement was during the police interview that the trial court had previously ruled inadmissible. The state argued Maldonado was attempting to elicit hearsay, but Maldonado disagreed, arguing that whether it was the first time the detective had heard such a statement "go[es] to the quality of the investigation." The court disallowed

the question because "[t]he parties ha[d] stipulated to suppression of that interview" and "eliciting a question about anything that occurred during that interview [would be] improper."

Prior Consistent Statement

¶19 Maldonado contends the precluded testimony about the police interview "did not call for hearsay" and therefore was admissible. He argues that he "was entitled to establish that [he] had made a prior consistent statement" regarding whether "T.S. came after him" pursuant to Rule 801(d)(1)(B), Ariz. R. Evid.

¶20 A statement is hearsay if the declarant did not make it "while testifying at the current trial or hearing" and it is offered "in evidence to prove the truth of the matter asserted." Ariz. R. Evid. 801(c). Hearsay statements are inadmissible. Ariz. R. Evid. 802. A declarant's statement, however, is not hearsay if: (1) the declarant testifies, (2) is subject to cross-examination about the prior statement, and (3) the statement is either inconsistent or consistent with the declarant's testimony. Ariz. R. Evid. 801(d)(1)(A)–(B).

¶21 Here, the trial court properly precluded the testimony. "[P]arties are bound by their stipulations, unless relieved therefrom by the trial court," *see Rutledge v. Ariz. Bd. of Regents*, 147 Ariz. 534, 549 (App. 1985), and Maldonado's questioning attempted to elicit testimony in violation of the parties' stipulation. Additionally, Maldonado's statement to police was also not admissible as a prior consistent statement because Rule 801(d)(1) required Maldonado, as the declarant, to testify at trial and be subject to cross-examination, neither of which occurred. *See* Rule 801(d)(1)(B). The court, therefore, did not abuse its discretion in precluding the detective's proposed testimony. *See Lehr*, 227 Ariz. 140, ¶ 36.

Confrontation Clause

¶22 Maldonado contends the trial court nevertheless erred in precluding the detective's testimony about the police interview because he had "a constitutional right to fully cross-examine the witnesses against him and to bring out exculpatory evidence." Because Maldonado raises his Confrontation Clause argument for the first time on appeal, we review it for fundamental, prejudicial error. *See State v. Escalante*, 245 Ariz. 135, ¶¶ 12, 21 (2018); *State v. Forde*, 233 Ariz. 543, ¶ 62 (2014).

¶23 "The 'primary object' of the Confrontation Clause is 'testimonial hearsay.'" *State v. Gomez*, 226 Ariz. 165, ¶ 8 (2010) (quoting

Crawford v. Washington, 541 U.S. 36, 53 (2004)). A statement is testimonial if it "w[as] made under circumstances which would lead an objective witness [to] reasonably . . . believe that the statement would be available for use at a later trial," including "pretrial statements that declarants would reasonably expect to be used prosecutorially." *State v. Parks*, 211 Ariz. 19, ¶ 50 (App. 2005) (quoting *Crawford*, 541 U.S. at 51-52). "The Confrontation Clause prohibits the admission of testimonial hearsay unless (1) the declarant is unavailable and (2) the defendant 'had a prior opportunity to cross-examine' the declarant." *State v. Damper*, 223 Ariz. 572, ¶ 9 (App. 2010) (quoting *State v. Armstrong*, 218 Ariz. 451, ¶ 32 (2008)); *see also State v. Aguilar*, 210 Ariz. 51, ¶ 1 (App. 2005) (testimonial out-of-court statements by unavailable declarant inadmissible if declarant not previously cross-examined about statements); *cf. State v. Abdi*, 226 Ariz. 361, ¶ 27 (App. 2011) (explaining constitutional rights "are not without limit[s]" and "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination" (quoting *State v. Cañez*, 202 Ariz. 133, ¶ 62 (2002))).

¶24 In this case, Maldonado ignores the Confrontation Clause's purpose, which is to preclude testimonial hearsay. *See Gomez*, 226 Ariz. 165, ¶ 8. The detective's proposed testimony not only called for hearsay, as discussed above, but was testimonial because Maldonado made the prior statement "about [T.S.] reaching" in custody during a police interview, which he reasonably should have expected could be used at trial. *See Parks*, 211 Ariz. 19, ¶ 50. And testimonial hearsay is inadmissible under the Confrontation Clause unless the declarant is unavailable and was previously cross-examined. *See Damper*, 223 Ariz. 572, ¶ 9. The prospective testimony was thus inadmissible because although Maldonado was unavailable at trial, *see State v. Nieto*, 186 Ariz. 449, 454 (App. 1996), he had not been cross-examined about the statement on any prior occasion, *see Damper*, 223 Ariz. 572, ¶ 9. Maldonado's assertion that he had a right "to fully cross-examine" the detective is also based on the faulty premise that his right to confront the detective was without limitation. *See Abdi*, 226 Ariz. 361, ¶ 27. We, therefore, find no error, fundamental or otherwise. *See Escalante*, 245 Ariz. 135, ¶ 21; *Forde*, 233 Ariz. 543, ¶ 62.

Prosecutorial Misconduct

¶25 Maldonado contends the trial court erred in denying his two motions for a mistrial based on prosecutorial misconduct. "[W]e will not disturb a trial court's denial of a mistrial for prosecutorial misconduct in the absence of a clear abuse of discretion." *See Newell*, 212 Ariz. 389, ¶ 61.

¶26 In considering whether a prosecutor has committed misconduct warranting a mistrial, a trial court must consider: "(1) whether the prosecutor's statements called to the jury's attention matters it should not have considered in reaching its decision and (2) the probability that the jurors were in fact influenced by the remarks." *Id.* ¶ 60. "To prevail on a claim of prosecutorial misconduct, a defendant must demonstrate that the prosecutor's misconduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *State v. West*, 238 Ariz. 482, ¶ 51 (App. 2015) (quoting *State v. Hughes*, 193 Ariz. 72, ¶ 26 (1998)). "A declaration of a mistrial . . . is 'the most dramatic remedy for trial error and should be granted only when it appears that justice will be thwarted unless the jury is discharged and a new trial granted.'" *State v. Dann*, 205 Ariz. 557, ¶ 43 (2003) (quoting *State v. Adamson*, 136 Ariz. 250, 262 (1983)). We defer to the trial court's determination, as it has broad discretion in ruling on such motions, and it "is in the best position to determine whether a particular incident calls for a mistrial because [it] is aware of the atmosphere of the trial." *See State v. Williams*, 209 Ariz. 228, ¶ 47 (App. 2004).

Other-Act Evidence

¶27 Maldonado argues the trial court erred in denying his motion for a mistrial after the state elicited testimony from Alvarez that Maldonado "had been threatened by other people around him," and he had "previously robbed someone of marijuana." Maldonado objected pursuant to Rule 404(b) and moved for a mistrial. The court sustained the objection, but denied Maldonado's motion, noting that opening statements are not evidence, but concluding that "sustaining the objection [was] sufficient" and it "d[id] not want to draw further attention to that statement by ordering it stricken." The court later restated that it did not want "any[witnesses] testifying about any previous armed robberies." Because the court is the best position to determine whether a mistrial is warranted under the circumstances, *see Williams*, 209 Ariz. 228, ¶ 47, we conclude the court did not abuse its discretion in denying Maldonado's first motion for a mistrial. *See Newell*, 212 Ariz. 389, ¶ 61.

¶28 We further conclude that any error in the state's eliciting testimony about the armed robberies was harmless. *See Hughes*, 193 Ariz. 72, ¶ 32 ("Prosecutorial misconduct is harmless error if we can find beyond a reasonable doubt that it did not contribute to or affect the verdict."). The testimony about the prior robberies was limited to three questions and answers on the second day of a six-day trial, the trial court released the jury before counsel argued their positions, and Maldonado's previous armed robberies were not discussed thereafter by Alvarez or any other witnesses,

or mentioned in closing argument. We are satisfied beyond a reasonable doubt that the elicited testimony did not contribute to or affect the verdict. *Id.*

Closing Argument

¶29 Maldonado argues the trial court erred in denying his second motion for a mistrial after the prosecutor "misled" and "intentional[ly] and knowing[ly] lie[d]" to the jury during closing argument by improperly referring to the Facebook conversation and the statements Maldonado had made during his police interview that had been precluded.

¶30 In his closing argument, the prosecutor told the jury that the Facebook conversation established an absence of mistake—that Maldonado intended to use the firearm. The prosecutor's argument was consistent with the trial court's ruling that the conversation could be used for this non-hearsay purpose in light of Maldonado's opening statement. The prosecutor also referred to the jail phone call between Maldonado and his brother to emphasize Maldonado's inconsistent explanation of his state of mind before he shot and killed T.S.

¶31 Because "[p]rosecutors are given 'wide latitude' in presenting closing argument to the jury," they may summarize the evidence, make submittals, ask the jury to draw reasonable inferences based on the evidence, and make suggested conclusions. *See State v. Goudeau*, 239 Ariz. 421, ¶ 196 (2016) (quoting *State v. Comer*, 165 Ariz. 413, 426 (1990)). The prosecutor's statements did not amount to misconduct, and the court did not abuse its discretion in denying Maldonado's second motion for a mistrial. *See Newell*, 212 Ariz. 389, ¶ 61.

Sentencing Discrepancy

¶32 Maldonado contends this court should correct the sentencing minute entry, which conflicts with the trial court's oral pronouncement during the sentencing hearing. "Upon finding a discrepancy between the oral pronouncement of sentence and a minute entry, a reviewing court must try to ascertain the trial court's intent by reference to the record." *State v. Stevens*, 173 Ariz. 494, 496 (App. 1992). Generally, "the '[o]ral pronouncement in open court controls over the minute entry,'" and this court "can order the minute entry corrected if the record clearly identifies the intended sentence." *State v. Ovante*, 231 Ariz. 180, ¶ 38 (2013) (alteration in *Ovante*) (quoting *State v. Whitney*, 159 Ariz. 476, 487 (1989)).

¶33 During the sentencing hearing, the trial court stated that it was sentencing Maldonado to life imprisonment without the possibility of release on any basis for twenty-five years for the first-degree murder conviction. The sentencing minute entry, however, provides that Maldonado was sentenced to "life" imprisonment. The court's oral pronouncement was clear, and we correct the minute entry to reflect the sentence for count one as life in prison without the possibility of release on any basis for twenty-five years. *See id.* (quoting *Whitney*, 159 Ariz. at 487).

Disposition

¶34 For the reasons stated above, we affirm Maldonado's convictions and sentences, correcting the sentencing minute entry as provided herein.