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1 **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **STATE OF NEW MEXICO,**

3 Plaintiff-Appellee,

4 v.

5 **GARY L. DOPORTO,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY**

8 **Jane Shuler Gray, District Court Judge**

9 Raúl Torrez, Attorney General

10 Santa Fe, NM

11 Eric Orona, Assistant Solicitor General

12 Albuquerque, NM

13 for Appellee

14 Harrison & Hart, LLC

15 Nicholas T. Hart

16 Albuquerque, NM

17 for Appellant

18 **DISPOSITIONAL ORDER**

19 **HENDERSON, Judge.**

20 This matter is on appeal from Defendant Gary Doporto's conviction for
21 trafficking a controlled substance (possession with intent to distribute), contrary to
22 NMSA 1978, Section 30-31-20 (2006). For the reasons that follow, we affirm.

Court of Appeals of New Mexico
Filed 2/24/2025 6:57 AM


Ramon J. Maestas
Chief Clerk

No. A-1-CA-40892

1 1. At trial for Defendant’s charge of trafficking a controlled substance, a
2 police officer was permitted to provide opinion testimony distinguishing personal
3 use and trafficking amounts of heroin over Defendant’s objection. The officer opined
4 that the weight of heroin present in this case, 1.93 grams, “is an amount to be given
5 away or sold.”

6 2. “We review the admission of evidence under an abuse of discretion
7 standard and will not reverse in the absence of a clear abuse.” *State v. Sarracino*,
8 1998-NMSC-022, ¶ 20, 125 N.M. 511, 964 P.2d 72 (citation omitted).

9 3. Additionally, “[i]n order to preserve an issue for appeal, a defendant
10 must make a timely objection that specifically apprises the trial court of the nature
11 of the claimed error and invokes an intelligent ruling thereon.” *State v. Montoya*,
12 2015-NMSC-010, ¶ 45, 345 P.3d 1056. “We generally do not consider issues on
13 appeal that are not preserved below.” *State v. Leon*, 2013-NMCA-011, ¶ 33, 292
14 P.3d 493 (internal quotation marks and citation omitted).

15 4. On appeal, Defendant claims that the district court improperly admitted
16 the police officer’s testimony because (1) the district court never recognized him as
17 an expert, (2) he was not qualified to offer opinion testimony distinguishing between
18 quantities of heroin for distribution and for personal use under Rule 11-702 NMRA,
19 and (3) his testimony improperly commented on Defendant’s intent.

1 5. Defendant’s first and second contentions were preserved by his
2 objection at trial to the officer’s qualifications to provide expert opinion testimony.
3 However, it appears from our review of the record that Defendant’s third contention
4 is unpreserved. Defendant’s foundational objections that the officer was unqualified
5 to testify as an expert were insufficient to alert the district court that the officer’s
6 opinion impermissibly reached the ultimate issue for the jury to decide. *See*
7 *Montoya*, 2015-NMSC-010, ¶ 45. Nevertheless, we will assume for purposes of our
8 analysis that this third claim of error, like the first two, was preserved.

9 6. We further assume, without deciding, that the district court erroneously
10 permitted the officer to give expert opinion testimony, which he was unqualified to
11 give, and to improperly comment on Defendant’s intent. Even in cases where it is
12 established that evidence was erroneously admitted, however, reversal is not
13 warranted if the error was harmless. *See State v. Tollardo*, 2012-NMSC-008, ¶ 25,
14 275 P.3d 110. Stated differently, reversal is warranted only where the error caused
15 prejudice—i.e., where there is a reasonable probability that the error contributed to
16 the verdict. *See id.* ¶¶ 25, 36 (affirming that the reasonable probability standard
17 applies to evidentiary errors such as the ones claimed here). The probable effect of
18 an evidentiary error is determined on a case-by-case basis by considering, among
19 other things, the circumstances of the error, the emphasis placed on the error,
20 evidence of a defendant’s guilt apart from the error, the importance of the improperly

1 admitted evidence, and whether the erroneously admitted evidence introduced new
2 facts or was merely cumulative. *Id.* ¶ 43. “Defendant bears the initial burden of
3 demonstrating that he was prejudiced by the error.” *State v. Astorga*, 2015-NMSC-
4 007, ¶ 43, 343 P.3d 1245.

5 7. Defendant has failed to meet his initial burden of showing how he was
6 prejudiced by the evidentiary errors such that reversal is warranted. That is,
7 Defendant does not discuss how the officer’s testimony resulted in prejudice in this
8 case under the numerous considerations in *Tollardo*. *See* 2012-NMSC-008, ¶¶ 43-
9 44 (stressing the case-specific nature of harmless error review). In fact, Defendant’s
10 briefing entirely omits any such analysis—failing even to cite the harmless error
11 standard. In short, Defendant fails to analyze the probable effect of the admission of
12 the officer’s testimony on the verdict in his case, *see id.* ¶ 36, and we will not perform
13 that analysis for him, *see State v. Flores*, 2015-NMCA-002, ¶ 17, 340 P.3d 622
14 (declining to review an inadequately briefed issue, where review would require this
15 Court to develop the defendant’s argument).

16 8. Because Defendant has failed his initial burden of demonstrating he
17 was prejudiced by the error such that reversal is warranted, *see Astorga*, 2015-
18 NMSC-007, ¶ 42, we conclude that the admission of the officer’s testimony, even if
19 in error, was harmless.

20 9. For these reasons, we affirm Defendant’s conviction.

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IT IS SO ORDERED.

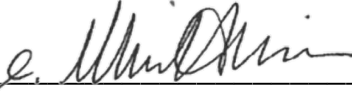


SHAMMARA H. HENDERSON, Judge

WE CONCUR:



JENNIFER L. ATTREP, Chief Judge



J. MILES HANISEE, Judge