IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Opinion Number: _____

Court of Appeals of New Mexico
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No. A-1-CA-41790

STATE OF NEW MEXICO,

Plaintiff-Appellee,

v.

SHAUN GERALD PAGLINAWAN,

Defendant-Appellant.

APPEAL FROM THE DISTRICT COURT OF MCKINLEY COUNTY
R. David Pederson, District Court Judge

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for Appellee

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for Appellant

OPINION

WRAY, Judge.

{1} At Defendant Shaun Paglinawan's jury trial, a police officer testified that in his opinion, based on his training and experience, the activity at a particular residence and certain items found there, including specific quantities of fentanyl as well as some methamphetamine, were indicative of trafficking of controlled substances. The State did not provide notice that the officer would testify as an expert, and the officer was neither acknowledged nor qualified as an expert at trial—but Defendant did not object to the testimony. The jury convicted Defendant of two counts of trafficking of controlled substances (fentanyl and methamphetamine), contrary to NMSA 1978, Section 30-31-20(A)(3) (2006) (prohibiting the trafficking of controlled substances by possession with intent to distribute). Defendant appeals the convictions and argues that the admission of the officer's testimony was plain error. We conclude that while the officer's testimony was expert testimony as defined by Rule 11-702 NMRA, under the circumstances, its admission was not plain error. *See State v. Gwynne*, 2018-NMCA-033, ¶ 27, 417 P.3d 1157 (applying the plain error rule "only in evidentiary matters and only if we have grave doubts about the validity of the verdict, due to an error that infects the fairness or integrity of the judicial proceeding" (internal quotation marks and citation omitted)). Defendant additionally challenges the sufficiency of the evidence, the effectiveness

of trial counsel, and the admission of some other evidence. We reverse Defendant's conviction for trafficking methamphetamine based on insufficiency of the evidence and otherwise affirm.

BACKGROUND

{2} Over the course of a several-months-long investigation of a residence, law enforcement officers (the LEOs) observed heavy foot traffic and other behaviors that they believed were indicative of drug trafficking. The investigation led the LEOs to obtain a search warrant for the residence. As the LEOs set up for the execution of the search warrant, an unknown vehicle neared the residence, and the driver noticed the LEOs outside. The LEOs observed the driver having a brief conversation with Defendant on the porch and then Defendant quickly leaving the residence with a military style backpack. Defendant got into a car (the car) and attempted to drive away but was blocked by a police vehicle that pulled out in front and when Defendant reversed to leave, he was blocked by another police vehicle that pulled in behind.

{3} The LEOs detained Defendant, impounded the car, and executed the search of the residence. In a bedroom that the LEOs associated with Defendant, they located two digital scales and separately—scattered at the bottom of a clothes drawer—approximately fourteen small plastic bags of different sizes and colors that each contained a crystal-like substance believed to be methamphetamine. Of the six bags

that were tested, the lab detected only trace or very small amounts of methamphetamine, between .003 and .38 grams. After obtaining a search warrant for the car and conducting a search, the LEOs found a military-style backpack on the passenger seat, which contained 421 fentanyl pills, a digital scale, a pipe with methamphetamine residue, and a small quantity of methamphetamine (.13 grams). In the trunk of the car was a black suitcase that contained a shotgun with the barrel sawed-off and ammunition for it. In relevant part, Defendant was charged with two counts of possession with the intent to distribute, one for methamphetamine and one for fentanyl.

{4} At trial, in addition to other evidence, the State introduced the shotgun and photos taken during the search of both the car and residence, including photos of mail with Defendant's name on it that had been located in a bedroom in the residence. The State's only witness was a single officer that had participated in the investigation. He testified to his own training and experience, the investigation, the search itself, and his opinions about the evidence that was discovered. The State did not offer the officer as an expert witness, and Defendant did not object to the officer's opinion testimony. Defendant argued to the jury that the items recovered were not his and that he did not live at the residence. Defendant was convicted on both counts and appeals.

DISCUSSION

{5} Defendant argues that (1) the admission of the officer's testimony resulted in plain error, (2) the evidence did not support the verdicts, (3) defense counsel was ineffective, and (4) the erroneous admission of evidence warrants reversal. We address each issue in turn.

I. The Officer's Testimony

{6} Broadly, Defendant argues that the officer gave impermissible expert opinion testimony about drug trafficking. Defendant acknowledges that he did not object to the officer's testimony on these grounds and therefore seeks this Court's review for plain error. Because we conclude that sufficient evidence did not support Defendant's conviction for trafficking methamphetamine, we limit our plain error review to the officer's testimony as it relates to trafficking fentanyl. "Because plain error is an exception to the general rule that parties must raise timely objection to improprieties at trial, it is to be used sparingly," and appellate courts reverse only if the asserted error "affected a substantial right of the defendant." *State v. Chavez*, 2024-NMSC-023, ¶ 10, 562 P.3d 521 (alterations, omission, internal quotation marks, and citation omitted). Before considering Defendant's specific assertions of plain error, we first consider the question of whether the officer provided expert testimony.

A. Lay or Expert Witness

{7} The State argues that the officer's testimony was entirely permissible lay opinion testimony. "Our rules of evidence create a distinction between opinion testimony offered by an observer and expert witness testimony offered based upon expertise in the relevant subject matter area." *State v. Vargas*, 2016-NMCA-038, ¶ 12, 368 P.3d 1232. A lay witness may testify in the form of an opinion that is "rationally based on the witness's perception," is helpful to understand the testimony or facts of the case, and is "not based on scientific, technical, or other specialized knowledge." Rule 11-701 NMRA. In this way, lay witness testimony "is generally confined to matters which are within the common knowledge and experience of an average person." *Vargas*, 2016-NMCA-038, ¶ 15 (internal quotation marks and citation omitted). An expert witness, however, is permitted to testify in the form of an opinion that is based on "scientific, technical, or other specialized knowledge" if the witness is qualified "by knowledge, skill, experience, training, or education" and the opinion will be helpful to understand the testimony or facts of the case. Rule 11-702. Law enforcement testimony "presents a particular challenge to courts" because "an officer's personal perception of events is often informed by technical or other specialized knowledge obtained through the officer's professional experience." *Vargas*, 2016-NMCA-038, ¶ 16.

{8} Defendant maintains that the officer gave expert testimony, including observations about types of evidence that indicate trafficking, conclusions about the investigation, and opinions about fentanyl generally, its effects, and quantities that are typical for possession and trafficking. Specifically, Defendant challenges the officer's explicit testimony that, "for the amount that we're talking in question here, 400 and some tablets, that is not personal use, if that's what you're asking." Contrary to the State's position, we conclude that this testimony was not based on the officer's perceptions or common knowledge.

{9} This testimony conveyed the officer's opinions and conclusions that were based on specialized knowledge he drew from his training and experience. The officer described the surveillance of the residence and the evidence discovered, but did not leave the jury to draw its own conclusions about the meaning of that evidence. *See Vargas*, 2016-NMCA-038, ¶ 22 (walking through the distinction between expert and lay testimony). The officer offered multiple opinions that the observations and evidence, including the quantity of fentanyl that was found, were indicative of drug trafficking. The officer's testimony revealed that his knowledge about drug trafficking "is based upon his law enforcement training and experience, rather than from life experience outside the law enforcement context." *See id.* Further, this Court has held that whether a quantity is indicative of personal use or intent to distribute is not generally a matter of common knowledge. *See State v.*

Becerra, 1991-NMCA-090, ¶¶ 22, 23, 112 N.M. 604, 817 P.2d 1246 (explaining that in a case that relies on quantity to establish the intent to distribute, "[w]e do not believe that a jury could use 'common knowledge' to determine if the amount was too much for personal use (as it might with respect to liquor or cigarettes)"). Thus, the officer did not comment only on his observations but used his "law enforcement training and experience to make connections for the jury" between the evidence discovered and the indicators of drug trafficking. *See Vargas*, 2016-NMCA-038, ¶ 22 (internal quotation marks and citation omitted). This is expert opinion testimony. *See* Rule 11-702 (permitting expert testimony based on "knowledge, skill, experience, training, or education").

{10} As a result, the State was required to lay the requisite foundation for the officer's expert opinion, and the district court was required to "exercise its gate-keeping function and ensure that the expert's testimony [was] reliable." *See State v. Torrez*, 2009-NMSC-029, ¶ 21, 146 N.M. 331, 210 P.3d 228; *see also State v. Yepez*, 2021-NMSC-010, ¶ 19, 483 P.3d 576 (establishing the prerequisites that the proponent of expert testimony must satisfy). Because the State did not formally satisfy these requirements, we continue our analysis to determine whether the district court's admission of the officer's testimony was plain error.

B. Plain Error

{11} "Unpreserved evidentiary errors are reviewable on appeal under a plain error standard." *Chavez*, 2024-NMSC-023, ¶ 10; *accord* Rule 11-103(E) NMRA. To establish plain error, "there must be (1) error, that is (2) plain, and (3) that affects substantial rights." *Gwynne*, 2018-NMCA-033, ¶ 27 (internal quotation marks and citation omitted). New Mexico courts have analyzed these factors in various sequences. In some cases, the appellate court determined there was no error at all. *See id.* ¶ 33 (ending the plain error analysis because there was no error in admitting the challenged testimony). In other cases, the appellate court identified or assumed error but nevertheless determined that any error present was not "plain" or did not affect substantial rights. *See State v. Torres*, 2005-NMCA-070, ¶¶ 11-12, 137 N.M. 607, 113 P.3d 877 (analyzing only whether the asserted error was "obvious" or "plain"); *Gwynne*, 2018-NMCA-033, ¶ 38 (concluding that the admission of testimony, if it was erroneous, did not "seriously affect . . . the substantial rights of [the d]efendant" (alteration, internal quotation marks, and citation omitted)). To warrant reversal, it is clear that the issue raised must amount to an error that is plain and that affects the substantial rights of the defendant. *See State v. Paiz*, 1999-NMCA-104, ¶¶ 27-29, 127 N.M. 776, 987 P.2d 1163 (reversing where the court's actions were error that was "obvious" to the appellate court and affected the defendant's substantial rights).

{12} Defendant argues that the admission of the officer's expert testimony was plain error because (1) the record does not—and should not be read to—demonstrate that the officer was qualified; and (2) the substance of the officer's expert testimony was inadmissible. As we explain, we conclude that any error arising from a lack of qualifications and the substance of the officer's testimony was not plain error and therefore did not require the district court's sua sponte intervention.

1. The Officer's Qualifications

{13} For the purposes of Rule 11-702, "a witness must qualify as an expert in the field for which [their] testimony is offered before such testimony is admissible." *State v. Rael-Gallegos*, 2013-NMCA-092, ¶ 18, 308 P.3d 1016 (internal quotation marks and citation omitted). While Defendant challenges the officer's qualifications to testify as an expert, he also maintains that this Court should refrain from using the record on appeal to retroactively establish the officer's expert qualifications. For this reason, we detour to consider the scope of our review.

{14} Defendant argues that allowing the State to establish the officer's qualifications for the first time on appeal is "fundamentally unfair," but this argument disregards that this matter is before us on review for plain error. Defendant did not object to the officer's qualifications. As a result, neither the State nor the district court had an opportunity to recognize or correct any potential insufficiency. *See State v. Montoya*, 2005-NMCA-005, ¶ 7, 136 N.M. 674, 104 P.3d 540

(describing that the purposes of the preservation requirement are to permit the opportunity for parties to respond and courts to correct errors). In this plain-error context, we "examine the alleged errors in the context of the testimony as a whole." *See Gwynne*, 2018-NMCA-033, ¶ 27 (internal quotation marks and citation omitted).

{15} The utility of this contextual examination is apparent. Though not articulated, Defendant's position on appeal is that the district court should have recognized the deficiency in the officer's qualifications and intervened to prevent the expert testimony. In similar circumstances, we have explained that "when the error [the] defendant asserts on appeal depends upon a factual finding the defendant neglected to ask the district court to make, the error cannot be clear or obvious unless the desired factual finding is the only one rationally supported by the record below." *Torres*, 2005-NMCA-070, ¶ 11 (internal quotation marks and citation omitted); *see Blauwkamp v. Univ. of N.M. Hosp.*, 1992-NMCA-048, ¶ 26, 114 N.M. 228, 836 P.2d 1249 (observing that whether an expert is qualified is considered to be "a preliminary factual question"). Thus, to determine whether the district court should have sua sponte excluded the officer's expert testimony, we must consider whether the inadmissibility of the expert testimony was the only rational conclusion the district court could have reached. *See State v. Balderama*, 2004-NMSC-008, ¶ 20, 135 N.M. 329, 88 P.3d 845 (explaining that a district court's authority to sua sponte exclude evidence should be used sparingly to account for the parties' responsibilities and

strategies and to safeguard against the appearance of advocacy). We cannot make that determination without reviewing the record to evaluate the evidence that the district court heard, *see Torres*, 2005-NMCA-070, ¶ 12 (reviewing the "facts in the record" to determine whether the district court should have suppressed evidence on its own motion)—but this is the analytical approach that Defendant asks us to disclaim.

{16} Defendant acknowledges that this Court, in an unpublished memorandum opinion, has previously relied on the record to determine that a witness would have been qualified to give expert testimony had that witness been offered as an expert. Despite Defendant's invitation to depart from the analysis in this unpublished opinion, we decline to do so—that case also involved a plain error analysis of expert qualifications.[1] *See State v. Dirickson*, A-1-CA-40036, mem. op. ¶¶ 5-8 (N.M. Ct. App. Feb. 21, 2023) (nonprecedential) (discerning no plain error when an officer provided expert testimony and the record supported his qualifications to do so). As we have explained, appellate courts reject plain error claims on multiple bases—when there was no error, if any error was not plain, or if substantial rights were not

[1]We note that we are not bound by our unpublished opinions, *Romero v. City of Santa Fe*, 2006-NMCA-055, ¶ 27, 139 N.M. 440, 134 P.3d 131, but nevertheless consider *Dirickson* because we find the analysis persuasive. *See Gormley v. Coca-Cola Enters.*, 2004-NMCA-021, ¶ 10, 135 N.M. 128, 85 P.3d 252 ("While an unpublished opinion of this Court is of no precedential value, it may be presented to this Court for consideration if a party believes it persuasive.").

affected by any error. Thus, in our current context, if the record shows that the district court heard testimony that established the witness was qualified—there was no error. If the record up to the point that an expert opinion is offered shows that the district court could have reached a rational conclusion that the witness was qualified to form that expert opinion—any error was not plain. *See Torres*, 2005-NMCA-070, ¶ 12. If the witness was plainly not qualified (i.e., the only rational conclusion was that the witness was unqualified), we would still reverse only if the admission of the testimony affected the defendant's substantial rights—"only if we have grave doubts about the validity of the verdict, due to an error that infects the fairness or integrity of the judicial proceeding." *State v. Dylan J.*, 2009-NMCA-027, ¶ 15, 145 N.M. 719, 204 P.3d 44 (internal quotation marks and citation omitted); *cf. id.* ¶ 32 (observing that the propriety of the expert's testimony was "a close call" but declining to reverse the convictions because any error did not affect the defendant's substantial rights).[2]

[2]Defendant cites another unpublished memorandum opinion that reversed a trafficking conviction and urges us to rely instead on that analysis. *See State v. Lucero*, A-1-CA-39210, mem. op. ¶ 17 (N.M. Ct. App. Oct. 24, 2022) (nonprecedential). But that case involved preserved expert testimony issues. *Id.* ¶¶ 3, 13 (reversing because the erroneous expert testimony was not harmless error). The key holdings in that case were that the officer's testimony was expert testimony and that the admission of the testimony was not harmless error. *Id.* ¶¶ 10, 16. We have already agreed with Defendant on the first issue and do not find this unpublished case to be helpful on the question of plain, as opposed to harmless, error. *See State v. Lopez*, 2018-NMCA-002, ¶ 35, 410 P.3d 226 (noting that "[b]y its nature, harmless error would not be sufficiently prejudicial to establish grave doubts in the minds of the jury and therefore would not rise to a level sufficient to establish plain error").

In considering substantial rights, we also must view the record as a whole, because the inquiry is whether the error "seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceedings." *Gwynne*, 2018-NMCA-033, ¶ 38 (alteration, internal quotation marks, and citation omitted)). Thus, considering the testimony as a whole to evaluate an assertion of plain error is an essential part of the plain error analysis.[3]

{17} Defendant argues that it would be unfair and violate due process for this Court to determine on appeal that a witness who was not offered as an expert at trial would have been qualified because the State would be permitted to "ambush [defendants] with a surprise expert during trial." Our holding is simply that on plain error review, we will look to the whole record to determine whether permitting the challenged testimony was plainly erroneous. This review must accommodate all of the circumstances of the trial, in part because the district court was not alerted to any irregularity. *Paiz*, 1999-NMCA-104, ¶ 28 (explaining that plain error "is an exception to the rule that parties must raise timely objection to improprieties at trial,

[3]Nor do we agree with Defendant that this analytical approach stems from a "misreading" of *State v. Barraza*, 1990-NMCA-026, 110 N.M. 45, 791 P.2d 799. Defendant asserts that *Barraza* involved only whether an expert's qualifications could extend to certain testimony and not whether the expert was qualified at all, and as a result, Defendant maintains that the *Barraza* analysis does not support the retroactive evaluation of an expert's qualifications. To us, the import of *Barraza* is that the case involved plain-error review of permissible expert testimony and to resolve the question, this Court considered "the alleged errors in the context of the testimony as a whole." *See id.* ¶ 18. We shall do the same.

a rule which encourages efficiency and fairness" and reversible plain error must "seriously affect[] the fairness, integrity or public reputation of judicial proceedings" (alteration, internal quotation marks, and citation omitted)). The potential for an ambush by an unnoticed expert does not support limiting the scope of plain error review. Instead, an unpreserved argument about lack of notice could be raised as part of the analysis of the impact on substantial rights or the fairness of the trial, based on the whole record. *See Chavez*, 2024-NMSC-023, ¶ 11 ("[T]he focus of plain error review is on the fairness of the trial."). Given Defendant's singular trial strategy in the present case to deny residency and possession of the drugs, "we are not prepared to hold" that the lack of notice that the officer would testify as an expert as to trafficking quantities of fentanyl "affected a substantial right of Defendant sufficient to require reversal based on plain error." *See Dylan J.*, 2009-NMCA-027, ¶ 32.

{18} With the scope of our review established, we arrive at the merits of Defendant's argument that the admission of the officer's testimony was plain error because the officer was not qualified. Under Rule 11-702, the proponent of expert testimony must "demonstrate that the expert has acquired sufficient knowledge, skill, experience, training or education so that [their] testimony will aid the fact[-]finder." *State v. Bullcoming*, 2010-NMSC-007, ¶ 29, 147 N.M. 487, 226 P.3d 1 (internal quotation marks and citation omitted), *rev'd on other grounds*,

Bullcoming v. N.M., 564 U.S. 647, 652, 658 (2011). An expert may testify based on their training and experience, and generally any perceived deficiencies in qualifications are "relevant to the weight accorded by the jury to the testimony and not to the testimony's admissibility." *Torrez*, 2009-NMSC-029, ¶¶ 18, 21 (alteration, internal quotation marks, and citation omitted). To evaluate the officer's qualifications in the present plain-error context, we consider, based on the record, whether the only rational determination for the district court to have made was that the officer was not qualified. *See Torres*, 2005-NMCA-070, ¶ 12.

{19} Considering the testimony as a whole, the officer provided sufficient information about his qualifications for the district court to avoid plain error. The officer testified as to his many years of training, experience, and specialized knowledge in relation to narcotics investigations generally as well as fentanyl specifically.[4] *See* Rule 11-702; *see also Rael-Gallegos*, 2013-NMCA-092, ¶ 20 ("[T]he court must evaluate the expert's personal knowledge and experience to determine whether the expert's conclusions on a given subject may be trusted."

[4]Defendant points to another unpublished memorandum opinion, *State v. Shipley*, 33,472, mem. op. (N.M. Ct. App. Jan. 20, 2016) (nonprecedential), in which this Court held that the district court abused its discretion when it determined that a particular officer's training and experience was sufficient to qualify him to testify about whether a drug quantity indicated an intent to possess the drug or distribute it. *Id.* ¶¶ 7-12. Defendant compares the officer's qualifications to the witness's in *Shipley* and in *Rael-Gallegos* and encourages us to find *Shipley* a more analogous match. Because both *Shipley* and *Rael-Gallegos* involved preserved error, we decline to do so.

(alteration, omission, internal quotation marks, and citation omitted)). Specifically, the officer testified that he had been a police officer for "almost nineteen years," with "twelve years as a narcotics agent," and he worked on a task force for federal agencies and "attended their basic narcotics schools." The State asked the officer about his training in the area of narcotics, and the officer explained that his narcotics course "incorporate[d] identifying and knowing these drugs" and included making methamphetamine and crack cocaine, as well as learning "about controlled buys, surveillance, and undercover operations." When asked about his experience in narcotic investigations, the officer responded that he had conducted narcotic cases for the twelve years that he was a narcotics agent for a task force, including activities from surveillance to controlled buys with confidential informants. The officer indicated that he had experience with fentanyl specifically. From this testimony, a finding that the officer was not qualified to provide the expert opinions that Defendant challenges was "not the only one rationally supported by the record." *See Torres*, 2005-NMCA-070, ¶¶ 11-12. As a result, we are not persuaded that the district court should have, on its own motion, excluded the officer's testimony. *See id.* Though we are troubled by the informality and imprecision with which the parties approached the officer's testimony, in the context of all of the testimony, we discern no plain error arising from any lack of qualification.

2. The Substance of the Officer's Testimony

{20} Defendant asserts that the admission of the officer's expert testimony was plain error in two additional respects. First, Defendant argues that the officer's expert testimony violated the stricture that witnesses may not state an opinion about a defendant's guilt. *See Rael-Gallegos*, 2013-NMCA-092, ¶¶ 18, 29 (noting that expert testimony may "touch[] upon the ultimate issue to be decided by the jury" but may not express an "opinion of the defendant's guilt" (alterations, internal quotation marks, and citation omitted)). Second, Defendant maintains that the officer's expert testimony was unduly prejudicial. *See* Rule 11-403 NMRA (permitting the exclusion of relevant evidence "if its probative value is substantially outweighed by a danger of . . . unfair prejudice"). We conclude that the admission of this testimony was either not error or was not plain error.

{21} As to Defendant's first argument, we have recognized that "it is difficult to determine when an expert crosses the fine line constituting error when testifying about whether the person possessing drugs intends to use or traffic those drugs." *See Rael-Gallegos*, 2013-NMCA-092, ¶ 35. While an officer cannot testify directly to the defendant's intent or "state their opinion of the defendant's guilt," *id.* ¶ 29, expert testimony about "a trafficking amount versus personal use amount of narcotics" is permissible, *id.* ¶ 30. Similarly, an officer's testimony may "embrace[] the ultimate issue by educating the jury in regard to what factors, in [their] experience, warranted

a trafficking charge." *Id.* ¶ 33. Defendant argues as follows: "It was plain error to permit [the officer] to testify definitively to the ultimate issue that he knew [Defendant] was a drug trafficker and that the pills in [Defendant]'s possession were 'not a personal use amount.'" Examining the officer's statements in context, *see Gwynne*, 2018-NMCA-033, ¶ 27, we are not persuaded that the two challenged statements improperly went to the ultimate issue.

{22} The first statement involved the LEOs' initial investigation. The officer explained that the investigation had permitted the LEOs to identify Defendant as a person living at the residence and that their observations showed activity "indicative of narcotic sales." When asked to explain whether he had contact with anyone in the court room, the officer stated that he had obtained a search warrant for the residence and that "the search warrant was to identify two individuals out of the residence that we know to be trafficking in narcotics," including Defendant. Defendant argues that in this statement, the officer improperly testified to the ultimate issue of Defendant's guilt. Context indicates, however, that the officer was testifying factually, first about the investigation of narcotics sales at the residence where the LEOs believed Defendant was living and second, that the resulting warrant included Defendant. Although the testimony was somewhat ambiguous, the officer did not give an opinion that Defendant, on the day in question, was guilty of possession with intent

to distribute fentanyl. As a result, allowing this testimony to continue was not error and therefore we cannot discern any plain error.

{23} The second statement involves the fentanyl pills seized during the search of the car. After the officer explained how a single pill can contain unknown quantities of fentanyl, the State asked the officer, "How much would a user use with one pill?" and the officer responded:

> It depends on the user's tolerancy, weight, how long they've been using. So, to try to identify a user based upon what their tolerancy is, how much of the actual fentanyl they're getting, and how they utilize it—it depends per individual. But for the amount that we're talking in question here—400 and some tablets—that is not personal use, if that's what you're asking.

Defendant argues that in this statement, the officer improperly testified that Defendant had the intent to distribute because the quantity of pills was "not a personal use amount." Context indicates, however, that the officer was asked how much fentanyl a user would ingest in one pill, and he explained that it would depend on the particular user but that in any case, 400 pills would be more than one typical user would have. While again somewhat ambiguous, the officer did not testify directly that Defendant had the intent to distribute fentanyl. This type of testimony, regarding intent to possess or intent to distribute, is often close to the line of impropriety. *See Rael-Gallegos*, 2013-NMCA-092, ¶¶ 35-37. An officer must tread lightly and restrict testimony about intent in this context to "typical users and traffickers based on the amount of drugs in their possession." *See id.* ¶ 35. But even

if the officer's imprecise testimony strayed toward impropriety and caused error, it did not so obviously cross the line that the error was plain.

{24} Nor was the officer's expert testimony so unduly prejudicial as to result in plain error. Defendant specifically points to the officer's testimony that fentanyl is "approximately seven times—eight times stronger than the actual heroin or opioid" and is "very fatal." Defendant argues that the evidence of potency was "entirely irrelevant to any element of drug trafficking." But the potency testimony was relevant because the information contributed to the likelihood that Defendant possessed that quantity of pills in order to distribute them, rather than to personally ingest them. *See id.* ¶ 37 (noting that this "type of testimony" about "typical circumstances in law enforcement can assist the jury in understanding intent as to drug use versus drug trafficking"); *see also* Rule 11-401 NMRA (describing relevant evidence as evidence that "has any tendency to make a fact [of consequence] more or less probable than it would be without the evidence"). Nevertheless, relevant and otherwise admissible expert testimony may still be excluded if it is unfairly prejudicial—where "the prejudicial effect of [the] expert testimony substantially outweighs its probative value." *Yepez*, 2021-NMSC-010, ¶ 19; *accord* Rule 11-403. Unfair prejudice "means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *State v. Bailey*, 2017-NMSC-001, ¶ 16, 386 P.3d 1007 (internal quotation marks and citation omitted).

Defendant describes the challenged testimony about the "potency and lethality of fentanyl" as "inflammatory." We agree that the statements were to some degree prejudicial, because they communicated negative attributes about the drug that Defendant was charged with having the intent to distribute. We disagree, however, that these brief, somewhat sterile statements, which focused on the officer's own qualifications and knowledge rather than any harm caused by Defendant, were unfairly prejudicial. *See id.* ("Rule 11-403 does not guard against any prejudice whatsoever, but only against unfair prejudice."). To the extent that the district court was obligated to intervene or risk plain error, we conclude that any prejudice resulting from the officer's testimony did not outweigh its probative value—but instead again provided context for the investigation, information about the drugs found, and details about how these drugs are typically used and sold. *See Torres*, 2005-NMCA-070, ¶¶ 11-12.

{25} In sum, though the officer gave expert testimony as a lay witness, no plain error resulted. The testimony in the present case was neither as clear nor as complete as the testimony on the same subject matter that we affirmed in *Rael-Gallegos*, on which Defendant relies. *See* 2013-NMCA-092, ¶¶ 21-25 (describing the qualifications for the expert witness in *Rael-Gallegos*). But in that case, the defendant objected to officer's expert testimony, and in the present case, as we have repeatedly emphasized, we review the issues Defendant raises for plain error. *See*

Gwynne, 2018-NMCA-033, ¶ 26 ("Absent preservation, we only review for plain error."). Plain error "is to be used sparingly," *id.* ¶ 27 (internal quotation marks and citation omitted), and we conclude that it does not apply in the circumstances of the present case.

II. Defendant's Remaining Arguments

{26} Defendant also argues that (1) there was insufficient evidence to uphold the verdicts of possession with intent to distribute for fentanyl and methamphetamine; (2) trial counsel was ineffective; and (3) the shotgun and mail evidence should not have been admitted. We address each remaining issue in turn.

A. Sufficiency of the Evidence

{27} "In reviewing the sufficiency of the evidence in a criminal case, we must determine whether substantial evidence, either direct or circumstantial, exists to support a verdict of guilty beyond a reasonable doubt for every essential element of the crime at issue." *Rael-Gallegos*, 2013-NMCA-092, ¶ 8 (internal quotation marks and citation omitted). Defendant disputes the sufficiency of evidence to prove one of the three elements of each charge—that Defendant intended to transfer fentanyl and methamphetamine to another person. *See* UJI 14-3111 NMRA (defining the elements of trafficking by possession with intent to distribute). "Intent to distribute may be proved by inference from the surrounding facts and circumstances." *Becerra*, 1991-NMCA-090, ¶ 22. Thus, "[i]f the amount of an illegal drug found in an

accused's possession is not by itself sufficient to prove inconsistency with personal use, then the state must present testimony that the amount of drugs in the accused's possession is inconsistent with personal use or that the other items found in possession of the accused . . . show that the accused intends to transfer drugs." *State v. Hubbard*, 1992-NMCA-014, ¶ 15, 113 N.M. 538, 828 P.2d 971 (citation omitted). We consider the evidence about Defendant's intent to transfer drugs "in the light most favorable to the verdict, resolving all conflicts therein and indulging all reasonable inferences therefrom in the light most favorable to the judgment." *See id.* ¶ 8.

{28} As to the fentanyl charge, the evidence supported the jury's verdict. The State produced evidence of (1) 421 fentanyl pills discovered in the backpack that Defendant was seen wearing and that was found in the car; (2) the officer's testimony that 400 plus pills would not be "personal use" for a user; (3) two digital scales discovered in the residence and one in the car; (4) the officer's testimony that scales can indicate trafficking; (5) a shotgun discovered in the car; (6) the officer's testimony that guns may indicate trafficking; (7) the LEOs' investigation of the residence that showed heavy traffic, with individuals staying for a very short time, which the officer also testified could indicate trafficking; and (8) Defendant attempting to flee the residence, which the State argued showed consciousness of guilt. Viewing the evidence in the light most favorable to the verdict, we hold that

sufficient evidence supported the jury's conclusion Defendant intended to transfer fentanyl. *See id.* ¶ 8 ("Substantial evidence is defined as that evidence which is acceptable to a reasonable mind as adequate support for a conclusion.").

{29} We conclude to the contrary, however, about the evidence supporting Defendant's conviction for possession of methamphetamine with the intent to distribute. In opening argument, the State announced that the jury would hear from two officers who found "substances that in their training and experience appeared to be large amounts of methamphetamine," in the residence. Only one officer, however, testified, and he relayed only that a "crystal like substance" that the officer knew to be methamphetamine was discovered "on" or "in" the bag that Defendant had carried from the residence to the car, in addition to small and varying quantities of methamphetamine found in a room in the residence where officers believed Defendant stayed. Also found in the backpack in the car was a pipe, which the officer testified was used to smoke methamphetamine, but he did not tie the pipe to distribution or otherwise explain its relevance. The methamphetamine discovered in the residence was located in fourteen baggies of various colors and sizes—in some instances in trace amounts as small as .003 grams. The officer testified that the "approximately fourteen small baggies . . . are indicative of drug use *or* drug sale." No evidence or expert testimony tied the quantities of methamphetamine found to distribution or established that Defendant had sold methamphetamine at any time

during the surveillance. The only other evidence was the already-described scales, shotgun, and flight from the scene—during which flight Defendant took the backpack with the fentanyl pills inside and the baggies with small amounts of methamphetamine remained behind in the residence.

{30} Under these circumstances, the State did not present any evidence about amounts of methamphetamine that would be consistent with distribution as opposed to personal use or evidence of surrounding facts and circumstances that would support beyond a reasonable doubt a conclusion that Defendant possessed methamphetamine, as opposed to fentanyl, with the intent to distribute the drug. *See Becerra*, 1991-NMCA-090, ¶ 22 (explaining that "[i]ntent to distribute may be proved by inference from the surrounding facts and circumstances" or in some cases, quantities may be "sufficient to support an inference of intent to distribute" but "where there was no evidence of the concentration of the drug, and no evidence of how long it would normally take a single drug user to consume a given quantity, the weight of the amount recovered could not in itself enable a fact[-]finder to conclude, beyond a reasonable doubt, that [the] defendant intended to distribute the substance"). We therefore hold that insufficient evidence supported Defendant's conviction for trafficking methamphetamine.

B. Ineffective Assistance of Counsel

{31} Defendant argues that his trial counsel was ineffective for (1) not objecting to the officer's expert testimony; and (2) not filing a motion challenging the search warrant. "Claims of ineffective assistance of counsel are reviewed de novo." *Rael-Gallegos*, 2013-NMCA-092, ¶ 40 (internal quotation marks and citation omitted). To establish a prima facie case for ineffective assistance of counsel, Defendant must show that counsel's performance was deficient and that prejudice resulted. *See State v. Mosley*, 2014-NMCA-094, ¶ 19, 335 P.3d 244. Our Supreme Court has explained that "[e]vidence of an attorney's constitutionally ineffective performance and any resulting prejudice to a defendant's case is not usually sufficiently developed in the original trial record." *See State v. Crocco*, 2014-NMSC-016, ¶ 13, 327 P.3d 1068. As a result, ineffective assistance claims "should normally be addressed in a post-conviction habeas corpus proceeding, which may call for a new evidentiary hearing to develop facts beyond the record, rather than on direct appeal of a conviction as in the case before us." *See id.* (citation omitted). In the present case, the record on appeal does not support a prima facie case for ineffective assistance of counsel.

{32} Defendant did not establish a prima facie case that trial counsel's performance was deficient because the lack of objection to the officer's testimony fell below an "objective standard of reasonableness." *See State v. Bello*, 2017-NMCA-049, ¶ 23, 399 P.3d 380 (internal quotation marks and citation omitted). To establish a prima

facie case for ineffective assistance of counsel, "a defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (internal quotation marks and citation omitted). The record on appeal suggests that trial counsel's strategy was to raise a reasonable doubt about whether Defendant possessed any of the narcotics or the other items seized by the LEOs. In argument to the district court and the jury, trial counsel maintained that the car Defendant used was registered to another person, the residence was leased by Defendant's ex-girlfriend, and he only went to the residence to visit their shared child. With this strategy, the officer's expertise regarding any intent to traffic was irrelevant. Because we can discern a rational trial strategy for not resisting the officer's expert testimony, Defendant has not established a prima facie case in this regard. *See State v. Hester*, 1999-NMSC-020, ¶ 15, 127 N.M. 218, 979 P.2d 729 ("Decisions regarding objections are matters of trial tactics which do not necessarily equate to ineffective assistance of counsel.").

{33} Defendant also contends that trial counsel "prioritized her judgment over [Defendant]'s regarding whether to file a substantive motion" challenging whether probable cause supported the search warrant. On the record before us, we disagree. The officer testified at trial that the LEOs had observed the residence for a period of time, saw activity that indicated trafficking, and identified Defendant as a person who lived at the residence. Based on these facts, a reasonable attorney could have

concluded that the LEOs had sufficient probable cause to support a search warrant of the residence and thus decided a motion to suppress was unwarranted. *See State v. Williamson*, 2009-NMSC-039, ¶ 31, 146 N.M. 488, 212 P.3d 376 ("Probable cause exists when there are reasonable grounds to believe that an offense has been or is being committed in the place to be searched." (internal quotation marks and citation omitted)). Therefore, we conclude that Defendant has not established a prima facie case for ineffective assistance relating to the search warrant. *See Mosley*, 2014-NMCA-094, ¶ 20 ("Where, as here, the ineffective assistance of counsel claim is premised on counsel's failure to move to suppress evidence, [the d]efendant must establish that the facts support the motion to suppress and that a reasonably competent attorney could not have decided that such a motion was unwarranted." (internal quotation marks and citation omitted)).

{34} Defendant did not demonstrate a prima facie case showing that trial counsel's performance was deficient in the ways specifically alleged, and therefore, "we need not reach the prejudice prong of the inquiry." *See State v. Garcia*, 2011-NMSC-003, ¶ 34, 149 N.M. 185, 246 P.3d 1057. Nothing in our analysis, however, "precludes [D]efendant from pursuing habeas corpus proceedings on this issue should he be able to garner evidence to support his claims." *See Bello*, 2017-NMCA-049, ¶ 25 (internal quotation marks and citation omitted).

C. Improper Admission of Evidence

{35} Defendant last argues that the improper admission of the shotgun and mail evidence requires reversal. As the State points out, Defendant did not object to this evidence and therefore did not preserve these claims of error for appeal. We therefore again review for plain error. *See State v. Montoya*, 2015-NMSC-010, ¶ 46, 345 P.3d 1056 ("Under Rule 11-103(D)-(E) . . . , this Court may review evidentiary questions although not preserved if the admission of the evidence constitutes plain error." (alteration, internal quotation marks, and citation omitted)). As we explain, the admission of this evidence was not plain error.

{36} Defendant argues the shotgun was improperly admitted because the evidence was not probative, was unfairly prejudicial, and at a separate trial, Defendant was acquitted of being a felon in possession of a firearm. We understand this argument to suggest that (1) because he later was acquitted of being a felon in possession, Defendant could not have possessed the shotgun; and (2) the shotgun was therefore not relevant, did not support the officer's testimony that the presence of the shotgun was "indicative" of trafficking, and was unduly prejudicial. Regarding the first argument, the State was not required to prove that Defendant possessed the shotgun in order to establish possession of fentanyl with intent to distribute. *See* UJI 14-3111 (identifying the elements for possession with intent to transfer a controlled substance). Regarding the second argument, the presence of the shotgun was

probative of whether the circumstantial evidence established Defendant's intent to transfer controlled substances. *See Becerra*, 1991-NMCA-090, ¶ 22 ("Intent to distribute may be proved by inference from the surrounding facts and circumstances."). Defendant repeatedly challenged his ownership of the shotgun in the trafficking case, which is an "appropriate means of attacking shaky but admissible evidence." *See Rael-Gallegos*, 2013-NMCA-092, ¶ 34 (internal quotation marks and citation omitted). Thus, the probative value of the shotgun and Defendant's rigorous denial of ownership outweighed the potential for prejudice at the trafficking trial—particularly because Defendant maintains that the potential for prejudice existed because ownership of the shotgun was separated out to be decided in a different trial at a later date. In light of the circumstances, we see no plain error in the admission of the shotgun. *See Bailey*, 2017-NMSC-001, ¶ 16 (providing that appellate courts give "much leeway [to] trial judges who must fairly weigh probative value against probable dangers" (internal quotation marks and citation omitted)).

{37} Defendant last argues that the mail evidence was unfairly prejudicial and improper character evidence. *See* Rule 11-403; Rule 11-404(A)(1) NMRA (prohibiting the use of "[e]vidence of a person's character or character trait . . . to prove that on a particular occasion the person acted in accordance with the character or trait"). In order to show that Defendant used a particular bedroom in the residence, the State offered an exhibit that contained numerous photos of items in the bedroom,

including photos of mail with varying legibility. In his testimony, the officer described the photos as "a past due insurance notice . . . , a motor vehicle department—tax and revenue department mailed item . . . , [and] a piece of paper belonging to the county jail identifying [Defendant] as the inmate there." Defendant argues that the jury could have used the photo of the jail letter to infer that Defendant had a criminal history, contrary to Rule 11-404(B), which establishes prohibited and permitted uses for character evidence. Although some of the photos on the exhibit showed mail that included Defendant's name, the photo of the jail letter did not. The jail letter shows no mailing address and only an unidentifiable signature by an inmate. It was therefore not, as the State would suggest, probative of identity—to show that Defendant used the room. *See* Rule 11-404(B) (permitting evidence of a prior criminal act to be used to show identity but prohibiting its use for propensity). It was further unfairly prejudicial to admit the photograph and for the officer to testify that the exhibit indicated Defendant had been an inmate. *See* Rule 11-403.

{38} Nevertheless, the exhibit was admitted without objection, and our review is for plain error. The exhibit included three pages, each with nine photos, and the jail letter was shown in only two of those twenty-seven photos. The officer's testimony about the jail letter, though unnecessary and prejudicial, was a brief statement and the State did not refer to it again. Defendant's trial counsel argued to the jury that the evidence did not associate Defendant with the bedroom or the residence and

specifically noted during cross-examination that none of the letters that contained Defendant's name also had the address of the residence. For these reasons, we conclude that the admission of the evidence relating to the jail did not cause "grave doubts about the validity of the verdict" nor did the error "infect[] the fairness or integrity of the judicial proceeding." *Dylan J.*, 2009-NMCA-027, ¶ 15 (internal quotation marks and citation omitted).

{39} Defendant alternatively suggests that because of the lack of objections to this evidence, a prima facie case for ineffective assistance of counsel is established. But Defendant has not established prejudice in the record before us. Even though the shotgun was admitted without objection, trial counsel argued that the State did not prove that it belonged to Defendant. We are further unpersuaded that the evidence in our record—the officer's single reference to the mail "identifying [Defendant] as the inmate" at the county jail and the accompanying exhibit—"represent[s] so serious a failure of the adversarial process that it undermines judicial confidence in the accuracy and reliability of the outcome." *See State v. Roybal*, 2002-NMSC-027, ¶ 25, 132 N.M. 657, 54 P.3d 61 (noting that "mere evidentiary prejudice is not enough"). We reiterate that Defendant may pursue this ineffective assistance claim in habeas corpus proceedings. *See Bello*, 2017-NMCA-049, ¶ 25.

CONCLUSION

{40} We remand this matter for the district court to vacate the conviction for trafficking of methamphetamine and to amend the judgment and sentence accordingly. Otherwise, we affirm.

{41} **IT IS SO ORDERED.**

KATHERINE A. WRAY, Judge

WE CONCUR:

JANE B. YOHALEM, Judge

KRISTOPHER N. HOUGHTON, Judge