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

2 Opinion Number: \_\_\_\_\_

Court of Appeals of New Mexico  
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Mark Reynolds

4 **No. A-1-CA-41901**

5 **STATE OF NEW MEXICO,**

6           Plaintiff-Appellee,

7 v.

8 **MONIQUE MARTINEZ,**

9           Defendant-Appellant.

10 **APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY**

11 **Stephen P. Ochoa, District Court Judge**

12 Raúl Torrez, Attorney General

13 Michael J. Thomas, Assistant Solicitor General

14 Albuquerque, NM

15 for Appellee

16 Bennett J. Baur, Chief Public Defender

17 Mary Barket, Assistant Appellate Defender

18 Santa Fe, NM

19 for Appellant

1 **OPINION**

2 **YOHALEM, Judge.**

3 {1} Defendant Monique Martinez appeals her conviction for trafficking by  
4 possession with intent to distribute methamphetamine, contrary to NMSA 1978,  
5 Section 30-31-20(A)(3)(c) (2006). Defendant challenges the admission of a law  
6 enforcement officer’s expert opinion that the evidence in Defendant’s case,  
7 “collectively, was evidence of trafficking.” Because the objections raised on appeal  
8 were not preserved in the district court, we review the admission of this and other  
9 similar testimony by the law enforcement officer in this case for plain error. The  
10 majority agrees that the officer’s expert testimony in this case, stating his opinion  
11 that “[t]here was trafficking of methamphetamine” based on the evidence found in  
12 the motel room, was plain error. We reverse on that basis.

13 {2} The three-judge panel of this Court, however, does not agree on where the line  
14 should be drawn between permissible expert opinion testimony by a law  
15 enforcement officer in a drug trafficking case that educates the jury and  
16 impermissible testimony encroaching on the jury’s role in deciding guilt or  
17 innocence. The author concludes that New Mexico law requires that law  
18 enforcement officer expert testimony in a trafficking case be limited to testimony  
19 that educates the jury about the distinctions between the typical customs and  
20 practices of those who use narcotics and those who traffic narcotics, and that an

1 expert opinion that goes further and gives the officer’s opinion based on the evidence  
2 introduced in the defendant’s case, advising the jury that, in the officer’s opinion,  
3 that certain evidence listed by the officer in his testimony “was for trafficking” or  
4 “indicates or is indicative of trafficking,” or “is consistent with trafficking” has no  
5 purpose other than to tell the jury how to decide the case, and is therefore  
6 impermissible.

7 {3} The special concurrence disagrees with the author’s conclusion that New  
8 Mexico law prohibits expert opinion testimony that the evidence in front of the jury  
9 “is trafficking” in the expert’s opinion, regardless of how the officer’s opinion is  
10 phrased. The special concurrence concludes that a law enforcement officer is  
11 permitted to testify that the evidence in the case is *consistent with trafficking*, without  
12 encroaching impermissibly on the exclusive function of the jury in determining a  
13 defendant’s guilt or innocence, so long as the expert does not say that the defendant  
14 *is trafficking* or that the evidence *indicates trafficking* or the evidence shows the  
15 defendant’s *intent to traffic*.

16 {4} Because the majority agrees that under our plain error standard, the admission  
17 of the expert testimony in this case—repeated testimony that, in the expert’s opinion,  
18 the evidence shows Defendant *was trafficking*—significantly impaired Defendant’s  
19 rights and put the validity of the verdict in doubt, we reverse and remand for a new  
20 trial.

1 **BACKGROUND**

2 {5} Defendant was convicted by a jury of one count of trafficking by possession  
3 with intent to distribute methamphetamine, contrary to Section 30-31-20(A)(3)(c);  
4 possession of a controlled substance (heroin), contrary to NMSA 1978, Section 30-  
5 31-23(A), (E) (2011, amended 2021); and possession of drug paraphernalia, contrary  
6 to NMSA 1978, Section 30-31-25.1(A), (C) (2001, amended 2022). Defendant was  
7 separately tried and convicted as a felon in possession of a firearm, contrary to  
8 NMSA 1978, Section 30-7-16(A)(1) (2019, amended 2022). All of the charges were  
9 based on a search on April 1, 2019, pursuant to a warrant, of a motel room in  
10 Alamogordo, New Mexico, occupied by Defendant and her boyfriend.<sup>1</sup> Defendant  
11 appeals solely from her conviction for trafficking.

12 {6} Apart from the testimony of a laboratory technician who testified that the  
13 substances recovered from the search were narcotics, the State's sole witness at trial  
14 was law enforcement officer Agent Brad Nordquist. The prosecutor first questioned  
15 Agent Nordquist about his training and experience in the enforcement of narcotics  
16 laws. Agent Nordquist testified to his work over the previous five years on the Otero

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<sup>1</sup>The jury rejected Defendant's argument that she was in possession of only the small amount of narcotics found in her purse, and entered a verdict of guilty of trafficking based on the evidence as a whole found in the search of the motel room. Defendant does not challenge the jury's decision that all of the drugs in the motel room were in Defendant's possession or control. We therefore do not include the evidence relevant solely to this argument.

1 County Sheriff's Narcotics Task Force and his experience as an undercover  
2 confidential informant on narcotics trafficking. The State did not ask the district  
3 court to qualify Agent Nordquist as an expert at the conclusion of the State's  
4 evidence on his qualifications and the defense did not object to his not being  
5 qualified or ask for an opportunity to voir dire.

6 {7} The prosecutor next proceeded to question Agent Nordquist for approximately  
7 an hour about his specialized knowledge, based on his experience and training,  
8 concerning: (1) the appearance of methamphetamine and heroin; (2) how  
9 methamphetamine and heroin are generally packaged for sale versus for personal  
10 use; (3) the quantities of methamphetamine commonly offered for sale on the street;  
11 (4) the amount generally purchased for personal use by the average street buyer and  
12 the cost of that amount; (5) how methamphetamine and heroin are typically ingested;  
13 (6) how a scale is used by drug traffickers to weigh small ready-to-sell quantities of  
14 narcotics, which are then transferred to small plastic baggies for sale; (7) the percent  
15 of drug traffickers, in Agent Nordquist's experience, who have guns; (8) the reasons  
16 traffickers generally have one or more guns; (9) why it is common for drug  
17 traffickers to deal drugs out of a motel rather than a residence; (10) that the quantities  
18 of methamphetamine most people possess for personal use range from 3 to 5 grams;  
19 (11) that in 2019 a gram of methamphetamine on the street cost approximately fifty  
20 to sixty dollars, and most addicts could generally afford to buy no more than 3 to 5

1 grams for personal use; and (12) that “a big indicator of trafficking or distribution”  
2 as opposed to possession for personal use, is possession of multiple packages, small  
3 plastic baggies, scales, different denominations of cash, and one or more firearms.

4 {8} After eliciting this testimony about drug trafficking, the amount of drugs  
5 generally possessed by traffickers versus drug users, the items generally used to  
6 traffic drugs versus the items used to ingest drugs, and the purpose of each type of  
7 item identified as commonly used by drug traffickers based on Agent Nordquist’s  
8 experience and training as a law enforcement officer specializing in narcotics,<sup>2</sup> the  
9 State next questioned Agent Nordquist about the April 1, 2019, search of the motel  
10 room occupied by Defendant and her boyfriend, a search Agent Nordquist conducted  
11 along with other officers.

12 {9} Agent Nordquist explained that the only person identified by name in the  
13 warrant was Defendant’s boyfriend, but that the affidavit and warrant indicated that  
14 an unidentified woman was likely to be present as well. Agent Nordquist testified  
15 that when he entered the motel room with the other agents after using a battering

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<sup>2</sup>Although the State did not ask the district court to qualify Agent Nordquist as an expert in drug possession and trafficking until near the end of his testimony, we have held that there is no error when a law enforcement officer provides expert testimony and the record supports their qualifications to do so. *See State v. Paglinawan*, 2026-NMCA-044, ¶ 15, 586 P.3d 346. Agent Nordquist’s qualifications as an expert are not challenged on appeal and much of his questioning by the State prior to his designation as an expert by the district court patently involved specialized knowledge about narcotics trafficking.

1 ram to open the door, Defendant was standing between the two beds in the room,  
2 and Defendant's boyfriend was in the bathroom. Agent Nordquist went into the  
3 bathroom where he described seeing several items of drug paraphernalia on the lip  
4 of the bathtub, as well as several baggies in the toilet that were filled with a white  
5 crystalline substance, which Defendant's boyfriend was trying to flush down the  
6 toilet. Agent Nordquist fished two baggies out of the toilet. Laboratory analysis later  
7 identified the white crystalline substance inside the baggies as methamphetamine.  
8 Both the drug-filled baggies and the objects on the bathtub were introduced into  
9 evidence as exhibits at trial.

10 {10} Agent Nordquist described the search of the motel room item by item, with  
11 the prosecutor questioning him to lay the foundation for the admission of each of the  
12 thirty-one exhibits offered by the State. Most of the exhibits were photographs taken  
13 during the search that illustrated Agent Nordquist's description of the search. The  
14 photographs included close-up views of open furniture drawers and of an open  
15 suitcase searched by the agents. Agent Nordquist testified that the agents found  
16 women's clothes in the suitcase along with a .25 caliber firearm in an inner sleeve,  
17 and introduced photographs of these items. In a medicine bag associated with the  
18 suitcase, agents found and photographed a glass pipe wrapped in a pink  
19 handkerchief. Other items found in the motel room during the search included a  
20 digital scale, a box of plastic baggies, and a jeweler's bag, each, with narcotic residue

1 on them. The State introduced these objects into evidence. Exhibits 14 and 15 are  
2 photographs of a used glass smoking pipe found toward the western edge of the desk  
3 area in the motel room, with a woman's makeup bag or carrying case nearby. There  
4 was a purse on the desk that contained an identification card belonging to Defendant,  
5 two tied-off plastic baggies with drug residue on them, and a scoop that Agent  
6 Nordquist described as usable either for separation of narcotics for sale or for  
7 personal consumption of narcotics. Law enforcement found a syringe in the  
8 bathroom that had been used to inject heroin, according to Agent Nordquist.

9 {11} On the second bed in the room, Agent Nordquist located a wallet belonging  
10 to Defendant's boyfriend, which contained twenty-dollar bills. Agent Nordquist  
11 estimated that the confiscated drugs retrieved from the toilet weighed approximately  
12 14 grams in their wet state. Finally, Agent Nordquist was questioned by the  
13 prosecutor as to whether, in his training and experience, the digital scale with  
14 residue, the baggies with residue, and the jeweler's bag with residue, "indicate[d]  
15 preparation for trafficking." Agent Nordquist responded that in his expert opinion  
16 "they are an indication of trafficking narcotics."

17 {12} At the conclusion of this portion of his testimony, the State proffered Agent  
18 Nordquist as an expert in "street level narcotics trafficking" and asked the district  
19 court to allow Agent Nordquist "to render an opinion as to trafficking." Defendant's  
20 counsel asked to voir dire Agent Nordquist "on his expertise." During voir dire,

1 Defendant asked about Agent Nordquist’s educational background, his training and  
2 experience as a police officer and narcotics agent, his current position, his previous  
3 experience with testifying in court, and expressed skepticism in his cross-  
4 examination questions about whether Agent Nordquist’s expertise extended to the  
5 type of drugs and the manner in which drugs were trafficked in April 2019 when he  
6 participated in the search of the motel room. Agent Nordquist denied that much had  
7 changed in the four years between 2019 and his testimony in court. When defense  
8 counsel concluded the voir dire, counsel stated that he was renewing his objection.  
9 The district court asked, “To [Agent Nordquist’s] testimony today?” Defense  
10 counsel stated, “Yes.”<sup>3</sup> The court then granted the State’s motion, qualifying Agent  
11 Nordquist as an expert “in street level narcotics trafficking.”

12 {13} The State’s examination of Agent Nordquist then continued with the  
13 following questions and responses by Agent Nordquist:

14 State: Do you have an opinion based on your experience and training,  
15 as to what the evidence in this case indicates with regard to the  
16 methamphetamine that was located?

17 Agent Nordquist: There was trafficking of methamphetamine coming  
18 out of the [motel] room.

19 State: Specifically with regard to the evidence that was found?

20 Agent Nordquist: I may not be understanding your questioning.

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<sup>3</sup>The objections, and the judge’s ruling are very difficult to hear. Neither party, however, objected to this Court’s understanding of the transcript at oral argument.

1 State: You phrase it, “there was trafficking.” I’m referring to the  
2 evidence that was there at the time that you located it. Based on  
3 the evidence that was found [inaudible] whether the drugs that  
4 were found, the methamphetamine specifically, was for personal  
5 use or for distribution?

6 Agent Nordquist: What I found collectively was evidence of trafficking  
7 methamphetamine.

8 State: Can you just perhaps make a list of the items that indicate to you  
9 that it was for trafficking?

10 Agent Nordquist: The amount of methamphetamine, the manner and  
11 ways in which it was bagged, the plastic baggies, the digital scale  
12 with the white crystalline residue and the currency located were  
13 to me all indicators that it was trafficking of methamphetamine.

14 State: And what role if any did the firearm play in your analysis?

15 Agent Nordquist: We call it “tools of the trade” for protection against  
16 theft and compensation of the product and/or currency.

17 On redirect, the State again asked Agent Nordquist:

18 State: Taking into account all the evidence in the case, not the isolated  
19 evidence that was in her purse, what’s your opinion as to the  
20 amount of methamphetamine in this case?

21 Agent Nordquist: It was being used for trafficking.

22 {14} The only other witness at trial was a laboratory technician who testified that  
23 the substances recovered from the motel room were methamphetamine and heroin.  
24 According to the technician, the plastic baggies of methamphetamine retrieved from  
25 the toilet weighed, when dry, around 0.424 grams, 7.149 grams, 0.507 grams, and

1 0.295 grams or in total about 8 grams. The amounts found in Defendant’s purse were  
2 0.516 grams of methamphetamine and 0.076 grams of heroin.

3 {15} In closing argument, the State reminded the jury that Agent Nordquist’s  
4 testimony was reliable because he was an “expert in street-level narcotics  
5 trafficking.” The jury convicted Defendant of trafficking. Defendant appealed.

6 **DISCUSSION**

7 {16} This appeal asks this Court to answer the following questions: What are the  
8 bounds of a law enforcement officer’s expert testimony in a drug trafficking case?  
9 and did Agent Nordquist’s expert opinion, that based on the evidence found in the  
10 motel room, the methamphetamine, “was for trafficking” exceed those bounds?

11 {17} Before we address these questions, however, we first need to resolve the  
12 dispute between the parties as to whether Defendant preserved the issue raised on  
13 appeal for our review. If not preserved, we review an evidentiary objection for plain  
14 error. *See State v. Contreras*, 1995-NMSC-056, ¶ 23, 120 N.M. 486, 903 P.2d 228  
15 (noting that appellate courts review unpreserved evidentiary objections for plain  
16 error). Finding that Defendant did not preserve the question she now raises on  
17 appeal, we conclude that our review is for plain error.

18 {18} The starting point for our plain error analysis is to determine whether there  
19 was error in the admission of the evidence. *See State v. Gwynne*, 2018-NMCA-033,  
20 ¶ 27, 417 P.3d 1157 (noting that the first criteria for plain error is that “there must

1 be . . . error”). We therefore next address whether the admission of Agent  
2 Nordquist’s opinion that the methamphetamine found in Defendant’s possession  
3 “was for trafficking,” that the methamphetamine found in Defendant’s possession  
4 “was being used for trafficking,” that “collectively, [the evidence] was trafficking,”  
5 and that “[t]he amount of methamphetamine, the manner and ways in which it was  
6 bagged, the plastic baggies, the digital scale with the white crystalline residue and  
7 the currency located were to me all indicators that it was trafficking of  
8 methamphetamine,” repeated multiple times to the jury, improperly communicate to  
9 the jury Agent Nordquist’s opinion that Defendant was guilty of trafficking and that  
10 the jury should find her guilty.

11 {19} Concluding that the admission of Agent Nordquist’s opinion on Defendant’s  
12 guilt is inconsistent with both this Court’s opinion in *State v. Rael-Gallegos*, 2013-  
13 NMCA-092, 308 P.3d 1016 and with our Supreme Court precedent limiting the  
14 admission of expert testimony on an ultimate issue under Rule 11-704 NMRA, we  
15 next determine whether the improper admission of Agent Nordquist’s expert  
16 testimony meets the high standard required to reverse for “plain error.” Concluding  
17 that this error affected substantial rights of the accused and raised doubt about the  
18 integrity of the proceedings, we reverse and remand for retrial with direction to limit  
19 law enforcement expert testimony asking the law enforcement officer to give their  
20 opinion as to whether Defendant was guilty of drug trafficking.

1 **I. The Arguments Made on Appeal Were Not Preserved in the District**  
2 **Court for Review on Appeal**

3 {20} “To preserve an issue for review, it must appear that a ruling or decision by  
4 the trial court was fairly invoked.” Rule 12-321(A) NMRA. “The preservation rule  
5 provides the lower court an opportunity to correct any mistake, provides the  
6 opposing party a fair opportunity to show why the court should rule in its favor, and  
7 creates a record from which this Court may make informed decisions.” *Yurcic v. City*  
8 *of Gallup*, 2013-NMCA-039, ¶ 35, 298 P.3d 500 (omission, internal quotation  
9 marks, and citation omitted).

10 {21} The State contends that Defendant objected only to Agent Nordquist’s  
11 qualifications to testify as an expert in narcotics trafficking, and that this objection  
12 did not alert the district court or the opposing party to the error she now claims on  
13 appeal, and therefore did not satisfy the purposes of preservation.

14 {22} We agree with the State that Defendant’s voir dire of Agent Nordquist,  
15 followed by a general objection to his testifying as an expert did not preserve the  
16 claim of error Defendant now raises on appeal concerning the admission of expert  
17 testimony on the ultimate issue of Defendant’s guilt or innocence. Neither the district  
18 court nor the State were informed of the nature of Defendant’s objection, and  
19 therefore, there was no opportunity to respond or to exclude the improper testimony  
20 now complained of on appeal. Our review, therefore, is solely for plain error.

1 {23} As we previously explained, we begin by examining whether the admission  
2 of Agent Nordquist’s challenged opinion testimony was error.

3 **II. Agent Nordquist’s Challenged Testimony Exceeded the Bounds of**  
4 **Permissible Expert Testimony**

5 {24} Defendant argues that the district court erred in admitting Agent Nordquist’s  
6 testimony that, based on his experience and training as a narcotics agent, the  
7 evidence found in Defendant’s possession “was trafficking.” Defendant contends  
8 that the agent’s testimony impermissibly intruded on the jury’s exclusive role in  
9 deciding guilt or innocence. According to Defendant, the only permissible role for  
10 an expert witness in a drug trafficking case is to educate the jury about the typical  
11 customs and practices of drug traffickers and of those who possess drugs for their  
12 own use. It must then be left to the jury, having been educated by the expert on the  
13 practices, methods, and items commonly used to prepare drugs for sale, to weigh  
14 both the expert testimony and the other evidence in the case and to decide the guilt  
15 or innocence of the defendant, applying common sense and community standards.

16 {25} The State argues in response that expert testimony on an “ultimate issue” is  
17 expressly permitted by Rule 11-704, and that only expert testimony that directly  
18 “tell[s] the jury what to do” or “impl[ies] that the question of guilt or innocence ha[s]  
19 been predetermined” would “cross the line into the territory of the ultimate jury  
20 determination of that defendant’s guilt or innocence.” According to the State,  
21 because there was no suggestion to the jury “that [it] was mandated to reach a legal

1 conclusion,” the challenged testimony did not encroach impermissibly on the  
2 exclusive function of the jury.

3 {26} Both parties rely on New Mexico Rules of Evidence 11-702 NMRA, and -704,  
4 and both parties claim that their position is consistent with this Court’s opinion in  
5 *Rael-Gallegos*, 2013-NMCA-092, the only precedential opinion from a New Mexico  
6 appellate court defining the line between permissible and impermissible expert  
7 testimony by a law enforcement officer in a drug trafficking case. The parties sharply  
8 disagree about the meaning of this Court’s decision in *Rael-Gallegos* and about how  
9 that decision should be applied to Agent Nordquist’s testimony in this case. Because  
10 we are bound to follow our own precedent, and because we believe *Rael-Gallegos*  
11 resolves the evidentiary question raised in this case, we address it first before turning  
12 to the parties’ arguments based on our rules governing the admission of expert  
13 opinion testimony and our precedent guiding our construction of those rules.

14 **A. *Rael-Gallegos***

15 {27} In *Rael-Gallegos*, this Court applied Rules 11-702 and -704, New Mexico  
16 precedent construing these rules, and examples taken from other states’ decisions  
17 concerning expert evidence in drug trafficking cases specifically to the expert  
18 testimony of a law enforcement officers in a drug trafficking case—an issue with  
19 which our appellate courts and the courts of other states have struggled. Given the  
20 contradictions in the arguments made by the parties and the confusion we find in this

1 Court’s nonprecedential opinions in the years following our decision in *Rael-*  
2 *Gallegos*,<sup>4</sup> we take this opportunity to clarify our holding in *Rael-Gallegos*.  
3 {28} *Rael-Gallegos* draws what the opinion acknowledges to be “a fine line”  
4 between permissible expert testimony (1) “as to *typical users and traffickers* based  
5 on the amount of drugs in their possession, and (2) testimony as to whether “the  
6 amounts *in the possession of the subject defendant* indicated a purpose to traffic and  
7 not to use.” 2013-NMCA-092, ¶ 35 (emphasis added). *Rael-Gallegos* focuses on this  
8 stated distinction between expert testimony about the customs and practices typical  
9 of drug trafficking in general, and expert opinion that *the evidence in the case being*  
10 *tried*—the amount of drugs and the nature of the items in the possession of the  
11 defendant—shows that the defendant “is trafficking” or that the defendant’s intent  
12 is to traffic. Intent to distribute is the sole element that distinguishes possession of  
13 drugs for personal use from possession of drugs for distribution and, thus, testimony  
14 that the defendant “intended to traffic” is tantamount to telling the jury the defendant  
15 “is guilty of trafficking.” See § 30-31-20(A)(3) (defining “traffic” to mean  
16 “possession *with intent to distribute*” (emphasis added)); see also *Rael-Gallegos*,

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<sup>4</sup> The dissent in part and concurrence in part, in our nonprecedential memorandum opinion in *State v. Renick*, A-1-CA-36319, mem. op. ¶ 27 (N.M. Ct. App. Nov. 18, 2019) (nonprecedential) (Ives, J., dissenting in part and concurring in part), points to confusion in this Court’s memorandum opinions applying *Rael-Gallegos*. We find the discussion of *Rael-Gallegos* in Judge Ives dissenting opinion persuasive and rely on its reasoning throughout this opinion.

1 2013-NMCA-092, ¶ 29 (treating the officer’s expert opinion that a defendant intends  
2 to traffic as simply another way of testifying to the officer’s opinion that the  
3 defendant is guilty of trafficking).

4 {29} The expert testimony challenged on appeal in *Rael-Gallegos* was a law  
5 enforcement officer’s observation, based on her training and experience,  
6 “differentiating between possession amounts and trafficking amounts of crack  
7 cocaine.” *Id.* ¶ 25. We concluded in *Rael-Gallegos* that the officer’s expert  
8 testimony was admissible because “[r]ead in context,” the officer was describing the  
9 circumstances she found during her career *in other cases* when she was involved in  
10 an arrest for trafficking, and she “did not relate those cases to [the d]efendant’s case.”  
11 *Id.* ¶ 32. The officer “was not asked, nor did she offer, her opinion as to whether [the  
12 d]efendant was trafficking cocaine.” *Id.*

13 {30} *Rael-Gallegos* concluded that the officer’s testimony was admissible because  
14 the officer avoided giving her opinion about whether *the evidence in the defendant’s*  
15 *case* showed that the defendant possessed the drugs with the intent to distribute them.  
16 *Id.* ¶ 32. This Court distinguishes “[t]he type of testimony given by [the officer] *as*  
17 *to typical circumstances in law enforcement* [that] can assist the jury in  
18 understanding intent as to drug use versus drug trafficking,” *id.* ¶ 37 (emphasis  
19 added), and that “educat[es] the jury in regard to what factors, in [the officer’s]  
20 experience,” indicate trafficking, *id.* ¶ 33, from impermissible testimony giving the

1 jury the expert’s opinion that “the amounts *in the possession of the subject defendant*  
2 indicated a purpose [or intent] to traffic and not to use.” *Id.* ¶ 35 (emphasis added).  
3 {31} In order to clarify “when an expert crosses the fine line constituting error,” *id.*  
4 ¶ 35, *Rael-Gallegos* quotes examples of admissible and inadmissible expert opinion  
5 from appellate decisions in other states. The testimony at issue in *Melton v. State*,  
6 824 So. 2d 948, 950 (Fla. Dist. Ct. App. 2002), and *Yates v. State*, 699 S.E.2d 43, 44  
7 (Ga. Ct. App. 2010), is quoted by this Court in *Rael-Gallegos* as an example of the  
8 type of expert testimony by a law enforcement officer that is admissible in a drug  
9 trafficking case. See *Rael-Gallegos*, 2013-NMCA-092, ¶¶ 30, 32. The testimony  
10 quoted from both *Melton* and *Yates* informs the jury of the amounts of narcotics  
11 generally possessed by the typical user versus the amount generally possessed by a  
12 typical seller.<sup>5</sup> *Rael-Gallegos* then gives as the example of *impermissible* expert  
13 testimony the expert’s opinion in *State v. Ogg*, 243 N.W.2d 620 (Iowa 1976), that  
14 “the amount . . . in the defendant’s possession exceeded what one might possess for  
15 personal use.” *Rael-Gallegos*, 2013-NMCA-092, ¶ 31. This testimony by a law

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<sup>5</sup>*Rael-Gallegos* states that “an officer may testify as an expert and offer [their] opinion as to a trafficking amount versus personal use amount of narcotics,” 2013-NMCA-092, ¶ 30, and supports that statement with the following two examples of permissible expert testimony: (1) “[A] typical user carries one or two pieces of crack cocaine, while a typical seller carries anywhere from one to fifty pieces.” *Id.* (quoting *Melton*, 824 So.2d at 950); and (2) “A qualified expert may offer opinion testimony regarding [their] knowledge of the amount of crack cocaine one would generally possess for personal use or the amount which might evidence distribution.” *Id.* (quoting *Yates*, 699 S.E.2d at 44).

1 enforcement officer is quoted as an example of expert testimony that encroaches on  
2 the role of the jury in weighing the evidence and determining guilt or innocence.

3 {32} The special concurrence disagrees that *Rael-Gallegos* draws the line between  
4 permissible and impermissible law enforcement officer expert testimony by limiting  
5 permissible expert testimony to general or typical behaviors of drug traffickers, and  
6 prohibiting expert opinion testimony based on the evidence against the defendant in  
7 the case being tried. The author believes that the close reading of *Rael-Gallegos* just  
8 discussed supports this holding. Moreover, the author strongly disagrees that such  
9 an important matter turns on whether the law enforcement officer testifies that the  
10 evidence in the pending case “is trafficking,” “indicates an intent to traffic,” or “is  
11 indicative of trafficking,” phrases that the special concurrence agrees cross the line  
12 into telling the jury how to decide the case, versus the law enforcement officer  
13 testifying that the evidence “is consistent with trafficking,” which the concurrence  
14 concludes is admissible expert testimony. In the author’s opinion, all of these phrases  
15 communicate to the jury that the law enforcement officer has weighed the evidence  
16 in the case and concluded that the defendant is guilty of trafficking. Such an expert  
17 opinion, in the context of a drug trafficking case, has no purpose apart from advising  
18 the jury how law enforcement would decide the case and by implication, how they  
19 should decide. The distinction between commenting directly on the state’s evidence  
20 in the case against a defendant and educating the jury about what evidence is

1 typically associated with drug trafficking, on the other hand, is a straightforward  
2 distinction that is supported, as explained in the next section of this opinion, by our  
3 rules of evidence and precedent construing those rules.

4 **B. Our Rules Governing the Admission of Expert Testimony Support the**  
5 **Holding of *Rael-Gallegos***

6 {33} On appeal, the State and Defendant both rely on precedent in addition to *Rael-*  
7 *Gallegos* that construes Rule 11-704 in other contexts besides prosecutions for drug  
8 trafficking. The State argues that our precedent construing Rule 11-704 supports its  
9 reading of *Rael-Gallegos* to broadly allow expert testimony concerning the ultimate  
10 issue in a case, subject only to the requirement that the expert not “tell the jury what  
11 to do nor . . . imply that the question of guilt or innocence had been predetermined.”  
12 Defendant finds support in Rule 11-704 and the precedent construing that rule for  
13 limiting expert testimony in drug trafficking cases to typical trafficking versus  
14 personal use practices, the line Defendant argues, and the author agrees, is drawn by  
15 *Rael-Gallegos*.

16 {34} Assuming that *Rael-Gallegos* does not fully resolve the question raised, we  
17 proceed to address the rules governing the admission of expert testimony and our  
18 Supreme Court precedent construing those rules. The majority agrees that the  
19 testimony at issue in this case is impermissible under our rules governing expert  
20 testimony, but again disagrees about where the line must be drawn in a drug  
21 trafficking case under this body of law.

1 **C. Rule 11-704**

2 {35} We agree with the parties that Rule 11-704 is of importance in determining  
3 the outer limits of expert testimony. Rule 11-704 provides: “An opinion is not  
4 objectionable *just because* it embraces an ultimate issue.” (Emphasis added.) Our  
5 Supreme Court has construed Rule 11-704 to allow the admission of expert  
6 testimony “even if it touches upon an ultimate issue to be decided by the trier of  
7 fact.” *State v. Alberico*, 1993-NMSC-047, ¶ 84, 116 N.M. 156, 861 P.2d 192. The  
8 Court cautioned, however, that Rule 11-704 “was not intended to permit experts to  
9 tell the jury what result to reach.” *Alberico*, 1993-NMSC-047, ¶ 86 (internal  
10 quotation marks and citation omitted).

11 {36} Our Supreme Court has distinguished inadmissible expert testimony that  
12 “tell[s] the jury what result to reach” from admissible expert testimony that touches  
13 on an ultimate issue by looking to whether the expert testimony is necessary to help  
14 the jury decide the case, one of the foundational requirements found in Rule 11-702  
15 for the admission of expert testimony. *Alberico*, 1993-NMSC-047, ¶ 86. In its  
16 opinion in *State v. Lopez*, 1973-NMSC-041, ¶ 28, 84 N.M. 805, 508 P.2d 1292, our  
17 Supreme Court stated that ““if the matter in dispute and to be decided involves causes  
18 and effects which are not within the knowledge or comprehension of the lay trier,  
19 expert testimony is admissible as an aid to the decisional process.”” (quoting *Padgett*  
20 *v. Buxton-Smith Mercantile Co.*, 262 F.2d 39, 41 (10th Cir. 1958)). The Court further

1 explained that “[i]t is only when the so-called expert testimony involves causes and  
2 effects readily within the knowledge or comprehension of the fact triers that we have  
3 ruled it out as an usurpation of the judicial function.” *Lopez*, 1973-NMSC-041, ¶ 28  
4 (internal quotation marks and citation omitted).

5 {37} In its opinion in *Alberico*, the Court again explained that where the jury is  
6 competent to independently draw a conclusion without additional expert testimony,  
7 allowing an expert to tell the jury how the expert would weigh the evidence is  
8 “nothing more than advice to jurors on how to decide the case.” 1993-NMSC-047,  
9 ¶ 86. “Such testimony was not legitimized by Rule [11-]704, and is not admissible  
10 under Rule [11-]702.” *Alberico*, 1993-NMSC-047, ¶ 86.

11 {38} We do not question the need for the expert testimony of a law enforcement  
12 officer with special knowledge of the patterns and practices associated with drug use  
13 and drug trafficking to assist the jury. The parties agree that most jurors are not  
14 familiar with the customs and practices of either users or traffickers, and do not know  
15 the amount of drugs that are typical of trafficking versus use, what items are typically  
16 used to package drugs for sale, or any of the many details of the drug trade addressed  
17 in Agent Nordquist’s several hours of expert testimony. *See State v. Cain*, 133 A.3d  
18 619, 627-28 (N.J. 2016) (explaining that “[t]he average juror is not knowledgeable  
19 about the arcana of drug-distribution schemes,” and expert assistance is required to  
20 inform them about how drugs are trafficked and what sorts of items and behavior are

1 typical of drug trafficking). Once extensive expert testimony about the items and  
2 behavior typical of drug trafficking has been presented to the jury, however, the jury  
3 is competent to draw its own conclusion as to the defendant’s guilt of trafficking.  
4 *See United States v. Boissoneault*, 926 F.2d 230, 233 (2d Cir. 1991) (“Once [the  
5 agent] had testified as to the likely drug transaction-related significance of each piece  
6 of physical evidence, the jury was competent to draw its own conclusion as to [the  
7 defendant’s] involvement in the distribution of cocaine.”). Expert testimony that  
8 weighs the evidence in the case and tells the jury that a law enforcement officer  
9 believes that the evidence shows the defendant “was trafficking” is testimony that,  
10 as our Supreme Court held in *Alberico*, “was not legitimized by Rule [11-]704, and  
11 is not admissible under Rule [11-]702.” *Alberico*, 1993-NMSC-047, ¶ 86.

12 {39} *Rael-Gallegos*’s conclusion that it is error to admit into evidence in a drug  
13 trafficking case a law enforcement officer’s opinion that the evidence “shows” or  
14 “indicates” or “is” drug trafficking or that the defendant “has an intent” to traffic is  
15 entirely consistent with—and indeed compelled by—our precedent construing Rule  
16 11-704 together with Rule 11-702.

17 **D. Application to the Challenged Opinion Testimony**

18 {40} We begin by noting that Agent Nordquist gave appropriate, admissible expert  
19 testimony for several hours, thoroughly educating the jury about the customs and  
20 practices typical of narcotics traffickers, providing information about the nature of

1 each narcotic, the methods of ingesting each, the amounts typically purchased and  
2 held by drug users, how different narcotics are packaged for sale, how and where the  
3 business of selling narcotics is conducted and the drugs and money protected, the  
4 amounts of money typically held by dealers and the amounts typically paid by  
5 purchasers, and the different customs and practices typical of those possessing  
6 narcotics solely for their own use. Agent Nordquist testified from his experience that  
7 over 50 percent of those trafficking drugs have one or more firearms to protect  
8 themselves from theft; that traffickers carry a lot of cash, usually in a variety of  
9 denominations; that drugs are often dealt out of motel rooms rather than out of a  
10 residence; that a drug user generally buys 3 to 5 grams of methamphetamine; that  
11 drugs for trafficking are often weighed on a scale and then packaged in small plastic  
12 baggies; that multiple baggies, scales, multi-denominational cash, firearms, and  
13 sometimes pipes and syringes for sale are commonly found where there is drug  
14 trafficking; and that drug users often turn to trafficking to get money to buy drugs  
15 for their personal use. This testimony stayed well within the line drawn by *Rael-*  
16 *Gallegos* for admissible expert testimony necessary to assist the jury in a trafficking  
17 case.

18 {41} After the completion of this testimony, the State switched topics, eliciting  
19 evidence specific to Defendant's case based on Agent Nordquist's participation in  
20 the search of Defendant's motel room. Agent Nordquist was asked to describe the

1 search of the motel room in detail and, in the course of that description, to identify  
2 each of the photographs taken by the team of narcotics agents during that search.  
3 The State offered thirty-one exhibits through Agent Nordquist’s testimony  
4 including, in addition to photographs, a scale, plastic baggies, glass pipes, and the  
5 bags of narcotics seized from the motel room.

6 {42} This expert testimony also properly assisted the jury by providing the  
7 information the expert has learned about narcotics and drug trafficking from years  
8 of experience. Agent Nordquist first provided general information about how the  
9 business of trafficking narcotics is typically conducted, and then provided  
10 information about how each item seized from Defendant’s motel room can be used  
11 to prepare the drugs for sale, or alternatively, prepare them to be ingested. When he  
12 finished this testimony, the jury was well-prepared to weigh the evidence and come  
13 to a verdict. They did not need Officer Nordquist to weigh the evidence for them and  
14 tell them that, in his opinion, Defendant “was trafficking.”

15 {43} The State, however, continued its questioning of Agent Nordquist, asking  
16 whether the physical exhibits introduced into evidence—the scale, baggies, and  
17 spoons found in Defendant’s possession—“In your experience, do they indicate  
18 preparation for trafficking?” Agent Nordquist answered, “Yes.” At this point, the  
19 State asked the district court to qualify Agent Nordquist as “an expert in street-level  
20 narcotics trafficking.” As soon as Agent Nordquist was qualified by the district court

1 as an expert in street-level trafficking, the State asked him whether, in his expert  
2 opinion, the methamphetamine seized from the motel room “was for personal use or  
3 distribution?” Agent Nordquist answered, “What I found collectively was evidence  
4 of trafficking methamphetamine.” Agent Nordquist also was asked by the State for  
5 “his opinion as to the amount of methamphetamine in this case?” He testified that  
6 “it was being used for trafficking.”

7 {44} We therefore conclude that Agent Norquist’s challenged testimony in this  
8 case plainly crossed the line drawn by *Rael-Gallegos* and by Rules 11-704 and -702  
9 between permissible expert testimony necessary to educate the jury about an  
10 unfamiliar field, and impermissible testimony telling the jury that the expert believes  
11 the defendant is guilty of drug trafficking, and that the jury should find the defendant  
12 guilty. It is important here that the guilt or innocence of Defendant was a decision  
13 the jury was perfectly capable of making on its own when it retired moments later  
14 to deliberate.

15 **III. Admission of Agent Nordquist’s Opinion on Defendant’s Guilt Was Plain**  
16 **Error**

17 {45} Because Defendant did not preserve her objection to the testimony challenged  
18 on appeal, we review for plain error. Defendant points to extensive precedent  
19 acknowledging the highly prejudicial impact on a jury of supposedly “expert”  
20 testimony, particularly the testimony of a law enforcement officer, that weighs the  
21 evidence for the jury and tells the jury the “right” result. The State argues in response

1 that the admission of the challenged testimony did not have a significant impact on  
2 the outcome of the trial or significantly invade Defendant’s rights given that  
3 Defendant was “caught fairly red-handed in a [motel] room containing narcotics,  
4 baggies and a digital scale.” The State claims that any error was corrected by the  
5 district court’s instruction to the jury, which we should presume the jury followed,  
6 that the jury is “the judges of credibility” and “the sole judges of the facts.” Not  
7 persuaded by the State’s arguments, we agree with Defendant that Agent Nordquist’s  
8 challenged testimony amounted to plain error under Rule 11-103(E) NMRA.

9 {46} Rule 11-103(E) allows this Court to review evidentiary questions that are not  
10 preserved under a plain error standard. To find plain error, this Court must be  
11 convinced “that admission of the [evidence] constituted an injustice that created  
12 grave doubts concerning the validity of the verdict,” *State v. Montoya*, 2015-NMSC-  
13 010, ¶ 46, 345 P.3d 1056 (internal quotation marks and citation omitted); *see State*  
14 *v. Chavez*, 2024-NMSC-023, ¶ 10, 562 P.3d 521 (“We will not reverse on the basis  
15 of plain error unless the error affected a substantial right of the defendant.”  
16 (alteration, internal quotation marks, and citation omitted)). The focus of our review  
17 is on the error’s effect on the overall fairness and integrity of the proceedings, and  
18 on the public perception of the proceeding’s fairness, rather than on whether the  
19 defendant’s guilt is so doubtful it would shock the conscience to allow it to stand.  
20 *Chavez*, 2024-NMSC-023, ¶ 11.

1 {47} We begin our analysis of the impact of Agent Nordquist’s challenged  
2 testimony on the fairness and integrity of the proceedings by acknowledging the  
3 importance of the distinction in our criminal justice system between possessing  
4 drugs for trafficking versus possessing drugs for personal use. Drug trafficking  
5 offenses are second-degree felonies, *see* § 30-31-20(B), which can result in a basic  
6 sentence of nine years imprisonment for a first offense, *see* § 30-31-20(B)(1)  
7 (classifying a first offense of trafficking methamphetamine as a second-degree  
8 felony); *see also* § 31-18-15(A) (providing basic sentence of a second-degree  
9 felony). The possession of methamphetamine for personal use, in contrast, is  
10 classified as a fourth-degree felony, *see* § 30-31-23(E), punishable by a basic  
11 sentence of eighteen months imprisonment, *see also* § 31-18-15(A) (providing basic  
12 sentence of a fourth-degree felony).

13 {48} As many courts have concluded, expert testimony by a law enforcement  
14 officer claiming to testify about the “specialized knowledge” they possess based on  
15 their experience and training “likely will have a profound influence on the  
16 deliberations of the jury.” *See Cain*, 133 A.3d at 427; *see also State v. Wheeler*, 416  
17 So. 2d 78, 82 (La. 1982) (stating that there is increased risk of prejudice to a  
18 defendant when “the [expert] witness expressing the opinion is one, such as a police  
19 officer, in whom jurors and the public repose great confidence and trust”); *State v.*  
20 *Renick*, A-1-CA-36319, memo. op. ¶ 27 (N.M. Ct. App. Nov. 18, 2019)

1 (nonprecedential) (Ives, J., dissenting in part and concurring in part) (noting that the  
2 opinion of a law enforcement officer recognized as an expert “[is] likely to have a  
3 powerful impact on juries”).

4 {49} In its opinion in *State v. Ashley*, 1997-NMSC-049, ¶¶ 18-19, 124 N.M. 1, 946  
5 P.2d 205, our Supreme Court went a step further, not only suggesting that the  
6 admission of law enforcement officer testimony giving the officer’s opinion on the  
7 defendant’s guilt based on the facts in the case being tried is highly prejudicial and  
8 invades the defendant’s rights, but holding that such testimony from a law  
9 enforcement officer impermissibly suggested to the jury that guilt had been  
10 determined by a judicial officer, a violation of the defendant’s constitutional due  
11 process rights.

12 {50} In this case, there are at least four factors that add to the tendency of a jury to  
13 defer to a law enforcement officer’s expert opinion on the Defendant’s guilt: (1) the  
14 law enforcement officer was the sole witness in the case apart from a witness  
15 presenting a laboratory report; (2) the same law enforcement officer was both the  
16 investigating officer and the State’s expert witness; (3) the State repeatedly elicited  
17 Officer Nordquist’s opinion on Defendant’s guilt of trafficking; and (4) the State  
18 waited to have the district court certify Agent Nordquist as an expert until just before  
19 it repeatedly asked him for his opinion on Defendant’s guilt.

1 {51} In countering this strong support for a finding that the law enforcement  
2 officer’s improper opinion testimony on Defendant’s guilt constituted plain error  
3 requiring reversal despite the lack of preservation, the State argues that other  
4 evidence strongly supported the verdict. The State’s argument, however, misstates  
5 the plain error standard: we look to the overall fairness and integrity of the  
6 proceedings and need not find that the verdict “shock[s] the conscience.” *See*  
7 *Chavez*, 2024-NMSC-023, ¶ 11.

8 {52} Finally, we do not agree with the State’s argument that instructing the jury  
9 that they are the “sole judge[s] of the facts in this case,” and that they “alone are the  
10 judges of the credibility of the witnesses,” cures any error. The jury instructions the  
11 State points to are not specific, limiting instructions designed to alert the jury to  
12 disregard Agent Nordquist’s stated opinion on Defendant’s guilt. These general  
13 instructions, therefore, were unlikely to overcome the jury’s tendency to defer to the  
14 expert opinion of a law enforcement officer. We note that the jury was not given UJI  
15 14-118 NMRA, the UJI that informs the jury it can disregard expert testimony  
16 entirely if it finds it is not credible. Although this instruction is unlikely to have cured  
17 the error here, its absence adds to the likelihood the jury was prejudiced by Agent  
18 Nordquist’s challenged testimony.


19 {53} For the reasons stated, we agree with Defendant that admission of Agent  
20 Nordquist’s opinion that the evidence shows “there was trafficking,” along with the

1 challenged multiple restatements of that opinion, such as the statement, “What I  
2 found collectively was evidence of trafficking methamphetamine.” and that the  
3 amount of methamphetamine seized in this case “was used for trafficking” impaired  
4 the overall fairness and integrity of the proceedings was plain error.

5 **CONCLUSION**

6 {54} We vacate Defendant’s conviction of possession with intent to traffic  
7 methamphetamine, and remand for retrial on the trafficking charge.

8 {55} **IT IS SO ORDERED.**

9  
10   
\_\_\_\_\_  
**JANE B. YOHALEM, Judge**

11 **MEGAN P. DUFFY, Judge, specially concurring**

12 **GERALD E. BACA, Judge, concurring in special concurrence**

1 **DUFFY, Judge (specially concurring).**

2 {56} We agree that the officer’s expert testimony in this case crossed the line and  
3 amounted to plain error, but cannot agree with the new line proposed in the majority  
4 opinion to distinguish admissible versus inadmissible expert testimony. This Court  
5 previously established the line in *Rael-Gallegos*, stating that “the distinction  
6 between admissible versus inadmissible expert testimony depends on whether the  
7 officer testified directly as to the defendant’s intent.” 2013-NMCA-092, ¶ 29. The  
8 majority opinion does not engage with this core aspect of *Rael-Gallegos*’s holding  
9 or provide a rationale as to why it is necessary to redraw that line.

10 {57} Trafficking is defined, in relevant part, as “possession with intent to  
11 distribute.” Section 30-31-20(A)(3). Thus, when the officer in this case testified that  
12 the evidence “collectively was evidence of trafficking,” and that “there was  
13 trafficking of methamphetamine coming out of the room,” the officer testified as to  
14 both the possession element and the intent element, because “trafficking”  
15 encompasses both propositions. Consequently, the officer’s testimony in this case  
16 clearly crossed the line into inadmissible expert testimony under the standard  
17 articulated in *Rael-Gallegos*. Based on both the nature of this testimony and the  
18 frequency with which it was repeated throughout the case, we have no trouble  
19 concluding that the error was plain.

1 {58} Given that *Rael-Gallegos* fully disposes of the issue before us, we are not  
2 persuaded that it is necessary to redraw the line in the manner proposed by the  
3 majority opinion—that is, to limit admissible expert testimony to general or typical  
4 behaviors, and prohibit “expert opinion testimony based on the evidence against the  
5 defendant in the case being tried.” *Maj. op.* ¶ 32. Admittedly, this Court has  
6 struggled to parse through the fine distinctions that arise from the myriad ways in  
7 which the prosecution elicits testimony about whether the evidence against the  
8 defendant “shows,” “indicates,” or “is consistent with” trafficking. *See Renick*, A-1-  
9 CA-36319; *State v. Taylor*, A-1-CA-33951, mem. op. (N.M. Ct. App. Jan. 11, 2016  
10 (nonprecedential); *State v. Segura*, A-1-CA-28527, mem. op. (N.M. Ct. App. Feb.  
11 24, 2011). Nevertheless, while there is no doubt that the majority opinion offers a  
12 clear, workable, and easily applicable standard, we have three significant concerns  
13 about adopting a rule that prohibits an expert from testifying about the evidence  
14 against the defendant.

15 {59} First, this bright-line prohibition is facially inconsistent with prior precedents  
16 of our Supreme Court that have affirmed the use of similar “consistent with”  
17 testimony. *See, e.g., Alberico*, 1993-NMSC-047, ¶ 84 (holding that “PTSD  
18 testimony may be offered to show that the victim suffers from symptoms that are  
19 consistent with sexual abuse”); *State v. Lucero*, 1993-NMSC-064, ¶ 19, 116 N.M.  
20 450, 863 P.2d 1071 (“It is proper, under *Alberico*, to offer the testimony of a

1 qualified psychologist to show that the complainant’s symptoms are consistent with  
2 symptoms that have been observed in known victims of sexual abuse because such  
3 expert opinion is probative of whether a crime has been committed.”); *State v.*  
4 *Consaul*, 2014-NMSC-030, ¶ 68, 332 P.3d 850 (“An expert may testify that an  
5 observation or an opinion is consistent with an underlying fact, even though that  
6 same observation may be consistent with other facts as well. Bloodshot and watery  
7 eyes may be consistent with intoxication, but that same observation is consistent  
8 with other, noncriminal explanations as well.”); *see also* Thomas M. Fleming, J.D.,  
9 Annotation, *Admissibility, in Criminal Prosecution, of Expert Opinion Allegedly*  
10 *Stating Whether Drugs Were Possessed With Intent to Distribute—State Cases*, 83  
11 A.L.R.4th 629 (1991) (collecting cases as to expert testimony on whether drugs were  
12 possessed with intent to distribute).

13 {60} Second, the rule announced today creates an obvious tension with a directive  
14 this Court has previously given to the State regarding its evidentiary burden in  
15 trafficking cases. In *State v. Hubbard*, 1992-NMCA-014, ¶ 15, 113 N.M. 538, 828  
16 P.2d 971, this Court stated that

17 [the d]efendant’s final argument on the sufficiency issue is that this  
18 court should adopt a specific test, either indicating what amount of  
19 drugs must be found in order to charge an accused with the crime of  
20 trafficking, or listing what factors are relevant to the determination.  
21 However, contrary to [the] defendant’s assertions, we believe present  
22 New Mexico cases adequately provide a test for what constitutes an  
23 “intent to transfer” drugs according to New Mexico law. While we are  
24 cognizant of [the] defendant’s concern that small amounts of drugs are

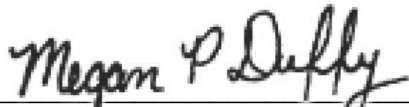
1 sometimes the basis for trafficking prosecutions, we believe that the  
2 “surrounding circumstances” test protects against the concern  
3 articulated by [the] defendant. If the amount of an illegal drug found in  
4 an accused’s possession is not by itself sufficient to prove inconsistency  
5 with personal use, *then the state must present testimony that the amount*  
6 *of drugs in the accused’s possession is inconsistent with personal use*  
7 *or that the other items found in possession of the accused, such as drug*  
8 *paraphernalia or significant sums of cash, show that the accused*  
9 *intends to transfer drugs.*

10 (Emphasis added.) Thus, when the evidence presents a close call about whether the  
11 drugs at issue were for personal use or for trafficking, *Hubbard* requires the State to  
12 present testimony concerning the specific evidence in the defendant’s case, but the  
13 majority opinion would prevent an expert from providing such testimony. It’s not  
14 apparent how prosecutors and district courts can navigate these competing directives  
15 in future prosecutions.

16 {61} Finally, while we believe the majority opinion is intended to be limited solely  
17 to trafficking cases, the opinion does not clearly express such a limitation. As a  
18 result, we worry that confusion will follow as to how this rule applies in other  
19 criminal prosecutions where experts are routinely called upon to offer similar  
20 ultimate issue opinion testimony.

21 {62} For these reasons, we readily concur with the result reached in this case on  
22 plain error grounds, but harbor concern about the standard for admissibility  
23 announced in the majority opinion. We wish to emphasize that although this standard

1 appears in the majority opinion, it does not carry the support of a majority of judges  
2 on this panel and is therefore not precedential.

3   
4 MEGAN P. DUFFY, Judge

5 **I CONCUR:**

6   
7 GERALD E. BACA, Judge