IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

S-1-SC-39004

STATE OF NEW MEXICO

Plaintiff-Respondent,

vs.

FRANCISCO JAVIER GRANADOS,

Defendant-Petitioner.

A-1-CA-37417
D-1215-CR-2013-00328

APPEAL FROM THE TWELFTH JUDICIAL DISTRICT COURT,
OTERO COUNTY,
HONORABLE JUDGE STEVEN E. BLANKINSHIP, PRESIDING

DEFENDANT-PETITIONER'S REPLY BRIEF ON CERTIORARI TO THE COURT OF APPEALS

BENNETT J. BAUR
Chief Public Defender

Kimberly Chavez Cook
Appellate Defender
Public Defender Department
1422 Paseo de Peralta, Bldg. 1
Santa Fe, NM 87501
(505) 395-2890

Attorneys for Defendant-Petitioner

TABLE OF CONTENTS

STATEMENT REGARDING RECORD CITATIONS

The record proper (**RP**) appears in two continuously paginated volumes cited by bates stamp page number. The district court proceedings were audio recorded and are cited by FTR date and timestamp. Some exhibits (Ex.) are passingly referenced based on the testimony but are not crucial to the issues on appeal.

CERTIFICATION OF COMPLIANCE

The body of this brief is within the page limits (15 pages) set forth in Rule 12-213(F)(2) NMRA. Counsel used Times New Roman, a proportionally-spaced type style / type face. This brief was prepared using Microsoft Word, version 2016.

TABLE OF AUTHORITIES

New Mexico Cases

Federal Cases

REPLY ARGUMENT

1. The informant's tip carries minimal to no weight toward reasonable suspicion.

The answer brief argues that the informant tip was reliable because the informant had proved reliable information in the past and because the informant correctly described Mr. Granados's car. [**AB 10-11**]

It is true that an informant's past performance is part of the reliability assessment. However, as argued in the brief in chief and discussed in the Court of Appeals' dissenting opinion, because Mr. Granados's car was not an instrumentality of the informant's allegation, it constitutes a "status quo fact" available to the public and any casual observer, and therefore adds nothing to the reliability of the tip itself, i.e., that Mr. Granados was trafficking drugs. *State v. Granados*, A-1-CA-37417, ¶ 35 (July 26, 2021) (non-precedential) (Attrep J., dissenting) (citing *State v. Robbs*, 2006-NMCA-061, ¶ 17, 139 N.M. 569); *see also id.* ¶¶ 31, 33, and n.6. Although the State asserts that accurately *describing* Mr. Granados's car somehow corroborated the substance of the tip [**AB 13-14**], that simply isn't the case.

The State makes a related argument that the officers "corroborated" the tip, albeit "mistakenly," when they saw him talk to his mother and believed he was engaged in a drug transaction. [**AB 11**] This argument is circular, unsupported by any citation to authority, and cannot be a viable way to render an informant tip

reliable. [**AB 13**] *See Matter of Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764 ("We assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority."). For one thing, a mistake about authority to seize a person cannot support the seizure, as New Mexico has rejected the good faith exception. *See State v. Gutierrez*, 1993-NMSC-062, ¶ 1, 116 N.M. 431, 863 P.2d 1052. Furthermore, the reliability inquiry cannot become a rubber stamp for informant tips.

> Information supplied to officers by the traditional police informer is not given in the spirit of a concerned citizen, but often is given in exchange for some concession, payment, or simply out of revenge against the subject. The nature of these persons and the information which they supply **convey a certain impression of unreliability**, and it is proper to demand that some evidence of their credibility and reliability be shown.

State v. Dietrich, 2009-NMCA-031, ¶ 16, 145 N.M. 733 (citation omitted, emphasis added). In essence, the State argues that an otherwise unreliable tip may be rendered reliable if the officers *erroneously* believe they have corroborated it. This turns the reliability inquiry on its head and obviates the need for a diligent investigation.

To argue against the staleness of a 72-hour-old tip, the State argues general principles and focuses on the tip's reference to a "large amount" of cocaine, presumably suggesting the quantity implicates a "continuous" offense. [**AB 12-13**] Yet the authority the State cites does not support its position.

The State provides authority that tips relating to "continuous" offenses are less likely to become stale with time, and that the mere counting of days does not assure staleness. [**AB 12-13** (citing *United States v. Miles*, 772 F.2d 613, 616 (10th Cir. 1985).] However, *Miles* involved a tip regarding the possession of stolen firearms which would have been observed by the informant within the preceding two-and-a-half weeks. *Miles*, 772 F.2d at 616. As argued in the brief in chief, drugs are different because of their consumable nature, and New Mexico has repeatedly held that an informant's one-time observations of drug trafficking became stale after 48 or 72 hours. [**BIC 18-19** (citing *State v. Whitley*, 1999-NMCA-155, ¶ 5, 128 N.M. 403 (where the information involved a motel room and was at least forty-eight hours old at the time the warrant was issued) (citing *State v. Lovato*, 1994-NMCA-042, ¶ 10, 118 N.M. 155 (controlled buy 72 hours earlier "fails to support a conclusion that criminal activity at the motel room was of an ongoing, continuous nature").] Indeed, as the brief in chief notes, *Whitley* specifically distinguished the consumable nature of drugs from other contraband, like guns. *Miles* does not aid the State.

As in *Lovato*, the informant tip did not suggests "ongoing, continuous" criminal activity, and the State does not explain why it would.

2. The officers' subjective suspicions were insufficient to satisfy the objective constitutional standard.

The State urges this Court to consider the fact that Mr. Granados was "on [the officers'] radar" to support reasonable suspicion. [**AB 14**] To allow the fact that officers are investigating a person to *itself* be a basis for reasonable suspicion swallows the reasonable suspicion requirement entirely. It would permit officers to assert reasonable suspicion based on the fact that they suspect someone of something, constitutionalizing a fishing expedition. This is the very type of investigatory tactic that search and seizure protections guard against. *See State v. Leyva*, 2011-NMSC-009, ¶ 55, 149 N.M. 435 (reasonable suspicion requirement "ensures that investigating officers do not engage in 'fishing expeditions.'") (citation omitted).

The State continues to misapply this Court's holding in *State v. Martinez*, 2020-NMSC-005, 457 P.3d 254, to argue that Mr. Granados's conversation with his mother at the window provided suspicion of a hand-to-hand transaction. [**AB 14-15**] Mr. Granados relies on his argument in the brief in chief on this point [**BIC 22-24**], but reiterates that the NEU officers did not attest the location was known for drug trafficking, did not witness multiple contacts, and Mr. Granados's mother stood in full view outside his window without a single officer observing an actual exchange. The officers lacked reasonable suspicion and *Martinez* does not advise otherwise.

Taken together, the informant tip and gas station observations do not provide reasonable suspicion. Because the officers lacked reasonable suspicion when they seized Mr. Granados by a show of authority, all evidence, including the fact of his flight and the bag of cocaine thrown from his car during flight, should have been suppressed.

3. The State failed to prove the essential elements of tampering with evidence.

The State emphasizes that Mr. Granados did not "merely throw the bag of cocaine on the floor in plain sight of the agents," but instead threw the bag out a window while continuing to flee. [**AB 20**] The State suggests that his *intent* to steer the officers away from the landing site renders this an "overt act of tampering." [**AB 20-21**] The State simply emphasizes the evidence of Mr. Granados' *intent to tamper* [**AB 21-22**], which is not disputed. As did the Court of Appeals, this analysis conflates the actus reus and mens rea elements of tampering. [***See* BIC 26-27** (arguing that the Court of Appeals' holding that an overt act can be inferred from "[the defendant's] intent to thwart the officer's investigation" "simply double-counts the intent element") (quoting *Granados*, A-1-CA-37417, ¶ 26).]

The State also fails to adequately distinguish *State v. Jackson*, 2021-NMCA-059, 497 P.3d 1208, in which the defendant, in tossing drugs to the other occupant of his car, was most certainly *hoping* the officers would not find it on him. As in

Jackson, despite a defendant's effort to hide drugs from an officer, the attempt to do so failed. Under *Jackson*,

> Defendant's actions plainly occurred in the presence of the police. The officers saw Defendant throw the baggie and were able to immediately recover it. The evidence was never concealed from the officers, and we therefore agree with the parties that Defendant's conviction for tampering with evidence is not supported by sufficient evidence.

Jackson, 2021-NMCA-059, ¶ 8.

The State endeavors to distinguish *Jackson* by arguing that not *all* of the officers pursuing Mr. Granados saw where the baggie landed. [**AB 23**] *Jackson* did not depend upon whether every officer in the vicinity observed the attempt to discard it, but the fact that it "was never concealed." *Id.* The answer brief misstates the situation by arguing that "[a] tampering conviction premised on hiding or placing evidence should not turn on how quick, or if, law enforcement finds the tampered evidence." [**AB 24** (citation omitted)] This case is not about evidence that was *hidden*, then *found* through a diligent search. Agent Huffman saw exactly where the drugs landed and directed Agent LaSalle to their exact location. **[1/20/15, 11:36:45, 11:41:38; 1:53:26]**

When a defendant does not actually interfere with law enforcement recovering the evidence, a conviction for tampering cannot be sustained. As there was no "act of concealment," Mr. Granados did not commit tampering with evidence.

4. Any evidentiary error has the potential to result in plain error, if that error is plain and impacts a defendant's substantial right to a fair trial.

The Court of Appeals assumed that admitting the officers' opinions was error, but held it was not *plain error* based on its own independent determination that the officers were indeed experts. *Granados*, A-1-CA-37417, ¶¶ 17-18.

The State now appears to seek a categorical rule that admitting expert testimony as lay testimony can never be plain error because courts "often struggle to differentiate" the two. [**AB 27-29**] This ignores the fact that New Mexico courts consistently reverse the improper admission of expert testimony as lay testimony in recognition of its impact on jurors. New Mexico law is *abundantly* clear about where the line lies between the two forms of opinion testimony. [***See* BIC 32-39** (collecting cases)]

The State also emphasizes the Court of Appeals' independent conclusion that the officers were sufficiently qualified, rendering their improper expert opinions harmless. [**AB 32-36**] Even if the district court *might have* qualified one or more of the officers as experts, multiple officers gave opinions that the quantity was consistent with trafficking and the brief in chief outlines the dubious foundations for each. [**AB 28-31**]

Mr. Granados' lack of objection merits a plain error standard of review, yet the State seeks also to blame Mr. Granados for the dearth of evidence in the record that the officers were experts. [**AB 36**] However, the State bears the affirmative

burden to qualify its expert witnesses. *See, e.g.*, *State v. Bregar*, 2017-NMCA-028, ¶ 35, 390 P.3d 212 (reviewing the absence of expert qualification for plain error and reviewing the record for evidence of expert qualification). The foundation requirements are not *relaxed* solely because the defendant may share some of the blame, and therefore the absence of qualification can constitute plain error. *Id.* Indeed, despite testimony that the accident reconstructionist police officer in *Bregar* was certified and had reconstructed at least fifty accidents, the Court held that "the State failed to meet its burden as the proponent of this testimony to establish that Deputy Garcia was qualified" to offer expert opinion testimony. *Id.* ¶¶ 35-37.

However, because the improper testimony did not comment on credibility and "was not the sole or primary item of evidence indicating Bregar's guilt," the Court of Appeals did not reverse for plain error in that case. *Id.* ¶ 43. This case is distinguishable, as argued below.

5. The improper expert opinions went to the heart of the defense, related to the only truly disputed fact, in a rare case where *no* circumstantial evidence corroborated the inferences based on quantity alone.

Quantity was the *only evidence* to support the intent to distribute distinguishing first-degree trafficking and fourth-degree possession. The officers did not observe any transactions or attempt a controlled buy. Mr. Granados did not have any cash, scales, or individual baggies. The absence of any direct evidence of

trafficking meant that the officers' opinions were critical to the verdict. *See State v. Becerra*, 1991-NMCA-090, ¶ 22, 112 N.M. 604 (although [i]n some cases, the quantity recovered is sufficient to support an inference of intent to distribute," "in this case, 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 defendant intended to distribute the substance").

"In ascertaining whether a plain error affects substantial rights, the plain error rule is not as strict as the doctrine of fundamental error in its application." *State v. Paiz*, 1999-NMCA-104, ¶ 28, 127 N.M. 776. Plain error does not require a miscarriage of justice, but need only "create[] grave doubts concerning the validity of the verdict." *State v. Barber*, 2004-NMSC-019, ¶ 40, 135 N.M. 621.

For the reasons argued herein and those argued in the brief in chief, the opinion testimony was crucial to the verdict and warrants reversal.

6. While the fact of a prior felony is admissible for impeachment, admitting the details of Mr. Granados's prior convictions requires reversal.

The answer brief only directly addresses the State's admission of the basic circumstances of the prior case to impeach Mr. Granados's claim that he did not know it was police who pursued him. [**AB 37-44**] The State's only response to the

State's additional disclosure to the jury regarding the quantity of drugs possessed on that prior occasion is that Mr. Granados did not request a limiting instruction. [**AB 44-45**]

For the reasons argued in the brief in chief, Mr. Granados maintains that the prosecutor injected facts about the quantity previously possessed specifically to suggest a propensity for trafficking, that a propensity for trafficking was at least implied by the State's closing argument, and that failing to request a curative instruction is not fatal to his claim on appeal. [**BIC 39-45**] The State asserts that a defendant's failure to request a curative instruction requires affirmance, without further analysis. [**AB 44-45**] Mr. Granados asks this Court to hold otherwise.

When defendants object to highly prejudicial, isolated statements, they are placed in an impossible position. New Mexico recognizes two competing effects of curative instructions: First, a curative instruction "posed the risk of emphasizing the matter to the jury." *See State v. Garcia*, 1994-NMCA-147, ¶ 17, 118 N.M. 773. Second, for "inadvertent remarks …, the trial court's offer to give a curative instruction, even if refused by the defendant, is sufficient to cure any prejudicial effect." *State v. Samora*, 2013-NMSC-038, ¶ 22, 307 P.3d 328 (emphasis added) (internal quotation marks and citation omitted).

If applied too broadly, the statement from *Samora* is highly problematic. As applied in this case, if an objection is sustained, a defendant must either (1) accept

a curative instruction that will draw attention to prejudicial testimony, knowing that a curative instruction will legally "cure" any error on appeal while actually increasing prejudice, or (2) decline a curative instruction, knowing that harmlessness will be presumed on appeal, also preventing relief. An error becomes virtually unreviewable if a curative instruction is either given or declined.

Mr. Granados asks this Court to clarify that a defendant need not request a curative instruction to avoid increased prejudice and is still entitled to a case-specific assessment of harmlessness on direct appeal. Unlike the situation described in *Samora*, 2013-NMSC-038, ¶ 22, the district court did not offer a curative instruction that Mr. Granados declined. Rather, the district court sustained the objection, and no further discussion occurred. Appellate courts should not presume harmlessness because a hypothetical curative instruction might have cured the prejudice when even well-intended curative instructions can make matters worse. *E.g.*, *State v. Hernandez*, 2017-NMCA-020, ¶ 25, 388 P.3d 1016 (reversing where flaws in the curative instruction "only reinforce why Defendant's motion for a mistrial should have been granted and could not be cured by the district court's efforts to use a curative instruction.").

Mr. Granados specifically challenged introduction of "the 11-gram quantity for the prior conviction," [**Ct.App.BIC 43-44**] yet the Court of Appeals failed to address this aspect of the claim. During closing argument, the prosecutor

emphasized Mr. Granados's prior convictions, specifically suggesting a propensity for *trafficking*, and *not* to rebut a mistake about the officers' identities. Reversal is appropriate.

CONCLUSION

For the foregoing reasons, Francisco Granados respectfully asks that this Court reverse his convictions.

Respectfully submitted,

Bennett J. Baur
Chief Public Defender

//S// *Kimberly Chavez Cook*
Kimberly Chavez Cook
Appellate Defender
1422 Paseo de Peralta, Bldg. 1
Santa Fe, New Mexico 87501
(505) 395-2890

CERTIFICATE OF DELIVERY

I hereby certify that a copy of this pleading was served electronically to Charles Gutierrez at the Attorney General's Criminal Appeals Division, this **21st** day of February, 2022.

//S// *Kimberly Chavez Cook*
Law Offices of the Public Defender