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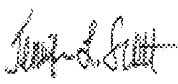

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-39004

STATE OF NEW MEXICO,

Plaintiff-Respondent,

vs.

FRANCISCO JAVIER GRANADOS,

Defendant-Petitioner.

ON CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

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

STATE OF NEW MEXICO'S ANSWER BRIEF

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CITATIONS TO THE RECORD

The record in this case consists of the record proper, an envelope containing the exhibits from Defendant's trial, and a compact disk containing an audio transcript of proceeds. When citing these sources, this brief follows the conventions of Rule 23-112 NMRA and its appendix.

The stenographic transcripts are cited in the format **[CD __/__/__, __:__:__-__:__:__]**

The record proper is cited by the abbreviation **RP** followed by the page number.

STATEMENT OF COMPLIANCE

In accordance with Rule 12-318(F)(3) NMRA, this brief contains 10176 words. This brief was prepared using Microsoft Word 2016.

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NATURE OF THE CASE

Defendant appealed from a judgment and sentence entered following jury convictions for trafficking cocaine (possession with intent to distribute) and tampering with evidence. **[RP 315]** The Court of Appeals affirmed his convictions in an unpublished memorandum opinion. In this certiorari proceeding, Defendant challenges the district court's denial of his motion to suppress, arguing that he was seized by officers without reasonable suspicion. However, this Court should reject Defendant's argument because the officers had reasonable suspicion before any seizure of Defendant occurred. Accordingly, the district court properly denied Defendant's motion.

Defendant also raises various trial issues. Because (1) sufficient evidence supports Defendant's conviction for tampering with evidence, (2) the district court did not commit plain error in admitting opinion testimony from officers that Defendant possessed an amount of cocaine consistent with trafficking without designating the officers as experts, (3) the district court did not err in admitting evidence of a prior bad act by Defendant under Rule 11-404(B) NMRA, this Court should affirm in full.

SUMMARY OF PROCEEDINGS – MOTION TO SUPPRESS

The State charged Defendant with trafficking cocaine (possession with intent

to distribute) and tampering with evidence. **[RP 1]** Before trial, Defendant filed a motion to suppress. **[RP 44]** At the motion hearing, the State presented testimony from three agents from the Otero County Narcotics Enforcement Unit ("NEU") – Rodney Scharmack, Timothy Huffman, and Obed Marte.

Agent Scharmack testified that he received a tip on April 29, 2013 from a "documented, reliable informant" stating that Defendant possessed a large amount of cocaine that he was distributing. **[CD 6/27/14, 2:34:44; 2:36:18; 2:39:40]** The informant provided particular personal information about Defendant, specifically describing two vehicles that Defendant was known to travel in – a black pick-up truck and a black Chrysler sedan. **[Id., 2:39:38]** Agent Scharmack explained that a documented informant is one that provides his or her personal information. **[Id., 2:36:38]** Further, an informant becomes reliable when the individual provides assistance with "buys" and warrants. **[Id. 2:36:58]** The particular informant in this case had provided information in the past that led to successful search warrants, arrests, and had also assisted in controlled buys. **[Id. 2:37:30, 2:37:35, 2:37:45]**

On May 2, 2013, four undercover NEU agents including Agent Scharmack observed Defendant in a Lowe's parking lot in a black pick-up truck. **[Id.. 2:42:20]** Agent Scharmack notified Defendant's probation officer that he saw Defendant. **[Id., 2:42:50]** The NEU agents were in an unmarked car, so they requested dispatch

send a marked patrol unit to conduct a traffic stop. **[Id., 2:43:20]** Defendant left the parking lot, and the agents followed until Defendant pulled into a Giant gas station. **[Id., 2:34:48]** Defendant backed into the parking lot with the front of his truck facing out towards the street but did not formally park in a marked parking spot. **[Id., 2:44:49; 2:45:36]** The agents then observed a white pick-up truck pull in and park right next to Defendant's truck. **[Id., 2:44:33]** The agents saw the driver of the white pick-up truck get out of the vehicle, walk over to the driver side window of Defendant's truck, and engage in conversation with Defendant while he stayed in his truck. **[Id., 2:46:23]** Based on experience and training, Agent Scharmack believed Defendant and the driver of the white pick-up truck to be engaged in a potential narcotics transaction. **[Id., 2:46:22]** The agents decided to make contact with Defendant to investigate, not arrest, Defendant. **[Id., 2:46:35; 3:10:47]** The agents parked the undercover vehicle and approached Defendant while displaying their badges and saying, "sheriff's office." **[Id., 2:47:41]** Agent Scharmack observed that when Defendant saw one of the agents, Commander LaSalle, he looked surprised and sped off in his truck**. [Id., 2:47:55]** One agent stayed at the Giant gas station to speak to the driver of the white pick-up truck, while the others got back in the undercover vehicle to follow Defendant. **[Id., 2:48:19]** Agent Scharmack contacted the marked unit to inform the officer that they were following

Defendant. **[Id., 2:50:30]**

While following Defendant, another agent in the vehicle, Agent Huffman, notified the others that he saw Defendant throw a white object out of his truck. **[Id., 2:51:02]** Shortly after, Defendant stopped his truck, got out with his hands in the air, and claimed that he did not do anything. **[Id., 2:51:38]** Defendant was then detained by the agents. **[Id., 2:52:07]** Commander LaSalle walked back to the location where Agent Huffman observed Defendant throw the object out of his truck and recovered "about a softball sized amount" of what appeared to be cocaine. **[Id., 2:52:10; 2:52:25]**

Next, Agent Huffman testified that when he observed Defendant and the driver of the white pick-up truck at the gas station, he believed it to be "a narcotics transaction." **[Id., 6/27/14 3:15:22, 3:17:35]** Agent Huffman testified that he saw an "almost like exchange" between Defendant and the other driver when asked what he specifically observed. **[Id., 3:17:38]** When the agents got out of their vehicle to make contact with Defendant at the gas station, he pointed at them and drove away. **[Id., 3:16:13]**

Finally, Agent Marte testified that Defendant backed into the east parking area of the gas station but without actually backing into a parking spot. He observed the white pick-up truck that pulled up next to Defendant, which officers knew

belonged to a previous narcotic target. **[Id., 3:27:35]** Agent Marte believed a narcotics exchange was “about to” occur between Defendant and the driver of the white pick-up truck based on the information the agents knew about Defendant, the known owner of the white pick-up truck, and observing the manner in which the female driver approached Defendant on the driver side of his truck. **[Id., 3:28:39]** When the agents got out of their vehicle, Defendant sped away. **[Id., 3:30:00]** Agent Marte stayed behind with the driver of the white pick-up truck, who was later identified as Defendant’s mother. **[Id., 2:53:48; 3:30:30]** He did not search the driver or the truck. **[Id., 3:30:55; 3:31:06]** Soon thereafter, a marked police unit arrived on the scene. **[Id., 3:30:40]** Agent Marte then released the driver of the white pick-up truck. **[Id., 3:30:42]**

Relevant to this appeal, the State argued that this case was “a reasonable suspicion issue” and that there was reasonable suspicion at every point in the encounter. **[Id., 3:35:04; 3:36:07]** The State asserted that the agents had reasonable suspicion to approach Defendant at the gas station based on the specific tip about Defendant from a reliable informant, the agents’ observation of Defendant in a truck that the informant described, and the agent’ observation of Defendant and the other driver engaging in a potential narcotics transaction. **[Id., 2:34:44; 2:36:18; 2:39:38; 2:44:26; 2:45:36; 2:45:40; 2:46:23; 3:28:35]**

Alternatively, the State argued that Defendant was not seized at the gas station because he did not submit to the agents' show of authority. **[Id., 3:37:50; 3:43:35]**

Defendant argued he was unlawfully seized at the gas station because agents did not have reasonable suspicion. **[Id., 3:41:38; 3:42:19; 3:42:45]**

The district court denied Defendant's motion to suppress. **[Id., 3:44:46]** Relevant to this certiorari proceeding, the district court determined that the agents had reasonable suspicion at the inception of the interaction at the gas station "based on the confidential informant's information and the sighting of defendant in one of the vehicles described," in combination with the agents' observation of the potential narcotics transaction. **[Id., 3:45:07; 3:45:40]**

At the directed verdict stage, Defendant renewed his motion to suppress the evidence. **[Id., 2:50:25]** The court ruled that there was nothing presented at trial that would warrant a change in its prior decision. **[Id., 2:55:56; 2:56:43]**

The Court of Appeals, in a 2-1 unpublished opinion, affirmed the district court's denial of Defendant's motion to suppress, determining that the NEU agents had reasonable suspicion to detain Defendant when they approached his truck at the gas station. **[Op. ¶¶ 6-14]** Judge Attrep dissented. **[Op. ¶¶ 30-39]**

ARGUMENT – MOTION TO SUPPRESS

This Court should reject Defendant's contention that the district court erred by denying his motion to suppress. **[BIC 13-25]** This Court should affirm the Court of Appeals' determination that the district court correctly decided that the NEU agents had reasonable suspicion to detain Defendant when they attempted to make contact at the gas station. **[Op. ¶¶ 6-14]**

I. The district court properly denied Defendant's motion to suppress

A. Standard of review

A district court's ruling on a motion to suppress involves mixed questions of law and fact. *State v. Urioste*, 2002-NMSC-023, ¶ 6, 132 N.M. 592. This Court reviews the facts in the light most favorable to the prevailing party and defers to the district court's findings of fact if there is substantial evidence to support such findings. *Id.* This Court reviews the district court's ruling regarding reasonable suspicion de novo. *State v. Harbison*, 2007-NMSC-016, ¶ 8, 141 N.M. 392. This Court is not confined to examining the facts elicited at the hearing on the motion to suppress but can consider the entire record on appeal. *State v. Martinez*, 1980-NMSC-066, ¶ 16, 94 N.M. 436.

B. This Court should assume that Defendant was seized when the NEU agents approached him at the gas station

This Court should assume that Defendant was seized for purposes of this

certiorari proceeding and need not address the merits of whether Defendant was seized. **[BIC 15-17]** The Court of Appeals did not determine if Defendant was seized because it affirmed the district court on the basis that reasonable suspicion supported any seizure at inception. **[Op. n.2]** This Court only issued a writ of certiorari on whether the Court of Appeals erred in its reasonable suspicion analysis. **[Petition for writ of certiorari to the New Mexico Court of Appeals, Pg. 2, filed herein]** If this Court were to conclude that the officers lacked reasonable suspicion, it should remand for the Court of Appeals to consider whether Defendant was constitutionally seized in the first instance. That issue will turn on whether Defendant preserved his argument that he was seized under Article II, Section of the New Mexico Constitution, or whether the issue is controlled by the federal standard. **[COA AB 18-20]**

C. The NEU agents had reasonable suspicion to approach Defendant at the gas station

Law enforcement is permitted to detain an individual to investigate when there is reasonable suspicion at the point of detention. *See State v. Jason L.*, 2000-NMSC-018, ¶ 20, 129 N.M. 119. "The term reasonable suspicion does not lend itself to a neat set of legal rules." *State v. Funderburg*, 2008-NMSC-026, ¶ 15, 144 N.M. 37. "[R]easonable suspicion is a commonsense, nontechnical conception[ ], which

requires that officers articulate a reason, beyond a mere hunch, for their belief that an individual has committed a criminal act." *Id.* (alteration in original) (internal quotation marks and citation omitted). "Officers are not required to rule out all possibility of innocent behavior before initiating a brief stop and request for identification." *State v. Martinez*, 2020-NMSC-005, ¶ 30, 457 P.3d 254 (internal quotation marks and citation omitted). Officers can rely on their experiences and their training to make inferences from the facts and information available to them. *State v. Neal*, 2007-NMSC-043, ¶ 21, 142 N.M. 176. Reasonable suspicion is not an onerous standard: "The level of suspicion required for an investigatory stop is considerably less than proof of wrongdoing by a preponderance of the evidence." *Martinez*, 2020-NMSC-005, ¶ 30 (internal quotation marks and citation omitted).

Based on the totality of the circumstances, the NEU agents had reasonable suspicion to detain Defendant following their observations at the gas station. *See State v. Leyva*, 2011-NMSC-009, ¶ 30, 149 N.M. 435 (stating that reasonable suspicion is determined by considering the totality of the circumstances). The seizure was supported by a reliable tip from a documented informant that Defendant was trafficking a large quantity of cocaine. The NEU officers then corroborated that tip less than 72 hours later by observing what they reasonably believed to be Defendant engaged in a narcotic transaction at the gas station.

The first component supporting reasonable suspicion was that the NEU agents received a tip that Defendant was trafficking a large amount of cocaine from a confidential informant. That tip was reliable. **[See Op. ¶ 8]** The confidential informant was documented and provided personal information. *See State v. Robbs*, 2006-NMCA-061, ¶ 13, 139 N.M. 569 (determining that the reliability of a confidential informant who provides personal information is more reliable than an anonymous tip). Additionally, the confidential informant had a history of providing credible information to law enforcement that led to numerous arrest warrants and search warrants, and has assisted law enforcement with controlled buys. *See State v. Vest*, 2011-NMCA-037, ¶ 16, 149 N.M. 148 ("The mere fact that a confidential informant has provided reliable information in the past does not necessarily mean that the informant will do so again[but w]e accept past performance as indicia of veracity because of the probability that the uncertain present result will be the same as in the past." (internal quotation marks and citation omitted)); s*ee also State v. Hernandez*, 2016-NMCA-008, ¶ 28, 364 P.3d 313 (Kennedy J. specially concurring) ("A confidential informant is someone who is known to the police, has assisted them with investigations, and whose information led to the seizure of controlled substances and many controlled substances related arrests."). Further, the confidential informant provided the NEU agents with specific personal

information about Defendant, a description of two vehicles that Defendant was known to drive. The agents verified that information by observing Defendant in one of those two vehicles. *See Robbs*, 2006-NMCA-061, ¶ 19 (holding that tip was reliable where the officers verified significant aspects of the tip).

The second component supporting reasonable suspicion was that the agents, reasonably even is mistakenly, corroborated the information provided by the confidential informant less than 72 hours later at the gas station by observing a potential narcotic transaction. The NEU agents saw Defendant driving the black pick-up truck that the informant described. The NEU agents followed Defendant until he stopped at a gas station. Defendant backed up into the parking lot and faced the street and did not back into an actual parking spot, situating himself to leave the parking lot quickly and easily. The NEU agents then immediately observed a white pick-up truck pull in and park right next to Defendant. The driver got out of the white pick-up truck and walked over to the driver's side of Defendant's truck while Defendant remained inside, and the two conversed and made a movement that was "almost like an exchange." **[Op. ¶ 3]** Based on these observations, in light of their training the experience, all three of the NEU agents believed that Defendant was engaging in a narcotics transaction. *See State v. Olson*, 2012-NMSC-035, ¶ 13, 285 P.3d 1066 (stating that this Court defers to "the training and

experience of the officer when determining whether particularized and objective indicia of criminal activity existed") At that point, in looking at the totality of the circumstances, the agents had reasonable suspicion to further investigate.

In line with the dissent, Defendant submits various arguments to defeat reasonable suspicion. Defendant argues that the CI tip was unreliable on the basis that it was stale. **[BIC 18-21]** Defendant claims that the passage of 72 hours and the consumable nature of drugs resulted in the CI tip being stale, relying on *State v. Whitley*, 1999-NMCA-155, 128 N.M. 403, and *State v. Lovato*, 1994-NMCA-042, 118 N.M. 155. **[BIC 18-19]** Defendant also claims that the majority "declined to consider [his] staleness arguments because the cited cases [*Whitley* and *Lovato*] involve probable cause determinations," not reasonable suspicion. **[BIC 20]** But the majority did not "decline" to consider his argument. It pointed out the analytical distinction between the standards - that probable cause is a more demanding standard than reasonable suspicion - and determined that the probable cause case law cited by Defendant does not "control" its analysis. **[Op. ¶ 9]**

Moreover, Defendant's argument that the 72-hour passage of time between the tip and the seizure is largely a red herring. The tip here was of ongoing trafficking activity of a "large" amount of cocaine. *See, e.g., U.S. v. Miles*, 772 F.2d 613, 616 (10th Cir. 1985) ("But the passage of time becomes less significant when

the criminal offense is continuous.”); *id.* (“We have made clear that staleness questions are not to be resolved by the mere counting of days between an event and the subsequent issuance of a warrant.”). A tip of that nature, under a reasonable suspicion standard, cannot be said to be stale where it was reasonably, even if mistakenly, corroborated within 72 hours. *See, e.g., United States v. Whiddon*, 146 Fed.Appx. 352, 355 (11th Cir. 2005) (non-precedential) (reasoning that probable cause existed where crime stoppers tips were “corroborated” by “CI's observations [that] were made within the 72 hours prior to the filing of the affidavit” and that the CI’s observations were “not stale”). The agents did not seize Defendant on the basis of a 72-hour-old tip alone.

Defendant, further addressing the reliability of the confidential informant tip, contends that “[m]ost critically the fact that officers corroborated the description of [his truck] did not corroborate the report of criminal activity.” **[BIC 20]** But the majority did not conclude that corroboration of the truck corroborated Defendant’s criminal activity. **[Op. ¶ 8]** Nor did the agents. If that was the case, the agents would have stopped Defendant as soon as they saw him driving that truck. However, as the majority properly reasoned, **[Op. ¶ 8]** corroboration of the truck was not insignificant to a reasonable suspicion analysis when considered in totality with the remaining circumstances. The corroboration of observing Defendant

driving the truck, as discussed, was relevant to the reliability of the confidential informant's tip. *See Robbs*, 2006-NMCA-061, ¶ 19.

Defendant also contends that his interaction at the gas station did not provide reasonable suspicion of a drug transaction. **[BIC 21]** Defendant first asserts that information that the agents knew about him from past investigations was insufficient to provide present reasonable suspicion. **[BIC 22]** The State takes no issue that the agents' testimony that Defendant had been the subject of previous investigations and surveillance and was on their radar for drug trafficking is alone insufficient, but Defendant presents no authority that a subject's history cannot properly be considered as a component of a reasonable suspicion analysis. *See State v. Vigil-Giron*, 2014-NMCA-069, ¶ 60, 327 P.3d 1129 ("[A]ppellate courts will not consider an issue if no authority is cited in support of the issue and that, given no cited authority, we assume no such authority exists."). Further, it appears that such generalized information can be included as a partial component of a reasonable suspicion analysis. *See, e.g., Martinez*, 2020-NMSC-005, ¶ 20 (relying partially on the officer's knowledge that drug transactions frequently occurred at gas station where a seizure occurred also supported reasonable suspicion).

Defendant contends that no weight should be afforded to the interaction because "no exchange occurred." **[BIC 22]** This Court's opinion in *Martinez* is

instructive. In *Martinez*, the officer was surveilling a gas station that he knew from his experience was often used for drug transactions. *Martinez*, 2020-NMSC-005, ¶ 3. While surveilling the gas station, the officer saw two men drive up, one being the defendant. *Id.* ¶ 4. The defendant got out and walked to the store entrance, passing an individual. *Id.* That same individual walked over, got into the back seat of the vehicle, and engaged with the man defendant arrived with. *Id.* After a few minutes, that individual left the vehicle. *Id.* The officer believed that the interaction was a "possible narcotics transaction." *Id.* The two men drove their car to another location in the parking lot, where another individual approached, got into the back seat, and left within a few minutes. *Id.* ¶ 5. The officer believed this was another narcotics transaction. *Id.* The officer approached to investigate. *Id.* ¶ 6. This Court held that the officer had reasonable suspicion to approach based on three components: The officer had training and experience with drug investigations, the defendant's conduct caused the officer to infer that he was engaged in a drug transaction, and the officer knew that frequent drug transactions occur at the gas station where the officer seized defendant. *Id.* ¶ 20.

Similar components for reasonable suspicion exist in this case as in *Martinez*, and this case is governed by *Martinez*. First, in this case, as in *Martinez*, the agents had extensive experience and training in drug transactions as undercover agents

assigned to the NEU. **[Op. ¶ 13]** The agents believed, based on that training and experience, that Defendant's behavior was consistent with a drug transaction. Second, as in *Martinez*, the agents described specifically why Defendant's behavior caused them to infer that Defendant was engaged in a narcotic transaction. Defendant backed his truck into the parking area facing the street but did not park in a marked space, which facilitated a quick exit. The white truck immediately pulled into the gas station and pulled up next to his truck, and the driver engaged in a conversation with Defendant at the driver's side window, who did not exit his truck. Third, as in *Martinez*, the officers had additional information supporting reasonable suspicion. In that case, drug transactions frequently occurred at the specific gas station where the officer detained the defendant. *Id.* ¶ 20. In this case, the additional information was more specific to Defendant: The NEU agents received a reliable tip from a confidential informant specifically that Defendant was trafficking a large amount of cocaine less than 72 hours later. This case is conceptually similar to *Martinez*.

The NEU agents had reasonable suspicion when they approached Defendant at the gas station. This Court should affirm the district court's denial of Defendant's motion to suppress.

SUMMARY OF PROCEEDINGS – TRIAL

The State presented the following evidence at trial:

Four undercover NEU agents (Officer Scharmack, Commander LaSalle, Agent Marte, and Agent Huffman) observed Defendant's vehicle at a Lowe's parking lot, and NEU began surveilling Defendant after Defendant left the parking lot. **[CD 1/20/15, 11:20:50-45]** The NEU agents were in a 1980s model tan Buick with no police lights or markings and in plain civilian clothes. **[Id., 11:22:45-23:30; 1:41:00-55]** From Lowes, Defendant drove to a gas station on Walker Rd. and Highway 70 and pulled into the east side of the store, situating his vehicle to face the street. **[Id., 11:23:30-25:25]** The NEU agents surveilled Defendant from a nearby location and observed a white S10 pickup truck pull into the lot immediately after Defendant and park on the right side of the entrance from Walker Rd. **[Id., 11:25:25-26:55]** A female subject exited the white truck and walked to Defendant's window, and the two conversed in a manner that raised concerns. **[Id., 11:25:25-26:55; 2:28:50-29:30]**

The NEU agents had a marked patrol unit en route but upon the suspicious observation decided to make contact with Defendant. **[Id., 11:28:30-55]** Agent Huffman drove into the parking lot and past Defendant's vehicle. All four officers exited the vehicle with their badges displayed. **[Id., 11:28:55-30:30]**

Defendant pointed at Commander LaSalle. **[Id., 11:30:30-50]** The officers loudly identified themselves and directed Defendant to exit his vehicle. **[Id., 11:30:30-31:25; 1:46:33-49:20; 2:09:05-10:45]** Defendant instead fled the parking lot at a high rate of speed, accelerating so abruptly his tires lost traction. Three of the NEU agents got back into their vehicle and followed Defendant, not intending to make a stop until a marked patrol unit arrived. **[Id., 11:31:55-32:20; 2:31:40-32:40]** Defendant traveled faster than the speed limit in a residential neighborhood. **[Id., 11:32:20-33:25]** Defendant turned right on James St. and sped up once he negotiated the turn. **[Id., 11:33:25-35:05; 1:48:10]** Defendant then made a left turn at Charles St. before stopping in the middle of the road at Dora St. **[Id., 11:35:05-40]** Defendant exited the vehicle, put his hands up, and began asking Commander LaSalle, "what's going on?" and "What did I do?" [**Id., 11:35:40-36:15; 2:33:15-45]**

During the pursuit, after Defendant executed the turn onto James St. and after Defendant passed 1-2 houses, Agent Huffman, immediately after he executed the same turn, observed Defendant throw a white object from his vehicle "toward the side of the road" [**Id., 11:36:15-37:05; 1:48:10-50:50; 2:33:45-34:50]** Commander La Salle later walked the route of travel and found a large baggie with 49.97 grams of cocaine. [**Id., 11:37:05-35; 41:35-55; 1:18:30-20:10; 1:53:20-54:30;**

2:34:50-35:40; State's Ex. # 4] Agent Scharmack photographed and seized the evidence. [**CD 1/20/15, 11:41:35-42:50; 1:14:35-17:15; State's Ex. # 4]** Defendant began to cry and panic when advised what the officers found. [**CD 1/20/15, 11:42:50-43:10]** Agent Scharmack and Agent Huffman both observed a white powdery substance in Defendant's truck on the door-frame arm rest and door control panel. [**Id., 11:43:10-44:30; 1:55:20-55:55; State's Ex. #s 7-8]**

Agent Scharmack, Agent Marte, and Commander LaSalle opined that cocaine is most commonly sold point-for-point with one gram costing $100; and that users typically purchased one gram or fractions of a gram at a time.**[CD 1/20/15, 11:16:15-35; 11:17:10-18:05; 2:05:05-06:50; 2:22:55-23:25; 2:25:05-27:15]** The three agents opined that the near 50 grams possessed by Defendant is consistent with trafficking as opposed to personal use. **[Id., 2:37:10-38:55; 2:11:50-15:05; 1:20:30-21:10]** Agent Scharmack explained that the amount of cocaine that Defendant possessed had a street value of $5000 in Alamogordo. **[Id., 1:21:20-23:15]**

ARGUMENT – TRIAL ISSUES

I. Defendant's tampering with evidence conviction was supported by sufficient evidence

A. Standard of review

When reviewing a sufficiency of the evidence claim, this Court conducts a two-part test. First, this Court "must view the evidence in the light most favorable to the [S]tate, resolving all conflicts therein and indulging all permissible inferences therefrom in favor of the verdict." *State v. Storey*, 2018-NMCA-009, ¶ 45, 410 P.3d 256. Second, this Court "determines whether the evidence, viewed in this manner, could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt." *Id.* "Jury instructions become the law of the case against which the sufficiency of the evidence is to be measured." *State v. Garcia*, 2016-NMSC-034, ¶ 17, 384 P.3d 1076.

B. The State presented substantial evidence that Defendant "hid" or "placed" cocaine

This Court should reject Defendant's argument that the State presented insufficient evidence to support his conviction for tampering with evidence. **[BIC 25-38]** Defendant contends "[w]hile tossing drugs in full view of police may constitute *attempted* tampering with evidence, it is not an overt act of tampering." **[BIC 25]** However, the Court of Appeals correctly determined that Defendant did not merely throw the bag of cocaine on the floor in plain sight of the agents, he hid or placed the cocaine by throwing it while negotiating a turn and then taking further evasive action in a residential area to misdirect the agents in pursuit and

lead them away from the location of the cocaine.

The district court instructed the jury using the “hiding” or “placing” statutory alternatives for tampering - that to find Defendant of tampering with evidence, the State had to prove that

1. [D]efendant destroyed, hid, and/or placed cocaine;
2. By doing so, [D]efendant intended to prevent the apprehension, prosecution, or conviction of himself[.]

[RP 206] *See* UJI 14-2241 NMRA; NMSA 1978, § 30-22-5(A) (2003) (“Tampering with evidence consists of destroying, changing, hiding, placing or fabricating any physical evidence with intent to prevent the apprehension, prosecution or conviction of any person[.]”). “Place” means “to put in or as if in a particular place or position”. *See* “Place” *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/place. “Hide,” when used as it was in this instruction, means “to put out of sight.’” *State v. Rodriguez*, Memo. Op. No. A-1-CA-35934, ¶ 18 (N.M. Ct. App., Dec. 23, 2019) (non-precedential) (citing “Hide,” *Merriam-Webster.com Dictionary*, Merriam-Webster, https://www.merriam-webster.com.dictionary/hide#synonym-discussion), *rev’d on other ground by* No. S-1-SC-38080 (dispositional order).

The Court of Appeals correctly determined that the evidence, particularly

when viewed in the light most favorable to the verdict, supported a finding that Defendant "placed" the cocaine and did more than "throw the bag of cocaine . . . in plain sight of the agents." **[Op. ¶ 27 (alteration omitted)]** Knowing he possessed cocaine, Defendant fled the gas station at a high rate of speed. He abruptly turned right onto James Street. As he sped up immediately following the execution of the turn, Defendant chose that precise moment to throw cocaine out the window knowing the pursuing officers would either be executing the same right turn at that moment or accelerating to catch up after executing that turn in pursuit. Defendant then further led the agents away from the cocaine by continuing to flee at a high rate of speed and then making another right turn in the residential area. Defendant then voluntarily pulled over without the cocaine. Defendant fled and eluded agents in order to get out of their direct line of sight, threw his cocaine out the window at a precise moment when pursuing agents would be the least likely to notice, and then evaded the agents to further lead them from the location of the cocaine. He placed the cocaine or hid cocaine.

Defendant asks this Court to "appl[y]" our Court of Appeals' opinion in *State v. Jackson*, 2021-NMCA-059, 497 P.3d 1208, "to the facts of this case." **[BIC 26-27]** In *Jackson*, officers conducted a traffic stop and the defendant got out of his car. *Id.* ¶ 4. The officer noticed a large baggie in the defendant's pocket. *Id.* The officer

attempted to restrain the defendant after defendant exited the car, and the defendant resisted, necessitating a struggle. *Id.* The defendant, at this point, pulled the baggie out of his pocket and threw it to a passenger. *Id.* The district court instructed the jury that it only had to find that the defendant "threw baggies of crack[]cocaine into a vehicle," not that he "hid" or placed" or committed any other statutory alternative from the tampering statute on the cocaine. *Id.* ¶ 6.

Our Court of Appeals reversed the defendant's tampering conviction on sufficiency grounds. *Id.* ¶¶ 8-9. It first noted that New Mexico cases "have drawn a distinction between acts occurring in the presence of an officer and those that attempted to conceal evidence outside the view of an officer." *Id.* ¶ 8. It determined that the "[d]efendant's actions plainly occurred in the presence of the police" and therefore "[t]he evidence was never concealed." *Id.* ¶ 9.

Jackson is distinguishable. Accepting that Agent Huffman observed Defendant throw the then unidentified object from his truck and noted the general vicinity where it landed, Defendant's actions still did not occur in the plain view of the two other agents in pursuit, who did not see Defendant throw the cocaine. Moreover, Defendant further concealed the cocaine from all of the agents by continuing to lead the pursuing agents through the residential area, including making at least one more turn, before voluntarily surrendering without possession

the cocaine and feigning "what's going on?" and "what did I do?" Although Agent LaSalle recovered the cocaine after Defendant's arrest, the cocaine was plainly out of the agents' sight as a result of Defendant's conduct and it was "concealed" from view for a period of time. A tampering conviction premised on hiding or placing evidence should not turn on how quick, or if, law enforcement finds the tampered evidence. *See, e.g., Garcia*, 2011-NMSC-003, ¶ 13 ("[W]hen a tampering conviction is based on concealing evidence, conviction is not predicated on actual recovery of the evidence.").

The out-of-jurisdiction case law Defendant relies upon is inapposite, legally and factually. **[BIC 27]** None of the cases relied upon by Defendant addressed statutory language of "hiding" or "placing" - the salient language in New Mexico's tampering with evidence statute and the alternatives that the district court instructed the jury upon in this case. *Compare* Section 30-22-5(A) (tampering can consist of hiding or placing evidence with requisite intent), *with¸ Anderson v. Alaska*, 123 P.3d 1110, 1117 (Ct. App. 2005); *Pennsylvania v. Delgado*, 679 A.2d 223, 224 (1996); *Louisiana v. Jones*, 983 So.2d 95, 98 (2008); *New Jersey v. Mendez*, 814 A.2d 1043 (2002); *New York v. Parker¸*148 A.D.3d 1583, 1584-5 (Sup. Ct., App. Div.2017); *A.F. v. Florida¸*850 So.2d 667, 668 (Dist. Ct. App. 2003).

Moreover, each of these cases involve inapposite facts. Most of the cases

involve defendants who merely "tossed" evidence while aware they were in plain sight of the officers. *See Anderson*, 123 P.3d at 1118 (holding that tossing away contraband in plain sight when approached by officers is insufficient as removal or concealment); *Delagado*, 679 A.2d at 225 (holding that throwing away object "aware" that officer was behind him in "plain view" was insufficient to sustain tampering conviction). *Parker*, 148 A.D.3d at 1585 (holding insufficient evidence supported tampering conviction "inasmuch as he dropped the items onto the floor in plain sight of the officers"). In the other case, the defendant did not complete the tampering act charged. *See A.F.*¸ 850 So.2d at 668 (child did not complete the act of swallowing marijuana because she was unsuccessful and spit it out).

This Court should affirm Defendant's tampering with evidence conviction.

II. The district court did not commit plain error by admitting opinion testimony from the NEU agents that the quantity of cocaine possessed by Defendant is consistent with trafficking without *sua sponte* qualifying the agents as experts

This Court should reject Defendant's argument that the district court erred in admitting "lay" opinion testimony from the three NEU agents that possession of fifty grams of cocaine is consistent with trafficking. **[BIC 28-39]**

A. Standard of review

Defendant concedes that this issue is not preserved and subject only to plain error review. This Court reviews unpreserved evidentiary errors under the plain

error doctrine. *See State v. Meira*, 2018-NMCA-020, ¶ 13, 413 P.3d 491. In order to establish plain error, Defendant has the burden to show that (1) there was error, (2) the error was plain or clear, and (3) the error affected his substantial rights. *State v. Gwynne*, 2018-NMCA-033, ¶ 27, 417 P.3d 1157. Importantly, this Court does "not use the plain error rule to review the validity of the admission of erroneously admitted testimony." *Id.* ¶ 27 (alteration, internal quotation marks, and citation omitted). Instead, this Court "must be convinced that admission of the testimony constituted an injustice that created grave doubts concerning the validity of the verdict." *Id.* (internal quotation marks and citation omitted).

As our Court of Appeals has recently observed: "The threshold finding for plain error is higher than that for harmless error: the doctrine applies only where the substantial rights of the accused are affected and the claimed error creates grave doubts concerning the validity of the verdict." *State v. Pritchett*, Memo. Op. No. A-1-CA-38206, ¶ 17 (N.M. Ct. App. Aug. 19, 2021) (non-precedential) (alteration, internal quotation marks, and citation omitted). "Further, in determining whether there has been plain error, [this Court] must examine the alleged errors in the context of the testimony as a whole." *State v. Montoya*¸2015-NMSC-010, ¶ 7, 345 P.3d 1056. The burden is on Defendant to establish prejudice for purposes of plain error. *State v. Dominque Muller*, Slip. Op. No. A-1-CA-36501,

¶ 43 (N.M. Ct. App. Feb. 9, 2022).

B. It is not “plain” or “clear” error when a district court does not correctly differentiate between a lay opinion and expert opinion during the testimony of an investigating officer

Defendant repeatedly objected to the NEU agents’ opinion testimony that the quantity of cocaine possessed was consistent with trafficking on the basis that it was not relevant and/or violated his confrontation rights. **[BIC 28-31]** The district court overruled the relevance objection and, in doing so, indirectly referred to or designated the opinions as “lay” opinions. **[BIC 29]** This Court should reject Defendant’s argument that the district court committed plain error by designating these opinions “lay” opinions. It is not “plain” or “clear” error for a district court to fail to *sua sponte* differentiate between an expert opinion and a lay opinion during an investigating officer’s testimony in the context of overruling an unrelated relevance objection. *See Gwynne*¸ 2018-NMCA-033, ¶¶ 27, 38 (holding that plain error requires that the error be “plain”); *id.* (determining that the “error could be deemed plain as evidenced by the district court’s immediate reaction to the testimony”); *see also U.S. v. Olano*, 507 U.S. 725, 734 (1993) (“‘Plain’ is synonymous with ‘clear’ or, equivalently, ‘obvious.’”).

Court often struggle to differentiate between lay opinion testimony and expert testimony in the context of testimony from investigating law enforcement

officers. Investigating officers often offer both lay opinions perceived from their investigation and expert opinions derived from their specialized training and experience. The distinction between expert opinions and lay opinions is often difficult to discern. As commentators and courts have both observed, "[c]ourts have often struggled to draw definitive lines between lay and expert police opinion testimony. In part, this is because, perhaps more than any other single witness, individual police officers often provide both lay and opinion testimony." Stoughton, Seth, *Evidentiary Rulings as Police Reform*, 69 Miami L. Rev. 429, 447 (2015); *see U.S. v. Cristerna-Gonzalez*, 962 F.3d 1253, 1259 (10th Cir. 2020) ("Although a law enforcement officer's testimony based on knowledge derived from the investigation of the case at hand is typically regarded as lay testimony, opinion testimony premised on the officer's professional experience as a whole is expert testimony."). Our Court of Appeals has similarly observed that "[t]he testimony of law enforcement officers presents a particular challenge to courts given that an officer's personal perception of events is often informed by technical or other specialized knowledge obtained through the officer's professional experience." *State v. Vargas*, 2016-NMCA-038, ¶ 16, 389 P.3d 1080.

This Court should not reverse a criminal defendant's conviction on the basis that an expert opinion offered was improperly referenced as a lay opinion during

an investigating officer's testimony where no objection was made and in a plain error review. This Court should hold that the district court's designation of the NEU agents' opinions on the quantity of cocaine possessed by Defendant as "lay" opinion testimony without an objection was not plain, or clear or obvious, error. *See U.S. v. Freeman*, 498 F.3d 893, 904 (9th Cir. 2007) (holding that because "the distinction between lay and expert testimony is this context is a fine one, we do not fault the district court for failing to intervene sua sponte. Thus there is not plain error"); *Cristerna-Gonzalez*, 962 F.3d at 1260, 1263 (determining that any error by admission of law enforcement lay opinion testimony was "hardly plain" and that defendant "has not come close" to satisfy the standard for any error being "plain" because even assuming improper lay opinion, such opinions as in that case are routinely admitted as expert opinions); *see also U.S. v. Whalen*, 578 Fed. Appx. 533, 540 (6th Cir. 2014) (non-precedential) (determining that it "need not decide whether [the witness'] testimony improperly veered into forbidden lay opinion because any error was not plain" where "the prosecution might have been able to qualify [the witness] as an expert").

In asserting that "it is plain and undisputable that the[agents'] opinions on these topics were improperly admitted" as lay opinions, as he did in the Court of Appeals below, Defendant relies on our Court of Appeals' opinions in *Winters* and

Vargas. **[BIC 35; COA BIC 32]** Pursuant to *Winters* and *Vargas*, the State agrees that a law enforcement officer's opinion that a quantity of drugs is consistent with trafficking as opposed to personal use is an expert opinion, as opposed to a lay opinion. However, generally, but particularly at the time of Defendant's trial, that conclusion was certainly not "plain" or "clear."

Winters and *Vargas* both specifically addressed law enforcement witnesses' opinion testimony. In both those cases, our Court of Appeals clarified that lay opinion testimony "is generally confined to matters which are within the common knowledge and experience of an average person." *State v. Winters*¸ 2015-NMCA-050, ¶¶ 11, 17, 349 P.3d 524; *Vargas*, 2016-NMCA-038, ¶ 15. In *Vargas*, the Court applied that principle and determined that an officer's testimony that a victim's injuries were caused by a stun gun was an expert opinion, because "his characterization . . . is [not] one that a normal person would form on the basis of observed facts." *Vargas*, 2016-NMCA-038, ¶ 23. In *Winters*, the Court determined that an officer's opinion on whether footprints found at a crime scene matched footprints found outside the defendant's residence could be either an expert or lay opinion depending on whether the similarities or distinguishing features of the prints are readily recognizable to an average lay witness. *Id.* ¶¶ 10-12. While these cases dictate that the NEU agents' opinions in this case were beyond the scope of

a lay opinion because they relied on specialized knowledge, neither case was decided when Defendant was tried in the district court, and therefore the parties below and the district court below did not have the benefit of the Court of Appeals' clarification in these cases. *See Cristerna-Gonzalez*, 962 F.3d at 1260, 1263 (in addressing an argument of improper expert testimony, stating that "[a]n error is plain if it is clear or obvious at the time of the appeal").[1]

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1 New Mexico courts prior to *Winters* and *Vargas* had addressed challenges to an officer's qualifications on differentiating between trafficking and personal use quantities of narcotics when the State tendered the witness as an expert, *see, e.g., State v. Rael-Gallegos*, 2013-NMCA-092, ¶ 25, 308 P.3d 1016, but our courts had never specifically addressed or expressly held that such opinions require qualification as an expert and are inadmissible as lay opinions. *See also State v. Segura*, Memo. Op. No. 28,527, *1 (N.M. Ct. App. Feb. 24, 2011) (non-precedential) (addressing whether officer was qualified to render an opinion on drug quantity and consistency with trafficking). Analogous federal authority as to the precise issue at hand - opinion testimony that a drug quantity is consistent with trafficking - is and was similarly unclear. Federal authority favors the position that such opinions are admissible as an expert testimony, not as lay testimony, but not consistently. For example, in the sixth circuit, a law enforcement officer provides expert testimony if he testifies about the quantities of drugs that are consistent with distribution, not personal use. *U.S. v. Ham*, 628 F.3d 801, 804–05 (6th Cir. 2011). Other circuits hold the same. *U.S. v. Taylor*, 462 F.3d 1023, 1026 (8th Cir. 2006) ("We have repeatedly upheld the admission of this type of expert testimony in drug and firearm cases because it assists the jury in understanding the business of drug trafficking, including the prevalent use of firearms."). However, in the first circuit, testimony by a law enforcement officer about a drug quantity being consistent with distribution as opposed to personal use is admissible as lay, not expert testimony. *U.S. v. Razo*, No. 1:11-cr-00184-JAW, 2012 WL 6569334, *6 (D. Me. Dec. 17, 2012) (non-precedential) (reaching this conclusion and discussing *U.S. v. Maher*, 454 F.3d 13, 24 (1st Cir.2006) and *U.S. v.*

Any error was not plain.

C. Alternatively, Defendant was not prejudiced, any error did not affect his substantial rights, and any error did not create "grave doubts concerning the validity of the verdict" because the State presented a sufficient foundation for each of the NEU officers' qualifications to render an expert opinion

The Court of Appeals determined that any error was not plain or clear on the basis that "the State presented evidence that the agents had sufficient training and specialized knowledge in the field of narcotics investigations to opine regarding the quantity of cocaine being consistent with trafficking." **[Op. ¶¶ 18-19]** As argued above, the nature of the error – a gratuitous reference to an investigating law enforcement witness' opinion as a "lay" opinion and not an "expert" opinion in the context of overruling a relevance objection - is not a clear or plain error regardless of the sufficiency of the foundation for the witnesses' qualifications. But the Court of Appeals' conclusion that the foundation was sufficient was correct, nonetheless, if required for any error to have been "plain" or "clear." **[Op. ¶ 19]** Moreover, because there was a sufficient foundation for the agents to render the expert opinions, the district court had the discretion to admit them into evidence regardless of any erroneous designation. Therefore Defendant, on a heightened

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Valdivia, 680 F.3d 33 (1st Cir.2012)).

plain error standard of review, cannot establish that he was prejudiced by the admission of the opinions, that any error affected his substantial rights, or that there are “grave doubts concerning the validity of the verdict.” *See Gwynne*, 2018-NMCA-033, ¶ 27; *Muller*, Slip. Op. No. A-1-CA-36501, ¶ 43.

Each of the officers in this case testified to a sufficient basis to support their conclusions regarding fifty grams of cocaine being consistent with trafficking as opposed to personal use under the appropriate standard. In order to determine whether the NEU agents were qualified to provide an expert opinion, this Court “must consider whether [the NEU agents’] knowledge and experience were sufficient to support a determination that [their] conclusions regarding the distinction between personal use amounts versus trafficking amounts of crack cocaine may be trusted.” *Rael-Gallegos*, 2013-NMCA-092, ¶ 21. Had there been a proper objection, the district court’s discretion in qualifying the officers would have been wide. *See State v. Stanley*, 2001-NMSC-037, ¶ 5, 131 N.M. 368 (admission of evidence is reviewed for an abuse of discretion)

Here, each of the officers testified to sufficient knowledge and experience allowing the district court to conclude that their opinions may be trusted. Agent Scharmack, a senior narcotics agent, testified that he had 8 years of total law enforcement experience and 2.5 years specifically with the NEU task force. **[CD**

1/20/15, 11:10:15-11:20] In his role, Officer Scharmack is charged with developing case informants, working leads, and investigating narcotic crimes. **[Id., 11:11:40-55]** Officer Scharmack is familiar with cocaine and crack and participated in the investigation of cocaine-related cases. **[Id., 11:13:03-20]** While he did not purchase cocaine himself, he was charged with obtaining search warrants utilizing information from confidential informants conducting controlled buys. **[Id., 11:13:20-15:15]** He is familiar with narcotic quantities typically sold on the streets of Alamogordo and typical prices, including cocaine, through the totality of his "experience" with NEU and his time spent as a patrol officer in Alamogordo. **[Id., 11:15:15-18:05]**

Similarly, Agent Marte was assigned to the NEU unit for 2.5 years and was also a patrol officer with the Alamogordo police department (APD) for 3.5 years. **[Id., 2:02:10-55]** With APD, he investigated narcotic cases occasionally. At NEU, he exclusively works on narcotic investigations. Specifically, he has investigated cocaine trafficking and possession; participated in undercover operations; and talked with and associated with known users and traffickers within the Alamogordo community. **[Id., 2:02:55-05:05]** Through this "experience and training" he has become familiar with the cost of cocaine in Alamogordo. **[Id., 2:05:05-06:50]**

Finally, Commander LaSalle has been the commander of the NEU for the last

four years. He supervises daily functions, works with agents, and participates in narcotic investigations. Prior to this position, he was employed for three years by the Otero County sheriff's department as a patrol deputy, including as a K-9 narcotic handler. He also has three years' experience with the APD. Thereafter, Commander LaSalle became an NEU agent, was promoted to sergeant, and became the commander. **[CD 1/20/15, 2:19:10-21:10]** In these capacities, he has talked with self-admitted users and traffickers. Through this experience, he has learned the costs, quantities, and prices of narcotics in Alamogordo, including cocaine. **[Id., 2:21:10-22:55]**

From this foundational testimony on their knowledge and experience, the district court would have unquestionably been within its discretion to admit each of the NEU agents' opinions as expert opinions if Defendant properly objected. *See, e.g. Segura*, Memo. Op. No. 28,257 at **2-3; *see also, e.g., U.S. v. West*, 671 F.3d 1195, 1201 n.6 (10th Cir. 2012) (holding that police officer with two years of experience in dealing with drug cases qualified as expert in drug distribution); *U.S. v. Harris*, 903 F.2d 770, 775–76 (10th Cir. 1990) (holding that FBI agent with four years of experience in drug-records sub[-]unit qualified as expert in interpreting drug-transaction records). Defendant therefore cannot establish prejudice, that any error affected his substantial rights, or that any error created grave doubts

about the validity of the jury's verdict rising to the level of plain error because the opinions he complains of were plainly admissible, even if they were labeled "lay" and not "expert" opinions.

Defendant claims that the Court of Appeals should not have engaged in "retroactive fact finding on appeal" by determining that the NUE agents' were qualified to render expert opinions. **[BIC 34]** But the Court simply engaged in a sufficiency analysis, which appellate courts commonly do. Although Defendant argues there was no finding that the NEU agents were qualified "to which to defer," **[BIC 35]** that is a product of Defendant's failure to invoke such a finding. Because the record contains a sufficient foundation for the expert opinions rendered, it would not have been an abuse of discretion on appeal for the district court to admit the NEU agents' opinions if Defendant made a proper objection, alerted the district court to the issue, and corrected the district court's designation of the opinions as "lay" opinions. It therefore cannot rise to plain error to admit those opinions without objection where the foundation was sufficient to invoke the district court's discretion to admit those opinions.

III. The district court did not abuse its discretion by admitting evidence that Defendant threw cocaine out the window during another incident for the non-propensity purpose of proving Defendant's tampering intent, knowledge that he was being pursued by officers, and absence of mistake

A. Additional background

Defendant lastly contends that the district court abused its discretion by "admitting the details of [his] prior convictions." **[BIC 39]** At trial, Defendant testified in his own defense. Defendant admitted possessing the cocaine at issue but denied intent to traffic. **[CD 1/20/15, 3:12:45-14:35]** He explained that he is addicted to crack, which he makes by cooking powdered cocaine and smoking it. He claimed his high from crack only lasts 15 minutes and that the 50 grams of cocaine would have only lasted him 1-2 days. **[Id., 3:07:55-12:45]**

In relation to the tampering charge for hiding his cocaine from the NEU agents, Defendant posited a defense based on mistake or lack of tampering intent. Defendant posited that he was unaware the agents following him were law enforcement officers, claiming that he saw four people with guns and plain clothes and fled for his mother's safety. **[Id., 3:15:25-16:10]** Defendant claimed he ultimately stopped his truck to confront the vehicle occupants. **[Id., 3:16:10-40]** He claimed that he tossed the cocaine out the window because he knew there was going to be a confrontation with the vehicle occupants. **[Id., 3:16:40-17:45]** Defendant expressly testified that he did not know he was being followed by law enforcement. **[Id.]**

On his direct examination, Defendant admitted that he has prior convictions

for trafficking, attempted trafficking, and aggravated fleeing. **[CD 1/20/15, 3:14:05-15]** Prior to cross-examination, the State informed the district court that it intended to ask Defendant about the "facts" regarding one of the prior convictions which involved Defendant throwing cocaine out the window. The State explained that Defendant's "suggestion [that he threw the cocaine out the window], you know, fearing a confrontation from some lowriders was not the truth." The State explained that, in the prior instance, Defendant knew law enforcement was in pursuit when he threw cocaine out the window because he was being followed by marked units. The district court recognized that the State had enunciated a purpose under Rule 11-404(B) for this evidence (to negate Defendant's contention that he lacked specific intent for tampering because he claimed that he did not know he was being followed by law enforcement and instead thought he was being followed by four armed civilians), which it termed "to show a mistake of fact." The district court allowed the State "to go that far" to show "absence of mistake." Defendant objected on the basis that this issue is controlled by Rule 11-609 NMRA and only the fact of the conviction is admissible. **[Id., 3:20:50-24:25]**

In the context of a lengthy cross-examination, including portions where the State challenged Defendant on his contention that he did not recognize the NEU agents as law enforcement when he threw the cocaine out the window, **[i.e., Id.,**

3:37:20-42:45] the State inquired "on December 9, 2011, you were being chased by police officers in marked patrol units, weren't you?" and that "on that occasion, you rolled down the driver's side window and you threw out cocaine in that situation, did you?" After an objection and bench conference on the next question, the State inquired "and in that situation, you threw cocaine out the window to keep it from police behind you?" and "so you had a little experience being chased by police officers, haven't you?" **[Id., 3:50:00-52:50]**

On appeal, Defendant argued that the district court committed reversible error under Rule 11-609, applying the six factors that provide guidance for the admission of prior convictions under that rule. **[COA BIC 40-44]** The Court of Appeals affirmed, determining that the district court's reason for allowing the prior bad act evidence was within the discretion of the district court under Rule 11-404(B). **[Op. ¶ 20-22]**

B. Standard of review

This Court reviews the admission or exclusion of evidence for abuse of discretion and will not disturb the district court's determination absent a clear abuse of that discretion. *State v. Thompson*, 2009-NMCA-076, ¶ 11, 146 N.M. 663. An abuse of discretion only occurs where the ruling is clearly against the logic and effect of the facts and circumstances of the case. *Id.*; *see also State v. Smith*, 2016-

NMSC-007, ¶ 27, 367 P.3d 420. "If there are reasons both for and against a court's decision, there is no abuse of discretion." *Id.* "The very essence of discretion is that there will be reasons for the district court to rule either way on an issue, and whatever way the district court rules will not be an abuse of discretion." *State v. Layne*, 2008-NMCA-103, ¶ 7, 144 N.M. 103.

C. The district court did not abuse its discretion in determining that the State made a sufficient showing of a non-propensity purpose

Defendant asserts that "there was no non-propensity purpose to which the [challenged evidence was] highly probative *other than credibility*." **[BIC 43]** Prior act evidence is governed by Rule 11-404(B). Rule 11-404(B)(1) provides the general rule that "[e]vidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." However, the rule does not bar evidence of a defendant's crime, wrong, or other act where the evidence is relevant "for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Rule 11-404(B)(2). Rule 11-404(B) requires the State to make a sufficient showing that the evidence would serve a legitimate purpose other than to show character or propensity. *State v. Dietrich*, 2009-NMCA-031, ¶ 40, 145 N.M. 733.

This Court has clarified several important principles under Rule 11-404(B). *See State v. Bailey*, 2017-NMSC-001, 386 P.3d 1007. "Importantly, . . . Rule 11-404(B) is a rule of inclusion, not exclusion, providing for the admission of all evidence of other acts that are relevant to an issue in trial[.]" *Id.* Where evidence is properly admitted for a permissible purpose, the fact that the evidence also allows a potential propensity inference is not fatal. *See id.* ¶ 19 ("But while a propensity inference can arguably be drawn in this case from [the Rule 11-404(B) evidence], the law does not ban admission of potential propensity evidence that also goes to proving something other than [d]efendant's propensity to act in a certain way."); *see also State v. Gallegos*, 2007-NMSC-007, ¶ 22, 141 N.M. 185 (evidence is inadmissible under Rule 11-404(B) only if "its sole purpose or effect is to prove criminal propensity").

Evidence that Defendant threw cocaine out the window when pursued by marked patrol units was relevant for the non-propensity purpose of proving Defendant's requisite intent and knowledge for tampering with evidence. Defendant placed this in issue, positing that he did not have the requisite specific intent for tampering on the theory that he did not know the NEU agents were law enforcement officers. Defendant explained that he mistook the NEU agents for four armed civilians. He claims he threw the cocaine out the window in order to protect

his cocaine from an anticipated confrontation with the individuals he mistook for civilians.

In order to prove tampering with evidence, the State had to prove that Defendant "intended to prevent the apprehension, prosecution, or conviction of himself" by throwing the cocaine out the window. **[RP 206]** In order to establish that element, the State had to establish that Defendant knew the undercover NEU agents were law enforcement officers and not civilians (ie. the State presented evidence that Defendant immediately recognized Commander LaSalle). Defendant's similar prior bad act was probative of whether Defendant knew he was being pursued by law enforcement. Whether the State's non-propensity theory is labeled as to prove intent, knowledge, or "absence of mistake" as characterized by the district court, the State had a valid purpose.

In other words, Defendant took the stand and admitted the act constituting tampering (hiding or placing cocaine) but disclaimed the necessary mental state the State was required to prove as an essential element of the offense. New Mexico courts have unequivocally held that, under Rule 11-404(B), "[w]hen the defendant admits the act which constitutes the crime, but denies having the required mental state, then evidence of another, nearly identical, act is admissible to show intent and knowledge." *State v. Nguyen,* 1997-NMCA-037, ¶ 10, 123 N.M. 290; *State v.*

Kalinowski, 2020-NMCA-018, ¶ 29, 460 P.3d 79 ("Thus, evidence of other similar transactions was relevant to disprove Defendant's assertions that he lacked the requisite criminal intent."). This Court and our Court of Appeals have applied this rule to affirm introduction of identical/similar criminal acts in a multitude of circumstances under Rule 11-404(B). *See Nguyen,* 1997-NMCA-037, ¶ 11 (holding that separate almost identical instances of forgery were cross-admissible under Rule 11-404(B) to show intent and knowledge required as elements of forgery); *see also State v. Otto*, 2007-NMSC-012, 141 N.M. 443 (evidence of uncharged sex crime on victim was highly probative because without the evidence jury was more likely to believe defendant's defense of mistake or accident); *Bailey*, 2017-NMSC-001, ¶¶24-26 (no abuse of discretion in allowing evidence of uncharged criminal sexual penetration of minor bearing on defendant's lack of mistake or accident in prosecution for criminal sexual contact with same minor). In fact, even had Defendant not expressly denied knowledge of the officers' identities and, therefore, his tampering intent, the evidence was plainly admissible. *Nguyen,* 1997-NMCA-037, ¶ 11 (agreeing with State's position that identical instances of forgery were cross-admissible even where defendant offered to stipulate not to rely on mistake or accident). Defendant fails to discuss the rather large body of case law on this principle.

Defendant's testimony admitted the tampering act but disclaimed the specific intent required for tampering with evidence because he claimed he threw his cocaine out the window without knowledge that law enforcement officers were in pursuit, mistaking the officers for civilians. Under well-established caselaw, particularly under these circumstances, the evidence of his similar prior bad act was plainly admissible under Rule 11-404(B) as probative of his tampering intent, knowledge that law enforcement was in pursuit, and to show that Defendant did not mistake the NEU agents for civilians. Regardless of whether the district court's label of "absence of mistake" was correct, the State explained its specific purpose and the district court admitted the evidence substantively under Rule 11-404(B) based on that proffered explanation.

Defendant claims that the Court of Appeals "did not address the full issue presented on appeal." **[BIC 45]** Specifically, Defendant argues that the Court did not consider his argument that the State improperly inquired as to the quantity of cocaine that Defendant threw out the window in the prior incident. **[BIC 45]** But the district court sustained the objection on quantity and no answer was provided. **[BIC 40-41]** To the extent that Defendant claims a curative instruction was required, he did not request such an instruction. "It is the duty of the complaining party to request a curative instruction." *State v. Collins*, 2005-NMCA-044, ¶ 41, 137 N.M.

353, *overruled on other grounds by State v. Willie*, 2009-NMSC-037, ¶ 18, 146 N.M. 481. The district court did not err by not sua sponte providing a curative instruction. *See State v. Laney*, 2003-NMCA-144, ¶34, 134 N.M. 648 (holding that "no error" occurred where defendant "objected and moved to strike testimony which the district court sustained" but did not request a curative instruction and "thus obtained the relief requested").

The district court did not abuse its discretion under Rule 11-404(B).

CONCLUSION

The State requests that this Court affirm the Court of Appeals on all the issues raised in Defendant's petition for writ of certiorari.

Respectfully submitted,

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<u>CERTIFICATE OF SERVICE</u>

I hereby certify that on February 14, 2022, I filed the foregoing brief electronically through the Odyssey/E-File & Serve System, which caused counsel of record Kimberly Chavez Cook to be served by electronic means.

<u>/s/ Charles J. Gutierrez</u>
CHARLES J. GUTIERREZ