STATE V. CHAVEZ

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ROBERT CHAVEZ,
Defendant-Appellant.

No. A-1-CA-33761

COURT OF APPEALS OF NEW MEXICO

December 17, 2018

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY, Mark Terrence Sanchez, District Judge

COUNSEL

Hector H. Balderas, Attorney General, Laura E. Horton, Assistant Attorney General, Santa Fe, NM, for Appellee

Bennett J. Baur, Chief Public Defender, B. Douglas Wood III, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

M. MONICA ZAMORA, Judge. WE CONCUR: J. MILES HANISEE, Judge, HENRY M. BOHNHOFF, Judge

AUTHOR: M. MONICA ZAMORA

MEMORANDUM OPINION

ZAMORA, Judge.

{1} Defendant Robert Chavez served as a leader of the drug trafficking organization known as the “AZ Boys,” which operated for many years in Alamogordo, New Mexico,

and Phoenix, Arizona. In 2014, a jury convicted Defendant of the following ten crimes, for which he received a thirty-six year prison sentence: one count of racketeering (conduct or participate) in violation of NMSA 1978, Section 30-42-4(C) (2002); one count of conspiracy to commit racketeering in violation of Section 30-42-4(D)[1]; one count of trafficking a controlled substance, to-wit: methamphetamine (by possession with intent to distribute) in violation of NMSA 1978, Section 30-31-20 (2006); two counts of conspiracy to commit trafficking a controlled substance, to-wit: methamphetamine (by possession with intent to distribute) in violation of NMSA 1978, Section 30-28-2 (1979); one count of attempt to commit trafficking a controlled substance, to-wit: methamphetamine (by possession with intent to distribute) in violation of Section 30-31-20; one count of money laundering (over $10,000) (structuring) in violation of NMSA 1978, Section 30-51-4 (1998); one count of money laundering (over $10,000) (further commission of an specified unlawful activity (SUA)) in violation of Section 30-51-4; and one count of money laundering (over $10,000) (making available for an SUA) in violation of Section 30-51-4; and one count of conspiracy to commit money laundering (over $10,000) (making available for an SUA), in violation of Section 30-51-4.

{2} Defendant raises four issues on appeal: (1) the constitutionality of a protective sweep law enforcement conducted on his residence and the district court's related ruling on his motion to suppress evidence, (2) double jeopardy as applied to Defendant's multiple conspiracy convictions, (3) sufficiency of evidence to support Defendant's convictions, and (4) admissibility of hearsay evidence concerning Defendant's girlfriend as relayed through testimony of the State's confidential informant. We affirm Defendant's convictions.

BACKGROUND

{3} In 2007 the Otero County Narcotics Enforcement Unit (OCNEU) learned of an organization known as the AZ Boys, suspected of trafficking methamphetamine in Alamogordo, New Mexico. In 2009, the OCNEU formally confirmed the AZ Boys as a drug trafficking organization, run by Defendant and his brothers Joe and Eduardo Chavez. The investigation of the AZ Boys was initially focused on the distribution of narcotics, but later expanded into money laundering and racketeering as well. In 2012 law enforcement developed two confidential informants, one of whom was Sanya Sanders.

{4} Sanders had been friends with Defendant's girlfriend, Angela Catt, since 2006. In March 2012, Sanders and Catt had a conversation about a man Sanders did not know named Sammy Mitchell who was arrested in February 2012 for suspected drug trafficking when he was caught with ten pounds of methamphetamine in the tire of his vehicle. Defendant and Catt gave Sanders $200 for money orders that Sanders mailed to Mitchell in jail. A few days later, Catt invited Sanders to her house to tell her that she and Defendant needed a driver, and she asked Sanders if she was interested. Sanders testified that she did not know she was agreeing to traffic methamphetamine. Catt offered Sanders $1,000 each time she drove for them. Days after this conversation, Sanders accompanied Defendant and Catt to Phoenix. Unbeknownst to Sanders,

Defendant expected Sanders to rent a truck in Phoenix to drive back to Alamogordo. Because Sanders did not have a credit card, Defendant put $500 on a prepaid credit card for her to rent a truck. Sanders could not rent the truck with a prepaid credit card, so Defendant ultimately rented her a truck with his personal credit card.

{5} Prior to leaving Phoenix to return to Alamogordo, Catt instructed Sanders to obey all traffic laws and do exactly as Defendant told her to do. Defendant placed a cooler behind Sanders's seat in the truck, and he explained to her that she would follow him for various stretches of the drive and that he would signal her turns. On this first drive back, Sanders pulled over approximately ten times, because her back was hurting and she needed to smoke cigarettes to manage her nerves. After returning to Alamogordo, Sanders followed Defendant and pulled over for Defendant to get the cooler out of her truck.

{6} Sanders testified that during this first trip, Defendant was friendly to her but after returning to Alamogordo she learned from Catt that Defendant was unhappy with Sanders' driving. With a swollen face, busted lip, and bruises, Catt explained to Sanders that Defendant "fucked her up" because Sanders messed up on the drive back, and Defendant attributed fault to Catt since she recruited Sanders to drive. During Defendant's next interaction with Sanders the following day, Defendant purchased a cell phone for her and told her to keep the $500 prepaid credit card. As part of her payment, Defendant's brother, Joe Chavez, gave Sanders three grams of methamphetamine worth $200 and Catt gave her an additional $300.

{7} In April 2012 Defendant and Catt asked Sanders for her driver's license information and provided her with a vehicle identification number for a new truck they had purchased for her. They instructed her to add this truck to her insurance and Defendant provided her money in cash to do so. She did not make payments to Richardson Motor Company for this truck but instead the purchase was arranged for her. Joe took her to the car dealership to pick up the truck when it was ready.

{8} About one week after Defendant provided Sanders with a new truck, they took a second trip to Phoenix and stayed there approximately one week. Prior to leaving, Sanders witnessed Defendant removing a tire and putting a new one onto her truck. To ease her nerves about driving back, Catt gave Sanders a line of methamphetamine, which she used prior to getting on the road. She received $900 in cash and money orders as payment for the second trip.

{9} In late April, Joe Chavez contacted Sanders about a third trip to Phoenix, but Sanders refused to go because of her children. Over the phone, Sanders could hear Defendant yelling in the background that she had to go. The group ultimately left without her. The following day, Sanders was stopped by the Otero County Sheriff's Department on Highway 70. Commander LaSalle and Officer Eldridge informed her that they had a warrant to search her person, car, and home for drugs. She handed over the methamphetamine that she had in her possession and agreed to cooperate with law enforcement.

{10} Once Sanders agreed to cooperate with law enforcement, Commander LaSalle and Officer Eldridge drove Sanders to a lake near Holloman Air Force Base to discuss the details of her cooperation. While Sanders was with the officers, Catt called Sanders to ask for her help because Catt was afraid that Defendant was going to harm her. Sanders testified that she agreed to cooperate partially out of fear for Catt's safety. The plan was for Sanders to take a trip to Phoenix, meet with Defendant, and drive a load of methamphetamine back to Alamogordo. Sanders asked Catt's permission to meet her and Defendant in Phoenix, and Defendant agreed that she could meet them but warned her that she needed to follow Defendant's instructions.

{11} A team of officers followed Sanders to Phoenix for the five day trip, during which she kept in touch with officers through a cell phone they provided to her. After Defendant announced that it was time to return to Alamogordo, the group went to purchase a tire for Sanders's truck. Back at Defendant's home in Phoenix, Sanders saw Defendant wrapping four large bundles of methamphetamine in plastic while a tire from her truck lay on the floor. As she did in the prior trip, Sanders asked Catt for a line of methamphetamine to calm her nerves. Sanders saw Defendant filling her tire up with air and placing it back onto her truck.

{12} Law enforcement officers were staged in various towns on the indirect route back. Officers followed Sanders' white truck and Defendant's black Mercedes SUV the entire way back. When they arrived back in Alamogordo around 2:00 a.m., Commander LaSalle and Officer Eldridge witnessed Defendant and Sanders exchange vehicles from a distance. Defendant drove home, where officers apprehended him in his driveway. The Officers, with the OCNEU, detained and handcuffed Defendant in the driveway of his home upon finding the four pounds of methamphetamine, wrapped in bundles in the spare tire, and executed a search warrant on the white truck. While Defendant was detained in his driveway, officers from the OCNEU conducted a protective sweep of Defendant's residence. Commander LaSalle then received a search warrant for Defendant's home. During this time, Sanders and Catt spoke by telephone and Catt screamed to her "You're dead, bitch!"

{13} Officers executed the search warrant on Defendant's home, looking for documentation that supported their suspicion that the AZ Boys organization was involved in money laundering. Commander LaSalle found a purchase order from Richardson Motor Company for Defendant's black Mercedes SUV illustrating that it had been paid for entirely in cash. Additionally, officers discovered a cut tire inside of Defendant's garage, numerous money orders, and business cards for Richardson Motor Company, a bundle of money hidden in an underwear drawer, and a file folder containing numerous cash receipts.

{14} The search of Defendant's home led to further investigation of money laundering and racketeering, which included searches of Joe Chavez's residence and Richardson Motor Company. The search of Joe Chavez's residence turned up marijuana and approximately $30,000 in cash recovered from a bedroom dresser drawer. During the search of Richardson Motor Company, officers obtained all records pertaining to

suspected members of the AZ Boys organization. After the initial search warrant was executed, Commander LaSalle witnessed Joe Chavez talking with the owner of Richardson Motor Company and cautioned them not to speak in light of the ongoing investigation. Shortly after this conversation, officers were notified of a dumpster fire at the car dealership.

{15} Before trial, Defendant filed a motion to suppress evidence, challenging the constitutionality of the protective sweep. At an evidentiary hearing on Defendant's motion to suppress, Commander LaSalle testified to the following factual summary. Since 2007, the OCNEU had been conducting an investigation into the AZ Boys, of which Defendant was the suspected leader. In May 2012 the OCNEU surveilled a trip to Phoenix with some of the AZ Boys and Sanders. On the drive from Phoenix to Alamogordo, officers kept Defendant under surveillance. Defendant arrived at his Alamogordo home from Phoenix, and immediately thereafter officers made contact with him in his driveway. Officers observed Defendant discard something into the back of a parked truck in his driveway. The lights were on in Defendant's house though he had not yet been inside since returning from Phoenix, and the garage door was open. Outside of Defendant's house, approximately seven vehicles were parked, three to four of which did not belong to Defendant. Additionally, officers had knowledge of the year's long investigation into the AZ Boys organization, and knowledge of Defendant's personal criminal history, including the fact that he was a suspect in ongoing murder investigations in both Alamogordo and Phoenix. Defendant was detained as the officers performed the protective sweep to ensure no one else was in the residence.

{16} The State argued that the protective sweep was both based on reasonable suspicion that others might be in the house and minimal in scope. Though the officers observed items in plain view, such as a firearm and ammunition, they did not seize any evidence. Defendant argued that all evidence obtained through the search warrant must be suppressed because the protective sweep was an "end run" around the Constitution. At the close of the hearing, the district court stated there was a difference between a protective sweep done to secure a residence prior to a warrant being obtained and using illegally obtained evidence to get a warrant. The district court reiterated that Commander LaSalle decided to apply for a search warrant prior to officers conducting the protective sweep. The district court denied Defendant's motion to suppress.

{17} The financial investigation resulted in evidence that from 2007 to 2012, approximately $300,000 in cash was spent on vehicles purchased from Richardson Motor Company by Defendant and other suspected members of the AZ Boys organization. The investigation also revealed additional evidence of tens of thousands of dollars in cash purchases by Defendant and others on items such as furniture, electronics, jewelry, and tools. With regard to Defendant's black Mercedes SUV, documentation illustrated that Defendant made multiple cash payments under $10,000 so as to not trigger IRS reporting requirements. Defendant's landlord testified that Defendant only paid him in cash.

{18} The jury heard testimony from Special Agent Robert Chesney of the New Mexico Attorney General's Office, who conducted records checks on Defendant and other suspected members of the AZ Boys organization. Agent Chesney explained that within New Mexico or Arizona, there were no records of taxes paid or salaries earned for Defendant, Joe Chavez, or others. The jury also heard testimony from former IRS Special Agent Michael Lacenski, who was qualified as an expert and testified that the money in question could have come from trafficking methamphetamine.

DISCUSSION

I. The Protective Sweep Was Constitutional

{19} The district court summarily denied Defendant's motion to suppress evidence obtained from the protective sweep. The district court did not make any findings of fact at the suppression hearing.

{20} Defendant argues on appeal that the protective sweep was invalid because the officers lacked a reasonable belief that there were other persons at the scene who posed a danger to officer safety. Defendant also argues that since Defendant was not under arrest at the time of the protective sweep, the protective sweep was invalid. Defendant contends that because the protective sweep was invalid, the warrant that was subsequently issued was also invalid. He asks this Court to suppress all evidence obtained during the protective sweep and after the warrant was issued. In response, the State argues that the protective sweep was based on reasonable suspicion that dangerous people were in the house.

{21} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Paananen*, 2015-NMSC-031, ¶ 10, 357 P.3d 958 (internal quotation marks and citation omitted). We review "factual matters with deference to the district court's findings if substantial evidence exists to support them, and . . . review[] the district court's application of the law de novo." *State v. Almanzar*, 2014-NMSC-001, ¶ 9, 316 P.3d 183. We do not reweigh the evidence, and we may not substitute our judgment for that of the fact-finder, as long as there is sufficient evidence to support the fact-finder's conclusion. *See State v. Griffin*, 1993-NMSC-071, ¶ 17, 116 N.M. 689, 866 P.2d 1156.

{22} It is well settled that the Fourth Amendment permits police officers to enter a person's home without a warrant for the limited purpose of conducting a protective sweep of the premises to ensure officer safety while making an arrest. *See Maryland v. Buie*, 494 U.S. 325, 329 (1990). In *Buie*, the United States Supreme Court defined a protective sweep as "a quick and limited search of the premises, incident to an arrest and conducted to protect the safety of police officers or others." 494 U.S. at 327. "It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding." *Id.* Recognizing the danger posed by an in-home arrest, namely an unexpected attack by other dangerous persons on the premises, the court explained that officer safety both during and after a suspect's arrest was "sufficient to outweigh the

intrusion such procedures may entail." *Id.* at 333-34. The court held that "there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." *Id.* at 334.

{23} New Mexico courts have applied the standard articulated in *Buie* a number of times when analyzing the constitutionality of a protective sweep. *See State v. Valdez*, 1990-NMCA-134, ¶¶ 8, 9, 111 N.M. 438, 806 P.2d 578 (applying the recently acknowledged protective sweep rule defined in *Buie*); *State v. Lara*, 1990-NMCA-075, ¶¶ 21, 23, 110 N.M. 507, 797 P.2d 296 (acknowledging the protective sweep rule set forth in *Buie*); *see also State v. Jacobs*, 2000-NMSC-026, ¶¶ 35, 38, 129 N.M. 448, 10 P.3d 127 (applying the *Buie* standard and holding that the protective sweep was justified because surveillance indicated that another person might be in the house, there were weapons inside the house, and the defendant was a suspect in a violent murder).

{24} Consistent with *Buie*, this Court has held protective sweeps invalid where the sweep was not conducted incident to arrest, where the sweep took place before the suspect's arrest, or where the officers lacked sufficient, articulable facts that led them to believe they faced a possible danger. *See Valdez*, 1990-NMCA-134, ¶ 10 (holding a protective sweep was invalid where the officers searched a defendant's home before deciding to arrest him and where the defendant was uncuffed and unsubdued while the officers searched his home); *see also State v. Ramos*, 2017-NMCA-041, ¶ 32, 394 P.3d 968 (holding a protective sweep was invalid where the officers swept the defendant's apartment though the defendant was not under arrest and had left the scene); *State v. Eckard*, 2012-NMCA-067, ¶¶ 14-15, 281 P.3d 1248 (holding a protective sweep was invalid where the officers arrested a defendant in his backyard then searched his home without sufficient articulable facts to reasonably conclude that others were in the home who posed a threat to officers); *State v. Trudelle*, 2007-NMCA-066, ¶ 22, 142 N.M. 18, 162 P.3d 173 (holding a protective sweep was invalid where the sweep took place before the defendant's arrest, where the defendant was unrestrained during the sweep, and where the arrest was prompted by an unrelated warrant officers discovered after the sweep).

A. Defendant was Lawfully Arrested at the Time of the Protective Sweep

{25} Defendant argues that the protective sweep was invalid because though he was detained during the sweep, he was not arrested, and thus, the sweep was not incident to the arrest. A protective sweep must be incident to a lawful arrest. *See Buie,* 494 U.S. at 327; *Valdez*, 1990-NMCA-134, ¶ 11 ("We believe that a protective sweep is allowed incident to an arrest because the arrest signals that the police fear that the person arrested may pose a danger."); *see also Ramos*, 2017-NMCA-041, ¶ 32 (holding that "there was no valid protective sweep because the sweep was not done incident to a lawful arrest"). Therefore, we must determine whether there was a lawful arrest and, if so, when it occurred.

{26} When an arrest has taken place it is a district court determination. *Boone v. State*, 1986-NMSC-100, ¶ 14, 105 N.M. 223, 731 P.2d 366. Without making any factual findings, the district court summarily denied Defendant's motion to dismiss, thereby finding the protective sweep constitutional. Based on the district court's denial, we assume it determined that Defendant was under arrest at the time of the protective sweep. *See State v. Aragon*, 1999-NMCA-060, ¶ 10, 127 N.M. 393, 981 P.2d 1211 ("There is a presumption of correctness in the district court's rulings." (alteration, internal quotation marks, and citation omitted)).

{27} We must now determine whether there is substantial evidence to support such a finding. Id. "A person is arrested when his freedom of action is restricted by a police officer and he is subject to the control of the officer." Boone, 1986-NMSC-100, ¶ 14. Boone is consistent with LaFave's contention that a "[r]esort to physical restraint is almost certain to result in a holding that an arrest had been made[.] . . . [T]he situation can amount to an arrest even though there were no formal words of arrest and no booking." 3 Wayne R. LaFave, Search and Seizure A Treatise on the Fourth Amendment § 5.1(a) (5th ed. 2012). In determining the level of formality required for making an arrest, our Supreme Court has stated that generally, handcuffing a person is enough to put them on notice they are under arrest. See Manning v. Atchison, T. & S. F. Ry. Co., 1938-NMSC-034, ¶ 8, 42. N.M. 381, 79 P.2d 922. In Manning, the Supreme Court stated, "as a general rule, the notice is sufficient when it is such as to inform a reasonable man of the authority and purpose of the one making the arrest, and the reason thereof. Circumstances, without express words, may afford sufficient notice." Id. (internal quotation marks and citation omitted); see Black's Law Dictionary 131 (10th ed. 2014) (defining "lawful arrest" as "[t]he taking of a person into legal custody either under a valid warrant or on probable cause that the person has committed a crime").

{28} The officers detained and handcuffed Defendant, searched his vehicle pursuant to the search warrant, and found four pounds of methamphetamine. At this point, probable cause existed to arrest Defendant. Defendant was clearly on notice the he was suspected of a drug related crime. We conclude that, as a matter of law, that Defendant was lawfully arrested at the time of the protective sweep.

B. Officers Had A Reasonable And Articulable Belief To Conduct The Protective Sweep

{29} Defendant next asserts that officers lacked a reasonable belief that other persons were in the residence, and thus, the protective sweep was invalid. We disagree. Defendant argues that the present facts are most similar to *Eckard*. He relies on *Eckard* for the proposition that vague generalizations and assumptions are insufficient to support a protective sweep. *See Eckard*, 2012-NMCA-067, ¶ 29 ("[O]ur review of the record indicates a complete lack of any specific evidence suggesting that [the d]efendant was engaged in an enterprise involving accomplices[.]"). However, Defendant's reliance on *Eckard* is misplaced because the *Eckard* court was unable to identify any facts suggesting "the presence of, much less [possible] danger posed by, other[s] on the scene." 2012-NMCA-067, ¶ 15. In contrast, the facts of this case indicate

that the officers had articulable facts to support a reasonable inference of a threat to their safety. At the time of Defendant's arrest, the OCNEU had been investigating his role in the drug trafficking organization known as the AZ Boys for approximately five years. Leading up to the encounter in Defendant's driveway, officers had current and evolving information from an informant within the AZ Boys about a drug transport from Phoenix to Alamogordo. Officers kept Defendant under surveillance throughout the trip until he arrived at his home with four pounds of methamphetamine. Commander LaSalle testified his officers observed Defendant discard something into the back of a parked truck in his driveway. The lights were on in Defendant's house, though he had not yet been inside since returning from Phoenix, and the garage door was open. Outside of Defendant's house, approximately seven vehicles were parked, three to four of which did not belong to Defendant. Additionally, officers had knowledge of Defendant's personal criminal history, including the fact that he was a suspect in ongoing murder investigations in both Alamogordo and Phoenix. The officers knew all of this information when Commander LaSalle ordered the protective sweep.

{30} When viewing these facts together through the lens of a reasonably prudent officer, the officers had a reasonable and articulable belief that they needed to conduct a protective sweep of Defendant's house for safety purposes. We hold the protective sweep of Defendant's residence was constitutional.

II. Double Jeopardy

{31} The jury convicted Defendant of four counts of conspiracy: one count of conspiracy to commit racketeering; two counts of conspiracy to commit trafficking a controlled substance, methamphetamine (by possession with intent to distribute); and one count of conspiracy to commit money laundering (over $10,000) (making available for an SUA).

{32} Defendant asserts a two-fold argument that several of his conspiracy convictions should be reversed on double jeopardy grounds. First, Defendant argues that his double jeopardy rights were violated when he was convicted of two counts of conspiracy to commit trafficking and conspiracy to commit money laundering because he could not have been found to have formed more than one overarching conspiracy. Second, Defendant argues that his conviction for conspiracy to commit racketeering is prohibited under double jeopardy principles as a double description of the substantive crime of racketeering itself. We address each of these arguments in turn.

{33} We generally apply a de novo standard of review to the constitutional question of whether there has been a double jeopardy violation. *See State v. Andazola*, 2003-NMCA-146, ¶ 14, 134 N.M. 710, 82 P.3d 77. However, where factual issues are intertwined with the double jeopardy analysis, the trial court's fact determinations are subject to a deferential substantial evidence standard of review. *State v. Rodriguez*, 2006-NMSC-018, ¶ 3, 139 N.M. 450, 134 P.3d 737.

A. Defendant's Multiple Conspiracy Convictions

{34} New Mexico's conspiracy statute states "[c]onspiracy consists of knowingly combining with another for the purpose of committing a felony within or without this state." Section 30-28-2(A). New Mexico's double jeopardy clause protects against multiple punishments for the same offense. *Swafford v. State*, 1991-NMSC-043, ¶ 6, 112 N.M. 3, 810 P.2d 1223. We classify multiple punishment cases in two ways: double description cases and unit of prosecution cases. *State v. Gallegos*, 2011-NMSC-027, ¶ 31, 149 N.M. 704, 254 P.3d 655. Here, a unit of prosecution analysis applies because Defendant was convicted of multiple violations of the same criminal statute. *See id.* ¶¶ 30-31 ("This being three convictions under the same conspiracy statute, we apply a unit of prosecution analysis.").

{35} Our review of Defendant's first double jeopardy argument is guided by *Gallegos*. In *Gallegos*, our Supreme Court faced an issue of first impression: how New Mexico double jeopardy principles apply to multiple conspiracy convictions. *Id.* ¶ 29. In applying the unit of prosecution analysis to the crime of conspiracy, our Supreme Court in *Gallegos* held that there is:

> [A] rebuttable presumption that multiple crimes are the object of only one, overarching, conspiratorial agreement subject to one, severe punishment set at the highest crime conspired to be committed. At trial, the state has an opportunity to overcome the Legislature's presumption of singularity, but doing so requires the state to carry a heavy burden.

Id. ¶ 55. To determine whether the state can overcome this presumption of singularity by demonstrating the existence of more than one conspiracy, our courts apply the totality of circumstances test utilized by the federal circuits. *Id.* ¶ 56. This multi-factored approach considers whether:

> (a) the location of the two alleged conspiracies is the same; (b) there is a significant degree of temporal overlap between the two conspiracies charged; (c) there is an overlap of personnel between the two conspiracies (including unindicted as well as indicted co-conspirators); and (d) the overt acts charged [are the same,] and (e) the role played by the defendant in the alleged conspiracies are similar.

Id. ¶ 42 (alterations, omission, internal quotation marks, and citation omitted). We must then review, through a deferential lens, whether a properly instructed jury was presented with substantial evidence to support each separate conspiracy. *Id.* ¶ 50.

{36} The jury was presented with evidence that Defendant and other members of the AZ Boys, including his two brothers, had been investigated for five years. At a minimum, the AZ Boys' operation included Defendant, Joe Chavez, Eduardo Chavez, Angela Catt, Sanya Sanders, Joe Chavez's girlfriend, Sammy Mitchell, and Richardson Motor Company. Each member appears to have played a different role and had been involved at different levels of the organization. At times, Defendant was directly involved in some of the criminal activity whereas other times he directed others to execute his plans.

{37} There was sufficient evidence to support the State's theory that multiple agreements were formed with regard to trafficking methamphetamine. At a minimum, Defendant conspired with his girlfriend Catt, his brother Joe Chavez, and his driver Sanders. Sanders took three separate trips to Phoenix with Defendant and Catt, and only able to do so at Defendant's direction. Each trip required a separate and distinct agreement on the part of the actors involved to traffic loads of drugs into Alamogordo.

{38} There was likewise sufficient evidence to support Defendant's conviction for conspiracy to money launder. The jury was presented with credible evidence that Defendant conspired with Richardson Motor Company to launder money via $300,000 in cash purchases over the course of five years. Again, Defendant and other suspected members of the AZ Boys made these purchases while not having any legitimate income in New Mexico or Arizona. This evidence alone, combined with the fact that after being served with a warrant, Richardson Motor Company had a dumpster fire that destroyed their company files, was sufficient for a reasonable jury to conclude that Defendant and Richardson Motor Company had an agreement to launder money. *See State v. Chandler*, 1995-NMCA-033, ¶ 14, 119 N.M. 727, 895 P.2d 249 (holding that the jury members are free to "use their common sense to look through testimony and draw inferences from all the surrounding circumstances" (internal quotation marks and citation omitted)).

{39} Since there was sufficient evidence to support each separate conspiracy conviction, the State overcomes the presumption of singularity. Accordingly, we hold that Defendant's multiple conspiracy convictions are supported by substantial evidence and do not violate double jeopardy principles.

B. Conspiracy to Racketeer and Racketeering

{40} Defendant also contends that his convictions for racketeering and conspiracy to racketeer violate double jeopardy principles. Defendant argues that his conviction for conspiracy to commit racketeering is a double description of the crime of racketeering itself. Defendant cites *State v. Silvas*, 2015-NMSC-006, 343 P.3d 616, to support this point. We disagree, as *Silvas* is distinguishable from the facts in this case.

{41} In most cases "conspiracy is typically treated separately from the substantive offense." *Id.* ¶ 22. In *Silvas*, however, our Supreme Court held that due to a "complete overlap in evidence[,]" the defendant's convictions for trafficking a controlled substance by possession with intent to distribute and conspiracy to commit the same crime violated double jeopardy. *Id.* ¶¶ 3, 28-29. In that case, the state relied on a single sale of narcotics to support charges of trafficking a controlled substance and conspiracy to commit the same. *Id.* ¶ 3. The court held that while there may be a crossover of evidence, in order to support the convictions, "New Mexico law . . . requires evidence of more than just the substantive crime" to support a conspiracy charge. *Id.* ¶ 26.

{42} Here, the State showed more than just the substantive crime of racketeering to support Defendant's conviction of conspiracy to racketeer. Defendant's charge for

conspiracy to racketeer stemmed from the multi-year operation and the multilayered conduct he and his co-conspirators engaged in over those many years. It did not stem from one single act as was the case in *Silvas*. The evidence of the conspiracy therefore does not rely solely on the substantive racketeering crime itself, primarily because Defendant formed many separate conspiracies with many different actors over the course of years in order to engage in the larger racketeering scheme. We hold that Defendant's conspiracy charges do not violate double jeopardy.

III. Sufficiency of the Evidence

{43} Defendant next argues that the State presented the jury with insufficient evidence to support eight of his convictions of racketeering, conspiracy to racketeer attempted trafficking, conspiracy to commit trafficking, three counts of money laundering, and conspiracy to commit money laundering.

{44} "The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Montoya*, 2015-NMSC-010, ¶ 52, 345 P.3d 1056 (internal quotation marks and citation omitted). The reviewing court "view[s] the evidence in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. We disregard all evidence and inferences that support a different result. *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829. "Jury instructions become the law of the case against which the sufficiency of the evidence is to be measured." *State v. Smith*, 1986-NMCA-089, ¶ 7, 104 N.M. 729, 726 P.2d 883.

A. Attempt to Traffic Methamphetamine

{45} We next address Defendant's conviction for attempt to commit trafficking methamphetamine. For a jury to find Defendant guilty of attempt to commit trafficking methamphetamine, the jury had to find that: (1) "[D]efendant intended to commit the crime of trafficking methamphetamine by possession with intent to distribute[,]" and (2) [D]efendant began to do an act which constituted a substantial part of the crime of trafficking methamphetamine by possession with intent to distribute but failed to commit trafficking methamphetamine by possession with intent to distribute[.]"

{46} Defendant challenges his conviction of attempted trafficking from the February 28, 2012 transport by Sammy Mitchell, which the Arizona police intercepted. Sammy Mitchell was arrested for possession of ten pounds of methamphetamine in the tire of his vehicle. The jury was presented with photographic evidence of Mitchell's vehicle at Defendant's Arizona home prior to his arrest. The jury also heard testimony indicating that Defendant and Catt knew Mitchell because they funded two separate $100 money orders for him and directed Sanders to mail them to him in jail. Mitchell trafficked the methamphetamine in the tire of his vehicle and was driving on the route Defendant was known to take from Phoenix to Alamogordo. Sanders transported methamphetamine the

same way as Mitchell, by Defendant filling a spare tire that is too small for the vehicle with plastic-wrapped methamphetamine. The jury could have reasonably inferred that Mitchell was a driver for the AZ Boys because mere weeks after his arrest, Catt approached Sanders about needing a new driver. Therefore, there was sufficient evidence to establish that Defendant attempted to traffic methamphetamine in February 2012 through Mitchell but the effort failed when Mitchell was arrested. *See Montoya*, 2015-NMSC-010, ¶ 53 (holding that substantial evidence may be comprised of either direct or circumstantial nature).

B. Three Counts of Money Laundering

{47} We next address Defendant's three convictions for money laundering. Each jury instruction varied slightly, but the State was responsible for proving: (1) "[D]efendant structured, or aided and abetted another to structure a financial transaction that involved property"; (2) "[D]efendant knew that the financial transaction was designed in whole or in part to avoid a transaction reporting requirement under state or federal law"; (3) "[t]he transaction involved over ten thousand dollars ($10,000), but not more than fifty thousand dollars ($50,000)." The money laundering charges focused on conduct that took place in March and April 2012. Defendant contends that the State failed to prove that Defendant received proceeds from an unlawful activity prior to undertaking the financial transaction.

{48} In March 2012, Defendant purchased a new truck for Sanders from Richardson Motor Company without her knowledge and without requiring her to financially contribute. Defendant paid for the truck with cash and he provided Sanders with cash to pay for the insurance coverage. Based on her experience driving for Defendant and Catt, the jury could have reasonably inferred that this truck was purchased in furtherance of the AZ Boys trafficking activities. The following month, in April 2012, Defendant purchased his black Mercedes SUV, also from Richardson Motor Company. He again paid for the vehicle with cash, breaking up the total cost of the vehicle into three cash payments, each below the $10,000 federal reporting requirement. The jury heard expert testimony that structuring a transaction this way avoids reporting the cash payments to the IRS. The jury was also presented evidence that over the course of five years, Defendant and other suspected members of the AZ Boys organization spent approximately $300,000 in cash on vehicles from Richardson Motor Company and did so without having any legitimate, reportable income. Finally, the State's expert witness, a former IRS agent, confirmed that such money could have come from trafficking methamphetamine. We conclude there was sufficient evidence to support Defendant's convictions for money laundering.

C. Racketeering

{49} We begin with Defendant's conviction for racketeering. For a jury to find Defendant guilty of racketeering, the jury had to find that:

1. There was an existence of an enterprise[;]

2. [D]efendant was associated with the enterprise[;]

3. [D]efendant participated in the conduct of the affairs of the enterprise through a pattern of racketeering through the commission of two or more crimes[;]

4. [D]efendant engaged in at least two incidents of racketeering with the intent to commit a prohibited activity, and at least one of the incidents of racketeering occurred within five years of a prior incident of racketeering[;]

5. This happened in New Mexico on or between the 1st day of November, 2007 and the 15th day of May, 2012.

"Whether [the d]efendant's activities constituted an association with others has been analyzed by this Court employing both statutory interpretation analysis using a de novo review and then a sufficiency of the evidence review of the particular facts in each case." *State v. Rivera*, 2009-NMCA-132, ¶ 8, 147 N.M. 406, 223 P.3d 951; *State v. Rael*, 1999-NMCA-068, ¶ 5, 127 N.M. 347, 981 P.2d 280 ("[W]hether [the d]efendant's association with others constituted an enterprise under the Racketeering Act is a matter of statutory interpretation, which is a question of law, not subject to the substantial evidence standard of review.").

{50} Under the Racketeering Act, NMSA 1978, §§ 30-42-1 to -6 (1980, as amended through 2015), "racketeering" is defined as "any act that is chargeable or indictable under the laws of New Mexico and punishable by imprisonment for more than one year," involving any of several enumerated offenses, including trafficking in controlled substances and money laundering. Section 30-42-3(A)(13),(20). A " 'pattern of racketeering activity' means engaging in at least two incidents of racketeering with the intent of accomplishing any of the prohibited activities set forth in Subsections A through D of Section 30-42-4." Section 30-42-3(D).

{51} Defendant only disputes the element of a "pattern of racketeering activity." He contends that the State failed to prove a pattern of racketeering because it only proved the May 1, 2012 trafficking, and a single racketeering related act cannot prove a pattern. This Court in *State v. Hughes*, 1988-NMCA-108, ¶ 20, 108 N.M. 143, 767 P.2d 382, expressly determined that "[a]lthough the state must prove both the existence of an 'enterprise' and a 'pattern of racketeering activity,' proof of these elements need not be, and often will not be, distinct and independent." *Id.* ¶¶ 26, 31.

{52} Here, the jury found at least two incidents of racketeering necessary for a pattern: money laundering and trafficking methamphetamine. Moreover, the Racketeering Act defines the acts as "chargeable or indictable[,]" not necessarily convictions. *See* § 30-42-3(A) (defining racketeering as "any act that is chargeable or indictable under the laws of New Mexico and punishable by imprisonment for more than one year," involving any of several enumerated offenses). The State presented evidence that Defendant committed three indictable acts of money laundering and three

indictable acts of trafficking methamphetamine with the intent of furthering the affairs of the AZ Boys enterprise.

{53} We conclude that the jury could have reasonably determined that the evidence of the multiple crimes of trafficking methamphetamine and money laundering through cash purchases of vehicles and other luxury items was sufficient to find that Defendant was engaged in racketeering.

D. Conspiracy to Commit Racketeering, Conspiracy to Commit Money Laundering, and Conspiracy to Traffic Methamphetamine

{54} Defendant challenges his convictions for conspiracy to commit racketeering, conspiracy to traffic methamphetamine, and conspiracy to commit money laundering on sufficiency of the evidence grounds. To find Defendant guilty of conspiracy of these substantive crimes, the jury must have found: (1) Defendant and another person by words or acts agreed together to commit the crime and (2) Defendant and the other person intended to commit the crime.

{55} There was sufficient evidence to support Defendant's conviction for conspiracy to racketeer. It bears repeating that the jury heard evidence that over the course of five years, Defendant and his brother Joe ran a sophisticated organization and directed many various actors to engage in criminal activity. The money from the methamphetamine trafficking was used to finance a lifestyle that included lavish vehicles, jewelry, electronics, etc. Each individual played a part in taking concerted action to contribute to an organization that carried out many substantive crimes. Without Defendant's oversight of the AZ Boys organization, none of these substantive crimes would have otherwise taken place.

{56} Because we have already discussed the sufficiency of the evidence, at length, to support Defendant's convictions for conspiracy to commit money laundering and conspiracy to commit trafficking, it is not necessary that we recite the evidence for purposes of the analysis here.

{57} The foregoing evidence, when viewed in the light most favorable to the verdict, is sufficient to support Defendant's convictions for charges of racketeering, attempt to traffic methamphetamine, money laundering, and the associated conspiracy charges.

IV. Hearsay

{58} At trial, Sanders testified about her relationship with Angela Catt, Defendant's girlfriend, who approached Sanders in March 2012 with an offer to drive round trip from Alamogordo to Phoenix in exchange for $1,000. Sanders described at length taking two trips to Phoenix with Defendant and Catt, and she testified as to statements Catt made to her regarding the logistics of the trips, Defendant's reactions to Sanders's driving, her fear of Defendant's violence, and more. Sanders testified that Catt told Sanders that Defendant "fucked her up" because Sanders messed up on the drive back, and

Defendant attributed fault to Catt since she recruited Sanders to drive. Additionally, while officers were detaining Defendant at his home in the early morning hours of May 1, 2012, Sanders and Catt spoke by telephone and Catt screamed at her "You're dead, bitch!" At trial, Defendant objected to Sanders testimony about statements Catt made to her on grounds of hearsay. The district court overruled Defendant's objection.

{59} The admission or exclusion of evidence is reviewed for an abuse of discretion. *State v. King*, 2015-NMSC-030, ¶ 23, 357 P.3d 949. "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the trial court abused its discretion by its ruling unless we can characterize [the ruling] as clearly untenable or not justified by reason." *Rojo*, 1999-NMSC-001, ¶ 41 (internal quotation marks and citation omitted).

{60} "Hearsay is an out-of-court statement offered to prove the truth of the matter asserted." *State v. Sisneros*, 2013-NMSC-049, ¶ 18, 314 P.3d 665; *see* Rule 11-801(C) NMRA. By definition, a statement "offered against an opposing party and . . . made by the party's co-conspirator during and in furtherance of the conspiracy" is not hearsay. Rule 11-801(D)(2)(e). Statements made in furtherance of the conspiracy "must somehow advance the objectives of the conspiracy, not merely inform the listener of the declarant's activities." *State v. Calderon*, 1991-NMCA-095, ¶ 6, 112 N.M. 400, 815 P.2d 1190 (internal quotation marks and citation omitted). "The co-conspirator's rule requires the proponent of the evidence to demonstrate: (1) [t]he existence of a conspiracy of which the declarant and the defendant were members, (2) that the statement was made in the course of that conspiracy, and (3) that the statement was made in furtherance of that conspiracy." *State v. Montes*, 2007-NMCA-083, ¶ 11, 142 N.M. 221, 164 P.3d 102. We require a "sufficient foundation establishing the existence of a conspiracy and that the co-conspirator's acts and statements were made in furtherance of the conspiracy" for Rule 11-801(D)(2)(e) to apply. *Montes*, 2007-NMCA-083, ¶ 11 (internal quotation marks omitted).

{61} Defendant argues that Catt's statements to Sanders were not made in furtherance of a conspiracy, but instead made in fear for her personal safety. In support of this argument, Defendant highlights statements Catt made to Sanders about an alleged battery Defendant committed against her after the first trip that Sanders drove to Phoenix. He claims that Catt made the statements out of concern for her personal well-being and therefore they do not illustrate the furtherance of a conspiracy. We disagree.

{62} Catt's statements to Sanders were in furtherance of a conspiracy to traffic methamphetamine. First, there was evidence that Sanders and Catt were members of the AZ Boys, conspiring to traffic methamphetamine. Second, Catt made the statements in the course of that conspiracy. The statements were made while Catt was recruiting Sanders and when Sanders had joined the AZ Boys. Finally, the statements were made in furtherance of the conspiracy to traffic methamphetamine. Catt's statements that Defendant beat her up because Sanders, Catt's friend and recommendation for a driver, drove poorly were made to convince Sanders to perform better as a driver in the drug trafficking organization, not out of fear. Catt's statements telling Sanders to obey all

traffic laws and do what Defendant told her to do were made to continue to conceal the criminal objectives of the AZ Boys and not be caught by the police trafficking methamphetamine. As shown above, there is a "sufficient foundation" that a conspiracy existed within the AZ Boys and that Catt and Sanders acted in furtherance of the conspiracy.

{63} The statements are not hearsay and instead were made by a co-conspirator during and in furtherance of the ongoing drug trafficking conspiracy. We therefore hold that the district court did not abuse its discretion in so ruling the statements admissible under Rule 11-801(D)(2)(e).

CONCLUSION

{64} For the aforementioned reasons, we affirm Defendant's convictions.

{65} IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

WE CONCUR:

J. MILES HANISEE, Judge

HENRY M. BOHNHOFF, Judge

1Defendant's indictment and judgment and sentence for conspiracy to commit racketeering was erroneously cited as Section 30-42-4(C) in the district court pleadings.