

STATE V. BRANCH

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STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
DEVIN BRANCH,
Defendant-Appellant.

No. A-1-CA-36258

COURT OF APPEALS OF NEW MEXICO

December 11, 2017

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY, Fred T. Van Soelen,
District Judge

COUNSEL

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JUDGES

J. MILES HANISEE, Judge. WE CONCUR: M. MONICA ZAMORA, Judge, STEPHEN
G. FRENCH, Judge

AUTHOR: J. MILES HANISEE

MEMORANDUM OPINION

HANISEE, Judge.

{1} Defendant has appealed from a conviction for trafficking a controlled substance. We issued a notice of proposed summary disposition in which we proposed to uphold

the conviction. Defendant has filed a memorandum in opposition. After due consideration, we affirm.

{2} The relevant background information has previously been described. We will avoid undue reiteration here, focusing instead on the content of the memorandum in opposition.

{3} Defendant continues to argue that the statements of a co-conspirator were admitted in derogation of his right to confrontation. [MIO 4-6] We remain unpersuaded. The Confrontation Clause is only implicated where testimonial statements are at issue. See *State v. Carmona*, 2016-NMCA-050, ¶ 15, 371 P.3d 1056. Testimonial statements include “formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions[,]” as well as “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *State v. Gurule*, 2013-NMSC-025, ¶ 35, 303 P.3d 838 (internal quotation marks and citation omitted). In this case, the challenged statements were made by Defendant’s co-conspirator to a confidential informant in the course of arranging a drug transaction. The co-conspirator was unaware that the purchaser was a confidential informant who was participating in a controlled buy. Under the circumstances, the statements cannot be characterized as testimonial in nature. See *State v. Telles*, 2011-NMCA-083, ¶ 20, 150 N.M. 465, 261 P.3d 1097 (observing that statements made unwittingly to government agents are not testimonial, and holding that a co-conspirator’s statements that were clandestinely recorded were non-testimonial in nature). Insofar as the informant was not a police officer and the declarant had no reason to believe that his statements would be used in a subsequent prosecution, we reject the suggested analogy to testimonial statements elicited in the course of police interrogations. [MIO 5-6] See generally *State v. Navarette*, 2013-NMSC-003, ¶ 8, 294 P.3d 435 (“[A] statement can only be testimonial if the declarant made the statement primarily intending to establish some fact with the understanding that the statement may be used in a criminal prosecution.”).

{4} Defendant also renews his challenge to the sufficiency of the evidence. [MIO 6-7] However, the evidence supplied by the confidential informant and the eyewitness account of the law enforcement officer who observed the transaction supplied sufficient direct and indirect proof of all of the essential elements. Although Defendant continues to argue that additional evidence should have been required to establish his possession of the controlled substance, such as fingerprint or DNA evidence, [MIO 6-7] we disagree. The circumstantial evidence, including Defendant’s observed actions, was sufficient to support the conviction. See generally *State v. Barber*, 2004-NMSC-019, ¶ 27, 135 N.M. 621, 92 P.3d 633 (“Proof of possession in controlled substances cases may be established by evidence of the conduct and actions of a defendant, and by circumstantial evidence connecting [the] defendant with the crime.”).

{5} Accordingly, for the reasons previously stated, we affirm.

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

J. MILES HANISEE, Judge

WE CONCUR:

M. MONICA ZAMORA, Judge

STEPHEN G. FRENCH, Judge