

STATE V. JAMES

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**STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
SERGIO JAMES,
Defendant-Appellant.**

No. 34,132

COURT OF APPEALS OF NEW MEXICO

March 24, 2016

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY, Drew D. Tatum,
District Judge

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, for Appellee

Jorge A. Alvarado, Chief Public Defender, Kathleen T. Baldrige, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

J. MILES HANISEE, Judge. WE CONCUR: MICHAEL E. VIGIL, Chief Judge, JAMES J. WECHSLER, Judge

AUTHOR: J. MILES HANISEE

MEMORANDUM OPINION

HANISEE Judge.

{1} Defendant appeals his conviction for trafficking a controlled substance. See NMSA 1978, § 30-31-20 (2006). We previously issued a notice of proposed summary disposition in which we proposed to affirm. Defendant has filed a combined

memorandum in opposition and motion to amend the docketing statement. After due consideration, we remain unpersuaded. We therefore affirm.

{2} The pertinent background information was previously set forth in the notice of proposed summary disposition. We will avoid undue reiteration here, focusing instead on the content of the memorandum in opposition.

{3} First, Defendant continues to challenge the admissibility of a video recording of a controlled buy. [DS 4; MIO 7-14] In the notice of proposed summary disposition, we observed that the State made an adequate foundational showing. See *generally State v. Glen Slaughter & Assocs.*, 1994-NMCA-169, ¶¶ 5-6, 119 N.M. 219, 889 P.2d 254. Defendant does not appear to challenge this aspect of our analysis. However, he continues to argue that his constitutional right to confront and cross-examine the confidential informant was violated. [MIO 7-14]

{4} We previously observed that Defendant's "own [recorded] statements . . . were non-testimonial and [as such, their admission does] not violate the Confrontation Clause." *State v. Telles*, 2011-NMCA-083, ¶ 19, 150 N.M. 465, 261 P.3d 1097; see *State v. Hernandez*, 2009-NMCA-096, ¶¶ 7, 16, 147 N.M. 1, 216 P.3d 251 (recognizing that a defendant's own admissions generally do not present Confrontation Clause concerns as long as they are authenticated and admitted through a proper vehicle). To the extent that Defendant and the confidential informant "talked freely with one another without police questioning," we similarly proposed to hold that any audible statements by the confidential informant were non-testimonial for Confrontation Clause purposes, notwithstanding the clandestine recording. *Telles*, 2011-NMCA-083, ¶ 20.

{5} In his memorandum in opposition Defendant clarifies that the audio portion of the recording contains a conversation between one of the agents and the confidential informant referencing \$100. [MIO 5] The recording then shows the confidential informant driving and "manipulating the visor on the rear view mirror and speaking on his cell phone." [MIO 5] After that, the confidential informant is seen getting out of the car, walking to a home, "being greeted by someone" and it also shows Defendant present at the home. [MIO 5] After a conversation about football, the audio is muted until the confidential informant is seen leaving the home. [MIO 5] Thereafter, the confidential informant hands a substance over to one of the agents, and the recording shows the agent holding up a bag of that substance, later determined to be cocaine. [MIO 5-6]

{6} Defendant contends that the confidential informant's recorded "statements and conduct" [MIO 7] should be regarded as testimonial in nature, such that his rights under the Confrontation Clause are implicated. [MIO 7-12] While acknowledging that no comprehensive definition of "testimonial" statements has been articulated, [MIO 19] Defendant argues that insofar as the confidential informant assuredly knew or should have known that his statements and actions, as reflected in the recording, would be used against Defendant in the course of the ensuing criminal prosecution, they should be regarded as testimonial. [MIO 10-12]

{7} As we previously observed, visual recordings are “not testimonial evidence but a species of real evidence.” *Glen Slaughter & Assocs.*, 1994-NMCA-169, ¶ 5. Insofar as the visual portion of the recording is not classifiable as a testimonial statement, we disagree with Defendant’s suggestion that the confidential informant’s actions implicate his constitutional right to confrontation. With respect to the audio portion of the recording, we note that Defendant’s argument appears to correlate with the “primary purpose test,” by which “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.” *State v. Navarette*, 2013-NMSC-003, ¶ 8, 294 P.3d 435. It is not at all clear that the recorded statements at issue in this case satisfy the primary purpose test. See, e.g., *Telles*, 2011-NMCA-083, ¶ 20 (holding that where the defendant and a confidential informant “talked freely with one another without police questioning,” the audible statements by the confidential informant were non-testimonial for Confrontation Clause purposes, notwithstanding the clandestine recording). For the present purposes we are willing to assume that the confidential informant’s statements fall within this category. However, the analysis does not end there. “The Confrontation Clause is violated only if the testimonial statement is offered to prove the truth of the matters asserted.” *Navarette*, 2013-NMSC-003, ¶ 12. In this case, the only matters asserted by the confidential informant involved a conversation about football, since it appears that a majority of the audio was muted. Clearly, the recording was not offered to prove the truth of any of the assertions made in that conversation. As a result, we remain unpersuaded that the recording is testimonial in nature such that the Confrontation Clause guarantees were violated.

{8} Finally, we address the motion to amend, by which Defendant seeks to challenge the sufficiency of the evidence to support his conviction. [MIO 15-19] Such a motion will only be granted if the argument is viable. See *State v. Sommer*, 1994-NMCA-070, ¶ 11, 118 N.M. 58, 878 P.2d 1007. For the reasons that follow, we conclude that the issue Defendant seeks to raise is not viable. We therefore deny the motion.

{9} When considering a challenge to the sufficiency of the evidence to support a conviction, “we must view 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.

{10} To obtain a conviction, the State was required to prove that Defendant transferred a controlled substance to another, he knew it was cocaine, and he committed the offense within New Mexico on or about the alleged date. [MIO 16; RP 271] See § 30-31-20(A)(2); UJI 14-3110 NMRA. In satisfaction of these elements, the State presented the recording discussed above, together with the testimony of the narcotics agents who organized the controlled buy and accepted the drugs from the confidential informant at the conclusion of the transaction. [MIO 2-7; 16-18] The agents’ testimony established that the confidential informant was given specific instruction to purchase crack cocaine from Defendant at 817 Edwards Street in Clovis, that the recording device was placed on the confidential informant by the narcotics agents, and that the confidential informant and his vehicle were searched both before and after the

transaction. [MIO 4-5] As previously mentioned, the recording reflects that the confidential informant drove to the location, where Defendant was present along with several others, that the confidential informant left the residence and drove to meet the agents, to whom he presented a substance which subsequently proved to be cocaine. [MIO 4-6] We conclude that this evidence, together with reasonable inferences drawn therefrom, was sufficient to support the fact finder's determination that Defendant transferred cocaine to the confidential informant on the date in question, knowing it to be cocaine.

{11} Defendant contends that the State's evidence should be deemed insufficient in light of the informational gaps in the recording, as well as the officers' lack of firsthand knowledge about the transaction and the confidential informant's motive and opportunity to falsely incriminate Defendant. [MIO 15-19] We acknowledge the circumstantial nature of the evidence presented below, as well as the fact that a different result could have been reached. However, these countervailing considerations do not render the verdict unsupported. "The finding of facts frequently involves selecting which inferences to draw. The possibility that on similar facts another trial court may have drawn different inferences . . . does not mean that we must reverse here." *State v. Anderson*, 1988-NMCA-033, ¶ 8, 107 N.M. 165, 754 P.2d 542 (citation omitted). We are similarly unpersuaded by Defendant's assertion that the evidence "is equally consistent" with a hypothesis of innocence. [MIO 18] *See generally State v. Chandler*, 1995-NMCA-033, ¶ 15, 119 N.M. 727, 895 P.2d 249 (stating that when a criminal defendant urges the equal hypotheses argument, appellate court's answer is that the jury, by its verdict, demonstrated that it considered the hypothesis it found to be more reasonable).

{12} Accordingly, for the reasons stated above and in the notice of proposed summary disposition, we affirm.

{13} IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:

MICHAEL E. VIGIL, Chief Judge

JAMES J. WECHSLER, Judge