NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	No. 1 CA-CR 12-0313 1 CA-CR 12-0603 (Consolidated)
v.	DEPARTMENT A
FRANKY SAUCEDO, Appellant.	**MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Yuma County

Cause No. S1400CR201100295

The Honorable John Neff Nelson, Judge

REVERSED AND REMANDED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Joseph T. Maziarz, Chief Counsel, Criminal Appeals Section
Barbara A. Bailey, Assistant Attorney General
Attorneys for Appellee

Michael A. Breeze, Yuma County Public Defender — Yuma
By Edward F. McGee, Deputy Public Defender
Attorneys for Appellant

J O H N S E N, Chief Judge

¶1 Franky Saucedo appeals his convictions of money laundering and use of wire or electronic communications in a drug-related transaction. We reverse the convictions and remand for a new trial.

FACTS AND PROCEDURAL BACKGROUND

¶2 The State indicted Saucedo on five drug-related offenses allegedly committed between February and April 2010: (1) Use of wire communication or electronic communication in drug related transactions, (2) participating in a criminal syndicate, (3) money laundering in the second degree, (4) conspiracy to transport narcotic drugs for sale and (5) conspiracy to possess narcotic drugs for sale.

¶3 The evidence presented at trial consisted primarily of wiretapped conversations between Saucedo's father, Rito, and Rito's associates. These conversations concerned a trip by Rito to the New York area in late March 2010, the purpose of which a special agent with the Drug Enforcement Administration ("DEA") testified was to pick up money in exchange for drugs.[1]

¶4 After Rito returned from the trip, he called Franky Saucedo to drive him to a site in Yuma, where Rito transferred what drug enforcement officers concluded from the wiretapped discussions was the money Rito had picked up in New York,

[1] Most of the men participating in the calls were not identified or were identified by first name only.

approximately $300,000. While Franky did not participate in the transfer of the money, he watched as Rito handed small dark bundles that purportedly contained the money to two other men at the site. A wiretap then captured a later conversation between Rito and Franky in which the two discussed where Franky had hidden $10,000 that law enforcement officers believed had been skimmed from the proceeds.

¶5 In later wiretapped conversations, Rito again discussed with persons other than Franky a future trip to the New York area in April 2010. Drug agents tracked Rito on this second cross-country trip and seized two knapsacks they saw him transfer to third parties. Agents found several shoe molds in the knapsacks. One of the agents testified that a substance in the molds appeared to be heroin and that a later DEA lab test confirmed it was heroin.

¶6 At the conclusion of the State's case-in-chief, the superior court granted Franky's motion for a directed verdict on both of the conspiracy charges. The jury ultimately convicted Franky on two of the remaining counts, use of wire communication or electronic communication in a drug-related transaction and money laundering in the second degree. The court imposed the presumptive term for each conviction, sentencing Franky to 2.5 years' incarceration on Count 1 and 3.5 years on Count 3, with the sentences to run concurrently.

¶7 We have jurisdiction of Franky's timely appeal pursuant to A.R.S. §§ 12-120.21(A)(1) (West 2013), 13-4031 (West 2013), and -4033(A)(1) (West 2013).[2]

DISCUSSION

A. The Superior Court Did Not Abuse Its Discretion in Admitting the Wiretapped Conversations Pursuant to Arizona Rule of Evidence 801(d)(2)(E).

¶8 Franky contests the superior court's admission of 19 wiretapped conversations in which he did not participate and six wiretapped conversations he had with Rito. He argues the court abused its discretion by admitting the conversations pursuant to Arizona Rule of Evidence ("Rule") 801(d)(2)(E), non-hearsay statements of co-conspirators, because he was acquitted on the conspiracy charges. The court admitted the wiretapped conversations over Franky's hearsay objection based on the prosecutor's avowal that she would offer evidence that Franky had joined the conspiracy. After the court acquitted Franky of the conspiracy charges, however, Franky did not ask the court to reconsider his hearsay objection, and the court did not do so *sua sponte*.

¶9 We review for an abuse of discretion a superior court's decision to admit statements of an alleged co-conspirator pursuant Rule 801(d)(2)(E). *State v. Dunlap*, 187

[2] Absent material revision after the date of an alleged offense, we cite a statute's current version.

Ariz. 441, 458, 930 P.2d 518, 535 (App. 1996). "An abuse of discretion is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.* (internal punctuation and citation omitted).

¶10 A statement offered to prove the truth of the matter asserted is hearsay. Ariz. R. Evid. 801. Pursuant to Rule 801(d)(2)(E), however, statements "made by the party's coconspirator during and in furtherance of the conspiracy" are not hearsay. Ariz. R. Evid. 801(d)(2)(E). Accordingly, "[a] coconspirator's statements are admissible when it has been shown that a conspiracy exists and the defendant and the declarant are parties to the conspiracy." *Dunlap,* 187 Ariz. at 458, 930 P.2d at 535 (internal punctuation and citation omitted). A defendant's involvement in a conspiracy may be established by circumstantial evidence. *See State v. Arredondo*, 155 Ariz. 314, 317, 746 P.2d 484, 487 (1987).

¶11 Contrary to Franky's argument, his acquittal on the conspiracy charges does not constitute a *de facto* finding that he was not a member of the conspiracy for purposes of Rule 801(d)(2)(E). A superior court may enter a judgment of acquittal only if there is "no substantial evidence" to support a conviction. Ariz. R. Crim. P. 20(a); *State v. Davolt*, 207 Ariz. 191, 212, ¶ 87, 84 P.3d 456, 477 (2004). "Substantial evidence is that which reasonable persons could accept as

sufficient to support a guilty verdict beyond a reasonable doubt." *Id.*

¶12 For purposes of Rule 801(d)(2)(E), however, the existence of a conspiracy and a defendant's involvement in it need only be established by a preponderance of the evidence. *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987). The superior court in this case accordingly could have found that the evidence did not meet the higher standard of proof for submission of the conspiracy charges to the jury, but did meet the lower standard of proof for admission of statements of co-conspirators under Rule 801(d)(2)(E). *See, e.g., United States v. Stanchich*, 550 F.2d 1294, 1298 (2d Cir. 1977) (judgment of acquittal on conspiracy charge was not necessarily inconsistent with admission of co-conspirator's declarations against defendant on other counts).

¶13 The superior court therefore did not abuse its discretion by implicitly finding that the evidence was sufficient to show by a preponderance that Franky was a participant in a conspiracy, so as to render the wiretapped conversations non-hearsay as statements of co-conspirators. The superior court reasonably could have concluded from Franky's driving Rito to the site, where he watched Rito transfer bundles of money to the two other men, that Franky was more likely than not involved with Rito in the drug trafficking conspiracy.

Additionally, Franky's conversation with Rito about hiding $10,000 purportedly skimmed from the $300,000 Rito brought back with him from a drug deal suggests that Franky knew of Rito's involvement in drug trafficking and was assisting in transferring proceeds received from trafficking. We cannot conclude, therefore, that the superior court's admission of the wiretapped conversations as statements of co-conspirators was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons," as necessary to find an abuse of discretion. *Dunlap*, 187 Ariz. at 458, 930 P.2d at 535.

¶14 We also note that the court did not abuse its discretion in allowing the jury to hear the statements made by Rito in the six recorded calls in which Franky participated. Franky does not dispute that it was appropriate for the jury to hear his side of those conversations, but contends, on hearsay grounds, that the jury should not have been permitted to hear Rito's statements in those conversations. Rito's statements, however, were not hearsay because they were not introduced to prove "the truth of the matter asserted," but rather, as Franky concedes, were offered to give meaning to Franky's own statements. *See United States v. Colon-Diaz*, 521 F.3d 29, 38 (1st Cir. 2008) (statement was not hearsay when admitted to give context to another's statement and make it "intelligible to the jury"); *United States v. Tolliver*, 454 F.3d 660, 666 (7th Cir.

2006) ("statements providing context for other admissible statements are not hearsay because they are not offered for their truth").

¶15 Franky also argues the admission of the conversations violated his Sixth Amendment right of confrontation. We review *de novo* evidentiary rulings that implicate the Confrontation Clause. *State v. Ellison,* 213 Ariz. 116, 129, ¶ 42, 140 P.3d 899, 912 (2006). The Confrontation Clause prohibits only the admission of "testimonial hearsay" from a witness who does not appear at trial. *See Crawford v. Washington*, 541 U.S. 36, 51, 68 (2004).

¶16 Although the Court in *Crawford* decided to "leave for another day any effort to spell out a comprehensive definition of 'testimonial,'" *id.* at 68, it described a "core class of 'testimonial' statements" that included, *inter alia*, "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." *Id.* at 51-52 (internal citations and punctuation omitted). In so doing, the *Crawford* court specifically noted that "statements in furtherance of a conspiracy" are "statements that by their nature [are] not testimonial." *Id.* at 56; *see also Giles v. California,* 554 U.S. 353, 374, n.6 (2008) ("[A]n incriminating statement in furtherance of the conspiracy would probably never be . . .

testimonial."); *State v. Tucker*, 231 Ariz. 125, ____, ¶ 49, 290 P.3d 1248, 1267 (App. 2012) ("[T]here is no requirement that a coconspirator's statement satisfy the Confrontation Clause to be admissible."). The conversations captured on the wiretaps plainly were not testimonial for purposes of the Confrontation Clause because the participants in the phone calls had no reason to anticipate that their statements would be used as evidence at a trial. The statements therefore were not testimonial under *Crawford*, and their admission did not violate Franky's confrontation rights.

B. Admission of the Agent's Statement About the Lab Test Results.

¶17 Franky next argues the superior court abused its discretion by admitting hearsay testimony from a DEA agent that "[t]here was a lab test done by our DEA lab in New York and all of the shoe molds were confirmed to contain heroin." Without comment, the superior court overruled Franky's contemporaneous hearsay objection to the testimony, then denied a motion Franky made the following day to strike the testimony on the ground that it violated his confrontation rights and lacked foundation.

¶18 We review evidentiary rulings for abuse of discretion, but we review evidentiary rulings that implicate the Confrontation Clause *de novo*. *Ellison,* 213 Ariz. at 129, ¶ 42, 140 P.3d at 903. We also review a superior court's erroneous

admission of testimony under a harmless error standard. *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993).

¶19 The DEA agent's statement about the laboratory test was offered for the truth of the matter asserted, i.e., that the substance found in the shoe molds was heroin. Although Franky timely objected to the statement as hearsay, the State argues on appeal that at the moment of the objection, it was "not apparent from the context" that the testimony was hearsay because it was not apparent that the witness himself had not performed the laboratory test he was describing. But an assertion that the witness had not performed the test himself was implicit in Franky's hearsay objection. Following the objection, the superior court did not require, and the prosecution did not offer, any explanation of the laboratory test or who had performed it.[3] The prosecution did not offer to lay foundation to show that the statement was not hearsay (i.e., that the agent himself performed the analysis); nor did it offer any other explanation of why, if the statement was hearsay, it came within some recognized exception to the hearsay rule.

[3] On appeal, the State does not point to any evidence that the agent who testified about the test performed the test himself or was associated with the "DEA lab in New York" that he said analyzed the substance. Moreover, nothing in the agent's description at trial of his background and experience might lead one to conclude he performed the test himself.

¶20 The State does not dispute that, if the testifying DEA agent did not perform the laboratory test, his statement describing the result of the test was hearsay. Nor does the State argue that if hearsay, the statement came within a recognized exception to the hearsay rule. On the record before us, we conclude that, in the absence of evidence that the testifying DEA agent performed the test, his testimony constituted inadmissible hearsay. Ariz. R. Evid. 801(c); *see Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 322 (2009) (reports generated for trial do not come within business records or public records exceptions to hearsay rule).[4]

¶21 To demonstrate that the erroneous admission of the statement was harmless, the State must prove beyond a reasonable doubt that the error "did not contribute to or affect the verdict or sentence." *State v. Henderson,* 210 Ariz. 561, 567, ¶ 18, 115 P.3d 601, 607 (2005) (citation omitted). The testimony that a laboratory tested the substance in the shoe molds and concluded that it was heroin constituted the only definitive direct evidence at trial that Rito was transporting drugs. The offenses of which Franky was convicted relied on a jury finding beyond a reasonable doubt that his actions were drug-related,

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[4] Because we conclude admission of the statement was reversible error, we need not address Franky's additional argument that admission of the statement violated his rights under the Confrontation Clause.

either in using a cell phone for a drug-related transaction or hiding proceeds from the sale of drugs. *See* A.R.S. § 13-3417(A) (use of a wire in a drug-related transaction requires finding in pertinent part that defendant used cell phone to facilitate a drug-related transaction); A.R.S. §§ 13-2317(B)(1), -2301(D)(4)(b)(xi) (money laundering requires finding in pertinent part that defendant knowingly received or concealed drug proceeds). Absent the evidence of the laboratory report that heroin was found on the molds, the only evidence that Franky was engaged in conduct relating to drug trafficking was an agent's interpretation of coded wiretapped conversations, an agent's surmise about the substance in the shoe molds and inferences from surveillance. On this record, we conclude the erroneous admission of the statement was not harmless because we cannot be certain that the agent's testimony about the laboratory test did not "contribute to or affect the verdict." *See Henderson*, 210 Ariz. at 567, ¶ 18, 115 P.3d at 607.

CONCLUSION

¶22 For the foregoing reasons, we reverse Franky's convictions and sentences and remand for a new trial.[5]

_______________/s/_________________
DIANE M. JOHNSEN, Chief Judge

CONCURRING:

________________/s/_________________
LAWRENCE F. WINTHROP, Presiding Judge

_______________/s/__________________
MARGARET H. DOWNIE, Judge

[5] Because we have reversed and remanded the convictions, we need not address Franky's contention that the prosecutor engaged in misconduct and violated his due-process rights and separation of powers principles by arguing a statutory definition of accomplice liability when the jury was not instructed on accomplice liability.