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1           **IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO**

2 **STATE OF NEW MEXICO,**

3                   **Plaintiff-Appellee,**

4           **v.**

**No. 34,132**

5 **SERGIO JAMES,**

6                   **Defendant-Appellant.**

7 **APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY**

8 **Drew D. Tatum, District Judge**

9 Hector H. Balderas, Attorney General

10 Santa Fe, NM

11 for Appellee

12 Jorge A. Alvarado, Chief Public Defender

13 Kathleen T. Baldridge, Assistant Appellate Defender

14 Santa Fe, NM

15 for Appellant

16                                   **MEMORANDUM OPINION**

17 **HANISEE Judge.**

1 {1} Defendant appeals his conviction for trafficking a controlled substance. *See*  
2 NMSA 1978, § 30-31-20 (2006). We previously issued a notice of proposed summary  
3 disposition in which we proposed to affirm. Defendant has filed a combined  
4 memorandum in opposition and motion to amend the docketing statement. After due  
5 consideration, we remain unpersuaded. We therefore affirm.

6 {2} The pertinent background information was previously set forth in the notice of  
7 proposed summary disposition. We will avoid undue reiteration here, focusing instead  
8 on the content of the memorandum in opposition.

9 {3} First, Defendant continues to challenge the admissibility of a video recording  
10 of a controlled buy. [DS 4; MIO 7-14] In the notice of proposed summary disposition,  
11 we observed that the State made an adequate foundational showing. *See generally*  
12 *State v. Glen Slaughter & Assocs.*, 1994-NMCA-169, ¶¶ 5-6, 119 N.M. 219, 889 P.2d  
13 254. Defendant does not appear to challenge this aspect of our analysis. However, he  
14 continues to argue that his constitutional right to confront and cross-examine the  
15 confidential informant was violated. [MIO 7-14]

16 {4} We previously observed that Defendant’s “own [recorded] statements . . . were  
17 non-testimonial and [as such, their admission does] not violate the Confrontation  
18 Clause.” *State v. Telles*, 2011-NMCA-083, ¶ 19, 150 N.M. 465, 261 P.3d 1097; *see*  
19 *State v. Hernandez*, 2009-NMCA-096, ¶¶ 7, 16, 147 N.M. 1, 216 P.3d 251

1 (recognizing that a defendant's own admissions generally do not present  
2 Confrontation Clause concerns as long as they are authenticated and admitted through  
3 a proper vehicle). To the extent that Defendant and the confidential informant "talked  
4 freely with one another without police questioning," we similarly proposed to hold  
5 that any audible statements by the confidential informant were non-testimonial for  
6 Confrontation Clause purposes, notwithstanding the clandestine recording. *Telles*,  
7 2011-NMCA-083, ¶ 20.

8 {5} In his memorandum in opposition Defendant clarifies that the audio portion of  
9 the recording contains a conversation between one of the agents and the confidential  
10 informant referencing \$100. [MIO 5] The recording then shows the confidential  
11 informant driving and "manipulating the visor on the rear view mirror and speaking  
12 on his cell phone." [MIO 5] After that, the confidential informant is seen getting out  
13 of the car, walking to a home, "being greeted by someone" and it also shows  
14 Defendant present at the home. [MIO 5] After a conversation about football, the audio  
15 is muted until the confidential informant is seen leaving the home. [MIO 5]  
16 Thereafter, the confidential informant hands a substance over to one of the agents, and  
17 the recording shows the agent holding up a bag of that substance, later determined to  
18 be cocaine. [MIO 5-6]

1 {6} Defendant contends that the confidential informant’s recorded “statements and  
2 conduct” [MIO 7] should be regarded as testimonial in nature, such that his rights  
3 under the Confrontation Clause are implicated. [MIO 7-12] While acknowledging that  
4 no comprehensive definition of “testimonial” statements has been articulated, [MIO  
5 19] Defendant argues that insofar as the confidential informant assuredly knew or  
6 should have known that his statements and actions, as reflected in the recording,  
7 would be used against Defendant in the course of the ensuing criminal prosecution,  
8 they should be regarded as testimonial. [MIO 10-12]

9 {7} As we previously observed, visual recordings are “not testimonial evidence but  
10 a species of real evidence.” *Glen Slaughter & Assocs.*, 1994-NMCA-169, ¶ 5. Insofar  
11 as the visual portion of the recording is not classifiable as a testimonial statement, we  
12 disagree with Defendant’s suggestion that the confidential informant’s actions  
13 implicate his constitutional right to confrontation. With respect to the audio portion  
14 of the recording, we note that Defendant’s argument appears to correlate with the  
15 “primary purpose test,” by which “a statement can only be testimonial if the declarant  
16 made the statement primarily intending to establish some fact with the understanding  
17 that the statement may be used in a criminal prosecution.” *State v. Navarette*,  
18 2013-NMSC-003, ¶ 8, 294 P.3d 435. It is not at all clear that the recorded statements  
19 at issue in this case satisfy the primary purpose test. *See, e.g., Telles*, 2011-NMCA-

1 083, ¶ 20 (holding that where the defendant and a confidential informant “talked  
2 freely with one another without police questioning,” the audible statements by the  
3 confidential informant were non-testimonial for Confrontation Clause purposes,  
4 notwithstanding the clandestine recording). For the present purposes we are willing  
5 to assume that the confidential informant’s statements fall within this category.  
6 However, the analysis does not end there. “The Confrontation Clause is violated only  
7 if the testimonial statement is offered to prove the truth of the matters asserted.”  
8 *Navarette*, 2013-NMSC-003, ¶ 12. In this case, the only matters asserted by the  
9 confidential informant involved a conversation about football, since it appears that a  
10 majority of the audio was muted. Clearly, the recording was not offered to prove the  
11 truth of any of the assertions made in that conversation. As a result, we remain  
12 unpersuaded that the recording is testimonial in nature such that the Confrontation  
13 Clause guarantees were violated.

14 {8} Finally, we address the motion to amend, by which Defendant seeks to  
15 challenge the sufficiency of the evidence to support his conviction. [MIO 15-19] Such  
16 a motion will only be granted if the argument is viable. *See State v. Sommer*,  
17 1994-NMCA-070, ¶ 11, 118 N.M. 58, 878 P.2d 1007. For the reasons that follow, we  
18 conclude that the issue Defendant seeks to raise is not viable. We therefore deny the  
19 motion.

1 {9} When considering a challenge to the sufficiency of the evidence to support a  
2 conviction, “we must view the evidence in the light most favorable to the guilty  
3 verdict, indulging all reasonable inferences and resolving all conflicts in the evidence  
4 in favor of the verdict.” *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711,  
5 998 P.2d 176.

6 {10} To obtain a conviction, the State was required to prove that Defendant  
7 transferred a controlled substance to another, he knew it was cocaine, and he  
8 committed the offense within New Mexico on or about the alleged date. [MIO 16; RP  
9 271] *See* § 30-31-20(A)(2); UJI 14-3110 NMRA. In satisfaction of these elements, the  
10 State presented the recording discussed above, together with the testimony of the  
11 narcotics agents who organized the controlled buy and accepted the drugs from the  
12 confidential informant at the conclusion of the transaction. [MIO 2-7; 16-18] The  
13 agents’ testimony established that the confidential informant was given specific  
14 instruction to purchase crack cocaine from Defendant at 817 Edwards Street in Clovis,  
15 that the recording device was placed on the confidential informant by the narcotics  
16 agents, and that the confidential informant and his vehicle were searched both before  
17 and after the transaction. [MIO 4-5] As previously mentioned, the recording reflects  
18 that the confidential informant drove to the location, where Defendant was present  
19 along with several others, that the confidential informant left the residence and drove

1 to meet the agents, to whom he presented a substance which subsequently proved to  
2 be cocaine. [MIO 4-6] We conclude that this evidence, together with reasonable  
3 inferences drawn therefrom, was sufficient to support the fact finder's determination  
4 that Defendant transferred cocaine to the confidential informant on the date in  
5 question, knowing it to be cocaine.

6 {11} Defendant contends that the State's evidence should be deemed insufficient in  
7 light of the informational gaps in the recording, as well as the officers' lack of  
8 firsthand knowledge about the transaction and the confidential informant's motive and  
9 opportunity to falsely incriminate Defendant. [MIO 15-19] We acknowledge the  
10 circumstantial nature of the evidence presented below, as well as the fact that a  
11 different result could have been reached. However, these countervailing considerations  
12 do not render the verdict unsupported. "The finding of facts frequently involves  
13 selecting which inferences to draw. The possibility that on similar facts another trial  
14 court may have drawn different inferences . . . does not mean that we must reverse  
15 here." *State v. Anderson*, 1988-NMCA-033, ¶ 8, 107 N.M. 165, 754 P.2d 542 (citation  
16 omitted). We are similarly unpersuaded by Defendant's assertion that the evidence "is  
17 equally consistent" with a hypothesis of innocence. [MIO 18] *See generally State v.*  
18 *Chandler*, 1995-NMCA-033, ¶ 15, 119 N.M. 727, 895 P.2d 249 (stating that when a  
19 criminal defendant urges the equal hypotheses argument, appellate court's answer is

1 that the jury, by its verdict, demonstrated that it considered the hypothesis it found to  
2 be more reasonable).

3 {12} Accordingly, for the reasons stated above and in the notice of proposed  
4 summary disposition, we affirm.

5 {13} **IT IS SO ORDERED.**

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**J. MILES HANISEE, Judge**

8 **WE CONCUR:**

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**MICHAEL E. VIGIL, Chief Judge**

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**JAMES J. WECHSLER, Judge**