SUMMARY
September 14, 2023

2023COA78

No. 19CA0376, *People v. Woodyard* — Crimes — Money Laundering — Colorado Organized Crime Control Act — Conspiracy; Constitutional Law — Fourth Amendment — Searches and Seizures — Reasonable Expectation of Privacy

A division of the court of appeals addresses a number of issues arising from convictions on numerous drug-distribution-related charges. Distinguishing *People v. Tafoya*, 2021 CO 62, the division holds that the police's use of a camera mounted on a telephone pole to surveil the street and sidewalk in front of the defendant's residence for about seven weeks was not a search within the meaning of the Fourth Amendment to the United States Constitution. Therefore, the district court did not err by denying the defendant's motion to suppress the evidence obtained from that camera. The division also holds that to prove money laundering under section 18-5-309(1)(b)(I), C.R.S. 2023, there must be evidence

that the defendant transferred money to someone else; evidence that the defendant received money from someone else does not prove money laundering under that subsection. But the division rejects the defendant's argument that to prove money laundering under that subsection, the prosecution must present evidence that the money transferred in the charged transaction came from committing another offense.

The division addresses other issues as well, applying settled law. Ultimately, the division reverses the defendant's two convictions for violating the Colorado Organized Crime Control Act, vacates many of the money laundering convictions, reverses a few of the conspiracy to distribute illegal drugs convictions, and otherwise affirms.

COLORADO COURT OF APPEALS **2023COA78**

Court of Appeals No. 19CA0376
Jefferson County District Court No. 16CR2265
Honorable Tamara Russell, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Jacob Benjamin Woodyard,

Defendant-Appellant.

JUDGMENT AFFIRMED IN PART, VACATED IN PART,
AND REVERSED IN PART, AND CASE REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE J. JONES
Dunn and Lum, JJ., concur

Announced September 14, 2023

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¶ 1 This case arose from a law enforcement investigation of illegal drug distribution. Investigators determined that defendant, Jacob Benjamin Woodyard, bought substantial quantities of various kinds of illegal drugs and resold the drugs using a number of underlings.

¶ 2 A jury found Woodyard guilty of two counts of violating the Colorado Organized Crime Control Act (COCCA), § 18-17-104(3), (4), C.R.S. 2023;[1] fourteen counts of conspiracy to distribute a controlled substance; five counts of conspiring to commit money laundering; five counts of money laundering; one count of possession with intent to distribute a controlled substance (methamphetamine); and one count of possession of a controlled substance (cocaine). The district court later adjudicated Woodyard a habitual offender on six habitual offender counts, each involving a different prior felony conviction.

¶ 3 The court sentenced Woodyard to ninety-six years in the custody of the Department of Corrections on each of the COCCA convictions after applying the habitual offender multiplier.

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[1] One of the COCCA convictions was for engaging in a pattern of racketeering activity, § 18-17-104(3), C.R.S. 2023, and the other was for conspiring to engage in a pattern of racketeering activity, § 18-17-104(4).

Woodyard received sentences ranging from sixty-four years to six months on the other convictions. The court ordered all the sentences to run concurrently.

¶ 4 On appeal, Woodyard attacks his convictions in total or in part on several separate grounds. He also challenges the constitutionality of his ninety-six-year sentences on his COCCA convictions. We conclude, applying the Colorado Supreme Court's intervening decision in *McDonald v. People*, 2021 CO 64, that the prosecution failed to prove, and the jury didn't find, a statutory element of the offense — an "enterprise." This is because the prosecution failed to present sufficient evidence that Woodyard was part of "an ongoing organization of associates, functioning as a continuing unit, that exist[ed] separate and apart from the pattern of racketeering activity in which it engage[d]," and the district court didn't instruct the jury on that concept. *Id.* at ¶ 4; *see also id.* at ¶¶ 46, 59. But because the evidence was sufficient to convict Woodyard on the COCCA charges under the previously controlling formulation of the "enterprise" element, the prosecution may retry Woodyard on those charges. *Id.* at ¶¶ 63-68.

¶ 5 We also conclude that the evidence was insufficient to convict Woodyard of eight of the money laundering charges because there was no evidence that he transferred money to someone else. So we must vacate those convictions. Certain of Woodyard's conspiracy convictions merge with other conspiracy convictions because the merged convictions are based on the same agreement. But we reject Woodyard's contentions based on the admission of evidence and, because of our resolution of his challenge to his COCCA convictions, we don't address the merits of his remaining contentions.

¶ 6 The bottom line is that we reverse Woodyard's COCCA convictions, reverse the sentences on those two convictions, and remand the case for a new trial on the COCCA charges. We vacate eight of the ten money laundering convictions. We reverse three of the conspiracy convictions, which merge with other conspiracy convictions. In all other respects, we affirm.

I. The District Court Did Not Violate Woodyard's Statutory Right to a Speedy Trial

¶ 7 Woodyard contends that the district court erred by denying his motion to dismiss the case because the court violated his statutory

right to a speedy trial by beginning his trial beyond his statutory speedy trial deadline. *See* § 18-1-405(1), C.R.S. 2023. We disagree.[2]

¶ 8 Woodyard entered a not guilty plea on May 1, 2017, making his speedy trial deadline November 1, 2017. Trial was set for October 23, 2017.

¶ 9 On July 17, the prosecution moved to join Woodyard's trial with that of one of his confederates, Jared Andersen. Andersen's speedy trial deadline was October 3, 2017, and his trial had been set to begin on September 19. Following a hearing, the court granted the prosecution's motion, over defense counsel's objection, finding that all the evidence against one defendant would be admissible against the other, their defenses weren't antagonistic, and trying the cases separately would be "a waste of time and effort." The court rejected defense counsel's argument that the prosecution had waited too long to seek to join the cases.

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[2] We address this issue first because if Woodyard is right that the court violated his statutory right to a speedy trial, all his convictions must be vacated, and the charges must be dismissed. § 18-1-405(1), C.R.S. 2023; *see People v. Nunez*, 2021 CO 31, ¶¶ 17, 23.

¶ 10 Woodyard's attorney then indicated that he could not try the case on September 19 — Andersen's trial date. Neither defendant's counsel could try the case before September 19, one or more of the defense attorneys had conflicts between September 19 and October 23 (Woodyard's trial date), Andersen's counsel couldn't try the case on October 23, and neither Woodyard's counsel nor Andersen's counsel could try the case before November 1.

¶ 11 The court set the trial for February 12, 2018 — a date acceptable to counsel for both defendants. In so doing, the court once again rejected Woodyard's counsel's arguments that the prosecution had unreasonably delayed in moving for joinder and rejected Woodyard's counsel's argument that the cases hadn't been properly joined. It ruled that under section 18-1-405(6)(c), a new trial date could be set outside the speedy trial deadline because the inability to set a date within the deadline was attributable to defense counsel's unavailability.

¶ 12 One week before trial, Woodyard's counsel moved to dismiss the case for violation of speedy trial. The court denied the motion, reiterating its previous rulings.

¶ 13 Woodyard argues that the district court erred because he was not the "moving force" for the delay in conducting the trial; the prosecution's "late" motion for joinder was. He also argues that section 18-1-405(6)(c) only authorized a delay of Andersen's trial date to October 23 — Woodyard's trial date — and that the court never found there was good cause for not granting a severance. These arguments fail.

¶ 14 We begin with section 18-1-405(6)(c). It provides that the speedy trial deadline may be extended for "[a] reasonable period . . . when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and there is good cause for not granting a severance."

¶ 15 Woodyard seems to argue initially that section 18-1-405(6)(c) shouldn't apply to him because the prosecution "dilly-dallied" in seeking joinder. The district court found otherwise, and its finding is supported by the record. (Woodyard doesn't argue in his opening brief that joinder was otherwise inappropriate.)[3]

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[3] Woodyard argues in his reply brief that most of the evidence against Andersen wasn't admissible against him. Given the COCCA and conspiracy charges, that argument appears incorrect. In any

¶ 16 We also reject Woodyard's argument that section 18-1-405(6)(c) can't apply because the district court failed to find good cause for not severing the cases. The court acknowledged this issue and said it had found there was no good cause for severance.

¶ 17 As for setting the joint trial beyond Woodyard's speedy trial deadline, the court's ruling was consistent with *People v. Reynolds*, 159 P.3d 684, 686-87 (Colo. App. 2006), and *People v. Backus*, 952 P.2d 846, 848-50 (Colo. App. 1998), in which divisions of this court held that delays attributable to a codefendant's counsel's unavailability were reasonable delays under section 18-1-405(6)(c). *See also Hills v. Westminster Mun. Ct.*, 245 P.3d 947, 948, 950-51 (Colo. 2011) (delay attributable to defense counsel's scheduling conflict is attributable to the defendant for speedy trial purposes). The delay beyond Woodyard's speedy trial date was entirely attributable to defense counsel's unavailability.[4]

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event, we don't consider arguments made for the first time in a reply brief. *People v. Czemerynski*, 786 P.2d 1100, 1107 (Colo. 1990), *abrogated on other grounds by Rojas v. People*, 2022 CO 8.

[4] For this reason, this case is distinguishable from *People v. DeGreat*, 2020 CO 25, on which Woodyard relies.

¶ 18 The court's ruling was also consistent with federal law applying a substantially identical federal statute. Recall that Andersen's speedy trial deadline was October 3 and Woodyard's was November 1. Under the federal counterpart to section 18-1-405(6)(c) — 18 U.S.C. § 3161(h)(6)[5] — when two (or more) codefendants' statutory speedy trial dates are different, the latest statutory speedy trial date becomes the statutory speedy trial date for all codefendants. *United States v. Cortes-Gomez*, 926 F.3d 699, 704-05 (10th Cir. 2019); *United States v. Margheim*, 770 F.3d 1312, 1318-19 (10th Cir. 2014). And if there is a delay attributable to a codefendant beyond the latest such statutory speedy trial date, that delay is attributable to all codefendants if it is reasonable. *Cortes-Gomez*, 926 F.3d at 705.

¶ 19 We see little daylight between our appellate courts' approach to this issue and the federal approach. Indeed, we think the federal approach merely makes more explicit what is both explicit and

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[5] This provision is part of the Speedy Trial Act of 1974. It says that "[a] reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted" is excludable from the speedy trial period. 18 U.S.C. § 3161(h)(6). It is therefore almost identical to section 18-1-405(6)(c).

implicit in section 18-1-405 and our case law interpreting that statute. Under the federal approach, when Andersen's and Woodyard's cases were joined, Andersen's statutory speedy trial date was extended to Woodyard's statutory speedy trial date — November 1 — if such an extension was reasonable. That seems implicit in the language of section 18-1-405(6)(c). And when Andersen needed a continuance beyond November 1, that continuance, if reasonable, applied to extend Woodyard's speedy trial date as well. To the extent further delays in the trial date were the result of Woodyard's counsel's scheduling conflicts, those delays are attributable to Woodyard. *See* § 18-1-405(6)(f). And under section 18-1-405(6)(c), any further delays attributable to Andersen's counsel's scheduling conflicts are also attributable to Woodyard if such delays were reasonable. *See Reynolds*, 159 P.3d at 686 (noting that a delay resulting from a codefendant's request for a continuance was reasonable).

¶ 20 The upshot is that under section 18-1-405(6)(c) and (f), any delay in the statutory speedy trial date beyond November 1 caused by defense counsels' scheduling conflicts extended Woodyard's statutory speedy trial date, except that any delay caused by

Andersen's counsel would not extend Woodyard's statutory speedy trial deadline to the extent any such delay was, from Woodyard's standpoint, unreasonable. But Woodyard doesn't argue that any such delay was unreasonable.

¶ 21 Therefore, we conclude that the district court didn't err by denying Woodyard's motion to dismiss.

II. The Pole Camera Video Was Not Obtained in Violation of the Fourth Amendment

¶ 22 Woodyard contends that the district court erred by allowing the prosecution to introduce evidence in the form of video recorded by a camera affixed to a telephone pole by law enforcement. He argues that the continuous recording of the area shown by the video for a period of forty-nine days constituted a warrantless search in violation of the Fourth Amendment to the United States Constitution and article II, section 7 of the Colorado Constitution. We conclude that the district court properly denied Woodyard's counsel's motion to suppress this evidence because there was no constitutionally cognizable search.

A. Additional Facts

¶ 23 Woodyard lived in a unit of a multi-family complex on a cul-de-sac. As part of their investigation, police installed three cameras near Woodyard's residence. Only one of the cameras — one on a telephone pole — is at issue. That camera recorded activity on the street and sidewalk running in front of the building containing Woodyard's unit. It also showed a small sliver of grass presumably in front of Woodyard's unit. But it didn't show any part of Woodyard's unit (or the building it was in): another building blocked the view of Woodyard's unit. Unrebutted testimony also established that a person could enter or exit the front of Woodyard's unit via another walkway and street without being seen by the camera.

¶ 24 The camera operated for about seven weeks. The prosecution used parts of the recording to show who came and went from Woodyard's unit, and when they did so.

¶ 25 Woodyard moved to suppress the evidence obtained from the camera, arguing that the long-term, continuous surveillance constituted a warrantless search in violation of the Fourth Amendment to the United States Constitution. Following an

evidentiary hearing, the district court denied the motion. It ruled that the surveillance wasn't a search within the purview of the Fourth Amendment because the camera could only see an unenclosed area — the public street and sidewalk — "that anyone walking down the street could see." Therefore, the court reasoned, Woodyard didn't have any privacy interest in the area surveilled.

B. Applicable Law and Standard of Review

¶ 26 The Fourth Amendment generally requires the police to obtain a warrant before conducting a "search." *Henderson v. People*, 879 P.2d 383, 387 (Colo. 1994); *see United States v. Karo*, 468 U.S. 705, 714-15 (1984). For Fourth Amendment purposes, a "search" occurs "when the government violates a subjective expectation of privacy that society recognizes as reasonable." *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (citing *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)); *see also People v. Tafoya*, 2021 CO 62, ¶ 25. Determining whether the defendant had a legitimate expectation of privacy such that the police's actions constituted a search requires consideration of all relevant facts and circumstances. *Tafoya*, ¶ 25; *People v. Shorty*, 731 P.2d 679, 681 (Colo. 1987).

¶ 27 We defer to the district court's factual findings if they have record support and review de novo the court's legal conclusions. *Tafoya*, ¶ 23.

C. Analysis

¶ 28 Relying primarily on the Colorado Supreme Court's decision in *Tafoya*, Woodyard contends that the district court erred by concluding that the pole camera surveillance didn't constitute a search within the purview of the Fourth Amendment. But *Tafoya* is clearly distinguishable.

¶ 29 In *Tafoya*, the police surveilled Tafoya's front yard, backyard, and driveway, for more than three months, using a camera mounted on a utility pole across the street from his property. The detached garage, backyard, and part of the driveway were enclosed by a six-foot-high privacy fence. *Tafoya*, ¶¶ 1, 5. The camera allowed the police to view these parts of Tafoya's property "not usually visible to members of the public." *Id.* at ¶ 5. The evidence at issue was obtained from video surveillance of those enclosed portions of the property. *Id.* at ¶¶ 7-9.

¶ 30 After canvassing the relevant law, the supreme court held that the long-term, continuous surveillance of the enclosed portions of

Tafoya's curtilage constituted a search. First, the court held that Tafoya had a subjective expectation of privacy in the area surveilled because it was his backyard (part of his house's curtilage); the area was "significantly set back from the street, so a person standing on the street could not see into the backyard"; "Tafoya maintained a six-foot-high privacy fence around the backyard"; and he used a gate "to further prevent the public from being able to see into his backyard." *Id.* at ¶ 42.

¶ 31 Second, the court held, after considering "the public exposure of the area as well as the duration, continuity, and nature of the surveillance," that Tafoya's subjective expectation of privacy was one that society is prepared to recognize as reasonable. *Id.* at ¶ 43; *see also id.* at ¶¶ 44-49. In that context, the court repeatedly emphasized that the area surveilled was the enclosed portion of the curtilage of Tafoya's house. *Id.* at ¶¶ 44-46, 48-49; *see also id.* at ¶ 5 n.2 ("It is the camera's ability to record Tafoya's *fenced-in* curtilage . . . that is at issue here.") (emphasis added).

¶ 32 This case is much different. Woodyard didn't have a subjective expectation of privacy in the area surveilled. That area included a public street, a public sidewalk, and a small sliver of

grass — presumably in front of Woodyard's unit. The record is devoid of any indication that Woodyard did anything — such as erecting a fence — to demonstrate a subjective expectation of privacy in that small area next to the sidewalk. *See id.* at ¶ 42 (backyard was "significantly set back from the street" and enclosed by a six-foot-high privacy fence). That area was open to residents of other units and to the public generally.

¶ 33 Nor would any subjective expectation of privacy that Woodyard had in the area surveilled be one that society is prepared to recognize as reasonable. Again, that area is not merely accessible or exposed to the public, it is owned by the public (with the possible exception of the visible sliver of grass). Woodyard cites no authority holding that a person has a reasonable expectation of privacy in a public street or sidewalk.

¶ 34 *Carpenter v. United States*, 585 U.S. ___, 138 S. Ct. 2206 (2018), and *United States v. Jones*, 565 U.S. 400 (2012), on which Woodyard relies in this context, don't support his position. In *Carpenter*, the Court held that the police's collection of four months' worth of the defendant's cell phone site location information from his wireless carrier constituted a search subject to the Fourth

Amendment. In reaching that conclusion, the Court said that persons have a "reasonable expectation of privacy in the whole of their physical movements," *Carpenter*, 585 U.S. at ___, 138 S. Ct. at 2217; the information at issue provided the police "a comprehensive chronicle of the user's past movements," *id.* at ___, 138 S. Ct. at 2211; and by using that information the police could track the defendant's "familial, political, professional, religious, and sexual associations," *id.* at ___, 138 S. Ct. at 2217 (quoting *Jones*, 565 U.S. at 415 (Sotomayor, J., concurring)). The Court emphasized, however, "the unique nature of cell phone location information," characterizing its decision as a "narrow one" that doesn't "call into question conventional surveillance techniques and tools, such as security cameras." *Id.* at ___, 138 S. Ct. at 2220.

¶ 35 This case doesn't involve the sort of "comprehensive" tracking of a person's movements at issue in *Carpenter*, nor does it involve the gathering of information generated by the defendant's property.

¶ 36 In *Jones*, the Court held that there was a Fourth Amendment search when officers attached a GPS device to the defendant's car and tracked the car's movement for four weeks. The Court based its decision on the defendant's property right in his car. *Jones*, 565

U.S. at 404 ("The Government physically occupied private property for the purpose of obtaining information."). Justice Alito, joined by three other justices, concurred in the judgment but reasoned that it was enough that the defendant had a reasonable expectation of privacy; specifically, Justice Alito said that GPS monitoring of "every single movement of an individual's car for a very long period" is something "the average person[]" wouldn't expect. *Id.* at 427-30 (Alito, J., concurring in the judgment).

¶ 37 This case obviously doesn't involve any trespass on Woodyard's property. And though the court in *Tafoya* observed that the Supreme Court in *Carpenter* had essentially applied the approach of Justice Alito's concurrence in *Jones*, *see Tafoya*, ¶ 35, and therefore concluded that "the duration, continuity, and nature of the surveillance matter," *id.* at ¶ 36, as discussed, both *Tafoya* and *Carpenter* are distinguishable because of significant differences between the facts of those cases and the facts of this one.

¶ 38 In sum, we conclude that Woodyard didn't have a reasonable expectation of privacy in the area surveilled by the pole camera. Therefore, there was no Fourth Amendment search. It follows that the district court didn't err by denying Woodyard's motion to

suppress. *See United States v. May-Shaw*, 955 F.3d 563, 568-69 (6th Cir. 2020) (three-plus weeks of camera surveillance of a parking lot near the defendant's apartment and a covered carport next to the apartment building wasn't a search because "the footage and photos only revealed what May-Shaw did in a public space — the parking lot"); *United States v. Flores*, Crim. A. No. 1:19-CR-389-LMM-CCB-15, 2022 WL 19828971, *3-4, *15-18 (N.D. Ga. Nov. 17, 2022) (unpublished order and recommendation) (forty-four-day pole camera surveillance of several apartment buildings and adjoining parking lot wasn't a search; distinguishing *Tafoya*, *Carpenter*, and *Jones*), *adopted in relevant part*, 2023 WL 3095566 (N.D. Ga. Apr. 26, 2023) (unpublished order); *United States v. Bronner*, No. 3:19-cr-109-J-34JRK, 2020 WL 3491965, *10, *21-23 (M.D. Fla. May 18, 2020) (unpublished report and recommendation) (six-week pole camera surveillance of the front and side of a residence wasn't a search; distinguishing *Carpenter*, *Jones*, and the Colorado Court of Appeals' decision in *People v. Tafoya*, 2019 COA 176), *adopted*, 2020 WL 3490192 (M.D. Fla. June 25, 2020) (unpublished order); *see also United States v. Dennis*, 41 F.4th 732, 740-41 (5th Cir. 2022) (surveillance by pole cameras of front and back of the

defendant's house, open to public view, wasn't a search), *cert. denied*, 599 U.S. ___, ___ S. Ct. ___, 2023 WL 3937640 (June 12, 2023).

III. The COCCA Convictions Must Be Reversed

¶ 39 Woodyard contends that the evidence introduced at trial was insufficient to convict him of the two COCCA charges. His contention is premised on *McDonald v. People*, 2021 CO 64, decided after the trial in this case, in which the supreme court held that to prove a COCCA charge alleging an "associated-in-fact enterprise," the prosecution must prove, among other things, an ongoing organization of associates who functioned as a continuing unit that existed separately from the pattern of racketeering conduct in which it engaged. *Id.* at ¶ 45. According to Woodyard, the prosecution didn't present evidence proving such an organization. We agree with Woodyard.

A. Additional Background

¶ 40 As relevant in this case, COCCA section 18-17-104(3) makes it "unlawful for any person employed by, or associated with, any enterprise to knowingly conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity."

Section 18-17-104(4) makes it unlawful to conspire to violate section 18-17-104(3). A grand jury indicted Woodyard on one count each of violating sections 18-17-104(3) and -104(4).

¶ 41 COCCA defines an "enterprise" as "any individual, sole proprietorship, partnership, corporation, trust, or other legal entity or any chartered union, association, or group of individuals, associated in fact although not a legal entity, and shall include illicit as well as licit enterprises and governmental as well as other entities." § 18-17-103(2), C.R.S. 2023. At issue in this case is the category "group of individuals associated in fact." COCCA doesn't define that phrase. But in *People v. James*, 40 P.3d 36 (Colo. App. 2001), *overruled by McDonald*, 2021 CO 64, the division rejected the argument that such an association — indeed, any "enterprise" under COCCA — must be an ongoing organization, operate as a continuing unit, and be separate and apart from the pattern of racketeering activity, all of which must be shown in a federal prosecution under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968. *James*, 40 P.3d at 47-48.

¶ 42 In this case, the district court, without objection, instructed the jury on the elements of the COCCA charges without defining an "enterprise."[6] And Woodyard's counsel never argued that the prosecution was required to prove an associated-in-fact enterprise as defined under RICO, much less that it had failed to do so.

¶ 43 But while this case was on appeal, the Colorado Supreme Court handed down *McDonald*, which expressly overruled *James* and held that (1) proof of a COCCA associated-in-fact enterprise requires proof of the aforementioned attributes applicable in RICO prosecutions and (2) the jury must be instructed as to those "structural features." *McDonald*, ¶¶ 44-46, 53, 59. So Woodyard now argues that the evidence admitted at trial was insufficient because there was no evidence of "an ongoing organization" of "associates function[ing] as a continuing unit" that existed "separate and apart from the racketeering activity." He also argues that the district court plainly erred by failing to properly instruct the jury on the meaning of an associated-in-fact enterprise as articulated in *McDonald*. We agree with Woodyard's sufficiency of

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[6] The court instructed the jury that it must find that Woodyard was "employed by, or associated with, an enterprise."

the evidence argument and therefore don't need to address his instructional argument.

B. Standard of Review

¶ 44 "[W]e review the record de novo to determine whether the evidence before the jury was sufficient both in quantity and quality to sustain the convictions." *Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005). In performing that review, we must look at the evidence, both direct and circumstantial, in the light most favorable to the prosecution and must give the prosecution the benefit of every inference that may reasonably be drawn from the evidence. *People v. Perez*, 2016 CO 12, ¶¶ 24-25. Ultimately, we must decide whether "the quantity and quality of the relevant evidence would support a fair-minded jury's finding 'that the guilt of the accused has been established beyond a reasonable doubt with regard to each essential element of the crime.'" *Id.* at ¶ 24 (quoting *People v. Gonzales*, 666 P.2d 123, 128 (Colo. 1983)).

C. Analysis

¶ 45 Before turning to the merits of Woodyard's challenge, we must address the People's argument that Woodyard's counsel invited any error by successfully moving to preclude any evidence of

Woodyard's and his associates' affiliations with certain white supremacist gangs.

¶ 46 Woodyard's counsel filed a motion in limine to exclude evidence of Woodyard's and witnesses' "alleged affiliation with Aryan-power and Nazi-affiliated gangs both inside and outside of prisons (e.g. — '211 Gang,' 'Nazi Low Riders,' etc.)." The motion argued that such evidence was irrelevant, *see* CRE 401, unfairly prejudicial even if relevant, *see* CRE 403, and improper character evidence, *see* CRE 404. The prosecution responded that such evidence was directly relevant to proving an associated-in-fact enterprise, an element of the COCCA charges. Such evidence would not be unfairly prejudicial, the prosecution argued, because it was highly relevant and wouldn't provoke a verdict based on some improper consideration, particularly if the court were to instruct the jurors on the limited purpose for which they could consider it. As for Rule 404(b), the prosecution argued that such evidence wasn't evidence of bad acts and wouldn't be offered to show Woodyard's character, but rather to show Woodyard's involvement in an enterprise and commission of racketeering acts in support of that enterprise.

¶ 47 The court held a hearing on Woodyard's motion. The prosecution argued primarily that the gangs — of which Woodyard and many of his co-conspirators were members or associates — enabled Woodyard and his confederates to sell drugs as a way of helping gang members get on their feet after getting out of prison (and to obtain the gang's trust), to obtain money to send to other gang members, and to obtain money to put into gang members' prison accounts. In short, the gangs were the enterprise and the drug sales were racketeering acts furthering the enterprise.

¶ 48 The district court granted Woodyard's motion, reasoning that the evidence of gang affiliation didn't have "anything to do with proving this case" and that it would be "highly prejudicial" and was therefore excludable under Rule 403.

¶ 49 "The doctrine of invited error prevents a party from complaining on appeal of an error that he or she has invited or injected into the case; the party must abide the consequences of his or her acts." *People v. Rediger*, 2018 CO 32, ¶ 34 (citing *People v. Zapata*, 779 P.2d 1307, 1309 (Colo. 1989)); *accord People v. Collins*, 730 P.2d 293, 304-05 (Colo. 1986).

¶ 50 We conclude that the invited error doctrine doesn't apply. Recall that at the time of the court's ruling excluding the evidence, and at the time of trial, the controlling law was that the prosecution wasn't required to prove an enterprise separate from the pattern of racketeering to prove an associated-in-fact enterprise. *James*, 40 P.3d at 47-48. Thus, the probative value of the evidence the prosecution sought to introduce didn't carry as much probative value as it does after *McDonald*. So the court arguably didn't err — at least at the time of the ruling — by affording the evidence little (or no) probative value and determining that the danger of unfair prejudice outweighed any probative value. *But see People v. Martinez*, 24 P.3d 629, 633-34 (Colo. App. 2000) (evidence of the defendant's gang affiliation was relevant in murder prosecution because the prosecution's theory was that the defendant aided, abetted, advised, and encouraged his fellow gang members in their criminal actions); *People v. Mendoza*, 876 P.2d 98, 102-03 (Colo. App. 1994) (evidence of gang affiliation was relevant to show the defendant's motive to murder the victim). And, therefore, Woodyard's counsel arguably didn't lead the court astray. True, *McDonald* later changed the calculus. But it is hard to fault a party

for taking a position seemingly consistent with the controlling precedent at the time of decision, at least when there was no indication at the time that subsequent legal developments would undermine the foundation of the controlling precedent. And the People haven't cited, and we haven't found, any case applying the invited error doctrine in these circumstances. We turn then to the merits of Woodyard's challenge.

¶ 51 We agree with Woodyard that there was little or no evidence of an associated-in-fact enterprise apart from the pattern of racketeering activity itself. In arguing to the contrary, the People point to evidence that Woodyard was "close to" and "lived together" with certain of his associates and had "strong connections" with others. But that evidence fails to show the kind of "structure" — the "ongoing organization of associates functioning as a continuing unit," *McDonald*, ¶ 46 — required to prove an associated-in-fact enterprise.

¶ 52 We agree with the People, however, that the prosecution's proof was sufficient to sustain the COCCA convictions under the law at the time of trial. Indeed, the evidence overwhelmingly satisfied that legal standard. *See James*, 40 P.3d at 47-48.

Therefore, as in *McDonald*, the People aren't precluded by the double jeopardy bar from retrying Woodyard on the COCCA charges. *McDonald*, ¶¶ 61-68. We reverse Woodyard's convictions on the two COCCA charges and remand the case for a new trial on those charges.[7]

IV. Most of the Money Laundering Convictions Must Be Vacated

¶ 53 Woodyard challenges his convictions on five counts of money laundering and five counts of conspiracy to commit money laundering, arguing that the evidence of the underlying transactions showed that he received money in those transactions, not that he transferred money in those transactions. He says the provision of the money laundering statute under which he was charged required proof that he transferred money to someone else; proof that he received money from someone else didn't satisfy the statutory requirement of a transfer. As to one of the convictions for money laundering and the corresponding conspiracy conviction

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[7] In light of our resolution of Woodyard's sufficiency of the evidence challenge, we don't need to address his challenge to the COCCA elemental jury instruction, which is also based on the court's holding in *McDonald v. People*, 2021 CO 64. And we don't need to address his challenges to his COCCA sentences.

(Counts 10 and 11), Woodyard also argues that there was no evidence of a financial transaction other than him purchasing drugs, and there must be evidence of a transaction using the drug proceeds apart from any evidence of the transaction generating the proceeds. We agree with Woodyard's first contention but not his second.

A. Additional Background

¶ 54 The People charged Woodyard with five counts of money laundering under section 18-5-309(1)(b)(I), C.R.S. 2023, which provides as follows:

> A person commits money laundering if he . . . [t]ransports, transmits, or transfers a monetary instrument or moneys . . . [w]ith the intent to promote the commission of a criminal offense . . . .

¶ 55 And the People charged Woodyard with five counts of conspiring to violate this statute. *See* § 18-2-201(1), C.R.S. 2023. The ten charges were based on five transactions:

- *Counts 10 (conspiracy) and 11 (money laundering).* On May 14, 2016, Woodyard gave about $9,000 to one of his suppliers, Nicholas Karampelas, in return for two pounds of methamphetamine that he expected to receive later.

- *Counts 16 (conspiracy) and 17 (money laundering).* On May 16, 2016, Cedric Clark transferred $1,250 through Western Union. Andersen picked up the money after first Woodyard and Clark and then Woodyard and Andersen had spoken on the phone about how much Clark was to pay for the drugs.
- *Counts 25 (conspiracy) and 26 (money laundering).* On May 22, 2016, Cody Stark paid Woodyard for heroin and methamphetamine Woodyard had delivered the day before.
- *Counts 29 (conspiracy) and 30 (money laundering).* On May 23, 2016, Stark paid $6,400 to Woodyard for heroin and methamphetamine he had received from Woodyard sometime previously.
- *Counts 35 (conspiracy) and 36 (money laundering).* On May 26, 2016, Stark paid Woodyard $6,600 for several ounces of methamphetamine he had received from Woodyard the previous day.

¶ 56 The jury found Woodyard guilty of all these charges.

B. Standard of Review

¶ 57 Because Woodyard's arguments raise issues of statutory interpretation, we review de novo. *People v. Robles-Sierra*, 2018 COA 28, ¶ 35. In interpreting the money laundering statute, we strive to determine and give effect to the General Assembly's intent. *Mosley v. People*, 2017 CO 20, ¶ 16. First we look to the statute's language, considering it as a whole and in context. *People v. Iannicelli*, 2017 COA 150, ¶ 12, *aff'd on other grounds*, 2019 CO 80. If the language is clear and unambiguous, we enforce it as written and don't resort to other tools of statutory construction. *See id.*; *People v. Lahr*, 2013 COA 57, ¶ 31.

C. Analysis

¶ 58 As relevant to this case, the plain language of the subsection of the money laundering statute under which Woodyard was charged required the prosecution to prove that Woodyard — the "person" or "he" — "[t]ransport[ed], transmit[ted], or transfer[red] . . . moneys." § 18-5-309(1)(b)(I). As a matter of basic grammar, it plainly identifies an actor — the person charged — who did the transporting, transmitting, or transferring of the money. *See*

Pellegrin v. People, 2023 CO 37, ¶ 22 (we construe a statute "according to the rules of grammar and common usage").

¶ 59 The People argue, however, that dictionary definitions of "transfer" — "to cause to pass from one to another," Merriam-Webster Dictionary, https://perma.cc/Z8FY-QHA5, and "[t]o convey or remove from one place or one person to another," Black's Law Dictionary 1803 (11th ed. 2019) — "cover[] individuals like Woodyard, who orchestrate transactions, generally through others, regardless of their role as supplier or recipient."[8] But the People's position ignores the structure of the statutory sentence. While it may be that a person could violate the statute by acting through someone else, that someone else must have transferred money *to* another. In other words, it isn't enough that the person charged was involved in a transfer (as the term is understood when used as a noun); the person charged must have done the transferring (as the term is understood when used, as in the statute, as a verb).

[8] The first definition of "transfer" from the online version of the Merriam-Webster Dictionary, https://perma.cc/Z8FY-QHA5, cited by the People is "to convey from one person, place, or situation to another."

And the person must have transferred "moneys," not something else in exchange for moneys.

¶ 60 Nor are we persuaded by the People's argument that subsection (1)(b)(I) of section 18-5-309 should be construed as applying to persons who transfer *or* receive money because subsections (1)(a) and (1)(c) apply to such persons. Those subsections are written differently than subsection (1)(b)(I). They apply to a person who "conducts a financial transaction" (or in the case of subsection (1)(a), also to a person who "attempts to conduct a financial transaction"), § 18-5-309(1)(a), (c), and subsection (3)(a) defines "[c]onducts or attempts to conduct a financial transaction" as "initiating, concluding, or participating in the initiation or conclusion of a transaction." That phrase, then, is broad enough to include not only someone who transfers money as part of a "transaction," but also one who receives money as part of the "transaction." But subsection (1)(b)(I) doesn't use that phrase, and subsection (1)(b)(I) is the provision under which the People charged Woodyard and the court instructed the jury.

¶ 61 We therefore conclude that the prosecution failed to prove Counts 16, 17, 25, 26, 29, 30, 35, and 36 because there was no

evidence that Woodyard transferred money in the transactions charged in those counts. We vacate those convictions. *See People v. Bott*, 2019 COA 100, ¶ 23, *aff'd*, 2020 CO 86.

¶ 62 That still leaves Counts 10 and 11, which were based on evidence that Woodyard transferred money to another. Woodyard argues that the convictions on those counts must be vacated because there was no evidence of a separate crime distinct from the underlying offense (the drug transaction) that generated the money transferred. This time we disagree with Woodyard.

¶ 63 As noted, Counts 10 and 11 were based on a transaction in which Woodyard paid a supplier about $9,000 for drugs.

¶ 64 Section 18-5-309(1)(b)(I) proscribes transporting, transmitting, or transferring a monetary instrument or money "[w]ith the intent to promote the commission of *a criminal offense*." (Emphasis added.) Can the "criminal offense" for purposes of this subsection be the transaction itself in which the money is transported, transmitted, or transferred? Woodyard says no. We say yes (under certain circumstances).

¶ 65 Woodyard's argument goes as follows. Colorado's money laundering statute is substantially similar to the federal money

laundering statute, 18 U.S.C. § 1956; therefore, we should look to federal cases interpreting the federal statute for guidance in interpreting the state statute. Federal courts, he says, have interpreted the federal statute to require proof of a separate crime distinct from the underlying offense that generated the money. For that proposition, Woodyard relies on *United States v. Castro-Aguirre*, 983 F.3d 927 (7th Cir. 2020). Because, Woodyard says, the prosecution didn't present any such evidence, but only submitted evidence of a drug deal in which money was paid, the evidence was insufficient to support the convictions on Counts 10 and 11.

¶ 66 But upon close inspection of the federal statute itself and federal cases interpreting that statute, Woodyard's argument falls apart.

¶ 67 Like the Colorado money laundering statute, 18 U.S.C. § 1956 provides various ways that a person can be guilty of money laundering. Subsections (a)(1), (a)(2)(B), and (a)(3) proscribe certain transactions or transfers involving "proceeds of specified unlawful activity" and "property represented to be the proceeds of specified unlawful activity, or property used to conduct or facilitate specified unlawful activity." These provisions are substantially similar to

subsections (1)(a), (1)(b)(II), and (1)(c) of section 18-5-309. Subsection (a)(2)(A) of 18 U.S.C. § 1956 provides that it is unlawful to transport, transmit, or transfer (or attempt to transport, transmit, or transfer) "a monetary instrument or funds" from the United States to a person outside the United States or to the United States from a place outside the United States "with the intent to promote the carrying on of specified unlawful activity." That provision — excluding the international transfer requirement — is substantially similar to subsection (1)(b)(I) of section 18-5-309, under which Woodyard was charged.

¶ 68 Federal courts have indeed interpreted the provisions of the federal money laundering statute proscribing transfers of "proceeds of specified unlawful activity" to require proof of a covered offense apart from the transfer itself. *Castro-Aguirre* is one such case. 983 F.3d at 941-42 (applying 18 U.S.C. § 1956(a)(1)); *see also United States v. Malone*, 484 F.3d 916, 920-21 (7th Cir. 2007). But Woodyard wasn't charged and convicted under any state counterpart to subsections (a)(1), (a)(2)(B), or (a)(3) of § 1956. Rather, he was charged and convicted under the state counterpart to subsection (a)(2)(A) of § 1956. And as to that subsection, the

federal courts have held that because it doesn't require proof of a transaction involving (or a transfer of) "proceeds" of criminal activity, proof of an offense separate from the transaction or transfer isn't required. *See*, *e.g.*, *United States v. Krasinski*, 545 F.3d 546, 549-51 (7th Cir. 2008); *United States v. Piervinanzi*, 23 F.3d 670, 680-82 (2d Cir. 1994) ("[Section] 1956(a)(2) contains no requirement that 'proceeds' first be generated by unlawful activity, followed by a financial transaction with those proceeds, for criminal liability to attach."); *United States v. Nazemzadeh*, Crim. No. 11 CR 5726 L, 2014 WL 310460, *11-13 (S.D. Cal. Jan. 28, 2014) (unpublished order). What is required is proof that the transaction or transfer promoted the carrying on of certain unlawful activity. *Krasinski*, 545 F.3d at 551.

¶ 69 Accepting Woodyard's premise that federal cases interpreting the federal money laundering statute should be deemed persuasive, *see People v. Butler*, 2017 COA 98, ¶ 17 (construing section 18-5-309), *aff'd*, 2019 CO 87, and persuaded by the federal courts' reasoning, we hold that in a prosecution under section 18-5-309(1)(b)(I), the People aren't required to prove that the funds involved in the transaction or transfer were derived from a

preceding offense separate from the transaction or transfer charged. It is enough that the People prove that the transaction or transfer promoted the "commission of a criminal offense."

¶ 70 In this case, the evidence was sufficient under that test. Counts 10 and 11 charged a transaction in which Woodyard paid one of his suppliers $9,000 for two pounds of methamphetamine. That transaction promoted the continuation of Woodyard's ongoing illegal drug distribution operation. Therefore, sufficient evidence supports the jury's verdict on these charges. *See Krasinski*, 545 F.3d at 551 (evidence was sufficient under 18 U.S.C. § 1956(a)(2) — the federal counterpart to section 18-5-309(1)(b)(I) — where the "transport and transfer of funds contributed to the drug conspiracy's prosperity and furthered it along").[9]

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[9] Indeed, this transaction may have been sufficient to establish culpability under section 18-5-309(1)(a)(I), C.R.S. 2023 — the state counterpart to 18 U.S.C. § 1956(a)(1)(A)(i), addressed in *Castro-Aguirre* — because federal courts have interpreted that federal "proceeds" provision to apply when a payment for drugs encourages other drug transactions. *See United States v. Fitzgerald*, 496 F. App'x 175, 178-79 (3d Cir. 2012) (citing cases).

V. The Cell Tower Location Evidence Was Admissible

¶ 71 Woodyard next contends that the district court abused its discretion by allowing a police officer — Detective O'Laughlin — to testify concerning "cell tower location evidence." Detective O'Laughlin testified as to maps he prepared purporting to show the cell towers through which certain phone calls were routed, which would show the caller's approximate location. Woodyard argues that (1) only an expert could give such testimony, and Detective O'Laughlin wasn't offered as an expert and failed to provide foundation that could only be given by an expert; (2) the maps were inadmissible hearsay; and (3) two maps that hadn't been admitted into evidence were given to the jury by mistake.

A. Additional Background

¶ 72 Troy Miller, a technical services specialist employed by the Fort Collins Police Department and assigned to the Northern Colorado Drug Task Force, testified, without objection, as an expert in wiretap interceptions and a software program known as ASACS that is used to monitor telephone conversations. He explained how that program works, including that it collects data provided by phone companies and generates reports showing the telephone

number of a call, "the location and the direction of the call if it is incoming [or] outgoing, [and] approximate location based upon cell phone towers." He also testified that the program can't manipulate the information it receives from a phone company and that law enforcement can't manipulate the information provided by the program. Defense counsel didn't object to this testimony, and Woodyard doesn't challenge any of it on appeal.

¶ 73 Detective O'Laughlin later testified about what he did with the reports generated by ASACS relating to calls made and received by Woodyard and others. He would take the cell phone tower information from a report, type that location into the Google Maps website, and "hit enter." That process, he said, was similar to typing in a street address, but using latitude and longitude instead. According to Detective O'Laughlin, "anyone" could do what he did with the data; no special training was required.

¶ 74 Evidence in the form of testimony or exhibits (typically maps) was introduced by the prosecution through Detective O'Laughlin and others based on the ASACS data and resulting Google searches. According to Woodyard, the prosecution used that

evidence in connection with Counts 3-5, 7, 20, 23-27, 29, 30, 34-36, and the COCCA charges (Counts 1 and 2).

¶ 75 During Detective O'Laughlin's testimony about what he did with the ASACS data, Woodyard's counsel objected on the bases that the testimony on the ASACS data identifying cell phone towers was expert testimony (and Detective O'Laughlin hadn't been admitted as an expert) and that the information showing that a call from a particular cell phone "is associated with a tower" was hearsay. The court overruled those objections.

B. Standard of Review

¶ 76 We review a district court's evidentiary rulings for an abuse of discretion. *Venalonzo v. People*, 2017 CO 9, ¶ 15 (lay versus expert testimony); *People v. Abad*, 2021 COA 6, ¶ 8 (hearsay). The court abused its discretion if its decision was manifestly arbitrary, unreasonable, or unfair, or based on a misapprehension or misapplication of the law. *People v. Baker*, 2019 COA 165, ¶ 12, *aff'd*, 2021 CO 29.

¶ 77 If we determine that the court abused its discretion, and the defendant preserved the issue by timely, specific objection, we must reverse unless the error was harmless. *Campbell v. People*, 2019

CO 66, ¶ 22.[10] An error is harmless if it didn't substantially influence the verdict or impair the fairness of the trial. *Id.*

C. Analysis

1. Lay Versus Expert Testimony

¶ 78 Lay testimony is that which "could be expected to be based on an ordinary person's experiences or knowledge." *Venalonzo*, ¶ 23. Expert testimony, in contrast, is that which "could not be offered without specialized experiences, knowledge, or training." *Id.*

¶ 79 Detective O'Laughlin's testimony wasn't expert testimony. He only input data into a Google website; the website generated maps showing the locations of cell phone towers. As Detective O'Laughlin testified, it took no specialized experience, knowledge, or training to do what he did; "anyone" could have done it.

¶ 80 Woodyard's reliance on *People v. Shanks*, 2019 COA 160, is misplaced. In that case, the division held that the court properly admitted an expert's testimony analyzing historical cell site data without first holding a *Shreck* hearing. *See People v. Shreck*, 22 P.3d 68 (Colo. 2001). Implicit in *Shanks*, Woodyard argues, is that

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[10] The People concede that Woodyard's contentions are preserved. For purposes of our analysis, we will assume that they are.

testimony about how cell phone towers function or testimony analyzing cell phone site data is expert testimony. But Detective O'Laughlin didn't give any such testimony.

¶ 81 Perhaps it could be argued that expert testimony was necessary to lay a *foundation* for the evidence of Woodyard's approximate location offered through the information used by Detective O'Laughlin. But Woodyard's counsel didn't make that objection below, and Woodyard doesn't make that argument on appeal.[11]

2. Hearsay

¶ 82 Woodyard next argues, in rather conclusory fashion, that the maps printed from the Google website were hearsay. But the maps were automatically generated based on information Detective O'Laughlin provided. Detective O'Laughlin's testimony about what he did obviously couldn't have been hearsay, and because the maps were automatically generated, they weren't statements subject to CRE 801. *See Abad*, ¶¶ 53-56.

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[11] The People argue that Miller's testimony provided the necessary foundation for Detective O'Laughlin's testimony. We don't need to decide that issue.

3. Harmless Error

¶ 83 Even if the district court abused its discretion by admitting the testimony and exhibits relating to cell phone location, any error was harmless. As Woodyard concedes, the evidence related only to certain charges. More importantly, this evidence added little independent oomph to the prosecution's case. Every charged transaction was also proved with evidence of intercepted phone calls, direct surveillance and observation, and eyewitness testimony. Accordingly, any error doesn't require reversal. *See Pettigrew v. People*, 2022 CO 2, ¶¶ 53-59; *People v. Bryant*, 2018 COA 53, ¶¶ 74-77.[12]

VI. Certain Conspiracy Convictions Must Be Merged

¶ 84 Woodyard contends that his convictions on both Count 23 and Count 24 for conspiracy to distribute a controlled substance are multiplicitous — violating his right to be free from double jeopardy — because they are based on conduct that occurred on the same

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[12] Woodyard also contends that two exhibits — maps marked Exhibits 50 and 52 — were given to the jury though the court didn't admit them into evidence. But the record doesn't clearly show that these exhibits were in fact given to the jury. And for the reasons given above, any error would be harmless.

date. He makes the same contention with respect to the conspiracy convictions on Counts 40-42. Under the specific facts presented, we agree with Woodyard's contentions.

A. Standard of Review and Applicable Law

¶ 85 The heart of Woodyard's argument is that Counts 23 and 24 are based on a single agreement (or criminal episode), as are Counts 40-42. We review de novo whether the evidence shows one agreement. Because Woodyard's counsel didn't raise this issue in the district court, we won't reverse unless any error was plain. *See People v. Zadra*, 2017 CO 18, ¶ 18. Plain error is error that is obvious and that so undermined the fundamental fairness of the proceeding as to cast serious doubt on the reliability of the judgment. *Hagos v. People*, 2012 CO 63, ¶ 14.

¶ 86 Section 18-2-201(4) provides that "[i]f a person conspires to commit a number of crimes, he is guilty of only one conspiracy so long as such multiple crimes are part of a single criminal episode." This provision helps effectuate the constitutional prohibition of multiplicitous convictions, a form of double jeopardy. *See Woellhaf v. People*, 105 P.3d 209, 214 (Colo. 2005). Thus, "a single conspiratorial agreement may not be divided into multiple charges."

People v. Davis, 2017 COA 40M, ¶ 17; *see Braverman v. United States*, 317 U.S. 49, 53-54 (1942); *People v. Brown*, 185 Colo. 272, 277, 523 P.2d 986, 989 (1974), *overruled on other grounds by Villafranca v. People*, 194 Colo. 472, 573 P.2d 540 (1978).

¶ 87 To determine whether charges arise from a single criminal episode, we look to whether (1) the acts alleged occurred during the same period; (2) the type of overt act alleged is the same; (3) the unlawful objectives of the charged conspiracies are the same; (4) the modus operandi is the same; and (5) the same evidence would be relevant to the charges. *Pinelli v. Dist. Ct.*, 197 Colo. 555, 558, 595 P.2d 225, 227 (1979). Factors indicating that the People charged multiple criminal episodes include that the defendant was "charged with conspiring (1) with different parties; (2) in different countries; (3) in different agreements; and [4] with allegations of different overt acts." *Id.*; *see also Davis*, ¶ 19 (noting that federal courts employ a similar multi-factor test to determine whether there was only one agreement, and thus only one conspiracy).

B. Analysis

1. Counts 23 and 24

¶ 88 Count 23 charged Woodyard with conspiracy to distribute methamphetamine on May 21, 2016, and named the conspirators as Woodyard, Andersen, and Stark. Count 24 charged Woodyard with also conspiring to distribute heroin on May 21, 2016, and also named the conspirators as Woodyard, Andersen, and Stark. The indictment alleged that Woodyard and Andersen went to Stark's residence that same day to deliver the methamphetamine and cocaine. (Woodyard doesn't raise any issue with respect to Count 24 charging conspiracy to distribute heroin and the evidence showing instead conspiracy to distribute cocaine.)

¶ 89 The prosecution's theory for bringing separate charges was that there were two separate agreements arising from the same telephone call on the same day (May 16): Stark first asked Woodyard whether Woodyard could supply him with methamphetamine, and Woodyard agreed to supply Stark with five ounces of methamphetamine; and seconds later, Stark asked whether Woodyard had any heroin. Woodyard said he didn't but agreed, at Stark's suggestion, to supply Stark with cocaine.

¶ 90 We conclude that there was only one agreement — or criminal episode — arising from that telephone call. Supplying Stark with the two types of drugs was discussed in the same telephone call mere seconds apart. The conspirators were the same. There was only one overt act — Woodyard's delivery of both methamphetamine and cocaine to Stark. Woodyard played the same role with respect to both drugs — he was the supplier. And the evidence proving both charges was essentially the same.

¶ 91 Therefore, the court erred by entering judgments of conviction on both Counts 23 and 24, and the error was plain. Maximizing the jury's verdicts, as we must, *see Thomas v. People*, 2021 CO 84, ¶ 54, the conviction on Count 24, a level 3 drug felony, must merge with the conviction on Count 23, a level 1 drug felony. § 18-18-405(1)(a), (2)(c), C.R.S. 2023.

2. Counts 40-42

¶ 92 Counts 40 through 42 charged Woodyard with conspiring with Clark on June 6, 2016, to distribute methamphetamine, heroin, and cocaine, respectively. According to the indictment, during two telephone calls on that date, Woodyard and Clark

> made an agreement with each other to distribute a quantity of methamphetamine, a quantity of heroin, and a quantity of cocaine. As part of this agreement, Woodyard arranged to meet with Clark [at a specified location] . . . [and] on that date, Woodyard traveled to that location and met with Clark there in order to distribute the illegal controlled substances.

In the first call, Woodyard agreed to supply Clark with heroin and cocaine. In the second call about three hours later, Woodyard agreed to supply Clark with methamphetamine. (Clark had said he needed more methamphetamine in the first call as well.)

¶ 93 Again, we conclude that there was one agreement or criminal episode. Supplying Clark with three types of drugs was discussed in two phone calls on the same day. In both calls, Woodyard and Clark contemplated that there would be a single delivery, and there was. The conspirators were the same and Woodyard's role as supplier was the same. The evidence relating to all three charges substantially overlapped: the evidence pertaining to the heroin and cocaine was identical, and the evidence pertaining to the methamphetamine differed from the evidence pertaining to the other two drugs only in that the methamphetamine was discussed for a second time in a second phone call.

¶ 94 Therefore, the district court plainly erred by entering judgments of conviction on all three counts. Because all three convictions were for level 3 drug felonies, the convictions on Counts 41 and 42 should merge with the conviction on Count 43.

VII. Disposition

¶ 95 The convictions for violating COCCA (Counts 1 and 2) are reversed, as are the corresponding sentences, and the case is remanded for a new trial on those charges. The convictions for money laundering on Counts 16, 17, 25, 26, 29, 30, 34, and 35 are vacated. The People may not retry Woodyard on those counts. The merged convictions for conspiracy (Counts 24, 41, and 42) are reversed. In all other respects, the judgment of conviction is affirmed.

JUDGE DUNN and JUDGE LUM concur.