ADVANCE SHEET HEADNOTE
September 13, 2021

2021 CO 64

No. 20SC354, *McDonald v. People*—Colorado Organized Crime Control Act—Statutory Interpretation—Double Jeopardy.

In this opinion, the Colorado Supreme Court interprets the Colorado Organized Crime Act ("COCCA"); specifically, the term "enterprise" as used in the statute. In doing so, the court adopts the structural requirements inferred by the U.S. Supreme Court under Racketeer Influenced and Corrupt Organizations Act ("RICO") and holds that COCCA requires an associated-in-fact enterprise to have (1) a minimum amount of structure—namely, a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit the associates to pursue the enterprise's purpose—and (2) an ongoing organization of associates, functioning as a continuing unit, that exists separate and apart from the pattern of racketeering activity in which it engages.

Here, the trial court erred by failing to instruct the jurors regarding the structural features required for an associated-in-fact enterprise and that error was not harmless. Accordingly, the defendant's conviction under COCCA is vacated.

And although this court concludes that the evidence presented was sufficient to sustain the COCCA conviction under the standard as it existed at the time of trial, because the prosecution did not have notice of the standard announced today, this court will not speculate as to whether a properly instructed jury would have found that the prosecution had met its burden of proof.

Therefore, the judgment of the court of appeals is reversed, and this case is remanded for a new trial on the COCCA charge.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2021 CO 64

Supreme Court Case No. 20SC354
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 17CA1096

Petitioner:

Marquis DeShawn McDonald,

v.

Respondent:

The People of the State of Colorado.

Judgment Reversed
en banc
September 13, 2021

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JUSTICE HOOD delivered the Opinion of the Court.

¶1 The theft of a van and a smash-and-grab at a jewelry store. These troubling but ordinary offenses became the key ingredients a jury used to convict Marquis McDonald of violating the Colorado Organized Crime Control Act ("COCCA"), a class 2 felony for which McDonald ultimately received a sentence of ninety-six years in prison.

¶2 In challenging his conviction, McDonald has focused on COCCA's requirement that a defendant participate in an "enterprise." He asserts no enterprise existed.

¶3 As relevant here, "enterprise" means a "group of individuals, associated in fact." According to McDonald, a division of the court of appeals erred when it declined to interpret this phrase as the U.S. Supreme Court has interpreted the same phrase in the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"). More specifically, McDonald claims that an associated-in-fact enterprise under COCCA must have the structural features that the Supreme Court deems necessary under RICO.

¶4 We agree and therefore reverse the judgment of the division. We hold that COCCA requires an associated-in-fact enterprise to have (1) a minimum amount of structure—namely, a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit the associates to pursue the enterprise's purpose—and (2) an ongoing organization of associates, functioning

as a continuing unit, that exists separate and apart from the pattern of racketeering activity in which it engages.

I. Facts and Procedural History

¶5 In August 2015, McDonald and at least three other men travelled from Michigan to Colorado, stole a minivan (their intended getaway vehicle), and drove it to Park Meadows Mall in Douglas County.[1] They sought to steal expensive watches from the mall's Ben Bridge Jeweler, apparently because a different group of thieves had successfully targeted the store the year before.

¶6 McDonald kicked off the ill-fated heist by entering the store and telling an employee that he was looking for a Rolex. When the employee led him to a display case, McDonald pulled a hammer from his pocket and began to smash the glass. One of McDonald's companions then entered the store with his own hammer and joined in. Together, they broke the case (damaging some watches in the process), scooped up about a dozen Rolexes, and fled. After reuniting with their lookout, they exited the mall only to find that their getaway driver and the stolen van weren't in position. The police apprehended the entire group, including the driver, near the mall.

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[1] The record indicates that a fifth man and his girlfriend may have travelled to Colorado with the group and may have been involved in the conspiracy.

¶7 The district attorney charged McDonald with multiple crimes: conspiracy to commit theft, §§ 18-2-201, -4-401(1)(a), -4-401(2)(i), C.R.S. (2020); theft, § 18-4-401(1)(a), (2)(i); criminal mischief, § 18-4-501(1), (4)(g), C.R.S. (2020); first degree aggravated motor vehicle theft, § 18-4-409(2)(d), (3)(a), C.R.S. (2020); and engaging in a pattern of racketeering activity in connection with an enterprise consisting of a group of individuals associated in fact, §§ 18-17-104(3), -105, C.R.S. (2020). The pattern of racketeering activity allegedly consisted of the conspiracy, thefts, and criminal mischief (essentially the property damage at the store)—and nothing else.

¶8 At trial, McDonald's counsel conceded that McDonald was guilty of conspiracy, theft, and criminal mischief but denied that he had committed motor vehicle theft or a pattern of racketeering activity in connection with an enterprise. Regarding the COCCA racketeering charge, defense counsel told the jury that "this charge was developed as a result of mafia-ism and cartels," whereas McDonald's group was "not even an organization" but rather "guys [who] got together and did something stupid."

¶9 Defense counsel tendered proposed jury instructions that pulled from U.S. Supreme Court case law defining an associated-in-fact enterprise under RICO. The tendered instructions said that an associated-in-fact enterprise "must have (1) a common purpose; and (2) an ongoing organization, either formal or informal;

and (3) personnel who function as a continuing unit." The proposed instructions also provided that this type of enterprise must be "distinct from pattern of racketeering activity."

¶10 The trial court rejected those instructions. Instead, it gave the jury COCCA's definition of "enterprise," which lists several qualifying entities including the undefined phrase "group of individuals, associated in fact." *See* § 18-17-103(2), C.R.S. (2020).

¶11 During deliberations, the jury asked, "What is an 'enterprise' of a group of individuals 'associated in fact'?" Weighing its response, the trial court told the parties, "I know I don't have a common meaning for 'associated in fact' necessarily, nor would I expect them to, but I don't think we have any guidance." The prosecution agreed: "I'm not sure 'we don't know any better than you do' is an appropriate response, but I feel like that's where we're at at this point, Judge." In the end, the court told the jury, "The court has instructed you on all the legal definitions applicable to this matter."

¶12 The jury convicted McDonald of all five charges. Violating COCCA is a class 2 felony and carried the highest penalty of the five convictions: a prison sentence of eight to twenty-four years. *See* § 18-17-105(1), C.R.S. (2020); § 18-1.3-401(1)(a)(V)(A), C.R.S. (2020). McDonald, however, received a mandatory ninety-six years because his prior felony convictions triggered the four-times-the-

maximum-presumptive-sentence formula from Colorado's habitual offender statute. *See* § 18-1.3-801(2)(a)(I)(A), C.R.S. (2020).

¶13 On appeal, McDonald argued that an associated-in-fact enterprise under COCCA requires the same structural features necessary under RICO. *People v. McDonald*, 2020 COA 65, ¶ 2, 490 P.3d 730, 733. So, the prosecution's evidence was insufficient to support his conviction, and the jury instructions should've included those structural requirements. *Id.* at ¶ 8, 490 P.3d at 734.

¶14 In a split opinion, a division of the court of appeals disagreed. It sided with another division that had rebuffed the same argument in *People v. James*, 40 P.3d 36, 47–48 (Colo. App. 2001). *McDonald*, ¶ 28, 490 P.3d at 738.

¶15 Having rejected McDonald's interpretation of COCCA, the division made quick work of his other arguments. Since COCCA doesn't require proof of the structural features necessary under RICO, the prosecution's evidence was sufficient to support his conviction. *Id.* at ¶¶ 34, 37–39, 490 P.3d at 739, 740. For the same reason, the trial court's instructions were accurate, and McDonald's weren't. *Id.* at ¶¶ 43, 45–46, 490 P.3d at 740–41. And, despite the jury's question and the trial court's own confusion, the division found no abuse of discretion in part because "nothing from the events during trial or the case law . . . would have alerted . . . the trial court that the phrase 'associated in fact' is sufficiently complicated that it required further definition." *Id.* at ¶ 47, 490 P.3d at 741.

¶16 In dissent, Judge Berger wrote that "we should depart from [*James*], and instead interpret the enterprise 'associated in fact' element of [COCCA] consistently with the United States Supreme Court's definition of the identical term in [RICO]." *Id.* at ¶ 54, 490 P.3d at 742 (Berger, J., dissenting). He expressed "serious doubts whether *James* was correctly decided." *Id.* at ¶ 57, 490 P.3d at 743. Further, he worried that the majority's refusal to embrace the Supreme Court's structural features would "transform 'run-of-the-mill' crimes into the much more harshly punished violations" and give jurors insufficient guidance. *Id.* at ¶¶ 59–60, 490 P.3d at 743. Echoing the trial court's and the prosecution's comments, he admitted, "Without further definition, I don't know what 'associated in fact' means, and I think it is presumptuous to assume that lay jurors are able to meaningfully understand and then apply that undefined term." *Id.* at ¶ 60. Given those and other concerns, Judge Berger would have remanded for a new trial on the COCCA charge. *Id.* at ¶ 65, 490 P.3d at 744.

¶17 We granted certiorari.[2]

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[2] We agreed to hear two issues:

1. [REFRAMED] Whether the court of appeals erred in declining to interpret the Colorado Organized Crime Control Act (COCCA) phrase "group of individuals, associated in fact" consistently with the United States Supreme Court's definition of the identical

II. Analysis

¶18 First, we interpret COCCA to determine whether associated-in-fact enterprises require the same structural features that are necessary under RICO. Then, we address whether McDonald's COCCA conviction should be vacated due to instructional error. Finally, we consider whether retrial is barred by double jeopardy concerns stemming from McDonald's sufficiency-of-the-evidence claim.

A. COCCA Associated-in-Fact Enterprises

1. Standard of Review

¶19 We review the court of appeals' interpretation of a statute de novo, and "our goal is to ascertain and give effect to the legislature's intent." *People v. Vidauri*, 2021 CO 25, ¶ 11, 486 P.3d 239, 242. "In doing so, we look to the entire statutory scheme in order to give consistent, harmonious, and sensible effect to all of its parts, and we apply words and phrases in accordance with their plain and ordinary meanings." *UMB Bank, N.A. v. Landmark Towers Ass'n, Inc.*, 2017 CO 107, ¶ 22, 408 P.3d 836, 840. Because "[w]e presume that the legislature intends a just

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phrase in the Racketeer Influenced and Corrupt Organizations Act (RICO).

2. Whether sufficient evidence existed to sustain a COCCA conviction where no evidence demonstrated the presence of a COCCA enterprise.

and reasonable result when it enacts a statute," *Mosley v. People*, 2017 CO 20, ¶ 16, 392 P.3d 1198, 1202, "[w]e also avoid constructions that would render any words or phrases superfluous or that would lead to illogical or absurd results." *Winninger v. Kirchner*, 2021 CO 47, ¶ 20, 488 P.3d 1091, 1095. "If the statutory language is clear, then we will apply it as written." *Id.*

¶20 "However, where a statute is ambiguous—that is, reasonably susceptible to more than one interpretation—we turn to other interpretive aids to discern the legislature's intent." *Nieto v. Clark's Mkt., Inc.*, 2021 CO 48, ¶ 13, 488 P.3d 1140, 1143. Those interpretative aids include a statute's "legislative declaration or purpose." § 2-4-203(1)(g), C.R.S. (2020). And, "insofar as the provisions and purposes of our statute parallel those of the federal enactments," federal case law is "highly persuasive." *Cagle v. Mathers Fam. Tr.*, 2013 CO 7, ¶ 19, 295 P.3d 460, 465 (quoting *Lowery v. Ford Hill Inv. Co.*, 556 P.2d 1201, 1204 (Colo. 1976)).

2. Discussion

a. Plain Language

¶21 COCCA 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." § 18-17-104(3). So, if McDonald violated COCCA, he must have engaged in a pattern of racketeering activity by way of an enterprise.

¶22 A "pattern of racketeering activity" means "engaging in at least two acts of racketeering activity which are related to the conduct of the enterprise." § 18-17-103(3). "Racketeering activity" means "to commit, to attempt to commit, to conspire to commit, or to solicit, coerce, or intimidate another person to commit" any crime listed in section 18-17-103(5)(b), including theft, criminal mischief, and aggravated motor vehicle theft. § 18-17-103(5). McDonald doesn't dispute that his non-COCCA crimes qualify as a pattern of racketeering activity.

¶23 McDonald does contend, however, that he didn't associate with or participate in an enterprise. "'Enterprise' means 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) (emphasis added).

¶24 Recall that the prosecution alleged that McDonald's enterprise was a "group of individuals, associated in fact," a phrase that COCCA doesn't define and that doesn't appear anywhere else in the statute. According to McDonald, the plain language of COCCA implies that an associated-in-fact enterprise requires certain "structural features." The prosecution counters that the plain meaning of "group of individuals, associated in fact" is "any group of people who have actually joined

together." Both parties also argue that, if the phrase is ambiguous, interpretive aids support their positions.

¶25 Some dictionary definitions tend to support the prosecution's theory that any individuals who have joined together qualify as an associated-in-fact enterprise. *See* Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/*associated*; [https://perma.cc/D7Y4-YD6N] (second definition: "related, connected, or combined together"); *In Fact*, Black's Law Dictionary (11th ed. 2019) ("Actual or real; resulting from the acts of parties rather than by operation of law."). *But see* Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/*associated*; [https://perma.cc/D7Y4-YD6N] (first definition: "joined together *often* in a working relationship" (emphasis added)).

¶26 Yet it is hard to imagine why the General Assembly used the term "enterprise," a word that implies structure, if any pair of cooperating people would suffice. *See Enterprise,* Black's Law Dictionary (11th ed. 2019) ("An organization or venture, esp. for business purposes."). Indeed, if it violates COCCA for a person to engage in a pattern of racketeering activity in coordination with any other person, that would render the term "enterprise" superfluous. As noted, that's an outcome we seek to avoid.

¶27 Still, we conclude that it would be reasonable to read the plain language of the statute as either party suggests. Therefore, we find the plain language ambiguous and turn to other interpretive aids.

b. Legislative Declaration

¶28 COCCA's legislative declaration evinces the General Assembly's intent to curb organized crime in part through the creation of new crimes with severe punishments. *See People v. Chaussee*, 880 P.2d 749, 753 (Colo. 1994) ("COCCA is prefaced by a detailed statement of legislative purpose, recognizing the pervasive and pernicious presence of organized crime in our society, including the use of money obtained through illegal activities . . . .").

¶29 COCCA's legislative declaration begins with a finding that "organized crime . . . is a highly sophisticated, diversified, and widespread activity that annually consumes millions of dollars locally." § 18-17-102, C.R.S. (2020). The declaration then spotlights how organized crime funds itself through unlawful conduct: "Organized crime derives a major portion of its power through money procured from such illegal endeavors as syndicated and organized gambling, loan-sharking, the theft of property and fencing of stolen property, [and] the illegal importation, manufacture, and distribution of drugs . . . ." *Id.* Finally, after finding that "organized crime continues to grow . . . because the sanctions and remedies presently available to the state are unnecessarily limited in scope and

impact," the General Assembly "declares that it is the purpose of this article to seek the eradication of organized crime in this state . . . by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." *Id.*

¶30 By targeting "organized" crime, the legislative declaration suggests that a group needs to have some modicum of structure to qualify as an associated-in-fact enterprise.

¶31 In contrast, it is difficult to see how the prosecution's reading of COCCA (that two predicate crimes, including an enumerated crime and a conspiracy to commit that same crime, by any two cooperating people is punishable as a class 2 felony) squares with the General Assembly's professed interest in stifling organized crime**.** The prosecution's interpretation draws no distinction between "mere[] patterns of criminal conduct" and "patterns of such conduct demonstrably designed to achieve the purposes . . . of organized, structurally distinct criminal entities." *See People v. W. Express Int'l Inc.*, 978 N.E.2d 1231, 1234 (N.Y. 2012) (discussing how "[t]he common challenge [for] both federal and state legislators in penalizing enterprise corruption" was "delineat[ing] the circumstances under which conduct already fitting under a criminal definition would additionally be subject to prosecution and more serious penalization for its connection to a criminal organization"). As such, it fails "[t]o justify [the statute's] superadded

penalties" and risks "sweeping relatively minor offenders into complex multidefendant, multicount prosecutions entailing a risk of draconian punishment." *Id.*

¶32 The prosecution contends that any reliance on the legislative declaration to limit COCCA's reach is undermined by this court's decision in *Chaussee*. We disagree.

¶33 In *Chaussee*, we declined to import RICO's requirement that the pattern of racketeering activity "amount to or pose a threat of continued criminal activity." *Chaussee*, 880 P.2d at 756 (quoting *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989)). The Supreme Court had inferred that rule, in part, because Congress defined "pattern of racketeering activity" in terms of what a pattern "requires." *H.J. Inc.*, 492 U.S. at 237. Because the COCCA definition of that phrase uses "means," not "requires," we reasoned that the Court's logic doesn't transfer. *Chaussee*, 880 P.2d at 757. Looking at COCCA's plain language, we held that a pattern of racketeering activity is "at least two acts of racketeering activity . . . that are *related to the conduct of the enterprise*." *Id.* at 758.

¶34 The prosecution points to two statements from *Chaussee* in support of its interpretation of "group of individuals, associated in fact." First, we observed that COCCA doesn't "reference . . . organized crime in the operative provisions," such as section 18-17-104(3)'s prohibition against participating in an enterprise through

a pattern of racketeering activity. *Chaussee*, 880 P.2d at 754. Second, we recognized that the U.S. Supreme Court, interpreting "pattern of racketeering activity" in RICO, had rejected the idea that "a defendant's racketeering activities form a pattern only if they are characteristic either of organized crime in the traditional sense, or of an organized-crime-type perpetrator." *Id.* (quoting *H.J. Inc.*, 492 U.S. at 243).

¶35 But neither of those statements, which we offered as "helpful background" in analyzing a different element of the offense, *id.* at 753, suggests that Colorado courts should ignore COCCA's organized-crime-fighting purpose when interpreting ambiguous provisions of the statute. That purpose didn't influence our analysis in *Chaussee* because the clarity of the statutory language immediately at issue eliminated any need to consult interpretive aids. *See id.* at 758.

¶36 So, COCCA's legislative declaration supports McDonald's interpretation notwithstanding *Chaussee*. Next, we seek guidance from federal case law interpreting RICO.

c. Federal Precedent

¶37 "In general, [COCCA] was patterned after [RICO] . . . ." *Id.* at 753. RICO provides that "[i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct

of such enterprise's affairs through a pattern of racketeering activity . . . ." 18 U.S.C. § 1962(c). "'[E]nterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or *group of individuals associated in fact* although not a legal entity." 18 U.S.C. § 1961(4) (emphasis added).

¶38 The U.S. Supreme Court discussed RICO associated-in-fact enterprises in *United States v. Turkette*, 452 U.S. 576, 583 (1981). Interpreting RICO's plain language, *id.* at 580–81, the Court construed "group of individuals associated in fact" as implying multiple structural requirements, *id.* at 583. These enterprises must have "a common purpose of engaging in a course of conduct"; "an ongoing organization, formal or informal"; and "associates [who] function as a continuing unit." *Id.*

¶39 The Court also underscored that an associated-in-fact enterprise "is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages." *Id.* As such, "[t]he existence of an enterprise at all times remains a separate element which must be proved by the Government." *Id.* The Court nonetheless acknowledged that, while "proof of one does not necessarily establish the other," "the proof used to establish these separate elements may in particular cases coalesce." *Id.*

¶40 The Court revisited associated-in-fact enterprises in *Boyle v. United States*, 556 U.S. 938 (2009). Boyle was involved in multiple bank thefts across a handful

of states that were conducted by a "core group," but that also involved other individuals who were recruited from time to time. *Id.* at 941. The members, who were set to carry out the theft, would meet beforehand to plan the crime, gather tools, and assign the roles they would each play. *Id.* The Court described the group as "loosely and informally organized"; the group didn't have a leader or hierarchy, and there didn't appear to be any long-term master plan or agreement between the participants. *Id.* Boyle was affiliated with the group for five years. *Id.*

¶41 The Court endorsed jury instructions that, in line with *Turkette*, required the government to show both "an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives" and that "the various members and associates of the association function[ed] as a continuing unit to achieve a common purpose." *Boyle*, 556 U.S. at 951 (alteration in original).

¶42 And, examining RICO's use of the words "enterprise," "associated," and "affairs," the Court inferred that associated-in-fact enterprises must have "at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Id.* at 946. Still, an associated-in-fact enterprise needn't have "businesslike" features, such as "a hierarchical structure," "fixed roles," "a name, regular meetings, dues, established rules and regulations, disciplinary

procedures, or induction or initiation ceremonies." *Id.* at 945, 948. The Court therefore rejected Boyle's argument that the jury should've been instructed that an enterprise "had an ongoing organization, a core membership that functioned as a continuing unit, and an ascertainable structural hierarchy distinct from the charged predicate acts." *Id.* at 943.

¶43 Even so, the Court reiterated in *Boyle* that an associated-in-fact enterprise's structure must go "beyond that inherent in the pattern of racketeering activity," in the sense that "the existence of an enterprise is a separate element that must be proved." *Id.* at 947, 950 n.5 ("Even if the same evidence may prove two separate elements, this does not mean that the two elements collapse into one."). "It is easy," the Court observed, "to envision situations in which proof that individuals engaged in a pattern of racketeering activity would not establish the existence of an enterprise." *Id.* at 947 n.4.

¶44 While the Supreme Court's interpretation of "group of individuals associated in fact" does not control our interpretation of the same language in COCCA, we find it persuasive. A COCCA associated-in-fact enterprise must have "at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *See id.* at 946.

¶45 Moreover, although the evidence used to establish the predicate acts and the existence of an associated-in-fact enterprise "may in particular cases coalesce," the prosecution must prove that an "ongoing organization" of "associates [who] function as a continuing unit" exists "separate and apart from the pattern of [racketeering] activity in which it engages." *Turkette*, 452 U.S. at 583; *see Boyle*, 556 U.S. at 951 (endorsing instructions requiring the government to prove "an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives" and that "the various members and associates of the association function[ed] as a continuing unit to achieve a common purpose" (alteration in original)).

¶46 Fleshing out that requirement, "[i]n deciding whether an alleged [associated-in-fact] enterprise has a[] . . . structure distinct from the pattern of racketeering activity, we must 'determine if the enterprise would still exist were the predicate acts removed from the equation.'" *Crest Constr. II, Inc. v. Doe*, 660 F.3d 346, 354–55 (8th Cir. 2011) (quoting *Handeen v. Lemaire*, 112 F.3d 1339, 1352 (8th Cir. 1997)). In other words, although a COCCA associated-in-fact enterprise may exist only to commit the pattern of racketeering activity, it must also have an ongoing organization of associates functioning as a continuing unit that "unit[es] its members in a cognizable group" beyond the fact that its members committed the predicate crimes, *Nelson v. Nelson*, 833 F.3d 965, 968 (8th Cir. 2016), and that

"distinguishes [associated-in-fact] enterprises from ad hoc one-time criminal ventures," *United States v. Cianci*, 378 F.3d 71, 82 (1st Cir. 2004). *See id.* ("[C]riminal actors who jointly engage in criminal conduct that amounts to a pattern of 'racketeering activity' do not automatically thereby constitute an association-in-fact RICO enterprise simply by virtue of having engaged in the joint conduct. Something more must be found . . . ."); *Sundquist v. Hultquist*, No. 1:20-CV-275-HAB, 2020 WL 5411375, at *3 (N.D. Ind. Sept. 9, 2020) ("Any RICO enterprise must consist of more than a group of people who get together to commit a pattern of racketeering activity."); *Maersk, Inc. v. Neewra, Inc.*, 687 F. Supp. 2d 300, 333 (S.D.N.Y. 2009) ("[T]he association among a group of defendants that necessarily results from a pattern of racketeering does not, without more, constitute a RICO enterprise . . . ."); *W. Express Int'l*, 978 N.E.2d at 1234 ("[RICO] demand[s] proof of an association possessing a continuity of existence, criminal purpose, and structure—which is to say, of constancy and capacity exceeding the individual crimes committed under the association's auspices or for its purposes.").

¶47 We recognize that some courts have read *Boyle* as eliminating any need to prove that an associated-in-fact enterprise exists beyond the pattern of racketeering activity. *See, e.g.*, *United States v. Hutchinson*, 573 F.3d 1011, 1020–22 (10th Cir. 2009); *see also People v. Cerrone*, 867 P.2d 143, 149 (Colo. App. 1993)

("[T]he enterprise need not be separate and distinct from the racketeering activity."). To be sure, the Supreme Court spurned the notion that the structure associated with sophisticated organizations is necessary, and it stated that "the evidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise 'may in particular cases coalesce.'" *Boyle*, 556 U.S. at 947 (quoting *Turkette*, 452 U.S. at 583).

¶48 But *Boyle* reaffirmed *Turkette*, *id.* at 946–48, 951, 954, and thus did not call into question the Court's earlier statements that associated-in-fact enterprises require "ongoing organization" and "associates [who] function as a continuing unit" and that "[t]he 'enterprise' . . . is an entity separate and apart from the pattern of activity in which it engages," *Turkette*, 452 U.S. at 583. On the contrary, the Court in *Boyle* emphasized that: "While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence." 556 U.S. at 948. And it did so on facts involving an "enterprise" that, though not formally structured, still contained a

semblance of an ongoing organization that existed "separate and apart" from the individual bank thefts.[3]

¶49 The division declined to follow federal precedent out of deference to *James*—a pre-*Boyle* case that the division conceded hangs on a "thin reed," *McDonald*, ¶ 28, 490 P.3d at 738—and the prosecution defends that choice. In *James*, the defendant had argued that COCCA enterprises require the structural features that the Supreme Court announced in *Turkette*. *James*, 40 P.3d at 47. The *James* division disagreed because RICO says that "enterprise" *includes* what's listed in 18 U.S.C. § 1961(4), while COCCA provides that "enterprise" *means* any of the things listed in section 18-17-103(2). *James*, 40 P.3d at 47. *James* held that it would be wrong to read COCCA like RICO because the General Assembly's use of "means" instead of "includes" makes COCCA's definition "complete" and not "open to [the] judicial construction and expansion" that happened in *Turkette*. *Id.* For support, *James* relied on *Chaussee*, where, as discussed above, we interpreted

[3] Moreover, regardless of what exactly the Supreme Court meant in *Boyle*, we embrace the separate-and-apart standard because it furthers the Colorado General Assembly's intent, as articulated in COCCA's legislative declaration. *See Michigan v. Long*, 463 U.S. 1032, 1042 (1983).

COCCA differently from RICO because COCCA used "means" where RICO used "requires." *Id.*; *see Chaussee*, 880 P.2d at 757.

¶50 We overrule *James* to the extent that it conflicts with this opinion. The fact that COCCA defines "enterprise" in terms of what it "means" does not limit our ability to rely on the Supreme Court's RICO precedent in construing a separate undefined phrase, particularly when the undefined phrase is identical to language found in the RICO statute.

¶51 And, as previously noted, *Chaussee* is distinguishable. In *Chaussee*, we simply held that a phrase that COCCA and RICO defined differently; namely, "pattern of racketeering activity," should be interpreted differently. 880 P.2d at 757. No such distinction exists as to "group of individuals, associated in fact."

¶52 Finally, we are not convinced that the General Assembly's instruction to "liberally construe[]" COCCA "[t]o effectuate the intent and purpose of this article" requires us to eschew the Supreme Court's approach. *See* § 18-17-108, C.R.S. (2020). Embracing the prosecution's interpretation would mean greenlighting COCCA prosecutions of unorganized crime without boosting the state's ability to combat organized crime. Such a construction of COCCA, though "liberal," wouldn't "effectuate the intent and purpose" of the statute. *See id.* Furthermore, the Supreme Court inferred structural requirements from RICO

despite Congress's command that RICO be liberally construed. *Boyle*, 556 U.S. at 944.

¶53 To recap, COCCA's legislative declaration suggests that the General Assembly expected associated-in-fact enterprises to have a modicum of structure, and we adopt the structural requirements inferred by the Supreme Court in *Turkette* and *Boyle*. Next, we analyze whether the court of appeals committed reversible instructional error when it failed to mention those structural requirements.

B. Instructional Error

1. Standard of Review

¶54 "We review jury instructions de novo to determine whether they accurately inform the jury of the governing law." *Hoggard v. People*, 2020 CO 54, ¶ 12, 465 P.3d 34, 38. "As long as the instruction properly informs the jury of the law, a trial court has broad discretion to determine the form and style of jury instructions." *Day v. Johnson*, 255 P.3d 1064, 1067 (Colo. 2011). "Therefore, we review a trial court's decision to give a particular jury instruction for an abuse of discretion." *Id.* "A trial court's ruling on jury instructions is an abuse of discretion only when the ruling is manifestly arbitrary, unreasonable, or unfair." *Id.*

¶55 Where an error exists and "a defendant . . . object[s] to an instruction, a harmless error standard applies." *People v. Garcia*, 28 P.3d 340, 344 (Colo. 2001).

"Under a harmless error standard, reversal is required unless the error does not affect substantial rights of the defendant." *Id.* "We have previously held that, '[w]here the error is not of constitutional dimension, the error will be disregarded if there is not a reasonable probability that the error contributed to the defendant's conviction.'" *Id.* (alteration in original) (quoting *Salcedo v. People*, 999 P.2d 833, 841 (Colo. 2000)).

2. Discussion

¶56 "While generally the giving of instructions in the language of the statute is proper, this is not the case when the statute itself . . . may tend to create ambiguities and lead to confusion in the minds of the jurors . . . ." *Leonard v. People*, 369 P.2d 54, 62 (Colo. 1962); *accord Leonardo v. People*, 728 P.2d 1252, 1254 (Colo. 1986) ("We have held that an instruction employing the language of the statute is sufficient if the language is clear."); *People v. Mendenhall*, 2015 COA 107M, ¶ 24, 363 P.3d 758, 766 ("[I]f a statutory definition does not adequately inform the jury of the governing law, additional instructions are required.").

¶57 To decide whether an undefined phrase in a jury instruction is "so technical or mysterious as to create confusion in jurors' minds," we've looked at whether the phrase "is one with which reasonable persons of common intelligence would be familiar." *People v. Deadmond*, 683 P.2d 763, 769 (Colo. 1984); *accord People v. Harris*, 2016 COA 159, ¶ 98, 405 P.3d 361, 378. Divisions of the court of appeals

have also asked whether "the jury . . . indicate[d] any confusion about the term or ask[ed] the trial court for further clarification." *People v. Lopez*, 2018 COA 119, ¶ 41, 488 P.3d 373, 381; *accord People v. Esparza-Treto*, 282 P.3d 471, 480 (Colo. App. 2011).

¶58 Both the trial court and Judge Berger admitted that they didn't know what "group of individuals, associated in fact" meant and that they didn't expect the jury to know either. *McDonald*, ¶ 60, 490 P.3d at 743 (Berger, J., dissenting). We were able to define the phrase only after consulting COCCA's legislative declaration and Supreme Court case law. And, of course, the jury asked for a definition, indicating confusion. Thus, reasonable persons of common intelligence are unfamiliar with what "group of individuals, associated in fact" means and the structural requirements that the phrase implies.

¶59 We conclude that the trial court erred by giving the jury the definition of "enterprise" without further explaining the structural features necessary for associated-in-fact enterprises. Since an "enterprise" of a "group of individuals, associated in fact" could reasonably be interpreted simply to encompass any group of people who have joined together, there's a high likelihood that the jury convicted McDonald believing that such a lesser, incorrect standard applied.

¶60 The trial court's instructional error was not harmless. There's a reasonable probability that it contributed to McDonald's conviction on the COCCA count because the jury might have acquitted him on that count had they known that an

associated-in-fact enterprise requires a purpose, relationships, longevity, and an ongoing organization of associates who function as a continuing unit that exists separate and apart from the predicate crimes. We therefore vacate the COCCA conviction.

C. Sufficiency of the Evidence

¶61 Our work is not done, however, because McDonald also raises a sufficiency of the evidence claim. "We must address this sufficiency challenge 'because if a defendant is entitled to reversal of her convictions on appeal due to insufficient evidence, the guarantees against double jeopardy in the United States and Colorado Constitutions may preclude retrial.'" *People v. Coahran*, 2019 COA 6, ¶ 40, 436 P.3d 617, 626.

¶62 Double jeopardy principles "prohibit[] a retrial where an appellate court reverses a conviction solely for lack of sufficient evidence to sustain the jury's verdict." *People v. Brassfield*, 652 P.2d 588, 594 n.5 (Colo. 1982). It is "central to the objective of the prohibition against successive trials" that the government be deprived of "another opportunity to supply evidence which it failed to muster in the first proceeding." *Burks v. United States*, 437 U.S. 1, 11, 17 (1978) ("[T]he purposes of the [Double Jeopardy] Clause would be negated were we to afford the government an opportunity for the proverbial 'second bite at the apple.'").

¶63 However, the government is not precluded from "retrying a defendant whose conviction is set aside because of an *error in the proceedings* leading to conviction." *Id.* at 14 (quoting *United States v. Tateo*, 377 U.S. 463, 465 (1964)). "[R]eversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case." *Id.* at 15.

¶64 When evaluating the sufficiency of the evidence, we review the record "to determine whether the evidence before the jury was sufficient both in quantity and quality to sustain the convictions." *People v. Harrison*, 2020 CO 57, ¶ 31, 465 P.3d 16, 23 (quoting *Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005)). "[W]e inquire whether the evidence, 'viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable mind that the defendant is guilty of the charge beyond a reasonable doubt.'" *Id.* at ¶ 32, 465 P.3d at 23 (quoting *People v. Bennett*, 515 P.2d 466, 469 (Colo. 1973)). "In applying this test, we are required to 'give the prosecution the benefit of every reasonable inference which might be fairly drawn from the evidence.'" *Id.* (quoting *People v. Perez*, 2016 CO 12, ¶ 25, 367 P.3d 695, 701).

¶65 Until now, trial courts were bound by *James*, which held that COCCA enterprises don't need the structural features required under RICO. 40 P.3d at 47–48. The evidence presented at trial showed that McDonald cooperated with

three others to plan and execute a heist. Given the deferential standard of review that we must afford the prosecution, that evidence was sufficient to support a conclusion by a reasonable mind that McDonald participated in a "group of individuals, associated in fact" if that phrase doesn't imply the structural features inferred by the Supreme Court.

¶66 McDonald argues not only that the evidence was insufficient under the definition of "enterprise" as it existed at the time of his trial, but that the evidence was insufficient under the structural requirements we announce today.

¶67 We decline to speculate on whether a properly instructed jury would have found that the prosecution met its burden of proof under the structural-requirements standard we announce today. Because the prosecution didn't have notice of these requirements, it cannot be held responsible for failing to muster evidence sufficient to satisfy a standard that, at the time of trial, didn't need to be met. *See United States v. Harrington*, 997 F.3d 812, 818 (8th Cir. 2021) (rejecting arguments that appellate courts should acquit defendants when the government "will lack the proof needed to convict . . . on retrial" under the new standard because, "[w]hether or not the Government will be able to carry its burden of proof on retrial, the fact remains that retrial is the Government's first 'bite at the apple' to prove its case under the correct legal standard"); *cf. United States v. Wacker*, 72 F.3d 1453, 1465 (10th Cir. 1995) (holding that the prosecution was not barred

from retrying the defendant when it failed to prove an element that was redefined following trial); *Lockhart v. Nelson*, 488 U.S. 33, 42 (1988) (noting that had inadmissible evidence been properly excluded at trial, the prosecution would have been given a chance to offer additional evidence to satisfy its burden).

¶68 And because we cannot say whether the jury would have convicted McDonald had it been properly instructed as to the definition of "enterprise," we leave that determination to a properly instructed jury. *See Wacker*, 72 F.3d at 1463–65, 1464 n.8 (acquitting defendants of charges where the trial evidence was totally incompatible with a conviction under the new standard but ordering retrial for other charges where the court could not "say how a jury might decide th[e] issue if properly instructed under the law").

III. Conclusion

¶69 We reverse the division's judgment, vacate the COCCA conviction, and remand this case for a new trial on that charge.