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

7 **STATE OF NEW MEXICO,**

8 Plaintiff-Appellee,

9 v.

NO. 30,837

10 **ERIC MUNOZ,**

11 Defendant-Appellant.

12 **APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY**

13 **Freddie J. Romero, District Judge**

14 Gary K. King, Attorney General

15 Santa Fe, NM

16 for Appellee

17 Chief Public Defender

18 Nina Lalevic, Assistant Appellate Defender

19 Santa Fe, NM

20 for Appellant

21 **MEMORANDUM OPINION**

22 **VIGIL, Judge.**

23 Defendant appeals his convictions for aggravated battery, conspiracy to commit

24 aggravated battery, and shooting at or from a motor vehicle. In this Court's notice of

1 proposed summary disposition, we proposed to affirm. Defendant has filed a motion
2 to amend the docketing statement and a memorandum in opposition to this Court's
3 proposed summary disposition, both of which we have duly considered. As we are
4 not persuaded by Defendant's arguments, we deny the motion to amend and we
5 affirm.

6 **Motion for a Mistrial**

7 Defendant contends that the district court erred in denying his motion for a
8 mistrial after a witness commented that the police had tried to interview Defendant.
9 [DS 6, 8] In this Court's notice of proposed summary disposition, we proposed to
10 hold that the district court did not abuse its discretion in denying the motion because
11 it appeared that the witness spontaneously made the statement, that the prosecutor did
12 not directly ask any questions that a jury would naturally and necessarily have taken
13 to be comments on Defendant's exercise of his right to remain silent, and that the
14 prosecution did not attempt to take advantage of the witness's spontaneous statement
15 by asking related questions or referring to Defendant's silence in closing argument.
16 Under such circumstances, we have held that reversal is not warranted. *See State v.*
17 *Wildgrube*, 2003-NMCA-108, ¶¶ 23-24, 134 N.M. 262, 75 P.3d 862 (holding that
18 when a witness made an unsolicited comment regarding the defendant's post-*Miranda*
19 silence and the prosecutor did not exploit the reference by asking related questions or
20 referring to it in closing argument, reversal was not warranted); *State v. Baca*, 89 N.M.

1 204, 205, 549 P.2d 282, 283 (1976) (holding that reversal was not warranted when a
2 witness made an isolated, unsolicited comment referring to the defendant’s post-
3 *Miranda* refusal to speak with the police).

4 Defendant’s memorandum in opposition provides no new facts or authority that
5 would persuade this Court that its proposed disposition was erroneous, instead arguing
6 that the witness’s statement “was clearly a significant factor in convicting” Defendant
7 because Defendant testified at trial in a manner favorable to himself and the jury
8 nevertheless found him guilty. [MIO 16] We are not persuaded that Defendant’s
9 view of the evidence warrants a departure from *Wildgrube* and *Baca*. Accordingly,
10 we conclude that the district court did not abuse its discretion.

11 **Sufficiency of the Evidence of Conspiracy to Commit Aggravated Battery**

12 Defendant contends that there was insufficient evidence to support his
13 conviction for conspiracy to commit aggravated battery. [DS 8] In our notice of
14 proposed summary disposition, we proposed to hold that there was sufficient
15 circumstantial evidence of a conspiracy. *See State v. Roper*, 2001-NMCA-093, ¶ 8,
16 131 N.M. 189, 34 P.3d 133 (stating that the agreement that constitutes the conspiracy
17 “can be nothing more than a mutually implied understanding that can be proved by the
18 cooperative actions of the participants involved.”); *see also State v. Mead*, 100 N.M.
19 27, 30, 665 P.2d 289, 292 (Ct. App. 1983) (stating that conspiracy need not be proven
20 by direct evidence of an agreement), *rev’d in part on other grounds sub nom. State v.*

1 *Segotta*, 100 N.M. 498, 499, 672 P.2d 1129, 1130 (1983); *State v. Dressel*, 85 N.M.
2 450, 451, 513 P.2d 187, 188 (Ct. App. 1973) (stating that conspiracy is seldom
3 susceptible of direct proof and may be proven by inference from circumstantial
4 evidence).

5 In Defendant's memorandum in opposition, he relies on the facts that are most
6 favorable to himself and argues that no reasonable juror could determine that the
7 evidence in this case supports a conviction for conspiracy to commit aggravated
8 battery. [MIO 18-19] However, as Defendant acknowledges, this Court is required
9 to view the evidence "in the light most favorable to the guilty verdict, indulging all
10 reasonable inferences and resolving all conflicts in the evidence in favor of the
11 verdict," *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176,
12 and a reviewing court is not required to consider evidence that may have supported
13 a verdict to the contrary, *State v. Vigil*, 110 N.M. 254, 256, 794 P.2d 728, 730 (1990).
14 Accordingly, we conclude that under this standard of review, the evidence was
15 sufficient.

16 **Double Jeopardy**

17 Defendant contends that his convictions for aggravated battery and conspiracy
18 to commit aggravated battery should have merged. [DS 8] In our notice of proposed
19 summary disposition, we proposed to find no error. This Court has previously held
20 that convictions of a substantive offense and a conspiracy to commit the substantive

1 offense do not violate double jeopardy. *State v. Smith*, 102 N.M. 512, 515, 697 P.2d
2 512, 515 (Ct. App. 1985) (“[D]ouble jeopardy is no defense to convictions for a
3 substantive offense and a conspiracy to commit that offense.”); *State v. Armijo*, 90
4 N.M. 12, 15-16, 558 P.2d 1151, 1154-55 (Ct. App. 1976). Defendant’s memorandum
5 in opposition addresses this issue only cursorily and acknowledges that *Smith* and
6 *Armijo* are contrary to his position. [MIO 14] Accordingly, we conclude that
7 Defendant’s convictions did not violate double jeopardy.

8 **Ineffective Assistance of Counsel**

9 Defendant’s memorandum states that he abandons the claim of ineffective
10 assistance of counsel raised in his docketing statement. [MIO 19-20]

11 **Motion to Amend the Docketing Statement**

12 Defendant moves to amend the docketing statement to add an argument that his
13 convictions for aggravated battery and shooting at or from a motor vehicle violate the
14 constitutional prohibition against double jeopardy. [MIO 6-13] We deny Defendant’s
15 motion because the issue is not viable. *See State v. Sommer*, 118 N.M. 58, 60, 878
16 P.2d 1007, 1009 (Ct. App. 1994) (denying a motion to amend the docketing statement
17 based on a conclusion that the motion and the argument offered in support of the
18 motion were not viable). Defendant acknowledges that our Supreme Court has held
19 that convictions for aggravated battery and shooting at or from a motor vehicle arising
20 from unitary conduct does not violate the prohibition against double jeopardy. *See*

1 *State v. Dominguez*, 2005-NMSC-001, ¶¶ 17-21, 137 N.M. 1, 106 P.3d 563. Although
2 Defendant argues that *Dominguez* was wrongly decided, he recognizes that this Court
3 is bound by the decision. [MIO 9]

4 Therefore, for the reasons stated in this opinion and in our notice of proposed
5 summary disposition, we affirm.

6 **IT IS SO ORDERED.**

7

8

MICHAEL E. VIGIL, Judge

9 **WE CONCUR:**

10

MICHAEL D. BUSTAMANTE, Judge

12

JAMES J. WECHSLER, Judge