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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT
v.

RICHARD JOHN RICHARDSON, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Did the admission of a coconspirator's nontestimonial statements made in the furtherance of a conspiracy violate the Confrontation Clause?
2. Did the trial court properly instruct the jury as to the requirements to find Mr. Richardson guilty of conspiracy to commit first-degree robbery?
3. Did the trial court abuse its discretion by finding that the conspiracy to commit robbery did not constitute the "same criminal conduct" as the murder for sentencing purposes?
4. Where the record establishes Richardson's indigency at the time of sentencing, should this Court strike the trial court's imposition of discretionary costs and interest, including the criminal filing fee and community supervision?

II. STATEMENT OF THE CASE

The victim, Damien Stewart, lived in an apartment in Spokane. 1RP 105-06.¹ On January 25, 2015, a neighbor found Mr. Stewart's lifeless

¹ Citation to the verbatim report of proceedings is as follows: 1RP – six consecutively paginated volumes consisting of 10/27/17, 2/9/18, 3/6/18,

body in the apartment. 1RP 121-22. Police arrived and observed a pool of dried blood around the body. 1RP 148, 150, 152. There were bloody footprints on the floor. 1RP 154, 228. The apartment was in disarray, as if ransacked. 1RP 150-52, 182. A knife blade without a handle was under Stewart's hand. 1RP 153, 164, 183. A broken jewelry box was next to his body. 1RP 153, 183. A bloody belt and tie, and pieces of a wooden stick, were nearby. 1RP 674- 75, 677. A frying pan was on the floor of the kitchen. 1RP 678. A neighbor believed drug dealing took place at the apartment and had recorded the license plate numbers of visiting vehicles in a logbook. 1RP 199, 210. Police traced one plate to a woman named Carla Ward. 1RP 231. When contacted, she informed the police that Mr. Stewart had given her an electronic benefit transfer (EBT) card. 1RP 238. It was determined that this card belonged to Chris Hall. *Id.*

After speaking with Ward, police conducted further investigation and eventually contacted Hall and Ricky Cox at the House of Charity, a facility for homeless people in downtown Spokane. 1RP 232-33, 460-61. Isaiah Freeman and Richard Richardson, the defendant, were located by the police in a skate park. 1RP 462-63.

3/7/18, 3/8/18, 3/12/18, 3/13/18, 3/14/18, 3/15/18, 4/20/18; 2RP – 3/5/18; 3RP – 11/4/16.

The State ultimately charged Richardson by amended information² with first-degree felony murder and conspiracy to commit first-degree robbery. CP 237-38. Freeman did not testify at Richardson's trial. Cox and Hall did.

Cox agreed to testify against Richardson in exchange for pleading guilty to second-degree murder and a significantly reduced sentence. 1RP 274, 329-30. Cox met Hall, Freeman and Richardson at the House of Charity. 1RP 275-76. Cox was a meth user. 1RP 277. He confederated with the other three. 1RP 276. Richardson used meth as well. 1RP 277. Cox also used to hang out with Mr. Stewart and sometimes got drugs from him. 1RP 278.

Cox set up a drug deal with Mr. Stewart for an "eight ball" of meth via text message. 1RP 280-85. Cox planned to rob Mr. Stewart. 1RP 285. The four of them had run out of meth previously provided by Richardson. 1RP 285, 288-89. The four men – Cox, Hall, Freeman and Richardson – walked from the skate park to Mr. Stewart's apartment. 1RP 287. As they

² Richardson was originally charged by information on February 26, 2015 with first-degree felony murder based upon first or second-degree robbery, as well as first-degree burglary. CP 1-2. That charge was amended pursuant to a plea agreement and Richardson entered a plea of guilty to second-degree murder on November 12, 2015. CP 13. Richardson later moved to withdraw his plea. The trial court allowed Richardson to withdraw his plea on March 28, 2016. CP 77-78.

walked, they discussed how they would smoke meth with Mr. Stewart and then rob him. 1RP 288-90. Richardson was privy to the discussion. 1RP 290. Cox heard Freeman say, “we’re all gonna rob Damien and kill him.” 1RP 290-91. The three others, including Richardson, “got scared, like, what? You’re not gonna ... no, you’re not gonna do that. And, you know, it just -- it just things just went out of hand and it went to the extreme to where it shouldn’t have went.” 1RP 291. Freeman said he was going to hurt Mr. Stewart really bad, “I’m going to beat the crap out of this dude,” and “I want him dead.” 1RP 291. Cox thought Freeman was joking. 1RP 291-93. “We all felt the same way.” 1RP 293. There was, though, an earnest plan to rob Mr. Stewart. 1RP 293.

When they arrived at Mr. Stewart’s apartment, Hall knocked on the door. 1 RP 297. Mr. Stewart opened it and was mad that two additional people had come over. 1RP 297, 349-50. A fight broke out and Hall hit Mr. Stewart. 1RP 297-98, 353. Freeman grabbed a chain around Mr. Stewart’s neck and dragged him inside. 1RP 315, 353. The door was shut and locked. 1RP 354. Cox and Richardson waited outside, keeping watch. 1RP 298. When a concerned neighbor came and asked if everything was okay, Richardson replied, “yes” and the neighbor returned to his residence. 1RP 298, 481, 593.

Cox and Richardson waited a while longer and then Cox knocked on the door. 1RP 298. Hall opened it. 1RP 301. Cox and Richardson went inside. 1RP 301-02. Mr. Stewart was face down on his stomach, being held there by Freeman. 1RP 302. Cox and Richardson started searching for the dope, "turning things over." 1RP 301-02. They could not find any. 1RP 302-03. Mr. Stewart went in and out of consciousness. 1RP 304. Richardson kicked Mr. Stewart in the face while Freeman continued to hold him down. 1RP 304-05. Mr. Stewart struggled and tried to fight back. 1RP 309. Cox also kicked Mr. Stewart. 1RP 304, 356. 356-57.

Freeman asked Richardson and Cox to hand him a frying pan, a knife, and speaker boxes. 1RP 305. Whatever item Freeman pointed to, Cox and Richardson grabbed it and gave it to him. 1RP 305. At Freeman's request, Richardson retrieved the frying pan from out of the sink and delivered it to Freeman. 1RP 305-07. Freeman beat Mr. Stewart in the face with the frying pan. 1RP 306-07. Freeman must have also kicked Mr. Stewart in the face; his shoeprint matched the imprint left in the blood at the scene and was consistent with a bloody print left on Mr. Stewart's face. 1RP 469, 472. Both Cox and Richardson restrained Mr. Stewart during the assault. 1RP 310.

When they left the apartment, Cox took the sleeping bags he had previously left there. 1RP 316. Freeman took Mr. Stewart's wallet and

phone. 1RP 316-17. Richardson took nothing. 1RP 367. The plan was to use the food stamp and money cards from the wallet to get some money and buy more dope. 1RP 317. Richardson was part of this plan. 1RP 317. They went to a 7-Eleven store to get money. 1RP 318. They were unsuccessful in their attempts to use the cards. 1RP 322. Freeman later disposed of the phone. 1RP 317-18.

Hall also agreed to testify against Richardson in exchange for pleading guilty to second-degree murder and a significantly reduced sentence. 1RP 384, 428, 432. The night of Mr. Stewart's death, the four men smoked meth that Richardson provided at the skate park. 1RP 387-88. Afterwards, Richardson wanted reimbursement. 1RP 388. There was talk about getting additional drugs from Mr. Stewart to repay Richardson. 1RP 389. They hatched a plan to rob Mr. Stewart of his drugs so that Hall could get the drugs he was owed and Richardson could be repaid. 1RP 389. Richardson was part of this discussion. 1RP 389. Cox texted Mr. Stewart to get a larger quantity of drugs, so that the extra amount could be used to pay Richardson. 1RP 394-95. The plan was to obtain the drugs through violent methods; to rob or beat Mr. Stewart. 1RP 395. While they walked to Mr. Stewart's apartment, "[t]here was a rough layout plan of how to attack and take what we wanted." 1RP 396-97. Richardson was privy to the planning. 1RP 397. Freeman said he was going to kill Mr. Stewart.

1RP 417. Hall assumed it was “street speech” and did not take him seriously. 1RP 417, 445. They were all under the influence of drugs; at worst, Hall expected a fight. 1RP 417. There was a plan to split up the proceeds. 1RP 419. Richardson was part of that discussion. 1RP 419.

Hall’s testimony was consistent with Cox’s regarding the murder. After gaining entry into Mr. Stewart’s residence, Freeman and Cox restrained him on the floor. 1RP 400. Hall kicked Mr. Stewart in the ribs. 1RP 400. Freeman kicked Mr. Stewart in the face. 1RP 450-51. Cox assaulted Mr. Stewart with a stick. 1RP 413-14. Freeman struck Mr. Stewart in the face with speaker boxes. 1RP 414. Richardson passed Freeman a frying pan, which Freeman used to strike Mr. Stewart’s face and head. 1RP 411-13. After Mr. Stewart was killed, Freeman made a vague threat, “this can happen to any one of us.” 1RP 451. There was talk about withdrawing money from a cash machine using a card from the wallet. 1RP 418-19. There was a plan to split up the proceeds. 1RP 419. Richardson was part of that discussion. 1RP 419. Mr. Stewart’s purloined phone was given to Richardson as a “down payment.” 1RP 421-22. Richardson gave the phone to his girlfriend. 1RP 420-21.

Detective Lesser interviewed Richardson. 1RP 473. Richardson initially denied using drugs. 1RP 648. Richardson revealed that on January 23, the four men were at the skate park, where Richardson

overheard the others talking, and that Hall, Cox and Freeman were devising a plan to rob Mr. Stewart of some drugs, as well as other electronic devices that they could grab while they were there. 1RP 476-77. These conversations took place as early as the Wednesday prior to the Friday homicide. RP 477. Freeman also discussed the contingency that may arise if a female were present at Mr. Stewart's apartment; Freeman made the comment that if she was present during the planned robbery they would take care of her also. 1RP 476.

Richardson decided he would accompany the other three to do the robbery. 1RP 478. The four of them then went to Mr. Stewart's apartment. 1RP 477-78; Ex. 117 at 41-42. Richardson thought they were going over there to get Cox's "stuff," including his drugs. Ex. 117 at 13. He vaguely knew their plan, but claimed the others kept him out of the loop. As the robbery progressed, Freeman cut at Mr. Stewart's throat with a knife. 1RP 595-96. The three others were trying to hold Mr. Stewart down. 1RP 597. Freeman struck Mr. Stewart in the head with a frying pan. 1RP 597; Freeman told Richardson to retrieve the frying pan. 1RP 598. Richardson admitted he gave the frying pan to Freeman, enabling him to strike Mr. Stewart with it again. 1RP 598; Ex. 117 at 55-58, 64. Richardson believed that his fingerprints would be found on the frying pan, and that his DNA could be found on Mr. Stewart's body. 1RP 598, 610.

The jury found Richardson guilty as charged and returned a special verdict that he was armed with a deadly weapon on the murder count. CP 276-78.

III. ARGUMENT

A. THE ADMISSION OF A COCONSPIRATOR'S NONTESTIMONIAL STATEMENTS MADE IN THE FURTHERANCE OF A CONSPIRACY DID NOT VIOLATE THE CONFRONTATION CLAUSE.

Richardson challenges the admission of Freeman's out-of-court statements that were made as the four men progressed on their quest to rob Mr. Stewart at his residence. Br. of Appellant 17-24. Freeman did not testify at Richardson's trial. Appellant argues that the admission of these statements violates the Confrontation Clause.

Generally, appellate courts review the trial court's admission of evidence for abuse of discretion. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996). However, whether a rule of evidence applies in a given factual situation is a question of law that is reviewed de novo. *State v. Williams*, 131 Wn. App. 488, 494, 128 P.3d 98, *review granted, cause remanded*, 158 Wn.2d 1006 (2006). Courts also review de novo alleged Confrontation Clause violations. *State v. Chambers*, 134 Wn. App. 853, 858, 142 P.3d 668 (2006).

The pertinent statements include Cox's testimony regarding Freeman's statement "we're gonna get some more dope from this person [Mr. Stewart] and we're gonna - - we're gonna rob [Mr. Stewart]" a statement made as the group of four were "walking from the skate part to Mr. Stewart's," and other similar statements made by Freeman, such as "we're all gonna rob Damien and kill him," and "I'm going to beat the crap out of this dude," and "I want him dead." 1RP 290-91.³

Importantly, trial counsel objected to Cox's and Hall's potential statements, but did not object to the similar statements Richardson made when he confessed that Freeman spoke about robbing Mr. Stewart and, in fact, admitted that Freeman also voiced a contingency plan that, should they encounter a female with Mr. Stewart when they robbed him, that they would "take care of her, too." 1RP 476.

The trial court ruled that Freeman's statements were non-testimonial as they were made in furtherance of the conspiracy to commit robbery, and that these were statements regarding a future act – the actions expected by the conspirators "when they got to the victim's home from a robbery

³ See also 1RP 416-17 where Hall testified, that although he believed it was just "street slang," Freeman discussed annihilating Mr. Stewart as the four men were walking from the park to Stewart's apartment.

prospective” constituting “a proposal of a future course of action.”
1RP 268.⁴

The trial court’s determination that these statements were not testimonial, and were statements made by coconspirators in furtherance of the conspiracy is amply supported by the evidence as well as caselaw.

The evidence and testimony regarding the discussions surrounding the planning of the robbery was consistent among both Hall and Cox, who

⁴ The trial court explained:

As I looked at all of those and the statements made, and I do have the citations here out of *Sing* [sic] [*United States v. Singh*, 494 F.3d 653 (8th Cir.), *cert. denied*, 128 S.Ct 528 (2007)] and out of Spottedell [sic] [*United States v. Spotted Elk*, 548 F.3d 641 (8th Cir. 2008)] with regards to these matters, what I come back to the conclusion is that there is a difference with regards to co-defendants. And in this particular case, the statements in question with regards to -- and I don’t have the exact statements being made at the skate park. My understanding is those are with regards to the robbery, the intent to go over to the apartment and further the robbery, as well as the statement made on the way to the apartment which was a statement to kill or mess up the victim in this matter. So the statements in question appear to be about a future act, what Mr. Freeman intended to do when he got to the victim’s home or, as they were sitting in the skate park, what they intended to do when they got to the victim’s home from a robbery perspective. This is not a statement of fact but a proposal of a future course of action as these cases go through and define.

These were also not made to law enforcement of any kind or to any official, as they outlined in some of these cases, but to the co-defendants themselves.

testified, and consistent with Richardson's confession. The four coconspirators sat around smoking meth at the skate park, conspiring and devising a plan where they would travel to Mr. Stewart's residence and rob him of drugs and electronics.⁵ These conversations took place as early as the Wednesday prior to the Friday homicide. RP 477. These discussions include Freeman's statements regarding the potential contingency that if a female were present at Mr. Stewart's apartment, they would take care of her also. 1RP 476. All four agreed to participate in the robbery. 1RP 478. They all went to Mr. Stewart's apartment to carry out the discussed robbery. Along the way, further statements were made as to how Freeman would take care of Mr. Stewart. Freeman's statements preceded the robbery and preceded his custody.

This evidence amply supported the trial court's determination that Freeman's statements were made in course of a conspiracy. This is a classic planning session followed up by statements amongst the coconspirators as to how the crime would take place.⁶

⁵ Importantly, the defendant himself revealed that on January 23, the four men were at the skate park, and that Hall, Cox and Freeman were devising a plan to rob Mr. Stewart of some drugs, as well as other electronic devices that they could grab while they were there. 1RP 476-77.

⁶ The State need show no more than the basic dictionary definition of a conspiracy: "an agreement ... made by two or more persons confederating to do an unlawful act," regardless of the crime charged. *State v. Halley*, 77 Wn. App. 149, 154, 890 P.2d 511 (1995) (quoting Webster's Third New

The law on this issue is also clear; as the trial court held, these statements were not testimonial. CP 243; 1RP 265-69. Coconspirator statements such as Freeman's are, by their nature, not testimonial. *See e.g., State v. Sanchez-Guillen*, 135 Wn. App. 636, 145 P.3d 406 (2006) (in a prosecution in which the defendant was charged with killing a police officer, statements by the defendant's mother to a third person, trying to arrange to have the defendant transported out of the country to avoid arrest, were admissible; no violation of the defendant's right to confrontation); *State v. Whitaker*, 133 Wn. App. 199, 226, 135 P.3d 923 (2006) (statements in furtherance of a conspiracy are not barred by *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), because they are not testimonial); *State v. Williams*, 131 Wn. App. 488 (a statement in furtherance of a conspiracy is not testimonial and thus is admissible even if

International Dictionary 485 (1969)). A conspiracy may be shown by circumstantial evidence. It is not necessary to show a formal agreement. A concert of action, all the parties working together understandingly with a single design for the accomplishment of a common purpose, will suffice. *State v. Barnes*, 85 Wn. App. 638, 664, 932 P.2d 669 (1997), *as amended on denial of reconsideration* (Apr. 18, 1997).

Additionally, "a coconspirator's statement is considered to be in furtherance of the conspiracy as long as it tends to promote one or more of the objects of the conspiracy." *United States v. Piper*, 298 F.3d 47, 54 (1st Cir. 2002).

the declarant/coconspirator was not present at trial and subject to cross-examination as to statements made before he was in custody).

Federal cases reach the same result. *See United States v. Ciresi*, 697 F.3d 19, 22 (1st Cir. 2012) (*Crawford* stated that statements in furtherance of a conspiracy are by their nature not testimonial, and “[m]oreover, we have already addressed this issue post-*Crawford* and concluded that coconspirator statements such as Zambarano’s are, by their nature, not testimonial. *See [United States v.] Rivera-Donate*, 682 F.3d [120,] 132 n.11 [(1st Cir. 2012)]; *United States v. De La Paz-Rentas*, 613 F.3d 18, 28 (1st Cir.2010); *United States v. Malpica-Garcia*, 489 F.3d 393, 397 (1st Cir.2007) (holding that coconspirator statements were nontestimonial because they were ‘made in the course of private conversations or in casual remarks that no one expected would be preserved or used later at trial’’).

Other federal circuits are in accord. *See, e.g., United States v. Farhane*, 634 F.3d 127, 162-63 (2d Cir. 2011); *United States v. Hendricks*, 395 F.3d 173, 183-84 (3d Cir. 2005); *United States v. Calderon*, 554 F. App’x 143, 154, 2014 WL 486664 (4th Cir. 2014)⁷ (Calderon’s

⁷ GR 14.1(b) permits citation to unpublished decisions from other jurisdictions as authorized under the rules of the jurisdiction issuing the opinion. FRAP 32.1 authorizes citation to unpublished decisions. A copy of this decision is attached as an appendix pursuant to GR 14.1(d).

constitutional claim is likewise wanting because the Confrontation Clause applies only to “testimonial” statements. *Crawford*, 541 U.S. at 51. Statements made by co-conspirators in furtherance of a conspiracy are not testimonial in nature, even when made unwittingly to undercover government agents); *United States v. Delgado*, 401 F.3d 290, 299 (5th Cir. 2005); *United States v. Jenkins*, 419 F.3d 614, 618 (7th Cir. 2005); *United States v. Mayfield*, 909 F.3d 956, 962-63 (8th Cir. 2018), *cert. denied*, No. 18-8894, 2019 WL 1767129 (U.S. May 20, 2019) (“Mayfield argues that Love’s statements ‘concerning whether Mayfield was involved in a drug conspiracy are testimonial.’ However, ‘co-conspirators’ statements made in furtherance of a conspiracy and admitted under Rule 801(d)(2)(E) are generally non-testimonial and, therefore, do not violate the Confrontation Clause as interpreted [in *Crawford*]” (alteration in original)); *United States v. Reyes*, 362 F.3d 536, 541 n. 4 (8th Cir. 2004), *cert. denied*, 542 U.S. 945 (2004); *United States v. Grasso*, 724 F.3d 1077, 1085 (9th Cir. 2013) (while the Sixth Amendment limits the admissibility of testimonial evidence, coconspirator statements in furtherance of a conspiracy are not testimonial and are admissible); *United States v. Allen*, 425 F.3d 1231, 1235 (9th Cir. 2005) (same); *United States v. Patterson*, 713 F.3d 1237, 1247 (10th Cir. 2013) (because these statements were made in furtherance of a conspiracy, they are nontestimonial and present no Sixth Amendment

problem, noting that under *United States v. Smalls*, 605 F.3d 765, 768 n. 2 (10th Cir. 2010) the *Bruton* rule does not apply to nontestimonial hearsay). *United States v. Underwood*, 446 F.3d 1340, 1347-48 (11th Cir. 2006).

The trial court correctly determined that Freeman's statements were admissible and not violative of the Confrontation Clause.

Harmless error.

Even if the admission of Freeman's statements violated the Confrontation Clause, any such error was harmless. Both Cox and Hall testified regarding the reasons for the formation of the agreement to rob Mr. Stewart, the circumstances surrounding the agreement, as well as how the agreement met its fruition in Mr. Stewart's apartment. More tellingly, Richardson *confessed* that, on January 23, the four were at the skate park, and that Hall, Cox and Freeman were devising a plan to rob Mr. Stewart of some drugs, as well as other electronic devices that they could grab while they were there. 1RP 476-77. Richardson admitted being privy to the discussion regarding the contingency that could arise if a female were present at Mr. Stewart's apartment; that he heard Freeman make the comment that if she was present during the planned robbery they would take care of her also. 1RP 476. Richardson unambiguously agreed to go with the other three to do the robbery. 1RP 477-78. He knew they were going to do

a robbery for drugs as well as an iPad tablet and other electronic stuff.
1RP 477.

Richardson's own words conclusively established his agreement in the conspiracy, and the subsequent events gave certainty to that agreement.

B. THE JURY WAS INSTRUCTED IN THE DEFINITIONAL INSTRUCTION AS TO SECOND-DEGREE ROBBERY RATHER THAN FIRST-DEGREE ROBBERY; THEREFORE, THE MOST APPROPRIATE REMEDY IS TO REMAND THE CONSPIRACY COUNT TO THE TRIAL COURT FOR RESENTENCING.

Before addressing the merits of defendant's claims that the court failed to appropriately instruct the jury on the definition of first-degree robbery, the State would note that he is precluded from challenging these instructions under both RAP 2.5(a) and by the invited error doctrine. He admits no objection was made in the trial court to any of the instructions given.

Generally, a party who fails to object to jury instructions in the trial court waives a claim of error on appeal. RAP 2.5(a); *State v. Schaler*, 169 Wn.2d 274, 282, 236 P.3d 858 (2010); *State v. Smith*, 174 Wn. App. 359, 364, 298 P.3d 785 (2013). As this Court observed in *State v. Guzman Nunez*, 160 Wn. App. 150, 157, 248 P.3d 103 (2011), *aff'd and remanded*, 174 Wn.2d 707 (2012): "[T]he general rule has specific applicability with respect to claimed errors in jury instructions in criminal

cases through CrR 6.15(c),⁸ requiring that timely and well stated objections be made to instructions given or refused ‘in order that the trial court may have the opportunity to correct any error.’” (Footnote added.) *Accord, State v. Sublett*, 176 Wn.2d 58, 75-76, 292 P.3d 715 (2012) (any objections to the instructions, as well as the grounds for the objections, must be put in the record to preserve review). The lack of a definitional instruction is not an error of constitutional magnitude that can be raised for the first time on appeal. *State v. Gordon*, 172 Wn.2d 671, 677, 260 P.3d 884 (2011).

Moreover, because any error was invited, it is generally not reviewable. Under the doctrine of invited error, counsel cannot set up an error at trial and then complain of it on appeal. Appellate courts may deem an error waived if, as here, the party asserting such error materially contributed to the error. Here, the defendant neither provided an instruction

⁸ CrR 6.15(c) states:

Objection to Instructions. Before instructing the jury, the court shall supply counsel with copies of the proposed numbered instructions, verdict and special finding forms. The court shall afford to counsel an opportunity in the absence of the jury to object to the giving of any instructions and the refusal to give a requested instruction or submission of a verdict or special finding form. The party objecting shall state the reasons for the objection, specifying the number, paragraph, and particular part of the instruction to be given or refused. The court shall provide counsel for each party with a copy of the instructions in their final form.

defining first-degree robbery, nor did he object to the giving of the instruction adopted by the trial court.

Richardson argues that the trial court's instruction regarding the conspiracy to commit first-degree robbery failed to properly define robbery in the first-degree, but instead, by giving a definition of second-degree robbery, the State only proved second-degree robbery.⁹ He admits no objection to the definitional instruction, or to any instruction, was made at the trial court level. Richardson argues that the proper remedy is reversal of the conspiracy charge, but does not discuss the more appropriate remedy of correcting the verdict to reflect the correct charge of conspiracy to commit second-degree robbery necessarily found by the jury.

Generally, unpreserved arguments or complaints regarding definitional instructions are not subject to review under RAP 2.5.¹⁰

⁹ “Here, the trial court only instructed the jury on the definition of second degree robbery and did not give an instruction that included the definition of first degree robbery as the target crime of the conspiracy.” Br. of Appellant at 30.

“Based on the manner in which the jury was instructed, the State was able to obtain this conviction only by proving Richardson conspired to commit second degree robbery.” Br. of Appellant at 29.

¹⁰ Generally, a defendant cannot challenge a jury instruction on appeal if he or she did not object to the instruction in the trial court. *State v. Salas*, 127 Wn.2d 173, 181, 897 P.2d 1246 (1995). In the absence of an objection, an appellate court reviews jury instructions for only an error of constitutional magnitude. RAP 2.5(a)(3); *State v. Hanna*, 123 Wn.2d 704, 709-10, 871 P.2d 135, *cert. denied*, 513 U.S. 919 (1994).

However, in this case, while the conspiracy to commit first-degree robbery to-convict instruction¹¹ contains all of the elements of the criminal conspiracy, the first element of that instruction requires the jury to find the defendant agreed with one or more persons to engage in or cause the performance of conduct constituting the *crime of first-degree robbery*. Yet, there is no instruction informing the jury as to what comprises a first-degree robbery. Therefore, the defendant's argument that the jury was not advised as to what constituted the crime of first-degree robbery is well-taken.

The definition of robbery that *was* supplied to the jury is the general robbery instruction for the crime of robbery in the second-degree. CP 260. For purposes of this case, first-degree robbery requires, in addition to a second-degree robbery, that the perpetrator be armed with a deadly, or apparently deadly weapon, or that the perpetrator inflict bodily injury. *Compare* WPIC 37.01 first-degree robbery definition, with WPIC 37.50, [second-degree] robbery definition.

Because this case involves a conspiracy to commit robbery, for the conspiracy to reach the elevated first-degree level of the offense, the agreement would have had to involve an agreement to use a weapon or display a weapon, or to involve an agreement to inflict bodily injury.

¹¹ CP 262.

Here, there was no weapon discussed during the conversations by the group of four. All of the weapons, the frying pan, the knife, and the stereo speaker, were obtained on site after the robbery had commenced.

There *was* mention of potential bodily injury to Mr. Stewart during the course of the conspiracy. These statements were made by Freeman. But, these statements were discounted as being simple street talk or braggadocio by the other three coconspirators. Therefore, the evidence is not overwhelming that the agreement the four reached – the conspiracy – involved an agreement to inflict bodily injury. If the jury had been properly instructed in this regard, it could have found the defendant guilty, and that finding would be sufficient on appeal. However, the jury was not required to make and unanimously agree on that issue.

A jury instruction that relieves the prosecution of its burden to prove an element of a crime is subject to harmless error analysis. *State v. Brown*, 147 Wn.2d 330, 332, 58 P.3d 889 (2002); *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). A jury instruction that omits an essential element is harmless if it appears beyond a reasonable doubt the error did not contribute to the verdict. *Brown*, 147 Wn.2d at 341. The omitted element must be supported by “uncontroverted evidence,” and the reviewing court must be able to “conclude beyond a reasonable doubt

that the jury verdict would have been the same absent the error.” *Id.* (quoting *Neder*, 527 U.S. at 19).¹²

While the evidence is incontrovertible that the four agreed to commit a second-degree robbery, it cannot be stated with confidence that the four agreed to commit a first-degree robbery.¹³ The jury was instructed on, and unanimously agreed that the crime of conspiracy to commit second-degree robbery had been proven. Given that the jury was instructed on, and necessarily found the elements of, conspiracy to commit robbery in the second-degree, the conspiracy to commit first-degree robbery conviction should be vacated and remanded to the trial court for the imposition of sentence on the lesser included conspiracy to commit second-degree robbery offense. This is the appropriate remedy. *See In re Heidari*, 174 Wn.2d 288, 292, 274 P.3d 366 (2012) (remand for imposition of judgment on lesser offense is appropriate where jury was instructed on and found the elements of the lesser offense).

¹² *Neder*, 527 U.S. 1

¹³ Because the State is conceding this point, argument regarding the alternative claim of ineffective assistance of counsel is not addressed. In light of the evidence presented at trial, representation would be found to be ineffective for allowing the jury to convict the defendant for conspiracy to commit first-degree robbery on instructions that did not establish what a first-degree robbery entailed.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY FINDING THAT THE CONSPIRACY TO COMMIT ROBBERY DID NOT CONSTITUTE THE “SAME CRIMINAL CONDUCT” AS THE MURDER FOR SENTENCING PURPOSES.

The trial court discussed why it found the conspiracy to commit robbery did not constitute the “same criminal conduct” as the murder for sentencing purposes:

The Court:

And based upon the facts as put forth in this trial, I do find that the conspiracy was committed and completed at the time the -- you all agreed to commit the robbery.

Now, unfortunately for Mr. Stewart, once that robbery started, his life was taken. That then becomes the murder in the first degree, felony murder in the first degree. It does not make a distinction between you intending to go there to murder him or not. And the jury did find you guilty of that, so that’s what we are here for sentencing purposes. I do not find those two offenses based upon the facts to be the same criminal course of conduct, therefore, from this Court’s perspective your offender score is a two. That puts the sentencing range for the murder at 261 months to 347 months and conspiracy to commit robbery at 30.75 months to 40.5 months.

1RP 1047.

The trial court did not abuse its discretion in making this decision. Under the Sentencing Reform Act of 1981, chapter 9.94A RCW, the sentencing range for each discrete conviction is calculated according to the offense and the defendant’s criminal offender score. RCW 9.94A.505(1), .525, .530. When a defendant is sentenced for multiple offenses during the

same proceeding, the default rule treats other current offenses as if they were prior convictions for the purpose of calculating the offender score. RCW 9.94A.589(1)(a). However, if the sentencing court finds that some or all of the defendant's current offenses encompass the "same criminal conduct," then those offenses shall be counted only as one crime when computing the score. *Id.*; *State v. Reyna Valencia*, 2 Wn. App. 2d 121, 125, 416 P.3d 1275, *review denied*, 190 Wn.2d 1020 (2018).

Whether multiple crimes constitute the same criminal conduct is a question of fact. *State v. Graciano*, 176 Wn.2d 531, 536, 295 P.3d 219 (2013). The inquiry turns on whether the crimes "require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1). The defendant bears the burden of proving that two or more current offenses are based on the same criminal conduct. *Reyna Valencia*, 416 P.3d 1275.

The appellate court reviews the trial court's disposition of this issue for abuse of discretion or misapplication of law. *Graciano*, 176 Wn.2d at 536.

Here the defendant fails to meet his burden to overcome the presumptive rule that the convictions were not based on the same criminal conduct. The conspiracy was complete before the four arrived at Mr. Stewart's residence. The felony murder, based upon a first-degree

burglary, occurred after the conspiracy was consummated. There was not an agreement to commit murder. The felony murder was based separately upon the commission of first-degree burglary. There was no error in this regard.

D. WHERE THE RECORD ESTABLISHES RICHARDSON'S INDIGENCY AT THE TIME OF SENTENCING, THIS COURT SHOULD STRIKE THE TRIAL COURT'S IMPOSITION OF DISCRETIONARY COSTS AND INTEREST, INCLUDING THE CRIMINAL FILING FEE AND COMMUNITY SUPERVISION.

Because the law has changed since Richardson's adjudications, the court should only impose legal financial obligations in accordance with the holding of *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018).

House Bill 1783, which became effective June 7, 2018, prohibits trial courts from imposing discretionary legal financial obligations (LFOs) on defendants who are indigent at the time of sentencing. Laws of 2018, ch. 269, § 6(3); *Ramirez*, 191 Wn.2d at 738. This change to the criminal filing fee statute is now codified in RCW 36.18.020(2)(h). These changes to the criminal filing fee statute apply prospectively to cases pending direct appeal prior to June 7, 2018. *Ramirez*, 191 Wn.2d at 747. Accordingly, the change in law applies to Richardson's case. Because he is indigent, the criminal filing fee must be stricken pursuant to *Ramirez*. The \$200 criminal

filing fee, the costs of community supervision,¹⁴ and the notation regarding the accrual of interest on all but his restitution ordered should be stricken upon remand.

IV. CONCLUSION

The evidence amply supported the trial court's determination that Freeman's statements were nontestimonial and made in the course of a conspiracy. There was no violation of the defendant's right to confrontation. Moreover, Richardson's own words conclusively established his agreement in the conspiracy, and the subsequent events gave certainty to that agreement; therefore, any error regarding confrontation was harmless.

The evidence is incontrovertible that the four men agreed to commit a second-degree robbery. However, it cannot be stated with confidence that the four agreed to commit a first-degree robbery. The jury was instructed on, and unanimously agreed that the crime of conspiracy to commit second-degree robbery had been proven. Because the instructions dealt with conspiracy to commit second-degree robbery, the jury necessarily found the elements of that crime. Vacation of the conspiracy to commit first-degree robbery conviction and imposition of sentence on the lesser included

¹⁴ *State v. Lundstrom*, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018) (cost of community custody is discretionary).

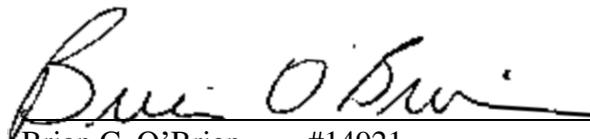
conspiracy to commit second-degree robbery offense is the appropriate remedy.

The trial court did not abuse its discretion by finding that the conspiracy to commit robbery did not constitute the “same criminal conduct” as the murder for sentencing purposes.

The judgment of the trial court should be affirmed as to the felony murder count, and remanded for resentencing on the robbery count. The above noted financial obligations should be stricken upon remand for resentencing.

Dated this 24 day of June, 2019.

LAWRENCE H. HASKELL
Prosecuting Attorney



Brian C. O'Brien #14921

Deputy Prosecuting Attorney
Attorney for Respondent

APPENDIX

554 Fed.Appx. 143

This case was not selected for publication in the Federal Reporter. Not for Publication in West's Federal Reporter.

See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Fourth Circuit Rule 32.1 (Find CTA4 Rule 32.1) United States Court of Appeals, Fourth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
[Juan CALDERON](#), Defendant–Appellant.

No. 12–5006.

|
Argued: Dec. 12, 2013.

|
Decided: Feb. 7, 2014.

Synopsis

Background: Defendant was convicted in the United States District Court for the District of South Carolina, [J. Michelle Childs, J.](#), of conspiracy to possess with intent to distribute marijuana, cocaine, and crack cocaine, and he appealed.

Holdings: The Court of Appeals held that:

[1] any Confrontation Clause violation was harmless error;

[2] evidence was sufficient to support conviction;

[3] evidence of attempted cocaine purchase was inextricably intertwined with charge against defendant;

[4] statement was admissible as non-hearsay statement of a coconspirator; and

[5] 292-month sentence was not substantively unreasonable.

Affirmed.

West Headnotes (8)

[1] Criminal Law

🔑 Reception of evidence

Any Confrontation Clause violation in trial court's ruling preventing drug conspiracy defendant from cross-examining cooperating government witnesses on their numerical sentencing ranges and potential sentence reductions was harmless error; court permitted defendant to conduct vigorous inquiry into the witnesses' understandings of their expected sentences, using adjectives rather than numbers, and defendant elicited from the witnesses that they faced long sentences, and despite court's restriction, one witness admitted on cross-examination that he was looking at life in prison, and court permitted a great deal of testimony regarding the witnesses' biases and credibility. [U.S.C.A. Const.Amend. 6](#).

[Cases that cite this headnote](#)

[2] Conspiracy

🔑 Narcotics and dangerous drugs

Evidence was sufficient to support conviction for conspiracy to possess with intent to distribute marijuana, cocaine, and crack cocaine, even though there was no evidence of defendant's personal involvement with crack cocaine; evidence showed that defendant assumed another conspirator's drug supply role when that conspirator went to prison, made repeated drug sales to coconspirators, modified coconspirator's pickup truck with hidden compartment for transporting marijuana, received drug payments through his bank account, was involvement in attempted cocaine purchase, later declared to coconspirators that a participant in that purchase was a snitch and had been killed, and attempted once in jail to intimidate and murder a cooperating witness. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), (b)(1)(A),

406, 21 U.S.C.A. §§ 841(a)(1), (b)(1)(A), 846.

[Cases that cite this headnote](#)

[3] Criminal Law

🔑 Conspiracy, racketeering, and money laundering

Incident in which coconspirator, defendant, and a third man traveled together to purchase cocaine, coconspirator gave third man money to buy cocaine while he and defendant waited nearby, and third man was arrested by undercover officer posing as cocaine dealer, was inextricably intertwined with charge against defendant of conspiracy to possess with intent to distribute marijuana, cocaine, and crack cocaine, and thus, at defendant's trial on the conspiracy charge, evidence of the incident was not governed by rule of evidence governing evidence of other crimes, wrongs, or acts; the attempt to buy cocaine arose out of coconspirator's and defendant's prior dealings buying and selling marijuana and demonstrated a continuation and deepening of their mutual plans to violate drug laws for personal gain. [Fed.Rules Evid.Rule 404\(b\)](#), 28 U.S.C.A.

[Cases that cite this headnote](#)

[4] Criminal Law

🔑 Acts and declarations during actual commission of crime

At defendant's trial on charge of conspiracy to possess with intent to distribute marijuana, cocaine, and crack cocaine, evidence of non-testifying coconspirator's statement to undercover officer posing as cocaine dealer that he was interested in purchasing three kilograms of cocaine on behalf of other individuals was admissible as non-hearsay statement of a coconspirator during and in furtherance of the conspiracy; evidence established defendant's and coconspirator's involvement in the attempted cocaine purchase as coconspirators, and coconspirator's statement

to undercover officer were made for the purpose of purchasing cocaine, a key objective of the conspiracy. [Fed.Rules Evid.Rule 801\(d\)\(2\)\(E\)](#), 28 U.S.C.A.

[Cases that cite this headnote](#)

[5] Criminal Law

🔑 Evidence as to information acted on

At defendant's trial on charge of conspiracy to possess with intent to distribute marijuana, cocaine, and crack cocaine, evidence of non-testifying coconspirator's post-arrest statement to undercover officer directing police to the restaurant where defendant and another coconspirator were waiting for him to return from a cocaine purchase was not hearsay, since it was offered to show why the officers went to the restaurant, not to prove the truth of the matter asserted. [Fed.Rules Evid.Rule 801\(c\)](#), 28 U.S.C.A.

[Cases that cite this headnote](#)

[6] Criminal Law

🔑 Coconspirators' statements

For purposes of the rule that the Confrontation Clause applies only to "testimonial" statements of absent declarants admitted against a defendant in a criminal trial, statements made by coconspirators in furtherance of a conspiracy are not testimonial in nature, even when made unwittingly to undercover government agents. [U.S.C.A. Const.Amend. 6](#).

[Cases that cite this headnote](#)

[7] Sentencing and Punishment

🔑 Quantity of drugs and drug-related matter

The sentencing court, in determining the amount of drugs attributable to drug conspiracy defendant for purposes of calculating offense level, was bound by the jury's verdict attributing to defendant at least 1,000 kilograms of marijuana, five kilograms

of cocaine, and 280 grams of cocaine base.

 [U.S.S.G. § 1B1.1](#) et seq., 18 U.S.C.A.

[Cases that cite this headnote](#)

[8] Conspiracy

Sentence and Punishment

Defendant's 292-month sentence for conspiracy to possess with intent to distribute marijuana, cocaine, and crack cocaine, which was within sentencing guidelines range of 292 to 365 months, was not substantively unreasonable by virtue of its disparity with defendant's coconspirators' sentences; although some of defendant's coconspirators received more lenient sentences, they had accepted responsibility for their criminal conduct, unlike defendant, and none of defendant's coconspirators had intimidated witnesses who were to testify against them, as defendant had.  [18 U.S.C.A. § 3553\(a\)\(6\)](#);

 [U.S.S.G. § 1B1.1](#) et seq., 18 U.S.C.A.

[Cases that cite this headnote](#)

***145** Appeal from the United States District Court for the District of South Carolina, at Greenville. [J. Michelle Childs](#), District Judge. (6:11-cr-00338-JMC-20).

Attorneys and Law Firms

ARGUED: [Russell Warren Mace, III](#), The Mace Firm, Myrtle Beach, South Carolina, for Appellant. [Andrew Burke Moorman, Sr.](#), Office of the United States Attorney, Greenville, South Carolina, for Appellee. **ON BRIEF:** [William N. Nettles](#), United States Attorney, Office of the United States Attorney, Columbia, South Carolina, for Appellee.

Before [WILKINSON](#), [KING](#), and [GREGORY](#), Circuit Judges.

Opinion

Affirmed by unpublished PER CURIAM opinion.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

****1** After a four-day trial, a jury found Juan Calderon guilty of one count of conspiracy to possess with intent to distribute marijuana, cocaine, and cocaine base (also known as “crack cocaine”). Calderon now appeals on multiple grounds, alleging that the district court erred in several evidentiary rulings, in dismissing his motion for a judgment of acquittal, and in determining his sentence. For the following reasons, we affirm his conviction and sentence.

I.

A.

In 2004, Justin Jenkins began operating a drug trafficking organization (DTO) in ***146** South Carolina dedicated to distributing marijuana, cocaine, and crack cocaine. The DTO obtained marijuana and cocaine, cooked a portion of the cocaine into crack cocaine, and then sold the inventory through a network of local distributors within South Carolina. Members of the DTO included, among others, Kevin Montgomery and Thomas Renrick IV.

Queston Clement, a friend and co-conspirator of Jenkins who lived in California, introduced Jenkins to Cristian Escobedo–Mendoza in 2008. Shortly thereafter, Escobedo began shipping marijuana from California to South Carolina. Later that year, Escobedo introduced Jenkins to Calderon so that Calderon could continue supplying marijuana to the DTO while Escobedo served a prison sentence. Calderon proceeded to sell marijuana to Jenkins and Clement from September 2008 to January 2009. He delivered the drugs in a variety of ways, one of which was to give packages to Clement, who would then ship them cross country in a pickup truck provided by Jenkins in which Calderon had installed a hidden compartment. In order to pay for the drugs, Jenkins either provided cash payments or had his associates deposit money into various South Carolina bank accounts, including one under the name of Juan Calderon.

In December 2008, Jenkins inquired into whether or not Calderon could procure cocaine, to which Calderon replied affirmatively. Following that discussion, on January 8, 2009, Jenkins flew to California to meet with Calderon and purchase cocaine from him. After his arrival, Jenkins, Calderon, and a third man named Heliodoro Torres-Sanchez drove to Fresno, where they stayed the night. The next morning Jenkins gave \$23,000 to Sanchez for the purpose of buying the cocaine in a Wal-Mart parking lot while Jenkins and Calderon waited at a nearby Carls, Jr. restaurant.

The three conspirators were unaware that Sanchez was the subject of an investigation by the Fresno Police Department (FPD), and that the purported cocaine dealer was, in reality, an undercover FPD detective named Manuel Robles. FPD officers arrested Sanchez immediately after he displayed the money to Detective Robles. They recovered from Sanchez \$23,000 and a set of car keys to a Chevy Malibu. Sanchez then directed them to the Carls, Jr. restaurant, where they found both Jenkins and Calderon. The officers ascertained that the car keys in Sanchez's possession were to Calderon's Malibu, and later that day placed both Jenkins and Calderon under arrest. The local district attorney declined to charge Jenkins and Calderon because of insufficient corroborating evidence and they were both released from custody. Jenkins left California, after which he and Calderon did not see each other again until 2011.

**2 Escobedo, upon his release from prison in late 2010, began once again supplying marijuana and cocaine to the DTO. As before, payments for these narcotics occurred at least partly through Calderon's bank account. In January 2011, Jenkins and Renrick traveled to Las Vegas to meet with Escobedo but were surprised to be met at the airport by both Escobedo and Calderon. Calderon drove Jenkins, Renrick, and Escobedo to their hotel and during the drive he declared that the "snitch" from the Fresno drug buy, Sanchez, had been killed.

Calderon was indicted by a federal grand jury later in 2011 in connection with his sale of narcotics to the DTO. While jailed and awaiting trial, Calderon told fellow inmate Stephon Hopkins that Jenkins had "snitched" on him. J.A. 491. Calderon tried to convince Hopkins to have *147 friends outside the jail frighten Jenkins's family to keep him from testifying for the prosecution and stated that if Jenkins did testify, Calderon would have

his associates "start killing ... people." J.A. 495. Calderon also mentioned his plans to intimidate Jenkins to another inmate, Derrick Mosley, and then endeavored to hire Mosley to murder Jenkins. Calderon finally attempted to persuade Demauryo Moody, a third inmate, to sign a false statement undermining Jenkins's credibility.

B.

The indictment charged Jenkins, Calderon, and the other coconspirators with multiple counts of criminal conduct arising from the operations of the DTO. Calderon was only charged under Count One: conspiracy to possess with intent to distribute five kilograms or more of cocaine, 280 grams or more of crack cocaine, and 1,000 kilograms or more of marijuana in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A), all in violation of 21 U.S.C. § 846.

Prior to trial, the government notified Calderon that Jenkins, Renrick, Montgomery, Clement, Escobedo, Hopkins, Mosley, and Moody would all testify against Calderon on behalf of the prosecution. Calderon indicated his desire to inquire into the sentences faced by these cooperating witnesses, and the government subsequently moved *in limine* to prohibit him from eliciting specific numerical ranges on cross-examination on the grounds that it would unduly prejudice the jury. The district court granted the motion, and restricted Calderon to using "adjectives" instead of specific numbers when examining the cooperating witnesses about their sentencing ranges.

For his part, Calderon moved *in limine* to exclude evidence of the events surrounding his 2009 arrest in Fresno (the Fresno Incident) as improper character evidence under Federal Rule of Evidence (FRE) 404(b) and as unfairly prejudicial under FRE 403 because it associated him with Jenkins, an admitted high level drug dealer. The district court found that evidence of the Fresno Incident was admissible because it was "intrinsic" to the conspiracy and denied Calderon's motion accordingly.

The government indicated that it would call three officers of the FPD to testify to the events surrounding the Fresno Incident. In response, Calderon moved *in limine* to exclude any testimony by these officers about statements Sanchez made to them on the basis that the statements were hearsay and admitting them would violate Calderon's

rights under the Sixth Amendment's Confrontation Clause. The district court denied Calderon's motion, finding that Sanchez's out-of-court statements were admissible because they were either being offered by the government to show the effect on the FDP's investigation or were admissions by Sanchez as Calderon's co-conspirator.

****3** At the conclusion of the government's case-in-chief, Calderon moved for a judgment of acquittal under [Rule 29 of the Federal Rules of Criminal Procedure](#) on the basis that the evidence was insufficient to sustain a conviction against him for conspiracy to distribute crack cocaine. The district court denied his motion and sent the charge to the jury. Following deliberations, the jury found Calderon guilty and attributed to him personally the liability for 1,000 kilograms or more of marijuana, five kilograms or more of cocaine, and 280 grams or more of cocaine base. Over Calderon's objections, the district court calculated his range under the United States Sentencing Guidelines at between 292 and 365 months and sentenced him to 292 months in prison. Calderon ***148** thereafter filed timely notice of this appeal.

II.

[1] Calderon's initial contention on appeal is that the district court violated his Sixth Amendment right to confront the witnesses against him when it prevented him from cross-examining the government's cooperating witnesses on their numerical sentencing ranges and potential reductions. "We review for abuse of discretion a trial court's limitations on a defendant's cross-examination of a prosecution witness," [United States v. Ramos-Cruz](#), 667 F.3d 487, 500 (4th Cir.2012) (internal quotation marks omitted), and review *de novo* the lower "court's legal conclusions regarding constitutional claims," [United States v. Dinkins](#), 691 F.3d 358, 382 (4th Cir.2012).

A.

The Confrontation Clause in the Sixth Amendment guarantees to every criminal defendant the right to cross-examine the witnesses against him, and thereby "expose to the jury the facts from which jurors ... could appropriately

draw inferences relating to [their] reliability." [Olden v. Kentucky](#), 488 U.S. 227, 231, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988) (internal quotation marks omitted). But this right is not absolute, because "trial judges possess wide latitude to impose reasonable limits on cross-examination, based on concerns including harassment, prejudice, confusion of the issues, repetition, or marginal relevance." [United States v. Turner](#), 198 F.3d 425, 429 (4th Cir.1999).

In the context of cross-examining cooperating witnesses, the "critical question" is whether the defendant was given the opportunity to reveal the witness's "subjective understanding of his bargain with the government." [United States v. Ambers](#), 85 F.3d 173, 176 (4th Cir.1996) (internal quotation marks omitted). Consequently, our inquiry on appeal focuses on "whether the jury possess[ed] sufficient evidence to enable it to make a discriminating appraisal of bias and incentives to lie on the part of the witnesses." [United States v. Cropp](#), 127 F.3d 354, 359 (4th Cir.1997) (internal quotation marks omitted).

In [Cropp](#), we held that a district court did not abuse its discretion when it prohibited a defendant from inquiring into the contrasting numerical sentencing ranges that co-conspirators could have received absent cooperation and hoped to receive with cooperation. [Id.](#) at 358–59. We recognized that the credibility of cooperating witnesses in a criminal prosecution is "very relevant." [Id.](#) at 358. But we also observed that a trial court might legitimately be concerned that, if the jury learned the severity of the sentences faced by a defendant's coconspirators, it would conclude he faced the same punishment and "hesitate to find [him] guilty even if the evidence proved [his] guilt." [Id.](#) We ruled that the threat of jury nullification trumped the minor marginal value added by permitting inquiry into specific sentencing ranges because, based on the testimony elicited on cross-examination, "the jury was already well aware that the witnesses were cooperators facing severe penalties if they did not provide the government with incriminating information." [Id.](#) at 359.

****4** In the case before us, the district court ruled under [FRE 403](#), which provides the trial court the discretion to exclude testimony when its probative value

is “substantially outweighed by a danger of ... unfair prejudice,” that Calderon was permitted to cross-examine each of the cooperating witnesses about their expected prison sentences using “adjectives” but not “numbers.” J.A. 68. Calderon maintains the numerical sentencing ranges and potential *149 reductions for assisting the government would facilitate the jury's ability to perform a “discriminating appraisal” of the incentives of the cooperating witnesses to be untruthful and the district court's evidentiary ruling was thus in error. He also claims that [Cropp](#) does not apply to the cross-examinations of Hopkins, Mosley, and Moody because they were not Calderon's co-conspirators. Even if Calderon is correct, we need not determine the precise scope or application of our holding in [Cropp](#) in this case. For assuming without deciding that any constitutional error occurred, it was unquestionably harmless.

B.

The “Constitution entitles a criminal defendant to a fair trial,” but it does not guarantee a “perfect one.” [Delaware v. Van Arsdall](#), 475 U.S. 673, 681, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). Therefore, “otherwise valid conviction [s] should not be set aside” if we can conclude, “on the whole record, that the constitutional error was harmless beyond a reasonable doubt.” [United States v. Abu Ali](#), 528 F.3d 210, 256 (4th Cir.2008) (internal quotation marks omitted).

As part of its case, the government introduced bank records and the testimony of the arresting officers involved in the Fresno Incident. The government's case also depended in large part on the testimony of co-conspirators and jailhouse informants. In [Turner](#), we found that the district court erred as a matter of law by excluding as not relevant testimony from a witness regarding her understanding of the penalties she would have faced had she not cooperated with the government. 198 F.3d at 430. We observed, though, that the witness admitted she faced a “pretty serious” penalty and that it was impossible to conclude that “a more specific response from [the witness] would have significantly changed the jury's impression of her credibility.” *Id.* at 431. Thus, we held that even if the error was constitutional it was “harmless beyond a reasonable doubt” because the district

court permitted a “substantial and thorough examination of [the witness's] biases.” *Id.* at 430–31 & n. 6.

The district court afforded Calderon a similar opportunity to conduct a vigorous inquiry into the cooperating witnesses' subjective understandings of their expected prison sentences and he took full advantage of it. The trial court explained that it “did allow the defense to use adjectives, harsh penalty, serious penalties, without indicating a number.” J.A. 361. Calderon elicited separately from Clement, Escobedo, and Moody the fact that they were each facing the possibility of serving “a lot of time” incarcerated, J.A. 361–62 (Clement), 457 (Escobedo), 589 (Moody), from Jenkins that he did not want to “spend a long time in jail,” J.A. 254, and from Mosley that he might receive a “significant amount of time” locked up, J.A. 566–67. Furthermore, despite the district court's restriction, Renrick admitted on cross-examination that he was “looking at life” in prison, J.A. 416, and Hopkins stated that he “just did two years” and had “five years and ten months” left on his sentence, J.A. 499. Finally, Calderon told the district court that he never intended to call into question the credibility of the eighth cooperating witness, Montgomery.

**5 In addition to these admissions, the record also reveals that the district court permitted a great deal of testimony regarding each of the cooperating witnesses' biases and credibility. All eight testified on direct examination that they had pleaded guilty to various crimes and hoped or expected to gain leniency on their sentences by testifying for the government. Calderon extensively impeached Jenkins, who was the government's key cooperating *150 witness, using his many past instances of untruthfulness. Calderon forced Clement to admit that he had lied to the police, cornered Renrick with his extensive criminal history, and revealed Escobedo's omission of key details in his early debriefings with government agents. He also cross-examined Hopkins, Mosley, and Moody—the three informants who had interacted with Calderon in jail—on their many criminal convictions unrelated to the conspiracy in this case and compelled them each to admit they wanted to be released as soon as possible. Calderon meticulously impeached these witnesses and we think the possibility exceedingly small that the admission of their precise sentencing ranges and possible reductions would have “significantly changed the jury's impression of [their] credibility.” [Turner](#), 198 F.3d at 431.

Moreover, it cannot be said that the jury did not have some notion of the exact prison sentences Calderon's coconspirators faced. When Calderon asked Renrick if he was "looking at a lot of time," which is the exact same question Calderon posed to several of the other cooperating witnesses, Renrick testified that he faced a life sentence. J.A. 416. The district court also highlighted the incentives of cooperating witnesses to be untruthful when it carefully instructed the jury prior to its deliberations that when deciding what weight to give their testimony it could consider the fact they were cooperating with and depended on the government for possible sentence reductions. Considering the entire record, we are satisfied that the district court's ruling did not deprive Calderon of a fair trial and that any violation of his Sixth Amendment rights was harmless beyond a reasonable doubt.

III.

Calderon's second and third arguments on appeal rest on his claim that the government failed to offer evidence connecting him to the sale of crack cocaine. He first maintains that the district court erred in denying his motion for a judgment of acquittal because the government did not prove beyond a reasonable doubt that he was involved in the sale of crack cocaine. He argues alternatively that the district court erred in dismissing his motion because the government proved not one conspiracy to distribute marijuana, cocaine, and crack cocaine, but instead two separate conspiracies: one involving marijuana and cocaine and the other, to which he was not connected, involving crack cocaine. We discuss each of these arguments in turn.

"We review *de novo* the district court's denial of a motion for judgment of acquittal pursuant to [Rule 29 of the Federal Rules of Criminal Procedure](#)." *United States v. Green*, 599 F.3d 360, 367 (4th Cir.2010). Because this is a challenge to the sufficiency of the evidence, "[w]e will sustain the jury verdict" if we find that, "viewing the evidence in the light most favorable to the government, there is substantial evidence to support the conviction."

[United States v. Hamilton](#), 699 F.3d 356, 361 (4th Cir.2012) (internal quotation marks omitted).

A.

**6 [2] Calderon asserts that the government, by charging him with conspiracy to distribute marijuana, cocaine, and cocaine base, must prove his connection with each of those substances beyond a reasonable doubt. It is true of course that the government bears the burden of proving to the jury all the elements of the charged offense beyond a reasonable doubt. [United States v. Burgos](#), 94 F.3d 849, 858 (4th Cir.1996) (en banc). The elements of the conspiracy charged in this case are that *151 the defendant (1) had an agreement to distribute marijuana, cocaine, and cocaine base, (2) knew of the conspiracy, and (3) knowingly and voluntarily participated in that conspiracy. [United States v. Allen](#), 716 F.3d 98, 103 (4th Cir.2013). Calderon rests his argument on the "and" linking the drugs in the first element, but we are not persuaded that this conjunction shows that the government failed to meet its burden.

It is clearly established that "one may be a member of a conspiracy without knowing its full scope, or all its members, and without taking part in the full range of its activities or over the whole period of its existence."

[Id.](#) (internal quotation marks omitted). The focus of a conspiracy charge is not on the details of the operation, but rather whether there has been an "agreement to violate the law." [Id.](#) (internal quotation marks omitted).

It is Calderon's position that the government did not prove his involvement in the conspiracy because while it presented evidence linking him to the sale of marijuana and cocaine, it had no evidence connecting him to the sale of crack cocaine, which was cooked and distributed solely in South Carolina by the DTO. But the record viewed in the light most favorable to the government affords ample reason to reject his claim. Calderon's assumption of Escobedo's drug supply role when Escobedo went to prison, repeated drug sales to Jenkins and Clement, modification of Jenkins's pickup truck with a hidden compartment, receipt of drug payments through his bank account, involvement in the attempted cocaine purchase in Fresno in 2009, declaration that Sanchez was a "snitch" and had been murdered, and attempts once in jail to intimidate and murder Jenkins altogether make for a strong case. Although the government did not offer

evidence of Calderon's personal involvement with crack cocaine, it is uncontested that members of the DTO produced and distributed crack cocaine. Calderon's part in advancing the general conspiracy plainly suffices to sustain his conviction, and we decline to disturb the jury's verdict in this regard.

B.

Calderon next claims that the government proved two conspiracies at trial, only one of which implicated him. Because he did not raise this argument in his [Rule 29](#) motion below, we review it for “plain error” under [Federal Rule of Criminal Procedure 52\(b\)](#). *United States v. Wallace*, 515 F.3d 327, 331–32 (4th Cir.2008). Under this standard, the defendant bears the burden of demonstrating that (1) an error occurred, (2) it was plain, and (3) it affected his substantial rights. *United States v. Rodriguez*, 433 F.3d 411, 414–15 (4th Cir.2006). And even if he can show these three factors, “we have discretion whether to recognize the error, and should not do so unless the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *United States v. Dyess*, 730 F.3d 354, 361 (4th Cir.2013) (internal quotation marks omitted).

****7** Calderon's contention relies on the same general proposition discussed above with one exception: in this version of the argument, he maintains that the government's failure to tie him to the crack cocaine shows that there were parallel but dichotomous conspiracies, only one of which involved him. We have recognized that a “single conspiracy exists, when the conspiracy had the same objective, it had the same goal, the same nature, the same geographic spread, the same results, and the same product.” *United States v. Jeffers*, 570 F.3d 557, 567 (4th Cir.2009) (internal quotation marks omitted). “The mere fact that more than one substance is charged ***152** ... does not mean there are multiple conspiracies.” *United States v. Barlin*, 686 F.2d 81, 89 (2d Cir.1982).

The testimony and evidence adduced at trial reveals the coherence of the conspiracy at issue in this case. Calderon shared the same objective as his co-conspirators: to make money by shipping and selling prohibited substances in violation of federal drug laws. He provided narcotics to the same individuals who were producing crack cocaine. The conspirators used the same methods to transport

the drugs and the same techniques to make and receive payments. They distributed those drugs within the same geographic area of South Carolina. And, until they were apprehended, they enjoyed the same fruits of their unlawful enterprise. We therefore hold that Calderon did not carry his burden of proving that the district court plainly erred in dismissing his [Rule 29](#) motion.

IV.

[3] In his fourth argument, Calderon maintains that the district court erred in permitting the government to offer evidence of his participation in the 2009 Fresno Incident because it was improper character evidence under [Federal Rule of Evidence \(FRE\) 404\(b\)](#) and unfairly prejudicial under [FRE 403](#). We review a district court's evidentiary rulings for abuse of discretion. *United States v. Lespier*, 725 F.3d 437, 447 (4th Cir.2013).

[FRE 404\(b\)](#) prohibits “[e]vidence of a crime, wrong, or other act” if offered at trial “to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.” However, not all purported character evidence falls under 404(b)'s proscription. A prior act that is “intrinsic to the crime charged, and is not admitted solely to demonstrate bad character, ... is admissible.” *United States v. Chin*, 83 F.3d 83, 88 (4th Cir.1996). “Other ... acts are intrinsic when they are inextricably intertwined or both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged.” *United States v. Wilson*, 624 F.3d 640, 652 (4th Cir.2010) (internal quotation marks omitted).

We are unconvinced by Calderon's arguments that the Fresno Incident is not inextricably intertwined with his conspiracy charge. He maintains that the Fresno Incident is extrinsic because he was never indicted for a crime in connection with his arrest due to a lack of sufficient corroborating evidence. However, the fact that Calderon was never indicted is of no import here because the evidence surrounding the Fresno Incident was undoubtedly relevant to the narrative of the conspiracy and “uncharged acts may be admissible as direct evidence of the conspiracy itself.” *United States v. Diaz*, 176 F.3d 52, 79 (2d Cir.1999) (internal quotation marks omitted).

It is the elements of the crime, not every single piece of evidence, that the government must prove beyond a reasonable doubt.

****8** The Fresno Incident was undeniably intrinsic to the charged conspiracy. Evidence adduced at trial showed that Jenkins and Calderon collaborated in the attempt to purchase cocaine from what turned out to be an undercover FPD detective. The attempt to buy cocaine arose out of Jenkins's and Calderon's prior dealings buying and selling marijuana and demonstrated a continuation and deepening of their mutual plans to violate federal drug laws for personal gain. The district court did not abuse its discretion in permitting testimony about the Fresno Incident as direct evidence of the conspiracy.

Calderon next calls for this court to overturn the trial court's ruling under ***153 FRE 403**, which permits a district court to exclude evidence if its probative value is "substantially outweighed by a danger of ... unfair prejudice." The preceding discussion of the Fresno Incident's intrinsic connection to the charged conspiracy demonstrates its probative value. But Calderon claims that the jury was prejudiced by the Fresno Incident because it associated him with Jenkins, the admitted leader of the DTO. The jury, he contends, may have desired to punish him for his involvement in the attempt to buy cocaine regardless of whether he was actually guilty of conspiracy. Any slight prejudice arising from these inferences is neither unfair, as **FRE 403** requires, and did not substantially outweigh the probative value of the Fresno Incident evidence as a whole. We cannot conclude that the district court abused its direction in admitting it.

V.

[4] Calderon next claims that the district court improperly permitted the FPD officers involved in the Fresno Incident to testify to statements made to them by Sanchez. Calderon alleges the statements were hearsay and their admission violated his right to confront the witnesses against him. We review the district court's rulings involving hearsay for abuse of discretion, *United States v. Obi*, 239 F.3d 662, 667 (4th Cir.2001), and its Confrontation Clause rulings *de novo*,  *United States v. Abu Ali*, 528 F.3d 210, 253 (4th Cir.2008).

During the trial, the government called Officer Robles, Officer Robert Valdez, and Officer Dean Cardinale of the FPD to describe the events surrounding the Fresno Incident. The officers testified that, among other things, Sanchez told the FPD prior to his arrest that he was interested in purchasing three kilograms of cocaine on behalf of other individuals. Officer Robles also provided the following testimony:

Q: After Mr. Sanchez was arrested in the Wal-Mart parking lot, where did you and other officers respond?

A: To the Carls, Jr. restaurant.

Q: Why did you respond to the Carls, Jr. restaurant?

....

A: We responded out there because we had information that a vehicle that was used was at that location with co-conspirators of the drug deal.

Q: Who gave you that information?

A: Mr. Sanchez did.

J.A. 143–44. Calderon maintains that Sanchez's statements were inadmissible hearsay and violated his Confrontation Clause rights. Specifically, he argues that Sanchez's pre-arrest statements were inadmissible because the government never showed that Sanchez was a co-conspirator and his post-arrest statement was inadmissible because it was offered by the government for its truth.

****9** Sanchez's statements prior to his arrest fall under the coconspirator provision in **FRE 801(d)(2)(E)**. **FRE 801(c)** generally prohibits witnesses from relaying to the jury out-of-court statements if they are "offer[ed] in evidence to prove the truth of the matter asserted." But statements are not hearsay if "made by the party's coconspirator during and in furtherance of the conspiracy" and are "offered against [the] party." **Fed.R.Evid. 801(d)(2)(E)**. Further, co-conspirator statements are admissible if the government can prove three elements by a preponderance of the evidence: (1) a conspiracy existed in fact, (2) "the declarant and the defendant were members of the conspiracy," and (3) "the statement was made in the course of, and in furtherance, of the conspiracy."

 *United States v. Graham*, 711 F.3d 445, 453 (4th Cir.2013).

*154 The government met its burden here. For the first element, there was the trial evidence already recounted proving the existence of a conspiracy. The second element was satisfied by the testimony of Jenkins, as well as Sanchez's own statements to the FPD, that showed both Sanchez's and Calderon's involvement in the attempted cocaine purchase as co-conspirators. Additionally, the car keys recovered from Sanchez's person after his arrest were to Calderon's Chevy Malibu, connecting Calderon directly to Sanchez and the attempted purchase. Renrick also testified that Calderon confirmed Sanchez's participation in the Fresno Incident when informing Jenkins that the "snitch" had been killed. And the third element was established because the statements at issue were clearly "in furtherance of" the crime in that they were made for the purpose of purchasing cocaine, a key objective of the conspiracy.

[5] Sanchez's statement after his arrest to Detective Robles directing the FPD to where Jenkins and Calderon were waiting was also admissible. A statement is not hearsay under FRE 801(c) if it is offered for a purpose other than the truth of the matter asserted, such as "the limited purpose of explaining why a government investigation was undertaken." *United States v. Love*, 767 F.2d 1052, 1063 (4th Cir.1985). Here, Sanchez's statement post-arrest was offered to show why the officers went to the Carls, Jr. restaurant and consequently was elicited simply to show its effect on the FPD's subsequent course of conduct. We thus find that the district court did not abuse its discretion when it admitted these statements.

[6] Calderon's constitutional claim is likewise wanting because the Confrontation Clause applies only to "testimonial" statements. *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Statements made by co-conspirators in furtherance of a conspiracy are not testimonial in nature, even when made unwittingly to undercover government agents. See *id.* at 56, 124 S.Ct. 1354. Likewise, statements offered for purposes other than to prove the truth of the matter asserted are not considered testimonial. *Id.* at 59 n. 9, 124 S.Ct. 1354. Therefore, Sanchez's statements to the FPD are not testimonial and do not run afoul of the Confrontation Clause, and the district court did not err in admitting them.

VI.

**10 Calderon's sixth and final argument is that the district court imposed on him an unreasonable sentence. We review a defendant's sentence to confirm first that the district court committed "no substantial procedural error." *United States v. Worley*, 685 F.3d 404, 409 (4th Cir.2012). We apply a clear error standard to the district court's factual findings and a *de novo* standard to its legal determinations. *United States v. McManus*, 734 F.3d 315, 317 (4th Cir.2013). "If no procedural error exists, we review the substantive reasonableness of the sentence imposed for abuse of discretion." *United States v. Strieper*, 666 F.3d 288, 292 (4th Cir.2012) (internal quotation marks omitted).

A.

[7] Calderon claims the district court miscalculated the amount of narcotics attributable to him and thereby erred in determining his sentencing range under the Sentencing Guidelines. First, he contends that because there was no evidence presented at trial tying him to the sale of crack cocaine he should not be held responsible at sentencing for the sale of 280 grams of crack cocaine because it was not "reasonably foreseeable to him." *United States v. Williams*, 986 F.2d 86, 90 (4th Cir.1993). Calderon also argues that the district court incorrectly found that he was liable for "2 to 300" pounds of marijuana, J.A. 849, when trial testimony established only his direct sale of "2 to 250" pounds, J.A. 349. Insofar as these drug amounts are not attributable to him, Calderon maintains that his Base Offense Level under the Guidelines should be lower and his sentence correspondingly reduced.

The district court, however, properly determined that it was bound by the jury's verdict attributing to Calderon at least 1,000 kilograms of marijuana, five kilograms of cocaine, and 280 grams of cocaine base. A sentencing court cannot, under its own preponderance standard, upend the jury's findings, particularly when those findings are expressed in no uncertain terms in a verdict. See *United States v. Curry*, 461 F.3d 452, 460–61 (4th Cir.2006) (overturning a district court's decision to vary downward from the Guidelines sentencing range because it "contradicted the weight of evidence and the verdict").

As a matter of law, the district court did not err in adopting the drug quantities found by the jury, and therefore it properly calculated his sentencing range under the Guidelines.

B.

[8] We next consider whether the resulting sentence was substantively reasonable, using the presumption on appeal that a sentence under a “properly calculated Guidelines range” is reasonable. *Strieper*, 666 F.3d at 295 (internal quotation marks omitted). A defendant may overcome this presumption by showing “that the sentence is unreasonable when measured against” the statutory sentencing factors in 18 U.S.C. § 3553(a). *United States v. Montes-Pineda*, 445 F.3d 375, 379 (4th Cir.2006) (internal quotation marks omitted).

Calderon advances two 18 U.S.C. § 3553(a) factors as grounds for error: that the district court failed to consider his “history and characteristics,” 18 U.S.C. § 3553(a)(1), and also ignored “the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct,” 18 U.S.C. § 3553(a)(6). He notes that his criminal history was less substantial than some of his co-defendants who received lesser sentences. And he

highlights the fact that some of his coconspirators, who pleaded to the same conduct for which he was found guilty, received sentences more lenient than his own.

**11 The sentencing court, however, properly determined his criminal history category. The court below also found it reasonable that his sentence was higher than some of his co-defendants because, unlike Calderon, they had accepted responsibility for their criminal conduct. Moreover, none of his co-conspirators had intimidated witnesses who were to testify against them. The Guidelines sentencing range for Calderon was between 292 and 365 months and the district court exercised its discretion to sentence him to the lower end of this range. We cannot conclude that Calderon's sentence was substantively unreasonable.

VII.

For the foregoing reasons, we affirm the judgment of the district court.

AFFIRMED.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

RICHARD RICHARDSON,

Appellant.

NO. 36035-1-III

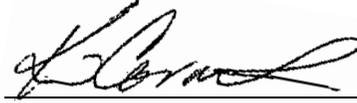
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I certify under penalty of perjury under the laws of the State of Washington, that on June 24, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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