COLORADO COURT OF APPEALS **2017COA98**

Court of Appeals No. 14CA0986
El Paso County District Court No. 13CR1193
Honorable Michael P. McHenry, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Caleb Charles Butler,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division VI
Opinion by JUDGE TERRY
Welling and Rothenberg*, JJ., concur

Announced July 27, 2017

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2016.

¶ 1 A jury convicted defendant, Caleb Charles Butler, of violating the Colorado Organized Crime Control Act (COCCA), sections 18-17-101 to -109, C.R.S. 2016, and of money laundering in violation of section 18-5-309, C.R.S. 2016, for his role in an operation that bought and sold illegally-obtained gift and merchandise cards (return cards), as well as stolen goods. Defendant asserts that his convictions must be reversed because there is insufficient evidence to support his two money laundering convictions and because the elemental jury instruction for money laundering was incomplete. He further asserts that the COCCA conviction cannot stand if there is insufficient evidence to support either of the two money laundering convictions that served as predicate acts for that conviction.

¶ 2 As a matter of first impression in Colorado, we address the required showing for a conviction of money laundering under section 18-5-309. We then conclude that there was sufficient evidence to support defendant's convictions for money laundering and that the trial court did not commit plain error in instructing the jury on these charges. Accordingly, we affirm defendant's convictions.

I. Caveat

¶ 3 Defendant worked as the assistant manager of Just Computers, a Colorado Springs store owned by Clayton Schaner. Schaner was accused of various crimes in connection with Just Computers, but defendant was tried separately from Schaner. We recognize that Schaner's conviction is currently on appeal in this court. *See People v. Schaner*, *appeal docketed*, No. 14CA0963 (Colo. App. ___). We comment only on the evidence presented in defendant's trial, and nothing in this opinion is meant as a judgment or commentary on whether the prosecution met its burden of proof in Schaner's trial.

II. Background

¶ 4 In late 2012, police received a tip from a confidential informant that Schaner, through Just Computers, was purchasing stolen items from individuals referred to as "boosters" and then reselling the items. The boosters would steal items from retail stores and either directly sell the items to Schaner or return the items to the store in exchange for a return card, which someone at Just Computers would purchase. Schaner would then post the items and return cards for sale on eBay or Plastic

Jungle — both Internet-based commerce platforms (e-commerce websites).

¶ 5 Defendant was the assistant manager in charge of the front part of the store. That part of the store operated as a legitimate computer repair business, although employees working in the front of the store sometimes bought return cards and sold non-computer merchandise. Schaner generally operated out of a small room located behind the front of the store. That back room was generally where the boosters would bring the return cards and merchandise.

¶ 6 Although Schaner was principally responsible for the operation of buying and selling the return cards and merchandise, defendant assisted in the transactions by purchasing return cards, checking the value of the cards, storing and shipping the cards and merchandise, and creating Internet posts advertising the sale of the cards and merchandise. Schaner transferred large sums of money to his employees, including defendant, and defendant made frequent trips to an automated teller machine (ATM) to retrieve cash that he gave back to Schaner.

¶ 7 With the help of a confidential informant, Detective Jason Blanscet was introduced as a booster to Schaner at Just Computers. Over the next three months, Detective Blanscet made multiple trips to Just Computers and sold a number of items to Schaner, including razor blades, a DeWalt power drill, and Home Depot gift cards. Schaner negotiated prices with and paid Detective Blanscet for the items and return cards. During the transactions, Detective Blanscet used language indicating that he had stolen the items from stores or that the return cards were in exchange for stolen items.

¶ 8 The Police arrested defendant, Schaner, and three others involved in the operation. The court severed the trial and tried defendant and two others together, but it tried Schaner and another employee separately. Defendant was charged with one count of violating COCCA, two counts of theft by receiving, three counts of money laundering, and five counts of computer crimes. The jury convicted him of two counts of money laundering relating to the razor blades and the DeWalt power drill, and a violation of COCCA based on the two predicate acts of money laundering. Defendant was acquitted of the other charges.

III. Sufficiency of the Evidence of Money Laundering

¶ 9 Defendant contends that there was insufficient evidence to support his two convictions of money laundering. We disagree.

A. Standards of Review

¶ 10 We review de novo whether the evidence before the jury was sufficient both in quantity and quality to sustain a conviction. *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010). We must determine "whether the relevant evidence, both direct and circumstantial, when 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.* (quoting *People v. Bennett*, 183 Colo. 125, 130, 515 P.2d 466, 469 (1973)).

¶ 11 We must give the People the benefit of every reasonable inference that may be drawn from the evidence. *Id.* at 1292. The determination of the credibility of witnesses rests solely within the province of the jury. *People v. Sprouse*, 983 P.2d 771, 778 (Colo. 1999). We may not serve as a thirteenth juror, and accordingly, we cannot determine what weight should be given to various pieces of evidence or resolve conflicts in the evidence. *Id.*

¶ 12 We review statutory provisions de novo. *Shelby Res., LLC v. Wells Fargo Bank*, 160 P.3d 387, 389 (Colo. App. 2007). In interpreting a statute, our primary goals are to discern and give effect to the General Assembly's intent. *Krol v. CF & I Steel*, 2013 COA 32, ¶ 15. We look first to the statutory language, giving the words and phrases used therein their plain and ordinary meanings. *Id.* We read the language in the dual contexts of the statute as a whole and the comprehensive statutory scheme, giving consistent, harmonious, and sensible effect to all of the statute's language. *Id.* After doing this, if we determine that the statute is not ambiguous, we enforce it as written and do not resort to other rules of statutory construction. *Id.*

B. Law

¶ 13 The People charged defendant under a complicity theory. Therefore, the jury could find him guilty if he (1) aided, abetted, advised, or encouraged Schaner to commit money laundering, and (2) acted with (a) the intent to aid, abet, advise, or encourage Schaner to engage in money laundering; and (b) an awareness of the circumstances attending Schaner's money laundering, including the required mental state for commission of the offense.

See § 18-1-603, C.R.S. 2016; *People v. Childress*, 2015 CO 65M, ¶ 34.

¶ 14 In determining whether defendant acted as a complicitor to money laundering, we must consider whether there was sufficient evidence presented in this trial for a reasonable juror to conclude beyond a reasonable doubt that money laundering was committed. *See People v. Wheeler*, 772 P.2d 101 (Colo. 1989); *People v. Theus-Roberts*, 2015 COA 32, ¶ 35; *see also People v. Scheidt*, 182 Colo. 374, 382, 513 P.2d 446, 450-51 (1973) (prosecution allowed to introduce otherwise inadmissible evidence at the complicitor-defendant's trial for the limited purpose of establishing the guilt of the principal).

¶ 15 Because interpretation of the money laundering statute is a matter of first impression, we begin by addressing the required elements to sustain a conviction under section 18-5-309.

¶ 16 The relevant portion of Colorado's money laundering statute states as follows:

> (1) A person commits money laundering if he or she:
>
> (a) Conducts or attempts to conduct a financial transaction that involves money or any other

> thing of value that he or she knows or believes to be the proceeds, in any form, of a criminal offense:
>
> (I) With the intent to promote the commission of a criminal offense; or
>
> (II) With knowledge or a belief that the transaction is designed in whole or in part to:
>
> (A) *Conceal or disguise the nature, location, source, ownership, or control of the proceeds of a criminal offense* . . . .

§ 18-5-309 (emphasis added).

¶ 17 Courts have noted that the General Assembly adopted COCCA in 1981 by patterning the Colorado statutory scheme after the Federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (2012), commonly referred to as RICO. *See, e.g.*, *People v. Chaussee*, 880 P.2d 749, 753 (Colo. 1994); *People v. Davis*, 2012 COA 56, ¶ 29. Section 18-5-309 closely tracks the federal statute, 18 U.S.C. § 1956 (2012), which defines money laundering for the purposes of RICO. *See* 18 U.S.C. § 1961(1) (incorporating § 1956's money laundering definition into the definitional section of RICO); *see also Chaussee*, 880 P.2d at 755 (finding that COCCA prohibits a number of criminal acts including any "racketeering activity" that

would be illegal under RICO). Therefore, in construing the state statute, we may consider persuasive authority from the federal courts construing 18 U.S.C. § 1956. *Flood v. Mercantile Adjustment Bureau, LLC*, 176 P.3d 769, 772 (Colo. 2008) (a court may look to federal case law as persuasive guidance in interpreting Colorado law when the state law parallels the federal statute); *Davis*, ¶ 29 (same).

¶ 18 The federal courts that have addressed the federal money laundering statute have found it necessary to closely examine the "[c]onceal or disguise" language that appears both in the federal statute and in our statute. *Compare* 18 U.S.C. § 1956 (federal money laundering statute), *with* § 18-5-309 (Colorado's money laundering statute).

¶ 19 The federal statute provides that money laundering is committed by a person who,

> knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct . . . a financial transaction which in fact involves the proceeds of specified unlawful activity --
>
> (A)(i) with the intent to promote the carrying on of specified unlawful activity; or

> . . . .
>
> (B) knowing that the transaction is designed in whole or in part --
>
> (i) *to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity* . . . .

18 U.S.C. § 1956(a)(1) (emphasis added).

¶ 20 In addressing the federal money laundering provision, the Tenth Circuit has said,

> to prevail at trial, the government was required to prove four elements beyond a reasonable doubt: (1) that Defendant engaged in a financial transaction; (2) that Defendant knew that the property involved in that transaction represented the proceeds of his unlawful activities; (3) that the property involved was in fact the proceeds of that criminal enterprise; and (4) that Defendant knew that "the transaction [was] *designed in whole or in part to conceal or disguise* the nature, the location, the source, the ownership or the control" of the proceeds of the specified unlawful activities.

United States v. Garcia-Emanuel, 14 F.3d 1469, 1473 (10th Cir. 1994) (emphasis added) (quoting 18 U.S.C. § 1956(a)(1)(B)(i)). A number of other federal decisions have also held that the crucial element of money laundering is whether a transaction was "designed" to conceal or disguise the true nature of unlawful proceeds. *See, e.g.*, *United States v. Shepard*, 396 F.3d 1116, 1120

(10th Cir. 2005); *United States v. Saget*, 991 F.2d 702, 712 (11th Cir. 1993); *United States v. Beddow*, 957 F.2d 1330, 1334-35 (6th Cir. 1992).

¶ 21 As to the design element, courts have drawn a distinction between engaging in financial transactions for a present personal benefit to the defendant, which does not constitute money laundering, and concealing the illicit sources of funds by actively trying to create the appearance of legitimate wealth, which does. *See Shepard*, 396 F.3d at 1120; *Garcia-Emanuel*, 14 F.3d at 1473-74. The Tenth Circuit has held that simply spending proceeds from some unlawful activity — for example, the sale of drugs or receipt of stolen goods — for a present personal benefit does not constitute money laundering. *Garcia-Emanuel*, 14 F.3d at 1474 ("If transactions are engaged in for present personal benefit, and not to create the appearance of legitimate wealth, they do not violate the money laundering statute.").

¶ 22 The Tenth Circuit also has said that "the statute is aimed at transactions that are engaged in for the *purpose* of concealing assets." *Id.* That court identified a nonexclusive list of circumstances surrounding a financial transaction that support a

finding that the transaction was designed to conceal the true nature or source of illegal funds:

- statements by a defendant probative of an intent to conceal;
- unusual secrecy surrounding the transaction;
- structuring the transaction in a way to avoid attention;
- depositing illegal profits in the bank account of a legitimate business;
- highly irregular features of the transaction;
- using third parties to conceal the real owner; or
- a series of unusual financial moves cumulating in the transaction.

Shepard, 396 F.3d at 1120 (citing *Garcia-Emanuel*, 14 F.3d at 1475-76). "In reviewing the sufficiency of the evidence, the most difficult cases are those in which the defendant acquires an asset which both brings a present personal benefit and has substantial resale value, and thus is a potential tool for money laundering." *Garcia-Emanuel*, 14 F.3d at 1475.

¶ 23 Consistent with federal law regarding the "design element," we conclude that section 18-5-309(1)(a)(II)(A) of Colorado's money

laundering statute requires the prosecution to prove beyond a reasonable doubt that (1) the defendant conducted or attempted to conduct a financial transaction; (2) the defendant knew or believed that the property involved in that transaction represented the proceeds of a criminal offense; and (3) the defendant knew or believed that the transaction was designed in whole or in part to conceal or disguise the nature, location, source, ownership, or control of the proceeds of the specified criminal offense.

C. Discussion

¶ 24 When viewed as a whole and in the light most favorable to the prosecution, we conclude that there is substantial evidence — both direct and circumstantial — to support defendant's convictions of the money laundering charges as a complicitor. *See Clark*, 232 P.3d at 1291-92 ("In applying the substantial evidence test, we must give the prosecution the benefit of every reasonable inference which may be fairly drawn from the evidence.").

1. Money Laundering

¶ 25 Because defendant was charged as a complicitor and we consider his conviction in that context, we first consider the evidence that was admitted at defendant's trial with regard to the principal, Schaner. *See People v. Thompson*, 655 P.2d 416, 418 (Colo. 1982) (requiring proof of knowledge by the complicitor that the principal intended to commit the crime).

¶ 26 Viewed in the light most favorable to the prosecution, the evidence at trial showed that Schaner was in charge of running a merchandise and return card operation from the back room, and that he knew that many of the return cards and much of the merchandise he was buying and reselling were acquired illegally. It also established that Schaner was reselling the unlawfully obtained goods on the e-commerce websites.

¶ 27 The evidence supports a reasonable inference that Schaner's reselling of the unlawfully obtained goods on e-commerce websites was designed to conceal the true nature of the ownership of the goods and the money obtained from the sale of the goods. A jury could reasonably conclude that the use of third parties (the e-commerce websites) for each sale of an unlawfully

obtained good facilitated a financial transaction that was designed to conceal the true source of the goods being sold and the crimes committed. *See, e.g.*, *Shepard*, 396 F.3d at 1122 (using third parties to conceal a legitimate owner supports an inference of an intent to disguise or conceal illegal funds); *United States v. Kaufmann*, 985 F.2d 884, 894 (7th Cir. 1993). In addition, evidence of Schaner's substantial transfers of money to employees' personal accounts, with the understanding that they would return the money to him in cash, created a strong inference that those transactions were designed to conceal the true source of the goods being sold and the crimes committed. *See, e.g.*, *United States v. Bowman*, 235 F.3d 1113, 1117 (8th Cir. 2000); *United States v. Massac*, 867 F.2d 174, 178 (3d Cir. 1989). Finally, the commingling of the funds obtained from illegal sources with the funds of the legitimate business operations of Just Computers supports an inference that Schaner was attempting to conceal the true nature of the source of the funds, which were from the stolen merchandise and return cards. *See, e.g.*, *United States v. Rodriguez*, 278 F.3d 486, 491 (5th Cir. 2002); *cf. United States v. Shoff*, 151 F.3d 889, 891 (8th Cir.

1998) ("[A] common type of money laundering involves the commingling of illegal proceeds with the identity or the funds of a legitimate and usually preexisting business.").

¶ 28 Evidence showing the complex nature of the operation supports a reasonable inference that Schaner was not engaging in these sales simply for a present personal benefit, but was in fact concealing the nature of the crimes. Therefore, viewing the evidence in the light most favorable to the prosecution, we conclude there is sufficient evidence in the record for a reasonable juror to conclude that Schaner was involved in a money laundering operation.

2. Defendant's Participation

¶ 29 There was sufficient evidence presented that defendant intentionally aided, abetted, or encouraged Schaner with knowledge of the circumstances surrounding the money laundering. The evidence at trial showed the following:

- Defendant knew that Schaner was in charge of a merchandise operation in the back room.
- Defendant knew of, and was concerned by, many of the repeat customers who were coming in with new

merchandise or return cards because they appeared to be drug addicts or unlikely to be able to obtain the goods lawfully.

- Defendant's former boss at Just Computers testified that he expressed his concerns to defendant about the nature of the business.
- Despite defendant's concerns about the origin of the return cards, he continued to buy cards from people — including from Detective Blanscet — without receipts showing proof of ownership.
- Many of the return cards and some of the items of merchandise were purported to be illegally acquired.
- Schaner regularly transferred sums of money to defendant's PayPal account.
- In a little more than a year, defendant had over two hundred thousand dollars transferred into his PayPal account.
- In that same period, defendant withdrew over one hundred and sixty thousand dollars from ATMs.

- Defendant would make regular small ATM withdrawals and return the money to Schaner in the form of cash.
- Schaner operated Just Computers and his back room operation by paying for the merchandise and return cards with that cash.

¶ 30 We conclude that the record supports the reasonable inference that defendant acted with the intent to aid, abet, or encourage Schaner in concealing or disguising the true nature of funds passing through Schaner and Just Computers. These funds included the money from the razors and power drill that the detective testified had been stolen. Therefore, there was sufficient evidence in the record to support defendant's convictions as a complicitor in Schaner's money laundering.

3. Whether Defendant Was Present for the Predicate Acts

¶ 31 In asserting that the evidence was insufficient, defendant argues that he was not present for, and had no knowledge of, the transactions involving the drill or the razors, and therefore he cannot be found guilty based on those transactions. We are not persuaded.

¶ 32 Defendant testified that almost daily he would withdraw small amounts of cash from an account into which Schaner had transferred money, and then return that cash to Schaner for the purpose of running the Just Computers operation. As discussed above in Part III.C.2, the record demonstrated that the jury could infer that defendant knew that the cash was used to purchase illegally obtained goods. A reasonable juror could also conclude that returning the funds in cash to Schaner aided, abetted, or encouraged Schaner in carrying out the illegal operation; that defendant returned the cash with the knowledge of the circumstances and the intent to further the illegal operation; that defendant's assistance was important to the operation; and that defendant acted with the intent and knowledge to further Schaner's overall plan. Defendant's physical absence from any given purchase by Schaner does not negate his culpability for the offenses. *See Newton v. People*, 96 Colo. 246, 251, 41 P.2d 300, 302 (1935) (the defendant's physical absence from the state at the time of the crime does not prevent conviction as an accessory).

¶ 33 There was substantial and sufficient evidence in the record to find that defendant intended to aid, abet, or encourage

Schaner to commit the crime of money laundering and that defendant knew of the circumstances surrounding his complicity in these crimes. *See* § 18-1-603; *Childress*, ¶ 34. We therefore conclude that the evidence was sufficient to sustain his conviction.

IV. Money Laundering Jury Instruction

¶ 34 Defendant also asserts that the trial court erred by omitting the statutory definitions in the elemental jury instruction for money laundering. He contends that if the definitions of "conducts or attempts to conduct a financial transaction," "financial transaction," and "transaction" that are included in section 18-5-309 (the definitions) had been included in the jury instructions, there is a reasonable chance he would not have been convicted of money laundering. We disagree.

A. Standard of Review

¶ 35 We review jury instructions de novo to determine whether the instructions accurately informed the jury of the governing law. *Riley v. People*, 266 P.3d 1089, 1092 (Colo. 2011). Because defendant did not object at trial to this jury instruction, we will reverse only if we find plain error. *Hagos v. People*, 2012 CO 63,

¶ 14; *People v. Miller*, 113 P.3d 743, 749-50 (Colo. 2005). Plain error is obvious and substantial error that so undermined the fundamental fairness of the trial itself as to cast serious doubt on the reliability of the judgment of conviction. *Hagos*, ¶ 14. The trial court has broad discretion to formulate jury instructions as long as they are correct statements of the law. *People v. Davis*, 935 P.2d 79, 85 (Colo. App. 1996).

B. Discussion

¶ 36 Section 18-5-309(1) defines the crime of money laundering and provides different ways in which the crime can be committed. Section 18-5-309(3) defines various terms used in subsection (1) including "[c]onducts or attempts to conduct," "[f]inancial transaction," and "[t]ransaction." The relevant instruction for the money laundering counts against defendant tracked the language of subsection (1), but it omitted the statutory definitions included in subsection (3).

¶ 37 We conclude that the trial court did not commit plain error when it omitted the definitions in the jury instruction for money laundering. First, the instruction for money laundering substantially tracked the language of the statute, and the

language is clear. *See Leonardo v. People*, 728 P.2d 1252, 1254 (Colo. 1986); *People v. James*, 40 P.3d 36, 46 (Colo. App. 2001). Ordinarily, words and phrases in our statutes should be "read in context and construed according to the rules of grammar and common usage." § 2-4-101, C.R.S. 2016; *Griego v. People*, 19 P.3d 1, 7 (Colo. 2001).

¶ 38 Second, the definitions have not taken on any technical or particular meanings beyond their ordinary and common understandings and were unlikely to be misunderstood by the jury so as to require further definition. *Griego*, 19 P.3d at 7. The statutory definitions do not diverge from the ordinary and plain understandings of the terms, and therefore, there was no need to specially define these terms for the jury. *See id.* at 10 ("[W]e perceive no meaningful difference between the dictionary definitions . . . and the limited statutory definition[s] . . . that might have affected the jury's understanding . . . as it applied to the issue . . . in this case.").

¶ 39 And in any event, defendant has not explained beyond the most bare and conclusory assertions how the exclusion of those three definitions contributed to his conviction. *See People v.*

Diefenderfer, 784 P.2d 741, 752 (Colo. 1989) (it is the duty of counsel for the appealing party to inform a reviewing court as to the specific errors relied on, as well as the grounds, supporting facts, and authorities therefor).

¶ 40 We note that the comments on use in the Colorado pattern jury instructions, *see* COLJI-Crim. 5-3:26 (2016), now reference the definitions. However, the instruction for money laundering was not included in the pattern instructions when this case was tried.

¶ 41 We conclude that under the circumstances of this case, the instructions given adequately informed the jury of the elements of money laundering and any imperfections do not rise to the level of plain error. *See People v. Wilson*, 791 P.2d 1247, 1250 (Colo. App. 1990); *People v. Romero*, 689 P.2d 692, 694 (Colo. App. 1984). Given the record as a whole, there is no reasonable probability that the jury reached its verdict on money laundering as a result of being improperly instructed. *Blecha v. People*, 962 P.2d 931, 944 (Colo. 1998). Consequently, we conclude that there was no plain error.

V. COCCA Conviction

¶ 42 Because the evidence was sufficient to support defendant's money laundering convictions, we further conclude that the prosecution proved the two requisite predicate acts to support defendant's COCCA conviction. *See Chaussee*, 880 P.2d at 758 ("[W]e conclude that a 'pattern of racketeering activity' can be established under COCCA's section 18-17-103(3) simply by proving at least two acts of racketeering activity, as defined in section 18-17-103(5), that are related to the conduct of the enterprise."). Thus, we reject defendant's assertion that his COCCA conviction must be reversed.

VI. Conclusion

¶ 43 The judgment is affirmed.

JUDGE WELLING and JUDGE ROTHENBERG concur.