

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

2 **STATE OF NEW MEXICO,**

Court of Appeals of New Mexico
Filed 3/1/2023 12:44 PM

3 Plaintiff-Appellee,



Mark Reynolds

4 v.

No. A-1-CA-39329

5 **DANIEL MCKINLEY,**

6 Defendant-Appellant.

7 **APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY**

8 **Steven Blankinship, District Court Judge**

9 Raúl Torrez, Attorney General
10 Lindsay Stuart, Assistant Attorney General
11 Santa Fe, NM

12 for Appellee

13 Bennett J. Baur, Chief Public Defender
14 Santa Fe, NM
15 Steven J. Forsberg, Assistant Appellate Defender
16 Albuquerque, NM

17 for Appellant

18 **MEMORANDUM OPINION**

19 **MEDINA, Judge.**

20 {1} A jury convicted Defendant Daniel McKinley of three counts of trafficking a
21 controlled substance (by possession with intent to distribute) (habitual offender),
22 contrary to NMSA 1978, Section 30-31-20(A)(3) (2006); one count of conspiracy to
23 commit trafficking a controlled substance (by possession with intent to distribute),

1 contrary to Section 30-31-20(A)(3) and NMSA 1978, Section 30-28-2 (1979); two
2 counts of tampering with evidence, contrary to NMSA 1978, Section 30-22-5
3 (2003); two counts of conspiracy to commit tampering with evidence, contrary to
4 Section 30-22-5 and Section 30-28-2; one count of receiving stolen property
5 (firearm), contrary to NMSA 1978, Section 30-16-11(A), (I) (2006); and one count
6 of receipt, transportation, or possession of a firearm or destructive device (felon),
7 contrary to NMSA 1978, Section 30-7-16(A)(1) (2018, amended 2022). Defendant
8 argues on appeal that his convictions for conspiracy to commit trafficking a
9 controlled substance and two counts of conspiracy to commit tampering with
10 evidence violate his double jeopardy rights because the convictions are based on
11 unitary conduct.¹ We hold that Defendant’s multiple conspiracy convictions violated
12 his double jeopardy rights. We therefore reverse and remand for proceedings
13 consistent with this opinion.

¹ Defendant also made an ineffective assistance of counsel argument on appeal, but concedes this argument in his reply brief because the record is not adequate for our review on this issue. *State v. Crocco*, 2014-NMSC-016, ¶ 15, 327 P.3d 1068 (“Without an adequate record, an appellate court cannot determine that trial counsel provided constitutionally ineffective assistance.”). As the parties agree on appeal, when the record is inadequate for review, “[r]ather than remand the case to the trial court for further hearings, this Court has a general preference that such claims be brought and resolved through habeas corpus proceedings.” *State v. Bernal*, 2006-NMSC-050, ¶ 33, 140 N.M. 644, 146 P.3d 289.

1 {2} Because this is a memorandum opinion, the parties are familiar with the facts
2 and procedural history and the parties’ positions on appeal, we discuss the facts only
3 as they become necessary to our analysis.

4 **DISCUSSION**

5 {3} Defendant argues that the State failed to establish distinct conspiracies for
6 trafficking a controlled substance, tampering with evidence for hiding the controlled
7 substances, and tampering with evidence for hiding the firearms at trial, and
8 therefore the two convictions for conspiracy to commit tampering with evidence
9 must be vacated. The State concedes Defendant’s convictions for two counts of
10 conspiracy to commit tampering with evidence violate double jeopardy and should
11 be vacated. However “we are not bound by the [s]tate’s concession, . . . we
12 independently assess [the d]efendant’s” argument on appeal. *State v. Comitz*, 2019-
13 NMSC-011, ¶ 25, 443 P.3d 1130. We review a claim of double jeopardy de novo.
14 *State v. Swick*, 2012-NMSC-018, ¶ 10, 279 P.3d 747.

15 {4} Our Federal and State Constitutions guarantee that no person shall be “twice
16 put in jeopardy for the same offense.” N.M. Const. art. II, § 15; *see* U.S. Const.
17 amend. V. “Double jeopardy protects against both successive prosecutions and
18 multiple punishments for the same offense.” *State v. Carson*, 2020-NMCA-015,
19 ¶ 31, 460 P.3d 54 (citation omitted) (text only). Defendant’s appeal involves the
20 latter—“specifically a ‘unit of prosecution’ claim”—where a defendant “argues he

1 has been charged with multiple violations of a single statute based on a single course
2 of conduct.” *Id.*

3 {5} For a unit of prosecution analysis of multiple conspiracy charges, our
4 Supreme Court concluded that “based on the text, history, and purpose of our
5 conspiracy statute the Legislature established a rebuttal presumption that multiple
6 crimes are the object of only one overarching, conspiratorial agreement subject to
7 one, severe punishment set at the highest crime conspired to be committed.” *Comitz*,
8 2019-NMSC-011, ¶ 33 (citation omitted) (text only). “At trial, the state has an
9 opportunity to overcome the Legislature’s presumption of singularity, but doing so
10 requires the state to carry a heavy burden.” *Id.* (internal quotation marks and citation
11 omitted).

12 {6} The State may overcome this presumption through a totality of the
13 circumstances test. We consider “whether the alleged conspiracies (1) have the same
14 location, (2) overlap significantly in time, (3) involve the same or overlapping
15 personnel, (4) involves similar overt acts charged against the defendant, and (5)
16 involve the defendant performing a similar role.” *Id.* ¶ 34.

17 {7} Based on our review of the record and Defendant’s arguments, we agree that
18 the State did not rebut the presumption that Defendant’s “actions were all part of
19 one, overarching conspiratorial agreement” to traffic controlled substances. *Id.* ¶ 36.
20 The State argued in closing that multiple conspiracies were created because

1 Defendant and the coconspirators adapted to the presence of police at the White
2 Sands Mall where Defendant hid the controlled substances, which lead to the
3 conspirators hiding the firearms at the Suburban Inn. Although the State presented
4 evidence of multiple crimes, this does not establish the existence of multiple
5 agreements needed to support multiple conspiracies. *See State v. Gallegos*, 2011-
6 NMSC-027, ¶ 62, 149 N.M. 704, 254 P.3d 655 (concluding that the original
7 conspiracy may expand to the commissions of other, new criminal acts without
8 creating a new agreement and “should be understood as one aspect of a larger
9 continuous combination” of acts in furtherance of the conspiracy). Without evidence
10 of multiple agreements, the State cannot rebut our Legislature’s presumption of
11 singularity of conspiracy.

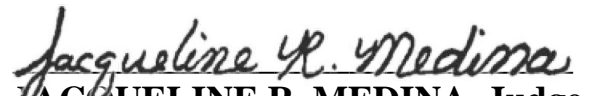
12 {8} Defendant’s three conspiracy convictions violate double jeopardy because
13 Defendant’s actions here were all part of one, overarching conspiracy. Because the
14 highest crime conspired to was trafficking a controlled substance (by possession
15 with intent to distribute) (habitual offender), this conspiracy conviction is affirmed.
16 *See Comitz*, 2019-NMSC-011, ¶ 36. *Compare* § 30-31-20(B)(2) (“A person who
17 violates this subsection is . . . for the second and subsequent offenses, guilty of a first
18 degree felony.”), *with* § 30-22-5(B)(1) (“[I]f the highest crime for which tampering
19 with evidence is committed is a capital or first degree felony or a second degree
20 felony, the person committing tampering with evidence is guilty of a third degree

1 felony.”), and § 30-22-5(B)(2) (“[I]f the highest crime for which tampering with
2 evidence is committed is a third degree felony or a fourth degree felony, the person
3 committing tampering with evidence is guilty of a fourth degree felony.”).

4 **CONCLUSION**

5 {9} For the forgoing reasons, we vacate Defendant’s two convictions for
6 conspiracy to commit tampering with evidence, reverse, and remand for proceedings
7 consistent with this opinion.

8 {10} **IT IS SO ORDERED.**

9
10 
JACQUELINE R. MEDINA, Judge

11 **WE CONCUR:**

12 
13 SHAMMARA H. HENDERSON, Judge

14 
15 GERALD E. BACA, Judge