--- F.3d ----, 2014 WL 1378269 (C.A.10 (Utah))
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United States Court of Appeals,
Tenth Circuit.
UNITED STATES of America, Plaintiff–Appellee,
v.
Eric KAMAHELE, Defendant–Appellant.
United States of America, Plaintiff–Appellee,
v.
Daniel Maumau, Defendant–Appellant.
United States of America, Plaintiff–Appellee,
v.
Kepa Maumau, Defendant–Appellant.
United States of America, Plaintiff–Appellee,
v.
Sitamipa Toki, Defendant–Appellant.
United States of America, Plaintiff–Appellee,
v.
Mataika Tuai, Defendant–Appellant.

Nos. 12–4003, 12–4005, 12–4007, 12–4015, 12–4039.
April 8, 2014.

BACHARACH, Circuit Judge.

Mr. Eric Kamahele, Mr. Daniel Maumau, Mr. Kepa Maumau,[FN1] Mr. Sitamipa Toki, and Mr. Mataika Tuai appeal their convictions arising from armed robberies and shootings in connection with the Tongan Crips Gang ("TCG") in Glendale, Utah. In a jury trial, Mr. Kamahele, Mr. Kepa Maumau, and Mr. Tuai were found guilty of conspiring to commit a racketeering offense under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961–1968 (2006). Mr. Eric Kamahele, Mr. Daniel Maumau, Mr. Kepa Maumau, and Mr. Sitamipa Toki were found guilty of committing violent crimes in aid of racketeering activity ("VICAR"), 18 U.S.C. § 1959(a) (2006). Mr. Kamahele, Mr. Kepa Maumau, and Mr. Tuai were also found guilty of violating the Hobbs Act, 18 U.S.C. § 1951(a) (2006). And all were found guilty of violating 18 U.S.C. § 924(c) (2006), for using guns during their respective crimes.

All of the defendants contend the district court erred by: (1) admitting expert testimony by Mr. Break Merino about the TCG's history, structure, and activities, and (2) denying their motions for a judgment of acquittal under Federal Rule of Criminal Procedure 29 based on the Government's failure to prove various elements of RICO and VICAR.

Four defendants also raise individual claims:

- Mr. Daniel Maumau contends the district court erred in its instruction to the jury on VICAR, selecting the jury, and deciding the appropriate sentence.

- Mr. Tuai contends the district court erred in instructing the jury on RICO.

- Mr. Kepa Maumau argues the district court erred by admitting evidence of identification from a photo array that was unduly suggestive.

- Mr. Kamahele alleges prosecutorial misconduct.

Rejecting all of the Defendants' arguments, we affirm.

I. Factual Background

To address the Defendants' appeal points, we must understand the TCG's structure and history, as well as the underlying crimes that were alleged.

A. Tongan Crips Gang's Structure and History

The TCG is part of the Crips gang that began in California and made its way to the Tongan community in Glendale, Utah. The Glendale chapter of TCG organizes through "generations," which are roughly equivalent to high-school age groups. The gang is also loosely organized by "families," which are signified by monikers such as "Loc," "Dog," and "Down."

Gang members are initiated into TCG by being "jumped in" (when the recruit fights gang members to prove his toughness) or "blessed in" (when the recruit has already proven himself as tough, either by being related to a TCG member or by his criminal reputation). Once initiated, gang members show their association with TCG through certain insignia. For example, members wear blue bandanas, solid-blue clothing, the number 104 (the last three digits of Glendale's zip code), and TCG tattoos (such as "Almighty T Gang"). Gang members also make "T" and "C" hand signs.

The gang adheres to principles such as the values of toughness and loyalty. Gang members must maintain a tough reputation by fighting and committing crimes (called "putting in work"). The gang values not only toughness, but also loyalty. Thus, TCG disapproves of "snitching" (giving information to police or rival gang members) and "hood jumping" (quitting TCG to become a member of another gang).

When the Utah gang formed in the 1990s, TCG members stole beer and fought. As time passed, TCG members continued to steal beer, but advanced to more serious crimes such as armed robberies and assaults.

B. Specific Crimes

At trial, the Government focused on a series of crimes: a shooting at the Faamausili home, a parking-garage robbery, a robbery of a clothing store, two restaurant robberies, and the robbery of a Wal–Mart.

1. *Shooting at the Faamausili Home*

In 2007, Mr. Toki and Mele Faamausili were having intercourse in a car when they were confronted by Mele's family. Upset by this discovery, Mele's cousin (Magic) punched Mr. Toki in the face. Mr. Toki jumped out of the car to fight Magic, but Mele's family left before the altercation could escalate.

Mr. Toki, still with Mele, rounded up two fellow TCG members (Mr. Daniel Maumau and Mr. David Kamoto) to "apologize" to Mele's family. Once they arrived at the Faamausili home, the three men shot at the home and into a carport where the Faamausili family was partying. During the shooting, Mr. Daniel Maumau and Mr. Kamoto wore blue bandanas over their faces.

Police later showed Mele a photo array of possible suspects, and she identified the shooters as Mr. Daniel Maumau and Mr. Kamoto.

2. *Republic Parking Garage Robbery*

In 2008, Mr. Kamahele and two accomplices robbed a cashier in a Republic Parking Garage ticket booth. The three men donned blue bandanas and pulled up in a tan Cadillac Escalade as the cashier was counting money. The men showed the cashier a sawed-off shotgun and demanded money, and the cashier turned over his credit cards and a manila envelope containing coins.

Approximately 30 minutes later, police discovered a Cadillac Escalade matching the cashier's description parked outside a home with Mr. Kamahele and others nearby. After being driven to the home by police, the cashier identified Mr. Kamahele as one of the robbers. Officers patted down Mr. Kamahele and discovered a manila envelope with coins, similar to the envelope stolen from the cashier. Police also found a sawed-off shotgun inside the Cadillac and the

cashier's cards scattered nearby.

3. *Gen X Clothing Store Robbery*

Later in 2008, Mr. Kepa Maumau and another gang member (Mr. Edward Kamoto) robbed a Gen X clothing store in South Ogden, Utah. During the robbery, which took approximately one minute, Mr. Kepa Maumau partially covered his face with his shirt and carried a gun. Of the three store employees who were present during the robbery, two later viewed a photo array and identified Mr. Kepa Maumau as one of the robbers.

4. *El Pollo Loco and Jack in the Box Robberies*

After robbing the Gen X Clothing store, Mr. Kepa Maumau and Mr. Kamoto went to Tempe, Arizona, and robbed an El Pollo Loco restaurant. Wielding a gun, the two took money from the cash register.

Mr. Kepa Maumau and Mr. Kamoto then robbed a Jack in the Box restaurant down the street. While fleeing the robbery, they encountered a couple leaving a nearby restaurant, who noticed that the robbers were wearing blue bandanas. After being chased by police for two miles, Mr. Kepa Maumau crashed the car. He and Mr. Kamoto tried to run, but were detained and arrested by police. After the arrest, police learned that the car was registered to Mr. Kepa Maumau and matched the witnesses' description. Inside were papers bearing Mr. Kepa Maumau's name, a document titled "Exit Plan," and a loaded gun. The "Exit Plan" described Mr. Kepa Maumau's involvement with TCG.

After his arrest, Mr. Kamoto pled guilty to robbery charges in Arizona state court and served eighteen months in an Arizona county jail. After his release, he returned to Utah with an enhanced reputation among his fellow TCG members because of his participation in these robberies.

5. *Wal–Mart Robbery*

In 2008, Mr. Latutaofieiki Fakaosiula, Mr. Kamahele, Mr. Tuai, Mr. Vainga Kinikini, and Mr. Tevita Tolutau attempted to rob a Wal–Mart Super Store in Riverton, Utah. At the time, Mr. Kinikini was a Wal–Mart employee. Using information obtained as an employee, Mr. Kinikini orchestrated the robbery plan. Essentially, the plan called for Mr. Kamahele and Mr. Tuai to arm themselves, enter the office where the money was held, and steal the proceeds.

The plan went badly. Mr. Kamahele and Mr. Tuai were able to enter the Wal–Mart office, but could not go into the area where the money was kept. Mr. Kamahele abandoned the plan, and the men fled.

Shortly thereafter, Mr. Kinikini and Mr. Fakaosiula confessed. According to Mr. Fakaosiula, Mr. Tuai and Mr. Kamahele discussed giving some of the robbery proceeds either to family members of incarcerated TCG members or to fund a drug-dealing operation. Mr. Kinikini denied such a plan, stating that the robbers were going to split the proceeds among themselves.

While in jail, Mr. Kamahele and Mr. Tuai attacked Mr. Fakaosiula and Mr. Kinikini in retaliation for "snitching."

Approximately one month after the Wal–Mart robbery, Mr. Kamahele stated in a recorded jailhouse telephone conversation that he did not intend to stop "putting in work" and that he needed "at least three."

II. Procedural Background

The Defendants were charged under one or more of four statutes:

- 18 U.S.C. § 1962(d) (2006), conspiracy to commit a racketeering offense,

- 18 U.S.C. § 1959(a) (2006), violent crimes in aid

of racketeering,

• 18 U.S.C. § 1951(a) (2006), Hobbs Act Robbery, and

• 18 U.S.C. § 924(c) (2006), using a gun during a crime of violence.

Mr. Kamahele, Mr. Kepa Maumau, and Mr. Tuai were convicted on the charges involving a RICO conspiracy. On these charges, the jury identified five of the robberies as racketeering acts committed as part of this conspiracy: the robberies of the Republic Parking Garage, the Gen X Clothing Store, the El Pollo Loco, the Jack in the Box, and the Wal–Mart.

Mr. Kepa Maumau was convicted on eight counts. For his part in the Gen X robbery, Mr. Kepa Maumau was found guilty on one VICAR count, one Hobbs Act count, and one § 924(c) count. For the El Pollo Loco and Jack in the Box robberies, Mr. Kepa Maumau was found guilty of two more VICAR counts and two more § 924(c) counts.

Likewise, Mr. Tuai and Mr. Kamahele were found guilty on one Hobbs Act count and one § 924(c) count arising from their participation in the Wal–Mart robbery. Mr. Kamahele was also found guilty of additional VICAR and § 924(c) counts arising from the Republic Parking Garage robbery. Finally, the jury found Mr. Daniel Maumau and Mr. Toki guilty on one VICAR count and one § 924(c) count arising from their involvement in the shooting at the Faamausili home.

* * * *

1. *Standard of Review*

We engage in de novo review of the sufficiency of the evidence to support the conviction. *See United States v. Irvin,* 682 F.3d 1254, 1266 (10th Cir.2012). In conducting this review, we treat the evidence in the light most favorable to the Government and ask whether a rational fact-finder could have concluded beyond a reasonable doubt that the defendant was guilty. *See id.* In addressing this question, we do not weigh conflicting evidence or consider the credibility of witnesses. *See United States v. Delgado–Uribe,* 363 F.3d 1077, 1081 (10th Cir.2004). Instead, we "simply determine 'whether [the] evidence, if believed, would establish each element of the crime.' " *Id.* (quoting *United States v. Vallo,* 238 F.3d 1242, 1247 (10th Cir.2001)). Reversal is warranted only when no rational trier of fact could have found the essential elements of the crime were proven beyond a reasonable doubt. *Irvin,* 682 F.3d at 1266.

2. *Sufficiency of the Evidence on the RICO Conspiracy Convictions*

Mr. Kamahele, Mr. Kepa Maumau, and Mr. Tuai were found guilty on Count 1, conspiracy to commit a racketeering offense in violation of RICO, 18 U.S.C. §§ 1961–1968 (2006). This law criminalizes conspiracy to violate any of the three substantive RICO provisions. 18 U.S.C. § 1962(d) (2006).

Count 1 alleged conspiracy to violate 18 U.S.C. § 1962(c), which makes it "unlawful for any person employed by or associated with any enterprise engaged in ... interstate ... commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c) (2006). A "pattern of racketeering activity" consists of two or more acts of racketeering activity (commonly referred to as "predicate acts"), which are related and " 'amount to, or ... otherwise constitute a threat of, *continuing* racketeering activity.' " *Hall v. Witteman,* 584 F.3d 859, 867 (10th Cir.2009) (quoting *H.J., Inc. v. Nw. Bell Tel. Co.,* 492 U.S. 229, 240, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989)).

For the predicate acts, the Government alleged violations of the Utah and Arizona robbery statutes. *See* 18 U.S.C. § 1961(1)(A) (2006) (defining "racket-

eering activity" as robbery that is "chargeable under State law and punishable by imprisonment for more than one year"); Utah Code § 76–6–301(1)(a) to-(b) (2004) (defining robbery); Ariz.Rev.Stat. § 13–1902(A) (2001) (defining robbery).

The parties agree that the Government had to prove that:

- the defendant knew about the commission of two or more acts that constituted a pattern of racketeering activity, and

- the defendant participated in an enterprise affecting interstate or foreign commerce.[FN13]

In light of this evidentiary burden, the Defendants make three arguments.

First, Mr. Kamahele, Mr. Kepa Maumau, and Mr. Tuai challenge the sufficiency of the evidence that TCG was an "enterprise."

Second, they question the proof of a nexus between the enterprise and racketeering activity.

Finally, Mr. Tuai contends that the evidence did not show that he had agreed to the commission of two or more predicate acts.

a. *Enterprise*

Viewing the record in the light most favorable to the Government, we conclude that the evidence sufficed for the jury to find the existence of an enterprise.

(i) *The Requirements of an "Enterprise"*

The term "enterprise" "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (2006). An association-in-fact requires: (1) a purpose, (2) relationships among those associated with the enterprise, and (3) longevity sufficient to permit those associated with the enterprise to pursue the enterprise's purpose. *See Boyle v. United States,* 556 U.S. 938, 946, 129 S.Ct. 2237, 173 L.Ed.2d 1265 (2009).

An enterprise may exist even without a formal hierarchy, chain of command, fixed roles, a name, established rules, initiation ceremonies, or regular meetings. *Id.* at 948, 129 S.Ct. 2237. To qualify as an enterprise under RICO, the association need only be a "continuing unit that functions with a common purpose." *Id.; see United States v. Turkette,* 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981) (concluding that an association-in-fact enterprise constitutes a "group of persons associated together for a common purpose of engaging in a course of conduct").

(ii) *Purpose*

The evidence would have allowed a rational jury to conclude that Mr. Kamahele, Mr. Kepa Maumau, and Mr. Tuai were members of the gang and acted to promote its criminal purposes through the robberies of the Wal–Mart, El Pollo Loco, Jack in the Box, Republic Parking, and Gen X Clothing Store.

The Defendants argue that while TCG was "a street gang drawn together by connections to their native Tonga and their geographic neighborhood," the evidence was not sufficient to establish that TCG members associated together with a common purpose of committing RICO predicates. *See, e.g.,* Kamahele's Opening Br. at 17.

For this argument, Mr. Kamahele downplays the criminality of the gang by pointing to its beer thefts, which he characterizes as innocuous youthful indiscretions rather than the sort of criminality associated with a criminal enterprise. But the jury was entitled

to view the gang in a different way. For example, the jury could reasonably view the Wal–Mart robbery as a complex undertaking. The five robbers met to discuss the layout of the store, the location of security cameras, the amount of money that was accessible ($100,000), the manner in which the employees would bring the money into the cash room, and the details of the cash room. The plan was sufficiently complicated to require three separate meetings. In these meetings, the robbers arranged for a lookout (who would call Mr. Kamahele and Mr. Tuai when the Wal–Mart employees headed to the cash room), a getaway driver (who would wait outside for Mr. Kamahele and Mr. Tuai), and a Wal–Mart insider (who would enter the Wal–Mart store after the robbery to gain intelligence on the police investigation). With evidence of this planning, the jury could reasonably reject Mr. Kamahele's view that the gang involved only adolescent mischief.

Mr. Kamahele and Mr. Kepa Maumau argue that TCG does not qualify as an enterprise because members were "drawn together by connections to their native Tonga and their geographic neighborhood," Glendale, rather than racketeering purposes. Kamahele's Opening Br. at 17. For this argument, the Defendants point to cases in which the gangs committed drug trafficking, drug dealing, and running prostitution rings. *See United States v. Harris,* 695 F.3d 1125, 1136 (10th Cir.2012) (holding that Crips gang sets constituted an association-in-fact enterprise when they "jointly operated the houses from which various set members sold drugs"); *United States v. Smith,* 413 F.3d 1253, 1264, 1268 (10th Cir.2005) (concluding that a gang constituted an enterprise for RICO purposes when the group used drug-distribution proceeds to support the families of fellow gang members), *overruled on other grounds by United States v. Hutchinson,* 573 F.3d 1011, 1021 (10th Cir.2009); *United States v. Killip,* 819 F.2d 1542, 1545–46, 1549–50 (10th Cir.1987) (concluding that a chapter of the Outlaws Motorcycle Club constituted a RICO enterprise when the chapter operated a drug-distribution scheme).

The gang here was different because it did not involve drugs or prostitution. But the jury could find that TCG was a continuing unit that functioned for a common purpose: enhancing the gang's reputation by instilling fear through criminal activity and profiting from that activity (either in the form of proceeds or goods from robberies). *See Smith,* 413 F.3d at 1271 (concluding that the purpose element could consist of maintenance of the group's fearsome reputation through acts of violence).

The Defendants argue that because gang members did not pool their money or jointly share in the profits of drug dealing, TCG could not qualify as a RICO enterprise. But economic gain is not required for the existence of an enterprise. *See Nat'l Org. for Women, Inc. v. Scheidler,* 510 U.S. 249, 261–62, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994) (holding that "RICO contains no economic motive requirement").

Though the Defendants focus on their Tongan roots, the Government's evidence focused on the criminal purposes of the group that transcended the larger Tongan community. Through this evidence, the Government presented sufficient evidence for the jury to infer an enterprise.

(iii) *Relationships Among Members*

The jury could also have inferred relationships among the TCG members. To infer these relationships, jurors could have relied on testimony that TCG members had met and shared TCG insignia, such as tattoos. Similarly, the "Exit Plan" described the gang's shared hostility toward anyone wearing red in the neighborhood (the color associated with a rival gang), stating that TCG gang members "learned to hate anybody that [the] gang didn't get along with[,] ... a tradition passed down from generation to generation." Kepa Maumau R. vol. 2, pt. 1, at 138–39. The evidence also suggested that gang members commit-

ted crimes together and looked out for fellow members. This unity was sufficient on the relationship prong. *See United States v. Harris,* 695 F.3d 1125, 1136 (10th Cir.2012) (concluding that the "relationship" prong was satisfied when Crips members met, socialized at the "Crip club," and "shar[ed] colors and handshakes").

(iv) *Longevity of the Enterprise*

The evidence was also sufficient to establish that TCG had the longevity for an association-in-fact enterprise. For example, the evidence indicated that TCG had begun in the 1990s and spanned multiple "generations" of TCG members. *See* Tuai R. vol. 3, pt. 10, at 1807–08; *see also Harris,* 695 F.3d at 1136 (concluding that the third prong was satisfied when the evidence supported a "pattern of activity ... over a period of years").

(v) *Summary*

Viewing the evidence in the light most favorable to the Government, a reasonable jury could conclude that TCG had a common purpose, relationships, and longevity, as required for an associate-in-fact enterprise.

b. *Nexus Between the Enterprise and Racketeering Activity*

The Defendants also argue that the Government failed to present sufficient evidence tying TCG to the robberies of Gen X, El Pollo Loco, Jack in the Box, and Wal–Mart. *E.g.,* Kepa Maumau's Opening Br. at 46. We disagree, for a reasonable jury could connect these robberies and TCG from testimony that: (1) TCG members had to commit crimes to maintain their status in the gang, and (2) the robbers intended to share the Wal–Mart money with other TCG members.

Conduct " 'forms a pattern if it embraces criminal acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.' " *See Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 496 n. 14, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985) (quoting 18 U.S.C. § 3575(e)).

The jury could infer a connection between the robberies and the enterprise (TCG). For example, the jury could have relied on testimony by Mr. Kamoto and a recorded statement of Mr. Kamahele. Mr. Kamoto accompanied Mr. Kepa Maumau on three of the robberies. At trial, he stated that TCG members committed robberies to maintain their criminal reputation. And, when Mr. Kamahele was asked whether he would stop committing robbery, he said in a jailhouse conversation that he needed to put in "at least three." From this statement, a jury could reasonably conclude the Defendants had committed the robberies to "earn stripes" and "put in work," a requirement of TCG membership.

Mr. Tuai focuses on the Wal–Mart robbery. But this robbery, like the others, involved two characteristics identified with TCG.

First, while discussing his participation in the Wal–Mart robbery, Mr. Latutaofieiki Fakaosiula testified that he and the other robbers had planned to give part of the stolen money to the families of incarcerated TCG members and possibly to rent a house to distribute marijuana. Tuai R. vol. 3, pt. 6, at 1059, 1084–85. Mr. Kamahele argues that Mr. Fakaosiula's testimony was inconsistent with other statements that Mr. Fakaosiula had given to police. And Mr. Vainga Kinikini testified that no such statements were made by or in front of him regarding the Wal–Mart robbery proceeds. Tuai R. vol. 3, pt. 7, at 1276–77. But we cannot weigh the evidence and must view the testimony in the light most favorable to the Government. *See United States v. Irvin,* 682 F.3d 1254, 1266 (10th Cir.2012).

Second, Mr. Fakaosiula testified that Mr. Kinikini, Mr. Tuai, and Mr. Kamahele were members of TCG and that Mr. Tuai wanted to commit the Wal–Mart robbery to get "stripes" and "make his name known." Tuai R. vol. 3, pt. 6, at 1083, 1161.

From Mr. Fakaosiula's testimony, the jury could tie Mr. Tuai's participation in the Wal–Mart robbery to his membership in TCG.

c. *Mr. Tuai's Agreement Involving the Commission of Two Predicate Acts*

Finally, Mr. Tuai argues that the evidence was insufficient to establish an agreement for a coconspirator to commit at least two predicate acts, as required to convict him of RICO conspiracy under § 1962(d). For this argument, Mr. Tuai stresses that the jury found him guilty of only one predicate act: the Wal–Mart robbery. We reject Mr. Tuai's argument because the jury could reasonably find that Mr. Tuai had agreed to other predicate acts by himself or by fellow TCG members.

As previously discussed, the Government does not need to prove that each defendant personally committed two predicate acts to prove a RICO conspiracy. *See Salinas v. United States,* 522 U.S. 52, 63, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997) ("There is no requirement of some overt act or specific act in the [RICO conspiracy] statute...."). And the jury could have inferred that Mr. Tuai agreed to other predicate acts by fellow gang members. In drawing this inference, a juror could point to Mr. Fakaosiula's testimony when he said that Mr. Tuai had wanted to commit the Wal–Mart robbery to get "stripes" and "mak[e] his name known." Tuai R. vol. 3, pt. 6, at 1083, 1161. From this testimony, the jury could have inferred that Mr. Tuai had agreed to commit at least one other racketeering act.

This inference would have been permissible even in the absence of an express agreement for other gang members to commit two specific predicate acts. Even without this level of specificity, the Government can prove an agreement "through 'inferences from the conduct of the alleged participants or from circumstantial evidence of a scheme,' amounting to evidence that each defendant necessarily must have known that the others were also conspiring to participate in the same enterprise through a pattern of racketeering." *United States v. Browne,* 505 F.3d 1229, 1264 (11th Cir.2007) (citation omitted) (quoting *United States v. Silvestri,* 409 F.3d 1311, 1328 (11th Cir.2005)).

The Government presented evidence that Mr. Tuai was a member of TCG and understood the gang's expectations that members commit crimes. There was also evidence that supported an inference that his membership in TCG predated the commission of the other predicate acts the jury found on Count 1. From this evidence, a reasonable jury could have concluded that Mr. Tuai, by joining TCG and participating in its affairs, agreed to the commission of two or more predicate acts. *See Smith,* 413 F.3d at 1272.

Mr. Tuai could have been guilty even if the jury had inferred an agreement for others to commit more crimes. As previously noted, the Government's evidence indicated that gang members had to earn "stripes," which involved crimes. And in a jailhouse call, Mr. Kamahele stated he had to get at least three stripes. A jury could reasonably infer that Mr. Tuai recognized a need for the gang to commit at least one more crime besides the Wal–Mart robbery. Thus, the evidence sufficed on Mr. Tuai's conviction for RICO conspiracy.

* * * *

V. Individual Issues Raised by the Defendants

* * * *

3. *RICO Instruction*

Mr. Tuai also challenges the district court's in-

struction on the RICO charge in Count 1, conspiracy to participate in a racketeering enterprise in violation of 18 U.S.C. § 1962(d) (2006). According to Mr. Tuai, the district court erred by failing to instruct the jury that it had to find that he had agreed that either he or another member of the enterprise, TCG, would commit at least two predicate racketeering acts. We disagree.

The district court twice instructed that a conviction required the defendant to agree to participate in the affairs of the enterprise through a pattern of racketeering activity, which it defined (by incorporating the Second Superseding Indictment) as an agreement that a conspirator would commit at least two acts of racketeering in conducting the affairs of the enterprise. With this definition, the district court adequately informed the jury that it could find guilt only if it concluded that Mr. Tuai had known about and agreed to the commission of at least two racketeering acts. Thus, the district court did not broaden the scope of RICO conspiracy by requiring only that Mr. Tuai associate "in some manner" with TCG.

On Count 1, the district court instructed the jury:

> The fourth element the government must prove beyond a reasonable doubt is that the particular Defendant knowingly and willfully became a member of the conspiracy. This means that in order to meet its burden of proof, the government must show that the particular Defendant agreed to participate, directly or indirectly, in the affairs of the enterprise through a pattern of racketeering activity as described in the Second Superseding Indictment.
>
> The focus of this element is on the particular Defendant's agreement to participate in the objective of the enterprise to engage in a pattern of racketeering activity, and not on the particular Defendant's agreement to commit the individual acts. *The government must prove that the particular Defendant participated in some manner in the overall objective of the conspiracy, and that the conspiracy involved, or would have involved, the commission of two racketeering acts.* The government is not required to prove either that the particular Defendant agreed to commit two racketeering acts or that he actually committed two such acts, although you may conclude that he agreed to participate in the conduct of the enterprise from proof that he agreed to commit or actually committed such acts.
>
> For the purposes of this count, the Second Superseding Indictment alleges that nine racketeering acts were or were intended to be committed as part of the conspiracy. I will discuss those racketeering acts with you in greater detail in a moment. Again, the government must prove that two of these acts were, or were intended to be, committed as part of the conspiracy, although it need not prove that the particular Defendant committed or agreed to commit any of these acts *as long as the government proves that the particular Defendant participated in some manner in the overall objective of the conspiracy.*

Instruction No. 33, Tuai R. vol. 1, pt. 4, at 739 (emphasis added).

Mr. Tuai argues that the district court erred in giving this instruction because it did not require proof of an agreement that two or more predicate acts would be committed by a member of the conspiracy. For support, Mr. Tuai relies on *United States v. Smith,* where we held:

> [I]n order to convict a defendant for violating § 1962(d), the Government [had to] prove beyond a reasonable doubt that the defendant: (1) *by knowing about and agreeing to facilitate the commission of two or more acts* (2) constituting a pattern (3) of racketeering activity (4) participate[d] in (5) an enterprise (6) the activities of which affect[ed] inter-

state or foreign commerce.

United States v. Smith, 413 F.3d 1253, 1266 (10th Cir.2005) (emphasis added), *overruled on other grounds by United States v. Hutchinson,* 573 F.3d 1011, 1021 (10th Cir.2009).

Mr. Tuai argues that the instruction does not require proof that the defendant joined the conspiracy with knowledge that it would involve two or more racketeering acts.[FN17] According to Mr. Tuai, the district court broadened the scope of a RICO conspiracy by requiring only that he associate "in some manner" with TCG. Tuai's Opening Br. at 46. We reject this contention because the requirement is fairly included in the instructions when read as a whole.

When considered as a whole, the instructions informed the jury that § 1962(d) required proof that Mr. Tuai had known about and agreed to the commission of two or more racketeering acts. It is true that the instructions included broader language that the defendant had to "participate[ ] in some manner in the overall objective of the conspiracy." But in two places, the instructions also required knowledge of and an agreement with the purpose of the conspiracy, which was to commit two or more racketeering acts.

The instructions stated that to find guilt, the jury had to conclude that the defendant "agreed to participate, directly or indirectly, in the affairs of the enterprise *through a pattern of racketeering activity as described in the Second Superseding Indictment.*" Instruction No. 33, Tuai R. vol. 1, pt. 4, at 739 (emphasis added). And the Second Superseding Indictment expressly stated that "each defendant *agreed* that a conspirator would commit at least two acts of racketeering in the conduct of the affairs of the enterprise." *Id.* at 739, 773 (emphasis added); *see United States v. Davis,* 55 F.3d 517, 520 (10th Cir.1995) (stating that incorporation of the indictment within the instruction clarified that the violation of § 924(c) had to be based on a separate underlying offense).

Mr. Tuai focuses on part of Instruction No. 33 without consideration of the language as a whole. In this instruction, the district court referred to the allegation of nine racketeering acts, reminding the jury: "Again, the government must prove that two of these [racketeering] acts were, or were intended to be, committed as part of the conspiracy." Instruction No. 33, Tuai R. vol. 1, pt. 4, at 739. Then, the district court clarified that the defendant could be guilty even if the racketeering acts were to be committed by someone else. *Id.* In making that clarification, the district court added that if the crimes were to be committed by someone else, the defendant would be guilty only if the government proved that the defendant "participated in some manner in the overall conspiracy." *Id.*

Mr. Tuai points out that when the district court added this clarification, it did not say that the Government had to prove an agreement to commit two or more racketeering acts. But, the district court had just said it-in the same sentence-in no uncertain terms. *See id.* ("Again, the government must prove that two of these [racketeering] acts were, or were intended to be, committed as part of the conspiracy.").

Accordingly, we conclude that the instructions (when read as a whole) adequately informed the jury that it could find guilt only if the defendant joined the conspiracy agreeing that two or more racketeering acts would be committed.

* * * *

VI. Conclusion

We affirm.

FN1. Mr. Daniel Maumau is Mr. Kepa Maumau's older brother. To avoid confusion, we will refer to each by their full name.

FN2. He also testified as a fact witness regarding an interview conducted with Daniel Maumau. *See* Tuai R. vol. 3, pt. 17, at 3242–60. But this appeal involves the officer's expert testimony rather than his fact testimony.

FN3. We review the district court's admission of Officer Merino's testimony for an abuse of discretion. *See United States v. Garcia,* 635 F.3d 472, 476 (10th Cir.2011). In this situation, we reverse only if: (1) the district court's ruling is " 'arbitrary, capricious, whimsical or manifestly unreasonable,' " or (2) the district court " 'made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.' " *United States v. Avitia–Guillen,* 680 F.3d 1253, 1256 (10th Cir.2012) (quoting *Dodge v. Cotter Corp.,* 328 F.3d 1212, 1223 (10th Cir.2003)).

FN4. *See United States v. Townley,* 472 F.3d 1267, 1271 (10th Cir.2007) (noting that we review de novo the district court's treatment of the claim involving the Confrontation Clause).

FN5. Mr. Daniel Maumau also argued that the district court abused its discretion in admitting Officer Merino's testimony, which Mr. Toki and Mr. Tuai join.

FN6. We use the 2011 version here because that is the version that applied in the trial, which took place in September 2011.

FN7. *See United States v. Garcia,* 635 F.3d 472, 477 (10th Cir.2011) (noting that the "average juror is as likely to be unaware of the dynamics of the illicit arms trade as of the trade in narcotics").

FN8. *See United States v. Garza,* 566 F.3d 1194, 1199 (10th Cir.2009) (discussing the use of guns in the drug trade); *see also United States v. Quintana,* 70 F.3d 1167, 1170–71 (10th Cir.1995) (explaining terminology used by drug traffickers); *United States v. Sturmoski,* 971 F.2d 452, 459 (10th Cir.1992) (explaining methamphetamine labs and the use of guns in these labs); *United States v. McDonald,* 933 F.2d 1519, 1520–23 (10th Cir.1991) (explaining the significance of certain quantities and packaging of cocaine, as well as the exchange of drugs for food coupons); *United States v. Harris,* 903 F.2d 770, 775–76 (10th Cir.1990) (discussing characteristics of documents used in drug enterprises).

FN9. *See United States v. Archuleta,* 737 F.3d 1287, 1296 (10th Cir.2013) ("[W]e have affirmed district courts' admission of gang-expert testimony as helpful to a jury when a defendant is a gang member."); *United States v. Hartsfield,* 976 F.2d 1349, 1352–53 (10th Cir.1992) (upholding the government's use of an officer-expert's testimony regarding the Black Mafia Crip Dawgs's objective of distributing cocaine and crack cocaine).

FN10. We recently rejected a similar argument in *United States v. Archuleta,* 737 F.3d 1287 (10th Cir.2013). There we held that an officer-expert's testimony regarding the Sureños Tortilla Flats gang did not violate Rule 702 because the expert's testimony assisted the jury. We reasoned that the expert's testimony provided context to the jury. *Id.* at 1296–97.

FN11. Stray comments in the Defendants'

briefs also appear to question Officer Merino's qualifications. *E.g.,* Daniel Maumau's Opening Br. at 42 (noting that "[t]here was nothing to indicate that Officer Merino had taken any courses or received any training beyond a high school education and military and police officer training"). But the Defendants do not appear to challenge the district court's ruling that Officer Merino could offer expert opinion testimony.

FN12. Mr. Tuai joins in his codefendants' Confrontation Clause argument. Tuai's Opening Br. at 47.

FN13. These elements were identified in *United States v. Smith,* 413 F.3d 1253, 1266 (10th Cir.2005), *overruled on other grounds by United States v. Hutchinson,* 573 F.3d 1011, 1021 (10th Cir.2009). After *Smith,* we held that in a prosecution under § 1962(d), the Government need not prove the existence of an enterprise. *United States v. Harris,* 695 F.3d 1125, 1132–33 (10th Cir.2012). Nonetheless, the district court instructed the jury that the § 1962(d) charge required the existence of an enterprise, and the Government did not object. Thus, the Government concedes that it had to prove the existence of an enterprise. *See United States v. Romero,* 136 F.3d 1268, 1273 (10th Cir.1998).

FN14. A VICAR "enterprise" includes "any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce." 18 U.S.C. § 1959(b)(2) (2006). As previously discussed, RICO similarly defines "enterprise" as "includ[ing] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4) (2006). Perhaps because of the similarity in the definitions, the parties do not suggest any differences in the assessment of an "enterprise" under VICAR and RICO. *See United States v. Phillips,* 239 F.3d 829, 843 (7th Cir.2001) ("[C]ases decided under [RICO] may also be used to determine what constitutes an enterprise under [VICAR].").

FN15. Mr. Toki joins in Mr. Daniel Maumau's jury-instruction argument. Toki's Opening Br. at 1.

FN16. In his opening brief, Mr. Daniel Maumau seems to agree. While arguing that there was insufficient evidence to convict under VICAR, Mr. Daniel Maumau stated that the fifth element of VICAR required only that "the defendant knew it was expected of him due to his membership in the enterprise *or* that it was committed in furtherance of that membership." *See* Daniel Maumau's Opening Br. at 19 (emphasis added) (discussing the holding in *Smith).* Mr. Daniel Maumau's counsel also stated in oral argument that these two methods of establishing the motive requirement were "alternatives."

FN17. At oral argument, counsel discussed whether the district court erred by failing to include the "agreed to and facilitate" language in *Smith.* But Mr. Tuai did not challenge the instructions based on the omission of this language. As a result, we decline to address the need to include the "agreed to and facilitate" language from *Smith.*

If we were to address the issue, we would

need to address the different terminology in *Smith,* for the opinion refers to the requirement (in different places) in both the conjunctive and disjunctive. In one part, for example, we stated that the conspiracy element is satisfied only if a defendant "knew about *and* agreed to facilitate the commission of ... at least two of the predicate acts constituting a pattern of racketeering activity." *Smith,* 413 F.3d at 1272 (emphasis added). Elsewhere, we stated that a defendant can be convicted if he "knew about *or* agreed to facilitate" the acts. *Id.* at 1265 (emphasis added). But, we need not decide whether the "facilitation" prong is conjunctive or disjunctive because Mr. Tuai did not address the issue in his brief.

FN18. The "gang poetry" referred to the number "104," which the prosecution had hoped to offer as evidence of gang activity by connecting the number to Glendale and the TCG.

FN19. This portion of the trial transcript was not included in Mr. Kamahele's record on appeal.

FN21. We have stated that the use of six-person photo arrays does not in itself lead to a finding of undue suggestiveness. *E.g., Sanchez,* 24 F.3d at 1263 (holding that an array with six photographs was not impermissibly suggestive); *United States v. Franklin,* 195 Fed.Appx. 730, 734–35 (10th Cir.2006) (concluding that a six-pack photo array was not unduly suggestive).

FN22. Mr. Tuai and Mr. Toki join in Mr. Daniel Maumau's jury-selection argument. Tuai's Opening Br. at 47; Toki's Opening Br. at 1.