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APPENDIX A: Decision of Minnesota Supreme Court

929 N.W.2d 414
Supreme Court of Minnesota.

STATE of Minnesota, Respondent,
v.
Cesar Rosario LOPEZ-RAMOS, Appellant.

A17-0609
|
Filed: June 12, 2019

Synopsis

Background: Defendant was convicted in the District Court, Nobles County, No. 53-CR-16-420, of first-degree criminal sexual conduct. He appealed. The Court of Appeals, 913 N.W.2d 695, affirmed. Defendant petitioned for further review, which petition was granted.

Holdings: The Supreme Court, Gildea, C.J., held that:

interpreter's translation of defendant's foreign-language statements during police interrogation did not implicate Confrontation Clause, and

defendant was declarant of statements translated by foreign language interpreter during police interrogation and, thus, such statements were not hearsay.

Affirmed.

Hudson, J., filed dissenting opinion in which Lillehaug and Thissen, JJ., joined.

Procedural Posture(s): Appellate Review; Trial or Guilt Phase Motion or Objection.

Syllabus by the Court

1. Use of a foreign language interpreter to translate statements by appellant from Spanish to English does not implicate the Confrontation Clause, U.S. Const. amend. VI.

2. Because appellant was the declarant of the statements translated by the foreign language interpreter, the statements are not hearsay under Minn. R. Evid. 801(d)(2)(A).

Court of Appeals

Attorneys and Law Firms

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Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Maria Villalva Lijó, Assistant Public Defender, Saint Paul, Minnesota, for appellant.

OPINION

GILDEA, Chief Justice.

***415** This case presents the questions of whether the admission of statements made by appellant using a foreign language interpreter violates the Confrontation Clause of the United States Constitution and hearsay rules. Because we conclude that the Confrontation Clause is not violated and the statements are not subject to the hearsay rules, we affirm the decision of the court of appeals.

FACTS

In May 2016, the State charged appellant Cesar Rosario Lopez-Ramos with one count of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(a) (2018).[1] Several days earlier, a county child protection worker contacted police regarding the possible sexual abuse of a 12-year-old female. During the subsequent investigation, the victim and her parents identified Lopez-Ramos as the only suspect.

Police officers made contact with Lopez-Ramos, and he agreed to provide a statement. An officer transported Lopez-Ramos to the county law enforcement center.[2] In an interview room, the officer started the recording system[3] and called the AT&T LanguageLine, a foreign language translation service.[4] The officer requested a Spanish interpreter.[5] Once a Spanish interpreter was on the line, the officer used the speaker function on the telephone to conduct an interview in sequential interpretation, meaning that the officer asked a question in English, the interpreter

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translated the question from English to Spanish, Lopez-Ramos responded in Spanish, and the interpreter translated the response from Spanish to English. During the interview, Lopez-Ramos admitted to the officer that he had sexual intercourse with the victim on one occasion.

The case proceeded to a jury trial. During a conference on the first morning of the trial, Lopez-Ramos told the district court that he intended to object to the admission of his translated statements. Lopez-Ramos argued that the admission of ***416** the translated statements into evidence would violate the Sixth Amendment's Confrontation Clause and Minnesota's hearsay rules because the State was not going to call the interpreter to testify during the trial.

The district court asked the State to make a foundational offer of proof regarding the interpreter used to translate the statements made by Lopez-Ramos from Spanish to English. The State explained that the interpreter's identification and physical location were never verified, primarily because Lopez-Ramos never formally challenged the accuracy of the translation. The district court concluded that the interpreter was acting as a "language conduit" during the interview, meaning that the statements were attributable to Lopez-Ramos as the declarant. The district court held that the admission of the translated statements did not violate the Confrontation Clause or hearsay rules, and therefore overruled the objection by Lopez-Ramos.

During the jury trial, the officer testified that Lopez-Ramos responded directly to the translated questions and never requested clarification from the interpreter. The officer told the jury that Lopez-Ramos admitted during the interview to having sexual intercourse with the victim.

The video recording of the interview was admitted into evidence and played for the jury. The video shows that Lopez-Ramos was able to fully participate in the interview and he never expressed any confusion or stated that he did not understand the questions asked by the officer and translated by the interpreter. [6]

The victim testified during the trial that Lopez-Ramos sexually penetrated her. Lopez-Ramos testified in his own defense and denied having any sexual contact with the victim. [7] Lopez-Ramos told the jury that during the police interview, he was intoxicated and did not understand some of the questions asked by the officer.

The jury found Lopez-Ramos guilty of first-degree criminal sexual conduct. The district court convicted Lopez-Ramos of that offense and sentenced him to 144 months in prison.

Lopez-Ramos appealed his conviction, arguing that the admission of his translated statements violated the Confrontation Clause and hearsay rules. In a published opinion, the court of appeals upheld the district court's ruling that the admission of the interpreter's translated statements did not violate the Confrontation Clause or hearsay rules. *State v. Lopez-Ramos*, 913 N.W.2d 695, 699 (Minn. App. 2018). The court of appeals held that "when the state seeks to admit into evidence a criminal defendant's admissions made through an interpreter, upon a Confrontation Clause or hearsay objection a district court must determine as a preliminary matter whether the interpreter's translation can fairly be attributable to the defendant, or whether the interpreter is a separate declarant." *Id.* at 708. The court of appeals addressed four factors: (1) which party supplied the interpreter, (2) whether the interpreter had any motive to mislead or distort, (3) the interpreter's qualifications, and (4) whether actions taken subsequent to the ***417** conversation were consistent with the statements as translated. *Id.* Applying the factors, the court of appeals determined that the interpreter's translated statements were attributable to Lopez-Ramos as the declarant. *Id.* at 709. Therefore, the court of appeals concluded that no Confrontation Clause violation occurred and the statements were admissible over the hearsay objection as admissions by a party-opponent under Minn. R. Evid. 801(d)(2)(A). 913 N.W.2d at 709–10.

We granted Lopez-Ramos's petition for review.

ANALYSIS

On appeal, Lopez-Ramos argues that the admission of his translated statements violates the Confrontation Clause. He also contends that his translated statements are inadmissible hearsay evidence. *See* Minn. R. Evid. 802 ("Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court or by the Legislature."). We consider each issue in turn. [8]

I.

We turn first to the argument by Lopez-Ramos that the admission of the video recording of his interview and the

officer's testimony regarding his statements violated the Confrontation Clause of the Sixth Amendment to the United States Constitution. The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. The United States Supreme Court has recognized that "the principal evil at which the Confrontation Clause was directed" was the use of *ex parte* or one-sided "examinations as evidence against the accused." *Crawford v. Washington*, 541 U.S. 36, 50, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The Supreme Court stated that the Confrontation Clause must be viewed with a historical focus, including its common-law heritage. *See id.* The common law did not allow the admission of testimonial out-of-court statements by a witness who did not appear at trial unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness.[9] *See id.* at 49–50, 53–54, 124 S.Ct. 1354. In other words, the primary objective behind the adoption of the Confrontation Clause was to regulate the admission of testimonial ***418** hearsay by witnesses against the defendant.

Prior to *Crawford*, the Supreme Court observed that its case law "has been largely consistent with" the original text and meaning of the Confrontation Clause. *See id.* at 57, 124 S.Ct. 1354. An aberration occurred in *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), when the Supreme Court departed from historical principle and allowed the admission of testimonial hearsay based upon a finding of reliability only. *See Crawford*, 541 U.S. at 60, 124 S.Ct. 1354; *Roberts*, 448 U.S. at 66, 100 S.Ct. 2531. But in *Crawford*, the Supreme Court discarded the "unpredictable and inconsistent" reliability principle espoused in *Roberts and returned to the original text and meaning of the Confrontation Clause. See* 541 U.S. at 66, 68 n.10, 124 S.Ct. 1354.

In *Crawford*, the government charged the defendant with assault and attempted murder for stabbing a man who allegedly sexually assaulted his wife. *Id.* at 38–40, 124 S.Ct. 1354. The defendant argued that the stabbing was done in self-defense. *Id.* at 40, 124 S.Ct. 1354. The government sought the admission of statements made by the defendant's wife to police officers regarding the stabbing because the wife's statements refuted the defendant's self-defense claim. *Id.* Even though the wife did not appear or testify during the trial, her statements to the police were admitted into evidence and used against him, and the jury found the defendant guilty. *Id.* at 40–41, 124 S.Ct. 1354.

The Supreme Court held that the admission of the wife's statements to police violated the Confrontation Clause. *Id.* at 68–69, 124 S.Ct. 1354. The Supreme Court abandoned the reliability analysis set forth in *Roberts*, *see id.* at 67, 124 S.Ct. 1354, and returned to the original text of the Confrontation Clause, noting that the clause specifically applies to "witnesses against the accused—in other words, those who bear testimony," *id.* at 51, 124 S.Ct. 1354 (internal quotation marks omitted) (citation omitted). The Supreme Court observed that "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not," and the text of the Confrontation Clause "reflects an especially acute concern with [the] specific type of out-of-court statement." *Id.* In applying the Confrontation Clause to the facts of *Crawford*, the Supreme Court concluded that the defendant had a right to confront his wife about her statements to police officers that arguably defeated his self-defense claim. *See id.* at 68–69, 124 S.Ct. 1354. In other words, the defendant had a constitutional right to confront a witness who made testimonial statements that were admitted against the defendant.

Lopez-Ramos relies on *Crawford* and argues that the translated statements he made to the police are like the statements made by the defendant's wife to the police in *Crawford*. We disagree. The statements at issue in *Crawford* were undoubtedly made by a third party—the defendant's wife. This case does not involve a third-party declarant whose testimony is offered against the defendant. The statements at issue here were made by the defendant himself in Spanish and then translated into English by a foreign language interpreter.[10] The facts of this case then are materially ***419** different from those presented in *Crawford*.

But the bedrock principle of *Crawford* still controls and compels the result that we reach. As the Supreme Court noted, the Confrontation Clause specifically applies to "*witnesses against the accused*—in other words, those who bear testimony." *Crawford*, 541 U.S. at 51, 124 S.Ct. 1354 (emphasis added) (internal quotation marks omitted) (citation omitted). The Supreme Court observed that the Confrontation Clause "reflects an especially acute concern" with statements made by a witness or "[a]n accuser who makes a formal statement to government officers." *Id.*

This case requires that we apply the underlying principle of *Crawford* to the role of a foreign language interpreter.

The function of an interpreter is to convert a statement from one language to another, processing the linguistics in order to allow parties to understand one another. The role of the interpreter is not to provide or vary content; the role of the interpreter is to relay what the defendant said in another language. In this way, an interpreter is not a witness against the defendant. *See United States v. Solorio*, 669 F.3d 943, 951 (9th Cir. 2012) (concluding that the Confrontation Clause was not violated when an interpreter translated in-court statements of a government informant because the defendant had an opportunity to cross-examine the informant and "[t]he interpreters, who only translated [the informant's] in-court statements, were not themselves witnesses who testified against [the defendant]."). The interpreter is simply the vehicle for conversion or translation of language. To be sure, the role of an interpreter can be fulfilled by a machine or someone using a foreign language dictionary to look up each word for the proper conversion. If a machine or foreign language dictionary is used for the translation, there would be no suggestion that either served as a witness against the declarant. The statement would still be attributable to the declarant as his or her own statement. The interpreter simply makes the language-conversion process more efficient and effective. [11]

The use of interpreters has become an important part of our criminal justice system. For example, under Minnesota law, when the police arrest someone who, because of difficulty speaking or understanding English, "cannot fully understand the proceedings or any charges," Minn. Stat. § 611.31 (2018), the police "shall obtain an interpreter at the earliest possible time," Minn. Stat. § 611.32, subd. 2 (2018). Section 611.32 requires that the police communicate with the arrested person "with the assistance of the interpreter." *Id.* And the interpreter must "take an oath, to make to the best of the interpreter's skill and judgment ***420** a true interpretation." Minn. Stat. § 611.33, subd. 2 (2018). We have recognized that "[t]he obvious purpose of the oath requirement in such a situation is to impress upon the interpreter that he is legally obliged to interpret fairly and accurately." *State v. Mitjans*, 408 N.W.2d 824, 829 (Minn. 1987); [12] *cf.* Code of Prof'l Responsibility for Interpreters in the Minn. State Court Sys. Canon 1 (requiring that interpreters provide "a complete and accurate interpretation ... without altering, omitting, or adding anything to the meaning of what is stated or written").

Mindful of the role played by a foreign language interpreter and centering our analysis on the text of the Confrontation Clause, we conclude that use of an interpreter to translate a statement from one language to another does not implicate the Confrontation Clause. The Confrontation Clause is not implicated because the act of processing the statement from one language to another does not transform the interpreter into a witness against the defendant.

The result we reach is consistent with the result reached in the majority of courts that have considered the question to date. These courts have sided with the Ninth Circuit's conclusion in *Nazemian v. United States*, 948 F.2d 522 (9th Cir. 1991), that the Confrontation Clause is not violated by the admission of translated statements. *Id.* at 526-28. *See* Kimberly J. Winbush, Annotation, *Application of Confrontation Clause Rule to Interpreter's Translations or Other Statements–Post-Crawford Cases*, 26 A.L.R.7th Art. 1, § 2 (2017). Reasoning that a generally unbiased and adequately skilled foreign language translator simply serves as a "language conduit," these courts have concluded that the translated statement is considered to be the statement of the original declarant and not the translator. *Id.* Accordingly, the Confrontation Clause is not implicated. [13]

***421** Lopez-Ramos relies on the minority view, citing *United States v. Charles*, 722 F.3d 1319 (11th Cir. 2013), and *Taylor v. State*, 226 Md.App. 317, 130 A.3d 509 (Md. Ct. Spec. App. 2016). *See* Winbush, *Application of Confrontation Clause Rule*, *supra*, at §§ 2, 7. The *Charles* court held that, because foreign language interpretation involves a concept-to-concept translation and not a word-to-word translation, the statements of the language interpreter and the defendant are not identical. *See* 722 F.3d at 1324, 1327 n.9. And the *Taylor* court held that the reasoning in *Nazemian* was irreconcilable with *Crawford* because the analysis in *Nazemian* depends on analogies to the evidentiary rules and premises the admissibility of an interpreter's statements on assumed reliability. *See* 130 A.3d at 538–39. Both *Charles* and *Taylor* likened the interpreter's translation to the testimony of a third-party witness and held that *Crawford* guaranteed the defendant a right to cross-examination. 722 F.3d at 1328; 130 A.3d at 540. Because the facts of *Crawford* are materially different from cases involving an interpreter, the underlying logic of decisions in cases like *Charles* and *Taylor* is unpersuasive.

Finally, in urging us to conclude that the admission of his translated statement violates the Confrontation Clause, Lopez-Ramos relies on *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011), *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d

314 (2009), and *State v. Caulfield*, 722 N.W.2d 304 (Minn. 2006). In *Bullcoming* and *Melendez-Diaz*, the Supreme Court held that the admission of forensic laboratory reports into evidence without calling the laboratory analyst who prepared the report to testify violated the Confrontation Clause. *See* 564 U.S. at 663, 131 S.Ct. 2705; 557 U.S. at 311, 129 S.Ct. 2527. The focus of the holdings in *Bullcoming* and *Melendez-Diaz* was the ability of the defense to verify the accuracy of the work by the analyst and the test result included in the report.

These cases are distinguishable because, unlike a forensic laboratory analyst, a foreign language interpreter simply converts information from one language to another language without adding content. *Compare Bullcoming*, 564 U.S. at 659–60, 131 S.Ct. 2705 (rejecting the argument that an analyst was a " 'mere scrivener' " because the analyst "reported more than a machine-generated number"). Moreover, a lab analyst is obviously a witness who bears testimony against the defendant. A laboratory analyst must input knowledge and content in order to take a biological sample and generate a report on the sample, including a definitive test result. The test result is then offered as evidence against the defendant. As the Court noted in *Bullcoming*, ***422** the forensic laboratory analyst did more than a simple conversion of the information from one format to another; instead, the analyst certified and verified the controls for accuracy and followed protocols to reach a definitive test result. *See* 564 U.S. at 659–60, 131 S.Ct. 2705.

In contrast to the lab analyst analogy suggested by Lopez-Ramos, a foreign language interpreter is more like a court reporter. Court reporters translate oral communications into a written format, conveying information but not adding content.[14] *See* Minn. Stat. § 486.02 (2018) (stating that "stenographer[s] shall take down all questions in the exact language thereof, and all answers thereto precisely as given by the witness or by the sworn interpreter"). A court reporter is not a witness against the defendant. Rather, court reporters create a written record of court proceedings. When that record is utilized in future proceedings, calling a court reporter to testify is illogical because the written record does not consist of the court reporter's statements but instead consists of the statements made by the actual declarants in the court proceeding. The same should be true for foreign language interpreters.

If an interpreter fails to interpret accurately or fully, or questions regarding authenticity arise, the proper objection is to a lack of foundation, not violation of the Confrontation Clause.[15] *Cf. State v. Daniels*, 361 N.W.2d 819, 828 (Minn. 1985) (concluding that "[t]he trial court properly excluded ... photographs for lack of foundation" where the photographs "did not accurately depict the scene"). Notably, in this case, Lopez-Ramos never formally challenged the adequacy or accuracy of his translated statements. *See State v. Sanchez-Diaz*, 683 N.W.2d 824, 835 (Minn. 2004) ("A defendant bears the burden of proving that the translation was inadequate."). Moreover, during the interview, Lopez-Ramos never asked the interpreter for clarification. The officer testified during the jury trial that the responses given by Lopez-Ramos during the interview were consistent with the questions being asked of him. The video shows that Lopez-Ramos was able to fully participate in the interview and he never expressed any confusion or stated that he did not ***423** understand the questions asked by the officer and translated by the interpreter. And the officer recorded the entire interview, preserving the entire translation for review. *See id.* ("[T]o ensure the admissibility of statements taken with an interpreter, prudent police investigators should comply with the statutory requirements and, additionally, either record the statement and/or reduce it to writing in the defendant's primary language."); *Mitjans*, 408 N.W.2d at 831 (noting that police could "tape-record[ ] the interrogation of defendant, thereby making an accurate record of what was said").

Ultimately, we conclude that Lopez-Ramos is the declarant of the statements in this case. Use of a foreign language interpreter to convert the statements by Lopez-Ramos from Spanish to English does not implicate the Confrontation Clause because the interpreter is not a witness who bears testimony against Lopez-Ramos. Instead, the interpreter merely converted the statement of Lopez-Ramos from one language to another. The Confrontation Clause "simply has no application because a defendant cannot complain that he was denied the opportunity to confront himself." *United States v. Hieng*, 679 F.3d 1131, 1140 (9th Cir. 2012). We therefore hold that the district court's admission of the translated statements Lopez-Ramos made to the police did not violate the Confrontation Clause.

II.

We turn next to Lopez-Ramos's contention that the admission of his translated statements violates the rule against hearsay. Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. Minn. R. Evid. 801(c). Hearsay is generally not admissible. Minn. R. Evid. 802. But a statement

offered against a party that is the party's own statement is not hearsay. Minn. R. Evid. 801(d)(2)(A).

Our holding that Lopez-Ramos was the declarant of his translated statements controls the hearsay analysis. If Lopez-Ramos was the declarant of the statements, and the State offered the statements against him, the statements are not hearsay under Minn. R. Evid. 801(d)(2)(A), and are therefore admissible. Accordingly, we hold that the district court did not abuse its discretion in admitting the translated statements into evidence over the hearsay objection by Lopez-Ramos.

CONCLUSION

For the foregoing reasons, we affirm the decision of the court of appeals.

Affirmed.

Dissenting, Hudson, Lillehaug, Thissen, JJ.

DISSENT

HUDSON, Justice (dissenting).

"The Sixth Amendment ... prohibits the introduction of testimonial statements by a nontestifying witness, unless the witness is 'unavailable to testify, and the defendant had a prior opportunity for cross-examination.' " *Ohio v. Clark*, —— U.S. ——, 135 S. Ct. 2173, 2179, 192 L.Ed.2d 306 (2015) (quoting *Crawford v. Washington*, 541 U.S. 36, 54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)). Because the court's decision contravenes this core tenet of the Sixth Amendment by permitting the State to introduce testimonial statements made by an unidentified interpreter working from an unidentified location without calling that interpreter as a witness, I respectfully dissent.

To secure defendants' rights to confront their accusers, the Sixth Amendment generally ***424** prohibits the State from admitting "testimonial statements." [1] *Id.* The first task in a Confrontation Clause analysis, therefore, must be to identify the statement in question. As an example, the court states that "Lopez-Ramos admitted to having sexual intercourse with the victim," presumably relying on the statement "We [sic] had intercourse with her." But Lopez-Ramos never said "We had intercourse with her." He said *something* in Spanish, and then an interpreter, appointed and paid by the police, said, "Lopez-Ramos said, 'We had intercourse with her.' " [2]

I agree with the court that "a defendant cannot complain that he was denied the opportunity to confront himself." Thus, the State was fully entitled (subject to the Minnesota Rules of Evidence) to admit the Spanish versions of Lopez-Ramos's statements. But Lopez-Ramos's statements in Spanish are not the statements at issue in this case. The statements at issue are the statements—made by the interpreter—purporting to translate what Lopez-Ramos said. But I know of no instance where a court has held that a third-party declarant's testimonial statements to the police—even statements alleging a confession by the defendant—are admissible without affording the defendant an opportunity to cross-examine the declarant. And the reason why is simple: "Testimonial statements of witnesses absent from trial [are admissible] only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford*, 541 U.S. at 59, 124 S.Ct. 1354. [3] "To be sure, the [Confrontation] Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." [4] *Id.* at 61, 124 S.Ct. 1354.

***425** The court sidesteps *Crawford*'s mandate by concluding that the Sixth Amendment does not apply to the interpreter's statements because he was acting as a "language conduit." But this language-conduit theory has no support in our precedent, and is undermined by our analysis in *State v. Caulfield*, 722 N.W.2d 304 (Minn. 2006), and the Supreme Court's subsequent decisions in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), and *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011).

Each of these cases involves a similar scenario: The primary evidence against the defendant was a forensic laboratory report. Without calling the analyst who prepared the report, the State offered the report into evidence, the district court received the report, and the defendant was convicted. *Bullcoming*, 564 U.S. at 651, 131 S.Ct. 2705; *Melendez-Diaz*, 557 U.S. at 308–09, 129 S.Ct. 2527; *Caulfield*, 722 N.W.2d at 306. In each case, the reviewing court concluded that the report was testimonial evidence against the defendant, and if the State wished to offer the report into evidence, the

Confrontation Clause required the State to call the authoring analyst.[5] *Bullcoming*, 564 U.S. at 652, 131 S.Ct. 2705; *Melendez-Diaz*, 557 U.S. at 311, 129 S.Ct. 2527; *Caulfield*, 722 N.W.2d at 306–07.

This case closely parallels *Bullcoming*, *Melendez-Diaz*, and *Caulfield*. Here, the primary evidence against Lopez-Ramos was the interpreter's report of what Lopez-Ramos said during his interview. Without calling the interpreter to testify —and without even proffering the interpreter's full name and location—the State offered the interpreter's translations into evidence, the district court admitted the translations, and Lopez-Ramos was convicted. Following *Bullcoming*, *Melendez-Diaz*, and *Caulfield*, Lopez-Ramos's conviction should be reversed because the State did not call the interpreter so that he could be cross-examined about his translations.

We are not the first court to consider the implications of *Bullcoming* and *Melendez-Diaz* on the admissibility of translator statements. As the court notes, both the Eleventh Circuit and Maryland's intermediate appellate court have applied those cases to reject the language-conduit theory. *See United States v. Charles*, 722 F.3d 1319, 1329–30 (11th Cir. 2013); *Taylor v. State*, 226 Md.App. 317, 130 A.3d 509, 539–41 (Md. Ct. Spec. App. 2016). Both cases strongly critique the view—wrongfully endorsed by this court's majority—that judges can "make a threshold determination of the interpreter's honesty, proficiency, and methodology *without testimony from the one witness whose testimony could best prove the accuracy of the interpretations*—the interpreter himself or herself." *Taylor*, 130 A.3d at 539 (emphasis added); *see also Charles*, 722 F.3d at 1327–28.

The court attempts to distinguish these cases, arguing that "[b]ecause we believe the facts of *Crawford* are materially different ***426** from cases involving an interpreter, the underlying logic of decisions in cases like *Charles* and *Taylor* is distinguishable." Assuming arguendo that the facts of *Crawford* can be distinguished from translator cases (perhaps because the *Crawford* declarant was a lay witness who saw the substantive events of the crime, whereas translators perform an expert analysis—translation—after the fact), *Charles* and *Taylor* were not based solely on *Crawford*; they rely just as much, if not more, on *Bullcoming* and *Melendez-Diaz*. As I discuss below, the court errs when it concludes that the laboratory analysts of those cases are distinguishable from the translators in *Charles*, *Taylor*, and this case. The logic of *Charles* and *Taylor* is sound, and the court errs in rejecting it.

Turning to *Bullcoming* and *Melendez-Diaz*, the court attempts to distinguish those cases, as well as implicitly *Caulfield*, by arguing that "unlike a forensic laboratory analyst, a foreign language interpreter simply converts information from one language to another without adding content," but in contrast, "[a] laboratory analyst must input knowledge and content in order to take a biological sample and generate a report on the sample, including a definitive test result." But this is an illusory distinction, created by conflating what interpreters aspire to do with what they actually do. In the ideal world imagined by the court, interpreters "simply convert[ ] information from one language to another without adding content." In actuality, however, interpreters, like laboratory analysts, often add content and nuance. And also like analysts, interpreters make mistakes.[6]

Indeed, one can draw a parallel between the translation process and between each step of the chemical-analysis process that the court lists. Interpreters must "take a sample" by listening to what the native speaker is saying. In doing so, interpreters, like analysts, may make "errors" in taking the sample if they mishear a word. *See* Roseann Dueñas González et al., *Fundamentals of Court Interpretation: Theory, Policy, and Practice* 576–79 (2d ed. 2012). Next, interpreters must apply their knowledge to the content by determining what English word or phrase most accurately conveys the native speaker's statement. Again, interpreters, like analysts, may make errors in making this determination. *Id.* at 779 ("[I]nterpreter error is inevitable."). Finally, interpreters must report their final result by stating (in English) what their determination is. Like analysts, interpreters may make errors in this report by saying (either intentionally or inadvertently) something other than what they believe to be the most accurate English translation. *Id.* at 637.[7]

The flaws in the language-conduit theory also become apparent if one considers what the outcome of this case would be with two minor factual changes. Suppose that, instead of speaking Spanish, Lopez-Ramos ***427** spoke English. Assume further that Lopez-Ramos and the officer were in different rooms, with a mutually trusted "conduit" walking back and forth from one room to another, conveying each other's messages. At trial, the State seeks to have the police officer testify that he was told by the conduit that Lopez-Ramos confessed to the crime. Without a doubt, the State would be required to call the conduit in order to admit that testimony. There would be no question that the statement "Lopez-Ramos said, 'We had intercourse with her' " was the

conduit's statement, not a statement of Lopez-Ramos, even if the conduit was just conveying what was said without adding content. And Lopez-Ramos would be entitled to challenge the veracity of that statement by cross-examining the conduit.

The court appears to accept as much, not contesting that in such a scenario, the conduit would be a witness against Lopez-Ramos that the State would be required to call if it wished to admit the conveyed statements. But then the court dismisses the hypothetical as unhelpful because "it does not recognize the difference between the function of an interpreter and the function of a witness who is offering testimony against the accused." I am baffled that such a scenario can present a Confrontation Clause issue if Lopez-Ramos and the conduit are speaking English, but that the constitutional problem somehow goes away if Lopez-Ramos speaks Spanish and an interpreter translates into English. Surely, if Lopez-Ramos has the right to confront a translator who only relays statements that are already in English, the need for confrontation increases—not decreases—if the interpreter is required to not only convey the statements, but also undertake the task of translating them from Spanish to English. If the interpreter is, as the court puts it, a "witness who is offering testimony against [Lopez-Ramos]" when conveying English statements, most certainly he retains that role when conveying Spanish statements.

Of course, the court points out that Lopez-Ramos never challenged the adequacy or accuracy of his translated statements prior to trial. But this is of no moment because the accuracy of the translation is irrelevant under the Confrontation Clause. Indeed, the dissent in *Melendez-Diaz* raised essentially the same argument—that "[w]here ... the defendant does not even dispute the accuracy of the analyst's work, confrontation adds nothing." 557 U.S. at 340, 129 S.Ct. 2527 (Kennedy, J., dissenting). But the Court rejected this argument, reiterating *Crawford*'s holding that regardless of whether there are specific challenges to the veracity of an expert's analysis, "the Constitution *guarantees*" the defendant the right to test the analysis " 'in the crucible of cross-examination.' " *Id.* at 317–18, 129 S.Ct. 2527 (majority opinion) (emphasis added) (quoting *Crawford*, 541 U.S. at 61, 124 S.Ct. 1354). The same holds true here; regardless of whether Lopez-Ramos challenged the accuracy of the interpreter's translations, the Constitution guarantees him the right to test them via cross-examination. [8]

Moreover, it is the *State's* obligation to ensure a fair trial and not Lopez-Ramos's obligation to affirmatively challenge the translations. *See* ***428** *State v. Kindem*, 338 N.W.2d 9, 15 (Minn. 1983) ("[T]he state's obligation was to prove its case in a fair way ...."). Indeed, in *Melendez-Diaz*, the state raised precisely the same argument, that the Court "should find no Confrontation Clause violation ... because [the defendant] had the ability to subpoena the analysts." 557 U.S. at 324, 129 S.Ct. 2527. The Court rejected this argument, reasoning that "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." *Id.* The Supreme Court concluded that the value of the Confrontation Clause is not replaced by a system that permits the state to present its evidence via out-of-court accusations and then wait for the defendant to subpoena the declarants if he so chooses. *Id.* at 324–25, 129 S.Ct. 2527.

The court also relies on Minn. Stat. §§ 611.30–.34 (2018) and our Code of Professional Responsibility for Interpreters in the Minnesota State Court System as evidence of the protections native speakers receive against incorrect interpretation. Again, those protections are irrelevant to a Confrontation Clause analysis. But even if they were relevant, Lopez-Ramos did not receive those protections. First, as the court notes, qualified interpreters must "take an oath[ ] to make to the best of the interpreter's skill and judgment a true interpretation." Minn. Stat. § 611.33, subd. 2. The interpreter in this case took no such oath. After being connected with the interpreter, the interrogating officer asked the interpreter to introduce himself to Lopez-Ramos, read Lopez-Ramos his *Miranda* rights in Spanish (even though his first language was Mam), after which the interpreter immediately began translating interrogation questions and answers.

The court's reliance on our Code of Professional Responsibility for Interpreters is similarly misplaced. Our Code only applies to "persons, agencies and organizations who administer, supervise, use, or deliver interpreting services within the Minnesota state court system." Code of Prof'l Responsibility for Interpreters in the Minn. State Court Sys., Applicability. But the interpreter here was *not* providing interpreting services within the Minnesota state court system. He was providing them to a police department. Nothing in the record suggests that the department had a code of conduct applicable to its interpreters, and even if there was such a code, there is no indication in the record that the interpreter in this case was ever informed of it. [9]

Finally, the court suggests that holding that Lopez-Ramos had the right to confront the interpreter in court would

imply that, whenever a transcript of a past proceeding was used, the defendant would have the right to confront the court reporter who prepared the transcript. The court is wrong. Only *testimonial* hearsay is implicated by the Confrontation Clause. *See Crawford*, 541 U.S. at 68, 124 S.Ct. 1354 ("Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law ...."). A necessary requirement for a statement to be testimonial is that "the 'primary purpose' of the [statement] was to 'creat[e] an out-of-court substitute for trial testimony.' " ***429** *Clark*, —— U.S. ——, 135 S. Ct. at 2180 (quoting *Michigan v. Bryant*, 562 U.S. 344, 358, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011)). But the primary purpose of court reporters is not to create a substitute for trial testimony; it is to create an official record of the proceedings to aid in the administration of justice. Therefore, the holding I would reach does not implicate court reporters.

Because: (1) the interpreter is the declarant of the statement, "Lopez-Ramos said, 'We had intercourse with her' "; (2) that statement was testimonial; and (3) the State did not call the interpreter at trial, the district court erred when it denied Lopez-Ramos's motion to suppress the statement. Obviously, the district court's decision to admit the statement was not harmless beyond a reasonable doubt. Accordingly, I would reverse Lopez-Ramos's conviction and remand for a new trial. At such a trial, the State could either offer the live testimony of the AT&T interpreter, or have a different interpreter in the courtroom translate Lopez-Ramos's recorded statement.

LILLEHAUG, Justice (dissenting).
I join in the dissent of Justice Hudson.

THISSEN, Justice (dissenting).
I join in the dissent of Justice Hudson.

Attachment

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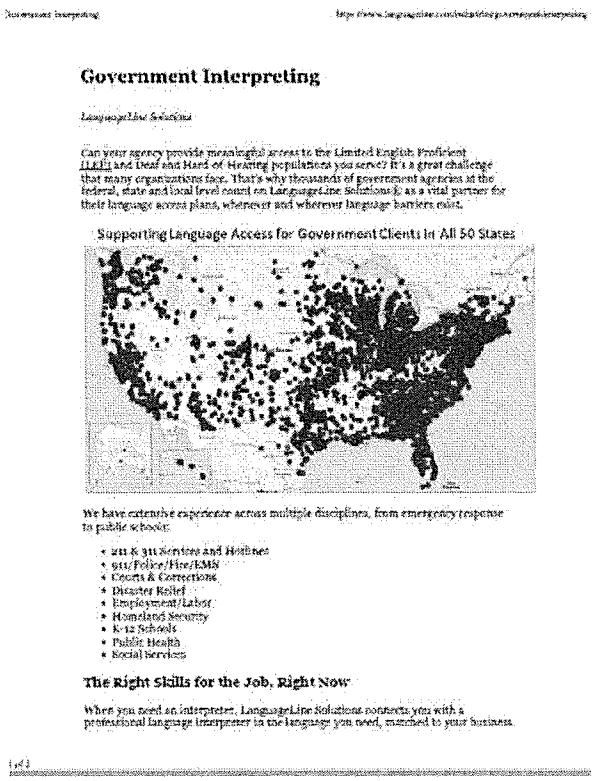

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All Citations

929 N.W.2d 414

Footnotes

1 Specifically, Lopez-Ramos was charged with the sexual penetration of a victim under 13 years of age when he was more than 36 months older than the victim.

2 There is no indication that Lopez-Ramos was placed under arrest at the time of the interview by the law enforcement officer. But the officer read Lopez-Ramos his *Miranda* rights before starting the voluntary interview. Based on the circumstances, we assume without deciding that the interview was a custodial interrogation.

3 The law enforcement center utilizes a recording system called WatchGuard that records digital video and audio in its interview rooms.

4 The officer testified that he uses the AT&T LanguageLine on a regular basis, but gave no further information about the service. According to the website, the AT&T LanguageLine provides interpreting services to government agencies across the country, including police/fire, schools, social services, and courts. *See* LanguageLine Solutions, *Government Interpreting,* https://www.languageline.com/industries/government-interpreting (last viewed May 28, 2019) [opinion attachment].

5 Lopez-Ramos's native language is Mam, a Mayan language spoken in Guatemala. Lopez-Ramos's second language is Spanish. His ability to speak and understand English is limited.

6 The jury was provided with a transcript of the interview while the video was played in open court. The transcript contained only the officer's statements in English and the English translation of Lopez-Ramos's statements. The district court instructed the jury that the transcript was provided to assist with their understanding of the interview, but the recording itself was the actual evidence. The transcript was not admitted into evidence.

7 During the trial, Lopez-Ramos testified using certified Spanish interpreters.

8 Although Lopez-Ramos challenged the admissibility of his interpreted statement, he made no objection to the accuracy or foundational reliability of the translation. Accordingly, there is no question before us as to the accuracy or reliability of the translation. When a defendant does object to the foundational reliability of a translated statement, the district court must engage in the necessary analysis to determine whether the translation included any material errors. *See, e.g., State v. Lee*, 494 N.W.2d 475, 481 (Minn. 1992). That analysis is unnecessary here.

9 The dissent discusses a historical impetus for the Confrontation Clause, the 1603 trial of Sir Walter Raleigh, and suggests that "the exact same circumstances are present" in this case. The dissent is not correct. The Raleigh trial involved the admission of a statement made by an alleged accomplice to the crime, Lord Cobham, someone who was clearly a witness against Raleigh. *See Crawford*, 541 U.S. at 44, 124 S.Ct. 1354 (discussing the Raleigh trial). Raleigh objected to the admission of the statement and demanded that his accomplice be called as a witness and subjected to cross-examination. *See id.* The facts of the present case are entirely distinguishable. In this case, the statements admitted during the trial were not made by a criminal accomplice of Lopez-Ramos. He acted alone during the commission of his crime. Moreover, Lopez-Ramos did not object to the accuracy of his statements or the foundation for their admission. Instead, he simply argued that the Confrontation Clause and hearsay rules prohibited the admission of his translated statements.

10 The State argues that our analysis in *Miller v. Lathrop*, 50 Minn. 91, 52 N.W. 274, 274 (1892) (describing an interpreter as the "agent" of the party for whom the interpreter is translating), is dispositive of the question presented here. *Miller* was a civil action to recover possession of personal property, and the plaintiff spoke Polish but made statements to the defendant using an interpreter. *Id.* We determined that the interpreter's statements were "not in the nature of hearsay" because "[w]hen two persons voluntarily agree upon a third to act as interpreter between them, the latter is to be regarded as the agent of each to translate and communicate what he says to the other, so that such other has a right to rely on the communication so made to him." *Id.* *Miller* is not dispositive because the question presented in that civil case did not implicate the Confrontation Clause.

11 The dissent poses a hypothetical suggesting that if Lopez-Ramos and the police officer were seated in different rooms and an individual went between rooms repeating the statements made by Lopez-Ramos, the individual or "conduit" would be required to testify regarding the truth and accuracy of the statements he or she relayed to the officer. The obvious flaw with the hypothetical is that it does not recognize the difference between the function of an interpreter and the function of a witness who is offering testimony against the accused. The hypothetical therefore is not relevant or applicable to the facts of this case.

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12 In *Mitjans*, a defendant made statements in Spanish to a Spanish-speaking police officer, who translated the statements into English to another officer. 408 N.W.2d at 826-27. In analyzing the defendant's challenge to the admission of this statement, we declined to directly answer the question of whether the interpreter or the defendant was the declarant of the statements, but noted that "under the agency theory of admissibility, the case for admission of the defendant's statements in a criminal prosecution is certainly stronger if the interpreter on whose interpretation the witness relies is the defendant's own interpreter or an independent interpreter appointed to assist the defendant rather than one employed as a police officer." *See id.* at 830–31.

Lopez-Ramos points to our comment in *Mitjans*, 408 N.W.2d at 832, that "[t]ranslation is an art more than a science, and there is no such thing as a perfect translation of a defendant's testimony," as demonstrating the complex nature of foreign language translation and argues that in this case, the interpreter should be designated as the declarant of his translated statements. An important difference in this case, however, is that the interpreter was not a police officer, but an employee of an independent entity. *See id.* at 831 (noting that the statute requires "the appointment of an independent interpreter" and that "prudent police investigators who wish to reduce substantially the risk of subsequent suppression of statements taken from suspects with language handicaps are advised to comply with the statutory requirements ...").

13 The language-conduit theory requires a case-by-case determination. Winbush, *Application of Confrontation Clause Rule*, *supra*, at § 2. For example, in *Nazemian*, the Ninth Circuit held that, under certain circumstances, a witness may testify regarding statements made by a defendant through a foreign language interpreter without raising Confrontation Clause concerns because the statements can be properly viewed as the defendant's own statements. *See* 948 F.2d at 527–28. Using the language-conduit or agency theory, the *Nazemian* court created a four-factor test to assess and determine whether an interpreter's statements can be attributed to the defendant as the declarant: (1) which party supplied the interpreter, (2) whether the interpreter had any motive to mislead or distort, (3) the interpreter's qualifications and language skill, and (4) whether actions taken subsequent to the conversation were consistent with the statements as translated. *Id.* at 527. Balancing the factors, the Ninth Circuit in *Nazemian* concluded that the defendant was the declarant of the interpreted statements and the Confrontation Clause did not apply. *Id.* at 528.

In this case, the district court applied the same factors, noting that no evidence was presented suggesting that the translation was inaccurate or that the interpreter had a motive to distort the translation. The district court also noted that although the State procured the interpreter, "it was not an interpreter specifically selected for the defendant." Under these circumstances, the district court concluded that the translated statements could be properly viewed as the statements of Lopez-Ramos and not the statements of the interpreter. The *Nazemian* factors may be helpful in a given case, but the overriding principle under the Confrontation Clause is whether the interpreter is being asked to be a witness against the defendant. In this case, it is clear that the answer to the question is "no."

14 The purpose of a court reporter is to make a record of what was said during a trial or hearing or deposition, regardless of whether an appeal follows, by converting oral proceedings into a written record. The court reporter does not add content. The same is true for an interpreter, who converts an oral conversation from one language to another. *See, e.g., United States v. Anguloa*, 598 F.2d 1182, 1186 n.5 (9th Cir. 1979) ("An [i]nterpreter really only acts as a transmission belt or telephone. In one ear should come in English and out comes Spanish ...." (internal quotation marks omitted)); *People v. Mejia-Mendoza*, 965 P.2d 777, 781 (Colo. 1998) ("The role of an interpreter ... is to act as a conduit by passing information between two participants, translating their words precisely without adding any of his or her own.").

15 The reasoning of the dissent appears to be premised primarily on the assumption that "interpreters make mistakes." Indeed, the dissent notes that during the trial in this case, the interpreter translating the testimony of Lopez-Ramos from Spanish to English corrected the translation of one word during Lopez-Ramos's testimony, changing the translated word "drunk" to "fear." Certainly, we cannot assume that the conversion of words from one language to another is always perfect, whether it is done by a human or a machine or a book. Linguistics are complicated, and if concerns exist about the accuracy of the translation, those concerns should be resolved in the context of foundation objections. As explained above, Lopez-Ramos did not raise foundational objections here. Accordingly, no foundational concerns are before us in this case.

1 The State argues that there has been no determination that the statements in question were testimonial. But "[s]tatements taken by police officers in the course of interrogations are ... testimonial under even a narrow standard." *Crawford*, 541 U.S. at 52, 124 S.Ct. 1354.

2 Of course, the interpreter did not literally say "Lopez-Ramos said" before rendering each translation. But it was unquestionably implicit in the interpreter's statements. As the State points out in its brief, the interpreter was certainly not claiming to have had intercourse with the victim; the interpreter was saying that Lopez-Ramos said he had intercourse with her.

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3 *Crawford* identifies one of "[t]he most notorious instances" of evidence the clause was intended to guard against as the 1603 trial of Sir Walter Raleigh. *Crawford*, 541 U.S. at 44, 124 S.Ct. 1354. In that trial, the attorney general read onto the record a declaration by Lord Cobham claiming that "Raleigh and he [were] to meet to confer about the distribution of ... money" obtained from the King of Spain for the furtherance of sedition. *See Trial of Sir Walter Raleigh*, 1 Jardine's Crim. Tr. 400, 411, 415 (1832). Raleigh demanded "to have [his] accuser brought here face to face to speak," citing statutes that required that, in treason cases, "accusers must be brought in person before the party accused at his arraignment, if they be living." *Id.* at 418. The court refused Raleigh's request, noting the statutes in question had been repealed because "they were found to be inconvenient." *Id.* at 420. Raleigh was subsequently found guilty and sentenced to death. *See id.* at 449, 451.

Of course, Lopez-Ramos was not and cannot be sentenced to death, but the exact same circumstances are present here: a third-party relayed an alleged confession to investigators, the State presented the alleged confession to the jury at Lopez-Ramos's trial, Lopez-Ramos demanded that the State call the interpreter, the judge refused, and Lopez-Ramos was convicted based primarily on the alleged confession.

4 To this end, the court is incorrect in stating that my disagreement is "premised primarily on the assumption that 'interpreters make mistakes.' " My discussion of interpreter mistakes throughout this opinion is merely intended to rebut the presumption—upon which the court bases much of its analysis—that an interpreter is some sort of infallible translating machine that does not make judgment calls when rendering its translation. But even if the interpreter's reliability was unquestionable, *Crawford* makes clear that Lopez-Ramos would still have the *procedural* right to cross-examine the interpreter. *See Crawford*, 541 U.S. at 61, 124 S.Ct. 1354; *see also infra* at 426-27.

5 Admitting the report also would not have violated the Confrontation Clause if the authoring analyst was unavailable to testify and the defendant had a pretrial opportunity to cross-examine the analyst. *Bullcoming*, 564 U.S. at 652, 131 S.Ct. 2705.

6 One such example can be found in this very case. At trial, Lopez-Ramos was asked if he remembered telling the investigating officer "that [he] had some incident with [the victim]." The court-appointed interpreter initially translated his response as "Ah, I don't remember it because I was drunk. I was not within my five senses. I was ask—asked—being asked questions that I was not understanding." However, the interpreter subsequently corrected his translation to "I was under fear."

7 Even this description of the interpretation process is a gross over-simplification. Although no one model of the interpretation process has gained universal acceptance, all reflect a complicated, multi-step process that is considerably more nuanced than the court's facile description of "simply convert[ing] information from one language to another without adding content." *See, e.g.*, González et al., *supra*, at 817–19 (laying out proposed models of the interpretation process).

8 The court also states that the State did not verify the interpreter's identification and physical location "*because* Lopez-Ramos never challenged the adequacy or accuracy of the translation." In addition to the accuracy of the translation being irrelevant, there is also no evidence to support this causal connection. The State admitted it did not verify the identity or location of the interpreter, but it never offered any explanation to the district court for its failure to do so.

9 Indeed, the paucity of information about this interpreter is startling. The State offered no evidence of who he was beyond his first name and interpreter-identification number, no evidence of where he was located, and most importantly, no evidence of his training or experience. Accordingly, even if the State had called the interpreter, it is likely that the interpreter would not have been allowed to testify under Minn. R. Evid. 702 unless the State laid more foundation as to his qualifications. *See* Minn. R. Evid. 604 ("An interpreter is subject to the provisions of these rules relating to qualification as an expert ....").

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APPENDIX B: Decision of Minnesota Court of Appeals

913 N.W.2d 695
Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Cesar Rosario LOPEZ-RAMOS, Appellant.

A17-0609
|
Filed April 16, 2018

Synopsis

Background: Defendant was convicted in the District Court, Nobles County, File No. 53-CR-16-420, of first-degree criminal sexual conduct, and he appealed.

Holdings: The Court of Appeals, Reilly, J., held that:

trial court should apply factors set forth in *United States v. Nazemian*, 948 F.2d 522, in deciding a preliminary fact question, namely whether interpreter translating foreign-language defendant's statements into English was declarant for purposes of confrontation clause;

as matter of first impression, interpreter's translation may be regarded as the statement of the defendant for purposes of confrontation clause and hearsay rule;

as matter of first impression, district court did not clearly err in its preliminary finding of fact that the interpreter's translation of defendant's foreign-language statements during police interrogation should be viewed as defendant's statement; and

translated statements of foreign-language speaking defendant were admissible as statements by a party opponent.

Affirmed.

Procedural Posture(s): On Appeal; Judgment.

Syllabus by the Court

I. When an interpreter contemporaneously translates a criminal defendant's foreign-language statement to law enforcement, absent a motive to mislead or distort, or other facts indicating miscommunication or inaccuracy, the interpreter's translation may be regarded as the statement of the defendant.

II. When the state seeks to admit into evidence a criminal defendant's admission made through an interpreter, upon a Confrontation Clause or hearsay objection, a district court must determine as a preliminary fact question whether the interpreter's translation can fairly be attributable to the defendant, or whether the interpreter is an independent declarant.

III. When a defendant is deemed the declarant of his or her translated statement, the Confrontation Clause is not implicated, and the statement is admissible as a party admission under Minn. R. Evid. 801(d)(2)(A).

***698** Nobles County District Court, File No. 53-CR-16-420

Attorneys and Law Firms

Lori Swanson, Attorney General, St. Paul, Minnesota; and Kathleen A. Kusz, Nobles County Attorney, Travis J. Smith, Special Assistant County Attorney, Slayton, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Maria Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Reilly, Judge; and Reyes, Judge.

OPINION

REILLY, Judge

In this direct appeal from final judgment of conviction and sentence for first-degree criminal sexual conduct (CSC), appellant Cesar Rosario Lopez-Ramos argues that his rights under the Confrontation Clause were violated when an interpreter who translated his foreign-language statements during a police interrogation was not present to testify at trial and the translated statements were admitted into evidence through a video recording and an officer's testimony. Lopez-Ramos also challenges ***699** the admission of his translated statements on hearsay grounds. Because the district court did not err in its determination that the interpreter in this case acted as a "language conduit" and was not a declarant, and

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therefore no Confrontation Clause or hearsay issues exist, we affirm.

FACTS

In May 2016, the state charged Lopez-Ramos with one count of first-degree CSC alleging that he engaged in sexual penetration with a minor under 13 years of age in April 2016. Lopez-Ramos is from Guatemala and he immigrated to the United States in 2016. His first language is Mam, Spanish is his second language, and he does not speak English fluently.

In April 2016, Nobles County child protection received a report expressing concern about a 12-year-old child due to "hickeys" on her neck. Child protection contacted police and Worthington Police Officer Daniel Brouillet began investigating. Brouillet spoke to the child's parents, who said that they suspected Lopez-Ramos.

On May 10, Officer Brouillet located Lopez-Ramos, who agreed to give a statement to police. Police brought Lopez-Ramos to an interview room, and they recorded the entire interrogation on video. At the beginning of the interrogation, Brouillet telephoned a foreign-language interpretation service for a Spanish interpreter. The interpreter was placed on speaker phone, and he translated the officer's questions from English to Spanish and then translated Lopez-Ramos's statements back to the officer from Spanish to English.

During the interrogation Lopez-Ramos admitted that he had sexual intercourse with the child in this case:

> OFFICER BROUILLET (OB): So a couple months ago, maybe a month ago, there was some talk between [the child's] dad ... and you about something that happened between you and [the child]. Can you explain that?
>
> LOPEZ-RAMOS BY INTERPRETER (LR/I): Uh-huh.
>
> OB: Do you know what incident I'm talking about?
>
> LR/I: Yes.
>
> OB: Okay. Can you explain?
>
> LR/I: Everything that happened was because she wanted to. That's not, things didn't happen the way she is telling. Everything that happened is because she wanted to, not the way she is telling it.
>
> OB: Okay, so tell me what happened in your, what was she doing? This is your time to explain your side of the story. LR/I: I got home from work. She got home from school. She started playing jokes, or you could say she started kidding me. Um, then I told her to stop making jokes or kidding me and then she ... told me to get into a little room and, um, after that well, I said I did not want to disturb anyone. After that I don't remember well what happened. I don't remember how things happened after that.
>
> OB: Okay. Well, what happened?
>
> LR/I: We had intercourse with her.
>
> OB: Okay. And how long ago was this?
>
> LR/I: Just now about a month ago.
>
> OB: Okay. And how many times did you have intercourse with [the child]?
>
> LR/I: Just that one time. Nothing else.
>
> OB: Okay. Did you use a condom?
>
> LR/I: No. Why should I lie?
>
> OB: Okay. Did you, uh, did you ejaculate?
>
> [Interpretation, then pause].
>
> ***700** OB: Did you come? Did semen come out of you?
>
> LR/I: Yes. [1]

Lopez-Ramos was arrested and charged. He pleaded not guilty and took his case to a jury trial. Before trial, Lopez-Ramos objected to the recording of his translated statement to police being played to the jury on Confrontation Clause and hearsay grounds because the interpreter was not present to testify. The prosecutor stated that the interpreter was probably at a call center and not in Nobles County.

The district court ruled that Officer Brouillet's testimony regarding the translated statements and the video recording of Lopez-Ramos's interrogation were both admissible and did not present Confrontation Clause or hearsay issues. Relying on a Ninth Circuit Court of Appeals case, *United States v. Nazemian*, 948 F.2d 522, 527 (9th Cir. 1991), the district court examined a set of factors to determine whether the interpreter's statements "fairly should be considered the statement of the speaker." The district court concluded that

the interpreter was a "language conduit" or an agent of Lopez-Ramos, and it treated the translated statements in English as Lopez-Ramos's own statements.

The video recording of Lopez-Ramos's interrogation was played for the jury and Officer Brouillet testified at trial that Lopez-Ramos told him that he (Lopez-Ramos) had "intercourse" with the child.

The child testified at trial that Lopez-Ramos pulled down her pants and underwear and placed his penis inside of her vagina. She stated that she felt pain when his penis was inside her vagina. On several occasions when asked difficult questions about what had occurred, the child had no response and the prosecutor reframed or repeated the question.

Lopez-Ramos testified and denied having any sexual contact with the child. He stated that he did not understand "why [Officer Brouillet] was asking questions" about the child. Lopez-Ramos said that he did not remember talking to Brouillet about an "incident" with the child or telling Brouillet that he had intercourse with the child because during the interrogation he was still intoxicated from a party the night before. He claimed that when he spoke to Brouillet he was "not within [his] five senses" and was "being asked question[s] that [he] was not understanding." Lopez-Ramos also claimed that he did not fully understand the interpreter because his native language is Mam. He testified, "In that video I had said that I had done things that I hadn't done."

On cross-examination, Lopez-Ramos admitted that he understood Brouillet's questions translated into Spanish regarding his date of birth, where he had lived, and his family and work history. When pressed on why he could successfully communicate on some topics but not on the topic of sexual contact with the child, Lopez-Ramos stated: "I didn't know exactly what [Officer Brouillet] was talking about.... I had no idea why he was asking me those questions. He didn't explain it."

In its closing argument, the state stressed that Lopez-Ramos's own words in his statement to police were the strongest evidence that sexual penetration occurred. On December 15, 2016, the jury found Lopez-Ramos guilty of first-degree CSC. ***701** The district court sentenced Lopez-Ramos to 144 months in prison.

Lopez-Ramos now appeals.

ISSUES

I. Was Lopez-Ramos's Sixth Amendment right to confront witnesses against him violated when the district court admitted into evidence his translated statements in a video recording of his interrogation and by way of Officer Brouillet's testimony, and when the interpreter was not available for cross-examination?

II. Did the district court abuse its discretion by admitting into evidence Lopez-Ramos's translated statements over his hearsay objection?

ANALYSIS

Lopez-Ramos argues that the district court deprived him of his Sixth Amendment right to confront witnesses against him when it allowed his translated statements into evidence through a video recording and Officer Brouillet's testimony and the interpreter was not available for cross-examination. He also argues the interpreter's statements constitute inadmissible hearsay.

Generally, appellate courts review a district court's evidentiary ruling for an abuse of discretion. *Miles v. State*, 840 N.W.2d 195, 204 (Minn. 2013). But, whether admission of evidence violates a criminal defendant's rights under the Confrontation Clause is a question of law that appellate courts review de novo. *Hawes v. State*, 826 N.W.2d 775, 786 (Minn. 2013). A district court's factual findings are reviewed for clear error. *State v. Horst*, 880 N.W.2d 24, 33 (Minn. 2016).

I. Confrontation Clause

The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions "the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI. The Sixth Amendment is applicable to the states via the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 403, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965). The Confrontation Clause bars the admission of testimonial out-of-court statements unless (1) the declarant is unavailable and (2) the defendant had a prior opportunity to cross-examine the declarant. *Andersen v. State*, 830 N.W.2d 1, 9 (Minn. 2013) (citing *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 1374, 158 L.Ed.2d 177 (2004)).

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In *Crawford*, the Supreme Court determined that the principal evil at which the Confrontation Clause was directed was the use of "ex parte examinations as evidence against the accused." 541 U.S. at 50, 124 S.Ct. at 1363. The Clause applies to those witnesses, in or out of court, who "bear testimony" against the accused. *Id.* at 51, 124 S.Ct. at 1364. "Testimony" means a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* Without fully defining the word "testimonial," the *Crawford* court noted that included within a "core class" of "testimonial" statements were:

> ex parte in-court testimony or its functional equivalent that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially ... ; extrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions[; and] statements that were made under circumstances which would lead an objective witness reasonably to believe that ***702** the statement would be available for use at a later trial.

Id. at 51-52, 124 S. Ct. at 1364 (quotations omitted).

In overruling *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the *Crawford* court determined that when testimonial statements are involved, the "vagaries of the rules of evidence," and "amorphous notions of reliability" should not be determinative of whether a statement is subject to confrontation. *Id.* at 61, 64, 124 S. Ct. at 1370-71. This is because the Confrontation Clause is a procedural right and commands "not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* at 61, 124 S.Ct. at 1370.

A. The threshold issue is the identity of the declarant.

Lopez-Ramos argues that the interpreter's statements to law enforcement during his interrogation were testimonial and therefore his Confrontation Clause rights were violated when the interpreter's statements were admitted into evidence without the interpreter being available for cross-examination. The state argues that the Confrontation Clause is not implicated here because the interpreter was acting as a "language conduit" and Lopez-Ramos, not the interpreter, was the declarant of his out-of-court statements.

We agree with the state that the threshold issue for both the Confrontation Clause and hearsay issues in this case is whether the interpreter is the declarant. Unlike most cases involving a Confrontation Clause or hearsay challenge, the identity of the declarant is not obvious when an interpreter translates a foreign language speaker's statements into English. *United States v. Charles*, 722 F.3d 1319, 1332 (11th Cir. 2013) (Marcus, J., specially concurring). As explained by the Ninth Circuit Court of Appeals in *United States v. Orm Hieng*, the identity of the declarant may dictate the result in such a case:

> If a court were to hold that the statement must be attributed to the interpreter, it would, under *Crawford*, ask whether the statement, as applied to the interpreter, was testimonial. If so, the statement could not be admitted without opportunity for confrontation of the interpreter. But if the court determines that a statement may be fairly attributed directly to the original speaker, then the court would engage in the *Crawford* analysis only with respect to that original speaker. Where ... that speaker is the defendant, the Sixth Amendment simply has no application because a defendant cannot complain that he was denied the opportunity to confront himself.

679 F.3d 1131, 1140 (9th Cir. 2012); *see also State v. Goodridge*, 352 N.W.2d 384, 388 n.2 (Minn. 1984) ("[A] party cannot object to his failure to have a chance to cross-examine himself.").

Therefore, for Lopez-Ramos to succeed in his Confrontation Clause challenge he must show that (1) the interpreter was a declarant, (2) the declarant's statements were testimonial and admitted for the truth of the matter asserted, and (3) Lopez-Ramos was unable to cross-examine the declarant. *See Andersen*, 830 N.W.2d at 9 (discussing the elements of a successful Confrontation Clause challenge).

The question of whether an interpreter translating a foreign-language speaker's statements into English is a declarant for the purposes of a Confrontation Clause analysis, appears to be an issue of first impression in Minnesota. To answer this question, we first examine Minnesota caselaw on hearsay and interpreted statements, ***703** and then turn to foreign authorities that also address the question.

i. Minnesota law on hearsay and interpreted statements

Two Minnesota cases address challenges to interpreters' statements on hearsay grounds. In *Miller v. Lathrop*—a 1892 Minnesota Supreme Court case involving a civil action to recover possession of certain personal property—the plaintiff, who spoke only Polish, made admissions to one of the defendants by way of her daughter translating from Polish to English. 50 Minn. 91, 93, 52 N.W. 274, 274 (1892). The supreme court concluded that the defendant's testimony as to the conversation between him and the plaintiff was admissible because "[t]he rendering in English by the daughter to [the defendant] of what her mother said in Polish was not in the nature of hearsay." *Id.* The supreme court determined:

> When two persons voluntarily agree upon a third to act as interpreter between them, the latter is to be regarded as the agent of each to translate and communicate what he says to the other, so that such other has a right to rely on the communication so made to him. It is the communication of the party through his agent.

Id.

A similar issue was addressed in *State v. Mitjans*, when a defendant made admissions in Spanish to a Spanish-speaking police officer, who acted as an interpreter to facilitate communication between the defendant and another officer. 408 N.W.2d 824, 826-27 (Minn. 1987). The defendant challenged the admission of the statements on hearsay grounds. *Id.* at 830-31. The supreme court ruled that the defendant's statements translated through the officer were admissible under Minn. R. Evid 801(d)(2)[2] because the officer was present in court, under oath, and subject to cross-examination. *Id.* at 830. In dicta, the supreme court noted that it "would have a difficult hearsay issue to resolve" had the translating officer not been present to testify at trial, and it noted that

> [t]he issue would be a hearsay issue because the other officer, who speaks only English, could testify only to what [the translating officer] said defendant had said. Some courts have reasoned that the interpreter normally may be viewed as an agent of the defendant and that therefore the translation is attributable to the defendant as his own admission and is admissible under rule 801(d)(2). We express no opinion on this issue but point out that under the agency theory of admissibility the case for admission of the defendant's statements in a criminal prosecution is certainly stronger if the interpreter on whose interpretation the witness relies is the defendant's own interpreter or an independent interpreter appointed to assist the defendant rather than one employed as a police officer.

Id. at 830-31 (quotation omitted).

The state asserts that the reasoning in *Miller* leads to a conclusion that Lopez-Ramos was the declarant in this case. Lopez-Ramos points to the language *Mitjans*—that the English-speaking officer "could testify only to what [the Spanish-speaking officer] said defendant had said"—as demonstrating the complex nature of language interpretation, which in turn supports the conclusion that the interpreter here was a declarant.

***704** However, we do not believe that *Miller* or *Mitjans* are controlling here. It is unclear from *Miller* whether we should

treat (1) the interpreter as a declarant, but whose statements are nevertheless admissible under what later became Minn. R. Evid. 801(d)(2)(D), which excludes statements made by a party's agent from the definition of hearsay, or (2) the foreign-language speaker as the sole declarant. Furthermore, rather than clarify this issue, the supreme court in *Mitjans* declined to express an opinion on whether an interpreter's translation is "attributable to the defendant as his own admission." 408 N.W.2d at 830. While the court in *Mitjans* hinted that the interpreter's statements may be admissible nonhearsay under an agency theory, like in *Miller*, it is unclear whether this means an interpreter should be treated as an independent declarant as the speaker's agent, or whether the foreign-language speaker would be the sole declarant. [3]

In short, Minnesota law provides no satisfactory answers.

ii. Foreign authority

For its assertion that Lopez-Ramos was the sole declarant in this case, the state relies on two Ninth Circuit Court of Appeals cases, *Nazemian*, 948 F.2d at 525-26, and *Orm Hieng*, 679 F.3d at 1140.

In *Nazemian*, the Ninth Circuit held that under certain circumstances a witness may testify regarding statements made by a defendant through an interpreter without raising Confrontation Clause or hearsay issues if the statements are properly viewed as the defendant's own. 948 F.2d at 528. In that case a Farsi-speaking defendant was indicted for a drug-distribution conspiracy. *Id.* at 524. She argued on appeal that her Confrontation Clause rights were violated when a government agent testified about her statements, which the agent only heard translated through an interpreter. *Id.* The *Nazemian* court treated the issue of "whether the interpreter or Nazemian should be viewed as the declarant" as a threshold matter, and addressed it before examining the now defunct pre-*Crawford* factors in *Roberts* on "indicia of reliability." *Id.* at 525, 532.

The court in *Nazemian* noted that other federal circuit courts of appeal take the view that an interpreter under "some circumstances [should] be viewed as an agent of the defendant, and the translation hence be attributable to the defendant as her own admission." *Id.* at 526 (citing *United States v. Da Silva*, 725 F.2d 828, 831-32 (2d Cir. 1983) (holding that when agency relationship between speaker and interpreter may properly be found to exist, interpreter becomes no more than a "language conduit" and the "testimonial identity between declarant and translator brings the declarant's admissions within Rule 801(d)(2)(C) or (D)") (other citations omitted)). In other federal cases addressing this issue, no hearsay problem existed because ***705** the court determined that the interpreter acted merely as a "language conduit." *Nazemian*, 948 F.2d at 526 (citing *United States v. Koskerides*, 877 F.2d 1129, 1135 (2d Cir. 1989) (holding that interpreter of witness statement was "no more than a language conduit" and therefore his translation did not create an additional layer of hearsay) (other citations omitted)).

Under the language-conduit or agency theory, the *Nazemian* court examined four factors it found relevant in determining whether the interpreter's statements should be attributed to the defendant. *Id.* at 527. These factors include: (1) "which party supplied the interpreter," (2) "whether the interpreter had any motive to mislead or distort," (3) "the interpreter's qualifications and language skill," and (4) "whether actions taken subsequent to the conversation were consistent with the statements as translated." *Id.* Balancing those factors, the *Nazemian* court ruled that the defendant and interpreter's statements were "identical for testimonial purposes." *Id.* at 528. Because the defendant, and not the interpreter, was the declarant, there were no hearsay or Confrontation Clause issues. *Id.*

In a post-*Crawford* case involving a Confrontation Clause challenge to the admission of an interpreter's out-of-court statement, the Ninth Circuit in *Orm Hieng*, 679 F.3d at 1139, ruled that its precedent *Nazemian* was reconcilable with *Crawford* and its progeny. The *Orm Hieng* court recognized that there may be "some tension" between the two cases because the test in *Nazemian* "stems from principles of the law of evidence" and *Crawford* could be read to divorce any Sixth Amendment analysis from the law of evidence. *Id.* at 1140. However, the court noted that, post-*Crawford*, the Supreme Court continues to use the vocabulary of evidence law and its cases "provide no clear guide with respect to the interplay, if any, between the Confrontation Clause and the law of evidence." *Id.* at 1141.

The Fifth Circuit Court of Appeals agreed with the Ninth Circuit that the Supreme Court's recent Confrontation Clause jurisprudence is not in conflict with the language-conduit theory. *United States v. Budha*, 495 Fed.Appx. 452, 454 (5th Cir. 2012), *cert. denied*, 568 U.S. 1164, 133 S.Ct. 1243, 185 L.Ed.2d 190 (2013). State appellate courts, both pre-

and post-*Crawford*, have also followed the language-conduit theory when examining Confrontation Clause and hearsay challenges. *See, e.g.*, *Correa v. Superior Court*, 27 Cal.4th 444, 117 Cal.Rptr.2d 27, 40 P.3d 739, 747 (2002) (adopting language-conduit theory in a hearsay context); *People v. Gutierrez*, 916 P.2d 598, 601 (Colo. App. 1995) (interpreter was merely a language conduit for Confrontation Clause and hearsay issue); *Hernandez v. State*, 291 Ga.App. 562, 662 S.E.2d 325, 329 (2008) (no hearsay or Confrontation Clause issue with admission of interpreter's out-of-court statements because the statements of interpreter treated as statement of foreign-language speaker); *Com. v. AdonSoto*, 475 Mass. 497, 58 N.E.3d 305, 314 (Mass. 2016) (applying the *Nazemian* factors and concluding that an interpreter is agent of defendant for hearsay purposes); *People v. Jackson*, 292 Mich.App. 583, 808 N.W.2d 541, 552 (2011) (determining nurse's reports to law enforcement regarding defendant's "yes" or "no" hand-signal responses were not hearsay under language-conduit theory and defendant did not have right to confront nurse); *State v. Patino*, 177 Wis.2d 348, 502 N.W.2d 601, 610 (Wisc. App. 1993) (concluding that statements of interpreter in some circumstances should be regarded as the statements of the foreign-language speaker without creating an additional layer of hearsay).

***706** Lopez-Ramos relies on *Charles*, 722 F.3d at 1321-24, 1130-31, and *Taylor v. State*, 226 Md.App. 317, 130 A.3d 509, 521, 540 (2016), which hold that an interpreter's translation as to a defendant's statement in a foreign language is testimonial and therefore the defendant has a Sixth Amendment right to confront an interpreter. In *Charles*, 722 F.3d at 1321-24, and in *Taylor*, 130 A.3d at 513, the defendants made incriminating statements to law enforcement during questioning through the aid of an interpreter, and the courts ruled that both the foreign-language speaker and the interpreter were separate declarants. The *Charles* court reasoned that because language interpretation involves a concept-to-concept translation and not a word-to-word translation, the statements of the language interpreter and the defendant are not one in the same. 722 F.3d at 1324. The *Taylor* court concluded that the reasoning in *Nazemian* was irreconcilable with *Crawford* because the analysis in *Nazemian* depends on analogies to evidentiary rules regarding hearsay, and that it "premises the admissibility of the absent interpreter's statements upon the apparent reliability of the interpretations." 130 A.3d at 538. Lopez-Ramos, like the court in *Taylor*, asserts that the language-conduit theory in *Nazemian* is similar to the reliability analysis in *Roberts*, which was overruled by *Crawford*.

iii. The *Nazemian* approach is not in conflict with *Crawford*.

While Lopez-Ramos's arguments are not without merit, we are convinced by the majority view that the factors employed in *Nazemian* to determine whether an interpreter is a declarant does not run afoul of the Supreme Court's Confrontation Clause jurisprudence.[4] We recognize that the *Nazemian* test was derived from federal courts' hearsay analyses on whether an interpreter could be considered an agent for the purposes of Fed. R. Evid. 801(d)(2)(D). *See Da Silva*, 725 F.2d at 832 (citing 4 J. Weinstein & M. Berger, *Evidence* ¶ 801(d)(2)(C) [01], at 801-158 n.34 (1981) and 6 J. Wigmore, *Evidence* § 1810(2), at 376 (Chadbourn rev. 1976)). The *Crawford* court determined that "replacing categorical constitutional guarantees with open-ended balancing tests ... do[es] violence to [the framers'] design." 541 U.S. at 67-68, 124 S.Ct. at 1373. Because the *Nazemian* factors constitute a balancing test in a case involving a Confrontation Clause challenge, it may appear at first blush that the language-conduit theory is in tension with *Crawford*. But, just because a Confrontation Clause challenge was made, does not mean the Clause is implicated. Here, the factors examined under the language-conduit theory do not run afoul of *Crawford* because they are not employed to assess the reliability of an interpreter's extrajudicial statements for the sole purpose of determining admissibility. Instead, the factors are employed to answer a more fundamental question of the identity of the declarant, and whether the Confrontation Clause is even implicated.

Here, the district court did not err in employing the *Nazemian* factors in deciding a preliminary fact question—whether an interpreter is a declarant for the purposes of a Confrontation Clause or hearsay issue. The district court acted properly pursuant to Minn. R. Evid. 104(a), which allows district courts to examine various circumstances to decide whether a preliminary fact has been established by a preponderance of the evidence. *See, e.g.*, ***707** *In re Source Code Evidentiary Hearings in Implied Consent Matters*, 816 N.W.2d 525, 538 (Minn. 2012); *Bourjaily v. United States*, 483 U.S. 171, 175, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987). Like in this case, district courts often act under rule 104(b) to make preliminary findings of fact that must be established before a statement may be admissible as an admission under the rule-801(d)(2) exemptions from hearsay. For example, to determine whether another person's statement is admissible as a defendant's "adoptive admission" under Minn. R. Evid. 801(d)(2)(B), a district court must first determine whether the defendant adopted the admission by conduct or statements which (1)

were unequivocal, positive, and definite in nature, and (2) clearly showed that in fact the defendant intended to adopt the hearsay statements as his own. *Goodridge*, 352 N.W.2d at 388. Under Minn. R. Evid. 801(d)(2)(C) and (d)(2)(D) a district court may need to make a preliminary finding on whether a declarant was authorized to speak or was an agent of the speaker. *See Carroll v. Pratt*, 247 Minn. 198, 204, 76 N.W.2d 693, 698 (1956) (discussing whether an attorney had the authority to make extrajudicial admissions on behalf of client); *Rent-A-Scooter, Inc. v. Universal Underwriters Ins. Co.*, 285 Minn. 264, 267, 173 N.W.2d 9, 11 (1969) (requiring that, to be admissible as an admission, statements made by an agent must be (1) against the principal's interests at the time of trial, (2) made in the scope of the agent's authority while engaged in the business of his principal, and (3) statements of fact). When the state seeks to introduce an out-of-court statement by the defendant's coconspirator under Minn. R. Evid. 801(d)(2)(E), it must first satisfy a set of factors defined in the rule by a preponderance of the evidence. *State v. Brist*, 812 N.W.2d 51, 54 (Minn. 2012); *see Bourjaily*, 483 U.S. at 175, 107 S.Ct. at 2778. And when a district court finds that a preliminary fact is established under rule 104, allowing a statement to be admissible under a rule-801(d)(2) exemption to the hearsay rule, that decision might be determinative of whether a statement can be admitted without violating the Confrontation Clause. *See Brist*, 812 N.W.2d at 57 (holding post-*Crawford* that admission into evidence of out-of-court statements made in furtherance of conspiracy under rule 801(D)(2)(E) did not violate the Confrontation Clause); *Vill. of New Hope v. Duplessie*, 304 Minn. 417, 421, 231 N.W.2d 548, 551 (1975) (stating pre-*Crawford* that: "In a literal sense, an adoptive admission manifested in an unequivocal manner constitutes a waiver of ... the right ... to be confronted by one's accuser."). Likewise, here, the district court properly used the *Nazemian* factors to make a preliminary finding as to the identity of the declarant in order to determine whether the Confrontation Clause was implicated and whether the statements were Lopez-Ramos's admissions. [5]

We are not persuaded that the nuanced nature of concept-to-concept language interpretation automatically turns an interpreter into a declarant. Criminal defendants frequently waive important rights and plead guilty via interpreters. In doing so, we presume that the interpreter's ***708** words in English are those of the defendant, and we do not treat such statements as coming from an independent declarant or as questionable hearsay.

Finally, an interpreter and their words do not fit into our normal definitions of "declarant" and "statement." A "declarant" is simply a person "who has made a statement." *Black's Law Dictionary* 467 (9th ed. 2009); Minn. R. Evid. 801(b). A "statement" is a "verbal assertion" or "nonverbal conduct intended as an assertion." *Black's 1539*; Minn. R. Evid. 801(a). Interpreters, like the one here, speak in the first person. But, we do not treat the interpreter's words literally, as if they made a verbal assertion about themselves. Normally, on hearing the interpreter's English words, we assume the foreign-language speaker made the verbal assertion, not the interpreter. Additionally, when an interpreter is speaking in the first person, the truth of the matter asserted flows back to the original foreign-language speaker. The *Nazemian* factors allow a district court to examine on a case-by-case basis as to whether these assumptions prove true, and in some cases a district court may rightly find that an interpreter became a declarant.

Therefore, when the state seeks to admit into evidence a criminal defendant's admissions made through an interpreter, upon a Confrontation Clause or hearsay objection a district court must determine as a preliminary matter whether the interpreter's translation can fairly be attributable to the defendant, or whether the interpreter is a separate declarant. The preponderance of the evidence standard applies and the state, as the proponent of the evidence, has the burden to establish the preliminary fact. *In re Source Code Evidentiary Hearings*, 816 N.W.2d at 538; *see, e.g., State v. Roman Nose*, 649 N.W.2d 815, 824 (Minn. 2002) (determining that proponent of scientific evidence has the burden of establishing its admissibility by establishing the relevant requirements); *see also* 1 McCormick on Evidence § 53 (Kenneth S. Broun ed., 7th ed. 2016) ("As a general proposition, the proponent of the evidence has the burden of establishing the preliminary facts."). In making this determination, the district court should consider on a case-by-case basis: (1) which party supplied the interpreter, (2) whether the interpreter had any motive to mislead or distort, (3) the interpreter's qualifications and language skill, and (4) whether actions taken subsequent to the conversation were consistent with the statements as translated. This is not an exhaustive list and other factors may be relevant.

B. The Confrontation Clause is not applicable because Lopez-Ramos was the declarant of the translated statements.

On application of the *Nazemian* factors to the record in this case, we conclude that the district court did not clearly

err in its preliminary finding of fact that the interpreter's translation should be viewed as Lopez-Ramos's statement, and therefore Lopez-Ramos was the sole declarant. Under the first factor, police supplied the interpreter through calling an interpreter service over the telephone. Police were able to choose the language but not the specific interpreter. Other courts applying this factor have ruled that the fact that the government supplied the interpreter is not dispositive, and this factor has a greater weight when the interpreter acts both as a translator and a law-enforcement officer. *Compare Da Silva*, 725 F.2d at 832 (government employee could still act as interpreter and agent of defendant) *with United States v. Sanchez-Godinez*, 444 F.3d 957, 960 (8th Cir. 2006) (federal agent could not be considered a ***709** "language conduit" when agent "Mirandized" defendant and asked questions he normally would ask in his capacity as a law-enforcement agent). Second, while the police supplied the interpreter, there is no evidence here that the interpreter had any motive to mislead or distort. To the contrary, as an employee for the interpreter service, the interpreter had every motive to render an accurate translation for both the police and Lopez-Ramos so that police would continue to contract with his company. Third, the state did not provide evidence of the interpreter's qualifications, but the videotaped interrogation and the behavior of Lopez-Ramos during the interrogation is evidence that the interpreter was skilled. Lopez-Ramos successfully communicated with Officer Brouillet on topics concerning his date of birth, current and past residences, family and work history. During the interrogation Lopez-Ramos gave no indication that he had difficulty understanding the interpreter. While Lopez-Ramos testified at trial that he did not fully understand the interpreter, the recording contradicts this assertion. On the fourth factor, Lopez Ramos's statements that he did not use a condom and had ejaculated were consistent with his earlier statement, as translated, that he had "intercourse" with the child. Had there been a mistranslation of the word "intercourse," Lopez-Ramos likely would have been confused by Brouillet's follow-up questions. Additionally, while Lopez-Ramos's first language is Mam, the video recording and trial transcript show that he had a sufficient mastery of Spanish to effectively communicate. *See Da Silva*, 725 F.2d at 831 (noting that while defendant's first language was Portuguese, evidence showed defendant's mastery of Spanish, the interpretation language).

On balance, the district court did not clearly err in its finding that the interpreter's words in English can fairly be attributed to Lopez-Ramos. Because Lopez-Ramos is the declarant and his statements were entered into evidence as his own admissions, no Confrontation Clause violation exists, as a criminal defendant does not have the right to confront himself. *United States v. Brown*, 441 F.3d 1330, 1358-59 (11th Cir. 2006); *Goodridge*, 352 N.W.2d at 388 n.2 ("[A] party cannot object to his failure to have a chance to cross-examine himself."). The district court did not abuse its discretion in admitting Lopez-Ramos's translated statements into evidence after the defense's objection on Confrontation Clause grounds because the Clause was not implicated here.

Because the admission of Lopez-Ramos's translated statements does not implicate the Confrontation Clause, we do not address whether the interpreter's statements were testimonial.

II. Hearsay

Lopez-Ramos also challenges the admission of his translated statements on hearsay grounds.

"Hearsay" is an out-of-court statement of a declarant offered into evidence to prove the truth of the matter asserted. Minn. R. Evid. 801(c). Such statements, though, are admissible as admissions of a party-opponent, and are exempted from the hearsay definition, when the statement is (1) offered against a party, and (2) the party's own statement. Minn. R. Evid. 801(d)(2)(A).

We have already determined under the *Nazemian* factors that Lopez-Ramos was the declarant of the translated statements. The translated statements, admitted through the video recording of the interrogation and Officer Brouillet's testimony, were Lopez-Ramos's own statements and were offered into evidence as proof of the matter asserted—that Lopez- ***710** Ramos had intercourse with the child. The state offered the statements against Lopez-Ramos as a party opponent. Therefore, the district court did not abuse its discretion in admitting the statements into evidence because they were admissible under Minn. R. Evid. 801(d)(2)(A).[6]

Because we find no error on hearsay or Confrontation Clause grounds, we do not address the parties' arguments regarding whether the harmless-error or plain-error standard should apply.

DECISION

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We affirm because the district court did not err by employing the *Nazemian* factors to determine that Lopez-Ramos, and not the interpreter, was the declarant, and that the translated statements were fairly attributable to Lopez-Ramos. Because Lopez-Ramos's admissions were his own, the district court did not err in determining that he did not have a right to confront the interpreter under the Sixth Amendment's Confrontation Clause, and that Lopez-Ramos's translated statements were not inadmissible hearsay.

Affirmed.

All Citations

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Footnotes

1 The quotation of Lopez-Ramos's interrogation in this opinion comes directly from the interpreter's English words in the video exhibit. An interpreter's creation of a transcript for trial presents other Confrontation Clause and hearsay issues that we do not address here. *See United States v. Curbelo*, 726 F.3d 1260, 1271 (11th Cir. 2013).

2 The supreme court did not specify the subpart—(A) through (E)—under Minn. R. Evid. 801(d)(2), to which it was referring.

3 To support its argument that Lopez-Ramos is the sole declarant, the state also cites Minn. Stat. §§ 611.32, subd. 2, and .33, subd. 2 (2016), which regulate the use of interpreters in legal proceedings. We are not convinced that these statutes shed light on whether a foreign-language speaker should be considered the sole declarant when an interpreter is used to translate their words into English. We also note that the statutes are not applicable to this case because police had not yet apprehended or arrested Lopez-Ramos and no legal proceedings had commenced. *See* Minn. Stat. § 611.32, subd. 2 (requiring law enforcement to obtain a qualified interpreter "[f]ollowing the apprehension or arrest of a person disabled in communication for an alleged violation of a criminal law"); Minn. Stat. § 611.33, subd. 2 (requiring a qualified interpreter to take an oath in court or at a legal proceeding); *Mitjans*, 408 N.W.2d at 827, 829 (determining that Minn. Stat. §§ 611.30 to .33 apply to the interrogation of a criminal suspect detained after arrest).

4 Decisions from foreign authorities are not binding, but they may be persuasive. *Mahowald v. Minn. Gas Co.*, 344 N.W.2d 856, 861 (Minn. 1984).

5 Findings of fact on a preliminary matter are reviewed for clear error. *Bourjaily*, 483 U.S. at 181, 107 S.Ct. at 2782 (applying the clear-error standard of review to a district court's factual findings when determining whether a conspiracy existed under Fed. R. Evid. 801(d)(2)(E)); *In re Source Code Evidentiary Hearings*, 816 N.W.2d at 537. But appellate courts review a district court's ultimate decision on whether to admit evidence for an abuse of discretion, and whether the admission of certain evidence violated a defendant's Confrontation Clause rights is reviewed de novo. *State v. Dobbins*, 725 N.W.2d 492, 505 (Minn. 2006).

6 We note that many federal courts of appeal and state appellate courts have determined that an interpreter is "viewed as an agent of the defendant; hence the translation is attributable to the defendant as his own admission and is properly characterizable as nonhearsay under Rule 801(d)(2)(C) or (D)." *Sanchez-Godinez*, 444 F.3d at 960 (citing *Da Silva*, 725 F.2d at 831); *see also AdonSoto*, 58 N.E.3d at 312 ("In these circumstances, the interpreter may properly be considered an agent of the defendant for hearsay purposes, negating exclusion on hearsay grounds."). We think our conclusion that the interpreter in this case is not a declarant, though, is more consistent with cases that conclude that a defendant's interpreted statements are admissible under rule 801(d)(2)(A). *See Al-Bihani v. Obama*, 590 F.3d 866, 879 (D.C. Cir. 2010) (Guantanamo Bay detainee's interpreted interrogation answers not hearsay under 801(d)(2)(A)); *United States v. Stafford*, 143 Fed.Appx. 531, 533 (4th Cir. 2005) (defendant's translated statements to coconspirator admissible under Fed. R. Evid. 801(d)(2)(A) when person who received the translated statements testified to them). We therefore express no opinion on whether a defendant's translated statements are admissible under Minn. R. Evid. 801(d)(2)(C) or (D).

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APPENDIX C: District Court's Order

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STATE OF MINNESOTA — IN DISTRICT COURT

COUNTY OF NOBLES — FIFTH JUDICIAL DISTRICT

Court File No. 53-CR-16-420

State of Minnesota,

Plaintiff,

vs.

JURY TRIAL - DAY 1

Cesar Rosario Lopez-Ramos,

Defendant.

* *

TRANSCRIPT OF PROCEEDINGS
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* *

The above-entitled matter came before the Honorable Gordon L. Moore, III, Judge of District Court, at the Prairie Justice Center, Worthington, Minnesota, on the 14th day of December, 2016, at 9:32 a.m.

* *

APPEARANCES

The Plaintiff was represented by Adam Johnson, Assistant Nobles County Attorney, Worthington, Minnesota.

The Defendant appeared personally and was represented by Louis Kuchera, Assistant Public Defender, Worthington, Minnesota, and was assisted by certified Spanish interpreters, Maritza Gibbs and Ivy Alvear.

Kate Harmsen
Certified Court Reporter
Worthington, Minnesota

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be to finish those four witnesses today. And we'll go as long as necessary to get those witnesses done. And so we'll stand in---in recess and we'll get right at it after that.

The Court is going to advise Mr. Lopez-Ramos that because the jury is sworn now, Mr. Lopez-Ramos, um, jeopardy has attached under the law. What that means is that if for some reason you chose to absent yourself from the trial, or if you were late for some reason, the Court could theoretically start and continue without you. I know the jailer will not permit that to happen, but just so you're advised that if for some reason you chose not to participate and come to court, the trial would continue. I don't anticipate that'll be an issue, but just to advise you of that.

All right, we'll stand in recess.

MR. KUCHERA: Your Honor?

THE COURT: Yes?

MR. KUCHERA: I believe in our pretrial meeting this morning, I indicated my intention to object to the defendant's statement being played based on hearsay and confrontation grounds regarding the interpreter not being in court to testify as to their statements made on behalf of the defendant or an interpretation of the defendant. I guess my recollection was the Court was indicating that it was going to allow that statement, if I am correct or not?

THE COURT: Thank you for reminding me of that, Mr.

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Kuchera. I don't think I had made a formal ruling on that. I had one issue I was looking at with Mr. Kuettner. I will make a formal decision on the record before the jury comes back into the courtroom on that so that---that's clear for the record. But your objection is noted and remains unruled upon at this point in time.

All right, we'll stand in recess.

(Proceedings recess at 3:23 p.m. and resume at 3:41 p.m. outside the presence of the jury.)

THE COURT: We are on the record in State of Minnesota versus Cesar Lopez-Ramos outside the presence of the jury. Prior to the break, counsel for the defendant asked for the Court to make a ruling on the defendant's motion to exclude the playing of the recording of the interview of the defendant conducted by law enforcement on the grounds that the defendant's right of confrontation would be denied because of the absence of the interpreter from the court proceeding. The question is whether there is a confrontation clause or hearsay problem regarding the Court permitting a recording of a statement interpreted by a interpreter to be admitted into evidence without the interpreter testifying at trial.

Mr. Johnson, before I issue my ruling on this matter, would you make an offer of proof, please, as to what the evidence the State expects to be regarding how the interpreter was obtained and where the interpreter was

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obtained from.

MR. JOHNSON: Yes, Your Honor. The State believes that the evidence will show that an interpreter was contacted using the AT&T Language Line at the Prairie Justice Center in an interview room that had audio and video recording capabilities. The interview was then conducted with the defendant using this interpreter in sequential interpretation. If the Court wanted me to---and I'll only---I'll only address those issues. It was a line, the language line that is actually frequently used by the Nobles County law enforcement community, and it is from a company that's pretty well known, AT&T. And the State has not previously received any sort of evidence or, um, I guess dispute that the translation that was done by that interpretation was somehow inadequate or inaccurate, though I know Mr. Kuchera brought up the issue back in June of 2016.

THE COURT: Brought up concerns regarding the accuracy of the translation or the absence of the interpreter from the trial?

MR. JOHNSON: No. It was the---brought up the issue of preserving the issue of whether or not the translation was accurate at that time. But I have never received any sort of motions or other evidence to contradict the accuracy.

THE COURT: So the interpreter was employed by this language line service and physically located someplace

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probably far away from Nobles County?

MR. JOHNSON: Probably at a call center, I would assume, but I don't know where.

THE COURT: Are you aware as to whether the officers in this case were able to choose the interpreter that was used for Mr. Lopez-Ramos?

MR. JOHNSON: I'm generally aware that officers are put onto a que when they call into the line, and they might wait for a short period of time and are just given an interpreter. They don't get a choice, except as to language, obviously.

THE COURT: Mr. Kuchera, would you like to be heard further on this particular issue?

MR. KUCHERA: No, Your Honor.

THE COURT: Well, the Court has done some research on this issue, and actually there's an interesting split in authority in the federal circuit courts of this country over this precise question. The Court has reviewed this case law briefly. There are law review articles and ALR journal articles regarding it. The Court is convinced that if the interpreter is viewed as a language conduit or as an agent of the defendant that there is not a hearsay or confrontation clause issue. In other words, if the statements are viewed as the defendant's, they would be non-hearsay admissions of a party. On the other hand, if the statements were viewed as the

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statements of the interpreter, those statements would not be necessarily viewed as the defendant's statement. And some courts have ruled that there is a confrontation clause issue when the interpreter is not in court to testify.

In reliance on the federal circuits, because apparently this issue has not been decided in the Minnesota courts, the Court is relying on the case of *United States v. Nazemian*, 948 F2d 522, 9th Circuit Court of Appeals decision from 1991. That suggests the approach the Court should follow is to consider on a case by case basis whether the translated statements fairly should be considered the statements of the speaker. And the Court is suggested to look at the question of interpreter capacity, whether there's a motive to misrepresent, and any other factors which could be relevant in determining whether the interpreter's statements should be attributed to the defendant.

Clearly, the government did provide the interpreter in this case, but it was not an interpreter specifically selected for the defendant. With regard to the qualifications, there's been no evidence provided to the Court that the translation was inaccurate. There's been no suggestion the interpreter had a motive to mislead, distort, or not accurately interpret the statements of the defendant.

Under these circumstances, the Court is going to treat the interpreter in this case as a language conduit or

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Mr. Lopez-Ramos' agent for purposes of conducting conversations with Officer Brouillet. And so the admission of Officer Brouillet's testimony regarding the translated statements and the admission of the actual tape---tape of the interview and the interpreter's statements do not create confrontation clause or hearsay issues. And so the Court is going to overrule the defense objection.

However, the Court has instructed the prosecutor to edit the transcript to indicate that the statements being attributed to Mr. Lopez-Ramos are made through what the Court is characterizing as his agent, the interpreter. And so the transcript should reflect the fact that those are statements that the interpreter made.

All right, with that ruling, is there anything else either party wishes to address before we bring the jury back in the courtroom? Mr. Kuchera?

MR. KUCHERA: No, Your Honor.

THE COURT: Mr. Johnson?

MR. JOHNSON: No, Your Honor.

THE COURT: All right, the bailiffs shall bring the jury back into the courtroom.

(Jury returns to the courtroom at 3:50 p.m.)

THE COURT: All right, members of the jury, the trial is about to begin and you've been sworn in. I'm going to give you some preliminary instructions before the actua