No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

_____
_____

ANTONIO NAVARRO, ,

Petitioner,

- vs -

STATE OF CALIFORNIA,

Respondent.

_____
_____

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR

_____
_____

JOHN LANAHAN
501 West Broadway, Suite 1510
San Diego, California 92101-3526
Telephone: (619) 237-5498
E-mail: lawnahan@sbcglobal.net

Attorney for Petitioner

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2020

ANTONIO NAVARRO,

Petitioner,

- vs -

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION FOUR

The Petitioner, Antonio Navarro, hereby prays that a Writ of Certiorari issue from the decision of the California Court of Appeal, Fourth Appellate District, Division Four, in case number B296251, affirming his conviction first degree murder and a firearm enhancement based upon the murder conviction. He argued on direct appeal before that Court that the admission at his trial of a translation of a witness's statement made in anticipation of litigation without calling the translator at trial for cross-examination, violated the Sixth and Fourteenth Amendments to the United States Constitution. The Court of Appeal issued its unpublished decision affirming Mr. Navarro's conviction on October 8, 2020. [Appendix A]. It found the issue had been forfeited

due to trial counsel's failure to object, but also ruled on the merits. [Appendix A, pp. 2, 6-8] The Court of Appeal rejected the Confrontation Clause claim, relying upon *Correa v. Superior Court*, 27 Cal.4th 444 (2002), a case decided prior to this Court's decision in *Crawford v. Washington,* 541 U.S. 36 (2004). Mr. Navarro's timely Petition for Review to the California Supreme Court, requesting it reexamine *Correa* in light of *Crawford*, was denied on December 23, 2020 [Appendix B].

OPINION BELOW

On October 8, 2020, the California Court of Appeal for the Second Appellate District, Division Four, issued and unpublished opinion, affirmed the Mr. Navarro's conviction for first degree murder. [Appendix A1-A11] The California Supreme Court denied Mr. Navarro's timely Petition for Review in case number S265616 on December 23, 2020. [Appendix B]. This petition is filed within ninety days of the final state court judgment and therefore timely under Rule 13.1.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment VI, provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .

United States Constitution, Amendment XIV, Section 1 provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .

STATEMENT OF THE CASE

Introduction:

Antonio Navarro was charged with murder, two counts of felon in possession of a firearm, and one count of shooting at an occupied vehicle. Counts one and four also charged firearm and criminal street gang enhancements. He was convicted of all counts and sentenced to twenty-five years to life in prison on the murder conviction, followed by a consecutive sentence of twenty-five years to life in prison for use of a firearm by a principal that caused death.

Evidence at trial

Antonio Navarro, the petitioner, was charged with murder and shooting into an occupied vehicle arising from a fight outside the Bartolo bar at the corner of Alma Avenue and Whittier Blvd. in East Los Angeles around 6:00 P.M. on November 23, 2016, resulting in the death of Uziel Sandoval. He was arrested on a warrant in his nearby apartment on February 28, 2017. One .45 cal. Glock pistol was found in his bedroom. That gun matched a damaged .45 cal. bullet that was recovered from the dashboard of the 2016 Dodge truck Sandoval had been driving, but Sandoval was killed by a 9 mm. bullet fired from another gun.

Andy Ly was a passenger in the truck driven by Sandoval as the two drove from

Monterey Park. California to Southgate on November 23, 2016. [2RT 333-334, 338]. Because there was heavy traffic, they decided to take side streets. [2RT 338]. Ly remembered getting out of the truck, blacking out, and finding himself on the ground in front of a house [2RT 338]. He did not remember getting into a fight or being kicked, but when he got up from the ground he heard gunshots and headed back to the truck.[2RT 340]. He looked inside and saw Sandoval, who had been shot in the chest and was breathing his last breath. [2RT 341, 3RT 606-607]. He did not identify Mr. Navarro as either present or involved in the fight or shooting.

The one person who placed Mr. Navarro at the scene was Merlyn Fermin, the barkeep at the Bartolo Bar. [2RT 346]. She spoke only Spanish [2RT 353]. She testified her shift began at 1:00 PM on November 23, 2016, and Mr. Navarro came to the bar that afternoon, paid for his drinks, and stayed there several hours. [2RT 351]. Between 5:00 and 6:00 that afternoon, while she was behind the bar, a fight began outside [2RT 378]. The fighters spoke English, so she did not understand what was said. [2RT 353]. She had begun drinking on her shift, and had drunk about twenty beers by the time the fight started. [2RT 353]. She looked out the metal security door at the front of the bar and saw two men arguing and fighting in the street. [2RT 355, 379]. Mr. Navarro was not one of them [2RT 380]. She heard two gunshots but did not see the shooter. [2RT 396]. She assumed Mr. Navarro was the shooter because she had seen him in the bar earlier. [2RT 397].One of the men ran up to the truck, the other ran down Alma Street. [2RT 356]. She went up to the apartment above the bar

where the owner's daughter lived, to get permission to close it. [2RT 356]. By the time she got back to the bar, the fight had stopped. [2RT 356]. She did not call 911, but the police arrived. [2RT 356-357]. She felt pressured into talking to the police that day, but did not fear Mr. Navarro and went to work the next day [2RT 381-382].

At trial., she denied telling the police that she had seen Mr. Navarro with a gun in his hand and yelling,"[n]o, Tony, no," just before he yelled "Laguna Park Putos" and that he fired two shots at the truck, or that he disappeared after firing the gun [2RT 358, 361, 386]. She also denied telling the police that she knew Mr. Navarro as "Psycho" or Grumpy from the Laguna Park Vikings. [2RT 359]. She was afraid to testify, but not scared of Mr. Navarro [2RT 362].

She identified a photo, not Mr. Navarro, from a six-pack police showed her as one of the men fighting in the street. She had seen him parking his car in the neighborhood, but she did not know if he was a gang member. [2RT 370]. She had seen the man, who was dark skinned, with Mr. Navarro that afternoon at the bar prior to the shooting and the two left together.[2RT 371]. She was nearsighted and not wearing her glasses the day of the fight. [2RT 373]. She had been drinking bottles of Corona while working, about one beer every five minutes [2RT 375-76].

Two of her statements to the police, one on January 23, 2017, the other two days later, were played to the jury. [2RT 388, 1CT 255]. Those statements were admitted pursuant to California Evidence Code § 770(a) and 1235, which permits the admission of prior

inconsistent statements substantive evidence if the declarant is available for cross-examination. At trial, Ms. Fermin testified she had drunk ten to twelve more beers between the shooting and that interview five hours later. [2RT 396]. In the first interview, she identified Mr Navarro, also known as Psycho, as the shooter. [1CT 261-62, 270]. She did not see him with a gun inside the bar. [1CT 269]. A dark skinned man was him while they drank about ten beers that afternoon, seated near the entrance to the bar [2RT 262]. She had not seen the dark skinned man before [1CT 272].

About forty five minutes after Mr. Navarro and the other man left the bar, she heard a fight outside and turned from the jukebox at the back of the bar. [1CT 274.] She went to the front door to lock it, peeked out and told the men to stop fighting [1CT268, 275-76.] The dark skinned man who had left with Mr. Navarro was fighting someone by the passenger side of the truck [1CT 266]. Mr. Navarro, wearing a neon shirt, yelled "Laguna Park Faggot" and fired two shots at a truck as it was turning. [1CT 263-64, 266, 279-80]. The dark skinned man was on the ground, the other man in the fight got up and into the truck. [1CT 277-78]. The dark skinned man ran in the direction of the apartments above the bar. [1CT 281]. About thirty seconds later, she heard two more gunshots [1CT 270].

She picked Mr. Navarro's photo from a "six pack" and identified him as the shooter. [1CT 284]. She told the police she could not go to court and testify because the person she would be testifying against would see her and know what she said . [1CT 261, 284].

In the second interview, on January 25, 2017, she was told it was likely Mr. Navarro

would be arrested. [2CT 291]. The police also told her they had found a surveillance video of the bar and she would be in it. [2CT 292]. She had told Mr. Navarro that she had spoken to the police and told them she had seen nothing. [2CT 292]. She did not want to testify before him in open court but refused to be relocated because she and her family had moved from El Salvador and were settled in Los Angeles [1CT 294-302, 306-307].

The bullet that killed Sandoval was fired from a 9mm gun [2RT 694]. A live 9 mm bullet was found on the ground near the dumpster at the back of the Bartolo bar, another at the corner of Alma and Whittier [3RT 649, 688]. A .45 bullet casing was found next to the driver's side door [3RT 644, 680]. A damaged .45 cal. bullet was found in the dashboard next to the windshield [3RT 648]. A white tank top t-shirt was found nearby, just north of Whittier Blvd. [2RT 646]. DNA recovered from the t-shirt matched that of Cesar Rodriguez, a member of the Laguna Park Vikings, who was later identified by Ms. Fermin as the dark skinned man with Mr. Navarro, but he was killed prior to trial [3RT 624, 636, 646-647, 799].

Mario Contreras, a detective with the Los Angeles County Sheriff, also testified about Ms. Fermin statements to him. She told him that she had heard a fight outside the bar, went over to the front door to look outside, and saw four men surrounding a truck, fighting [2RT 404]. She identified the shooter as "Psycho" from the Laguna Park Vikings gang [2RT 405]. The police had received a call about a prowler wearing a long sleeved blue shirt or sweater going northbound at 820 South Alma Street with an unknown object in his hand, but no one was found [2RT 406]. Another caller said a prowler in a dark shirt was running southbound

toward the park across the street from the bar [3RT 687]. Another caller, who identified herself as Ramirez, said she saw Mr. Navarro running [3RT 689].

Mr. Navarro's residence at 825 South Alma Street, near the Bartolo Bar, was searched on February 28, 2017, after he had left to go to work [2RT 411, 418; 3RT 758-759]. The police found a loaded .45 cal. pistol in his bedroom, between the mattress and the box spring of his bed [2RT 413, 3RT 647-48, 758-759]. That gun had fired the damaged .45 bullet that had been found in the dashboard [3RT 734, 736, 744]. A yellow long sleeved shirt commonly worn by construction workers was also found there, along with clothing with the logo of the Minnesota Vikings football team [2RT 415, 758-776, 774].

Video surveillance

A video from the inside of the bar showed Rodriguez and Mr. Navarro there with Ms. Fermin about one half hour before the fight on the street [3R 655-657, 698]. Surveillance from the rear of the bar showed Mr. Navarro with a large heavy object in his right pocket [3RT 658]. The object appeared black, the same color of the butt and magazine of the .45 cal. gun found in Mr. Navarro's bedroom [3RT 660, 700]. Video surveillance from a liquor store about 200 feet from the bar showed two people getting out of the truck, two fighting, one on the ground and the driver going back into the truck [3RT 653]. Another video showed Sandoval and Ly getting out of the truck into a group of three other people, one of whom was Rodriguez [3RT 697]. Mr. Navarro was not in that group [3RT 697]. Another video showed the truck crashing into a tree [3RT 667]. Another video showed Rodriguez fighting Andy Ly,

who was getting up off the ground and walking by the truck [3RT].

Direct Appeal before the Second Appellate District

Before the Court of Appeal for the Second Appellate District, Division Four, Mr. Navarro argued that the admission of M. Fermin's statements without calling the translator of them for cross-examination violated his right to confrontation under the Sixth and Fourteenth Amendments. He also argued that even though no objection the admission of the translations had been made on Sixth Amendment grounds, the claim should be reviewed on direct appeal because an objection on Sixth Amendment grounds would have been futile given this Court's decision in *Correa v. Superior Court*, 27 Cal.4th 444 (2002), that would have allowed for their admission.

The Court of Appeal rejected the claim on the basis that the issue had been forfeited for review [Appendix A-8]. That Court rejected Mr. Navarro's claim that the issue should be reviewed because an objection to the admission of the transcripts on the basis of a Sixth Amendment violation would have been futile given that the trial court would have been bound by this Court's decision in *Correa*. [Appendix A-8]. The Court of Appeal, however, also reviewed the issue on the merits and found a split in post-*Crawford* federal decisions as to whether a translation adds a layer of hearsay, and therefore violates the Sixth Amendment. [Appendix A8-9.] Finally, the Court found that the record was inadequately developed for the Court to "resolve it in an intelligible manner" [Appendix A-9.]

REASONS FOR GRANTING THE PETITION

THE "LANGUAGE CONDUIT" EXCEPTION TO HEARSAY IN *CORREA v. SUPERIOR COURT* CANNOT BE RECONCILED WITH THIS COURT'S SUBSEQUENT SIXTH AMENDMENT ANALYSIS IN *CRAWFORD* v. *WASHINGTON* LATER CASES

A. Applicable facts:

The one witness who placed Mr. Navarro at the scene of fight that resulted in the death of Sandoval testified at trial that she saw Mr. Navarro at the bar hours before the fight, but that he was neither involved in the later fight nor fired a gun. Her prior statements to the police, however, placed him at the scene and had him involved in the fight, including firing a gun in the direction of Sandoval's truck. A gun found in Mr. Sandoval's nearby apartment months later matched a bullet found in the dashboard of Sandoval's truck, but the bullet that killed Sandoval had been fired from another gun, most likely by Cesar Rodriguez, who was seen with Mr. Navarro hours before the fight at the nearby bar and was later seen involved in the fight on local video surveillance.

On appeal, Mr. Navarro argued the admission of the English translation was a testimonial and hearsay that had been admitted in violation of the Sixth and Fourteenth Amendments to the federal constitution. He argued that the California Supreme Court's decision in *Correa v. Superior* Court (2002) 27 Cal.4th 444, 457-459, which held the admission of a translation was an exception to the hearsay rule and did not deny the right to confrontation the Sixth Amendment right to confrontation was sufficiently reliable as a "language conduit," should be reconsidered in light of subsequent decisions of this Court

beginning with *Crawford v. Washington* (2004) 541 U.S. 36. He also asked the Court of Appeal to review the claim despite trial counsel's failure to object on the basis of the denial of the right of confrontation, because the trial court would have overruled the objection because it was bound by this Court's decision in *Correa*.

The Court of Appeal found the issue was forfeited due to trial counsel's failure to object [Appendix A-8] but also reviewed eh claim on the merits. It found that the "language conduit" analysis used by the California Supreme Court *Correa* has survived in some post-*Crawford* federal decisions and that the failure of trial counsel to object denied the Court of Appeal a sufficient record on which to make a reasoned decision. [Appendix A8-A9.]

B. *Correa* is inconsistent with this Court opinion in *Crawford* and should be reviewed pursuant to Supreme Court Rule 10(b)

The translation of Ms. Fermin's statement to the police was hearsay, because the translation was not the words of the declarant, but an out of court statement made as to what the statement of Ms. Fermin meant in English [2RT 364]. The video of an interview on November 23, 2016, that had been conducted in Spanish, and a recording of an interview in January 25, 2017, also conducted in Spanish, were played to the jury. Transcripts of both interviews in Spanish, with English translations, were also distributed [2RT 386, 393; 1CT 254-286, 2CT 287-313].

The English translations of the statements made by Ms. Fermin were also hearsay, in that they were out of court statements by a translator as to what Ms. Fermin had said in Spanish. As such, their admission denied Mr. Navarro's right under the Sixth and Fourteenth

Amendments to confront that translator or translators, and he therefore could not test the accuracy or reliability of the translation. *Crawford v. Washington* (2004) 541 U.S. 36; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305; *Bullcoming v. New Mexico* (2011) 564 U.S. 647.

The California Supreme Court in *Correa v. Superior Court*, 27 Cal.4th 444, 457-459 (2002), addressed this issue prior to the decision in *Crawford*. That decision relied heavily upon the analysis of the Ninth Circuit in *United States v. Nazemian* , 948 F.2d. 522, 525-527 (9th Cir., 1991), and held that when the interpreter or translator operated as a "language conduit" and had no interest in the outcome, the interpreter/translator was presumed to be reliable. *Correa*, 27 Cal.4th at 461-462.[1]

The Ninth Circuit in *Nazemian* had relied upon this Court's earlier decision in *Ohio v. Roberts* (1980) 448 U.S. 56, to set forth factors that would permit the admission of the statement of an unavailable witness. (*Nazemian,* 948 F.2d at 525.) The facts of that case were that Ms. Nazemian made statements in Farsi to an undercover agent that had to be translated by a non-testifying interpreter. That Court first regarded Nazemian's statements as admissible either as statements made to the undercover agent during the course of a conspiracy or admissions by a party-opponent. *Id.*, at 526. The Court found, however, that "[a]uthority is sparse on the treatment of extrajudicial statements made through interpreters." *Id.*, at 526.

---

[1]"Interpreter" as used in this Petition is someone who verbally interprets from one language to another during a conversation. A "translator" is someone who translates and transcribes a written translation for later use.

Some courts had considered the interpreter as an agent of the declarant, and hence admissible on that basis; others viewed the interpreter/translator as a "language conduit." In considering whether the interpreter/translator was reliable, either as an agent or language conduit, courts could look at various factors, such as which party supplied the interpreter, whether the interpreter had any motive to mislead or distort, the interpreter's qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with the statements as translated. *Id.*, at 527. The court noted that the interpreter in this case worked for the Government and there was no evidence as to her or his proficiency as an interpreter, but s/he had been used over several months during the investigation in the case, a fact in favor of reliability. Under those circumstances, the Court found sufficient indicia of reliability to find no plain error (error argued for the first time in appeal) and affirmed the conviction. *Id.*, at 528.

The underpinnings of that "indicia of reliability" analysis radically changed in 2004, with this Court's decision in *Crawford*, in which overruled the "indicia of reliability" test that had been used in *Ohio v. Roberts* to determine if an out of court statement was admissible where the declarant was unavailable for cross-examination. *Crawford*, 541 U.S. at 62.

The facts were that Crawford and his wife went to the apartment of a man she claimed raped her. There was a fight during which Crawford stabbed the man in his apartment. Crawford made a post-arrest statement that was admitted at his trial. His wife also made one, but could not testify based upon the marital privilege, so her statement, which differed from

and was more incriminating than his, was admitted at trial to undercut his version of events. Her statement was admitted at trial over a hearsay objection because the trial court found sufficient indicia of reliability for it to be trustworthy. The Washington Supreme Court upheld that ruling on the basis that her statement "bore guarantees of trustworthiness." *Id.*, at 40-41.

This Court reversed, overruling *Ohio v. Roberts* on the basis that "the unpardonable vice of the *Roberts* test, however, is not its unpredictability, but its demonstrated capacity to admit core testimonial statements that the Confrontation Clause plainly meant to exclude." *Id.*, at 63. The majority held that in order for an out of court "testimonial" statement to be admitted, there must be an opportunity for the accused in a criminal case to cross examine the declarant, or the statement is inadmissible regardless of any indicia of reliability. *Id.*, at 68.) A "testimonial" statement is one made by a witness that is made or recorded for the use in a later court proceeding. *Id.*, at 51-53.

The definition of "testimonial" has since been expanded by this Court in *Melendez-Diaz v. Massachusetts,* 557 U.S. 305, at 310-311, which held that a lab report that had been prepared for use in a criminal case to prove the accused possessed illegal drugs was testimonial, and there the person who prepared the report must testify and be subject to cross-examination in order for it to be admissible. It was further expanded in *Bullcoming v. New Mexico,* 564 U.S. 647, at 663-664, to apply to the admission of a blood-alcohol analysis report that was prepared to be admitted in a DUI trial.

In this case, the statements made by Ms. Fermin to the police were testimonial, because they were prepared for the purpose of being used against Mr. Navarro in a criminal case. The transcripts and translations of her statements were similarly testimonial because they were specifically prepared as exhibits to be used in a criminal case, like the test results in *Melendez-Diaz* and *Bullcoming*. The previous agency theory or "language conduit" analysis under *Correa* and *Nazemian* that would permit their admission on the basis that the non-testifying interpreter/translator was presumably reliable no longer survives under *Crawford*, and those transcripts were admitted against Mr. Navarro, in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

C. There is a split between the the Fourth, Fifth, Ninth, and Eleventh Circuits on this issue

The Court of Appeal noted that the Ninth Circuit, which had decided *Nazemian*, had since, post-Crawford refused to overrule it in *United States v. Orm Hieng,* 679 F.3d 1131, 1138-1139 (9th Cir., 2012). [Appendix A-9]. In *Hieng*, the Ninth Circuit noted a tension between *Nazemian* and *Crawford*, but refused to overrule *Nazemian* because this Court has not directly reviewed the question of whether a translator acting purely as a translator of a declarant, as opposed to a declarant on his or her own, is testimonial hearsay that must be subject to cross-examination. The three judge panel therefore could not overrule the *en banc* holding in *Nazemian. Id.*, at 1138-1139. Another three judge panel of the Ninth Circuit, however, in *United States v. Gutierrez-Salinas,* 640 Fed.Appx. 690, 692-693 (9th Cir., 2016), *did* find that the admission of an INS form signed by the defendant, where the translator of

the form was not called, was a violation of the Sixth Amendment under *Crawford*, but harmless. The decision of the Second Appellate District in this case also noted split in the circuits on this issue, citing the Eleventh Circuit in *United States v. Charles*, 722 F.3d 1319, 1327-1329 (11th Cir. 2013) which rejected the language conduit theory allowing for the admission of a translation without calling the translator, a decision that conflicts with the Fourth Circuit in *United States Vidacak*, 553 F.3d 344, 352 (4th Cir., 2009); and the Fifth in *United States v. Budha*, 495 Fed.Appx. 452, 454 (5th Cir. 2012. [Appendix A-10, n.5] The Court of Appeal used this apparent disagreement among federal circuit courts as a basis to find that an objection to the admission of the translation on Sixth Amendment grounds would not have been futile and therefore forfeited for appellate review. Such a split in the circuits, however, under Rule 10(a), is a separate basis upon which to grant certiorari.

One state, Maryland in *Taylor v. State*, 226 Md.App. 317, 356-370 (Md., 2016), has also held that the "language conduit" exception in *Nazemian* cannot does not survive this Court's Sixth Amendment analysis in *Crawford.* Another state, Massachusetts, in *Commonwealth v. AdonSoto*, 475 Mass. 497, 502-509 (Mass., 2016), has noted the tension between *Nazemian* and *Crawford*, but found *Crawford* inapplicable because the translation was admitted in that case was not inculpatory. In this case, however, Ms. Fermin's statement to the Sheriff's detective was the only evidence that placed Mr. Navarro at the scene of the fight or engaged in it. Although the surveillance video of the bar had what looked like the bulge of a gun in his pants pocket hours before the fight, and the gun that fired the bullet

lodged in the dashboard of Sandoval's truck was found months later in Mr. Navarro's apartment, the translation of her statements was the only evidence that had him at the scene and acting as an accomplice to Cesar Rodriguez, who fired the shot that killed Sandoval. The constitutional violation arising from the admission of the English translation of her statements can therefore not be shown to be harmless beyond a reasonable doubt, and Mr. Navarro's convictions for murder and shooting into an occupied motor vehicle must be reversed. .*Chapman v. California*, 386 U.S. 18, 24 (1967).

CONCLUSION

For the foregoing reasons, Antonio Navarro, requests the Court grant his Petition for Writ of Certiorari, on the issue of and order that the Court of Appeals grant a Certificate of Appealability on the following issue: whether the admission at a criminal trial of a translation of a witness's statement made in anticipation of litigation without calling the translator at trial for cross-examination, violates the Sixth and Fourteenth Amendments to the United States Constitution?

Respectfully submitted,

Dated: March 23, 2021

JOHN LANAHAN
CA State Bar Number 133091
501 West Broadway, Suite 1510
San Diego, CA 92101-8557
Telephone: (619) 237-5498
E-mail: lawnahan@sbcglobal.net

Attorney for Petitioner

APPENDIX A

Filed 10/8/20 P. v. Navarro CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ANTONIO NAVARRO, Defendant and Appellant.	B296251 Los Angeles County Super. Ct. No. BA457180

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Affirmed.

John Lanahan, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Senior Assistant Attorney General, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted appellant and defendant Antonio Navarro of one count of first degree murder of Uziel Sandoval, two counts of possession of a firearm by a convicted felon, and one count of shooting at an occupied motor vehicle. On appeal, Navarro argues the trial court erred by admitting into evidence the audio recordings of a witness's two interviews with police conducted in Spanish, as well as the transcripts of the recordings. The transcripts contained Spanish transcriptions of the interviews and English translations. Navarro contends: (1) the admission of the transcripts' English translations violated his rights under the Confrontation Clause pursuant to *Crawford v. Washington* (2004) 541 U.S. 36 [125 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*) and its progeny[1]; and (2) the court abused its discretion under Evidence Code section 352 when it allowed the prosecution to play the recordings for the jury and provided them with the transcripts. The Attorney General responds Navarro has forfeited his claims on appeal because he did not object on these grounds at trial.

We agree with the Attorney General and conclude Navarro forfeited the claims of error raised in this appeal. Accordingly, the judgment is affirmed.

---

1 Under *Crawford*, "[w]here a hearsay statement is 'testimonial,' the confrontation clause bars the prosecution from using it against a criminal defendant unless the declarant is available to testify at trial, or the defendant had a previous opportunity to cross-examine the declarant." (*People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1401 [citing *Crawford, supra*, 541 U.S. at pp. 49-57].) In this case, Navarro contends the *translator* is the "declarant" and the translator was not present at trial for cross-examination.

PROCEDURAL BACKGROUND

The Los Angeles County District Attorney filed an information charging Navarro with one count of first degree murder (Pen. Code, § 187, subd. (a)[2]; count one), two counts of possession of a firearm by a convicted felon (§ 29800, subd. (a)(1); counts two and four), and one count of shooting at an occupied motor vehicle (§ 246; count three). The information alleged a principal personally discharged a firearm causing death in the commission of counts one and three, (§ 12022.53, subds. (d) & (e)(1)), discharged a firearm (§ 12022.53, subds. (c) & (e)(1)), and used a firearm (§ 12022.53, subds. (b) & (e)(1)). The information further alleged Navarro committed the crimes for the benefit of a criminal street gang with intent to promote gang members' criminal conduct (§ 186.22, subds. (b)(1)(A) & (C)), and Navarro sustained two prior prison term convictions. (§ 667.5, subd. (b)).

Navarro admitted the allegations regarding his prior felony and prison term convictions, and the jury found Navarro guilty on all counts. The jury found true the street gang allegations on counts one, two, and three. On count one, the jury found true all three firearm allegations. On count three, however, the jury found true only the allegations that a principal discharged and used a firearm in the commission of the offense.

The court sentenced Navarro to a total term of seven years and eight months plus 50 years to life in state prison, consisting of: (1) a term of 25 years to life with an additional consecutive term of 25 years to life due to a principal's discharge of a firearm causing death, for a total of 50 years to life, on count one; (2) a

---

[2] All undesignated statutory references are to the Penal Code.

two-year middle term with a three-year street gang enhancement, for a total of five years, on count two; (3) a term of eight months (one-third the mid-term of two years) on count four; and (4) two one-year terms based on Navarro's prior convictions.[3]

Navarro timely appealed.

FACTUAL BACKGROUND

In the late afternoon of November 23, 2016, Sandoval was driving from Monterey Park to South Gate in his truck with a friend. They passed through the intersection of Whittier Boulevard and Alma Street in East Los Angeles where the Bartolo bar is located. The area around the intersection is claimed by a street gang known as the Laguna Park Vikings. Video surveillance footage was recovered from the Bartolo bar. The footage shows Navarro inside the bar on that date with a large and heavy black object in his front right pocket.

As Sandoval and his friend were passing by the Bartolo bar, they stopped the truck, exited the vehicle, and got into a fight with several individuals outside the bar. Sandoval ran back to his truck, got into the driver's seat, and started driving away. As the truck was turning the corner, a bartender working at the bar saw Navarro take a gun out from his waist, yell "'Laguna Park'" and fire two shots at the truck. Thirty seconds later, the bartender heard two more gunshots fired by an unknown person.

---

[3] With respect to count one, the court also imposed and stayed two additional firearm enhancements and a street gang enhancement. Additionally, the court imposed and stayed a life term with a minimum of 15 years along with two firearm enhancements on count three.

The truck crashed into a tree on Alma Street, just north of Whittier Boulevard.

Upon arrival at the crash site, police found Sandoval dead in the driver's seat of the truck. He was killed by a single gunshot wound to the chest. The bullet that killed him was fired by a nine-millimeter gun. Police found a .45 caliber bullet casing next to the driver-side door of a white van parked nearby and recovered a bullet from the truck's dashboard.

Later that evening, the police interviewed the bartender at the police station. The interview was conducted in Spanish and recorded. The bartender related what she observed during the fight outside the bar. She identified Navarro as a member of the Laguna Park Vikings known as "Psycho." She also picked Navarro out of a photographic line-up as the individual who fired two gunshots at Sandoval's truck.

The police again interviewed the bartender at her home in Spanish on January 25, 2017. During the second interview, which also was recorded, the bartender told police Navarro had visited her home and asked her about what she had previously told them. The police informed the bartender that Navarro was going to be prosecuted for Sandoval's murder. They offered to help her and her family move to a different home for their safety.

Police searched Navarro's residence on February 28, 2017. They found a loaded .45 caliber semi-automatic pistol with a black handle in his bedroom. Ballistics tests revealed the pistol fired the casing found next to the white van parked near the crash site. Due to the damage to the bullet recovered from the truck's dashboard, ballistics tests could only confirm it "was consistent with bullets loaded in .45 auto caliber cartridges."

DISCUSSION

At trial, the bartender professed not to recall details of the incident or what she had said about it during her interviews with police. She also stated she felt "pressured" to answer police questions. The prosecution confronted the witness using the recordings, the Spanish language transcriptions, and the English translations of her police interviews. Navarro contends this constituted error. In support of his position, Navarro advances two arguments. First, he argues the admission of the transcripts' English translations violated his rights under the Confrontation Clause pursuant to *Crawford*, *supra*, 541 U.S. 36, and its progeny, because the translations constituted testimonial hearsay statements by the translator, who Navarro complains he did not have the opportunity to cross-examine. Second, Navarro argues the court abused its discretion under Evidence Code section 352 by admitting the interview recordings, transcripts, and translations.

The Attorney General responds Navarro forfeited these claims on appeal by failing to raise them at trial as evidentiary objections or in any other fashion. We agree with the Attorney General.

In general, "'"questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal."' [Citations]." (*People v. Alvarez* (1996) 14 Cal.4th 155, 186 (*Alvarez*); Evid. Code, § 353, subd. (a).) "'The reason for the [objection] requirement is manifest: a specifically grounded objection to a defined body of evidence serves to prevent error. It allows the trial judge to consider excluding the evidence or limiting its admission to avoid possible

prejudice. It also allows the proponent of the evidence to lay additional foundation, modify the offer of proof, or take other steps designed to minimize the prospect of reversal.' [Citation.]" (*People v. Partida* (2005) 37 Cal.4th 428, 434.)

At trial, the bartender testified she did not remember telling the police she saw Navarro fire two shots at Sandoval's truck while yelling "'Laguna Park . . . .'" In response, the prosecution informed the trial court they intended to "confront" the bartender with the recording of her first interview, along with the transcript thereof. Relying on an unidentified "de-published case," the trial court stated it would not admit the interview recording or transcript because "[t]he case held that it was structural error for a court to allow the jurors to translate themselves the Spanish language audio of the witness's interview." Instead, the court stated it would permit the prosecution to play the recording for the bartender outside the jury's presence. If the bartender maintained she did not make certain statements to the police, the prosecution could call "a witness who was present to testify as to the contents strictly in English." Alternatively, the court would allow the prosecution to call the translator to provide a certified translation of the bartender's interview.

Before the prosecution could confront the bartender with the recording, however, she testified she felt "pressured" to answer the police's questions during the interviews. Based on this testimony, the trial court reversed its ruling in light of *People v. Mora and Rangel* (2018) 5 Cal.5th 442 (*Mora and Rangel*). In response, defense counsel argued *Mora and Rangel* was inapplicable. The trial court rejected defense counsel's argument. Thereafter, the court allowed the prosecution to play the

recordings of the bartender's two police interviews for the jury. The trial court also allowed the prosecution to distribute the transcripts containing both the Spanish transcription and the English translation to the jury.

The record thus reflects defense counsel did not object to the prosecution's use of the recordings and transcripts of the bartender's police interviews based on the Confrontation Clause or Evidence Code section 352. Accordingly, we conclude the claims Navarro raises on appeal have been forfeited. (*Alvarez, supra*, 14 Cal.4th at p. 186; Evid. Code, § 353, subd. (a).)

In addition, we reject Navarro's argument that he did not forfeit his Confrontation Clause claim because an objection to the translated transcripts on that ground would have been futile under *Correa v. Superior Court* (2002) 27 Cal.4th 444 (*Correa*).[4] As discussed below, *Correa* would not necessarily have required the trial court to overrule a Confrontation Clause objection to the English translations of the bartender's statements, as Navarro suggests.

In *Correa*, our Supreme Court adopted the "language-conduit theory," holding that "if a contemporaneously translated statement fairly may be attributed to the declarant under the particular circumstances of the case . . . the translation does not add a layer of hearsay." (*Correa, supra*, 27 Cal.4th at pp. 457, 463.) Relying on the Ninth Circuit's decision in *United States v. Nazemian* (9th Cir. 1991) 948 F.2d 522 (*Nazemian*), the *Correa* court held trial courts must decide whether a translated statement may be fairly considered a statement by the original

---

[4] In his Reply Brief, Navarro does not dispute his Evidence Code section 352 claim has been forfeited.

declarant on a case-by-case basis, by considering a number of factors, "'such as which party supplied the interpreter, whether the interpreter had any motive to mislead or distort, the interpreter's qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with the statements as translated.' [Citation.]" (*Id.* at pp. 457-458.)

Courts applying the same analysis embraced in *Correa* have arrived at different conclusions based on the specific facts presented in each case. (See, e.g., *United States v. Orm Hieng* (9th Cir. 2012) 679 F.3d 1131, 1138-1139 (*Hieng*) [applying multi-factor language-conduit theory test to conclude translated statements by the defendant in an interview with FBI agents were properly attributed to him, and therefore the Confrontation Clause was not implicated]; *United States v. Gutierrez-Salinas* (9th Cir. 2016) 640 Fed.Appx. 690, 692-693, cert. den. (2016) 136 S. Ct. 2528 [195 L.Ed.2d 855] [applying multi-factor language-conduit theory test to conclude a form affidavit written in English and signed by a Spanish-speaking defendant could not be fairly attributed to the defendant and was therefore a separate hearsay statement by the form's author, and further concluding admission of the form violated the Confrontation Clause because it was testimonial in nature and the defendant had no opportunity to cross-examine its author].) Accordingly, we are not persuaded that a Confrontation Clause objection to the translated transcripts necessarily would have been futile under *Correa.*

Navarro also argues the translations of the bartender's statements should be considered hearsay statements by the translator because *Correa*'s language-conduit theory test "no longer survives" post-*Crawford.* According to Navarro, *Nazemian,*

supra, 948 F.2d 522, the case from which the *Correa* court adopted its multi-factor test, is irreconcilable with *Crawford*. (See, e.g., *United States v. Charles* (11th Cir. 2013) 722 F.3d 1319, 1327-1329 [rejecting the language-conduit theory in light of *Crawford* and its progeny and concluding admission of a Creole-speaking defendant's translated statements made in an interrogation by a Customs and Border Protection officer violated the Confrontation Clause because the defendant did not have an opportunity to cross-examine the interpreter].)[5] Because Navarro failed to raise this argument at trial, it has also been forfeited. (See *Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d 124, 143 [appellate courts generally will not consider arguments raised for the first time on appeal].)

Moreover, even if we chose to address Navarro's Confrontation Clause claim on the merits, we would be unable to resolve it in an intelligible manner because the record was not adequately developed at trial. As noted, defense counsel did not object to the translated transcripts of the bartender's interviews on Confrontation Clause grounds. No evidence or arguments were presented on whether the translated statements fell within the language-conduit theory under the *Correa* test.[6] And neither the

---

[5] In contrast with the Eleventh Circuit, the Ninth and Fifth Circuits have held the language-conduit theory remains valid and can still apply in the wake of *Crawford* and its progeny. (*Hieng*, *supra*, 679 F.3d 1131, 1138-1141; *United States v. Budha* (5th Cir. 2012) 495 Fed.Appx. 452, 454.) Additionally, the Fourth Circuit has continued to apply the language-conduit theory post-*Crawford*. (See, e.g., *United States v. Vidacak* (4th Cir. 2009) 553 F.3d 344, 352.)

[6] The Attorney General suggests the language-conduit theory should apply here because the English translations of the

prosecution nor Navarro offered evidence or argument at trial about whether the translations were "testimonial" within the meaning of *Crawford* and its progeny. The lack of information essential to resolving Navarro's Confrontation Clause claim further supports our conclusion that the claim has been forfeited, and may not be considered for the first time on appeal.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CURREY, J.

We concur:

MANELLA, P.J.

COLLINS, J.

---

transcripts were prepared by a "court-certified translator." So far as we can tell, however, the record reflects the name of the translation service, but does not indicate whether the translator was court-certified. Indeed, although the parties (and therefore we) refer to the English language version of the interviews as a translation, the record does not reveal whether it was based on the recording or its Spanish language transcription.

APPENDIX B

Supreme Court

Court data last updated: 03/21/2021 12:23 PM

Docket (Register of Actions)

PEOPLE v. NAVARRO

Division SF

Case Number S265616

Date Description Notes

11/17/2020 Petition for review filed Defendant and Appellant: Antonio Navarro Attorney: John Lanahan

11/17/2020 Record requested Court of Appeal record has been imported and is available in electronic format.

11/19/2020 Received Court of Appeal record

12/23/2020 Petition for review denied