IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTONIO FARIAS-MUNGUIA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 62577

FILED

JAN 16 2014

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

This is an appeal from a judgment of conviction entered pursuant to a jury verdict of two counts of first-degree kidnapping, three counts of battery with the intent to commit sexual assault, two counts of attempted sexual assault, and one count of attempted second-degree kidnapping. Eighth Judicial District Court, Clark County; Jerome T. Tao, Judge.[1]

Appellant Antonio Farias-Munguia contends that the district court violated his Sixth Amendment right to confront and cross-examine his accusers by allowing victim Ksenia Sidushova's preliminary hearing testimony to be entered into evidence. Farias-Munguia claims that the State failed to demonstrate that Sidushova was unavailable. And Farias-

[1]The Honorable Jerome T. Tao, District Judge, presided over the pretrial proceedings and sentencing. The Honorable Sally L. Loehrer, Senior Judge, presided over the trial.

Munguia argues that this constitutional violation was prejudicial because the jury heard testimony that "added to the State's case as part of a common scheme."

A criminal defendant has a constitutionally guaranteed right to confront and cross-examine the witnesses against him. U.S. Const. amend. VI; *Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986). However, this constitutional right is not absolute. An exception exists where the witness is unavailable, has given testimony at a previous judicial proceeding against the same defendant, and was subject to cross-examination by that defendant. *Barber v. Page*, 390 U.S. 719, 722 (1968); *see also Crawford v. Washington*, 541 U.S. 36, 59 (2004). At issue here is whether the witness was unavailable.

"[A] witness is not 'unavailable' for purposes of the . . . exception to the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Barber,* 390 U.S. at 724-25. "The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness." *Ohio v. Roberts*, 448 U.S. 56, 74 (1980) (quotation marks omitted) (omission in original), *abrogated on other grounds by Crawford*, 541 U.S. at 60-69. The prosecution bears the burden of demonstrating that the witness is unavailable despite its good-faith effort to secure the witness's presence at trial. *Id.* at 74-75.

"We generally review a district court's evidentiary rulings for an abuse of discretion. However, whether a defendant's Confrontation Clause rights were violated is ultimately a question of law that must be

reviewed de novo." *Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009) (internal citation and quotation marks omitted); *see also Hernandez v. State*, 124 Nev. 639, 647, 188 P.3d 1126, 1132 (2008) (reviewing a district court's determination that the prosecution exercised constitutionally reasonable diligence to procure a witness's attendance as a mixed question of law and fact).

Here, the prosecutor argued that Sidushova was unavailable because she had returned to Russia, it would cost $9,740 to fly her back for the trial, and Farias-Munguia should not get a windfall simply because one of his victims lives in Russia. The prosecutor clarified for the district court that she could not authorize payment for Sidushova's travel expenses, she had never talked with Sidushova about flying her back from Russia, and Sidushova had never said that she would not come. And the prosecutor asserted that Sidushova is legally unavailable because the State could not compel her presence if she refused to come.

The prosecutor failed to demonstrate that any effort was made to secure Sidushova's presence at trial: the prosecutor did not ask Sidushova if she would voluntarily travel to the United States for the trial, seek authorization for funding Sidushova's travel, or investigate the formal procedure for obtaining witnesses from Russia. *See Roberts*, 448 U.S. at 74 ("[I]f there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation."); *Barber*, 390 U.S. at 723-25 (a good faith effort must be undertaken even if the court itself lacks the power to compel the witness's presence); *State v. Mokake*, 829 P.2d 1225, 1226

(Ariz. Ct. App. 1991) (Lesothoan witnesses were not unavailable and admission of their pretrial testimony violated defendant's confrontation rights because the State did not make an effort to have them appear voluntarily or pursue the formal procedure for obtaining witnesses from Lesotho); *People v. Sandoval*, 105 Cal. Rptr. 2d 504, 516-17 (Ct. App. 2001) (a Mexican witness was not unavailable and use of his pretrial testimony violated defendant's confrontation rights because the State made no effort to secure the witness's presence at trial despite the witness's assurances that he wanted to cooperate but needed funds to comply and the existence of a mutual cooperation treaty with Mexico that provided alternative means for obtaining a witness's presence at trial); *State v. Aaron*, 745 P.2d 1316, 1321 (Wash. Ct. App. 1987) (witness residing in England was not unavailable and admission of her pretrial testimony was error because the State made *no* effort to obtain her presence and made no factual showing that economic considerations and nature of the charge somehow affected the State's obligation to obtain her presence at trial); *see also* Treaty Between the United States of America and the Russian Federation on Mutual Legal Assistance in Criminal Matters, U.S.-RF, June 17, 1999, S. Treaty Doc. No. 106-22, http://www.state.gov/documents/organization/123676.pdf (providing formal procedure for obtaining a Russian witness's appearance in a United States court). Accordingly, we conclude that the district court erred by ruling that Sidushova was unavailable for trial and admitting her preliminary hearing testimony into evidence.

The State bears the burden of showing that the Confrontation Clause error was harmless beyond a reasonable doubt. *Medina v. State*,

122 Nev. 346, 355, 143 P.3d 471, 476-77 (2006); *Polk v. State*, 126 Nev. ___, ___ n.2, 233 P.3d 357, 359 n.2 (2010). The State contends that this error was harmless because other evidence corroborated Sidushova's preliminary hearing testimony. "An assessment of harmlessness cannot include consideration of whether the witness' testimony would have been unchanged, or the jury's assessment unaltered, had there been confrontation; such an inquiry would obviously involve pure speculation, and harmlessness must therefore be determined on the basis of the remaining evidence." *Coy v. Iowa*, 487 U.S. 1012, 1021-22 (1988). The testimony of the police officer who translated Sidushova's statements from Russian to English suffers the same Confrontation Clause problem that arose in presenting Sidushova's preliminary hearing testimony—Sidushova was not unavailable. *See Davis v. Washington*, 547 U.S. 813, 822 (2006) (statements made to the police when there is no ongoing emergency are testimonial); *Crawford*, 541 U.S. at 68 (the admission of testimonial hearsay statements violates the Confrontation Clause unless the declarant is unavailable to testify and defendant had a prior opportunity to cross-examine the declarant). The testimony that Sidushova picked Farias-Munguia out of a photographic line-up, sat down with a sketch artist who drew Farias-Munguia's likeness, and described Farias-Munguia's car and testimony that Farias-Munguia admitted that he tried to pick up girls and one of the girls he picked up did not speak English does not establish the necessary elements of the crimes allegedly perpetrated upon Sidushova. *See* NRS 193.330(1); NRS 200.310(1); NRS 200.366(1); NRS 200.400(1). We conclude that the error was not harmless

and that Farias-Munguia's convictions for first-degree kidnapping (count 5), attempted sexual assault (count 6), and battery with the intent to commit sexual assault (count 7) must be reversed. Accordingly, we

ORDER the judgment of conviction AFFIRMED IN PART AND REVERSED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.

_____, J.
Hardesty

_____, J.
Douglas

_____, J.
Cherry

cc: Hon. Jerome T. Tao, District Judge
Leslie A. Park
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk