No. S165195

IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

ANTHONY NAVARRO

Defendant and Appellant.

Automatic Appeal from the Superior Court
of Orange County
Case No. 02NF3143
Honorable Francisco Briseño, Judge

APPELLANT'S SECOND SUPPLEMENTAL REPLY BRIEF

RICHARD I. TARGOW
Attorney at Law (SBN 87045)
Post Office Box 1143
Sebastopol, California 95473
Telephone: (707) 829-5190

Attorney for Appellant

TABLE OF CONTENTS

ARGUMENT 5

I. RESPONDENT'S ARGUMENT THAT IT IS SUFFICIENT THAT THE COURT GAVE AN INSTRUCTION TO THE JURY TO BE FAIR AND OPEN-MINDED IGNORES SCIENCE AND HUMAN NATURE 5

II. THE EVIDENCE SUPPORTING THE SPECIAL CIRCUMSTANCES WAS, COMPARED TO THE SUBSTANTIAL EVIDENCE INTRODUCED BY THE DEFENSE, PAPER THIN 13

III RESPONDENT CONFLATES THE ANALYSIS DESIGNED TO DETERMINE SUFFICIENCY OF THE EVIDENCE WITH THE ANALYSIS DESIGNED TO DETERMINE WHETHER RETRIAL IS PERMISSIBLE. 20

CONCLUSION 23

CERTIFICATE OF LENGTH 24

TABLE OF AUTHORITIES

CASES

Crawford v. Washington
(2004) 541 U.S. 36 22

Fost v. Superior Court
(2000) 80 Cal.App.4th 724 10

In re Z.A.
(2012) 207 Cal.App.4th 1401 22

Lockhart v. *Nelson*
(1988) 488 U.S. 33 21

McDaniel v. Brown
(2010) 558 U.S. 120 21

People v. Dennis
(1998) 17 Cal.4th 468 11

People v. Gurule
(2002) 28 Cal.4th 557 11

People v. Sanchez
(2016) 63 Cal.4th 665 22

People v. Story
(2009) 45 Cal.4th 1282 21

United States v. Hershenow
(1st Cir., 1982) 680 F.2d 847 11

Wright v. United States
(D.C. Ct. of Appeals, 1986) 88 A.2d 915 11

MISCELLANEOUS

Kalven & Zeisel, *The American Jury* (1966) 7. 9

Raymond S. Nickerson, Confirmation Bias: A Ubiquitous Phenomenon in Many Guises (1998) 2 Rev. Of Gen Psychology, No. 2, at 175-220 [Abstract, at <https://journals .sagepub. com/doi/10.1037/1089-2680.2.2.175 7

ARGUMENT

I. RESPONDENT'S ARGUMENT THAT IT IS SUFFICIENT THAT THE COURT GAVE AN INSTRUCTION TO THE JURY TO BE FAIR AND OPEN-MINDED IGNORES SCIENCE AND HUMAN NATURE

In his second supplemental brief, appellant presented additional evidence, based on Truth-Default Theory, of the prejudice that arose from the trial court's error in preventing the defense from presenting an opening statement before the prosecution presented their case. (ASSB 6-17.)

Respondent's contrary argument relies on misdirection. However, before addressing that argument, it is worth noting that respondent has not challenged the predicate of appellant's argument, i.e., that it was the court's ruling that resulted in the defense opening statement being delayed until after the close of the prosecution case. Instead, she focuses on whether or not appellant has overcome a presumption that the jury would have followed the court's instruction to keep an open mind. (Respondent's Second Supplemental Brief [RSSB] 11-12.)

Appellant, however, is not arguing jury misconduct; rather, he is explaining the prejudice that necessarily flowed from the

court's error in effectively denying the defense an opening statement. Respondent's argument is that there is no prejudice because the jury was instructed to be fair and keep an open mind, ergo they were fair and kept an open mind. The problem with this argument is that it ignores (1) what the science tells us about human nature, as applied to jurors; (2) our own experience as humans; (3) what we all know as confirmation bias; and (4) common sense.

Appellant has shown, and respondent apparently concedes, that the court's hearsay ruling is what created the problem in the first place. (See AOB 100-130; ARB 16.) Appellant's statements to his law enforcement handlers were not offered to prove the truth of the content of those statements but rather the mere fact that the statements were made. Indeed, even if appellant had told his handlers a flat-out lie about being solicited to commit this crime in Orange County, he still would have been crazy to then commit the very crime he had described to them.

Appellant's additional argument sets out the more recent science confirming his initial argument about prejudice. Appellant pointed in his opening brief to juror studies which show

that jurors do what all of us do – they form a point of view and generally don't depart from it, accepting facts consistent with it and rejecting the rest. (Kalven & Zeisel, *The American Jury* (1966); AOB 120-121.) This is not surprising; it is normal human behavior. In their study's findings that, once having formed a point of view people generally accept facts consistent with it and reject facts not consistent with it, Kalven and Zeisel were, in 1966, describing what is now well known as confirmation bias, i.e., "the seeking or interpreting of evidence in ways that are partial to existing beliefs, expectations, or a hypothesis in hand." (Abstract, Raymond S. Nickerson, Confirmation Bias: A Ubiquitous Phenomenon in Many Guises (1998) 2 Rev. Of Gen Psychology, No. 2, at 175-220 [Abstract at <https://journals .sagepub. com/doi/10.1037/1089-2680.2.2.175> (as of November 3, 2020)].) The American Psychological Association definition is quoted online as follows:

> Confirmation Bias is the tendency to look for information that supports, rather than rejects, one's preconceptions, typically by interpreting evidence to confirm existing beliefs while rejecting or ignoring any conflicting data (American Psychological Association).

(<https://www.simplypsychology.org/confirmation-bias.html> (as of November 3, 2020.)

Thus, contrary to respondent's contention, when the jurors here were not informed at the beginning that a well-founded but alternative story of the case even existed, ~~then~~ even the best cross-examination may not cut through the very human tendency toward confirmation bias.

In addition, in his second supplemental brief petitioner also discussed Professor Levine's findings of the importance of context in assessing truth. (ASSB at pp. 10-12.) ~~Thus~~ In addition to the problem of confirmation bias, petitioner was further prejudiced by the complete absence of any context for the cross-examination of prosecution witnesses, all because of the court's erroneous hearsay ruling. Without context, and weighed against the force of confirmation bias, all the exhortations of the judge for the jury to keep an open mind amounted to a nullity, even for the most conscientious of jurors.

Respondent claims that Truth-Default Theory does not establish that the jury would judge a witness's testimony solely based on what was said during opening statements and disregard

cross-examination. (RSSB 10.) Appellant made no such assertion. Rather, to be clear, appellant contends that if there is no alternative theory presented to the jury before the start of the prosecution's case, then the jury will have nothing against which to test the prosecution's evidence as it comes in. Worse, the jury will have no context for the questions and answers presented on cross-examination, thus giving them no basis on which to judge either those questions or answers. As a consequence, the after-presented defense will be subject to all of the hurdles described by Kalven and Zeisel and confirmation bias. The result, petitioner asserts, is to both functionally reverse the burden of proof and to make it nearly impossible for the defense to meet that new burden.

Respondent goes on to claim that "cross-examination itself can provide context for the testimony on direct that the defense seeks to challenge . . . [and] can reveal the circumstances surrounding the witnesses statements on direct . . . ." (RSSB 10.) But other than these generalized statements of what cross-examination can do, nowhere does respondent respond to the very specific examples given by appellant of where the lack of context

undermined the actual cross-examination. (ASSB 14-16.) These examples give the lie to the respondent's statement that "cross-examination provided the defense with ample opportunity to contextualize Corona's testimony and challenge the truthfulness of her statements." (RSSB 10.)

Respondent relies on Fost v. Superior Court (2000) 80 Cal.App.4th 724, 734, for the proposition that facts may be brought out on cross-examination that tend to discredit a witness by showing that her testimony in chief was untrue. (RSSB 10.) But cross-examination cannot fully serve that function if those facts are untethered to any contextual framework. (See, generally, discussion of importance of context in ASSB, at 12-13, and more specifically, with examples from this case, at 13-17.) Fost, moreover, is inapposite here. The case involved whether or not a journalist, called by the defense, should be shielded from disclosing unpublished sources, not whether a defendant could effectively cross-examine witnesses during the prosecution's case-in-chief. (80 Cal.App.4th at pp. 728-730.)

This court has explained that, "'[t]he function of an opening statement is not only to inform the jury of the expected evidence,

but also to prepare the jurors to follow the evidence and more readily discern its materiality, force, and meaning." (People v. Dennis (1998) 17 Cal.4th 468, 518.)" (People v. Gurule (2002) 28 Cal.4th 557, 610; italics added.) The emphasized language reinforces what Professor Levine has taught about the importance of context for judging cross-examination. No admonition from the judge about keeping an open mind can make up for the lack of juror preparation provided by an opening statement. (See also, United States v. Hershenow (1st Cir., 1982) 680 F.2d 847, 858 [even defense decision not to call witnesses of its own does not diminish the right to present an opening statement]; Wright v. United States (D.C. Ct. of Appeals, 1986) 88 A.2d 915, 919, and cases there cited.)

Respondent correctly notes that the jurors were instructed that an opening statement is not evidence nor argument, and that they could expect to hear defense counsel's openings statements at the conclusion of the prosecution's case. (RSSB at 10-11.) Again, however, this argument is not responsive, and provides no answer whatsoever, to appellant's underlying contention. So, too, with respondent's observation that the jury was given a packet of

instructions which contained CALJIC No. 0.50 (RSSB at 11), as well as respondent's assertion that the jury was given an instruction in this packet on the purpose of an opening statement. (Id.) This is all simply beside the point, as is the presumption that the jurors are presumed to have performed their duty. They cannot perform a duty which is beyond human nature to perform.

The remainder of respondent's argument and cited cases are similarly misdirected and thus irrelevant. Appellant is entitled to reversal.

II. THE EVIDENCE SUPPORTING THE SPECIAL CIRCUMSTANCES WAS, COMPARED TO THE SUBSTANTIAL EVIDENCE INTRODUCED BY THE DEFENSE, PAPER THIN

Respondent correctly states the law with regard to, and understandably relies on, the substantial evidence rule. (RSBB 13.) Appellant agrees that there was some evidence from which a jury laboring under the pro-prosecution bias discussed in Argument I could have inferred an intent to kill and major participation by appellant, but viewed in its totality the evidence is simply not sufficient to prove to any rational jury beyond a reasonable doubt that appellant participated in these crimes with the intent to kill. (RSBB 15-25.)

The trial appellant received was clearly not a fair one. As set forth in appellant's opening brief, the trial court's hostility toward defense counsel and the resulting extraordinary imbalance in its evidentiary rulings distorted the trial and made a mockery of due process. (See AOB Arguments III-IV, at pp. 131-204.) In addition, the argument set forth in appellant's second supplemental brief, and here in Argument I, shows that the jury itself was necessarily skewed toward the prosecution's story by the end of the prosecution case such that, by virtue of

confirmation bias and lack of context for the defense cross-examination, the jury could only have convicted on these special circumstances by substituting speculation for evidence, and ignoring all of the mostly uncontradicted facts demonstrating that appellant did not harbor an intent to kill Montemayor and was not a participant in his murder.

The evidence of appellant's innocence was both substantial and to a great extent was either presented or confirmed by police, federal agents, and a recognized gang expert. These witnesses included LAPD Detective Rod Rodriguez, FBI Special Agent Curran Thomerson, ATF Special Agent James Starkey; and well-known gang expert Richard Valdemar – all frequent prosecution witnesses who testified here for the defense.

The evidence which would have persuaded any rational jury of the presence of reasonable doubt included:

- Law enforcement personnel relating the extent to which appellant had become a reliable informant (20 RT 3761[Thomerson]; 21 RT 3875-3876, 3910-3911 [Starkey]; Exh. 149);

- the fact that, some months before the crime, appellant was almost immediately released after a potential third-strike arrest for being a felon in possession of a firearm, an event which put his gang cohorts on notice that appellant was a likely informant from whom they would never have taken orders to commit a crime (18 RT 3441, 3449-3450 [appellant]; 25 RT 4550-4551 [Valdemar]);

- the fact that appellant told his handlers long before the crime was committed that he had been solicited to commit it (23 RT 4220-4222 [appellant]); 21 RT 3878 [Starkey]; 23 RT 4220-4222, 4243 [Rodriguez];

- the fact that there was no evidence that he was actually using the cell-phone – one of nine that he had access to – that was connected to the crime on the night before and the day of the crime, and that the speculation that the cell-phone in question must have been used by him was further undermined when Detective Rodriguez confirmed that appellant used a different phone each time appellant contacted him (23 RT 4258);

- the fact that appellant's gang-connected wife, who by the time of the crime had become friends with Edelmira Corona

14 RT 2849-2850 [Corona]; 18 RT 3361 [appellant]), told his ATF handler, Agent Starkey, that he was selling drugs and in possession of a firearm (again, a third strike) – evidence which was surely sufficient to show her anger at him, the fact that she would be inclined to conspire with Corona and Macias to frame appellant, and the fact that the gang knew he was an informant (21 RT 3876-3878, 3844, 3887 [Starkey];

- the fact that appellant's actions with respect to his so-called gang underlings – providing cell-phones, allowing them to hang out at his house, writing gang-moniker rosters on his garage wall – were entirely consistent with being an informant holding himself out as a shot-caller (23 RT 4211-4212 [Rodriguez]; 25 RT 4444-4445 [Valdemar]);

- the fact that no experienced gang member, let alone shot-caller, would allow a vehicle registered at his residence to be used as a "g-ride" to commit a crime (23 RT 4212, 4214, 4319-4320[Rodriguez]) or allowed Macias's rented car to remain in front of his house long enough for it to be found by investigators (23 RT 4318-4320 [Rodriguez]); the fact that both occurred

actually showed the intent of the perpetrators to implicate appellant (25 RT 4447-4448 [Valdemar]);

- and, finally, the fact that he had been targeted for a hit by the Mexican Mafia shot-caller for the East Valley (20 RT 3713-3714 [Thomerson]; 21 RT 3943-3946 [Starkey]), and, indeed, had been the target of three attempts on his life (18 RT 3355-3356 [appellant]), further confirming that he was a known informant from whom his supposed underlings would have been unwilling to take orders.

Again, it is notable how many of the facts set forth above were testified to first by appellant and then confirmed by law enforcement officers. This alone would have alerted most jurors who had not been infected by the errors previously discussed that there was, indeed, reasonable doubt.

In light of all this evidence, the prosecution testimony was tissue-thin. Respondent discusses the "flurry and timing of cellphone activity among Navarro and his co-conspirators" (RSSB 24) but, as noted above, there was no evidence that the phone ascribed to him, one of nine, was actually either in his possession or being used by him during the relevant times. As noted,

Detective Rodriguez testified that during the period when appellant was calling him, he used several different numbers– "You never knew what number he was calling from"– and that appellant used a different number each time. (23 RT 4258.) So while the prosecutor was laser-focused on tying appellant to the one cell phone that was in touch with the three perpetrators the night before and the morning of the crime, there was no direct evidence that he was the one using it.

Similarly, respondent cites the fact that Martinez had one of appellant's phone numbers – not the number appellant was supposedly using that day – along with his auto-club membership number. (RSSB 24.) Neither of these is probative of anything. That Martinez had one of appellant's many cell phone numbers is probative of nothing regarding this crime other than what had already been admitted by appellant: that Martinez was one of the gang underlings he was tracking as an informant. (See ante, and comments of Rodriguez and Valdemar at 23 RT 4211-4212, 25 RT 4444-4445 [Valdemar].

Regarding the auto-club membership number, how can this provide substantial evidence of anything related to the crime

when there is no indication of when Martinez obtained the auto-club membership number, or for what purpose? Indeed, if they had anticipated a need for the card, they would not have used the vehicle they used – which, indeed, broke down. "Here, take my auto-club number because that old truck might break down, perhaps shortly after you've killed the victim, and you'll want to call AAA."

But for the evidence cited above that directly undercut the prosecution's theory, but for the horrendously skewed process of the trial itself, and but for the additional distortions caused by the forced delay of the defense opening statement, perhaps appellant could have been said to have been recklessly indifferent to human life and a major participant in the crime. In reality, there was insufficient evidence to prove either of these elements, and a plethora of evidence that in any fair trial would have amounted to reasonable doubt.

III RESPONDENT CONFLATES THE ANALYSIS DESIGNED TO DETERMINE SUFFICIENCY OF THE EVIDENCE WITH THE ANALYSIS DESIGNED TO DETERMINE WHETHER RETRIAL IS PERMISSIBLE

Respondent contends that the evidence was sufficient to prove the gang special circumstance allegation against appellant but that even if the prosecution gang expert's testimony was improperly admitted in violation of Sanchez, that same evidence must still be considered in determining the sufficiency of the evidence. (RSSB 26.)

With regard to the first contention, appellant has previously shown that, viewed in its totality, the prosecution evidence was insufficient to prove appellant's guilt beyond a reasonable doubt. (See Argument II, supra.)

With regard to respondent's second point, however, respondent is conflating the analysis of whether a criminal defendant's conviction on a count or special circumstance allegation must be reversed for insufficiency of the evidence, on the one hand, with the analysis required to determine whether a defendant who obtains such a reversal may be retried on that count or allegation, on the other hand.

Respondent, citing McDaniel v. Brown (2010) 558 U.S. 120, 131, and People v. Story (2009) 45 Cal.4th 1282, 1296, argues that "under a sufficiency review, this Court considers all of the evidence presented at trial, including inadmissible evidence." (RSSB 26.) This is an incorrect reading of both cases.

McDaniel and Story both involved the question of whether, for double jeopardy purposes, a retrial was permissible. Thus, in Story, this court explained that, "[I]n reviewing the sufficiency of the evidence for purposes of deciding whether retrial is permissible, [we] must consider all of the evidence presented at trial, including the evidence which should not have been admitted." (45 Cal.4th at p. 1296 [initial italics added]; see also, McDaniel, supra, 558 U.S. at p. 131.) This rule traces back at least as far as Lockhart v. Nelson (1988) 488 U.S. 33, 34.

However, Sanchez itself makes clear that the foregoing rule has nothing to do with the question of whether a defendant is entitled to reversal on a particular count or allegation if evidence was improperly admitted. It should be noted that in Sanchez there was no mention of either Story or McDaniel, and the court reversed the true findings on the street gang enhancements and

remanded because the gang expert's testimony improperly relied on hearsay in violation of Crawford v. Washington (2004) 541 U.S. 36. (People v. Sanchez, supra, 63 Cal.4th at pp. 699-700.) In reversing the judgment, the Sanchez court pointedly observed that although it reversed the judgment on that basis, "[w]hether the gang allegations may be retried is an issue neither raised not briefed and we express no views on it." (Sanchez, supra, at p. 699, n. 24.)

Indeed, respondent's reading of Story and McDaniel is also logically challenged. It is absurd to argue that the evidence was insufficient to prove a conviction or true finding on a gang enhancement or special circumstance allegation but then to say that reversal is not required because the evaluation of the sufficiency of the evidence must include the erroneously-admitted evidence.[1]

---

[1] Respondent's crabbed view of the McDaniel and Story holding appears to have been adopted by some of the courts of appeal. (See, e.g., In re Z.A. (2012) 207 Cal.App.4th 1401, 1425; and a number of unpublished cases easily found in online searches.) The court may wish to state clearly its disapproval of these holdings.

In short, the question of whether appellant is entitled to reversal because gang evidence was improperly admitted in violation of Crawford and Sanchez is separate and distinct from the question of whether he may be retried for the special circumstance.

Because the conflation of these two elements of the analysis is likely to reoccur in other cases, appellant respectfully suggests that the court clarify that the analysis required for reversal and the analysis required for retrial be kept distinct.

CONCLUSION

For the foregoing reasons, and the reasons set forth in appellant's opening, reply briefs and first supplemental briefs, the conviction herein should be reversed.

DATED: November 11, 2020

Respectfully submitted,

_____

RICHARD I. TARGOW
Attorney for Appellant

CERTIFICATE OF LENGTH OF BRIEF

I, Richard I. Targow, attorney for appellant herein, hereby certify that this brief uses a 13-point Century Schoolbook font and contains 3219 words.

_____

RICHARD I. TARGOW

DECLARATION OF SERVICE

Re: People v. Anthony Navarro No. S165195

I, RICHARD I. TARGOW, certify:

I am, and at all time mentioned herein was, an active member of the State Bar of California and not a party to the above-entitled cause. My business address is Post Office Box 1143, Sebastopol, California 95473.

I served a true copy of the attached APPELLANT'S SECOND SUPPLEMENTAL BRIEF on each of the following, by TrueFiling or by placing same in an envelope or envelopes addressed, respectively, as follows:

Christine Bergman, Dep. Atty. Gen. (TrueFiling)
Office of the Attorney General
P.O. Box 85266-5299
San Diego, CA 92186-5266

Wesley Van Winkle (TrueFiling)
Alternate Assisting Attorney
P.O. Box 5216
Berkeley, CA 94705-0216

Anthony Navarro, Appellant (Mail)

Orange County Superior Court (Mail)
Clerk, Criminal Appeals
700 Civic Center Drive West
Santa Ana, CA 92701

For each mail recipient, each said envelope was then, on November 11 or 12, 2020, sealed and deposited in the United States Mail at Sebastopol, California, with postage fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 11th day of November, 2020, at Sebastopol, California.

_____
RICHARD I. TARGOW
Attorney at Law

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. NAVARRO (ANTHONY)**
Case Number: **S165195**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **rtargow@sonic.net**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
SUPPLEMENTAL BRIEF	Second Supp Reply Brief

Service Recipients:

Person Served	Email Address	Type	Date / Time
Wesley Van Winkle Attorney at Law 129907	tacitus@pacbell.net	e-Serve	11/12/2020 1:32:46 PM
Office Office Of The Attorney General Court Added	sdag.docketing@doj.ca.gov	e-Serve	11/12/2020 1:32:46 PM
Richard Targow Attorney at Law 87045	rtargow@sonic.net	e-Serve	11/12/2020 1:32:46 PM
Attorney Attorney General - San Diego Office Christine Levingston Bergman, Deputy Attorney General 225146	Christine.Bergman@doj.ca.gov	e-Serve	11/12/2020 1:32:46 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

11/12/2020
Date

/s/Richard Targow
Signature

Targow, Richard (87045)
Last Name, First Name (PNum)

Richard I. Targow, Attorney at Law

Law Firm