331717-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MAHADI H. ALJAFFAR, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. INTRODUCTION

The defendant claims his right to be present and to confront his accuser at trial was violated because the trial court used a non-certified Arabic interpreter, over his objection, during the trial proceedings. This claim has no merit.

For the first time on appeal, the defendant raises the issue of interpreter incompetence. The defendant failed to raise any issue of the court-qualified interpreter's competence during trial.

Consequently, the defendant failed to preserve any alleged error regarding the interpreter's alleged competency, precluding review under RAP 2.5(a). If this Court determines the claimed error implicates a specific constitutional right invoking an exception to RAP 2.5(a), the defendant has failed to identify any obvious or "practical and identifiable consequences" in the interpretation constituting actual prejudice at trial under RAP 2.5 (a)(3).

If this Court determines the defendant preserved the alleged error of interpreter incompetence, the defendant has not demonstrated how the error, if any, had an effect on the outcome of the trial, requiring reversal.

II. APPELLANT'S ASSIGNMENT OF ERROR

"Mr. Aljaffar was denied his 6th [sic] amendment right to face his accuser and to be present at his own trial when the trial court, over his

objection, permitted a non-certified Arabic interpreter to interpret the proceedings in violation of RCW 2.43.030."

III. ISSUES PRESENTED

1. Where the defendant failed to object to the interpreter's alleged inadequacy and performance at trial and has not established any prejudice in the outcome of the trial from the use of the court-qualified Arabic interpreter, should this Court exercise its discretion and decline review of the defendant's claim of interpreter incompetence because the defendant has not demonstrated a manifest error affecting a constitutional right under RAP 2.5(a)?

2. If the Court accepts review of the defendant's claim, has he established any evidence of incompetency on the part of the court-appointed and court qualified-interpreter that had practical and identifiable consequences at trial requiring reversal of his convictions?

IV. STATEMENT OF THE CASE

Defendant was charged by amended information in Spokane County with two counts of indecent liberties, two counts of unlawful imprisonment, and one count of voyeurism. CP 20-22. The matter proceeded to a jury trial and the defendant was convicted on December 4, 2014, of two counts of indecent liberties and one count of unlawful imprisonment. CP 116-117, 120.

The defendant was sentenced to a standard range sentence on January 21, 2015, and this appeal timely followed. CP 169-183.

Summary of substantive facts underlying the charged offenses.

Victim Leslie Ellis was working at Irv's bar[1] on May 31, 2014, as a go-go dancer. RP 93. Around midnight, Ms. Ellis used the women's restroom. RP 94. Alone in the restroom, Ms. Ellis observed the defendant inside and told him to get out. RP 95-96. The defendant walked toward Ms. Ellis, uttered sexual remarks, and blocked her exit from the restroom. RP 95-96. The defendant spoke in English to Ms. Ellis. RP 96. As the defendant got closer to Ms. Ellis, she expressed her concerns louder and louder, informing the defendant to leave her alone. RP 98.

The defendant grabbed Ms. Ellis' arm, and pushed her against the sink. RP 95-96. As the defendant grabbed her arm, he started rubbing his clothed, erect penis against her groin. RP 96, 98-99. The defendant was extremely rough. RP 98. Ms. Ellis ultimately fought off the defendant's advances, and ran out of the lavatory. RP 96, 100.

Also on May 31, 2014, sisters Daniele Weiler and Amber Hicks traveled to Spokane to dance, arriving at Irv's bar in the late evening hours. RP 55, 69-70, 97. Ms. Weiler, who became intoxicated, was

[1] Irv's bar is a dance establishment located in downtown Spokane. RP 55, 107.

dancing when the defendant began to grind against her on the dance floor, being "touchy-feely." RP 56-57, 60. Ms. Weiler told the defendant to leave her alone and excused herself to the restroom. RP 57. The defendant followed Ms. Weiler into the women's restroom. RP 58. As Ms. Weiler used the restroom stall, she observed the defendant's shoes at the foot of the stall, which concerned her. RP 59. As Ms. Weiler left the restroom, she observed the defendant's attention directed toward another female. RP 59.

Before leaving the establishment around one o'clock a.m., victim Ms. Hicks used the restroom. RP 72-73. The defendant was inside the women's restroom. RP 73. Another patron told the defendant to get out and he complied. RP 73-74. Shortly thereafter, Ms. Hicks entered and occupied one of the restroom stalls, where she then observed the defendant's shoes outside her stall. RP 75. She requested several times that the defendant leave the restroom. RP 76. As Ms. Hicks attempted to exit the stall, the defendant forced himself into the stall with Ms. Hicks. RP 76. He grabbed Ms. Hick's breast and began groping her. RP 76. Ms. Hicks attempted to open the stall door as the defendant simultaneously tried to close it. RP 76-77. At one point, the defendant pulled Ms. Hicks against himself. RP 87. She was eventually able to exit the stall and restroom, advising bar personnel of what occurred. RP 78-79.

Procedural history of the trial court's appointment and use of the interpreter at the time of trial.

At the pretrial hearing, the deputy prosecutor asked the court for a preliminary hearing regarding an interpreter for the defendant. RP 4. The deputy prosecutor advised the court that interpreter Imad Beirouty was present; however, he was not a court-certified Arabic interpreter, but he was an Arabic language interpreter, that had the ability to both speak and write Arabic.[2] RP 4.

The defense attorney stated he was under the belief the court would appoint a certified interpreter; however, he was having difficulty in locating a certified interpreter. RP 5-6. He asserted that he located a Seattle interpreter, but the Spokane County court administrator was reluctant to use this person for logistical reasons. RP 6. Ultimately, the defense objected to using a non-certified Arabic interpreter, but then deferred to the trial court. RP 6.

At the pretrial hearing, Mr. Beirouty testified that Arabic is his native language and English is his second language since the calendar year 1980. RP 8. Mr. Beirouty advised he had been interpreting for defendants for over three years in Spokane legal proceedings, and he had

[2] The deputy prosecutor further advised the court that Spokane County did not have a court-certified Arabic language interpreter. RP 5. The only certified interpreter was in western Washington and that person was not available at the start of trial. RP 5.

been qualified by various trial courts. RP 9. He had not previously interpreted any trial, but interpreted for preliminary hearings during those times. RP 9. Mr. Beirouty did not experience any difficulty or confusion when interpreting for defendants during the previous hearings. RP 10. Mr. Beirouty also felt comfortable interpreting the Arabic dialect necessary for the defendant and he previously was able to communicate with the defendant "very well." RP 11. Mr. Beirouty finally advised the court that he would literally translate the proceedings to the defendant, and that he had previously taken the oath of ethics for interpreters.[3] RP 12. Thereafter, the defendant did not object or raise any issue regarding the interpreter's qualifications. RP 13.

The trial court satisfied itself on the record that the proposed interpreter was qualified. RP 13-14. In doing so, the trial court stated:

> I think based upon my conversation with this gentleman[,] I believe he is sufficiently qualified to be an interpreter in this matter. He is willing to undertake the role. He has done it in the past in the legal setting. And he understands that he is a neutral party and he -- as he indicated, he understands his role and he has no relation to the defendant outside of this process.

RP 14.

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[3] An interpreter must abide by the code of ethics and take an oath to interpret the person's statements "to the best of the interpreter's skill and judgment." RCW 2.43.050.

The court then administered the oath to the interpreter. RP 14.

V. ARGUMENT

A. THE DEFENDANT, ALLEGING FOR THE FIRST TIME ON APPEAL THAT THE INTERPRETER WAS NOT COMPETENT AT THE TIME OF TRIAL, HAS NOT DEMONSTRATED A MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT UNDER RAP 2.5(A)(3).

Here, the defendant and his trial counsel failed to voice any objection or concern regarding the interpreter's competency to interpret during the trial or after trial. Accordingly, the defendant has failed to preserve the issue for appeal.

Standard of review regarding claims not raised in the trial court.

RAP 2.5(a) provides that an appellate court "will not review any claim of error that was not raised in the trial court." *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013); *State v. Lazcano*, 188 Wn. App. 338, 355, 354 P.3d 233, *as amended on reconsideration in part* (2015). "The underlying policy of the rule is to 'encourag[e] the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.'" *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010) (alteration in original), citing *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). Stated differently,

"[T]here is great potential for abuse when a party does not object because '[a] party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal.'" *State v. Weber*, 159 Wn.2d 252, 271-72, 149 P.3d 646 (2006) (alteration in original).

Argument.

1. The defendant's general objection to using a non-certified interpreter was not sufficient to preserve the purported competency error for appeal.

In the present case, there was no objection or criticism posed by either the defendant or his lawyer during or after trial as to any inadequacy in the interpreter's ability. The defendant and defense attorney were in the best position to bring any perceived extant flaws in the interpretation or ability of the interpreter to the trial court's attention at the time of trial, or afterward.

With regard to objections, it has long been the rule in this state that a general objection which does not specify the particular ground upon which it is based is insufficient to preserve the question for appellate review. *State v. Ford*, 137 Wn.2d 472, 488, 973 P.2d 452 (1999). As stated by our Supreme Court in *State v. Boast*, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976):

> When an objection is so indefinite as not to call the court's attention to the real reason for the testimony's

> inadmissibility, error may not be based upon the overruling of the objection. *Coleman v. Montgomery*, 19 Wash. 610, 53 P. 1102 (1898). An assignment of error as to the admission of evidence upon a certain ground cannot be made where no objection to the testimony was made on that ground. *State v. Poole*, 42 Wash. 192, 84 P. 727 (1906). Objection to evidence can be made in this court only upon the specific ground of the objection. *Bolster v. Stocks*, 13 Wash. 460, 43 P. 532, 534, 1099 (1896).

Accordingly, "[o]bjections must be accompanied by a reasonably definite statement of the grounds therefore so that the judge may understand the question raised and the adversary may be afforded an opportunity to remedy the claimed defect." *Presnell v. Safeway Stores, Inc.*, 60 Wn.2d 671, 675, 374 P.2d 939 (1962). In the same context, it is well established that:

> [i]f a specific objection is overruled and the evidence in question is admitted, the appellate court will not reverse on the basis that the evidence should have been excluded under a different rule which could have been, but was not, argued at trial.

State v. Mak, 105 Wn.2d 692, 719, 718 P.2d 407 (1986), *cert. denied*, 479 U.S. 995 (1986), *overruled on other grounds by State v. Hill*, 123 Wn.2d 641, 645-47, 870 P.2d 313 (1994).

In the present case, the defendant seemingly conflates "certification" and "competency."[4] Here, a general objection by the

[4] An interpreter could be certified, but incompetent, or he or she could be competent, but not certified. Here, the defendant objected to using a non-certified interpreter, but failed to raise an objection or argue the interpreter was not qualified at trial. A general objection to translator competence may be sufficient to preserve the issue on appeal if it

defense to the trial court's use of a non-certified Arabic interpreter, voiced at the pretrial hearing, was insufficient to preserve his objection to the trial court's ruling that the interpreter was qualified to interpret. More specifically, after making his general objection at the pretrial hearing to the use of a non-certified Arabic interpreter, and then deferring to the trial court on the matter (tacitly waiving any objection), the defendant failed to voice an objection after the trial court heard testimony from the interpreter and qualified him to interpret the proceedings. Moreover, during trial, the defendant failed to object or bring to the court's attention any claimed shortfall regarding the interpreter's abilities.

Certainly, if there was a basis in fact to allege faulty translations at trial, as claimed by the defendant's counsel on appeal, it surely would be expected and incumbent upon both the defendant and his lawyer to have contemporaneously brought the issue to the attention of the trial court.

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represents a good faith effort by defense counsel to address perceived translation problems. *United States v. Urena*, 27 F.3d 1487, 1492 (10th Cir. 1994); *United States v. Paz*, 981 F.2d 199, 201 (5th Cir. 1992), *cert. denied*, 508 U.S. 924 (1993); *United States v. Moya–Gomez*, 860 F.2d 706, 740 (7th Cir. 1988), *cert. denied*, 492 U.S. 908 (1989). However, in the present case, the defendant did not make a general or a specific objection at trial. He now attempts to argue that since the interpreter was not *certified* by the court, by analogy, the interpreter was therefore not *qualified* to interpret at trial. This argument is contrary to RCW 2.43.030(1), *infra*, and established case law.

Consequently, the defense's failure to object at trial, and apparent concession, should preclude review of the claimed error on appeal under RAP 2.5. "A reviewing court is unlikely to find that a defendant received a fundamentally unfair trial due to an inadequate translation in the absence of contemporaneous objections to the quality of the interpretation." *United States v. Joshi*, 896 F.2d 1303, 1310 (11th Cir. 1990); *Valladares v. United States*, 871 F.2d 1564, 1566 n. 2 (11th Cir. 1989).[5] As the Eleventh Circuit has observed:

> Only if the defendant makes any difficulty with the interpreter known to the court can the judge take corrective measures. *To allow a defendant to remain silent throughout the trial and then, upon being found guilty, to assert a claim of inadequate translation would be an open invitation to abuse.*

Valladares, 871 F.2d at 1566.

2. The defendant has neither argued nor established a manifest constitutional error under RAP 2.5(a)(3). That rule requires a plausible showing that the asserted error had practical and identifiable consequences in the trial.

To establish that an alleged unpreserved constitutional error is reviewable under RAP 2.5(a)(3), the defendant must establish that the error is "manifest." Here, error, if any, relating to the interpreter's

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[5] *See also United States v. Bennett*, 848 F.2d 1134, 1141 (11th Cir. 1988); *United States v. Lim*, 794 F.2d 469, 471 (9th Cir. 1986), *cert. denied*, 479 U.S. 937 (1986); *United States v. Tapia*, 631 F.2d 1207 (5th Cir. 1980); *United States v. Martinez*, 616 F.2d 185, 187–88 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981).

competence at trial is not manifest or obvious, as required by RAP 2.5.[6] Manifest error requires a showing of actual prejudice. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). An error is "manifest" if it had "practical and identifiable consequences in the trial of the case." *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). And "[i]n normal usage, 'manifest' means unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed." *Id.* A defendant must then show how, in the context of the entire trial, any claimed error actually affected his or her rights. *State v. Kirkman*, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007).

> In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is *so obvious on the record* that the error warrants appellate review. *See [City of Seattle v.] Harclaon*, 56 Wn.2d [596], [] 597, 354 P.2d 928 [1960]; *McFarland*, 127 Wn.2d at 333, 899 P.2d 1251. It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.

State v. O'Hara, 167 Wn.2d at 99-100 (footnote omitted).

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[6] Our courts have indicated that "the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can 'identify a constitutional issue not litigated below.'" *Scott*, 110 Wn.2d at 687.

The defendant does not argue manifest error in his brief. His argument assumes error occurred with respect to interpreter. There is nothing in defendant's claim or in the record, as discussed below, which would constitute any error, let alone, manifest error. Defendant's alleged error is not plain and indisputable, or so apparent on review that it amounts to a complete disregard of the controlling law or the credible evidence in the record, such that the judge hearing the case should have clearly corrected any alleged error at trial.[7]

The failure to object or identify any actual prejudice from the use of the qualified interpreter at trial precludes review of the defendant's claim of error under RAP 2.5. Moreover, the defendant has not argued or identified any obvious error as required under RAP 2.5(3). This Court should not consider the defendant's unpreserved claim and deny review.

[7] If an error of constitutional magnitude is manifest, it may nevertheless be harmless. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). The State has the burden of showing an error of constitutional magnitude is harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

B. IF THIS COURT FINDS THE DEFENDANT PRESERVED THE ISSUE OF ALLEGED INTERPRETER INCOMPETENCE, HE FAILS TO IDENTIFY ANY PREJUDICE OR CONSEQUENCE IN THE QUALITY OF TRANSLATION AT THE TIME OF TRIAL.

Standard of review.

The appointment of an interpreter is a matter within the discretion of the trial court to be disturbed only upon a showing of abuse. *State v. Gonzales-Morales*, 138 Wn.2d 374, 381, 979 P.2d 826 (1999).

Washington has not adopted a standard of review on whether an interpreter is qualified. Instead, courts have used various federal court standards. *See, State v. Ramirez-Dominguez*, 140 Wn. App. 233, 244, 165 P.3d 391 (2007); *State v. Teshome*, 122 Wn. App. 705, 712, 94 P.3d 1004 (2004), *review denied*, 153 Wn.2d 1028 (2005).

The Ninth Circuit has identified three types of evidence which may establish an incompetent translation on review.

> First, direct evidence of incorrectly translated words is persuasive evidence of an incompetent translation. Second, unresponsive answers by the witness provide circumstantial evidence of translation problems. A third indicator of an incompetent translation is the witness's expression of difficulty understanding what is said to him.

Perez-Lastor v. I.N.S., 208 F.3d 773, 778 (9th Cir. 2000) (citations and case examples omitted).[8]

[8] The *Teshome* court distinguished *Perez–Lastor* stating: "[T]he standard for competence should relate to whether the rights of non-English speakers are protected, rather than whether the interpreting is or is not egregiously poor." *Id.* at 712.

If one or several of these factors are present establishing interpreter incompetence, the appellate court then looks to whether the inadequate translation prejudiced the outcome of the proceeding, i.e., whether a better translation would have made a difference in the outcome. *Perez-Lastor*, 208 F.3d at 780. The Ninth Circuit noted this "[s]tandard is onerous, but not insurmountable," citing several examples. *Id.* at 773.

In Washington, the right of a criminal defendant to an interpreter is based upon the Sixth Amendment constitutional right to confront witnesses and the "right inherent in a fair trial to be present at one's own trial." *Gonzales-Morales*, 138 Wn.2d at 379.

When a non-English-speaking person is a party to a legal proceeding, a "certified" interpreter must be appointed unless good cause[9]

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[9] Here, both counsel represented to the court the difficulty in finding a certified Arabic interpreter for trial. After counsel made these representations to the court, and in making its ruling regarding the use of Mr. Beirouty, the trial court analyzed the requirements of RCW 2.43.030, the interpreter statute, on the record, finding the interpreter qualified. Any failure to mention the phrase "good cause" on the record was harmless error. *See State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986) (error is not prejudicial unless within reasonable probabilities there is a substantial likelihood that the outcome of the trial was materially affected); *State v. Powell*, 126 Wn.2d 244, 264-65, 893 P.2d 615 (1995) (where the trial court did not explicitly weigh the probative value of prior misconduct evidence against its prejudicial effect, but admitted only some evidence of the defendant's prior acts while excluding evidence of the acts that were most inflammatory, our Supreme Court concluded that the record as a whole demonstrated that the trial court had fulfilled the requirements of the rule); *State v. Norlin*, 134 Wn.2d 570, 582, 951 P.2d

is shown. RCW 2.43.030(1)(b); *State v. Serrano*, 95 Wn. App. 700, 704, 977 P.2d 47 (1999).[10] RCW 2.43.030 states:

> (1) Whenever an interpreter is appointed to assist a non-English-speaking person in a legal proceeding, the appointing authority shall, in the absence of a written waiver by the person, appoint a certified or a qualified interpreter to assist the person throughout the proceedings.[11]
>
> (a) Except as otherwise provided for in (b) of this subsection, the interpreter appointed shall be a qualified interpreter.
>
> (b) Beginning on July 1, 1990, when a non-English-speaking person is a party to a legal proceeding, or is subpoenaed or summoned by an appointing authority or

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1131 (1998) (if the record reflects that the trial court gave thoughtful consideration to the prejudicial impact of the evidence, an appellate court may affirm on any basis supported by the record).

[10] Defendant's appellate counsel relies on and cites an unpublished opinion, *State v. Lakilado*, 167 Wn. App. 1015 (2012), regarding the use of a qualified interpreter. *See* Def. Br. at 4. GR 14.1(a) prohibits a party from citing as authority an unpublished opinion of the court of appeals. *State v. Nysta*, 168 Wn. App. 30, 44, 275 P.3d 1162 (2012), *review denied*, 177 Wn.2d 1008 (2013) ("[n]o matter how well reasoned, unpublished opinions of the court of appeals lack precedential value, in part, because they merely restate well established principles"); *Skamania Cty. v. Woodall*, 104 Wn. App. 525, 536 n. 11, 16 P.3d 701 (2001) ("[u]npublished opinions have no precedential value and should not be cited or relied upon in any manner").

[11] A "certified interpreter" is one who is certified by the office of the administrator for the courts. RCW 2.43.020(2). A "qualified interpreter" is a person who is able to interpret or translate spoken and written English for non-English-speaking persons and to interpret or translate oral or written statements of non-English-speaking persons into spoken English. RCW 2.43.020(5).

is otherwise compelled by an appointing authority to appear at a legal proceeding, the appointing authority shall use the services of only those language interpreters who have been certified by the administrative office of the courts, unless good cause is found and noted on the record by the appointing authority. For purposes of chapter 358, Laws of 1989, "good cause" includes but is not limited to a determination that:

(i) Given the totality of the circumstances, including the nature of the proceeding and the potential penalty or consequences involved, the services of a certified interpreter are not reasonably available to the appointing authority; or

(ii) The current list of certified interpreters maintained by the administrative office of the courts does not include an interpreter certified in the language spoken by the non-English-speaking person.

(c) Except as otherwise provided in this section, when a non-English-speaking person is involved in a legal proceeding, the appointing authority shall appoint a qualified interpreter.

(2) If good cause is found for using an interpreter who is not certified or if a qualified interpreter is appointed, the appointing authority shall make a preliminary determination, on the basis of testimony or stated needs of the non-English-speaking person, that the proposed interpreter is able to interpret accurately all communications to and from such person in that particular proceeding. The appointing authority shall satisfy itself on the record that the proposed interpreter:[12]

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[12] The defendant faults the trial court for not engaging in a colloquy with the defendant regarding his ability to understand and speak English and the defendant's ability to understand the interpreter. *See,* Def. Br. at 9. Although prudent, a trial court is under no obligation to speak with the

> (a) Is capable of communicating effectively with the court or agency and the person for whom the interpreter would interpret; and
>
> (b) Has read, understands, and will abide by the code of ethics for language interpreters established by court rules.

The statute's approach of what constitutes good cause is not exclusive. *State v. Pham*, 75 Wn. App. 626, 633, 879 P.2d 321 (1994), *review denied*, 126 Wn.2d 1002 (1995).

In addition, ER 604 (Interpreters) states:

> An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.[13]

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defendant and the trial court can rely on representations made by counsel when making the determination of whether there is a language problem with the defendant. *See, State v. Woo Won Choi*, 55 Wn. App. 895, 902, 781 P.2d 505 (1989), *review denied*, 114 Wn.2d 1002 (1990) (superseded by statute on other grounds) (defendant was not denied his constitutional rights to be present at trial and confront witnesses by the trial court's failure to inquire directly of him whether he needed an interpreter, and its reliance instead on defense counsel's representations regarding the defendant's language ability and understanding of English).

[13] ER 702 states: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." "Qualifications of expert witnesses are to be determined by the trial court within its sound discretion, and rulings on such matters will not be disturbed unless there is a manifest abuse of discretion." *In re Det. of A.S.*, 138 Wn.2d 898, 917, 982 P.2d 1156 (1999).

A defendant does not have a constitutional right to a certified interpreter. *Pham*, 75 Wn. App. at 633. However, a defendant does have a constitutional right to a competent interpreter. *Teshome*, 122 Wn. App. at 711. "[A]s long as the defendant's ability to understand the proceedings and communicate with counsel is unimpaired, the appropriate use of interpreters in the courtroom is a matter within the discretion of the [trial] court." *Gonzales-Morales*, 138 Wn.2d at 382; *United States v. Lim*, 794 F.2d 469, 471 (9th Cir. 1986).

In addition, there is no constitutional right to a flawless, word-for-word interpretation - occasional lapses from a word-to-word translation will not render a trial fundamentally unfair. *United States v. Gomez*, 908 F.2d 809, 811 (11th Cir. 1990), *review denied*, 498 U.S. 1035 (1991). However, interpreters should nevertheless strive to translate exactly what is said. *Id., See also Valladares*, 871 F.2d at 1566 (the trial court must be given "wide discretion" in evaluating the adequacy of the interpreter's ability; "[t]he ultimate question is whether any inadequacy in the interpretation 'made the trial fundamentally unfair'"); *United States v. Cerda-Pena*, 799 F.2d 1374, 1380 (9th Cir. 1986) (the appellant's claim of incompetency of an interpreter during a deportation hearing based solely on two misstatements by the interpreter, neither of which were prejudicial to the appellant, was harmless error).

In *Ramirez-Dominguez, supra,* the defendant was unschooled and convicted at a bench trial. On appeal, he challenged the adequacy of the interpretation, which was in Spanish instead of his native Mixteco language. *Id.* at 244. The trial court made a finding that any "[p]roblems with Spanish conjugation or syntax don't impact the substantive content of that statement or make the substantive content of it any less reliable." *Id.* at 247. Division Two of this court, reviewing the appointment of the Spanish interpreter for an abuse of discretion, held that the defendant's right to a fair trial was protected by the Spanish interpretation: "Given Ramirez-Dominguez's illiteracy and the fact that Spanish was his second language, his responses to the questions were in context and appropriate." *Id.* at 247.

Similarly, in *State v. Sengxay*, 80 Wn. App. 11, 16, 906 P.2d 368 (1995), an interpreter was not sworn on the record but the defendant never objected to the interpreter's participation at trial. The defendant did not argue the interpreter behaved improperly. He only hypothesized that the interpreter's conduct may have been improper. This Court concluded that this was not enough to show obvious error. *Id.* at 16. Absent a showing of performance deficiency, failure to administer the interpreter oath is not reversible error. *Id.* at 16. There was no obvious error and the defendant failed to establish any prejudice. *Id.* at 16.

Compounding the defendant's lack of objection at the time of trial in the present case is the fact that he has not pointed to any evidence regarding any deficiency in the interpreter's skill level or translation at the time of trial. When the record in the present case is reviewed in context, the interpretation was fluid and understandable.

The following passages are cited by the defense as establishing the interpreter's alleged incompetence. The specific examples cited by the defense are in italics, with the remaining context of the quoted portion in standard font. *See* Def. Br. at 10-14.

> *Q. (By Mr. Cruz [deputy prosecutor]) What identification did you use to get inside the bar?*
>
> *MR. BEIROUTY: He answered a different answer, and I will try and rephrase that question again.*
>
> A. Saudi ID.
>
> Q. (By Mr. Cruz) Did it have your date of birth listed on it?
>
> MR. BEIROUTY: Yes.
>
> Q. (By Mr. Cruz) Did it have your correct date of birth on it?
>
> MR. BEIROUTY: Yes.
>
> Q. (By Mr. Cruz) So if it had your correct date of birth on it, they would have realized that you were too young to have gotten into that club; would you agree?
>
> MR. BEIROUTY: He said he knew from other people at the school that if he did bribe, he could get in.

Q. (By Mr. Cruz) And you bribed somebody, is that what you're saying?

MR. BEIROUTY: Yes.

Q. (By Mr. Cruz) So if there were other people that were there who were employed there who saw you at that establishment before, would they be mistaken?

MR. BEIROUTY: I think.

Q. (By Mr. Cruz) When did you start drinking?

MR. BEIROUTY: You want the time or the --

MR. CRUZ: The time.

MR. BEIROUTY: 12:30.

RP 160-61.

Q. (By Mr. Cruz) So you knew that that bathroom was occupied?

MR. BEIROUTY: Yes.

Q. (By Mr. Cruz) And how did you know it was occupied?

MR. BEIROUTY: I pushed on the door; they were closed.

Q. (By Mr. Cruz) So why did you wait in the female's restroom?

MR. BEIROUTY: I felt dizzy. And I needed to get some water.

Q. (By Mr. Cruz) Why didn't you go to the other stall?

MR. BEIROUTY: He didn't feel comfortable.

Q. (By Mr. Cruz) You didn't feel comfortable about going to the unoccupied stall?

MR. BEIROUTY: He is -- The way he answer, he's confusing the men's bathroom from the ladies' bathroom.

I'm going to explain to him what you mean.

(Discussion held off the record.)

MR. BEIROUTY: It was closed. He thought it was closed.

Q. (By Mr. Cruz) How did you know it was closed?

MR. BEIROUTY: He pushed on the two doors. He noticed door was closed.

Q. (By Mr. Cruz) So why didn't you leave the women's restroom, knowing that the two -- the two stalls were being occupied?

MR. BEIROUTY: I thought somebody would leave soon. And I wasn't able to move.

Q. (By Mr. Cruz) You weren't able to move?

MR. BEIROUTY: I was feeling dizzy. I need to just relax.

Q. (By Mr. Cruz) So you decided the best way to relax and calm down was to remain in the women's bathroom?

MR. BEIROUTY: The whole thing was under two minutes.

Q. (By Mr. Cruz) Now at some point in time you realized that Ms. Wicks was starting to exit the bathroom stall; correct?

MR. BEIROUTY: Yes.

RP 171-72.

Q. (By Mr. Cruz) Did you place your hands on her?

MR. BEIROUTY: No.

Q. (By Mr. Cruz) And then she was able to -- you said -- it was at that point in time that then security came into the bathroom?

MR. BEIROUTY: Yes.

Q. (By Mr. Cruz) But isn't it true that security wasn't aware that that had taken place yet?

MR. BEIROUTY: He didn't understand the question.

Q. (By Mr. Cruz) Security wasn't aware of the altercation that was happening inside the bathroom stall when it was just you and Ms. Wicks –

MR. BEIROUTY: They thought he was trying to rape her --

THE REPORTER: Hang on. Thank you. Go ahead.

MR. BEIROUTY: They thought he was trying to rape her.

She acted like -- that he was going to rape her, and he wasn't -- doing it.

Q. (By Mr. Cruz) The question, sir, is, did security contact you inside the women's bathroom when you were in there with Ms. Wicks?

MR. BEIROUTY: They came and they took him, and they call the police.

Q. (By Mr. Cruz) Was that inside the women's restroom?

MR. BEIROUTY: Yes.

Q. (By Mr. Cruz) Now, after Ms. Wicks had left the restroom, there was Ms. Ellis, who came into the restroom.

Do you remember that?

MR. BEIROUTY: Ms. Ellis, she came before, came before Ms. Wicks.

RP 176-77.

Q. (By Mr. Cruz) Then it was only after your encounter with the go-go dancer you encountered Amber Wicks?

A. Yes.

MR. BEIROUTY: Yes.

Q. (By Mr. Cruz) Now, if that is the sequence of how the events took place, you would have been already detained by security after Ms. Ellis, the go-go dancer, reported that you sexually assaulted her in the bathroom?

MR. BEIROUTY: Amber, when she left, the security came in and they detain me.

Q. (By Mr. Cruz) You weren't detained outside of the restroom?

MR. BEIROUTY: They took him out to the street and they called the police.

Q. (By Mr. Cruz) Okay. But isn't it true that you were detained outside of the women's bathroom?

MR. BEIROUTY: They took him outside.

Q. (By Mr. Cruz) The question, sir, is, you were detained outside of the women's restroom; correct?

MR. BEIROUTY: He said outside. He answered many times.

Q. (By Mr. Cruz) So for clarification –

MR. RAE [defense attorney]:Your Honor, asked and answered.

Q. (By Mr. Cruz) -- you were detained by your vehicle -- getting into a vehicle, weren't you?

THE COURT: When we're saying outside -- I'm sorry, I don't mean to interject -- but the question is, are you asking him outside but inside the building, or outside of the building? We're just going in a circle here.

MR. CRUZ: I guess the confusion the state is having -- and that's why we're repeating the question -- is because I thought Mr. Aljaffar indicated he was detained inside the women's restroom.

THE COURT: Okay.

MR. CRUZ: That's where the confusion is that I'm having.

THE COURT: I don't know if it's confusion or you don't agree with him. You have asked the question about eight times, and you are getting the same answer. I'm inclined to say we're kind of done with the question. You know, if you want to clarify the question, you keep using the same question over and over. We're not going anywhere. I'm sorry to interrupt. I'm a little frustrated. I don't know where we're going with all this.

MR. CRUZ: And I apologize.

Q. (By Mr. Cruz) When you were detained by security, were you still inside the bar or were you detained outside the bar?

MR. BEIROUTY: Outside.

> *Q. (By Mr. Cruz) So you were on -- in the process of leaving the bar?*
>
> *MR. BEIROUTY: No. They took him by force outside the bar, and they detained him until the police came.*
>
> *Q. (By Mr. Cruz) You weren't detained –*
>
> MR. RAE: Objection, Your Honor, for the Court's same frustration.
>
> THE COURT: I'm going to sustain it. We have covered it.
>
> MR. CRUZ: No further questions.

RP 187-189.

Here, there is nothing in the record supporting a claim that the interpreter was not able to keep pace with the testimony, or could not interpret simultaneously. There is no showing the defendant had difficulty understanding the interpreter, confronting a particular witness, communicating with his trial lawyer, or that Mr. Beirouty's translating was inadequate, to any degree, as to make the trial fundamentally unfair.

Presumably, trial counsel spoke with the defendant during the course of trial, and after trial, in preparation for sentencing. Yet, neither the defense attorney nor the defendant brought any asserted deficiency to the trial court's attention.

Now, on appeal, the defendant asserts inadequacy regarding the interpretation, which he alleged had occurred during cross-examination of

the defendant. The lack of understanding, if any, of the several examples cited in the defendant's brief had to do with the substance of the deputy prosecutor's questions during cross-examination, and do not evince a translation problem. Even if there was a problem in the translation with the defendant, the defendant has not established how he was prejudiced at trial.

VI. CONCLUSION

The defendant does not cite to any areas in the transcript of the trial proceedings that would indicate the interpreter's inaccuracy or incompleteness. The defendant has not pointed to one instance in the record showing that he did not understand the proceedings at trial, or that the use of the trial court qualified interpreter affected the outcome of the proceedings. Accordingly, the defendant has not established any error. This Court should affirm his convictions.

Dated this 7 day of March, 2016.

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