

Supreme Court No. 94343-5
COA No. 33171-7-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff/Respondent

v.

MAHADI H. ALJAFFAR,

Defendant/Appellant

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

ANSWER TO DEFENDANT'S PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT AND INTRODUCTION

Respondent, State of Washington, respectfully requests that this Court deny review of the Court of Appeals Division Three's published decision dated March 7, 2017 ("Opinion") attached as an Appendix to the Petition for Review.

II. STATEMENT OF THE CASE

Mr. Aljaffar was convicted by a jury on December 4, 2014, of two counts of indecent liberties and one count of unlawful imprisonment. CP 116-17, 120.

1. Summary of substantive facts underlying the charged offenses.

Victim Leslie Ellis was working at Irv's bar¹ on May 31, 2014, as a clothed go-go dancer. RP 93-94. 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.

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

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.

On the same day, 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 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 go 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 turn 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 had occurred. RP 78-79.

At the time of trial, Mr. Aljaffar stated he was studying English in Spokane. RP 155-56. In that regard and at the start of direct examination, Mr. Aljaffar answered several questions in English before he was instructed by his lawyer to wait for the translation from the interpreter. RP 145.

Mr. Aljaffar's theory at trial was a general denial of the charges. He testified that he was gay, he entered the bar on the evening in question, and began drinking. RP 148, 150. He became sick, and entered a restroom not realizing it was designated for women. RP 151-52. Mr. Aljaffar maintained that he did not touch any woman, or become aroused inside the bar. RP 152-53. He asserted that he did not become aroused because he was very tired due to the alcohol he had consumed. RP 153, 189. He again averred that he was not interested in women. RP 154, 183. When asked on cross-examination about the assertion that he was aroused in the bar, Mr. Aljaffar claimed the victim could have fabricated her testimony. RP 186.

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

Before trial, the defense objected to using a non-certified Arabic interpreter, but then deferred to the trial court. RP 6. The trial court appointed Amad Beirouty, who testified that Arabic is his native language and English had been his second language since the calendar year 1980. RP 8. Mr. Beirouty had been interpreting for defendants for over three years in Spokane legal proceedings, and he had been qualified by various trial courts in the past. RP 9. He had not previously interpreted for a trial, but interpreted for preliminary hearings. 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 had been able to communicate with the defendant "very well." RP 11.

On appeal, the court remanded the matter to the trial court for a reference hearing regarding several issues surrounding the interpreter's translation at trial. RAP 9.11(b). Prior to the hearing, the trial court employed a court certified Arabic interpreter to compare the trial transcript of Mr. Aljaffar's trial testimony to an audio recording of his trial testimony (taken by the court reporter at the time of trial). Findings of Fact - reference

hearing (12/12/16) at 1-2. Thereafter, the trial court conducted an extensive hearing. RP 296-369.

The trial court addressed several of the court of appeal's questions. The trial court found there were forty-four instances wherein the interpreter referred to the defendant in the "third person" rather than "first person," twenty-four other discrepancies, eleven instances where the trial interpreter "commented" rather than strictly interpreted the defendant's testimony, and three instances where there was no translation. After doing so, the trial court made the following finding:

First, Mr. Aljaffar's testimony was only one piece of evidence at trial. Second, the discrepancies, in this Court's opinion, do not alter the content of the Defendant's message to the jury, which was that he did not physically touch anyone inappropriately and only went into the women's restroom (apparently not knowing it was the women's restroom) on the date in question to be ill as opposed to attempting to look at or inappropriately touch a female patron of the bar. He further indicated he was interested in males and not females.

The jury ultimately rejected this version of events based on all of the testimony. To suggest that, for example, the use of the "third person" by the interpreter would change the result of the trial ignores the weight of the evidence.

It is this Courts "finding" that the discrepancies found by Ms. Noman do not rise to such a level as would change the outcome of the trial. It should be noted this Court does not condone inaccurate or inappropriate interpretation at any

level, but that is a separate matter from the impact of the trial outcome.

Id. at 3-4.

III. WHY REVIEW SHOULD NOT BE ACCEPTED

Petitioner has failed to identify or demonstrate the existence of any issues meriting review under RAP 13.4(b).

A party seeking discretionary review of a court of appeals decision must demonstrate one or more of the criteria required by RAP 13.4(b) warrants review. These criteria preclude review unless (1) the decision of the court of appeals is in conflict with a decision of the Supreme Court; (2) the decision of the court of appeals is in conflict with another decision of the court of appeals; (3) the case involves a significant question of law under the Constitution of the State of Washington or the United States; or (4) the petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(1)-(4). Petitioner has not met his burden.

A. THE COURT SHOULD DENY REVIEW UNDER RAP 13.4(B)(1) BECAUSE THE COURT OF APPEALS FOLLOWED WELL-ESTABLISHED PRECEDENT AND ITS OPINION IS NOT IN CONFLICT WITH ANY DECISION OF THIS COURT.

The defendant has petitioned for review based on a general disagreement with the court of appeal's opinion. Mr. Aljaffar's petition fails

to demonstrate how the decision of the court of appeals is in conflict with any decision of this Court.

B. MR. ALJAFFAR HAS NOT IDENTIFIED ANY CONFLICTING PUBLISHED DECISION CONTRARY TO THE COURT OF APPEALS OPINION UNDER RAP 13.4(B)(2).

Where “the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals,” a basis exists for a petition for discretionary review by the Supreme Court. RAP 13.4(b)(2). Mr. Aljaffar has not identified any conflicting appellate court decision.

C. MR. ALJAFFAR’S PETITION FAILS TO ESTABLISH THE DECISION BELOW INVOLVES A SIGNIFICANT QUESTION OF LAW UNDER THE STATE AND FEDERAL CONSTITUTIONS UNDER RAP 13.4(B)(3).

The right of a defendant in a criminal case to have an interpreter is derived from the Sixth Amendment right to confront witnesses, have a fair trial, and be present at one’s own trial. *State v. Gonzales-Morales*, 138 Wn.2d 374, 379, 979 P.2d 826 (1999). Accordingly, under RCW 2.43, all non-English speaking individuals in criminal proceedings are entitled to the appointment of a qualified interpreter to assist them at trial. In that regard, a defendant has a constitutional right to “a competent interpreter, [but] not necessarily a certified interpreter.” *State v. Pham*, 75 Wn. App. 626, 633, 879 P.2d 321 (1994), *review denied*, 126 Wn.2d 1002 (1995). Moreover, “the standard [of review] 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.”
State v. Teshome, 122 Wn. App. 705, 712, 94 P.3d 1004 (2004), *review denied*, 153 Wn.2d 1028 (2005).

Mr. Aljaffar has not identified in the record any alleged translation difficulty outside of his testimony at the time of trial.

Mr. Aljaffar first claims that the appellate court did not consider the full record when making its determination; rather, it only focused on the accuracy of the translation of Mr. Aljaffar’s testimony. Pet. Br. at 12-14. Mr. Aljaffar fails to identify any alleged interpreter error outside the parameters of his testimony.²

Indeed, the appellate court invited both the State and defense to address *any* factual issues related to the question of whether the use of a certified interpreter would have made a difference in Mr. Aljaffar’s trial. *State v. Aljaffar*, No. 33171-7-III, 2017 WL 952667 (Wash. Ct. App. Mar. 7, 2017). The court of appeals gave some deference to the trial court’s finding that in the context of the entire trial, Mr. Aljaffar was able to relay his version of events to the jury for its consideration, and, in the context of the entire trial, Mr. Aljaffar was not prejudiced. *Aljaffar*, at *6

² The party seeking review on appeal has the burden of perfecting the record for review so the reviewing court has before it all of the evidence relevant to the issue. *See State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999); *State v. Garcia*, 45 Wn. App. 132, 140, 724 P.2d 412 (1986).

With regard to Mr. Aljaffar's argument that the court of appeals did not consider the interpreter's translation of the entire trial, the court stated:

Throughout this appeal, the only complaints lodged against Mr. Beirouty pertained to the interpretation of Mr. Aljaffar's trial testimony. At the reference hearing, the parties were invited to address *any* factual issues related to the question of whether the use of a certified Arabic interpreter would have made a difference at Mr. Aljaffar's trial. Despite having the assistance of counsel and a certified interpreter, Mr. Aljaffar did not present any evidence at the reference hearing and did not challenge Mr. Beirouty's testimony that he and Mr. Aljaffar had no problems communicating. Given these circumstances, Mr. Aljaffar's argument that inadequacies existed outside of his trial testimony lacks factual support.

Aljaffar, at *6 (emphasis in the original).

Similarly, there is nothing in the record suggesting, nor any argument by Mr. Aljaffar that he was unable to keep up with the testimony, that he did not understand the interpreter, or understand the witnesses. Likewise, Mr. Aljaffar makes no claim that he, the trial court, or his trial counsel had any language difficulties with the court interpreter.

Ultimately, the court of appeals found that the trial court's factual findings supported the conclusion that the court's failure to comply with the certification requirements of RCW 2.43.030 was not prejudicial under the statute. *Aljaffar*, at *6.

Furthermore, a party's failure to raise an issue at trial generally waives the issue on appeal unless the party can show the presence of a manifest error affecting a constitutional right. RAP 2.5(a); *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011). Here, Mr. Aljaffar neither preserved a constitutional claim nor makes an adequate showing of manifest constitutional error as found by the appellate court. His petition fails to demonstrate a significant constitutional question that warrants review under RAP 13.4(b)(3).

D. THE PETITION DOES NOT ADDRESS WHETHER THERE ARE ANY ISSUES OF SUBSTANTIAL PUBLIC INTEREST UNDER RAP 13.4(B)(4).

Mr. Aljarffar neither argues nor claims review is appropriate because it involves an issue of substantial public interest. Review is not merited under this prong.

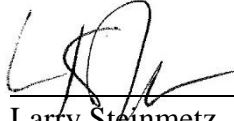
IV. CONCLUSION

Mr. Aljaffar's claims are conclusory and he has not identified how he suffered any actual prejudice at the time of trial, as his defense was one of general denial. The State respectfully requests this Court deny

Mr. Aljaffar's petition for review as it does not meet the criteria under
RAP 13.4(b).

Dated this 3 day of May, 2017.

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I certify under penalty of perjury under the laws of the State of Washington, that on May 3, 2017, I e-mailed a copy of the Answer to Defendant's Petition for Review in this matter, pursuant to the parties' agreement, to:

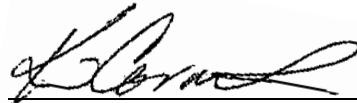
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