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SUPREME COURT NO. 97953-7

NO. 78256-8-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

ZAHID KHAN,

Petitioner.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable David Svaren, Judge

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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Zahid Khan, appellant below, requests this Court grant review pursuant to RAP 13.4 of the Court of Appeals' unpublished opinion affirming the Superior Court's findings and conclusions in the reference hearing in State v. Khan, (No. 78256-8-I, filed November 12, 2019). A copy of the opinion is attached as an appendix.

B. ISSUE PRESENTED FOR REVIEW

A criminal defendant is prejudiced by his attorney's deficient performance when there is a reasonable probability that, but for the deficient performance, the outcome of the trial would have been different. Khan is a native of Pakistan whose broken English impeded communication several times during trial. The State used Khan's confused and contradictory answers to argue in closing that he was not credible. The superior court found he was not prejudiced and denied Khan's personal restraint petition on the grounds that he did not show what he would have done differently with an interpreter. When the evidence at the reference hearing showed the lack of an interpreter negatively impacted Khan's credibility at trial, did the superior court err by denying his personal restraint petition?

C. STATEMENT OF THE CASE

1. Procedural Facts

Khan was born in Pakistan; his first language is Urdu. In re Pers. Restraint of Khan, 184 Wn.2d 679, 683, 363 P.3d 577 (2015). He is incarcerated pursuant to criminal convictions resulting from a trial at which he testified in English without an interpreter. Id. at 682. In 2015, he filed a personal restraint petition alleging violations of his constitutional and statutory rights to an interpreter. Id.

This Court concluded Khan's confusion over the word "erection" suggested a limited ability to understand questions or meaningfully respond and was concerned there may be other such instances. Id. at 692. However, this Court found the record insufficient because Khan had not identified what, specifically, he would have done differently with an interpreter. Id. at 691. The court remanded for a reference hearing to determine whether Khan was entitled to an interpreter and, if so, whether he was prejudiced by the lack of an interpreter. Id.

After a reference hearing, the superior court found Khan's English ability was such that his constitutional right to an interpreter was not violated, but he was entitled to an interpreter under Washington law. CP 15-16. The court also found Khan did not establish prejudice from the statutory violation because he did not show what he would have done differently with

an interpreter. CP 15. The court denied Khan's personal restraint petition. CP 15-16.

Khan appealed from the court's findings and conclusions after the reference hearing. CP 9. The Court of Appeals concluded substantial evidence supported the superior court's findings regarding the lack of prejudice. App. at 13. Khan now seeks this Court's review.

2. Trial

In 2007, Khan lived with his wife Eram Mirza, her daughter from a previous marriage, R.H., and the couple's two younger children. Ex. 17 (11/27/07RP 140). On July 16, several extended family members were in town for a celebration. Ex. 17 (11/27/07RP 151). R.H. was sleeping on the couch in the loft area with her two younger siblings on the floor nearby. Ex. 17 (11/27/07RP 153-56).

Mirza and her sister went down the street to visit a third sister, while Khan remained at home to go to bed because he had to work in the morning. Ex. 17 (11/27/07RP 156-57). When Mirza and her sister returned after midnight, they heard R.H. call out for her mother and heard Khan say, "Shut up." Ex. 17 (11/27/07RP 161). They testified that, when they went upstairs, they saw Khan with a full erection standing near R.H. Ex. 17(11/27/07RP 165).

R.H. testified Khan had squeezed her breasts in 2004 shortly after the family moved to Bothell. Ex. 17 (11/27/07RP 53-57). Another time, she fell asleep on the couch watching television and woke to find Khan moving his finger in and out of her anus. Ex. 17 (11/27/07RP 66-68). On another occasion, when she was 13 or 14, she woke to find Khan's finger moving in and out of her vagina. Ex. 17 (11/27/07RP 71-72). She claimed this happened several other times, but she was afraid to tell anyone. Ex. 17 (11/27/07RP 75-76). With the other family members visiting in 2007, she felt safer and told her mother this had been happening for a long time. Ex. 17 (11/27/07RP 77-79).

Khan denied the allegations and testified that night he was only in the room to cover his younger daughter with a blanket. Ex. 14 (11/28/07RP 344). Khan denied ever touching his stepdaughter inappropriately and denied having an erection in her presence on that night in 2007 or, indeed, ever. Ex. 14 (11/28/07RP 345, 351-52, 372).

On cross-examination, the prosecutor asked him, "You don't ever get erections?" Ex. 14 (11/28/07RP 358). He answered, "No. No." Id. Later, she asked again, "So you want to show that you didn't have an erection?" Ex. 14 (11/28/07RP 372). He answered, "I don't have erection." Id. The exchange continued, "Q. Ever? A. Never. Ever. Look at this, this my family. Okay, front of my kids, what I'm showing this kind of thing? I am respectable



person.” Id. Later, on redirect, his attorney asked Khan, “she asked you, Do you ever have erections, and you said no.” Ex. 14 (11/28/07RP 394). Khan answered, “No.” Id. Defense counsel clarified, “Do you mean ever, ever, or just –” Id. Khan explained, “In front of my wife. I live with my wife. I have erection because when I sleep with her, without erection I cannot do make my kids.” Id. The exchange continued, “Q. But what did you mean that you don’t have an erection? A. I mean not in front of kids. I just stay inside my home, inside the room, whenever I do, inside my room.” Id.

At other times, Khan was confused about the meanings of words such as “curse,” and the phrase “get along with” someone. Ex. 14 (11/28/07RP 349, 401-02). Another problem arose when Khan was asked whether he has been married the whole time. Ex. 14 (11/28/07RP 340). Despite being married at that time to his first and only wife, Khan answered, “No.” Id. Only on clarification was he able to give an accurate answer. Id.

Khan was also unable to answer questions such as “Who else was upstairs other than the children?” Ex. 14 (11/28/07RP 342-43). In response, he testified, “No, nobody upstairs.” Id. In the next few questions, he agreed the grandmother and her friend were also upstairs, but in a bedroom rather than out in the loft area. Id.

In closing argument, the prosecutor argued Khan's denial of ever having an erection showed he was not credible. Ex. 16 (11/29/07RP 63). She argued:

I don't get erections. That's what he said the first time. Later he said – and I asked him again, You don't get erections? No, I don't get erections. That wasn't natural or credible. He was trying to say whatever he can to make himself look better. Later he said, well, I did have the children, so in the bedroom. But apparently his erections are limited to that place. I would submit to you that that is not credible. His testimony in general was not credible. It's not supported by any of the other evidence, and he was caught not telling the truth a couple of times or being confused.

Id. There was no physical or corroborating evidence. The jury's decision at trial rested solely on whether they believed R.H.'s accusations or Khan's protestations of innocence.

### 3. Reference Hearing

At the reference hearing, the court was charged by this Court with answering two questions: whether Khan was entitled to an interpreter and, if so, whether there was a reasonable probability that, absent counsel's errors, the outcome of the trial would have been different. In re Pers. Restraint of Khan, 184 Wn.2d 679, 692-93, 363 P.3d 577 (2015). Khan called two witnesses: Dr. Robert Leonard, a forensic linguist, and Jay Stansell, an experienced defense attorney.

Leonard testified Khan's answers showed he did not understand the word "erection" and his limited English proficiency resulted in misunderstandings of other common words. RP 144, 313. For example, Khan was asked what time he had to be at work. Ex. 14 (11/28/07RP 371). He replied there was no limit. Id. The next question asked why he left for work so early. Id. He answered that he had to be there at eight. Id. Both answers – that there is no time limit and that he has to be there at eight – cannot be true. Leonard identified this as another example of Khan being unable to understand and meaningfully answer the questions put to him. RP 153. He noted at least 20 instances of misunderstanding at trial. RP 148. Leonard found Khan's English proficiency was very limited, but his incomprehensible statements were ignored in the interest of getting on with the trial. RP 133, 136. He explained that, with an interpreter, this lack of precision in Khan's testimony would not have occurred. RP 171.

Stansell testified the lack of an interpreter was "bound to affect the jury." RP 87-88. He identified 50 to 100 instances in which Khan's inability to understand or meaningfully answer the questions put to him made him seem evasive. RP 96. For example, Khan's inability to answer simple questions such as whether he was still married showed Khan did not understand the questions. RP 89. He estimated that 30 percent of Khan's testimony was incomprehensible. RP 101. He testified competent defense

counsel would not offer so much meaningless testimony by his client. RP 101. Stansell could not believe a jury would be able to view Khan as credible under such circumstances. RP 96.

Khan's defense attorney, prosecutor, and judge from the 2007 trial all testified that it never occurred to them that he needed an interpreter. RP 209, 225-26, 245, 297-98. The prosecutor admitted her argument about the erection testimony was a useful one for the State. RP 311.

D. REASONS WHY REVIEW SHOULD BE GRANTED AND ARGUMENT

THIS COURT SHOULD GRANT REVIEW, VINDICATE KHAN'S RIGHTS TO AN INTERPRETER AND TO EFFECTIVE ASSISTANCE OF COUNSEL, AND GRANT HIS PERSONAL RESTRAINT PETITION.

All accused persons are constitutionally entitled to effective assistance of defense counsel. In re Pers. Restraint of Burlingame, 3 Wn. App. 2d 600, 608, 416 P.3d 1269 (2018) (citing U.S. Const. amend. VI; Const. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). This right is violated when (1) counsel performs in an unreasonably deficient manner and (2) counsel's errors undermine confidence in the outcome of the trial. Id. As a personal restraint petitioner, Khan is entitled to relief when a preponderance of the evidence shows he was prejudiced by his attorney's failings. In re Pers. Restraint of Brett, 142 Wn.2d 868, 874, 16 P.3d 601 (2001) (citing In re Pers. Restraint

of Cook, 114 Wn.2d 802, 814, 792 P.2d 506 (1990)). Ineffective assistance is a mixed question of law and fact that courts review de novo on appeal. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

The first prong of the Strickland test is not at issue in this appeal. This Court held that if Khan needed an interpreter, his attorney necessarily performed deficiently in failing to request one. In re Pers. Restraint of Khan, 184 Wn.2d 679, 690, 363 P.3d 577 (2015). The second prong of the Strickland test is met because the record shows Khan would have answered questions at trial more accurately and directly, and, therefore, more credibly, with an interpreter. This Court should grant review, reverse the trial court's ruling, and grant Khan's personal restraint petition for three main reasons. First, the Court of Appeals erred in failing to apply de novo review to a question of law. Second, the court erred in refusing to acknowledge that the impact on the jury's perception of credibility can amount to prejudice under the Strickland standard. Finally, the court erred in affirming the superior court's rejection of Khan's evidence of prejudice on the grounds that it was speculative.

- a. Prejudice caused by ineffective assistance is a question of law reviewed de novo.

First, the Court of Appeals failed to apply the correct standard of review under State v. Lopez, 190 Wn.2d 104, 126, 410 P.3d 1117 (2018).

The Court of Appeals found the lack of prejudice finding was supported by substantial evidence, namely, the testimony by those present at Khan's trial that he seemed to understand and answer appropriately. Slip op. at 15. But the ultimate question of prejudice, whether there was a reasonable probability that that outcome of the trial was affected, is a question of law that should be reviewed de novo on appeal. Lopez, 190 Wn.2d at 126. Under Lopez, while the existence of an adverse effect from counsel's errors may be a factual question, it is a legal conclusion whether that adverse effect amounted to prejudice. Id. Courts apply the appropriate standard of review on appeal even when a trial court has incorrectly labelled a legal conclusion as a factual finding. Mid-Town Ltd. Partnership v. Preston, 69 Wn. App. 227, 232, 848 P.2d 1268 (1993). Review is warranted under RAP 13.4 (b)(1) because the Court of Appeals decision conflicts with Lopez.

- b. Prejudice can arise from inaccurate translation when it causes the jury to have a negative perception of the defendant's credibility.

Second, the court erred in finding no prejudice on the grounds that Khan did not show he would have done anything differently with an interpreter. See CP 15. The Strickland standard requires a reasonable probability of a different outcome, not a specifically different act by a defendant or defense counsel. See, e.g., Strickland, 466 U.S. at 694;

Burlingame, 3 Wn. App. 2d at 608, 611. The evidence at the reference hearing met this test.

Absent counsel's error, Khan would have had an interpreter. In one sense, with an interpreter, he would have done precisely what he did – attempt to answer the questions put to him to the best of his ability. Khan showed that, with an interpreter, he would have answered more accurately the first time, and that such accuracy had a reasonable probability of affecting his credibility and, therefore, the outcome of the trial. With a competent interpreter, the “misunderstandings and miscommunications” identified by Stansell and Leonard would not have occurred. RP 171. Khan's answers would have been more precise. RP 171. He would not have been seen as contradicting himself and making nonsensical statements. Khan's answers and intended meaning would not have necessitated clarification after he appeared to make contradictory and obviously false statements. Most importantly, the prosecutor would not have been able to seize on these misunderstandings and miscommunications to argue he was not credible.

The likelihood of a different outcome with an interpreter arises less from Khan's actions than from the jury's perception of his actions. The language barrier caused misunderstandings and miscommunications during Khan's testimony that made him appear deceitful or evasive. RP 96. The prosecutor used this to argue in closing that Khan was not credible. Ex. 16

(11/29/07RP 63). Furthermore, she admitted this argument was useful to her case. RP 311. This evidence gives rise to a reasonable probability that, with an interpreter, the jury would have had a better perception of Khan's credibility and would have arrived at a different verdict.

To reject the possibility of this type of prejudice, as the superior court did at the reference hearing, raises a conflict with State v. Aljaffar, 198 Wn. App. 75, 86-87, 392 P.3d 1070, rev. denied, 188 Wn.2d 1021 (2017). In Aljaffar, the Court of Appeals recognized the potential that poor quality interpretation could affect the jury's verdict by affecting the jury's perception of the defendant's credibility. Id. at 89.

Like Khan, Aljaffar testified at his trial, but the interpreter was not certified. Id. at 78-79. As in this case, the question of prejudice was remanded for a reference hearing. Id. at 80. After the hearing, the court concluded the numerous discrepancies in the translation, "did not alter the content of Mr. Aljaffar's message to the jury or his proffered defense." Id. at 82.

The Court of Appeals held Aljaffar's statutory right to a certified interpreter was violated but found the question of prejudice more difficult. Id. at 86. Ultimately, the court relied on the trial court's careful assessment at the reference hearing of the impact of the errors on Aljaffar's credibility. The court recognized, "Given the fact that Mr. Aljaffar testified and placed his



credibility before the jury, inadequate interpretation could have impacted the jury's verdict." Id. at 89.

Nevertheless, after careful review of the record, the court found no prejudice because the only errors in the translation were that the interpreter often spoke of Aljaffar in the third person, rather than offering a verbatim translation of his first-person account, and sometimes paraphrased or explained, rather than directly translating. Id. There was no sign that explanatory phrasing or use of the third person impacted the jury's assessment of Aljaffar's credibility. Id. at 88-89. The court correctly recognized that an impact on the defendant's perceived credibility could constitute prejudice; it simply did not in Aljaffar's case. Id.

Here, the errors did impact Khan's credibility. Khan's errors made him appear to be intentionally giving false testimony. Ex. 14 (11/28/07RP 340, 358, 371, 372). The State ensured this negative impression remained firmly in place, relying on the "erection" confusion to argue Khan was not credible. Ex. 16 (11/29/07RP 63). The prosecutor would not have mentioned this in closing if she did not view it as material to the jury's credibility determination. Her testimony confirmed it was a significant part of her argument. RP 311.

The trial court's requirement that Khan show what he would have done differently, rather than show an impact on the jury's perception of his

credibility, is grounded in this Court's language from the 2015 opinion. In re Pers. Restraint of Khan, 184 Wn.2d 679, 692, 363 P.3d 577 (2015) ("This is likely in part a consequence of the high level of abstraction with which Khan is approaching this issue, rather than drilling down into how the lack of an interpreter caused him prejudice by demonstrating what specifically he would have done differently had he understood the proceedings or questions."). This Court should grant review to resolve the apparent conflict between that case and Aljaffar. RAP 13.4(b)(1), (2). This Court should also grant review under RAP 13.4(b)(3) and (4); it is an issue of substantial public interest and an important constitutional question to clarify how the Strickland standard is applied when prejudice results from the impact of deficient performance on the jury's perception of the defendant rather than from his specific conduct.

- c. Evidence of prejudice caused by ineffective assistance of counsel is inherently speculative and the court erred in rejecting Khan's evidence on that basis.

Third, the court erred in dismissing Khan's expert testimony about the likely effect on the jury as mere speculation. CP 19. The nature of the prejudice inquiry in a case of ineffective assistance of counsel is inherently speculative. The court must imagine an alternate reality in which counsel acted effectively in engaging an interpreter for his client. The court must then imagine how the trial would have proceeded and how the jury would

have perceived those proceedings to determine whether there is a reasonable probability of a different outcome.

An inquiry as to what would have happened without counsel's errors is always inherently speculative. This Court recently recognized this in State v. Gregory, 192 Wn.2d 1, 21-22, 427 P.3d 621 (2018). This Court explained the standard for prejudice from ineffective assistance of counsel saying, "We do not expect the defendant to present statistical evidence of the outcome of hypothetical trials with a more effective attorney and compare it to the original trial, controlling for all other variables." Id. at 22.

Moreover, the prosecutor's closing argument is not speculation. She argued:

I don't get erections. That's what he said the first time. Later he said – and I asked him again, You don't get erections? No, I don't get erections. That wasn't natural or credible. He was trying to say whatever he can to make himself look better. Later he said, well, I did have the children, so in the bedroom. But apparently his erections are limited to that place. I would submit to you that that is not credible. His testimony in general was not credible. It's not supported by any of the other evidence, and he was caught not telling the truth a couple of times or being confused.

Ex. 16 (11/29/07RP 63). She used the miscommunications that resulted from the lack of an interpreter to urge the jury not to believe Khan. RP 311. Review should be granted as a matter of public interest to clarify the constitutional standard for how courts gauge the prejudice caused by

ineffective assistance of counsel. RAP 13.4(b)(3), (4). Additionally, review is warranted because the decision below conflicts with Gregory. RAP 13.4(b)(1).


E. CONCLUSION

The Court of Appeals' decision is in conflict with decisions by this Court and the Court of Appeals, and this case presents significant constitutional issues and issues of public interest. RAP 13.4(b). Therefore, Khan asks this Court to grant review and grant his personal restraint petition.

DATED this 5<sup>th</sup> day of December, 2019.

Respectfully submitted,

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\_\_\_\_\_  
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# Appendix

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

THE STATE OF WASHINGTON,	)	No. 78256-8-I
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
KHAN, ZAHID AZIZ,	)	
	)	
Appellant.	)	FILED: November 12, 2019

SCHINDLER, J. — Zahid Aziz Khan filed a personal restraint petition (PRP) contending his attorney provided ineffective assistance of counsel by not obtaining an interpreter for trial on charges alleging multiple counts of child molestation and rape. The Washington Supreme Court ordered a reference hearing to determine whether Khan's constitutional or statutory rights were violated by the lack of an interpreter, and if so, whether actual and substantial prejudice entitled him to relief in his PRP. Following three days of testimony, the superior found that Khan was able to comprehend and understand the proceedings and was clearly understood by trial counsel. Although Khan "spoke in broken English and sometimes strained to find the right word or words to express himself," he "was nonetheless able to clearly express his defense." The superior court concluded Khan could not establish prejudice because there was no reasonable probability that the result of the trial would have been different if Khan had

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an interpreter, and denied the PRP. Because substantial evidence supports the superior court's findings and the findings in turn support the conclusions of law, we affirm denial of the PRP.

## FACTS

Zahid Aziz Khan was born in Pakistan in 1972 and is a native Urdu speaker. Khan moved to the United States in 1999 to marry Eram "Mona" Mirza. Mirza had a daughter, R.H., from a prior marriage. After marrying Khan, Mirza gave birth to a son and a daughter.

Mirza put the three children to bed the evening of July 16, 2007 at around 10:00 p.m. before leaving with her sister Sanober to visit family members down the street. Fourteen-year-old R.H. slept on a couch in a loft area and the two younger children slept nearby on mattresses on the floor. Khan was asleep in the master bedroom.

Mirza and Sanober both testified that after they returned sometime after midnight, they heard R.H. call out in a "shaky" voice, " 'Mom, mom, where are you?' " Mirza and Sanober heard Khan's voice coming from the loft area saying, " 'Shut up, shut up, what is your problem.' " When they climbed up to the loft area, both Mirza and Sanober saw Khan standing over R.H. with a full erection. R.H. was crying. R.H. told Mirza and Sanober that Khan had been molesting her "for a long time."

The State charged Khan in Snohomish County Superior Court with child molestation in the second degree, rape of a child in the second degree, rape of a child in the third degree, child molestation in the third degree, and attempted child molestation in the third degree of R.H.

R.H. testified that Khan had been molesting her since approximately 2004. R.H. testified she was in the fifth grade the first time Kahn molested her. The night before Valentine's Day during the fifth grade, R.H. told her mother she needed to bring cards to school. Khan offered to drive her to the store. On the way home in the car, Khan "grabbed" her breast and said, "[I]f you let me do this, then I'll get you things." R.H. said it "hurt" and she "felt really uncomfortable. . . . I was in shock." Khan told R.H. that if she told her mother what happened her mother would not believe her, and R.H. would be "sent away" to live in Pakistan. R.H. testified she did not tell her mom about the molestation because she "was scared."

R.H. testified that Khan frequently molested her while she was sleeping, either in her bedroom or in the loft area if she had fallen asleep while watching television. On one occasion, R.H. woke up to find Khan "squeeze[ing]" her breasts. Another time, R.H. was awakened by Khan moving his "finger . . . in and out" of her anus. R.H. testified, "I was scared out of my mind" and, "I cried." R.H. told a friend that Khan was molesting her but begged her friend not to tell anyone. R.H. said she did not tell her family because Khan threatened her or bought her gifts to keep her from doing so. Instead, R.H. said she begged her mother for a lock for her door. When Mirza did not get her a lock, R.H. asked for some bells that she could hang on her door so that she would wake up if Khan entered her room.

Mirza testified that Khan frequently woke up in the night to use the bathroom. Mirza said that instead of using the bathroom inside their master bedroom, Khan insisted on using the bathroom near R.H.'s room. When Mirza asked him not to do so, Khan argued, "This is my house, and I'll use any bathroom I want to." Mirza also



testified that R.H. asked "[m]any times" over the years for both a lock and the bells for her bedroom door.

Khan testified that Mirza and Sanober never left the house the night of July 16, 2007 and that he was in the loft area the entire time, not in the master bedroom. Khan testified that at one point he got up to cover his younger daughter with a blanket and give her a goodnight kiss. Khan said R.H. began yelling because she did not like him kissing his younger daughter and he told her, "[S]hut up, this is none of your business." Defense counsel asked Khan about the testimony of both Mirza and Sanober that he had an erection. Khan strenuously denied that he had an erection:

- Q. Did you have an erection when you were upstairs with the children in the loft?  
A. No. She is my daughter. I don't even think this way.

On cross-examination, the prosecutor also asked Khan whether he had an erection while in the loft on July 16, 2007.

- Q. So what about all this caused you to get the erection?  
A. What do you mean, erection?  
Q. I mean, what caused your penis to get aroused?  
A. When I heard this thing, I'm thinking, how they is using this word? I can[n]ot say anything in front of my sister or anything, this kind of word. How they using openly, in front of everybody, and they don't feel one thing, this is how shameful word. I not imagine.  
Q. So they should be too ashamed to say that?  
A. No, ashamed to say I can do this thing, this kind of thing, this kind of feeling, like I have something like that.  
Q. You don't ever get erections?  
A. No. No.

The prosecutor later returned to the issue of the erection:

- Q. I believe you testified earlier that you — we were talking about the erection, and you said you wished you had a camera to show what had happened; is that right?  
A. No, no, no. I said, you know, like, video camera, I can make my own — all you guys saying erection, right?

- Q. Uh-huh.
- A. I say, I wish I can also made — I can made video my own, what kind of I have my — like, how what I'm wearing, what I had kind of I have pant, what kind of I have shirt. I mean that.
- Q. So you want to show what, now, that you didn't have an erection?
- A. I don't have erection.
- Q. Ever?
- A. Never. Ever. Look at this, this is my family. Okay, front of my kids, what I'm showing this kind of thing? I am respectable person.

On redirect, defense counsel asked Khan to clarify what he meant when he said that he "[n]ever" had an erection.

- Q. So when you covered [the younger daughter] up, did you have an erection?
- A. She's my blood, sir. Don't even think about it. She's my blood.
- Q. But [R.H.] is not your blood?
- A. I treat her more — like, same, like [the younger daughter].
- Q. So you didn't have an erection because of [R.H.]?
- A. No.
- Q. Did you have an erection at all?
- A. Not at all.
- Q. Have you ever walked around the house with an erection?
- A. Sir, I'm the man of the home. I want to respect them. I want to give them example like that, I'm this kind of person, how they going to grow up? What they going to think about me, what kind of our dad?
- Q. You mentioned to the prosecutor — or she asked you, Do you ever have erections; and you said no.
- A. No.
- Q. Now, do you mean ever, ever, or just —
- A. In front of my wife. I live with my wife. I have erection because when I sleep with her, without erection I cannot do my — make my kids.
- Q. But what did you mean, that you don't have an erection?
- A. I mean not front of kids. I just stay inside my home, inside the room, whenever I do, inside my room.

In closing argument, defense counsel challenged R.H.'s credibility, arguing that R.H. waited four years to report the molestation and that she had a motive to lie because she did not like following Khan's rules. Defense counsel argued Khan's testimony was more credible.

In rebuttal argument, the prosecutor argued Khan's testimony about the erection was not credible:

Mr. Khan, the defendant, testified or [defense counsel] Mr. Nahajski said that when he testified, his reaction to the accusation that he had an erection was natural and credible. I want to tell you again, any credibility determination is yours; not mine, not Mr. Nahajski's. But you will remember what he said: This is ridiculous; I don't get erections. That's what he said the first time. Later he said — and I asked him again, You don't get erections? No, I don't get erections.

That wasn't natural or credible. He was trying to say whatever he can to make himself look better. Later he said, Well, I did have the children, so in the bedroom. But apparently his erections are limited to that place. I would submit to you that that is not credible.

A jury convicted Khan as charged. We affirmed the jury convictions. State v. Khan, 149 Wn. App. 1052, 2009 WL 1058626.<sup>1</sup>

Khan filed a personal restraint petition, arguing his defense attorney was ineffective for failing to obtain an interpreter for trial. In support of his petition, Khan attached his own declaration in which he stated that he had only a middle school education and understood limited English. According to Khan, he told his attorney that he "did not speak English very well" and that he "would probably not understand everything that was said in court." Khan said the attorney reassured him that everything would be fine and that "using an interpreter would make me look bad." Khan stated that he was "confused" when he testified and that "there were a number of times when I did not understand exactly what was asked or how to accurately express myself in English." We dismissed the petition.

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<sup>1</sup> In his direct appeal, Khan argued that the prosecutor committed misconduct by expressing a personal belief in his guilt, his attorney was ineffective for failing to object to testimony regarding the negative social consequences R.H. experienced as a result of testifying, and the court erred in admitting a photograph of his younger daughter.

The Washington Supreme Court granted review. The court concluded that based on the existing record, Khan had not "established prejudice sufficient to justify vacating his conviction." In re Pers. Restraint of Khan, 184 Wn.2d 679, 692, 363 P.3d 577 (2015). However, the court states the line of questioning involving the erection "strongly suggests [Khan] had only limited ability to either understand the questions or meaningfully respond to them." Khan, 184 Wn.2d at 692. The court ordered the superior court to conduct a reference hearing to determine whether "Khan's language skills were such that he was entitled to the assistance of an interpreter" and if so, "whether there is a reasonable probability that but for counsel's errors, the result of the trial would have been different." Khan, 184 Wn. 2d at 692-93.

On remand, a Skagit County Superior Court judge presided over the reference hearing. Over the course of the three-day evidentiary hearing, the superior court reviewed 15 exhibits and heard testimony from eight witnesses. Khan called three witnesses to testify— teacher Kelly Anderson, attorney Jay Stansell, and linguist Dr. Robert Leonard. An Urdu interpreter assisted Khan throughout the hearing. Khan did not testify at the hearing.

Kelly Anderson is an adult basic education teacher who was Khan's GED<sup>2</sup> instructor in prison. Anderson testified that when Khan entered prison, his written English vocabulary and comprehension were at a fifth grade level. But Anderson acknowledged that speaking and listening in English are "generally easier than reading or [w]riting" and "[t]here was no test given to test his ability to communicate verbally in the English language."

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<sup>2</sup> General education development.

Jay Stansell is an experienced public defender in state and federal court with particular expertise working with clients whose native language is not English. Stansell had never met or spoken to Khan. However, Stansell testified that based on the transcript of the trial, Khan was prejudiced by the lack of an interpreter because Khan was attempting "to explain complicated things about his movements on that night" and "his relationship with the alleged victim"; and "over, and over, and over again his answers are either confused, or contradictory, or incomprehensible." Stansell identified "50 to 100" instances at trial in which Khan's inability to understand or meaningfully answer questions made him seem "evasive," and estimated that 30 percent of Khan's testimony was "incomprehensible" to the jury. Stansell concluded that a jury would not see Khan as credible under such circumstances. Nonetheless, Stansell acknowledged that a person in court "listening to Mr. Khan testify would have a better ability to assess his English fluency than a person reading a transcript of that proceeding." Stansell also admitted that he had not read the transcript of the testimony from the other witnesses and did not compare Khan's fluency and comprehension to those of the other witnesses who did not speak English as a first language.

Dr. Robert Leonard is a linguistics professor at Hofstra University. Dr. Leonard had not met with or spoken to Khan. Based on a review of the transcript of Khan's testimony, Dr. Leonard concluded that Khan had only limited working proficiency in English. Dr. Leonard identified a large number of grammatical errors in Khan's testimony. But he conceded many of these were trivial, including improper "word order" or the absence of an indefinite article such as "a" or "the."

The State called five witnesses to testify— jail classification counselor Terry Bloss, former Snohomish County Deputy Prosecutor Cynthia Larsen, Khan's trial attorney Lennard Nahajski, Snohomish County Superior Court Judge Kenneth Cowser, and Snohomish County Sherriff Detective Steven Martin.

Terry Bloss conducted the intake interview with Khan at the Snohomish County Jail. Bloss asked Khan a standard set of questions, including questions about disciplinary problems at prior institutions, whether he needed to be placed in protective custody, potential gang affiliation, and medical history. Bloss testified Khan "was able to answer each and every question" she asked him, she was able to understand him, and he told her that he understood her questions and "the inmate handbook."

Deputy Prosecutor Cynthia Larsen<sup>3</sup> testified that Khan spoke with an accent and imperfect English, as did other witnesses, including Mirza and Sanober. However, Larsen did not have "any difficulty" understanding what Khan was saying during his testimony. Larsen said there was nothing in his manner or facial expressions that made her believe Khan was not understanding the proceedings. Larsen testified that if she had any concern that Khan needed an interpreter, she would have raised the issue and that she did not do so.

Lennard Nahajski has practiced in the field of criminal defense since 1992. Nahajski testified that he met with Khan in jail at least 5 times and had at least 18 telephone conversations with him before trial. Nahajski discussed prospective witnesses with Khan and extensively prepared Khan for his own testimony. Nahajski also had a lengthy discussion with Khan about whether to seek a continuance of the

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<sup>3</sup> At the time of the reference hearing, Larsen was a Snohomish County Superior Court judge.

trial date to subpoena records from R.H.'s Myspace<sup>4</sup> account, and Khan agreed that he should. Nahajski testified that he has represented "many" clients for whom English is not their first language and that "it's readily apparent" to him when a client needs an interpreter. Nahajski testified that Khan never requested an interpreter, that he did not need to use an interpreter to understand Khan's English, and that Khan did not express or exhibit any apparent inability to speak or understand English. Nahajski testified that "based on his interactions with me it appeared to me that he was understanding 100 percent." Nahajski denied that he ever told Khan that an interpreter would "make him look bad."

Snohomish County Superior Court Judge Kenneth Cowsert presided over Khan's trial. Judge Cowsert testified he did not have any difficulty understanding Khan and it appeared Khan understood the allegations against him and was adequately able to communicate. Judge Cowsert testified that as a judicial officer, it was his responsibility to intervene and obtain an interpreter for a defendant who could not understand the proceedings, "whether or not the parties appearing in front of [him] had raised that same concern."

Detective Steven Martin was the detective who investigated the alleged crimes against R.H. and advised Khan of his rights during an interview. Detective Martin testified that he gave Khan an explanation of rights form and that he read the form aloud to Khan and "asked for him to read along with me." Detective Martin testified that Khan acknowledged that he understood his rights verbally and signed the form. Detective Martin testified that after Khan told him that he understood his rights, Khan requested to

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<sup>4</sup> Myspace is a social networking website.

to speak to an attorney and Detective Martin terminated the interview. The court admitted the explanation of rights form signed by Khan into evidence. During the examination of Detective Martin, the prosecutor played the audio recording of Martin's interview with Khan.

Detective Martin also attended the trial. Detective Martin testified that he sat at counsel's table and observed Khan throughout the trial. Detective Martin testified that he did not have any difficulty understanding Khan and that Khan appeared to be comprehensively responding to the questions asked him at trial.

The superior court issued a letter ruling. The superior court first addressed whether Khan's constitutional or statutory right to an interpreter was violated. The court concluded his constitutional right to an interpreter was not violated because Khan "was capable of making himself understood," "seemed to readily comprehend questions put to him," and "was able to clearly express his defense." By contrast, the court notes that the statutory right to an interpreter is "more extensive than the constitutional" right. The court ruled that chapter 2.43 RCW guaranteed the right to an interpreter for non-English speakers, and that a non-English speaking person is any person involved in a legal proceeding who cannot "readily" speak or understand the English language. RCW 2.43.020(4). The superior court concluded that Khan's statutory right to an interpreter was violated. Although Khan "was able to make himself understood and present his defense, that ability does not equate to being readily able to speak the English language."<sup>5</sup>

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<sup>5</sup> Emphasis added.



The court then turned to whether Khan was prejudiced by the lack of an interpreter. The court states Khan "has not identified a single instance where he would [have] done anything differently had there been an interpreter." The court concluded that Khan was not prejudiced because he could not show "a reasonable probability that but for counsel's errors, the result of the trial would have been different."

The superior court entered findings of fact and conclusions of law consistent with the letter ruling. The findings of fact and conclusions of law state:

A. FINDINGS OF FACT

1. Prior to and during trial, the defendant was readily able to understand and be understood by his trial counsel.
2. During trial, the defendant was able to readily comprehend the questions that were asked of him and make himself understood while testifying.
3. During trial, the defendant spoke in broken English and sometimes strained to find the right word or words to express himself. He was nonetheless able to clearly express his defense.
4. The defendant has not established that he would have done anything differently at trial if an interpreter had been provided.
5. There is no reasonable probability that the result of the trial would have been different if the defendant had been provided an interpreter. This court's confidence in the outcome has not been undermined.

B. CONCLUSIONS OF LAW

1. A defendant has a constitutional right to an interpreter if he is incapable of comprehending questions or of making himself understood in English. Since the defendant in this case was capable of doing those things, his constitutional right to an interpreter was not violated.
2. Under RCW 2.43.010, a defendant has a statutory right to an interpreter if he cannot readily understand or communicate in the English language due to a non-English-speaking cultural background. "Readily" means "in a ready manner" or "without much difficulty." Since the defendant spoke in broken English and sometimes strained to find the right word or words to express himself, he had a statutory right to an interpreter.
3. To establish prejudice from the lack of an interpreter, the defendant must establish a reasonable probability that the outcome of the trial [would] have been different if an interpreter

was provided. Since no such probability exists, the defendant has failed to establish prejudice.

The superior court denied Khan's personal restraint petition. Khan appeals.

#### ANALYSIS

The sole issue on appeal is whether the superior court erred in finding Khan was not prejudiced by the lack of an interpreter for his trial. We conclude substantial evidence supports the superior court findings.

To be entitled to relief by way of a personal restraint petition, a petitioner must establish either constitutional error that caused actual and substantial prejudice or a nonconstitutional error that constitutes a fundamental defect that results in a complete miscarriage of justice. In re Pers. Restraint of Davis, 152 Wn.2d 647, 671-72, 101 P.3d 1 (2004). A petitioner who makes a successful ineffective assistance of counsel claim has necessarily met his burden to show actual and substantial prejudice. State v. Buckman, 190 Wn.2d 51, 63, 409 P.3d 193 (2018) (citing In re Pers. Restraint of Crace, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012)).

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel to help ensure a fair trial. State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). To prevail on an ineffective assistance of counsel claim, a defendant must show both deficient performance and resulting prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish prejudice, a defendant must show there is a reasonable probability that the result of the trial would have been different but for counsel's deficient performance. Strickland, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the

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outcome.” Strickland, 466 U.S. at 694. “The likelihood of a different result must be substantial, not just conceivable.” Harrington v. Richter, 562 U.S. 86, 112, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

Ineffective assistance of counsel claims present mixed questions of law and fact. State v. Lopez, 190 Wn.2d 104, 116, 410 P.3d 1117 (2018). We review a trial court’s factual findings made in the course of deciding an ineffective assistance issue for substantial evidence. Lopez, 190 Wn.2d at 116. We review the legal conclusions flowing from the factual findings and testimony de novo. Lopez, 190 Wn.2d at 116-17. Substantial evidence is “defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true.” Sunnyside Valley Irrig. Dist. v. Dickie, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Unchallenged findings of fact are verities on appeal. State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005).

Khan challenges finding of fact 5 that states, “There is no reasonable probability that the result of the trial would have been different if the defendant had been provided an interpreter.” Khan contends that the evidence at the reference hearing shows “[i]t is reasonably probable that the jury’s assessment of Khan’s credibility at trial rested in significant part on the language barrier” and “[t]hat fact alone undermines confidence in the outcome and requires reversal.” We disagree.

First, finding of fact 3 states that Khan “spoke in broken English and sometimes strained to find the right word or words to express himself” but “was nonetheless able to clearly express his defense.” Khan does not challenge this finding and it is therefore a

verity on appeal. Second, substantial evidence supports the finding that Khan did not show prejudice. None of Khan's witnesses at the reference hearing, with the exception of one,<sup>6</sup> had ever met or spoken with him. Attorney Stansell and linguistics professor Dr. Leonard based their opinion of Khan's communication abilities entirely on the written record of the trial. But there are a host of factors that are impossible to capture in a transcript, such as facial expressions, gestures, demeanor, body language, and tone of voice. In contrast, Khan's defense counsel, the prosecutor, and the trial judge witnessed Khan testify and spent significant time interacting with Khan in person. And all three agreed that Khan was able to understand the questions put to him and communicate his defense to the jury. The superior court found their testimony more relevant and credible than that of Stansell and Dr. Leonard. We defer to the trier of fact to weigh conflicting testimony and the credibility of witnesses, and accordingly we do not disturb its findings on appeal.

Khan compares this case to State v. Aljaffar, 198 Wn. App. 75, 392 P.3d 1070, review denied, 188 Wn.2d 1021, 398 P.3d 1143 (2017). But Aljaffar supports the superior court's finding that Khan did not show prejudice. In Aljaffar, defense counsel advised the court of the need for an Arabic interpreter, but the trial court appointed an uncertified interpreter without the requisite finding of good cause. Aljaffar, 198 Wn. App. at 78-79. At a reference hearing, a certified Arabic interpreter found multiple discrepancies between the English spoken at trial and the Arabic interpretation, as well as instances where no interpretation was provided at all. Aljaffar, 198 Wn. App. at 81. We noted that an inadequate English interpretation of the defendant's testimony "could

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<sup>6</sup> GED instructor Anderson.

have detracted from the jury's ability to assess [the defendant]'s credibility." Aljaffar, 198 Wn. App. at 86. However, we concluded that the evidence presented at the reference hearing established the defendant was not prejudiced because he "was able to relay his version of the incident to the jury" during the trial. Aljaffar, 198 Wn. App. at 87.

Likewise, here, Khan does not show prejudice. It was clear from the testimony that Khan understood what an erection was. Defense counsel was the first to raise the issue, asking if Khan had an erection while in the loft area. Khan said, "She is my daughter. I don't even think this way." Though Khan answered "[n]ever" when the prosecutor asked if he had ever had an erection, Khan immediately clarified that he meant he had never had an erection in front of his children by stating, "Look at this, this is my family. Okay, front of my kids, what I'm showing this kind of thing? I am respectable person." Further, on redirect, Khan testified, "I mean not front of kids. . . . [W]henever I do, inside my room." None of the other grammar or word choice errors identified by Dr. Leonard had any impact on the jury's ability to understand Khan. Khan has not shown a substantial possibility that had he been provided an interpreter, the jury would have acquitted him of the charges.

Khan challenges finding of fact 4 that states, "The defendant has not established that he would have done anything differently at trial if an interpreter had been provided." Khan argues that Strickland requires finding only a reasonable probability of a different outcome, not that the defendant or defense counsel would have acted differently. The findings of fact show the court used the Strickland standard for prejudice. See Strickland, 466 U.S. at 694. First, as noted, finding of fact 5 states, "There is no

reasonable probability that the result of the trial would have been different if the defendant had been provided an interpreter. This court's confidence in the outcome has not been undermined." Second, the language the court used in finding of fact 4 mirrors the language the Washington Supreme Court used in explaining the remand for a reference hearing:

Khan has not established prejudice sufficient to justify vacating his conviction. He simply has not shown that, even assuming counsel was deficient in failing to secure an interpreter, " 'there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different.' " In re Pers. Restraint of Brett, 142 Wn.2d [868,] 873[, 16 P.3d 601 (2001)] (quoting [State v. Hendrickson, 129 Wn.2d [61,] 78[, 917 P.2d 563 (1996)]). This is likely in part a consequence of the high level of abstraction with which Khan is approaching this issue, rather than drilling down into how the lack of an interpreter caused him prejudice by demonstrating what specifically he would have done differently had he understood the proceedings or questions. While we understand that he believes this is structural error, he would have been well advised to present sufficient evidence and argument of prejudice in the alternative. See In re Pers. Restraint of Coats, 173 Wn.2d [123,] 132[, 267 P.3d 324 (2011)] (citing In re Pers. Restraint of Elmore, 162 Wn.2d 236, 251, 172 P.3d 335 (2007)); In re Pers. Restraint of Rice, 118 Wn.2d [876,] 886[, 828 P.2d 1086 (1992)].

Khan, 184 Wn.2d at 692.<sup>7</sup> We do not find any error with regard to finding of fact 4.

Khan challenges findings of fact 1 and 2. Finding of fact 1 provides, "Prior to and during trial, the defendant was readily able to understand and be understood by his trial counsel." Finding of fact 2 provides, "During trial, the defendant was able to readily comprehend the questions that were asked of him and make himself understood while testifying." Khan contends that these findings "appear to involve a scrivener's error"

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<sup>7</sup> Emphasis added.

because the findings are inconsistent with conclusion of law 2 that states:

Under RCW 2.43.010,<sup>[8]</sup> a defendant has a statutory right to an interpreter if he cannot readily understand or communicate in the English language due to a non-English-speaking cultural background. "Readily" means "in a ready manner" or "without much difficulty." Since the defendant spoke in broken English and sometimes strained to find the right word or words to express himself, he had a statutory right to an interpreter.

We agree that there appears to be an ambiguity between use of the word "readily" in the findings of fact and use of the word "readily" in the conclusion of law. But the letter ruling clarifies the inconsistency. In the letter ruling, the court states that while Khan was able to "readily" understand English, he was not able to "readily" speak English:

While the record and witness testimony reflects that Mr. Khan was able to readily understand English, he spoke in broken English and sometimes strained to find the right word or words to express himself. The testimony of both Dr. Leonard and Ms. Anderson place Defendant's English speaking proficiency at a grade school level. While Defendant was able to make himself understood and present his defense, that ability does not equate to being readily able to speak the English language.

A superior court's letter ruling may be considered for the purpose of interpreting its findings of fact and conclusions of law. State v. Wilks, 70 Wn.2d 626, 629, 424 P.2d 663 (1967). In context, the superior court found that Khan was able to "readily" understand the proceedings and the questions asked, that Khan was able to communicate and present his defense, and that he was not "readily" able to speak English. The findings are not inconsistent with the conclusion that the lack of an

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<sup>8</sup> RCW 2.43.010 provides, in relevant part:

It is hereby declared to be the policy of this state to secure the rights, constitutional or otherwise, of persons who, because of a non-English-speaking cultural background, are unable to readily understand or communicate in the English language, and who consequently cannot be fully protected in legal proceedings unless qualified interpreters are available to assist them.

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interpreter did not violate his constitutional rights but was a violation of his statutory right to an interpreter.

We affirm the superior court order denying the personal restraint petition.

Schneider, J.

WE CONCUR:

Andrus, J.

Appelwick, CJ



**NIELSEN, BROMAN & KOCH P.L.L.C.**

**December 06, 2019 - 9:20 AM**

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