

No. 65495-1-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

JOHN BIEL,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. John Biel was denied due process and a fair trial because an incompetent interpreter was used during portions of his trial including his testimony.

2. The trial court deprived Mr. Biel of his Sixth Amendment right to present a defense when it barred the admission of relevant evidence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth Amendment to the United States Constitution guarantees the right to present a defense, including to confront witnesses and to be present at one's own trial. The Fourteenth Amendment to the United States Constitution guarantees a defendant the right to due process and fair proceedings. These rights entitle non-English-speaking defendants to competent interpreters. Where the record establishes the interpreter used during portions of trial including Mr. Biel's testimony was not providing competent interpretation, was Mr. Biel denied a fair trial?

2. The Sixth Amendment to the United States Constitution guarantees an accused person the right to present a defense and meet the charges against him. Here, the trial court barred Mr. Biel from introducing relevant evidence of bias of a crucial witness for

the State. Did the court deprive Mr. Biel of his right to present a defense?

C. STATEMENT OF THE CASE

In August 2006, John Biel, a Sudanese refugee, travelled to the Seattle area from Nebraska on his way to find a fishing job in Alaska. 11/5/09 RP 158-59. During his brief time in the Seattle area, Mr. Biel stayed at the Kent apartment of a fellow Sudanese refugee, Simon Bol. 11/5/09 RP 166-68.

I.C. had been kicked out of her mother's home and was sitting in a bus shelter. 11/4/09 RP 59, 63. While there, she met a black male and accepted his invitation to stay at his home for the night. 11/4/09 RP 64-66. I.C. and the man walked to an apartment, later identified as Simon Bol's, where two other men were present. 11/2/09 RP 22-23; 11/4/09 RP 69-70. I.C. testified she and the man she had met on the street sat on a bed in one of the apartment's bedrooms drinking alcohol. 11/4/09 RP 71. I.C. then fell asleep. 11/4/09 RP 77. I.C. testified she was later by the same man who then raped her. 11/4/09 RP 77-79. I.C. then left the apartment and called police. 11/4/09 RP 84

Immediately following the incident, I.C. described the rapist as a tall, skinny African male wearing a black baseball hat with

white stripes, with a scar on his cheek. 11/2/09 RP 19. Mr. Biel has ritualistic scarring on his forehead. 11/2/09 RP 40. No black hat matching I.C.'s description was recovered from the apartment. In court, I.C. identified Mr. Biel as the person who raped her.

Mr. Bol testified he had fallen asleep while Mr. Biel and Andrew Rang, a roommate, were drinking. 11/2/09 RP 121-22. Mr. Bol claimed that he woke up later and saw I.C. with Mr. Biel sitting in the bedroom. 11/2/09 RP 125-27. Mr. Biel testified he had fallen asleep earlier in the evening in the bedroom and that he never left the apartment that night. 11/5/09 RP 196. Mr. Biel had never seen I.C. prior to her testimony. 11/5/09 RP 200.

While male DNA was found in swabs taken from I.C. during a medical examination following her allegations, it was not matched to Mr. Biel's. 11/4/09 RP 18-22. I.C.'s DNA was found in a small blood stain on the shirt Mr. Biel was wearing when he was arrested. 11/4/09 RP 25.

The State charged Mr. Biel with one count of second degree rape. CP 6. Because his native language is Nuer, and he only speaks broken English with a heavy accent, Mr. Biel relied on interpreters to assist him through the proceedings. See, e.g., 10/26/09 RP 3-5. A jury convicted Mr. Biel as charged. CP 28.

D. ARGUMENT

1. INCOMPETENT INTERPRETATION DENIED MR. BIEL A FAIR TRIAL

a. Non-English speaking defendants are entitled to competent interpretation. The Sixth Amendment to the United States Constitution requires the appointment of an interpreter for a non-English speaking defendant. State v. Gonzales-Morales, 138 Wn.2d 374, 379, 979 P.2d 826 (1999); State v. Teshome, 122 Wn.App. 705, 711, 94 P.3d 1004 (2004) review denied, 153 Wn.2d 1028 (2005). Due process requires that a person who is not fluent in English be provided a qualified interpreter during all legal proceedings. U.S. Const. Amend. XIV; Const. Art. I, § 3; Gonzales-Morales, 138 Wn.2d at 379; Negron v. New York, 434 F.2d 386, 389 (2nd Cir. 1970). That right requires a competent interpreter. See State v. Pham, 75 Wn.App. 626, 633, 879 P.2d 321 (1994). The right to competent interpretation is grounded in “considerations of fairness, the integrity of the fact-finding process, and the potency of our adversary system of justice.” Negron, 434 F.2d at 389.

Similarly, the Legislature has codified this right declaring that

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.

RCW 2.43.010. These rights and principles logically extend the right to competent interpretation from the defendant herself to defense witnesses. E.g., Negron, 434 F.2d at 389; Teshome, 122 Wn.App. at 712.

The Legislature has codified the requirement of competent interpretation. Under RCW 2.43.030, where an interpreter is not certified by the administrative office of the courts, the court must find “good cause” for using a non-certified interpreter and “satisfy itself on the record” that the proposed interpreter is competent. RCW 2.43.030(1)(b) & (2). Good cause may exist where there is no interpreter certified in the language required. RCW 2.43.030(1)(b)(ii). However, competency must still be evaluated on the record. The statute sets forth the following mandatory scheme for ensuring competency of a non-certified interpreter:

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:

(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.

RCW 2.43.030(2).

b. Because he did not receive competent interpretation, Mr. Biel was denied a fair trial. Competence is lacking where the rights of non-English speakers are not protected in court proceedings. Teshome, 122 Wn.App. at 712. Accuracy of the interpretation is one measure of competency. Id. at 712-13. As the Ninth Circuit has held, direct evidence of incorrectly translated words is persuasive evidence of incompetent interpreting. Perez-Lastor v. I.N.S., 208 F.3d 773 (9th Cir. 2000); see Teshome, 122 Wn.App. at 713 (relying on Perez-Lastor). A nonsensical interpretation is also evidence of lack of competency. Teshome, 122 Wn.App. at 712 (quoting United States v. Cirrincione, 780 F.2d 620, 634 (7th Cir. 1985)). Repeated indications of the interpreter's inability to competently translate trial testimony may show that the defendant's right to understand what is happening at his own trial, and in essence his right to be present, were violated. For example,

in Teshome, error occurred where the interpreter was interpreting in a language that was not certified by the State of Washington, and the court asked only two questions about his qualifications. 122 Wn.App. 705. The court did not inquire about the interpreter's education in English or in the language of the defendant, Amharic. The court did not ask the defendant about her comfort with the interpreter. The court did not ask if the interpreter was familiar with the code of ethics. Instead, the court made the assumption that because the interpreter had interpreted in the past, he must be qualified. Teshome, 122 Wn.App. at 710-11. Although the court ultimately held that the trial court's errors regarding the interpreter were only one factor in determining whether the appellant could withdraw his plea, the court noted that in cases of criminal trials on review, these errors are more dispositive. Id. at 712-14.

Here, the trial judge herself noted that during Mr. Biel's testimony, the translator was not translating Mr. Biel's testimony verbatim. The judge provided a specific example where she heard Mr. Biel say "Washington" but the interpreter did not repeat the word in his translation. 11/5/09 RP 177. In response the translator explained he was rephrasing questions and answers where there

was no Nuer counterpart to the English word. Id. at 178. The court instructed him he could not do that.

Mr. Biel subsequently filed a motion for new trial. Mr. Biel complained that the interpreter made several errors in interpreting his testimony to the jury. CP 82. Mr. Biel's trial attorney, called as a witness by the State in response to the motion for new trial, also detailed that Mr. Biel had difficulty using the interpreter.

This is not a case in which the only evidence of inadequate interpretation is an after-the-fact complaint by the defendant. Instead the interpretation was so obviously flawed that both the trial judge and defense attorney, neither of whom spoke Nuer, noticed its inadequacy. The interpreter himself explained he had been rephrasing questions and answers during Mr. Biel's testimony. That is not the "accurate" translation required by RCW 2.43.030(2). It is not the competent translation demanded by due process.

Mr. Biel was denied his right to competent interpretation and thereby his right to a fair trial.

c. This Court must reverse Mr. Biel's conviction so that he may have a trial that satisfies due process. A constitutional error requires reversal unless the State can establish beyond a reasonable doubt the error "did not contribute to the verdict

obtained.” Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); United States v. Neder, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). Incompetent translation is like no interpretation at all. It is clear from the record that Mr. Biel was not receiving competent interpretation during his testimony to the jury. There is nothing in the record that would enable the State to prove the incompetent interpretation was harmless. The Court must reverse Mr. Biel’s conviction.

2. THE TRIAL COURT DENIED MR. BIEL HIS RIGHT TO PRESENT A DEFENSE BY EXCLUDING HIGHLY RELEVANT EVIDENCE

a. Mr. Biel properly offered evidence establishing bias by Simon Bol. Mr. Biel had \$1760 and two ATM cards with him when he arrived at Mr. Bol’s apartment. 11/5/09 205. That money, the ATM cards, and the remainder of his property was left at Mr. Bol’s apartment following Mr. Biel’s arrest.

During cross-examination of Simon Bol, defense counsel began questioning him about the whereabouts of Mr. Biel’s property. While on the witness stand, Mr. Bol unexpectedly took the ATM cards from his pocket and handed them to defense counsel. 11/3/09 RP 20. When defense counsel sought to ask Mr.

Bol if he had used the cards, the deputy prosecutor objected.

11/3/09 RP 21.

The deputy prosecutor noted his objection was based only on the fact that he was unaware of this information and wished to interview Mr. Bol before defense counsel inquired further. 11/3/09 RP 50. Defense counsel explained the evidence should be admissible under ER 403(b) as evidence of bias, and ER 608(b) as a specific instance of conduct relevant to Mr. Bol's credibility.

The court sustained the objection, but not on the limited basis which the prosecutor had presented. The court instead concluded Mr. Bol's use of the ATM cards was not relevant.

11/3/09 RP 55-56.

b. The court's exclusion of relevant evidence denied Mr. Biel his right to present a defense. The Sixth and Fourteenth Amendments separately and jointly guarantee an accused person the right to a meaningful opportunity to present a defense. (Citations and internal quotations omitted.) Holmes v. South Carolina, 547 U.S.319, 324, 126 S.Ct 1727, 164 L.Ed.2d 503 (2006). Article I, section 22 of the Washington Constitution provides a similar guarantee. State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996). A defendant must receive the

opportunity to present his version of the facts to the jury so that it may decide “where the truth lies.” Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); Chambers v. Mississippi, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). “[A]t a minimum, . . . criminal defendants have . . . the right to put before the jury evidence that might influence the determination of guilt.” Pennsylvania v. Ritchie, 480 U.S. 39, 56, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987).

The right to offer the testimony of witnesses ... is in plain terms the right to present a defense, the right to present the defendant's version of the facts.... [The accused] has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.”

Washington, 388 U.S. at 19

i. Evidence of Mr. Bol's theft from Mr. Biel was relevant. Relevant evidence tends to make a material fact more or less probable. ER 401. Relevant evidence is generally admissible. ER 402. Evidence of Mr. Bol's theft from Mr. Biel, following Mr. Biel's arrest was plainly relevant.

Mr. Bol identified Mr. Biel as the only person in the apartment who interacted with I.C. Because of I.C.'s inaccurate

identification, Mr. Bol's testimony was an important part of the state's case, and thus any matter which undercut his credibility or established bias was relevant. Mr. Bol had committed at least two felonies by taking Mr. Biel's ATM cards, and perhaps a third if he similarly acknowledged taking the cash Mr. Biel left behind. See RCW 9A.56.040 (A person is guilty of theft in the second degree if he or she commits theft of . . . property which exceeds seven hundred and fifty dollars in value . . . or . . . an access device.") That Mr. Bol had not been charged with at least three felonies arising from the circumstances surrounding the crime, was a fact that made his credibility more or less likely.

Bias is a term used in the "common law of evidence" to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest. Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony.

U.S. v. Abel, 469 U.S. 45, 52, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984)

(Citations omitted.)

Mr. Bol identified Mr. Biel as the only person in the apartment who interacted with I.C. This despite I.C.'s own identification, which was far from accurate when applied to Mr. Biel. Mr. Bol's testimony was an important part of the State's case, and thus any matter which undercut his credibility or established bias was relevant. The proffered evidence tended to establish Mr. Bol's bias and thus was relevant.

ii. Beyond its relevance, the evidence was also properly offered under ER 608(b). ER 608(b)

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Evidence of Mr. Bol's theft from Mr. Biel was probative of his untruthfulness. Proof of that theft did not rely on extrinsic evidence as Mr. Bol acknowledged he had Mr. Biel's ATM cards. The question of whether he had used the cards was similarly not based

upon extrinsic evidence. Thus, the evidence was properly offered under ER 608(b).

“Failing to allow cross-examination of a state's witness under ER 608(b) is an abuse of discretion if the witness is crucial and the alleged misconduct constitutes the only available impeachment.” State v. Clarke, 143 Wn.2d 731, 767, 24 P.3d 1006, cert. denied, 534 U.S. 1000 (2001) (citing State v. York, 28 Wn.App. 33, 621 P.2d 784 (1980)). Mr. Bol’s testimony was a crucial component of the State’s case. The proffered evidence was powerful impeachment evidence. The trial court abused its discretion in excluding it.

c. The trial court’s refusal to admit relevant evidence requires reversal of Mr. Biel’s conviction. Because the court’s exclusion of relevant evidence denied Mr. Biel his Sixth Amendment right to present a defense, the error requires reversal of Mr. Biel’s conviction unless the State can prove beyond a reasonable doubt that it “did not contribute to the verdict obtained.” Chapman, 386 U.S. at 24; Neder, 527 U.S. at 9. The State cannot meet this burden in this case.

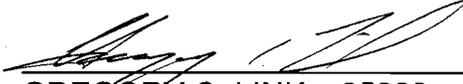
While I.C. testified at trial that Mr. Biel was the person that raped her, the description she provided police immediately

following the incident did not match Mr. Biel. She described a black male wearing a black baseball hat with white stripes and with a scar on his cheek. Mr. Biel did not have such a hat and did not have a scar on his cheek. By identifying Mr. Biel as the only person who was with I.C. that night, Mr. Bol's unimpeached testimony lent support to I.C.'s testimony. But had evidence of Mr. Bol's bias been presented to the jury, the impact of his testimony would have been lessened. Thus, the State cannot prove beyond a reasonable doubt that the exclusion of relevant evidence of bias was harmless. This court must reverse Mr. Biel's conviction.

E. CONCLUSION

For the reasons above, this Court should reverse Mr. Biel's conviction.

Respectfully submitted this 28th day of February, 2011.



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Respondent,)	
)	NO. 65495-1-I
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)	
JOHN BIEL,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF FEBRUARY, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF FEBRUARY, 2011.

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