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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

vs.

MAHADI ALJAFFAR

Appellant.

BRIEF OF APPELLANT

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I. IDENTITY OF THE APPELLANT

Mahadi Aljaffar is the Appellant in this cause.

II. ASSIGNMENT OF ERROR

- A. Mr. Aljaffar was denied his 6th 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. STATEMENT OF THE CASE

On December 4, 2014, a jury found Mr. Mahadi Aljaffar guilty of the following charges after, and over the defendant's objection, a non-certified court interpreter was permitted to interpret the case for the appellant: Two counts of indecent liberties by forcible compulsion and one count of unlawful imprisonment (RP 273-274). The jury found Mr. Aljaffar not guilty of one count of voyeurism and was "hung" on the second count of unlawful imprisonment (RP 274).

On the first day of trial, a discussion arose on the record over an issue where the court and ultimately Mr. Aljaffar were without a certified court interpreter. A discussion about that issue was then thoroughly addressed by the court. Prior to the actual commencement of trial, the court ordered that a *court certified* interpreter be obtained for the trial as Arabic was Mr. Aljaffar's native language (RP 5-6).

The State argued to the court without any evidence in the record whatsoever that a non-certified court interpreter, who was present in the courtroom on the first day of trial, was competent and requested that the Court qualify that interpreter and then use that same non-certified interpreter at trial. (RP 4-13).

The State justified its advocating the use of the non-certified interpreter, a Mr. Beirouty, by stating without any evidence whatsoever in the record:

“Spokane County does not have a court-certified Arabic language interpreter. They have a contract with an individual who is a court certified Arabic interpreter, however, that individual is on the west side of the state. So logistically it is difficult to have that person here. Further, that person would not have been available to proceed with interpretation at the start of this trial, which was set for December 1st” (RP 5).

The defense then objected to use of the prosecution’s proposed non-certified interpreter (RP 6, LN 25). Over the defendant’s objection and without any effort to find any facts to support a good cause finding for the use of a non-certified interpreter, the Court then allowed the non-certified interpreter to interpret the entire judicial proceedings and trial for Mr. Aljaffar. (RP 13-14). Confusion with the language of the interpretation later became apparent in the record. (*See, for example* RP 171). Mr. Aljaffar’s conviction ultimately followed.

IV. ARGUMENT

2. MR. ALJAFFAR'S 6TH AMENDMENT RIGHT TO BOTH CONFRONT WITNESSES AND BE PRESENT AT HIS OWN TRIAL WERE VIOLATED UNDER BOTH THE STATE AND FEDERAL CONSTITUTIONS BY THE TRIAL COURT'S ERRONEOUS APPROVAL OF A NON-CERTIFIED COURT INTERPRETER.

In Washington, a defendant has a constitutional right to a competent interpreter. *State v. Teshome*, 122 Wn. App. 705, 711, 94 P.3d 1004 (2004). This right is based on ““the Sixth amendment constitutional right to confront witnesses and the right inherent in a fair trial to be present at one's own trial.”” *Id.* at 709-10 (quotation marks omitted) (quoting *State v. Gonzales-Morales*, 138 Wn.2d 374, 379, 979 P.2d 826 (1999)). “The appointment of an interpreter is a matter within the discretion of the trial court to be disturbed only upon a showing of abuse [of discretion].” *State v. Gonzales-Morales*, 138 Wn.2d 374, 381, 979 P.2d 826 (1999).

The legislature has codified these rights, in part, in chapter 2.43 RCW. Every non-English-speaking person in a legal proceeding is entitled to the services of a court-appointed, qualified interpreter. RCW 2.43.030. The 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 (*Italics and bold added*).

Good cause to excuse the burden placed upon the court for the mandatory use of a certified interpreter may be, for example, that no certified interpreter is reasonably available (not the case here as an Arabic interpreter was presumably under contract with the Spokane County Superior Court) (RP 5)). *RCW 2.43.030(1)(b)(i). State v. Lakilado 167 Wn. App. 1015, (Div. 1)(2012).*

As indicated in *Lakilado*, the controlling statute for the use of and subsequent judicial appointment of an interpreter in Washington state is *RCW 2.43.030*. It states the following:

“(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.

(a) Except as otherwise provided for in (b) of this subsection, the interpreter appointed shall be a qualified interpreter.

(b) Beginning 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 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 []**.

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:

- (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,

Unfortunately, and in Mr. Aljaffar’s case, the presiding judge who made the decision to allow a non-certified interpreter did not make an informative good cause inquiry on the record at all. (RP 13-16). In his ruling, the judge stated the following:

“THE COURT: All right. As I understand the rule and the law, that if someone is not certified, it is required that the Court qualify the proposed interpreter as an expert. And if the Court qualifies someone as the expert, then to administer an oath to them. I apologize. 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. I think he is sufficiently qualified to interpret in this case. Having said that, I just need to administer the oath. Then I think once we do that, we're okay; we can proceed" (RP 13-14).

At no time did the trial court in any way address the "the totality of the circumstances, including the nature of the proceeding and the potential penalty or consequences involved, as directed by *R.C.W. 2.43.030*. (RP 13-16). Nowhere does the record indicate that the services of a certified interpreter were not reasonably available to the appointing authority," as directed by (1)(b)(i) of *RCW 2.43.030*. (RP 13-16).

The record does not indicate as to what "logistical" difficulty prevented the use of a certified interpreter, as was claimed by, but without supporting evidence of the prosecution, would be involved in securing the services of the certified Arabic interpreter that was apparently under contract with Spokane County Superior Court. (RP 5).

The record is absent any showing that the certified Arabic Interpreter under contract by Spokane County could not be available within a reasonable time from the scheduled day for trial to commence. (RP 5-16). As important to our Supreme Court in *State v. Gonzales- Morales*, 138 *Wn.2d* 374, 381, 979 *P.2d* 826 (1999) and citing *RCW 2.43.030*, Mr. Aljaffar's trial court did not make any effort to determine "on the basis of testimony or stated

needs of the non-English- speaking person, that the proposed interpreter was able to interpret accurately all communications to and from such person in that particular proceeding. (RP 5-16) nor that the proposed non-certified interpreter had read, understood, or would abide by the code of ethics for language interpreters established by court rules as is also required. *RCW 2.43.030 (2)(a) and (b)*.

As discussed above, the state prosecutor made only the following statement, albeit unsupported by any evidence in the record to support that statement, that some reason existed for the use of a non-certified court interpreter:

“Spokane County does not have a court-certified Arabic language interpreter. They have a contract with an individual who is a court-certified Arabic interpreter, however, that individual is on the west side of the state. So logistically it is difficult to have that person here. Further, that person would not have been available to proceed with interpretation at the start of this trial, which was set for December 1st” (RP 5).

Even if the Court had accepted the State’s argument, and the record does not indicate that the trial court so accepted that argument, such a finding would not suffice and should not be considered a viable reason to find good cause. That is because, as the State advised the trial Court but without any factual support from the record, *Spokane County did have under contract an Arabic speaking Court certified interpreter from Western Washington* (RP 5).

Spokane County, of course, had undoubtedly contracted with that interpreter, referenced at RP 5, so that defendant's like Mr. Aljaffar could have both their Federal and State constitutional rights of due process and 6th amendment right to confront witnesses and be present at their own trial upheld by their being able to actually understand the testimony and evidence being presented against them.

If in fact, and there is nothing other than the prosecutor's statement to support this assertion, the west-side Arabic interpreter "would not have been available to start trial" (See, RP 5) the trial court could have either simply recessed the proceedings until the interpreter could appear or briefly continue the trial date on its own motion as ample "speedy trial" time was available.

The true problem here was that there was actually not a problem at all in finding and using an Arabic court certified interpreter. As the prosecutor so stated, *logistically it [would be] difficult to have that person here.* (RP 5).

An alternative to using the state certified Arabic interpreter would have been for the trial court to have followed *RCW 2.43.030* and make a record that there was good cause to use the non-certified interpreter if, after taking testimony and considering the needs of Mr. Aljaffar, that Mr. Aljaffar was able to understand the

non-certified interpreter so as to qualify Mr. Beirouty properly. For example, *Section 2 of RCW 2.43.030*, states that:

“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” (RCW 2.43.030(2) Emphasis added).

Under *RCW 2.43.030(2)*, the Court was required to make such a determination based on the “testimony or needs of the non-English speaking person” (*RCW 2.43.030(2)*). However, the only record made with regard to Mr. Aljaffar’s needs came when only the interpreter, and not Mr. Aljaffar, was very broadly questioned by the Court, and where the Court asked the prospective interpreter:

“The Court: And is Mr. Aljaffar indicating that he is understanding you?

Mr. Beirouty: Yes sir” (RP 11).

The Court, of course, should have next inquired of Mr. Aljaffar, as is also required by *RCW 2.43.030 (2)*, whether he could understand the proceedings. A colloquy with Mr. Aljaffar could have been enlightening as to how much Mr. Aljaffar was able to understand from his non-certified court interpreter; as opposed to the interpreter being colloquied, and one collateral question that was

more of an aside being asked by the Court with regard to Mr. Aljaffar's ability to understand the non-certified interpreter.

The record demonstrates there was apparent and substantial difficulty with regard to Mr. Aljaffar understanding the non-certified interpreter when, for example, Mr. Aljaffar was being cross examined by the prosecution, such as this exchange:

Prosecutor: What identification did you use to get inside the bar?

Mr. Beiriuty: He answered a different answer, and I will try and rephrase that question again (RP 160, LN 5-8).

Whether Mr. Aljaffar's response to the prosecution's question was "he answered a different answer" as stated by Mr. Beiriuty, is not relevant to the translation. This is true unless, of course, Mr. Aljaffar's response to the prosecution's question "he answered a different answer and I will try and rephrase that question again" was Mr. Aljaffar's actual reply to the prosecution's question.

Yet there were other apparently confusing exchanges, for example:

Prosecutor: So why did you wait in the female's restroom?

Mr. Beirouty: I felt dizzy. And I needed to get some water.

Prosecutor: Why didn't you go to the other stall?

Mr. Beirouty: He didn't feel comfortable.

(RP 171). This translation indicates that Mr. Alhaffar was answering the prosecution's questions in the third person; a highly

unlikely scenario. More confusion followed, however:

Prosecutor: 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) (RP 171, LN 12-17).

The above actually indicates the great confusion the interpreter was having in understanding his own role as the interpreter. He appeared to be answering the questions more like a witness than an interpreter for Mr. Aljaffar.

And then there was this confusing exchange:

Prosecutor: But isn't it true that security wasn't aware that that had taken place yet?

Mr. Beirouty: He didn't understand the question

(RP 177, LN1-3).

Here, the interpreter is again answering the questions as a witness.

And finally this exchange:

Prosecutor: You weren't detained outside of the restroom?

Mr. Beirouty: They took him out to the street and they called the police.

Another example of third person translation. (RP 187).

Prosecutor: Okay. But isn't it true that you were detained outside of the women's bathroom?

Mr. Beirouty: They took him outside.

Prosecutor: The question, sir, is, you were detained outside of the women's restroom; correct?

Mr. Beirouty: He said outside. He answered many times.

The above is another example of the interpreter answering in the

third person and then interpreting for Mr. Aljaffar more as a witness. (RP 187).

Prosecutor: When you were detained by security, were you still inside the bar or were you detained outside the bar?

Mr. Beirouty: Outside.

Prosecutor: 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.

Prosecutor: You weren't detained --

The above demonstrates that Mr. Aljaffar was answering in the third person again. (RP 187-189).

As is demonstrated in the above cited portions of the transcripts, there was significant confusion due to the language barrier with the non-certified interpreter for Mr. Aljaffar during cross-examination. However, and to some extent because the court did not inquire of Mr. Aljaffar as is required by *RCW 2.43.030*, the Court of Appeals is now left to speculate as to how much Mr. Aljaffar understood when he was sitting at the defense table observing the trial and listening and trying to understand his accusers through his non-certified interpreter.

Mr. Aljaffar stated the following on direct examination with regard to his limited skills as an English language speaker:

Defense: Did you learn any English before you came into the United States?

Mr. Aljaffar: Like A, B, C, D; like, letters.

Defense: So aside from basic characters of the English language, when you arrived 15 months ago, you didn't understand any English; correct?

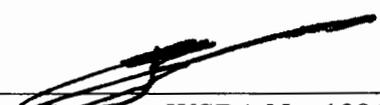
Mr. Aljaffar: Yeah. Almost like that.” (RP 146, LN 1-6).

The exchanges cited above further demonstrate why *RCW* 2.03.030 proscribes a process for vetting court interpreters.

Understandably, Mr. Aljaffar now believes he was denied his constitutional right to due process and 6th amendment right to face his accusers was compromised due to the use of the non-certified interpreter. This error of the trial court inhibited the communication between defense counsel and Mr. Aljaffar during the trial and limited Mr. Aljaffar’s own observations of his trial which were made in a foreign language.

V. CONCLUSION

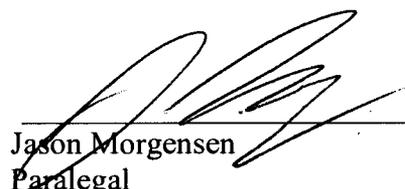
Mr. Aljaffar respectfully requests the Court to rule that the trial Court abused its discretion by not finding good cause to use a non-certified interpreter, and that the trial court improperly qualified the non-certified interpreter. Mr. Aljaffar is requesting that based on these errors, he was denied his right to due process and his 6th amendment right to confront his accusers and be present at his own trial, both under both the State and Federal constitutions, and that he should be given a new trial because of that error.



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CERTIFICATE OF SERVICE

I declare under penalty of perjury that on January 4, 2016, I placed a copy of this document in the United States Postal Service Mail, postage pre-paid addressed to the Court of Appeals Division III, 500 N Cedar St, Spokane, WA, 99201. I also placed a copy of this document in the United States Postal Service Mail, postage pre-paid, to Spokane County Prosecuting Attorney's Office at Public Safety Building, 1100 West Mallon, Spokane, WA 99260, and a copy was mailed to Mahadi Aljaffar, Washington Corrections Center, Shelton, WA.



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