

65575-2

65575-2

NO. 65575-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

Mary Lakilado,

Appellant.

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

APPELLANT'S OPENING BRIEF

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SUPERIOR COURT OF WASHINGTON
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A. SUMMARY OF ARGUMENT

Mary Lakilado attended a crowded party at a friend's house in October 2007. After an attendee Ms. Lakilado did not know was injured by a glass that struck her face, Ms. Lakilado was charged with second degree assault and a deadly weapon enhancement was later added. The jury trial came down to the word of Ms. Lakilado and her witnesses versus the word of the victim and her witnesses. Although the jury convicted Ms. Lakilado, her conviction should be reversed on several independent grounds.

First, though the second degree assault statute requires the State to show *intentional* assault that thereby *recklessly* inflicts substantial bodily harm, the jury instructions relieved the State of proving the separate mens rea as to each element.

Second, throughout the jury trial, Ms. Lakilado, who is from the Sudan and speaks Arabic, was assisted by an interpreter. Two of her key witnesses, the disc jockey at the party and a good friend and fellow partygoer, speak a different Arabic dialect and an interpreter was provided during their testimony. The court did not inquire as to the competency of the witnesses' interpreter. Confusion abounded during their testimony. Though defense

counsel was aware of the confused interpretations, no objection was made during trial.

After the trial, Ms. Lakilado's counsel moved to vacate the verdict and for a new trial based on the interpretive errors. An independent interpreter reviewed the audio recording of the witnesses' testimony and prepared a lengthy reconciliation of the interpretation as provided and as it should have been provided. Ms. Lakilado's motion was denied. The reconciliation, however, makes plain the interpretive errors and their prejudicial effect.

In the alternative, this Court should strike the jury's special finding that a deadly weapon was used because the trial court's instruction did not clearly instruct that unanimity was not required to reach a negative answer.

B. ASSIGNMENTS OF ERROR

1. Instruction 11, defining reckless, relieved the State of its burden to prove every element of the offense of second degree assault beyond a reasonable doubt and violated Mary Lakilado's right to due process under the Fourteenth Amendment.

2. Ms. Lakilado was denied due process and a fair trial because an incompetent interpreter was used during the testimony of two key defense witnesses.

3. Ms. Lakilado was denied her Sixth Amendment right to present a defense because an incompetent interpreter was used during the testimony of two key defense witnesses.

4. The trial court erred by failing to satisfy itself on the record that the interpreter for two key defense witnesses was competent.

5. The trial court erred by denying Mary Lakilado's motion to vacate the jury verdict based on errors in the interpretation for two key defense witnesses.

6. The trial court erred by denying Ms. Lakilado's motion for a new trial based on errors in the interpretation for two key defense witnesses.

7. Ms. Lakilado did not receive the effective assistance of counsel required by the federal and state constitutions because her attorney failed to notify the court and seek a mistrial or propose a new interpreter when counsel became aware of interpretation errors.

8. The trial court erred in giving Instruction No. 12, which improperly instructs on the issue of unanimity.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Due Process Clause of the Fourteenth Amendment requires the State prove each element of an offense beyond a reasonable doubt. Where a jury is instructed that proof of one element conclusively establishes another, the State is relieved of its burden of proof and the defendant is denied the process due. In a prosecution for second degree assault, where the State alleged Ms. Lakilado intentionally assaulted another and thereby recklessly caused injury, was the State relieved of its burden of proof when the jury was instructed that the proof of intent necessarily proves recklessness?

2. A criminal defendant has a Sixth Amendment right to present a defense, including to confront witnesses and to be present at one's own trial. The Fourteenth Amendment guarantees a defendant's right to due process and fair proceedings. These rights entitle non-English-speaking defendants and their witnesses to competent interpreters. In Washington, the right to competent interpretation is also secured by statute under Chapter 2.43 RCW. Where the interpreter for two key Arabic-speaking defense witnesses was not certified, good cause to use a non-certified interpreter was not evaluated, and the court did not satisfy itself of

competency on the record under RCW 2.43.030, and where a post-trial reconciliation proves numerous substantive interpretive errors as well as interpretations that threaten the witnesses' credibility or are nonsensical, should the conviction be reversed because the trial process violated defendant's constitutional rights.

3. The accused has the constitutional right to effective assistance of counsel at trial. An attorney's failure to object to trial error constitutes ineffective assistance of counsel under the Sixth Amendment where there is no reasonable tactical justification for the omission and the omission prejudices the accused. Where errors in interpretation for two key defense witnesses were brought to the attention of defendant's trial counsel and the court failed to satisfy itself as to the interpreter's qualifications on the record, was it ineffective assistance for counsel to fail to object or seek a new interpreter?

4. A jury does not need to be unanimous in a special verdict finding when it determines that the State has not met its burden of proof. Jury instructions must be manifestly clear to the average juror. The trial court instructed the jury that it had to be unanimous in reaching the special verdict and that it should answer "no" if it had a reasonable doubt. Where the deliberative process requires

accurate instructions on the requirement of unanimity, does the incorrect instruction undermine the jury's special verdict finding and require this Court to strike the special verdict?

D. STATEMENT OF THE CASE

Ms. Lakilado attended a party at a friend's house on October 7, 2007. 1/28/09RP 8; 2/2/09 11. Though Ms. Lakilado did not know all the attendees, most were acquaintances through a community of people originally from the Sudan. 1/27/09RP 14; 1/29/09 33; 2/2/09 8-9, 11-12. The house became quite crowded with partygoers. 2/2/09 11-12; 1/29/09 36; 1/28/09RP 54. It seemed as though everyone at the party was drinking, but people brought their own drinks and there were no drinks available for public consumption. 1/29/09RP 88; 2/2/09RP 33. Olympia Williams and her friend Latoya Jackson shared drinks, Smirnoff and White Zinfandel, before most of the crowd arrived. 1/27/09RP 11-12, 32-33; see 1/27/09RP 43. Though the testimony conflicted as to whether Ms. Lakilado had anything to drink at the party, at most she shared some wine with friends. Compare 1/27/09RP 14 (Jackson testimony that Lakilado and friend shared some wine) with 2/2/09RP 33 (Lakilado testimony that she drank nothing at the party); 1/28/09RP 36-37, 55 (not sure whether Ms. Lakilado drank

at party). She may have had one beer or half of a beer before arriving. See, e.g., 1/29/09RP 87-88; 2/2/09RP 33.

Babo Keny disc jockeyed the party and kept much of the crowd dancing in the center of the room. 1/29/09RP 34, 42. Mr. Keny testified that Ms. Lakilado and her friend Karamella Auko spent the evening far away on the other side of the room near his DJ station. 1/29/09RP 37-38, 48-49; see 2/2/09RP 13.

While Mr. Keny played a reggae song, everyone on the crowded dance floor raised their hands and glasses to the beat of the music. CP 200; 1/29/09RP 42, 61. Ms. Williams was struck in the face by a glass, resulting in cuts to her face. 1/27/09RP 25. The party disbursed and Ms. Williams was taken to the hospital. 1/27/09RP 28.

After a cursory investigation, Ms. Lakilado was charged with assault in the second degree for hitting Ms. Williams. CP 1; see 1/27/09RP 71, 73-74, 77, 81; 1/28/09RP 5, 9-10, 22-23, 27-29, 31-33, 36, 38-39. The information was later amended to include a deadly weapon enhancement. CP 5.

Additional facts are set forth in the relevant argument sections below.

E. ARGUMENT

1. INSTRUCTION 11 CREATED A MANDATORY PRESUMPTION ON THE ISSUE OF RECKLESSNESS RELIEVING THE STATE OF ITS BURDEN OF PROVING EACH ELEMENT OF SECOND DEGREE ASSAULT AND DEPRIVING MS. LAKILADO OF DUE PROCESS.

a. A jury instruction that creates a mandatory presumption violates the Due Process Clause of the Fourteenth Amendment.

A criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. Blakely v. Washington, 542 US. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The constitutional rights to due process and a jury trial “indisputably entitle a criminal defendant to ‘a jury determination that he is guilty of every element of the crime beyond a reasonable doubt.’” Apprendi, 530 U.S. at 476-77; U.S. Const. amends. VI & XIV.

To convict Ms. Lakilado of second degree assault, the State was required to prove she *intentionally* assaulted Ms. Williams and

“thereby *recklessly* inflict[ed] substantial bodily harm.” RCW 9A.36.021(1)(a) (emphasis added); CP 27.

Jury Instruction 11 created a mandatory presumption, providing that if the jury found Ms. Lakilado intentionally assaulted Williams, she necessarily “recklessly inflict[ed] substantial bodily harm” upon Williams.¹ That presumption improperly relieved the State of its obligation to prove the second element of this crime in violation of Ms. Lakilado’s right to due process.

A mandatory presumption is a presumption, created by jury instructions, that requires the jury “to find a presumed fact from a proven fact.” State v. Hayward, 152 Wn. App. 632, 642, 126 P.3d 354 (2009) (citing State v. Deal, 128 Wn.2d 693, 699, 911 P.2d 966 (1996)). A mandatory presumption exists if a reasonable juror would interpret the presumption to be mandatory. Sandstrom v. Montana, 442 U.S. 510, 514, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979); Hayward, 152 Wn. App. at 642.

¹ Instruction 11 states in full:

A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and that this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

When recklessness is required to establish an element of a crime, the element is also established if a person acts intentionally or knowingly.

CP 31.

Such presumptions violate a defendant's right to due process because they relieve the State of its obligation to prove every element of a charged crime. Sandstrom, 442 U.S. at 522 (impermissible presumption in jury instructions conflicts with presumption of innocence for each element of charged crime) (citing Morissette v. United States, 342 U.S. 246, 274-75, 72 S. Ct. 240, 96 L. Ed. 288 (1952)); Hayward, 152 Wn. App. at 642 (citing State v. Thomas, 150 Wn.2d 821, 844, 83 P.3d 970 (2004)); Deal, 128 Wn.2d at 699. A reviewing court must examine the jury instructions as a whole to determine if the mandatory presumption unconstitutionally relieves the State's obligation. Deal, 128 Wn.2d at 701; State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

b. Instruction 11 created an improper mandatory presumption.

The court's "to convict" instruction accurately defined the elements of assault in the second degree as:

- (1) That on or about October 7, 2007, the defendant intentionally assaulted Olympia Williams;
- (2) That the defendant thereby recklessly inflicted substantial bodily harm on Olympia Williams; and
- (3) That the acts occurred in the State of Washington.

CP 27 (Instruction 7); cf. RCW 9A.36.021. The jury was further instructed: “When recklessness is required to establish an element of a crime, *the element is also established if a person acts intentionally or knowingly.*” CP 31 (emphasis added) (Instruction 11).

A reasonable juror who found that Ms. Lakilado intentionally assaulted Williams (element one) would understand Instruction 11 to mean that the ‘recklessness element’ (element two) was also automatically established, because Lakilado had “act[ed] intentionally or knowingly.” See Jury Instruction 11. This confusion would naturally arise because Jury Instruction 11 does not inform the jury that the ‘intentional act’ must be specifically related to the second element of recklessness. In other words, it cannot be the intentional act related to the assault in element one. Jury Instruction 11 thus created a mandatory presumption. Sandstrom, 442 U.S. at 514; Hayward, 152 Wn. App. at 642, citing Deal, 128 Wn.2d at 701.

This conclusion is precisely the result this Court recently reached in Hayward. Just as in the present case, the first two elements in the “to convict” instruction in Hayward provided:

(1) That on or about the 25th day of March, 2007, the Defendant intentionally assaulted [the victim];

(2) That the Defendant thereby recklessly inflicted substantial bodily harm on [the victim].

152 Wn. App. at 640. The instructions stated further “Recklessness also is established if a person acts intentionally.” Id. This Court found the instructions created a mandatory presumption which

conflated the intent the jury had to find regarding Hayward’s assault against [the victim] with a [sic] intent to cause substantial bodily harm required by the recklessness mental state into a single element and relieved the State of its burden of proving [the defendant] recklessly inflicted substantial bodily harm.

Id. at 645 (internal citations omitted). The Court concluded

Without language limiting the substituted mental states (here, intentionally) to the specific element at issue (here, infliction of substantial bodily harm), as required by RCW 9A.08.010(2) and revised WPIC 10.03 (2008), [the jury instructions] violated [the defendant’s] constitutional right to due process by creating a mandatory presumption and relieved the State of its burden to prove [the defendant] recklessly (or intentionally) inflicted substantial bodily harm.”

Id. at 646.²

² The language of RCW 9A.08.010(2) does not limit the substituted mental states (‘intent’ or ‘knowledge’) to a specific element of a crime. However, RCW 9A.08.010(2) does not exist within the confines of a specific crime and could not, therefore, specify to which element ‘intent’ must relate. More importantly, this Court recognized in Hayward that RCW 9A.08.010(2) clearly intends to “limit[] the substituted mental states . . . to the specific element at issue.” Hayward 152 Wn. App at 646.

The instructions in Hayward are similar to those in the present case. Both instructions state that ‘recklessness’—or the ‘recklessness element’—is “established if a person acts intentionally.” Furthermore, neither instruction specifies that “intention” must be related to the element at issue. Just as in Hayward, Instruction 11 here violated Ms. Lakilado’s right to due process.

This Court reached a contrary result in State v. Holzknecht, 157 Wn. App. 754, 238 P.3d 1233 (2010), “respectfully disagreeing” with Hayward. The Holzknecht Court relied in part on a plurality decision in State v. Sibert, 168 Wn.2d 306, 316, 230 P.3d 142 (2010), a drug possession case, which found that defining knowledge to include acting intentionally did not create an improper presumption. Sibert is inapposite to the issue in the case at bar, because the only mens rea required for drug possession is knowledge of the possession of the drug and the Court found no possibility that the jury misunderstood the mens rea element when the “to-convict” instructions did not mention any other mens rea. 168 Wn.2d at 316.

On the other hand, assault in the second degree contains and requires the mens rea of intent and recklessness. RCW

9A.36.021; CP 27. For that crime, the Hayward Court correctly analyzed the confusion resulting from the jury being told that proof of intent necessarily proves recklessness.

Because the conclusive presumption required the jury to find the second element was established whenever the first was, the State was relieved of its obligation to prove all elements of assault in the second degree. This violated Ms. Lakilado's right to due process. U.S. Const. amend XIV; Sandstrom, 442 U.S. at 520 (citing In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)); Hayward, 152 Wn. App. at 642; Deal, 128 Wn.2d at 699.

c. This Court must reverse Ms. Lakilado's conviction.

A constitutional error is presumed prejudicial unless the government can show "beyond a reasonable doubt that the error complained of 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); Neder v. United States, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Applied to instructions which create a mandatory presumption, this standard requires reversal unless the error was "unimportant in relation to everything else the jury considered on the issue in question" Yates v. Evatt, 500 U.S.

391, 111 S. Ct. 1884, 114 L. Ed. 2d 432 (1991), overruled in part on other grounds, Estelle v. McGuire, 502 U.S. 62, 73 n.4, 12 S. Ct. 475, 116 L. Ed. 2d 385 (1991). To make this determination, a court must engage in two-step analysis. “First, it must ask what evidence the jury actually considered in reaching its verdict.” Yates, 500 U.S. at 404. In the second step, “it must then weigh the probative force of that evidence as against the probative force of the presumption standing alone.” Id. Elaborating on this part of the test, the Yates Court reasoned:

To satisfy Chapman’s reasonable-doubt standard, it will not be enough that the jury considered evidence from which it could have come to the verdict without reliance on the presumption. Rather, the issue under Chapman is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption. Since that enquiry cannot be a subjective one into the jurors’ minds, a court must approach it by asking whether the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the presumption. It is only when the effect of the presumption is comparatively minimal to this degree that it can be said, in Chapman’s words, that the presumption did not contribute to the verdict rendered.

Id. at 404-05. Thus, a reviewing court evaluating prejudice cannot rely on evidence drawn from the entire record “because the terms of

some presumptions so narrow the jury's focus as to leave it questionable that a reasonable juror would look to anything but the evidence establishing the predicate fact in order to infer the fact presumed." Id. at 405-06.

Here, the effect of the presumption was not "comparatively minimal." The presumption narrowed the jury's focus as to leave it questionable that a reasonable juror would look to anything but the evidence establishing the predicate fact in order to infer the fact presumed. Yates, 500 U.S. at 405-06. Instruction 11 told the jury that if they found Ms. Lakilado had a mens rea of intent she also necessarily had acted recklessly. CP 31. The instruction did this without limitation of which acts those mens rea were to apply to; i.e., jurors could presume guilty knowledge from proof of *any* intentional act. See id. A straightforward application of the instruction would require jurors to conclude that if they find Ms. Lakilado had intentionally assaulted Ms. Williams and Ms. Williams was injured, Ms. Lakilado necessarily inflicted the injury recklessly.

The prosecutor drew the jury's attention to this specific issue during closing argument, emphasizing the State's claim that Ms. Lakilado acted intentionally and minimizing the need to independently find recklessness. 2/3/09RP 8-9. In fact, the

prosecutor told the jury “these concepts [of intentionality and recklessness] overlap a little bit.” 2/3/09RP 8. The prosecutor continued by telling the jury that the recklessness element “is also established if a person acts intentionally” as defined in instruction number 9. 2/3/09RP 8-9. While the prosecutor may have intended to convey the State’s belief that Ms. Lakilado both intentionally assaulted Ms. Williams and intentionally caused substantial bodily harm, her argument further collapsed the distinct requirements of both an intentional assault and the causation of injuries that must be reckless at the least.

The absence of a limitation on which intentional act the jury could rely upon to find recklessness makes it impossible to know what act the jury actually relied upon, much less whether that act was independent of the predicate for presumption. Jurors could have focused on evidence of *any* intentional act, and disregarded all other evidence on the question. Under Yates and Chapman, the State cannot show the presumption was harmless beyond a reasonable doubt, i.e., that it did not contribute to the verdict obtained in this case.

2. MS. LAKILADO WAS DENIED DUE PROCESS AND HER RIGHT TO PRESENT A DEFENSE WHEN AN INCOMPETENT INTERPRETER WAS USED FOR TWO KEY DEFENSE WITNESSES AND NUMEROUS INTERPRETIVE ERRORS OCCURRED.

- a. Under the Sixth Amendment and the Due Process Clause, Ms. Lakilado has a constitutional right to competent translation at trial.

A non-English-speaking defendant has a constitutional right to a competent interpreter. See State v. Pham, 75 Wn. App. 626, 633, 879 P.2d 321 (1994). In Washington, a defendant's right to an interpreter 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." State v. Teshome, 122 Wn. App. 705, 711, 94 P.3d 1004 (2004) (quoting State v. Gonzales-Morales, 138 Wn.2d 374, 379, 979 P.2d 826 (1999)) (internal quotation omitted), review denied, 153 Wn.2d 1028, 110 P.3d 213 (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. 1, § 3; Gonzales-Morales, 138 Wn.2d at 379; Negron v. New York, 434 F.2d 386, 389 (2nd Cir. 1970). 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 Washington Legislature declares it state policy “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 further codified, in part, the right to competent interpretation in Chapter 2.43 RCW. 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).

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.

- b. The uncertified interpreter used for two key defense witnesses resulted in several substantive and other interpretive errors that deprived Ms. Lakilado of her constitutional right to competent translation.

Ms. Lakilado's key witnesses, Babo Keny and Karamella Auko, speak a Sudanese dialect of Arabic with an accent close to Juba Arabic. CP 284 (Decl. of Nadi Ali, ¶ 6). The provided interpreter spoke a different dialect, associated with the peoples of Lebanon, Syria, Palestine or Jordan, and was not certified by the administrative office of the courts. *Id.*; see RCW 2.43.030(1)(b).³ The trial court failed to conduct any inquiry under RCW 2.43.030 to satisfy itself on the record that the interpreter was competent.

The resulting record reflects several signs of incompetence. A post-trial reconciliation performed by an independent, qualified interpreter reveals (i) extensive interpretive errors that affected the substance of what was communicated to counsel, defendant, the court and the jury; (ii) nonsensical interpretations; and (iii) interpretive errors, which affected the credibility of the witnesses.

i. Interpretive errors that affected substantive issues before the jury. The post-trial reconciliation of testimony and interpretation reveals witness testimony on critical substantive

³ At the time of Ms. Lakilado's trial, there were no interpreters certified in Arabic. CP 59-60 (Decl. of Katrin Johnson, ¶ 3).

issues that was incorrectly interpreted. For example, much of the trial testimony focused on the layout of the room and the location of the victim and the defendant at the time of the alleged assault. Mr. Keny, the disc jockey at the party, was a key witness for Ms. Lakilado on this issue. He testified that the incident occurred in the middle of the make-shift dance floor amidst a crowd of dancers. 1/29/09RP 34, 42. Ms. Lakilado, on the other hand, was on the other side of the room near Mr. Keny's music station. 1/29/09RP 37-38. In one instance, the courtroom interpreter failed entirely to translate Mr. Keny's testimony regarding Ms. Lakilado's location:

Defense Counsel Question	Courtroom Interpreter's Interpretation of Question to Witness Babo Keny	Mr. Keny's Testimony (as interpreted post-trial by Nada Ali)	Courtroom Interpreter's Interpretation of Mr. Keny's Testimony (What the jury heard)
Okay. And you are saying that, you are at your DJ booth and Mary, Karamela.	You were in the DJ booth and Mary was?	On this side, they were toward the direction of the couch. We moved the chairs and the couch like that, but they are to this direction.	It's on the side where the couch is. And, we moved the couch there and we put a few chairs in that area.

CP 198-99 (emphasis added). The jury accordingly received no testimony in this instance regarding Ms. Lakilado's positioning. Mr. Keny, however, testified that she and Karamello Auko were on the side near the couch (away from the dance floor). Similarly, defense counsel, working contemporaneously through the courtroom interpreter, was not aware of Mr. Keny's testimony as to Ms. Lakilado; she had no basis to seek follow up testimony. Equally significant, the courtroom interpreter relayed later that Mr. Keny testified that Ms. Lakilado was "standing" on his left hand side, whereas Mr. Keny actually testified that Ms. Lakilado and her friends were "sitting toward the left hand side." CP 201; accord 1/29/09RP 92-93 (Auko testimony that she was sitting on couch).

On other key testimony regarding Ms. Lakilado's location at the time of the incident, the courtroom interpreter provided less specific information and emphasis than Mr. Keny's testimony reflects:

Defense Counsel Question	Courtroom Interpreter's Interpretation of Question to Witness Babo Keny	Mr. Keny's Testimony (as interpreted post-trial by Nada Ali)	Courtroom Interpreter's Interpretation of Mr. Keny's Testimony (What the jury heard)

Would it be fair to say that you were not watching where Ms. Waki Lado [sic] went the whole time you were there?	Can we say that you were not, Mrs. Lakilado all the time while you were there? You were not always watching her?	Not all the time. But Mary was on the left hand side. Even when the accident/incident happened she was on the left hand side and the girl was in the center/middle. That is, she was far from [Mary]. I mean this is what I recall. This is what I recall.	Ah, Not but all that I remember that she was, Mary was on my side , and when the incident occurred, the girl was far away when that happened. And that's what I remember.
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CP 223 (emphasis added).

In interpreting whether Mr. Keny discussed the ultimate issue—that Ms. Lakilado did not assault Ms. Williams—with his friends the next day, the simultaneous interpretation failed to pick up the unequivocal nature of Mr. Keny's testimony:

Defense Counsel Question	Courtroom Interpreter's Interpretation of Question to Witness Babo Keny	Mr. Keny's Testimony (as interpreted post-trial by Nada Ali)	Courtroom Interpreter's Interpretation of Mr. Keny's Testimony (What the jury heard)
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What about am, after this incident say the next day or anything, did you talk to your roommates or to anybody else?	After the accident occurred, the next day, did you talk with the roommates or with other friends about this issue??	Yes I spoke, I told them again, we spoke just like that [informally/ in conversation]. I told them Mary did not hit anybody.	I talked to them, yes, later and I told them I don't think that Mary hit that woman.
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CP 211-12.⁴

Interpretive errors also abounded on the substantive issue of whether Ms. Lakilado drank and, if so, how much she had to drink that evening. In response to direct defense counsel questioning on the issue, Mr. Keny, through the courtroom interpreter, testified he “guess[ed] she was drinking because everybody was drinking.” The reconciled interpretation, however, never posits his testimony so strongly; instead the most Mr. Keny testified was that “maybe she drank but I did not pay attention because everybody was drinking.” CP 192. In later testimony regarding what Mr. Keny said in a pretrial interview on the topic, the courtroom interpreter again failed to interpret Mr. Keny’s unequivocal testimony that he is not certain whether Ms. Lakilado drank at all:

⁴ Furthermore, in earlier testimony, the courtroom interpreter used the word “incident” whereas the reconciled interpretation recorded Mr. Keny as using the word “accident.” CP 193 (first full row). The jury simply heard the courtroom interpretation—incident.

Defense Counsel Question	Courtroom Interpreter's Interpretation of Question to Witness Babo Keny	Mr. Keny's Testimony (as interpreted post-trial by Nada Ali)	Courtroom Interpreter's Interpretation of Mr. Keny's Testimony (What the jury heard)
You didn't tell me at that interview that Mary was drinking and that you saw a drink in her hand?	Did you not tell me at that interview that Mary was drinking or whether you saw her holding a drink?	I do not remember [what she just said]. But what I said at the time, was that all the people were drinking. I am not certain whether Mary drank , but all people had drinks.	The, I do not recall but I recall one thing that I always said: that everybody was drinking there.

CP 219-20 (emphasis added).

Even more egregiously, the courtroom interpreter left out altogether testimony from Ms. Auko that Ms. Lakilado was pregnant and therefore could not drink a significant amount:

Defense Counsel Question	Courtroom Interpreter's Interpretation of Question to Witness Babo Keny	Mr. Keny's Testimony (as interpreted post-trial by Nada Ali)	Courtroom Interpreter's Interpretation of Mr. Keny's Testimony (What the jury heard)
But Mary was drinking at her house.	Mary was drinking at her house.	She may have had only one drink. Because at the time she was pregnant so she could not drink.	Yeah, it must have been that she drank in her house before the party.

CP 273 (emphasis added). Indeed, what the jury heard was that Ms. Lakilado “must” have drunk before the party. Id.; see also CP 245 (courtroom interpretation that Ms. Auko “think[s] Mary did” drink versus reconciled interpretation that Ms. Lakilado “might” have drunk), 272 (reconciled testimony shows Ms. Auko “did not see her [drink]” whereas courtroom interpreter stated (1/29/09RP 103) “I did not see her, but I know in her house, in her house was busy and everybody drink and I assume she did drink”).

Because of interpreter error, moreover, a possible defense might have slipped by defense counsel. While the evidence that Ms. Williams was hit by some glass object was fairly strong, there was conflicting evidence as to whether Ms. Lakilado had a motive

or intent to strike Ms. Williams and whether she was properly placed in the room at the time to have done so. Accordingly, an alternative explanation, such as an accidental collision between Ms. Williams and a drinking glass, might have sat well with the jury. Mr. Keny testified twice that at the time of the incident, everyone was dancing and raising their glasses in tune with the reggae music Mr. Keny was playing. CP 200, 230-31. Only the later testimony, on cross-examination by the prosecutor, was put before the jury and defense counsel. The court interpreter denied access to Mr. Keny's earlier testimony:

Defense Counsel Question	Courtroom Interpreter's Interpretation of Question to Witness Babo Keny	Mr. Keny's Testimony (as interpreted post-trial by Nada Ali)	Courtroom Interpreter's Interpretation of Mr. Keny's Testimony (What the jury heard)
So, when this woman was hurt, did you see her get hurt?	When she was hurt, did you see her get hurt?	I was, yeah, I heard something that said <i>taakh</i> (bang sound), just like that. Because when she was dancing, she was dancing toward the center, where young men were. I was playing reggae music, reggae songs of Jamaica, and [when people are dancing] they all raise their glasses up.	I was, I was playing music of Jamaica, everybody was raising his hands up, and in the middle of the center she was there and then I hear this pop sound.

CP 200 (emphasis added). The significance of this error relating to an alternative explanation for Ms. Williams' injuries was demonstrated at closing argument. At that time, the prosecutor told the jury, "[T]here's no one who's testified that this was in any way accidental." 2/3/09RP 10. Mr. Keny, indeed, had twice told the

jury—and defense counsel—that the incident may have been an accident, but the interpreter’s errors prevented the testimony from being heard.

ii. Interpretive errors which do not make sense or are plainly erroneous. The courtroom interpreter also provided interpretations that lacked logic, incorrectly conveyed counsel's questions, and demonstrated confusion as set forth in the below chart. Like the examples above, these errors collectively demonstrate a lack of competence.

Defense Counsel Question	Courtroom Interpreter’s Interpretation of Question to Witness Babo Keny	Mr. Keny’s Testimony (as interpreted post-trial by Ali Nada)	Courtroom Interpreter’s Interpretation of Mr. Keny’s Testimony (What the jury heard)
And that’s the girl that you saw him with before?	Was she the one you were talking with at the beginning? ⁵	Talking with?	I don’t I do not if you repeat that. I do not understand. ⁶

⁵ Misinterpretation of counsel's question. CP 189.

⁶ Misinterpretation of witness's testimony and shows confusion, though the proper interpretation (“Talking with?”) would have more clearly demonstrated that the confusion was a result of poor interpretation of counsel's question. CP 189.

Okay, does this look the same or at least similar to what it looked like [unclear—interrupted].	Is that the same or similar to the way the place [looked like] at the time?	No, that day we moved things around. We took that TV away, that table was not there. They were like that, one to this side and one to this side, and the chairs, we brought them from [unclear] and we placed them at . . .	Ah, we, from that day we changed things here in this room. TV and table we took it away. And the chairs we moved them one chair on that side one chair in this side.
		[no interpretation]	And then we make the circle there. ⁷
Okay, can you explain if it was, was it up against am this back wall here up against the [slider?] on the corner?	Was it at that side? ⁸	[irrelevant]	[irrelevant]

⁷ Courtroom interpretation contains additional line of testimony. CP 194-95.

⁸ Poor interpretation of counsel's question. CP 198; see Joanne I. Moore, ed., Immigrants in Courts at 39-40 (Univ. of Washington Press 1999) (stating "Uncertified interpreters' undetected alteration of material is one of the most frequent complaints of judges, non-English-speaking parties, newspaper reporters, and auditors examining court interpreters. Every known court and news audit has found similar interpreting distortions in legal proceedings where uncertified, untrained court interpreters are used."; providing examples).

And just to confirm, you testified under oath that you did not see how that woman got injured.	So as to confirm, you testified that you did not see anyone get hurt?	She means, she means?	What is your intent, what you, what're you saying? ⁹
When you went outside the first time, how many people were outside?	The first time you went outside, how many people were outside?	There were no people outside. Everyone ran out except me. Because Rubeca was not there. I was waiting for Rubeca. Standing at the door.	Everybody was outside [fn] I was the only one who was waiting there for Rebecca to come back. ¹⁰
Were there cars leaving?	There were many cars leaving?	There were not many cars. I was looking for a car.	Many cars were out there, yes.[fn] ¹¹
And where did you live at that time?	Where did you live at that time? Where	Twelve O'clock.	It was about midnight. 12 O'clock. ¹²

⁹ Both interpretations of witness testimony show confusion based on interpreter's misinterpretation of counsel's question. CP 230 (emphasis added).

¹⁰ The courtroom interpreter's rendering of Ms. Auko's testimony was so erroneous the subsequent interpreter placed a footnote explaining, "The witness said there was nobody out there, she was the only one waiting for Rebecca." CP 267 (emphasis added).

¹¹ Here, again, the subsequent interpreter inserted a footnote to emphasize that the courtroom interpreter had interpreted the witness's testimony to be exactly the opposite of what the witness actually said. CP 268 (emphasis added).

¹² Confusion is clearly demonstrated by the lack of correlation between counsel's question (regarding the location of Ms. Auko's residence) and the witness's testimony in response (regarding the time). CP 276.

	did you live? In which place/area?		
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See also CP 228 (interpretations of testimony regarding the fathers of Ms. Lakilado’s two children demonstrates possible interpreter confusion¹³).

iii. Interpretive errors that affected credibility of key witnesses. In addition to the errors in interpretation of substantive facts and nonsensical interpretations, some interpretive errors were particularly likely to have affected the credibility of the key defense witnesses. For example, Mr. Keny testified in response to questioning regarding whether he knew any other women at the party. 1/29/09RP 35. His reconciled testimony is interpreted as:

I swear to God [well], there were too many women. But those people, Sudanese you may know [the person] but not know their real names [i.e., in the Sudanese community some people may have more than one name].

CP 188. However, the courtroom interpreter’s version of the testimony leaves out the explanation that (a) “there were too many women” to know all their names and (b) sometimes in Sudanese culture one does not know another’s “real” name. CP 188.

¹³ See Moore, ed., *Immigrants in Courts*, *supra* n.8 at 37 (“Another indication of inadequate interpreting is confusing answers by witnesses or the necessity to keep repeating questions.”).

The court interpreter also jeopardized Mr. Keny's credibility on testimony regarding the individual fathers of Ms. Lakilado's two children. The jury heard from Ms. Lakilado that she had two children, that she was married to but had separated from the father of her oldest child, and that the father of the younger child did not reside in the area. 2/2/09RP 8-9, 27-29. In the subsequent, reconciled interpretation it is clear Mr. Keny confirmed this evidence and testified "I know the father . . . of her elder child; but do not know the second one. They separated." CP 228. However, the testimony presented to the jury through the courtroom interpreter first told the jury that Mr. Keny knew "the old husband, the father of her kids." CP 228 (emphasis added). The courtroom interpreter also had to explain some confusion between use of the phrases "elder son" and "first son." 1/29/09RP 60.¹⁴ The testimony presented to the jury also focused on the children rather than the fathers of these children, the focus of counsel's questions. See CP 228-29.

¹⁴ Though the transcript records the response as coming from the witness, because it states "I translated as the first son . . .," it apparently was made by the interpreter. See 1/29/09RP 60. Even if the statement can be attributed to the witness, however, the result is the same: the confusion in interpretation was such that someone felt the need to explain it.

In regards to Ms. Auko, her credibility was damaged by the courtroom interpreter providing testimony that was exactly the opposite of what she actually said. In response to questioning by defense counsel on direct regarding whether she recalled a pretrial interview, the courtroom interpreter relayed Ms. Auko's testimony as "This has been long time." CP 264. To which defense counsel followed up, "It has? Do you remember being there at all?" Id. However, the reconciliation shows Ms. Auko's testimony was actually "I remember. It has not been a long time [since that interview]. I remember." Id. Especially because the jury was aware that the interview had taken place within the months preceding trial, the courtroom interpreter's misinterpretation did Ms. Lakilado a disservice. See 1/29/09RP 33, 50 (interview happened after Keny returned from Alaska in October).

Collectively, this evidence strongly supports a finding of incompetent interpretation based on the standards set forth by this Court in Teshome.

- c. Ms. Lakilado's conviction must be reversed because the constitutional error was not harmless.

The incompetent interpretation provided Ms. Lakilado cannot be dismissed as harmless error. Because the right to a competent

interpreter is an element of fundamental due process and a defendant's Sixth Amendment rights, incompetent interpretation is not harmless unless the State can demonstrate beyond a reasonable doubt that any reasonable jury would reach the same verdict, despite the error.

Because this case was based upon the words of Ms. Lakilado and her witnesses versus those of the victim and the State's witnesses, the State cannot show beyond a reasonable doubt that the verdict would have been the same if Ms. Lakilado's witnesses had been able to communicate through a competent interpreter. Reversal is required.

3. BECAUSE MS. LAKILADO'S COUNSEL FAILED TO ACT ON KNOWLEDGE OF ERRONEOUS AND CONFUSING INTERPRETATIONS, MS. LAKILADO DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS.

- a. Ms. Lakilado had the constitutional right to effective assistance of counsel.

A criminal defendant has the constitutional right to the assistance of counsel.¹⁵ U.S. Const. amends. VI, XIV; Const. art. I,

¹⁵ The Sixth Amendment provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment states in part, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

§ 22; State v. Grier, No. 83452-1, -- Wn.2d --, -- P.3d --, 2011 WL 459466, *8 (Feb. 10, 2011); State v. A.N.J., 168 Wn.2d 91, 96-97, 225 P.3d 956 (2010). Counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); United States v. Cronic, 466 U.S. 648, 656, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). "[T]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975). The right to counsel therefore necessarily includes the right to effective assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365, 377, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); A.N.J., 168 Wn.2d at 98.

When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in Strickland v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Under Strickland, the appellate court must determine (1) was the attorney's performance below objective standards of reasonable

Article I, Section 22 provides in part, "In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel"

representation, and, if so, (2) did counsel's deficient performance prejudice the defendant. Strickland, 466 U.S. at 687-88; Thomas, 109 Wn.2d at 226. Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. Strickland, 466 U.S. at 698.

A lawyer's strategic choices made after thorough investigation of the law and the facts rarely constitute deficient performance. Strickland, 466 U.S. at 690. In reviewing the first prong of the Strickland test, the appellate courts presume that defense counsel was not deficient, but this presumption is rebutted if there is no possible tactical explanation for counsel's performance. Strickland, 466 U.S. at 689-90; State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The appellate court will find prejudice under the second prong if the defendant demonstrates "counsel's errors were so serious as to deprive the defendant of a fair trial." Strickland, 466 U.S. at 687.

- b. It was objectively unreasonable for counsel not to object to ongoing interpretive errors.

Ms. Lakilado was denied effective counsel here because it was objectively unreasonable for defense counsel not to object to ongoing errors. First, the trial court erred by not satisfying itself on

the record of the interpreter's competence as required by RCW 2.43.030. During trial, it also became apparent to Ms. Lakilado that there were communication problems between witnesses Keny and Auko and their provided interpreter. CP 285-86 (Lakilado Decl.). Through her independent interpreter, Ms. Lakilado informed her attorney of her concerns. Id. Ms. Lakilado even mentioned the lack of linguistic understanding in her testimony. 2/2/09RP 25 (explaining she laughed a little bit at the defense table because Auko and the interpreter did not understand each other). But counsel did not object or otherwise bring the issue to the court's attention. Id.

Even absent the expressed concerns of her client, interpretive errors were apparent on the record that objectively should have raised concern for defense counsel. E.g., CP 189, 228, 230, 276 (setting forth interpretations that demonstrate confusion even as interpreted in court). Defense counsel's closing argument plainly demonstrates she was aware of interpretive errors. 2/3/09RP 39-40 (telling the jury that "clearly for Karamella [Auko] there was some confusion altogether between the language, the dialect, and some of the questions; it was very difficult to get very simple answers to very simple questions, she was confused

very easily” & “one distinction to make is, from the way it was represented by the interpreter as well,”).

The error cannot be excused because there is no tactical explanation for counsel’s failure to object to obvious errors and in the face of her client’s expressed concerns. Unlike the decision to seek a jury instruction on a lesser included offense, for instance, there is no conceivable strategic reason for failing to object to interpretation errors during the testimony of two key defense witnesses. See Grier, 2011 WL 459466, at *15. This is particularly true where, as demonstrated in section 2 and below, the improperly interpreted testimony was less favorable to the defense than the witnesses’ actual testimony as discovered through the post-trial reconciliation. Accordingly, the presumption in favor of reasonable performance by counsel is rebutted. Id. at *9 (“a criminal defendant can rebut the presumption of reasonable performance by demonstrating that ‘there is no conceivable legitimate tactic explaining counsel’s performance.’” (quoting Reichenbach, 153 Wn.2d at 130; State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999))).

- c. Defense counsel’s failure to object to the interpretational errors prejudiced Ms. Lakilado.

In addition to establishing deficient performance, Ms. Lakilado must show prejudice. Strickland, 466 U.S. at 693. To establish prejudice, a defendant “need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” Id. Rather, she need only show “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

As demonstrated in argument 2 above, Ms. Lakilado was prejudiced by counsel’s deficient performance. The interpretive errors skewed the information presented to the jury, to defense counsel, and to the court. The jury did not hear accurate testimony on Ms. Lakilado’s location in relation to the incident, how much she may have drunk that evening, and that at the time of the incident everyone on the crowded dance floor had their hands and glasses up in the air to the tune of Mr. Keny’s reggae music.

In addition, the erroneous courtroom interpretation presented testimony to the jury that affected the credibility of the two key defense witnesses. During deliberations, moreover, the jury indicated its verdict was close by returning two inquiries seeking

additional information and evidence. CP 36, 38. Because this case came down to the word of defense witnesses versus the word of Ms. Williams and the State's witnesses, there is a reasonable probability that but for defense counsel's failure to object to interpretive errors, the jury may not have convicted Ms. Lakilado.

4. THE COURT GAVE A FATALLY FLAWED UNANIMITY INSTRUCTION FOR THE SENTENCING ENHANCEMENT USED IN THE SPECIAL VERDICT FORM .

In the alternative, this Court should vacate the special verdict finding because under the trial court's instruction the jury was not properly instructed that a negative finding need not be unanimous.

- a. The court must properly instruct the jury on the unanimity required for an aggravating circumstance.

When the jury is asked to make an additional finding beyond the substantive offense, the jury need not be unanimous to find the State has not sufficiently proven the aggravating factor. State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010); State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003). In Bashaw and Goldberg, the jurors were told that their answer in a special verdict form addressing an additional aggravating factor must be unanimous for either a "yes" or "no" answer. Bashaw, 169 Wn.2d at 139;

Goldberg, 149 Wn.2d at 894. The Supreme Court held that such an instruction is incorrect, and unanimity is required only when the jury answers “yes.”

The rule from Goldberg¹⁶ then, is that a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant’s maximum allowable sentence.

Bashaw, 169 Wn.2d at 146.

The jury instruction given in Bashaw for the special verdict form told the jurors, “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” Id. at 139. The Bashaw Court held that jurors need not be unanimous in a special finding. Rather, any jury’s less than unanimous verdict “is a final determination that the State has not proved that finding beyond a reasonable doubt.” Id. at 145.

Bashaw and Goldberg are predicated on the right to trial by jury, an “inviolable” right guaranteed and strictly protected by the Washington Constitution, article I, sections 21 and 22. State v.

¹⁶ In Goldberg, when the jury was not unanimous in its finding on an aggravating factor in a first degree murder prosecution, the trial court instructed the jury to continue deliberations and reach a unanimous verdict, either “yes” or “no.” 149 Wn.2d at 891. After further deliberations, the jury returned with a unanimous verdict favoring the aggravating factor. Id. at 892. The Supreme Court reversed, ruling that the trial court erred by insisting on unanimity to answer a special verdict form. Id. at 894.

Williams-Walker, 167 Wn.2d 889, 225 P.3d 913 (2010). The jury's verdict must authorize the punishment imposed. Id. at 899.

Similarly to Bashaw, the trial court here instructed the jury "Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form." CP 32 (Instruction 12). Though the court's instruction elaborated that "to answer the special verdict form 'yes', you must unanimously be satisfied beyond a reasonable doubt that 'yes' is the correct answer", the instruction was not clear that a "no" finding need not be unanimous. See id. Instead, the trial court instructed the jury only that "If you have a reasonable doubt as to this question, you must answer 'no'." Id.¹⁷ Particularly because the instruction also contains the statement that "all twelve of you must agree in order to answer the special verdict form," the instruction is far from clear that unanimity is not required to reach a "no" finding. Because a jury lacks interpretive tools and training, jury instructions must be manifestly clear to the average juror. See, e.g., State v. Allery, 101 Wn.2d

¹⁷ In even further confusion of the issue, the instruction actually originally read that "If you unanimously have a reasonable doubt as to this question, you must answer 'no'." CP 32; 2/3/09RP 5-6, 58. The court then instructed the jury to cross out the word "unanimously" from this sentence but made no further changes to the instruction. Id. Accordingly, the jury was free to still rely on the part of the instruction that stated "all twelve of you must agree in order to answer the special verdict form." CP 32.

591, 595, 682 P.2d 312 (1984); State v. LeFaber, 128 Wn.2d 896, 913 P.2d 369 (1996), abrogated on other grounds by State v. O'Hara, 167 Wn.2d 91, 217 P.3d 756 (2009). The court's special verdict instruction did not make manifestly clear that a negative finding need not be unanimous.

The jury instruction in the case at bar consequently presents the identical error identified in Bashaw. The court erroneously, even if unintentionally, told the jury that they needed to be unanimous to vote "no" in the special verdict form.

b. The incorrect jury instruction requires reversal of the special verdict.

The court in Bashaw characterized the problem as an error in "the procedure by which unanimity would be inappropriately achieved." 169 Wn.2d at 147. This instructional error creates a "flawed deliberative process" and does not let the reviewing court simply surmise what the result would have been had it been given a correct instruction. Id.

The Bashaw Court looked to the example of the deliberative process in Goldberg, where several jurors had initially answered "no" to the special verdict, but after the trial judge told them they must be unanimous, they returned with a "yes" finding on the

aggravating factor. Id. Thus in Bashaw, although “[t]here was no objection to the instruction” regarding the unanimity required for the special verdict form sentencing enhancement, the Supreme Court held the special finding must be reversed. State v. Bashaw, 144 Wn. App. 196, 199, 182 P.3d 451 (2009), reversed on review, 169 Wn.2d at 146.¹⁸ In Bashaw, moreover, the trial court polled the jury and the jury said its verdict was unanimous, but the Supreme Court found the fundamental, structural nature of the incorrect explanation about the deliberative process denied Bashaw a fair trial. Id. at 147-48.

Where the trial court improperly insisted on a unanimous determination for a “no” finding, this Court “cannot say with any confidence what might have occurred had the jury been properly instructed,” and cannot conclude that the error was harmless beyond a reasonable doubt. Id. As in Bashaw, the jury was incorrectly informed that their special verdict finding of use of a deadly weapon must be unanimous. CP 32. The trial court’s polling of the jury after the instruction had been given and the special verdict returned does not resolve the error. Compare 2/4/09RP 4-7 (polling jury) with Bashaw, 169 Wn.2d at 147-48.

¹⁸ The Court of Appeals decision in Bashaw provides further details regarding the instructional issue and nature of objections lodged.

This Court may not guess the outcome of the case had the jury been correctly instructed, and thus the special findings imposing additional punishment because the incident involved a deadly weapon must be stricken. Bashaw, 169 Wn.2d at 147; CP 15, 387.

F. CONCLUSION

Ms. Lakilado's conviction should be reversed on three independent grounds. First, the jury instructions relieved the State of proving an element of the crime of assault in the second degree. Ms. Lakilado's constitutional rights were also violated by the use of an interpreter not competent in the dialect of two key defense witnesses. Finally, defense counsel's failure to object to the interpretive errors during trial deprived Ms. Lakilado of her constitutional right to effective assistance.

In the alternative, the deadly weapon enhancement should be stricken because the jury was improperly instructed as to unanimity.

DATED this 14th day of February, 2011.

Respectfully submitted,



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Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 65575-2-I
v.)	
)	
MARY LAKILADO,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH 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 14TH DAY OF FEBRUARY, 2011.

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