

No. 92162-8
Court of Appeals No. 46563-9-II

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

VLADIMIR BELOUSOV,

Appellant.

FILED
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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR CLARK COUNTY

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4 Vladimir Belousov asks this Court to accept review of the Court of Appeals ruling denying his motion to modify a commissioner's ruling on a motion on the merits. In *State v. Belousov*, 46563-9-II.

B. DECISION BELOW

A commissioner of the Court of Appeals granted a motion on the merits to affirm Mr. Belousov's conviction rejecting his claim that he was denied the assistance of an interpreter during his trial. The Court of Appeals subsequently denied a motion to modify.

C. ISSUE PRESENTED

The Sixth Amendment and Article I, section 22, guarantee a person the right to present at trial and to assist in his defense with counsel. Where an accused person is a non-English speaking or limited-English speaking person and is not provided an interpreter, these rights are denied. Where Mr. Belousov went without an interpreter during significant portions of trial, was he denied his right to be present and to assist counsel?

D. STATEMENT OF THE CASE

Mr. Belousov had a two-day jury trial on a single count of first degree child molestation. Because he speaks Russian, an interpreter was appointed to assist Mr. Belousov during trial. *See e.g.* RP 13.

Natalyz Alyayeva, the mother of the alleged victim V.A., was one of two witnesses to testify she was present during the alleged events. RP 75-97. V.A. was the other. Because she speaks Russian, an interpreter provided an English translation of Ms. Alyayeva's testimony for the courtroom. RP 74-75.

Ms. Alyayeva testified she was present at the time of the alleged incident and in the room when it occurred. RP 80. By the best account, Ms. Alyayeva did not contact police for at least several weeks, and perhaps months, after the event occurred. RP 86. In the midst of Ms. Alyayeva's testimony, the interpreter assisting Mr. Belousov ceased interpreting for him and left counsel table. RP 83. The court concluded the interpreter was unnecessary because Ms. Alyayeva was testifying in Russian and thus Mr. Belousov did not require an interpreter. *Id.*

A jury convicted Mr. Belousov as charged. CP 36-37.

On appeal, Mr. Belousov contends he was denied his Sixth Amendment right to counsel by the absence of an interpreter.

A commissioner of the Court of Appeals permitted the State to supplement the record with video recording of the proceedings which show another person sit at counsel table after the interpreter leaves. There is no record that the person who sat down was or was not an interpreter. Despite the trial court's statement that no interpreter was necessary, the commissioner's ruling assumes the second person was an interpreter and grants a motion on the merits faulting Mr. Belousov for failing to establish the second person was not an interpreter.

E. ARGUMENT

The lack an interpreter to assist Mr. Belousov during significant portions of his trial violated the Sixth Amendment and Article I, section 22.

The denial of the assistance of an interpreter during trial is a significant constitutional issue which warrants review under RAP 13.4.

Article I, section 22 provides in relevant part:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel [and] to meet the witnesses against him face to face

The Sixth Amendment offers a similar guarantee:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . to be confronted with the witnesses against him . . . and to have the assistance of counsel for his defense.

“The right of a defendant in a criminal case to have an interpreter is based upon 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. Gonzales-Morales*, 138 Wn.2d 374, 379, 979 P.2d 826 (1999). RCW 2.43.010 requires appointment of interpreter 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.

One of the fundamental aspects of the right to be present is the “ability to communicate with . . . counsel.” *Illinois v. Allen*, 397 U.S. 337, 344, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970); *State v. Finch*, 137 Wn.2d 792, 845, 975 P.2d 967 (1999). Explanation of what that right entails comes from cases discussing the minimal requirements of competency to stand trial. To be found competent, a person must have ability to consult with his attorney “with a reasonable degree of rational understanding,” *Dusky v. United States*, 362 U.S. 402, 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960). The requisite ability is the capacity for ‘reasoned choice’ among the alternatives available to him.” *Godinez v. Moran*, 509 U.S. 389, 397, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993).

At bottom, what is demanded is that a defendant has "sufficient competence to take part in a criminal proceeding and to make the necessary decisions throughout its course." *Moran*, 509 U.S. at 403 (Kennedy, J., concurring).

Where a non-English speaking person does not have the assistance of an interpreter, he is denied the right to be present and the ability to assist counsel in violation of the Sixth Amendment. *U. S. ex rel. Negron v. New York*, 434 F.2d 386, 389 (2d Cir. 1970).

During the course of the testimony of a critical state witness, the interpreter assisting Mr. Belousov ceased interpreting and left counsel table. IRP 83. The court stated "the witness is speaking in Russian so . . . her comments don't need to be interpreted." *Id.* Scemingly ignoring that statement, the ruling of the commissioner assumes the person who state next to Mr. Belousov was as second interpreter. But the record does not establish that is the case. Indeed, if interpretation were continuing the trial court's statement that no interpreter was needed makes no sense. The record affirmatively establishes that Mr. Belousov was without the assistance of any interpreter during at least a portion of trial.

That the witness was testifying in Russian is not the end of the inquiry. The prosecutor was not asking his questions in Russian, and no interpreter was translating those questions for Mr. Belousov.

Without the benefit of an interpreter, Mr. Belousov heard:

A: I don't remember

....

A: I don't know exactly, right now, because a lot of time lapsed.

....

A: Yes.

....

A: Yes.

....

A: Yes.

....

A: Yes.

....

A: At first - - at first, I didn't know about everything and then someone - - and then someone told me I need to report it and I made a decision to report it and then latter I stepped on a rusty nail and was busy with the - - puncture wound.

RP at 86-87. A person hearing that would have no idea that in fact Ms. Alyayeva was testifying to when the alleged incident occurred, or that she was testifying about the incident at all.

The full exchange provided:

Q: How long did it take you to report this to police?

A: I don't remember

Q: Do you remember when this incident happened?

A: I don't know exactly, right now, because a lot of time lapsed.

Q: Do you think it was in 2013?

A: Yes.

Q: Do you think it was in the fall?

A: Yes.

Did you meet with the police on October 30th?

A: Yes.

Q: So Does that sound like when this happened?

A: Yes.

Q: Why did you wait three to four weeks to report this to the police?

A: At first - - at first, I didn't know about everything and then someone - - and then someone told me I need to report it and I made a decision to report it and then latter I stepped on a rusty nail and was busy with the - - puncture wound.

RP at 86-87. Without the benefit of an interpreter, Mr. Belousov heard the first version and could only guess at the actual content of the testimony, never mind his complete inability to assess its reliability or veracity.

The same exercise could be repeated for the remainder of the State's examination of Ms. Alyayeva and the entirety of his attorney's cross-examination. Mr. Belousov was provided only one part of the conversation occurring in the courtroom. Every other person in the room heard the complete conversation. An answer of "yes" or "no" or "I can't remember that" means nothing without the context provided by the question. The credibility, accuracy, reliability and veracity of a witness's testimony can only be measured by first hearing the question asked.

Beyond his inability to know what was being said from the witness stand, Mr. Belousov had no ability to assist counsel throughout that critical portion of trial.

The constitutional right to have the assistance of counsel . . . carries with it a reasonable time for consultation and preparation. Consultation includes not only assistance in trial preparation, but opportunity for private and continual discussions between defendant and his attorney during the trial.

State v. Hartzog, 96 Wn.2d 383, 402, 635 P.2d 694 (1981) (citing Const. Art. I, § 22). Without an interpreter Mr. Belousov had no opportunity for discussion with counsel. He could not help shape cross-examination without hearing the questions asked. He could not offer his insight on the witness's testimony even if he could understand what was being asked. Mr. Belousov could not ask questions of his attorney regarding the proceedings going on around him. Through a significant portion of the proceedings he faced the "Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment" *State v. Woo Won Choi*, 55 Wn. App. 895, 901, 781 P.2d 505 (1989) (quoting *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir.1973), *cert. denied*, 416 U.S. 907 (1974)).

Without the assistance of an interpreter, Mr. Belousov had no ability to consult with his attorney or assist in his own defense. Mr.

Belousov could not make reasoned choices throughout the course of the proceedings when he was denied the ability to know what is happening before him. The interpreter's absence from counsel table violated the Sixth Amendment and Article I, section 22.

F. CONCLUSION

As set forth above, this Court should grant the petition pursuant to RAP 13.4 and reverse Mr. Belousov's conviction

Respectfully submitted this 28th day of August, 2015.



GREGORY C. LINK – 25228
Washington Appellate Project
Attorneys for Petitioner

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,
Respondent.

v.

VLADIMIR BELOUSOV,
Appellant.

No. 46563-9-II

ORDER DENYING MOTION TO MODIFY

APPELLANT filed a motion to modify a Commissioner's ruling dated June 24, 2015, in the above-entitled matter. Following consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

DATED this 31st day of July, 2015.

PANEL: Jj. Johanson, Worswick, Maxa

FOR THE COURT:

Johanson, C.J.
CHIEF JUDGE

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STATE OF WASHINGTON
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cc: Aaron Bartlett
Gregory Charles Link

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

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THE STATE OF WASHINGTON,

Respondent,

v.

VLADIMIR V. BELOUSOV,

Appellant.

No. 46563-9-II

RULING GRANTING MOTION
ON THE MERITS TO AFFIRM

Vladimir Belousov appeals his child molestation conviction, arguing he was denied the assistance of an interpreter during a portion of his trial. Pursuant to RAP 18.14(a)¹ and RAP 18.14(e)(1),² this court affirms.

¹ RAP 18.14(a) provides, in relevant part:

The appellate court may, on its own motion or on motion of a party, affirm or reverse a decision or any part thereof on the merits in accordance with the procedures defined in this rule.

² RAP 18.14(e)(1) provides:

A motion on the merits to affirm will be granted in whole or in part if the appeal or any part thereof is determined to be clearly without merit. In making these determinations, the judge or commissioner will consider all relevant factors including whether the issues on review (a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court or administrative agency.

FACTS

The State charged Belousov with (1) first degree child molestation and (2) harassment—death threats (domestic violence). During the testimony of a State's witness, the verbatim report of proceedings (VRP) contains the notation that "Interpreter for the Defense leaves the defense table." Report of Proceedings (RP) (June 17, 2014) at 83. There is nothing to indicate that the interpreter returned before the prosecutor continued questioning the witness. The defense did not object when the State resumed its direct examination.

After the State rested, the trial court granted Belousov's motion to dismiss the harassment charge. The jury found Belousov guilty of child molestation and also found that he used a position of trust or confidence to facilitate the commission of the crime. He received a 68-month sentence. Belousov appeals his conviction, arguing that the lack of an interpreter violated his constitutional rights.

ANALYSIS

If a trial court determines an interpreter is needed, a defendant has a constitutional right to the assistance of an interpreter. *State v. Woo Won Choi*, 55 Wn. App. 895, 901, 781 P.2d 505 (1989), *superseded by statute on other grounds as recognized by State v. Anderson*, 72 Wn. App. 453, 458, 864 P.2d 1001 (1999); *see also State v. Gonzales-Morales*, 138 Wn.2d 374, 379, 979 P.2d 826 (1999). The significance of this right means that a defendant can argue that he was denied the services of an interpreter for the first time on appeal. *Woo Won Choi*, 55 Wn. App. at 901 (accepting review); *see also* RAP 2.5(a).

A review of the video recording of trial court proceedings,³ however, shows that Belousov had the assistance of a second interpreter after his first interpreter excused himself. Specifically, at 3:19:57 in the recording, during the State's direct examination of Natalya Alyayeva, the prosecutor asks the witness if she needs water. Clark County Superior Court proceedings, *State v. Belousov*, No. 13-1-02082-3 (June 17, 2014), at 3 hr., 19 min., 57 sec. (video recording on file with court). At 3:20:18, Belousov's interpreter stands up from his seat next to Belousov, speaks briefly to another gentleman seated directly behind Belousov, and walks away. Videotaped Proceedings at 3 hr., 20 min., 18 sec. At 3:20:40, the court prompts the State to resume questioning, and the prosecutor states, "I think we need to wait for the interpreter, Your Honor." RP (June 17, 2014) at 83; Videotaped Proceedings at 3 hr., 20 min., 40 sec. At 3:20:50, before questioning resumes, the gentleman seated behind Belousov sits in the interpreter's seat next to Belousov.⁴ Videotaped Proceedings at 3 hr., 20 min., 50 sec. At 3:20:59, questioning resumes. Videotaped Proceedings at 3 hr., 20 min., 59 sec. Consequently, Belousov's

³ The State urges this court to decline to address the interpreter issue because Belousov failed to include the video recording of the trial as part of the record on appeal. When faced with an inadequate record, this court may "seek to supplement the record on its own initiative" or, if the record contains a material omission, this court may decline to address a claimed error. *State v. Sisouvanh*, 175 Wn.2d 607, 619, 290 P.3d 942 (2012).

A report of proceedings is generally part of the record on review. RAP 9.1. This usually takes the form of a VRP. RAP 9.2; *see also generally* RAP 9.3 & RAP 9.4. The rules on appeal, however, do not require a video recording of trial court proceedings, RAP 9.1, and absent any indication from the VRP that a video recording would be necessary for appellate review, this court will not penalize Belousov's appellate counsel for failing to include a video recording in the record on appeal. Rather, this court will supplement the record on appeal with the video discs appended to the State's brief. RAP 9.10.

⁴ The record indicates that two interpreters assisted at trial. Also, Belousov did not file a reply brief challenging that the second seated person was not an interpreter.

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claim that he was denied the services of an interpreter lacks merit and his conviction is affirmed. Accordingly, it is hereby

ORDERED that this court's motion on the merits to affirm is granted.

DATED this 24th day of June, 2015.



Aurora R. Bearse
Court Commissioner

cc: Gregory C. Link
Aaron Bartlett
Hon. Robert Lewis
Vladimir V. Belousov

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 46563-9-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

- respondent Aaron Bartlett, DPA
[prosecutor@clark.wa.gov]
Clark County Prosecutor's Office
- petitioner
- Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: August 28, 2015

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