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Court of Appeals
Division III
State of Washington

331717-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MAHADI H. ALJAFAR, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Were there any material discrepancies between Mr. Aljaffar's answers at trial and the translation provided by the interpreter?
2. Can Mr. Aljaffar establish that a better translation would have made a difference in the outcome of the trial?
3. Can Mr. Aljaffar establish prejudice from the use of the trial interpreter?

II. STATEMENT OF THE CASE

On October 11, 2016, this Court ordered a reference hearing regarding the interpreter used at the time of Mr. Aljaffar's trial. The superior court conducted a RAP 9.11 hearing and entered findings of fact and conclusions of law. On December 15, 2016, this Court directed the parties to discuss the impact of the evidence and the trial court's findings. Otherwise, the respondent incorporates the summary of facts outlined in its opening brief.

III. ARGUMENT

Mr. Aljaffar cannot establish any material differences between his testimony and the translation provided by the interpreter at the time of trial which affected his Sixth Amendment 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).

Standard of review.

Although Washington courts have not yet decided the standard of review necessary to establish interpreter deficiency, other courts have decided the issue and placed the burden on the defendant to show that he or she was denied a fair trial by the asserted interpreter deficiencies. In such a claim, the burden is on the appellant to show both that the interpreter was deficient, *State v. Rios*, 112 Ariz. 143, 144, 539 P.2d 900 (1975), and that the deficiency denied the defendant a fair trial. *State v. Mendoza*, 181 Ariz. 472, 475, 891 P.2d 939 (Az. Ct. App. 1995); *Acewicz v. U.S. I.N.S.*, 984 F.2d 1056, 1063 (9th Cir. 1993) (a petitioner must show that a better translation would have made a difference in the outcome of the hearing); *State v. Fung*, 907 P.2d 1192, 1194 (Utah Ct. App. 1995) (“[t]he burden rests squarely upon defendant to show either that the trial court’s choice of an interpreter prejudiced him or that the interpreter was biased”); *State v. Besso*, 72 Wis. 2d 335, 343, 240 N.W.2d 895 (1976) (the burden is on the appellant to show that the interpreter was deficient).

This standard of review should be the appropriate standard of review for this Court.

A. THERE ARE NO MATERIAL DISCREPANCIES IN THE TRIAL INTERPRETER'S TRANSLATION OF MR. ALJAFFAR'S ARABIC ANSWERS AT THE TIME OF TRIAL.

A defendant is not entitled to a perfect trial. *Brown v. United States*, 411 U.S. 223, 231, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973); *State v. Davis*, 175 Wn.2d 287, 345, 290 P.3d 43 (2012). With this in mind, allegations of interpreter problems are reviewed in the context of the entire trial. *United States v. Long*, 301 F.3d 1095, 1105 (9th Cir. 2002). Correspondingly, there is no constitutional right to a flawless, word-for-word interpretation. *Long*, 301 F.3d at 1105; *United States v. Gomez*, 908 F.2d 809, 811 (11th Cir. 1990), *cert. denied*, 498 U.S. 1035 (1991).

The analysis focuses on whether the asserted inadequacies in the interpreter's services rendered the trial fundamentally unfair. *Long*, 301 F.3d at 1105; *Gomez*, 908 F.2d at 811. Nevertheless, interpreters should strive to translate exactly what is said; courts should discourage interpreters from "embellishing" or "summarizing" live testimony. *United States v. Joshi*, 896 F.2d 1303, 1309 (11th Cir.1990). As the *Joshi* court stated:

Defendant errs, however, in assuming that occasional lapses from this standard, particularly when they are not objected to by the defendant, will render a trial fundamentally unfair. Although a continuous word for word translation of the proceedings will always pass constitutional muster, minor deviations from this standard will not necessarily contravene a defendant's constitutional rights.

Id.

Similarly, the Ninth Circuit recognizes that, while the general standard for interpreters requires continuous word-for-word translation, minor deviations will not necessarily contravene a defendant's constitutional rights. *Long*, 301 F.3d at 1105.

For instance, in *Acewicz*, the Ninth Circuit found an adequate translation where the interpreters were sworn in in accordance with the federal interpreter law, the record revealed a complete and adequate translation, neither of the defendants indicated difficulty in understanding the questions, and both provided responsive answers. 984 F.2d at 1063. The court noted that the defendant provided only isolated passages of "garbled" testimony and failed to cite instances in which an incorrect or incomplete translation prevented him from providing relevant evidence. *Id.* Most importantly, to prevail on an incompetent translation claim, the court found that a defendant must show prejudice. *Id.* at 1062.¹

¹ In the case of an incompetent translation claim, the federal standard is whether "a better translation would have made a difference in the outcome of the hearing." *Acewicz*, 984 F.2d at 1063; *see also* *Cheo v. I.N.S.*, 162 F.3d 1227, 1229 (9th Cir. 1998) (finding no prejudice where mistakes in translation did not "influence the outcome"); *Kotasz v. I.N.S.*, 31 F.3d 847, 850 (9th Cir. 1994) (requiring a showing that a deficient translation did not "influence the outcome"); *Kovac v. I.N.S.*, 407 F.3d 102, 108 (9th Cir. 1969) (translation violated due process where the court had "grave doubt" that the hearing provided the petitioner "a reasonable opportunity" to present his evidence); *Augustin v. Sava*, 735 F.2d 32, 38 (2nd Cir. 1984) (translation violated due process where, among other things,

In contrast, evidence of incompetent translation claims includes direct evidence of incorrectly translated words, unresponsive answers by a witness, and a witness's apparent difficulty understanding what is said to him or her. *Perez–Lastor v. I.N.S.*, 208 F.3d 773, 778 (9th Cir. 2000).

Here, even if Mr. Aljaffar could establish deficiencies in the interpreter's translation, he cannot demonstrate that any alleged incompetence on the part of the interpreter prejudiced the outcome of his trial. *See Hartooni v. I.N.S.*, 21 F.3d 336, 340 (9th Cir. 1994) (to show prejudice as a result of a constitutional violation, a petitioner must show that the inadequate procedures occurred “in a manner so as potentially to affect the outcome of the proceedings”). More specifically, Mr. Aljaffar cannot point to any specific instance, nor does the record reveal any, where the interpreter is alleged to have materially erred in the translation, *id.* at 340, and he cannot indicate “which, if any, words would have been translated differently, given a more competent interpreter,” *Acewicz*, 984 F.2d at 1063.

Notwithstanding any claimed interpreter problems, Mr. Aljaffar's theory at trial was a general denial and he was able to relay that theory to the jury. The translation of his defense was accurately interpreted at trial as

“the accuracy and scope of hearing translation [was] subject to grave doubt”).

established by the Arabic court certified interpreter's² (hereinafter "CCI") subsequent examination of the record. There are no differences, let alone material differences, in Mr. Aljaffar's testimony concerning his theory of the case. His testimony established that he was gay, he entered the bar on the evening in question, and began drinking. RP 148, 150; EX. "A" at 6, 8. He became sick, and entered a restroom not realizing it was designated for women. RP 151-52, 170; EX "A" at 9-10, 28. Mr. Aljaffar maintained that he did not touch any woman, or become aroused inside the bar. RP 152-53; EX. "A" at 10, 12. He did not become aroused because he was very tired due to the alcohol. RP 153, 189; EX. "A" at 12, 47. He again averred that he was not interested in women. RP 154, 183; EX. "A" at 12, 41.

When asked on cross-examination about the assertion that he was aroused in the bar, Mr. Aljaffar claimed the victim could have fabricated her testimony. RP 186; EX. "A" at 44. He again averred that he was not interested in women.

Mr. Aljaffar's general denial was properly and accurately presented to the jury for its consideration through his testimony and any language

² The CCI was hired for the reference hearing and she listened to a tape recording of the defendant's testimony obtained from the court reporter at the trial. She prepared a transcript of the defendant's testimony registering any inconsistencies in the translation. Otherwise, the trial was not videotaped or tape recorded.

discrepancies are minor and not material to the message conveyed to the jury.

B. THE TRIAL INTERPRETER'S OCCASIONAL LAPSES INTO USING THE "THIRD PERSON" DOES NOT AMOUNT TO A MATERIAL DISCREPANCY IN THE MESSAGE AND EVIDENCE THAT WAS BEFORE THE JURY.

At the reference hearing, the CCI remarked during the reference hearing that, at times,³ the trial interpreter referred to the testimony of Mr. Aljaffar in the "third person."

[Deputy Prosecutor]: When you reviewed the transcript and listened to the tape, when Mr. Beirouty answered in the first person using "I" and then finished up the question, and in other areas he said "he" and then he finished up the question, he was conveying the same -- was it clear to you that it was the defendant's answer?

RP 328.

[CCI]: I believe that in many instances the information that was conveyed was still preserved as the defendant gave his answer.

RP 329.

[CCI]: However, there were times because of the use of the third person and first person interchangeably that led to some confusion.

...

³ The trial court documented "44" instances where the interpreter referred to Mr. Aljaffar in the "third person" rather than the "first person." Reference Hearing Findings of Fact and Conclusions of Law at 2.

[Deputy Prosecutor]: And in those areas it would just require reading the transcript to gain clarity of who's -- who was answering the question; correct?

...

[CCI]: Generally speaking, yes.

RP 329.

The CCI remarked that the trial interpreter's use of the "third person" *may* have caused confusion for Mr. Aljaffar or the jury. RP 339-40. However, she did not explain this remark.⁴ The CCI further commented that there were some discrepancies between Mr. Aljaffar's Arabic testimony and the translation provided by the interpreter. For instance, when Mr. Aljaffar was asked to state his name, the interpreter, speaking Arabic, advised Mr. Aljaffar to state his full Arabic name which meant his four formal Arabic names. RP 346. The CCI also elaborated on several minor inconsistencies in the interpretation during the trial. RP 354-57.

The Eleventh Circuit Court of Appeals has observed:

Interpreters and translators engage in a process far more complex than the "mechanical substitution of words in one language with their verbatim equivalent in another"; instead, taking statements in one language and expressing them in a different language "requires a continuing exercise of

⁴ See *State v. Mitjans*, 408 N.W.2d 824, 832 (Minn. 1987) ("Translation is an art more than a science, and there is no such thing as a perfect translation.... Indeed, in every case there will be room for disagreement among expert translators over some aspects of the translation").

judgment and analysis of what is meant or intended to be said by the parties.”

United States v. Khan, 794 F.3d 1288, 1295 (11th Cir. 2015) (citations omitted). Accordingly, “[w]ords in one language may not have an exact equivalent in another so that, in some instances, it is impossible for an interpreter to translate a witness’ answer word for word.” *Stubblefield v. Com.*, 10 Va. App. 343, 350, 392 S.E.2d 197 (1990); *cf.*, *Taylor v. State*, 226 Md. App. 317, 350, 130 A.3d 509 (2016) (acknowledging “[s]ome judges and attorneys have a mistaken belief tha[t] an interpreter renders ... proceedings word for word, but this is impossible because there is not a one-to-one correspondence between words or concepts in different languages”).⁵

The Oregon Court of Appeals has recognized that an interpreter requires certain skills:

An interpreter must listen to what is being said, comprehend the message, abstract the entire message from the words and the word order, store the idea, search his or her memory for the conceptual and semantic matches, and reconstruct the message (keeping the same register or level of difficulty as in the source language). While doing this, the interpreter is

⁵ Citing “National Association of Judicial Interpreters and Translators, FAQ About Court and Legal Interpreting and Translating, <http://www.najit.org/certification/faq.php#judiciary> (last visited Sept. 1, 2015).”

speaking and listening for the next utterance of the language to process, while monitoring his or her own output.”

State v. Montoya-Franco, 250 Or. App. 665, 672, 282 P.3d 939 (2012); *cf. United States v. Charles*, 722 F.3d 1319, 1324–25 (11th Cir. 2013) (“Not only does a language interpreter face obstacles in trying to convey the semantic meaning of a speaker’s words but language interpretation necessarily requires the interpreter also to understand ‘the contextual, pragmatic meaning of specific language’ so that ‘much of the information required to determine the speaker’s meaning is not contained in the words of the speaker, but instead is supplied by the listener’”).

In that regard, if an interpreter “employs an irregular technique in answering in the third person,” or “edits, explains, or interpolates the questions and answers,” it does not automatically create reversible error. *Stubblefield*, 10 Va. App. at 350. Similarly, in *Seniuta v. Seniuta*, 31 Ill. App. 3d 408, 417, 334 N.E.2d 261 (1975), the Illinois Court of Appeals found that an interpreter’s account of the answers of a witness need not be literal as long as the answers of the interpreter and the witness amounted to the same thing.

For instance, in *People v. Jackson*, 53 Cal.2d 89, 95, 346 P.2d 389 (1959), *disapproved on other grounds*, *People v. Hall*, 28 Cal. 3d 143, 156 n. 8, 616 P.2d 826, 833 (1980), *overruled by People v. Newman*,

21 Cal. 4th 413, 981 P.2d 98 (1999), the California Supreme Court considered an interpreter's use of the third person and some instances of editing, explaining or interpolation of questions and answers during trial. The court found there was no prejudice as "[the] answers given through the interpreter [did] not substantially, if at all, vary from the other testimony in the case." *Id.* at 95;

Similarly, in *People v. Rivera*, 72 Ill. App. 3d 1027, 1039, 390 N.E.2d 1259 (1979), the defendant claimed the Arabic interpreter used at his trial was incompetent. His claim was summarized by the Illinois court as follows:

[The defendant] points out that the interpreter had been used to prepare the State's witnesses for trial and that she had to communicate with the witnesses in Arabic, their second language. Defendant cites frequent use of the third person rather than the first person and one instance where the interpreter apparently answered a question directly as showing an inability to translate literally and a general incompetence. Defendant claims he was thereby denied his right to effective cross-examination.

Id. at 1038-39.

The Illinois court found no error because the defendant did not object at the time of trial except for the use of the third person. The court found that "[n]o inability to translate accurately or any general incompetence has been established." *Id.* at 1039; *cf.*, *State v. Doucette*, 398 A.2d 36, 39-40 (Me. 1978) (holding that an interpreter's "occasional

lapses from first to third person” when interpreting for the victim did not deprive the defendant of a fair trial); *United States v. Haywood*, 363 F.3d 200, 213 (3d Cir. 2004) (there was no due process violation where the defendant claimed that the interpreter consistently translated testimony in the third person by using the pronouns “she” and “her,” which could have referred to several different witnesses causing confusion.); *United States v. Urena*, 27 F.3d 1487, 1491–93 (10th Cir. 1994) (despite several conversations between the interpreter and defendant, and several instances where the defendant answered questions before they were translated, the defendant provided coherent answers posed by the lawyers, and a new trial was not warranted); *United States v. Huang*, 960 F.2d 1128, 1136–37 (2nd Cir. 1992) (finding that a mistrial was not warranted based upon claim that interpreters summarized witness’s answers where there was no evidence of any substantive inaccuracy in translation); *Gomez*, 908 F.2d at 811 (finding that mistranslation of crucial matter caused prejudice to defendant, but that evidence against defendant was overwhelming, and the trial was not fundamentally unfair).

In the present case, at the time of trial, neither Mr. Aljaffar nor his trial lawyer ever expressed any concern to the trial interpreter regarding his

translation. RP 307.⁶ More significantly, after being provided the opportunity, Mr. Aljaffar did not offer any evidence at the reference hearing that his ability to understand the proceedings and communicate with his lawyer was impaired, that he experienced confusion regarding the translation at trial, that he was unable to place his theory of the case before the jury, or how he was prejudiced by the trial interpreter's translation. A review of the CCI's interpretation of the translation provided by the interpreter and the answers given by Mr. Aljaffar at the time of trial, when read in context, cannot be said to have affected the substance of his testimony or his theory of the case.

Mr. Aljaffar's testimony, as it appears (translated) in the trial transcript and also the CCI's report, presents a coherent picture consistent with his version of events as presented at the time of trial. Finally, and most importantly, Mr. Aljaffar cannot establish any prejudice from the several instances of mistranslation as they were not material to his defense or theory of the case.

⁶ The Reference Hearing transcript from December 15, 2016, was sequentially numbered following the trial transcript as Volume III, starting at page 296.

C. MR. ALJAFFAR'S MULTIPLE INTERRUPTIONS AND ANSWERS IN ENGLISH DURING TRIAL ESTABLISH HE HAD SOME COMPREHENSION OF THE ENGLISH LANGUAGE.

At the time of trial, Mr. Aljaffar stated he was studying English in Spokane. RP 155-56. In that regard and at the start of direct examination, Mr. Aljaffar answered several questions in English before he was instructed by his lawyer to wait for the translation from the interpreter. RP 145.

[Defense attorney]: I understand you're able to understand a lot of what was I'm saying now?

[Mr. Aljaffar] Yes.

[Defense attorney]: If at any time you may not understand my question, please remember that you have an interpreter there.

[Mr. Aljaffar]: Okay.

[Defense attorney]: It may be easier for you to wait for me to finish my question and let the translation occur so we make sure there is no confusion of what I am asking and what you are answering.

[Mr. Aljaffar]: Okay.

RP 144 (emphasis added).

[Defense attorney]: ... Had you learned any English before you came to the United States?

[Defense attorney]: Have the translator translate.

[Mr. Aljaffar]: He translated right away.

[Defense attorney]: We need to make sure we do this correctly, okay?

[Mr. Aljaffar]: Okay.

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

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

[Defense attorney]: 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.

[Defense attorney]: Where is your family?

[Mr. Aljaffar]: In my country.

[Defense attorney]: Are you married?

[Mr. Aljaffar]: No.

[Defense attorney]: Do you have any children?

[Mr. Aljaffar]: No.

[Defense attorney]: So you said you are here to study to be a mechanical engineer?

[Mr. Aljaffar]: Yes.

[Defense attorney]: So what do you have -- what is the process for that -- how did that take place for you to come here to study; what is the process for that?

MR. BEIROUTY [Interpreter]: He said, like, what?

[Defense attorney]: So what are the steps that you had to take to become a student in the United States?

[Mr. Aljaffar]: Like, dual visa, and dual, like --

[Defense attorney]: Would it be easier for you to answer these questions in Arabic?

[Mr. Aljaffar]: Yes.

[Defense attorney]: Then I will encourage you to do so, please.

MR. BEIROUTY: He applied for a visa.

[Defense attorney]: Okay.

MR. BEIROUTY: And he chose the university he can go to. And he communicated with them. And they accepted him to --

[Defense attorney]: Okay. Thank you.

RP 145-47.

In addition to the above, there are frequent occurrences in the transcript and during trial where Mr. Aljaffar began to answer the lawyer's question before the interpretation was completed by the interpreter. EX. "A." Mr. Aljaffar also spoke to one of the witnesses in English, at the bar, during the event. RP 96. This suggests Mr. Aljaffar had at least some grasp of the English language and the proposition is buttressed by his lawyer's assertion at the start of trial that Mr. Aljaffar was able to "understand a lot" of what was being asked of him by his lawyer.

A defendant's ability to answer a question before it is translated can be indicative of "at least some ability [of a defendant] to monitor the

questions and answers as conveyed by the interpreter.” *Urena*, 27 F.3d at 1493. In this regard, an appellate court considers how well a defendant speaks and understands English. *See State v. Teshome*, 122 Wn. App. 705, 711, 94 P.3d 1004 (2004).⁷

IV. CONCLUSION

A criminal defendant is not constitutionally entitled to a perfect, word-for-word interpretation. Considered in full context and with respect to the entirety of the trial, Mr. Aljaffar cannot establish any translation errors significantly hindered the presentation of his defense or that the translation altered in a material way the evidence submitted to the jury. Mr. Aljaffar cannot establish a better translation would have made a difference in the

⁷ In *Teshome*, the defendant’s interpreted plea hearing was reviewed and reinterpreted by a certified interpreter after review of a recorded transcript. According to the reinterpretation, the original interpreter did not accurately interpret key questions relating to the defendant’s charge, added words to the questions, and omitted certain key words when describing the defendant’s options at a plea. *Id.* at 713. However the defendant did not show the manifest injustice required to withdraw his plea. *Id.* at 717.

trial and he cannot establish any prejudice in the trial interpreter's translation of his testimony.

Respectfully submitted this 5 day of January, 2017.

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

STATE OF WASHINGTON,

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v.

MAHADI H. ALJAFFAR,

Appellant

NO. 33171-7-III

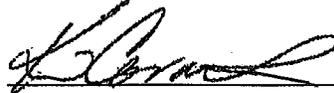
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on January 5, 2017, I e-mailed a copy of the Supplemental Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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john@johncrowleylawyer.com

1/5/17
(Date)

Spokane, WA
(Place)



(Signature)

