

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

VICTOR MANUEL ANDRADE,

Defendant-Appellant.

UNPUBLISHED

December 16, 2010

No. 293319

Lapeer Circuit Court

LC No. 2008-009774-FC

Before: WILDER, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of involuntary manslaughter, MCL 750.321, and four counts of felonious driving, MCL 257.626c.¹ He was sentenced to four to fifteen years' imprisonment on the involuntary manslaughter charge, to be served concurrently with one to two years' imprisonment on each count of felonious driving. Because we conclude that the trial court erred in failing to provide an interpreter for defendant, we reverse and remand for a new trial.

This matter arises out of a car accident that resulted in serious injuries to several people and the death of a teenage girl, Renee. On September 13, 2002, defendant and several teenage girls planned a hotel party to celebrate the 18th birthday of one of the girls. At approximately 9:00 p.m. on that night, defendant drove his car, with three teenage female passengers, to Renee's home to pick her up. On their way back to the hotel, with Renee now as an additional passenger, defendant disregarded a stop sign and, according to the passengers' testimony, he also disregarded their repeated entreaties to slow down and to stop. He entered the intersection at a high rate of speed,² where his car was hit by an SUV that had the right of way in the intersection.

¹ Defendant was initially also charged with second-degree murder. However, the jury acquitted him of that charge as well as a lesser included charge of negligent homicide.

² While a Michigan State Police accident reconstruction expert testified that at the time of the accident defendant's car was traveling at 56 miles an hour on the 55 miles an hour road, one of the occupants of defendant's car testified that defendant had accelerated to close to 80 miles an hour as he approached the intersection.

As a result, all of the passengers in defendant's vehicle were injured, with Renee's injuries being fatal.

After the completion of an investigation into the circumstances surrounding the accident, a warrant was issued for defendant's arrest. Defendant had, however, left the country and returned to Mexico, where most of his family resided. After several years, defendant was located in Mexico and extradited to the United States to face charges of second-degree murder and several counts of felonious driving. A jury found defendant guilty of four counts of felonious driving and additionally convicted him of involuntary manslaughter. This appeal followed.

On appeal, defendant first contends that the trial court violated his due process rights in failing to adequately inquire whether defendant required an interpreter, or to sua sponte appoint an interpreter. We agree.

This Court generally reviews a trial court's decision not to provide an interpreter for an abuse of discretion. *People v Warren (After Remand)*, 200 Mich App 586, 591; 504 NW2d 907 (1993). However, because defendant did not raise this issue below, it has not been preserved for appeal. Accordingly, the issue is reviewed for plain error affecting substantial rights. *People v Odom*, 276 Mich App 407, 421; 740 NW2d 557 (2007). Reversal is warranted only where defendant was actually innocent, or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings, regardless of his innocence. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

MCL 775.19a provides, in relevant part:

If an accused person is about to be examined or tried and it appears to the judge that the person is incapable of adequately understanding the charge or presenting a defense to the charge because of a lack of ability to understand or speak the English language . . . the judge shall appoint a qualified person to act as an interpreter.

A trial court, then, should appoint an interpreter for a defendant when it appears from the record that the defendant or a witness is not understandable, comprehensible, or intelligible, to defendant or to the factfinder, and the absence of an interpreter would deprive the defendant of some basic right. See *Warren (After Remand)*, 200 Mich App at 591-592. Such was the case here.

In the instant matter, defendant was provided with an interpreter during his preliminary examination, and during most pre-trial proceedings before the trial judge. At the beginning of defendant's trial, the trial court noted:

One other thing I wanted to cover was that at a prior hearing there was a request for an interpreter and I have not received any request for [an] interpreter today or for this trial . . . am I to assume that you do not intend to bring an interpreter?

Defense counsel, who is bi-lingual, responded:

. . . I think that it's—at the preliminary stages of the trial Mr. Andrade's going to rely on my, if he doesn't understand anything he's going to understand—he's going to rely on my interpretation. [A]s the trial progress[es], it depends on what comes out, then I may have someone.

The following exchange then took place between the trial court and defendant, in English:

Court: Mr. Andrade, would you tell me your name please?

Defendant: Victor Manuel Andrade.

Court: Mr. Andrade, your attorney says that he is going to help you understand, but you do not want an interpreter right now for this trial, is that true?

Defendant: Yes.

Court: Thank you. I'm going to leave it at that. That's his choice and I will assume that he will understand what's going on unless he tells me otherwise.

Defendant contends that because he had an interpreter present for most pre-trial proceedings, the trial court was well aware of defendant's difficulty with the English language and thus should have appointed an interpreter for him. We agree.

The prosecutor cites *People v Atsilis*, 60 Mich App 738; 231 NW2d 534 (1975) for the proposition that the trial court need not affirmatively establish the defendant's proficiency in English unless the issue has been introduced by defendant or as a result of the trial court's encounters with the defendant. We disagree with the prosecutor's reliance on *Atsilis* here, given the amount of evidence presented to the court that defendant's lack of ability to understand or speak the English language rendered him incapable of adequately presenting a defense to the charges against him.

In *Atsilis*, this Court noted that “*neither the record nor defendant's trial counsel indicated that defendant had any difficulties with English.*” *Id.* at 739 (emphasis added). In the present case, however, the record clearly evidences that defendant had difficulties with English. The investigating officer in both his report and his testimony notes that he needed a translator to speak with defendant. At defendant's arraignment, a translator retained by the prosecutor was present. At the preliminary examination, one of the victims who knew defendant testified that defendant “knew little English.” Another victim testified that she had known defendant two months and, when asked whether defendant knew English, she testified, “not really, some,” and could not recall whether she'd ever heard him say any English words and that she had always spoken with him through a translator. Defendant's plea of nolo contendere, which was later withdrawn, was done through a translator. A translator was also present at the plea withdrawal. Even during trial there was evidence of defendant's inability to understand English. One witness testified that defendant's English ability extended to words like “bathroom,” “Taco Bell,” and “I'm sorry.” The police officer testified that defendant had asserted that he could not understand English and that the officer could not call defendant by telephone because, “I interviewed him twice and [] due to the language barrier I knew I was going to need an interpreter.” Moreover,

the fact that at trial and sentencing, where no translator was present, defendant said nothing, which strongly suggests his inability to participate.

Moreover, the fact that defendant understood some English is insufficient to absolve the trial court of its responsibility to appoint an interpreter. The ability to order fast food or to inquire about the location of a bathroom in a foreign language is not enough to ensure that a defendant can meaningfully participate in a complicated court proceeding. Although the defendant in this case has some English capability, the record reveals that his difficulty understanding English was obvious. Indeed, it was so obvious that it was the prosecution that initially requested the interpreter. Accordingly, we conclude that, the record provided more than sufficient evidence that “defendant [wa]s incapable of understanding the nature of, or defending himself in, the proceedings against him because he [wa]s unable to understand the English language.” *Id.*

The prosecution relies on two main facts to support its argument that the trial court’s decision to proceed without an interpreter was correct: first, that defendant never requested an interpreter;³ and second, that defendant’s counsel was bi-lingual. These facts are insufficient to uphold the trial court’s failure to provide an interpreter. In *People v Sepulveda*, 102 Mich App 777; 302 NW2d 256 (1980), the defendant was a Mexican national who was unable to speak English. *Id.* at 778. He appealed his conviction claiming he was denied a fair trial because the trial court failed to provide an interpreter even though defendant had never requested one and defendant had been represented by counsel who was fluent in Spanish. *Id.* This Court affirmed the conviction based on defendant’s failure to request an interpreter and the trial court’s taking of judicial notice that defendant’s counsel was fluent in Spanish. *Id.* at 778-779. Our Supreme Court peremptorily reversed, holding that, “[n]otwithstanding the failure of the defendant to request an interpreter, it was error to fail to appoint an interpreter where the record clearly shows that the defendant spoke no English whatsoever.” *People v Sepulveda*, 412 Mich 889; 313 NW2d 283 (1981).

The rationale for this decision is sound, given the vital role counsel already must play in a defendant’s defense, and the probability that attempting to assume the mantle of interpreter in addition to that of defense counsel would require that counsel sacrifice his ability to adequately perform one duty at the expense of another. As discussed in *People v Cunningham*, 215 Mich App 652, 654-655; 546 NW2d 715 (1996), an interpreter’s function at trial is not merely to serve to summarize what is occurring in the proceeding:

As a general rule, the proceedings or testimony at a criminal trial are to be interpreted in a simultaneous, continuous, and literal manner, without delay,

³ The prosecutor intimates on appeal that we could find that the above pre-trial discussion constitutes a waiver by defendant of his right to an interpreter. However, we do not read the short discussion as a clear acknowledgement by the court that defendant had the right to an interpreter at trial, and thus do not find that defendant’s affirmance of counsel’s statement that defendant would begin the trial without an interpreter a waiver under the circumstances.

interruption, omission from, addition to, or alteration of the matter spoken, so that the participants receive a timely, accurate, and complete translation of what has been said. 32 ALR5th 149, § 71, p 466. Although occasional lapses will not render a trial fundamentally unfair, adequate translation of trial proceedings requires translation of everything relating to the trial that someone conversant in English would be privy to hear. *United States v Joshi*, 896 F.2d 1303, 1309 (CA 11, 1990). The interpreter should not aid or prompt the primary witness in any way, or render a summary of what the witness stated. *State of New Jersey, in Interest of RR*, 79 NJ 97, 117-119; 398 A2d 76 (1979). In *Rajnowski v Detroit, B C & A R Co*, 74 Mich 15, 19; 41 NW 849 (1889), our Supreme Court addressed the role of an interpreter in similar terms:

It is necessary, for the due course of examination, that the interpreter shall give to the witness the precise form and tenor of each question propounded, and no more or less, and that he shall in like manner translate the precise expressions of the witness. As it is not supposed that court, counsel, and jury can follow him in the foreign language, it is obvious that if he undertakes--as is too often done--to expound things to the witness in his own fashion, or to have any conversation with him beyond strict translation, no one can tell how far the testimony is reliably genuine, or how far it consists of what is admissible.

Given the translator's more than minimal role, the fact that defense counsel may be bilingual is of little help in ensuring a defendant's due process rights. It is hardly to be expected that counsel would be able to adequately translate the prosecutor's questions and the witness' answers, not to mention his own questions and statements, verbatim, while actively engaging in formulating and executing strategic trial decisions.⁴ Thus, no matter whether counsel thought that he could "assist" defendant, if the trial court knew that defendant had difficulty understanding English to the point that he needed such assistance, it was required to appoint an interpreter. Its failure to do so was clearly erroneous.

Furthermore, at least one federal court has granted a writ of habeas corpus on the basis of the failure to provide an interpreter where the defendant spoke some English but failed to request an interpreter. In *Gonzalez v Phillips*, 147 F Supp 2d 791 (ED Mich, 2001), the defendant filed a petition for a writ of habeas corpus challenging this Court's decision to affirm the defendant's convictions in light of his claim of ineffective assistance of counsel for his attorney's failure to

⁴ While the *Cunningham* Court discussed this issue in the context of a defendant who spoke English receiving a translation of witness testimony from the complainant who did not, *Cunningham*, 215 Mich App at 654, we find it equally applicable to the instant case. It is no less a violation of due process for a defendant's interpreter to fail to translate each question and response from English-speaking witnesses where translation is needed as it was for the interpreter in *Cunningham* to fail to translate the responses of the non-English-speaking witness in that case. *Id.* at 657.

request a Spanish interpreter for him. *Id.* at 792-793, 795-796. The Court granted an evidentiary hearing to determine, among other things, whether the defendant “spoke and understood English adequately well at the time of this trial to intelligently participate in his own defense and protect his right of confrontation without the services of a competent interpreter.” *Id.* at 804.

At the hearing, the trial judge “provided an affidavit that she saw no indication during the arraignment, trial or sentencing that [the defendant] had difficulty understanding the English language, nor was she informed by [the defendant] or his attorney of any difficulty.” *Gonzalez v Phillips*, 195 F Supp 2d 893, 895 (ED Mich, 2001). However, based on the testimony of the other witnesses, including the defendant, the Court concluded that this Court’s determination that the defendant had received effective assistance of counsel “was an unreasonable application of Supreme Court precedent” because the attorney’s failure to request an interpreter for his client “fell outside the range of professionally competent assistance.” *Id.* at 898-899. The Court granted the defendant’s request for a writ of habeas corpus and ordered that a new trial be scheduled within 90 days, or the defendant was to be unconditionally released. *Id.* at 908.

Notably, the Court in *Gonzalez* relied on *Sepulveda*, 412 Mich at 889, *Atsilis*, 60 Mich App at 738, and MCL 775.19a in reaching its conclusion. 147 F Supp 2d at 800. In light of the above case law, we conclude that defendant is entitled to a new trial.

We regret that ordering a new trial requires the victims and their families to again relive this incident. This is a terrible case in which the life of a young girl was cut short in an automobile crash while defendant was behind the wheel. Nevertheless, these disturbing facts cannot trump our responsibility to assure that defendant understands the words being spoken at his trial. Because the record clearly contained evidence that made it abundantly clear that defendant could not understand English to the extent necessary to meaningfully participate in his own defense absent a translator, and the prosecutor expressly requested a translator, we conclude that this Court is required by case law to remand for a new trial.

Due to this conclusion, we find it unnecessary to reach defendant’s remaining issues at this time.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Kurtis T. Wilder
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro