

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
February 16, 2012

v

SHOU YU CHEN,

Defendant-Appellant.

No. 301153
Washtenaw Circuit Court
LC No. 98-011284-FH

Before: STEPHENS, P.J., and WHITBECK and BECKERING, JJ.

PER CURIAM.

Defendant Shou Yu Chen appeals as of right his conviction for third-degree criminal sexual conduct, MCL 750.520d(1)(b) (force or coercion). We affirm.

Defendant, an acupuncturist and non-English speaker, was charged with third-degree criminal sexual conduct after being accused of digitally penetrating a patient's vagina during an acupuncture session. During jury voir dire and opening statements, a court appointed interpreter translated the proceedings to Mandarin Chinese for defendant. Defendant was unhappy with the interpreter's performance. Prior to the start of the second day of trial, defendant chose a replacement interpreter. The replacement interpreter was a man whom defendant had brought to the first day of trial to assist him with his communications with his attorney. That interpreter assisted defendant for the remainder of his trial, including when defendant elected to testify on his own behalf. Defendant was ultimately convicted in 1999 and then absconded. He was apprehended in 2010. On appeal, he asserts the existence of several reversible errors, each relating to the alleged deficient performance of the interpreter that he selected to assist him.

Defendant first asserts that he was denied his right to a full interpretation of the trial proceedings. Defendant asserts that this denial constituted reversible error because, as a result of the lack of a full translation, he was denied his constitutional rights to due process, to be present at his trial, to assist in his own defense and to confront and cross-examine witnesses. While we agree that error occurred when defendant was not provided with a full, simultaneous translation of the trial proceedings, we determine that he is not entitled to relief because he has failed to show that the error caused him prejudice.

Much of the dispute relating to defendant's first issue on appeal involves the determination of the proper standard of review.¹ This Court reviews unpreserved assertions of constitutional errors for plain error that affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant asserts that his translator's failure to provide him with a full and accurate translation of the proceedings amounted to a denial of the right to be present at his trial and his right to cross-examine witnesses. We do not agree with defendant's assertion that the cited error amounted to a structural error. Constitutional errors are classified as either structural or non-structural. *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000). "Structural errors are defects that affect the framework of the trial, infect the truth-gathering process, and deprive the trial of constitutional protections without which the trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *People v Watkins*, 247 Mich App 14, 26; 634 NW2d 370 (2001). Where a structural error occurs, reversal is required regardless of any showing of prejudice. *People v Cook*, 285 Mich App 420, 424; 776 NW2d 164 (2009). In contrast, a nonstructural constitutional error is subject to the harmless error analysis. *Carines*, 460 Mich at 774. Defendant has failed to cite any precedent for the notion that the failure to provide a full and simultaneous translation of trial proceedings amounts to a structural error. The constitutional errors that allegedly occurred as a result of the deficient translation is non-structural. As our Supreme Court explained in *People v Morgan*, 400 Mich 527, 536; 255 NW2d 603 (1977), a defendant who alleges that he was denied the right to attend a portion of his trial must demonstrate a reasonable possibility of prejudice to be afforded relief. Likewise, an assertion that a defendant was denied his right to adequately cross-examine a witness is "subject to harmless-error analysis." *People v Cunningham*, 215 Mich App 652, 657; 546 NW2d 715 (1996). Finally, the right to assist in one's own defense derives from the right to the effective assistance of counsel. *People v Sterling*, 154 Mich App 223, 232; 397 NW2d 182 (1986). A claim of ineffective assistance of counsel requires a showing of prejudice. *Strickland v Washington*, 466 US 668, 692; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Therefore, in order to be entitled to relief, defendant must not only demonstrate that error occurred, but that he was actually prejudiced by the error.

As stated above, defendant asserts that the denial of a full-interpretation of the trial proceedings constituted error and that relief is required. In *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 715 (1996),² this Court explained the adequacy of the translation required for a fair trial.

¹ The prosecution contends that defendant is not entitled to any review of this issue because he waived any argument on appeal when he selected the interpreter that he now claims was insufficient. Waiver occurs when a party affirmatively approves of an alleged error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). While defendant did affirmatively approve of the initial selection of the interpreter at issue, it does not follow that he approved of the eventual performance of that interpreter. As a result, we conclude that this claim of error has not been waived.

² We note that *Cunningham*, 215 Mich App at 654, involved a case where the defendant spoke English but did not receive a simultaneous translation of the testimony of a non-English speaking

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, 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. [*Id.* (emphasis added).]

While an interpreter is required to provide a defendant with a simultaneous translation of what was said at trial, “occasional lapses will not render a trial fundamentally unfair” *Id.* Additionally, this Court has found that the failure to translate a witness’s testimony is a more egregious error than the failure to translate attorney colloquy. *People v Truong (After Remand)*, 218 Mich App 325, 333; 553 NW2d 692 (1996), lv den 455 Mich 870 (1997). In general though, an “adequate translation of trial proceedings requires translation of everything relating to the trial that someone conversant in English would be privy to hear.” *Cunningham*, 215 Mich App at 654-655. As indicated in *Truong*, 218 Mich App at 333, the failure to receive a full translation can result in the deprivation of the “rights to due process, confrontation, or to be present at trial.”

Defendant did not receive a simultaneous translation of his trial within the meaning of *Cunningham*. Defendant submitted a DVD of the trial proceedings and has identified 55 instances where Chin appeared to be silent and failed to translate what was said.³ These numerous instances demonstrate that the lapses in translation were more than occasional, and therefore make defendant’s case distinguishable from *Truong (After Remand)*, 218 Mich App at 332-333. In that case, this Court found no violation of defendant’s right to a simultaneous translation where the interpreter summarized what was said during attorney colloquy, but provided defendant with a word-for-word translation of what each witness said. *Id.* Here, by contrast, there were numerous instances during cross-examination of two of the prosecution’s witnesses, including the victim, where Chin appeared silent. Thus, he did not provide defendant with a word-for-word translation of witness testimony at all times, and the failure to do so deprived defendant of a simultaneous translation. *Truong (After Remand)*, 218 Mich App at 332-333. Additionally, Chin appeared silent on several occasions during closing argument. Chin’s deficiencies as a translator did not produce a mere minor lapse in translation, as did the translator’s shortcomings in *Truong (After Remand)*, 218 Mich App at 333. Rather, Chin’s lapses deprived defendant of a “translation of everything relating to the trial that someone conversant in English would be privy to hear,” because his translation omitted significant portions of what was said during trial. See *Cunningham*, 215 Mich App at 654-655. Consequently, we conclude that a plain error did occur. The incomplete translations provided to defendant effectively prevented him from being truly present at each portion of his trial and arguably interfered with his cross-examination of witnesses and his ability to assist in his defense.

witness. However, this Court has held that the rule from *Cunningham* also applied to cases where a non-English speaking defendant was not provided with a simultaneous interpretation of the proceedings. See, e.g., *People v Truong (After Remand)*, 218 Mich App 325, 333; 553 NW2d 692 (1996).

³ At the evidentiary hearing, however, defendant identified only 15 such instances. Regardless, all instances went unchallenged by objections, none are preserved for appeal, and all are considered herein under the plain error standard.

Despite our finding that plain error occurred when defendant was not provided with a full translation of the trial proceedings, we find that defendant is not entitled to relief. While defendant argues that the failure to provide a full and simultaneous translation prevented him from responding to the victim's testimony, he fails to allege any specific instances of prejudice resulting from the incomplete translation he received at trial. Defendant has not explained how he would have assisted his attorney or how his attorney's cross-examination strategy would have differed if his interpreter had been adequate. He also does not explain how his lack of understanding of the proceedings contributed to his eventual conviction. Rather, as the prosecution argues, defendant developed a defense theory that directly responded to the specific allegations of the victim and presented that theory to the jury. While we recognize the importance of each of the constitutional rights implicated by this interpreter's deficient performance, we simply cannot conclude that the outcome of the trial would have differed had the interpreter performed as required. As a result, defendant has not shown that the plain error that did occur impacted his substantial rights. Accordingly, defendant is not entitled to relief on the basis of this issue.

Next, defendant argues that he was denied the right to testify on his own behalf as a result of his translator's failure to accurately translate defendant's testimony to the jury. Because defendant failed to preserve this issue below, he must demonstrate that plain error occurred and that his substantial rights were impacted. *Carines*, 460 Mich at 774. As this Court has explained, a denial of a defendant's right to testify is subject to the harmless error analysis, as it is not a structural error. *People v Solomon*, 220 Mich App 527, 538; 560 NW2d 651 (1996). This Court has applied the harmless error analysis to an instance in which a defendant's testimony was not accurately translated for the jury. *Truong (After Remand)*, 218 Mich App at 332 n 4. While we agree that plain error occurred when defendant's translator failed to accurately translate defendant's testimony for the jury, we find that any error was harmless and that defendant is not entitled to relief.

Defendant has provided this Court with a lengthy and detailed list of each instance in which his translator inaccurately translated his testimony to the jury. Having reviewed each instance of inaccurate translation, we cannot conclude that any of the errors, whether viewed separately or cumulatively, adversely impacted defendant's opportunity for acquittal. Nearly every inaccurate translation related to matters that were wholly tangential to the question of defendant's guilt. Many of the challenged translations related to very specific aspects of defendant's background and his medical training and experience. While the translation of defendant's testimony may not have been accurate, we cannot find instances in which the translations provided to the jury caused defendant's account of the incident to be implausible or any less credible. Rather, defendant was able to explain to the jurors that he did not digitally penetrate the victim's vagina and that she was merely experiencing a sensation that has been associated with acupuncture. Having heard the accounts of the victim and defendant, the jurors apparently determined that the victim was the more credible witness. It is not the place of this Court to question the jury's credibility determinations. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). Therefore, because we find that the inaccurate translations, though numerous, were inconsequential, we hold that defendant is not entitled to relief on the basis of this argument.

Lastly, Defendant argues that he was denied the effective assistance of counsel when his attorney failed to ensure that defendant was provided with a full and simultaneous translation of the proceedings and failed to ensure that the translator accurately conveyed the content of defendant's testimony to the jury. We disagree. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579, 582; 640 NW2d 246 (2002). This Court reviews questions of law de novo, and it reviews the trial court's findings of fact for clear error. *Id.*

A defendant is denied effective assistance of counsel in violation of the Sixth Amendment if counsel's "performance fell below an objective standard of reasonableness, ...[and] the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994); *Strickland*, 466 US at 692. Thus, a defendant must show that counsel's performance was not objectively reasonable and that he was prejudiced as a result of the deficient performance. *Pickens*, 446 Mich at 309. Prejudice under *Pickens* requires a showing that "but for counsel's errors, the result of the proceeding would have been different." *Pickens*, 446 Mich at 348-349.

As explained in relation to the previous two issues, we have concluded that although plain error occurred when defendant was denied a full translation of the trial proceedings and when his testimony was inaccurately translated to the jury, he was not entitled to relief because he failed to show that he was prejudiced by the errors. Defendant claims that his attorney was ineffective for allowing those plain errors to occur. However, because defendant was not prejudiced by those errors, it logically follows that he was not prejudiced by his attorney's alleged failure to prevent those errors. As a result, defendant's claim of ineffective assistance of counsel cannot succeed and it is unnecessary for this Court to determine whether counsel's performance fell below an objective standard of reasonableness. However, we note that defendant's argument that counsel's performance was objectively unreasonable is not persuasive. Because defendant personally selected the interpreter at issue and initially utilized his services to help him communicate with his attorney, defense counsel certainly had reason to believe that the individual was capable of performing the task at hand. Further, it is unclear how a defense attorney who is fully engaged with a testifying witness, a prosecutor or a judge could be expected to constantly monitor the performance of a translator. The record is also devoid of any in trial protest by the defendant that might have put his counsel on notice of a translation problem. It was not until after the defendant returned to the jurisdiction after he absconded to avoid his sentence that any translation issues were raised. This issue was raised, and the subsequent evidentiary hearing occurred, long after the death of the translator. Therefore, even if defendant had shown that the errors associated with the translator had prejudiced him, it would not follow that defendant was denied the effective assistance of counsel.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ William C. Whitbeck
/s/ Jane M. Beckering