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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 07/19/2011  
RUTH A. WILLINGHAM,  
CLERK  
BY: DLL

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 10-0479  
)  
Appellee, ) DEPARTMENT C  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
CATARINO TORRES VALENZUELA, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CR2008-167601-002DT

The Honorable Michael D. Jones, Judge

**AFFIRMED**

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Thomas C. Horne, Arizona Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel  
Criminal Appeals/Capital Litigation Section  
and Michael O'Toole, Assistant Attorney General  
Attorneys for Appellee

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Attorneys for Appellant

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**K E S S L E R**, Judge

¶1 Catarino Torres Valenzuela ("Appellant") appeals his convictions and sentences for two counts of kidnapping, one count of armed robbery, one count of conspiracy to commit burglary in the first degree, one count of burglary in the first degree, and four counts of misconduct involving weapons. With the exception of three of the four counts of misconduct involving weapons, the jury found that all of the counts were dangerous felonies with aggravating circumstances. For the following reasons, we affirm Appellant's convictions and sentences.

#### **FACTUAL AND PROCEDURAL HISTORY**

¶2 S.J., the victim, arrived home in the afternoon with her seven-year-old son and saw a woman standing by the front gate of her house. The woman asked S.J. for "the man of the house," but S.J. informed her that R.H., her boyfriend, was still at work. The woman appeared to make a call on a "radio."

¶3 A truck then arrived which was driven by Appellant and contained two other passengers. The male passenger got out of the car, consulted with the female who had already been at the house, and then proceeded to pull out a gun and place it in S.J.'s back. The male led her into the house, leaving her son outside until he was brought in shortly thereafter. Once S.J. and her son were brought into the house, they were seated on the couch and not allowed to leave. Appellant and two others then

began searching the house while the man with the gun stayed with S.J. and her son.

¶4 After Appellant was unable to find what he was looking for, Appellant pulled out a gun, pointed it in S.J.'s face, and asked where the marijuana was. S.J. informed Appellant that there was no marijuana in the house. Appellant left the living room, but soon returned and demanded money. S.J. informed Appellant that there was not any money or drugs in the house.

¶5 After being in S.J.'s house for roughly thirty minutes, the four individuals left the house. However, the group took with them a Sony PSP, a Sony PS2, some jewelry, and \$350 in cash from the house. Once the group left, S.J. first called R.H. and then the police.

¶6 A month after the incident, S.J. identified Appellant from a police photograph lineup. After Appellant was identified in the lineup, Police executed a search warrant of Appellant's home. The officers discovered numerous firearms and some body armor.

¶7 The State charged Appellant with conspiracy to commit kidnapping (Count 1), two counts of kidnapping (Counts 2 and 7), conspiracy to commit armed robbery (Count 3), armed robbery (Count 4), conspiracy to commit burglary (Count 5), burglary (Count 6) and four counts of misconduct involving weapons

(Counts 8-11). The State alleged aggravating circumstances for all counts.

¶8 The court dismissed Counts 1 (conspiracy to commit kidnapping) and 3 (conspiracy to commit armed robbery). The jury found Appellant guilty of all remaining counts. The jury further found that, with the exception of three of the counts of misconduct with weapons, all of the charged counts constituted dangerous felonies. However, the jury also found that the charged kidnapping of S.J.'s son did not constitute a dangerous crime against children. During the aggravation phase, the jury found aggravating circumstances for all of the charged counts except for three of the counts for misconduct involving weapons.

¶9 The trial court sentenced Appellant to aggravated fifteen-year terms of imprisonment, to run concurrently, for kidnapping, armed robbery, conspiracy to commit burglary in the first degree, and burglary in the first degree. The court further sentenced Appellant to a presumptive seven-year term of imprisonment for misconduct involving weapons as a dangerous felony, as well as to two-year terms of imprisonment for the final three counts of misconduct involving weapons, all to run concurrently with the prior sentences. Finally, the trial court sentenced Appellant to an aggravated fifteen-year term for kidnapping S.J.'s son, to run consecutively to the prior sentences.

¶10 Appellant timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and -4033(A)(1) (2010).

#### DISCUSSION

¶11 Appellant alleges two errors. First, Appellant argues that he was denied both his right to confront witnesses presented against him and his right to due process when the judge told the prospective bilingual jurors that they were bound by the court interpreter's official interpretation. Although Appellant did not request any additional jury instructions during voir dire or trial, he argues that despite his failure to object to the instruction and to the quality of the translator, the court should have instructed the jurors, sua sponte, that they were to inform the court of any potential misinterpretation. Second, Appellant contends that he was prejudiced when the court, without objection, mentioned sentencing while giving the jury instructions at the start of the aggravation phase.

- I. **The trial court did not violate Appellant's confrontation clause or due process rights when it instructed the jurors that they were bound by the court interpreter's official translation.**

¶12 During voir dire, the trial court, without objection, asked the potential jurors:

For those of you who speak Spanish, even a small amount of Spanish, I want to ask if you would have any difficulty being bound by the interpretation that our interpreters [sic] will give in this case? The reason for that is different people can have different interpretations. We are bound by our professional interpreters.

Both Ms. Villar and Ms. Huberman are sworn, certified court interpreters. If they have any doubt or question, they will pause our proceedings and you will hear them converse with either a witness or Mr. Torres Valenzuela to make sure that precise meaning is determined before we go further.

Would any of you have difficulty accepting their interpretations? No? Okay. All right.

¶13 Since Appellant neither objected to the instruction when given, nor requested the additional instruction prior to trial, we review only for fundamental error. Ariz. R. Crim. P. 21.3(c); *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005); see also *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977) ("It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial"). "To obtain relief under fundamental error review, a defendant must prove: (1) that error occurred; (2) that the error was fundamental; and (3) that the error was prejudicial." *State v. Avila*, 217 Ariz. 97, 99, ¶ 9, 170 P.3d 706, 708 (App. 2007). An error is fundamental when it "goes to the foundation of the case, or . . . takes from a

defendant a right essential to his defense.” *State v. Mincey*, 130 Ariz. 389, 397, 636 P.2d 637, 645 (1981). An error is prejudicial if, absent the error, the jury could have reasonably reached a different result. *State v. Martin*, 225 Ariz. 162, 166, ¶ 14, 235 P.3d 1045, 1049 (App. 2010). While Appellant asserts that he was prejudiced by fundamental error, we disagree.

**A. The trial court did not commit error, fundamental or otherwise, when it instructed the jurors that they were bound by the official court interpretation.**

¶14 Appellant argues that *if* the translations were inaccurate, he would have been denied the ability to confront the State’s witness because he and his counsel would have missed what the witness actually said. Appellant further contends that the jury instruction violated Appellant’s right to due process under federal and Arizona law because, without an accurate translation, he could not have a fair trial. Appellant’s rationale is that the jury must receive an accurate translation of a witness’ testimony for the defendant to receive a fair trial, which would not occur if there was a misinterpretation.

¶15 Appellant cites no authority to support his position that the jury should not be bound to the official court interpretation, and there is little reason to believe that such authority exists. See *Hernandez v. New York*, 500 U.S. 352 (1991) (holding that the desire to exclude bilingual jurors who

were hesitant to defer to the official interpreter's translation was a valid race-neutral reason for striking two jurors). In fact, there is a strong argument for excluding non-English statements from being considered as evidence. As the Ninth Circuit explained:

When, as here, a district court is faced with a jury that includes one or more bilingual jurors and . . . conversations are in a language other than English, restrictions on the jurors who are conversant with the foreign tongue is not only appropriate, it may in fact be essential. Where the translation . . . is disputed, both sides have an interest in what information is given to the jury. The rules of evidence . . . would prove of little use if a self-styled expert in the deliberations were free to give his or her opinion on this crucial issue, unknown to the parties.

*United States v. Fuentes-Montijo*, 68 F.3d 352, 355 (9th Cir. 1995).

¶16 Starting with Appellant's confrontation clause argument, when a defendant is not fluent in English, the defendant's right to confront a witness can be violated if the defendant is unable to understand the evidence being presented against him. *Escobar v. State*, 30 Ariz. 159, 168, 245 P. 356, 359 (1926); see also *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973) (holding that "the right to confront witnesses would be meaningless if the accused could not understand their testimony, and the effectiveness of cross-examination would be



severely hampered"). For such a violation to occur, the defendant's inability to understand the State's witness must preclude the defendant from being able to perform a meaningful cross-examination of the witness as well as from meeting the witness' evidence with his own. *Id.* However, when the accused is represented by counsel who understands the evidence, either directly or through an interpreter, the defendant's right to confront the witness is complied with even though the defendant himself may not understand what the witness said. *Id.*

¶17 In the case at hand, at least one certified court interpreter was present at all times during the trial to provide an interpretation for Appellant and the trial court. Moreover, there were at least two court interpreters in the court room when J.B., the only witness who needed an interpreter, testified in Spanish. Since Appellant failed to object to an interpretation during trial and even now fails to allege, let alone point out, that any improper translations occurred, we presume that the court interpreters correctly carried out their duties and provided proper interpretations. *State v. Mendoza*, 181 Ariz. 472, 475, 891 P.2d 939, 942 (App. 1995).

¶18 We feel especially confident in our presumption in this case given two different facts. First, Appellant speaks Spanish, meaning he understood any testimony spoken in Spanish

and could alert his attorney to any issues.<sup>1</sup> Second, J.B. spoke some English. We assume she would have realized if her testimony was misinterpreted.<sup>2</sup> Since we are to presume that all interpretations were correct, Appellant and his attorney were able to understand and cross-examine J.B. Consequently, there was no confrontation clause violation.

¶19 Appellant also argues that the jury must receive an accurate translation of a witness' testimony for the defendant to receive a fair trial, which it would not have received *if* there was a misinterpretation. However, the burden is on the appellant to show that an error in interpretation occurred, and that such error resulted in an unfair trial. *State v. Burris*, 131 Ariz. 563, 569, 643 P.2d 8, 14 (App. 1982) (holding that "[t]he burden was on appellant to show that the deficiencies of

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<sup>1</sup> Appellant's attorney argues that Appellant *might* have understood the trial court's instruction to mean that he was bound by the official court interpretation as well, and thus could not bring any potential errors to the court's attention.

We find this argument unpersuasive for two reasons. First, it is presumed that counsel and client will communicate during trial, and that Appellant would have brought any concerns to his attorney's attention. *Escobar*, 30 Ariz. at 168, 245 P. at 359.

Second, the jury instruction explicitly indicated that Appellant would be consulted if there was any confusion about an interpretation. Thus, Appellant knew that he could play an important role in the interpretation process.

<sup>2</sup> At trial, J.B. asked whether she should testify in English or Spanish. She was then told to testify in whatever language she was most comfortable speaking, which she indicated was Spanish.

the interpreter denied him a fair trial"). As previously indicated, Appellant has failed to demonstrate the existence of any inaccurate translations, and it is presumed that no misinterpretations exist. Without the existence of any erroneous interpretations, there is no foundation for Appellant's due process claim.

**B. The trial court did not commit error, fundamental or otherwise, when it failed to instruct the jurors, sua sponte, that they should notify the court of any potential misinterpretations.**

¶20 Appellant claims that the trial court also erred when it failed to instruct the bilingual jurors, sua sponte, that they should bring any potential misinterpretations to the court's attention. Appellant argues that by failing to give such an instruction, the court removed an additional safeguard to ensure that the interpretations were correct, and in doing so might have prevented him from understanding what the witness was actually saying. However, if Appellant had any concerns regarding the qualification of these interpreters or their actual interpretations, the burden was on him to make these concerns known to the court. *In re MH 2007-001895*, 221 Ariz. 346, 349, ¶ 12, 212 P.3d 38, 41 (App. 2009) (holding that the burden is on the defendant to challenge the qualification of a court interpreter); *Mendoza*, 181 Ariz. at 475, 891 P.2d at 942 (holding that, absent an objection, it is presumed that an

interpreter provided a proper and correct interpretation). While we can appreciate Appellant's desire for jury assistance in ensuring that interpretations are correct, the trial court did not commit error when it failed to give such an instruction sua sponte.<sup>3</sup> Having failed to ask for such an instruction prior to trial, Appellant cannot now attempt to shirk his responsibility to object in a timely manner to any faulty interpretations.

**C. Even if the trial court did commit error, Appellant was not prejudiced.**

¶21 Appellant has further failed to meet his burden of showing that such error prevented him from receiving a fair trial. Since Appellant is arguing under the assumption that

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<sup>3</sup> When an interpreter is required in a court proceeding, the goal of the court should be to obtain an accurate and faithful meaning of a witness' testimony. Thus, the trial court would be well-served by providing jurors with a means of alerting the court to a potential misinterpretation. See *Hernandez*, 500 U.S. at 379 (Stevens, J., dissenting) (providing an alternative to dismissing potential jurors simply because they speak Spanish and might not listen to the court interpreter).

However, just because the jurors were told that they had to rely exclusively upon the official interpretation does not mean that they were denied the ability to rectify any potential confusion they might have had as a result of a faulty interpretation. The trial court, in accordance with Rule 18.6 of the Arizona Rules of Criminal Procedure, instructed the jurors that they may submit to the court any questions they may have for the witness or the court. Thus, if a juror believed that a significant misinterpretation occurred, he or she was able to submit a question asking for the Spanish speaking witness to clarify any potentially confusing testimony.

some hypothetical misinterpretation occurred, any prejudice to Appellant is entirely speculative. Such speculative prejudice is insufficient to constitute fundamental error. *Martin*, 225 Ariz. at 166, ¶ 15, 235 P.3d at 1049.

¶22 Any potential misinterpretation did not affect the jury's verdict. At trial, only one of the State's eighteen witnesses needed an interpreter. Whether the jury relied upon J.B.'s testimony in its original Spanish form is ultimately irrelevant. While J.B. was an accomplice who identified Appellant in court as a participant in the robbery, there was ample evidence to support the jury's verdict by relying solely on testimony from the other seventeen witnesses, all of whom testified in English. For instance, the State's first witness, S.J., was the victim of the home invasion. She testified, in English, to the events that occurred during the robbery and identified Appellant as one of the burglars. Her testimony is supported by several other witnesses who also testified without needing an interpreter. Accordingly, Appellant has not only failed to demonstrate that his right to confront witnesses was denied, but also that such denial prejudiced him.

II. Appellant was not prejudiced when the trial court informed the jury that a finding of aggravating circumstances would make Appellant eligible for an aggravated sentence.

¶23 At the beginning of the aggravation phase of the trial, the trial court told the jury:

Under the law in the State of Arizona, every person guilty of these crimes is presumed to be sentenced to a presumptive sentence unless aggravation is proved by the State.

The State has alleged aggravation in this case. Based on the allegation, we are now beginning the hearing where you will decide whether the defendant should be eligible for an aggravated sentence under the law.<sup>4</sup>

¶24 Appellant did not object to this instruction at trial, but now contends that the trial court erred by informing the jury of the effect of its decision on the potential sentence and that he was prejudiced because the jury would have implied from the instruction that he would get a light sentence unless it found aggravators. Since Appellant failed to object at trial, we review for fundamental error. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. While Appellant argues that such fundamental error exists, we disagree.

¶25 During the guilt phase, the sole function of the jury in a criminal trial is to determine whether the defendant is

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<sup>4</sup> We note that this instruction differs from the Revised Arizona Jury Instructions ("RAJI"). RAJI's non-capital *Blakely* instructions do not refer to sentencing in any manner, and certainly do not indicate to the jurors that they will have a voice in the sentencing decision. See REVISED ARIZONA JURY INSTRUCTIONS (CRIM.) 495-96 (3rd ed. 2011).

guilty or not guilty. *State v. Koch*, 138 Ariz. 99, 105, 673 P.2d 297, 303 (1983). When the jury is informed of the possible sentence, the trial court runs the risk that the potential punishment will improperly influence the jury's verdict. Thus, to ensure that a defendant receives a fair trial, "a trial court's jury instructions generally should not touch on the subject of punishment except to advise the jury not to consider it." *Id.*

¶26 When the trial court improperly mentions the subject of punishment during jury instructions, we review to determine whether the error was prejudicial. *Id.* In the context of this case, the discussion of punishment was prejudicial if it induced the jurors to reach a verdict they might not otherwise have reached.

¶27 It has long been recognized that "a verdict of guilty cannot stand if it has been induced by any intimation from the trial judge that a light sentence might be imposed, thus encouraging a juror to abandon his vote of not guilty." *United States v. Glick*, 463 F.2d 491, 494 (2d Cir. 1972); see also *United States v. Davidson*, 367 F.2d 60, 63 (6th Cir. 1966) ("But when the jury's verdicts turn . . . on the right to recommend leniency, the permission to make such recommendation is plain error which affected the substantial rights of the defendants"). The fear is that where jurors know that only a minor sentence

will be given, the importance of their decision will be trivialized and they will be less likely to hold the State to its burden of proof. However, where the jury is properly instructed not to consider punishment, and the reference to punishment neither indicates that Appellant will be treated with leniency nor appears to have induced the jury to compromise its role as fact finder, there is no significant risk of prejudice. *Koch*, 138 Ariz. at 105-06, 673 P.2d at 303-04. We have yet to determine the extent to which this rationale applies to the aggravation phase.

¶28 The Supreme Court has held that it is the role of the jury to determine the existence of aggravating circumstances. *Blakely v. Washington*, 542 U.S. 296, 301 (2004) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). Following this decision, and subject to certain exceptions not present here, the role of the jury expanded to determine the presence of aggravating factors. While it is still inappropriate for the judge to inform the jury of the specific punishments that the defendant might receive, it is unclear whether it is improper for a court to merely inform the jury of the purpose of the aggravation phase.

¶29 In its answering brief, Appellee cites to *State v. Lynch*, 225 Ariz. 27, 34 ¶ 21, 234 P.3d 595, 602 (2010), in which the Arizona Supreme Court held that, in a capital case, it is



appropriate for a trial court to explain that a finding of an aggravating circumstance makes the defendant eligible for the death penalty. However, we have yet to determine whether *Lynch* applies to non-capital cases and we do not need to make such a determination today because Appellant has failed to demonstrate that he was prejudiced.

¶30 During the aggravation phase of the case at hand, the jury was properly instructed that it was not to consider punishment and that the question of punishment was ultimately for the court to determine. When the trial court has properly instructed the jury to not consider possible punishments in reaching its verdict, there is a rebuttable presumption that the jury followed the judge's instructions and found aggravating circumstances without being influenced by potential penalties. *State v. Parker*, 116 Ariz. 3, 7, 567 P.2d 319, 323 (1977). Such a presumption is difficult to overcome except when extraordinary circumstances exist. Compare *Glick*, 463 F.2d at 494-95 (finding prejudice when, during deliberation, the trial court instructed the jury that it could recommend leniency without making clear that sentencing was for the trial court to decide, thereby "unlocking" a jury that had been deadlocked for several hours), with *Koch*, 138 Ariz. at 105-06, 673 P.2d at 303-04 (finding no prejudice when the jury was instructed that the death penalty was off the table, as the judge did not indicate what sentence

might be imposed or that the defendant would not receive the maximum sentence if found guilty).

¶31 Here, unlike in *Glick*, there was no promise of a light sentence. Nor did the trial court tell the jurors what the specific punishments might be if they found or failed to find aggravating circumstances. Rather, the trial court merely informed the jurors that by finding aggravating circumstances, Appellant would be eligible to receive a harsher sentence. Under both *Glick's* and *Koch's* logic, the only risk presented by such an instruction was that the jury would be induced into not finding any aggravating circumstances out of a fear of defendant receiving a punishment that was too harsh.

¶32 Nevertheless, Appellant argues that, due to the seriousness of the crime, the jurors would choose to find the existence of aggravating circumstances to ensure that Appellant was locked up for a longer period of time. This argument is belied by the facts. During the guilt phase of the trial, the jury did not find the charged kidnapping of S.J.'s seven-year-old son to be a dangerous crime against a child. Similarly, during the aggravation phase of the trial, the jury found a lack of aggravating circumstances for three of the counts. Presumably, if the jurors had wanted Appellant to receive as long of a sentence as possible, they would have returned verdicts in favor of the prosecution in all four instances.

Since this did not occur, there is no reason to believe that the jury's decision on aggravators was improperly influenced by the court's instruction as to the purpose of the aggravation phase of the trial. Thus, even if the court's instructions were improper, Appellant was not prejudiced by them.

**CONCLUSION**

¶33 For the foregoing reasons, we affirm Appellant's convictions and sentences.

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DONN KESSLER, Judge

CONCURRING:

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PATRICIA K. NORRIS, Presiding Judge

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PHILIP HALL, Judge