

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	NO. 65495-1-I
)	
Respondent,)	DIVISION ONE
)	
v.)	
)	
JOHN BIEL,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: March 12, 2012
)	

Lau, J. — John Biel challenges his second degree rape conviction, arguing (1) denial of a fair trial because his interpreters were incompetent and (2) the court improperly limited cross-examination of a material witness. Finding no error, we affirm.

FACTS

At trial, witnesses testified to the following facts. Fourteen-year-old IC identified John Biel as the man who raped her. She first testified about the events leading to the rape. She testified that she asked Biel for a cigarette outside a gas station store and he asked her why she was alone outside. She told him she had nowhere to go, and he invited her to his place to sleep. She walked with him to a nearby apartment complex. Two other men were in the apartment. IC and Biel sat in a bedroom, drank alcohol, and talked, and the other two men entered and then left the room at various times. Biel left

the room and IC fell asleep. Biel reentered the room, laid down behind IC on the bed, and tried to pull her close. IC told him to stop but instead he had sex with her. One of the other men in the apartment knocked on the bedroom door, and Biel left the room. IC put on her shorts and shoes and ran from the apartment.

IC reported the rape to Kent Police Officer Peter Stewart. IC described her attacker as a tall, skinny black male with very dark skin, a strong African accent, and a scar on his left cheek. He wore a white tank top and a baseball cap with white stripes. IC also described the other two men who were in the apartment that night.

Stewart drove IC to the apartment complex, and she pointed out the exact apartment where the incident occurred. IC then went with her father to the hospital. Simon Bol lived in the apartment where Biel was staying. When Biel allowed Stewart into the apartment, Stewart found Biel sleeping on the floor in the bedroom on a pile of blankets, one with multiple colors. There was a red blanket with yellow stitching on the bed. Beer bottles and a large bottle of whiskey were scattered around the bedroom.

Stewart contacted IC at Valley Medical Center for details about the room where the rape occurred. IC described the blanket on the bed as red with yellow lines, and said that there was a colorful blanket or rug on the floor. IC also said that the room contained beer bottles and a whiskey bottle.

It appeared Biel had been drinking, and Stewart had a hard time rousing him. Biel was skinny and wore a white tank top. A black baseball cap was next to him on the floor and had a pattern "similar to [IC's] description." RP (Nov. 2, 2009) at 29. Biel had a "strong African accent." RP (Nov. 2, 2009) at 29. Stewart arrested Biel.

Kent Police Detective Lillian Melton met IC at Valley Medical Center. IC told Melton that the man who raped her wore a gold necklace with a round pendant and a tank top with stripes on the straps.

Melton then went to the Kent city jail, where she contacted Biel. He wore a white tank top with black and red stripes. His jail property contained a gold chain with a pendant similar to IC's description. Melton spoke to Biel in English and asked if he could understand. Biel said yes, and Melton could also understand Biel. Biel responded promptly and appropriately to Melton's questions. Biel "denied being in the company of a female." RP (Oct. 29, 2009) at 149. He confirmed that the tank top he was wearing was the same one he wore the night before (when IC testified the rape occurred).

Bol testified at trial that he found Biel in the bedroom on the night in question with a girl and that they were talking, laughing, and drinking beer. Nothing seemed wrong, and Biel went to bed.

Forensic scientist Jennifer Reid examined evidence collected in this case. One item tied Biel to IC—stains on Biel's tank top near the bottom tested positive for blood with a profile that matched IC. Nurse Anna Hulse, who examined IC at the hospital, testified that IC was having her menstrual period and blood was found in her genital area.

Through an interpreter, Biel testified at trial that he was staying at Simon Bol's apartment. Biel said that he watched television until about 10 p.m., and then went to sleep on the floor in the bedroom. Biel testified that he drank little that night. He

denied seeing IC until she appeared in court at his trial. Biel could not explain how IC's blood stained his tank top.

A jury found Biel guilty as charged. The trial court sentenced him within the standard range. He moved to arrest or vacate judgment and for a new trial, arguing the language interpreters' incompetence at trial and ineffective assistance of counsel.¹ The court denied the motion. Biel appeals.

ANALYSIS

Biel's native language is Neur, a Sudanese dialect. The court appointed qualified Neur language interpreters to assist Biel at trial. He argues that his constitutional right to a competent interpreter was violated because his interpreters were incompetent. The State argues that Biel relies on a single improper translation and that this isolated occurrence is insufficient to warrant a new trial.

In Washington, the right of a criminal defendant to 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) (quoting State v. Woo Woo Choi, 55 Wn. App. 895, 901, 781 P.2d 505 (1989)). Any inaccuracies in interpretation must be reviewed to determine whether they made the trial fundamentally unfair, thereby contravening a defendant's constitutional rights. See Valladares v. United States, 871 F.2d 1564, 1566 (11th Cir.1989). We review allegations of constitutional violations de novo. State v. Vance, 168 Wn.2d 754, 759, 230 P.3d 1055 (2010).

¹ Biel makes no ineffective assistance of counsel argument on appeal.

A right to an interpreter is the right to a competent interpreter. State v. Teshome, 122 Wn. App. 705, 711, 94 P.3d 1004 (2004). Because interpreters are provided to non-English speakers to secure their rights in legal proceedings, “the standard for competence should relate to whether the rights of non-English speakers are protected, rather than whether the interpreting is or is not egregiously poor.” Teshome, 122 Wn. App. at 712. We also consider how well the defendant speaks and understands English. See Teshmoe, 122 Wn. App. at 716.

In Teshome, the defendant’s interpreted plea hearing was reinterpreted from a recorded transcript. According to this reinterpretation, the interpreter did not accurately interpret key questions relating to the defendant’s charge, added words to the questions, and omitted certain words when describing the defendant’s options. Teshome, 122 Wn. App. at 713. But the defendant did not show the manifest injustice required to withdraw a plea. Teshome, 122 Wn. App. at 717.

The Ninth Circuit found inadequate interpretation based on direct evidence of incorrectly translated words, unresponsive answers, and the witness’s expression of difficulty in understanding what was being said to him. See Perez-Lastor v. I.N.S., 208 F.3d 773, 778 (9th Cir. 2000). In contrast, the Ninth Circuit found adequate translation when the translators were sworn in in accordance with the federal interpreter law, the record revealed a complete and adequate translation, neither petitioner indicated difficulty in understanding the questions, and both provided responsive answers. Acewicz v. United States I.N.S., 984 F.2d 1056 (9th Cir. 1993). There, the court noted that the petitioners 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. Acewicz, 984 F.2d at 1063.

Two Neur interpreters interpreted for Biel during the trial. The record reveals only one instance where the court raised a concern about the interpretation. The court heard Biel say the word “Washington,” but the interpreter did not repeat the word. RP (Nov. 5, 2009) at 177. The court and the interpreter then discussed how the interpreter should proceed when the English language has no Neur equivalent. RP (Nov. 5, 2009) at 177-78. The record reveals no other concerns expressed by the court or Biel about the quality of the interpretation until after the trial. The record shows that Biel provided responsive answers during trial.

The motion for a new trial and Biel’s appellate briefing identify no other specific examples of incorrect interpretation. Furthermore, the trial court observed that it was “quite clear” Biel understood English and instructed Biel to let the interpreter finish translating before providing a response. RP (Nov. 5, 2009) at 180. Biel fails to demonstrate his interpreters’ performance deprived him of a fair trial.

Biel next argues the court erred when it limited cross-examination of Simon Bol. Bol testified that he had Biel’s ATM (automated teller machine) cards in his possession, and he produced them in court upon request. Biel’s counsel sought to ask Bol about whether Bol used Biel’s ATM cards without his consent as a possible motive to implicate Biel in the rape. Biel argues that the evidence was relevant and admissible under ER 608(b). The State counters that these questions were irrelevant and speculative.

A person accused of a crime has a constitutional right to confront his or her accuser. U.S. Const. amends. VI, XIV; Wash. Const. art. I, § 22; State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). The primary and most important component is the right to conduct a meaningful cross-examination of adverse witnesses. State v. Foster, 135 Wn.2d 441, 456, 957 P.2d 712 (1998). The right to cross-examine an adverse witness is not absolute however. Darden, 145 Wn.2d at 620. Courts may, within their sound discretion, deny cross-examination if the evidence sought is vague, argumentative, or speculative. Darden, 145 Wn.2d at 620-21. Such determinations are limited by general considerations of relevance. Darden, 145 Wn.2d at 651; ER 401, 403. A defendant's right to introduce relevant evidence must also be balanced against the State's interest in precluding evidence so prejudicial as to disrupt the fairness of the trial. Darden, 145 Wn.2d at 621. Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. ER 401. When attacking a witness's credibility, it is not permissible to use extrinsic evidence of specific instances of conduct. ER 608. At the discretion of the trial court, a witness may be impeached on cross-examination with specific instances of conduct if that conduct is probative of the truthfulness of the witness. ER 608(b).

Bol surprised both the State and defense counsel during his testimony by handing Biel's ATM cards to defense counsel during cross-examination. Defense counsel then asked Bol,

Q: Did you ever use this card for any transaction after Mr. Biel was arrested?

A: No, I didn't get money, \$93. The car was tow with those.

Q: I'm sorry, let's go back. With regard - - with regard to the Tier One Bank, is that - - is this the one you're referring to?

A: (Shook head negatively)

THE COURT: Is that a no, sir?

MR. BOL: It is a no, yes.

RP (Nov. 3, 2009) at 21. At this point, the State objected and the parties went off the record. Defense counsel sought to question Bol about why he had the cards in his possession, what he had done with them, and why he had not come forward with the cards earlier. The court expressed concern about Bol's Fifth Amendment rights. The court also indicated its preliminary ruling that the questioning had no relevance. The court reasoned,

I don't see how that can show any bias or motive on Mr. Bol's part if the statements that he gave immediately after the event are the same statements that he alleged now, because there - - if there was a change, then there might have been an influence by him wanting to arguably get Mr. Biel convicted, so he doesn't get in trouble for using his cards or using his money. But if there's no change in the statements, then I don't see how that would be - how that would establish anything, even assuming that he did use the cards, the access cards and did take the money, if the statement is consistent, then it cannot connect to motive or bias in any way against Mr. Biel, because that was done after he gave the statement that is consistent with his testimony today. So in that case, I don't see how it would be relevant, or intent or motive.

And I don't see how it's admissible under [ER] 608, also. And again, because of the timing of this and the consistency of the statements, the only thing it could be used for is saying, see what a bad person Mr. Bol is, and that he took advantage of somebody that was arrested and used his stuff. And that's not the purpose of testimony is to show how bad somebody is, so that's what I'm inclined to say.

RP (Nov. 3, 2009) at 55-56.

Defense counsel later asked again for an opportunity to question Bol about these subject areas. The court offered an opportunity to question Bol off the record because the court still was not convinced the questions had relevance. Defense

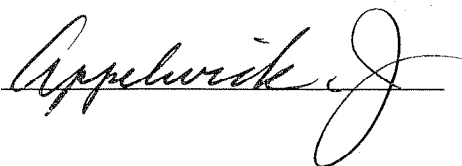
counsel declined the offer to interview Bol.

Generally, “an act of theft is not directly relevant to [a witness’s] propensity for truthfulness and veracity” State v. Cummings, 44 Wn. App. 146, 152, 721 P.2d 545 (1986). But even if we assumed theft might constitute a motive for Bol to lie, nothing in the record indicates Bol improperly used Biel’s ATM cards. Defense counsel had no evidence that Bol used the cards to withdraw money, and declined the opportunity to question Bol off the record. Biel’s attorney sent subpoenas to the banks for each of the two cards, and the only one that responded disclosed that there was no activity on the account. The defense attorney also had an opportunity to ask Bol at trial about at least one of the cards, before the State objected, and Bol denied its use. The court acted within its discretion to exclude speculative or irrelevant testimony. Biel demonstrates no reversible error.

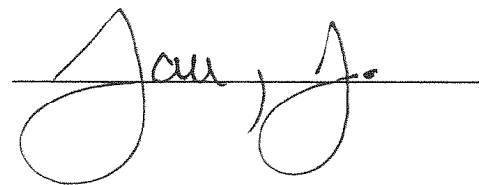
CONCLUSION

Because Biel demonstrates neither incompetent interpreters nor a violation of his right to confront witnesses, we affirm his judgment and sentence.

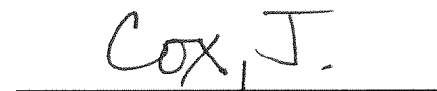
WE CONCUR:



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