IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHIGNTON,	)	No. 65575-2-I
Respondent,	)	
	)	DIVISION ONE
v.	)	
	)	UNPUBLISHED OPINION
MARY JAMIS LAKILADO,	)	
	)	
Appellant.		FILED: March 19, 2012
	)	
	)	
	)	

Appelwick, J. — Lakilado appeals her conviction for assault in the second degree, arguing that she was denied her right to a fair trial by an erroneous jury instruction, an incompetent interpreter, and ineffective assistance of counsel. Alternatively, she argues her sentencing enhancement must be reversed based on an erroneous unanimity instruction. Any error at trial was harmless, and Lakilado is barred from raising her sentencing enhancement argument under the invited error doctrine. We affirm.

FACTS

On October 7, 2007, Mary Lakilado attended a party at a house rented by Babo Keny and three other men. Keny and most of the people attending were Sudanese. Members of the Sudanese community often gather for such house parties or for church functions. Lakilado is part of the Sudanese community.

Olympia Williams also attended the house party, going along with her coworker, Latoya Jackson, and Jackson's boyfriend Tito. While Tito is Sudanese, Jackson and Williams are not. Jackson had met Lakilado several

times before that night, while accompanying Tito to earlier parties. At one such earlier event, Jackson had seen Lakilado with a man Lakilado described as her boyfriend.

At the party on October 7, the house became crowded. Keny was acting as the disc jockey (DJ), playing music while guests danced in the center of the room. Keny testified that Lakilado spent most of the evening away from the center dancing area, standing instead near his DJ station.

Williams testified she was standing at the edge of the room with Jackson when she asked a male guest for a piece of gum. Jackson recognized the man as Lakilado's boyfriend. Lakilado then approached and spoke to her boyfriend in a language that Williams did not understand. Lakilado's boyfriend quickly moved to another part of the room. Williams and Jackson then walked over to Lakilado to explain that Williams had not meant any offense in speaking to Lakilado's boyfriend. Lakilado hit Williams in the face with a glass bottle, breaking the bottle and injuring Williams. One of the men who lived in the house called 911, and Williams was eventually taken to the hospital in an ambulance.

Lakilado testified that she did not assault Williams that night, or even see the assault. Keny also testified on Lakilado's behalf, as did Lakilado's friend Karamella Auko, who was at the party and was with Lakilado both before and after the party.

Lakilado was charged with assault in the second degree, with a deadly weapon enhancement. A jury found her guilty as charged in February, 2009.

Lakilado filed a motion for a new trial, and new counsel was substituted.

The trial court denied that motion in April 2010. The trial court imposed a standard range sentence. Lakilado timely appeals.

DISCUSSION

I. Jury Instructions Defining Recklessness

The State must generally prove every element of an offense charged beyond a reasonable doubt. State v. Wheeler, 145 Wn.2d 116, 120, 34 P.3d 799 (2001). The elements of the charged crime, assault in the second degree, were set out in jury instruction 7, which was based on RCW 9A.36.021(1)(a):

> (1) That on or about October 7, 2007, the defendant intentionally assaulted Olympia Williams;
>
> (2) That the defendant thereby recklessly inflicted substantial bodily harm on Olympia Williams; and
>
> (3) That the acts occurred in the State of Washington.

Thus, the second degree assault instruction contains two separate mental states, each corresponding to a separate act: (1) intentionality with the assaultive act; and (2) recklessness with the infliction of substantial bodily harm. State v. McKague, 159 Wn. App. 489, 509, 246 P.3d 558 (2011), aff'd, 172 Wn.2d 802 262 P.3d 1225 (2012).

Jury instruction 9 defined "intentionally": "A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result which constitutes a crime." And, jury instruction 11 defined "recklessly":

> A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and this disregard is a gross deviation from conduct that a reasonable person would exercise in the same situation.

> *When recklessness is required to establish an element of a crime, the element is also is* [sic] *established if a person acts intentionally or knowingly.*

(Emphasis added.)

Lakilado argues that jury instruction 11 was improper and relieved the State of its burden of proving the second element of the crime. She contends, in essence, that the instruction created a mandatory presumption, naturally leading the jury to an erroneous understanding that a finding of intentional assault under the first element would automatically establish a finding that she acted recklessly under the second element. A mandatory presumption is one that requires the jury to find a presumed fact from a proven fact. State v. Atkins, 156 Wn. App. 799, 807, 236 P.3d 897 (2010). Mandatory presumptions violate a defendant's right to due process if they relieve the State of its obligation to prove all of the elements of the crime charged. Id. at 808.

Lakilado relies principally on Hayward to support her argument. State v. Hayward, 152 Wn. App. 632, 217 P.3d 354 (2009). In that case, the trial court administered a "to convict" instruction for assault in the second degree, essentially identical to the one here. Id. at 643. It then provided an additional recklessness instruction, stating: "'Recklessness also is established if a person acts intentionally.'" Id. On review, the court concluded that this additional jury instruction was defective, and improperly collapsed the two discrete elements. Id. at 645. The instruction conflated the intent the jury had to find regarding Hayward's assault with intent to cause substantial bodily harm required under the second element. Id. The court held that this created a mandatory

presumption that relieved the State of its burden of proving the reckless infliction of bodily harm, and violated Hayward's due process rights. Id. This is precisely the result that Lakilado now seeks.

But, Lakilado's argument fails to recognize or adequately address the fact that both Divisions One and Two of the Court of Appeals have considered this issue after Hayward and reached the opposite result. In McKague, Division Two concluded that a trial court may avoid the problem in Hayward by giving a correct "recklessness" instruction—one that does not create mandatory presumption. 159 Wn. App. 510. The "recklessness" instruction at McKague's trial provided: "When recklessness as to a particular fact is required to establish *an element* of a crime, *the element* is also established if a person acts intentionally or knowingly." Id. at 509-10. This instruction is consistent with the 2008 version of Washington's practice series pattern instruction. 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 10.03, at 209 (3d ed. 2008) (WPIC).[1] The McKague court expressly held that such an instruction removed the confusion in Hayward, and did not create a mandatory presumption. 159 Wn. App. 510. And, the instruction given in Lakilado's trial was identical to that given in McKague, devoid of the ambiguity that created a mandatory presumption in Hayward.

[1] The pattern instruction provides:

[When recklessness [as to a particular [result] [fact]] is required to establish an element of the crime, the element is also established if a person acts [intentionally] [or] [knowingly] [as to that [result] [fact]].]

11 WPIC 10.03, at 209.

Division One addressed this issue in State v. Holzknecht, 157 Wn. App. 754, 238 P.3d 1233 (2010), review denied, 170 Wn.2d 1029, 249 P.3d 623 (2011). In that case, the disputed "recklessness" instruction was more akin to that given in Hayward. It provided, in relevant part, "'Recklessness is also established if a person acts intentionally or knowingly.'" Holzknecht, 157 Wn. App. at 762. This court concluded that even this more ambiguous instruction was sufficient, on the heels of the basic "to convict" instruction, to correctly inform the jury of the applicable law:

> The instructions made clear that a different mental state must be determined for each element: intent as to assault, and recklessness as to infliction of substantial bodily harm. The instructions thus clearly require two separate inquiries, and nothing in the knowledge instruction suggests otherwise.

Id. at 766. The court held that the instructions did not result in a mandatory presumption and thus did not relieve the State of its burden of proving every element. Id. at 766. In Lakilado's case, the instructions given for the same crime actually included more safeguards against such a mandatory presumption, emphasizing that each element must be considered independently by the jury. Applying Holznecht, we hold that the jury instructions did not create a mandatory presumption or relieve the State of its burden of proof.

II. Interpretation

Lakilado argues she was denied due process and her right to present a defense, because an incompetent interpreter was used for the testimony of her two key witnesses. She points out that the interpreter, Walid Farhoud, was uncertified, and contends he committed numerous interpretive errors. She also

raised these arguments in a motion for a new trial. The trial court made oral findings and denied Lakilado's motion based on those findings. A trial court's denial of a motion for a new trial will not be reversed on appeal unless the defendant makes a clear showing that the trial court abused its discretion. State v. Pete, 152 Wn.2d 546, 552, 98 P.3d 803 (2004). Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. State v. Ramos, 83 Wn. App. 622, 636, 922 P.2d 193 (1996).

Farhoud acted as the interpreter for defense witnesses Auko and Keny at trial. Farhoud also interpreted for Keny at a pretrial interview on December 8, 2008. At that interview, Farhoud confirmed that Keny understood the standard Arabic that Farhoud used and that Farhoud understood Keny's Sudanese dialect. Farhoud speaks Modern Standard Arabic, a universal, common dialect, which shares its core with the Sudanese dialect that Auko and Keny speak. Farhoud stated both witnesses speak and understand Modern Standard Arabic, and he and they had no trouble understanding each other. According to Farhoud's declaration submitted by the State, Farhoud has been an Arabic interpreter in federal, state, and local courts since 1985. He has written articles and books relating to English-Arabic court interpretation. Throughout trial, Lakilado was provided with separate interpreters.

In Washington, a defendant has a right to a competent interpreter. State v. Teshome, 122 Wn. App. 705, 711, 94 P.3d 1004 (2004). This right is based on "'the Sixth Amendment constitutional right to confront witnesses and the right

inherent in a fair trial to be present at one's own trial.'" Id. at 709-10 (quotation marks omitted) (quoting State v. Gonzales-Morales, 138 Wn.2d 374, 379, 979 P.2d 826 (1999)). The legislature has also codified this right in part in chapter 2.43 RCW. Every non-English-speaking person in a legal proceeding is entitled to the services of a court-appointed, qualified interpreter. RCW 2.43.030. The interpreter must abide by the code of ethics and take an oath to interpret the person's statements "to the best of the interpreter's skill and judgment." RCW 2.43.050. If the non-English-speaking person is a witness compelled to appear, the court must use a certified interpreter unless good cause is found. RCW 2.43.030(1)(b). Good cause may be that no certified interpreter is reasonably available or that there are no certified interpreters in the language spoken. RCW 2.43.030(1)(b)(i)-(ii). If the court finds good cause to use an uncertified interpreter, it shall make a preliminary determination on the record that the proposed interpreter is capable of communicating effectively with the court and the person needing the interpreter. RCW 2.43.030(2). The court must also determine that the interpreter will abide by the code of ethics established by court rules. RCW 2.43.030(2).

For the purposes of her motion for a new trial, Lakilado had another Arabic interpreter, Nada Ali, listen to a recording of the testimony at trial from Keny and Auko. Ali created and submitted a transcript of both Keny and Auko's testimony in the form of a table, including her sometimes different interpretations, both from English into Arabic and from Arabic into English. Lakilado points to various discrepancies between Farhoud's interpretations and

Ali's interpretations, and argues Farhoud's interpretations were plainly erroneous, contained errors affecting substantive issues, and affected the perceived credibility of her witnesses.

In response to Lakilado's motion for a new trial, the trial court noted there are no certified Arabic interpreters in Washington. It conceded that it failed to make the inquiry into the interpreter's qualifications on the record, as required by RCW 2.43.030(2). But, it found that Lakilado waived this error by failing to object, and that failure to inquire on the record was a harmless error in any event, where it did not result in any prejudice. The trial court then turned to the alleged errors in interpretation and concluded that any discrepancies were "either nonmaterial or they did not affect the outcome of the trial." The trial court found that "the result would have been the same even if the jury had heard Dr. Ali's interpretation." Absent prejudice, the trial court denied the motion for a new trial.

A. Waiver

When Lakilado's counsel introduced Farhoud as the interpreter for defense witness Keny, counsel did not state whether Farhoud was certified. The trial court administered an oath, but it was not the oath required under RCW 2.43.050. Lakilado failed to object to the trial court's procedure or omission at trial.

The general rule is that appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a); State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). A claim of error may be raised for the first time on appeal if it

is a manifest error affecting a constitutional right. Id. at 926; RAP 2.5(a)(3). The defendant must identify the constitutional error and also must show how the alleged error resulted in actual prejudice to his or her rights at trial. Id. at 926-27. The State argues that because the trial court's error here was statutory, Lakilado's failure to raise this issue at trial resulted in her waiving it. The State points out that the general rule—that statutory errors are waived unless raised at trial—applies to errors in the statutory procedures relating to interpreters. State v. Serrano, 95 Wn. App. 700, 704, 977 P.2d 47 (1999).

To the extent that Lakilado's argument focuses on the trial court's errors and procedural deficiencies under chapter 2.43 RCW, we hold that this argument was waived by failing to object. To the extent that Lakilado's argument focuses on the constitutional claims, we analyze them below.

B. Competent Interpretation

Lakilado correctly asserts the trial court failed to comply with the statute by failing to properly evaluate Farhoud's competency on the record. Since she did not object, this failure is not reviewable unless it is manifest constitutional error. Kirkman, 159 Wn.2d at 926. On the motion for new trial, the trial court noted there are no certified Arabic interpreters in Washington. It explained that if it had heard Farhoud's "impressive" credentials at trial, it would have found him to be qualified. The trial court's failure to comply with the statute was harmless.

Lakilado's argument extends beyond an assertion of the trial court's statutory errors, however. She contends the alleged defects in Farhoud's

interpretation deprived her of her constitutional right to competent interpretation. Teshome, 122 Wn. App. at 711. One central measure of competence in interpretation is accuracy. Id. at 712-13. The Ninth Circuit has held that direct evidence of incorrectly translated words is persuasive evidence of incompetent interpreting. Id. at 713 (relying on Perez-Lastor v. Immigration & Naturalization Serv., 208 F.3d 773, 778 (9th Cir. 2000). And, the Seventh Circuit has framed the question as whether the accuracy and scope of a translation is subject to grave doubt. United States v. Cirrincione, 780 F.2d 620, 634 (7th Cir. 1985). Lakilado relies on Ali's transcript and table, contending that a comparison of Ali's interpretation with Farhoud's reflects several signs of incompetence.

But, as the trial court recognized, interpreting from one language to another is not an exact science, nor is there always a "correct" or perfect interpretation:

> Words have different meanings, depending on the context. Words in one language do not always have the exact equivalent in another language so interpreters, particularly those doing instantaneous [interpretations], have to exercise judgment when they're engaged in this process. Thus, the mere fact that Dr. Ali's interpretation is different from Mr. [Farhoud's] does not necessarily mean that one is right and the other is wrong.

The State points out that the premise of Lakilado's argument is that Ali's interpretation is correct and Farhoud's is incorrect. But, this is a premise that the trial court was not persuaded of, and that Lakilado has failed to prove.

Lakilado identifies two main substantive areas where she claims interpretive errors prejudiced her case: how much Lakilado had been drinking and Lakilado's location in the room at the time of the assault. Both Lakilado and

the State include the contested passages and their side-by-side interpretations from Farhoud and Ali. The State contends the disparate interpretations Lakilado relies on are often indistinguishable in substance or hinge on words that could have either meaning based on context. The State points out Farhoud had the benefit of being physically present during the testimony. Accordingly, Ali's different interpretations, particularly of such words that have multiple meanings based on their context, do not establish that Farhoud was incompetent or even incorrect.

As the trial court stated, the plain import of Keny and Auko's testimony to Lakilado's defense was that, while they did not see the assault, they believed Lakilado to be in another part of the room when it occurred. Their testimony, both in Farhoud's interpretation that the jury heard and in Ali's subsequent interpretation, corroborated Lakilado's testimony denying that she committed the assault. The trial court also concluded that alcohol consumption did not play an important role in the case—the State did not present evidence that Lakilado was intoxicated when she committed the assault, but focused instead on the fact that she was motivated by anger or jealousy. The trial court concluded that there was no prejudice and that the result of the case would have been the same even if the jury had heard Ali's interpretation. We agree. Lakilado has not adequately demonstrated that the alleged errors supported her assertion that Farhoud was incompetent. She has not established that Farhoud's interpretation prejudiced the outcome of her case. Lakilado has not established a manifest constitutional error.

C. Ineffective Assistance of Counsel

Lakilado next argues she received ineffective assistance of counsel, based on her attorney's failure to object to the two alleged errors addressed above. She points first to her attorney's failure to object when the trial court committed the procedural error of failing to consider Farhoud's competence on the record, as required under RCW 2.43.030. And, second, Lakilado argues it was error for her attorney not to object, in light of the interpretive errors. She asserts those errors should have been apparent to her trial attorney.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances, and that the deficient performance prejudiced the trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). If one of the two prongs of the test is absent, we need not inquire further. Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726 (2007). The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). Prejudice is present if there is a reasonable probability that, but for counsel's error, the result would have been different. Id. at 334-35. Judicial scrutiny of counsel's performance must be highly deferential. Strickland, 466 U.S. at 689. Where a claim of deficiency rests on defense counsel's failure to object, the defendant bears the

burden of showing that the objection likely would have been sustained. McFarland, 127 Wn.2d at 336.

The trial court recognized it failed to follow the statutory procedure under RCW 2.43.030 requiring it to make a preliminary determination that Farhoud was able to interpret accurately. It also failed to administer the proper oath as required under RCW 2.43.050. But, Lakilado's argument that her counsel was ineffective for failing to object is unpersuasive, because the trial court's procedural error did not result in prejudice. As addressed above, the statutory error was a harmless one. The trial court found that Farhoud had "impressive" credentials and stated it would have found him to be qualified. It also noted that Farhoud's declaration indicated that he and the defense witnesses did not have difficulty understanding each other. By contrast, neither Keny nor Auko indicated, via declaration or otherwise, that they were unable to understand Farhoud. Prejudice has not been established. An objection at trial would not have changed the outcome of the trial, and the failure to object thus does not constitute ineffective assistance of counsel.

Lakilado next argues her counsel was ineffective for failing to object to the alleged interpretive errors. This argument is similarly unpersuasive. As the trial court recognized, her attorney did not speak Arabic and so did not have a basis for evaluating the interpreter. The accuracy of the interpretation could only be determined by having a third party fluent in both English and Arabic review the transcript. Lakilado asserts she provided some basis for her counsel to object when she mentioned that she could not understand Farhoud when he was

interpreting for Keny and Auko and that she perceived inaccuracies in Farhoud's interpretation. But, this occurred only after the testimony was over. The trial court also noted that Lakilado was not fluent in English, so her ability to ascertain whether the witnesses' testimony was being accurately translated was questionable.

We hold that Lakilado has not overcome the presumption of competent representation, nor has she demonstrated her counsel's performance prejudiced her case. Her argument fails both prongs of the Strickland analysis.

III. Special Verdict

Lakilado argues in the alternative that even if her conviction is affirmed, the special verdict finding of the deadly weapon enhancement must be reversed, because the trial court gave an improper instruction. She contends the instruction erroneously suggested to the jury that unanimity was required for a "no" verdict. While unanimity is required to find the presence of a special finding, it is not required to find the absence of such a special finding. State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010).

The disputed instruction provided, in part:

> If you find the defendant guilty of assault in the second degree, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you ~~unanimously~~ have a reasonable doubt as to this question, you must answer "no".

The original instruction contained the word "unanimously" in the final sentence,

but upon reading the instruction to the jury, the court concluded that the sentence was incorrect. After the parties agreed to the change, the court instructed the jurors to cross out the word "unanimously" from that sentence.

We review de novo claimed errors of law in jury instructions. State v. Campbell, 163 Wn. App. 394, 400, 260 P.3d 235 (2011). In so doing, we consider "the context of the instructions as a whole," rather than viewing each instruction as an isolated mandate. State v. Benn, 120 Wn.2d 631, 654-55, 845 P.2d 289 (1993). In order for jury instructions to be sufficient, they must be "'readily understood and not misleading to the ordinary mind.'" Campbell, 163 Wn. App. at 400 (quoting State v. Dana, 73 Wn.2d 533, 537, 439 P.2d 403 (1968)).

Lakilado relies principally on Bashaw for support. In Bashaw, the special verdict form instruction told jurors: "'Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.'" 169 Wn.2d at 139. The Supreme Court reaffirmed its holding from State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1083 (2003), that unanimity was not required for a "no" determination on a special verdict. d. at 147. It concluded that the instruction amounted to a plain and erroneous suggestion that unanimity *was* required for either determination. Id. As Lakilado points out, the instruction given in her case contained a sentence that was essentially the same as the one the Supreme Court held constituted reversible error. In her case, the instruction read: "Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form."

The State responds that this error was invited by Lakilado, and she is thus precluded from raising this argument. "A party may not request an instruction and later complain on appeal that the requested instruction was given. State v. Boyer, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979). The invited error doctrine bars relief regardless of whether counsel intentionally or inadvertently encouraged the error. City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002).

The State originally proposed a special verdict form instruction that was from the 2005 version of the pattern instructions. 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 160.00, at 274 (2d ed. Supp. 2005). That version did not include the sentence that was rejected in Bashaw that suggested there was a general unanimity requirement, even for a "no" verdict. The proposed 2005 version stated, in pertinent part:

> If you find the defendant guilty of this crime, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer.

Thus, while the 2005 version was older and out of date, it did not contain the error that Lakilado now complains of. But, Lakilado's counsel requested that the proposed 2005 instruction be replaced with the erroneous 2008 version. She stated:

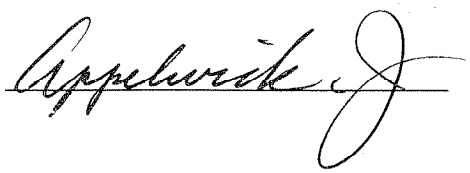
> I noticed that the instructions that the State has submitted, which Ms. Atchison [the prosecutor] was also unaware of, they're all dated 2005; and in December 2008, most of them were updated and the language is quite different.

> There's probably about six or seven instructions that are very different to where just inserting a few words wouldn't qualify, so I'm hoping that I could have -- I think Ms. Atchison wanted an opportunity to update her packet as well.

It was in response to this request that the State offered the 2008 version of 11A WPIC 160.00, at 630, which was the instruction that the trial court ultimately gave to the jury (after the modification).

After instructing the jurors to cross out the word "unanimously" from the final sentence of the instruction, the trial court asked counsel from both sides to go on record with their position on that modification. Lakilado's attorney stated, "I actually agreed with that change. I think that the 'unanimous' was incorrectly stated in that sentence as, of course, they don't have to be unanimous if they don't agree." The erroneous instruction was thus proffered by the State and given by the trial court as a direct response to Lakilado's own complaint and request. Lakilado's counsel explicitly agreed to the submission of instruction 12 with the trial court's modification. We hold that the invited error doctrine is applicable here. Lakilado may not now complain on appeal that the instruction was given.

We affirm.



WE CONCUR:

Leach, A.C.J. Schindler, J.