IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 27613-9-III**
	)	
Respondent,	)	
	)	
v.	)	**Division Three**
	)	
SYLVINO (NMI) FLORES PINEDA,	)	
	)	
Appellant.	)	**UNPUBLISHED OPINION**

Korsmo, J. — Sylvino Flores Pineda challenges his convictions for forgery and no valid operator's license, arguing that his interpreter was not competent and that two jury instructions were erroneous. The record supports the trial court's determination that there were no interpreter problems. We also find no error in the instructions. Accordingly, we affirm.

FACTS

Officer Darren Smith stopped Mr. Pineda for speeding on September 7, 2008. Mr. Pineda told the officer that he did not have a driver's license or any identification. When

asked to write down his complete name and date of birth, Mr. Pineda consulted an employment identification card before filling out the birth date information. Officer Smith ultimately arrested Mr. Pineda for driving without a valid license. A search uncovered a Social Security card and a work permit card that the officer believed were both forged. A pay stub that contained the suspect Social Security number was also discovered.

The officer used a Spanish-speaking interpreter to interview Mr. Pineda at the jail. Mr. Pineda admitted that both of the suspect documents were counterfeit and that he used them to work in the United States. He ultimately was charged in the Grant County Superior Court with two counts of forgery, one count of making a false statement to a public servant, and one count of operating a motor vehicle without a driver's license.

Mr. Pineda's counsel repeatedly told the court prior to trial that she was unable to communicate with her client through a court-certified Spanish interpreter and that Mr. Pineda's primary language was Mixteco. The court conducted a special hearing November 12, 2008, and heard testimony from interpreters who communicated with Mr. Pineda up to that point. The court found that Mixteco was Mr. Pineda's native language, but that he spoke Spanish well enough to conduct trial in that language. Nonetheless, because counsel believed the Spanish interpretation was insufficient, the court appointed

a Mixteco interpreter for trial.

The following week, counsel again raised the interpreter issue. She alleged that the Mixteco interpreter understood her client, but that her client could understand Spanish better than he could understand the interpreter's Mixteco. She requested that a Spanish interpreter be used at trial in conjunction with the Mixteco interpreter. The court denied the request.

The court held a CrR 3.5 hearing prior to trial. Defense counsel declined to call her client to testify. She alleged that interpretation problems were the reason for the decision. The court ruled that Mr. Pineda was properly advised of his rights by the Spanish-speaking jail interpreter. The statements were found to be admissible.

Mr. Pineda did testify at trial. He communicated in a responsive manner to questions asked by his counsel during direct and redirect examinations, as well as to the prosecutor's cross examination questions. Mr. Pineda sometimes asked to have the interpreter repeat a question in Spanish instead of Mixteco. No apparent communication problems occurred during trial.

Defense counsel objected to the court giving instructions 12 and 13 concerning intend to defraud. Instruction 12 told jurors that the intent to defraud element could be directed at any person, corporation, or government body. Instruction 13 advised the

jurors that the prosecution was not required to prove that anyone was actually defrauded.

The jury acquitted Mr. Pineda on the false statement charge, but convicted on the remaining three counts. He timely appealed to this court.

ANALYSIS

This court reviews a trial court's factual determinations for substantial evidence. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879, 73 P.3d 369 (2003). Substantial evidence is the quantum of evidence sufficient to persuade a rational, fair-minded person the premise is true. *Id.; Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). Questions of law and conclusions of law are reviewed *de novo*. *Sunnyside Valley,* 149 Wn.2d at 880. We review Mr. Pineda's challenges with these standards in mind.

Interpreter Competency

A non-English speaking defendant has a Sixth Amendment right to an interpreter. *State v. Gonzales-Morales,* 138 Wn.2d 374, 379, 979 P.2d 826 (1999). Washington law also secures the right by statute. RCW 2.43.010. When the sufficiency of the interpreter's efforts is questioned, the inquiry becomes whether the rights of the non-English speaking defendant have been protected. *State v. Ramirez-Dominguez,* 140 Wn. App. 233, 244, 165 P.3d 391 (2007); *State v. Teshome,* 122 Wn. App. 705, 712, 94 P.3d

1004 (2004), *review denied,* 153 Wn.2d 1028 (2005).

Washington has not adopted a standard for review of this issue. Instead, our courts have borrowed from federal courts. *Teshome* and *Ramirez-Dominguez* looked at tests used in *Perez-Lastor v. Immigration & Naturalization Service,* 208 F.3d 773 (9th Cir. 2000), and *Amadou v. Immigration & Naturalization Service,* 226 F.3d 724 (6th Cir. 2000). *Ramirez-Dominguez,* 140 Wn. App. at 245-246; *Teshome,* 122 Wn. App. at 712. Both of the federal cases looked to the trial court records for instances where the defendant stated he could not understand the interpreter or answered the questions inappropriately. *Id.*

Teshome also discussed a four-factor test used in *United States v. Cirrincione,* 780 F.2d 620 (7th Cir. 1985). *Teshome,* 122 Wn. App. at 712-713. That test, as recited by *Teshome,* looks at the following factors:

> (1) what is told [the defendant] is incomprehensible; (2) the accuracy and scope of a translation at a hearing or trial is subject to grave doubt; (3) the nature of the proceeding is not explained to him in a manner designed to insure his full comprehension; or (4) a credible claim of incapacity to understand due to language difficulty is made and the district court fails to review the evidence and make appropriate findings of fact.

Id. (citing *Cirrincione,* 780 F.2d at 634).

Critical to each of these approaches is record-based evidence that there were significant communication difficulties involving the defendant and the interpreter. The

record in this case does not show such difficulties. Mr. Pineda testified at trial and answered all questions from both counsel appropriately. There were no instances of mangled translation. Objectively viewed, the record simply does not support the claim of communication difficulty.

Mr. Pineda argues strenuously that his counsel's pretrial objections showed that he was not able to effectively communicate with her and that counsel's concerns should be given great weight. While true attorney-client communication problems could present interpreter competency issues, the trial court's take on the problem here was that any problems were related to Mr. Pineda's education and limited courtroom experiences rather than language barriers.

> Now in this particular case I think the defendant has a little difficulty understanding because we are using terms that he is not familiar with. I think that is part of the problem. But we can do no more than provide his language and his dialect of that language. And that's all we're going to do, put the County to that expense and give your client a fair trial.

Report of Proceedings (Nov. 12, 2008) 42.

The trial court's assessment of what was actually taking place is a factual determination that this court will accept on appeal. Whatever difficulties there may have been, they simply do not appear to be related to interpreter inadequacy.

The record does not support Mr. Pineda's argument that his interpreters were

inadequate.

Jury Instructions

Appellant also argues that jury instructions 12 and 13 constituted mandatory presumptions and also were comments on the evidence. We find no error in either instruction.

Instruction 12 provided:

> Whenever an intent to defraud shall be an element of an offense, it shall be sufficient if the intent to defraud is directed toward any person, association, corporation or public body politic whatsoever.

Clerk's Papers (CP) 34. In turn, Instruction 13 read:

> Plaintiff is not required to prove that anyone actually be defrauded.

CP 35.

"A mandatory presumption instructs the jury that it '*must* find the elemental fact upon proof of the basic fact.'" *State v. Hanna,* 123 Wn.2d 704, 710, 871 P.2d 135 (quoting *County Court of Ulster Cy. v. Allen,* 442 U.S. 140, 157, 60 L. Ed. 2d 777, 99 S. Ct. 2213 (1979)), *cert. denied*, 513 U.S. 919 (1994). In contrast, a "permissive inference or presumption permits, but does not require, the jury to infer an element of the offense." *Hanna,* 123 Wn.2d at 710. A mandatory presumption can run afoul of the constitution if it shifts the government's burden of proof on an element of the offense. *Id.*

Nothing in the challenged instructions tells the jury that it must find one fact based

upon another fact. They do not constitute presumptions. Rather, each simply states a legal principle about the intent to defraud element of forgery. Instruction 12 tells to whom the intent to defraud could be directed. Instruction 13 reminded jurors that evidence that someone was actually defrauded was not required.

Neither of these instructions directed the jury to find one fact if it found another. They were not presumptions, let alone mandatory ones.

Article IV, § 16 of the Washington constitution prohibits judges from commenting on the evidence. It states:

> Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

This provision is violated when a judge's statement or instruction conveys the judge's personal opinion about the evidence or the case. *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). The purpose of this provision "is to prevent the jury from being unduly influenced by the court's opinion regarding the credibility, weight, or sufficiency of the evidence." *State v. Sivins*, 138 Wn. App. 52, 58, 155 P.3d 982 (2007) (citing *State v. Eisner*, 95 Wn.2d 458, 462, 626 P.2d 10 (1981)).

We do not see how either of these instructions conveys the judge's personal opinion about the case to the jury. Both are correct statements of the law, and both instructions were needed to counter contrary arguments from defense counsel. An

accurate statement of the law is not a comment on the evidence. *State v. Ciskie,* 110 Wn.2d 263, 282-283, 751 P.2d 1165 (1988).

There was no error in giving instructions 12 and 13.

CONCLUSION

The convictions are affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Korsmo, J.

WE CONCUR:

_____
Kulik, A.C.J.

_____
Sweeney, J.