

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALI HUSAN KEJJAN,

Defendant-Appellant.

UNPUBLISHED

May 2, 2024

No. 359988

Ingham Circuit Court

LC No. 17-000727-FC

Before: N. P. HOOD, P.J., and JANSEN and FEENEY, JJ.

N. P. HOOD, P.J. (*dissenting*).

I respectfully dissent. The central issue in this case is whether the trial court abused its discretion by failing to provide—rather than failing to appoint—an interpreter. See *People v Gonzalez-Raymundo*, 308 Mich App 175, 187-193; 862 NW2d 657 (2014) (addressing the failure to provide an interpreter consistent with prior appointment of an interpreter). See also *People v Warren*, 200 Mich App 586, 590-592; 504 NW2d 907 (1993) (addressing the decision to appoint an interpreter). This distinction is important because, prior to trial, both the district court and the circuit court entered orders appointing an Arabic-English language interpreter so that Defendant Ali Husan Kejjan, who speaks some English, could fully participate in the criminal proceedings. Prior to trial, the trial judge never disturbed these orders. But neither did he enforce them. Instead, Kejjan proceeded to trial without an interpreter and was convicted. Despite the presence of DNA evidence, the trial was essentially a credibility contest, but one where, without the aid of an interpreter, Kejjan elected not to testify. He was then sentenced at a hearing where his lawyer acknowledged his language difficulty may have affected his statements in the presentence report. This all occurred without the trial court ever addressing its own orders requiring an interpreter.

It appears undisputed that the trial court’s failure to provide an interpreter was a result of ignorance of the existence of the prior orders appointing an interpreter, rather than a principled decision to deny Kejjan an interpreter. Our court rules provide a mechanism for removing an interpreter upon a person’s waiver, but they do not provide a mechanism for the court to revoke the appointment. See MCR 1.111(C). A defendant can waive an interpreter, (which a trial court may accept or reject), see *id.*, but here, no such waiver occurred—or appears to have even been

contemplated. Instead, at a *Ginther* hearing on Kejjan’s motion for a new trial, the trial court made a post hoc determination that Kejjan spoke English well enough to affirm his conviction.

Now on appeal, we face the same question: whether he understands English well enough for us to confidently affirm his conviction. The Legislature has indicated that we should not have to answer that question. See MCL 775.19a. So do our court rules. See MCR 1.111(B), (C). So does our precedent. See *People v Cunningham*, 215 Mich App 652; 546 NW2d 715 (1996) (holding that it was impossible to determine whether the error of providing imprecise translation was harmless beyond a reasonable doubt); *Gonzalez-Raymundo*, 308 Mich App at 192-193. Relying on these authorities, I would vacate the conviction and sentence and remand for a new trial.

I. BACKGROUND

The majority opinion accurately describes the relevant facts underpinning Kejjan’s convictions. Critically, this appeal arises from Kejjan’s convictions of criminal sexual conduct (CSC-II) and accosting a minor for immoral purposes, related to the sexual assault of SP, who was 11 years old at the time.

The central issue in this appeal however relates to the procedures surrounding the appointment of an interpreter so that Kejjan could fully participate in the criminal proceedings against him and subsequent failure to provide an interpreter without analysis or explanation. Kejjan, a native Arabic speaker, was convicted at a trial where the trial court did not provide him with an interpreter. This was despite the fact that both the district court and the circuit court entered orders prior to trial appointing an Arabic-English language interpreter for the duration of the proceedings. In September 2017, the district court judge entered an order appointing an Arabic-English language interpreter. The order stated that the district court had been informed that Kejjan needed an interpreter and ordered the appointment of one “until the conclusion of the case or until further order of the Court.” Based on this first order, an interpreter was present for the preliminary examination and interpreted during Kejjan’s waiver of his right to a preliminary examination. Likewise, in October 2018, the circuit court entered a similar order, stating it had been informed that Kejjan needed an interpreter and ordering the appointment of an interpreter “until the conclusion of the case or until further order of the Court.”

Kejjan never waived his right to have an interpreter present. Despite these orders and the lack of a waiver, the trial court failed to provide an interpreter at critical points during the criminal proceeding, including his competency examination, trial, and sentencing. Kejjan’s counsel also failed to demand that it enforce the previously-entered orders.

At trial, the critical evidence supporting Kejjan’s conviction was the testimony of SP, who described the sexual assaults. SP testified the Kejjan licked her cheek and touched the outside of her vagina with his fingers. She also testified that he asked if he could lick her vagina. The prosecution presented DNA evidence that indicated that DNA from Kejjan was on her cheek. The DNA evidence was in the form of a report that the defense stipulated to admit. The report did not specify what the source of the DNA was (i.e., saliva, blood, seminal fluid, skin cells). Without specification regarding the DNA evidence, and without a counter expert, the trial was essentially

a credibility contest. The defense theory was that Kejjan's DNA on SP's cheek was the result of an age-appropriate kiss on the cheek. But Kejjan did not testify. And he was convicted.

During the trial, the circuit court's order for an interpreter based on Kejjan's need was still effective. But the trial court did not provide one. So, the entirety of SP's testimony, discussion of the DNA evidence, Kejjan's waiver of his right to testify, and every other component of the trial was without the benefit of an interpreter.

Likewise, at sentencing Kejjan did not have an interpreter. His trial counsel informed the trial court that Kejjan's English comprehension was not strong. And he asked for the trial court's understanding related to certain of Kejjan's statements contained in the presentence investigation report that may not have been reflective of his true intentions. Despite these statements, and the prior orders that were still in effect, the trial court proceeded with the sentencing hearing.

The decision of the trial court not to provide an interpreter appears to have been unintentional. Following the jury trial and conviction, Kejjan moved for a new trial and a *Ginther* hearing¹ in part based on the trial court's failure to provide an interpreter. The trial court appears to have first become aware that there was a standing order requiring an interpreter at the hearing on the motion for a new trial. On the record, the trial judge reflected on verbal interactions he had with Kejjan during the trial. Out of concerns related to this apparent defect, the trial court granted Kejjan's request for a *Ginther* hearing.

When the trial court held the *Ginther* hearing, an interpreter was present consistent with the previously-entered orders. The transcript contains a notation that specifies "All answers and colloquy designated as 'The Defendant' are offered through the Interpreter. Any answers and colloquy designated as 'Mr. Kejjan' are offered directly from the Defendant in English." The trial court began by acknowledging, "the first thing we need to do is make sure Mr. Kejjan has an interpreter that's with him that he can communicate well with." The trial court swore the interpreter, inquired into her ability, confirmed that Kejjan could understand with her assistance, and offered both lawyers the opportunity to question her ability to provide a simultaneous translation.

During the hearing, Kejjan, a prior interpreter, and both of his attorneys testified. The first witness was Keith Watson, Kejjan's attorney during the preliminary examination and early parts of the case before Kejjan retained other counsel. Watson acknowledged that Kejjan was bilingual. He testified that he arranged for Kejjan to have an interpreter because English was not his first language. Watson described their early communication, which included completing simple pretrial conference forms and determining whether the case would require motion practice, and explained that these communications occurred without an interpreter. Kejjan ultimately retained another lawyer for trial. Watson clarified that had he remained on the case, he would not have proceeded through trial without an interpreter. He stated, "I probably would have been in a position where an interpreter would have been necessary for further consultation in preparation for trial." He explained that he needed an interpreter so that Kejjan, like every other client that goes

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

to trial, could provide input during the course of the trial as he saw and heard the evidence. He did not recall Kejjan asking for an interpreter or waiving his right to an interpreter. He explained that he was able to communicate with Kejjan but often had to explain or rephrase things for him.

Frederick Blackmond, Kejjan's retained trial counsel, also testified at the hearing. Blackmond testified that he knew that Kejjan's first language was not English and that he could not read and write English. Blackmond did not recall making statements at the sentencing hearing that Kejjan's English was bad but, when confronted, acknowledged the existence of his statements in the transcript and did not dispute its accuracy. He acknowledged that there were times that he had to explain or rephrase things for Kejjan, but he stated that he was able to understand him. He explained that Kejjan never told him to stop having an interpreter because they never discussed the issue. He was also unaware that the district court and circuit court entered orders appointing an interpreter prior to his retention. During his testimony the prosecution played a portion of Kejjan's interrogation with investigators where he spoke without the assistance of an interpreter.

Ziad Fadel, a retired lawyer who served as court-appointed interpreter during Kejjan's waiver of his preliminary examination, also testified. He testified that Kejjan spoke rudimentary or simple English, referring to it as "factory worker" English. He clarified, "I would not think that he could sit through a trial in the English language without the need for an interpreter."

Kejjan also testified. He explained that for longer or more complicated words, he requires clarification, including interactions with his appellate counsel. He testified that at trial he had trouble understanding what was happening in court and asked Blackmond for clarification. He stated, "I did ask a couple of times what does it mean and he [Blackmond] said, 'Later I will tell you.' " He stated that he wanted to testify in his defense, but Blackmond told him " 'Because your English is not good I would worry about you saying something that would be taken against you. Let me do that on your behalf.' " Kejjan explained that he was not nervous about testifying on his own behalf, but he was worried about speaking in English. Specifically, he was worried about being able to understand the questions being asked. He testified that he was not able to understand all of the testimony at trial without an interpreter. And although he understands some English, having an interpreter makes it easier for him to understand.

Following the testimony and arguments at the *Ginther* hearing, the trial court denied Kejjan's motion for a new trial from the bench. The trial court began by citing MCR 1.111, the court rule providing for appointment of foreign language interpreters. It stated that MCR 1.111 provides that if individual requests an interpreter or if the court determines that it is necessary, the court "shall" provide an interpreter. The trial court then stated, "The order uses the word 'shall,' so it's compelling for this Court unless the Court determines it is waived on the record or unnecessary."² Interestingly, the rule does not provide a remedy."

² It is unclear if this statement, regarding waiver or finding an interpreter "unnecessary," was a reference to the prior district court and circuit court orders appointing an interpreter, or a reference to MCR 1.111. To the extent that it is a direct reference to the court rule, as discussed below, it is an incorrect statement of the law. Neither MCL 775.19a, nor MCR 1.111(B) or (C) provide a

The trial court noted that Kejjan never requested an interpreter. Instead it stated, “One could assume that the earlier court and the earlier attorney decided an interpreter was necessary because of Mr. Kejjan’s nationality.” It is unclear what evidence it was relying on when making this finding of fact.

It then stated, “So let’s go to the next step and find out if it was necessary.”³ The trial court then concluded that Kejjan understood enough English to make an interpreter unnecessary. It cited the testimony of both lawyers that they communicated with Kejjan without an interpreter, and that Kejjan could speak but not read English. The trial court also cited a portion of the Fadel’s testimony that Kejjan “spoke factory worker English” and his earlier statement at the preliminary examination waiver that Kejjan speaks English. Inconsistent with Kejjan’s testimony, the trial court also found that “Mr. Kejjan testified that he was not nervous about testifying himself, if necessary.” The trial court also found it compelling that Kejjan’s competency hearing and interrogation were in English and that his wife did not request an interpreter. It concluded by stating, “It may have been factory English, but this Court, in its years, has seen many a person from simple origins who speaks simple English and yet still can communicate.” Finally, noting its own noncompliance, the trial court stated, “The Court understands that it did not arrange for an interpreter, but finds one is not necessary due to Mr. Kejjan’s abilities.”

The majority opinion otherwise accurately states the factual and procedural background.

II. STANDARD OF REVIEW

On his first claim of error, Kejjan argues that the trial court violated his constitutional right to due process when it failed to provide an interpreter as it had previously found necessary and relatedly that trial counsel was ineffective for failing to secure an interpreter. The majority correctly states the standard of review for claims of ineffective assistance of counsel. It appears to apply the wrong standard of review to the trial court’s failure to provide an interpreter.

Generally, this Court reviews a trial court’s decision about whether to provide an interpreter for a defendant for an abuse of discretion. *Warren*, 200 Mich App at 591-592. This Court also reviews a trial court’s decision to grant or deny a motion for a new trial for an abuse of discretion. *Gonzalez-Raymundo*, 308 Mich App at 186. “An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of principled outcomes.” *Id.* (citations

mechanism for the trial court to deny a person an interpreter based on a later finding that it is unnecessary. To the extent that it suggests an ability to undo another circuit judge’s finding of necessity, it also appears to be incorrect. See MCR 2.613(B) (prohibiting a judge from setting aside the order of a coequal judge).

³ Again, this suggests that the trial proceeded with an incorrect understanding of the court rule, framing the inquiry as (1) whether Kejjan requested an interpreter, and (2) whether it was necessary. Although MCR 1.111(C) provides that a trial court may refuse to accept a waiver finding that an interpreter *is* necessary, it does not provide a mechanism for the trial court absent a waiver to remove a previously appointed interpreter on a later finding that it is unnecessary. See MCR 1.111; See also MCL 775.19a.

omitted). In the context of the court’s decision to provide an interpreter for a defendant (as opposed to for a witness), the trial court abuses its discretion when (1) it appears from the record that the defendant is incapable of adequately understanding the charge or presenting a defense because of an inability to understand English and (2) that the absence of an interpreter deprived the defendant of some basic right. See *Warren*, 200 Mich App at 591-592 & n 1; See also *Gonzalez-Raymundo*, 308 Mich App at 189-190. Regarding the first prong of this two-part inquiry, our Court has looked to whether the trial court complied with MCL 775.19a. See *Gonzalez-Raymundo*, 308 Mich App at 189-192.

Kejjan and the prosecution rely on a different standard of review: plain-error analysis. Ordinarily, when a defendant fails to contemporaneously object in response to a trial issue, the issue is unpreserved (or forfeit) and subject to plain-error analysis. See *People v Carines*, 460 Mich 750, 762 n 7 & 763; 597 NW2d 130 (1999); *People v Davis*, 509 Mich 52, 64-65; 983 NW2d 325 (2022). To obtain relief under the plain-error rule, a defendant must prove that (1) an error occurred, (2) the error was plain, which is to say obvious, and (3) that the plain error affected their substantial rights—in other words, the error affected the outcome of the proceedings. *People v Anderson*, 341 Mich App 272, 280; 989 NW2d 832 (2022). If a defendant satisfies these three requirements, we must determine whether the plain error warrants reversal, in other words, whether it seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant’s innocence. *Carines*, 460 Mich at 763-764. Sometimes identified as a fourth prong of plain-error analysis, this last step conceptually overlaps with the third prong. *Davis*, 509 Mich at 75-76.

This standard also applies to the rare category of constitutional errors identified as “structural errors,” *People v Cain*, 498 Mich 108, 116; 869 NW2d 829 (2015), which Kejjan argues is the case here. Structural errors involve constitutional rights so basic to a fair trial that their infraction can never be treated as harmless. *Davis*, 509 Mich at 73 (citations omitted). See, e.g., *Arizona v Fulminante*, 499 US 279, 309; 111 S Ct 1246; 113 L Ed 2d 302 (1991) (holding that the use of coerced confession at trial was a structural error); *Weaver v Massachusetts*, 582 US 286, 293-296; 137 S Ct 1899; 198 L Ed 2d 420 (2017) (holding that the right to public trial is structural); *United States v Gonzalez-Lopez*, 548 US 140, 148-150; 126 S Ct 2557; 165 L Ed 2d 409 (2006) (holding that the Sixth Amendment right to counsel of one’s choice is structural). Our Supreme Court recently explained that forfeited structural errors are also “particularly ill-suited to an analysis of whether the error affected the outcome of the trial court proceedings.” *Davis*, 509 Mich at 72. While preserved structural errors warrant automatic reversal, *id.* at 73, “the existence of a forfeited structural error alone satisfies the third prong of the plain-error standard, and a defendant need not also show the occurrence of outcome-determinative prejudice.” *Id.* at 74. In other words, a forfeited structural error automatically satisfies the third prong and creates a formal rebuttable presumption that a defendant has satisfied the fourth prong—a rebuttable presumption for reversal. *Id.* at 73-75.

There are two problems with applying plain-error analysis to Kejjan’s claim regarding the trial court’s failure to provide an interpreter. First, it is not the standard we have applied to this issue in the past. See *Gonzalez-Raymundo*, 308 Mich App at 186 (analyzing an unpreserved (and arguably waived) issue of whether the trial court violated the defendant’s constitutional rights by failing to provide an interpreter at trial by addressing (1) trial court’s noncompliance with MCL 775.19a; and (2) whether defendant’s constitutional rights were violated). See also *Warren*, 200

Mich App at 592 & n 1 (applying a two-part analysis to an unpreserved issue of whether the trial court violated the defendant's constitutional rights by failing to provide an interpreter for one witness by addressing: (1) whether it appeared from the record that the witness was understandable, comprehensible, or intelligible; and (2) whether the absence of an interpreter deprived the defendant of some basic right). Second, a defendant legitimately raising the interpreter issue will likely never be in a position to preserve it by contemporaneously objecting at trial. If a defendant truly does not adequately understand English to participate at trial or in their defense, then they likely also will not adequately understand English to object to not having an interpreter. Applying the aforementioned two-part test from *Warren* and *Gonzalez-Raymundo* avoids the paradox of forcing defendants legitimately raising this critical issue from only being able to do so under the unforgiving plain-error standard. Applying that standard also would allow us to resolve this case without addressing whether the failure to provide an interpreter is a structural error, as Kejjan argues. See *Gonzalez-Raymundo*, 308 Mich App at 191-192 (declining to address whether failing to provide an interpreter is a structural error). But see *Cunningham*, 215 Mich App at 657 (applying harmless-error analysis, but holding "Because it is impossible to determine whether this error was harmless beyond a reasonable doubt without a recording of the trial, we must remand for a new proceeding"; strongly suggesting the error was structural). I therefore would employ the two-part test identified in *Warren* and *Gonzalez-Raymundo* rather than plain-error analysis or the standard on which the majority relies.

III. FAILURE TO PROVIDE AN INTERPRETER

Applying the aforementioned two-part test, I would conclude that the trial court abused its discretion by (1) failing to provide an interpreter in violation of MCR 1.111 and MCL 775.19a when the circuit court had already determined an interpreter was necessary and (2) depriving Kejjan of his constitutional right to participate in his own criminal trial. See *Gonzalez-Raymundo*, 308 Mich App at 186-192.⁴

A. NONCOMPLIANCE WITH MCL 775.19a AND MCR 1.111(B) AND (C)

⁴ I reiterate that we review a trial court's decision to provide an interpreter for abuse of discretion. *Warren*, 200 Mich App at 592. I observe that the two-part test we fashioned in *Warren* and appear to have applied in *Gonzalez-Raymundo* is aimed at answering this question: did the trial court abuse its discretion? At the threshold, it seems that if the reason the trial court failed to provide an interpreter was because it was unaware of its own order requiring an interpreter, then it necessarily abused its discretion. See *Gonzalez-Raymundo*, 308 Mich App at 186 ("An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of principled outcomes."). Here, the trial court's decision not to provide an interpreter was not rooted in some reasoned and principled decision-making, rather, it appears that the trial court was simply unaware of orders within the trial court file. This is evinced by the trial court's decision to provide an interpreter at the *Ginther* hearing—the first hearing after it became aware of its prior orders appointing an interpreter. Thus, without additional analysis, we could comfortably conclude that the trial court abused its discretion.

The first inquiry is whether the trial court complied with MCL 775.19a and MCR 1.111. See *Gonzalez-Raymundo*, 308 Mich App at 186 (addressing waiver, compliance with 775.19a, and deprivation of a constitutional right). It is undisputed that it did not. At the threshold, I observe that Kejjan never waived his right to an interpreter. To the extent that the trial court made findings regarding the “necessity” of an interpreter, absent a waiver, those findings have zero bearing on whether an interpreter is required under the statute and the court rule.

The relevant statute, MCL 775.19a, provides in relevant part:

If an accused person is about to be examined or tried and it appears to the judge that the person is incapable of adequately understanding the charge or presenting a defense to the charge because of a lack of ability to understand or speak the English language, the inability to adequately communicate by reason of being mute, or because the person suffers from a speech defect or other physical defect which impairs the person in maintaining his or her rights in the case, the judge shall appoint a qualified person to act as an interpreter.

The statute imposes an affirmative duty to appoint an interpreter, and it provides no mechanism for removal. See MCL 775.19a.

The relevant court rule, MCR 1.111(B), provides more details on the mechanics of appointing an interpreter. In relevant part, it provides:

(1) If a person requests a foreign language interpreter and the court determines such services are necessary for the person to meaningfully participate in the case or court proceeding, or on the court’s own determination that foreign language interpreter services are necessary for a person to meaningfully participate in the case or court proceeding, the court shall appoint a foreign language interpreter for that person if the person is a witness testifying in a civil or criminal case or court proceeding or is a party.

* * *

(3) In order to determine whether the services of a foreign language interpreter are necessary for a person to meaningfully participate under subrule (B)(1), *the court shall rely upon a request by an LEP individual^[5] (or a request made on behalf of an LEP individual) or prior notice in the record.* If no such requests have been made, the court may conduct an examination of the person on the record to determine whether such services are necessary. During the examination, the court may use a foreign language interpreter. For purposes of this examination, the court

⁵ MCR 1.111 references “LEP” without definition. The official commentary describes LEP as “Limited English Proficiency,” stating, “The Michigan Supreme Court embraces the goal of providing access to all the courts of this State. This includes interpreter services for persons with Limited English Proficiency (LEP), to ensure that they have meaningful access to our courts.” MCR 1.111, Comments of Supreme Court to 2013 Adoption.

is not required to comply with the requirements of subrule (F) and the foreign language interpreter may participate remotely. [MCR 1.111(B)(1), (3) (emphasis added).]

To simplify and shorten, the court must appoint an interpreter when necessary, see MCR 1.111(B)(1), and the court determines necessity by relying on an individual's request, "or prior notice in the record," such as a court order. See MCR 1.111(B)(3).

Unlike MCL 775.19a, the court rule provides a mechanism for a person to waive an interpreter, and for the court to accept or reject the waiver. Compare MCL 775.19a with MCR 1.111(C). The rule provides:

A person may waive the right to a foreign language interpreter established under subrule (B)(1) unless the court determines that the interpreter is required for the protection of the person's rights and the integrity of the case or court proceeding. The court must find on the record that a person's waiver of an interpreter is knowing and voluntary. When accepting the person's waiver, the court may use a foreign language interpreter. For purposes of this waiver, the court is not required to comply with the requirements of subrule (F) and the foreign language interpreter may participate remotely. [MCR 1.111(C).]

In other words, a person may waive their right to an interpreter, but the court may reject the waiver if it determines that an interpreter is required to protect the person's rights and the integrity of the proceeding. See *id.* Although the trial court has a duty to appoint an interpreter (or reject a waiver) when it is necessary, there is no mechanism in the statute or the court rule for the trial court to remove the interpreter requirement without a person's waiver. See MCL 775.19a; MCR 1.111.

Here, it is undisputed that there was no waiver and that the trial court failed to comply with MCL 775.19a and MCR 1.111(B). Regardless of the circumstances under which the district court and the prior judge on the circuit court entered orders appointing an interpreter for Kejjan, two prior judges determined that an interpreter was necessary for Kejjan to effectively participate. "Therefore, having failed to secure defendant's personal and knowing waiver of his right to simultaneous translation, the trial court erred by allowing defendant to proceed to trial without simultaneous translation of the trial proceedings." *Gonzalez-Raymundo*, 308 Mich App at 189-190 (internal citations omitted). See also MCR 1.111(B)(1), (3), and (C).

In *Gonzalez-Raymundo*, this Court affirmed a trial court's grant of a new trial on an eerily similar fact pattern. There, we affirmed the trial court's decision to grant a new trial based on its failure to provide an interpreter as it had previously ordered. *Gonzalez-Raymundo*, 308 Mich App at 185-194. Immediately before jury selection at his trial for CSC-III, MCL 750.520d(1)(a), defense counsel indicated that the defendant intended to waive his right to an interpreter during the proceedings. *Id.* at 181-182. Defense counsel stated that he could explain the proceedings to the defendant during breaks, and that the defendant was willing to accept the prejudice that might result from "minimal misunderstandings" in order to safeguard against prejudice jurors may have for someone who is not a native English speaker. *Id.* at 182. The trial court accepted defense counsel's indication that his client could understand well enough to participate, and without making a formal waiver, proceeded with the trial without an interpreter. *Id.* at 181-183. Until that

point, the defendant had the benefit of an interpreter present at other proceedings, including his preliminary examination and an evidentiary hearing. *Id.* at 181 & n 8. The defendant appealed, and on remand, following a *Ginther* hearing, the trial court granted the defendant's motion for a new trial, concluding that "it had erred when it did not have defendant personally waive simultaneous translation, instead accepting trial counsel's word on the subject." *Id.* at 185. The trial court also concluded that the defendant had been prejudiced by not being able to hear the victim's testimony in real time and be able to respond to his lawyer and ask questions. *Id.*

The prosecution appealed that decision, and we affirmed the trial court's grant of a new trial. *Id.* at 185-186. In doing so, we concluded that the trial court had not abused its discretion in granting a new trial and addressed the claim in three parts: (1) whether there was a valid waiver of the right to an interpreter, *id.* at 187-189; (2) whether the trial court failed to comply with MCL 775.19a, *id.* at 189-191; and (3) whether the defendant was deprived of his constitutional rights, *id.* at 191-193. After concluding that there was no valid waiver, *id.* at 187-189, we concluded that the trial court clearly failed to comply with MCL 775.19a's requirement to provide an interpreter. *Id.* at 189-191. We observed that the trial court, prosecution, and defense "all were aware that defendant was incapable of understanding English at a level necessary to effectively participate in his defense without simultaneous translation of the proceedings." *Id.* at 189. Therefore, without a waiver of his right to simultaneous translation, the trial court erred. *Id.* at 189-190. We further held that the trial court had an affirmative duty to establish the defendant's proficiency in English before proceeding without an interpreter, or appoint an interpreter, "in light of the record evidence concerning his limited understanding of English." *Id.* at 190. We concluded that the trial court erred by failing to satisfy this duty—essentially failing to comply with MCL 775.19a—"and that this error effectively prevented defendant from being truly present at his trial and arguably interfered with his ability to assist in his defense, including in the cross-examination of witnesses." *Id.* at 190.

Similarly here, the trial court failed to comply with its duty. Under MCL 775.19a, once there was an order establishing the necessity of an interpreter, the trial court had to provide one. See *id.* See also MCL 775.19a. The appointment orders indicated that both the district court and the circuit court (albeit a different judge from the trial judge) were made aware of Kejjan's need for an interpreter. These were the only orders in effect at the time of trial. Kejjan had not waived his right to an interpreter. And when the trial court denied Kejjan an interpreter, it had not made a determination about his English proficiency that was different from the prior orders. In *Gonzalez-Raymundo*, the trial court at least relied on the statements of counsel that the defendant could understand what was going on, which we later found to be insufficient. *Gonzalez-Raymundo*, 308 Mich App at 187-189. Here, it appears the only reason the trial court failed to provide an interpreter was based on its ignorance of the two prior orders—in other words, a mistake. This is illustrated by its later decision to provide an interpreter at the *Ginther* hearing. Thus, it is undisputed that the trial court failed to comply with MCL 775.19a and MCR 1.111.

The trial court's subsequent finding at the *Ginther* hearing that Kejjan understands enough English to render an interpreter unnecessary does not remedy this. At the *Ginther* hearing, the trial court observed that MCR 1.111 "[i]nterestingly . . . does not provide a remedy." More accurately, MCR 1.111 does not provide an alternative to providing an interpreter. See MCR 1.111(B), (C). As stated, neither MCL 775.19a, nor MCR 1.111 provide a mechanism for denying a person an interpreter once one is appointed. Instead, once appointed, an interpreter is required unless a

person waives their right to one, and even then the court can refuse to accept the waiver if it finds that an interpreter is necessary. See MCR 1.111(C). See also *Gonzalez-Raymundo*, 308 Mich App at 187-189. See also *id.* at 193.

Further, to the extent that this part of the analysis requires us to consider Kejjan's English proficiency, I would conclude that the trial court clearly erred in its fact-findings in three respects. First, two other judges, including one coequal circuit court judge, entered prior orders that found an interpreter was necessary. These fact-findings are entitled to deference, not only by us, but also by the trial judge. See MCR 2.613(B) and (C). The trial judge however overruled these orders without authority to do so. See *id.* (prohibiting a judge from setting aside or vacating the prior order of a coequal judge). See also MCL 775.19a (providing no mechanism for removing an interpreter); MCR 1.111(C) (providing no mechanism for the trial court to remove an interpreter without a valid waiver).

Second, even if the trial court had legal authority, which it did not, its finding was dubious. In its single reference to the orders and the findings of fact underpinning them, it stated, "One could assume that the earlier court and the earlier attorney decided an interpreter was necessary because of Mr. Kejjan's nationality." Not only is this speculative, but it is unsupported by the facts in the record. There is no indication what exactly the district court judge and prior circuit court judge relied on when deciding to order the appointment of an interpreter.

Third, even if the trial court had legal authority to undo the prior orders, and even if the record supported its determination regarding the facts underlying the prior court orders, its findings of fact were clearly erroneous because they ignored critical facts. The trial court appeared to ignore large portions of the interpreter's testimony about Kejjan's proficiency, his prior attorney, Watson's testimony about his proficiency and whether he would proceed to trial preparation and trial without an interpreter, and Kejjan's own statement about his decision not to testify and not understanding aspects of the trial. Most egregiously, the trial court found that Kejjan was "not nervous about testifying himself, if necessary." Kejjan did say he was not nervous about testifying, but he also said he was nervous about speaking English and worried about being able to understand questions being asked of him. Likewise, the trial court found that the interpreter, Fadel, testified that he spoke "factory worker English." Though accurate, the trial court omitted the interpreter's unambiguous testimony: "I would not think that he could sit through a trial in the English language without the need for an interpreter." I believe these omissions combined with its selective fact-findings amounted to clear error. This error is especially concerning considering the nature of the error. See *Gonzalez-Raymundo*, 308 Mich App at 188 ("The right at issue is . . . not merely statutory as codified by MCL 775.19a, but constitutional, and thus subject to every reasonable presumption against its loss."). Thus, the trial court clearly erred.

Regarding the first prong, I would conclude that the trial court misapplied MCL 775.19a and MCR 1.111. To the extent that this analysis requires our review of its fact-finding, I would find that it was clearly erroneous both in its fact-finding related to the evidence collected at the *Ginther* hearing and the fact-finding related to its decision to overturn the prior circuit court order appointing an interpreter.

B. DEPRIVATION OF RIGHT TO BE PRESENT AT TRIAL

Our second inquiry on this issue is whether the defendant was deprived of some basic right. See *Warren*, 200 Mich App at 592; *Gonzalez-Raymundo*, 308 Mich App at 187-189, 191-192. “The lack of simultaneous translation implicate[s] [a] defendant’s rights to due process of law guaranteed by the United States and Michigan Constitutions.” *Gonzalez-Raymundo*, 308 Mich App at 188, citing US Const, Am V; US Const, Am XIV; Const 1963, art 1, § 17. Although this implicates a panoply of rights, relevant here is a defendant’s right to be present at a trial against him. *Gonzalez-Raymundo*, 308 Mich App at 188, citing *Drope v Missouri*, 420 US 162, 171; 95 S Ct 896; 43 L E 2d 103 (1975). “[A] defendant’s lack of understanding of the proceedings against him renders him effectively absent.” *Gonzalez-Raymundo*, 308 Mich App at 188. See also *Cunningham*, 215 Mich App at 654-655. “The right at issue is thus not merely statutory as codified by MCL 775.19a, but constitutional, and thus subject to every reasonable presumption against its loss.” *Gonzalez-Raymundo*, 308 Mich App at 188.

Here, Kejjan had a statutory and constitutional right to have an interpreter at trial, and the failure to provide one deprived him of his right to be present at trial. See *Gonzalez-Raymundo*, 308 Mich App at 188, 190. At the time of his trial, the circuit court had a standing order that he required an interpreter. As stated, Kejjan did not waive his right to an interpreter. The findings of fact and legal conclusions underpinning these orders were never disturbed. Based on its reference to MCR 1.111, the trial court’s assessment of the necessity of an interpreter at the *Ginther* hearing did not appear to be an analysis of Kejjan’s right to be present, but rather appeared to be a misapplication of MCR 1.111(B) and (C) and a misunderstanding that the trial court could waive the interpreter requirement based on some finding of lack of necessity. This was incorrect. See MCR 1.111(C). Nonetheless, a generous reading of its findings and conclusions is that the trial court also concluded that its deprivation of an interpreter was harmless error. As stated, I believe this was also incorrect.

Although Kejjan knew some English, it is undisputed that it was his second language, and his English language proficiency was less than his proficiency in his native Arabic. His language ability affected his decision to testify. He stated that (as the trial court observed) he was not nervous to testify, but he was nervous about his language ability and the possibility that he would misunderstand questions in a manner that might affect his case. Blackmond counseled him not to take the witness stand. Notably, Blackmond also echoed Kejjan’s concern about being misunderstood at the sentencing hearing. His other lawyer, Watson, and the prior interpreter appointed to the case both testified that he could not adequately participate in a trial without an interpreter. Acknowledging that the trial involved some DNA evidence, at its heart, the trial was a credibility contest between Kejjan and SP. The absence of an interpreter impacted his right to confront the prosecution witnesses and participate in his defense, see *Cunningham*, 215 Mich App at 654-655, his right to testify (and his right to voluntarily remain silent), and more broadly his right to participate in the criminal trial. See *Gonzalez-Raymundo*, 308 Mich App at 188, 190.

This is not a situation of someone who is uneducated or unsophisticated; this case involves a language barrier. The conclusion, that he speaks enough English to get by, which is to say, enough English to affirm his conviction despite an extraordinary defect and error by the trial court, mirrors the prosecution’s (and now the majority’s) reliance on a single, out-of-context sentence from our decision in *Cunningham*, 215 Mich App at 654-655. There, we stated, “Although occasional lapses will not render a trial fundamentally unfair, adequate translation of trial proceedings requires translation of everything relating to the trial that someone conversant in

English would be privy to hear.” *Id.* Out of context, this statement could appear to hold that one does not have to understand English perfectly to proceed to trial without an interpreter. The trial court’s conclusion that Kejjan spoke “factory English, but this Court, in its years, has seen many a person from simple origins who speaks simple English and yet still can communicate” would seem to be consistent with this decontextualized statement from *Cunningham*. In *Cunningham*, however, we addressed a fundamentally different issue. There, unlike here, the trial court *provided* an interpreter consistent with its orders. *Id.* at 654-657. But “the interpreter did not translate each question and answer, but instead, had a conversation with the complainant that was not translated for the trier of fact,” rephrasing the questions for the witness, engaging in dialogue, and providing a synthesized answer. *Id.* at 656-657. We stated:

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. Although occasional lapses will not render a trial fundamentally unfair, adequate translation of trial proceedings requires translation of everything relating to the trial that someone conversant in English would be privy to hear. The interpreter should not aid or prompt the primary witness in any way, or render a summary of what the witness stated. [Id. at 654-655 (emphasis added).]

The sentence on which the prosecution, trial court, and majority appear to rely is limited to the context of an interpreter providing an imperfect translation, not a defendant’s English proficiency level. See *id.* Further, in *Cunningham*, we concluded that the inadequate translation of the complainant’s cross-examination denied the defendant his constitutional right to confront the witness in the CSC prosecution. *Id.* at 657. Concluding that it was impossible to measure the prejudice, we granted a new trial. *Id.*

Put plainly, *Cunningham* did not address the amount of English someone must understand before we can convict them without an interpreter. See *id.* It dealt with an imperfect translation, not a defendant’s imperfect understanding of English. See *id.* See also *People v Truong*, 218 Mich App 325, 333; 553 NW2d 692 (1996) (applying *Cunningham* in context; finding no error where a translator was present during all stages of the criminal proceeding, and minor lapses only occurred when translating attorney colloquies). Putting aside the fact that the error in *Cunningham* also warranted reversal, we should not expand its holding beyond that based on a mischaracterization of a single sentence in the opinion.

Here, unlike *Cunningham*, the trial court did not provide an interpreter at all. We therefore are not dealing with an imperfect translation with occasional lapses, we are dealing with no translation after another judge in the same court determined that one was necessary, through an order that was in effect at the time of trial. That puts this case closer to *Gonzalez-Raymundo*. There, an order for an interpreter was in effect during the trial. *Gonzalez-Raymundo*, 308 Mich App at 188-190. But the trial court chose not to provide an interpreter, relying on the statements of defense counsel that his client understood enough English to get by. *Id.* In short, it had already determined an interpreter was necessary, but it failed to provide one consistent with its orders. See *id.*

That is what happened here. Kejjan undoubtedly knew some English. But his language ability was such that two prior judges determined that he needed an interpreter to fully participate. His language barrier affected his decision to testify and his ability to understand the trial as it was happening. In short, as in *Gonzalez-Raymundo*, the defect affected his rights to confrontation, to participate in his defense, to testify or knowingly remain silent, and fundamentally the right to be present at his trial. See *id.* at 188, 190. Finding the second prong of the *Warren/Gonzalez-Raymundo* standard (deprivation of a fundamental right) satisfied, I would conclude that the trial court abused its discretion when it failed to provide an interpreter. It likewise abused its discretion when it denied the motion for a new trial on that basis.

IV. CONCLUSION

For the above-stated reasons, I would vacate the conviction and remand for a new trial with an interpreter or valid waiver prior to trial. This case is not about ineffective trial counsel. And it is not about an appellate parachute. See *Gonzalez-Raymundo*, 308 Mich App 193 (explaining how strict compliance with MCL 775.19a avoids appellate parachute concerns). This case is about the trial court's own failure to follow MCL 775.19a and the orders contained within the court file. Acknowledgment of this failure prompted the trial court to provide an interpreter at the *Ginther* hearing. It should have prompted the trial court to grant the motion for a new trial. For these reasons I would vacate, leaving it unnecessary to address the other claims of error.

/s/ Noah P. Hood