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Summary of Ouanbengboune v. State, 125 Nev. Adv. Op. No. 56

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**CRIMINAL LAW – POST-JUDGMENT TRANSLATION ERRORS &
AFTERTHOUGHT ROBBERY JURY INSTRUCTION REVIEW**

Summary

An appeal from an Eighth Judicial District Court judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon and robbery with the use of a deadly weapon.

Disposition/Outcome

The district court’s judgment of conviction was affirmed after analyzing two issues: (1) even though certain translational inaccuracies fundamentally altered the defendant’s trial testimony, the inaccuracies did not prejudice the defendant, and therefore did not warrant a new trial; (2) the district court’s error of failing to instruct the jury on afterthought robbery did not rise to the level of plain error because it did not affect the defendant’s substantial rights.

Factual and Procedural History

Defendant Vannasone “Sonny” Ouanbengboune (Sonny), a Laotian immigrant, maintained a romantic relationship with Raynna Bunyou between 2001 and 2003. Their relationship deteriorated, and on August 7, 2003, Sonny took a bus to a lounge in Las Vegas to confront Raynna for allegedly lying to him. He brought a revolver with him and testified that he intended to prove his love to Raynna by committing suicide in front of her. Sonny produced the revolver and shot Raynna in the leg while the two argued outside the lounge. Raynna fell to the ground. Sonny pointed the gun toward lounge patrons when they came outside to view the scene and ordered them to go back inside. Sonny then shot Raynna in the head. He testified that he did not aim the gun at Raynna’s head when he fired the second shot.

Sonny drove Raynna’s car from the scene. He contacted his family members and traveled to Oklahoma City where he was ultimately arrested. Once in custody, Sonny gave a written statement to the FBI and allowed two Las Vegas Metropolitan Police officers to conduct a tape-recorded interview.

The district court appointed a Laotian interpreter for the trial. Concerns about the adequacy of the interpreter’s translation of Sonny’s testimony were brought to the district court’s attention during trial, even though Sonny did not object to the errors at the time. The district court admonished the interpreter to translate properly.

The jury found Sonny guilty of first-degree murder with the use of a deadly weapon, and robbery with the use of a deadly weapon. Sonny hired an independent interpreter to review his tape-recorded trial testimony and compare it with the transcript of his translated testimony. Based upon that review, Sonny argues his constitutional rights were violated because his conviction was based upon an improper translation of his testimony.

Discussion

Interpreter Inaccuracies Made During Trial

The Court indicated the issue on appeal was whether the defendant’s due process right to a fair trial was undermined by interpreter inaccuracies that materially altered his testimony.

¹ By Ammon Francom

The Court cited precedent explaining that criminal defendants have “a due process right to an interpreter at all crucial stages of the criminal process,”² and that the standard of review for translated testimonies is whether the translation is adequate and accurate in its entirety.³ The Court indicated it has not previously considered either (1) the standard of review concerning the adequacy of an interpreter’s performance when translation errors are discovered post-judgment, or (2) what prejudice must be shown when fundamental errors have been discovered.

The Court cited to *Baltazaar-Monterrosa*⁴ as precedent for translation issues and adapted two different forms of the three-step procedure in *Baltazaar-Monterrosa* whereby defendants may file a post-trial motion challenging alleged translation inaccuracies when those inaccuracies are not discovered until after trial. A challenging party may either (1) move for a new trial under NRS 176.515, or (2) move to modify or correct the trial record on appeal pursuant to NRAP 10(c). The Court noted that in order to avoid abuse of post-trial review, translation errors discovered during trial should be objected to during the trial, rather than afterward.

Motion for New Trial

The Court held that the three-step procedure in *Baltazaar-Monterrosa*⁵ applies to motions filed under NRS 176.515 and adapted each step to a review of translated testimony as follows: (1) each party has its own interpreter review the translated testimony for discrepancies. The challenging party must demonstrate the inaccuracy of any discrepancies that exist and that they fundamentally alter the substance of the testimony; (2) the district court should appoint an independent, certified (if available) court interpreter to review the translations. After reviewing the disputed versions of the testimony, the court must determine whether the alleged inaccuracies or omissions fundamentally alter the context of the testimony, and whether the inaccuracies prejudiced the defendant such that a new trial is warranted;⁶ and (3) the district court should preserve a copy of each translation for the record on appeal.

Motion to Modify or Correct the Trial Record

The Court held that when inaccuracies are discovered during a pending appeal from a judgment of conviction, the challenging party should move to amend or correct the trial record pursuant to NRAP 10(c)⁷ using a five-step procedure based on *Baltazaar-Monterrosa*⁸ and FRAP 10(e)⁹ as follows: (1) the challenging party should file a motion with the district court to modify or correct the trial record according to NRAP 10(c); (2) each party should have its own interpreter review the translated testimony for discrepancies. The challenging party must demonstrate the inaccuracy of any discrepancies that exist and that they fundamentally alter the substance of the testimony; (3) where possible, the parties should determine and stipulate to the translation that is more accurate; (4) if the parties cannot stipulate to an accurate translation, the district court should appoint an independent, certified (if available) court interpreter to review the

² *Ton v. State*, 110 Nev. 970, 971, 878 P.2d 986, 987 (1994).

³ *Baltazaar-Monterrosa v. State*, 122 Nev. 606, 614, 137 P.3d 1137, 1142 (2006).

⁴ *Id.* at 614-17, 137 P.3d at 1142-44.

⁵ *Id.* at 617, 137 P.3d at 1144.

⁶ *United States v. Gomez*, 908 F.2d 809, 811 (11th Cir. 1990) (affirming defendant’s conviction despite some resulting prejudice from interpreter error because “the evidence against the [defendant] was, in all other respects, overwhelming”).

⁷ See NEV. R. CIV. P. 10(c).

⁸ See *Baltazaar-Monterrosa*, 122 Nev. at 616, 137 P.3d at 1144.

⁹ See FED. R. APP. P. 19(e)(2)(a) (this rule is analogous to NEV. R. CIV. P. 10(c), but contains more detailed language).

translations. The district court should then determine which translation accurately reflects the trial testimony and certify that translation as part of the record for review; and (5) the district court should preserve a copy of each translation for the record on appeal.

Because the State stipulated to it, the Court accepted the re-translation in this case as part of the record before analyzing several interpretation errors raised on appeal. The Court recognized the district court's admonishment of the court-appointed interpreter for concerns recognized during trial. The Court also analyzed several examples of technical errors that did not fundamentally alter the trial testimony because the interpretation, in its entirety, was sufficiently accurate and adequate. One such example was the interpreter's use of the Laotian term for "tempting" instead of "flirting" when Sonny testified of Raynna flirting with other men. Another example was the interpreter stating Sonny met Raynna at "4:00 p.m." on the Monday before the shooting, rather than at "sometime in the afternoon," as stated by Sonny. The Court concluded this technical error did not impugn Sonny's veracity before the jury.

However, the Court more thoroughly analyzed the interpreter's translation of Sonny's testimony on cross-examination regarding questions about firing the gun. The Court examined translation errors regarding whether Sonny re-cocked the gun before shooting Raynna the second time, and whether or not the gun was a single-action. The Court found that even though Sonny demonstrated the inaccuracies in translation fundamentally altered the context of his statements, he did not demonstrate a prejudicial effect warranting a new trial because there was overwhelming evidence of guilt.¹⁰ The Court based its finding on expert testimony stating the gun's design required it to be cocked before it could be fired a second time, and Sonny's admission to the Las Vegas Metropolitan Police that he fired the gun two or three times. Thus, a new trial was not warranted because overwhelming evidence supported the conclusion that Sonny acted with premeditation and as a result, the jury's verdict would have been the same even with a correct translation of Sonny's testimony.

The District Court's Failure to Instruct the Jury on Afterthought Robbery did not Affect Sonny's Substantial Rights.

The Court concluded that the district court's felony-murder instruction was not an abuse of discretion because the State adduced sufficient evidence to warrant the instruction. However, the Court concluded sua sponte¹¹ that the district court erred by failing to instruct the jury on afterthought robbery,¹² because robbery may not serve as a predicate to felony murder where evidence shows the accused did not form the intent to rob until after killing a person.¹³ However, because Sonny failed to object or propose an instruction on afterthought robbery, the Court reviewed the district court's decision for plain error, *i.e.* whether the error was clear from the record and adversely affected Sonny's substantial rights.¹⁴

The Court concluded that the error did not adversely affect Sonny's substantial rights because the record proves beyond a reasonable doubt that a rational jury would have convicted

¹⁰ See *United States v. Gomez*, 908 F.2d 809, 811 (11th Cir. 1990); see also *United States v. Long*, 301 F.3d 1095, 1105 (9th Cir. 2002).

¹¹ See *Emmons v. State*, 107 Nev. 53, 61, 807 P.2d 718, 723 (1991) (noting the Court may address plain error or constitutional issues sua sponte), *overruled on other grounds by* *Harte v. State*, 116 Nev. 1054, 1072, 13 P.3d 420, 432 (2000).

¹² *Nay v. State*, 123 Nev. 326, 333, 167 P.3d 430, 435 (2007).

¹³ *Id.*

¹⁴ See *Anderson v. State*, 121 Nev. 511, 516, 118 P.3d 184, 187 (2005).

Sonny of first-degree murder even if it had been properly instructed on afterthought robbery. The Court based this determination on facts showing Sonny acted willfully, deliberately, and with premeditation when he purposely carried a handgun to confront Raynna, shot her in the leg, and then shot her a second time in the head after having time for reflection (when he ordered bystanders back into the lounge at gunpoint).

Conclusion

The Court adopted procedures pursuant to either NRS 176.515, or NRAP 10(c) that allow a defendant to file a post-trial motion challenging inaccurate translations made by a court-appointed interpreter, when the inaccuracies are discovered post-judgment.

The Court concluded that although some translational inaccuracies fundamentally altered the defendant's testimony herein, such inaccuracies were not prejudicial and did not warrant a new trial because there was overwhelming evidence of the defendant's guilt.

Further, the Court held the district court's failure to instruct the jury on afterthought robbery did not amount to plain error because a rational jury would have convicted the defendant of first-degree murder despite improper instruction due to overwhelming evidence the defendant's actions were premeditated, willful, and deliberate. The Court, therefore, affirmed the judgment of conviction.