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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ALFONSO ZAMORA, Defendant and Appellant.	D061313 (Super. Ct. No. SCN280404)

APPEAL from a judgment of the Superior Court of San Diego County, Robert J. Kearney, Judge. Affirmed.

A jury convicted Alfonso Zamora of lewd or lascivious act upon a child under 14 years old. (Pen. Code, § 288, subd. (a).) Zamora appeals, claiming the trial court violated his confrontation rights under the Sixth Amendment of the federal Constitution by admitting into evidence an unauthenticated English translation of his police interview

conducted in Spanish. He alternatively contends he received ineffective assistance of counsel, who objected to the translated transcript on foundational grounds but not on constitutional grounds. We affirm the judgment.

BACKGROUND

Because Zamora does not challenge the sufficiency of the evidence supporting his conviction, we need only discuss the facts relevant to the admission of the translated transcript.

A secretary at the district attorney's office testified for the prosecution that she was responsible for transcribing tapes or compact discs given to her by deputy district attorneys. She speaks both Spanish and English fluently, but Spanish is her first language. She testified that, following her office's ordinary procedure regarding lengthy interviews conducted in Spanish, she sent the recording of Zamora's interview with San Diego Sheriff's Department Detective Juan Marquez to an "outside" translator. The secretary reviewed the translation for accuracy. Her two-step review process involved listening to the entire interview to ensure the Spanish transcription matched the Spanish voices, and verifying the translation was accurate. She stated Zamora's interview was accurately translated.

The secretary testified that the Spanish word for "hot," which is "caliente," may refer to both weather and sexual arousal. On cross-examination, the secretary stated she did not know the qualifications of the outside translator or whether he or she was certified by any state or county agency; however, judging from the translation, the translator

appeared competent. On re-direct examination, she testified that the transcript of Zamora's police interview admitted into evidence was true and accurate.

Detective Marquez, a child abuse detective, testified that he had interviewed Zamora, and the translation of the interview was accurate. Detective Marquez testified on cross-examination that he did not remember everything said in the interview, and therefore those portions of the transcript that the transcriber had marked "unintelligible" were "lost" to his memory.

At trial, Zamora's counsel objected to admission of the transcript because the identity and qualification of the outside translator was unknown. The court overruled the objection, noting the secretary had testified that the translation was accurate. The court permitted the prosecutor and Detective Marquez to read the entire translated transcript of Zamora's interview into the record. The court admitted a copy of the transcript into evidence without further objection.

DISCUSSION

I.

A.

Zamora contends the court violated his Sixth Amendment right to confrontation by admitting into evidence the transcript of his police interview, which was not properly authenticated. Although we conclude the trial court erred in admitting the transcript without authentication by the translator, the error was harmless beyond a reasonable

doubt.[1]

Under the Evidence Code, interpreters and translators are subject to the laws relating to witnesses. (Evid. Code,[2] § 750.) The translator of written documents shall "take an oath that he or she will make a true translation in the English language of any writing he or she is to decipher or translate." (§ 751, subd. (c).) "When the written characters in a writing offered in evidence are incapable of being deciphered or understood directly, a translator who can decipher the characters or understand the language shall be sworn to decipher or translate the writing." (§ 753, subd. (a).)

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1 Zamora's opening brief contains numerous additional arguments that are unavailing. Specifically, he argues that in the interview he did not use the Spanish word, "caliente" in reference to sexual arousal; translators must have their qualifications put on the record when their translations are placed in evidence; the "conduit" exception set forth in *Correa v. Superior Court* (2002) 27 Cal.4th 444 does not apply here; the testimony of Detective Marquez and the secretary regarding the accuracy of the translation "changes nothing, because translators and interpreters are 'subject to all the rules of law relating to witnesses,' " and a witness talking about the certification of another witness does not "effect an end run around the right of confrontation"; a witness cannot authenticate a tape unless he was present at the time it was made; this case is analogous to red light camera cases which produce incriminating photos from an unknown operating system; Zamora "cannot be deemed to have authorized the translation under Evidence Code section 1222"; cases that found harmless error in admitting translated documents are distinguishable because the specific wording of the translation was not as important in those cases; Zamora equivocated greatly in responding to Detective Marquez's question regarding sexual arousal; the trial testimony and the young victims' accounts of the incidents were subject to "some vagaries"; and there was "great emotionality about the whole case," causing an interpreter to be replaced at trial because she cried while translating the mother's testimony. The claims are unavailing because they do not survive the harmless error analysis set forth below or alternatively, our analysis of the merits of the claim set forth in Part B, *infra*.

2 All further statutory references are to the Evidence Code unless otherwise stated.

The analysis in *People v. Torres* (1985) 164 Cal.App.3d 266 (*Torres*) is instructive for evaluating Zamora's evidentiary objections. In *Torres*, the defendant was convicted based on translated transcripts of a tape recording of a drug transaction and a separate conversation between the defendant and an informant. (*Torres*, at p. 268.) No evidence was presented that a certified court interpreter had translated the conversations. (*Ibid*.) The defendant claimed the trial court erred by not requiring the interpreter's sworn testimony about his or her qualifications and the accuracy of the translation, thus denying defendant an opportunity for cross-examination. (*Ibid*.)

The *Torres* court stated that sections 750 and 751 require the administration of a "precisely formulated oath to any person who is to act as an interpreter, and the statutory requirements are mandatory in a criminal prosecution." (*Torres*, 164 Cal.App.3d at p. 269.) The court stated that "[t]he failure to call the original translator to the witness stand denied the defendant a meaningful opportunity to cross-examine the individual who translated the material as to his qualifications and the accuracy of the translation." (*Ibid*.) Although the court held it was a violation of the defendant's confrontation right to admit the transcript, it concluded such error was not per se reversible, and no prejudice or miscarriage of justice occurred because a Spanish-speaking officer, who was present at the time of the conversation, had authenticated the translations and testified they were accurate. (*Id*. at pp. 269-270.) Although the defense could have challenged the accuracy of the translations through cross-examination of this officer or obtained its own expert to translate the recordings, it chose not to do so. (*Ibid*.) Accordingly, any error in not

requiring the original interpreter to testify was deemed harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18. (*Torres*, *supra*, at p. 270.)

We conclude that the trial court committed the same error as in *Torres* by not having the translator authenticate the transcript of Zamora's interview as required under the Evidence Code. However, the error was harmless beyond a reasonable doubt because Zamora had opportunities to challenge the transcript's accuracy by cross-examining both the secretary who reviewed the translation and Detective Marquez. Both testified the translation was accurate. As in *Torres*, Zamora also elected not to call his own expert to challenge the translator's accuracy. (*Torres*, 164 Cal.App.3d at p. 270.)

B.

In any event, on the merits, we reject Zamora's contention that when answering Detective Marquez's question about whether he was sexually aroused upon touching the victim he "equivocated greatly;" therefore, expert translation was required because he could have meant to admit being in a "compromising position tickling a little girl." Detective Marquez asked Zamora in the interview whether he was sexually aroused when he touched the victim, "because you were a little hot, sexually, you think?"[3] Zamora answered, "Perhaps."

We set forth this complete line of questioning in the police interview:

"[Detective] Marquez: For-, because you were a little hot, sexually, you think?

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3 Detective Zamora's specific question to Zamora in Spanish was, "[P]orque estuvo poquito caliente sexualmente, crees?"

"Zamora: Perhaps.

"[Detective] Marquez: Perhaps?

"Zamora: Mm-hmm, but I never, I never went past there, I never got lower, on her vagina, never.

"[Detective] Marquez: And the, and the sec-, the second time, she still stayed laying there when you touched her the first time. And the second time, um, you started to tickle her, and co-, you went down again. That time, what were you thinking in your head?

"Zamora: Then-, I thought the same thing, well the same, that, that well, maybe because of getting hot, but at the same time, I reacted to myself, I said, 'You know what? Go play with the kids.' "

Because Detective Marquez asked Zamora whether he was "hot" in regards to sexual arousal and not whether the weather was hot, it was for the jury to evaluate Zamora's response and credibility in deciding whether he was guilty of committing a lewd and lascivious act upon a child. (*People v. Hovarter* (2008) 44 Cal.4th 983, 996 [" 'it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends' "].) By its verdict, the jury rejected the notion Zamora was merely admitting to being in a compromising position tickling a little girl. We perceive no basis for disturbing that finding on appeal.

II.

Zamora argues it was per se ineffective assistance of counsel for his trial attorney not to object to the admission of the translation of his police interview on constitutional grounds. We disagree.

In order to establish an ineffective assistance of counsel claim, a defendant must show prejudice. (*In re Avena* (1996) 12 Cal.4th 694, 721.) In light of our conclusion Zamora suffered no prejudice when the court admitted the transcript without requiring its authentication under sections 750 and 751, Zamora cannot establish an ineffective assistance of counsel claim. (*Strickland v. Washington* (1984) 466 U.S. 668, 678 [a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defense; if no prejudice is found, the claim fails].)

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.