FILED
02/10/2023
Clerk of the
Appellate Courts

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 13, 2022

STATE OF TENNESSEE v. MICHAEL NYOK LUETH

Appeal from the Criminal Court for Davidson County
No. 2020-A-517 Mark J. Fishburn, Judge

No. M2022-00206-CCA-R3-CD

The Defendant, Michael Nyok Lueth, was convicted as charged by a Davidson County Criminal Court jury of driving under the influence (DUI), sixth offense (Count 1); DUI per se, sixth offense (Count 2); and driving on a revoked license (Count 3). The trial court sentenced the Defendant as a Range II, multiple offender to concurrent six-year sentences for the DUI convictions, merged the DUI convictions, and imposed a concurrent sentence of eleven months and twenty-nine days imprisonment for the conviction for driving on a revoked license. On appeal, the Defendant argues: (1) the trial court erred in telling prospective jurors that an interpreter had been provided for the Defendant "out of an abundance of caution"; (2) the trial court erred in providing a special instruction to the jury that it was not allowed to consider the Defendant's lack of fluency in English when assessing the evidence in the case; (3) the trial court erred in denying defense counsel's motion for a mistrial after the prosecutor, relying on the trial court's proposed special instruction, stated during its rebuttal closing argument that the jury could not allow the Defendant's failure to speak English fluently to affect how the jury viewed the evidence; and (4) he was improperly sentenced as a second offender for his conviction for driving on a revoked license. After review, we affirm the Defendant's convictions but remand the case for entry of a corrected judgment form in Count 3 reflecting that the conviction offense is driving on a revoked license, first offense, a Class B misdemeanor, and that the Defendant's sentence is six months, served concurrently with the sentence in Count 1.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed and Remanded

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which TIMOTHY L. EASTER and JILL BARTEE AYERS, JJ., joined.

Martesha L. Johnson, District Public Defender, Jeffrey A. DeVasher (on appeal), Jessica Dragonetti and Chris Street-Razbadouski (at trial), Assistant District Public Defenders, for the Defendant-Appellant, Michael Nyok Lueth.

Jonathan Skrmetti, Attorney General and Reporter; Richard D. Douglas, Senior Assistant Attorney General; Glenn R. Funk, District Attorney General; and Elaine Heard, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Officer Torian Cox with the Metro Nashville Police Department (MNPD) testified that on the night of November 24, 2019, he was with two other officers in a parking lot when a "kind of hysterical" man pulled in. This man said he had been driving behind an erratic vehicle and had just witnessed the vehicle crash on Charlotte Pike. When Officer Cox arrived at the scene of this crash, he observed the Defendant and a second man standing next to a brown Lexus that had the front right tire and the rear right tire flat. At the time, the Lexus's engine was not running, but the keys were in the ignition.

When Officer Cox asked the Defendant what happened, the Defendant said "he had just wrecked his car and pointed to both tires." When the officer asked who was driving the car, the Defendant acknowledged that he had been driving the car, that the car belonged to him, and that he had just wrecked it. The car was also registered in the Defendant's name.

Officer Cox, who had received DUI training, said he smelled "the odor of an alcoholic beverage" on the Defendant's breath. He also noticed that the Defendant was "unsteady on his feet" and that the Defendant's eyes were "bloodshot and watery."

Officer Cox asked the Defendant for his driver's license, and the Defendant provided his Tennessee identification card. He later discovered that the Defendant's driver's license was revoked. When Officer Cox asked if the Defendant had been drinking, the Defendant admitted that he had consumed "three large Budweisers." At the time, the Defendant was "staggering" and "about to fall," so Officer Cox held onto the Defendant's arm to steady him. He then walked the Defendant to his patrol car and had him lean on it.

Because of the Defendant's multiple signs of intoxication, Officer Cox called a DUI officer. He said there was never any indication that someone other than the Defendant had been driving the car at the time of the wreck.

Officer Cox said that he spoke to the Defendant in English and that he was able to communicate with the Defendant. Based on his training and experience, he believed the Defendant could not safely operate a motor vehicle at that time.

On cross-examination, Officer Cox acknowledged that he had never met the Defendant before November 24, 2019. He said he did not know what country the Defendant was from and did not know what language the Defendant grew up speaking. He also acknowledged that he never asked the Defendant how long he had been in this country or how much English the Defendant had studied. Officer Cox said he did not inquire about whether the Defendant wanted or needed an interpreter, and he acknowledged that he did not request an interpreter on his own.

When Officer Cox first approached the scene, he saw two men outside the car trying to change one of the tires. He identified the Defendant as the driver of the wrecked car based on the Defendant's statement to him that he had been driving the car. He said the Defendant "spoke good English," and they talked about the accident. Officer Cox reiterated that the Defendant told him "it was his vehicle and he was driving it."

MNPD Sergeant Paul Stein testified that he first encountered the Defendant when the Defendant was sitting in the back of Officer Cox's patrol car. He asked the Defendant to step out of the car and noticed an "obvious odor of an alcoholic beverage" coming from the Defendant's body and breath. He also observed that the Defendant's left eye was "bloodshot and watery" and that the Defendant's right eye had "a white film" covering the pupil, although the Defendant later told him he was blind in his right eye. In addition, he noted that the Defendant was "unsteady on his feet" and "swayed from side to side and front to back." The Defendant told Sergeant Stein that he had consumed "three Bud bottles at a friend's house." He described the Defendant's mental state as "stuporous[,]" meaning that he had the appearance of being impaired. He also noted that the Defendant had a difficult time walking and that the Defendant had a cast on his right ankle, which was from a previous injury. He stated that the Defendant walked with a limp but was "somewhat unsteady on his feet even with the limp."

Sergeant Stein had the Defendant complete several field sobriety tests. When he looked at the Defendant's eyes, the Defendant swayed from side to side and from front to back. When Sergeant Stein asked him to follow an object with his eyes, the Defendant was unable to comply. On the modified Romberg test, which required the Defendant to tilt his head back, close his eyes, and estimate the passage of thirty seconds, the Defendant estimated the passage of thirty seconds in forty-two actual seconds, even though the average range for this test was between twenty-five and thirty-five seconds. Sergeant Stein said this response indicated that the Defendant's internal clock was slowed and suggested that the Defendant had ingested some sort of depressant, like alcohol.

Sergeant Stein checked the status of the Defendant's driver's license and discovered that it was revoked. Thereafter, based on the Defendant's signs of impairment and his performance on the field sobriety tests, Sergeant Stein took the Defendant into custody.

Sergeant Stein read the Defendant the implied consent form, and the Defendant consented to a blood test. He said that he "was able to converse with [the Defendant]" and knew the Defendant "understood what [he] was saying based on his responses" to his questions. However, because the Defendant spoke a language other than English as his primary language, Sergeant Stein asked the Defendant to repeat what he had read to him from the implied consent form. When the Defendant was unable to fully repeat back this information, Sergeant Stein obtained a search warrant for the Defendant's blood draw.

Sergeant Stein confirmed that all of his conversations with the Defendant took place in English. He gave the instructions for the field sobriety tests in English, and the Defendant responded in English. Sergeant Stein said he was able to communicate with the Defendant and only obtained the warrant for the blood draw as a way to "safeguard" the Defendant's rights "in the event that [the Defendant] didn't understand what was going on."

The Defendant's blood draw took place approximately three hours after Sergeant Stein first encountered the Defendant. Based on his training and experience, Sergeant Stein believed the Defendant was impaired to the extent that it was unsafe for him to drive.

On cross-examination, Sergeant Stein acknowledged that police policy required him to get supervisor approval before using the interpreter services line because of the costs associated with that service. He also said that pursuant to this policy, he would have been unable to obtain an interpreter in the Defendant's case because it was considered a non-serious traffic accident. Sergeant Stein confirmed that there had been a "passenger" at the scene originally, but this passenger had been put "in the back of a car or taken away for an unrelated incident," so he was unable to speak to him.

Sergeant Stein said he did not administer a breath test on the Defendant because he was concerned that the Defendant would not be able to follow the detailed instructions associated with that test, given that English was not the Defendant's primary language. He acknowledged that he had never met the Defendant before that night and did not know what country the Defendant was from, what language the Defendant spoke, or how long he had been in this country. Although Sergeant Stein did not know how much English the Defendant had studied, he said the Defendant could "hold a dialogue with [him] and could perform the things [he] asked him to perform."

Logan Pierce, an expert in forensic toxicology with the MNPD crime lab, testified that he tested the Defendant's blood and that it had a blood alcohol level of .3 percent, which was nearly four times higher than the legal limit of .08 percent. In Pierce's opinion, an individual with a blood alcohol level of .3 percent would be impaired.

The Defendant was convicted as charged by a Davidson County Criminal Court jury of driving under the influence (DUI), sixth offense (Count 1); DUI per se, sixth offense (Count 2); and driving on a revoked license (Count 3). The trial court sentenced the Defendant as a Range II, multiple offender, imposed concurrent six-year sentences for the DUI convictions, and merged the DUI conviction in Count 2 with the DUI conviction in Count 1. The trial court also imposed a concurrent sentence of eleven months and twenty-nine days imprisonment for the conviction for driving on a revoked license.

Thereafter, the Defendant timely filed a motion for new trial, alleging in pertinent part that the trial court erred in commenting on the Defendant's "language ability and use of an interpreter in the presence of the jury during jury selection," that the trial court erred in including "a special jury instruction on the use of interpreters," and that the trial court erred in "allowing the State to quote the language from the special jury instruction in its closing argument." The trial court entered a written order denying this motion. In it, the court acknowledged that it "should not have read the jury instruction regarding witnesses and interpreters because it was inapplicable in this case" but asserted that any error regarding this instruction was "harmless when considered with any other instructions" and "had no effect on the verdict." The Defendant then timely filed his notice of appeal.

ANALYSIS

I. Trial Court's Statement to Prospective Jurors. The Defendant contends that the trial court erred in telling prospective jurors that an interpreter was being provided to the Defendant at trial "out of an abundance of caution." He claims that the court's comment "effectively expressed its personal opinion that [the Defendant] could speak and understand English well enough that an interpreter was not necessary" and "effectively endorsed Officer Cox's subsequent testimony that he was able to communicate with [the Defendant] in English and that [the Defendant], in response to questioning, stated that he had been driving the vehicle." The Defendant asserts that because a key issue in this case was whether the Defendant understood Officer Cox's question about whether he had been driving, the trial court's remark constituted a judicial comment on the evidence in violation of article VI, section 9 of the Tennessee Constitution as well as the Fifth and Fourteenth Amendments to the United States Constitution. The Defendant also asserts that the trial court's erroneous comment should not be deemed harmless under Rule 36(b) of the Tennessee Rules of Appellate Procedure because whether the Defendant understood

Officer Cox's question about whether he had been driving was "the primary contested issue in this case."

In response, the State argues that because the trial court made these comments to ensure that the prospective jurors would not harbor a bias toward either party based on the presence of the interpreter and to identify potential jurors who might be unable to view the evidence objectively in light of the interpreter, these comments were a proper exercise of the trial court's discretion when conducting voir dire and did not constitute an improper comment on the evidence. See State v. Cazes, 875 S.W.2d 253, 262 (Tenn. 1994). We conclude that the Defendant is not entitled to relief after considering the trial court's comments in the overall context of the case.

During a pretrial hearing, defense counsel asked the trial court for a ruling on her motion to secure an in-person interpreter or continue the trial. She said she had reserved an interpreter two months prior and had confirmed that an interpreter was available. However, she later learned that this particular interpreter, who is fluent in the Defendant's native language of Dinka, lived in California and had been using the Zoom application to assist in trials during the Covid pandemic. Defense counsel said that she was requesting "the California interpreter, another interpreter, an in-person interpreter" because the challenges involved in trying to proceed with a "Zoom interpreter" at trial would be too difficult. Defense counsel acknowledged that the Defendant had testified in English at earlier hearings but asserted that the Defendant's testimony at those hearings had been "very challenging for the court reporter" and "very challenging for both of us." The State argued that there was no need to continue the trial because the Defendant had never had the assistance of an interpreter during the prior hearings in this case and there had never been an allegation that the Defendant did not speak English. The trial court noted that the Defendant spoke "broken English," and defense counsel asserted that the Defendant did not speak English well enough to listen to trial testimony and process it. The trial court then stated,

> [W]here English is a second language[,] the need for an interpreter does increase at a trial where you cannot pace yourself to try and slowly and methodically understand each other. There are some quick, rapid questions and answers that make it more difficult to possibly comprehend, so I'm sensitive to that fact. So, while I realize we've kind of been proceeding for the most part without an interpreter, I do remember [the Defendant's] testimony[,] and we got through it, but it was not a piece of cake.

The trial court also recognized that an in-person interpreter at trial would help to avoid appellate issues in the event of a conviction. The court asked defense counsel to see if the California interpreter would be able to appear at trial. The court said it would contact the person in charge of interpreters to ensure that the California interpreter was brought in for trial if another interpreter was unable to assist in this case.

Thereafter, the defense obtained both an on-site interpreter and a remote interpreter for the Defendant at trial. At the beginning of voir dire, the trial court addressed several "preliminary matters" before making the following announcement to the prospective jurors:

> In this trial, we have an interpreter. [The Defendant] has some basic ability to speak and understand English, but that is not his native tongue. Out of an abundance of caution, there is an interpreter sitting next to [the Defendant].

The trial court stated that the Rules of the Tennessee Supreme Court required that two interpreters to be used at trial and explained how these two interpreters would perform their duties. The trial court then told the prospective jurors:

> I will give you a legal instruction on interpreters at the end of the trial and how they are not to have any influence on you, the Jurors, in terms of making the determination, the decision as to the final issues that have to be addressed by you. But is there anyone in here right now that has any preformed ideas about the fact that there are interpreters being used as it relates to the issues of guilt or innocence? Anybody that has that thought process or concern about an interpreter?

The record shows that no juror replied affirmatively to the trial court's questions.

Immediately thereafter, defense counsel asserted during a bench conference that she was "a little concerned" about the trial court's statements to the potential jurors that the Defendant spoke English "to some extent" and that the use of the interpreter was "out of an abundance of caution" because the defense theory at trial was going to be focused on the Defendant's "language ability and [his] potential miscommunication with the police officers." The State argued that the Defendant had "spoken English a number of times in this courtroom," and the trial court agreed that this was the first time the Defendant had used an interpreter in this case. Defense counsel said she was still concerned that the trial court's statements could negatively impact the defense theory at trial.

The trial court then made the following statement to the prospective jurors:

> [G]oing back on the issue of interpreters . . . , I'm not suggesting that [the Defendant] has a command of the English language by any stretch of the imagination. That's why it is critical that we have the interpreters. So I am not trying to give any misleading information on the ability or the extent of [the Defendant's] ability to understand English because that may become an issue in this case.
>
> But certainly, at a very fundamental level, [the Defendant] has shown some capability of being able to speak English. Although it can be rather difficult going through the process in English. The interpreters are going to help expedite that and make sure that there's no misunderstanding as to what is being—what is occurring during the course of the trial.

The Defendant argues that the trial court's comment during voir dire that an interpreter was being provided to the Defendant at trial "out of an abundance of caution" constituted an unconstitutional comment on the evidence. In Tennessee, a judge is constitutionally prohibited from commenting on the credibility of witnesses or the evidence in a case. See Tenn. Const. art. VI, § 9 ("Judges shall not charge juries with respect to matters of fact, but may state the testimony and declare the law"); see also U.S. Const. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law"); U.S. Const. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law"). A trial judge must be "very careful not to give the jury any impression as to his [or her] feelings or to make any statement which might reflect upon the weight or credibility of evidence or which might sway the jury." State v. Suttles, 767 S.W.2d 403, 406-07 (Tenn. 1989). However, not every comment on the evidence made by a judge provides grounds for a new trial. State v. Hester, 324 S.W.3d 1, 89 (Tenn. 2010); Mercer v. Vanderbilt Univ., Inc., 134 S.W.3d 121, 134 (Tenn. 2004). This court must consider the trial court's comments in the overall context of the case when determining whether the comments were prejudicial. Hester, 342 S.W.3d at 89; State v. Caughron, 855 S.W.2d 526, 536-37 (Tenn. 1993).

Here, the only comment about which the Defendant specifically complains is the trial court's first comment, wherein the court stated that there was an interpreter sitting next to the Defendant "out of an abundance of caution." The record shows that the trial court made this remark, not to comment on the evidence or the credibility of any of the witnesses, but to explain to prospective jurors why there was an interpreter present during voir dire and trial. The court then told the prospective jurors that it would provide an instruction on interpreters at the end of the case and instructed them that the presence of an interpreter should have no influence on them in deciding the Defendant's case. Thereafter, the trial court questioned the prospective jurors about whether the presence of an interpreter would impact their thoughts about the Defendant's guilt or innocence. When defense counsel

expressed concern about these comments, the trial court equitably informed the potential jurors that the Defendant's ability to understand English might become an issue in this case, and that, while the Defendant had shown some capability of being able to speak English, the interpreter was present to ensure that there was no misunderstanding as to what would occur during the trial. In its final charge, the trial court instructed the jury that it could consider "what, if any, [e]ffect the language barrier may have had on any communications between the Defendant and the police." In addition, the trial court separately instructed the jury that it should consider each instruction in light of and in harmony with the others, that opening and closing statements of attorneys are not evidence, that the jury is the exclusive judge of the facts in this case, of the law under the direction of the court, and of the credibility of witnesses and the weight given to their testimony. A jury is presumed to follow all of a trial court's instructions. State v. Rimmer, 623 S.W.3d 235, 263 (Tenn. 2021); State v. Harbison, 539 S.W.3d 149, 163 (Tenn. 2018).

The Defendant claims that the trial court, with its "out of an abundance of caution" comment, effectively expressed its opinion that the Defendant could speak and understand English well enough that an interpreter was unnecessary. He also claims that the trial court's comment effectively endorsed Officer Cox's later trial testimony that he was able to communicate with the Defendant in English at the scene, which led to the Defendant admitting that he had been driving the vehicle. After careful review, the record supports neither of these claims.

We reiterate the trial court made its first "out of an abundance of caution" comment to explain to prospective jurors why there was an interpreter present. The bulk of the court's remaining comments were made to ensure that the prospective jurors were not biased toward either party based on the presence of the interpreter and to identify any potential jurors who might not be able to view the proof objectively because of the interpreter. The court also made it very clear to the prospective jurors that the Defendant's ability to understand English could become an issue in this case. These comments were neutral and impartial. Moreover, these comments were a proper exercise of the trial court's discretion during voir dire. See Cazes, 875 S.W.2d at 262 ("The ultimate goal of voir dire is to insure that jurors are competent, unbiased, and impartial, and the decision of how to conduct voir dire of prospective jurors rests within the sound discretion of the trial court."); State v. Samuel, 243 S.W.3d 592, 599 (Tenn. Crim. App. 2007) ("The conducting of the voir dire of prospective jurors is in the discretion of the trial court."). After considering these comments in the overall context of the case, we conclude the Defendant has failed to show that the trial court abused its discretion in making these comments.

II. Special Jury Instruction. The Defendant also argues that the trial court erred in providing a special jury instruction, stating that the jury "must not allow the fact that a participant does not speak English fluently to affect how [it] view[s] the evidence, the law,

or the credibility of a witness." He claims that because the defense theory at trial was that his limited understanding of English led Officer Cox to mistakenly believe that the Defendant had admitted to driving the car, the trial court's special instruction "negated" this defense by requiring the jury to disregard any consideration of his English language deficiencies in determining whether the proof was legally sufficient to support his convictions. The Defendant also claims that because the pattern instruction, on which this special jury instruction was based, should be given only if a non-English-speaking witness testifies, the special instruction was inapplicable to the case because he never testified at trial. In addition, the Defendant asserts that the trial court's very next instruction, that the jury could "consider what, if any, [e]ffect the language barrier may have had on any communications between the Defendant and the police," directly conflicted with its earlier instruction. See State v. Welcome, 280 S.W.3d 215, 220 (Tenn. Crim. App. 2007) (reiterating that inconsistent or contradictory jury instructions do not neutralize or validate each other and that the parties have a right to a clear and consistent charge, as well as a correct one, so that justice may be served). Therefore, the Defendant contends that inclusion of the erroneous instruction cannot be deemed harmless. The State responds that the trial court properly instructed the jury regarding the use of the interpreter. Alternatively, the State maintains that if the trial court's instruction was error, the error was harmless. We conclude that the trial court's special jury instruction was not error, or, at the most, was harmless error.

"It is well settled in Tennessee that a defendant has a right to a correct and complete charge of the law so that each issue of fact raised by the evidence will be submitted to the jury on proper instructions." State v. Farner, 66 S.W.3d 188, 204 (Tenn. 2001) (citing State v. Garrison, 40 S.W.3d 426, 432 (Tenn. 2000); State v. Teel, 793 S.W.2d 236, 249 (Tenn. 1990)). Accordingly, trial courts have a duty to give a "'complete charge of the law applicable to the facts of a case.'" State v. James, 315 S.W.3d 440, 446 (Tenn. 2010) (quoting State v. Harbison, 704 S.W.2d 314, 319 (Tenn. 1986)). Pattern jury instructions are often used as a source for jury instructions in criminal cases. State v. Davis, 266 S.W.3d 896, 901 n.2 (Tenn. 2008). However, pattern instructions are not entitled to greater deference than other instructions given by the trial court. See James, 315 S.W.3d at 446; Rimmer, 250 S.W.3d at 30. In fact, the preface to the collection of pattern jury instructions provides that the pattern instructions "are not intended to provide instructions applicable without change to every case" and "are meant to provide judges and lawyers with models of instructions designed to aid in juror comprehension." Tenn. Prac. Pattern Jury Instr. T.P.I.—Crim. Preliminary Materials.

Because questions regarding the propriety of jury instructions are a mixed question of law and fact, this court reviews those questions de novo with no presumption of correctness. State v. Hawkins, 406 S.W.3d 121, 128 (Tenn. 2013) (citing State v. Rogers, 188 S.W.3d 593, 628-29 (Tenn. 2006); State v. George R. Thacker, No. E2011-02401-

CCA-R3-CD, 2012 WL 4078440, at *8 (Tenn. Crim. App. Sept. 18, 2012)). When reviewing challenged jury instructions, this court must "view the instruction in the context of the charge as a whole" in determining whether prejudicial error has been committed requiring reversal. State v. Clark, 452 S.W.3d 268, 295 (Tenn. 2014) (citing Rimmer, 250 S.W.3d at 31; State v. Hodges, 944 S.W.2d 346, 352 (Tenn. 1997)). When "the instruction alone infected the entire trial and resulted in a conviction that violates due process," see James, 315 S.W.3d at 446, or "when the judge's charge, taken as a whole, failed to fairly submit the legal issues or misled the jury as to the applicable law," see State v. Majors, 318 S.W.3d 850, 864-65 (Tenn. 2010), the jury instruction is prejudicially erroneous. Clark, 452 S.W.3d at 295.

During a hearing outside the presence of the jury prior to the presentation of proof at trial, the trial court gave the State and defense counsel a draft of its jury charge. The court noted that there was a pattern jury instruction that addressed situations in which the Defendant testified through an interpreter at trial. The court stated that it "rewrote" this pattern instruction because it referenced "a witness testifying" so "it expanded [the instruction] to include anybody who is a participant in the trial . . . ." The pattern jury instruction on interpreters referenced by the trial court states:

> During this trial, [a witness has][witnesses have] testified through an interpreter. The fact that a witness does not speak English fluently does not affect that witness's credibility, and you must not allow the fact that a witness did not give testimony in English to affect your view of that witness's testimony.
>
> If any of you have some familiarity with the native language you heard the witness speak, you must not consider as evidence anything you think the witness may have said from your knowledge of the language. You must only consider as evidence the official interpretation in English given to you during the trial.

7 Tenn. Prac. Pattern Jury Instr. T.P.I.—Crim. 42.26.

During a jury-out hearing following the first day of trial, the trial court reiterated that it had "redrafted the first paragraph" of the pattern instruction on interpreters and had left the second paragraph of this instruction unchanged; however, it asserted that the second paragraph would be "deleted altogether" if the Defendant chose not to testify because this paragraph would be "irrelevant." Defense counsel agreed with the trial court's assessment. When defense counsel asked if the trial court would delete all "three paragraphs" if the Defendant chose not to testify, the court replied, "Yeah. So I mean, that's still up in the air because I don't know what you're going to do in that regard, but I just want to make you

aware . . . ." After the Defendant waived his right to testify,[1] the trial court informed the parties that it would change the instruction to reflect that the Defendant would not be testifying and that it would provide the parties with copies of the jury charge before this charge was given to the jury.

During its jury charge, the trial court provided the following special instruction:

> During the trial, the services of an interpreter were required. The fact that a trial participant does not speak English fluently does not [a]ffect the law that applies in this case or the credibility of a witness. You must not allow the fact that a participant does not speak English fluently to affect how you view the evidence, the law, or the credibility of a witness. However, you may consider what, if any, [e]ffect the language barrier may have had on any communications between the Defendant and the police.

Throughout the trial, defense counsel pursued a theory that the Defendant was not guilty of DUI because the Defendant's limited understanding of English led Officer Cox to mistakenly believe that the Defendant admitted to driving the wrecked car. The Defendant was subsequently convicted as charged.

Following his conviction, the Defendant filed a motion for new trial, arguing that the trial court erred in instructing the jury it "must not allow the fact that a participant does not speak English fluently to affect how [it] view[s] the evidence, the law, or the credibility of a witness." At the hearing on this motion, the trial court reminded defense counsel that it had also given an additional clarifying instruction to the jury. When the trial court asked what it should do when an interpreter is used by a defendant at trial, defense counsel replied that she had "proposed a modified instruction" during the jury-out hearing at trial; however, she acknowledged that she did not currently have this modified instruction with her. The trial court asserted that it could not find this modified instruction in the record. While the court "acknowledge[d] that the charge as read was inapplicable since [the Defendant] did not testify," it nevertheless found that this "error" was "harmless" in light of the "various instructions [it] gave to the Jury as related to interpreters[.]" The trial court then entered an order acknowledging that it "should not have read the jury instruction regarding witnesses and interpreters because it was inapplicable in this case" but asserting that any error regarding this instruction was "harmless when considered with any other instructions" and "had no effect on the verdict."

The Defendant disagrees with the trial court's conclusion that its error regarding the special instruction was harmless in light of the "other instructions" given. While the

[1] See Momon v. State, 18 S.W.3d 152 (Tenn. 1999).

Defendant agrees that the jury was instructed that it could "consider what, if any, [e]ffect the language barrier may have had on any communications between the Defendant and the police," he claims this instruction "directly conflict[ed]" with the immediately preceding erroneous instruction that the jury "must not allow that a participant does not speak English fluently to affect how [it] view[s] the evidence." The Defendant argues that where two instructions are inconsistent, and the jury is presumed to follow both, inclusion of the erroneous instructions is not harmless.

We conclude that the trial court's special instruction regarding the Defendant's use of an interpreter was not prejudicially erroneous. The first instruction ensured that the jury was not biased against the Defendant or the State based on the Defendant's use of an interpreter at trial. The instruction immediately following made it clear that the jury could consider what, if any, effect the language barrier may have had on any communications between the Defendant and the police. Accordingly, we conclude that these two instructions were not inconsistent or contradictory. We reiterate that the court separately instructed the jury that it should consider each instruction in light of and in harmony with the others, that opening and closing statements of attorneys are not evidence, that the jury is the exclusive judge of the facts in this case, of the law under the direction of the court, and of the credibility of witnesses and the weight to be given to their testimony. Again, this court presumes that the jury follows all instructions given by the trial court. Rimmer, 623 S.W.3d at 263; Harbison, 539 S.W.3d at 163.

We further conclude that even if the special instruction was somehow erroneous, any such error was harmless. In order to determine whether an instructional error is harmless, this court must ask whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. State v. Cecil, 409 S.W.3d 599, 610 (Tenn. 2013) (citations and quotation marks omitted); see State v. Rodriguez, 254 S.W.3d 361, 371 (Tenn. 2008); State v. Allen, 69 S.W.3d 181, 190 (Tenn. 2002). As a whole, the court's instructions did not negate the Defendant's theory of defense. The instructions protected the Defendant and the State against bias based on the Defendant's use of an interpreter and informed the jury it could consider what, if any, effect the language barrier may have had on any communications between the Defendant and the police in deciding whether the Defendant had admitted to driving the car. Because the jury was properly instructed that the Defendant's lack of fluency in English was a relevant factor to consider in determining the Defendant's guilt or innocence, it appears beyond a reasonable doubt that any error regarding the instruction did not contribute to the verdict in this case.

III. Motion for Mistrial. Third, the Defendant contends that the trial court erred in denying defense counsel's motion for a mistrial after the prosecutor, relying on the trial court's proposed special jury instruction, stated during its rebuttal closing argument that the jury could not allow the fact that the participant does not speak English fluently to affect

how it viewed the evidence. He claims the prosecutor's argument "effectively ordered the jury to ignore relevant evidence that would have supported a finding that [the Defendant's] alleged admission of driving was the result of a miscommunication between [the Defendant] and Officer Cox" due to the Defendant's "limited understanding of, and fluency in, English." The Defendant notably does not allege that this part of the prosecutor's closing argument "constituted misconduct" because the record indicates that the prosecutor had been "provided with a copy of the trial court's forthcoming instructions" at the time this argument was made and that the prosecutor "relied upon those instructions in making the argument at issue." In response, the State asserts that the Defendant was not entitled to a mistrial based on the State's closing argument. We conclude that the trial court did not abuse its discretion in denying the motion for a mistrial.

During the State's rebuttal closing argument, the following exchange occurred:

Prosecutor: . . .The defense says that the State needs to answer all of your questions. We do not. Absolute certainty is not required. You will be instructed that . . . absolute certainty is not required, that beyond a reasonable doubt is required. You must not allow the fact that the participant does not speak English fluently to affect how you view the evidence—

Defense counsel: I object.

Trial Court: I'm sorry?

Prosecutor: Your Honor, I'm reading from the jury charge.

Defense Counsel: The jury charge paragraphs that are going to be removed.

Prosecutor: This is the one I was just handed.

Trial Court: Members of the Jury, they're—overruled. She's allowed to read from the jury charge, but ultimately I will give you the law in this case, but she can connect the facts of this case with the law that will be provided to you.

Prosecutor: The judge is going to read you a jury charge. He is going to explain the law. He is going to explain the

definition of words. He's going to give you the rules on evidence and how you should deliberate. And he will say you must not allow the fact that a participant does not speak English fluently to affect how you view the evidence, the law[,] or the credibility of a witness.

Defense Counsel: Judge, I renew my objection.

Trial Court: Overruled.

After the conclusion of the State's rebuttal closing argument, the trial court announced to the jury that it would read the jury charge, and defense counsel requested a bench conference before the charge was read. During this conference, which was outside the hearing of the jury, defense counsel said she had understood from the trial court's earlier ruling that if the Defendant did not testify, then the three paragraphs from the trial court's special instruction on interpreters would be deleted. The trial court countered that it never ruled that all three paragraphs would be removed, only that it would remove the first paragraph "about a witness testifying," and the State agreed with the court. Defense counsel asserted that the language that "you must not allow the fact that a participant does not speak English fluently to affect how you view the evidence, the law or the credibility of the witness" could be understood by the jury to mean that the Defendant's lack of understanding of English "doesn't matter" and that the jury should "not be allowed to take that into consideration." When the trial court indicated that it would allow defense counsel to present a brief rebuttal closing argument to outline her interpretation of the special instruction, the State objected.

The trial court acknowledged that the jury instruction at issue probably "should have included some language that . . . you can't take from the fact that [the Defendant's] first language isn't English to place any kind of negative or undue improper weight o[n] the evidence." The State then requested that the trial court give the jury "a limited instruction" on this issue because it was inappropriate to give defense counsel "another closing argument." Upon hearing this, defense counsel asserted that the pattern jury instruction only applied when a witness testified through an interpreter at trial, which did not occur in this case, and then requested that the trial court delete the all three paragraphs in the charge concerning the interpreter. The trial court disagreed with defense counsel, stating that the issue "needs to be addressed [with the jurors] so they don't draw a negative connotation from the fact that [the Defendant] does not speak English [as his primary language]." The court also asserted that the Defendant had "giv[en] testimony through the police officer," and defense counsel insisted that the Defendant had not testified "through an interpreter." The trial court then excused the jury from the courtroom.

During this jury-out hearing, defense counsel argued that the pattern jury instruction should only be given when a witness testifies through an interpreter and claimed that she had found one instruction, not in the Tennessee pattern jury instructions, that covered the present scenario, where "an interpreter is just provided for a defendant."[2] Defense counsel said she was concerned that the jury would believe that it could not consider the Defendant's "language abilities" in deciding this case.

Thereafter, defense counsel moved for a mistrial. As the trial court was reviewing its draft of the jury charge, the State suggested that the court add a sentence that the jury could not draw a negative inference from the Defendant's use of an interpreter. Ultimately, the trial court agreed to leave the charge as it was but added a sentence that the jury "may consider what if any effect the possible language barriers may have had on the conversations between the participant and the police[.]" The trial court said that the addition of the aforementioned sentence did not "change what [the prosecutor] argued in closing" but "just clarifie[d] what [the prosecutor] was arguing." When defense counsel moved for a mistrial a second time, the trial court denied this motion on the basis that the additional sentence to the instruction "adequately address[ed]" defense counsel's concern and that a mistrial was "not necessary to see that justice is done."

As we previously noted, the trial court provided the following special instruction to the jury during its charge:

> During the trial, the services of an interpreter were required. The fact that a trial participant does not speak English fluently does not [a]ffect the law that applies in this case or the credibility of witnesses. You must not allow the fact that a participant does not speak English fluently to affect how you view the evidence, the law or the credibility of a witness. However, you may consider what if any [e]ffect the language barrier may have had on any communications between the Defendant and the police.

Following his conviction, the Defendant filed a motion for a new trial, arguing that the trial court erred in allowing the prosecutor to quote the language from the special jury instruction during its closing argument. At the hearing on this motion, the trial court acknowledged that the special instruction, which was quoted by the prosecutor, should not have been given because the Defendant did not testify; however, the trial court asserted that this error was harmless. The trial court later entered a written order denying the motion

[2] Defense counsel presented this suggested instruction to the trial court, who asked that copies of this instruction be made for all the parties. However, it appears that defense counsel's suggested instruction is not included in the appellate record.

for new trial, although the court did not specifically reference the challenged portion of the prosecutor's closing argument in its order.

"'The purpose for declaring a mistrial is to correct damage done to the judicial process when some event has occurred which precludes an impartial verdict.'" State v. Reid, 164 S.W.3d 286, 341-42 (Tenn. 2005) (quoting State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996)). The decision to grant or deny a mistrial rests within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. State v. Nash, 294 S.W.3d 541, 546 (Tenn. 2009); State v. Robinson, 146 S.W.3d 469, 494 (Tenn. 2004). A trial court should declare a mistrial "only upon a showing of manifest necessity." Robinson, 146 S.W.3d at 494 (citing State v. Saylor, 117 S.W.3d 239, 250-51 (Tenn. 2003)). "'In other words, a mistrial is an appropriate remedy when a trial cannot continue, or a miscarriage of justice would result if it did.'" Saylor, 117 S.W.3d at 250 (quoting State v. Land, 34 S.W.3d 516, 527 (Tenn. Crim. App. 2000)). The party seeking a mistrial has the burden of establishing the necessity for a mistrial. Reid, 164 S.W.3d at 342 (citing Williams, 929 S.W.2d at 388).

In the previous section, we concluded that the trial court's special jury instruction was not prejudicially erroneous because it ensured that the jury was not biased against the Defendant or the State based on the Defendant's use of an interpreter at trial. The record at least suggests that the prosecutor quoted this portion of the trial court's proposed special jury instruction during its rebuttal closing argument, not to prevent jury bias based on the Defendant's use of an interpreter as the trial court intended, but to undercut the defense's theory that the Defendant's alleged admission to driving was the result of a miscommunication between the Defendant and Officer Cox due to the Defendant's limited understanding of the English language. If this was, in fact, the prosecutor's intent, her reference to the proposed special instruction was improper. See State v. Houston, 688 S.W.2d 838, 841 (Tenn. Crim. App. 1984) ("It is the province of the trial judge to state to the jury the law of the case, and it is not advisable for counsel to attempt to do so in final argument because of the possibility of error in their summation."); State v. Benson, 645 S.W.2d 423, 425 (Tenn. Crim. App. 1983) ("'It is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one'") (quoting Berger v. United States, 295 U.S. 78, 88 (1935)). However, the trial court's decision to charge the jury that it could "consider what, if any, [e]ffect the language barrier may have had on any communications between the Defendant and the police" was an appropriate remedy and sufficiently protected the Defendant's right to an impartial verdict. Because the Defendant has failed to establish that trial court abused its discretion in denying the mistrial, we conclude that he is not entitled to relief on this issue.

IV. Sentence. Lastly, the Defendant asserts that he was improperly sentenced as a second offender for his conviction for driving on a revoked license. He asserts that his indictment never alleged that he had a prior conviction for driving on a revoked license and that he never stipulated to such a prior conviction. He also states that the jury was never asked to determine whether he had a prior conviction for driving on a revoked license. Consequently, the Defendant asks this court to remand his case to the trial court with directions to modify his conviction in Count 3 to driving on a revoked license, first offense, a Class B misdemeanor, and to impose a concurrent sentence of not more than six months. In response, the State argues that the Defendant waived this issue by not raising it at the sentencing hearing but concedes that the case should be remanded for resentencing on the conviction for driving on a revoked license as a first offense. We conclude that the case should be remanded for entry of a corrected judgment form. See Tenn. Code Ann. § 40-35-401(a) (providing that "[t]he defendant in a criminal case may appeal from the length, range or the manner of service of the sentence imposed by the sentencing court"); § 40-35-401, Tenn. Sentencing Comm'n Cmts. ("permit[ting] appellate review of all sentencing determinations"); see also Tenn. R. App. P. 3(b).

Here, the judgment reflects that the Defendant was sentenced in Count 3 for driving on a revoked license, second offense, as a Class A misdemeanor. See Tenn. Code Ann. § 55-50-504(a)(2). Code section 55-50-504(a)(1) provides, "A person who drives a motor vehicle . . . at a time when the person's privilege to do so is cancelled, suspended, or revoked commits a Class B misdemeanor. This statute also provides that "[a] second or subsequent violation of subdivision (a)(1) is a Class A misdemeanor." Id. § 55-50-504(a)(2). However, "[i]f the criminal offense for which the defendant is charged carries an enhanced punishment for a second or subsequent violation of the same offense, the indictment in a separate count shall specify and charge that fact[,]" and "[i]f the defendant is convicted of the offense, then the jury must find that beyond a reasonable doubt the defendant has been previously convicted the requisite number of times for the same offense." Id. 40-35-203(e); see State v. Wyrick, 62 S.W.3d 751, 763 (Tenn. Crim. App. 2001) ("[T]he legislature requires that a jury determine that a defendant has previously been convicted of the same offense in order to enhance punishment for a subsequent conviction for that offense.").

The indictment in this case did not allege that the Defendant had a prior conviction for driving on a revoked license, and while the Defendant stipulated to having five convictions for DUI, he never stipulated to having a prior conviction for driving on a revoked license. In addition, the jury was never asked to determine whether the Defendant had a prior conviction for driving on a revoked license. At the sentencing hearing, the trial court merged the DUI conviction in Count 2 with the DUI conviction in Count 1. It then stated only that it was imposing a concurrent sentence of eleven months and twenty-nine days for the driving on a revoked license conviction.

Because the indictment did not charge the Defendant with driving on a revoked license as a second or subsequent offense and because the jury did not find beyond a reasonable doubt that the Defendant had previously been convicted for this offense, the Defendant's conviction offense should have been for driving on a revoked license, first offense, which is a Class B misdemeanor. A sentence for a Class B misdemeanor cannot exceed six months. Tenn. Code Ann. § 40-35-111(e)(2). Because the judgment in Count 3 reflects an incorrect offense grade and improper sentence, we remand the case for entry of a corrected judgment form in Count 3 to reflect that the conviction offense is driving on a revoked license, first offense, a Class B misdemeanor, and that the Defendant's sentence in this count is six months, served concurrently with the sentence in Count 1. See id. § 40-35-401(c) (providing that if a sentence is appealed, the appellate court may "remand the case or direct the entry of an appropriate sentence or order").

CONCLUSION

We affirm the judgments of the trial court but remand the case for entry of a corrected judgment form in Count 3 to reflect that the conviction offense is driving on a revoked license, first offense, a Class B misdemeanor, and that the Defendant's sentence in this count is six months, served concurrently with the sentence in Count 1.

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CAMILLE R. MCMULLEN, JUDGE