

Appendix A

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

April 19, 2018

Elisabeth A. Shumaker
Clerk of Court

VAN LE,

Petitioner - Appellant,

v.

DEBBIE ALDRIDGE, Warden,

Respondent - Appellee.

No. 17-6151
(D.C. No. 5:15-CV-01002-M)
(W.D. Okla.)

ORDER DENYING CERTIFICATE OF APPEALABILITY*

Before MORITZ, McKAY, and KELLY, Circuit Judges.

Van Le, an Oklahoma state prisoner, seeks a certificate of appealability (COA) to challenge the denial of her habeas petition filed under 28 U.S.C. § 2254. *See id.* § 2253(c)(1)(A) (stating that no appeal may be taken from a final order denying a § 2254 petition unless the petitioner obtains a COA). We deny a COA and dismiss the appeal.

I

Ms. Le is serving a life sentence without the possibility of parole for the first degree murder of a child she was babysitting. She immigrated to the United States from Vietnam some seventeen years before the murder and claimed on direct appeal that she

* This order is not binding precedent except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

was denied a fair trial because she was tried without a qualified Vietnamese interpreter. She also claimed her attorney rendered ineffective assistance of counsel by failing to investigate her ability to speak and understand English, using an unqualified interpreter, and failing to prepare and present an effective defense. Lastly, she claimed cumulative error required reversal of her conviction. The Oklahoma Court of Criminal Appeals (OCCA) rejected these claims and upheld her conviction. *See Le v. Oklahoma*, No. F-2013-630 (Okla. Crim. App. Sept. 16, 2014) (unpublished). Ms. Le pursued federal habeas relief on the same claims, but a magistrate judge recommended that her § 2254 petition be denied, and the district court adopted that recommendation. The district court subsequently denied a COA. Ms. Le now seeks a COA in this court.

II

A COA is a jurisdictional prerequisite to our review. 28 U.S.C. § 2253(c)(1)(A); *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003). We will issue a COA “only if the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). This requires an applicant to show “that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (internal quotation marks omitted).

We have reviewed the magistrate judge’s report and recommendation, as adopted by the district court, and we conclude that reasonable jurists would not debate the district court’s denial of relief. Federal habeas relief is precluded for claims adjudicated on the

merits by a state court unless the state court decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States,” or “was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(1), (2). A state court’s factual determinations are presumed correct and are rebuttable only by clear and convincing evidence. *Id.* § 2254(e)(1).

A. Interpreter

Ms. Le first claimed she was denied a fair trial because she was tried without a qualified Vietnamese interpreter. But she did not request an interpreter, and thus the OCCA reviewed only for plain error. The OCCA noted that on the day set for trial, Ms. Le’s attorney sought a continuance because he had just recently discovered that she could, in fact, speak English. Her attorney had explained to the trial court that after several meetings with Ms. Le and a non-certified translator, he met with her alone and informed her that her son would be providing incriminating testimony, at which point she “became upset and began communicating with [him] in English.” R. at 31. The non-certified translator had also testified that Ms. Le resisted his efforts to discuss the case, claiming she did not understand or know what happened to the victim, but her husband indicated to him that she lived in the United States for seventeen years and could understand English. Additionally, the OCCA observed that Ms. Le had communicated in English during a police interview, albeit at times with the help of an interpreter, and she testified in English at trial, experiencing some difficulty understanding questions on cross-examination but never indicating that she could not continue testifying due to a

misunderstanding. Given this evidence, the OCCA concluded that the trial court's failure to appoint a qualified interpreter was not plain error and did not prejudice her defense.

The district court denied relief, ruling that no clearly established federal law held that a trial court's failure to appoint an interpreter violated a defendant's constitutional rights when the defendant could speak and understand English and had no impediment preventing her from assisting in her defense. The court further concluded that the OCCA's decision was not based on an unreasonable determination of the facts, which included the trial judge's express finding that Ms. Le could speak English and did not need an interpreter to aid in her defense.

In her COA application, Ms. Le offers no argument or authority suggesting the district court's conclusion is reasonably debatable. She asserts she was confused during the trial and did not fully understand the extent of her prison term, but she cites no evidence (let alone clear and convincing evidence) to rebut the OCCA's findings. Under these circumstances, reasonable jurists would not debate the denial of this claim.

B. Ineffective Assistance

Ms. Le also claimed her attorney rendered ineffective assistance. To establish ineffective assistance of counsel, she had to show her attorney's deficient performance prejudiced her defense. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Ms. Le claimed her attorney was ineffective in failing to investigate her ability to speak and understand English, failing to use a qualified interpreter, and failing to prepare and present an effective defense. She sought an evidentiary hearing on these claims and submitted affidavits from several people attesting to her limited ability to speak English.

She also submitted affidavits indicating her son would sometimes make inaccurate statements, she and her husband were good people, the victim would often get sick in her care, and her counsel failed to elicit favorable testimony from five potential witnesses.

Invoking *Strickland*, the OCCA denied Ms. Le an evidentiary hearing because she failed to establish by clear and convincing evidence “a strong possibility [that] trial counsel was ineffective for failing to utilize or identify the complained-of evidence,” as required by Rule 3.11(B)(3)(b)(i), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. The OCCA explained that Ms. Le’s supporting affidavits reflected her limited understanding of English, but there was contrary evidence demonstrating she understood the proceedings, the proceedings were fundamentally fair, and an interpreter was available to her. The OCCA also noted that she failed to show the non-certified translator conveyed inaccurate information. Finally, regarding Ms. Le’s contention that her attorney failed to prepare and present an effective defense, the OCCA determined that defense counsel had full access to discovery, met with Ms. Le several times, and presented a reasonably effective defense challenging the sufficiency of the evidence. Under these circumstances, the OCCA concluded that Ms. Le failed to show her attorney rendered ineffective assistance.

The district court determined that the OCCA reasonably applied *Strickland*. The district court observed that, under Oklahoma law, the denial of a Rule 3.11 evidentiary hearing is necessarily an adjudication that a defendant failed to show defense counsel was ineffective under the *Strickland* standard. *See R. at 423 (citing Simpson v. Oklahoma, 230 P.3d 888, 905-06 (Okla. Crim. App. 2010))*. Moreover, the district court recognized

that the OCCA's ruling "operates as an adjudication on the merits of the *Strickland* claim and is therefore entitled to deference under § 2254(d)(1)." *Id.* (quoting *Lott v. Trammell*, 705 F.3d 1167, 1213 (10th Cir. 2013)). Thus, applying deferential review and considering the record and the material Ms. Le submitted in support of her claims, the district court concluded that she was not entitled to relief because she failed to demonstrate that fairminded jurists would disagree with the OCCA's assessment of her counsel's effectiveness.

This conclusion is not reasonably debatable. Ms. Le claims her attorney failed to investigate her ability to speak and understand English, but she cites no evidence to rebut the OCCA's presumptively correct finding that she understood the proceedings. She also claims counsel used an inadequate interpreter, but she cites no evidence to counter the OCCA's conclusion that she failed to show the translator made inaccurate communications in her case. Last, she claims her attorney failed to prepare and present an adequate defense, but she offers only her own characterization of the evidence and does not explain how she was prejudiced.

C. Cumulative Error

Finally, Ms. Le claimed cumulative error. Absent any errors, however, reasonable jurists would not debate the district court's rejection of this claim. *See Hooks v. Workman*, 689 F.3d 1148, 1195 (10th Cir. 2012) (holding that cumulative-error analysis "does not apply to the cumulative effect of non-errors" (ellipsis and internal quotation marks omitted)).

III

We deny a COA and dismiss this appeal.

Entered for the Court

Monroe G. McKay
Circuit Judge

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

VAN LE,)
)
Petitioner,)
)
vs.) Case No. CIV-15-1002-M
)
DEBBIE ALDRIDGE, Warden,)
)
Respondent.)

ORDER

On April 5, 2017, United States Magistrate Judge Bernard M. Jones issued a Report and Recommendation in this action brought pursuant to 28 U.S.C. § 2254, seeking a writ of habeas corpus. The Magistrate Judge recommended that the Petition for Writ of Habeas Corpus be denied. The parties were advised of their right to object to the Report and Recommendation by April 17, 2017. After receiving an extension of time, petitioner filed her objection on May 17, 2017.

Having carefully reviewed this matter de novo, the Court:

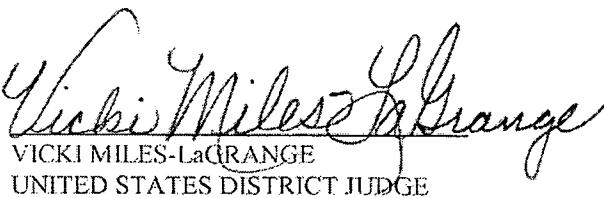
Appendix B-Document 24

(1) ADOPTS the Report and Recommendation [docket no. 19] issued by the Magistrate Judge on April 5, 2017;

(2) DENIES petitioner's Petition for Writ of Habeas Corpus, and

(3) ORDERS that judgment in favor of respondent issue forthwith.

IT IS SO ORDERED this 26th day of May, 2017.


VICKI MILES-LAGRANGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

VAN LE,)
)
Petitioner,)
)
v.) Case No. CIV-15-1002-M
)
DEBBIE ALDRIDGE, Warden,)
)
Respondent.)

REPORT AND RECOMMENDATION

Petitioner Van Le, appearing through counsel, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 [Doc. No. 1] and Brief in Support of Petition for Writ of Habeas Corpus [Doc. No. 8], challenging the constitutionality of her state court conviction. Respondent has filed a Response [Doc. No. 16]. The matter, referred by United States District Judge Vicki Miles-LaGrange for initial proceedings consistent with 28 U.S.C. § 636(b)(1)(B) and (C), is now at issue. For the reasons set forth below, it is recommended that the Petition be denied.

I. Procedural Background

Petitioner, an immigrant from Vietnam who came to this country some seventeen years before the events underlying this case, was convicted of First Degree Murder (child abuse) and sentenced to life imprisonment without possibility of parole in Case No. CF-2012-6373, District Court of Oklahoma County, State of Oklahoma. Petitioner appealed her conviction to the Oklahoma Court of Criminal Appeals (OCCA), Case No. F-2013-630, raising the following grounds for relief:

1. Appellant's trial was fundamentally unfair because she was tried without the appointment of a qualified Vietnamese interpreter in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article II §§ 7 and 20 of the Oklahoma Constitution;

2. Appellant received ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article II §§ 7 and 20 of the Oklahoma Constitution in that (A) Counsel did not conduct a reasonable investigation into his client's ability to speak and understand the English language, improperly disclosed attorney/client communications, and wholly abdicated his role as counsel; (B) Counsel utilized a deficient/inadequate Vietnamese interpreter; and (C) Counsel failed to conduct a reasonable investigation or prepare and present evidence at trial;

3. Appellant was denied a full and complete record contrary to her rights as an appellant;

4. The cumulative effect of all the errors deprived Appellant of a fair trial.

[Doc. No. 1], 3; [Doc. No. 16-1] (Appellate Brief before the OCCA). The OCCA affirmed Petitioner's conviction on September 16, 2014. [Doc. No. 16-3] (Opinion of OCCA).

II. Factual Background

The evidence introduced at Petitioner's trial was summarized by the OCCA in its opinion issued upon Petitioner's direct appeal following her conviction. Petitioner is referred to as "appellant."

Appellant was the babysitter of the two-year-old victim, J.C. The child's mother, Mina Chau, left her daughter in Appellant's care in Oklahoma City on the morning of September 22, 2012, and went to work in Guthrie. J.C. had been recovering from a stomach flu, but had no serious problems or injuries. That afternoon, Appellant called Ms. Chau and told her the child had been taken to the hospital. At the hospital, Ms. Chau learned her child had suffered a fractured skull and other head trauma. J.C. died from her injuries.

Medical investigation indicated a blunt force trauma to the head caused J.C.'s death. J.M., Appellant's son, was seven years old at the time of the incident. He testified at trial that on the day J.C. was injured, she had been jumping on the bed. Appellant repeatedly told J.C. to stop and come to her, then picked J.C. up by her legs and "threw her on the floor twice, or several times." J.M. demonstrated for the jury how his mother grabbed J.C. by her legs and slammed her down "very hard" at least two times.

J.M. testified that J.C. was screaming after this incident, then vomited, and later lost consciousness. Appellant laid J.C. on the sofa and tried to wake her up, but could not. Appellant called the ambulance, but lied to the emergency responders, indicating she had been speaking to the child before she lost consciousness. J.M.

testified that J.C. did not speak again after being thrown down, but only screamed and cried.

At trial, Appellant testified that J.C. was crying and screaming that day after her mother dropped her off, got sick and vomited at some point, and slept “all day,” or most of the day. When Appellant could not rouse J.C. from sleep, “I try to pick her up and I shook her very hard.” Appellant denied abusing J.C. or injuring her. In closing argument, defense counsel claimed that J.C. could have been injured before arriving at Appellant’s house.

[Doc. No. 16-3], 1-2.

III. Standard of Review

Petitioner’s grounds for habeas relief are subject to review under the standards set forth in the Anti-terrorism and Effective Death Penalty act of 1996 (AEDPA). “AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court.” *Burt v. Titlow*, ____ U.S. ___, 134 S.Ct. 10, 16 (2013). This Court may reverse the state court’s judgment only if the state court’s decision “was contrary to, or involved an unreasonable application of, clearly established Federal law” or “was based on an unreasonable determination of the facts in light of the evidence presented.” 28 U.S.C. § 2254(d). This high burden is placed on state habeas petitioners because “habeas corpus is a ‘guard against extreme malfunctions in the state criminal justice systems,’ not a substitute for ordinary error correction through appeal.” *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011) (*quoting Jackson v. Virginia*, 443 U.S. 307, 332, n. 5 (1979) (Stevens, J., concurring in judgment)).

A state-court decision is contrary to clearly established federal law under 28 U.S.C. § 2254(d)(1) if it “applies a rule that contradicts the governing law set forth in Supreme Court cases or confronts a set of facts that are materially indistinguishable from a decision of the Supreme Court and nevertheless arrives at a result different from that precedent.” *Ryder ex rel. Ryder v. Warrior*, 810 F.3d 724, 739 (10th Cir. 2016) (internal quotation marks omitted). “A state-court

decision is an ‘unreasonable application’ of Supreme Court precedent if the decision ‘correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner’s case.’” *Fairchild v. Trammell*, 784 F.3d 702, 711 (10th Cir. 2015) (*quoting Williams v. Taylor*, 529 U.S. 362, 407–08 (2000)). In analyzing a state court’s application of clearly established federal law in its decision, a habeas court measures the decision against “the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.” *Lockyer v. Andrade*, 538 U.S. 63, 71–72 (2003). That inquiry focuses exclusively on “the holdings, as opposed to the dicta, of [the Supreme Court’s] decisions as of the time of the relevant state-court decision.” *Id.* at 71 (internal quotation marks omitted). “The absence of clearly established federal law is dispositive under § 2254(d)(1).” *Hooks v. Workman*, 689 F.3d 1148, 1163 (10th Cir. 2012).

AEDPA also narrows a habeas court’s review of a state court’s factual findings under § 2254(d)(2). A habeas court cannot conclude a state court’s factual findings are unreasonable “merely because we would have reached a different conclusion in the first instance.” *Brumfield v. Cain*, ____ U.S. ___, 135 S.Ct. 2269, 2277 (2015) (brackets omitted). Rather, we must defer to the state court’s factual determinations so long as “reasonable minds reviewing the record might disagree about the finding in question.” *Id.* Thus, a state court’s factual findings are presumed correct, and the petitioner bears the burden of rebutting that presumption by “clear and convincing evidence.” 28 U.S.C. § 2254(e)(1). But if the petitioner can show that “the state courts plainly misapprehend[ed] or misstate[d] the record in making their findings, and the misapprehension goes to a material factual issue that is central to petitioner’s claim, that misapprehension can fatally undermine the fact-finding process, rendering the resulting factual finding unreasonable.” *Ryder*, 810 F.3d at 739 (internal quotation marks omitted).

IV. Grounds for Habeas Relief

In her federal habeas petition, Petitioner raises five of the six grounds for relief presented to the OCCA:

- Ground I: Petitioner's trial was fundamentally unfair under the Sixth and Fourteenth Amendments because no qualified Vietnamese interpreter was appointed at trial.
- Ground II: Trial Counsel was ineffective in failing to conduct a reasonable investigation into Petitioner's ability to speak and understand the English language and abdicated his role as counsel.
- Ground III: Trial Counsel was ineffective in using a deficient/inadequate Vietnamese Interpreter.
- Ground IV: Trial Counsel was ineffective in failing to conduct a reasonable investigation and in failing to prepare and present evidence at trial.
- Ground V: Trial errors, considered in a cumulative fashion, warrant a new trial.

V. Analysis

A. Appointment of Interpreter

Petitioner contends she is entitled to habeas relief because no "qualified Vietnamese interpreter" was appointed to assist her at trial, violating her Sixth Amendment rights and rendering her trial fundamentally unfair. She also challenges the qualifications of the interpreter who assisted trial counsel during his trial preparation with Petitioner before trial and at the preliminary hearing before counsel discovered Plaintiff's ability to speak and understand English.

The issues regarding Plaintiff's ability to speak and understand English and the alleged error of the trial court in failing to appoint an interpreter at trial are central to Petitioner's habeas case. Because neither Petitioner nor her counsel requested the trial court to appoint an interpreter, the OCCA reviewed the trial court's decision not to sua sponte appoint an interpreter for plain error under the abuse of discretion standard.

In its decision, the OCCA summarized the direct evidence supporting its conclusion that Petitioner was sufficiently proficient in English to understand the judicial proceedings and participate in her defense without the use of an interpreter:

Appellant is Vietnamese and immigrated to the United States. English is her second language. After her arrest, she retained private counsel, John Albert, who represented her throughout trial. Mr. Albert initially communicated with the Appellant through a non-certified Vietnamese translator, Fred Nguyen,¹ who was apparently an acquaintance of the Appellant and a business associate of Mr. Albert's law office. The record indicates Mr. Albert visited with Appellant five times before trial, for approximately five hours.

On the day set for trial, during a hearing on defense counsel's motion for a continuance, Mr. Albert informed the trial court that after three or four visits during which Appellant communicated only through the interpreter, Fred Nguyen (and offered very little about the facts of her case), he met with Appellant alone. During that visit, he informed Appellant of the expected incriminating testimony of her son. Appellant became upset and began communicating with counsel in English.

Fred Nguyen also testified at this hearing that Appellant had spoken to Mr. Albert only through him in three or four meetings, and had resisted their requests to discuss the facts of her case, claiming at times that she did not understand or know what happened to J.C. Mr. Nguyen also testified that he accompanied Mr. Albert to a meeting with Appellant's husband, Mohammed, who told them that Appellant had been in the United States for 17 years and could understand English.

In a videotaped interview with police conducted after J.C.'s death,² Appellant was assisted, at times, by a Vietnamese translator, but at other times communicated with the investigator in English and indicated her understanding of the investigator's statements. Other witnesses testified that Appellant communicated with them in English, without apparent difficulty, after J.C. was injured. Appellant testified at trial in the English language. She appeared to understand and respond to questions propounded in English by defense counsel, but sometimes indicated difficulty understanding the questions asked on cross-examination. Still, Appellant never indicated her lack of understanding prevented her from continuing with her testimony.

¹ At the time of these events and up to the completion of Appellant's trial, Oklahoma had no active program for the certification of courtroom interpreters, though a board had been created by statute to implement such a program. The board is now active. (footnote in original).

² The interview itself is not part of the appellate record, but was attached to Appellant's *Application for Evidentiary Hearing on Sixth and Fourteenth*

Amendment Claims. Other testimony indicates that Appellant was questioned and responded in English for the majority of the interview. (footnote in original).

[Doc. No. 16-3], 4-5.

On direct appeal, Petitioner contended she had a “right” to the appointment of a qualified interpreter. [Doc. No. 16-3], 5. Citing Oklahoma law, the OCCA stated there is no such right in the absence of a showing that an appellant could not “understand the English language sufficiently to follow the trial proceedings and participate meaningfully in her defense.” *Id.* at 5-6.

At a pretrial motion hearing held to consider defense counsel’s motion for continuance, counsel advised the trial court that he had only recently discovered Plaintiff’s ability to speak and understand English. During this pretrial hearing, the trial judge found on the record that Petitioner could understand the English language and that, in the judge’s opinion, Petitioner did not need an interpreter. [Doc. No. 16-4] (Relevant Transcripts), 12. Still, the trial court left the decision regarding appointment of an interpreter to defense counsel, *id.*, and the trial record reveals that the original interpreter was available at trial while Petitioner testified. [Doc. No. 16-4], 56. His services were not needed, however.

Before this Court, Petitioner contends the OCCA “never cited or acknowledged the long-standing federal constitutional right to the services of a qualified interpreter for a non-English speaking criminal defendant.” [Doc. No. 8], 14. For this proposition, Petitioner cites cases from federal circuit courts, not including the Tenth Circuit, holding generally that a criminal defendant’s rights under the Sixth Amendment are violated when a non-English speaking defendant is not afforded the assistance of an interpreter to aid in his defense.¹ Only one of the

¹ For the proposition that appointment of a translator for a non-English speaking defendant is a “constitutional right,” Petitioner also relies on the “Court Interpreters Act,” 28 U.S.C. § 1827 passed by the United States Congress in 1988 as part of the “Judicial Improvements and Access

cases cited by Petitioner, *United States ex rel. Negron v. State of New York*, 434 F.2d 386 (2nd Cir. 1970), is a habeas case brought by a state prisoner rather than the direct appeal of a defendant from a federal conviction. *Negron* was decided nearly thirty years before AEDPA was enacted, and the Second Circuit was not bound by AEDPA's deferential review. The Second Circuit compared a Spanish-speaking defendant, who could not understand English, to a defendant with a mental disability and found, "Negron's language disability was obvious, not just a possibility, and it was as debilitating to his ability to participate in the trial as a mental disease or defect." *Id.* at 390. In the case of a non-English speaking defendant, the Second Circuit held, "[t]he least we can require is that a court, put on notice of a defendant's severe language difficulty, make unmistakably clear to him that he has a right to have a competent translator assist him, at state expense if need be, throughout his trial." *Id.* at 390-391.

But Petitioner has not identified any clearly established law embodied in the holding of a Supreme Court case to support her contention that, under the circumstances in her case, the trial court's failure to appoint an interpreter rendered her trial fundamentally unfair or violated her Sixth Amendment rights. Even applying the holding in *Negron* to the facts in this case would not advance Petitioner's cause. Here, the facts demonstrate that Petitioner could speak and understand English and did not have a "language disability" that prevented her from assisting in her defense. Moreover, Petitioner's counsel advised the judge that Petitioner could speak English, and the judge specifically found Petitioner did not need an interpreter to aid in her defense.

to Justice Act." This law requires the Director of the Administrative Office of the United States Courts to establish a program to facilitate the use of "certified or otherwise qualified interpreters in judicial proceedings instituted by the United States." 28 U.S.C. §1827(b)(1). By its terms, this law applies only to cases brought in federal courts by the United States and only for hearing impaired defendants or those who speak only, or primarily, a language other than English.

Nevertheless, the trial transcript reveals an interpreter was available during Petitioner's testimony in case she needed help. [Doc. No. 16-4], 56. Thus, Petitioner cannot demonstrate she was prejudiced by the trial court's decision not to appoint a "certified" interpreter.

As for Petitioner's challenge to the accuracy of Mr. Nguyen's translations, the OCCA determined there was no evidence to support a conclusion that any deficiencies in translation prejudiced Petitioner:

Counsel for the Appellant has not identified any aspect of the proceedings in which Appellant's limited English prejudiced her ability to understand or present an adequate defense. Counsel offers nothing more than surmise that any translation services provided by Fred Nguyen or any other interpreter inaccurately conveyed the communications involved to her detriment.

[Doc. No. 16-3], 6-7.

The decision of the OCCA on Petitioner's first ground for relief is neither contrary to, nor an unreasonable application of the Supreme Court law. Moreover, The OCCA's determination of the facts from the evidence of record is reasonable, and Petitioner has not presented clear and convincing evidence to the contrary. Thus, Petitioner is not entitled to habeas relief based on her assertion that the trial court's decision not to appoint a "certified" interpreter violated her Sixth or Fourteenth Amendment rights.

B. Ineffective Assistance of Counsel

In Grounds II, III and IV, Petitioner contends her counsel was ineffective in failing to investigate Petitioner's ability to speak and understand the English language; in using a deficient Vietnamese interpreter;² and in failing to investigate, prepare and present the testimony of

² Petitioner raised this issue in the context of her first ground for relief. The OCCA found no evidence to support the claim that the interpreter's translations were deficient, and no resulting prejudice. [Doc. No. 16-3] at 6-7. Thus, Petitioner can show no prejudice in the context of an ineffective assistance of counsel claim, and she is not entitled to habeas relief.

witnesses who would have informed counsel about Petitioner's limited English speaking skills and would have testified on her behalf.

1. Review of Ineffective Assistance of Counsel Claims

The OCCA reviews ineffective assistance of counsel claims under the two-part test mandated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687, (1984). The *Strickland* test requires an appellant to demonstrate: (1) counsel's performance was constitutionally deficient; and (2) counsel's deficient performance prejudiced the defense. *Id.*

On habeas review of an ineffective assistance of counsel claim, the pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. *Harrington v. Richter*, 562 U.S. 86, 101 (2011). This question is different from asking whether defense counsel's performance fell below *Strickland's* standard. Were that the inquiry, the analysis would be the same on habeas review and on direct appeal. Because of AEDPA's deferential standard of review, however, the two questions are necessarily different. "For purposes of § 2254(d)(1), 'an unreasonable application of federal law is different from an incorrect application of federal law.'" *Harrington* at 101 (citing *Williams v. Taylor*, 529 U.S. 362, 410 (2000)). "A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself." *Id.*

2. The OCCA's Application of *Strickland*

The OCCA identified and applied *Strickland v. Washington*, 466 U.S. 668, 681 (1984) in determining Petitioner's counsel was not constitutionally ineffective:

Under *Strickland v. Washington* ..., Appellant must establish that counsel's performance was deficient; and that she was prejudiced by the deficient performance. To determine whether counsel's performance was deficient, we ask whether the challenged act or omission was objectively reasonable under prevailing professional norms. To determine prejudice, we consider whether counsel's unprofessional act or omission creates a reasonable probability that the outcome of

the trial or sentencing would have been different. If the record permits resolution of the claim on the ground that *Strickland*'s prejudice prong has not been met, we ordinarily follow this course.

[Doc. No. 16-3], 7-8 (internal quotations omitted). The OCCA determined Petitioner had not demonstrated *Strickland* prejudice arising from her ineffective assistance of counsel claims.

With her direct appeal, Petitioner moved for an evidentiary hearing on the issue of counsel's ineffective assistance pursuant to Oklahoma's Rule 3.11(B)(3)(b)(i), *Rules of the Court of Criminal Appeals*. See Okla. Stat. tit. 22, ch. 18, app., Rule 3.11(B)(3)(b)(i) (authorizing an evidentiary hearing for ineffective-assistance-of-counsel claims when "the application and affidavits ... contain sufficient information to show this Court by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence"). In support of her motion, Petitioner submitted *ex parte* affidavits and other evidence to the OCCA.³ If the OCCA had determined the evidence presented constituted clear and convincing evidence of a strong possibility of ineffectiveness, the OCCA would have "remand[ed] the matter to the trial court for an evidentiary hearing, utilizing the adversarial process, and direct[ed] the trial court to make findings of fact and conclusions of law solely on the issues and evidence raised in the application." Rule 3.11(B)(3)(b)(ii). See [Doc. No. 16-3], 8.

In this case, the OCCA identified the proffered evidence supporting Petitioner's motion for evidentiary hearing:

Among the materials submitted by Appellant are affidavits from her husband, a close personal friend, a Vietnamese acquaintance, and two fellow inmates, all of whom state their observations that Appellant has a limited understanding of the English language. Appellant's personal friend rates her English comprehension at "about 40%." Another acquaintance states that he is Vietnamese and has never seen Appellant speak English, and offers the opinion that Appellant does not

³ The evidence submitted in support of Petitioner's motion for evidentiary hearing was not a part of the record on appeal. See [Doc. No. 16-3], 8.

“ha[ve] good enough English comprehension” to defend herself in court. Appellant’s husband also testifies by affidavit to her limited comprehension of English. A fellow prisoner of the Appellant testifies that she had to explain Appellant’s sentencing paperwork to her, after which Appellant was sad and cried. Another inmate also testifies that she communicated with Appellant and assisted her in communicating with others in English.

In connection with her claim that trial counsel unreasonably failed to investigate her case, Appellant attaches: (1) an affidavit from her personal friend stating that Appellant’s son would sometimes say things that were inaccurate; (2) an affidavit from a Vietnamese acquaintance attesting that Appellant and her husband were “very good people” and that J.C., the victim, would “get sick a lot” while in Appellant’s care; (3) an affidavit of Appellant’s husband detailing the events surrounding the hiring of John Albert as defense counsel and Mr. Albert’s instruction to find five witnesses to testify for the defense, witnesses Mr. Albert later failed to call in Appellant’s defense. All of the affiants indicate that they were willing to testify in Appellant’s defense.

[Doc. No. 16-3], 8-9.

The OCCA initially found that the materials submitted in support of Petitioner’s motion for evidentiary hearing “do not establish clear and convincing evidence of a strong possibility that trial counsel was ineffective in investigating her ability to speak and understand English.” [Doc. No. 16-3], 10. The OCCA further found the materials failed to establish clear and convincing evidence of a strong possibility that counsel was ineffective in his investigation of the underlying facts of the case and preparations for trial. “The record shows that trial counsel had full access to the State’s discovery; met with Appellant several times seeking her account of events and discussing her defense; and conducted a reasonably effective defense challenging the sufficiency of the evidence that Appellant caused the fatal injury.” *Id.*

The OCCA has explained its standard for determining whether an appellant should be afforded a hearing on ineffective assistance of counsel claims:

As the rules specifically allow Appellant to predicate his claim on allegations “arising from the record or outside the record or a combination of both,” *id.*, it is, of course, incumbent upon this Court, to thoroughly review and consider Appellant’s application and affidavits along with other attached non-record

evidence to determine the merits of Appellant's ineffective assistance of counsel claim. Our rules require us to do so in order to evaluate whether Appellant has provided sufficient information to show this Court by clear and convincing evidence that there is a strong possibility trial counsel was ineffective for failing to utilize or identify the evidence at issue. Rule 3.11(B)(3)(b), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2007). This standard is intended to be less demanding than the test imposed by *Strickland* and we believe that this intent is realized. Indeed, it is less of a burden to show, even by clear and convincing evidence, merely a strong possibility that counsel was ineffective than to show, by a preponderance of the evidence that counsel's performance actually was deficient and that but for the unprofessional errors, the result of the proceeding would have been different as is required by *Strickland*. Thus, when we review and grant a request for an evidentiary hearing on a claim of ineffective assistance under the standard set forth in Rule 3.11, we do not make the adjudication that defense counsel actually was ineffective. We merely find that Appellant has shown a strong possibility that counsel was ineffective and should be afforded further opportunity to present evidence in support of his claim. However, when we review and deny a request for an evidentiary hearing on a claim of ineffective assistance under the standard set forth in Rule 3.11, we necessarily make the adjudication that Appellant has not shown defense counsel to be ineffective under the more rigorous federal standard set forth in *Strickland*.

Simpson v. State, 230 P.3d 888, 905-906 (Okla. Crim. App. 2010).

The Tenth Circuit has held "as a matter of federal law, that any denial of a request for an evidentiary hearing on the issue of ineffective assistance of counsel filed pursuant to OCCA Rule 3.11 ... operates as an adjudication on the merits of the *Strickland* claim and is therefore entitled to deference under § 2254(d)(1)." *Lott v. Trammell*, 705 F.3d 1167, 1213 (10th Cir. 2013).

Careful consideration of Petitioner's grounds for habeas relief based on alleged ineffectiveness of counsel leads to the conclusion that Petitioner has failed to demonstrate that all fairminded jurists would disagree with the OCCA's assessment of counsel's effectiveness. Thus, it is recommended that habeas relief be denied on these grounds.

C. Cumulative Error

Petitioner contends the cumulative effect of all the grounds for relief she asserts violated her right to a fair trial. The OCCA considered this proposition on the merits:

In Proposition Four, Appellant argues the cumulative effect of errors requires reversal. The cumulative error doctrine applies when several errors occurred, but none alone warrants reversal. *Derosa v. State*, 2004 OK CR 19, ¶100, 89 P.3d 1124, 1157. We find here that even if Appellant's trial was not error free, any errors and irregularities, considered both individually and in the aggregate, did not render the trial fundamentally unfair.

[Doc. No. 16-3], 12.

"In the federal habeas context, a cumulative-error analysis aggregates all constitutional errors found to be harmless and analyzes whether their cumulative effect on the outcome of the trial is such that collectively they can no longer be determined to be harmless." *Alverson v. Workman*, 595 F.3d 1142, 1162 (10th Cir. 2010) (internal quotation marks and brackets omitted). "[A]s the term 'cumulative' suggests, ... we undertake a cumulative-error analysis only if there are at least two errors." *Hooks*, 689 F.3d at 1194–95.

In this case, the OCCA identified no constitutional errors, and on habeas review, neither has this court. Thus, there are no constitutional errors to accumulate. The OCCA's cumulative error analysis is neither contrary to, nor an unreasonable application of Supreme Court law.

RECOMMENDATION

In sum, the grounds for habeas relief are without merit, and it is therefore recommended that the Petition [Doc. No. 1] be denied.

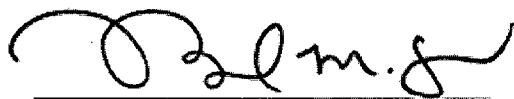
NOTICE OF RIGHT TO OBJECT

The parties are advised of their right to object to this Report and Recommendation. *See* 28 U.S.C. § 636. Any objection must be filed with the Clerk of the District Court by April 17, 2017. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(2). Failure to make timely objection to this Report and Recommendation waives the right to appellate review of the factual and legal issues addressed herein. *Moore v. United States*, 950 F.2d 656 (10th Cir. 1991).

STATUS OF REFERRAL

This Report and Recommendation terminates the referral by the District Judge in this matter.

ENTERED this 3rd day of April, 2017.



BERNARD M. JONES
UNITED STATES MAGISTRATE JUDGE

Appendix C

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

VAN LE,

NOT FOR PUBLICATION

Appellant,

v.

Case No. F-2013-630

THE STATE OF OKLAHOMA,

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

Appellee.

SEP 16 2014

OPINION

MICHAEL S. RICHIE
CLERK

LEWIS, PRESIDING JUDGE:

Appellant, Van Le, was tried by jury in the District Court of Oklahoma County, Case No. CF-2012-6373, and found guilty of murder in the first degree, in violation of 21 O.S.2011, § 701.7(C). The jury sentenced her to life imprisonment without the possibility of parole. The Honorable Ray C. Elliott, District Judge, pronounced judgment and sentence accordingly. Ms. Le appeals.

FACTS

Appellant was the babysitter of the two year-old victim, J.C. The child's mother, Mina Chau, left her daughter in Appellant's care in Oklahoma City on the morning of September 22, 2012, and went to work in Guthrie. J.C. had been recovering from a stomach flu, but had no serious problems or injuries. That afternoon, Appellant called Ms. Chau and told her the child had been taken to the hospital. At the hospital, Ms. Chau learned her child had suffered a fractured skull and other head trauma. J.C. died from her injuries.

Medical investigation indicated a blunt force trauma to the head caused J.C.'s death. J.M., Appellant's son, was seven years old at the time of the incident. He testified at trial that on the day J.C. was injured, she had been jumping on the bed. Appellant repeatedly told J.C. to stop and come to her, then picked J.C. up by her legs and "threw her on the floor twice, or several times." J.M demonstrated for the jury how his mother had grabbed J.C. by her legs and slammed her down "very hard" at least two times.

J.M. testified that J.C. was screaming after this incident, then vomited, and later lost consciousness. Appellant laid J.C. on the sofa and tried to wake her up, but could not. Appellant called the ambulance, but lied to the emergency responders, indicating she had been speaking to the child before she lost consciousness. J.M. testified that J.C. did not speak again after being thrown down, but only screamed and cried.

At trial, Appellant testified that J.C. was crying and screaming that day after her mother dropped her off, got sick and vomited at some point, and slept "all day," or most of the day. When Appellant could not rouse J.C. from sleep, "I try to pick her up and I shook her very hard." Appellant denied abusing J.C. or injuring her. In closing argument, defense counsel claimed that J.C. could have been injured before arriving at Appellant's house.

ANALYSIS

In Proposition One, Appellant claims her trial “without the appointment of a qualified Vietnamese interpreter” violated the Sixth and Fourteenth Amendments. The record shows no request by the Appellant or her counsel for the appointment of a qualified interpreter at trial. Absent a timely request, this issue is waived, and our review is limited to plain error. *Simpson v. State*, 1994 OK CR 40, ¶ 2, 876 P.2d 690, 692-93. To obtain relief for plain error, Appellant must show that a plain or obvious error affected the outcome of the trial. *Hogan v. State*, 2006 OK CR 19, ¶ 38, 139 P.3d 907, 923. The decision to correct an error forfeited by the failure to object at trial lies within the sound discretion of this Court, to be exercised only where “the error ‘seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’” *Simpson*, 1994 OK CR 40, ¶ 30, 876 P.2d at 700-701, (citing *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770, 1776, 123 L.Ed.2d 508, 518 (1993)).

Trial courts are vested with broad discretion whether to appoint an interpreter according to the necessity of the particular occasion. *McGirt v. State*, 54 Okl.Cr. 276, 278, 18 P.2d 1099, 1100 (1933). A trial court’s refusal to appoint an interpreter upon request, when necessary to ensure the fundamental fairness of a criminal trial, would violate the constitutional rights of the accused. *Parra v. Page*, 1967 OK CR 130, ¶ 14, 430 P.2d 834, 838 (holding denial of interpreter violated due process). The question before us here is whether the trial court’s failure to appoint an interpreter, *in the absence*

of any request by the accused or her counsel, was a plain and obvious error that affected the outcome of the trial.

Appellant is Vietnamese and immigrated to the United States. English is her second language. After her arrest, she retained private counsel, John Albert, who represented her throughout trial. Mr. Albert initially communicated with the Appellant through a non-certified Vietnamese translator, Fred Nguyen,¹ who was apparently an acquaintance of the Appellant and a business associate of Mr. Albert's law office. The record indicates Mr. Albert visited with Appellant five times before trial, for approximately five hours.

On the day set for trial, during a hearing on defense counsel's motion for a continuance, Mr. Albert informed the trial court that after three or four visits during which Appellant communicated only through the interpreter, Fred Nguyen (and offered very little about the facts of her case), he met with Appellant alone. During that visit, he informed Appellant of the expected incriminating testimony of her son. Appellant became upset and began communicating with counsel in English.

Fred Nguyen also testified at this hearing that Appellant had spoken to Mr. Albert only through him in three or four meetings, and had resisted their requests to discuss the facts of her case, claiming at times that she did not

¹ At the time of these events and up to the completion of Appellant's trial, Oklahoma had no active program for the certification of courtroom interpreters, though a board had been created by statute to implement such a program. The board is now active.

understand or know what happened to J.C. Mr. Nguyen also testified that he accompanied Mr. Albert to a meeting with Appellant's husband, Mohammed, who told them that Appellant had been in the United States for 17 years and could understand English.

In a videotaped interview with police conducted after J.C.'s death,² Appellant was assisted, at times, by a Vietnamese translator, but at other times communicated with the investigator in English and indicated her understanding of the investigator's statements. Other witnesses testified that Appellant communicated with them in English, without apparent difficulty, after J.C. was injured. Appellant testified at trial in the English language. She appeared to understand and respond to questions propounded in English by defense counsel, but sometimes indicated difficulty understanding the questions asked on cross-examination. Still, Appellant never indicated her lack of understanding prevented her from continuing with her testimony.

Appellant complains that the trial court committed error here because it never advised Appellant of her "right" to the appointment of a qualified interpreter, or conducted a separate hearing to determine whether an interpreter was necessary. Of course, no such right exists in the absence of a showing of need, i.e., that Appellant could not understand the English

² The interview itself is not part of the appellate record, but was attached to Appellant's *Application For Evidentiary Hearing On Sixth And Fourteenth Amendment Claims*. Other testimony indicates that Appellant was questioned and responded in English for the majority of the interview.

language sufficiently to follow the trial proceedings and participate meaningfully in her defense. *Rodriguez v. State*, 1982 OK CR 53, ¶ 2, 644 P.2d 564, 565. We note that neither counsel nor the Appellant indicated to the trial court that she could not understand English sufficiently to understand the proceedings and present her defense at trial. We find the trial court is under no obligation to convene a hearing on its own motion in these circumstances.

We also find that the record circumstantially demonstrates that Appellant can speak and understand English, and that the lack of additional interpretive services did not prevent her from understanding the trial or presenting her defense. Despite the absence of any formal request for an interpreter to assist *her* (other witnesses required interpreters to translate their testimony), the trial court was acutely aware of Appellant's limited fluency in English and its potential impact on her ability to participate in her trial. The trial court granted considerable latitude to counsel and exercised reasonable care that Appellant understood the proceedings and her right to a fair trial was preserved.

Counsel for the Appellant has not identified any aspect of the proceedings in which Appellant's limited English prejudiced her ability to understand or present an adequate defense. Counsel offers nothing more than surmise that any translation services provided by Fred Nguyen or any other interpreter inaccurately conveyed the communications involved to her detriment. The trial court's failure to appoint a qualified Vietnamese

interpreter for Appellant's defense was not a plain or obvious error that affected the outcome of the proceedings. Proposition One is denied.

In Proposition Two, Appellant claims that trial counsel rendered ineffective assistance of counsel, by (1) failing to reasonably investigate her ability to speak and understand English; (2) failing to obtain the services of a qualified courtroom interpreter; and (3) failing to interview and prepare certain witnesses favorable to the defendant and present those witnesses at trial.³ In connection with these claims, Appellant has filed an *Application for Evidentiary Hearing on Sixth and Fourteenth Amendment Claims*, containing several affidavits and other exhibits in support of her request for an evidentiary hearing.

Under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984), Appellant must establish that counsel's performance was deficient; and that she was prejudiced by the deficient performance. *Spears v. State*, 1995 OK CR 36, ¶ 54, 900 P.2d 431, 445. To determine whether counsel's performance was deficient, we ask whether the challenged act or omission was objectively reasonable under prevailing professional norms. To determine prejudice, we consider whether counsel's unprofessional act or omission creates

³ Appellate counsel also suggests that trial counsel improperly divulged confidential information in statements to the court concerning Appellant's ability to communicate in English, and labored under some unspecified conflict of interest in his business relationship with Fred Nguyen, but fails to develop these allegations with a proper argument or citations of authority. These arguments are waived for appellate review. Rule 3.5(A)(5), *Rules of the Court of Criminal Appeals*, 22 O.S.Supp.2013, Ch. 18, App.

a reasonable probability that the outcome of the trial or sentencing would have been different. *Tate v. State*, 2013 OK CR 18, ¶ 38, 313 P.3d 274, 284-85. If the record permits resolution of a claim on the ground that *Strickland's* prejudice prong has not been met, we ordinarily follow this course. *Phillips v. State*, 1999 OK CR 38, ¶ 103, 989 P.2d 1017, 1043.

Appellant's *ex parte* affidavits and materials are not a proper part of the appellate record. Under Rule 3.11(B)(3)(b)(i), *Rules of the Court of Criminal Appeals*, 22 O.S.Supp.2013, Ch. 18, App., this Court reviews the affidavits and evidentiary materials submitted by Appellant to determine whether they contain "sufficient information to show this Court by clear and convincing evidence there is a strong possibility trial counsel was ineffective for failing to utilize or identify the complained-of evidence." If the Court determines from the application that a strong possibility of ineffectiveness is shown, we will "remand the matter to the trial court for an evidentiary hearing, utilizing the adversarial process, and direct the trial court to make findings of fact and conclusions of law solely on the issues and evidence raised in the application." Rule 3.11(B)(3)(b)(ii). The evidentiary record thus created in the district court may then be admitted as part of the record on appeal and considered in connection with Appellant's claims of ineffective counsel. Rule 3.11(B)(3).

Among the materials submitted by Appellant are affidavits from her husband, a close personal friend, a Vietnamese acquaintance, and two fellow

inmates, all of whom state their observations that Appellant has a limited understanding of the English language. Appellant's personal friend rates her English comprehension at "about 40%." Another acquaintance states that he is Vietnamese and has never seen Appellant speak English, and offers the opinion that Appellant does not "ha[ve] good enough English comprehension" to defend herself in court. Appellant's husband also testifies by affidavit to her limited comprehension of English. A fellow prisoner of the Appellant testifies that she had to explain Appellant's sentencing paperwork to her, after which Appellant was sad and cried. Another inmate also testifies that she communicated with Appellant and assisted her in communicating with others in English.

In connection with her claim that trial counsel unreasonably failed to investigate her case, Appellant attaches: (1) an affidavit from her personal friend stating that Appellant's son would sometimes say things that were inaccurate; (2) an affidavit from a Vietnamese acquaintance attesting that Appellant and her husband are "very good people" and that J.C., the victim, would "get sick a lot" while in Appellant's care; (3) an affidavit of Appellant's husband detailing the events surrounding the hiring of John Albert as defense counsel and Mr. Albert's instruction to find five witnesses to testify for the defense, witnesses Mr. Albert later failed to call in Appellant's defense. All of the affiants indicate that they were willing to testify in Appellant's defense.

We initially find that Appellant's submissions do not establish clear and convincing evidence of a strong possibility that trial counsel was ineffective in investigating her ability to speak and understand English. While this extra-record evidence indicates a limited understanding of English, the record contains additional, contrary evidence of Appellant's understanding in her own testimony and demeanor, as well as her interactions with other witnesses, police, her counsel, the prosecutor, and the trial court. Appellant's understanding of English is not perfect, but it is sufficient to support the conclusion that she understood the proceedings and her trial was fundamentally fair. If and when Appellant required the services of an interpreter, those services were available, and she has not shown that the services were inadequate or her fundamental rights were abridged.

Appellant's affidavits and additional evidence presented in her application for evidentiary hearing also fail to establish clear and convincing evidence of a strong possibility that counsel was ineffective in his investigation of the underlying facts of the case and preparations for trial. The record shows that trial counsel had full access to the State's discovery; met with Appellant several times seeking her account of events and discussing her defense; and conducted a reasonably effective defense challenging the sufficiency of the evidence that Appellant caused the fatal injury.

Appellant criticizes trial counsel's failure to file motions and request a copy of the preliminary hearing transcript, but does not specify what motions

he should have filed or how the absence of the transcript impaired her defense. Considering the entire record before us, we do not find that counsel made errors so serious that he ceased to function as an advocate, or that the adversarial testing process of the trial broke down. Proposition Two, and the accompanying application for an evidentiary hearing, are denied.

In Proposition Three, Appellant claims that she has been "denied a full and complete record" to afford a meaningful review. This claim renews Appellant's earlier request to have audio recordings of certain hearings that were translated by non-certified interpreters incorporated into the record on appeal. Appellant points to the language of 20 O.S.2011, § 1710, requiring that such proceedings "shall be labeled and remain an official part of the record."

This Court stated in a previous order that the tapes in question remain part of the official district court record. Counsel for the Appellant reasons that because she has offered evidence that Fred Nguyen is not a certified interpreter, that he has some business relationship with trial counsel that may give rise to an unspecified conflict of interest, and that the 10th Circuit Court of Appeals termed Fred Nguyen's translation services "troubling" in an unrelated drug case, "is more than sufficient to require the examination of these audio recordings."

We note that counsel for the Appellant has retained a certified Vietnamese interpreter for appeal, yet offers no proof of translation errors (or

any diligent efforts to discover such errors) in those proceedings.⁴ The presumption on appeal “is that the trial was regular and fair . . . and the burden is upon the party complaining to overcome this presumption, and to show . . . that [s]he suffered injury thereby.” *Wallace v. State*, 29 Okl.Cr. 197, 198, 233 P. 241, 242 (1925). Appellant has not been denied a complete record for appellate review. Proposition Three is denied.

In Proposition Four, Appellant argues the cumulative effect of errors requires reversal. The cumulative error doctrine applies when several errors occurred, but none alone warrants reversal. *Derosa v. State*, 2004 OK CR 19, ¶ 100, 89 P.3d 1124, 1157. We find here that even if Appellant’s trial was not error free, any errors and irregularities, considered both individually and in the aggregate, did not render the trial fundamentally unfair. Proposition Four is denied.

DECISION

The Judgment and Sentence of the District Court of Oklahoma County is **AFFIRMED**. Pursuant to Rule 3.15, Rules of the Court of Criminal Appeals, Title 22, Ch. 18, App. (2014), the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

⁴ Fred Nguyen did not interpret testimony in these proceedings for the record. Mr. Nguyen may have translated certain instructions from the court to Appellant’s husband regarding his conduct toward witnesses, but Appellant has not explained how this could affect any issues raised in the current appeal.

**AN APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY
THE HONORABLE RAY C. ELLIOTT, DISTRICT JUDGE**

APPEARANCES AT TRIAL

JOHN ALBERT
3011 N. CLASSEN BLVD.
OKLAHOMA CITY, OK 73106

ATTORNEY FOR DEFENDANT

GAYLAND GEIGER
MARCY FASSIO
ASST. DISTRICT ATTORNEYS
320 ROBERT S. KERR, STE. 505
OKLAHOMA CITY, OK 73102

ATTORNEYS FOR THE STATE

OPINION BY LEWIS, P.J.
SMITH, V.P.J.: Concur
LUMPKIN, J.: Concur
A. JOHNSON, J.: Concur

APPEARANCES ON APPEAL

WAYNA TYNER
OKLA. INDIGENT DEFENSE SYSTEM
P.O. BOX 926
NORMAN, OK 73070-0926

ATTORNEY FOR APPELLANT

E. SCOTT PRUITT
ATTORNEY GENERAL
JAY SCHNIEDERJAN
ASSISTANT ATTORNEY GENERAL
313 N.E. 21st ST.
OKLAHOMA CITY, OK 73105
ATTORNEYS FOR THE APPELLEE