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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MERDAN HAYDAROV,

Defendant and Appellant.

B281565

(Los Angeles County
Super. Ct. No. BA418786)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Lisa B. Lench, Judge. Affirmed.

David D. Carico, under appointment by the Court of
Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief
Assistant Attorney General, Lance E. Winters, Assistant
Attorney General, Margaret E. Maxwell and Nancy Lii Ladner,
Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Merdan Haydarov of second degree murder. Haydarov contends his conviction must be reversed because the trial court failed to provide him with a competent interpreter at his preliminary hearing and at trial, thereby violating his state and federal constitutional rights. In supplemental briefing, Haydarov urges that the imposition of restitution fines and two assessments, without a determination of his ability to pay, violated his due process and equal protection rights, and must be stricken. We affirm the judgment.¹

FACTUAL AND PROCEDURAL BACKGROUND

1. *People's evidence*

Appellant Haydarov, who was 19 years old when he committed the murder, was born in Turkmenistan. He had moved to the United States approximately two years earlier, aspiring to be an actor. He lived in a Hollywood apartment with three American roommates. In November 2013, Haydarov was in financial straits. He was unable to pay his rent and had borrowed money from one of his roommates for necessities. He had attempted to cash a \$12,000 check from his checking account, but it bounced. His father was scheduled to arrive from Turkmenistan to visit him on November 24.

¹ The parties initially agreed that this court should order clerical errors in a minute order and the abstract of judgment corrected. Appellant subsequently requested that the record be augmented with, among other things, documentation showing that the trial court has already corrected the errors. Accordingly, this contention is moot and we need not address it.

a. *The victim's disappearance*

The victim, 49-year-old Randy Kreeger, lived in a condominium in Los Angeles. In early November 2013, Haydarov and Kreeger began texting each other. Haydarov used an alias, "Eric Demetri." On November 13, 2013, "Demetri" texted Kreeger, asking how he was and why he had not returned Demetri's text. Kreeger responded, "I felt like you may not be ready for all this yet, and it may be better for you to have experience with someone your own age that you have strong feelings for." Haydarov responded that he was "fine," and Kreeger should "teach" him. Kreeger reiterated, "Your first time should be with someone your age that you're crazy for." Haydarov answered, "I don't have nobody on my age." Thereafter, Haydarov sent repeated text messages asking to meet with Kreeger. Eventually, Haydarov and Kreeger arranged for Haydarov to visit Kreeger at Kreeger's condominium on November 23, 2013.

Kreeger missed an appointment with a friend on the evening of November 23, 2013, and did not arrive for a morning meeting with another friend on November 24, conduct which was out of character for him. Alarmed, on November 24, several of Kreeger's friends went to his condominium to check on him. A neighbor of Kreeger's assisted them in reviewing videotape from the complex's video surveillance system, which showed a man they did not recognize driving away in Kreeger's green Mini Cooper. Entering Kreeger's residence with a locksmith's help, the friends found his bedroom in disarray. The bed had been "pushed askew," the sheets were stripped from the bed, and a bloodstained rug was rolled up and placed behind a door. Several large black trash bags and a Home Depot bag containing bungee

cords and black latex gloves was in the bedroom. Inside the trash bags were, inter alia, scissors, a bloody knife with a four- and three-quarter-inch-long blade, and bloody towels. Police were summoned.

An officer reviewed the condominium's video footage. It showed that Kreeger entered his building, after a visit to the gym, at approximately 11:00 a.m. on November 23. At 12:27 p.m., Haydarov arrived and entered the building. At 2:24 p.m., Haydarov, carrying a duffle bag he had not had when he entered earlier, went to the subterranean parking garage. He drove away in Kreeger's car shortly thereafter. At approximately 6:13 p.m., Haydarov returned to Kreeger's garage. He removed a large suitcase from the car, put plastic bags into it, and went inside the building. At 9:34 p.m., Haydarov moved the Mini Cooper onto the street, just outside the garage. At 9:45 p.m., he placed the suitcase, which now appeared to be heavy and full and had plastic bags sticking out of the ends, into the Mini Cooper's trunk. Haydarov reentered the building one more time and returned with a plastic trash bag, which he also placed into the car. He then drove away in the Mini Cooper.

By tracking the location of Kreeger's cellular telephone, at 7:30 p.m. on November 24, 2013, officers located Haydarov, who was driving the Mini Cooper in Hollywood. Quickly recognizing him as the person seen in the video footage, officers arrested Haydarov. He had Kreeger's credit cards in his wallet, as well as two of Kreeger's checks. One, filled out in handwriting other than Kreeger's, was made out to Haydarov, in the amount of \$3,000.

b. *Haydarov's confession*

Los Angeles Police Department (LAPD) detectives interviewed Haydarov on the morning of November 25, 2013, in English. Haydarov initially denied any involvement in Kreeger's disappearance. He claimed Kreeger had given him \$200 in cash and the \$3,000 check to help him out, and allowed him to borrow the Mini Cooper to pick up his father from the airport. After detectives displayed photographs of Haydarov loading the suitcase into the Mini Cooper, Haydarov confessed to killing Kreeger. According to him, after Kreeger gave him the check, Kreeger gave him a glass of water that tasted strange. Kreeger then made unwanted sexual advances. When Haydarov repeatedly rebuffed him, Kreeger pushed him. They tussled, kicking and punching each other. Kreeger purportedly picked up a glass ashtray and it broke. Haydarov grabbed it and punched Kreeger with it, cutting Kreeger's neck. Haydarov attempted to render medical aid, but to no avail. Kreeger died.

Haydarov thereafter went to Home Depot and purchased items to dispose of the body, with cash he took from Kreeger's wallet.² He wrapped Kreeger's body in plastic and other materials, forced it into a suitcase, drove to an apartment where he had previously lived, and threw the suitcase in a dumpster. He claimed that he threw the glass ashtray in a trash bin on the sidewalk on the street where Kreeger's condominium was located.

² Video footage and store receipts showed that at 5:34 p.m. on November 23, 2013, Haydarov purchased "gorilla grip" gloves, garbage bags, bungee cords, and a ratcheting strap at Home Depot.

c. Discovery of Kreeger's body and the investigation

On the afternoon of November 25, 2013, officers and an LAPD criminalist discovered the suitcase, which contained Kreeger's body, in the dumpster at the location Haydarov described. The body was bent in half at the waist, backwards. It was wrapped in a blanket, a towel, plastic bags, and other materials, and was tied with various items, including plastic bags, belts, a scarf, bungee cords, and an orange ratcheting strap.

An autopsy showed that Kreeger's throat had been cut with a sharp object, such as a knife blade. The neck wound was "very large," spanning the entire neck and severing the trachea, esophagus, carotid artery, and internal jugular vein. Premortem wounds included a three and three-quarters-inch stab wound to Kreeger's back; a stab wound to the back of his head that went from back to front, down and forward; a defensive stab wound to his hand that penetrated to the bone; and stab wounds to his face. The wounds were all consistent with a knife being used as the murder weapon. The kitchen knife found in Kreeger's bedroom could have caused his injuries. It was highly unlikely that a glass ashtray, even if broken, could have caused the neck wound; the weapon had to have been "very, very sharp." Had the perpetrator used a very sharp piece of glass to inflict the injuries, he would have suffered deep cuts to his hands.

When interviewed and booked on November 25, 2013, Haydarov had scratches on his right leg and knee, ankle, and right buttocks. He did not have injuries to his fingers or hands.

Red stains on the knife found in Kreeger's bedroom matched Kreeger's DNA profile. The black gloves found in Kreeger's bedroom contained a mixture of Kreeger's and Haydarov's DNA. A red stain found on the heel of the shoe

Haydarov was wearing when he was arrested also matched Kreeger's DNA profile. Blood and an orange tie-down strap were found in the Mini Cooper.

A glass cup found on Kreeger's bedside table was tested for controlled substances. None were detected.

Police found Kreeger's possessions, including his cellular telephone, key fob, passport, laptop, and checkbook, in Haydarov's apartment.

Officers searched in trash cans for the glass ashtray Haydarov had described, in the area where he said he had disposed of it. No such item was found.

On November 23, at 3:28 p.m.—after he had killed Kreeger—Haydarov sent a text message to Kreeger's cell phone, apologizing that he had been unable to visit Kreeger's home. On November 24, Haydarov texted Kreeger, asking how his night had been.

d. *The defense*

The defense presented no evidence.³ During argument, defense counsel conceded that Haydarov was the killer, but argued that the crime was, at most, manslaughter, and that the People had failed to prove the killing was carried out during the commission of a robbery.

³ During cross-examination, defense counsel elicited that Kreeger's cell phone contained sexually suggestive text messages between Kreeger and a 22-year-old man who was unrelated to the case, sent shortly before Haydarov arrived at the condominium.

2. *Procedure*

A jury convicted Haydarov of second degree murder (Pen. Code, § 187, subd. (a)),⁴ and found he personally used a deadly and dangerous weapon in the commission of the crime (§ 12022, subd. (b)(1)).⁵ The trial court sentenced Haydarov to a term of 16 years to life in prison, comprised of 15 years to life for the murder and one year for the weapon enhancement. It imposed a \$300 restitution fine, a suspended parole revocation restitution fine in the same amount, a \$40 court operations assessment, and a \$30 criminal conviction assessment. Haydarov stipulated to direct victim restitution in the amount of \$2,591.88 plus interest. He timely appealed.

DISCUSSION

1. *Right to an interpreter*

Haydarov was provided with the services of a Turkmen interpreter, but complained after the preliminary hearing that he was unable to understand him. Thereafter, Haydarov opted to proceed to trial without an interpreter. He contends that the trial court's failure to provide him with a competent interpreter at the preliminary hearing and at trial requires reversal of his conviction. We disagree.

a. *Additional facts and contentions*

(i) *Proceedings prior to trial*

Pretrial proceedings were held before several different judges, and Haydarov was initially represented by several different public defenders. The case was called for arraignment

⁴ All further undesignated statutory references are to the Penal Code.

⁵ The jury acquitted Haydarov of first degree murder.

on November 27, 2013. On that date, the court issued a routine order finding good cause for appointment of a Russian interpreter. At proceedings on December 18, 2013, and January 3, 2014, Haydarov was assisted by the Russian interpreter. Also on January 3, a different judge issued a second order finding good cause for appointment of a Russian interpreter.

At a February 5, 2014 hearing, defense counsel Thomas Ahearn stated that Haydarov “could speak some English” but was not fluent, and needed a Turkmen interpreter, not a Russian interpreter, in that he did not speak Russian. Counsel stated he did not believe any Turkmen interpreters were available in California. He indicated Haydarov spoke English well enough to waive time to continue arraignment. On February 13, 2014, a judge issued an order finding good cause for appointment of a Turkmen interpreter.

On March 11, 2014, Turkmen interpreter Bahram Ganjineh interpreted for Haydarov.⁶ Ganjineh had been certified as a Turkmen interpreter in the federal immigration courts, had been approved as an interpreter by the United States District Court, and had been provisionally qualified by the Riverside, San Bernardino, and Orange County superior courts. Counsel indicated, without objection, that Ganjineh was translating using both Turkmen and Uzbeki. Thereafter, Ganjineh interpreted at proceedings transpiring on April 22, May 28, June 27, July 23, August 21, September 18, and October 21, 2014, without any

⁶ Ganjineh was found to be provisionally qualified as a Turkmen interpreter in the Los Angeles Superior Court in January 2015.

objection from the defense. The court's minute orders (and, where available, the reporter's transcripts) for these dates show no mention of any concern about Ganjineh's competence.

Ganjineh also translated at the preliminary hearing, which transpired over two days (November 13 and November 18, 2014). He again translated at a proceeding on December 2, 2014. Neither Haydarov nor defense counsel made any objection to Ganjineh during these proceedings, nor did they indicate Ganjineh's translation was unsatisfactory. At the December 2, 2014 hearing, defense counsel specifically requested a particular date for arraignment because it was the only date Ganjineh was available.

On December 9, 2014, after the preliminary hearing, defense counsel requested appointment of Dr. Timothy Collister for two purposes: first, to complete a comprehensive psychiatric evaluation of Haydarov; and second, to evaluate Haydarov's English comprehension. Counsel noted that Haydarov "utilizes the services of an interpreter who speaks the Turkmen language when in Court." The request said nothing about any deficiency with Ganjineh's interpretation.

On January 6, 2015, defense counsel informed the trial court that Haydarov had "expressed frustration" because there was "a barrier of communication" between him and Ganjineh, in part because they spoke different Turkmen dialects. Counsel explained that Ganjineh was the only certified Turkmen interpreter in Los Angeles County. Counsel observed that Ganjineh had interpreted the preliminary hearing, "[i]t seemed to go without much of a hitch," and Haydarov had "appeared to understand" the procedures and "what was happening" at earlier hearings. Also, Haydarov had been "interviewed by the LAPD

detectives in English and understood most of what was being asked of him.” Nonetheless, counsel averred that “[t]he interpreter situation” had been “somewhat of an issue from the beginning.” The trial court requested that counsel move in writing for appointment of a new interpreter, and provide as much information as possible about Haydarov’s dialect and efforts that had been undertaken to find an interpreter. The court stated it would do its best to “locate an interpreter somewhere on the face of the planet to be able to assist him.”

Pursuant to the court’s request, defense counsel prepared a letter, dated January 13, 2015, explaining what counsel viewed as difficulties with translation (the January 13 letter). Counsel averred that “[l]anguage and interpretation difficulties have been an issue in Mr. Haydarov’s case since the day of his arrest.” Counsel described Haydarov’s background, and noted that he had been interviewed by detectives in English. Counsel averred—incorrectly—that on January 3, 2014, an attorney who previously represented Haydarov informed the trial court that Haydarov did not understand the interpreter. Counsel also stated, again incorrectly, that he had “put on the record” his concerns about the interpreter at the August 21, 2014 hearing. Counsel further stated that Haydarov had informed his two previous attorneys that Ganjineh was not translating properly, and Haydarov only understood about one in five words in the translation. Counsel had unsuccessfully attempted to locate an alternative Turkmen interpreter. In January 2015, Ganjineh conferred with counsel and stated he thought he could reach a breakthrough with Haydarov, using a Turkmen vocabulary book. However, when Ganjineh met with Haydarov at the jail, Haydarov simply became irritated.

On January 13, 2015, at another hearing, the trial court relayed that the Judicial Council had been unable to locate another Turkmen interpreter in California. Defense counsel stated that Haydarov preferred to proceed in English, rather than use Ganjineh's services, because "it's just more annoying than helpful to him and he understands more of the English being spoken than when the interpreter interprets for him."

On February 11, 2015, defense counsel stated that Haydarov would "waive this interpreter and just go with the English rather than have this interpreter continue to serve on this case." The court responded, "If the defendant indicates that he understands English and he is not requesting an interpreter, he can proceed in English. But this interpreter was specifically requested. We have looked far and wide for any other potential interpreters and there are none."

At a March 12, 2015 court appearance, defense counsel acknowledged that although Ganjineh had been provisionally certified as a Turkmen interpreter, Haydarov "doesn't understand what he says to him" and did not understand the proceedings. Counsel observed that Ganjineh was "the only certified Turkmen interpreter in the United States." Counsel acknowledged that Haydarov did "speak some English." The court and the parties discussed the fact that Haydarov had been a student at Santa Monica College, had waived an interpreter in prior hearings, and had been interviewed by police in English. He was also able to answer the court's questions. However, the court ordered either that a different Turkmen interpreter be made available, or, if one could not be found, that the interpreters' office give a detailed account of its efforts to locate one.

On April 15, 2015, Oguljan Fuchs, who was originally from roughly the same region of Turkmenistan as Haydarov, appeared and translated for Haydarov. Fuchs was flown in from Virginia, where she taught Russian at the University of Virginia as part of her graduate studies. Counsel confirmed that Haydarov understood Fuchs. Fuchs explained that she and Haydarov spoke the Khorezmian dialect, “the most unusual dialect of all Turkmen dialects there are,” spoken by persons who lived near the Uzbeki border. Counsel stated that Haydarov had understood “some, but not all” of Ganjineh’s interpretation, but understood all of Fuchs’s.

(ii) *Haydarov’s nonstatutory motion to dismiss, the evidentiary hearing, and the trial court’s ruling*

On June 5, 2015, Haydarov filed a nonstatutory motion to dismiss, on the ground that he was denied a substantial right at the preliminary hearing, i.e., the assistance of “an interpreter who spoke the Turkme[n] language sufficiently for [him] to understand” the testimony and “assist his counsel at the hearing.”

The trial court thereafter conducted an evidentiary hearing on the motion, at which Fuchs, Ganjineh, and clinical psychologist Collister testified. Ganjineh, who was Azerbaijani, explained that he had learned Turkmen as a child, when his family repeatedly vacationed in an area where the language was spoken. He then enhanced his understanding by studying on the internet and reading newspapers. He believed that Haydarov’s difficulties in understanding were due to regional variations in speech. As an example, he noted that in the United States, some persons might use the word “potato,” whereas others would say “tater.” Also, Haydarov spoke a less formal version of Turkmen

than did Ganjineh. Some words simply did not exist in Turkmen. During interviews, Ganjineh could more effectively communicate with Haydarov because he could clarify meanings and use alternative words. But this was not possible during court proceedings, which were faster paced. At the preliminary hearing, there were only two or three words each day that were problematic.

Fuchs testified that Ganjineh interspersed his Turkmen with words from other Turkic languages. (To a lesser degree, she did the same thing, using some Russian words.) The various Turkic languages have the same grammar and syntax, but the phonetics and intonation are different, and some vocabulary is different. In Fuchs's opinion, Ganjineh's language did "not qualify as Turkmen," formal or informal; because he was not a Turkman, there was "no way he could speak Turkmen perfectly." When she spoke to Haydarov, she used a different intonation than did Ganjineh. She understood Ganjineh, but believed it would have been difficult for Haydarov to understand him because Haydarov's background was less diverse than hers.

Collister conducted a comprehensive psychological evaluation of Haydarov, without an interpreter, and drew on portions of that testing to evaluate Haydarov's English abilities. On a vocabulary subtest—in which Haydarov was asked to define words—Haydarov scored at the upper end of the mild range of intellectual disability, with an age equivalent score of 10 years three months. On a test measuring the ability to use social judgment and comprehend social situations in English, he scored at the top of the mild range of intellectual disability. In a similarity subtest, in which he was asked to explain how things are related, he scored at the eight-year, eight-month equivalent.

However, he demonstrated understanding of many of the words themselves, and understood certain social norms. In the comprehension subtest, for example, he knew that an envelope found in the street, addressed and stamped, should be taken to the post office; that money was used to purchase things; and that food had to be cooked. In Collister's opinion, Haydarov was unable to conduct an uninterrupted, completely comprehensive conversation in English without assistance. His understanding of English vocabulary was at a four-year-old level. However, when other kinds of verbal functions in English were factored in, Haydarov's score increased to the eight-year, eight-month level. Haydarov was better able to comprehend and interact in "contextual situation[s]." Haydarov's English reading level was at a 3.5 grade equivalency. Haydarov was able to communicate in English with adequate rate, rhythm, prosody, and volume, and his English speech was concrete. Haydarov had provided a "complex[]" clinical history to Collister, documenting his life from birth to the present, "covering everything," in English, with no interpreter present. Collister believed Haydarov was not malingering.

The trial court denied the motion to dismiss, ruling as follows. Although no objection was made at the preliminary hearing, the court accepted defense counsel's representation that "there were discussions beforehand and afterwards."⁷ The court had reviewed portions of Haydarov's interview with detectives, which had been conducted in English. "The defendant's answers

⁷ Contrary to Haydarov's contention, the trial court's ruling was not based on the conclusion that Haydarov had waived his right to an interpreter.

seemed responsive. If he didn't understand something, he asked for clarification and he received it. He then responded in seeming appropriate language. Words and answers. [¶] So it appears to me that the defendant—and everybody seems to agree—speaks some English. And it's not in my opinion a minimal amount. He was able to communicate with a variety of people in English. [¶] So with respect to any irregularity in the preliminary hearing, the motion to dismiss is denied.” The court did not make a finding on whether Ganjineh was competent to translate Turkmen, or whether Haydarov's complaint that he could not understand Ganjineh was valid.

The court continued, “there still remains the additional issue of how to proceed at this time. [¶] Now that there has been some articulated, at least before this court, articulated issue with respect to Mr. Haydarov's understanding of Mr. Ganjineh, Ms. Fuchs—and we haven't really gone into English. But Ms. Fuchs, it appears, is able to communicate with the defendant, according to the defendant, more effectively.” The court observed that Fuchs was unavailable for trial, but informed the defense it would authorize expenses, including for travel and her services. Haydarov could proceed in English or with Ganjineh serving as interpreter, because those were the only options available. Counsel informed the court that Haydarov was displeased with his options.

The defense continued to rely on Fuchs to translate outside of the courtroom when assisting with trial preparation, which counsel observed was “very helpful.” Haydarov ultimately opted to proceed in English at trial rather than use Ganjineh as interpreter.

(iii) *Contentions*

Haydarov contends that the trial court's failure to provide him with an adequate interpreter at the preliminary hearing and at trial violated his federal constitutional rights to due process, the effective assistance of counsel, the right to confront witnesses, the right to be present at trial, and the right to testify on his own behalf, as well as his California constitutional right to an interpreter. He argues that forcing him to either proceed in English or with an incompetent interpreter presented him with a "Hobson's choice" that deprived him of his constitutional rights. These purported errors, he argues, require reversal of his conviction. We disagree.

b. *Relevant legal principles*

"A person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings." (Cal. Const., art. I, § 14; *People v. Sanchez* (2016) 63 Cal.4th 411, 472.) Unsurprisingly, that right includes the right to a competent interpreter throughout the entire proceeding. (*Sanchez*, at p. 472; *People v. Aguilar* (1984) 35 Cal.3d 785, 787 (*Aguilar*); *People v. Superior Court (Almaraz)* (2001) 89 Cal.App.4th 1353, 1359; *People v. Estrada* (1986) 176 Cal.App.3d 410, 415; Cal. Rules of Court, rule 2.890(b) [an interpreter must interpret accurately and fully, without embellishing].) "An interpreter is necessary so that a defendant can understand and fully participate in the proceedings" (*People v. Rodriguez* (1986) 42 Cal.3d 1005, 1010 (*Rodriguez*).) As relevant here, an interpreter performs the dual functions of advancing a non-English speaking defendant's understanding of colloquies between the attorneys, witnesses, and the judge, and enables the defendant to consult with his or her English-speaking

attorney. (*Ibid.*; *Aguilar*, at p. 790; *People v. Romero* (2008) 44 Cal.4th 386, 410.) The right to an interpreter “has its underpinnings in a number of state and federal constitutional rights,” including the rights to due process, to confrontation, to the effective assistance of counsel, and to be present at trial. (*Romero*, at p. 410; *Rodriguez*, at p. 1011; *People v. Aranda* (1986) 186 Cal.App.3d 230, 236 [“a defendant who cannot understand the proceedings taking place is not truly present at his trial, and a defendant who cannot communicate with his counsel is ipso facto denied effective representation”].)

A court is not required to appoint an interpreter simply because a defendant requests one; the right to an interpreter is contingent upon the person’s being unable to understand English. (*In re Raymundo B.* (1988) 203 Cal.App.3d 1447, 1452–1453; *People v. Carreon* (1984) 151 Cal.App.3d 559, 567, disapproved on another ground by *Rodriguez, supra*, 42 Cal.3d 1005, as stated in *People v. Chavez* (1991) 231 Cal.App.3d 1471, 1477.) “[A]n affirmative showing of need is required.” (*In re Raymundo B.*, at p. 1453.) The “burden is on the accused to show that his understanding of English is not sufficient to allow him to understand the nature of the proceedings and to intelligently participate in his defense.” (*Id.* at p. 1454.) While the fact that an accused “states that he does not understand English and requests an interpreter on that basis may be some evidence of the fact that the charged individual does not understand English, it cannot be considered conclusive proof of that lack of proficiency in English.” (*Id.* at p. 1453.) A trial court has broad discretion in determining whether a defendant’s comprehension of English is minimal enough to render an interpreter’s services necessary. (*Carreon*, at pp. 566–567.)

The question of an interpreter's competence is a factual issue for the trial court. (*People v. Sanchez, supra*, 63 Cal.4th at p. 472; *People v. Aranda, supra*, 186 Cal.App.3d at p. 237.) “The ideal time to question the qualifications of an interpreter is before he is permitted to act [citation], although, if the competence of an interpreter becomes an issue after he commences his duties, it can be raised at that time.” (*Aranda*, at p. 237.) “When no objection is raised to the competence of the interpreter during trial, the issue cannot be raised on appeal.” (*Ibid.*)

We review a trial court's finding that an accused understood English, and its refusal to appoint an interpreter, for abuse of discretion. (*In re Raymundo B., supra*, 203 Cal.App.3d at p. 1456.)

c. Denial of the nonstatutory motion to dismiss

As noted, Haydarov's motion below alleged that the information charging him was invalid because he was denied a substantial right—the right to a competent interpreter—at the preliminary hearing. “The denial of a substantial right at the preliminary examination renders the ensuing commitment illegal, entitling defendant to dismissal of the information on timely motion. [Citation.] When the error is apparent from the ‘“four corners”’ of the preliminary hearing transcript, the appropriate motion is brought under . . . section 995; when the error is not known and is not reflected in the transcript of the preliminary hearing, it ‘may be called to the court's attention through a nonstatutory motion to dismiss.’ [Citations.]” (*Harris v. Superior Court* (2014) 225 Cal.App.4th 1129, 1144; *People v. Duncan* (2000) 78 Cal.App.4th 765, 772; *Stanton v. Superior Court* (1987) 193 Cal.App.3d 265, 270.) When challenged on

appeal after trial and conviction, “ ‘irregularities in the preliminary examination procedures which are not jurisdictional in the fundamental sense shall be reviewed under the appropriate standard of prejudicial error and shall require reversal only if defendant can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination.’ ” (*Avitia v. Superior Court* (2018) 6 Cal.5th 486, 496, quoting *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529.)⁸

Haydarov’s contention that the trial court erroneously denied his motion to dismiss fails, first and foremost, because he has forfeited any challenge to Ganjineh’s competence at the preliminary hearing. It is undisputed that the defense voiced no objection to or complaint about Ganjineh’s services at the

⁸ *People v. Estrada* stated in dicta that “deprivation of a personal interpreter would be jurisdictional in the most fundamental sense” (*People v. Estrada, supra*, 176 Cal.App.3d at p. 416.) We disagree. *People v. Letner and Tobin* (2010) 50 Cal.4th 99, construing *Pompa-Ortiz*’s “jurisdictional in the fundamental sense” language, explained that a lack of jurisdiction in a fundamental sense exists when a court lacks power to hear or determine the case, or lacks authority over the subject matter or the parties. (*Letner and Tobin*, at p. 139.) “ ‘On the other hand, a court may have jurisdiction in the strict sense but nevertheless lack ‘ ‘jurisdiction” (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites.’ [Citation.] When a court fails to conduct itself in the manner prescribed, it is said to have acted in *excess* of jurisdiction.” [Citations.]’ ” (*Id.* at pp. 139–140.) Applying these principles, the erroneous denial of an interpreter is error, but is not jurisdictional in the fundamental sense.

preliminary hearing. Despite Haydarov's assertions below and in his appellate briefing that he alerted the trial court to his dissatisfaction with Ganjineh prior to the preliminary hearing, the record belies this contention. In the January 13 letter, counsel Caruso averred that prior defense counsel, Thomas Ahearn, stated on the record on January 3, 2014, that Haydarov did not understand Ganjineh. This is incorrect. Ganjineh did not translate at the January 3, 2014 hearing; a Russian interpreter did. On February 5, 2014, Ahearn informed the court that Haydarov needed a *Turkmen* interpreter, rather than a *Russian* interpreter. Ahearn said nothing about Ganjineh's translation, as Ganjineh's services had not yet been enlisted. Counsel Caruso also mistakenly averred in the January 13 letter that he personally "took over the case on August 21, 2014," and "put on the record in Department 30 there was a problem with [Haydarov] understanding the interpreter." Neither the reporter's transcript nor the minute order for that date indicate that any such objection was made, or that any such information was conveyed to the court by either Caruso or Haydarov.

In his opening brief, Haydarov asserts that defense counsel Caruso "told the court on at least one occasion before the preliminary hearing" that Haydarov did not understand Ganjineh. In support, the brief cites only to Ganjineh's testimony at the hearing on the nonstatutory motion. At that hearing, attorney Caruso initially elicited from Ganjineh that the prior attorney, Ahearn, told the court about the interpreter issue. But then Ganjineh corrected himself and said Ahearn had not objected in court; only Caruso had done so, and Ganjineh did not recall whether this was before or after the preliminary hearing, or in which department. Ganjineh also testified that he recalled

Haydarov telling the trial court he was having problems with the interpretation. But Ganjineh did not state when this occurred, and Haydarov does not point to any such statement in the record. We have reviewed the record, and have not discovered any objection or notification to the court regarding the adequacy of Ganjineh's translation prior to the preliminary hearing.

When ruling on the motion to dismiss, the trial court accepted counsel's representation that he had alerted the court to the issue prior to the preliminary hearing.⁹ We do not. Instead,

⁹ Haydarov asserts that the trial court "conceded that it had been informed of problems with the interpreter before" the preliminary hearing, and that the prosecutor "admitted" that Caruso raised concerns prior to the preliminary hearing. This is incorrect. Attorney Caruso stated at a hearing that he had continued the hearing on the nonstatutory motion to dismiss "to obtain additional transcripts" which would show the defense objected to interpreter Ganjineh. The court stated, "*I am willing to accept your representation as an officer of the court . . . that you made this known in Department 30.*" (Italics added.) When ruling on the motion, the court again said, "I accept your representation, Mr. Caruso, that there were discussions beforehand . . ." Trusting counsel's representation—because counsel was an officer of the court—is not the equivalent of a concession or finding that the court had actually been alerted to the purported problem.

At the same hearing, the prosecutor stated she was aware the defense had complained about the *Russian* interpreter. She also stated she had a note in her file from September 2014, from the former prosecutor. It stated that defendant had complained "the interpreter doesn't fluently speak his rare language." The note further stated that Ganjineh estimated he could translate Turkmen 90 percent of the time and translate the remaining 10 percent in Uzbeki, per an agreement with the defendant, who

we conclude that under these circumstances, Haydarov's challenge has been forfeited. If, as Haydarov contends, he could only understand every fifth word the interpreter said or, as Fuchs opined, Ganjineh's language did not qualify as Turkmen, surely this circumstance must have been immediately apparent the first time Ganjineh translated for Haydarov. But instead of alerting the trial court that Ganjineh was speaking a different language or was incomprehensible, the defense opted to stay silent until *after* the preliminary hearing, as well as approximately nine other hearings, had transpired. A defendant cannot request an interpreter, be provided an interpreter in the language he has designated, sit quietly through a plethora of proceedings where the interpreter is apparently translating, and then, after the fact, complain that the interpreter was incomprehensible. "Only if the defendant makes any difficulty with the interpreter known to the court can the judge take corrective measures. To allow a defendant to remain silent throughout the trial and then, upon being found guilty, to assert a claim of inadequate translation would be an open invitation to abuse." (*Valladares v. United States* (11th Cir. 1989) 871 F.2d 1564, 1566.)

People v. Romero is instructive. There, the defendant complained that unreported discussions at trial between interpreters and three witnesses violated his constitutional rights. (*People v. Romero, supra*, 44 Cal.4th at p. 404.)

spoke both languages. It explained that "Defense attorney Caruso will work with the People and [the investigating officer] to contact [the] Turkmenistan embassy *if he feels it's necessary*." (Italics added.) This exchange can hardly be construed as an "admission" by the prosecutor that any concerns were raised *to the court*.

Acknowledging that a defendant cannot be held to have *waived* the right to an interpreter absent a personal and knowing waiver (see *Aguilar, supra*, 35 Cal.3d at p. 794), the court nonetheless found the defendant's claim forfeited. Forfeiture, it explained, results from the failure to invoke a right, while waiver denotes an express relinquishment of a known right; "the two are not the same." (*Romero*, at p. 411.) " "[A]s a general rule, 'the failure to object to errors committed at trial relieves the reviewing court of the obligation to consider those errors on appeal.' [Citations.] This applies to claims based on statutory violations, as well as claims based on violations of fundamental constitutional rights. [Citations.]" ' [Citation.] The reason for this rule is to allow errors to be corrected by the trial court and to prevent gamesmanship by the defense. [Citations.] We see no reason why the general rule of forfeiture should not be applied to violations of rules of court or to claims of error relating to interpreters for the witnesses. Here, each of the claimed violations of defendant's rights could easily have been addressed and corrected in the trial court had defendant objected. His failure to do so precludes him from now asserting errors relating to the witness interpreters." (*Romero*, at p. 411; see also *People v. Aranda, supra*, 186 Cal.App.3d at p. 237 [failure to object to competency of interpreter during trial precludes issue from being raised on appeal].) The same is true here.

Absent forfeiture, the trial court's denial of the motion to dismiss must be upheld for a second reason: Haydarov has not demonstrated prejudice. (See, e.g., *Avitia v. Superior Court, supra*, 6 Cal.5th at p. 496.) As the trial court found, Haydarov speaks considerable English. As we discuss in more detail *post*, this conclusion is supported by substantial evidence. Haydarov

gave no indication at the preliminary hearing that he was having any difficulty comprehending the proceedings. Counsel informed the court, before bringing the motion to dismiss, that Ganjineh had interpreted the preliminary hearing and “[i]t seemed to go without much of a hitch.” Moreover, Haydarov had “appeared to understand” the procedures and “what was happening” at earlier hearings. Counsel did not, at that point, aver that Haydarov had been unable to assist him in preparing a defense. Ganjineh testified, at the hearing on the motion to dismiss, that during each day of the two-day preliminary hearing, there were only a few words that he had difficulty translating. (See *United States v. Long* (9th Cir. 2002) 301 F.3d 1095, 1105 [occasional lapses in word-for-word translation will not necessarily contravene a defendant’s constitutional rights]; *United States v. Joshi* (11th Cir. 1990) 896 F.2d 1303, 1309 [occasional lapses or minor deviations from the continuous translation requirement do not necessarily render a trial fundamentally unfair].) The only reasonable inference from the foregoing is that Haydarov was not deprived of a substantial right at the preliminary hearing because he understood the proceedings and was able to sufficiently assist counsel.

d. *Deprivation of an interpreter at trial*

We turn next to Haydarov’s contention that, by forcing him to proceed to trial with either a purportedly incompetent interpreter, or no interpreter at all, the court violated his constitutional rights to due process, the effective assistance of counsel, the right to confront witnesses, and the right to be present at trial, as well as his California constitutional right to an interpreter.

The People contend that the trial court found Haydarov could understand the proceedings in English; therefore he was not entitled to an interpreter; and the court's conclusions were supported by substantial evidence. We agree that substantial evidence supported the trial court's conclusion that Haydarov's grasp of English was substantial. But we are not convinced that the trial court found his command of English was sufficiently competent that he was not entitled to an interpreter. Indeed, if that was the import of the court's finding, the court's next action—giving him the option of using Ganjineh's services at trial, and offering to appoint Fuchs as an expert to assist in trial preparation—is somewhat puzzling. It is possible, of course, that the court simply provided for future interpretive services out of an abundance of caution, rather than because it concluded Haydarov's English was deficient. However, from the record before us, the import of the court's ruling is not entirely clear.

Therefore, we proceed on the assumptions that, due to the differences in their dialects or for other reasons, Ganjineh was unable to competently interpret for Haydarov, and that Haydarov was entitled to an interpreter at trial despite his substantial command of English. Nonetheless, we conclude the failure to provide Haydarov with a Turkmen interpreter who spoke his unusual dialect was harmless beyond a reasonable doubt.

(i) *The Chapman reasonable doubt standard applies*

In *Rodriguez*, our Supreme Court held that a violation of the right to an interpreter is subject to harmless error analysis under *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*)—that is, reversal is not required if the error is harmless beyond a reasonable doubt. (*Rodriguez, supra*, 42 Cal.3d at pp. 1010,

1012.) There, two defendants were tried together. At the preliminary hearing, two interpreters were sworn. However, one was used to interpret for a witness, rather than for one of the defendants; at trial, similarly, one of the interpreters sworn to assist the defendants was used to interpret for witnesses. (*Id.* at p. 1009.) This, the court held, was error; absent waiver, each defendant should have had an interpreter assigned to assist him. (*Id.* at p. 1013.)

The court devoted considerable analysis to “the appropriate standard of review for violations of the right to an interpreter.” (*Rodriguez, supra*, 42 Cal.3d at p. 1010.) The court reasoned that “[t]here are three separate possible tests for reversal if an interpreter is improperly denied”: (1) per se reversal; (2) the federal *Chapman* standard; or (3) the *Watson* standard, applicable to violations of state constitutional rights (*People v. Watson* (1956) 46 Cal.2d 818, 836). (*Rodriguez*, at p. 1010.) “Application of the per se standard requiring automatic reversal for a violation of a constitutional right normally is dependent upon the fundamental character of the right invaded or the impossibility of assessing prejudice. [Citation.] This test has not been applied to all deprivations of constitutional rights, even federal constitutional rights [citations], and we believe that it similarly is unnecessary here. In so concluding, we do not intend to diminish the importance of the right to an interpreter where required. However, our consideration of the panoply of constitutional rights implicated in the use of or denial of an interpreter, and the fact that the violation of these rights does not automatically lead to substantial prejudice, leads us to believe that a different standard is appropriate. Moreover, if a defendant can demonstrate, either on the record or through

habeas corpus, that a fundamental right has been infringed, the denial of which as a general rule would lead to automatic reversal, then he may still obtain such relief on that basis. However, we agree with the Court of Appeal that ‘circumstances may exist in which there could be no prejudice’ resulting from the absence of an interpreter. [Citation.]” (*Id.* at pp. 1010–1011.) Various rights that may be implicated if an interpreter is not provided—including due process, to confrontation, to presence at trial, and to the effective assistance of counsel—do not necessarily require automatic reversal, but instead are subject to a harmless error analysis. (*Id.* at pp. 1011–1012; see *People v. Chavez, supra*, 231 Cal.App.3d at p. 1478 [observing that *Rodriguez* “states the appropriate standard of review in denial of interpreter cases is ‘harmless beyond a reasonable doubt’ ”].)

To determine whether the error was prejudicial, we must “‘examine the entire record and “if . . . it appears reasonably possible that the error might have materially influenced the jury in arriving at its verdict,” the judgment must be reversed.’” (*Rodriguez, supra*, 42 Cal.3d at p. 1012.) The impact of the error on the course of the trial must also be weighed. (*Ibid.*) “The test is whether an actual material interference with the defendant’s rights has been shown In some instances, such as those where there is complete deprivation of the assistance of an interpreter, the record will suffice to demonstrate an error requiring reversal.” (*Id.* at pp. 1014–1015, fn. 6.)

In his opening brief, Haydarov acknowledged that the *Chapman* standard applied. In his reply brief, he urges that he is entitled to “per se . . . automatic reversal” because the deprivation of an interpreter infringed upon several fundamental constitutional rights. In a supplemental brief, Haydarov argues a

variation on this theme: that *Rodriguez* adopted a “hybrid” reversible error standard in which errors that are “insubstantial” or concern “matters not possibly prejudicial” are evaluated under *Chapman*, but the complete deprivation of an interpreter, or a deprivation of a fundamental constitutional right, requires per se reversal. Finally, in the supplemental brief, he also advances the theory that the failure to provide an interpreter is structural error.

The first two arguments rest upon a misinterpretation of *Rodriguez*. *Rodriguez* did not hold that per se reversal was required when a defendant claims the absence of an interpreter violated the constitutional rights that Haydarov asserts were impacted here. As we have set forth, *Rodriguez* reasoned that, although deprivation of an interpreter may implicate a variety of constitutional rights, because violations of those rights do not themselves require per se reversal, neither does error in failing to provide an interpreter. (*Rodriguez, supra*, 42 Cal.3d at pp. 1011–1012.) The court explained that if a defendant demonstrates infringement of a fundamental right, “the denial of which as a general rule would lead to automatic reversal,” he or she may obtain such relief on that basis. (*Id.* at p. 1011.) To illustrate: a violation of the right to consult counsel is evaluated under *Chapman*; therefore, when denial of an interpreter results in a defendant’s inability to consult with counsel, the denial of the interpreter is also evaluated under *Chapman*. (*Rodriguez*, at pp. 1010–1011.) But if the denial of an interpreter causes a structural error, such as, for example, racial discrimination in jury selection (see *People v. Aranda* (2012) 55 Cal.4th 342, 364), then the failure to provide an interpreter would also constitute structural error.

Here, the “fundamental rights” Haydarov contends were impacted are not subject to a per se reversal standard. Violations of the rights to due process, confrontation, presence at trial, and effective assistance of counsel, are all trial errors subject to harmless error review. (*Rodriguez, supra*, 42 Cal.4th at pp. 1011–1012.) And, the *Rodriguez* court’s holding that the *Chapman* standard applies was not, as Haydarov suggests, limited to the facts of that case.

Certainly, *Rodriguez* did state that if there was a complete deprivation of an interpreter, the “record will suffice to demonstrate an error requiring reversal.” (*Rodriguez, supra*, 42 Cal.3d at pp. 1014–1015, fn. 6.) But we do not believe this statement should be read to apply across the board, without consideration of the defendant’s English-speaking abilities. Had *Rodriguez* intended such an interpretation, we do not think the court would have so clearly held that the *Chapman* standard applied. Instead, the court’s statement in footnote 6 simply contemplates the obvious: if an accused is completely unable to communicate in English, and is not provided with an interpreter, prejudice under the *Chapman* standard (or indeed, any standard) would exist. In such circumstances, the defendant would indeed be “adrift in a ‘babble of voices.’” (See *Rodriguez*, at p. 1014.) But, for the reasons we set forth *post*, that was not the case here.¹⁰

¹⁰ Haydarov argues that *Aguilar* applied a reversible per se standard for the complete deprivation of an interpreter, and *Rodriguez* reaffirmed that view. This is incorrect. *People v. Chavez* rejected this argument, explaining: “Defendant contends *People v. Aguilar* . . . establishes a ‘reversal per se’ standard of review in denial of interpreter cases. This contention

In his “structural error” argument, Haydarov urges that, when *Rodriguez* was decided, the concept of structural error was in its infancy; *Rodriguez*’s analysis was overly narrow and failed to take into account certain factors, such as that “errors have been deemed structural . . . even if the right at issue was not designed to protect a defendant’s right to a fair trial”; and the structural error doctrine should apply here. In support,

is based upon one sentence of the opinion which states that ‘A reversal is required unless the defendant waived the constitutional right we have described.’ [Citation.] The standard of review is given no further mention. In *People v. Rodriguez* . . . , the court cites *Aguilar* and asserts *Aguilar* did not adopt any particular standard of review. [Citation.] If the *Aguilar* court did employ a ‘reversible per se’ standard of review, it is unclear to us whether they meant to limit this standard of review to certain kinds of denial of interpreter cases or to apply it to all such cases, without regard to their specific facts. We need not determine this issue, however, because ‘cases, of course, are not authority for propositions not there considered.’ [Citation.] And, the court’s later opinion in *Rodriguez* states the appropriate standard of review in denial of interpreter cases is ‘harmless beyond a reasonable doubt.’” (*People v. Chavez, supra*, 231 Cal.App.3d at pp. 1477–1478.) And, Haydarov’s citations to *United States ex rel. Negron v. New York* (2d Cir. 1970) 434 F.2d 386, *People v. Chavez* (1981) 124 Cal.App.3d 215, disapproved on another ground by *People v. Mendez* (1999) 19 Cal.4th 1084, 1097–1098 & fn. 7, and *People v. Menchaca* (1983) 146 Cal.App.3d 1019), are unavailing: in each of those cases, the defendant was unable to speak *any* English. (See *Negron*, at p. 388 [undisputed that defendant “neither spoke nor understood any English”]; *Chavez*, at p. 219 [defendant was “illiterate, and neither speaks nor understands English”]; *Menchaca*, at p. 1021 [defendant was “illiterate and neither speaks nor understands English”].)

Haydarov relies heavily on a Texas federal district court case. (*Garcia v. Davis* (S.D. Tex., Nov. 13, 2018, Civ. No. 7:16-CV-632) 2018 U.S. Dist. Lexis 192801.) We need not delve into these arguments, however. Our Supreme Court has clearly held that the *Chapman* standard applies. (*Rodriguez, supra*, 42 Cal.3d at p. 1010 [“We will conclude that per se reversal is not appropriate and that a *Chapman* approach best serves the varied constitutional interests at issue.”].) Haydarov cites no United States Supreme Court authority requiring a conclusion that *Rodriguez* has been vitiated. Accordingly, we are bound to follow *Rodriguez*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

(ii) *The absence of an interpreter was harmless beyond a reasonable doubt*

Turning then to application of the *Chapman* standard, we conclude that in this unique case, any deprivation of an interpreter was harmless beyond a reasonable doubt.

First, and most significantly, this case does not involve a truly non-English-speaking defendant who was deprived of an interpreter. The record demonstrates that at the time of trial, Haydarov spoke more than rudimentary English, indeed more than a minimal amount. The trial court so concluded. Multiple factors support this finding. Haydarov had lived in California for almost two years prior to his arrest. He came to the United States to study English, and attended an English language school for six months. He took acting lessons at Santa Monica College. He lived with three English-speaking roommates. At some point during his residency, he had a job. He communicated with the victim in English.

Further, Haydarov underwent a lengthy interview with detectives without significant confusion. During the interview, Haydarov was readily able to communicate in English. He obviously understood the detectives' questions and provided responsive answers. Indeed, he understood enough that he was able to fabricate and communicate explanations for why he had the victim's car, checks, and possessions, even before the officers confronted him with this evidence. He also had the foresight to admit he used the credit card, acknowledging this was a mistake and stating he intended to explain his action to Kreeger. He was able to distinguish subtleties in the conversation; for example, when shown a picture of himself with the suitcase containing the victim's body, he stated it was not him, but just looked like him. Although Haydarov argues, as did his counsel below, that the interview transcript shows he was confused and the detectives had to repeat information, our review of the transcript suggests otherwise; we discern no more confusion or repetition than is typical in a police interrogation.

Moreover, defense expert Dr. Collister was able to take a "complex[] . . . clinical history" from Haydarov, covering his life from birth to the present, without an interpreter. The People's psychologist also examined Haydarov prior to trial. She interviewed him in English and concluded that his "grasp of the English language" was adequate for purposes of the evaluation. And, the record of trial provides examples of Haydarov's English speaking ability. For example, at one point attorney Caruso informed the court that Haydarov had told him that Haydarov's brother had recently flown to Los Angeles, was turned away at the airport, and flew back to Turkmenistan. When the court noted that Haydarov seemed able to communicate with counsel,

counsel agreed they could communicate somewhat, while pointing out their conversation about the brother had not involved legal issues. As noted, counsel at another point observed that Haydarov had “appeared to understand” the procedures and “what was happening” at hearings prior to the preliminary examination.

Thus, our review of the record convinces us that Haydarov had a considerable grasp of the English language at the time of trial. While he doubtless was unable to communicate with the elegance of an English professor, there was ample evidence to suggest he would have been able to understand the proceedings and communicate effectively with counsel.

We also conclude that to the extent Haydarov exhibited English language deficits, this fact would have had little or no effect on the course of trial. (See *Rodriguez, supra*, 42 Cal.3d at p. 1012 [court must consider the impact of the error on the course of the trial].) The evidence presented at trial was not complex, and most of it was undisputed. The trial evidence did not involve complex concepts or complicated vocabulary. Most of the witness examinations were short, and involved simple questions and answers that would have been easily understandable to a person who spoke some English, but was not fluent. Much of the evidence was comprised of or illustrated by photos and videos. Moreover, Dr. Collister opined that Haydarov’s comprehension was improved when information was presented in context, rather than when Haydarov was asked to define words in the abstract. Trial testimony, by its very nature, is generally offered in a contextual, question-and-answer format. Moreover, interpreter Fuchs, who Haydarov agreed was a competent Turkmen translator, was made available to the defense outside of trial, and

actually assisted on several occasions, ensuring that pretrial preparation could be completed with her assistance.

In sum, given that Haydarov had a considerable grasp of the English language, the evidence at trial was not complex and was largely undisputed, and the services of a competent interpreter were offered to assist in trial preparation, we believe the fact an interpreter was not present at trial, even if error, was harmless beyond a reasonable doubt.

Haydarov makes a variety of arguments in support of the contrary conclusion. He contends that the fact an interpreter was provided for him at the outset reflects a judicial determination that he needed one. And, at a March 12, 2015 hearing, the trial court briefly questioned him and then ordered an interpreter other than Ganjineh be provided, conduct he contends amounted to an implied finding an interpreter was necessary. However, the fact an interpreter has been appointed in previous proceedings in the case does not raise a presumption that an interpreter is, in fact, necessary; if other evidence regarding the need for an interpreter exists, a previous appointment is merely a factor to be considered. (*In re Raymundo B.*, *supra*, 203 Cal.App.3d at pp. 1454–1456; *People v. Estany* (1962) 210 Cal.App.2d 609, 611–612.) That Haydarov was provided interpreters throughout the proceedings, until he opted to dispense with Ganjineh’s services, does not change our conclusion that the record shows he had at least a moderate command of English.

Haydarov also points to Dr. Collister’s conclusions as evidence of his poor grasp of English, including that he suffered from ADHD. But the trial court, which had the report and the doctor’s testimony before it, concluded that Haydarov spoke more than minimal English. “When evaluating a determination as to

the necessity of appointing an interpreter, the policy of upholding a lower court's decision based upon informed discretion is strong. The trial judge is in a unique position to evaluate the reactions and responses of the accused and to determine whether he or she does or does not require an interpreter in order to be adequately understood or in order to adequately understand the proceedings. This exercise of discretion should not be reversed unless there is a complete lack of any evidence in the record that the accused does understand English, thereby rendering the decision totally arbitrary." (*In re Raymundo B.*, *supra*, 203 Cal.App.3d at p. 1456.) By the same token, the trial court's conclusion here—that Haydarov had a considerable grasp of English—is supported by the evidence and is entitled to deference. Moreover, Dr. Collister's evaluation was not directly aimed at determining Haydarov's English comprehension; instead, he conducted a comprehensive psychological evaluation and cobbled together certain test results to form his opinion about Haydarov's English abilities. Many of these results were somewhat contradictory. For example, testing showed Haydarov had a 3.5 grade reading score, but another test placed his receptive vocabulary knowledge at the level of a four-year-old. The trial court was not obliged to credit Collister's opinion without regard to the other evidence suggesting Haydarov possessed considerably stronger English language abilities.

Haydarov challenges consideration of his interview with detectives as evidence of his language abilities, arguing that his level of comprehension there would not translate to a trial. In support, he points to *Aguilar*. There, the trial court appointed an interpreter for the defendant, a seasonal farmworker who was illiterate in both English and Spanish and spoke only broken

English, but improperly “borrowed” the interpreter to interpret for witnesses at trial. (*Aguilar, supra*, 35 Cal.3d at pp. 788–791 & fn. 4.) The majority rejected the view, expressed in a dissent authored by Justice Richardson and joined by Justice Mosk, that the record showed Aguilar spoke English well enough to proceed without an interpreter. The dissent relied in part upon the fact that Aguilar had been interviewed in English by an officer, and the officer stated defendant had no difficulty understanding or speaking English. (*Aguilar*, at p. 796 (dis. opn. of Richardson, J.)) Aguilar testified that he understood very little English, but was able to understand the detective because the detective explained and read everything to him. (*Id.* at p. 788, fn. 2.) The majority reasoned: “There is a vast difference between the stationhouse and the courtroom in terms of defendant’s ability to use and understand English. Detective Terry, we assume, had ample time to assure by measured tone of voice and repetition that defendant understood him. In contrast, a trial is a formal proceeding. The trial court, having the advantage of observing and listening to defendant in that setting, concluded that the defendant was in need of an interpreter and thus appointed the interpreter for the defendant. It is this conclusion, by the trial court . . . and not the extrajudicial conclusion of Detective Terry, which forms the basis for this appeal.” (*Ibid.*) Nothing in the record negated the trial court’s conclusion that Aguilar needed an interpreter. (*Id.* at p. 789, fn. 4.)

Aguilar does not hold that consideration of a defendant’s English language ability, as evidenced in a police interview, must be entirely disregarded. (See *In re Raymundo B.*, *supra*, 203 Cal.App.3d at p. 1457 [fact minor spoke English during contacts with an officer was one factor supporting conclusion that minor

could understand English].) Here, Haydarov's interview with detectives is but one piece of evidence factoring into the whole picture, and we consider it, taking into account *Aguilar's* cautionary guidance. We find it significant that the interview transcript does not reflect that the detectives often needed to engage in repetitive questioning in order to make themselves understood. And, rather than a judicial finding that Haydarov was unable to communicate in English, here, we have a judicial determination that his command of English was *not* insignificant.

Next, Haydarov contends that the lack of an interpreter might have impacted the defense trial strategy and "potentially" violated his right to testify on his own behalf. He argues that it was impractical for him to testify without the assistance of an interpreter, and therefore he was hampered in his ability to present theories of self-defense, imperfect self-defense, and heat of passion. He contends such defenses could have been viable, based on the following. He told Collister that he had been the victim of a sexual assault in Turkmenistan, and Collister opined that he suffered from Post-Traumatic Stress Disorder. Also, in Turkmenistan, homosexuality is illegal and gay men are stigmatized; therefore, he could have been "conflicted about a homosexual encounter" with the victim. These circumstances, he argues, could have triggered a violent reaction if Haydarov feared Kreeger was going to rape him. The victim's wounds, he asserts, showed a "frenetic act of violence" rather than a planned killing.

The problem with these theories is that they were seriously contradicted by the evidence. The text messages showed Haydarov pursued Kreeger, not vice versa. Kreeger's wounds could not be described as the product of frenetic violence; they were targeted to the head and neck. The neck wound, in

particular, would have taken considerable force and could not have been the result of a frenzied attack or simple attempt to punch him. Haydarov's story that he grabbed the glass ashtray and inadvertently cut the victim's throat with it was also untenable. The medical examiner testified that it was highly unlikely such an implement could have caused the wound; Haydarov had no injuries to his hands; and in any event, a bloody knife, containing Kreeger's DNA, was in a trash bag in the apartment.

Moreover, Haydarov was painted as a liar by the story he told the detectives. The evidence conclusively showed Kreeger did not try to drug him; the cup found in the bedroom tested negative for controlled substances, and Haydarov's conduct after the murder was incompatible with a drugged state. Shortly after the murder, Haydarov obtained a particular set of items from Home Depot and then used an elaborate tying scheme to force Kreeger's body into the suitcase, including, inter alia, creating a makeshift "corset" from a towel and a scarf to compact the victim's body. He had the wherewithal to send text messages to the deceased Kreeger in an obvious attempt to deflect suspicion from himself. And, Haydarov gave the People's expert an additional account of the crime, stating, among other things, that the purportedly drugged water produced hallucinations that Kreeger was a zombie who attacked him with a spiked glass ashtray. The People's expert concluded that Haydarov's behavior during the crime was not impacted by mental illness, intellectual disability, or intoxication. While the People's expert's conclusions did not preclude the defense from offering any of the aforementioned defenses, it could have cast additional doubt on them. In short, self-defense, imperfect self-defense, and heat of

passion theories were not tenable, whether or not Haydarov had been assisted by an interpreter.

Haydarov argues that his right to testify was not dependent upon the success of the theory, and he had the right to control the direction of the defense. (*McCoy v. Louisiana* (2018) __ U.S. __, __ [138 S.Ct. 1500, 1505] [holding that a defendant has the right to insist that counsel refrain from admitting guilt, even when counsel’s experience-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty].) But there is no showing here that Haydarov would have testified had he had the assistance of an interpreter. Indeed, there is no meaningful showing Haydarov disagreed with the defense strategy or wanted to testify. Defense counsel stated in open court that he had advised that it was not in Haydarov’s best interest to testify, and his best chances at beating the more serious charges were to rest and rely on the state of the evidence. The trial court advised Haydarov that he had a right to testify: “You make the decision. You talk to Mr. Caruso about it, but in the end, you make the decision” Haydarov indicated he understood, and that he was making the decision not to testify with the understanding he had the absolute right to testify.

Nor does the *Marsden*¹¹ hearing referenced by Haydarov show he would have testified but for the absence of an interpreter. During trial, Haydarov told the judge that he wanted to hire a private lawyer because his friends had encouraged him to do so. However, Haydarov specifically said appointed counsel Caruso was “doing a really good job,” and he had no complaints about him. Counsel stated that he and Haydarov had gotten in a “little bit of a yelling match” when

¹¹ *People v. Marsden* (1970) 2 Cal.3d 118.

counsel emphasized “the problems with the case and things that we need to accept.” But neither counsel nor Haydarov stated that Haydarov wished to testify or to abandon the strategy counsel suggested; fairly read, counsel’s comments disclose only that Haydarov was upset about the evidence against him. Haydarov also stated that “when the D.A. brought up some stuff, like I do my best to stay humble and patient. I just want to speak up, like I want to, you know, like it’s my turn.” Neither the trial court nor defense counsel interpreted this remark as suggesting Haydarov wanted to testify, nor do we.

2. Imposition of fines and court fees

The trial court sentenced Haydarov in March 2017. Without objection, it imposed a \$300 restitution fine, a suspended parole revocation restitution fine in the same amount, a \$40 court operations assessment, and a \$30 criminal conviction assessment. Haydarov stipulated to direct victim restitution in the amount of \$2,591.88 plus interest.

In supplemental briefing, citing *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), Haydarov asserts that because he is indigent, imposition of the restitution fines and assessments, without a hearing on his ability to pay, violated his constitutional rights to due process rights and equal protection. He urges that the criminal conviction assessment, the court security fee, and the restitution fines should be stricken. We observe that the California Supreme Court is currently considering whether a court must consider a defendant’s ability to pay before imposing or executing fines, fees, and assessments. (*People v. Kopp* (2019) 38 Cal.App.5th 47, review granted November 13, 2019, S257844.) Pending further guidance from our Supreme Court, we reject Haydarov’s contention.

The defendant in *Dueñas* was an indigent mother of two young children. (*Dueñas, supra*, 30 Cal.App.5th at p. 1160.) Because of her cerebral palsy, Dueñas dropped out of high school, did not have a job, and, as an adult and mother, received public assistance. (*Ibid.*) As a teenager, she was unable to pay three juvenile citations, which led to a suspension of her driver's license. She then suffered misdemeanor convictions for driving with a suspended license. In each case, she "was offered the ostensible choice of paying a fine or serving jail time in lieu of payment." (*Id.* at p. 1161.) Unable to pay, she served time in jail. (*Ibid.*) When she was charged with another misdemeanor for driving with a suspended license, she asserted at sentencing that she did not have the ability to pay the fine. She asked the trial court to set a hearing to determine her ability to pay. However, the trial court concluded that the assessments were mandatory regardless of her inability to pay them and rejected the view that due process and equal protection required the court to consider her ability to pay. (*Id.* at p. 1163.)

On appeal, *Dueñas* held that due process requires a trial court to conduct a hearing to determine a defendant's ability to pay before imposing assessments. (*Dueñas, supra*, 30 Cal.App.5th at p. 1164.) Further, constitutional concerns required execution of the section 1202.4 restitution fine to be stayed pending an ability to pay hearing. (*Dueñas*, at p. 1164.)

Unlike the defendant in *Dueñas*, Haydarov did not object below on the ground of his inability to pay. Generally, where a defendant has failed to object to a restitution fine based on an inability to pay, the issue is forfeited on appeal. (*People v. Avila* (2009) 46 Cal.4th 680, 729.) We agree with our colleagues in Division Eight that this general rule applies to the assessments

imposed under section 1465.8 and Government Code section 70373. (*People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153; *People v. Rodriguez* (2019) 40 Cal.App.5th 194, 206; but see *People v. Castellano* (2019) 33 Cal.App.5th 485.)

As to whether forfeiture applies to the \$300 restitution fine under section 1202.4, subdivision (b), that is an issue we need not decide. Whether or not forfeiture applies to the restitution fine, as well as to assessments, *Dueñas* is still inapplicable. *Dueñas* is based on the due process implications of imposing assessments and fines on an impoverished defendant. The situation in which Haydarov has put himself—16 years to life in prison—does not implicate the same due process concerns at issue in factually unique *Dueñas*. Haydarov, unlike *Dueñas*, does not face incarceration because of an inability to pay assessments and fines. Haydarov is in prison because he murdered Kreeger. At this juncture, even if Haydarov does not pay the assessments and fines, he will suffer none of the cascading and potentially devastating consequences *Dueñas* suffered. (See *Dueñas, supra*, 30 Cal.App.5th at p. 1163.)

DISPOSITION

The judgment is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL
REPORTS**

EDMON, P. J.

We concur:

EGERTON, J.

DHANIDINA, J.