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OF WISCONSIN**

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2016AP000225 CR

STATE OF WISCONSIN,
vs.
BRENDA S. WEBSTER,

Plaintiff-Respondent,
Defendant-Appellant

APPEAL FROM THE JUDGMENT OF CONVICTION AND
SENTENCE, ENTERED IN THE SHAWANO COUNTY CIRCUIT
COURT, THE HONORABLE JAMES R. HABECK PRESIDING.

DEFENDANT-APPELLANT'S BRIEF AND APPENDIX

ZALESKI LAW FIRM
Steven W. Zaleski
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone), Zaleski@Ticon.net
Attorney for Defendant-Appellant

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ISSUE PRESENTED

Did interpreter's errors in interpreting trial testimony of complaining witness require that interpreter be disqualified?

The trial court answered: no.

Did such errors require that trial court strike testimony of complaining witness?

The trial court answered: no.

POSITION ON ORAL ARGUMENT AND PUBLICATION

Counsel would welcome oral argument should this Court determine that such argument would be helpful in addressing the issues presented in this brief.

Counsel believes that publication will be warranted as this appeal involves issues not yet examined by Wisconsin courts in a published case.

STATEMENT OF THE CASE

The State charged Webster with armed robbery, misdemeanor battery, felony intimidation of a victim, and disorderly conduct with use of a dangerous weapon. A-Ap.100-101. The criminal complaint contains the specific allegations made by the State. 1:1-10.

After various pre-trial proceedings, the case proceeded to a two day jury trial wherein the jury found Webster guilty on all counts. A-Ap.102. At sentencing, the trial court sentenced Webster to 10 years confinement and 5 years extended supervision (armed robbery), 9 months jail (battery), 3 years confinement and 3 years extended supervision (intimidation of a victim) and 9 months jail (disorderly conduct with use of a dangerous weapon) with all sentences to be served concurrently. A-Ap.102-103. Webster timely filed a notice of intent to pursue postconviction relief pursuant to which the State Public Defender appointed the undersigned counsel. These proceedings follow Webster's notice of appeal. 37.

STATEMENT OF FACTS

At trial, an interpreter provided translation for the complaining witness's testimony. 50: 99-100. The complaining witness, M.P., testified in the Spanish language. 50:102. Prior to M.P.'s testimony, the trial court swore in the interpreter. 50:100. The record does not reflect the specific oath recited by the interpreter or any qualifications on her part. 50:100.

During M.P.'s testimony, trial counsel moved to disqualify the interpreter and to strike the testimony of M.P. 50:150. The trial court denied the motions. 50:153.

In the interest of economy and a logical presentation of facts, the specific errors in the interpreter's translation will be referenced and discussed below in the context of Webster's arguments.

ARGUMENT

Trial court erroneously exercised its discretion in failing to disqualify interpreter and strike complaining witness's testimony.

A. Standard of review and applicable law

It is well-settled that the use of an interpreter is discretionary with the trial court. **Kropiwka v. Department of Industry, Labor & Human Relations**, 87 Wis.2d 709, 715, 275 N.W.2d 881 (1979). Discretionary determination, to be sustained, must demonstrably be made and based upon facts appearing in record and reliance on appropriate and applicable law, and most importantly, discretionary determination must be product of rational mental process by which facts of record and law relied upon are stated and are considered together for purpose of achieving reasoned and reasonable determination. **Wisc. Prof'l. Baseball Park v. Mitsubishi Heavy Indus.**, 2007 WI App 185, ¶39, 304 Wis.2d 637, 738 N.W.2d 87. Trial court erroneously exercises its discretion when it: 1) fails to consider and make record of relevant factors; 2) considers improper or clearly irrelevant factors; and 3) gives too much weight to any single factor. **Id.** Abuse of discretion may also occur when trial court makes error of law. **Id.** at ¶40.

B. Good cause existed to disqualify interpreter and strike complaining witness's testimony.

Wis. Stat. Sec. 885.38 pertains to "Interpreters in circuit and appellate courts." Subsection (6) provides as follows:

Any party to a court proceeding may object to the use of any qualified interpreter for cause. The court may remove a qualified interpreter for good cause. Wis. Stat. Sec. 885.38(6).

Webster, through trial counsel, moved the trial court to disqualify the interpreter and strike M.P.'s testimony due to an inaccurate translation, 50:150-151, and an "honesty issue" presented by the interpreter. 50:152. Webster identified three particular instances which demonstrated that the interpreter had not provided accurate translation. The first two instances pertained generally to M.P.'s identification of Webster as the robber. In support of the identification, M.P. testified regarding her observation of certain clothing worn by the robber and prior times where the robber had come into her store.

The prosecutor asked M.P. is she had ever seen Webster before:

Q: Would you take a look at the person sitting at the table over there? 50:139.

A: Yes. 50:139.

Q: Have you seen her before? 50:139.

A: Yes. 50:139.

Q: When? 50:139.

A. Before there was a robbery. On two occasions she went in with her daughter and son-in-law. The son-in-law is Mexican, and the man was sending money. 50:139.

Q: Okay. But you have seen that person sitting at the defense table in your store two times before? 50:140.

A: Yes. 50:140.

Q: And when you say two times—when I'm asking you two times before, before June 27? 50:140.

A; Before the 27th. 50:140.

Q: Do you know how long before? Estimate, if you know, if you recall. 50;140.

A: About ten days before, but she had been there before. The second time was closer to the 27th. 50:140.

Q: Okay. The first time, though, that was about how long before, if you know? If you remember? 50:140.

A: About two weeks before the robbery, could it have been. I don't remember the exact date, but she was there on two occasions with her daughter and the son-in-law. The son-in-law has a really ugly nickname. They nickname him el chango, the monkey. 50:140.

Q: El chango? 50:140.

A: Yes, that's what they call him. 50:141.

Q: Oh, okay. And when they came in those two times, was it to send money to Mexico both times? 50:141.

A: Two times, yes. He was a client there. Every two weeks when they get paid, they send money to Mexico. 50:141.

Q: Okay. So that man came in more times than this person over here? 50:141.

A: Yes. Him and his daughter, they would come in to buy tortillas. The woman, I don't know if it's the wife or who she is, she would grab the tortillas while he was making the payment to send the money. 50:141.

Based upon the discrepancy between the former testimony that woman had come into the store with her daughter and son-in-law, and the latter testimony that the man came into the store with "his daughter," Webster advised the trial court as to the apparent problem in translation. 50:50:141-142. The trial court then directly asked M.P. to clarify her testimony:

Q: Here's the point ma'am. When the man came in that sent money to Mexico, did he have a daughter sometimes? 50:143.

A. The daughter of the lady. 50:143.

Q: Did you have two women and one man? 50:143.

A: Yes. The lady's daughter. There were two. And there is another daughter, and there were three daughters, and one of them looks a lot like her. And then the son-in-law and her. 50:143.

In further support of the argument that the translation was not accurate, Webster pointed to a second example, one regarding M.P.'s testimony regarding the mask worn by the robber. 50:137. Trial counsel informed that court that he believed M.P. had described the mask as revealing the eyes and mouth of the robber, whereas the interpreter translated the

testimony as the mask only revealed the ears and mouth. 50:143-144. Trial counsel was correct:

Q: Do you remember –what do you remember about the clothing? 50:137.

A: Everything was black. She was wearing a ski mask. One of those ones where you can only see the ears and the mouth, so I didn't see anything. It was all black and she was wearing a black sweatshirt that was too big for her. It was black and large. 50:137.

Webster then pointed to a third instance where the interpreter did not provide accurate translation, in the spelling of M.P.'s surname. In this regard, Webster clarified that the interpreter translated the spelling of M.P.'s surname as x-x-x-x-S, 50:100, when in fact, M.P., had testified that she spelled her name, x-x-x-x-Z. 50:156.

The interpreter, in responding to Webster's complaint regarding the accuracy of the translation, informed the trial court that she had, during a break, spoken to certain Spanish speaking observers of the trial, one of whom was M.P.'s daughter, and inquired whether she had made any mistakes during her translation. 50:146,147. The interpreter advised the trial court that the individuals replied, "no." 50:146.

In hearing Webster's argument that the interpreter had not provided accurate translation, the trial court took testimony from M.P.'s daughter.

50:146- 149.¹ The daughter testified that she understood both Spanish and English, and that she had heard her mother's testimony and the interpreter's translation of it. 50:148. When asked by the trial court if she had "spott(ed) problems" with the translation, the daughter responded, "yes". 50:148-149. The daughter testified that her mother said "eyes" and not "ears" in describing those features not covered by the mask, and that her mother described the defendant's daughter as the man's girlfriend or wife, not his daughter. 50:149, 150.

In declining to grant Webster's request to disqualify the interpreter and strike M.P.'s testimony, the trial court concluded that the interpreter had provided a "substantial correct interpretation" and that the trial could proceed. 50:153. The trial court erred in rejecting Webster's motion. First, the standard for assessing the interpreter's performance was not whether the interpreter provided a "substantial correct interpretation," as considered by the trial court, but whether she provided a "complete and accurate interpretation." The rules of the Supreme Court establish a "Code of Ethics for Court Interpreters." See SCR 63.001 to 63.10. Rule 63.01 pertains to "Accuracy and completeness" and provides as follows:

¹ For clarification, the daughter and the mother share the name, M.P., 50:147.

Interpreters shall render a complete and accurate interpretation or sight translation by reproducing in the target language the closest natural equivalent of the source language message, without altering, omitting, or adding anything to the meaning of what is stated or written, and without explanation. SCR 63.01.

The comments to Rule 63.01 are further instructive:

Interpreters have a twofold role: (1) to ensure that court proceedings reflect, in English, precisely what was said by persons of limited English proficiency; and (2) to place persons of limited English proficiency on an equal footing with persons who understand English. This creates an obligation to conserve every element of information contained in a source language communication when it is rendered in the target language.

Therefore, interpreters are required to apply their best skills and judgment to preserve, as faithfully as is reasonably possible and without editing, the meaning of what is said, including the style or register of speech, the ambiguities and nuances of the speaker, and the level of language that best conveys the original meaning of the source language. Verbatim, “word for word,” or literal oral interpretations are inappropriate when they distort the meaning of what was said in the source language. However, every spoken statement, even if it appears non-responsive, obscene, rambling, or incoherent should be interpreted. This includes apparent misstatements.

Interpreters should not interject any statement or elaboration of their own. If the need arises to explain an interpreting problem, such as a term or phrase with no direct equivalent in the target language or a misunderstanding that only the interpreter can clarify, the interpreter should ask the court’s permission to provide an explanation.

Spoken language interpreters should convey the emotional emphasis of the speaker without reenacting or mimicking the speaker’s emotions, or dramatic gestures. Sign language interpreters, however, must employ all of the visual cues that the language they are interpreting for requires-including facial expressions, body language, and hand gestures. Judges should ensure that court participants do not confuse these essential elements of the interpreted language with inappropriate interpreter conduct. Any challenge to the interpreter’s conduct should be directed to the judge.

The obligation to preserve accuracy includes the interpreter’s duty to correct any errors of interpretation discovered during the proceeding. Interpreters should demonstrate their professionalism by objectively analyzing any challenge to their performance...Comment, SCR Rule 63.01.

SCR Rule 63.004 provides that “(t)he comments accompanying this code are not adopted. The comments are intended as guides to interpretation, but the text of each rule is authoritative.” As such, Rule 63.01 required the interpreter, by use of the term “shall,” to provide complete and accurate interpretation. Plainly, the interpreter did not do this. As evidenced by the specific examples cited by Webster and confirmed by M.P.’s daughter, the interpreter inaccurately interpreted certain aspects of M.P.’s testimony. These inaccuracies alone constituted good cause to disqualify the interpreter and strike the testimony. Questions concerning the credibility and voracity of the interpreter compounded these inaccuracies as a good cause basis. The court and all parties must accept at face value what the represented translation is. Indeed, unless there is some witness to the translation who can evaluate its accuracy, as we have in this case, there may be no avenue for ensuring or even determining accuracy. The interpreter in this case advised the trial court that there were witnesses who could inform the court that there were no mistakes in the translation. 50:146. This turned out to be incorrect. In fact, the witness offered to the trial court by the interpreter testified to the contrary, that there were in fact mistakes. 50:147-150. This discrepancy in the interpreter’s representation of what

the witness would say about the translation and what the witness actually did say, served to undermine the credibility and voracity of the interpreter as well her accuracy in transferring information between individuals. This court should reject the trial court's rationale that because the interpreter had provided a "substantial correct interpretation," she could proceed with the trial. 50:153. The "Code of Ethics for Court Interpreters" does not speak in terms of providing a mostly correct translation or a substantially correct translation. Rule 63.01 expressly requires a "complete and accurate interpretation." That clearly did not occur in this case. Moreover, if this court were to tolerate inaccuracies in translated testimony, which Webster maintains it should not do, it should at least confine the acceptance of such inaccuracies to areas of testimony which have limited materiality or relevance to the proceeding. In such instances, perhaps the court could overlook the inaccurate translation of a non-material witness or of an area which had little probative value to the central issues in the case. But here, the interpreter's inaccuracies involved the testimony of the State's complaining witness, essentially the most vital witness to the case. Similarly, the inaccuracies pertained to the complaining witness's identification of the robber in general and to her identification of Webster

in particular. As such, the inaccuracies could not have occurred in more seminal areas. Had the trial court evaluated “good cause” based on the proper standard, whether the interpreter had provided a “complete and accurate interpretation,” it would have been compelled to find that good cause existed to disqualify the interpreter and strike the testimony.

Further, the trial court should have considered that the inaccuracies compromised Webster’s constitutional rights. In this regard, the 6th Amendment to the United States Constitution and Article I, Section 7 of the Wisconsin Constitution both guarantee a defendant’s right to confront his accusers. The Fifth Amendment to the United States Constitution and Article I, Section 8 of the Wisconsin Constitution both guarantee a defendant the right to due process. In the context of an interpreter’s performance, federal courts have recognized that an interpreter’s deficiencies may implicate both the right to due process and to confrontation. See **United States v. Martinez**, 616 F.2d 185, 188 (5th Cir. 1980); **U.S. v. Bennett**, 848 F.2d 1134, 1141 (11th Cir. 1988). In exercising discretion, the trial court must balance the defendant’s rights to confrontation against the public’s interest in economical administration of criminal law. See **Valladares v. U.S.**, 871 F.2d 1564, 1566 (11 Cir. 1989).

In this case, the trial court failed not only to engage in any such “balancing,” but to even countenance that the inaccuracies and problems with the interpretation implicated Webster’s constitutional rights. Without considering these factors, the trial court cannot be deemed to have properly exercised its discretion. Had the trial court properly engaged in the requisite “balancing” of the relevant rights and interests at stake, it would have been compelled to conclude that good cause existed to disqualify the interpreter and strike the testimony.

Finally, the trial court failed to establish for the record that the interpreter was sufficiently qualified to participate in the case. The decision to admit expert witness rests with the discretion of the circuit court. See **Dakter v. Cavallino**, 2014 WI App 112, ¶68, 358 Wis.2d 434, 856 N.W.2d 523. The circuit court’s exercise of discretion will not be overturned if the decision had a reasonable basis, and if the decision was made in accordance with accepted legal standards and in accordance with the facts of the record. **Id.** In this case, the trial court’s discretionary decisions regarding the use of the interpreter at trial were not made in accordance with accepted legal standards. Under Wisconsin law, an interpreter must be qualified as an

expert witness. See **State v. Santiago**, 206 Wis.2d 3, 23, 556 N.W.2d 687 (1996). Wis. Stat. Sec. 906.04, “Interpreters,” provides as follows:

An interpreter is subject to the provisions of chs. 901 to 911 relating to qualification as an expert and the administration of an oath or affirmation that the interpreter will make a true translation. Wis. Stat. Sec. 906.04.

The Wisconsin Court Interpreters Handbook, Supreme Court of Wisconsin, Office of Court Operations, 2004, pages 6-7, provides a list of questions which trial courts may use in qualifying a potential court reporter:

VoirDire Examination Questions

1. What is your native language? How did you learn English/the other language? How long have you been speaking it?
2. Please describe your formal schooling?
3. Do you have any formal training in interpreting? In legal or court interpreting?
4. Please describe your experience as an interpreter. Have you ever interpreted in court before? What kind of proceeding?
5. Are you certified as court reporter in Wisconsin or any state or federal court? Do you have any other accreditation for interpretation or translation?
6. Have you spoken with the person who needs interpreting, or do you need a few minutes to now talk? Are you familiar with the dialect he/she speaks? Are you able to understand him/her and communicate with him/her?
7. Do you know any of the parties, witnesses or attorneys? Are you aware of any conflict of interest that you might have in this case?
8. Describe what it means to interpret simultaneously and consecutively. Are you able to do so? Do you understand that you must interpret everything said on the record?
9. Do you need time to review any documents in this case?

10. Have you read the Code of Ethics for Court Interpreters in Wisconsin Courts? Do you understand it and agree to abide by it?

The *Handbook* additionally references and discusses the “certification” program offered through the Wisconsin Director of State Courts. See *The Wisconsin Court Interpreters Handbook*, Supreme Court of Wisconsin, Office of Court Operations, 2004, page 7. Of course, simply being a “certified” interpreter does not equate to meeting the qualifications for an expert witness under Wis. Stat. Sec. 907.02. Even if the interpreter is “certified,” the trial court must still qualify the interpreter as an expert witness. A trial court may do so by stipulation, judicial notice, or by a voir dire into the interpreter’s qualifications. See D. BLINKA, WISCONSIN PRACTICE SERIES, VOLUME 7, CIVIL EVIDENCE (Thomson Reuters/West, Third Edition, 2008), p.426. In this case, the trial court failed to qualify the interpreter as an expert witness in any manner. Indeed, the record is wholly silent as to the interpreter’s education, training, experience and credentials. The interpreter plainly had not been formally qualified to participate in the proceedings as an expert witness under Secs. 906.04, 907.02 and **Santiago**. It was therefore error for the trial court to proceed with the interpreter from the outset. When the problems with the

interpreter's performance surfaced during trial and Webster sought to disqualify the interpreter, the trial court had a continuing duty to inquire and evaluate the interpreter's qualifications as an expert witness. The trial court failed to do so. In fact, at no time during the trial did the trial court establish for the record the interpreter's qualifications, experience, and credentials. In light of the inaccuracies presented by the interpretation, the trial court failed to properly exercise its discretion in using the interpreter in general, and in particular, declining to disqualify her and strike her translated testimony.

Conclusion

For all reasons stated in this brief, this Court should vacate the judgment of conviction and sentence, and remand the case for a new trial.

Dated this _____ day of April 2016.

Respectfully submitted,
BY: _____/s/_____
Zaleski Law Firm
Steven W. Zaleski
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone), Zaleski@Ticon.net
Attorney for Defendant-Appellant

CERTIFICATION

I hereby certify that this petition meets the form and length requirements of Wis. Stat. Rules 909.62(4) and 809.19(8)(b) and (d) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 points for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line. The text is 13 point type and the length of the brief is 3558 words.

Dated this _____ day of April 2016.

THE ZALESKI LAW FIRM

BY: _____ /s/_____
Steven W. Zaleski
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone)
Zaleski@Ticon.net

Attorney for Defendant-Appellant

CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with s.809.19(2)(a) and that contains: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and the final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this _____ day of April 2016.

THE ZALESKI LAW FIRM

BY: _____ /s/_____
Steven W. Zaleski
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone)
Zaleski@Ticon.net

Attorney for Defendant-Appellant

**CERTIFICATION OF COMPLIANCE WITH RULE
809.19(12)**

I hereby certify that:

I have submitted an electronic copy of this petition, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that:

This electronic petition is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served upon all opposing parties.

Dated this ____ day of April 2016.

THE ZALESKI LAW FIRM

BY: _____/s/_____
Steven W. Zaleski
State Bar No. 1034597
10 E. Doty St., Ste. 800
Madison, WI 53703
608-441-5199 (Telephone)
Zaleski@Ticon.net

Attorney for Defendant-Appellant