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COURT OF APPEALS

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OF WISCONSIN**

DISTRICT III

Case No. 2016AP225-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

BRENDA S. WEBSTER,

Defendant-Appellant.

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

BRIEF OF PLAINTIFF-RESPONDENT

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STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State requests neither oral argument nor publication. The parties' briefs will fully develop the issues presented, which can be resolved by applying well-established legal principles.

STATEMENT OF THE CASE AND FACTS

As Respondent, the State exercises its option not to include separate statements of the case and facts. *See* Wis. Stat. § (Rule) 809.19(3)(a)2. Relevant information will be included where appropriate in the State's argument.

ARGUMENT

Defendant-appellant Brenda S. Webster appeals a judgment of conviction for one count each of armed robbery, victim intimidation, battery, and disorderly conduct. (33; 34.) *See* Wis. Stat. §§ 943.32(2), 940.45(1), 940.19(1), 947.01(1). A jury convicted Webster of these crimes for robbing a grocery store in Shawano and battering the mother of the store's owner, who was working at the time of the robbery. Webster argues that she should get a new trial because the court interpreter made errors when translating the victim's trial testimony from Spanish. Webster contends the court should have disqualified the interpreter and stricken the victim's testimony. (Webster's Br. 4-14.) She also argues that the circuit court erred by not qualifying the interpreter as an expert under Wis. Stat. § 906.04. (Webster's Br. 14-17.)

This Court should affirm. The interpreter's errors did not prejudice Webster. The errors were either insignificant or the parties clarified the incorrectly translated testimony for the jury after becoming aware of it, or both. In addition, Webster forfeited any objection to the interpreter's

qualifications by not objecting when the circuit court allowed her to translate for the victim. Webster is not entitled to a new trial.

Webster is not entitled to a new trial based on the interpreter’s translation errors and she forfeited her claim that the circuit court failed to properly qualify the interpreter.

A. Applicable law and standard of review.

“The selection of a suitable person as an interpreter is within a trial court’s discretion.” *State v. Besso*, 72 Wis. 2d 335, 343, 240 N.W.2d 895 (1976) (citation omitted). This Court will uphold a circuit court’s discretionary decision if it has a rational basis and was made in accordance with accepted legal standards in view of the facts of record. *State v. Giese*, 2014 WI App 92, ¶ 16, 356 Wis. 2d 796, 854 N.W.2d 687. If a circuit court fails to set forth its reasoning in making a discretionary decision, this Court will search the record for reasons to uphold the court’s decision. *State v. Manuel*, 2005 WI 75, ¶ 24, 281 Wis. 2d 554, 697 N.W.2d 811.

Further, “[a] trial court’s discretion in the choice of an interpreter will not be upset unless there is evidence showing that a defendant has been prejudiced by the interpreter’s performance.” *Besso*, 72 Wis. 2d at 343 (citation omitted). “Although a trial court has the duty to choose the most competent and least biased person available, the defendant must show that some injustice has resulted because of the appointment of the interpreter.” *Id.* (citation omitted).

B. Webster was not prejudiced by any of the three interpretation errors.

Webster points to three errors by the interpreter that she claims warrant relief. But the errors, either singly or together, were not sufficiently prejudicial to justify giving Webster a new trial.

The first error is the interpreter's translation of testimony about victim's having seen Webster before the robbery. (Webster's Br. 5-7.) The victim testified that Webster, Webster's daughter, and Webster's son-in-law had come into the store twice before the robbery so that the son-in-law could wire money to Mexico. (50:139-41.) The victim later testified, though, that "[h]im and his daughter" came to the store and that "[t]he 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.) Defense counsel objected that he thought there was a problem with the interpreter's translation. (50:141-42.) Outside the jury's presence, the court asked the victim if the man brought his daughter with him to the store, and the victim replied "[t]he daughter of the lady." (50:143.) The victim also clarified that "the lady" had three daughters, and that two of them, and the son-in-law, had been in the store. (50:143.) Later, the victim's daughter informed the circuit court that the interpreter had mistranslated her mother's testimony, and that she had "said that it was the guy, her client, and his wife or girlfriend which is her daughter." (50:150.)

This error was not prejudicial. The translation error, as the State understands Webster's claim, is that the victim testified that Webster and her daughter came to the store, not the son-in-law and his daughter. The testimony about Webster's being in the store was relevant to show that she was aware that the store processed money transfers to

Mexico and thus chose to rob it knowing that the store would have significant amounts of cash on hand. But nothing about the mistranslation mattered to this inference in any way that harmed Webster. The victim clearly testified that she saw Webster in her store before the robbery and that her son-in-law came with her. The only question raised by the mistranslation is whether Webster's daughter or the son-in-law's daughter also came into the store with the two of them. It did not affect the victim's testimony that she saw Webster in the store before the robbery or that she was with someone who was sending money. And further demonstrating the error's irrelevancy, while defense counsel brought the error to the court's attention outside of the jury's presence, he did not bother to address it when he cross-examined the victim after the jury returned. (50:141-43, 155-73.) Whose daughter Webster was with at the store did not matter.

The second error is that the interpreter translated the victim's testimony about the robber's ski mask as being "[o]ne of those ones where you can only see the ears and the mouth." (Webster's Br. 7-8; 50:137.) When counsel later objected to the translation, he said, "I'm going to speculate that what she said was eyes," not ears. (50:144.) The circuit court noted that the victim had gestured to her eyes when she testified, and said that it thought that she had either misspoken or the interpreter erred. (50:144.) The victim's daughter told the court that her mother had said eyes. (50:149.) The victim subsequently testified with the jury present that she could see "[o]nly the mouth," and could not see the robber's eye or skin color because of the mask. (50:154.)

Again, this error was in no way prejudicial to Webster. The victim said the robber was wearing a ski mask. It is common knowledge that ski masks have holes for the mouth and eyes, but not for the ears, so the jury would have

understood that the victim meant eyes even if the interpreter said ears. This was reinforced by the victim's gesturing toward her eyes and her subsequent testimony that she could not see the robber's eye color because of the mask, which suggests she could see the robber's eyes, but not in detail. Further, whether the victim could see the robber's eyes does not matter to Webster's guilt. The victim testified that she could not see the robber's face during the crime and did not identify Webster as the person who robbed her. (50:127, 138.) The mistranslation about the ski mask had no effect on the jury's verdict.

The final translation error is that the interpreter said that the victim's name ended in an "s" instead of a "z." (Webster's Br. 8; 50:101, 155-56.) There is no way that this possibly prejudiced Webster. Not only was the spelling of the victim's name entirely irrelevant to Webster's guilt, defense counsel noted and corrected the mistranslation when cross-examining the victim. (50:155-56.)

Webster argues that she is entitled to a new trial because the interpreter did not provide "a complete and accurate translation" as required by the Code of Ethics for Court Interpreters in SCR 63.01. She similarly argues that the circuit court applied the wrong standard when it denied her request to strike the victim's testimony after it concluded that the interpreter had given a "substantial correct interpretation." (Webster's Br. 9-13; 50:153.)

There are several problems with this argument, all of which should lead this Court to reject it. First, Webster never specifically argued in the circuit court that SCR 63.01 required striking the testimony because of the translation errors, so the argument is forfeited. *See State v. Lippold*, 2008 WI App 130, ¶ 8 n.3, 313 Wis. 2d 699, 757 N.W.2d 825. Second, nothing in SCR 63.01 or SCR Chapter 63 establishes

that striking a witness's testimony is an appropriate remedy when an interpreter fails to accurately translate portions of that testimony. Finally, case law establishes that any translation errors must be prejudicial to justify relief; isolated and irrelevant errors like those at issue here will not suffice.

Webster also appears to argue that the errors were prejudicial, noting that they involved the testimony of the victim and related to her identification of the robber. (Webster's Br. 12-13.) But as argued, the errors were inconsequential to determining Webster's guilt. Webster further notes that interpretation problems can implicate a defendant's due process and confrontation rights, but she develops no argument how they did so here. (Webster's Br. 13.) This Court need not, and should not, address Webster's conclusory constitutional argument. *State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

Finally, Webster complains that the circuit court failed to make a record of the interpreter's qualifications as an expert witness under Wis. Stat. § 906.04. (Webster's Br. 14-17.) But Webster never objected to the court's decision to allow the interpreter to translate for the victim. (50:98-100.) Webster's failure to object is a forfeiture of her right to complain on appeal about the lack of a record of the interpreter's qualifications. *See State v. Torkelson*, 2007 WI App 272, ¶ 25, 306 Wis. 2d 673, 743 N.W.2d 511.

CONCLUSION

The State respectfully requests that this Court affirm the circuit court's judgment of conviction.

Dated June 13th, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (c) for a brief produced with a proportional serif font. The length of this brief is 1,652 words.

Dated this 13th day of June, 2016.

AARON R. O'NEIL
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that:

This electronic brief 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 with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 13th day of June, 2016.

AARON R. O'NEIL
Assistant Attorney General