STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III

Appeal No. 2016AP225 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

BRENDA S. WEBSTER, 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 REPLY BRIEF

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ARGUMENT

I. Erroneous interpretation was prejudicial.

In its brief, the State relies on **State v. Besso**, 72 Wis.2d 335, 240 N.W.2d 895 (1976) for the proposition that "[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." **Id**. at 343. **Besso** however does not square with the facts presented in this case. **Besso** involved a plea of guilty not a jury trial. The interpreter as such was interpreting the concepts that a defendant must understand in order to make a guilty plea. **Id**. at 343. Though significant, such duty was not as encompassing as that of interpreting for the jury, court, counsel, reporter and the parties the questions asked of the complaining witness and her answers. Further, in **Besso**, even though the defendant had an interpreter, there was substantial evidence in the record that she had sufficient knowledge of English to answer responsively on some occasions. **Id**. at 342. Indeed, the trial court specifically and personally asked the defendant whether she understood the proceedings and she personally responded that she did. **Id**. at 345. In this case, it does not appear that the complaining witness could independently understand questions posed to her in English

and respond in English. Unlike the defendant in **Besso**, the complaining witness in this case was fully dependent on the interpreter. Unlike the trial court in **Besso**, the trial court in this case was also fully dependent upon the interpreter as was the jury and all parties. Finally and perhaps most significantly, there was no showing or even an assertion in **Besso** that the interpreter made any error in translation or that there was criticism of the interpreter's function. **Id**. at 343. Such is not the case here. The general standard for interpreters requires continuous word-for-word translation. See **U.S. v. Long**, 301 F.3d 1095, 1105 (9th Cir. 2002). Further, as discussed in Webster's brief-in-chief, an interpreter is *required* by SCR Rule 63.01 to provide a "complete and accurate interpretation." Prejudice, in the context of interpretation errors, is determined by whether any part of any witness's testimony was misinterpreted to convey an erroneous meaning or impression to the jury. See **Lujan v. United States**, 209 F.2d 190, 192 (10th Cir. 1993).[1] Webster has plainly shown specific examples where the interpretation conveyed erroneous meaning to the jury. Webster has similarly shown facts which call into question the credibility of the

[1] **Besso**'s use of the term "prejudice" is based upon **Chee v. United States**, 449 F.2d 747 (9th Cir. 1971) which in turn is based upon **Lujan**.

interpreter. Webster has thus shown sufficient "prejudice" as that term is used in the context of interpretation.

Moreover, if this court finds, as Webster believes it must, that it was error for the trial court to not have disqualified the interpreter, then it must necessarily find that such error effected the jury's verdict. In this regard, the interpreter was a conduit for the testimony of the complaining witness, M.P. The testimony and the interpretation of it were so intertwined that they could not reasonably be separated. The proper remedy, as trial counsel requested, was therefore to enlist a new interpreter before continuing the testimony and to strike the testimony that had already been elicited. Because this did not happen, the jury's verdict was necessarily based on erroneously admitted testimony. In short, the interpreter tainted the testimony of the complaining witness. This circumstance proves fatal for the integrity of the jury's verdict because there was no other evidence to sustain the verdict besides the erroneously admitted testimony. In particular, the elements of the armed robbery and misdemeanor battery charges could not have been established and cannot be sustained without the interpreted testimony of the complaining witness. The battery charge

required the complaining witness's testimony as to her lack of consent to bodily harm. See WI JI CRIMINAL 1220, "Battery," 2015 Regents, Univ. of Wis. The armed robbery charge required the complaining witness's testimony as to her ownership of the property. See WI JI CRIMINAL 1480, "Armed robbery by use of threat of use of a dangerous weapon," 2009 Regents, Univ. of Wis. Webster recognizes that there may cases where erroneously admitted expert testimony does not require a new trial. For instance, where it is shown that certain expert testimony had been erroneously admitted, there may be other evidence to sustain a jury's verdict besides the expert testimony. See for example, **United States v. Duval**, 272 F.2d 825, 829 (7th Cir. 2001) (holding that even if expert testimony opining that drugs were packaged for distribution was admitted in error, the error was harmless because the defendant admitted he intended to distribute the drugs in question). But the situation in this case is not like **Duvall**. Here, the jury verdict cannot be sustained on other evidence. Without M.P.s interpreted testimony, the jury's verdict cannot stand.

With respect to the constitutional dimension of the error at issue, the State, at p.6 of its brief, suggests that Webster's constitutional argument is

"conclusory" and that this court should not address it. Webster's argument is not "conclusory" but merely simple and obvious. A defendant cannot satisfactorily exercise his right to confront his accuser when the accuser's accusations are not accurately and completely interpreted. A defendant cannot receive due process and a fundamentally fair trial when the complaining witness's allegations are misstated by the interpreter. This is plainly the situation which unfolded at trial and which prompted trial counsel to object and move to strike the testimony. Trial counsel properly recognized the magnitude of the problem and characterized it as "of the utmost importance." 50:141. Webster has cited applicable law and relevant facts. The argument is sufficiently set forth for this court's consideration on the merits.

II. Webster did not forfeit argument that the trial court failed to properly qualify the interpreter under Sec. 906.04.

The State argues that "Webster never objected to the court's decision to allow the interpreter to translate for the victim." See State's brief at p.6. To the contrary, Webster specifically moved to disqualify the interpreter and to strike the complaining witness's testimony. If an objection is to be made, it must be made as soon as any incapacity or deficiency becomes

apparent. **State v. Besso**, 72 Wis.2d at 343 citing **Collier v. State**, 30 Wis.2d 101, 104, 140 N.W.2d 252 (1966). Webster moved to disqualify the interpreter as soon as her deficiency became apparent. As such, under the State's own primary authority, **Besso**, Webster's motion is considered timely. Once Webster made her motion, the trial court had an obligation under Sec. 906.04 and Sec. 907.02 to ensure that the interpreter was properly qualified as an expert before allowing the interpreter to continue. As of February 1, 2011, Wisconsin adopted the **Daubert** reliability standard found in Federal Rule of Evidence 702.[2] Since Wisconsin is now a **Daubert** state, case law construing **Daubert** as well as Federal Rule of Evidence 702 is informative. Under **Naeem v. McKesson Drug Company**, 444 F.3d 593 (7th Cir. 2006) a party's objection or motion challenging the qualifications of an expert may be timely made either through a motion in limine or *during the testimony itself*. See **Naeem v. McKesson Drug Company**, 444 F.3d at 610. Italics added. Once a party makes such objection, the court "must perform its gatekeeping function by performing some type of **Daubert** inquiry and by making findings about the witness's qualification to give expert testimony." **Carlson v.**

[2] **Daubert v. Merrell Dow Pharmaceuticals Inc**., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

Bioremedi Therapeutic Systems Inc., United States Court of Appeals, Fifth Circuit, May 16, 2016, ___F.3d___, 2016 WL 2865256, ¶4, citing **Smith v. Jenkins**, 732 F3d 51, 64 (1st Cir. 2013); **Naeem v. McKesson Drug Company**, supra, **Dodge v. Cotter Corp.** 328 F.3d 1212, 1223 (10th Cir. 2003). "To trigger a **Daubert** inquiry, an expert's testimony must be sufficiently called into question." **Carlson**, supra at ¶2. Once it is, at a minimum, a court must create a record of its **Daubert** inquiry and "articulate a basis for admitting expert testimony." **Id**. An expert's testimony should be excluded if the court finds that the witness is not qualified to testify in a particular field or on a given subject. **Carlson**, supra at ¶3. A court abuses its discretion by not conducting a **Daubert** inquiry or by not making a **Daubert** determination on the record. **Id**. In this case, the trial court did neither. The trial court failed to make any inquiry into the qualifications of the interpreter or make any determination of the interpreter's qualifications on the record. In response to Webster's motion to disqualify the interpreter and strike the testimony, the trial court concluded as follows:

> THE COURT: But I don't find a significant difference between this and an English speaking witness, where every juror hears a little bit differently on common matters. People that speak English sometimes misspeak. Sometimes they gesture with the eyes and say ears. And I have had many witnesses in English misspeak over small items like that and I don't strike their whole testimony because of a small error like that.

And we have a jury here to evaluate what is accurate or not. I'm satisfied that we have a substantial correct interpretation and, therefore, we can proceed. We can bring the jury back in. 50:152-153.

The above analysis by the trial court was inadequate and failed to constitute a sufficient inquiry and on the record qualification of the interpreter. What was necessary was for the trial court to embark on the type of inquiry discussed in Webster's brief-in-chief at pages 15 to 16. The Wisconsin Court Interpreter's Handbook, Supreme Court of Wisconsin, Office of Court Operations, 2004, pages 6-7, provides trial courts with what is essentially a "script" for qualifying an interpreter. In the alternative, the trial court could have attempted to qualify the interpreter by obtaining a stipulation from the parties or by taking judicial notice. See D. BLINKA, WISCONSIN PRACTICE SERIES, VOLUME 7, CIVIL EVIDENCE (Thomson Reuters/West, Third Edition, 2008), p.426. The trial court failed to avail itself of any of these avenues for ensuring the expert qualifications of the interpreter. In doing so, the trial court abused its discretion.

Conclusion

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

Dated this _____day of June 2016.

Respectfully submitted,
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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 1808 words.

Dated this _____day of June 2016.

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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 June 2016.

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