

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 27, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 99-0733-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SHAH N. MIAN,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: ROBERT J. MIECH, Reserve Judge, and CLARE L. FIORENZA, Judge.¹ *Reversed and cause remanded with directions.*

SCHUDSON, J. Shah N. Mian appeals from the judgment of conviction, following a jury trial, for endangering safety by use of a dangerous weapon, and from the order denying his motions for postconviction relief. He

¹ Judge Robert J. Miech presided over the trial; Judge Clare L. Fiorenza decided the postconviction motions.

argues that “[t]he trial court erred by failing to make a factual inquiry of whether [his] language difficulty required the use of an interpreter” and, therefore, that he is entitled to a new trial. The State concedes that the trial court erred by failing to conduct a hearing to determine whether Mian needed an interpreter, but contends that the error was harmless.

This court agrees with Mian and the State—the trial court erred in failing to conduct a hearing to determine whether Mian needed an interpreter, and the postconviction court erred in finding that the predecessor trial court “was not given notice that the defendant had a language difficulty because of the inability to speak or understand English.” This court disagrees, however, with the State’s contention that this court can conclude that the error was harmless, based on the record of the trial and postconviction hearing. Without trial court findings on the issue of whether Mian needed an interpreter, this court cannot determine whether the error was harmless. This court also disagrees with Mian’s assertion that a new trial is required. At this juncture, the appropriate remedy is a remand for the required hearing.

The facts essential to resolution of this appeal are undisputed. Mian, a native of Pakistan who had been in the United States for nine years, was charged with endangering safety by use of a dangerous weapon (pointing), arising out of an incident at a convenience store where he was employed. On the day of trial, his lawyer advised the trial court that she had “someone coming down so that when [Mian] testifies, only because it is hard to understand him sometimes because he talks so quickly, so when he testifies, we will use the interpreter or the translator.” When Mian testified, however, no interpreter was present, no explanation was given for the interpreter’s absence, and no inquiry was made to determine whether Mian needed the interpreter.

Section 885.37, STATS., in relevant part, provides:

(1) (a) If a court has notice that a person fits any of the following criteria, the court shall make the determinations specified under par. (b):

1. The person is charged with a crime.

....

(b) If a court has notice that a person who fits any of the criteria under par. (a) has a language difficulty because of the inability to speak or understand English, ... is unable to speak or has a speech defect, the court shall make a factual determination of whether the language difficulty ... or speaking impairment is sufficient to prevent the individual from communicating with his or her attorney, reasonably understanding the English testimony or reasonably being understood in English. If the court determines that an interpreter is necessary, the court shall advise the person that he or she has a right to a qualified interpreter and that, if the person cannot afford one, an interpreter will be provided for him or her at the public's expense. Any waiver of the right to an interpreter is effective only if made voluntarily in person, in open court and on the record.

The statute codifies *State v. Neave*, 117 Wis.2d 359, 344 N.W.2d 181 (1984), in which the supreme court declared:

We conclude that due regard for the right of a criminal defendant who does not understand English to the services of an interpreter requires that whenever a trial court is put on notice that the accused has a language difficulty, the court must make a factual determination of whether the language disability is sufficient to prevent the defendant from communicating with his attorney or reasonably understanding the English testimony at the preliminary hearing or trial. If the court determines that an interpreter is necessary, it must make certain that the defendant is aware that he has a right to an interpreter and that an interpreter will be provided for him if he cannot afford one. Any waiver of the right to an interpreter must be made voluntarily in open court on the record.

Id. at 375, 344 N.W.2d at 188-89 (footnote omitted).

The State concedes that counsel's comment to the trial court regarding Mian's possible communication difficulty and the expected presence of an interpreter was sufficient to establish notice, thus triggering the requirement for a hearing to determine whether, in the absence of the interpreter, Mian's "language difficulty ... or speaking impairment [was] sufficient to prevent [him] from communicating...." See § 885.37(1)(b), STATS. The State's concession is correct and consistent with *State v. Yang*, 201 Wis.2d 725, 549 N.W.2d 769 (Ct. App. 1996), in which this court recently stated:

We conclude that a court has notice of a language difficulty within the meaning of § 885.37(1)(b), STATS., when it becomes aware that a criminal defendant's difficulty with English may impair his or her ability to communicate with counsel, to understand testimony in English, or to make himself or herself understood in English. At that point, the court has an obligation to make the factual determination on the need for an interpreter required under § 885.37(1)(b).

Id. at 734, 549 N.W.2d at 772. Just as significantly for purposes of this appeal, the State also correctly concedes that, in the instant case, "there were no findings relating to Mr. Mian's need for an interpreter."

The State argues, however, that "this court should rely upon the record before it to determine whether or not Mr. Mian actually needed an interpreter." This court declines to do so. Although the record of both the trial and postconviction motion hearing certainly could influence such a determination, neither directly addressed the issue of whether Mian needed an interpreter. And although the postconviction motion hearing certainly revealed factual matters overlapping those that could also unfold in a hearing under § 885.37(1)(b), STATS., the issues of the postconviction hearing were quite distinct—whether trial counsel was ineffective for failing to provide Mian an interpreter at the trial, and

whether the trial court received notice of Mian’s possible language difficulty. Indeed, given that the postconviction hearing probed defense counsel’s conduct in ultimately deciding that no interpreter was needed, this court must be mindful of an additional consideration that may emerge at a hearing under § 885.37(1)(b): “the right to an interpreter is a personal right of the defendant and may not be waived by his attorney.” *Neave*, 117 Wis.2d at 373, 344 N.W.2d at 188.

At this point, Mian is entitled to the required hearing, not a new trial. *See Yang*, 201 Wis.2d at 735, 549 N.W.2d at 773 (“[The defendant] implicitly concedes that even if the court erred in not determining the need for an interpreter, he is not entitled to a new trial unless he did need an interpreter.”). Thus, the case is remanded to the trial court for the hearing under § 885.37(1)(b), STATS.²

By the Court.—Order reversed and cause remanded with directions.³

This opinion will not be published *See* RULE 809.23(1)(b)4, STATS.

² Nothing in this decision precludes the trial court, at the hearing under § 885.37(1)(b), STATS., from utilizing the record of the trial and the previous postconviction hearing. The parties may build upon those records by eliciting whatever additional testimony they deem necessary to assist the court in arriving at its findings and conclusion. *See State v. Neave*, 117 Wis.2d 359, 375 n.6, 344 N.W.2d 181, 189 n.6 (1984) (“A hearing to determine the defendant’s ability to understand English need not be elaborate.”).

³ At this point, only the order is reversed. If, following the hearing on remand, the trial court determines that Mian needed an interpreter, the judgment also is reversed and Mian then would be entitled to a new trial.

