

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 15, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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Appeal No. 2016AP225-CR

Cir. Ct. No. 2014CF170

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRENDA S. WEBSTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Shawano County:
JAMES R. HABECK, Judge. *Affirmed.*

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 STARK, P.J. Brenda Webster appeals a judgment convicting her of armed robbery, misdemeanor battery, felony intimidation of a victim, and disorderly conduct with use of a dangerous weapon. At Webster's trial, the victim testified through an interpreter. Webster argues on appeal that the circuit court

should have granted her motion to disqualify the interpreter and strike the victim's testimony, based on errors in the interpreter's translation. Webster also argues the circuit court erred by failing to determine, on the record, that the interpreter was qualified as an expert witness. We reject these arguments and affirm.

BACKGROUND

¶2 A criminal complaint alleged that Webster robbed a grocery store in Shawano while armed with a knife. M.P., who was the mother of the store's owner, was working in the store at the time of the robbery. The complaint further alleged that, during the course of the robbery, Webster pushed M.P. to the ground and took M.P.'s cell phone to prevent her from reporting the robbery.

¶3 Because M.P. spoke only Spanish, she testified through an interpreter at Webster's trial. When asked on direct examination whether she had ever seen Webster before, M.P. responded affirmatively and stated, "Before there was a robbery. On two occasions she went in [to the store] with her daughter and son-in-law. The son-in-law is Mexican, and the man was sending money." When asked when she first saw Webster in the store in relation to the date of the robbery, M.P. testified, "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 State then asked whether the man sent money to Mexico on both of the prior occasions when he came into the store with Webster, and M.P. responded, "Two times, yes. He was a client there. Every two weeks when they get paid, they send money to Mexico." The State then asked whether that man "came in more times than" Webster. M.P. responded, "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.”

¶4 At that point, defense counsel requested a side bar. Outside the jury’s presence, counsel informed the circuit court he believed there was “a problem with the translation,” based on the discrepancy between M.P.’s initial testimony that Webster came into the store with her daughter and son-in-law, and her subsequent testimony that the man came to the store with his daughter. In response to counsel’s concern, the court asked M.P. whether the man who sent money to Mexico “ha[d] a daughter sometimes,” and M.P. responded, “The daughter of the lady.” The court then asked M.P. whether there were “two women and one man” who came into the store, and M.P. responded, “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.”

¶5 Defense counsel then cited a second inaccuracy in the interpreter’s translation. According to the interpreter, when describing the clothing worn by the robber, M.P. had stated, “She was wearing a ski mask. One of those ones where you can only see the ears and the mouth.” Defense counsel speculated M.P. had actually said she could only see the robber’s eyes and mouth. Counsel stated, “[W]ith all due respect to the translator, I don’t think we’re getting an accurate translation here.” The circuit court responded, “The translator did indicate ears and eyes [sic], but the gesture of the witness immediately before that was around her eyes. I believe that was an incorrect translation or the witness misspoke, and either is possible. So I will do nothing to change that.” Counsel then clarified, “I’m not so much asking you to change it on the record. I’m concerned about the quality of the translation. And what the Court is going to do about that, I have no clue.” In response, the court stated the discrepancy regarding the ski mask was “a

very minor thing, and I think nobody on the jury was misled just as I was not misled, because the gestures of the witness were very clear.”

¶6 A recess was then taken, after which the interpreter informed the circuit court she had “spoke[n] during the break to Spanish speaking witnesses,” including M.P.’s daughter, “asking them if they had heard me make any mistakes during my rendition, and their reply was no.” The court then took testimony from M.P.’s daughter, who, contrary to the interpreter’s assertion, testified the interpreter had mistranslated M.P.’s testimony on two occasions. First, the daughter stated M.P. said “eyes,” rather than “ears,” when describing the parts of the robber’s face that were visible through the ski mask. Second, the daughter stated M.P. had testified the man who wired money came into the store with “his wife or girlfriend[,] which is [Webster’s] daughter.” M.P.’s daughter testified she did not notice any other problems with the translation of her mother’s testimony, and the “great majority” of the translation was accurate.

¶7 Based on the testimony of M.P.’s daughter, defense counsel moved to disqualify the interpreter and strike all of the testimony she had translated. Defense counsel emphasized that the interpreter had told the court she had spoken to witnesses who confirmed the accuracy of her translation, but that turned out to be untrue. Counsel therefore asserted, “We have an honesty issue ... regarding this interpreter.” In response, the State suggested a curative instruction might be appropriate, and it also offered to ask M.P. additional questions in the jury’s presence to clarify her testimony regarding the ski mask.

¶8 The circuit court denied defense counsel’s motion to disqualify the interpreter and strike M.P.’s testimony. The court explained:

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 substantial correct interpretation and, therefore, we can proceed.

¶9 The circuit court instructed the State to ask M.P. "about whether the eyes were the visible part of the ski mask so we get a clarification there." The following exchange subsequently occurred after the jury returned to the courtroom:

[STATE:] And we were also asking about the mask that she was wearing. This mask, what could you see? That is, what could you see on the person themselves?

[M.P.:] Nothing because it was all black. It was a black mask like this, all of it.

[STATE:] And could you see eyes, mouth, anything like that?

[M.P.:] Only the mouth is what you can see. I couldn't see the color of the eyes or the color of the skin. The only—that was the only thing that was open, and the rest of it was closed.

¶10 Thereafter, in his cross-examination of M.P., defense counsel highlighted a third inaccuracy in the interpreter's translation of M.P.'s testimony. Counsel observed that, when M.P. was asked at the beginning of her testimony to spell her surname, the interpreter had translated the last letter of her surname as an "S." M.P. clarified her surname actually ends with the letter "Z."

¶11 The jury ultimately found Webster guilty of all four charged counts, and this appeal follows.

DISCUSSION

I. Webster's motion to disqualify the interpreter and strike M.P.'s testimony

¶12 Webster first argues on appeal that the circuit court erred by denying her motion to disqualify the interpreter who translated M.P.'s trial testimony and to strike the translated testimony. "The selection of a suitable person as an interpreter is within a [circuit] court's discretion." *State v. Besso*, 72 Wis. 2d 335, 343, 240 N.W.2d 895 (1976). "A circuit court's discretionary decision will not be reversed if it has a rational basis and was made in accordance with accepted legal standards in view of the facts in the record." *State v. Giese*, 2014 WI App 92, ¶16, 356 Wis. 2d 796, 854 N.W.2d 687, *review denied*, 2015 WI 24, 862 N.W.2d 602.

¶13 The parties dispute the proper standard to apply when assessing a challenge to an interpreter's performance. Webster cites Wisconsin's "Code of Ethics for Court Interpreters," *see* SCR 63.001 to 63.10, which states in relevant part that an interpreter "shall render *a complete and accurate interpretation* ... 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 (emphasis added). Based on this language, Webster argues the court was required to disqualify the interpreter and strike M.P.'s testimony. Webster essentially contends that any mistake in translation made by an interpreter, no matter how trivial, is grounds to disqualify the interpreter and strike the translated testimony.

¶14 There are several problems with Webster's argument regarding SCR 63.01. First, Webster never argued in the circuit court that SCR 63.01 required the court to disqualify the interpreter or strike M.P.'s testimony based on errors in the interpreter's translation. We generally decline to consider arguments raised for the

first time on appeal. *Estate of Hegarty ex rel. Hegarty v. Beauchaine*, 2001 WI App 300, ¶10, 249 Wis. 2d 142, 638 N.W.2d 355. Second, Webster cites no legal authority for the proposition that SCR 63.01 defines the standard a court must apply when exercising its discretion to determine whether to disqualify an interpreter. Third, we are not persuaded that SCR 63.01, by requiring a “complete and accurate interpretation,” mandates disqualification of an interpreter based on even minor, inconsequential mistakes. The comment to SCR 63.01 clarifies that 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” SCR 63.01 (comment) (emphasis added). Although the comments to SCR ch. 63 are “not adopted,” they “are intended as guides to interpretation.” SCR 63.004. The comment to SCR 63.01 suggests that a word-perfect translation is not required of an interpreter under all circumstances. We therefore decline to adopt Webster’s position that the interpreter in this case should have been disqualified pursuant to SCR 63.01 solely because she failed to provide an error-free translation.¹

¶15 Instead, we agree with the State that the proper standard for assessing an interpreter’s performance is set forth in *Besso*. There, our supreme court held that when an interpreter’s performance is challenged, it is the challenger’s burden to show that the interpreter was deficient. *Besso*, 72 Wis. 2d

¹ Webster also cites *United States v. Long*, 301 F.3d 1095, 1105 (9th Cir. 2002), for the proposition that “[t]he general standard for interpreters requires continuous word-for-word translation.” However, *Long* actually states, “While the general standard for interpreters requires continuous word-for-word translation, *occasional lapses in the standard will not necessarily contravene a defendant’s constitutional rights.*” *Id.* (emphasis added). Thus, contrary to Webster’s suggestion, *Long* does not support her argument that any errors in an interpreter’s translation require a circuit court to disqualify the interpreter and strike the translated testimony.

at 343. The court further held that “[a circuit] 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.* “Although a [circuit] court has the duty to choose the most competent and the least biased person available, the defendant must show that some injustice has resulted because of the appointment of the interpreter.” *Id.*²

¶16 Here, Webster has failed to show that any of the errors committed by the interpreter, whether considered individually or together, were sufficiently prejudicial to warrant relief.³ Webster first cites the interpreter’s apparent mistranslation regarding the identity of one of the individuals with whom Webster came into the store prior to the robbery. As noted above, according to the interpreter’s translation, M.P. initially testified Webster came into the store before the robbery with her daughter and son-in-law, but she subsequently stated the man was accompanied by “his daughter.” M.P.’s daughter informed the court the interpreter’s reference to the man’s daughter was inaccurate, and her mother

² Webster asserts the standard set forth in *State v. Besso*, 72 Wis. 2d 335, 240 N.W.2d 895 (1976), is inapplicable due to factual differences between *Besso* and this case. She observes that: (1) *Besso* involved an interpreter translating for a non-English-speaking defendant at a plea hearing, rather than translating a witness’s testimony at trial; (2) there was evidence in *Besso* that the defendant could understand some English; and (3) there was no assertion in *Besso* that the interpreter made any error in translation. We do not view these factual differences as significant. *Besso* sets forth a general standard for assessing an interpreter’s performance when that performance is challenged on appeal. *See id.* at 343. Nothing in *Besso* suggests that standard is restricted to the specific factual circumstances that were before the *Besso* court.

³ The circuit court found that the interpreter’s mistranslation of the word “eyes” as “ears” did not prejudice Webster, describing that error as “a very minor thing.” The court did not make any express finding regarding whether other mistranslations raised on appeal prejudiced Webster. However, if a circuit court fails to adequately explain its reasoning, we will search the record for reasons to sustain its discretionary decision. *State v. Manuel*, 2005 WI 75, ¶24, 281 Wis. 2d 554, 697 N.W.2d 811. For the reasons explained below, we conclude the record supports a conclusion that Webster was not prejudiced by any of the interpreter’s errors.

actually testified Webster came to the store with a man and “his wife or girlfriend[,] which is [Webster’s] daughter.”⁴

¶17 Webster was not prejudiced by the discrepancy regarding the identity of the individual who accompanied Webster and her son-in-law to the store prior to the robbery. The testimony regarding Webster’s earlier visits to the store was relevant to show that she was aware the store processed money transfers to Mexico, and she therefore chose to rob the store because she knew it would have significant amounts of cash on hand. M.P.’s testimony supported this inference, regardless of the interpreter’s apparent mistranslation. The only question raised by the mistranslation was whether Webster and her son-in-law were accompanied by Webster’s daughter or by the son-in-law’s daughter. However, this discrepancy did not affect the salient points of M.P.’s testimony that she saw Webster in the store before the robbery, and Webster was with someone who was sending money. While Webster argues the mistranslation was relevant to M.P.’s “identification of the robber,” M.P. never actually identified Webster as the robber during her trial testimony. Moreover, although defense counsel brought this mistranslation to the court’s attention outside the jury’s presence, he failed to

⁴ We are not wholly convinced a mistranslation occurred in this regard. M.P. initially testified Webster came into the store on two previous occasions with her daughter and son-in-law. She was subsequently asked whether “that man” came in more times than Webster. She responded, “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.”

When M.P. made the statement regarding the man’s “daughter,” she appears to have been referring to other occasions when the man came into the store, not the two occasions when he came in with Webster. Nevertheless, the State does not dispute Webster’s assertion, which seems to be supported by the testimony of M.P.’s daughter, that the interpreter’s reference to the man’s daughter was a mistranslation. We therefore assume, for purposes of this opinion, that a mistranslation did in fact occur.

address it during his subsequent cross-examination of M.P. This suggests that even defense counsel did not view this particular mistranslation as being significant to the determination of Webster's guilt.

¶18 Webster next cites the interpreter's mistake regarding the parts of the robber's face that were visible through the ski mask. According to the interpreter, M.P. testified the ski mask was "[o]ne of those ones where you can only see the ears and the mouth." However, the circuit court observed that M.P. gestured to her eyes when describing the ski mask, and M.P.'s daughter later confirmed her mother said "eyes" rather than "ears."

¶19 Again, Webster has failed to show that she was prejudiced by this mistranslation. It is common knowledge that ski masks have holes for the mouth and eyes, but not for the ears. *See, e.g.*, NEW OXFORD AMERICAN DICTIONARY 1598 (2001) (defining "ski mask" as "a protective covering for the head and face, with holes for the eyes, nose, and mouth"); WEBSTER'S NEW COLLEGIATE DICTIONARY 1088 (1977) (defining "ski mask" as "a knit fabric mask that covers the head, has openings for the eyes, mouth, and sometimes the nose, and is worn esp. by skiers for protection from the cold"). Thus, the jury likely understood that M.P. meant eyes when she described the parts of the robber's face that were visible through the ski mask, even though the interpreter said ears. This impression would have been reinforced by the fact that M.P. gestured to her eyes when describing the features visible through the ski mask. In addition, M.P. subsequently testified that she could not discern the robber's eye color, which suggests she was able to see the robber's eyes, but not in detail. On this record, it is highly unlikely the jury was misled by the interpreter's mistranslation of the word "eyes" as "ears."

¶20 Even more importantly, whether M.P. could see the robber’s eyes through the ski mask was ultimately irrelevant to a determination of Webster’s guilt. As noted above, M.P. did not identify Webster as the robber during her trial testimony. Webster does not point to any other issue at trial to which M.P.’s testimony regarding the features visible through the ski mask was potentially relevant. Accordingly, Webster has failed to show she was prejudiced by the interpreter’s mistranslation of the word “eyes” as “ears.”

¶21 Webster also cites the interpreter’s erroneous statement that M.P.’s surname ended in an “S” instead of a “Z.” However, we decline to consider this argument because Webster failed to raise this error in the circuit court as a basis for her motion to disqualify the interpreter and strike the translated testimony. *See Estate of Hegarty*, 249 Wis. 2d 142, ¶10. Moreover, regardless of the fact that the spelling of the victim’s last name was wholly irrelevant to whether Webster committed the charged offenses, defense counsel noted and corrected the mistranslation when cross-examining M.P. As a result, the jury was not actually misinformed regarding the spelling of M.P.’s last name.

¶22 In her reply brief, Webster cites *Lujan v. United States*, 209 F.2d 190 (10th Cir. 1993), for the proposition that “[p]rejudice, 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.” She then argues that, because she has cited specific errors in the interpreter’s translation that conveyed an erroneous meaning to the jury, she must have been prejudiced by the interpreter’s performance. This argument is unavailing. *Lujan* did not hold, as Webster suggests, that prejudice occurs as a matter of law every time an interpreter mistranslates a witness’s testimony so as to convey an erroneous meaning to the jury. The *Lujan* court simply concluded that, on the

record before it, there was no evidence indicating “any part of any witness[’s] testimony was misinterpreted to convey an erroneous meaning or impression to the jury,” and for that reason the defendant had failed to show he was prejudiced by the court’s choice of interpreter. *Id.* at 192. It does not follow from that conclusion that whenever an interpreter makes a mistake in translating a witness’s testimony, no matter how inconsequential, the error is per se prejudicial.

¶23 Webster also asserts she has “shown facts which call into question the credibility of the interpreter.” Webster appears to be referring to the interpreter’s statement that she had spoken to Spanish-speaking observers, including M.P.’s daughter, who confirmed the accuracy of her translation. That statement was subsequently contradicted by M.P.’s daughter, who testified the translation was inaccurate in two respects. Assuming without deciding that these circumstances raise a concern regarding the interpreter’s credibility, we are nevertheless unpersuaded by Webster’s argument that the circuit court erroneously exercised its discretion by refusing to disqualify the interpreter. Webster does not explain why facts pertaining to the interpreter’s credibility are relevant, given that we have already concluded Webster was not prejudiced by any of the interpreter’s errors.

¶24 Finally, Webster asserts federal courts have recognized “that an interpreter’s deficiencies may implicate both the right to due process and to confrontation.” She therefore argues the circuit court “should have considered that the inaccuracies [in the interpreter’s translation] compromised Webster’s constitutional rights.” In particular, she argues the court was required to “balance [her] right[] to confrontation against the public’s interest in [the] economical administration of criminal law,” and the court erroneously exercised its discretion by failing to do so.

¶25 We reject Webster’s constitutional argument for two reasons. First, Webster failed to argue in the circuit court that any of her constitutional rights were implicated by the errors in the interpreter’s translation of M.P.’s testimony. As noted above, we generally refuse to consider arguments raised for the first time on appeal. *Estate of Hegarty*, 249 Wis. 2d 142, ¶10; *see also State v. Rogers*, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995) (“We will not ... blindside trial courts with reversals based on theories which did not originate in their forum.”). Second, Webster’s constitutional argument is conclusory and inadequately developed. Although she states, generally, that an interpreter’s deficiencies “may implicate” a defendant’s rights to due process and confrontation, she does not develop any specific argument explaining how those rights were violated in the instant case. We need not address inadequately developed arguments. *See State v. Pettit*, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

¶26 For the foregoing reasons, we conclude Webster was not prejudiced by any errors in the interpreter’s translation of M.P.’s testimony. We therefore reject Webster’s argument that the circuit court erroneously exercised its discretion by denying her motion to disqualify the interpreter and strike the translated testimony.

II. Circuit court’s failure to determine whether the interpreter was qualified as an expert witness

¶27 As Webster correctly notes, under Wisconsin law, an interpreter must be qualified as an expert witness. *See* WIS. STAT. § 906.04; *State v. Santiago*, 206 Wis. 2d 3, 23, 556 N.W.2d 687 (1996). Webster cites the Wisconsin Court Interpreters Handbook, which provides the following list of

questions that “may be used in the voir dire examination of a potential court interpreter”:

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 a court interpreter 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 now to 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 the Wisconsin Courts? Do you understand it and agree to abide by it?

SUPREME COURT OF WISCONSIN, OFFICE OF COURT OPERATIONS, WISCONSIN COURT INTERPRETERS HANDBOOK 6-7 (2004), <https://www.wicourts.gov/services/interpreter/docs/handbook.pdf>. Webster observes that the circuit court in this case failed to conduct the inquiry prescribed by the Wisconsin Court Interpreters Handbook, or any similar inquiry, to determine whether the interpreter

was qualified as an expert. Webster therefore argues the court erroneously exercised its discretion by permitting the interpreter to translate M.P.'s testimony. See *Martindale v. Ripp*, 2001 WI 113, ¶28, 246 Wis. 2d 67, 629 N.W.2d 698 (circuit court has discretion to determine whether a witness is qualified as an expert).

¶28 As a general matter, we recommend that circuit courts use the procedure outlined in the Wisconsin Court Interpreters Handbook, or a similar procedure, to ascertain whether a proposed interpreter has the background, experience, and expertise necessary to be qualified as an expert witness. Here, however, the circuit court's failure to do so does not warrant reversal because Webster never challenged the interpreter's qualifications in the circuit court. She did not raise any concern about the interpreter prior to the start of M.P.'s testimony. Although she objected during M.P.'s testimony and moved that the interpreter be disqualified, she did so based on errors in the interpreter's translation, not based on any perceived deficiency in the interpreter's qualifications.

¶29 “To preserve an alleged error for review, ‘trial counsel or the party must object in a timely fashion with specificity to allow the court and counsel to review the objection and correct any potential error.’” *State v. Torkelson*, 2007 WI App 272, ¶25, 306 Wis. 2d 673, 743 N.W.2d 511 (quoting *State v. Nielsen*, 2001 WI App 192, ¶11, 247 Wis. 2d 466, 634 N.W.2d 325). Had Webster specifically objected to the interpreter's qualifications in the circuit court, either before the start of M.P.'s testimony or in conjunction with her motion to disqualify the interpreter, the circuit court could have corrected any potential error by making a record regarding the interpreter's qualifications. Because Webster failed to bring the issue to the circuit court's attention, she has forfeited her right to raise it on

appeal. See *Tatera v. FMC Corp.*, 2010 WI 90, ¶19 n.16, 328 Wis. 2d 320, 786 N.W.2d 810; see also *Estate of Hegarty*, 249 Wis. 2d 142, ¶10.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

