STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT IV

Case No. 2018AP873-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

EDWARD L. BRANSON,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN THE LACROSSE COUNTY CIRCUIT COURT, THE HONORABLE SCOTT L. HORNE, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

At Defendant-Appellant Edward L. Branson's trial for possession with intent to deliver methamphetamine, a detective testified about the demeanor of Branson and his co-actor during their respective police interviews.

1. Did Branson receive ineffective assistance when his trial attorney failed to object to this testimony?

The circuit court answered, "no."

This Court should affirm.

2. Is Branson entitled to a new trial in the interest of justice?

The circuit court answered, "no."

This Court should answer, "no."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State does not request oral argument or publication. This case can be resolved by applying settled legal principles to the facts.

INTRODUCTION

Two officers with the La Crosse Police Department stopped Branson's car for a seatbelt violation and a flat tire. During the traffic stop, the officers located a bag containing over 22 grams of methamphetamine packaged for sale. In addition, Branson had nearly $1900 in cash on his person.

The State charged Branson with one count of possession with intent to distribute methamphetamine as a repeater and one count of operating a motor vehicle while revoked as a repeater. Branson pleaded guilty to operating while revoked and went to trial on the drug charge, where a

jury found him guilty. The circuit court sentenced him to five years of initial confinement and four years of extended supervision.

After his conviction, Branson sought a new trial in the interest of justice on the ground that Officer Tolvstad had improperly testified at trial about the eye contact of both Branson and his passenger during police questioning. Branson also contended that his trial counsel's failure to object to this testimony constituted ineffective assistance of counsel. After an evidentiary hearing, the circuit court denied Branson's request for a new trial. Branson now appeals that decision on the same grounds he argued in the circuit court.

This Court should affirm for two reasons. First, Branson did not receive ineffective assistance from his trial counsel because counsel's performance was not deficient and did not prejudice Branson. Second, Branson is not entitled to a new trial in the interest of justice because the real controversy was fully tried.

STATEMENT OF THE CASE

On December 19, 2016, Officers Dan Ulrich and Andrew Tolvstad were on duty in the city of La Crosse. (R. 59:33.) While on patrol, the officers saw a car with a very flat tire and a driver without his seatbelt fastened, and they executed a traffic stop. (R. 59:33.) Branson was driving the car, and Chad Queen was riding in the front passenger seat. (R. 59:34.)

As the officers approached the car, Officer Ulrich saw Queen "making several movements with his left hand." (R. 59:34.) Officer Tolvstad went to the driver's side of the car, and Officer Ulrich went to the passenger's side. (R. 59:35.) Officer Ulrich had Queen open the door, and after

noticing that Queen looked nervous, asked him if there were any drugs in the car. (R. 59:35.) Queen told Officer Ulrich that there was methamphetamine in the car, which Officer Ulrich then recovered from between the passenger seat and the center console. (R. 59:36.) The methamphetamine was packaged in 14 individual "gem bags" and weighed in total about 22 grams. (R. 59:36–37, 86.)

Officer Tolvstad and Officer Ulrich arrested Branson and Queen and, during a search incident to Branson's arrest, found nearly $1900 in cash and a cell phone on him. (R. 59:85–86.) With the assistance of another officer, Officer Tolvstad and Officer Ulrich took Branson and Queen to the La Crosse Police Department for questioning. (R. 59:42.)

Officer Tolvstad then interviewed both Queen and Branson. (R. 59:87.) During these interviews, Officer Tolvstad noted that Queen was very talkative, answered all of his questions, and maintained eye contact. (R. 59:88–89.) Branson, however, gave only vague answers and avoided eye contact. (R. 59:88–89.) Queen told Officer Tolvstad that when police pulled them over, Branson took the bag of methamphetamine from his pants and told Queen to take it. (R. 59:59.) Queen said he told Branson he did not want the drugs, and shoved the bag toward the back seat to avoid it looking like the drugs were his. (R. 59:59.) Branson, meanwhile, told Officer Tolvstad that the cell phone found on him was not his, and that he was unable to unlock it. (R. 59:91.) However, when Officer Tolvstad dialed the number Queen had for Branson, the phone in question rang, which Branson was unable to explain. (R. 59:91–92.)

The State charged Branson with one count of possession with intent to deliver methamphetamine, and one count of operating a motor vehicle while revoked. (R. 5:1.) Both charges included repeater enhancements. (R. 5:1.) On

March 22, 2017, Branson pleaded guilty to the charge of operating while revoked, and requested a jury trial on the possession with intent charge. (R. 51:3.)

During a one-day trial on April 17, 2017, Officer Tolvstad testified about his interviews of both Queen and Branson. (R. 59:89.) As part of his testimony, Officer Tolvstad recounted his observation that Queen was "very talkative. He would look [Officer Tolvstad] in the eye, he seemed concerned about the incident." (R. 59:88.) Queen also gave Officer Tolvstad permission to look through his phone. (R. 59:88.) Officer Tolvstad did so, and did not see any activity on the phone suggesting Queen was involved in drug dealing. (R. 59:89.)

By contrast, Officer Tolvstad said that Branson did not look him in the eye, and that when asked a question, "either he would not answer it or give some sort of vague answer." (R. 59:89.) Branson did not object to this testimony. (R. 59:88–89.) Nor did Branson put forth any testimony in his own defense. (R. 59:124.)

At closing, the State reiterated Officer Tolvstad's testimony about his interviews of Queen and Branson: "[F]irst is [Queen]. Officers testified that he maintained good eye contact with them. He had consistent statements . . . . He was cooperative." (R. 59:140.) The State contrasted Queen's behavior during the interview with Branson's: "[Branson] was the opposite. When he was talking to the officers, he avoided eye contact. He lied to them . . . . He was uncooperative. He refused to give them access to his phone." (R. 59:140–41.) Again, Branson did not object. (R. 59:140–41.) Instead, his counsel argued that the State had failed to meet its burden to show that Branson had actually possessed the methamphetamine. (R. 59:148.) The jury found Branson guilty, and the circuit court, the Honorable

Scott L. Horne, presiding, sentenced Branson to five years of initial confinement and four years of extended supervision. (R. 59:158, 61:17.)

On December 28, 2017, Branson filed a postconviction motion for a new trial. (R. 40.) The motion argued that Branson's trial counsel was ineffective for failing to object to Officer Tolvstad's testimony about eye contact, and that Branson was entitled to a new trial in the interest of justice because of Officer Tolvstad's testimony. (R. 40:1.)

The circuit court held a *Machner* hearing on April 16, 2018, at which Branson's trial counsel testified that he was unfamiliar with *State v. Echols*, 2013 WI App 58, 348 Wis. 2d 81, 831 N.W.2d 768, and *United States v. Williams*, 133 F.3d 1048 (7th Cir. 1998)—cases that Branson relied on to support his ineffective assistance claim. (R. 64:4–5.) Branson's counsel conceded that there was no tactical reason for him not to object to Tolvstad's testimony about eye contact. (R. 64:5.) He also stated that in retrospect, he was not sure whether he would have objected had he known about *Echols* and *Williams*. (R. 64:5.)

The circuit court found that trial counsel's performance was "not objectionable" because the relevant testimony was only about demeanor and did not include testimony as to Officer Tolvstad's opinion about the meaning of that demeanor. (R. 64:13–14.) The circuit court also determined that trial counsel's performance did not prejudice Branson because of the significant amount of other evidence against him. (R. 64:14–15.) The court also declined to grant Branson's request for a new trial in the interest of justice. (R. 64:14–15.)

Branson appeals.

STANDARD OF REVIEW

Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). A trial court's findings of fact, "the underlying findings of what happened," will not be overturned unless clearly erroneous. *State v. Pitsch*, 124 Wis. 2d 628, 634, 369 N.W.2d 711 (1985). The ultimate determination of whether counsel's performance was deficient and prejudicial are questions of law which this Court reviews independently. *Id*.

Whether a witness has improperly opined on the credibility of another witness presents a legal question that this Court reviews de novo. *State v. Krueger*, 2008 WI App 162, ¶ 7, 314 Wis. 2d 605, 762 N.W.2d 114. A reviewing court must examine the testimony's purpose and effect to determine whether the opinion testimony violates *Haseltine*. *State v. Tutlewski*, 231 Wis. 2d 379, 388, 605 N.W.2d 561 (Ct. App. 1999).

As Branson asks this Court to grant a new trial in the interest of justice using its authority under Wis. Stat. § 752.35, there is no standard of review applicable to his claim.

ARGUMENT

I. Branson did not receive ineffective assistance from his trial counsel.

A. Legal principles

1. Ineffective assistance of counsel

Criminal defendants have the right to effective assistance of counsel. U.S. Const. amends. VI, XIV. To state a claim for ineffective assistance of counsel, the defendant must demonstrate: (1) that his counsel's performance was

deficient; and (2) that the deficient performance was prejudicial. *Strickland*, 466 U.S. at 687. The well-known *Strickland* standard applies to trial counsel, postconviction counsel, and appellate counsel. *State v. Balliette*, 2011 WI 79, ¶ 28, 336 Wis. 2d 358, 805 N.W.2d 334.

To establish deficient performance, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

To demonstrate prejudice, the defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. In other words, the question is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. *See also State v. Romero-Georgana*, 2014 WI 83, ¶¶ 39–41, 360 Wis. 2d 522, 849 N.W.2d 668.

2. Testimony about honesty

"Under Wisconsin law, a witness may not testify 'that another mentally and physically competent witness is telling the truth.'" *State v. Jensen*, 147 Wis. 2d 240, 249, 432 N.W.2d 913 (1988) (quoting *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984)). "The *Haseltine* rule is intended to prevent witnesses from interfering with the jury's role as the 'lie detector in the courtroom.'" *State v. Snider*, 2003 WI App 172, ¶ 27, 266 Wis. 2d 830, 668 N.W.2d 784 (quoting *Haseltine*, 120 Wis. 2d at 96). But a *Haseltine* violation will "not result in reversible error unless the opinion testimony creates too great a possibility that the jury abdicated its fact-finding role to the witness and did not

independently find the defendant's guilt." *State v. Patterson*, 2010 WI 130, ¶ 58, 329 Wis. 2d 599, 790 N.W.2d 909 (citation omitted).

And the *Haseltine* rule is not implicated when "neither the purpose nor the effect of [a witness's] testimony was to attest to [another witness's] truthfulness." *State v. Smith*, 170 Wis. 2d 701, 718–19, 490 N.W.2d 40 (Ct. App. 1992). For example, in *Smith*, an officer's testimony that he did not believe a witness's story during an interrogation was properly introduced to explain why the officer continued to interrogate the witness. *Id.* Similarly, in *Snider*, a detective did not violate *Haseltine* because he testified about the believability of the victim and the defendant when "he was conducting the investigation, not whether [the defendant] or the victim was telling the truth at trial." *Snider*, 266 Wis. 2d 830, ¶ 27; *see also State v. Miller*, 2012 WI App 68, ¶ 16, 341 Wis. 2d 737, 816 N.W.2d 331 (holding that a detective's telling Miller that Miller was lying in a videotaped interview did not implicate *Haseltine* because the statements were "made in the context of a pretrial police investigation" and was not sworn testimony commenting on Miller's testimony at trial).

In *State v. Echols*, the circuit court permitted a witness to testify that Echols eyes dropped, his head would go down, and he would stutter when he was lying. *Echols*, 348 Wis. 2d 81, ¶¶ 9–10. That testimony "went far beyond describing the [witness]'s perception of Echols at a particular moment" and characterized the witness as a person who presented himself as a "human lie detector," and was especially problematic because Echols stuttered at trial. *Id.* ¶¶ 11, 24, 27.

Similarly, in *State v. Romero*, the prosecutor asked several witnesses if the victim was an honest person. *State v. Romero*, 147 Wis. 2d 264, 267–68, 432 N.W.2d 899 (1988).

The prosecutor also asked witnesses, including a social worker and an officer, about the victim's reputation for truthfulness. *Id.* at 269–70. The Wisconsin Supreme Court held that their answers "clouded" the credibility issue and "pervaded the entire trial." *Id.* at 279. The court further held that there was "a significant possibility that the jurors, when faced with the determination of credibility, simply deferred to witnesses with experience in evaluating the truthfulness of victims of crime." *Id.* Therefore, the court reversed for a new trial. *Id.* at 280.

These cases establish that lay witness testimony about credibility or truthfulness must pervade the trial and usurp the jury's role in order to warrant reversal. They do not stand for the proposition that any testimony that allows the jury to make an inference about a defendant's truthfulness is improper.

B. Branson has not established that his trial counsel performed deficiently.

Branson's claim of deficient performance hinges on trial counsel's failure to object to Officer Tolvstad's testimony about Branson and Queen's body language during their respective police interviews. (Branson's Br. 12.) Because Officer Tolvstad's testimony was not improper, Branson's claim fails.

Unlike the testimony in *Echols*, the testimony in this case was not improper. *Echols* focused on testimony by the defendant's supervisor, who said that the defendant would stutter "every time" he lied. *Echols*, 348 Wis. 2d 81, ¶ 10. This court held that this testimony "went far beyond describing the [supervisor's] perception of Echols at a particular moment." *Id.* ¶ 24. Instead, the supervisor "extrapolated from a couple of instances . . . to opine that Echols *always* stutters when he lies. In other words, the [supervisor] presented herself as a human lie detector." *Id.*

Echols thus does not prohibit testimony about a person's body language or eye contact—it prohibits testimony purporting to state conclusively whether a person has been truthful. *See also Romero*, 147 Wis. 2d at 279.

Here, Officer Tolvstad did not offer any testimony about whether Branson and Queen were being truthful during their interviews. Instead, he simply described his "perception of [them] at a particular moment." *See Echols*, 348 Wis. 2d 81, ¶ 24. He stated that Branson looked down and avoided eye contact while Queen did not. (R. 59:88–89.) The jury was free to draw its own conclusions about the meaning of Officer Tolvstad's observations. Thus, his testimony was in line with the restrictions set by *Echols*, and it was not deficient performance for Branson's attorney not to object.

In addition to *Echols*, Branson cites *Williams* for the proposition that Officer Tolvstad's testimony was improper. (Branson's Br. 15–17.) However, *Williams* focuses on inadmissible hearsay testimony about an informant's identification of the defendant. *Williams*, 133 F.3d at 1051. While the Seventh Circuit did say the admission of testimony about the defendant's body language presented "some concerns," it is not clear that the court's reversal was based on the body language testimony. *Id.* at 1053.

Moreover, *Williams*, as well as *People v. Henderson* and *Tolliver v. State*—two related cases that Branson cites—are not binding in Wisconsin courts as they come from outside jurisdictions. *See Williams*, 133 F.3d 1048; *Tolliver v. State*, 922 N.E.2d 1272 (Ind. Ct. App. 2010); *People v. Henderson*, 915 N.E.2d 473 (Ill. App. Ct. 2009). Branson's suggestion that his trial counsel's performance was deficient—that it "fell below an objective standard of reasonableness"— for failure to make an argument based on non-binding case law is unpersuasive. *Strickland*, 466 U.S.

at 688. This Court should decline to hold that Branson's counsel was obligated to make such an argument.

C. Branson has not established that his trial counsel's performance prejudiced him.

This Court need not address prejudice because Branson's trial counsel did not perform deficiently. *See Strickland*, 466 U.S. at 687. However, even if this Court determines that counsel's performance fell below an objective standard of reasonableness, it should still affirm because the significant evidence against Branson establishes that counsel's performance did not prejudice him.

During Branson's trial, the State presented a significant amount of evidence apart from Officer Tolvstad's commentary about Branson and Queen's body language that supported the jury's finding of guilt. This evidence included Queen's testimony that the drugs were Branson's (R. 59:59), the fact that Queen could have just hidden the drugs if they were his (R. 59:40), the fact that there was no evidence of drug dealing on Queen's phone (R. 59:89), and the significant amount of cash found on Branson (R. 59:85–86). Moreover, the State presented the jury with independent evidence it could use to reach a conclusion about Branson's honesty, such as the fact that Queen's number for him rang the phone found in his pocket, even though Branson claimed the phone was not his. (R. 59:91–92.) In light of all of this evidence, even if Branson's counsel performed deficiently, that deficient performance did not prejudice him. His claim must therefore fail.

Branson contends that "the jury's determination depended substantially on an assessment of the credibility of Queen and Branson and the veracity of their statements." (Branson's Br. 18.) He points out that "[t]here was no confession, no eyewitness testimony [other than Queen's], no

'controlled buy' evidence, no physical evidence, and no evidence of communications regarding the sale of drugs involving Branson." (Branson's Br. 18.) However, there was other evidence that the jury was able to use to assess the relative credibility of both Branson and Queen. For Queen, the jury was able to witness his testimony, including Branson's attempts to impeach that testimony. The jury also heard testimony about the lack of any drug activity on Queen's phone. This was likely far more influential to the jury's credibility determination than Officer Tolvstad's testimony about Queen's eye contact during his interview.

As for Branson, the jury heard testimony about Branson's vague answers and inability to explain why Queen had the number for the phone that supposedly was not his. This again was likely to have created impressions about Branson's honesty. Although, as Branson points out, the State did mention Officer Tolvstad's testimony about eye contact during its summation, the State also discussed these other facts about Queen's and Branson's credibility. (R. 59:140–41.)

In sum, there was ample evidence for the jury to convict Branson even without the testimony about Queen and Branson's body language. Thus, counsel's failure to seek exclusion of the testimony did not prejudice Branson. This Court should therefore affirm.

II. The real controversy was fully tried.

A. Legal principles

Wisconsin Stat. § 752.35 confers discretionary authority on this Court to review a claim of error, reverse a judgment, and order a new trial in the interest of justice. *See Vollmer v. Luety*, 156 Wis. 2d 1, 17–19, 456 N.W.2d 797 (1990). An appellate court may order a new trial in the

interest of justice: "(1) whenever the real controversy has not been fully tried or (2) whenever it is probable that justice has for any reason miscarried." *Id*. at 16 (citation omitted).

The Wisconsin Supreme Court has recognized two situations when the real controversy has not been tried: first, when the jury does not have the opportunity to hear important evidence that bears on an important issue; and second, when the jury had before it improperly admitted evidence and "this material obscured a crucial issue and prevented the real controversy from being tried." *State v. Burns*, 2011 WI 22, ¶ 24, 332 Wis. 2d 730, 798 N.W.2d 166 (citation omitted).

Because "reversals under Wis. Stat. § 752.35 are rare and reserved for exceptional cases[,]" this Court should exercise this discretionary authority only "after all other claims are weighed and determined to be unsuccessful." *State v. Kucharski*, 2015 WI 64, ¶¶ 41, 43, 363 Wis. 2d 658, 866 N.W.2d 697.

B. Branson has not met his burden of demonstrating that his case is an exceptional one that warrants reversal in the interest of justice.

This case is both unexceptional and undeserving of reversal for a new trial in the interest of justice.

Branson's alternative argument is that the admission of Officer Tolvstad's testimony about eye contact so clouded the actual issue in this case that it prevented the real controversy from being tried. (Branson's Br. 22.) However, Branson has failed to meet his high burden to demonstrate that this is an "exceptional" case warranting discretionary reversal. *See Kucharski*, 363 Wis. 2d 658, ¶ 41. This Court should affirm.

As noted above, the real controversy is not tried when the jury had before it improperly admitted evidence and "this material obscured a crucial issue and prevented the real controversy from being tried." *Burns*, 332 Wis. 2d 730, ¶ 24. The State renews its contention that the testimony about Branson's and Queen's eye contact was not improperly admitted. It therefore cannot form the basis for discretionary reversal. *Id.*

However, even if this Court determines that the testimony about eye contact was improper, Branson still has failed to establish he is entitled to relief. In this case, the crucial issue is whether Branson possessed the methamphetamine found in the car he was driving. As evidence that he did, the State presented testimony from the passenger in that car—Queen—saying that the drugs were Branson's. (R. 59:59.) The State also presented evidence that Queen had no reason to lie because it would have been easier for him to simply hide the drugs in his clothing. (R. 59:40–41.) Indeed, there was no evidence of drug dealing on Queen's phone. (R. 59:89.) The State further presented evidence that Branson was being dishonest about owning the phone police found on him, and that the cash he was carrying was indicative of drug dealing activity. (R. 59:91–92, 113–14.) Thus, in all of the evidence presented to the jury, the testimony about Branson's and Queen's eye contact was only a small part.

Branson relies on *Romero* to support his contention that a new trial is warranted in the interest of justice. (Branson's Br. 22.) Unlike the facts in *Romero*, where the improper testimony pervaded the trial and usurped the jury's role as factfinder, it cannot be said that Officer Tolvstad's testimony "obscured" the matter in controversy. *See Romero*, 147 Wis. 2d at 279. This Court should affirm.

CONCLUSION

For the reasons set forth above, the State respectfully requests that this Court affirm Branson's judgment of conviction and the circuit court's denial of his postconviction motion.

Dated this 30th day of October, 2018.

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) and (c) for a brief produced with a proportional serif font. The length of this brief is 3,817 words.

_____
JOHN A. BLIMLING
Assistant Attorney General

CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 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. § 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 30th day of October, 2018.

_____
JOHN A. BLIMLING
Assistant Attorney General