STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 4

Appeal No. 2018AP000873-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,

vs.

EDWARD L. BRANSON, Defendant-Appellant

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

DEFENDANT-APPELLANT'S REPLY BRIEF

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Tolvstad's testimony was improper in its purpose and effect.

On page eight of the State's brief, the State cites *State v. Smith*, 170 Wis.2d 701, 718-719, 490 N.W.2d 40 (Ct. App. 1992), for the proposition that 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." In *Smith*, the purpose and effect of the testimony at issue was to explain the circumstances of an interrogation of an accomplice and why the detective continued on with the interrogation in the manner that he did. *Id.* at 719. The detective testified that the interrogation continued until the accomplice gave a statement that the detective felt was the truth. *Id.* at 706. The court found that because the testimony was not an attempt to bolster the accomplice's testimony, it was not improper under *Haseltine* and *Romero. Id.* at 719. A similar situation occurred in *State v. Patterson*, 2010 WI 130, 329 Wis.2d 599, 790 N,W.2d 909, also cited by the State at page eight. The court found that the testimony at issue was offered to explain an investigator's actions in *not* continuing on with the interrogation rather than to establish the truth or falsity of the

witness's statements. *Id.* at 64. Like in *Smith*, such circumstances did not constitute reversible error under *Haseltine*. Id.

The circumstances before this court are different than those presented in *Smith* and *Patterson*. Here, the State does not even allege that there was some other purpose for Tolvstad's testimony other than to bolster Queen's testimony and cast doubt on statements received from Branson. Perhaps this is because the State cannot credibly do so. The testimony from Tolvstad at issue in this case specifically involved his perceptions and comparative assessment of the demeanor and behavior of Queen and Branson during their respective interviews. The only realistic purpose of offering such testimony was to support Queen's testimony and discredit statements made by Branson. It was squarely the type of "human lie detector" evidence found to be improper in *Williams*, *Henderson* and *Tolliver*.

Williams cannot be rejected as easily as the State suggests.

In the State's brief, the State asserts that *Williams*, as well as *Henderson* and *Tolliver,* are not binding on this court as they come from outside jurisdictions. See State's brief at page 10. It is true that

these cases arise from outside jurisdictions. However, *Williams* and *Henderson* are specifically cited by this court in *Echols*:

> In other words, the safety director presented herself as a human lie detector. See *United States v. Williams*, 133 F.3d 1048, 1052-53 (7th Cir. 1998) (police officer's "human lie detector" testimony that defendant avoided eye contact and lowered head while being questioned about a bank robbery was inadmissible opinion testimony); see also *People v. Henderson*, 915 N.E.2d 473, 477-78 (Ill. App. 2009) (detective's testimony regarding defendant's body language during interview as indicating deception was inadmissible, but harmless error).

Echols, 2013 WI App 58 at ¶24.[1] The above references by this court in *Echols* plainly refer to the impropriety of body language as it relates to truthfulness or lack thereof. It is true that *Echols* itself involved a different factual situation than this case presents. *Williams* however involved the same or substantialy similar factual situation. As discussed in Branson's brief-in-chief at pages 15-16, in *Williams*, the impermissible testimony described only the suspect's demeanor and reactions during the interview, without an interpretation as to what the demeanor or reactions meant. *Williams,* 133 F.3d at 1052. There was no additional testimony

[1] The State's brief curiously omits any reference to or acknowledgment of the above references from *Echols*.

by the agent to interpret the meaning of the suspect's demeanor or reactions. Nonetheless, the Seventh Circuit concluded that such testimony in itself improperly bolstered other government evidence and required reversal. *Williams*, 133 F.3d at 1053. It is true that the court focused on the inadmissible hearsay in the form of an informant's identification of the defendant, but the court also expressly found the agent's testimony about demeanor to be improper and prejudicial:

> *These observations are improper characterizations of the defendant and useless in the determination of innocence or guilt, and in fact, they tend to prejudice the jury. It is Williams' denial of guilt that is important and not the manner in which he communicates it.*

Williams, 133 F.3d at 1053. *Williams* plainly indicates that the type of testimony provided by Tolvstad in this case was improper. Further, Williams plainly indicates that such type of testimony was prejudicial. *Williams* as such directly supports Branson's arguments. The State's simple dismissal of *Williams* as a case from an "outside jurisdiction," is unpersuasive. This court has already recognized and relied upon *Williams* in the development of

its own jurisprudence. This court could of course qualify or clarify its reliance on *Williams,* but as it stands, *Williams* instructs that the testimony at issue in this case was improper and prejudicial. Trial counsel should have utilized *Echols* and *Williams* to object to Tolvstad's testimony and move for a mistrial. His failure to do so was deficient and prejudicial.

There was not a "significant amount of evidence" against Branson.

In attempting to demonstrate a lack of prejudice, the State asserts that 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." See State's brief at page 11. The State specifically refers to "Queen's testimony that the drugs were Branson's, the fact that Queen could have just hidden the drugs if they were his, the fact that there was no evidence of drug dealing on Queen's phone, and the significant amount of cash found on Branson." See State's brief at page 11. The State also cites the fact that "Queen's

number for (Branson) rang the phone found in (Branson's) pocket, even though Branson claimed the phone was not his." See State's brief at page 11. Apart from Queen's testimony, all such other evidence was indirect and highly circumstantial. The jury's determination depended substantially on an assessment of the credibility of Queen and Branson and the veracity of their statements. Other than Queen's own self-serving statements, there was no other evidence to support the allegation that the methamphetamine was Branson's and not his. There was no confession, no eyewitness testimony, no "controlled buy" evidence, no physical evidence, and no evidence of communications regarding the sale of drugs involving Branson. Without Queen's testimony, the State's case against Branson was weak. As such, the State, not surprisingly, attempted to buttress Queen's testimony via that of Tolvstad. It of course then argued the significance of such testimony during closing argument. If Tolvstad's testimony regarding demeanor had no significance, it is curious that the State introduced it in the first place and

emphasized it during closing. The State's effort to downplay the significance of the improperly admitted evidence is unpersuasive. This court should recognize, as the Seventh Circuit did in *Williams*, that such evidence was improper and prejudicial.

CONCLUSION

For the reasons stated above and in Branson's brief-in-chief, this court should reverse and remand the case for a new trial.

Dated this _____day of November 2018.

Respectfully submitted,
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CERTIFICATION

I hereby certify that this brief meets the form and length requirements of Wis. Stat. Rule 809.19(8)(b) and (c) in that 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 1287 words.

Dated this ___day of November 2018.

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CERTIFICATION OF COMPLIANCE WITH 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 s. 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 upon all opposing parties.

Dated this ___ day of November 2018.

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