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Case Number 523,2013 D

IN THE SUPREME COURT OF THE STATE OF DELAWARE

BRANDON WILLIAMS,	)	
	)	
Defendant-Below,	)	
Appellant	)	
	)	
v.	)	**No. 523, 2013**
	)	
	)	
	)	
STATE OF DELAWARE	)	
	)	
Plaintiff-Below,	)	
Appellee.	)	

APPELLANT'S REPLY BRIEF

ON APPEAL FROM THE SUPERIOR COURT IN AND OF NEW CASTLE COUNTY

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DATE: JANUARY 29, 2014

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I. THE TRIAL COURT VIOLATED WILLIAMS' RIGHT TO A FAIR TRIAL WHEN IT ALLOWED THE STATE TO EMPHASIZE THROUGH 4 POLICE OFFICER'S AND CLOSING ARGUMENT THE FACT THAT HE WAS ARRESTED IN THIS BURGLARY CASE, AFTER POLICE RESPONDED TO A CALL OF AN ATTEMPTED BURGLARY AT ANOTHER LOCATION.

The State is simply wrong in its assertion that details of the alleged burglary attempt at the gas station were "necessary to explain the sequence of events during the approximate 45 minute time-frame between 11:00 p.m. and 11:45 p.m." Resp.Br. at 8. The Fisher burglary was not called in until 11:18 p.m. A-12, 27. Williams' defense was that he did not burglarize the Fishers' home but received the wallet at some point then used the credit card unlawfully at the Rite Aid. The store receipt revealed that he used the card at 11:17 p.m. It was between 11:25 p.m. and 11:30 p.m. that police heard the radio dispatch about the alleged attempted burglary at the gas station.

Arguably, the time police heard the dispatch about the alleged attempted burglary was relevant. However, police would not have been put in "the false position of seeming just to have happened upon the scene" by providing a more limited and less prejudicial statement regarding that dispatch. Resp.Br. at 9. The officers could have testified that between 11:25 p.m. and 11:30 p.m. they received an unrelated call regarding an individual in the area who matched Williams' general description. As a

result of investigating that call, they located Williams, found the wallet and arrested him. The jury certainly did not need to be told 4 different times about the alleged burglary attempt and the State did not need to remind the jury of it in closing.

It is telling that the State responds only in a footnote with a claim that a limiting instruction was not necessary. This Court holds the opposite. The jury must be given an instruction that "the third-party statement or other bad acts [we]re not being admitted for the truth of their content but only to provide the jury with a background explanation for the actions taken by the police." *Sanabria v. State*, 974 A.2d 107, 116 (Del. 2009).

The State's failure to comply with this Court's holding was extremely prejudicial to Williams. The erroneous admission of the burglary attempt allowed the jury to conclude that Williams committed the burglary in this case because he was seen trying to commit another burglary shortly thereafter. Thus, the error in the admission of that evidence was so clearly prejudicial to Williams' substantial rights that it jeopardized the fairness and integrity of his trial. Therefore, this Court must reverse Williams' convictions of burglary second degree and theft < $1,500.

II. THE TRIAL COURT UNFAIRLY BOLSTERED THE TESTIMONY OF SEVERAL POLICE OFFICERS WHO TESTIFIED AS FACT WITNESSES WHEN, EVEN THOUGH NO EXPERTS TESTIFIED, IT PROVIDED AN EXPERT WITNESS INSTRUCTION THAT ALSO REFERRED TO POLICE OFFICERS.

The State does not dispute that no witness was qualified under the rules of evidence as an expert in this case. Instead, it implies that the K-9 officer was an expert and, thus, the expert witness instruction was appropriate. The State does this by relying on a discovery violation argument made by defense counsel. The State is correct that defense counsel argued the State had violated the rules of discovery based on her position that the K-9 officer was an expert. However, what the State fails to tell this Court is that the prosecutor's position was that the officer was not an expert:

> Defense Counsel: Here's my concern with his testimony: I believe that a K-9 handler is an expert if he is going to discuss what his dog, quote, unquote, told him, and the scenting on the house, etc. And he's not disclosed as an expert.
>
> […]
>
> Prosecutor: First of all, your Honor, I don't agree that it's [sic] an expert. But assuming that it is, the very next paragraph [in the discovery materials] says 'summarized in the enclosed reports,' Corporal Breitigan's report was

> submitted in Rule 16 to defense counsel long ago.

A-18. The judge found no discovery violation and allowed the officer to testify. However, he never found the officer to be an expert. A-18. The State never attempted to have the officer declared an expert under *D.R.E.* 702.[1] There was nothing that indicated that the officer's testimony was the "product of reliable principles and methods" or that he "applied the principles and methods reliably to the facts of the case."

On appeal, the State relies on a Maryland case in support of its implication that the K-9 officer was an expert. Resp.Br. at 13. What that decision actually stands for is that a K-9 handler cannot testify unless he is qualified as an expert and the State follows the discovery rules related to experts. The State seeks to "have its cake and eat it to." The argument boils down to: the State was not required to properly qualify the K-9 officer as an

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[1] *D.R.E.* 702 provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

expert but it was entitled to the benefit of the expert instruction because he could have been qualified as an expert, (even though the prosecutor never believed him to be an expert). *Simpson v. State*, 76 A.3d 458, 491 (Md.App. 2013). If a judge can instruct the jury on expert witnesses when no expert testifies, no one would ever have to comply with the rules of discovery and evidence that apply to the presentation of expert witnesses. This would be an absurd result.

The State contends there was no harm because the instruction was a correct statement of the law. The problem for the State is that the instruction was not a correct statement of the law *applicable in this case*. The instruction was not reasonably informative, was misleading and unnecessarily bolstered the testimony of the officers. It was "unfairly prejudicial to put an expert label or veneer on [that] evidence. A jury would be confused by the labeling." *Anker v. State*, 913 A.2d 569 (Del. 2006) (affirming trial court's decision not to label a witness an expert because testimony was to matters that are commonly understood and because the jury would be confused). The harm is heightened by the fact that several witnesses testified for the State and most of them were police officers.

Because this error jeopardized the fairness and integrity of Williams' trial, his convictions must be reversed. U.S.Const., Amend.V.

CONCLUSION

For the foregoing reasons and upon the authority cited herein, the undersigned respectfully submits that Williams' convictions should be reversed.

\s\ Nicole M. Walker
Nicole M. Walker, Esquire

DATE: January 29, 2014