STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT III
CASE NO. 2021AP001346-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOBERT L. MOLDE,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENTS AND ORDERS, ENTERED IN THE CIRCUIT COURT FOR DUNN COUNTY, CASE NO. 17 CF 34, THE HONORABLE ROD W. SMELTZER, PRESIDING

DEFENDANT-APPELLANT'S BRIEF

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STATEMENT OF THE ISSUES

I. Was trial counsel constitutionally ineffective when she failed to object to the juror's question concerning the frequency of false sexual assault reports?

The Trial Court Answered: "No."

II. Was trial counsel constitutionally ineffective when she did not move for a mistrial once Swenson's answer was given.

The Trial Court Answered: "No."

III. Was trial counsel constitutionally ineffective for failing to seek the admission of relevant opinion evidence regarding L.L.M.'s lack of truthfulness and honesty under Wis. Stat. § 906.08(1)?

The Trial Court Answered: "No."

IV. Was trial counsel constitutionally ineffective when she withdrew her objection to the admission of prior acts?

The Trial Court Answered: "No."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Molde does not request oral argument and but does recommend that the opinion be published because this case applies an established rule of law to a factual situation significantly different from that in published opinions. Wis. Stat. (Rule) 809.23(1)(a)2.

STATEMENT OF THE CASE AND FACTS

On January 31, 2017, the State of Wisconsin charged Molde with one count of first-degree sexual assault of a child under the age of twelve, in violation of Wis. Stat. § 948.02(1)(b), and one count of incest, in violation of Wis. Stat. § 948.06(1). (1). The criminal complaint alleged that Molde had sexually assaulted his daughter, L.M., approximately five years prior. (1:1–2). An information charging the same two counts was filed on February 16, 2017. (8).

Molde emphatically denied having any sexual contact with L.M. (139:31–32, 35). He further took and passed a polygraph examination to corroborate his innocence. (197:18). Trial counsel shared the results of Molde's polygraph examination with the State to further demonstrate that Molde was telling the truth when he denied the allegations. (197:52–53).

The State, nevertheless, continued to prosecute Molde, and a jury trial was ultimately held on March 18 and 19, 2019. (138 and 139). Other than L.M.'s testimony, there was no direct evidence to support the allegation that Molde had sexually assaulted her. (138:96–98). There was no confession, no eyewitness testimony, no physical evidence, no biological evidence, and no medical evidence. (*Id*.)

At trial, the State presented the testimony of Dr. Alice Swenson[1] for the purpose of showing that the proper protocols were used when interviewing L.M. about her sexual assault allegations. (138:122).

Swenson admitted there were several problems with how the interview was conducted, (138:148–49), but generally defended it as reliable. Notably, neither

[1] The State originally named Laurel Edinburgh, the nurse practitioner who conducted L.M.'s forensic interview, as its expert. (29). Edinburgh was unable to attend trial, however, and the circuit court allowed the State to substitute Dr. Alice Swenson, the physician who supervised L.M.'s forensic interview, over trial counsel's objection. (151:10–12; 152:3–11).

the State nor trial counsel asked Swenson any questions regarding the frequency of false allegations in child sexual abuse cases. (175:15).

Following Swenson's testimony, the circuit court asked the jurors if they had any questions. (138:154). One did. The question, in writing, was: "How frequent is it for children to make up a story of sexual abuse?"; and if so, "Why would they do that? (138:154). The written question was passed to the court, who presented it to both trial counsel and the prosecutor. Neither of them had any objection.

The court then directed the juror's question to Swenson:

> THE COURT: Doctor, it says how frequent is it for children to make up a story of sexual abuse?
>
> THE WITNESS: False disclosures are extraordinarily rare, like in the one percent of all disclosures are false disclosures.
>
> THE COURT: Second part of that is why would they do that?
>
> THE WITNESS: I don't think I really have an answer to that.

(138:154–55). In addition, trial counsel asked Swenson on re-cross:

> Q: Are there particular studies that have been conducted regarding the reporting of false accusations?
>
> A: There are that I've read, yes. I don't know the names of them off the top of my head.

(138:155).

Trial counsel testified at the postconviction hearing that she did not object to the written jury question because she could not think of a legal reason for doing so. (175:17–18, 24). In hindsight, however, she agreed an objection to the juror's written question could and should have been made for the following reasons. (175:22, 24–25).

First, at no point did the State give notice that it would present expert testimony concerning the frequency of false allegations in child sexual abuse

cases. (29:1–5; 175:11). Nor did the circuit court ever make a ruling permitting Swenson to offer such expert testimony.

Rather, the State advised that Swenson would be "talking about the same issues as [the State] had proposed for Dr. Edinburgh [in its July 20, 2018 expert notice] so it hasn't changed." (152:40). That prior notice indicated that Edinburgh's expert testimony would be limited to the interview she conducted of L.M. and her physical exam of L.M., as well as the following categories: delayed reporting/non-disclosure, mental health issues relating to sexual assault victims, and physical evidence. (29:1–3).

The circuit court further qualified Swenson's testimony for the sole purpose of analyzing L.M.'s forensic interview. (151:12). In denying a defense objection to Swenson's testimony, the circuit court made clear the permitted scope of Swenson's trial testimony prior to trial:

> THE COURT: I believe we have Dr. Swenson that's going to testify concerning the protocol of the interview. True, Ms. Nodolf?
>
> PROSECUTOR: True
>
> THE COURT: And the Court had previously ruled that this particular interview was an actual interview of the words of both the interviewer and the interviewee, which was LM and that the Court -- the jury is going to see the actual statements and then Dr. Swenson would just be testifying as to whether those proper procedures and protocol were followed during the interview. I think this is -- that this is a supervising physician over the person that conducted this interview, and I think as long as you can attest to the protocol that was followed, I think it's appropriate that Dr. Swenson be able to address that. She is the supervising person over this individual that performed the interview and for the same reasons that the Court had ruled before that I am allowing it and I deny your motion.

(138:122–23).

Second, the circuit court had made a pretrial ruling that if either counsel objected to a written question asked by the jury, then that question would not be asked. (175:16). Given the court's pretrial ruling that any objection to a written

question by the jury would be sustained, trial counsel could not think of any strategic reason for failing to do so. (175:18).

Finally, trial counsel agreed that she should have objected to the juror's question as she did not know what Swenson's answer would be. (175:21–22). Trial counsel testified that no "alarm bells" went off in her head when the juror's written question was asked, although she agreed in hindsight they should have as Swenson was unlikely to give any answer that would have been helpful to Molde's defense. (175:22–23).

Regardless of what answer Swenson gave, trial counsel agreed that she was in no position to impeach Swenson given the lack of pretrial notice. (175:20, 23). Trial counsel admitted that she did not know what percentage of child sexual assault allegations were false, nor was she familiar with any source that could provide such information. (175:20). She did not conduct any research on this same topic prior to Swenson's trial testimony, nor did she review Swenson's curriculum vitae for Swenson's qualifications to offer such expert testimony. (175:12–13).

Trial counsel agreed an objection posed "absolutely no risk" to Molde. (175:17). She therefore testified that it was a mistake for her to not object to the written jury question. (175:22).

Further, once Swenson's answer was given, trial counsel did not move for a mistrial because she did not think about it. (175:24). In hindsight, however, she agreed that such action could and should have been taken in response to Swenson's answer. (175:24–25). She also agreed that there was no strategic reason for not requesting a mistrial following Swenson's answer. (175:24).

Because trial counsel did not have any background information regarding the frequency of false allegations in child sexual abuse case at the time Swenson provided her testimony, she was unable to determine in that moment whether Swenson's answer was correct or incorrect, or accurate or inaccurate. (175:19–20).

An expert in the field of child sexual assault, Dr. David Thompson, was retained by Molde to review Swenson's one-percent claim. He concluded such a claim is "inaccurate," "erroneous," and "not based on scientific fact." (188:3–4).[2] No existing body of science or research allows any "expert" to answer the question with any authority. (188:2). There "are no studies that have examined the rates of false accusations in currently adjudicated trials—which would be the information that would be most relevant for the judge or jurors." (163:29). Additionally, differences in definition, methodology, and study subjects make it impossible to give a percentage figure. (163:29). Notably, the "rate" of false allegations varies wildly based on differing definitions and methodology. They could be as low as .06% for investigations with a final ruling of an intentionally false allegation, as frequent as 8% for suspected false allegations made by adolescents, or as high as 29% for false allegations in custody cases involving children older than seven years old. (163:18)

Moreover, the use of a percentage is particularly "misleading." The lack of a consistent methodology in the research coupled with an expert's implicit institutional and historical bias means that any number they may testify to is arbitrary. (163:29). However, when a specific percentage of false positives is relayed to the jury such as, for example, two percent, judges and juries are led to believe "there is a 98% chance [] the accusations in the case before them [are] true." (163:29).

The State relied on Swenson's 1% testimony during its closing argument, informing the jury:

> And you also need to take into consideration Dr. Swenson's testimony that false disclosures are extraordinarily rare. They're in the one percent of cases that she's seen.

[2] The parties stipulated to the admission of Dr. Thompson's April 23, 2020 letter/report in its entirety as part of the record to Molde's postconviction motion. (190).

(139:163).

Trial counsel additionally testified that her entire trial strategy was to attack the credibility of L.M. and the veracity of her allegation. (175:26; 197:31).

She was further familiar with the fact that Wis. Stat. § 906.08 allows a defendant to impeach the credibility of a witness against him by soliciting opinion and/or reputation evidence of that witness's character for untruthfulness. (175:32).

Trial counsel agreed that the only way for an attorney to become aware of such impeachment evidence is to investigate. (175:32). She therefore hired a private investigator to gather information about L.M. being untruthful. (197:52). As part of this effort, the private investigator met with potential witnesses who could aid in Molde's defense. (197:40–41). Trial counsel was then provided the written summaries of the private investigator's interviews with these witnesses. (197:41).

Based on the information in those written summaries, as well information provided by Molde, trial counsel was made aware that Stephanie Molde,[3] Hunter Clementson,[4] Willow Molde,[5] Brandi Timm,[6] Tristin Molde,[7] and Taylor Paulus[8] could all attack the credibility of L.M. at trial. (175:31; 197:41–43, 56–57).

Trial counsel therefore spoke with all six of these witnesses, most on multiple occasions, prior to trial. (175:37, 43, 49; 197:62–63). She confirmed that during these conversations, all six witnesses made clear that they did not believe L.M.'s allegation. (175:45).

Although trial counsel agreed that such opinion testimony from these family members as to L.M.'s character for untruthfulness would have been helpful

[3] Stephanie Molde is L.M.'s mother and Molde's wife. (197:76).
[4] Hunter Clemetson is L.M.'s half-brother and Molde's step-son. (197:99–100).
[5] Willow Molde is L.M.'s sister and Molde's daughter. (197:90–91).
[6] Brandi Timm is L.M.'s cousin and Molde's niece. (197:109).
[7] Tristin Molde is L.M.'s brother and Molde's son. (197:105).
[8] Taylor Paulus is L.M.'s cousin and Molde's niece. (197:112).

to the defense, (197:58), she testified that she never had a conversation with any of these six witnesses about their opinion of L.M.'s character for untruthfulness. (197:59). Given that credibility was the crux of the case, trial counsel agreed there was no conceivable strategic reason for failing to investigate this further or to present this evidence at trial. (197:54).

At trial, the State attacked Molde's credibility. (197:53). During its opening statement, the State informed the jury that it would hear testimony that Molde continually denies having any sexual contact with L.M. whatsoever. (138:96). It further acknowledged that in addition to there being no admission or confession, there was also no physical evidence, no eyewitness evidence, and no corroborating evidence. (138:96). Other than L.M.'s testimony, there was no other evidence to support the allegation Molde had sexually assaulted her. (138:96, 158–178). Still, the State argued to the jury throughout trial that Molde should not be believed. (138:96–97; 139:161; 197:53–54).

Stephanie Molde, Hunter Clementson, Willow Molde, Brandi Timm, Tristin Molde, and Taylor Paulus all testified at trial. (139:2). All six witnesses confirmed that had they been asked, each would have testified to L.M.'s lack of truthfulness and honesty, as well as Molde's reputation for truthfulness and honesty. (197:54).

Trial counsel, however, did not present any of this evidence at trial. (197: 57). Her explanation for not using Stephanie Molde, Hunter Clementson, Willow Molde, Brandi Timm, Tristin Molde, and Taylor Paulus opinion evidence that L.M. has an untruthful character was that she did not think about it. (197:54, 56). She agreed that had she properly investigated and learned that all six of these witnesses had the opinion that L.M. has a character for being untruthful, she would and should have introduced this evidence at trial. (197:58).

Finally, prior to trial, the defense moved the circuit court to prohibit the State from introducing other acts evidence related to Molde's prior conviction and

incarceration for operating a motor vehicle while intoxicated ("OWI"). (88:4). The State argued this evidence was needed to support L.M.'s claim that the alleged assault occurred during a time when Molde was drinking and before he went to jail. (152:27–28; 197:48).

The court ruled that the State could get into the fact that Molde's wife had left him and that he had been drinking heavily, but not that he was convicted of an OWI and incarcerated. (152:31).

At the beginning of the trial, however, trial counsel withdrew her objection to the State introducing this evidence concerning Molde's alcohol-related conviction and incarceration. (138:6). She testified that she made the decision to withdraw her objection to evidence of Molde's conviction and incarceration for OWI because she thought this evidence impeached L.M.'s trial testimony that Molde was drinking at the time of the alleged incident. (175:57–58; 197:46).

As a result, the prosecutor asked L.M.: "Do you remember your dad going to jail for a period of time in 2012?" She answered that yes, she "remember[ed] him going away for a while…." (138:175). L.M. also testified that Molde went to treatment for alcohol abuse. (138:178–79). Detective Williams Anderson likewise testified that Molde was incarcerated from January 2012 to July 2012. (139:19). He also testified that Molde was convicted of an OWI offense. (139:30). Molde's wife, Stephanie Molde, agreed with the prosecutor when asked if Molde got arrested for OWI and went to jail in January 2012. (139:47–48). She also answered affirmatively when the prosecution asked if she could "remember a time where your husband had to be brought home by law enforcement because he was staggering on the road?" (139:44).

Trial counsel testified, however, that she neither investigated nor considered other possible methods of impeaching L.M.'s trial testimony prior to withdrawing her objection. (175:57). She never investigated, considered, or explored the possibility of reaching a stipulation with the State that established a

particular timeline of events, nor did she consider rephrasing Molde's conviction and subsequent period of incarceration in a far less prejudicial manner by stating, for example, Molde was "out of the home." (175:58). Trial counsel further agreed that there were other ways for her to effectively impeach L.M.'s trial testimony without informing the jury that Molde had been convicted and incarcerated for OWI. (175:58–59). For example, trial counsel agreed she could have rephrased Molde's conviction and subsequent period of incarceration in a far less prejudicial manner by stating that Molde was "out of the home." (175:58).

Trial counsel agreed her decision to withdraw the objection was a mistake. (175:59–60). She conceded she mistakenly failed to investigate or consider other possible methods of impeaching L.M.'s trial testimony prior to withdrawing her objection. (175:57). She could have used other evidence to establish Molde was sober during the time frame in which L.M. alleges the incident occurred. (175:58–59). The jury did not need to know Molde was convicted and incarcerated for OWI. (175:59; 197:51).

Trial counsel also acknowledged her decision to withdraw her objection to evidence of Molde's conviction and incarceration for OWI, as well as his drinking and treatment, was in fact prejudicial. (175:55). As highlighted at the postconviction motion hearing, at trial, L.M. called Molde a drinker and trial counsel then introduced evidence in which Molde had been convicted of and incarcerated for a crime involving drinking. (197:50).

The jury returned verdicts of guilty on both counts: 1) first-degree sexual assault of a child under the age of twelve, contrary to Wis. Stat. § 948.02(1)(b); and 2) incest, contrary to Wis. Stat. § 948.06(1). (139:195). On count 1, Molde was sentenced to 32.5 years, with 25 years of initial incarceration and 7.5 years of extended supervision. (154:24; 145 (A:15)). On count 2, Molde was sentenced to 8 years, with 5 years of initial incarceration and 3 years of extended supervision, concurrent with count 1. (154:24; 145 (A:15)).

The circuit court denied Molde's postconviction motion. (218 (A:3–13)). The court found that trial counsel's handling of Swenson's 1% testimony was not ineffective. (218:5 (A:7)). The court found that the jury's question "would have been within in the purview of Dr. Swenson's expertise," that trial counsel had "an opportunity to cross-examine Dr. Swenson," and that, "based on case law, [Swenson's answer] didn't fall into the realm where [she] was commenting on the credibility of the victim in this case as to whether she was telling the truth or not." (218:4–5 (A:6–7)).

The court further found that trial counsel's failure to admit opinion evidence regarding L.M.'s lack of truthfulness and honesty under Wis. Stat. § 906.08(1) was not ineffective. (218:5 (A:7)). The court agreed that trial counsel "did not bring in family members to give an opinion as to L.M.'s propensity for truthfulness." (218:8 (A:10)). Trial counsel, however, "used other testimony from the family to be able to attack, I guess, L.M.'s testimony of whether she was being truthful or not, and that was a decision that [trial counsel] had made." (218:8 (A:10)).

Finally, the court found that trial counsel's decision to withdraw her objection to the admission of prior acts was also not ineffective. (218:7 (A:9)). The court found "that went to a trial strategy as to part of the prior acts went to the timeline in which the allegations had -- allegedly had occurred, and so when she withdrew that, that was part of the trial strategy to use those acts to help determine what the timeline was." (218:7 (A:9)).

The circuit court entered an order denying Molde's postconviction motion on October 11, 2021. (225 (A:14)).

Molde now appeals to this Court.

ARGUMENT

I. TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE WHEN SHE FAILED TO OBJECT TO THE JUROR'S QUESTION CONCERNING THE FREQUENCY OF FALSE SEXUAL ASSAULT REPORTS.

a. Legal Standards -- Ineffective Assistance of Counsel.

Molde was denied his right to effective assistance of counsel under the Sixth Amendment of the United States Constitution, and article I, section 7 of the Wisconsin Constitution. ***Strickland v. Washington***, 466 U.S. 688 (1984); ***State v. Pitsch***, 124 Wis. 2d 628, 633, 369 N.W.2d 711 (1985). Wisconsin uses a two-prong test to determine whether trial counsel's actions constitute ineffective assistance of counsel. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845 (1990). The first half of the test considers whether trial counsel's performance was deficient. ***Id***. Trial counsel's performance is deficient if it falls outside "prevailing professional norms" and is not the result of "reasonable professional judgment." ***Strickland***, 466 U.S. at 690.

An effective attorney has the duty to "investigate adequately the circumstances of the case and to explore all avenues which could lead to facts that are relevant to either guilt or innocence," and counsel's conduct "must be based upon a knowledge of all facts and all the law that may be available. The decision must evince reasonableness under the circumstances." ***State v. Felton***, 110 Wis. 2d 485, 501–02, 329 N.W.2d 161 (1983). Counsel's performance further cannot be based on an "irrational trial tactic" or "caprice rather than judgment." ***Id***. at 502–03.

If counsel's performance is found to be deficient, the second half of the test considers whether the deficient performance prejudiced the defense. ***Id***. at 506–07. The defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been

different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***State v. Harvey***, 139 Wis. 2d 353, 375, 407 N.W.2d 235, (1987). The ***Strickland*** test is not outcome determinative. The defendant need only demonstrate the outcome is suspect. He need not establish the final result of the proceeding would have been different. ***State v. Smith***, 207 Wis. 2d 258, 275–76, 558 N.W.2d 379 (1997).

A single mistake in an attorney's otherwise commendable representation may be so serious as to impugn the integrity of a proceeding. ***State v. Thiel***, 2003 WI 111, ¶ 60, 264 Wis. 2d 571, 665 N.W.2d 305. Likewise, the cumulative effect of several deficient acts or omissions may, in certain instances, also undermine a reviewing court's confidence in the outcome of a proceeding. ***Id***. Therefore, in determining whether a defendant has been prejudiced because of counsel's deficient performance, the court may aggregate the effects of multiple incidents of deficient performance in determining whether the overall impact of the deficiencies satisfied the standard for reversal under ***Strickland***. ***Id***.

Whether trial counsel performed deficiently is a question of law appellate courts review de novo. ***State v. Breitzman***, 2017 WI 100, ¶ 38, 378 Wis. 2d 431, 904 N.W.2d 93. Whether any deficient performance was prejudicial is also a question of law appellate courts review de novo. ***Id***.

b. Trial Counsel was constitutionally ineffective for not objecting to the juror's question when the question was nearly certain to elicit an inadmissible opinion.

Following the completion of her lengthy testimony concerning L.M.'s forensic interview, the bailiff presented the court with a written question from one of the jurors. The juror asked: "How frequent is it for children to make up a story of sexual abuse?"; and if so, "Why would they do that? (138:154). Both trial counsel and the prosecutor reviewed the question. Neither had any objection. Swenson answered: "False disclosures are extraordinarily rare, like in the one percent of all disclosures are false disclosures." (138:154).

Trial counsel was deficient when she failed to object to the juror's question for two reasons: First, the juror's question was likely to elicit an inadmissible opinion on L.M.'s credibility. Second, and alternatively, the juror's question was likely to elicit an opinion beyond the scope of the court's order as well as implicate ***Daubert v. Merrell Dow Pharm., Inc.,*** 509 U.S. 579 (1993), and Wis. Stat. § 907.02(1).

1. The juror's question was likely to elicit an impermissible expert opinion on L.M.'s credibility.

The juror's question asked "how frequent" children made false reports and that is exactly what Swenson addressed. Her answer, predictably, was that only 1% percentage of all sexual assault reports are false. (138:154). An expert stating as a fact that only 1% of all sexual assault reports are false is no different, as a practical matter, than offering an opinion that the complainant is credible, and the defendant is not. One witness, however, cannot comment on another witness's credibility: "[n]o witness, expert or otherwise, should be permitted to give an opinion that another mentally and physically competent witness is telling the truth." ***State v. Haseltine***, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984).

"[T]he jury is the lie detector in the courtroom." ***Id***. It is the jury's duty to assess credibility. ***State v. Romero***, 147 Wis. 2d 264, 278, 432 N.W.2d 899 (1988) (citation omitted). Allowing a witness to testify about another witness's truthfulness usurps the jury's role. ***Id***. "It is well established that an expert witness cannot testify as to the credibility of another witness." ***State v. Krueger***, 2008 WI App 162, ¶ 17, 314 Wis. 2d 605, 762 N.W.2d 114 (citations omitted). Swenson's answer was inadmissible.

The witness does not have to use specific language in order for the prohibition on vouching to apply. The "essence" of the ***Haseltine*** rule is to prohibit testimony which "invades the province of the fact-finder as the sole determiner of credibility." ***State v. Kleser***, 2010 WI 88, ¶ 104, 328 Wis. 2d 42, 786 N.W.2d 144. The Wisconsin Supreme Court explained that vouching for another witness may be implied:

> We are not persuaded that the vouching rule becomes inapplicable simply because a witness does not use specific words such as "I believe X is telling the truth," or is inapplicable because X never testified as a witness. There is no requirement that an expert *explicitly* testify that she believes a person is telling the truth for the expert's opinion to constitute improper vouching testimony. *In* Haseltine*, for example, the expert testified only implicitly that the victim was telling the truth.* ***Haseltine***, 120 Wis. 2d at 96, 352 N.W. 2d 673. A requirement that specific words be used would permit the rule to be circumvented easily.

Id. at ¶ 102 (emphasis added).

This Court has also acknowledged that a generalized percentage probability—if high enough—could violate ***Haseltine***. ***Morales-Pedrosa***, 2016 WI App 38 at ¶¶ 23–24. In ***Morales-Pedrosa***, a state expert addressed behavior commonly observed in child victims of abuse at Morales-Pedrosa's trial for child sexual assault. ***Id***. at ¶ 12. On cross-examination, defense counsel asked the expert about "alternative hypotheses" regarding abuse allegations, and the expert answered that "one hypothesis is the child is making an allegation and the allegation is true" while "an alternative hypothes[i]s is the child made an allegation

and for some reason that allegation is either mistaken or false." ***Id***. at ¶ 12 n.2. On redirect, the prosecutor asked the expert: "[I]n your training and experience when you're eliminating the alternative hypotheses, is it commonly understood that approximately 90 percent of reported cases are true?" ***Id***. The expert answered "Correct." ***Id***.

Morales-Pedrosa brought an ineffective assistance of counsel claim alleging that defense counsel should have objected to this testimony because it violated ***Haseltine*** and ***Kleser***. ***Id***. at ¶¶ 19–20. He cited three out-of-state decisions which held that a generalized probability of "99.5%," "98%," and "92–98%" was the functional equivalent of vouching for the complainant's credibility. ***Id***. at ¶¶ 24–25; *see* ***United States v. Brooks***, 64 M.J. 325 (C.A.A.F. 2007); ***Snowden v. Singletary***, 135 F.3d 732 (11th Cir. 1998); and ***Wilson v. State***, 90 S.W.3d 391 (Tex. Ct. App. 2002).

In ***Brooks***, the state's expert testified that only 2% of all sexual assault allegations are false, thus "suggest[ing]…there was better than a ninety-eight percent probability that the victim was telling the truth." 64 M.J. at 326. This 2% claim "impart[ed] an undeserved scientific stamp of approval on the credibility of the victim[ ] in this case." ***Id***. (citation omitted). Moreover, as "a mathematical statement approaching certainty about the reliability of the victim's testimony[,]" it "goes directly to the core issue of the victim's credibility and truthfulness." ***Id***. While the expert "'can inform the jury of characteristics in sexually abused children and describe the characteristics the alleged victim exhibits,' the expert should not be permitted to give testimony that is *the functional equivalent of saying that the victim in a given case is truthful or should be believed*." ***Id***. (emphasis added; citation omitted). Because the expert's 2% claim "invaded the province of the [jury] members, [the court could not] say with any confidence that the [jury] members were not impermissibly swayed and thus that they properly performed

their duty to weigh admissible evidence and assess credibility." *Id*. This testimony was "plain[ly] and obvious[ly]" prejudicial error. ***Id***.

In ***Snowden***, the prosecution's expert testified that "99.5% of children tell the truth" and that "in his own experience with children, [he] had not encountered an instance where a child had invented a lie about abuse." 135 F.3d at 737–38. Because the case against Snowden relied on complainant testimony, "allowing expert testimony to boost the credibility of the main witness against Snowden—considering the lack of other evidence of guilt—violated his right to due process by making his criminal trial fundamentally unfair." ***Id***. at 739. "That such evidence is improper, in both state and federal trials, can hardly be disputed,…." ***Id***. at 738. The court further elaborated:

> The jury's opinion on the truthfulness of the children's stories went to the heart of the case. This circumstance makes Snowden—against whom there was, otherwise, very little evidence—deserving of relief. Permitting an expert to vouch forcefully for the children's credibility in this case was a "crucial, critical, highly significant factor." In addition, there was no adequate means to counter such a contention: it truly was this expert's opinion that child witnesses in sexual abuse cases tell the truth.

Id. at 738–39 (citations omitted).

In ***Wilson***, the prosecution's expert testified that according to studies, "only two to eight percent of children lie about being sexually assaulted." 90 S.W.3d at 392. Unlike ***Brooks*** and ***Snowden***, the ***Wilson*** decision does not state whether the expert in that case had examined the victim. ***Morales-Pedrosa***, 2016 WI App 38 at ¶ 24 n.4. Unlike ***Snowden***, moreover, the prosecutor in ***Wilson*** never referred to the expert's testimony about the percentage of children who lie about being sexually abused during closing arguments. ***Wilson***, 90 S.W.3d at 394. Nevertheless, the ***Wilson*** court determined that the trial court erred in admitting the statistical testimony:

> This testimony went beyond whether the child complainant's behavior fell within a common pattern and addressed whether children who claimed to be sexually assaulted lie. Her testimony did not aid, but supplanted, the jury in its decision

> on whether the child's complainant's testimony was credible. Therefore, the trial court erred by allowing [the expert] to testify about what percentage of children lie about being sexually assaulted.

Id. at 393. The ***Wilson*** court ultimately found the error to be harmless, however, "[c]onsidering the record as a whole…." ***Id***. at 394.

Brooks, ***Snowden***, and ***Wilson*** are not alone in their holdings. Notably, other jurisdictions have reached the same conclusion when addressing whether statistical testimony of near mathematical certainty is the functional equivalent of a witness vouching for the credibility of the complainant.

In ***Powell v. State***, 527 A.2d 276, 278 (Del. 1987), the prosecution's expert testified that "ninety-nine percent of the alleged victims involved in sexual abuse treatment programs in which she was also involved 'have told the truth.'" The expert volunteered her 99% claim when asked by defense counsel whether she had investigated any allegations of child abuse later established as false. ***Id***. Even though the expert's 99% claim was elicited by defense counsel, the Delaware court deemed the admission of this statement "plain error." ***Id***. at 279. The ***Powell*** court found that this "percentage" testimony exceeded the permissible bounds of expert testimony permitted in child sexual abuse prosecutions. ***Id***. "The obvious purpose of [the expert]'s testimony," stated in "stark mathematical terms," "was to bolster the complainant's credibility vis-à-vis the defendant's denial." ***Id***. at 279, 280. As there was "[n]o direct evidence establish[ing] that a rape occurred" besides the complainant's testimony, "or if one did, that [Powell] committed it[,]" the expert's 99% claim deprived Powell of his "substantial right" to have "his fate determined by a jury making the credibility determinations,…." ***Id***. at 280. Powell's conviction was reversed. ***Id***.

In ***State v. Lindsey***, 149 Ariz. 472, 476–77, 720 P.2d 73 (1986), the prosecution expert testified that "99 percent of [child] victims tell the truth." Admitting this testimony was prejudicial error, the ***Lindsey*** court held, because

"[q]uantification of the percentage of witnesses who tell the truth is nothing more than the expert's overall impression of truthfulness,…." Such statistical testimony therefore "goes beyond 'ultimate issues' and usurps the function of the jury." ***Id***. While such testimony standing alone "might not be prejudicial in a case in which there was ample extrinsic evidence of guilt … [t]hat was not the situation here." ***Id***. "Since guilty or innocence on these counts inherently turned on the question of the [complainant]'s credibility, it cannot be said beyond a reasonable doubt that the jury would have convicted even in the absence of the error." ***Id***. at 477.[9]

Morales-Pedrosa did not object to the holdings in ***Brooks***, ***Snowden***, and ***Wilson***, or the rationale of these cases, but rather distinguished them on two factual grounds. First, unlike the 99.5 and 98 percent probability in ***Brooks*** and ***Snowden***, 90 percent was not high enough to constitute the functional equivalent of an opinion on the complainant's credibility. ***Morales-Pedrosa,*** 2016 WI App 38 at ¶ 23. This Court cited ***Wilson***'s finding of harmless error with a 92–98 percent probability as more akin to the 90 percent testimony in the ***Morales-Pedrosa*** case. ***Id***. at ¶ 24 n.4. Second, because the State's expert had never met, interviewed, or examined the complainant, "there was no risk the jury believed [the expert] was providing a personal or particularized opinion as to [the complainant]'s credibility." ***Id***. Because of these differences, this Court was unable to conclude

[9] *See also* ***People v. Julian***, 34 Cal. App. 5th 878, 883, 885, 246 Cal. Rptr. 3d 517 (2019) (expert testimony that rate of false allegations "is as low as one percent or as high as about six or seven or eight percent" was highly prejudicial and deprived defendant of his right to a fair trial.); ***State v. Williams***, 858 S.W.2d 796, 801 (Mo. Ct. App. 1993) (doctor's testimony that incidents of children lying about sexual abuse is "less than three percent" was inadmissible as an "improper quantification of the probability of the complaining witness'[s] credibility."); ***State v. Vidrine***, 9 So. 3d 1095, 1111 (La. Ct. App. 2009) (expert testimony that "ninety-five to ninety-eight percent" of allegations of sexual abuse are valid impermissibly bolstered the complainant's testimony and was prejudicial error); ***State v. W.B.,*** 205 N.J. 588, 613–14, 17 A.3d 187 (2011) ("[s]tatistical information quantifying the number or percentage of abuse victims who lie deprives the jury of its right and duty to decide the question of credibility of the victim based on evidence relating to the particular victim and the particular facts of the case."); ***State v. MacRae***, 141 N.H. 106, 110, 677 A.2d 698 (1996) (expert testimony was inadmissible "because it improperly provided statistical evidence that the victim more probably than not had been abused.")

the expert's testimony "'invade[d] the province of the fact-finder as the sole determiner of [the complainant's] credibility,' … or 'create[d] too great a possibility that the jury abdicated its fact-finding role to [the expert] and did not independently decide [Morales-Pedrosa's] guilt' …" ***Id***. (citations omitted).

Neither of these factual differences is present here. Swenson's 1% false reporting claim falls squarely within the holdings of ***Brooks*** and ***Snowden***. In addition, unlike the expert in ***Morales-Pedrosa*** who "made clear she had never examined [the complainant][,]" ***Id***. at ¶ 24, Swenson had direct contact with L.M. According to Swenson, she "supervised the *entire* evaluation." (138:135) (emphasis added).

There's no possibility the jury could have interpreted Swenson's testimony as something other than a comment on L.M.'s credibility. She was the only person in the courtroom to whom the percentage would have applied. Swenson also gave her opinion after lengthy testimony concerning L.M.'s examination. The State also referred to Swenson's 1% claim in its closing argument, clearly implying L.M. was, as a sexual assault complainant, highly unlikely to be lying. (139:163).[10] The near mathematical certainty (99%) that all sexual assault reports are truthful *is* the functional equivalent of an opinion on L.M.'s veracity.

Morales-Pedrosa was published in 2016, several years before Molde's trial. Trial counsel should have been aware of the issue presented as well as its citation to authority that a "99.5%" or "98%" probability of truthful sexual allegations was the equivalent of children claiming to have been abused are telling the truth. 2016 WI App 38 at ¶ 25. In fact, ***Morales-Pedrosa***'s observation that a '90 percent' probability the complainant is telling the truth is "less obviously objectionable" than testimony of a 98 or 99.5% probability, clearly implies that a probability of

[10] Specifically, the State informed the jury during its closing argument: "And you also need to take into consideration Dr. Swenson's testimony that false disclosures are extraordinarily rare. They're in the one percent of cases that she's seen." (139:163).

99% *is* obviously objectionable. Accordingly, trial counsel had a duty to object to Swenson's 1% claim and argue ***Morales-Pedrosa***. ***State v. Savage***, 2020 WI 93, ¶ 37, 395 Wis. 2d 1, 951 N.W.2d 838 ("A trial counsel performance generally falls below an objectively reasonable standard when trial counsel fails to raise an issue of settled law.").

Once Swenson told the jury there was only a 1% chance L.M. was lying, Molde was denied a fair trial. A 99% probability L.M. is telling the truth is indistinguishable from an opinion that a "mentally and physically competent witness is telling the truth." ***Haseltine***, 120 Wis. 2d at 96. While the jury could have, in theory, rejected the expert's testimony, the defense provided no reason for it to do so. The jury heard nothing that contradicted Swenson's opinion. Indeed, the State relied on Swenson's testimony in its closing argument. (139:163).

In her postconviction testimony, trial counsel agreed she should have objected to the juror's question as she did not know what Swenson's answer would be. (175:21–22). She wanted to object but could not think of a legal reason for doing so. (175:17–18, 21–22). Trial counsel had forgotten the circuit court's prior ruling that if either party objected to any question asked by a juror, the question would not be allowed. (175:16). Given the court's pretrial ruling that any objection to a written question by the jury would be sustained, trial counsel could not think of any strategic reason for failing to do so. (175:18). She agreed an objection posed "absolutely no risk" to the defendant. (175:17).

Trial counsel's deficient performance in failing to object to the juror's question was clearly prejudicial. The only issue at trial was L.M.'s credibility. There were no witnesses, no confession, and no physical or other evidence corroborating her testimony. (138:96–98). All six testifying members of Molde's family expressed doubts about L.M.'s allegations. (175:45). L.M.'s cousin, Taylor Paulus, testified that L.M. provided her with an inconsistent account of the alleged incident. (139:120). Molde emphatically denied ever assaulting L.M. (197:52–53).

Left unchallenged, the jury had no reason to reject Swenson's testimony which, in turn, directly bolstered L.M.'s credibility. As Swenson's testimony went to "the core issue of the victim's credibility and truthfulness," Molde was clearly prejudiced. ***Brooks***, 64 M.J. at 326. The State's reference to this testimony in its closing argument magnified the prejudicial effect. ***Romero,*** at 279.

2. The juror's question was likely to elicit an expert opinion that went beyond the scope of what the circuit court allowed and contrary to the requirements of *Daubert* and Wis. Stat. § 907.02(1).

Trial counsel was deficient when she failed to object to the juror's question as it was likely to elicit an answer that went beyond the scope of the expert's permitted testimony and failed to meet the requirements of ***Daubert*** and Wis. Stat. § 907.02(1).

The circuit court qualified Swenson's testimony for the sole purpose of analyzing the complainant's forensic interview. (151:12). At no point did the State give notice that Swenson would be testifying as an expert on the frequency of false allegations in child sexual abuse cases. (29:1–5; 175:11). Nor did the circuit court ever make a ruling permitting Swenson to provide expert testimony on the frequency of false sexual assault reports. The circuit court never certified Swenson to address this question.

In addition, trial counsel should have objected because she knew or should have known the juror's question implicated ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993).

Trial counsel admitted she did not know what percentage of child sexual assault allegations were false, nor was she familiar with any source that could provide such information. (175:20). She did not conduct any research on this same topic prior to Swenson's trial testimony, nor did she review Swenson's curriculum vitae for Swenson's qualifications to offer such expert testimony. (175:12–13).

Trial counsel should have objected to the question and requested a ***Daubert*** hearing because she had no reason to believe Swenson's answer would have been admissible under ***Daubert***.

Under ***Daubert***, the trial court acts as a "gate-keeper" to ensure: (1) that an expert's opinion is based on a reliable foundation; (2) is relevant to the material issues; and (3) the jury is not presented with "conjecture dressed up in the guise of expert opinion." ***State v. Giese***, 2014 WI App 92, ¶¶ 18–19, 356 Wis. 2d 796, 854 N.W.2d 687. The ***Daubert*** rule is codified in Wis. Stat. § 907.02(1):

> 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 the testimony is based upon sufficient facts or data, the testimony is the product of reliable principles and methods, and the witness has applied the principles and methods reliably to the facts of the case.

Wis. Stat. § 907.02 requires the circuit court to consider five factors before admitting expert testimony: (1) whether the scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue; (2) whether the expert is qualified as an expert by knowledge, skill, experience, training or education; (3) whether the testimony is based upon sufficient facts or data; (4) whether the testimony is the product of reliable principles and methods; and (5) whether the witness has applied the principles and methods reliably to the facts of the case. *See* ***In re Commitment of Jones***, 2018 WI 44, ¶ 29, 381 Wis. 2d 284, 911 N.W.2d 97. As adopted by Wis. Stat. § 907.02, the ***Daubert*** standard "is flexible but has teeth." ***Giese***, 2014 WI App 92 at ¶ 19.

In answering these questions, the court may consider a variety of factors, including whether the evidence can (and has been) tested, whether the theory or technique has been subjected to peer review and publication, the known or potential error rate, the existence and maintenance of standards controlling the

technique's operation, and the degree of acceptance within the relevant scientific or other expert community. ***Jones***, 2018 WI 44 at ¶ 33. The court must focus on the principles and methodology on which the expert relies, not the conclusion he or she reaches. ***Giese***, 2014 WI App 92 at ¶ 18.

An expert opinion regarding false allegations in child sexual abuse cases has no accepted basis in the field; nor can such a broad opinion be given solely from anecdotal professional experience. There is no evidence Swenson, or any expert for that matter, is qualified to offer on an opinion on the frequency of false sexual assault reporting. The sheer scope of such an opinion would require a statistically valid study of immense proportions, with consistent protocols and definitions. As Dr. Thompson points out, he does not know of any such study nor, in his opinion, would such a study likely be possible. (163:29).

Having extensive knowledge in a certain field does not necessarily qualify an expert to answer a specific question. ***In re Termination of Parental Rights to Daniel R.S.***, 2005 WI 160, ¶ 36, 286 Wis. 2d 278, 706 N.W.2d 269 (an expert witness, though qualified to testify, may not be qualified to testify with regard to a particular question). Relying on "studies" she could not identify, Swenson clearly based her opinion on outside sources rather than her own research. (138:155).

Dr. Thompson, moreover, denied there is any existing body of science or research that would allow any expert to offer such an opinion with any degree of accuracy. (188:2). The use of a specific number such as one percent was particularly "inaccurate," erroneous," and "not based on scientific fact." (188:3–4). Swenson's testimony on this issue was inadmissible because it lacked foundation.

Molde was prejudiced because, as previously noted, trial counsel failed to mitigate the impact of this evidence. First, the lack of notice prevented trial counsel from effectively cross-examining Swenson. While trial counsel got Swenson to admit she could not identify the "studies" she was relying on, she insisted such

studies did exist and she had read them. (138:155). Trial counsel was unable to contradict this assertion in any meaningful way. Second, Molde demonstrated that for a myriad of reasons, no such studies exist and that an opinion with such mathematical certainty has no basis in fact.

In sum, trial counsel was deficient when she did not object to the juror's question. Trial counsel should have known that any answer from the state's expert would likely violate ***Haseltine*** and ***Daubert***. At the very least she should have sought to voir dire of the witness to find out what the answer would be. As the answer did violate ***Haseltine***, Molde was prejudiced.

II. ALTERNATIVELY, TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE WHEN SHE DID NOT MOVE FOR A MISTRIAL ONCE SWENSON ANSWERED THE JUROR'S QUESTION.

Assuming for the sake of argument trial counsel was not deficient when she failed to object to the question prior to the answer being given, she was, alternatively, deficient when she did nothing to mitigate the effect of Swenson's answer once it was given. She did not, for example, seek a mistrial. (175:24). Swenson's 1% testimony was left unchallenged in the juror's minds.

Here, the jury's determination depended substantially, if not exclusively, on an assessment of the credibility of L.M. and the veracity of her allegations. Other than L.M.'s testimony, there was no direct evidence to support the allegation that Molde had sexually assaulted her. There was no confession, no eyewitness testimony, no physical evidence, no biological evidence and no medical evidence. Swenson's testimony, in turn, directly bolstered L.M.'s credibility in a case where credibility was the only contested issue. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." ***Strickland***, 466 U.S. at 695–96.

After Swenson's answer was given, trial counsel did not move for a mistrial because she did not think about it. (175:24). In hindsight, she agreed such action could and should have been taken in response to Swenson's answer. (175:24–25). She also agreed there was no strategic reason for not moving for a mistrial following Swenson's answer. (175:24).

The only effective remedy once Swenson gave her answer was a mistrial. By characterizing L.M.'s truthfulness with a mathematical probability approaching certainty, Swenson's answer "goes directly to the core issue of the victim's credibility and truthfulness." ***Brooks***, 64 M.J. at 326. While a curative instruction in theory cures the error, the axiom that you cannot unring the bell better describes the situation here. The prejudicial nature of the testimony was too great for the jurors to simply put it out of their minds. *See, e.g.,* ***Dunn v. United States***, 307 F.2d 883, 886 (5th Cir. 1962) ("[I]f you throw a skunk into the jury box, you cannot instruct the jury not to smell it").

A mistrial must be granted when a claimed error is sufficiently prejudicial to have deprived the defendant of his right to a fair trial. ***Oseman v. State***, 32 Wis. 2d 523, 528–29, 145 N.W.2d 766 (1966). The reviewing court must weigh the strength of all the evidence to determine the effect of the error on the result. ***Id***. If the evidence presented in the case was extremely weak, a mistrial may be appropriate because it is more likely that the error improperly influenced the jury's conclusion. ***Id***.

Once Swenson told the jury there was only a 1% chance L.M. was lying, Molde was denied a fair trial. *See also* ***Romero***, 147 Wis. 2d at 277–78 (erroneously admitted testimony from social worker and police officer that victim was being honest required a new trial in the interest of justice); *see also* ***State v. Echols***, 2013 WI App 58, ¶¶ 26–27, 348 Wis. 2d 81, 831 N.W.2d 768 (error to deny motion for mistrial after lay witness testified that defendant stutters when lying, particularly in a case that depends substantially on a credibility assessment);

State v. Tutlewski, 231 Wis. 2d 379, 391, 605 N.W.2d 561 (Ct. App. 1999) (testimony by one witness that complaining witnesses were incapable of lying constituted reversible error).

In sum, had a motion for mistrial been made, it would have been granted. Swenson's answer was highly prejudicial. A mistrial is especially appropriate when, as here, the State's evidence is weak and the error is more likely to improperly influence the jury's conclusion. *See* ***Oseman***, at 528–29.

III. ALTERNATIVELY, TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO SEEK THE ADMISSION OF RELEVANT OPINION EVIDENCE REGARDING L.M.'S LACK OF TRUTHFULNESS AND HONESTY UNDER WIS. STAT. § 906.08(1).

There is no dispute that Wis. Stat. § 906.08(1) allows a defendant to challenge a witness's credibility by soliciting evidence of that witness's character for untruthfulness, if such testimony is in the form of reputation or opinion. ***State v. Cuyler***, 110 Wis. 2d 133, 138, 327 N.W.2d 662 (1983). Evidence of a witness's character for truthfulness or untruthfulness helps the jury evaluate credibility. In a close case, character evidence may create a reasonable doubt. ***United States v. Burke***, 781 F.2d 1234, 1240 (7th Cir. 1985); *see also* ***Edgington v. United States***, 164 U.S. 361, 366 (1896) ("The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing"); ***Michelson v. United States***, 335 U.S. 469, 476 (1948) (same); ***State v. Cuyler***, 110 Wis. 2d 133, 327 N.W.2d 662 (1983) (where relative credibility was the crux of the case, absence of witnesses to the defendant's good character for truthfulness prevented real controversy from being fully tried). This is especially true given the inherent weaknesses of the state's case. ***Strickland***, 466 U.S. at 696 ("[A] verdict

or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support").

Trial counsel had such evidence readily available to her but failed to use it. Stephanie Molde, Hunter Clementson, Willow Molde, Brandi Timm, Tristin Molde, and Taylor Paulus all had personal knowledge of L.M.'s untruthful character and were available and willing to testify to that fact. Although trial counsel was familiar with these witnesses and had spoken with some of them, she never asked any of them about L.M.'s character for untruthfulness. The use of character evidence simply didn't occur to her. (197:54, 56, 59).

Testimony from these witnesses that L.M. had a reputation for untruthfulness would have been admissible. *See* ***Cuyler***, 110 Wis. 2d at 139. Further, the probative value of this opinion evidence would not have been substantially outweighed by considerations of unfair prejudice, confusion of issues, or undue delay. ***Id***.

In retrospect, trial counsel agreed such opinion testimony from these family members as to L.M.'s character for untruthfulness would have been helpful to the defense. (197:58). She agreed there was no conceivable strategic reason for failing to ask them about it and use it at trial. (197:54). Defense counsel has a duty to "introduce … [evidence] that demonstrates [her] client's factual innocence, or that raise[s] sufficient doubt as to that question to undermine confidence in the verdict." ***Duncan v. Ornoski***, 528 F.3d 1222, 1234 (9th Cir. 2008).

The real controversy in this case was a credibility battle between L.M. and Molde. Given the lack of physical evidence and third-party eyewitnesses, there can be little doubt that any relevant information regarding the victim and her character for untruthfulness would be at the heart of the jury's deliberation. The lack of clear and direct opinion evidence on L.M.'s reputation from six witnesses—if not alone, then in conjunction with other unused impeachment evidence—prejudiced Molde.

The State argues that Molde suffered no prejudice because their opinions of L.M.'s character were obvious when they testified (on other matters). The State is wrong. Inferences are no substitute for direct and explicit testimony of untruthfulness. Evidence corroborating the defense is extremely important in a credibility contest. *See, e.g.*, ***State v. Cooks***, 2006 WI App 262, ¶¶ 63–64, 297 Wis. 2d 633, 726 N.W.2d 322. In a sexual assault case where the only witnesses to the crime are the complainant and defendant, "the jury's verdict is often a matter of which person the jury finds more credible." ***State v. O'Brien***, 223 Wis. 2d 303, 326, 588 N.W.2d 8 (1999).

IV. ALTERNATIVELY, TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE WHEN SHE WITHDREW HER OBJECTION TO THE ADMISSION OF PRIOR ACTS.

Prior to trial, the circuit court ruled that evidence of Molde's conviction and incarceration for OWI was inadmissible. (152:31). Nonetheless, trial counsel later withdraw her objection to evidence of Molde's conviction and incarceration for OWI because she thought this evidence impeached L.M.'s trial testimony that Molde was drinking at the time of the alleged incident. (175:57–58; 197:46). She reasoned that "the way [L.M.] explained it, just couldn't happen." (197:46). As a result, jurors heard testimony regarding Molde's conviction and incarceration for OWI. (138:175, 178–79; 139:19, 30, 44, 47–48).

Trial counsel testified, however, that she neither investigated nor considered other possible methods of impeaching L.M.'s trial testimony prior to withdrawing her objection. (175:57). She never investigated, considered, or explored the possibility of reaching a stipulation with the State that established a particular timeline of events, nor did she consider rephrasing Molde's conviction and subsequent period of incarceration in a far less prejudicial manner by stating, for example, Molde was "out of the home." (175:58). Trial counsel further agreed

there were other ways for her to effectively impeach L.M.'s trial testimony without informing the jury that Molde had been convicted and incarcerated for OWI. (175:58–59).

While strategic choices are entitled to some deference, the assertion of strategy does not automatically scuttle an ineffective assistance claim. *See* ***Wiggins v. Smith***, 539 U.S. 510, 533–34 (2003) (trial counsel deficient insofar as choice not to investigate was not a valid strategic choice); *see also* ***People v. Ledesma***, 43 Cal. 3d 171, 217, 729 P.2d 839 (1987) (deferential scrutiny of trial counsel's performance "must never be used to insulate counsel's performance from meaningful scrutiny and thereby automatically validate challenged acts or omissions."). Indeed, only those "strategic choices made after a *thorough investigation of the law and facts* relevant to plausible options are virtually unchallengeable." ***Strickland***, 466 U.S. at 690–91 (emphasis added).

Effective assistance of counsel therefore requires that "before counsel undertakes to act at all [s]he will make a rational and informed decision on strategy and tactics founded on adequate investigation and preparation." ***Ledesma***, 43 Cal. 3d at 215. "[S]trategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." ***Wiggins***, 539 U.S. at 536 (quoting ***Strickland***, 466 U.S. at 689).

Although trial counsel is typically afforded leeway in making tactical decisions regarding trial strategy, counsel cannot be said to have made a tactical decision without first procuring the information necessary to make such a decision. *See* ***Sanders v. Ratelle***, 21 F.3d 1446, 1457 (9th Cir. 1994) ("Ineffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice when s/he [*sic*] has not yet obtained the facts on which such a decision could be made." (citations and emphasis omitted.)); ***Duncan***, 528 F.3d at 1238 (recognizing that trial counsel

cannot be said to have made a strategic choice when counsel has not yet obtained the facts on which a decision could be made); *see also* ***Riley v. Payne***, 352 F.3d 1313, 1324 (9th Cir. 2003) (holding that, under clearly established Supreme Court law, when defense counsel failed to contact a potential witness, counsel could not "be presumed to have made an informed tactical decision" not to call that person as a witness); ***Williams v. Washington***, 59 F.3d 673, 681 (7th Cir. 1995) ("Because investigation [of the witnesses] might have revealed evidence bearing upon credibility (which counsel believed was the sole issue in the case), the failure to investigate was not objectively reasonable.").

In particular, if trial counsel's failure to investigate possible methods of impeachment is part of the explanation for counsel's impeachment strategy (or a lack thereof), the failure to investigate may in itself constitute ineffective assistance of counsel. *See* ***Tucker v. Ozmint***, 350 F.3d 433, 444 (4th Cir. 2003) ("Trial counsel have an obligation to investigate possible methods for impeaching a prosecution witness, and failure to do so may constitute ineffective assistance of counsel.").

Trial counsel agreed that her decision to withdraw the objection was a mistake. (175:59–60). She could have used other evidence to establish Molde was sober during the time frame in which L.M. alleges the incident occurred. (175:58–59). The jury did not need to know Molde was convicted and incarcerated for OWI. (175:59; 197:52). Therefore, trial counsel cannot be said to have made a strategic decision in withdrawing her objection. See ***Sanders***, 21 F.3d at 1457 (trial counsel cannot be said to have made a strategic choice when counsel has not yet obtained the facts on which a decision could be made); and ***Reynoso v. Giurbino***, 462 F.3d 1099, 1113 (9th Cir. 2006) (recognizing that a poor tactical decision involving trial counsel's approach to impeachment may constitute deficient conduct where the challenged action cannot be considered sound trial strategy).

Further, as trial counsel later acknowledged, her decision to withdraw her objection to evidence of Molde's conviction and incarceration for OWI, as well as his drinking and treatment, was in fact prejudicial. (175:55). At trial, L.M. called Molde a drinker and trial counsel then introduced evidence in which Molde had been convicted of and incarcerated for a crime involving drinking. (197:50).

"[A] invitation to focus on an accused's character and bad behavior is prejudicial because it magnifies the risk that jurors will punish the accused for being a bad person regardless of his or her guilt of the crime charged." ***State v. Sullivan***, 216 Wis. 2d 768, 576 N.W.2d 30 (1998). This other acts evidence unduly tainted Molde's character in the eyes of the jury with no conceivable benefit to him in return. *See e.g.,* ***Sullivan***, 216 Wis. 2d at 792 (admission of other acts evidence was reversible error where the state's case was weak and there was a reasonable possibility that the other acts evidence contributed to defendant's conviction); *see also* ***United States v. Slade***, 627 F.2d 293, 308 (D.C. Cir. 1980) (erroneous admission of prior conviction evidence harmful when the record showed that other evidence against the defendant was weak or unreliable); ***United States v. Barb***, 20 F.3d 694, 696 (6th Cir. 1994) (erroneous admission of prior conviction evidence harmful when the case was hard fought and it was possible that prior conviction evidence had a significant impact on the jury); and ***United States v. Roenigk***, 810 F.2d 809, 814–17 (8th Cir. 1987) (admission of prior criminal conduct evidence against the defendant improper when the evidence was not introduced for purposes of impeachment and when it was irrelevant to the offense charged).

Accordingly, trial counsel was constitutionally ineffective when she withdrew her objection to the admission of these prior bad acts.

CONCLUSION

For the foregoing reasons, Molde respectfully requests that this Court vacate his conviction and sentence and order a new trial.

Dated this 10th day of February, 2022.

Respectfully submitted,

Electronically signed by:

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CERTIFICATION BY ATTORNEY

I hereby certify that this brief conforms to the rules contained in s. 809.19 (8) (b), (bm) and (c) for a brief. The length of this brief is 10,149 words.

I further certify that filed with this brief is an appendix that complies with s. 809.19 (2) (a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under s. 809.23 (3) (a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 10th day of February, 2022.

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