STATE OF WISCONSIN

C O U R T O F A P P E A L S

DISTRICT III

Case No. 2021AP1346-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOBERT L. MOLDE,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF ENTERED IN DUNN COUNTY CIRCUIT COURT, THE HONORABLE ROD W. SMELTZER, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED

1. Has Molde shown that defense counsel rendered ineffective assistance by not objecting to a juror's question that elicited testimony from the State's expert about the prevalence of false accusations of child sexual assault?

The circuit court answered no.

This Court should answer no.

2. Has Molde shown that defense counsel rendered ineffective assistance by not seeking a mistrial once the expert answered the juror's question and provided an answer that was not favorable to the defense?

The circuit court did not address this question.

This Court should answer no.

3. Has Molde shown that defense counsel rendered ineffective assistance by not asking witnesses whether the child victim had a character for untruthfulness under Wis. Stat. § 906.08?

This circuit court answered no.

This Court should answer no.

4. Has Molde shown that defense counsel rendered ineffective assistance by withdrawing an objection to the admission of prior acts?

The circuit court answered no.

This Court should answer no.

INTRODUCTION

Molde was convicted upon a jury trial of first-degree sexual assault of a child under the age of 12 and incest for having sexual intercourse with his daughter, L.M. Molde challenges the performance of trial counsel on four grounds.

At trial, a jury submitted a question for the State's child sexual assault expert about the prevalence of false accusations of sexual assault. The expert responded that such accusations are exceedingly rare, constituting about 1% of allegations. Molde maintains that trial counsel was ineffective for not objecting to the question and for not seeking a mistrial once the expert gave her answer. These claims fail because Molde cannot show that an objection to the question or a motion for mistrial would have been grounded on settled Wisconsin law.

L.M.'s family members testified against her at trial, and defense counsel methodically elicited testimony from them establishing that they did not believe L.M.'s allegations against Molde. Their testimony left little doubt that they did not believe that L.M.'s character was truthful. Counsel was therefore neither deficient nor prejudicial in not asking the family members whether LM. had a character for untruthfulness.

Finally, Molde fails to show that counsel rendered ineffective assistance by not objecting to evidence that Molde had an OWI conviction and served jail time. Counsel's choice not to object to admission of this evidence was reasonable strategy because it established the timeline necessary to support the family's defense that Molde could not have assaulted L.M. when she said he did.

This Court should therefore affirm the judgment of conviction and the order denying the motion for postconviction relief.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Neither is requested. The issues may be resolved on the briefs by applying established law to the facts.

STATEMENT OF THE CASE

In January 2017, Jobert Molde's daughter L.M. attempted suicide in a high school bathroom by taking a bunch of over-the-counter pills. (R. 1:2.) L.M. had with her notes for each of her family members. (R. 1:2.) The note to her father said, "I want to say I love you, but I can't. I hope you remember that night at the brown house. The night mom was gone and you made [L.M.'s younger sister] Willow come get me. You told me to be a 'big girl for daddy.'" (R. 1:2; 118:1.) "Because of that night I am where I am." (R. 1:2; 118:1.)

A school guidance counselor provided assistance to L.M. in the bathroom and took her to the school nurse. (R. 1:2; 138:107–08.) The guidance counselor saw L.M.'s note to her father and asked her about it. (R. 1:2; 138:109–10.) L.M. said that her father had sexual intercourse with her. (R. 1:2; 138:110–11.)

Three days later, L.M. provided a full narrative of the assault in a videorecorded forensic interview. (R. 1:3.) Molde was charged on January 31, 2017, with first-degree sexual assault of a child under the age of 12 and incest. (R. 1:1.)

Before trial, the State gave notice that it intended to have the forensic interviewer, Laurel Edinburgh of Midwest Children's Resource Center, present expert testimony "regarding issues that are common in child sexual abuse cases." (R. 29:1.) At an August 2018 hearing, the court approved the State's request, remarking that expert testimony "especially with regard to like delayed reporting . . . [and] mental health issues relating to victims . . . certainly can be helpful for a jur[y's] understanding . . . ." (R. 65:10–12.) Upon learning before trial that Edinburgh would be unavailable to testify, the State moved to substitute Edinburgh's supervisor, Dr. Alice Swenson, as its expert. (R. 151:10.) Molde objected, but the court allowed the State to

substitute Dr. Swenson for Edinburgh at an early March 2019 hearing. (R. 151:10.)

The case was tried to a jury March 18 and 19, 2019. (R. 138; 139.) Once the jurors were empaneled, the court informed them that they could submit written questions of witnesses during the trial. (R. 138:105.)

One of the State's first witnesses, Dr. Swenson testified that she is a child abuse pediatrician at the Midwest Children's Resource Center in Minnesota. (R. 138:128.) Discussing her training and experience, Dr. Swenson noted that she had written a textbook on medical conditions that mimic signs of sexual abuse. (R. 138:129.) Dr. Swenson testified about how delayed or piecemeal reporting by child sexual assault victims is "the rule and not the exception." (R. 138:130–33.) Dr. Swenson said children who have difficulty coping with the effects of an assault may "end up doing things like self harming and suicide attempts." (R. 138:132–33.)

Dr. Swenson testified that she supervised Laurel Edinburgh's January 16, 2017 forensic examination of L.M., and the video recording of the interview was played for the jury. (R. 138:134–35, 136.)

In the recording, L.M. told the interviewer that she and her family—L.M. and Molde, L.M.'s adoptive mother Stephanie Molde, older brothers Hunter and Tristan, and younger sister Willow—lived in a house "in town" in Colfax until she was about 11. (R. 126:5–8.) When asked to talk about Molde touching her, L.M. said, "My mom had gone away one night, and my sister [Willow] whenever my mom was gone, she'd be upset, so she'd go and sleep upstairs in [Molde's] room with her." (R. 126:9.)[1] "And [Molde] made [Willow] come down

[1] The State cites the transcript of the interview, which was received as trial exhibit 20. (R. 126:1.) A DVD with the video

and get me." (R. 126:9.) "And when I got upstairs, Dad told Willow to wait at the door. He told me to be a big girl, and he made me get undressed. He laid me down on the bed, and he also got undressed." (R. 126:10–11.) Asked what happened next, L.M. said, "He did something inappropriate." (R. 126:11.) L.M. said she was scared and confused. (R. 126:11.) She said that the door was open, and Willow was waiting outside the door. (R. 126:11.) Asked if she could remember what Molde said, L.M. said, "He just told me it will be good." (R. 126:12.) L.M. said that Molde "used his private part and he put it in mine," which "hurt." (R. 126:13.) L.M. said that she was "[e]ight or nine" at the time. (R. 126:15.)

L.M. said, "Afterwards I was crying, and [Willow] told me that she wanted to be a big girl too." (R. 126:16.) "I told her she didn't." (R. 126:16.) The next morning, L.M. said she told Willow that "it was all just a dream, forget about it, [and] not to tell anyone." (R. 126:16.)

L.M. said she disclosed Molde's abuse to her sister Autumn, who lives with another family. (R. 126:17.) She said she attempted suicide about a week later. (R. 126:17–18.)

After the video was concluded, Dr. Swenson testified that "[i]n about 97 percent of sexual abuse cases" in which "there's been a report of penetration, there are no findings on the anal[/]genital exam." (R. 138:139.) In reviewing the records of L.M.'s physical exam, Dr. Swenson said there were no signs of abuse. (R. 138:140.)

Following the lawyers' questions, a juror submitted two questions in writing for Dr. Swenson. (R. 138:154.) The court held a brief sidebar with the attorneys, and then asked Dr. Swenson, "Doctor, [the juror's first question] says how

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recording of the interview is also part of the record. (R. Tr. Ex. #7.) A DVD with the video recording of Molde's custodial interview is also part of the record as Trial Exhibit #9.

frequent is it for children to make up a story of sexual abuse?" (R. 138:154.) The doctor responded, "False disclosures are extraordinarily rare, like in the one percent of all disclosures are false disclosures." (R. 138:154.) The court then asked the juror's follow up, "Second part of that is why would they do that?" The doctor responded, "I don't think I really have an answer to that." (R. 138:154–55.)

When defense counsel Jessie Weber asked if there were "particular studies that have been conducted" about false allegations, Dr. Swenson said that she could not recall their names: "There are that I've read, yes. I don't know the names of them off the top of my head." (R. 138:155.)

L.M. also testified at trial. (R. 138:158.) L.M. testified about text messages received into evidence that she sent to Autumn a few days before her suicide attempt. (R. 123:1–9; 138:162.) L.M. said in one message that she was "pretty sure [Molde] was drunk" on the night of the assault, and Molde "ma[d]e me lose my virginity at about 9." (R. 123:2.) L.M. also testified about her suicide attempt and read aloud her notes to Molde, Stephanie Molde, Willow, and Tristan. (R. 117; 118; 119; 120; 138:163–68.)

L.M. testified about the assault, largely restating the narrative she told the interviewer over two years earlier. (R. 138:168–74.) The only significant addition was she said Molde told her "[t]hat it was our little secret." (R. 138:172.) L.M. agreed she "start[ed] to forget" what Molde had done, but then she started to remember again. (R. 138:174.) At that point, she started cutting herself "[s]o I could focus on something else." (R. 138:175.)

L.M. agreed she remembered Molde went away to jail for a period of time in 2012. (R. 138:175.) Asked why she didn't tell anyone about the abuse sooner, L.M. said, "Growing up, I was told that cops and social workers were bad, and if something happened and my parents went to jail, then we

would be put into foster homes and be split up and wouldn't see each other." (R. 138:177–78.)

Colfax Chief of Police William Anderson testified about the investigation, and his interview of Molde with a sheriff's department investigator. (R. 139:13–15.) Excerpts of the videorecording of the interview were played for the jury. (R. 139:15–18.) At one point, Molde was asked if his kids "were honest," and he responded: "Yeah. Very honest. Brutally honest." (R. 130:16;[2] 139:16.) On cross-examination, defense counsel played for the jury portions of the video in which Molde strenuously denied assaulting L.M. (R. 130:33, 47–48, 53; 139:32–35.) In another excerpt, Molde said that he told L.M. and Willow "to be a big girl for daddy" when he kicked their mother out of the house after he got back from alcohol treatment. (R. 130:39; 139:33.)

The State called Stephanie Molde and was granted permission to treat her as a hostile witness if necessary. (R. 139:39–40.) Stephanie said that she knew L.M. had alleged Molde committed the assault on a night when she (Stephanie) was staying elsewhere, then testified there was only one such period, and it lasted just two days. (R. 139:46–47.) Further, she insisted that this time happened after Molde completed alcohol treatment in July 2011 and was sober. (R. 139:58, 71.)

Stephanie made several statements indicating that she did not believe L.M.'s allegation against her husband. (R. 139:51–74.) Likewise, the defense called other relatives of L.M.—including her older brother Hunter Clemetson and younger sister Willow Molde, and her cousin Taylor Paulus—who offered testimony showing that they also did not believe L.M. (R. 139:89–134.) Molde did not testify. (R. 139:136.)

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[2] The State cites to the transcript of the interview, which was accepted as Exhibit 23 at trial. (R. 130:1.)

The jury found Molde guilty of both counts. (R. 139:195.) The court imposed a total sentence of 25 years of initial confinement and 7 years and 6 months of extended supervision.[3] (R. 145:1–2.)

In November 2020 and February 2021, Molde, by counsel, filed a motion and a supplemental motion for postconviction relief pursuant to Wis. Stat. § (Rule) 809.30. (R. 163:1–36; 185:1–40.) Molde alleged in the motions that trial counsel rendered ineffective assistance by (1) not objecting to a juror's question about the prevalence of false allegations of sexual assault (R. 163:2–8; 185:2); (2) not seeking a mistrial once the expert testified that only about 1% of allegations are false (R. 163:8; 185:8); (3) not asking L.M.'s family members whether she had a reputation for dishonesty under Wis. Stat. § 906.09(1) (R. 185:12–16); and (4) withdrawing counsel's prior objection to admission of other act evidence that Molde spent time in jail on a conviction for operating a motor vehicle while intoxicated (OWI).[4] (R. 163:11–13.)

The court held an evidentiary hearing on the motion over two days at which trial counsel Jessie Weber testified. (R. 175; 197.) Several of L.M.'s family members also testified,

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[3] Twenty-five years is the mandatory minimum period of initial confinement on a conviction for first-degree sexual assault of a child under the age of 12 by sexual intercourse, contrary to Wis. Stat. § 948.02(1)(b). Wis. Stat. § 939.616(1r). Before sentencing, Molde moved to preclude application of the mandatory minimum, alleging that the statute violated the separation of powers doctrine and was therefore unconstitutional. (R. 142:1–5.) The sentencing court denied the motion, and Molde does not renew this challenge on appeal. (R. 154:5–6.)

[4] Molde also argued that counsel was ineffective in her litigation of a motion seeking admission of hospital records allegedly showing L.M.'s reputation for dishonesty. (R. 163:8–11; 185:8–11.) The court denied this claim (R. 218:6–8), and Molde does not renew it on appeal.

each briefly asserting that, had they been asked at trial, they would have testified that L.M. had a reputation for dishonesty. (R. 197:76–114.)

The parties filed post-hearing briefs. (R. 202; 203; 207; 208.) Addressing each claim except ineffectiveness for not seeking a mistrial,[5] the circuit court denied the postconviction motions in a July 16, 2021 bench ruling. (R. 218:1–11.) Portions of the circuit court's oral ruling, and testimony from the postconviction hearing, are provided in the Argument section.

The court issued a final written order denying the motions on October 11, 2021. (R. 225:1.) Molde appeals.

ARGUMENT

I. Molde cannot show that trial counsel was ineffective for not objecting to a juror's question of the State's child sexual assault expert witness about the prevalence of false reports of assault.

A. Standard of Review

Whether a defendant was deprived of the right to effective assistance of counsel is a question of constitutional fact reviewed under a mixed standard of review. *State v. Mayo*, 2007 WI 78, ¶ 32, 301 Wis. 2d 642, 734 N.W.2d 115. Findings of fact are upheld unless clearly erroneous, and whether those facts constitute deficient performance and prejudice is decided independently. *Id.*

[5] The court did not address the mistrial claim because, in his original postconviction motion, Molde presented it within the context of his claim of ineffectiveness for not objecting to the juror's question. (R. 163:8.)

B. To prove ineffective assistance, the defendant must overcome the strong presumption that counsel's performance was constitutionally adequate and show a reasonable probability that, but for counsel's errors, the outcome would have been different.

A defendant claiming ineffective assistance of counsel must prove both that his lawyer's representation was deficient and that he suffered prejudice as a result of counsel's deficient performance. *State v. Burton*, 2013 WI 61, ¶ 47, 349 Wis. 2d 1, 832 N.W.2d 611 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

To prove deficient performance, a defendant must show specific acts or omissions of counsel that were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court "strongly presume[s]" that counsel has rendered adequate assistance. *Id.* "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. A lawyer's performance is not deficient unless he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687.

"[C]ounsel does not perform deficiently in failing to 'object and argue a point of law' that is 'unclear.'" *State v. Morales-Pedrosa*, 2016 WI App 38, ¶ 16, 369 Wis. 2d 75, 879 N.W.2d 772 (quoting *State v. Thayer*, 2001 WI App 51, ¶ 14, 241 Wis. 2d 417, 626 N.W.2d 811).

To show prejudice, the defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "It is not enough 'to

show that the errors had some conceivable effect on the outcome of the proceeding.'" *Harrington v. Richter*, 562 U.S. 86, 104 (2011) (quoting *Strickland*, 466 U.S. at 693).

C. Counsel's performance in not objecting to the juror's question was not deficient because the testimony the question elicited did not implicate *Haseltine*, was within the scope of the circuit court's order, and did not violate Wis. Stat. § 907.02(1) and *Daubert*.

As noted, a juror submitted two questions of the State's child sexual abuse expert, Dr. Swenson: "How frequent is it for children to make up a story of sexual abuse[?]" and "Why would they do that[?]" (R. 106:1; 138:154.) The court held a sidebar with the attorneys, and neither objected to the question being asked. (R. 138:154.) Postconviction, trial counsel Jessie Weber testified that she could not think of a legal basis on which to object to the question. (R. 175:17–18.) In its postconviction decision, the circuit court found that the jurors' question was "within the purview of Dr. Swenson's expertise." (R. 218:4.) The court concluded that counsel's non-objection to the juror's question "was not ineffectiveness of counsel." (R. 218:5.)

Molde argues that counsel was ineffective for not objecting to the juror's question for two reasons. First, he asserts the question elicited testimony from Dr. Swenson that was inadmissible because it constituted an opinion as to whether L.M. was telling the truth. (Molde's Br. 22–30.) Second, he maintains that the question produced testimony that was beyond the scope of the circuit court's order granting the State's request to present expert testimony and was contrary to *Daubert v. Merrell Dow Pharm. Inc.*, 509 U.S. 579 (1993) and Wis. Stat. § 907.02(1). (Molde's Br. 30–33.)

As shown below, Molde cannot prove deficient performance or prejudice on either of his theories. Accordingly, his claim fails.

1. Under Wisconsin law, Dr. Swenson's answer did not constitute inadmissible *Haseltine* testimony, and thus counsel was not deficient for not objecting to the juror's question on this ground.

"[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). 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).

Molde argues Dr. Swenson's testimony that false accusations of assault are "extraordinarily rare, like in the one percent of all disclosures are false" was an implicit statement that L.M. was telling the truth, contrary to *Haseltine*. (Molde's Br. 22–30.) But this Court has already rejected a claim that counsel was ineffective for not objecting on *Haseltine* grounds to a question intended to elicit expert testimony on the prevalence of false accusations of sexual assault.

In *Morales-Pedrosa*, 369 Wis. 2d 75, ¶¶ 1, 12, the defendant was charged with several offenses for sexually assaulting his daughter, and the State presented an expert witness on child sexual assault at trial. The prosecutor asked

the expert if it was true that, based on the expert's knowledge and experience, that "90 percent of reported cases are true?" *Morales-Pedrosa*, 369 Wis. 2d 75, ¶ 12. The expert answered, "Correct." *Id.*

On appeal, Morales-Pedrosa argued that counsel was ineffective for not objecting to the prosecutor's question, arguing that it sought to elicit impermissible *Haseltine* testimony about whether the victim was telling the truth. *Morales-Pedrosa*, 369 Wis. 2d 75, ¶ 19. This Court disagreed, concluding that counsel did not perform deficiently by not objecting to the prosecutor's question "because the law in Wisconsin was unclear as to whether the type of testimony elicited from McGuire constituted impermissible vouching for B.M.'s credibility." *Id.*

This Court distinguished Morales-Pedrosa's case from *Haseltine*. *Morales-Pedrosa*, 369 Wis. 2d 75, ¶ 23. The Court determined that the expert's "generalized statement" about the prevalence of false allegations was not "functionally [the] equivalent to [the expert] testifying [the victim] was being truthful with her accusations in the case." *Id.* To the extent the issue of whether such an expert could, in effect, be an impermissible opinion on whether the victim was telling the truth, the Court concluded that trial counsel did not have a duty to raise an objection that was based on unsettled law. *Id.* ¶ 24. The Court noted that Morales-Pedrosa's argument relied primarily on law from other jurisdictions—law that is not binding in Wisconsin, and thus did not create a duty on counsel's part to raise an objection. *Id.*

Molde cites *Morales-Pedrosa* but only for the proposition that "[t]his Court has . . . acknowledged that a generalized percentage probability—if high enough—could violate *Haseltine*." (Molde's Br. 23.) True, it *could*, but no Wisconsin court has decided this question. *Morales-Pedrosa* explicitly declined to do so in part because the issue was a novel one arising in the context of ineffective assistance.

Morales-Pedrosa, 369 Wis. 2d 75, ¶ 23. That is the case here, too. Even though an opinion that only 1% of accusations are false may be more "objectionable" than the 10% figure in *Morales-Pedrosa*, *id.* ¶ 24, the fact remains that no Wisconsin case has held that an expert opinion based on a general statistic constitutes a *de facto* opinion as to the truthfulness of a victim's allegation.

Thus, the primary rationale for this Court's decision in *Morales-Pedrosa* also applies here: counsel did not perform deficiently for not making a *Haseltine* objection because Wisconsin law is unclear as to whether the expert's testimony in this case runs afoul of *Haseltine*. *See Morales-Pedrosa*, 369 Wis. 2d 75, ¶ 16. Molde's extended discussion of cases from other jurisdictions (Molde's Br. 24–30) fails to show that counsel had a duty to make such an objection under Wisconsin law.

Additionally, Molde fails to show that Wisconsin courts would or should adopt his position that an expert opinion that false accusations of sexual assault amount to 1% of accusations constitutes an opinion that this victim is telling the truth. A statement based on research regarding the prevalence of false accusations is not an opinion about whether a particular victim is telling the truth. Recently, the Wisconsin Supreme Court construed *Haseltine* narrowly in concluding that an expert's testimony was admissible about whether the victim's statements made during a cognitive graphic interview showed "indications" of coaching or dishonesty. *State v. Maday*, 2017 WI 28, ¶¶ 38–39, 374 Wis. 2d 164, 892 N.W.2d 611. The court explained that the testimony did not amount to an opinion as to whether the victim was being truthful because the testimony was based on objective standards and the expert's training and experience.

2. The juror's question did not implicate matters beyond the scope of the court's order and Molde has not shown that Dr. Swenson's answer was inadmissible under *Daubert* or Wis. Stat. § 907.02(1); thus, counsel was not deficient in not objecting to the juror's question on these bases.

Molde next argues that counsel should have objected on the ground that the question sought an opinion that was beyond the scope of the court's order. (Molde's Br. 30.) Further, Molde argues, the question elicited testimony that was inadmissible under *Daubert* and Wis. Stat. § 907.02(1).

First, Molde fails to show that the question elicited testimony that was beyond the scope of the court's order allowing expert testimony. The court found in its postconviction decision that the juror's question was, in fact, "within the purview of Dr. Swenson's expertise." (R. 218:4.) Despite the court's decision, Molde misleadingly asserts that the court qualified Dr. Swenson's testimony "for the sole purpose of analyzing the complainant's forensic interview," citing R. 151:12. (Molde's Br. 30.) Of course, Dr. Swenson testified about much more than this limited topic—she addressed delayed reporting of child sexual assault and when physical findings of abuse are not likely to be present, for example. (R. 138:133, 138–39.) The language Molde cites is merely a rejection of Attorney Weber's argument that Swenson should not address the forensic interview itself because Dr. Swenson did not conduct the interview (Dr. Edinburgh did). (R. 151:11–12.)

No, the State substituted Dr. Swenson for Dr. Edinburgh as its expert, and Dr. Swenson was allowed to testify on the same broad topics that Dr. Edinburgh originally was. The State notified the court that its expert would present testimony "regarding issues that are common in child sexual

abuse cases." (R. 29:1, 4.) The State then listed three specific topics the expert would address—delayed reporting, mental health issues of sexual assault victims, and physical evidence of assault—but did not state that the testimony would be limited to these topics only. (R. 29:1–4.) When the court authorized the State to present expert testimony, it remarked that testimony about "delayed reporting . . . [and] mental health issues relating to victims . . . certainly can be helpful for a jur[y's] understanding . . . ," but it did not limit the scope of the testimony to those topics. (R. 65:10–12.) And, notably, the court did not recognize the juror's question to be outside the scope of its order allowing expert testimony.

Molde does not show that testimony about the prevalence of false accusations of assault was outside the bounds of the order authorizing expert testimony, and thus counsel was not deficient for not objecting to the juror's question on this ground.

Second, Molde fails to show that Dr. Swenson's testimony about the prevalence of false accusations of child sexual assault was inadmissible under *Daubert* and Wis. Stat. § 907.02(1).

Under *Daubert*, the trial court engages in a gatekeeping function to ensure that the expert's opinion is based on a reliable foundation and is relevant to the material issues. *State v. Giese*, 2014 WI App 92, ¶ 18, 356 Wis. 2d 796, 854 N.W.2d 687 (citing *Daubert*, 509 U.S. at 589 n.7). Wisconsin Stat. § 907.02(1) incorporates the reliability standard set forth in *Daubert* and governs the admission of expert testimony. *See Seifert v. Balink*, 2017 WI 2, ¶¶ 50–51, 372 Wis. 2d 525, 888 N.W.2d 816.

The statute states that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue," then "a witness qualified as an expert by knowledge, skill,

experience, training, or education, may testify thereto in the form of an opinion or otherwise," provided that "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(1). *Daubert* contains a non-exhaustive list of factors courts may consider in applying this standard, and the *Daubert* test is meant to be flexible. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999).

Molde has a difficult task in demonstrating that Dr. Swenson's testimony about the prevalence of false accusations of assault is inadmissible under *Daubert* and Wis. Stat. § 907.02, and he fails to do so. He asserts without citation that "[a]n expert opinion regarding false allegations in child sexual abuse cases has no accepted basis in the field." (Molde's Br. 32.) Molde provides no case from any jurisdiction that stands for this proposition. In fact, such expert testimony on this topic appears to be offered with some frequency in child sexual assault cases, as *Morales-Pedrosa* and the many other cases Molde cites in the previous discussion demonstrate (setting aside whether such testimony was deemed inadmissible on *Haseltine*-type grounds).

Dr. Swenson's training and knowledge in the field of child sexual abuse is extensive, as her CV shows and Molde does not appear to dispute. (R. 122:1–8.) Again, the court found postconviction that the prevalence of false accusations was within the doctor's expertise. (R. 218:4.) Molde's suggestion that, to have a qualified opinion, Dr. Swenson must have conducted "her own research" on this specific topic instead of relying on her knowledge of the published studies in the field is absurd and unsupported by law. (Molde's Br. 32.)

Finally, it would be wholly speculative to predict what the outcome of a *Daubert* inquiry might have been had counsel raised a *Daubert* objection, given the flexible,

multifactor nature of such an inquiry. The opinion Molde obtained from Dr. David Thompson about the usefulness of such an assessment—there is "no support for expert testimony giving a single rate" or false accusations, he argued—would be relevant to this inquiry. (R. 188:2.) But neither it nor anything else Molde offers in this discussion proves that Dr. Swenson's testimony is inadmissible under *Daubert*.

For these reasons, counsel was not deficient in not raising a *Daubert* challenge to the juror's question.

* * * *

Based on the foregoing, Molde cannot prove that counsel was ineffective for not objecting to the juror's question.

II. Molde cannot show that counsel was ineffective for not seeking a mistrial after the State's expert answered the juror's question.

In the alternative, Molde argues that, once Dr. Swenson testified about the exceedingly low prevalence of false accusations of assault, he was entitled to a mistrial, and trial counsel was ineffective for not requesting one. Molde is wrong.

A. Mistrial standard

"A mistrial is appropriate only when a 'manifest necessity' exists for the termination of the trial." *State v. Adams*, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998). A trial court deciding a request for a mistrial "must determine, in light of the whole proceeding, whether the claimed error was sufficiently prejudicial to warrant a new trial." *State v. Sigarroa*, 2004 WI App 16, ¶ 24, 269 Wis. 2d 234, 674 N.W.2d 894.

B. The absence of a motion for a mistrial was neither deficient nor prejudicial where such a motion would not have been granted.

Molde fails to show that Dr. Swenson's testimony created a manifest necessity for termination of the trial.

The main problem with Molde's mistrial argument is Molde cannot prove that admission of Dr. Swenson's testimony was error, much less that the alleged error was "sufficiently prejudicial" to warrant a mistrial. Molde appears to assume that the admission of Dr. Swenson's testimony was an obvious error under *Haseltine* and *Daubert*, compelling counsel to move for mistrial. But Molde has not proven that admission of this evidence was contrary to these cases. No Wisconsin case holds that expert testimony about the prevalence of false accusations of assault is functionally *Haseltine* testimony on the truthfulness of the victim. *See Morales-Pedrosa*, 369 Wis. 2d 75, ¶ 23. And Molde does not begin to show that Dr. Swenson's testimony was contrary to *Daubert*. She was qualified to offer such an opinion (R. 122:1–8; 218:4) and Molde does not show that Dr. Swenson's testimony was not "based upon sufficient facts or data" or was not "the product of reliable principles and methods." Wis. Stat. § 907.02(1).

Relatedly, the fact that expert testimony was presented that was prejudicial to Molde does not demonstrate that the evidence was "sufficiently prejudicial" to warrant a mistrial under *Adams*. Evidence offered by the State at trial is generally "prejudicial" to the defendant. *See State v. Alexander*, 214 Wis. 2d 628, 571 N.W.2d 662 (1997). But the prejudice assumed by the "substantial prejudice" analysis is prejudice arising from error, not the sort of regular, permissible prejudice associated with admissible evidence. Again, because Molde cannot show error, he cannot prove "substantial prejudice" under *Adams*. *See Sigarroa*, 269 Wis. 2d 234, ¶ 24.

As with the analysis in the first section, counsel was not deficient for not seeking a mistrial because she lacked an established ground in Wisconsin law on which to assert that admission of Dr. Swenson's testimony was an error. *See Morales-Pedrosa*, 369 Wis. 2d 75, ¶ 16. And Molde fails to show the legal error on which the circuit court would have granted a mistrial had counsel requested one.

Because Molde cannot demonstrate that the circuit court would have granted a mistrial following Dr. Swenson's testimony, he cannot prove deficient performance or prejudice for counsel not seeking a mistrial. *See State v. Wheat*, 2002 WI App 153, ¶¶ 14, 23, 256 Wis. 2d 270, 647 N.W.2d 441.

III. Molde cannot show that counsel was ineffective for not asking L.M.'s family members at trial whether L.M. had a character or reputation for untruthfulness.

Molde next argues that counsel rendered ineffective assistance by not asking each of the family member witnesses who testified at trial whether L.M. had a character or reputation for dishonesty. (Molde's Br. 35–37.) As shown below, counsel already elicited from the family members substantial, damaging testimony establishing that they did not believe L.M.'s allegations. Under these circumstances, Molde cannot show that the absence of a question about whether L.M. had a character for untruthfulness was deficient or prejudicial.

As pertinent, Wis. Stat. § 906.08(1)(a) provides that "the credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion" but "may refer only to [the witness's] character for truthfulness or untruthfulness." *See State v. Cuyler*, 110 Wis. 2d 133, 138, 327 N.W.2d 662 (1983). Here, counsel did not ask the family member witnesses—L.M.'s mother Stephanie Molde, brothers Hunter Clemetson and Tristan Molde, sister Willow Molde,

and cousins Brandi Timm and Taylor Paulus—whether L.M. had a character for untruthfulness. All but one of these witnesses (Brandi Timm) gave testimony indicating that they did not believe L.M.'s allegations, much of it methodically elicited by defense counsel.

Stephanie Molde. L.M.'s adoptive mother offered testimony that contradicted L.M.'s testimony and statements about Molde's assault. L.M. testified that the assault happened on a night when Stephanie was out of the house, and said at trial and in a text to her sister Autumn (who lived with another family) that she smelled alcohol on Molde's breath. (R. 123:2; 126:9; 138:172.) But Stephanie testified that she was gone from the house for only one two-night period, and it was after Molde was sober from alcohol following treatment—a time when L.M. presumably would not have smelled alcohol on Molde's breath. (R. 139:46, 51–52, 58–59.)

Stephanie testified that she would have expected that L.M. would have told her if Molde sexually assaulted her "[b]ecause she always told me. She always told me when something was wrong." (R. 139:60.) Stephanie said she read L.M.'s diary and said L.M. "talk[ed] a lot about a friend of hers that was cutting [herself] a lot" and was "getting a lot of attention for it," which led Stephanie to infer that L.M. started cutting, too, for attention—all but saying she did not believe that she started cutting because of memories of Molde raping her. (R. 139:64.) Stephanie also said that L.M. was frustrated with the house rules she and the other children were living when she attempted suicide—the Molde family was living with Stephanie's parents at the time because their trailer burned down in 2013. (R. 139:64–69.) Stephanie admitted to the prosecutor that she believed that L.M. attempted suicide because she didn't want to live at her grandparents' house anymore, not because of memories of the alleged assault. (R. 139:73.) Finally, Stephanie disputed

L.M.'s statement that she didn't disclose the assault right away because she was brought up not to trust cops and social workers. "I don't' know why I would have told her that," Stephanie testified. (R. 139:69.)

Hunter Clemetson. L.M.'s 21-year-old brother testified that Molde is his stepfather, and he was raised by Molde. Hunter confirmed his mother Stephanie's story that she was gone from the house for only one short period, and it was after Molde stopped drinking. (R. 139:96–98.) Clemetson then testified that, he recalled these few nights well, and that he was not sleeping because he was worried about his mother and was waiting for her to come home. (R. 139:99–100.) He testified that if Willow had come to get L.M., and if Molde had assaulted L.M., "I would have noticed" because he was awake and he was in the living room at the time. (R. 139:100.)

When asked if he considered L.M. his sister, Hunter responded, "At this point, I don't know . . . . Because of what she is accusing my dad of." (R. 139:106–07.)

Willow Molde. Willow denied going downstairs to get L.M. for Molde or standing outside the doorway while Molde had intercourse with L.M. (R. 139:124–25.) Willow agreed that it was something she would have remembered had it happened. (R. 139:125.) Willow then testified that she had a dream that was similar to L.M.'s allegations: "In my dream, my dad came downstairs and woke [L.M.] up and brought her back upstairs and did that." (R. 139:125–26.) Willow said she told L.M. about the dream, and L.M. told her it was "just a nightmare." (R. 139:126.) Willow said she also asked L.M. at school "why she was trying to put my dad in jail." (R. 139:127.)

Tristan Molde. L.M.'s 18-year-old brother testified only briefly and was not cross-examined by defense counsel. (R. 139:80–85.) But Tristan testified that he had continued to live with his father in the two years since L.M. had alleged that Molde assaulted her. (R. 139:84–85.)

Taylor Paulus. L.M.'s 17-year-old cousin testified that she had spoken recently at school with L.M. about allegations she made against Molde. (R. 139:108–09.) Taylor testified that L.M. had made some statements to her about other assaults Molde had committed against her that made little sense. (R. 139:110.) For example, Taylor said that L.M. told her that Molde also assaulted her at Stephanie's boyfriend's house in Bloomer, when Stephanie was living there and not with Molde. (R. 139:110.)

Brandi Timm. L.M.'s cousin gave brief testimony on behalf of Molde about a conversation she had with L.M. in 2010 when L.M. was seven and Brandi was nine. (R. 1:1; 139:90.) Brandi testified that L.M. explained to her "what a condom is and how to use it and I just was so confused," indicating that L.M. had sexual knowledge two years before the alleged assault. (R. 139:90.)

After all this testimony, it would have been patently clear to the jury that L.M.'s family members—particularly her closest family members, her mother Stephanie, brother Hunter, sister Willow, and, to a lesser extent, brother Tristan—did not believe L.M.'s allegations against Molde. The only witness whose testimony does not obviously support such an inference is cousin Brandi.

Where counsel methodically elicited testimony establishing that L.M.'s family members did not believe her, the absence of an additional question about whether L.M. had a character for untruthfulness was neither deficient performance nor prejudicial. It is well-established that "[c]ounsel need not be perfect, indeed not even very good, to be constitutionally adequate." *State v. Thiel*, 2003 WI 111, ¶ 19, 264 Wis. 2d 571, 665 N.W.2d 305 (quoting *State v. Williquette*, 180 Wis. 2d 589, 605, 510 N.W.2d 708 (Ct. App. 1993). Attorney Weber's performance here in eliciting a significant amount of testimony from L.M.'s family members that was adverse to L.M.'s credibility far exceeded this

standard. Counsel was not deficient for failing to put a bow on her examination of these witnesses by also asking if L.M. had a character for untruthfulness. And where the witnesses' testimony left little doubt about their opinion of L.M.'s truthfulness, Molde cannot show that the absence of a question about character for truthfulness was prejudicial.

For these reasons, Molde cannot show that counsel was ineffective for not asking L.M.'s family members about her character for truthfulness.

IV. Molde cannot show that trial counsel was ineffective for withdrawing her objection to the admission of prior acts evidence.

Finally, Molde argues that counsel rendered ineffective assistance for withdrawing an objection to the admission of evidence that Molde had an OWI conviction for which he served jail time in 2012. But, as Molde acknowledges, counsel made a strategic decision not to object to presentation of evidence that Molde was a drinker and was jailed on a conviction, and Molde fails to show that this decision was unreasonable or prejudicial.

As noted, a strong presumption exists that counsel's performance "was within the 'wide range' of reasonable professional assistance." *Richter*, 562 U.S. at 104 (citation omitted). Reasonable strategic decisions do not constitute deficient performance. *See State v. Vinson*, 183 Wis. 2d 297, 307–08, 515 N.W.2d 314 (Ct. App. 1994). To be a reasonable trial strategy, "[t]he defense selected need not be the one that by hindsight looks best to us." *State v. Felton*, 110 Wis. 2d 485, 501–02, 329 N.W.2d 161 (1983). The plan and execution of that strategy need not be ideal to be constitutionally adequate. *See Richter*, 562 U.S. at 105 (counsel's performance is deficient if it "amount[s] to incompetence under 'prevailing professional norms,' not whether it deviated from best practices . . . ." (citation omitted)).

Here, Attorney Weber withdrew the defense's objection to evidence Molde had an OWI conviction for which he served jail time because the evidence established a timeline that supported Molde's defense that the assault could not have happened when L.M. said it did. As noted, L.M. testified that the assault occurred when her mother was out of the house, and Molde smelled of alcohol during the assault. Stephanie and Hunter both testified that the only time when Stephanie was away from the home was for two days *after* Molde returned from jail and treatment and was sober. (R. 139:46, 51–52, 58–59, 96–98.)

The postconviction court properly concluded that counsel's strategy in not opposing evidence of the OWI conviction and jail sentence was reasonable under the circumstances. (R. 218:7.) The evidence helped to establish the timeline that supported Stephanie's and Hunter's testimony that Molde was sober at the only time he could have committed the offense. This was a critical element of Molde's defense, and this evidence established the timeline supporting the family members' narrative of Molde's path from alcohol use to sobriety.

Molde argues that counsel's strategy was unreasonable because counsel could have established this timeline for the jury without informing it about his OWI conviction and jail time. (Molde's Br. 37–40.) Molde argues she could have reached a timeline by stipulation, but Molde merely assumes the State would have agreed to such a stipulation. (Molde's Br. 37.) But even assuming the State would have agreed to it, such a stipulation presumably still would have included a tacit admission that Molde had a drinking problem: It would have showed that he went to treatment during the time he was "out of the home" and became sober. And evidence that Molde "hit bottom" by his OWI conviction and jail time arguably would have made his family's testimony that he was sober when he returned home more credible. Regardless,

Molde cannot show that his attorney not seeking alternative means to establish the relevant timeline rendered his strategy unreasonable where the timeline was an essential part of his defense. *See Richter*, 562 U.S. at 105.

Finally, Molde cannot show a reasonably probability that admission of evidence of an OWI conviction for which he served a jail sentence would have affected the outcome where Molde was charged with wholly unrelated, and far more grave, offenses. *See Ritcher*, 562 U.S. at 104 (prejudice requires more than showing that counsel's errors had a conceivable effect on the outcome).

CONCLUSION

The order denying postconviction relief and the judgment of conviction should be affirmed.

Dated this 13th day of May 2022.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,354 words.

Dated this 13th day of May 2022.

Electronically signed by:

Jacob J. Wittwer
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CERTIFICATE OF EFILE/SERVICE

I certify that in compliance with Wis. Stat. § 801.18(6), I electronically filed this document with the clerk of court using the Wisconsin Court of Appeals Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 13th day of May 2022.

Electronically signed by:

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