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 REPLY BRIEF

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ARGUMENT

The state makes the following arguments. First, counsel's performance in not objecting to the juror's question was not deficient because: 1) the testimony the jury question elicited did not implicate ***Haseltine***; 2) was within the scope of the circuit court's order; and 3) did not violate Wis. Stat. § 907.02(1) or ***Daubert***. (State's Br. 17–24). Second, the absence of a motion for a mistrial was neither deficient nor prejudicial because such a motion would not have been granted. (State's Br. 25–26). Third, 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 because "counsel already elicited from the family members substantial, damaging testimony establishing that they did not believe L.M.'s allegations." (State's Br. 26–30). Finally, Molde cannot show that counsel was ineffective for withdrawing her objection to the admission of prior acts evidence because "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." (State's Br. 30–32). Molde will now address these arguments in turn.

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

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

The state misleadingly asserts that "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." (State's Br. 18).

This Court has acknowledged that a generalized percentage probability—if high enough—could violate ***State v. Haseltine***, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984). ***State v. Morales-Pedrosa***, 2016 WI App 38, ¶¶ 23–24, 369 Wis. 2d 75, 879 N.W.2d 772.

Morales-Pedrosa did not clearly prohibit a forensic interviewer's testimony that 90% of child sexual assault reports are true. However, this Court distinguished that figure from other jurisdictions that found statistical testimony improper when it claimed that "99.5%," "98%," or even "92–98%" of child sexual assaults are truthful. ***Id***. at ¶ 25. Therefore, while this Court left open the question of what percentage testimony would effectively constitute improper vouching, it nevertheless provided clear and compelling authority that statistical testimony that approaches near mathematical certainty is the functional equivalent of a witness improperly vouching for the credibility of the complainant. ***Id***. at ¶¶ 24–26.

Because ***Morales-Pedrosa*** was published in 2016—several years before Molde's trial—and applied the well-established and long-standing ***Haseltine*** rule against vouching for the credibility of the complainant, counsel should have been aware of the issue presented as well as its citation to authority that an expert's statement that "99.5%" or "98%" of children claiming to have been abused are telling the truth is the functional equivalent of saying that the victim in a given case is truthful or should be believed. ***Id***. at ¶ 25. ***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 99% as testified by Swenson *is* obviously objectionable and violates ***Haseltine***.

Moreover, virtually every case the Defense has located involving similar rates of statistical testimony has concluded such testimony was impermissible

credibility-bolstering testimony that invaded the province of the jury.[1] And like ***Morales-Pedrosa***, nearly all these cases were published well before Molde's trial. As such, this issue is far from a novel one as the state contends. (State's Br. 19). As recently stated by the California Court of Appeals, "the clear weight of authority in our sister states, the federal courts, and the military courts finds such

[1] ***United States v. Brooks***, 64 M.J. 325, 326–27, 329–30 (C.A.A.F. 2007) (expert testimony given by clinical psychologist who examined the victim that only 2% of all sexual assault allegations are false "invaded the province of the [jury] members" and was "plain[ly] and obvious[ly]" prejudicial error because "[t]his testimony provided a mathematical statement approaching certainty about the reliability of the victim's testimony"); ***Snowden v. Singletary***, 135 F.3d 732, 737–739 (11th Cir. 1998) ("[C]onsidering the lack of other evidence of guilt" and the fact that the government repeatedly "stressed the significance" of this testimony during its closing argument to the jury, expert testimony that "99.5% of children tell the truth" in sexual abuse cases "violated [defendant]'s right to due process by making his criminal trial fundamentally unfair" and the impropriety of this type of numerical credibility-bolstering evidence, "in both state and federal trials, can hardly be disputed."); ***Wilson v. State***, 90 S.W.3d 391, 392–93 (Tex. Ct. App. 2002) (expert testimony that "only two to eight percent of children lie" about being sexually assaulted "did not aid, but supplanted, the jury in its decision on whether the child complainant's testimony was credible," and was error); ***Powell v. State***, 527 A.2d 276, 278 (Del. 1987) (expert testimony that "ninety-nine percent of the alleged victims involved in sexual abuse treatment programs in which she was also involved 'have told the truth'" deprived defendant of his "substantial right" to have "his fate determined by a jury making the credibility determinations"); ***State v. Lindsey***, 149 Ariz. 472, 476–77, 720 P.2d 73 (1986) (expert testimony that "99 percent of [child] victims tell the truth" was prejudicial error because "[q]uantification of the percentage of witnesses who tell the truth is nothing more than the expert's overall impression of truthfulness" and "goes beyond 'ultimate issues' and usurps the function of the jury"); ***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").

evidence inadmissible." ***People v. Wilson***, 33 Cal. App. 5th 559, 570, 245 Cal. Rptr. 3d 256, 265 (2019).[2]

Counsel therefore had a duty to object to Swenson's 1% claim and argue ***Morales-Pedrosa***. ***State v. McMahon***, 186 Wis. 2d 68, 85, 519 N.W.2d 621 (Ct. App. 1994) (when counsel fails to raise an issue, counsel is deficient if the law is such that "reasonable counsel should know enough to raise the issue.").

Swenson's 1% testimony was likewise extremely prejudicial. Swenson's answer improperly vouched for L.M.'s allegation by suggesting a mathematical certainty that sexual abuse reports from children were not false. Simply put, if the jury believed Swenson, it would believe that the likelihood of L.M. falsely alleging sexual assault was virtually impossible.

The error in failing to object to the false report rate testimony was especially prejudicial because it was not a single, isolated reference. The state drew special attention to it in closing arguments. (139:163). Moreover, this argument was made in the middle of discussing L.M.'s allegation, (139:163), which was supported by no direct evidence at trial, (138:96–98). Thus, the reference appeared calculated to bolster the credibility of a particularly weak charge by reminding the jury that almost only 1% of reports are false, and by implication, this report was not false either. In a case which hinges largely on witness credibility, improperly bolstering the credibility of the accuser by using irrelevant and unsupported statistical testimony at a minimum undermines confidence in the outcome, especially when viewed with trial counsel's other errors.

[2] Notably, ***Morales-Pedrosa*** is one of the many cases cited by the ***Wilson*** court. The California Court of Appeals summarizes this Court's decision in ***Morales-Pedrosa*** as "distinguishing ***Brooks*** and ***Snowden*** on ground that generalized statement that 90 percent of children claiming to have been abused are telling the truth was 'less obviously objectionable than testimony that "99.5%," "98%," or even "92–98%" are telling the truth.'" 33 Cal. App. 5th at 570.

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).

The state erroneously argues that Molde failed to show that Swenson's 1% testimony "was outside the bounds of the order authorizing expert testimony," or that Swenson's answer was inadmissible under ***Daubert***[3] and Wis. Stat. § 907.02(1). (State's Br. 22).

As the state concedes in its brief, at no point did it give notice that Swenson would be testifying as an expert on the frequency of false allegations in child sexual abuse cases, nor did the circuit court ever make a ruling permitting Swenson to provide expert testimony on the frequency of false sexual assault reports. (State's Br. 21–22). Rather, the circuit court made clear that the permitted scope of Swenson's testimony was limited to "whether [the] proper procedures and protocol were followed during the interview." (138:122–23).

The state's argument that "the circuit court did not recognize the juror's question to be outside the scope of its order allowing expert testimony" is also unpersuasive. (State's Br. 22). "[A] trial judge is not expected to raise an evidentiary issue mid-trial on his or her own initiative." ***State v. Cameron***, 2016 WI App 54, ¶ 16, 370 Wis. 2d 661, 885 N.W.2d 611.

More importantly, Molde has shown that no such studies exist on the frequency of false sexual assault reporting and that an opinion with such mathematical certainty has no basis in fact. *See* Molde's Br. 32.

And while the state is correct that "such expert testimony on this topic appears to be offered with some frequency in child sexual assault cases," (State's Br. 23), Molde has shown that courts have consistently found the admission of

[3] ***Daubert v. Merrell Dow Pharm., Inc.***, 509 U.S. 579 (1993).

such testimony plainly and obviously prejudicial error. *See* Arg. I, Sec. 1, pp. 7–9, fn.1, *supra*.

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

The state argues that "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." (State's Br. 25).

However, Molde has shown that Swenson's 1% testimony violated the principles of ***Haseltine*** by presenting statistics which created a near mathematical certainty that L.M.'s sexual assault allegation was true. *See* Arg. I, Sec. 1, pp. 7–9, *supra*; Molde's Br. 22–30.

The state further grossly misvalues the degree of prejudice caused by Swenson's 1% claim. The jury's determination depended substantially, if not exclusively, on an assessment of the credibility of L.M. and the veracity of her allegation. Other than L.M.'s testimony, there was no direct evidence to support the allegation that Molde had sexually assaulted her. Swenson's testimony, in turn, directly bolstered L.M.'s credibility in a case where credibility was the only contested issue.

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).

The state argues that counsel's failure to elicit direct and explicit testimony from Stephanie Molde, Hunter Clementson, Willow Molde, Brandi Timm, Tristin

Molde, and Taylor Paulus that L.M. has a reputation for untruthfulness was neither deficient nor prejudicial because, based on the testimony that was elicited, "it would have been patently clear to the jury that L.M.'s family members … did not believe L.M.'s allegations against Molde." (State's Br. 29). The state is wrong.

The problem with the state's argument is that inferences are no substitute for direct and explicit testimony on L.M.'s character for untruthfulness and dishonesty. Again, the state never disputes Molde's claim that L.M.'s credibility was crucial in this case. There were no witnesses, no confession, and no physical or other evidence corroborating her testimony. (138:96–98). Counsel likewise testified that her entire trial strategy centered on attacking L.M.'s credibility. (175:26; 197:31).

Yet in the credibility battle of Molde's trial, the jury heard no direct testimony as to L.M.'s character for untruthfulness. This is because despite L.M.'s mother Stephanie Molde, brothers Hunter Clemetson and Tristan Molde, sister Willow Molde, and cousins Brandi Timm and Taylor Paulus all making clear to counsel prior to trial that they did not believe L.M.'s allegation, (175:45), counsel failed to elicit clear and direct testimony from these family members that L.M. has a character for untruthfulness and dishonesty.

Counsel agreed that there was no conceivable strategic reason for failing to elicit this testimony at trial, (197:54), as such opinion testimony from these family members as to L.M.'s character for untruthfulness would have been helpful to the defense, (197:58). *See* ***State v. Cooks***, 2006 WI App 262, ¶¶ 63–64, 297 Wis. 2d 633, 726 N.W.2d 322 (evidence corroborating the defense is extremely important in a credibility contest). Counsel's failure to elicit this vital testimony was therefore deficient. ***Duncan v. Ornoski***, 528 F.3d 1222, 1234 (9th Cir. 2008) (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.").

The state also contends that Molde was not prejudiced as "[a]ll but one of these witnesses … gave testimony *indicating* that they did not believe L.M.'s allegations." (State's Br. 27) (emphasis added). But that limited testimony was no substitute for clear and direct testimony that L.M. was known to be untruthful in matters other than this case. Telling the jury that L.M. has a flat-out untruthful reputation is a more compelling indictment of her credibility than the limited testimony that only hinted at her untruthful and dishonest character.

Given the lack of physical evidence and third-party eyewitnesses, there can be little doubt that any relevant information regarding L.M. and her character for untruthfulness would be at the heart of the jury's deliberation. *See* ***State v. O'Brien***, 223 Wis. 2d 303, 326, 588 N.W.2d 8 (1999) (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.").

Indeed, it would have been difficult for the jury to discount the complementary testimony of all six of these witnesses, had it been presented. ***State v. Cuyler***, 110 Wis. 2d 133, 141, 327 N.W.2d 662 (1983) (cases involving pure credibility battles are more likely to warrant reversal when the jury was not given the opportunity to assess evidence which could have significantly impacted the credibility determination).

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

The state mischaracterizes counsel's "decision not to object to presentation of evidence that Molde was a drinker and was jailed on a conviction" as a "strategic

decision" rather than what it is—deficient performance resulting in prejudice. (State's Br. 30).

Counsel made clear that she neither investigated nor considered other possible methods of impeaching L.M.'s trial testimony prior to withdrawing her objection to evidence of Molde's conviction and incarceration for OWI. (175:57). She further agreed that her decision to withdraw the objection was a mistake as there were several other ways for her to effectively impeach L.M.'s trial testimony without alerting the jury to Molde's conviction and incarceration for OWI. (175:58–60); *see* Molde's Br. 37–38.

Counsel therefore cannot be said to have made a strategic decision in withdrawing her objection. ***Sanders v. Ratelle***, 21 F.3d 1446, 1457 (9th Cir. 1994) (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); ***Reynoso v. Giurbino***, 462 F.3d 1099, 1113 (9th Cir. 2006) (a poor tactical decision involving counsel's approach to impeachment may constitute deficient conduct where the challenged action cannot be considered sound trial strategy).

The state's assertion that Molde suffered no prejudice because he "cannot show a reasonably probability that admission of the 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" likewise fails to carry water. (State's Br. 32). Counsel testified that 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).

The jury did not need to know Molde was convicted and incarcerated for OWI. (175:59; 197:52). Yet, at trial, L.M. called Molde a drinker and counsel then introduced evidence in which Molde had been convicted of and incarcerated for a crime involving drinking. (197:50). "Opening the door to otherwise inadmissible

extraneous offense evidence that undermines the defendant's character and credibility serves no purpose than to prejudice the defendant's ability to present his defense." ***Garcia v. State***, 308 S.W.3d 62, 69 (Tex. App. 2009).

CONCLUSION

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

Dated this 8th day of July, 2022.

Respectfully submitted,

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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 2,995 words.

Dated this 8th day of July, 2022.

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