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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

SUPPLEMENTAL BRIEF OF PLAINTIFF-RESPONDENT

JOSHUA L. KAUL
Attorney General of Wisconsin

JACOB J. WITTWER
Assistant Attorney General
State Bar #1041288

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1606
(608) 294-2907 (Fax)
wittwerjj@doj.state.wi.us

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The Court has ordered the parties to file supplemental briefs in light of its decision in *State v. Mader*, 2023 WI App 35, 408 Wis. 2d 632, 993 N.W.2d 761. The Court directs the parties to address whether, if *Mader* is controlling as to whether counsel was deficient for not objecting to Dr. Swenson's testimony that false reports account for one percent of sexual abuse disclosures by children, Molde suffered prejudice.

As shown below, Molde cannot demonstrate prejudice for counsel's non-objection to Dr. Swenson's testimony. L.M.'s multiple, detailed statements about the sexual assault—to her sister Autumn, to the forensic interviewer, and at trial—were consistent with each other. L.M. had no discernable motive to make up the allegation, and her disclosure that her father sexually assaulted her as a young child explained why, as a teenager, L.M. engaged in acts of self-harm, including cutting herself and attempted suicide. Assuming Dr. Swenson's testimony was improper, the State mentioned it only briefly in closing arguments, and the court properly instructed the jury to consider the expert's testimony as it would any other and not be bound by it.

The jury believed L.M.'s consistent reports of assault and not Molde's denials in finding Molde guilty beyond a reasonable doubt. Molde cannot show that, absent Dr. Swenson's testimony, there is a substantial likelihood that the jury would have reached a different result.

ARGUMENT

Molde cannot show prejudice for counsel's non-objection to Dr. Swenson's statistical testimony about the prevalence of false reports of sexual abuse by children.

A. To show *Strickland* prejudice, a defendant must demonstrate that the likelihood of a different result is substantial.

A defendant claiming ineffective assistance of counsel must prove that they suffered prejudice as a result of counsel's deficient performance. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Whether counsel's performance prejudiced the defense is a question of law this Court determines independently. *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996).

To show prejudice, the defendant must affirmatively prove that the alleged defect in counsel's performance actually had an adverse effect on the defense. *Strickland,* 466 U.S. at 693. It is not enough to show that counsel's alleged error had some conceivable effect on the outcome. *Id.* Rather, the defendant must show that 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." *Id.* at 694.

In *Harrington v. Richter*, 562 U.S. 86, 105 (2011), the Supreme Court discussed the high standard a defendant must meet to establish prejudice. "In assessing prejudice under *Strickland*, the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead," the Court continued, "*Strickland* asks whether it is 'reasonably likely' the result would have been different. This does not require a

showing that counsel's actions 'more likely than not altered the outcome' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Richter*, 562 U.S. at 111–12 (citations omitted). "*The likelihood of a different result must be substantial, not just conceivable*." *Id.* at 112 (emphasis added).

In deciding the issue of prejudice, the reviewing court "must also assume that the jury 'reasonably, conscientiously, and impartially appl[ied]' the instructions of law given by the trial court." *Mader*, 408 Wis. 2d 632, ¶ 80 (alteration in original) (quoting *Strickland*, 466 U.S. at 695).

B. Molde cannot show that, absent Dr. Swenson's statistical testimony about the prevalence of false reports, the likelihood that the jury would have reached a different verdict was substantial.

The State presented Dr. Alice Swenson of Midwest Children's Resource Center to testify about issues common in child sexual abuse cases. (R. 29; 65:10–12; 151:10.) Dr. Swenson testified that delayed and piecemeal reporting by child sexual abuse victims is "the rule and not the expectation," and that 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.)

At the conclusion of Dr. Swenson's testimony, a juror submitted a note with two questions for the doctor. (R. 138:154.) Following a brief sidebar with the attorneys, the court asked Dr. Swenson, "Doctor, [the juror's first question] says how frequent is it for children to make up a story of sexual abuse?" (R. 138:154.) "False disclosures are extraordinarily rare," the doctor responded, "like in the one percent of all disclosures are false disclosures." (R. 138:154.) The court then asked, "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 pressed Dr. Swenson for more details about "particular studies" of false allegations, the doctor responded that she had read such studies, but "I don't know the names of them off the top of my head." (R. 138:155.)

Right before closing arguments, the court told jurors that expert testimony had been presented "to help you reach a conclusion," but instructed them that they were "not bound by any expert[']s opinion." (R. 139:155–56.)

Turning to Molde's case, the State notes that here, as in *Mader*, the issue of witness credibility was paramount. There were no third party witnesses, and, as with most child sexual assault cases (R. 138:139), there was no physical evidence. Like in *Mader*, the verdict turned on whether the jury believed the victim's account or the defendant's denial. *See Mader*, 408 Wis. 2d 632, ¶ 81.

But the fact that this was a so-called "he said, she said" case does not mean that counsel's non-objection to Dr. Swenson's testimony was automatically prejudicial. Though Molde's and Mader's cases are not identical, Molde, like Mader, cannot show prejudice. There are at least six reasons he cannot do so.

First, L.M.'s account was detailed, and the details remained largely the same from the initial disclosure via text message to her sister Autumn, to the forensic interview, and to L.M.'s trial testimony. Throughout, L.M. maintained that there was only one assault, and it occurred when she was "around the age of nine" or "8 or 9" on a night when her mother was staying elsewhere because her parents had been fighting. (R. 123:1–3; 126:6, 15; 138:169–70.) She said that her younger sister, Willow, was upstairs sleeping with Molde because she always got scared when their mother was gone. (R. 123:1–2; 126:9.) L.M. said that Willow came downstairs

and told L.M. that Molde wanted her to come upstairs. (R. 123:1–2; 126:10; 138:168–70.) L.M. said that when she got upstairs, Molde told her that she would have "to be a big girl now" or "to be a big girl" or "to be his big girl for daddy" and made her take off her pajamas and lie down on the bed. (R. 123:2; 126:10; 138:170–71.) L.M. said that she was "pretty sure he was drunk," and that Molde's breath smelled of alcohol. (R. 123:2; 138:172, 178.)

L.M. said that Molde either took off his clothes or was already naked and then got on top of L.M. (R. 126:10–11; 138:171.) Molde then forced his penis inside L.M.'s vagina, which L.M. said "hurt." (R. 123:3; 126:13; 138:171, 174.) Molde's arms were positioned above the child's shoulders, his legs were wrapped "around" hers, and he did not kiss her. (R. 126:14–15.) L.M. said that it was dark in the room, and that Willow was outside of the bedroom door. (R. 126:11; 138:172–73.) L.M. said that, later, Willow told L.M. that she wanted to be a big girl, too, and L.M. said, no, you don't. (R. 123:3; 126:16; 138:174.)

Second, the veracity of L.M.'s account was buttressed by the fact that she told another person, her sister Autumn, about the assault before the suicide attempt and her disclosure to authorities. *See State v. Domke*, 2011 WI 95, ¶¶ 11, 58, 337 Wis. 2d 268, 805 N.W.2d 364 (relying in part on child victim's initial disclosure to friends before reporting the sexual assault to authorities in finding no prejudice). The text messages containing the initial disclosure were presented at trial, and Autumn testified about receiving these messages. (R. 123; 138:190–96.)

Third, L.M. engaged in self-injurious behaviors as a teenager, including cutting herself and attempting suicide. (R. 138:159, 175.) These behaviors, Dr. Swenson testified, were consistent with L.M.'s report of sexual assault as a young child. (R. 138:132–33.) By her own account, L.M. said

that Molde's sexual assault was what led to her suicide attempt. (R. 138:168.)

Fourth, the defense did not offer a plausible theory to explain why L.M. would fabricate an allegation of sexual abuse against her father. For example, Stephanie, L.M.'s adoptive mother, testified that she thought L.M. attempted suicide because she did not want to live at her grandparents (where the whole family was living) anymore, not because of memories of the assault. (R. 139:72–73.) In closing arguments, defense counsel speculated that there are "all kinds of reasons for false allegations." (R. 139:173–74.) But counsel did not link any trial testimony or other evidence to a particular theory why this victim, L.M., would make up such serious allegations against this defendant, Molde. (R. 139:173–74.) Counsel also speculated that L.M. may have convinced herself of something that did not actually happen. (R. 139:173–74.) But this, too, was speculative, and the defense presented no evidence in support of this theory of defense at trial.[1]

Granted, L.M.'s family members largely took Molde's side at trial and indicated that they did not believe L.M.'s allegations, as detailed in the State's original brief. (Resp. Br. 26–30.) But their testimony was undermined in part by Molde's own statement in a recorded interview (played at trial) that his kids were "[v]ery honest. Brutally honest." (R. 130:16; 139:16.) And Molde's wife and his other children, who had already been separated from Molde once when he was jailed on an unrelated crime in 2012, had a plain motive to support Molde to ensure that he was not taken from them again. (R. 139:175.)

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[1] The State does not mean to suggest that Molde had a burden to prove this or any other defense. But whether he produced any evidence at all in support of this defense is plainly relevant to whether he can show prejudice.

Fifth, the effect of any error in admission of the statistical evidence was blunted by the jury being properly instructed that it was not bound by such testimony. *See Mader*, 408 Wis. 2d 632, ¶ 86. The court advised the jury as follows:

> Ordinarily, a witness may testify only about facts. However, a witness with expertise in a particular field may give an opinion in that field. In determining the weight to give this opinion, consider the qualifications and credibility of the witness, the facts upon which the opinion was based, and the reasons given for the opinion.
>
> Opinion evidence was received to help you reach a conclusion. However, you're not bound by any experts opinion.

(R. 139:155–56.)

Finally, the State did not place undue emphasis on Dr. Swenson's statistical testimony in argument to the jury. In her closing, which runs 10 transcript pages, Dunn County District Attorney Andrea Nodolf mentioned Dr. Swenson's testimony only once: "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." (R. 139:163.) In rebuttal, District Attorney Nodolf referenced this testimony in one sentence: "And, keep in mind, false reports only occur one percent of the time, according to Dr. Swenson." (R. 139:183.)

The State expects Molde to attempt to distinguish his case from *Mader* in arguing prejudice. And there are differences—the most significant being that Mader's victim alleged that Mader engaged in a series of increasingly inappropriate acts eventually leading to multiple acts of intercourse. *Mader*, 408 Wis. 2d 632, ¶ 82. As a result, Mader's victim provided detailed descriptions of multiple criminal acts committed by Mader. But, while L.M. consistently alleged that Molde committed only one assault,

her account of this incident, like the *Mader* victim's accounts, was detailed and specific. Moreover, like Mader's victim, who told two peers about the assaults before reporting, L.M. also told her sister Autumn before the suicide attempt and eventual disclosure to authorities.

Based on the foregoing, Molde cannot meet his burden to demonstrate prejudice resulting from counsel's alleged error in not objecting to Dr. Swenson's testimony that false reports account for one percent of child disclosures of sexual assault. The jury heard all of the trial evidence, including L.M.'s consistent, credible account of the assault and Molde's vigorous denials to police, and it found Molde guilty beyond a reasonable doubt. Molde cannot show that, without Dr. Swanson's statistical testimony about the prevalence of false disclosures, there is a substantial likelihood that the jury would have reached a different verdict.

CONCLUSION

Molde's claim of ineffective assistance fails, and the order denying postconviction relief and the judgment of conviction should be affirmed.

Dated this 21st day of February 2024.

Respectfully submitted,

JOSHUA L. KAUL
Attorney General of Wisconsin

Electronically signed by:

Jacob J. Wittwer
JACOB J. WITTWER
Assistant Attorney General
State Bar #1041288

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-1606
(608) 294-2907 (Fax)
wittwerjj@doj.state.wi.us

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 2,206 words.

Dated this 21st day of February 2024.

Electronically signed by:

Jacob J. Wittwer
JACOB J. WITTWER
Assistant Attorney General

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 Appellate Court Electronic Filing System, which will accomplish electronic notice and service for all participants who are registered users.

Dated this 21st day of February 2024.

Electronically signed by:

Jacob J. Wittwer
JACOB J. WITTWER
Assistant Attorney General