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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**

**SUPPLEMENTAL BRIEF
OF DEFENDANT-APPELLANT**

ROBERT PAUL MAXEY
State Bar No. 1112746

NELSON DEFENSE GROUP
304 Locust Street
Hudson, WI 54016
(715) 386-2694
robert@nelsondefensegroup.com

Attorneys for the Defendant-Appellant

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ARGUMENT

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 has demonstrated prejudice for counsel's non-objection to Swenson's testimony. 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. (138:96–98). There was no confession, no eyewitness testimony, no physical evidence, no biological evidence, and no medical evidence corroborating L.M.'s testimony. (138:96–98, 197:52–53). Moreover, L.M. provided differing and inconsistent accounts of the alleged incident. (123:2; 126:15; 138:113; 139:111). All six testifying members of Molde's family also expressed doubts about L.M.'s allegations, (139:40–74, 80–133), with L.M.'s cousin testifying that L.M. had provided her with inconsistent accounts of the alleged incident, (139:110–20). Additionally, L.M. had a discernable motive to make up the allegation, that being her immense dissatisfaction with living at her grandparents' residence and all the rules and restrictions that came with living there, as well as her documented hunger for attention and status. (139:64, 73, 173). Notably, L.M. wrote in her diary how self-injurious behavior was getting a lot of attention amongst her group of friends. (139:64). L.M. was also engrossed in "smut" literature at the time she made her allegation. (139:68).

Yet, Swenson's improper statistical testimony distracted the jury from its duty to decide the properly admitted evidence. And the State repeated and emphasized the significance of Swenson's opinion on the credibility of child victims of supposed sexual abuse in closing arguments, (139:163, 183), magnifying the testimony's prejudicial effect.

This circumstance makes Molde—against whom there was, otherwise, very little evidence—deserving of relief. Molde has shown that, absent Swenson's testimony, there is a substantial likelihood that the jury would have reached a different result.

MOLDE HAS SHOWN THAT TRIAL COUNSEL'S FAILURE TO OBJECT TO SWENSON'S 1% TESTIMONY CONCERNING THE FREQUENCY OF FALSE SEXUAL ASSAULT REPORTS WAS PREJUDICIAL.

A. To show *Strickland* prejudice, a defendant must show that there is a reasonable probability that the outcome of the trial would have been different absent counsel's errors.

To prove prejudice, Molde must show that trial counsel's "errors were so serious as to deprive [Molde] of a fair trial, a trial whose result is reliable." *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). Molde "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." *See id.* at 694. Because counsel's performance was deficient in multiple respects, this Court must assess prejudice "based on the cumulative effect of [her] deficiencies," *see State v. Thiel*, 2003 WI 111, ¶ 59, 264 Wis. 2d 571, 665 N.W.2d 305, and consider the impact of the errors in light of the totality of the evidence presented to the jury. *See State v. Jenkins*, 2014 WI 59, ¶ 50, 355 Wis. 2d 180, 848 N.W.2d 786. "[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 696.

B. Molde has carried his burden to show prejudice because he has established a reasonable probability that his trial would have ended differently absent Swenson’s statistical testimony about the frequency of false sexual assault reports.

Applying these standards to the evidence presented at trial, this Court must conclude that Molde has carried his burden to show prejudice because he has established a reasonable probability that his trial would have ended differently absent trial counsel’s glaring errors.

At trial, the State presented the testimony of Dr. Alice Swenson for the purpose of showing that the proper protocols were used when interviewing L.M. about her sexual assault allegations. (138:122). Swenson made clear in her testimony that she had direct contact with L.M. According to Swenson, she “supervised the *entire* evaluation.” (138:135) (emphasis added).

Following Swenson’s testimony, a juror submitted two questions for the court to ask her. (138:154). Following a sidebar with the attorneys, the court asked Swenson, “Doctor, [the juror’s first question] says how frequent is it for children to make up a story of sexual abuse?” (138:154). Swenson answered, “False disclosures are extraordinarily rare, like in the one percent of all disclosures are false disclosures.” (138:154). The court then asked, “Second part of that is why would they do that?” Swenson responded, “I don’t think I really have an answer to that.” (138:154–55).

Trial counsel subsequently pressed Swenson for more details about “particular studies that have been conducted regarding the reporting of false accusations.” (138:155). However, Swenson responded that while she had read such studies, “I don’t know the names of them off the top of my head.” (138:155).

The State then relied on Swenson's 1% testimony during its closing argument, stressing to the jury, "[Y]ou 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). In rebuttal, the State again referenced Swenson's testimony, emphasizing to the jury, "And, keep in mind, false reports only occur one percent of the time, according to Dr. Swenson." (139:183).

As conceded by the State, the "issue of witness credibility was paramount" in Molde's case. (State's Supp. Br. at 6). The State further concedes that there was never an admission or confession by Molde, no third party witnesses, and no physical evidence. (State's Supp. Br. at 6, 10). Other than L.M.'s testimony, there was no direct evidence to support the allegation that Molde had sexually assaulted her. (138:96–98). Thus, unlike *Mader*, this was a case "in which the evidence for and against guilt was nearly in equipoise" and "in which external endorsements of credibility ... carr[ied] significant weight." *Mader*, 2023 WI App 35 at ¶ 86. Still, the State claims that Molde cannot show prejudice "for at least six reasons." (State's Supp. Br. at 6).

First, the State argues that "L.M.'s account was detailed, and the details remained largely the same from her initial disclosure via text message to her sister Autumn, to the forensic interview, and to L.M.'s trial testimony." (State's Supp. Br. at 6). Yet, a thorough review of the properly admitted evidence reveals that L.M. provided differing and inconsistent accounts of the alleged incident. Significantly, L.M. provided differing ages as to how old she was at the time of the alleged incident. In her text messages with Autumn, L.M. indicated that she was "about 9" years old at the time of the incident. (123:2). However, when speaking with the school's counselor, Amy Bowe, L.M. indicated that she was 10 or 11 years old at the time of the incident. (138:113). Then during her forensic interview, L.M. indicated that she was "eight or nine" years old. (126:15). L.M.'s

cousin, Taylor Paulus, likewise testified that L.M. had “given me a few ages [when discussing how old she was at the time of the alleged incident]. One [time] she told me 12, one [time] she told me eight or nine, and then one time she told me when she was really little.” (139:111).

Paulus further testified that L.M. provided her with “different stories” as to the location of the alleged incident. (139:120). Specifically, Paulus testified that L.M. “told me it happened at the brown house when Stephanie and Jobey were living in town. And then another place was when Stephanie was living with Tom in Bloomer, her boyfriend. And then recently she told me the trailer court that burnt down.” (139:110).

A review of the record reveals additional inconsistencies in L.M.’s accounts. Notably, L.M. indicated in her text message to Autumn, “I’m pretty sure [Molde] was drunk.” (123:2). She likewise testified at trial that Molde’s “breath smelled like alcohol” on the night in question. (138:172, 178). Yet, at no point during her forensic interview did L.M. mention that Molde’s breath smelled of alcohol or that he appeared to be inebriated. (126:2–19).

Similarly, while L.M. stated in her forensic interview that Willow had spoken with her immediately following the alleged incident, (126:15–16), she testified at trial that Willow did not say anything to her that night after she allegedly exited the room with Molde, (138:173).

L.M. also stated in her forensic interview that as she was lying on the bed, Molde told her that “it will be good.” (126:11–12). However, when asked at trial what, if anything, Molde had said to her that night, L.M. answered, “To be a big girl and to be his big girl for daddy.” (138:171). She at no point testified that Molde had told her “it will be good.”

Additionally, at trial, L.M. added for the first time that Molde had also told her that this “was our little secret.” (138:172). Yet, at no point during her forensic

interview did L.M. disclose that Molde had told her that this was to be their “little secret.” (126:2–19).

Moreover, L.M. claimed in her forensic interview that Molde took off his clothes *after* she had entered his room. (126:10–11). However, when asked at trial whether Molde was wearing any clothes at the time she entered his room that evening, L.M. testified, “I don’t think so.” (138:171).

L.M.’s text messages with Autumn also provide scant details, with L.M. never mentioning that she had spoken with Willow that same night after exiting Molde’s room, that Molde had told her that “it will be good” and that this “was our little secret,” or Molde’s clothes situation. (123:1–9).

Second, the State argues “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.” (State’s Supp. Br. at 7). The Defense finds the State’s proposition that a complainant’s decision to tell his or her friends about an alleged assault first before disclosing the incident to authorities only strengthens the veracity of the complainant’s allegation alarming. Wisconsin alone has seen its fair share of not guilty verdicts in child sexual assault cases where the child complainant tells his or her friends about a fabricated incident at a sleepover or at school prior to their disclosure to authorities.

Still, L.M. decision to first disclose her allegation to Autumn via text message lacks any buttressing effect in light of the properly introduced evidence. First, L.M.’s text message disclosure to Autumn occurred roughly five years after the alleged date of the assault. (138:160; 139:19). Second, and most significantly, L.M.’s sister Willow, who L.M. claimed was a firsthand witness to the alleged assault and who was also the first person she discussed the incident with, flat-out denied L.M.’s accusations at trial. (126:10–12, 15; 139:124–125).

Third, the State additionally points to L.M.’s “self-injurious behaviors” as also supporting the veracity of her allegation. (State’s Supp. Br. at 7). However,

L.M.'s mother, Stephanie Molde, testified at trial that L.M. had identified in her diary the amount of attention self-injurious behavior was getting amongst her group of friends. Stephanie explained that she "checked [L.M.'s] diary frequently because I knew there was issues with a couple other girls cutting and it was creating a lot of drama with the group of girls." (139:49). Stephanie further explained that L.M. had told her "about a friend of hers that was cutting a lot and it had turned into somewhat of a soap opera between the girls in school and her friend was getting a lot of attention for it." (139:64). Stephanie testified that she then read in L.M.'s diary that "[L.M.] was now cutting herself because Jayada was getting a lot of attention for it." (139:64). Stephanie believed that L.M. had attempted suicide because "she was having troubles fitting in, which is what she told her friends." (139:73). Stephanie additionally testified that around the time she made her allegation, L.M. was "getting into a lot of the—I don't want to say smut books but smut books, yeah." (139:68).

Fourth, the State argues that "the defense did not to offer a plausible theory to explain why L.M. would fabricate an allegation of sexual abuse against her father." (State's Supp. Br. at 8). Yet, this is simply not true. The Defense cited several driving factors for L.M.'s false allegation that were supported by the properly introduced evidence at trial, most notably L.M.'s desire for attention and status amongst her peers. (139:173). Moreover, Molde has shown that in the credibility battle of his 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), trial counsel nevertheless failed to elicit clear and direct testimony from these family members at trial that L.M. has a character and reputation for untruthfulness and dishonesty. Had counsel introduced this relevant and vital testimony regarding L.M. and her reputation and

character for untruthfulness, then the Defense would have provided critical and compelling evidence further supporting Molde's defense that L.M.'s allegation was merely a fabrication.

Fifth, the State argues "the effect of any error in the admission of the statistical evidence was blunted by the jury being properly instructed that it was not bound by such testimony." (State's Supp. Br. at 9). Yet, several factors weigh against concluding that the members of the jury were unaffected by Swenson's quantification of the victim's probable truthfulness. Again, this case hinged on the victim's credibility. There were no other direct witnesses, no confession, and no physical evidence to corroborate L.M.'s sometimes consistent testimony. (138:96–98, 197:52–53). Any impermissible evidence reflecting that L.M. was truthful may have had particular impact upon the pivotal credibility issue and ultimately the question of guilt. Swenson made clear that she had direct contact with L.M., telling the jury that she "supervised the *entire* evaluation." (138:135) (emphasis added). Swenson's testimony imparted an underserved scientific stamp of approval on the credibility of L.M. in this case. And 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. Given the context of this one-on-one credibility battle, "[t]here was a significant possibility that the jurors ... simply deferred to witnesses with experience in evaluating the truthfulness of victims of crime." *State v. Romero*, 147 Wis. 2d 264, 279, 432 N.W.2d 899 (1988).

Finally, the State argues that the prosecution did not place "undue emphasis" on Swenson's statistical testimony in argument to the jury. (State's Supp. Br. at 9). Yet the record makes clear that the prosecutor emphasized the significance of Swenson's opinion about the credibility of child victims of supposed sexual abuse on more than one occasion in closing arguments. (139:163, 183). In repeatedly emphasizing Swenson's 1% claim in its closing argument, the State implied that L.M. was, as a sexual assault complainant, highly unlikely to be

lying. (139:163). Ultimately, the State's repeated reference to Swenson's testimony in its closing argument magnified the prejudicial effect. *Romero*, 147 Wis. 2d at 279.

Based on the foregoing, Molde has shown that Swenson's 1% testimony prejudicially deprived him of his right to have his fate determined by a jury making the credibility determinations, so clearly crucial in these cases, without guidance from an expert, in stark mathematical terms, bolstering the credibility of the complainant and thereby impugning his credibility in a case where credibility was the only contested issue. In short, Swenson's improper statistical testimony distracted the jury from its duty to decide the properly admitted evidence.

Because Swenson's credibility quantification testimony invaded the province of the jury members, it cannot be said with any confidence that the members of the jury were not impermissibly swayed and thus that they properly performed their duty to weigh admissible evidence and assess credibility.

CONCLUSION

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

Dated this 15th day of March, 2024.

Respectfully submitted,

Electronically signed by:

ROBERT PAUL MAXEY

State Bar No. 1112746

NELSON DEFENSE GROUP

304 Locust Street

Hudson, WI 54016

(715) 386-2694

robert@nelsondefensegroup.com

Attorneys for the Defendant-Appellant

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 2,754 words.

Dated this 15th day of March, 2024.

Electronically signed by:

ROBERT PAUL MAXEY
State Bar No. 1112746

NELSON DEFENSE GROUP
304 Locust Street
Hudson, WI 54016
(715) 386-2694
robert@nelsondefensegroup.com

Attorneys for the Defendant-Appellant