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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2021AP1346-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JOBERT L. MOLDE,

Defendant-Appellant.

PETITION FOR REVIEW AND APPENDIX

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INTRODUCTION

The State of Wisconsin requests review of the court of appeals' judge-authored decision in *State v. Jobert L. Molde*, No. 2021AP1346-CR (Wis. Ct. App. May 21, 2024) (not recommended for publication), reversing Molde's 2019 conviction for first-degree sexual assault of a child under the age of 12 and incest with a child. The court of appeals relied on *State v. Mader*, 2023 WI App 35, ¶¶ 38–40, 408 Wis. 2d 632, 993 N.W.2d 761, *review denied* (WI Sept. 26, 2023),[1] to conclude that an expert's statistical testimony about the infrequency of false reports of sexual abuse amounted to opinion testimony about the truthfulness of the victim, contrary to *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984).

This Court should accept review to address the proper use of statistical testimony about false reports of sexual abuse in sexual assault cases, and it should conclude that such testimony is not barred by *Haseltine*. Such testimony is *not* testimony about whether the victim in a particular case is being truthful: by its nature, testimony about statistics says little about whether a particular individual is telling the truth. Accordingly, such testimony does not implicate *Haseltine* absent additional, persuasive evidence that the expert's personal opinion is that the victim is telling the truth. This Court should disavow language in *Mader* holding otherwise.

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[1] The State prevailed in *Mader* on the ground that counsel's non-objection to the testimony was not prejudicial. *State v. Mader*, 2023 WI App 35, ¶¶ 81–87, 408 Wis. 2d 632, 993 N.W.2d 761. So the State could not challenge *Mader*'s partial holding that statistical evidence of the prevalence of false reporting may violate the *Haseltine* rule. *See* Wis. Stat. § (Rule) 809.62(1g) (party may only petition from an "adverse decision").

Even if this Court were to agree with *Mader* that such statistical testimony is vouching, it should revisit *Mader*'s second holding: that its rule was well established at the time the case was tried in 2019. That ruling, which the court of appeals followed here regarding a case that was also tried in 2019, is not supported by the case law that existed then.

Finally, this Court should consider whether any error was harmless: the statistical expert testimony was very brief, and the jury would have convicted Molde given the other evidence in the case.

STATEMENT OF THE ISSUES

Since 2016, the court of appeals has decided two published cases and one citable, unpublished case addressing whether statistical testimony about the incidence of false reports of sexual abuse may constitute *Haseltine* vouching testimony to which defense counsel has a duty to object. *Molde*, No. 2021AP1346-CR (Pet-App. 3–32); *Mader*, 408 Wis. 2d 632; *State v. Morales-Pedrosa*, 2016 WI App 38, 369 Wis. 2d 75, 879 N.W.2d 772.

Here, applying *Mader*, the court of appeals in Molde's case concluded that the statistical testimony of the expert, Dr. Swenson, that one percent of child reports of abuse are false was impermissible *Haseltine* testimony, and counsel was deficient in failing to object because it was settled law at the time of Molde's 2019 trial that this testimony violated *Haseltine*.

1. This petition asks the Court to address the following two questions related to the *Haseltine* issue:

   a. What is the proper place for statistical evidence of the prevalence of false reports of abuse in sexual assault cases, and did the court of appeals wrongly conclude in *Mader* and now in this case in holding that statistical testimony putting the incidence

of false reporting at or below 8 percent amounts to *Haseltine* testimony that the victim in the case is telling the truth?

b. Even if *Mader* correctly determined that such statistical testimony violates *Haseltine*, was this proposition settled law at the time of Mader's and Molde's 2019 trials, as *Mader* and the court here held below, so that trial counsel should have known to object to the testimony?

2. The court of appeals concluded that counsel's non-objection to the statistical testimony was prejudicial even though Dr. Swenson's statistical testimony was in no way linked to an assessment of the child victim's truthfulness, the statistical testimony was brief, the victim's account of the assault was detailed and remained consistent through multiple tellings, and the victim disclosed the assault to her sister a week prior to its disclosure, among other factors.

Even if the statistical testimony should not have been admitted, did the court of appeals err in concluding that Molde had proven that counsel's alleged error in not objecting to Dr. Swenson's testimony was prejudicial?

STATEMENT OF CRITERIA SUPPORTING REVIEW

Review is necessary to provide guidance to Wisconsin courts regarding the use in sexual assault prosecutions of statistical evidence of the prevalence of false reports of abuse and to decide whether such evidence may violate the *Haseltine* rule. *See* Wis. Stat. § (Rule) 809.62(1r)(c) (review is appropriate when a decision of this Court would clarify the law). Review is necessary to correct *Mader*'s mistaken treatment of statistical testimony as *Haseltine* testimony regarding the truthfulness of another witness. Rule 809.62(1r)(c). Review would also clarify the state of the law at the time of Molde's 2019 trial, and thus answer whether his

attorney had a duty to make a *Haseltine* objection to Dr. Swenson's statistical testimony. Rule 809.62(1r)(c).

STATEMENT OF THE CASE

In January 2017, Jobert Molde's daughter Lauren[2] attempted suicide in a high school bathroom by taking a bunch of over-the-counter pills. (R. 1:2.) Lauren had a note to her father, which read: "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 . . . . 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 found the note when responding to the suicide attempt. (R. 1:2; 138:107–08.)

Three days later, Lauren provided a full account of the assault in a videorecorded forensic interview. (R. 1:3.) The State subsequently charged Molde with first-degree sexual assault of a child under the age of 12 and incest of a child. (R. 1:1.)

Before trial, the State gave notice that it intended to have the forensic interviewer, nurse practitioner Laurel Edinburgh, present expert testimony "regarding issues that are common in child sexual abuse cases." (R. 29:1.) The court approved the request following a hearing. (R. 65:10–12.) When Edinburgh was unavailable to testify, the court granted the State's request to call Edinburgh's supervisor, child abuse physician Dr. Alice Swenson, as its expert. (R. 151:10–12.)

[2] Lauren is the pseudonym the court of appeals used for the victim. The State also uses the pseudonyms the court used for Lauren's siblings—Amanda, Whitney, Heath, and Trevor.

Trial

The case was tried to a jury over two days in March 2019. (R. 138; 139.) The court told jurors that, if they had a question for a witness, they could submit it in writing for the court to review, if appropriate, ask of the witness.

Dr. Swenson was among the State's first witnesses. After discussing her training and experience, Dr. Swenson testified about common characteristics of child sexual assault cases. She testified that delayed and piecemeal reporting by child victims is "the rule and not the exception." (R. 138:130–33.) She said 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.)

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

In the recording, Lauren told the interviewer that she and her family—Lauren, Molde, Lauren's adoptive mother Stephanie Molde, older brothers Heath and Trevor, and younger sister Whitney—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, Lauren said, "My mom had gone away one night, and my sister [Whitney] 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.) "And [Molde] made [Whitney] come down and get me." (R. 126:9.) "And when I got upstairs, Dad told [Whitney] 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, Lauren said, "He did something inappropriate." (R. 126:11.) Lauren said she was scared and confused. (R. 126:11.) She said that the door was open, and Whitney was waiting outside the door. (R. 126:11.) Asked if

she could remember what Molde said, Lauren said, "He just told me it will be good." (R. 126:12.) Lauren said that Molde "used his private part and he put it in mine," which "hurt." (R. 126:13.) Lauren said that she was "[e]ight or nine" at the time. (R. 126:15.)

Lauren said, "Afterwards I was crying, and [Whitney] 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, Lauren said she told Whitney that "it was just a dream, forget about it, [and] not to tell anyone." (R. 126:16.)

Lauren said she disclosed Molde's abuse to her sister Amanda, who lives with another family. (R. 126:16–17.) She said she attempted suicide about a week later. (R. 126:17–18.)

The video concluded, and 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 Lauren's physical exam, Dr. Swenson said there were no signs of abuse. (R. 138:140.)

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

Defense counsel Jessie Weber asked the doctor if there were "particular studies that have been conducted" about false allegations. (R. 138:155.) Dr. Swenson responded, "There

are that I've read, yes. I don't know the names of them off the top of my head." (R. 138:155.)

Lauren also testified at trial. (R. 138:158.) She 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.) In one message, Lauren said 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.) Lauren also testified about her suicide attempt and read aloud her notes to Molde, Stephanie Molde, Whitney, and Trevor. (R. 117; 118; 119; 120; 138:163–68.)

Lauren testified about the assault, largely restating the narrative she told the interviewer two years earlier. (R. 138:168–74.) The only significant addition was that she said Molde told her "[t]hat it was our little secret." (R. 138:172.) Lauren 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.)

Lauren 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, Lauren 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 the interview that a sheriff's department investigator conducted of Molde. (R. 139:13–15.) Parts of a videorecording of this 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; 139:16.) On cross-examination, defense counsel played for the jury portions of the video in

which Molde strenuously denied assaulting Lauren. (R. 130:33, 47–48, 53; 139:32–35.) In another excerpt, Molde said that he had told Lauren and Whitney "to be a big girl for daddy"—but it was when he kicked their mother out of the house after he got back from alcohol treatment. (R. 130:39; 139:33.)

The State called Molde's wife Stephanie and was granted permission to treat her as a hostile witness. (R. 139:39–40.) Stephanie testified that she knew Lauren had alleged Molde committed the assault on a night when she (Stephanie) was staying elsewhere, then said that there was only one such period, and it lasted just two days. (R. 139:46–47.) She insisted that it happened after Molde completed alcohol treatment in July 2011 and was sober. (R. 139:58–59, 71.)

Stephanie made additional statements indicating that she did not believe Lauren's allegation. (R. 139:51–74.) After the State rested, the defense called other relatives of Lauren—including her older brother Heath and younger sister Whitney, and a cousin—who offered testimony showing that, to varying degrees, they doubted Lauren's allegation. (R. 139:89–134.) Molde did not testify. (R. 139:136.)

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. (R. 145:1–2.)

Postconviction Proceedings

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 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 Lauren's family members whether she had a reputation for dishonesty under Wis. Stat. § 906.08(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). (R. 163:11–13.)

The court held an evidentiary hearing on the motion at which trial counsel Jessie Weber testified. (R. 175; 197.) The parties filed post-hearing briefs. (R. 202; 203; 207; 208.) The circuit court denied the postconviction motions in a July 16, 2021 bench ruling. (R. 218:1–11, Pet-App. 33–43.) The court issued a final written order denying the motions on October 11, 2021. (R. 225:1, Pet-App. 44.)

Court of appeals proceedings

On appeal, Molde renewed his allegations that trial counsel was ineffective, arguing that counsel was deficient for (1) not objecting or moving for a mistrial in response to Dr. Swenson's testimony about the prevalence of false reports; (2) not eliciting testimony from several witnesses regarding Lauren's "character for untruthfulness," pursuant to Wis. Stat. § 906.08(1); and (3) withdrawing an objection to evidence of Molde's 2012 incarceration for an OWI conviction. (Pet-App. 12, 27, 28–29.)

As to the first allegation, Molde argued that such testimony constituted impermissible vouching under *Haseltine*, and the State responded that counsel was not deficient for not raising a *Haseltine* objection. (Pet-App. 4, 12.) Both parties relied on *State v. Morales-Pedrosa*, 2016 WI App 38, 369 Wis. 2d 75, 879 N.W.2d 772. There, the court of appeals concluded that defense counsel's non-objection to testimony that 90% of child reports of abuse are true was not deficient performance. *Morales-Pedrosa*, 369 Wis. 2d 75, ¶¶ 23–26. The court determined that Morales-Pedrosa's

contention that such testimony was barred by *Haseltine* was not settled law in Wisconsin, so trial counsel had no duty to raise a *Haseltine* objection. *Id.* ¶ 26. Citing this conclusion, the State argued that it remained true that no Wisconsin case had prohibited such testimony. But Molde cited language in *Morales-Pedrosa* suggesting that testimony that "'99.5,' '98%,' or even '92–98%'" of children who report abuse "are telling the truth" would be more "objectionable" than the 90% figure in that case. *Id.* ¶ 25.

After the case was submitted on briefs, a District II panel decided *State v. Mader*, 2023 WI App 35, ¶¶ 36–38, 408 Wis. 2d 632, 993 N.W.2d 761, *review denied* (WI Sept. 26, 2023). The court held in *Mader* that testimony by two witnesses constituted "a *Haseltine* violation": testimony by an investigator who repeatedly interviewed the victim and said that "only one" of the 150 child victims he had interviewed in his career had made a false report; and expert testimony by a therapist who testified that research shows that 3–8% of reported sexual assaults are false, and that she had personally treated over 500 victims in her career, and four that she had known about had falsely reported. *Mader*, 408 Wis. 2d 632, ¶¶ 5–7, 39.

After *Mader* was issued, the court here ordered and the parties filed supplemental briefs addressing whether defense counsel's alleged error in not objecting to Dr. Swenson's testimony was prejudicial. (Pet-App. 18 n.11.)

The court then reversed Molde's judgment of conviction and the order denying postconviction relief on May 21, 2024. (Pet-App. 3–32.) In an opinion authored by Judge Gill, the court concluded that defense counsel was deficient for not objecting to Dr. Swenson's testimony that "[f]alse disclosures are extraordinarily rare, like in the one percent of all disclosures are false disclosures." (Pet-App. 12.) The court concluded that "the law was clear" at the time of Molde's 2019 trial that testimony like Dr. Swenson's violated *Haseltine*.

The court concluded that Dr. Swenson's testimony about false disclosures being "extraordinarily rare," amounting to "one percent" of all disclosures "falls squarely within the meaning of impermissible vouching testimony articulated in *Morales-Pedrosa* and *Mader*." (Pet-App. 17.) The court said that Dr. Swenson's "statistical opinion" that 99 percent of disclosures are true "is far higher than that present in *Morales-Pedrosa* (90 percent) and falls into the realm of testimony warned about in that case." (Pet-App. 17.) Citing *Mader* and *Morales-Pedrosa*, the court said that "[a] 99 percent statistic 'provided a mathematical statement approaching certainty' that false reporting simply does not occur." (Pet-App. 18.) The court also determined that jurors would "inevitably" view her statistical testimony as "'a personal or particularized' endorsement of [Lauren's] credibility," "[g]iven Dr. Swenson's testimony that she supervised Lauren's sexual assault evaluation," though she had never met or interviewed Lauren herself. (Pet-App. 17.)

The court also concluded that counsel's failure to object to Dr. Swenson's testimony was prejudicial.

ARGUMENT

I. The Court should accept review to address the proper place of statistical testimony about the infrequency of false reports of sexual abuse and to clarify that such testimony does not implicate *Haseltine*.

Applying *Mader*, the court of appeals wrongly concluded that an expert's statistical testimony about the infrequency of false reports of sexual abuse violated *Haseltine*. *Mader*'s holding that such statistical evidence violates *Haseltine* when the incidence of false reports is at or below 8 percent should be disavowed. Even if *Mader* was correct on this point of law, *Mader* was still wrong that its position was settled law at the time of Mader's and Molde's

2019 trials. Thus, trial counsel was not deficient in not objecting to Dr. Swenson's statistical testimony. This Court should grant the petition and reverse the court of appeals.

A. Statistical testimony like that in *Mader* and this case is not *Haseltine* testimony.

In recent years, the court of appeals has addressed in two published cases (*Morales-Pedrosa* and *Mader*) and one citable case (*Molde*) the admission of statistical testimony about the incidence of false reporting of sexual abuse in prosecutions for sexual assault. Statistical testimony about the prevalence of false reports is relevant and may be particularly useful in disabusing jurors of widely held misconceptions that a great many, if not most, allegations of sexual assault are untrue.[3]

In these three cases, defendants argued that trial counsel was ineffective for not objecting to such statistical testimony under *State v. Haseltine*, which states that a witness may not testify "that another mentally and physically competent witness is telling the truth. 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

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[3] Charlie Huntington, et. al, *Engaging Boys and Men in Sexual Assault Prevention,* "False accusations of sexual assault" 380 (2022) http://www.alanberkowitz.com/articles/False%20Accusations%20of%20Sexual%20Assault%20-%20Ch.%2016.pdf (accessed June 12, 2024) (discussing surveys of law enforcement, military personnel, and other groups showing perceived rates of false reports to be as high as 53%); Nikki Graf, "Sexual Harassment at Work in the Era of #Me Too" Pew Research Center at 3 (Apr. 4, 2018) https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2018/04/Pew-Research-Center-Sexual-Harassment-Report-April-2018-FINAL.pdf (accessed June 12, 2024) (31% of Americans believe that women falsely claiming sexually harassment or assault is a major problem).

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). This rule "is rooted in the rules of evidence that say 'expert testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue."'" *State v. Maday*, 2017 WI 28, ¶ 34, 374 Wis. 2d 164, 892 N.W.2d 611 (quoting Wis. Stat. § 907.02) (citations omitted). "Expert testimony does not assist the fact-finder if it conveys to the jury the expert's own beliefs as to the veracity of another witness." *State v. Pittman*, 174 Wis. 2d 255, 267, 496 N.W.2d 74 (1993). 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).

1. In *Morales-Pedrosa*, the court of appeals held that testimony that 90 percent of reported cases are true was not improper vouching.

In *Morales-Pedrosa*, the defendant was tried on multiple counts of child sexual abuse, and the State called forensic interviewer Julie McGuire to provide expert testimony about behaviors commonly observed in child victims of abuse. 369 Wis. 2d 75, ¶¶ 1, 2, 12. McGuire, who had never met or interviewed the victim, was asked by the State on re-direct examination, "[I]s it commonly understood that approximately 90 percent of reported cases are true?" McGuire responded, "Correct." *Id.* ¶ 12. Postconviction, Morales-Pedrosa argued counsel was ineffective for not raising a *Haseltine* objection to this testimony, and the circuit court denied his claim following a hearing. *Id.* ¶ 13.

The court of appeals likewise rejected Morales-Pedrosa's ineffectiveness claim in a published decision. *Morales-Pedrosa*, 369 Wis. 2d 75, ¶¶ 24–26. The court identified four reasons why counsel's non-objection to the expert's statistical testimony was not deficient:

- No Wisconsin case had held that such testimony is barred by *Haseltine*, so counsel had no duty to make an objection based on unsettled law;
- the expert neither met nor examined the victim, so there was no risk the jury believed he was providing a personal opinion as to the victim's credibility;
- the expert never suggested that the victim "was like the generalized ninety percent" of truthful child reporters "nor connected the statistic to her report of abuse or the likelihood she was telling the truth"; and
- testimony that 90 percent of children claiming abuse are truthful "would have less impact on a fact finder and be less obviously objectionable than testimony that '99.5%,' '98%,' or even '92–98%' are telling the truth."

Id. ¶¶ 23–25.

The court then stated: "We leave for another day—more direct and developed argument on the issue—what type of statistical testimony might effectively constitute improper vouching." *Id.* ¶ 25.

2. In *Mader*, the court of appeals erred in concluding that testimony by an expert witness who had not met the victim was improper vouching.

Seven years later, the court announced in *Mader* that the "day" referenced in *Morales-Pedrosa* "has arrived." *Mader*, 408 Wis. 2d 632, ¶ 38. Two witnesses provided expert testimony in *Mader*—one of which plainly *did* violate *Haseltine*, while the other provided statistical testimony like that considered in *Morales-Pedrosa* and here. But *Mader* lumped the witnesses' testimonies together and treated them as "a *Hasletine* violation." *Id.* ¶ 39.

Gary Steier, a sheriff's department investigator, testified that he had interviewed Mader's victim multiple

times. *Mader*, 408 Wis. 2d 632, ¶ 7. Steier also testified that "[o]ut of about 150" reports he had investigated, only one "was a false report." *Id.*

As the court of appeals appropriately concluded, Steier's testimony constituted vouching under *Haseltine*. *Mader*, 408 Wis. 3d 632, ¶ 38. Based on Steier's testimony that he interviewed the victim and that *only one* of the 150 reported assaults he had ever investigated was false, "it would be clear to a jury that he did not count [the victim's report] as [the] false report." *Id.* "His testimony would inevitably be seen by the jury as 'a personal or particularized' endorsement of [the victim's] credibility." *Id.* (quoting *Morales-Pedrosa*, 369 Wis. 2d 75, ¶ 23).

By contrast, Susan Lockwood, a retired therapist, testified that she had provided therapy to more than 500 victims in her career, but she had not treated this victim. *Mader*, 408 Wis. 2d 632, ¶ 5. She provided expert testimony about "grooming" behaviors of perpetrators and delayed reporting by child victims, among other topics. *Id.* Asked about the truthfulness of reporters, she testified that, of the over 500 victims she had treated, she knew or "was sure" that four were false reporting. *Id.* ¶ 6. She added that false reporting was "very uncommon," referencing "research in the field indicating 'unusually 3 percent to 8 percent of reported sexual assaults are false.'" *Id.*

Despite having had no connection to the victim from which the jury might conclude that Lockwood believed that this victim was truthful, *Mader* treated Lockwood's testimony about the prevalence of false reports as part of the same *Haseltine* violation as Steier's. To do so, the court viewed the statistics themselves—less than 1% known false reporters in her own practice (4 of 500), and between 3–8% false reports in the research—as opinion evidence that this victim was telling the truth. *Mader*, 408 Wis. 2d 632, ¶¶ 39–40. In effect, *Mader* held in part that statistical testimony that the incidence of

false reports is 8% or less constitutes impermissible vouching testimony under *Haseltine* to which defense counsel has a duty to object. *See id.* ¶ 39.

The *Mader* court of appeals erred in treating Lockwood's testimony as *Haseltine* testimony. Statistical testimony, by definition, is not a personal opinion that a particular witness is telling the truth. The statistics are the statistics, and, unless they somehow put the incidence of false reports at "zero" or "never," they say little about whether *this* victim was telling the truth. The statistics are a fact the jury may consider in its deliberations; they do not violate *Haseltine*. *See State v. Harrison*, 267 Or. App. 571, 340 P.3d 777, 780–81 (2014) (holding that an expert's testimony that "96% to 98% of the time" child reports of sexual abuse are truthful was not vouching where the expert did not link the statistic to the victim).

This Court should take review to clarify that statistical testimony like Lockwood's—and like Dr. Swenson's in the present case, as discussed later—is not *Haseltine* testimony.

3. In this case, the court followed *Mader* and concluded that an expert witness's response to a juror question was improper vouching.

Of course, *Mader* was controlling in this case on the issues of whether statistical testimony putting false reports of abuse at 8% or below violates *Haseltine*, and whether this was settled law at the time of Molde's 2019 trial. *See Cook v. Cook*, 208 Wis. 2d 166, 189–90, 560 N.W.2d 246 (1997) (court of appeals must follow its own precedents). But, just as *Mader* erred on in concluding that Lockwood's testimony violated *Haseltine*, and that the applicable law was settled as of 2019, the court of appeals here made the same errors in evaluating similar testimony of Dr. Swenson.

Here, the State did not ask Dr. Swenson about the incidence of false reports of abuse; a juror did after the parties' examination of Dr. Swenson was complete. In response, Dr. Swenson testified: "False disclosures are extraordinarily rare, like in the one percent of all disclosures are false disclosures." (R. 138:154.) Defense counsel then asked if there were "particular studies that have been conducted" about false reports. (R. 138:155.) Dr. Swenson responded, "There are that I've read, yes. I don't know the names of them off the top of my head." (R. 138:155.) That was Dr. Swenson's complete testimony on the subject.

Apart from its brevity and the fact that it was not elicited by the State as a part of its case, Dr. Swenson's statistical testimony resembled Lockwood's testimony in *Mader* in important ways. It was based on Dr. Swenson's recollection of research that she had read concerning the incidence of false reporting, like Lockwood's own testimony that 3–8% of reports are false. Like Lockwood, Dr. Swenson did not link her statistical testimony to Lauren by suggesting that her report was in some way like that of the 99% of reports that are truthful. And, like Lockwood, Dr. Swenson had neither met nor personally examined Lauren.

Granted, Dr. Swenson was the forensic examiner's supervisor in this case, and she supervised the interview. But her brief statistical testimony—which was not presented in the State's case-in-chief with testimony about her supervision of Lauren's interview—was about research she had read, and it would not have been mistaken to be an opinion about Lauren's truthfulness.

In sum, Dr. Swenson's brief testimony in response to a juror question that "one percent" of reports of abuse are false was not impermissible opinion testimony that Lauren was telling the truth, and it would not have been misunderstood that way by the jury. The court of appeals' decision should be reversed.

B. *Mader* also erred in determining that it was settled law in 2019 that statistical testimony like Lockwood's was barred by *Haseltine*.

Even if *Mader* were correct that statistical testimony putting the rates of false reports of abuse at 8% or below violates *Haseltine*, it was wrong that this question was settled law in 2019, and thus that counsel had a duty to object. *See State v. Thayer*, 2001 WI App 51, ¶ 14, 241 Wis. 2d 417, 626 N.W.2d 811; *State v. Breitzman*, 2017 WI 100, ¶ 48, 378 Wis. 2d 431, 904 N.W.2d 93. The court of appeals in this case made the same error.

Because no contemporaneous objection was raised in *Morales-Pedrosa*, *Mader*, and this case, the *Haseltine* issue has arisen in the context of ineffective assistance. But counsel is not deficient for failing to "object and argue a point of law" that is "unclear." *Thayer*, 241 Wis. 2d 417, ¶ 14; *see also Breitzman*, 378 Wis. 2d 431, ¶ 48.

As noted, in *Morales-Pedrosa*, the court identified four reasons why the expert's testimony did not violate *Haseltine*. At least two of those reasons applied with equal force to Lockwood's statistical testimony: (1) she had not treated (nor apparently met) the victim, and thus there was no risk that the jury would conclude she was offering an opinion as to the victim's credibility; and (2) Lockwood did not offer an opinion about whether the victim was in some way "like" the group of 92–97% of reporters that are truthful. And the fact that no legal new developments (at least none cited in *Mader*) had occurred since the 2016 *Morales-Pedrosa* decision itself indicated that a third factor applied: No Wisconsin case had established that statistical testimony like Lockwood's had violated *Haseltine*. *See Morales-Pedrosa*, 369 Wis. 2d 75, ¶¶ 23–25.

And yet, *Mader* reached for language in *Morales-Pedrosa* itself to conclude that, by Mader's 2019 trial, things

had changed, and it was now settled law that Lockwood's testimony was barred by *Haseltine*. *See Mader*, 408 Wis. 2d 632, ¶ 38. *Mader* homed in on the *one* factor suggesting that Lockwood's testimony might be barred by *Haseltine*—her statistical figures indicated a rate of false reporting that was significantly lower than 90%--to conclude that her testimony, like Steier's, was *Haseltine* testimony. Though *Mader* said in 2023 that the "day" had "arrived' to determine that statistical testimony like Lockwood's was barred by *Haseltine*, *id.*, a reasonably competent attorney familiar with *Morales-Pedrosa* would not have known at Mader's 2019 trial that Wisconsin law clearly barred Lockwood's testimony.

Here, the law at the time of Molde's 2019 trial was not settled on whether Dr. Swenson's testimony constituted *Haseltine* testimony that Lauren was telling the truth. Contrary to *Mader*, competent counsel familiar with *Morales-Pedrosa* would not have read that decision to have held that statistical testimony like Dr. Swenson's and Lockwood's was barred by *Haseltine*.

The *Molde* court of appeals erred in concluding that counsel was deficient for not objecting to Dr. Swenson's testimony, and its decision should be reversed.

II. The Court should take review and conclude that counsel's non-objection to Dr. Swenson's testimony was not prejudicial.

The State's main arguments for review concern the court of appeals' conclusion that counsel's performance was deficient. It was not deficient because Dr. Swenson's statistical testimony did not violate *Haseltine*, and, even if it did, the proposition that statistical testimony like that of Dr. Swenson is *Haseltine* testimony was not established law at the time of Molde's 2019 trial.

But the State also believes that the court of appeals erred in concluding that counsel's alleged error in not

objecting to the doctor's testimony was prejudicial—that there is a reasonable probability that, absent this testimony, the outcome of the trial would have been different. *See Harrington v. Richter*, 562 U.S. 86, 111–12 (2011) (citations omitted). To show prejudice, "[t]he likelihood of a different result must be substantial, not just conceivable." *Id.* at 112. The defendant has the burden to prove prejudice, and the court of appeals erred in concluding that he met that burden. *State v. Sanchez*, 201 Wis. 2d 219, 232, 548 N.W.2d 69 (1996).

The fact that this case turned on a determination of Lauren's credibility against that of Molde and the defense witnesses *does not* mean that, without Dr. Swenson's statistical testimony that the incidence of false reports of abuse is extremely low, there is a substantial likelihood that the jury would have acquitted Molde.

First, Dr. Swenson's statistical testimony that false reports amount to "one percent" of reports said little about whether *Lauren* was telling the truth. Dr. Swenson did not indicate whether she believed that Lauren was telling the truth, and reasonable jurors would understand that statistics ultimately cannot answer that question. To the extent the statistics informed the jurors' consideration of the evidence, the statistical testimony was very brief, and it came at the conclusion of Dr. Swenson's testimony. Thus, it would not have been confused with her prior testimony about Lauren's forensic interview or any effort by the State to convince the jury that Lauren was credible. While the State referenced Dr. Swenson's statistical evidence in closing arguments, it did so only briefly with a host of other arguments. (R. 139:163, 183.)

Second, Lauren's account was detailed, and the details remained largely the same from the initial disclosure via text to her sister Amanda, to the forensic interview, and to Lauren's trial testimony. Throughout, Lauren 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, Whitney, was upstairs sleeping with Molde because she always got scared when their mother was gone. (R. 123:1–2; 126:9.) Lauren said that Whitney came downstairs and told Lauren that Molde wanted her to come upstairs. (R. 123:1–2; 126:10; 138:168–70.) Lauren 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.) Lauren said that she was "pretty sure he was drunk," and that Molde's breath smelled of alcohol. (R. 123:2; 138:172, 178.)

Lauren said that Molde either took off his clothes or was already naked and then got on top of Lauren (R. 126:10–11; 138:171.) Molde then forced his penis inside Lauren's vagina, which Lauren 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.) Lauren said that it was dark in the room, and that Whitney was outside of the bedroom door. (R. 126:11; 138:172–73.) Lauren said that, later, Whitney told Lauren that she wanted to be a big girl, too, and Lauren said, no, you don't. (R. 123:3; 126:16; 138:174.)

Third, the veracity of Lauren's account was buttressed by the fact that she told another person, her sister Amanda, 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 Amanda testified about receiving these messages. (R. 123; 138:190–96.)

Fourth, Lauren engaged in self-injurious behaviors in the years after the assault, including cutting herself and attempting suicide. (R. 138:159, 175.) These behaviors, Dr. Swenson testified, were consistent with Lauren's report of sexual assault as a young child. (R. 138:132–33.) By her own account, Lauren said that Molde's sexual assault was what led to her suicide attempt. (R. 138:168.)

Fifth, the defense offered varying, unpersuasive theories of why Lauren might fabricate an allegation of sexual abuse against her father. For example, Stephanie, Lauren's adoptive mother, testified that she thought Lauren attempted suicide because she did not want to live at her grandparents' house (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 none of the defense's theories adequately explained why Lauren would make up such serious allegations against her father. (R. 139:173–74.) While Lauren's family members largely took Molde's side at trial, they also had a motive to defend him to ensure that their father was not taken from them again, as he had been in 2012 when he was jailed for OWI. (R. 139:175.)

Finally, the effect of any error in admission of the statistical evidence was blunted by the jury being properly instructed that Dr. Swenson's "[o]pinion evidence was received to help you reach a conclusion," but they were not to be "bound by any expert's opinion." (R. 139:155–56.)

In concluding counsel's non-objection was prejudicial, the court of appeals contrasted the evidence in Molde's case with that in *Mader*, where the court of appeals held that multiple errors by counsel were not prejudicial. *Mader*, 408 Wis. 2d 632, ¶¶ 81–87. But the evidence in *Mader* was overwhelming—the victim suffered numerous assaults over a period of years, and she was able to identify dates, locations,

and details of the assaults themselves, including a birthmark on Mader's penis that was visible only when erect. The absence of such unmistakable, overwhelming evidence does not mean that Molde has met his burden to show prejudice.

For the reasons stated above, Molde has not shown that any error in counsel not objecting to Dr. Swenson's statistical testimony is prejudicial. Accordingly, the court of appeals decision should be reversed for this reason as well.

CONCLUSION

This Court should grant the petition for review and reverse the decision of the court of appeals.

Dated this 19th day of June 2024.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition produced with a proportional serif font. The length of this petition is 6,785 words.

Dated this 19th day of June 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 19th day of June 2024.

Electronically signed by:

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