STATE OF WISCONSIN

I N S U P R E M E C O U R T

Case No. 2021AP1346-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

JOBERT L. MOLDE,

Defendant-Appellant.

ON REVIEW FROM A DECISION AND ORDER OF THE WISCONSIN COURT OF APPEALS, DISTRICT III, REVERSING A JUDGMENT OF CONVICTION AND AN ORDER DENYING POSTCONVICTION RELIEF OF THE DUNN COUNTY CIRCUIT COURT, THE HONORABLE ROD W. SMELTZER, PRESIDING

PLAINTIFF-RESPONDENT-PETITIONER'S BRIEF-IN-CHIEF AND APPENDIX

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

At Defendant-Appellant Jobert L. Molde's trial at which he was found guilty of first-degree sexual assault of a child and incest, a juror submitted a question for the State's expert witness: "How frequent is it for children to make up a story of sexual abuse?" The expert responded, without objection from defense counsel, "False disclosures are extraordinarily rare, like in the one percent of all disclosures are false disclosures."

The court of appeals ordered a new trial for defense counsel's non-objection to this testimony. Relying on *State v. Mader*, 2023 WI App 35, 408 Wis. 2d 632, 993 N.W.2d 761, the court held that the expert's statistical testimony about the infrequency of false reports was opinion testimony that the victim was telling the truth, contrary to *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). Per *Mader*, the court also held that counsel should have known to object because, at the time of Molde's 2019 trial, it was settled law that such testimony was barred by *Haseltine*.

This Court should partially overturn *Mader* and hold that expert statistical testimony like the testimony here about the infrequency of false reports of sexual assault is not *Haseltine* testimony. Statistics, by their nature, say little about whether a particular victim is telling the truth and thus do not implicate *Haseltine*. The court of appeals' decision should therefore be reversed.

But even if this Court were to hold that the expert's testimony was barred by *Haseltine*, it should still reverse and overturn a secondary *Mader* conclusion: That its holding that certain statistical testimony violates *Haseltine* was actually settled law *four years earlier* during Mader's 2019 trial. It was not, so the attorneys' lack of an objection in *Mader* and at Molde's trial (also held in 2019) was not deficient performance. Finally, even if somehow deficient, counsel's non-objection was not prejudicial; there is no reasonable

probability that the outcome would have been different absent any error. The Court should therefore reverse.

ISSUES PRESENTED

1. Should this Court overturn *Mader* in part and conclude that expert statistical testimony about the prevalence of false reports of sexual assault is not *Haseltine* testimony that the sexual assault victim is telling the truth? Should the court of appeals' decision, which relied on *Mader*, be reversed because the expert's statistical testimony in this case did not violate *Haseltine*, and counsel was therefore not deficient in not making an objection?

This Court should answer yes and yes.

2. If *Mader* correctly held that expert statistical testimony about the prevalence of false reports of sexual assault is barred by *Haseltine*, should the court of appeals' decision be reversed nonetheless and a secondary conclusion of *Mader*—that its primary holding that certain statistical testimony violated *Haseltine* was *already* settled law in 2019 during Mader's trial—be overturned, so that neither Mader's attorney nor Molde's attorney at *his* 2019 trial was deficient performance for not objecting to the testimony?

This Court should answer yes.

3. If Molde's trial counsel was deficient for not objecting to the expert's statistical testimony about the prevalence of false reports of sexual assault, should the court of appeals' decision still be reversed because Molde cannot show prejudice?

This court should answer yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is scheduled for March 12, 2025. This Court typically publishes its decisions.

STATEMENT OF THE CASE

In January 2017, Jobert Molde's daughter Lauren[1] attempted suicide in a high school bathroom by taking a bunch of over-the-counter pills. (R. 1:2.) Lauren had in her possession notes addressed to family members, including this note to her father: "I want to say I love you, but I can't. I hope you remember that night at the brown house. The night mom was gone and you made [Whitney] come get me. You told me to be a 'big girl for daddy.'" (R. 1:2; 118:1; 119:1; 120:1.) "Because of that night I am where I am." (R. 1:2; 118:1.) A school guidance counselor who responded to the suicide attempt found this note. (R. 1:2; 138:107–08.) The counsellor asked Lauren about the note, and Lauren said that her father had sexual intercourse with her. (R. 1:2; 138:110–11.)

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 the forensic interviewer, nurse practitioner Laurel Edinburgh, would provide 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.)

[1] 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.) Once the jury was empaneled, the trial court, the Honorable Rod W. Smeltzer, presiding, said that it would allow jurors to submit questions of the witnesses. (R. 138:104–05.) The court said that it would screen the submissions and decide whether to ask the question: "After consulting with counsel," the court explained, "I will determine if your question is legally proper. If I determine that your question may be properly asked, I will ask it." (R. 138:105.)

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. (R. 138:130–33.) She testified that delayed and piecemeal reporting by child victims is "the rule and not the expectation." (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 Colfax until she was about 11. (R. 126:5–8.) When asked about the incident, 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 him." (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.)

"Afterwards I was crying," Lauren told the interviewer, "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 that, about one week before her suicide attempt, she disclosed Molde's assault to her sister Amanda, who lives with another family. (R. 126:16–18.)

After the video concluded, Dr. Swenson testified that "[i]n about 97 percent of sexual abuse cases" in which "there's been a report of penetration, there are no findings on the anal[/]genital exam." (R. 138:139.) Dr. Swenson said that based on her review of the medical records, Lauren's physical exam did not reveal signs of abuse. (R. 138:140.)

A juror submitted a note to the court with two questions for Dr. Swenson. (R. 138:154.) At the conclusion of Dr. Swenson's testimony, the court held a brief sidebar with the attorneys, 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, "Second part of [the juror's questions] 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 followed up with Dr. Swenson: "Are there particular studies that have been conducted regarding the reporting of false allegations?" (R. 138:155.) The doctor 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, now 16, testified at trial. (R. 138:158.) She read aloud part of instant messages she sent to Amanda a few days before her suicide attempt. (R. 123:1–9; 138:160–62.) 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 had told her "[t]hat it was our little secret." (R. 138:172.) Lauren agreed she "start[ed] to forget" what Molde had done, but it came back to her again. (R. 138:174.) At that point, she started cutting herself "[s]o I could focus on something else." (R. 138:175.)

Lauren said that she remembered Molde spent some time in jail in 2012, and the assault happened before he went away. (R. 138:175.) Asked why she didn't tell anyone about it 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 an investigator's interview of Molde. (R.

139:13–15.) Portions of a videorecording of the interview were played for the jury. (R. 139:15–18.) At one point, Molde was asked if his kids "were honest," and he responded: "Yeah. Very honest. Brutally honest." (R. 130:16; 139:16.) On cross-examination, defense counsel played portions of the video in which Molde strenuously denied assaulting Lauren. (R. 130:33, 47–48, 53; 139:32–35.) In another excerpt, Molde agreed 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 abuse 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 returned from 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, 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.[2] (R. 210:1–2, Pet-App. 33–34.)

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[2] First-degree sexual assault of a child under the age of 12 by sexual intercourse carries a mandatory minimum term of 25

Postconviction Proceedings

Molde filed a motion and a supplemental motion for postconviction relief pursuant to Wis. Stat. § (Rule) 809.30. (R. 163:1–36; 185:1–40.) He alleged that Dr. Swenson's answer to the juror's question about the incidence of false reporting of sexual assault was impermissible *Haseltine* testimony that Lauren was telling truth, and trial counsel was ineffective for not objecting to it. (R. 163:2–8; 185:2.) He also argued that counsel was ineffective for not seeking a mistrial based on this testimony, for not asking Lauren's family members whether she had a reputation for dishonesty, and for withdrawing a prior objection to admission of evidence that Molde was in jail on an OWI conviction. (R. 163:8, 11–13; 185:8, 12–16.)

The court, the Honorable Judge Smeltzer again presiding, held an evidentiary hearing on the motion at which Attorney Weber testified. (R. 175; 197.) The attorney said that she did not object to the juror's question about the incidence of false reports of sexual abuse or Dr. Swenson's answer to the question because she couldn't think of a legal basis for an objection, including under *Haseltine*. (R. 175:18; 197:25.) She agreed that she did not have a strategic reason not to object. (R. 175:22.) During this line of questioning, the court interjected that its usual practice is not to ask a juror's question when either attorney objects to the question.[3] (R.

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years of initial confinement. Wis. Stat. §§ 939.616(1r), 948.02(1)(b). Before sentencing, Molde challenged the mandatory minimum as a violation of the doctrine of separation of powers. (R. 142:1–5.) The sentencing court rejected this argument, and Molde abandoned it in the court of appeals. (R. 154:5–6.)

[3] Noting that it had given a specific instruction at trial on juror questioning of witnesses, the court said: "I'm going to interject here because it would say on the record what we've done on that process. If either counsel objects to a [juror] question . . .

175:16.) Attorney Weber testified that she did not recall the court explaining this practice to the parties. (R. 175:17.)

On cross-examination, Attorney Weber noted that she had filed a pretrial motion for the county to pay for the defense to retain its own child sexual abuse expert, which the court denied. (R. 197:13–14.) Attorney Weber agreed that Dr. Swenson's answer to the juror's question that one percent of disclosures are false was not an opinion about whether Lauren was telling the truth. (R. 197:21.) Attorney Weber agreed that she did not know before Dr. Swenson answered the juror's question whether that answer would be helpful or harmful to the defense. (R. 197:31.)

The parties filed post-hearing briefs. (R. 202; 203; 207; 208.) At a July 2021 hearing, the circuit court issued a bench ruling denying the postconviction motions. (R. 218:1–11, Pet-App. 35–45.) The court concluded that counsel's non-objection to Dr. Swenson's answer that one percent of sexual abuse reports are false reports was not deficient performance. (R. 218:5, Pet-App. 39.) The court determined that the juror's question raised a matter within Dr. Swenson's expertise, and her answer was not objectionable because the doctor did not "comment[ ] on the credibility of the victim in this case as to whether she was telling the truth or not." (R. 218:5, Pet-App. 39.) The court further concluded that counsel's "handling of th[e] situation was not ineffectiveness of counsel" because, in part, counsel elicited an admission from Dr. Swenson that she "could not recall" the studies on which her answer was based. (R. 218:5, Pet-App. 39.) The court also rejected Molde's remaining claims. The court later issued a written order

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it's not asked." (R. 175:15–16.) In its instruction to the jury, the court said that it would decide whether a juror question is "legally proper" and "may be properly asked" "[a]fter consulting with counsel." (R. 138:105.)

denying the motions for the reasons given at the hearing. (R. 225:1, Pet-App. 46.)

Court of Appeals' Decision

On appeal, Molde renewed his allegation that trial counsel was ineffective for not making a *Haseltine* objection to Dr. Swenson's answer in response to a juror's question that false disclosures by children of sexual abuse are "extraordinarily rare," representing "one percent" of child reports of sexual abuse. (Pet-App. 12.) The State responded that counsel was not deficient for not raising a *Haseltine* objection. 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.

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). (Pet-App. 64–66.) The court held in *Mader* that testimony by two witnesses constituted "a *Haseltine* violation": testimony by an investigator who had 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 of 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. (Pet-App. 50–51, 66.)

After *Mader* was decided, the court ordered the parties to file supplemental briefs addressing in greater detail

whether defense counsel's alleged error in not objecting to Dr. Swenson's testimony was prejudicial. (Pet-App. 18 n.11.)

Following supplemental briefing, the court issued a decision and order on May 21, 2024, reversing the judgment of conviction and ordering a new trial. (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.) Relying on *Mader*, the court concluded that "the law was clear" at the time of Molde's 2019 trial that testimony like Dr. Swenson's violated *Haseltine*. (Pet-App. 12.)

The court concluded that Dr. Swenson's testimony about false disclosures by children 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 the doctor's 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 Attorney Weber's lack of an objection to Dr. Swenson's testimony, unlike defense counsel's non-objection to similar testimony in *Mader*, was prejudicial. (Pet-App. 18–27.)

The State petitioned, and this Court granted review.

STANDARD OF REVIEW

Whether counsel rendered ineffective assistance is a mixed question of law and fact. *State v. Thiel*, 2003 WI 111, ¶ 21, 264 Wis. 2d 571, 665 N.W.2d 305. This court will uphold the postconviction court's factual findings unless they are clearly erroneous. *Id.* Whether the defendant satisfies *Strickland*'s deficiency or prejudice prongs is a question of law that this Court reviews without deference to the lower courts' conclusions. *State v. Domke*, 2011 WI 95, ¶ 33, 337 Wis. 2d 268, 805 N.W.2d 364.

ARGUMENT

I. Expert statistical testimony about the infrequency of false reports of sexual assault does not implicate *Haseltine*, and *Mader*'s holding that expert evidence placing false reports below a certain threshold violates *Haseltine* should be overturned.

A. *Haseltine* prohibits any witness from offering an opinion that another competent witness is telling the truth.

The admissibility of expert testimony is governed by Wis. Stat. § 907.02(1). In the most general terms, expert testimony is admissible if the witness is qualified, and if the proffered testimony is relevant and reliable. *State v. Hogan*, 2021 WI App 24, ¶ 19, 397 Wis. 2d 171, 959 N.W.2d 658; *see also In re Commitment of Jones*, 2018 WI 44, ¶ 29, 381 Wis. 2d 284, 911 N.W.2d 97. Such testimony is relevant "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Section 907.02(1); *Hogan*, 397 Wis. 2d 171, ¶ 19.

But experts, like lay witnesses, may not "give an opinion that another mentally and physically competent

witness is telling the truth." *Haseltine*, 120 Wis. 2d at 96. "The *Haseltine* rule is intended to prevent witnesses from interfering with the jury's role as the 'lie detector in the courtroom.'" *State v. Snider*, 2003 WI App 172, ¶ 27, 266 Wis. 2d 830, 668 N.W.2d 784 (quoting *Haseltine*, 120 Wis. 2d at 96). 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, 490 N.W.2d 40 (Ct. App. 1992). So, this Court has held that expert testimony about the post-assault behavior of sexual assault victims may be used to rebut the suggestion that the victim's conduct showed that she fabricated the charge. *State v. Jensen*, 147 Wis. 2d 240, 250, 432 N.W.2d 913 (1988). An expert's testimony that there were "no indications" that the victim had been coached was not *Haseltine* testimony that the victim was telling the truth. *Maday*, 374 Wis. 2d 164, ¶ 38. And an officer's trial testimony about her beliefs during the investigation is not *Haseltine* testimony about whether she believes that the victim (or the defendant) is telling the truth. *See State v. Johnson*, 2004 WI 94, ¶ 14 n.2, 273 Wis. 2d 626, 681 N.W.2d 901; *Snider*, 266 Wis. 2d 830, ¶ 27; *Smith*, 170 Wis. 2d at 718.

B. The court of appeals' application of *Haseltine* to statistical testimony about the infrequency of false reports of sexual abuse in *Morales-Pedrosa* and *Mader*.

In recent years, the admission of statistical testimony about the incidence of false reporting of sexual abuse in prosecutions for sexual assault has been addressed by the court of appeals in two published cases (*Morales-Pedrosa* and *Mader*) and now one citable, unpublished case (*Molde*). Defendants argued in each of these cases that trial counsel was ineffective for not objecting to the admission of such statistical testimony under *Haseltine*.

1. In *Morales-Pedrosa*, the court of appeals held that expert testimony that 90 percent of reported cases are true did not violate *Haseltine*.

In 2016, the court of appeals first addressed *Haseltine* and statistical testimony about the incidence of false reports of sexual assault. *Morales-Pedrosa*, 369 Wis. 2d 75. Esequiel Morales-Pedrosa 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 sexual abuse. *Id.* ¶¶ 1, 2, 12. McGuire, who had never met or interviewed the victim, was asked by the State, "[I]s it commonly understood that approximately 90 percent of reported cases are true?" McGuire responded, "Correct." *Id.* ¶ 12. Postconviction, Morales-Pedrosa argued that 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 affirmed, rejecting 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: (1) counsel had no duty to object because no Wisconsin case had held that such testimony was barred by *Haseltine*; (2) the expert had no connection to the victim so there was minimal risk the jury would conclude that he was vouching for the victim; (3) the expert never suggested that the victim shared the characteristics of the 90% of truthful reporters nor linked the victim's reports of abuse to the statistics; and (4) testimony that 90% of children claiming abuse are truthful was "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 held that expert testimony that 3–8 percent of sexual assault reports are false violates *Haseltine*.

In 2023, the court of appeals announced in *Mader* that the "day" referenced in *Morales-Pedrosa* "has arrived." *Mader*, 408 Wis. 2d 632, ¶ 38. (Pet-App. 65.) Two witnesses in *Mader* provided testimony about the prevalence of false reports of sexual assault.

Gary Steier, a sheriff's department investigator who interviewed Mader's victim several times, testified that "[o]ut of about 150" sexual assault reports he had investigated, "only one 'was a false report.'" *Mader*, 408 Wis. 2d 632, ¶ 7. (Pet-App. 51.)

Susan Lockwood, a retired therapist who spent more than 30 years treating victims of sexual abuse, testified that she had treated more than 500 persons in her career, but she had not treated Mader's victim. *Mader*, 408 Wis. 2d 632, ¶ 5. (Pet-App. 50–51.) 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, there were only 4 that she knew or "was sure" had falsely reported. *Id.* ¶ 6. (Pet-App. 51.) She added that false reporting was "very uncommon," referencing "research in the field indicating 'usually 3 percent to 8 percent of reported sexual assaults are false.'"[4] *Id.* (Pet-App. 51.)

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[4] Lockwood's testimony about the research was consistent with the results of two published meta-analyses of studies about the incidence of false reporting.

The first analysis examined 16 studies of false reports of sexual victimization in the United States and other industrialized nations and concluded that "between 2.1% and 10.3% of reports may be false." L. Orchowski, et al., *False Reporting of Sexual Victimization: Prevalence, Definitions, and False Perceptions* at 4, 6, 17 (2020) in R. Geffner et al. (eds.) Handbook of Interpersonal Violence Across the Lifespan, https://www.researchgate.net/publication/342701233_False_Reporting_of_Sexual_Victimization_Prevalence_Definitions_and_Public_Perceptions (accessed Jan. 10, 2025).

The second systematic examination of such studies concluded that "estimates for the percentage of false reports begin to converge around 2–8%." K.A. Lonsway, et al., *False Reports: Moving Beyond the Issue to Successfully Investigate and Prosecute Non-Stranger Sexual Assault*, The Prosecutor, Journal of Nat' Dist. Attys. Assn. 2009 Jan-Mar. 43 at 4, https://ndaa.org/wp-content/uploads/False_Reports_Pros_Jan_Feb_Mar_09.pdf (accessed Jan 10, 2025).

Both analyses recognized the importance of methodology and the definition of "false report" to study outcomes. And both appeared to give greater weight to studies that used reliable, verifiable grounds for classifying a report as "false"—for example, an investigation disproved the report, or the accuser made a credible admission that the report was false. Lonsway, *False Reports* at 3; Orchowski, *False Reporting* at 6.

Steiner's testimony left little doubt that he believed that the victim was telling the truth—the jury would have understood that she was *not* the "only one" of the 150 that he had interviewed who had made a "false report." *Mader*, 408 Wis. 2d 632, ¶ 7. (Pet-App. 51.) By contrast, Lockwood never met the victim, and her testimony about the infrequency of false reports—3 to 8 percent from the research, and 4 individuals (that she knew of) of the 500 she had treated—did not mention the victim. *Id.* ¶ 6. (Pet-App. 51.)

Despite these differences, the court of appeals lumped the two witnesses' testimonies together and labelled them "a *Haseltine* violation." *Mader*, 408 Wis. 2d 632, ¶ 39. (Pet-App. 66.) As for Steiner's testimony, the court properly concluded that it constituted vouching under *Haseltine*; Steiner conveyed that he believed that the victim was telling the truth by testifying that "only one" of the persons that he had interviewed had falsely reported. *Id.* ¶ 38. (Pet-App. 65–66.)

But *Mader* broke new legal ground by treating Lockwood's expert statistical testimony about the incidence of false reports of sexual abuse as a *Haseltine* violation, too. In doing so, the court viewed the statistics themselves—3–8% false reports from the research—as opinion evidence that the victim was telling the truth. *Mader*, 408 Wis. 2d 632, ¶¶ 39–40. (Pet-App. 66–67.) 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. (Pet-App. 66.)

Because the district attorney in the present case never intended to introduce evidence about the incidence of false reporting in her case-in-chief (Dr. Swenson's testimony on the subject was in response to a juror's question), no studies on the topic were introduced at trial.

Mader's determination that statistical testimony putting the incidence of false reports of sexual assault at 8% or less violates *Haseltine* was ultimately not necessary to the outcome. That's because the court also determined that Mader suffered no prejudice from counsel's errors in not objecting to the testimony of Steiner and Lockwood, and to other testimony not relevant here. *Mader*, 408 Wis. 2d 632, ¶¶ 79–87. (Pet-App. 85–89.) Because the *Mader* decision was not adverse to the State under the appellate rules, the State could not seek review of *Mader*. Wis. Stat. § (Rule) 809.62(1g)(a) & (1m)(a)1.

Bound by *Mader*, the court of appeals in Molde's case concluded that Dr. Swenson's answer to the juror's question about the incidence of false disclosures—"extraordinarily rare," amounting to "one percent of all disclosures" based on studies that the doctor had read—was *Haseltine* testimony that the victim was telling the truth. (Pet-App. 17–18.)

C. *Mader*'s holding that expert statistical testimony about the prevalence of false reports violates *Haseltine* when it is at or below 8 percent should be overturned.

This Court has consistently required a compelling reason to overturn *its own* precedents. *See, e.g., State v. Luedtke*, 2015 WI 42, ¶ 40, 362 Wis. 2d 1, 863 N.W.2d 592 (citations omitted); *Bartholomew v. Wisconsin Patients Comp. Fund & Compcare Health Servs. Ins. Corp.*, 2006 WI 91, ¶ 33, 293 Wis. 2d 38, 717 N.W.2d 216. But, as explained recently, it has "never required a special justification to overturn a decision of the court of appeals." *State v. Johnson*, 2023 WI 39, ¶¶ 19–20, 407 Wis. 2d 195, 990 N.W.2d 174; *accord Evers v. Marklein*, 2024 WI 31, ¶ 25, 412 Wis. 2d 525, 8 N.W.3d 395.

In *Mader*, the court of appeals held in part that expert testimony that research indicates 3–8% of sexual assault reports are false is prohibited opinion testimony that the

victim is telling the truth. *See Mader*, 408 Wis. 2d 632, ¶¶ 38–40. (Pet-App. 65–67.) This holding is unsound and inconsistent with *Haseltine* and should be overruled.

Expert statistical testimony about the prevalence of false reports of sexual assault, by itself, is not an opinion about whether the victim is telling the truth. Statistics are "a collection of quantitative data," and a statistic is "a single term or datum in a collection of statistics." *Statistics* and *statistic*, Merriam-Webster Online Dictionary, merriam-webster.com/dictionary/statistics (accessed Jan. 13, 2025). A statistic about the prevalence of false reports of sexual assault is derived from a data set of sexual assault reports—not, of course, from any information about the victim in the case. Alone, a statistic about the incidence of false reports—even one putting the incidence at a very low rate[5]—does not express an opinion about whether the victim is telling the truth.

Mader appears to be unique among *Haseltine* cases in holding that certain expert scientific testimony not linked to the victim is nonetheless prohibited opinion testimony that the victim is telling the truth. In *Mader*, Lockwood, who had

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[5] Mader may respond that hypothetical testimony based on statistical research concluding that false reports *never* happen would, at least, constitute an opinion that the victim is telling the truth. *Cf. State v. Tutlewski*, 231 Wis. 2d 379, 605 N.W.2d 561 (Ct. App. 1999) (expert testimony that cognitively impaired victims cannot lie because of their disability usurped the jury's role in determining credibility). The State has two responses to this hypothetical. First, it doubts that actual, scientific research exists showing that false reports *never* occur—or that such research would be deemed reliable under Wis. Stat. § 907.02(1). Second, even if such research existed and it was somehow reliable, it still would not answer the question of whether the victim is telling the truth. Statistics contain little information about the victim—her account, evidence tending to confirm or disprove her story, her demeanor, etc.—necessary to a jury's common-sense determination of whether she is credible.

not examined or met the victim, testified that "research in the field indicat[es] 'usually 3 percent to 8 percent of reported sexual assaults are false'" and that, of the 500 persons she had treated, there were 4 that she "was sure" had falsely reported. *Mader*, 408 Wis. 2d 632, ¶ 6. (Pet-App. 51.) Though Lockwood did not mention the victim in her statistical testimony about false reports, *Mader* held in part that Lockwood's testimony about research into the prevalence of false reporting of sexual assaults violated *Haseltine*. *Id.* ¶¶ 38–40. (Pet-App. 65–67.)

By contrast, the experts in other cases applying the *Haseltine* rule used scientific evidence to convey their own opinion that the victim was telling the truth. In *Haseltine* itself, the defendant, who was accused of sexually assaulting his daughter, objected to a psychiatrist's expert testimony that there "was no doubt whatsoever" that the daughter was an incest victim. 120 Wis. 2d at 93–96. The court of appeals reversed. *Id.* at 96. The court said that the psychiatrist's testimony "goes too far" because his opinion that the daughter was an incest victim "is an opinion that she was telling the truth." *Id.*

Likewise, in *State v. Krueger*, a social worker who had conducted many interviews of suspected child victims testified that, because the child victim "was not highly sophisticated she would not have been able to maintain consistency throughout her interview 'unless it [the charged offense] was something that she experienced.'" 2008 WI App 162, ¶¶ 3, 16, 314 Wis. 2d 605, 762 N.W.2d 114. Defense counsel did not object to this testimony, and the jury found Kreuger guilty. The court of appeals said that the social worker's testimony also "went too far" because it conveyed the expert's opinion that the child was telling the truth, and trial counsel was ineffective for not making a *Haseltine* objection. *Id.* ¶ 17.

In *State v. Tutlewski*, the defendant was convicted upon a jury trial of sexually assaulting a cognitively impaired

victim. 231 Wis. 2d 379, 382–83, 605 N.W.2d 561 (Ct. App. 1999). The State's expert, who had also been the victim's special education teacher, testified that the victim—and her cognitively disabled husband, a trial witness—lacked the capacity to lie because of their disability. *Id.* The court of appeals reversed, concluding that the expert's testimony that the victim and her husband were incapable of lying violated *Haseltine* and usurped the jury's role of determining witness credibility. *Id.* at 389–90.

Thus, the *Haseltine* rule is focused on whether the expert's testimony conveyed an opinion that the victim (or another witness) is telling the truth.[6] The new rule in *Mader* is not. Under *Mader*, certain expert statistical testimony—even if relevant and reliable under Wis. Stat. § 907.02(1) *and* silent on whether the victim is telling the truth—is inadmissible *based on the results of the statistics themselves*. But the statistics are the statistics, and they are not an opinion about whether the victim is telling the truth. *Mader*'s rule is therefore not grounded in *Haseltine*.

While Dr. Swenson's statistical testimony about the prevalence of false reporting of sexual assault was not elicited by the State in this case, a trial court may decide within its discretion to admit such evidence under Wis. Stat. § 907.02 in a given case. A trial court could, for example, grant a State's request to present such expert statistical evidence upon a showing that many persons believe that false charges of sexual assault are endemic. Published research about public opinion surveys shows that certain groups and the public at

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[6] *See* 7 Daniel D. Blinka, *Wisconsin Practice Series: Wisconsin Evidence* § 608.3 at 489–90 (3rd ed. 2008) (discussing *Haseltine*) ("Under no circumstances may the expert venture an opinion about whether the subject is being truthful or whether the crime occurred.").

large greatly overestimate the prevalence of false reporting.[7] L. Orchowski, et al., *False Reporting of Sexual Victimization: Prevalence, Definitions, and Public Perceptions* at 2, 6–9 (2020) in R. Geffner et al. (eds.) Handbook of Interpersonal Violence Across the Lifespan, https://www.researchgate.net/publication/342701233_False_Reporting_of_Sexual_Victimization_Prevalence_Definitions_and_Public_Perceptions (accessed Jan. 10, 2025).[8] As argued throughout this brief, expert testimony about the prevalence of false reports does not and cannot answer the ultimate question of whether the victim is telling the truth. But it may assist the trier of fact to determine facts in issue by correcting misconceptions that may color some jurors' consideration of an allegation of sexual assault. Section 907.02(1).

Based on the foregoing, this Court should overrule *Mader* and conclude that expert statistical testimony about the prevalence of false reports of sexual assault is not *Haseltine* testimony, and a trial court may admit such

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[7] For example, one 2020 survey conducted at a large military installation in the United States "indicated that 49% of respondents believed that women lie about rape to get back at their dates." Orchowski, *False Reporting* at 2. A study of police officers who had conducted at least one sexual assault investigation in the past year showed similarly high estimates of false reporting. Orchowski, *False Reporting* at 2. The study authors identified media coverage of false accusations, cognitive biases that prevent individuals from recognizing the veracity of a rape accusation, high profile denials of sexual assault by politicians and athletes, and stereotypes about sexual violence as reasons why many overestimate the prevalence of false reporting.

[8] *See also* Nikki Graf, *Sexual Harassment at Work in the Era of #MeToo,* 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 Jan. 10, 2025) (31% of Americans believe that women falsely claiming sexually harassment or assault is a major problem).

evidence under Wis. Stat. § 907.02(1) within the exercise of its discretion.

D. Dr. Swenson's answer to the juror's question did not violate the *Haseltine* rule, so counsel's lack of an objection was not deficient performance.

If this Court overrules *Mader*, it should conclude that Dr. Swenson's answer to the juror's question about the frequency of false reports of sexual assault did not violate properly understood *Haseltine* principles.

Like Lockwood's testimony in *Mader*, Dr. Swenson's answer to the juror's question about the frequency of false reports did not mention the victim Lauren or express any view about the doctor's opinion of Lauren's credibility. It merely expressed a statistic—"like . . . one percent of all disclosures are false disclosures"—based on the doctor's unprompted recollection of studies she had read. The doctor said nothing about Lauren in her brief responses to the juror's question or defense counsel's follow-up question.

In addition to the fact that the substance of Dr. Swenson's answer did not reference Lauren, the answer's context further minimized the chance that jurors might view the testimony as an opinion about Lauren's credibility. The doctor's statistical answer was made in response to a juror's question following the doctor's testimony. (R. 138:154–55.) The State did not elicit Dr. Swenson's statements about false disclosures in its case-in-chief with other expert testimony, including testimony about Lauren's interview. In other words, the purpose of Dr. Swenson's testimony was plainly *not* to provide an opinion about Lauren's truthfulness. *See Smith*, 170 Wis. 2d at 718. Thus, both the substance and context of Dr. Swenson's statistical answer to the juror's question about the prevalence of false reporting makes it unlikely that the

jury would believe the doctor's answer to be an opinion that Lauren was telling the truth. .

Granted, Dr. Swenson had some ties to Lauren and the investigation. The doctor supervised the forensic interviewer, and she testified about the interview at trial. But she neither interviewed nor met Lauren. (R. 138:134–36.) And in light of the circumstances discussed above, these ties were not sufficient for a reasonable juror to conclude that the doctor's brief statistical answer to the juror's impromptu question about the frequency of false reports was opinion testimony that Lauren was telling the truth.

Accordingly, if this court overturns *Mader*, it should conclude that Dr. Swenson's answer did not violate *Haseltine*. Thus, defense counsel's lack of a *Haseltine* objection to the doctor's answer was not deficient performance, and Molde's ineffective assistance claim fails. *See State v. Jacobsen*, 2014 WI App 13, ¶ 49, 352 Wis. 2d 409, 842 N.W.2d 365 (counsel is not deficient for failing to make a losing argument). The court of appeals' decision should therefore be reversed.

II. Even if *Mader*'s holding is correct and Dr. Swenson's answer was barred by *Haseltine*, Molde's claim that counsel was ineffective for not objecting to the answer still fails because the law was not settled that testimony like the doctor's violated *Haseltine*.

A. Proving a claim of ineffective assistance is difficult, and the defendant's claim may not rest on an issue of law that is not settled.

This Court reviews ineffective assistance of counsel claims under the two-part *Strickland* test. *State v. Reinwand*, 2019 WI 25, ¶ 40, 385 Wis. 2d 700, 924 N.W.2d 184. A defendant claiming ineffective assistance of counsel must prove both that counsel's performance was deficient and that he suffered prejudice as a result of that deficient performance. *Id.* ¶¶ 40, 42.

"To prove deficient performance, a defendant must point to specific acts or omissions by the lawyer that are 'outside the wide range of professionally competent assistance.'" *State v. Beauchamp*, 2010 WI App 42, ¶ 15, 324 Wis. 2d 162, 781 N.W.2d 254 (quoting *Strickland v. Washington*, 466 U.S. 668, 690 (1984)). This Court "strongly presume[s]" counsel has rendered constitutionally adequate assistance. *Strickland*, 466 U.S. at 690. This Court finds deficient performance only if "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687. "[C]ounsel's performance need not be perfect, nor even very good, to be constitutionally adequate." *State v. Carter*, 2010 WI 40, ¶ 22, 324 Wis. 2d 640, 782 N.W.2d 695.

"[T]he test for effective assistance of counsel is not the legal correctness of counsel's judgments, but rather the reasonableness of counsel's judgments." *State v. Weber*, 174 Wis. 2d 98, 115, 496 N.W.2d 762 (Ct. App. 1993) (emphasis omitted) (citing *State v. Pitsch*, 124 Wis. 2d 628, 636–37, 369

N.W.2d 711 (1985)). For this reason, a defendant claiming ineffective assistance must "demonstrate that counsel failed to raise an issue of settled law." *State v. Breitzman*, 2017 WI 100, ¶ 49, 378 Wis. 2d 431, 904 N.W.2d 93. "[F]ailure to raise arguments that require the resolution of unsettled legal questions generally does not render a lawyer's services 'outside the wide range of professionally competent assistance' sufficient to satisfy the Sixth Amendment." *State v. Lemberger*, 2017 WI 39, ¶ 18, 374 Wis. 2d 617, 893 N.W.2d 232 (citation omitted). "When case law can be reasonably analyzed in two different ways, then the law is not settled." *State v. Jackson*, 2011 WI App 63, ¶ 10, 333 Wis. 2d 665, 799 N.W.2d 461.

To prove prejudice, "[t]he 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." *Strickland*, 466 U.S. at 694. The State analyzes prejudice in the final section of this brief.

B. Contrary to *Mader*, it was not settled law that statistical testimony like Dr. Swenson's was barred by *Haseltine*, so counsel's lack of a *Haseltine* objection was not ineffective assistance.

Upon determining that Lockwood's expert statistical testimony (and Steiner's testimony) constituted a *Haseltine* violation, the court of appeals in *Mader* further concluded that, by the time of Mader's 2019 trial, it was settled law that such testimony violated *Haseltine*. Accordingly, the court concluded that defense counsel should have known to make a *Haseltine* objection to Lockwood's testimony, and was deficient in not doing so. *Mader*, 408 Wis. 2d 632, ¶¶ 38, 40. (Pet-App. 65–67.) Applying *Mader*, the court of appeals in this case also concluded that Molde's attorney performed deficiently for not objecting under *Haseltine* to Dr. Swenson's

answer at Molde's trial, which was also held in 2019. (Pet-App. 4, 18.)

The court of appeals erred in *Mader* in determining that it was settled law in 2019 that expert statistical testimony about the incidence of false reports of sexual assault is barred by *Haseltine*. Thus, even if the Court agrees with *Mader* that such testimony violates *Haseltine*, it should overturn *Mader*'s secondary holding that this legal issue was settled at the time of Mader's (and Molde's) trial.

As noted, in *Morales-Pedrosa* (2016), the court of appeals rejected the defendant's claim that counsel was ineffective for not making a *Haseltine* objection to an expert's testimony "that approximately 90 percent of reported cases are true." 369 Wis. 2d 75, ¶¶ 12, 24–26. The court relied on four grounds in concluding that counsel's non-objection was not deficient performance:

- No Wisconsin case had held that such testimony is barred by *Haseltine*, and counsel had no duty to make an objection based on unsettled law;
- The expert neither met nor examined the victim, so there was little 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.

Three of these four reasons why Morales-Pedrosa's attorney was not deficient also applied to Mader's attorney's

performance in not objecting to Lockwood's testimony. First, Lockwood, like the *Morales-Pedrosa* expert, neither treated nor met the victim, so there was little risk that her statistical testimony would be mistaken for an opinion about the victim herself. *See Mader*, 408 Wis. 2d 632, ¶¶ 5–6. (Pet-App. 50–51.) Second, Lockwood likewise did not offer an opinion about whether the victim in some way resembled the group of 92–97% of reporters who were truthful. *See id.* And third, it remained that no Wisconsin case had held that statistical testimony like Lockwood's was barred by *Haseltine*.

Still, *Mader* homed in on the one factor in *Morales-Pedrosa* suggesting that Lockwood's testimony might implicate *Haseltine*—the 3–8% incidence of false reports statistic cited in her testimony, which was significantly lower than the 10% figure in the prior case. *See Mader*, 408 Wis. 2d 632, ¶¶ 38, 39. (Pet-App. 65–66.) Yet there were no facts indicating that this statistical testimony reflected Lockwood's opinion that the victim was telling the truth—she never met or examined the victim, and she offered no testimony connecting the victim to the statistical evidence. Moreover, it remained the case in 2019 that no Wisconsin decision had held that expert statistical testimony like Lockwood's violated *Haseltine*. Whether Lockwood's testimony was barred by *Haseltine* was therefore not settled law under *Morales-Pedrosa*, *Haseltine*, or any other authority in 2019.

Thus, *Mader* erred by concluding that its primary holding—that expert statistical testimony putting false reports of sexual assault at 8 percent or less is barred by *Haseltine*—was actually settled law four years earlier. Because the issue was, in fact, not settled, counsel's non-objection to Lockwood's testimony on *Haseltine* grounds was not deficient performance. *See Breitzman*, 378 Wis. 2d 431, ¶ 49. Mader's secondary holding that it was already settled law four years earlier during Mader's (and Molde's) trial that

certain statistical testimony about the prevalence of false reporting violates *Haseltine* should be overturned.

For the same reasons, Attorney Weber's lack of a *Haseltine* objection to Dr. Swenson's answer was not deficient performance. *Mader*'s holding that expert statistical testimony putting the incidence of false reports below a certain threshold is barred by *Haseltine* was not settled law at the time.[9] Therefore, even if *Mader* correctly held that certain expert statistical testimony about the incidence of false reports is barred by *Haseltine*, Molde's ineffective assistance claim fails. The court of appeals' decision should be reversed.

III. Even if counsel's performance in not making a *Haseltine* objection was deficient, it was not prejudicial.

If this Court concludes that counsel was deficient for not objecting to Dr. Swenson's answer because it was barred by *Haseltine and* the law was settled at the time, it should nonetheless reverse because Molde cannot show that counsel's alleged error was prejudicial.

Prejudice means counsel's alleged errors "actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. To prove prejudice, "[t]he 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." *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "*Strickland* asks whether it is 'reasonably likely'

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[9] Moreover, counsel's performance in challenging Dr. Swenson about the basis for her answer that the incidence of false reporting was "one percent"—which forced a response from Dr. Swenson in which she was unable to provide information about the studies she had read—was reasonable and somewhat undermined the doctor's answer. (R. 138:155.)

the result would have been different" if not for counsel's alleged error. *Harrington v. Richter*, 562 U.S. 86, 111 (2011) (citing *Strickland*, 466 U.S. at 696). "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 (citing *Strickland*, 466 U.S. at 693, 697). "The likelihood of a different result must be substantial, not just conceivable." *Id.* at 112.

The State notes that the issue of witness credibility was central in this case. As with most child sexual assault cases, there was no physical evidence (R. 138:139), and there were no third-party witnesses. The verdict turned on whether the jury believed Lauren's account or Molde's denial.

But these facts do not mean that counsel's non-objection to Dr. Swenson's answer to the jury's question was automatically prejudicial. To prevail, Molde must prove that absent Dr. Swenson's answer to the juror's question about the prevalence of false reports, there is a substantial likelihood that the jury would have reached a different verdict. Molde cannot meet his burden for at least six reasons.

First, Lauren's account was detailed, and the details remained largely the same from the initial disclosure via text message 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 her. (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.) Lauren said that the next day Whitney talked to her about what happened, and Lauren told her that "it was just a dream." (R. 138:180.)

Second, 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 disclosure to authorities. *See Domke*, 337 Wis. 2d 268, ¶¶ 11, 58 (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 Lauren's initial disclosure were presented at trial, and Autumn testified about receiving these messages. (R. 123; 138:190–96.)

Third, Whitney's testimony about "a dream" she had and a conversation she had about it with Lauren echoed parts of Lauren's account of the night of the assault and of a conversation she had with Whitney about it. To be clear, Whitney answered "no" when asked by defense counsel if any of the parts of Lauren's story involving Whitney ever happened. (R. 139:125.) Likewise, Lauren's other family

members also largely took Molde's side at trial. (R. 139:60, 73, 100, 106–07.) But Whitney testified about a dream she had in which "my dad came downstairs and woke [Lauren] up and brought her back upstairs and did that [sexually assaulted her]." (R. 139:125–26.) Whitney said that she told Lauren about the dream, and Lauren told her that "it was just a nightmare."[10] (R. 139:126.)

Fourth, Lauren 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 Lauren's report of sexual assault as a young child. (R. 138:132–33.)

Fifth, though Molde denied the allegations throughout, he did not offer a plausible theory to explain why Lauren would fabricate an allegation of sexual abuse against him. 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 about why Lauren would make up such serious allegations against her father. (R. 139:173–74.)

Sixth and finally, the effect of any error in admission of the statistical evidence was mitigated by the jury being properly instructed, repeatedly, about its role as the fact finder and sole judge of credibility—and about the fact that it was not bound by any expert's opinion. As relevant, the court gave the following instructions:

- "You, the jury, are the sole judges of the facts . . . ."

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[10] The State omitted Whitney's testimony about the dream in briefing prejudice in the court of appeals. (Pet-App. 22 n.13.) If, as the court of appeals determined, the State's omission was a concession that the testimony does not support the State's position on prejudice, the State withdraws this concession here. Moreover. this Court decides the issue of prejudice *de novo*.

- "You the jurors are the judges of credibility of the witnesses and the weight to give to the evidence."
- "It is the duty of the jury to scrutinize and to weigh the testimony of witnesses to determine the effect of the evidence as a whole. You are the sole judges of the credibility, that is the believability of the witnesses and the weight to be given to their testimony."
- "[G]ive the testimony of each witness the weight you believe it should receive."
- "Opinion evidence was received to help you reach a conclusion. However, you're not bound by any experts opinion."

(R. 139:147, 153–56.)

As *Mader* emphasized in concluding that counsel's non-objection to *Haseltine* testimony was ultimately not prejudicial: "[W]e must presume that the jurors followed the trial court's closing instruction that they—not any particular witness or witnesses—were 'the sole judges of the credibility, that is, the believability of the witnesses and of the weight to be given to their testimony.'" *Mader*, 408 Wis. 2d 632, ¶ 86. (Pet-App. 88.) The same applies here.

The conclusion in *Mader* that the defendant could not show prejudice also relied on the fact that the case against Mader was overwhelming. There, the victim provided detailed descriptions of multiple, increasingly depraved acts leading to repeated acts of intercourse. *Mader*, 408 Wis. 2d 632, ¶ 82. (Pet-App. 86–87.) Here, there was one act of assault. But the absence of multiple allegations does not necessarily mean that Molde can meet his burden to show prejudice. As argued, Lauren's account was detailed, largely consistent, and she disclosed the assault to another person before the suicide attempt and reporting the allegations to police. The court of appeals contrasted the evidence of guilt in *Mader* with the trial evidence in the present case in determining that Molde showed prejudice.

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 Lauren'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. Swenson's statistical testimony about the prevalence of false disclosures, there is a substantial likelihood that the jury would have reached a different verdict.

CONCLUSION

Mader's holding that expert statistical testimony putting the incidence of false reports of sexual assault below a certain threshold is *Haseltine* testimony should be overruled. Because Dr. Swenson's testimony was not barred by *Haseltine*, counsel's non-objection to the doctor's testimony was not deficient performance.

If *Mader* was correctly decided and Dr. Swenson's testimony violates *Haseltine*, counsel's non-objection was still not deficient because *Mader*'s rule that barring certain expert statistical testimony about the prevalence of false reports of sexual assault was not settled law at the time of Molde's trial.

Even if counsel's non-objection was deficient, Molde is not entitled to relief on his claim of ineffective assistance because he cannot show prejudice.

The court of appeals decision should be reversed, and the case remanded with instructions to reinstate the judgment of conviction.

Dated this 21st day of January 2025.

Respectfully submitted,

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FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § (Rule) 809.19(8)(b), (bm) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,931 words.

Dated this 21st day of January 2025.

Electronically signed by:

Jacob J. Wittwer
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CERTIFICATE OF EFILE/SERVICE

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

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