STATE OF WISCONSIN

IN SUPREME COURT

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

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTRODUCTION

Contrary to *Mader*, expert statistical testimony putting the incidence of false reports of sexual assault at 8% or less is not *Haseltine* testimony that the victim is telling the truth. Here, Swenson's answer to a juror's question about the incidence of false reporting was not a personal opinion about the credibility of the victim, Lauren. The juror's question called for a statistical response, and the doctor's brief answer that false reports are "extraordinarily rare, like . . . . one percent" of reports did not mention Lauren. The doctor said nothing to indicate whether she believed that Lauren was telling the truth, or whether she was like other truthful reporters.

Alone, statistical testimony about the incidence of false reporting does not violate *Haseltine* because it is not a personal, particularized opinion about the victim's veracity. Molde is mistaken that *Mader* is consistent with "all decisions in other jurisdictions"[1] to address this issue. As shown, there is disagreement in the case law about whether, alone, such statistical testimony is improper vouching—and many of the cases Molde cites turned on other facts showing plain vouching unrelated to statistical testimony. *Mader*'s holding that statistical testimony putting the incidence of false reporting at 8 percent or less should be overturned, and the court of appeals decision in this case reversed.

Even if this Court concludes that *Mader* was correctly decided and Dr. Swenson's answer violated *Haseltine*, it was not settled law at Molde's and Mader's 2019 trials that this statistical testimony was barred—and, in this respect at the very least, *Mader* erred in concluding otherwise. At that time, the only Wisconsin case to have addressed such testimony, *Morales-Pedrosa*, *expressly left unresolved* the question of

[1] (Molde's Br. 7.)

whether such statistical testimony violates *Haseltine*. Counsel for Molde and Mader therefore did not perform deficiently by not objecting to the expert statistical testimony. Thus, alternatively, *Mader*'s secondary holding that its 2023 decision barring certain expert statistical testimony was settled law in 2019 should be overturned, and the court of appeals' decision reversed.

Finally, even if Molde's trial counsel was deficient for not objecting to Dr. Swenson's answer, this Court should reverse because counsel's error was not prejudicial.

ARGUMENT

I. Dr. Swenson's statistical answer to a juror's question about the frequency of false reports of sexual assault was not an opinion that Lauren was telling the truth, and *Mader*'s holding barring such testimony should be overturned.

No expert or lay witness may "give an opinion that another mentally and physically competent witness is telling the truth." *State v. Haseltine*, 120 Wis. 2d 92, 96, 352 N.W.2d 673 (Ct. App. 1984). Applying *Haseltine*'s rule, Wisconsin courts have held that an expert impermissibly telegraphed to the jury his or her own opinion about the veracity of a witness when, for example:

- a psychiatrist said that there was "no doubt whatsoever" that the defendant's daughter was an incest victim, *Haseltine*, 120 Wis. 2d at 93–96;
- a special education teacher testified that a cognitively disabled sexual assault victim lacked the capacity to lie because of her disability, *State v. Tutlewski*, 231 Wis. 2d 379, 382–83, 605 N.W.2d 561 (Ct. App. 1999); and
- an investigator who interviewed the victim, Gary Steiner, testified that "[o]ut of about 150" sexual

> assault reports he had investigated, "only one 'was a false report.'" *State v. Mader*, 2023 WI App 35, ¶¶ 7, 38, 408 Wis. 2d 632, 993 N.W.2d 761. (Pet-App. 51, 65–66.)

But Wisconsin courts have rejected *Haseltine* claims when the facts showed that the expert had not conveyed a personal and particularized opinion about the veracity of a witness's trial testimony. *See State v. Smith*, 170 Wis. 2d 701, 718, 490 N.W.2d 40 (Ct. App. 1992) (officer's testimony about her beliefs during an investigation is not *Haseltine* testimony).

At least until *Mader*. There, a retired therapist, Susan Lockwood, testified about matters specific to child sexual assault cases. *Mader*, 408 Wis. 2d 632, ¶¶ 5–6. (Pet-App. 50–51.) Asked about the incidence of false reporting among child victims, she said false reports were "very uncommon" and "research in the field indicat[es] 'usually 3 percent to 8 percent of reported sexual assaults are false.'" *Id.* ¶ 6. (Pet-App. 51.) She also said that of the 500 victims she treated, there were 4 "who she was sure" had falsely reported, an answer acknowledging that there may have been additional false reporters among her clients. *Id.* (Pet-App. 51.) Lockwood never treated nor met Mader's victim and did not indicate whether she believed the child.

Nonetheless, *Mader* lumped Lockwood's testimony together with Steiner's vouching testimony (see above) and treated it as one *Haseltine* violation. *Mader*, 408 Wis. 2d 632, ¶ 39. (Pet-App. 66.) The court said that Lockwood's testimony that "she was sure" that 4 of her clients had falsely reported "'provided a mathematical statement approaching certainty' that false reporting does not occur. Even the research cited by Lockwood indicating that only three to eight percent of assault reports turned out to be false" was "objectionable," the court concluded. *Id.* (Pet-App. 66.)

Mader thus effectively holds that statistical testimony putting false reports of sexual assault at 8 percent or less is *Haseltine* testimony. Applying this holding, the court of appeals concluded that Dr. Swenson's unobjected-to response to a juror's question that false disclosures "are extraordinarily rare, like . . . one percent of all disclosures" was barred by *Haseltine*. (Pet-App.4)

Mader's holding categorically barring such statistical testimony misapplied *Haseltine* and should be overturned. Statistics, alone, say little about whether a particular victim is telling the truth and thus do not implicate *Haseltine*. Lockwood did not say whether she would place Mader's complainant in the 3–8% group or the 92–97% group referenced in the research, or whether the child seemed like the many persons the therapist had treated and had no reason to disbelieve or the four whom "she was sure" had falsely reported. *See Mader*, 408 Wis. 2d 632, ¶¶ 5–6. (Pet-App. 50–51.)

Likewise, Dr. Swensen provided a statistical answer based on her recollection of the research (about "one percent") when a juror asked a statistical question about the incidence of false reporting. She did not tie her answer to Lauren or otherwise indicate whether she believed Lauren or not. While Dr. Swenson supervised the person who interviewed Lauren and testified about the interview at trial, she never met nor evaluated Lauren.

Molde's argument that Dr. Swenson's expert statistical testimony violated *Haseltine* relies heavily on "the effect" of such testimony. (Molde's Br. 23–26.) Some *Haseltine* cases address the "purpose and effect" of purported vouching testimony. *See, e.g., Tutlewski*, 231 Wis. 2d at 382–83. Plainly, here, neither the State nor Dr. Swenson had the "purpose" to present such statistical testimony; a *juror* asked the question about false reporting. The "effect" of Dr. Swenson's testimony on the jury would appear to turn on whether the testimony

supported a reasonable inference that the doctor's own opinion was that Lauren was telling the truth. *See id.*; *Haseltine*, 120 Wis. 2d at 93–96. Again, the doctor's statistical testimony about the incidence of false reporting did not mention Lauren much less address whether she was like other reporters who told the truth. Accordingly, this testimony does not support a reasonable inference that the doctor was expressing a personal opinion about Lauren's veracity.

Statistical testimony like Dr. Swenson's and Lockwood's about the incidence of false reporting of sexual assault does not convey an opinion about whether another witness is telling the truth, the *sine qua non* of a *Haseltine* violation. However, as argued, such statistical testimony may assist jurors by serving as a reality check to ground their consideration of an allegation of sexual assault. (*See* Op. Br. 27–28.)

Any risk that jurors might use a statistic as a substitute for examining all the evidence and determining the credibility of the witnesses is mitigated by the extensive instructions juries receive about determining witness credibility. *See State v. Dorsey*, 2018 WI 10, ¶ 55, 379 Wis. 2d 386, 906 N.W.2d 158 (jurors are presumed to follow jury instructions). Here, the jury was instructed as follows:

> 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. In determining the credibility of each witness and the weight you give the testimony of each witness, consider these factors: Whether the witness has an interest or lack of interest in the result of this trial, a witnesses conduct, appearance, and demeanor on the witness stand. The clearness or lack of clearness of the witnesses recollections. The opportunity the witness had for observing and

> knowing the matters the witness testified about. The reasonableness of witnesses testimony. The apparent intelligence of the witness. Bias or prejudice, if any has been shown.

(R. 139:154–55.)

Though Molde discusses several cases from other jurisdictions and asserts that "all jurisdictions" support his position, he omits at least two cases in which expert statistical testimony about the incidence of false reports has been held *not* to be vouching testimony.

An interviewer with a child abuse assessment center in Oregon was asked at trial about the prevalence of false allegations of assault based on his training and experience. *State v. Harrison*, 340 P.3d 777, 779 (Or. Ct. App. 2014). The interviewer said that "children rarely lie about these things" and asserted that "96 to 98 percent" of disclosures are truthful. *Id.*

The Oregon Court of Appeals concluded that the interviewer's statistical testimony "did not run afoul of the prohibition on true vouching" because the interviewer "stopped short of stating that [the child] was like the 96 to 98 percent of [the assessment center] complainants whose reports were truthful." *Harrison*, 340 P.3d at 780. "[I]t is not apparent that [the interviewer] even indirectly connected the statistic that he cited to [the child's] report of abuse or its purported veracity." *Id.*

An Indiana pediatrician who treated a child victim testified that the vast majority of child sexual abuse victims show no signs of injury. *Alvarez-Madrigal v. State*, 71 N.E.3d 887, 891 (Ind. Ct. App. 2017). Asked if those children "are making up allegations," the doctor said no then added: "[S]ome statistics will quote that less than two to three children out of a thousand are making up claims." *Id.*

The Indiana Court of Appeals concluded that this statistical testimony was not prohibited vouching. *Alvarez-Madrigal*, 71 N.E.3d at 892–93. The testimony "was not a statement as to [the child's] credibility." *Id.* at 893. "It was not an opinion regarding the truth of the allegations against Alvarez-Madrigal. It was not an opinion about, or related to, whether [the child] had been coached, and it did not concern whether [the child] was a truthful person in general." *Id.*

A similar analysis should apply here. Dr. Swenson's statistical testimony about the incidence of false reporting was also not tied to the child victim in this case. Further, Dr. Swenson never directly examined the child, unlike the Oregon interviewer and the Indiana pediatrician, and her answer was elicited by a juror and not during the State's direct examination. Jurors would therefore have been even less likely than those in *Harrison* and *Alvarez-Madrigal* to construe the doctor's testimony to be an endorsement of the victim's credibility.

So, among jurisdictions that have squarely addressed the issue, there is disagreement about whether such statistical testimony, alone, amounts to impermissible vouching. Further, many of Molde's cases from other jurisdictions (Molde's Br. 27–32) show that other facts, not statistical testimony about false reports alone, told jurors that the experts believed the victims:

- In *Snowden v. Singletary*, 135 F.3d 732, 737–38 (11th Cir. 1998), the State's expert interviewed the child *and* testified that "in his own experience with children, [he] had not personally encountered an instance where a child had invented a lie about abuse." This is textbook vouching apart from the statistical testimony ("99.5% of children tell the truth").

- In *State v. Lindsey*, 720 P.2d 73, 75, 77 (Ariz. 1986), the State's expert was asked if the complainant "is consistent with someone who had been sexually abused" by her father. The expert responded: "I think the likelihood is very strong . . . . I feel there's a preponderance of the evidence here." This is also textbook vouching apart from the statistical testimony (99% of victims are truthful).
- In *State v. Myers*, 382 N.W.2d 91, 92 (Iowa 1986), a child abuse investigator testified that she had personally interviewed the complainant *and* "I have only had one child that lied to me about sexual abuse" in 16 years. This testimony is also vouching separate from statistical testimony ("perhaps one in 2,500 children . . . did not tell the truth").
- And in *State v. Williams*, 858 S.W.2d 796, 800–801 (Mo. Ct. App. 1993), a physician mixed statistical testimony ("lying among children is very low, less than three percent") with observations indicating to him that the victim was telling the truth. Together, the statements showed that the expert believed that this child was not among the "three percent" of false reporters.

Mader's holding barring such expert testimony under *Haseltine* should be overturned and the court of appeals' decision in this case reversed.

II. Even if *Mader* correctly barred certain statistical testimony under *Haseltine* principles, this holding was not settled law in 2019, and thus counsel's non- objection to Dr. Swenson's answer was not deficient performance.

Molde's reliance on case law from other jurisdictions is understandable. Before *Mader* (2023), no prior Wisconsin case had held that expert statistical testimony about the incidence of false reporting of sexual assault was improper vouching for the victim's credibility. But this fact means Molde cannot show—and *Mader* incorrectly held—that counsel should have known at trial to object to such statistical testimony.

At that time, one published Wisconsin case, *State v. Morales-Pedrosa*, 2016 WI App 38, 369 Wis. 2d 75, 879 N.W.2d 772, had considered a claim that expert statistical testimony about the incidence of false reporting of sexual assault violated *Haseltine*. The expert's testimony was not objected to, so the claim arose in the context of ineffective assistance. *Morales-Pedrosa*, 369 Wis. 2d 75, ¶¶ 24–26. Following an analysis of all the relevant circumstances, the court of appeals concluded that counsel's non-objection was not deficient performance because, at the time, it was unclear whether such statistical testimony violated *Haseltine*.

Counsel at Molde's and Mader's 2019 trials were also not deficient for not raising a *Haseltine* objection to expert statistical testimony because *Morales-Pedrosa expressly stated* that it was leaving this legal issue unresolved: "Wisconsin law was not clear at the time of Morales–Pedrosa's trial (*and remains unclear*) on the question of whether general statistical testimony alone might constitute impermissible vouching." *Morales-Pedrosa*, 369 Wis. 2d 75, ¶ 26 (emphasis added).

Moreover, *Morales-Pedrosa*'s full analysis of the vouching issue shows that it really did leave the issue unresolved. *Mader* relied on one sentence from *Morales-*

Pedrosa—that the expert's testimony that 90% of reports are truthful is "less obviously objectionable" than testimony putting the rate at "92–98%" or higher—to conclude that *Morales-Pedrosa* established in 2019 that testimony like Lockwood's was barred by *Haseltine*. *See Mader*, 408 Wis. 2d 632, ¶¶ 37–40. (Pet-App. 64–65.) *Mader* ignored the rest of *Morales-Pedrosa*'s analysis, which highlighted additional facts indicating that the statistical testimony was not improper vouching. *Morales-Pedrosa*, 369 Wis. 2d 75, ¶¶ 23, 25. These facts—that the expert had not met or examined the victim and had not connected the statistical testimony to the victim—are especially relevant to Lockwood's and Dr. Swenson's testimony. *Id.* And *Morales-Pedrosa* even cited the Oregon case discussed above to show that one court had concluded that testimony that "96 to 98 percent" of child reports of sexual abuse are truthful was not vouching because the expert had not connected the statistic to the child's testimony. *Id.* ¶ 25 (citing *Harrison*, 340 P.3d at 780–81).

In sum, if Dr. Swenson's answer was inadmissible, *Mader's* secondary holding that it was settled law in 2019 that such statistical testimony violated *Haseltine* should be overturned, and the court of appeals decision reversed because Molde's attorney's non-objection to the doctor's answer was not deficient performance.

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

The State renews its opening brief arguments showing that counsel's non-objection to Dr. Swenson's statistical answer, even if deficient, was not prejudicial. There is no reasonable probability that the outcome would have been different absent the doctor's statistical answer. *See Harrington v. Richter*, 562 U.S. 86, 111–12 (2011) (noting that "the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'"). Lauren's account was detailed and credible; she told another family member about the assault before her suicide attempt; and her story mirrored a "dream" that her younger sister testified that she had. Finally, the statistical testimony was brief and, as shown above, the jury was properly instructed on its exclusive responsibility to decide witness credibility. (Op Br. 35–40.)

CONCLUSION

This Court should overturn *Mader*'s holding barring expert statistical testimony placing false reports of sexual assault at 8% or less, or, alternatively, its secondary holding that its bar on such statistical testimony was settled law at the time of Mader's and Molde's trials. If it overturns either holding, this Court should conclude that counsel's lack of an objection to Dr. Swenson's testimony was not deficient performance and reverse the court of appeals' decision. Finally, counsel's non-objection, even if deficient, was not prejudicial, and the court of appeals' decision should be reversed.

Dated this 25th day of February 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 2,968 words.

Dated this 25th day of February 2025.

Electronically signed by:

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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.

Dated this 25th day of February 2025.

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