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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II

Case No.: 2022AP382-CR
Calumet County Circuit Court
Case No.: 2018 CF 13

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

CONRAD M. MADER,

Defendant-Appellant.

BRIEF OF DEFENDANT-APPELLANT

On Appeal From A Judgment of Conviction
And Denial of Post-Conviction Motion
Entered In The Circuit Court For Calumet County,
Hon. Jeffrey S. Froehlich, Presiding

Respectfully Submitted,
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Wisconsin Cases Cited

Other Cases Cited

Statutes

Other Authorities

STATEMENT OF ISSUES

I. Did trial counsel provide ineffective assistance by failing to adequately challenge opinion testimony from the State's sexual assault expert and detective?

Answered by Circuit Court: No.

II. Did trial counsel provide ineffective assistance by failing to consult with and present testimony from a defense expert to rebut opinions offered by the State's experts?

Answered by Circuit Court: No.

III. Did trial counsel provide ineffective assistance by failing to move to exclude as irrelevant the opinion testimony from the State's experts about the extreme statistical rarity of false accusations of sexual assault reported in disputed research and in their own cases and experience?

Answered by Circuit Court: No.

IV. Did trial counsel provide ineffective assistance by failing to object to irrelevant and prejudicial testimony by the defendant's ex-wife about their diminished sexual relations and hearsay statements she related concerning supposedly suspicious sounds that were inferred to be from the defendant sexually assaulting the complainant?

Answered by Circuit Court: No.

V. Did trial counsel provide ineffective assistance by failing to

object to the State's inadmissable Rape Shield evidence about the complainant's alleged loss of virginity at the hands of the defendant, her use of birth control at his insistence and the impact of the alleged childhood sexual assaults on her present ability to be intimate with her boyfriend in their sexual relations?

Answered by Circuit Court: No.

VI. Did the trial court err in excluding relevant evidence to rebut the inaccurate and unfairly sympathetic portrayal of the complainant as a sexually inhibited woman who was traumatized by the defendant as a child?

Answered by Circuit Court: No.

VII. Did trial counsel provide ineffective assistance by failing to investigate and present evidence to the court to support the admission of evidence that explained an alternative source of the complainant's knowledge of sex toys she claimed the defendant forced her to use as a child and evidence that would rebut her claim that she was sexually inhibited due to the defendant's assaults?

Answered by Circuit Court: No.

VIII. Did trial counsel provide ineffective assistance by failing to object during closing argument when the State argued facts not in evidence by referring to matters discussed during voir dire by prospective jurors who were not selected to sit on the jury?

Answered by Circuit Court: No.

IX. Did trial counsel provide ineffective assistance by failing to object to the court sending the complainant's redacted handwritten statement to the jury room that included matters not testified about, and by failing to ensure the defendant's police interview was replayed for the deliberating jury when they requested it?

Answered by Circuit Court: No.

X. Was the defendant prejudiced by the cumulative effect of trial counsel's numerous errors and deficient performance?

Answered by Circuit Court: No.

STATEMENT AS TO ORAL ARGUMENT AND PUBLICATION

Counsel believes that the parties' briefs will adequately address the issue raised in this appeal, and that the Court will therefore deem oral argument to be unnecessary. Publication is requested to assist litigants and trial courts on a recurring issue concerning the impropriety of testimony by prosecution witnesses about the allegedly low statistical frequency of false allegations of sexual assault.

STATEMENT OF CASE

Pretrial

On February 2, 2018, Mader was charged with a single count of

repeated acts of sexual assault of a child, contrary to § 948.025(1)(e), Wis. Stats. (R. 1). The complaint alleged that Mader sexually assaulted B.S., who was a 21 year old adult stepchild when she made the accusation. She claimed Mader repeatedly sexually assaulted her for years beginning when she was 12 or 13 and continuing until she was age 17 and had moved out of the house. (R.1: 3). She claimed Mader gave her massages, then progressed to "fingering her" and then penis to vagina and anus intercourse. (R. 1: 2-3). She also claimed he used a dildo on her. (R.1: 3). The defendant gave a statement to the police and denied the accusation, saying "I never did anything inappropriate, ever." (R.1: 2).

Before trial, the State filed an expert witness summary for Susan Lockwood, a social worker and therapist. (R. 30). Defense counsel did not name any experts or present any at trial, nor did he ask for a *Daubert* hearing on Lockwood's proposed testimony.

The State also filed a motion in limine asking to exclude any reference to B.S.'s employment "associated with romance parties" on relevance and §904.03 grounds. (R. 37). Defense counsel argued orally that she sold sex toys at parties and that her knowledge of the dildo she claimed Mader used when she was a child, and which she vividly described, resulted from her employment, not through childhood abuse. Nonetheless, the court excluded the evidence. (R. 118: 4-5, 9-10, 11)

The Trial[1]

During its opening statement at the trial the State said that the complainant had "lost her virginity" to Mader. (R. 116: 7). The State also told the jury that B.S.'s mother, Yvonne Scheffler, would testify about "red flags" and explain some of the "warning signs that she saw," looking back years after the fact. (R. 116: 13). The defense did not object or ask for motion *in limine* to exclude evidence of virginity under Rape Shield or to determine the nature of Scheffler's "red flags" and whether this evidence was relevant.

The State's expert, social worker Susan Lockwood, testified without objection that of her approximately five hundred clients, in her opinion, only four had provided a false report of sexual assault (i.e., only 0.8%). (R. 116: 25). She determined that these were false reports based on her own intuition. (R. 116: 25, 45-46). She provided no other methodology for how she concluded those four patients falsely reported and the others were truthful. Lockwood also testified that some undisclosed literature suggests that between 3-8% of complainants falsely report sexual assaults. (R. 116: 26-27). She did not explain why her own subjective experience was so at odds with the published research. She also asserted, without objection, that teens don't lie about sexual assault and she discussed the impact of childhood sexual assaults

[1]The trial transcript pages do not match the e-filed document page numbers. For consistency, references are to the Document pages, not the court reporter's page number.

on sexual intimacy in adulthood, neither of which topics were disclosed in the State's § 971.23(1)(e) notice of expert. (R. 116: 33, 41-42).

Two of the complainant's friends from middle school, Lea Reinholtz and Karah Saunders testified that they never witnessed any inappropriate contact between Mader and the complainant but that B.S. "bragged" about giving "road head" (oral sex in a car) to Mader. (R. 116: 58, 62).[2] Lea told her mother about B.S.'s claims and her mother asked B.S. directly whether the statement about sex with Mader was true. (R. 116: 66-67). B.S. told Lea's mother that it was all a lie she made up. (R. 116: 66-67). Lea ended the friendship after hearing B.S. admit she had lied. (R. 116: 61-62).

Yvonne Scheffler, the complainant's mother and Mader's ex-wife, testified that she had not witnessed any of the alleged assaults, never saw Mader give B.S. a massage, and never noticed anything that at the time gave her concern about Mader and B.S. (R. 116: 173-176). In hindsight, there were a few incidents that she felt were suspicious after hearing her daughter's allegation. Scheffler described an incident in high school where she found a dildo under her daughter's mattress. (R. 116: 132). When confronted with the discovery, B.S. gave her mother and Mader the same explanation – that the dildo came from a neighbor girl's house where they found it in her mother's drawers. (R. 116: 137).

[2]But at trial B.S. denied giving Mader oral sex at any time. (R. 119: 118).

Scheffler also testified about a decrease of marital intimacy with Mader in the latter years of their marriage, which only aroused her suspicions after hearing about B.S.'s claims of abuse. (R. 116: 140-141). She also testified, without objection, to a hearsay statement that her son, Scott, supposedly heard sounds like monkeys in the morning, which Scheffler now inferred were sexual noises from Mader's assaults of her daughter. (R. 116: 142). But when Scott later testified he said nothing about hearing unusual noises. Instead, he said he did not note anything special about the relationship between Mader and B.S. and never saw any signs of an inappropriate relationship over the eight years they lived together. (R. 119: 19, 22).

When B.S. testified she said that Mader assaulted her using his finger, penis, and a large dildo, at all hours of the day and night, during multiple days of the week, sometimes twice in a day, and in many different places in the home. (R. 119: 43-46). She even claimed he performed nude massages on her in her brother's room while her brother was home. (R. 119: 102). However, neither her brother nor her mother recalled any massages in his room or anywhere. B.S. testified that several times she bled because of the rough, quick vaginal and anal intercourse and the use of the dildo. (R. 119: 63, 65, 116; R. 72: Ex#14, p. 8-9, 13). There was no medical corroboration of injuries and no one testified that B.S. had ever complained of medical problems consistent with these claims.

B.S. testified that when she was in high school she began to fight back, lock her door, kick and fight, yell loudly and make a scene when Mader tried to get access to her. (R. 119: 70-71). However, while her mother, brothers and younger sisters were present in the home during these years, no one testified that they noticed B.S. make any attempts to avoid or fight with Mader.

In violation of Rape Shield Law, the prosecutor asked B.S. about losing her virginity to Mader, her use of birth control and her sexual intimacy problems with her current boyfriend, which she attributed to her prior abuse. (R. 119: 78-79; 85-86). Without objection, she testified about how she was uncomfortable with any touch she regarded as sexual. (R. 119: 130-31). B.S.'s boyfriend at the time of the trial also testified that B.S. didn't like to be kissed or touched in a sexual way. (R. 119: 32).

While the State was allowed to introduce evidence about B.S.'s sexual inhibitions, the defense was precluded from challenging this testimony by asking B.S. about her decision to market and sell sexual aids, such as dildos, to women in private parties as a self-styled "women's health educator." Defense counsel renewed his pretrial motion to admit evidence of her activities when B.S. opened the door in her testimony that Mader's assaults had caused the intimacy problems with her boyfriend. (R. 119: 88-89) (R. 72: Trial Exhibit 14 at 1). But the court again precluded the evidence. (R. 119: 92-93).

Det. Steier testified for the State, without objection, on several topics

which required a specialized expertise, although he was never listed as an expert witness in the State's pretrial disclosures under § 971.23(1)(e). He testified about traumatic memory, "trauma informed interviews" and, sometimes inaccurately, on how memory works. (R. 119: 135-37). Steier also testified without objection that of the one hundred and fifty sexual assault cases he had investigated, only one had involved a false report. (R. 119: 162-63). He provided no basis for this claim and did not identify B.S. as the single false reporter, thereby indirectly vouching for her credibility.

Steier testified that during Mader's interrogation at the station Mader repeatedly denied ever assaulting B.S. and he answered all questions, provided some motives for a fabricated allegation and pointed the detective to witnesses to support his innocence. (R. 119: 143, 147, 150-51. But the jury did not see the video recording. Instead, the State offered, without objection, a heavily redacted audio-only recording of Mader's police interrogation.(R. 119: 147).[3]

The defense presented a number of witnesses who challenged the credibility of both B.S. and her mother. (R. 120: 10-11, 30). Several of B.S's claims about specific incidents, such as frequent intercourse in the morning and that assaults occurred on Christmas Day, were rebutted because Mader was at work at 6:00 a.m. during the times she claimed he was home and both

[3]In the version presented at trial, it appears that the State had deleted about half the content of the recorded interrogation when transcripts of both are compared. (R. 132, Ex. 15).

B.S. and her brother always spent Christmas morning and day with their father, so Mader had no access to her on that day. (R. 120: 24, 39, 42-43, 47, 55-56, 61-62). An incident where B.S. claimed Mader removed the bathroom door handle to get to her when she fled from him and locked herself in the bathroom was rebutted by a witness. B.S. claimed he gained entry by taking the door handle screws out. (R. 119: 11-12). However, the carpenter witness noted that door handle screws were on the *inside* of the door, making removal of the handle impossible from the outside. (R. 120: 16).

Mader himself testified and denied any inappropriate conduct with his step-daughter. (R. 120: 74-75). He described some of B.S.'s and Scheffler's motives to fabricate that he had provided to police, some of which the jury did not hear on the audio recording. Mader testified that he thought that Scheffler "put (B.S.) up to this" to help her get more money or full custody of the younger girls. He also testified that B.S. may have made the accusation to please her mother, to save her younger sisters from possible abuse after her mother's suggestive comments to her and to gain her mother's love. (R. 120: 79-81).[4]

In closing arguments, both sides agreed that the key issue was credibility. Without objection, the prosecutor used comments made by prospective jurors during voir dire about sexual assault experiences to arouse

[4]Both younger girls were forensically interviewed and reported no abuse. (R. 119: 165).

their emotions about the frequency of sexual assaults and support the idea that victims routinely fail to report assaults to the police: "Remember jury selection process? Remember how many people put their hands up? Holy cow. It's a lot more popular than we would like to know. It's a lot more prevalent." (R. 120: 116-17). He also highlighted the testimony of Lockwood and Steier about the rarity of false claims in their experience and that teenagers don't lie about sexual assaults, and he claimed that B.S.'s purported intimacy problems with her boyfriend proved that she was an abuse victim because Lockwood claimed that sexual abuse "absolutely will have an impact on future sexual relationships." (R. 120: 117-20, 135-36). Defense counsel had no rebuttal for Lockwood's claims about false reporting, trauma and the "classic" characteristics of the victim. In his rebuttal closing, the prosecutor reemphasized all the dubious testimony about false reports and Rape Shield testimony about intimacy, and he argued:

> And at the end of the day, when you listen to Susan Lockwood's testimony and you take all these observations of characteristics of victims of sexual assault, when you consider the numbers that fall into false reporting and the research, not just Susan's numbers or Investigator Steier's numbers, you really have to ask yourself how often is this going on in our community?
>
> And then you look at all the characteristics and you apply those to [B.S.] and you say, just as I promised you in my opening statement, that everything Susan would say about what to expect was classic with [B.S.].

(R. 120:174-75).

About three hours into deliberations, the jury asked for a copy of B.S.'s handwritten statement and Mader's recorded statement or a transcript of it. (R.

120: 180). The court instructed the jury that there was no transcript of Mader's interview.[5] The court's answer implied that their request to hear the recording would be granted, stating "the 55 minute recording or portions of the recording may be played again in open court. The recording may not go to the jury room." (Doc. 82; R. 120: 180). However, the jury was not told they had to *again* request the recording be played before the court would do so. The interview was never replayed. Defense counsel agreed to send B.S.'s fifteen page statement to the jury room after redacting approximately 2.5 pages. The statement included material not testified to at trial. (R. 132: Ex. 14R) (R. 120: 187-88).The jury returned a guilty verdict after about six hours of deliberations. (Doc. 56).

The defendant was given a 20 year bifurcated prison sentence with the first 10 years of initial confinement. (R. 103).

The defendant filed a motion for post-conviction relief and a *Machner*[6] hearing was held with testimony from the defendant's trial counsel and an expert witness, Dr. David Thompson. The defense attorney testified he had only used a defense expert witness in one or two of the sexual assault cases he handled. R. 156: 9. He said he knew that he had to object to evidence at trial to preserve the issue for appeal and attributed his failures to oversight, rather

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[5]The transcript of the police recording that is in the appellate record at R. 132: Exhibit 15 was only prepared after trial, for the post-conviction motion.

[6]*State v. Machner,* 92 Wis. 2d 797, 285 N.W.2d 905 (Ct. App. 1979)

than trial strategy. R. 156: 18, 27, 30-31, 41, 90. He admitted that testimony about a complainant's virginity was improper and did not know why he failed to object in this case. (*Id*. at 46-47).

The circuit court denied the post-conviction motion in a written decision. R. 188; APP 101-115. The court concluded that most of defense counsel's alleged errors were not deficient performance, except the failure to object to the testimony about virginity, diminished marital intimacy and speculative hearsay about "monkey" noises. (*Id.* at 8-9). Nevertheless, the court found no prejudice. (*Id.* at 14-15).

The court made almost no factual findings so this Court's review is *de novo,* but the circuit court's ruling will be discussed where appropriate in the Argument sections which follow, particularly regarding its ruling on the prejudice prong of *Strickland*.

ARGUMENT

I. Standard of Review.

Whether a defendant received ineffective assistance of counsel is a mixed question of law and fact. An appellate court will uphold the circuit court's findings of fact unless they are clearly erroneous. Whether counsel's performance satisfies the standard for ineffective assistance of counsel is a question of law which the appellate court reviews *de novo*. *State v. Jenkins*, 2014 WI 59, ¶ 38, 355 Wis. 2d 180, 196, 848 N.W.2d 786, 794.

In assessing the prejudice caused by a defense trial counsel's performance, i.e., the effect of the defense trial counsel's deficient performance, a circuit court may not substitute its judgment for that of the jury in assessing which testimony would be more or less credible. *Id.* at ¶ 64.

II. Defense Counsel Performed Deficiently in the Investigation, Preparation, and Trial of this Case, Which Caused Prejudice to the Defendant.

A. Legal Standards.

A defendant alleging ineffective assistance of counsel must first "show that the counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The court "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in a particular case." *Strickland*, 466 U.S. at 690; *see, Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986). Defense counsel's representation must be equal to that which the ordinarily prudent lawyer skilled and versed in criminal law would give to clients who had privately retained his services. *State v. Harper*, 57 Wis. 2d 543, 557, 205 N.W.2d 1, 9 (1973). The deficiency prong of the *Strickland* test is met when counsel's performance was the result of oversight rather than a reasoned defense strategy. *See Wiggins v. Smith*, 539 U.S. 510, 534 (2003); *State v. Moffett*, 147 Wis.2d 343, 433 N.W.2d 572, 576 (1989).

A defendant must also show that counsel's deficient performance

prejudiced his defense. "[A] counsel's performance prejudices the defense when the 'counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *State v. Johnson*, 133 Wis. 2d 207, 220, 395 N.W.2d 176, 183 (1986), *quoting Strickland*, 466 U.S. at 687." The defendant is not required [under *Strickland*] to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'" *Moffett*, 433 N.W.2d at 576, *quoting Strickland*, 466 U.S. at 693. Rather, "[t]he test is whether defense counsel's errors undermine confidence in the reliability of the results. The question on review is whether there is a reasonable probability that a jury viewing the evidence untainted by counsel's errors would have had a reasonable doubt respecting guilt." *Moffett*, 433 N.W.2d at 577 (citation omitted). The focus of the inquiry is upon fundamental fairness and whether there was a breakdown in the adversarial process that our system counts on to produce just results. *Id*.

"Reasonable probability," under this standard, is defined as "'probability sufficient to undermine confidence in the outcome.'" *Id*., *quoting Strickland*, 466 U.S. at 694. When there are numerous deficiencies in counsel's performance the court considers whether their cumulative effect caused prejudice, rather than focusing on the prejudicial effect of each error separately. *See State v. Thiel*, 2003 WI 111, ¶ 59, 264 Wis.2d 571, 665 N.W.2d 305.

B. Defense counsel failed to adequately challenge opinion testimony from the State's sexual assault expert and detective, and failed to obtain a defense expert to rebut a number of their assertions.

1. The expert opinion testimony was inadmissible because it was irrelevant to the matters at issue in Mader's case.

Expert testimony must be first and foremost relevant and helpful to the jury to understand the evidence or fact in issue. *Kumho Tire v. Carmichael*, 526 U.S. 137, 152 (1999). It must also be based on reliable data, methods and principles. § 907.02, Wis. Stats. While some of Lockwood's testimony in Mader's case arguably met those standards, other parts did not. Lockwood veered far from "general behaviors" testimony when she testified about her subjective opinion about the truthfulness of her own clients and she utterly failed to establish any foundation, much less reliable data, methods and principles for her subjective opinions. The same arguments apply to Det. Steier's subjective opinions about the truthfulness of the complainants in his 150 investigations. Defense counsel was deficient for failing to request a *Daubert* hearing pretrial and to object at trial to this irrelevant and prejudicial testimony.

On appeal, the defendant does not object to the qualifications of Lockwood to testify about general observations about some behaviors of sexual assault complainants that the public might not understand. *See State v.*

Jensen, 147 Wis. 2d 240, 250-52, 432 N.W.2d 913, 918 (1988). But, her testimony and that of Det. Steier about the percentage of clients in her practice that she believed were truthful in reporting sexual assaults (99.2% and 99.33% respectively) went beyond permissible *Jensen* testimony. All the opinion testimony regarding the truthfulness of sexual assault complainants was completely irrelevant to the question of whether the complainant in this case was truthful. It simply had no bearing on whether B.S. was telling the truth in this case and trial counsel should have objected on relevance and *Daubert* grounds.

The only published case in Wisconsin to discuss the admissibility of testimony which relates to general statistical studies of flase accusations is *State v. Morales-Pedrosa*, 2016 WI App 38, 369 Wis. 2d 75, 879 N.W.2d 772. The defendant argued that his trial attorney was ineffective because he did not object to testimony, as a violation of the *Haseltine* rule prohibiting vouching, in which a social worker stated that 90% of sexual assault reports were true. The *Morales-Pedrosa* court disagreed, ruling that the social worker – who had never even met the complainant – gave only "general testimony that '90 percent' of children claiming to have been abused are telling the truth [which] 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.* at ¶ 25.

In Mader's case, the combined testimony of Lockwood and Steier established that their experience revealed that sexual assault complainants told the truth 99.3% of the time, a rate that not only was far higher than any published study, but which provided a mathematical statement approaching certainty. That was far more likely to have an improper impact on the jury and was easily more objectionable than general testimony that "90 percent" of children are telling the truth. In addition, unlike *Morales-Pedrosa*, one of the State's experts in Mader's case, Detective Steier, actually examined the complainant, which created an increase risk of impermissible vouching.

The *Morales-Pedrosa* court also ruled that because the law on the use of statistical evidence of false reports as *impermissible vouching* was unsettled, defense counsel was not deficient for failing to object. 2016 WI App 38, ¶ 25-26. But, the law is not at all unsettled about whether *irrelevant evidence* is admissible at trial. It is not. Whether any unrelated witness or patient made a false accusation is simply irrelevant to the question the jury needed to decide here: was B.S. truthful in her accusations. Such testimony was not only irrelevant, it was unfairly prejudicial because it gave the jury a baseline that virtually no sexual assault complainant ever lies. It suggests an improper presumption of the defendant's guilt.

This Court should take this opportunity to rule clearly on a recurring issue, as have a long line of cases in other states, that such statistical testimony

should be excluded as improper and irrelevant. *See State v. Myers*, 382 N.W.2d 91, 97 (Iowa Sup. Ct. 1986) ("the effect of the expert opinions in this case [that young children do not lie about sexual matters] was the same as directly opining on the truthfulness of the victim."); *Wilson v. State*, 90 S.W.3d 391, 393 (Texas Ct. App., 2002) (trial court erred by allowing the expert to testify that between 2% to 8% percent of children lie about sexual assault" based on studies); *Powell v. Delaware*, 527 A.2d 276, 278 (Del. Sup. Ct, 1986)(plain error for expert to testify that only one victim in one hundred was later established to have given a false complaint); *State v. Lindsey,* 149 Ariz. 472, 720 P.2d 73, 77 (1986) (expert's "[q]uantification of the percentage of witnesses who tell the truth" in incest cases "usurps the function of the jury"); *State v. W.B.,* 205 N.J. 588, 17 A.3d 187, 202 (2011) ("Statistical information quantifying the number or percentage of abuse victims who lie deprives the jury of its right and duty to decide the question of credibility of the victim"); *State v. MacRae* 141 N.H. 106, 677 A.2d 698, 702 (1996) (expert testimony was inadmissible "because it improperly provided statistical evidence that the victim more probably than not had been abused"); *State v. Williams,* 858 S.W.2d 796, 801 (Mo. Ct. App. 1993) (doctor's testimony that incidents of children lying about sexual abuse is "less than three percent" was inadmissible as an "improper quantification of the probability of the complaining witness'[s] credibility"); *State v. Vidrine*, 9 So.3d 1095, 1111 (La. Ct.App. 2009) (expert's

"testimony regarding the statistical probability of false reporting ... of rape cases was irrelevant to the charges at hand and was clearly offered for the sole purpose of bolstering the credibility of [the minor]"].) The same trend continues in more recent cases. *See State v. Grimshaw*, 2020 MT 201, 401 Mont. 27, 469 P.3d 702; *People v. Marx*, 2019 COA 138, 467 P.3d 1196 (Colo. 2020); *People v. Wilson*, 33 Cal. App. 5th 559, 245 Cal. Rptr. 3d 256 (2019) ("Here there is no justification for counsel's failure to object to Urquiza's statistical evidence on false allegations. It was inadmissible and it improperly suggested that Julian was guilty based on statistical probabilities that were irrelevant to this case.)

It was deficient performance for trial counsel not to ask for a *Daubert* hearing to exclude this irrelevant opinion testimony, or to fail to object to it at trial. There was ample legal authority for Mader's counsel to move before and during trial to exclude Lockwood's and Steier's testimony on relevance grounds, notwithstanding the *Morales-Pedrosa* holding discussing improper vouching. Indeed, an expert's subjective opinions about whether others lied is just the sort of evidence *Daubert* intended to exclude as unreliable and irrelevant. Trial counsel testified at the *Machner* hearing that neither witness presented a foundation for their assertions about the truthfulness of the complainants, nor any relevant expertise. R. 156: 26, 30. He conceded that studies show therapists and detectives are no better at detecting lies than the

average person. (R. 156: at 30). He offered no strategic reason for failing to demand a *Daubert* hearing, consult with an expert before trial, or object to any of this irrelevant testimony at trial. (R. 156: 30-31, 33-34).

In a pure credibility case such as this, evidence which tended to bolster the accuser's testimony was especially damaging and trial counsel's failure to object was deficient performance which prejudiced Mader. In a close case like Mader's, where "the outcome was highly contingent on the credibility" of the accuser in a sexual assault trial, there is a reasonable probability that the jury might have held a reasonable doubt as to Mader's guilt if B.S.'s claims were not improperly bolstered by the inadmissible opinion testimony by Lockwood and Steier. *Adams v. Bertrand*, 453 F.3d 428, 438 (7th Cir. 2006).

2. The defense failed to utilize an independent expert to challenge the opinions of the State's expert or the detective.

In appropriate cases, defense counsel's duty to investigate all available defenses includes the duty to seek an opinion from a qualified expert. *Rogers v. Israel*, 746 F.2d 1288, 1295 (7th Cir. 1984). Moreover, even counsel's otherwise admirable performance in court does not excuse the failure to consult an expert as part of counsel's duty to investigate. *Moore v. United States*, 432 F.2d 730, 739 (3d Cir.1970) (*en banc*) ("representation involves more than the courtroom conduct of the advocate. The exercise of the utmost skill during the trial is not enough if counsel has neglected the necessary

investigation and preparation of the case ...").

The importance the State placed on Lockwood's testimony was apparent through her status as the very first witness to testify, long before the jury was to hear from the alleged victim. Her professional experience and her opinions were highlighted repeatedly by the State during her examination and during the State's opening statement and closing argument. The State told the jury that B.S.'s behaviors would and did match Lockwood's descriptions of real victims of sexual assault and would demonstrate the truthfulness of the allegations against Mader. (R. 116: 14-15; R. 120: 174-75).

To compound the problem, Lockwood testified that while teens may lie about some things, "not about sexual assault." (R. 116: 126). The jury was obviously supposed to infer from this statement that B.S. would not lie to the jury about the sexual assault claims she made against Mader. Det. Steier was also allowed to testify, without objection, about the impact of trauma on a witness's memory, which he claimed explained why there could be inconsistencies in B.S.'s versions of the events. (R. 116: 155-56). He had no suitable expertise in this complex and evolving area of science.

Lockwood's importance as an apparently neutral and authoritative voice was clearly established for the jury and Steier's lack of qualifications went unchallenged. The defense needed an expert, such as Dr. David Thompson, who could have rebutted a number of Lockwood's and Steier's claims and cast

doubt on others.

Dr. David Thompson testified at the post-conviction hearing. He is a board certified forensic and clinical psychologist, who has a clinical practice working with children and families and a consulting practice working with attorneys on a variety of issues relating to the intersection of psychology and the law. (R. 156: 117). Dr. Thompson is retired from the Walworth County Department of Health and Human Services where he served first as a consultant, acting director and deputy director on a part-time basis from 2006 until his retirement. In this capacity he supervised the child protective services unit and social workers charged with the investigation and services to abused and neglected children. (R. 156: 125).

In Mader's case, Dr. Thompson reviewed transcript sections and other materials discussed in his affidavit and disagreed with a number of statements and assertions testified to by Lockwood and Det. Steier.

Dr. Thompson disagreed with Lockwood's assertions that therapists customarily receive training on the detection of falsehood or that she could determine the truthfulness of their sexual assault allegation with any degree of reliability. In fact, therapists are not trained to detect client's falsehoods but to accept their statements at face value and the research proves that neither therapists nor law enforcement officers were able to determine whether the witnesses or clients they interview were telling the truth in studies performed

for that purpose. (R. 156: 132-136). He also testified, contrary to Lockwood's assertion, that false reporting is not "very uncommon". The studies she may have been relying on for the 3% to 8% rate of false reports do not allow for a clear conclusion about the actual rate of false reports. Various studies often cited for this purpose utilized different methods of obtaining data, different parameters for what is a false report and other metrics. (R. 156: 137-139). Therefore, the current data on false reports is not reliable enough to serve as a real guide for fact finders, as Dr. Thompson could have explained to the jury. (R. 156: 140).

Dr. Thompson also disagreed with Lockwood's testimony that it was more common for children, including teens, never to report than to report right away. He testified that many teens report right away and many children report right away as well. (R. 156: 141-43). He would also have debunked her claim that while teens lie, they don't lie about sexual assault. He knew of no research that would support this claim. Dr. Thompson disagreed with some of the Lockwood's statments relating to grooming behaviors, pointing out that positive interactions between children and adults are not noteworthy or unusual unless and until there is an accusation. The same behavior can then appear to be grooming in retrospect, when in fact, it proves nothing. (R. 156: 144-45).

Dr. Thompson disagreed with Lockwood's statements that suggested

that people who have been through a traumatic experience won't necessarily remember the details of the event. (R. 156: 149-150). This was simply not supported by the research. (R. 156: 149). Dr. Thompson was also familiar with the research involving memory of police shooting described by Det. Steier and testified that the phenomenon the detective described was not applicable to this case. (R. 156: 150). He pointed out that Det. Steier's interviewing techniques, which included suggestive and leading questions, could contaminate the memories of adults, such as B.S. and Scheffler, and that Det. Steier's testimony about repressed memories to explain B.S.'s inconsistencies was not only incorrect but that the very existence of repressed memories is controversial and not generally accepted in his field. (R. 156: 150-51).

At the *Machner* hearing, trial counsel testified that he was aware that an important part of his job was to find and secure expert witnesses especially in cases where the State planned to offer expert testimony. R. 156: 33. Yet, he did not even consult with an expert about the possibility of rebutting Lockwood's testimony nor did he perform any independent research to better inform himself about the flaws in Lockwood's opinions. Because Detective Steier's expert opinions were not disclosed by the State pretrial, defense counsel had no idea he would need an expert to rebut Det. Steier's equally damaging testimony. (R. 156: 28-29). His plan was to rely on his cross-examination of Lockwood. (R. 156: 25). He conceded that he could have

called an expert, such as Dr. Thompson, to rebut Lockwood's testimony about the frequency of false reports in sexual assault cases, grooming, and other opinions discussed in Dr. Thompson's affidavit. (R. 156: 34-35).

Trial counsel's failure to consult with and use a defense expert to rebut the State's expert was deficient performance. His explanation that he intended to rely on cross-examination of Lockwood does not excuse this constitutional violation. A similar explanation was rejected recently by the court in *Dunn v. Jess*, 981 F.3d 582 (7th Cir. 2020).

In *Dunn*, the defense attorney consulted with a forensic pathologist before trial, but then chose not to use him for trial, instead relying on his cross examination of the state's pathologist. He made the "improbable assumption that the state's medical examiner would testify that the state's causation theory was medically impossible. And when that unlikely strategy blew up, counsel had no Plan B." *Id.* at 593. While it may sometimes be a reasonable strategy to rely on cross-examination to cast reasonable doubt, the court found that counsel remained "nearly passive in the face of damning testimony" from the state's expert and therefore the strategy was unreasonable. *Id.* at 594-95.

In Mader's case, defense counsel's strategy was not reasonable because he never even consulted with an independent expert to determine whether the opinions disclosed in the State's notice of expert were valid and whether he could fashion a cross-examination sufficient to discredit Lockwood's opinion.

He never challenged the witnesses' dubious statistical experience with false accusations. The failure to consult with and present an expert to rebut the damaging and erroneous information Lockwood and Steier presented prejudiced the defense in this pure credibility case.

C. Defense counsel did not object to the defendant's ex-wife's irrelevant and unfairly prejudicial testimony that the defendant had lost interest sexually in her during the marriage and about hearsay statements suggesting that her son heard sounds suspicious of sex between Mader and B.S.

When evidence is challenged under §§ 904.01-.03, Stats., the court must determine whether the evidence is relevant and, if so, whether the danger of unfair prejudice outweighs the evidence in the case, which requires making an assessment of what the evidence adds to the case. The lower the probative value, the more likely it will be outweighed by unfair prejudice, confusion of the issues or the danger of misleading the jury. § 904.03; Blinka, D., *Wisconsin Evidence*, 3rd Edition, pp. 135-36. In order for evidence to be excluded under § 904.03, Stats., on the basis of unfair prejudice, it must have "a tendency to influence the outcome by improper means." *State v. Baldwin*, 101 Wis. 2d 441, 455, 304 N.W.2d 742, 750 (1981). In Mader's case, defense counsel's failure to object to irrelevant and unfairly prejudicial testimony from his ex-wife was deficient performance.

1. Diminished sex life.

Yvonne Scheffler's testimony that her sexual relationship with Mader

went into a decline after she had a miscarriage and that they failed to have sexual intercourse on a romantic getaway in 2011 was irrelevant and unfairly prejudicial. (R. 116: 139-41). That sexual relations between this working couple raising two adolescents and a toddler diminished shortly after a miscarriage was neither surprising nor relevant. The inference the State wanted the jury to make was that their sexual life deteriorated because Mader was engaged in almost daily sexual behavior with B.S., leaving little interest or energy for his wife. This inference was not factual, logical or rational. B.S. claimed she had been having sex with Mader for several years before the miscarriage and yet Scheffler reported no change in the couple's sexual relations until after the miscarriage.

At the *Machner* hearing, trial counsel said he had "no reason" why he did not object to this testimony, and that it was an oversight on his part. (R. 156: 41). He agreed that Scheffler's testimony on this issue was prejudicial and damaging to the defense. (R. 156: 42). He also testified that he knew the couple's last child was born approximately nine months after that romantic 2011 weekend, but he did not present that fact to the jury to rebut her claim that Mader had lost sexual interest in her at that point. (R. 156:42). Trial counsel also knew that Mader told the police that the real reason the marriage declined was because of Scheffler's affair with a coworker, but he failed to present that evidence to the jury and it was redacted from the version of his

police interview the jury heard. (R. 156: 42-43; R.142: Exhibit A, p. 30).

Scheffler's testimony was unfairly prejudicial under § 904.03. The inference the State wanted the jury to draw was unsupported by any data, research or expert opinion. Absent some expert to tie the lack of marital sexual relations to the alleged assaultive behavior, the testimony encouraged the jury to speculate and respond based on sympathy and emotion rather than evidence presented in court.

2. Speculative hearsay statements about suspicious noises.

Immediately after the irrelevant testimony about the marital sex life, Scheffler was prompted by the prosecutor to discuss another incident "that stood out to you now looking back." (R. 116: 141). She then testified, without objection, to hearsay statements made by her son and her father-in-law that now made her suspicious. Scheffler testified that around Easter in 2011, her son said ."..well, I'd be able to sleep, but it sounds like monkeys in the morning. I'm always dreaming about hearing monkeys." (R. 116: 142). She testified that Mader's father, who did not testify, then said something to the effect that "someone may have been having sex." (R. 116: 142). Scheffler testified that at that time she "didn't necessarily connect dots." (R. 116: 142). The inference the State wanted the jury to draw from this hearsay testimony was that the noises her son allegedly said he heard were made by Mader and

B.S. during the sexual behavior.

This testimony was not only inadmissible hearsay, it was irrelevant and prejudicial and lacked even a minimal foundation to support the State's inference and, since her son was never asked about his statement at trial, there is no proof he ever made the statement, that he was awake instead of dreaming the noises, or whether the noises could have been from some other innocuous source.

At the *Machner* hearing, defense counsel conceded his failure to object to Scheffler's testimony was a mistake. He said he didn't object because "I think I just missed it." (*Id*. at 43). The circuit court agreed in its decision on the post-conviction motion that this was deficient performance, but ruled there was no prejudice. (R. 188: 8; APP 108.

D. Defense counsel failed to object to the State's presentation of testimony about birth control, virginity and the impact of the alleged sexual assaults on the complainant's sexual intimacy with her current boyfriend, all of which was irrelevant and inadmissible under §972.11 (Rape Shield).

1. The inadmissible Rape Shield evidence.

The Rape Shield law, § 972.11, Stats., declares inadmissible any evidence concerning the complaining witness's prior experience of sexual conduct (except in specified instances not applicable in this case). The purpose is to prevent evidence which has low probative value and is highly prejudicial from reaching the jury, as well as to encourage victims of rape to report the

crime and to appear as witnesses without fear of having their past sexual history exposed to the public. *State v. Penigar*, 139 Wis. 2d 569, 575, 408 N.W.2d 28, 31 (1987). Neither the defense nor the State may present testimony about sexual intercourse or contact, birth control, sexual intimacy, lifestyle, sexual experience or virginity. *Penigar*, 139 Wis. 2d at 585. Even if the defense does not object and uses the testimony to its advantage, the admission of this evidence is improper and the conviction may be reversed. *Id.* at 583.

The plain meaning of the words "prior sexual conduct" includes the lack of sexual activity as well. Accordingly, the Wisconsin Supreme Court concluded almost thirty years ago that a statement about a woman's virginity is necessarily a comment on the woman's prior sexual conduct. Testimony about virginity is inadmissible under the statute. *State v. Gavigan*, 111 Wis. 2d 150, 158-59, 330 N.W.2d 571, 576-77 (1983). Indirect references to a complainant's virginity are also generally inadmissible. In *State v. Clark*, 87 Wis.2d 804, 817, 275 N.W.2d 715 (1979), the complainant testified, over defense objection, that she had never had sexual intercourse prior to the incident in question. The court found that the testimony violated the statute.

In Mader's case, trial counsel failed to object when the State discussed during opening statement and presented evidence from several witnesses about B.S.'s sexual conduct, including her lack of sexual experience when the assaults began, use of birth control and unsatisfying sexually intimate

experiences as an adult with her boyfriend. B.S. testified without objection that she suffered from an inability to have satisfying sexually intimate relations with her boyfriend because of the alleged assaults. ("I can't have a real relationship," R. 119: 86). She also testified about her use of birth control as a teen, that she was a virgin before the assaults, that she learned everything about sex from Mader and other irrelevant, prejudicial evidence that violated the Rape Shield statute. (R. 119: 79-80, 85).

The State never filed a motion to introduce the sexual conduct testimony. There was no hearing, no objection from defense counsel and no ruling about its admissibility. Nothing about her professed current sexual intimacy problems, her virginity or her use of birth control met any of the exceptions to the rape shield statute. Defense counsel had advance notice of these claims by B.S. because they were highlighted in the discovery and foreshadowed by the State's expert. At the *Machner* hearing, trial counsel testified that he understood before trial that the Rape Shield statute does not permit evidence regarding sexual conduct, including the matters discussed above. (R. 156: 19-20, 44-46). Yet he did not demand before trial that the improper Rape Shield evidence be excluded and he failed to recognize the testimony at trial as a violation of that statute. (R. 156: 46-47).

Trial counsel's failure to object to this inadmissible evidence because of an oversight about the law was deficient performance. *See State v. Domke*,

2011 WI 95, ¶ 46, 337 Wis. 2d 268, 293, 805 N.W.2d 364, 377 (deficient performance where defense counsel failed to object because he misunderstood law excluding certain hearsay statements made to counselors and sexual workers as outside the hearsay exception for medical diagnosis and treatment); *see also Sussman v. Jenkins*, 636 F.3d 329, 350 (7th Cir. 2011) (counsel deficient in failing to move pretrial for admission of prior false sexual assault allegation by accuser because he forgot Wisconsin law requires a pretrial determination).

2. The trial court erred in excluding relevant evidence to rebut the inaccurate portrayal of B.S. as a sexually inhibited woman traumatized by years of abuse by Mader.

The introduction of the inadmissible Rape Shield evidence in Mader's trial was aggravated by the manner in which it misleadingly portrayed his accuser as sexually inhibited and fearful. In fact, as demonstrated in evidence presented on post-conviction, B.S. held herself out to be a "women's health educator," and worked at a company called "Pure Romance", selling sexual aids and lotions at parties during which she presented information about sexual practices and demonstrated how the products could enhance their sexual pleasure. (R. 141: Exhibit C).

Defense counsel twice tried unsuccessfully to introduce evidence about her chosen line of work which would have explained to the jury how she could

have described the "strap on" dildo so graphically in the absence of childhood abuse. The court excluded the evidence before trial, but defense counsel argued again mid-trial that B.S. opened the door by her testimony that she was inhibited in her adult sexual intimacy because of Mader's assaults. (R. 119: 88-89; R. 72: Trial Exhibit 14 at 1). The court again precluded the evidence. (R. 119: 92-93).

The admission of evidence is subject to the circuit court's discretion. *State v. Jackson*, 216 Wis.2d 646, 655, 575 N.W.2d 475 (1998).When a circuit court exercises discretion, the record on appeal must reflect the circuit court's reasoned application of the appropriate legal standard to the relevant facts in the case. If the circuit court applied the wrong legal standard or the facts fail to support the circuit court's decision, the circuit court has erroneously exercised its discretion. An appellate court may engage in its own examination of the record to determine whether the facts provide support for the circuit court's decision. *State v. DeSantis*, 155 Wis. 2d 774, 777, n.1, 456 N.W.2d 600, 602 (1990).

It was error by the trial court to exclude the proffered evidence which explained not only B.S.'s ability to graphically describe the dildo she said Mader used on her but which also would have rebutted the State's portrayal of B.S. to the jury as a sexually inhibited person as a result of her victimization by Mader. Had the jury learned of her employment choice as a purveyor and

teacher of sexual toys after the State's false portrayal of her, the jury may well have concluded that she was an accomplished actress and storyteller, as Mader said. The evidence would have posed no threat of unfair prejudice as B.S. openly held herself out to be a "women's health educator" on the internet, in her police statement, and in public. In short, this evidence was relevant and became increasingly so after the State's many references to B.S's sexual inhibitions.

3. Alternatively, trial counsel's argument to admit evidence to rebut the false portrayal of B.S. was deficient performance.

Alternatively, if defense counsel's argument in favor of introducing the evidence is deemed to have been inadequate, his performance was deficient. Pages from B.S.'s "Pure Romance" business web site were reproduced and filed with the court on post-conviction and are in the appellate record. "Pure Romance" is a company that provides a female centered line of lubricants, body oils and sexual aids, such as "dual action vibrators", clitoral massagers, G-spot vibrators, C-rings (cock) and anal trainer kits. www.pureromance.com (last viewed July 23, 2022). As a purveyor of "Pure Romance" products, B.S. did not just sell sexual products across a counter. She sold them at parties, creating an atmosphere that would attract women to purchase the objects after she demonstrated them and explained their use in enhancing sexual satisfaction. (*See* R. 141: Exhibit C). Her Facebook page included rave reviews

in the customer comments:

- "[B.S.] Makes everything so fun and inviting! She makes talking about sexual things fun not awkward;" "....it (the party) was a blast thanks to [B.S.];"
- "She is very knowledgeable about the products and makes learning about them fun!!!"; "Whoever thunks talking about your body...and sex could be fun and not awkward?"
- "[B.S.] Knows how to make it a fun learning experience. She makes sure she is very knowledgeable which is comforting. Her home parties are the ? And you may pee your pants from ? so hard;"

This light hearted approach hardly matched the description that was portrayed to the jury of a reserved, sexually inhibited young woman traumatized by years of sexual abuse from the defendant. This additional information would have established the relevance of her endeavors as a sexual aid educator and entertainer. But trial counsel failed to investigate and use this publically available information to argue to the court even before trial the relevance of her business to his defense. He testified at the *Machner* hearing that he knew it was routine practice for defense counsel to check social media sources on witnesses because it can often reveal useful impeachment evidence. (R. 156: 47, 50). He offered no strategic reasons for not doing so here. Lawyers have a duty "to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits." *State v. Pitsch*, 124 Wis.2d 628, 638, 369 N.W.2d 711 (1985); *State v. Mayo*, 2007 WI 78, ¶ 59, 301 Wis. 2d 642, 673, 734 N.W.2d 115, 130 (deficient performance where counsel failed to conduct independent investigation which would have revealed corroborating witnesses).

Thus, if defense counsel's argument to the trial court to admit the evidence is deemed insufficient by this Court, his failure to investigate and present the court with additional publicly available evidence to explain B.S.'s business as a sexual aid purveyor and educator was deficient performance. The defendant was prejudiced by this failure because it allowed the State to present a false and prejudicially sympathetic portrait of B.S. in this case where credibility was the primary issue.

E. Defense counsel performed deficiently by failing to object during closing argument when the State argued facts not in evidence.

"Argument on matters not in evidence is improper." *State v. Neuser*, 191 Wis. 2d 131, 142, 528 N.W.2d 49, 53-54 (Ct. App. 1995) citing *State v. Albright*, 98 Wis.2d 663, 676, 298 N.W.2d 196, 203 (Ct.App.1980). *See also State v. Burns*, 2011 WI 22, 48, 332 Wis. 2d 730, 757, 798 N.W.2d 166, 179. It is improper because it tells the jury to rely on matters outside the evidence in contradiction of the presumption of innocence and burden of proof. *Taylor v. Kentucky*, 436 U.S. 478, 486-87, 98 S. Ct. 1930, 1935, 56 L. Ed. 2d 468 (1978).

In Mader's case, the prosecutor argued matters outside of the evidence when he asked the jury to consider statements prospective jurors made during voir dire.

> [E]verybody in the world doesn't want sexual assault to happen in their own community. Everybody wants to push that away and say, good Lord, that's

> not happening here. Remember jury selection process? Remember how many people put their hands up? Holy cow. It's a lot more popular than we would like to know. It's a lot more prevalent. And remember in the jury selection process, one of those jurors had never reported it to the police. You saw in your own small demographic area the amount of sexual assaults that happened just by being called into jury duty.

(R. 120: 574-75).

At the *Machner* hearing, trial counsel testified that he could not give a reason for his failure to object to this argument. (R. 156: 73). He also failed to object to the prosecutor's improper argument that "I get it that he has said I didn't do it, but isn't that what we expect someone to say if they're accused of a child sexual assault."(R. 156: at 74).

The post-conviction court acknowledged the prosecutor argued matters not in evidence, but declined to rule that Attorney Musolf's failure to object was deficient performance. (R. 188: 12-13; APP 112-13). The court concluded that the improper argument did not "infect the trial with unfairness" sufficient to warrant overturning the conviction because the jury received several pattern instructions permitting them to use their common knowledge and experiences in weighing testimony. (R. 188: 12; APP 112). However, the reference to hands raised about sexual assaults and comments made by prospective jurors during voir dire involved primarily jurors who did not deliberate upon a verdict, so they were not part of the common life experience of the deliberating jurors. (R. 114: 12-13, 15-16, 18, 22, 90). The pattern instruction on closing arguments told them the arguments of counsel were not evidence, but the court

never instructed the jurors that they should disregard the comments of prospective jurors during voir dire.

F. During deliberations defense counsel failed to object to the court sending the complainant's fifteen page written statement to the jury and did not ensure the jury's request was granted to review the defendant's recorded police interview.

During deliberations the jury asked two questions:

> Question Number 1, "We would like [B.S.]'s statement?"
> Question Number 2, "May we please get the recording of Conrad's investigation or a copy of the transcript?"

(R. 120: 180).

A longstanding rule holds that when a jury has questions regarding testimony, "the jury has a right to have that testimony read back to it, subject to the discretion of the trial judge to limit the reading." *Kohlhoff v. State*, 85 Wis.2d 148, 159, 270 N.W.2d 63 (1978) (citing *Jones v. State*, 70 Wis.2d 41, 57, 233 N.W.2d 430 (1975), and *State v. Cooper*, Wis.2d 251, 255-56, 89 N.W.2d 816 (1958)). An appellate court will reverse a circuit court's decision refusing to read testimony to the jury when the circuit court has erroneously exercised its discretion. *Id.; State v. Anderson*, 2006 WI 77, 83, 291 Wis. 2d 673, 714-15, 717 N.W.2d 74, 95, overruled on other grounds by *State v. Alexander*, 2013 WI 70, 83, 349 Wis. 2d 327, 833 N.W.2d 126. While a jury may abandon its desire to have the testimony read back, it should be an affirmative abandonment. Absent affirmative evidence of abandonment, the

appellate court may find that the trial court effectively refused to read back the testimony. *Id.* at 90.

The court sent the jury a note stating that there was no transcript of Mader's interview and they could only hear the recording in open court, which they had already expressly asked to do; the provision of a transcript being only a possible second option. ("May we please get the recording of Conrad's investigation *or* a copy of the transcript?") (emphasis added). The jury was not told they had to repeat their request if they wanted to hear the recording and likely assumed their express request was sufficient. (*See* Court's answer, R. 82). Defense counsel did not take any action to ensure the jury's request to hear the recording would be honored. According to his *Machner* hearing testimony, he instead just assumed that it was going to happen. (R. 156: 77). Thus, the jury never heard the recording again, and ultimately returned a verdict without benefitting from the opportunity to refresh or clarify their recollections of the defendant's interview with the recording. (R. 156: 76).

The problem was compounded because the jury *was* granted their request to have B.S.'s statement sent to the jury room. This not only highlighted the testimony of the accuser over the defendant's denials, but also included matters she never testified to at the trial. Defense counsel agreed to provide the jury with B.S.'s fifteen page written statement and agreed to make redactions. Ultimately, the deliberating jurors were able to read B.S.'s

statement but did not hear Mader's recorded rebuttal to it. (R. 156: 76).

Whether an exhibit should be sent to the jury during deliberations is a discretionary decision for the trial court, but the record must show a proper exercise of that discretion, by applying the facts and reaching "a conclusion based on logic and founded on proper legal standards." *State v. Hines*, 173 Wis. 2d 850, 858, 496 N.W.2d 720, 723 (Ct. App. 1993). A trial court's decision whether to send exhibits to the jury during deliberations is guided by three considerations: (1) whether the exhibit will aid the jury in proper consideration of the case; (2) whether a party will be unduly prejudiced by submission of the exhibit; and (3) whether the exhibit could be subjected to improper use by the jury. *State v. Jensen*, 147 Wis.2d 240, 260, 432 N.W.2d 913, 921-22 (1988).

In Mader's case, B.S.'s redacted handwritten statement should not have been given to the deliberating jury. It unduly prejudiced the defendant by highlighting one party's story and it included inadmissible evidence, such as Rape Shield material about virginity, birth control and sexual intimacy problems, but redacted other information helpful to the defense, such as B.S.'s various grievances and the real reason she moved out of the house. The redacted version of B.S.'s statement *deleted* the explanation B.S. gave that the reason for her impulsive move to her father's house was an argument with her mother. (R. 72: 12). Instead, the redacted version *left in* only a claim that "I

took the rest of my life in my hands. I packed my belongings and never came back. I ran for my life from Conrad." (R. 73: Ex. 14, p. 12). In fact, there was no mention of Conrad in the story of conflict which caused B.S. to move to her father's house.

In the statement the jury received, B.S. also discussed her fear that maybe Mader did something to his own young children, based on her mother's statements to her.

> Never in a million years did I think that Conrad would do anything to his own children. Those girls mean everything to me. Even if he didn't (that's what I want to think) their lives growing up SAFE is extremely important. For them I have to be strong. They do not deserve to be in this position. I don't want them to get hurt or go through anything I went through. I thought it didn't matter what happened to me because I wanted my sisters to have a father. I even put Conrad in front of myself. My physical everyday pain I suffer because of the huge trauma in my life, before my emotional feelings. But I will no longer let the devil make me feel that way. I matter, my sisters, Brad, my brother, and Mom and the whole rest of my family matter. Not what Conrad put into my mind.

(R. 73: Ex. 14R, p. 15). This closing paragraph in the redacted copy of B.S.'s statement that the deliberating jurors received was full of emotional, inflammatory and unfairly prejudicial information that was never admitted in testimony at trial. This prejudicial statement that the jury read raised the prospect that Mader assaulted others, that he was the devil, that B.S. sacrificed herself to Mader, and that she now had to be strong (and prosecute Mader) for her sisters' welfare. None of this was testified to at trial and none of it should have gone to the jury.

The post-conviction court ruled that trial counsel's agreement to the

redacted statement going to the jury room was "trial strategy," (R. 188: 13; APP 113), because he testified at the *Machner* hearing that he wanted the jury to believe B.S. was a "storyteller" and see that she wrote a 15-page statement. (R. 156: 79). But it was not a reasonable strategy to allow false and misleading information into the jury room while redacting statements that were consistent with the defense theory. For example, statements about her mother's treatment of her were consistent with the theory that she would lie to get her mother's attention and love, yet they were redacted. Meanwhile, statements that gave the misleading and false impression that B.S. left the home for good to escape from Mader when, in fact, she left because of an unrelated fight with her mother, remained for the jury's consideration. At the *Machner* hearing, trial counsel conceded that he could have accomplished the "storyteller" theme by other means. (R. 156: 80). His decision to permit the jury to have this inflammatory statement with them during deliberations was deficient performance. This was aggravated by his failure to have Mader's recorded statement played for the jury (as they requested) to neutralize the inherent prejudice involved in sending back only the complainant's statement without Mader's response.

III. The defendant was prejudiced by the cumulative effect of defense counsel's deficient performance.

Finally, it must be remembered that prejudice is evaluated by the

totality of counsel's errors. Trial counsel's failure (1) to object to or impeach irrelevant, improper or unfairly prejudicial testimony, (2) to hold a *Daubert* hearing to challenge Lockwood's testimony or use an expert to rebut the State's expert, (3) to object to the complainant's statement being provided to the jury, (4) to insist that Mader's statement be played for the jury after their request, and (5) to object to misleading or prejudicial redactions, taken together, cumulatively caused prejudice to his defense. *See State v. Thiel*, 2003 WI 111, ¶ 59, 264 Wis.2d 571, 665 N.W.2d 305 ("when a court finds numerous deficiencies in a counsel's performance, it need not rely on the prejudicial effect of a single deficiency if, taken together, the deficiencies establish cumulative prejudice"); *State v. Zimmerman*, 2003 WI App 196, ¶ 47, 266 Wis. 2d 1003, 1029, 669 N.W.2d 762, 774; *Washington v. Smith*, 219 F.3d 620, 634-35 (7th Cir.2000) ("Evaluated individually, these errors may or may not have been prejudicial to *Washington*, but we must assess 'the totality of the omitted evidence' under *Strickland*, rather than the individual errors").

Courts have repeatedly held that a "defendant is not required [under *Strickland*] to show 'that counsel's deficient conduct more likely than not altered the outcome of the case.'" *State v. Moffett*, 147 Wis. 2d 343, 433 N.W.2d 572, 576 (1989), quoting *Strickland*, 466 U.S. at 693. Given the multitude of defense counsel's errors in Mader's case there is clearly a reasonable probability that a jury would have had reasonable doubt respecting

guilt absent defense counsel's deficient performance. Accordingly, the conviction must be set aside due to ineffective assistance of counsel.

The post-conviction court did not address the cumulative impact of counsel's unprofessional errors, instead concluding that considering the evidence at trial the result of the proceedings would not have been different. (R. 188: 14-15; APP 114-15). The court believed B.S.'s appearance and demeanor at trial was compelling. (R. 188: 14-15; APP 114-15). But she was not subjected to a thorough cross examination because the court precluded the extensive "Pure Romance" evidence which would have made very dubious her self-described sexually inhibited persona due to years of Mader's alleged assaults and explained how she could have so vividly described a somewhat unusual type of "strap on" dildo. The jury also heard a myriad of inadmissible Rape Shield testimony about the complainant that appeared to support her claims but should never have been offered at trial.

Although the post-conviction court seemed impressed by many of the supposed details B.S. provided, there were just as many contradicted by the evidence, including that her claims about an attempted assault on Christmas Day was implausible because of the children's placement schedule, an incident where he supposedly entered the bathroom was incredible because the door lock was inside where he could not reach the mechanism, the birth mark on Mader's penis was not where she described it (and her mother may have

provided B.S. the information that Mader had a birthmark), the downstairs freezer where she described having sex was too high for the activity and that her brother and later two sisters were home often during the alleged assaults and heard nothing. Nor was there any explanation about who took care of the two young sisters, who were infants and toddlers during the virtually continuous assaults B.S. described.

In addition, the claims B.S. made to her school friends were different than her testimony at trial and B.S. admitted to one of the girl's mother that she lied and made the story up. This actually supported the defense argument that she was a big story teller and trotted out an old lie for a new purpose.

Her vivid description of a dildo would hardly be challenging for a young woman who sold them and demonstrated their use professionally but virtually incomprehensible for a sexually inhibited woman unless its use was forced upon her by Mader as she claimed. B.S. was not a child, but a 21-year-old woman with years of experience selling sexual aids at the time of her testimony, easily old enough and experienced enough to allow her to create a story for court testimony. Importantly, the *judge's* opinion of B.S.'s credibility is not the deciding factor, it is whether there is a reasonable likelihood that *the jury* viewing the evidence untainted by counsel's errors would have had a reasonable doubt respecting guilt. *See State v. Jenkins*, 2014 WI 59, ¶ 38, 355 Wis. 2d 180, 196, 848 N.W.2d 786, 794 ("court may not

substitute its judgment for that of the jury in assessing which testimony would be more or less credible"); *State v. Guerard*, 2004 WI 85, 273 Wis.2d 250, 682 N.W.2d 12 (the perceived weaknesses in the witness's testimony "would have been a factor for the jury to consider....The jury would have had to determine the weight and credibility to assign" to the witness's statements).

As the Wisconsin Supreme Court noted in *State v. Pitsch*, 124 Wis. 2d 628, 646, 369 N.W.2d 711, 720 (1985):

> "[b]ecause credibility was the central issue in this case, we conclude that the error had "a pervasive effect on the inferences to be drawn from the evidence" and "alter[ed] the entire evidentiary picture." *Strickland v. Washington*, 104 S.Ct. at 2069. Thus, despite the strong presumption of the reliability of the outcome, our confidence in the result is undermined because of "a breakdown in the adversarial process that our system counts on to produce just results." *Strickland v. Washington*, 104 S.Ct. at 2069.

Likewise, the errors in Mader's case undermine confidence in the guilty verdict.

CONCLUSION

For all of the foregoing reasons, the defendant requests the Court to vacate his conviction and order a new trial.

Dated this 25th day of July, 2022.

Respectfully submitted,

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CERTIFICATION BY ATTORNEY

I hereby certify that this Document conforms to the rules contained in § 809.19(8)(b), (bm) and (c) for a brief. The length of this document is 10,993 words.

I also hereby certify that filed with this brief is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the trial court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the trial court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any and final decision of the administrative agency.

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

Dated this 25th day of July, 2022.

Electronically signed by Jerome F. Buting
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APPENDIX TABLE OF CONTENTS