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.

REPLY 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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I. Defense counsel failed to adequately challenge the State's experts.

The State attempts to reframe Lockwood's and Steier's subjective opinion testimony about the truthfulness of unrelated sexual assault complainants as nothing more than a statement that "false reports of sexual assault are uncommon." (State's Brief at 18). But this opinion testimony vouched for the truthfulness of a whole class of witnesses who claim to be victims. It was a claim that false accusations never occur, to a mathematical near certainty.

The State asserts that there is no reported case prohibiting the use of experience-based opinion testimony about the prevalence of false reports. But, the Wisconsin Code of Evidence prohibits the use of *irrelevant* testimony and the State fails to offer any viable theory for the relevance of this evidence. §904.02, Stats.; *see also Bittner by Bittner v. Am. Honda Motor Co.*, 194 Wis. 2d 122, 147, 533 N.W.2d 476, 486 (1995) ("a judge has no discretion to admit irrelevant evidence"). The truthfulness of other witnesses in other situations was wholly irrelevant to the core issue in this case: whether B.S. was truthful.

The State also claims that the testimony did not run afoul of *State v. Jensen*, 147 Wis. 2d 240, 250-52, 432 N.W.2d 913, 918 (1988), because neither witness "opined whether they thought V's allegations were truthful." The witnesses need not directly testify that they believed B.S. for such

testimony to constitute improper vouching. Vouching evidence can be both direct and indirect. *See State v. Kleser*, 2010 WI 88, ¶ 102, 328 Wis. 2d 42, 86–87, 786 N.W.2d 144, 166 ("There is no requirement that an expert explicitly testify that she believes a person is telling the truth for the expert's opinion to constitute improper vouching testimony. . . A requirement that specific words be used would permit the rule to be circumvented easily).The only possible purpose for this testimony was to convey to the jury that sexual assault complainants do not lie, ergo this complainant is telling the truth. This is vouching prohibited by *Jensen* and counsel should have objected.

Both Lockwood and Steier indirectly vouched for the truthfulness of B.S. when they testified that sexual assault complainants are truthful over 99% of the time. Steier's vouching was even more direct in that he reported only one false complaint, implicitly telling the jury that B.S. was telling the truth because he did not name her as the one liar. The testimony was both improper and prejudicial. *See also State v. Krueger*, 2008 WI App 162, ¶ 16, 314 Wis. 2d 605, 619, 762 N.W.2d 114, 120 (testimony that the complainant was not highly sophisticated and therefore could not maintain consistency throughout her interview "unless it was something that she experienced" was improper vouching.).

Finally, the State argues that counsel's decision not to even consult with an expert about Lockwood's opinions was a strategic decision and, therefore,

virtually unassailable. (State's Brief at 18). However, the deference the State relies upon is only due after counsel demonstrates that he has made a "thorough investigation of law and facts relevant to plausible options." *Strickland v. Washington*, 466 U.S. at 690-91. Mader's counsel neither consulted an expert nor researched available cases. Had he done so, he would have seen that the statistical studies on false complaints were flawed and unreliable and understood that the experiential testimony was irrelevant. Instead, he accepted without question that the same testimony from Lockwood he failed to challenge in a prior case would be admitted at Mader's trial. R. 156 at 26. This was deficient performance because it was based on *no* investigation whatsoever.

II. Counsel was deficient when he failed to object to testimony about birth control and B.S.'s alleged problematic sexual relations with her boyfriend.

The State concedes that B.S.'s statement that she lost her virginity to Mader was inadmissible and counsel was deficient for not objecting. State's Brief at 23. The State also agrees that "a victim's pre-assault 'use of birth control'" should be inadmissible under the Rape Shield exclusion. *Id.* However, the State suggests B.S.'s testimony that Mader asked her if she received her birth control shot transformed the evidence into *conduct that was part of the sexual assault*, and thus not excluded under § 972.11. This argument is unpersuasive and factually unsupported.

Scheffler testified that her daughter came to her, complained of heavy periods, and asked for birth control. Scheffler noticed her daughter's "frequent" use of menstrual care products and discussed the potential use of birth control to ameliorate her symptoms. R. 116 at 237. Scheffler testified that *she* put B.S. on birth control. R. 116 at 144-45. Mader had nothing to do with the decision between the mother and daughter. The use of birth control was a medical decision unrelated to the alleged sexual assault, and thus inadmissible under § 972.11. Defense counsel should have objected to any such testimony.

The State agrees that the evidence of alleged sexual intimacy problems with her boyfriend is a "closer call" than the birth control evidence but argues that B.S.'s discomfort with touching her breasts, kissing (both physical acts) and "the whole process" of sexual intimacy is just an expression of thought or desire not excluded by the Rape Shield statute, citing *State v. Vonesh*, 135 Wis. 2d 477, 487-88, 401 N.W.2d 170 (Ct. App. 1986). This might be true if the witness had merely said that she did not like the *thought* of sexual intimacy. But, both B.S. and B.B. testified about alleged difficulties she had with sexual *acts*, which *are* barred by Rape Shield. (e.g., "having intercourse with him still, nothing is the same"). R. 119 at 86. *See also*, *State v. Mulhern*, 2022 WI 42, ¶¶ 42, 53, 402 Wis. 2d 64, 85, 975 N.W.2d 209, 219, where the court rejected a similar argument by the state that evidence about a lack of

sexual intercourse was not conduct prohibited by the statute. The State's argument in Mader's case should also be rejected. At the *Machner* hearing, counsel said he could not think of any reason why he did not object to the testimony about sexual conduct between B.B. and B.S. R. 156 at 46. This was deficient performance.

The State argues that even if counsel was deficient for not objecting, there was no prejudice. This ignores the State's prominent use of the inadmissible evidence throughout its case and in its closing argument. Lockwood highlighted sexual intimacy problems in preparation for what was to come: the testimony about B.S.'s discomfort with sexual touching and intercourse. In his closing argument the prosecutor argued that this inadmissible evidence proved that B.S. was a victim because "it (sexual assault) *absolutely* will have an impact on future sexual relationships, future consensual --having an intimate moment with your partner will be more challenging because of this." R. 120 at 119. (emphasis added). He argued that "everything [Lockwood] would say about what to expect was classic with [B.S.]." R. 120 at 174-75. The State argued the testimony by B.S. and B.B. about their sexual intimacy difficulties made her story more credible. R. 120 at 134-35, 136-37.

This case was a credibility contest with little or no corroboration. The use of inadmissible Rape Shield testimony relating to sexual conduct, birth

control and virginity was unquestionably prejudicial.

III. Counsel was deficient in his failure to investigate and use her employment as evidence to rebut the portrayal of B.S. as a sexually inhibited young woman.

Before trial, defense counsel offered the court a general argument that B.S. sold sex toys and would have knowledge of them. However, both before and during the trial, defense counsel failed to offer the court social media that would have bolstered the arguments in favor of admissibility even though he knew that it was routine practice for defense attorneys to check social media sources on witnesses for impeachment evidence. He could offer no reason why he failed to do so in this case. R. 156 at 47-49.

The State argues that B.S.'s employment at "Pure Romance" would "only be arguably relevant if the existence of the dildo was in question; it wasn't." State's Brief at 30. This ignores the relevance of such evidence to demonstrate an alternative source for B.S.'s vast knowledge of all kinds of sexual conduct, *See* R. 72: 13 (*e.g.*, "You need proper lubrication [for anal intercourse] at first and to start small."). She did not just sell sex toys, she hosted parties and instructed women how to use them to enhance sexual pleasure. *See* Defendant's Brief-in-Chief at pp. 43-44. Defense counsel conceded at the *Machner* hearing that he failed to make this argument. R. 156: 48-49.

The court's decision at trial that the evidence about B.S.'s work with

"Pure Romance" was insufficiently probative to overcome its prejudicial effect was ill-informed because defense counsel did not show the court posts about B.S.'s carefree and fun attitude about sex at the parties she hosted – behavior at odds with her demeanor in court and which would have shown an alternative source for her large and detailed fund of sexual knowledge. The trial judge accepted without question that Lockwood's testimony that victims respond to trauma in various ways explained the anomalies in B.S.'s behavior. But he did so without all available information because of counsel's deficient performance.

IV. Counsel performed deficiently when he failed to object when the State argued facts not in evidence.

The State contends that the prosecutor's closing argument references to the jurors' knowledge of sexual assault in their community were not facts outside the evidence because all the jurors saw the raised hands of others during voir dire. That is beside the point. The prosecutor offered the voir dire incident as *evidence* to support the believability of the complainant. The prosecutor argued the jury should "believe B.S." because the response of jurors during voir dire proved sexual assault was "prevalent" in their community. R. 120:116. He even used one juror's voir dire comment that they never reported the assault to the police to bolster Lockwood's testimony that

most children don't report right away.[1] *Id.* at 117.

The State argues there was no prejudice because the judge instructed the jury that arguments are not evidence. But the court of appeals has reversed for similar inflammatory and prejudicial prosecution arguments. *See, e.g., State v. Smith*, 2003 WI App 234, ¶ 12, 268 Wis. 2d 138, 146, 671 N.W.2d 854, 857 (prejudice where prosecutor improperly argued facts outside of evidence to rebut defense counsel's inference impugning integrity of hard-working police officers). The court in *Smith* noted the trial was a credibility contest where there was little clear corroborative evidence to establish that the defendant had committed the crime. The same holds true for Mader's case.

V. Counsel's decisions regarding the trial exhibits going to the jury were unreasonable and demonstrated deficient performance.

The State argues that counsel made a reasonable strategic, and therefore unassailable, decision to send the complainant's written statement to the jury. On the contrary, counsel's decision was an unreasonable blunder, especially in light of his failure to ensure that the jury heard Mader's interrogation tape as they requested. It should be given no deference.

The fundamental problem with giving a jury a complainant's hearsay statement is that they may rely on it or place undue emphasis on what they

[1]Dr. Thompson would have contested Lockwood's claim, noting studies which show more than half of children reported within between one week and two years, and other studies which showed teenagers have "a higher rate of timely disclosures." R. 156: 172, 175-76.

read in the jury room rather than the testimony at trial. It is inequitable to allow one side to make its case with written statements while requiring the other side to rely on the jury's recollection of oral testimony. *State v. Hines*, 173 Wis. 2d 850, 862, 496 N.W.2d 720, 725 (Ct. App. 1993).

Even redacted, B.S.'s statement was full of dramatic and emotional appeals, R. 73 at 1, 5, 10, 12 and 15, and it contained inadmissible Rape Shield evidence. *Id.* at 6. At the *Machner* hearing, counsel's only rationale for presenting this prejudicial, inflammatory document to the jury was that *its length* showed she was a "storyteller," but he agreed the same point could have been demonstrated by other means. R. 156 at 79-80. He believed some of the prejudicial effect of her inflammatory remarks in the statement would be moderated when the jury listened to Mader's statement again, but this never happened because he did not ensure his client's interview was replayed for the jury. R. 156 at 77. These failures together were greater than each one would have been alone. In this close credibility contest, the jury got to examine and ruminate about B.S.'s statement for almost two hours, while never hearing Mader's statement again.

In a similar situation the Wisconsin Supreme Court reversed. In *State v. Anderson*, 2006 WI 77, ¶ ¶ 10-14, 291 Wis. 2d 673, 687, 717 N.W.2d 74, 81, the jury first asked to see the victim's recorded interview. The recording was sent back to the jury room but the jury then asked for testimony of the

defendant and victim to be read back. The court told the jury their request was "cumbersome" asked them to be more specific. The jury responded that they did not understand the defendant's testimony. The court never responded. The supreme court reversed, finding, in part, that the trial court erred when it failed to allow the jury to hear both witnesses' testimony again. *Id*. at ¶ 34. The request to hear Mader's audio recording was a request for an exhibit, but the same standards apply to exhibits and reading back testimony and a trial court's failure to appropriately exercise discretion in either situation is error. *Id.* at ¶¶ 26, 93.

In Mader's case, as in *Anderson*, the trial court gave an acceptable answer, that recordings had to be replayed in court, *Id.* at ¶ 95, but nothing told the jury they had to ask again in order to hear it replayed. R. 82. The jurors asked for the exhibit and it was an unnecessary burden on the jury to expect them to ask for the playback a second time. *Id.* at 110. It was counsel's responsibility to make sure they received access to Mader's favorable statement as they had requested. He failed in his duty.

As in *Anderson*, this was a credibility case. Both juries were "obviously having difficulty sorting it all out and wanted to be able to re-examine the evidence." *Id.* at ¶ 121.Both juries asked for help and in both cases the jury received the complainant's statement in the jury room and not the accused's statement. As in *Anderson*, "it appears from the jury's request for the testimony

that the jury was attempting to evaluate the defendant's and victim's credibility and their respective versions of events." *Id.* at ¶ 99, In Mader's case, the jury started deliberations at 1:58 pm and asked for the audio and written statements just 2.5 hours later, having clearly hit a credibility roadblock. In the end, Mader's jury only got half of what it requested, thus highlighting the complainant's version while forcing the jurors to rely on memory for Mader's response to the accusations. The court in *Anderson* concluded that it was prejudicial error to give the jury the victim's videotaped interview to be viewed in the jury room while refusing the jury's request to hear testimony read back. *Id.* at ¶¶ 119-120. The same holds true in Mader's case.

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

Finally, the State argues even if counsel's performance was deficient there is no prejudice because of the "breadth of detail and corroboration" in the State's case. State's Brief at 42. In fact, there was little to no corroboration besides the complainant "bragging" to middle school friends that she later retracted. Despite claims of brutal vaginal and anal intercourse without lubrication which allegedly caused bleeding and permanent damage, there were no medical records or testimony by her mother to support such injuries.

As argued in the Defendant's Brief-in-Chief at pp 51-55, the cumulative effect of counsel's errors can cause prejudice. *See State v. Thiel*, 2003 WI 111,

¶ 59, 264 Wis.2d 571, 665 N.W.2d 305. Given the multitude of defense counsel's errors in Mader's case there is a reasonable probability that a jury would have had reasonable doubt respecting guilt absent defense counsel's deficient performance.

The post-conviction court did not address the cumulative impact of counsel's unprofessional errors, instead concluding that B.S.'s appearance and demeanor at trial was compelling. R. 188: 14-15; APP 114-15). But, her lack of credibility was not fully exposed because she was not thoroughly cross examined. Had defense counsel presented the extensive "Pure Romance" evidence, it would have made very dubious her self-described sexually inhibited persona due to years of Mader's alleged assaults. And it would have explained how she could have so vividly described sexual conduct. The jury also heard inadmissible Rape Shield testimony that appeared to support her claims which should never have been offered at trial.

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, ¶ 49, 273 Wis.2d 250, 682 N.W.2d 12 (even though

victim's testimony appeared compelling, evidence which revealed weaknesses in the 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). There is certainly a reasonable probability a jury would harbor reasonable doubt about guilt with B.S.'s credibility significantly weakened.

CONCLUSION

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

Dated this 14th day of November, 2022.

Respectfully submitted,

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CERTIFICATION BY ATTORNEY

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Dated this 14th day of November, 2022.

Electronically signed by Jerome F. Buting
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