STATE OF WISCONSIN
IN THE SUPREME COURT

Case No: 2022AP382-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

CONRAD M. MADER,

Defendant-Appellant.

PETITION FOR REVIEW
AND APPENDIX

Respectfully Submitted,

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Was it ineffective assistance for defense counsel to have failed to object to evidence that the defendant allegedly had a diminished sexual interest in his wife during the time he is alleged to have been sexually assaulting his stepdaughter?

Answer by Circuit Court: No.
Answer by Court of Appeals: No.

Both courts ruled the evidence was relevant and not unfairly prejudicial and thus failure to object was not deficient performance.

II. Did defense counsel provide ineffective assistance by failing to object to inadmissible rape shield testimony that the complainant lost her virginity to the defendant, that she was on birth control and that Mader's assaults impacted her ability to be sexually intimate with her boyfriend.

Answer by Circuit Court: No.
Answer by Court of Appeals: No.

Both courts ruled the failure to object to the virginity evidence was deficient performance, but the birth control evidence was connected to the defendant's assaults and therefore not barred by the rape shield statute. The court of appeals did not decide whether the evidence of her sexual intimacy problems with her boyfriend was admissible.

III. Did defense counsel provide ineffective assistance by failing to adequately investigate social media posts by the complainant about her employment hosting parties at which she sold sexual aids and received rave reviews about the fun and enjoyable way she discussed sex, to counter inadmissible evidence the State presented about her loss of virginity and sexual intimacy problems and the State's inaccurate portrayal of

her as sexually inhibited and fearful as a result of the defendant's alleged assaults?

Answer by Circuit Court: No.
Answer by Court of Appeals: No.

IV. Did defense counsel provide ineffective assistance by failing to object to the prosecutor's closing argument which referenced as evidence they should consider certain disclosures made at voir dire by prospective jurors who were not selected to serve?

Answer by Circuit Court: No.
Answer by the Court of Appeals: No.

V. Did defense counsel provide ineffective assistance by failing to ensure that the deliberating jurors' request to review testimony concerning the defendant's denials of guilt during a police interrogation was honored by the court and instead allowing the complainant's handwritten statement which contained inadmissible rape shield evidence to be sent to the jury room?

Answer by Circuit Court: No.
Answer by Court of Appeals: No.

VI. Did the cumulative effect of defense counsel's errors prejudice the defendant?

Answer by Circuit Court: No.
Answer by Court of Appeals: No.

REASONS FOR GRANTING REVIEW

1. The case presents real and significant questions of state and federal constitutional law, Wis. Stat. (Rule) §809.62(1r)(a).

This case involves real and significant questions of state and federal constitutional law, including the petitioner's right to the effective assistance to counsel. Defense counsel failed to object to inadmissible evidence of the complainant's loss of virginity, use of birth control and supposed sexual inhibition caused by the petitioner's alleged assaults. Defense counsel also failed his duty to investigate which would have uncovered evidence to rebut the State's claim that the complainant was a reserved, sexually inhibited young woman traumatized by years of sexual abuse from the defendant, as portrayed in her direct testimony. Defense counsel also failed to object to improper evidence that the defendant supposedly displayed a decreased sexual interest in his wife during the period of the alleged assaults, while failing to show his wife gave birth to their second child literally nine months after she claimed the defendant was refusing sexual relations with her. Defense counsel also failed to object to improper closing argument and allowed inadmissible rape shield evidence to go to the deliberating jury in an inadequately redacted handwritten statement of the accuser, while also failing to ensure that the jury's request was honored to rehear the defendant's police interview which contained his denials.

The court of appeals agreed some of counsel's performance was deficient and some evidence allowed was inadmissible, but ultimately ruled none of it constituted ineffective assistance.

2. Review is also appropriate to clarify a question of law likely to recur unless resolved by this Court. Wis. Stat. (Rule) § 809.62(1r)(c)(3).

This case involves a recurring question of counsel's reference in closing argument to matters outside the evidence, in this case the comments during voir dire about the experiences of prospective jurors who were not selected for the jury.

The court of appeals ruled such statements were permissible because jurors are permitted to bring their experiences in life to their deliberations. But, as evidence for why the complainant should be believed, the prosecutor improperly argued the experiences of *nonjurors* discussed at voir dire, not the life experiences of the seated jurors.

In addition, this case involves a recurring question of how to respond to a deliberating jury's request for evidence to go to the jury room. The jury asked for the complainant's handwritten statement as well as the audio recording or transcript of the defendant's police interview, which included his denials. The court sent a redacted copy of the complainant's statement but sent the jury a note that no transcript of the defendant's audio recording existed and the recording could only be replayed in the courtroom. Neither the court nor defense counsel asked if the jury still wanted to have the recording replayed in court, and the jury rendered a verdict without hearing it. The court appeals ruling effectively places an improper burden on a deliberating jury to repeat its requests, rather than on the court and counsel to ensure the jury's requests are honored.

Despite admonishments from this Court in *State v. Anderson*, 2006 WI 71, 291 Wis. 2d 673,717 N.W.2d 74, that a trial court must not frustrate and effectively deny a jury's

request to have testimony reread unless the jury "affirmatively abandons" its request, trial courts continue to improperly do so. This is likely to recur in other cases unless this Court clarifies and strongly condemns the practice.

STATEMENT OF THE 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 Beverly, 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 ask for a *Daubert* hearing to challenge or limit Lockwood's proposed testimony.

The State also filed a motion in limine asking to exclude any reference to Beverly'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 Beverly's mother 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 Beverly's mother'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 on sexual intimacy in adulthood, neither of which topics were disclosed in

[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.

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 Beverly "bragged" about giving "road head" (oral sex in a car) to Mader. (R. 116: 58, 62).[2] Lea told her mother about Beverly's claims and her mother asked Beverly directly whether the statement about sex with Mader was true. (R. 116: 66-67). Beverly told Lea's mother that it was all a lie she made up. (R. 116: 66-67). Lea ended the friendship after hearing Beverly admit she had lied. (R. 116: 61-62).

Beverly's mother, Mader's ex-wife, testified that she had not witnessed any of the alleged assaults, never saw Mader give Beverly a massage, and never noticed anything that at the time gave her concern about Mader and Beverly (R. 116: 173-176). In hindsight, there were a few incidents that she felt were suspicious after hearing her daughter's allegation. Beverly's mother described an incident in high school where she found a dildo under her daughter's mattress. (R. 116: 132). When confronted with the discovery, Beverly 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).

Beverly's mother 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 Beverly's claims of abuse. (R. 116: 140-141). She described a romantic weekend where her husband allegedly showed no sexual interest

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

in her.[3] She also testified, without objection, to a hearsay statement that her son, Scott, supposedly heard sounds like monkeys in the morning, which Beverly's mother 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 Beverly and never saw any signs of an inappropriate relationship over the eight years they lived together. (R. 119: 19, 22).

When Beverly 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. Beverly 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 Beverly had ever complained of medical problems consistent with these claims.

Beverly 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

[3]However, the couple's second child was born 9 months after that supposed period of no sexual relations, a fact trial counsel failed to present at trial, which he admitted at the *Machner* hearing was an oversight. (R. 156: 42-43).

testified that they noticed Beverly make any attempts to avoid or fight with Mader.

The prosecutor asked Beverly 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). Beverly's boyfriend at the time of the trial also testified that Beverly didn't like to be kissed or touched in a sexual way. (R. 119: 32).

While the State was allowed to introduce evidence about Beverly's sexual inhibitions, the defense was precluded from challenging this testimony by asking Beverly 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 Beverly 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, 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 Beverly 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 Beverly 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).

The defense presented a number of witnesses who challenged the credibility of both Beverly and her mother. (R. 120: 10-11, 30). Several of Beverly'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 Beverly 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 Beverly 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. Beverly 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 motives Beverly and her mother had to fabricate, which he had provided to police, some of which the jury did not hear on the audio recording. Mader testified that he thought that Beverly's mother "put (Beverly) up to this" to help her get more money or full custody of the younger girls. He also testified that Beverly 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 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).

The prosecutor 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 Beverly'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). 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 [Beverly] and you say, just as I promised you in

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

> my opening statement, that everything Susan would say about what to expect was classic with [Beverly].

(R. 120:174-75).

About three hours into deliberations, the jury asked for a copy of Beverly'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 Beverly'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).

Post-conviction proceedings

The defendant filed a motion for post-conviction relief and a *Machner* hearing was held with testimony from the defendant's trial counsel The defense attorney testified he knew that he had to object to evidence at trial to preserve the issue for

[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.

appeal and attributed his failures to oversight, rather 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 144-158. 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 and speculative hearsay about "monkey" noises. (*Id.* at 8-9). Nevertheless, the court found no prejudice. (*Id.* at 14-15).

Court of Appeals

The court of appeals accepted the State's concession that defense counsel's performance was deficient by failing to object to evidence of Beverly's virginity and the hearsay testimony about monkey noises inferred to be sounds of sex between the defendant and the complainant. APP. 114, ¶ 31.

The court of appeals also concluded that it was deficient performance for defense counsel not to object to Lockwood and Steier's testimony about the truthfulness of accusers and the statistical evidence of the rarity of false accusations of sexual assault. APP 118-19, 138; ¶¶40, 79. The court ruled such testimony violated the prohibition on vouching discussed in *State v. Haseltine*. ¶ 39, APP 118.

However, the court of appeals ruled Mader was not prejudiced by his counsel's deficient performance because "Beverly's detailed account of years of sexual abuse, along with the contemporaneous and after-the-fact corroboration discussed above was inherently credible." ¶ 86; APP 141. The court believed this "was not a case in which the evidence for and against guilt was nearly in equipoise." *Id.* In part, the court

reached its conclusion by believing "the evidence presented by Mader, was by comparison, meager." ¶ 84. As argued below, the court of appeals failed to consider that evidence elicited on cross-examination by the defense was as much evidence as that later presented in the defense case.

This petition follows.

ARGUMENT

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

A. 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 Beverly

1. Diminished sex life.

Beverly's mother'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 Beverly, leaving little interest or energy for his wife. This inference was not factual, logical or rational. Beverly

claimed she had been having sex with Mader for several years before the miscarriage and yet Beverly's mother 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 Beverly's mother's testimony on this issue was prejudicial and damaging to the defense. (R. 156: 42)

The court of appeals found the evidence was relevant and admissible such that the failure to object was not deficient performance. The court concluded that a reasonable explanation for Mader's lack of interest in sexual relations with his wife was that "he was obtaining gratification elsewhere." ¶48; APP 123.

However, the court ignored Mader's argument that his counsel failed to present to the jury the fact that couple's second child was born 9 months after the Door County weekend, to contradict Beverly's mother's claim that Mader refused sexual relations because he lost sexual interest in her at that point. (R. 156:42). The court of appeals also ignored Mader's argument that trial counsel knew Mader told the police that the real reason the marriage declined was because of Beverly's mother'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).

Given such countervailing evidence, the relevance of Beverly's mother's claimed lack of sexual interest on a single "romantic" weekend had minimal probative value. This increased the likelihood that if counsel had presented Mader's explanation for the real reason for declining sexual relations the

court would have excluded her diminished sexual interest testimony under §904.03 because its minimal probative value was outweighed by the danger of unfair prejudice. Beverly's mother's extramarital affair would have been fair game to rebut her testimony, but the court may have excluded all testimony about the supposed lack of sexual interest to avoid distracting the jury with testimony about Beverly's mother's marital infidelity.

2. Speculative hearsay statements about suspicious noises.

Immediately after the irrelevant testimony about the marital sex life, Beverly's mother 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. Beverly's mother 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). Beverly's mother 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 Beverly during the sexual behavior.

The court of appeals accepted the State's concession on appeal that defense counsel's failure to object to this hearsay and irrelevant testimony was deficient performance.

B. 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. Beverly's virginity testimony.

Mader's counsel failed to object when the State discussed during opening statement and presented evidence from several witnesses about Beverly'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. Beverly 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).

On appeal, the State conceded that evidence and references to Beverly's virginity was inadmissible and counsel was deficient for failing to object. The court of appeals agreed.

But, the court of appeals did not believe counsel was deficient for failing to object to the remainder of the evidence about Beverly's sexual conduct.

2. Birth control.

The court of appeals ruled that Beverly'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. ¶ 53; APP 125-26. The court concluded his "apparent preoccupation" with Beverly's birth control connected her use of birth control to the "course of assaultive conduct." *Id.*

This is factually incorrect. Beverly's mother testified that her daughter came to her, complained of heavy periods, and asked for birth control. Beverly's mother 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. Beverly's mother testified that *she* put Beverly 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.

3. Defense counsel was deficient by failing to adequately investigate evidence of Beverly's employment with Pure Romance and her customer's reviews that Beverly hosted fun and informative sexual aids parties, to rebut the State's inaccurate portrayal of Beverly 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, Beverly 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 Beverly 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).

Defense counsel's argument in favor of introducing the evidence was lacking because he failed to investigate Beverly's employment with Pure Romance.

"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 3, 2023). As a purveyor of "Pure Romance" products, Beverly 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:

- "[Beverly] Makes everything so fun and inviting! She makes talking about sexual things fun not awkward;" "....it (the party) was a blast thanks to [Beverly];"

- "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?"

- "[Beverly] 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. 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.

Thus, because of his inadequate investigation, defense counsel's argument to the trial court to admit the evidence was insufficient to support the relevance and importance of Beverly's employment to rebut the State's false and prejudicially sympathetic portrait of Beverly in this case where credibility was the primary issue.

The court of appeals ruled trial counsel was not deficient because presenting the Pure Romance evidence ran the risk of "corroborating" Beverly's account "given that victims can react to sexual abuse in different way." APP 129, ¶ 58. But, that was not the State's portrayal of Beverly. They offered her sexual

intimacy problems as proof of Mader's abuse and defense counsel had no competing evidence for rebuttal. Moreover, defense counsel did not strategically decide to avoid the risk; he *wanted* to present her Pure Romance activities and experiences. However, he was ineffective because he failed to investigate it properly to strengthen his argument for relevance to the trial court.

C. 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). 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.

The court of appeals declined to rule the closing argument impermissible. It held that the prosecutor simply asked, in evaluating Beverly's credibility, that they rely on their own life experiences and "knowledge of sexual assault and delayed reporting." ¶63; APP 131. But, the State used expert testimony in this and many cases to describe delayed reporting precisely because jurors supposedly don't have such knowledge

and require expert testimony to enlighten them. Here, the prosecutor used not just expert testimony about delayed reporting, he bolstered that testimony and Beverly's credibility by using comments outside the evidence, made by jurors who did not serve on the jury. The prosecutor asked the deliberating jury to not just rely upon their own life experiences, but also that of other jurors not selected for the panel. Defense counsel was deficient for failing to object.

The court of appeals also said that the State's argument was "sandwiched between references that tended to support Beverly's credibility, such as Lockwood's testimony about the hundreds of assault victims with whom she had worked." ¶ 64, APP 132. However, that timing aggravated the improper comment upon facts not in evidence, because Lockwood impermissibly vouched for Beverly with statistics that claimed accusations were nearly always true, with mathematical near certainty.

This Court should clarify the law and make it clear that jurors may not simply incorporate as their own life experiences to bring to deliberations the unverified claims of others they may hear in voir dire from persons who are not part of the selected jury panel. Neither party should be permitted to make such arguments at closing as they are facts not in evidence.

D. Jury requests during deliberations.

During deliberations the jury asked two questions:

> Question Number 1, "We would like [Beverly]'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. Absent affirmative evidence that a jury abandoned its request, the appellate court may find that the trial court effectively refused to read back the testimony. *Id.* at 90.

In Mader's case, 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 Beverly'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 Beverly's fifteen page written statement and agreed to make redactions. Ultimately, the deliberating jurors were able to read Beverly's statement but did not hear Mader's recorded rebuttal to it. (R. 156: 76).

Beverly'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 included references to Beverly's virginity, in violation of the Rape Shield prohibition.

In the statement the jury received, Beverly 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 Beverly'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 Beverly 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 Beverly 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. 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.

The court of appeals ruled that defense counsel's failure to ensure that the jury was replayed the testimony about Mader's police interview was not deficient because it is only in hindsight of a guilty verdict that his performance seems unreasonable. ¶ 74; APP 136. The court said defense counsel had no way of knowing *why* the jury wanted to review that evidence. *Id.* But, this was not a strategic decision rendered suspect only in hindsight. Defense counsel was unequivocal about his desire to have his client's denials replayed for the jury. He wanted it heard again and thought the judge was going

to replay that testimony. He was deficient in not following through to ensure that it was.

The court of appeals placed an impermissible burden on a deliberating jury to ask again to rehear testimony even after they have already made clear their request. Absent an affirmative response by a jury that their request is withdrawn, a trial court must not effectively block their request by waiting for the jury to ask more than once.

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

Prejudice is evaluated by the totality of counsel's errors. Trial counsel's failure (1) to object to irrelevant, improper or unfairly prejudicial testimony that was inadmissible under Rape Shield, (2) to impeach misleading portrayals of Beverly with her Pure Romance evidence, (3) to object to the complainant's statement being provided to the jury, and (4) to insist that Mader's statement be played for the jury after their request, 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.

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.

The court of appeals ruled this was not a case where the evidence for and against guilt was in "equipoise." ¶ 86, APP

141. The court was impressed that Beverly gave "detailed accounts of years of sexual abuse" while "the evidence presented by Mader was, by comparison, meager." ¶ 84, 86, APP 140, 141. But facts Mader presented on cross-examination are just as much evidence as if presented in the defense case.

Significantly, Beverly's detailed accounts came only after she met with Detective Steier "multiple times." ¶ 7, APP 103. The detective explained that he told her to go back and check her diaries, the calendar and Facebook posts to get the kind of details she eventually came up with. (R. 119: 154-58), and Beverly herself used many Facebook posts and photographs during her testimony that prompted her to provide details. *Id.* at 48-59, 113-114).

Moreover, Beverly 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 would have 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 court of appeals seemed impressed by many of the supposed details Beverly provided, there were just as many contradicted by the evidence. Her claims about an attempted assault on Christmas Day was implausible because of the children's placement schedule. An incident where Mader supposedly forced his way into a bathroom to assault Beverly by removing the lock to the door was incredible because the door lock was inside where he could not reach the screws to remove the lock. The birth mark on Mader's penis was not where Beverly described it (and her mother may have provided

Beverly the information that Mader had a birthmark). Beverly describe in great detail several instances when she was in pain and bleeding and claimed that both her vagina and anus was torn and permanently damaged, yet there were no contemporaneous medical complaints or treatment and no records at all to corroborate any injury or permanent damage. Finally, the supposed contemporaneous corroboration from middle school friends that Beverly told them Mader was assaulting her was contradicted because she told each of them she was giving "road head" but at trial Beverly said she'd never given Mader oral sex, and Beverly also told one of her friend's mother that she lied about her whole story of her stepfather's assaults to get attention. This latter point actually supported the defense argument that Beverly was a big story teller and trotted out an old lie for a new purpose.

Importantly, the *court's* opinion of Beverly'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. 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 grant this petition and review the case, then vacate his conviction and order a new trial.

Dated this 5th day of July, 2023.

Respectfully submitted,
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CERTIFICATION

I hereby certify that this petition conforms to the rules contained in Sec. 809.19(8)(b), and (bm) for a brief and Sec. 809.62(4) for a petition for review. The length of this petition for review is 7988 words.

I further certify that filed with this Petition for Review, as a separate document, an appendix that complies with Sec. 809.62(2)(f) and that contains, at a minimum: (1) a table of contents; (2) the decision and opinion of the court of appeals; (3) the judgments, orders, findings of fact, conclusions of law

and memorandum decision of the circuit court necessary for an understanding of the petition; (4) any other portions of the record necessary to an understanding of the petition; and (5) a copy of any unpublished opinion cited under Sec. 809.23(a) or (b).

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using first names and last initials instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Electronically signed by Jerome F. Buting
Attorney Jerome F. Buting

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