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CLERK OF WISCONSIN
SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

No. 2022AP382-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

CONRAD M. MADER,

Defendant-Appellant-Petitioner.

RESPONSE TO PETITION FOR REVIEW

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This Court should deny Conrad M. Mader's petition for review. He requests error-correction in what is ultimately a fact-driven case in which counsel's few errors had no discernable effect on the outcome.

Nevertheless, if this Court disagrees and grants the petition, it should also consider the following issue:¹ whether recognized statistics that single-digit percentages of allegations of sexual assault are false violate the rules in *Haseltine* and *Morales-Pedrosa*² against one witness vouching for another's truthfulness.

ARGUMENT

I. None of the issues that Mader raises warrants this Court's review.

Mader asserts that because this case involves ineffective-assistance of counsel claims, it presents a "real and significant" constitutional question. (Pet. 6.) If simply presenting a claim of ineffective assistance satisfied the criterion in Wis. Stat. § (Rule) 809.62(1r)(a), this Court would be mired in such cases.

Mader also suggests that this case involves likely-to-recur open questions regarding: (1) the prosecution's allegedly arguing "matters outside the evidence" in closing, and (2) the court's duty in responding to a jury request for audiovisual materials during deliberations. (Pet. 7.) But Mader's characterizations of these claims and the relevant facts are misleading. Here, the prosecutor did not reference facts or matters outside of evidence in closing, but rather the jurors'

¹ See Wis. Stat. § (Rule) 809.62(3)(e) (requiring respondent to identify any additional issues not included in the petition for review).

² See *State v. Morales-Pedrosa*, 2016 WI App 38, 369 Wis. 2d 75, 879 N.W.2d 772; *State v. Haseltine*, 120 Wis. 2d 92, 352 N.W.2d 673 (Ct. App. 1984).

collective observation and experience during voir dire. (Pet-App. 33–35.)³ Likewise, the court soundly and correctly informed the jury that it could not send audiovisual materials to the jury room, but that it could view them in open court if it wished. (Pet-App. 38–39.) That communication was consistent with the holding in *Anderson*.⁴ (Pet-App. 40–41.)

To be sure, *Strickland* cases can involve open-yet-likely-to-recur questions that require clarification or guidance from this Court. Or they may involve a misapplication of *Strickland* that will cause confusion for courts and parties in later decisions. But this is not one of those cases.

Moreover, at bottom, any errors in this case were demonstrably harmless. In other words, even if Mader can establish unreasonable errors by counsel beyond those identified by the lower courts, he cannot show that they were prejudicial.

As the trial court and the court of appeals observed, “the evidence presented at trial weighed significantly in the State’s favor.” (Pet-App. 42.) Indeed, the victim’s accounts of Mader’s many assaults of her were accompanied by credible details of not only dates and locations, but also sounds, words, emotions, and physical feelings from the assaults. (Pet-App. 42–43.) Notably, the victim was able to describe a distinctive birthmark on Mader’s penis that was visible only when he was erect. (Pet-App 43.) Her testimony was also corroborated by testimony from former friends and her boyfriend that the victim had disclosed Mader’s assaults to them when they were occurring, and by her mother, who recalled consistent circumstantial details. (Pet-App. 43.) In

³ For all citations to the Petitioner’s Appendix, the State cites to the electronic page numbers.

⁴ *State v. Anderson*, 2006 WI 77, 291 Wis. 2d 673, 717 N.W.2d 74, *overruled on other grounds by State v. Alexander*, 2013 WI 70, 349 Wis. 2d 327, 833 N.W.2d 126.

comparison, Mader's defense, under the circumstances, was "meager." (Pet-App. 43–44.) Against the State's remarkably strong and compelling evidence, Mader cannot show more than the few insignificant errors by counsel that the court of appeals clarified and that the State largely conceded.

Mader's petition otherwise asks this Court to conclude that counsel made more errors than the court of appeals identified. (Pet. 7–8, 17–30.) This request, at bottom, is for fact-specific error correction, which this Court does not do. *See State ex rel. Dep't of Nat. Res. v. Wis. Court of Appeals, Dist. IV*, 2018 WI 25, ¶ 43, 380 Wis. 2d 354, 909 N.W.2d 114 (footnote omitted) ("We are not, primarily, an error-correcting tribunal, and we normally hear only those cases that present something more than just an error of law.").

Specifically, this Court need not explore whether counsel should have objected to evidence that the trial court, in its discretion, deemed admissible or to a permissible statement by the prosecutor in closing regarding the jurors' common experience during voir dire. It need not address whether counsel should have introduced evidence that the victim, as an adult, hosted sex toy parties, or whether counsel soundly agreed to the court's correct response to a jury request to view certain testimony. Rather, the circuit court and court of appeals identified the relevant law and facts and correctly concluded that counsel did not err in any of these respects. There is no new ground for this Court to clarify, nor is there any aspect of the court of appeals' decision adversely affecting Mader that should prompt this Court's review.

II. If this Court disagrees and grants Mader's petition, it should review one additional issue.

If this Court disagrees and believes that Mader has presented adequate issues warranting further consideration, this Court should decide the following additional issue: whether general statistics reflecting that single-digit

percentages of allegations of sexual assault are false violate the rule against one witness vouching for another's truthfulness. The court of appeals held that they do; this Court should reverse.

Here, the prosecutor elicited testimony from an expert witness that one study determined that three to eight percent of sexual assault allegations are false. (Pet-App. 18.) The court of appeals concluded that because that testimony suggested that more than 90 percent of victims tell the truth about sexual assaults, it constituted improper vouching under *Haseltine* and *Morales-Pedrosa*: “Even the research cited by [the expert] indicating that only three to eight percent of assault reports turned out to be false fits within the range we described in *Morales-Pedrosa* as more clearly objectionable.” (Pet-App. 21.)

That reasoning does not make sense. The statistics are the statistics, not a personal opinion that a witness is telling the truth. The fact that the statistics in question reflect only a single-digit probability that a victim in a sexual assault case is lying reflect a fact that the jury can weigh in its deliberations. It should not violate the principles under *Haseltine*. What's more, the court of appeals' reasoning here—that statistics would not violate *Haseltine* if they reflected a ten percent or higher rate of false reporting, but single-digit percentages cut too close to impermissible vouching, (Pet-App. 21)—would have a prosecutor either misrepresent or not inform a jury of accepted statistics while allowing the defendant to suggest that lying or false claims are more prevalent than they actually are.

Accordingly, the State requests review of this issue if this Court is inclined to grant Mader's petition. That said, the issues raised by Mader do not warrant further consideration, and the State's interest in finality for the victim in this case outweighs its interest in this Court's addressing this additional issue. This Court should deny review.

CONCLUSION

This Court should deny the petition for review.

Dated this 19th day of July 2023.

Respectfully submitted,

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Electronically signed by:

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FORM AND LENGTH CERTIFICATION

I hereby certify that this petition or response conforms to the rules contained in Wis. Stat. §§ (Rules) 809.19(8)(b), (bm) and 809.62(4) for a petition or response produced with a proportional serif font. The length of this petition or response is 1188 words.

Dated this 19th day of July 2023.

Electronically signed by:

Sarah L. Burgundy
SARAH L. BURGUNDY
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CERTIFICATE OF EFILE/SERVICE

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

Dated this 19th day of July 2023.

Electronically signed by:

Sarah L. Burgundy
SARAH L. BURGUNDY
Assistant Attorney General