STATE OF WISCONSIN

COURT OF APPEALS DISTRICT I

Case No. 2016-AP-231-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN A. AUGOKI,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DAVID BOROWSKI PRESIDING

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

ISSUES PRESENTED

Whether the Court's allowance of prior bad acts of the defendant-appellant into evidence was proper under current Wisconsin Law and whether the defendant-appellant's confrontation rights under the Sixth Amendment to the United Sates Constitution were violated when the circuit court limited the cross-examination of the State's expert witness.

STATEMENT ON PUBLICATION AND ORAL ARUGMENT

Augoki does not request publication or oral argument. This case involves the application of well settled principles of law and the parties briefing with adequately address all issues.

STATEMENT OF FACTS

The defendant-appellant, John Augoki ("Augoki") originally is from Sudan. (116:10). He immigrated to the United States. *Id*. Apeu Acuil ("Apeu"), also originally from South Sudan, immigrated to the United States. *Id*. at 8. Both Apeu and Augoki landed in Connecticut. (116:11). While in Connecticut Augoki and Apeu met, fell in love and had a child, Nygur Abraham. *Id.* at 13-16. Before meeting Augoki, Apeu had a child with a different man. (116:8). This child was SA. While Augoki is not SA's biological father, SA grew up believing that Augoki was SA's biological father.

Some of Apeu's family had also immigrated from Sudan to the United States and was living in Connecticut at the same time as Apeu and Augoki. (114:38). Specifically, Anyikor Acuil ("Anyikor"), Apeu's sister, was living in Connecticut at the same time Apeu and Augoki became romantically involved. *Id*. Anyikor claims Apeu became pregnant with Nygur by Augoki when Apeu was 15 or 16 years old. (114:39).

It was no secret that Anyikor did not particularly like Augoki. *Id*.

Because of Anyikor's distain for Augoki, Apeu and Augoki decided to move their family to Milwaukee. (116:17). After the move to Milwaukee, Apeu and Anyikor would

occasionally talk on the telephone. (114:44). Additionally, Anyikor and SA would talk on the telephone as well. *Id*.

In the summers of 2010 and 2011, Nygur and SA went to visit their Aunt Anyikor in Connecticut. *Id*. Both of these visits lasted several weeks. *Id*. In between the visits, Anyikor claimed that SA revealed to her that Augoki was "touching" her. (114:46). Anyikor then claims that during the 2011 visit, SA described in greater detail the "touching" that Augoki was performing. *Id*. at 47-8. Anyikor, then alerted the Wisconsin Department of Child Welfare, while SA and Nygur were still in Connecticut. *Id* at 50.

After the visit with her Aunt, SA was taken directly to Child Protection Center ("CPC"). (116:28). At CPC, SA was interviewed by Amanda Didier, a forensic interviewer employed by CPC. (115:29). The interview was recorded and during that interview, SA again accused Augoki of sexual assault. *Id*. at 32.

STATEMENT OF THE CASE

On July 17, 2011, Augoki was charged with one count of first degree sexual assault of a child – intercourse with a person under 12 years of age. (2:1) The initial appearance commenced on the same day. (81:1). Augoki's preliminary hearing was held on August 8, 2011 and he was bound over to the trial court. (83:20-27).

Augoki had two jury trials. The first trial ended in a mistrial. (97:21). After numerous pretrial court appearances, the first jury trial commenced on February 6, 2012. (91:1). Jury selection commenced and was completed on February 7, 2012. (92:1). After jury selection, the State presented its first witness, SA. (93:125). SA was the alleged victim in the case. *Id*. SA testified that Augoki had sexual intercourse with her on several different occasions. (93:32-54). SA testified that

this sexual intercourse included penis to vagina contact and that there was penetration. *Id*. SA testified that she first reported the assault several years after it happened to Anyikor. *Id*. Anyikor did not testify at the first trial.

After SA's testimony, Deborah Bretl – a licensed nurse practitioner who examined the victim – testified. Nurse Bretl testified to that she examined SA after SA had reported the assault to the police. (93:87) She testified that the exam was "normal." *Id*. at 99. On cross examination she was questioned about the veracity of the report and about the findings of that report. *Id*. at 103-113. Finally, Bretl testified that she could not say whether SA was sexually assaulted or not. *Id.* at 112.

State's next witness was Nygur Abraham. *Id*. at 124 Ms. Abraham is Augoki and Apeu's daughter. *Id.* at 124-135. She is also SA's half sister. *Id*. at 125. Ms. Abraham testified that she went with SA to Connecticut to visit her Aunt Anyikor. *Id*. at 124-135. NA testified that while she was in Connecticut SA told her and Anyikor that Augoki was assaulting SA. *Id*.

The next State's witness was Milwaukee Police Detective Sarah Blomme. (94:2). Blomme testified that she had investigated the allegations SA made against Augoki. *Id*. She also testified that she interviewed Apeu Acuil after Apeu learned of the allegations and that Apeu Acuil was "hostile" and had "negative energy." *Id.* at 19.

The State then rested and the defense began its case. In the first trial the defense put on several witnesses including Augoki. (95:78). Augoki denied SA's allegations. *Id*. at 91. Ultimately, the jury could not reach a unanimous verdict and the Court declared a mistrial. (97:21).

The case was ultimately reset for trial. After numerous delays and adjournment requests by both the defense and the State the case proceeded to trial a second time. (111:1-23).

At the second trial the State amended the information to include two additional counts of first degree sexual assault of a child for a total of three counts of first degree sexual assault of a trial. (24:1). The State's witnesses at the second trial were the same as the State's witnesses at the first trial with one notable exception, Anyikor Acuil, the Aunt who SA reported the assaults to, was present to testify at the trial. (114:36). Anyikor testified about the conversations she had with SA when SA reported the assaults to her. *Id.* at 46. Anyikor also testified about the relationship she had with Augoki and her sister, Apeu. *Id.* at 37-45. Further, Anyikor testified about prior bad acts, crimes or wrongs that Augoki had committed, specifically that he got Apeu pregnant when Apeu was 15 or 16 years old. *Id.* at 41.

There were other notable differences in the witnesses' testimony at the second trial. Nurse Bretl was unable to testify consistent with her previous testimony regarding a "normal" sexual assault exam. (115:43-53). This disputed testimony is the subject of a portion of the argument section of this case and is discussed in detail below.

There were several differences in SA's testimony. In the first trial she testified that the assaults happened a total of five or six times. (93:38). In the second trial, she testified that the assaults happened once a week for a number of years. (113:77).

ARGUMENT

I. The State improperly introduced evidence of prior wrongs, acts or crimes to demonstrate that the defendant acted in conformity therein in violation of Wis. Stat. 904.04(2)(b).

An appellate court will review the admission of other acts evidence under an erroneous exercise of discretion standard. *State v. Marinez*, 2011 WI 12, ¶17, 331 Wis.2d 568, 583, 797 N.W.2d 399, 409 (citation omitted). The reviewing court is to uphold the circuit court's ruling if it "examined the relevant facts, applied a proper standard of law, used a demonstrated rational process and reached a conclusion that a reasonable judge could reach." *Id.* (citation omitted). If the circuit court fails to reveal the basis for its ruling, the reviewing court will independently review the record and determine if it provides an appropriate basis for the circuit court's decision. *Id.*

Wis. Stat. 904.04(2)(a) states "General admissibility. Except as provided in par. (b) 2., evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

There is a three step analysis that the Court must go through to determine the admissibility of other acts evidence under § 904.04(2)(a). *State v. Sullivan*, 216 Wis.2d 768, 772, 576 N.W.2d 30 (1998). The steps are: (1) Is the other acts evidence being introduced for an acceptable purpose, i.e. to establish motive, intent, preparation, plan, knowledge, identity or absence of mistake or accident; (2) Is the other acts evidence relevant under Wis. Stat. § 904.01; (3) Is the probative value of the other acts evidence substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence? *Sullivan*, 216 Wis.2d at 772-4.

There were two instances of other acts evidence that were improperly allowed in Augoki's case. The first piece of improperly allowed other acts evidence was introduced during the testimony of the State's witness Anyikor Acuil, the victim's aunt. During direct examination, the prosecution, through Anyikor Acuil, introduced evidence to show that Augoki impregnated SA's mother, Apeu, with Apeu was 15 or 16 years old. The exchange is as follows:

> Q: When did – John when did Mr. Augoki become involved with your sister?
>
> A: I honestly don't know, but he used to come to my house, and then when I find out my sister was pregnant, so I didn't know when they have relationship.
>
> Q: How old was your sister at the time?
>
> A: She was 16, 15. Not good with – because she was going to Sudan, so I'm not good with the years.

(114:40-41).

The second instance of improperly allowed evidence dealt with the same situation, whether Augoki had an improper sexual relationship with Apeu when she was 15. The second instance happened during the prosecution's cross-examination of Apeu. During this exchange, the prosecution was attempting to establish that Apeu Acuil was 16 years old when Ms. Abraham (Apeu and Augoki's biological daughter) was born. This is the same factual scenario the prosecution was establishing with Anyikor's above testimony. The relevant portion of the exchange is as follows:

Q: So if you were 20 in 2005, which makes your birth date 1984, you were in fact 13 to 14 years old when you had your first child. Correct?

A: No. That's because it's not my birth date, no.

Q: Right. And you said you became pregnant with Sara when you were in Sudan at that age. Right?

A: Pregnant with Sara when I was 18.

Q: I just have to do some math. Which would have made your birth date 1980.

A: 1981, that's my birth date.

Q: And if according to the Yale Daily News article where you told them you were 20 and Nygur was born in 2001, you would have been about 16 or 17 if the math is correct. Right?

A: No.

(116:33-35).

This exchange was previously objected to by defense counsel twice. The Court overruled the objection both times. The first time the Court indicated that counsel had "opened the door" without any further explanation. The second time, the Court indicated that "clarification" was needed.

Clearly, this is a prior crime, bad act or wrong. It is illegal to have intercourse with someone under the age of 16. *See Wis. Stat.* § 948.02.The question then becomes whether, under the three step analysis in *Sullivan*, this evidence should have been allowed.

1. Evidence of Augoki's prior bad acts was not introduced for proper purpose under §904.04(2)(b).

The first step is whether it was allowed for a proper purpose under § 904.04(2)(b). § 904.04(2)(b) allows other acts evidence if it is introduced to establish motive, opportunity, plan, intent, knowledge or absence of mistake.

In this case, the other acts evidence was not introduced to show motive, opportunity, plan, intent, knowledge or absence of mistake. The evidence does not demonstrate any motive for the crimes. It does not prove that Augoki had the opportunity to commit the crimes or that he had any plan to commit the crimes. The evidence does not demonstrate his intent while committing the crimes or that he was somehow mistaken.

The only possible reason that the State wanted to introduce this evidence was to demonstrate that Augoki had committed sexual assault crimes in the past and because of that past he was likely to commit them again. This evidence put Augoki into a very negative light in front of the jury.

2. Even if the prior bad acts evidence was introduced for proper purpose, it was not relevant under § 904.04(2)(b).

Assuming *arguendo* that the evidence was introduced for a property purpose under § 904.04(2)(b), the next step in the *Sullivan* analysis would be whether the evidence was relevant under § 904.01. *Sullivan*, 216 Wis.2d at 772. Determining relevance under § 904.01 is a two-step process. *Id*. First, it must be determined whether the other acts evidence relates to the fact or proposition that is of consequence to the determination of the action. *Id*.

Second, is whether the evidence has probative value or whether the other acts evidence has a tendency to make the consequential fact or proposition more probable or less probable than it would be without the evidence. Probative value depends upon the other incident's nearness in time, place and circumstances or the fact or proposition to be proved. *Sullivan*, 216 Wis.2d at 786 (*Citing Whitty v. State*, 34 Wis.2d 278, 149 N.W.2d 557 (1967)).

The fact that Augoki allegedly impregnated Apeu when she was 15 years old is not of any consequence to the determination of whether Augoki sexually assaulted SA. SA was 10 years old when she alleges Augoki assaulted her. SA's assault would have happened years after Apeu was impregnated by Augoki. There is nothing in the record to indicate the specifics of the alleged improper sexual relationship between Augoki and Apeu. Thus, there is not any evidence to demonstrate that the alleged assault of Apeu and the assault of SA were so similar in place, time or circumstance so as to increase its probative value.

The alleged improper sexual relationship between Apeu and Augoki had nothing to do with determining a critical fact that was of consequence to the determination of the action. Moreover, the evidence of Augoki's improper sexual relationship with Apeu does not have any probative value that would tend to make it more or less likely that he assaulted SA.

3. Even if relevant and introduced for a proper purpose, the prior bad acts evidence probative value was substantially outweighed by the danger of unfair prejudice.

Finally, even if the evidence of Augoki's improper sexual relationship with Apeu was introduced for a proper

purpose and was relevant, its probative value was substantially outweighed by the danger of unfair prejudice. As the Supreme Court stated in *Sullivan*, the extreme danger of allowing this type of evidence into the record is that it is "an invitation to focus on an accused's character magnifies the risk that jurors will punish the accused for being a bad person regardless of his or her guilt of the crime charged." *Sullivan*, 216 Wis.2d at 783.

If the proffered evidence is highly relevant to the crime charged, it has a very high probative value where as evidence that is only slightly relevant has a low probative value. *See State v. Hurley*, 2015 WI 35 ¶87, 216 Wis.2d 529, 585, 861 N.W.2d 174. Unfair prejudice will result when the other acts evidence "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." *Sullivan*, 216 Wis.2d at 789-90.

The risk the Court in *Sullivan* was weary of is the exact type of prejudice that Augoki suffered in this case. Anyikor's testimony regarding Augoki's improper sexual relationship with Apeu was introduced solely to demonstrate that Augoki was a bad person, that he had sexually assaulted someone before and that because he had done it before he was likely to do it again. The danger of this prejudice substantially outweighed any sort of probative value this evidence had.

Defense counsel did object to this questioning to Apeu and thus the issue is preserved. However, it is true that trial counsel did not object to Aynikor's testimony regarding Augoki's alleged improper sexual relationship with Apeu or ask for a mistrial. Nevertheless, under certain circumstances, there is not a waiver. *State v. Rockette*, 2006 WI App 103,¶ 29, 294 Wis.2d 611, 718 N.W.2d 269. Wisconsin recognizes

the plain error doctrine. *See Wis. Stat.* § 901.03(4). The plain error doctrine allows a Court to review errors that were otherwise waived. *See State v. Mayo*, 2007 WI 78, 301 Wis.2d 642, 734 N.W.2d 115.

A plain error is one that is so plain or fundamental that a new trial or other relief must be granted even though the error was not objected to a trial. *State v. Jorgensen*, 2008 WI 60, ¶ 21, 310 Wis.2d 138, 754 N.W.2d 77. "[T]he existence of a plain error will turn on the facts of the particular case." *Id* (quoting *Mayo,* ¶ 29). There is no bright line rule to determine whether a reversal is warranted. *Jorgensen*, ¶ 22. Thus, the evidence that was admitted and the seriousness of the error are particularly important. *Id*. If the defendant shows that the unobjected to error is fundamental, obvious, and substantial, the burden then shifts to the State to show the error was harmless. *Id* at ¶ 23.

The other acts evidence allowed by the Court was so fundamental, obvious and substantial that a new trial must be granted. As was stated above, there is an extreme danger that this evidence focused the jury's attention not on the credibility of the victim's testimony or the plausibility of her recollection of events, but on the character of the Augoki. Testimony about Augoki alleged prior improper sexual relationship with Apeu added nothing to determining whether the facts alleged by SA actually happened. The only thing this testimony did was slander Augoki's character, shift the attention away from the possible inconsistencies in SA's story and attempt to confuse the jury by bringing in evidence of a separate crime.

II. Augoki's right to confrontation under the Sixth Amendment to the United States Constitution and his right to cross-examination under Wisconsin Law was violated because he was denied effective cross-examination of the State's witnesses.

"Trial courts possess considerable latitude in determining the proper scope of cross-examination, the matter resting in the sound discretion of the court." *Haskins v. State,* 97 Wis.2d 408, 422, 294 N.W.2d 25, 35 (1980), quoting *Johnson v. State,* 75 Wis.2d 344, 361, 249 N.W.2d 593, 602 (1977). "The trial court's ruling will not be reversed unless it clearly appears that the trial court abused its discretion and that the error affected a substantial right of the complaining party and probably affected the result of the trial." *Haskins,* 97 Wis.2d at 422, 294 N.W.2d at 35.

The confrontation clause of the Sixth Amendment to the United States Constitution states: "the accused shall enjoy the right . . . to be confronted with the witnesses against him." The confrontation clause requires an adequate opportunity for cross-examination. *Pointer v. Texas*, 380 U.S. 400, 403-08 (1965). The Wisconsin Statutes have put some limits on this clause under *Wis. Stat*. § 906.11(2). § 906.11(2) allows cross-examination of a witness for any matter relevant to the issue in the case. It also allows the Court to limit the scope of cross examination to matters that were testified to on direct examination if doing so in in the interests of justice. *Id*.

Augoki's confrontation rights were denied when defense counsel was limited in his cross-examination of Deborah Bretl, a nurse who testified for the State. During direct examination, the State introduced Nurse Bretl's report as evidence. Nurse Bretl also testified extensively about the

physical features, including SA's hymen, she observed during SA's exam. (115:52-66).

Defense counsel then attempted to cross-examine Nurse Bretl about her findings. When questioned about the findings in her report, and whether those findings were consistent with someone who had been sexually abused for an extended period of time the Court began to stop defense counsel from questioning Nurse Bretl. Particularly, defense counsel attempted to question Nurse Bretl about her report and the condition of SA's hymen that was noted in the report. (115:52). When Nurse Bretl testified she didn't understand the question and was confused, defense counsel attempted to impeach her with a transcript of her testimony at the previous trial. *Id*. at 53. The State objected to the questioning. Defense counsel was asking the same questions, word for word, that Nurse Bretl answered in the previous trial. *Id*. 52-66,

At this point, the Court stopped the questioning, ordered the jury out of the courtroom and began to hear arguments about the State and defense regarding this line of questioning. At some point during the arguments, the Court gave its opinion on the hymen and how it applied to the case. (115:61). The Court eventually ruled that this line of questioning was vague and not relevant and ordered that defense counsel could not go further with this line of questioning. *Id*. 63-66.

In her report, Nurse Bretl wrote that the hymen was "redundant" and there were "no disruptions or tears noted. (115:61). She was asked about this "redundant" hymen on direct examination. *Id*. She also stated that the hymen was normal. *Id*. at 44. Bretl also testified at the previous trial and on cross examination was asked and answered as follows:

Q: Is a hymen always intact?

A: No.

Q: What causes a hymen not to be intact?

A: If there's been penetration into that area, it could cause the hymen to be thinned out and will resolve in that area?

Q: Thin out and resolve?

A: The hymen is no longer present in certain parts.

Q: And that could be caused from penetration of a penis, correct?

A: It could be, yes

(115:52-66).

At the second trial, counsel attempted to ask Bretl the same questions about hymens:

Q: . . . But the hymen is not always intact?

A: Yes, it is. It is intact.

Q: It is always intact?

A: It should be intact.

……..

Q: Hymens, there are times where hymens thin out and resolve correct?

THE COURT: Where they do what?

ATTORNEY AHMAD: Thin out and resolve.

> A: I'm not sure what you are asking. At this point, the State objected based on vagueness and there were arguments as to the relevance and admissibility of the questioning. The Court noted that "I don't think hymens go away. Maybe they do. I'm a man as you've noticed."

(115:52-53).

Nurse Bretl was able to explain what she meant by "thin out and resolve" in detail at the trial on February 7, 2012. But at the trial on December 11, 2013 she did not understand what "thin out and resolve" meant. The defense attempted to impeach Nurse Bretl by using her prior trial testimony. However, the Court would not allow the defense to impeach the witness with that testimony. This was a significant error by the Court.

Defense counsel is always able to use a witnesses' prior statements for cross examination at trial. In fact, the United States Supreme Court stated in *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354 (2004) that "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his [or her] prior testimonial statements." *Crawford*, 541 U.S. at 59 n.9 (citation omitted). Thus, the Confrontation Clause allows the defense to question a witness about the prior statement she made at trial. In this case, counsel was stopped by the Court from doing so.

Moreover, the Court's opinion about the usefulness of the defense's questioning about the hymen should have no bearing on whether that questioning should be allowed in this case. Nurse Bretl's report that the defense was reading from was already introduced as evidence. The defense was

question what was in that report. Certainly, if the Court believed the report was relevant evidence then the defense has a right to question the nurse about what was in her report.

Finally, the Court was clearly concerned that the questions being asked of the nurse by defense counsel were vague. This is an erroneous concern. Defense began the questioning by having Nurse Bretl look at her report. Clearly, the questions defense counsel was asking had to do with the terms as they were used in her report. Defense counsel was using terms Nurse Bretl used in her report. Moreover, these were the same terms (and in some cases the same questions) that were used in her testimony in the first trial.

CONCLUSION

For the foregoing reasons, Augoki requests this court reverse the judgment of conviction and remand the case back to the circuit court for a new trial.

Dated this 26th day of May, 2016

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CERTIFICATION AS TO FORM/LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of the brief is 4,163 words.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

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CERTIFICATION AS TO APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of 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 circuit court and Court of Appeals; and (3) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court 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.

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.

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