STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP231

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JOHN A. AUGOKI,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION AND AN ORDER DENYING MOTION FOR POSTCONVICTION RELIEF, ENTERED IN THE MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE DAVID BOROWSKI AND M. JOSEPH DONALD, PRESIDING

PLAINTIFF-RESPONDENT'S BRIEF

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ISSUES PRESENTED

1. Did error occur when the State introduced evidence that the victim's mother may have been a minor when Augoki impregnated her with a second child?

The circuit court answered: No. (78:2.)

2. Did the circuit court violate Augoki's right to confrontation when it limited his cross-examination of the nurse who examined the victim about the nurse's prior testimony at Augoki's first trial?

The circuit court answered: No. (78:2-3.)

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The State believes that neither oral argument nor publication is necessary. The parties have fully developed the arguments in their briefs and the issues presented involve the application of well-settled legal principles to the facts.

SUPPLEMENTAL STATEMENT OF THE CASE AND FACTS

The State will supplement Augoki's statement of the case and facts as appropriate in its argument.

INTRODUCTION

The State charged Augoki with first-degree sexual assault of a child under the age of 12. (2.) The jury deadlocked in Augoki's first trial and the circuit court declared a mistrial. (97:21.) The State filed an amended information, alleging three counts of first-degree sexual assault of a child under the age of 12. (24.) The Honorable

David Borowski presided over Augoki's second trial. The jury found Augoki guilty of each charged offense. (52; 53; 54.)

Augoki sought postconviction relief. (73.) The circuit court, the Honorable M. Joseph Donald, denied Augoki's motion in a written decision and order. (78.)

Augoki raises on appeal the same issues that he raised in his postconviction motion. First, Augoki contends that the State impermissibly presented other act evidence when it introduced evidence that Augoki had impregnated SA's[1] mother when she was 15 or 16 years old. (Augoki Br. 5-12.) The circuit court rejected this claim. It concluded that the evidence was not other act evidence because the State merely sought to clarify the mother's age when she gave birth. Further, the circuit court held that the evidence would have been admissible as other act evidence to more fully explain interfamilial relationships between the mother, her sister, and the defendant. It was also relevant to rebut Augoki's challenge to the sister's credibility. Finally, even if the evidence were improper other act evidence, "it was not plain error to admit this evidence because it was not so fundamental, obvious and substantial that a new trial must be granted." (78:2.)

Second, Augoki argues that the circuit court improperly limited his right to confront Deborah Bretl, the nurse who examined SA, about her testimony from the first trial, specifically as it related to the condition of SA's hymen. (Augoki Br. 13-17.) In its order denying postconviction relief,

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[1] The State uses the initials SA to identify the victim. It identifies her sister with the initials, NA. It identifies their mother with the pseudonym, April. It identifies SA's and NA's aunt with the pseudonym, Angela. Angela and April are sisters. None of them share the Augoki's last name. *See* Wis. Stat. § (Rule) 809.86(4).

the circuit court found that it had made a reasoned decision limiting Augoki's cross-examination of Bretl. It concluded that Augoki did not have a constitutional right under the Confrontation Clause to examine Bretl about matters that were "vague, redundant and misleading to the jury." (78:3.) Further, the circuit court found that even if it had erred, "the error was insignificant, as the defense was still able to demonstrate to the jury that the results of S.A.'s examination were normal with no visible injuries and no sign of sexual assault." (78:3.)

As the State will demonstrate, the circuit court properly exercised its discretion at trial and properly denied Augoki's motion for postconviction relief.

ARGUMENT

I. The State did not improperly introduce other act evidence when it asked witnesses how old SA's mother was when she became pregnant with her second child.

Augoki contends that the State improperly elicited testimony about the age of SA's mother April when Augoki impregnated her with her second child, NA. He contends that testimony about the mother's age constituted impermissible other act evidence under Wis. Stat. § 904.04(2)(a). (Augoki Br. 5-12.)

Augoki's claim should fail on several grounds. First, Augoki forfeited the claim by failing to timely object and object with the requisite specificity to the questions. Second, there was no error because the evidence was not other act evidence, and even if it were, it satisfied the requirements for admission under Wis. Stat. § 904.04(2). Finally, any error in its admission was harmless.

A. Relevant facts.

Augoki's theory of defense was that he did not assault SA. Rather, he contended that SA's aunt Angela influenced SA to fabricate the sexual assault allegations. (117:29-32.) In his opening statement, Augoki asserted that Angela was biased against him because he was of a lower caste than Angela and April's family. In addition, Augoki maintained that Angela was upset because Augoki "stole" April without paying the dowry after Angela had already arranged a marriage for April and received the dowry for it. (113:24-25.) Angela became further irate when Augoki fathered April's second child, NA. (113:25.) Angela sought to undermine SA's relationship with Augoki by informing her that Augoki was not her father. (113:27-28.) Augoki argued, "that's why we're here because [Angela's] vengeance turned into this lie." (113:25.)

During Angela's testimony, the State asked her questions about April's age when Augoki impregnated her.

> Q: 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.
>
> Q: What was your reaction to learning that she was pregnant by the – by Mr. Augoki at that age?

A: I wasn't happy at the beginning because she was studying, going to high school and then we can enroll [SA] to a day-care, so we . . . try to help her so she can continue her education.

(114:40-41). Augoki did not object to Angela's testimony.

On cross-examination, Augoki asked Angela if there ever came a time when SA stayed with her, rather than live with Augoki and April. Augoki suggested that Angela wanted to keep SA so that she could keep the dowry when SA got married. (114:56-57.) On redirect examination, Angela explained that she intended to take care of SA only until Augoki and April found a place to live. The State asked how much older Augoki was when April got pregnant at age 15 or 16. Angela replied that she did not know. When the State attempted to ask another question about Augoki's age, Augoki objected: "She just said she didn't know his age." (114:68.) The judge overruled the objection and Angela replied that he was in his twenties. (114:68.)

During the State's cross-examination of April, the following exchange occurred regarding the age that she gave birth to her first child.

Q: In fact, you talked about being in school while your daughters, [SA] and [NA], ages 5 and 3, were in day-care. Right?

A: No, I don't understand that.

Q: Okay. And you told the Yale Daily News with your very unique name that you were 20 years old. Right?

A: No.

Q: Okay. Which means that if you had been 20 years old in 2005, your birth date would be

1984. Right? I mean the math is correct. Right?

A: That would be.

[TRIAL COUNSEL]: Objection. She already testified that that was not correct.

THE COURT: Overruled. This is cross. She needs to clarify. She said two different things. Go ahead.

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 [SA] when you were in Sudan at that age. Right?

A: Pregnant with [SA] 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 [NA] was born in 2001, you would have been about 16 or 17 if the math is correct. Right?

A: No.

(116:34-35). Augoki did not otherwise object to this line of questions.

B. Augoki failed to object to the testimony about April's age on the grounds that it constituted improper other act evidence and forfeited his right to raise this claim on appeal.

1. General legal principles related to failures to object, forfeiture, and the plain error rule.

Under Wis. Stat. § 901.03(1), a party may not predicate a claim of error:

> unless a substantial right of the party is affected; and
>
> (a) *Objection*. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context[.]

Id.

"[S]ome rights are forfeited when they are not claimed at trial; a mere failure to object constitutes a forfeiture of the right on appellate review." *State v. Ndina*, 2009 WI 21, ¶ 30, 315 Wis. 2d 653, 761 N.W.2d 612. The forfeiture rule allows a court to avoid or correct any errors "with minimal disruption of the judicial process, eliminating the need for appeal." *Id*.

Under the plain error doctrine, a court may review errors that affect a party's substantial rights that would otherwise be forfeited through the party's failure to object. *See* Wis. Stat. § 901.03(4); and *State v. Miller*, 2012 WI App 68, ¶ 18, 341 Wis. 2d 737, 816 N.W.2d 331. But appellate courts apply the plain error doctrine sparingly, when the

error is fundamental, "obvious and substantial." *Id*. (internal citation and quotations omitted).

2. Augoki has forfeited his right to raise this claim on appeal.

Augoki forfeited his challenge to the State's introduction of evidence about April's age by failing to timely object to it on the grounds that it constituted improper other act evidence. The record demonstrates that Augoki did not timely object to questions about April's age when he impregnated her. And when he did object, Augoki did not do so on the grounds that the testimony constituted inadmissible other act evidence.

Augoki did not object when the State briefly broached the subject during Angela's testimony on direct. (114:40-41). On redirect examination, the State asked about April's and Augoki's ages when April had become pregnant with her second child. Augoki objected to a question about Augoki's age, but on the grounds that Angela "just said she didn't know his age." (114:68.) The objection was not grounded in a claim that the State was seeking to introduce improper other act evidence.

During the State's cross-examination of April, the State asked April if she would have been 20 years old in 2005 if her birth date was in 1984. Augoki objected, "She already testified that that was not correct." (116:34.) The circuit court replied, "Overruled. This is cross. She needs to clarify. She said two different things." (116:34.) The State then proceeded to question April about her age when she gave birth to SA and later NA. (116:34-35.) Augoki did not specifically object to the questions on the ground that the answers would lead to the admission of inadmissible other act evidence.

Had Augoki made a timely objection and stated the basis for it during Angela's testimony, the circuit court could have addressed whether this testimony was logically or legally relevant, or whether it constituted other act evidence. Had the circuit court agreed with Augoki, it could have struck the testimony and issued a limiting instruction to the jury. Likewise, it could also have foreclosed the State from prospectively pursuing this line of questioning during April's testimony. But Augoki never provided the circuit court with the opportunity to timely address this issue. Under the circumstances, Augoki has forfeited his right to raise this claim on appeal.

3. Any error here would not rise to the level of a plain error.

This Court should not apply the plain error doctrine to reach this forfeited issue. As the State will demonstrate in the next section, the circuit court did not err by admitting this evidence. But even if it did err, the error did not rise to the level of plain error that affected Augoki's substantial rights. Wis. Stat. § 901.03(4). The discussion of April's age when she gave birth to Augoki's child NA covers no more than a few transcript pages in a multiday jury trial. Augoki has not suggested that the State asked the jury to draw an impermissible inference that Augoki must have assaulted SA because he had sex with April at a young age. The alleged error here was not so fundamental, obvious, or substantial to warrant this Court's application of the plain error doctrine.

C. The challenged evidence was admissible.

1. General legal principles governing the admissibility of evidence including other act evidence.

Standard of review. The decision to admit or exclude evidence rests within the circuit court's discretion. *State v. Warbelton*, 2009 WI 6, ¶ 17, 315 Wis. 2d 253, 759 N.W.2d 557. An appellate court will only reverse a decision to admit or exclude evidence when the circuit court has erroneously exercised its discretion. *Id*. An appellate court will not find an erroneous exercise of discretion if the record contains a reasonable basis for the circuit court's ruling. *State v. Hammer*, 2000 WI 92, ¶ 21, 236 Wis. 2d 686, 613 N.W.2d 629.

Admissibility of evidence generally. Evidence is not admissible unless it is relevant. Wis. Stat. § 904.02. Relevance is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Wis. Stat. § 904.01. But a circuit court may exclude relevant evidence "if its probative value is 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." Wis. Stat. § 904.03

Admissibility of other act evidence. Wisconsin Stat. § 904.04(2)(a) permits the introduction of other act evidence. Courts apply a three-step analysis to determine the admissibility of "other acts." *State v. Sullivan*, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998).

First, the evidence must be offered for an admissible purpose under § 904.04(2)(a), such as to establish motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident, although this list is not exhaustive or exclusive. *Sullivan*, 216 Wis. 2d at 772. Courts have also admitted other act evidence to show the context of the crime, to provide a complete explanation of the case, and to establish the credibility of victims and witnesses. *State v. Hunt*, 2003 WI 81, ¶¶ 58, 59, 263 Wis. 2d 1, 666 N.W.2d 771.

Second, the evidence must be relevant, which means it must both be of consequence to the determination of the action, and must also have a tendency to make a consequential fact or proposition more probable or less probable than it would be without the evidence. *Sullivan*, 216 Wis. 2d at 772; *see also* Wis. Stat. § 904.01. "To be relevant, evidence does not have to determine a fact at issue conclusively; the evidence needs only to make the fact more probable than it would be without the evidence." *State v. Hartman*, 145 Wis. 2d 1, 14, 426 N.W.2d 320 (1988).

Third, the probative value of the other act evidence must not be substantially outweighed by the considerations set forth in Wis. Stat. § 904.03, including the danger of unfair prejudice, confusion of the issues or misleading the jury, or undue delay, waste of time or needless presentation of cumulative evidence. *Sullivan*, 216 Wis. 2d at 772-73. The opponent of the other act evidence must demonstrate that any unfair prejudice that would flow from the admission of the other act evidence substantially outweighs its probative value. *Hunt*, 263 Wis. 2d 1, ¶ 53.

Evidence that relates directly to an element of the crime or that directly supports a theory of defense is not other act evidence. *See State v. Johnson*, 184 Wis. 2d 324, 349, 516 N.W.2d 463 (Ct. App. 1994) (Anderson, J.,

concurring). Likewise,"[e]vidence is not 'other acts' evidence if it is part of the panorama of evidence needed to completely describe the crime that occurred and is thereby inextricably intertwined with the crime." *State v. Dukes*, 2007 WI App 175, ¶ 28, 303 Wis. 2d 208, 736 N.W.2d 515.

2. The State did not improperly introduce evidence about April's age at the time she had NA.

In its order denying Augoki's postconviction motion, the circuit court correctly held that evidence regarding April's age at the time Augoki impregnated her was properly admitted. It determined that this was not other act evidence because the State did not suggest that April's pregnancy was the result of a prior crime or bad act. It also found that the evidence was admissible to rebut Augoki's challenge to Angela's credibility and motives. (78:2.)

The circuit court also applied an other act analysis. It found that the testimony was admissible for a proper purpose because it provided context and more complete background necessary to an understanding of the case. The testimony was relevant to Angela's credibility and motive as Augoki placed those matters in issue. Finally, the evidence was not prejudicial because no one suggested Augoki had committed a crime by entering into a relationship with April. Further, the factual record itself did not establish that April was a minor when Augoki impregnated her. (78:2.)

The record supports the circuit court's decision. At trial, the State called Angela, to testify about SA's report that Augoki sexually assaulted her. (114:46-50.) In his opening statement, Augoki challenged Angela's credibility, asserting "that's why we're here because [Angela's] vengeance turned into this lie." (113:25.) Augoki identified

several reasons why Angela was biased against him. (113:24-25).

In light of Augoki's attack on Angela's credibility, it was appropriate for the jury to understand Angela's relationship with Augoki and April. Angela testified that April's pregnancy at age 15 or 16 upset Angela because it interfered with April's high school education. (114:40-41). Her testimony also rebuts Augoki's claim that Angela was upset because his relationship with April interfered with a previously arranged marriage. Under the circumstances, the testimony enhanced Angela's credibility and it provided context and a more complete background necessary for the jury's understanding of the case. *State v. Marinez*, 2011 WI 12, ¶ 27, 331 Wis. 2d 568, 797 N.W.2d 399 ("context, credibility, and providing a more complete background are permissible purposes under Wis. Stat. § 904.04(2)(a)").

Here, Augoki placed Angela's motive and credibility at issue. Angela's testimony about April's age and how her pregnancy interfered with her education was relevant to rebutting claims that Angela disliked Augoki for other reasons, such as his lower caste or interference with a dowry. These events were not remote because Augoki attempted to portray Angela as someone who held a longstanding hostility toward him, lasting almost 10 years. (113:25-27).

The testimony about April's age when Augoki impregnated her was not unduly prejudicial. During Angela's testimony, the State referenced it only once. (114:40-41.) And, as the circuit court noted, no one suggested that Augoki's conduct was criminal. (78:2.) In addition, April undermined any suggestion that Augoki impregnated her when she was a minor. During the State's cross-examination of April, April disagreed with the State's calculation of her

age, insisting that she was 18 when she became pregnant with her oldest child, SA. (116:34.) Based on this record, Augoki has failed to demonstrate that any unfair prejudice that flowed from the admission of the other act evidence substantially outweighed its probative value.

D. Any error in admitting the evidence was harmless.

The admission of inadmissible evidence is subject to the harmless error rule, under which the reviewing court will reverse only if there is a reasonable possibility that the error contributed to the conviction. *See State v. Dyess*, 124 Wis. 2d 525, 542-43, 370 N.W.2d 222 (1985). "An error is harmless if there is no reasonable possibility that the error affected the outcome of the trial." *State v. Koller*, 2001 WI App 253, ¶ 62, 248 Wis. 2d 259, 635 N.W.2d 838 (citation omitted).

For several reasons, any error in admitting testimony about April's age when Augoki impregnated her with NA was harmless. First, no one suggested Augoki's conduct was criminal. Second, April testified that she was 18 when she had SA, which means that she would have been even older when Augoki impregnated her. (116:34.) This undermined any suggestion that Augoki had sex with a minor. Third, the discussion of the age issue was limited, covering only a few transcript pages in a multiday trial. (114:41; 116:34-35.)

Fourth, other evidence at trial, including SA's detailed testimony about Augoki's assaults, demonstrate that there is no possibility that the error affected the trial's outcome. The State presented strong evidence that supported the jury's verdict and undermined Augoki's defense.

SA testified that when she was 10 years old, Augoki told her that fathers and daughters should be close. (113:48.)

She described the first time Augoki touched her the wrong way and gave her goodnight kiss. He repeated the conduct another time. (113:50-51.) SA described how Augoki took her to Augoki's and April's bedroom. He took off her pants and underwear as she lay on the bed. Augoki used his penis to touch the private part of her body that SA uses to go to the bathroom. He touched her inside her body, describing his motion as back and forth. SA said it hurt. (113:52-54.)

When SA told Augoki that it hurt and asked him to stop, Augoki replied that "'this is what fathers and daughters do.'" (113:54.) When he finished, he told SA to wash up. SA felt fluid coming out from between her legs when she got up. Augoki said it was Vaseline. (113:55.) He then sprayed the room with air freshener. (113:56.) She was 10 years old when this happened. (113:54.)

SA also stated that Augoki placed his private parts inside her mouth. (113:57.) SA described his private part as soft when he started and then described it as getting hard as he moved back and forth. (113:58-59.) This first happened when she was 10 years old. (113:57.)

Augoki also told SA to put her hands on his private parts on several occasions. (113:61.) On another occasion, she described Augoki giving her a carrot to insert into her private parts. He explained to SA that he wanted her to do it to make her private part expand or be bigger. SA stated that she stopped because the carrot was cold and it was hurting her. (113:62-63.)

SA recounted that on another occasion, Auoki put a glove inside her, blew it up, and tied it. Augoki told SA that he was doing this to make her private part bigger. She obeyed him. She also said that this hurt her. (113:63.)

On other occasions, Augoki would take SA to the closet in his bedroom. He directed her to look through the door and watch Augoki have sex with April. SA described Augoki doing the same thing to her mother that he did to her. Specifically, she said that his private parts were touching hers. She saw this on more than one occasion when she was 10 or 11 years old. (113:66.)

Augoki also told SA that if anyone found out, she should tell them that she had a boyfriend and was having sex with him. (113:67.) SA testified that she was afraid of what would happen if she told anyone because Augoki told her not to. (113:68.)

Augoki extensively cross-examined SA about the allegations. He questioned her about her inconsistent statements to the social worker and in her prior testimony. The inconsistencies related to how long the sex act lasted (114:6-8) and the frequency of the sex. (114:9-10). Augoki also challenged SA's recollection of watching Augoki and April have sex. (114:12-13.) Augoki established SA's relationship with her Aunt Angela and inconsistencies in how she first reported the sex. (114:15-16.)

Amanda Didier from the Children's Hospital's Child Protection Center, conducted a forensic interview of SA. (115:23, 36.) The interview was recorded and saved on a DVD. The State played portions for the jury. (115:36-37; 122:Ex. 29.)[2]

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[2] These excerpts included from 15 minutes to 22 minutes, 5 seconds and from 35 minutes to 44 minutes, 30 seconds, and from 47 minutes to 56 minutes and 15 seconds. (115:32, 37.) The time is determined based on the actual duration clock that appears in the media player panel rather than the time/date stamp appearing on the video itself. When the State references a specific

(continued on next page)

SA told Didier that Augoki had been raping her since she was 10 years old. (122:Ex. 29 at 00:15:15.) After SA turned 10, Augoki told her that she was a grown woman and that a father and daughter become close to each other, become friends, and keep secrets. (122:Ex. 29 at 00:15:40-58, 00:37:50.) Five months later, Augoki told April to go to the store. (122:Ex. 29 at 00:16:03-13, 00:38:40.) Augoki grabbed SA and threw her on the bed that Augoki shared with April. (122:Ex. 29 at 00:16:3040.) Augoki put his penis inside SA's vagina. (122:Ex. 29 at 00:16:54, 00:40:07.) Augoki held her down with her body against her body. SA was unable to push him off. (122:Ex. 29 at 00:17:00-08.) Augoki stopped and told her to take a shower. (122:Ex. 29 at 00:40:29.) SA described how something came out of her; Augoki explained at the time that it was Vaseline. She later learned that it was sperm. (122:Ex. 29 at 00:40:2943-46.) Augoki would spray the house with air freshener because the sperm did not smell good. (122:Ex. 29 at 00:41:40-56.)

SA told Didier that when she was 11, Augoki told her to get a carrot or a balloon. Augoki took a finger off of a glove and blew it up. He told SA to put it in her vagina to make it bigger. (122:Ex. 29 at 00:17:30-45.). When SA turned 12, Augoki would tell her sister go outside while her Mom was at work. Augoki would force SA to take her panties off and rape her. (122:Ex. 29 at 00:18:16-38.)

On other occasions, Augoki would squeeze SA's breasts (122:Ex. 29 at 00:42:10-15) and place his hand inside her vagina (122:Ex. 29 at 00:42:20-23). SA also said that Augoki directed her to perform oral sex on him, describing how

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section of the recording it will do so by including the hours-minutes-second (H:M:S) as it appears in the media player panel.

Augoki would have her masturbate him and how he would ejaculate. (122:Ex. 29 at 00:42:45-43:30.)

Augoki offered to buy SA new clothes and shoes. Later, he forced her on the bed and told her that he bought her all these clothes and asked, "so don't I get a pay back?" (122:Ex. 29 at 00:19:10-37, 00:47:50-48:00.) SA also told Didier about how she first reported the sexual assault to Angela. (122:Ex. 29 at 00:35:00.)

SA disclosed the assaults to NA and Angela. (113:68.) SA first disclosed the assault to Angela in a voice mail. (114:18). Angela testified that SA first reported the sexual assault to her by leaving a message on Angela's voicemail. (114:45-46.)

Later, during a 2011 visit at Angela's Connecticut home, SA disclosed that Augoki was "touching me the wrong way and doing stuff to me the wrong way." (113:47.) Angela testified that SA described the touching during a summer visit with Angela. Just as SA testified, she also told Angela that Augoki told her about what fathers and daughters do. (114:47-48.) Angela made arrangements for the Department of Children and Families to interview SA when she returned to Milwaukee. (114:50.)

On cross-examination of Angela, Augoki effectively attacked Angela's credibility and explored his theory that Angela "coaxed the victim to say what she's saying." (114:82.) Angela acknowledged that she was upset because Augoki impregnated April and Augoki suggested that Angela attempted to facilitate an abortion for April. (114:56.) Augoki also suggested that Angela sought to turn SA against him by disclosing to SA that Augoki was not her real father. (114:60.)

Augoki also sought to undermine SA's credibility through his cross-examination of NA. NA acknowledged that because SA lied to NA in the past, NA had a hard time believing the allegations. NA also stated that SA had lied to both April and Augoki. (114:78.)

Augoki also used April to attack both Angela and SA's credibility. April testified that Angela has arranged a marriage for her and received the dowry and that Angela would get mad if she knew April was dating Augoki. (116:9-10, 12.) When Angela learned of April's pregnancy, Angela became upset and insisted that April get an abortion. (116:12-13.) April also explained that Angela refused to give SA back to her after April moved in with Augoki. She claimed that Angela intended to keep SA for her eventual dowry. (116:14-15.) April reported that she moved to Milwaukee so that she and her family could avoid Angela. (116:17-18.)

Augoki also presented testimony that suggested that Angela had attempted to drive a wedge between him and SA. Without April's permission, Angela told SA that Augoki was not her biological father. (116:21.) SA would visit Angela in Connecticut. When she returned, Angela and SA would regularly speak by telephone. (116:22-23.) SA also told April that Angela was going to buy a big house and that SA would move in with Angela so that SA could have her own room. (116:23.)

Augoki also used April to attack SA's credibility. April also challenged SA's testimony that SA saw Augoki and April have sex. (116:24.) Augoki also raised questions about SA's claim that April was gone for long enough periods for Augoki to assault her or SA's testimony that Augoki had changed the sheets on bed after having sex with her. (113:80; 116:25-26.)

Any error in admitting evidence about April's age when Augoki impregnated her with NA was harmless. This case focused on SA's and Angela's credibility. Augoki was able to present significant evidence that supported his theory of defense that Angela coaxed SA to falsely allege that Augoki sexually assaulted her. The jury rejected his defense. Based on this record, there is no possibility that the alleged error affected the jury's guilty verdicts.

II. The circuit court's appropriately exercised its discretion when it limited Augoki's cross-examination of Nurse Deborah Bretl about her prior testimony at Augoki's first trial.

Augoki asserts that the circuit court violated his confrontation rights when it limited his cross-examination of Bretl, the nurse who examined SA, with her testimony from Augoki's first trial as it related to the condition of SA's hymen. (Augoki Br. 13-14.) As the State will demonstrate, the circuit court appropriately exercised its discretion when it limited Augoki's questioning of Bretl. The circuit court's decision did not undermine Augoki's confrontation rights. And even if it did, the error was harmless.

A. General legal principles related to confrontation rights and cross-examination.

The Confrontation Clause of the Sixth Amendment to the United States Constitution and article I, § 7 of the Wisconsin Constitution guarantee the right of an accused "the opportunity of cross-examination." *See Delaware v. Van Arsdall*, 475 U.S. 673, 678 (1986) (internal quotation marks and citation omitted); *State v. Barreau*, 2002 WI App 198, ¶ 47, 257 Wis. 2d 203, 651 N.W.2d 12. But trial courts retain "wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-

examination" based on concerns about "harassment, prejudice, confusion of the issues, the witness' safety," or the needless presentation of cumulative or "only marginally" relevant evidence." *Van Arsdall*, 475 U.S. at 679.

A defendant's right of confrontation is not denied "in each instance that potentially relevant evidence is excluded." *Barreau*, 257 Wis. 2d 203, ¶ 53. The ultimate question is whether a defendant was denied the opportunity to effectively cross-examine a witness. "When the record shows that the witness's credibility was adequately tested, the defendant's right of confrontation has not been violated." *Id*. (citations omitted).

Standard of review. "Generally, the decision to admit or exclude evidence is within the circuit court's discretion." *Id*. ¶ 48 (citation omitted). "However, this discretion may not be exercised until the court has accommodated the defendant's right of confrontation." *Id*. Whether the limitation of cross-examination violates the defendant's right of confrontation is a question of law that the court of appeals reviews de novo. *Id*.

Applicability of harmless error analysis. An appellate court's finding that a circuit court violated the confrontation clause does not result in an automatic reversal, but is subject to harmless error analysis. *State v. Rhodes*, 2011 WI 73, ¶ 32, 336 Wis. 2d 64, 799 N.W.2d 850. Under the harmless error test, an appellate court must determine "whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Van Arsdall*, 475 U.S. at 684. In assessing whether the error was harmless, courts consider several factors, including "the importance of the witness' testimony in the prosecution's case, whether the testimony

was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." *Id*.

B. The circuit court's limitation on examination did not deprive Augoki of his right to confront Bretl about her observations or opinions.

Augoki claims that the circuit court improperly restricted his cross-examination of Bretl about her testimony at Augoki's first trial, which related to whether a female's hymen could be thinned out and resolved, such that it was no longer present, following penile penetration. (Augoki Br. 14-17.) The record demonstrates that the circuit court granted trial counsel broad latitude in questioning Bretl and it supports the circuit court's decision to limit Augoki's questioning on these specific questions.

1. Relevant facts.

At Augoki's trial, the State called Bretl, a pediatric advance practice nurse employed at the Children's Hospital of Wisconsin at the Child Protection Center. (115:39.) Bretl received training to conduct medical examinations for physical or sexual abuse of children. (115:41.)

Bretl examined SA on July 13, 2011, and documented her findings in a report. (115:43; 122:Ex. 32.) Bretl observed that SA's examination was normal. Both the labia majora and minora were normal. She described the hymen as "redundant." (115:44.) She explained that the hymen was "plumper," which occurs when estrogen causes the hymen to get more elastic and stretchy in puberty. (115:44.) She also described the hymen as mucosal, explaining that glands

keep it moist and stretchy. Further, Bretl stated that injuries might not be detected because the tissue has gotten plump. (115:45.) Bretl also explained that an exam may be normal even if a child had been sexually abused. Injuries heal quickly and some offenders are careful to avoid hurting the children. (115:46.) Based on her training and experience, Bretl testified that 95% of the examinations of children evaluated for sexual abuse are normal. (115:44.)

On cross-examination, Bretl testified that SA's labia majora was normal. She also explained that it may appear "abnormal" if "severe trauma" were present, but "usually not." (115:48.) Augoki questioned Bretl about her prior testimony that sexual penetration could cause the labia majora to be abnormal. (115:50; 93:105.) Similarly, referencing Bretl's prior testimony (93:106), Augoki asked if penetration could cause the labia minora to look abnormal. Bretl replied that it could if it were forced, such as through a rape. (115:51.)

Augoki's cross-examination shifted to Bretl's observations of SA's hymen. Bretl confirmed that she observed no disruption or tears to SA's hymen. (115:51.) Trial counsel then asked questions about whether a hymen is "intact." The circuit court interrupted.

> THE COURT: All right. That was kind of vague. You need to clarify. Is this a hypothetical? I mean you need to be way more specific.
>
> [ATTORNEY]: I'm asking if the hymen, Judge could be not intact in any portion at any time.
>
> THE COURT: On any woman at any time in any hymen?
>
> [ATTORNEY]: It's a general question[.]

. . . .

[PROSECUTOR]: I'm objecting and this is why. I don't think that intact has been clarified[.]

THE COURT Sustained. It's all way to vague.

Q: Hymens—there are times when hymens thin out and resolve. Correct?

THE COURT: Where they do what?

[ATTORNEY]: Thin out and resolve.

A: I'm not sure what you are asking.

Q: . . . if I say a hymen is no longer present in certain parts, is that true?

[PROSECUTOR]: Objection. Vague. Is it in an adult woman, is it in children, or something else[?]

THE COURT: Sustained.

(115:52-53.)

After it excused the jury, the circuit court expressed its concern that trial counsel's questions were "all too vague." (115:53.) It then observed, "The look on the nurse's face is like she has no idea what these questions are." (115:53.) The circuit court again reiterated that counsel's questions were confusing the witness. (115:55.) Trial counsel then attempted to explain that he wanted to question Bretl about her prior testimony that a hymen could thin out and resolve. (115:57-58.)

Trial counsel sought to question Bretl about the following testimony from Augoki's first trial.

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.

(93:107; 115:57-58.)

The circuit court questioned the relevance of this evidence from the first trial. It observed that Bretl had testified that her examination of SA was normal, but that a normal examination does not mean that someone was not assaulted. (115:58-59.) The circuit court then pressed trial counsel on where this examination was going. Trial counsel explained that the witness previously testified that sexual penetration of a vaginal area could have an effect on the hymen. (115:59.) The circuit court then observed that the line of questions was misleading, in part because it had previously heard testimony in other cases from experts that these examinations typically do not reveal injuries. (115:59, 61.) The circuit court then returned to its observations that trial counsel's questions were vague. "You are asking all these other things about hymen and women and anyone in the world. Is it possible that a hymen somewhere some time somewhere on earth could be harmed. It's too vague. The witness is not acting. She is confused." (115:63.)

Finally, the circuit court observed that trial counsel was not actually asking Bretl the questions previously asked in the first trial. "You didn't ask the actual question that

was asked last time. You are asking part of her answer." (115:64.) The circuit court then directed trial counsel to "Ask more clear questions and relevant questions." (115:65.)

Augoki's cross-examination of Bretl resumed. Bretl confirmed that sexual penetration into the vaginal area could cause tears "if there's trauma and a lot of force[.]" (115:66.) She also confirmed that she observed no trauma or no scarring, which may be evidence of a wound healing. (115:66.) Bretl acknowledged that the exam neither confirmed nor denied that any sexual abuse had occurred. (115:66-67.)

On redirect exam, Bretl observed that even pregnant women have normal hymen exams. (115:67.) Further, she also explained that with the passage of time between an event and examination, healing of the sexual organs would occur. (115:68.)

2. The circuit court did not violate Augoki's confrontation rights.

Augoki wanted to question Bretl about her prior testimony to demonstrate that sexual "penetration could have an effect on the hymen[.]" (115:57-59.) Presumably, Augoki wanted the jury to infer that the absence of any sign of injury in SA is evidence that Augoki did not penetrate SA.

The circuit court properly limited impeachment for several reasons. First, as the circuit court noted on several occasions, trial counsel's questions were confusing, vague, or misleading. (115:53, 55, 61.) These are legitimate grounds for limiting cross-examination. *See Van Arsdall*, 475 U.S. at 679. Second, Bretl observed that SA's sex organs were normal and showed no signs of trauma, but also noted that in 95% of the cases, evidence of abuse is not present. (115:66-

68.) Under the circumstances, Bretl's prior testimony was at best marginally relevant where there was no visible trauma to SA's hymen. Under *Van Arsdall,* a court may limit cross-examination about marginally relevant evidence. *Van Arsdall*, 475 U.S. at 679.

As the record demonstrates, the circuit court provided a reasonable rationale for limiting Augoki's cross-examination of Bretl about her prior testimony. Under the circumstances, the circuit court did violate Augoki's rights under the Confrontation Clause when it limited his cross-examination of Bretl.

C. Any error in limiting cross-examination about was harmless.

Even if the circuit court erred in limiting cross-examination of Bretl concerning her prior testimony about hymens, the error was harmless. In opening, Augoki advised the jurors that the physical examination of SA "frankly, yeilds nothing." (113:29.) And Augoki was able to make this point through Bretl, who testified on direct and cross-examination that the examination was normal, that the hymen had a normal opening, that there were no signs of trauma, and that the exam did not confirm whether sexual abuse occurred. (115:44, 66-67.) Augoki was otherwise allowed to extensively cross-examine Bretl. At the end of her testimony, the jury knew that Bretl did not observe any physical evidence that supported SA's claim that Augoki sexually assaulted her. Finally, as outlined in Section I. D., above, the State also presented other compelling evidence that supported the jury's guilty verdict. For these reasons, any error in limiting cross-examination was harmless beyond a reasonable doubt.

CONCLUSION

For the above reasons, the State respectfully asks this Court to affirm the circuit court's entry of the judgment of conviction and order denying postconviction relief.

Dated this 27th day of September, 2016.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 6953 words.

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I hereby certify that:

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This electronic brief is identical in content and format to the printed form of the brief filed as of 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.

Dated this 27th day of September, 2016.

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