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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The State improperly introduced other acts evidence when it asked SA's mother how old she was when she became pregnant with her second child.

The circuit court erred when it allowed the State to introduce evidence that SA's mother was 15 or 16 years old when she became pregnant with Augoki's biological child, NA.

In its response brief, the State claims: (1) Augoki waived this claim on appeal because he did not object to the questioning; (2) this evidence was property allowed because it was not other acts evidence; (3) any error in its admission was harmless. (Res. Br. 3).

The State's arguments fail.

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 Angela,[1] the victim's aunt. During direct examination, the prosecution, through Angela, introduced evidence to show that Augoki impregnated SA's mother, April, when April was 15 or 16 years old.

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[1] In its brief, the State refers to two witnesses under pseudonyms. For ease of reading, the defense will continue using the two pseudonyms. SA refers to the victim. NA refers to the victim's sister. Angela, is a pseudonym for SA's aunt, and April is the pseudonym for SA's mother.

The second instance of improper testimony happened during the prosecution's cross-examination of April. During the cross examination, the State attempted to establish that April was 16 years old when April and Augoki's biological daughter, NA, was born.

Augoki did object to the introduction of this evidence. (116: 34-35).

Even if this Court rules that Augoki did not preserve this issue for appeal with a proper objection, the plain error doctrine applies.

The State argues that the plain error doctrine does not apply because it claims there was no error and, even if there was an error, it did not substantially affect Augoki's rights. (Res. Br. 9).

Whether or not a plain error exists will turn on the facts of each particular case. *State v. Mayo*, 2007 WI 78, ¶29, 301 Wis.2d 642, 734 N.W.2d 115. The State first argues that an error did not occur because Angela's testimony enhanced her credibility, provided necessary context, and a more complete background (Res. Br. 13). However, the State fails demonstrate how Augoki's prior bad acts enhanced Angela's credibility. While Augoki did attack Angela's credibility during the trial, testimony about April's age when she became pregnant by Augoki did not enhance Angela's credibility. Rather, this testimony served only one purpose: to defame Augoki's character in front of the jury.

The State also argues that testimony about April's age when Augoki impregnated her was not unduly prejudicial

because "no one suggested it was criminal." (Res. Br. 13). This is strawman argument.

No one needed to tell the jury that sex with a person under the age of consent is illegal. In fact, Augoki's entire case was about just that, sex with a minor. The jury heard instructions telling them that sex with a minor was illegal. It certainly did not need another reminder that an adult having sex with a 15 or 16 year old child is illegal.

The State next argues that even if the circuit court erred in allowing testimony about April's age when she was impregnated by Augoki, the error was harmless. (Res. Br. 14).

The testimony about April's age was devastating to Augoki's case. 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 Augoki's character. The trial's focus immediately shifted from the facts surrounding SA's allegations to Augoki's alleged prior improper sexual relationship with April. This testimony added nothing to determining whether the facts alleged by SA actually happened. The State succeeded in painting Augoki as a serial offender who acted in conformity with prior crimes he had committed.

The error admitting Angela's and April's testimony regarding April age when Augoki impregnated her was not harmless. When determining whether an error was harmless the Court should consider the following factors: (1) the frequency of the error; (2) the importance of the erroneously admitted evidence; (3) the presence or absence of evidence

corroborating or contradicting the erroneously admitted evidence; (4) whether the erroneously admitted evidence duplicates untainted evidence; (5) the nature of the defense; (6) the nature of the State's case; and (7) the overall strength of the State's case. *State v. Jorgenson,* 2008 WI 60, ¶ 45, 310 Wis.2d 138, 754 N.W.2d 77 (*Citing Mayo*, 2007 WI ¶ 48).

The testimony regarding April's age when Augoki impregnated her was mentioned prominently twice during the trial. Moreover, it was an important piece of evidence to show that Augoki was a serial rapist. It did not prove any fact necessary to the outcome of the case. Nevertheless, it was important because after the jury heard this testimony the perception that Augoki was a rapist existed.

The State's case was ultimately based on the testimony of SA. During cross-examination of SA's, Augoki was able demonstrate several instances of prior inconsistent statements including: (1) the amount of time the assaults lasted was different from the first trial to the second trial (114:7); (2) the total number of assaults changed from a total of five to once a week for years (114:11); (3) the year Angela told SA Augoki was not her biological father changed from 2010 to 2011 (114:16-17).

Augoki was also able to attack the timeline of the assaults. SA testified that during the assaults, her mother and sister would sometimes go the liquor store. Then, the assault would last 10-15 minutes, she would take a shower and Augoki would change the sheets on the bed before her mother and sister were back from the liquor store. (114:9).

Augoki called a private investigator as a witness. (116:47). The investigator testified that he had visited Augoki

and SA's residence, there was a liquor store close to the residence, and that he had walked from the residence to the liquor store. (116:53). It took him five minutes to walk from the liquor store to the residence. (116:53).

Given the close proximity of the liquor store to the residence, there is no way Augoki could have assaulted SA for 10-15 minutes, showered, changed the bed sheets, and be done with all of that before April and her other daughter returned from the liquor store.

These inconsistencies not only challenge the credibility of SA's claims but also the plausibility of her claims. If the jury was on the fence about Augoki's guilt or innocence they certainly could have been swayed by the knowledge that Augoki had impregnated April when she was 15 or 16.

This is the danger of allowing the other bad acts evidence into the trial. The Court in *Sullivan* noted this danger by stating that other acts evidence tends to "provoke[] [a jury's] instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case." *State v. Sullivan*, 216 Wis.2d 768 at 789-90, 576 N.W.2d 30 (1998). This evidence certainly could have affected the jury's guilty verdicts. It was not harmless.

II. The circuit court denied Augoki his confrontation rights when it limited Augoki's cross-examination of Nurse Bretl.

Augoki's confrontation rights were denied when defense counsel was limited in his cross-examination of

Deborah Bretl, a sexual assault nurse who testified for the State.

The State argues that Augoki's confrontation rights were not violated for several reasons.

First, the State argues the circuit court properly limited cross-examination because Augoki's questions were irrelevant and vague. (Res. Br. 26). However, Augoki was simply questioning Bretl's about her own report that had already been introduced into evidence. Moreover, Augoki was asking Bretl the exact same questions she had been asked (and had answered) during the first trial. The State's, and the circuit court's, contention that the question was too vague to be answered does not hold any weight because Bretl had already answered it at the first trial.

Second, the State argues Bretl testified that SA's sex organs were normal and showed no signs of trauma. Thus, her testimony was not particularly relevant to the final outcome. (Res. Br. 26-27). The State misses the point of Augoki's cross-examination. Bretl testified at the first trial that hymens could "thin out and resolve" or "not be intact" because of the penetration of a penis. (93:107). However, when asked the same questions at the second trial, she was not able to answer. (115:52-66). Had Bretl answered consistently Augoki could have argued that while SA's exam was "normal", in cases where penetration occurs, hymens "thin out and resolve" or are "not intact." Alternatively, Augoki could have impeached Bretl with her prior testimony and attained the same result. Augoki tried to impeach Bretl but was stopped by the circuit court.

Third, the State argues that even if Augoki's confrontation rights were violated, the error was harmless.

(Res. Br. 27). The error was not harmless. As noted above, the error prevented Augoki from arguing that a normal exam may not be present when a child has been repeatedly assaulted over a number of years. Unfortunately, Augoki was limited to arguing that the exam simply showed nothing. Had the cross-examination and impeachment been allowed, Augoki could have argued that her normal hymen, should have "thinned out or resolved" and "not been intact" instead of normal.

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 11th day of October, 2016

Signed:

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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 1,554 words.

Dated this 11th day of October, 2016.

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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.

Dated this 11th day of October, 2016.

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