COURT OF APPEALS
DECISION
DATED AND FILED

April 25, 2017

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2016AP231-CR **Cir. Ct. No. 2011CF3300**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLANTIFF-RESPONDENT,

V.

JOHN A. AUGOKI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: DAVID L. BOROWSKI and M. JOSEPH DONALD, Judges. *Affirmed*.

Before Kessler, Brash and Dugan, JJ.

¶1 DUGAN, J. John A. Augoki appeals the judgment of conviction of three counts of first-degree sexual assault of a child and the order denying his

post-conviction motion for a new trial.[1] Augoki argues that the trial court committed plain error when it allowed the State to present other acts evidence and violated his right to confrontation by limiting his cross-examination of the State's expert. We disagree and for the reasons set forth below we affirm.

BACKGROUND

¶2 Augoki was originally charged with one count of first-degree sexual assault of a child under the age of twelve. Augoki allegedly had sexual intercourse with S.A., his girlfriend's daughter who was born in Sudan. Augoki met his girlfriend, A.A., in Connecticut and had a child, N.A., with her.

¶3 The case proceeded to a jury trial in early February 2012. That trial ended in a mistrial after the jurors were unable to reach a unanimous verdict.

¶4 On June 22, 2012, the State amended the information to include two additional counts of first-degree sexual assault of a child. A second jury trial began on December 9, 2013, before the Honorable David Borowski[2] with different attorneys. Augoki's defense was that S.A. had fabricated the sexual assault allegations at the insistence of her aunt, Anyikor, A.A.'s sister.[3]

[1] The Honorable David Borowski presided over the jury trial and entered the judgment of conviction. The Honorable M. Joseph Donald entered the order denying the defendant's postconviction motion.

[2] The Honorable J.D. Watts presided over the first jury trial. The Honorable David Borowski presided over the second jury trial as a part of the normal judicial rotation in Milwaukee County Circuit Courts.

[3] Because A.A. and her sister, Anyikor, have the same initials we will refer to Anyikor by her given name.

¶5 During opening statements, trial counsel stated that Anyikor was upset at Augoki and A.A.'s relationship because in the Sudanese culture a poor person cannot be with a rich person and Augoki was from a poor family while A.A. was from a rich family. He argued that Anyikor was further angered because she had already arranged a marriage for A.A. and had obtained a dowry from that man. He further argued that when Augoki impregnated A.A., Anyikor got even more upset. Trial counsel went on to highlight other evidence of Anyikor's anger at Augoki and stated that her "anger became vengeance, and that's why we're here because that vengeance turned into this lie."

¶6 The jury returned verdicts finding Augoki guilty of all three counts. Augoki filed a postconviction motion for a new trial contending that the trial court committed plain error when it allowed the State to present other acts evidence, and violated his right to confrontation by limiting his cross-examination of the State's expert. In a written decision, the trial court denied the motion. This appeal followed.

¶7 For the reasons stated below we affirm.

DISCUSSION

I. Augoki Forfeited His Right to Appeal Whether the Testimony about A.A.'s Age Constituted Improper Other Acts Evidence.

¶8 Augoki argues that the trial court erred in allowing the testimony of A.A. and Anyikor about A.A.'s age when Augoki impregnated her. He contends that the evidence constituted other acts evidence that should have been excluded under ***State v. Sullivan***, 216 Wis. 2d 768, 771-73, 576 N.W.2d 30 (1998).

¶9 During direct examination of Anyikor the prosecutor asked the following questions:

> 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 that time?
>
> A: She was 16, 15. Not good with—because she was going to Sudan, so I'm not good with the years.

Trial counsel did not object to this line of questioning.

¶10 The subject of A.A.'s age came up once again when the prosecutor cross-examined A.A. During cross-examination of A.A., the prosecutor asked the following questions:

> Q: Okay. And it's also true that in February of 2005 there was an article in the *Yale Daily News* about teenage mothers and you were in that article. Right?
>
> A: No.
>
> Q: In fact, you talked about being in school while your daughters [S.A.] and [N.A.], 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.

> [DEFENSE COUNSEL]: Objection. She already testified that that was not correct.
>
> 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 [S.A.] when you were in Sudan at that age. Right?
>
> A: Pregnant with [S.A.] 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 [N.A.] was born in 2001, you would have been about 16 or 17 if the math is correct. Right?
>
> A: No.

¶11 Although trial counsel objected to one question on the grounds that A.A. already said the question was wrong, he did not object on the grounds of improper other acts evidence. "'[U]nobjected-to errors are generally considered waived; and the rule applies to both evidentiary and constitutional errors.'" ***State v. Davis***, 199 Wis. 2d 513, 517, 545 N.W.2d 244 (Ct. App. 1996) (citation omitted).

II. Augoki is Not Entitled to Relief Under the Plain Error Doctrine.

¶12 Augoki argues that, under the doctrine of plain error, this court should review whether the testimony about A.A.'s age at the time she was pregnant was improper other acts evidence even though he did not object to the

testimony. *See* WIS. STAT. § 901.03(4) (2015-16).[4] In ***State v. Jorgensen***, 2008 WI 60, 310 Wis. 2d 138, 754 N.W.2d 77, our supreme court explained:

> The plain error doctrine allows appellate courts to review errors that were otherwise waived by a party's failure to object. Plain error is "'error so fundamental that a new trial or other relief must be granted even though the action was not objected to at the time.'" The error, however, must be "obvious and substantial." Courts should use the plain error doctrine sparingly.

Id., ¶21 (quoted sources and internal citations omitted).

¶13 The court further explained:

> However, "'the existence of plain error will turn on the facts of the particular case.'" The quantum of evidence properly admitted and the seriousness of the error involved are particularly important. "Erroneously admitted evidence may tip the scales in favor of reversal in a close case, even though the same evidence would be harmless in the context of a case demonstrating overwhelming evidence of guilt." Thus, no bright-line rule exists to determine automatically when reversal is warranted.

Id., ¶ 22 (quoted sources and internal citations omitted).

¶14 If the defendant shows that the error that was not objected to is fundamental, obvious, and substantial, the burden shifts to the State to show the error was harmless. ***Id.***, ¶23. To determine whether an error is harmless, we inquire whether the State can prove beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *See* ***id.*** In determining whether the error is harmless, this court considers: "(1) the frequency of the error; (2) the importance of the erroneously admitted evidence; (3) the presence or

[4] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

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." *See* ***id.***

¶15 Assuming, without so finding, that the admission of the testimony about A.A.'s age when she was pregnant with N.A. was error, we find that any such error was not so fundamental, obvious, or substantial to warrant the application of the plain error doctrine. Moreover, if the error was fundamental, obvious and substantial, it was harmless.

A. Any Error was Not Fundamental, Obvious and Substantial.

¶16 First, the evidence was not fundamental, obvious and substantial. It involved only several pages of transcript over a three and a half-day jury trial. Although the State raised the issue of A.A.'s age when she became pregnant with N.A. in its direct examination of Anyikor, it states that it did so only after Augoki's opening statement. The State further argues that it needed to explain why Anyikor did not like Augoki in response to the defense's opening statement and to support her credibility.

¶17 The prosecutor asked the two questions excerpted above. In answer to the last question, "How old was your sister at the time?" Anyikor testified, "She was 16, 15. Not good with—because she was going to Sudan, so I'm not good with the years." The State was trying to show that Anyikor was not angry at Augoki because of cultural reasons and/or the loss of a dowry, but because he got A.A. pregnant when she was young and he interfered with A.A. completing her education. The State did not even mention, let alone argue, that Augoki's getting

A.A. pregnant was a crime. Additionally, the two short questions the State asked Anyikor did not establish A.A.'s age. In fact, Anyikor's answer did not even convey that she actually knew A.A.'s age. She said she was not good with years and that A.A. was going to Sudan. This further reflects that Anyikor was confused because A.A. became pregnant with N.A. while she was in Connecticut, not in Egypt or Sudan.

¶18 Further, the State's cross-examination of A.A. did not support Anyikor's testimony. A.A. specifically testified that she was born in 1981 and that she was eighteen years old when she was pregnant with S.A. Additionally, the *Yale Daily News* article that the State referred to was neither introduced into evidence nor referred to again during the trial. Thus, if the jury even considered the testimony about A.A.'s age when she became pregnant with N.A., the evidence consisted of Anyikor's confusing testimony and A.A.'s clear testimony that she was eighteen years old when she was pregnant with S.A.

¶19 Second, trial counsel incorporated the testimony about A.A.'s age into the theory of defense. He intended to portray Anyikor as so angry she was even willing to lie about A.A.'s age. To prove that point, when trial counsel called A.A. to testify at trial, he quickly asked her about her age. He asked her the following questions and she gave the following answers:

> Q: And how did it come about that you ended up in the United States?
>
> A: My sister brought me here.
>
> Q: When she brought you here, did she—are you aware who did the immigration papers for you?
>
> A: Anyikor. My sister Anyikor did the immigration.
>
> Q: At the time she did the immigration papers for you, how was your ability to speak English?

A: I don't speak at all this particular time.

Q: What is your birth date?

A: My date of birth is May 1st, 1984.

Q: Is that the date of birth that is on your driver's license?

A: Yes.

Q: Is that your actual date of birth?

A: No.

Q: What is your actual date of birth?

A: The actual is May 1st, 1981.

Q: Why is it that your date of birth on your driver's license is different than the date of birth——than your actual date of birth?

A: That's because my sister Anyikor did my immigration papers, and when I came here, I find out that not my real date of birth.

Q: So on the immigration papers the date of birth was not—

A: May 1st—yes, May 1st, 1984.

Q: 1984. But once again you were born in 1981?

A: Yes.

¶20 Additionally, in his closing argument, trial counsel used this testimony to support his contention that Anyikor coaxed S.A. to fabricate the sexual assault allegations against Augoki. He argued:

> Now there's been some talk as well about [A.A.]'s age. And Anyikor testified that [A.A.] is a few years younger than [A.A.] says she is. [A.A.] was 19 years old when she gave birth to [N.A.] She was born in 1981. She testified to that. End of story. The immigration papers she filed when she came to the United States were in English. She didn't speak any English. She had someone fill them out who spoke English.

> And it's not only her age that Anyikor can't be truthful about[.]

¶21 Trial counsel incorporated the testimony regarding A.A.'s age as part of his defense strategy. As noted in ***State v. Felton***, 110 Wis. 2d 485, 502, 329 N.W.2d 161 (1983): "This court has often stated that it disapproves of postconviction counsel second-guessing the trial counsel's considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel."

¶22 Trial counsel presented well-reasoned testimony in support of his strategy, including his contention that Anyikor was lying about A.A.'s age and it is not this court's prerogative to second-guess trial counsel's reasonable tactical decisions. We reject Augoki's contention that his counsel's failure to object to Anyikor's brief testimony regarding A.A.'s age when she became pregnant with N.A. and/or to A.A's age being raised briefly during the State's direct and cross-examination of A.A. constitutes a fundamental, obvious and substantial error. Therefore, the plain error doctrine does not apply in this case.

B. Even if the Failure to Object was Fundamental, Obvious and Substantial, it was Harmless Error.

¶23 Even if admitting the testimony about A.A.'s age was fundamental, obvious and substantial, it was harmless error. *See* ***Jorgensen,*** 310 Wis. 2d 138, ¶23. The first factor that this court considers in determining whether error is harmless is the frequency of the error. *See* ***id.*** Here the frequency was quite limited. As noted above the State asked two questions during Anyikor's testimony that did not establish A.A.'s age and reflected Anyikor's confusion about whether the question related to A.A.'s age when she was pregnant with S.A. or N.A. During the State's cross-examination of A.A., she clearly and directly stated that

she was eighteen years old when she was pregnant with S.A. The State only had Anyikor's confusing testimony to offer. Further, the *Yale Daily News* article to which the State referred was not introduced into evidence and was not referred to again.

¶24 The second factor this court considers is the importance of the erroneously admitted evidence. *See* ***id.*** As noted, the State briefly referenced the issue of A.A.'s age in its direct examination of Anyikor and cross-examination of A.A. Moreover, the State did not establish A.A.'s age by either line of questioning. By contrast, trial counsel believed that Anyikor's testimony helped prove the defense theory and argued in closing that Anyikor lied about A.A.'s age as part of her quest for vengeance against Augoki. Neither the State nor trial counsel commented or argued that Augoki committed a crime when he impregnated A.A.

¶25 The third factor this court considers is the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence. *See* ***id.*** The court's analysis under factors one and two also applies to this factor.

¶26 The fourth factor this court considers is whether the erroneously admitted evidence duplicates untainted evidence. *See* ***id.*** Although the State first introduced evidence about A.A.'s age, Augoki also raised the issue of her age during A.A.'s direct examination. Therefore, the State's evidence regarding A.A.'s age addresses the same evidence raised by Augoki.

¶27 The fifth factor this court considers is the nature of the defense. *See* ***id.*** As explained above, Augoki's defense was that Anyikor hated Augoki so much that out of revenge she coaxed S.A. to fabricate the sexual assault charges against him. Trial counsel made the strategic decision not to object to the

testimony on the grounds that it was improper other acts evidence because he believed that the testimony helped the defense. When trial counsel questioned A.A., he brought out testimony regarding her age, as well as testimony that Anyikor had filled out A.A.'s immigration papers and provided a birthdate for her. Lastly, in closings, trial counsel argued that Anyikor hated Augoki so much that among other lies, she was willing to lie about A.A.'s age.

¶28 Moreover, A.A.'s age when she became pregnant with N.A. was a minor part of both the State and defense cases. The State raised it only to rebut the defense arguments in opening statement. But more significantly, trial counsel aggressively challenged the credibility of S.A. and Anyikor in supporting the defense theory that Anyikor coaxed S.A. to fabricate the false allegations of sexual assault against Augoki.

¶29 Augoki's counsel extensively cross-examined S.A. about her testimony and her inconsistent statements to the social worker and at the first trial. He questioned S.A. regarding inconsistencies pertaining to how long the sex act lasted, the frequency of the assaults, what Augoki did following each assault, and whether she told her sister, N.A. about Augoki's assaults. Counsel also elicited testimony from S.A. that her recollection of the duration of the sexual assault had improved over the intervening two years between her initial interview by a social worker and the second trial. Trial counsel also challenged S.A.'s recollection of watching Augoki and A.A. have sex. He also established S.A.'s relationship with Anyikor and inconsistencies in how she first reported the sex.

¶30 On cross-examination of Anyikor, Augoki effectively attacked Anyikor's credibility and explored his theory that Anyikor "coaxed the victim to say what she's saying." Anyikor acknowledged that she was upset because

Augoki impregnated A.A. and Augoki's counsel suggested that Anyikor attempted to facilitate an abortion for A.A. Trial counsel also suggested that Anyikor sought to turn S.A. against him by disclosing to S.A. that Augoki was not her real father.

¶31 Augoki also used A.A. to attack both Anyikor and S.A.'s credibility. A.A. testified that Anyikor had arranged a marriage for her and received the dowry and that Anyikor would get mad if she knew A.A. was dating Augoki. When Anyikor learned of A.A.'s pregnancy, Anyikor became upset and insisted that A.A. get an abortion. A.A. reported that in 2005 she moved to Milwaukee so that she and her family could avoid Anyikor.

¶32 Augoki also presented testimony that suggested that Anyikor had attempted to drive a wedge between him and S.A. A.A testified that, in 2010, S.A. and N.A. visited Anyikor in Connecticut. Without A.A.'s permission, Anyikor told S.A. that Augoki was not her biological father. After S.A. returned to Milwaukee, Anyikor and S.A. spoke regularly by telephone. S.A. also told A.A. that Anyikor was going to buy a big house and that S.A. would move in with Anyikor and S.A. could have her own room.

¶33 Augoki used A.A. to attack S.A.'s credibility. A.A. also challenged S.A.'s testimony that S.A. saw Augoki and A.A. have sex. Augoki raised questions about S.A.'s claim that A.A. was gone for long enough periods of time to allow Augoki to assault S.A. and that Augoki had changed the sheets on the bed after having sex with her.

¶34 The sixth factor this court considers is the nature of the State's case. *See* ***id.*** The State's case was based on S.A.'s clear and precise testimony that Augoki sexually assaulted her. From the State's perspective, Anyikor's testimony was only raised to refute Augoki's argument in opening that Anyikor hated him

because of cultural reasons and because she had arranged for A.A. to marry another man and, as a result of Augoki and A.A.'s relationship, she lost a dowry. The State introduced the evidence of A.A.'s age to establish that there were other reasons Anyikor disliked Augoki and to support Anyikor's credibility.

¶35 The seventh factor this court considers is the overall strength of the State's case. *See* ***id.*** The State's case was very strong. The State presented the testimony of S.A. and Amanda Didier, the Children's Hospital's Child Protection Center nurse examiner, who conducted a July 2011 forensic interview of S.A. The parties stipulated to playing portions of that interview for the jury.

¶36 S.A. testified that when she was ten years old, Augoki told her that fathers and daughters are really close. She described the first time Augoki touched her the wrong way and gave her a goodnight kiss.

¶37 The next incident S.A. described occurred a week later. Augoki took her to the bedroom that he and A.A. shared and took off S.A.'s pants and underwear as she lay on the bed. While standing next to her, Augoki used his penis to touch the private part of her body that S.A. uses to go to the bathroom. He touched her inside her body, and moved around back and forth. S.A. said it hurt. When S.A. told Augoki that it hurt and asked him to stop, Augoki kept saying, "this is what fathers and daughters do." When he finished, he told S.A. to wash up. S.A. felt fluid coming out from between her legs when she got up. Augoki told S.A. it was Vaseline. He then sprayed the room with air freshener. She was ten years old the first time this happened.

¶38 S.A. also testified that Augoki placed his private parts inside her mouth. She described his private part as soft when he started and then described it as getting hard as he moved back and forth. This first happened when she was ten

years old, and it happened more than once. Augoki also told S.A. to put her hands on his private parts more than once.

¶39 On another occasion, she described Augoki giving her a carrot to insert into her private parts. He explained to S.A. that he wanted her to do it to make her private part expand or be bigger. S.A. stated that after she initially obeyed him, she stopped because the carrot was cold and it was hurting her.

¶40 S.A. recounted that on another occasion Augoki put a glove inside her, blew it up, and tied it. Augoki told S.A. that he was doing this to make her private part bigger. She also said that this hurt her.

¶41 On other occasions late at night, when S.A. was ten to eleven years old, Augoki had S.A. use the bathroom closet entrance to quietly crawl into a walk-thru closet that opened into his bedroom, peer through a crack in the closet door, and watch him have sex with A.A. S.A. testified that Augoki was doing the same thing to A.A. that he did to her. Specifically, she said that his private parts were touching A.A.'s. Augoki also told S.A. that if anyone found out about what Augoki was doing to her, she should tell them that she had a boyfriend and was having sex with him.

¶42 S.A. testified that she first told N.A. about Augoki's sexual assaults and then she told her aunt, Anyikor. Later, during a 2011 visit at Anyikor's Connecticut home, S.A. disclosed that Augoki was "touching me the wrong way and doing stuff to me the wrong way." S.A. also said that she did not tell A.A. because she thought A.A. wasn't the right person to tell. S.A. was also afraid that that if she told A.A., A.A. would tell Augoki. Augoki told S.A. not to tell anyone or something bad would happen.

¶43 S.A.'s statements to Didier during the forensic interview were very consistent with her testimony. The jury watched that DVD showing S.A. telling Didier that Augoki had been raping her since she was ten years old. After S.A. turned ten, 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. Five months later, Augoki told A.A. to go to the store. Augoki grabbed S.A. and threw her on the bed that Augoki shared with A.A. and removed the clothing from the lower part of her body. Augoki put his penis inside S.A.'s vagina. Augoki held her down with his body. S.A. was unable to push him off. Augoki stopped and told her to take a shower. S.A. described how something came out of her; Augoki explained at the time that it was Vaseline. She later learned that it was sperm. Augoki would spray the house with air freshener because the sperm did not smell good.

¶44 S.A. told Didier that when she was eleven years old, Augoki told her to get a carrot or a balloon. Another time, Augoki took a finger off of a glove, blew it up, and told S.A. to put it in her vagina to make it bigger. When S.A. turned twelve, Augoki would tell her sister, N.A., to go outside while A.A. was at work. Augoki would force S.A. to take her panties off and rape her. S.A. stated that on other occasions, Augoki would squeeze her breasts and place his hand inside her vagina. S.A. also said that Augoki directed her to perform oral sex on him, and described how Augoki would have her masturbate him and how he would ejaculate.

¶45 S.A. also told Didier that Augoki offered to buy S.A. 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?" Additionally, S.A. told Didier about how she first reported the sexual assault to Anyikor.

¶46 S.A.'s statements to Anyikor were also consistent with her testimony and her statements to Didier. Anyikor testified that S.A. first reported the sexual assaults to her by leaving a message on Anyikor's voicemail. Anyikor testified that S.A. described the touching during a summer visit with her. S.A. also told Anyikor that Augoki told her this is what fathers and daughters do. She also testified that S.A. told her that Augoki would send A.A. and N.A. on errands and then "drag" S.A. into the bedroom that he and A.A. shared and engage in sexual intercourse. Anyikor testified that S.A. described what Augoki did to her in detail.

¶47 Based on the factors above and the record, any error in admitting evidence about A.A.'s age when Augoki impregnated her with N.A. was harmless. *See* ***Jorgensen***, 310 Wis. 2d 138, ¶23. This case focused on the credibility of S.A. and Anyikor. Augoki was able to present significant evidence that supported his theory of defense that Anyikor coaxed S.A. to falsely claim Augoki sexually assaulted her. The jury heard S.A.'s compelling testimony along with all the other evidence and rejected Augoki's defense.

¶48 We conclude that, based on the record, it is clear beyond a reasonable doubt that a rational jury would have found Augoki guilty absent the testimony in question. *See* ***id.***

II. Augoki was Not Denied Effective Cross-Examination of the State's Expert.

¶49 Augoki argues that his confrontation rights were denied when trial counsel was limited in his cross-examination of Deborah Bretl, the nurse practitioner at the Children's Hospital Child Protection Center, who examined S.A. on July 13, 2011, and testified as an expert for the State. He states that the trial court stopped him from questioning Bretl about the findings in her report and

whether those findings were consistent with someone who had been sexually abused over an extended period of time. In particular, Augoki notes that he attempted to question Bretl about the condition of S.A.'s hymen; however, Bretl said she did not understand the question and was confused. He then attempted to impeach her using the transcript of her testimony in the first trial, but the trial court did not allow him to do so. Augoki contends that trial counsel was asking Bretl the same questions that she was asked and answered during the first trial.

¶50 The Confrontation Clause of the Sixth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, 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) (quotation marks; citation and emphasis omitted); ***State v. Barreau***, 2002 WI App 198, ¶47, 257 Wis. 2d 203, 651 N.W.2d 12. However, 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.

¶51 In ***Barreau***, this court explained:

> Generally the decision to admit or exclude evidence is within the [trial] court's discretion. However, this discretion may not be exercised until the court has accommodated the defendant's right of confrontation. Whether the limitation of cross-examination violates the defendant's right of confrontation is a question of law that we review de novo.

Id., 257 Wis. 2d 203, ¶48 (internal citations omitted).

¶52 A defendant's right of confrontation is not denied "in each instance that potentially relevant evidence is excluded." ***Id.***, ¶53. "The ultimate question is whether [the 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." *See* ***id.***

¶53 Trial counsel asked questions to elicit testimony from Bretl that penetration during sex can cause injuries. He asked and she answered the following questions:

> Q: Can you read the first three words I guess of that line.
>
> A: It's 4 and then labia majora normal.
>
> Q: Okay. And you kind of alluded to this before, but can you explain once again what is labia majora.
>
> A: Those are the outer lips that cover the opening of the vagina area.
>
> Q: Okay. And based on your exam, that was normal. Correct?
>
> A: Correct.
>
> ….
>
> Q: Okay. Is it possible that penetration could cause that area to be abnormal—that labia majora to be abnormal?
>
> A: Is it possible that it could be abnormal? If there was severe trauma, maybe, but usually not. We usually see it normal because penetration is between the labia. There's two labias and you open up the labia and then you get to the vagina area.
>
> Q: So then your testimony today is that the sexual penetration would not potentially cause the labia majora to look abnormal?
>
> A: I don't understand the question.
>
> ….

> Q: And my question is if there was penetration, could penetration cause the labia majora to look not normal?
>
> [PROSECUTOR]: That question was asked and answered. So I'm objecting because her answer was with severe trauma and the fact that penetration occurs with the vagina. Not the labia.
>
> THE COURT: That's exactly right. It was asked and answered. She said with trauma. Sustained.
>
> ….
>
> Q: And so do you recall in the previous hearing in this matter, you testified that sexual penetration could cause the labia majora to be abnormal. Correct?
>
> A: It could, yes.
>
> ….
>
> Q: And I'm going to ask you the same question about the labia minora. Could penetration cause the labia minora to look abnormal?
>
> A: It could if there were trauma.

¶54 Trial counsel asked Bretl some questions about the hymen, particularly if it is always intact and are there times when the hymen thins out and resolves. The prosecutor objected and the trial court excused the jury and heard lengthy arguments from the attorneys on the record.

¶55 At one point the trial court said:

> ... As an offer of proof, you are not going to find any doctor or nurse anywhere that's going to come in here and say that sex—not a beating, not a savage ripping apart of a vagina, but sex from your client with the victim allegedly would result in injuries 3 or 4 months later. No doctor or nurse is going to come in and say that.

Trial counsel responded: "Right. And then the nurse can say that that's the case. That's why she's here." The trial court then stated: "Well, counsel, then ask that

question. You are asking all these other things about hymen and women and anyone in the world."

¶56 Trial counsel then argued that he was asking Bretl the same questions that she was asked in the first trial. The trial court responded: "But you are not using them in the context they were used initially. You are using the follow[]up three or four questions as the initial question."

¶57 After trial counsel read a question to Bretl from the first trial, the trial court explained: "That's my point. You didn't ask the actual question that was asked last time. You are asking part of her answer." The trial court then directed trial counsel to: "Ask more clear questions and relevant questions."

¶58 The jury was brought back into the courtroom and trial counsel asked the following questions and Bretl gave the following answers:

> Q: Okay. Isn't it true that sexual penetration into the vaginal area could cause tears?
>
> A: If there's trauma and a lot force, it could possibly cause tears.
>
> Q: But none was noted here. Correct?
>
> A: Correct.

¶59 In response to further questions from trial counsel, Bretl then testified that the hymen was normal; there was no scarring; and that, although there was some skin irritation, it had nothing to do with the allegations in the case. Bretl further testified that her exam of S.A. neither confirmed nor denied that any sexual abuse occurred.

¶60 The trial court only limited Augoki's cross-examination questions to Bretl that it found were vague, or asked and answered, or hypothetical and

confusing to the witness. Although Augoki asserted that he was asking the same questions that Bretl was asked and answered in the first trial, the trial court determined that trial counsel was *not* actually asking the questions previously asked in the first trial because he was asking them in a different context.

¶61 The thrust of trial counsel's cross-examination of Bretl was that her examination of S.A. was normal, that S.A. had no injuries, and that the examination neither confirmed nor denied that any sexual abuse occurred. When he asked those questions, Bretl gave him those answers.

¶62 Moreover, the trial court did not prohibit trial counsel from asking the specific questions about evidence of injuries several months after the sexual contact. In fact when the trial resumed, trial counsel made the very points he had raised in the off-the-record hearing. Although there was a lengthy hearing off the record about the cross-examination, in the end the trial court did not limit Augoki's cross-examination of Bretl and trial counsel elicited the information that he wanted by rephrasing his questions. The trial court did not deny Augoki the opportunity to effectively cross-examine Bretl.

¶63 Therefore, we conclude that Augoki's confrontation rights were not violated because the trial court did not deny him the right to effective cross-examination of Bretl.

¶64 For the reasons stated above, we affirm the judgment and order.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.