

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

January 30, 2001

Cornelia G. Clark  
Clerk, Court of Appeals  
of Wisconsin

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Nos. 00-1350-CR  
00-1613-CR**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**No. 00-1350-CR**

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TINA S. CORDERO,**

**DEFENDANT-APPELLANT.**

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**No. 00-1613-CR**

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**MARK KOSHNEY,**

**DEFENDANT-APPELLANT.**

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APPEALS from a judgment and an order of the circuit court for Door County: JOHN D. KOEHN, Judge. *Reversed and cause remanded.*

Before Cane, C.J., Hoover, P.J., Peterson, J.

¶1 PETERSON, J. Tina Cordero appeals the denial of her motion for a mistrial and her judgment of conviction for failing to prevent the sexual assault of a child, contrary to WIS. STAT. § 948.02(3)<sup>1</sup> and causing a child to view or listen to sexual activity, contrary to WIS. STAT. § 948.055(2)(a). Mark Koshney appeals the denial of his motion for a mistrial and his judgment of conviction for having sexual contact with a person who has not attained the age of thirteen years, contrary to WIS. STAT. §§ 948.025(1) and 939.05 and causing a child to view or listen to sexual activity.

¶2 Cordero and Koshney<sup>2</sup> argue that the trial court erroneously allowed investigator William Larson's police report to go to the jury during deliberation. They contend that the extraneous information contained in the report was prejudicial and that there is a reasonable possibility that the information contributed to the guilty verdicts.<sup>3</sup> We agree and therefore reverse and remand for a new trial.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

<sup>2</sup> Upon this court's motion these appeals have been consolidated.

<sup>3</sup> Cordero also argues that it was prejudicial error to admit evidence of other acts committed in Minnesota. In addition, Koshney argues that he was denied effective assistance of counsel and that his conviction should be reversed in the event that the Wisconsin Supreme Court decides in *State v. Johnson*, No. 99-2968-CR, *cert granted*, 2000 WI 102, 237 Wis. 2d 264, 618 N.W.2d 753, that WIS. STAT. § 948.025 is unconstitutional. Because our resolution of this issue is dispositive of the appeal, we need not address the other issues Cordero or Koshney raise. *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

## BACKGROUND

¶3 Cordero and her boyfriend, Koshney, were both charged with having sexual contact with their daughter, and with failing to take action to prevent the sexual assault of their daughter. Cordero and Koshney were additionally charged with intentionally causing their daughter to view or listen to sexually explicit conduct. The two were tried jointly.

¶4 During the investigation, Cordero signed a statement that was later introduced into evidence. The statement denied the allegations of sexual abuse. She also gave oral statements to investigator Larson. Larson wrote a report about his interview with Cordero and his search of the home.

¶5 At trial, Larson testified that Cordero denied there were any sexual devices in the home. Larson testified that he searched the home and found X-rated movies, adult magazines, and other sexual devices. His report was not introduced into evidence and contained extraneous information not mentioned at trial.

¶6 During deliberation, the jury asked if it could review Cordero's statements. The trial court consulted with the prosecutor. Cordero and her attorney were not present. The trial court then gave the jury Larson's police report.

¶7 About five or ten minutes later, defense counsel was advised that Larson's report had gone to the jury. Defense counsel questioned whether Larson's report had been received into evidence. The trial court determined that it had not and the report was removed from the jury room.

¶8 Defense counsel moved for a mistrial. Without determining whether the jury read Larson's report, the trial court denied the motion because it concluded that the report merely reiterated evidence the jury already heard.

¶9 The jury subsequently found Cordero guilty of failing to prevent the sexual assault of a child and causing a child to view or listen to sexual activity. The jury found Koshney guilty of having sexual contact with a person who has not attained the age of thirteen years and causing a child to view or listen to sexual activity. This appeal followed.

#### STANDARD OF REVIEW

¶10 Whether to declare a mistrial is directed to the trial court's discretion. *See State v. Copening*, 100 Wis. 2d 700, 709-10, 303 N.W.2d 821 (1981). When we review a discretionary determination, we examine the record to determine whether the circuit court logically interpreted the facts, applied the proper legal standard, and used a demonstrated, rational process to reach a conclusion that a reasonable judge could reach. *See State v. Keith*, 216 Wis. 2d 61, 69, 573 N.W.2d 888 (Ct. App. 1997).

¶11 In considering whether to grant a mistrial, the trial court must determine, in light of the whole proceeding, whether the claimed error was prejudicial so that a mistrial was warranted. *See State v. Hampton*, 217 Wis. 2d 614, 621, 579 N.W.2d 260 (Ct. App. 1998). However, the constitutional question of whether a defendant's right to a fair trial was violated is a question of law that we review independently. *See id.*

## DISCUSSION

¶12 Cordero and Koshney argue that giving Larson's report to the deliberating jury violated their constitutional rights. We agree.

¶13 When extraneous prejudicial information is improperly brought to the jury's attention, the right to trial by an impartial jury, the right to be present during proceedings, and the right to be represented by an attorney are implicated. *See State v. Poh*, 116 Wis. 2d 510, 525-26, 343 N.W.2d 108 (1984). The Sixth Amendment requires that evidence be subject to the rules of evidence and that counsel have an opportunity to cross-examine the state's witnesses. *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965).

¶14 Under *Chapman v. California*, 386 U.S. 18, 24 (1967), the beneficiary of the constitutional error, in this case the State, must "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained ... and we must be able to declare a belief that [the constitutional error] was harmless beyond a reasonable doubt." We consider factors such as the nature of the extraneous information and the circumstances under which it was brought to the jury's attention; the nature of the state's case; the defense presented at trial; and the connection between the extraneous information and a material issue in the case. *Poh*, 116 Wis. 2d at 530. Based on a consideration of these factors, we conclude that in this case the error was not harmless beyond a reasonable doubt.

## TITLES OF MAGAZINES AND VIDEOTAPES

¶15 We must first determine whether the extraneous information in Larson's police report was prejudicial. Cordero and Koshney argue that the trial court erred when it concluded that Larson's report merely reiterated evidence the

jury already heard. They contend that the report contained extraneous information that was prejudicial because the report identified the titles of the magazines and videotapes found in their home. Many of these titles suggested that the topic of the magazines or videotapes involved incestuous behavior. As a result, Cordero and Koshney claim the material undoubtedly influenced the jury because it directly related to their defense that their daughter made up the allegations of sexual assault. We agree.

¶16 A review of the record reveals that the jury had already heard evidence that Cordero and Koshney committed repeated acts of incest with their daughter over a period of at least two years. However, the jury heard only general references to erotic material found at the home. Larson testified that he found a suitcase containing X-rated movies, adult magazines, two vibrators, a dildo, condoms, and various other items. The jury did not hear about the titles of the material or about other sexual items.<sup>4</sup>

¶17 The State's case was based on the child's testimony. Cordero and Koshney's defense was that the incidents of sexual assault never happened. The case became one of credibility between the child and her parents. Information that Cordero and Koshney possessed erotic material relating to incest could have had a negative impact on their credibility.

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<sup>4</sup> Larson's report states that at the home, the following items were found:

a "butt plug," numerous erotic "booklets" some of which were titled "Family Talk," "Family Taboos," "Real Letters ... From Family Lovers," "Best of Family Taboos," etc., two "Minnesota Playhouse" magazines which could be considered "swinger" magazines where couples can meet other couples for sexual liaisons, four National Enquirer type magazines with Jon Bonet [sic] Ramsey highlighted on the covers ....

## ILLEGAL DRUG USE

¶18 Cordero and Koshney argue that extraneous information in the police report was prejudicial because it referred to illegal drugs. The report referenced drug paraphernalia found at the home and stated that a small plastic bag was found in Cordero's wallet. The jury never heard testimony regarding possible drug use or possession by Cordero and Koshney.

¶19 The State argues that the report's references to illegal drugs were limited and could not possibly constitute prejudice. The State further contends that the references were not similar or related to the offenses charged and were irrelevant to any element of the crimes against Cordero and Koshney.<sup>5</sup> See *Poh*, 116 Wis. 2d at 531. We disagree.

¶20 Larson's report stated that Cordero admitted that sexual activity could have occurred "because for a period of time she was addicted to 'crank' and also used marijuana as did Koshney." Not only did this expose the jury to extraneous information about drug use, it connected the drug use to the alleged assaults.

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<sup>5</sup> The State argues that Cordero and Koshney have waived the issue of whether their alleged drug use influenced the jury. We disagree. At trial, defense counsel stated that, "there are a number of items that are included in Mr. Larson's narrative that are negative, that weren't in evidence that would have an impact on the fact-finder." Wisconsin courts do not require an objection to be as specific as possible to be effective. *State v. Agnello*, 226 Wis. 2d 164, 173-74, 593 N.W.2d 427 (1999). To be sufficient, an objection need only give notice of the disputed issue. See *id.* Here, the disputed issue was sending the report to the jury. The trial court examined the report and did not find it prejudicial. As a result, we conclude that this issue was properly preserved.

## OPPORTUNITY

¶21 Koshney additionally argues that Larson's report was prejudicial because it contained information that Cordero thought Koshney could have committed the assaults. He contends that both of them maintained at trial that the other did not commit the alleged acts against their daughter.

¶22 Cordero testified that she "had no suspicion whatsoever" that Koshney might have been doing anything to their daughter. However, Larson's report stated that while Cordero initially denied that there was any sexual contact between her daughter and Koshney, she later stated that she was gone from the residence a lot and, if any sexual activity occurred, it could have occurred when she was gone. Additionally, Cordero stated that anything could have happened when they lived in Duluth because "for a period of time she was addicted to 'crank' and also used marijuana as did Koshney."

¶23 The State argues that Larson's report does not mean what Koshney thinks it means. The reference means only that if the assault occurred, it happened when Cordero was not there. We disagree.

¶24 From these passages, the jury may have seen a different picture than what was shown at trial. The jury could have learned that Koshney had the opportunity to assault his daughter and that "anything could have happened" because of his and Cordero's drug use. Cordero's statement in the report also implies that she believed Koshney was capable of assaulting their daughter.

## COOPERATION WITH THE POLICE

¶25 Koshney argues that Larson's report gave the jury the impression that he had not cooperated with the investigation. Larson's report stated that



Koshney invoked his rights and declined to say anything further without an attorney.

¶26 The State concedes that this passage would not have been admissible, but contends that there is no reason to believe that this passage played a role in the jury's determination of Koshney's guilt. The State argues that the jury was not influenced by the passage because there was testimony that Koshney did in fact cooperate. We disagree.

¶27 The jury may have seen a different picture of Koshney than what was shown at trial. There was testimony that Koshney was very cooperative when he was arrested and that he gave a statement. Larson's report conflicts with this testimony. This confusion could have had a negative impact on Koshney's credibility.

#### POLICE RECORDS AND SOCIAL SERVICES INTERVENTION

¶28 Last, Koshney argues that Larson's report contained references to personal papers found at the home relating to police records and social services intervention. He contends that this would lead the jury to suspect that he and Cordero had been in trouble with both the police and social services in the past even though there was no evidence of either.

¶29 The State argues that the references to police records and social services intervention were so vague that it could not possibly have had an impact on the jury's ultimate verdict. We disagree.

¶30 The information in the report could have had a negative impact on Koshney and Cordero's credibility. The jury never heard about past criminal

behavior or social services intervention. As a result, the jury may have inferred that Koshney and Cordero have been in trouble before.

¶31 In this case, each piece of extraneous information in Larson's report painted Cordero and Koshney in a negative light that was not evident otherwise. The State maintains that none of the extraneous information could have influenced the jury. However, it is the State's burden to prove beyond a reasonable doubt that Larson's report did not contribute to the verdict. *Chapman*, 386 U.S. at 24. It has not done so. We conclude, therefore, that there was extraneous information in Larson's report and that it was prejudicial. The cumulative effect presents a reasonable possibility that the extraneous prejudicial information contributed to the conviction. See *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963).

#### REMEDY

¶32 The State further argues that because the trial court never actually determined whether the jury read Larson's report, we should remand the case to determine whether the extraneous prejudicial information actually influenced the jury. We disagree.

¶33 The jury deliberation occurred on March 17, 1999. Considering the passage of time, it would be impractical for the trial court to accurately determine to what extent the jurors read the report or relied on it while reaching their verdict. We do know that the report was in the jury room about ten minutes. Because the jury specifically asked to review Cordero's statements, we must conclude that the jury examined the report during that time.

*By the Court.*—Judgment and order reversed and cause remanded with directions.

Not recommended for publication in the official reports.

