

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 14, 2011**

A. John Voelker  
Acting Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

**Appeal No. 2010AP2115-CR**

**Cir. Ct. No. 2008CF25**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**TAMARA K. HOFFMAN,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Dunn County: WILLIAM C. STEWART, JR., Judge. *Reversed and cause remanded.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Tamara Hoffman appeals a judgment of conviction for interference with child custody, and an order denying her postconviction motion. Hoffman argues she did not knowingly and voluntarily waive her right to counsel, the circuit court made evidentiary errors, and the State made an improper

closing argument. We conclude that the circuit court erroneously submitted an exhibit to the jury and that the error was prejudicial. We therefore reverse and remand.

### **BACKGROUND**

¶2 Hoffman and her ex-husband, Larry Hoffman, have a daughter. A family court order provided that the daughter would live with each parent for three-month alternating periods, with the other parent having alternating weekend placement. In the first week of placement with Larry, the daughter left his home. The daughter was located several weeks later after Hoffman enrolled her in a nearby school. Hoffman was charged with concealing the daughter from Larry during that time period.

¶3 During trial, the State elicited testimony concerning a custody study conducted by the Caillier Clinic. The State marked the eighteen page, single-spaced Caillier report as an exhibit, but never moved to introduce it into evidence. Over Hoffman's objections, the lengthy Caillier report, and a family court order explicitly relying on it, were sent to the jury. Following the denial of her postconviction motion, Hoffman appeals.

### **DISCUSSION**

¶4 Hoffman raises several issues concerning the admission of evidence at trial. However, we resolve only her argument that the Caillier report was improperly sent to the jury, because we conclude Hoffman is entitled to a new trial based on that error alone. For the same reason, we do not reach Hoffman's additional arguments regarding waiver of counsel and closing arguments. *See*

*State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).

¶5 It is within the circuit court’s discretion to determine what exhibits are permitted in the jury room. *Shoemaker v. Marc’s Big Boy*, 51 Wis. 2d 611, 619, 187 N.W.2d 815 (1971). However, an exhibit becomes evidence only when received by the court. An exhibit marked for identification, but not received, is not evidence. See *Krause v. Milwaukee Mut. Ins. Co.*, 44 Wis. 2d 590, 603, 606-07, 172 N.W.2d 181 (1969); WIS JI—CRIMINAL 103, 155 (Apr. 2000).<sup>1</sup> Hoffman argues, and the State concedes, that it was an erroneous exercise of discretion to send the Caillier report to the jury because the report was never received into evidence. We agree.

¶6 The State, however, argues the court’s error was harmless. An error is harmless if the beneficiary of the error proves beyond a reasonable doubt that the error did not contribute to the verdict obtained. *State v. Harris*, 2008 WI 15, ¶42, 307 Wis. 2d 555, 745 N.W.2d 397. Alternatively stated, an error is harmless if it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error. *Id.*, ¶43.

¶7 The State argues the error was harmless for two reasons. First, the State contends the Caillier report reflects poorly on both parents, not just Hoffman. As the State observes, the report lists an allegation of domestic abuse by Larry against Hoffman. Further, the report describes Larry as “somewhat of an odd character” who voluntarily isolates himself. The report also lists three items under

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<sup>1</sup> The Wisconsin jury instructions constitute only persuasive authority. *State v. Olson*, 175 Wis. 2d 628, 642 n.10, 498 N.W.2d 661 (1993).

the category of “parenting concerns.” However, two of the concerns are characterized as inabilities and imply Hoffman is partly to blame.

¶8 The report casts Hoffman in an exponentially worse light than it does Larry. For instance, the report lists three reports of domestic assault by Hoffman against Larry.<sup>2</sup> The report also lists eleven parenting concerns for Hoffman, most or all of which are likely more damaging than the three listed for Larry. For example, while the report does not mention the domestic abuse by Larry as a parenting concern, as to Hoffman it notes: “Information received from [Larry] indicated a past of physical assault by [Hoffman] towards him while the children witnessed the repeated behavior. While the case was reportedly dismissed, witnessing the assaults would be a part of [the daughter’s] past to which [Hoffman] negatively added.” As additional examples of parenting concerns, the report indicates: “The relationship between father and daughter is being minimally enhanced or encouraged by this mother[,]” and “In regards to the relationship between her daughter and her father, [Hoffman] does not show flexibility, honesty or supportiveness in dealing with [Larry.]”

¶9 The Caillier report also includes a psychological evaluation section for each of the parents. Regarding Larry’s evaluation, the report references substantial negative information about *Hoffman*. In part, the report indicates:

As the interview went on, a pattern in Larry’s past behavior became clear. Larry is apparently easily confused and does not deal well, if at all, with emotional material. As a result, whenever chaos is created around him, he cannot deal with it and certainly does not know how to be assertive in his

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<sup>2</sup> The Caillier report also lists incident reports resulting in an order for protection against both Larry and Hoffman. It then lists several violations of the protection orders, but it is not clear which parent was the violator.

relationship with [Hoffman] or with his daughter. Along with [Hoffman's] and [the daughter's] attitude, it has been very difficult for him to establish a good relationship with his daughter. He claims this has been further interfered with by interruption in the visitation.

¶10 The psychological evaluation of Hoffman, on the other hand, includes substantially more nonhistorical content, including the evaluator's defense of Larry's actions as well as opinions that Hoffman attempted to defeat the MMPI-2 instrument and was "evasive and manipulative during the interview process." In further contrast to Larry's psychological evaluation, the report observes:

In the final analysis, [Hoffman] is a very evasive and manipulative individual who does not answer questions directly. She blames and establishes a victim stance for herself. She takes little or no responsibility for her behavior and practices impression management. Her primary way of gaining control of a situation is to create a whirling maelstrom of chaos so that no one can figure out what is going on. ... It would appear that [Hoffman] consistently downgrades [Larry] and appears to demonstrate weak or frivolous rationalizations for the depreciation. She demonstrates a lack of ambivalence [sic] in this and she does not appear to feel guilty with reference to her behavior.

¶11 Finally, the conclusion section of the Caillier report is significantly more damaging to Hoffman than Larry. In addition to him being "odd," the report concludes Larry is "a non-assertive individual who is easily overwhelmed by emotional events and does not have a great deal of social skills and/or assertiveness to operate in the world." The author then places substantial responsibility for Larry's parental failings on Hoffman and the daughter. As to Hoffman, in contrast, the conclusion indicates:

[Hoffman] is a calculating individual who very much needs to have control over [her daughter] and Larry, although she would deny this. She typically creates crises and then manipulates the happenings and the facts to place herself in

a positive light. It is clear she is very negative towards Larry, does not want Larry to see his daughter except on a very limited basis as controlled by her. ...

....

[Hoffman's] plans are quite clear. [S]he very much intends to leave this area at the first opportunity .... At that point, [Larry] will lose complete contact with his daughter once again. ... [Hoffman's failure] to notice that her daughter is falling significantly behind in [school is], at best, an oversight and at worst, neglect. ... [Hoffman] does not appear to understand the negative way in which she treats Larry and/or does not care. ...

(Underlining added in original exhibit.)<sup>3</sup>

¶12 In addition to arguing the Caillier report contained negative information about both parents, the State contends the report was nonprejudicial because it was merely cumulative to the family court order that relied on it.<sup>4</sup> The State emphasizes that the family court order discussed parental alienation, including the family court's opinions that Hoffman alienated the daughter from Larry and substantially "poisoned" the relationship between the two.

¶13 The Caillier report was not merely cumulative. Parental alienation was only one aspect of the prejudicial information contained in the lengthy, detailed Caillier report. In fact, we conclude the family court order amplified the

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<sup>3</sup> Several portions of the typed Caillier report are emphasized by underlining or large brackets added to the original document by pen. The emphasis was evidently added before submission to the jury, because the ink is photocopied on the exhibit. Most, if not all, of the emphasized portions bear negatively on Hoffman.

<sup>4</sup> The family court order was also submitted to the jury over Hoffman's objection. Prior to trial, the circuit court agreed with Hoffman that most of the order was irrelevant, with the exception of the visitation schedule set forth therein. The court indicated it would therefore redact other portions of the order. The entire order, however, was submitted to the jury without redaction. Hoffman asserts this was error. We need not reach this argument.

level of prejudice to Hoffman because it states the “court found that Dr. Caillier’s report was thorough and extremely useful and insightful and the court gave great weight to both the testimony and the report of Dr. Caillier.” The order further concludes: “That Dr. Caillier’s assessment of the mother is accurate was further corroborated by” other testimony.

¶14 Prior to trial, the circuit court concluded the Caillier report was irrelevant to the criminal case and all reference to it would be excluded. The State concurred. The court only permitted limited testimony about the report because it concluded Hoffman’s questioning of witnesses had opened the door regarding the issue of parental alienation. Aside from being mostly irrelevant, the report contained highly prejudicial information: reports of past criminal conduct coupled with a psychologist’s professional opinions that Hoffman was dishonest, manipulative, evasive, controlling, neglectful, and unremorseful.

¶15 The Caillier report was not evidence and was not properly before the jury. Yet, the jury also learned that another judge had found the report accurate and credible. Thus, the jury was told that both a psychologist and a judge had concluded Hoffman had a bad character and was not a credible witness.<sup>5</sup> The State has failed to meet its burden to prove the error was harmless.

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

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

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<sup>5</sup> Hoffman testified at trial.

