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January 29, 2015

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You are hereby notified that the Court has entered the following opinion and order:

2013AP1419-CRNM State of Wisconsin v. Randell R. Hall (L.C. # 2012CM392)

Before Kloppenburg, J.[1]

Randell Hall appeals a judgment convicting him of disorderly conduct and criminal damage to property, following a jury trial. *See* WIS. STAT. §§ 947.01(1), 943.01(1). Attorney Ben Hanes has filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32; s*ee also* ***Anders v. California***, 386 U.S. 738, 744 (1967); ***State ex rel. McCoy v. Wisconsin Court of Appeals, Dist. I***, 137 Wis. 2d 90, 403 N.W.2d 449 (1987), *aff'd*, 486 U.S.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

429 (1988). Hall was sent a copy of the report, but has not filed a response. Upon reviewing the entire record, as well as the no-merit report, we conclude that there are no arguably meritorious appellate issues.

The criminal complaint in this matter was filed after an altercation between Hall and an individual named David Roth on September 11, 2012. Hall and his girlfriend, Tami Cowan, had been evicted from their apartment and were in the process of moving out with their son. David Hinderman, the landlord, was present that day with his friend, Roth. Hall made verbal threats to Roth. Hall threw food and rocks at Roth's truck, cracking the windshield. A jury found Hall guilty of one count of disorderly conduct and one count of criminal damage to property.

The no-merit report addresses whether Hall is entitled to a new trial because the State failed to disclose a police report concerning a prior incident involving Hinderman and Cowan, whether error was committed by the circuit court or by Hall's trial counsel when Roth testified that Hall had a criminal record, and whether Hall's trial counsel was ineffective for failing to cross-examine a police officer upon recall.

We turn first to the issue of the police report from an incident between Hinderman and Cowan. Failure by the prosecution to disclose evidence favorable to the accused "violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." ***Brady v. Maryland***, 373 U.S. 83, 87 (1963). *See also* WIS. STAT. § 971.23(1)(h) (State is required to disclose "[a]ny exculpatory evidence" to the defense). The undisclosed evidence is material "'only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been

different.'" ***State v. Harris***, 2004 WI 64, ¶14, 272 Wis. 2d 80, 680 N.W.2d 737 (quoted source omitted).

The undisclosed evidence at issue in this case is a police report prepared by the Grant County Sheriff's Department, detailing a conflict between Cowan and Hinderman that occurred about a month before the altercation that gave rise to the charges in this case. On August 6, 2012, Cowan called the police to report that Hinderman had removed the electricity meter from her residence, cutting off the electricity. Cowan told police that Hinderman had done this because of an ongoing eviction dispute. Cowan said that Hinderman wanted her family gone from the residence, but that he had not begun any formal eviction proceedings. Hinderman was arrested on suspicion of disorderly conduct for removing the meter.

We agree with counsel that there would be no arguable merit to pursuing a new trial based upon the non-disclosure of the August 6, 2012 police report. The report does not fall within the scope of materials that must be disclosed under WIS. STAT. § 971.23(1)(a)-(h). The report does not contain statements of any witnesses at Hall's trial, nor does it contain any facts that would tend to negate Hall's guilt. Neither Hall nor Roth is mentioned in the report. The only arguable relevance of the report is that it may lend context to the eviction dispute that had been going on between Hall's family and Hinderman, who was a friend of Roth. However, the jury heard testimony at trial about the fact that there was an ongoing eviction dispute for which the sheriff's department had been called numerous times. Cowan testified about the fact that Hinderman had asked them to leave and had turned the power off. Because the jury was made aware of the eviction dispute even without the report, we agree with counsel that there would be no merit to an argument that the outcome of the trial would have been different if the report had been made available.

We turn next to the issue of whether error was committed by the circuit court or by Hall's trial counsel when Roth testified that Hall had a criminal record. At one point during Roth's trial testimony, he stated, "[Hall] scared me when he said [he] was going to come to my house because … based on his criminal record, how many times he's been charged, I didn't want him at my house." Roth's statement was not solicited by the prosecutor, and was made in the middle of a lengthy response to an unrelated question. The no-merit report concedes that the testimony was inadmissible character evidence. *See* WIS. STAT. § 904.04(2)(a). We agree. The question, then, is whether Hall was prejudiced by the testimony.

Whether inadmissible character evidence is so prejudicial as to require a new trial is a question of fact. ***State v. Staples***, 99 Wis. 2d 364, 370, 299 N.W.2d 270 (Ct. App. 1980). Because Roth's testimony does not go directly to the issue of Hall's guilt, as does, for instance, an improperly admitted confession, we must consider the testimony in the context of the other facts of the case to determine whether the error was harmless. ***Id.*** An error is harmless when "it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'" ***State v. Harris***, 2008 WI 15, ¶¶42-43, 307 Wis. 2d 555, 745 N.W.2d 397 (citations and footnotes omitted). We determine whether an error is harmless in light of the totality of the circumstances. ***Id.***, ¶48.

After Roth made the statement about Hall's criminal record, Hall's counsel immediately objected and moved to strike the testimony. The court granted the request and told the jury to "[i]gnore the last statement by the witness." Then, during jury instructions, the court reminded the jury to disregard all stricken testimony.

Given the curative instructions by the court, we are satisfied that the court's instructions minimized any prejudicial effect the testimony may have had. In addition, prior to making the statement about Hall's criminal record, Roth had testified that Hall threw a rock at his truck and cracked the windshield. Photographs of the cracked windshield were shown to the jury. We are satisfied that, in light of the totality of the circumstances, a rational jury would have found Hall guilty beyond a reasonable doubt, even absent the improper character testimony by Roth. Given this conclusion, we agree with counsel's assessment that there would be no merit to an argument that Hall's trial counsel was ineffective for failing to move for a mistrial on the basis of the admission of character testimony.

We also are satisfied that there would be no merit to an argument that Hall's counsel was ineffective for failing to cross-examine Deputy Mark Schwarz when he was recalled to the witness stand. Schwarz had been the officer dispatched to the scene of the altercation between Hall and Roth. Schwarz testified on recall that when he interviewed Hall, Hall was standing right next to his son, Austin, and that Austin occasionally "chime[d] in" to say something. Schwarz implied in his trial testimony that the responses Austin gave were influenced by his father. Austin had been called as a witness by the defense earlier in Hall's trial, and it could be argued that Schwarz's recall testimony cast doubt on the reliability of Austin's testimony.

However, after reviewing both Austin's testimony and Schwarz's, we are satisfied that counsel's failure to cross-examine Schwarz on recall was not ineffective assistance. Austin was eleven years old at the time of trial. He had difficulty remembering the events, testifying first that he saw Hall throw a rock at Roth's truck and then saying, only a few sentences later, that he didn't really see Hall throw the rock. If Hall's counsel had cross-examined Schwarz on recall, it is likely that any testimony he provided would have further highlighted the inconsistencies in

Austin's testimony. We are satisfied, then, that the decision not to cross-examine Schwarz on recall was a reasonable one based on strategy, such that a challenge on appeal would be without merit. *See* ***Strickland v. Washington***, 466 U.S. 668, 690 (1984) (strategic choices made after thorough investigation of the law and facts are virtually unchallengeable).

A challenge to Hall's sentence would also lack arguable merit. Our review of a sentence determination begins with a "presumption that the [circuit] court acted reasonably" and it is the defendant's burden to show "some unreasonable or unjustifiable basis in the record" in order to overturn it. ***State v. Krueger***, 119 Wis. 2d 327, 336, 351 N.W.2d 738 (Ct. App. 1984). The court withheld sentence and placed Hall on twelve months of probation. *See* WIS. STAT. §§ 973.09(2)(a)1m., 973.09(2)(a)1r., and 973.09(2)(a)2. The sentence imposed was within the applicable penalty ranges. *See* WIS. STAT. §§ 947.01(1) (classifying disorderly conduct as a Class B misdemeanor); 943.01(1) (classifying criminal damage to property as a Class A misdemeanor); 939.51(3)(b) (providing maximum imprisonment of ninety days for a Class B misdemeanor); 939.51(3)(a) (providing maximum imprisonment of nine months for a Class A misdemeanor). There is a presumption that a sentence "'well within the limits of the maximum sentence'" is not unduly harsh, and the sentences imposed here were not "'so excessive and unusual and so disproportionate to the offense[s] committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.'" ***State v. Grindemann***, 2002 WI App 106, ¶¶31-32, 255 Wis. 2d 632, 648 N.W.2d 507 (quoted sources omitted).

Upon our independent review of the record, we have found no other arguable basis for reversing the judgment of conviction. *See* ***State v. Allen***, 2010 WI 89, ¶¶81-82, 328 Wis. 2d 1,

786 N.W.2d 124. We conclude that any further appellate proceedings would be wholly frivolous within the meaning of ***Anders*** and WIS. STAT. RULE 809.32.

Accordingly,

IT IS ORDERED that the judgment of conviction is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Ben Hanes is relieved of any further representation of Randell Hall in this matter pursuant to WIS. STAT. RULE 809.32(3).

Diane M. Fremgen
Clerk of Court of Appeals