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February 4, 2019

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

2018AP105-CRNM State of Wisconsin v. Samuel Lee Isom (L.C. # 2016CM3827)

Before Dugan, J.[1]

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

[1] This matter is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2017-18). All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

Samuel Lee Isom appeals a judgment of conviction entered after a jury found him guilty of multiple misdemeanors: battery, trespass, and disorderly conduct in a private place, all arising on November 8, 2016; and disorderly conduct in a public place, arising on November 9, 2016. Attorney Vicki Zick filed a no-merit report and a supplemental no-merit report concluding that further postconviction or appellate proceedings would lack arguable merit. *See* WIS. STAT. RULE 809.32. Upon review, the court concludes that Isom could pursue an arguably meritorious challenge to trial counsel's effectiveness for failing to object to the admission of three 911 recordings on the ground that they were not properly authenticated. We also conclude that Isom could pursue an arguably meritorious challenge to the use of WIS JI—CRIMINAL 140 to explain the State's burden of proof. Accordingly, we reject the no-merit report, dismiss the appeal without prejudice, and extend the deadline for filing a postconviction motion.

The State filed a criminal complaint alleging, as relevant here, that on November 8, 2016, Isom forced his way into the home of his former girlfriend, T.L.C., hit her, and engaged in disorderly conduct. The State further alleged that on November 9, 2016, Isom engaged in disorderly conduct outside the home. At trial, the State presented the testimony of a police officer who responded to the first of four 911 calls made in relation to these incidents. Appellate counsel explains in the no-merit report that this officer "testified generally about his observations." A second officer testified about the circumstances of arresting Isom early in the morning of November 9, 2016, near T.L.C.'s home. The State also presented recordings of four 911 calls. April Shorter, the 911 operator who received the first of the calls, testified and

authenticated that call, which was placed at 11:11 p.m. on November 8, 2016.[2] The operator who received the remaining three calls did not testify. No citizen witness testified to placing any of the 911 calls or to the events underlying the charges.

In the no-merit and supplemental no-merit reports, Attorney Zick considers whether Isom could challenge trial counsel's effectiveness for failing to object to the admission of the final three 911 calls. To prove that trial counsel was ineffective, a defendant must show that counsel's performance was deficient and that the deficiency prejudiced the defendant. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Appellate counsel explains that, in her view, the State did not properly authenticate the three 911 calls received by an operator other than Shorter and that trial counsel therefore performed deficiently by failing to object to the admission of the recordings. Appellate counsel concludes, however, that Isom was not prejudiced by the failure

[2] The first 911 call was as follows:

Operator:	911 Operator 18, where is your emergency?
[Caller]:	We need help right now! He's punching all of us and he tried to shoot my mama. We need help! 2977 Right away please.
Operator:	You said what's going on? I can't hear you.
[Caller]:	So – He's – He got a gun and he tried to shoot my mama. He hit her in the face with a gun.
Operator:	Who?
[Caller]:	Samuel Isom.
Operator:	Ma'am, who is
[Caller]:	He's still going crazy, please can somebody get here? Help!
Operator:	Ok ma'am, what is he – who is he to you guys?
[Caller]:	We don't have time to explain all this. He's still –
Operator:	Ma'am, the call is already in, but you're not helping anyone if you're not answering questions. So who is he to you?
[Caller]:	He's nothing to me.
Operator:	Ok, who is he to your mom then? Who is he? Just a stranger from –
[Caller]:	Ex boyfriend.
Operator:	Who? Your mom's ex boyfriend?
[Caller]:	Yes.
Operator:	All right. And how old is he?
[Caller]:	I don't know! Can some one get here? Oh my god.

because the evidence would have been sufficient to sustain all four convictions even without the calls.

In the original no-merit report, appellate counsel specifically examined the sufficiency of the evidence as to the trespass charge absent the latter three 911 calls. The elements of trespass are: (1) the defendant intentionally entered or remained in the dwelling of another; (2) the defendant entered or remained in the dwelling without the consent of someone lawfully upon the premises; and (3) the defendant entered or remained in the dwelling under circumstances tending to create or provoke a breach of the peace. *See* WIS JI CRIMINAL—1437. Appellate counsel discussed those elements in light of the first 911 call:

> the caller does suggest that Isom is not a welcome guest in the house. The fact that he is the victim's ["]ex-boyfriend["] suggests he does not reside with the victim. That he is ["]nothing["] to the caller, the victim's daughter, suggests too that he is not a person who lives in the house. Further the fact that the caller is frantically yelling ["]we need help["] suggests that she believes help is needed to remove Isom from the house because he is not supposed to be there.

Appellate counsel therefore advises: "there is probably enough contained in [the first 911 call] to allow a reasonable juror to conclude that Isom was a trespasser in the house" from which the call was placed.

Appellate counsel's conclusion is equivocal at best. Her assertion that the first 911 call was "probably enough" evidence to prove trespass beyond a reasonable doubt fails to persuade us that it would be wholly frivolous to mount a contrary argument.

Turning to the disorderly conduct charge that arose on November 9, 2016, the circuit court instructed the jury that the elements of disorderly conduct in a public place are: (1) the

defendant engaged in loud, violent, or otherwise disorderly conduct; and (2) "[t]he conduct ... under the circumstances as they then existed, tended to cause or provoke a disturbance." *See* WIS JI—CRIMINAL 1900. In the supplemental no-merit report, appellate counsel examines the sufficiency of the evidence to prove the charge absent the last three 911 calls.

Appellate counsel first considers the substance of the first 911 call, made on November 8, 2016. That call, however, was made the day before the charge arose. Moreover, counsel's summary of the call includes a substantial amount of information that is contained only in the latter three 911 calls, including information that Isom had "broken in" to someone's home and that a resident in the home had been taken to the hospital. Appellate counsel also discusses the testimony of the officer who arrested Isom on November 9, 2016. Counsel's review of that testimony, however, does not fully comport with our reading of the transcript. For example, appellate counsel asserts that the officer testified about his "personal observation of Isom sneaking around T.C.'s property" before his arrest. The officer, however, testified that his view was blocked and that he was able to tell the jury nothing more than what his partner saw, specifically, "a black figure in what appeared to be the corner yard ... southwest corner of the intersection appeared to be a subject in that yard." Ultimately, appellate counsel advises: "it would seem that Isom would have some difficulty arguing on appeal that no jury acting reasonably, could find him guilty of disorderly conduct on November 9 [, 2016]."

As the foregoing reflects, appellate counsel is certain that Isom can satisfy the first ***Strickland*** prong, namely, that trial counsel performed deficiently by failing to seek exclusion of the last three 911 calls presented to the jury. Counsel's conclusions that Isom cannot satisfy the prejudice prong are less confidently stated. Moreover, the difficulty in proving prejudice that appellate counsel identifies in regard to the disorderly conduct charge appears to flow in

meaningful measure from an uncertain reading of the transcript and from confusing the evidence found in the first 911 call with the evidence found in later 911 calls that appellate counsel believes would have been excluded but for trial counsel's deficient performance.[3] In sum, although appellate counsel plainly perceives difficulties in demonstrating that Isom's trial counsel was ineffective, appellate counsel does not persuade this court that it would be wholly frivolous for Isom to claim prejudice as a result of trial counsel's failure to object to the bulk of the State's evidence.

As a second matter, the circuit court used WIS JI—CRIMINAL 140 to instruct the jury in regard to the State's burden of proof. On November 13, 2018, the Wisconsin Supreme Court granted a petition for review in ***State v. Trammell***, No. 2017AP1206-CR, unpublished slip op. (WI App May 8, 2018). The court is expected to address whether the holding in ***State v. Avila***, 192 Wis. 2d 870, 532 N.W.2d 423 (1995)—that it is "not reasonably likely" that WIS JI—CRIMINAL 140 reduces the State's burden of proof—is good law; or whether ***Avila*** should be overruled on the ground that it stands rebutted by empirical evidence. Consequently, an issue of arguable merit exists arising from the use of WIS JI—CRIMINAL 140 at Isom's trial.

[3] We do not consider whether trial counsel should have objected to admission of any of the 911 calls or whether the objection would have been sustained. Appellate counsel advises that such an objection was meritorious and should have been made. For purposes of this proceeding, we accept that advisement, recognizing that, should this matter proceed to an appeal on the merits, we cannot predict how we would resolve a dispute briefed by zealous advocates for both sides.

When resolving an appeal under WIS. STAT. RULE 809.32, the question is whether a potential issue would be "wholly frivolous." ***State v. Parent***, 2006 WI 132, ¶20, 298 Wis. 2d 63, 725 N.W.2d 915. The test is not whether the lawyer should expect the argument to prevail. *See* SCR 20:3.1, cmt. (action is not frivolous even though the lawyer believes his or her client's position will not ultimately prevail). Rather, the question is whether the potential issue so lacks a basis in fact or law that it would be unethical for the lawyer to prosecute the appeal. *See* ***McCoy v. Court of Appeals***, 486 U.S. 429, 436 (1988). In light of the foregoing, we must reject the no-merit report filed in this matter.

We add that our obligation to reject the no-merit report for the reasons discussed in this order does not mean we have reached a conclusion about the ultimate merit of an appeal in this matter or about the arguable merit of any other potential issue in the case. Isom is not precluded from raising any issue in postconviction proceedings that counsel may now believe has merit.

IT IS ORDERED that the no-merit report is rejected and this appeal is dismissed without prejudice.

IT IS FURTHER ORDERED that this matter is referred to the Office of the State Public Defender to consider appointment of new counsel for Isom, any such appointment to be made within forty-five days after this order.

IT IS FURTHER ORDERED that the State Public Defender's Office shall notify this court within five days after either a new lawyer is appointed for Isom or the State Public Defender determines that new counsel will not be appointed.

IT IS FURTHER ORDERED that the deadline for Isom to file a postconviction motion is extended until forty-five days after the date on which this court receives notice from the public defender's office advising either that it has appointed new counsel for Isom or that new counsel will not be appointed.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals