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January 12, 2021

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

2019AP1945-CRNM State of Wisconsin v. Jamil Sharon Allen (L.C. # 2017CF3725)

Before Brash, P.J., Dugan and Donald, JJ.

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).

Jamil Sharon Allen appeals from a judgment of conviction for possession of a firearm by a felon and from an order denying his postconviction motion for a new trial. *See* WIS. STAT.

§ 941.29(1m)(a) (2017-18).¹ Allen's appellate counsel, Sarah Zwach, has filed a no-merit report pursuant to *Anders v. California*, 386 U.S. 738 (1967), and WIS. STAT. RULE 809.32. Allen was informed of his right to file a response and has not filed one. We have independently reviewed the record and the no-merit report, as mandated by *Anders*. We conclude that there is no issue of arguable merit that could be pursued on appeal. Therefore, we summarily affirm.

In August 2017, a woman called 911 seeking police assistance. She said that a man named Jamil Allen had hit her and was walking down the street with a gun. She said she did not want to remain at the location to talk to the police because Allen had a gun. She said she would take the bus to a certain location and meet the police there. She gave the 911 operator her phone number and provided a description of Allen.

As police officers were driving around looking for Allen, they telephoned the woman to gather more information. She said she had been riding in a car with Allen, who was driving a black Nissan with temporary license tags. After Allen hit her, she got out of the car and called 911. The officers located the vehicle and attempted to conduct a traffic stop. The vehicle started to stop but then sped away and crashed into a garage. When officers got to the vehicle, the driver was gone. They found a gun on the floor by the front passenger seat. Later, the officers found Allen standing outside a nearby home, talking to two other individuals.

Allen was charged with being a felon in possession of a firearm and fleeing an officer. The fleeing charge was later amended to causing property damage while fleeing an officer. The case proceeded to a jury trial where Allen's defense was that he was not the individual who drove and

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

crashed the vehicle. The woman who called 911 did not testify, but the State was allowed to introduce—over the defendant’s objection—parts of the 911 call and limited information about the subsequent call between the police officer and the woman. The jury also heard a recorded jail call between Allen and the woman. In addition, the State introduced security camera footage of the vehicle hitting the garage and a man jumping out of the vehicle and running away.

The jury found Allen guilty of being a felon in possession of a firearm but acquitted him of fleeing an officer. The trial court sentenced Allen to twenty-two months of initial confinement and twenty-two months of extended supervision.

Allen filed a postconviction motion seeking a new trial on grounds that the trial court erroneously admitted the 911 call.² The trial court denied the motion. This no-merit appeal follows.

The no-merit report addresses three issues, including: (1) whether the trial court “incorrectly rule[d] that the 911 call was non-testimonial and use[d] the wrong legal standard in determining its admissibility”; (2) whether there was sufficient evidence supporting the conviction; and (3) whether the sentence was unduly harsh and excessive. The no-merit report thoroughly addresses each of those issues, providing citations to the record and relevant authority. This court is satisfied that the no-merit report properly analyzes the issues it raises. Based on our independent

² Allen’s motion also challenged the use of jury instruction WIS JI—CRIMINAL 140. The trial court rejected that argument after the Wisconsin Supreme Court issued a decision concluding that the jury instruction was not improper. See *State v. Trammell*, 2019 WI 59, ¶67, 387 Wis. 2d 156, 928 N.W.2d 564. Given the holding in *Trammell*, there would be no arguable merit to pursue an appeal based on the use of that jury instruction at Allen’s trial.

review of the record, we agree with counsel’s assessment that none of those issues presents an issue of arguable merit. We will briefly address each issue.

First, the no-merit report discusses the trial court’s decision to allow the State to introduce most of the 911 call even though the caller did not testify.³ We agree with appellate counsel’s analysis of this issue; there would be no arguable merit to challenging the trial court’s conclusion that the caller’s statements were non-testimonial. *See State v. Mattox*, 2017 WI 9, ¶24, 373 Wis. 2d 122, 890 N.W.2d 256 (“[C]onfrontation challenges begin with an analysis of whether the out-of-court statements used against a defendant are ‘testimonial.’ If the statements are not testimonial, the Confrontation Clause is not implicated.”). The woman called 911 to seek police assistance, and she expressed immediate concern about her safety, indicating that she was going to take a bus to get away from the area where Allen was walking with a gun. Her statements to the 911 operator were non-testimonial. *See Davis v. Washington*, 547 U.S. 813, 817-18, 828 (2006) (holding that 911 caller’s statements about an altercation with a former boyfriend who had just left her home were non-testimonial because their “primary purpose was to enable police assistance to meet an ongoing emergency”).

We further conclude that there would be no arguable merit to challenging the trial court’s decision to admit the statements as non-testimonial hearsay under the “excited utterance” and “present sense impression” exceptions to the hearsay rule. *See WIS. STAT. § 908.03(1), (2)*.

Next, we agree with appellate counsel that there would be no arguable merit to asserting that the evidence, viewed most favorably to the State and the conviction, was “so insufficient in

³ The trial court did not allow the State to introduce the caller’s statement that Allen had hit her.

probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt.” See *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). Specifically, Allen did not dispute that he is a felon, and the State presented evidence that the gun was found in the vehicle registered to Allen that contained receipts bearing Allen’s name and his identification card. While Allen argued that he was not the man seen on video running from the vehicle, there was evidence the jury could rely on to make that finding, as detailed in the no-merit report.

There also would be no arguable merit to challenging the trial court’s exercise of its sentencing discretion or asserting that the sentence was unduly harsh and excessive. The trial court considered the requisite sentencing factors and explained its sentencing decision, consistent with the dictates of *State v. Gallion*, 2004 WI 42, ¶¶40-43, 270 Wis. 2d 535, 678 N.W.2d 197. Further, the trial court could have imposed ten years of imprisonment. The total sentence of three years and eight months was well within the maximum sentence, and we discern no erroneous exercise of discretion. See *State v. Scaccio*, 2000 WI App 265, ¶18, 240 Wis. 2d 95, 622 N.W.2d 449 (“A sentence well within the limits of the maximum sentence is unlikely to be unduly harsh or unconscionable.”).

Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent Allen further in this appeal.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order are summarily affirmed. See WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that Attorney Sarah Zwach is relieved from further representing Jamil Sharon Allen in this appeal. *See* WIS. STAT. RULE 809.32(3).

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

Sheila T. Reiff
Clerk of Court of Appeals