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April 13, 2021

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Wayne M. Lautenbach
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You are hereby notified that the Court has entered the following opinion and order:

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2019AP2265-CRNM State of Wisconsin v. Wayne M. Lautenbach (L.C. No. 2016CF93)

Before Stark, P.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 appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2019-20). All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

Attorney Gregory Bates, appointed counsel for Wayne Lautenbach, has filed a no-merit report pursuant to WIS. STAT. RULE 809.32, concluding that there is no arguable merit to challenging Lautenbach's convictions for two counts of disorderly conduct while using a dangerous weapon. Lautenbach filed a response, and Bates filed a supplemental no-merit report. Upon consideration of the report, the response, the supplemental report, and an independent review of the record as mandated by ***Anders v. California***, 386 U.S. 738 (1967), we conclude that there is no arguable merit to any issue that could be raised on appeal. Accordingly, we summarily affirm.

As discussed further below, the charges against Lautenbach arose out of an incident involving Lautenbach, his brother's girlfriend, T.M., and T.M.'s friend, O.S. The State prosecuted Lautenbach on the two disorderly conduct counts based on T.M. and O.S. each being victims of Lautenbach's conduct.[2] Lautenbach was convicted of the two counts after a jury trial. The circuit court sentenced Lautenbach to concurrent ninety-day jail terms and a $100 fine on each count.

The no-merit report addresses whether the evidence was sufficient to support Lautenbach's convictions. For the reasons that follow, we agree with counsel that there is no arguable merit to this issue.

Our review of the sufficiency of the evidence is highly deferential. We will not overturn a conviction "unless the evidence, viewed most favorably to the [S]tate and the conviction, is so

[2] A victim of disorderly conduct may be "any person who suffers from the conduct that tends to provoke a disturbance." ***Leonard v. State***, 2015 WI App 57, ¶27 n.9, 364 Wis. 2d 491, 868 N.W.2d 186.

insufficient in 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).

The elements of disorderly conduct are: (1) the defendant engaged in violent, abusive, indecent, profane, boisterous, unreasonably loud, or otherwise disorderly conduct; and (2) the conduct of the defendant, under the circumstances as they then existed, tended to cause or provoke a disturbance. *See* WIS. STAT. § 947.01(1) (2015-16); WIS JI—CRIMINAL 1900. A "[d]angerous weapon" for purposes here includes "any … device or instrumentality which, in the manner it is used or intended to be used, is calculated or likely to produce death or great bodily harm." *See* WIS. STAT. § 939.22(10) (2015-16).

We do not repeat all of the evidence here. However, we will summarize some of the most significant evidence supporting the jury's verdicts.

Lautenbach and his brother, Frank Lautenbach, were involved in a dispute over the taking of wood from family property. On the day of the incident, Frank's girlfriend, T.M., drove to the property to take photographs of Lautenbach collecting wood on the property. T.M.'s friend, O.S., was with her.

According to T.M. and O.S., after they arrived at the property and as T.M. began taking photos, Lautenbach approached them, screamed or yelled at T.M., and called T.M. a vulgar term. Lautenbach also started a chainsaw and, with the chain spinning, brought the chainsaw close to T.M. and made jabbing motions toward her while her vehicle window was down. Lautenbach walked away, and T.M. called 911. Lautenbach then drove a large logging vehicle toward T.M.'s vehicle and rocked or pushed T.M.'s vehicle with the logging vehicle. Photos that T.M.

had taken documented parts of the incident and included images of Lautenbach standing just outside of T.M.'s car window, holding a chainsaw and appearing angry.

T.M. testified that she was very frightened by the incident and that, after it was over, she sought medical care in an emergency room for a panic attack. She recalled that O.S. yelled or screamed that Lautenbach was going to hit them and that O.S. suddenly jumped out of the car. O.S. testified that she was "scared to death." She said that she jumped out of T.M.'s car thinking that she did not want to die in a flipped over vehicle. O.S. stated that she had never seen such aggressive behavior before, and that she believed that she and T.M. were going to die.

Lautenbach testified and claimed that he did not call T.M. a vulgar term, did not activate the chainsaw's chain, and did not contact T.M.'s vehicle with his logging vehicle. He admitted, however, to some of the other conduct that T.M. and O.S. described. Regardless, the conflicts between Lautenbach's testimony and T.M.'s and O.S.'s testimony do not create a sufficiency-of-the-evidence issue. "The function of the jury is to decide which evidence is credible and which is not and how conflicts in the evidence are to be resolved." ***Poellinger***, 153 Wis. 2d at 503. The evidence T.M. and O.S. provided, along with the other evidence of record, was sufficient to support Lautenbach's convictions.

The no-merit report also addresses whether the circuit court erred in pretrial rulings, including evidentiary rulings and the judge's determination that there was no basis for his recusal. We are satisfied that the no-merit report properly analyzes these issues as having no arguable merit.

Our review of the record discloses no other issues of arguable merit with respect to events before or during trial. We see no basis to pursue any issue with respect to jury selection,

the circuit court's evidentiary rulings at trial, Lautenbach's decision to exercise his right to testify, the jury instructions, or arguments made to the jury.

In his response to the no-merit report, Lautenbach argues that he has two viable claims for ineffective assistance of his trial counsel. He contends that his trial counsel should have: (1) requested a modified self-defense instruction; and (2) sought to admit other acts evidence relating to T.M. In the supplemental no-merit report, no-merit counsel concludes that these claims have no arguable merit. We agree and discuss each claim below.

To show ineffective assistance of counsel, the defendant must establish both that counsel's performance was deficient and that the deficient performance prejudiced the defense. ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). To establish deficient performance, "[t]he defendant must show that counsel's representation fell below an objective standard of reasonableness." ***Id.*** at 688. To establish prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694.

We turn first to Lautenbach's claim that his trial counsel should have requested a modified self-defense jury instruction. Lautenbach does not make clear what instruction language he believes counsel should have requested. Based on Lautenbach's arguments and legal citations, it appears that Lautenbach believes his trial counsel should have requested: (1) an instruction based on defense of property under WIS. STAT. § 939.49(1) because, according to Lautenbach, T.M. was unlawfully trespassing on his property; or (2) an instruction based on the defense of one's place of business under WIS. STAT. § 939.48(1m) because, according to Lautenbach, T.M. unlawfully entered his property and interfered with his wood-cutting business.

Lautenbach points out that while the jury was deliberating, it sent out a note asking whether there is a state statute for protecting one's property from interference.[3]

WISCONSIN STAT. § 939.49(1), defense of property, states: "Only such degree of force or threat thereof may intentionally be used as the actor reasonably believes is necessary to prevent or terminate the interference." Section 939.49(1) further states: "It is not reasonable to intentionally use force intended or likely to cause death or great bodily harm for the sole purpose of defense of one's property." WISCONSIN STAT. § 939.48(1m), sometimes referred to as the "castle doctrine," encompasses one's place of business, but it applies only upon forcible entry. *See* § 939.48(1m)(ar).

Even if we assume that T.M. unlawfully trespassed on Lautenbach's property and interfered with his place of business, we see no basis to argue that either theory of defense applies. Lautenbach's use of the chainsaw and logging vehicle was unreasonable under the circumstances as a matter of law, where there was no evidence that T.M. or O.S. displayed any threatening conduct whatsoever. Moreover, the castle doctrine cannot apply, as there was no evidence that T.M. made any forcible entry to the property. Accordingly, we see no basis to argue that Lautenbach's trial counsel was ineffective by not requesting a self-defense instruction under WIS. STAT. § 939.49(1) or WIS. STAT. § 939.48(1m).

If Lautenbach means to claim that his trial counsel was ineffective by failing to request a novel self-defense instruction based on an extension of existing or unsettled law, there is also no

[3] With the agreement of the parties, the circuit court provided a response to the jury's note stating that the jury should refer to the instructions already provided.

arguable merit to this claim. Counsel's failure to raise a novel argument does render counsel's performance defective. *See* ***State v. Lemberger***, 2017 WI 39, ¶18, 374 Wis. 2d 617, 893 N.W.2d 232. Similarly, "[w]hen the law is unsettled, the failure to raise an issue is objectively reasonable and therefore not deficient performance." ***State v. Jackson***, 2011 WI App 63, ¶10, 333 Wis. 2d 665, 799 N.W.2d 461.

We turn to Lautenbach's claim that his trial counsel should have sought to admit other acts evidence relating to T.M. According to Lautenbach, this other acts evidence would have included that T.M. had a history of fabricating complaints against him with law enforcement and harassing him. Lautenbach argues that it was unreasonable for trial counsel not to seek to admit this other acts evidence and that there is a strong likelihood that he would have been acquitted on all counts had the evidence been admitted.

We conclude that, regardless of any arguable deficient performance that could be presumed, there is no arguable basis to claim prejudice. "[M]erely showing that the error had some conceivable effect on the outcome" is not sufficient. ***State v. Reed***, 2002 WI App 209, ¶17, 256 Wis. 2d 1019, 650 N.W.2d 885.

Even if T.M. made false complaints against Lautenbach and harassed him in the past, there was ample evidence to corroborate her testimony as to his conduct here. That evidence included the photographs that T.M. had taken documenting the incident and corroborating O.S.'s testimony. Additionally, Lautenbach admitted during his testimony that he yelled or screamed at T.M., that he started the chainsaw and revved it a couple of times but without activating the chain, and that he drove his logging vehicle toward T.M.'s vehicle hoping it would get her to move. Furthermore, the jury heard testimony regarding the poor relationship between

Lautenbach and T.M., and it also heard from multiple witnesses regarding a history of family conflict. With or without the other acts evidence about T.M., the jury would have understood that T.M. might have a motive to lie or exaggerate about Lautenbach's conduct. For all of these reasons, we see no basis for Lautenbach to claim prejudice based on his counsel's failure to seek admission of the other acts evidence relating to T.M.

We turn finally to sentencing. The no-merit report addresses whether the circuit court erroneously exercised its discretion in imposing sentence. We agree with counsel that there is no arguable merit to this issue. The court discussed the required sentencing factors along with other relevant factors, and it did not rely on any inappropriate factors. *See* ***State v. Gallion***, 2004 WI 42, ¶¶37-49, 270 Wis. 2d 535, 678 N.W.2d 197. The sentence was lawful and was not so excessive so as to shock public sentiment. *See* ***Ocanas v. State***, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975). We see no other arguable basis for Lautenbach to challenge his sentence.

Our review of the record discloses no other potential issues for appeal.

Therefore,

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

IT IS FURTHER ORDERED that attorney Gregory Bates is relieved of any further representation of Wayne Lautenbach in this matter. *See* WIS. STAT. RULE 809.32(3).

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

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*Sheila T. Reiff*
*Clerk of Court of Appeals*