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**DISTRICT I**

November 1, 2022

To:

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Perry Adrian Felton  
2571 N. 13th. St.  
Milwaukee, WI 53206

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

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2021AP1041-CRNM      State of Wisconsin v. Perry Adrian Felton (L.C. # 2016CF3719)

Before Brash, C.J., Dugan and White, 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).**

Perry Adrian Felton appeals a judgment convicting him of one count of physical abuse of a child (intentionally causing bodily harm) and one count of strangulation and suffocation. He also appeals an order denying his postconviction motion. Assistant State Public Defender David Malkus filed a no-merit report seeking to withdraw as appellate counsel. *See* WIS. STAT. RULE 809.32 (2019-20);<sup>1</sup> *Anders v. California*, 386 U.S. 738, 744 (1967). Felton was provided with a

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

copy of the no-merit report and advised of his right to respond, but he has not responded. After considering the no-merit report and conducting an independent review of the record as mandated by *Anders*, we conclude that there are no issues of arguable merit that Felton could raise on appeal. Therefore, we summarily affirm. *See* WIS. STAT. RULE 809.21.

According to the criminal complaint, Felton put his hands around the neck of his sixteen-year-old daughter, P.F., and violently shook her. P.F. could not breathe or speak while her father choked her. Felton waived his right to a jury trial in favor of a two-day trial to the circuit court. The circuit court found Felton guilty of the charges. The circuit court sentenced Felton to a total of three years of initial confinement and three years of extended supervision. Felton moved for postconviction relief, arguing that he did not knowingly, voluntarily, and intelligently waive his right to a jury trial, and that he received ineffective assistance of trial counsel. The circuit court denied the motion after an evidentiary hearing.

The no-merit report addresses whether there was sufficient evidence adduced at trial to support Felton's conviction. When reviewing the sufficiency of the evidence, we look at whether "the evidence, viewed most favorably to the [S]tate and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." *State v. Zimmerman*, 2003 WI App 196, ¶24, 266 Wis. 2d 1003, 669 N.W.2d 762 (citation omitted).

Police Officer Justin Ferrari testified that he interviewed P.F. in the hospital after she was transported to the hospital by ambulance. Officer Ferrari testified that P.F. said Felton put his hands around her neck and shook her, causing her head to hit a fence. Officer Ferrari further testified that P.F. told him she could not breathe or speak while her father was choking her.

Officer Ferrari testified that P.F.'s mother, N.L., told him that P.F.'s father choked P.F. Madeline Winn, a physician's assistant who treated P.F., testified that P.F. said she was choked by her father two days before P.F. was treated in the hospital. Winn testified that P.F. reported having neck pain and shoulder pain, and said she initially had trouble breathing, though that had subsided. Winn testified that P.F. was emotional and had a limited range of motion to her neck. Dr. Angela Rabbitt, a child abuse pediatrician with Child Advocacy and Protection Services, testified that P.F.'s injuries were consistent with choking or strangulation. Based on our review of the trial transcript and other evidence, as partially summarized here, we conclude that there was sufficient evidence to convict Felton of the charges. Accordingly, there would be no arguable merit to a claim that there was insufficient evidence to support the convictions.

The no-merit report also addresses whether there would be arguable merit to an appellate challenge to Felton's sentence. The circuit court sentenced Felton to three years of initial confinement and three years of extended supervision on each count, to be served concurrently. The circuit court considered appropriate sentencing objectives and explained that the sentence it imposed was based on various sentencing criteria applied to the facts of this case. *See State v. Brown*, 2006 WI 131, ¶26, 298 Wis. 2d 37, 725 N.W.2d 262. Because the circuit court properly exercised its discretion, there would be no arguable merit to an appellate challenge to the sentence.

The no-merit report next addresses whether there would be any arguable merit to an appellate challenge to the circuit court's order denying Felton's postconviction motion. Felton argued that his jury trial waiver was not knowing, voluntary, and intelligent because he did not know that he had a constitutional right to subpoena witnesses. Felton also argued that he received ineffective assistance of counsel because his trial counsel: (1) failed to advise him of

his right to subpoena witnesses; (2) failed to object to other acts evidence; and (3) failed to object to the admission of jail calls used in rebuttal to impeach him. We agree with the no-merit report's analysis of these issues. The circuit court is not required to inform a defendant who wishes to waive a jury trial in favor of a bench trial that the defendant has a right to subpoena witnesses. See *State v. Anderson*, 2002 WI 7, ¶24, 249 Wis. 2d 586, 638 N.W.2d 301. Therefore, there is no merit to the argument that Felton's jury trial waiver was not knowing, voluntary, and intelligent, and the claim of ineffective assistance of counsel based on such is meritless. As for the other ineffective assistance of counsel claims, Felton cannot establish prejudice because the circuit court explained in its order denying postconviction relief that it "would have made the same findings and rendered the same verdict even without the admission of the other[-]acts evidence" and the jail calls were admissible as rebuttal evidence, and thus counsel was not ineffective for failing to object to their admission. See *State v. Zimmerman*, 2003 WI App 196, ¶33, 266 Wis. 2d 1003, 669 N.W.2d 762 ("In order to prevail on an ineffective assistance of counsel claim, a defendant bears the burden of establishing that counsel's performance was deficient and that the deficient performance prejudiced the defense."). Therefore, there would be no arguable merit to an appellate challenge to the order denying the postconviction motion.

The no-merit report also discusses whether there would be any potential appellate issues related to Felton's motion to dismiss at the close of the State's evidence, Felton's decision to testify at trial, and objections raised during the witnesses' testimony. We agree with the report's analysis of these issues and its conclusion that there are no arguably meritorious issues for appeal.

Our independent review of the record reveals no arguable basis for reversing the judgment of conviction or order denying postconviction relief. Therefore, we affirm the judgment and order, and relieve Assistant State Public Defender Malkus of further representation of Felton.

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

IT IS FURTHER ORDERED that Assistant State Public Defender David Malkus is relieved of any further representation of Felton 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*