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**DISTRICT III**

November 16, 2021

To:

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Electronic Notice

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Winn S. Collins  
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Electronic Notice

Dennis Schertz  
Electronic Notice

Richard A. Westcott II  
N9486 State Road 25  
Colfax, WI 54730

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

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2019AP1150-CRNM      State of Wisconsin v. Richard A. Westcott II  
(L. C. No. 2016CF40)

Before Stark, P.J., Hruz and Gill, 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).**

Counsel for Richard A. Westcott II has filed a no-merit report concluding no grounds exist to challenge Westcott's convictions for strangulation and suffocation, battery, and criminal damage to property—all counts as a repeater. Westcott was informed of his right to file a response to the no-merit report, and he has not responded. Upon our independent review of the record as mandated by *Anders v. California*, 386 U.S. 738 (1967), we conclude there is no

arguable merit to any issue that could be raised on appeal. Therefore, we summarily affirm the judgment of conviction. *See* WIS. STAT. RULE 809.21 (2019-20).<sup>1</sup>

The charges in this case arose from allegations that Westcott attacked a former girlfriend, Jenny, while he was staying at a home she shared with a roommate, Susan.<sup>2</sup> The complaint alleged that when Susan offered to take Westcott to a hospital to address his drug abuse issues, he became enraged after Jenny suggested it would not help based on his past failures to remain hospitalized. According to the complaint, Westcott started choking Jenny and “bashed” her head on a dresser and into a wall. He also damaged Susan’s “clothing rack, a fan, six bins, and [a] clothes bin.”

At trial, Westcott moved for a mistrial after three pictures of Jenny’s injuries were inadvertently projected on the lower left corner of a screen for “not more than a minute” during the prosecutor’s opening statement. The circuit court denied the motion, concluding that the fact the jury “may have had a glimpse of them, not knowing what they were at the time of the opening statement,” constituted harmless error. Westcott subsequently moved for a mistrial following Jenny’s testimony that the attack happened shortly after Westcott was released from jail. The court denied that motion, concluding that because the comment was immediately stricken, and the jury was instructed to ignore it, any error was harmless and did not warrant a mistrial. Westcott again moved for a mistrial after the pictures of Jenny’s injuries were admitted as exhibits, reiterating that the jury saw evidence “before it ha[d] been properly admitted.”

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

<sup>2</sup> Pursuant to the policy underlying WIS. STAT. RULE 809.86(4), we use pseudonyms instead of the victims’ names.

Westcott also argued that the combination of errors warranted a mistrial. The court denied the motion, reiterating that when the photos were inadvertently shown during the prosecutor's opening argument, they were on the periphery of the screen and were not "central to the slide" that was being discussed. The court added that when looking at the testimony and evidence presented, any cumulative impact of the errors did not "rise[] to the level that a mistrial is warranted."

After deliberating for over three hours, the jury informed the circuit court that it was deadlocked on one of the counts. The parties agreed that the court should read the supplemental instruction on agreement to the jury. *See* WIS JI—CRIMINAL 520 (2001). The jury ultimately found Westcott guilty of the crimes charged. Out of a maximum possible aggregate sentence of twelve years' total for the three crimes, the court withheld sentence on the strangulation and suffocation offense, and it imposed five years' probation with one year in jail as a condition.<sup>3</sup> The court also allowed thirty days of the conditional jail time to be served in an inpatient alcohol and drug treatment facility. With respect to the misdemeanor convictions, the court imposed an aggregate total of nine months' concurrent jail time.

The no-merit report addresses whether there was sufficient credible evidence to support the guilty verdicts; whether the circuit court properly exercised its sentencing discretion; and

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<sup>3</sup> We note that although the complaint and the Information properly noted the maximum six-year penalty for the offense of strangulation and suffocation—eight years with the repeater enhancer—contrary to WIS. STAT. § 940.235(1), the presentence investigation report mistakenly stated a twelve and one-half year maximum for the offense. We further recognize that although the complaint and the Information mistakenly stated that a conviction for misdemeanor battery as a repeater could be increased "by not more than 2 years," the maximum term for that crime could be increased "to" not more than 2 years. *See* WIS. STAT. § 939.62(1)(a). Nothing in the record, however, suggests that Westcott or the sentencing court misunderstood the maximum possible sentence for these crimes.

whether there are any grounds to challenge the effectiveness of Westcott's trial counsel. The no-merit report also addresses a number of additional trial-related issues, including whether Westcott properly waived his right to testify, whether the jury was properly instructed, and whether the court properly denied Westcott's mistrial motions. Upon reviewing the record, we agree with counsel's description, analysis, and conclusion that none of these issues has arguable merit. The no-merit report sets forth an adequate discussion of the potential issues to support the no-merit conclusion, and we need not address them further.

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

Therefore,

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

IT IS FURTHER ORDERED that Attorney Dennis Schertz is relieved of his obligation to further represent Richard A. Westcott II, 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*