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110 EAST MAIN STREET, SUITE 215  
P.O. BOX 1688  
MADISON, WISCONSIN 53701-1688  
Telephone (608) 266-1880  
TTY: (800) 947-3529  
Facsimile (608) 267-0640  
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**DISTRICT III**

March 22, 2022

To:

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Electronic Notice

Brand B. Biller 515058  
Oshkosh Correctional Inst.  
P.O. Box 3310  
Oshkosh, WI 54903-3310

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

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2020AP470-CRNM      State of Wisconsin v. Brand B. Biller (L. C. No. 2016CF489)

Before Stark, P.J., Hruz and Neubauer, 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 Brand Biller has filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2019-20),<sup>1</sup> concluding that no grounds exist to challenge Biller's convictions for burglary, theft of moveable property with a value exceeding \$10,000, and criminal damage to property, all counts as a repeater. Biller 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

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

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.

The charges against Biller were based on allegations that he had entered a home in Appleton without the owners' consent after breaking the glass on the home's back door. Once inside, Biller took juice out of the refrigerator and drank it. He then proceeded upstairs, where he ransacked several bedrooms and took jewelry worth approximately \$65,000. A landscaper who had arrived to perform work at the house heard the back door slam shut and then saw Biller running away from the house carrying a bag and what looked like a pillowcase with something inside it. Biller initially ran toward the front of the house, but the landscaper subsequently found him hiding in some bushes behind the house. Biller then went into a river that ran behind the house and hid underneath a dock. When law enforcement arrived at the scene, Biller refused their commands to get out of the river. Officers successfully removed Biller from the river about forty-five minutes later.

Biller was placed under arrest and was transported to a local hospital. During the ambulance ride, Biller told officers that he had been using methamphetamine for three days and that he went into the victims' house to get a drink of water. He further stated that he took juice from the victims' refrigerator and planned to take a pair of shoes, but he then decided to "take \$900 value worth" from the victims because they were rich and someone had robbed him of \$900 the night before. Jewelry belonging to the victims was later recovered from the river behind their home.

Based on these events, the State charged Biller with burglary, theft of moveable property with a value exceeding \$10,000, and criminal damage to property, all counts as a repeater. Following a one-day trial, a jury found Biller guilty of all three charges. The circuit court subsequently imposed sentences totaling four years' initial confinement and four years' extended supervision, concurrent to one another and to another sentence that Biller was then serving.

The no-merit report addresses whether the evidence was sufficient to support the jury's verdicts; whether the circuit court properly exercised its sentencing discretion; and whether there would be any grounds to argue that Biller's trial attorney was constitutionally ineffective. We agree with counsel's description, analysis, and conclusion that these potential issues lack arguable merit, and we therefore do not address them further.<sup>2</sup>

The no-merit report does not address whether any of the circuit court's pretrial rulings were erroneous, whether any errors occurred during the selection of the jury, whether the court properly instructed the jury, whether the court erred when ruling on objections during Biller's trial, or whether any improprieties occurred during the parties' opening statements or closing arguments. Having independently reviewed the record, we conclude that any challenge to Biller's convictions on these grounds would lack arguable merit.

The no-merit report also fails to address whether Biller knowingly, intelligently, and voluntarily waived his right to testify at trial. The record shows, however, that the circuit court

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<sup>2</sup> Although not addressed in the no-merit report, we note that the circuit court briefly mentioned the COMPAS risk assessment during its sentencing remarks. However, the court's comments clearly show that COMPAS was not "determinative" of the sentences imposed. *See State v. Loomis*, 2016 WI 68, ¶¶98-99, 371 Wis. 2d 235, 881 N.W.2d 749. Any challenge to Biller's sentences on this basis would therefore lack arguable merit.

conducted an on-the-record colloquy, during which Biller confirmed that he was aware of his constitutional right to testify and his corresponding right not to testify; that he had sufficient time to discuss those rights with his attorney and believed that he was fully informed; that he had decided not to testify; and that his decision in that regard was made freely and voluntarily. Biller's trial attorney also confirmed that he and Biller had discussed Biller's rights to testify and not to testify multiple times; that counsel had explained the pros and cons of testifying and remaining silent; that counsel had not threatened or pressured Biller with respect to his decision; and that counsel believed Biller's decision was knowing, intelligent, and voluntary. Based on the representations made by Biller and his trial attorney, the court determined that Biller had knowingly, intelligently, and voluntarily waived his right to testify. On the record before us, any challenge to that determination would lack arguable merit.

The no-merit report also fails to address whether the circuit court properly determined, during the course of Biller's trial, that suppression of Biller's postarrest statements to law enforcement was not warranted. At trial, two officers testified regarding statements that Biller had made during the ambulance ride and after he arrived at the hospital. The first officer—Blake Rice—initially testified regarding those statements without objection. However, when asked whether Biller had said anything in the hospital about the events that day, Rice responded: “[H]e had made some statements. Um, there was a question posed to him regarding clothing. Um, he stated that he had had a shirt on that he had gotten from inside the house, um, but that he had left that shi[r]t behind, left it there. He also stated that ...”

At that point, defense counsel objected. Outside the presence of the jury, counsel explained that one of Biller's prior attorneys had filed a suppression motion before trial, but counsel had decided not to pursue that motion because it was merely pro forma and did not

allege specific facts supporting an argument that Biller's postarrest statements to law enforcement should be suppressed. Counsel then further explained that the discovery materials he had received before trial indicated that after Biller was arrested and given *Miranda*<sup>3</sup> warnings, Biller "start[ed] making voluntary utterances about how he was the one that burglarized the residence and he was the one that broke the door to make entry into the home." Contrary to the representation in the discovery materials that Biller had volunteered these statements, counsel argued that Rice's trial testimony about Biller "being asked questions" while in the hospital raised an issue as to whether the officers had impermissibly questioned Biller after he invoked his right to remain silent.

Both the prosecutor and Biller's attorney then questioned Rice on the record regarding the circumstances of Biller's postarrest statements. Rice testified that after Biller was arrested, he was advised of his *Miranda* rights and indicated that he did not want to "make a statement or respond to interrogation." Accordingly, Rice testified that he did not "initiate any questions" to Biller "regarding anything involving this case." Rice explained that the question he had previously referenced regarding Biller's clothing was actually posed to Biller by hospital staff. Rice also denied that any officer "was asking [Biller] any questions or saying things to him that could have been reasonably expected to elicit inculpatory information." In addition, Rice testified that "[a]ny conversation ... or questions that were posed to Mr. Biller were a response to ... statements initiated by Mr. Biller."

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<sup>3</sup> See *Miranda v. Arizona*, 384 U.S. 436 (1966).

Based on Rice’s testimony, the circuit court concluded that the question about Biller’s clothing was part of a conversation “between the medical staff and the defendant. So it was not a police interrogation at that point.” The court therefore ruled that Rice could testify regarding Biller’s response to that question. Any challenge to the court’s ruling in this regard would lack arguable merit. Rice testified that hospital staff posed the question about Biller’s clothing, and there is nothing in the record to suggest that the question was in any way prompted or directed by law enforcement. See *State v. Lee*, 122 Wis. 2d 266, 275, 362 N.W.2d 149 (1985). Under these circumstances, the question did not violate Biller’s constitutional right to remain silent. See *State v. Cummings*, 2014 WI 88, ¶52, 357 Wis. 2d 1, 850 N.W.2d 915 (noting that when a suspect invokes the right to remain silent, all *police questioning* must cease).

As for the rest of Biller’s statements, “[a]n individual in custody who has claimed the right to remain silent under *Miranda* has the right to change his mind and to decide to volunteer a statement.” See *Wright v. State*, 46 Wis. 2d 75, 88, 175 N.W.2d 646 (1970). Rice expressly testified that Biller volunteered his postarrest statements and that those statements were not prompted by police questioning. Under these circumstances, there would be no merit to a claim that the court erred by failing to suppress Biller’s statements.

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

Therefore,

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

IT IS FURTHER ORDERED that Attorney Mark Schoenfeldt is relieved of further representing Brand Biller 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*