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

2018AP847-CRNM State of Wisconsin v. Clarence M. Young (L.C. #2013CF4552)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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).

Clarence M. Young appeals from a judgment convicting him of armed robbery following a trial to the court. Young's appellate counsel filed a no-merit report pursuant to WIS. STAT.

RULE 809.32 (2017-18)¹ and *Anders v. California*, 386 U.S. 738 (1967). Young filed a response, and appellate counsel filed a supplemental no-merit report. After reviewing the record, counsel's original and supplemental no-merit reports, and Young's response, we conclude that there are no issues with arguable merit for appeal. Therefore, we summarily affirm the judgment. *See* WIS. STAT. RULE 809.21.

On September 26, 2013, at 2:55 a.m., police responded to a robbery report. The victim, K.N., told police that he was heading toward his apartment when a car stopped and two black males got out. They told K.N. to get down on his knees, pointed a rifle at his chest, and said "Give me all your shit." K.N. gave them his phone and wallet and they drove away. He described one of the men as having dreadlocks. About two hours later, there was a second armed robbery reported under similar circumstances in which the suspects stole a 2013 VW Jetta. Later that same day, the Jetta was used in a third armed robbery. Police responded and the Jetta was found abandoned with a BB rifle inside. Fingerprints lifted from the Jetta and from the BB rifle matched Young's. Five days later, K.N. identified Young from a police lineup as the male who pointed the rifle and demanded his phone and wallet. Young was arrested and charged with the armed robbery of K.N.

Young waived his right to a jury trial and had a one-day court trial. The theory of defense was misidentification, specifically, that Young's physical characteristics did not match K.N.'s initial description of him. The State presented evidence from K.N. and from five law enforcement officers involved in the investigation. Young testified on his own behalf, including

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

that he stood 6'1" and had consistently weighed about 195 pounds.² He said he had never worn dreadlocks, but wore braids to the back of his head, and that he had obtained the three visible facial tattoos not mentioned in K.N.'s description to law enforcement long before the September 2013 incident.³ He could not recall what he did on September 26, 2013, but knew he did not rob K.N. The court found that the State had proven the offense elements beyond a reasonable doubt and adjudged Young guilty. At sentencing, the court imposed a sixteen-year bifurcated sentence, with eleven years of initial confinement followed by five years of extended supervision.

Appellate counsel's no-merit report analyzes as without merit potential issues arising from Young's preliminary hearing, Young's waiver of his right to try his case to a jury, Young's decision to testify at trial, the court's ruling on evidentiary objections at trial, and the parties' closing arguments. We agree with the discussion in the no-merit report and its conclusion that none of these potential issues gives rise to an arguably meritorious claim. The circuit court's colloquies with Young concerning his right to have a jury trial and his right not to testify were sufficient, and its evidentiary rulings were proper. We will not discuss these points further.

The no-merit report also concludes that any challenge to the sufficiency of the evidence would lack arguable merit. We must affirm the verdict unless the evidence, viewed most favorably to the State and the conviction, is so insufficient in probative value and force that as a

² K.N. testified that he thought the robbers were "around 5'10"," but he had been on his knees and was unsure. In Young's response to the no-merit report, he asserts he is "6'3" tall, 5 inches taller than" K.N.'s description. However, Young testified at trial that he was 6'1".

³ Because of Young's facial tattoos, police had him wear small bandages over the tattoos during the lineup. All other participants in the lineup also wore bandages in the same spots.

matter of law no reasonable trier of fact could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). When acting as fact finder, the circuit court is the ultimate arbiter of witness credibility. *State v. Peppertree Resort Villas, Inc.*, 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. “When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.” *Id.* (citation omitted). In finding Young guilty, the circuit court went through the offense elements, explained how the evidence satisfied each element, and stated: “The Court believes that the state’s met their burden of proof beyond a reasonable doubt as to each and every single one of those elements of the offense.” We agree with appellate counsel’s conclusion that there exists no meritorious challenge to the circuit court’s finding of guilt.

In his response, Young highlights the evidence that trial counsel used to impeach K.N.’s identification of Young, including K.N.’s description to law enforcement concerning Young’s height, weight, and hair, as well as K.N.’s failure to describe the perpetrator as having facial tattoos. Appellate counsel’s no-merit report and the record show that trial counsel thoroughly cross-examined the State’s witnesses on these and other discrepancies. Though Young disagrees with how the circuit court viewed and weighed the evidence, this is not relevant to our standard of review. We “must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law.” *Poellinger*, 153 Wis. 2d at 507.

The central complaint in Young’s response concerns a notice of alibi filed by his original trial counsel and which named defense witnesses not called at trial. Essentially, Young claims that successor counsel abandoned the alibi defense at trial and that this constitutes ineffective assistance of trial counsel. Appellate counsel filed a supplemental no-merit report squarely

addressing Young's claim. The supplemental no-merit report attaches reports from a defense investigator and a detective, both of whom interviewed the named alibi witnesses.⁴ The reports indicate that Young's proffered witnesses would not have supported his alibi defense. Further, the record shows that successor trial counsel followed up on the notice of alibi but did not use the alibi defense. Appellate counsel's supplemental no-merit report asserts that she reviewed with Young the potential issue of trial counsel's ineffectiveness for failing to pursue an alibi defense and determined that it lacked arguable merit. Young has not responded to appellate counsel's supplemental no-merit report and we accept its assertions as true. We conclude that any challenge to trial counsel's failure to pursue Young's proffered alibi defense would lack arguable merit.

The final issue addressed in counsel's no-merit report is Young's sentence. We agree that any challenge to the circuit court's exercise of its sentencing discretion would be without arguable merit. *See State v. Gallion*, 2004 WI 42, ¶17, 270 Wis. 2d 535, 678 N.W.2d 197 (it is well-settled that sentencing is committed to the circuit court's discretion and appellate review is limited to determining whether the court erroneously exercised that discretion). The court considered the "significantly serious" nature of the offense, Young's character as evidenced by his juvenile record and culpability in this offense, and the need to protect the public from Young's "further criminal behavior" in a structured setting given his history of prior unsuccessful interventions. *See State v. Ziegler*, 2006 WI App 49, ¶23, 289 Wis. 2d 594, 712 N.W.2d 76. The court's stated goals included punishment, deterrence to Young and "to the friends that you apparently hang out with," and community protection. The court determined

⁴ One of the witnesses could not be located.

that confinement was necessary to protect the public and that any treatment needed to be done in a structured setting. These are proper sentencing objectives. Further, we cannot conclude that the sixteen-year sentence when measured against the possible maximum sentence of forty years is so excessive or unusual as to shock public sentiment. *See Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Our review of the record discloses no other potential issue for appeal.⁵ Accordingly, this court accepts the no-merit report, affirms the judgment, and discharges appellate counsel of the obligation to further represent Young on appeal. Therefore,

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

IT IS FURTHER ORDERED that Attorney Angela Conrad Kachelski is relieved from further representing Clarence M. Young 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

⁵ Included in the record on appeal at No. 49 (R.49) is a “Court of Appeals decision & order affirming” a wholly unrelated case with a different defendant-appellant and a separate appeal number, 2015AP1645-CR. We observe that this record item is not included in the circuit court’s docket, and it appears to have been inadvertently filed in the appellate record in this case. We point this out so that it can be excluded from future compilations of the appellate record, if any.