OFFICE OF THE CLERK
WISCONSIN COURT OF APPEALS
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
Web Site: www.wicourts.gov

DISTRICT II

December 4, 2019

To:

Hon. Barbara H. Key
Circuit Court Judge
Winnebago County Courthouse
P.O. Box 2808
Oshkosh, WI 54903-2808

Melissa M. Pingel
Clerk of Circuit Court
Winnebago County Courthouse
P.O. Box 2808
Oshkosh, WI 54903-2808

Jaymes Fenton
Fenton Law Office
1123 N. Water St., Ste. 400
Milwaukee, WI 53202

Christian A. Gossett
District Attorney
P.O. Box 2808
Oshkosh, WI 54903-2808

Criminal Appeals Unit
Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

Kinnie R. McGee Jr., #541001
Columbia Correctional Inst.
P.O. Box 900
Portage, WI 53901-0900

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

2018AP1979-CRNM State of Wisconsin v. Kinnie R. McGee, Jr. (L.C. #2016CF542)

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).

Kinnie R. McGee, Jr., appeals from a judgment convicting him after a jury trial of armed robbery with use of force and of substantial battery intending bodily harm as a party to a crime (PTAC); both carried a repeater penalty enhancer. McGee's appointed appellate counsel has

filed a no-merit report pursuant to WIS. STAT. RULE 809.32 (2017-18)[1] and ***Anders v. California***, 386 U.S. 738 (1967). McGee exercised his right to file a response, to which counsel filed a supplemental report. Upon consideration of the no-merit reports, the response, and an independent review of the record as mandated by ***Anders*** and RULE 809.32, we summarily affirm the judgment because there is no arguable merit to any issue that could be raised on appeal. *See* WIS. STAT. RULE 809.21.

T.G. was visiting Abigail Schutzbank at her apartment. Hoping to impress her, he showed her a wad of cash—approximately $18,000—he had in his pocket to purchase a truck the next day. Schutzbank told her cousin, William Marx, and Marx's friend, Lee Hopfensperger, about the money. The three decided to rob T.G. Marx, Hopfensperger, and several others, including McGee, came and went throughout the day and night. Early the next morning, Marx telephoned someone saying, "We're going to hit a lick," which means to rob someone; McGee arrived shortly after. Several males—T.G. did not see who—battered him over the head with a liquor bottle and closed fists and, prompted by Schutzbank, took the money from his pocket. Eight staples were required to close his scalp laceration.

McGee, Hopfensperger, Marx, and Schutzbank were charged with PTAC armed robbery with use of force and substantial battery intending bodily harm. The codefendants' cases were severed; McGee's case proceeded to a jury trial. The jury found him guilty on both counts. On count one, the court sentenced him to ten years' initial confinement and fifteen years' extended

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

supervision and, on count two, two years' IC and two years' ES, concurrent to count one. Joint and several restitution of $15,000 was ordered. This no-merit appeal followed.

The no-merit report addresses whether there is sufficient evidence to support the guilty verdict on the two counts in the information and whether the trial court erroneously exercised its discretion at sentencing. As our review of the record satisfies us that the no-merit report properly analyzes these potential issues and concludes they are without merit, we address them no further, except to the extent raised in McGee's response.

McGee challenges the sufficiency of the evidence, the witnesses' credibility and veracity, defense counsel's failure to subpoena two witnesses he wanted called, and the alleged police failure to properly investigate the allegations against him, including checking surveillance camera footage and interviewing employees at various businesses where he claimed to have been at the time of the crime.

We disagree with McGee's assertion that there was "absolutely zero evidence, proof, hard facts that suggest that [he] was involved" in the crime. First, he misunderstands our standard of review when reviewing whether sufficient evidence supports a jury's verdict. This court "may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state 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. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). This standard applies whether the evidence is direct or circumstantial. ***Id.*** at 503. If the facts of record support more than one inference, this court "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." ***Id.*** at 506-07. It is

the jury's function "to decide which evidence is credible and which is not and how conflicts in the evidence are to be resolved. The jury can thus, within the bounds of reason, reject evidence and testimony suggestive of innocence." ***Id.*** at 503.

Second, there was considerable testimony implicating McGee. There was testimony that he beat T.G. so fiercely with the liquor bottle that Marx thought McGee would kill T.G.; that McGee held T.G. in a bear hug while Hopfensperger and Marx kicked and pummeled T.G.; that it was McGee who took the money from T.G. and divvied it up among the four actors; that McGee bought a new cell phone the morning after the attack and that the one used the day of the incident could not be located; that Police Officer Dean Artus listened to jail phone calls between McGee and a woman Hopfensperger had solicited to provide an alibi for him and McGee was heard asking the woman to get "Sam" to provide him an alibi for the time of the robbery; that Artus learned that "Sam" was "Samantha Zimmer," and on interviewing her discovered her timeline of events did not mesh with McGee's or the time of the crime; that Schutzbank's roommate gave a written statement saying that Schutzbank told her McGee hit T.G. in the head with the liquor bottle; and that Schutzbank told Artus McGee had given her some of the money.

In addition, Hopfensperger testified that he "probably" told Artus that Marx called McGee at about 5 a.m. to come over; that when McGee arrived a half hour or forty-five minutes later, Marx awakened Schutzbank, who was sleeping on the couch with T.G.; that when she and Marx went somewhere to talk, T.G. woke up and went into the bathroom; and that when he came out they "took his money." Hopfensperger claimed at trial that he could not recall who hit T.G. with the bottle but acknowledged having told Artus that it was McGee and, further, he "might have" told Artus that, after T.G. fell, McGee held him in a bear hug while he and Marx hit T.G.

Hopfensperger disclaimed memory of who actually took T.G.'s money but said he "may have" told Artus that McGee later "handed out" $3000 to him and money to Marx as well.

Marx's girlfriend testified consistent with her written statement to police that Marx told her that he "hit a lick," that McGee struck T.G. "hard" and "a lot," and that she and Marx went shopping with the "couple thousand" dollars the three men split from the robbery.[2]

McGee also faults the police for not investigating his claimed alibi. He says he could not have participated in the attack as he was at a gas station, a restaurant, and at a cell phone store with Zimmer, one of the two witnesses he criticizes counsel for not calling. Zimmer gave a statement to police stating that McGee arrived at her house about 5 a.m., left twenty or twenty-five minutes later after receiving a phone call, returned shortly after 7 a.m., showered, and only then did the two go to the establishments he mentioned. Police were called to the crime scene about 6:20 a.m. It is unlikely a cell phone store would have been open at the time the crime occurred. Accordingly, checking surveillance video or calling Zimmer as a trial witness would not have aided McGee's defense.

The other witness McGee suggests should have been called was a "Bobby Woods." McGee does not say what relevant or exculpatory testimony Woods would have offered. Moreover, the defense's private investigator was unable to locate Woods or any contact information for him.

[2] McGee asserts that the girlfriend's testimony should have been excluded because she uses "mind-altering narcotics" and admitted she was under the influence of heroin when she gave her written statement to police. His challenge goes to the weight, not the admissibility, of her testimony. The jury was free to discount or reject it.

The jury was properly instructed as to the elements of the crimes. It heard eight witnesses' testimony, some of it conflicting, and McGee contends some witnesses lied. Their credibility and the weight of their testimony was for the jury to decide, however, and it concluded that the State proved the case against him. As the evidence presented was not incredible as a matter of law, *see* ***Poellinger***, 153 Wis. 2d at 507, we are bound by its decision.

To the extent we have not specifically addressed any of McGee's issues, we nonetheless have considered them and reject them as being without arguable merit. Our review of the record discloses no other potential issues for appeal. Accordingly, this court accepts the no-merit report, affirms the conviction, and discharges appellate counsel of the obligation to represent McGee further in this appeal. Therefore,

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

IT IS FURTHER ORDERED that Attorney Jaymes K. Fenton is relieved from further representing McGee 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