COURT OF APPEALS
DECISION
DATED AND RELEASED

November 12, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

NOTICE

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No. 96-0490-CR-NM

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

JERMAINE M. WEBB,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Jermaine M. Webb appeals a judgment of conviction for first-degree intentional homicide, party to a crime, contrary to §§ 940.01(1), 939.63(1)(a) and 939.05, STATS., and armed robbery, party to a crime, §§ 943.32(1)(a) and 939.05, STATS. He was sentenced to life imprisonment with parole eligibility of February 17, 2038, 101 days credit, for the homicide and forty years concurrent, 101 days credit, for the armed robbery. Webb's appellate

counsel has filed a no merit report pursuant to ***Anders v. California,*** 386 U.S. 738 (1967), raising four potential issues: (1) sufficiency of the evidence; (2) adequacy of the jury instructions; (3) propriety of the trial court's evidentiary rulings; and (4) the reasonableness of the trial court's sentencing discretion.

Webb has been provided a copy of the report and advised of his right to file a response. He has not responded. Based upon our independent review of the record, we conclude that the no merit properly analyzes the issues raised. The record discloses no other potential issues of arguable merit. Accordingly, we affirm the judgment and discharge Webb's appellate counsel of his obligation to represent Webb further in this matter.

"[A]n appellate court may not reverse a criminal conviction unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value ... that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger,*** 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). On review of jury findings of fact, viewing the evidence most favorably to the State and the conviction, we ask only if the evidence is inherently or patently incredible or so lacking in probative value that no jury could have found guilt beyond a reasonable doubt. ***State v. Tarantino,*** 157 Wis.2d 199, 218, 458 N.W.2d 582, 590 (Ct. App. 1990).

The armed robbery and homicide occurred in May 1994 at 2703 West Wisconsin Avenue in the City of Milwaukee and the victim's name was John Pickens, Jr. Because Webb's defense was that the shooting was accidental, the underlying facts are not substantially controverted. Around midnight, a bus driver discovered an injured man lying near the curb, bleeding from a puncture wound in the back. An investigating officer testified that he went to Lake County, Indiana, to interview Webb, a suspect, who was in custody. Webb told the officers that he was with two friends in Milwaukee outside a tavern when a man they did not know happened to be walking by after leaving the tavern. Webb's friend ran up and pushed the man into the man's car.

According to the statement, Webb's two friends began to search the man, beat him and threatened to kill him. One of his friends gave Webb a sawed-off shotgun, which he was holding in his lap, pointed toward the man. The man reached over to Webb and pushed him in the face while attempting to

exit the car and the gun went off. Webb's friend quickly drove away and hid the car in some bushes. Webb stated that he did not mean to shoot the man, but his finger was on the trigger when the man pushed him.

The officer testified that the wound was approximately three inches left of the center of the man's back. John Teggatz, a forensic pathologist, testified that he performed the Pickens autopsy. Pickens had been pronounced dead in the ambulance. He had suffered a gunshot wound toward the left back in the chest area. A large amount of pellets and plastic wadding from the shotgun shell were recovered from the wound. Teggatz testified: "And there has been some contact made at the time of discharge of the skin with the muzzle." Pickens died from loss of blood due to lacerations to his heart and lungs from the shotgun wound.

Because Webb's statement admits fatally shooting the victim, the only issue is Webb's intent at the time of the shooting. Shooting someone in the back at close range supports a finding of intent to kill. *See* ***State v. Borello,*** 167 Wis.2d 749, 780, 482 N.W.2d 883, 895 (1992). We agree with the no merit report's analysis that there is no arguable merit to any challenge to the sufficiency of the evidence to support the conviction for homicide with a dangerous weapon party to a crime. Sections 940.01(1), 939.63(1)(a), and 939.05, STATS.

The record also supports the verdict finding that Webb participated in the armed robbery. He admitted joining his accomplices who drove off in the victim's car. His accomplices beat the man while searching him. Webb held the gun pointed at the victim in the back seat. Ten tapes and the car were taken from the victim by use of force to overcome any physical resistance. Any challenge to the armed robbery conviction party to a crime is without arguable merit. Sections 943.32(1)(a) and 939.05, STATS.

Next, we agree with the no merit report that any challenge to the form of the verdict or jury instructions would be without arguable merit. A trial court has broad discretion in instructing a jury based on the facts and circumstances of a case. ***La Chance v. Thermogas Co.***, 120 Wis.2d 569, 577, 357 N.W.2d 1, 5 (Ct. App. 1984). The burden is on the party asserting the error in the instructions to point out with specificity what portions of the instructions are in error and how the instructions are in error. ***Howard v. State Farm Mut.***

Auto. Liab. Ins. Co., 70 Wis.2d 985, 996, 236 N.W.2d 643, 648 (1975). Here, the court granted the defense request for lesser offense instructions on both first-degree reckless homicide and felony murder. These instructions are consistent with Webb's defense and put squarely before the jury the disputed issue of Webb's intent at the time of the shooting. No arguable basis exists for challenging the court's instructions.

No arguable basis exists to challenge the court's ruling that Webb's custodial statement was admissible. Detective Leroy Shaw, the interrogating officer, testified that he and another officer interviewed Webb in a well-lit comfortable room. Webb was given ***Miranda*** warnings from a standard issue card. Webb indicated he understood his rights and wished to talk to the officers without an attorney present. Their conversation lasted one and one-half hours. No threats or promises were made. Webb was not in restraints during the conversation. Webb was cooperative. Based on this testimony, the trial court denied the suppression motion. Because the record reveals no basis to challenge the trial court's determination, there is no arguable merit to a challenge to the admission of Webb's custodial statement.

Next, a challenge to sentencing would be without arguable merit. Sentencing is addressed to trial court discretion. ***State v. Echols***, 175 Wis.2d 653, 681, 499 N.W.2d 631, 640 (1993), *cert. denied*, 510 U.S. 889. Relevant factors include the gravity of the offense, the character of the defendant and the need for public protection. The record reflects that Webb had an opportunity to review the presentence report with his attorney and agreed that it was accurate. The court considered the seriousness of the senseless abduction and murder of an innocent victim. Despite the seriousness of the crime, the court considered other factors as well: Webb's age, twenty-two; his criminal history; and lack of willingness to accept responsibility for his act. The record reflects the trial court's reasonable exercise of discretion. Accordingly, no basis exists to challenge the sentence.

We are satisfied that the record reveals no potential issues of arguable merit. We therefore affirm the judgment and discharge attorney William J. Tyroler from any obligation to represent further Webb in this appeal.

By the Court.—Judgment affirmed.