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**DISTRICT IV**

January 27, 2015

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

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2014AP33-CR

State of Wisconsin v. Kyle J. Wedekind (L.C. # 2012CF133)

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

Kyle Wedekind appeals an order that denied his motion for sentence modification on a conviction for robbery by use of force. Wedekind contends that he was sentenced based upon inaccurate information provided to the court by the victim in her statement at sentencing. After reviewing the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).<sup>1</sup> We affirm.

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

A defendant has a due process right to be sentenced based upon accurate information. *State v. Tiepelman*, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. If a defendant can establish by clear and convincing evidence both that inaccurate information was presented at sentencing and that the court relied upon the misinformation in reaching its determination, the burden shifts to the State to show that the error was harmless. *Id.*, ¶26.

At sentencing the victim told the court:

He had my cell phone that night. He called family members. My cell phone was directed to my Facebook. He posted on my Facebook that he left me dead because I was unconscious at the time he had left. Um, he called my family, he posted on Facebook to my friends that he was going to have [a] dirt party with my whole family. He was going to kill all of them....

... And then, if they were remorseful afterwards, if that was the case, then why did the threats come afterwards? He had my phone a couple of days. He threatened my mom ....

He threatened my children. He called my father, who was in my contacts, told him that he left me dead. Everyone thought I was dead until they heard from me. And this went on days from him.

... it doesn't seem like someone [was] remorseful when they just stalk a person afterwards and make threats to my family.

The court observed that the victim was “very believable when she says that they had contact by phone, her and her family, from her cell phone between the time of February 6th when this occurred and February 28th when Mr. Wedekind was ultimately taken into custody.” The court characterized Wedekind’s behavior after the offense as “threatening but taunting” and concluded that it both increased the seriousness of the offense and demonstrated a lack of remorse.

Wedekind filed a postconviction motion alleging that he was sentenced based upon false information because he had obtained phone records that showed all activity on the victim's phone had ceased within a few hours after the robbery, with the exception of two incoming texts about a week later, in apparent contradiction to the victim's testimony that the threats went on for "days." The circuit court agreed that it had relied upon the victim's statement at sentencing, and noted that the only question was whether that information was accurate or inaccurate.

At the postconviction hearing, both Wedekind and his co-defendant testified that the co-defendant had taken the victim's phone during the robbery and given it to Wedekind. Wedekind further testified that he had thrown the phone out of a car window within five minutes after the robbery as he and the co-defendant drove away from the scene, while the co-defendant testified that he had never seen Wedekind with the phone again. The victim clarified her earlier statement by confirming that all of the explicit threats and taunts Wedekind made to her family members and friends occurred on the night of the robbery, and that the victim's reference to Wedekind's use of her phone to stalk and threaten her for "days" referred to his use of the victim's phone to access her Facebook account for at least a week after the robbery. She explained that a detective had asked her to keep the phone account active so that the police could attempt to track it, and that each time she logged onto her Facebook account using a computer in the police station, she deactivated the phone as a device in her Facebook settings, only to find it reactivated as a device the next time she logged on—meaning that her phone had been used to log into her Facebook account in the interim. The victim admitted that she had not personally seen and had no documentation of any of the Facebook posts she had alleged Wedekind made, but rather was relaying information that she had been told by a friend who "got a text message." Finally, the victim's father testified that when he called his daughter's phone to check on her welfare on the

night of the robbery, Wedekind answered and told him that his daughter was dead, that Wedekind had stabbed her in the face. The father spoke with Wedekind over the phone a second time that night in the presence of a police officer, and handed the phone to the officer.

The circuit court determined that Wedekind's testimony was "unworthy of belief" because phone records showed that the victim's phone had been used to call both the victim's father and brother after the robbery, and a sworn statement from a police officer introduced at the probable cause hearing related a contemporaneous statement by the father that when he spoke to Wedekind on the phone, Wedekind "was threatening them and was telling them that he had a gun and would harm them." Conversely, the court found the testimony of both the victim and her father to be credible, noting that while "the dates and exact timing of these things is not exactly clear," it was "absolutely clear that this phone was being used," and that Wedekind had provided no reason to doubt that "threats [ ] were being made" and that family members had recognized Wedekind's voice. The court concluded that Wedekind had failed to satisfy his burden to demonstrate that the information the court had relied upon was inaccurate.

In this appeal, Wedekind asserts that "most of the victim's claims to the court at sentencing were not accurate" because the victim did not provide any documentation of any threatening Facebook posts, and the lack of data usage on the phone logs after the night of the robbery proved that the phone could not have been used to access the victim's Facebook account after that night. Although Wedekind concedes there was evidence that he made some threatening communications to the victim's family members on the night of the robbery, he maintains that the court's understanding of the *duration* of his threatening behavior was inaccurate, and complains that the circuit court "refuses to acknowledge the false information with which it was provided."

However, merely because a defendant disputes a credibility determination or factual finding made by the circuit court does not render that fact “inaccurate.” Because the circuit court is in the best position to observe witness demeanor and gauge the persuasiveness of testimony, it is the “ultimate arbiter” for credibility determinations when acting as a fact finder, and we will defer to its resolution of discrepancies or disputes in the testimony and its determinations of what weight to give to particular testimony. *Johnson v. Merta*, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980) (quoted source omitted); *see also* WIS. STAT. § 805.17(2) (“due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses”). Moreover, we will not set aside a fact found by the circuit court unless the record shows it to be clearly erroneous—meaning that after accepting all credibility determinations made and reasonable inferences drawn by the fact finder, the great weight and preponderance of the evidence support a contrary finding. *Noll v. Dimiceli’s, Inc.*, 115 Wis. 2d 641, 643-44, 340 N.W.2d 575 (Ct. App. 1983).

Wedekind did not present any testimony or affidavits from the victim’s family or friends disputing the accuracy of any of the threats and taunts that the victim told the court had been made. Accepting as credible the victim’s testimony that a friend had told her about threats against her family made in Facebook posts, and that the victim’s Facebook settings indicated that her phone had been repeatedly reactivated as a device linked to her Facebook account in the week following the robbery, the circuit court was entitled as the fact finder to resolve any potential discrepancies between that testimony and the phone records. For instance: the phone logs reflecting data usage on the night of the robbery could have correlated to Facebook posts, even if it may have been days later that the posts were seen or described to the victim; the victim could have been confused about whether the “dirt party” threat relayed to her by friends had been posted on Facebook or sent via an otherwise unexplained outgoing text message from the

victim's phone; and, depending on the type of the victim's phone and her data plan, data usage might only have shown up on the phone log when the phone was roaming or out of wi-fi range.

In sum, the evidence produced at the postconviction hearing corroborated the victim's statement that Wedekind had engaged in a series of contacts with the victim's brother and father using the victim's phone on the night of the robbery, and did not disprove her assertions that taunts and threats against her entire family were made during those contacts, or that the victim's phone was linked to the victim's Facebook account for at least a week after the robbery, and may have been used to access the account. We fully agree with the circuit court's conclusion that Wedekind failed to meet his burden of showing by clear and convincing evidence that he was sentenced based upon inaccurate information.

IT IS ORDERED that the order denying Kyle Wedekind's motion for sentence modification is summarily affirmed under WIS. STAT. RULE 809.21(1).

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*