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April 3, 2013

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

2012AP327-CR

State of Wisconsin v. Richard A. Powell (L.C. # 2009CF40)

Before Higginbotham, Blanchard and Kloppenburg, JJ.

Richard Powell appeals a judgment of conviction of five counts of homicide by intoxicated use of a motor vehicle and an order denying his postconviction motion for sentence modification. The dispositive issue is whether the sentencing court's reliance on inaccurate information was harmless error. Based upon our review of the briefs and record, we conclude at

conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ We affirm the judgment and order.

Powell was sentenced to five consecutive terms of five years' initial confinement and three years' extended supervision. After sentencing, Powell moved for sentence modification on the ground that the falsity of statements made by his ex-wife in a letter to the sentencing court was a new factor, or for resentencing on the ground that he had been sentenced on the basis of inaccurate information. The trial court found that Powell's ex-wife lied when her letter described an incident in which Powell told her to get on her knees in their garage, told her to prepare to die, shot a bullet into the garage floor, and laughed about it, saying he wasn't aiming at her but only trying to scare her. The State concedes that the information about the incident in the garage was inaccurate and that the sentencing court relied on it.²

Powell met his burden of establishing that the sentencing court actually relied on inaccurate information and we turn to consider whether the State met its burden to show that the reliance was harmless error. *See State v. Tiepelman*, 2006 WI 66, ¶26, 291 Wis. 2d 179, 717 N.W.2d 1. If there is no reasonable probability that the inaccurate information contributed to the outcome, reliance on inaccurate information at sentencing is harmless error. *State v. Payette*, 2008 WI App 106, ¶46, 313 Wis. 2d 39, 756 N.W.2d 423. "The determination of whether an

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

² We reject Powell's attempt to expand the scope of inaccurate information to include other statements the ex-wife made in her letter and to the presentence investigation report author and statements in letters submitted by Powell's step-son and ex-wife's boyfriend. Powell's motion did not attack any of those statements. At the evidentiary hearing on his postconviction motion, Powell only suggested reasons to suspect the motivations for and truthfulness of the unfavorable statements about Powell by his ex-wife.

error is harmless is a question of law, which we review de novo.” *State v. Harrell*, 2008 WI App 37, ¶37, 308 Wis. 2d 166, 747 N.W.2d 770.

Although Powell argues that other information provided by Powell’s ex-wife in her letter and to the presentence investigation report author was not worthy of belief, the trial court found the information truthful. This determination was made as part of the trial court’s factfinding role. See *State v. Anderson*, 222 Wis. 2d 403, 412, 588 N.W.2d 75 (Ct. App. 1998). The court heard the ex-wife’s testimony that she had lied about the garage incident and questioned her about the other statements she made, including her observation of Powell’s demeanor after the fatal accident and at the hospital, that Powell claimed to be the best drunk driver, and that Powell had driven drunk other times. “The credibility of a witness is for the trial court to determine, and we will not upset such a finding unless clearly erroneous.” *State v. Lukensmeyer*, 140 Wis. 2d 92, 105, 409 N.W.2d 395 (Ct. App. 1987). The trial court noted that the ex-wife’s observation of Powell’s post-accident demeanor was corroborated by a state trooper and her story of a separate domestic violence incident was repeated by Powell’s step-son. The trial court’s credibility determination is not clearly erroneous.

The other information about Powell’s demeanor after the fatal accident and at the hospital, that Powell claimed to be the best drunk driver, and that Powell had driven drunk other times, provided ample basis for the sentencing court’s assessment that Powell likely had a “darker side” not visible to the public and that it was not the only time he had driven drunk. The ex-wife’s untruthful information was not enough to change the assessment of Powell’s character. The sentence was also based on the seriousness of the offenses and the determination that Powell was a danger to the community. In light of the multitude of factors relied on by the sentencing

court, there was no reasonable possibility that the error in reliance on the inaccurate information about the garage incident contributed to Powell's sentence. The error was harmless.

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order are summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals