396 Wis.2d 196
Supreme Court of Wisconsin.

STATE of Wisconsin, Plaintiff-Respondent-Petitioner,

v.

Mark D. JENSEN, Defendant-Appellant.

No. 2018AP1952-CR
|
Oral Argument: November 17, 2020
|
Opinion Filed: March 18, 2021

Synopsis

Background: State, following order of the United States District Court for the Eastern District of Wisconsin, William C. Griesbach, C.J., 2013 WL 6708767, vacating defendant's conviction for first-degree intentional homicide of his wife, initiated new proceedings against defendant. The Circuit Court, Kenosha County, Chad G. Kerkman, J., granted state's motion to reinstate the original conviction and life sentence. Defendant appealed. The Court of Appeals reversed. State petitioned for review.

The Supreme Court, Rebecca Frank Dallet, J., held that the Court's prior holding, 299 Wis.2d 267, 727 N.W.2d 518, that certain statements made by wife before she died were testimonial in nature constituted the law of the case.

Affirmed.

Jill Karofsky, J., concurred and filed opinion, which Annette Kingsland Ziegler, J., joined.

See also 331 Wis.2d 440, 794 N.W.2d 482.

****245** Appeal from Circuit Court, Kenosha County, Chad G. Kerkman, Judge (L.C. No. 2002CF314)

Attorneys and Law Firms

For the plaintiff-respondent-petitioner, there were briefs filed by Aaron R. O'Neil, assistant attorney general; with whom on the briefs was Joshua L. Kaul, attorney general. There was an oral argument by Aaron O'Neil.

For the defendant-appellant, there was a brief filed by Lauren J. Breckenfelder and Dustin C. Haskell, assistant state public defenders. There was an oral argument by Lauren Jane Breckenfelder.

DALLET, J., delivered the majority opinion of the Court, in which ROGGENSACK, C.J., ANN WALSH BRADLEY, REBECCA GRASSL BRADLEY, and HAGEDORN, JJ., joined, and in which ZIEGLER and KAROFSKY, JJ., joined except for ¶35. KAROFSKY, J., filed a concurring opinion, in which ZIEGLER, J., joined.

Opinion

REBECCA FRANK DALLET, J.

****246** ***199** ¶1 Fourteen years ago, Mark Jensen was on trial for killing his wife, Julie.[1] Before the start of that trial, we held that certain hearsay statements made by Julie were testimonial. State v. Jensen (Jensen I), 2007 WI 26, ¶2, 299 Wis. 2d 267, 727 N.W.2d 518. For that reason, and because Jensen had no opportunity to cross-examine Julie about those statements, the statements were inadmissible under the Confrontation Clause.[2] We are now asked to determine whether the law on testimonial hearsay has since changed to such a degree that, at Jensen's new trial,[3] the circuit court was no longer ***200** bound by Jensen I. We hold that it has not. We therefore affirm the court of appeals' decision.[4]

I

¶2 Julie died from poisoning in 1998. Prior to her death, she made several statements suggesting that, if she died, the police should investigate Jensen. She wrote a letter and gave it to her neighbor with instructions to give the letter to the police should anything happen to her. She also left two voicemails with Pleasant Prairie Police Officer Ron Kosman two weeks before she died stating that if she were found dead, Jensen should be Kosman's "first suspect." In 2002, Jensen was charged with first-degree intentional homicide. Over the next several years, the circuit court held a series of pretrial hearings addressing the admissibility of Julie's letter and voicemails.

¶3 The circuit court initially ruled that Julie's letter was admissible but her voicemails were not. After that ruling,

however, the United States Supreme Court decided Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), which established that an unavailable witness's hearsay statement is inadmissible under the Confrontation Clause if the statement is testimonial and the defendant had no prior opportunity to cross-examine the witness. Id. at 50-54, 124 S.Ct. 1354. In light of that decision, Jensen asked the circuit court to reconsider its previous ruling. Upon reconsideration, the circuit court determined that, under Crawford, Julie's letter and voicemails ("Julie's statements") were testimonial hearsay and were inadmissible because Jensen had no opportunity to cross-examine Julie.

***201** ¶4 The State appealed and we affirmed, applying Crawford and the United States Supreme Court's subsequent decision, Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).[5] ****247** Jensen I, 299 Wis. 2d 267, 727 N.W.2d 518. Davis set out what has come to be known as the "primary purpose test": a statement is testimonial if its primary purpose is "to establish or prove past events potentially relevant to later criminal proceedings." 547 U.S. at 822, 126 S.Ct. 2266. The Court explained that although statements made in response to police questioning are generally testimonial, such statements are nontestimonial if their primary purpose is to help the police "meet an ongoing emergency." Id. at 822, 126 S.Ct. 2266. Applying that test, we determined in Jensen I that the primary purpose of Julie's statements was not to help the police resolve an active emergency but to "investigate or aid in prosecution in the event of her death." Jensen I, 299 Wis. 2d 267, ¶¶27, 30, 727 N.W.2d 518. Thus, under Crawford and Davis's interpretation of the Confrontation Clause, Julie's statements were inadmissible. Id., ¶34.

¶5 We remanded the cause to the circuit court to determine whether Julie's statements were nevertheless admissible under the forfeiture-by-wrongdoing doctrine, which we adopted in Jensen I. See id., ¶¶2, 52. At the time, that doctrine stated that a defendant forfeits his constitutional right to confront a witness when the defendant caused that witness's unavailability. See id., ¶57. On remand, the circuit court found that the State had shown by a preponderance of the evidence that Jensen caused Julie's unavailability. Therefore, the Confrontation Clause notwithstanding, ***202** Julie's statements were admissible after all. Relying at least in part on those statements, a jury convicted Jensen of Julie's murder.

¶6 Jensen again appealed. State v. Jensen (Jensen II), 2011 WI App 3, 331 Wis. 2d 440, 794 N.W.2d 482. While that appeal was pending, the United States Supreme Court decided another case directly affecting Jensen, Giles v. California, 554 U.S. 353, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008). There, the Court refined the forfeiture-by-wrongdoing doctrine, holding that it applies only when the defendant caused the witness's unavailability with the specific intent of preventing the witness from testifying. See id. at 361-68, 128 S.Ct. 2678. In Jensen II, the court of appeals "assum[ed]" that Jensen had not killed Julie specifically to keep her from testifying at trial; therefore, under Giles, Jensen had not forfeited his Confrontation Clause rights and the circuit court had erred in admitting Julie's statements. But the court of appeals also held that the circuit court's error was harmless, given the "voluminous" other evidence supporting the jury's guilty verdict. See Jensen II, 331 Wis. 2d 440, ¶35, 794 N.W.2d 482.

¶7 That harmless error conclusion formed the basis for Jensen's federal habeas corpus litigation.[6] There, the federal courts agreed with Jensen that it was not harmless error to admit Julie's testimonial statements in violation of the Confrontation Clause. Jensen v. Schwochert, No. 11-C-0803, 2013 WL 6708767 (E.D. Wis. Dec. 18, 2013), aff'd, Jensen v. Clements, 800 F.3d 892, 908 (7th Cir. 2015) (holding that was it was "beyond any possibility for fairminded disagreement" that admitting Julie's statements "had a ***203** substantial and injurious effect" on the jury's verdict (quoted source omitted)). Concluding that the Wisconsin court of appeals' decision in Jensen II was an "unreasonable application of ****248** clearly established federal law," the federal court ordered Jensen's conviction vacated. Schwochert, 2013 WL 6708767, at *16-17. The State immediately initiated new proceedings against Jensen.

¶8 In this new pretrial period, Jensen filed a motion to exclude Julie's statements, per our holding in Jensen I. The State urged the circuit court to address anew whether Julie's statements were admissible, arguing that the United States Supreme Court had since "narrowed" the definition of "testimonial" to such a degree that the circuit court was not bound by Jensen I. The circuit court agreed. It explained that "a lot has happened" since Jensen I and that "based upon the law that we have today," Julie's statements were not testimonial. The circuit court reached that conclusion by "applying the factors in Ohio v. Clark, the more recent cases including Michigan v. Bryant, and other cases that came out since Crawford v. Washington and Jensen I."[7] The State then moved the circuit court to forgo a new trial and reinstate Jensen's original conviction and life

sentence on the grounds that, if Julie's statements were again admissible, the evidence now was identical to that in Jensen's first trial. The circuit court granted the State's motion. Jensen appealed.

¶9 The court of appeals reversed, holding that neither it nor the circuit court was "at liberty to decide" that Julie's statements were nontestimonial, given our ***204** holding in Jensen I. State v. Jensen (Jensen III), No. 2018AP1952-CR, unpublished slip op., at 12 (Wis. Ct. App. Feb. 26, 2020). The court of appeals explained that under Cook v. Cook, 208 Wis. 2d 166, 560 N.W.2d 246 (1997), this court is the only one with the power to modify or overrule one of our previous decisions. The court of appeals concluded that, because we have never modified or overruled Jensen I, the circuit court erred in finding Julie's statements admissible and, in turn, failing to hold a new trial. It then remanded the cause "for a new trial at which Julie's letter and [voicemails] may not be admitted into evidence." Id. Having decided Jensen's appeal under Cook, the court of appeals declined to address Jensen's other challenges, including claims that the circuit court judge was biased against him and that the circuit court violated the federal court's habeas order by reinstating his conviction without a trial.

¶10 We granted the State's petition for review of the following three issues: (1) whether the court of appeals erred in reviewing the circuit court's decision under Cook instead of the law of the case; (2) if so, whether the circuit court permissibly deviated from the law of the case and correctly determined that Julie's statements are nontestimonial hearsay; and (3) whether we should remand the cause to the court of appeals to decide Jensen's remaining challenges.

¶11 Although we agree with the court of appeals' ultimate conclusion that the circuit court is bound by Jensen I, we hold that the court of the appeals erred in relying on Cook to reach that decision. In Cook, we held that the court of appeals has no power to overrule, modify, or withdraw language from one of its own published decisions; only this court has that power. See Cook, 208 Wis. 2d at 189, 560 N.W.2d 246. The issue here, ***205** however, is about the law of the case, to which Cook does not apply. Accordingly, we modify the court of appeals' decision to the extent it relies on ****249** Cook. Our analysis proceeds under the doctrine of the law of the case.

II

¶12 Whether a decision establishes the law of the case is a question of law that we review de novo. State v. Stuart (Stuart I), 2003 WI 73, ¶20, 262 Wis. 2d 620, 664 N.W.2d 82. Although lower courts have the discretion to depart from the law of the case when a "controlling authority has since made a contrary decision of the law," State v. Brady, 130 Wis. 2d 443, 448, 388 N.W.2d 151 (1986), whether such a contrary decision has been made is a question of law that we review de novo. See Kocken v. Wis. Council, 2007 WI 72, ¶¶25-26, 301 Wis. 2d 266, 732 N.W.2d 828.

¶13 The law of the case is a "longstanding rule" that requires courts to adhere to an appellate court's ruling on a legal issue "in all subsequent proceedings in the trial court or on later appeal." Stuart I, 262 Wis. 2d 620, ¶23, 664 N.W.2d 82 (quoting Univest Corp. v. Gen. Split Corp., 148 Wis. 2d 29, 38, 435 N.W.2d 234 (1989)). The rule ensures stability for litigants and reinforces the finality of a court's decisions. See Univest Corp., 148 Wis. 2d at 37-38, 435 N.W.2d 234. Courts in subsequent proceedings should therefore "be loathe" to revisit an appellate court's decision absent "extraordinary circumstances." Christianson v. Colt Indus. Oper. Corp., 486 U.S. 800, 817, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988). That admonition aside, absolute adherence to the law of the case is not required. As is relevant ***206** here, lower courts may depart from the initial decision if "a controlling authority has since made a contrary decision of the law" on the same issue.[8] Stuart I, 262 Wis. 2d 620, ¶24, 664 N.W.2d 82 (quoting Brady, 130 Wis. 2d at 448, 388 N.W.2d 151).

¶14 Our analysis thus proceeds in two parts. First, we determine which case established the law of the case that Julie's statements are testimonial hearsay. Second, we analyze whether a controlling court has since issued a contrary decision on the same point of law.

A

¶15 The parties largely agree that Jensen I established the law of the case. Jensen also argues that either federal habeas case, Schwochert or Clements, could establish the law of the case because both concluded that admitting Julie's statements violated the Confrontation Clause. But a federal habeas proceeding cannot establish the law of the case because it "is not a subsequent stage of the underlying criminal proceedings; it is a separate civil case." E.g., Edmonds v. Smith, 922 F.3d 737, 739 (6th Cir. 2019). Therefore, Jensen I

is the only decision establishing the law of the case that Julie's hearsay statements are testimonial.[9]

***207** B

¶16 We next analyze whether the current law regarding the admissibility of testimonial ****250** hearsay is contrary to that relied upon in Jensen I. We decided Jensen I under both Crawford and Davis. Therefore, we must determine whether the United States Supreme Court has since contradicted Crawford or Davis. See State v. Stuart (Stuart II), 2005 WI 47, ¶3 n.2, 279 Wis. 2d 659, 695 N.W.2d 259. As Jensen's Confrontation Clause issue arises under the federal Constitution, we are bound by the United States Supreme Court's jurisprudence interpreting that clause. See, e.g., State v. Delebreau, 2015 WI 55, ¶43, 362 Wis. 2d 542, 864 N.W.2d 852.

¶17 Since Jensen I, the United States Supreme Court has decided two cases that address the definition of testimonial hearsay: Michigan v. Bryant, 562 U.S. 344, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011), and Ohio v. Clark, 576 U.S. 237, 135 S.Ct. 2173, 192 L.Ed.2d 306 (2015). The State argues that Bryant and Clark narrowed the definition of "testimonial" so extensively that Jensen I no longer applies, thereby allowing the circuit court to re-evaluate Julie's statements and conclude that they are admissible nontestimonial statements. Jensen counters that neither Bryant nor Clark altered the Confrontation Clause analysis set forth in Crawford and Davis in any way that undermines our reasoning in Jensen I.

¶18 We agree with Jensen. At the time we decided Jensen I, the Confrontation Clause barred the admission at trial of an unavailable witness's hearsay ***208** statement that the defendant had no prior meaningful opportunity to cross-examine and that was made for the primary purpose of creating prosecutorial evidence. Bryant and Clark represent developments in applying the primary purpose test, but neither is contrary to it.

1

¶19 Prior to Crawford, an unavailable witness's hearsay statement was admissible under the Confrontation Clause if it met a certain "reliability" threshold. See Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). A statement met that threshold if it fell within a "firmly rooted hearsay exception" or if it bore some other "indicia of reliability." Id. The United States Supreme Court had read traditional hearsay rules and the Confrontation Clause as somewhat redundant, reasoning that "certain hearsay exceptions rest upon such solid foundations that admission of virtually any evidence within them comports with" the Confrontation Clause. See id.

¶20 Crawford "fundamentally change[d]" that analysis. Jensen I, 299 Wis. 2d 267, ¶14, 727 N.W.2d 518. Crawford first focused the scope of the Confrontation Clause analysis on the circumstances in which one makes a statement, explaining that the Constitution is "acute[ly]"—but not exclusively—concerned with "formal statement[s] to government officers" rather than "casual remark[s] to an acquaintance." Crawford, 541 U.S. at 51, 124 S.Ct. 1354. The Court then turned to the statement itself, holding that the Confrontation Clause's application to an unavailable witness's hearsay statement turns on two key factors: the statement's purpose and whether the statement had been "tested" on cross-examination. Crawford, 541 U.S. at 55-56, 124 S.Ct. 1354.[10]

****251** ***209** ¶21 On the former, Crawford held that the Confrontation Clause applied only to statements that are "testimonial," which it defined as a statement "made for the purpose of establishing or proving some fact." Id. at 51, 124 S.Ct. 1354 (quoted source omitted). The Court declined, however, to "spell out a comprehensive definition of 'testimonial.' " Id. at 68, 124 S.Ct. 1354; see also Davis, 547 U.S. at 822, 126 S.Ct. 2266 (declining to "produce an exhaustive classification of all conceivable statements"). Rather, it identified three broad "formulations" of testimonial statements: (1) "ex parte in-court testimony," such as "prior testimony that the defendant was unable to cross-examine"; (2) out-of-court statements "contained in formalized testimonial materials," such as an affidavit or a deposition; and (3) "statements that were made under circumstances [that] would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Crawford, 541 U.S. at 51-52, 124 S.Ct. 1354 (quoted sources omitted). Putting these factors together, but again declining to limit its holding to the specific facts in Crawford, the Court held that, "at a minimum," the definition of "testimonial" includes prior testimony and a statement made during police interrogation. Id. at 68, 124 S.Ct. 1354.

¶22 In Davis and its companion case, Hammon, however, the Court explained that not all statements to police are

testimonial. There, the Court analyzed statements made to police during their response to two ***210** domestic violence incidents. It applied Crawford to both situations, but factual differences between the two cases led the Court to divergent conclusions. In Davis, the victim told the 911 operator that Davis was "jumpin' on [her] again" and beating her with his fists. She "described the context of the assault" and gave the 911 operator other identifying information about Davis. Davis, 547 U.S. at 817-18, 126 S.Ct. 2266. In Hammon, the police had responded to a report of domestic violence, finding the victim on the front porch and Hammon inside the house. The victim allowed the police to go inside, where they first questioned Hammon and then her. At the end of that questioning, the victim "fill[ed] out and sign[ed] a battery affidavit" in which she explained that Hammon broke a glass heater, pushed her into the broken glass, hit her in the chest, damaged her van so that she could not leave, and attacked her daughter. Id. at 819-21, 126 S.Ct. 2266.

¶23 The Court held that the victim's statements in Davis were not testimonial because their primary purpose was to "enable police assistance with an ongoing emergency." Id. at 828, 126 S.Ct. 2266. The Court differentiated these "frantic" statements, made "as they were actually happening" and while the victim was "in immediate danger," from those in Crawford, which were made "hours after the events ... described had occurred." Id. at 827, 831, 126 S.Ct. 2266 (emphasis removed). The statements also helped the police "assess the situation, the threat to their own safety, and possible danger to the potential victim." Id. at 832, 126 S.Ct. 2266 (quoting Hiibel v. Sixth Jud. Dist. Ct., 542 U.S. 177, 186, 124 S.Ct. 2451, 159 L.Ed.2d 292 (2004)). Thus, the victim "simply was not ... testifying" because "[n]o 'witness' goes into court to proclaim an emergency." Id. at 828, 126 S.Ct. 2266.

¶24 The Court reached the opposite conclusion in Hammon. There, it held that the victim's statements ***211** were testimonial because their primary purpose was to provide a "narrative of past events." Id. at 832, 126 S.Ct. 2266. Even though Hammon ****252** was present while the police took the victim's statements, there "was no emergency in progress." Id. at 829, 126 S.Ct. 2266. Her statements did not describe what was happening at that very moment, as in Davis, but rather what happened before the police arrived. Id. at 830, 126 S.Ct. 2266.

¶25 We decided Jensen I by analyzing Julie's statements under the primary purpose test as explained in Davis. See Jensen I, 299 Wis. 2d 267, ¶¶18-19, 727 N.W.2d 518. We must therefore examine the United States Supreme Court's more recent decisions in Bryant and Clark to determine if either decision is contrary to that test, thereby justifying the circuit court's departure from Jensen I.

2

¶26 The Court's main task in Bryant was to clarify what it means, outside of Davis's specific factual context, for a statement to have the primary purpose of "enabl[ing] police assistance to meet an ongoing emergency." See Bryant, 562 U.S. at 359, 131 S.Ct. 1143 (quoting Davis, 547 U.S. at 822, 126 S.Ct. 2266). Indeed, the Court noted that it "confront[ed] for the first time circumstances in which the 'ongoing emergency' discussed in Davis extends beyond an initial victim to a potential threat to the responding police and the public at large." Id. In Bryant, the police found the victim, Covington, at a gas station bleeding badly from a gunshot wound and having trouble speaking. They asked Covington who shot him and where the shooting occurred. Covington told the police that Bryant shot him through the back door of Bryant's house. Covington was then taken to a hospital, where he died a few hours later. ***212** Id. at 349-50, 131 S.Ct. 1143. The Michigan Supreme Court held that Covington's statements were inadmissible testimonial hearsay similar to those in Hammon because he made them after the shooting occurred and the police did not "perceive[ ] an ongoing emergency at the gas station." Id. at 351, 131 S.Ct. 1143.

¶27 The United States Supreme Court reversed. It held that the primary purpose of Covington's statements was to help the police resolve an ongoing emergency, because when the police arrived on the scene, they did not know whether the person who shot Covington posed an ongoing threat to the public. Id. at 371-72, 131 S.Ct. 1143. Covington's behavior —profusely bleeding from the stomach, repeatedly asking when an ambulance would arrive, having difficulty breathing —objectively revealed that he was answering the officers' questions only to give them information about what might be an active-shooter scenario. Id. at 373-74, 131 S.Ct. 1143. Other evidence supporting that conclusion included the fact that, like the 911 call in Davis, Covington's statements were "harried" and made during a "fluid and somewhat confused" situation. Id. at 377, 131 S.Ct. 1143. Because the primary purpose of the statements was to help the police resolve an ongoing emergency, they were not testimonial.

¶28 In reaching that conclusion, Bryant emphasized that the test for determining a statement's primary purpose is an objective one. Id. at 360, 131 S.Ct. 1143. When deciding whether a statement is made to assist the police in resolving an ongoing emergency, courts must consider the overall circumstances in which the statement is made, such as whether the statement is made near the scene of the crime or later at the police station. Id. at 360–61, 131 S.Ct. 1143. Ultimately, the crux of the inquiry is whether the statement is made to "end[ ] a threatening ***213** situation" (not testimonial) or to "prove[ ] past events potentially relevant to later criminal prosecution" (testimonial). Id. at 361, 131 S.Ct. 1143 (quoting ****253** Davis, 547 U.S. at 822, 832, 126 S.Ct. 2266). On that point, the Court cautioned against construing Davis's "ongoing emergency" definition too narrowly:

> Domestic violence cases like Davis and Hammon often have a narrower zone of potential victims than cases involving threats to public safety. An assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue.

Id. at 363–64, 131 S.Ct. 1143.

¶29 Bryant also reminded courts that whether an ongoing emergency exists is only one factor for determining a statement's primary purpose. Id. at 366, 131 S.Ct. 1143. Other factors are also relevant, such as the statements and actions of both the declarant and the interrogators and formality of the encounter. Id. at 366-67, 131 S.Ct. 1143. But just as formal police interrogations do not always produce testimonial statements, informal questioning "does not necessarily indicate ... the lack of testimonial intent." Id. at 366, 131 S.Ct. 1143; see also Davis, 547 U.S. at 822 & n.1, 126 S.Ct. 2266. Courts must objectively analyze the declarant's and the interrogator's "actions and statements." Bryant, 562 U.S. at 367-68, 131 S.Ct. 1143. The Court noted that this approach was the one it "suggested in Davis" when it first articulated that statements made to resolve an ongoing emergency are not testimonial. Id. at 370, 131 S.Ct. 1143.

***214** 3

¶30 Whereas Bryant's contextual analysis focused on the person making the statement, Clark focused on the person to whom the statement was made. In Clark, the Court was asked to resolve "whether statements to persons other than law enforcement officers are subject to the Confrontation Clause." 576 U.S. at 246, 135 S.Ct. 2173. There, Clark had been convicted of assaulting his girlfriend's three-year-old child due, in part, to statements the child made to his teachers identifying Clark as his abuser. The child made those statements in response to his teachers' inquiries about visible injuries on his body. Concerned that the child was being abused, the teachers asked him questions "primarily aimed at identifying and ending the threat" of potentially letting him go home that day with his abuser. Id. at 247, 135 S.Ct. 2173. When the teachers were questioning the child, their objective was "to protect" him, "not to arrest or punish his abuser"; they "were not sure who had abused him or how best to secure his safety." Id.

¶31 The Court held that the Confrontation Clause applied to "at least some statements made to individuals who are not law enforcement," but not the child's statements here. Id. at 246, 135 S.Ct. 2173. Reiterating Bryant's guidance to consider all of the relevant circumstances, the Court explained that "[c]ourts must evaluate challenged statements in context, and part of that context is the questioner's identity." Id. at 249, 135 S.Ct. 2173 (explaining that it is "common sense that the relationship between a student and his teacher is very different from that between a citizen and the police"). The Court then considered "all the relevant circumstances," including the child's age, the school setting, the teachers' objective, and the overall informality of the situation, ***215** and concluded that the primary purpose of the child's statements was not to "creat[e] evidence" for Clark's prosecution. Id. at 246, 135 S.Ct. 2173. Although the Court again "decline[d] to adopt a categorical rule" on the issue, id., it pointed out that statements by someone as young as this child ****254** "will rarely, if ever, implicate the Confrontation Clause," id. at 248, 135 S.Ct. 2173.

C

¶32 Bryant and Clark neither contradicted Crawford or Davis nor drastically altered the Confrontation Clause analysis. Given that both Crawford and Davis declined to "comprehensive[ly]" define "testimonial statement," it was inevitable that future cases like Bryant and Clark would further refine that term. See Crawford, 541 U.S. at 68, 124 S.Ct. 1354; Davis, 547 U.S. at 821-22, 126 S.Ct. 2266. In the "new context" of a potential threat to the responding police and the public at large, Bryant "provide[d] additional clarification with regard to what Davis meant by 'the primary

purpose of the interrogation is to enable police assistance to meet an ongoing emergency.' " Bryant, 562 U.S. at 359, 131 S.Ct. 1143. Similarly, in Clark, the Court applied the primary purpose test to answer a question it had "repeatedly reserved: whether statements made to persons other than law enforcement officers are subject to the Confrontation Clause." Clark, 576 U.S. at 246, 135 S.Ct. 2173.

¶33 The Court's own reflections on its post-Crawford decisions demonstrate that it did not see those decisions as contradicting Crawford or Davis but rather as efforts to "flesh out" the test it first articulated there. See id. at 243-46, 135 S.Ct. 2173; see also id. at 252, 135 S.Ct. 2173 (Scalia, J., concurring) (plainly stating in 2015 that Crawford "remains the law"). Federal courts of appeals' interpretations of Bryant and Clark confirm that ***216** progression. See, e.g., United States v. Norwood, 982 F.3d 1032, 1043-44 (7th Cir. 2020); Issa v. Bradshaw, 910 F.3d 872, 876 (6th Cir. 2018); United States v. LeBeau, 867 F.3d 960, 980 (8th Cir. 2017). The Seventh Circuit Court of Appeals, for instance, recently noted that Bryant "further elaborated" on Davis's ongoing emergency analysis by "ma[king] clear that the totality of the circumstances guides the primary purpose test, not any one factor." Norwood, 982 F.3d at 1043-44 (emphasis removed). That court has likewise cited Clark as a continuation in the primary purpose test's development. See, e.g., United States v. Amaya, 828 F.3d 518, 528-29, 529 n.4 (7th Cir. 2016).

¶34 Our recent jurisprudence also reveals that Crawford and Davis—and therefore our analysis in Jensen I—have not been contradicted. Even after Bryant and Clark, we continue to cite Crawford and Davis in resolving whether an unavailable witness's statement is testimonial. See State v. Reinwand, 2019 WI 25, ¶¶19-22, 385 Wis. 2d 700, 924 N.W.2d 184; State v. Nieves, 2017 WI 69, ¶¶26-29, 376 Wis. 2d 300, 897 N.W.2d 363; State v. Zamzow, 2017 WI 29, ¶13, 374 Wis. 2d 220, 892 N.W.2d 637; State v. Mattox, 2017 WI 9, ¶¶24-25, 373 Wis. 2d 122, 890 N.W.2d 256. Even more to the point, on the limited occasions we have cited Bryant or Clark, we have interpreted them as continuing to apply the primary purpose test. See Reinwand, 385 Wis. 2d 700, ¶¶22, 24, 924 N.W.2d 184; Mattox, 373 Wis. 2d 122, ¶32, 890 N.W.2d 256 ("Clark reaffirms the primary purpose test"). We have never interpreted Bryant or Clark to be a departure from Crawford or Davis, much less the type of drastic departure required to justify deviating from the law of the case.

¶35 In some ways, Jensen I anticipated Bryant and Clark. For instance, we decided Jensen I by not ***217** only analyzing the content of Julie's statements but also objectively evaluating the relevant "circumstances" under which she made them. Jensen I, 299 Wis. 2d 267, ¶¶26-30, 727 N.W.2d 518. That is what the United States Supreme Court held in Bryant. See 562 U.S. at 359, 131 S.Ct. 1143 (requiring ****255** courts to "objectively evaluate the circumstances" surrounding the statement's creation when determining its primary purpose). In Jensen I, we rejected the State's argument that "the government needs to be involved in the creation of the statement" for that statement to be testimonial. See Jensen I, 299 Wis. 2d 267, ¶24, 727 N.W.2d 518. This mirrors the holding in Clark. See 576 U.S. at 246, 135 S.Ct. 2173 (recognizing that "at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns"). Far from being contrary to Jensen I, Bryant and Clark are consistent with it.

III

¶36 Our decision in Jensen I that Julie's statements constituted testimonial hearsay established the law of the case. Subsequent developments in the law on testimonial hearsay are not contrary to Jensen I. Therefore, the circuit court was not permitted to deviate from our holding in Jensen I. Accordingly, we affirm the court of appeals' decision. We modify that decision, however, to the extent that the court of appeals incorrectly relied upon Cook.

By the Court.—The decision of the court of appeals is modified, and as modified, affirmed.

JILL J. KAROFSKY, J. (concurring).

¶37 I join the majority opinion, with the exception of ¶35, ***218** because I agree that our decision in Jensen I that Julie's statements constituted testimonial hearsay established the law of the case and a controlling court has not issued a contrary decision on the same point of law. State v. Jensen (Jensen I), 2007 WI 26, 299 Wis. 2d 267, 727 N.W.2d 518. I write separately, however, because I disagree with the majority's assertion that the Jensen I court "objectively evaluat[ed] the relevant 'circumstances' under which she made [her statements]." Majority op., ¶35. In other words, I conclude that the Jensen I court completely failed to consider the context in which Julie made her statements.

¶38 Had this court in Jensen I truly considered that context, it would have recognized that Julie was undeniably a victim of

domestic abuse and that prior to her death she lived in terror born of the unimaginable fear that her husband was going to kill her and claim that her death was a suicide. It was under these circumstances that she left two voicemails for Pleasant Prairie Police Officer Ron Kosman and wrote a letter which she gave to a neighbor with instructions to give it to the police should anything happen to her.

¶39 This writing begins with a discussion of domestic abuse and how Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), impacted the prosecution of domestic abuse cases. Next, I summarize the United States Supreme Court's decisions in Crawford, Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), and Davis' companion case, Hammon v. Indiana. I follow with an examination of Jensen I, since it was decided less than a year after Davis and Hammon, and with a discussion of three cases from the United States Supreme Court and this court that were decided post-Jensen I. This case overview reveals how the United States Supreme Court and this court have increasingly given weight to ***219** context when assessing whether the hearsay statement of an unavailable witness is testimonial in nature. Next, to assist future courts in assessing context, I supply a non-exhaustive list of contextual questions based off the previously summarized cases. Finally, I conclude this concurrence with a discussion of assessing context in domestic abuse cases ****256** and an objective evaluation of the circumstances under which Julie made her statements.

I. DOMESTIC ABUSE AND VICTIMLESS PROSECUTION

¶40 Domestic abuse, or interpersonal violence, is a significant public health issue. About one in four women and one in seven men have experienced an act of physical violence from an intimate partner in their lifetime. Caitlin Valiulis, Domestic Violence, 15 Geo. J. Gender & L. 123, 124 (2014). In addition, and far more sobering, the nation's crime data suggests that over half of female homicide victims in the United States are killed by a current or former intimate partner. See Natalie Nanasi, Disarming Domestic Abusers, 14 Harv. L. & Pol'y Rev. 559, 563 & n.16 (2020) (citing statistics from the Center for Disease Control and Prevention regarding the role of intimate partner violence).

¶41 To counteract this public health issue, prosecutors have worked to hold abusers accountable. This is often a difficult, if not impossible, task because abusers' actions often render their victims unavailable to testify. Beginning in the mid-1990s, prosecutors pursued these so-called "victimless" prosecutions by seeking to introduce reliable evidence using victims' out-of-court statements through 911 operators, medical professionals, social workers, and law enforcement officers. See Andrew King-Ries, ***220** Crawford v. Washington: The End of Victimless Prosecution?, 28 Seattle U. L. Rev. 301 (2005). Victim advocates and prosecutors applauded this approach because it maintained victims' safety and avoided retraumatization. Id. This practice, however, came to a screeching halt after the United States Supreme Court's decision in Crawford,[1] in which the Court profoundly altered the analysis as to when an unavailable witness's hearsay statement is admissible under the Confrontation Clause of the Sixth Amendment.

II. PRECEDENT FROM THE UNITED STATES SUPREME COURT ABOUT NONTESTIMONIAL HEARSAY

¶42 In Crawford, the United States Supreme Court fundamentally changed the analysis regarding the admissibility of an out-of-court witness's statement by deciding that when such a statement is testimonial in nature, the witness must testify and face cross-examination. 541 U.S. at 68, 124 S.Ct. 1354. Consequently, if that witness is unavailable, his or her testimony will be excluded. Id. The Crawford Court did not further explain what it meant by "testimonial." Writing for the majority, Justice Scalia reasoned:

> Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law ***221** required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.

Id. (Footnote omitted.)

¶43 The United States Supreme Court first applied its reasoning in Crawford to ****257** situations of domestic abuse in Davis and Hammon. In doing so, the Court created a primary-purpose test to determine whether or not a statement is testimonial. In short, the test is designed to ascertain whether the primary purpose of an interrogation is to enable police to meet an ongoing emergency. Statements are "testimonial when the circumstances objectively indicate

that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Davis, 547 U.S. at 822, 126 S.Ct. 2266.

¶44 In Davis, the Court analyzed a 911 call in which the victim reported that Davis was "jumpin' on [her] again" and beating her with his fists. Id. at 817, 126 S.Ct. 2266. The victim also "described the context of the assault" and gave identifying information about Davis. Id. at 818, 126 S.Ct. 2266. The Court held that these statements were admissible because their primary purpose was to "enable police assistance to meet an ongoing emergency." Id. at 828, 126 S.Ct. 2266.[2] The Court distinguished this statement from the ***222** one at issue in Crawford, reasoning that the statements were made "as they were actually happening" and while the victim was "in immediate danger." Id. at 827, 831, 126 S.Ct. 2266 (emphasis in original). The Court also determined that the statements were helpful to the police because they allowed them to assess any potential threats towards them or the victim. Id. at 832, 126 S.Ct. 2266. In sum, the Court decided that the victim was not testifying because "[n]o 'witness' goes into court to proclaim an emergency and seek help." Id. at 828, 126 S.Ct. 2266.

¶45 The Court reached a different conclusion in Hammon, in which police called to a domestic violence incident found the victim on the front porch and Hammon inside the house. Id. at 819, 126 S.Ct. 2266. As part of their investigation, the officers asked the victim to fill out and sign a "battery affidavit." Id. at 820, 126 S.Ct. 2266. In filling out the affidavit, the victim described how Hammon broke a glass heater, pushed her into the broken glass, hit her in the chest, prevented her from leaving by damaging her van, and attacked her daughter. Id. The Court determined the primary purpose of this statement was to provide a "narrative of past events," and the Court reasoned that giving a statement about past events meant there was "no emergency in progress." Id. at 829, 832, 126 S.Ct. 2266. For these reasons, the Court decided the victim's affidavit was inadmissible hearsay. Id. at 834, 126 S.Ct. 2266.

***223** III. JENSEN I

¶46 Shortly after the United States Supreme Court decided Davis and Hammon, this court determined in Jensen I that the primary purpose of Julie's letter was not to help the police in an ongoing emergency, but to "investigate or aid in prosecution in the event of her death." Jensen I, 299 Wis. 2d 267, ¶27, 727 N.W.2d 518. Additionally, ****258** the court also reasoned that the voicemails "were entirely for accusatory and prosecutorial purposes." Id., ¶30.

¶47 In Julie's second voicemail, she told Officer Kosman that she thought Jensen was going to kill her. The letter that Julie gave her neighbor read as follows:

> I took this picture [and] am writing this on Saturday 11-21-98 at 7AM. This 'list' was in my husband's business daily planner—not meant for me to see, I don't know what it means, but if anything happens to me, he would be my first suspect. Our relationship has deteriorated to the polite superficial. I know he's never forgiven me for the brief affair I had with that creep seven years ago. Mark lives for work [and] the kids; he's an avid surfer of the Internet....
>
> Anyway—I do not smoke or drink. My mother was an alcoholic, so I limit my drinking to one or two a week. Mark wants me to drink more—with him in the evenings. I don't. I would never take my life because of my kids—they are everything to me! I regularly take Tylenol [and] multi-vitamins; occasionally take OTC stuff for colds, Zantac, or Immodium; have one prescription for migraine tablets, which Mark use[s] more than I.
>
> I pray I'm wrong [and] nothing happens ... but I am suspicious of Mark's suspicious behaviors [and] fear for my early demise. However, I will not leave David ***224** [and] Douglas. My life's greatest love, accomplishment and wish: "My 3 D's"—Daddy (Mark), David [and] Douglas.

Id., ¶7.

¶48 Although the record in this case was replete with references to domestic abuse and the Jensen I majority took great pains to explain that it reached its decision by examining "[t]he content and the circumstances surrounding the letter" and applied the same reasoning to the voicemails, id., ¶27, nowhere in the majority opinion, not even in a passing phrase or fleeting word, did this court acknowledge that Julie was the victim of domestic abuse. Instead, employing an ill-suited analogy, the majority compared Julie's letter and voicemails to Lord Cobham's letter at Sir Walter Raleigh's trial for treason. Id., ¶29. Drawing a parallel between a 1603 treason trial —where Cobham, the missing (but still very much alive) accomplice, wrote a letter maintaining his innocence while accusing Raleigh—and a 1998 domestic homicide makes for a particularly inapt analogy; it draws a comparison remote in time, place, content, and circumstance in every possible aspect.

IV. POST-JENSEN I

¶49 Post-Jensen I, the United States Supreme Court issued two decisions that further illuminated the import of assessing context when courts are determining the primary purpose of an unavailable witness's hearsay statement, Michigan v. Bryant, 562 U.S. 344, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011), and Ohio v. Clark, 576 U.S. 237, 135 S.Ct. 2173, 192 L.Ed.2d 306 (2015). In Bryant, the police found a gunshot victim at a gas station. 562 U.S. at 349, 131 S.Ct. 1143. Although the victim was bleeding profusely and was having trouble speaking, ***225** he told police that Bryant shot him through the back door of Bryant's house. Id. Unfortunately, the victim died within hours. Id. The Bryant Court decided that the victim's statement was admissible because its primary purpose was to help the police resolve an ongoing emergency, especially in light of the fact that Bryant posed an ongoing threat to the community at large. Id. at 371-73, 131 S.Ct. 1143. The Court emphasized that determining the primary purpose of a statement is an objective test and clarified that an ongoing emergency is only ****259** one factor to be considered. Id. at 360, 366, 131 S.Ct. 1143. The Court outlined other important factors, including the statements and actions of both the declarant and the interrogators, and the formality of the encounter. Id. at 366-67, 131 S.Ct. 1143. The court noted that victims may have "mixed motives" when making a statement to the police. Id. at 368, 131 S.Ct. 1143 ("During an ongoing emergency, a victim is most likely to want the threat to her and to other potential victims to end, but that does not necessarily mean that the victim wants or envisions prosecution of the assailant.").

¶50 Clark, 576 U.S. 237, 135 S.Ct. 2173, involved a different type of violence in the home: child abuse. In that case, Clark was accused of abusing his girlfriend's three-year old son after the victim disclosed the abuse to a teacher who observed visible injuries on the boy's body. Id. at 240-41, 135 S.Ct. 2173. The statements to the teacher were determined to be nontestimonial because the teacher's objective in asking questions was to protect the victim, not to arrest or punish his abuser. Id. at 247, 135 S.Ct. 2173. The Clark Court reiterated the importance of context, explaining "[c]ourts must evaluate challenged statements in context, and part of that context is the questioner's identity." Id. at 249, 135 S.Ct. 2173. In considering "all the relevant circumstances," including the child's age, the school ***226** setting, the teacher's objective, and the overarching informality of the situation, the Court concluded that the primary purpose of the victim's statements was not to "creat[e] evidence" for Clark's prosecution. Id. at 246, 135 S.Ct. 2173. Rather, the teacher's questions were intended to identify the abuser "to protect the victim from future attacks." Id. at 247, 135 S.Ct. 2173.

¶51 Subsequently, we interpreted Clark in Reinwand, in which Joseph Reinwand was convicted of first-degree intentional homicide for killing his daughter's former partner. State v. Reinwand, 2019 WI 25, 385 Wis. 2d 700, 924 N.W.2d 184. Reinwand's daughter and the victim were planning to mediate a custody dispute and in the days leading up to the mediation, Reinwand threatened to harm or kill the victim if he continued to seek custody. Id., ¶6. The victim reported these threats to family and friends, saying he was scared for his life and that if anything happened to him, people should look to Reinwand. Id. A short time later, the victim was found dead in his home. This court looked to four relevant factors in deciding whether Reinwand's statements were testimonial:

> (1) the formality/informality of the situation producing the out-of-court statement; (2) whether the statement is given to law enforcement or a non-law enforcement individual; (3) the age of the declarant; and (4) the context in which the statement was given.

Id., ¶25 (citing State v. Mattox, 2017 WI 9, ¶32, 373 Wis. 2d 122, 890 N.W.2d 256).

¶52 The Reinwand court concluded that the statements were nontestimonial because: (1) they were given in informal situations, primarily inside people's houses and at an Arby's restaurant; (2) none of the statements were given to law enforcement or intended ***227** for law enforcement; (3) the age of the victim was irrelevant; and (4) the victim's statements were made to friends and family and his demeanor suggested genuine concern because he seemed "concerned, stressed, agitated ... and genuinely frightened." Id., ¶¶27-30. The court concluded that the victim's "demeanor suggests that he was expressing genuine concern and seeking advice, rather than attempting to create a substitute for trial testimony." Id., ¶30.

****260** V. ASSESSING CONTEXT

¶53 The post-Crawford cases emphasized the importance of assessing context when courts are determining whether the hearsay statement of an unavailable witness is testimonial. The following non-exhaustive list of questions summarizes

the contextual inquiries the United States Supreme Court and this court made in post-Crawford cases:

- Is there an ongoing emergency? (Davis)
- Do the statements help the police assess whether there is a potential threat? (Davis)
- Is the victim in immediate danger? (Davis)
- Is the statement a narrative of past events? (Hammon)
- Is the statement related to an ongoing threat to the community at large? (Bryant)
- What's the declarant's actual statement? (Bryant)
- What are the actions of the declarant? (Bryant)
- What are the actions and statements of the interrogators? (Bryant)
- Are the interrogators' intentions to protect the victim or arrest/prosecute the abuser? (Clark)

***228** • Is the encounter formal (at a police station) or informal? (Bryant)

- Was the statement given to law enforcement? (Clark)
- Were the statements intended for law enforcement? (Clark)
- How old is the declarant? (Clark)
- What is the relationship between the declarant and the suspect? (Clark)
- What was the demeanor of the declarant at the time the statements were made? (Reinwand)
- Is the statement a prediction of future events? (Reinwand)

VI. CONTEXT IN DOMESTIC ABUSE CASES

¶54 Applying the above considerations to situations of domestic abuse can be challenging because domestic abuse rarely takes place in a vacuum. That is, there are often multiple incidents and the abuse can span the course of days, weeks, months, or years. See, e.g., Eleanor Simon, Confrontation and Domestic Violence Post-Davis: Is There and Should There Be a Doctrinal Exception?, 17 Mich. J. Gender & L. 175, 206 (2011) ("[A] domestic violence victim exists in a relationship defined by long-term, ongoing, powerful, and continuous abuse ... it is illogical and impractical to attempt to find the beginning and end of an 'emergency' in such a context."). In addition, victims of domestic abuse are often afraid to report acts of violence, or they recant or refuse to cooperate after initially providing information because they fear retaliation. Id. at 184-85. Therefore, victims may not make a report or they may minimize or deny incidents of abuse. It is also important to understand that no one ***229** knows an abuser better than the abuser's victim. And the most dangerous time for a victim of domestic abuse is when he or she decides to leave the relationship. See Lisa A. Goodman & Deborah Epstein, Listening to Battered Women: A Survivor-Centered Approach to Advocacy, Mental Health, and Justice 76 (2008) ("Substantial data show that separation from the batterer is the time of greatest risk of serious violence and homicide for battered women and for their children.").

¶55 Having suggested some contextual questions and acknowledging the challenges of understanding context in cases of domestic abuse, I conclude this concurrence by objectively evaluating the relevant ****261** circumstances under which Julie made her statements, a task the majority opinion erroneously claims the Jensen I court did. That evaluation reveals that Julie:

- was a victim of domestic abuse;
- believed there was an ongoing emergency as she feared her husband was going to kill her;
- perceived herself to be in immediate danger because her husband was engaging in behavior that did not make sense to her;
- had significant safety concerns;
- was afraid her death was going to be made to look like a suicide;
- loved her sons;
- wanted her sons to know she did not intend to kill herself;
- was making a prediction about her husband's future behavior;
- was not questioned/interrogated in this case; and

***230** • did not have a formal encounter in a police station.

¶56 When looking at this evidence in context, it is apparent that Julie was a victim of domestic abuse and that prior to her death she lived in terror born of the unimaginable fear that her husband was going to kill her and claim that her death was a suicide. It was under these circumstances that she left the voicemail messages for Officer Kosman and wrote the letter which she gave to a neighbor with instructions to give it to the police should anything happen to her.

¶57 With this context in mind, we must ask: Was Julie making statements for the future prosecution of her husband for her murder? Or was she a woman trying to survive ongoing domestic abuse, fearing and predicting an imminent attempt on her life, telling her sons that she loved them too much to commit suicide? This is the voice—Julie's voice—that this court failed to acknowledge in Jensen I.

¶58 Although the law of the case prohibits this court from reconsidering the determinations reached by the Jensen I court, had the Jensen I court actually "objectively evaluat[ed] the relevant circumstances" surrounding Julie's statements, it would have recognized the atmosphere of domestic abuse that suffused the factual background and the relationship at the center of this case and possibly reached a different conclusion.

¶59 For the foregoing reasons, I concur.

¶60 I am authorized to state that Justice ANNETTE KINGSLAND ZIEGLER joins this concurrence.

All Citations

396 Wis.2d 196, 957 N.W.2d 244, 2021 WI 27

Footnotes

1 To avoid confusion—and to remain consistent with previous decisions in this case—we refer to Mark Jensen as "Jensen" and Julie Jensen as "Julie."

2 U.S. Const. amend. VI, cl. 4 ("In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ....").

3 The Honorable Chad G. Kerkman of the Kenosha County Circuit Court presiding.

4 State v. Jensen, No. 2018AP1952-CR, unpublished slip op. (Wis. Ct. App. Feb. 26, 2020).

5 Unless otherwise noted, all references to Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), are also references to Hammon v. Indiana, which the Court consolidated with Davis.

6 We denied Jensen's petition for review regarding Jensen II. See Jensen v. Schwochert, No. 11-C-0803, 2013 WL 6708767, at *5 (E.D. Wis. Dec. 18, 2013), aff'd, Jensen v. Clements, 800 F.3d 892 (7th Cir. 2015).

7 The circuit court noted, incorrectly, that Davis (and Hammon) was decided after Jensen I. Not only was Davis decided before Jensen I but in Jensen I we expressly followed Davis. See State v. Jensen (Jensen I), 2007 WI 26, ¶19, 299 Wis. 2d 267, 727 N.W.2d 518.

8 Courts may also depart from the law of the case in two other situations: when the evidence at a subsequent trial is "substantially different" than that at the initial trial; and when following the law of the case would result in a "manifest injustice." See Stuart I, 262 Wis. 2d 620, ¶ 24, 664 N.W.2d 82 (quoted source omitted). Neither of those situations applies here.

9 Even if Schwochert or Clements could establish the law of the case, our conclusion would be the same because both agreed with our holding in Jensen I that Julie's statements are testimonial hearsay. See Schwochert, 2013 WL 6708767, at *17 ("Jensen's rights under the Confrontation Clause of the Sixth Amendment were violated when the trial court admitted" Julie's statements); Clements, 800 F.3d at 908 (adding that "there is no doubt that" admitting Julie's statements violated "Jensen's rights under the Confrontation Clause").

10 Before Crawford, cross-examination was but one method of proving that a testimonial hearsay statement was acceptably reliable. See Ohio v. Roberts, 448 U.S. 56, 70-73, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980); Mancusi v. Stubbs, 408 U.S. 204, 216, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972). But Crawford went further, holding that a prior opportunity for meaningful cross-examination was the only way to show that a testimonial hearsay statement was sufficiently reliable under the Confrontation Clause. Crawford v. Washington, 541 U.S. 36, 55-56, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

1 In a 2004 survey of 64 prosecutors' offices in California, Oregon, and Washington, 63 percent of respondents reported that Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) had significantly impeded domestic violence prosecution. Tom Lininger, Prosecuting Batterers After Crawford, 91 Va. L. Rev. 747, 750 (2005). Further, 76

percent of respondents indicated that after Crawford their offices were more likely to dismiss domestic violence charges when the victims refused to cooperate or were unavailable. Id. at 773.

2 The Davis Court described these statements as "frantic," 547 U.S. at 827, 126 S.Ct. 2266, a word that connotes a lack of thought or good judgment. This type of language is emblematic of the obstacles domestic abuse victims face in effectively conveying the truth of their experiences to institutional gatekeepers. "[D]omestic violence complainants can find themselves in a double bind. The symptoms of their trauma—the reliable indicators that abuse has in fact occurred—are perversely wielded against their own credibility in court. [Post-traumatic stress disorder] symptoms can ... contribute to credibility discounts that may be imposed by police, prosecutors, and judges." Deborah Epstein & Lisa A. Goodman, Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences, 167 U. Penn. L. Rev. 399, 422 (2019).

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DISTRICT II

February 26, 2020

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

2018AP1952-CR State of Wisconsin v. Mark D. Jensen (L.C. #2002CF314)

Before Reilly, P.J., Gundrum and Davis, JJ.

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).

This case has much history, having already been the subject of one supreme court decision more than a decade ago, ***State v. Jensen (Jensen I)***, 2007 WI 26, 299 Wis. 2d 267, 727 N.W.2d 518, a prior decision by this court, ***State v. Jensen (Jensen II)***, 2011 WI App 3, 331 Wis. 2d 440, 794 N.W.2d 482, and multiple federal court decisions, ***Jensen v. Schwochert***, No. 11-C-0803, unpublished slip op. (E.D. Wis. Dec. 18, 2013), *aff'd*, ***Jensen v. Clements***, 800 F.3d 892 (7th Cir. 2015), ***Jensen v. Clements***, No. 11-C-803, unpublished slip op. (E.D. Wis. Nov. 27, 2017), and ***Jensen v. Pollard***, 924 F.3d 451 (7th Cir. 2019).

In this current challenge, Mark Jensen appeals from a judgment of the circuit court convicting him of first-degree intentional homicide, which judgment was entered after the United States District Court for the Eastern District of Wisconsin granted his petition for a writ of habeas corpus and ordered Jensen "released from custody unless, within 90 days of the date of this decision, the State initiates proceedings to retry him." ***Jensen v. Schwochert***, No. 11-C-0803, at 55. Because the circuit court entered this judgment without affording Jensen a new trial (and without otherwise being based upon a plea), he asserts the court erred either by "unconstitutionally direct[ing] a new judgment against him without a trial or plea, or because the circuit court re-entered an old, constitutionally infirm conviction that was invalidated by a higher court." 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 (2017-18).[1] Because we agree the circuit court erred in entering judgment against Jensen without affording him a new trial, we reverse and remand for further proceedings.

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

Background[2]

In 2002, Jensen was charged with first-degree intentional homicide of his wife, Julie, in connection with her death by poisoning. He filed a motion challenging on Confrontation Clause grounds the admissibility of a handwritten letter Julie wrote prior to her death. The letter, bearing Julie's signature, had been in a sealed envelope addressed to "Pleasant Prairie Police Department, Ron Kosman or Detective Ratzenburg" and given to a neighbor. Julie had instructed the neighbor that he should give the envelope to police if anything happened to her. The letter stated, among other things, that "if anything happens to me, [Jensen] would be my first suspect" and "I pray I'm wrong [and] nothing happens ... but I am suspicious of [Jensen's] suspicious behaviors [and] fear for my early demise."

Jensen similarly challenged the admissibility of voicemail messages and other oral statements Julie made to Officer Kosman. In one of the messages, Julie told Kosman she thought Jensen was attempting to kill her and asked that Kosman call her back. ***Jensen I***, 299 Wis. 2d 267, ¶6; ***Jensen v. Schwochert***, No. 11-C-0803, at 2. Our supreme court further described Julie's messages as indicating that "Jensen had been acting strangely and leaving himself notes Julie had photographed and that she wanted to speak with Kosman in person because she was afraid Jensen was recording her phone conversations." ***Jensen I***, 299 Wis. 2d 267, ¶30. The other oral statements at issue relate to Kosman speaking with Julie in person in response to her voicemail messages. As our supreme court expressed it in ***Jensen I***, in such

[2] Because of the extensive history of this case and the role that history plays in this appeal, we draw much of the background information from the prior cases.

statements, Julie indicated, among other things, that "if she were found dead, ... she did not commit suicide, and Jensen was her first suspect."[3] ***Id.***, ¶6.

The circuit court originally ruled that the letter and in-person statements to Kosman were admissible. After the United States Supreme Court decided ***Crawford v. Washington***, 541 U.S. 36 (2004), however, Jensen moved for reconsideration. Revisiting the issue, the circuit court concluded the letter and voicemail messages were testimonial statements and as such were inadmissible under ***Crawford***. The State had conceded the in-person statements were testimonial.

On appeal to our supreme court, the court observed in ***Jensen I*** that the United States Supreme Court "fundamentally changed the Confrontation Clause analysis" with its decision in ***Crawford***. ***Jensen I***, 299 Wis. 2d 267, ¶14. Prior to ***Crawford***, our supreme court noted, Confrontation Clause jurisprudence was driven by ***Ohio v. Roberts***, 448 U.S. 56 (1980). As the ***Jensen I*** court expressed it,

> Under ***Roberts***, when an out-of-court declarant is unavailable, his or her statement is admissible if it bears an adequate indicia of reliability, which could be satisfied if the statement fell within a firmly rooted hearsay exception or bore particularized guarantees of trustworthiness. ***Roberts***, 448 U.S. at 66.

Jensen I, 299 Wis. 2d 267, ¶14. Constituting a "major shift in Confrontation Clause jurisprudence," the ***Crawford*** Court instead "determined that the Confrontation Clause bars

[3] This evidence was presented at Jensen's preliminary hearing. ***State v. Jensen (Jensen I)***, 2007 WI 26, ¶¶4-7, 299 Wis. 2d 267, 727 N.W.2d 518.

admission of an out-of-court-*testimonial* statement unless the declarant is unavailable and the defendant has had a prior opportunity to examine the declarant with respect to the statement." ***Jensen I***, 299 Wis. 2d 267, ¶15 (emphasis added). The ***Jensen I*** court recognized that ***Crawford*** "did not spell out a comprehensive definition of what 'testimonial' means" and then identified indicators from ***Crawford*** to aid in a determination of whether a statement is testimonial or nontestimonial. ***Jensen I***, 299 Wis. 2d 267, ¶16.

The ***Jensen I*** court also recognized that in a post-***Crawford*** Confrontation Clause case, ***Davis v. Washington***, 547 U.S. 813 (2006), the United States Supreme Court referenced a "primary purpose" test in holding: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." ***Jensen I***, 299 Wis. 2d 267, ¶19. Ultimately, the court held that "Julie's statements to the police and the letter are testimonial." ***Id.***, ¶20.

With respect to its holding that the letter and statements by Julie are testimonial, the ***Jensen I*** court discussed the following:

> We begin first with the statements Julie made in her letter. The circuit court concluded that the letter was testimonial as it had no apparent purpose other than to "bear testimony" and Julie intended it exclusively for accusatory and prosecutorial purposes. Furthermore, the circuit court stated, "I can't imagine any other purpose in sending a letter to the police that is to be opened only in the event of her death other than to make an accusatory statement given the contents of this particular letter."

Id., ¶26. The ***Jensen I*** court expressed its agreement with the circuit court's observation, and added that Julie's letter "even referred to Jensen as a 'suspect.'" ***Id.***

Similar to the circuit court, the ***Jensen I*** court stated that

> [t]he content and the circumstances surrounding the letter make it very clear that Julie intended the letter to be used to further investigate or aid in prosecution in the event of her death. Rather than being addressed to a casual acquaintance or friend, the letter was purposely directed toward law enforcement agents. The letter also describes Jensen's alleged activities and conduct in a way that clearly implicates Jensen if "anything happens" to her.

Id., ¶27.

The ***Jensen I*** court noted the similarity between Julie's letter and Lord Cobham's letter accusing Sir Walter Raleigh of treason, followed by an infamous trial that provided an impetus for the Confrontation Clause. *Id.*, ¶29; *see also* ***Crawford***, 541 U.S. at 44-45. The ***Jensen I*** court stated that Julie's letter was

> testimonial in nature as it clearly implicates Jensen in her murder. If we were to conclude that her letter was nontestimonial, we would be allowing accusers the right to make statements clearly intended for prosecutorial purposes without ever having to worry about being cross-examined or confronted by the accused. We firmly believe ***Crawford*** and the Confrontation Clause do not support such a result.

Jensen I, 299 Wis. 2d 267, ¶29. Specifically as to the voicemail messages Julie left for Kosman, the ***Jensen I*** court again agreed with the circuit court.

> Again, the circuit court determined that these statements served no other purpose than to bear testimony and were entirely for accusatory and prosecutorial purposes. Furthermore, Julie's voicemail was not made for emergency purposes or to escape from a perceived danger. She instead sought to relay information in order to further the investigation of Jensen's activities. This distinction convinces us that the voicemails are testimonial. *See* ***Pitts v. State***, 280 Ga. 288, 627 S.E.2d 17, 19 (2006) ("Where the primary purpose of the telephone call is to establish evidentiary facts, so that an objective person would recognize that the statement would be used in a future prosecution, then that phone call 'bears testimony' against the accused and implicates the concerns of the Confrontation Clause.").

Jensen I, 299 Wis. 2d 267, ¶30. The *Jensen I* court's ultimate holding on the issue of Julie's letter and voicemail messages is that they are "testimonial."[4] *Id.*, ¶34.

Despite its determination that Julie's letter and other statements are testimonial, the *Jensen I* court did not simply rule them inadmissible because it also held that the doctrine of "forfeiture by wrongdoing" might apply to this evidence, so it remanded the matter back to the circuit court to determine whether, by a preponderance of the evidence, Jensen caused Julie's unavailability for confrontation and thus forfeited his right to confront her. *Id.*, ¶58. Following a hearing on remand focused on the forfeiture-by-wrongdoing exception, the circuit court

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[4] The *Jensen I* court noted that the State had conceded that the in-person statements Julie made to Kosman when he followed up on her voicemails were testimonial. *Jensen I*, 299 Wis. 2d 267, ¶11 n.4; *State v. Jensen (Jensen II)*, 2011 WI App 3, ¶11 n.4, 331 Wis. 2d 440, 794 N.W.2d 482. In this current appeal, the State asks us to rule that Julie's voicemails and in-person statements, along with the letter, are nontestimonial. In doing so, the State effectively treats the voicemails and in-person statements as being of the same nature and character for Confrontation Clause purposes and refers to them collectively as "the statements." The State is not incorrect in doing so as Julie's voicemail messages and in-person statements to Kosman are in fact of the same nature and character for Confrontation Clause purposes in that they occurred around the same time, related to the same concern that Jensen may have been trying to kill her, and were made to the same person, who was a law enforcement officer. As the *Jensen I* court stated with regard to the voicemail messages:

> [T]he circuit court determined that these statements served no other purpose than to bear testimony and were entirely for accusatory and prosecutorial purposes. Furthermore, Julie's voicemail was not made for emergency purposes or to escape from a perceived danger. She instead sought to relay information in order to further the investigation of Jensen's activities. This distinction convinces us that the voicemails are testimonial.

(continued)

determined by a preponderance of the evidence that Jensen had caused Julie's unavailability and thus had forfeited his confrontation right, and it ruled Julie's letter and statements admissible. The circuit court held a trial at which the letter and other statements were admitted, and Jensen was found guilty.

Subsequent to the trial, the United States Supreme Court decided ***Giles v. California***, 554 U.S. 353 (2008), which addressed the forfeiture-by-wrongdoing doctrine. On appeal of his conviction to this court, Jensen challenged the admission of the letter and statements, and ultimately the guilty verdict against him, based upon ***Giles***' holding regarding the forfeiture-by-wrongdoing doctrine, which holding conflicted with our supreme court's holding on that issue in ***Jensen I***. ***Jensen II***, 331 Wis. 2d 440, ¶22. We assumed, without deciding, that the letter and statements were erroneously admitted at trial but held that their admission was harmless. *Id.*, ¶35.

Jensen also contended in the appeal to us that his due process right to a fair trial was violated because the judge who presided over his trial was the same judge who previously made the finding that he had forfeited his Confrontation Clause challenge to the letter and statements

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Jensen I, 299 Wis. 2d 267, ¶30. Pursuant to ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997), and in light of our supreme court's decision in ***Jensen I***, we conclude we are not at liberty to treat Julie's in-person statements to Kosman any differently than her voicemail messages to him, and we conclude that both the messages and in-person statements are testimonial. Furthermore, the State abandoned its opportunity to argue that the in-person statements are nontestimonial when it conceded in ***Jensen I*** that they were testimonial. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("[A]n issue raised in the trial court, but not raised on appeal, is deemed abandoned."). We further note that it appears the federal courts also determined that both the voicemail and in-person statements, as well as the letter, were testimonial and that their admission at trial violated Jensen's Confrontation Clause rights. *See* ***Jensen v. Schwochert***, No. 11-C-0803, unpublished slip op. at 18, 28, 54-55 (E.D. Wis. Dec. 18, 2013), *aff'd*, ***Jensen v. Clements***, 800 F.3d 892, 896, 908 (7th Cir. 2015).

by causing Julie's unavailability. We rejected this contention on the merits and also concluded he had forfeited it by failing to first raise it in the circuit court. ***Id.***, ¶¶94-96. On the merits, we stated:

> Under WIS. STAT. § 901.04, a judge must make preliminary evidentiary findings such as the finding Judge Schroeder made that Jensen was guilty of forfeiture by wrongdoing. Moreover, Judge Schroeder was ordered by our supreme court to make a forfeiture by wrongdoing finding. Additionally, Jensen points to nothing to support his implied contention that a judge who makes the preliminary finding of forfeiture by wrongdoing must recuse himself or herself from the trial. Finally, Jensen proffers no objective evidence of bias. We address this argument no further.

Jensen II, 331 Wis. 2d 440, ¶96 (footnote omitted).

Jensen subsequently filed a petition for review by the Wisconsin Supreme Court, which petition the court denied. Jensen then filed a habeas petition in federal court. The federal district court for the Eastern District of Wisconsin ruled that the admission of the testimonial letter and statements by Julie at trial violated Jensen's rights under the Confrontation Clause and, contrary to our ruling in ***Jensen II***, was not harmless error, and the court ordered Jensen "released from custody unless, within 90 days of the date of this decision, the State initiates proceedings to retry him." ***Jensen v. Schwochert***, No. 11-C-0803, at 55.

The State appealed the federal district court's ruling to the Seventh Circuit Court of Appeals, and that court affirmed, expressing "[t]hat the jury improperly heard Julie's voice from the grave in the way it did means there is no doubt that Jensen's rights under the federal Confrontation Clause were violated." ***Jensen v. Clements***, 800 F.3d at 908. The court stated that the "letter and other accusatory statements [Julie] made to the police in the weeks before her death regarding her husband should never have been introduced at trial," adding that "[t]he erroneous admission of Julie's letter and statements to the police had a substantial and injurious

influence or effect in determining the jury's verdict." *Id.* at 895. Upon remand to the state circuit court, Jensen's conviction was vacated and further proceedings were held.

Despite the Wisconsin Supreme Court's ruling in ***Jensen I*** and the federal court rulings holding that Julie's letter and other statements were testimonial, as the parties prepared for a retrial, the State asked the circuit court to consider anew the admissibility of the letter and Julie's other statements and rule them admissible at a retrial. The State asserted, as it does on appeal, that United States Supreme Court cases decided in 2011, 2012, and 2015 modified the definition of what constitutes a "testimonial" statement and that under the revised definition, Julie's letter and other statements do not qualify. The circuit court agreed and ruled that the letter and statements are nontestimonial and could be admitted at trial. The State subsequently filed a motion to reinstate the original jury verdict without a retrial, and the circuit court did just that, reinstating the original conviction as well as Jensen's life sentence, explaining that there was no need for a new trial because the evidence would be "materially the same as the first trial."[5] Jensen appeals.

Discussion

In this appeal, Jensen argues that the circuit court erred either by "unconstitutionally direct[ing] a new judgment against him without a trial or plea, or because the circuit court re-entered an old, constitutionally infirm conviction that was invalidated by a higher court." We need not delve into the murky waters of deciding between these two because whichever action the court in fact took under the law was in error as they are both based on the court's erroneous

[5] Related litigation then followed in federal court, but our ruling is not dependent on those proceedings.

ruling that Julie's letter and other statements are nontestimonial and thus not subject to the Confrontation Clause.

"[T]he Confrontation Clause applies ... to statements that are testimonial in nature," but does not apply to statements that are nontestimonial. ***State v. Reinwand***, 2019 WI 25, ¶¶22-23, 385 Wis. 2d 700, 924 N.W.2d 184. Whether a particular statement is testimonial or nontestimonial is a question of law we review de novo. ***State v. Deadwiller***, 2012 WI App 89, ¶7, 343 Wis. 2d 703, 820 N.W.2d 149.

While our recitation of the procedural history of this case is long, our analysis will be short. Neither we nor the circuit court are at liberty to decide that the letter and other statements Julie made to Kosman are nontestimonial. Under ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997), "[t]he supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case." *See* ***Jensen II***, 331 Wis. 2d 440, ¶27. That is what the circuit court erroneously did and what the State asks us to affirm in this case.

We will not again detail all that the supreme court said in ***Jensen I*** with regard to the testimonial nature of Julie's letter and other statements to Kosman. We will, however, point out again that the court stated:

> If we were to conclude that her letter was nontestimonial, we would be allowing accusers the right to make statements clearly intended for prosecutorial purposes without ever having to worry about being cross-examined or confronted by the accused. We firmly believe ***Crawford*** *and the Confrontation Clause* do not support such a result.

Jensen I, 299 Wis. 2d 267, ¶29 (emphasis added). The supreme court made its "firm[] belie[f]" abundantly clear, not just in a case with facts very similar to the facts in this case, but in this case itself, with these same exact facts. *Id.* In the end, the court ruled in *Jensen I* that "the statements Julie made to Kosman, including the letter, are testimonial," *id.*, ¶58, and it did so not solely based upon the *Crawford* decision, but upon the Confrontation Clause itself. We are not at liberty to state otherwise.[6] With that, we must conclude the circuit court erred in entering a judgment of conviction without a new trial, a new trial which was envisioned by the federal district court when it returned this case to the circuit court with instructions to "release [Jensen] from custody unless, within 90 days of the date of this decision, the State initiates proceedings to retry him." *Jensen v. Schwochert*, No. 11-C-0803, at 55. We reverse and we remand for a new trial at which Julie's letter and other statements may not be admitted into evidence.[7]

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[6] We have already recognized in *Jensen II*, almost four years after *Jensen I*, that we are bound by our supreme court's declaration in *Jensen I* that "the statements Julie made to Kosman, including the letter addressed to the police, are 'testimonial,'" *Jensen II*, 331 Wis. 2d 440, ¶27, and we referred to these statements as testimonial, *see id.*, ¶¶13, 14, 35, 38, 71, 73. Related to our ruling that we are bound by the *Jensen I* court's determination that the letter and other statements are testimonial, we specifically stated:

> In order to determine which statements may be analyzed under the broader version of the forfeiture by wrongdoing analysis, we must first determine which statements are testimonial and which are not. Fortunately, our supreme court has done so for us in *Jensen*, 299 Wis. 2d 267, ¶2. *See Livesey v. Copps Corp.*, 90 Wis. 2d 577, 581, 280 N.W.2d 339 (Ct. App. 1979) (recognizing that "[t]he court of appeals is bound by the prior decisions of the Wisconsin Supreme Court").

Jensen II, 331 Wis. 2d 440, ¶27.

[7] Jensen also argues that if his "current conviction is a re-entry of the old constitutionally infirm judgment ... this judgment is infected by the same judicial bias that Jensen presented in his direct appeal in *Jensen II*." Jensen recognizes that we already answered in *Jensen II* that he had failed to show judicial bias, but he acknowledges he is just raising the issue again to preserve it "for review by a federal habeas court, if necessary." Because we already have ruled that he is entitled to a new trial upon remand (at which trial the challenged statements may not be admitted) and that he has not shown judicial bias, we see no need to address this issue further.

Therefore,

IT IS ORDERED that the judgment of the circuit court is summarily reversed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this case is remanded with directions.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals

STATE OF WISCONSIN **CIRCUIT COURT** **KENOSHA COUNTY**

DA Case No.: FR2000 839

STATE OF WISCONSIN
Plaintiff,

Court Case No.: 2002CF000314

vs.

ORDER

MARK D. JENSEN
DOB: 10/05/1959
Defendant.

Hon. Chad Kerkman

For Official Use

The court having carefully considered the briefs filed by the State and the defendant to reinstate the Defendant's original conviction and having heard oral argument's at the hearing held on 1st day of September, 2017 makes the following findings:

1. On July 13, 2017, the court, applying *Ohio V. Clark*, *Michigan v. Bryant* and other cases decided since *Crawford v. Washington* and *Jensen I* as cited by the State in its briefs, found Julie Jensen's letter and statements to Officer Kosman to be non-testimonial, not violative of the Defendant's constitutional confrontation clause, and admissible under exceptions to the rules against hearsay.
2. As a result, the evidence at a second trial in the case of State v. Mark Jensen would be materially the same as in the first trial.
3. The federal district court in its clarifying Order of August 18, 2017 held that the State has complied with its Order by reinstating proceedings to try the Defendant.
4. Because all the evidence at the second trial will be materially the same as at the first trial, it makes no sense to have a second trial.
5. As the State had previously paraphrased the Supreme Court of the United States: "There is no constitutional necessity at this point for proceeding with a new trial for [Jensen] has already been tried to a jury with [the letter and statements] placed before it and has been found guilty." *Jackson v. Denno*, 378 U.S. 368,395, 845 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

Accordingly, IT IS HEREBY ORDERED:

THE JUDGMENT OF CONVICTION IS REINSTATED.
THE PREVIOUSLY IMPOSED SENTENCE OF LIFE IMPRISONMENT WITHOUT PAROLE IS REINSTATED.
THE DEFENDANT'S BOND IS REVOKED.
CUSTODY OF THE DEFENDANT IS COMMITTED TO THE CUSTODY OF THE DEPARTMENT OF CORRRECTIONS FOR CONFINEMENT IN THE WISCONSIN STATE PRISON FOR THE REMAINDER OF HIS LIFE.

BY THE COURT:

Dated this 18th day of September, 2017

BY THE COURT:

Electronically signed by Judge Chad G. Kerkman, Circuit Court Branch 8
Circuit Court Judge

Judge Chad Kerkman
Kenosha County Circuit Court

STATE OF WISCONSIN: CIRCUIT COURT: KENOSHA COUNTY:

BRANCH 8

STATE OF WISCONSIN,)
)
Plaintiff,) CASE NO. 02-CF-314
)
-vs-) **MOTION HEARING**
)
MARK D. JENSEN,)
)
Defendant.)

THE HONORABLE CHAD G. KERKMAN
JUDGE PRESIDING

APPEARANCES

ATTORNEY ANGELINA GABRIELE, Kenosha County Deputy District Attorney, and ATTORNEY ROBERT JAMBOIS, Special Prosecutor, appeared on behalf of the State of Wisconsin.

ATTORNEYS DEBORAH SUSAN VISHNY AND MACKENZIE RENNER, Assistant State Public Defenders, appeared on behalf of the defendant who appeared in person.

DATE OF PROCEEDINGS:
September 1, 2017

SHERRY BAUER
COURT REPORTER

THE COURT: I'll call State versus Mark D. Jensen, 02-CF-314. Appearances.

MR. JAMBOIS: Good morning, Your Honor. The State of Wisconsin appears by Special Prosecutor Robert Jambois and Deputy District Attorney Angelina Gabriele.

MS. VISHNY: Mr. Jensen appears in person subject to jurisdictional objections by Attorneys Deja Vishny and Mackenzie Renner. Good morning, Your Honor.

THE COURT: Good morning. We are here today for pretrial motions. We have a jury trial scheduled for September 25th. The Court received correspondence from Attorney Vishny on -- it's dated August 25th -- about the -- listing all the motions you want to have heard today. I really appreciate that.

Before we get to those motions I just want to make sure that you received my draft of the jury questionnaire and it was consistent with our discussions?

MS. VISHNY: Yes.

THE COURT: Okay. Number two, the motion to seal your motion, I think the State was objecting to that. And so, I have unsealed that motion.

MS. VISHNY: Yeah. I just want to clarify something on the record, Judge. I think that I made my

record in writing why I had sought to seal it. And until the Court had ruled, I had done a motion to seal the second pleading. I just want to let you know that we received notice from the clerk that the second -- the response brief was unsealed, but that the first one never was. So I don't know if that's because there is some kind of error, but I just wanted to point that out to the Court.

THE COURT: Thank you. I did look into that and I was told when documents are eFiled and there is a request to seal from the attorneys, a petition is supposed to pop up that the judge is supposed to review. I'm not aware if a petition popped up for you. I certainly didn't get it. That's what I was told. Maybe it's not true. I don't know. But that's a judge decision in my opinion, not an attorney or clerk decision whether a document is sealed.

MS. VISHNY: Yeah. I assumed that. I'm just letting you know I only got notice on the second pleading by the defense, not the first.

THE CLERK: They're both unsealed.

THE COURT: Right. They're both unsealed now.

MS. VISHNY: Okay. Thank you.

THE COURT: All right. Now getting to the

motions in your list. The motion to reinstate the conviction filed by the State on August 11th. Defense responded August 25th. I'm pretty sure the State replied to that as well. I have reviewed the motions and the briefs. Anything further, Attorney Jambois?

MR. JAMBOIS: Nothing from the State, Your Honor. I would indicate that the suggestion that this Court is obligated to re-try the matter, that that's exactly the only remedy available, just doesn't make any sense when you consider what if, for example, the parties had negotiated resolution of this case? What if there was a plea agreement? Would the Court be foreclosed from accepting a guilty plea on a negotiated settlement?

When the appellate -- when the Federal District Court sent this matter back with the conditional writ of habeas corpus, the court sent it back to this Court. A Court that has broad jurisdiction to do what is necessary in order to transform an invalid judgment into a valid judgment, as Justice Scalia has indicated. And the process that we've pursued here is a very typical process in pretrial litigation.

The Court is called upon to make all of these significant, discretionary decisions regarding

the admissibility or the exclusion of evidence. And the Court has made those decisions and the decisions clearly reflect then that the first verdict in this case was a valid verdict. And so, you could alternatively view my motion, as I've indicated in the brief, as a motion to -- for judgment in accordance with the verdict, a valid verdict. Or, alternatively, you could view it as a motion to reinstate the judgment of conviction that had been previously vacated.

The Court has authority to do either one. And the major difference between the two would be is if you grant the State's motion for judgment in accordance with the verdict, then you would also need to resentence the defendant. If you grant the motion to reinstate the vacated judgment of conviction, then you simply reinstate the previously imposed sentence as well. Thank you.

THE COURT: Attorney Vishny.

MS. VISHNY: Judge, just -- I just want to clarify the record. The State did file a responsive brief which at least I received notice of on August 28th and the defense also supplemented the record in terms of facts on August 30th. We did that in writing so we didn't have to have oral argument. But I just wanted to make sure the factual record was

accurate.

THE COURT: I do have that.

MS. VISHNY: Thank you very much. Judge, I really said everything that I had to say in writing except for one quote that I think is relevant from **Jensen v. Schwochert**, which is this. The court -- this is Judge Griesbach at page 15. And I brought copies in case anybody wants to see it. But on December 18, 2013, Judge Griesbach said, "If, as a general matter, there are other grounds that can constitutionally support a state's" -- I'm sorry -- "a state court's ruling that, as rendered, is contrary to clearly established federal law, the state may seek the same ruling on the alternative grounds at a new trial in state court."

So that's exactly what happened here. The State sought the same ruling, which is the admission of the letter, and now we have to have a new trial. I completely disagree with the State's assessment that this Court has the authority to defy a federal court order. The Supremacy Clause holds very clearly that you can't. The State's interpretation of when it sought an advisory opinion from Judge Griesbach in my opinion is wrong.

But I think we've laid out the arguments

and I'm sure that this Court has read everything, so -- and looked at the case law. And at this time I will rest on the written arguments that we have made. But it is clear that this Court -- that having a plea agreement has nothing to do with this. Parties when a trial is pending are free to reach plea negotiations at any time. Nobody has a right -- a federal court doesn't have a right to force a case to trial. But this case is scheduled for trial. It has to be tried. And the State is simply wrong in its assessment that this Court can simply reinstate the Judgment of Conviction. Thank you.

THE COURT: All right. Well, I appreciate the State filing their motion in federal court for clarification. That -- I think it does give me some guidance. I think the federal court's decision is helpful to me. It states on page 5, "The State did in fact initiate proceedings to retry Jensen within 90 days of the effective date of the court's order. As a result, Respondent is not required to release Jensen from his custody. In fact, the parties have advised the court that Jensen is no longer in Respondent's custody, but is being held awaiting trial in the Kenosha County Jail. Because Jensen is no longer in his custody, Respondent has no power to release him in

any event, and thus cannot be found in contempt for failing to do so."

And I agree that the court also went on to state that they offer no opinion as to whether my decision that -- that the challenged statements are non-testimonial and whether the previous conviction can be constitutionally reinstated without a new trial. The court -- the court clearly offered no opinion on that. But I also think it's clear that the State would not be in contempt if there were no trial because the State did, in fact, reinitiate proceedings to try the defendant.

I made a decision -- an evidentiary decision -- on Julie Jensen's letter and that decision was consistent with Judge Schroeder's decision to allow that evidence to come in into the trial. And so, I think that the evidence in a new trial would be materially the same as in the first trial. There has been no interlocutory appeal. This trial is expected to be very long. Six, maybe seven weeks.

And so, the question right now is should the prior conviction be reinstated along with the sentence or do we need to have a new trial because we believe that the federal court ordered us to have a new trial even though the evidence would be the same.

That doesn't make a whole lot of sense to me. If the evidence is going to be materially the same as in the first trial and the federal judge says, yes, the State has complied with our order, they've -- they had the choice of releasing the defendant or reinstating proceedings to try the defendant, and it sounds to me like the federal judge has agreed that the State has done what they needed to do, it doesn't make a whole lot of sense to me as far as judicial economy to have a new trial on the same evidence as in the first trial.

So I am going to grant the State's motion to reinstate the conviction and the sentence. We are not going to have a trial on September 25th. And the Court of Appeals and the Supreme Court can do as they will.

MS. VISHNY: Okay.

MR. JAMBOIS: Thank you, Your Honor. I'll prepare an order for the Court's signature. Unless you want to prepare the order.

MS. VISHNY: No. Why don't you prepare it.

MR. JAMBOIS: Well, I wanted to confer with the Attorney General's Office first. It will be done as quickly as we can. Certainly no later than

Monday or Tuesday.

MS. VISHNY: All right. Before the Court signs an order, I would ask that the defense be able to review it.

MR. JAMBOIS: Of course.

MS. VISHNY: Monday --

THE COURT: Five days.

MS. VISHNY: Five days. Yeah. Monday is Labor Day. Okay. I just want to do just a couple of procedural issues just to be clear. Okay. We all know where this is going. To federal court. And, therefore, the trial is off. The defense is going to cancel its subpoenas as a result.

THE COURT: I don't see how we're going to have a trial on September 25th.

MS. VISHNY: Okay. That's fine. So we're going to cancel the subpoenas.

THE COURT: Yes.

MS. VISHNY: The other motions are pending should they need to be heard at a later date.

THE COURT: Yes. Yes. And, again, thank you very much for your list.

MS. VISHNY: Thank you, Your Honor.

MR. JAMBOIS: Thank you, Your Honor.

MS. VISHNY: Oh, wait. I did have one

other matter and that's about where Mr. Jensen is going to be located. I know that the sentence has been reinstated, which would mean he would be transported to Dodge Correctional. I would ask that Mr. Jensen remain in the custody of Kenosha County for one week so that his lawyers can easily confer with him.

MR. JAMBOIS: Why don't I do this then. I'll prepare the order for the Court's signature on Friday and then --

MS. VISHNY: No. We object to that.

MR. JAMBOIS: Well, he must remain here until the Court signs an order.

MS. VISHNY: Okay. Well, if the Court signs the order by the end of business Tuesday, I think that will probably do the trick.

THE COURT: I thought I understood that you wanted some time to review the order. So I will not be signing it on Tuesday if you wanted time.

MS. VISHNY: I just want to make sure that counsel can see him on Tuesday because we're not going to confer with him here in the courtroom. So that's fine. You can submit it on Tuesday. He'll still be here on Tuesday then. That's all I really cared about.

MR. JAMBOIS: I wanted time to confer with the Attorney General's Office. I might not get that

done by Tuesday. So I was hoping to file the order by Friday of next week and that's what the State was intending to do because, like I said, we need to consult with the Attorney General's Office about it.

MS. VISHNY: Let me just say this, Judge. On May 15th, or whatever date it was in May, in 2016, Mr. Jambois came to this Court and said he was going to be filing a motion to readmit the letter and then to reinstate the conviction. In other words, the State has planned this action for approximately 15 months at this juncture.

I realize that they have conferred with the Attorney General's Office prior to this and that this has been a joint venture between the Attorney General's Office and the prosecutors in this case. At least to some degree there's been some coordination since the Attorney General's Office went to federal court. I see no reason for further delay in the production of an order here.

The defense is prepared to produce the order by Tuesday. That would be consistent with the Court. In fact, we could even get it done today. I don't see any reason for delay.

THE COURT: My normal practice is if a proposed order is filed with the Court, then I allow

five days for the other party to review it. So if you want to draft an order, have it filed on Tuesday, that's fine. If the State wants to propose an order as well, that's fine. I can take a look at that and I'll give you five days on each order and then I'll sign an order.

MS. VISHNY: Okay. I was not familiar with the Court's procedure. Thank you for enlightening me, Judge.

THE COURT: It's just how I normally do it.

MS. VISHNY: That's fine. I just needed to know that.

THE COURT: All right.

MR. JAMBOIS: Thank you, Your Honor.

(End of proceedings.)

STATE OF WISCONSIN)
)
COUNTY OF KENOSHA)

I, Sherry Bauer, a Registered Merit Reporter in and for the State of Wisconsin, hereby certify that the foregoing 13 pages comprise a true, complete, and correct transcript of the proceedings had at the Motion Hearing held before the Honorable Chad G. Kerkman, Branch 8, on September 1, 2017, at the Kenosha County Courthouse, Kenosha, Wisconsin.

In witness whereof I have hereunto set my hand this 1st day of September, 2017.

Electronically Signed By
Sherry Bauer
Registered Merit Reporter

June 29, 2020

141 S.Ct. 165
Supreme Court of the United States.

Mark D. JENSEN, Petitioner,

v.

William POLLARD.

No. 19-7603.
|

Case below, 924 F.3d 451.

Opinion

Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

All Citations

141 S.Ct. 165 (Mem), 207 L.Ed.2d 1100

End of Document

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

November 6, 2019

Before

ILANA DIAMOND ROVNER, *Circuit Judge*

DIANE S. SYKES, *Circuit Judge*

AMY C. BARRETT, *Circuit Judge*

No. 17-3639

MARK D. JENSEN,
Petitioner-Appellant,

v.

WILLIAM POLLARD,
Respondent-Appellee.

Appeal from the
United States District Court
for the Eastern District of Wisconsin.

No. 11-C-803

William C. Griesbach,
Judge.

O R D E R

On consideration of the petition for rehearing and for rehearing en banc, no judge in active service has requested a vote on the petition for rehearing en banc,[1] and all of the judges on the original panel have voted to deny rehearing. It is therefore ordered that the petition for rehearing and for rehearing en banc is **DENIED**.

[1] Circuit Judge Michael B. Brennan did not participate in the consideration of the petition for rehearing.

924 F.3d 451
United States Court of Appeals, Seventh Circuit.

Mark D. JENSEN, Petitioner-Appellant,

v.

William POLLARD, Respondent-Appellee.

No. 17-3639
|
Argued November 7, 2018
|
Decided May 15, 2019
|
Rehearing and Rehearing En Banc Denied November 6, 2019*

Synopsis

Background: Following affirmance of his conviction for first-degree murder, 331 Wis.2d 440, 794 N.W.2d 482, state inmate filed petition for writ of habeas corpus. The United States District Court for the Eastern District of Wisconsin, William C. Griesbach, Chief Judge, 2013 WL 6708767, granted petition, and state appealed. The Court of Appeals, 800 F.3d 892, affirmed. After mandate issued, state trial reinstated petitioner's conviction. The United States District Court for the Eastern District of Wisconsin, No. 11-C-803, William C. Griesbach, Chief Judge, 2017 WL 5712690, denied petitioner's motion to enforce conditional writ, and petitioner appealed.

The Court of Appeals, Sykes, Circuit Judge, held that district court did not abuse its discretion in determining that state complied with conditional habeas writ.

Affirmed.

Rovner, Circuit Judge, concurred in part, concurred in judgment, and filed opinion.

***452** Appeal from the United States District Court for the Eastern District of Wisconsin. No. 11-C-803 — **William C. Griesbach**, *Chief Judge*.

Attorneys and Law Firms

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Aaron R. O'Neil, Attorney, OFFICE OF THE ATTORNEY GENERAL, Wisconsin Department of Justice, Madison, WI, for Respondent-Appellee.

Before Rovner, Sykes, and Barrett, Circuit Judges.

Opinion

Sykes, Circuit Judge.

In a prior appeal, we affirmed an order granting Mark Jensen's application for habeas relief from his conviction for the 1998 murder of his wife, Julie. *Jensen v. Clements*, 800 F.3d 892 (7th Cir. 2015). The Wisconsin Court of Appeals had rejected Jensen's Confrontation Clause challenge to the admission of Julie's "voice from the grave" letter expressing her fear that her husband might kill her. The rationale for that ruling was harmless error. We agreed with the district court that the state court unreasonably applied Supreme Court precedent. *Id.* at 908.

After our mandate issued, the district judge issued a conditional writ requiring the State of Wisconsin to either release Jensen or "initiate[ ] proceedings to retry him" within 90 days. The State timely initiated retrial proceedings. But before the retrial, the state trial judge concluded that the out-of-court statements were not testimonial, curing the constitutional defect in Jensen's first trial. Reasoning that a second trial was unnecessary, the trial judge reinstated Jensen's original conviction. ***453** Jensen appealed the new judgment, but the Wisconsin Court of Appeals has not yet ruled.

In the meantime, Jensen returned to federal court and moved to enforce the conditional writ, which he argued guaranteed a retrial without the challenged statements. The district court denied the motion and we affirm. Our jurisdiction is limited to assessing the State's compliance with the conditional writ. The State complied with the writ when it initiated proceedings for Jensen's retrial.

I. Background

In March 2002 Kenosha County prosecutors charged Jensen with first-degree intentional homicide for the death of his wife, Julie, on December 3, 1998. Julie's "voice from the grave" was central to the prosecution's case. Two weeks before her death, Julie wrote a letter disclaiming any intention of suicide and stating that she feared her husband was going to kill her. She gave the letter to a neighbor in a sealed envelope with instructions to give it to the police if anything happened to her. Julie also made similar statements to a police officer shortly before her death.

Based on *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Kenosha County Circuit Court concluded that the letter and statements were testimonial hearsay, inadmissible under the Confrontation Clause. *See* U.S. Const. amend. VI. On interlocutory appeal the Wisconsin Supreme Court agreed that the letter and statements were testimonial. But the court also held that the trial judge could admit the evidence under the forfeiture exception to the Confrontation Clause if he found by a preponderance of the evidence that Jensen caused his wife's death. *State v. Jensen* ("*Jensen I*"), 299 Wis.2d 267, 727 N.W.2d 518, 536 (2007). After a ten-day hearing, the trial judge admitted the evidence. The State introduced the letter and statements at trial, and a jury found Jensen guilty.

While Jensen's appeal to the Wisconsin Court of Appeals was pending, the United States Supreme Court held that the forfeiture exception applies only when a defendant acts with the particular purpose of preventing the witness's testimony. *See Giles v. California*, 554 U.S. 353, 367–68, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008). The Wisconsin Court of Appeals affirmed Jensen's conviction without deciding whether *Giles* abrogated *Jensen I*. It instead concluded that any error, if one occurred, was harmless. *State v. Jensen* ("*Jensen II*"), 331 Wis.2d 440, 794 N.W.2d 482, 493 (Wis. Ct. App. 2010). The court also found that Jensen had waived a separate due-process claim alleging judicial bias. *Id.* at 504. The Wisconsin Supreme Court denied Jensen's petition for review.

Jensen then turned to federal court. He filed a habeas petition under 28 U.S.C. § 2254, reasserting his Confrontation Clause and judicial-bias claims. After observing that the State did not dispute that Julie's letter and statements were testimonial, the district judge held that the admission of the evidence was an unreasonable application of the forfeiture exception and harmless-error doctrine. *Jensen v. Schwochert* ("*Jensen III*"), No. 11-C-0803, 2013 WL 6708767, at *17 (E.D. Wis. Dec. 18, 2013). The judge issued a conditional writ with the following mandate:

> Jensen is therefore ordered released from custody unless, within 90 days of the date of this decision, the State initiates proceedings to retry him. The Clerk is directed to enter judgment accordingly. In the event [the State] elects to appeal, the judgment will be stayed pending disposition of the appeal.

***454** *Id.* The State appealed and we affirmed. *Jensen*, 800 F.3d at 908. The writ issued on October 19, 2015.

On December 29 the state trial judge vacated Jensen's conviction, and the prosecution noticed its intent to retry him. Jensen predictably moved to exclude Julie's statements. The prosecution objected, arguing that two Supreme Court decisions postdating *Jensen II* narrowed the definition of "testimonial," abrogating *Jensen I*'s holding that Julie's letter and statements were testimonial for purposes of Confrontation Clause analysis. *See Ohio v. Clark*, —— U.S. ——, 135 S. Ct. 2173, 192 L.Ed.2d 306 (2015); *Michigan v. Bryant*, 562 U.S. 344, 131 S.Ct. 1143, 179 L.Ed.2d 93 (2011). The trial judge agreed. Applying Wisconsin's law-of-the-case doctrine, he concluded that *Jensen I* no longer controlled and ruled that Julie's statements were not testimonial.

At this point the State asked the federal habeas court for clarification. Its position was that the trial court's latest ruling cured any constitutional error, so it intended to move for reinstatement of the original judgment if the conditional writ allowed it. The district judge clarified that the State was not required to release Jensen because it initiated retrial proceedings within 90 days of the order. The prosecution then asked the state trial court to reinstate Jensen's original conviction. The judge granted that request, reasoning that no purpose would be served by holding a duplicate trial with identical evidence. Jensen's appeal from the new judgment is pending in the state court of appeals.

While still exhausting his state remedies, Jensen returned to federal court with a motion challenging the reinstatement of the conviction. He argued that the State didn't comply with the writ because it didn't actually retry him. Alternatively, he asked the district judge to adjudicate his judicial-bias claim, which wasn't resolved in the original habeas proceedings.

The judge declined to do either. He instead held that the conditional writ only compelled the State to *initiate* retrial

proceedings and that the State had done so. But he didn't stop there. The judge determined that § 2254 "require[d]" him to "inquire into whether the State's actions constitute[d] a good faith effort to comply with the substance, as well as the form, of the court's order." He then examined the state court's post-writ proceedings in detail. After concluding that the State had colorable legal grounds to seek reinstatement of Jensen's conviction, the judge denied relief. Jensen appealed.

II. Discussion

When a district court issues a conditional habeas writ, it retains jurisdiction to determine compliance. *See Hudson v. Lashbrook*, 863 F.3d 652, 656 (7th Cir. 2017). But once the State complies with the writ, the district court loses jurisdiction. *Id.* Accordingly, the only question properly before this court is whether the State complied with the writ.[1]

The relevant facts are undisputed: After initiating proceedings to retry Jensen, the State sought to introduce Julie's letter and statements. Relying on Supreme Court decisions that postdated *Jensen II*, the trial judge held that the evidence was admissible and granted the State's ensuing motion to reinstate the conviction. That new judgment is now under review by the Wisconsin Court of Appeals. The sole federal dispute centers on the meaning of the conditional writ. We review a district court's interpretation of its conditional writ ***455** for abuse of discretion. *Pidgeon v. Smith*, 785 F.3d 1165, 1172 (7th Cir. 2015).

The writ mandates that Jensen must be "released from custody unless ... the State initiates proceedings to retry him." The district judge rejected Jensen's contention that the writ guaranteed him a trial free of Julie's letter and statements. The judge reasoned that the State could not have complied with such a writ within 90 days given the complexity of the case. He also explained that the language of the writ left room to resolve the case without a new trial. That is, the writ "deliberately required only the initiation of proceedings for a retrial within the time allowed in order for the State to comply with the writ."

That interpretation was not an abuse of discretion. It neatly tracks the conditional writ's unambiguous language. Conversely, Jensen's proposed interpretation asks us to ignore the writ's instruction to "initiate proceedings" in favor of a more robust command for a "trial free of [Julie's] letter." The Supreme Court has cautioned that courts "should not infer ... conditions from silence" when interpreting conditional writs. *Jennings v. Stephens*, ––– U.S. ––––, 135 S. Ct. 793, 799, 190 L.Ed.2d 662 (2015). Instead, a petitioner's "rights under the judgment were what the judgment provided." *Id.* at 798. The judgment here gave the State two options: release Jensen or initiate proceedings to retry him. It did not contain an implicit right to retrial without Julie's letter or statements.

But while the judge's interpretation of his order is correct, we are skeptical that § 2254 required him to scrutinize the prosecutor's good faith. As with all conclusions of law, we consider this issue de novo. *See Warren v. Baenen*, 712 F.3d 1090, 1096 (7th Cir. 2013). Looking beyond the express terms of a writ to assess the State's good faith risks creating the very unstated conditions that courts cannot read into writs. *See Jennings*, 135 S. Ct. at 799. And asking whether post-writ proceedings are "shams" requires examining the legal merits of state proceedings prior to exhaustion. *See* 28 U.S.C. § 2254(b)(1). Indeed, the district court's inquiry here discussed the very issues that remain pending in Jensen's direct appeal in the Wisconsin Court of Appeals.

We have long held that courts should presume that states will comply with equitable remedies in good faith. *Jenkins v. Bowling*, 691 F.2d 1225, 1234 (7th Cir. 1982). This presumption applies with particular force in § 2254 proceedings, where "[f]ederalism and comity principles pervade." *Johnson v. Foster*, 786 F.3d 501, 504 (7th Cir. 2015). A conditional writ under § 2254 is not "a general grant of supervisory authority over state trial courts." *Jennings*, 135 S. Ct. at 799; *see also Hudson*, 863 F.3d at 656 ("The writ is directed to the person detaining another: it is not directed at the state government *in toto*."). In short, jurisdiction to assess state compliance with conditional writs is constrained by the actual remedy ordered by the court—that is, the terms of the writ.

In this case the conditional writ required the State to either release Jensen or "*initiate* proceedings to retry him." The State did the latter, and at that moment the district court lost jurisdiction. Jensen's custody flows from a new judgment reinstating the original conviction on an alternative ground from that challenged in *Jensen III*. *See Coulter v. McCann*, 484 F.3d 459, 466 (7th Cir. 2007) (holding that post-writ proceedings in state court can confirm that no constitutional violation occurred in the first place). We lack jurisdiction to explore whether that judgment is constitutionally infirm. Jensen is free to challenge any perceived constitutional errors via his ***456** direct appeal in state court. Indeed, he must

exhaust those remedies before raising any constitutional claims in a new § 2254 petition.

Affirmed.

Rovner, Circuit Judge, concurring in part and concurring in the judgment.

I agree with my colleagues that we may review only for abuse of discretion the district court's determination that the State complied with the writ. And I am persuaded that, once we have concluded that there is no abuse of discretion, there is nothing left for the federal courts to do until the petitioner has exhausted state court remedies and brings a new federal *habeas* proceeding. I do not agree, however, that it was inappropriate for the district court to examine whether the State complied in good faith with the writ or instead engaged in sham proceedings in order to circumvent the writ.

The majority cites *Jenkins v. Bowling*, 691 F.2d 1225, 1234 (7th Cir. 1982), for the proposition that, "We have long held that courts should presume that states will comply with equitable remedies in good faith." But *Jenkins* also makes clear that the presumption is rebuttable and that federal courts have the power to correct noncompliance:

> When formulating equitable remedies against a state—an entity still to be regarded as having some sovereign dignity—a federal court should try to minimize their abrasive potential. It should presume that the state will attempt to comply in good faith with the letter and spirit of its ruling. Events may rebut the presumption in particular cases[.] ... If the state does try [to evade the order], the federal courts have all the powers they need, including the power to issue mandatory injunctions as detailed and specific as the situation requires, backed up by all the force of the United States, to make their decisions effective.

Jenkins, 691 F.2d at 1234. Although *Jenkins* did not address *habeas* proceedings, it did involve a federal court "formulating equitable remedies against a state," and the comity concerns are comparable.

In my view, the district court properly assessed whether there was good faith compliance with the writ, or a possible bad faith effort to circumvent the writ. That was especially appropriate in a case where the State sought to reinstate (and in fact *did* reinstate) the very same judgment that the federal courts had found constitutionally infirm, a procedural scenario that I believe I have not encountered in my nearly thirty-five years on the federal bench. The district court's analysis of whether the State had engaged in sham proceedings to circumvent the writ was part and parcel of its review of whether the State had complied with the writ. Therefore, I respectfully concur in part, and concur in the judgment.

All Citations

924 F.3d 451

Footnotes

* Circuit Judge Michael B. Brennan did not participate in the consideration of the petition for rehearing.

1 We thus lack jurisdiction to consider Jensen's judicial-bias claim.

2017 WL 5712690
Only the Westlaw citation is currently available.
United States District Court, E.D. Wisconsin.

Mark D. JENSEN, Petitioner,

v.

Marc CLEMENTS, Respondent.

Case No. 11-C-803

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Signed 11/27/2017

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DECISION AND ORDER DENYING MOTION TO ENFORCE JUDGMENT

William C. Griesbach, Chief Judge

***1** This court granted Petitioner Mark D. Jensen's application for a writ of habeas corpus on December 18, 2013, on the ground that the Wisconsin Court of Appeals had unreasonably applied clearly established federal law in deciding that the admission at his state trial of out-of-court statements his deceased wife had made implicating him in her death, though a violation of Jensen's rights under the Confrontation Clause, was harmless error. *Jensen v. Schwochert*, No. 11-C-803, 2013 WL 6708767 (E.D. Wis. Dec. 18, 2013), ECF No. 65. The court ordered Jensen "released from custody unless, within 90 days of the date of this decision, the State initiates proceedings to retry him." *Id.* at *17. On appeal, during which the order was stayed, a divided panel of the Seventh Circuit affirmed. *Jensen v. Clements*, 800 F.3d 892 (7th Cir. 2015). Respondent's petitions for reconsideration and en banc review were denied.

After the Seventh Circuit's mandate issued on October 19, 2015 (ECF No. 79), Jensen was returned to the Kenosha County Jail, and the Kenosha County Circuit Court vacated his judgment of conviction on December 29, 2015, and set the matter for a new trial. ECF No 86-1 at 21. In the proceedings leading up to the trial, the circuit court determined that in light of recent Supreme Court precedent, the statements at issue were not testimonial and their admission at trial did not violate Jensen's Sixth Amendment confrontation right. ECF No. 94-9 at 73–74. The circuit court thereafter determined that its new ruling on Julie's statements, including her letter and reports to police, cured the constitutional defect in Jensen's first trial, and based upon this determination reinstated Jensen's conviction and sentence. ECF No. 94-11 at 11–12, 35–36. This matter now returns to this court on Jensen's motion to enforce judgment, which argues that the State violated this court's order to release or retry Jensen with the series of events that resulted in the reinstatement of his conviction and sentence. ECF No. 93.

There is no dispute that Jensen has the right to challenge the circuit court's ruling that the out-of-court statements of his deceased wife are admissible after all and its decision to enter a judgment of conviction against him for the murder of his wife based on the earlier verdict, both procedurally and on the merits. The question presented by the unusual facts of the case is whether he must first seek review in the appellate courts of the State of Wisconsin before returning to this court for relief under 28 U.S.C. § 2254. For the reasons set forth below, I conclude that he must do so. Jensen's motion will therefore be denied.

BACKGROUND

Earlier orders by this court and the Seventh Circuit recite the history of Jensen's case in great detail, so only a brief summary and discussion of recent procedural developments is necessary here. *See Jensen*, 800 F.3d at 895–98; *Jensen*, 2013 WL 6708767, at *1–5. Julie Jensen was found dead in the Jensens' home on December 3, 1998. *Jensen*, 2013 WL 6708767, at *1. Her death was initially treated as a suicide, but there was no dispute that her death resulted at least in part from poisoning by ethylene glycol, a chemical used in antifreeze. *Id.* Prosecutors eventually charged her husband, Mark Jensen, with first degree intentional homicide on March 19, 2002. *Id.* at *3. The case against Jensen relied in part upon a sealed letter she had given to neighbors and several statements to police that Julie made in the weeks before her death expressing her fear that her husband was plotting to kill her. *Id.* at *1–2. The admissibility of the letter and statements

has been the focal point of litigation in this case over the past fifteen years.

***2** Before Jensen's trial for Julie's murder, the United States Supreme Court decided *Crawford v. Washington*, 541 U.S. 36 (2004), which recast the right protected by the Sixth Amendment's Confrontation Clause. As a result, the circuit court determined that Julie's letter and statements were inadmissible testimonial statements. *Jensen*, 2013 WL 6708767, at *3. The State sought an interlocutory review of that decision, and after granting a bypass petition allowing the case to skip the Wisconsin Court of Appeals, the Wisconsin Supreme Court reversed the circuit court's decision. *State v. Jensen*, 2007 WI 26, ¶ 2, 727 N.W.2d 518. Although the Wisconsin Supreme Court agreed with the circuit court that the statements were testimonial, it adopted a broad "forfeiture by wrongdoing doctrine" and remanded for a hearing to determine whether Jensen had "lost the right to object on confrontation grounds to the admissibility of out-of-court statements of a declarant whose unavailability the defendant ... caused." *Id.* On remand, the Kenosha County Circuit Court conducted a ten-day evidentiary hearing and concluded that Jensen forfeited his confrontation right by killing Julie and therefore causing her absence from trial. *Jensen*, 2013 WL 6708767, at *3. As his defense at the trial that followed, Jensen attempted to show that Julie committed suicide and sought to frame him for her death, but the jury—which saw the letter and Julie's other statements—ultimately convicted Jensen of first-degree intentional homicide. *Id.* at *4–5.

While Jensen's direct appeal to the Wisconsin Court of Appeals was pending, the Supreme Court decided *Giles v. California*, 554 U.S. 353 (2008), which rejected the broad forfeiture by wrongdoing doctrine adopted by the Wisconsin Supreme Court in Jensen's case. Nevertheless, the Wisconsin Court of Appeals affirmed Jensen's conviction on direct review. *State v. Jensen*, 2011 WI App 3, ¶ 1, 794 N.W.2d 482. Assuming, without deciding, that the circuit court erred under *Giles* by admitting the testimonial letter and statements, the court of appeals concluded that any error was harmless beyond a reasonable doubt in light of the weight of the state's evidence and the strength of its case. *Id.* ¶ 35. The Wisconsin Supreme Court denied Jensen's petition for review on June 15, 2011.

On August 24, 2011, Jensen filed a petition for a writ of habeas corpus under 28 U.S.C. § 2254, and this court issued its decision granting the petition on December 18, 2013. *Jensen*, 2013 WL 6708767. Noting that "[t]he parties [did] not dispute that both the letter and Julie Jensen's statements to [a police officer] were testimonial," this court concluded that those "erroneously admitted testimonial statements had a 'substantial and injurious effect' on the jury's verdict." *Id.* at *6–7, *10 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 622 (1993)). Because the erroneous admission of the letter and statements therefore was not harmless, the decision by the Wisconsin Court of Appeals constituted an unreasonable application of clearly established federal law. *Id.* at *17. The court issued the following direction with regard to Jensen:

> Jensen is therefore ordered released from custody unless, within 90 days of the date of this decision, the State initiates proceedings to retry him. The Clerk is directed to enter judgment accordingly. In the event Respondent elects to appeal, the judgment will be stayed pending disposition of the appeal.

Id. Respondent appealed, and the Seventh Circuit affirmed, agreeing that "the improperly admitted letter and accusatory statements resulted in actual prejudice to Jensen." *Jensen*, 800 F.3d at 908. Under this court's order, the 90-day window for the State to release Jensen or initiate proceedings to retry him opened when the Seventh Circuit issued its mandate on October 19, 2015. ECF No. 79.

On December 29, 2015, the Circuit Court of Kenosha County vacated Jensen's judgment of conviction and reopened the case. ECF No. 86-1 at 21. That day, the State also communicated its intent to retry Jensen. *Id.* In anticipation of the new trial, Jensen filed a motion on November 29, 2016, to exclude all of Julie's testimonial statements, including the letter. ECF No. 94-3 at 97. After two rounds of extensive briefing and oral argument on the motion,[1] the circuit court found in July 2017 that Julie's letter and statements to officers were non-testimonial based upon the post-*Crawford* evolution of the meaning of "testimonial" in cases such as *Michigan v. Bryant*, 562 U.S. 344 (2011), and *Ohio v. Clark*, 135 S. Ct. 2173 (2015), both decided after Jensen's first trial. ECF No. 94-9 at 73–74, 96. The circuit court therefore denied Jensen's motion and concluded that the letter and related statements would be admissible at Jensen's new trial. ECF No. 94-9 at 96.

***3** The State took two relevant actions in response the circuit court's decision that Julie's letter and statements would be admissible at Jensen's second trial. First, Respondent filed a motion for clarification in this court on August 10, 2017. ECF No. 86. After explaining recent developments

in Jensen's case, Respondent informed this court that the Kenosha County prosecutors intended to move the circuit court to reinstate Jensen's conviction on the grounds that the trial court's recent conclusion that the letter and statements were not testimonial "cure[d] the constitutional error believed to have existed in the first trial." *Id.* at 4. Respondent sought clarification as to whether reinstatement of Jensen's conviction under these circumstances would comply with this court's order that Jensen be "released from custody unless, within 90 days of the date of this decision, the State initiates proceedings to retry him." *Id.* at 5. This court granted Respondent's motion in an August 18, 2017 order. ECF No. 90. Recognizing that this court possessed continuing jurisdiction to assess Respondent's compliance with the conditional writ of habeas corpus, this court concluded that, because "[t]he State did in fact initiate proceedings to retry Jensen within 90 days of the effective date of the court's order[,] ... Respondent is not required to release Jensen from his custody." *Id.* at 5. The court further observed that because "Jensen is no longer in Respondent's custody, but is being held awaiting trial in the Kenosha County Jail[,] ... Respondent has no power to release him in any event." *Id.* at 5–6. However, the court declined to offer an opinion "as to whether the circuit court's determination that the challenged statements are non-testimonial is proper and whether Jensen's previous conviction can be constitutionally reinstated without a new trial," recognizing that addressing either would constitute improper issuance of an advisory opinion. *Id.* at 6.

Second, as represented to this court, the State filed a motion in the Kenosha County Circuit Court on August 11, 2017, seeking to reinstate Jensen's judgment of conviction and accompanying life sentence. ECF No. 94-10 at 42–56.[2] The circuit court held a hearing on the motion on September 1, 2017. *Id.* at 97–100 & ECF No. 94-11 at 1–10. Citing this court's August 18, 2017 order, the circuit court concluded that "it's clear that the State would not be in contempt if there were no trial because the State did, in fact, reinitiate proceedings to try" Jensen. ECF No. 94-11 at 4. The circuit court further found that, as a result of its decision to admit Julie's letter and statements at the upcoming trial, "the evidence in a new trial would be materially the same as in the first trial." *Id.* Questioning the appropriateness of investing court time and resources in holding a duplicate trial, the circuit court granted the State's motion. *Id.* at 5. The circuit court entered the new judgment of conviction and life sentence for Jensen on September 8, 2017. *Id.* at 11–12. A September 18, 2017 written order briefly elaborated on the circuit court's reasoning: "There is no constitutional necessity at this point for proceeding with a new trial for [Jensen] has already been tried to a jury with [the letter and statements] placed before it and has been found guilty." *Id.* at 35–36 (alterations in original) (quoting *Jackson v. Denno*, 378 U.S. 368, 394 (1964)). Returning to this court, Jensen filed his motion to enforce judgment on September 29, 2017. ECF No. 93.

ANALYSIS

A district court that grants a petition for a writ of habeas corpus may nonetheless "delay the release of a successful habeas petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court." *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987). Consequently, when a district court issues a conditional writ of habeas corpus, the court "retains jurisdiction to determine whether a party has complied with the terms of [the] conditional order." *Phifer v. Warden, U.S. Penitentiary, Terre Haute, Ind.*, 53 F.3d 859, 861 (7th Cir. 1995). When a State fails to correct the constitutional violation within the time established by the district court, "the consequence ... is always release." *Wilkinson v. Dotson*, 544 U.S. 74, 87 (2005) (Scalia, J., concurring). But "[o]nce ... the habeas writ [is] complied with, ... the district court [loses] jurisdiction over the case." *Hudson v. Lashbrook*, 863 F.3d 652, 656 (7th Cir. 2017).

Jensen first argues that this court's conditional writ was clear: "if the State failed to retry Jensen without the letter, Jensen was entitled to release." Mot. to Enforce J., ECF No. 93 at 18. But that is not what this court's order said. As the court noted in its Decision and Order Granting Respondent's Motion for Clarification, the order stated that Jensen was to be "released from custody *unless, within 90 days of the date of this decision, the State initiates proceedings to retry him.*" ECF No. 90 at 5 (quoting ECF No. 65 at 33) (emphasis added). Given the complexity and length of the original trial, the court certainly did not expect the State to retry Jensen within 90 days of the effective date of its order. The original trial lasted six weeks and involved experts in toxicology, pathology, and psychiatry. Moreover, cases in which a writ of habeas corpus is issued frequently do not result in a retrial. The parties are often able to reach agreement on a disposition that obviates the need for a new trial. Given this uncertainty over whether the parties would need to retry the case, and if they did, how much time they would need to prepare for and complete a new trial, the court deliberately required only the initiation of proceedings for a retrial within the time allowed in order for the State to comply with the writ. And as the court likewise

noted in its clarification order, the State did comply at least with the letter of the court's conditional writ: "The State did in fact initiate proceedings to retry Jensen within 90 days of the effective date of the court's order." *Id.* As a result, the court concluded that the State was not required to release Jensen from its custody at that time. *Id.*

***4** The State argues that having already determined that it complied with the letter of the writ by initiating proceedings to retry Jensen, the court no longer has jurisdiction over the original petition: "[W]hen a state meets the terms of the habeas court's condition, thereby avoiding the writ's actual issuance, the habeas court does not retain any further jurisdiction over the matter." *Gentry v. Deuth*, 456 F.3d 678, 692 (6th Cir. 2006) (citing *Pitchess v. Davis*, 421 U.S. 482, 490 (1975) (per curiam)). But surely, a State cannot claim to have complied with a conditional order for release under § 2254 by vacating the previous judgment, initiating proceedings for a new trial, and then, with no further analysis or development of the record, simply reinstating the same judgment that was the subject of the previous order. To be meaningful, a federal court's jurisdiction to determine whether a party has complied with the terms of its order allows, indeed requires, the court to inquire into whether the State's actions constitute a good faith effort to comply with the substance, as well as the form, of the court's order, or instead amounts to nothing more than a sham intended to circumvent the federal court's writ.

Jensen suggests that the State has not acted in good faith. He argues that rather than use the opportunity afforded by the conditional writ to retry him, the State has sought to delay his retrial, defy this court's order, and further violate his constitutional rights. He contends that the State waited seventeen months after the federal mandate before submitting its brief arguing that the letter was not testimonial and never presented the argument to this court pursuant to Rule 60(b)(6). The State then defied this court's ruling, Jensen contends, by duping the trial judge into revisiting the settled issue of whether the letter was testimonial and ruling it admissible. The State then went even further, Jensen argues, and convinced the trial judge to take the unprecedented step of skipping the trial and reinstating his conviction. Mot. to Enforce J., ECF No. 93 at 7, 27.

Jensen overlooks the fact that it was a state court, not the prosecutor or other officer of the executive branch of state government, that ultimately set the trial date, ruled that the letter was non-testimonial after all, and reinstated the judgment of conviction. The State court might have been in error, but to claim that the judge was "duped" and characterize the court's rulings as the State's deliberate defiance of this court's order ignores the lengthy briefing on the issues offered by the parties in the state court proceedings, the independent analysis undertaken by the trial court, and the respect due to state courts and state proceedings. As the Seventh Circuit recently noted in another habeas case challenging the proceedings in state court following the issuance of a conditional order of release, "State authorities applying their own criminal laws are not marionettes controlled by the federal courts, and the writ of habeas corpus, while a 'great writ,' is not without limit. The writ is directed to the person detaining another: it is not directed at the state government in toto." *Hudson*, 863 F.3d at 655–56.

The circuit court in this case did not lightly undertake the task of revisiting an issue that had been seemingly decided by the Wisconsin Supreme Court more than ten years earlier in the lengthy procedural history of this case. The question of whether the letter and related statements were testimonial under current law was raised by the State in its response to Jensen's motion *in limine* seeking to preclude the State from making any reference to or attempting to admit into evidence in any manner Julie Jensen's letter. The State filed a 100-page brief in response, 26 pages of which argued that under the Supreme Court's more recent decisions in *Bryant* and *Clark*, the letter and related statements to police were not testimonial statements within the meaning of the Confrontation Clause of the Sixth Amendment. ECF No. 94-5 at 48–74. As the State pointed out, it is true that in the years since Jensen's trial, the United States Supreme Court has issued a number of decisions that have arguably narrowed the definition of the kind of "testimonial statements" to which *Crawford* held the Confrontation Clause strictly applies. *Id.* at 52–53.

***5** In *Bryant*, for example, decided three years after Jensen's conviction, the Court held that statements by the mortally wounded victim of a shooting identifying the shooter and location of the shooting in response to questions put to him by police officers dispatched to the place to which he had fled were not testimonial. In reaching this conclusion, the Court noted that "the most important instances in which the [Confrontation] Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial." 562 U.S. at 358. The primary purpose of the police interrogation in that case, the Court observed, was to enable police assistance to meet an ongoing

emergency, rather than to gather evidence to prove past events potentially relevant to later criminal prosecution. The Court also commented on the informality of the encounter: "the questioning in this case occurred in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion. All of those facts make this case distinguishable from the formal station-house interrogation in *Crawford*." *Id.* at 366. Based on its consideration of these factors, the Court concluded that the victim's statements to police were not testimonial and that their admission at trial did not violate the Confrontation Clause. *Id.* at 378.

Then in *Ohio v. Clark*, decided more than seven years after Jensen's previous conviction, the Court held that a three-year-old victim's statements to his preschool teachers identifying the defendant as the person who caused his injuries were not testimonial. There the Court again reiterated the importance of the purpose of the interrogation and the formality surrounding it as important factors to consider in determining whether the resulting statement was testimonial. 135 S.Ct. at 2179–80. "In the end," the Court stated, "the question is whether, in light of all the circumstances, viewed objectively, the 'primary purpose' of the conversation was to 'creat[e] an out-of-court substitute for trial testimony.' " *Id.* at 2180 (quoting *Bryant*, 562 U.S. at 358). In holding that the child victim's statements were not testimonial, the Court noted that the interrogation was by teachers, not police, and for the purpose of protecting the child from further abuse, not to gather evidence for a prosecution. *Id.* at 2181.

It was in light of these more recent decisions that the State argued Julie's letter and related statements to police prior to her death should not be considered testimonial. The State also argued in its response to Jensen's motion *in limine* that under a well-established exception to the law of the case doctrine, the court could and should revisit the question of whether the letter and related statements were testimonial. ECF No. 94-9 at 74–77. That exception applies when controlling legal authority has arrived at a contrary decision of the law under which an earlier determination was made. *Id.* at 74 (citing *State v. Brady*, 130 Wis. 2d 443, 448, 388 N.W.2d 151 (1986), and *White v. Murtho*, 377 F.2d 428, 431–31(5th Cir. 1967)). Only after additional and extensive briefing and argument by both parties did the court render its decision that the law of the case doctrine did not bar the court from revisiting the issue and that, under the more recent decisions of the United States Supreme Court, the letter and related statements to the police were not testimonial and therefore admissible at trial. ECF No. 94-9 at 68–74.

In light of the circuit court's conclusion that the letter and related statements were not testimonial and thus their admission at trial did not violate the Confrontation Clause, the State then moved for reinstatement of the judgment of conviction based on the jury's verdict in the previous trial. "The defendant is not entitled to a new trial," the State argued, "since he has already had a trial by a jury of his peers which was free of constitutional error." Br. in Supp. of Mot. to Reinstate, ECF No. 94-10 at 42. In the State's view, the determination by the federal courts that the Wisconsin Court of Appeals had unreasonably applied clearly established federal law in finding the admission of such evidence harmless error was not dispositive once the circuit court found that admission of the same evidence was not error. Since the original jury trial was not tainted by the erroneous admission of evidence in violation of Jensen's confrontation rights, the State argued that the circuit court should reinstate the previous judgment of conviction, or alternatively, enter a new judgment of conviction on the jury's verdict. *Id.* at 51. The circuit court agreed and granted the State's motion.

***6** Whether the circuit court was free to revisit the issue at this stage of the proceedings, and if so, whether the letter and related statements are indeed non-testimonial and thus admissible under the Confrontation Clause are, to be sure, important questions that Jensen has every right to challenge. But his challenge to the circuit court's rulings, at least as an initial matter, must be by appeal to the Wisconsin appellate courts. This is because the trial court's reinstatement of the judgment of conviction represents a new state court judgment for purposes of § 2254, and a federal court cannot grant relief from such a judgment "unless it appears ... the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A).

In this respect, the case is similar to *Hudson v. Lashbrook*, 863 F.3d 652 (7th Cir. 2017). There, a federal district court, following *Lafler v. Cooper*, 566 U.S. 156 (2012), held that but for the ineffective assistance provided by his trial attorney, the petitioner would have accepted the State of Illinois' plea offer of twenty years rather than go to trial which, upon conviction, resulted in a mandatory life term. 863 F.3d at 654. Based upon this determination, the federal court ordered the State to reoffer the petitioner the original plea deal of twenty years. In accordance with the federal court's order, the State extended the offer, which the petitioner accepted, and then both parties filed a joint motion to vacate the original conviction and sentence. Noting that she would have rejected

the plea agreement based on the petitioner's criminal history even if she was considering it for the first time, however, the state judge refused to accept the agreement and denied the motion. *Id.* The petitioner then returned to the federal district court on a motion to enforce that court's order. The district court denied the motion on the grounds that the petitioner's state appeal remained pending and that "the Illinois Appellate Court should have the first opportunity to both define *Lafler's* discretionary factors and in deciding how to resentence or treat a reoffered plea, and to determine whether the state trial court operated within the bounds of fair discretion in this case." *Id.* at 655. The Seventh Circuit affirmed, noting that "[o]nce the state reoffered the plea deal, the habeas writ was complied with, and the district court lost jurisdiction over the case." *Id.* at 656. Explaining further, the court noted:

> The state judge, faced with what she thought was also not a case or controversy, declined to opine until, finally, she considered and rejected it. Whether she had jurisdiction, and whether her merits ruling was proper or improper are matters of state law, pending on appeal. And it bears mentioning that at no point was the state judge herself a party before the federal district judge in this case.

Id.

Similarly, in this case, the state trial judge, who was not himself a party before the court, concluded that significant changes in the law concerning a defendant's Sixth Amendment right to confront the witnesses against him allowed him to revisit an issue that the Wisconsin Supreme Court had seemingly decided more than ten years ago when the case first came before it prior to Jensen's trial. Given the state supreme court's determination under then-existing law that the letter and related statements were testimonial, the State shifted to the alternative theory of admissibility —forfeiture by wrongdoing—that the supreme court had approved in the same decision. After the expenditure of much time and effort, the State succeeded in introducing the evidence under that theory, resulting in Jensen's conviction, only to have the broad form of the forfeiture by wrongdoing exception that the Wisconsin Supreme Court had adopted in *Jensen I* rejected by the United States Supreme Court in *Giles*. Whether under this unique set of circumstances the state trial court had the authority to revisit the issue of whether the letter and related statements were testimonial, as well as whether the court's determination on the merits that they were not, are matters of state and federal law of which Jensen is free to seek review in the Wisconsin Court of appeals. Indeed, it appears that Jensen has already filed a Notice of Intent to Seek Post Conviction Relief from the new judgment of conviction entered against him. *See* Wisconsin Circuit Court Access for Kenosha County Case No. 2002CF000314, at https://wcca.wicourts.gov (last visited Nov. 27, 2017).

***7** The fact that the circuit court characterized its action as "reinstating" the judgment of conviction, as opposed to entering a new judgment of conviction on the original verdict, does not change the result. It remains the case that the original conviction was vacated and the State initiated proceedings for a new trial. Only after the trial court later determined that the letter and statements that were the subject of the previous harmless error analysis were not testimonial under current law and thus lawfully admissible did the court decide that the original trial was free of error and the resulting verdict valid. It thereupon ordered entry of a judgment of conviction upon the verdict rendered after the earlier trial, thereby giving rise to new rights for Jensen to appeal and/or seek post-conviction relief. It is for the Wisconsin appellate courts to determine, at least as an initial matter, whether this procedure is lawful and complies with the Constitution and laws of the United States, as well as those of the State of Wisconsin.

Finally, the court declines Jensen's request to take up the due process judicial bias claim raised in his original petition. This court granted Jensen's original petition based on his harmless error argument, so it was not necessary to address his due process argument at that time. Jensen argued that he was denied due process of law because the judge who adjudicated his trial was no longer impartial after forming an opinion as to Jensen's guilt as a consequence of the forfeiture hearing ordered by the Wisconsin Supreme Court. As already discussed above, however, Jensen obtained the relief he sought in his original habeas corpus petition: the Kenosha County Circuit Court vacated his tainted judgment of conviction, and the State chose to initiate a new prosecution. The judgment of conviction resulting from that renewed prosecution is the one now before the court, meaning that any remaining objections to Jensen's previous judgment of conviction are moot. To the extent he believes that bias on the part of the previous judge infected the jury trial upon which a different judge entered a new judgment of conviction, he is free to raise that issue in the appellate courts of Wisconsin and, if unsuccessful, seek federal relief pursuant to § 2254.

CONCLUSION

For the reasons set forth above, the court concludes that the State of Wisconsin complied with this court's conditional

order when the State initiated a new prosecution after the Kenosha County Circuit Court vacated Jensen's life sentence and judgment of conviction. As a result, the court concludes that it no longer possesses jurisdiction over Jensen's petition. Thus, the State now holds Jensen in custody pursuant to a judgment as to which Jensen has not yet exhausted his state court remedies. Jensen's motion to enforce judgment (ECF No. 95) is therefore **DENIED**.

SO ORDERED this 27th day of November, 2017.

All Citations

Not Reported in Fed. Supp., 2017 WL 5712690

Footnotes

1 *See* ECF No. 94-3 at 97–100 & ECF No. 94-4 at 1–9 (Jensen's motion); ECF No. 94-5 at 47–89 (State's response); ECF No. 94-6 at 70–100, ECF No. 94-7 at 1–100, & ECF No. 94-8 at 1–45 (first motion hearing); ECF No. 94-8 at 47–71 (Jensen's response brief); ECF No. 94-8 at 75–85 (State's reply); ECF No. 94-8 at 88–89 (Jensen's response letter); ECF No. 94-8 at 90–95 (State's response letter); ECF No. 94-8 at 97–100, ECF No. 94–9 at 1–100, & ECF No. 94-10 at 1–2 (second motion hearing).

2 *See also* ECF No. 94-10 at 69–77 (Jensen's response); *id.* at 84–94 (State's reply); *id.* at 95–96 (Jensen's response letter).

331 Wis.2d 440
Court of Appeals of Wisconsin.

STATE of Wisconsin,
Plaintiff–Respondent,
v.
Mark D. JENSEN, Defendant–Appellant.†

No. 2009AP898–CR.
|
Submitted on Briefs June 4, 2010.
|
Opinion Filed Dec. 29, 2010.

Synopsis

Background: Defendant was charged with intentional homicide in the first degree of his wife. The Circuit Court, Kenosha County, Bruce E. Schroeder, J., entered order excluding wife's letter and voicemail messages to police, and denied defendant's motion to exclude wife's statements to neighbor and her son's teacher. On petition to bypass the Court of Appeals in which State appealed and defendant cross-appealed, the Supreme Court, Jon P. Wilcox, J., 299 Wis.2d 267, 727 N.W.2d 518, affirmed in part, reversed in part, and remanded. On remand, defendant was convicted as charged following jury trial in the Circuit Court. Defendant appealed.

Holdings: The Court of Appeals, Anderson, J., held that:

wife's non-testimonial statements were not hearsay under rule which excluded from hearsay statements made by unavailable witnesses;

any error in admission of hearsay was harmless beyond a reasonable doubt;

evidence that defendant could have left pornographic photos around house to harass wife was admissible;

other acts evidence that penis-focused pornography was found on defendant's home and office computers was properly admitted panorama evidence;

other act evidence that defendant had quizzed his paramour about her sexual history was properly admitted panorama evidence;

warrantless search of defendant's home and seizure of his computer without a warrant did not violate Fourth Amendment; and

defendant made no showing by preponderance of evidence that trial judge was biased.

Affirmed.

Attorneys and Law Firms

****486** On behalf of the defendant-appellant, the cause was submitted on the briefs of Christopher W. Rose and Terry W. Rose of Rose & Rose, Kenosha, and Michael D. Cicchini of Cicchini Law Office, LLC, Kenosha.

On behalf of the plaintiff-respondent, the cause was submitted on the brief of Marguerite M. Moeller, assistant attorney general, and J.B. Van Hollen, attorney general.

Before BROWN, C.J., NEUBAUER, P.J., and ANDERSON, J.

Opinion

ANDERSON, J.

***447** ¶ 1 Mark D. Jensen appeals from a judgment of conviction for the first-degree intentional ***448** homicide of his wife Julie Jensen. Jensen presents many arguments on appeal, none of which persuade. We affirm.

Background

¶ 2 Paragraphs three through thirteen of this opinion relate pertinent background facts laid out by our supreme court in *State v. Jensen,* 2007 WI 26, 299 Wis.2d 267, 727 N.W.2d 518. We will recite additional facts as they become relevant to our discussion of the appellate issues.

¶ 3 A criminal complaint charging Jensen with first-degree intentional homicide in the December 3, 1998 poisoning death

of his wife Julie was filed in Kenosha county on March 19, 2002. *Id.,* ¶ 3.

¶ 4 At Jensen's preliminary hearing conducted in spring 2002, the State presented testimony from several witnesses, including Julie's neighbor, Tadeusz Wojt, Officer Ron Kosman, and Detective Paul Ratzburg. *Id.,* ¶ 4.

¶ 5 Wojt testified that just prior to Julie's death, she gave him an envelope and told him that if anything happened to her, Wojt should give the envelope to the police. *Id.,* ¶ 5. Wojt also stated that during the three weeks prior to Julie's death, she was upset and scared, and she feared that Jensen was trying to poison her or inject her with something because Jensen was trying to get her to drink wine and she found syringes in a drawer. *Id.,* ¶ 5. Julie also allegedly told him that she did not think she would make it through one particular weekend because she had found suspicious notes written by her husband and computer pages about poisoning. *Id.*

¶ 6 Kosman testified that he received two voicemails approximately two weeks prior to Julie's death. ***449** *Id.,* ¶ 6. Julie told Kosman in the second voicemail that she thought Jensen was trying to kill her, and she asked him to call her back. *Id.* Kosman returned Julie's call and subsequently went to her home to talk with her. *Id.* Julie told Kosman that she saw strange writings on Jensen's day planner, and she said Jensen was looking at strange material on the Internet.[1] *Id.* Julie also informed Kosman that she had photographed ****487** part of Jensen's day planner and had given the pictures, along with a letter, to a neighbor (Wojt). *Id.* Julie then retrieved at least one picture, but not the letter from the neighbor, and gave it to Kosman, telling him if she were found dead, that she did not commit suicide, and Jensen was her first suspect. *Id.* Kosman also testified that in August or September 1998, Julie told him it had become very "cold" in their home and that Jensen was not as affectionate as he used to be. *Id.* Kosman stated that Julie said that when Jensen came home from work, he would immediately go to the computer. *Id.*

¶ 7 Ratzburg testified that on the day after Julie's death, he received a sealed envelope from Wojt. *Id.,* ¶ 7. The envelope contained a handwritten letter,[2] addressed to "Pleasant Prairie Police Department, Ron ***450** Kosman or Detective Ratzburg"; it bore Julie's signature that read as follows:

> I took this picture [and] am writing this on Saturday 11–21–98 at 7AM. This "list" was in my husband's business daily planner—not meant for me to see, I don't know what it means, but if anything happens to me, he would be my first suspect. Our relationship has deteriorated to the polite superficial. I know he's never forgiven me for the brief affair I had with that creep seven years ago. Mark lives for work [and] the kids; he's an avid surfer of the Internet....
>
> Anyway—I do not smoke or drink. My mother was an alcoholic, so I limit my drinking to one or two a week. Mark wants me to drink more—with him in the evenings. I don't. I would never take my life because of my kids —they are everything to me! I regularly take Tylenol [and] multi-vitamins; occasionally take OTC stuff for colds, Zantac, or Immodium; have one prescription for migraine tablets, which Mark use[s] more than I.
>
> I pray I'm wrong [and] nothing happens ... but I am suspicious of Mark's suspicious behaviors [and] fear for my early demise. However, I will not leave David [and] Douglas. My life's greatest love, accomplishment and wish: "My 3 D's"—Daddy (Mark), David [and] Douglas.

Id.

¶ 8 Following the preliminary hearing, Jensen was bound over for trial, and an information charging Jensen with first-degree intentional homicide was filed. *Id.,* ¶ 8. Jensen subsequently entered a plea of not guilty at his arraignment on June 19, 2002. *Id.*

¶ 9 Among the pretrial motions Jensen filed were motions challenging the admissibility of the letter received by Ratzburg and the oral statements Julie allegedly made to Wojt and Kosman. *Id.,* ¶ 9. Jensen also ***451** challenged the admissibility of oral statements Julie purportedly made to her physician, Dr. Richard Borman, and her son's teacher, Therese DeFazio. *Id.* These motions were extensively briefed and argued before the court. *Id.* The circuit court evaluated each of Julie's disputed statements independently to determine its admissibility under the hearsay rules and the then-governing test of *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). *Jensen,* 299 Wis.2d 267, ¶ 9, 727 N.W.2d 518. The circuit court ruled that most, but not all, of the statements were admissible. *Id.* Julie's in-person statements to Kosman and Julie's letter ****488** were admitted in their entirety. *Id.* The State conceded the voicemails to Kosman were inadmissible hearsay. *Id.*

¶ 10 On May 24, 2004, Jensen moved for reconsideration on the admissibility of Julie's statements in light of the United States Supreme Court's ruling in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004),

that the Sixth Amendment's Confrontation Clause bars admission against a criminal defendant of an uncross-examined "testimonial" statement that an unavailable witness previously made out of court. *See Jensen,* 299 Wis.2d 267, ¶ 10, 727 N.W.2d 518. After a hearing on the motion, the circuit court orally announced its decision on June 7, 2004, and concluded that Julie's letter and voicemails were testimonial and therefore inadmissible under *Crawford. Jensen,* 299 Wis.2d 267, ¶ 10, 727 N.W.2d 518. The circuit court rejected the State's argument that the statements were admissible under the doctrine of forfeiture by wrongdoing.[3] *Id.* The circuit court also determined that Julie's statements to Wojt and DeFazio were nontestimonial ***452** and, therefore, the statements were not excluded. *Id.* On August 4, 2004, the circuit court issued a written order memorializing its oral rulings. *Id.*

¶ 11 The State appealed the circuit court's ruling with respect to Julie's letter and her voicemail message to Kosman.[4] *Id.,* ¶ 11. Jensen subsequently cross-appealed the ruling that the statements of Wojt and DeFazio were not excluded. *Id.* After the State and Jensen had filed opening briefs in the court of appeals, the State filed a petition to bypass, which Jensen did not oppose. *Id.* Our supreme court granted the petition. *Id.*

¶ 12 Reduced to their essence, the appeal and cross-appeal before the supreme court concerned the circuit court's determinations on the testimonial or nontestimonial nature of various statements of Julie's that the State sought to introduce. *Id.* The supreme court affirmed the order of the circuit court as to its initial rulings on the admissibility of the various statements under *Crawford. Jensen,* 299 Wis.2d 267, ¶ 2, 727 N.W.2d 518. It ***453** held that the statements Julie made to Kosman, including the letter, are "testimonial," while the statements Julie made to Wojt and DeFazio are "nontestimonial." *Id.*

¶ 13 However, it reversed the circuit court's decision as to the applicability of the forfeiture by wrongdoing doctrine to Julie's testimonial statements. *Id.* In so doing, the supreme court "explicitly" adopted a broad forfeiture by wrongdoing doctrine "whereby a defendant is deemed to have lost the right to object on confrontation grounds to the admissibility of out-of-court statements of a declarant whose ****489** unavailability the defendant has caused." *Id.,* ¶ 2; *see also id.,* ¶ 57. It concluded that if the State can prove by a preponderance of the evidence that the accused caused the absence of the witness, the forfeiture by wrongdoing doctrine will apply to the confrontation rights of the defendant. *Id.,* ¶¶ 2, 57. As such, it remanded the case to the circuit court "for a determination of whether, by a preponderance of the evidence, Jensen caused Julie's unavailability, thereby forfeiting his right to confrontation." *Id.,* ¶ 2.

Remand

¶ 14 On remand, a ten-day forfeiture by wrongdoing hearing ensued. For its decision, the circuit court followed the supreme court's mandate to make a determination of whether, by a preponderance of the evidence, Jensen caused Julie's unavailability. *See id.,* ¶¶ 2, 57. Ultimately, the circuit court admitted the disputed evidence, relying on its finding by a preponderance of the evidence that Jensen had caused Julie's absence from the trial and thus forfeited his right to confront the testimonial statements attributed to Julie.

***454** ¶ 15 During the forfeiture hearing, the State also introduced other acts evidence which it offered to demonstrate the existence of motive. At trial, various objections were made to the allegedly improper other acts evidence and ruled on by the circuit court.

¶ 16 The circuit court also conducted hearings on other motions, including Jensen's motion to suppress the search evidence from his home. The central issue was whether the consent form signed by Jensen provided authority for police to search and seize Jensen's computer and hard drive. Detective Paul Ratzburg testified that on December 3, 1998, he was dispatched to the Jensen home because Julie had been found dead. Ratzburg said that he asked Jensen if he knew of any information on why Julie died and that Jensen indicated he was unsure but thought it had something to do with an allergic reaction to medications. Ratzburg stated Jensen indicated that he had been up earlier that evening or the day before looking up that information on the internet.

¶ 17 Ratzburg also testified that he showed Jensen a Consent to Search and Seizure document and informed Jensen that he wanted to investigate the potential cause of Julie's death and whether it was connected to the previously reported incidents by Jensen and Julie that they thought they had prowlers leaving pornographic photographs in and around the Jensen home. He said he told Jensen that because of their investigation, Jensen would have to find somewhere else to spend the night. Jensen said that would be no problem, he would stay with his dad. Jensen read and signed the consent document. The document, State's Exhibit 1, included

Jensen's authorization for the police to conduct "a complete search of my premise, automobile, and/or person." And further included: "I, ***455** Mark Jensen, fully realize my right to refuse to consent to this said search and seizure. I do hereby authorize the said police officers to take from my premise, automobile and/or person any letters, writings, paper, materials or other property which they may desire."

¶ 18 After hearing the evidence on the motion to suppress, the court denied it, finding that it would be "quite apparent to a reasonable person that the search was going to be a very thorough one" and that a reasonable person would conclude:

> [A]t a minimum the police would turn the computer on and review historical information contained on it or otherwise examine its contents, again, particularly since [Jensen] himself had told the police that he had used it the previous day ****490** to access sites dealing with drug reactions which would be relevant to this case.

¶ 19 After the many days of motion hearings concluded, the over thirty-day jury trial began on January 3, 2008, and concluded on February 21, 2008. A judgment of conviction finding Jensen guilty of first-degree intentional homicide was entered on February 27, 2008. Given the enormity of the record, and in the interest of judicial economy, we include further facts and evidence presented at trial in our discussion.

Discussion

¶ 20 Four months after Jensen's conviction, in June 2008, the United States Supreme Court decided *Giles v. California,* 554 U.S. 353, 128 S.Ct. 2678, 171 L.Ed.2d 488 (2008), and clarified the forfeiture by wrongdoing exception to the Confrontation Clause. On April 6, 2009, Jensen filed notice of this appeal. On appeal, Jensen raises multiple challenges to his homicide conviction:

> ***456** 1. Did *Giles*' narrow interpretation of the forfeiture by wrongdoing exception to the Confrontation Clause overrule the Wisconsin Supreme Court's broad interpretation in *Jensen* making Julie's letter and statements to Kosman inadmissible pursuant to *Crawford* ?
>
> 2. Are the admission of Julie's letter and Jensen's statements to Kosman harmless error?
>
> 3. Is Julie's letter to police a dying declaration?
>
> 4. Are the statements Julie made to Therese DeFazio, Tad and Margaret Wojt, Kosman and Ratzburg, via the letter, inadmissible hearsay which should have been excluded?
>
> 5. Was the circuit court biased against Jensen's case?
>
> 6. Was prejudicial other acts evidence admitted which should have been excluded from trial?
>
> 7. Should the computer evidence seized at Jensen's home have been excluded because the evidence was obtained without a warrant and was beyond the scope of the consent given?
>
> 8. Should Jensen's conviction be reversed in the interest of justice?

¶ 21 Several of Jensen's challenges are nonstarters which we address later in this discussion; the rest center on the admissibility of testimonial and nontestimonial evidence as it relates to the Sixth Amendment right of confrontation, to the hearsay rules and to their respective exceptions.

Giles

¶ 22 First, *Giles.* In a much narrower interpretation of the forfeiture by wrongdoing exception to the Confrontation Clause than that espoused by our supreme ***457** court in *Jensen,* the United States Supreme Court, in *Giles,* held that a defendant forfeits his or her confrontation right only when acting with intent to prevent the witness from testifying; the requirement of intent "means that the exception applies only if the defendant has in mind the particular purpose of making the witness unavailable." *See Giles,* 128 S.Ct. at 2687 (citations omitted). The Supreme Court further clarified that "only testimonial statements are excluded by the Confrontation Clause," but "[s]tatements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules which are free to adopt the dissent's version of forfeiture by wrongdoing." *See id.* at 2692–93.

¶ 23 Put another way then, nontestimonial statements are *not* excluded by the Confrontation Clause and thereby may ****491** be analyzed for purposes of a hearsay objection under the version of the forfeiture by wrongdoing doctrine espoused by the *Giles*' dissent, which, like the version espoused by our supreme court in *Jensen,* is very broad.

See Jensen, 299 Wis.2d 267, ¶¶ 2, 57, 727 N.W.2d 518. The broad version of the forfeiture by wrongdoing analysis—specifically approved in *Giles* for nontestimonial statements—deems nontestimonial statements admissible if the witness's "unavailability to testify at *any* future trial was a *certain* consequence of the murder. And any reasonable person would have known it." *See Giles,* 128 S.Ct. at 2698 (Breyer, J., dissenting) (citation omitted); *see also id.* at 2692–93, and *Jensen,* 299 Wis.2d 267, ¶¶ 2, 57, 727 N.W.2d 518.

¶ 24 Jensen asserts that, under the narrow version of the forfeiture by wrongdoing exception espoused by the *Giles*' majority, the admission of the *testimonial* ***458** statements is reversible error. He further argues that the admission of the *nontestimonial* statements is reversible error under *State v. Manuel,* 2005 WI 75, ¶ 60, 281 Wis.2d 554, 697 N.W.2d 811, which held that nontestimonial statements still should be evaluated for Confrontation Clause purposes. *See Jensen,* 299 Wis.2d 267, ¶ 12 n. 5, 727 N.W.2d 518.

¶ 25 Mistakenly, while Jensen ardently relies on *Giles*' clarification narrowing the forfeiture by wrongdoing exception, he pays no heed to *Giles*' further clarification that "*only testimonial* statements are excluded by the Confrontation Clause," but "[s]tatements to friends and neighbors about abuse and intimidation, and statements to physicians in the course of receiving treatment would be excluded, if at all, only by hearsay rules, which are free to adopt the dissent's version of forfeiture by wrongdoing." *See Giles,* 128 S.Ct. at 2692–93 (emphasis added).

¶ 26 Unlike Jensen, we do pay heed to the entirety of the *Giles*' decision. In so doing, we recognize that *Manuel*'s holding that nontestimonial statements should be evaluated for Confrontation Clause purposes is in direct conflict with *Giles*' holding that "only testimonial statements are excluded by the Confrontation Clause." We adhere to the *Giles*' holding because the Supremacy Clause of the United States Constitution compels adherence to United States Supreme Court precedent on matters of federal law, although it means deviating from a conflicting decision of our state supreme court. *See State v. Jennings,* 2002 WI 44, ¶ 3, 252 Wis.2d 228, 647 N.W.2d 142. Thus, Jensen's reliance on *Manuel,* for his assertion that the nontestimonial statements should have been excluded, fails. The ***459** nontestimonial statements are not excluded by the Confrontation Clause and, for purposes of a hearsay objection, may be analyzed under a broader version of the forfeiture by wrongdoing doctrine, such as that proffered by the dissent in *Giles* and by our supreme court in *Jensen. See Giles,* 128 S.Ct. at 2692–93.

Testimonial/Nontestimonial Statements

¶ 27 In order to determine which statements may be analyzed under the broader version of the forfeiture by wrongdoing analysis, we must first determine which statements are testimonial and which are not. Fortunately, our supreme court has done so for us in *Jensen,* 299 Wis.2d 267, ¶ 2, 727 N.W.2d 518. *See Livesey v. Copps Corp.,* 90 Wis.2d 577, 581, 280 N.W.2d 339 (Ct.App.1979) (recognizing that "[t]he court of appeals is bound by the prior decisions of the Wisconsin Supreme Court"). After explaining that a statement is "testimonial" if a reasonable person in the position of the declarant would objectively foresee that his or her statement might be used in the investigation or ****492** prosecution of a crime, the supreme court determined that the statements Julie made to Kosman, including the letter addressed to the police, are "testimonial," while the statements Julie made to her neighbor, Wojt, and her son's teacher, DeFazio, are "nontestimonial." *Jensen,* 299 Wis.2d 267, ¶¶ 2, 25, 727 N.W.2d 518.

¶ 28 With regard to the nontestimonial evidence, per the Supreme Court's rationale in *Giles,* we may adhere to the broad version of the forfeiture by wrongdoing exception to the general prohibition against hearsay, such as that espoused by our supreme court in *Jensen.* Thus, because the circuit court's finding by a ***460** preponderance of the evidence that Jensen caused Julie's absence is not clearly erroneous, we hold that any hearsay objection is overcome.[5]

¶ 29 With regard to the testimonial statements, i.e., hearsay evidence, the Sixth Amendment demands what the common law required: (1) unavailability and (2) a prior opportunity for cross-examination. *See Crawford,* 541 U.S. at 68, 124 S.Ct. 1354. The threshold question in examining whether a defendant's right to confrontation is violated by the admission of hearsay evidence is whether that evidence is admissible under the rules of evidence. *State v. Williams,* 2002 WI 118, ¶ 2, 256 Wis.2d 56, 652 N.W.2d 391. If the evidence does not fit within a recognized hearsay exception, it must be excluded. *Id.*

¶ 30 However, only after it is established that the evidence fits within a recognized hearsay exception or was admitted erroneously does it become necessary to consider

confrontation. *Id.* In so doing, it is necessary to bear in mind that a determination of a Confrontation Clause violation does not result in automatic reversal, but rather is subject to harmless error analysis. *Id.* The test for this type of harmless error was set forth in *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). There, the Supreme Court explained that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a ***461** reasonable doubt." *Id.* at 24, 87 S.Ct. 824; *see also State v. Harvey,* 2002 WI 93, ¶ 48 n. 14, 254 Wis.2d 442, 647 N.W.2d 189 (citing *Neder v. United States,* 527 U.S. 1, 18, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)).

¶ 31 Our Wisconsin Supreme Court has articulated several factors to aid in the harmless error analysis; these include the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the defense, the nature of the state's case, and the overall strength of the state's case. *State v. Stuart,* 2005 WI 47, ¶ 41, 279 Wis.2d 659, 695 N.W.2d 259.

¶ 32 An error is harmless if the beneficiary of the error proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.,* ¶ 40 (citing *Chapman,* 386 U.S. at 24, 87 S.Ct. 824). In this appeal, the State carries the burden of proof in this regard. *See, e.g., Stuart,* 279 Wis.2d 659, ¶ 40, 695 N.W.2d 259.

****493** ¶ 33 The State claims that post-*Giles,* "logic" and case law "compel the conclusion that if [the State can prove] one reason Jensen killed Julie was to prevent her testimony in a family court action, then he forfeited the right to confront her at his murder trial." The State argues that if we reject its invitation to adopt a broad interpretation of the post-*Giles* forfeiture by wrongdoing exception, any error in admitting the challenged evidence was harmless beyond a reasonable doubt.

¶ 34 We decline the State's invitation to adopt a broad interpretation of the post-*Giles* forfeiture by wrongdoing exception and leave for another day whether *Giles* should be read to permit testimonial ***462** evidence when the state can establish by a preponderance of the evidence that the defendant sought to prevent the victim from testifying in *any* court proceeding.

¶ 35 Instead, we assume that the disputed testimonial evidence was erroneously admitted; however, we deem its admission harmless beyond a reasonable doubt given the voluminous corroborating evidence, the duplicative untainted evidence, the nature of the defense, the nature of the State's case, and the overall strength of the State's case. *See Stuart,* 279 Wis.2d 659, ¶ 41, 695 N.W.2d 259.

¶ 36 Here, we will not attempt to catalog all the untainted evidence the State presented; however, we will summarize some of the compelling pieces in order to illustrate that the record is replete with reason to uphold the jury's verdict, even if the assumedly tainted evidence is disregarded.

¶ 37 This case was not a classic whodunit. Jensen's counsel told the jury in opening statements that the facts will prove Julie killed herself and tried to frame Jensen for her murder. Thus, any evidence favoring the State's homicide charge or disfavoring Jensen's suicide/framing theory strengthened the State's case. Again, we underscore that the below summary is meant only to be illustrative and does not convey the entirety of the compelling case the State presented to the jury:

1. *The computer evidence.* This was probably the most incriminating other evidence. In October 1998, the Jensens' home computer revealed that searches for various means of death coincided with e-mails between Jensen and his then-paramour, Kelly, discussing how they planned to deal with their respective spouses and begin "cleaning up [their] lives" so they could be together ***463** and take a cruise the next year. Jensen was evasive when Kelly asked him how he planned to take care of his "details" and, significantly, Jensen's e-mails did not mention divorce at all. On the same date Jensen was planning a future with Kelly, his home computer revealed Internet searches for botulism, poisoning, pipe bombs and mercury fulminate. A website was visited that explained how to reverse the polarity of a swimming pool—the Jensens had a pool—by switching the wires around, likening the result to the 4th of July. The State pointed out the absence of Internet searches on topics like separation, divorce, child custody or marital property.

Significantly strong was the evidence of the Internet sites visited on the morning of Julie's death. Exhibit 89 reveals a 7:40 a.m. search for "ethylene glycol poisoning." Jensen told Ratzburg that the morning of Julie's death she "could hardly sit up," she "was not able to get out of bed," and she "was not able to move around and function." Jensen said he was propping Julie up in bed at 7:30 a.m., which was ten minutes before the search for ethylene glycol poisoning,

and that he did not leave home to take their son to preschool until 8:00 or 9:00 a.m.

****494** Finally, the State presented abundant evidence that Julie rarely used computers and that, in contrast, Jensen was a skilled computer user and avid Internet surfer.

2. *The motive evidence.* Elsewhere in this opinion we elaborate on the motive evidence, but suffice it to say that the State provided evidence that, not only was Jensen having an affair and planning a future with another woman in the months before Julie died, he remained bitter about Julie's affair and engaged in a campaign of emotional torture against Julie.

3. *Jensen's incriminating statements.* The jury also heard from Jensen's coworker and friend, David ***464** Nehring, who testified that around November 1998 Jensen was researching possible drug interactions on the Internet several times a day and told Nehring that he was doing it in order to find an explanation for Julie's (allegedly) unusual behavior.

In addition, the jury heard from Edward Klug, a fellow stockbroker, who attended a national sales convention with Jensen November 5–7, 1998. Klug testified that during a late-night gripe session about their spouses, Jensen told him that if one wanted to get rid of his wife, there were websites instructing how to kill her, how to poison her with things that would be undetectable. Klug said that Jensen told him that giving doses of Benadryl and antifreeze "over a long period of time" is "relatively undetectable" and will start "crystallizing you from the inside out." Klug said that this was not a discussion of how to get rid of one's wife in the abstract but rather that Jensen "was telling me that he was going to be doing that."

4. *The medical evidence.* The jury heard medical testimony that Julie suffered from ethylene glycol poisoning and died of asphyxia. Dr. Michael Chambliss, who conducted the autopsy, testified that he believed the cause of death to be "asphyxia by smothering." Dr. Mary Mainland, a medical examiner for Kenosha county, concluded that Julie had received multiple doses of ethylene glycol—an indicator for homicide rather than suicide—and testified that Julie's "cause of death is ethylene glycol poisoning with probable terminal asphyxia."

5. *Miscellaneous evidence.* The jury heard evidence from Jensen's coworker Nehring that Jensen reported his work computer—the computer on which Nehring had seen Jensen look up drug interactions—"had been fried and he'd have to get a new one." And the jury heard that Jensen said this on the Monday following a Friday conversation during which Nehring remarked to ***465** Jensen that he was surprised that the police had not seized Jensen's work computer.

The jury learned that on the day Julie died, Jensen did not call an ambulance despite Jensen's description of her as "almost incoherent," having very labored breathing and needing help to sit up in bed. Instead, Jensen drove one son to daycare, came home for a while and then ran a work-related errand.

Nehring testified that Jensen told him that, after picking up the boys from school, "something didn't feel right" when they arrived home, so Jensen told the boys to wait in the car.

¶ 38 With the above illustrative summary of the other, untainted and undisputed gripping evidence against Jensen—from which a rational jury could alone conclude beyond a reasonable doubt that Jensen cruelly planned and plotted and, in fact, carried out the murder of his wife ****495** Julie—we move on to examine the admitted testimonial evidence for a determination as to whether the assumed error in admitting it was harmless or reversible. As already noted, we conclude that the State has met its burden of proving admission of the testimonial evidence was harmless beyond a reasonable doubt. The State deftly dissects the challenged testimonial evidence and is able to point to admissible duplicative and corroborative evidence in the record.

¶ 39 We begin with Julie's letter.[6]

***466** ¶ 40 *Assumed inadmissible evidence.* The first two sentences of Julie's letter state: "I took this picture and am writing this on Saturday 11–21–98 at 7AM. This 'list' was in my husband's business daily planner—not meant for me to see." *Jensen,* 299 Wis.2d 267, ¶ 7, 727 N.W.2d 518.

¶ 41 *Admissible duplicative/corroborative evidence in the record.* Julie's neighbor, Wojt, testified that Julie told him that she saw sticky notes with "different poisoning sites for different poison" on Jensen's desk and Wojt further testified that Julie was "very confused and scared, because there was some times that Mark [Jensen] left to work and he left his computer on and on the screen of the computer there was the website about the poisoning." Wojt testified that he advised Julie to "take the pictures" of "the screen, the notes and give it to the police." Finally, Wojt testified that he knew that Julie

took a picture because she told him, "I took the picture ... and I tried to contact the police to give it to them."

¶ 42 Jensen's sister, Laura Koster, testified that in fall 1998, Julie had shown her a picture that Julie had photographed of a page from Jensen's planner and the photograph showed that in Jensen's planner, in his handwriting, he had made a "list of things." Koster said the same photograph also showed that, lying next to the planner, there was a plastic cylinder that "[a]t first glance ... looked like a syringe."

¶ 43 Therese DeFazio, son David's teacher, testified that on November 25, 1998, while at David's school, Julie "was acting extremely nervous" and "didn't want ***467** to tell" DeFazio what was on her mind and said, "I don't know if I should be telling you this." DeFazio said she told Julie that "when you're ready ... you can tell me whatever it is that's bothering you." Julie then "started to wring her hands again and she said I think my husband is going to kill me." DeFazio said Julie then told her that she saw a list of items by Jensen's computer "such as syringes ... and drugs and items like that." Julie told her she feared that Jensen was going to try to give her an overdose of drugs or something by putting it in her food and that Jensen was trying to get her to eat and drink things and she refused.

¶ 44 *Assumed inadmissible evidence.* The third sentence of Julie's letter states: "I don't know what it means, but if anything happens to me, he [Jensen] would be my first suspect."

¶ 45 *Admissible duplicative/corroborative evidence in the record.* Wojt, the Jensens' neighbor, testified that about one month before Julie died Julie was very ****496** confused and scared and told him that Jensen would go to work and leave his computer on with the screen displaying a website about poisoning. Wojt said Julie told him, "I don't know what [Jensen's] trying to do to me, if he's like trying to scare me, he's playing with my mind or he just forgot to turn it off." Wojt said that Julie expressed suspicions that Jensen was trying to poison her or trying to drive her nuts in order to take the kids from her. Wojt said that Julie told him that during an argument she had with Jensen, Jensen said she was an unfit mother and that he "will take the kids away from her."

¶ 46 Wojt testified that about two weeks before Julie died, she told him that Jensen was "chasing her" with a glass of wine trying to get her to drink it, that Jensen kept following her with the wine, would put it ***468** next to her and this went on until three in the morning. Julie told Wojt that the same night she also saw their nightstand drawer left cracked open and inside the drawer she could see syringes. Julie told Wojt that she and Jensen had a huge fight that night and she refused to drink the wine and "was afraid that [Jensen] put something in the wine" and was going to "inject her with something else. That's why the syringes were there."

¶ 47 Wojt further testified that Julie told him she was "scared she was go[ing to] die; [that Jensen's] go[ing to] poison her." As mentioned earlier, son David's teacher, DeFazio, testified that Julie said, "I think my husband is going to kill me." DeFazio also testified that Julie told her that she feared that Jensen was going to try to give her an overdose of drugs or something by putting it in her food. Jensen's sister, Koster, testified that Julie told her in the fall of 1998 that she thought Jensen might be planning to kill her.

¶ 48 *Assumed inadmissible evidence.* Sentence four and five of Julie's letter states: "Our relationship has deteriorated to the polite superficial. I know [Jensen's] never forgiven me for that brief affair I had with that creep seven years ago."

¶ 49 *Admissible duplicative/corroborative evidence in the record.* Jensen admitted to Detective Ratzburg that their marriage was never the same after Julie's affair. Wojt testified that Julie repeatedly told him about marital problems she and Jensen were having. Dr. Richard Borman, the family's doctor, testified that two days before Julie's death she was in to see him and alluded to an affair that she had in the past and said she believed that Jensen had "never really forgiven" her for it.

¶ 50 Nehring testified that he first met Jensen in 1990 or 1991 and became friends with him and continued ***469** that friendship thereafter. He said they talked on the phone regularly both about business and personal things, and they did family outings together. Nehring testified that soon after he met Jensen, sometime around 1990–91, Jensen told him about Julie's affair. Nehring acknowledged that eight years after telling him about the affair, neither Jensen's anger nor his hurt diminished. He said that "[Jensen] remained upset about [the affair] and distressed over it for as long as I knew him."

¶ 51 Additionally, DeFazio testified that Julie told her that Jensen "never forgave her for [the affair]."

¶ 52 Finally, the State presented uncontroverted evidence that Jensen repeatedly placed pornographic photos around the house for Julie to find and that Jensen knew Julie believed

her former paramour was planting them. This evidence is discussed in further detail later in this opinion when we address and reject Jensen's argument that impermissible other acts evidence was admitted. It is sufficient to **497 say for now that this evidence duplicates the contested evidence put on to show that Jensen had never forgiven Julie for her affair.

¶ 53 *Assumed inadmissible evidence.* Sentence six of Julie's letter stated: "Mark lives for work and the kids; he's an avid surfer of the Internet."

¶ 54 *Admissible duplicative/corroborative evidence in the record.* Again, other undisputed evidence at trial pointed to Jensen, not Julie, being the user of their home computer. Jensen's friend and coworker, Nehring, testified that Jensen's computer skills were "above average," noting that Jensen was always buying and replacing computers and usually owned two personal computers at any time. Nehring testified that before Julie's death, Jensen conducted Internet searches on *470 drug interactions "on a very frequent basis." DeFazio testified that during a school open house in August 1998, she asked Julie if she could use a computer because she wanted Julie to help in the computer lab with the children, and Julie said, "[O]h, I can't do that, I don't even know how to turn one on." DeFazio also testified that David told her that he was teaching his mom how to use a computer because "she didn't know how." Finally, the time of day that Internet activity occurred was consistent with Jensen being the user. Computer evidence showed that Internet activity occurred late at night and into the early morning when Jensen would be home. The computer evidence showed that when Jensen attended a conference in St. Louis, there was no Internet activity. Additionally, during November 1998, no Internet use occurred from Monday through Friday between 9 a.m. and 6 p.m.

¶ 55 On the morning Julie died, the evidence reveals a 7:40 a.m. search on the Jensen home computer for "ethylene glycol poisoning." The computer evidence also reveals that the user of the home computer that same morning double-deleted that morning's Internet history. Jensen told Ratzburg that on the morning of Julie's death, Julie "could hardly sit up," "was not able to get out of bed," and "was not able to move around and function."

¶ 56 *Assumed inadmissible evidence.* Sentences seven and eight of Julie's letter state: "Anyway—I do not smoke or drink. My mother was an alcoholic, so I limit my drinking to one or two a week."

¶ 57 *Admissible duplicative/corroborative evidence in the record.* Dr. Borman testified that Julie denied smoking, stated that she drank alcohol occasionally and told him that her mom had alcohol problems so she was careful about alcohol consumption. Julie's *471 brother, Paul Griffin, testified that their mother was an alcoholic and that Julie "rarely" drank.

¶ 58 *Assumed inadmissible evidence.* Sentences nine and ten of Julie's letter state: "Mark wants me to drink more with him in the evenings. I don't."

¶ 59 *Admissible duplicative/corroborative evidence in the record.* As noted earlier in this opinion, the Jensens' neighbor, Wojt, provided testimony with this same information. Jensen's friend Nehring testified that Jensen told him he was trying to get Julie to relax by offering her a glass of wine at night, but she always said no. Nehring stated that Jensen told him that on only one occasion did Julie accept a drink of wine and immediately following taking a sip of wine, she fell over sideways.

¶ 60 *Assumed inadmissible evidence.* Sentence eleven of Julie's letter states: "I would never take my life because of my kids. They are everything to me!"

¶ 61 *Admissible duplicative/corroborative evidence in the record.* Julie told Borman that she loved her children "more than anything and they were the most **498 important thing in the world to her." DeFazio testified that Julie told her she gave her neighbor a note, "saying that if my husband ever kills me please believe that I did not commit suicide, I would never do that because I love my children and I wouldn't do that to my children."

¶ 62 *Assumed inadmissible evidence.* Sentence twelve of Julie's letter states: I regularly take Tylenol and multi-vitamins; occasionally take OTC stuff for colds, Zantac, or Imodium." Borman's notes of Julie's September 1998 doctor's visit indicate she was taking a multivitamin and calcium. Whether Julie took Tylenol and occasionally took over-the-counter medications is not relevant or prejudicial.

*472 ¶ 63 *Assumed inadmissible evidence.* Sentence thirteen of Julie's letter states: "[I] have one prescription for migraine tablets, which Mark uses more than I." This information is not in evidence outside the letter, but is not material or prejudicial.

¶ 64 *Assumed inadmissible evidence.* Sentence fourteen of Julie's letter states: "I pray I'm wrong & nothing happens ... but I am suspicious of Mark's suspicious behaviors & fear for my early demise."

¶ 65 *Admissible duplicative/corroborative evidence in the record.* As noted earlier in this opinion, Jensen's sister, Koster, Julie's neighbor, Wojt, and Julie's son's teacher, DeFazio, testified that Julie was suspicious of Jensen and thought he might try to kill her.

¶ 66 *Assumed inadmissible evidence.* Sentence fifteen of Julie's letter states: "However, I will not leave David & Douglas."

¶ 67 *Admissible duplicative/corroborative evidence in the record.* As noted earlier, DeFazio testified that Julie told her she wrote a letter in which she stated that she would never commit suicide. Also, Borman testified that two days before her death, Julie denied being suicidal and said her boys meant "everything" to her and she did not want to lose them.

¶ 68 *Assumed inadmissible evidence.* The last sentence of Julie's letter states: "My life's greatest love, accomplishment and wish: 'My 3 D's—Daddy (Mark), David & Douglas."

¶ 69 *Admissible duplicative/corroborative evidence in the record.* Other evidence revealed that Julie's license plate read "MY 3 DS."

¶ 70 The State's additional evidence, compared to Julie's letter, illustrates that virtually all relevant information in Julie's letter was duplicated by admissible ***473** nontestimonial evidence from other sources. The rest of the record reflects that the jury heard overwhelming evidence of murder, and upon this record, it could rationally have concluded beyond a reasonable doubt that Jensen murdered Julie.

¶ 71 The same is true regarding Julie's testimonial statements to Kosman; that is, virtually everything related in Julie's statements to Kosman was duplicated by admissible evidence from other sources. Kosman testified that he received a voicemail message from Julie that said "to call [her] as soon as possible, and if she were to end up dead, Mark [Jensen] would be her suspect." Likewise, Wojt and DeFazio testified that Julie told them she thought Jensen was going to kill her. Kosman testified that Julie had told him she had taken photographs of notes from Jensen's planner and that she had written a note and given it to a neighbor with instructions to give it to the police if anything happened to her. Likewise, Wojt testified to the fact that Julie told him she had taken pictures of Jensen's day planner and that she was worried Jensen was planning to poison her. Wojt testified that one of the ****499** times when he and Julie were talking, she put an envelope in his coat pocket and told him that if anything happened, he should give it to the police.

¶ 72 Kosman testified that Julie told him she thought that Jensen was going to kill her and make it look like suicide. Likewise, DeFazio testified that Julie told her that she feared Jensen "was going to make it look like a suicide."

¶ 73 Thus, even assuming the testimonial evidence of Julie's letter and Julie's statements to Kosman were inadmissible under the rules of evidence and the Sixth Amendment Confrontation Clause, we deem any error in admission harmless. The sine qua non is that ***474** the testimonial statements provided nothing significant beyond the properly admitted nontestimonial statements.

Other Acts

¶ 74 That determined, we now address the alleged improperly admitted "other acts"[7] evidence. Jensen acknowledges that the evidence that Julie had an affair and that he had an affair was properly admitted other acts evidence to show motive. However, Jensen argues that certain categories of evidence were improperly admitted "other acts" evidence. Specifically, he takes issue with the admission of (1) the evidence that he left pornographic photos—depicting erect penises and fellatio—around the Jensen home; (2) the evidence that pornography—depicting penis pictures—was found on Jensen's home computer in 1998 and 2002; and (3) the evidence that he had quizzed Kelly Jensen[8] about her sexual history, including fellatio and details of her past partners' penis sizes. We conclude that all three categories of evidence were properly admitted.

***475** ¶ 75 A circuit court's decision to admit evidence, including "other acts," is discretionary. *See State v. Webster,* 156 Wis.2d 510, 514–15, 458 N.W.2d 373 (Ct.App.1990), and *State v. C.V.C.,* 153 Wis.2d 145, 161, 450 N.W.2d 463 (Ct.App.1989). We will not disturb a circuit court's exercise of discretion if the circuit court correctly applied accepted legal standards to the facts of record and, using a rational process, reached a conclusion that a reasonable judge could reach. *See Webster,* 156 Wis.2d 510, 514–15, 458 N.W.2d

373. The basis for the court's decision should be set forth; however, if the circuit court fails to provide reasoning for its evidentiary decision, we will independently review the record to determine whether the circuit court properly exercised its discretion. *Martindale v. Ripp,* 2001 WI 113, ¶ 29, 246 Wis.2d 67, 629 N.W.2d 698. In admissibility determinations, an appellate court is concerned with whether a circuit court's *decision* is correct, rather than with the reasoning employed by circuit court. *See State v. Baudhuin,* 141 Wis.2d 642, 648, 416 N.W.2d 60 (1987). If the decision is correct, it should be sustained, and we may do so on a theory or on reasoning not presented to the circuit court. *See id.*

****500** ¶ 76 Our supreme court has set forth a three-part analytical test for determining when other acts evidence can be admitted. *State v. Sullivan,* 216 Wis.2d 768, 772, 576 N.W.2d 30 (1998). The three-part test asks the court to consider: (1) whether the evidence is offered for a permissible purpose under Wis. Stat. 904.04(2); (2) whether the evidence is relevant; and (3) whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, ***476** confusion of the jury or needless delay.[9] *Sullivan,* 216 Wis.2d at 772, 576 N.W.2d 30.

¶ 77 Wisconsin does not prohibit the admission of other acts evidence if "offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Wis. Stat. § 904.04(2). The listing of circumstances under § 904.04(2) for which the evidence is relevant and admissible is not exclusionary but, rather, illustrative. *State v. Shillcutt,* 116 Wis.2d 227, 236, 341 N.W.2d 716 (Ct.App.1983). Accepted bases for the admissibility of evidence of other acts not listed in the statute arise when such evidence provides background or furnishes part of the context of the crime or case or is necessary to a full presentation of the case. *See id.; see also State v. Hereford,* 195 Wis.2d 1054, 1069, 537 N.W.2d 62 (Ct.App.1995).

¶ 78 Furthermore, often times evidence treated by the parties and the circuit court as "other acts" evidence is not necessarily even "other acts." In *State v. Johnson,* 184 Wis.2d 324, 516 N.W.2d 463 (Ct.App.1994), the majority analyzed the disputed evidence as ***477** "other acts" because the parties treated it as such. *Id.* at 339 n. 2, 516 N.W.2d 463. There, Johnson's former live-in girlfriend, Karen Petersen, contended that during an argument, Johnson assaulted her. *Id.* at 334, 516 N.W.2d 463. Based on her allegations, the State charged Johnson with battery and second-degree reckless endangerment while using a dangerous weapon. *Id.*

¶ 79 Johnson's theory of defense was that Petersen falsely accused him of assault so that after he was incarcerated, she could misappropriate certain items of his personal property. *Id.* at 338, 516 N.W.2d 463. To bolster this theory, he sought to introduce evidence that within days after his arrest, Petersen approached several of the people who were storing property for Johnson and attempted to claim the property as her own. *Id.* Johnson offered it as probative of Petersen's motive for falsely accusing him of the assault. *Id.* The circuit court did not let in the evidence and Johnson was found guilty of battery and second-degree reckless endangerment. *Id.* at 333, 516 N.W.2d 463. Johnson appealed.

¶ 80 We reversed the circuit court's ruling to suppress this evidence and remanded for a new trial. *Id.* In discussing our decision, we explained that this evidence, viewed from the theory of defense, is directly linked to the criminal events charged against Johnson. *Id.* at 339, 516 N.W.2d 463. The probative value of other acts evidence is partially dependent on its ****501** nearness in time, place and circumstance to the alleged act sought to be proved. *Id.* The evidence involved the relationship between the principal actors (Johnson and Petersen), followed on the heels of Petersen's accusations against Johnson and, most importantly, traveled directly to Johnson's theory as to why Petersen was falsely accusing him. *Id.*

¶ 81 Notably, given this linkage with the offenses charged against Johnson, we questioned whether this ***478** evidence "even required" an "other acts" analysis, and pointed the reader to the concurring opinion which further pursued this matter. *Id.* at 339 n. 2, 516 N.W.2d 463. In his concurrence, Judge Anderson explained that if evidence is part of the "panorama" of evidence surrounding the offense, it is not other acts evidence and need not be analyzed as such. *See id.* at 348–49, 516 N.W.2d 463 (Anderson, P.J., concurring). Judge Anderson then explained why he did not consider this evidence to be other acts evidence:

> For Johnson's theory of defense to have any viability, Petersen's conduct cannot be viewed frame-by-frame as the State argues. The fact that Petersen's bid to secure Johnson's personal property came after the alleged assault does not make it an "other act" subject to analysis under [Wis. Stat.] § 904.04(2). A criminal act cannot be viewed frame-by-frame if the finder of fact is to arrive at the truth.

See Johnson, 184 Wis.2d at 350, 516 N.W.2d 463 (Anderson, P.J., concurring).

¶ 82 Like the complained-about evidence in *Johnson,* the evidence that Jensen may have left pornographic photos—depicting such things as erect penises and fellatio—around the house was admissible, whether subjected to an other acts analysis under Wis. Stat. § 904.04(2) and *Sullivan,* or examined as "panorama" evidence under *Johnson.*

¶ 83 The State argues this was properly admitted "other acts" evidence showing that Jensen's bitterness over Julie's 1991 affair was "deep-seated and obsessive and gave him a motive to kill Julie, although it was not his sole motive." The State establishes a contextual reason for admitting the evidence in its further assertion that Jensen "orchestrated [a] campaign of harassment." While Jensen denied knowing the origin of the pornographic photos, he told Ratzburg, the investigating ***479** officer, that he believed Julie's former paramour was sending the photos to him at work. Jensen admitted to Ratzburg that he began saving the photos and using them to upset Julie when "something would happen" that caused him to "get pissed off." He explained that sometimes he would just leave the photos out for Julie to find and other times he would bring them out, show them to Julie and tell her that he "found these in the shed."

¶ 84 We agree with the State that if analyzed as other acts evidence, it is properly admitted motive[10] and/or context evidence under *Sullivan.* See *Sullivan,* 216 Wis.2d at 772, 576 N.W.2d 30. The evidence that Jensen left pornographic pictures around the home is relevant: long ago, our supreme court recognized that in cases of uxoricide,[11] evidence of the defendant's ill feeling toward his wife is relevant to prove motive. *Runge v. State,* 160 Wis. 8, 12–13, 150 N.W. 977 (1915). This evidence ****502** is offered for a permissible purpose: that of establishing context and providing a full presentation of the case, i.e., Jensen's hostility and desire to seek revenge against Julie for her affair. *See Shillcutt,* 116 Wis.2d at 236, 341 N.W.2d 716; *see also Hereford,* 195 Wis.2d at 1069, 537 N.W.2d 62. Finally, the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.

¶ 85 Also, even if this was not admissible other acts evidence, it is admissible when analyzed as "part of the panorama of evidence" surrounding the offense. *See* ***480** *Johnson,* 184 Wis.2d at 348–49, 516 N.W.2d 463 (Anderson, P.J., concurring). It is admissible as part of the State's theory that before Jensen murdered his wife, Jensen engaged in a campaign of emotional torture by repeatedly confronting Julie with pornographic photos. The evidence involved the relationship between the principal actors (Jensen and Julie) and traveled directly to the State's theory as to why Jensen murdered Julie. *See id.* at 339, 516 N.W.2d 463.

¶ 86 The second category of evidence that Jensen claims is inadmissible other acts—evidence that pornography was found both on Jensen's home computer in 1998 and office computer in 2002—was properly admitted "panorama" evidence. For the finder of fact to arrive at the truth, it was proper not to limit the evidence to a frame-by-frame presentation. *See id.* at 350, 516 N.W.2d 463 (Anderson, P.J., concurring). The evidence that Jensen secretly planted pornography around the home gave viability to the State's theory of the case that Jensen had been engaging in a campaign of emotional torture toward Julie up to the time he poisoned her. *See, e.g., id.* We agree with the circuit court that because Jensen persistently denied leaving the pornographic photos, evidence of the pornography found on his work computer in 2002—long after Julie's death—was relevant to prove him the source of the pornography found on the Jensen home computer in 1998, which, in turn, was relevant to show Jensen left the pornographic photos around the Jensen home.

¶ 87 What is more, the similarity of what was specifically depicted in most of the pictures, i.e., penis-focused pornography, made it even more relevant to proving the State's case because the evidence, showing that Jensen was storing penis photos on his computer in 2002, bolstered the State's theory that Jensen had ***481** accessed similar penis pornography on the home computer in 1998, which, in turn, linked him to being the one who left similar penis-focused pornographic photos around the home.

¶ 88 Moreover, this evidence is highly probative to another key issue in the trial that the State was seeking to establish: that Julie knew very little about computers and rarely used the home computer while, in contrast, Jensen was computer savvy and surfed the Internet regularly at home. The circuit court observed that the defense had impeached Detective Ratzburg's testimony—i.e., that Jensen told him right after Julie's death that he was the principal computer user and that Julie rarely used their computer—by pointing out that Ratzburg never included this information in any report. Plainly, given the critical issue as to who had searched for ethylene glycol and other poisons on the home computer, evidence tending to show Jensen was by far the primary user

of the computer had great probative value outweighing any unfair prejudice.

¶ 89 The third category of evidence Jensen claims was inadmissible other acts evidence is the evidence that Jensen had quizzed Kelly Jensen about her sexual history, including fellatio and details of her past partners' penis sizes. This ****503** evidence also qualifies as properly admitted "panorama" evidence because it, too, tended to show that Jensen (a) had a longstanding fascination or obsession with penises and (b) given this, was likely the one responsible for the penis-focused photos stored on the home and office computer and left around the Jensen home to emotionally torture Julie.

¶ 90 Each category of evidence Jensen complains about was properly admitted, even if the circuit court's reasoning for admitting the evidence differs from ours, ***482** its decision to admit was correct and we, therefore, sustain the circuit court's determination under our deferential standard of review. *See Baudhuin,* 141 Wis.2d at 648, 416 N.W.2d 60.

Search Warrant

¶ 91 Like Jensen's preceding arguments, Jensen's additional arguments do not sway this court from affirming. Jensen claims that "[t]he search of [his] home and seizure of his computer without a warrant exceeded the scope of the consent to search." Warrantless searches are per se unreasonable under the Fourth Amendment, subject to a few carefully delineated exceptions. *State v. Sanders,* 2008 WI 85, ¶ 27, 311 Wis.2d 257, 752 N.W.2d 713. The consent search is one exception. Wis. Stat. § 968.10(2). A consent search is constitutionally reasonable to the extent that the search remains within the bounds of the actual consent. *State v. Douglas,* 123 Wis.2d 13, 22, 365 N.W.2d 580 (1985). "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness —what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Florida v. Jimeno,* 500 U.S. 248, 251, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991).

¶ 92 Jensen argues that the consent form language, "any letters, writings, paper, materials, or other property," limited the consent to the seizure of documents and similar items. He also argues that "[n]o reasonable person would have anticipated that a search for evidence relating to a death would have extended to seizing and searching Mr. Jensen's home computer." We cannot agree. As already noted, the form Jensen signed ***483** specifically stated: "I, Mark Jensen, fully realize my right to refuse to consent to this said search and seizure. I do hereby authorize the said police officers to take from my premise, automobile and/or person any letters, writings, paper, materials or other property which they may desire."

¶ 93 A reasonable person who consents to a police search and seizure of "other property which they may desire" would not believe that "other property" was limited to papers and written material. There is no meaningful difference between records maintained electronically and those kept in hard copies and, in this age of modern technology, persons have increasingly become more reliant on computers not only to store information, but also to communicate with others. *See Commonwealth v. McDermott,* 448 Mass. 750, 864 N.E.2d 471, 488–89 (2007). "[C]lairvoyance cannot be expected of police officers to know in what form a defendant may maintain his records." *Id.* at 488. We conclude that the consent form signed by Jensen authorized police to seize the electronic storage media (computers and disks) within which the documents listed in the warrant may have been stored.

Judicial Bias

¶ 94 Jensen's next argument is that Judge Schroeder's pretrial forfeiture by wrongdoing finding of guilt by a preponderance of the evidence rendered the ****504** judge biased and violated Jensen's due process right to a fair trial. Jensen has waived this argument because he failed to present it in the circuit court. *See Apex Elecs. Corp. v. Gee,* 217 Wis.2d 378, 384, 577 N.W.2d 23 (1998) ***484** "[t]he oft-repeated rule of Wisconsin appellate practice is that issues not raised in the circuit court will not be considered for the first time on appeal").

¶ 95 Further, even if this argument had not been waived, it lacks merit. The right to a fair trial includes the right to be tried by an impartial and unbiased judge. *State v. Walberg,* 109 Wis.2d 96, 105, 325 N.W.2d 687 (1982). Whether Judge Schroeder was a neutral and detached magistrate as mandated by the United States and Wisconsin Constitutions is a question of constitutional fact that we review de novo without deference to the circuit court. *See State v. McBride,* 187 Wis.2d 409, 414, 523 N.W.2d 106 (Ct.App.1994). There is a presumption that a judge is free of bias and prejudice.

Id. In order to overcome this presumption, the party asserting judicial bias must show by a preponderance of the evidence that the judge is biased or prejudiced. *Id.* at 415, 523 N.W.2d 106.

¶ 96 Jensen makes no such showing. Under Wis. Stat. § 901.04, a judge must make preliminary evidentiary findings such as the finding Judge Schroeder made that Jensen was guilty of forfeiture by wrongdoing.[12] Moreover, Judge Schroeder was ordered by our supreme court to make a forfeiture by wrongdoing finding. Additionally, Jensen points to nothing to support his implied contention that a judge who makes the ***485** preliminary finding of forfeiture by wrongdoing must recuse himself or herself from the trial. Finally, Jensen proffers no objective evidence of bias. We address this argument no further.

Interest of Justice

¶ 97 Jensen's final argument is that we should reverse his conviction in the interest of justice. We disagree. Our discretionary reversal power under Wis. Stat. § 752.35 is formidable and should be exercised sparingly and with great caution. *State v. Williams,* 2006 WI App 212, ¶ 36, 296 Wis.2d 834, 723 N.W.2d 719. We are reluctant to grant new trials in the interest of justice and exercise our discretion to do so "only in exceptional cases." *See State v. Armstrong,* 2005 WI 119, ¶ 114, 283 Wis.2d 639, 700 N.W.2d 98. While this case is "exceptional," it is so only because of the staggering weight of the untainted evidence and cumulatively sound evidence presented by the State to a jury of Mark Jensen's peers leading it to convict Jensen beyond a reasonable doubt of murder in the first degree. Because the State has proven beyond a reasonable doubt that any error complained of did not contribute to the verdict obtained, Jensen is not entitled to a new trial and his conviction stands. *See Stuart,* 279 Wis.2d 659, ¶ 40, 695 N.W.2d 259 (citing *Chapman,* 386 U.S. at 24, 87 S.Ct. 824); *see also Harvey,* 254 Wis.2d 442, ¶ 46, 647 N.W.2d 189. Upon review of the extensive record and briefing on appeal, we affirm.

Judgment affirmed.

All Citations

331 Wis.2d 440, 794 N.W.2d 482, 2011 WI App 3

Footnotes

† Petition For Review Filed

1 "After Julie's death, police seized the computer in the Jensen [s'] home and found that on various dates between October 15 and December 2, 2002, several websites related to poisoning were visited; including one entitled 'Ethylene Glycol.' " *State v. Jensen,* 2007 WI 26, ¶ 6 n. 1, 299 Wis.2d 267, 727 N.W.2d 518. (Because Julie died on December 3, 1998, we believe the court meant to refer to the three-month time period leading up to Julie's death, October 15 to December 2, 1998, not 2002.)

2 After comparing the letter to known writing samples from Julie, a document examiner with the state crime lab concluded that the letter was written by Julie. *Jensen,* 299 Wis.2d 267, ¶ 7, 727 N.W.2d 518.

3 The forfeiture by wrongdoing doctrine was codified in 1997 in the Federal Rules of Evidence as a hearsay exception. *See* Fed.R.Evid. 804(b)(6); *see also Jensen,* 299 Wis.2d 267, ¶ 43, 727 N.W.2d 518. This rule reads as follows:

> Rule 804. Hearsay Exceptions; Declarant Unavailable
>
> ....
>
> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> ....
>
> (6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the decedent as a witness.

Fed.R.Evid. 804(b)(6).

4 The district attorney conceded that the statements Julie made to Kosman during a conversation on November 24, 1998, were testimonial. *Jensen,* 299 Wis.2d 267, ¶ 11 n. 4, 727 N.W.2d 518. With respect to these statements, the State argued only that they are admissible under the forfeiture by wrongdoing doctrine. *Id.*

5 We note that Jensen did not substantively challenge the circuit court's finding that the preponderance of the evidence showed that Jensen caused Julie's absence. We deem that challenge abandoned. *See State v. Ledger,* 175 Wis.2d 116, 135, 499 N.W.2d 198 (Ct.App.1993) (issues not briefed or argued are deemed abandoned).

6 On appeal, Jensen argues that the circuit court erred in admitting Julie's letter as a "dying declaration." The State explicitly does not argue that Julie's letter was a dying declaration "because it believes the theory for admissibility" it advances "is stronger and, unlike the dying-declaration theory, not subject to a potential waiver bar." The State does, however, note that this court "could still adopt" the circuit court's rationale for admitting the letter as a dying declaration. We decline to reach the dying declaration issue given our harmless error analysis. *See Gross v. Hoffman,* 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

7 Wisconsin Stat. § 904.04(2) (2007–08) provides in pertinent part:

> [E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

All references to the Wisconsin Statutes are to the 2007–08 version unless otherwise noted.

8 Kelly Jensen is the woman Jensen was having an affair with; he married Kelly after Julie's death.

9 This three-part test has sometimes been worded differently, apparently combining the second and third step into one step. *State v. Hunt,* 2003 WI 81, ¶ 32 n. 11, 263 Wis.2d 1, 666 N.W.2d 771 (citing *State v. Pharr,* 115 Wis.2d 334, 340 N.W.2d 498 (1983), which held that circuit courts must apply a two-prong test in determining whether evidence of other crimes is admissible. The first prong requires the circuit court to determine whether evidence fits within one of the exceptions set forth in Wis. Stat. § 904.04, and the second prong requires the circuit court to determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice to the defendant).

10 We note that "[m]otive has been defined as the reason which leads the mind to desire the result of an act." *State v. Johnson,* 184 Wis.2d 324, 338, 516 N.W.2d 463 (Ct.App.1994).

11 Uxoricide is defined as "the murder of one's wife." Black's Law Dictionary 1583 (8th ed.2004).

12 Wisconsin Stat. § 901.04 provides in pertinent part:

> (1) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to sub. (2) and ss. 971.31(11) and 972.11(2). In making the determination the judge is bound by the rules of evidence only with respect to privileges and as provided in s. 901.05.

299 Wis.2d 267
Supreme Court of Wisconsin.

STATE of Wisconsin, Plaintiff–Appellant–Cross–Respondent,
v.
Mark D. JENSEN, Defendant–Respondent–Cross–Appellant.

No. 2004AP2481–CR.
|
Argued Jan. 11, 2006.
|
Decided Feb. 23, 2007.

Synopsis

Background: Defendant was charged with first-degree intentional homicide. The Circuit Court, Kenosha County, Bruce E. Schroeder, J., entered order excluding victim's letter and voicemail messages to police, and denied defendant's motion to exclude victim's statements to neighbor and son's teacher.

Holdings: On petition to bypass the Court of Appeals in which State appealed and defendant cross-appealed, the Supreme Court, Jon P. Wilcox, J., held that:

statements in victim's letter she told neighbor to give to police if anything happened to her were testimonial in nature, overruling *State v. Hemphill,* 287 Wis.2d 600, 707 N.W.2d 313;

voicemail messages to police officer left by victim indicating that defendant was trying to kill her were testimonial in nature;

admission of victim's statements to neighbor and son's teacher indicating that she thought defendant was trying to kill her would not violate defendant's right of confrontation; and

defendant forfeited right of confrontation with respect to testimonial statements by victim if defendant's wrongdoing caused victim to be unavailable to testify.

Affirmed in part; reversed in part; remanded.

Louis B. Butler, Jr., J., filed opinion concurring in part and dissenting in part.

Attorneys and Law Firms

****520** For the plaintiff-appellant-cross-respondent the cause was argued by Marguerite M. Moeller, assistant attorney general, with whom on the briefs was Peggy A. Lautenschlager, attorney general.

For the defendant-respondent-cross-appellant there were briefs by Craig W. Albee and Glynn, Fitzgerald, Albee & Strang, S.C., Milwaukee, and oral argument by Craig W. Albee.

Opinion

¶ 1 JON P. WILCOX, J.

***271** This case comes before us on a petition to bypass the court of appeals pursuant to Wis. Stat. § (Rule) 809.60 (2005–06). The State of Wisconsin appealed an order of the Kenosha County Circuit Court, Bruce E. Schroeder, Judge, denying the ***272** admissibility of Julie Jensen's (Julie) letter to the police and her voicemail message and other oral statements to Officer Ron Kosman ****521** (Kosman). The defendant, Mark D. Jensen (Jensen), cross-appealed the same order of the circuit court denying his motion to exclude statements Julie made to her neighbor, Tadeusz Wojt (Wojt), and her son's teacher, Theresa DeFazio (DeFazio).

¶ 2 We affirm the order of the circuit court as to its initial rulings on the admissibility of the various statements under *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). That is, the statements Julie made to Kosman, including the letter, are "testimonial," while the statements Julie made to Wojt and DeFazio are "nontestimonial." However, we reverse the circuit court's decision as to the applicability of the forfeiture by wrongdoing doctrine. Today, we explicitly adopt this doctrine whereby a defendant is deemed to have lost the right to object on confrontation grounds to the admissibility of out-of-court statements of a declarant whose unavailability the defendant has caused. As such, the case must be remanded to the circuit court for a determination of whether, by a preponderance

of the evidence, Jensen caused Julie's unavailability, thereby forfeiting his right to confrontation.

I

¶ 3 A criminal complaint charging Jensen with first-degree intentional homicide in the December 3, 1998, poisoning death of his wife was filed in Kenosha County on March 19, 2002.

¶ 4 At Jensen's preliminary hearing conducted on April 23, 2002, and May 8, 2002, before the Honorable Carl M. Greco, Court Commissioner, the State ***273** presented testimony from several witnesses including Wojt, Kosman, and Detective Paul Ratzburg (Ratzburg).

¶ 5 Wojt testified that just prior to Julie's death, she gave him an envelope and told him that if anything happened to her, Wojt should give the envelope to the police. Wojt also stated that during the three weeks prior to Julie's death, she was upset and scared, and she feared that Jensen was trying to poison her or inject her with something because Jensen was trying to get her to drink wine and she found syringes in a drawer. Julie also allegedly told him that she did not think she would make it through one particular weekend because she had found suspicious notes written by her husband and computer pages about poisoning.

¶ 6 Kosman testified that he received two voicemails approximately two weeks prior to Julie's death. Julie told Kosman in the second voicemail that she thought Jensen was trying to kill her, and she asked him to call her back. Kosman returned Julie's call and subsequently went to her home to talk with her. Julie told Kosman that she saw strange writings on Jensen's day planner, and she said Jensen was looking at strange material on the Internet.[1] Julie also informed Kosman that she had photographed part of his day planner and gave the pictures, along with a letter, to a neighbor (Wojt). Julie then retrieved the picture, but not the letter from the neighbor, and gave it to Kosman telling him if she were found dead, that she did not commit suicide, and Jensen was her first suspect. Kosman also testified that in August or September of 1998, Julie told ***274** him it had become very "cold" in the residence and that Jensen was not as affectionate as he used to be. She claimed that when Jensen came home from work, he would immediately go to the computer.

****522** ¶ 7 Finally, Ratzburg testified at the preliminary hearing that on the day after Julie's death, he received a sealed envelope from Wojt. The envelope contained a handwritten letter,[2] addressed to "Pleasant Prairie Police Department, Ron Kosman or Detective Ratzenburg" and bearing Julie's signature that read as follows:

> I took this picture [and] am writing this on Saturday 11–21–98 at 7AM. This "list" was in my husband's business daily planner—not meant for me to see, I don't know what it means, but if anything happens to me, he would be my first suspect. Our relationship has deteriorated to the polite superficial. I know he's never forgiven me for the brief affair I had with that creep seven years ago. Mark lives for work [and] the kids; he's an avid surfer of the Internet....
>
> > Anyway—I do not smoke or drink. My mother was an alcoholic, so I limit my drinking to one or two a week. Mark wants me to drink more—with him in the evenings. I don't. I would never take my life because of my kids—they are everything to me! I regularly take Tylenol [and] multi-vitamins; occasionally take OTC stuff for colds, Zantac, or Immodium; have one prescription for migraine tablets, which Mark use[s] more than I.
> >
> > I pray I'm wrong [and] nothing happens ... but I am suspicious of Mark's suspicious behaviors [and] fear for my early demise. However, I will not leave David [and] Douglas. My life's greatest love, accomplishment and wish: "My 3 D's"—Daddy (Mark), David [and] Douglas.

***275** ¶ 8 Following the preliminary hearing, Jensen was bound over for trial, and an information charging Jensen with first-degree intentional homicide was filed. Jensen subsequently entered a plea of not guilty at his arraignment on June 19, 2002.

¶ 9 Among the pretrial motions Jensen filed were motions challenging the admissibility of the letter received by Ratzburg and the oral statements Julie allegedly made to Wojt and Kosman. Jensen also challenged the admissibility of oral statements Julie purportedly made to her physician, Dr. Richard Borman (Borman), and her son's teacher, DeFazio.[3] These motions were extensively briefed and argued before the court. The circuit court evaluated each of Julie's disputed statements independently to determine its admissibility under the hearsay rules and the then-governing test of *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). The court ruled that most, but not all, of the statements were admissible. Julie's entire in-person statements to Kosman

****523** and the letter sent to Ratzburg were admitted in their entirety. ***276** The State conceded the voicemails were inadmissible hearsay.

¶ 10 On May 24, 2004, Jensen moved for reconsideration on the admissibility of Julie's statements in light of the United States Supreme Court's ruling in *Crawford,* 541 U.S. 36, 124 S.Ct. 1354. After a hearing on the motion, the circuit court orally announced its decision on June 7, 2004, and concluded that Julie's letter and voicemails were testimonial and therefore inadmissible under *Crawford.* The court rejected the State's argument that the statements were admissible under the doctrine of forfeiture by wrongdoing. The court also determined that Julie's statements to Wojt and DeFazio were nontestimonial, and therefore, the statements were not excluded. On August 4, 2004, the circuit court issued a written order memorializing its oral rulings.

¶ 11 The State appealed the court's ruling with respect to Julie's letter and her voicemail message to Kosman.[4] Jensen subsequently cross-appealed the ruling that the statements of Wojt and DeFazio were not excluded. After the State and Jensen had filed opening briefs in the court of appeals, the State filed a petition to bypass, which Jensen did not oppose. We granted the petition.

II

¶ 12 Reduced to their essence, the appeal and cross-appeal concern the circuit court's determinations on the testimonial or nontestimonial nature of various ***277** statements of Julie's that the State seeks to introduce.[5] "ALTHOUGH A CIRCUIT court's decision to admit evidence is ordinarily a matter for the court's discretion, whether the admission of evidence violates a defendant's right to confrontation is a question of law subject to independent appellate review." *State v. Williams,* 2002 WI 58, 253 Wis.2d 99, ¶ 7, 644 N.W.2d 919 (citing *State v. Ballos,* 230 Wis.2d 495, 504, 602 N.W.2d 117 (Ct.App.1999)). For purposes of that review, the appellate court must accept the circuit court's findings of fact unless they are clearly erroneous. *State v. Jackson,* 216 Wis.2d 646, 575 N.W.2d 475 (1998).

III

¶ 13 " 'The Confrontation Clause of the United States and Wisconsin Constitutions guarantee criminal defendants the right to confront witnesses against them.' " *State v. Manuel,* 2005 WI 75, ¶ 36, 281 Wis.2d 554, 697 N.W.2d 811 (quoting *State v. Hale,* 2005 WI 7, ¶ 43, 277 Wis.2d 593, 691 N.W.2d 637); U.S. Const. amend. VI;[6] ***278** Wis. Const. art. I, § 7.[7] We generally apply ****524** United States Supreme Court precedents when interpreting these clauses. *Hale,* 277 Wis.2d 593, ¶ 43, 691 N.W.2d 637.

¶ 14 In 2004 the U.S. Supreme Court fundamentally changed the Confrontation Clause analysis in *Crawford,* 541 U.S. 36, 124 S.Ct. 1354. Michael Crawford was charged and convicted of assault and attempted murder for stabbing a man, who allegedly tried to rape Crawford's wife, Sylvia. *Id.* at 38, 124 S.Ct. 1354. At trial, the State played for the jury Sylvia's tape-recorded statement to the police describing the stabbing. *Id.* Sylvia did not testify at trial due to Washington's marital privilege; the privilege, however, did not extend to a spouse's out-of-court statements admissible under a hearsay exception. *Id.* at 40, 124 S.Ct. 1354. Crawford contended that this procedure violated his rights under the Confrontation Clause. *Id.* Relying on *Roberts,* the trial court concluded that the admission of Sylvia's statement was constitutionally permissible. *Id.* Under *Roberts,* when an out-of-court declarant is unavailable, his or her statement is admissible if it bears an adequate indicia of reliability, which could be satisfied if the statement fell within a firmly rooted hearsay exception or bore particularized guarantees of trustworthiness. *Roberts,* 448 U.S. at 66, 100 S.Ct. 2531. The circuit court admitted the statement on the latter ground, and Crawford was convicted. *Crawford,* 541 U.S. at 40–41, 124 S.Ct. 1354. The Washington Court of Appeals reversed, and the Washington Supreme Court then reinstated the conviction. *Id.* at 41–42, 124 S.Ct. 1354.

¶ 15 On certiorari, the U.S. Supreme Court determined that Crawford's constitutional right to confrontation was violated, and his conviction was reversed. ***279** *Id.* at 68–69, 124 S.Ct. 1354. Justice Scalia, writing for the majority, announced a major shift in Confrontation Clause jurisprudence away from the *Roberts* reliability standard:

> Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence, much less to amorphous notions of "reliability." ... To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It

> commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.

Id. at 61, 124 S.Ct. 1354. The Court determined that the Confrontation Clause bars admission of an out-of-court-testimonial statement unless the declarant is unavailable and the defendant has had a prior opportunity to examine the declarant with respect to the statement. *Id.* at 68–69, 124 S.Ct. 1354. The *Roberts* test remains when nontestimonial statements are at issue. *See Manuel,* 281 Wis.2d 554, ¶¶ 54–55, 697 N.W.2d 811; *Crawford,* 541 U.S. at 68, 124 S.Ct. 1354.

¶ 16 The Court, unfortunately, did not spell out a comprehensive definition of what "testimonial" means. What we do know is that "[w]hatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Crawford,* 541 U.S. at 68, 124 S.Ct. 1354. The Court also noted that "testimony" is typically a " 'solemn declaration or affirmation made for the purpose of establishing or proving some fact.' " *Id.* at 51, 124 S.Ct. 1354 (quoting *An American Dictionary of the English Language* (1828)). "An accuser who makes a formal statement to government officers bears testimony in a sense ***280** ****525** that a person who makes a casual remark to an acquaintance does not." *Id.*

¶ 17 The Court mentioned various formulations that had been proposed to define the "core class of 'testimonial' statements" but did not choose among these formulations. *Id.* at 51–52, 124 S.Ct. 1354. In the Court's words, these formulations "all share a common nucleus and then define the Clause's coverage at various levels of abstraction around it." *Id.* at 52, 124 S.Ct. 1354:

> [E]x parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.
>
> ....
>
> [E]xtrajudicial statements ... contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.
>
> ....
>
> [S]tatements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Id. at 51–52, 124 S.Ct. 1354.

¶ 18 This court subsequently adopted all three of the *Crawford* formulations, and reserved for another day whether these formulations or perhaps a different formulation would become the rule. *Manuel,* 281 Wis.2d 554, ¶ 39, 697 N.W.2d 811. Applying this third formulation in *Manuel,* we concluded that a witness's statements to his girlfriend, Anna Rhodes (Rhodes), were nontestimonial. ***281** Derrick Stamps (Stamps), the witness, told Rhodes that Manuel had shot the victim. *Id.,* ¶ 9. When Stamps was subsequently taken into custody, Rhodes informed police that Manuel had shot the victim. *Id.* At trial, the State sought to introduce the statements Stamps made to Rhodes that incriminated Manuel. However, Stamps refused to testify, so the State was forced to admit the statements through the arresting officer. *Id.,* ¶ 13. Manuel argued this violated his right to confrontation. *Id.,* ¶ 35. We reasoned that statements " 'made to loved ones or acquaintances ... are not the kind of memorialized, judicial-process-created evidence of which *Crawford* speaks.' " *Id.,* ¶ 53 (quoting *United States v. Manfre,* 368 F.3d 832, 838 n. 1 (8th Cir.2004)). Moreover, we reasoned that Stamps' girlfriend was not a government agent, and there was no reason to believe that Stamps expected his girlfriend to report to the police what he told her. *Id.* (citing *People v. Cervantes,* 118 Cal.App.4th 162, 12 Cal.Rptr.3d 774, 783 (2004)). Because the conversation was private with no eye towards litigation, we determined the statements were nontestimonial and thus subject to *Roberts* to determine whether there was a Confrontation Clause violation. *Id.,* ¶¶ 53, 60.

¶ 19 In deciding subsequent cases involving the Confrontation Clause, the U.S. Supreme Court retained its position from *Crawford* that it would not define the term "nontestimonial" beyond the three formulations of the classes of testimonial statements. *Davis v. Washington,* 547 U.S. 813, ——, 126 S.Ct. 2266, 2273, 165 L.Ed.2d 224 (2006)(also deciding *Hammon v. Indiana*). The Court did find it necessary to slightly expand its previous discussion of what constitutes testimonial statements to resolve the cases presented, which involved police interrogations. It held as follows: "Statements are nontestimonial when made in the course of police interrogation under circumstances ***282** objectively indicating that the primary purpose of the interrogation is to enable police ****526** assistance to meet an ongoing emergency." *Id.* at 2273.

¶ 20 In deciding this case, we are again left with the three formations of testimonial statements from *Crawford.* Like *Manuel,* only the third formulation listed above is applicable to the statements at issue in this case, as there was no ex parte in-court statements or extrajudicial statements made in formalized testimonial materials. For the reasons that follow, we hold that under the third *Crawford* formulation and the facts and circumstances of this case, the circuit court properly concluded, as a matter of law, that Julie's statements to the police and the letter are testimonial and Julie's statements to her neighbor, Wojt, and her son's teacher, DeFazio, are nontestimonial.

¶ 21 Generally stated, the State argues that in determining whether a statement was "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" what matters is the expectation of a reasonable person in the declarant's position rather than the subjective purpose of the particular declarant. The State further contends that government involvement in creating a statement is an indispensable feature of a testimonial statement. Alternatively, Jensen's basic thrust is that testimonial statements need not be elicited by the police, and accusatory statements directed to the police are testimonial.

¶ 22 The parties' opposing positions represent the standard schools of thought of *Crawford's* intended breadth and scope of testimonial statements. *See State v. Davis,* 364 S.C. 364, 613 S.E.2d 760, 767–68 (App.2005). The narrow definition championed by Professor Akhil Reed Amar suggests that the Confrontation Clause ***283** " 'encompasses only those "witnesses" who testify either by taking the stand in person or via government-prepared affidavits, deposition, videotapes, and the like.' " *Id.* at 767 (quoting A. Amar, *Confrontation Clause First Principles: A Reply to Professor Friedman,* 86 Geo. L.J. 1045 (1998)). Amar's focus is "what was the common understanding of being a witness against someone during the Founding Era[,]" and he contends that *Crawford* is implicated only when the circumstances surrounding the statement are formal. *Id.*

¶ 23 The broader definition is championed by Professor Richard Friedman. Under this school of thought, " 'a declarant should be deemed to be acting as a witness when she makes a statement if she anticipates that the statement will be used in the prosecution or investigation of a crime.' " *Id.* (quoting Richard D. Friedman, *Confrontation: The Search for Basic Principles,* 86 Geo. L.J. 1011, 1040–43 (1998)).

¶ 24 We note that there is support for the proposition that the hallmark of testimonial statements is whether they are made at the request or suggestion of the police. *See State v. Barnes,* 854 A.2d 208, 211 (Me.2004). In our view, however, the Sixth Circuit's decision in *United States v. Cromer,* 389 F.3d 662 (6th Cir.2004), aptly describes why such an inquiry is insufficient under *Crawford:*

> Indeed, the danger to a defendant might well be greater if the statement introduced at trial, without a right of confrontation, is a statement volunteered to police rather than a statement elicited through formalized police interrogation. One can imagine the temptation that someone who bears a grudge might have to volunteer to police, truthfully or not, information of the commission of a crime, especially when that person is assured he will not be subject to confrontation.... If ***284** the judicial system ****527** only requires cross-examination when someone has formally served as a witness against a defendant, then witnesses and those who deal with them will have every incentive to ensure that testimony is given informally. The proper inquiry, then, is whether the declarant intends to bear testimony against the accused. That intent, in turn, may be determined by querying whether a reasonable person in the declarant's position would anticipate his statement being used against the accused in investigating and prosecuting the crime.

Id. at 675. Thus, we believe a broad definition of testimonial is required to guarantee that the right to confrontation is preserved. That is, we do not agree with the State's position that the government needs to be involved in the creation of the statement.[8] We believe such a narrow definition of testimonial could create situations where a declarant could nefariously incriminate a defendant.

***285** ¶ 25 The State cites to *United States v. Summers,* 414 F.3d 1287 (10th Cir.2005), for its contention that the subjective purpose of the declarant is not important to the analysis. However, this is not a correct interpretation of the *Summers* decision. The Tenth Circuit concluded that "the 'common nucleus' present in the formulations which the Court considered centers on the *reasonable expectations of the declarant.*" *Id.* at 1302 (emphasis added) (citation omitted). The Tenth Circuit rejected the narrow approach argued in this case by the State, and held that "an objective test focusing on the reasonable expectations of the declarant under

the circumstances of the case more adequately safeguards the accused's confrontation right and more closely reflects the concerns underpinning the Sixth Amendment." *Id.* (citing *Confrontation: The Search for Basic Principles, supra,* at 1040–43). In other words, "a statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime." *Id.*[9]

¶ 26 With these considerations in mind, we turn to the facts and circumstances of this case. We begin first with the statements Julie made in her letter. The circuit court concluded that the letter was testimonial as it had no apparent purpose other than to "bear testimony" and Julie intended it exclusively for accusatory and prosecutorial purposes. Furthermore, the circuit court stated, "I can't imagine ****528** any other purpose in ***286** sending a letter to the police that is to be opened only in the event of her death other than to make an accusatory statement given the contents of this particular letter." Indeed, the letter even referred to Jensen as a " suspect."

¶ 27 In light of the standard set out above, we conclude that under the circumstances, a reasonable person in Julie's position would anticipate a letter addressed to the police and accusing another of murder would be available for use at a later trial. The content and the circumstances surrounding the letter make it very clear that Julie intended the letter to be used to further investigate or aid in prosecution in the event of her death. Rather than being addressed to a casual acquaintance or friend, the letter was purposely directed toward law enforcement agents. The letter also describes Jensen's alleged activities and conduct in a way that clearly implicates Jensen if "anything happens" to her.

¶ 28 Furthermore, the State insists that the letter is nontestimonial because it was created before any crime had been committed so there was no expectation that the letter would potentially be available for use at a later trial. However, under the standard we adopt here it does not matter if a crime has already been committed or not. The focus of the inquiry is whether a "reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime." *Id.* We conclude that the letter clearly fits within this rubric.

¶ 29 Perhaps most tellingly, Julie's letter also resembles Lord Cobham's letter implicating Sir Walter Raleigh of treason as discussed in *Crawford,* 541 U.S. at 44, 124 S.Ct. 1354. At Raleigh's trial, a prior examination and letter of Cobham implicating Raleigh in treason were read to the ***287** jury. *Id.* Raleigh demanded that Cobham be called to appear, but he was refused. *Id.* The jury ultimately convicted Raleigh and sentenced him to death. *Id.* In the Supreme Court's view, it was these types of practices that the Confrontation Clause sought to eliminate. *Id.* at 50, 124 S.Ct. 1354. While Julie's letter is not of a formal nature as Cobham's letter was, it still is testimonial in nature as it clearly implicates Jensen in her murder. If we were to conclude that her letter was nontestimonial, we would be allowing accusers the right to make statements clearly intended for prosecutorial purposes without ever having to worry about being cross-examined or confronted by the accused. We firmly believe *Crawford* and the Confrontation Clause do not support such a result.

¶ 30 For many of the same reasons, we also determine that the voicemails to Kosman are testimonial.[10] The crux of Julie's message was that Jensen had been acting strangely and leaving himself notes Julie had photographed and that she wanted to speak with Kosman in person because she was afraid Jensen was recording her phone conversations. Again, the circuit court determined that these statements served no other purpose than to bear testimony and were entirely for accusatory and prosecutorial purposes. Furthermore, Julie's voicemail was not made for emergency purposes or to escape from a perceived danger. She instead sought to relay information in order to further the investigation of Jensen's activities. This distinction ***288** convinces us that the voicemails ****529** are testimonial. *See Pitts v. State,* 280 Ga. 288, 627 S.E.2d 17, 19 (2006) ("Where the primary purpose of the telephone call is to establish evidentiary facts, so that an objective person would recognize that the statement would be used in a future prosecution, then that phone call 'bears testimony' against the accused and implicates the concerns of the Confrontation Clause.").

¶ 31 Finally, we consider the statements Julie made to Wojt and DeFazio. Jensen argues that if the circumstances reveal that the declarant believed her statements to nongovernmental actors would be passed on to law enforcement officials, those statements are testimonial. While we reiterate that governmental involvement is not a necessary condition for testimonial statements, we conclude that under the circumstances of this case, Julie's statements to Wojt and DeFazio were nontestimonial. Essentially, we are not convinced that statements to a neighbor and a child's teacher, unlike the letter and voicemails—which were directly intended for the police—were made under circumstances

which would lead a reasonable person in the declarant's position to conclude these statements would be available for later use at a trial.

¶ 32 Our decision in *Manuel,* 281 Wis.2d 554, 697 N.W.2d 811, guides us to this conclusion. In *Manuel,* we determined that statements made to loved ones or acquaintances are not the memorialized type of statements that *Crawford* addressed. *Id.,* ¶ 53. Moreover, we determined that the witness's girlfriend was not a governmental agent, and there was no reason to believe the declarant expected his girlfriend to report to the police what he told her. *Id.* Here, Julie confided in Wojt and DeFazio about the declining situation in the Jensen household ***289** and her statements are wholly consistent with the statements of a person in fear for her life. As one court put it, "when a declarant speaks with her neighbor across the backyard fence, she has much less of an expectation that the government will make prosecutorial use of those statements." *State v. Mizenko,* 330 Mont. 299, 127 P.3d 458 (2006); *see also Compan v. People,* 121 P.3d 876, 880–81 (Colo. 2005) (holding that victim's statement to an acquaintance made after an assault were nontestimonial).

¶ 33 In essence, we conclude that Julie's statements were informally made to her neighbor and her son's teacher and not under circumstances which would lead an objective witness to reasonably conclude they would be available at a later trial, and as such are nontestimonial. *See Crawford,* 541 U.S. at 51, 124 S.Ct. 1354 ("An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.").[11]

¶ 34 In sum, under *Crawford,* we conclude that Julie's letter and voicemail messages are testimonial, while her statements to Wojt and DeFazio are nontestimonial. We now turn to a discussion of the State's argument regarding the forfeiture by wrongdoing doctrine.

IV

¶ 35 Essentially, the forfeiture by wrongdoing doctrine states that an accused can have no complaint based on the right to confrontation about the use ***290** against him or her of a declarant's statement if it was the accused's wrongful conduct ****530** that prevented any cross-examination of the declarant. In this case, the State argues that Julie's statements, even if testimonial, should be admitted if the State can prove, by a preponderance of the evidence, that Jensen murdered his wife. For support of this argument, the State contends we look no further than *Crawford.*

¶ 36 As discussed in *Crawford,* the right of confrontation is "most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding. As the English authorities [ ] reveal, the common law in 1791 conditioned admissibility of an absent witness's examination on unavailability and a prior opportunity to cross-examine." *Crawford,* 541 U.S. at 54, 124 S.Ct. 1354. The Court recognized that there may have been some exceptions to the general rule of exclusion of hearsay evidence, but "there is scant evidence that exceptions were invoked to admit *testimonial* statements against the accused in a *criminal* case." *Id.* at 56, 124 S.Ct. 1354. Here, the Court noted that one such deviation was for dying declarations; however, *Crawford* did not decide whether the Sixth Amendment incorporated such an exception for testimonial dying declarations. Instead, the Court stated that "[i]f this exception must be accepted on historical grounds, it is sui generis." *Id.* at 56 n. 6, 124 S.Ct. 1354.

¶ 37 After this discussion of historical exceptions to the Confrontation Clause, the Court turned its focus to the abrogation of the *Roberts* analysis to testimonial statements. In this discussion, the Court made the following statement:

> The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere ***291** judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one. In this respect, it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability. *See Reynolds v. United States,* 98 U.S. 145, 158–59 [25 L.Ed. 244] (187[8]).

Id. at 62, 124 S.Ct. 1354.

¶ 38 *Reynolds* was one of the first federal decisions to elaborate on the forfeiture by wrongdoing doctrine. In *Reynolds,* the defendant, George Reynolds, claimed that his right to confront a witness was violated when the lower court admitted into evidence testimony that was given at a former trial for the same offense with the same parties but under another indictment. *Reynolds,* 98 U.S. at 153. The witness, who was the alleged second wife of the accused, testified

at a former trial against Reynolds. *Id.* at 160. At the former trial, the accused was present during her testimony and given the full opportunity to cross-examine the witness. *Id.* at 161. Prior to and after the commencement of the second trial, an officer attempted to deliver a subpoena to the witness but was unsuccessful on three separate occasions. *Id.* at 159–60. The trial court subsequently ruled that the witness's previous testimony could be admitted at trial because Reynolds did not refute that he had been instrumental in concealing or keeping the witness away. *Id.* at 160.

¶ 39 The *Reynolds* Court began its analysis with the following:

> ***292** The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against ****531** him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

Id. at 158. In other words, while the Constitution does grant a privilege of confronting ones accusers, that privilege is lost if the accused causes the witness's unavailability at trial.

¶ 40 Since the *Reynolds* decision, the Court has continued to acknowledge the concept that a defendant can forfeit through misconduct his or her confrontation rights.[12] *See, e.g., Diaz v. United States,* 223 U.S. 442, 451–53, 32 S.Ct. 250, 56 L.Ed. 500 (1912) (holding that a defendant waives[13] right ***293** to object to a hearsay statement on confrontation grounds when he or she offers the statement); *Snyder v. Massachusetts,* 291 U.S. 97, 106, 54 S.Ct. 330, 78 L.Ed. 674 (1934) *overruled by Malloy v. Hogan,* 378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964) (holding that defendant was permissibly excluded from going to view the scene of the crime as part of his trial. In dicta, Justice Cardozo stated that, " [n]o doubt the privilege [afforded by the Sixth Amendment] may be lost by consent or at times even by misconduct"); and *Illinois v. Allen,* 397 U.S. 337, 343, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970) (holding that a defendant can lose his right to be present at trial, if after a warning by the judge, he continues his disruptive behavior).

¶ 41 The Eighth Circuit appears to be the first federal court to apply the forfeiture doctrine to a situation where the defendant had no prior opportunity to cross-examine the witness. *See United States v. Carlson,* 547 F.2d 1346 (8th Cir.1976), *cert. denied,* 431 U.S. 914, 97 S.Ct. 2174, 53 L.Ed.2d 224 (1977). *Carlson* held that the defendant waived his right to confrontation when he intimidated a witness into not testifying at trial; therefore the admission of the witness's prior grand jury testimony was permissible. *Id.* at 1360.

****532** ¶ 42 The *Carlson* court first noted that "[t]he Sixth Amendment does not stand as a shield to protect the accused from his own misconduct or chicanery." ***294** *Id.* at 1359 (citing *Diaz,* 223 U.S. at 458, 32 S.Ct. 250; *Reynolds,* 98 U.S. at 159). The court acknowledged the distinction between its case and *Reynolds,* in that Reynolds was afforded the opportunity to cross-examine the witness at the time the former testimony was recorded. *Id.* at 1359 n. 12. Carlson, however, was never afforded such an opportunity. *Id.* In the Eighth Circuit's view, "[t]o that extent, this case presents a more difficult question than *Reynolds*. However, by focusing on the defendant's conduct ... there is a similarity and we are guided by the precept articulated in *Reynolds* that 'no one shall be permitted to take advantage of his own wrong.' " *Id.* (quoting *Reynolds,* 98 U.S. at 159). Ultimately, the court believed that permitting the defendant to " profit from such conduct would be contrary to public policy, common sense and the underlying purpose of the confrontation clause." *Id.* at 1359. However, the court did not go so far as to say that all extrajudicial statements may be admitted. *Id.* at 1360 n. 14. Earlier in its opinion, the Eighth Circuit concluded that the witness's grand jury testimony was admissible hearsay pursuant to the residual exception of the Federal Rules of Evidence. *Id.* at 1353–55. In other words, the court determined that Carlson's right to confrontation was forfeited by misconduct and the disputed statement was admissible under the residual hearsay exception.

¶ 43 Subsequent to *Carlson* and a host of other cases from various federal and state jurisdictions, the forfeiture by wrongdoing doctrine was codified in 1997 in the Federal Rules of Evidence as a hearsay exception. Fed.R.Evid. 804(b)(6). This rule reads as follows:

> Rule 804. Hearsay Exceptions; Declarant Unavailable
>
> ....

> ***295** (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> ....
>
> (6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the decedent as a witness.

Fed.R.Evid. 804(b)(6). The Advisory Committee on Rules enacted such a rule because it believed there was a need for "a prophylactic rule to deal with abhorrent behavior 'which strikes at the heart of the system of justice itself.' " Notes of Advisory Committee on Rules—1997 Amendments to Federal Rules of Evidence (quoting *United States v. Mastrangelo,* 693 F.2d 269, 273 (2d Cir.1982), *cert. denied,* 467 U.S. 1204, 104 S.Ct. 2385, 81 L.Ed.2d 343 (1984)). Furthermore, the Committee recognized that "[e]very circuit that has resolved the question has recognized the principle of forfeiture by misconduct, although the tests for determining whether there is forfeiture have varied." *Id.* (list of cited cases omitted).

¶ 44 One notable example of a post-Fed. R. Evid. 804(b)(6) decision is *United States v. Emery,* 186 F.3d 921 (8th Cir.1999). In *Emery,* the court concluded that the defendant forfeited his right to confrontation under *Carlson,* 547 F.2d 1346, and further he forfeited his right to object on hearsay grounds under Fed.R.Evid. 804(b)(6). Emery asserted that the admission of hearsay statements of a federal informant he was charged with murdering violated his right to confrontation. *Id.* at 926. Emery argued that the principles of the forfeiture by wrongdoing doctrine as stated in Fed.R.Evid. 804(b)(6) "should apply ****533** only in a trial on the underlying crimes about which he feared [the informant] would ***296** testify, not in a trial for murdering her." *Id.* The *Emery* court concluded the following:

> We believe that both the plain meaning of Fed.R.Evid. 804(b)(6) and the manifest object of the principles just outlined mandate a different result. The rule contains no limitation on the subject matter of the statements that it exempts from the prohibition on hearsay evidence. Instead, it establishes the general proposition that a defendant may not benefit from his or her wrongful prevention of future testimony from a witness or potential witness. Accepting Mr. Emery's position would allow him to do just that.

Id. Thus, the court held that Emery forfeited his right to object on both confrontation and hearsay grounds.

¶ 45 Since the release of *Crawford,* many jurisdictions have either adopted the forfeiture by wrongdoing doctrine if they had not done so before, or they have expanded the doctrine to encompass more testimonial statements. For example, in *State v. Meeks,* 277 Kan. 609, 88 P.3d 789 (2004), the defendant, Meeks, shot Green during a fight in the street. *Id.* at 791. The first officer on the scene asked Green who shot him, and he responded, "Meeks shot me." *Id.* at 792. This statement was later admitted at trial, and after Meeks was convicted, he argued on appeal his right to confrontation had been violated when the trial court admitted the statement because the statement lacked adequate indicia of reliability. *Id.* at 792–93.

¶ 46 The Kansas Supreme Court, citing to *Reynolds,* held that a defendant forfeits his right to confrontation, and waives any hearsay objections if the witness's absence was due to the defendant's wrongdoing. *Id.* at 794. The *Meeks* court fully recognized that the underlying crime and the crime by which Meeks rendered the witness unavailable were the same, but ***297** the court concluded this was immaterial to the analysis. For support, *Meeks* quoted an amicus brief of *Crawford* authored by a number of law professors and ultimately concluded the following:

> "If the trial court determines as a threshold matter that the reason the victim cannot testify at trial is that the accused murdered her, then the accused should be deemed to have forfeited the confrontation right, *even though the act with which the accused is charged is the same as the one by which he allegedly rendered the witness unavailable.*"

Id. at 794 (citing Richard D. Friedman, *Confrontation and the Definition of Chutzpa,* 31 Israel L.Rev. 506 (1997) [hereinafter *Chutzpa*]).

¶ 47 Indeed, Professor Friedman, a renowned expert on Confrontation Clause law, was one of the first to argue for a broad forfeiture by wrongdoing doctrine. In *Chutzpa,* Professor Friedman argued that identity between the victim and the declarant should not have any bearing on whether to apply what he phrased as the "reflexive forfeiture principle." *Chutzpa, supra,* at 521.

> I do not believe [ ] that this identity presents a reason not to apply the forfeiture principle. The identity should not distract us from the importance of deciding the evidentiary predicate. If the predicate is true, then ... the defendant's

> inability to confront the declarant is attributable to his own misconduct. And if that is true, the defendant should not be able to keep the declarant's statement out of evidence by a claim of the confrontation right. A court should not decline to decide the predicate question, for evidentiary purposes, simply because the same question must also be decided ****534** in making the bottom-line determination of guilt.

Id. at 522.

***298** ¶ 48 After *Crawford* was released, Friedman again reiterated his view on the forfeiture by wrongdoing doctrine in an article exploring the meaning of "testimonial" statements. *See* Richard D. Friedman, *Grappling with the Meaning of "Testimonial",* 71 Brook. L.Rev. 241 (2005). In discussing whether a crime has to already have been committed in order for a statement to be considered testimonial, Friedman gave the following example: " Not necessarily: here I have in mind the cases in which an eventual murder victim, fearing her assailant, tells a confidante information to be used in the event that he does in fact assault her and render her unable to testify.... Again, forfeiture is probable in this situation." *Id.* at 250 n. 27.

¶ 49 Other post-*Crawford* decisions also aid our analysis.[14] One of the most persuasive for our purposes is *United States v. Garcia–Meza,* 403 F.3d 364 (6th Cir.2005). In that case, Garcia–Meza was on trial for the first-degree murder of his wife, Kathleen. *Id.* at 367. Five months prior to her murder, Garcia–Meza had assaulted Kathleen, and the district court permitted the government to introduce testimony from the investigating officers about what Kathleen told them. *Id.* at 369. After his conviction, Garcia–Meza argued that admission of this evidence violated his Confrontation Clause rights. *Id.*

***299** ¶ 50 Without deciding whether Kathleen's statements were testimonial or not, the Sixth Circuit determined that Garcia–Meza had forfeited his right to confront Kathleen because his wrongdoing was responsible for her unavailability. *Id.* at 370 (citing *Crawford,* 541 U.S. 36, 124 S.Ct. 1354; *Reynolds,* 98 U.S. 145, 25 L.Ed. 244). After noting that it was undisputed that Garcia–Meza killed his wife,[15] the Sixth Circuit dispelled the notion that in order for the forfeiture by wrongdoing doctrine to apply, Garcia–Meza had to commit the murder with the specific intent to prevent her from testifying:

> There is no requirement that a defendant who prevents a witness from testifying against him through his own wrongdoing only forfeits his right to confront the witness where, in procuring the witness's unavailability, he intended to prevent the witness from testifying. Though the Federal Rules of Evidence may contain such a requirement, the right secured by the Sixth Amendment does not depend on, in the recent words of the Supreme Court, "the vagaries of the Rules of Evidence." The Supreme Court's recent affirmation of the "essentially equitable grounds" for the rule of forfeiture strongly suggests that the rule's applicability does not hinge on the wrongdoer's motive. The Defendant, regardless of whether he intended to prevent the witness from testifying against him or not, would benefit through his own wrongdoing if such a witness's statements could not be used against him, which the rule of forfeiture, ****535** based on principles of equity, does not permit.

Id. at 370–71 (internal citations omitted).

***300** ¶ 51 The general timeline of events in *Garcia–Meza* and this case are substantially similar. Specifically, in *Garcia–Meza* the events of the case played out as follows: (1) the declarant gave a statement; (2) the defendant commits a crime rendering the declarant unavailable; (3) the defendant is charged with the declarant's death; and (4) the government seeks to introduce the declarant's prior statement. The difference between these cases is that there was no dispute in *Garcia–Meza* that the defendant was responsible for the declarant's unavailability. However, we do not believe that this distinction means the forfeiture by wrongdoing doctrine cannot apply. If the circuit court determines, in a pre-trial decision by the court, that Jensen caused his wife's unavailability, then the forfeiture by wrongdoing doctrine applies to Jensen's confrontation rights, and otherwise testimonial evidence may be admitted.

¶ 52 In essence, we believe that in a post-*Crawford* world the broad view of forfeiture by wrongdoing espoused by Friedman and utilized by various jurisdictions since *Crawford's* release is essential. In other words, after "[n]oting the broad embrace of the doctrine" by courts nationwide and "recognizing the compelling public policy interests behind its enactment," *Commonwealth v. Edwards,* 444 Mass. 526, 830 N.E.2d 158, 165 (2005), we elect to adopt the forfeiture by wrongdoing doctrine in Wisconsin.

V

¶ 53 Having concluded the forfeiture by wrongdoing doctrine is appropriate in Confrontation Clause cases, we now analyze

the appropriate standard of review for the circuit court to apply on remand.

***301** ¶ 54 As Justice Prosser noted in his concurrence in *Hale,* most jurisdictions require proof of the defendant's wrongdoing by a preponderance of the evidence. *Hale,* 277 Wis.2d 593, ¶ 96, 691 N.W.2d 637 (Prosser, J., concurring) (citing *Emery,* 186 F.3d at 927; *United States v. White,* 116 F.3d 903, 912 (D.C.Cir.1997); *United States v. Houlihan,* 92 F.3d 1271, 1280 (1st Cir.1996); *Steele v. Taylor,* 684 F.2d 1193, 1201 (6th Cir.1982); *United States v. Rivera,* 292 F.Supp.2d 827, 831 (E.D.Va.2003); *State v. Hallum,* 606 N.W.2d 351, 355–56 (Iowa 2000)). *See also Edwards,* 830 N.E.2d at 172 nn. 24, 25 (collecting cases). A few courts, however, use the "clear and convincing evidence" standard of proof. *Hale,* 277 Wis.2d 593, ¶ 96, 691 N.W.2d 637 (citing *United States v. Thevis,* 665 F.2d 616, 631 (5th Cir.1982); *People v. Giles,* 19 Cal.Rptr.3d 843, 848 (Cal.Ct.App.2004)).

¶ 55 Citing to Professor Friedman's view, Jensen argues that "given the importance of the confrontation right, the court should not hold that the accused has forfeited it unless the court is persuaded to a rather high degree of probability that the accused has rendered the declarant unavailable." *Chutzpa, supra,* at 519. In other words, Jensen argues that given the seriousness of the charges against him and given the presumption that he is innocent until proven guilty, a higher standard of clear and convincing evidence should be used.

¶ 56 As noted by one court, "[r]equiring the court to decide by a preponderance of the evidence the very question for which the defendant is on trial may seem, at first glance, troublesome." *United States v. Mayhew,* 380 F.Supp.2d 961, 967 (S.D.Ohio 2005). For the following reasons, however, the *Mayhew* court, like the jurisdictions cited in the *Hale* concurrence, concluded that equitable considerations ****536** demand such a result. The court based its conclusion on the "equitable principles ***302** outlined in *Crawford,* the jury's ignorance of the court's threshold evidentiary determination, and the analogous evidentiary paradigm of conspiracy." *Id.* at 968. On this last point, *Mayhew* aptly describes the similarity between conspiracy and the application of the forfeiture by wrongdoing doctrine and why the idea of "bootstrapping" should not be worrisome to us:

> For example, statements offered against a defendant to prove his participation in a charged conspiracy are admissible if the court first finds, by a preponderance of the evidence, that the conspiracy for which defendant is on trial existed. *Bourjaily v. United States,* 483 U.S. 171, 175–76 [107 S.Ct. 2775, 97 L.Ed.2d 144] (1987).... The same principle applies to the forfeiture doctrine when the court makes a preliminary determination as to whether the defendant committed the crime for which he is [ ] charged. *See Emery,* 186 F.3d at 926 (basing its approach to the forfeiture doctrine on the co-conspirator cases, noting "the functional similarity of the questions involved ...."); *see also White,* 116 F.3d at 912 ("[T]he forfeiture finding is the functional equivalent of the predicate factual finding that a court must make before admitting hearsay under the co-conspirator exception.").

Id. We agree with the reasoning of *Mayhew,* and the multitude of other jurisdictions and adopt a preponderance of the evidence standard.[16]

¶ 57 In short, we adopt a broad forfeiture by wrongdoing doctrine, and conclude that if the State can ***303** prove by a preponderance of the evidence that the accused caused the absence of the witness, the forfeiture by wrongdoing doctrine will apply to the confrontation rights of the defendant.

VI

¶ 58 To conclude, we affirm the order of the circuit court as to its initial rulings on the admissibility of the various statements under *Crawford,* 541 U.S. 36, 124 S.Ct. 1354. That is, the statements Julie made to Kosman, including the letter, are testimonial, while the statements Julie made to Wojt and DeFazio are nontestimonial. However, we reverse the circuit court's decision as to the applicability of the forfeiture by wrongdoing doctrine. Today, we explicitly adopt this doctrine whereby a defendant is deemed to have lost the right to object on confrontation grounds to the admissibility of out-of-court statements of a declarant whose unavailability the defendant has caused. As such, the cause must be remanded to the circuit court for a determination of whether, by a preponderance of the evidence, Jensen caused Julie's unavailability, thereby forfeiting his right to confrontation.

The order of the circuit court is affirmed in part; reversed in part; and the cause is remanded.

¶ 59 LOUIS B. BUTLER, JR., J. (concurring in part, dissenting in part).

The Confrontation Clause of the Sixth Amendment to the United States Constitution provides: "In *all* criminal

prosecutions, *the accused shall enjoy the right ... to be confronted with the witnesses against him* " (emphasis added). ***304** ****537** Article I, section 7 of the Wisconsin Constitution similarly provides: "In *all* criminal prosecutions the accused shall enjoy the right ... to meet the witnesses face to face" (emphasis added).[1] THE OPERATIVE WORD in each of these constitutional provisions is the word "all". Neither provision creates a homicide exception to the constitutional guarantee of confrontation. Yet, the majority's misconception of the doctrine of forfeiture by wrongdoing does precisely that, defeating the confrontation guarantee contained within the state and federal constitutions. Moreover, the majority fails to properly apply the recent decision of *Davis v. Washington,* 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), in ascertaining whether statements made to certain witnesses in this case are testimonial or nontestimonial. Accordingly, I respectfully concur in part, and dissent in part.

I

¶ 60 At issue in this case are numerous statements made by the homicide victim, Julie Jensen (Julie), to her neighbor, Tadeusz Wojt (Wojt), police officer Ron Kosman (Kosman), her physician, Dr. Richard Borman (Borman), and her son's teacher, Theresa DeFazio (DeFazio), as well as a letter she wrote to Detective Paul Ratzburg (Ratzburg). The circuit court on September 4, 2003, reviewed over 100 statements made by Julie and evaluated the reliability of these statements using the balancing test established in *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). The court ruled that parts of many of her statements were not excluded, while other parts were excluded. The court also reserved its ruling with respect to some of the statements ***305** until the trial, and reserved the right to reverse itself based on how the evidence was offered at trial. In addition, Julie's in-person statements to Kosman and her letter to Ratzburg were admitted in their entirety.

¶ 61 Mark Jensen (Jensen), the defendant, moved for reconsideration on the admissibility of Julie's statements in light of the United States Supreme Court ruling in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). After a hearing, the circuit court concluded that Julie's letter to Ratzburg and voicemail messages to Kosman were testimonial and therefore inadmissible under *Crawford.* The circuit court also determined that Julie's statements to Wojt and DeFazio were nontestimonial, and, therefore, the court's prior rulings on the admissibility of such statements remained in effect.

¶ 62 The majority concludes that the statements that Julie Jensen made to Kosman prior to her death and the statements made by her in her letter to Ratzburg constitute testimonial evidence, while the statements she made to Wojt and DeFazio constitute nontestimonial evidence.[2] Majority op., ¶ 2. The majority concludes that the court's initial determination to admit the nontestimonial evidence was proper. Majority op., ¶ 58. As to the testimonial evidence, however, the majority adopts a broad forfeiture by wrongdoing doctrine and remands the case to the circuit court ****538** to determine whether the State can prove, by a preponderance of the evidence, that Mr. Jensen caused the unavailability of his wife. *Id.*

***306** ¶ 63 I disagree that all of the statements made by Julie to Wojt and to DeFazio are nontestimonial. I do agree with the majority that this court should adopt the doctrine of forfeiture by wrongdoing, and that, under a proper application of the doctrine, the burden be placed upon the State to establish the doctrine's applicability by a preponderance of the evidence. Because I conclude, contrary to the majority, that the forfeiture doctrine should be applied (1) where the defendant caused the absence of the witness *and* (2) did so for the purpose of preventing the witness from testifying, I respectfully dissent in part.

II

¶ 64 As noted previously, under the Sixth Amendment to the United States Constitution, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him [or her]." In order to properly interpret this right of confrontation, we must understand the original intent of the Framers in adopting the Sixth Amendment.

¶ 65 In *Crawford,* the United States Supreme Court examined the historical background that culminated in the creation of this Sixth Amendment right of confrontation. *Crawford,* 541 U.S. at 43, 124 S.Ct. 1354. The founding fathers' immediate source of the Confrontation Clause was English common law. *Id.* That common law tradition is one of live testimony in court subject to adversarial testing. *Id.*

¶ 66 The Court explained that in the 16th and 17th centuries, witnesses' statements against an accused could be read to the

jury, and the accused was offered no opportunity to cross-examine his or her accuser. In reaction to some of these cases, "English law ***307** developed a right of confrontation that limited these abuses." *Id.* at 44, 124 S.Ct. 1354. First, courts developed relatively strict rules of unavailability. *Id.* at 44–45, 124 S.Ct. 1354. Second, "[o]ne recurring question was whether the admissibility of an unavailable witness's pretrial examination depended on whether the defendant had had an opportunity to cross-examine him." *Id.* at 45, 124 S.Ct. 1354. For example, in 1696 the Court of King's Bench ruled that "even though a witness was dead, his examination was not admissible where 'the defendant not being present when [it was] taken before the mayor ... had lost the benefit of a cross-examination.' " *Id.* (quoting *King v. Paine,* 5 Mod. 163, 165, 87 Eng. Rep. 584, 585 (1696)). By the mid–1700s, the right of an accused to confront any witness against the accused was firmly rooted in English common law, and the right of confrontation was included in declarations of rights adopted by at least eight of the original colonies. *Id.* at 48, 124 S.Ct. 1354. This right was ultimately included in the Sixth Amendment to the United States Constitution. *Id.* at 48–49, 124 S.Ct. 1354. Indeed, several American authorities flatly rejected any special status that would allow for the admissibility of statements made to a coroner absent cross-examination. *Id.* at 47 n. 2, 124 S.Ct. 1354.

¶ 67 The *Crawford* court also reviewed the first judicial interpretations of the Confrontation Clause because these cases "shed light upon the original understanding of the common-law rule." *Id.* at 49, 124 S.Ct. 1354. For example, the court in *State v. Webb* concluded "that depositions could be read against an accused only if they were taken in [the defendant's] presence." *Id.* (citing *State v. Webb,* 2 N.C. 103 (Super. L. & Equ. 1794)). Similarly, in *State v. Campbell,* South Carolina excluded the deposition of a deceased witness ****539** because the deposition was taken in the absence of the accused. *Id.* (quoting *State v. Campbell,* 30 S.C.L. 124 (App.L.1844)). That court concluded:

> ***308** [N]otwithstanding the death of the witness, and whatever the respectability of the court taking the depositions, the solemnity of the occasion and the weight of the testimony, such depositions are ex parte, and, therefore, utterly incompetent.

Id. (quoting *Campbell,* 30 S.C.L. 124).

¶ 68 The court in *Crawford* concluded that the history of the Confrontation Clause supports two inferences. *Id.* at 50, 124 S.Ct. 1354. First, the principal purpose of the Confrontation Clause was to exclude the use of ex parte examinations as evidence against the accused. *Id.* Second, "the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial unless he [or she] was unavailable to testify, *and the defendant had had a prior opportunity for cross-examination.*" *Id.* at 53–54, 124 S.Ct. 1354 (emphasis added). The *Crawford* court emphasized that this right of confrontation under the Sixth Amendment "is most naturally read as a reference to the right of confrontation at common law, *admitting only those exceptions established at the time of the founding.*"[3] *Id.* at 54, 124 S.Ct. 1354 (citations omitted) (emphasis added). Moreover, the United States Supreme Court has recently reaffirmed its reliance on this narrow, historical interpretation of the Confrontation Clause as described in *Crawford. Davis,* 126 S.Ct. at 2274 n. 1.

¶ 69 Based on this historical approach, the court in *Crawford* explicitly rejected the admission of otherwise inadmissible testimonial evidence based on the reliability test established in *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).[4]

> ***309** This [Roberts] test departs from the historical principles identified above in two respects. First, it is too broad: It applies the same mode of analysis whether or not the hearsay consists of ex parte testimony. This often results in close constitutional scrutiny in cases that are far removed from the core concerns of the Clause. At the same time, however, the test is too narrow: It admits statements that do consist of ex parte testimony upon a mere finding of reliability. This malleable standard often fails to protect against paradigmatic confrontation violations.
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> ....
>
> ... Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.
>
> ....
>
> The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the

> constitutionally prescribed method of assessing ****540** reliability with a wholly foreign one.

Crawford, 541 U.S. at 60–62, 124 S.Ct. 1354.

¶ 70 The court recognized that although there existed exceptions to the general rule of exclusion, "there is scant evidence that exceptions were invoked to admit *testimonial* statements against the accused in a ***310** *criminal* case." *Crawford,* 541 U.S. at 56, 124 S.Ct. 1354 (emphasis in original). The *Crawford* court explained that this historical context suggests that the requirement of a prior opportunity for cross-examination was "dispositive, and not merely one of several ways to establish reliability." *Id.* at 55–56, 124 S.Ct. 1354. The *Crawford* court unequivocally concluded:

> Our cases have thus remained faithful to the Framers' understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.

Id. at 59, 124 S.Ct. 1354 (footnote omitted).

III

¶ 71 Testimonial statements cause the declarant to be a "witness" within the meaning of the Confrontation Clause. *Davis,* 126 S.Ct. at 2273. The court in *Crawford* did discuss a historical dictionary definition of "testimony." *Crawford,* 541 U.S. at 51, 124 S.Ct. 1354. The court noted that the dictionary defined "testimony" as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* (quoting 2 N. Webster, *An American Dictionary of the English Language* (1828)). Relying on this definition of "testimony," the *Crawford* court concluded that "testimony" constitutes "[a]n accuser who makes a formal statement to government officers [and] bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Id.* The *Crawford* court, however, declined to spell out a comprehensive definition of "testimonial."[5] *Crawford,* 541 U.S. at 68, 124 S.Ct. 1354.

***311** ¶ 72 In *Davis,* the United States Supreme Court recently shed some additional light on the difference between testimonial and nontestimonial evidence, in the limited context of police questioning:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis, 126 S.Ct. at 2273–74.

¶ 73 The Court in the *Davis* matter concluded that the declarant was speaking to the police officer about events as they were actually happening, rather than describing past events about an ongoing emergency, and that consequently the ****541** statements in question were not testimonial. *Id.* at 2276–77. The court later clarified that the police officer's interrogation of the witness in the *Hammon*[6] matter was testimonial because it was clear that the interrogation was part of ***312** an investigation of past criminal events and that there was "no emergency in progress." *Id.* at 2278.

¶ 74 The court noted that this description was in the context of interrogations because the cases they were examining involved interrogations. The court explicitly recognized that simply because a statement is made in the absence of any interrogation does not necessarily mean the statement is nontestimonial. "The Framers were no more willing to exempt from cross-examination *volunteered testimony* or answers to open-ended questions than they were to exempt answers to detailed interrogation." *Id.* at 2274 n. 1 (emphasis added). It is with the above constitutional principles in mind that I examine the statements to Wojt and DeFazio.

A

¶ 75 I begin with the statements allegedly made by Julie Jensen to Tadeusz Wojt. During the week of November 9, 1998, Julie Jensen told Mr. Wojt that she was upset because her marriage was in trouble, that she and the defendant argued about everything, that she suspected that the defendant was having an affair, and talked about a number of marital problems between the two of them. Similarly, Julie had conversations with Malgorzata Wojt on December 1 and 2, 1998, that were about day care and school, Julie getting a job, Julie's doctor appointment, some medicine she took, and the defendant being good to her. Because the "primary purpose" of these conversations between Julie and the Wojts was not "to establish or prove past events potentially relevant to later criminal prosecution[,]" I agree with the majority that the statements made during the ***313** week of November 9, and

on December 1 and December 2, 1998, were nontestimonial. *See* majority op., ¶¶ 31–33.

¶ 76 The majority's analysis does not hold true for the remainder of the statements made by Julie to Mr. Wojt. On November 21, 1998, Julie told Wojt that the defendant was going to poison her. She described past events that would be potentially relevant to a criminal prosecution, including the defendant leaving syringes in a drawer and looking up something on the computer having to do with poison, and her finding notes written by him which had to do with poison. Wojt told her to call the police.

¶ 77 The very next day, Julie gave Wojt an envelope with instructions to give it to the police if anything happened to her. She also gave him a roll of undeveloped film, indicating that these were photographs of things the defendant would look up or note referencing poisoning. Earlier that day, she told Wojt that the defendant was trying to pressure her to eat or drink, and that he would become angry when she refused. She told Wojt that she called the police, but that they were not available. She did not sleep that night, and did not think she would live out the weekend.

¶ 78 On November 24, 1998, she asked Wojt to return the roll of film to her, as she was going to give it to the police. She repeated her fears to Wojt between November 24 and November 28, 1998, and to Ms. Wojt on November 29, 1998.

****542** ¶ 79 Clearly, the primary purpose of each of these conversations was to establish or prove past events potentially relevant to a later criminal prosecution, that of Julie's husband, the defendant. Indeed, as to the purpose of the statements, the circuit court recognized as much when it wrote: "Mrs. Jensen's statements to ***314** the Wojts ... could be viewed as remarks which were intended for the ears of the police, when viewed in conjunction with the conversations which she had with Officer Kossman." The reason that the circuit court rejected that conclusion was twofold.

¶ 80 First, the circuit court's decision of August 4, 2004, was based in part upon the fact that the United States Supreme Court "did not adopt in *Crawford* the argument that 'testimonial statements' include any 'statements that were made in circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " Based on our decision in *State v. Manuel,* 2005 WI 75, ¶ 3, 281 Wis.2d 554, 697 N.W.2d 811, we now know that the circuit court's conclusion was in error, as Wisconsin subsequently adopted that standard for testimonial evidence.

¶ 81 Second, in ruling on the evidence that would be available to the jury, the circuit court believed it would have to abandon neutrality and embrace the theme offered by the defendant that Mrs. Jensen's motives were suicidal and malicious. Yet, the circuit court recognized that Julie's statements could have been motivated by those purposes, as well as driven by many other considerations. The standard for determining whether evidence is testimonial is its potential relevance to a later prosecution. Given that the circuit court acknowledged that multiple purposes could be deduced from the proffer of evidence, and based its ruling on an erroneous view of the law, I would conclude that the statements in question meet the requisite standard for "testimonial."

¶ 82 The statements were also relevant to establish or prove past events that were potentially relevant to the prosecution of the defendant. The syringes had ***315** already been left in the drawer. The notes about poisoning had already been made by the defendant. She had already viewed the computer in relation to poisoning. She had already taken pictures of a number of these items. He had already tried to pressure her to eat or drink. As she indicated to Wojt when she gave him the envelope to give to the police, she wanted the police to have that information should anything happen to her. It is obviously relevant to the defendant's prosecution, or the State would not attempt to use it. And it was expressly her purpose to identify her killer should anything happen to her. These statements, given by Julie to the Wojts, were simply as testimonial as they come. I respectfully disagree with the majority's conclusion to the contrary.

B

¶ 83 Whether the statements made by Julie to DeFazio are testimonial presents a tougher question. After reviewing the statements from November 25 and December 2, 1998, made by Julie to DeFazio, I conclude that the majority is correct in its determination that these statements are nontestimonial in nature. *See* majority op., ¶¶ 31–33. While these statements reflect, in part, past events potentially relevant to later prosecution, it cannot be seriously argued that Julie's purpose when making these statements was to establish or prove those past events.

IV

¶ 84 The right of confrontation is not absolute. The *Crawford* court explicitly recognized that one exception to the inadmissibility ****543** of testimonial evidence under the Confrontation Clause is the forfeiture by ***316** wrongdoing exception. *Crawford,* 541 U.S. at 62, 124 S.Ct. 1354. That exception "is most naturally read as a reference to the right of confrontation at common law, *admitting only those exceptions established at the time of the founding.*" *Id.* at 54, 124 S.Ct. 1354 (citations omitted) (emphasis added).

¶ 85 The *Crawford* court relied on *Reynolds v. United States,* 98 U.S. 145, 25 L.Ed. 244 (1879), in concluding that the rule of forfeiture by wrongdoing exception "extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability." *Id.* at 62, 124 S.Ct. 1354 (citing *Reynolds,* 98 U.S. at 158–159).

¶ 86 In *Reynolds,* the United States Supreme Court discussed the application of the forfeiture by wrongdoing rule to the Confrontation Clause:

> The Constitution gives the accused the right to a trial at which he should be confronted with the witnesses against him; but if a witness is absent by his own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away. The Constitution does not guarantee an accused person against the legitimate consequences of his own wrongful acts. It grants him the privilege of being confronted with the witnesses against him; but if he voluntarily keeps the witnesses away, he cannot insist on his privilege. If, therefore, when absent by his procurement, their evidence is supplied in some lawful way, he is in no condition to assert that his constitutional rights have been violated.

Reynolds, 98 U.S. at 158. *Reynolds,* in turn, relied on *Lord Morley's Case,* from 1666, in which the House of Lords held:

> [I]n case oath should be made that any witness, who had been examined by the coroner and was then absent, *was detained by the means or procurement of the* ***317** *prisoner,* and the opinion of the judges asked whether such examination might be read, we should answer, that if their lordships were satisfied by the evidence they had heard that the witness was detained by means or procurement of the prisoner, then the examination might be read; but whether he was detained by means or procurement of the prisoner was matter of fact, of which we were not the judges, but their lordships.

Id. at 158 (emphasis added).

¶ 87 The court in *Reynolds* also noted that in *Regina v. Scaife* (17 Ad. & El. N.S. 242), a unanimous court determined that "if the prisoner had resorted to a contrivance to keep a witness out of the way, the deposition of the witness, taken before a magistrate and in the presence of the prisoner, might be read." *Id.*

¶ 88 The *Reynolds* court explained that the forfeiture by wrongdoing rule "has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong." *Id.* at 159. Applying this principle to the facts before the court, where the witness had testified at a prior trial and the defendant had full opportunity of cross-examination, the court in *Reynolds* held the testimony admissible, explaining that

> [t]he accused ... had full opportunity to account for the absence of the witness, if he would, or to deny under oath that he had kept her away. Clearly, enough had been proven to cast the burden upon him of showing that he had not been instrumental in concealing or keeping the witness away.

Id. at 160.[7]

****544** ***318** ¶ 89 The United States Supreme Court again reaffirmed the forfeiture exception in *Davis,* stating "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." *Davis v. Washington,* 126 S.Ct. at 2280. The *Davis* court reasoned: " [W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce." *Id.* The Court took no position on the standards necessary to justify application of the doctrine of forfeiture by wrongdoing, although it did cite Federal Rule of Evidence 804(b)(6) as codifying the doctrine, and that under the federal rule, the government has generally been held to the preponderance-of-the-evidence standard. *Id.* The Court also noted that state courts tend to follow the same practice as the federal rule. *Id.*

***319** ¶ 90 At common law, the forfeiture doctrine was applied in situations where the defendant's wrongful acts were committed with the purpose of preventing a witness from testifying, *see* Hon. Paul W. Grimm and Professor Jerome E. Diese, Jr., *Hearsay, Confrontation, and Forfeiture by Wrongdoing: Crawford v. Washington, a Reassessment*

of the Confrontation Clause, 35 U. Balt. Law Forum 5, 32–33 (2004), and most modern courts have held to this rule. *See e.g. United States v. Houlihan,* 92 F.3d 1271, 1278 (1st Cir.1996); *United States v. Lentz,* 282 F.Supp.2d 399, 426 (E.D.Va.2002). In other words, the forfeiture exception has been applied when an accused has made a witness unavailable, *and when the accused's intent was to deny that witness's presence at the trial.*

¶ 91 Federal Rule of Evidence 804(b)(4), adopted in 1997, even goes so far as to codify this requirement as an element of the Rule. It states that if the declarant is unavailable as a witness, the hearsay rule does not apply to any "statement offered against a party that has engaged or acquiesced in wrongdoing that *was intended to*, and did, procure the unavailability of the declarant as a witness" (emphasis added). *See, e.g., United States v. Dhinsa,* 243 F.3d 635, 654 (2d Cir.2001) (requiring that the government prove "the defendant (or party against whom the out-of-court statement is offered) acted with the intent of procuring the declarant's unavailability as an actual or potential witness" for a statement to be admitted under the forfeiture by wrongdoing doctrine) (citations omitted); *State v. Alvarez–Lopez,* 136 N.M. 309, 314, 98 P.3d 699 (2004) ("The elements that must be shown for ****545** Rule 804(b)(6) to apply are: (1) the declarant was expected to be a witness; (2) the declarant became unavailable; (3) the defendant's misconduct caused the unavailability of the ***320** declarant; and (4) the defendant intended by his misconduct to prevent the declarant from testifying.") (citations omitted). A defendant that is put on trial for murder cannot be deemed to have killed that person with the intent to deny that person's presence at the witness's own murder trial, unless a preponderance of the evidence establishes that the defendant in fact possessed the intent to keep the witness from testifying.[8]

¶ 92 The majority's discussion of *United States v. Emery,* 186 F.3d 921 (8th Cir.1999) is illustrative. Majority op., ¶ 44. In *Emery,* the court concluded that the defendant forfeited his right to confrontation where he murdered a federal informant to keep the informant from testifying in another trial. *Id.* at 926. The court declined to accept his argument that the forfeiture doctrine should only be applied where the defendant procured the absence of the witness is the same case the witness was to testify in, as opposed to a subsequent homicide trial. *Id.*

¶ 93 The majority relies on recent cases from other jurisdictions that adopt the broad forfeiture doctrine the majority seeks to employ in this case. Majority op., ¶¶ 45–52. That doctrine is based on a newly created "reflexive forfeiture principle" first advocated by Professor Richard D. Friedman, in ***321** *Confrontation and the Definition of Chutzpa,* 31 Israel L.Rev. 506 (1997) (hereinafter *Chutzpa*).[9] By doing so, however, the majority abandons the substantive doctrine that was adopted by the founders in favor of a far more expansive doctrine not contemplated by the founders or by the Sixth Amendment, contrary to Justice Scalia's admonition.[10] *Crawford,* 541 U.S. at 54, 124 S.Ct. 1354 (explaining that the right of confrontation under the Sixth Amendment "is most naturally read as a reference to the right of confrontation at common law, *admitting only those exceptions established at the* ****546** *time of the founding* ") (citations omitted) (emphasis added). The Sixth Amendment to the United States Constitution does not ***322** state that, "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him [or her], *except in homicide cases.*" While other courts may feel free to disregard the very principles upon which the Confrontation Clause rests, our decision must be limited by the Constitution and the United States Supreme Court decisions interpreting it, i.e., *Reynolds, Crawford* and *Davis.*

¶ 94 In *Crawford,* Justice Scalia wrote that "[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty." *Crawford,* 541 U.S. at 62, 124 S.Ct. 1354. In a similar vein, applying the forfeiture doctrine to admit testimonial evidence when the defendant is on trial for the crime that rendered the witness unavailable, absent any showing that the defendant's purpose was to procure the absence of the witness to keep him or her from testifying at trial, places the cart before the horse.

¶ 95 The circuit court got it right when it noted that the broad forfeiture doctrine advocated by the State, which the majority now adopts, would render superfluous the doctrine of dying declarations. *See generally* Michael J. Polelle, *The Death of Dying Declarations in a Post–Crawford World,* 2006 Mo. L.Rev. 285. The circuit court discerned that both doctrines coexisted at common law at the time the Constitution was ratified. Thus, the circuit court properly reasoned that a current application of the forfeiture doctrine may not do away with the dying declaration doctrine. To quote the circuit judge:

> If an accused forfeits or waives the right of cross-examination merely by killing the victim to "put her out of the way," then there would have been no reason for

the development of the Dying Declaration Rule, which ***323** contains the added requirement that the declarant's statement have been made "while believing that the declarant's death was imminent." The existence of the Dying Declaration Rule makes sense only in an evidentiary framework in which the mere fact that the defendant can be convincingly shown to the judge to have killed the declarant does not, by itself, justify exception to the requirements of the Confrontation Clause.

¶ 96 I have no objection to applying the forfeiture doctrine in a criminal trial. That doctrine does not, however, create a homicide exception to the Confrontation Clause. I would not adopt the broad forfeiture doctrine set forth by the majority in this case. I would remand this matter to the circuit court to apply the common law forfeiture doctrine, as it existed at the time that the Constitution was ratified. The majority's broad new rule, I conclude, is unconstitutional.

¶ 97 For the foregoing reasons, I respectfully concur in part and dissent in part.

All Citations

299 Wis.2d 267, 727 N.W.2d 518, 2007 WI 26

Footnotes

1 After Julie's death, police seized the computer in the Jensen's home and found that on various dates between October 15 and December 2, 2002, several websites related to poisoning were visited; including one entitled "Ethylene Glycol."

2 After comparing the letter to known writing samples from Julie, a document examiner with the State Crime Lab concluded that the letter was written by Julie.

3 The criminal complaint provides the following summary of DeFazio's conversations with Julie on November 25, 1998:

> [W]hen I coaxed her, she told me how she was afraid her husband was going to kill her last weekend. When I asked her why she thought such a serious thing was going to happen, she explained why. She had found a paper listing things to buy in her husband's stuff. She said it listed syringes and names of drugs on it. Then she said that she thought he might try to kill her with a drug overdose and make it look like a suicide. I asked her why she thought he would do this. She said that there were other things she couldn't explain. She also wondered aloud if the drugs were for himself, but she didn't ever see him taking drugs so she didn't think that was the reason for the list.... One other time she had mentioned that it bothered her how every time she walked into the room when her husband was on the computer, he always turned it off or covered it quickly. She asked him why once, but he said he was doing business stuff, and he was done.

4 The district attorney conceded that the statements Julie made to Kosman during a conversation on November 24, 1998, were testimonial. With respect to these statements, the State is arguing only that they are admissible under the forfeiture by wrongdoing doctrine, which is discussed in Section IV.

5 In *State v. Manuel,* 2005 WI 75, ¶ 60, 281 Wis.2d 554, 697 N.W.2d 811, this court held that nontestimonial statements still should be evaluated for Confrontation Clause purposes under the test of *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). The circuit court's findings under *Roberts* admitting some statements and excluding others were not reduced to a written order and they are not the subject of either the State's appeal or Jensen's cross-appeal.

6 The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him[.]"

7 Article I, Section 7 of the Wisconsin Constitution states that "[i]n all criminal prosecutions the accused shall enjoy the right ... to meet the witnesses face to face."

8 We note that recently in *State v. Hemphill,* 2005 WI App 248, 287 Wis.2d 600, 707 N.W.2d 313, the court of appeals held that a declarant's spontaneous statement to responding police officers implicating the defendants in a crime was deemed nontestimonial. The court reasoned, in part as follows:

> The statement made by [the declarant] in the instant case does not fall into any of the identified categories of "testimonial" statements. This was not a statement extracted by the police with the intent that it would be used later at trial. It was not an interrogation situation. [The declarant] offered the statement without any solicitation from police. It was a spontaneous statement made to a responding police officer. Like the foreign cases cited by the State in its brief, the [declarant's] statement was offered unsolicited by the victim or witness, and was not generated by the desire of the prosecution or police to seek evidence against a particular subject.

Id., ¶ 11. We do not read *Crawford* in such a restrictive light. Under the definition of testimonial adopted today we must overrule *Hemphill.*

9 As noted in *Summers,* other federal circuits have created similar standards. *United States v. Summers,* 414 F.3d 1287, 1302 n. 9 (10th Cir.2005) (citing *United States v. Cromer,* 389 F.3d 662 (6th Cir.2004); *United States v. Hendricks,* 395 F.3d 173 (3d Cir.2005); *United States v. Saget,* 377 F.3d 223 (2d Cir.2004)).

10 Additionally, although the circuit court considered whether the admission of the voicemails violated the Confrontation Clause under *Crawford,* the court already had excluded the voicemails as inadmissible hearsay. Thus, even if the voicemails are nontestimonial, they must still be excluded under *Roberts,* 448 U.S. 56, 100 S.Ct. 2531.

11 While we conclude that Julie's statements to Wojt and DeFazio were nontestimonial, this is not the same as concluding that they are admissible. When considering the admissibility of such evidence, the test from *Roberts,* 448 U.S. 56, 100 S.Ct. 2531, applies. *Manuel,* 281 Wis.2d 554, ¶ 60, 697 N.W.2d 811.

12 The forfeiture by wrongdoing doctrine did not arise related to the Court's holding in *Davis v. Washington,* 547 U.S. 813, ——, 126 S.Ct. 2266, 2273, 165 L.Ed.2d 224 (2006), but the Court addressed it because the States, and their amici, raised it as an issue. Seemingly as dicta, the Court stated the following: "We reiterate what we said in *Crawford* : that 'the rule of forfeiture by wrongdoing ... extinguishes confrontation claims on essentially equitable grounds.' That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." *Id.* at 2280 (quoting *Crawford v. Washington,* 541 U.S. 36, 62, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)) (citations omitted).

13 Although *Diaz v. United States,* 223 U.S. 442, 451–53, 32 S.Ct. 250, 56 L.Ed. 500 (1912), and other courts have used the term waiver in this context, we conclude the term forfeiture is more appropriate "because the phrase 'forfeiture by wrongdoing' better reflects the legal principles that underpin the doctrine." *Commonwealth v. Edwards,* 444 Mass. 526, 830 N.E.2d 158, 168 n. 16 (2005). That is, there is an important distinction between the concept of waiver and forfeiture. "Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right." *United States v. Goldberg,* 67 F.3d 1092, 1100 (3d Cir.1995).

14 Other cases in which courts have applied the forfeiture by wrongdoing doctrine to situations where the defendant is charged with the same homicide that rendered the declarant unavailable include the following: *People v. Moore,* 117 P.3d 1 (Colo.Ct.App.2004) (applying similar reasoning as *State v. Meeks,* 277 Kan. 609, 88 P.3d 789 (2004)); *Gonzalez v. State,* 155 S.W.3d 603 (Tex.App.2004) (same); and *United States v. Mayhew,* 380 F.Supp.2d 961 (S.D.Ohio 2005) (same).

15 Garcia–Meza's defense was that he did not have the necessary premeditation for first-degree murder because he was too intoxicated. *United States v. Garcia–Meza,* 403 F.3d 364, 367 (6th Cir.2005).

16 Related to the proper burden of proof, the Court in *Davis* stated the following: "We take no position on the standards necessary to demonstrate such forfeiture, but federal courts using Federal Rule of Evidence 804(b)(6), which codifies the forfeiture doctrine, have generally held the Government to the preponderance-of-the-evidence standard." *Davis,* 126 S.Ct. at 2280 (citations omitted).

1 As the majority notes, we generally apply United States Supreme Court precedents when interpreting these clauses. Majority op., ¶ 13.

2 I agree with and join that part of the majority opinion that concludes that the statements to Kosman and the letter to Ratzburg were testimonial. I do not discuss these statements further. I also agree that the statements made by Julie to DeFazio are nontestimonial, for reasons stated later in this opinion. At issue are the statements made by Julie to Wojt.

3 This principle has been totally abandoned by the majority in its adoption and application of a broad forfeiture by wrongdoing doctrine, as I will discuss later in this opinion.

4 We have previously recognized that Wisconsin follows the reliability standard established in *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), for evaluating the admissibility of nontestimonial evidence. *State v. Manuel,* 2005 WI 75, ¶ 3, 281 Wis.2d 554, 697 N.W.2d 811.

5 In Wisconsin, at a minimum, testimonial evidence includes ex parte in-court testimony or its functional equivalent (such as affidavits, custodial examinations, prior testimony not subject to cross-examination by the defendant, or similar pretrial statements declarants would reasonably expect to be used prosecutorially), extrajudicial statements contained in formalized testimonial materials (such as affidavits, depositions, prior testimony, or confessions), and statements made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. *Manuel,* 281 Wis.2d 554, ¶¶ 37, 39, 697 N.W.2d 811.

6 *Hammon v. Indiana,* 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006) (decided in the same opinion as *Davis v. Washington*).

7 The majority does not address the fact that the doctrine of forfeiture by wrongdoing at common law merely provided that "if a witness is kept away by the adverse party, his testimony, *taken on a former trial between the same parties*

upon the same issues, may be given in evidence." *Reynolds v. United States,* 98 U.S. 145, 158–59, 25 L.Ed. 244 (1879) (emphasis added). *See also* Adam Sleeter, *Injecting Fairness into the Doctrine of Forfeiture by Wrongdoing,* 83 Wash. U. Law Quarterly 1367, 1370–71. Thus, the historical rule was limited to where the witness was corruptly and wrongfully kept away, and the rule only allowed former trial evidence between the same parties upon the same issues to be admitted. This case does not involve former testimony at an earlier trial. In *Crawford v. Washington,* 541 U.S. 36, 54, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the court stated that it would recognize "*only those exceptions established at the time of the founding,*" which included the forfeiture doctrine (emphasis added). In *Davis v. Washington,* 547 U.S. 813, 126 S.Ct. 2266, 2280, 165 L.Ed.2d 224 (2006), the court then discussed, without adopting, the version of the doctrine codified in Federal Rule of Evidence 804(b)(6), which does not limit the doctrine to cases in which testimony was given at an earlier trial. Neither *Crawford* nor *Davis* answered whether the scope of the forfeiture by wrongdoing exception must be limited to that which was recognized at the founding.

8 The court in *Davis* took "no position on the standards necessary to demonstrate" forfeiture by wrongdoing, but recognized that federal courts, relying on the Federal Rules of Evidence § 804(b)(6) (codifying the forfeiture doctrine) "have generally held the Government to the preponderance-of-the-evidence standard." *Davis,* 126 S.Ct. at 2280. I accept that, for purposes of this opinion, the majority is not in error in adopting this standard. *See* majority op., ¶ 57.

9 Professor Friedman recognizes that reflexive application of the forfeiture doctrine is controversial, as well as "quite far-reaching." Richard D. Friedman, *Confrontation and the Definition of Chutzpa,* 31 Israel L.Rev. 506, 508 (1997) (hereinafter *Chutzpa*). The majority declines, however, to adopt Professor Friedman's recommendation that "the court should not hold that the accused has forfeited [the confrontation right] unless the court is persuaded to a rather high degree of probability that the accused has rendered the declarant unavailable[.]" *Id.* at 519.

10 Professor Friedman's far-reaching approach, if fully embraced by the majority, would clearly lead to nonsensical applications. For example, Friedman suggests that "[t]he prosecution should bear the burden of taking all reasonable steps to protect whatever aspects of confrontation are possible given the defendant's conduct, and of demonstrating that it has done so." *Chutzpa* at 525. Thus, under the reflexive forfeiture principle advocated by Friedman, once Julie left the voicemail to Officer Kosman that indicated that she thought Jensen was trying to kill her, the State had an obligation to notify Jensen that Julie made the statement, and give him an opportunity to cross-examine her by way of videotape or deposition. *Id.* For obvious reasons, the majority does not advance that view. Yet, this is the proper application of Professor Friedman's reflexive forfeiture doctrine adopted by the majority in this case.

United States Code Annotated
Constitution of the United States
Annotated
Amendment VI. Jury Trial for Crimes, and Procedural Rights (Refs & Annos)

U.S.C.A. Const. Amend. VI-Jury Trials

Amendment VI. Jury trials for crimes, and procedural rights [Text & Notes of Decisions subdivisions I to XXII]

Currentness

<Notes of Decisions for this amendment are displayed in multiple documents.>

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Notes of Decisions (5897)

U.S.C.A. Const. Amend. VI-Jury Trials, USCA CONST Amend. VI-Jury Trials
Current through PL 117-17 with the exception of PL 116-283, Div. A, Title XVIII, which takes effect January 1, 2022.

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