STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT II

Case No. 2009AP898-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MARK D. JENSEN,

Defendant-Appellant.

ON APPEAL FROM A JUDGMENT OF CONVICTION ENTERED IN KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE BRUCE E. SCHROEDER, PRESIDING

BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

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ISSUES PRESENTED FOR REVIEW

1. Were Julie Jensen's letter to the police and her oral statements to Officer Kosman admissible under the doctrine of forfeiture by wrongdoing adopted by the United States Supreme Court in *Giles v. California* because one of Mark Jensen's reasons for killing Julie was to prevent her from invoking the judicial system by initiating divorce and child custody proceedings against him, thereby satisfying the intent element of *Giles*?

The trial court did not address this question because when it found that Jensen by killing his wife had forfeited the right to confront her, the court did so under the version of forfeiture by wrongdoing ("FBW") the Wisconsin Supreme Court had adopted in Jensen's pretrial appeal, and that version lacks an intent element.

2. Alternatively, should this court remand to the trial court to determine this issue?

This question was not raised below.

3. Assuming this court answers the first two questions "no," was the admission of Julie Jensen's letter to police and her testimonial statements to Officer Kosman harmless error?

This question was not raised below.

4. By failing to raise it below, has Jensen waived the argument that his right to a fair trial was violated when the judge who found Jensen had forfeited his right to confront the victim presided at his murder trial? Alternatively, did Judge Schroeder's pretrial finding that the State had proved by a preponderance of the evidence that Jensen killed Julie render the judge biased against Jensen?

These questions were not raised below.

5. Did the trial court erroneously exercise its discretion when it allowed the State to present evidence that Jensen, during the years preceding his wife's death, had repeatedly and surreptitiously placed pornographic photos on and around their property to punish Julie Jensen for a brief extramarital affair?

The trial court ruled that this evidence was admissible to prove one of Jensen's motives for killing his wife, i.e., his bitterness toward her and his need to punish her for the affair.

6. Relatedly, did the trial court erroneously exercise its discretion in admitting evidence of Jensen's sex talk with Kelly Jensen, including a discussion of the size of her former lovers' penises, to show that Jensen searched the home computer for "John Jock Joseph" in October 1998 and that he was the source of the photos left around the Jensen home?

The trial court admitted the evidence.

7. Did the trial court erroneously exercise its discretion in admitting testimony that penis photos were found on Jensen's home computer in 1998 and his work computer in 2002, to establish that Jensen was the person who had left pornographic photos around the family home for years?

The trial court admitted the evidence.

8. Assuming Jensen killed his wife in part to prevent her from initiating family court proceedings, did he thereby forfeit any hearsay objections to the admission of her testimonial statements?

This question was not raised below.

9. By killing his wife, did Jensen forfeit any hearsay objections to the admission of her nontestimonial statements to other witnesses, regardless of his motivation in killing her?

The trial court said yes.

10. Was the seizure and search of Jensen's home computer a valid consent search?

The trial court said yes.

11. Should this court grant Jensen a new trial in the interest of justice?

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Although Jensen provides no reason for requesting oral argument, the State joins in his request because argument would allow the parties to focus their attention on issues the court may find troubling or in need of additional development, a situation likely to arise given the sheer volume of the record and the number of issues raised on appeal. The State also requests oral argument because due to the word-count limitation established in this court's order of December 14, 2009,[1] the State's brief is not as comprehensive as it could be in addressing each of the issues Jensen has raised on appeal. Oral argument would allow the State to articulate its position in more detail.

If this court orders oral argument, the State respectfully requests that the court specify the issues it would like the parties to address. The State also suggests that the court consider enlarging the time allotted for oral argument from the typical thirty minutes per side to a longer period, the precise time dependent on the number of issues targeted.

The State requests publication of the court's decision if it addresses the contours of forfeiture by wrongdoing under *Giles v. California*, 128 S. Ct. 2678 (2008), or if the court determines whether the version of forfeiture by wrongdoing adopted in *State v. Jensen*, 2007 WI 26, 299 Wis. 2d 267, 727 N.W.2d 518, still applies to nontestimonial statements.

[1]The State had requested permission to file a brief of 23,000 words; this court allowed it to file a brief of no more than 17,960 words.

ARGUMENT

I. JULIE JENSEN'S LETTER AND HER TESTIMONIAL STATEMENTS TO OFFICER KOSMAN ARE ADMISSIBLE UNDER *GILES*'S VERSION OF FORFEITURE BY WRONGDOING BECAUSE ONE REASON JENSEN KILLED HIS WIFE WAS TO PREVENT HER TESTIMONY IN ANY FAMILY COURT PROCEEDING.

The trial court used the version of FBW adopted in *Jensen*, 299 Wis. 2d 267, in deciding that Jensen had forfeited his right to confront Julie (*see* 317:36). Thus, the court had only to find by a preponderance of the evidence that Jensen caused Julie's absence, not that he did so for any particular reason.

Later, the Supreme Court in *Giles*, 128 S. Ct. at 2684-88, effectively overruled *Jensen* with respect to Julie's testimonial statements, holding that a defendant forfeits his confrontation right only when acting with intent to prevent the witness from testifying.

Jensen assumes that because the State did not prove he killed Julie to prevent her from testifying at his murder trial, admitting her letter and statements to Officer Kosman[2] was error under *Giles* and entitles him to a new

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[2]"Statements to Officer Kosman" include only Julie's voicemail messages and statements made during a November 24, 1998 conversation. These are the only statements Jensen discusses in argument I.

This court is bound by the supreme court's determination that the voicemails are testimonial, *see* 299 Wis. 2d 267, ¶30. As for Julie's November 24, 1998 statements, the prosecutor had conceded such statements were testimonial. *Id.* at ¶ 11 n.4. Even absent this concession, the court's ruling regarding the voicemails would apply equally to the in-person statements. Thus, the State will not now withdraw from that concession.

trial. He argues that our supreme court's adoption of a version of FBW *Giles* later repudiated necessarily means Julie's testimonial statements were inadmissible, and then attempts to show why their admission was not harmless. He also challenges the trial court's spontaneous conclusion that Julie's letter was a dying declaration (*id.* at 27-32).[3]

The State will demonstrate below that, even post-*Giles*, Jensen forfeited his right to confront Julie's testimonial statements because the evidence shows one reason he killed her was to prevent her from being a witness in a family court proceeding. Alternatively, the State will argue that this court should order the trial court to determine whether the State can make the showing *Giles* requires.

But even if this court rejects those arguments, Argument II. shows why any error in admitting the challenged evidence was harmless beyond a reasonable doubt.

A. Post-*Giles*, proof that one reason Jensen killed Julie was to prevent her from testifying in a family court action is sufficient for forfeiture.

Early on, the State in addressing the implications of *Crawford v. Washington*, 541 U.S. 316 (2004), wrote that one reason Jensen killed Julie was "to avoid any litigation surrounding a divorce or a custody dispute involving their two children" (89:13). Observing that the murder "was very carefully planned," the State argued that Jensen

[3]The State will not argue that the letter was a dying declaration because it believes the theory for admissibility advanced herein is stronger and, unlike the dying-declaration theory, not subject to a potential waiver bar. However, this court could still adopt the trial court's thoughtful rationale for admitting the letter as a dying declaration. *See* 358:123-31; A-Ap. 102-10; 363:3-23; R-Ap. 116-36.

wanted to eliminate Julie so he could "pursue his relationship with Kelly LaBonte, maintain his relationship with his children and *avoid the financial sacrifices associated with divorce in this marital property state*" (*id.*; emphasis added).

The prosecutor pursued this theory – that Jensen killed Julie so he could unite with Kelly without experiencing a divorce or the loss of child custody – through closing argument. *See* 359:59.

The question post-*Giles* is whether this motive for murder – preventing a declarant from seeking a divorce and/or child custody – supports a determination that the defendant forfeited his right to confront the declarant in a trial for her murder. For reasons discussed below, the answer is yes.

1. Cases applying Fed. R. Evid. 804(b)(6) support this position.

In arguing that *Giles*'s version of FBW is satisfied by evidence that Jensen's intent in killing Julie was to prevent her from using the legal system, the State will rely partially on cases applying Fed. R. Evid. 804(b)(6). Such reliance is appropriate, given the Supreme Court's statement that this rule "'codifies the forfeiture doctrine.'" *Davis v. Washington*, 547 U.S. 813, 833 (2006), *quoted in Giles*, 128 S. Ct. at 2687. Although not binding, cases interpreting the federal rule provide guidance on construing the intent element of forfeiture post-*Giles*.

Jensen espouses the narrow view that the proceeding at which the State seeks to admit an absent declarant's statements must be the same proceeding at which the defendant intended to prevent the declarant's testimony. But that narrow view is contrary to cases applying Rule 804(b)(6) and its state counterparts pre- and post-*Giles* and is also contrary to *Giles* itself.

Pre-*Giles*, *United States v. Dhinsa*, 243 F.3d 635, 652-53 (2d Cir. 2001), held that Rule 804(b)(6) applies in prosecutions for crimes additional to those about which the defendant feared the victim would testify, including a prosecution for murdering the victim. The court explained that this interpretation accords with the purpose of the doctrine, whereas restricting FBW to the proceeding in which the defendant wanted to prevent the declarant's testimony would limit the proof against the defendant, thereby contravening the rule's reason. *Id.* at 653.

The Second Circuit reaffirmed this view in *United States v. Stewart*, 485 F.3d 666, 672 (2d Cir. 2007), observing that Rule 804(b)(6)'s text "'does not require that the declarant would otherwise be a witness at any *particular* trial.'" Accordingly, although Stewart had Ragga murdered to prevent him from testifying at Stewart's state assault trial, Ragga's statements were admitted in Stewart's federal prosecution on charges not yet filed when Ragga was killed. *Id.* at 672. The court approved language from other cases indicating that forfeiture applies even absent an ongoing proceeding in which the declarant was scheduled to testify. *Id.*

Other federal appellate courts agree. *See, e.g., United States v. Emery*, 186 F.3d 921, 926 (8th Cir. 1999); *United States v. Gray*, 405 F.3d 227, 241 (4th Cir. 2005) (holding statements of Gray's second husband admissible under Rule 804(b)(6) at her trial for mail and wire fraud, although she did not have him killed to procure his unavailability at that trial).

Consistent with the federal cases is *Vasquez v. People*, 170 P.3d 1099 (Colo. 2007) (en banc). Rejecting Vasquez's argument that forfeiture could not apply in his trial for bail bond and restraining order violations because those charges were not brought until five months after he killed his wife, the court observed that "[n]o jurisdiction . . . has required a showing of intent that is specific to the particular case at hand." *Id.* at 1103.

The Second Circuit has determined that *Dhinsa* and *Stewart* survive *Giles*. In *United States v. Vallee*, 304 Fed. Appx. 916 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 2887 (2009), the court explained that the Supreme Court's invitation to explore Giles's intent on remand suggests that forfeiture applies not only at the earlier proceeding from which the defendant intended to prevent the witness from testifying but also at the defendant's trial for murdering her. *Id.* at 921 n.3. Thus, the finding Vallee killed Carter to prevent his testimony in Vallee's Canadian drug prosecution was sufficient to admit Carter's statements in Vallee's federal criminal trial.

These cases establish that if a preponderance of the evidence proves that one reason Jensen killed Julie was to prevent her from filing a divorce/child custody action, that should be sufficient post-*Giles* to find forfeiture. While the above defendants intended to prevent testimony at a criminal proceeding, no case holds that FBW is so circumscribed, and the Fourth Circuit has applied forfeiture where the defendant intended to procure a witness's unavailability in a civil action.

In *United States v. Lentz*, 524 F.3d 501 (4th Cir. 2008), the court concluded that where Lentz killed his ex-wife to avoid the consequences of a contentious state-court divorce action, *see id.* at 507-10, her statements were admissible at Lentz's federal criminal trial for interstate kidnapping resulting in death. *Id.* at 527. *Lentz* supports the proposition that Julie's testimonial statements were admissible if Jensen killed her to avoid the consequences of a divorce/child custody action, a motive similar to that underlying Lentz's kidnapping and murder of his ex-wife.

More important than the support *Lentz* provides, however, is the logic of the State's position.

When a defendant kills a witness to prevent her from testifying against him, it should not matter whether the witness's testimony would have been offered in a criminal

or civil matter. Either way, the defendant should not be allowed to benefit from his intentional wrongdoing by excluding the witness's statements in the defendant's later trial for murdering her. After all, the stakes in a civil action may be higher than those in a criminal prosecution, depending on the facts and the perspective of the litigant.

To illustrate, suppose a wealthy testator has left his entire estate to the defendant, but an employe of the testator plans to testify in a probate case that the defendant exerted undue influence to convince her boss to name him sole beneficiary. If the defendant kills the witness to prevent her testimony in the probate matter, why should he be treated differently than the defendant who kills a witness expected to testify against him in a criminal case? Undeniably, for some people the financial motive in the probate case would provide a greater incentive to murder the witness than would avoidance of a criminal conviction. Thus, if the defendant later faces a murder charge for killing the probate witness, her statements should be admitted against him despite his confrontation objection. Simply stated, the defendant who kills a witness for financial reasons should not escape FBW while the defendant who kills a witness to avoid a criminal conviction forfeits his confrontation right. Evenhanded application of FBW and logic require that the doctrine be applied to situations in which the defendant has killed or otherwise procured the absence of a witness in a civil case as well as in a criminal prosecution.

Although factually distinguishable, *United States v. Johnson*, 495 F.3d 951 (8th Cir. 2007), illustrates why the type of proceeding in which the defendant intended to prevent a witness's testimony should not control whether forfeiture applies in a later criminal action. *Johnson* held that Rule 804(b)(6) allowed the admission of hearsay against Johnson, although she had aided the murder of the declarants to prevent them from testifying against her boyfriend. The court reasoned that "Johnson's conduct was no less abhorrent and no less offensive to 'the heart of the system of justice itself' because she procured the

unavailability of witnesses against Honken rather than against herself." *Id.* at 972.

Likewise, Jensen's conduct in killing Julie is no less abhorrent and no less offensive to the civil justice system just because he procured her unavailability as a witness in family court rather than a criminal prosecution.

Thus, logic and the foregoing cases compel the conclusion that if 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.

2. Jensen's narrow view of forfeiture conflicts with the view of the entire *Giles* Court.

Jensen's belief that FBW applies only in the proceeding for which the defendant procured the witness's absence contradicts the view of the entire *Giles* Court.

Justice Scalia, joined by three other Justices, acknowledged that *Giles*'s forfeiture rule may apply when "the defendant is on trial for murdering a witness in order to prevent his testimony." 128 S. Ct. at 2691 n.6. Similarly, Justices Souter and Ginsburg clearly envision forfeiture being applied in a defendant's trial for murdering a witness whose testimony he wanted to prevent. *Id.* at 2694. Moreover, by advising the state court it was "free to consider evidence of the defendant's intent on remand" (*id.* at 2693), the majority implicitly indicated that California would not have to prove Giles intended to render Avie unavailable at his murder trial in order to invoke forfeiture. Finally, the dissenting Justices would have found forfeiture even without proof of an intent to prevent the witness from testifying.

Thus, the entire Court has rejected Jensen's view that forfeiture applies only in the proceeding for which the defendant procured the witness's absence.

Assuming this court agrees with the State's view on FBW post-*Giles*, Argument I.B. summarizes the evidence proving that one reason[4] Jensen killed Julie was to prevent her testimony in a divorce/child custody action.[5]

B. The record shows that one reason Jensen killed Julie was to prevent her testimony in a divorce/child custody action.

When Jensen killed Julie, he was having an affair with Kelly LaBonte, whom he later married. Before Jensen could live with Kelly, one of two things had to occur: he and Julie had to divorce or Julie had to die. Bigamy was not an option.

Summarized below is the evidence allowing this court to find by a preponderance that Jensen never considered divorce as a solution, leading to the conclusion that one reason he killed Julie was to avoid a divorce and loss or sharing of child custody. Although the trial court did not make a finding regarding Jensen's intent, a remand is unnecessary because appellate courts have routinely made forfeiture findings after trial, even where FBW was not raised below. *See*, *e.g.*, *People v. Banos*, 100 Cal. Rptr. 3d 476, 492 (Cal. Ct. App. 2009); *State v. Meeks*, 88 P.3d 789, 794 (Kan. 2004); *Gonzalez v. State*, 195 S.W.3d 114, 125-26 (Tex. Crim. App. 2006).

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[4]The intent to prevent the declarant's testimony needn't be the sole motivation for killing her. *See*, *e.g.*, *United States v. Gray*, 405 F.3d 227, 242 & n.5 (4th Cir. 2005); *United States v. Dhinsa*, 243 F.3d 635, 654 (2d Cir. 2001); *United States v. Houlihan*, 92 F.3d 1271, 1279 (1st Cir. 1996); *People v. Banos*, 100 Cal. Rptr. 3d 476, 492 (Cal. Ct. App 2009).

[5]That no such action was pending when Jensen killed Julie does not matter. *See Houlihan*, 92 F.3d at 1279, *accord United States v. Miller*, 116 F.3d 641, 668 (2d Cir. 1997).

Probably the strongest proof that Jensen killed Julie to prevent her testimony in family court is the temporal overlap of an e-mail exchange between Jensen and Kelly and his computer searches for poisoning and other homicidal methods during October 1998. To fully understand their October 16, 1998 e-mail exchange (367:Ex. 64), this court should read Kelly's explanation of various expressions used in their e-mails (*see* 341:260-73).

These e-mails discussed taking a cruise together, with Kelly proposing they go on Jensen's birthday – October 5 (1:1) – the next year (367:Ex. 64:5). She gave herself until year's end to decide, so that Jensen could make a deposit in January if she agreed to go (*id.*:4). The reference to "cleaning up our lives" meant getting rid of their respective spouses (341:263). Jensen was evasive when Kelly asked how he planned to take care of his details, i.e., the fact he was married. His e-mails did not mention a possible divorce or any of the complications attending one. *See* 367:Ex. 64.

On the same date Jensen was planning a future with Kelly, he was searching the Internet for botulism and poisoning (335:93, 98-101) and visiting websites about pipe bombs and mercury fulminate (*id.*:104-06). He also visited a website that explained how to reverse the polarity of a swimming pool by switching the wires around, likening the result to "the 4th of July" (*id.*:108-09).[6] Significantly, the Jensens had a pool (339:105).

The timing of the above searches vis-à-vis Jensen's e-mail discussions with Kelly about taking a cruise and attending to the details necessary to do so is strong circumstantial proof that Jensen had decided to eliminate Julie by killing her rather than divorcing her. How else to explain the lack of any Internet searches on topics like

[6]Assuming Jensen argues that there is insufficient proof that he, and not Julie, was using the computer when these sites were accessed, *see* argument II.D., *infra*.

separation, divorce, child custody or marital property (*see* 335:103)? When his affair with Kelly escalated, Jensen did not surf the Internet for divorce lawyers, or information on marital property law. Instead, he searched for botulism, poisoning and pipe bombs.

Testimony from David Nehring, an investment advisor who met Jensen in 1990 or 1991 (333:253-54), helps show that Jensen killed Julie rather than let her divorce him. Nehring testified that early in Jensen's affair with Kelly, Jensen was "torn whether or not to proceed or to cut it off" (334:14). Nehring advised him the affair was not a good idea (*id.*), and they talked about the difficulties in a divorce involving children, specifically "one spouse getting custody and possibly moving away" (*id.*:15). However, they never discussed the financial ramifications of divorce (*id.*). Nehring also testified that during November 1998, Jensen was researching possible drug interactions on the Internet several times daily (333:258). His professed reason was finding an explanation for Julie's allegedly unusual behavior (*id.*:259).

Jensen's conversation with Nehring about the complications of divorce, followed by Jensen's repeated Internet searches for drug interactions, further proves he was choosing murder as an alternative to the legal system to eliminate Julie. Edward Klug, a fellow stockbroker who attended a national sales convention with Jensen November 5-7, 1998 (332:89-90, 92), gave similar testimony.

Klug testified that during a late-night gripefest about their spouses, Jensen said that if you wanted to get rid of your wife, there were websites telling you how to poison her with things that would be undetectable (332:99, 101). Klug said Jensen was not just talking in the abstract but actually planned to get rid of his wife this way (*id.*:102).

Evidence of Jensen's spending habits provides additional proof that one reason he killed Julie was to

avoid sharing their marital estate. For example, in March 1999 Jensen gave Kelly $12,000 to help her pay bills (309:180-81). A year after Julie's death, Jensen bought Kelly a diamond bracelet (342:33). And in fall 1999, he and Kelly moved into a new home that cost $30,000 more than the home he and Julie shared (*id.*:34-35). Had Julie filed for divorce, Jensen likely would have had to pay to maintain two households, one for Julie and the children, and one for himself and Kelly. He would also have incurred expenses for a lawyer and – assuming Julie got primary custody of their children – would also have had to pay child support. Killing Julie eliminated the financial costs a divorce would have entailed. It also guaranteed that Jensen would have sole child custody, a situation he desired.

Certainly Jensen was aware of the financial and child-custody ramifications of a divorce because Julie had filed a divorce petition on June 24, 1991, withdrawing it only three days later (367:Ex. 204). Julie had asked for maintenance; primary physical custody of their son; a division of the couple's property; the costs of the divorce action and attorney fees; child support; and an allocation of the couple's debts (*id.*:Petition). Although the petition stated that the Jensen marriage was "irretrievably broken" (*id.*:¶7), Julie withdrew it promptly after Jensen threatened she would never see David again (358:63).

Consistent with Julie's reason for withdrawing her divorce petition is Therese DeFazio's testimony that Julie told her Jensen said that if she tried to divorce him, he would try to take the children from her and she'd never see them again (334:148). Jensen's October 26, 1998 e-mails to Kelly reveal that he envisioned Kelly caring for his sons (367:Ex. 69:11:59 a.m. e-mail), circumstantial proof that he had no intention of Julie getting primary custody, despite being a stay-at-home mom.

While Jensen tried to portray Julie as an unfit mother, surely he knew their friends did not share this view. For example, Sharon Nehring testified that "Julie

was a very loving, hands-on mother. She loved her kids to death and was always . . . doing things with them" (333:238). Similarly, Angela Martinelli described Julie as "always a very caring, loving mother" (336:152). Marion Pacetti said Julie "was an excellent mother" and that "[t]he children were everything to her" (*id.*:238-39). Next-door neighbor Tadeusz Wojt testified Julie was a "very loving mother, very great parent" (339:102-03).

Given the virtually uniform perception that Julie was a wonderful mother, and her status as a fulltime mom, Jensen undoubtedly realized that if Julie sought primary physical custody of their children, she was likely to get it. He also knew, based on Julie's withdrawal of the 1991 divorce petition, that keeping child custody was important to Julie. This realization, coupled with Jensen's desire to retain custody, provided another motive for him to kill Julie rather than let her divorce him.

Based on the above evidence, this court should find that one reason Jensen killed Julie was to prevent her testimony in a divorce/child custody action, confirming Julie's belief that "Mark would kill me first before he divorced me" (340:9). Because that finding supports the trial court's forfeiture ruling, Julie's testimonial statements were properly admitted even post-*Giles.*

C. Alternatively, this court should remand for a determination on the intent element of forfeiture.

If this court is unable to find by a preponderance of the evidence, based on the current record, that Jensen killed Julie to prevent her from testifying in a family court action, then this court should remand to the trial court to make that determination.

A remand would allow the State to present additional evidence to support its theory that Jensen killed Julie to avoid the consequences of a divorce. Fairness requires a

remand, particularly since the trial court prevented the State from introducing evidence of various purchases Jensen had made, which the prosecutor argued would demonstrate "a financial motive . . . to not want to split his money with his homemaker wife" (342:38). Although the trial court prevented the jury from hearing that evidence, the court likely would have admitted it for purposes of deciding whether Jensen forfeited his right to confront Julie. But when the forfeiture hearing was held, the governing version of FBW did not include an intent element; thus, the prosecutor was unaware that such evidence might be critical. Fairness demands that the State be given a chance to meet this heightened showing, as the Supreme Court recognized in *Giles* when it declared that the state court was "free to consider evidence of the defendant's intent on remand." 128 S. Ct. at 2693.

Therefore, if this court agrees with Argument I.A. but finds insufficient evidence of the requisite intent, it should remand to the trial court to decide that question.

II. ANY ERROR IN ADMITTING JULIE'S TESTIMONIAL STATEMENTS WAS HARMLESS BEYOND A REASONABLE DOUBT.

If this court finds that Jensen did not forfeit his right to confront Julie, then, for the reasons discussed below, it should find that admission of her testimonial statements was harmless error.

A. The test for harmless error.

See Jensen's brief at 19-20.

As beneficiary of any error in admitting Julie's testimonial statements, the State will show that admission of this evidence was harmless because virtually all the information in her letter and oral statements was duplicated by admissible evidence; even if the letter's

contents were inadmissible in the State's case-in-chief, the jury still would have learned of the letter and some of its content; and the State's case was strong even without Julie's testimonial statements.

B. Most of the information in the letter and in Julie's statements to Kosman was duplicated by other admissible evidence.

In claiming that admission of Julie's letter and testimonial statements to Kosman cannot be harmless, Jensen ignores the fact that virtually every statement in Julie's letter and to Kosman was duplicated by other unobjectionable evidence introduced at trial. To illustrate, the State will dissect Julie's letter sentence-by-sentence and show how the same or similar information was presented via alternate means.

"**I took this picture and am writing this on Saturday 11-21-98 at 7 AM.**" Tadeusz Wojt testified that Julie had photographed Jensen's notes she had found (339:130-31). Jensen's sister, Laura Koster (353:203), testified that in fall 1998, Julie had photographed and shown her a picture of a page from Jensen's business planner (354:114). Koster identified the handwriting as her brother's (*id.*:117).

"**This list was in my husband's business daily planner – not meant for me to see.**" Koster's testimony duplicated the first half of this statement (354:114), and Therese DeFazio testified that Julie said she saw a list of suspicious items near the computer and gave it to someone (334:138). Whether Jensen intended for Julie to see the list is not critical.

"**I don't know what it means, but if anything happens to me, he would be my first suspect.**" Wojt testified that Julie couldn't decide whether Mark was trying to poison her or "drive her nuts" (339:110). Both Wojt and DeFazio

testified Julie feared Jensen was going to poison her (339:117; 334:138, 141). Koster testified that she had a conversation with Julie in fall 1998 in which Julie said she thought Mark might be planning to kill her (354:117-18).

"**Our relationship has deteriorated to the polite superficial.**" Jensen admitted to Ratzburg that their marriage was never the same after Julie's affair (367:Ex. 142:53). In e-mails to Kelly, Jensen alluded to marital problems. *See*, *e.g.*, *id.*:Ex. 42:1. Wojt testified about marital problems Julie said they were having (339:101-03, 112-13).

"**I know he's never forgiven me for that brief affair I had with that creep seven years ago.**" Dave Nehring testified that Jensen "remained upset about [the affair] and distressed over it for as long as I knew him" and that neither Jensen's anger nor his hurt had diminished over the years (334:8). DeFazio provided similar testimony (*id.*:156). Evidence that Jensen repeatedly placed pornographic pictures around the house and tried to convince Julie they were left by her former paramour (*see* argument IV., *infra*) showed that he never forgave her.

"**Mark lives for work and the kids; he's an avid surfer of the Internet . . .**" Whether Jensen lived for work was not important, and his devotion to his children was well-documented (*see* 354:87-89). Nehring testified that before Julie's death, Jensen conducted Internet searches on drug interactions "on a very frequent basis" (334:112). The State presented abundant evidence that a user of the Jensen home computer visited numerous Internet sites (*see*, *e.g.,* 367:Ex. 272), and that Jensen was that user. *See* Argument II.D., *infra*.

"**Anyway – I do not smoke or drink.**" Dr. Borman said that at a September 21, 1998 appointment, Julie denied smoking and reported drinking alcohol only occasionally (354:14-16).

"**My mother was an alcoholic, so I limit my drinking to one or two a week.**" Julie's brother testified their mother was an alcoholic and that Julie drank only rarely (358:3, 19-20).

"**Mark wants me to drink more with him in the evenings.**" Wojt provided similar information (339:113, 116), and Jensen told Nehring he was trying to get Julie to relax by offering her a glass of wine at night, but she always said no (334:21).

"**I don't.**" *See above.*

"**I would never take my life because of my kids. They are <u>everything</u> to me!**" Julie told Dr. Borman she loved her children more than anything and that "they were the most important thing in the world to her" (354:69). DeFazio related 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" (334:151-52).

"**I regularly take Tylenol and multi-vitamins; occassionally [sic] take OTC stuff for colds, Zantac, or Imodium.**" Dr. Borman's notes of Julie's September 1998 visit indicate she was taking a multivitamin and calcium (354:13-14). Whether she regularly took Tylenol and occasionally took over-the-counter medications was unimportant.

"**[I] have one perscription [sic] for migraine tablets, which Mark use[s] more than I.**" This information does not appear outside the letter.

"**I pray I'm wrong & nothing happens. . . but I am suspicious of Mark's suspicious behaviors & fear for my early demise.**" Testimony that Julie was suspicious of Jensen and thought he might try to kill her came from DeFazio (334:138-39) and Wojt (339:115-17). Julie also

told Koster she thought Mark might be trying to kill her (354:118).

"**However, I will not leave David & Douglas.**" Dr. Borman testified that two days before her death, Julie denied being suicidal and said her boys meant everything to her and she didn't want to lose them (354:24, 31). *Also see* 334:151-52 (DeFazio testimony). Dr. Borman's notes from 1990 indicate she denied being suicidal then because "I could not do it because of my baby" (367:Ex. 222:third page).

"**My life's greatest love, accomplishment and wish: 'My 3 D's – Daddy (Mark), David & Douglas."** Julie's license plate read "MY 3 DS" (358:63).

The foregoing discussion illustrates that virtually all the information in Julie's letter was duplicated by admissible evidence from other sources. The same is true of Julie's testimonial statements to Kosman.

Those statements are summarized at page 25 of Jensen's brief. The State disputes Jensen's characterization of one statement as testimonial, however. Kosman's testimony that during past contacts, Julie reported "strange incidents occurring around the home" (343:43), is not a testimonial statement. That testimony refers to information Julie provided regarding harassment she believed Perry Tarica orchestrated. Julie's testimonial statements to Kosman were made in a voicemail and in person on November 24, 1998 (*see id.*:41-47).

Only Julie's statement that she thought Jensen was recording her conversations (343:43) was not replicated by other evidence. But this statement was not prejudicial because no evidence to support this belief was presented, and the statement actually supported his theory that Julie was emotionally unstable.

Julie's remaining testimonial statements to Kosman were presented via alternate means. Her statement that

she had photographed notes from Mark's planner and given them and a note to a neighbor, to be given to police if something happened to her (*see* 343:45), echoed statements made to DeFazio, Wojt and Koster. *See* 334:146; 339:130-31; 353:114. Her voicemail message that if anything happened to her, Mark would be her suspect (343:41), was similar to nontestimonial statements she made to Wojt and DeFazio. *See* 339:117; 334:138, 141. Finally, Kosman's testimony that Julie said it looked like Jensen was "trying to make it look like she was going to commit suicide" (343:46) was mirrored by DeFazio's testimony that Julie feared her husband "was going to make it look like a suicide" (334:147).

Thus, just as virtually all the statements in Julie's letter were replicated by other evidence, other witnesses related the same statements Julie had made to Kosman. This is one reason any error in admitting her letter and statements was harmless.

C. Even if the letter had not been admitted in the State's case-in-chief, the jury still would have learned of its existence and some of its content.

Even if Julie's letter had not been admitted in the State's case-in-chief, the jury would have learned of it and inferred that it was not a suicide note. Additionally, the jury would have learned of some of the letter's contents during the examination of the defense experts.

Dr. Mary Mainland relied on the letter in concluding that Julie's death was a homicide (345:26-29). Even if the letter's contents should not have been admitted, Dr. Mainland still would have been allowed to rely on the letter in forming her opinion. *See* Wis. Stat. § 907.03. Thus, when the prosecutor had Mainland list the sources underlying her opinion that Julie was not suicidal (345:24-26), the doctor could have said she relied in part on Julie's letter. Without divulging its contents, the prosecutor

could have asked her whether she considered the letter to be consistent or inconsistent with suicidal ideation, and the doctor would have said "inconsistent," as she did at trial (*id.*:29). Thus, even if the prosecutor had been prevented from exploring the letter's contents, which he did to some extent during the doctor's testimony (*id.*:27), the jury would have learned the letter existed and that the State's expert believed it was inconsistent with suicidal ideation.

Jensen wrongly assumes all references to the letter would be banished from the prosecution expert's testimony. While this is one option a trial court has under *State v. Weber*, 174 Wis. 2d 98, 107 n.6, 496 N.W.2d 762 (Ct. App. 1993), this judge would not have chosen that option, given his firm belief that the jury should hear as much relevant evidence as possible (*see, e.g.,* 342:65; 350:193, 203), and given that the central question was whether Jensen killed Julie or she killed herself.

The jury also would have heard about the letter from watching the DVD of Ratzburg's April 1999 interview of Jensen (367:Ex. 254), portions of which were played during Ratzburg's testimony (*see* 348:10-13). The transcript of the played portion (367:Ex. 142) was given to the jury during deliberations. During their interview, Ratzburg produced Julie's letter and said "Read this. This is a letter your wife left me and Officer Ron Kosman" (*id.*:68). Even if the portions of the DVD and transcript quoting statements in the letter (*see*, *e.g.*, *id.*:70) would have been excluded, the jury still would have viewed those portions of the DVD and transcript during which Ratzburg gave Jensen the letter and he read it to himself. Knowing Julie had left a letter that Ratzburg used to confront Jensen during questioning would have helped the jury evaluate Jensen's demeanor and credibility during that portion of the interview after Ratzburg revealed the letter's existence.

The jury also would have learned of the letter and some of its contents during the examination of the defense

experts who opined that Julie's death was suicide (Dr. Spiro) or undetermined (Dr. Denton).

Both doctors relied on Julie's letter in formulating their opinions (367:Ex. 300:6, Ex. 310:4; R-Ap. 143). Dr. Denton's report called the letter "contrived, unbelievable, and self-serving" and said it was "very suspect as an indication of homicide" (367:Ex. 310:4; R-Ap. 167). Both sides questioned Dr. Denton about the letter (356:165-66, 202-03). Even if the letter had been excluded, the State would have been able to cross-examine the defense experts about it, even if they had not considered the letter in forming their opinions.

If Dr. Denton had relied on the letter despite its exclusion, the prosecutor could have cross-examined him about why he viewed the letter as not indicative of homicide, and this questioning necessarily would have revealed some of its contents to the jury. But, even if the defense had told its experts *not* to consider the letter in formulating their opinions, the prosecutor could have cross-examined them about whether they had considered the letter, especially Julie's claim that she would never take her life, in reaching their opinions. The extent to which the letter's contents would have been revealed is unclear, but certainly the prosecutor would have been entitled to ask about the letter and some of its statements in attempting to impeach the experts.

Thus, ruling the letter inadmissible in the State's case-in-chief would not have prevented any reference to it during trial. This is a second reason why any error in admitting the letter was harmless.

D. The case against Jensen was strong even without Julie's testimonial statements.

Another reason any error in admitting Julie's testimonial statements was harmless is that the case

against Jensen was strong even without the challenged evidence. Unlike a classic whodunit, here the jury had to decide whether Jensen killed Julie or whether she killed herself and tried to frame Jensen, as defense counsel posited in opening statement (*see* 328:51).

Thus, any evidence tending to favor the homicide theory or disfavor the suicide/framing theory strengthened the State's case. A summary of that evidence – wholly separate from Julie's letter or statements – is summarized below.

The computer evidence. This was probably the most incriminating evidence that was uninfluenced by anything in the letter or Julie's statements to Kosman.

The State has already shown how October 1998 computer searches for various means of death coincided with e-mails between Jensen and Kelly discussing how they planned to deal with their respective spouses so they could be together and take a cruise the next year. The timing of these searches vis-à-vis the steamy e-mails between the two points to Jensen as the searcher, which in turn shows he was contemplating ways to kill Julie as early as October 16, 1998. *Also see* 367:Ex. 89:17-37. That a search for John Jock Joseph in the Stifel Nicolaus directory occurred during the same time frame (*see id.*:46-47) also points to Jensen as the searcher, given his knowledge of Kelly's sexual encounter with Joseph, branch manager of Stifel's Colorado Springs office (341:145-46). The same is true regarding visits to the Windstar Cruises website on October 14 and 25, 1998 (367:Ex. 89:2; Ex. 272:56), which explains Jensen's reference to having "tickets for the windstar in your hand" in an October 1998 e-mail (367:Ex. 64:6).

Particularly damning were the Internet sites visited on the morning of the day Julie died. Exhibit 89 reveals a 7:49 a.m. search for "ethylene glycol poisoning" (267:Ex. 89:139-43). Jensen's statements make it virtually certain he was the searcher. During an April 1999 interview,

Jensen told Ratzburg that on the morning of her death, Julie "could hardly sit up" (367:Ex. 142:89); "was not able to get out of bed" and had to be held up (*id.*:90); and "was not able to move around and function" (*id.*:91). Jensen made similar statements to Paul Griffin during a January 8, 2000 conversation (358:10-11), telling Griffin Julie had to be propped up in bed the day she died (*id.*:11). Given Julie's condition, it is unbelievable she left her bed to visit websites on ethylene glycol poisoning. More importantly, had Julie used the home computer at 7:40 a.m., Jensen would have noticed because he told Ratzburg he was propping her up in bed at 7:30 (367:Ex. 142:100) and didn't leave home to take Douglas to preschool until 8 or 9 a.m. (*id.*:94). That the user double-deleted the Internet history visited during this time frame (350:277) is consistent with someone who wants to cover his tracks, not with a woman hours from death who is trying to frame her husband.

The above evidence identifies Jensen as having searched for ethylene glycol poisoning while Julie was near death, and he would have done so only if he had poisoned her and was trying to determine when she was likely to die.

While the defense wanted jurors to believe Julie had used the home computer to search websites on suicide and poisoning, the State presented abundant evidence to show that Julie rarely used the computer whereas Jensen was an inveterate Internet surfer.

Therese DeFazio testified that during a school open house in August 1998, Julie said she couldn't help kids use a computer because she didn't even know how to turn one on (334:239). Similarly, eight-year-old David Jensen told DeFazio he was teaching his mother how to use a computer because he knew more than she did (*id.*:177, 213).

In contrast, Nehring described Jensen's computer skills as "above average" (334:6), noting that Jensen was

always buying and replacing computers and usually owned two personal computers at any time (*id.*:7). Jensen provided Nehring computer help and owned specialized software for analyzing stock movements (*id.*). During November 1998, Jensen used the Internet to look up possible drug interactions several times daily (333:258).

The time of day Internet activity occurred was also consistent with Jensen being the user. Because Julie was a stay-at-home mom, one would expect the searches for poisoning, etc. to occur during times she was at home and Jensen at work. But the computer evidence showed the opposite – Internet activity usually occurred late at night and into early morning, times when Jensen would be home. *See generally* 367:Ex. 89. Consistent with this pattern, when Jensen attended a conference in St. Louis (332:92), there was no Internet activity (367:Ex. 272:22-23). In fact, during November 1998, no Internet use occurred from Monday through Friday between 9 a.m. and 6 p.m. (335:63-64).

The large number of pornographic websites visited, *see*, *e.g.*, 367:Ex. 272:79-106, is further proof that Jensen was by far the predominant computer user. As Argument IV. will show, other evidence of Jensen's sexual interests strongly suggests he, and not Julie, frequented these sites.

Forensic computer evidence showing systematic deletion of the Internet history points to Jensen as the user. As Martin Koch explained, someone intentionally deleted the Internet history at least four times, i.e., on November 22 and 29 and December 2 and 3, 1998 (352:145). If Julie poisoned herself and tried to frame Jensen, she would not delete the Internet history. Rather, the intentional deletions are more consistent with a murderer trying to erase evidence of his guilt.

The motive evidence. Not only was Jensen having an affair with Kelly and planning a future with her in the months before Julie died, he remained bitter about her affair with Perry Tarica.

Jensen was so bothered by Julie's infidelity that he conducted a years-long campaign of psychological torture against her. *See* Argument IV., *infra*. The centerpiece of this campaign involved leaving pornographic photos where Julie could find them or, more commonly, presenting her with photos purportedly found outside the house or on his vehicle and telling her they had been mailed to him at work. As part of this campaign, Jensen told others, including Nehring and Ratzburg, that the photographs showed Julie in compromising positions (*see*, *e.g.*, 334:9; 367:Ex. 142:44-46). Kosman testified that over the years, he recovered fifty to sixty such photos (343:54). At one point, the woman featured resembled Julie (*id.*:53).

While Jensen – even after Julie's death – denied being the photos' source, he admitted to Ratzburg that he would save the photos and confront Julie with them when he got mad (367:Ex. 142:44-46, 50-51). Despite Jensen's denials, police believed he was the source (343:61-63), particularly after discovering that Tarica had moved out of state and was incapable of leaving them on Jensen's vehicle, etc. (343:200-01). Consistent with the police theory, women who worked with Jensen at Baird and opened the mail there never heard him complain about receiving harassing photos at the office (345:102-04, 112-13).

The lengths to which Jensen went to torture Julie for having a short-lived affair years earlier reflects his deep-seated hostility, which provided a powerful motive for killing her after he decided to leave her for Kelly.

The medical evidence. Totally unaffected by Julie's letter and statements to Kosman was medical testimony that, although Julie suffered from ethylene glycol poisoning, the proximate cause of death was asphyxia. Dr. Michael Chambliss, who conducted the autopsy (329:6) and had originally listed the cause of death as undetermined (332:36), testified that the proximate cause was "asphyxia by smothering" (*id.*). Dr. Chambliss changed his opinion

based on findings in the autopsy report (*id.*), after linking up injuries found on the body with photographs of Julie at the scene (*id.*:53).

Also unaffected by the letter and Julie's statements to Kosman was Dr. Mainland's opinion that the cause of death was "ethylene glycol poisoning with probable terminal asphyxia" (344:105). While Mainland considered the letter in concluding that Julie did not intentionally ingest ethylene glycol, her conclusion that Julie was asphyxiated was unconnected to the letter. Instead, Mainland relied on Aaron Dillard's statement relating what Jensen had told him about suffocating Julie (*id.*:115). Mainland explained at length how Dillard's statement was consistent with the physical findings (*id.*:115-29). Thus, Mainland's conclusion as to asphyxia was unrelated to the challenged evidence. Nor was her conclusion that Julie had received multiple doses of ethylene glycol – an indicator for homicide rather than suicide (*id.*:129-32) – influenced by the letter or Julie's statements to Kosman.

Jensen's incriminating statements. The State has previously summarized incriminating statements Jensen made to Edward Klug the month before Julie's death. Jensen told Klug he would use something that crystallizes your body from the inside out to kill Julie (332:104).

Klug's conversation with Jensen predated the letter and was unaffected by its contents. Importantly, Klug's testimony was consistent with medical evidence showing oxalic acid crystals in Julie's kidneys from ingesting ethylene glycol (329:21; 344:109-13).

Jensen also made incriminating statements to fellow jail inmate Aaron Dillard. After reading the transcript of Klug's forfeiture hearing testimony, Dillard told Jensen he'd be "screwed" if witnesses would corroborate Klug's testimony (*id.*:90). After many conversations, Dillard finally accused Jensen of killing Julie (*id.*:107-08). Jensen admitted giving Julie antifreeze mixed with juice (*id.*:109)

and described how it made her act drunk (*id.*:112). He also told Dillard he gave Julie Ambien the next morning so she could sleep (*id.*:114). That night he gave her more Ambien and more juice with antifreeze (*id.*:116-17). When she awoke the next morning, her breathing was "really raspy and really hard" (*id.*:117). His children wanted him to call an ambulance, and he promised he would if their mom was not better when they returned from school (*id.*:117-18).

Dillard said Jensen told him Julie was breathing better when he came home after taking the kids to school and doing something for work; this made him nervous and scared (340:118). At that point, he rolled Julie over, sat on her back, and pushed her neck into the pillow (*id.*:119). He did this until she died (*id.*:120).

Dillard also said Jensen admitted to trying to poison Julie previously, before attending a stockbrokers' meeting (*id.*:122). Jensen explained to Dillard that "he would have been really fucked if she died that weekend" because he "was drunk and mouthed off to Klug" and Klug likely would have come forward immediately (*id.*:123).

Thus, not only did Jensen incriminate himself in talking to Dillard; Dillard's version of what Jensen had said corroborated Klug's testimony and other evidence that Julie had been sick and vomited a lot while he was gone (334:41-42). Dillard's testimony also corroborated the medical testimony that Julie had been asphyxiated as well as poisoned.

Miscellaneous evidence. Chilling testimony came from Joseph Mangi, interim supervisor of the Kenosha Unified Schools (345:164). When Mangi called the Jensen home a day or so before Julie died to offer her a job, someone identifying himself as "Mr. Jensen" said "she's asleep. She's going to be asleep for a long time" and then laughed (*id.*:169). When Mangi discovered Julie had died, he reported this conversation to police (*id.*:170-71). The only logical inference is that Jensen made that comment

knowing Julie would never awake from her drug-induced sleep if all went as planned.

Evidence showing Jensen's consciousness of guilt came from Nehring's testimony that Jensen reported his work computer "had been fried and he'd have to get a new one" (333:270). That statement was uttered on a Monday following a Friday conversation during which Nehring remarked that it was odd police hadn't seized Jensen's work computer (*id.*). The work computer Jensen claimed had been "fried" was the one on which Nehring had seen him look up drug interactions (*id.*). The short interval between their conversation and the computer's destruction is very suspicious and suggests Jensen did not want police to examine that computer.

Jensen also exhibited suspicious behavior on the day Julie died. Despite describing her as "almost incoherent," having very labored breathing and needing help to sit up in bed (367:Ex. 142:90), Jensen did not call an ambulance or doctor. Instead, he drove one son to daycare, came home for a while and then ran a work-related errand (*id.*:92-93).

Jensen told Nehring that after picking up the boys from school, "something didn't feel right" when they arrived home, so he told the boys to wait in the car, whereupon he entered the house and found Julie dead (334:20). A reasonable inference is that the real reason Jensen made his children wait outside was that he knew Julie was dead because he had killed her and wanted to prevent the boys from seeing his handiwork.

That the poison Julie ingested was ethylene glycol makes it more likely her death was a homicide. Julie's education included three years of nursing school (367:Ex. 220; R-Ap. 137), making it unlikely she would poison herself with a substance that caused a protracted and painful death rather than ingesting something that would work quickly and painlessly. And because ethylene glycol is not commonly searched for in toxicology tests

(338:140), its use is consistent with a murderer trying to conceal the cause of his victim's death and not with a suicide victim trying to frame her husband.

While not an exhaustive recitation of the evidence uninfluenced by Julie's letter and statements, the above evidence – combined with the reasons advanced in Arguments II.B. and II.C. – is enough to show why any error in admitting Julie's letter and testimonial statements was harmless beyond a reasonable doubt. But even if the evidence summarized above does not convince this court, a review of the entire trial record should do so.

III. JENSEN HAS WAIVED THE ARGUMENT THAT HIS RIGHT TO A FAIR TRIAL WAS VIOLATED WHEN THE JUDGE WHO MADE THE FORFEITURE FINDING PRESIDED AT JENSEN'S MURDER TRIAL; ALTERNATIVELY, JENSEN HAS FAILED TO DEMONSTRATE JUDICIAL BIAS.

A. Jensen has waived the claim that the trial judge was biased.

Jensen recognizes he failed to argue below that Judge Schroeder's forfeiture finding regarding Julie's statements rendered the judge biased. Nevertheless, Jensen contends this court should reach the merits of this claim because it allegedly would have been futile to raise it below. *See* Jensen's brief at 34.

Jensen's suggestion is meritless. Nothing the supreme court said in *Jensen* prevented Jensen, following the circuit court's forfeiture finding, from moving to disqualify Judge Schroeder. While counsel need not object when the point at issue is one on which the trial court has just ruled adversely, *see Schueler v. Madison*, 49 Wis. 2d 695, 707, 183 N.W.2d 116 (1971), that principle

is inapplicable because the trial court was *never* afforded the opportunity to consider the issue, even in the context of a postconviction motion.

Had Jensen successfully disqualified the judge after the forfeiture hearing but before trial, the issue would have evaporated. But even if a pretrial motion had failed, or if Jensen had raised the claim via § 809.30, Judge Schroeder could have explained why his forfeiture ruling did not render him biased, thereby facilitating appellate review. But Jensen did neither, thereby depriving this court of the trial court's views on the issue.

State v. Carprue, 2004 WI 111, 274 Wis. 2d 656, 683 N.W.2d 31, illustrates the importance of timely raising a claim of judicial bias. There the court found Carprue had waived the claim that the trial judge violated his due process right to a fair trial before an impartial judge by failing to timely object to the judicial conduct underlying this claim. *Id.,* ¶¶36-37. The court observed that "[t]imely objections promote efficient judicial administration by encouraging parties and courts to correct or avoid errors at trial." *Id.*, ¶37 (citation omitted). The court further noted that even unsuccessful objections create a record that facilitates appellate review.

B. Judge Schroeder's pretrial forfeiture ruling is not tantamount to a pretrial finding of guilt and does not constitute judicial bias.

Alternatively, this court should deny Jensen's judicial-bias claim on the merits. A pretrial determination that a defendant forfeited the right to confrontation does not render the judge who made that determination biased, even where the judge finds by a preponderance of the evidence that the defendant killed the witness. Although the issue was not squarely presented in either case, *Giles* and *Jensen* severely undercut the argument that Judge Schroeder became biased against Jensen when the judge

ruled that Jensen had forfeited his right to confront Julie by killing her.

Jensen's attempt to distinguish the forfeiture finding made here from the type *Giles* requires is nonsensical. Under *Giles*, Judge Schroeder would have to find that one of Jensen's motives in killing Julie was to prevent her from testifying. That finding would be no less a determination of guilt than the finding the judge actually made, the only difference being the addition of an intent element. Either way, the conduct giving rise to forfeiture is murder, so a forfeiture finding satisfying *Giles* would be subject to the same criticism Jensen levels at Judge Schroder's forfeiture ruling.

In claiming judicial bias, Jensen ignores *Giles*'s acknowledgment that the Court's forfeiture doctrine would allow a jurist "to inquire into guilt of the charged offense in order to make a preliminary evidentiary ruling." 128 S. Ct. at 2691 n.6. As the Court explained, "That must sometimes be done . . . when, for example, the defendant is on trial for murdering a witness in order to prevent his testimony." *Id.*

The Court's acknowledgment that under its version of forfeiture, a judge presiding at a murder trial may need to make a preliminary finding of guilt, without the Court even hinting that this situation would create the specter of judicial bias, strongly suggests that the Court perceives no potential due-process problem under that scenario.

Similarly, our supreme court's reasoning in adopting FBW in *Jensen* indicates that the court was untroubled by having the same judge who made the forfeiture ruling preside at the accused's murder trial. *Jensen* cited with approval *United States v. Mayhew*, 380 F. Supp. 2d 961 (S.D. Ohio 2005). *See* 299 Wis. 2d 267, ¶56. The judge who would later preside at Mayhew's trial held a murder victim's audiotaped statement admissible against Mayhew on federal kidnapping and murder charges because he had forfeited his confrontation right by murdering her. The

court acknowledged that it might seem "troublesome" to ask the trial court to decide by a preponderance of the evidence whether defendant committed the crime for which he is on trial. Nevertheless, the *Mayhew* court explained why forfeiture applies even when the conduct underlying forfeiture also underlies the criminal charge: 1) the jury will never learn of the judge's preliminary finding and will use different evidence and a different burden of proof; and 2) analogous evidentiary situations – such as determining the existence of a conspiracy – permit a judge to determine preliminary facts although the same facts may be necessary to the jury's verdict. 380 F. Supp. 2d at 968.

Our court's explicit agreement with the above reasoning shows it was not troubled by having the same judge who found forfeiture later preside at the defendant's trial for murdering the witness. Had the court believed the procedure it endorsed posed the problem of judicial bias, the court would have said so, at least in passing.

Ironically, the only direct support Jensen can muster for his judicial-bias claim is a law review article by one of his appellate attorneys. *See* Jensen's brief at 33. But Jensen does not cite a single case with similar facts[7] to support the proposition that Judge Schroeder had predetermined his guilt.

Jensen's reliance on *Franklin v. McCaughtry*, 398 F.3d 955 (7th Cir. 2005), to support his claim that Judge Schroeder could not remain impartial once he made his

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[7]Such a case exists. In *United States v. Lentz*, 282 F. Supp. 2d 399, 426 (E.D. Va. 2002), the district court refused to apply forfeiture because it believed doing so would undermine the presumption of innocence.

The *Mayhew* court acknowledged *Lentz*, *see United States v. Mayhew*, 380 F. Supp. 2d 961, 967 n.7 (S.D. Ohio 2005), but rejected its reasoning. Thus, by approving *Mayhew*'s reasoning, *Jensen* implicitly rejected *Lentz*.

forfeiture ruling is misplaced. Apart from its nonbinding status, *Franklin* is factually distinguishable.

Although *Franklin* coincidentally involved Judge Schroeder, the similarity between the cases ends there. While Franklin's case was pending before him, the judge cited Franklin as exemplifying the foolhardiness of an appellate decision holding that a defendant cannot be denied bail pending appeal solely because of indigence. The judge referenced Franklin in a memorandum the judge filed in *State v. Taylor* explaining his decision to deny Taylor's release without bail. When approached by a newspaper reporter to weigh in on the issue of defendants being released without bail pending appeal, the judge referred the reporter to the *Taylor* memorandum. The reporter then wrote an article mentioning it. When Franklin cited the article as a basis for recusal, the judge downplayed his involvement in the article. On these facts, the Seventh Circuit found unreasonable the state court's determination that Judge Schroeder was not actually biased. *See* 398 F.3d at 961.

Unlike the *Franklin* situation, here Judge Schroeder simply concluded pretrial that the State had proven by a preponderance of the evidence that Jensen killed Julie, allowing the State to use her uncross-examined statements against him. The burden of proof was lower than reasonable doubt, and the rules of evidence inapplicable. Contrary to Jensen's assertion, the supreme court did not order "the judge's pretrial finding of guilt." The court merely ordered a hearing so the trial court could determine if Jensen had forfeited his confrontation right. In deciding the State had met its burden, the judge was merely making an evidentiary ruling, not prejudging the ultimate question of guilt. In contrast, the judge in *Franklin* was not responding to an appellate court's directive; he was not even acting in Franklin's case. Instead, the judge singled out Franklin in another case under circumstances which the Seventh Circuit believed demonstrated the judge's belief that Franklin was guilty of the charges pending before him.

If this court rejects the State's waiver argument, then it should reject Jensen's contention that Judge Schroeder was biased.

IV. EVIDENCE THAT JENSEN HAD FOR YEARS LEFT PORNOGRAPHIC PHOTOS ON THE JENSEN PROPERTY TO PUNISH JULIE FOR A BRIEF AFFAIR WAS PROPER OTHER-ACTS EVIDENCE DESIGNED TO PROVE MOTIVE AND TO EXPLAIN THE DYNAMICS OF THEIR MARRIAGE; PORNOGRAPHY-RELATED EVIDENCE FROM JENSEN'S COMPUTERS AND EVIDENCE OF JENSEN'S SEX TALK WITH KELLY WAS NOT OTHER-ACTS EVIDENCE BUT WAS PROPERLY ADMITTED FOR OTHER PURPOSES.

A. Only Jensen's conduct in leaving the pornographic photos should be analyzed as "other-acts" evidence.

Jensen argues that the trial court improperly admitted three categories of what he terms other-acts evidence: evidence that he left pornographic photos around the house; evidence that pornography was found on his computer in 1998 and 2002; and evidence he had quizzed Kelly at length about her sexual history, including the size of her ex-lovers' penises. Jensen refers to the first category of evidence as the primary other act, while labeling the latter two categories secondary other acts. *See* Jensen's brief at 37-39.

Actually, only the evidence that Jensen had left pornographic photos around the house from 1991-97[8] is other-acts evidence under Wis. Stat. § 904.04(2). That evidence was admissible to prove motive. *See* Argument IV.B. below. But neither the computer-pornography evidence nor the sex-talk evidence constitutes other-acts evidence. Rather, evidence that the Jensen home computer was used to visit numerous pornographic websites in 1998 and that Jensen's work computer in 2002 housed numerous photos of erect penises was relevant to show he provided the pornographic photos left on the Jensen property for years. Portions of the sex-talk evidence were likewise admissible for this purpose. And the sex-talk evidence as a whole helped prove that Jensen used the home computer in October 1998 to search for "John Jock Joseph."[9]

Authority for the State's position comes from *State v. Bauer*, 2000 WI App 206, 238 Wis. 2d 687, 617 N.W.2d 902, and *State v. Seefeldt*, 2002 WI App 149, 256 Wis. 2d 410, 647 N.W.2d 894.

Bauer argued that evidence he had solicited the murders of his wife and a friend who was going to testify against him was improperly admitted under § 904.04(2) at his trial for the attempted homicide of his wife. 238 Wis. 2d 687, ¶¶1-2. Although the trial court had admitted the solicitation evidence as other acts relevant to prove intent or motive, this court held it was not other-acts evidence but was instead admissible to prove consciousness of

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[8]Jensen says the photos were left between 1993-96. However, some of the trial evidence indicates photos were found as early as 1991 (367:Ex. 142:5) and continued to be found until November 13, 1997, when pornographic pictures were allegedly left on Jensen's truck (367:Ex. 231:log page 44).

[9]That the parties and the trial court treated all three types of evidence as falling under § 904.04(2) is not fatal to the State's position on appeal because this court can affirm the trial court on a theory not even presented to it. *State v. Baudhuin*, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987).

guilt. *Id.*, ¶2. This court explained why a defendant's act that differs in time, place and manner from the charged crime is not necessarily other-acts evidence. *See* 238 Wis. 2d 687, n.2. That explanation is pertinent here.

Similarly, in *Seefeldt*, 256 Wis. 2d 410, this court explained that defense counsel's reference to a witness's outstanding warrants did not violate a pretrial order prohibiting "other acts" evidence until such evidence was deemed admissible because the warrant evidence did not implicate § 904.04(2):

> Carroll . . . sought to admit the warrants in order to bolster Seefeldt's defense theory that Bart was the party who made the decision to flee and not Seefeldt. The . . . warrants explained why Bart would engage in a high speed chase to avoid being arrested. There was no suggestion that the flight . . . conformed in any way to an earlier incident of flight and that therefore Bart had the propensity to flee. In fact, there was no conformity comparison at all. The warrants were referenced for the sole purpose of showing Bart's motive to flee, an essential aspect of Seefeldt's theory of defense. . . . [E]vidence of the warrants was relevant to a proposition of consequence entirely unrelated to Bart's character and any inference that she acted in conformity therewith.
>
> . . . [T]he reference to the outstanding warrants is not classic "other acts" evidence invoking . . . 904.04(2) analysis. Rather, the existence of the warrants is "part of the panorama of evidence" that directly supports Seefeldt's defense.

256 Wis. 2d 410, ¶¶22-23.

Just as the conduct at issue in *Bauer* and in *Seefeldt* was not other-acts evidence subject to the test for admissibility in *State v. Sullivan*, 216 Wis. 2d 768, 786-87, 576 N.W.2d 30 (1998), neither the computer pornography nor the sex talk constitutes other-acts evidence under § 904.04(2).

As Argument IV.C. will show, the computer pornography was admitted primarily to prove that Jensen

provided the photographs repeatedly found on the Jensen property and, allegedly, on Jensen's vehicle for years following Julie's affair. As explained in *State v. Schindler*, 146 Wis. 2d 47, 52, 429 N.W.2d 110 (Ct. App. 1988), implicit in the analysis of other-acts evidence is the requirement that the defendant committed the other act. *Schindler* adopted the analysis of *Huddleston v. United States*, 485 U.S. 681 (1988), for use in applying §§ 901.04(2) and 904.04(2). Under that analysis, other-acts evidence is admissible if a reasonable jury could find, by a preponderance of the evidence, the existence of the conditional fact. The conditional fact in *Huddleston* was that the televisions and other appliances involved in prior sales by defendant were stolen. Here, the conditional fact is that Jensen provided the pornographic photos.

Because Jensen denied doing so, the State had to present evidence sufficient to allow a reasonable jury to find, by a preponderance of the evidence, that he had left the photos. *See State v. Gray*, 225 Wis. 2d 39, 59, 590 N.W.2d 918 (1999). Absent such proof, the evidence would not have been relevant to prove motive. Apart from connecting Jensen to the photos, evidence that he visited pornographic websites on the home computer or stored a collection of penis photos on his work computer would not have been relevant to prove he murdered Julie.

Thus, the admissibility of the computer pornography does not hinge on whether it satisfies *Sullivan*'s tripartite test. Nor do the pornographic photos found on Jensen's computers need be so similar to the photos left on the Jensen property as to constitute his imprint, a requirement whenever other-acts evidence is introduced to show identity. *See*, *e.g.*, *State v. Rushing*, 197 Wis. 2d 631, 647, 541 N.W.2d 155 (Ct. App. 1995).

Rather, the issue is whether the computer-pornography evidence was properly admitted under §§ 904.01 and 904.03, a question addressed in Argument IV.C. and E. below.

Similarly, evidence of sex talk between Jensen and Kelly was not other-acts evidence but instead was admitted primarily to show that Jensen searched for "John Jock Joseph" on the home computer in October 1998. The sex talk involved Jensen asking Kelly for exceedingly intimate details of her relationships with other men and Kelly providing the information. The conversations were memorialized in notes Jensen had taken (367:Exs. 146, 149-59), which included remarks about "Jock" (*id.*:Ex. 146). Kelly explained the remarks related to her encounter with John Jock Joseph, who worked in the Colorado Springs office of Stifel Nicholas (341:145-46). Proof that Jensen had searched for Joseph on the home computer October 16, 1998, was important because sites on pipe bombs and poisons were visited during the same time frame (*see* 335:104-12). Thus, if Jensen searched for Joseph, then he likely visited those sites.

Portions of the sex-talk evidence in which Jensen drew comparisons between his penis and those of Kelly's ex-lovers was also admissible to prove Jensen had left the pornographic photos because one photo bore the writing "is he as big as I am" (343:56-57). Jensen's fixation on penis size, as illustrated by portions of his conversations with Kelly, helped prove he authored this writing and therefore left the photos.

Because the sex talk was not other-acts evidence, its admissibility is determined solely under §§ 904.01 and 904.03, not § 904.04(2).

The State will show below that all of the evidence about which Jensen complains was properly admitted. Evidence of the pornographic photos was admissible under § 904.04(2) to establish one motive for killing Julie and to explain the dynamics of their marriage. Evidence of the pornography found on his computers in 1998 and 2002 was relevant to show he was the source of the pornographic photos. Evidence of his sex talk with Kelly was relevant to show he used the home computer in October 1998 to search for John Jock Joseph, while a

portion of this evidence was also admissible to connect him to the pornographic photos.

B. Evidence that Jensen had for years left pornographic photos around the house to punish Julie for her brief affair was relevant to prove motive and to explain the dynamics of their marriage.

In reviewing a circuit court's admission of other-acts evidence, this court must decide if the lower court exercised appropriate discretion. *Sullivan*, 216 Wis. 2d at 780. Before this court can decide whether the trial court properly exercised discretion in admitting evidence that Jensen disseminated the pornographic photos, some background is necessary. The photos were part of a campaign of harassment that began around January 1992 with a series of hang-up calls (367:Ex. 231:log page 33). Julie kept a detailed log of events she believed might be part of the harassment (*id.*:Ex. 231). Usually the photos were "discovered" by Jensen outside their home (343:52). Officer Kosman described them as "men and women involved in various sexual acts, including oral sex, and the ejaculation of the male onto a female's face" (*id.*:53). He estimated that overall, he recovered between fifty and sixty photographs from the Jensens (*id.*:54). By the time of trial, police had retained only one photo, which Jensen said he found July 3, 1995, in his truck (*id.*:55). It depicts a woman's face, covered with apparent ejaculate, near an erect penis (367:Ex. 197).

The first time Julie complained to police, she said she believed the photos were left by Perry Tarica, the former coworker with whom she'd had a brief affair (343:57). As late as April 1999, Jensen expressed the belief that Tarica was responsible for the harassment (367:Ex. 142:5-9). During the police investigation, Kosman suspected Jensen had been making hang-up calls and leaving the photos (343:61-68).

If Jensen orchestrated this campaign of harassment, then this evidence shows that his 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. While Jensen denied knowing the photos' origin, he admitted saving the pictures and then bringing them out and showing them to Julie (367:Ex. 142:48-50). As he told Ratzburg, "I'd put them away, and then something would happen, and I'd get pissed off, and I'd pull some out, and I'd say I found these in the shed" (*id.*:50-51).

Jensen does not dispute that under *Sullivan*, motive is a legitimate reason for introducing other-acts evidence. Rather, he claims the photos are not relevant to prove motive because leaving photos around the house could not have tempted him to commit homicide (Jensen's brief at 40). While Jensen's observation is accurate, he misses the mark by ignoring the difference between direct and indirect proof of motive. Direct evidence is proof "that a prior [act] 'created' or gave rise to the motive for the present crime," while indirect evidence of motive is proof "that the prior [act] and the present crime are both products of the same pre-existing motive." *Hill v. United States*, 600 A.2d 58, 61 (D.C. 1991).

Evidence that Jensen engaged in emotional torture by repeatedly confronting Julie with pornographic photos indirectly proves one motive for killing her: his deep-seated hostility over her short-lived affair. Both Julie's murder and the prior act are products of the same motive – hostility and revenge for Julie's unfaithfulness. Although Jensen correctly observes that the photos did not give him cause to kill Julie, such a connection is unnecessary where the other-acts evidence provides *indirect* proof of motive.

Long ago, our supreme court recognized that evidence of the defendant's ill feeling toward his wife in a trial for murdering her was relevant to prove motive. *See Runge v. State*, 160 Wis. 8, 12-13, 150 N.W. 977 (1915). The *Runge* court declared that in circumstantial cases, "the question of motive becomes one of great importance, and

may well turn the scale either way." *Id.* at 13. Similarly, the court in *Hill*, 600 A.2d at 61, observed that evidence of prior instances of hostility is particularly relevant in marital homicide cases.

While Jensen intimates that the relevance of the evidence was low because the conduct occurred two to five years before Julie's death, the State has already shown that the last documented instance of a photo being left on Jensen's truck occurred in November 1997 (367:Ex. 231:log page 44), about a year before Julie died. Moreover, the campaign of harassment continued well into 1998, at which time it involved videotapes and phone calls referencing videotapes (*id.*:log page 47). Thus, the course of conduct was not remote from Julie's death, and any temporal gap between some of the prior acts and the charged crime affects only the weight of the evidence and does not bar its admission. *State v. Clark*, 931 P.2d 664, 674 (Kan. 1997).

While Jensen suggests it was enough that the jury knew about Julie's affair, that evidence alone was weak proof of motive since the affair occurred in 1991. Absent evidence that Jensen engaged in long-term harassment to punish her for this misstep, the jury would have known only that Julie had a weekend affair seven years before her death. The temporal gap between the affair and her death would cause most jurors to conclude the former was not a catalyst for murder. But, given Jensen's obsession with Julie's brief dalliance, as demonstrated by his use of the pornographic photos to torture her emotionally, the jury could better understand how the affair provided one motive for her murder.

The photo evidence was also relevant to prove the dynamics of the Jensen marriage,[10] providing insight into

[10]Pretrial, the prosecutor also argued that the evidence was admissible to prove Julie's state of mind (*see* 155:1, 6-9). Although the State agrees, it will not separately discuss this purpose other than to disagree with Jensen's argument that because Julie believed Perry

(Footnote continued)

the unique circumstances existing in their household, a permissible purpose of other-acts evidence. *See State v. Hunt*, 2003 WI 81, ¶58, 263 Wis. 2d 1, 666 N.W.2d 771. Jensen's repeated use of the photos to cause Julie to believe her affair caused them years of harassment fueled her guilt over her unfaithfulness. In turn, Julie's guilt explained why she dismissed the suggestion that Jensen was responsible for the harassing calls and photos and why she disregarded Kosman's directive to conceal from Jensen the final trace on their phone (*see* 343:62-63, 65-68). As she told Kosman, she "did not want to keep any more secrets from [Mark]" and "felt bad because she had the affair" (*id.*:69).

Thus, the trial court properly exercised its discretion in allowing evidence that Jensen disseminated the pornographic photos.

C. Storing penis photos on his work computer in 2002 made it more likely Jensen had accessed similar pornography on the home computer in 1998, which in turn helped prove he was the one who left pornographic photos around the home and accessed poisoning sites before Julie's death.

The State has established that the only limits on admissibility of the computer pornography are §§ 904.01 and 904.03. The State will now show that the evidence was properly admitted under those statutes.

Because Jensen's brief falsely insinuates that jurors viewed penis pictures found on Jensen's home and work

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Tarica orchestrated the harassment, the other-acts evidence could not show her state of mind.

Contrariwise, Julie's refusal to believe Jensen was behind the photos or the other harassment speaks volumes about her mindset.

computers, some clarification is required before the State can discuss the theories underlying admission of the challenged evidence. The 1998 evidence was a list of websites found in the Internet history of the Jensen home computer, the URL's of which strongly suggested they contained images of penises.[11] *See*, *e.g.*, 367:Ex. 272:94, 102-04. Testimony accompanying this exhibit came from its creator, Martin Koch, a forensic scientist formerly employed in the Computer Evidence Unit of the State Crime Laboratory (350:204).[12] Koch testified that various pornographic websites had been accessed on the Jensen home computer July 10, 1998 (350:291-96). Some sites apparently related to men and their erect penises (*id.*:294-96), and some files were saved on the computer hard drive (351:43). However, the jury did not view any of the material referenced.[13]

Koch also supplied the 2002 evidence, testifying that he found voluminous pornography on the computer seized from Jensen's office that year (351:15, 17). Koch explained that the 2002 pornography was organized in two ways. One series of three folders named D-average, D-small and D-large featured mostly erect male penises (*id.*:17). Another series of folders named Oral contained "principally images of a male erect penis, along with a female either close by or actually having contact with that penis" (*id.*). Approximately 750 images were located in this directory structure (*id.*:18).

Only one photo from Jensen's work computer was printed off and displayed to jurors (351:24; 367:Ex. 275).

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[11]Other websites listed in the Internet history apparently featured different types of pornography (*see* 367:Ex. 272:91-93).

[12]Koch's testimony consumed a portion of four days (*see* 350:203-96; 351:15-61; 352:97-219; 353:3-84), but most of it was unrelated to pornographic photos.

[13]Jensen's brief at 37 wrongly cites 349:20-21 to show that the State "produced the 1998 pictures." Those pages contain a discussion regarding admissibility of the 2002 computer evidence.

Thus, the jury saw only one penis photo from the pornography discovered on his work computer and did not view the numerous photographs in Exhibit 269.

In his brief, Jensen ignores the trial court's explanation regarding the purposes for which it admitted the evidence (351:3-6; R-Ap. 101-04). The court found that because Jensen persistently denied leaving the pornographic photos, evidence of 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 he left the pornographic photos repeatedly recovered from the Jensen property (*id.*:3-4). The court also admitted evidence of the computer pornography to show who visited poisoning sites on the home computer in 1998. This was a major issue throughout trial, with the State trying to establish that Julie knew very little about computers and rarely used the home computer while Jensen was computer savvy and surfed the Internet regularly. As the trial court observed (*id.*:4-5), the defense had impeached Detective Ratzburg's testimony 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 (*see* 350:175-80). Given the importance of determining who had searched for ethylene glycol and other poisons on the home computer, evidence tending to show Jensen was by far the primary user had great probative value, especially after counsel's cross-examination of Ratzburg.

Contrary to Jensen's protest, the organized files of penis images stored on his work computer in 2002 makes it more likely that in July 1998 he was visiting websites containing similar images. In turn, the 1998 and 2002 evidence makes it more likely he left the pornographic photos found on the Jensen property. Jensen's fixation on penis size, as demonstrated by the 2002 computer evidence, makes it more likely he left the penis photo bearing the notation "is he as big as I am" (*see* 343:57).

Having this fixation in 2002 makes it more likely he had it in 1998, when the Jensen home computer was used to visit a variety of pornographic websites, many ostensibly containing images of erect penises. The pornographic sites visited in 1998, some of which relate to oral sex, also make it more likely Jensen was the source of the one pornographic photo retained by police, which shows an erect penis and a woman's face covered by apparent ejaculate (367:Ex. 275).

Because, as Argument IV.A. above establishes, the evidence discovered on Jensen's home and work computers is not other-acts evidence, it did not have to be so remarkably similar to the photographs left on and around the Jensen property as to constitute Jensen's signature or imprint. Rather, it only had to satisfy §§ 904.01 and 904.03, and the foregoing discussion establishes that it satisfied the former statute.

D. Sex talk between Kelly and Jensen helped prove he searched for John Jock Joseph in October 1998 and also helped identify Jensen as the source of the pornographic photos.

The evidence identified as "sex talk" consists of Kelly's testimony about conversations during which Jensen asked for intimate details of her prior sexual activity and she provided them (*see* 342:186-94, 199-204), and Jensen's detailed notes of their conversations (*see* 367:Exs. 146, 149-59). As he did with the computer evidence, Jensen ignores the trial court's rationale for admitting the sex-talk evidence (343:104-07; R-Ap. 171-74).

The court explained that the timing of Kelly's first conversation with Jensen about her former lovers was important because a conversation preceding the October 16, 1998 computer search for John Jock Joseph – one of the men Kelly mentioned – would strongly suggest

Jensen had conducted the search, making it likely he had also researched poisoning and other means of death on the Internet within the same time frame (343:104; R-Ap. 171).

Kelly originally denied having any conversation with Jensen about Joseph until mid-1999 or early 2000 (342:112). However, on redirect she conceded the possibility she had such a conversation in 1998 although she couldn't recall it (*id.*:157-58, 187).

The prosecutor doubted Kelly's inability to recall when the first such conversation occurred because it was so shocking and unusual; he likened it to "a wife coming home, walking in the bedroom, and finding her husband wearing her lingerie" (343:110). The prosecutor also implied that Kelly's professed lack of recall was due to Jensen's prompting during a telephone call from jail, when he told her that the conversation about Joseph did not occur in 1998 (*id.*). Thus, the level of detail regarding the sex talk was necessary to emphasize the point that a wife would remember exactly when her husband-to-be interrogated her about ex-lovers, their sexual activities and their penis sizes.

The trial court also found the sex talk evidence admissible because it tended to prove Jensen was the source of the pornographic photos. Because one photo bore the writing "is he as big as I am," the fact the sex talk illustrated Jensen's fixation on the penis size of Kelly's former paramours tended to prove he provided the writing and other similar photos (343:107; R-Ap. 174).

Therefore, the trial court properly exercised its discretion in finding the sex talk relevant under § 904.01.

E. Jensen failed to prove that the probative value of any of the challenged evidence was substantially outweighed by the danger of unfair prejudice.

The opponent of other-acts evidence must show that its probative value is substantially outweighed by the danger of unfair prejudice. *State v. Hunt*, 263 Wis. 2d 1, ¶53. Logically, the same burden attaches to the opponent of non-other-acts evidence deemed relevant under § 904.01.

"Unfair prejudice" under § 904.03 "'results where the proffered evidence . . . would have a tendency to influence the outcome by improper means or if it appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish or otherwise causes a jury to base its decision on something other than the established propositions in the case.'" *State v. Doss*, 2008 WI 93, ¶78, 312 Wis. 2d 570, 754 N.W.2d 150 (citation omitted).

Jensen contends the three categories of evidence discussed above "carried an incredibly high risk of unfair prejudice." Jensen's brief at 43. In support, he selectively quotes the record to make it appear that the trial court and the prosecutor *conceded* that the sex talk and computer pornography evidence was admitted for an improper purpose when that is untrue. For example, the prosecutor's statement at 333:277 was made during a discussion about evidence showing that Jensen had purposely destroyed his work computer. In replying to the trial court's question about the difference between fair and unfair prejudice, the prosecutor opined that evidence a murder defendant was a sex pervert "that had nothing to do with the murder" would be unfair (*id.*). But that comment was unrelated to the sex talk or computer pornography evidence Jensen is challenging.

Insofar as the trial court commented that by introducing the sex-talk evidence, the prosecutor was

"trying to prove that the defendant is sleazy" (342:199), this court must consider the context in which the remark was made. Defense counsel had objected to the evidence on the ground it would violate the rape-shield law[14] by suggesting the examining party (the State) thinks the witness (Kelly) is "sleazy" (*id.*). The trial court's flippant remark that the prosecutor was trying to show that Jensen, and not the witness, was sleazy was intended as a facetious response to that objection. The prosecutor promptly disavowed any intent to portray Jensen as sleazy, interjecting, "I'm trying to prove that she's not telling the truth [about when the conversation occurred]" (*id.*:199). The trial court then acknowledged that reason for admitting the evidence (*id.*). Under these circumstances, this court should reject Jensen's invitation to find, based on the trial court's attempt at jocularity during an extremely contentious trial, that the evidence was introduced for an improper purpose.

While the computer pornography and sex-talk evidence did demonstrate Jensen's fixation on penis size, it did not portray him as a "sex pervert," which connotes something more sinister, like pedophilia. After all, possessing adult pornography is not illegal. Simultaneously, evidence Jensen had left pornographic photos around the house to punish Julie for a short-lived affair was highly probative to show motive and the state of their marriage. The jury's knowledge that Jensen pretended that Perry Tarica likely was leaving such photos around the house and on Jensen's truck is not evidence likely to cause a jury to base its verdict on "something other than the established propositions in the case." Thus, there was no unfairness in alerting the jury to Jensen's emotionally abusive conduct toward Julie.

Moreover, the sex talk and the computer pornography were admissible to connect Jensen to the

[14]This argument was baseless, given that Wis. Stat. § 972.11(2)(a) applies only to the complaining witness in certain sexual assault prosecutions.

photos, a condition precedent for admissibility of the other acts. And both categories of evidence were independently admissible for other purposes, detailed above.

Contrary to Jensen's suggestion, the jury's knowledge of his longstanding fetish about penis size was not evidence that would cause them to find he was the kind of person likely to poison and asphyxiate his wife. As the trial court observed, the wealth of other lurid material already introduced made it doubtful that evidence of penis photos on Jensen's computers would "push the jury over the edge" (350:170). The most prominent illustration is the exchange of sexually charged e-mails between Jensen and Kelly, about which the prosecutor extensively questioned her (341:165-211). Among other tidbits, the jury heard of Jensen's frequent allusions to oral sex, symbolized by a tongue hanging out (*id.*:169-70; *also see* 367:Ex. 69:2); his fantasizing about Kelly while having sex with Julie (341:181); his questioning Kelly about how he felt to her during sexual intercourse (*id.*:201-02); and his mention of possible sexual activities they could have on his desk and in his office chair (*id.*:204).[15]

The jury also learned that after Julie died, Jensen asked Nehring if it would be okay to have Kelly attend Julie's wake (333:268), and that Jensen put Julie's belongings on the curb for trash pickup the week after her funeral (336:243).

The record refutes Jensen's claim that the trial court failed to limit the presentation of the sex evidence. After the prosecutor began naming various websites visited on the Jensen home computer on July 10, 1998 (350:293-96), defense counsel objected under § 904.03, and the trial court ended that line of questioning (*id.*:296).[16]

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[15]The e-mails themselves appear as Exhibits 36-45 and 47-81.

[16]Contrary to Jensen's suggestion, the reference to "blowjobcentral" occurred outside the jury's presence (350:297).

Significantly, defense counsel declined a limiting instruction, thinking it might add prejudice (342:185). For its part, the trial court suggested that a cautionary instruction on use of the sex-talk evidence was warranted but said it would not give one unless the defense requested it (*id.*:197). Counsel declined an instruction at that point but reserved the option of crafting one later (*id.*:197-98).

Therefore, Jensen cannot complain that the trial court exacerbated the impact of the sex-talk and pornography evidence.

Finally, Jensen's contention that the risk of unfair prejudice from the computer pornography was heightened by the limitations the trial court imposed on defense counsel during voir dire is meritless. When voir dire occurred, the trial court had ruled evidence of the penis photos inadmissible so its restrictions on asking the panel about their reaction to pornography was reasonable. In any event, unfair prejudice is not determined by what the parties were allowed to explore during voir dire.

This court should therefore affirm the trial court's exercise of discretion in admitting all three categories of evidence.

V. THE SEIZURE AND SEARCH OF JENSEN'S COMPUTER DID NOT EXCEED THE SCOPE OF HIS CONSENT.

The State agrees with the legal principles and standard of review at 61 of Jensen's brief. Additional guidance comes from *Florida v. Jimeno*, 500 U.S. 248, 251 (1991), where the Court reiterated that "[t]he 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?"

The scope of a search is generally defined by its expressed object. *Jimeno*, 500 U.S. at 251. Thus, police may search where the sought-after objects can be found. *State v. Matejka*, 2001 WI 5, ¶41, 241 Wis. 2d 52, 621 N.W.2d 891.

Jensen advances two arguments for why the police seizure of his computer exceeded the scope of his consent. First, he contends that the language "'any letters, writings, paper, materials or other property'" in the consent form he signed "limited the consent to the seizure of documents and similar items." Jensen's brief at 62. Second, he asserts that in light of Ratzburg's statements, no reasonable person would think that a search for evidence regarding the cause of Julie's death would extend to a computer. *Id.* at 63.

Jensen offers no authority for his claim that the language "other property" in the consent form must be limited to documents and similar items. Because "other property" is modified by the language "which they [i.e., the police] may desire" (39:3; A-Ap. 147), "other property" should be broadly construed, given that the form implicitly gives police unlimited discretion to decide what property they desire to search and seize.

Alternatively, even if "other property" is limited to "documents and similar items," Jensen's computer and its files qualify. *See Commonwealth v. McDermott*, 864 N.E.2d 471 (Mass. 2007), and the numerous cases cited therein.

In rejecting McDermott's contention that the seizure of computers and disks from his residence was unlawful because the warrant did not specifically name these items, the court joined other state and federal courts adopting the approach that a warrant authorizing a search for records permits the seizure of computers and disks that electronically may hide and store such records. 864 N.E.2d at 487-88. The court explained why this approach makes sense "in this age of modern technology." *See id.*

McDermott and the cases it discusses provide persuasive authority that even if the language "other property" in the consent form is limited to documents and similar items, this terminology would encompass Jensen's computer and the files it housed.

Thus, the seizure of Jensen's computer was not beyond the scope of his consent, either because "other property which they may desire" should be broadly construed or because, even under the narrow construction Jensen advocates, his computer and the files it contained would qualify as documents and similar items.

Jensen's other claim – that in light of Ratzburg's statements no reasonable person would think that a search for evidence of the cause of Julie's death would extend to a computer – is equally meritless. In support, Jensen cites Ratzburg's suppression hearing testimony (103:54-55) that he wanted Jensen's consent to search so he could explore a possible connection between Julie's death and previous incidents in which pornographic photos had been left around their home. In focusing on a small part of Ratzburg's testimony, Jensen ignores significant portions which reveal that Ratzburg did not suggest that the sole reason for the search was to uncover a possible link between the earlier incidents and Julie's death. Rather, as a series of questions and answers at 103:54-55 reveals, Ratzburg made clear that the overarching purpose of the search was to seek evidence regarding cause of death.

After signing the consent-to-search form, but before the search started, Jensen told Ratzburg he thought Julie's death "had something to do with an allergic reaction between" Ambien and Paxil, and he reported having been on the Internet the day before, seeking that information (103:23).

A reasonable person would have understood that Ratzburg wanted to search the home for any clues regarding the cause of Julie's death. A reasonable person would not have thought Ratzburg was limiting his search

to items showing a possible linkage between her death and the previous incidents reported to police. The focus is not on what Jensen believed, but what the "typical reasonable person" would have understood. *Jimeno*, 500 U.S. at 251. Based on Jensen's statements to Ratzburg, a reasonable person would have believed the detective would investigate the possibility that a drug interaction caused Julie's death and that information from the Jensen computer might illuminate that possibility.

Even if a reasonable person would believe Ratzburg's search would be narrowly focused on a linkage between the prior incidents and Julie's death, seizing and searching the computer was within the scope of consent. Given that Julie had kept a contemporaneous record of the harassing incidents (367:Ex. 231), it would be reasonable to check the computer for files containing such records.

Not only is Jensen's reasoning flawed; the federal cases on which he relies are inapposite.

Two of the cases involved search warrants rather than consent-to-search forms: *United States v. Medlin*, 842 F.2d 1194, 1199 (10th Cir. 1988); and *United States v. Foster*, 100 F.3d 846 (10th Cir. 1996). Those cases therefore implicate the particularity requirement of the Fourth Amendment, meaning a warrant must "describe the place to be searched and the things to be seized with 'particularity.'" *See United States v. Setser*, 568 F.3d 482, 487 (5th Cir. 2009). No particularity requirement attends consent searches or consent-to-search forms, however.

Additionally, in both cases the agents executing the warrant went well beyond its scope, causing the court in each case to suppress all items taken in the search, including items specifically listed in the warrant. *See Medlin*, 842 F.2d at 1200; *Foster*, 100 F.3d at 847-48. In contrast, no flagrant police misconduct occurred here.

And while *United States v. Dichiarinte*, 445 F.2d 126 (7th Cir. 1971), involved a consent search, it is easily

distinguishable. Unlike Jensen, who knew police were trying to determine the cause of Julie's death and who signed a form allowing them to seize "letters, writings, paper, materials or other property which they may desire" (39:3; A-Ap. 147), Dichiarinte reasonably believed he had only given agents verbal consent to search his home for narcotics. *See* 445 F.2d at 128.

For all of these reasons, this court should affirm the trial court's determination that the police legally seized and searched Jensen's computer.

VI. BECAUSE JENSEN HAS FORFEITED HIS SIXTH AMENDMENT RIGHT TO CONFRONT JULIE'S TESTIMONIAL STATEMENTS UNDER *GILES*, AND HIS STATE CONSTITUTIONAL RIGHT TO CONFRONT HER NON-TESTIMONIAL STATEMENTS UNDER *JENSEN*, JULIE'S STATEMENTS DID NOT HAVE TO SATISFY A HEARSAY EXCEPTION.

Jensen contends that apart from any confrontation violations, Julie's statements to the Wojts, Kosman, DeFazio and Ratzburg were inadmissible because they failed to satisfy any hearsay exception under Chapter 908. He claims the trial court was wrong when it concluded that he forfeited any hearsay objection to Julie's statements along with any confrontation objection.

Contrary to Jensen's view, the State does not have to show that Julie's statements satisfied a hearsay exception after it has shown Jensen forfeited his right to confrontation regarding those statements. With respect to the statements previously deemed testimonial, if this court finds that one reason Jensen killed Julie was to prevent her from testifying in a family court action, then Jensen forfeited both confrontation and hearsay objections. And with respect to Julie's nontestimonial statements to the

Wojts, DeFazio and police, the trial court correctly found that under *State v. Jensen*, Jensen simultaneously forfeited both confrontation and hearsay objections by killing Julie.

A. A defendant who forfeits the right to object to a witness's testimony on Sixth Amendment grounds also forfeits the right to object on hearsay grounds.

Jensen's belief that the State, after satisfying the requirements of FBW under *Giles*, must also show that Julie's testimonial statements satisfy a hearsay exception before they are admissible conflicts with *Giles* itself. In dismissing California's argument that a forfeiture of confrontation rights by wrongdoing would not also forfeit hearsay objections, the Court stated:

> No case or treatise that we have found, however, suggested that a defendant who committed wrongdoing forfeited his confrontation rights but not his hearsay rights. And the distinction would have been a surprising one, because courts prior to the founding excluded hearsay evidence in large part *because* it was unconfronted. . . .

Id. at 2686.

Although dictum, the above statement is legally correct and this court should adopt it and hold that Jensen simultaneously forfeited confrontation and hearsay objections to Julie's statements. The cases below support this view.

In *Proffit v. State*, 191 P.3d 963, 967 (Wyo. 2008), *cert. denied*, 129 S. Ct. 1048 (2009), the court cited the above-quoted language from *Giles* in concluding that because FBW applied, it was unnecessary for the State to also satisfy a hearsay exception to have B.C.'s statement admitted. The Wyoming court said "it would be illogical to apply forfeiture by wrongdoing to the constitutional

right, while denying its application to the rule of evidence." *Id.*[17]

Similarly, in *Roberson v. United States*, 961 A.2d 1092, 1095 (D.C. 2008), the court held that FBW applies simultaneously to confrontation and hearsay objections where a defendant wrongfully procures a witness's absence with intent to prevent him from testifying. In support, *Roberson* cited *Devonshire v. United States*, 691 A.2d 165 (D.C. 1997). *See* 961 A.2d at 1095 n.6. In turn, *Devonshire* relied on numerous federal decisions predating Fed. R. Evid. 804(b)(6), including *United States v. Houlihan*, 92 F.3d 1271, 1281 (1st Cir. 1996); *United States v. Thai*, 29 F.3d 785, 814 (2d Cir. 1994); *Steele v. Taylor*, 684 F.2d 1193, 1201 (6th Cir. 1982); and *United States v. Balano*, 618 F.2d 624, 628-29 (10th Cir. 1979). *See* 691 A.2d at 168-69 & n.4.

The *Houlihan* court explained why it rejected the defendants' argument that even if they waived their confrontation rights, the district court should not have admitted Sargent's hearsay statements because they lacked the "circumstantial guarantees of trustworthiness" required by Fed. R. Evid. 804(b)(5):

> Once the confrontation right is lifted from the scales by operation of the accused's waiver of that right, the balance tips sharply in favor of the need for evidence.

92 F.3d at 1281.

State cases holding likewise include *Commonwealth v. Edwards*, 830 N.E.2d 158, 170 (Mass. 2005), and *State v. Hallum*, 606 N.W.2d 351, 356 (Iowa 2000).

The foregoing cases are but a representative sampling of the federal and state decisions that validate *Giles*'s observation that it would be surprising for a court

[17]Like Wisconsin, Wyoming has not codified forfeiture by wrongdoing. *See* 191 P.3d at 967 n.6.

to hold that a defendant has waived his confrontation objection but not his hearsay objection to a testimonial statement of an absent witness. While such a distinction may have been made pre-*Giles* in jurisdictions where forfeiture for Confrontation Clause purposes had no intent element but forfeiture for hearsay purposes did,[18] that situation no longer exists post-*Giles*.

Post-*Giles*, it is illogical to allow a defendant to benefit from his misconduct by successfully invoking a hearsay objection to the statement of a declarant following a judicial determination that the defendant procured the declarant's unavailability to prevent her testimony. As a leading evidence treatise notes, "the narrower approach [the view that forfeiting confrontation rights does not also forfeit hearsay objections] allows misbehaving defendants to exclude some statements (those fitting no exception), leaving in place *some* incentive for misconduct." Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence*, § 8:134 at 9 (3d ed. 2009 Supp.).

Significantly, the trial court's belief that a forfeiture finding applied to hearsay and confrontation objections alike (*see* 334:3; 347:286-87) was apparently shared by defense counsel (334:3; 347:291-92). The trial court's belief explains its retreat from 2003 pretrial rulings excluding some of Julie's statements on hearsay grounds (*see*, *e.g.*, 107:84).

Accordingly, this court should hold that if Jensen forfeited the right to confront Julie's testimonial

[18] *See*, *e.g.*, *United States v. Garcia-Meza*, 403 F.3d 364, 370 (6th Cir. 2005), where the court adopted a version of FBW for confrontation purposes that did not contain an intent element, whereas the federal rule governing forfeiture of hearsay objections does.

statements, he necessarily forfeited hearsay objections to these statements as well.[19]

B. This court is bound by the supreme court's determination that, by killing Julie, Jensen forfeited any confrontation objection to her nontestimonial statements under the Wisconsin Constitution, and that forfeiture ruling should extend to any hearsay objection.

The parties agree that *Giles* effectively overruled *Jensen* insofar as testimonial hearsay is concerned by holding that for Sixth Amendment purposes, FBW requires that the defendant intended to prevent the witness from testifying. *See* 128 S. Ct. at 2683-91.

Giles made clear that the narrow version of FBW sanctioned there applies only to testimonial statements, leaving states free to adopt the dissent's version of FBW – a broad version without an intent element – for nontestimonial hearsay. 128 S. Ct. at 2692-93. This is because nontestimonial statements are no longer subject to Confrontation Clause scrutiny. *See Davis v. Washington*, 547 U.S. at 823-24.

This means *Jensen*'s version of FBW is still valid with respect to Julie's nontestimonial statements to the Wojts, DeFazio and others. Under that version the State need only show by a preponderance of evidence that Jensen killed Julie, without regard to his intent. The trial

[19]The State is *not* suggesting that forfeiture would apply to multiple levels of hearsay incorporated in any of those statements. For example, if Julie reported what another person had said, and that person's statement was offered for its truth, then the State would have to satisfy a hearsay exception to admit the other person's statement. The trial court recognized that forfeiture would not extend to such statements (*see* 347:291).

court ruled that the State had made this showing at the forfeiture hearing, and the jury – applying a higher standard of proof – agreed.

Because *Giles* applies only to testimonial statements, *Jensen* remains good law with regard to forfeiture of confrontation objections to nontestimonial statements under the state constitution.[20] *Cf. Roberts v. State*, 894 N.E.2d 1018, 1025 (Ind. Ct. App. 2008) (broader view of FBW Indiana Supreme Court had adopted pre-*Giles* still applies "to non-testimonial statements whose admissibility is challenged under the Indiana Evidence Rules"). Thus, this court is bound by *Jensen*'s holding that by killing Julie, Jensen forfeited any state constitutional objection to her nontestimonial statements. *See Cook v. Cook*, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997).

But even if *Jensen* were not controlling, this court should still follow it because the supreme court cited compelling policy reasons for adopting a broad version of FBW, *see* 299 Wis. 2d 267, ¶52. Those policy concerns still apply to nontestimonial statements post-*Giles*.

In Argument VI.A., the State has explained why a defendant who forfeits via wrongdoing his Sixth Amendment confrontation objection to testimonial hearsay should also be deemed to have simultaneously forfeited his state hearsay objections. The same reasoning applies where a defendant has forfeited via wrongdoing a confrontation objection under the state constitution to nontestimonial statements of a declarant whose absence he has procured by killing her.

Had Julie survived Jensen's attempts to kill her, she could have told the jury in an attempted-homicide trial many things she told her neighbors and her son's teacher, to prove Jensen tried to murder her. She could have told

[20] *Jensen* applied both the Sixth Amendment's Confrontation Clause and Wis. Const. art. I, § 7. *See State v. Jensen*, 299 Wis. 2d 267, ¶13.

them that she saw poisoning websites her husband had left on their computer screen; that he never forgave her for having an affair; and that she never would try to kill herself because she loved her children so much. It would be ironic to hold that the jury could hear those statements after a failed murder attempt, but not after a successful one.

Certainly it would be anomalous to hold that Jensen forfeited a right bestowed by the state constitution but not a right provided by the state's evidence code. Forfeiture of a constitutionally based objection unaccompanied by forfeiture of a hearsay objection would be illogical and defeat the purpose behind FBW – preventing a defendant from benefiting from his wrongdoing.[21]

This court should therefore reject Jensen's argument that Julie's letter and statements had to satisfy a hearsay exception even if Jensen forfeited the right to confront her.

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[21]At page 10 of his brief, Jensen says that *Ohio v. Roberts*, 448 U.S. 56 (1980), remains the test for admission of nontestimonial hearsay. Jensen is only half right.

While *State v. Manuel*, 2005 WI 75, ¶¶54-55, 281 Wis. 2d 554, 697 N.W.2d 811, so holds, *Davis v. Washington*, 547 U.S. 813, 823-25 (2006), overruled *Manuel* insofar as it was based on the Sixth Amendment.

For now, however, *Manuel* remains the law with respect to the confrontation right found in Wis. Const. art. I, § 7. *See* 281 Wis. 2d at ¶¶3, 76.

C. Most of Julie's nontestimonial statements were admissible for nonhearsay purposes, i.e., as circumstantial evidence that she was not suicidal.

Even if this court rejects the arguments advanced in Argument VI.B. and also finds that one or more of Julie's nontestimonial statements should not have been admitted for their truth, most of her statements were admissible for nonhearsay purposes, i.e., as circumstantial evidence of her state of mind.

For example, Julie's statements to DeFazio and Wojt that she feared Jensen was trying to poison her may not have been admissible to prove he was trying to poison her, but the statements would still have been admissible to prove she was not suicidal. *See*, *e.g.*, *United States v. Brown*, 490 F.2d 758, 767 (D.C. Cir. 1973); *Commonwealth v. DelValle*, 221 N.E.2d 922 (Mass. 1966); *State v. Blanchard*, 315 N.W.2d 427, 432-33 (Minn. 1982); *State v. Wauneka*, 560 P.2d 1377, 1380 (Utah 1977). In that respect, this case is distinguishable from *State v. Kutz*, 2003 WI App 205, 267 Wis. 2d 531, 671 N.W.2d 660, where the court held that evidence of the victim's statements indicating that Kutz had threatened her were inadmissible to prove the victim's state of mind. *Id.*, ¶62. Whereas Kutz was not claiming his wife had committed suicide, Jensen's suicide/framing defense meant the jury had to decide whether Julie killed herself or whether Jensen killed her. Under this scenario, Julie's statement that she feared being poisoned was relevant to show she was nonsuicidal because fear for one's life is arguably inconsistent with suicidal intent. Julie's statements that she feared Jensen was trying to poison her were therefore admissible for nonhearsay purposes even if not to prove the truth of what she feared.

This means the jury would have heard those statements, albeit accompanied by a limiting instruction had one been requested. For that reason, and in light of

the evidence of guilt summarized in Argument II.B.-D., any error in admitting such statements without a limiting instruction was not reversible error.

VII. JENSEN SHOULD NOT RECEIVE A NEW TRIAL IN THE INTEREST OF JUSTICE.

Wisconsin Stat. § 752.35 grants this court the power of discretionary reversal in two situations: 1) if it appears from the record that the real controversy has not been fully tried; or 2) it is probable that justice has miscarried.

Initially, based on Jensen's citation to three cases in which the supreme court overturned a conviction because the real controversy was not fully tried (*see* Jensen's brief at 66), it appears he is claiming the real controversy was not fully tried here. However, Jensen's later assertion that it is "likely" or "clear" that justice has miscarried (*see id.* at 67-68), implies he is relying on the second ground for relief contained in § 752.35. Regardless of how his request is characterized, Jensen is not entitled to discretionary reversal.

Jensen merely summarizes the same claims of error previously advanced and then asks this court to reverse based on those alleged errors, whether considered separately or cumulatively. Jensen's brief at 67-68. As the supreme court has explained, however, "Zero plus zero equals zero." *Mentek v. State*, 71 Wis. 2d 799, 809, 238 N.W.2d 752 (1976). Thus, if this court finds no reversible error, it should refuse to grant Jensen a new trial in the interest of justice based on previously rejected claims.

CONCLUSION

This court should affirm the circuit court's judgment.

Dated this 1st day of February, 2010.

Respectfully submitted,

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CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure as amended by this court's order of December 14, 2009, for a document printed in a proportional serif font. The brief contains 17,956 words.

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MARGUERITE M. MOELLER

CERTIFICATE OF COMPLIANCE
WITH WIS. STAT. § (RULE) 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Wis. Stat. § (Rule) 809.19(12).

I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 1st day of February, 2010.

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