STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT II
Appeal No. 2009AP898-CR

STATE OF WISCONSIN,
Plaintiff-Respondent
v.

MARK D. JENSEN,
Defendant-Appellant

ON APPEAL FROM JUDGMENT OF CONVICTION ENTERED ON THE 27TH DAY OF FEBRUARY, 2008, IN THE KENOSHA COUNTY CIRCUIT COURT, JUDGE BRUCE E. SCHROEDER, PRESIDING

REPLY BRIEF OF DEFENDANT-APPELLANT

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I. FORFEITURE BY WRONGDOING

The State argues that both Julie Jensen's letter and her statements to Officer Kosman are admissible, as Mr. Jensen killed her to prevent her testimony in a nonexistent family court proceeding. This Court should reject this interpretation of Giles, as Giles did not hold that some unidentified, imaginary civil case could serve as a basis to admit prior statements of a witness under the forfeiture by wrongdoing exception. See Giles v. California, 128 S.Ct. 2678 (2008). In fact, the State is now asking this Court to adopt yet another forfeiture standard, this one even broader than the one adopted by the Wisconsin Supreme Court in State v. Jensen, 2007 WI 26, and declared unconstitutional in Giles. The State's position fails for several reasons.

First, it conflicts with the reasoning of Giles, which referred to witnesses whom were going to give testimony in a ***criminal proceeding***, not some yet to be determined, unknown civil proceeding or family court action. In discussing the history of the forfeiture by wrongdoing exception, several passages from Giles demonstrate the fallacy behind the State's argument:

> The terms used to define the scope of the forfeiture rule suggests that the exception applied only when the defendant engaged in conduct ***designed to prevent the witness from testifying***. Giles, 128 S.Ct. at 2683**.**

Cases and treatises of the time indicated that a "purpose based definition of these terms governed." Id. at 2683-84. A number of them said that prior testimony was admissible when a witness was kept away by the defendant's "means and contrivance". Id. at 2684. The phrase required the defendant to have schemed to bring about the absence that he "contrived". Id. Therefore, the manner in which the forfeiture rule was applied "makes plain that unconfronted testimony would not be admitted without a showing that defendant intended to prevent a ***witness*** from testifying." Id. The "wrong" or "evil practices" was, therefore, conduct designed to ***prevent a witness from testifying***. Id. at 2686. In sum, the U.S. Supreme Court's interpretation of the common law forfeiture rule and reasoning was supported by:

> (1) The most natural reading of the language used at common law; (2) The absence of common-law cases admitting prior statements on a forfeiture theory when the defendant had not engaged in conduct designed to prevent a witness from testifying; (3) The common law's uniform

> exclusion of unconfronted inculpatory testimony by murder victims (except testimony given with awareness of impending death) in the innumerable cases in which the defendant was on trial for killing the victim, but was not shown to have done so for the purpose of preventing testimony; (4) A subsequent history in which the dissent's broad forfeiture theory has not been applied. Id. at 2688.

Second, the forfeiture by wrongdoing doctrine is designed to prohibit a defendant from complaining about his confrontation rights being violated if he prevented ***a witness*** from testifying in a ***criminal prosecution***. Conversely, the State's proposed standard would encompass testimony at any trial, including even divorce trials or child custody hearings. Clearly, these proposed exceptions, as explained previously, were not "established at the time of the founding". Id. at 2682. Additionally, nowhere does Giles discuss or imply such a reading. Instead, Giles limits its discussion to interfering with "criminal prosecutions" or preventing "testimony in ongoing proceedings". Id. at 2692-93. Civil cases simply are not included. In fact, one of the State's post-Giles cases is United States v. Vallee, 304 Fed.

Appx. 916 which supports Jensen's contention as out-of-court statements made by a witness in a ***Canadian prosecution*** were admissible in a ***subsequent prosecution*** for murder.

A third problem with the State's proposed standard is that the State interprets Giles to hold that a defendant forfeits his right of confrontation even when there is ***no pending civil case***. In Jensen's case, there was not a divorce or custody action pending between Mr. Jensen and Julie Jensen. Despite this, the State argues that Jensen still forfeited his right to confrontation. This is completely contrary to Giles. Even the case cited in support of the State's argument, U.S. v. Lentz, 524 F. 3d 501, had a divorce case and family court orders from that case occur prior to the complainant's death. See id. at 507.

Therefore, even if this court found that a defendant could forfeit his right of confrontation in the civil arena, the standard certainly would not apply when there is no pending civil case. The confrontation clause would be completely bypassed in nearly every case, as literally any dispute between the deceased and the defendant could conceivably result in a future, potential civil suit. Under the State's theory,

any witness could testify at a forfeiture hearing that the deceased and the defendant had an argument over a contract, their children, their marriage, or virtually anything, and based on that, the defendant would lose his right of confrontation. Giles would not support such a conclusion. The State's argument should therefore be rejected in its entirety.

This Court should also reject the State's proposed remand as there was no evidence at the forfeiture hearing or at trial that a divorce case had been filed. Further, in the closing arguments, the State even conceded that Julie did not even want a divorce at or near the time of her death because Mr. Jensen was being good to her, was taking care of her, was being kind to her and was trying to help her, and that she didn't have to do anything rash like leaving the house and taking the children with her. (359:42-43.) Allowing the Court on remand now to consider whether there was a divorce proceeding, when it was very clear that there was not a divorce proceeding, would allow the State to assert inconsistent positions at trial, which it is estopped from doing. See State v. Petty, 201 Wis. 2d 337, 346 (1994).

II. HARMLESS ERROR

The State argues that the admission of Julie's letter and statements made to Officer Kosman is harmless error because several pieces of non-testimonial hearsay were also admitted, and were arguably consistent with the testimonial hearsay. The State, however, greatly overvalues the non-testimonial statements, many of which were made in passing to neighbors. Testimonial statements are statements of great force and weight, and consist of "a solemn declaration or affirmation made for the purpose of establishing or proving some fact. An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Crawford v. Washington, 541 U.S. 36, 51 (2004) (internal quotations omitted).

Conversely, "casual remarks", or non-testimonial statements, are of such little probative force that all a prosecutor need accomplish is to ease them through one of the thirty-plus hearsay exceptions. These statements are of such little probative value that the Constitution affords no protection against them. See Davis v. Washington, 547 U.S.

813 (2006). It is therefore untenable for the State to assert that, because the jury heard Julie's "casual remark[s] to an acquaintance", it would have convicted beyond all reasonable doubt, even without the formal, solemn statements by Julie to law enforcement, including but certainly not limited to the "letter from the grave". The fact that Julie's testimonial statements were duplicated to some extent by non-testimonial sources does not make the error harmless.

The State further argues that all references to the testimonial statements would *not* have been banished from trial because of the trial judge's belief that the jury should hear as much relevant evidence as possible. This is pure speculation, unsupported by anything in the record. Further, the fact that Detective Ratzburg produced the letter and told Mr. Jensen to "read it"—therefore implying that the jury would have heard about the existence of the letter via the tape-recorded interrogation—ignores the fact that the video also captured Mr. Jensen shaking his head "no" when he read the letter (367:Ex. 254; 348:68). It is also speculation that the jury would have learned of the letter during the examination

of the defense experts, experts that may not have even testified were the letter deemed inadmissible. Furthermore, it is pure speculation that the letter would have been allowed into evidence through the experts, had they testified.

As for the computer evidence, that evidence did not demonstrate which person used the computer; also, the defense had impeached Detective Ratzburg's testimony—testimony that Jensen told him right after Julie's death that he was the principal computer user and that Julie rarely used their computer—pointing out that Ratzburg never included this information in any report (350:175-80). Additionally, the fact that Dr. Chambliss testified that the approximate cause of Julie Jensen's death was asphyxia, by smothering, ignores the doctor's change in opinion at trial based on the findings in the autopsy report (332:36). Further, statements that Jensen reportedly made to Edward Klug were discredited on cross examination as Mr. Klug did not even report the conversation to the police, and did not tell law enforcement until years later (332:117). Finally, Aaron Dillard, the jailhouse informant with numerous prior acts and criminal convictions involving dishonesty *around the globe*,

was completely discredited on cross examination. (340: 156-290.) A review of the entire record therefore will show the State cannot prove beyond a reasonable doubt that admission of the letter and testimonial statements to Kosman was harmless error. See State v. Stuart, 2005 WI 47, ¶57.

III. JULIE JENSEN'S NON-TESTIMONIAL HEARSAY

The State argues that because Jensen forfeited his right of confrontation, he has also forfeited his right to the rules of evidence with regard to the non-testimonial hearsay statements Julie made to the Wojts, Kosman and Ratzburg. (State's brief at 57.) First, this presumes that Mr. Jensen forfeited his right of confrontation which, as explained previously, he did not.

Second, it is true that some federal courts, pre-Crawford, ruled that forfeiting the right of confrontation also resulted in forfeiting the hearsay objection. However, these were federal courts applying the 1997 codification of the Federal Rules of Evidence that included a specific hearsay exception for forfeiture. See State v. Jensen, 2007 WI 26, ¶43-46. Prior to that codification, federal courts would have

to find both a confrontation violation and a hearsay exception in order to admit the hearsay. See United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976).

Further, the 1997 codification was based on Ohio v. Roberts, 448 U.S. 56 (1980), the pre-Crawford interpretation that made the confrontation clause synonymous with hearsay rules. Since then, however, the U.S. Supreme Court purposely separated the right of confrontation from the rules of evidence stating that "where testimonial statements are involved, we do not think the framers meant to leave the Sixth Amendment protection to the vagaries of the Rules of Evidence." Crawford v. Washington, 541 U.S. at 61.

The State also ignores State v. Jensen where, although the circuit court considered whether the admission of the voice mails violated the Confrontation Clause pursuant to Crawford, the court had already excluded the voice mails as inadmissible hearsay. See Jensen at ¶30, n.10. Thus, even if the voice mails are non-testimonial they still must be excluded under Roberts. Id. Therefore, even if the State were correct that Jensen remains good law, Jensen holds that non-testimonial statements would still have to meet a hearsay

exception. Id.

Finally, the State argues that most of Julie's non-testimonial statements were admissible for non-hearsay purposes, as circumstantial evidence of her state of mind; but the State does not specify which statements, other than Julie's statement to DeFazio and Wojt that Jensen was trying to poison her. To this extent, such a statement is not admissible to prove Julie Jensen was not suicidal, as a declarant's statement regarding her feelings is admissible only to prove how a declarant feels, not to prove that certain events occurred. This statement, therefore, was being used only to prove that Mark Jensen was trying to poison Julie while making it look like a suicide, and is inadmissible. See Kutz, 2003 WI App. 205, ¶60.

IV. SEARCH AND SEIZURE

The State claims that the scope of the search of Jensen's home and seizure of his computer was not a Fourth Amendment violation as a reasonable person would have believed that Detective Ratzburg, who was investigating the possibility that a drug interaction caused Julie's death, would find this information on a computer which "might illuminate

that possibility". (State Brief at 56.) This Court should summarily reject this argument. The detective's contention that he would "see what he could come up with" is a general exploratory search, beyond the scope of any consent given by Jensen and is therefore unconstitutional on that basis. See Dichiarinte, 445 F.2d 126, 129, n.3.

V. JENSEN DID NOT WAIVE HIS RIGHT TO AN IMPARTIAL JUDGE, AND FURTHER, JENSEN HAS DEMONSTRATED JUDICIAL BIAS.

First, the state blames trial counsel for waiving Jensen's right to an impartial judge. In so doing, the state ignores Jensen's claim of "plain error." Jensen's Brief at 34. The state also argues that, had there been a timely objection, Judge Schroeder could have explained why he was *not* biased, and cites State v. Carprue, 274 Wis. 2d 656 (2004). However, in Caprue, the issue was a claim of "general bias," which could only be decided upon a timely objection and explanation by the judge. Id. at 684. Conversely, Jensen is claiming that the judge prejudged his guilt, which, even according to Carprue, "constitutes 'structural error' and would be subject to automatic reversal." Id. at 682. See also Franklin v. McCaughtry, 398 F.3d 955,

961 (2005) (holding that a judge is not impartial merely because he said "he was not biased," and that such bias is "structural error"); Jensen's Brief at 33-34 (claiming "structural error").

Second, the state argues that our supreme court in Jensen "did *not* order the judge's pretrial finding of guilt." State's Brief at 36. However, the Jensen court quoted Richard Friedman, stating that "[i]f the trial court determines . . . that the reason the victim cannot testify at trial is that the accused murdered her," then forfeiture applies. State v. Jensen, 2007 WI 26, ¶46. Second, the court stated that "the broad view of forfeiture by wrongdoing espoused by Friedman . . . is essential" and was adopted. Id. at ¶52. Third, Judge Schroeder found that Jensen forfeited his right of confrontation. Wording this finding as "Jensen caused his wife's unavailability" does not save the state. Id. at ¶51. Rather, Julie was unavailable because she was deceased, and Jensen was charged with murdering her. Therefore, in finding forfeiture, Judge Schroeder *necessarily* found that Jensen "murdered her" and was therefore guilty of the crime charged.

Third, the state urges yet another expansive reading of the forfeiture doctrine in arguing that pretrial determinations of guilt do not constitute bias. More specifically, the state urges this court to expand the forfeiture doctrine to include not only cases where defendants interfere with ongoing criminal prosecutions, but also ongoing ***civil cases***. And not only ongoing civil cases, but also civil cases ***that don't exist***. And not only civil cases that don't exist, but civil cases that the state has argued ***neither of the parties wanted***. (359: 42-43; 59.) This lengthy and meandering path urged by the state would result in forfeiture every time the deceased and the defendant had ***any*** prior argument about ***any*** potential civil matter, whether familial, business or otherwise.

Finally, the state also attempts to distinguish our case from Franklin, which the defense has already done. See Jensen's Brief at 35. Still, the question remains: "Is there any substantive difference between expressing an opinion of guilt in a pretrial memorandum, as in Franklin, and expressing an opinion of guilt in a pretrial ruling under the forfeiture doctrine, as in Jensen?" Michael D. Cicchini, *Judicial*

(In)Discretion: How Courts Circumvent the Confrontation Clause Under Crawford and Davis, 75 Tenn. L. Rev. 753, 777 (2008). This question was answered in Giles: Pretrial, judicial findings of guilt, "after less than a full trial, mind you, and of course before the jury has pronounced guilt" is "repugnant to our constitutional system of trial by jury[.]" Giles v. California, 128 S. Ct. 2678, 2691 (2008). The fact that such a finding could possibly be permitted in the narrowly drawn circumstance discussed in Giles' dicta does not warrant opening the floodgates to include nonexistent divorce and family cases.

VI. THE OTHER ACTS EVIDENCE WAS, IN FACT, OTHER ACTS AND WAS IMPROPERLY ADMITTED

The state now argues that the other acts evidence—evidence offered as such by the state and admitted as such by the court—really wasn't "other acts" at all. To support its position it cites Bauer, where the defendant's *post*-crime behavior was not other acts, but rather evidence of consciousness of guilt, much like the post-crime act of fleeing. It also cites Seefeldt, where the existence of a warrant, which doesn't constitute an act at all, isn't an other

act. See Bauer, 2000 WI App. 206; Seefeldt, 2002 WI App. 149. Neither of these cases, of course, is applicable to our facts. All of the other acts in our case, including the secondary other acts, were offered and admitted as such and, at least pre-textually, for reasons delineated by statute, including "identity." See Jensen's Brief at 41-42.

Further, the numerous other acts can't escape their classification merely because the evidence was introduced in multiple layers and through a meandering chain of disconnected and speculative events. The Sullivan framework still governs, and was applied by Jensen in his Brief. State v. Sullivan, 216 Wis. 2d 768 (1998). Finally, unfair prejudice is not erased by merely dismissing the trial judge as being "flippant," "facetious," or making an "attempt at jocularity." State's Brief at 51. The state has no such knowledge, and this court should not entertain these claims.

VII. CONCLUSION

For the reasons cited herein and for the reasons cited in Mr. Jensen's Brief-in-Chief, this Court should reverse Mr. Jensen's conviction in the interest of justice.

Dated this 18th day of February, 2010.

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CERTIFICATION

I certify that this brief meets the requirements of the Rules of Appellate Procedure for a document printed in proportional serif font. The brief contains 2,990 words.

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

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

I further certify that this electronic reply 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 18th day of February, 2010.

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