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SUPREME COURT

STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP1952-CR

STATE OF WISCONSIN,

Plaintiff-Respondent-Petitioner,

v.

MARK D. JENSEN,

Defendant-Appellant.

ON PETITION FOR REVIEW FROM A DECISION OF THE WISCONSIN COURT OF APPEALS REVERSING A JUDGMENT OF CONVICTION, ENTERED IN KENOSHA COUNTY CIRCUIT COURT, THE HONORABLE CHAD G. KERKMAN, PRESIDING

REPLY BRIEF OF PLAINTIFF-RESPONDENT-PETITIONER

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I. *Cook* and the law-of-the-case doctrine did not require the circuit court to conclude that Julie's statements were testimonial.

Jensen first argues that the court of appeals was correct that the circuit court had to conclude that Julie's statements were testimonial. (Jensen's Br. 13–19.) He contends that this is true whether the issue is analyzed under *Cook v. Cook*, 208 Wis. 2d 166, 560 N.W.2d 246 (1997), which the court of appeals applied, or under the law-of-the-case doctrine, which the State argues should govern. (Jensen's Br. 16–19.) Under either analysis, Jensen says, the circuit court had to follow this Court's holding in *Jensen I* that Julie's statements were testimonial. (Jensen's Br. 16–19.)

This Court should reject this argument. *Cook* does not apply here. *Cook* is about the precedential effect of published court opinions. It holds that only this Court can overrule, modify, or withdraw language from Wisconsin's precedential decisions. *Cook*, 208 Wis. 2d at 189. The concern in *Cook* was the court of appeals' obligation to follow its own published opinions when the same issue arose in another case. *Id.* at 185–89.

The issue here, in contrast, is whether a circuit court can revisit a ruling from a higher court in the same litigation when the controlling law has changed. That analysis is governed by the law-of-the-case doctrine, and the court of appeals should have reviewed the circuit court's decision under it, not *Cook*. Thus, the court of appeals erred by reviewing the circuit court's decision under *Cook*.

Jensen further argues that it does not matter whether *Cook* or the law-of-the-case doctrine applies because both allow lower courts to depart from a prior holding when the law has changed. (Jensen's Br. 16–19.) Specifically, Jensen

notes that lower Wisconsin courts are required to follow United States Supreme Court decisions that conflict with decisions from this Court on issues of federal constitutional law. (Jensen's Br. 16–17.) *See State v. Jennings*, 2002 WI 44, ¶¶ 18–19, 252 Wis. 2d 228, 647 N.W.2d 142. Thus, he says, there is "no tension between the principles underlying *Cook* and the law-of-the-case doctrine." (Jensen's Br. 18.)

Jensen's argument should fail. It does not recognize the distinction between *Cook* and the law-of-the-case doctrine. The former involves a court's obligation to follow precedent in another case. The latter is concerned with a court's need to follow a prior decision in the same litigation. In addition, *Jennings* is limited to issues of federal constitutional law decided by the United States Supreme Court. While, admittedly, this case involves such an issue, the law-of-the-case doctrine is not so limited. Rather, the doctrine allows courts to revisit earlier decisions when there has been a change in the controlling law from any court.

Finally, Jensen contends that the court of appeals did not "blindly follow" *Jensen I*, but instead, decided to follow the prior decision after "thoughtful analysis." (Jensen's Br. 17–18.) The State interprets Jensen's argument to be that the court of appeals considered whether there had been a change in the controlling law before deciding to reverse the circuit court's decision.

If this is Jensen's argument, this Court should reject it. The court of appeals' decision is blunt. It held that neither it nor the circuit court could hold that Julie's statements were nontestimonial because *Cook* required both courts to follow *Jensen I*. (Pet-App. 11–12.) While the court discussed some of this Court's reasoning from *Jensen I* why it held that Julie's statements were testimonial, its bottom-line decision was that it was "not at liberty" to reach a different conclusion.

(Pet-App. 12.) The court of appeals wrongly concluded that *Cook* required it and the circuit court to follow *Jensen I*.

II. The circuit court properly revisited—and this Court can properly revisit—*Jensen I's* holding because Julie's statements are no longer testimonial under current confrontation law.

A. Only this Court's decision in *Jensen I* establishes the law of the case that Julie's statements were testimonial.

Jensen next argues that the circuit court erred when it concluded that Julie's statements were nontestimonial under current confrontation principles. (Jensen's Br. 19–47.) He first contends that both this Court's and the federal courts' decisions established the law of the case that Julie's statements were testimonial. (Jensen's Br. 19–21, 34–40.) Jensen says that the State is asking this court to "ignore" the federal decisions because the cases it is relying on to show a change in confrontation law were decided while his federal case was pending. (Jensen's Br. 38.)

The State is not asking this Court to ignore the federal decisions. Rather, this Court should recognize that neither the district court nor the Seventh Circuit ever held that Julie's statements were testimonial. As the State explained in its opening brief, both courts focused their decisions on the application of the forfeiture-by-wrongdoing doctrine and the court of appeals' holding that admitting Julie's statement was harmless. (State's brief-in-chief at 14.) That was the reason the courts held that Jensen's confrontation rights were violated. Neither court specifically addressed whether Julie's statements were testimonial, and thus, neither decision established the law of the case on this issue. *See State v. Stuart*, 2003 WI 73, ¶ 25, 262 Wis. 2d 620, 664 N.W.2d 82 (citation omitted)(application of the law-of-the-case doctrine

"turns on whether a court previously 'decide[d] upon a rule of law.'").

Jensen argues that both federal courts unequivocally held that his confrontation rights were violated. (Jensen's Br. 37.) And, he says, implicit in their decisions is a conclusion that Julie's statements were testimonial. (Jensen's Br. 37.) He cites federal cases stating that a court's implicit decisions can establish the law of the case. (Jensen's Br. 37.) But, again, Wisconsin's law-of-the-case doctrine focuses on the issues actually decided by a court. Here, this Court has been the only one to address and decide whether Julie's statements were testimonial.

Jensen also contends that the State is suggesting that the federal courts were prevented from considering whether Julie's statements were testimonial because the parties did not dispute that they were. (Jensen's Br. 38.) Relatedly, he contends that the State waived any argument that the statements are not testimonial by not asserting that in federal court. (Jensen's Br. 39–41.)

These arguments fail. The State is not arguing that the federal courts were prevented from assessing whether Julie's statements were testimonial. The courts could have reviewed the issue had they wished to. But doing so would have been inconsistent with the nature of federal habeas corpus review. Federal habeas courts generally assess whether the last state-court decision to reach the merits of the petitioner's claims unreasonably applied or is contrary to federal law. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018). That is what the federal courts did here when they reviewed the court of appeals' harmless-error determination in *Jensen II*. (Pet-App. 129–35, 141–46.)

Further, Jensen has pointed to no authority holding that a State can waive a state-court argument by not raising

it in earlier federal habeas litigation. The case he relies on, *United States v. Miller*, No. 08CR629, 2013 WL 3353917, *14 (N.D. Ill. July 3, 2013) (unpublished), involves federal district court criminal proceedings after a remand from an appellate court. The district court held that the defendant had waived an argument by not raising it during the appeal. *Id*. The case does not hold that the State can waive an argument in a state criminal case by not raising it in an earlier, separate federal habeas corpus proceeding. *See United States ex rel. Cosey v. Wolff*, 682 F. 2d 691, 694 (1982) ("a habeas corpus proceedings is not an appeal of a state court decision.") The State did not waive its argument that Julie's statements are not testimonial.

B. A court does not have to find a manifest injustice to disregard the law of the case.

Jensen next argues, based on *Arizona v. California*, 460 U.S. 605, 618 n.9 (1983), and *Christianson v. Colt Indus. Op. Corp.*, 486 U.S. 800, 817 (1988), that courts can only disregard the law of the case where the prior holding is "clearly erroneous and would work a manifest injustice." (Jensen's Br. 19–20)(citation omitted.)

The law in Wisconsin is not so strict. Instead, Wisconsin courts may disregard the law-of-the-case "when 'cogent, substantial, and proper reasons exist.'" *Stuart*, 262 Wis. 2d 620, ¶ 24 (citation omitted.) This includes when the controlling law has been changed or modified. *Id*.; *Welty v. Heggy*, 145 Wis. 2d 828, 839, 429 N.W.2d 546 (Ct. App. 1988). Thus, this Court should reject Jensen's argument that a court needs to find a manifest injustice to disregard the law of the case. Instead, a change in the law showing that the prior holding is wrong is sufficient.

C. The narrowing of the definition of testimonial since *Jensen I* is sufficient to allow both the circuit court and this Court to revisit the admissibility of Julie's statements.

Next, Jensen contends that the definition of testimonial has not changed since *Jensen I*. (Jensen's Br. 21–34.) This Court should reject his arguments.

Jensen describes the state of confrontation law as determined by the United States Supreme Court at the time of *Jensen I*. (Jensen's Br. 21–22.) He explains the Court's ruling in *Crawford v. Washington*, 541 U.S. 36 (2004), and the inception of the primary-purpose test in *Davis v. Washington*, 547 U.S. 813 (2006), to determine whether a statement is testimonial. (Jensen's Br. 21–22.) The State does not dispute Jensen's summary of the law as it existed at that time.

Next, Jensen argues that this Court applied the primary-purpose test in *Jensen I*. (Jensen's Br. 22–23.) And, he contends, the Supreme Court has not altered that test since then. (Jensen's Br. 24–34.) Thus, he maintains, there was and is no basis to revisit *Jensen I*'s holding that Julie's statements were testimonial. (Jensen's Br. 24–34.)

Jensen is wrong. The definition of testimonial that this Court applied in *Jensen I* is far broader than the definition under the current primary-purpose test. *Jensen I's* definition is no longer good law.

The current definition of the primary-purpose test deems testimonial statements that are made with the primary purpose of creating an out-of-court substitute for trial testimony. *Ohio v. Clark*, 576 U.S. 237, 244–45 (2015); *Michigan v. Bryant*, 562 U.S. 344, 358 (2011). This is narrower than the "broad" definition of testimonial that this Court adopted in *Jensen I*. *State v. Jensen*, 2007 WI 26, ¶ 24,

299 Wis. 2d 267, 727 N.W. 2d 518. There, this Court said that "a statement is testimonial if a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime." *Id*. ¶ 25 (citation omitted). For a statement to be testimonial now, it must be made with the primary purpose of creating a substitute for trial testimony. Under *Jensen I*, it was enough that the statement might be used to investigate a crime. Those are different tests, and the latter is much broader.

This Court should also reject Jensen's specific arguments why *Jensen I* is consistent with current confrontation law.

Jensen notes that *Jensen I* cited *Davis*'s formulation of the primary purpose test and argues that this means that this Court applied the test in its decision. (Jensen's Br. 22–23, 32–33.) But the Court's discussion of *Davis* was limited to noting that the Supreme Court had held that statements made in response to police interrogation are not testimonial when the interrogation's primary purpose is to let police respond to an emergency. *Jensen*, 299 Wis. 2d 267, ¶ 19. This Court did not refer to *Davis's* fuller explication of the test, which says statements are testimonial when the "primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822.

Further, regardless of whether this Court applied *Davis*'s explanation of the primary-purpose test, the Supreme Court has since narrowed and refined that test. Under *Clark* and *Bryant*, the primary purpose must be to create a substitute for trial testimony. Under *Davis*, it is enough that the primary purpose is to "establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at 822. Again, the latter test is broader.

Jensen insists that the Supreme Court has not narrowed the primary-purpose test since *Davis*. (Jensen's Br. 24–34.) He contends that *Clark* and *Bryant* merely applied *Davis* to new types of statements that the Court had not previously considered. (Jensen's Br. 24–31.) And, Jensen claims, neither case establishes that *Jensen I* was clearly erroneous or applying it would be a manifest injustice because the statements in those cases are very different than Julie's statements. (Jensen's Br. 24–31.)

This Court should reject these arguments. As noted, Jensen is wrong that the State has to prove, or that a court has to find, that a prior decision is clearly erroneous or a manifest injustice to depart from the law of the case.

Further, the State does not contend that Julie's statements are exactly like those in *Clark* and *Bryant*. Unquestionably, Julie's statements were not those of a child reporting abuse, as in *Clark*. Nor were they statements of a victim identifying his shooter to police, like in *Bryant*.

Instead, what matters about *Clark* and *Bryant* is how these cases refined and narrowed the definition of testimonial from the one this Court relied on in *Jensen I*. This narrower definition permitted the circuit court—and allows this Court—to revisit *Jensen I's* holding that Julie's statements were testimonial.

Jensen also argues that the State has not shown that the law in *Jensen I* conflicts with *Clark* and *Bryant*. (Jensen's Br. 31–34.) He contends that this Court applied the primary-purpose test in its decision because it concluded that Julie's statements had "[n]o other purpose than to bear testimony" and were "entirely for accusatory and prosecutorial purposes." (Jensen's Br. 31–33 (citing *Jensen I*, 299 Wis. 2d 267, ¶¶ 26, 30).) But this ignores significant parts of this Court's opinion, which deemed the statements testimonial because they could

be used to investigate crimes or for prosecutorial purposes. *Jensen*, 299 Wis. 2d 267, ¶¶ 24–30. Those definitions conflict with the current primary-purpose test.

Jensen also appears to concede that the State has established at least some differences between the current primary-purpose test and *Jensen I*. (Jensen's Br. 33–34.) He argues that these differences, though, are irrelevant because they would not have changed this Court's decision. (Jensen's Br. 33–34.) But, again, Jensen insists that the differences have to render *Jensen I* clearly erroneous or a manifest injustice. Wisconsin law does not require that. Instead, it is enough that the law has changed since *Jensen I*. This change allows both this Court and the circuit court to revisit that decision and apply the current law.

D. Julie's statements are not testimonial under current confrontation law.

Finally, Jensen argues that even if it is permissible to revisit *Jensen I*'s holding, Julie's statements remain testimonial because she made them with the primary purpose of using them "against Jensen in case of her death." (Jensen's Br. 42.) But that is not the standard. The statements are testimonial only if their primary purpose is to substitute for trial testimony. *Clark*, 576 U.S. at 244–45 Jensen has not shown that the State is wrong that Julie's statements did not meet this definition.

Jensen, like the State, analyzes Julie's statements under the four factors that this Court identified in *State v. Mattox*, 2017 WI 9, ¶ 32, 373 Wis. 2d 122, 890 N.W.2d 256. (Jensen's Br. 41–47.) He contends the statements were formal because they were either in writing, made to law enforcement, or both. (Jensen's Br. 42, 44.) While this is true, Julie's statements do not have the hallmarks of statements meant to

substitute for trial testimony. Julie did not make her statements under oath or even in response to police questioning. In addition, police were not investigating any crime when she made them.

Further, while Julie made the statements to law enforcement and not in an emergency, this does not make the statements testimonial. (Jensen's Br. 42–45.) This was not a typical police-citizen interaction. Julie had a longstanding relationship with the officers. And, again, she volunteered her statements and was not reporting a crime.

Jensen contends that Julie's age weighs in favor of finding her statements to be testimonial, contrasting her with the young child in *Clark* and noting her frequent contacts with law enforcement. (Jensen's Br. 43, 45.) But that Julie was an adult is a neutral factor. *State v. Reinwand*, 2019 WI 25, ¶ 29, 385 Wis. 2d 700, 924 N.W.2d 184. And Jensen does not explain why Julie's past contacts with police would lead her to think she was giving the equivalent of testimony. He does not say, for example, that any of her earlier statements were used in lieu of live testimony to prosecute anyone in the past.

Finally, Jensen points to *Jensen I*'s finding that the letter's context showed that Julie intended it to investigate or aid the prosecution if she died. (Jensen's Br. 43–44.) He also notes that her voicemails also provided information for a possible investigation. (Jensen's Br. 45.) But statements that could potentially be used in an investigation are not automatically testimonial. Instead, only statements whose primary purpose is to substitute for testimony are testimonial. Julie's statements do not meet that definition.

CONCLUSION

This Court should reverse the court of appeals.

Dated October 1, 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 2932 words.

_____
AARON R. O'NEIL
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CERTIFICATE OF COMPLIANCE WITH WIS. STAT. § 809.19(12)

I hereby certify that:

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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 October 2020.

_____
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