Appeal No. 2017AP850-CR **Cir. Ct. No. 2013CF196B**

WISCONSIN COURT OF APPEALS
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

JOSEPH B. REINWAND,

DEFENDANT-APPELLANT.

FILED

JUL 26, 2018

Sheila T. Reiff
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Lundsten, P.J., Sherman and Fitzpatrick, JJ.

We certify this appeal to the Wisconsin Supreme Court to decide a question involving the "forfeiture by wrongdoing" doctrine. Under this doctrine, testimonial statements, which would otherwise be barred under the Confrontation Clause of the Sixth Amendment if the declarant does not appear at trial, may be admitted nonetheless if the reason the declarant does not appear is the result of wrongdoing by the defendant. In the typical case, this doctrine is applied when a defendant prevents a witness from testifying at the proceeding at which the State seeks to admit the out-of-court statement. For example, in a trial where a declarant is prepared to testify against the defendant, the "forfeiture by wrongdoing" doctrine applies to permit the declarant's statement incriminating the

defendant if the failure of the declarant to appear at trial is the result of the defendant acting with intent to prevent the declarant from testifying.

The question we certify today is whether the "forfeiture by wrongdoing" doctrine applies at a homicide trial where the declarant is the homicide victim, but where the defendant killed the declarant to prevent him or her from testifying *at a separate proceeding*. It may matter that in the case at hand, the defendant is not a party to the separate proceeding and the declarant would not have testified against the defendant in that separate proceeding.

An additional and closely related question we certify is whether preventing the declarant from testifying must be the defendant's *primary* purpose for the wrongful act that prevented the declarant from testifying in that separate proceeding.

Each of these questions are issues of first impression in Wisconsin and a decision on these questions will have statewide impact. In addition, there is limited, if any, case law addressing these questions in other state and federal jurisdictions. A decision on these questions will, therefore, also provide guidance to other state and federal courts.

BACKGROUND

Joseph Reinwand was charged with first-degree intentional homicide for the shooting death of Dale Meister. Meister is the father of Reinwand's granddaughter, E.M., and it is undisputed that at the time of Meister's death, Meister was involved in a placement dispute with Reinwand's daughter, Jolynn Reinwand. Shortly before Meister's murder, Meister and Jolynn participated in mediation to resolve their conflict and they purportedly reached an agreement on

E.M.'s placement. However, following their mediation, Jolynn indicated to Meister that she was not happy with the results of their mediation and that she would continue to deny Meister placement with E.M., thus raising an inference that there would be further litigation between Meister and Jolynn.

Prior to trial in this homicide case, involving the allegation that Reinwand killed Meister, the State moved the circuit court to introduce into evidence out-of-court hearsay statements made by Meister to various individuals during the weeks before his murder. The Meister statements generally fall within one of the following two categories: (1) statements indicating that if Meister was found dead, Reinwand should be "looked into"; and (2) statements telling the listener that Reinwand had threatened to harm or kill Meister and that Meister was afraid that Reinwand was going to harm him.

The circuit court determined that statements falling within the first category are testimonial and are subject to the Confrontation Clause, but that the State met its burden of establishing that the forfeiture by wrongdoing doctrine applied to those statements and, therefore, they were admissible at trial. The court found that a preponderance of the evidence established that Reinwand engaged in wrongdoing by killing Meister. Notable here, the circuit court found that Reinwand killed Meister with intent to prevent him from testifying as a witness in likely further placement proceedings involving E.M., Reinwand's daughter and grandchild. Thus, unlike the typical "forfeiture by wrongdoing" scenario, the defendant was not found by the circuit court to have intended to prevent the declarant from testifying against the defendant in the proceeding in which the State sought to admit the out-of-court statements, but rather where the defendant intended to prevent the declarant from testifying in a different proceeding.

As to the second category of statements, the court did not make a specific determination that those statements are testimonial or non-testimonial. However, it appears from the court's oral ruling that the court implicitly determined that those statements are testimonial but admissible under the forfeiture by wrongdoing doctrine for the same reasons the first category of statements are admissible under the forfeiture by wrongdoing doctrine, and the parties' briefs treat the statements as such.

The statements at issue on appeal were admitted into evidence at trial and the jury found Reinwand guilty. Reinwand moved the circuit court for a new trial, which the court denied.

DISCUSSION

At issue in this case is the admissibility at trial of various out-of-court statements that are inadmissible under the Confrontation Clause unless they are admissible under the forfeiture by wrongdoing doctrine.

Under the Confrontation Clause, criminal defendants are guaranteed the right to confront witnesses who testify against the defendant at trial. U.S. CONST. amend. VI. In ***Crawford v. Washington***, 541 U.S. 36, 68-69 (2004), the U.S. Supreme Court held that a defendant's right to confrontation is violated when a witness is permitted to relate out-of-court "testimonial" hearsay statements unless the declarant is unavailable and the declarant had a prior opportunity to cross-examine the declarant. On appeal, the State "assumes for the purpose of [the State's appellate] argument" that the unconfronted out-of-court statements at issue are testimonial, but argues that the statements are nevertheless admissible under the forfeiture by wrongdoing doctrine. While we question the State's assumption that all of the statements at issue are testimonial, the testimonial nature of the

statements is undisputed on appeal. Accordingly, the focus of the appeal is on whether the statements fall within the forfeiture by wrongdoing doctrine.

In ***Crawford***, the Supreme Court stated that the Confrontation Clause is "most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding." ***Id.*** at 54. Included among those exceptions is the forfeiture by wrongdoing doctrine. *See* ***id.*** at 62; ***Giles v. California***, 554 U.S. 353, 358-59 (2008). The Supreme Court stated in ***Crawford*** that "the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds." ***Crawford***, 541 U.S. at 62. According to this doctrine, "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation." ***Davis v. Washington***, 547 U.S. 813, 833 (2006).

Following ***Crawford***, our supreme court decided ***State v. Jensen***, 2007 WI 26, 299 Wis. 2d 267, 727 N.W.2d 518, wherein the supreme court formally adopted a "broad" interpretation of the forfeiture by wrongdoing doctrine in Wisconsin. ***Id.***, ¶¶52, 57. The ***Jensen*** court explained the doctrine as follows: "Essentially, the forfeiture by wrongdoing doctrine states that an accused can have no complaint based on the right to confrontation about the use against him or her of a declarant's statement if it was the accused's wrongful conduct that prevented any cross-examination of the declarant." ***Id.***, ¶35. The ***Jensen*** court held that "if the State can prove by a preponderance of the evidence that the accused caused the absence of the witness, the forfeiture by wrongdoing doctrine will apply to the confrontation rights of the defendant." ***Id.***, ¶57.

Shortly after ***Jensen*** was issued, the United States Supreme Court issued its decision in ***Giles***, which narrowed the limits of the forfeiture by

wrongdoing doctrine by requiring intent. The Supreme Court held that the doctrine "permit[s] the introduction of statements of a witness who was 'detained' or 'kept away' by the 'means or procurement' of the defendant," provided there has been "a showing that the defendant *intended* to prevent a witness from testifying." ***Giles***, 554 U.S. at 359-61 (emphasis added); *see also* ***State v. Jensen***, 2011 WI App 3, ¶22, 331 Wis. 2d 440, 794 N.W.2d 482 ("a defendant forfeits his or her confrontation right only when acting with intent to prevent the witness from testifying; the requirement of intent 'means that the exception applies only if the defendant has in mind the particular purpose of making the witness unavailable.'" (quoted source omitted)). Thus, as the law currently stands, the forfeiture by wrongdoing doctrine applies where: (1) a witness is unavailable to testify; (2) the State made a good faith effort to produce the witness to testify; (3) the defendant prevented the witness from testifying; and (4) the defendant intended to prevent the witness from testifying. ***State v. Baldwin***, 2010 WI App 162, ¶¶37-39, 48, 330 Wis. 2d 500, 794 N.W.2d 769.

Giles is notable because, prior to that decision, statements of a defendant's homicide victim, implicating the defendant in the homicide, were often admitted under the forfeiture by wrongdoing doctrine. Indeed, our supreme court's 2007 ***Jensen*** decision is an example of this. *See* ***Jensen***, 299 Wis. 2d 267, ¶¶57-58. We understand the teaching of ***Giles*** to be that this should not occur in the normal course because a homicide is not typically designed to prevent the victim from testifying at a trial addressing the very same homicide. *See* ***Giles***, 554 U.S. at 359-60, 363-64, 369.

The issue in the present case involves the intent requirement. The State argues that the intent requirement does not include a requirement that the defendant intended to prevent the declarant from testifying *against the defendant*.

According to the State, a defendant should be deprived of his right to confront a witness if the prosecution proves that a defendant caused a witness to be unavailable to testify *in any legal proceeding*, so long as the defendant did so with the intention of preventing the witness from testifying. In support of this argument, the State relies on federal cases interpreting FED.R. EVID. 804(b)(6), which codifies the forfeiture by wrongdoing doctrine for purpose of hearsay. In particular, the State relies on the Fourth Circuit Court of Appeals' decision in ***United States v. Gray***, 405 F.3d 227 (4th Cir. 2005).

In ***Gray***, the defendant challenged her conviction for mail and wire fraud, which related to the receipt of insurance proceeds following the murder of her second husband, on the ground that the trial court erred in introducing into evidence unconfronted out-of-court statements made by her second husband during the three months preceding his murder, which she claimed was inadmissible hearsay. *See* ***id.*** at 233, 240. The defendant argued that FED.R. EVID. 804(b)(6), which adopted the forfeiture by wrongdoing doctrine for purposes of hearsay, did not apply because *she did not intend to procure her husband's unavailability as a witness at her fraud trial*. ***Id.*** at 241. The Fourth Circuit Court of Appeals rejected the defendant's argument, concluding that forfeiture by wrongdoing doctrine applies "*whenever* the defendant's wrongdoing was intended to, and did, render the declarant unavailable as a witness against the defendant, without regard to the nature of the charges at the trial in which the declarant's statements are offered." ***Id.***

The ***Gray*** court reasoned that the text of FED.R. EVID. 804(b)(6) "does not require that the declarant would otherwise be a witness at any *particular* trial, nor does it limit the subject matter of admissible statements to [particular] events." ***Id.*** As it concerns FED.R. EVID. 804(b)(6), the ***Gray*** court stated: "We

emphasize that the intent requirement in Rule 804(b)(6) continues to limit application of the forfeiture-by-wrongdoing exception to those cases in which the defendant intended, at least in part, to render the declarant unavailable as a witness against him." ***Id.*** at 242, n.9. Absent such intent, Rule 804(b)(6) has no application. ***Id.*** The ***Gray*** court also reasoned that its broad interpretation "advances the clear purpose" of the forfeiture by wrongdoing doctrine. ***Id.*** at 241. The court pointed out that advisory committee notes for Rule 804(b)(6) state that the goal of the exception is to "implement a 'prophylactic rule to deal with abhorrent behavior which strikes at the heart of the system of justice itself,'" and that courts "have recognized that the forfeiture-by-wrongdoing exception is necessary to prevent wrongdoers from profiting by their misconduct." ***Id.*** at 241-42 (quoting Rule 804(b)(6) advisory committee note). The ***Gray*** court also pointed out that the elements of the doctrine have been construed in similarly broad manners by other courts. ***Id.*** at 242. *See, e.g.,* ***United States. v. Dhinsa***, 243 F.3d 635, 652 (2d Cir. 2001) (stating the exception may apply where the declarant was only a potential witness); ***United States v. Cherry***, 217 F.3d 811, 820 (10th Cir. 2000) (holding that the exception applied against a defendant who participated in a conspiracy to silence the declarant but did not himself engage in witness intimidation or other wrongdoing); ***Steele v. Taylor***, 684 F.2d 1193, 1201 (6th Cir. 1982) (concluding that "any significant interference" with declarant's appearance as a witness amounts to wrongdoing that forfeits defendant's right to confront the declarant); and ***United States v. Johnson***, 219 F.3d 349, 354 (2000) (holding that a defendant need only intend "in part" to procure declarant's unavailability). The ***Gray*** court concluded that its "interpretation … ensures that a defendant will not be permitted to avoid the evidentiary impact of statements made by his [or her] victim, whether or not he [or she] suspected that the victim would be a witness at the trial in which the evidence is offered against him." ***Gray***, 405

F.3d at 242; *see also* ***United States v. Lentz***, 524 F.3d 501, 506, 507-08 (4th Cir. 2008) (concluding that hearsay statements made by the defendant's deceased wife were admissible under the forfeiture by wrongdoing exception, FED.R. EVID. 804(b)(6) at the defendant's trial for the interstate kidnapping resulting in the death of the ex-wife where the defendant had engaged in wrongdoing that was intended, in part, to prevent the victim-declarant's availability at their divorce proceeding).

Reinwand does not respond to the State's assertion that unconfronted out-of-court statements are admissible under the forfeiture by wrongdoing doctrine in all court proceedings in which the unavailable witness's statements are otherwise admissible. However, Reinwand argues that he did not forfeit his right to confront Meister in this case because a placement proceeding had not been filed at the time of Meister's murder. Reinwand asserts, without reference to legal authority, that he could not have murdered Meister with the intent to silence him from testifying in a placement proceeding since he had no idea whether such a proceeding would or would not be initiated. Reinwand also asserts that in order for the forfeiture by wrongdoing doctrine to be implicated, a circuit court must find that the "primary purpose," as opposed to just one reason, for the defendant's wrongful act must have been procuring the witness's unavailability to testify. In support, Reinwand relies on the United States Supreme Court's requirement of intent in ***Giles.***

Our own research has revealed only one decision addressing whether a defendant who intentionally procures a witness's unavailability to testify against the defendant at a particular legal proceeding forfeits his or her right to confrontation as to that witness in *all* subsequent proceedings in which that unavailable witness's statements are otherwise admissible. *See* ***Vasquez v.***

People, 173 P.3d 1099 (Colo. 2007). In ***Vasquez***, the defendant was convicted of murdering his wife two days before she was scheduled to testify against the defendant in a harassment case. ***Id.*** at 1102. Vasquez had admitted to law enforcement officers that he killed his wife because "she set [him] up." ***Id.*** In a separate proceeding, the defendant was charged with restraining order and bail bond violations, and the trial court admitted unconfronted statements by the defendant's wife upon finding that the defendant had murdered his wife, at least in part, to prevent her from testifying at the harassment case against him. ***Id.*** at 1101-02. On appeal, the defendant argued that his wife's unconfronted statements were inadmissible because he could not have intended to prevent his wife from testifying in the restraining order and bail bond violations case because that case was not pending at the time of his wife's murder. ***Id.***

The Colorado Supreme Court rejected the defendant's arguments and concluded that where the circuit court had found that the defendant had killed his wife, at least in part, to prevent her from testifying as a witness in the harassment case against the defendant, the defendant forfeited his right to confrontation in any proceeding in which his wife's testimony was otherwise admissible. In reaching that conclusion, the ***Vasquez*** court pointed out that no other state court had addressed the fact scenario in which a defendant had the requisite intent to work a forfeiture in one proceeding, and then benefited from the witness's unavailability in another proceeding. ***Id.*** at 1104. The court relied on cases construing FED.R. EVID. 804(b)(6) as not requiring that a defendant's intent attach to any particular proceeding, or even to a proceeding that is ongoing at the time of the defendant's wrongful act that results in the witness's unavailability. ***Id.*** at 1104-05. The court reasoned that its adoption of the broad interpretation of the forfeiture by wrongdoing doctrine comported with the doctrine's rationale in

reducing the incentive a defendant might have to tamper with a witness. ***Id.*** at 1104.

The Colorado Supreme Court's decision in ***Vasquez*** was issued before the United States Supreme Court issued ***Giles***. It is unclear what, if any, impact ***Giles*** has on the court's decision in ***Vasquez*** given that intent was a requirement in Colorado for application of the forfeiture by wrongdoing doctrine.

We are not aware of any state or federal case addressing the questions we now certify that has been issued after ***Giles***. Thus, we believe that the answers to the questions we now certify is of significant importance and that Wisconsin courts are in need of guidance from the supreme court.[1]

[1] In addition to Reinwand's challenge of the admissibility of Meister's out-of-court statements, Reinwand also contends on appeal that the circuit court erred in admitting other acts evidence at trial and that he received ineffective assistance of counsel. These contentions do not present complex or novel issues of law and can be resolved with little difficulty.