COURT OF APPEALS
DECISION
DATED AND FILED

May 24, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2004AP1864-CR **Cir. Ct. No. 2002CF271**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID W. THROM,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed*.

Before Lundsten, P.J., Vergeront and Higginbotham, JJ.

¶1 PER CURIAM. David Throm appeals a judgment convicting him of first-degree homicide of his former fiancée, Colleen Wilke, and hiding her corpse. He also appeals the order denying him postconviction relief. The issue is

whether evidence introduced at trial of statements Wilke made before her death violated Throm's constitutional right to confront witnesses. We affirm.

¶2 Wilke was beaten to death shortly after she and Throm decided to end their relationship. At his trial, Throm conceded he caused Wilke's death. His defense to the first-degree intentional homicide charge was involuntary intoxication caused by prescription medication. To rebut that defense, the State used evidence of six statements Wilke made to third persons shortly before she died.

¶3 Throm argued on appeal that Wilke's statements were testimonial and inadmissible as such under the holding in ***Crawford v. Washington***, 541 U.S. 36 (2004). We affirmed his conviction in our first decision. We held that five of the six statements were admissible because they were not testimonial, as ***Crawford*** defined and applied the term. We held that admission of the sixth statement, even if it were arguably testimonial, was harmless.

¶4 The supreme court subsequently granted Throm's petition for review, summarily vacated our decision, and remanded to this court for reconsideration in light of its opinion in ***State v. Manuel***, 2005 WI 75, 281 Wis. 2d 554, 697 N.W.2d 811. We ordered additional briefing and then stayed the appeal pending the recently issued supreme court decision in ***State v. Jensen***, 2007 WI 26, ___ Wis. 2d ___, 727 N.W.2d 518.

¶5 In ***Jensen*** the court declared that "we explicitly adopt [the] doctrine whereby a defendant is deemed to have lost the right to object on confrontation grounds to the admissibility of out-of-court statements of a declarant whose unavailability the defendant has caused." ***Id.***, ¶2. This doctrine is known as the forfeiture by wrong-doing doctrine. The court further held that the doctrine

applies if the State can prove by a preponderance of the evidence that the accused caused the absence of the witness. ***Id.***, ¶57. The court expressly rejected a narrower forfeiture by wrongdoing doctrine, which means that the State need not show that the defendant caused the witness's unavailability with intent to prevent the witness from testifying. ***Id.***, ¶¶50-52, 57.

¶6 Here, as noted, Throm conceded at trial that he caused Wilke's death. He does not now deny that it was the product of his wrongdoing. Instead, he contends that ***Jensen*** was wrongly decided, because it does not require the State to prove that the defendant intended, at least in part, to prevent the witness from testifying. However, the holding in ***Jensen*** binds this court. *See* ***State v. Lossman***, 118 Wis. 2d 526, 533, 348 N.W.2d 159 (1984). Therefore, we necessarily conclude that Wilke's statements were immune under the forfeiture by wrongdoing doctrine to a confrontation clause challenge.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.