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**WISCONSIN COURT OF APPEALS**
110 EAST MAIN STREET, SUITE 215
P.O. BOX 1688
MADISON, WISCONSIN 53701-1688
Telephone (608) 266-1880
TTY: (800) 947-3529
Facsimile (608) 267-0640
Web Site: www.wicourts.gov

**DISTRICT II**

February 26, 2020

*To*:

Hon. Chad G. Kerkman
Circuit Court Judge
Kenosha County Courthouse, Br. 8
912 56th St.
Kenosha, WI 53140

Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
912 56th St.
Kenosha, WI 53140

John Blimling
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Michael D. Graveley
District Attorney
912 56th St.
Kenosha, WI 53140-3747

Dustin C. Haskell
Assistant State Public Defender
735 N. Water St., Rm. 912
Milwaukee, WI 53203

Aaron R. O'Neil
Assistant Attorney General
P.O. Box 7857
Madison, WI 53707-7857

Jeremy C. Perri
First Asst. State Public Defender
735 N. Water St., Rm. 912
Milwaukee, WI 53203

You are hereby notified that the Court has entered the following opinion and order:

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2018AP1952-CR State of Wisconsin v. Mark D. Jensen (L.C. #2002CF314)

Before Reilly, P.J., Gundrum and Davis, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

This case has much history, having already been the subject of one supreme court decision more than a decade ago, ***State v. Jensen (Jensen I)***, 2007 WI 26, 299 Wis. 2d 267, 727 N.W.2d 518, a prior decision by this court, ***State v. Jensen (Jensen II)***, 2011 WI App 3, 331 Wis. 2d 440, 794 N.W.2d 482, and multiple federal court decisions, ***Jensen v. Schwochert***, No. 11-C-0803, unpublished slip op. (E.D. Wis. Dec. 18, 2013), *aff'd*, ***Jensen v. Clements***, 800 F.3d 892 (7th Cir. 2015), ***Jensen v. Clements***, No. 11-C-803, unpublished slip op. (E.D. Wis. Nov. 27, 2017), and ***Jensen v. Pollard***, 924 F.3d 451 (7th Cir. 2019).

In this current challenge, Mark Jensen appeals from a judgment of the circuit court convicting him of first-degree intentional homicide, which judgment was entered after the United States District Court for the Eastern District of Wisconsin granted his petition for a writ of habeas corpus and ordered Jensen "released from custody unless, within 90 days of the date of this decision, the State initiates proceedings to retry him." ***Jensen v. Schwochert***, No. 11-C-0803, at 55. Because the circuit court entered this judgment without affording Jensen a new trial (and without otherwise being based upon a plea), he asserts the court erred either by "unconstitutionally direct[ing] a new judgment against him without a trial or plea, or because the circuit court re-entered an old, constitutionally infirm conviction that was invalidated by a higher court." Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] Because we agree the circuit court erred in entering judgment against Jensen without affording him a new trial, we reverse and remand for further proceedings.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

## ***Background***[2]

In 2002, Jensen was charged with first-degree intentional homicide of his wife, Julie, in connection with her death by poisoning. He filed a motion challenging on Confrontation Clause grounds the admissibility of a handwritten letter Julie wrote prior to her death. The letter, bearing Julie's signature, had been in a sealed envelope addressed to "Pleasant Prairie Police Department, Ron Kosman or Detective Ratzenburg" and given to a neighbor. Julie had instructed the neighbor that he should give the envelope to police if anything happened to her. The letter stated, among other things, that "if anything happens to me, [Jensen] would be my first suspect" and "I pray I'm wrong [and] nothing happens … but I am suspicious of [Jensen's] suspicious behaviors [and] fear for my early demise."

Jensen similarly challenged the admissibility of voicemail messages and other oral statements Julie made to Officer Kosman. In one of the messages, Julie told Kosman she thought Jensen was attempting to kill her and asked that Kosman call her back. ***Jensen I***, 299 Wis. 2d 267, ¶6; ***Jensen v. Schwochert***, No. 11-C-0803, at 2. Our supreme court further described Julie's messages as indicating that "Jensen had been acting strangely and leaving himself notes Julie had photographed and that she wanted to speak with Kosman in person because she was afraid Jensen was recording her phone conversations." ***Jensen I***, 299 Wis. 2d 267, ¶30. The other oral statements at issue relate to Kosman speaking with Julie in person in response to her voicemail messages. As our supreme court expressed it in ***Jensen I***, in such

[2] Because of the extensive history of this case and the role that history plays in this appeal, we draw much of the background information from the prior cases.

statements, Julie indicated, among other things, that "if she were found dead, … she did not commit suicide, and Jensen was her first suspect."[3] ***Id.***, ¶6.

The circuit court originally ruled that the letter and in-person statements to Kosman were admissible. After the United States Supreme Court decided ***Crawford v. Washington***, 541 U.S. 36 (2004), however, Jensen moved for reconsideration. Revisiting the issue, the circuit court concluded the letter and voicemail messages were testimonial statements and as such were inadmissible under ***Crawford***. The State had conceded the in-person statements were testimonial.

On appeal to our supreme court, the court observed in ***Jensen I*** that the United States Supreme Court "fundamentally changed the Confrontation Clause analysis" with its decision in ***Crawford***. ***Jensen I***, 299 Wis. 2d 267, ¶14. Prior to ***Crawford***, our supreme court noted, Confrontation Clause jurisprudence was driven by ***Ohio v. Roberts***, 448 U.S. 56 (1980). As the ***Jensen I*** court expressed it,

> Under ***Roberts***, when an out-of-court declarant is unavailable, his or her statement is admissible if it bears an adequate indicia of reliability, which could be satisfied if the statement fell within a firmly rooted hearsay exception or bore particularized guarantees of trustworthiness. ***Roberts***, 448 U.S. at 66.

***Jensen I***, 299 Wis. 2d 267, ¶14. Constituting a "major shift in Confrontation Clause jurisprudence," the ***Crawford*** Court instead "determined that the Confrontation Clause bars

[3] This evidence was presented at Jensen's preliminary hearing. ***State v. Jensen (Jensen I)***, 2007 WI 26, ¶¶4-7, 299 Wis. 2d 267, 727 N.W.2d 518.

admission of an out-of-court-*testimonial* statement unless the declarant is unavailable and the defendant has had a prior opportunity to examine the declarant with respect to the statement." ***Jensen I***, 299 Wis. 2d 267, ¶15 (emphasis added). The ***Jensen I*** court recognized that ***Crawford*** "did not spell out a comprehensive definition of what 'testimonial' means" and then identified indicators from ***Crawford*** to aid in a determination of whether a statement is testimonial or nontestimonial. ***Jensen I***, 299 Wis. 2d 267, ¶16.

The ***Jensen I*** court also recognized that in a post-***Crawford*** Confrontation Clause case, ***Davis v. Washington***, 547 U.S. 813 (2006), the United States Supreme Court referenced a "primary purpose" test in holding: "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." ***Jensen I***, 299 Wis. 2d 267, ¶19. Ultimately, the court held that "Julie's statements to the police and the letter are testimonial." ***Id.***, ¶20.

With respect to its holding that the letter and statements by Julie are testimonial, the ***Jensen I*** court discussed the following:

> We begin first with the statements Julie made in her letter. The circuit court concluded that the letter was testimonial as it had no apparent purpose other than to "bear testimony" and Julie intended it exclusively for accusatory and prosecutorial purposes. Furthermore, the circuit court stated, "I can't imagine any other purpose in sending a letter to the police that is to be opened only in the event of her death other than to make an accusatory statement given the contents of this particular letter."

***Id.***, ¶26. The ***Jensen I*** court expressed its agreement with the circuit court's observation, and added that Julie's letter "even referred to Jensen as a 'suspect.'" ***Id.***

Similar to the circuit court, the ***Jensen I*** court stated that

> [t]he content and the circumstances surrounding the letter make it very clear that Julie intended the letter to be used to further investigate or aid in prosecution in the event of her death. Rather than being addressed to a casual acquaintance or friend, the letter was purposely directed toward law enforcement agents. The letter also describes Jensen's alleged activities and conduct in a way that clearly implicates Jensen if "anything happens" to her.

***Id.***, ¶27.

The ***Jensen I*** court noted the similarity between Julie's letter and Lord Cobham's letter accusing Sir Walter Raleigh of treason, followed by an infamous trial that provided an impetus for the Confrontation Clause. ***Id.***, ¶29; *see also* ***Crawford***, 541 U.S. at 44-45. The ***Jensen I*** court stated that Julie's letter was

> testimonial in nature as it clearly implicates Jensen in her murder. If we were to conclude that her letter was nontestimonial, we would be allowing accusers the right to make statements clearly intended for prosecutorial purposes without ever having to worry about being cross-examined or confronted by the accused. We firmly believe ***Crawford*** and the Confrontation Clause do not support such a result.

***Jensen I***, 299 Wis. 2d 267, ¶29. Specifically as to the voicemail messages Julie left for Kosman, the ***Jensen I*** court again agreed with the circuit court.

> Again, the circuit court determined that these statements served no other purpose than to bear testimony and were entirely for accusatory and prosecutorial purposes. Furthermore, Julie's voicemail was not made for emergency purposes or to escape from a perceived danger. She instead sought to relay information in order to further the investigation of Jensen's activities. This distinction convinces us that the voicemails are testimonial. *See* ***Pitts v. State***, 280 Ga. 288, 627 S.E.2d 17, 19 (2006) ("Where the primary purpose of the telephone call is to establish evidentiary facts, so that an objective person would recognize that the statement would be used in a future prosecution, then that phone call 'bears testimony' against the accused and implicates the concerns of the Confrontation Clause.").

***Jensen I***, 299 Wis. 2d 267, ¶30. The ***Jensen I*** court's ultimate holding on the issue of Julie's letter and voicemail messages is that they are "testimonial."[4] ***Id.***, ¶34.

Despite its determination that Julie's letter and other statements are testimonial, the ***Jensen I*** court did not simply rule them inadmissible because it also held that the doctrine of "forfeiture by wrongdoing" might apply to this evidence, so it remanded the matter back to the circuit court to determine whether, by a preponderance of the evidence, Jensen caused Julie's unavailability for confrontation and thus forfeited his right to confront her. ***Id.***, ¶58. Following a hearing on remand focused on the forfeiture-by-wrongdoing exception, the circuit court

[4] The ***Jensen I*** court noted that the State had conceded that the in-person statements Julie made to Kosman when he followed up on her voicemails were testimonial. ***Jensen I***, 299 Wis. 2d 267, ¶11 n.4; ***State v. Jensen (Jensen II)***, 2011 WI App 3, ¶11 n.4, 331 Wis. 2d 440, 794 N.W.2d 482. In this current appeal, the State asks us to rule that Julie's voicemails and in-person statements, along with the letter, are nontestimonial. In doing so, the State effectively treats the voicemails and in-person statements as being of the same nature and character for Confrontation Clause purposes and refers to them collectively as "the statements." The State is not incorrect in doing so as Julie's voicemail messages and in-person statements to Kosman are in fact of the same nature and character for Confrontation Clause purposes in that they occurred around the same time, related to the same concern that Jensen may have been trying to kill her, and were made to the same person, who was a law enforcement officer. As the ***Jensen I*** court stated with regard to the voicemail messages:

> [T]he circuit court determined that these statements served no other purpose than to bear testimony and were entirely for accusatory and prosecutorial purposes. Furthermore, Julie's voicemail was not made for emergency purposes or to escape from a perceived danger. She instead sought to relay information in order to further the investigation of Jensen's activities. This distinction convinces us that the voicemails are testimonial.

(continued)

determined by a preponderance of the evidence that Jensen had caused Julie's unavailability and thus had forfeited his confrontation right, and it ruled Julie's letter and statements admissible. The circuit court held a trial at which the letter and other statements were admitted, and Jensen was found guilty.

Subsequent to the trial, the United States Supreme Court decided ***Giles v. California***, 554 U.S. 353 (2008), which addressed the forfeiture-by-wrongdoing doctrine. On appeal of his conviction to this court, Jensen challenged the admission of the letter and statements, and ultimately the guilty verdict against him, based upon ***Giles***' holding regarding the forfeiture-by-wrongdoing doctrine, which holding conflicted with our supreme court's holding on that issue in ***Jensen I***. ***Jensen II***, 331 Wis. 2d 440, ¶22. We assumed, without deciding, that the letter and statements were erroneously admitted at trial but held that their admission was harmless. ***Id.***, ¶35.

Jensen also contended in the appeal to us that his due process right to a fair trial was violated because the judge who presided over his trial was the same judge who previously made the finding that he had forfeited his Confrontation Clause challenge to the letter and statements

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***Jensen I***, 299 Wis. 2d 267, ¶30. Pursuant to ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997), and in light of our supreme court's decision in ***Jensen I***, we conclude we are not at liberty to treat Julie's in-person statements to Kosman any differently than her voicemail messages to him, and we conclude that both the messages and in-person statements are testimonial. Furthermore, the State abandoned its opportunity to argue that the in-person statements are nontestimonial when it conceded in ***Jensen I*** that they were testimonial. *See* ***A.O. Smith Corp. v. Allstate Ins. Cos.***, 222 Wis. 2d 475, 491, 588 N.W.2d 285 (Ct. App. 1998) ("[A]n issue raised in the trial court, but not raised on appeal, is deemed abandoned."). We further note that it appears the federal courts also determined that both the voicemail and in-person statements, as well as the letter, were testimonial and that their admission at trial violated Jensen's Confrontation Clause rights. *See* ***Jensen v. Schwochert***, No. 11-C-0803, unpublished slip op. at 18, 28, 54-55 (E.D. Wis. Dec. 18, 2013), *aff'd*, ***Jensen v. Clements***, 800 F.3d 892, 896, 908 (7th Cir. 2015).

by causing Julie's unavailability. We rejected this contention on the merits and also concluded he had forfeited it by failing to first raise it in the circuit court. ***Id.***, ¶¶94-96. On the merits, we stated:

> Under WIS. STAT. § 901.04, a judge must make preliminary evidentiary findings such as the finding Judge Schroeder made that Jensen was guilty of forfeiture by wrongdoing. Moreover, Judge Schroeder was ordered by our supreme court to make a forfeiture by wrongdoing finding. Additionally, Jensen points to nothing to support his implied contention that a judge who makes the preliminary finding of forfeiture by wrongdoing must recuse himself or herself from the trial. Finally, Jensen proffers no objective evidence of bias. We address this argument no further.

***Jensen II***, 331 Wis. 2d 440, ¶96 (footnote omitted).

Jensen subsequently filed a petition for review by the Wisconsin Supreme Court, which petition the court denied. Jensen then filed a habeas petition in federal court. The federal district court for the Eastern District of Wisconsin ruled that the admission of the testimonial letter and statements by Julie at trial violated Jensen's rights under the Confrontation Clause and, contrary to our ruling in ***Jensen II***, was not harmless error, and the court ordered Jensen "released from custody unless, within 90 days of the date of this decision, the State initiates proceedings to retry him." ***Jensen v. Schwochert***, No. 11-C-0803, at 55.

The State appealed the federal district court's ruling to the Seventh Circuit Court of Appeals, and that court affirmed, expressing "[t]hat the jury improperly heard Julie's voice from the grave in the way it did means there is no doubt that Jensen's rights under the federal Confrontation Clause were violated." ***Jensen v. Clements***, 800 F.3d at 908. The court stated that the "letter and other accusatory statements [Julie] made to the police in the weeks before her death regarding her husband should never have been introduced at trial," adding that "[t]he erroneous admission of Julie's letter and statements to the police had a substantial and injurious

influence or effect in determining the jury's verdict." ***Id.*** at 895. Upon remand to the state circuit court, Jensen's conviction was vacated and further proceedings were held.

Despite the Wisconsin Supreme Court's ruling in ***Jensen I*** and the federal court rulings holding that Julie's letter and other statements were testimonial, as the parties prepared for a retrial, the State asked the circuit court to consider anew the admissibility of the letter and Julie's other statements and rule them admissible at a retrial. The State asserted, as it does on appeal, that United States Supreme Court cases decided in 2011, 2012, and 2015 modified the definition of what constitutes a "testimonial" statement and that under the revised definition, Julie's letter and other statements do not qualify. The circuit court agreed and ruled that the letter and statements are nontestimonial and could be admitted at trial. The State subsequently filed a motion to reinstate the original jury verdict without a retrial, and the circuit court did just that, reinstating the original conviction as well as Jensen's life sentence, explaining that there was no need for a new trial because the evidence would be "materially the same as the first trial."[5] Jensen appeals.

## ***Discussion***

In this appeal, Jensen argues that the circuit court erred either by "unconstitutionally direct[ing] a new judgment against him without a trial or plea, or because the circuit court re-entered an old, constitutionally infirm conviction that was invalidated by a higher court." We need not delve into the murky waters of deciding between these two because whichever action the court in fact took under the law was in error as they are both based on the court's erroneous

[5] Related litigation then followed in federal court, but our ruling is not dependent on those proceedings.

ruling that Julie's letter and other statements are nontestimonial and thus not subject to the Confrontation Clause.

"[T]he Confrontation Clause applies … to statements that are testimonial in nature," but does not apply to statements that are nontestimonial. ***State v. Reinwand***, 2019 WI 25, ¶¶22-23, 385 Wis. 2d 700, 924 N.W.2d 184. Whether a particular statement is testimonial or nontestimonial is a question of law we review de novo. ***State v. Deadwiller***, 2012 WI App 89, ¶7, 343 Wis. 2d 703, 820 N.W.2d 149.

While our recitation of the procedural history of this case is long, our analysis will be short. Neither we nor the circuit court are at liberty to decide that the letter and other statements Julie made to Kosman are nontestimonial. Under ***Cook v. Cook***, 208 Wis. 2d 166, 189, 560 N.W.2d 246 (1997), "[t]he supreme court is the only state court with the power to overrule, modify or withdraw language from a previous supreme court case." *See* ***Jensen II***, 331 Wis. 2d 440, ¶27. That is what the circuit court erroneously did and what the State asks us to affirm in this case.

We will not again detail all that the supreme court said in ***Jensen I*** with regard to the testimonial nature of Julie's letter and other statements to Kosman. We will, however, point out again that the court stated:

> If we were to conclude that her letter was nontestimonial, we would be allowing accusers the right to make statements clearly intended for prosecutorial purposes without ever having to worry about being cross-examined or confronted by the accused. We firmly believe ***Crawford*** *and the Confrontation Clause* do not support such a result.

***Jensen I***, 299 Wis. 2d 267, ¶29 (emphasis added). The supreme court made its "firm[] belie[f]" abundantly clear, not just in a case with facts very similar to the facts in this case, but in this case itself, with these same exact facts. ***Id.*** In the end, the court ruled in ***Jensen I*** that "the statements Julie made to Kosman, including the letter, are testimonial," ***id.***, ¶58, and it did so not solely based upon the ***Crawford*** decision, but upon the Confrontation Clause itself. We are not at liberty to state otherwise.[6] With that, we must conclude the circuit court erred in entering a judgment of conviction without a new trial, a new trial which was envisioned by the federal district court when it returned this case to the circuit court with instructions to "release [Jensen] from custody unless, within 90 days of the date of this decision, the State initiates proceedings to retry him." ***Jensen v. Schwochert***, No. 11-C-0803, at 55. We reverse and we remand for a new trial at which Julie's letter and other statements may not be admitted into evidence.[7]

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[6] We have already recognized in ***Jensen II***, almost four years after ***Jensen I***, that we are bound by our supreme court's declaration in ***Jensen I*** that "the statements Julie made to Kosman, including the letter addressed to the police, are 'testimonial,'" ***Jensen II***, 331 Wis. 2d 440, ¶27, and we referred to these statements as testimonial, *see* ***id.***, ¶¶13, 14, 35, 38, 71, 73. Related to our ruling that we are bound by the ***Jensen I*** court's determination that the letter and other statements are testimonial, we specifically stated:

> In order to determine which statements may be analyzed under the broader version of the forfeiture by wrongdoing analysis, we must first determine which statements are testimonial and which are not. Fortunately, our supreme court has done so for us in ***Jensen***, 299 Wis. 2d 267, ¶2. *See* ***Livesey v. Copps Corp.***, 90 Wis. 2d 577, 581, 280 N.W.2d 339 (Ct. App. 1979) (recognizing that "[t]he court of appeals is bound by the prior decisions of the Wisconsin Supreme Court").

***Jensen II***, 331 Wis. 2d 440, ¶27.

[7] Jensen also argues that if his "current conviction is a re-entry of the old constitutionally infirm judgment ... this judgment is infected by the same judicial bias that Jensen presented in his direct appeal in ***Jensen II***." Jensen recognizes that we already answered in ***Jensen II*** that he had failed to show judicial bias, but he acknowledges he is just raising the issue again to preserve it "for review by a federal habeas court, if necessary." Because we already have ruled that he is entitled to a new trial upon remand (at which trial the challenged statements may not be admitted) and that he has not shown judicial bias, we see no need to address this issue further.

Therefore,

IT IS ORDERED that the judgment of the circuit court is summarily reversed pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this case is remanded with directions.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*
*Clerk of Court of Appeals*