SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: CRIMINAL TERM: PART 13
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PEOPLE OF THE STATE OF NEW YORK

-against-

TIMOTHY BROWN
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Decision and Order
Indictment No.: 4335-2011

Anthony S. Chilliest, Esq
For the Defendant

Olatokumbo Olaniyan, Esq.
Michael Trabulsi, Esq.
Asst. District Attorneys
For the People

Hon. Guy J. Mangano, Jr.
Dated: January 11, 2013

The defendant is charged with Rape in the First Degree (Penal Law § 130.35), Burglary in the First Degree (Penal Law § 140.30), Strangulation in the Second Degree (Penal Law § 121.12) and related charges. A *Sirois* hearing was ordered and held. The People called three witnesses: Kings County District Attorney's Office Detective Investigator William Aviles, civilian Shavene Cole (a friend of the complainant) and Josette McLean (an Investigator for the New York City Department of Corrections). The defense called one witness, the complainant, Victoya Walker.

FINDINGS OF FACT

This Court finds the People's witnesses to be credible. However, based upon the following, this Court finds the defense witness' testimony to be incredible.

The indictment alleges that on May 5, 2011, defendant entered the home of Victoya Walker and sexually assaulted her. It is also alleged that subsequent to Ms. Walker's outcry and interview with the police, defendant returned to Ms. Walker's home and "balled his fists" at the victim. Ms.

Walker fled the apartment and contacted the police. Defendant was found by the police standing outside Ms. Walker's window ledge.[1]

During the investigation and preparation of this case for trial, it became apparent to the People that Ms. Walker's version of the events had changed from her Grand Jury testimony. The instant hearing to determine if defendant played any part in Ms. Walker's apparent recantation was held over a three day period wherein the People produced three witnesses and played hours of recorded telephone conversations between defendant, Ms. Walker and others, which spanned over 18 months.

On May 11, 2011, Kings County Detective Investigator William Aviles began a threat assessment investigation for the complainant in the above captioned sex crimes case, Victoya Walker. Detective Aviles spoke with Ms. Walker (also know as "Chicago"), at the offices of the Kings County District Attorney and learned that Ms. Walker was contacted by telephone approximately five times the previous day by defendant's cousin, Jamel Goodridge. Mr. Goodridge had offered the complainant money in return for dropping the case against defendant. At this point in Detective Aviles' investigation, Ms. Walker appeared cooperative and provided all the information he had asked for during the interview. Ms. Walker also indicated to the detective that she intended to go forward with the prosecution of the case against Timothy Brown.

In response to the investigation, Detective Aviles offered Ms. Walker police protection and relocation of her residence. While Ms. Walker stated that she did not feel safe at home given the fact that defendant was still at liberty at the time, she did not wish the District Attorney's Office to

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[1] This information was provided in the People's affirmation in support of the request for the instant *Sirois* hearing.

relocate her.[2] Instead, Ms. Walker indicated that she would be moving and staying with a friend.

Thereafter, over one year later, on August 16, 2012, Detective Aviles, while working with a partner, continued his investigation in this matter, and was directed to serve a letter and a subpoena upon Victoya Walker at 1612 Prospect Place, Brooklyn.[3] The subpoena sought the presence of Ms. Walker at the Kings County District Attorney's Office to be interviewed by the investigating assistant district attorney. Ms. Walker was not present at the premises and the detective left the correspondence and subpoena at the location. According to Detective Aviles, the same subpoena had been similarly left the day before by two fellow Detective Investigators. To Detective Aviles' knowledge, Ms. Walker did not appear at the Kings County District Attorney's Office as mandated by the subpoenas.[4]

The People then called Shavene Cole, a "close friend" of Ms. Walker who had also known defendant for approximately a year. In May, 2011, Ms. Cole became aware of an incident which occurred between defendant and Ms. Walker from a telephone call from Ms. Walker. While crying,

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[2] Defendant was arrested on May 6, 2011. While defendant was released on bail on May 11, 2011, he was arrested on an unrelated matter and remanded on the instant Indictment. From July 18, 2011 until March 23, 2012, defendant was continuously incarcerated on Rikers Island. Since March 23, 2012, defendant has been continuously detained at the Brooklyn Detention Complex.

[3] In the affirmation in support of the request for the instant hearing, the assigned assistant district attorney, Olatokumbo Olaniyan, Esq., averred that between September, 2011 and March, 2012, she and a sex crimes counselor from the District Attorney's Office had monthly contact with Ms. Walker where she maintained her cooperation with the prosecution of this matter.

[4] As a result of conversations with Ms. Walker's family and friends (discussed below), as well as the sudden and drastic turn in Ms. Walker's cooperation with the prosecution, the affirmation in support of the *Sirois* hearing indicated that defendant's inmate telephone records and visitor logs were ordered. Despite the full order of protection issued by this Court, defendant's inmate records revealed that defendant repeatedly placed telephone calls to Ms. Walker, accepted visits from her on four occasions and sent letters to her as well.

Ms. Walker told Ms. Cole that defendant had raped her. At the time of the incident, Ms. Cole met Ms. Walker at the hospital and then accompanied her to the police precinct. Moreover, Ms. Walker told Ms. Cole "that she wanted [defendant] to get arrested for what happened."

In the Spring of 2012, Ms. Cole was contacted by the Kings County District Attorney's Office for her help in locating Ms. Walker. In a telephone conversation in August 2012, Ms. Walker told Ms. Cole "that it wasn't up to anyone to determine what [defendant's] judgment would be and that it would only be up to God for what happened to him." Ms. Cole also discussed a letter from defendant received by Ms. Walker in which defendant wrote "that he was sorry, that he really truly wanted her to forgive him or whatever."

In August 2012, Ms. Cole contacted the Kings County District Attorney's Office to inquire why the "police" were looking for Ms. Walker.[5] Ms. Walker had contacted Ms. Cole when she found the subpoenas left under the door of her apartment. In response to questions about the subpoena, Ms. Walker told Ms. Cole that she would not be honoring the subpoenas and would not appear in court.

The final witness for the People was Josette McLean, an Investigator for the New York City Department of Corrections. One of Ms. McLean's duties with the corrections department is to download the recorded telephone conversations of inmates and respond to subpoenas seeking said recordings. Ms. McLean provided the Court with the procedure for an inmate to make an outgoing telephone call. Each inmate must input a unique ten digit book and case number as well as a six digit unique PIN number before dialing the telephone number. Moreover, the inmate is informed that the telephone conversation will be recorded and that the recordings made at Rikers Island are

[5] This was a reference to the subpoenas left for Ms. Walker on August 15 and 16, 2012.

kept for approximately 18 months. A total of three DVDs were admitted into evidence with hundreds of recorded telephone conversations made by defendant using his unique ten digit book and case number as well as a six digit unique PIN number. The final DVD contained a recorded telephone conversation of defendant to Ms. Walker dated June 21, 2012, wherein defendant used another inmate's unique ten digit book and case number as well as a six digit unique PIN number. The Court listened to all of the recordings in evidence, and again listened to them *in camera*.

The defense called the complainant, Victoya Walker. Ms. Walker testified on direct examination that she filed a complaint against defendant and that she voluntarily came to court to testify at this hearing. Moreover, she stated that if called by the prosecution in the future, she would voluntarily come to court at that time.

On cross examination, Ms. Walker testified that she sought medical attention in the emergency room at Interfaith Hospital on May 5, 2011, for a "bite mark." When asked by the assistant district attorney whether she had informed the detectives from the Special Victims Squad that she wished to file a complaint against defendant, Ms. Walker invoked her Fifth Amendment right not to answer the question.

In the early morning hours of May 10, 2011,five days after the incident, defendant's cousin, Jamel Goodridge, repeatedly placed telephone calls to Ms. Walker and offered to pay her to drop the case. Although Ms. Walker denied telling Detective Aviles about this initial bribery attempt, her report of the misconduct was contemporaneously documented and signed by her. When the document admitting the bribery was read into evidence, Ms. Walker refused to answer any question regarding the offering of money to drop the case. Ms. Walker's denial of this bribe is but one factor that has diminished the credibility of her testimony.

In a July 24, 2011 telephone conversation made from defendant to Jamel Goodridge, defendant clearly states, "make sure nobody comes to court," an obvious reference to Ms. Walker. Further, on July 26, 2011, defendant tells Mr. Goodridge and another male to give Ms. Walker money to not cooperate with the government. And on July 28, 2011, defendant tells Mr. Goodridge to have Ms. Walker write a statement and "make up a lie."

Ms. Walker testified that in August 2011, she spoke to Mr. Goodridge multiple times. Although she invoked her Fifth Amendment right not to respond to the question regarding the substance of these conversations, the aforementioned recorded telephone conversations lead this Court to the only conclusion that these encounters similarly sought to dissuade Ms. Walker from cooperating with the District Attorney's Office regarding this matter.

In a telephone conversation on March 24, 2011, Mr. Goodridge repeatedly tells defendant to convince Ms. Walker to "take a perjury charge." Moreover, in a telephone call on April 1, 2012, defendant tells Mr. Goodridge to follow the instructions laid out in a letter recently written to him. Finally, Mr. Goodridge visited defendant in jail on multiple occasions, providing ample opportunity to strategize the plan to convince Ms. Walker not to cooperate with the People.

Shevene Cole, a close friend of Ms. Walker, testified that before the summer of 2012, Ms. Walker informed her of a letter sent by defendant in which he apologized and asked for forgiveness. On May 21, 2012, Mr. Goodridge facilitated a three-way telephone call between defendant and Ms. Walker. Then in a telephone conversation on June 4, 2012, defendant and Ms. Walker discussed the letters sent by defendant. Shortly thereafter, Ms. Walker started visiting defendant in jail for a total of four times.

On June 21, 2012, defendant used another inmate's information to place a telephone call to

Ms. Walker and relayed to her the advice of his lawyer that she should not visit him in jail again and that they should not be talking on the telephone. The use of another inmate's telephone information was a clear attempt to avoid further detection. Defendant also stated to Ms. Walker that she would not get into any trouble or face perjury charges if she failed to appear in court, which had been defendant's apparent primary plan throughout the course of the contact with the complainant. Defendant also attempted to dissuade Ms. Walker from retaining her own attorney to represent her in the event she is charged with perjury. Moreover, defendant discussed an alternate plan with Ms. Walker to inform the People that she was drunk on the night of the incident and does not recall what transpired.

On September 11, 2012, on the eve of the instant hearing, defendant called Ms. Walker four times and attempted to leave a voice message during each call. In one of the calls, defendant states, "I appreciate anything you could do, like for real." One minute later, defendant calls again, stating, "I appreciate anything you could do right now."

CONCLUSIONS OF LAW

Not only did this Court hear the testimony proffered by the complaining witness but carefully observed her demeanor and temperament on the stand. Many of her answers were hesitant and contradicted by the People's documented evidence. Based upon these observations, this Court finds Ms. Walker's testimony to be evasive, inconsistent and incredible. Moreover, this Court finds that defendant's numerous telephone calls and two letters to Ms. Walker, as well as the four jail visits, establish an attempt to manipulate her into recanting her previous testimony and invoking her Fifth Amendment right not to answer questions. As discussed below, defendant's attempts at bribery and

statements that he is Ms. Walker's best friend, that he is only looking out for her and that she needs to just see things his way, as well as his pleas for help, created a scheme to intimidate, confuse and harass the victim of a heinous sex crime.

The purpose of a *Sirois* hearing is "to determine whether the defendant has procured a witness's absence or unavailability through his own misconduct, and thereby forfeited any hearsay or Confrontation Clause objections to admitting the witness's out-of-court statements" (*Cotto v Herbert*, 331 F3d 217, 225–226*; see People v Sirois*, 92 AD2d 618; *People v Geraci*, 85 NY2d 359 *Matter of Holtzman v Hellenbrand*, 92 AD2d 405). The People bear the burden of establishing, by clear and convincing evidence, that the defendant has procured the witness's absence or unavailability (*see People v Geraci*, 85 NY2d at 367, *supra*). And, "[c]ircumstanial evidence, where present, may be sufficient to sustain a finding that a defendant or someone on his . . . behalf has been involved in tampering with a witness so as to justify the admissibility of the witness's prior Grand Jury testimony" (*People v Hamilton*, 127 AD2d 691, 693; *see also People v Cotto*, 92 NY2d 68). Moreover, "great weight must be accorded the determination of the hearing court with its particular advantages of having seen and heard the witnesses [citation omitted], and that determination should not be disturbed where it is supported by the record" (*People v Gee*, 104 AD2d 561; *see also People v Prochili*, 41 NY2d 759; *People v Hamilton*, 127 AD2d 691, *supra*).

The Confrontation Clause of the Sixth Amendment to the United States Constitution requires that in all criminal prosecutions a defendant "shall enjoy the right . . . to . . . confront . . . the witnesses against him." In light of this fundamental right, out-of-court statements made by an unavailable witness, such as those sought to be introduced by the People here, i.e., the Grand Jury testimony of the complaining witness, are generally inadmissible as evidence in-chief at trial *(see*

Davis v Washington, 547 US 813; *Crawford v Washington*, 541 US 36; *People v Cotto*, 92 NY2d 68, *supra*; *People v Geraci*, 85 NY2d 359, *supra*; *People v Encarnacion*, 87 AD3d 81). However, a criminal defendant's right to confront a witness "is not absolute" (*People v Encarnacion*, 87 AD3d 81, *supra* at 86) and can be forfeited by a defendant's misconduct which causes the unavailability of the witness he wishes to confront (*see People v Cotto*, 92 NY2d 68, *supra* at 76; *People v Geraci*, 85 NY2d 359, *supra* at 266; *Matter of Holtzman v Hellenbrand*, 92 AD2d 405, *supra*).

In *Davis v Washington* (547 US 813, *supra*), the United States Supreme Court stated that "one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation" (*id*. at 833). Quite simply, the "law will not allow a person to take advantage of his own wrong" (*People v Geraci*, 85 NY2d 359, *supra* at 366) and all courts have a duty to ensure "the integrity of the adversary process by deterring litigants from acting on strong incentives to prevent the testimony of an adverse witness" (*id*.). Thus, where the People establish by clear and convincing evidence that a defendant procured or otherwise caused the unavailability or absence of a witness by his intentional misconduct, defendant will be "precluded from asserting either 'the constitutional right of confrontation or the evidentiary rules against the admission of hearsay in order to prevent the admission of the witness's out-of-court declarations'" (*People v Cotto*, 92 NY2d 68, *supra* at 76, *quoting People v Geraci*, 85 NY2d 359, *supra*]).

In this matter, the defense maintains that Ms. Walker is available and prepared to testify at defendant's trial. It is argued that she willingly appeared at this *Sirois* hearing and that she will continue to come to court as required. The People, on the other hand, contend that Ms. Walker is unavailable to them because, aside from ignoring numerous telephone calls and subpoenas, Ms. Walker has become evasive when discussing the matter with representatives from the District

Attorney's Office and has recanted a large portion of her Grand Jury testimony. The People further argue that even if Ms. Walker were to voluntarily appear and testify at trial, she would testify falsely, which effectively makes her "unavailable" to the People. To support these allegations, the People have submitted a plethora of recorded telephone conversations which clearly evince wrongdoing on the part of defendant and his agents. Accordingly, under the circumstances presented, this Court finds that Ms. Walker is clearly "unavailable" to the People.

While it is true that ordinarily a *Sirois* forfeiture occurs where the defendant's misconduct causes a witness's physical absence from the proceedings (*see e.g.*, *People v McCrae*, 69 AD3d 759 [witness murdered]; *People v Jernigan*, 41 AD3d 331 [witness "failed to appear for trial"]; *People v Geraci*, 85 NY2d 359, *supra* [witness refused to testify upon being returned from outside state upon material witness order]; *People v Encarnacion*, 87 AD3d 81, *supra* [witness "stopped cooperating and was refusing to testify at trial"]; *People v Byrd*, 51 AD3d 267 [physically available witness refuses to testify]), physical absence is not required. There is no distinction which can be drawn between a physically unavailable witness or a witness present at the proceedings who recants her initial accounts of the crime and instead offers a fabricated version of the events in response to defendant's misconduct (*see People v Cotto*, 92 NY2d 68, *supra* [eyewitness to shooting expressed reluctance about testifying at trial because he believed his family was in jeopardy and at trial witness testified that he could not identify shooter]; *People v Geraci*, 85 NY2d 359, *supra* [eyewitness to a shooting testified in the grand jury but later refused to testify at trial]). Finally, Ms. Walker's unavailability is further demonstrated by the numerous times during the hearing that she invoked her Fifth Amendment right to refuse to answer questions (*see People v Johns*, 297 AD2d 645 ["the witness's refusal to testify based upon her assertion of the Fifth Amendment privilege rendered her

unavailable within the meaning of CPL 670.10"]; *see also People v Webster*, 248 AD2d 738; *People v Ortiz*, 209 AD2d 332; *People v Varsos*, 182 AD2d 508).

Based upon the foregoing, this Court finds that the People have met their burden of showing by clear and convincing evidence that defendant's misconduct caused the unavailability of Ms. Walker. As previously stated, the testimony of the complaining witness was, in short, incredible. For example, when asked about her time in the emergency room after the attack, Ms. Walker stated at the hearing that she sought medical attention for a "bite mark," in clear contradiction to her Grand Jury testimony where she complained of the sexual assault. Moreover, when asked about the name of her longtime friend who Ms. Walker claimed to live with, Ms. Walker said she did not know her name and only reluctantly provided a first name when pressed. This is the same friend who Ms. Walker called immediately after the sexual assault and the same friend who accompanied Ms. Walker to the hospital , police station and District Attorney's Office. Ms. Walker also claimed to not have been offered money by Mr. Goodridge, defendant's cousin, despite her previous written report of being bribed and the recorded telephone conversations wherein Mr. Goodridge tells defendant that he spoke with Ms. Walker about money. Similarly, Ms. Walker claimed that she did not receive a subpoena to come to court because she was out of the state even though her visits to the corrections facility during the time period was documented. Ms. Walker even denied that defendant told her that she "not be around" despite the fact that the telephone conversation was recorded. Simply put, defendant's conduct evinced an intent to have Ms. Walker commit perjury by either recanting her Grand Jury testimony or testifying to an alternate version of the events at trial. There is ample proof of the identities of the participants in the recorded telephone conversations and to the extent that defendant's threats to the witness were implied threats, the implication was

unmistakable.

This Court finds that the commutative effect of defendant's repeated illegal conduct is that Ms. Walker will absent herself from these proceedings, refuse to testify, or testify contrary to her initial statements to law enforcement, the prosecution and the Grand Jury. It would be unconscionable to allow defendant to benefit from his intentional harassing and manipulative conduct.

To establish this illegal conduct, to the full satisfaction of this Court, the People produced several hours of recorded telephone conversations in which the only conceivable topic of discussion was either silencing Ms. Walker from continuing this prosecution against defendant and /or recanting the version of facts she relayed to the Grand Jury. Defendant's campaign of witness tampering began shortly after the incident and he enlisted the help of his cousin and others to accomplish this goal. His scheme continued with multiple recorded telephone conversations and messages left on Ms. Walker's voice mail, at least two letters providing instructions on how to recant the allegations and at least four jail visits with Ms. Walker in which he had ample opportunity to manipulate, pressure and scare the victim of this sexual attack into altering her Grand Jury testimony. Equally telling is that Ms. Walker's recantation and reluctance to continue cooperating with the District Attorney's office began to occur precisely at the time when defendant commenced his barrage of persuasion tactics (*see People v Byrd*, 51 AD3d 267, *supra* [defendant forfeited confrontation rights by misconduct which included "visits" and "hundreds of calls to . . . during the pendency of the case"]; *People v Jernigan*, 41 AD3d 331, *supra* [defendant pressured victim by making 59 telephone calls to the complainant and leaving her voice mail imploring her not to send him to prison]). Similarly, the manifested intent of the many recorded telephone conversations and other contact with Ms.

Walker was for her to cease cooperation with the prosecution. Accordingly, since the People have established by clear and convincing evidence that defendant's conduct has caused the victim's unavailability at trial, defendant will be "precluded from asserting either 'the constitutional right of confrontation or the evidentiary rules against the admission of hearsay in order to prevent the admission of [Ms. Walker's] out-of-court declarations'" (*People v Cotto*, 92 NY2d 68, *supra* at 76, *quoting People v Geraci*, 85 NY2d 359, *supra*]).

Thus, the People's motion to introduce into evidence on their direct case various out-of-court statements made by Ms. Walker is hereby granted.

This shall constitute the Decision and Order of the Court.

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HON. GUY J. MANGANO, JR.
JUSTICE OF THE SUPREME COURT