

STATE OF OHIO ) IN THE COURT OF COMMON PLEAS  
 ) SS:  
COUNTY OF CUYAHOGA ) CASE NO. CR 13-577464-A

STATE OF OHIO, )  
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 )  
Plaintiff )  
 )  
vs. )  
 )  
TELSTAR TATUM, )  
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 )  
Defendants )

**OPINION**

**SHIRLEY STRICKLAND SAFFOLD, JUDGE:**

**I. FACTUAL BACKGROUND**

On or about July 1, 2013 in Cleveland, Ohio, the Defendant, Telstar Tatum (hereinafter “Defendant”), allegedly went to a home located on Holmes Avenue on Cleveland’s east side where he demanded to see his alleged girlfriend and the victim in this matter, Kelly Thacker (hereinafter “Victim”). Once he saw the Victim, the Defendant allegedly brandished a gun, removed the Victim from the home, and proceeded to repeatedly hit her about the head and body with the gun as well as with his closed fist. It is further alleged that when the Defendant was finished, he left the Victim in the area of Clarkstone Road and Euclid Avenue.

The Defendant was eventually charged with one count of Felonious Assault with one and three firearm specifications in violation of Ohio Revised Code § 2903.11(A)(2), 2941.141(A), and 2941.145(A); Kidnapping in violation of Ohio Revised Code §2905.01(A)(3) with one and three firearm specifications in violation of Ohio Revised Code § 2941.141(A) and 2941.145(A); Abduction in violation of Ohio Revised Code § 2905.02(A)(1) with one and three firearm specifications in violation of Ohio Revised Code § 2903.11(A)(2), 2941.141(A), and

2941.145(A); Abduction in violation of Ohio Revised Code § 2905.02(A)(2) with one and three firearm specifications in violation of Ohio Revised Code § 2903.11(A)(2), 2941.141(A), and 2941.145(A); Aggravated Menacing in violation of Ohio Revised Code § 2903.21(A); and Having Weapons Under Disability in violation of Ohio Revised Code § 2923.13(A)(2).

The State further alleges that the Defendant has contacted the Victim urging her not to come to court and that since his arraignment has violated this Court's no contact order by advising third parties to contact the Victim and advise her not to appear for court. It is the State's position that the sudden lack of participation by the Victim is not of her own volition, but rather due to the Defendant's wrongdoing.

Thus, the State filed a Motion to Declare A Forfeiture by Wrongdoing on October 10, 2013, and a hearing on the Motion was subsequently held on October 22, 2013. All parties were present and were heard on the record.

## **II. LAW & ANALYSIS**

The State proposes in its Motion, that the Victim "...[W]ill intentionally absent herself from the trial proceedings as a witness against Defendant, even though the State has issued a subpoena for her appearance."<sup>1</sup> The State basis it's Motion on Ohio Evidence Rule 804(b)(6) which provides:

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

A statement offered against a party if the unavailability of the witness is due to the wrongdoing of the party for the purpose of preventing the witness from attending or testifying. However, a statement is not admissible under this rule unless the proponent has given to each adverse party advance written notice of an intention to introduce the statement sufficient to provide the adverse party a fair opportunity to contest the admissibility of the statement.

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<sup>1</sup> Mot. at 3.

It is important to first note that although trial in this matter has not yet occurred, the application of Evid. R. 804(b)(6) has been extended to potential witnesses. Evid. R. 804(b)(6) Staff Notes.<sup>2</sup>

To usurp a defendant's Sixth Amendment rights and to be admissible under Evid. R. 804(b)(6), "...[T]he offering party must show (1) that the party engaged in wrongdoing that resulted in the witness's unavailability, and (2) that one purpose was to cause the witness to be unavailable at trial." *State v. Hand* (2006), 107 Ohio St. 3d 378, 391; see also *United States v. Houlihan* (C.A. 1, 1996), 92 F. 3d 1271, 1280. Furthermore, pursuant to the opinion in *State v. Hand*, an evidentiary hearing shall be held and the burden of proving by a preponderance of the evidence that the defendant's actions were for the purpose of causing the witness to be unavailable at trial. *Id.* at 391.

Pursuant to the opinion in *State v. Hand*, this Honorable Court held such an evidentiary hearing on October 22, 2013. After reviewing the evidence and the testimony presented it is the Opinion of this Court that the State has failed to prove by a preponderance of the evidence that the Defendant engaged in wrongdoing that resulted in the witness's unavailability and that the purpose was to cause the unavailability for trial.

In addressing the first prong of the Evid. R. 804(b)(6) test, the State posits that the Defendant has been in contact with the Victim. This is based on the fact that in a call to his brother on August 25, 2013, Defendant stated that he has been "...[T]rying to call her but she ain't answering the phone, at least she can hear my name say it's Telstar..."<sup>3</sup> The State further

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<sup>2</sup> The rule extends to potential witnesses. See *United States v. Houlihan*, 92 F.3d 1271, 1279 (1st Cir. 1996) ("Although the reported cases all appear to involve actual witnesses, we can discern no principled reason why the waiver-by-misconduct doctrine should not apply with equal force if a defendant intentionally silences a potential witness.") (citation omitted), cert. denied, 519 U.S. 1118 (1997).

<sup>3</sup> Mot. at 5.

provided taped telephone conversations where the Defendant reiterated that the key to getting this matter dismissed was for the Victim to fail to appear in court.

Although the Defendant's discussions in the telephone calls were certainly in violation of the No-Contact Order, this Court is not convinced that they are enough to deprive the Defendant of his Sixth Amendment Rights. The Court listened intently to numerous telephone call recordings that the State presented. Throughout the telephone calls with various friends and family members the Defendant repeatedly stated that the key to the dismissal of this matter was the Victim not showing up. However, there was no showing by the State that this statement was made as a threat, that the threat was communicated to the Victim, or that the Defendant instructed any third party to convey it to the Victim, thus failing to meet the first prong of the two pronged test.

The Supreme Court of the United States in addressing this issue has opined:

The manner in which this forfeiture rule was applied makes plain that unconfrosted testimony would not be admitted without a showing that the defendant intended to prevent a witness from testifying. In cases where the evidence suggested that the defendant wrongfully caused the absence of a witness, but had not done so to prevent the witness from testifying, unconfrosted testimony was excluded unless it fell within the separate common law exception to the confrontation requirement for statements made by speakers who were both on the brink of death and aware that they were dying.

*Giles v. California* (2008), 128 S. Ct. 2678, 2679. Here, even if this Court were to view the evidence in a light most favorable to the moving party there has been no showing that the Defendant attempted to cause the absence of the Victim specifically for the purpose of preventing her from testifying. At most, the State has shown that the Defendant contacted third parties stating that the key to having his case dismissed was the Victim failing to appear. There was no mention of what she would testify to or if she would testify. As such, there has been no

showing that the Defendant's purpose was to prevent testimony and not to simply prevent appearance.

Furthermore, the State has failed to show the Court that it exhausted all of its remedies in trying to locate and secure the appearance of the Victim. Detective Jarod Schalcht testified at the Hearing that he attempted to contact the Victim via telephone approximately two times. One time, he left a message with an unknown third party. The State also has shown that it issued a subpoena for the Victim to appear. However, the State has not shown that it has attempted any further contact with the Victim, nor has the State requested that this Court issue a warrant to secure the Victim's appearance, both of which are remedies available to the State.

### **III. CONCLUSION**

As such, it is the finding of this Honorable Court that the State of Ohio has failed to meet the burden of the two pronged test outlined above by failing to prove by a preponderance of the evidence that the Defendant engaged in wrongdoing that resulted in the witness's unavailability. Therefore, the Motion of the State of Ohio to Declare a Forfeiture by Wrongdoing is hereby denied in its' entirety.

This matter is to go forward to trial as set.

**IT IS SO ORDERED.**

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Date

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Judge Shirley Strickland Saffold

**CERTIFICATE OF SERVICE**

A copy of the foregoing OPINION was forwarded this \_\_\_\_\_ day of October, 2013

by regular United States mail to:

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