

MEMORANDUM

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF QUEENS: CRIMINAL TERM: PART K-4

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THE PEOPLE OF THE STATE OF NEW YORK : BY: WILLIAM M. ERLBAUM, J.  
: :  
-against- : DATE: January 15, 2010  
: :  
MOHAMMED KAHN, : INDICT. NO. 834/2008  
DEFENDANT. :  
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The defendant was indicted in April of 2008 for the crimes of Attempted Murder in the Second Degree [PL 110/125.25(1)], Assault in the First Degree [PL 120.10(1)], Assault in the Second Degree [PL 120.05(1)(2)], Criminal Possession of a Weapon in the Fourth Degree [PL 265.01(2)], and Endangering the Welfare of a Child [PL 260.10-1]. It is alleged that the defendant committed these crimes against Nazreen Kahn, the defendant's wife, and their three children. The People allege that on February 15, 2008, the defendant repeatedly struck the alleged victim, Nazreen Kahn, on her upper torso with a large knife or cleaver, causing injuries to her head and shoulder. Furthermore, they allege that the defendant committed these acts in the presence of the couple's three children. The defendant was arraigned in the Supreme Court, Queens County, on April 17, 2008, and is currently incarcerated.

The People filed a motion dated January 27, 2009 seeking a

Sirois hearing (see, People v. Geraci, 85 NY2d 359 [1995]; In the Matter of Holtzman v. Hellenbrand, 92 AD2d 405 [2<sup>nd</sup> Dept 1983]), claiming that misconduct on the part of the defendant induced victim Nazreen Kahn to refuse to testify at the trial of this matter. In a decision dated May 13, 2009, this Court granted the People's motion and ordered that a Sirois hearing be conducted.<sup>1</sup>

The hearing was held over a period of three days, with testimony taken on July 1, 2009 and August 4, 2009, and oral argument conducted on November 13, 2009. The People elicited testimony from four witnesses, Police Officer Eric Tomala, Attorney Richard Rosenthal, Assistant District Attorney Joyce Smith, and Detective Michael Gabrielli. The Court finds their testimony to be credible. The defense did not call any witnesses. The Court will now summarize the relevant testimony of each of the witnesses.

Police Officer Eric Tomala testified that at approximately midnight on February 15, 2008, going into February 16, 2008, while on duty, he was assigned to respond to an assault in progress at 61-80 Woodhaven Boulevard, Queens County, an assisted living facility. Upon arriving at the location, he was directed

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<sup>1</sup> The Court notes that the defense, in its memorandum-of-law, dated September 21, 2009, at page 15, makes reference to a possible witness named "Ms. Barr". However, this Sirois hearing concerns only the alleged unavailability of the victim, Mrs. Kahn.

to a female sitting on a chair covered in blood, with a man standing next to her holding a towel to her head. The woman was conscious, but not speaking. The male informed the police officer that the woman was attacked by her husband. The officer testified that he requested an ambulance to the scene and that he interviewed the victim's three children, ages 13, 11, and 9, who were all present at the scene. The officer stated that the oldest child informed him that his father came to the facility with the children to talk to their mother, and then started to attack her with a knife. The child described the knife as being wide, and after the officer drew a picture of a meat cleaver, identified that as the type of weapon used. The child also informed the officer that the defendant took the knife from the kitchen.

Officer Tomala continued his testimony by stating that he also spoke to the receptionist of the facility. The officer testified that she informed him that the victim's husband came to the facility with their children and that they apparently started to argue. Then, the receptionist told him that it looked like the husband started to strike the victim and that the son then tackled the father. The receptionist stated that the name of the victim's husband was Mohamed Kahn.

Officer Tomala concluded his direct testimony by stating

that EMS responded to the facility to treat the victim and then transported her to Elmhurst General Hospital.

Upon cross-examination, Officer Tomala testified that though he was informed that the victim, Mrs. Kahn, was taken to Elmhurst Hospital, he did not know that from his own personal knowledge, as he did not go with her to the hospital. The officer also testified that he did not see the defendant at the location of the incident, and that on February 15, 2008, or February 16, 2008, he did not see the defendant do anything to prevent anyone from coming forward as a witness. The officer continued that the receptionist he spoke with was named Ms. Barr, that he took pedigree information from her, but he did not get the name of the individual that was assisting the victim, though that individual lived in the building. The officer concluded his cross-examination by stating that he informed detectives who arrived at the scene of what he had seen and heard.

Upon re-direct examination, Officer Tomala testified that the victim's first name is Nazreen.

The People's next witness was attorney Richard Rosenthal. Mr. Rosenthal testified that he has been practicing law since 1979, with 75-80 percent of his practice consisting of criminal cases. He stated that he is an attorney in good standing. Mr. Rosenthal indicated that sometime prior to February 18, 2008, the

defendant retained him to represent him on the pending criminal matter,<sup>2</sup> and Mr. Rosenthal did so until he was subsequently relieved by the Court. Mr. Rosenthal stated that on March 26, 2009, he made an application to be relieved on this matter,<sup>3</sup> and he indicated that he has not, in his career, ever made an application to be relieved based upon the grounds he presented in this case, namely because of a fear of witness tampering.

Attorney Rosenthal testified that the first time any discussion or issue of witness tampering arose was immediately after he was retained, when the defendant's mother brought the victim to his office and asked the attorney to tell her what to say to make this case go away. At that time, Mr. Rosenthal testified, he explained that he could not tell a witness what to say, and that if a witness was having trouble with the District Attorney, the witness needed to retain her own counsel, but that

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<sup>2</sup> The Court notes that at this point in the proceeding the Court indicated that "lawyers serve not only as representatives of their respective clients but as officers of the court, and have a professional duty to protect the integrity of the court and its processes" (see, the minutes, dated August 4, 2009, page 28, line 25- page 29, line 5). Furthermore, the Court made reference to the minutes of March 26, 2009, when the issue of Mr. Rosenthal being relieved as defendant's counsel arose, and a thorough discussion took place on the record regarding what types of matters and conversations are not covered by attorney-client privilege. See, the minutes, March 26, 2009.

<sup>3</sup> The minutes of March 26, 2009 were introduced into evidence as People's exhibit 1.

he could not counsel the witness and represent the defendant.

Mr. Rosenthal testified that subsequent to this meeting with the defendant's mother and the victim, the defendant's mother called his office, a couple of times, and put the victim on the phone to talk to him, and he refused to engage in conversation with the victim, beyond, if you are having a problem, you need to hire your own attorney. Mr. Rosenthal continued that he had contact with the defendant's mother approximately every week or two throughout the pendency of his representation of the defendant, which was over a year. Mr. Rosenthal stated that the defendant's mother continually told him that there was no chance that the victim would testify, that she would make sure of that. He testified that he informed the defendant's mother, on numerous occasions, that even if the victim did not testify there was an independent witness, and her response was, on more than one instance, that she knew who that witness was, and that she will have a lapse of memory, that she is old, and she will not testify against the defendant. Attorney Rosenthal elaborated that throughout the course of his relationship with the defendant's mother, possible witness tampering was a continuing theme. He indicated that when he discussed the case with her, the defendant's mother made comments that, until the end of his representation of the defendant, he discounted as mere bravado.

For example, she stated that she did not understand why the attorney could not get the defendant released from incarceration, since there would be no one testifying against him.

Regarding conversations that Mr. Rosenthal had with the defendant, the attorney testified that from the beginning of the case, when he attempted to discuss the weight of the People's case, and defense strategy, the defendant continually made comments such as he will be the only one testifying, whatever he says will be the truth, no one will testify differently than him, they have to accept what he says as the truth. Furthermore, when the attorney brought up the defendant's wife, the defendant commented that his wife will not be in court, will not cooperate. Attorney Rosenthal testified that at a certain point it became clear that the instant matter was proceeding to trial. He stated that he met with the defendant to plan trial strategy. When the attorney started to outline the People's case, the defendant basically cut him off and said that it did not matter, the People would have no witnesses, that whatever he said would be the truth.

At this point in his testimony, Attorney Rosenthal indicated to the Court that though he would continue to testify, he would be omitting some information which he felt remained privileged. The attorney continued that he discussed with the defendant the

defendant's right to testify, but also informed him that if he intended to testify contrary to prior conversations that they had regarding the facts of the case, as Mr. Rosenthal stated the defendant intimated, the attorney would request that the Court permit the defendant to testify in the narrative. Mr. Rosenthal also informed the defendant that the only time a defendant will testify in the narrative is when the attorney believes he is about to commit perjury. He continued that he further informed the defendant that this is a tip-off to the Court that the defendant is about to lie. The attorney stated that he advised the defendant that it is in his best interest to testify truthfully, or to not testify at all. Mr. Rosenthal said that the defendant replied that if he was not going to do what he needed him to do, then he will get the attorney thrown off the case on ethical grounds and won't tell his new attorney anything but what he is planning on testifying about.

Mr. Rosenthal testified that on the day this matter was scheduled for trial, he received a letter from the Grievance Committee, seeking to have him relieved from the case, as well as a pro se motion by the defendant to have him removed from the matter on ethical grounds. Mr. Rosenthal stated that this was the point at which he felt the defendant was no longer engaging in bravado or idle talk. The attorney further indicated that the

motion and grievance were similar to the conversation he had with the defendant, as to the defendant's intention to file such a motion and grievance.

On cross-examination, Mr. Rosenthal testified that he was paid, in full, to represent the defendant, and that he did not return any of the money. He indicated that he was not paid for, nor did he conduct, a trial. The attorney testified that after his initial conversation with the defendant's mother, he did not report the incident to the Court, nor did he make any notes or memoranda concerning the incident. He further testified that he made no notes or memoranda concerning the phone calls he received from the defendant's mother, when she would put the victim on the telephone. He continued that since he refused to converse with the victim, he was unable to determine whether or not the victim was being influenced by the defendant's mother. Mr. Rosenthal stated that though he had suspicions during his numerous conversations with the defendant's mother that she was getting very close to the line of improper conduct, at the time he believed that she had not crossed the line, and he had no actual or personal knowledge that she had done anything wrong. He did not report his suspicions to the Court.

Mr. Rosenthal continued that he was cognizant of the ethical minefield that was being presented to him, and that he continued

to warn the defendant's mother as to what she should not do. He was careful not to ask her questions as to what she had done or was planning to do. Though the comments being made to him by the defendant's mother were making him uncomfortable, he did not believe that they went over the line to the point that an ethical obligation to report it was triggered.

Attorney Rosenthal testified that in preparation for trial, he broached the idea of a plea with the defendant. The defendant responded that he would not take a plea, he will not do time on this case, and he forbade the attorney from exploring plea options with the People. Furthermore, Mr. Rosenthal testified that he did not report to the Court the conversation he had with the defendant regarding the defendant's proposed testimony which may be contrary to his prior statements to his attorney.

Mr. Rosenthal continued that the grievance filed against him by the defendant has been dismissed. Mr. Rosenthal conceded that it was not until after the grievance was filed that he reported his concerns about witness tampering to the Court. The attorney said that the timing was unrelated.

Mr. Rosenthal testified that in a conversation with the defendant during preparation for trial, the defendant stated that he will make sure that he was the only one testifying. The attorney stated that he did not memorialize this conversation in

any way. The attorney indicated that he thought the conversation was only bravado, until he received the grievance and the motion to have him relieved on ethical grounds.<sup>4</sup> Mr. Rosenthal concluded his testimony by stating that since he had been retained by the defendant, the defendant could terminate his representation at any time. He stated that the defendant could fire him, and that the attorney had advised the defendant of this fact.

The next witness called by the People was Queens County Assistant District Attorney Joyce Smith. ADA Smith testified that she was assigned, mid-February, 2008, to prosecute the instant matter. She explained that the case involved a complaint that the defendant attacked his wife, Nazreen Khan, with a meat cleaver in front of their three children inside her place of business. The victim was treated for injuries at Elmhurst Hospital, and ADA Smith testified that she subpoenaed and received the certified medical records of the victim from the hospital.<sup>5</sup>

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<sup>4</sup> Attorney Rosenthal concluded that by the defendant's motion and grievance, the defendant had put into action a plan to eject Rosenthal from the case, and to obtain a new lawyer whom he intended to keep in the dark.

<sup>5</sup> The victim's medical records were introduced into evidence as People's exhibit 2.

ADA Smith testified that the medical records indicated that several interviews were conducted of the victim by medical personnel at, and prior to her admission into, the hospital. ADA Smith elaborated that the medical records show repeated references to the manner in which the victim was injured and by whom. For example, the records demonstrate that during an interview with the emergency medical technician who responded to the scene of the incident, the victim stated to that person that her husband stabbed her in the head. The Assistant stated there were other such references in the medical records as well.<sup>6</sup>

ADA Smith testified that a full stay-away, no contact, order of protection was issued at the defendant's arraignment on February 17, 2008, and several other orders of protection, also no contact orders, followed that initial issuance.<sup>7</sup> She elaborated that the orders prohibited contact between the defendant and the victim.

ADA Smith continued that the first time she had a conversation with the victim was at the end of March, 2008. She

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<sup>6</sup> Assistant District Attorney Smith indicated that she tabbed the medical records, and the exhibit, in its current condition before the Court, has four yellow tabs on it, apparently indicating occasions where the victim told medical personnel that her husband stabbed her.

<sup>7</sup> The orders of protection were collectively admitted into evidence and marked People's exhibit 3.

explained that after leaving the victim several voice mail messages,<sup>8</sup> the victim showed up at her office. ADA Smith said that the victim did not want to sit down and stood in the office doorway. The victim told the Assistant that she did not want to do anything against her husband, that she was not going to speak to her about the case. ADA Smith testified that the victim stated that where she is from, it is a bad thing for a wife to leave her husband, and that she deserved what happened. The Assistant said that she implored the victim to sit down so that she could offer her assistance or counseling, but the victim refused.

ADA Smith testified that on April 1, 2008 the victim appeared at her office with her children and members of the Hofstra Law School Child Advocacy Clinic. The Assistant continued that she sat with the victim, her children, and the clinic members, and the victim explained that she was not going to testify and was not coming to court. ADA Smith explained to the victim her duty and obligation to appear in court, and before the Grand Jury, on April 7, 2008, that she was being served a subpoena, and that she was expected to appear. The ADA testified that though she did serve the victim with a subpoena, the victim

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<sup>8</sup> The Assistant called the victim at two telephone numbers, [redacted] and [redacted].

did not appear in court or at the Grand Jury. Though the Assistant tried calling the victim on other occasions, the victim never responded to her phone messages. ADA Smith continued her direct testimony by stating that she called the victim at various times at the telephone numbers she had for her, and the Assistant indicated that she believed she asked the victim if those were her phone numbers.<sup>9</sup> The Assistant also testified that she got the phone numbers she had for the victim from the police reports of Detective Michael Gabrielli, the officer who made the felony complaint.

ADA Smith testified that she reviewed People's Exhibit 6, the visitor log relating to the defendant, and she noted that the victim's name appears on the log on February 24, 2008 and March 5, 2008.<sup>10</sup> The Assistant concluded her direct testimony by stating that she reviewed People's Exhibit 5, the defendant's call list, and while counting how many times the victim's phone

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<sup>9</sup> At this point in ADA Smith's testimony, the People introduced into evidence People's exhibit 5, Rikers Island Inmate's Phone Call List, and People's Exhibit 6, Visitor Log, both relating to the defendant.

<sup>10</sup> The testimony indicates that the name Nazreen Khan, with a date of birth of [redacted], appears on the log. The People then showed ADA Smith an unredacted copy of People's exhibit 2, the victim's medical records, and established that the victim's date of birth is [redacted]. Furthermore, the unredacted medical records showed that the victim's phone number is [redacted], one of the phone numbers the Assistant called to try and speak to the victim.

numbers appeared, she stopped counting at 100 calls to the victim's two phone numbers.

Upon cross-examination, ADA Smith testified that though she had two phone numbers to contact the victim at, she never spoke to her over the telephone. The Assistant stated that she did leave several messages for the victim, but she never received a return phone call. ADA Smith also testified that, regarding the phone call list, it would not be fair to say that she did not know if there was any conversation on any of the calls.<sup>11</sup> The Assistant also stated that she was not a party to any of the phone calls. ADA Smith concluded her cross-examination by stating that before one is permitted entry to Rikers Island, one must produce identification and an entry is made of one's arrival at the facility.

On re-direct examination, ADA Smith stated that in the voice mail messages she left for the victim on what she believed to be one of the victim's phone numbers, she identified herself and where she worked.

The last witness to testify for the People was Detective Michael Gabrielli, who stated that he was assigned to investigate

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<sup>11</sup> The Court assumes that the reason the Assistant implied that she knew that conversations took place during the phone calls registered on the phone list is because many of the calls lasted several minutes.

the assault against the victim. The Detective testified that on February 16, 2008, he interviewed the victim at Elmhurst Hospital. The Detective continued that the victim stated to him that she had gone to work the previous evening at about 11:30 at night to relieve another receptionist, that she was there speaking to the lady when her husband, the defendant, showed up at the front door with their three children. They entered the facility and the defendant stated to her that she left the children alone, and then the defendant proceeded to assault her with a meat cleaver. The victim also informed the Detective that she was able to fight him off and then run away to the cafeteria. The victim indicated to the Detective that she and the defendant had been married for 18 years, that he had physically hit her in the past, but had never used any type of weapon. The victim gave the Detective her pedigree information.<sup>12</sup>

Upon cross-examination, Detective Gabrielli testified that he spoke to the victim on February 16, 2008, and that she came to the precinct on February 17, 2008, to retrieve her identification. The Detective stated that at that time the defendant was already under arrest. The Detective continued that he spoke to the victim at that time but he did not record the

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<sup>12</sup> The victim stated her address was [redacted]; her telephone number was [redacted]; her date of birth was [redacted].

conversation. Regarding her husband, the Detective stated that the victim said she did not want to be bothered anymore. Furthermore, the Detective stated that he took a photograph of the victim's injury.

The People rested their case. The defense did not call any witnesses.

The question to be resolved by the Court is whether the People presented sufficient evidence to establish that the defendant's misconduct caused the victim, Nazreen Kahn, to be unavailable to testify at the trial of this matter. The People submit that they did, and that they should therefore be permitted to introduce into evidence on their direct case, during trial, the complainant's out-of-court statements. The People are seeking to use statements allegedly made by the victim to police officers, medical personnel, and emergency medical technicians.

Generally, out-of-court statements of unavailable witnesses are not admissible as evidence-in-chief in a criminal prosecution. However, if the People prove at a Sirois hearing (see, Matter of Holtzman v. Hellenbrand, 92 AD2d 405 [2<sup>nd</sup> Dept 1983]), by clear and convincing evidence, that the defendant caused the witness's unavailability through violence, threats, chicanery, pressure based on a relationship, or other misconduct,

the out- of- court statements<sup>13</sup> may be admissible into evidence due to the defendant's waiver of his constitutional Right of Confrontation (see, People v. Santiago, 2003 N.Y. Slip Op. 51034(U); see also, People v. Jernigan, 41 AD3d 331 [1<sup>st</sup> Dept 2007], leave denied, 9 NY3d 923 [2007]) and of the rules against admitting hearsay into evidence (see, People v. Geraci, 85 NY2d 359, 366 [1995]).

"Because of the inherently surreptitious nature of witness tampering circumstantial evidence may be used to establish in whole or in part, that a witness's unavailability was procured by the defendant" (see, People v. Cotto, 92 NY2d 68, 76 [1998]; see also, People v. Geraci, 85 NY2d 359 [1995]). Furthermore, at a Sirois hearing, when evaluating evidence, the Court may consider hearsay testimony (see, People v. Geraci, 85 NY2d 359 [1995]).

Initially, the Court finds that the victim in this case is clearly unavailable. She has avoided the People's phone calls, disregarded a subpoena directing her to appear in court, and before the Grand Jury, informed the People that she will not testify in this matter, and has basically had no contact with the

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<sup>13</sup> Out-of court statements admissible into evidence include all reliable hearsay statements, such as statements made to law enforcement personnel, as well as Grand Jury testimony (see, People v. Cotto, 92 NY2d 68 [1998]).

District Attorney's Office.<sup>14</sup> Therefore, the question at hand is whether the People have met their burden, by clear and convincing evidence, that the defendant caused the victim's unavailability, and the Court finds that they have.

Before the Court reviews the evidence which led it to this conclusion, the testimony of Attorney Rosenthal must be addressed. The defense has argued that his testimony should carry no weight because he has violated his ethical duties to the

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<sup>14</sup> The Court notes that the defendant submits that the People have not demonstrated that the defendant is currently physically unavailable to them to testify at trial, despite the evidence that the victim has not returned any of their calls, ignored a subpoena, and insisted she would not testify. The defendant claims that the People have not shown that the victim is, for example, deceased, missing, or has moved away from the jurisdiction (see, defendant's memorandum- of- law, dated September 21, 2009, pages 14- 15). However, the defense has failed to recognize the significance a domestic violence situation has on a witness' availability. Generally, in a criminal proceeding, a victim is considered to be available to the People, and would usually testify for the prosecution. However, in a domestic violence situation, as is the instant case, when the defendant and victim maintain their relationship despite the incident that allegedly occurred, the issue of whether the victim is available to the People is not the same (see, People v. Modeste, 1 Misc3d 315 [2003]). In fact, in a domestic violence case, a victim may be found to be unavailable based simply upon her refusal to testify (see, People v. Hernandez, 256 AD2d 18 [1<sup>st</sup> Dept 1998], leave denied, 93 NY2d 874 [1999]). In the case at bar, in addition to the victim's refusal to testify, the People presented evidence, such as phone records, the visitor's log, and testimony that the victim and the defendant's mother were in close contact, and that the defendant and victim were continuing their relationship. Clearly, the People could not expect the victim to "give testimony favorable to the prosecution" (see, Hernandez, at 19).

defendant, and revealed the defendant's confidential statements (see, the minutes of November 13, 2009, pages 34- 36). There are two aspects to the defendant's argument regarding the attorney's testimony. He complains of Mr. Rosenthal's revealing statements on the issue of alleged witness tampering, and on the issue of whether the defendant would be offering allegedly perjured testimony at the trial of this matter. In that this hearing concerns the victim's unavailability at trial due to the alleged actions of the defendant, the Court finds that it is not necessary to address the perjury aspect of the defendant's argument, and the Court did not consider that testimony during its consideration of the subject matter raised in this Sirois hearing. However, as to the matter of possible witness tampering, the Court finds that Mr. Rosenthal did not breach his ethical duties to the defendant, and has considered his testimony on this topic in evaluating the ultimate issue at this hearing.<sup>15</sup>

New York's Code of Professional Responsibility, Disciplinary Rule 4-101[C][3] states that despite attorney-client privilege, a lawyer may reveal "the intention of a client to commit a crime

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<sup>15</sup> The defense would also have the Court disregard the testimony of Attorney Rosenthal based upon the allegation that he can not be believed, in that he only testified against the defendant after the defendant filed a grievance against him. However, this defense allegation is completely unsupported, the attorney is in good standing, and the grievance has been dismissed. The Court finds the attorney's testimony credible.

and the information necessary to prevent the crime".

Furthermore, in People v. DePallo, 96 NY2d 437, 442 [2001], the New York State Court of Appeals held that the "intent to commit a crime is not a protected confidence or secret".

In this case, the Court finds that the admission into evidence of Attorney Rosenthal's testimony was proper, in that it described a situation wherein the defendant told his attorney that he will make sure that no witnesses will testify against him at the trial of this matter, that his testimony will be the only testimony a jury will hear, that his wife will not testify against him. The testimony by Attorney Rosenthal clearly establishes the intent of the defendant to tamper with witnesses and prevent the People from offering evidence against him at trial. Though the defense submits that the crime of witness tampering had been completed, because the victim had already failed to appear in court or at the Grand Jury, the Court disagrees with that argument. In this case, the witness tampering was not at all academic, because there has yet to be a trial in this matter, the final opportunity at which the victim could appear in court, but the witness tampering is actually ongoing. Not only was testimony elicited at his hearing that the defendant and his mother have been continually stating that the victim will not testify against her husband, but the phone

records admitted into evidence in this case demonstrate that the defendant has been repeatedly calling the victim's phone numbers. Therefore, the Court cannot conclude that the crime of witness tampering is fully completed and therefore solely a past crime that must be protected by attorney-client privilege. The testimony of Attorney Rosenthal was properly provided and admitted into evidence at this hearing, and was properly considered by the Court in its determinations.

When evaluating the evidence to ascertain whether the People met their burden in this case, the Court finds that the victim in this case initially was cooperative with the authorities. She spoke to the emergency medical technicians about her injuries, spoke to the hospital medical personnel about how her husband attacked her, and she spoke to the police about what had happened to her at the hands of her husband.

However, at some point, and it was early in the case, things began to change. The victim told the detective that she did not want to be bothered by the case<sup>16</sup>, she never returned the Assistant's phone calls, and she ignored a subpoena. Clearly,

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<sup>16</sup> The Court notes that the detective in this case testified that the victim told him on February 17, 2008, at his precinct, that she did not want to be bothered with this case. However, the medical records indicate that the victim was not released from the hospital until February 18, 2008. Therefore, it appears that this conversation between the detective and the victim had to have occurred on or after February 18, 2008.

the victim was avoiding the People. It became obvious to the People, and it is clear to the Court, that the victim was no longer a cooperating, available witness in this matter.<sup>17</sup>

In People v. Geraci, 85 NY2d 359, 370 [1995], the New York State Court of Appeals stated that "the cumulative evidence and the inferences that logically flow therefrom [are] sufficient to support a determination by a rational fact finder, under the clear and convincing evidence standard, that defendant either was responsible for or had acquiesced in the conduct that rendered [the complainant] unavailable for trial". Likewise, in the case at bar, the cumulative evidence and the inferences that follow, establish that the defendant, with the aid of his mother, engaged in unlawful behavior which rendered the victim unavailable for

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<sup>17</sup> The defendant submits that the victim was never a cooperating witness, that she informed the detective at the inception of this case that she did not want to bother with it. However, the Court agrees with the People's position (see, the minutes, November 13, 2009, page 10), that though she indicated that she did not want to be bothered, the victim did not tell the detective that she wanted the matter dropped, or that she would not testify against the defendant. This statement does not indicate that the victim was immediately an uncooperative witness. Furthermore, the Court notes that, as mentioned in footnote 16, the earliest date on which this conversation could have taken place was February 18, 2008, and the phone log indicates that the defendant was already calling the victim's phone numbers by February 19, 2008. Clearly, the defendant was attempting to exert his influence over the victim at the earliest possible moment.

trial.<sup>18</sup>

The Court finds that the defendant and his mother acted in a manner which "implicitly pressured" (see, People v. Major, 251 AD2d 999 [4<sup>th</sup> Dept 1998], leave denied, 92 NY2d 927 [1998]) the victim not to testify against the defendant. Specifically, in violation of an order of protection, the defendant had personal and third-party contact with the victim. The Court finds that the actions of the defendant's mother clearly demonstrate her intent to prevent the victim from testifying against her son, in that the defendant's mother brought the victim to the defendant's attorney's office, asking him to counsel her on what to say to make the case go away; the defendant's mother made phone calls to the defendant's attorney, and put the victim on the phone to speak to the attorney, for the same purpose; and continually made statements to the defendant's attorney indicating that she would make sure that the victim did not testify. Furthermore, from the totality of the circumstances, the Court finds that the defendant

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<sup>18</sup> The Court is aware that it is the defendant's position that the victim would not testify against her husband, the defendant, due to her culture. The defense points to the victim's comments to Assistant District Attorney Smith that, where she is from, it is bad for a wife to leave her husband, and that she deserved what had happened to her. However, the Court finds that these statements speak to the victim's state of mind, of perhaps guilty feelings she may have had. They do not prove that the victim would not have testified against the defendant based solely upon the victim's own volition, absent improper constraints from the defendant and his mother.

both caused and acquiesced in his mother's conduct (see, People v. Geraci, 85 NY2d 359 [1995]; People v. Major, 251 AD2d 999 [4<sup>th</sup> Dept 1998], leave denied, 92 NY2d 927 [1998]). The visitor's log admitted into evidence as People's exhibit 6 shows that the defendant's mother<sup>19</sup> made numerous visits to her son in jail.<sup>20</sup> The defendant's mother was involved in his defense, meeting with his attorney, phoning his attorney, and assuring his attorney, exactly like her son did, that the victim would not appear.<sup>21</sup>

In addition to his mother, the Court finds the defendant himself "wrongfully made use of his relationship with the victim in order to pressure her to violate her duty to testify" (see, People v. Jernigan, 2007 NY Slip Op. 5629 [1<sup>st</sup> Dept 2007], leave

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<sup>19</sup> According to the defendant's memorandum-of-law, page 9, dated September 21, 2009, the defendant's mother is named Bebe Hani. The visitor's log lists a "Bibi Hanif" as a frequent visitor of the defendant.

<sup>20</sup> Though the defendant submits that the visitor log does not actually prove that a visitor definitely met face to face with the defendant, the Court, in this case, finds that contention far-fetched and unreasonable.

<sup>21</sup> Earlier in this opinion, the Court found that the testimony of Attorney Rosenthal regarding the statements made to him by the defendant, that the defendant would make sure the victim did not appear to testify against him, were admissible into evidence and not a violation of attorney-client privilege. However, the Court would note that even if these statements were not admitted into evidence, and not considered by the Court in determining the issue of whether the defendant caused the victim's unavailability, the actions of the defendant's mother alone, with his acquiescence, are sufficient to support such a finding.

denied, 9 NY3d 923 [2007]). The defendant, in violation of a full order of protection, and while incarcerated, made at least 100 telephone calls to the victim.<sup>22</sup> Furthermore, as the victim visited the defendant in jail on two occasions,<sup>23</sup> the defendant had the opportunity to exert his influence over the victim in person. The repeated comments by the defendant to his attorney that he will make sure the victim will not appear, and that he would be the only one testifying at the trial, compel the conclusion that the defendant caused her unwillingness to testify.<sup>24</sup> These statements by the defendant, as well as those

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<sup>22</sup> In Jernigan, in addition to other prohibited conduct, the defendant made 59 phone calls to the victim, the content of which could not be determined, in order, the Court found, to put pressure on the victim not to testify against him. See also, People v. Santiago, 2003 N.Y. Slip Op. 51034(U), where the defendant called the victim 100 times.

<sup>23</sup> As stated in footnote 20, the Court does not accept the defense analysis that the visitor log, and at this point, the telephone list as well, do not prove actual contact between the parties. With such strong circumstantial evidence of such extensive contact, directly and indirectly, between the defendant and the victim, the Court concludes that the parties did indeed have contact and communicated.

<sup>24</sup> The Court notes that though there was no direct evidence presented that the defendant, or his mother, specifically threatened the victim not to testify against the defendant, case law has held that specific threats are not a necessary tool to improperly influence a witness. Evidence that a defendant simply used his relationship with a witness to pressure one to refrain from testifying, provides a valid basis from which to conclude that the defendant caused a witness's unavailability (see, People v. Jernigan, 2007 NY Slip Op. 5629 [1<sup>st</sup> Dept 2007], leave denied, 9 NY3d 923 [2007]).

made by his mother, belie the defense's position that the victim's refusal to testify against the defendant is unrelated to their actions.

In the case at bar, the Court finds that the continued illegal contact between the victim and the defendant and the defendant's mother caused the victim to absent herself from these proceedings. Accordingly, the Court finds that the People have met their burden at the Sirois hearing and grants their application to introduce into evidence on their direct case during the trial of this matter the out- of- court statements of the victim, Nazreen Kahn.

This constitutes the decision and order of the Court.

The Clerk of the Court is directed to provide copies of this decision and order to the attorney for the defendant and to the District Attorney.

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WILLIAM M. ERLBAUM, J.S.C.