

People v Wilkinson

2015 NY Slip Op 32677(U)

July 30, 2015

County Court, Westchester County

Docket Number: 2010-00082

Judge: Barbara G. Zambelli

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

FILED
AND ENTERED

ON
July 30, 2015

WESTCHESTER
COUNTY CLERK

COUNTY COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

THE PEOPLE OF THE STATE OF NEW YORK

- against -

KEITH WILKINSON,

TR
FILED
JUL 30 2015
TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER-X
Defendant

Indictment No: 2010-00082

AMENDED
DECISION AFTER HEARING

ZAMBELLI, J.

On May 19, 2015, the People made application for a Sirois hearing and to introduce evidence of consciousness of guilt and prior bad acts. The People alleged that defendant's misconduct induced two witnesses, DS¹ and MN² to be unavailable for trial and therefore the out of court statements of both should be admitted at trial as evidence in chief pursuant to People v. Geraci, 85 N.Y.2d 369.

A Sirois/Molineux/Ventimiglia/Massiah hearing was held on May 21, May 22, May 27, May 28, June 3, June 8, June 15, June 16, June 17, June 23, June 24, 2015, and June 25, 2015. The court rendered its decision on the Molineux/Ventimiglia application from the bench. The following people gave testimony: Investigator Michael LaRotonda, Investigator Arthur Muhammad, Investigator Edward Salinas, Assistant District Attorney Nadine Nagler

¹ Name changed to "DS" in order to protect her identity.
² Name changed to "MN" in order to protect his identity.

all of the Westchester County District Attorney's Office, Sergeant Anthony Mitchell, Detective George Ossipi, of the Mount Vernon Police Department, DS and Bruce Rivers.

EVIDENCE ADDUCED AT THE HEARING

On January 27, 2009, Fernando Cofresi who lived in a house at 613 South 10th Avenue in the City of Mount Vernon was pushed into his home, pistol whipped on his head and face and then pushed down the stairs by two gunmen. His glasses fell off. Both men were slim built, taller than Cofresi's 5'10" frame and wearing black North Face jackets, pants, baseball caps, boots or sneakers. One man wore a ski mask while the other used a white scarf with black print to cover his face. Both wore gloves. Cofresi and his roommate Leaton Burke were in the business of selling marihuana. The gunmen were looking for the marihuana and the money. Cofresi was placed on the kitchen floor. His wrists were tied. He had difficulty seeing because he was not wearing his glasses and blood was running down his face. His mouth was duct taped. Burke pulled into the driveway. The men inside heard Burke arrive and told Cofresi to be quiet otherwise they would put a bullet in his head. As Burke entered the house, he called out to Cofresi. As he walked down the stairs, one of the men knocked him down, punched and kicked him. Cofresi heard the men kicking and questioning Burke and then heard a gunshot. The men searched for marihuana and money. After the men left, Cofresi dialed 911 from the cell phone in his pocket. Once the police arrived, Cofresi saw Burke lying face down in a pool of blood with a hole in his head. Burke was pronounced dead.

On January 6, 2010, the Mount Vernon Police Department received an anonymous call from a female stating that Keith Wilkinson was involved in the homicide on South 10th Avenue wherein an individual was shot in the head in the basement.

She told Det Fatigate Wilkinson had committed the crime with "Boxer" and "Reps." She told Detective Fatigate she would call back. Fatigate relayed the information to Detective Ossipo. The female did call back, identified herself as "Georgette" and spoke to Detective Ossipo. She told him that there were two victims, one was taken into the apartment and bound and beaten and then a second victim was taken into the apartment and threatened and then shot in the head. She told Ossipo that Wilkinson knew the victims because he had been observing them at a club. They had been flashing a lot of money and jewelry.

On January 7, 2010 the woman identifying herself as Georgette called again and again spoke to Detective Ossipo. She wanted to meet sometime in the near future with them to discuss the incident in greater detail. She picked the location of the Argonaut diner in Yonkers. She wanted to meet there for her own safety and the safety of her family and her grandmother. On January 10, 2010, Detective Ossipo, Detective Sergeant Anthony Mitchell and "Georgette" met at the diner. At this time they learned her true name, DS. Mitchell described her as intelligent and articulate (t174). She told the detectives that she had been in a relationship with Keith Wilkinson on and off for eight years. She was not currently living with him. She was pregnant with his child, approximately 5 ½ months.³ She told them she waited almost a year to come forward because she was in fear for her

³ She thereafter miscarried.

safety. She feared Wilkinson because he was involved in a violent gang. He had threatened to kill her grandmother if she revealed what he had told her. She was aware that he had shot somebody and had done time for gun possession. She knew he was involved with guns and drugs. She had moved out of state and that is why she now felt comfortable talking to them. Wilkinson had been physically violent to her in the past. Because of his physical violence toward her, she did not want to say anything until she moved out of state. On the night of the homicide, when they were in a physical altercation, he told her he had "killed for less."

She told them that Wilkinson told her that he, Reps., and Boxer were looking at doing another home invasion.

Mitchell took notes of her statement (Exhibit 30). According to the notes, she was living with defendant at the time of the homicide. He came home that night at approximately 11:00 p.m. He was arguing with her because he couldn't get in touch with her. She had been with her daughter and her daughter's father. Defendant had been trying to reach her all day and couldn't. His argument became physical. During the physical altercation he told her he killed people for less. She told Mitchell that she knew he had shot someone in 2002 and had gone to jail only for criminal possession of a weapon. She told them she no longer wants contact with Keith. She told them that Keith and his friends were staking out the victim's place for a couple of hours. They had parked in the Bronx facing the street where the victims' lived waiting for the roommate to come home. They pushed in the apartment. The roommate was an older guy. They tied him up. Keith was with Boxer and Reps. When they got the victim they kept asking him where

his drug stash was. The victim refused to give up the information and kept making noise. Keith told her Boxer kept hitting the victim while Rep was looking for the stash. Keith told the victim that if he wasn't quiet he would shoot him. The victim wasn't quiet so he shot the victim and left. Keith was wearing a grey Dickie shirt and pants. Keith was driving a blue Acura Integra. She gave them the license plate and year of the car.

She told them that one of the reasons she was giving them this information is because Keith plans on doing it again. He had been staking out new victims with his cohorts. They meet at a club in the Bronx.

She told them Keith's friend MN lives on 10th Avenue. Keith went to his house right after the shooting and then went to Yonkers. Georgette believed MN took or Keith gave him Keith's clothes. Keith and MN spoke about the homicide.

Based on the information she had given them about MN, Detective Mitchell followed up with MN. MN told Detective Mitchell that Keith told him he had been involved in a home invasion where someone was shot. Keith came to him with clothes because he was concerned about the DNA on his clothing therefore they got rid of them.

On January 17, 2010 defendant was arrested. During the course of the detective's conversation with defendant, reference was made to DS. Defendant told Detective Mitchell to "ask DS, she'll tell you the truth." The detective followed up by contacting her. She arrived at the Mount Vernon Police Department. She spoke to defendant. He asked her whether she had told them. She told him "yes" and then they both started crying. He told her "I did a bid, one of us has to live. One of us has to die."

At 1:14 a.m. on the 18th, she gave the detective a sworn statement as to what

defendant had told her the night of the homicide (Exhibit 29):

When he had arrived home that night he was agitated. He asked why she didn't have anything to eat ready, why his white shirt wasn't washed, why was the window open. All questions he never asked before. He told her he shot someone that night for \$160 and a couple of pounds of weed. He told her that he was staking out a house on 10th Avenue coming from the Bronx area around Duryea Avenue. He said that Boxer and Reps were staking out the house for about two hours. He was on the sidewalk opposite the house and the other two were on the side of the house waiting for his signal. Keith saw the roommate walking toward the house. That's when he signaled to the other two that the roommate was coming. Keith said that they rushed the roommate into the door from behind. Keith entered behind them and then he went downstairs while the other two tied up the roommate. Boxer came downstairs with the roommate and they left Reps upstairs to search the house. He and Boxer were downstairs asking the guy where's the money, where's the stuff and then Keith said the guy started yelling and screaming for help and then the guy kept pleading for them not to hurt him and then Keith said to the guy then give us the shit we're looking for. Keith said the guy kept yelling so he shot him in the head and after the gun went off they yelled to Reps let's go. They all left running back to the car. They used a 1990 Acura Integra. Keith went to MN's house and then came home about 10:00 p.m.

She didn't believe what he had told her at first but then he turned on Channel 12 News and waited for the story to come on. After the story came on Channel 12, Keith told her to just remember that the next time she thinks he's someone to play with.

DS testified before the grand jury and an indictment was voted. Defendant was remanded to the Westchester County Jail. After his arrest, defendant called DS approximately 183 times from the jail. She visited him approximately 55 times (Exhibit 26b) The caller from the jail is notified that the conversation is being recorded.

A trial date was set for January, 2011.

During the instant hearing, the District Attorney offered in evidence a number of

recorded conversations between defendant and DS. Portions of these conversations, are set forth below:

On **December 20, 2010**, the following conversation was recorded between them:

1429 Def: Babe, I have to come home. I do so much stuff getting ready to come home, that I have to go home.

1440 DS: You are. *You are coming home.*⁴

Def: *I gave away all my shit and it'd be fucked up if I have to come back in,* Well, if I lose,

1450 DS: That's what I wanted to ask you. Do you think they'll push it off because of me?

1453 Def: No, cause if they, if they bring that up in Court, then I will just say that, if they be like, um, your Honor, we tryin' to get in contact with so and so's girlfriend, I be like, she does not want any part of it.

1506 DS: Well, that's why I'm saying. I just have a feeling they'll be like, oh well, someone's not cooperating or something like that and...might postpone

1518 Def: Alright, well if someone's not cooperating, then yeah, they'll postpone it, but they can only do it so many times.

1527 DS: Well I don't want to postpone it, that's what I'm saying.

1530 Def: That, that's the least of my worries. If they can do it three times, for thirty days a piece, I'm ok with that. *Just knowing, I'm coming home is, that's it.*

1544 DS: I know. I'm already getting ready and everything.

On December 29, 2010, DS was subpoenaed to testify at trial. In the recorded conversations with the defendant on the 29th and the 30th, DS repeatedly expressed her anger at being subpoenaed to testify. (Exhibit 11B). She also told Defendant that his mother, Margaret, had been subpoenaed as well.

The following conversation occurred on **December 29**:

DS: Okay, Oh and guess who else gotta show up?

Def: Who?

DS: Margaret. They subpoenaed her.

(5:06) Def: For what?

⁴ Italics is added as emphasis.

(5:08) DS: You asking me like I know. She called me and she said, cops came to her door um and gave it to Trooper. Saying she gotta be at court at 10:30 on the 5th. They just wranglin' all us niggas in. I'm like what the fuck. Actually my next move was, because I told her, I said this can't be allowed. You can't just make me do something I don't wanna do. I said you know what, fuck this, I wanna speak to the judge. So, when I go in I'm supposed to speak to the judge, if I don't speak to no judge, I aint touching no court. Simple as that.

Def: *I wanna know what's the plan with subpoenaing Margaret.*

DS: *What'd you say?*

Def: *I said I wanna know what's the point of subpoenaing Margaret.*

DS: *What do they want with Margaret?*

Def: *Yeah.*

DS: *I don't know. Looked like when she got served with the same paper as me. All it says is just the day and time we gotta be there, we're being used as witnesses in the trial against you and blah, blah, blah, blah. That's all it says. It don't say what we gotta testify to or nothing.*

DS: *That's bad.*

Def: *(Inaudible) and keep the ear, see what the fuck Margaret knows.*

Def: Mhm.

DS: I mean not on like you know no mean shit or nothing like that but he don't have no time and I don't have no time since you know I got new responsibilities as well. After they came to my job today I was sick to my stomach. I was about to throw the fuck up. I'm like you cannot be serious, you kidding me.

(10:50) Def: *(Inaudible) didn't come today.*

(11:04) DS: Well I know he's in court I believe Tuesday that's the first, Tuesday is the 4th. And that's the first time I, well that's the first time I've seen. I don't know if he's ever met your judge but he's going in front of your judge that day.

Def: You don't plan on coming on the 5th?

DS: Do I, do I not, depends on what he says.

Def: Ok.

DS: I don't well yea I do. I wanna speak to the judge. If it's guaranteed I'm speaking to the judge I'll come. If I'm not speaking to the judge I'm leaving, I don't care I'm out.

Def: Did you tell Richie?

DS: Yes he was the first person I called right after they left. I was like Richie you aint gon' believe this shit. And he was like no they didn't. And I'm like yes they did I'm looking at the paper right now. And he was like well tell me what that nigga says when he calls.

(12:08) Def: This is my shit.

DS: For who?

Def: Huh? It's like why, y'all don't know nothing about my case why they subpoenaing y'all?

DS: Well from what I'm thinking hopefully character I guess I don't know. Cause' they only one (Inaudible) the list was Margaret. If they bringing Margaret they bringing anyone in. Probably the bum off the street that you spoke to last or whatever.

Def: *What Margaret gotta do with anything? Ok they talking about something I gotta lock in now so I guess I...*

DS: I'm sorry guess then you'll see me Friday, I love you.

Def: Love you.

The next day, **December 30:**

DS: Did you tell him?

Def: *Yea, and um, he said "yea, go" and when you get there, you tell the Judge or whoever that you do not wish to be a part of this, (1:00) that you do not know nothing about this.*

DS: Ok. So I did the right thing by telling her I want to see her?

Def: No, say that you both come into Court - but he ain't say nothing. You both come to the Courthouse on January 5th and tell them right then and *there that you don't want no part of it and they'll let you go, because you don't know nothing about the matter at hand.*

DS: I don't understand what you telling me.

Def: I'm saying go there ... *where you go there that you don't want no part of this and ... and why are they calling you to Court.*

DS: Who am I supposed to be saying that to?

Def: When you get to the Court, whoever is there, period.

Whoever comes to see you. *Tell them that you want no part of it.*

Def: Ok, you gotta do that. If you don't go like that then they can't arrest you. Go out there and do the bullshit.

DS: But see that's what... I... ugh, I didn't say that. That's why I said I was gonna go. Also I was gonna...

Def: *Just as long as you don't go there and say ...*

DS: Well that's why I wanted to speak to Susan.

Def: I should get um the rest of my... um... discovery, um, Tuesday.

DS: And you start picking this Monday?

Def: Not this, um ... the next Monday after the motions.

DS: The 10th?

On **January 3:**

30:10 Def: *I hope this shit just get dropped before that.*

30:11 DS: *You're gonna be ok. You're coming home.*

31:02 Def: *Now, it depends on what you tell em, if they gonna, if they wanna call you... for the jury.*

DS: but I'm saying, ok.

Def: If you sayin that you, if you don't don't want no part then, then you know, they can't call you. If you tell them that yeah, I'm cooperating or whatever, I know something, then they probably say, you know, we can use em.

DS: No but like I said it is a waste of people's time. It's a waste of my time because one you're calling me now which means you're gonna call me for the jury, and this is what I was tryin to talk about.

Def: *Now it depends on what you tell em, if they gonna, if they wanna call you...for the jury. (31:00)*

DS: But if I'm saying... ok I get it.

Def: *But if you sayin you want no part, then they can't call you, but if you say yea I'm cooperating or whatever, I know something, then they might say that they can use you.*

DS: I just don't want you to think that I'm overreacting, I just like being disrespected, and she is a disrespectful bitch. The way she come at me is crazy.

At some point after January 3, the defendant received the Rosario material wherein DS's statements to the police were turned over to the defendant.

On January 7:

Def: Can I ask you a question?

DS: Anything. Go ahead.

(2:00)

Def: What the hell possessed you to call the police and tell police some stuff like that.

DS: First of all I did not.

Def: You never contacted the police and told them nothing like that?

DS: I never went to them, they came to me. And that's what I'm defeating.

Def: They said they came to you, and you told -

DS: Yes they did, no like you said, they came to me.

Def: *They said, they said, if, there they said you called them, and you, from a blocked number you gave them your information this is crazy. I'm reading this shit all out man I'm like why the hell would she come see me and do all this and I'm telling like yo I ain't never said nothing like that what the fuck was they saying it's crazy I don't want to talk about that.*

What's good otherwise?

Def: *Because I'm reading all this shit and it gets, it gets, it gets, I got three statements from you, you signed one so you had to know one is the grand jury (5:00) you telling me you never signed nothing?*

DS: I DIDN'T.. ok, I'll leave that alone.

Def: One has that "DS" and the other has "DS" ... your handwriting, your script.

DS: Like I said I'll leave it alone, because this has been discussed before.

Def: I'm like why my life [Inaudible]

DS: Ok, you're entitled to think that. (Someone in the background then says) "Why you gotta play me like that bitch!"

DS: I honestly don't like how you throw me in that way but...

Def: But what if I get 15 to life? Then what happens after. Or let's say I get 25 to life. Then what happens.

(6:00)

DS: Don't you think I'm considering all of that? Don't you think I know that?

Def: *I don't know. If feel like I'm dying... this isn't even no eyewitness stuff. This is stuff people they hear from me. I don't even talk to Margaret. I don't even fuck with Margaret. This is crazy why is she going around making up this story and where is she getting this story from.*

DS: Well...

Def: That's what I can't understand.

DS: I can't really speak for her.

Def: *Yea, I know but, lot of the stuff they say you say. I'm like what the fuck. I see where you signed, I see grand jury minutes (7:00) Most of it is you saying the same thing. That I beat you up all the time, that I put the gun up to your face.*

DS: Yea, I read that too.

Def: You scared for your life that's why... um... that's why you told them you waited til you moved to Connecticut and then you called the police on me.

DS: I read that too.

Def: I cannot believe you.

Def: I just cannot believe that.

DS: Me? I'm just gonna take that. Yea.

Def: *I'm not even gonna argue with you. Because I come to where, I love you. It is what it is. If you did lie and call the police, cause that's obvious. I got black and white right here. Anyone can see this black and white. This is a sworn affidavit.*

Def: I have paperwork right here saying that you went to the police precinct, at this time this date, and they swore you in, they swore you in

saying that everything that you telling is true. And then you started saying.

DS: And that... ok. I'm not saying anything else.

Def: Do you want me to send it to you?

DS: I have it! I have everything! Like I said, I just got that yesterday. If that information was allowed to me [Inaudible] It probably would have different if I would've known.

Def: But you um... I guess you gotta talk to me Sunday because I gotta understand that... where did they get this from? When did you go in when they say? You say that they are exaggerating anything (9:00) that's what you're basically telling me, right?

DS: Excuse me?

Def: They made these stories up, or they exaggerated the stories that you told them. I can't accuse you of nothing because I don't understand yet.

DS: Most of it I can say was that was never said.

Def: Because I'm assuming like ok she was scared. They came to her and all bullshit she got scared and put it all on me. Or they told you some fucking story and that's what they wanted to say?

DS: Yea, that's closer to that.

Def: *Yeah, Because I'm all like what the fuck, I'm like why would she play with me like this? I'm expecting to come home and your their number witness, you have me, it's crazy. That's why they running you down. Because you the reason that sent them to MN! They never knew nothing about MN, you told them to go to MN because I told you (10:00) I did it and I went to MN's house, and they went to MN's house and then... and I guess... you told them... some, this shit is so weird. I'm like oh my lord have mercy. Um, um, shit, um, um, the shit with Reps. I'm like what the fuck? They took you to the precinct and you have a statement there, you picked him out, you know from 241st? I'm like what the fuck?*

DS: Well, you know, I told you about that one.

Def: Ok but I'm just... it don't matter that you know him, know what?

DS: I don't.

Def: *This shit is (inaudible). I'm like... I don't even want to talk about that no more. (11:00) This is what it is, so, I want to talk to you to keep my spirits up, just to hear your voice is... I was happy before this. What's good... hello?*

DS: Yea? I thought you were talking to somebody else.

Def: Oh. We only got about five more minutes on the phone.

DS: Well, like I said, my only thing is...

Def: *I only get a half and hour on the phone. A day. When I tell them I got... I feel so bad that I call you and I want to believe everything that you been telling me is true and that I can be happy again... but I don't know. I don't want to call nobody else because I gotta understand what*

would make you do some stuff like this. I don't want to speak to nobody... *mumbles*

(12:00)

Def: He's not even gonna fight hard for me, it says here that he told me that I'm gonna lose, that he just gonna say fuck it I can do anything and I'll still lose, he's expecting that. I'm just, I'm just praying because I have to take the [Inaudible] myself.

DS: Well, um... I don't know. I think there's something else, I don't think this is... should be...

Def: We'll talk Sunday, I don't like talking on the phone.

DS: I know.

Def: I swear that they gonna take this to corporate court and say that I'm threatening you or they gonna say that you called them when I get off the phone and threatened you. (15:00)

DS: Ok, that can be verified and I understand you're paranoid.

Def: I told you that I don't even... if you could see how I feel, like, you probably, [Inaudible]

DS: I'm about to cry... yea, that was [Inaudible]

Def: They've been contacted by someone with the name of Georgette... blocked number...

DS: Wait what?

Def: you called them one day, and you didn't give them your name or nothing, you just called them gave them the information that your boyfriend had... you said that you had the paperwork? Did you see what you said?

DS: No, I didn't hear all of that information, just listened to the 18th. I only got what happened on the 18th.

Def: About... this is what I'm talking about, this is before you even met.

DS: Yes, this is what I'm saying, this is what I'm saying...I don't... (16:00) I don't go ahead.

Def: *This is how the cops were on it.*

Def: *Hey babycakes, this started with you calling in with an anonymous tip, then you called back with the name Georgette, you didn't want to give your name so you told them to call you Georgette, so, in some of the statements, there's pages where it's just that. Some of the shit that you got, that...*

DS: *Ok well where did that come from because I didn't give that -*

Def: *That came from you talking to the police and then [inaudible] writing everything down... Just like your handwriting that [Inaudible] allegedly, allegedly... I don't know. I'm not accusing you of anything.*

DS: *Hmm?*

Def: *I'm not accusing you of anything, but... this right here is black and white (17:00) So this is supposed to be fact. Alright baby, I think my*

time is over, Ok?

Def: I love you.

DS: I love you too.

(17:39)

On January 8, 2011:

3:50 *Def: I mean by the time that come, shit, either I'll be going home or I'll be fucking getting my life sentence.. So if I'm getting a life sentence.*

3:57 *Def: So, if I'm getting a life sentence, I'm not gonna wanna.*

4:00 *DS: I still think home.*

4:03 *Def: If my lawyer don't think so I can't think so.*

4:05 *DS: No, that's well. That's another story we'll discuss tomorrow. I still say home.*

Def: Maybe, yeah, I just. You gotta make sure you just. Nah.

4:38 *Def: Nah, I was thinking about something else; about those things that you promised.*

DS: Those things what?

4:43 *Def: I was promised.*

4:47 *DS: Just say it.*

Def: I don't get to. It just depress me. Make me wanna cry.

4:54 *DS: It's still you lose, I lose.*

Def: Huh

DS: You might not see it that way. I said, it's still you lose I lose, even though you're not gonna see it that way and that's understandable.

5:08 *DS: Just because he says something doesn't mean, I, what?*

5:13 *It got you lookin' in this paper, like you wanted to go back to frank da, da, da, da, da, you talking about that's why we started fightin' because you wanted to spend quality time with frank, you frank and ya'lls's baby.*

5:25 *DS: Keith, that's why I need to know, what hell are you lookin' at?*

5:27 *Def: Hay, this is supposedly what you told them when you came. I don't know, you got so many statements, but I could, I could.*

5:35 *DS: No, I don't have any statements because I only have one. So if I do have more statements, out there, then I should have them. That's why I need to know what to do you have that's saying all this?*

5:46 *Def: The time when you, you called the police the first time. I have um*

5:53 *DS: That's not a statement.*

Def: Well, it's, it's they have it on their phone records.

5:58 *DS: Is it their statement?*

Def: Yes.

6:00 *DS: Okay. So say "you have their statement, not mine."*

6:04 *Def: They saying, this is what you said. First you called as an*

anonymous caller, then you called as some "Georgette" and then every time you spoke to them, they wrote it all down. What they asked you. What your response was. I have you at some restaurant in Yonkers. I have you at the Grand Jury. I have you at um, Repts lineup shit. There's a whole bunch of shit. It's a folder.

6:33 DS: Oh, okay, I can. Okay. So how come I don't have all this if this is what I supposedly said. So that means I can just write down anything, right? And say, they said that to me.

6:45 That's how it should be. I need to know everything you have that was submitted to you. Just like whatever.

6:52 Def: Cause they gonna say, why you need to see it, if you, if you, if you testified to that.

7:00 DS: I'm not testifying to that, that's the thing. You can't have something that I did not say. Unless they can prove to me-no-cause this is saying - oh my God. Go ahead.

7:12 Def: *The thing that you signed, your signature on - that say you can get um, a misdemeanor - A- if you lying. Are you willing to take a misdemeanor?*

7:25 DS: *That's not something you should be worried about.*

Def: Alright.

7:27 DS: What you should be worried about is what you have because that means you have a police statement saying that Margaret said something. You don't have nothing with Margaret's signature on it?

Def: No. Margaret's signature's not on nothing. Your signature's on stuff.

7:38 DS: Okay. Fine. That's understandable. She didn't give any statement?

7:43 Def: No. Margaret just told them that us, I came to the house one day and said it and she didn't believe me so she just closed the door and that was it, I never went into no details after an argument we had and that when things started winding down, you asked me what I am talking about, why did I say that and

8:01 DS: Okay. So according to them I said that.

Def: Yeah and you said that in Grand Jury.

DS: Yeah, according to them I said that.

Def: Yeah

8:15 Def: Yeah at this point I'm not I'm not taking any of this with a grain of salt, because my lawyer's working on it.

8:27 DS: But, I mean you have the right. You have the right to believe anything you want to. You are given that right. And I want you to. So when it's proven differently, then I want the apology. Then again, I'm not gonna trip on it cause I know what happened. I know what I did. I know what was said to me.

8:45 Def: *Excuse me. I love you. It don't matter. Like*

8:57 DS: Keith, I love you too. And I don't wanna see you go away either. And's that's not what you're getting the... I knew this was gonna happen.

9:00 Def: Why they lying on you, saying you called the police precinct with the information? Well, that's the real thing, but whatever.

9:10 DS: I can't answer that.

9:15 Def: Yeah, but I'll read everything and then I'll tell you everything tomorrow.

DS: Hon. It's okay.

9:30 Def: At least you could say I love you when heard it, huh?

DS: Huh?

Def: *I said now you can say, I love you still, when they heard it.*

9:40 DS: Well, so could you - I guess you don't see it as equivalent. Everybody's different.

11:40 Def: It's just, when I got all this shit, it was like, I don't even know if I can trust you or what was your intentions, cause the papers it said you trying to get back to Frank so I'm, I don't even know what to believe.

11:52 DS: It does not say I'm trying to get back with Frank. It does not say that.

Def: If say that you wanna.

DS: Cause if it does I wanna see it.

11:59 Def: You wanted to spend time with him and

12:00 DS: it did not say I wanted to spend time with him. It better not say I wanted to spend time with him.

12:04 Yeah you just wanted to spend time with you, him and Jasmine and I make a big deal out of it.

12:08 DS: Wow

12:11 Def: So I didn't know if that's what your purpose was and that's why I's here. I don't, I didn't know what to believe. But I wanna try, cause

12:19 DS: Okay, then that's it. You know what, then that's, that's perfect. I put you in jail because I want to be with my, my, my husband. No no no.

Def: That's what they trying to make it like you didn't want me to come to Connecticut either.

DS: Yeah, I know.

Def: No, but then I got something else in your paperwork that say you said I couldn't come to Connecticut because my parole officer wouldn't let me, so that shows that somewhere they lied, somewhere they

12:50 DS: Can you please stop talking about it.

13:00 DS: *I'm just saying. I put you. No, I want to say that I put you in jail (laughs) because I wanted. No, no, no, I'm not saying it for you, I'm saying it for the audience. Yes, that's exactly what happened.*

13:16 Def: well, I'm gonna believe you first.

13:20 DS: Well, I love you.

Def: I love you too.

DS: I still love you.

13:24 Def: *I'm going with you first, until the wheels fall off. I don't know if they threatened you to sign anything or anything (13:29) cause I'm not gonna just believe that.*

17:56 DS: If I'm not with you, I don't wanna be with anybody else. If it's not with you, then I prefer to be by myself.

18:03 Def: Aw right, now I hear that from you. With these papers they got that they gonna try to make you be out in court, in front of them jurors, it don't say that.

18:13 DS: But you knew that. This is what I'm saying. Some of this stuff you already know. Think of what we've gone through the whole year. You knew this. A lot of this stuff.

18:24 Def: In the papers, like you make it seem like I beat you up everyday.

18:27 DS: Of course they're gonna do that.

18:30 Def: We had a couple of altercations and in the papers, it's like I beat you up and all kinds of shit.

18:38 DS: I don't know where they got that, like I said, I don't know what you're lookin at.

Def: I'm sure they probably stretched it, but before you sign anything don't you read it?

18:46 DS: Of course. Hold up. It doesn't say "multiple altercations" in the signed statement that I have.

18:58 Def: I don't know. I don't know if my lawyer gave me every single one I got maybe four or five form you. One from MN and _____.

19:05 DS: Those can't be, those can't be statements.

Def: Yeah. They are what the police supposedly asked you and what you answered.

19:13 DS: Those are police statements.

Def: Grand Jury, it's so, it's so

19:21 DS: It's already said, I know what happened. I know what happened. And that's the problem we're having.

19:30 Def: Lawyer... I don't understand fucking any of it.

On January 11, 2011, DS appeared before the trial judge who had signed a material witness order. An attorney was assigned to represent her and she was ordered by the court to appear for trial.

On January 24, 2011 she testified in the jury trial. When questioned on direct

examination about the statements defendant had made to her about the homicide of January 27, 2009, she answered approximately 200 times that she either could not recall or did not remember. On January 31, 2011, the jury returned a verdict of guilty on eight counts including two counts of Murder in the Second Degree. Defendant was sentenced on March 29, 2011.

On August 6, 2014, the Appellate Division, Second Department reversed the judgment of conviction on the ground "...the County Court erred in admitting into evidence portions of a witness's (DS's) grand jury testimony recounting inculpatory statements allegedly made by the defendant, under the past recollection recorded exception to the hearsay rule." and remanded the matter for a new trial (People v. Wilkinson, 120 A.D.3d 521).

Defendant was returned to the Westchester County Jail on September 18, 2014. On that same date, he contacted his friend Nneka telling her to contact an individual to get Denzil's number because there would come a time that he would need Denzil to "bust a move" for him (Exhibit 36) From September, 2014 - March 9, 2015, the defendant made 543 phone calls to his friend Nneka. (Exhibit 32)

Investigators LaRotunda, Salinas, and Muhammed were assigned to locate DS for the retrial of the defendant.

On November 12, Investigators Salinas and Hackette went to two addresses in Bridgeport Connecticut in an effort to locate DS - one on Atlantic Avenue and another address on Dean Place. The address on Atlantic Avenue was under renovation. The individuals in the apartment were from the management company. They told the

Investigators that DS had not resided in the apartment for a month or two. The investigator then went to 42 Dean Place. They went to apartment 302 A. They knocked on the door and displayed Salinas' shield. He heard somebody walking toward the door, slowly, but did not answer the door. He knocked two or three more times without a response. He left two business cards at the door. They remained there for approximately four minutes. Two days later the Investigator contacted by phone an individual who was with the management company for the building. The investigator was informed that DS lived in the building. No further information would be provided by phone. The investigator went to the management company on November 14 and spoke to the gentlemen personally who gave him DS's two phone numbers. He also confirmed that she did live at 302A and gave him information on a vehicle that she drove. She was the only adult in the apartment with two children. He called both phone numbers. He left a voicemail message on one number. DS did not return the phone call. The Investigator returned to the apartment on May 13, 2015 to execute a search warrant.

On December 3, 2014, Investigator Mohammed went to speak to DS at her place of employment in Stamford, Connecticut. He went in the early morning with Investigator Latheia Smith. They were sent to this location because she had not been responding to the District Attorney's Office (t35). They did not contact her ahead of time to let her know they were coming. They asked the receptionist to speak to DS. The receptionist told them that the manager would be coming to speak with them. The manager told them that DS was working from home. The investigators went to her home at 42 Dean Place in Bridgeport, Apartment 302. The location is a three story apartment building. The

investigators went to Apartment 302. Smith knocked on the door and identified herself. The investigator heard someone walking quietly inside the apartment. No one answered the door. They knocked again, identified themselves and again there was no answer. They stood at the door for ten minutes, waiting, hoping that she thought they had left and would come out.

A series of love letters from DS to the defendant evidently written in December 2014 and January, 2015 were recovered in defendant's jail cell following the execution of a search warrant in March 2015. DS wrote to defendant using different names. (t95) In one letter postmarked December 10, 2014 (Exhibit 15) DS writes:

Anyways I do forgive our past. I just bring it up when you bring it up because I hate when you point fingers at me. What I did really wasn't out (sic) malice to hurt you. You kept saying you didn't need me and that other people were better than me so I thought you didn't care whether I was there or not. But you had me back when you said this time that you saw what life was like without me and you didn't want to live without me again. Honestly that's all I ever wanted from you. Just to know that above all else it was me that you want and no one else. You weren't there at the time I guess. I just always felt that I was an ATM to you. Like Tawanna used to tell you that you worked at the bank of me (meaning me). You only kept sleeping with me to make sure I didn't stop doing for you. That's how everyone saw it. It was embarrassing because I was so blinded by my love for you that I didn't want to open my eyes. So how much time have they offered you for you to take a cop out.

In a letter dated January 6, 2015, DS noted that prior to his arrest in this case, defendant had never told her that he loved her (Exhibit 15):

Hearing the words "I love you" from your mouth to my ears is wonderful. Main reason is because you never said it at all when you were home. You only started saying it to me when you got locked up.

On **December 13, 2014**, the following conversation was recorded (Exhibit 24b):

DS: You hurt my feelings last night.

D: And today when I called you I was like I don't know if she's cutting me off cause she hears me or if she's just cutting me off cause she don't feel like hearing me

DS: What does that mean? Didn't you tell me to

D: huh?

DS: Didn't you tell me to press it if I hear you, so what does that mean.

D: Huh? No. Just, just knowing that you was upset, so you pressed five and I'm like she probably doesn't even wanna talk to me.

DS: Cause I heard you. If you wanted me to pick up you would've called back and said pick up.

D: Yeah. Nah, it's my brain playing tricks on me.

DS: *Obviously, And seeing then you take it out on me and you say dumb shit to me like oh you're an evil person for thinking that way just cause I'm upset? I'm an evil person because I get upset too. I don't think you're used to me getting upset because I was such a doormat to you before. Any time you would do something or whatever whatever I would just, keep it going. But now it's just like no, everybody walking all over me is now detrimental to my health. It's deteriorating my health, so I'm not gonna take it because my kids mean more than anybody else.*

D: *Blah, blah, blah*

DS: *Exactly you don't care about anything I have to say.*

D: *I'm joking, shit up.*

DS: (to kid) hey, hey, what's wrong with you. Go climb your mountain.

D: Am I gonna get mail today?

DS: Maybe not you.

D: mm

DS: Why are you looking at me like that?

D: Hm?

On **December 14**: (Exhibit 22b)

D: Yeah. Hey, do you remember the other morning we was talking, early in the morning, and you snapped at me?

DS: *I don't know what I snapped you about, but I guess so.*

D: *I, cause I said that, cause I said that um, if, if you was dead, it would, it would, it would be a plus, but I don't wish that on you?*

DS: *Yeah.*

D: Yeah I wrote a letter, I wrote a letter talking about that, some funny shit. You had me turned on, cause I'm so used to you crying over anything. I'd prefer you to snap. I'd prefer you to slap me in

the back of the head. I'd prefer you do a lot of things before you start crying. You look like you're a fucking dickhead.

DS: I had you turned on?

D: Yeah I was laughing my whole time I went back to my cell. Said this fucking girl's crazy.

DS: It's funny because you, you really don't like when I talk back. You like when I'm crying or very vulnerable or whatever.

D: No, I prefer, no I prefer you, I prefer you to snap back. If you cry later it's because you frustrated, but I prefer you snap back first.

Cause crying to solve the problem(). I prefer you to say what's the problem. It was funny though.

DS: Well why did it make you laugh?

D: Why, cause, cause it shows strength. Stand up, and I did not expect you to call me a dick head. I guess cause I was not expecting it.

DS: Ok, I don't know what to say.

D: It was funny.

DS: Well I'm just confused by oh it had me turned on.

D: Cause I didn't, I didn't, I couldn't not turned on sexually, it just, turn on by you. I don't know if I explained it right in my letter. See some things it'd be (), it'd be mad hard for me to explain to you.

DS: Ok. Damn this goes by short. It seems like it, it goes by longer on the phone.

D: Yeah. Phone is a lot more expensive.

DS: You still love me though, even though I called you a dickhead?

D: *Yeah, I told you I love you right after you called me a dickhead. And I love you more today, cause you was able to find (name).*

DS: Oh, no I, I found her yesterday.

D: Yeah, but you was able to show me the pictures today. Now we just gotta see if we can get them.

In their December 18, 2014 conversation, DS tells him she thinks he is going "to let her get away with anything." Defendant answers, "yeah, just about." (Exhibit 18a)

In 2015, Investigator LaRotunda called her from a number of different phones to avoid identifying the caller. He called the number he had from the jail records. DS' number was confirmed by the other investigators (T67) He was unable to reach her.

One afternoon in February, 2015 he called her number and a female answered the

phone. He recognized DS voice. He introduced himself and explained that they had been trying to get in touch with her. The woman on the phone said she was not DS. He told her he knew it was her, DS. She again stated it wasn't DS and hung up (t68).

On January 30, 2015, ADA Nadine Nagler spoke to a woman named Shaniqua who had called Ms. Nagler to tell her that a friend of hers (Shaniqua's) named Bruce Rivers was currently in the county jail housed with an inmate named Keith Wilkinson. She went on to tell Ms. Nagler that Rivers had information for her regarding Wilkinson and would like to meet with her. Ms. Nagler made arrangements with the clerk of the court to have Mr. Rivers produced on February 3, 2015. She also contacted his attorney. She was informed that Mr. Rivers was due in court to plead to a violation off a misdemeanor the following week in city court. On February 3, 2015, Investigator La Rotunda met with Mr. Rivers along with Assistant District Attorney O'Rourke. Rivers told them that he had been having conversations with Wilkinson and Wilkinson had told him the details of the homicide and that he wanted Rivers to assist in the kidnapping and or killing of MN (t70). After that meeting, Assistant District Attorney Nagler was informed that Rivers had spoken to the defendant and that the defendant had made admissions to him regarding the homicide for which he was incarcerated. She was also informed that Rivers had told LaRotunda that Wilkinson planned to kidnap and or kill MN, a witness in the homicide trial. A separate investigation was opened (t71). Arrangements were made for Rivers to be brought back to the District Attorney's Office on February 13. Ms. Nagler met with him along with Investigator LaRotunda to get more details about the conversation he had with defendant. Rivers and the defendant were housed in the same block at the jail. Rivers gave a sworn

statement (Exhibit 1).

With regard to the threat against MN, he told Rivers that he was his "right hand man" who had testified against him. He asked Rivers to kidnap him so he would not come and testify against him at his new trial. He (Defendant) had already had someone approach him (MN) not to testify and he had that person tell him to leave the state to go to Florida or something while the trial was going on and if he doesn't leave the state, to tell him Defendant knows where his son goes to school. Defendant asked Rivers if he could get someone to help kidnap him and to wear masks and if MN saw their faces to kill him and he would pay him \$10,000. Defendant knew Rivers was getting out soon. He told Rivers to come visit him and he was going to explain the details to him. Rivers was supposed to visit his girlfriend in Connecticut and she was going to give him the picture, address of his right hand man and the money for doing this. Defendant gave Rivers a piece of paper with his name and his inmate number. The paper said Keith Wilkinson and his inmate number and he put two phone numbers on the back. (Exhibit 5, t115).

At the conclusion of the meeting, Rivers was told he was not to speak to defendant about anything to do with the homicide. He was told he could not ask him anything about the homicide and he was told they could not legally do that. He was told that if he overheard anything, to let them know but he was directed under "no circumstances to speak to him about it (homicide)" (t231).

The Investigators continued the investigation into the alleged plot against MN. Investigator LaRotunda and the Assistant District Attorneys went to the Westchester County Department of Corrections for the purpose of making arrangements to get a

recording device into the jail so that Rivers would be able to record conversations with defendant. Sometime after the 13th, there was a recording of defendant telling Rivers that if they got MN, to "beat him up bad and skedaddle" (t76,108).

On February 26, 2015, Rivers was released from custody. Defendant gave Rivers a name and a phone number of a girl, Nneka Weathers or Telyana Weathers. Rivers was told by the defendant to call Nneka and she would provide him with the address of MN and pictures of him. Rivers called Nneka. The Investigator was present for the call. On the third call she picked up. Nneka was living in the Bronx at the time. Rivers made arrangements to meet with her that night. The Investigators dropped Rivers off in the Bronx. He was wired to record and videotape the conversation. He went into Nneka's building and returned to the investigators. Upon return, the investigators viewed and heard the video (Exhibit 2). Nneka scrolled through her phone and stopped at two pictures, one of which was definitely of MN. She did not know MN's exact address but explained it was on 10th Avenue in Mount Vernon. It was a house with a big tree in front. The photo of what was shown to Rivers was marked in evidence as Exhibit 3 which is a picture of MN and his son.

In early March, the District Attorney's Office concluded that there was a credible threat either to hurt MN or to kill him and they determined they had an obligation to notify him that his life could be in danger (t82). The investigators went to MN's home which is his parent's house. The investigators met with his parents. Investigator LaRotunda and Bock explained to his mother that they needed MN to testify again at the trial and they needed to speak to him. He also told her that they believed someone may be looking to

threaten him or hurt him. His mother told them she would try to reach out to her son. She also told them that not long ago someone had shot at MN's car. The family was definitely concerned about their family's safety. MN's father was definitely afraid. His mother reached out to her son and made arrangements for him to speak to the investigators. She left a message later that day with the Investigators that MN would not come to speak to them. Investigator Rotunda spoke to her later and asked her to bring her son with her husband to speak to them on March 18, 2015 in the District Attorney's Office. MN walked into the conference room with his parents. The Assistant District Attorneys and the Investigators were all there. They told him he would need to testify again. He told them he wasn't going to testify. He said he testified the first time and would not do it again. MN explained how he knew Nneka and he knew Nneka was very close with the defendant. On the first trial when he testified, she was there. After he testified she went out in the street and started to spread the word around that he was a snitch. Nneka had approached him and called him a snitch. He was told Nneka showed the photo. The detective showed him the photo from Nneka's phone. (Exhibit 3) MN said he did not know who was in the photo(t88). The detective told him it was him and his son. His mother said it was him. He denied it was him. His mother went into her own phone because Exhibit 3 is MN's facebook photo, the same photo (Exhibit 4). MN continued to deny it was him. MN's son was also in the photo and his mother had great concerns for her grandson. MN was asked if someone had recently shot at his car. He said no. His mother looked at him in disgust and said "you know your car was shot at." He denied it.

A search warrant was executed at Nneka's home in the Bronx on March 24 for

Nneka's phone. She was asked what was going on between her and Keith. She told them that Keith wanted her to see if MN was going to testify. She explained that she showed MN's picture to "his guy" because that was the conversation she had with Keith.

(t94) On May 28, 2015 DS contacted the Assistant District Attorney Nagler. Notes were contemporaneously made of the conversation (Exhibit 42). They spoke about DS' child care arrangements in order to appear for the trial. She needs the courtroom closed if she testifies. She does not want to leave the building at lunchtime. She had brain surgery this year. She needs to keep the stress level down. She will be safe with her husband, MS⁵.

She needs him there to protect her. Keith's people will not do anything to her if her husband is there. "Outside people being in court is where we failed the first time. He had people from the neighborhood there when I testified, Keith's people. I don't know their names. I don't know what kind of connections they have and don't want to find out the hard way". Asked by Ms. Nagler what the letters and phone calls were about, if she was pacifying Keith, she responded "Of course, I am pacifying him to make sure that he doesn't send someone to hurt me. I'm concerned from my family. I'm concerned for my grandmother. I don't know if he would hurt my grandmother. I don't want to take a chance. He has done this before. I am fearful, please stress to the Judge a closed courtroom." (Id)

On June 1, 2015, she spoke to Ms. Nagler again (Exhibit 43). DS told Assistant District Attorney Nagler she did not want to go through the process. She never lied about anything she told the police. Defendant is controlling, manipulative, conniving. He

⁵ Name changed to "MS" in order to protect his identity.

wanted her to marry him so that she could not testify against him. She was not afraid of perjuring herself, just freezing up. She was scared in the first trial. People from his neighborhood were coming into the courtroom. She didn't want them to run back and tell everyone.

On June 8, DS testified. She explained that before testifying at the first trial she was in fear of the defendant. She had been the victim of his violence in the past toward her. He had also threatened her and her grandmother (t262-264,277). He told her that people know where her grandmother lives. His people know where she is. (t277) He had held a gun to her head, knocked her tooth out, and on other occasions, beaten her. She was concerned for her own safety and the safety of her grandmother. She had stopped taking his phone calls from state prison after about a month since he was blaming her for being in prison. He started calling her again toward the end of 2014 (t288). Nneka told her he wanted to speak to her but didn't know if she would speak to him. She told Nneka she would speak to him.

She was concerned she would be called as a witness again. He asked her to marry him. He still wanted to be with her even though she was the reason he was in prison (t290) which surprised her. The love letters were written by her to keep him happy. She was concerned for her safety (t291). She has two kids. Her health is really bad. Even if she wanted to put up a fight she couldn't, she knew how he could be if he is upset (t291). Questioned by the court as to why she answered during the first trial that she could not remember what defendant had told her the night of the homicide, she answered because she was afraid (t297) Asked why she was afraid she answered "because there

were people in the courtroom" (t 297) that she recognized from the neighborhood and she didn't know what they were going out of the courtroom saying because "remember, I'm the one who has to walk out of here" She didn't know what would happen, if her grandmother would be hurt or they would follow her. Asked if she was concerned that defendant would be asking people to do things to harm her family, she answered her family. Had there ever been a threat towards your grandmother prior to the trial? She answered "There's been statements." What were the statements and who made them? She answered "They were just, like, Oh, well, my people know where your grandmother is, my people know where you are, kind of thing. And when he said "his people," what did you take that to mean? She answered "Just people outside." (t277). She also heard that attempts were made on another witness. She did not know what would have been done, what would have happened if she told the truth. Asked about her apparent loving relationship with the defendant based on the conversations and letters, she answered "My goal is if he's happy I have nothing to worry about." (t299) Asked if she was ready to testify to the truth, she answered in substance, "only if there is no one here, I'm just not ready, either emotionally physically. It's like I can't even stay still right now. I'm an epileptic, I had brain surgery, I just can't it's too much" Asked who she didn't want in the courtroom, she answered "anyone that's affiliated with him (defendant)"(t308) Asked if she would be safer just because they are not in the courtroom, she answered, " Like right now of course, now it's a problem. He's here, he's able to reach out to other people and it's just going to cause a telephone effect." (t309)

On June 24, 2015, Bruce Rivers testified that he and defendant were housed in the

same cell block in the old Westchester County Jail in January of 2014. During the month of January, the two of them struck up a conversation wherein they learned they were godfathers in the Bloods and talked about what they were in for. They had associates in common. They saw and spoke to each other every day (t5) Defendant was the porter for the floor (t20). The Defendant told him his right hand man named MN had testified in the first trial. Defendant already had people approach MN to tell him that if he cooperates, they know where his son lives (t15) Defendant wanted Rivers to kidnap MN but first to tell MN to go away and not testify. He wanted Rivers to tell MN to go to Florida and if he didn't cooperate, he would be kidnaped(T7). Rivers was to wear a mask but if MN saw his face he should be killed and he would be given \$10,000 if he had to kill MN. The Connecticut girl would pay the money. Defendant told him MN lives on South 10th Avenue between Second and Third streets and described the house. Defendant told him his girlfriend would give him the actual address and a picture of MN. The foregoing statements of defendant and the information provided in Rivers' statement of February 13, 2105 were made by the defendant to Rivers prior to February 3, 2105.

On January 30, 2015, Rivers was housed in a different dorm. He was returned to defendant's cell block on February 20, 2015 (Exhibit 25b) At some point after Feb 3, 2015, defendant gave Rivers Nneka's name and phone number (Exhibit 5b) for Rivers to contact her to get a picture of MN and MN's address. On the day he was released, he called Nneka and went to her apartment. On the same date, February 26, defendant had set up a prearranged alert with Nneka to let her know that she was to "link up my boy," "go on facebook to get it" (Exhibit 41). Rivers was wired for audio and visual coverage. Nneka

showed him a picture of MN with his young son (t25).

The People and the defense stipulated that Rivers was not acting as an agent of law enforcement prior to February 3, 2015. Accordingly, the statements made by defendant to Rivers before February 3 are admissible on the People's case in chief (See, People v. Cardona, 41 N.Y.2d 333) River's testimony concerning defendants statements in January relating to the efforts to silence MN are admissible on the People's case in chief as consciousness of guilt (People v. Torres, 61 A.D.3d 489). Defense counsel was instructed at the time of the the hearing herein to submit or request a limiting instruction to the jury. Rivers testimony and the audio visual coverage concerning his calling and meeting Nneka at her apartment is admissible as well. Defendant had told Rivers about Nneka and MN in January. He had described MN's house and location to him as well. Nneka's phone number was easily ascertainable from the jail records and was well known to the People since defendant had called her over five hundred times including four times on the date Rivers was to see her. The People recognize they are prohibited from eliciting testimony from Rivers concerning all statements made by defendant to Rivers after February 3 and were directed to caution their witness prior to his testimony.

DS - Parties' Contentions

The People contend that defendant should be precluded from cross examining DS on her trial testimony for the reason that her failure to testify about the statements he made to her concerning the commission of the crimes was as a result of his misconduct of pressuring and manipulating her in order to silence her.

Defendant contends the evidence is insufficient to establish the defendant

engaged in any misconduct. DS and defendant had a loving and affectionate relationship. She did not have to accept his calls. She visited him in jail. She did not report any of his alleged physical abuse to the police.

LAW:

Under the Sixth Amendment of the US Constitution and article I section 6 of the State Constitution, a criminal defendant has the right to be confronted with the witnesses against him (see U.S. Const. Amend.VI; N.Y. Const, art I s 6) However a defendant through his misconduct forfeits his constitutional right to confront a witness and the right to assert otherwise viable evidentiary rules barring the use of hearsay as evidence in chief when the defendant procures a witness's silence by threats, trickery, violence, misconduct including intimidation and bribery and the use of a relationship to improperly procure a witness's silence (See, People v Geraci, 85 N.Y.2d 359; People v. Cotto, 92 NY2d 68; People v. Encarnacion, 87 A.D.3d 81; People v. Jernigan, 41 A.D.3d 331). This limited forfeiture by misconduct exception to the fundamental right to confront witnesses is "dictated by sound public policy" because "the law will not allow a person to take advantage of his own wrong" (Geraci supra at 366). Moreover, courts have a paramount duty to protect "the integrity of the adversary process by deterring litigants from acting on strong incentives to prevent the testimony of an adverse witness (id).

The standard for the granting of a Sirois hearing is where "the People allege specific facts which demonstrate a "distinct possibility" that a criminal defendant's misconduct has induced a witness' unlawful refusal to testify at trial or has caused the witness' disappearance or demise, the People shall be given the opportunity to prove that

misconduct at an evidentiary hearing." (Matter of Holtzman v. Hellenbrand, 92 A.D.2d 405, 415).

At the hearing, the People "must demonstrate through clear and convincing evidence that the defendant engaged in misconduct aimed at least in part at preventing the witness from testifying and that those misdeeds were a significant cause of the witness's decision not to testify." (People v. Smart, 23 N.Y.3d 213, 220).

"Because witness tampering is a surreptitious activity rarely admitted by the defendant or the witness, few cases will involve direct evidence of this causal link between the defendant's misconduct and the witness' refusal to testify or failure to appear in court (citations omitted) Therefore at a hearing held pursuant to Sirois and Geraci, the court may infer the requisite causation from the evidence of the defendant's coercive behavior and the actions taken by the witness in direct response to or within a close temporal proximity to the misconduct" (id). The evidence must be sufficient to support a determination that the defendant either was responsible for or acquiesced in the conduct that rendered the witness unavailable for trial (id).

Thus the courts have upheld the admission of grand jury testimony where it was established that the defendant wrongfully made use of his relationship with the victim in order pressure her to violate her duty to testify (People v Jernigan, supra); even where a defendant after threatening a witness wavered in his desire to stop the witness from testifying, the totality of phone calls between the witness and the defendant revealed his desire a least in part to forestall the witness's potential trial testimony (People v. Smart, supra); witness physically available but defendant caused witness to recant (People v.

Turnquest, 35 Misc. 3d 329); evidence of recorded conversations of defendant while incarcerated with a person outside of the jail in which defendant gave the person the phone number of the witness in question and stated that he could not have that witness appear at his trial (People v. Clarke, 55 A.D.3d 1447); the witness's original version of the crime which she had testified to before the grand jury changed as a result of improper influence by the defendant (People v. Encarnacion, 87 A.D. 3d 81); defendant wrongfully made use of his relationship with the victim in order to pressure her to violate her duty to testify (People v. Jernigan, 41 A.D.3d 331); in addition to extensive evidence concerning the defendant's conduct toward the missing witness, "the court properly considered evidence of defendant's unsuccessful attempt to tamper with other witnesses since this evidence established a common scheme or plan to tamper with as many witnesses as possible" (People v. Leggett, 107 A.D.3d 741); defendant used his close relationship with his sister to persuade or pressure her into not testifying (People v. Evans, 2015 NY slip op 02782; decided April 1, 2015); history of domestic abuse relevant to show defendant's degree of control over witness who refused to testify (People v. Byrd, 51 A.D.3d 267); numerous phone calls, two letters, four jail visits established defendant's attempt to manipulate the witness into recanting her previous testimony and invoking her fifth amendment right not to answer questions (People v. Brown, 38 Misc. 3d 1210).

CONCLUSIONS

In this case, the People have established by clear and convincing evidence that defendant manipulated and pressured DS into changing her testimony in the first jury trial. He also instilled in her fear that she or her grandmother would suffer harm if she repeated

what he had told her the night of the homicide.

The credible evidence established that DS is an educated woman with a masters degree who works as an accountant. DS was living with defendant on and off for eight years and determined to leave him at the end of 2009, New Year's 2010. Described by the detective as intelligent and articulate, DS, on her own initiative, told the Mount.Vernon Detectives a detailed narrative of defendant's statements to her concerning his involvement in the homicide on South 10th Avenue on January 27, 2009. She also told the detectives about defendant turning his clothing over to MN so as to destroy any evidence. She waited to tell the police about his involvement in the homicide until after she left him and moved out of state because she feared for her own safety and the safety of her grandmother. Defendant had physically abused her in the past, which abuse included knocking out one of her teeth, beating her, and holding a gun to her head. She knew he belonged to a violent subset of the Bloods. She left him even though she was carrying his child (she thereafter miscarried).

On the night of the homicide defendant returned home to her in a foul mood. After telling her what he had done that night, they got into a physical altercation after which he told her he had "killed for less." After a story about the homicide was played on News 12, defendant told her to remember that the next time she thought he was "someone to play with."

Defendant was arrested in January, 2010. Upon being questioned, he told the detectives to ask DS, she would tell them the truth. DS told defendant she had told the detectives what he had said about the commission of the crime. From that point on,

defendant knew DS was the witness against him in the homicide. Over the next twelve months, defendant set out to convince DS he loved her and wanted to be with her. Notably, before his arrest in this matter, defendant had never told DS that he loved her, but had been physically abusive toward her and had used her as an ATM machine while they were together. She loved him but also feared him because when he was upset he was violent, knocking out one of her teeth and holding a gun to her head.

Once he was incarcerated, defendant refrained from making direct threats to DS, his comments revealed his awareness that the conversations were being recorded and he expressly stated "I don't like talking on the phone." Defendant's comments also reveal his knowledge of the legal issues involved and the potential risk to him if he directly threatened DS ("I swear that they gonna take this to corporate court and say that I'm threatening you or they gonna say that you called them when I get off the phone and threatened you.")

While the trial date was looming, he told her he loved her repeatedly, although he had not told her that he loved her prior to his arrest in this case. She told him she loved him and wanted him to come home. He told her he had to come home ("I'm comin home, I hope I comin home I have to come home, how can I not come home? I need to get outta here. I hope the charges get dropped.") He said he gave away everything, and it would be f-d up if he had to come back in. When she expressed her anger at being subpoenaed he urges her to lie and tells her to go to court and tell them she doesn't want any part of this and to tell whoever is there that she wants no part of it ("Tell the Judge or whoever that you don't not wish to be part of this, you know nothing about this. If you

have to be in court, tell them right then and there you don't know nothing about the matter at hand. If you tell them you don't want no part of it then they can't call you."). He told her to "keep the ear" and see what Margaret knows, as she had also been subpoenaed.

When he received all the statements she made to the police he asked her if she would take a misdemeanor since the statement she signed states it was a misdemeanor for lying. After reading her statements to the police, he continued to play on her feelings, to make her believe he loved her even though she had repeated everything to the police. He repeatedly tells her that he feels like crying and feels bad, and that he was happy before he learned about her statements, even though he knew that she had spoken to the police about the crime from the time he was arrested. He saw that she led them to MN ("you told them, I'm like oh my lord have mercy. I'm like what the f k? They took you to the precinct and you have a statement there, ... I'm like I don't even want to talk about that no more. This is what it is. I want to talk to you to keep my spirits up, just to hear your voice is, I was happy before this. I'm not accusing you of anything, but this is black and white., So this is supposed to be fact. Alright baby, I love you.") Indeed, the recorded conversations are replete with his cloying, disingenuous wonder that she had reported him to the police while nevertheless professing his love for her. Given the violent history of defendant's relationship with DS, coupled with his knowledge of the damage she could do as a witness and his awareness that he could not directly threaten her, defendant's repeated protestations of love, made for the first time ever, are patently incredible.

Moreover, the credible testimony at the hearing established that, after defendant

was convicted in his first trial, DS had to stop taking his calls from prison because, despite her testimony, he blamed her for being in prison. In his recorded conversation with her from December 14, 2014, defendant even goes so far as to suggest that if DS was dead, it would be a plus, but that he didn't wish this on her, which comment clearly evinces defendant's will that she not testify against him. As to the remedy imposed herein, at the Sirois hearing, DS testified about their relationship prior to 2009 including his acts of violence, implied threats to harm her and her grandmother, and her knowledge of his gang membership. She testified that it was her fear of the people in the courtroom that they would act on his threats to harm herself and her grandmother which caused her to change her testimony in the first trial by failing to recall what he had confessed to her. In addition to her credible fear of the defendant and his friends, she testified that her failure to recall during the first trial was also in large part caused by his convincing her in 2010 that he loved her, that he wanted to come home to her, and because he convinced her he loved her and cared about her, he was able to improperly influence her to testify that she didn't know anything. As a result of this manipulation of their relationship and pressure on her, she did not tell the jury what defendant had confessed to her on the night of the homicide.

Based on the foregoing findings of fact, the clear and convincing evidence adduced at the hearing demonstrates that while in custody, in lieu of direct threats, defendant wrongfully made use of his relationship with the victim in order to pressure and manipulate her to change her trial testimony, and that this behavior occurred against the "backdrop" of the history of their relationship, which included several acts of violence and

overt threats against DS (see, People v. Jernigan, supra): Accordingly, as a result of his misconduct, defendant has forfeited his right to cross examine DS on her testimony from the first trial in the retrial. (See, People v Bosier, 6 N.Y.3d 523)

MN:

The People have proven by clear and convincing evidence that defendant is directly and indirectly responsible for procuring MN's refusal to cooperate. The evidence shows that he was the victim of threats and intimidation orchestrated by the defendant. His mother told the police his car was shot at. MN's refusal to admit that it is his picture with his son that was shown to the person who was to kidnap him is the direct result of these threats. Defendant sent people to threaten him to leave the state. Defendant's misconduct has procured the desired result, to wit; MN is silenced. He has become unavailable by refusing to cooperate, appear, and testify truthfully (See, People v. Geraci, 85 N.Y.2d 359). Accordingly, MN's testimony from the first trial is to be admitted on the People's case in chief.

The foregoing constitutes the Decision and Order of the Court.

Dated: White Plains, New York
July 30, 2015



BARBARA G. ZAMBELLI
COUNTY COURT JUDGE