

TIBA's Case of the Week

Fourth Court of Appeals

Case Name: [Jose Gutierrez v. The State of Texas](#)

- **OFFENSE:** Assault / Dating Relationship
- **COUNTY:** Bexar
- **C/A CASE No.** 04-23-00088-CR
- **DATE OF OPINION:** September 4, 2024 **OPINION:** [Justice Irene Rios](#)
- **DISPOSITION:** Trial Court Reversed
- **TRIAL COURT:** 290th D/C; Hon. Jennifer Peña
- **LAWYERS:** [Dean Diachin](#) (Defense); [Andrew Warthen](#) (State)

(Background Facts): Appellant was indicted for felony assault against a person with whom he had a dating relationship, as a second offense. The indictment alleged habitual offender enhancements because Appellant had two prior felony convictions for family-violence assault, but the State later abandoned one of the enhancements. The assault arose from a domestic violence dispute between Appellant and his girlfriend, Vanessa Ruiz. Initially, the State also charged Ruiz with misdemeanor assault arising from the same domestic violence episode. Because there were pending charges against Ruiz, the State's victim advocate was prohibited from contacting Ruiz. At some point the State dismissed the charges against Ruiz. The victim advocate called Ruiz on May 23, 2022 to inform her that she needed to appear the next day to testify in Appellant's trial. Ruiz told the victim advocate she was not coming to court, and the State filed a motion to continue the trial that day. The trial court granted the continuance. The victim advocate testified she subsequently made a "few attempts to reach [Ruiz,]" and the State attempted to serve her with a subpoena in July 2022. On July 25, 2022, the State filed its motion for forfeiture by wrongdoing asserting Appellant's wrongful conduct was causing Ruiz's unavailability to testify at trial. Specifically, the State alleged that Ruiz would not testify because Appellant made several jailhouse calls to Ruiz requesting she not testify. The motion also alleges Appellant attempted to leverage an open case with the Texas Department of Family and Protective Services regarding Appellant and Ruiz's child to persuade Ruiz not to testify. For example, in one of the jailhouse calls, Appellant told Ruiz that he was told the only way she would be reunified with their daughter is through him. The State's motion requested the trial court render a pretrial

order that Appellant’s wrongful conduct caused Ruiz’s unavailability at a future trial date pursuant to forfeiture by wrongdoing. Consequently, the State sought an order that Appellant has waived any right to make confrontation and hearsay objections to Ruiz’s out-of-court statements made on the 911 phone call and the responding police officer’s bodycam on the day of the domestic violence incident. On July 26, 2022, the victim advocate contacted Ruiz again via phone to inform her that she needed to be in court for trial. Ruiz told the victim advocate she would not be there, and she did not appear for trial. On September 8, 2012, Ruiz filed an executed affidavit of non-prosecution with the State. The affidavit stated Ruiz no longer wanted Appellant prosecuted and requested the State dismiss the case. The affidavit further stated Ruiz does not wish to testify against Appellant but recognized she could be compelled to appear if subpoenaed by the State. While Ruiz was filing the affidavit at the District Attorney’s office, the State served her with a subpoena summoning her to appear for trial on September 12, 2022. Ruiz did not appear at court on September 12, 2022, and the trial did not commence.

[§§ 294.11 Hearsay & Confrontation / Forfeiture by Wrongdoing]: On October 17, 2022, the trial court held a two-day hearing on the State’s motion for forfeiture by wrongdoing. The victim advocate testified generally about her efforts to procure Ruiz’s presence at trial but offered few specifics about the dates and details of the State’s attempts to obtain Ruiz’s testimony. The trial court admitted the return of service for the subpoena and six jailhouse calls between Appellant and Ruiz. The State did not seek a writ of attachment to compel Ruiz’s appearance on September 12, 2022, and it did not make any further attempts to subpoena Ruiz for court dates thereafter. On November 2, 2022, the trial court signed an order granting the State’s motion for forfeiture by wrongdoing and issued findings of fact and conclusions of law. In its findings of fact and conclusions of law, the trial court found “that the State has established that the complainant in this case, Vanessa Ruiz, appears very unwilling to appear in court and testify against [Appellant.]” The trial court also found Appellant repeatedly attempted to dissuade Ruiz from testifying at his trial. The trial court concluded Appellant’s actions show that his goal was to persuade her not to testify and that he had forfeited his right to object to Ruiz’s out-of-court statements on confrontation and hearsay grounds as a result. Appellant argues on appeal that the trial court erred when it granted the State’s motion for forfeiture by wrongdoing, ruling Appellant would be precluded from raising confrontation and hearsay objections to Ruiz’s out-of-court statements. Specifically, he argues: (1) the trial court erred when it determined Ruiz would be unavailable for trial; and (2) Ruiz’s alleged unavailability was not caused by Appellant’s wrongful conduct.

Holding: As a fundamental part of our jurisprudence, the State bears the burden to prove alleged criminal conduct beyond a reasonable doubt. See ***Baltimore v. State***, 689 S.W.3d 331, 340 (Tex.Cr.App. 2024)(see **§§, Vol. 32, No. 20**; 05/27/2024). *** “[A] witness is not ‘unavailable’ for purposes of the . . . confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain [the witness’s] presence at trial.” ***Hardy v. Cross***, 565 U.S. 65 (2011), quoting ***Barber v. Page***, 390 U.S. 719 (1968). *** Here, the State failed to show that it made a good-faith effort to secure Ruiz’s presence at trial. The State subpoenaed Ruiz for the September

12, 2022 trial setting. The victim advocate testified that the State did not request the trial court issue a writ of attachment to procure Ruiz’s attendance at trial after she failed to appear at the September 12 setting. While we recognize that the State is not always required to request a writ of attachment when a witness fails to appear, it is a “factor for the trial court to consider in determining whether the State made a good-faith effort to obtain [the witness’s] presence at trial . . .” *** Of course, it would be clearly futile to seek a writ of attachment when the witness’s location is unknown to the State or there is some impediment -- such as death or the inability to locate the witness -- that causes the witness’s unavailability. *** But the State in this case knew Ruiz’s exact location, and the evidence it presented at the pretrial hearing did not establish that its efforts to secure her presence at trial through a writ of attachment would have been clearly futile, especially given Ruiz’s acknowledgment in her non-prosecution affidavit that she could be compelled to appear for trial. *** Regarding Ruiz’s availability, the trial court’s findings of fact and conclusions of law merely state that the trial court finds Ruiz “appears very unwilling to appear in court and testify against [Gutierrez].” At most, Ruiz was uncooperative at the point the trial court heard the motion for forfeiture by wrongdoing. The State oftentimes must deal with uncooperative witnesses to prove its case. While Ruiz may have been uncooperative, the victim advocate’s non-specific testimony does not support a conclusion that Ruiz was trying to hide from the victim advocate or that the State was unable to locate her. In fact, the victim advocate testified there was never “an issue of getting a hold of her . . . [,] we’ve always had her phone number.” Under these facts, the State knew how to locate Ruiz, knew where she lived, and could have issued a writ of attachment to secure her presence. The State’s actions here fall short of a good faith effort to secure the witness’s presence. *** The State here did not seek to invoke forfeiture by wrongdoing in response to Ruiz’s absence during trial, because trial never commenced. Rather, in a pretrial hearing, the State sought a ruling on the admissibility of out-of-court statements at a future trial by arguing the witness’s present failure to cooperate with the State makes her unavailable at that future trial. *** In sum, there are two problems with the trial court’s conclusion that Ruiz was unavailable to testify at trial. First, the trial court can only conclude Ruiz was unavailable if the State made a good faith effort to secure Ruiz’s presence at trial. *** Second, the trial court could not have made a determination that Ruiz was unavailable for a trial that had not occurred, and was not scheduled, when the State knew where to locate her and had means to compel her appearance. Because the trial court could not have possibly known whether Ruiz would be unavailable for a trial that never commenced -- or a future trial date that was never set -- its unavailability conclusion is outside the zone of reasonable disagreement. *** Accordingly, the trial court abused its discretion when it made a preliminary determination that Ruiz was unavailable to testify at an unknown, future trial date.

Ed Note: Finding that it could not conclude the trial court’s error to be harmless, the Court of Appeals sustain Appellant’s claim.

Sidebars

([John G. Jasuta](#)) Good instructional case for the State and the defense.

[\(David A. Schulman\)](#) This unpublished opinion should have been published (which is why it's our Case of the Week). It is very clear on the State's role in obtaining the presence of "an uncooperative witness," and should be instructive to the bench and bar across the State.