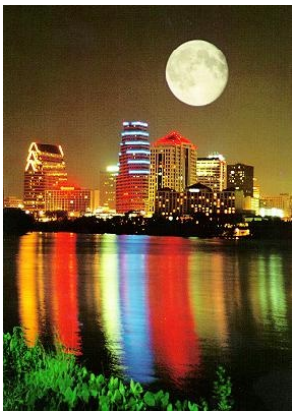
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**Case Name**: ***Ali Khalid Mohsin v. The State of Texas***

- **OFFENSE**: Aggravated Assault on a Family Member
- **COUNTY**: Williamson
- **C/A CASE No**. 03-22-00175-CR
- **DATE OF OPINION**: April 30 , 2024 **OPINION**: Justice Edward Smith
- **DISPOSITION**: Conviction Affirmed
- **TRIAL COURT**: 277th D/C
- **LAWYERS**: Aaron Spolin (Defense); Andrew Erwin (State)

(**Background Facts**): In the early morning of January 23, 2021, Appellant brought his wife, Yasmeen Wadiwalla, to Ascension Seton Northwest Hospital in Austin. She had three facial fractures and required surgery on her jaw, which had to be wired shut. Throughout the week following her admission, she offered changing accounts for the cause of her injuries, variously explaining that Appellant had ambushed her outside her apartment and punched her in the face, that she had tripped and fallen, or that she could not remember what had happened. In a sworn written statement made on January 27th, she attested, "[My] friend dropped me off at my apartment. While I was walking to the door[,] I looked around and saw Ali approach me. All I can remember was him saying where were you. After that I blacked out then just remember being in the grass, then his car." Officers arrested Appellant on February 9th. He was originally indicted for aggravated assault causing serious bodily injury; however, the charge was amended in a reindictment on February 10, 2022, to allege that he had used or exhibited a deadly weapon and that Wadiwalla was a person with whom he had or had previously had a dating relationship. On October 4, 2021, Wadiwalla signed a "Release of Obligation," stating that she no longer wished to pursue the charge against Appellant, that she had fallen on a sidewalk after having had too much to drink, and that she did not want Appellant "to be falsely charged with a felony when [she did not] remember what happened."

[§§ 294.11 **Hearsay & Confrontation / Exceptions / Forfeiture by Wrongdoing**]: Wadiwalla was served with a subpoena by the State twice in advance of trial: by email on February 17, 2022, and

in person at her apartment on March 7, 2022. Wadiwalla informed the State on multiple occasions that she would not cooperate with its investigation, appear at trial, or testify. Likewise, on recorded jail calls with Appellant, she complained of the State's persistence in attempting to secure her presence at trial, stated that she would rather go to jail for a year than testify, and told him that she was not going to return to her apartment but was going to stay with friends. Anticipating that she either would not appear or would appear and recant her sworn statement, which according to the State would render her testimony false -- and arguing that such a recantation would render her "unavailable" -- the State filed a "Brief on the Defendant's Sixth Amendment Right to Confrontation Forfeited by Wrongdoing," requesting that the trial court admit Wadiwalla's out-of-court statements at trial. A hearing was held on the State's request, at which the State offered testimony from Williamson County Sheriff's Office Investigator Pete Hughey, who reviewed jail calls between Appellant and Wadiwalla. He testified that Appellant "d[id] not want the victim to appear in court for trial" and had advised her to file an affidavit of non-prosecution and not to appear. Noting that there had been approximately 2,400 jail calls between Appellant and Wadiwalla since Appellant's arrest approximately a year earlier -- of which one or two were initiated by her and many of which she did not answer -- Hughey testified about the contents of a sample of fourteen. Hughes also testified concerning the history of abuse in Appellant and Wadiwalla's relationship. The trial court admitted a 2018 judgment in which Appellant was placed on deferred adjudication for 12 months for assaulting her. Prior to the start of jury selection on the day for which Wadiwalla had been subpoenaed, the trial court announced its conditional ruling: Wadiwalla would be found to be available and required to testify if she appeared, but if she did not appear, "she's unavailable, and her statement will come in." On appeal, Appellant contends that the trial court abused its discretion by granting the State's motion for forfeiture by wrongdoing and that the error "prejudiced [him] to the extent that the judgment should be reversed."

**Holding**: Under the Sixth Amendment, a criminal defendant has the right to be confronted with the witnesses against him. ***Pointer v. Texas***, 380 U.S. 400 (1965)(applying Sixth Amendment to states). The Amendment "contemplates that a witness who makes testimonial statements admitted against a defendant will ordinarily be present at trial for cross-examination, and that if the witness is unavailable, his prior testimony will be introduced only if the defendant had a prior opportunity to cross-examine him." ***Giles v. California***, 554 U.S. 353 (2008), citing ***Crawford v. Washington***, 541 U.S. 36, 68 (2004). *** The Confrontation Clause is, however, subject to certain "equitable exceptions," including the rule of forfeiture by wrongdoing, a doctrine of estoppel that allows for the admission of out-of-court statements over both confrontation and hearsay objections. ***Colone v. State***, 573 S.W.3d 249 (Tex.Cr.App. 2019)(see ℌℌ, Vol. 27, No. 17; 05/13/2019); ***Gonzalez v. State***, 195 S.W.3d 114 (Tex.Cr.App. 2006)(see ℌℌ, Vol. 14, No. 24; 06/21/2006). *** When, as here, the trial court does not issue findings of fact, we review the evidence in the light most favorable to the trial court's ruling and assume that the court made findings that are supported by the record. ***Brown v. State***, 618 S.W.3d 352 (Tex.Cr.App. 2021)(see ℌℌ, Vol. 29, No. 8; 03/08/2021). *** [Appellant] raises three arguments in support of his contention that the trial court abused its discretion by granting the State's motion for forfeiture by wrongdoing: (1) Wadiwalla was not "unavailable," (2) he did not engage in "wrongful conduct,"

and (3) his conduct did not cause Wadiwalla's unavailability. *** (**Unavailability**) [Appellant] argues that Wadiwalla was not unavailable because the State "failed to make a good-faith effort to obtain her presence at trial." *** Specifically, he appears to assert that the State should have sought to compel her presence through a writ of attachment. *** Considering [Appellant]'s threats and Wadiwalla's many assertions that she would not appear at trial, would not testify, and intended to stay with friends and not return to her apartment, the trial court could have reasonably concluded that any further attempts to contact her would have been futile and counterproductive. *** From this record, we conclude that the trial court did not abuse its discretion by finding that the State made a good-faith effort to secure Wadiwalla's presence at trial. *** (**Wrongful Conduct**) [Appellant] next argues that his conduct was not wrongful for purposes of Article 38.49. Although the Court of Criminal Appeals has not defined "wrongful conduct," it has -- as noted above -- quoted language from the New Mexico Supreme Court [in ***Brown***] recognizing that any "significant interference" with the interest in disclosing relevant information at trial "beyond the exercise of legal rights provided the defendant by the trial or constitution" may amount to wrongful conduct. *** The evidence reflects an extensive history of abuse and harassment by [Appellant] against Wadiwalla. *** Against this backdrop of abuse and manipulation, [Appellant], while incarcerated, engaged in a persistent and concerted campaign of intimidation, coercion, bribery, and threats, attempting -- over 2,400 calls and dozens of kiosk messages—to secure Wadiwalla's absence from trial. He repeatedly threatened to have his father take [Appellant]'s car from her if she appeared to testify and warned that she would go to jail if she came to court in the car. *** Consequently, while [Appellant] is correct that he did not threaten Wadiwalla with physical harm or directly prevent the State from learning of her whereabouts, his conduct nevertheless constituted wrongdoing under Article 38.49. Unlike ***Brown***, this is not a case in which, aside from past instances of family violence, the State "has not offered evidence that the defendant issued any threats or engaged in conduct otherwise designed to control" a witness. *** (**Causation**) Third, [Appellant] argues that "any alleged misconduct" did not cause Wadiwalla's unavailability and that "it is apparent that [she] had either reconciled or simply no longer wanted to press charges." *** As discussed above, the facts of this case are distinguishable from those of ***Brown***, in which the Court of Criminal Appeals held that the past commission of family violence-assault offenses alone is insufficient to prove causation where the State otherwise failed to show any conduct intended to control or influence the witness, there was no "logical connection" between the defendant's conduct and the witness's refusal to speak with law enforcement, and the State "did not point to any act by [defendant] that might have motivated" the witness's conduct. *** In the context of [Appellant]'s extensive history of domestic violence, he pleaded for Wadiwalla not to cooperate with investigators; pressured her to sign an affidavit of non-prosecution; erroneously assured her that she could not be arrested or made to testify; told her to insist on his innocence to police and the trial judge; offered her financial incentives not to appear at trial; and threatened to report her to CPS, turn their son against her, and have his father take [Appellant]'s car from her if she appeared. Throughout the jail calls and kiosk messages, [Appellant] alternated professions of his love with insults, demeaning language, and accusations of infidelity. *** Although [Appellant] asserts that Wadiwalla's "decision to not attend the [trial] was one made from an independent desire to no longer proceed with the prosecution and arguably from an independent wish to reconcile with [him]," the trial

court was the sole trier of fact and judge of credibility at the Article 38.49 hearing, and, to the extent the record supports alternative inferences regarding her unavailability to testify at trial, we must defer to the trial court's resolution of any conflicting inferences. *** Viewing the record in the light most favorable to the trial court's ruling, we conclude that the trial court did not abuse its discretion by granting the State's motion for forfeiture by wrongdoing.

[ 304.01 **Witnesses / Missing Witnesses / Writs of Attachment**]: Appellant contends that the trial court abused its discretion by denying his application for a writ of attachment. He argues that Wadiwalla was a material witness because she had made various statements that he did not assault her and that because she did not appear for trial, he "was deprived of any witnesses who could testify to the true nature and details surrounding the alleged offense."

**Holding**: In 2017, Article 24.111 of the Code of Criminal Procedure was amended to require a hearing to be held before issuance of a writ of attachment and to permit the trial judge to issue an attachment only if she determines that issuance is "in the best interest of justice." *** Although "best interest of justice" is not defined in the Code, the term "interests of justice" has been defined as both the "proper view of what is fair and right in a matter in which the decision-maker has been granted discretion," *Interests of Justice*, Black's Law Dictionary (11th ed. 2019), and "a judge's discretion to make a ruling in the interests of fairness and equity in a particular situation depending on the facts," ***Ex parte Pointer***, 492 S.W.3d 318 (Tex.Cr.App. 2016)(see , Vol. 24, No. 24; 06/13/2016). *** As the State correctly points out, [Appellant] does not address the "best interest of justice" or Article 24.111 in his brief. Although the trial court did not make an explicit finding with respect to its best-interest determination, we may infer the finding from its ruling. *** Further, the record supports a determination that granting [Appellant]'s request for a writ of attachment would not have been in the best interest of justice. As examined above, [Appellant] spent much of the time following his arrest attempting to procure Wadiwalla's absence from trial through threats, intimidation, and manipulation. His statements on jail calls with her reflect a belief that were she not to testify at trial, the charge against him would be dropped, and he would be released. Only after the trial court granted the State's motion for forfeiture by wrongdoing and ruled that Wadiwalla's statements would be admissible despite her unavailability did he file the writ application. In light of the abusive dynamics evident in their relationship and his repeated endeavors to influence her statements to law enforcement and prosecutors, allowing him to compel her presence at trial would have undermined the court's forfeiture ruling and created, at a minimum, a risk of tampering and perjury.

## Sidebars

(**Rob Daniel**) The Court of Appeals suggested that a trial court can determine it is in the "best interest of justice" not to issue a writ of attachment for a complainant whose location is known if the court finds the defendant might testify untruthfully at trial. In my view, this type of analysis is prohibited by ***Hemphill v. New York***, No. 20-637 (2022)("the role of the trial judge is not, for Confrontation Clause purposes, to weigh the reliability or credibility of testimonial hearsay evidence; it is to ensure that the Constitution's procedures for testing the reliability of that evidence are followed"). The Court of Appeals opinion, however, does not cite ***Hemphill***, possibly because it was not cited in either party's brief.

(**John G. Jasuta**) Of course it was a sham. He didn't want that lady testifying but doesn't he have the right to subpoena her, even during trial?

(**David A. Schulman**) I agree with Rob about the entire discussion about the "interests of justice," especially because it was clearly not part of the trial court's rulings. That notwithstanding, it appears to me that, if Appellant and/or the defense team really wanted the lady to testify, they should have obtained a subpoena before trial.