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IN THE CIRCUIT COURT OF BERKELEY COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA

v.

CRIMINAL ACTION NO. 14-F-220
Judge Yoder

DENNIS E. STREETS,
Defendant.

ORDER GRANTING DEFENDANT'S MOTION FOR NEW TRIAL

This matter comes on before the Court upon the papers and proceedings formerly read and had herein; upon the Defendant's conviction by jury verdict on August 28, 2015, for the felony offense of embezzlement; upon the Defendant's Motion for New Trial or alternatively Motion for Judgment of Acquittal Notwithstanding the Verdict of the Jury and Supplement thereto, timely filed herein; upon the State's Objection, and Supplement to State's Objection; upon the arguments of the State and Defendant before the Court on October 29, 2015; upon the proposed orders of each party filed herein; upon the appearance of the State of West Virginia by Timothy D. Helman, Esq., Assistant Prosecuting Attorney for Berkeley County, West Virginia; and upon the appearance of the Defendant, in person and by counsel, B. Craig Manford.

The Court has carefully reviewed the submitted proposed orders of the parties; the Motion for New Trial and Supplement; the State's Objection and Supplement; the transcript of the State's cross-examination of the Defendant and the State's closing argument had at trial; and the law cited to the Court.

The Defendant raises two errors of law in his Motion for New Trial. First, the Defendant argues that the State made improper and prejudicial comments in its closing argument by specifically drawing into issue the Defendant's character arguing that since the Defendant defaulted on his mortgage by "walking away" from his obligation to pay, he was possessed of bad

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character, implying that he was predisposed to commit the crime in question.

Second, the Defendant argues that the Court committed error by failing to direct a verdict in favor of the Defendant at the close of the evidence and alternatively that the jury's verdict was contrary to the evidence presented.

The State responds by arguing that the Defendant "opened the door" and placed his character into issue by testifying that he simply walked away from his mortgage; that the State was legitimately allowed to attack the Defendant's character to the jury based upon his testimony; and that even if the State made improper remarks in its closing, the Defendant failed to object and such error is waived.

The particular comments in question come from the State's closing argument and include the following:

Closing Argument of The State

The motive. You know, we talked about his motive that he was in debt. Not just in debt. He was in debt up to his neck with \$38,000, six different judgments. He'd been foreclosed on, evicted. I believe three times we have records of three different evictions and his wages were being garnished. You know, everybody has financial problems at one point and I wouldn't hold that against him but it is a motive and could cause somebody under extreme financial pressure to do something you wouldn't normally expect of them. Ladies and gentlemen, I would argue that when he got up there and started explaining some of these records if he was asked about his home foreclosure and he just said, you know, I'm sorry it's tough financial times I couldn't afford the payments it went into foreclosure you know what I can't fault the guy for that. That happens to good people and I'd have probably just left it at that. But do you recall his explanation of the home foreclosure? That didn't sound right to me he said he just walked away from it he said he walked away from it because of the neighbors across the street. It was a drug house across the street and he felt justified walking away, and further he said that he had been approved for another home. I can't recall if it was building or purchasing some other home in Back Creek. He had gotten loan approval for it to go there. So his testimony was he

walked away from his house because he didn't like what was going on across the street and he had a better situation somewhere else. Is that really believable? And then the other situation didn't work out so he has to rent instead. He doesn't just go back to the house he's at. Well, I think ladies and gentlemen, he wasn't being completely honest about that. But let's assume that he was being honest about that don't you think that gives a little bit of insight about his character? If the story is as he described that he just walked away from it because he didn't like the situation he felt justified in doing that what else might he feel justified in doing?

Transcript Page 67, Line 12 - Page 68, Line 23.

And again I don't hold that against him it happens to a lot of honest people but he was dishonest about this when he testified. But consider this - - all right, let's give him the benefit of the doubt that when he says he walked away from all three of those situations and he says he just walked away and you want to believe well that means that you're then going to trust the testimony of somebody who entered into a contract and decided he was justified in walking away from it and defaulting on his obligations just because he felt justified not because of his financial troubles. He said it was because he didn't like the neighbors across the street. It was because Pittsnogle was a slumlord. And remember his testimony of Monique Milas he said oh we could afford the payment it just kind of made things tough so we left. All right. He feels justified in doing that. What else might he feel justified in doing?

Transcript Page 81, Lines 1-16.

404(b) Evidence

The State previously filed a notice of intent to use Rule 404(b) evidence in this matter, to-wit, that the Defendant was in dire financial straits at the time of the alleged offense as he had multiple judgments against him resulting in garnishment of his wages from the Berkeley County Sheriff's Department, which agency is the victim herein. The State's purported purpose for seeking admission of this evidence was to prove the Defendant possessed a motive to steal the guns in question. The State sought to introduce certified copies of the Defendant's judgments or abstracts thereof and that the Defendant had defaulted upon his mortgage.

A pre-trial hearing was had wherein the Court conducted the appropriate analysis under *State v. McGinnis*, and found that the evidence offered by the State was offered to establish a possible motive for the thefts in question rather than prove the bad character of the Defendant. The Court also found that if the evidence was so offered, then its probative value was not outweighed by its prejudicial effect upon the Defendant.

The Court, nevertheless, noted its reservations in allowing the subject evidence as it was afraid the trial would turn into a proceeding resting primarily upon the Defendant's financial problems rather than upon his guilt or innocence. In retrospect, the Court believes that it may have committed error by even allowing the evidence in as direct evidence, because the case turned into a sideshow on the Defendant's debts and the reasons for the debts. The Court questions how far down this road the State should be allowed to go in using a defendant's debts to try to prove that he or she had a motive for a crime. Are we going to start looking at credit reports to show that a person accused of committing a theft had a motive for the theft?

Purpose of Rule Excluding Prior Bad Act Evidence

In *State v. McDaniel*, 211 W.Va. 9, 560 S.E.2d 484 (2001), the Supreme Court of Appeals stated:

Typically, evidence of other uncharged crimes is not admissible against a defendant in a criminal case. This general exclusion is to . . . prevent the conviction of an accused for one crime by the use of evidence that he has committed other crimes, and to preclude the inference that because he had committed other crimes previously, he was more liable to commit the crime for which he is presently indicted and being tried.

State v. Thomas, 157 W.Va. 640, 654, 203 S.E.2d 445 (1974).

In Syllabus Point 1, *State v. Edward Charles L.*, 183 W.Va. 641, 398 S.E.2d 123 (1990), the Court held that:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Citing W. Va. R. Evid. 404(b).

Analysis

To the extent that the State's closing argument went to point out the Defendant's financial condition which provided a possible motive to commit the thefts in question and to impeach or rebut the credibility of his testimony, no improper comments were made. This, however, was not the end of the State's comments. The State went on to comment upon the Defendant's character directly and indirectly:

Ladies and gentlemen, I would argue that when he got up there and started explaining some of these records if he was asked about his home foreclosure and he just said, you know, I'm sorry it's tough financial times I couldn't afford the payments it went into foreclosure you know what I can't fault the guy for that. That happens to good people and I'd have probably just left it at that. But do you recall his explanation of the home foreclosure? That didn't sound right to me he said he just walked away from it he said he walked away from it because of the neighbors across the street.

Clearly the State insinuated that the Defendant was not a good person because his explanation of why his house was foreclosed upon was not simply because he was going through tough financial times. The State went on to comment that the Defendant's reasons for walking away from his mortgage weren't "right." These comments clearly go past the scope of the State's intended purpose for admission of this evidence, to-wit, motive to steal, and are improper. Had the State simply argued that for whatever reason the Defendant was in tough financial straits and clearly had a motive to steal then no harm could have been attributed to the Defendant.

Subsequently, the State went even further in its comments regarding the Defendant's

character:

But let's assume that he was being honest about that don't you think that gives a little bit of insight about his character? If the story is as he described that he just walked away from it because he didn't like the situation he felt justified in doing that what else might he feel justified in doing?

This comment strikes at the heart of the prohibition against proving guilt by use of the prior character, bad acts or misconduct of the Defendant, i.e., proving the bad character of a person in order to show that he acted in conformity therewith in the instant offense. The State even used the word "character" in its argument.

In *State v. Rollins*, 233 W.Va. 715, 760 S.E.2d 529 (2014), the West Virginia Supreme Court set forth the applicable standard to apply regarding improper comments by a prosecuting attorney during argument:

When reviewing the propriety of remarks made to the jury by the prosecutor, the Court has held that "[a] judgment of conviction will not be set aside because of improper remarks made by a prosecuting attorney to a jury which do not clearly prejudice the accused or result in manifest injustice. Syl. Pt. 5, *State v. Sugg*, 193 W.Va. 388, 456 S.E.2d 469 (1995). See also syl. pt. 1, *State v. Dunn*, 162 W.Va. 63, 246 S.E.2d 245 (1978) (A judgment of conviction will not be reversed because of improper remarks by a prosecuting attorney in his opening statement to a jury which do not clearly prejudice the accused or result in manifest injustice.); *State v. Coulter*, 169 W.Va. 526, 530, 288 S.E.2d 819, 821 (1982) (applying syllabus point 1 of *Dunn* to an evaluation of a prosecuting attorney's closing argument).

The Court finds that the improper comments made by the State were clearly prejudicial to the Defendant. This finding does not, however, resolve the issue.

The Defendant did not note any objection to the State's improper comments and the State argues such objection is now waived. "If either the prosecutor or defense counsel believes the other has made improper remarks to the jury, a timely objection should be made coupled with a request to the court to instruct the jury to disregard the remarks." Syl. Pt. 5, in part, *State v.*

Grubbs, 178 W.Va. 811, 364 S.E.2d 824 (1987). See also *Coulter*, 169 W.Va. at 530, 288 S.E.2d at 821 (1982) (“In order to take advantage of remarks made during an opening statement or closing argument which are considered improper an objection must be made and counsel must request the court to instruct the jury to disregard them.”).

The Defendant in rebuttal argues that the improper comments of the State were so egregious that even if an objection had been timely made and the Court had ordered the jury not to consider the same, the damage or “taint” had already occurred and could not have been corrected by any corrective measures the Court might employ. The Defendant also argues the prosecution’s improper comments constituted plain error.

To trigger the plain error doctrine there must be (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) seriously affects the fairness, integrity, or public reputation of the judicial proceedings. Syl. Pt. 7, *State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995).

The improper comments made by the State in its closing appear to the Court to constitute plain error. First, there was obviously an error in that the prior bad character or misconduct of the Defendant was used not only to prove motive, but clearly to insinuate that he acted in conformity with that bad character by committing the instant offense. In fact, the whole tenor of the trial became one of an attack upon the Defendant’s mismanagement of his financial affairs.¹

Second, the error was plain, undeniable, and well recognized at law. Third, the Defendant had a substantial right against the use of character evidence against him to prove guilt as prohibited by Rule 404(a) of the West Virginia Rules of Evidence and therefore injection by the State of the

¹ The Court notes that there were additional prejudicial comments made by the State during cross-examination and closing argument beyond those cited above by the Defendant, e.g.: “*Well, what’s right about that you just walked away from your mortgage payment ‘cause you didn’t like the neighborhood?*” Transcript Page 54, Lines 10-12; “*Consider whether or not he’s being honest and whether or not that you think this is proper that he claims that he walked away from his home and let it be in a foreclosure.*” Transcript Page 79, Line 24 – Page 80, Lines 1-3.

Defendant's bad character or prior misconduct (not just for motive) substantially prejudiced and affected that right.

Finally, the State's improper comments, in the Court's opinion, did seriously affect the fairness, integrity, and public reputation of the judicial proceedings.

Although the Court believes that there was substantial evidence against the Defendant without the State's improper comments for a jury to convict him of the offense, the Court cannot say beyond a reasonable doubt that the Defendant would have been convicted if such comments had not been made. On this point the Court notes that the statements about debts and the judgments against the Defendant were not introduced as direct evidence in a prior trial of this matter involving two counts against the Defendant. In that trial, the jury acquitted the Defendant of one count and hung on the instant count. So it does appear that these statements could have been prejudicial and very well made a difference in the jury's ruling.

As to the State's argument that the Defendant "opened the door" to allow the State to introduce character evidence, the same is misplaced. The Defendant testified and presented explanations in response to the State's barrage of financial misconduct adduced against him. The Court finds that the Defendant's attempt to rehabilitate himself regarding the possibly prejudicial 404(b) evidence introduced against him does not fall under Rule 404(a)(2)(A)², as the State argues. The State was free to comment upon the veracity of the Defendant's explanations, which it did, however, the State was not allowed to comment upon his character in doing so.

In *Bailey v. McDonald*, 204 W.Va. 352, 512 S.E.2d 865 (1998), the West Virginia Supreme Court stated: "This Court has previously said that "[w]hen a case involving conflicting

² "[A] defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;" W. Va. R. Evid. 404(a)(2)(A).

testimony and circumstances has been fairly tried, under proper instructions, the verdict of the jury will not be set aside unless plainly contrary to the weight of the evidence or without sufficient evidence to support it.” Syl. Pt. 4, *Laslo v. Griffith*, 143 W.Va. 469, 102 S.E.2d 894 (1958). Syl. Pt. 1, *Wilkinson v. Bowser*, 199 W.Va. 92, 483 S.E.2d (1996).

Based upon all of the foregoing, the Court finds that this matter was not “fairly tried” as the State’s comments in closing argument were improper, constituted plain error, and denied the Defendant a fair trial.

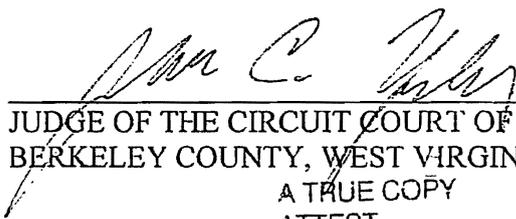
Lastly, given the Court’s findings and ruling herein, it need not address the second assignment of error raised by the Defendant in his Motion for New Trial.

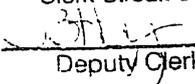
Accordingly, it is ADJUDGED and ORDERED that the Defendant’s conviction for felony embezzlement be and is hereby OVERTURNED and SET ASIDE and the Defendant is hereby granted a new trial upon Count One of the Indictment.

The sentencing hearing set on November 25, 2015, is hereby cancelled. A status hearing shall be held on December 17, 2015, at 1:00 p.m.

The Clerk shall transmit attested copies of this Order to counsel of record.

Entered this 24th day of November, 2015.



JUDGE OF THE CIRCUIT COURT OF
BERKELEY COUNTY, WEST VIRGINIA
A TRUE COPY
ATTEST
Virginia M. Sine
Clerk Circuit Court
By: 
Deputy Clerk