

FILE COPY

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

DOCKET No. 18-0731

IN RE: STATE OF WV

Plaintiff below,

Respondent herein

Appeal from a Final Order of the
Circuit Court of Nicholas County
(17-F-29)

v.

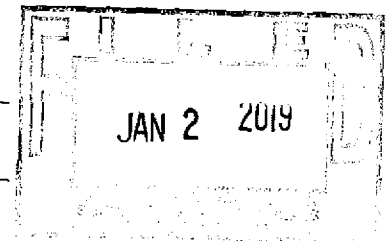
JAMIA DAWN COLEMAN

Defendant below,

Petitioner herein

**DO NOT REMOVE
FROM FILE**

Petitioner's Brief



Counsel for the Petitioner, Jamia Dawn Coleman

James R. Milam II (WV Bar No. 7899)

James R. Milam II Attorney at Law, PLLC

701 Church Street

Summersville, WV 26651

Phone: (304) 872-7575

Facsimile: (304) 872-1233

Email: pkmilam@hotmail.com

TABLE OF CONTENTS

ASSIGNMENTS OF ERROR	4
STATEMENT OF THE CASE.....	4
SUMMARY OF ARGUMENT	5
STATEMENT REGARDING ORAL ARGUMENT AND DECISION	6
ARGUMENT	6
I. The Circuit Court erred by instructing the jury while the Defendant was not present in the courtroom in violation of the Defendant's right to be present during all critical stages of the trial.	6
II. The Circuit Court abused its discretion by denying the Defendant's right to call witnesses on her own behalf in support of her alibi defense.....	8
III. The Circuit Court improperly concluded, in denying the motion for directed verdict and motion for acquittal, that the State introduced evidence to meet each of the elements of the felony offense of Embezzlement.....	11
CONCLUSION	13
CERTIFICATE OF SERVICE	15

TABLE OF AUTHORITIES

Cases

<i>Chamber v. Mississippi</i> , 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973).	10
<i>Shabazz v. West Virginia</i> , 529 U.S. 1113, 120 S.Ct. 1971, 146 L.Ed.2d 801 (2000).....	6
<i>State v. Boyd</i> , 160 W.Va. 234, 246, 233 S.E.2d 710, 719 (1977)	7
<i>State v. Brown</i> , 210 W.Va. 14, 522 S.E.2d 390 (2001)	6
<i>State v. Frasher</i> , 164 W.Va. 572, 265 S.E.2d 43 (1980)	12
<i>State v. Miller</i> , 197 W.Va. 588, 601, 476 S.E.2d 535, 548 (1996).....	7
<i>State v. Moyer</i> , 58 W. Va. 146, 52 S.E. 30 (1905)	12
<i>State v. Shabazz</i> , 206 W.Va. 555, 557, 526 S.E.2d 521, 523 (1999), <i>cert denied</i>	6
Syl Pt. 4, <i>State v. Bowyer</i> , 143 W.Va. 302, 101 S.E.2d 243 (1957).....	13
Syl. Pt 2, <i>State v. Tiller</i> , 168 W.Va. 522, 285 S.E.2d 371 (1981)	6
Syl. Pt. 3, <i>State v. Guthrie</i> , 194 W.Va. 657, 461 S.E.2d 163 (1995).....	11
Syl. Pt. 6, in part, <i>State v. Boyd</i> , 160 W.Va. 234, 233 S.E.2d 710 (1977).....	8
<i>U.S. v. Rolle</i> , 204 F.3d 133, 136 (4 th Cir. 2000)	7

Statutes

W.Va. Code §61-3-20	4
---------------------------	---

Other Authorities

Trial tr. vol. 1, 197:23 - 198:10	12
Trial tr. vol. 1, 82:22-24	6

Rules

Rule 12.1 of the West Virginia Rules of Criminal Procedure.....	8
---	---

Constitutional Provisions

Article III, Section 14, West Virginia Constitution.....	8
Fifth Amendment, U.S. Constitution	7
Sixth Amendment, U.S. Constitution	7

ASSIGNMENTS OF ERROR

- I. The Court instructed the jury while the Defendant was not present in the courtroom in violation of the Defendant's right to be present during all critical stages of the trial.**
- II. The Circuit Court abused its discretion by denying the Defendant's right to call witnesses in support of her alibi defense.**
- III. The Circuit Court erroneously concluded, in denying the motion for acquittal, that the State introduced evidence to meet each of the elements of the felony offense of Embezzlement.**

STATEMENT OF THE CASE

The Petitioner, Jamia Dawn Coleman, was indicted by the Nicholas County Grand Jury on May 9, 2017 of one count of the felony offense of Embezzlement in violation of W.Va. Code §61-3-20. *App.*, p. 6. The Petitioner was an employee of Long Point Grille & Bar, and worked as a waitress. The State alleged that the Petitioner knowingly removed various food and drink items from 1582 customer orders after the bill was printed, and embezzled the value of each of those items from her employer.

A week before the trial began, the Defendant served upon the State a Notice of Alibi Defense. *App.*, pg. 30. The notice indicated that the Defendant would introduce evidence through her mother-in-law that she was in the State of Virginia during certain dates she was alleged to have committed some of these transactions. Days prior to the trial, the Trial Court ruled that the Notice of Alibi was not in conformity with Rule 12.1 of the West Virginia Rules of

Criminal Procedure, and prohibited the Defendant from calling any witnesses in support of her alibi defense. *App.*, p. 34.

The jury trial began on March 20, 2018. During voir dire, while the parties were outside the courtroom making their strikes, the Court instructed the jury concerning the six stages of the trial and how to weigh witness testimony concerning credibility. *App.*, p. 35. After a two-day jury trial the Petitioner was convicted of the one count of Embezzlement as contained in the indictment. *App.*, p. 41. Subsequently, the Petitioner filed a motion to set aside the verdict on various grounds. *App.*, p. 44. The motion was denied by the Circuit Court by way of written order. *App.*, p. 51. The Petitioner was thereafter sentenced by the Court to 1-5 years of incarceration which was suspended. The Petitioner was placed on 5 years of supervised probation with 30 days of actual incarceration to be served and 6 months of home confinement. *App.*, p. 55.

SUMMARY OF ARGUMENT

The Petitioner believes she was not afforded a fair trial, as a constitutional matter, because she was not present in the courtroom when the Circuit Court instructed the jury concerning issues at the very heart of the trial. Furthermore, the Petitioner believes she was wrongfully limited by the Circuit Court in presenting her alibi defense, allowing the State to obtain a conviction without strict proof of each of the elements of the felony offense of Embezzlement.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner submits that oral argument is necessary upon this appeal under Rule 19 of the Revised Rules of Appellate Procedure, as this appeal involves claims of insufficient evidence and a verdict not supported by the evidence, and further involves claims involving the assignment of error in the application of settled law, and unsustainable exercise of discretion. Thus, the Petitioner prays that this matter be scheduled for Rule 19 oral argument upon this appeal.

ARGUMENT

- I. The Circuit Court erred by instructing the jury while the Defendant was not present in the courtroom in violation of the Defendant's right to be present during all critical stages of the trial.**

This Court has held in *State v. Brown*, 210 W.Va. 14, 522 S.E.2d 390 (2001) that:

The right to be present is not a right to be present at every moment, but a right to be present at all "critical stages" in a criminal proceeding. *State v. Shabazz*, 206 W.Va. 555, 557, 526 S.E.2d 521, 523 (1999), *cert denied*, *Shabazz v. West Virginia*, 529 U.S. 1113, 120 S.Ct. 1971, 146 L.Ed.2d 801 (2000). "A critical stage of a criminal proceeding is where the defendant's right to a fair trial will be affected." Syl. Pt 2, *State v. Tiller*, 168 W.Va. 522, 285 S.E.2d 371 (1981).

It is clear from the record that State of West Virginia and the Defendant exited the courtroom to begin making the selection of jurors they each wished to strike. After exiting the courtroom, the Court stated "I'd like to try to save some time by talking about – give you some instructions while they're considering their strikes." Trial tr. vol. 1, 82:22-24. The Court then proceeded to instruct the jury as to the six basic stages of the trial; jury selection, opening

statements, introduction of evidence, instruction of the law by the Court, final arguments of counsel, and lastly jury deliberation.

Most importantly, the Court then began to instruct the jury pool as to the credibility of witnesses and the weight of the evidence. During the Court's instruction in determining the credit and weight the jury will give to any witness, the record clearly indicates that the Defendant and counsel re-entered the courtroom. *App.*, 38. At a point later, the record indicates the complaining officer, D.P. White, and the attorneys for the State returned to the courtroom.

The Petitioner contends that the giving of jury instruction during the voir dire process is a critical stage of the criminal proceeding and that the court erred in instructing the jury while she was not present in the courtroom. Specifically, instructing the jury as to the weight and credibility of witness testimony was essential to the Petitioner and her counsel to gauge the jury's reactions or mannerisms concerning their understanding of the way the witnesses were to be viewed by the jurors. Additionally, the Petitioner's decision to testify at trial had not yet been made.

"The Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fifth Amendment together guarantee a defendant charged with a felony the right to be present at all critical stages of his trial. As a constitutional matter, a defendant thus has the right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." *U.S. v. Rolle*, 204 F.3d 133, 136 (4th Cir. 2000).

This Court has determined that "[a] critical stage in the criminal proceeding is one where the defendant's right to a fair trial is affected." *State v. Boyd*, 160 W.Va. 234, 246, 233 S.E.2d 710, 719 (1977). Voir dire is a critical stage of a trial because it is the "primary means by which

a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice [.]” *State v. Miller*, 197 W.Va. 588, 601, 476 S.E.2d 535, 548 (1996).

Having established that voir dire is a critical stage of the trial and that the Petitioner “has a right under Article III, Section 14 of the West Virginia Constitution to be present at all critical stages in the criminal proceeding; and when he is not, the State is required to prove beyond a reasonable doubt that what transpired in his absence was not harmless.” Syl. Pt. 6, in part, *State v. Boyd*, 160 W.Va. 234, 233 S.E.2d 710 (1977).

Here the State is unable to establish, beyond a reasonable doubt, that the Petitioner's absence was not harmless because the State was also absent from the courtroom. Such absence by the State and the Defendant precludes any knowledge of the jurors' reactions or mannerisms to indicate how the Court's instructions affected their ability to fairly serve as jurors and to determine the weight and credibility to give to the witnesses who appeared before them. Furthermore, the jury was unable to evaluate the Petitioner during this time to determine if her reactions and mannerisms may aid them in their decision-making process.

II. The Circuit Court abused its discretion by denying the Defendant's right to call witnesses on her own behalf in support of her alibi defense.

At a pretrial hearing held on March 16, 2018, the Court granted the State's motion to prevent the Defendant from bringing forth any evidence regarding the Defendant's alibi defense. The Court found that the Notice of Alibi Defense was untimely filed and not in accordance with Rule 12.1 of the West Virginia Rules of Criminal Procedure.¹ Counsel for the Defendant objected to the Court's ruling that only the Defendant could testify to her alibi and no witnesses could be called in support of her alibi defense. In objecting, counsel indicated to the Court that

¹ Counsel for the State filed a Reciprocal Motion for Discovery on June 8, 2017.

the State alleged that over an eleven-month span that the Defendant had altered more than 1500 transactions. Because of this volume of dates and transactions, counsel indicated to the Court that he had only recently discovered that the Defendant could produce evidence to show she was not present in the state of West Virginia on at least one of the alleged occasions of criminal conduct. Counsel also stated to the Court that he had only discovered the evidence on Friday March 9, 2018 and provided notice of the alibi defense to the State as soon as he could after the discovery of the evidence in preparation for trial.²

The Court, without making any findings of fact, excluded any witness testimony concerning alibi except for the testimony of the Defendant.³ The Court did not inquire as to whether the State had an opportunity to interview the alibi witness, or if there was any allegation of unfair surprise.⁴ However, the Court chose to employ the strictest sanction available, which was to exclude the testimony.

The Petitioner believes the Court abused its discretion when it prohibited the Defendant from putting forth an alibi defense at trial through witness testimony, infringing upon her right not to testify if she wanted the jury to hear any evidence supporting her alibi defense. Such sanctions should only be used when there is some evidence of intent to circumvent the discovery rules or absent good cause. The Court failed to recognize that the State continued to supplement evidence to the Defendant for a significant period of time after the Rule 12.1 time limits had

² Counsel for the Defendant filed a Notice of Alibi Defense on March 13, 2018. Courts were closed on Monday, March 12, 2018 because of a snow storm.

³ The Notice of Alibi stated that the defense would introduce evidence at trial that the Defendant was in Stuart, Virginia visiting her mother-in-law, Ellen Brewster, on the dates of December 11, 12 and 13, 2015, and January 29, 30 and 21, 2016. The name of the witness and telephone number were also provided in the Defendant's witness list filed at the same time.

⁴ The State did telephonically interview the alibi witness prior to the hearing wherein the State moved to prohibit the alibi defense.

passed.⁵ Additionally, the Court refused to impose sanctions to limit the State's evidence after a formal motion had been filed by the Defendant because of the State's failure to supply a complete record of the transactions during the alleged time period.⁶

The Petitioner believes this case to be one of first impression before this Court. The question of exclusion of an alibi defense has previously been reviewed in cases concerning a very short period of time, primary consisting of one specific act. Here, the alleged conduct spans an eleven-month time period and concerns more than 1500 separate transactions. The trial Court concluded that the amount of data was so voluminous that the State was permitted to introduce summary reports of the transactions at trial, over the objection of the Defendant, rather than the original records. To assume that the Defendant should have known her whereabouts on each of those various dates during that eleven-month period puts a very unfair burden upon the Defendant.⁷ Absent a showing of strategic plan to unfairly surprise the State with this alibi defense, the Court's sanction to exclude all witnesses other than the Defendant denied the Defendant her Constitutional right to call witnesses in her own defense. The sanction of excluding evidence should only be used in the most extreme circumstances because the purpose of the trial is to search for the truth. The search for the truth necessitates that the parties be permitted to introduce evidence that would aid the trier of fact in ascertaining that truth. "Where constitutional rights directly affecting the ascertainment of guilt are implicated, [a state evidentiary rule] may not be applied mechanically to defeat the ends of justice." *Chamber v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973). Here, the ends of

⁵ The State did not provide complete records alleging the dates of the criminal activity until the August 9, 2017 hearing by hand delivering a flash drive to counsel for the Defendant more than two months after the reciprocal discovery request was made.

⁶ See July 13, 2017 Pretrial Hearing Order.

⁷ The potential alibi defense was not discovered until the Defendant happened across some dated photographs on her mobile phone showing her at her mother-in-law's residence on the dates specified in the notice of alibi defense.

justice were defeated because in its summary report, the State introduced evidence that the Defendant had altered transactions on dates she was clearly out of State. Without testifying herself, the Defendant was precluded from introducing evidence from witnesses to rebut the evidence because of the Court's sanctions. This preclusion only served to defeat the defeat the interests of justice and violated the due process rights of the Defendant.

III. The Circuit Court improperly concluded, in denying the motion for directed verdict and motion for acquittal, that the State introduced evidence to meet each of the elements of the felony offense of Embezzlement.

“A criminal defendant challenging the sufficiency of the evidence to support a conviction takes on a heavy burden. An appellate court must review all the evidence, whether direct or circumstantial, in the light most favorable to the prosecution and must credit all inferences and credibility assessments that the jury might have drawn in favor of the prosecution. The evidence need not be inconsistent with every conclusion save that of guilt so long as the jury can find guilt beyond a reasonable doubt. Credibility determinations are for a jury and not an appellate court. **Finally, a jury verdict should be set aside only when the record contains no evidence, regardless of how it is weighed, from which the jury could find guilt beyond a reasonable doubt. To the extent that our prior rulings are inconsistent, they are expressly overruled.**” Syl. Pt. 3, *State v. Guthrie*, 194 W.Va. 657, 461 S.E.2d 163 (1995)

Subsequent to the trial, the Defendant filed a motion erroneously entitled “Motion to Set Aside Jury Verdict.”⁸ In the Motion the Defendant alleged that the State had failed to prove beyond a reasonable doubt all the elements of the felony offense of Embezzlement. Specifically, the Defendant alleged that the State failed to introduce any evidence concerning the element of intent as required in the Court's instructions that the Defendant performed the alleged acts “with

⁸ The Circuit Court, in its order, correctly treated the motion as a “Motion for Judgment of Acquittal”

the intent to permanently deprive Long Point Grille and Bar, LLC of the use and possession thereof.” The basis for the motion was that when asked upon cross examination as to how many of the 1582 alleged acts committed by the Defendant were done so improperly, the alleged victim could not identify one specific instance wherein the Defendant’s conduct was improper. Trial tr. vol. 1, 197:23-198:10. The State only presented two other witnesses at trial, the investigating police officer and an accountant hired by the State to compile reports of the numerous transactions. At trial, both witnesses testified that they received all of their information from the alleged victim and had no independent knowledge of the alleged acts. Therefore, only the alleged victim could testify as to whether or not any of the alterations were legitimate or improper. When specifically asked, she could not identify one specific instance either way.

In its order dated April 26, 2018, the Court concluded that “It can also be reasonably inferred that the reason the Defendant altered the checks was her intention to keep the money for herself.” In doing so, the Circuit Court improperly determined that the State need only introduce an inference concerning the element of intent to commit Embezzlement. Furthermore, the Court did not identify any specific evidence introduced at trial to support this conclusion. The State must prove that it was done with the intent to permanently deprive the owner thereof. *State v. Frasher*, 164 W.Va. 572, 265 S.E.2d 43 (1980). The mere detention of money belonging to another, without a fraudulent intent to deprive the owner of his property, does not constitute Embezzlement. *State v. Moyer*, 58 W. Va. 146, 52 S.E. 30 (1905). The intention to permanently the owner of his or her property is an essential element of Embezzlement and must be proven beyond a reasonable doubt.

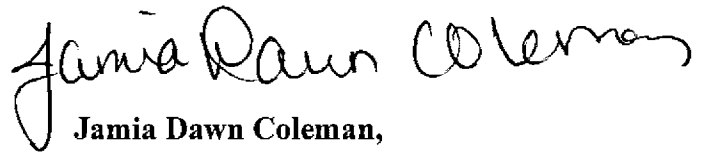
The State failed to introduce any evidence, or elicit any testimony during redirect examination of the witness, to rebut what the alleged victim had stated during her cross examination that she could not identify if the Defendant had committed these acts with the intent to deprive her of her money. Therefore, the only evidence before the jury was that the alleged victim of the embezzlement could not identify any specific instance of the Defendant intending to permanently deprive her of her money. This fails to meet the necessary burden of proof beyond a reasonable doubt because of a failure to introduce any evidence concerning intent. The Court could only reach the conclusion that a reasonable inference can be made if there is, in the light most favorable to the State, some evidence to support that conclusion. In the instant case, there was no such evidence presented to the jury.

When a jury finds a defendant guilty of a crime where there is no evidence satisfying an essential element of the offense, “or the evidence is plainly insufficient to warrant such finding by the jury, such verdict should be set aside and a new trial awarded.” Syl Pt. 4, *State v. Bowyer*, 143 W.Va. 302, 101 S.E.2d 243 (1957).

CONCLUSION

The Circuit Court of Nicholas County denied the Petitioner a fair trial by instructing the jury outside her presence, thus committing plain error. The Petitioner’s rights to a fair trial were further violated when the Trial Court prohibited her from calling witnesses to support her alibi defense. Such a harsh sanction, considering the specific circumstances in this case, was unwarranted and should have only been used in the most extreme of circumstances. This sanction by the Trial Court was an abuse of discretion. Finally, the Trial Court was clearly erroneous when it concluded that the State had met its burden of proof for each of the specific

elements of the felony offense of Embezzlement. For these reasons your Petitioner prays that this Court set aside her conviction in the Circuit Court of Nicholas County and award her a new trial.


Jamia Dawn Coleman,

By Counsel.