IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH	:	NO. 02-11,985
	:	
vs.	:	
	:	
OLIVER WALKER,	:	
Defendant	:	

SUPPLEMENTAL OPINION IN SUPPORT OF ORDER OF JANUARY 22, 2004
IN COMPLIANCE WITH RULE 1925(A) OF
THE RULES OF APPELLATE PROCEDURE

Defendant appeals from this Court's Judgment of Sentence entered January 22, 2004, which imposed sentence following his conviction of burglary and related charges.[1] When Defendant failed to file a Statement of Matters Complained of on Appeal in spite of this Court's Order of February 17, 2004, directing such, this Court issued, on March 9, 2004, an Opinion noting the lack of a statement and indicating nothing would be addressed. Defendant then filed, on March 11, 2004, his Statement of Matters Complained of on Appeal. Several weeks later the Court was made aware by defense counsel that the statement had been filed,[2] and requested to issue an opinion addressing the issues raised therein. To avoid any further claims of ineffective assistance of counsel, the Court has chosen to issue this Supplemental Opinion addressing the issues raised by Defendant on appeal.

First, Defendant contends the Court erred in denying his motion for a mistrial after the Commonwealth "made a reference to the 'Public Defender's Office'." The Court notes the reference was to the "defender's office", not the "public defender's office", N.T., October 28, 2003 at 36, and after reviewing the transcript, the Court believes it was correct in denying the motion for mistrial. The reference did not so prejudice Defendant as to deny him a fair trial. See Commonwealth v. Walls, 396 A.2d 419 (Pa. Super. 1978), citing Commonwealth v.

1 By Order dated February 9, 2004, the sentence was amended to consider that Count 3 should have merged with Count 1 for sentencing purposes.

2 A copy of the Statement was not served on the undersigned, contrary to Pa.R.A.P. 1925(b).

Garcia, 387 A.2d 46 (Pa. 1978). Since the complainant had died after the preliminary hearing but before trial, the Commonwealth introduced his preliminary hearing testimony by reading it into the trial record. In explaining who was speaking, the assistant district attorney stated as follows:

> "… just as a point of clarification for the members of the jury, there are four individuals who were throughout the transcript, there is Mr. Mitchell, who was the assistant district attorney who actually conducted the hearing on behalf of the Commonwealth, Miss Nicole Spring, who is from the defenders office who represented Mr. Walker at this preliminary hearing, Mr. Carn and then Mr. Cero."

N.T., October 28, 2003 at 36. Although defense counsel asked for a sidebar conference as soon as the assistant district attorney was finished speaking (he continued with several other sentences in his explanation to the jury), nothing was said to the jury to alert them to the fact defense counsel was objecting to the reference to the "defender's office" and the Court believes it was most likely not even noticed. Even if noticed, the reference itself is somewhat obscure, and the Court fails to see how such could have deprived Defendant of a fair trial. A mistrial was therefore not required.

Next, Defendant contends the Court erred in admitting testimony by an assistant district attorney respecting certain statements allegedly made by Defendant. Specifically, Defendant objects to the testimony from assistant district attorney Henry Mitchell that he had been contacted by defense counsel and informed that Defendant wanted to talk to him and show him where the money was buried,[3] that a meeting was set up and several individuals including Defendant and his counsel went out onto the dike outside of Williamsport (at Defendant's direction) where Defendant showed them where to dig for the money, and that while there Defendant asked Mr. Mitchell if he could speak with him. According to Mr. Mitchell's testimony, Defendant's counsel, who was involved in the digging, was consulted regarding Defendant's wish to speak to the assistant district attorney and she informed Mr. Mitchell that he was free to speak with Defendant, that Defendant knew what he was doing. Mr. Mitchell testified he then informed Defendant of his right to remain silent, and then Defendant stated he

3 The burglary with which Defendant was charged involved the theft of approximately $21,000 in $100 bills.

was sorry for what he had put the family through , that he did not want to put them through any more by having to go through a trial, that he had given $6000 to two girls and had wired $1000 to an attorney. Defendant contends these statements are not admissible as having been made in furtherance of plea negotiations. While it is true that statements made in furtherance of plea negotiations are not admissible, See Pa.R.Crim.P. 410(a)(4), the Court does not believe the statements in question here were indeed made in furtherance of plea negotiations. To qualify as such, the Court must find (1) the accused exhibited an actual subjective expectation to negotiate a plea at the time of the statement and (2) the accused's expectation was reasonable given the totality of the circumstances. Commonwealth v. Jones, 544 A.2d 54 (Pa. Super. 1988), citing Commonwealth v. Calloway, 459 A.2d 795 (Pa. Super. 1983). Of primary importance in assessing an accused's subjective expectation of negotiating a plea is whether the Commonwealth showed an interest in participating in such discussions. Id. Mr. Mitchell testified that no assurances had been made to Defendant, that in fact he had been told that no assurances could be made, that he must "give [them] something" and then they would see what they could do, in response to Defendant having inquired, through counsel, whether he could talk to the district attorney's office. While defense counsel argued that by taking everyone up on the dike and showing them where to dig,[4] Defendant was "giving them something" and therefore in the process of negotiating a plea, the Court sees nothing done or said on the part of the Commonwealth which would make any expectation held by Defendant that the Commonwealth was interested in negotiating a plea at the time he made the statements, reasonable. The Court cannot, therefore, categorize the statements as having been made in furtherance of plea negotiations and believes the admission of the testimony in question was proper.

Next, Defendant contends that if the statements were not in furtherance of plea negotiations, defense counsel[5] was ineffective "by allowing and encouraging her client to make statements without the benefit of a plea agreement". The Court notes that at trial, Defendant

4 No money was ever found.

5 At trial, Defendant was represented by Jason Poplaski, Esquire, of the Public Defender's Office but during pre-trial proceedings, had been represented by other members of the Public Defender's Office.

flatly and emphatically denied making any statements at all or even talking to Mr. Mitchell.[6] N.T., October 28, 2003 at 166-67, 171. The Court will therefore not address this issue further.

Next, Defendant contends his current counsel was ineffective for not having raised prior counsel's ineffectiveness "at the time it became apparent." Assuming Defendant is referring to the ineffectiveness alleged with regard to Defendant's making of statements, for the same reason just given, this issue will also not be addressed further.

Next, Defendant contends the court abused its discretion in sentencing him to four (4) to twenty (20) years incarceration. While this sentence is indeed in the aggravated range, the Court believes such is justified based on Defendant's obvious lack of remorse, his having testified falsely at trial, the egregious breach of trust involved in this matter and the particularly devastating hardship that was exacted on the victims in this case.

Finally, Defendant contends the verdict was based on insufficient evidence, specifically arguing insufficient evidence to place Defendant at the crime scene at the time of the incident, and insufficient evidence that Defendant took the money. The Court finds absolutely no merit to this argument. The Commonwealth introduced evidence that Defendant had been staying in the victims' home at the invitation of their son for approximately three weeks shortly before the money was stolen, that the empty box which had contained the money was found in the bedroom in which Defendant had been staying, that Defendant had left the residence suddenly and unexpectedly, without telling anyone, and had checked into a local hotel, and that when arrested, Defendant had $3000 in $100 bills on his person, and another seven to nine $100 bills folded in his shoe. The victims' son testified that he visited Defendant in the county jail while Defendant was awaiting trial and Defendant asked him what would happen if he returned $15,000, and also asked him to apologize to his parents. The victims' son also testified that when he asked Defendant why he did it Defendant said he did not know, and that Defendant told him he took some of the money the day he left and then returned and broke in, and that he had found the money when he was asked to take some laundry into the victims' bedroom (where the money had been hidden in a box in a drawer). Additionally, two neighbors of the

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6 Defendant testified that he went up on the dike with everyone on the advice of his friend, Walter Cero, the complainant's son, but did not instruct his attorney to contact the District Attorney's Office for that purpose. N.T., October 28, 2003 at 166-67, 174.

victims testified to having seen Defendant near the victims' home on the day of the break-in, one sighting him two blocks away, heading toward the home, and the other seeing him on the steps of the home at one point in the day and leaving the home about ten minutes later. Finally, the assistant district attorney previously handling the matter testified as noted above, to the search for the money on the dike initiated at Defendant's direction, and to the statements made by Defendant explaining partial disposition of the money and expressing regret about the trouble he had caused the family. The Court finds this evidence more than sufficient to support the verdict in this matter.

In conclusion, the Court finds no error in the conduct of the trial and sees no abuse of its discretion in imposition of sentence. It is therefore respectfully suggested the judgment of sentence be affirmed.

Dated: April 23, 2004

By The Court,

Dudley N. Anderson, Judge

cc: DA
Jason Poplaski, Esq.
Gary Weber, Esq.
Hon. Dudley N. Anderson