IN THE SUPREME COURT OF THE STATE OF DELAWARE

DANIEL J. ANKER,	§	
	§	No. 552, 2005
Defendant Below-Appellant,	§	
	§	Court Below: Superior Court of the State of Delaware in and for New Castle County
v.	§	
	§	
STATE OF DELAWARE	§	ID # 0402010394
	§	
Plaintiff Below, Appellee.	§	
	§	

Submitted: August 21, 2006
Decided: October 31, 2006

Before **STEELE,** Chief Justice**, BERGER,** and **RIDGELY**, Justices.

O R D E R

(1) Defendant-Appellant Daniel J. Anker appeals his convictions in Superior Court of nine counts of Felony Theft and one count of Conspiracy Second Degree. At the time of the alleged crimes, Anker was an attorney who conducted residential real estate closings, including refinancing of mortgages. The charges concerned his alleged misappropriation of funds from his client escrow account.

(2) In this appeal, Anker claims that the Superior Court committed reversible error in four ways. First, Anker contends that the Superior Court should not have admitted evidence that the victims' mortgages were "paid off" by the Delaware Lawyers' Fund for Client Protection. Second, Anker claims that

evidence of prior wrongs or acts was admitted in contravention of D.R.E. 404(b). Third, he claims that evidence relating to the impact of the crime on the victims should have been excluded. Finally, Anker claims that the exclusion of the two defense expert witnesses constitutes reversible error. We find no merit to his arguments and affirm.

(3) Anker was a real estate lawyer practicing in Delaware as a solo practitioner. During the relevant times in this case, his daughter, Laura Larks, was his sole employee. Each of the alleged nine acts of theft was similar. Anker would represent the individual at the real estate closing.[1] In the refinancing closings, Anker did not apply the money deposited into his escrow account by the new mortgagee to satisfy the existing mortgages. In the two situations where Anker represented the seller, he did not apply the money deposited by the buyer to pay off the seller's mortgage. In the one situation where Anker represented the buyer, Anker did not pay the money to the seller's mortgagee.

(4) When the clients realized that the money was not paid to satisfy the mortgages, they contacted Anker's office. Although slightly different events transpired for each client, generally, Larks would tell them that it was the bank's fault. In some situations, Larks and/or Anker told the client that the bank offered

[1] Six of the real estate closings involved refinancing. In two of the closings, Anker represented the seller and in one closing Anker represented the buyer.

the client a settlement for the mix up. In one case, the settlement was as high as $700,000. After the jury convicted Anker of the nine counts of Felony Theft and Conspiracy, he was sentenced to five years in jail and ordered to pay $554,046 in restitution. This appeal followed.

(5) We review all the evidentiary claims for plain error. We review the trial judge's exclusion of the defense experts for abuse of discretion.[2]

(6) Anker's first claim of error stems from testimony from five of the nine victims that the Lawyer's Fund for Client Protection ("Lawyer's Fund") "paid off" their unpaid mortgages. Anker did not object to these statements when they were made at trial. Anker now argues that the testimony confused the jury into believing that Anker was previously adjudged guilty from another tribunal, namely the Lawyer's Fund. He argues that the evidence should have been excluded as unduly prejudicial under D.R.E. 403.

(7) This Court will generally decline to review issues that are not raised below and preserved for appeal.[3] "Failure to make an objection at trial constitutes a waiver of the defendant's right to raise that issue on appeal, unless the error is

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[2] *M.G. Bancorporation, Inc. v. Le Beau*, 737 A.2d 513, 522 (Del. 1999) ("[A]n appellate court must apply an abuse of discretion standard when 'it reviews a trial court's decision to admit or exclude expert testimony.'" (citing *General Electric Co. v. Joiner*, 522 U.S. 136 (1997))).
[3] Del. Supr. Ct. R. 8.

plain."[4] Plain error exists when the error is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."[5] Such errors must be apparent on the face of the record and be "so basic, serious and fundamental in their character that they clearly deprive an accused of a substantial right or show manifest injustice."[6] Moreover, "it is difficult to conclude that the judge committed plain error by refusing to bar the admission of the evidence under D.R.E. 403."[7]

(8) Anker has not shown that the admission of evidence that the Lawyer's Fund paid the mortgages was plain error. The Lawyer's Fund is not a tribunal. Furthermore, there is nothing in the record to support Anker's argument that the jury equated the payments by the Lawyer's Fund with his being found guilty of any crime. Rather, evidence that the Lawyer's Fund paid the mortgages was relevant to show that Anker did not pay them with the money entrusted to him.

(9) Anker's second claim of error is the admission of "bad act" evidence in contravention of D.R.E. 404(b). He claims that three different pieces of evidence should have been excluded because of the prohibition of bad act evidence. The first is Anker's own testimony that he falsely certified to the

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[4] *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).
[5] *Id.*
[6] *Hunter v. State*, 788 A.2d 131 (Del. 2001) (TABLE).
[7] *Id.*

Delaware Supreme Court that his escrow account was in compliance with the Court's requirements. The second is testimony that Anker failed to pay his federal taxes for several years. Finally, a defense witness testified that Anker failed to pay $211,000 in insurance settlements to his client.

(10) Rule 404(b) is not a complete bar to the admission of prior bad acts, "so long as [the] evidence has relevance beyond merely showing a character trait."[8] Each piece of evidence that Anker complains of was relevant. The evidence concerning the certification of his escrow account directly contradicts Anker's defense that his daughter tricked him and stole the money. The state of Anker's escrow account was directly related to the theft charges. Evidence that Anker wrote two escrow checks to the United States Internal Revenue Service satisfies the motive exception to Rule 404(b). Finally, as the trial judge explained during the trial, evidence of the misappropriation of settlement funds was relevant to show intent, knowledge or absence of mistake. Further, the trial judge's limiting instruction with respect to this evidence was consistent with *Getz v. State*.[9] We find no merit to his second claim of error.

(11) Anker's third evidentiary claim is that the victims were allowed to testify that Anker's failure to pay off their mortgages damaged their credit. He

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[8] *Baumann v. State*, 891 A.2d 146, 149 (Del. 2005).
[9] 538 A.2d 726 (Del. 1988).

argues that a jury may not consider evidence of the impact of the defendant's conduct on the victim.[10] Like the other types of evidence complained of, Anker did not object to these statements made during the trial. Anker has not shown that the admission of the evidence affected the outcome of the trial. The consequence of nonpayment of a mortgage on a mortgagor's credit standing is obvious. Only four of the nine victims testified concerning the effect on their credit. A less favorable credit rating due to the failure to satisfy a mortgage is not the type of impact evidence that would infuriate a jury to the point of "manifest injustice."[11] We find no plain error.

(12) Anker's final claim of error is the exclusion of testimony from two psychiatrists about his relationship with Larks, his own personality traits and his feelings of guilt about the effect of his separation from his wife and their divorce on Larks. Anker argues that such exclusion denied his constitutional right to present a defense to a charge.[12] Anker acknowledges that Rule 702 of the Delaware Rules of Evidence governs the admissibility of expert testimony.[13]

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[10] Appellant's Opening Br. at 26. "In a time where the public is exposed, nearly every day, to media accounts of the often irreparable harm caused to the credit ratings of victims of economic crimes, this evidence, which had no relevance to the issue of guilt, no doubt influenced the jury to be prejudiced towards Anker."

[11] *Hunter*, 788 A.2d 131.

[12] Appellant's Opening Br. at 29

[13] D.R.E. 702 provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert

Under this rule, the trial court has the role of a gatekeeper and must determine if the evidence is relevant and reliable.[14]

(13) Anker first offered testimony from Dr. Neil S. Kaye, a forensic psychiatrist. Dr. Kaye was retained specifically for trial as an expert. He was neither Anker's nor Larks' treating physician. Anker's purpose for calling Dr. Kaye as a witness was two-fold. First, Dr. Kaye would have testified that Anker was vulnerable and susceptible to Larks and thus, was unable to see or believe the events as they transpired. Second, Dr. Kay would have testified that Larks' actions were done "out of her anger at her father for the perceived abandonment, and would have the added attraction of taking advantage of people who would be most malleable because they were friends and family."

(14) The Superior Court, determined that Dr. Kaye's testimony was not admissible under D.R.E. 702 because it did not "assist the jury to understand the evidence or to determine a fact in issue." The trial judge determined that "[i]t is within the common experience of the jury to know motive, hate and the vulnerability of a father who, from love or easy understood emotion, may be blind

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> by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

[14] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993); *M.G. Bancroporation v. Le Beau*, 737 A.2d 513, 521-522 (Del. 1999).

to what his daughter was about."[15] Additionally, Dr. Kaye did not interview Larks. The only information Dr. Kaye had concerning Larks was a prescription found at Larks's home and information he received from Anker. The proffer also did not reveal any diagnosis of Anker. In the words of the trial judge, the proffer leaves one "to guess what the disorder is, [and] how that may relate to the times of the charged offenses." On the record before us, we find no abuse of discretion in the Superior Court's exclusion of Dr. Kaye's proffered testimony.

(15) Dr. Neal A. Shore treated Anker after the charges were brought against him. The records of his treatment relate to the hospital admissions, an adult disorder and depression that resulted from the loss of Anker's legal practice long after the offenses occurred. The trial judge refused to allow this expert testimony of Dr. Shore's because it was not relevant and because it was inadmissible under D.R.E. 403. The trial judge found that the basic purpose of Dr. Shore's testimony was to say that Anker is credible and Larks is not credible. The trial judge further found that it would be "unfairly prejudicial to put an expert label or veneer on evidence which is commonly understood. A jury would be confused by the labeling." Based upon the record before us, we find that the Superior Court did not abuse its discretion in excluding the proffered testimony of Dr. Shore.

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[15] *See U.S. v. Dupre*, 339 F.Supp. 2d 534, 541 (S.D.N.Y. 2004) ("courts should not admit expert testimony that is 'directed solely to lay matters which a jury is capable of understanding and deciding without the expert's help'").

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/Henry duPont Ridgely
Justice