

STATE OF MAINE
KNOX, SS.

MAINE SUPERIOR COURT
LOCATION: ROCKLAND
Docket No. KNOCD-CR-21-185

STATE OF MAINE,)	
Plaintiff)	
)	
v.)	MR. STEWART'S FIFTH MOTION <i>IN</i>
)	<i>LIMINE</i> (filed via sharefile)
)	
)	
MALCOLM STEWART,)	
Defendant)	

NOW COMES Mr. Stewart, by and through his attorney, David J. Bobrow
and, with this Pretrial Motion *in limine* particularly stated as follows:

PROCEDURAL POSTURE

Castle Builders closed their doors in September of 2019. Castle Builders and Malcolm Stewart initiated bankruptcy proceedings shortly after that in the U.S. Bankruptcy Court and were later declared bankrupt. Prior to the Government pursuing criminal charges against Mr. Stewart, it initiated a civil action. Undersigned counsel was not involved in that action. On March 4, 2021, 21 days before Mr. Stewart was indicted, the Government conducted a deposition of Mr. Stewart. At no time during the deposition is there any indication of a pending indictment.

Mr. Stewart was indicted by a Grand Jury on March 25, 2021 of two counts of theft by deception (Class B), 17-A M.R.S. S 354. Mr. Stewart was arraigned by video on May 20, 2021. Mr. Stewart pleaded ‘not guilty’ and the court set a \$50,000 unsecured bond. A Dispositional Conference was scheduled for July 22, 2021 and later continued until September 30, 2021 as Mr. Stewart tried to obtain representation. On February 8, 2022, undersigned counsel entered an appearance on behalf of Mr. Stewart in the criminal case only. The Court later assigned undersigned as counsel when Mr. Stewart was unable to pay legal expenses due to a lien on his last remaining asset, his real estate. During this time, the same entity that is prosecuting this matter, the Office of the Attorney General, continued its civil action against Mr. Stewart. That matter went to trial in August of 2022. A default judgment was entered against Mr. Stewart in August of 2022. The criminal matter is set for trial during the month of August of 2024. Jury selection is set for August 1, 2024. The Court issued an order, pretrial, that allows Mr. Stewart to appear by zoom due to his significant health challenges. Other matters have been addressed pretrial including precluding the State from arguing Mr. Stewart fled the State of Maine to avoid prosecution and informing the jury as to Mr. Stewart’s appearance by zoom due to significant health issues.

INDICTMENT

The Indictment charges Mr. Stewart with two counts of Theft By Deception under 17-A M.R.S. §354(1)(B)(1). The Indictment includes Appendix A, as referenced in Count I, which names 57 separate persons.

BACKGROUND

Castle Builders, Inc. opened in 2017 employing office staff and laborers. Malcolm Stewart, the founder, had a background in sales but not as much in construction. He was the salesman for Castle Builders, Inc. and his wife, Elizabeth managed the finances. Castle Builders, Inc. offered residential construction and renovation services. At the start, Castle was highly successful and generated repeat business.

As with many construction businesses, there were errors made in accounting and related to the work force, to name two areas. Work crews saw consistent turnover. But at no point did Castle ever fail to pay a worker, even though some work checks initially had insufficient funds. As time progressed, Castle saw its income dwindling and its bills expanding, as evidenced by the monthly summaries. Castle hoped to secure cash infusion by bringing in a financial partner(s), but were unable to close any deal.

Finally, without money to pay the employees or creditors, Mr. Stewart closed his business on September 8, 2019, leaving behind all of his business and main personal

assets. Both he and his wife filed for bankruptcy. Subsequently, Mr. Stewart was employed as a car salesman, sometimes working 60 hours per week. His wife has worked stocking shelves at a store and is currently a public high school custodian. Currently, Mr. Stewart is unable to work for any significant periods due to health problems. He receives dialysis three times per week.

GENERAL AUTHORITY

The defendant or the State may make a pretrial motion requesting a pretrial ruling on the admissibility of evidence at trial or on other matters relating to the conduct of the trial. The court may rule on the motion or continue it for a ruling at trial. In determining whether to rule on the motion or to continue it, the court should consider the importance of the issue presented, the desirability that it be resolved prior to trial, and the appropriateness of having the ruling made by the justice who will preside at trial. For good cause shown the trial justice may change a ruling made *in limine*. M.R.Crim.P. 12(c).

Counsel for Mr. Stewart moves for the following to be allowed as evidence by judicial notice:

1. Preclude the State from suggesting that Mr. Stewart targeting elderly people.

On numerous occasions, the State has suggested that Mr. Stewart targeted elderly or vulnerable people. While Mr. Stewart vehemently denies that he had the intent at the time of entering the contracts of failing to perform, there is also no evidence that any specific groups of persons was targeted for contracts. This is another attempt at the State trying to incite feelings of animosity against Mr. Stewart without evidence. See *Hance v. Zant*, 696 F.2d 940 (11th Cir.1983); *Reed v. US*, 403 A.2d 725 (1979). A jury instruction would not cure a prejudicial statement by the State. See *Hance v. Zant*, 696 F.2d 940 (11th Cir.1983); *Reed v. US*, 403 A.2d 725 (1979).

2. Allow Mr. Stewart to present witnesses who would testify as to successful and completed projects.

Mr. Stewart intends to present evidence, in the form of witnesses, who would testify that Castle Builders, Inc. completed projects during the period of time where the State is suggesting that he had no intention, at the time of entering contracts, to complete projects for those named in the indictment, Appendix A. As a preliminary matter, the State must show that Mr. Stewart had the specific intent to commit the theft at the time of, or prior to, the commission of the act of taking the initial deposits. *Stramaglia v. State*, 603 So. 2d 536, 537-38 (Fla. 4th DCA 1992). Thus, Mr. Stewart seeks to present such witnesses, not for character evidence under M.R.Evid. 404(b), but to negate the suggestion he had the intent to commit theft

from anyone.¹ See, e.g., *United States v. Thomas*, 32 F.3d 418, 421 (9th Cir. 1994) (observing that defendants are entitled “to present, within reason, the strongest case they are able to marshal in their defense” which includes testimony of previous lawful behavior to negate fraudulent intent); *United States v. Shavin*, 287 F.2d 647, 654 (7th Cir. 1961)(observing that, in a close question of whether the defendant acted with fraudulent intent or in good faith, it was error for the district court to refuse to allow the defendant to introduce evidence of other legitimate business transactions); *Bogren v. State*, 611 So. 2d 547, 550-51 (Fla. Dist. Ct. App. 1992)(holding that testimony of satisfied travel agency customers was relevant to the issue of the defendant's intent in accepting advance payments for travel when the travel agency was on the brink of collapse); *State v. Marinos*, 45 Ohio App. 2d 312, 345 N.E.2d 76, 79 (Ohio Ct. App. 1975)(holding that it was prejudicial error to exclude the testimony of satisfied customers during the three-month period when the defendant allegedly engaged in fraud because the excluded testimony would rebut evidence introduced by the state on the question of fraudulent intent).

¹ Mr. Stewart acknowledges that such witnesses would be irrelevant except for projects that were completed during the timeframe where he is alleged to have intended to deprive individuals named in Appendix A of their deposits and/or payments without completing work.

WHEREFORE Mr. Stewart respectfully requests that this Honorable Court grant this motion together with any and all other relief that this Honorable Court deems fit and just.

Dated: July 21, 2024

/s/ David J. Bobrow

David J. Bobrow, Maine Bar No. 9164
Attorney for Defendant Malcolm Stewart
Bedard and Bobrow, PC
P.O. Box 366
Eliot, ME 03903
207-439-4502
207-439-6172(fax)

CERTIFICATE OF SERVICE

I hereby certify that on this date I emailed, postage paid, a copy of this Motion to the Assistant Attorney Generals.

Date: 07/21/2024

/s/ David J. Bobrow