IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

EARNEST LEE WILSON, JR. — APPELLANT

VS. — NO. 2007-KA-1532

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

STATE RULES

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

EARNEST LEE WILSON, JR. **APPELLANT**

VERSUS **NO. 2007-KA-1532-COA**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Procedural History

Earnest Lee Wilson, Jr., was convicted in the Circuit Court of Rankin County on a charge of embezzlement and was sentenced as an habitual offender to a term of 10 years in the custody of the Mississippi Department of Corrections. He also was ordered to pay a fine of $10,000, restitution in the amount of $800, and court costs. (C.P.56-57) Aggrieved by the judgment rendered against him, Wilson has perfected an appeal to this Court.

Substantive Facts

Melanie Anderson testified that at approximately 2:30 a.m. on November 5, 2005, she was working at a Texaco gas station in Brandon when the defendant "came to this store." (T.80-81) According to Ms. Anderson,

> He was driving a gold Lexus, and I said, that's a nice car you're driving; and it had a for sale sign. And he said, well, it's already sold. And he said– I said, well, I was looking for me a vehicle. So he said, well, I go to the auction so I can get one. So I told him that I was wanting an SUV.
>
> (T.81)

Ms. Anderson went on to tell Wilson that she wanted a black Tahoe in particular. During the discussion of price, "He said a thousand dollars deposit, and he would finance the rest of it," approximately $14,500. At that point, Ms. Anderson "hired him to get one." After further discussion, Wilson agreed to purchase the vehicle with a down payment of $500. Ms. Anderson gave him that amount, and he gave her a receipt, which was introduced into evidence. Wilson told Ms. Anderson that he would bring her the Tahoe "in a couple of days," at which point she would begin to make monthly payments to him. (T.82-87)

Wilson telephoned Ms. Anderson shortly afterward and told her that "he had a black Tahoe and it had a sun roof and it was fully loaded." In Ms. Anderson's words, "He said that he was going to bring the car, it's a truck, and let me see it, but I would have to come up with the rest of the money. So he kept calling, but he never showed me the truck." Ms. Anderson called Wilson "over and over and over," during a two-month period, only to hear excuses such as, "that he was in New Orleans and the weather is bad," or "I got to take my daddy to the hospital." On other occasions, he would say that he was on his way to her with the Tahoe, but he "never showed up." (T.87-90) Ms. Anderson testified further,

> After time went by, I just kept calling him and kept calling him, and he never did respond to my call. So I just went by where his grandmother stayed, and he was out there, you know, doing the yard. And so I stopped by there, and I told him that I wanted my money.
>
> (T.89)

In February 2006, Wilson called Ms. Anderson and told her that he had procured another Tahoe, "a higher end model," that he would sell to her and finance for an additional $300 down. He agreed to bring her the vehicle and allow her to "pay him the rest of it." Again, Wilson failed to hold up his end of the bargain. Although she called him repeatedly, he "never showed up." In early February, Wilson and Ms. Anderson agreed to meet on Lakeland Drive; she waited "a good two hours," but, again, Wilson failed to appear. When she called him, "[h]e never answered the phone." The next day, he finally answered and told her, "I was tied up with my daddy." Wilson intermittently engaged in similar shenanigans with Ms. Anderson through the month of February and into March, when she discovered that his telephone "was cut off." Ms. Anderson managed to track him down by calling him at a different number. He sounded "surprised" to hear from her, but he reassured her, "I'm going to bring it to you." Once more, Wilson failed to appear at the agreed-up meeting place. (T.90-97)

Finally, Ms. Anderson went to his parents' house and demanded that Wilson return her money. He agreed to send a check to Ms. Anderson's address, but she never received payment. In July, she "just gave up" and reported these incidents to the police. (T.98-99)

David Ruth, chief detective for the Brandon Police Department, testified that Ms. Anderson "came to the police department July 31st of '06, to file a complaint against one Earnest Wilson, that he had embezzled some money from her ... " Detective Ruth "looked

at the facts of the complaint and substantiated those facts." The investigation "ultimately led to the arrest of Mr. Wilson," whom Detective Ruth had known for 20 years. When Detective Ruth telephoned Wilson, he denied that he had received $800 from Ms. Wilson and stated that she "owed him money." He did "set up and date and a time to come in to talk." In the course of his investigation, Detective Ruth never saw "any kind of paperwork that would substantiate any vehicle purchase" by Wilson during this time frame. (T.130-35)

Detective Bo Edgington testified that he questioned the defendant after having given him the *Miranda* warnings. First, Detective Edgington "asked him if he had accepted any money from Ms. Anderson." Wilson replied that "he had accepted an initial down payment of three hundred dollars from her on November 18, 2005." Wilson went on to state that during the initial negotiation with Ms. Anderson, he told her that "he needed 15 hundred dollars up front," but that he purchased a vehicle for her after she had given him only $300. When Detective Edgington showed him the receipts provided by Ms. Anderson, Wilson did not deny their authenticity; nor did he deny having received a total of $800 from her. (T.154-60) He also was unable to provide any paperwork to show that he had purchased a Tahoe for Ms. Anderson. (T.167-68)

Tamie Griffin testified that in 2005, Wilson agreed to purchase a Crown Victoria for her for $700 down. She "met him, the next day, ... at Texaco on Lakeland and gave him seven hundred dollars." Thereafter, Wilson performed the bait-and-switch routine, telling Ms. Griffin that "they got rid of the Crown Vic," but that he had "seen an Acura" which would "look good on" her. Not surprisingly, to buy the Acura, he needed an additional $1400, which Ms. Griffin gave him. Wilson actually brought the Acura to Ms. Griffin, and she test drove it, but he told her that he needed to repair some slight body damage before he

turned it over to her. Ms. Griffin "never did" receive the car. She did get a fresh excuse each time she called him. Finally, she told him to return her money. He agreed to do so, but, again, provided more excuses each time she pressed him. Ultimately, he "stopped answering" her calls. (T.176-79)

Crystal Paige Chambers and Lotonia Brunston testified that Wilson performed similar scams on them in 2005. (T.181-84, 186-90)

The defense did not put on evidence. (T.196-97)

SUMMARY OF THE ARGUMENT

Wilson's challenge to sufficiency of the indictment is without merit. The state was not required to charge that Ms. Anderson was one of the entities enumerated in the first sentence of the embezzlement statute in effect at the time this crime was committed.

The trial court did not abuse its discretion in admitting the testimony of Tamie Griffin, Crystal Chambers and Lotonia Brunston. The court found that this evidence was admissible pursuant to several exceptions listed in M.R.E. 404(b), and that M.R.E. 403 did not require its exclusion.

Wilson's third proposition is procedurally barred by his failure to object to the court's questioning him at the close of the sentencing hearing. Alternatively, the state submits any arguable error with respect to this point is harmless.

The verdict is based on legally sufficient proof and is not against the overwhelming weight of the evidence. To the contrary, the state presented substantial credible evidence of guilt. The defendant's failure to put on proof left the jury free to give full effect to the testimony of the witnesses for the prosecution.

PROPOSITION ONE:

WILSON'S CHALLENGE TO THE SUFFICIENCY OF THE INDICTMENT IS WITHOUT MERIT

Wilson first contends the indictment returned against him failed to state an essential element of the crime. The linchpin of his argument is the assertion that the statute in effect at the time of the alleged crime defined

> "two categories of **potential victims** against whom the crime of embezzlement could be committed: either (1) "any director, agent, clerk, servant, or officer of any unincorporated company," or (2) "any trustee or factor, carrier, or bailee, or any clerk, agent or servant of any private person ..."
>
> (emphasis added) (Brief for Appellant 7)[1]

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[1]The statute applicable at the time in question is set out below:

> If any director, agent, clerk, servant, or officer of any incorporated company, or if any trustee or factor, carrier or bailee, or any clerk, agent or servant of any private person, shall embezzle or fraudulently secrete, conceal, or convert to his own use, or make way with, or secrete with intent to embezzle or convert to his own use, any goods, rights in action, money, or other valuable security, effects, or property of any kind or description which shall have come or been intrusted to his care or possession by virtue of his office, place, or employment, either in mass or otherwise, with a value of Five Hundred Dollars ($500.00) or more, he shall be guilty of felony embezzlement, and, upon conviction thereof, shall be imprisoned in the Penitentiary not more than ten (10) years, or fined not more than Ten Thousand Dollars ($10,000.00), or both. If the value of such goods, rights in action, money or other valuable security, effects, or property of any kind is less than Five Hundred Dollars ($500.00), he shall be guilty of misdemeanor embezzlement, and, upon conviction thereof, shall be imprisoned in the county jail not more than six (6) months, or fined not more than One Thousand Dollars ($1,000.00), or both."

Wilson thus suggests that the indictment is fatally defective for failing to identify Ms. Anderson as one of these entities.

The dispositive flaw in Wilson's argument is that the entities set out under subsections (1) and (2) above refer not to the victim of embezzlement, but to the perpetrator. The indictment cannot be insufficient for failing to identify Ms. Anderson as one of these individuals, as the statute clearly does not require such identification. Wilson's first proposition should be denied.

PROPOSITION TWO:

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING THE TESTIMONY OF TAMIE GRIFFIN, CRYSTAL CHAMBERS AND LOTONIA BRUNSTON

Wilson argues additionally that the trial court committed reversible error in admitting the testimony of Tamie Griffin, Crystal Chambers and Lotonia Brunston. This issue arose when the state sought to call Ms. Griffin. A bench conference ensued; the defense apparently objected; and the court excused the jury and conducted a hearing on this issue. (T.169)

At the outset, the defendant's legal advisor asserted that testimony from these witnesses would constitute inadmissible evidence of other crimes. (T.171) The prosecutor responded as follows:

> Judge, I think these are 404(b), other bad acts that show intent. He has definitely adduced testimony from the witness stand that he forgot about one of them. So part of it is, I didn't intent to take it. Preparation, plan. This shows that he is operating in exactly the same way in each and every one of

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MISS. CODE ANN. § 97-23-19 (1972) (as amended).

> these cases. Identity, absence of mistake or actions [sic]. Once again, he has adduced testimony that, you know, I've given the money back, I didn't mean to, and it was really, you know, she owed me money. I think this shows, this testimony, this proof, will show that he had a method of operating. This method was employed in this case. These is no absence of intent. He did intend it. There is no mistake. This is exactly how he steals money, he takes it from people. ...
>
> (T.172)

On the issue of the M.R.E. 403 balancing test, the prosecutor argued the following:

> I would point out, in that balancing test, his defense has been the testimony he's adduced from the witness stand, is that, you know, I forgot about that, didn't know. And I think when that is the central issue, ... I would encourage the court to find that this proof is necessary, and it does not prejudice him unduly. Plus, from his opening, he said– I mean, actually, he has been testifying all along, Judge. We should get impeachment proof in with how much he has testified.
>
> (T.173)

Having stated that he had reviewed the Comment to M.R.E. 404(b),the trial court made a ruling set out in pertinent part below:

> [T]he way I read 404(b) in the comment that I made reference to, and the State's attempt, this is something that would be admissible for the showing of intent or absence of mistake. And I think that that has been brought into issue. And considering that I do not find that the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or any of the other things under the rule regarding delay, waste of time or cumulative. So based on the narratives that's in the State's disclosure filed in the court file, those witnesses will be allowed to testify as to those matters.
>
> (T.174)

This ruling is not subject to reversal absent a finding that it constitutes an abuse of discretion. *Jones v. State*, 904 So.2d 149, 152 (Miss.2005). The state contends the trial

court was well within its discretion in admitting this evidence under Rules 404(b) and 403.

Rule 404(b) provides that while 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 be admissible for other purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The state submits the testimony in issue constituted proof of *modus operandi*, a recognized exception to the prohibition of evidence of other crimes. *Winding v. State*, 908 So.2d 163, 170 (Miss.App.2005); *Ford v. State*, 555 So.2d 691, 694-95 (Miss.1989), *Fisher v. State*, 532 So.2d 992, 1000 (Miss.1998).[2] These cases contradict Wilson's argument that other crimes or acts admitted pursuant to Rule 404(b) must be interconnected with the charged offense in order to be admissible. To the contrary, the "complete story" exception is separate from those listed in Rule 404(b). See *Williams v. State*, 962 So.2d 129, 133 (Miss.App.2007) (upholding admission of other-crimes evidence on distinct bases 1) that it was necessary to show the complete story of the charged crime, and 2) that it tended to show guilty knowledge).

Morever, the trial court's Rule 403 balancing was sufficient. The trial judge stated affirmatively that he did not "find that the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or any of the other things under the rule regarding delay, waste of time or cumulative." Thus, "magic words" were spoken, although they are not required. *Dao v. State,* ___ So.2d ___

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[2]Such proof goes to show knowledge, motive, intent, and/or absence of mistake or accident. *Smothers v. State*, 756 So.2d 779, 784 (Miss. App. 1999).

(Miss.App.) (decided December 11, 2007), 2007 WL 4303779.

Finally, the state points out that the trial court instructed the jury that the acts testified to by these witnesses was "to be considered only for the limited purpose of showing intent or absence of mistake or accident..." Moreover, the jurors were forbidden to infer "that the Defendant acted in conformity with his previous acts" and that he was "therefore guilty of the charge" for which he was on trial. (C.P.42) Of course, the jury is presumed to have followed this instruction. *Watts v. State*, 976 So.2d 364, 370 (Miss.App.2008).

For these reasons, Wilson's second proposition lacks merit.

PROPOSITION THREE:

WILSON'S THIRD PROPOSITION IS PROCEDURALLY BARRED; IN THE ALTERNATIVE, THE STATE SUBMITS ANY ARGUABLE ERROR WITH RESPECT TO THIS POINT IS HARMLESS

After the verdict of guilty was returned, the court excused the jury and conducted a sentencing hearing to determine whether the defendant was an habitual offender within the meaning of MISS.CODE ANN. §99-19-81 (1972) (as amended). (T.226) The state then introduced certified copies of sentencing orders "in cause numbers 3879, 3880, 3881, 3882, 3883, 3884, 3885 ... [and] 2115." There was some discussion as to whether this documentation was sufficient, but the court ultimately concluded that it was. (T.227-30)

The court then questioned the defendant about the factual bases for his prior convictions. The defendant answered these questions without objection. (T.231-40) Nor did he object when the sentence was imposed. (T.240)

Wilson now contends the trial court violated his right against self-incrimination in conducting this inquiry.

The state counters first that the failure to object operates as a waiver of this issue. Even a Fifth Amendment issue may be barred for failure to interpose a proper objection.[3] *Strohm v. State*, 845 So.2d 691, 697-98 (Miss.App.2003). Wilson's third issue is procedurally barred.

Alternatively, the state submits any arguable error was harmless. Before the court questioned the defendant, the state had submitted sufficient proof of his status as an habitual offender. Thus, the sentence was mandatory. It is inconceivable that the defendant's statements to the court had any effect on the outcome of sentencing. Accordingly, if error occurred, it was harmless. *Kohlberg v. State*, 829 So.2d 29, 67 (Miss.2002).

The state maintains that this proposition is barred. It should be rejected accordingly.

PROPOSITION FOUR:

THE VERDICTS ARE BASED ON LEGALLY SUFFICIENT PROOF AND ARE NOT CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE

Under his final proposition, Wilson argues that the proof is legally insufficient to sustain the verdicts and alternatively that he is entitled to a new trial because the verdict is against the overwhelming weight of the evidence. To prevail on his challenge to the sufficiency of the evidence, he must satisfy the following formidable standard of review:

> When on appeal one convicted of a criminal offense

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[3]The jury had already returned a verdict of guilty, and the state had proved that Wilson was an habitual offender. Thus, the state disputes the assumption that the defendant's statements to the court were testimonial or incriminatory. Under the circumstances presented here, it is not necessary to belabor the point.

> challenges the legal sufficiency of the evidence, our authority to interfere with the jury's verdict is quite limited. We proceed by considering all of the evidence--not just that supporting the case for the prosecution--in the light most consistent with the verdict. We give [the] prosecution the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts and inferences so considered point in favor of the accused with sufficient force that reasonable men could not have found beyond a reasonable doubt that he was guilty, reversal and discharge are required. On the other hand, if there is in the record substantial evidence of such quality and weight that, having in mind the beyond a reasonable doubt burden of proof standard, reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions, the verdict of guilty is thus placed beyond our authority to disturb.
>
> *Manning v. State*, 735 So.2d 323, 333 (Miss.1999), quoting *McFee v. State*, 511 So.2d 130, 133-34 (Miss.1987).

Furthermore,

> The jury is charged with the responsibility of weighing and considering conflicting evidence, evaluating the credibility of witnesses, and determining whose testimony should be believed. [citation omitted] The jury has the duty to determine the impeachment value of inconsistencies or contradictions as well as testimonial defects of perception, memory, and sincerity. *Noe v. State*, 616 So.2d 298, 302 (Miss.1993) (citations omitted). **"It is not for this Court to pass upon the credibility of witnesses and where evidence justifies the verdict it must be accepted as having been found worthy of belief."** *Williams v. State*, 427 So.2d 100, 104 (Miss.1983).
>
> (emphasis added) *Ford v. State*, 737 So.2d 424, 425 (Miss. App.1999).

See also *Jackson v. State*, 580 So.2d 1217, 1219 (Miss.1991) (on appellate review the state "is entitled to the benefit of all favorable inferences that may reasonably be drawn from the evidence"), and *Noe*, 616 So.2d at 302 (evidence favorable to the defendant should be disregarded). Accord, *Harris v. State*, 532 So.2d 602, 603 (Miss.1988) (appellate court "should not and cannot usurp the power of the fact-finder/ jury"). "When

a defendant challenges the sufficiency of the evidence to support a conviction, the evidence which supports the verdict is accepted as true by the reviewing court, and the State is given the benefit of all reasonable inferences flowing from the evidence." *Dumas v. State*, 806 So.2d 1009, 1011 (Miss.2000).

This rigorous standard applies to the claim that the defendant is entitled to a new trial:

> The standard of review in determining whether a jury verdict is against the overwhelming weight of the evidence is well settled. "[T]his Court must accept as true the evidence which supports the verdict and will reverse only when convinced that the circuit court has abused its discretion in failing to grant a new trial." *Dudley v. State*, 719 So.2d 180, 182(¶ 8) (Miss.1998). On review, the State is given "the benefit of all favorable inferences that may reasonably be drawn from the evidence." *Griffin v. State*, 607 So.2d 1197, 1201 (Miss.1992). "Only in those cases where the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would sanction an unconscionable injustice will this Court disturb it on appeal." *Dudley*, 719 So.2d at 182 . "This Court does not have the task of re-weighing the facts in each case to, in effect, go behind the jury to detect whether the testimony and evidence they chose to believe was or was not the most credible." *Langston v. State*, 791 So.2d 273, 280 (¶ 14) (Miss.Ct.App.2001).
>
> *Smith v. State*, 868 So.2d 1048, 1050-51 (Miss.App.2004),

In this case "[t]here was not a great deal of evidence for the fact finder to weigh since the defendant did not testify" or put on any evidence. *White v. State*, 722 So.2d 1242, 1247 (Miss.1998). The defendant's failure to do so left the jury free to give "full effect" to the testimony of the state's witnesses. *Id.*

We incorporate by reference the proof set out in our Statement of Substantive Facts to support our position that the prosecution presented substantial credible evidence that Wilson was guilty of embezzlement. He has failed to show otherwise on this appeal.

Accordingly, his final proposition should be denied.

CONCLUSION

The state respectfully submits the arguments presented by Wilson are without merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Deirdre McCrory, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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