IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

EARNEST LEE WILSON, JR. APPELLANT

VS. NO. 2007-KA-01532-COA

STATE OF MISSISSIPPI APPELLEE

APPEAL FROM
THE CIRCUIT COURT OF THE
FIRST JUDICIAL DISTRICT OF HINDS COUNTY

BRIEF FOR APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. The representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

1. Earnest Lee Wilson Jr., Appellant
2. Melanie Anderson, alleged victim
3. Walter Bleck, Assistant District Attorney
4. Jamie McBride, Assistant District Attorney
5. Dan W. Duggan, Trial Legal Advisor to Earnest Lee Wilson, Jr.
6. Donald W. Boykin, Attorney for Appellant, Earnest Lee Wilson, Jr.

DONALD W. BOYKIN
ATTORNEY FOR APPELLANT

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STATEMENT OF THE CASE

Earnest Lee Wilson, Jr. was indicted in Rankin County, Mississippi for the offense of embezzlement, Section 97-23-19, Miss. Code Annotated of 1972. The indictment states he embezzled in excess of $500.00 on, about or between November 8, 2005 and February 1, 2006, the money being the personal property of Melony (Melanie) Anderson. (C.P. 4). On August 24, 2007 the State filed its Motion to Amend Indictment, whereby the indictment against Wilson was amended to provide that he was an habitual offender, pursuant to Section 99-19-81 of the Miss. Code Annotated of 1972 (C.P. 15). On August 27, 2007, the day before the trial began, the trial court granted the State's Motion to Amend Indictment. (T. 13)

Wilson chose to represent himself, even though he had previously been appointed Dan W. Duggan, Jr. as his attorney. However, the trial court appointed Mr. Duggan as Wilson's legal advisor, stating that Mr. Duggan would, " be present in the courtroom for you to ask questions and give any assistance that you feel proper, or feel that you need." (T. 10)

On August 28, 2007, Wilson was tried and convicted of embezzlement. The trial court sentenced Wilson to ten years in the custody of the Mississippi Department of Corrections, without eligibility for early release or parole. (T. 240)

On August 30, 2007, the Court entered its Order Denying Motion for New Trial (C.P. 58). It is from Wilson's conviction and Order Denying Motion for New Trial that he appeals.

STATEMENT OF FACTS

Melanie Anderson testified that while she was a cashier at a gasoline station in Rankin County, Wilson came into the station. She told him she liked the automobile he was driving, and he responded that he could get her one at an auction. (T. 80, 81, 99)

She told him the type of vehicle in which she was interested. She said Wilson told her that she needed to make a $1,000.00 deposit on the vehicle, and that he would finance the balance. (T. 82).

The total cost of the automobile was to be approximately $14,500.00 (T.82). She gave Wilson a $500.00 deposit on November 15, 2005 (T.80, 84 89). She said that since she had not seen the vehicle she only gave him $500.00 as opposed to the $1,000.00 deposit he originally requested. She was given a receipt for the $500.00 deposit (T. 85, 86).

She said she repeatedly called and talked to Wilson, but that he gave multiple excuses and he never took her the vehicle. In February, 2006 he called her and said that he had a different vehicle for her, but he needed an additional $300.00 deposit. She gave him the $300.00 for which she was given a receipt (T. 90, 91).

She said she never got the vehicle even after Wilson told her that he would meet her and give her the vehicle she wanted (T.93). The total cost of the second vehicle was to be $14,000.00, provided Ms. Anderson gave Wilson an additional $300.00. He was to finance the balance, and she was to pay monthly payments (T. 96).

Subsequently, she went to Wilson's parents' house where he was. She said he agreed to return her money, and that his bank would send her a check (T. 98). In July, 2006 she said she gave up and went to the police about the problem (T. 98, 99).

The initial $500.00 payment was made to Wilson at a truck stop in Pearl (T. 99). The subsequent $300.00 payment was given to him at the gasoline station where Ms. Anderson worked in Brandon (T. 100).

David Ruth, the then Chief Detective with the Brandon Police Department, testified concerning his investigation and discussions with Wilson. He stated that he talked with both Wilson and Ms. Anderson, and that she presented him her receipts for the $500.00 and $300.00 payments. Detective Ruth testified that Wilson could not provide him evidence of conveying title to any vehicle to Ms. Anderson (T. 130-135).

Detective Bo Edgington, also with the Brandon Police Department, took over the investigation for Lieutenant Ruth. Detective Edgington stated that he questioned Wilson, who initially told him he received $300.00 from Ms. Anderson as deposit toward the purchase of a vehicle. However, Detective Edgington said that subsequently Wilson was shown the receipts for $500.00 and $300.00 respectively, and Wilson admitted that those were the receipts given to Ms. Anderson by him (T. 157-160).

Over the objection of Wilson, the State questioned Tamie Griffin, Crystal Chambers, and Lotonia Brunston, who all claimed that they had given Wilson money as a deposit on a vehicle, but that he never conveyed to them title to the vehicles (T. 175-195).

STATEMENT OF ISSUES

ISSUE ONE

THE INDICTMENT FAILED TO STATE AN ELEMENT OF THE CRIME OF EMBEZZLEMENT, SECTION 97-23-19

ISSUE TWO

PERMITTING THE TESTIMONY OF WITNESSES GRIFFIN, CHAMBERS, AND BRUNSTON VIOLATED M.R.E. 403 AND 404(B).

ISSUE THREE

THE CONDUCT OF THE SENTENCING PHASE VIOLATED WILSON'S CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION AND HIS RIGHT TO DUE PROCESS

ISSUE FOUR

THE STATE FAILED TO SATISFY ITS BURDEN OF PROOF AS TO THE ELEMENTS OF EMBEZZLEMENT, AND THE COURT SHOULD HAVE GRANTED WILSON'S MOTION FOR DIRECTED VERDICT AND MOTION FOR NEW TRIAL, OR IN THE ALTERNATIVE, JUDGMENT NOTWITHSTANDING THE VERDICT.

SUMMARY OF ARGUMENTS

ISSUE ONE

THE INDICTMENT FAILED TO STATE AN ELEMENT OF THE CRIME OF EMBEZZLEMENT, SECTION 97-23-19

A necessary element of the crime of embezzlement was omitted from the indictment. That element reads, "if any trustee or factor, carrier or bailee, or any clerk, agent, or servant of any private person...." Because of that, Wilson's conviction must be reversed. Because of his conviction, should Wilson be re-tried for the same offense, that would violate the Double Jeopardy clause of the Fifth Amendment to the U.S. Constitution and Article 3, Section 22 of the Mississippi Constitution.

ISSUE TWO

PERMITTING THE TESTIMONY OF WITNESSES GRIFFIN, CHAMBERS, AND BRUNSTON VIOLATED M.R.E. 403 AND 404(B).

Over the objection of Wilson, the Court permitted testimony of three persons who testified that they had given money to Wilson to acquire automobiles for them, but that Wilson never provided them the automobile nor returned their money. There was no inter-connectedness between those three situations and that of Melanie Anderson, and thus, their testimony violated M.R.E. 403 and 404(b).

ISSUE THREE

THE CONDUCT OF THE SENTENCING PHASE VIOLATED WILSON'S CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION AND HIS RIGHT TO DUE PROCESS

Wilson represented himself at trial, and told the Judge that he did not wish to testify. Prior to the Court's imposing sentence on Wilson, Wilson told the Court he had nothing to say. However,

the Court questioned Wilson extensively about his prior convictions. It clearly appears that the Court considered Wilson's testimony about those convictions when it imposed the maximum sentence under the statute for embezzlement. This Court's questioning of Wilson violated his constitutional right against self-incrimination.

ISSUE FOUR

THE STATE FAILED TO SATISFY ITS BURDEN OF PROOF AS TO THE ELEMENTS OF EMBEZZLEMENT, AND THE COURT SHOULD HAVE GRANTED WILSON'S MOTION FOR DIRECTED VERDICT AND MOTION FOR NEW TRIAL, OR IN THE ALTERNATIVE, JUDGMENT NOTWITHSTANDING THE VERDICT.

Jury Instruction 8 (S-1/A) instructed the jury on elements of the crime of embezzlement with which Wilson was charged. However, that instruction failed to include the element omitted from the indictment discussed under Issue One. Because of that, the State failed to prove all elements of the crime beyond under a reasonable doubt.

ARGUMENT OF ISSUES

ISSUE ONE

THE INDICTMENT FAILED TO STATE AN ELEMENT OF THE CRIME OF EMBEZZLEMENT, SECTION 97-23-19

Wilson was charged by indictment with embezzlement, Section 97-23-19. The alleged crime, according to the indictment, was to have occurred, "On, about or between the dates of the 8th day of November and the 1st day of February, 2006...." (C.P.4). At that time, Section 97-23-19 provided:

> 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 away 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 entrusted 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. (underline supplied)

Effective March 15, 2007, Section 97-23-19 was amended, but the statute applicable at the time Wilson allegedly committed embezzlement provided 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 incorporated company," or (2) "any trustee or factor, carrier, or bailee, or any clerk, agent or servant of any private person...."

The indictment against Wilson charged him as follows:

> On, about or between the dates of the 8th day of November, 2005 and the 1st day of February, 2006, in the county aforesaid and within the jurisdiction of this Court, did wilfully, unlawfully, feloniously, take, and convert to his own use U. S. currency, valued in excess of Five Hundred Dollars ($500.00), the personal property of Melony Anderson, which had been entrusted to his care by virtue of his employment, in violation of Mississippi Code Annotated Section 97-23-19 (1972), as amended, and against the peace and dignity of the State of Mississippi.

While the indictment alleges that Wilson converted the money to his own use, and that it had been entrusted to his care by virtue of his employment, it failed to state, "if any trustee or factor, carrier or bailee, or any clerk, agent or servant of any private person, shall embezzle or fraudulently...."

Admittedly, Wilson did not object by demurrer to the defective indictment, but the Court of Appeals has said that despite a defendant's failure to demurrer, the issue can be raised on appeal. In Baker v. State, 930 So. 2d 399, 404 (Miss. App. 2005), the Court stated:

> Further, the Mississippi Supreme Court has held that where a deficiency appearing in an indictment is non-jurisdictional, it may not be raised for the first time on direct appeal "absent a showing of cause and actual prejudice." Brooks v. State, 573 So. 2d 1350, 1353 (Miss. 1990); Braisington v. State, 760 So. 2d 18, 26 (Miss. Ct. App. 1999). Our courts have identified two incidences where deficiencies are deemed jurisdictional, "where, the indictment fails to charge a necessary element of a crime," and where "there exists no subject matter jurisdiction."

Thus, Baker holds for the proposition that in instances such as the indictment against Wilson, because the missing element was necessary, the trial court had no jurisdiction of the case, and therefore, Wilson is permitted to raise this issue for the first time on appeal.

Wilson's conviction for embezzlement must be reversed. In Neal v. State, 936 So. 2d 463 (Miss. Ct. App. 2006), the defendant entered a guilty plea purportedly to a bill of information charging him with armed robbery and manslaughter. Because the bill of information did not include a necessary element of armed robbery, the Court found that the trial court had no jurisdiction to accept the defendant's plea to armed robbery, but only for the crimes of robbery and manslaughter. It would violate the Double Jeopardy clause in the Fifth Amendment to the U. S. Constitution and Article 3, Section 22 of the Mississippi Constitution for Wilson to be retried for the same crime. Article 3, Section 22 says:

> No person's life or liberty shall be twice placed in jeopardy for the same offense, but there must be an actual acquittal or conviction on the merits to bar another prosecution. (underline supplied).

Because Wilson was convicted, to retry him for the same offense would violate the Double Jeopardy clauses.

ISSUE TWO

PERMITTING THE TESTIMONY OF WITNESSES GRIFFIN, CHAMBERS, AND BRUNSTON VIOLATED M.R.E. 403 AND 404(B).

On August 24, 2007, the State filed the State's Disclosure of Trial Witnesses pursuant to Uniform Circuit Court Rule 9.04A (C.P. 20). Notably, August 24th was on a Friday, and Wilson's trial

began August 28th, so he was given notice, at best, only one working day prior to his trial that Lotonia Brunston, Tamie Griffin, and Crystal Chambers would testify against him, and that their testimony would concern their dealings with him. Wilson's legal advisor, Dan Duggan, objected to their testimony (T.170). The trial court overruled Wilson's objection (T. 174).

Tamie Griffin testified that sometime in 2005 she met Wilson. She testified that she needed a car, that she called Wilson, and that he told her he could get her a car at the auction. She said she wanted a "Crown Vic" and that Wilson needed $1,700.00 of which $700.00 was to be paid at that time. She said he subsequently told her that that car had been sold, that he had found an Acura for her, but that he needed $2,100.00 for that. She said after that she gave him $1,400.00.

That day Wilson showed her the car, but said he had to have some body work done on the car and would then give her the car. She said that after a couple of days passed, she had not gotten the car, and asked Wilson to return her money. She said that after repeated phone calls over a period of weeks, she stopped calling Wilson, but she never received the car nor a refund (T.175-179). Upon cross examination of her, she admitted that she had no receipt for the money, that she never filed a police report, nor did she ever sue Wilson (T.181).

Crystal Chambers said she came in contact with Wilson in late 2005. She said that she was to have given Wilson $1,000.00 down for him to acquire an automobile for her at an auction, but she

gave him only $200.00. She said that Wilson told her that he had to have the balance of the $1,000.00 before he would get her car. She never gave him the balance of the $1,000.00, and she said Wilson never returned her money. She said she told him that she had the balance of the money, and asked if she could see the car before she gave it to him. She said Wilson told her he had to have the balance, $800.00, before she could see the car. She said she asked him twice to see the car, but after he did not provide the car to her, she asked for a refund. She said that after that Wilson told her he would mail her a check, but she never received it.

On cross examination, Ms. Chambers stated that she did not have a receipt for the $200.00. She also said that approximately a month and a half passed between the time that she gave Wilson the $200.00, and when "the deal was off." She said she never filed a police report, nor did she ever sue Wilson (T.181-186).

Lotonia Brunston testified that in 2005 she gave Wilson $1,000.00 for him to obtain an automobile for her at an auction. She testified that after she gave Wilson a $1,000.00 deposit, he was to obtain a car for her having a total cost of $3,000.00-$4,000.00. Wilson was to finance the car for her. She said she never saw the car. Her boyfriend owed Wilson $600.00. She said she, Wilson and her boyfriend met, and that Wilson returned $500.00 to her of the $600.00 that her ex-boyfriend owed Wilson. She did not testify as to any length of time between the time she gave Wilson the $1,000.00 and when she ceased communications with him.

(T. 181-184) She, like Ms. Griffin and Ms. Chambers, had no receipt for the money allegedly given to Wilson (T. 184-186).

In discussing whether the testimony of these three individuals should be permitted, the Court said:

> And I believe character is an issue in this case. And the way I read 404(b) and 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 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 would be allowed to testify as to those matters (T. 174).

First, it appears that one of the reasons the trial court permitted the introduction of the testimony is because it deemed character to be an issue. First, M.R.E. 404(a) says that evidence of a person's character is not admissible to prove that someone acted in conformity therewith. Secondly, M.R.E. 404(b) says that evidence of other crimes, wrongs or acts is inadmissible to prove character and to show that someone acted in conformity therewith. Thus, based on those two rules, the trial court erred in permitting the three individuals to testify against Wilson.

M.R.E. 404(b) does say that evidence of other crimes, wrongs or acts is admissible to prove, inter alia, intent or absence of mistake. The purpose of Rule 404(b) is to obviate the inference that a defendant has committed other crimes, and is therefore

likely to have committed the crime charged. Denham v. State, 966 So. 2d 894 (Miss. Ct. App. 2007). However, the Comment to 404(b) says:

> Evidence of another crime, for instance, is admissible where the offense in the instant case and in the past offense are so interconnected as to be considered part of the same transaction. Neal v. State, 454 So. 2d 743 (Miss. 1984).

In Jones v. State, 920 So. 2d 465 (Miss. 2006) the State was permitted to introduce evidence that the defendant had assaulted the victim one day before the incident for which the defendant was indicted for aggravated assault, kidnapping and unlawful possession of a firearm after having been convicted of a felony, on the basis that the evidence was admissible under M.R.E. 404(b) to establish motive, intent, plan and absence of mistake or accident. In holding that the evidence was admissible, the Court stated:

> We have expounded upon the well defined exceptions to this rule and stated:
>
> Proof of another crime is admissible where the offense charged and that offered to be proved are so interrelated as to constitute a single transaction or occurrence or a closely related series of transactions or occurrences. Such proof of another crime is also admissible where it is necessary to identify the defendant, where it is material to prove motive, and there is an apparent relation or connection between the act proposed to be proved and that charged, where the accusation involves a series of criminal acts which must be proved to make out the offense, or where it is necessary to prove scienter or guilty knowledge. Neal, 451 So. 2d at 758-59 Underwood v. State, 708 So. 2d 18, 31-32 (Miss. 1998).

> In Ballenger v. State, 667 So. 2d 1242, 1257 (Miss. 1995), we explained further: The State has a "legitimate interest in telling a rational and coherent story of what happened...." Turner v. State, 478 So. 2d 300, 301 (Miss. 1985); Neal v. State, 451 So. 2d 743, 759 (Miss. 1984). Where substantially necessary to present to the jury "the complete story of the crime" evidence or testimony may be give even though it may reveal or suggest other crimes. State v. Villavicencio, 95 Ariz. 199, 388 P. 2d 245 (1966).

Thus, to be admissible, the crimes or bad acts about which Griffin, Chambers, and Brunston testified would have to have been, "so interrelated as to constitute a single transaction or occurrence or a closely related series of transactions or occurrences," or, were "necessary to identify the defendant," were "material to prove motive, and there is an apparent relation or connection between the act proposed to be proved and that charged," the accusation against Wilson involved "a series of criminal acts which must be proved to make out the offense," or were "necessary to prove scienter or guilty knowledge."

Obviously, Wilson's actions concerning those three women were not in any way interrelated to that in the case sub judice so as to constitute a single transaction or occurrence, nor were they in any way "a closely related series of transactions or occurrences." Further, there was no "apparent relation or connection" between Wilson's actions involving the three women and Mrs. Anderson's. Also, there were not "a series of criminal acts which must be proved to make out the offense" against Wilson. Though evidence of prior bad acts may be a 404 (b) exception, the trial court must

still apply M.R.E. 403 and weigh the prejudicial effect of the evidence against its probative value.

Without question, the evidence of the three women prejudiced Wilson. The Court of Appeals has held that while the evidence must be "filtered" through a balancing test, failure to explicitly perform that test does not necessitate a reversal. West v. State, 969 So. 2d 147 (Miss. App. 2007). In the case sub judice the Court made only a conclusory statement that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. No balancing analysis was stated for the record. In West, at p. 152, the Court said:

> It follows that our review depends on the evidence and not the judge, and while a judge's own-the-record analysis is recommended as it serves to fortify the judge's position for purposes of review, the lack of such analysis is harmless unless we deem the evidence to be patently prejudicial.

The testimony of Chambers, Griffin and Brunston was "patently prejudicial." Further, in West the Court found that the probative value against the defendant was extremely significant, because "it gave meaning to what would have otherwise been a random act of violence." West, at p. 153. The testimony of the three women added nothing to the other evidence against Wilson, but only subjected Wilson to extreme prejudice.

ISSUE THREE

THE CONDUCT OF THE SENTENCING PHASE VIOLATED WILSON'S CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION AND HIS RIGHT TO DUE PROCESS

At the conclusion of the State's case in chief, the trial court advised Wilson that he had the right to remain silent and not testify. Wilson told the Judge he chose not to testify (T. 197). Subsequently, after the jury had reached a verdict, the Judge asked Wilson if he had anything to present to the Court prior to the Court imposing sentence. Wilson's legal advisor told the Judge that Wilson did not (T. 231). Yet, in spite of Wilson's previous statement to the Court that he did not wish to testify, the Court began extensive questioning of Wilson with respect to his previous convictions. Among other things, the Court asked Wilson, "What did you do in those cases?" (T. 32). As a result of Wilson's response to that question, the Court said it understood Wilson to say that he denied committing the prior charges for embezzlement. The Judge then questioned Wilson about a marijuana charge to which he had plead guilty. Again, the Judge asked Wilson to tell him about that charge (T.234). In response to that question, the Judge then said:

> So it sounds like you got eight felony convictions where you are really trying to say you just really weren't, you wasn't the person that did it.

Again, after Wilson responded to more questions from the Judge, the Judge said, "You seem to be fairly well versed in the world of drug seizures and forfeitures." Finally, after the questioning of Wilson had ceased, the Judge made the following statements:

> But what I've got before me is a defendant that has eight prior felony convictions that really is refusing to accept any responsibility for any of them. He's got an explanation for all of them. (T. 237)
>
> I suspect you probably also have done this to many other people before you did this to the victim in this case.
>
> I am also convinced that there are others that you have conned. (T. 238).
>
> But I believe if I could sentence you to twenty years, I would, because you have no remorse. You don't have any remorse for the eight prior felonies before you. (T. 239).

The Court then sentenced Wilson to ten years in the custody of the Mississippi Department of Corrections, without eligibility for early release or parole. Subsequently, the Court stated:

> And I want the record to reflect that you are among the worst criminals I think I have seen in this courtroom.
>
> You got what you deserve, and I'm not even going to say any more than that, <u>because I need to keep quiet</u>. (T. 240). (underline supplied)

Finally, the Court stated:

> I just want to supplement the record that part of my consideration in discussing with the defendant the way I was, was that he had, he has presently a capital rape charge pending, a
>
> false pretense and embezzlement by contract in this Court. (T. 241).

Admittedly, during the sentencing phase, Wilson did not object to the Court's questioning him, but that was not required. As this Court has recognized, once a person asserts their right not to incriminate themselves, then all questioning must cease. Further, even if it should be contended that Wilson was required to make a

contemporaneous objection to preserve his right to appeal on this ground, the error by the trial court in questioning Wilson constituted "plain error." This Court has said:

> The plain error doctrine requires that there be an error and that the error must have resulted in a manifest miscarriage of justice (ld at 187). Further, [the] Court applies the plain error rule only when it affects a defendant's substantive/fundamental rights. The plain error doctrine has been construed to include anything that "seriously affects the fairness, integrity or public reputation of judicial proceedings." McClain v. State, 929 So. 2d 946, 951 (Miss. Ct. App. 2005) (citing United States v. Olano, 507 U. S. 725, 732; 113 S.ct. 1770; 123 L. Ed. 2d 508 (1993); Smith v. State ___ So.2d, ___ 2007 WL 2770181 (Miss. App.)

Clearly, Wilson's responses to the Court's questioning prejudiced him. Had Wilson remained silent, whether or not he was remorseful for prior crimes, would not have been an issue in his sentencing by the Court. It strongly appears that the Court recognized that its questioning of Wilson and its comments about him were improper when the Court said, "I'm not even going to say any more than that, because I need to keep quiet" (T. 240).

Failure to inform a defendant unrepresented by counsel that he is not required to testify violates his due process rights against self-incrimination, and the right not to testify is not waived by testifying. People v. Kramer, 227 Cal. App. 2d 199; 38 Cal. Rptr. 487 (2d Dist. 1964); Maples v. State, 35 Md. 330, 600 A. 2d 851 (1992). Where an unrepresented defendant was informed by the trial judge, at the conclusion of the prosecution's case, that he could make any statement he wished, the appellate court held that the

trial court had a duty to inform the defendant that he had the right not to testify, that the defendant's decision to testify did not constitute a waiver, and therefore, the conviction was reversed. Cochran v. State, 117 So. 2d 544 (Fla. App. 1960).

In the case sub judice the trial court's questioning of Wilson after he asserted his right not to testify is analogous to the interrogation of a person by a law enforcement officer after he has chosen to remain silent. Once the right to remain silent is invoked, interrogation must cease. Mooney v. State, 951 So. 2d 627 (Miss. App. 2007), citing Holland v. State, 587 So. 2d 848 (Miss. 1991 citing Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L. Ed. 378 (1991).

The Court claimed that at the time of the trial Wilson had pending charges for capital rape, false pretenses and embezzlement, none of which were in evidence, and even if they were, should not have been considered in the sentencing of Wilson. Because of that, Wilson's rights to due process as guaranteed him by the Fifth and Fourteenth Amendments to the U. S. Constitution and Article 3, Section 14 of the Mississippi Constitution were violated.

Obviously, it was error for the Court to question Wilson after he had asserted his right not to testify, and it was error to include matters not in evidence in the Court's consideration of sentencing. Unquestionably, violations of those rights of Wilson were violations of "substantive/fundamental rights," and seriously affected the fairness, integrity, and public reputation of judicial proceedings.

The trial court had the authority to sentence Wilson to less than the maximum term imposed by statute. Trial courts have the authority to consider constitutional principles of proportionality and to impose less than the maximum sentence as otherwise required by statute. Bonner v. State, 962 So. 2d 606 (Miss. App. 2006); Flowers v. State, 522 So. 2d 762 (Miss. 1988). Thus, the trial court was incorrect when it stated that only the maximum sentence could be imposed (T. 231).

ISSUE FOUR

THE STATE FAILED TO SATISFY ITS BURDEN OF PROOF AS TO THE ELEMENTS OF EMBEZZLEMENT, AND THE COURT SHOULD HAVE GRANTED WILSON'S MOTION FOR DIRECTED VERDICT AND MOTION FOR NEW TRIAL, OR IN THE ALTERNATIVE, JUDGMENT NOTWITHSTANDING THE VERDICT.

As stated under Issue One the indictment failed to list a necessary element of the crime of embezzlement. Likewise, Jury Instruction 8 (S-1A) failed to state that element. (C.P. 39) Wilson moved the Court for a directed verdict at the conclusion of the prosecution's case, but the motion was denied (T. 196). Wilson filed with the Court his Motion for New Trial, or in the Alternative, Judgment Notwithstanding the Verdict (C.P. 54). That Motion was denied by the Order Denying Motion for New Trial (C.P. 58).

In ruling upon a motion for directed verdict or motion for judgment notwithstanding the verdict, the trial judge is required to accept as true all the evidence that is favorable to the State, including the reasonable inferences that may be drawn therefrom, and to disregard evidence favorable to the defendant. Hart v.

State, 637 So. 2d 1329 (Miss. 1994); Edwards v. State, 615 So. 2d 590 (Miss. 1993); Clemons v. State, 460 So. 2d 835 (Miss. 1984).

In Bounds v. State, 962 So. 2d 1255, 1259 (Miss. 2007), the Court stated:

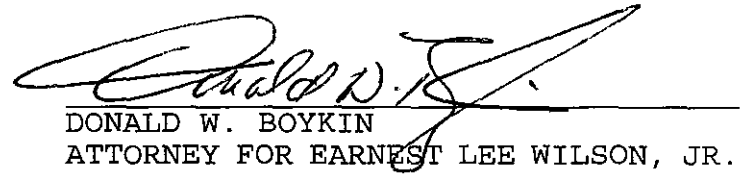
> In reviewing whether a verdict is supported by the evidence, we are required to look at the totality of the circumstances, and "our concern... is whether the evidence in the record is sufficient to sustain a finding adverse to [the defendant] on each element of the offense... with respect to each element...[we must] consider all the evidence-not just the evidence that supports the case for the prosecution - in the light most favorable to the verdict." McKee v. State, 791 So. 2d 804, 807 (Miss. 2001).
>
> It is hornbook criminal law that the state must prove each element of the offense. Neal v. State, 451 So. 2d 747, 757 (Miss. 1984). Due process requires that the state prove each element of the offense beyond a reasonable doubt. Saxon v. Virginia, 443 U.S. 307, 324; 99 S.Ct. 2781; 61 L.Ed 2d 560 (1979) (internal citation omitted). There must be in the record evidence sufficient to establish each element of the crime. Fisher v. State, 481 So. 2d 203, 211 (Miss. 1985).

Considering that the indictment and Jury Instruction 8 failed to state a necessary element of the crime of embezzlement, and therefore, not only was that element not proven beyond reasonable doubt, there was no evidence of that element, and thus, no finding by the jury.

CONCLUSION

Due to the State's failure to include in the indictment a necessary element of the crime of embezzlement and in Jury Instruction 8, stating the elements of the crime which the State had to prove, the conviction of Wilson should be reversed. It would violate the Double Jeopardy clauses of the U.S. Constitution and Mississippi Constitution to re-try Wilson, and therefore, this Court should render a decision in favor of Wilson. The State failed to satisfy its burden of proof that Wilson committed the crime of embezzlement, and therefore, the conviction of Wilson should be reversed and a decision rendered in his favor. In the alternative, the conviction of Wilson should be reversed and the matter remanded to the Circuit Court for a new trial.

Respectfully submitted,



DONALD W. BOYKIN
ATTORNEY FOR EARNEST LEE WILSON, JR.

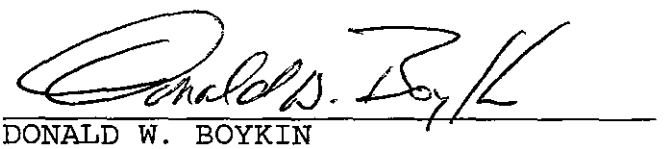
CERTIFICATE OF SERVICE

I, Donald W. Boykin, hereby certify that I have this day mailed by United States Mail or hand delivered, a true and correct copy of the Brief for Appellant to:

a. Hon. William E. Chapman, III, Circuit Judge;

b. Hon. Jim Hood, Attorney General; and

c. Hon. Michael P. Guest, District Attorney



DONALD W. BOYKIN