IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CAROLYN M. BARNES — APPELLANT

VS. — NO. 2008-KA-0684

STATE OF MISSISSIPPI — APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

JIM HOOD, ATTORNEY GENERAL

BY: DEIRDRE MCCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL
[redacted]

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MS 39205-0220
TELEPHONE: (601) 359-3680

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

IN THE SUPREME COURT OF MISSISSIPPI

CAROLYN BARNES **APPELLANT**

VERSUS **NO. 2008-KA-0684-SCT**

STATE OF MISSISSIPPI **APPELLEE**

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Procedural History

In the Circuit Court of Warren County, Carolyn Barnes was tried on a two-count indictment charging her with embezzlement and robbery. She was acquitted of the charge of robbery, convicted on the charge of embezzlement, and sentenced to ten years in the custody of the Mississippi Department of Corrections. Aggrieved by the judgment rendered against her, Mrs. Barnes has perfected an appeal to this Court.

Substantive Facts

Lottie Montague, 88 years old at the time of trial, testified that "all this happened" when she was 86. On May 8, 2006, her care giver, Carolyn Barnes, drove her to the Bancorp South bank in Vicksburg. Knowing that her daughter Joyce "needed some money," i.e., $3,000, to get out of a

financial jam, Mrs. Montague cashed a check for that amount.[1] She and Mrs. Barnes "went to Kentucky Fried Chicken and got a sandwich" and then went to Mutual Credit Union, where Mrs. Barnes offered to put the money into Joyce Montague's account. While Mrs. Barnes was inside the credit union office, Mrs. Montague's son Charles Montague, who worked across the street, approached that car and asked, "What are y'all doing here?" She replied, "I'll tell you about it later." (T.180-83)

After Mrs. Barnes drove Mrs. Montague back home, they had their lunch, and Mrs. Montague said that she wanted to take a nap. Mrs. Barnes responded that she would "lock the door" on her way out to ensure that Mrs. Montague would be safe. Mrs. Montague then lay down and "went to sleep." (T.183-84)

At trial, when she was asked, "How did you wake up?" Mrs. Montague testified,

> [S]omebody had thrown a pillow– had thrown a blanket over my face and they had gotten a pillow and they were rubbing it back and forth across my face. And I thought, Well, if this is the way I'm going to die, I might as well die. So I just– I just laid down and relaxed. And I had rings on my fingers, and they took the rings off my fingers.
>
> (T.184)

Her purse, containing $300 in cash, also was taken. Mrs. Montague saw that her assailant was wearing "a white shirt with a blue stripe down it," but she was unable to identify him or her. (T.184-85)

---

[1]Mrs. Montague testified that Mrs. Barnes was her employee at the time and that she trusted her. (T.182-83)

Shortly afterward, Mrs. Montague's daughter reported that the $3,000 had not been deposited into her account. Mrs. Barnes never reported back to work for Mrs. Montague. (T.186-87, 215)

Janice Brown, custodian of records for the local branches of Bancorp South, testified that at 12:22 p.m. on May 8, 2006, a check for $3,000 was drawn on Mrs. Montague's account. Charles Montague, Charles Montague, Jr., and M. Joyce Montague also were authorized to write checks on this account. (T.226-27)

Rachel Griffin, an employee of Mutual Credit Union, had been asked to review surveillance footage taken on May 8, 2006. She had looked "for a transaction that was supposed to be made into Joyce's account."[2] She saw observed Barnes, but none of the Montague family, on the tape. During the time frame in question, no deposit was into Joyce Montague's account, or into any account held by any member of the Montague family. (T.228-32)

Detective Randy Lewis of the Warren County Sheriff's Department testified that he was assigned to this case on May 8, 2006. He went to the residence of Mrs. Montague, who informed him that her assailant had taken her rings, credit cards, $300 in cash, and a set of car keys. Detective Lewis found no sign of forced entry into the house. Acting on leads provided by Mrs. Montague, he determined that the alibis of the potential robbery suspects "check[ed] out." (T.242-47)

The following day, Detective Lewis received the "startling information" that Mrs. Montague also had been relieved of $3,000. That day, Mrs. Montague went to the sheriff's office, where she informed Detective Lewis that she had given the cash to Mrs. Barnes to deposit into Joyce Montague's account at Mutual Credit Union. (T.247-50)

---

[2]Ms. Griffin knew Lottie Montague, Charles Montague, Joyce Montague and Barnes. (T.229)

The defense presented two character witnesses. (T.272-81)

Mrs. Barnes testified that she and Mrs. Montague had gone inside the bank, and that Mrs. Montague had put the $3,000 cash into her wallet and then into her purse. After they went to Kentucky Fried Chicken to get lunch, Mrs. Barnes drove Mrs. Montague to the Mutual Credit Union "to get some change." When they "pulled up in the parking lot," Mrs. Montague's son "appeared" and inquired about their business. Mrs. Barnes told him that she was "about to go and get some change" and that she would talk to him later. She "left him at the truck on the passenger's side talking to Mrs. Lottie" and "went into the bank," where she obtained change from the hundred-dollar bill that Mrs. Montague had handed to her. She returned to the truck and gave the change to Mrs. Montague, who put it inside her purse. (T.287-92)

SUMMARY OF THE ARGUMENT

The trial court found that Mrs. Barnes did not invoke her right to counsel before making the statement to Detective Lewis. Accordingly, no error has been shown in the admission of that statement into evidence.

Furthermore, the trial court properly denied the motion for new trial. The state presented substantial credible evidence that Mrs. Barnes was guilty of embezzlement, and the proof to the contrary simply created an issue of fact which was properly resolved by the jury.

PROPOSITION ONE:

THE TRIAL COURT DID NOT ERR IN ADMITTING THE DEFENDANT'S STATEMENT INTO EVIDENCE

Prior to trial, the defense filed a motion to suppress the statement given by Mrs. Barnes to Detective Lewis. (C.P.23-25) During the hearing on this motion, Detective Lewis testified that he

had asked Mrs. Barnes to come to his office for an interview on May 23, 2006. At this point, he did not consider her to be a suspect. Her statement was recorded and later transcribed. (T.138-39)

After Mrs. Barnes began to make statements which indicated that she might be a "person of interest," Detective Lewis informed her of her *Miranda* rights. She executed a waiver of those rights. (T.140)

Detective Lewis went on to testify, "When an individual formally requests an attorney, my questioning is going to stop with that individual." When asked whether Mrs. Barnes had ever requested an attorney during the interview, he replied, "No, sir, she did not." At one point, he asked her again whether she wanted to "get an attorney," and "[s]he said if I need to get one." He replied, "Well, I mean, is that what you want to do?" She responded, "It doesn't matter to me." Detective Lewis reiterated that she had never requested the assistance of an attorney, and testified that at the conclusion of the questioning, she thanked him. (T.141-43)

During cross-examination, he testified, "All she had to say was, I want an attorney, and that would have been the end of it." (T.145)

On redirect examination, Detective Lewis was asked, "And you offered her an attorney?" He answered, "Several times," and went on to testify that she never said that she wanted an attorney, but that she "continued to talk." (T.147)

Mrs. Barnes testified that she felt she was "under pressure" to continue talking to Detective Lewis after he had informed her of her rights. She also said that she had asked him, "Well, do I need a lawyer?" (T.154-55)

The state argued in pertinent part that Mrs. Barnes had made "no clear invocation of her rights" and that "she continued to talk of her own volition for 21 pages after being read her rights

and any discussion of any attorney." (T.162) After hearing arguments from both parties, the court made these findings and conclusions:

> The Court finds that the defendant understood her right to get an attorney, as expressed in the statement. ... [T]hey were talking around the point, but it seems very clear on page 32, when the ... investigator asked, she says, "Now if I need to get a lawyer," she said, "I will get one," He said, "Is that what you want to do?" She says, "It don't matter to me." And he asked her plainly, "Do you want"– she said, "Whatever we got to do."
>
> **She never does say she wants an attorney, and the Court is going to so find. She understood her rights. She never exercised that right. She talked around it. ... [T]he Court is of the impression that she was considering whether she wanted to get an attorney, but she never said that she wanted an attorney.** So I'm going to find that her statement was free and voluntary. It was not coerced. And she was given her Miranda warnings, and they were not abused.
>
> (emphasis added) (T.165-66)

The record supports the court's finding that Mrs. Barnes never made an unequivocal request for an attorney, and that her comments on the point were ambiguous at best. *Chamberlin v. State*, 989 So.2d 320, 332-33 (Miss.2008), citing *Davis v. United States*, 512 U.S. 452, 458-59 (1994) ("if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel," cessation of questioning is not required). Accord, *Delashmit v. State*, 991 So.2d 1215 ,1221 (Miss.2008) (invocation of right to counsel must be unambiguous). Accordingly, no error can be shown in the court's denial of her motion and the admission of her statement into evidence. Mrs. Barnes's first proposition should be denied.

PROPOSITION TWO:

THE TRIAL COURT PROPERLY OVERRULED THE MOTION FOR NEW TRIAL

Mrs. Barnes finally contends the court erred in denying her motion for new trial on the ground the verdict was contrary to the overwhelming weight of the evidence. To prevail, she must satisfy the following rigorous standard of review:

> "[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),

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).

It has been "held in numerous cases that the jury is the sole judge of the credibility of the witnesses and the weight to be attached to their testimony." *Kohlberg v. State*, 704 So.2d 1307, 1311 (Miss.1997). As this Court recently reitereated in *Hales v. State*, 933 So.2d 962, 968 (Miss.2006), criminal cases will not be reversed "where there is a straight issue of fact, or a conflict in the facts..." [citations omitted] Rather, "juries are impaneled for the very purpose of passing upon such questions of disputed fact, and [the Court does] not intend to invade the province and prerogative of the jury. " [citations omitted]

Incorporating by reference the evidence recounted under out Statement of Substantive Facts, we submit the prosecution presented substantial credible proof that Mrs. Barnes committed the crime of embezzlement as set out in the indictment and defined by MISS. CODE ANN. Section 97-23-19 (1972) and Instruction S-1. (C.P. 5, 68) Mrs. Montague testified unequivocally that she gave Mrs. Barnes, her employee, $3,000 to put into Joyce Montague's account, and that Mrs. Barnes went into the credit union with the money. Other proof showed that the money was never deposited into Joyce Montague's account. The reasonable inference is that Mrs. Barnes converted this money to her own use. Evidence to the contrary simply created an issue of fact which was properly resolved by the jury. Mrs. Barnes's second proposition should be denied.

CONCLUSION

The state respectfully submits that the arguments presented by Mrs. Barnes have no merit. Accordingly, the judgment entered below should be affirmed.

Respectfully submitted,

JIM HOOD, ATTORNEY GENERAL
STATE OF MISSISSIPPI

BY: DEIRDRE McCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

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:

Honorable Frank G. Vollor
Circuit Court Judge
P. O. Box 351
Vicksburg, MS 39181-0351

Honorable Richard Smith
District Attorney
P. O. Box 648
Vicksburg, MS 39181

Erin E. Pridgen, Esquire
Attorney At Law
Mississippi Office of Indigent Appeals
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201

This the 26th day of June, 2009.

DEIRDRE MCCRORY
SPECIAL ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL
POST OFFICE BOX 220
JACKSON, MISSISSIPPI 39205-0220
TELEPHONE: (601) 359-3680