

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

HAZEL L. CUMMINGS

APPELLANT

VS.

NO. 2009-KA-1896

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF THE CASE

On or about March 28, 2007, a Jones County Grand Jury indicted Hazel L. Cummings embezzled and converted to her own use a sum of money in excess of \$500.00, which had been entrusted to her care or possession by virtue of her employment with Leon Stinson and Ellen Stinson d.b.a. Stinson Mini-marts, Laurel, Mississippi, in violation of Mississippi Code Annotated § 97-23-19 (1972). (C.P. 3) Cummings was tried and convicted of one count of embezzlement on June 4, 2009. Cummings was sentenced to 10 years in the custody of the Mississippi Department of Correction with five years suspended and five years to serve. The trial court sentenced Cummings to serve a ten (10) year sentence with the Mississippi Department of Corrections, to be suspended upon the successful completion of the Restitution Center and the successful completion of five (5) years on post-release supervision and successful completion of the Circuit Court Community Service Program. Cummings was sentenced to restitution in the amount of court costs of \$271.50, attorney fees of \$750.00, and restitution due in the amount of \$34,411.04 for a total sentence of restitution in the amount of \$35,432.54 to be paid. The remaining balance after successful completion fo the restitution center is to be paid at the rate of \$300.00 a month until paid in full, beginning thirty (30) days after Cummings is placed on any type of post-release supervision. (Tr. 35-36)

STATEMENT OF THE FACTS

Testimony of Ellen Stinson

Mrs. Stinson testified that she and her husband, Leon, own eight BP stations, including the two which are the subject of this case, the Daphne BP and the Interstate BP, in Jones County,

Mississippi. (Tr. 25) Mrs. Stinson serves as a bookkeeper for the stores. (Tr. 44) She testified that her son, Ralph, works for the oil company and has a trucking business. (Tr. 25, 26) Ralph is occasionally in the stores if extra help is needed. (Tr. 26, 27) Ralph Stinson has the authority to sign checks to vendors and tax checks. He was not otherwise involved in the management or running of the stores. (Tr. 41)

Mrs. Stinson testified that the shift reports from the Daphne Store did not match the bank statements. Mrs. Stinson testified that she was present at the discussion that occurred when Leon Stinson called Cummings into his office to ask her about the discrepancies. Mrs. Stinson testified that she told Cummings that she had been working on the bank reconciliation and that several times the deposits had not been put in on the correct date. Mrs. Stinson told Cummings that she thought this was something that should change. Mrs. Stinson testified Cummings agreed that it was a lot of money and told Mrs. Stinson that it had kind of snow balled. Mrs. Stinson testified that she and Mr. Stinson then realized that they would have to give Cummings a vacation or put someone else in charge of deposits. (Tr. 39) Mrs. Stinson testified that Cummings said that she did not do it, but Cummings did not blame anyone else. (Tr. 39) Mrs. Stinson testified that Cummings was asked to take a week's vacation. A week to ten (10) days later Cummings was sent a certified letter placing her on administrative leave without pay. (Tr. 40)

Testimony of Leon Stinson

Leon Stinson testified that Cummings was the manager of three of the Stinson's BP stores including the Daphne store. Cummings was to go into the stores and check the inventories and work with the clerks. (Tr. 48) Cummings was in charge of the daily shift reports and bank

deposits and transporting the deposits to the banks. (Tr. 48) Cummings was also responsible for hiring and firing the employees at the stores she managed. (Tr. 49)

Leon Stinson testified that the store starts off with \$100.00 or \$200.00 for the day. During the course of the day, once the register exceeds that original amount, the clerk dropped the excess into the safe. At the end of the shift, the clerk would do her daily report and make up the deposit according to what the register tape showed. The safe is about three feet high and has an opening at the top and at the bottom to put the money in. A key is required to open the safe to get the money out for that shift and take it to the bank. (Tr. 49) The clerk does not have access to the money in the safe once it is put in the safe. (Tr. 49)

Leon Stinson testified that Cummings was responsible for taking the deposits out of the safe and bringing them to the bank. The normal procedure would be to go to the bank with all the deposits and deposit the money and bring all copies of deposit slips and the dailies to the office for processing. Both the deposit slips and dailies should match. (Tr. 50)

Leon Stinson testified that when he learned that there were problems with the deposit, he asked Cummings to bring all of the deposits into the store. (Tr. 50) Cummings brought some of the deposits into the store. Leon Stinson testified that it was apparent that Cummings was short on deposits. Cummings claimed that there were no more deposits. (Tr. 51) There were no deposits to match with some of the daily sheets, showing that money was not deposited into the bank. Cummings explanation was that there just was no more money. Cummings blamed Leon Stinson's son, Ralph Stinson and said that Ralph was getting the money. (Tr. 52)

Leon Stinson testified that Ralph Stinson does not have a key to the safes and that he is in and out of the stores a lot. Leon Stinson testified that Ralph Stinson is not involved in handling

the money matters at the stores. Leon Stinson testified that Ralph Stinson worked for him and that he works for the petroleum company, Stinson Petroleum Company. Ralph Stinson is in sales for the petroleum company. He went into the stores to buy snacks and just to look around and see what the stores look like and to see if the coolers were stocked and stuff like that. (Tr. 52) Ralph Stinson was not in charge of deposits at the stores.

Leon Stinson testified that if something happened with the store when it was closed at night, usually the manager of that store was called or sometimes the call would go to Leon Stinson. (Tr. 52) Leon Stinson testified that prior to confronting Cummings with the missing money she never came in and told them there was not money to make a deposit or reported that there was money missing. Stinson testified that she did not ever come in to report that she went to make a deposit but that there was no money. Leon Stinson testified that Cummings never told him that Ralph got the money and he did not ever remember her bringing the subject up. (Tr. 53) Leon Stinson testified that he does not do any of the bookkeeping. (Tr. 54)

Testimony of Adriana Pitts

Ms. Pitts testified that she worked for the Stinson Petroleum Company at its Interstate BP (Chantilly Street) location in September of 2006. She testified that Cummings was the manager of the store at that time. Ms. Pitts testified that she worked as a cashier and a stocker. Her duties were to keep the store clean and to run the cash register. As a part of running the register, Ms. Pitts was required to put money in the safe or, "make drops," each time they reached one hundred in the cash register drawer. Ms. Pitts testified that she put the money in a bag, made a slip, and dropped it in the safe. Ms. Pitts testified that Cummings was the only person who had access to the safe. She testified that she never saw anyone else open the safe. (Tr. 57) Ms. Pitts

testified that when Cummings would open the safe she would put all the money in a brown paper bag and go into her office. At some point after that Cummings would leave the store. (Tr. 57)

Ms. Pitts testified that she worked at the Interstate BP for about two years and sometimes worked double shifts. (Tr. 58)

Testimony of Veronica McCollum

Ms. McCollum testified that she worked at the Interstate BP (Chantilly Street) for about a year. She testified that she was a clerk at the store and ran the register. Ms. McCollum testified that as a clerk, she was required to deposit money from the register into the safe. She was required to key it into the computer and then drop the money into the safe. (Tr. 59) Once the money was in the safe, no one had access to it other than Cummings. Cummings was the person who was responsible for making the deposit for that store. McCollum testified that when she went to work in the morning Cummings would get the money out of the safe and go into her office. McCollum testified that she sometimes went into Cummings office with her. McCollum testified that Cummings would count all the money and do the paperwork. Cummings would then tell McCollum, "I'll be back in a minute. I'm going to the bank." Ms. McCollum testified that the entire time she was there she never saw anyone else go in or out of the safe. (Tr. 60) Ms. McCollum testified that she saw Ralph Stinson two or three times while she worked at the store. Stinson stayed out where the gas was or would come into the front of the store. Ms. McCollum testified that he did not go where the money was, but stayed in the front of the store. (Tr. 60)

Testimony of Ralph Leon Stinson, III

Ralph Stinson testified that Ellen and Leon Stinson are his parents and that he works for them and that his job is to sell and collect for the petroleum company. (Tr. 61) Ralph Stinson

testified that he sometimes goes into the curb stores for random inspections to see what kind of job the employees are doing and if the store is clean. (Tr. 62) Ralph Stinson testified that the safe in the Daphne store has a combination lock and that he does not have the combination for that lock. He testified that the combination may be at the office. He testified that he does not have any reason to go into the safes. Ralph Stinson testified that the managers have total responsibility for getting the money from the stores to the bank and that he does not ever do that.

Ralph Stinson testified that he does not have any part in reconciling the daily sheets or the deposits. He testified that he does work in the office on the petroleum side of the business but that he does not have any idea day to day what is going on in the stores. (Tr. 63) Ralph Stinson testified that he has a master key to get in and out of the store for emergencies such as an alarm going off at 2:00 or 3:00 in the morning so that he can go shut the alarm off. The master key does not give him access to the safe. (Tr. 64)

Ralph Stinson testified that during the period of time that Cummings was the manager of the stores he did not go in and take money out of any of the safes. He testified that he never instructed anyone to take any money out of a safe. Stinson testified that during Hurricane Katrina he asked Cummings to cash checks for workers who were from out of town. She did cash them, but not at the Daphne store. (Tr. 65)

The Documentary Proof

The documentary proof reflected that, in the month of September, six deposits from the Daphne store were never made, for a total amount missing of \$7309.57. Each missing deposit was over \$500.00. (State's Exhibits 1, 2 and 3)

The Sentencing Hearing

The trial court sentenced Cummings to 10 years in the custody of the Mississippi Department of Corrections with five years suspended. The trial court ordered that Cummings be placed in the Restitution Center for as long as possible.

SUMMARY OF THE ARGUMENT

The evidence was sufficient to support the verdict, since taking the evidence in the light most favorable to the verdict and affording the State all inferences favorable to the verdict, the jury was clearly justified in convicting Cummings of embezzlement. Cummings did not object to the sentence of restitution at the sentencing hearing and is therefore pursuant to Harris v. State, 757 So.2d 195 (Miss.2000) and Powell v. State, 536 So.2d 13, 17 (Miss.1988) she is procedurally barred from raising it on appeal. Further, Cummings did not raise any issues related to sentencing in her Motion for New Trial and is barred from raising such issues now.

The trial court considered all the necessary factors pursuant to Mississippi Code Annotated § 99-37-3 (1972, as amended). Further, this issue is procedurally barred as it was not raised at the sentenced hearing or in the Motion for New Trial.

Even if Cummings had properly objected to the amount of restitution based on proof offered at trial, she is barred from challenging the sentence pursuant to the Sixth Amendment of the Constitution of the United States, since “[a]n objection must be made with specificity, and failure to articulate the grounds for objection constitutes a waiver of the alleged error.” Ross v. State, 954 So.2d 968, 987 (Miss.2007). “Furthermore, when a party makes an objection on specific grounds, it is considered a waiver regarding all other grounds.” Copeland v. Copeland, 904 So.2d 1066, 1073 (Miss.2004) (citing Burns v. State, 729 So.2d 203, 219 (Miss.1998)).

ARGUMENT

I. The evidence was sufficient to support the guilty verdict.

Hazel Cummings was employed by Ellen and Leon Stinson. She was responsible for the management of three of the Stinson's BP convenience stores. After the Stinsons discovered that the daily log of money placed in the safe at each store did not match the deposit slips or records of deposits made by Ms. Cummings. Ms. Cummings was indicted on one count of embezzlement in an amount exceeding \$500.00 and was tried and convicted in the Jones County Circuit Court.

Testimony at trial showed that Cummings was the only person responsible for the safes in two of the BP stores owned by the Stinsons, the Daphne BP and the Interstate BP. At the Daphne BP, Cummings was the only person who had a key to the safe. The cashiers kept a daily log of the money they put in the safe. After the cashiers put the money from their shift into the slot in the safe, only Cummings could open the safe. She was the only person who opened the safe, got the money from the safe, counted it, made out the deposit slips and made the deposit. The evidence showed that during the month of September, 2006, there were six (6) daily logs showing that the cashier had put money in the safe that did not have a corresponding deposit. When the Stinsons questioned Cummings about the discrepancy, she replied that there was no money to deposit on those days. However, the Stinsons testified that Cummings had never come to them to report that there was no money in the safe when the daily log clearly stated that there should be money to deposit. There were daily log sheets in the amounts of \$894.40, \$1,470.47, \$1,160.43, \$1,314.75, \$1,416.29, 1,053.25, for which there was no corresponding deposit made by Cummings. Two employees testified that it was Cummings duty to make the deposits. They testified that no one entered the safe except Cummings, that only she got the money out, filled

out the deposit slip and made the deposit.

Mississippi Code Annotated § 97-23-19 provides:

If any 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 entrusted to his care or possession by virtue of his office, position, 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 custody of the Department of Corrections not more than ten (10) years, or fined not more than Twenty-five Thousand Dollars (\$25, 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.

Embezzlement requires that property be entrusted to a person who then converts it to his own use. “Embezzlement is the wrongful conversion of property lawfully possessed by the person charged.” Montgomery v. State, 891 So.2d 179, 186 (Miss.2004) (citing Medley v. State, 600 So.2d 957, 960 (Miss.1992)). In Champluvier v. State, 942 So.2d 145, 151 (Miss.2006) (quoting May v. State, 240 Miss. 361, 363, 127 So.2d 423, 425 (1961)), the supreme court restated the elements of embezzlement:

The constituent elements of the offense are (1) an agent or trustee of a private person, (2) embezzling *or* converting to his own use, (3) rights in action, money, or other valuable security, effects or property of any kind, (4) which have been intrusted to his care or possession by virtue of his position or employment.

In Jones v. State, 872 So.2d 53 (Miss.Ct.App.2003), the Mississippi Court of Appeals stated:

The jury is the sole judge of the weight and worth of testimony. Brown v. State, 726 So.2d 248, 250 (Miss.Ct.App.1998). The jury may draw any reasonable inferences from the evidence. Tolbert v. State, 407 So.2d 815, 820 (Miss.1981). We look to the evidence that was considered by the jury and to what inferences could have been drawn by the jury. Here, we find that there was sufficient evidence for the jury to find that Jones made an unauthorized sale of furniture, owned by Johnston Tombigbee, to Leslie and kept the money for himself, thereby converting Johnston Tombigbee's property for his own use.

“Conversion is one of the essential elements under the charge of embezzlement The intent to convert may always be proven by circumstantial evidence if it is sufficient to prove a willful and unlawful conversion.” Gradsky v. State, 243 Miss. 379, 385, 137 So.2d 820, 821 (1962) (citation omitted). However, to sustain a guilty verdict in a circumstantial evidence case, the State is required to show that the defendant is guilty beyond a reasonable doubt, and that evidence presented excludes every reasonable hypothesis of innocence. Lester v. State, 692 So.2d 755, 796 (Miss.1997). “Embezzlement does not require a distinct act of taking, and the conversion essential to the crime of embezzlement may consist of failing to account for and to pay over money on demand.” Patterson v. State, 724 So.2d 920 (Miss.Ct.App.1998) (citing, 26 Am.Jur.2d Embezzlement § 4 (1966)).

When reviewing motions for a directed verdict on appeal, consider all evidence, including that which does not support the State's case, in the light most favorable to the State. Morgan v. State, 703 So.2d 832, 835 (Miss.1997). The State as the verdict winner is afforded the benefit of all favorable inferences that may reasonably be drawn from the evidence. A reviewing court may reverse only where the evidence is such that reasonable and fair-minded jurors could only find the defendant not guilty. Id. It is impossible to conclude that the jury had to find Cummings not

guilty. While the only evidence on the element of conversion was circumstantial, the jury could reasonably infer from that evidence that Cummings converted the money for her own use.

The jury could easily infer that Cummings converted the money to her own use since there was testimony from two employees who were supervised by Cummings during that time period that Cummings was the only one who opened the safe and that it was solely her responsibility to get the money from the safe, count the money, fill out the deposit slip and make the deposit. Further, the Stinsons testified that Cummings told them that she did not make the deposits corresponding to the daily logs because there was no money. It is reasonable to infer that an employee responsible for making daily and twice daily deposits would immediately contact her supervisors if she discovered that there was no money in the safe to be deposited while was a daily log completed by the cashier showing that the store had taken in money that day. It is absolutely illogical to think that a manager would not report such a discrepancy immediately. However, Cummings did not. The only logical inference is that Cummings did not report the missing money because she had embezzled it and converted it to her own use.

II. The sentence of restitution was legal pursuant to Mississippi Code Annotated § 99-37-3.

Hazel Cummings embezzled \$34,411.04 from the three BP convenience stores she managed for Leon and Ellen Stinson. She was indicted on one count of embezzlement of more than \$500.00. At trial, evidence was presented to show that she had embezzled \$7309.57 from the Daphne BP location. The jury found Cummings guilty of one count of embezzlement of more than \$500.00. Cummings was sentenced to 10 years in the custody of the Mississippi Department of Correction with five years suspended and five years to serve. The trial court

sentenced Cummings to serve a ten (10) year sentence with the Mississippi Department of Corrections, to be suspended upon the successful completion of the Restitution Center and the successful completion of five (5) years on post-release supervision and successful completion of the Circuit Court Community Service Program. Cummings was sentenced to restitution in the amount of court costs of \$271.50, attorney fees of \$750.00, and restitution due in the amount of \$34,411.04 for a total sentence of restitution in the amount of \$35,432.54 to be paid. The remaining balance after successful completion fo the restitution center is to be paid at the rate of \$300.00 a month until paid in full, beginning thirty (30) days after Cummings is placed on any type of post-release supervision. (Tr. 35-36)

Mississippi courts have consistently ruled that “[s]entencing is within the complete discretion of the trial court and is not subject to appellate review if it is within the limits prescribed by statute.” *Nichols v. State*, 826 So.2d 1288, 1290 (Miss.2002). Mississippi Code Annotated Section 97-23-19 (Rev.2000) provides a maximum ten-year sentence for embezzlement. Cummings’ sentence of 10 years in the custody of the Mississippi Department of Corrections, to be suspended upon the successful completion of the Restitution Center and the successful completion of five (5) years post-release supervision and successful completion of the Circuit Court Community Service Program was within the statutory allowed amount. As such, the trial court properly exercised its discretion in sentencing Cummings.

Even if it was error for the trial judge to sentence Cummings to restitution of the entire amount embezzled from the Stinsons, the error is not reversible. Mississippi Code Annotated § 99-37-3(3) provides that if a defendant objects to the order of restitution, the trial court must allowed him to be heard “*at the time of sentencing.*” [emphasis added] As noted in *Powell v.*

State, 536 So.2d 13 (Miss. 1988), this infers that the objection must be made at the time of the hearing. In *Powell*, the Mississippi Supreme Court held:

It was error for the judge to use facts not in evidence to determine the amount of restitution yet the amount of restitution will not be reversed. The language in Section 99-37-3(3) infers that the defendant must object to the restitution at the time of sentencing. Section 99-37-3(3) states that, "if the defendant objects to the imposition, amount or distribution of the restitution, the court shall, at the time of the sentencing, allow him to be heard on such issues." Troy Powell made no objection to the restitution at the time of sentencing. He waited until he was before this Court to object. Having failed to object at the sentencing phase he will not be allowed to object now. See Watts v. State, 492 So.2d 1281, 1290-91 (Miss.1986).

Therefore, if the trial court committed any error in sentencing Cummings to the restitution of the full amount she embezzled from the Stinsons, she has waived that objection and the issue is now procedurally barred.

III. Trial court did not err in determining restitution was appropriate.

Mississippi courts have consistently ruled that "[s]entencing is within the complete discretion of the trial court and is not subject to appellate review if it is within the limits prescribed by statute." *Nichols v. State*, 826 So.2d 1288, 1290 (Miss.2002). Mississippi Code Annotated Section 97-23-19 (Rev.2000) provides a maximum ten-year sentence for embezzlement. Cummings' sentence of 10 years in the custody of the Mississippi Department of Corrections, to be suspended upon the successful completion of the Restitution Center and the successful completion of five (5) years post-release supervision and successful completion of the Circuit Court Community Service Program was within the statutory allowed amount. As such, the trial court properly exercised its discretion in sentencing Cummings.

Cummings argues that the trial judge failed to consider the factors set forth in Mississippi

Code Annotated § 99-7-3 when determining whether the sentence of restitution was appropriate.

Section 99-7-3 provides:

- (1) When a person is convicted of criminal activities which have resulted in pecuniary damages, in addition to any other sentence it may impose, the court may order that the defendant make restitution to the victim; provided however, that the justice court shall not order restitution in an amount exceeding Five Thousand Dollars (\$5,000.00).
- (2) In determining whether to order restitution which may be complete, partial or nominal, the court shall take into account:
 - a) The financial resources of the defendant and the burden that payment of restitution will impose, with due regard to the other obligations of the defendant;
 - b) The ability of the defendant to pay restitution on an installment basis or on other conditions to be fixed by the court; and
 - c) The rehabilitative effect on the defendant of the payment of restitution and the method of payment.
- (3) If the defendant objects to the imposition, amount or distribution of the restitution, the court shall, at the time of sentencing, allow him to be heard on such issue.
- (4) If the court determines that restitution is inappropriate or undesirable, an order reciting such finding shall be entered, which should also state the underlying circumstances for such determination.

The trial court, while not citing to the statute, did consider the requisite factors contained in the statute. During the sentencing hearing, the trial judge inquired as to Cummings' age and ability to work. He sentenced Cummings' to serve her time at the restitution center so that she might be provided a job that would allow her to repay the money embezzled. (Tr. 95) That consideration clearly addressed Cummings' financial resources, other obligations and her ability to pay, since it provided her with a way to pay the restitution without taking from the social security income on which she relied to pay her bills and living expenses.

In Harris v. State, 757 So.2d 195 (Miss.2000), the Mississippi Supreme Court cited Powell v. State, 536 So.2d 13, 17 (Miss.1988), for the proposition that by failing to object at

sentencing to imposition of a specified amount for restitution for the victim Powell waived this issue on appeal. The *Powell* Court stated as follows:

The language in Section 99-37-3(3) infers that the defendant must object to the restitution at the time of sentencing....Troy Powell made no objection to the restitution at the time of sentencing. He waited until he was before this Court to object. Having failed to object at the sentencing phase he will not be allowed to object now. See Watts v. State, 492 So.2d 1281, 1290-91 (Miss.1986).

536 So.2d at 17. Just as in *Powell* and *Harris*, Cummings did not object to the amount of restitution during the sentencing hearing. Further, there is no objection to the sentencing or order of restitution in Cummings' Motion for New Trial. (C.P. 32-33) The objection is therefore waived and this argument is procedurally barred.

IV. Cummings sentence was not excessive and was not in violation of the Sixth Amendment of the United States Constitution.

At trial, Cummings did not object to restitution as a violation of the Sixth Amendment of the United States Constitution. This issue is therefore procedurally barred. "An objection must be made with specificity, and failure to articulate the grounds for objection constitutes a waiver of the alleged error." Ross v. State, 954 So.2d 968, 987 (Miss.2007). "Furthermore, when a party makes an objection on specific grounds, it is considered a waiver regarding all other grounds." Copeland v. Copeland, 904 So.2d 1066, 1073 (Miss.2004) (citing *Burns v. State, 729 So.2d 203, 219 (Miss.1998)*).

Mississippi courts have consistently ruled that "[s]entencing is within the complete discretion of the trial court and is not subject to appellate review if it is within the limits prescribed by statute." *Nichols v. State, 826 So.2d 1288, 1290 (Miss.2002).* Mississippi Code Annotated Section 97-23-19 (Rev.2000) provides a maximum ten-year sentence and/or

\$10,000.00 fine for embezzlement. Cummings' sentence of 10 years in the custody of the Mississippi Department of Corrections, to be suspended upon the successful completion of the Restitution Center and the successful completion of five (5) years post-release supervision and successful completion of the Circuit Court Community Service Program was within the statutory allowed amount. As such, the trial court properly exercised its discretion in sentencing Cummings.

Further, as noted earlier, this issue is procedurally barred pursuant to Harris and Powell. In Harris v. State, 757 So.2d 195 (Miss.2000), the Mississippi Supreme Court cited Powell v. State, 536 So.2d 13, 17 (Miss.1988), for the proposition that by failing to object at sentencing to imposition of a specified amount for restitution for the victim Powell waived this issue on appeal. The Powell Court stated as follows:

The language in Section 99-37-3(3) infers that the defendant must object to the restitution at the time of sentencing....Troy Powell made no objection to the restitution at the time of sentencing. He waited until he was before this Court to object. Having failed to object at the sentencing phase he will not be allowed to object now. See Watts v. State, 492 So.2d 1281, 1290-91 (Miss.1986).

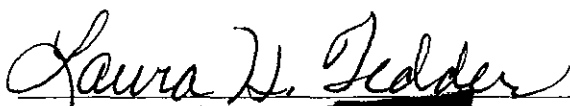

536 So.2d at 17. Just as in Powell and Harris, Cummings did not object to the amount of restitution during the sentencing hearing. Further, there is no objection to the sentencing or order of restitution in Cummings' Motion for New Trial. (C.P. 32-33) The objection is therefore waived and this argument is procedurally barred.

CONCLUSION

The assignments of error presented by the Appellant are without merit and the jury's verdict and the rulings of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

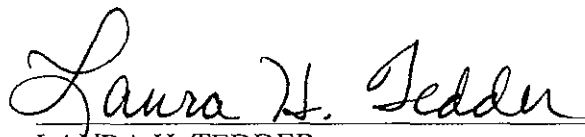
I, Laura H. Tedder, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

Honorable Billy Joe Landrum
Circuit Court Judge
P. O. Box 685
Laurel, MS 39441

Honorable Anthony J. Buckley
District Attorney
P. O. Box 313
Laurel, MS 39441

Justin T. Cook, Esquire
Attorney At Law
Mississippi Office of Indigent Appeals
301 North Lamar Street, Suite 210
Jackson, Mississippi 39201

This the 17th day of June, 2010.



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