

IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 93-KA-00891 COA

ELTON HAROLD HALE

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. ANDREW CLEVELAND BAKER

COURT FROM WHICH APPEALED: DESOTO COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

MATTHEW M. MOORE

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: CHARLES W. MARIS

DISTRICT ATTORNEY: ROBERT L. WILLIAMS

NATURE OF THE CASE: EMBEZZLEMENT

TRIAL COURT DISPOSITION: CONVICTED OF EMBEZZLEMENT, SENTENCED TO 5
YEARS IN THE MDOC WITH THE LAST 4 YEARS SUSPENDED PENDING DEFENDANT'S
FUTURE GOOD BEHAVIOR, AND REQUIRED TO PAY RESTITUTION IN THE AMOUNT
OF \$4,000.00 AND ALL COURT COSTS

BEFORE FRAISER, C.J., BARBER, AND SOUTHWICK, JJ.

FRAISER, C.J., FOR THE COURT:

Elton Harold Hale appeals from a jury verdict of guilty of embezzlement. On appeal, Hale asserts that he could not be found guilty of embezzlement because he was not entrusted with the \$6,900.00, but paid for services under a contract. We agree and reverse and render.

FACTS

Hale was a self-employed carpenter in DeSoto County, Mississippi for approximately twenty (20) years. In December 1991, Hale entered into a contract with Horace Dunn to construct a driveway and 24' by 24' garage in Southaven, Mississippi. The contract between Dunn and Hale was reduced to writing and called for a total payment of \$8,000.00 for the project. In furtherance of the contract, Dunn paid \$4,000.00 in advance, with the balance of the contract to be due upon completion. After the slab was poured, Dunn paid Hale an additional \$2,900.00 for the concrete foundation. A dispute arose between Dunn and Hale regarding the work expected of Hale under the contract. Dunn demanded that Hale perform additional work beyond that contracted for, but refused to pay Hale any additional compensation. Hale refused to do the work, and Dunn demanded Hale return the funds he had been paid. Hale refused to return the money. Dunn and Hale never resolved their differences. Dunn eventually filed a civil lawsuit against Hale. Two days later, Dunn filed a complaint with the Southaven Police Department which eventually led to the arrest of Hale for false pretenses and ultimately resulted in his conviction for embezzlement under section 97-23-19 of the Mississippi Code. Hale appeals to this Court contending that there was insufficient evidence to sustain a conviction for embezzlement.

DISCUSSION

Hale preserved his challenge to the sufficiency of the evidence by moving for a directed verdict and J.N.O.V. Regarding the legal sufficiency of the evidence, the standard of review is as follows:

[W]e must, with respect to each element of the offense, consider all of the evidence -- not just the evidence which supports the case for the prosecution -- in the light most favorable to the verdict. The credible evidence which is consistent with guilt must be accepted as true. The prosecution must be given the benefit of all favorable inferences that may reasonably be drawn from the evidence. Matters regarding the weight and credibility to be accorded the evidence are to be resolved by the jury. We may reverse only where, with respect to one or more of the elements of the offense charged, the evidence so considered is such that reasonable and fair-minded jurors could only find the accused not guilty.

Wetz v. State, 503 So. 2d 803, 808 (Miss. 1987) (citations omitted).

Section 97-23-19 provides as follows:

§ 97-23-19. Embezzlement; by agents, bailees, trustees, servants and persons generally.

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, he shall be guilty of embezzlement, and, upon conviction thereof, shall be imprisoned in the penitentiary not more than ten years, or fined not more than one thousand dollars and imprisoned in the county jail not more than one year, or either.

Miss Code Ann. § 97-23-19 (1972). The phrase, "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," is simply a restatement of the common-law requirement that the item embezzled be the property of another. It is standard hornbook law firmly ingrained in the law of this State that one cannot be guilty of embezzlement of his own property. "So to a building contractor who receives from the landowner an advance payment on the contract and who thereafter spends the money for his own purposes and does not fulfill the contract, is not guilty of embezzlement, unless the money is earmarked to be used only for a construction purpose." 2 Wayne R. LaFarve & Austin W. Scott, Jr., *Substantive Criminal Law* § 8.6 (1986). The Mississippi Supreme Court has stated that "[w]ith respect to the first element, 'the obtaining of the property of another,' we do not feel the acceptance of advance money on a construction contract is the property of another." *Shelley v. State*, 447 So. 2d 124, 126 (Miss. 1984) (citing *Commonwealth v. Austin*, 393 A.2d 36, 38 (Penn. 1978)). The contractor's "duty was to perform the services under the contract and failure to perform was a breach of that contract with its proper remedy in a civil forum." *Id.* (citing *Austin*, 393 A.2d at 39).

The contract did not earmark any of the proceeds for construction purposes only. However, there was a notation on the contract proposal sheet that Hale had received \$2,900.00 for the concrete slab, which was paid to the subcontractor who poured it. Because the proceeds were not earmarked for

the subcontractor, those proceeds could not be embezzled. However, even if we were to consider the \$2,900.00 as earmarked, Hale did not take that money. He paid the \$2,900.00 to the subcontractor. Thus, Hale retained no proceeds of the contract earmarked for construction purposes. Consequently, Hale's actions fall within the general rule that advance money on a construction contract is his property, not the property of another. Because the proceeds of the contract were Hale's property, Hale could not have committed embezzlement. In fact, the notation on Dunn's check to Hale was that the check was partial payment on the contract. Under the circumstances of this case in the light most favorable to the State, no reasonable and fair-minded juror, properly instructed in the law, could find that Hale had embezzled the property of another. *Wetz*, 503 So. 2d at 808. The verdict of the trial court is reversed and rendered.

THE DESOTO COUNTY CIRCUIT COURT'S JUDGMENT OF CONVICTION OF EMBEZZLEMENT IS REVERSED AND RENDERED AND DEFENDANT DISCHARGED. COSTS OF THIS APPEAL ARE TAXED TO DESOTO COUNTY.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.