

IN THE COURT OF APPEALS 08/06/96
OF THE
STATE OF MISSISSIPPI
NO. 93-KA-01339 COA

LINDA DIANE MCBROOM A/K/A LINDA

DIANNE MCBROOM

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. ISADORE W. PATRICK, JR.

COURT FROM WHICH APPEALED: WARREN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

W. RICHARD JOHNSON

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: BILLY L. GORE

DISTRICT ATTORNEY: JOHN W. BULLARD

NATURE OF THE CASE: EMBEZZLEMENT

TRIAL COURT DISPOSITION: GUILTY OF EMBEZZLEMENT, SENTENCED TO SERVE 10
YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND
ORDERED TO PAY RESTITUTION IN THE AMOUNT OF \$7,670.28

BEFORE BRIDGES, P.J., DIAZ, AND SOUTHWICK, JJ.

DIAZ, J., FOR THE COURT:

Diane McBroom (McBroom) was indicted, tried, and convicted of embezzlement by a jury in the Circuit Court of Warren County. McBroom was sentenced to serve ten (10) years in the custody of the Mississippi Department of Corrections and ordered to pay restitution to the victim in the amount of \$7,670.28. McBroom's prison sentence was suspended provided that she complete a program at the Jackson County Restitution Center. Feeling aggrieved, McBroom appeals and cites the following four errors: (1) The court erred in allowing the video deposition of the State's complaining witness; (2) The court erred in failing to grant a directed verdict on the basis that the evidence was completely lacking to support the indictment, which charged Appellant as an employee; (3) The verdict was against the overwhelming weight of the evidence, and (4) Appellant did not receive adequate legal assistance. We reverse.

FACTS

Mrs. Aura Curtis (Curtis) was an elderly lady living alone and plagued with many medical problems. In January 1992, McBroom began assisting Curtis with her affairs. McBroom, a neighbor, would go to the grocery store for Curtis, collect the mail, and run various errands. These services were performed by McBroom gratuitously, and no employment agreement, written or verbal, existed between the individuals. Normally, Curtis would sign a blank check and give it to McBroom to purchase various grocery or alcoholic items for her. On occasion, Curtis would request that a certain amount of cash be brought back to her from purchases made by McBroom. Curtis claimed that she rarely requested cash back, but McBroom testified that she regularly requested, and received, money from the purchases. Copies of the canceled checks written by McBroom reveal that substantial amounts of cash were received from grocery purchases. Additionally, several checks were written to "cash" or "Diane McBroom" for amounts ranging from \$500.00 to \$900.00. McBroom testified that Curtis asked her to cash the checks in the amounts written and that she promptly returned all the cash to Curtis. Curtis denies ever requesting or receiving cash from these checks.

DISCUSSION

McBroom argues that the trial court erred in denying her motion for a directed verdict because the evidence presented did not support the indictment. Specifically, McBroom contends that the State failed to prove that she was an employee of Aura Curtis and, therefore, she cannot be guilty of the indicted offense. The indictment, in pertinent part, reads as follows:

The Grand Jurors of the State of Mississippi, . . . upon their oaths present that Linda Dianne McBroom on or about April 14, 1992 . . . within the jurisdiction of this Court did willfully, unlawfully, and feloniously at a time when he/she was an employee of Aura Curtis, embezzle and convert to their own use blank signed checks having a value of \$10,631.15, owned by Aura Curtis which had been entrusted to his/her care by virtue of his/her employment in violation of Miss. Code Sec. 97-23-19, contrary to the statute in such cases made and provided, and against the peace and dignity of the state of Mississippi.

Clearly, the indictment reveals that the State proceeded under the theory that McBroom was an employee of Curtis. However, section 97-23-19 does not contain the term "employee" as one who may commit an embezzlement. The statute proceeded under by the State reads 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).

For the indictment to be sufficient, it must contain the essential elements of the crime charged. *Peterson v. State*, 671 So. 2d 647, 652 (Miss. 1996). Thus, the initial question is whether the term "employee," as contained in the indictment, was sufficient to inform McBroom of the nature and cause of the accusations against her. *Id.* at 654. The sufficiency of indictments at the time McBroom was indicted was controlled by Rule 2.05 of the Uniform Criminal Rules of Circuit Court Practice. This rule provided:

The indictment upon which the defendant is to be tried shall be a plain, concise and definite written statement of the essential facts constituting the offense charged and shall notify the defendant of the nature and cause of the accusation against him. *Formal or technical words are not necessary in an indictment, if the offense can be substantially described without them.*

Unif. Crim. R. Cir. Ct. Prac. 2.05 (1994) (emphasis added).

The supreme court has held that the terms "employer" and "employee" as used in the Mississippi Worker's Compensation Act are synonymous with the words "master" and "servant" as used under common law. *Walls v. North Miss. Med. Ctr.*, 568 So. 2d 712, 714 (Miss. 1990). For workers' compensation purposes, an employer-employee relationship is defined as "any person, ... in the service of an employer under any contract of hire or apprenticeship, written or oral, express or implied ..." *Id.* at 715. Additionally, *Black's Law Dictionary* lists "employee" as its first definition of "servant." *Black's Law Dictionary* 525 (6th ed. 1990).

Although the indictment charged McBroom with embezzling as an employee of Curtis rather than as a servant of Curtis, the language was sufficient to notify McBroom of the charges against her. Moreover, the indictment cited the specific statute the State proceeded under which provided additional notice to McBroom. Thus, we find that the indictment was sufficient to notify McBroom that she was being charged with embezzling at a time when she was a servant of Curtis.

The next hurdle is whether McBroom was an employee-servant of Curtis. The court instructed the jury that an employee was "any person in the service of another under any contract of hire or apprenticeship, written, or oral, express or implied." Additional instructions required the jury to find that McBroom "was an employee or servant" of Curtis and that she fraudulently converted to her own use the currency entrusted to her care and possession "by virtue of her employment as servant of Aura D. Curtis." Jury instruction D-2 required the jury to find, among other things, that McBroom was an employee of Curtis and the checks were obtained in the course and scope of her employment.

"The traditional features of an employment contract are (1) consent of the parties, (2) consideration for the service rendered, and (3) control by the employer over the employee." *Walls*, 568 So. 2d at 715. A review of the record does not reveal any evidence of a written or oral contractual agreement between McBroom or Curtis. Absent a written or oral contractual relationship, we must look deeper into the statutory language. *Id.* The record reveals no evidence that McBroom was compensated in any way for the services she performed for Curtis. The nature of the relationship was gratuitous and not mutually beneficial. Moreover, Curtis testified in her deposition that she did not pay McBroom for any of the services she performed. Thus, the second feature of an employment contract does not exist under the facts of this case. The last determination of control is irrelevant if consideration between the parties does not exist. In light of the State's failure to prove that McBroom was an employee-servant of Curtis, we must reverse.

CONCLUSION

The State presented no evidence that McBroom was an employee of Aura Curtis, nor did they produce evidence that McBroom was compensated in any manner for the services she rendered to Curtis. Therefore, we reverse the conviction of McBroom and remand back to the lower court for further proceedings.

THE JUDGMENT OF THE CIRCUIT COURT OF WARREN COUNTY IS HEREBY REVERSED AND REMANDED. ALL COSTS OF THIS APPEAL ARE TAXED TO WARREN COUNTY.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.