

**IN THE COURT OF APPEALS 03/12/96**  
**OF THE**  
**STATE OF MISSISSIPPI**  
**NO. 95-KA-00221 COA**

**KIMBERLY ANN BUCHANAN**

**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. KOSTA N. VLAHOS

COURT FROM WHICH APPEALED: CIRCUIT COURT OF HARRISON COUNTY

ATTORNEY FOR APPELLANT:

ALBERT NECAISE

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

DISTRICT ATTORNEY: CONO CARANNA

BY: SANDRA GILL

NATURE OF THE CASE: EMBEZZLEMENT

TRIAL COURT DISPOSITION: GUILTY OF EMBEZZLEMENT, SENTENCED

TO TEN (10) YEARS SUSPENDED, ORDERED

TO PAY RESTITUTION

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

DIAZ, J., FOR THE COURT:

Kimberly Ann Buchanan was indicted, tried and convicted of embezzling \$88,000.00 from her employer in the Circuit Court of Harrison County. She was given a ten year (10) suspended sentence with five years (5) probation and ordered to pay restitution. On appeal Buchanan raises three issues: (1) whether the evidence was sufficient to support a verdict of guilty; (2) whether the restitution imposed is appropriate based on statutory guidelines governing the imposition of restitution; and (3) whether the defendant's constitutional right to effective assistance of counsel was denied. Finding no reversible error, we affirm.

### FACTS

Kimberly Buchanan was employed by Himel Auto Parts, Inc. from 1986 until June of 1991 as a bookkeeper. Among other responsibilities, Buchanan's duties included receiving payments on accounts receivable, completing daily reports, and making the bank deposits. In 1991 Paul Broussard, the owner of Himel Auto Parts, Inc., discovered discrepancies in the bookkeeping and Ms. Buchanan quit her employment with the company soon thereafter.

On December 16, 1991, the grand jury of the Second Judicial District of Harrison County, Mississippi indicted Buchanan for embezzlement. At trial, the State presented testimony from Paul Broussard and introduced voluminous business records from Himel Auto Parts, Inc. The defendant presented testimony from Glenda Lee, a former employee who worked alongside Ms. Buchanan for approximately six weeks during December 1988 and January 1989. Broussard and Lee were the only witnesses to testify.

On February 11, 1994 the jury found Buchanan guilty of embezzlement.

### DISCUSSION

#### I. Was the Evidence Sufficient to Support a Verdict of Guilty

In reviewing the sufficiency of the evidence to support a guilty verdict, this Court must view all facts favorable to the State and reasonable inferences flowing therefrom as true and, if they are sufficient to support a verdict of guilty, then the question is resolved against the appellant. *Minor v. State*, 379 So. 2d 495, 496 (Miss. 1979)(citing *Warn v. State*, 349 So. 2d 1055, 1056 (Miss. 1977)). Only where the evidence is so lacking as to an essential element of the crime charged, that a fair and reasonable juror could only find the accused not guilty, will this Court reverse. *McClain v. State*, 625 So. 2d 774, 778 (Miss. 1993).

Buchanan challenges the legal sufficiency of the evidence presented. Specifically, she argues that the indictment contained an element of conversion which was not proved by the State. The State argues that the statute violated by Buchanan and proceeded under at trial was section 97-23-19. This statute applies to private citizens and does not contain conversion as an essential element. Miss. Code Ann. § 97-23-19 (1972).

The indictment itself did not mention a specific statute by number. Although not always necessary, it is a better practice to include it to prevent this type of confusion. *Martin v. State*, 501 So. 2d 1124, 1126 (Miss. 1987). During discussion of the motion for directed verdict the court specifically mentioned section 97-23-19 as the embezzlement statute being proceeded under by the State. The record does not reveal any objection by defense counsel at any time challenging the sufficiency of the indictment, the specific statute being proceeded under, or the failure to prove conversion. The defendant had every opportunity to object to the sufficiency of the indictment and failed to do so. Buchanan is procedurally barred from raising this issue on appeal because she failed to raise the issue at trial. *Craft v. State*, 656 So. 2d 1156, 1165 (Miss. 1995)(citing *Holland v. State*, 587 So. 2d 848, 868 n.18 (Miss. 1991)). Thus, this assignment of error is without merit.

## II. Whether the Restitution Imposed was Inappropriate

### Based on Statutory Guidelines

The trial judge ordered Buchanan to pay \$500.00 per month in restitution to her former employer. Buchanan was found guilty of embezzlement which results in pecuniary damages. Thus, the trial judge had authority to order restitution in addition to any other sentence. *Butler v. State*, 544 So. 2d 816, 821 (Miss. 1989).

Buchanan argues that the trial judge erred by imposing restitution due to her financial condition. She had a right to object to restitution during the sentencing hearing but failed to do so. Miss. Code Ann. § 99-37-3(3) (1972). Furthermore, the record shows that Buchanan agreed to the amount and imposition of restitution by signing the sentencing order. The Mississippi Supreme Court has previously held that failure to object to an order of restitution during sentencing bars appeal on that issue. *Green v. State*, 631 So. 2d 167, 176 (Miss. 1994)(citing *Shook v. State*, 552 So.2d 841, 851 (Miss. 1989)). Thus, this assignment of error is without merit.

## III. Whether the Defendant's Right to Effective

### Assistance of Counsel was Denied

Buchanan also argues that she was denied effective assistance of counsel. A claim of ineffective assistance of counsel must satisfy the two-pronged test established by *Strickland v. Washington*, 466 U.S. 668, 687 (1984). This test requires (1) a showing of deficient performance by defense counsel and (2) the deficient performance must constitute prejudice to the defense. *McQuarter v. State*, 574 So. 2d 685, 687 (Miss. 1990). In addition, the defendant must overcome a strong but rebuttable presumption that defense counsel's performance was within the broad range of reasonable professional assistance. *McQuarter*, 574 So. 2d at 687. An allegation of ineffective assistance of counsel will be sustained only if there is a reasonable probability that without counsel's errors the trial would have resulted in a different outcome. *Cabello v. State*, 524 So. 2d 313, 315 (Miss. 1988). This standard is to be determined by looking at the totality of the circumstances. *Carney v. State*, 525 So. 2d 776, 780 (Miss. 1988).

Buchanan claims that her defense counsel erroneously convinced her not to testify on her own behalf, failed to give an opening statement after an incriminating statement by the prosecution, and failed to call more than one witness on her behalf. Buchanan also contends that counsel advised her to admit

to committing embezzlement in order to get probation rather than prison time.

Buchanan did not testify in her own behalf. She faults defense counsel for the decision not to call her as a witness. Buchanan does not suggest that she insisted upon testifying and that she was precluded from doing so by her counsel. *Merritt v. State*, 517 So. 2d 517, 520 (Miss. 1987). Buchanan does not allege any improper reason for her defense counsel's advise to her. Thus, the defense counsel's performance cannot be found deficient for suggesting that she not take the stand.

No effort has been made to show how her defense counsel's decision to refrain from making an opening statement is deficient performance or how the decision prejudiced Buchanan. Buchanan fails to meet the burden of demonstrating either prong of the *Strickland* test on this issue.

Buchanan's claim that counsel erroneously advised her to admit to the embezzlement after the jury had returned a guilty verdict is without merit. Again, Buchanan fails to establish either element of *Strickland* to promote her claim. The jury had already determined Buchanan's guilt. Therefore, we do not conclude that, under the circumstances, i.e. the jury's guilty verdict, her counsel's advise to avoid prison time should be viewed as ineffective or prejudicial.

Last, Buchanan claims that her counsel was deficient for failing to call certain witnesses during the trial. Buchanan specifically claims that members of her church should have been called to testify that they noticed no change in her lifestyle. However, this Court is unpersuaded that this additional testimony would have resulted in a different outcome or that the failure to call the witnesses constitutes deficient performance.

For the foregoing reasons the judgment of the circuit court of the second judicial district of Harrison County is affirmed.

**THE JUDGMENT OF THE CIRCUIT COURT OF THE SECOND JUDICIAL DISTRICT OF HARRISON COUNTY OF CONVICTION OF EMBEZZLEMENT AND SENTENCE OF TEN (10) YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS WITH TEN (10) YEARS SUSPENDED AND FIVE (5) YEARS PROBATION WITH CONDITIONS AND TO PAY RESTITUTION IN THE AMOUNT OF \$500.00 PER MONTH IS AFFIRMED. COSTS ARE ASSESSED AGAINST HARRISON COUNTY.**

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

**THOMAS, P.J., NOT PARTICIPATING.**