NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1253

STATE OF LOUISIANA

VERSUS

BRETT S. HOLLOWAY

Judgment Rendered: March 25, 2011

Appealed from the
Twenty-Second Judicial District Court
in and for the Parish of St. Tammany, State of Louisiana
Trial Court Number 444262

Honorable Reginald T. Badeaux, III, Judge Presiding

* * * * * * * * *

Walter P. Reed
Covington, LA

Kathryn W. Landry
Baton Rouge, LA

Counsel for Appellee,
State of Louisiana

Marion B. Farmer
Dwight Doskey
Milton P. Masinter
Covington, LA

Counsel for Defendant/Appellant,
Brett S. Holloway

* * * * * * * * *

BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McDonald, J. concurs and assigns reasons.
McClendon, J. concurs.

WHIPPLE, J.

The defendant, Brett S. Holloway, was charged by bill of information (as amended) with theft of a value of $500.00 or more, a violation of LSA-R.S. 14:67. The defendant entered a plea of not guilty. After a trial by jury, the defendant was found guilty as charged. The defendant was sentenced to ten years imprisonment at hard labor, suspended, with five years active supervised probation under general and the following special conditions: a $500.00 fine and costs; $173,348.72 restitution; random drug screening; and a $55.50 monthly supervision fee.[1] The defendant now appeals, challenging the sufficiency of the evidence to support the conviction, the trial court's failure to give a limiting instruction regarding hearsay testimony, the trial court's inadequate jury instructions on the elements of theft and responsive verdicts, and the propriety of the amount of restitution ordered. The defendant also filed a pro se brief wherein he does not assign any errors, but presents a factual statement that appears to challenge the sufficiency of the evidence to support criminal charges. The state filed a motion to strike the defendant's pro se brief because it lacks record references and "argues self-serving facts not contained in the evidence or record of this proceeding." We hereby deny the motion to strike. For the following reasons, we affirm the defendant's conviction and sentence.

STATEMENT OF FACTS

The victims, James Brown and Shannon Comeaux (who was Brown's fiancée at the time), contracted with the defendant to build a home in Versailles Subdivision in St. Tammany Parish. The victims obtained a construction loan from Iberia Bank whereby money was disbursed to the victims to pay the defendant according to a draw schedule and the completion of work as determined

[1]The trial court specified that the restitution would be paid monthly during the defendant's fifty-eight months of probation, at an approximate rate of $2,988.00 per month.

by an independent third-party inspector. The victims and the defendant executed a "Lot Hold" agreement on August 16, 2006, and executed the contract for the construction of the home on April 25, 2007. The victims issued a check for $5,000.00 to hold the lot and paid an additional $16,495.00 at the defendant's request for a total deposit of $21,495.00.

In early June 2007, the victims issued the first draw to the defendant in the amount of $81,681.00 By the end of August 2007, the total issued by the victims in separate draws was $275,226.53. Two weeks after the final payment, the defendant abandoned the project, stating that he was having extreme financial difficulties. The victims received notices of unpaid bills and liens from vendors because the defendant did not pay bills for items that were in the house although draws from the victims' bank were paid to the defendant for the items. The liens for unpaid bills instituted on the victims' residence by various vendors and other unpaid bills for which the defendant had received funds from the victims totaled $65,304.06.[2]

ASSIGNMENT OF ERROR NUMBER ONE

In the first assignment of error, the defendant contends that the evidence is insufficient to support the conviction. Specifically, the defendant argues that the State failed to prove that there was the intent to permanently deprive at the time of the taking. The defendant contends that he overextended himself and became simply a defaulting debtor. The defendant further contends that the only possible responsive verdict would be guilty of unauthorized use of movables of a value under one thousand dollars and notes that the jury was not instructed on that possible verdict.

In reviewing the sufficiency of the evidence to support a conviction, a Louisiana appellate court is controlled by the standard enunciated by the United

States Supreme Court in Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). The Jackson standard of review, incorporated in Louisiana Code of Criminal Procedure article 821, is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. LSA-C.Cr.P. art. 821B; State v. Ordodi, 2006-0207 (La. 11/29/06), 946 So. 2d 654, 660; State v. Wright, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So. 2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So. 2d 1157, 2000-0895 (La. 11/17/00), 773 So. 2d 732. The Jackson standard is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that the factfinder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. See State v. Patorno, 2001-2585 (La. App. 1st Cir. 6/21/02), 822 So. 2d 141, 144. When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defendant's own testimony, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. State v. Captville, 448 So. 2d 676, 680 (La. 1984).

Theft is defined as the misappropriation or taking of anything of value which belongs to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices, or representations. An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential. LSA-R.S. 14:67A. Specific criminal intent is that "state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act." LSA-R.S. 14:10(1). Though intent is a question

[2]The portion of this total sum representing the liens alone amounted to $61,573.39.

of fact, it need not be proven as a fact. It may be inferred from the circumstances of the transaction. Thus, specific intent may be proven by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as a defendant's actions or facts depicting the circumstances. The trier of fact is to determine the requisite intent in a criminal case. State v. Crawford, 619 So. 2d 828, 831 (La. App. 1st Cir.), writ denied, 625 So. 2d 1032 (La. 1993).

According to their trial testimony, the victims were engaged when they met the defendant, a contractor. The record reflects that the victim, James Brown, was working for Shelter Distribution, a roofing company, as the territory manager. The victims decided to build a house in Versailles Subdivision in Covington, Louisiana. The defendant told them to give him a $5,000.00 deposit to have the developer hold the lot. They paid the defendant the deposit and executed a "Lot Hold" contract with defendant. The defendant told the victims the house would be completed in six or seven months. After the construction contract was executed, payments were issued in April, June, and July 2007. Between June and July, the victims began hearing about the defendant's financial trouble (that he had a lot of houses that were not selling). The defendant reassured Brown that everything was going to be okay.

Brown continued to receive negative feedback regarding the defendant's financial status. The construction had come to a halt in August. Brown attempted to contact the defendant, but was initially unsuccessful. Brown spoke to the defendant when he made a payment on August 17, 2007, and the defendant once again reassured him. Iberia Bank continued to make disbursements based on physical drive-by inspections.

Regarding the final payment of $40,840.00 on August 31, 2007, the defendant specifically requested this half-draw, stating he had to pay for stucco and brick that particular day. The bank allowed the payment. Brown testified that

he felt uneasy because the payment was made at the defendant's request in an unusual manner, i.e., on the side of the road in another commercial area instead of in the defendant's office. Brown testified that he was very concerned because the defendant was anxious and wanted to receive the funds "right now," but the defendant again reassured him, stating that this was normal business, that he needed to pay some of his workers and that he was waiting for the closing on a couple of houses. Two weeks later, the defendant came to the victim's home and informed him that he could not finish the home and that he was having extreme financial problems, but would file bankruptcy so that "everything" would be "wiped away" from the house. After this conversation, Brown's attempts to contact the defendant were unsuccessful.

The plumbing company informed Brown that the defendant was on a credit hold with the company and the victim had to pay for the hot water heaters in order to keep them. The victims also started to receive lien letters from vendors such as Poole Lumber Company, because the defendant did not pay bills incurred for items that were in the house, despite draws that were paid to the defendant for the items. After the defendant abandoned the construction of the home, painting negotiations fell through and the victims had to pay a higher rate to have the home painted. The victims also received notice of the defendant's failure to pay from Masonry Products Sales, Inc., the amount of $5,869.05, representing the cost for bricks, mortar, sand, flashing, and angle iron. They also received a notice of lien for materials for the fireplace and chimney for $2,796.64. Other liens placed on the victims' property and unpaid bills included: Saba Stucco for $22,345.00; Poole Lumber Company for lumber and framing for $23,468.51; Engineering Services for $2,431.97; Campbell Roofing Material Company for $4,662.22; and $3,730.67 from Cellulose Insulation.

Because the defendant abandoned the project, the victims were responsible for completing the construction of the home and had to pay for materials at rates that differed from those in the original project agreement with defendant. Brown specifically testified that the flooring, for example, cost an additional $1,400.00. The bank was not willing to close on the loan because of the liens. The victims had to take an additional loan from Iberia Bank, but at a higher interest rate (from an original rate of six percent to approximately eight percent) and execute a contractual agreement to pay the liens. The victims were still paying Iberia Bank at time of trial under the threat of losing the house for $50,000.00 of debt. The defendant never contacted the victims about finishing the house or paying the debts.

As stated, each payment disbursed to the defendant was for work completed and to pay vendors, but, as reflected in the liens, the defendant did not pay vendors. Although the defendant told Brown that he had to have the final draw to pay vendors for brick, stucco, siding, soffit, and facia, the money was not used to pay for those items. The victims were also forced to hire a lawyer because of the various lawsuits. The other victim, Shannon Comeaux-Brown, was the bookkeeper for the couple and kept the receipts. Comeaux-Brown testified that she and Brown paid a total of $275,226.53 to the defendant, of which $101,877.81 was actually spent on the home, leaving an unaccounted balance which she calculated as $173,348.72. During cross-examination, Comeaux-Brown confirmed that she is not a professional accountant and acknowledged that she may have made some mistakes in calculation.

The defendant was the sole defense witness. The defendant testified that he formed Holloway Homes, L.L.C. in 2001. The defendant further testified that his financial decline began with the failure of some developments as a result of the economy and that he could not continue to pay interest on home loans for unsold

homes. He exhausted his life savings in an attempt to save the company. The defendant had about sixteen homes under construction at the time the victims' home was being constructed. The defendant obtained bank loans to build some of the homes to be sold later, while others were funded by clients like the victims. The defendant explained that other projects were being funded from the same bank account in which the victims' payments were deposited. The defendant's business folded after the homes in a subdivision could not be sold and the loans went into foreclosure. The defendant testified that he never took any money from the victims for himself and that his business was doing well when he met the victims. The defendant also testified that some work was done on the victims' residence after August 31, 2007, noting that a check was paid for sheetrock on September 7, 2007.

The defendant acknowledged that Holloway Homes, L.L.C. was paid approximately $275,000.00 by August 31, 2007, in draws, but contested the victims' documentation as to the amount spent on the construction. He contended that he spent about $234,000.00 on the victims' home. Thus, the defendant specifically admitted that $40,000.00 of the money paid to him for materials and labor on the victims' home was not used for that purpose. The defendant testified that his records were seized by Citizens Savings Bank in 2008, when it took over a model home where his office was located.

The defendant further testified that at the time of the final draw, he did not want to abandon the construction project in question and was not panicked at that time. A week after that payment, the defendant did not have access to the funds because they were "cross-collateralized" by the bank. When the defendant found out what happened, he explained the situation to Brown and further told him that he did not have a solution at the time, but did mention bankruptcy as one of his options that would "make all of this go away ... so that he could go forward with

the project." The defendant stated that he had never been in that predicament before. While the defendant never determined how to resolve the situation, he claimed he did not hide from the victims and maintained his office. The defendant acknowledged that liens were placed on the victims' property for unpaid debts, but noted their contractual clause with a prescriptive period that would have allowed the liens to be paid at the end of the project had he been able to complete the project. The defendant also testified that surety bonds were another option of paying off the liens. The defendant contended that he could have completed the victims' contract under his father's company, as he did for another project with "cross-collateralized" funds, had he been given the opportunity. The defendant contended that Brown cut off their communication and had him arrested before he could go forward.

During cross-examination, the defendant confirmed that the police contacted him regarding this matter in November and not in August. The defendant also admitted that he had not paid any of the liens at the time of the trial, and had not paid for the sheetrock, stucco, brick, the fireplace, or insulation.

In State v. Winston, 97-1183 (La. App. 3d Cir. 12/9/98), 723 So. 2d 506, 511-12, writ denied, 99-0205 (La. 5/28/99), 743 So. 2d 659, the defendant wrote three checks, from an account that had been closed for nearly two years, to Sanders Antiques and More totaling $3,000.00, to purchase antique furniture. Thus, the checks were worthless and the defendant never paid for the value of the three checks. The court found that the defendant's failure to reimburse the victims therein established the defendant's intent to permanently deprive. The court further held that the evidence supported the verdict, guilty of theft, beyond a reasonable doubt.

In State v. Hayes, 2001-3193 (La. 1/28/03), 837 So. 2d 1195 (per curiam), the defendant was employed by Lake Charles Diesel, which was located in

Calcasieu Parish. Outfitted with company equipment, tools, and uniforms in Calcasieu Parish, the defendant was dispatched to repair a vessel engine in Lafourche Parish, pursuant to a contract entered into via facsimile transmissions to and from Lafourche and Calcasieu Parishes. While in Lafourche, the defendant reported to Lake Charles Diesel that he had received a cashier's check from the owner of the vessel in the amount of $15,000.00. Instead of bringing the check back to Calcasieu Parish, as he was told, the defendant reported that the check had been stolen from his truck.[3] That was the last time the employer heard from defendant. State v. Hayes, 837 So. 2d at 1196.

The defendant therein was charged in Calcasieu Parish with theft of currency valued over $500.00, in violation of LSA-R.S. 14:67A. The defendant moved to quash the information based on improper venue, claiming the alleged criminal activities could have occurred only in Lafourche Parish, not Calcasieu Parish. The trial court ruled that venue was proper in Calcasieu Parish. The Third Circuit reversed the trial court, finding that the State failed to show the defendant had formed the intent to permanently deprive his employer of the tools and uniforms at the time of the taking. The Third Circuit also found the State did not prove that, while in Calcasieu Parish, the defendant had formed the requisite intent to permanently deprive his employer of the $15,000.00, which he received as payment from a customer in Lafourche Parish. State v. Hayes, 837 So. 2d at 1196-97.

The Supreme Court reversed the Third Circuit and found that venue in Calcasieu Parish was proper. The Supreme Court noted that the locus delicti of a crime is determined from the nature of the crime alleged and the location of the act

[3]A cashier's check never existed. At the defendant's insistence, the owner of the vessel obtained $15,000.00 in cash and gave it to the defendant in return for a receipt. State v. Hayes, 837 So. 2d at 1196.

or acts constituting it. The court further noted that theft is broadly defined in LSA-R.S. 14:67A, and that the statute combines the common law crime of larceny with the offense of embezzlement. In the offense of embezzlement, the court explained, the felonious conversion or misappropriation takes place after the lawful receipt of the goods or property by the accused in the course of a fiduciary relationship with the victim that he then breaches in the act of conversion. The court held that the intent to deprive the owner of his property permanently, therefore, need not coincide with the actual taking. The court found that the crime of theft charged against the defendant was in the nature of an embezzlement offense. State v. Hayes, 837 So. 2d at 1197-98.

Moreover, in State v. Langford, 483 So. 2d 979 (La. 1986), the Supreme Court noted that the theft statute encompasses common law larceny, stating as follows:

> One who takes another's property intending only to use it temporarily before restoring it unconditionally to its owner (i.e., one who normally is found not to have an intent to steal) may nevertheless be guilty of larceny if he later changes his mind and decides not to return the property after all.

Langford, 483 So. 2d at 985 (citations and footnote omitted). In affirming the theft conviction therein, the court found that the defendant's intent to deprive his bank permanently of more than $500.00 was sufficiently supported by evidence which included the fact that the defendant was unable or unwilling to repay mistakenly honored overdrafts in the amount of $848,000.00 upon the bank's demand. State v. Langford, 483 So. 2d at 985.

In his appeal brief, the defendant cites State v. Greene, 2008-1318 (La. App. 4th Cir. 11/12/09), 26 So. 3d 274, wherein the defendant was convicted of unauthorized use of a movable and the appellate court found that the evidence was insufficient to support the conviction. In that case, the Fourth Circuit specifically

concluded that the evidence failed to exclude the reasonable probability that the defendant and the alleged victim, Ms. Blanks, had a legitimate business dispute as to how best to proceed with the repairs and renovation of her home and that she terminated the defendant's services after he was reluctant to proceed in the manner she suggested. Based on the record therein, the appellate court concluded that when Ms. Blanks terminated the contract, the dispute that existed between the parties was civil in nature, not criminal, and should have been handled in a civil proceeding, where any damages owed by either party could be properly assessed under the terms of the contract. State v. Greene, 26 So. 3d at 280-281. However, the Louisiana Supreme Court granted the State's application for writs of certiorari and review, State v. Greene, 2009-2723 (La. 9/3/10), 44 So. 3d 709, and reversed the Fourth Circuit's decision. State v. Greene, 2009-2723 (La. 1/19/11), ___ So. 3d ___ (per curiam). The Court specifically noted, in part, that based on the evidence, any rational trier of fact could find that the defendant therein took advance payment on the contract from Ms. Blanks by fraudulently representing himself as a licensed general contractor in Louisiana, and by that act alone, committed the offense of unauthorized use of a movable in violation of LSA-R.S. 14:68, when he took a $25,000.00 deposit from her. The court further held that it was not appropriate for the court of appeal majority to substitute its own appreciation of what the evidence at trial did or did not prove for that of the fact finder. State v. Greene, 2009-2723, ___ So. 3d at ___.

In the instant case, the victims testified that the defendant informed them that he could not complete the project and did not later contact them in an attempt to do so. Further, the testimony is not in conflict as to the amount that was paid to the defendant for the construction of the victims' home. While the defendant may dispute the total from that amount that was not used to construct the victims' home, the uncontested evidence is that the amount far exceeded $500.00. The jury

obviously rejected the defendant's hypothesis of innocence regarding his intent. As the trier of fact, a jury is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, even where there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. State v. Richardson, 459 So. 2d 31, 38 (La. App. 1st Cir. 1984). The trier of fact's determination of the weight to be given evidence is not subject to appellate review. An appellate court will not reweigh the evidence to overturn a factfinder's determination of guilt. State v. Taylor, 97-2261 (La. App. 1st Cir. 9/25/98), 721 So. 2d 929, 932. A reviewing court is not called upon to decide whether the conviction is contrary to the weight of the evidence. State v. Smith, 600 So. 2d 1319, 1324 (La. 1992). We are constitutionally precluded from acting as a "thirteenth juror" in assessing what weight to give evidence in criminal cases. See State v. Mitchell, 99-3342 (La. 10/17/00), 772 So. 2d 78, 83. The fact that a record may contain evidence which conflicts with the trier of fact's verdict does not render the evidence accepted by the trier of fact insufficient. See State v. Azema, 633 So. 2d 723, 727 (La. App. 1st Cir. 1993), writ denied, 94-0141 (La. 4/29/94), 637 So. 2d 460; State v. Quinn, 479 So. 2d 592, 596 (La. App. 1st Cir. 1985). An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. State v. Calloway, 2007-2306 (La. 1/21/09), 1 So. 3d 417, 418 (per curiam). The testimony of the victim is sufficient to establish the elements of the offense. State v. Creel, 540 So. 2d 511, 514 (La. App. 1st Cir.), writ denied, 546 So. 2d 169 (La. 1989).

The defendant concedes that he never covered the unpaid bills or settled the liens placed on the victims' property for unpaid bills. By accepting and

demanding funds from the victims for the construction of their home that were not used for that purpose, the defendant took something of value which belonged to another without consent by means of fraudulent conduct, practices, and representations. As noted above, the defendant argues that he did not have the intent to deprive the victims permanently at the time of the taking. Considering the Supreme Court's language (albeit in the context of venue) in Hayes, it is inconsequential whether the taking and formation of intent to permanently deprive coincided. Nonetheless, intent to deprive the victims permanently can be inferred based upon the circumstances including the defendant's actions or inaction after the taking. See State v. Winston, 723 So. 2d at 511-512. The evidence shows that the defendant did not seek to complete the construction project or pay the debts. The jury reasonably rejected any hypothesis of innocence. Accordingly, after a thorough review of the record, we are convinced, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant committed theft over $500.00. This assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER TWO

In his second assignment of error, the defendant contends that the trial court erred in allowing hearsay testimony without giving a limiting instruction. Specifically, the defendant contends that over the defense's objection, Brown testified about rumors of the defendant being in dire financial straits. The defendant contends that the trial court erred in denying the defense's request for a limiting instruction. Contending that there was no "reason [that] needed to be given at all" by Brown to explain why he began asking questions, the defendant argues the jury should have been told that the statement could only be used to explain why Brown was asking the defendant about the prospects for finishing the

project within the budget for the purpose of establishing the truth thereof (i.e., the defendant's actual finances) as evidence of fraudulent intent. The defendant further contends that the admission of the testimony in question without a limiting instruction contributed to the need for him to take the stand and explain that he always thought things would balance in the end. Noting that the trial judge stated that jurors struggled with questions about the defendant's intent, the defendant argues that the admission of the testimony in question was not harmless beyond a reasonable doubt. The defendant concludes that because the evidence should never have been admitted and its impact was never limited by judicial admonition, the conviction should be reversed. The defendant does not contest the trial court's denial of the final jury charge requested as to this issue.

The defendant contests the following testimony by James Brown during direct examination by the State:

> Q. ...Now between the first check of June 8 and July 11, had you started to have some concerns about Brett Holloway?
>
> A. Yes. Once again, being in the industry, I had heard rumors.

At this point, the defense objected as follows: "Let me again object to heard rumors." This was the defense's first objection regarding rumors heard by the victims.[4] The trial court overruled the objection and the State noted that the testimony was not being presented for the truthfulness of it, only as an explanation for the victims' concerns. The defendant then asked for a limiting instruction to the jury. The trial court stated that it would give the instruction at the end of the trial instead of stopping to do so at that point.

[4]The unrelated prior defense objection occurred when Brown was testifying about the deposit paid by the victims and the defendant's statement concerning the deposit. At that point, the defense objected to the testimony as containing hearsay and being non-responsive to the district attorney's question.

Louisiana Code of Evidence article 801C defines hearsay as "a statement, other than one made by the declarant while testifying at the present trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is not admissible except as otherwise provided by the Louisiana Code of Evidence or other legislation. LSA-C.E. art. 802.

Arguably, the provisions of LSA-C.E. art. 103A(1), which require a contemporaneous objection and the grounds therefor to preserve appellate review of a trial error, were not satisfied. See also LSA-C.Cr.P. art. 841A. The grounds for counsel's objections must be sufficiently brought to the attention of the trial judge to allow him the opportunity to make the proper ruling and correct any claimed prejudice to the defendant. Herein, the defense attorney did not state the ground for this objection. Nonetheless, we conclude that any error in allowing the testimony was harmless beyond a reasonable doubt. See LSA-C.Cr.P. art. 921; Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S. Ct. 2078, 2081, 124 L. Ed. 2d 182 (1993).

Reversal for erroneous admission of hearsay is only mandated when there is a reasonable possibility that the evidence might have contributed to the verdict. State v. Wille, 559 So. 2d 1321, 1332 (La. 1990), cert. denied, 506 U.S. 880, 113 S. Ct. 231, 121 L. Ed. 2d 167 (1992). The correct inquiry is whether the reviewing court is convinced that the error was harmless beyond a reasonable doubt. Facts to be considered include the importance of the witness's testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution's case. See Wille, 559 So. 2d at 1332.

In this case, the State's evidence was strong. Shannon Comeaux-Brown also testified regarding the transactions and sequence of events giving rise to the charge

against the defendant, including the substantial amount of funds obtained from the victims, but not used on the construction of their home, and the actions of the defendant that established his fraudulent intent. Further, in presenting his side of the story, the defendant admitted to having financial difficulties, albeit as related to his hypothesis of innocence and his claim that the victims' funds were taken due to the bank's "cross-collateralization" of funds for different projects. In light of the facts of the entire case, the statement by Brown complained of cannot be said to have contributed to the jury's verdict and, therefore, any error in its admission constituted harmless error. This assignment of error also is without merit.

ASSIGNMENT OF ERROR NUMBER THREE

In the third assignment of error, the defendant contends that the trial court erred in failing to explain to the jury that the theft statute requires proof of intent to deprive at the time of the taking or misappropriation and in failing to charge the jury on unauthorized use of a movable. On appeal, the defendant concedes that there was no contemporaneous objection based on these arguments. The defendant argues that should this court find no merit in his sufficiency-of-the-evidence argument, the trial court's failure to fully define theft and the responsive verdicts thereto require vacating the conviction and remanding for a new trial.

As conceded by the defendant on appeal, the defense counsel did not lodge a contemporaneous objection to the trial court's instruction on the elements of theft or the responsive verdicts. Absent an objection during the trial, a defendant may not complain on appeal of an allegedly erroneous jury charge or the failure to give a jury instruction. See State v. Tipton, 95-2483 (La. App. 1st Cir. 12/29/97), 705 So. 2d 1142, 1147; see also LSA-C.Cr.P. arts. 801C, 841A & 920(2). Accordingly, these issues are not properly preserved for appellate review. State v. Dilosa, 2001-0024 (La. App. 1st Cir. 5/9/03), 849 So. 2d 657, 671, writ denied, 2003-1601 (La. 12/12/03), 860 So. 2d 1153.

ASSIGNMENT OF ERROR NUMBER FOUR

In the fourth and final assignment of error, the defendant argues that the trial court erred in imposing an unconstitutionally harsh sentence and in miscalculating the amount of restitution due. The defendant contends that the trial court based sentencing on the amount of which the victims were deprived as opposed to his personal history. The defendant notes that he is a first offender who was gainfully employed and created jobs for others, and that the jury had doubts that he intended to steal anything other than the $40,000.00 in the last draw. The defendant argues that he did not deserve the maximum sentence. The defendant also notes that the conviction will affect his employability and his ability to make restitution payments.

Regarding the amount of restitution ordered, the defendant notes the contract contemplated a home worth $430,000.00. Based on calculations purportedly including the victims' total construction loan amount, interest, and money for materials, the defendant argues that $104,000.00 in restitution should have been ordered. The defendant further notes that a deduction of $34,000.00 the Browns claimed to have used to purchase materials would lead to restitution of $70,000.00. The defendant argues that the trial court based the restitution on the amount the Browns believed was improperly diverted to the defendant's overhead, as opposed to the Browns' pecuniary loss.

As noted by the State, the defendant did not object to his sentence, file a motion to reconsider sentence, or raise these issues below. Following the restitution hearing, the defense simply stated, "We object to the court's ruling." As stated above, LSA-C.Cr.P. art. 841A requires a contemporaneous objection and a statement of the grounds therefor to preserve appellate review of a trial error. Under the clear language of LSA-C.Cr.P. art. 881.1E, failure to make or file a motion to reconsider sentence precludes a defendant from raising an objection to

the sentence on appeal. One purpose of the motion to reconsider sentence is to allow the defendant to raise any errors that may have occurred in sentencing while the trial judge still has the jurisdiction to change or correct the sentence. The defendant may point out such errors or deficiencies, or may present argument or evidence not considered in the original sentencing, thereby preventing the necessity of a remand for resentencing. State v. Mims, 619 So. 2d 1059 (La. 1993) (per curiam). The defendant's failure to make or file and include these specific grounds in a motion to reconsider precludes him from urging same on appeal. Thus, the defendant's allegations regarding the constitutionality of his sentence and error in the amount of restitution ordered are not properly before this court for the first time on appeal and will not be considered herein. See State v. Felder, 2000-2887 (La. App. 1st Cir. 9/28/01), 809 So. 2d 360, 369, writ denied, 2001-3027 (La. 10/25/02), 827 So. 2d 1173; State v. Diaz, 612 So. 2d 1019, 1020 n.1 (La. App. 2d Cir. 1993).

CONVICTION AND SENTENCE AFFIRMED; STATE'S MOTION TO STRIKE DEFENDANT'S PRO SE BRIEF DENIED.

STATE OF LOUISIANA

VERSUS

BRETT HOLLOWAY

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1253

McDONALD, J., Concurring:

While it is not error to prosecute this matter under the general theft statute (La. R.S. 14:67) I note that there is a more specific statute governing this conduct and feel it would have been more appropriate to pursue it under La. R.S. 14:202.