NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 1834

STATE OF LOUISIANA

VERSUS

JAMES SANDIFER

Judgment Rendered: May 3, 2012

* * * * *

On Appeal from the
23rd Judicial District Court,
In and for the Parish of Ascension,
State of Louisiana
Trial Court No. 21,954

Honorable Alvin Turner, Jr., Judge Presiding

* * * * *

A. Gregory Rome
Baton Rouge, LA

Attorney for Defendant-Appellant,
James Sandifer

Ricky L. Babin
District Attorney
Donaldsonville, LA
Donald D. Candell
Assistant District Attorney
Gonzales, LA

Attorneys for Appellee,
State of Louisiana

* * * * *

BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

HIGGINBOTHAM, J.

The defendant, James Sandifer, was charged by four separate bills of information with one count each of contractor misapplication of payments, violations of La. R.S. 14:202. The defendant pled not guilty. He waived his right to a jury trial, and the cases were consolidated for a bench trial. The charge relating to Lot 1 was under docket number 21,954; Lot 2 was under docket number 21,952; Lot 13 was under docket number 21,955.[1] During trial, the State dropped the charge against the defendant pertaining to Lot 13. As to the charge pertaining to Lot 2, the trial court found the defendant not guilty. As to the charge pertaining to Lot 1, the trial court found the defendant guilty as charged. The defendant was sentenced to five years imprisonment at hard labor. The trial court deferred imposition of the sentence, and placed the defendant on five years supervised probation with conditions. The defendant now appeals, designating two assignments of error. We affirm the conviction and sentence.

FACTS

Jason Morris purchased Louisiana Heritage Estates, a defunct subdivision, from a previous developer. Unable to build on all of the lots, Morris recruited others to help him build, including Bill Bauder. After acquiring ownership of a lot, each of the men entered into a contract with the defendant to build the houses on their respective lots. The defendant's company was Sandifer Consultants, Inc. In December of 2006, the Ascension Parish Sheriff's Office received complaints from these men that the defendant, as the contractor, failed to pay many of his subcontractors and/or suppliers for the construction of these houses.

Bauder had contracted with the defendant in January 2006 to build a house on Lot 2 of the subdivision for a cost between $160,000.00 and $170,000.00. The

[1] The charge relating to Lot 4 was under docket number 21,953. Prior to trial, regarding the charge pertaining to Lot 4, the defendant entered a plea of nolo contendere to contractor misapplication of payments.

total amount of payments made by Bauder to the defendant was $90,810.84. This amount was paid to the defendant over time with four separate draws, which was based on Bauder's bank's draw schedule. After receiving this money, the defendant informed Bauder that he (defendant) was paying with his own money out-of-pocket, and he would be unable to finish construction of the house. Several suppliers and/or subcontractors who were not paid in full by the defendant threatened to file liens against the property. Bauder paid most of the suppliers and/or subcontractors to prevent the filing of the liens, and completed the construction of the house on his own.

Morris had contracted with the defendant in February 2006 to build a house on Lot 1 of the subdivision for an estimated cost of $160,000.00. Based on a similar draw schedule, Morris paid the defendant $140,594.11 for the construction of the house, including a final payment of $30,854.11 for overruns. The completed house and lot (along with a $2,516.14 custom upgrade) sold for $202,416.00. Morris received a final invoice from the defendant that indicated everything had been paid. After the closing, however, Morris began receiving invoices from various vendors and suppliers who had not been paid in full by the defendant.

The vendors or suppliers for which Morris paid the outstanding invoices were Rescom Electric, LLC for $2,430.00; Cajun Plumbing, Inc. for $5,714.00; Ascension Insulation and Supply, Inc. for $816.00; Central Heating and Air for $2,180.00; Stanton's Appliance Sales and Service, Inc. (Stanton's) for $1,656.80; Acoustical Specialties and Supply, Inc. (Acoustical) for $1,208.00; and Picou Builders Supply Company, Inc. (Picou) for $22,320.45. Stanton's, Acoustical, and Picou all filed liens for a total of $25,185.25 owed to the lien holders. Morris paid the full amount owed to Stanton's and Acoustical, and he paid $12,000.00 to Picou.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the trial court erred in allowing the State to improperly consolidate the charges against him. Specifically, the defendant contends that the prosecutor improperly consolidated the offenses during his opening statement.

We initially note that at no time did the defendant object to the offenses being consolidated. In fact, it was defense counsel, prior to trial, who filed a motion to consolidate all four bills of information. The motion was subsequently denied by the trial court. Following the opening statement by the prosecutor wherein he discussed three of the defendant's offenses, defense counsel inquired about whether they were consolidated. They were not, so the trial court asked counsel if they wanted to go forward with the offense involving Mr. Bauder only, or go forward with all three of the remaining charges. Defense counsel responded that it did not matter to him and that he would try whatever the trial court ordered. With the agreement to try all offenses together, the trial court suggested that each one be addressed separately. Defense counsel responded:

> I'm very confident that you can separate it. I don't have any problem with that. I agree with you in that; and I don't want to tell the D.A. how to present their case, but, you know, we should deal with one lot or one victim and then move on to the next.

The trial court agreed and suggested to the prosecutor that he compartmentalize his presentation. Thus, rather than objecting, defense counsel offered instructive advice on how to best try all three offenses together. In any event, any alleged improper consolidation of offenses for trial was waived by the defendant's failure to object. See **State v. Griffin**, 2007-0974 (La. App. 1st Cir. 2/8/08), 984 So.2d 97, 112.

The waiver of the issue of improper consolidation of offenses notwithstanding, we find the defendant was not prejudiced by the consolidation.

Consolidation of two or more criminal offenses is governed by La. C.Cr.P. art. 706, which provides that "[u]pon motion of a defendant, or of all defendants if there are more than one, the court may order two or more indictments consolidated for trial if the offenses and the defendants, if there are more than one, could have been joined in a single indictment." The statute permits a defendant to intrude on the otherwise plenary discretion of the State to determine "whom, when, and how" to prosecute by moving the trial court to consolidate crimes the State has chosen to prosecute in separate cases. La. C.Cr.P. art. 61; see **State v. Crochet**, 2005-0123 (La. 6/23/06), 931 So.2d 1083, 1085-86 (per curiam). However, given Louisiana's present broad joinder rules, La. C.Cr.P. art. 706 does not confer on a defendant a statutory right to hold the State to its initial charging decision that he alone may waive by moving for consolidation of the charges. Assuming that the crimes are otherwise properly joined in a single prosecution, pursuant to La. C.Cr.P. art. 493 or 493.2, the State may effect consolidation without the approval of the defendant or the court by filing a superceding indictment. **Crochet**, 931 So.2d at 1086.

In the present case, the State's discussion immediately before trial with the trial court and defense counsel regarding consolidating the offenses did not involve formal consolidation of the cases through the filing of a superceding bill of information or amendment of the original bills of information. However, for purposes of appellate review, whether the claim involves misjoinder of offenses, prejudicial joinder, or improper consolidation, the defendant must show prejudice to establish that trial of two or more crimes in a single proceeding "affect[ed his] substantial rights." See La. C.Cr.P. art. 921; see also **Crochet**, 931 So.2d at 1086.

Factors to determine if prejudice resulted from consolidation include whether the factfinder would be confused by the various charges; whether the factfinder would be able to segregate the various charges and evidence; whether the defendant could be confounded in presenting his various defenses; whether the

crimes charged would be used by the factfinder to infer a criminal disposition; and finally, whether, especially considering the nature of the charges, the charging of several crimes would make the factfinder hostile. See **Crochet**, 931 So.2d at 1087.

Consideration of these factors in this matter convinces us the defendant was not prejudiced by the consolidation. Since the charge pertaining to Lot 13 was dropped, the trial court listened to evidence pertaining to only two lots and two houses. The lots were in the same subdivision with houses being built by the same contractor, the defendant. In both instances, the defendant was paid by the owner of the lot for building expenses, but the defendant allegedly failed to pay in full his subcontractors and vendors. Thus, while the issues were clearly similar enough to permit consolidation, the evidence regarding Lots 1 and 2 was presented separately and in an orderly fashion at trial. Also, the defendant completed construction of the house on Lot 1, but never completed construction of the house on Lot 2. The issues as they pertained to each of the two lots were readily distinguishable. We note as well that defense counsel's representation of the defendant at trial indicated he was fully prepared to challenge the allegations in all three charges. Finally, the trial court's adjudications revealed its ability to compartmentalize the offenses, as the defendant was found guilty of only one of the counts. See **Crochet**, 931 So.2d at 1088. Accordingly, the consolidation did not prejudice the defendant.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues the evidence was insufficient to support the conviction. Specifically, the defendant contends the State did not introduce any direct evidence that he misapplied funds provided to him for the construction of Lot 1 and that the circumstantial evidence did not exclude every reasonable hypothesis of innocence.

A conviction based on insufficient evidence cannot stand, as it violates due process. See U.S. Const. amend. XIV; La. Const. art. I, § 2. The standard of review for the sufficiency of the evidence to uphold a conviction is whether or not, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979); see La. C.Cr.P. art. 821(B); **State v. Ordodi**, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988). The **Jackson** standard of review, incorporated in Article 821, is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides that, in order to convict, 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 evaluating circumstantial evidence, the trier of fact must consider the circumstantial evidence in light of the direct evidence, and vice versa, and the trier of fact must decide what reasonable inferences may be drawn from the circumstantial evidence, the manner in which competing inferences should be resolved, reconciled, or compromised, and the weight and effect to be given to each permissible inference. From facts found from direct evidence and inferred from circumstantial evidence, the trier of fact should proceed, keeping in mind the relative strength and weakness of each inference and finding, to decide the ultimate question of whether this body of preliminary facts excludes every reasonable hypothesis of innocence. **State v. Chism**, 436 So.2d 464, 469 (La. 1983).

Constitutional law does not require the reviewing court to determine whether it believes the witnesses or whether it believes that the evidence establishes guilt beyond a reasonable doubt. **Mussall**, 523 So.2d at 1309. Rather, the factfinder is

given much discretion in determinations of credibility and evidence, and the reviewing court will only impinge on this discretion to the extent necessary to guarantee the fundamental protection of due process of law. **State v. Spears**, 2005-0964 (La. 4/4/06), 929 So.2d 1219, 1222-23. The testimony of the victim alone is sufficient to prove the elements of the offense. **State v. Johnson**, 529 So.2d 466, 472 (La. App. 1st Cir. 1988), writ denied, 536 So.2d 1233 (La. 1989).

Misapplication of payments by a contractor is prohibited under La. R.S. 14:202, which provides, in pertinent part:

> A. No person, contractor, subcontractor, or agent of a contractor or subcontractor, who has received money on account of a contract for the construction, erection, or repair of a building, structure, or other improvement, including contracts and mortgages for interim financing, shall knowingly fail to apply the money received as necessary to settle claims for material and labor due for the construction or under the contract.

The essential elements of the crime are: (1) the existence of a contract to construct, erect, or repair a building, structure, or other improvement; (2) the receipt of money on the contract; and (3) a knowing failure to apply the money received as necessary to settle claims for material and labor due for the construction or under the contract. **State v. Cohn**, 2000-0313 (La. 4/3/01), 783 So.2d 1269, 1275. Proving misapplication of the funds, however, is not enough. The State must prove that the misapplication was made knowingly. See **Spears**, 929 So.2d at 1223.

Specific 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. La. R.S. 14:10(1). Specific intent may be proved by direct evidence, such as statements by the defendant, or by inference from circumstantial evidence, such as a defendant's actions or facts depicting the circumstances. **State v. Marshall**, 99-2884 (La. App. 1st Cir. 11/8/00), 808 So.2d 376, 381.

Here, there is no dispute, and the defendant concedes, that the first two elements were proven – the existence of the contract and the receipt of the money. The defendant contends that the third element was not proven, namely, that he knowingly failed to apply the money received as necessary to settle claims for material and labor due under the contract.

The testimony and documentary evidence introduced at the trial established that the estimated "hard cost" for the defendant to construct a house on Lot 1, owned by Morris, was $160,000.00. The "actuals," however, came in at $169,085.00. The house was sold on October 23, 2006, for $202,416.00. The defendant sent a fax to Morris, dated October 23, 2006, explaining that the actuals were higher than the total hard cost due to a combination of things. The defendant explained in the fax that "every sub and supplier had increases across the board from the time it was bid until completion, i.e. concrete, lumber, etc. We also spent additional money on fill dirt around the home, tree removal, etc." Per the draw schedule, Morris paid to the defendant the following amounts invoiced by the defendant for construction and labor: $22,148.00; $32,722.00; $33,722.00; and $21,148.00. Following these payments, Morris paid the defendant $30,854.11 on October 26, 2006. This amount represented the overages and the closure of the account. Morris referred to this amount as "a final above-and-beyond draw." Morris explained that when the house sold, the closing check from the sale of the house netted a profit of $36,023.00. The money remaining in Morris's checking (draw) account, due to a small reserve to pay interest, was $872.30, for a total of $36,895.30. From this amount, Morris had to pay the defendant $30,854.11 for the overages (or overruns). Thus, the $30,854.11 amount had nothing to do with monies received out of a draw from the bank, but were monies from the proceeds from the closing of the sale on Lot 1. When asked on direct examination if he was of the opinion that everything, and all vendors, were paid for, Morris responded:

"At that point, yes, because a title search had been ran on the property and everything seemed to be fine. His [defendant's] wife showed up to the closing and we closed the loan. Everything was very good at that point." However, following the closing on the house, Morris was informed that there were numerous outstanding bills, including three liens filed against the property totaling more than $25,185.25.

On cross-examination, the defendant admitted that he knew there were unpaid invoices at the time of closing:

> Q. As the owner of the company you were familiar with what accounts you had open, is that correct, on Lot No. 1?
>
> A. Yes.
>
> Q. So you knew you had an account open with Picou Builders; is that correct?
>
> A. Yes.
>
> Q. It's your testimony that you did not know that you had been -- you had charged $37,000 for Lot No. 1 on that account and you had only paid [$]15,000 and you didn't realize that there was still $22,000 unpaid?
>
> A. Ask that again, please.
>
> Q. You knew about your accounts; is that correct?
>
> A. (Witness nods head.)
>
> Q. You knew that you had an account with Picou Builders for Lot No. 1 at the time of closing; is that correct?
>
> A. Yes.
>
> Q. You knew at some point you had ran [sic] up $37,000 in charges at Picou Builders, is that correct, for Lot No. 1?
>
> A. At some point -- to use your words --I guess I knew that.
>
> Q. Prior to closing?
>
> A. I don't know that I knew it prior to closing what the amount was.
>
> Q. I'll ask you this. At Picou Builders, at the time of closing, did you know that you had a balance at Picou Builders?

A. Yes.

Q. So to sum it up, you did know that there were unpaid invoices at the time of closing for Lot No. 1?

A. That's what I said earlier, yes.

Q. Why didn't you inform Mr. Jason Morris of that?

A. I guess because I wasn't asked.

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 which raises a reasonable doubt. See **State v. Captville**, 448 So.2d 676, 680 (La. 1984). The trier of fact is free to accept or reject, in whole or in part, the testimony of any witness. Moreover, when 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. 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. 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 the record contains evidence which conflicts with the testimony accepted by a trier of fact does not render the evidence accepted by the trier of fact insufficient. **State v. Quinn**, 479 So.2d 592, 596 (La. App. 1st Cir. 1985). In the absence of internal contradiction or irreconcilable conflict with the physical evidence, one witness's testimony, if believed by the trier of fact, is sufficient to support a factual conclusion. **State v. Higgins**, 2003-1980 (La. 4/1/05), 898 So.2d 1219, 1226, cert. denied, 546 U.S. 883, 126 S.Ct. 182, 163 L.Ed.2d 187 (2005).

The guilty adjudication returned in this case indicates that, after considering the credibility of the witnesses and weighing the evidence, the trial court accepted the testimony of Morris, as well as the witnesses who established the outstanding payments and liens on Lot 1, who supported Morris's claims. In finding the defendant guilty, the trial court clearly rejected the defendant's theory of innocence, namely, that he did not knowingly fail to apply the funds paid to him by Morris. See **State v. Cohn**, 2003-0313 (La. 4/3/01), 783 So.2d 1269, 1275-76. On appeal, the reviewing court does not determine whether another possible hypothesis suggested by a defendant could afford an exculpatory explanation of the events. **State v. Mitchell**, 772 So.2d at 83. See **State v. Juluke**, 98-0341 (La. 1/8/99), 725 So.2d 1291, 1293 (per curiam).

After reviewing the record, we are convinced that the testimonial and documentary evidence supported the trial court's determination. We reject the defendant's argument, and find that the requisite specific intent can be inferred from the circumstances of the crime. We believe that a rational trier of fact, viewing all of the evidence, both direct and circumstantial, as favorable to the prosecution as any rational factfinder can, could have concluded beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence suggested by the defendant at trial, that the defendant was guilty. The trial court could have reasonably concluded that the State proved, beyond a reasonable doubt, that defendant knowingly failed "to apply the money received as necessary to settle claims" for the Morris job. See La. R.S. 14:202. See also **Marshall**, 808 So.2d at 383; **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

This assignment of error is without merit.

We affirm the conviction and sentence of the defendant, James Sandifer.

CONVICTION AND SENTENCE AFFIRMED.