

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 1258

STATE OF LOUISIANA

VERSUS

KATHERINE CONNER

Judgment Rendered: March 25, 2011.

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On Appeal from the  
20th Judicial District Court,  
in and for the Parish of East Feliciana  
State of Louisiana  
District Court No. 21756

The Honorable George H. Ware, Jr., Judge Presiding

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

*Jaw Welch J. dissent + assign reasons*

**CARTER, C.J.**

The defendant, Katherine Conner, was charged by bill of information with theft of a value of \$500 or more, a violation of La. Rev. Stat. Ann. § 14:67, and entered a plea of not guilty. A jury found the defendant guilty as charged. The defendant was sentenced to three years imprisonment at hard labor. The trial court suspended the imprisonment term and imposed three years active supervised probation under the following conditions: forty-five days of public service; payment of a \$1,000.00 fine and court costs; payment of \$10,251.46 in restitution; random drug screening; payment of \$50.00 per month as a supervision fee; and the standard conditions of probation under La. Code Crim. Proc. Ann. art. 895. The defendant now appeals, raising error as to the sufficiency of the evidence to support the conviction and the propriety of the restitution order. For the following reasons, we affirm the conviction and sentence and remand with instructions.

**STATEMENT OF FACTS**

On July 7, 2008, the victim, construction worker Ralph Jefferson of Jefferson Roofing, executed a contract to do work for the defendant on her home in East Feliciana Parish for \$14,000.00. That same date, the defendant made a partial payment of \$7,000.00. Jefferson testified that the first installment was used to purchase materials for the project. Jefferson had two helpers to whom he personally paid wages. The project consisted of removing an existing roof and installing rafters and a metal roof. Unexpected, incidental work was performed since the home was actually constructed over a mobile home. Jefferson explained that he had to cut the top of the mobile home open in order to attach new joists, and the house had

to be extended an additional four feet.<sup>1</sup> Jefferson completed the repair of the roof and cornice, joist attachment, and outside work. At the end of July, the defendant paid Jefferson an additional \$1,200.00 for labor.

On August 1, 2008, the defendant paid Jefferson \$7,574.00 as final payment for the work that was completed. Jefferson deposited the check with his bank. Then, on August 26, 2008, the defendant executed with her bank, Pelican State Credit, an "Affidavit of Forgery," alleging the August 1 check was a forgery. The August 1 check was deemed a non-redeemable forgery, and a "Returned Deposit Item Notice" was generated on August 28, 2008. The \$7,574.00 funds from the August 1 check were retrieved from the victim's account.

The defendant testified at trial, offering explanation of her actions. According to the defendant, she had paid for materials that the victim had failed to purchase, such as insulation, Sheetrock compound, and plywood. She paid \$361.00 for these supplies, and she claimed the victim instructed her to deduct this amount from the \$7,000.00 balance due. The defendant explained that she had forgotten to deduct the amount she spent on supplies, as well as the total paid for outsourced work, from the final payment made to the defendant. Thus, in accordance with the defendant's testimony, she recalled the check as a forgery because she overpaid the victim, and the work had not been completed.

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<sup>1</sup> According to Jefferson's testimony, the defendant informed him that she would pay him for the work completed and have a family member complete unfinished items specifically described as "some doors and things." The defendant testified that she paid Perry Dunn \$1,300.00 "off the balance" to perform skilled tasks requiring more manpower than Jefferson could handle.

### ASSIGNMENT OF ERROR NUMBER ONE

In the first assignment of error, the defendant contends the evidence is insufficient to support her conviction. Noting that the case involves a factual dispute over whether the victim finished the construction job and how much he was owed, the defendant argues that this was a civil contractual dispute that should not have been prosecuted as a crime. The defendant also submits that she signed the affidavit of forgery based on her credit union's recommendation. The defendant argues that her actions do not amount to theft. The defendant specifically contends that the State failed to prove that the funds withdrawn from her account by the victim legally belonged to the victim. The defendant maintains she sought to get the money back because she disagreed that the check was for the correct amount owed, and she wanted to resolve the contractual dispute with the victim.

In reviewing the sufficiency of the evidence to support a conviction, a Louisiana appellate court proceeds under the standard enunciated by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 (1979). That *Jackson* standard of review, incorporated in La. Code Crim. Proc. Ann. art. 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 beyond a reasonable doubt. *See State v. Ordodi*, 06-0207 (La. 11/29/06); 946 So. 2d 654, 660. The *Jackson* standard is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. *State v. Patorno*, 01-2585 (La. App. 1 Cir. 6/21/02); 822 So. 2d 141, 144. When analyzing circumstantial evidence, La. Rev. Stat. Ann. § 15:438 provides that the factfinder must be

satisfied the overall evidence excludes every reasonable hypothesis of innocence. *Patorno*, 822 So. 2d at 144. When a case involves circumstantial evidence and the jury 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 that belongs to another, either without the consent of the other to the misappropriation or taking or by means of fraudulent conduct, practices, or representations. La. Rev. Stat. Ann. § 14:67(A). An intent to deprive the other permanently of whatever may be the subject of the misappropriation or taking is essential. *Id.*

The \$14,000.00 contractual agreement the victim executed with the defendant states that the cost was to be paid in two installments. As referenced during the victim's trial testimony, the contract also contains the following stipulation: "In case other work needs to be done that are [sic] not included in this agreement, and [sic] additional fee may be required from Katherine Conner." The victim's wife, Sherry Jefferson, who assists with the construction business and handles banking affairs, testified that the defendant was supposed to pay an additional \$3,800.00 for the extra work; however, she and her husband agreed to accept \$1,200.00 from the defendant because the defendant indicated it was all she could pay at the time.<sup>2</sup> Thus, with the initial \$7,000.00 payment, the defendant had paid the

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<sup>2</sup> The victim also testified there was a contract for the extra amount of work and additional payment outside of the original contract. However, the parties did not sign that contract.

victim a total of \$8,200.00 before the defendant recalled the \$7,574.00 payment.

The victim and his wife were at the defendant's residence when they witnessed her write the August 1, 2008, check in the amount of \$7,574.00. According to Mrs. Jefferson, the defendant became agitated, erred, and had to start over. At one point, the defendant suggested that Mrs. Jefferson fill out the check, and the defendant would sign. However, Mrs. Jefferson insisted the defendant complete a new check in its entirety, and the defendant did so. The defendant instructed the Jeffersons to wait until after lunch to take the check to the bank. The victim initially attempted to cash the check from the defendant's account; however, the funds were not available at that time. Instead, the defendant deposited the check into his account at Regions Bank, and the check cleared. The victim and his wife further testified that the defendant did not contact them before the funds for the final check were retrieved from the victim's bank account and that the defendant never complained about the amount of the final check or the work completed.

The victim contended that, at the time the defendant submitted the check as final payment, \$15,774.00 was proper payment for the work completed and materials used and that he had performed all the work as agreed. Mrs. Jefferson testified that the work performed by the victim was actually worth more than they agreed to accept for payment. Thus, the victim contends that at the time of the final payment on August 1, 2008, the defendant owed the sum of \$7,574.00 as tendered in the subsequently recalled check.

After the check cleared, the victim paid several bills from his account. On August 28, the Jeffersons were informed that \$7,574.00 had been withdrawn from their account, that their account had a negative balance, and that the victim (Mr. Jefferson) had been accused of committing fraud. Mrs. Jefferson estimated that NSF fees in a sum of almost \$1,000.00 had been charged against their account as a result of the recalled check.

The defendant testified that she intended to pay the victim when she wrote the August 1 check. She explained that she was agitated because she did not have the right calculations. After the Jeffersons left her home, the defendant began looking through her account and realized that she had not deducted certain funds from the balance owed to the defendant. According to the defendant, she called Mrs. Jefferson and informed her of the mistake. Mrs. Jefferson told her that the amount on the check was the balance due. The defendant disagreed, pointing out that she advanced \$1,200.00, was owed a credit of \$361.00 for buying materials, and was entitled to a reduction of \$1,800.00 from the balance due to account for the hiring of Perry Dunn. The defendant also testified that she told Mrs. Jefferson to return the check, offering to pay what she believed to be the correct amount, but Mrs. Jefferson would not do so. The defendant said she then informed Mrs. Jefferson that she would stop payment on the check.

The defendant further testified that her bank, Pelican State Credit Union, stopped payment at her request but only as to the "paper check," allowing the victim to later submit the check electronically. According to the defendant, her credit union instructed her that this constituted forgery and that the defendant should indicate by a notarized statement that the

check was a forgery in order to recover the money. The defendant testified that she did not have the intent to defraud anyone.

During cross-examination, the defendant confirmed that she did not pay the victim any amount to cover the balance owed after she recouped the \$7,574.00, adding that the construction to her home was still not finished. The defendant stated that she did not complain about the home being unfinished when she wrote the final check. She explained that she and the victim agreed that Perry Dunn did not complete the work because she did not provide him with sufficient funds to pay the cost of the materials. The defendant contacted the Board of Contractors, and her home was inspected. According to the defendant, the roof was not attached correctly, nor was it braced. Regarding the completion of the project, the defendant added that the “whole back side—the roof is off ... The motion lights are hanging down. It’s just a mess.”

On rebuttal, the victim testified that, contrary to the defendant’s assertions, he completed the work that he was supposed to complete. Mrs. Jefferson also denied the defendant’s claim that the two women had a conversation after the defendant supplied the August 1 check.

In *State v. Winston*, 97-1183 (La. App. 3 Cir. 12/9/98); 723 So. 2d 506, writ denied, 99-0205 (La. 5/28/99); 743 So. 2d 659, the defendant wrote three checks totaling \$3,000.00, from an account that had been closed for nearly two years, to purchase antique furniture. Thus, the checks were worthless, and the defendant never made a payment 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. *Winston*,



723 So. 2d at 512. The court further held that the evidence supported the verdict, guilty of theft over \$500, beyond a reasonable doubt. *Id.*

Herein, while the defendant may now dispute the amount owed to the victim and/or the amount of work that was completed, it is uncontested that she wrote a check in the amount of \$7,574.00 and submitted it to the defendant as final payment. Thereafter, she fraudulently signed an affidavit stating that this check had been a forgery. As the trier of fact, a jury is free to accept or reject, in whole or in part, the testimony of any witness. *State v. Richardson*, 459 So. 2d 31, 38 (La. App. 1st Cir. 1984). Moreover, 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. *Id.* The trier of fact's determination of the weight to be given evidence is not subject to appellate review. *State v. Taylor*, 97-2261 (La. App. 1 Cir. 9/25/98); 721 So. 2d 929, 932. An appellate court will not reweigh the evidence to overturn a fact finder's determination of guilt. *Id.* A reviewing court is not called upon to decide whether it believes the witnesses or 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 the record contains evidence that 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. 1 Cir. 1993); *writ denied*, 94-0141 (La. 4/29/94); 637 So. 2d 460.

By having the funds recovered from the victim's account, the defendant took something of value that belonged to another without consent, by means of fraudulent conduct, practices, and representations. A finding that the defendant had the intent to deprive the victim permanently is supported by the fact that she did not make any payment after taking the funds in question. The jury reasonably rejected any hypothesis of innocence. 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*, 07-2306 (La. 1/21/09); 1 So. 3d 417, 418 (*per curiam*). 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 was guilty of theft over \$500. Assignment of error number one lacks merit.

#### **ASSIGNMENT OF ERROR NUMBER TWO**

In the second assignment of error, the defendant argues that the trial court ordered more restitution than that which is supported by the record. The defendant notes that while the restitution order consists of \$10,251.46, a balance of only \$6,574.00 was owed since she paid \$8,200.00 of the \$15,774.00 contract obligation. The defendant further notes that the inclusion of the \$1,000.00 in NSF fees incurred by the victim would result in an amount of \$7,574.00, which is \$2,677.46 less than the amount ordered by

the court. The defendant concludes that the evidence at trial does not support the restitution amount.

The defendant did not raise this issue below, did not file a motion to reconsider sentence, or object to the sentence. Under the clear language of La. Code Crim. Proc. Ann. art. 881.1(E), a 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. *State v. Mims*, 619 So. 2d 1059, 1059 (La. 1993) (*per curiam*). 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. *Id.* The defendant's failure to make or file a motion to reconsider sentence precludes her from raising an objection on appeal. *See State v. Felder*, 00-2887 (La. App. 1 Cir. 9/28/01); 809 So. 2d 360, 369, *writ denied*, 01-3027 (La. 10/25/02); 827 So. 2d 1173. Thus, the defendant is procedurally barred from having assignment of error number two reviewed.

#### **REVIEW FOR ERROR**

In accordance with La. Code Crim. Proc. Ann. art. 920, this court has reviewed the record for errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. There is nothing in the record to establish the trial court established a payment schedule for the payment of restitution as required by La. Code Crim. Proc. Ann. art. 895.1(A). Accordingly, we remand the matter to the trial court for

a determination of the manner in which restitution should be paid, either in a lump sum or in monthly installments, based on the defendant's earning capacity and assets. *See State v. McGee*, 08-395 (La. App. 5 Cir. 10/28/08); 996 So. 2d 1191, 1195, *writ denied*, 08-2791 (La. 6/5/09); 9 So. 3d 868.

**CONVICTION AND SENTENCE AFFIRMED; REMANDED  
WITH INSTRUCTIONS.**

**STATE OF LOUISIANA**

**NUMBER 2010 KA 1258**

**VERSUS**

**FIRST CIRCUIT**

**KATHERINE CONNER**

**COURT OF APPEAL**

**STATE OF LOUISIANA**

**WELCH, J. DISSENTING.**

*JW* I respectfully dissent, finding the evidence insufficient to support defendant's theft conviction. This case represents a classic example of the use of the criminal justice system to resolve a civil contractual dispute. In order to find defendant guilty of theft, the State had to prove beyond a reasonable doubt that defendant took money belonging to Mr. Jefferson with the intent to permanently deprive Mr. Jefferson of that money. The record reflects that there are unresolved factual contractual disputes between defendant and Mr. Jefferson over whether the project had been completed as agreed and the amount owed by defendant on the contract. Because of these contractual disputes, the State could not establish that the funds withdrawn from defendant's account by Mr. Jefferson legally belonged to Mr. Jefferson or that defendant intended to permanently deprive Mr. Jefferson of money belonging to him. For these reasons, I would reverse defendant's theft conviction.