STATE OF LOUISIANA	*	**NO. 2001-KA-1456**
VERSUS	*	**COURT OF APPEAL**
AUBREY B. MCSWAIN	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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APPEAL FROM
PLAQUEMINES 25TH JUDICIAL DISTRICT COURT
NO. 99-3131, DIVISION "B"
Honorable William A. Roe, Judge
* * * * * *
JUDGE

JOAN BERNARD ARMSTRONG
* * * * * *

(Court composed of Judge Joan Bernard Armstrong, Judge Steven R. Plotkin and Judge Terri F. Love)

PLOTKIN, J., DISSENTING.

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AFFIRMED;
SENTENCE VACATED AND REMANDED.

STATEMENT OF CASE

The defendant, Aubrey McSwain, was charged by bill of information on August 16, 1999, with two counts of theft over five hundred dollars, violations of La. R.S. 14:67 (A). The defendant pled not guilty at his arraignment on October 4, 1999. On February 11, 2000, the State filed a motion to amend the bill of information and added two counts of misapplication of funds in excess of one thousand dollars, violations of La. R.S. 14:202 (C), which was granted. Following a trial on November 15, 2000, a six-person jury found the defendant guilty of two counts of misapplication of funds in excess of one thousand dollars, and the two counts of theft were dismissed. On February 7, 2001, the defendant was sentenced to three years in the custody of the Department of Corrections for each count to run concurrently. The defendant's sentences were suspended and he was placed on five years active probation. The trial court granted the defendant's motion for appeal. On April 4, 2001, the trial court denied the defendant's motion to reconsider the sentence. The defendant now appeals.

STATEMENT OF FACT

The record reflects that on February 14, 1999, Keith and Sharon Hinkley signed a contract with Atlantic Pools, owned and operated by the defendant, for the installation of an in-ground swimming pool at their home in Belle Chasse, Louisiana. The Hinkelys initially gave the defendant a one thousand dollar deposit. On March 10, 1999, the defendant began construction on the Hinkley's pool, with the hole being dug and the iron being set. That day, the Hinkleys issued a second check for the pool construction for approximately thirty percent of the agreed upon fee in the amount of six thousand, one hundred seventy-two dollars. Several days later after the cement work was completed the Hinkleys gave the defendant a third check in the amount of seven thousand, sixty-three dollars. The Hinkleys were advised that the cement had to set and so no work would be done for about a week. Soon after, the Hinkelys were informed that the check issued by the defendant to Nairn the concrete company had been returned for insufficient funds, and the company had been unable to contact the defendant. The Hinkleys became concerned and attempted to meet with the defendant at his home, which was also his place of business, but the

Hinkleys were never able to speak to him personally. However, the defendant's wife did indicate that all bills were being paid and that the work would be continuing as needed. The Hinkleys finished the construction of their pool themselves after they received no response from the defendant.

On February 17, 1999, the Hinkley's next-door neighbors, Patrick and Karen Bucher, also signed a contract with the defendant to have a swimming pool built at their home and gave the defendant a one thousand dollar deposit. On March 10, 1999, the hole was dug and the Buchers gave the defendant a second check in the amount of four thousand, seven hundred fifty dollar. On March 16, 1999, a third check was given to the defendant in the amount of five thousand, seven hundred dollars. Several weeks later after attempting to contact the defendant, Nairn concrete contacted the Buchers to tell them it had not been paid for the concrete installed in their pool, and a lien would be put on their house if it were not paid. The gunite company, who supplied a special kind of building material for the pool, also told the Buchers that it also had not been paid. The Buchers attempted several times to speak to the defendant, but he would only respond by fax. The Buchers thus finished the pool themselves as well.

Donald Whittington, an excavating contractor, was hired to furnish a digging machine and operator to dig out the swimming pools for the

Hinkleys and Buchers. After completing the work, the defendant was given a bill at the job site. A formal invoice was subsequently mailed to the defendant in the amount of nine hundred and sixty dollars. Only one hundred and fifty dollars of the total was paid despite repeated attempts by Whittington to obtain payment.

Dominic Viverito was hired by the defendant to do the trim, tie the steel, install the main drains, as well as all of the plumbing in the concrete work for the Hinkley and Bucher pools. Viverito gave the defendant two invoices, one for each pool, one for one thousand, three hundred thirty-five dollars, and one for one thousand, one hundred sixty-dollars and fifty cents. The defendant paid three hundred dollars toward one of the invoices.

Peggy Pavlovich, the bookkeeper and secretary for Nairn Concrete, testified that Nairn provided materials to the defendant for the installation of both pools, for which the company received a check upon delivery in the amount of three thousand, two hundred forty-eight dollars and fifty-two cents. Nairn deposited the check , but it was returned for insufficient funds. Pavlovich spoke with the defendant's wife who said she would send a check overnight, but instead sent a letter stating she would pay five hundred dollars. Nairn advised that the amount would be unacceptable, but it would accept three payments, one a month, in the amount of one thousand, eighty-

seven dollars. Nairn received one payment in the agreed upon sum.

The defendant testified that he intended to complete the pools contracted by the Hinkleys and the Buchers, but his failing health was worsened due to a stroke during the construction.

ERRORS PATENT

The defendant complains that there was an error in his sentence that will be discussed in assignment of error number two. There are no other errors patent.

ANALYSIS

ASSIGNMENT OF ERROR NUMBER 1

In this assignment of error the defendant complains the evidence is insufficient to support the conviction of misapplication of funds.

The standard for reviewing a claim of insufficient evidence is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found all of the essential elements of the offense proven beyond reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). The reviewing court is to consider the record as a whole and not just evidence most favorable to the prosecution; and if rational triers of fact could disagree as to the interpretation of the evidence, the rational decision to convict

should be upheld. State v. Mussall, 523 So.2d 1305 (La. 1988). Additionally, the 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. Id. The trier of fact's determination of credibility is not to be disturbed on appeal absent an abuse of discretion. State v. Cashen, 544 So.2d 1268 (La. App. 4 Cir. 5/25/89).

When circumstantial evidence forms the basis for the conviction, such evidence must exclude every reasonable hypothesis of innocence. La. R.S. 15:438. The court does not determine whether another possible hypothesis suggested by the defendant could afford an exculpatory explanation of the events. Rather, this court when evaluating the evidence in the light most favorable to the prosecution, must determine whether the possible alternative hypothesis is sufficiently reasonable that a rational juror could not have found proof of guilty beyond reasonable doubt under Jackson. State v. Davis, 92-1623 (La. 5/23/94), 637 So.2d 1012. This is not a separate test from Jackson, but is instead an evidentiary guideline for the jury when considering circumstantial evidence, and the test facilitates appellate review of whether a rational juror could have found the defendant guilty beyond a reasonable doubt. State v. Wright, 445 So.2d 1198 (La. 1984).

The elements of misapplication of funds as found in La. R.S. 14:202

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 under the contract. State v. Cohn, 2000-0313, p.7 (La. 4/3/01), 783 So.2d 1269, 1275.

The misapplication of funds is a specific intent crime and the state had to show the defendant actively desired the prescribed criminal consequences to follow his act or failure to act. La. R.S.14:10 (1).

Evidence that the defendant knowingly failed to apply money received under each contract as necessary to settle claims for material and labor due under the contract supports a conviction for misapplication of payments by a contractor. Cohn, Id.

In the instant case, we find that the evidence supports the defendant's conviction. The defendant contracted with the Hinkleys and Buchers to build in-ground swimming pools at their homes. The Buchers and Hinkleys paid the defendant a combined sum of more than twenty-five thousand dollars. The Hinkleys and Buchers testified that the defendant dug the holes in their backyards and applied the cement, but did not complete the jobs. They further testified that when they tried to contact the defendant he could not be reached. Several of the subcontractors testified that they had not

received payment from the defendant for work done on the Hinkley and Bucher pools. The bookkeeper of one subcontractor testified that the company did receive payment from the defendant for the work done on the Hinkley and Bucher pools, but the check was returned for insufficient funds.

Patricia McSwain, the defendant's wife, testified that the money received from the Hinkleys and Buchers was used to pay subcontractors for work done on previous jobs. The State proved all of the elements of misapplication of funds.

This assignment of error is without merit.

ASSIGNMENT OF ERROR NUMBER 2

In his second assignment of error, the defendant complains the trial court imposed an illegal sentence. Specifically, the defendant argues that La. R.S. 14:202 (C) allows for a minimum sentence of ninety days and a maximum of six months for each one thousand dollars in misapplied funds with the aggregate not to exceed five years, and the trial court erred in its calculation of the misapplied amount. The defendant further argues that the misapplied amount should be five thousand, one hundred seventy-nine dollars and fifty-two cents, and not the twenty thousand, two hundred fifty-three dollars and fifty two cents designated by the trial court as the amount due by the defendant as restitution. Therefore, the three-year sentence

exceeds the six months per one thousand dollars allowed by the statute, and the maximum for the five thousand dollar sum should have been two and one half years. The defendant further avers that La. R.S. 14:202 (C) provides for restitution to the subcontractors, but not to the Hinkleys and Buchers for their out of pocket expenses paid to finish the pools themselves.

In excessive sentence assignments, this Court recognizes the wide discretion of the trial court and requires a manifest abuse of discretion be demonstrated before setting aside a sentence. State v. Stephenson, 30,271, p.5 (La. App. 2 Cir. 1/21/98), 706 So.2d 604, 607; State v. Square, 433 So.2d 104 (La. 1983).

The defendant argues that his three-year sentence for each count is excessive, and should be based on the actual amount misapplied and not on the total amount determined by the court to be paid in restitution.

In State v. Stewart, 605 So.2d 648 (La. App. 4 Cir. 9/17/92), this Court affirmed the method used by the trial court in determining the amount misapplied, and the amount owed in restitution. In Stewart, it appears the trial court deducted the amounts paid by the contractor to the subcontractors from the amount still owed to the subcontractors to determine the amount misapplied.

In the instant case, the amount misapplied in count three for the

Hinkleys appears to be $2,671.26, and the amount misapplied in count four for the Buchers appears to be $2,496.26 for a total of $5, 167.52. The following figures show how the sum was determined:

Buchers

Excavator (Mr. Whittington)	Amount due	$480.00 (1/2 of $960)
	Amount paid	$ 75.00 (1/2 of $150)

	Not paid	$ 405.00
Viverito	Amount due	$1,160.50
	Amount paid	$ 150.00 (1/2 of $300)

	Not paid	$1,010.50
Nairn	Amount due	$1,624.26 (1/2 of $3,248.52)
	Amount paid	$ 543.50 (1/2 of $1,087.00)

	Not paid	$1,080.76

Total unpaid amount for Bucher's pool $2,496.26 (count four)

Hinkleys

Excavator (Mr. Whittington)	Amount due	$480.00 (1/2 of $960)
	Amount paid	$ 75.00 (1/2 of $150)

	Not paid	$405.00
Viverito	Amount due	$1,335.50
	Amount paid	$ 150.00 (1/2 of $300)

	Not paid	$1,185.50
Nairn	Amount due	$1,624.26 (1/2 of $3,248.52)
	Amount paid	$ 543.50 (1/2 of $1,087.00)

	Not paid	$1,080.76

Total unpaid amount for Hinkley's pool $2,671.26 (count three)

La. R.S. 14:202 (C) provides:

> When the amount misapplied is greater than one thousand dollars, whoever violates this section shall be fined not less than one hundred dollars nor more than five hundred dollars, or imprisoned with or without hard labor for not less than ninety days nor more than six months, or both, for each one thousand dollars in misapplied funds, provided that the aggregate imprisonment shall not exceed five years.

We find that the three-year sentences imposed for counts three and four in this case exceed the maximum allowed by the statute if the amount misapplied is about five thousand dollars. The maximum sentence in this case for each count is two and one half years. Because La. R.S. 14:202 provides a range of sentences, we remand the case for resentencing.

With respect to the amount of restitution, our review of the record reveals that the trial court based its restitution award upon the amounts still owed to the suppliers, subcontractors, etc., as well as the net "out-of-pocket" expenses of the homeowners. In conformance with La. R.S. 14:202(D), the court is authorized to order the payments to the suppliers, etc. The real question is whether the court could also order the defendant to pay $7,500 restitution to each of the homeowners to reimburse them for the additional cost of completing the pools. La. R.S. 14:202(D) specifically provides for

the payment of any misapplied funds to "the person whose construction contract payments were misapplied". It also provides for the payment of "any additional legal costs resulting from the misapplication of construction fund payments". This appears to cover such things as the payment by the owner of liens placed on property by suppliers and subcontractors. The $7,500 restitution awarded to each homeowner does not appear to fit within the definition of La. R.S. 14:202(D). However, the court suspended the sentences and ordered this restitution payment to the homeowners. The issue is then whether the court could order this restitution as a condition of probation. La. C.Cr.P. art. 895(A)(7) provides:

> A. When the court places a defendant on probation, it shall require the defendant to refrain from criminal conduct and to pay a supervision fee to defray the costs of probation supervision, and it may impose any specific conditions reasonably related to his rehabilitation, including any of the following. That the defendant shall:
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> * * *
>
> (7) Make reasonable reparation or restitution to the aggrieved party for damage or loss caused by his offense in an amount to be determined by the court;

In addition, La. C.Cr.P. art. 895.1 provides in part:

> A. (1) When a court places the defendant on probation, it shall, as a condition of probation, order the payment of restitution in cases where the victim or his family has suffered any direct loss of

> actual cash, any monetary loss pursuant to damage to or loss of property, or medical expense. The court shall order restitution in a reasonable sum not to exceed the actual pecuniary loss to the victim in an amount certain. However, any additional or other damages sought by the victim and available under the law shall be pursued in an action separate from the establishment of the restitution order as a civil money judgment provided for in Subparagraph (2) of this Paragraph. The restitution payment shall be made, in discretion of the court, either in a lump sum or in monthly installments based on the earning capacity and assets of the defendant.
>
> (2)(a) The order to pay restitution, as provided in this Article, is deemed a civil money judgment in favor of the person to whom restitution is owed, if the defendant is informed of his right to have a judicial determination of the amount and is provided with a hearing, waived a hearing, or stipulated to the amount of the restitution ordered. In addition to proceedings had by the court which orders the restitution, the judgment may be enforced in the same manner as a money judgment in a civil case. Likewise, the judgment may be filed as a lien as provided by law for judgment creditors. Prior to the enforcement of the restitution order, the defendant shall be notified of his right to have a judicial determination of the amount of restitution. Such notice shall be served personally by the district attorney's office of the respective judicial district in which the restitution is ordered.

In Stephenson, the defendant was charged with two counts of La. R.S. 14:202 and pled *nolo contendere* to one count. The trial court suspended the sentence and ordered restitution to both victims (homeowners). The court

calculated the amount of restitution by taking the amount each victim paid the defendant, and then subtracting the amount the defendant paid the subcontractors and suppliers. The court considered the remaining amount to be the applicable amount of restitution. Both had spent more to have the construction completed, but the court did not award this extra amount as restitution. The Second Circuit affirmed the sentence. On review, the Supreme Court denied writs. State v. Stephenson, 98-0426 (La. 6/19/98), 720 So. 2d 1211.

In Stewart, the defendant pled *nolo contendere* to one count of La. R.S. 14:202. The trial court suspended his sentence and imposed restitution which included not only liens from subcontractors/suppliers, *but also* included most of the difference between the amount the victim gave the defendant on the building contract and the amount he paid for labor, building supplies, and a building permit. On review, this court affirmed the amount of restitution, but remanded the case for specification of the method of restitution.

In the instant case, we find that because the trial court suspended the defendant's sentences and placed him on probation, it was not limited by the provisions of La. R.S. 14:202(D) and could order further restitution under La. C.Cr.P. arts. 895 and 895.1. Additionally, the trial court found the

defendant's excuses about his health to be mitigating, and not exonerating factors. The trial court also found that it was the defendant's failure to apply the funds given to him that subjected the property owners to suit and to have a lien filed against their property, as well as the defendant's attitude, and lack of remorse to be its reasons for imposing the sentence given in this case.

Therefore, the trial court did not abuse its discretion in determining the amount due in restitution. Accordingly, we affirm the restitution award.

For the foregoing reasons, the defendant's convictions are affirmed, his sentences vacated, and the case remanded for resentencing.

AFFIRMED;
SENTENCE VACATED AND REMANDED.