STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 KA 1158 R

STATE OF LOUISIANA

VERSUS

MARTIN G. LEMOINE

DATE OF JUDGMENT: **SEP 2 6 2017**

ON APPEAL FROM THE EIGHTEENTH JUDICIAL DISTRICT COURT
NUMBER 70287, DIVISION A, PARISH OF POINT COUPEE
STATE OF LOUISIANA

HONORABLE JAMES J. BEST, JUDGE

* * * * * *

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* * * * * *

BEFORE: WHIPPLE, PETTIGREW, AND CHUTZ, JJ.

Disposition: TRIAL COURT'S RULING GRANTING DEFENDANT'S POSTVERDICT JUDGMENT OF ACQUITTAL REVERSED; DEFENDANT'S CONVICTION REINSTATED; REMANDED TO TRIAL COURT FOR SENTENCING.

Pettigrew, J. Concurs

CHUTZ, J.

On January 20, 2004, a grand jury returned an indictment charging Morel G. Lemoine Distributors, Inc., Martin G. Lemoine, and Veronica Lemoine with conspiracy to commit money laundering (count 1), violations of La. R.S. 14:26 and 14:230; money laundering (count 2), a violation of La. R.S. 14:230; and racketeering (count 3), a violation of La. R.S. 15:1351 et seq. The defendants pled not guilty to the charges. The indictment charged that the offenses occurred between March 15, 1995 and March 6, 1998. Trial began on August 26, 2013. The State dismissed the charges against Morel G. Lemoine Distributors, Inc. Also, the parties made clear that the only charge against the sole defendant, Martin G. Lemoine, was one count of money laundering, pursuant to La. R.S. 14:230(B)(2). Following the jury trial, the defendant was found guilty as charged. The defendant filed a motion for postverdict judgment of acquittal. Following a hearing on the matter, the trial court took the matter under advisement. Subsequently, the trial court granted the motion for postverdict judgment of acquittal "for the reasons stated in the Defendant's memoranda in support thereof and adopted by this Court as its own." The State appealed, designating one assignment of error.

We affirmed the trial court's ruling and reversed the defendant's conviction. See ***State v. Lemoine***, 2014-1158 (La. App. 1st Cir. 5/6/15), 174 So.3d 31, reversed, 2015-1120 (La. 5/3/17), --- So.3d ----, 2017 WL 1787745 (per curiam). Of the three issues raised by the defendant's motion for postverdict judgment of acquittal, we addressed only the second issue, wherein the defendant argued: "The State failed to offer any evidence whatsoever to attempt to prove that he acted for the purpose of committing or furthering the commission of any criminal activity as required by La. R.S. 14:230(B)(2)." ***Id.*** at 38. We agreed with this contention, stating:

> The evidence as a matter of law was insufficient to convict because the State failed to prove every element of the offense. Specifically, the State failed to prove the defendant knowingly acted in a way for the purpose of committing or furthering the commission of any criminal activity. Because the foregoing analysis disposes of the sufficiency issue in its entirety, we do not address the other arguments raised by the defendant.

Id.

The supreme court, in a per curiam opinion, reversed and vacated our ruling, remanding the case to this court for consideration of the two remaining grounds in the defendant's motion for postverdict judgment of acquittal. See ***State v. Lemoine***, 2015-1120 (La. 5/3/17), --- So.3d ---, 2017 WL 1787745 (per curiam). Finding no merit in either ground, we conclude that the trial court erred in granting the postverdict judgment of acquittal. Therefore, the defendant's conviction is reinstated, and we remand to the trial court for sentencing.

FACTS

A full recitation of the procedural history and facts can be found at ***Lemoine***, 174 So.3d 31. Because the supreme court remanded the case to this court to address the two remaining issues of the sufficiency of the evidence raised by the defendant, we include those facts that are pertinent to the discussion of the defendant's outstanding claims.

The defendant was president of Morel G. Distributors, Inc. (Morel), a New Roads company that supplied diesel fuel to Union Pacific Railroad (U.P.) at the rail yard in Livonia, Point Coupee Parish. In the mid-1990s, from about 1995 to 1997, several drivers drove bobtail fuel trucks for Morel with carrying capacities of up to 5,000 gallons of fuel. Morel's drivers would travel most often to Valero Refining Company in Krotz Springs and occasionally to Placid Refining Company in Port Allen to fill up their trucks with high-sulfur diesel fuel. When a driver filled his truck up, he was issued a fuel manifest from the refinery. From the refinery, Morel's drivers would drive to the U.P. rail yard and transfer the fuel in the trucks

directly into the locomotives. At the end of a day or shift, each driver would give his stack of manifests to Morel's lead driver who, from 1995 to 1997, was Keith Glaser. Glaser transferred the handwritten information on the fuel manifests to a field ticket. A single field ticket could contain a half-dozen or more engine numbers and the corresponding gallons of fuel pumped into each engine. Glaser would handwrite the field ticket number onto its corresponding fuel manifest so that Morel could keep track of when, where, and how much it was fueling. Rex Averill, who worked in Morel's office as a truck dispatcher, also generated the invoices based on the numbers on the field tickets. Invoices referenced the fuel manifests by their numbers and contained the amount of fuel transferred into a U.P. locomotive on a particular date. Averill sent these invoices to U.P. U.P. paid Morel with company checks, which were deposited into Morel's business checking account.

Averill testified at trial that during Glaser's time at Morel in the mid-1990s, Glaser inflated the amounts of diesel fuel on the field tickets.[1] With knowledge that Glaser was doing this, Averill then transferred the inflated numbers to the invoices that would be sent to U.P. Accordingly, U.P. was overbilled or overcharged for the amount of fuel it was actually receiving in its locomotives.

Stephen Paddy, a U.P. Special Agent, testified at trial about the alleged fraudulent billing scheme from 1995 to 1997. Agent Paddy presented many examples of gallons of fuel having been inflated on Morel's invoices, testifying that the inflation was often by 200 to 300 gallons. The fuel manifests from 1995 to 1997 that were introduced into evidence all contained scratched out fuel amounts; that is, after the U.P. engine number and the amount of fuel pumped into that engine were handwritten on the bottom of the manifest, the fuel amounts were subsequently scratched out with an ink pen in an apparent attempt to hide the

[1] Glaser did not testify at trial.

actual amount of fuel transferred into an engine. The defendant's wife, Veronica Lemoine, and Averill subsequently began scratching out the fuel gallon amounts on the manifests. According to Averill, Veronica did the vast majority of the scratching out.

The fuel manifests that contained scratch-outs and their corresponding invoices and field tickets were from the years 1995 through 1997. Beginning in 1998, the fuel manifests did not have scratch-outs on them. The focused time period of money laundering was from January 20, 1998 to March 6, 1998. According to Agent Paddy, the defendant's billing scheme had stopped by March 6, 1998 because, by this time, U.P. at the Livonia rail yard had gone "on line," that is, U.P. obtained its own fueling facility. Agent Paddy testified that since U.P. had its own tanks in the yard and everything was metered, padding invoices was impossible.

According to Averill, by the beginning of 1998, there were no more scratch-outs on the fuel manifests because there were too many "checks and balances." Averill explained that the fuel was metered at four different checkpoints. He maintained, however, that the fuel inflation still continued in 1998. Averill testified that instead of writing the number of gallons of fuel on the manifests, they were written on any piece of paper, e.g., a shop towel or toilet paper. Averill used these numbers to make the invoices and then threw away the pieces of paper. Averill stated that he personally inflated the numbers on the invoices and sent them to U.P. for payment. Averill was fired from Morel in early 2002 and, in 2003, he told U.P. about Morel's alleged fraudulent billing scheme. Averill testified that prior to the charged time period (1995 to 1997), he had paid Glaser to pad the invoices at the behest of the defendant. During the charged time period of forty-six days in early 1998, after Glaser had already been fired, Averill continued the

inflation of the invoices, but he was not paid anything extra by the defendant to maintain the scheme.

Christopher Peters, who qualified as an expert in forensic accounting, testified for the State. A certified fraud examiner with the accounting firm, Postlethwaite and Netterville, Peters was asked to analyze the documentation associated with the forty-six-day charged time period. According to Peters, there were twenty-nine days during the charged time period where the defendant overcharged or overbilled U.P. On some days, Morel charged U.P. for fewer gallons than Morel had actually purchased from the refineries. Peters explained that Morel's credit of some of the money that it had taken within the overall framework of stealing money from U.P. was Morel's way of hiding what it was actually doing. It was part of the sophistication of the scheme, according to Peters. Thus, he explained, the important number in his analysis was the cumulative difference, or the total variance over all forty-six days, between the number of gallons of fuel on all the fuel manifests and the number of gallons of fuel on all the corresponding invoices that Morel sent to U.P. for payment. Peters testified that of the around two million gallons of diesel fuel that was sold over the forty-six-day period, U.P. was overcharged or overbilled for 111,000 gallons of fuel, which amounted to about $55,000.00.

POSTVERDICT JUDGMENT OF ACQUITTAL REMAINING ISSUES

In his motion for postverdict judgment of acquittal, the defendant argued the evidence was insufficient to support the guilty verdict of money laundering. As directed by the supreme court, we address those two sufficiency issues that were pretermitted in our original decision. See ***Lemoine***, 174 So.3d 31. Those two remaining issues are as follows:

> (1) The State failed to offer proof sufficient to reasonably support a guilty verdict of the offense allegedly underlying the money laundering charge -- the State failed to prove the defendant sent any

> invoice during the charged time period which billed the railroad for more fuel than it received.
>
> (3) The defendant is entitled to a postverdict judgment of acquittal as to any grade of the offense beyond the misdemeanor defined in La. R.S. 14:230(E) because the evidence clearly shows that the "value of the funds" was less than $3,000 since the "things of value" in the case were checks, while "funds" is defined in the statute as cash.

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, 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 also ***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 the fact finder 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.

In his first argument, the defendant sets out several interrelated assertions that amount to the following: the State did not offer or submit the requisite evidence at trial to establish that he was engaged in money laundering during the charged time period and, as such, the State, based on Peters' calculations, failed to prove Morel sent any invoices during the charged time period that indicated U.P. was billed for more fuel than it received; the U.P. checks received by Morel were outside of the charged time period and, thus, made it impossible to determine whether any invoice was inflated; and the State failed to prove Peters included all

of Morel's purchases from the two refineries, as well as the Exxon refinery, in his daily purchase figures, thereby rendering Peters' calculations baseless. Finally, the defendant contends that Averill provided no evidence to prove he used U.P.'s checks for the purpose of committing or furthering the commission of a crime.

At the outset, we note that the defendant's assertion that there were no invoices during the charged time period that indicated U.P. was overbilled is manifestly inaccurate. The State's "Peters" in globo exhibits introduced at trial contained invoices for the days of the charged time period from January 20, 1998 to March 5, 1998. On each of the exhibits, Peters attached cover pages that list all of the fuel purchased by Morel on a particular day (mostly from Valero). The cover pages further list all of the invoices for a particular day along with each of the invoice numbers that Morel sent to U.P. for payment. Peters then attached each of the actual invoices, usually ranging from about three to eight invoices per day, to the back of each of the exhibits. There are twenty-nine days during the charged time period that indicate Morel was overcharging or overbilling U.P.

Where Morel did not clearly overcharge U.P., the numbers indicate that Morel had purchased more fuel from the refinery than it had sold to U.P. On those days, it appeared Morel was "undercharging" U.P. or giving some sort of credit to U.P. The crediting was done merely to keep some of the fuel it purchased from the refinery in an attempt to offset the impact of the overbilling. In other words, the amount of fuel billed according to the invoice may have been the exact amount put into a U.P. locomotive. For example, on exhibit Peters 34, the amount of fuel Morel bought from Valero on February 20, 1998 was 50,795 gallons. The amount of fuel sold to U.P. that day was 45,646 gallons. Accordingly, by Peters' calculations, U.P. appeared to have been charged "less" that day, i.e., 5,149 gallons' worth, than on other days. But this is not necessarily accurate. Morel had many other customers to whom it delivered fuel. Furthermore, the defendant kept

fuel in his own storage containers. Thus, on February 20, 1998, Morel may have delivered exactly 45,646 gallons to U.P. and billed U.P. for exactly that much. Morel may have then transferred the 5,149 gallons elsewhere, giving U.P. simply that for which it had paid.

The pressing issue throughout trial was the form of payment U.P. used to pay Morel. According to the defendant, $362,900.00 in U.P. checks received by Morel were outside of the charged time period and, thus, made it impossible to determine whether any invoice was inflated, using Peters' calculations. Under the applicable provision of La. R.S. 14:230(B)(2), it is unlawful for any person knowingly to give, sell, transfer, trade, invest, conceal, transport, maintain an interest in, or otherwise make available anything of value known to be for the purpose of committing or furthering the commission of any criminal activity. The defendant in brief notes that the defense at trial took the position that the crime of money laundering could not be committed until the defendant had possession and control of the "thing of value," which the parties seemed to have agreed was the check itself. During the special charges hearing, which followed the conclusion of all the trial testimony, the State suggested that Morel maintained an interest in the work it did -- providing fuel to U.P. -- whether Morel had an actual check in hand or not. Thus, before Morel was paid, according to the State, Morel had an asset that had value and in which it maintained an interest.

The trial court then made the following ruling:

> All right. If they didn't receive it between January the 20th and March the 6th, it was not an asset. I heard what he said when he -- I -- I remember when he opened his mouth, he said for accounting purposes. That's not the law that I appreciate from this; receiving anything of value. You cannot maintain an interest in something that somebody has in an account in Omaha, Nebraska. It is only when you receive it that you maintain an interest in it.

According to the defendant, Peters' calculations included checks dated after March 6, 1998, as well as invoices to U.P., which had been paid by those checks.

The defendant asserts that in so doing, Peters included payments that were outside the scope of the charged time period and, thus, were not relevant. A review of the in globo exhibit of the copies of the checks shows that a total of $362,900.26 in checks was dated after March 6, 1998. Thus, the defendant contends that it is impossible to determine whether the "padded" invoices are those that were paid for by the late checks and, therefore, not part of the charges.

The defendant's argument that Morel needed to have received a check from U.P. on the day it delivered fuel to U.P. for each day of the charged time period in order for the State to prove money laundering is unavailing. In the Peters in globo exhibits, there was at least one check attached to the back of each exhibit that was dated within the charged time period. Some checks were rather large and did not necessarily correspond to a single day of transactions; that is, it appeared U.P. paid on a single day during the charged time period for multiple days of fuel purchases. The State also introduced into evidence Exhibit "Robillard 1," through witness Loretta Robillard, who worked in accounts receivable for Morel in 1998. "Robillard 1" is an in globo exhibit that contains copies of U.P. checks paid to Morel for fuel that U.P. purchased from it. Robillard testified that she deposited these checks in Guaranty Bank Trust & Co. The Robillard exhibit contains copies of checks dated from January 1998 to April 1998, one dated September 21, 1998, and one dated September 25, 1998. Along with the copy of the front of each check is a copy of the back, showing that the check had been negotiated. The checks from January to April are not sequential; that is, there are only several days for each month represented by this exhibit. These particular checks were selected for the Robillard 1 (in globo) exhibit because, according to Averill, these were "inflated" checks.

This Robillard exhibit shows that checks from U.P. to Morel were consistently deposited in the same bank over time. The checks outside the charged

time period in this exhibit were not used by Peters, as the defendant purports, to calculate the fuel bought and sold by Morel during the charged time period. The money laundering under the defendant's direction that Peters established over the charged time period was based on differing amounts between the manifests (indicating the amount of fuel Morel purchased from the refineries) and the invoices (indicating the amount of fuel Morel sold to U.P.), and *not* U.P. checks that may or may not have been received by Morel during the charged time period.

Based on the foregoing, U.P. was not obligated to deliver a check to Morel on the same day it received its fuel from Morel in order for the State to prove money laundering. If, for example, U.P. received fuel from Morel on January 23, 1998, it is of no moment that U.P. did not produce and deliver a check for those services to Morel on that same day. There is no such legal requirement under La. R.S. 14:230(B)(2). Morel would eventually get its check for services rendered on January 23, and it makes no difference, regarding proof of money laundering, whether the receipt of that January 23 services-rendered check by Morel fell within the charged time period.

By virtue of the written contract between Morel and U.P., Morel maintained an interest in the fuel it sold to U.P., regardless of when U.P. paid for the fuel. If Morel delivered fuel to U.P. on a given day and was not immediately paid, Morel possessed an asset: the money owed to it for the delivery of fuel. This asset was logged into the Morel accounting books as an accounts receivable. Even the defendant's own expert witness testified as much. William Potter, a CPA with Postlethwaite & Netterville, testified in the defendant's case-in-chief. On cross-examination, Potter testified as follows:

Q. Okay. All right. Accounts receivables, are you familiar with that?
A. Yes.
Q. What are account receivables?

A. That's typically an unpaid invoice that a business has rendered product or services to a customer, and the customer has not yet paid for it. So, that would be an account receivable.
Q. Is that a value?
A. It's an asset of the business.
Q. Is it worth something?
A. Absolutely.
Q. You mean, so if I'm talking to somebody and I'm telling them that I rendered a service on March 6th of 1998, but they didn't pay me until September, you can -- you mean you're telling this Court and this Jury that that's still a value -- an asset of that business?
A. It's going to count as an asset, it's got a value, it's still a collectible.
Q. Okay. If it's -- just say I'm trying to stretch it out to its broadest meaning; it's an asset?
A. Accounts receivable is an asset.
Q. It's an interest?
A. Pardon?
Q. Is it an interest, like you maintain an interest in it; you've got some value in it?
A. It's owned by the business, it's an intangible asset.
Q. And that's real; isn't it?
A. Absolutely.
Q. And if somebody tries to come in and say, "Oh, that's fictitious, that's hocus pocus," that's not is it?
A. If you what the facts are --
Q. I know --
A. -- but I agree that accounts receivable is an asset.
Q. You agree that if it's done within a certain time period, the services were done then, then you're locked into that deal; right?
A. Right. I mean, there are general accepting accounting principles, you pull that, but when all works been performed to completion, product delivered, then it's owed at that point.
Q. Oh, so there's a check that Marty Lemoine Distributors got in May or June that ties back to that same time period, the work was performed before -- during the time period of January 20 to March 6, so those checks, even though they may be later on, that's an account -- that's an asset to Marty G. Lemoine's business?
A. I would say those checks were probably payments on that accounts receivable on that business.
Q. And they are, and they're an asset and they're worth value; correct?
A. Yes.

During cross-examination, Peters likened the delay between services rendered and paying the bill to a doctor's visit:

Q. Yes, give us the example, and then we'll move on.
A. Sure. So, I'm sure y'all have all gone to the doctor; right. So, when you go to the doctor, there's a long time period before you get your bill. But, when you get your bill that date of service is going to be the date you came in. So, it's not going to be the date that you got

> the bill. It's going to be the date you came in; right. And so, you may get the bill, let's say a month later, and there's all kind of other activity that's going on, right. So, you've gone to the doctor multiple times, so they have to make sure, okay, how did that line up; right. So, you need to know, okay what am I paying for. I've been to the doctor ten times, I need to know which one this invoice is for. So, they're going to put that date of service, things like that.
> Q. Okay. That's a real good example, as a matter of fact, but the date on your bill from the doctor will be the date that it was prepared?
> A. No, the date on the bill from the doctor would be -- it would show the date of service that you came in.

The supreme court, in reversing and vacating this court's ruling, found that the defendant engaged in money laundering for years and that the "scheme ultimately ceased by March 6, 1998, when [U.P.]'s own fueling facility became operational." Under this ongoing scheme, the defendant "routinely defrauded [U.P.] by billing the railroad for more fuel than was dispensed to it. [U.P]'s payments of the inflated invoices came in the form of checks which were deposited into Morel's business checking account." ***Lemoine***, --- So.3d at ----, 2017 WL 1787745 at *3.

Over the years, the "clean" money in the defendant's business became so intermingled with the "dirty" money through the continual overinflating of U.P.'s invoices, it no longer mattered that in *some* particular transactions with U.P., Morel did not overbill U.P. As the supreme court ruled:

> [W]e find that the Louisiana money laundering law places no ... burden on the [S]tate to trace dirty money after it has been commingled with clean money. Money launderers often mix the fruit of their crimes with legitimately-acquired assets, assuming detection of the dirty funds will be more difficult as a result. Mindful of this reality, courts have found that commingling can itself be evidence of money laundering and have found that the purpose of money laundering statutes indicates direct tracing is not required. (Footnote omitted).

Lemoine, --- So.3d at ----, 2017 WL 1787745 at *7.

Years before the charged time period, the defendant had been stealing money from U.P. with overinflated invoices for fuel it provided to U.P. Some of this stolen money was used for business expenses, which would have included the

purchase of more fuel to sell. This cycle of the continued theft of money from U.P. finally ended by March 6, 1998, as the supreme court found. Thus, from the first day that Morel, under the defendant's direction, overcharged U.P. until the last day of overbilling, the defendant had been engaged in a criminal enterprise of money laundering. Although there may have been bouts or periods of legitimate transactions between Morel and U.P. during these years, this had no effect on the overall money laundering scheme. What is clear is that for every inflated charge during the charged time period, which amounted to $55,000.00, U.P. paid Morel with a check, which was deposited in the defendant's business checking account at Guaranty Bank. Thus, because the forty-six-day window of the charged time period was so tainted by this point, whether a U.P. check that represented overpayment for fuel delivered during the charged time period was actually received by Morel during that same period is inconsequential.

As the supreme court opined, the evidence showed:

> not only that defendant repeatedly stole from [U.P.], but that he was depositing those ill-gotten gains into his business account, in which he maintained an interest and from which he routinely transferred money to perpetuate and further his business operations, which functions involved the recurring thefts. Put another way, this is not a "garden variety" theft case, as defendant asks us to find, but rather, in light of the use of stolen money to finance future thefts, a prototypical money laundering case.

Lemoine, --- So.3d at ----, 2017 WL 1787745 at *5-6.

Moreover, despite the defendant's contention that Averill provided no evidence of proof of a crime, it is clear that the supreme court found Averill's testimony compelling and illuminating. According to the defendant, Averill's testimony "elicited through leading questions, uncorroborated, and contradicted on critical points by the State's own witnesses, cannot provide the evidence from which any reasonable juror could have concluded that the elements of the crime were proven beyond a reasonable doubt." The supreme court's treatment of what Averill's testimony established serves two purposes. First, it is a direct refutation

of the defendant's argument that Averill's testimony could not support a conviction for money laundering. Second, it confirms our finding herein that the defendant was guilty of money laundering during the charged time period, regardless of when Morel received U.P. checks for services rendered during that time. The supreme court found:

> Averill played a pivotal role in the scheme, *at defendant's direction*, both before and during the charged period. It is immaterial that Averill's wages did not include "extra" pay to further the scheme because nothing in Section (B)(2) [of La. R.S. 14:230] justifies drawing such a distinction. To the contrary, though Averill was not paid extra to inflate the numbers, testimony showed that during the 46 days at issue he was paid on a weekly basis in exchange for performing the duties of his employment -- *which included the continued overbilling of* [*U. P.*]....
>
> More broadly, defendant's assertion that the account was used only for legitimate business purposes rings hollow in a case in which the evidence showed that his business was routinely committing theft and thereby operating as a criminal enterprise. It appears plain that when an enterprise engages in crime, its operating expenses may ... reasonably be characterized as illegitimate, *i.e.,* for the known purpose of furthering the criminal activity.
>
> ... Robillard ... testified that she deposited checks from [U.P.] into defendant's checking account at Guaranty Bank, generated invoices based on the sales numbers Averill logged, and that money in the account was used to pay the bills and expenses of running the business. She also testified that she shared invoicing duties with Averill. Averill testified that he worked as a truck dispatcher for Morel from 1995 until he was terminated in 2002. He explained that his duties included a variety of tasks, ranging from managerial to janitorial, and that he did "all the things that [defendant] didn't wanna do," to keep operations going. Averill facilitated the scheme by including "phantom gallons" on invoices prepared for [U.P.] and Averill's testimony verified that defendant knew as much. As part of his work duties, Averill also kept an overage report-*for defendant and with defendant's knowledge*-tracking the number of phantom gallons for which [U.P.] was being fraudulently billed. Defendant came to Averill routinely to see "where [they stood] on the overage report," that is, to gauge how many gallons they had overbilled. Averill confirmed that the scheme was ongoing during the charged period, at defendant's direction, and that Averill personally generated and sent inflated invoices during that time, and further, that checks from [U.P.] paying inflated invoices were received during that time. Averill's description of the scheme was corroborated by [U.P.] Special Agent Stephen Paddy, who presented examples of inflated invoices received and paid by [U.P.].
>
> Jurors were entitled to credit this testimony, and to conclude based thereon that defendant was guilty of laundering money during the charged period. Jurors were similarly justified in finding, based

> on the bookkeeper's testimony, that the account into which the [U.P.] checks were deposited was the same account that defendant used to pay Averill's wages (and other business operating expenses, including defendant's own salary), knowing that the business operations would include continued overbilling of [U.P.] during the charged period. [See ***State v. Mussall***, 523 So.2d at 1310] (fact-finder makes credibility determinations and may, within the bounds of rationality, accept or reject the testimony of any witness; thus, a reviewing court may impinge on the "fact finder's discretion only to the extent necessary to guarantee the fundamental due process of law."). Based on the evidence presented, jurors rationally found that defendant knowingly gave, transferred, maintained an interest in, and/or otherwise made available the value of the checks from [U.P.] with a known purpose of committing or furthering the commission of the overbilling scheme. The crime of money laundering is, for all practical purposes, a process by which ill-gotten gains are commingled with clean funds and used to perpetuate criminal activity. The notion that the circumstances in this case constitute anything other than money laundering is plainly belied by the record. (Footnote omitted.)

Lemoine, --- So.3d at ----, 2017 WL 1787745 at *9-11.

Finally, regarding the "check" issue -- that checks received by Morel outside of the charged time period rendered Peters' calculations meaningless -- we suggest that La. R.S. 14:230(B)(2) is much broader than the narrow interpretation given to it at trial.

At the trial of this matter, the parties and the trial court focused only on "maintain an interest in." What Morel did in this case was to sell or transfer or make available the *fuel* it owned to U.P. And at the defendant's direction, Morel sold, transferred, or made available inflated amounts of fuel, unbeknownst to U.P., resulting in U.P., on the whole, paying for more fuel than the amount it actually received. That is, this thing of value -- the fuel -- was knowingly used -- through selling, transferring, or making available by the defendant -- to further the commission of criminal activity.

The Peters 5 exhibit, for example, indicates that Morel sold fuel to U.P. on January 22, 1998. Part of this in globo exhibit contains several manifests, which indicate Morel had purchased fuel from a refinery on January 22, 1998. Peters testified at trial that he could say with certainty that the manifest showing fuel

bought on a certain day was also sold on that day. Thus, regardless of what day the invoice for the sale of the fuel was generated, it reflects the day of the fuel purchase. As noted, Peters likened this to going to the doctor's office, then getting the bill a month later.

Thus, when we apply this actual occurrence to the language of Section (B)(2), it is clear that at the defendant's direction, Morel sold (or transferred, or made available a thing of value) fuel to the railroad on January 22, 1998 (a date in the window) and that, on this particular date, according to Peters, Morel overbilled $2,400.00. The defendant, therefore, sold a fictitious amount of fuel to surreptitiously appropriate $2,400.00 in cash from U.P. Further, the invoices in the Peters 5 exhibit are dated January 22, 1998. Thus, as Peters noted with his doctor example, regardless of when U.P. was sent these invoices and physically possessed them, the date on each invoice indicated when the fuel -- i.e., something of value -- was sold (or transferred) to the railroad.

The final contention that we address as part of the defendant's first argument is that the State failed to prove Peters included all of Morel's purchases from the two refineries, as well as from the Exxon refinery, in his daily purchase figures, which rendered his calculations baseless. According to the defendant, the State introduced only some records of fuel purchases by Morel from two refineries, but it never established that the records introduced represented all of the purchases of railroad fuel from these refineries during the charged time period.

U.P. Special Agent Paddy testified at trial that he obtained a search warrant for the defendant's warehouse in New Roads, and that they seized "[a]nything and everything that was related to fueling activities between [U.P.] and [Morel]." On cross-examination, Paddy reiterated that they seized from the defendant's warehouse all fuel purchase manifests that were related to the sale of fuel to the railroad. Paddy further testified that all of the documents were seized in August

2003, and that while all the documents were under his custody and supervision, he allowed the defendant, under the direction of the court, to have full access to them.

There is nothing in the record to indicate any records were left out, purposefully or accidentally, from Peters' calculations. All relevant records were seized from the defendant's warehouse about a decade before the start of trial, and for that decade, the defendant had unfettered access to those records. With the defendant insisting that he is not required to prove anything at trial and, at the same time, insisting that the State did not produce all of the evidence, the State is placed in the untenable position of having to prove a negative, that is, that it did *not* withhold evidence, specifically refinery manifests, invoices, and canceled checks, all related to the charged time period. The State presented its case with the evidence that it had and proved the defendant committed the crime of money laundering. Nothing more is required by the State.

Regarding the Exxon refinery, we find it interesting that the defendant, on the one hand, insists Averill's testimony proved nothing at trial and that there were "significant credibility issues" regarding this witness, i.e., that he was "an angry, fired ex-employee" who took company documents as an "insurance policy," yet waited over a year to divulge anything. But on the other hand, the defendant urges that Averill's testimony supports his assertion that the State failed to include any of Morel's purchases from the Exxon refinery in Peters' calculations. Specifically, the defendant asserts, "Averill testified on direct examination that in addition to Valero and Placid refineries, [Morel] obtained fuel from 'Exxon on Scenic Highway.' ... This makes sense, since [Morel] is an Exxon fuel distributor."

Peters did not include in his calculations for the charged time period any manifests indicating fuel Morel bought from Exxon refinery because apparently there were none. As established continually throughout the trial, Morel's drivers would travel *most often* to Valero Refining Company and *occasionally* to Placid

Refining Company to fill up their trucks with high-sulfur diesel fuel. Even if there had been invoices from Morel sent to U.P. for fuel it had purchased from Exxon, we fail to see how this would in any way change, account for, or somehow explain, *those* inflated invoices sent during the charged time period to U.P. for fuel Morel had purchased from Valero and, to a much lesser extent, from Placid. The defendant presented his case-in-chief, with his expert CPA and never addressed any issues regarding ostensible fuel purchases from the Exxon refinery. The only mention of "Exxon" during defense counsel's examination of defense expert CPA Potter was in the following exchange on redirect examination:

> Q. I'll show you the document and represent to you that [testimony established that] there is absolutely no information on there about what [the defendant] purchased either from Valero, from Placid, from himself or Exxon, and do you see anything on there that indicates what he bought?
>
> A. No .... I think the invoice amounts could include directly -- deal directly from the refinery to U.P. or could include inventory, but you can't tell.

The jury heard all of the testimony and viewed all of the documentary evidence and chose to believe there was an ongoing scheme of money laundering by the defendant as set out by the State. 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 State presented its expert witness, who testified that the evidence established that the defendant committed the crime of money laundering; the defendant presented its own expert, who testified that the same evidence did not establish the defendant committed the crime of money laundering. The issue of which expert to believe was a matter of credibility, and the jury clearly decided that the State's expert CPA Peters was more credible.

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 fact finder'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 that 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).

With a review of fuel purchases during each of the forty-six days of the charged time period, Peters established that, cumulatively, Morel, at the defendant's direction, overcharged U.P. the amount of $55,000.00. Of the about two million gallons of fuel at issue, according to Peters, U.P. was overcharged for 111,000 of those gallons; that is, 111,000 is the amount of gallons of fuel that never existed for which U.P. paid. This was 5.3% of the total amount of fuel which, according to Peters, is consistent with the 5% fraud that occurs nationally. To this point, the supreme court opined:

> in a money laundering case, the law only requires the [S]tate to prove that dirty money constituted a portion of the commingled funds that were maintained or deployed for a criminal purpose. Accordingly, even accepting that the evidence in this case showed the dirty money made up less than six percent of the balance of defendant's business account, the [S]tate carried its burden of proof in this regard. (Footnote omitted.)

Lemoine, --- So.3d at ----, 2017 WL 1787745 at *8.

When a case involves circumstantial evidence and the trier of fact reasonably rejects the hypothesis of innocence presented by the defense, that hypothesis falls, and the defendant is guilty unless there is another hypothesis that raises a reasonable doubt. ***State v. Moten***, 510 So.2d 55, 61 (La. App. 1st Cir.), writ denied, 514 So.2d 126 (La. 1987). The jury's verdict reflected the reasonable conclusion that at the defendant's direction, Morel sold inflated amounts of fuel to U.P. and used various schemes to cover his fraudulent tracks. In finding the defendant guilty, the jury clearly rejected the defense's theory of innocence. See ***Moten***, 510 So.2d at 61.

After a thorough review of the record, we find the evidence supports the jury's guilty verdict. We are convinced that viewing the evidence in the light most favorable to the State, any 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 money laundering. See ***State v. Calloway***, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam).

In the third issue asserted by the defendant in his motion for postverdict judgment of acquittal isthat he is entitled to a postverdict judgment of acquittal as to any grade of the offense of money laundering beyond a misdemeanor. Because the value of the funds in this case was zero, the defendant suggests, his sentencing exposure is at most for the misdemeanor grade offense of money laundering.

Under La. R.S. 14:230(A)(2), "funds" is essentially defined as cash money. Under Section (B)(2), the "anything of value" in this case was checks. In each of the sentencing provisions of the money laundering statute, the words "value of the funds" are used. See La. R.S. 14:230(E)(1), (E)(2), (E)(3), & (E)(4). Section (E)(1) provides: "Whoever violates the provisions of this Section, if the value of the funds is less than three thousand dollars, may be imprisoned for not more than six months or fined not more than one thousand dollars, or both."

The defendant cites ***State v. Odom***, 2007-0516 (La. App. 1st Cir. 7/31/08), 993 So.2d 663 (per curiam) and states that this court held that the word "funds" in La. R.S. 14:230 means cash and does not include bank checks. Thus, according to the defendant, unless "funds" means two different things in different places in the money laundering statute, only the lowest penalty provision of Section (E)(1) applies to his case.

We first note that our treatment of the word "funds" in ***Odom*** did not culminate in the holding. It was dicta wherein we merely pointed out that since "proceeds" is a type of "funds," and "funds" is defined as cash, then so too does "proceeds" refer to cash. Specifically, we found the following in ***Odom***, 993 So.2d at 670:

> Subsection (A) of La. R.S. 14:230 defines the terms used in the statute, in pertinent part, as follows:
>
> > (2) "Funds" means any of the following:
> > (a) Coin or paper money of the United States or any other country that is designated as legal tender and that circulates and is customarily used and accepted as a medium of exchange in the country of issue.
> > (b) United States silver certificates, United States Treasury notes, and Federal Reserve System notes.
> > (c) Official foreign bank notes that are customarily used and accepted as a medium of exchange in a foreign country and foreign bank drafts.
> >
> > ***
> >
> > (4) "Proceeds" means funds acquired or derived directly or indirectly from or produced or realized through an act.
>
> It is clear from the wording of the statute that the word "proceeds" refers to the word "funds," which is defined under Subsection (A)(2)(a), (b), and (c). Checks are not included in the definition. It is obvious that the definition intended to include items which are accepted as legal tender, that circulate, and that are customarily used and accepted as a medium of exchange.

The State in ***Odom*** responded that "anything of value" as stated in La. R.S. 14:230(B)(2) included checks. We noted, however, that La. R.S. 14:230(B)(2) was not at issue in ***Odom***, since the defendant had been charged only under La. R.S. 14:230(B)(1), (3), (5), and (6). Accordingly, we concluded that "we need not

decide whether the term 'anything of value' includes checks." ***Odom***, 993 So.2d at 671-72.

Unlike ***Odom***, in the instant case, the defendant was charged under Subsection (B)(2) of La. R.S. 14:230. Since "anything of value" under La. Subsection (B)(2) clearly includes checks, the value of those checks can be used to determine which sentencing provision applies. Perhaps as an oversight or poor drafting, the money laundering statute uses only the word "funds" in its sentencing provisions. But because, as the case at hand readily shows, things "of value" can come in many forms other than cash, the meaning of "value of funds" in the sentencing provisions is necessarily broader than only cash. During the special jury charges hearing after the defendant rested, the trial court ruled that the "value of funds" includes the "value of checks." We find, moreover, that if "funds" (and by extension, "proceeds") meant cash or money other than checks for purposes of a sentencing scheme, then the sentencing provisions would be inapplicable to the paragraphs of Subsection (B) of La. R.S. 14:230 that define money laundering, an incongruity clearly not intended by the drafters of this statute.[2] As the State noted in its appellant brief, "it is absurd to find that the legislature would have intended to enact a provision of the Money Laundering statute ... and then not provide a sentence for violation thereof."

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[2] In 2010, the money laundering statute was amended and the definition of "funds" was expanded to include, among other things, checks, specifically: "Electronic or written checks, drafts, money orders, traveler's checks, or other electronic or written instruments or orders for the transmission or payment of money." La. R.S. 14:230(2)(d).

DECREE

The trial court erred in granting the postverdict judgment of acquittal. Accordingly, the trial court's ruling is reversed, the defendant's conviction is reinstated, and we remand to the trial court for sentencing.

TRIAL COURT'S RULING GRANTING DEFENDANT'S POSTVERDICT JUDGMENT OF ACQUITTAL REVERSED; DEFENDANT'S CONVICTION REINSTATED; REMANDED TO TRIAL COURT FOR SENTENCING.