STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2018 KA 0152

STATE OF LOUISIANA

VERSUS

TYRONE FOLSE

Judgment Rendered: SEP 2 1 2018

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Appealed from the
32nd Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
Case No. 689,846

The Honorable Randall L. Bethancourt, Judge Presiding

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Aaron P. Mollere Reserve, Louisiana	Counsel for Defendant/Appellant Tyrone Folse
Joseph L. Waitz, Jr. District Attorney Ellen Daigle Doskey Assistant District Attorney Houma, Louisiana	Counsel for Appellee State of Louisiana

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BEFORE: GUIDRY, THERIOT, AND PENZATO, JJ.

Penzato, J. concurs

THERIOT, J.

The defendant, Tyrone Folse, was charged by bill of information in district court docket number 689846 with home improvement fraud when paid an amount of one thousand five hundred dollars or more, a violation of La. R.S. 14:202.1(A) and (F)(1).[1] He pled not guilty and, after a trial by jury, was found guilty as charged. The trial court denied the defendant's motion for post-verdict judgment of acquittal and motion for new trial. The defendant was sentenced to five years imprisonment at hard labor and ordered to pay $2,700.00 of restitution within six months of his release, or in default thereof, to serve an additional two years imprisonment at hard labor. The trial court further ordered that the sentence be served consecutive to any other sentence. The defendant now appeals, assigning error to the trial court's denial of a challenge for cause to strike a juror, the admission of his pretrial statement, statements by the prosecution at trial, the constitutionality and legality of the sentence, and the sufficiency of the evidence. For the following reasons, we affirm the conviction and sentence.

STATEMENT OF FACTS

Don Peter Hebert, the victim herein, entered into two separate contractual agreements with the defendant and his fencing company, TNT Fencing. As to the initial contract, dated January 18, 2014, the defendant agreed to build a wooden fence around Hebert's residence, located at 3189 Mathilde Marie Drive in Gray, Louisiana. Hebert indicated that the work for the initial contract was completed. On May 30, 2014, Hebert and the

[1] The instant case is denoted home improvement fraud, consistent with the version of the statute in effect at the time of the offense (prior to amendment by 2014 La. Acts, No. 62 § 1). The defendant has two additional pending appeals for cases that were combined with the instant case for trial, also involving violations of La. R.S. 14:202.1. Specifically, in 2018-KA-0153 (district court docket number 711282) and 2018-KA-0154 (district court docket number 712011), the defendant appeals convictions for two additional violations of La. R.S. 14:202.1, denoted residential contractor fraud in accordance with the version of La. R.S. 14:202.1 in effect at the time of those offenses.

defendant entered into the second contract, in which the defendant agreed to install ornamental fencing and gates. In regard to that agreement, the total contract price was $3,000.00, and Hebert made an up-front payment to the defendant of $2,700.00. In accordance with testimony by Hebert and photographic evidence, no work was performed in regard to the May 30, 2014 contract.

ASSIGNMENTS OF ERROR

The defendant cites seven assignments of error:

1. The trial court erred in failing to strike Juror Shanida Kanach for cause since Ms. Kanach admitted to being unable to fully read and understand the English language.

2. The trial court erred in allowing the defendant's statement to be introduced over the objection of defense counsel since the state failed to read the defendant his **Miranda**[2] rights prior to taking his statement.

3. The trial court erred in failing to strike prejudicial statements made by the prosecution and failed to give an order for the jury to disregard the same.

4. The trial court's sentence of five (5) years on each count to be served consecutively is grossly disproportionate, excessive, cruel, and unusual.

5. The trial court erred in failing to grant the defendant's motion for a new trial since the evidence was not sufficient to uphold a conviction. The state failed to prove each and every element of the offense charged.

6. The trial court erred in denying the defendant's motion for reconsideration of sentence to cure an excessive and illegal sentence.

7. The trial court erred in denying the defendant's motion for reconsideration of sentence to cure an excessive and illegal sentence.

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[2] **Miranda v. Arizona**, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966).

SUFFICIENCY OF THE EVIDENCE

In assignment of error number five, the defendant argues that evidence was not sufficient to uphold the conviction. Thus, he asserts in assignment of error number five that the trial court should have granted his motion for new trial. As to each of the three cases, the defendant argues that the State failed to prove the statutory element of "greater than $1,500.00" as well as whether no work was done after receiving payment. He argues that the State's assertion at trial that any forty-five day period of no work was sufficient to constitute a violation of La. R.S. 14:202.1 is a misreading of the statute. In that regard, he argues that the statute is clear and unambiguous in that the legislative intent is to charge a defendant if zero work is done on the contract. He claims that as to each contract, a lot of work was done on each parcel of property that he entered into a contract to make improvements thereto.

As to the instant offense involving the contract with Don Peter Hebert, the defendant claims that Hebert paid him $10,000.00 out of the $14,000.00 contract price as to the first contract with Hebert. He claims that there was no evidence to prove that the initial contract was amended or that there was any settlement. Thus, he contends that Hebert has a remaining balance owed on the initial contract and therefore was not defrauded of anything of value. He notes that the second contract was entered into for another job, for which Hebert provided the defendant with $2,700.00 out of the $3,000.00 contract price. In that regard, he argues that the State failed to show that forty-five days of no work lapsed due to the fault of the defendant. He contends that there was testimony that Hebert asked him to sell the fencing that he purchased, which he argues is an indication that Hebert did not wish to have any work done at all under the second contract.

When issues are raised on appeal contesting the sufficiency of the evidence and alleging one or more trial errors, the reviewing court should first determine the sufficiency of the evidence. The reason for reviewing sufficiency first is that the accused may be entitled to a retrial under **Hudson v. Louisiana**, 450 U.S. 40, 43, 101 S.Ct. 970, 972, 67 L.Ed.2d 30 (1981), if a rational trier of fact, viewing the evidence in accordance with **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), in the light most favorable to the prosecution, could not reasonably conclude that all of the essential elements of the offense have been proven beyond a reasonable doubt. When the entirety of the evidence is insufficient to support the conviction, the accused must be discharged as to that crime, and any discussion of trial error issues as to that crime would be pure dicta since those issues are moot. However, when the entirety of the evidence is sufficient to support the conviction, the accused is not entitled to a retrial, and the reviewing court must then consider the other assignments of error to determine whether the accused is entitled to a new trial. If the reviewing court determines that there has been trial error (which was not harmless) in cases in which the entirety of the evidence was sufficient to support the conviction, then the accused will be granted a new trial, but is not entitled to an acquittal. See **State v. Hearold**, 603 So.2d 731, 734 (La. 1992).

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 constitutional standard for testing the sufficiency of the evidence, as enunciated in **Jackson v. Virginia**, requires that a conviction be based on proof sufficient for any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, to find the essential elements of the crime beyond a reasonable doubt. See La. Code Crim. P. art. 821(B); **State**

v. Ordodi, 2006-0207 (La. 11/29/06), 946 So.2d 654, 660. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states in part, "assuming every fact to be proved that the evidence tends to prove," every reasonable hypothesis of innocence is excluded. La. R.S. 15:438; **State v. Wright**, 98-0601 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157 & 2000-0895 (La. 11/17/00), 773 So.2d 732.

Pursuant to La. R.S. 14:202.1(A)(1) (as in effect at the time of the offense), in pertinent part, home improvement fraud is committed when a person who has contracted to perform any home improvement knowingly fails "to perform any work during a forty-five-day period of time or longer after receiving payment." "Home improvement" means any alteration, repair, modification, or other improvement to any immovable or movable property primarily designed or used as a residence or to any structure within the residence or upon the land adjacent thereto. La. R.S. 14:202.1(B). In this case, the State was further required to prove that the defendant was paid an amount of one thousand five hundred dollars or more. La. R.S. 14:202.1(F)(1).

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). Further, the testimony of the victim alone is sufficient to prove the elements of the offense. **State v. Dickerson**, 2016-1336 (La. App. 1st Cir. 4/12/17), 218 So.3d 633, 640.

Pertinent to the instant case, the State introduced a compact disc including two photographs of an incomplete fence, a contract dated May 30,

2014, a voided check of $2,700.00, a copy of a check for $2,700.00 made payable to the defendant, and an endorsement of the same check made payable to the defendant. Hebert first entered into a contract with the defendant, dated January 18, 2014, to build a wooden fence for his residence. Hebert testified that the defendant completed the job under the January contract and that while issues arose as to that agreement, the issues were fully resolved.

As to the May 30, 2014 contractual agreement for the installation of aluminum/ornamental fencing and gates (the basis for the instant offense), Hebert initially wrote a check payable to TNT Fencing, but voided that check, as the defendant wanted it to be made payable to him personally. Hebert indicated that he was also contacted by the bank with the request, which he complied with, to make the payment payable to the defendant. The check payable to the defendant for $2,700.00 was cashed and endorsed by the defendant. Hebert identified a photograph depicting posts that designated the would-be location of the fencing and gates that were never constructed. Hebert further testified that more than forty-five days elapsed before the police became involved in the issue. Hebert indicated that the brick columns or posts depicted in the photographs were built by the defendant in conjunction with the January contract. Despite Hebert's making contact with the defendant from the date of the May contract to the date of his arrest on October 15, 2014 for the instant offense, the defendant never performed any work in regard to the May contract. According to Hebert, the defendant made "excuse after excuse" when contacted. Hebert denied that there were any problems or hindrances that would have prevented the defendant from performing the agreed upon work. Hebert was

never reimbursed for the payment of $2,700.00 and ultimately hired a different contractor to perform the work.

Detective Terry Daigre of the Terrebonne Parish Sheriff's Office testified that he initially met with Hebert on August 7, 2014. Detective Daigre noted that Hebert filed a complaint in reference to the May 30, 2014 contract at issue. Detective Daigre went to Hebert's place of business and obtained his version of the facts. He then went to Hebert's residence and took the photographs of the area wherein the defendant agreed to perform the work, as identified by Hebert. After contacting the defendant initially by phone, Detective Daigre met the defendant at his residence on or about August 26, 2014 to get his version of the events and in an attempt to resolve the matter. They spoke about both contracts and the defendant, consistent with Hebert, indicated that he and Hebert formed a mutual agreement as to the initial contract. As to the second contract at issue herein, the defendant admitted that he accepted $2,700.00 of the $3,000.00 contract total, in order to purchase materials. The defendant further stated that he purchased materials for near the price of the down payment and was in the process of obtaining reimbursement for the materials in order to repay Hebert, providing an estimated timeline. The defendant explained that Hebert had contacted him and stated that he no longer wanted him to perform the work.

Detective Daigre made subsequent attempts to contact the defendant, most of which were unsuccessful, in order to try to resolve the matter. At one point, the detective reached the defendant, and the defendant told the detective that he would contact him after he was reimbursed for the materials. On September 16, 2014, as Detective Daigre had not heard from the defendant, he and another investigator went back to the defendant's residence and made contact with him again. On that occasion, Detective

Daigre asked the defendant to come to the sheriff's office to discuss the matter, but the defendant advised the detective that he had to go to work but would contact him later that month. After not hearing from the defendant, Detective Daigre contacted the defendant again on September 23, 2014, at which point the defendant confirmed that he had been reimbursed for the materials, but had not yet reimbursed Hebert because his bank account had been frozen. The defendant further stated that the hold on his account would be lifted on October 1, 2014, at which point he would repay Hebert.

Detective Daigre waited until October 2, 2014 before attempting to make further contact with the defendant but was unable to do so. On October 10, 2014, the detective applied for a warrant for the defendant's arrest. On October 15, 2014, Detective Daigre was informed that the arrest warrant had been executed by another officer. Detective Daigre noted that the defendant never provided any documentation to show that he actually purchased materials. Detective Daigre confirmed that the photographs in evidence accurately reflected Hebert's residence and the area that he designated as the would-be location of the unperformed work.

The defendant testified that he was the only worker for his company TNT Fencing, and that he had been working in that capacity since "[a] little after [20]08." He stated that he had ongoing jobs when he met Hebert and contracted to perform fence work at his residence. As to the initial contract, the defendant indicated that Hebert wanted him to build a shadow box fence, which he defined as, "boards on opposite side of the runners with some brick columns which is with seven brick columns and some ornamental fencing between the columns." He noted that he and a helper began working under the initial contract after being paid $10,000.00 out of the total contract price of $14,000.00. The defendant further contended that the work was

completed in approximately two and one-half months. When asked if there were any complaints following the completion of the work, the defendant testified as follows:

> We came to an agreement due to our verbal agreement on the material that he was trying to get and the money that was required down, it wasn't enough. And that if we couldn't get the material he wanted, I would return the money back to him upon him giving me the repose of that and the remaining balance of my fee.

The defendant confirmed that the work was satisfactorily completed, but claimed that Hebert, without reason, never paid the remaining balance of $4,000.00. The defendant claimed that he made several attempts to collect the balance and that Hebert kept asking for more time to pay it. As to the second contract, from which the offense at issue arose, the defendant indicated that Hebert approached him while he was performing work for another client. According to the defendant, Hebert initially wanted the defendant to build a cyclone fence next to his place of business before deciding that he wanted ornamental fencing and gates at his residence. They entered into the contract for the ornamental aluminum fencing and gates at Hebert's residence wherein the defendant agreed to install the fence on the right side of Hebert's property, where he initially built the brick columns. The defendant confirmed that the contract price, including labor and materials, was $3,000.00, and that Hebert made a $2,700.00 down payment. The defendant denied wanting the check to be made payable to him personally, indicating that the bank would not accept the check payable to TNT Fencing. Nevertheless, the defendant confirmed that he cashed the subsequent check that was written payable to him personally. He stated that after he informed Hebert that he was busy with other jobs, Hebert told him

that he could start the job when he was ready, that there was "no rush," and that it was at the defendant's discretion.

The defendant claimed that although he purchased the metal for the second job from Baker Steel, everything was halted as Hebert repeatedly failed to pay the balance on the initial contract. The defendant confirmed that he did not return the $2,700.00 under the contract at issue. He stated that he spent the money on the materials but ultimately began to sell parts of the metal after his attempt to return the materials was unsuccessful due to the closure of Baker Steel. He further indicated that he and Hebert never came to a resolution.

When specifically asked if he did any work at Hebert's residence as agreed in the second contract, the defendant responded, "No." As to his failure to provide invoices for the supposed materials purchased after receiving the $2,700.00, as requested by Detective Daigre, the defendant testified that he was unable to locate the invoices, adding that when he did find the carbon copies they were damaged from getting wet. Regarding the funds that he collected in selling some of the materials, the defendant testified that he was "trying to give the money to him [Hebert]," confirming that it was still in his (the defendant's) possession. He stated, "And then I was told, Mr. Hebert came to my house personally. He came to my house personally and shook my hand. He said just sell the material. The following day, I got arrested." The defendant testified that he did not make any profit and that he instead lost money.

The trier of fact 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). Unless there is internal contradiction or irreconcilable conflict with the physical evidence, the testimony of a single witness, if

believed by the fact finder, is sufficient to support a factual conclusion. See **Higgins**, 898 So.2d at 1226. 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.

Herein, the defendant's hypothesis of innocence is that he did not perform work under the contract at issue because he was owed a balance under a separate contract. The verdict rendered in this case indicates that the jury rejected that hypothesis. We note that the claim that money was owed under the initial contract was in direct conflict with the testimony of Detective Daigre and Hebert. Moreover, the contract at issue does not make mention of a previous balance. A previous balance, if any, was not part of the contractual terms at issue in this case. The defendant agreed to perform home improvement work under the contract at issue, concedes that he received a payment of $2,700.00 under the contract, and further concedes that he never performed any of the work under the contract. None of the affirmative defenses listed in La. R.S. 14:202.1(C) are applicable or even asserted herein. In reviewing the evidence, we cannot say that the jury's determination was irrational under the facts and circumstances presented to them. See **Ordodi**, 946 So.2d at 662.

An appellate court errs by substituting its appreciation of the evidence and credibility of witnesses for that of the fact finder and thereby overturning a verdict on the basis of an exculpatory hypothesis of innocence presented to, and rationally rejected by, the jury. **State v. Calloway**, 2007-2306 (La. 1/21/09), 1 So.3d 417, 418 (per curiam). A court of appeal impinges on a fact finder's discretion beyond the extent necessary to

guarantee the fundamental protection of due process of law in accepting a hypothesis of innocence that was not unreasonably rejected by the fact finder. See **State v. Mire**, 2014-2295 (La. 1/27/16), ___ So.3d ___, ___, 2016 WL 314814 (per curiam); **State v. Mussall**, 523 So.2d 1305, 1310 (La. 1988). Based on our careful review of the record, we are convinced that any rational trier of fact, viewing the evidence presented at trial in the light most favorable to the State, could have found beyond a reasonable doubt, and to the exclusion of every reasonable hypothesis of innocence, that the defendant was guilty of the offense of home improvement fraud when paid an amount of one thousand five hundred dollars or more. Accordingly, assignment of error number five lacks merit.

CHALLENGE FOR CAUSE

In assignment of error number one, the defendant argues that the trial court erred in denying his challenge for cause to strike prospective juror Shanida Kanach. The defendant contends that Kanach stated on the record that she has a basic understanding of the English language. The defendant argues that her ability to understand the written English language is deficient, noting that the record indicates that she needed assistance with certain words while attempting to read the newspaper. Further noting that each case involves written contracts and/or text messages, and strict interpretation of jury instructions, the defendant argues that the ability to read is not equivalent to the ability to write or speak English in basic terms. He notes that he was required to use a peremptory challenge to strike Kanach.

An accused in a criminal case is constitutionally entitled to a full and complete voir dire examination and to the exercise of peremptory challenges. La. Const. art. I, § 17(A). The purpose of voir dire examination

is to determine prospective jurors' qualifications by testing their competency and impartiality and discovering bases for intelligent exercise of cause and peremptory challenges. **State v. Mills**, 2013-0573 (La. App. 1st Cir. 8/27/14), 153 So.3d 481, 486, writs denied, 2014-2027 (La. 5/22/15), 170 So.3d 982 & 2014-2269 (La. 9/18/15), 178 So.3d 139. An erroneous ruling depriving an accused of a peremptory challenge violates his substantial rights and constitutes reversible error; therefore, prejudice is presumed when a defendant's challenge for cause is erroneously denied and the defendant exhausts all of his peremptory challenges. **State v. Taylor**, 2003-1834 (La. 5/25/04), 875 So.2d 58, 62. In this case, the defendant exhausted all of his peremptory challenges.

Louisiana Code of Criminal Procedure article 401, in pertinent part, states that jurors must be able to read, write, and speak English. The question of a juror's qualifications is addressed to the sound discretion of the trial judge. **Mills**, 153 So.3d at 488; **State v. Lewis**, 2012-0803 (La. App. 4th Cir. 9/25/13), 125 So.3d 1252, 1263, writ denied, 2013-2537 (La. 6/20/14), 141 So.3d 279. A trial court is afforded broad discretion in determining whether to strike a juror for cause because of the trial court's ability to form a first-person impression of prospective jurors during voir dire. **State v. Brown**, 2005-1676 (La. App. 1st Cir. 5/5/06), 935 So.2d 211, 214, writ denied, 2006-1586 (La. 1/8/07), 948 So.2d 121. Therefore, the trial court's rulings will not be disturbed unless a review of the voir dire as a whole indicates an abuse of that discretion. **State v. Lee**, 637 So.2d 102, 108 (La. 1994).

When questioned regarding her ability to read, write, and speak English, Shanida Kanach stated, "I may not understand the word or the question, you know." When asked to identify her primary language, Kanach

stated, “Thailand,” noting that she had been living in the United States since 1979. She stated that she worked as a ceramics teacher and operated her own ceramic shop. When asked if she was able to read the local newspaper, she stated, “Somewhat. Not -- sometimes I have to ask somebody what does that mean, what does that mean.” She confirmed that she was able to write in the English language, though she noted that she had some difficulty with proper spelling. She confirmed that she was able to understand what the trial judge was saying to her.

In challenging Kanach for cause, the defense counsel claimed that due to her “language barrier” she would not be able to follow the intricacies of the trial. The State noted that Kanach had no difficulty participating in the back and forth colloquy with the trial judge. The trial court agreed, noting that it would provide a special instruction to her in particular and everyone, to raise their hand if questions or answers were stated too fast. The defense counsel responded, “That’s fine.” The defense counsel further thanked the court for the decision to provide the special instruction.

We note that a defendant may not assign as error on appeal a ruling refusing to sustain a challenge for cause made by him, unless an objection thereto is made at the time of the ruling. La. Code Crim. P. art. 800(A); **Mills**, 153 So.3d at 486. In this case, the defense counsel acquiesced and thanked the court as to its decision to give a special instruction as opposed to sustaining the challenge for cause. Moreover, the trial court conducted a colloquy with the prospective juror and was satisfied with her ability to understand the English language. Kanach lived in the United States since 1979, worked in the United States, and operated her own business. After a thorough review, we find no abuse of discretion in the trial court’s ruling

that denied the for-cause challenge of Kanach. Assignment of error number one lacks merit.

ADMISSION OF THE DEFENDANT'S PRETRIAL STATEMENT

In assignment of error number two, the defendant argues that the trial court erred in allowing his pretrial statements to be introduced even though he was not advised of his **Miranda** rights prior to the interview. The defendant claims that Detective Daigre met him at his residence and began questioning him as a suspect about the circumstances surrounding the events leading to a charged offense. The defendant further argues that Detective Daigre used an implicit strategy to create leverage by convincing the defendant that he had already sealed his fate. The defendant contends that custody should be implied since Detective Daigre showed up at his home to obtain information, knowing the defendant was a suspect. The defendant claims that Detective Daigre's methodology included an indication to the defendant that he was trying to see if he "could work things out." Thus, the defendant argues that Detective Daigre came to his home under the guise of attempting to work out the situation in order to obtain information relative to the charge. He concludes that the convictions in each case should be overturned due to the admission of his statements.

The Fourth Amendment of the United States Constitution and Article I, Section 5, of the Louisiana Constitution protect persons from unreasonable searches and seizures. However, not every encounter between a citizen and a policeman involves a "seizure." **Terry v. Ohio**, 392 U.S. 1, 19, n.16, 88 S.Ct. 1868, 1879, n.16, 20 L.Ed.2d 889 (1968). "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." **Id.** at 16, 88 S.Ct. at 1877. "As long as a reasonable person would feel free to disregard the encounter and walk away, there has

been no 'seizure.'" **State v. Ossey**, 446 So.2d 280, 285 (La. 1984), cert. denied, 469 U.S. 916, 105 S.Ct. 293, 83 L.Ed.2d 228 (1984) (citing **Florida v. Royer**, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); **State v. Belton**, 441 So.2d 1195, 1199 (La. 1983), cert. denied, 466 U.S. 953, 104 S.Ct. 2158, 80 L.Ed.2d 543 (1984)). Furthermore, if a citizen after being approached by law enforcement officers consents to stop and answer questions, there is no Fourth Amendment violation. "If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed." **Florida v. Royer**, 103 S.Ct. at 1324; **State v. Oliver**, 457 So.2d 1269, 1271 (La. App. 1st Cir. 1984).

The threshold issue is whether the initial encounter between the police and the defendant constituted a seizure within the meaning of the Fourth Amendment. If there was no seizure, the Fourth Amendment is not implicated. If there was a seizure, however, such an investigatory stop must be based on reasonable suspicion that a person is committing, has committed, or is about to commit an offense. See La. Code Crim. P. art. 215.1(A); **State v. Bozeman**, 2008-1077 (La. App. 1st Cir. 2/13/09), 6 So.3d 899, 901, writ denied, 2009-0629 (La. 11/25/09), 22 So.3d 170.

In the instant case, Detective Daigre was initially questioned outside of the presence of the jury in regard to the admissibility of the defendant's pretrial statements made at his residence. He testified that at the time of the initial meeting with the defendant at his residence on or about August 26, 2014, after Hebert's complaint, the defendant was not under arrest and was free to leave as he wished. During the questioning, the defendant was in his yard "walking around ... preparing to go to work for the day..." and was not physically restrained in any manner. The detective indicated that at that time, he was hoping that the matter between the defendant and Hebert could

be resolved in some manner, either by completion of the work or reimbursement. Detective Daigre testified that he did not feel that **Miranda** warnings were necessary due to the nature of the conversation with the defendant. Detective Daigre noted that Hebert had initially indicated that if he were to be reimbursed, he would not pursue the matter as a criminal issue. The defendant provided his version of the story regarding the contract at issue, including explanations as to why the work had not been completed. Detective Daigre further noted that the defendant also gave an indication as to when he would be able to repay Hebert. Detective Daigre recalled the defendant stating that he had already returned the materials and was waiting to be reimbursed for the materials in order to repay Hebert. After additional contact by phone, Detective Daigre applied for the arrest warrant on October 10, 2014, over one month after the encounter at the defendant's residence. Noting that **Miranda** requirements apply only to custodial interrogations, the trial court ruled the defendant's statements admissible.

During his trial testimony,[3] the defendant confirmed that when he initially talked to Detective Daigre at his home, the plan was to "work it out." Thus, consistent with Detective Daigre's testimony, the defendant's testimony indicated that when Detective Daigre initially came to his home and inquired about the circumstances, the goal was to come to a resolution. The detective was not accompanied by any other officers, and there was no testimony to show that he made any show of authority. There was never any conduct to suggest that the defendant was not free to leave or discontinue the questioning. We find that under these circumstances a reasonable person

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[3] In determining whether or not a ruling on a motion to suppress was correct, this court is not limited to the evidence adduced at the hearing on that motion. Instead, we will consider the record as a whole, including trial testimony. See **State v. Young**, 576 So.2d 1048, 1054 n.1 (La. App. 1st Cir.), writ denied, 584 So.2d 679 (La. 1991).

would have felt free to disregard the encounter. See **State v. Mareno**, 530 So.2d 593, 600 (La. App. 1st Cir.), writ denied, 533 So.2d 354 (1988), quoting **United States v. Mendenhall**, 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1980) (where this court stated that "[e]xamples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."). Viewing the totality of the circumstances presented herein, we conclude that a reasonable person would have believed he was free to leave. Accordingly, no seizure of the defendant occurred prior to the statements at issue or within close proximity thereof. Hence, the defendant's Fourth Amendment rights and rights pursuant to Art. I, § 5 of the Louisiana Constitution were not violated and the trial court properly admitted the testimony at issue. This assignment of error lacks merit.

STATEMENTS BY THE PROSECUTION AT TRIAL

In assignment of error number three, the defendant contends that the prosecutor used a text message that was admittedly taken out of context, in an attempt to convey the victims' feelings. Noting that the prosecutor specifically quoted a Bible verse,[4] the defendant argues that the comment was "out-of-place" and had nothing to do with the conclusions that could be drawn from the evidence. The defendant contends that the statement was outside of the scope of proper closing argument. The defendant argues that

[4] The defendant specifically references the following statement by the prosecutor during closing arguments at trial: "This, I think, is a good summary of the feelings of the victims in this case. It was on one of the text messages. A text message from one of the victims to the defendant, 'Ephesians 4:28, let the thief no longer steal, but yet let him labor, doing honest work with his own hands so that he may have something to share with everyone in need.'"

the statement could have influenced the jury in an inappropriate manner to make a decision based on the State's implication that the verse was a reflection of the victims' feelings and the use of the verse to refer to the defendant as a thief. The defendant further argues that the statement gave undue credibility to testimony elicited by the State from Detective Daigre to show that the defendant and Hebert reached a settlement in regard to Hebert's supposed unpaid balance on a separate contract. He concludes that the Biblical quote improperly influenced the jury, likely could have affected the verdict, and that he was denied his due process right to a fair and impartial trial due to the trial court's failure to provide a curative instruction.

Closing arguments in criminal cases should be restricted to the evidence admitted, to the lack of evidence, to conclusions of fact that may be drawn therefrom, and to the law applicable to the case. Further, the State's rebuttal shall be confined to answering the argument of the defendant. See La. Code Crim. P. art. 774. Prosecutors are allowed wide latitude in choosing closing argument tactics. **State v. Draughn**, 2005-1825 (La. 1/17/07), 950 So.2d 583, 614, cert. denied, 552 U.S. 1012, 128 S.Ct. 537, 169 L.Ed.2d 377 (2007). However, even if the prosecutor exceeds these bounds, the court will not reverse a conviction if not "thoroughly convinced" that the argument influenced the jury and contributed to the verdict. See **State v. Martin**, 93-0285 (La. 10/17/94), 645 So.2d 190, 200, cert. denied, 515 U.S. 1105, 115 S.Ct. 2252, 132 L.Ed.2d 260 (1995); **State v. Vansant**, 2014-1705 (La. App. 1st Cir. 4/24/15), 170 So.3d 1059, 1063; **State v. Prestridge**, 399 So.2d 564, 580 (La. 1981); **Mills**, 153 So.3d at 496. The trial judge has broad discretion in controlling the scope of closing arguments.

We note that the defendant did not object to the closing arguments. "A defendant's failure to object contemporaneously to improper argument by the prosecutor waives any claim on appeal based on the argument." **State v. Johnson**, 2000-0680 (La. App. 1st Cir. 12/22/00), 775 So.2d 670, 680, writ denied, 2002-1368 (La. 5/30/03), 845 So.2d 1066; See also La. Code Crim. P. art. 841. Irregularities or errors cannot be availed of on appeal if no objection is made at the time of the occurrence. **State v. Walker**, 94-0587 (La. App. 1st Cir. 4/7/95), 654 So.2d 451, 453, writs denied, 95-1124 & 95-1125 (La. 9/22/95), 660 So.2d 470. "The grounds for objection must be sufficiently brought to the court's attention to allow it the opportunity to make the proper ruling and prevent or cure any error." **State v. Trahan**, 93-1116 (La. App. 1st Cir. 5/20/94), 637 So.2d 694, 704. Thus, we find no merit in this assignment of error.

THE CONSTITUTIONALITY AND LEGALITY OF THE SENTENCING

In assignments of error numbers four, six, and seven, the defendant argues that the trial court's imposition of five years imprisonment at hard labor on each count to be served consecutively is grossly disproportionate, excessive, and cruel and unusual. He notes that he was ordered to pay restitution of $2,700.00 to Hebert, $4,000.00 to victim Billy Burrow, Jr., and $8,000.00 to victim Larry Wells, and to serve two years of imprisonment at hard labor in each case in default of paying restitution (totaling $14,700.00) within six months. The defendant argues that there were no aggravating factors and cites several other cases, contending that a review of other cases across the State shows that his sentences are excessive. In assignment of error number seven, the defendant argues that the trial court erred in denying his motion to reconsider sentence. He adds the argument that a sentence

should be considered excessive if it is in excess of the maximum sentence that could be imposed upon a defendant in a more egregious case. In support of this argument, he contends that the legislature intended to formulate the punishment for a violation of La. R.S. 14:202.1 by taking the amount of fraud into consideration.[5] Thus, he argues that the sentences imposed are in conflict with the legislative intent in formulating respective punishments for violations of the statute.[6]

Article I, Section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. A trial judge is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Hurst**, 99-2868 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962.

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[5] The defendant specifically states the following on page 33 of his brief in footnote 4:

> Hypothetically, a person could commit Residential Contractor Fraud in an amount clearly in excess of the amount in the instant case ($14,700.00) and receive a lesser sentence. Theoretically, if there is one victim who suffers from Residential Contractor Fraud greater than the total amount claimed by the State as defrauded here can only get a maximum sentence of ten (10) years, whereas your Appellant received a total of fifteen (15) years – five (5) years for each charge [to run] consecutively.

[6] The defendant is not challenging the legality or constitutionality of the statute and does not otherwise challenge the legality of his sentences.

The Louisiana Code of Criminal Procedure sets forth items which must be considered by the trial court before imposing sentence. La. Code Crim. P. art. 894.1. The trial court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the criteria. **State v. Herrin**, 562 So.2d 1, 11 (La. App. 1st Cir.), writ denied, 565 So.2d 942 (La. 1990). In light of the criteria expressed by Article 894.1, a review for individual excessiveness should consider the circumstances of the crime and the trial court's stated reasons and factual basis for its sentencing decision. **State v. Watkins**, 532 So.2d 1182, 1186 (La. App. 1st Cir. 1988).

When the person with whom the contract for the home improvement has been entered into has been paid an amount of one thousand five hundred dollars or more, whoever commits the crime of home improvement fraud shall be fined not more than twenty thousand dollars and shall be imprisoned, with or without hard labor, for not more than ten years. La. R.S. 14:202.1(F)(1). We note that the defendant was sentenced to mid-range sentences of five years imprisonment at hard labor in each case. The trial court considered the facts and circumstances of the cases and the victims' testimony prior to the imposition of the sentences. While the defendant challenges the trial court's order that the sentences in the cases be served consecutively, we note that the cases all involve different victims and different sets of circumstances and time periods. The offenses were not based on the same act or transaction and did not constitute parts of a common scheme or plan.[7] We also reject the defendant's argument that the

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[7] The law concerning consecutive sentences, La. Code Crim. P. art. 883, in pertinent part, provides:

> If the defendant is convicted of two or more offenses based on the same act or transaction, or constituting parts of a common scheme or plan, the

trial court erred in failing to consider sentences imposed in similar cases. There is little value in making sentencing comparisons. It is well settled that sentences must be individualized to the particular offender and to the particular offense committed. **State v. Batiste**, 594 So.2d 1, 3 (La. App. 1st Cir. 1991). Based on our thorough review of the record, we find that the sentence was not grossly disproportionate to the severity of the offense, and thus was not unconstitutionally excessive. Accordingly, these assignments of error are without merit.

CONVICTION AND SENTENCE AFFIRMED.

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terms of imprisonment shall be served concurrently unless the court expressly directs that some or all be served consecutively. Other sentences of imprisonment shall be served consecutively unless the court expressly directs that some or all of them be served concurrently....