NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2007 KA 1726

STATE OF LOUISIANA

VERSUS

ROBERT BOURGEOIS

DATE OF JUDGMENT: March 26, 2008

ON APPEAL FROM THE EIGHTEENTH JUDICIAL DISTRICT COURT
(NUMBER 71479-F, DIV. "C"), PARISH OF POINT COUPEE
STATE OF LOUISIANA

HONORABLE ALVIN BATISTE, JR., JUDGE

* * * * * *

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and
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State of Louisiana

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Robert Bourgeois

* * * * * *

BEFORE: PARRO, KUHN, AND DOWNING, JJ.

Disposition: CONVICTION AFFIRMED, SENTENCE CONDITIONALLY AFFIRMED, CONDITION OF PROBATION VACATED, AND CASE REMANDED WITH INSTRUCTIONS.

Kuhn, J.

Defendant, Robert Bourgeois, was charged by a grand jury indictment with one count of theft involving an amount over $500.00, a violation of La. R.S. 14:67(A) and (B)(1) (Count 1).[1] Defendant entered a plea of not guilty and was tried before a jury. The jury unanimously determined that defendant was guilty as charged.

The trial court sentenced defendant to serve five years at hard labor, suspended the sentence, and placed defendant on supervised probation for a period of five years. Additionally, the trial court assessed a fine of $2,500.00 to defendant and ordered defendant to pay restitution as provided in the pre-sentence investigation report (PSI).

Defendant appeals, urging the following assignments of error:

> 1. The trial court erred in denying defendant's post-verdict motion for judgment of acquittal, where as a matter of law the defendant had the authority over the corporation to make the challenged expenditures.
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> 2. The trial court erred in denying defendant's post-verdict motion for judgment of acquittal where, taken in the light most favorable to the State, no reasonable juror could have found from the evidence that the State proved beyond a reasonable doubt that the defendant did not have the actual authority to act on behalf of the corporation, or even if he lacked the actual authority, he reasonably believed that he had such authority, precluding the existence of the requisite criminal intent.
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> 3. The trial court erred in refusing to give the defendant's requested special jury instructions on corporate law and on reasonable mistake of fact, which refusal prejudiced the defendant.
>
> 4. The trial court erred in allowing the State to put on evidence showing that under defendant's management, the dealership was doing poorly

[1] The same bill of indictment also charged defendant with two counts of state income tax evasion, violations of La. R.S. 47:1642 (Counts 2 & 3). The record, however, indicates the State dismissed Count 2 prior to trial. At the beginning of the trial, when the indictment was read, the only count asserted by the State was Count 1, the theft count. Defendant was not tried on Count 3, and no issues have been raised in this appeal with regard to Count 3.

financially, which was irrelevant to the charge and prejudicial to the defendant.

5. The defendant was deprived of a fair trial by the prosecutor's statement in closing argument that an inference of guilt could be had from the fact of the indictment and his subsequent reinforcement of that statement by a characterization of defense counsel's objection.

We affirm defendant's conviction and conditionally affirm defendant's sentence. We also vacate a condition of his probation and remand the matter to the trial court for imposition of a specific amount to be paid in restitution.

FACTS

In 1988, James M. Bouanchaud, Sr., purchased the Chevrolet automobile franchise in New Roads, Louisiana.[2] This franchise was known as Quality Chevrolet Buick Pontiac, Inc. (hereinafter, "Quality"). Bouanchaud had been involved in the automobile business since 1955, and he owned several dealerships, including a Ford dealership in New Roads, i.e., New Roads Motor Company.

Bouanchaud approached defendant, who at that time was the general sales manager at Iberville Motors. As employment discussions between Bouanchaud and defendant were taking place, General Motors Corporation (GMC) raised questions regarding Bouanchaud's ability to be approved as a dealer for Quality. GMC was aware that Bouanchaud was also a dealer at a Ford dealership in the same area and was concerned about his ability to provide a competitive situation between the two franchises. In an effort to appease GMC, Bouanchaud designated defendant as the dealer on the franchise agreement between Quality and GMC. The franchise agreement provided defendant was to have full managerial authority

[2] We refer to James M. Bouanchaud, Sr., simply as Bouanchaud, and we refer to his son, James Madison Bouanchaud, Jr., by his full name.

over dealership operations, which included sales and service of new and used GMC products and parts.

In late 1988, defendant became the dealer at Quality. On October 14, 1988, the board of directors of Quality held its first meeting. According to the minutes of this meeting, the officers of the corporation were chosen: Bouanchaud as president; defendant as vice-president; and James Madison Bouanchaud, Jr., as secretary. The board of directors also passed a resolution, which in pertinent part provided:

> I. BE IT RESOLVED, that any one officer of the corporation ... is hereby individually authorized and empowered, without the aid or authorization of any other officer of the corporation, for and on behalf of the corporation:
>
> (a) To do any and all things necessary in order to carry on the day to day business operations of the corporation occurring on a recurring and routine basis and considered to be in the normal course of business. This shall include the right to buy and sell the inventory and parts of the corporation which are purchased for the purpose of sale or resale.
>
> (b) All other transactions, including, but not limited to, the purchase and/or sale of corporate assets, the borrowing of funds and the mortgaging of property shall be as authorized by the Board of Directors of the corporation.

At the initial meeting of the board of directors, shares in the corporation were designated as 1,106 in Bouanchaud's name; 221 in defendant's name; and 148 in James Madison Bouanchaud, Jr.'s, name. Bouanchaud explained that he wanted defendant to have an ownership interest in Quality because it would serve as an incentive for defendant to put his best efforts into the operation of the business.

Defendant testified that he asked Bouanchaud how much money he should invest in Quality, and Bouanchaud told him he would have to put up 15%. To accomplish this, defendant executed a promissory note payable to Bouanchaud in the amount of $22,100.00, which would be payable at the end of the first year of operation. Defendant stated that Bouanchaud told him that "if things are good," the debt would be ignored. Bouanchaud testified that he always intended for defendant to pay for his shares, but Quality never performed well financially, so he never demanded payment.

According to both defendant and Bouanchaud, defendant had full managerial authority to conduct business on behalf of the corporation. Included in this authority was defendant's power to hire and fire employees and to set legitimate compensation for employees. Bouanchaud explained that he expected defendant to exercise these powers in the best interest of the corporation.

When defendant took over as dealer of Quality, there were five employees, including himself. Defendant met with advertising agencies and developed the "Quality Man" campaign wherein he would be the spokesman for the dealership. Defendant claimed that within the first six months, the company grew to fifteen employees, and the sales rose from five vehicles per month to approximately thirty vehicles per month.

According to Bouanchaud, defendant was compensated by a straight salary,[3] and he was given use of a demonstrator vehicle, gasoline for that vehicle, hospitalization insurance, and various perks that were "customary" in the business. Bouanchaud testified that he had infrequent conversations with defendant about

[3] Defendant's annual salary was $53,350.00.

his compensation because the company was not "making enough money to pay anybody."

On November 19, 2003, Bouanchaud approached defendant and explained that they needed to "part company." Bouanchaud allowed defendant to resign. The next day, defendant surrendered his shares of Quality stock to Bouanchaud. Following defendant's departure from Quality, Bouanchaud had Quality's financial documentation reviewed for the period of 2000-2003. Based on the findings of this review, Bouanchaud learned that defendant had incurred certain expenses that had been paid by Quality that he did not consider to be legitimate business expenses of Quality.[4] Defendant neither contests the fact he incurred these expenses nor the amounts. These expenses are summarized as follows:

1. $5,001.82 charged in 2002 on a gold card for small business issued by American Express in the name of Quality Chevrolet Buick Pontiac, Robert Bourgeois (defendant).

2. $2,021.41 charged in 2003 on the American Express credit card.

3. $3,713.74 charged in 2002 to a Capital One Visa credit card issued to Quality in defendant's name.

4. $1,457.87 charged from June 2001 to December 2001 to Exxon Mobil gasoline cards issued to Quality in defendant's name.

5. $3,103.21 charged in 2002 to Exxon Mobil gasoline cards issued to Quality in defendant's name.

6. $3,608.54 charged in 2003 to Exxon Mobil gasoline cards issued to Quality in defendant's name.

7. $1,206.70 charged from June 2001 to December 2001 to Shell Texaco gasoline cards issued to Quality in defendant's name.

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[4] Bouanchaud subsequently hired counsel to pursue a civil action against defendant and to take the necessary steps to make claims under two insurance policies that protected Quality against employee theft. It was revealed at trial that one of the insurance policies required an employee to be convicted of theft before a claim would be paid. Thus, Bouanchaud's counsel presented evidence, which supported his theft allegation, to the district attorney's office.

8. $2,033.37 charged in 2002 to Shell Texaco gasoline cards issued to Quality in defendant's name.

9. $2,557.58 charged in 2003 to Shell Texaco gasoline cards issued to Quality in defendant's name.

10. $5,320.00 in lawn care expenses between June 2001 and December 2003 for defendant's personal residence paid to McIntosh Ground Maintenance by Quality.

11. $1,602.36 paid to Cingular Wireless for the period of February 17, 2002, to September 17, 2003, for an account in defendant's name.

12. $767.22 paid to Cingular Wireless for the period of January 9, 2002, to September 17, 2003, for an account in defendant's name.

13. $525.55 paid to Cingular Wireless for the period of January 9, 2002, to September 17, 2003 for an account in defendant's name.

14. $2,000.00 loan to Quality employee, Michael Berthia, for Berthia's use as a down payment on a personal residence.

Darlene Allemond, who at the time of trial held the positions of office manager and comptroller of New Roads Motor Company and Quality, testified as the custodian of records for Quality. According to Allemond, during the time period of 2000-2003, Nancy Mayeaux was the bookkeeper at Quality. Allemond noted in her review of Mayeaux's work that Mayeaux was not accounting for certain activities or handling some of the accounting matters in the proper manner.

Using Allemond's testimony, the State was able to highlight the nature of many of the expenses charged to the American Express and Capital One Visa cards held by defendant. As an example, Allemond noted that the American Express bill dated April 17, 2002, totaled $923.84, and included charges incurred at Satterfield's Restaurant in New Roads, T.J. Ribs Restaurant in Baton Rouge, and Trail Boss Steakhouse in Natchitoches. According to Allemond, there was no way to determine whether any of the meals charged on either the American

Express or Capital One Visa cards had anything to do with Quality business. Allemond also noted that the Shell and Exxon gasoline credit card accounts reflected charges incurred in Natchitoches and areas between Natchitoches and New Roads during the period that defendant's daughter, Carrie, was attending college in Natchitoches.

Defendant testified that it was his understanding that he had full managerial authority to run Quality on a day-to-day basis without consulting any of the other members of the board of directors or officers. Defendant admitted he obtained the American Express and Capital One Visa cards while at Quality, along with the Shell and Exxon gasoline credit cards. Defendant explained he obtained these cards as a convenience to pay recurring bills associated with Quality.

Defendant also testified that he had the authority to set his own compensation. From 1998 to 2003, there was no change in defendant's annual salary, which was $53,350.00. In lieu of taking an increase in pay, defendant had Quality pay some of his expenses. Defendant contended that this arrangement would allow Quality to save money on taxes and allow defendant to have certain personal expenses paid by Quality as part of his compensation. Defendant testified that obtaining cellular telephones for him and his wife and two daughters was an example of this "perk."

Defendant admitted he once charged pool supplies for his personal residence on a Capital One Visa card. The only example of defendant actually reimbursing Quality for an acknowledged personal expense was a pair of checks he wrote to Quality to cover the cost of his pool supplies and some other miscellaneous items. Defendant also admitted he used the credit cards to purchase

two DVD players for his children, totaling $396.78, but he later admitted that he had no proof that he reimbursed Quality for these items.

Defendant also addressed the multitude of meal expenses incurred and charged to the American Express and Capital One Visa credit cards. Defendant explained that he oftentimes bought meals for people, including Quality employees, used car buyers, or customers who were dining while he was having a meal. Defendant explained that he used the credit cards in this manner as an advertising tool for his business and to build up goodwill in the community. According to defendant, he never noted anything on a receipt regarding the business nature of an expenditure incurred on these cards. However, defendant claimed when he used the credit cards for personal expenses, he would make a notation on the credit card bill by writing his name next to the charge, and he would reimburse Quality for the expenditure.

Defendant also acknowledged that his daughters, Carrie and Rebecca, worked at Quality but were not paid by checks for the work they performed. Defendant testified that he would buy them other things as repayment for working for him and that these purchases were business-related expenses. Defendant stated that it was his decision to determine the method of compensation for his daughters at the dealership.

Defendant's daughter, Carrie, testified that defendant had given her a Chevrolet Tahoe demonstrator vehicle to use while in college and a cellular telephone. Carrie testified that she and her sister frequently worked at Quality performing such tasks as filing and running errands to the Department of Motor Vehicles in Baton Rouge. Moreover, Carrie testified that even while she was

away at college in Natchitoches, she promoted the Quality dealership. When asked to explain how she did this, Carrie replied that she often spoke of the dealership and would show demonstrator vehicles to her friends. Carrie claimed that as a result of her efforts while in college, Quality had made at least one vehicle sale.

Defendant also testified as to another "perk" he granted himself as part of his compensation. Defendant explained that because he spent ten hours a day, six days a week at Quality, it was not worth it for him to care for his own lawn. He made a business decision for his personal lawn to be serviced as a business expense. In 2001, defendant approached Henry McIntosh, who owned McIntosh Ground Maintenance (this company was also known as Cut Above Lawn Maintenance), and asked for a price to cut his personal lawn at his residence as well as the Quality dealership. At that time, McIntosh Ground Maintenance performed work at the Quality dealership. According to McIntosh, he charged Quality $500.00 a month, $300.00 of which was for the work done on the dealership grounds. Defendant testified that this arrangement allowed him the freedom to be at Quality.

Defendant admitted he loaned $2,000.00 from Quality to Berthia, a Quality employee, so that Berthia could use that money as a down payment on his personal residence. Defendant testified that Berthia issued two checks, in amounts of $1,100.00 and $800.00 to defendant's wife as reimbursement for this loan. According to defendant, his wife later reimbursed this money to Quality. Defendant explained that he conducted this transaction in this manner so Berthia's mortgage company would not discover the loan.

Defendant denied he ever stole anything from Quality or engaged in anything that was against Quality's best interests. Defendant denied that he used an electronic fund transfer (EFT) payment for the American Express and Visa bills in an effort to hide these expenses from Bouanchaud. Defendant stated that when Bouanchaud signed the checks from Quality paying the expenses defendant had incurred, that Bouanchaud gave his tacit approval of these expenditures.

Bouanchaud testified that he never granted defendant permission to get an American Express card or a Capital One Visa card or to have Quality funds used to pay defendant's personal expenses by his use of those cards. Bouanchaud further denied that he gave defendant permission to use the Shell and Exxon gasoline cards for his personal use or for his family members to use. Bouanchaud testified that the board of directors never authorized defendant to obtain these credit cards or to use them in the manner they were used. Bouanchaud further testified that the money used to pay amounts owed on these cards came from Quality. Bouanchaud testified that he could understand defendant's need for a business-related cellular telephone but not cellular telephones for defendant's entire family. Bouanchaud testified that he never approved lawn service for defendant's personal residence, or any other personal purchases made with these credit cards.

DENIAL OF POST-VERDICT JUDGMENT OF ACQUITTAL

In his first two assignments of error, defendant argues the trial court erred in denying his motion for post-verdict judgment of acquittal. Initially, defendant contends that as a matter of law, he had the authority to make the challenged expenditures. Secondly, defendant maintains, even if he lacked this authority, the

evidence indicated that he reasonably believed he had such authority, precluding the existence of the requisite criminal intent.

The standard of review for 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 conclude the State proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. 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, in order to convict, every reasonable hypothesis of innocence must be excluded. ***State v. Wright***, 98-0601, pp. 2-3 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486-87, ***writs denied***, 99-0802 (La. 10/29/99), 748 So.2d 1157, and 2000-0895 (La. 11/17/00), 773 So.2d 732 (citing La. R.S. 15:438).

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. ***State v. Wright***, 98-0601 at p. 3, 730 So.2d at 487.

Regarding defendant's first assignment of error, he contends that he had the authority "as a matter of law" to incur these expenses that were paid by Quality.

Defendant maintains that Quality's corporate bylaws and the franchise agreement signed by defendant between Quality and GMC granted him full managerial authority over the dealership. Defendant further asserts that Bouanchaud acknowledged that he had full managerial authority at Quality, including the authority to set his own compensation.

Bouanchaud testified that there were no regular discussions involving compensation because the business was not performing well. Bouanchaud reiterated that he trusted defendant to be prudent and make decisions that were in the best interest of Quality when exercising that authority.

When determining whether defendant had the authority to incur these expenses as a matter of law, we must be mindful of the definition of theft:

> In Louisiana, the crime of theft is broadly defined in La. R.S. 14:67(A) as "the misappropriation or taking of anything of value, which [belongs] to another, either without the consent of the other to the misappropriation or taking, or by means of fraudulent conduct, practices, or representations." An intent to deprive the victim permanently of "whatever may be the subject of the misappropriation or taking is essential." The statute combines the common law crime of larceny with the offense of embezzlement. See La. R.S. 14:67 Rptr.'s Cmt. ("One of the most important single changes made by the 'theft' section is the combination of what was 'larceny' and what was 'embezzlement.' This was accomplished by the elimination of the element of common law larceny known as 'a trespass in the taking,' or 'taking out of the owner's possession.'"). The crime of embezzlement "is a fraudulent and felonious appropriation of another's property by the person to whom it has been entrusted or into whose hands it has lawfully come. The gist of the offense is a breach of trust. The essence of the offense is the conversion of the property." **State v. Smith**, 194 La. 1015, 195 So. 523, 525 (1940); see also Clark & Marshall, *A Treatise on the Law of Crimes*, § 12.19, p. 903 (7th ed. 1967) ("It is an essential element of embezzlement that the property charged to be embezzled was lawfully in the accused's possession by fiduciary relation with the owner. Embezzlement differs from larceny in that the original taking is lawful. The gravamen of the offense is the subsequent felonious conversion of the

property with the intent to convert it to the accused's own use." (Internal quotation marks and citation omitted)).

State v. Hayes, 01-3193, pp. 3-4 (La. 1/28/03), 837 So.2d 1195, 1197 (per curiam).

Defendant asserts that he had full managerial authority over Quality and this authority was memorialized in the minutes of the board of directors and the franchise agreement between Quality and GMC. Defendant also points to Bouanchaud's testimony, acknowledging that defendant was in control of the day-to-day operations at Quality and this control extended to matters involving compensation. Defendant maintains that each expenditure at issue was made within the exercise of his authority as manager of the dealership. Defendant also claimed that these expenditures were proper as within his authority to set his own compensation. Defendant explained he had the authority to set his own compensation, so he assigned himself various perks, specifically, the payment of certain personal expenses incurred on the credit cards, the gasoline cards, and cellular phones for him and his family.

Bouanchaud's testimony reiterated that defendant's authority was tempered by the duty to do what was "prudent and necessary" for the conduct of the business affairs of Quality.[5]

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[5] Furthermore, we note that defendant's authority is tempered by La. R.S. 12:91(A), which provides:

> Officers and directors shall be deemed to stand in a fiduciary relation to the corporation and its shareholders, and shall discharge the duties of their respective positions in good faith, and with that diligence, care, judgment, and skill which ordinary prudent men would exercise under similar circumstances in like positions; however, a director or officer shall not be held personally liable to the corporation or the shareholders thereof for monetary damages unless the director or officer acted in a grossly negligent manner as defined in Subsection B of this Section, or engaged in conduct which demonstrates a greater disregard of the duty of care than gross negligence, including but not limited to intentional

Viewing the evidence on this issue in the light most favorable to the State, we find that the evidence supports the jury's conclusion that the defendant did not have the authority "as a matter of law" to incur these expenses. Although defendant could control the day-to-day operations of Quality and set his own compensation, we do not find his authority extended to allowing him to convert Quality's funds for his own personal use, which is what, in essence, he admitted that he did.

Defendant further argues that even if this court does not find that defendant had the actual authority to incur these expenses, defendant had a reasonable belief that he had such authority, precluding the finding of the requisite element of intent. We disagree. The circumstantial evidence in this case leads to no other conclusion than that defendant was attempting to conceal how these expenses were incurred. First, we note that despite Bouanchaud's daily stops at Quality to discuss the business, defendant never revealed to Bouanchaud that he had obtained credit cards that he was using for personal expenditures, nor did he discuss that payment of these expenditures were being made by Quality in lieu of defendant taking a raise. Both Bouanchaud and defendant testified of their warm relationship during this time period, yet defendant never revealed to Bouanchaud that he was assigning himself perks in lieu of a pay increase. Second, defendant arranged to have the American Express and Capital One Visa bills paid by an EFT from Quality's account at the People's Bank of New Roads, thereby preventing their discovery by Bouanchaud, because payment of these bills would not be by a

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(Continued . . .)

tortious conduct or intentional breach of his duty of loyalty. Nothing herein contained shall derogate from any indemnification authorized by [La.] R.S. 12:83.

check requiring Bouanchaud's signature. Third, although Bouanchaud signed checks paying for expenditures of gasoline from both Shell and Exxon, and the cellular phone accounts, it is conceivable that an automobile dealership would have accounts with these companies to fuel its vehicles and that cellular phone use was a necessary business expense. At no time, however, did defendant inform Bouanchaud that these expenses were incurred by defendant's family as opposed to dealership business. Fourth, defendant facilitated a loan to Berthia, an employee of Quality, by using funds from Quality. Defendant admitted that he had Berthia repay the loan to defendant's spouse, who in turn, repaid Quality. According to defendant, he conducted this transaction in this manner in order to prevent Berthia's mortgage company from discovering he had received a loan from Quality. While those facts may be true, defendant's actions with regard to this loan also prevented Bouanchaud from discovering that such a transaction had occurred.

Finally, the guilty verdict in this case reflects that the jury rejected defendant's theories of defense, i.e., he either had the actual authority to incur these expenses or he reasonably believed he had the authority to incur these expenses. We note that defendant provided conflicting explanations. First, defendant explained that these expenditures were the result of his decision to assign himself and his family certain perks in lieu of taking an increase in compensation. Defendant also offered the explanation that he reimbursed Quality for every personal expenditure he incurred using the credit cards he obtained in Quality's name. However, defendant was only able to illustrate one instance (the pool supplies) wherein he actually reimbursed Quality for items bought with one

of the credit cards. Defendant also maintained that his use of the credit cards was for business purposes. As an example, defendant cited the multitude of meals purchased during this time frame and explained that he used these cards to buy business associates, employees, and general members of the community meals in an effort to market Quality.

The jury was faced with conflicting explanations that defendant had decided to assign certain personal expenses to be paid by Quality in lieu of a salary increase, yet defendant also maintained that these same expenses were business-related. Defendant also asserted that he reimbursed Quality for personal expenditures paid for by Quality's funds. Despite these contentions, defendant then maintained that he never made any type of notations on meal receipts to record the business nature of meal expenses.

We conclude the jury rejected the theory that every meal charged on the two credit cards at issue over a three-year period was related to defendant's position with Quality. Likewise, the jury also rejected defendant's contention that he was in good faith when he gave his daughters gasoline cards and cell phones to use while attending college in Natchitoches. Defendant's daughter, Carrie, testified that while attending college, she promoted the Quality dealership; however, Bouanchaud disputed the one sale Carrie claimed was made as a result of her efforts in college, because he had a lengthy relationship with the buyer of that vehicle.

This case turned on issues of credibility. Defendant claimed he reasonably believed he had the authority to incur these expenses in the manner in which he did. Bouanchaud testified that these expenses exceeded the scope of what was

reasonable and prudent. Defendant's actions, when viewed in the light most favorable to the prosecution, clearly indicate an intent to use Quality's funds for his own personal use without revealing his actions to Bouanchaud.

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. Williams***, 2001-0944, p. 6 (La. App. 1st Cir. 12/28/01), 804 So.2d 932, 939, ***writ denied***, 2002-0399 (La. 2/14/03), 836 So.2d 135.

In the present case, the jury was presented with evidence, both direct and circumstantial, of defendant making these expenditures without informing any of the other shareholders of Quality. The jury made a factual determination that these expenditures constituted theft. In reviewing the evidence of defendant's actions as previously outlined, we cannot say that the jury's determination is irrational under the facts and circumstances presented to them. See ***State v. Ordodi***, 2006-0207, p. 14 (La. 11/29/06), 946 So.2d 654, 662.

We also reject defendant's reliance on the cases of ***State v. Rabalais***, 99-623 (La. App. 3d Cir. 1/26/00), 759 So.2d 836, and ***State v. Thibodeaux***, 441 So.2d 821 (La. App. 3d Cir. 1983), to support his argument that he had a reasonable belief in his authority to incur these expenses. In both cases, the property at issue was the subject of a specific agreement between the parties regarding its

ownership. In this case, while defendant maintains that he was granted full managerial authority over the Quality dealership, defendant's authority was affected by his duty to be prudent. Moreover, apart from defendant's own testimony, there was no evidence that defendant's authority over Quality allowed him to use Quality's funds to pay for his own personal expenses.

Based on the foregoing, we find the trial court properly denied defendant's motion for a post-verdict judgment of acquittal. The evidence sufficiently supports defendant's conviction of theft of items valued at over $500.00. These assignments of error are without merit.

FAILURE TO GIVE REQUESTED JURY INSTRUCTIONS

In his third assignment of error, defendant argues the trial court erred in refusing to give defendant's requested special jury instructions, and this refusal was prejudicial to him.

Defendant filed D-30 as an exhibit, reflecting the five proposed special jury instructions that he requested the trial court to provide to the jury. These instructions are as follows:

DEFENDANT'S SPECIAL JURY INSTRUCTION NO. 1

> If a defendant holds an honest and reasonable belief that he owns an interest in an item of property, that belief precludes a finding that the defendant could intend to permanently deprive another of the property. Consequently, a defendant who honestly and reasonably believes that he is the owner of something cannot commit theft as to that thing.
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> State v. Rabalais, 759 So.2d 863, (La. App. 3 Cir. 2000) (Defendant's reasonable and honest belief that she owned interest in vehicle precluded finding that she intended to deprive purported vehicle owner of property, as required by theft statute. [La. R. S. 14:16, 14:67]

DEFENDANT'S SPECIAL JURY INSTRUCTION NO. 2

If a person takes property under a mistaken, but honest, belief that it is his property, he cannot be found guilty of theft.

State v. Rabalais [Cite omitted.] (The validity of the (transfer, sale) donation is not important, because, even if one takes property under a mistaken but honest belief that it is his property, he cannot be found guilty of theft. *State v. Miller*, 154 La. 138, 97 So. 342 (1923).)

DEFENDANT'S SPECIAL JURY INSTRUCTION NO. 3

[This instruction set forth the language of La. R.S. 12:91, which addresses the relation of directors and officers to corporation and shareholders.]

DEFENDANT'S SPECIAL JURY INSTRUCTION NO. 4

You are instructed that an owner of stock in a corporation does not, as the result of that ownership of stock alone, own the property which belongs to the corporation. A corporation acts only through its officers, elected by its board of directors. The powers and duties of the officers are established through the articles and bylaws of the corporation.

Theriot v. Bourg, 691 So.2d 213 (La. App. 1st Cir. 1997)

Theft is a crime which requires criminal intent. If you find that a corporate officer reasonably believed that he had the authority to act in the manner in which he did, that officer cannot be said to have formed criminal intent with regard to his actions.

During the course of this trial, evidence has been admitted regarding whether or not the business made a profit during various periods of time. You are instructed that the defendant is not charged with failing to make a profit, or with poorly managing the affairs of the business. The only charge against the defendant is theft, which you are to consider using the instructions I have given you.

DEFENDANT'S SPECIAL JURY INSTRUCTION NO. 5

Harvey v. Nolan, 1921 WL 1497 (La App Orleans, 1921)

The law in this state, and the world over, is thoroughly well settled, that one who voluntarily affixes his **signature** to a written instrument obligates himself according to the very tenor thereof; and he will not be permitted to say that he did not intend to obligate himself, but **meant** to **bind** himself only in some other way or even not at all.

> *DeSete Building Co v. Kohnstamm,* Our No. 7267, and authorities there cited; *Bagneris v. Odde*, Our No. 7471, and authorities there cited; also *Beagui v. Fouchy, 26 An* 594 and *Advance Thresher Co v.* Roger, 123 La 1067. For **signatures** to an obligation are not mere ornaments, and parties will not be relieved therefrom simply because they did not know or did not intend what they signed. *Boulet v. Sarpy,* 30 An 494.

Under Louisiana Code of Criminal Procedure article 807, a requested special jury charge shall be given by the court if it does not require qualification, limitation, or explanation, and if it is wholly correct and pertinent. The special charge need not be given if it is included in the general charge or in another special charge to be given. Failure to give a requested jury instruction constitutes reversible error only when there is a miscarriage of justice, prejudice to the substantial rights of the accused, or a substantial violation of a constitutional or statutory right. ***State v. Tate***, 2001-1658, pp. 20-21 (La. 5/20/03), 851 So.2d 921, 937, ***cert. denied***, 541 U.S. 905, 124 S.Ct. 1604, 158 L.Ed.2d 248 (2004).

In denying defendant's request to give these special jury instructions, the trial court ruled that Special Jury Instructions Numbers 1 and 2 were cited from a case involving facts dissimilar to the facts involved in this case. The trial court ruled that the next three instructions involved corporate law principles taken from civil cases. The trial court stated that giving these three instructions probably would have required some type of qualification or explanation not provided by the instructions themselves.

After reviewing the instructions given by the trial court, we do not find the trial court erred in refusing to provide the jury with defendant's requested special jury instructions. We agree with the trial court's finding that the first two requested special jury instructions, which were taken from ***State v. Rabalais***,

involved a different factual scenario than the present case. Moreover, we note that the general charge instructed the jury as to the requisite knowledge and intent needed for the crime and the additional charge would have been redundant. See ***State v. Holland***, 544 So.2d 461, 469 (La. App. 2d Cir. 1989), ***writ denied***, 567 So.2d 93 (La. 1990) (citing ***State v. Williams***, 471 So.2d 255 (La. App. 1st Cir.), ***writ denied***, 475 So.2d 1102 (La. 1985)).

Next, we agree that the remainder of defendant's requested special jury instructions would have required some further type of qualification and explanation because of the fact that the civil law principles these instructions contain cannot be used to absolve one of criminal wrongdoing.

This assignment of error is without merit.

EVIDENCE OF FINANCIAL PERFORMANCE OF QUALITY

In his fourth assignment of error, defendant argues that the trial court erred in allowing the State to present evidence showing that under defendant's management, the dealership was doing poorly financially, which was irrelevant to the theft charge and prejudicial to defendant. In brief, defendant specifically argues that this evidence was inadmissible under La. Code Evid. art. 404(B).

This issue first arose when the prosecutor was questioning Bouanchaud on why he never requested payment of the promissory note executed by defendant for the shares in Quality that defendant received. Bouanchaud explained that Quality never performed well financially so he never demanded payment from defendant. The prosecutor then commented to Bouanchaud, "But he made you $35 million over that time." Bouanchaud replied, "Well, I wish that were true." Defense

counsel then objected and asked to approach the bench. The trial court heard and ruled on defendant's objection at a sidebar conference that was not transcribed.

Later, during Bouanchaud's testimony when called as a witness by the defense, the prosecutor proceeded to use documents reflecting the profits and losses of Quality during a certain time period. Again defense counsel objected, with the grounds for objection appearing as "inaudible" in the transcript. The trial court overruled the objection.

To raise an objection, a party must make clear, at the time a ruling of the court is made or sought, the action he or she desires to be taken, together with the objection and grounds. ***State v. Trahan***, 93-1116, p. 15 (La. App. 1st Cir. 5/20/94), 637 So.2d 694, 703. An irregularity or error cannot be complained of after the verdict unless it was objected to at the time of the occurrence. La. Code Evid. art. 103(A)(1); La. Code Crim. P. art. 841(A); see ***State v. Young***, 99-1264, p. 9 (La. App. 1st Cir. 3/31/00), 764 So.2d 998, 1005.

Arguably, defendant's failure to state the grounds for his objection on the record to this line of testimony could be viewed as a failure to properly preserve this issue for appellate review. However, in an abundance of caution, we will address this issue.

Concerning other crimes, wrongs, or acts, La. Code Evid. Art. 404(B)(1) provides in pertinent part:

> Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to

> introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

Before evidence of other crimes is admitted as proof of intent, three prerequisites must be satisfied: (1) the prior acts must be similar, (2) there must be a real genuine contested issue of intent at trial, and (3) the probative value of the evidence must outweigh its prejudicial effect. ***State v. Romero***, 574 So.2d 330, 336 (La. 1990). Further, where the testimony shows that the factual circumstances of the prior acts and the crime charged are virtually identical, the evidence of the other crimes is corroborative of the victim's testimony and establishes a system or plan. ***State v. Johnson***, 96-0950, p. 16 (La. App. 4th Cir. 8/20/97), 706 So.2d 468, 477, ***writ denied***, 98-0617 (La. 7/2/98), 724 So.2d 203, ***cert. denied***, 525 U.S. 1152, 119 S.Ct. 1054, 143 L.Ed.2d 60 (1999).

Bouanchaud testified that the financial statements prepared under defendant's supervision showed Quality lost $3,595.00 in 2001, made a profit of $14,675.00 in 2002, and was making a profit of $9,926.00 by August 31, 2003. Following defendant's departure from Quality, a certified public accountant determined that Quality had a net loss in 2003 of $935,585.00.

Defendant argues any evidence of the poor financial condition of Quality was irrelevant to the charge of theft. We disagree. Defendant's defense was based on the theory that he either had the direct authority to incur these expenses on behalf of Quality or was mistaken as to his authority to incur these expenses on behalf of Quality. Such a defense clearly placed defendant's intent regarding the assets and financial condition of Quality at issue.

Moreover, the probative value of this evidence clearly outweighs any prejudicial effect on defendant. Defense counsel's reference to Quality's $35 million in gross sales under defendant's management did not place his business acumen at issue as much as defendant's intent to mislead Bouanchaud into an erroneous impression of the financial stability of Quality. Moreover, defendant was allowed to emphasize this $35 million figure was a gross amount. Defendant also presented evidence through his testimony indicating that Bouanchaud never sufficiently capitalized Quality as required by the franchise agreement with GMC, in an attempt to refute that Quality's poor financial standing was the sole result of defendant's management.

It has long been held that in prosecutions for larceny or embezzlement, where defendant offers as a defense that he took the property by mistake, accident, or by misadventure, or that he believed that he had a legal right to take and appropriate the property, the State may, to show guilty knowledge and intent, introduce evidence of prior similar transactions on the part of defendant and thereby show that the defense urged is a mere subterfuge. ***State v. Rives***, 193 La. 186, 190 So. 374, 377-78 (1939). Such is precisely what occurred in the present case. The factual circumstances surrounding the theft charge arose from a situation where defendant was not providing accurate financial information regarding Quality to Bouanchaud. In the same manner, defendant orchestrated the payment of his personal expenses by Quality's funds in a manner such that a reasonable juror could have concluded these expenses were not intended to be revealed to Bouanchaud.

Under these circumstances, we cannot say the trial court erred in admitting the evidence of Quality's poor financial performance. This assignment of error is without merit.

REMARKS BY PROSECUTOR

In defendant's final assignment of error, he argues he was deprived of a fair trial by the prosecutor's statement in closing argument that an inference of guilt could be had from the fact of the indictment and the prosecutor's subsequent reinforcement of that statement by a characterization of defense counsel's objection.

The following exchange that occurred during the prosecutor's closing argument forms the basis of this assignment of error:

> MR. CLAYTON [Prosecutor]:
>
> But more importantly, the Grand Jury in this Parish indicted him, a Grand Jury, 12 people. Ricky Ward didn't indict him. The Grand Jury indicted him. Did Mr. Bouanchaud go pay the Grand Jury? The Grand Jury or 12 people met and heard the case and issued the indictment.
>
> MR. KOCH [Defense counsel]:
>
> That's improper argument. That is not proper argument suggesting that there is some inference from the fact of the indictment.
>
> MR. CLAYTON:
>
> It's improper to object to the –

THE COURT:

I am going to overrule your objection. This is closing. Go ahead, Mr. Clayton.

Defense counsel also argues that the trial court seemingly made it clear he was applying a "no objection during closing" rule and any objection made during closing would be overruled. Defense counsel further complains that the prosecutor emphasized his improper point by stating:

MR. CLAYTON:

When you throw a rock – My grandpa used to always say, you throw a rock at a bunch of pigs, when they squeal, you know you hit them – you know you are hitting them. You know you are hitting them.

Ricky Ward didn't do it. You know, this case didn't come to Ricky Ward and say, hay, Ricky Ward presents it to a Grand Jury. They decided to indict him.

Defendant contends that these comments amounted to the prosecutor's suggestion that the jury should consider the grand jury's actions as evidence against defendant. We disagree.

During cross-examination of Bouanchaud, defense counsel pursued a line of questioning establishing that Bouanchaud, hired a private law firm to pursue the present charge against defendant in order to collect on an insurance policy covering Quality against employee theft. Bouanchaud's testimony established that of the two policies providing coverage for employee theft, one policy required a criminal conviction for the employee's actions. Defense counsel further presented evidence establishing a campaign contribution was made by Bouanchaud to the district attorney, two months after one of the insurers advised Bouanchaud of the need to obtain a criminal conviction. Bouanchaud denied that his contribution to District Attorney Richard J. Ward, Jr., was in any way related to his attempts to

collect on an insurance policy. However, this line of questioning clearly placed at issue Bouanchaud's motives in pursuing the present charge.

When considering the prosecutor's comments in this context, we do not find that they represent an improper suggestion to the jury that the Grand Jury's indictment of defendant should be considered as evidence of defendant's guilt. On the contrary, the prosecutor was merely arguing against the evidence presented by the defendant during Bouanchaud's cross-examination that indicated Bouanchaud had a financial interest in defendant being convicted of the present charge.

Accordingly, we do not find any error in the trial court's overruling of defendant's objection to the prosecutor's closing argument. This assignment of error is without merit.

REVIEW FOR ERROR

This court reviews the record for error under La. Code Crim. P. art. 920(2). Under Article 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. See ***State v. Price***, 2005-2514, pp. 18-22 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (en banc), ***writ denied***, 2007-0130 (La. 2/22/08), ___ So.2d ___.

Our review has revealed an error in the trial court's imposition of restitution. At sentencing the trial court stated:

> I am also going to order restitution in this matter. The amount of restitution was provided in the pre-sentence investigation. I think approximately $81,000. This amount is to be set off by any judgment in a civil action that Mr. Bouchaund [sic] or New Roads Motor Company should obtain against you. That amount – and if that amount is included, then that amount will be set off in terms of the amount of restitution that you have to pay.

However, the PSI states that the "amount of restitution needs to be determined by the District Attorney's Office."

Considering the foregoing, we find the trial court failed to set a specific amount of restitution to be paid as a condition of defendant's probation. When a trial court suspends the imposition or execution of sentence and places a defendant on probation, the court is required to set the amount of restitution. La. Code Crim. P. arts. 895(A)(7) and 895.1(A); see ***State v. Cortina,*** 632 So.2d 335, 338 (La. App. 1st Cir. 1993). In the present case, the condition of probation imposed is defective because of the trial court's failure to state a specific amount to be paid in restitution.

Because of this error, we vacate this particular condition of probation, and remand this matter to the trial court solely for the purpose of having the trial court impose a specific amount of restitution to be paid as a condition of defendant's probation.

CONCLUSION

For these reasons, the defendant's conviction of theft involving an amount over $500 is affirmed, and the defendant's sentence is conditionally affirmed. Because the trial court ordered restitution without specifying the amount, we vacate solely that portion of the sentence imposing that condition of probation, and we remand this matter to the trial court with instructions.

CONVICTION AFFIRMED, SENTENCE CONDITIONALLY AFFIRMED, CONDITION OF PROBATION VACATED, AND CASE REMANDED WITH INSTRUCTIONS.