Affirmed and Opinion filed November 15, 2001.

In The

Fourteenth Court of Appeals

NOS: 14-00-00853-CR,
14-00-00854-CR
14-00-00855-CR
14-00-00856-CR
14-00-00857-CR
14-00-00858-CR

CHARLIE CORTEZ, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 338th District Court
Harris County, Texas
Trial Court Cause Nos. 839,085; 839,084;839,083; 839,082;839,080;839,079

O P I N I O N

A grand jury returned six separate indictments for bribery against the appellant, Charlie Cortez. The six were consolidated for trial, and a jury found appellant guilty of all six charges and recommended ten years' confinement and a $10,000 fine. The trial court recommended restitution of $75,000 as a condition of parole. Appellant challenges the legal sufficiency of the evidence to support his conviction, the effectiveness of his counsel, and

the trial court's $75,000 restitution recommendation. We affirm.

Appellant was the Chief Information Officer of the Harris County Hospital District (Hospital District), a political subdivision of the state. He had personal authority to award contracts for computer services below $15,000 and made recommendations after bidding was conducted on larger contracts. As part of the Hospital District's conversion from DOS to Windows, appellant awarded five contracts under $15,000 to Jesse Rodriguez and recommended acceptance of Rodriguez's bid on a larger contract.[1]

According to Rodriguez's testimony, he went to appellant's office to discuss the first contract. When informed that it required documentation (so later programmers could understand what had been done), Rodriguez demurred because he disliked writing. Appellant suggested he hire someone to do the documentation and explained to Rodriguez how much he would charge for doing the work. Taking a hint, Rodriguez offered the documentation job to appellant, who accepted, even though the Hospital District's policies prohibited him from doing so.

Rodriguez testified that appellant did the documentation for the first contract and performed 85% to 90% of the work on the second. Rodriguez was paid $14,995 for the first contract and subsequently wrote a check to appellant for $4,995. Rodriguez was awarded $14,000 for the second, third, fourth, and sixth contracts and subsequently wrote four checks to appellant for $7,000 each. For the fifth contract, Rodriguez received $79,000 and wrote a check to appellant for $17,500. All told, of the $149,995 paid to Rodriguez, $50,495 ended up with the appellant.

According to the appellant's testimony, the checks from Rodriguez were for work he had done completing a project for the Mental Health Association that Rodriguez left unfinished, not for the Hospital District work.

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[1] The appellant and Rodriguez knew each other socially and had worked together converting the Mental Health Association's computer network from DOS to Windows.

Legal Sufficiency

Appellant asserts the evidence is legally insufficient to establish that he accepted the checks from Rodriguez as consideration for using his discretion to award Rodriguez the contracts. Evidence is legally insufficient if, when viewed in a light most favorable to the verdict, a rational jury could not have found each element of the offense beyond a reasonable doubt. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). The evidence includes the following testimony by Rodriguez:

- Rodriguez would not have paid anyone else (other than someone who was giving him the contract) $7,000 for the work appellant did because it was not worth $7,000, and he felt obligated to pay appellant more money because appellant had given him the contracts.
- Rodriguez paid appellant to help him do the work *and* because he knew he got the contracts because appellant directed them his way.
- Rodriguez believed he would not have been awarded any other contracts if he had hired someone other than appellant to do the documentation.
- Rodriguez believed appellant determined he should get half of the contract award because appellant did most of the work *and* because he awarded Rodriguez the contracts.
- Rodriguez knew he was going to be awarded the contracts as a result of appellant's recommendations and discretion.
- When Rodriguez's wife complained that he was paying appellant too much money, appellant communicated to Rodriguez that he might not be awarded future contracts if he did not keep his wife out of their business.

Appellant argues that the essence of Rodriguez's testimony was that he paid appellant for helping him do the work. But each time Rodriguez explained why he paid appellant the amount he did, he explained that his payment was for appellant's work *and* because appellant was giving him the contract. We find that this testimony is legally sufficient to uphold the jury's verdict that appellant accepted a benefit as consideration for his decision and recommendation to award Rodriguez the contracts.

Ineffective Assistance of Counsel

In order to show ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S.Ct. 2052, 2064-65, 2068 (1984); *Rodriguez v. State*, 899 S.W.2d 658, 664 (Tex. Crim. App. 1995). We must presume counsel made all significant decisions in the exercise of reasonable professional judgment. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994).

The Court of Criminal Appeals has repeatedly held that without record evidence, appellant has not carried his burden to overcome this presumption, and we cannot conclude his counsel was ineffective. *See Tong v. State,* 25 S.W.3d 707, 714 (Tex. Crim. App. 2000) (holding that "without some explanation as to why counsel acted as he did, we presume that his actions were the product of an overall strategic design"), *cert. denied*, 121 S. Ct. 2196 (2001); *Thompson v. State,* 9 S.W.3d 808, 814 (Tex. Crim. App. 1999); *Jackson*, 877 S.W.2d at 771. Thus, except in rare cases a claim of ineffective assistance must be brought by application for writ of habeas corpus rather than direct appeal, in order to develop the facts and allow trial counsel to explain.

In this case, appellant did not file a motion for new trial, and the record is silent as to the basis for trial counsel's actions. Were we to speculate, we might consider the following explanations:

- Testimony by Dan McAnulty (the State's investigator) that (1) he only pursues charges that have merit, (2) sometimes criminals are caught because they make mistakes, and (3) appellant's charges in excess of the value of work done constituted "kickbacks" were not objectionable. Counsel commits no error by failing to object when it would do no good. *McFarland v. State*, 845 S.W.2d 824, 846 (Tex. Crim. App. 1992). Further, trial counsel might want to bring out these opinions to argue that the State's expert was biased against his client.

- Testimony by Rodriguez's defense counsel that he would not have advised his client to plead guilty without proof was admissible to rebut any claim that Rodriguez was lying in order to get a lighter sentence in his own case.
- Asking "one question too many" of the purchasing employee so as to elicit negative personal opinion testimony was error only in hindsight.
- The complained of prosecutor's statement in closing argument that "I feel that as a prosecutor it is my duty to prosecute corruption in public servants when I see it" was accompanied by his statements: "I believe that you would want us to do that [prosecute corruption]. You need to tell us by your verdict whether you want us to or not." In this context, there is no implication that the prosecutor has special expertise or that the jury should rely on his expertise in making their decision. *McKay v. State*, 707 S.W.2d 23, 37 (Tex. Crim. App. 1986); *Cf. Johnson v. State*, 698 S.W.2d 154, 167 (Tex. Crim. App. 1985). Consequently, it is a proper plea for law enforcement. *Jackson v. State*, 17 S.W.3d 664, 675 (Tex. Crim. App. 2000).

Additionally, we note that trial counsel vigorously cross-examined the State's most important witness, Rodriguez.[2] However, without any development of the record, we need not speculate on the reasons for counsel's actions. "[O]nly in rare cases will the record on direct appeal be sufficient for an appellate court to fairly evaluate the claim." *Robinson v. State*, 16 S.W.3d 808, 813 n.7 (Tex. Crim. App. 2000). Because this is not one of those cases, we overrule appellant's second point of error.

Restitution

Appellant argues the trial court abused its discretion in recommending that appellant pay $75,000 in restitution as a condition of parole because (1) appellant received only $50,495 from Rodriguez, and (2) there was evidence that appellant earned a substantial amount of what he received. But restitution may be set according to the amount a victim lost, even if it is higher than the amount a defendant gained. *See* TEX. CODE CRIM. PROC. ANN. art. 42.037(c)(1) (Vernon Supp. 2001)*; see also, e.g., Campbell v. State*, 5 S.W.3d 693, 696-

[2] Trial counsel impeached Rodriguez with prior inconsistent statements, resulting in Rodriguez's repeated admissions to the jury that he lied to the police in an attempt to cover-up his involvement. By the end of one round of cross-examination, Rodriguez had effectively given up, saying "I can't answer that" in response to four of counsel's probative questions.

97 (Tex. Crim. App. 1999). In this case, Rodriguez testified that the $149,995 the Hospital District paid was not worth half that value. Consequently, the trial court did not abuse its discretion in recommending restitution in the amount of $75,000.

We overrule appellant's third point of error and affirm the trial court's judgment.

/s/ Scott Brister
Chief Justice

Judgment rendered and Opinion filed November 15, 2001.
Panel consists of Chief Justice Brister and Justices Fowler and Seymore.
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