Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-18-00345-CR

Comfort Delando **ROBERTS**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 186th Judicial District Court, Bexar County, Texas
Trial Court No. 2016CR11457
Honorable Jefferson Moore, Judge Presiding

Opinion by: Rebeca C. Martinez, Justice

Sitting: Rebeca C. Martinez, Justice
Beth Watkins, Justice
Liza A. Rodriguez, Justice

Delivered and Filed: June 26, 2019

AFFIRMED

Comfort Delando Roberts was convicted by a jury of theft by check. On appeal, Roberts contends his trial counsel rendered ineffective assistance of counsel and the evidence did not support the submission of a presumption in the jury charge. We affirm the trial court's judgment.

BACKGROUND

On June 9, 2015, Roberts issued check number 1577 in the amount of $6,000 to a car dealership. At trial, Roberts testified the check was given to an unidentified salesperson to provide an inducement for the car dealership to search for a car that was not in its inventory, and the

salesperson agreed the check would be negotiated only if the dealership ultimately located the car and Roberts purchased it. The car dealership's finance officer, however, testified the check was in partial payment of the down payment for a vehicle purchased by Roberts's life partner.

A videotape of the financing transaction for the purchase of the life partner's vehicle was introduced into evidence in which Roberts is shown writing a check and providing it to the finance officer. On the video, Roberts stated the check was to cover the balance of the down payment not covered by his life partner's credit card payments. At trial, the finance officer identified Roberts's check number 1577 as the check given to him during the financing transaction. Roberts, however, testified the check provided during the transaction was a check written on his life partner's account, not on Roberts's account.

Roberts's bank returned the check to the dealership's bank because Roberts did not have sufficient funds in his account to pay the check. The dealership turned the check over to the district attorney, and Roberts was charged with theft by check. A jury found Roberts guilty of the offense, and Roberts appeals.

INEFFECTIVE ASSISTANCE OF COUNSEL

In his first issue, Roberts contends his trial counsel rendered ineffective assistance of counsel because trial counsel failed to object to the video of the financing transaction being admitted into evidence on the basis that it was edited or incomplete. Roberts also contends trial counsel was ineffective in failing to object to: (1) a witness reading the contents of a letter sent to Roberts from the district attorney's office; (2) Roberts's bank records being admitted into evidence; and (3) Roberts's indictment being admitted into evidence.

A. Standard of Review

To prevail on a claim of ineffective assistance of counsel, appellant must establish by a preponderance of evidence that: (1) his attorney's performance was deficient; and (2) his attorney's

deficient performance deprived him of a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "Appellate review of defense counsel's representation is highly deferential and presumes that counsel's actions fell within the wide range of reasonable and professional assistance." *Scheanette v. State*, 144 S.W.3d 503, 509 (Tex. Crim. App. 2004). Ineffective assistance claims must be firmly founded in the record to overcome this presumption. *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999). "Under most circumstances, the record on direct appeal will not be sufficient to show that counsel's representation was so deficient and so lacking in tactical or strategic decision-making as to overcome the strong presumption that counsel's conduct was reasonable and professional." *Scheanette*, 144 S.W.3d at 510. "A reviewing court can frequently speculate on both sides of an issue, but ineffective assistance claims are not built on retrospective speculation." *Id*. Therefore, in the absence of a developed record, we will not speculate as to the reasons trial counsel acted as he did. *Rodriguez v. State*, 446 S.W.3d 520, 538 (Tex. App.—San Antonio 2014, no pet.). Rather, we "must presume that the actions were taken as part of a strategic plan for representing the client." *Id*. (internal quotation omitted).

B. Analysis

With regard to the videotape of the financing transaction, Roberts's assertion of ineffective assistance is not firmly founded in the record because the record does not establish the videotape was edited or incomplete. With regard to Roberts's assertions relating to trial counsel's failure to object to the admission of various other evidence, "[w]e note that although [Roberts] filed a motion for new trial, he did not allege ineffective assistance of counsel or request a hearing on the same." *Id*. "Thus, the record does not contain any evidence of defense counsel's reasoning or lack thereof." *Id*. Although the State's brief posits reasons trial counsel may have elected not to object, we are not permitted to engage in such retrospective speculation. *See Scheanette*, 144 S.W.3d at 510. Accordingly, given the absence of a developed record, we must presume trial counsel acted

pursuant to a reasonable trial strategy. *See Rodriguez*, 446 S.W.3d at 538. Roberts's first issue is overruled.

JURY CHARGE

Roberts's second issue states, "The record contains insufficient evidence to warrant an instruction allowing the jury to presume that appellant intended to deprive the complainant of property when he issued check no. 5177 on June 9, 2015." We construe Robert's second issue as a complaint that the trial court erred in including an instruction in the jury charge regarding the presumption under section 31.06 of the Texas Penal Code.

A. Standard of Review

"Our first duty in analyzing a jury-charge issue is to decide whether error exists." *Ngo v. State*, 175 S.W.3d 738, 743 (Tex. Crim. App. 2005). "Then, if we find error, we analyze that error for harm." *Id*. Because Roberts did not object to the charge in this case, the record would have to show egregious harm to establish reversible error. *Id*. at 743-44. "Errors that result in egregious harm are those that affect 'the very basis of the case,' 'deprive the defendant of a valuable right,' or 'vitally affect a defensive theory.'" *Id*. at 750.

B. Section 31.06

Section 31.06(a)(2) of the Texas Penal Code provides in pertinent part:

> (a) If the actor obtained property … by issuing or passing a check …, when the issuer did not have sufficient funds in or on deposit with the bank or other drawee for the payment in full of the check … as well as all other checks … then outstanding, it is prima facie evidence of the issuer's intent to deprive the owner of property under Section 31.03 (Theft) including a drawee or third-party holder in due course who negotiated the check … if:
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> …
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> (2) payment was refused by the bank or other drawee for lack of funds or insufficient funds, on presentation within 30 days after issue, and the issuer failed to pay the holder in full within 10 days after receiving notice of that refusal.

TEX. PENAL CODE ANN. § 31.06(a)(2). Section 31.06(b) provides that "notice" for purposes of section 31.06(a)(2) may be actual notice or notice in writing; however, if notice is in writing section 31.06(b) contains specific requirements the written notice must satisfy.[1] *Id*. § 31.06(b).

C. Jury Charge

The jury charge in the instant case instructed the jury as follows:

> You are instructed if the actor obtained property by issuing or passing a check or similar sight order for the payment of money, when the issuer did not have sufficient funds in or on deposit with the bank or other drawee for the payment in full of the check or order as well as all other checks or orders then outstanding, it is prima facie evidence of the issuer's intent to deprive the owner of property under Section 31.03 (Theft) if payment was refused by the bank or other drawee for lack of funds or insufficient funds, on presentation within 30 days after issue, and the issuer failed to pay the holder in full within 10 days after receiving notice of that refusal.
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> Notice may be actual notice and the requisite intent may be established by direct evidence.
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> The facts giving rise to the presumption must be proven beyond a reasonable doubt.
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> If proven beyond a reasonable doubt that the facts giving rise to the presumption exist, that is, the defendant did obtain property by issuing or passing a check for the payment of money, when the defendant did not have sufficient funds in or on deposit with the bank or other drawee for the payment in full of the check as well as all other checks or orders then outstanding and upon refusal by the bank or other drawee for lack of funds or insufficient funds, on presentation within 30 days after issue and the defendant failed to pay the bank or drawee in full within 10 days of the notice of refusal, the jury must find that the presumed fact exists, that the defendant intended to deprive the owner of property, but it is not so bound.
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> Even if the jury finds the facts giving rise to the presumption has been proven beyond a reasonable doubt, the State must prove beyond a reasonable doubt each of the elements of the offense charged in the indictment and if the jury has a reasonable doubt as to the existence of a fact or facts giving rise to the presumption,

[1] The requirements include the manner in which the notice is addressed and mailed and a statement the notice is required to include. TEX. PENAL CODE ANN. § 31.06(b). Roberts argues the requirements also apply to actual notice; however, this argument is a clear misreading of the statute because actual notice is not required to be addressed and mailed. *See id*.; *see also Leon v. State*, 102 S.W.3d 776, 783-84 (Tex. App.—Houston [14th Dist.] 2003, no pet.) (applying requirements to written notice but not to actual notice); *Warren v. State*, 91 S.W.3d 890, 897 (Tex. App.—Fort Worth 2002, no pet.) (noting "statute indicates that the certified mail notice is an alternative to actual notice in establishing prima facie evidence of intent to deprive the owner of property").

> the presumption fails and the jury shall not consider the presumption for any purpose.
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> Therefore, if you believe from the evidence beyond a reasonable doubt that the defendant, Comfort Roberts, did obtain property, to-wit: a motor vehicle, by issuing or passing a check for the payment of money, when Comfort Roberts did not have sufficient funds in or on deposit with Navy [F]ederal Credit Union for the payment in full of the check as well as all other checks or orders then outstanding; and payment was refused by Navy Federal Credit Union and upon presentation within 30 days after issue, Comfort Roberts failed to pay Ancira Motor Company in full within 10 days of the notice of the refusal, then it is presumed and you may find that the Comfort Roberts intended to deprive the owner of property.
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> However, you are not bound to so find and even if you do the State must still prove beyond a reasonable doubt each and all of this and the other elements of the offense charged.
>
> If you have a reasonable doubt that Comfort Roberts had actual notice of Navy Federal Credit Union's refusal for lack of funds or insufficient funds and failed to pay Ancira Motor Company in full within 10 days of the notice of the refusal, the presumption that the defendant intended to deprive the owner of property fails, and you are not to consider the presumption for any purpose.

D. Analysis

Having compared section 31.06(a)(2) and the jury charge, we hold the jury charge tracks the presumption in the statute.[2] Because section 31.06(a)(2) establishes a presumption with respect to Roberts's intent, the trial court was required to submit the issue of the existence of the presumed fact to the jury "if there [was] sufficient evidence of the facts" giving rise to the presumption "unless the court [was] satisfied that the evidence as a whole clearly preclude[d] a finding beyond a reasonable doubt of the presumed fact." *Id*. § 2.05(a)(1). In his brief, Roberts contends the trial

[2] We also note the charge complied with the requirements of section 2.05(a)(2) of the Texas Penal Code which states: "(2) if the existence of the presumed fact is submitted to the jury, the court shall charge the jury, in terms of the presumption and the specific element to which it applies, as follows: (A) that the facts giving rise to the presumption must be proven beyond a reasonable doubt; (B) that if such facts are proven beyond a reasonable doubt the jury may find that the element of the offense sought to be presumed exists, but it is not bound to so find; (C) that even though the jury may find the existence of such element, the state must prove beyond a reasonable doubt each of the other elements of the offense charged; and (D) if the jury has a reasonable doubt as to the existence of a fact or facts giving rise to the presumption, the presumption fails and the jury shall not consider the presumption for any purpose." TEX. PENAL CODE ANN. § 2.05(a)(2).

court erred in including the instruction because there was not sufficient evidence that: (1) Roberts's bank refused payment of his check based on insufficient funds within thirty days after the issuance of the check; or that (2) Roberts failed to pay the car dealership within ten days after receiving actual notice of that refusal. We disagree.

The evidence presented at trial included bank statements from Roberts's bank establishing he did not have sufficient funds in his account to cover the check he issued to the car dealership on June 9, 2015. In addition, the bank statements showed Roberts was charged returned item fees relating to check number 1577 on June 16, 2015, and June 23, 2015, which were within thirty days of the issuance of the check. The evidence also included a letter from the car dealership's bank dated June 24, 2018, stating the check had been returned from Roberts's bank due to insufficient funds. Furthermore, Sandra Nagore, a check section supervisor for the district attorney's office in 2015, testified she spoke with Roberts by telephone regarding the check, and he knew the check had been returned. This is evidence Roberts had actual notice the check was returned.[3] Finally, the car dealership's business manager and the check section supervisor for the district attorney's office at the time of trial both testified Roberts still had not paid the check. Therefore, the trial court did not err in including the presumption in the jury charge. Roberts's third issue is overruled.

[3] Although Roberts contends Nagore did not testify regarding the date she phoned Roberts, she testified the paperwork is not processed to move forward with prosecution until the check is not paid in response to their efforts to contact the check writer. Accordingly, the trial court and the jury could reasonably infer that Nagore spoke with Roberts at least ten days before trial commenced on March 26, 2018, at which time the check still had not been paid. *See Perez v. State*, No. 05-07-00970-CR, 2008 WL 3412204, at *3 (Tex. App.—Dallas Aug. 13, 2008, no pet.) (not designated for publication) (holding the evidence established the defendant had actual notice of the returned checks at least by December 13, 2006, the date he posted bond on the charge, and the evidence showed the checks had not been paid as of the May 11, 2007 trial date); *Warren*, 91 S.W.3d at 896-97 (noting actual notice established where record reflected defendant was arrested more than ten days before trial, arrest would have given defendant notice of dishonored checks, and checks had not been paid as of trial).

CONCLUSION

The trial court's judgment is affirmed.

Rebeca C. Martinez, Justice

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