In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00480-CR

JONATHAN MICHAEL BARNETT, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 252nd District Court
Jefferson County, Texas
Trial Cause No. 07-01602

MEMORANDUM OPINION

A jury convicted Jonathan Michael Barnett of engaging in organized criminal activity and assessed punishment at 180 days in a state jail facility and a fine of $10,000. The trial court sentenced appellant in accordance with the jury's verdict. Appellant filed a notice of appeal and a motion for new trial. The trial court, after an evidentiary hearing, denied appellant's motion for new trial.

Appellant advances two issues on appeal. In his first issue, appellant claims that the trial court erred in admitting hearsay over appellant's objections. In his second issue,

appellant claims that he was denied effective assistance of counsel due to an actual conflict of interest and because of counsel's otherwise deficient and prejudicial performance. We affirm the trial court's judgment.

BACKGROUND

Appellant testified that his grandfather started Big B Novelty (Big B) in the 1960's. Big B leased various coin-operated amusement devices including pinball machines, jukeboxes, and pool tables for a fee, usually a percentage of the profits obtained from those devices. Eventually, Big B added video games to its inventory, including eight-liners (computerized slot machines). Initially, Big B provided prizes valued at less than five dollars to its lessees for ticket redemption. At some point, appellant's grandfather decided he could no longer manage the demand for the prizes and agreed with his lessees that they would purchase and provide the prizes to their customers and that Big B would offset the cost of the prizes out of the profits received from the machines.

Big B employed Johnny Costanzo to regularly service and empty its machines. On Big B's behalf, Costanzo split the profits with the bar owners, and also retrieved and delivered the various machines and equipment from a warehouse to Big B's customers. According to appellant, Big B first employed Costanzo before appellant was born.

When appellant's grandfather died in 1998, appellant began to run Big B for his grandmother. Appellant counted and deposited the money Costanzo collected from the

various machines. He also paid Big B's expenses and kept the books. He visited all of Big B's clients and let them know that Costanzo would still be servicing the machines and that the business's operation would not change under the new leadership.

Appellant joined the Texas Department of Public Safety (DPS) in September 2001. Appellant testified that he notified Big B's customers that due to a "conflict of interest" he would no longer be running the business, but that his mother would be taking over. Appellant testified that thereafter Costanzo delivered the profits from the machines, including the eight-liners to appellant's mother. Appellant initially described his role in Big B after 2001 as "very, very limited."

In 2006, the DPS initiated an investigation of appellant for suspected promotion of illegal gambling. Through its investigation, the DPS discovered that Big B leased eight-liners to a number of places, including two bars in Jefferson County. Undercover officers entered these bars and witnessed bartenders illegally paying customers cash in exchange for redemption tickets from the eight-liners. Thereafter, on several occasions, employees of these two bars paid cash directly to the undercover officers for their winning tickets. At one bar, Costanzo paid an undercover officer cash for his redemption tickets.

EVIDENTIARY ISSUE

In his first issue, appellant contends the trial court erred in admitting State's exhibits 81 through 89 and exhibit 93 because these exhibits contain hearsay and the State failed to establish a hearsay exception to allow for their admission. Texas Ranger

Mark Leger testified that he retrieved the boxes labeled State's exhibits 81 through 89 and the contents in each from the home of appellant's parents on June 8, 2007, pursuant to a search warrant. The State offered *en masse* exhibits 81 through 89. Appellant alleges the exhibits totaled over 30,000 pages and the State does not contest this calculation. Appellant's trial counsel lodged a general objection that these exhibits contained hearsay. The trial court overruled this objection and admitted the exhibits into evidence.

The State sought and received permission to publish portions of State's exhibits 81 through 89 to the jury. The State relabeled for identification purposes only, the documents it published to the jury from exhibits 81 through 89 as State's exhibits 95 through 122 respectively. Appellant's counsel agreed to the State's relabeling of the exhibits.

Leger further identified the contents of State's exhibit 93 as Big B's cash log, which he testified he also retrieved from the home of appellant's parents. State's exhibit 93 is a notebook labeled, "Big B Novelty, Inc. Cash Log." The notebook was obtained from the home of appellant's parents. The notebook contains a number of handwritten entries with dates from April 2005 through June 2007. The credit entries are listed with the term "collection" or with the name of a liquor establishment. There are also various individual names listed with debit dollar amounts. Some of the individual names are accompanied with terms like "pay," "payment," "draw," and "reimburse." There are also entries of debits for what appears to be general business expenses. The State tendered

exhibit 93 for admission into evidence, and appellant's trial counsel objected to its admission as hearsay. The State responded that exhibit 93: "[P]roves up an actual crime that would initiate best interest. It is hearsay, but it's actually proof of them -- of her actually being involved in keeping records of the payouts. And, so, it's proof of the crime." The trial court overruled appellant's objection and admitted exhibit 93 into evidence.

Appellant complains on appeal that the trial court erred in overruling his hearsay objection and admitting State's exhibits 81 through 89 and 93. Assuming, without deciding, that the trial court erred in admitting these exhibits, we hold that appellant has failed to demonstrate that he was harmed by admission of the complained of exhibits. *See* Tex. R. App. P. 44.2. We analyze violations of evidentiary rules resulting from a trial court's erroneous admission of evidence as non-constitutional error. *See Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998); *see also Gregory v. State*, 159 S.W.3d 254, 262 (Tex. App.—Beaumont 2005, pet. ref'd). Under Rule 44.2(b), we disregard non-constitutional error unless it affected the defendant's substantial rights. Tex. R. App. P. 44.2(b). A defendant's substantial rights are affected by the erroneous admission of evidence if the error influenced the factfinder's decision, and the influence was more than "slight." *See Motilla v. State*, 78 S.W.3d 352, 355 (Tex. Crim. App. 2002).

Appellant emphasizes various documents that he alleges were inadmissible hearsay and that were harmful to him because they demonstrated his ties to Big B. Appellant argues:

> The records documented the cash flow of the business, including the collections of cash from the eight-liners (SX81-88); showed regular payments to Appellant in cash or by check (SX93; 103; 104; 119); showed Appellant to be in charge of warehouse construction projects (SX96; 99; 113); showed that Appellant was named as company representative on business correspondence and invoices (SX 95; 96; 98; 101; 108; 109; 110; 113; 116; 120; 121); and showed that Appellant signed legal and business documents (105; 106; 114; 118). State's Exhibit 115, notes apparently written by Monica Barnett, described Appellant's contribution to the company as a trusted advisor and the family's desire to disassociate itself from the leasing of eight-liners.

Appellant further argues that the State emphasized the records by publishing various records to the jury, cross-examining appellant concerning the records, and then by highlighting the contents of the records in its closing statement.

Aside from exhibits 81 through 89 and 93, the State also admitted into evidence other documents evidencing appellant's ties to the business obtained through means other than the initial search warrant. The State brought forth testimony that demonstrated appellant's ties to Big B. Appellant admits that he ran Big B from the time his grandfather died in 1998 until he joined the DPS in 2001. Appellant admits to keeping Big B's books during this time. He testified that he did not change the nature of how the business operated when he took it over. He testified that when his mother took over the business, Costanzo continued doing the same type of work he had been doing for his

grandfather. Initially, the only function appellant admitted to performing after 2001 was answering his mother's questions. While appellant claimed to no longer have an active role in the business after he became a state trooper, there was substantial evidence in the record, aside from the evidence appellant now complains of on appeal, to indicate otherwise.

In 2004, appellant became the registered agent for Big B, replacing his grandmother. The trial court admitted into evidence and the State published to the jury, a document from the Secretary of State indicating appellant's role as Big B's registered agent in 2004. A certified copy of the title ownership of the truck Costanzo drove to perform his duties for Big B indicates that appellant held the title to the truck in his name until he sought to have the title changed in November 2007. Appellant testified that he solely handled the purchase and building of a warehouse that Big B used post-2001. Moreover, appellant was the registered agent for a company that owned the warehouse that stored Big B's inventory, including its eight-liner machines. Appellant admitted that he continued to make purchases for Big B after he joined the DPS. Appellant also admitted to receiving payments from Big B after becoming a DPS officer, but he characterized these payments as either reimbursement for the warehouse building material expenses or loan repayments for his grandmother's home. However, appellant failed to produce documents supporting this explanation at trial.

The trial court admitted into evidence Big B's Articles of Incorporation, which indicate that appellant, his mother, and his grandmother were the directors of the corporation. The trial court also admitted into evidence Big B's Texas Franchise Tax Public Information Reports from May 2002, May 2003, May 2004, March 2005, and May 2006. All of these reports indicate that at the time Big B filed them with the State, appellant was the president of Big B. Moreover, appellant signed the reports dated March 2005 and May 2006. The State also introduced into evidence certified copies from the Texas Comptroller's office of Big B's renewal applications for its general business license and coin-operated machine inventory supplements for years 2006 and 2007, which were signed by appellant in December 2005 and December 2006 as a representative of Big B. The trial court admitted bank records from October 2004 indicating that appellant had applied for a personal loan. In the loan document, appellant listed $2,600 from Big B, as part of his monthly income in 2004. The document reflects his total monthly income was $18,949.66 from his income with the DPS, Big B, and from his rental properties. His annual income was $227,395.92. Appellant admitted that while he was working as a DPS officer, his net worth was over two million dollars. Finally, regarding his connections to Big B appellant testified as follows:

> [PROSECUTOR]: Well, did you work out contracts, buy/purchase equipment, … pay certain bills? Did you arrange for which machines to be purchased and where they go? Did you do any of that after 2001?
>
> [APPELLANT]: I would have probably done some of that, yes, sir.

Appellant testified that he did not deny involvement with Big B. Appellant further did not dispute that others were using Big B's machines illegally for gambling. Rather, appellant claimed he did not have any knowledge that Big B participated in using the eight-liners illegally.

Former DPS Trooper, Jason Demontmollin, testified that when he resigned from DPS in 2004, he had a conversation with appellant wherein appellant advised him that he should open a game room with eight-liners, that the laws prohibiting paying cash were not enforced, that displaying cheap prizes would give the appearance of legitimacy, and that he was making a lot of money from leasing eight-liners. Demontmollin testified that he acted on appellant's advice and in late 2004, he partnered with Jason Morgan to open a game room with eight-liners leased from appellant. Demontmollin and Morgan paid cash for winnings on the eight-liners. After they paid the winnings to their customers, they split the profits in half with Big B. Demontmollin testified that appellant directed them to contact Costanzo if they needed anything in relation to Big B. Demontmollin further testified that Costanzo was aware that they were paying cash on the eight-liners. Demontmollin testified that he had no doubt that appellant knew of the illegal payouts, and in fact appellant told him that he would have to pay cash out on the machines to maintain customers.

Finally, Charles Foster testified that while employed by the Food Basket No. 8 store around 2000-2001, appellant came in and talked to the storeowners about putting in

more eight-liners. Appellant arranged to receive sixty-percent of the profits from the machines, while the owners would receive forty-percent. Foster testified that during a certain time, appellant personally emptied the machines and met with the owners to apportion the profits. Foster testified that the owners of the store paid customers cash for their winnings from the eight-liners and that appellant knew of the illegal payouts.

Thus, the evidence appellant complains of on appeal is duplicative of other documentary and testimonial evidence admitted before the jury. After examining the record as a whole, we have more than a fair assurance that the error did not influence the jury, or had but a slight effect and any error regarding the admission of State's exhibits 81 through 89 and exhibit 93 was harmless. *See Motilla*, 78 S.W.3d at 355. We overrule this issue.

INEFFECTIVE ASSISTANCE OF COUNSEL

In appellant's second issue, he complains that he received ineffective assistance of counsel "both because [his] trial counsel had an actual conflict of interest and because [his] trial counsel's performance was otherwise deficient and prejudicial."

Waiver of Conflict of Interest

Appellant argues that his trial counsel's performance was ineffective, as an actual conflict of interest arose from his trial counsel's joint representation of appellant and appellant's parents. Appellant contends that the conflict of interest adversely affected his trial counsel's performance when he failed to call appellant's parents as witnesses and

actively avoided a trial strategy that involved casting blame on them as the true operators of Big B. Appellant further denies validly waiving his right to conflict free counsel.

While ineffective assistance of counsel claims are usually analyzed under the *Strickland* standards, when it is asserted that the ineffective assistance derived from a conflict of interest, the Supreme Court articulated a separate standard in *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); *see also Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In *Cuyler*, the Supreme Court held that for an appellant to prevail on an ineffective assistance claim, he need only show that his trial counsel "actively represented conflicting interests" and that counsel's performance at trial was "adversely affected" by the conflict of interest." *Cuyler*, 446 U.S. at 348-50. An actual conflict of interest exists if counsel is required to make a choice between advancing a client's interest in a fair trial or advancing other interests to the client's detriment. *Monreal v. State*, 947 S.W.2d 559, 564 (Tex. Crim. App. 1997). If an appellant can show that a conflict of interest actually adversely affected the adequacy of his counsel's representation, prejudice is presumed. *Cuyler*, 446 U.S. at 348-50. An actual conflict of interest that requires reversal exists when one defendant stands to gain significantly by counsel adducing probative evidence that is damaging to a co-defendant whom counsel also represents. *Foster v. State*, 693 S.W.2d 412, 413 (Tex. Crim. App. 1985).

Even if a conflict of interest exists, a defendant may waive his right to conflict-free counsel so long as the record demonstrates that the defendant knowingly and voluntarily waived his right to conflict-free counsel. *Ex parte Prejean*, 625 S.W.2d 731, 733 (Tex. Crim. App. 1981). The record should show that defendant was aware of the conflict of interest, realized the consequences of continuing with such counsel, and was aware of his right to obtain other counsel. *Id*.

Here, appellant argues that although he executed a waiver, the waiver was insufficient to constitute a waiver of the actual conflict of interests in his case. In support of his motion for new trial on this issue, appellant submitted his affidavit; the affidavit of his mother, Monica Barnett; and the affidavit of his father, James Michael Barnett. In appellant's affidavit, he states:

> At no point was there any discussion between [trial counsel] and me, or my parents in my presence, about conflict of interest. At no time were the possible adverse effects of an actual conflict explained to me. Though [trial counsel] asked me to sign some piece of paper so that he, in his words, "could represent me," at no point did I ever knowingly or intelligently waive the right to conflict free counsel. Based on the events at trial, it is my opinion that [trial counsel] actively represented conflicting interests and his performance at trial was adversely affected by the conflict of interest.

Appellant's trial counsel testified at the motion for new trial hearing. He testified that in every case where he represents more than one individual in the same criminal matter, he explains to his clients the concepts of conflict of interest. He testified that he explained to appellant and his parents "how [a conflict of interest] might arise." Appellant's trial counsel further explained, "Generally, you know, there's always an

occasion to where one defendant can lay blame on the other; and then the other defendant can lay blame, you know, on the other individual. If I represent both, then it's tough to advance both interests at the same time." He specifically recalled explaining these concepts to appellant and his parents in September 2007, after which they signed waivers. The trial court admitted into evidence the signed waivers. Appellant's waiver stated:

> I have been informed by my attorney [] about a possible conflict of interest when representing more than one individual in the same criminal matter. As of right now, I do not believe there to be a conflict in a joint representation myself, Mike Barnett and Monica Barnett by [my attorney]. If there is any conflict of interest, I hereby waive that conflict of interest and agree to be represented by [my attorney]. Should I revoke this waiver, I will inform [my attorney] and ask him to withdraw representation at the earliest practicable time.

Appellant's parents each signed a similar waiver. Appellant's trial counsel testified he had no reason to believe that appellant did not sign this waiver knowingly and intelligently. He specifically recalled explaining to appellant, "if the case results unfavorably to any one of you three, I don't want you coming back and pointing the finger at me and saying I didn't explain to you conflict of interest concepts, all that stuff." Appellant's trial counsel testified that no one approached him during his representation of appellant about a potential conflict of interest. Trial counsel testified that during the week of November 23, 2009, appellant's parents dropped into his office and asked for copies of the waivers. Trial counsel testified that at that time they did not discuss with him any conflicts or concerns about a potential conflict. Trial counsel denied the truth of

the statement's in appellant's affidavit, and testified that he discussed with appellant conflict of interests.

Although appellant alleges that his trial counsel failed to explain the conflict of interest and that as a result he did not knowingly waive conflict-free counsel, the record belies his contention. Appellant signed a written waiver indicating that he had been informed about a possible conflict of interest from his trial counsel's representation of appellant and his parents. It can be inferred in the last sentence of the written waiver that on his trial counsel's withdrawal, appellant could obtain another attorney. In addition to the written waiver shown above, the record reflects that Barnett's counsel orally advised him of the possible conflict resulting from his representation of more than one defendant. We hold that appellant's trial counsel met the requirements in *Prejean* when he obtained the signed waiver from appellant and thoroughly apprised appellant of his rights. *See Prejean*, 625 S.W.2d at 733. Since we have held that appellant waived his right to conflict-free counsel, we need not discuss the merits of whether there was an actual conflict of interest.

Other Claims of Ineffective Assistance of Counsel

To show ineffective assistance of counsel, appellant must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *Garza v. State*, 213 S.W.3d 338, 347 (Tex. Crim. App. 2007) (citing *Strickland*, 466 U.S. at 687). We look at the totality of counsel's representation and the particular circumstances of each

case and "avoid the deleterious effects of hindsight." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

> To show deficient performance, the defendant must prove by a preponderance of the evidence that his counsel's representation fell below the standard of professional norms. To demonstrate prejudice, the defendant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

Garza, 213 S.W.3d at 347-48 (footnotes omitted); *see also Strickland*, 466 U.S. at 688, 694. We "'indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance[.]'" *Williams v. State*, 301 S.W.3d 675, 687 (Tex. Crim. App. 2009) (quoting *Garcia v. State*, 57 S.W.3d 436, 440 (Tex. Crim. App. 2001)).

Appellant asserts that his trial counsel was ineffective for failing to conduct a sufficient legal and factual investigation regarding the contents and legal admissibility of State's exhibits 81 through 89 and for failing to make a legally sufficient hearsay objection to exhibits 81 through 89 and 93.

Trial counsel testified that he did not have a copy of State's exhibits 81 through 89 in his possession prior to trial; however, he was aware of what the documents were and had copies of some of the documents in his possession. Prior to trial, trial counsel discussed with appellant the contents of the records seized from the home of appellant's parents. Trial counsel had an inventory sheet listing the documents and testified he knew

the "sum and substance" of them. Trial counsel testified he believed the documents were all business records from Big B Novelty.

During the motion for new trial hearing, appellant's trial counsel responded to questions regarding the adequacy of his hearsay objections. He explained that he believed that all of the documents were inadmissible because the State had not, and without appellant's mother could not, establish the business records exception to hearsay. Trial counsel testified that he believed the State should have had a difficult time introducing exhibits at trial. Once the documents were admitted, trial counsel's strategy was to use the documents to appellant's advantage to show a lack of guilty knowledge that appellant was part of a racketeering enterprise since the exhibits evidence that appellant willingly signed his name to publicly filed documents that tied him to Big B. Contrary to the picture appellant attempts to paint of his trial counsel as one who made strategic decisions with little knowledge regarding the documents within State's exhibits 81 through 89, we hold that the knowledge trial counsel had of the evidence was sufficient to render a reasonable professional judgment regarding the contents of the exhibits and their admissibility. Further, in light of our holding in issue one, we hold that even if trial counsel failed to properly object to the admissibility of the exhibits, appellant has failed to show that there was any reasonable probability that the result of this trial would have been any different had the trial court excluded the exhibits.

Appellant also argues his counsel was ineffective for waiving error concerning the admissibility of a hearsay statement from Costanzo; for failing to make legally sufficient objections to State's exhibits 1 and 2; and for failing to make requisite offers of proof when the trial court sustained the State's objections to the admission of testimony. However, there is no direct evidence in the record as to why counsel took the actions or made the omissions upon which appellant relies to establish his claim of ineffective assistance. *See Thompson,* 9 S.W.3d at 813-14. We will not second-guess legitimate strategic or tactical decisions made by counsel in the midst of trial. *Strickland,* 466 U.S. at 689. Appellant has failed to overcome the presumption that counsel employed sound trial strategy. *See id*.

Having concluded that the admission of State's exhibits 81 through 89 and 93 was harmless error and having concluded that appellant failed to establish his trial counsel was ineffective, we overrule appellant's two issues and affirm the trial court's judgment.

AFFIRMED.

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CHARLES KREGER
Justice

Submitted on March 30, 2011
Opinion Delivered July 13, 2011
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Before McKeithen, C.J., Kreger and Horton, JJ.