98 N.Y.2d 105, 772 N.E.2d 1124, 745 N.Y.S.2d 766, 2002 N.Y. Slip Op. 03734

The People of the State of New York, Respondent,
v.
Cyrus Wolf, Appellant.
Court of Appeals of New York

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Argued February 5, 2002;
Decided May 7, 2002

CITE TITLE AS: People v Wolf

SUMMARY

Appeal, by permission of an Associate Judge of the Court of Appeals, from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered June 5, 2001, which affirmed a judgment of the Supreme Court (Bernard Fried, J.), rendered in New York County upon a verdict convicting defendant of commercial bribing in the first degree (two counts), scheme to defraud in the first degree, and commercial bribing in the second degree.

People v Wolf, 284 AD2d 102, modified.

HEADNOTES

Crimes

Commercial Bribing
Proof of Concrete Economic Harm to Employer

([1]) Felony commercial bribery legislation requires proof of concrete economic loss suffered by the bribe receiver's employer, which would not have been incurred in the absence of the corrupt arrangement. Proof that the employer of a bribe receiver paid an amount greater than it would have otherwise paid to consummate a transaction as a result of the bribe would establish the requisite economic harm. To hold that a kickback alone is equivalent to economic harm would effectively eliminate the economic harm element the Legislature explicitly added to the statute for first degree felony commercial bribing. The "economic harm to the employer or principal" (Penal Law § 180.03) required for first degree commercial bribing cannot be established by proof of solely intangible, esoteric, or theoretical harms that would not result in additional costs increasing the price of goods or services to consumers.

Crimes

Commercial Bribing
Proof of Concrete Economic Harm to Employer--Payoff to Insurance Adjuster

([2]) In a prosecution for felony commercial bribing arising out of defendant attorney's payment of kickbacks to an insurance adjuster for expediting the settlement of personal injury claims, the People failed to establish the necessary element of economic harm to the insurer where they did not show that an expedited settlement of defendant's claims would have occurred had there been no corrupt arrangement with the adjuster. While the payment of the kickback may have suggested defendant's willingness to settle the claims at that point in time for the amount of the settlement minus the amount of the bribe, the proof was that an honest adjuster would have rejected any such offer. The People conceded that proof of an inflated settlement was absent, and never asserted that defendant would have reduced his fee by an amount equivalent to the bribe if the claims had awaited their normal, protracted course for settlement purposes, without a corrupt arrangement.*106

Crimes

Commercial Bribing
Proof of Concrete Economic Harm to Employer--Payoff to Insurance Adjuster

([3]) In a prosecution for felony commercial bribing arising out of defendant attorney's payment of kickbacks to an insurance adjuster for expediting the settlement of personal injury claims, the People established the necessary element of economic harm to the insurer where there was proof that the bribed adjuster "pulled" the file from the adjuster to whom it was originally assigned, protracted settlement negotiations ensued, and honest adjusters eventually approved the settlement without knowledge of the kickback. Accordingly, a trier of fact could reasonably find that absent the corrupt arrangement, at the moment defendant's case with the insurer was actually resolved, a reduced fee arrangement, offered to effect a lesser settlement, would have been accepted by the honest adjusters. At the point in time when the settlement occurred, honest adjusters did not reject the inflated settlement offer as premature. Thus, it could have reasonably been inferred by a trier of fact that the kickback arrangement actually deprived the insurer of the opportunity to achieve a disposition of defendant's case in the amount of the actual settlement but reduced by a sum equivalent to the kickback.

Crimes

Scheme to Defraud
Bribing Insurance Adjusters

([4]) In a prosecution arising out of defendant's payment of kickbacks to insurance adjusters for expediting the settlement of personal injury claims, the evidence that an insurer incurred economic harm as a result of the kickback to its adjuster supports defendant's conviction for

first degree scheme to defraud pursuant to Penal Law § 190.65. The evidence established a conspiracy to defraud liability insurance companies. Further, the kickback of well over $1,000 to the corrupt adjuster demonstrates that the insurer was deprived of and defendant concomitantly obtained property in excess of the statutory minimum.

Crimes

Evidence
Hearsay--Coconspirator Exception

([5]) In a prosecution arising out of defendant's payment of kickbacks to insurance adjusters for expediting the settlement of personal injury claims, the trial court did not abuse its discretion by admitting various out-of-court statements made by an unavailable, fugitive codefendant under the coconspirator exception to the hearsay rule since the proof of conspiracy was overwhelming, thereby satisfying the prima facie requirement for the statements' admissibility. Three coconspirators admitted their involvement in the kickback scheme, and identified the fugitive and defendant as also participating. Moreover, ample evidence in the form of the other coconspirators' business records further supports the trial court's determination that the prima facie case of conspiracy had been established.

Crimes

Disclosure
Failure to Produce Rosario Material--Prejudice

([6]) Reversal of defendant's conviction for first degree felony commercial bribing and related crimes is not warranted on the theory that the People failed to disclose *Rosario* material. The *Rosario* objection was raised for the first time in a motion to set aside the verdict brought purportedly under CPL 330.30 (1); however, the factual assertions concerning this material were outside the record and therefore could not be considered on such a motion. Therefore, the application was at best a de facto CPL 440.10 motion. As such, defendant had the burden of demonstrating prejudice and failed to do so.*107

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Am Jur 2d, Bribery §§ 23, 30-32, 34; Depositions and Discovery §§ 426, 428, 443; Evidence §§ 831, 835, 846-850; Fraud and Deceit §§ 45, 51, 272, 469, 478.

Carmody-Wait 2d, Criminal Procedure §§ 172:1905, 172:1918, 172:1921, 172:2451, 172:2452, 172:2979-172:2982, 172:3162.

McKinney's, CPL 330.30 (1); 440.10; Penal Law §§ 180.03, 190.65.

NY Jur 2d, Criminal Law §§ 1589, 1592, 1927-1929, 2550, 3061, 3077, 4438, 4439, 4518-4525.

ANNOTATION REFERENCES

Validity and construction of statutes punishing commercial bribery. 1 ALR3d 1350.

Necessity and sufficiency of independent evidence of conspiracy to allow admission of extrajudicial statements of coconspirators. 46 ALR3d 1148.

POINTS OF COUNSEL

Brafman & Ross, P.C., New York City (*Mark M. Baker, Benjamin Brafman* and *Melinda Sarafa* of counsel), for appellant.

I. The mere payment of a kickback to an insurance company's adjuster, from an attorney's portion of the client's settlement of a wholly legitimate personal injury claim, in order to expedite, but not inflate, such settlement, is insufficient as a matter of law to establish "economic harm" in the absence of any proof that the settlement would have been less had no bribe been paid; accordingly, defendant's convictions must be reduced to misdemeanors. (*Jaggie v Northstar Tubular Corp.,* 195 AD2d 336; *Donemar, Inc. v Molloy,* 252 NY 360; *Moll v US Life Tit. Ins. Co. of N.Y.,* 710 F Supp 476; *McNally v United States,* 483 US 350; *United States v Runnels,* 833 F2d 1183, 877 F2d 481; *United States v Zauber,* 857 F2d 137, 489 US 1066; *United States v Shelton,* 848 F2d 1485; *United States v Ochs,* 842 F2d 515; *United States v Holzer,* 840 F2d 1343, 486 US 1035; *United States v Asher,* 854 F2d 1483, 488 US 1029.) II. The crime of scheme to defraud in the first degree requires proof of an intent, through fraudulent means, to deprive the victims of property, as well as the actual deprivation of property; accordingly, since guilt cannot be predicated upon the mere fact that bribes had been paid, the conviction on that *108 count should be reversed and the count dismissed. (*People v First Meridian Planning Corp.,* 86 NY2d 608; *People v Mikuszewski,* 73 NY2d 407; *People v Brigham,* 261 AD2d 43, 94 NY2d 900; *United States v Rossomando,* 144 F3d 197; *People v Ford,* 88 AD2d 859; *People v Norman,* 85 NY2d 609.) III. Where the admissibility of a coconspirator's statements is established through the use of a defendant's own conversations which, in turn, rely solely upon the testimony of an accomplice for their interpretation, the requisite prima facie test has not been satisfied; accordingly, the trial court's failure to strike all conversations involving Joel Cohen mandates a reversal of the judgment of conviction, as a matter of due process. (*People v Bac Tran,* 80 NY2d 170; *People v Cona,* 49 NY2d 26; *People v Velasquez,* 151 AD2d 159, 76 NY2d 905; *People v Breland,* 83 NY2d 286; *People v Hudson,* 51 NY2d 233; *People v Sabella,* 35 NY2d 158; *People v Brown,* 40 NY2d 381; *People v Murphy,* 198 AD2d 525; *O'Neal v McAninch,* 513 US 432; *Wray v Johnson,* 202 F3d 515.) IV. CPL 240.75, effective February 1, 2001, should not apply to initial appeals that had been perfected prior to that date; accordingly, because the later

disclosed grand jury testimony of Edward Quigley related to the subject matter of his direct examination at trial, it constituted *Rosario* material, and the District Attorney's purposeful failure to provide it to the defense until after the trial was completed mandated the per se setting aside of the verdict; in any event, there was a reasonable possibility that had it been disclosed the verdict would have been different. (*People v Harrell,* 251 AD2d 240, 92 NY2d 925; *Buran v Coupal,* 87 NY2d 173; *Hauck v New York Hilton,* 276 AD2d 378; *Johnson v Nyack Hosp.,* 86 F3d 8; *Valverde v Stinson,* 224 F3d 129; *O'Hara v Bayliner,* 89 NY2d 636; *People v Perez,* 65 NY2d 154; *People v Ranghelle,* 69 NY2d 56; *People v Jones,* 70 NY2d 547; *People v Young,* 79 NY2d 365.)

Robert M. Morgenthau, District Attorney, New York City (*Michael S. Morgan* and *Mark Dwyer* of counsel), for respondent.

I. Defendant's guilt was proven beyond a reasonable doubt. (*Jackson v Virginia,* 443 US 307; *People v Taylor,* 94 NY2d 910; *People v Cabey,* 85 NY2d 417; *People v Tejeda,* 73 NY2d 958; *People v Kennedy,* 47 NY2d 196; *People v Bleakley,* 69 NY2d 490; *People v Grassi,* 92 NY2d 695; *People v Steinberg,* 79 NY2d 673; *People v Tuttle,* 45 AD2d 750; *People v Jacobs,* 309 NY 315.) II. The trial court properly admitted various out-of-court statements made by Joel Cohen under the coconspirator exception to the hearsay rule. (*109 *People v Liccione,* 50 NY2d 850; *People v Castillo,* 223 AD2d 481; *People v Stewart,* 173 AD2d 877; *People v Ayala,* 75 NY2d 422; *People v Persico,* 157 AD2d 339; *People v Berkowitz,* 50 NY2d 333; *People v Salko,* 47 NY2d 230; *People v Luciano,* 277 NY 348; *People v Davis,* 56 NY 95; *People v Sanders,* 56 NY2d 51.) III. The People did not violate their *Rosario* obligations by not disclosing the minutes of the grand jury testimony offered by Edward Quigley in an unrelated case. (*People v Rosario,* 9 NY2d 286; *People v Harrell,* 251 AD2d 240; *People v Jones,* 70 NY2d 547; *Matter of Cheryl R.,* 235 AD2d 365; *People v Howard,* 127 AD2d 109; *People v Feerick,* 241 AD2d 126, 93 NY2d 433; *People v Barclift,* 228 AD2d 194; *People v Perez,* 65 NY2d 154; *People v Kronberg,* 243 AD2d 132; *People v Davis,* 160 AD2d 718.)

OPINION OF THE COURT

Levine, J.

In 1983 the Legislature created the felony crimes of first degree commercial bribing and commercial bribe receiving by adding an additional element to the definitions of the corresponding prior commercial bribery class A misdemeanors: that the bribe "causes economic harm to the employer or principal in an amount exceeding two hundred fifty dollars" (L 1983, ch 577, amending Penal Law §§ 180.03, 180.08). The primary issue on this appeal is the legal sufficiency of the evidence to establish that Aetna Life and Casualty Company, and Commercial Union Insurance Company, incurred the requisite economic harm as a result of defendant's bribery of their employees, as alleged in the two felony commercial bribing counts of the indictment. Resolving that issue requires us to determine the nature of the proof required to demonstrate economic harm under the circumstances of this case.

The underlying facts concerning defendant's conduct are not in dispute. Defendant, an attorney, paid kickbacks to insurance company adjusters through intermediaries out of his contingent fees, for expediting the settlement of his clients' personal injury claims. The courts below held that the payment of a kickback alone was sufficient to establish prima facie both the fact and the amount of the economic harm the insurance carrier/employer incurred in each of these cases. The Appellate Division based that conclusion on a simple syllogism and arithmetic calculation:

"[B]y accepting a specified settlement and then turning over a percentage of that settlement to the *110 adjuster, defendant clearly evinced a willingness to settle the claim, at that point in time, for the amount of the settlement minus the amount of the bribe paid to the adjuster.

"Thus, a jury could find that each settlement was necessarily inflated by the amount of the bribe." (284 AD2d 102, 102 [2001].)

([1]) As will be explained, however, the felony commercial bribery legislation requires proof of concrete economic loss suffered by the bribe receiver's employer, which would not have been incurred in the absence of the corrupt arrangement. Proof that the employer of a bribe receiver paid an amount greater than it would have otherwise paid to consummate a transaction as a result of the bribe would establish the requisite economic harm. But not every kickback, though indicating the payor's "willingness to settle" for a lower amount, will demonstrate that the settlement would have been less costly had there been no venal agreement. To hold otherwise (as did the lower courts in this case)--that the kickback alone is equivalent to economic harm--would in effect eliminate the economic harm element the Legislature explicitly added to the statute for first degree felony commercial bribing.

I

The legislative history of the 1983 felony commercial bribery statute shows a purpose to require proof of an actual economic injury exceeding $250, suffered by the employer, that would not have occurred absent the bribery of its employee, in order to establish the new economic harm element. The primary purpose of the legislation was to deter through enhanced punishment the kind of commercial bribery that results in monetary or property loss that would be passed on to consumers in the form of higher prices (*see* Letter from Senator James Lack, Senate Sponsor, to Governor's Counsel, Bill Jacket, L 1983, ch 577, at 21; Attorney General's Legislative Program, *id.* at 17).

Initially, the requirement of economic loss that would not have been incurred but for the bribery was introduced into the proposed statutory scheme as an affirmative defense (*see* Attorney General's Legislative Program, *id.* at 16). During the Senate debate on the 1983 amendment, Senator Emanuel Gold asked Senator Lack whether the affirmative defense would be made out by proof that the employer

would have paid the verysame*111 price in the transaction, irrespective of the bribing of its employee:

"Am I to understand that if there is a situation of commercial bribery, but it's a bribery between two competitive interests who may be at the same price and one interest decides that, in order to get the contract, [it] will make a commercial bribe, that *since the employer may not suffer economically since it's between competing interests at the same price,* that we are creating an affirmative defense?" (Senate debate transcript, at 9759-9760 [emphasis supplied].)

Senator Lack replied, "[i]f it did not cause economic harm, it is an affirmative defense in a commercial bribery situation" (*id.* at 9760). Ultimately, the affirmative defense was dropped in favor of making actual economic harm suffered as a result of the bribery an element of the offense to be established in the People's case.

It is thus quite clear that the "economic harm to the employer or principal" (Penal Law § 180.03) required for first degree commercial bribing cannot be established by proof of solely intangible, esoteric, or theoretical harms that would not result in additional costs increasing the price of goods or services to consumers. Therefore, the statute is not satisfied by such proof of harm as a breach of the duty of faithful service by the bribed employee; the loss of the employer's control over dispensing funds caused by the failure of the employee to share information concerning the payor's willingness to bribe; or the failure of the employee to turn over the bribe payments under a constructive trust or similar theory. No such "deprivations" would have resulted in losses to be passed on to customers.

II

We agree with both the defendant and the People that the kickback/bribery cases under the federal mail fraud statute (18 USC § 1341 et. seq.), decided before a later amendment to that law, are analogous to our first degree commercial bribery cases, and instructive on the issue before us. Like the economic harm requirement for first degree commercial bribing, the mail fraud statute mandated proof of a "scheme ... for *obtaining money or property* by means of false or fraudulent pretenses" (§ 1341 [emphasis supplied]). Contrary to the People's reading of the cases, however, the payment of a bribe or kickback was repeatedly *112 held to be insufficient to satisfy the money or property loss element of mail fraud. Additional proof was required that the employer would have achieved a better deal with the payor of the bribe or kickback, in the form of lower prices or more favorable terms, had there been no corrupt arrangement with the employee.

The seminal mail fraud case involving kickbacks was *McNally v United States* (483 US 350 [1987]). In that case, the defendants controlled the granting of state insurance contracts. They awarded the state's workers' compensation insurance contract in return for a kickback from the successful broker's earned

commissions. In *McNally,* the Court rejected the theory that the mere payment of a kickback showed that a deprivation of money or property was involved, holding instead that, under the mail fraud statute, "[t]here are no constructive offenses" (*id.* at 360 [internal quotations and citations omitted]). The state's loss of the intangible right to faithful service from the bribed official/employee was also found insufficient to satisfy the "money or property" element of section 1341 (*id.* at 356). The Court reversed the convictions because there was no proof or even a charge "that *in the absence of the alleged scheme* the Commonwealth *would have paid a lower premium or secured better insurance*" (*id.* at 360 [emphasis supplied]).[1]

1 Recently, the Second Circuit explained that the 1988 amendment adding 18 USC § 1346 was intended "to expand the definition of 'scheme or artifice to defraud' in response to *McNally v. United States* [483 US 350, 360 (1987)]" (*United States v Rybicki,* 287 F3d 257, 261 [2002]). The 1988 amendment to the statute added that "a scheme ... to deprive another of the intangible right of honest services" could constitute the crime (*see* 18 USC § 1346). Under nearly identical facts to those presented here, the court--after emphasizing the distinction between the concept of actual (or intended) harm and the reasonably foreseeable harm required to be shown under the mail fraud statute--held in *Rybicki* that the government need only prove "that it was reasonably foreseeable that the fraudulent scheme *could* result in some economic consequence that was more than *de minimis*" (*id.* at 267 [emphasis supplied]). Thus, the court concluded that the jury could find reasonably foreseeable harm if it determined that by the payment of the kickback, the defendant attorneys "intended to obtain favorable treatment from the adjusters at the expense of the insurance companies' *intangible right* to the adjusters' undivided loyalty and honest services" (*id.* at 266 [emphasis supplied]). Alternatively, the jury could have found that it was reasonably foreseeable that the kickback would provide the adjusters with an incentive not to seek the lowest settlement or to delay settlement, depriving the insurance company of the time value of money (*id.*).

Following *McNally,* the Tenth Circuit sitting en banc in *United States v Shelton* (848 F2d 1485 [1988]) overturned the mail fraud convictions of defendants for "taking ten percentkickbacks*113 from suppliers who sold goods to the[ir] counties [because] ... the evidence at trial tended to show that the sales were made at a previously established low price and that the kickbacks were paid out of the suppliers' profits" (*id.* at 1491). Thus, there was a failure of proof that the scheme involved the taking of money or property--i.e., that "the counties *lost money*"--because of the kickbacks (*id.* [emphasis supplied]).

United States v Johns (742 F Supp 196 [ED Pa 1990]) is especially instructive. In *Johns,* the defendant was a procurement director for the "Acme" supermarket chain. Just like the People here, the government based its theory of property loss, in part, on the ground that the kickbacks from vendors that defendant received for channeling Acme's purchases of services and supplies both established and measured Acme's economic detriment caused by the corrupt arrangement. The court held, however, that the vendors' payment of kickbacks, despite suggesting their willingness to offer Acme reduced prices, was insufficient. As in *McNally,* the court required an additional showing that without the corrupt arrangement, Acme in fact would have achieved better terms with those vendors. "[T]he government must prove that Acme paid additional money to its vendors as a result of the kickback scheme" (*id.* at 215). That fact, however, was negated by the government's concession that "the prices charged by the vendors who made kickback payments ... 'were not inflated, in comparison to prices they were charging other accounts'" (*id.*) and that "Acme made its buyers aware that *they were not*

permitted to violate the Robinson-Patman Act by inducing their vendors to sell to Acme at lower prices, or on terms more favorable, than those offered to Acme's competition" (*id.* at 216 [emphasis supplied]).

In other mail fraud bribery cases, the federal courts arrived at the same conclusion--that the payment and receipt of a bribe will not in itself establish a governmental or private employer's loss of money or property. In *United States v Slay* (858 F2d 1310 [8th Cir 1988] [R. Arnold, J.]), the court affirmed the setting aside of a mail fraud conviction based on the bribing of city officials to obtain a cable television franchise. "It strains language to the breaking point to argue, for example, that defendant Slay defrauded the City of St. Louis of money simply by offering money to a city official. The money allegedly offered was properly Slay's, not the City's, and Slay's dishonest use of his own money would not by itself be a cognizable loss to the City for purposes of the mail fraud statutes" (*id.* at 1316 n 4).*114

In *United States v Zauber* (857 F2d 137 [3d Cir 1988], *cert denied* 489 US 1066 [1989]), a mail fraud conviction against the trustees of a union pension fund was reversed based on the absence of proof that the pension fund lost money or property arising out of the defendants' acceptance of bribes for steering a $20 million investment loan to a Florida-based mortgage company. The court explained that "[t]he problem with [the government's] argument is that although the ... investment may have been unwise, it still returned exactly what the investment agreement called for [and] ... *the record here does not show that a better deal was available when the trustees made the ... investment*" (*id.* at 146 [emphasis supplied]).

III

The language and legislative history of our felony commercial bribing statute, and the decisional law on kickbacks and employee bribery under the analogous federal mail fraud statute, thus all militate toward requiring more than payment of a kickback to establish the economic harm element of commercial bribing in the first degree. The payment of the kickback may show that the payor was willing to take less to consummate the transaction. But it does not provide the necessary proof of actual economic harm--that, absent the corrupt arrangement, the employer of the kickback payee "*would* have paid a lower [price] or secured better [terms]" (*McNally v United States,* 483 US 350, 360, *supra* [emphasis supplied]).

Judge Leisure perceptively noted this point in *Moll v US Life Tit. Ins. Co. of N.Y.* (710 F Supp 476 [SD NY 1989]). *Moll* was a civil damages suit by real estate purchasers under the Federal Racketeer Influenced and Corrupt Organizations Act (RICO), against the defendant title insurance company. Commission of Penal Law § 180.03 first degree commercial bribing was alleged as the predicate criminal conduct for RICO purposes. The bribing allegedly consisted of kickbacks paid to real estate lawyers to steer their clients to the defendant for title insurance. The uncontested evidence was, however, that while the kickbacks may well have supported the inference of the defendant's willingness to reduce title insurance premiums by the

equivalent amount, no such reduction would have occurred even in the absence of any kickback/referral arrangement, because premiums were uniformly fixed by law (*see* 710 F Supp at 481-482). Because the purchasers could not have obtained cheaper title insurance elsewhere, the kickbacks caused them no economic harm. Otherwise "the statute's economic *115 harm requirement--specifically added by the Legislature in 1983--would be rendered superfluous" (*id.* at 482).

With the foregoing in mind, we examine the record to determine whether the People's proof here sufficiently established economic harm of more than $250 to sustain those convictions. The People's theory was that although the settlements were concededly fair, defendant's payment of the kickback evinced his willingness to take less in a bona fide settlement. Thus, the critical question is whether, at the time of the settlement, the corrupt arrangement deprived the insurance companies of the opportunity to take advantage of that willingness.

From our review of the record, we conclude that the People failed to establish a prima facie case of economic harm to support the first degree commercial bribing conviction involving the kickback to the adjuster at Commercial Union. The People's proof there was that the kickback was paid to expedite settlement before the completion of the normal investigation and verification necessary to assess a claim's value and enter into meaningful settlement discussions, as described by People's witness Meredith Furel, a Commercial Union Claims Specialist. Furel testified that any such premature settlement was against company policy and practice, and an act of disloyalty by the adjuster:

"[W]hen you think of a kickback it's usually to settle a case in a speedy manner and *what the adjustor is doing is taking that file which probably should be going through a discovery procedure which takes a while and putting it above the other claimants,* putting it actually in front of the other cases" (emphasis supplied).

Under company policy, according to Furel, any attempt by defendant to speed up the settlement process on a legitimate, albeit premature, basis would have been rejected. Asked whether a persistent lawyer could achieve a bona fide settlement on an expedited basis, she replied that "if an adjustor is doing his job correctly that attorney can call ten times a day and until that adjustor gets the proper documentation and the proper investigation he is not or should not settle that case." Finally, Furel confirmed that from her review of the file, it did not appear that the investigation and evaluation process had been completed.

([2]) The People failed to establish that an expedited settlement of defendant's cases with Commercial Union would have *116 occurred had there been no corrupt arrangement with the adjuster. While the payment of the kickback, as noted by the Appellate Division, may have suggested defendant's "willingness to settle the claim, *at that point in time,* for the amount of the settlement minus the amount of the bribe" (284 AD2d at 102 [emphasis supplied]), the

proof was that an honest adjuster would have rejected any such offer.

Simply put, the People made no showing that Commercial Union would have availed itself of defendant's "willingness" to accept a lesser settlement by cutting his fee in the amount equivalent to the kickback. The People failed to establish, for example, that at the time the case was disposed of, it was ripe for settlement and that settlement would have been considered by an honest adjuster. Nor did the People establish that the insurance company had sufficient information to justify a settlement at the amount actually paid. Such testimony could have supported an inference that the settlement was inflated, but the People conceded that proof of an inflated settlement was absent. Furthermore, the People never asserted that defendant would have reduced his fee by an amount equivalent to the bribe if the claims had awaited their normal, protracted course for settlement purposes, without a corrupt arrangement.

Thus, as to the Commercial Union count, there was a failure of proof that, without the payment of the kickback to Commercial Union's adjuster, defendant's cases in fact would have been disposed of for less than the actual settlement amount--i.e., that Commercial Union would have accepted an honest offer by defendant to settle the cases at a reduced rate in an expedited manner. The absence of proof to support an inference that, had there been no corrupt arrangement to expedite defendant's cases with Commercial Union, they would have been settled for less is fatal to the People's proof of economic harm necessary to sustain his conviction of first degree commercial bribery on that count, and the conviction must therefore be reduced to a misdemeanor (*see* *People v Ryan,* 82 NY2d 497, 507; *see also* *United States v Zauber, supra,* 857 F2d at 140).

We reach a different conclusion with respect to the first degree commercial bribing count involving an Aetna adjuster. There, the proof was that the file was assigned originally to an adjuster who was not party to the kickback scheme. In exchange for a promised kickback, however, a more senior adjuster "pulled" the file and entered into negotiations with defendant's accomplice. Despite that corrupt arrangement, *117 those negotiations became protracted before a settlement agreeable to both sides was achieved. Significantly, the evidence established that the file had remained the responsibility of the honest adjuster to whom the case had originally been assigned, and no settlement could be effected without her consent and that of her supervisor. Ultimately, they reviewed the file and then approved the proposed settlement without any knowledge of the kickback.

([3]) Affording, as we must, every favorable inference to the People's evidence, and viewing it in its most favorable light, we conclude that a trier of fact could reasonably find that absent the corrupt arrangement, at the moment defendant's case with Aetna was actually resolved, a reduced fee arrangement, offered to effect a lesser settlement, would have been accepted by the honest adjusters. In contrast to the proof involving Commercial Union, at the point in time when the settlement with Aetna occurred, honest Aetna adjusters did not reject the inflated

settlement offer as premature. Thus, it could have reasonably been inferred by a trier of fact that the kickback arrangement actually deprived Aetna of the opportunity to achieve a disposition of defendant's case in the amount of the actual settlement but reduced by a sum equivalent to the kickback. We therefore conclude that the conviction of defendant on the first degree commercial bribing count involving Aetna should be affirmed.[2]

2 While defendant adequately preserved his challenge to the sufficiency of the proof in his motion to dismiss, he failed to do so with respect to the court's jury instruction on first degree commercial bribing.

([4]) Our conclusion that the evidence was sufficient to show that Aetna incurred economic harm as a result of the kickback to its adjuster similarly supports defendant's conviction for first degree scheme to defraud. Penal Law § 190.65 (1), in pertinent part, provides that "[a] person is guilty of a scheme to defraud in the first degree when he ... engages in a scheme constituting a systematic ongoing course of conduct with intent to defraud more than one person or to obtain property from more than one person by false or fraudulent pretenses, representations or promises, and so obtains property with a value in excess of one thousand dollars from one or more such persons." As explained below, the evidence in this case established a conspiracy to defraud liability insurance companies. Moreover, the kickback of well over $1,000 to the corrupt Aetna adjuster demonstrates that Aetna was deprived *118 of and defendant concomitantly obtained property in excess of the statutory minimum.

Two remaining issues merit discussion. First, defendant asserts that the trial court abused its discretion by admitting various out-of-court statements-- written notes and taped conversations--made by Joel Cohen, an unavailable, fugitive codefendant, under the coconspirator exception to the hearsay rule. Defendant argues that the court should have excluded the statements because the People failed to establish "the requisite conspiratorial connection" between Cohen and defendant.

"A declaration by a coconspirator during the course and in furtherance of the conspiracy is admissible against another coconspirator as an exception to the hearsay rule" (*People v Bac Tran,* 80 NY2d 170, 179 [1992]). However, such "evidence may be admitted only upon a showing that a prima facie case of conspiracy has been established" (*id.*). While this "determination ... must be made without recourse to the declarations sought to be introduced" (*id.*), the testimony of other witnesses or participants may establish a prima facie case (*see People v Sledge,* 223 AD2d 922, 925-926, *lv denied* 88 NY2d 854 [1996] [testimony of an admitted coconspirator regarding defendant's involvement established a prima facie case]; *People v Gonzalez,* 120 AD2d 888, 889 [1986], *lv denied* 68 NY2d 770 [prima facie proof of a conspiracy was provided by the independent testimony of other witnesses]).

([5]) Here, the proof of conspiracy was overwhelming, clearly satisfying the prima facie requirement for the statements' admissibility. Three coconspirators admitted their involvement in the kickback scheme and identified Cohen

and defendant as also participating. Moreover, ample evidence in the form of the other coconspirators' business records, such as ledgers reflecting settlement payments from defendant, notes concerning his and Cohen's participation in settlement of cases where kickbacks were made, computer printouts and checks, further supports the trial court's determination that the prima facie case of conspiracy had been established.

([6]) Also unpersuasive is defendant's contention that reversal is required because of the People's violation of *People v Rosario* (9 NY2d 286, *cert denied* 368 US 866 [1961]) by not disclosing the minutes of the grand jury testimony of the People's key witness, coconspirator Edward Quigley, in an unrelated case. Assuming without deciding that this was *Rosario* material, *119 reversal is not warranted. The *Rosario* objection was raised for the first time in a motion to set aside the verdict brought purportedly under CPL 330.30 (1). The factual assertions concerning this material were outside the record and for that reason could not be considered in a CPL 330.30 (1) motion (*see People v Kronberg*, 243 AD2d 132, 135, 152, *lv denied* 92 NY2d 880; *People v Herrington*, 194 AD2d 379, 380, *lv denied* 82 NY2d 755). Therefore, we agree with the Appellate Division that the application was "at best, a de facto CPL 440.10 motion" (284 AD2d at 104). As such, defendant had the burden of demonstrating prejudice (*see People v Machado*, 90 NY2d 187, 192) and failed to do so here.

Accordingly, the order of the Appellate Division should be modified by reducing defendant's conviction of commercial bribing in the first degree on count 113 of the indictment to commercial bribing in the second degree and remitting to Supreme Court for resentencing and, as so modified, affirmed.

Chief Judge Kaye and Judges Smith, Ciparick, Wesley, Rosenblatt and Graffeo concur.

Order modified and case remitted to Supreme Court, New York County, for further proceedings in accordance with the opinion herein and, as so modified, affirmed.*120

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