Affirmed and Opinion filed April 12, 2001.

In The

Fourteenth Court of Appeals

NO. 14-99-00514-CR

CHARLES HINES, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 248th District Court
Harris County, Texas
Trial Court Cause No. 790,575

O P I N I O N

Appellant was charged by indictment with the offense of aggravated robbery. *See* TEX. PEN. CODE ANN. § 29.03(a)(2). A jury convicted appellant of the charged offense and assessed punishment at twenty-seven years confinement in the Texas Department of Criminal Justice--Institutional Division. Appellant raises three points of error. We affirm.

I. The Confidential Informant.

The first point of error contends the trial court erred in admitting statements made by a confidential informant connecting appellant to the commission of the instant offense. During the cross-examination of

Harris County Sheriff's Department Detective Shane McCoy, who investigated the instant offense and obtained appellant's written confession, the following exchange occurred:

> Q. The only thing that ties [appellant] to the Klein Bank on this date of the offense is this statement –
>
> A. No, sir.
>
> Q. -- is that right?
>
> A. There's more information than that. I have a statement from a confidential informant and I have an oral statement of another informant. And then I have the statement not to tie in, but showing his tie-in with Hines, his oral statement that Mr. Hunt said he knew him.

Appellant objected, and in a bench conference outside the hearing of the jury, explained that he objected to any reference to the confidential informant's statement, and also requested the informant's identity.[1]

We read this point of error as raising the following complaints: (1) that the trial court erred by admitting McCoy's statement that appellant's confession linking him to the bank robbery was corroborated by statements of two confidential informants; (2) that the trial court erred in refusing to permit appellant to review the statements by the confidential informants in order to cross-examine the confidential informants on the accuracy of their linking appellant to the offense; and, (3) that the trial court erred in refusing to disclose the identity of the confidential informants.

This is a multifarious point of error. *See Stults v. State*, 23 S.W.2d 198, 205 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) ("A multifarious point is one that embraces more than one specific ground."). However, when a ground is multifarious, an appellate court may address an argument point which is sufficiently developed in the brief. *See id.*; *and Saldivar v. State*, 980 S.W.2d 475, 487 n.3 (Tex. App.—Houston [14th Dist.] 1999, pet ref'd). *See also Chimney v. State*, 6 S.W.3d 681,

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[1] During appellant's motion to suppress the evidence, the trial court denied appellant's request to review the confidential informant's statement. Appellant did not request the informant's name and offered to redact the informant's name in order to review the statement.

687 (Tex. App.—Waco 1999, pet. filed) (Noting that Texas Rule of Appellate Procedure 38.1 overrules multifariousness doctrine and requires courts to undertake measures in order to permit consideration of issues).

Appellant argues McCoy's reference to statements by the confidential informant was inadmissible. However, appellant specifically elicited the response and was clearly aware of the confidential informant's statements through the pretrial suppression hearing. Testimony, which is otherwise inadmissible, may become admissible against a party where that party opens the door. *See Schutz v. State*, 957 S.W.2d 52, 71 (Tex. Crim. App. 1997); *Daniels v. State,* 25 S.W.3d 893, 898 (Tex. App.—Houston [14th Dist] 2000, no pet.); *Hodge v. State*, 940 S.W.2d 316, 321 (Tex. App.—Eastland 1997, pet. ref'd) (police officer's testimony about defendant's motive for killing was elicited as response to counsel's question about regarding possible motives for offense); *Cacy v. State*, 901 S.W.2d 691, 701 (Tex. App.—El Paso 1995, pet. ref'd) (counsel opened door for admission of hearsay testimony relating to probable cause to arrest defendant by placing probable cause at issue).

In *Blondett v. State*, 921 S.W.2d 469, 474 (Tex. App.—Houston [14th Dist.] 1996, pet. ref'd), we held the defendant opened the door for a police officer's reference to the co-defendant's confession which implicated the defendant in the offense by questioning the officer about his basis for arresting the defendant. *Id*. However, while opening the door may render that testimony admissible, it does not do so in all forms. *See Daniels*, 25 S.W.3d at 898; *and Cardenas v. State*, 971 S.W.2d 645, 651 (Tex. App.—Dallas 1998, pet. filed)(citing *Kipp v. State*, 876 S.W.2d 330, 337 (Tex. Crim. App. 1994) (plurality opinion)). Nevertheless, while McCoy's response would have been subject to objection on the grounds of non-responsiveness and hearsay, *Daniels*, 25 S.W.3d at 898; *and Cardenas*, 971 S.W.2d at 651, appellant did not object on either basis. Therefore, any error on these grounds is not preserved for our review.

Appellant also argues in this ground that the trial court erred by refusing appellant's request to disclose the identity of the confidential informant. We note that during the suppression hearing, appellant specifically stated that he did not want the confidential informant's name, and only wanted to review the confidential informant's statement to the police as a basis for probable cause implicating him in the robbery.

Appellant first requested the confidential informant's identity during trial for the purposes of cross-examining him to determine the reliability of his corroborating appellant's confession, connecting him to the offense.

The State has a privilege to refuse to disclose the identity of a person who has furnished information relating to an investigation of a possible violation of the law. *See Rincon v. State*, 979 S.W.2d 13, 17 (Tex. App.—Houston [14th Dist.] 1999, no pet.) (citing TEX.R.EVID. 508(a)). An exception exists where it appears the informer may be able to give testimony necessary to a fair determination of guilt or innocence. *See Rincon*, 979 S.W.2d at 17 (citing TEX.R.EVID. 508(c)(2)); *Bridges v. State*, 909 S.W.2d 151, 157 (Tex. App.—Houston [14th Dist.] 1995, no pet.); *and Abdel-Sater v. State*, 852 S.W.2d 671, 674 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd). The burden rests upon the party seeking disclosure to demonstrate that the potential testimony will significantly aid him and mere conjecture or supposition about the possible relevance of the confidential informant's identity and testimony is insufficient to meet the burden. *See Bridges*, 909 S.W.2d at 157; *Abdel-Sater*, 852 S.W.2d at 673-74. In the case at bar, while the confidential informant's statements to the police appear to be relevant toward the issue of probable cause to arrest appellant[2], appellant sought the confidential informant's identity for cross-examination purposes of undermining the corroboration of appellant's confession. Appellant did not present evidence during trial to demonstrate how cross-examination of the confidential informant would have significantly aided appellant. Accordingly, we hold appellant has not carried his burden in proving the materiality of the confidential informant's identity.

Finally, appellant argues the trial court erred during the suppression hearing by failing to require the State to disclose to appellant the written statements by the confidential informant which provided probable cause to arrest appellant. Appellant has cited no specific authority to require the disclosure of a confidential informant's statement where the informant does not testify, and we are unable through our own independent research to find any law requiring such a disclosure.

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[2] During the pretrial suppression hearing, the appellant elicited testimony that the confidential informant was not a participant in the bank robbery, but was present with appellant and the co-defendant during the planning before the robbery and after the robbery had occurred.

The confidential informant did not testify and details from his or her written statement were not admitted before the jury. Therefore, appellant was not entitled to review the statement pursuant to Texas Rule of Evidence 615(a). In reference to the preceding issue, we observe that testimony during the suppression hearing indicated that even with redaction of the confidential informant's name, providing his written statement would have made his or her identity evident, and that appellant has failed to carry his burden in showing how the informant's identity would significantly aid him in the issue of guilt. We also note that during the suppression hearing, appellant and the State elicited the fact that the informant had not been a participant in the robbery, that he or she had been present during the planning and in the aftermath of the robbery, that the informant did not have any pending charges in relation to the bank robbery, and that McCoy had not promised anything to the informant in exchange for his or her statement. We hold, therefore, that appellant has not carried his burden in showing that he was entitled to review the confidential informant's statement or that he was entitled to learn the confidential informant's identity.

For these reasons, the first point of error is overruled.

II. The Custodial Statement.

The second point of error contends the trial court erred in admitting appellant's custodial statement into evidence at trial. During the pretrial suppression hearing, McCoy testified he obtained an arrest warrant for appellant based on information obtained from a confidential informant. McCoy obtained and executed an arrest warrant for appellant. McCoy advised appellant of his *Miranda* rights.[3] After acknowledging he understood those rights, appellant spoke with McCoy about the offense. At McCoy's request, appellant subsequently agreed to provide a written statement. After McCoy typed the statement, appellant reviewed it and signed it in the presence of McCoy and FBI Special Agents Jack Kelleher and J.P. Usher. McCoy testified appellant never asked for an attorney or asked to terminate the interview. He also testified no one threatened appellant or promised appellant anything in exchange for his statement. On cross-examination, McCoy admitted informing appellant that either federal or state charges could be

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966).

filed in relation to the instant offense, but denied threatening appellant with federal charges unless he confessed.

F.B.I. Special Agent Kelleher testified at the suppression hearing that he was present in the room when McCoy typed appellant's statement. Kelleher observed appellant review and sign the written statement. Kelleher stated appellant was neither threatened nor promised anything in exchange for his statement. On cross-examination, Kelleher estimated he was present with appellant for approximately one hour.

Appellant testified at the hearing that he was 22 years old and had a ninth grade education. Appellant stated that on the day of his arrest, he had smoked marijuana, which had an intoxicating effect. Appellant testified he was threatened by McCoy with federal charges unless a statement was forthcoming. Appellant gave the statement because he was afraid of the time involved in the possible federal charge. He believed that in exchange for making the statement, he would only receive state charges. At the time he made the statement, he was still intoxicated with the marijuana.

The trial court denied appellant's suppression motion and the custodial statement was subsequently admitted at trial. The trial court subsequently entered written findings of fact and conclusions of law supporting admission of the statement.

Appellant initially argues the statement was not admissible because the arrest warrant was not based upon probable cause. In determining whether probable cause existed to support the issuance of a warrant, the reviewing court is limited to the information contained within the four corners of the affidavit. *See Highwarden v. State*, 846 S.W.2d 479, 482 (Tex. App.—Houston [14th Dist.] 1993), *pet. dism'd as improvidently granted*, 871 S.W.2d 726 (Tex. Crim. App. 1994) (citing *Tolentino v. State*, 638 S.W.2d 499, 501 (Tex. Crim. App. 1982)); *Curry v. State*, 815 S.W.2d 263, 265 (Tex. App.—Houston [14th Dist.] 1991, no pet.). In the instant case, the statement was admitted at the suppression hearing; however, the arrest warrant and supporting affidavit were not. It was then the responsibility of the appellant to see that the latter documents were included in the record on appeal. *See Moreno v. State*, 858 S.W.2d 453, 462 (Tex. Crim. App. 1993). We presume that missing portions

of the record support the trial court's ruling. *Skinner v. State*, 837 S.W.2d 633, 635 (Tex. Crim. App. 1992). While some may argue the rule in *Skinner* has been abrogated by the new rules of appellate procedure, we disagree. The rule in *Skinner* was based on the premise that appellant bore the burden of providing the appeals court with a record sufficient to prove error. The rules of appellate procedure prior to September 1, 1997 said as much. *See* TEX. R. APP. P. 50(d) (repealed September 1, 1997). When that burden went unsatisfied, we were to presume the missing portions of the record supported the trial court's decision. Under rule 37.3 of the Texas Rules of Appellate Procedure, the appellate court is now responsible for ensuring the record is timely filed. Appellant, however, maintains responsibility for requesting a complete record. TEX. R. APP. P. 34. Thus, under the new rules, appellant must still provide a sufficient record for review. Additionally, we note the trial court found McCoy "arrested [appellant] pursuant to a valid arrest warrant." And the trial court entered the following conclusion of law: "[Appellant] was arrested pursuant to a valid arrest warrant. The probable cause affidavit supporting the warrant provided sufficient probable cause."

Appellant next contends the statement was coerced and involuntary. At a suppression hearing, the trial court is the sole trier of fact and may choose to believe or disbelieve any or all of a witness's testimony. *See Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990). The appellate court may not engage in its own independent factual review. *See Banda v. State*, 890 S.W.2d 42, 51 (Tex. Crim. App. 1994), *cert. denied*, 493 U.S. 923, (1995). Instead, the appellate court must review the case to determine whether the trial court's findings are supported by the record, and must uphold any finding of the trial court that is supported by the record, absent an abuse of discretion. *See Meek v. State*, 790 S.W.2d 618, 620 (Tex. Crim. App. 1990). An abuse of discretion occurs when the trial court's acts are arbitrary and unreasonable without reference to any guiding rules or principles, *Montgomery v. State*, 810 S.W.2d 372, 380 (Tex. Crim. App. 1990) (opinion on reh'g), or when the trial court's decision is so clearly wrong as to lie outside that zone within which reasonable persons might disagree. *Id*. at 391. Thus, our review is limited to whether the trial court properly applied the law to the facts. *See Romero*, 800 S.W.2d at 543.

In support of this argument, appellant states he was misinformed and deceived regarding McCoy's promise that appellant would not be prosecuted federally for the instant offense. While this argument is supported by appellant's testimony at the suppression hearing, it was contradicted by McCoy and Kelleher. Further, the trial court specifically found: "Officer McCoy did not promise [appellant] that federal charges would not be pursued if the defendant provided a confession. The officers who testified at the pretrial hearing ... were credible. [Appellant] was not credible." Additionally, the trial court concluded as a matter of law that the "statement was freely and voluntarily made by [appellant], in the absence of any threats, promises, coercion, or other improper inducement on the part of any police officer or other individual."

The trial court was in a position to believe or disbelieve any or all of a witness's testimony. *See Romero*, 800 S.W.2d at 543. The appellate court may not engage in its own independent factual review. *See Banda v. State*, 890 S.W.2d at 51. The trial court specifically found the witnesses for the State were credible and appellant not credible. Further, the trial court's findings and conclusions are supported by the record. *See Meek*, 790 S.W.2d at 620. In light of these findings and conclusions, we do not find the trial court's denial of the suppression motion was arbitrary, unreasonable, or so clearly wrong as to lie outside that zone within which reasonable persons might disagree. *See Montgomery*, 810 S.W.2d at 380 and 391. Finding no abuse of discretion in admitting appellant's written statement, we overrule the second point of error.

III. Lesser Included Offenses.

The third point of error contends the trial court erred by failing to instruct the jury on the lesser-included offense of robbery. Appellant argues he was entitled to such an instruction because his written statement does not mention either appellant or his co-defendant used a weapon during the instant offense. However, appellant's statement clearly states that the co-defendant possessed a shotgun during the robbery. Specifically, the confession states: "[Co-defendant] and me were wearing long sleeve black shirts and black jeans. We each had black pull over caps that we had cut eye holes in, and [co-defendant] was carrying the black shotgun."

While appellant's statement does not expressly describe how the firearm was used, the testimony elicited from the bank teller who was the first to arrive at the bank establishes that a firearm was used. Specifically, that testimony establishes that when the teller reached the bank's front door, appellant and another male emerged from some nearby shrubs and instructed the complainant to unlock the door. Both men were dressed in black, and wore ski masks and gloves; one of them carried a shotgun. The complainant quickly entered the bank and attempted to lock the men outside. However, the gunman stuck the barrel of a shotgun between the doors, pried the door open and grabbed the complainant by the throat. The gunman asked the complainant where the alarm pad was located. The gunman and the complainant proceeded to the pad. The gunman instructed the complainant to disable the alarm. When the complainant had difficulty performing that task due to nervousness, the gunman threatened to shoot the complainant.

Determining whether a charge on a lesser included offense is warranted presents a dual inquiry. First, is the lesser offense included within the proof necessary to establish the offense charged? *See Rousseau v. State*, 855 S.W.2d 666, 672-73 (Tex. Crim. App. 1993). Second, if so, is there some record evidence from which a jury could rationally find that if the defendant is guilty, he is guilty only of the lesser offense? *See ibid*. While we agree that robbery is a lesser included offense of aggravated robbery, we cannot agree that the second prong of *Rousseau* has been met. There is simply no reading of the trial record from which a jury could rationally find that appellant, if guilty, is guilty only of robbery. *See Russell v. State*, 804 S.W.2d 287, 289 (Tex. App.—Fort Worth 1991, no pet.) (fact that defendant did not mention use of a knife in the face of overwhelming evidence that he did use a knife, does not constitute evidence showing that a knife was not used). Accordingly, the third point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed April 12, 2001.

Panel consists of Justices Wittig, Baird, and Senior Chief Justice Murphy.[4] (Wittig, J., concurs in the result only).

Do Not Publish — TEX. R. APP. P. 47.3(b).

[4] Senior Chief Justice Paul C. Murphy and Former Judge Charles F. Baird sitting by assignment.