Affirmed and Opinion filed June 8, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-00968-CR

MICHAEL JAMES PIPKIN, Appellant

V.

THE STATE OF TEXAS , Appellee

On Appeal from the 262nd District Court
Harris County, Texas
Trial Court Cause No. 775,099

O P I N I O N

A Harris County jury found Michael James Pipkin guilty of capital murder and the trial court assessed punishment at forty years confinement. Pipkin appeals his conviction in eight points of error. We affirm.

Background Facts

Prior to Pipkin's indictment for capital murder, he was arrested and charged with organized criminal activity involving aggravated robbery, theft of cocaine, and theft of money. Pipkin hired Ray Epps to represent him on the organized criminal activity charges. While Pipkin was in jail awaiting trial, Epps

contacted Assistant District Attorney John Brook about Pipkin testifying for the State in other matters. Soon thereafter, Pipkin, Assistant District Attorney John Brook, Houston Police Officers Sgt. Belk and Sgt. Swaim met in a room at the Harris County Jail. During the interview with Assistant District Attorney Brook, Pipkin confessed to the capital murder of complainant.

During this meeting, John Brook and the officers believed no restrictions were placed on the topics of discussion, including but not limited to the case Pipkin was currently under indictment. Brook never communicated, at Epps' request, the information gained during Pipkin's interview, to Epps. Epps and his client believed the District Attorney had orally granted Pipkin use immunity.[1] Thus, he believed he had an agreement that what was said during the interview would never be used against him.

Lesser Included Offense

In his first issue, Pipkin contends the trial court erred by not instructing the jury on the lesser included charge of theft because there is some evidence to support his contention that he only accepted property he knew to have been recently stolen. A two-prong test must be met before the trial court is required to give a lesser-included-offense instruction: the lesser-included-offense must be included within the proof necessary to establish the offense charged, and, some evidence must exist in the record that if the defendant is guilty, he is guilty only of the lesser offense. *See Medina v. State*, 7 S.W.3d 633, 638 (Tex. Crim. App. 1999); *Rousseau v. State*, 855 S.W.2d 666, 672-75 (Tex. Crim. App. 1993). When determining whether a lesser-included instruction should have been given, the credibility of the evidence and whether it conflicts with other evidence or is controverted may not be considered. *See Saunders v. State*, 840 S.W.2d 390, 391 (Tex. Crim. App. 1992). Accordingly, if the record reflects some evidence that refutes or negates the aggravating element of the greater offense or if the evidence is subject to different interpretations, the trial court must submit a lesser-included charge to the jury. *See id.* at 391-92. Anything more than a scintilla of evidence on the requested lesser included is sufficient to entitle a defendant to the lesser charge. *See Bignall v. State*, 887 S.W.2d 21, 23 (Tex. Crim. App. 1994).

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[1] "Use" or testimonial immunity provides a criminal witness protection from prosecution, except for aggravated perjury or contempt, on account of information derived, directly or indirectly, from the testimony. *See* TEX. PEN. CODE ANN. § 71.04. There was testimony from other defense attorneys from Harris County that oral use immunity grants are commonplace by the Harris County District Attorney's office.

We find the record does not provide a rational basis upon which the jury could have concluded Pipkin, if guilty, was guilty only of theft. The evidence shows he helped plan the robbery and knew the people who committed the robbery would have a gun with them when they committed the robbery. Pipkin did not want to be present at the robbery because the complainant knew him. Furthermore, he rejoined the robbers immediately after the robbery. His participation in the robbery continued by accepting his share of the stolen property and disposing of the gun. Thus, under the facts of this case, appellant was guilty as a party to an aggravated robbery, not theft. *Compare* TEX. PEN. CODE ANN. § 31.03 and § 22.02. Therefore, Pipkin was not entitled to the lesser-included-offense instructions.

Consequently, we overrule Pipkin's first issue.

Plea Negotiation

Pipkin's second and third issues regarding his plea negotiations will be discussed together. In his second issue, Pipkin argues his statement should not have been admitted because it was taken pursuant to plea negotiations between him and the State. In his third issue, Pipkin argues the trial court erred in failing to submit his requested jury instruction to determine the disputed fact issue concerning whether the statement given was part of pre-trial plea negotiations in violation of Evidence Rule 410 and therefore barred from admissibility by that Rule and article 38.23, *Texas Code of Criminal Procedure*. *See* TEX. R. EVID. 410; TEX. CODE CRIM. PROC. ANN. art. 38.23.

Evidence Rule 410(4) proscribes evidence of "any statement made in the course of plea discussions with an attorney for the prosecuting authority" is not admissible against the defendant who made the plea or was a participant in the plea discussions. TEX. R. EVID. 410(4). Article 38.23 of the *Texas Code of Criminal Procedure*, contains a similar proscription of use, states:

> (a) No evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.
>
> In any case where the legal evidence raises an issue hereunder, the jury shall be instructed that if it believes, or has a reasonable doubt, that the evidence was obtained in violation of the provisions of this Article, then and in such event, the jury shall disregard any such evidence so obtained.

> (b) It is an exception to the provision of Subsection (a) of this Article that the evidence was obtained by a law enforcement officer acting in objective good faith reliance upon a warrant issued by a neutral magistrate on probable cause.

TEX. CODE CRIM. PROC. ANN. art. 38.23 (Vernon Supp. 2000).

For us to decide there was an ongoing plea bargain discussion, the evidence must show: "(1) that an offer be made or promised, (2) by an agent of the State in authority, (3) to promise a recommendation of sentence or some other concession such as a reduced charge in the case, (4) subject to the approval of the trial judge." *Wayne v. State*, 756 S.W.2d 724, 728 (Tex. Crim. App. 1988). Pipkin's statement was not the result of a plea bargain because there is no evidence a plea bargain was underway. No offer was ever made or promised by the State in exchange for his statement. Rather, Pipkin volunteered to provide information concerning an unsolved murder with the *hope* a bargain could be made regarding his organized crime charges. Because Pipkin believed there was an ongoing plea bargaining process and that he would receive some benefit from the police for the disclosure of the information does not transform the confession into one made during a "plea discussion." *See Wayne*, 756 S.W.2d at 734. As in *Wayne*, "[t]here is no express showing, not even an after-the-fact expression, of a desire to negotiate a plea on appellant's part or on his behalf." *Id*. Because there was no fact issue raised regarding how Pipkin gave his statement, the trial court was not required to give an article 38.23 instruction. *See Poulos v. State*, 799 S.W.2d 769, 772 (Tex. App.–Houston [1st Dist.] 1990, no pet.) (citing *Thomas v. State*, 723 S.W.2d 696, 707 (Tex. Crim. App. 1986) ("A trial court is required to include an Article 38.23 instruction in the jury charge only if there is a factual dispute as to how the evidence was obtained."). All parties agreed Pipkin, via his attorney, contacted the District Attorney's office and informed the prosecutor that he had some information on an unsolved crime he wanted to provide in the hope that he could work out a deal for a lenient sentence on his organized crime case. This evidence was not controverted. In fact, in his brief, Pipkin has not identified any facts in dispute concerning the circumstances surrounding his statement. Accordingly, we overrule Pipkin's second and third issues.

Ineffective Assistance of Counsel

In his fourth and fifth issues, Pipkin argues the trial court should have suppressed his confession because it was taken in violation of his right to effective assistance of counsel. Also, he contends the jury

should have been instructed not to consider his statement if they found it was taken in violation of his right to effective assistance of counsel.

"[T]he Sixth Amendment right to counsel is offense-specific" and "cannot be invoked against potential future prosecutions which have not yet commenced." *Janecka v. State*, 937 S.W.2d 456, 466 (Tex. Crim. App. 1996) (citing *McNeil v. Wisconsin*, 501 U.S. 171, 175-76, 111 S.Ct. 2204, 2207-08 (1991)). The right to counsel "attaches only at or after the initiation of adversary judicial criminal proceedings in the offense for which the right is claimed." *Id*. When Pipkin confessed, he had not yet been charged with capital murder. Because his Sixth Amendment right to counsel did not attach, *see id*., he cannot claim his statements regarding the murder were obtained in violation of this right. Consequently, Pipkin's fourth and fifth points of error are overruled.

Jury's Request for Transcript

In his sixth point of error, Pipkin argues the trial court erred by refusing the jury's request that the transcript of his statement be made available to them. Throughout the trial, the State referred to the transcript in the presence of the jury. The State utilized the statement during Ray Epps' cross-examination. Appellant offered the transcript, but it was not admitted. The jury sent a note and requested only the pages of the transcript earlier admitted by the court. The Court refused their request and wrote back to them that the transcript was not in evidence.

In his seventh point of error, Pipkin argues the trial court should have admitted the transcript into evidence. To review the trial court's decision to exclude the transcript, we "must afford [the] trial court great discretion in its evidentiary decisions." *See Montgomery v. State*, 810 S.W.2d 372, 378 (Tex. Crim. App. 1990). This court may not overturn the evidentiary ruling of a trial judge absent a clear abuse of this discretion. *See id*.

An audiotape recording of Pipkin's statement was admitted into evidence. The trial court stated, in refusing Pipkin's request to admit the tape:

> The Court has heard the tape. The Court has read the transcript. The tape is totally audible. It's one of the most audible tapes the Court has ever heard. It's the opinion of

> this Court that the transcript would do nothing more than confuse the issue since it's not accurate.

Thus, having ruled the transcript inadmissible, the trial court did not abuse its discretion in rejecting the jury's request for a copy of the transcript. *See* TEX. R. EVID. 1002. Similarly, we find the trial court did not err by not providing the transcript of the tape recording to the jury. A jury is entitled only to those items that are actually admitted during trial. *See* TEX. CODE CRIM. PROC. ANN. art. 36.25; *Wade v. State*, 833 S.W.2d 324, 326 (Tex. App.–Houston [1st Dist.] 1992, no pet.)

Accordingly, Pipkin's sixth and seventh points of error are overruled.

"Substantial Compliance"

In his eighth point of error, Pipkin argues the jury charge should have included a definition of the term "substantial compliance." We disagree.

"[A] word, term, or phrase which is not defined by statute is to be taken and understood in its ordinary language and speech." *Andrews v. State*, 652 S.W.2d 370, 377 (Tex. Crim. App. 1983). Additionally, if a word, term, or phrase has not been statutorily defined at the time of trial, the court's charge need not include a definition of the word, term, or phrase. *See id.*

"Substantial compliance" is not defined by statute. These two words have "a common and ordinary meaning that jurors can be fairly presumed to know and apply such meaning." *Russell v. State*, 665 S.W.2d 771, 780 (Tex. Crim. App. 1983). Therefore, the trial judge did not err in failing to define the term "substantial compliance" in the charge. *See id.*

Accordingly, we overrule Pipkin's eighth issue. Having overruled all of his issues, we affirm the trial court's judgment.

/s/ Norman Lee
Justice

Judgment rendered and Opinion filed June 8, 2000.

Panel consists of Justices Cannon, Draughn, and Lee.[*]
Do Not Publish — TEX. R. APP. P. 47.3(b).

[*] Senior Justices Bill Cannon, Joe L. Draughn, and Norman Lee sitting by assignment.