**Affirmed and Memorandum Opinion filed February 18, 2016.**


**In The**

# Fourteenth Court of Appeals

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**NO. 14-14-00535-CR**

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**LAURO GRIMALDO RINCON, Appellant**

**V.**

**THE STATE OF TEXAS, Appellee**

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**On Appeal from the 9th District Court**
**Montgomery County, Texas**
**Trial Court Cause No. 13-02-01982 CR**

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## M E M O R A N D U M  O P I N I O N

A jury convicted appellant Lauro Grimaldo Rincon of possession with intent to deliver a controlled substance (cocaine weighing at least 400 grams), found two enhancement paragraphs true, and assessed punishment at ninety-nine years' confinement. In various overlapping issues, appellant contends the trial court reversibly erred by (1) refusing to order the State to divulge the identity of a confidential informant (the Informant); (2) admitting statements made by a

coconspirator and the Informant; and (3) admitting a document that included hearsay from a police officer.

We affirm.

## I. BACKGROUND

The Informant, cooperating with the United States Drug Enforcement Agency (DEA), negotiated with Angel Vazquez to purchase twenty kilograms of cocaine for $710,000. DEA Special Agent Joel Saldana testified that Vazquez was brokering the deal, so Vazquez would put the buyer and seller together and would make a profit out of the deal. The Informant and an undercover DEA agent met with Vazquez and others in December 2012 to complete the sale. The sale fell through, however, because the sellers wanted to see the money first, and the DEA did not have the money.

Agent Saldana testified that Vazquez seemed determined to make the sale. Vazquez told the Informant that he had found someone else to supply the cocaine. Over appellant's hearsay and Confrontation Clause objections, the trial court admitted several Spanish-to-English translated transcripts of recorded telephone calls including Vazquez, the Informant, and the Informant's wife between February 11, 2013, and February 18, 2013. During the calls, Vazquez repeatedly referred to unidentified owners of the cocaine as "they," "he," and "those people."[1] He also referenced his conversations with "the old man."[2]

[1] For example, Vazquez said, "They talked to me about twenty . . . [f]rom thirty-three I brought it down to thirty-two and a half, do you understand me," and, "We'll see if he lowers it a little more." He also said, "If you guys made a decision, . . . so they can set some aside for us, do you understand me? They'll set some aside. . . . I'm going to tell him yeah, to set them aside."

[2] Vazquez said, "You called me on your end and, and he called me too. The old man is coming too, and, and he'll come over here and look for me. . . . The old man . . . so he confirmed it and he came over here and said, 'The people are already ready.'"

At around noon on February 22, Agent Saldana and Houston Police Officer Jose Benevides (both undercover) met with Vazquez, Vazquez's brother, and appellant at a motel in Houston. During the meeting, Vazquez referred to appellant as "el viejo," which means "older man." Agent Saldana testified that Vazquez said, "This is the man that is going to make it happen. He knows the source of supply. He is good friends with them. He's going to make it happen. That's why I brought him with me." Vazquez continued, "Look at him. He looks like a day laborer. No one ever suspects of him being involved in this."

Agent Saldana brought a vehicle with secret trap compartments for storing cocaine. Agent Saldana showed the three suspects how to use the trap compartments although Vazquez was already familiar with the vehicle from his prior dealings with the Informant. Appellant sat in the passenger seat of the car to look at the trap near the glove box. Agent Saldana asked Vazquez to send Saldana a picture of the cocaine next to the vehicle, and Vazquez agreed. As the three suspects left in the trap vehicle, Vazquez said that appellant was going to take them to where the cocaine was located. The three suspects went to the stash house, which was then placed under surveillance.[3]

Because Agent Saldana's Blackberry could not receive pictures, Vazquez sent the picture of the cocaine (State's Exhibit 183) to the Informant, who forwarded it to Officer Benevides. Later that evening, Agent Saldana met with Vazquez and appellant in the parking lot of a restaurant. Agent Saldana asked Vazquez to show Saldana one kilogram of cocaine before consummating the transaction. At this request, Vazquez became "very agitated." Appellant got out of the vehicle, and Agent Saldana said, "I just want to see one kilo." Appellant

[3] Agent Saldana testified that a stash house is "typically a house where they use to drop off narcotics before it's transferred out or distributed out or—as a hub as you would."

appeared receptive because he said "un kilo" or "solo kilo," which to Agent Saldana was "like, oh, it's only one kilo. Let's be reasonable." But Vazquez became belligerent and was trying to get Agent Saldana in their vehicle. Agent Saldana refused, went to his vehicle, and drove away while radioing Officer Benevides to activate a "kill switch" for the trap vehicle. This immobilized the vehicle. Ultimately, appellant and Vazquez were arrested, and two cell phones were seized—a Samsung phone and an LG phone.

Meanwhile, a van occupied by Vazquez's brother and two other people left the stash house. A deputy with the Montgomery County Sheriff's Department stopped the van and searched it after obtaining the driver's consent. The deputy found ten kilograms of cocaine and at least four cell phones.

A jury found appellant guilty, and this appeal followed.

## II. RULE 508: INFORMANT PRIVILEGE

In his first two issues, appellant contends the trial court erred by denying appellant's motion for production of the Informant and disclosure of his identity under Rule 508 of the Texas Rules of Evidence.[4] First we review the rule and associated legal principles. Then we address each of appellant's issues.

### A. Rule 508 and Legal Principles

Rule 508 allows the State to refuse to disclose the identity of an informant. *See* Tex. R. Evid. 508 (amended 2015). Two exceptions are relevant for purposes

[4] Appellant argues his first two issues together. Each issue concerns a different part of Rule 508. Appellant also contends in each issue that the trial court violated the Confrontation Clause by admitting out-of-court recordings of the Informant's conversations. These issues are multifarious, and we may disregard them. *See, e.g.*, *Gilley v. State*, 418 S.W.3d 114, 119 n.19 (Tex. Crim. App. 2014); *Nwosoucha v. State*, 325 S.W.3d 816, 828 n.17 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd). Appellant's sixth issue, however, complains about the trial court's admission of the Informant's statements in violation of the Confrontation Clause. Thus, we address appellant's Confrontation Clause argument below.

of this appeal: (1) if the informant "appears as a witness" for the State, and (2) if there is a reasonable probability that the informant can "give testimony necessary to a fair determination . . . on guilt or innocence in a criminal case." Tex. R. Evid. 508(c)(1)–(2). The defendant bears the burden of demonstrating that the identity must be disclosed. *Bodin v. State*, 807 S.W.2d 313, 318 (Tex. Crim. App. 1991). We review the trial court's ruling for an abuse of discretion and may reverse only if the ruling falls outside the zone of reasonable disagreement. *See Haggerty v. State*, 429 S.W.3d 1, 8 (Tex. App.—Houston [14th Dist.] 2013, pet. ref'd).

**B. Witness Exception Not Preserved**

In his first issue, appellant relies on the first exception to the privilege: when the informant "appears as a witness." The State contends appellant failed to preserve error because appellant did not make this argument to the trial court. We agree with the State.

To preserve error for review, an appellant must make a timely objection that states the grounds for the ruling sought with sufficient specificity to make the trial court aware of the complaint. Tex. R. App. 33.1(a)(1)(A). Appellant's motion for disclosure and the arguments presented at the hearing on the motion did not refer to the "appear as a witness" exception; they only referred to the exception for when the informant's testimony will be necessary to a fair determination of guilt or innocence. Thus, appellant's argument on appeal concerning the "appears as a witness" exception differs from the argument in the trial court, and appellant has not preserved error. *See, e.g.*, *Clark v. State*, 365 S.W.3d 333, 339 (Tex. Crim. App. 2012) (error is forfeited if a point of error on appeal does not comport with the objection made at trial); *Resendez v. State*, 306 S.W.3d 308, 315 (Tex. Crim. App. 2009 (specific suppression argument not raised in the trial court was not preserved for appellate review).

Appellant's first issue is overruled.

## C. Informant's Identity Unnecessary

In his second issue, appellant contends the trial court abused its discretion by concluding that appellant failed to establish there was a reasonable probability that the Informant could give testimony necessary to a fair determination of appellant's innocence. In particular, appellant contends that only the Informant could dispute the authenticity of Exhibit 183—the picture of the cocaine that Vazquez sent to the Informant, who forwarded it to Officer Benevides.

Under this Rule 508 exception, the defendant must show that the informant's potential testimony will "significantly aid the defendant." *Bodin*, 807 S.W.2d at 318. "[M]ere conjecture or supposition about possible relevancy is insufficient." *Id.* But the defendant need only make a "plausible showing" of how the informant's testimony may be important. *Id.*

The case of *Abdel-Sater v. State* is illustrative. *See* 852 S.W.2d 671 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd). This court upheld the trial court's decision to deny disclosure under Rule 508 when the informant provided the basis for the officer's search, which ultimately revealed a kilogram of cocaine. *See id.* at 673–74. The informant had told the police that he observed a large number of small plastic bags containing cocaine and a brick of cocaine, and the defendant had told the informant that the substance was cocaine and for sale. *Id.* at 674. This court held that the informant's identity was not essential to a fair determination of the defendant's guilt or innocence, rejecting the defendant's claim that the informant was a material witness to whether the defendant knowingly possessed the cocaine with the intent to deliver. *See id.*

Here, we hold that the trial court did not abuse its discretion because appellant has not made a plausible showing that the Informant's testimony was necessary to a fair determination of appellant's innocence. There are at least two reasons for this conclusion. First, appellant has not explained, beyond mere supposition, how the Informant's testimony might undermine the authenticity of Exhibit 183. In fact, a picture identical to Exhibit 183 was found on Vazquez's cell phone, which strongly corroborated the testimony that Vazquez had sent the picture to the Informant. And second, the probative value of Exhibit 183 was minimal concerning appellant's guilt—the picture did not relate directly to appellant's participation in the offense. *See id.* at 674 (informant's identity was unnecessary to undermine the defendant's possession of a brick of cocaine even though a brick of cocaine was ultimately admitted at trial and formed the basis for the conviction).

Appellant's first and second issues are overruled.

## III. HEARSAY AND CONFRONTATION: VAZQUEZ AND INFORMANT TESTIMONY

Appellant consolidates his third through sixth issues in a single argument, where he contends the trial court abused its discretion by admitting hearsay statements and testimonial statements in violation of the Confrontation Clause made by Vazquez and the Informant before February 22, 2013, "because appellant was not part of any conspiracy to distribute cocaine" before that date. The State contends that appellant's brief "lacks the precision necessary to properly analyze the issue." This is a fair characterization of appellant's multifarious briefing.

Although appellant's "points of error" concern the admission of *any* statements made before February 22, he identifies in his "summary of the argument" section only one category of allegedly inadmissible evidence: "the many hours of recorded conversations between the confidential informant and

Vazquez regarding that October 2012 conspiracy [and] the transcriptions of those conversations." Similarly, appellant complains in the "argument and authorities" section of his brief only about the "recordings and testimony" concerning the "first conspiracy" and "October 2012 conspiracy." Thus, we treat appellant's issues as applying only to those particular statements.[5]

Although the parties agree that the trial court admitted Spanish-language audio recordings concerning the "first" conspiracy that began in late 2012, the State correctly notes that the trial court never admitted transcripts of those recordings.[6] And although Agent Saldana was questioned about the recordings, he could not recall (and did not testify about) any particular statements made during those recordings. The trial court explained repeatedly that the non-transcribed recordings from the first conspiracy were admitted so Agent Saldana could "identify the voices" and "establish who the parties are." Thus, the trial court did not abuse its discretion by overruling appellant's hearsay and Confrontation Clause

[5] Even if we were to understand appellant as challenging *all* statements made before February 22, his issues would be overruled regarding the February 2013 statements. Statements made by Vazquez during February 2013, including the recordings and transcripts thereof, would be admissible as non-hearsay statements by coconspirators because there is evidence of a conspiracy in February 2013, Vazquez's statements were made in furtherance of the conspiracy, and appellant was a member of that conspiracy. *See Guidry v. State*, 9 S.W.3d 133, 148 (Tex. Crim. App. 1999); *see also* Tex. R. Evid. 801(e)(2)(E). Further, the Informant's statements to Vazquez were not offered to prove the truth of the matter asserted by the Informant, but rather to put Vazquez's incriminating statements in context. *See* Tex. R. Evid. 801(d); *see also Baker v. State*, No. 04-02-00232-CR, 2003 WL 244860, at *2 (Tex. App.—San Antonio Feb. 5, 2003, no writ) (mem. op., not designated for publication). Similarly, the admission of these statements would not violate the Confrontation Clause. *See Del Carmen Hernandez v. State*, 273 S.W.3d 685, 687 (Tex. Crim. App. 2008) ("[T]he Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (alterations and quotations omitted)); *Arroyo v. State*, 239 S.W.3d 282, 291 n.4 (Tex. App.—Tyler 2007, pet. ref'd) ("Statements of a coconspirator in furtherance of a conspiracy are not, in the ordinary case, testimonial.").

[6] Appellant did not object to the lack of transcripts, and indeed, asked the court reporter to not translate any of the recordings when appellant played portions of one recording for the jury.

objections because the recordings were not admitted for purposes of establishing the truth of the matter asserted therein. *See, e.g.*, Tex. R. Evid. 801(d) (hearsay is a statement "offered in evidence to prove the truth of the matter asserted"); *Del Carmen Hernandez v. State*, 273 S.W.3d 685, 687 (Tex. Crim. App. 2008) ("[T]he Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (alterations and quotations omitted)). Indeed, because the recordings were never translated, neither the jury nor this court can even determine what matters were asserted in the foreign language. *Cf. Flores v. State*, 299 S.W.3d 843, 855–56 (Tex. App.—El Paso 2009, pet. ref'd) (noting that the translation presented by an interpreter, rather than a foreign language audio recording, is what "creates the record and that ultimately serves as the basis for any potential appeal"); *see also Ortiz v. State*, 144 S.W.3d 225, 230 (Tex. App.—Houston [14th Dist.] 2004, pet. ref'd) (noting that is the appellant's burden to develop a sufficient record in the trial court to demonstrate reversible error on appeal).

To the extent appellant also complains about the trial court admitting Agent Saldana's testimony concerning the first conspiracy, we hold that appellant has failed to preserve error. An appellant must preserve error in the trial court by making a specific and timely objection and obtaining a ruling from the trial court. *See Lacaze v. State*, 346 S.W.3d 113, 119 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd). We have reviewed the portions of the record cited by appellant where appellant contends he objected to Agent Saldana's testimony. *See id.* at 119–20 (reviewing pages of the record cited by the appellant that contained hearsay objections).[7] None of the cited pages of the record includes a hearsay or

[7] Appellant contends that "[o]ver objections, Special Agent Saldana testified at length about the details of the first conspiracy that formed in October 2012," citing a seven-page span in the reporter's record. Appellant contends further, without citation to the record, that he

Confrontation Clause objection. Thus, appellant has not preserved error concerning the admission of that evidence.[8]

Appellant's third through sixth issues are overruled.

## IV. HEARSAY OF EXHIBIT 179

In his seventh and final issue, appellant contends the trial court reversibly erred by admitting Exhibit 179 into evidence over appellant's hearsay objection. The exhibit, prepared by a detective from the Montgomery County Sheriff's Office, is a one-page summary listing some of the text messages and calls to and from the "LG phone" obtained from the restaurant parking lot.[9] Appellant contends the "offending part of State's Exhibit 179 is [the detective's] typed statement of the State's belief that the LG phone was Rincon's phone." Specifically, the second line of Exhibit 179 includes the following statement: "(956)742-8679- (listed as 'Lolo' in Rincon's phone)-." The State contends that any error in the admission of this opinion testimony was harmless.

Assuming without deciding that appellant preserved error[10] and that the trial court erred by failing to redact appellant's name on the second line of the

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"objected whenever the prosecution presented the substance of the conversations . . . if the substance of those conversations dealt with the October 2012 conspiracy."

[8] Appellant does not refer to his running objection, which he made after Agent Saldana testified about much of the October 2012 conspiracy. The State notes, correctly, that the trial court granted appellant a running objection only as to statements made in furtherance of the second (February) conspiracy. So this objection did not obviate the need to object to statements arising out of the first conspiracy.

[9] The parties appear to agree that Exhibit 179 summarizes screenshots taken from messages and call logs of the LG phone. The detective's testimony at trial is not clear on this point because much of the State's questioning referred to "this phone," "the other phone," and "the phone." In fact, the State's questioning suggested that Exhibit 179 was a summary of the messages and calls from one of the phones obtained in the search of the van. Our review of Exhibit 177, however, confirms that Exhibit 179 summarizes Exhibit 177.

[10] Although the trial court overruled trial counsel's objection to the document as a whole, the trial court agreed to counsel's request that the document be redacted because the State had

document, we hold that appellant was not harmed. The erroneous admission of hearsay is nonconstitutional error, which requires reversal only if it affected appellant's substantial rights. *Fischer v. State*, 207 S.W.3d 846, 860 (Tex. App.—Houston [14th Dist.] 2006), *aff'd*, 252 S.W.3d 375 (Tex. Crim. App. 2008); *see also* Tex. R. App. P. 44.2(b). A substantial right is affected if the error had a substantial and injurious effect or influence on the jury's verdict. *Robinson v. State*, 461 S.W.3d 194, 200 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). On the other hand, the admission of hearsay is harmless if we have a fair assurance that the error had no influence or only a slight influence on the jury. *Saldinger v. State*, 474 S.W.3d 1, 7 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). We must consider the entire record to make this determination, including the nature of the evidence, the character of the alleged error and how it might be considered in connection with other evidence, the jury instructions, the State's and defense's theories of the case, closing arguments, and voir dire if applicable. *See Robinson*, 461 S.W.3d at 200.

We have a fair assurance that the errant reference to "Rincon's phone" in Exhibit 179 had no influence or only a slight influence on the jury. The detective

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not proven the phone belonged to appellant. The trial court redacted part of the first line, informing counsel, "It's not coming through." But counsel said, "Let me see it. I can see it." So, the trial court offered to make a copy of the document. Counsel said, "We can do that in a minute," and the State said it would not publish the document to the jury. Accordingly, it appears from the record that counsel reviewed the redacted version of the document and did not object to the trial court's failure to redact appellant's name from the second line of the document.

At least one other court has found waiver on similar facts in an unpublished opinion. *See Aguilera v. State*, No. 13-13-00650-CR, 2015 WL 7746996, at *6 (Tex. App.—Corpus Christi Nov. 24, 2015, no pet. h.) (mem. op., not designated for publication) (holding that the defendant failed to preserve his hearsay complaint when the appellant objected to the whole document based on hearsay, the trial court made some redactions but did not redact one of the statements challenged on appeal, counsel stated he had "no objection to it as redacted," and counsel did not complain to the trial court about the inadequate redaction; also holding "to the extent that [the defendant] challenges the correctness of the trial court's redactions on appeal, he has waived the complaint by failing to object or obtain an adverse ruling from the trial court on that basis").

who compiled Exhibit 179 never testified that any of the phones belonged to appellant, and the reference to appellant in Exhibit 179 was never read directly into the record. *Cf. Sanchez v. State*, 383 S.W.3d 211, 216 (Tex. App.—San Antonio 2012, no pet.) (finding constitutional Confrontation Clause error to be harmful in part because the inadmissible testimony was read directly into the record and emphasized during the State's closing). She testified that only one of the phones could be traced to its owner—Vazquez. Thus, her own alleged hearsay statement was undermined by her direct testimony. The fact that she testified at trial and was available for cross-examination on the subject also weighs against a finding of harm. *See Billings v. State*, 399 S.W.3d 581, 589 (Tex. App.—Eastland 2013, no pet.) (harmless error in the admission of "blatant hearsay" of a testifying witness when the witness was available for cross examination and his testimony at trial was more damaging than the inadmissible hearsay).

Although the State argued during closing that it was likely one of the two cell phones seized at the restaurant belonged to appellant, the State never mentioned Exhibit 179 or the alleged hearsay statement. Neither did trial counsel. This fact weighs against a finding of harm. *See Coleman v. State*, 428 S.W.3d 151, 162 (Tex. App.—Houston [1st Dist.] 2014, pet. ref'd) (finding error harmless even though both the State and trial counsel referred to the witness's testimony, but neither party specifically referenced the inadmissible hearsay). Trial counsel argued during closing that the jury should look at the phone records because none of the evidence from the phone records implicated appellant. The jury followed counsel's advice and requested the phone records during deliberations.

Further, we have reviewed these phone record exhibits, which exceed 375 pages. Exhibit 177, which contains the screen shots upon which Exhibit 179 was compiled, indicates that the phone belonged to Vazquez because it was synched

with various accounts using an "Angel Vazquez" email address. One such account was an "LG" account. This exhibit also contained a picture identical to Exhibit 183 (discussed above). The jury heard testimony that Vazquez, not appellant, had sent Exhibit 183 to the Informant. Accordingly, it is highly unlikely that the jury assigned any weight to Exhibit 179's unsubstantiated inference that one of the phones belonged to appellant.

Appellant's seventh issue is overruled.

## V. CONCLUSION

Having overruled all of appellant's issues, we affirm the trial court's judgment.

/s/ Sharon McCally
Justice

Panel consists of Justices Jamison, McCally, and Wise.
Do Not Publish — Tex. R. App. P. 47.2(b).