Affirmed and Opinion filed November 16, 2000.

In The

Fourteenth Court of Appeals

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NO. 14-99-00305-CR

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JULIAN CARL HUTTO, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 230th District Court
Harris County, Texas
Trial Court Cause No. 793,829

O P I N I O N

Appellant was charged by indictment with the offense of possession with intent to deliver more than four but less than 200 grams of cocaine. The indictment also alleged three prior felony convictions to enhance the range of punishment. A jury convicted appellant of the charged offense. Appellant pled true to the enhancement allegations and the jury assessed punishment at 35 years confinement in the Texas Department of Criminal Justice--Institutional Division. Appellant raises two points of error. We affirm.

I. Sufficiency Challenges

The first point of error contends the evidence is both legally and factually insufficient to support the jury's verdict.

A. Standards of Appellate Review

We will begin by establishing the appropriate standards of appellate review for these sufficiency challenges. When we are asked to determine whether the evidence is *legally* sufficient to sustain a conviction we employ the standard of *Jackson v. Virginia* and ask "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

When we determine whether the evidence is *factually* sufficient, we employ one of the two factual sufficiency formulations recognized in *Johnson v. State,* 23 S.W.3d 1 (Tex. Crim. App. 2000). In cases, such as this, where the appellant attacks the factual sufficiency of an adverse finding on an issue on which he did not bear the burden of proof, the appellant must demonstrate there is insufficient evidence to support the adverse finding. *Id*. at 11. Under a factual sufficiency challenge, the evidence is viewed without the prism of "in the light most favorable to the prosecution" but rather "in a neutral light, favoring neither party." *Id*. at 6. A reversal is necessary only if the evidence standing alone is so weak as to be clearly wrong and manifestly unjust. *Id*. at 8. The *Johnson* Court reaffirmed the requirement that in conducting a factual sufficiency review the appellate court must employ appropriate deference to avoid substituting its judgment for that of the fact finder. *Id*. at 7. To ensure this level of deference, the court of appeals, before ordering a reversal, should provide a detailed explanation supporting its finding of factual insufficiency by clearly stating why the fact finder's finding is insufficient and the court should state in what regard the evidence is so weak as to be clearly wrong and manifestly unjust. *Id*. at 8.

B. Factual Summary

1. The State's Case-In-Chief

At approximately 8:30p.m., on September 25, 1998, several officers of the Houston Police Department executed a search warrant for the residence located at 1218 West Webster Street in Houston, Harris County. The lead officer, Michael Burdick, entered the residence and found it to be occupied by appellant, a female and two minor children. Appellant was in the bedroom, seated on the bed in his underwear and no shirt, the female was in the kitchen and the children were in the bathtub.

Burdick entered the small bedroom and found a nine-millimeter pistol and white specks of suspected cocaine powder on top of the dresser. The pistol was loaded with five rounds of ammunition and one of the specks field tested positive for cocaine. However, the chemist, Leopoldo Vigil, tested the cotton swab used by Burdick to recover the substance and Vigil testified the swab contained "no controlled substance."[1] Inside the dresser, Burdick found $700.00 cash primarily in $20 bills. Several razor blades were found above the sink in the bathroom. Also, Burdick found three rolls of aluminum foil in the kitchen area. Additionally, Burdick recovered some documents in appellant's name from inside the residence. Burdick knew from a prior investigation that appellant lived in the residence.

Officer Michael Lumpkin was assigned to search the outside of the residence. In the course of his search, Lumpkin noticed a flowerpot, which contained soil, but no plant. Lumpkin moved the pot away from the residence, removed the soil from the pot and found a brown paper bag. Within the bag Lumpkin found several napkins covering aluminum foil which enclosed two plastic bags. Within these bags, Lumpkin saw what he recognized as one whole and one-half "cookie" of crack cocaine. This substance was later determined to be cocaine weighing 48.3 grams.

2. Appellant's Case-in-Chief

Appellant's lone witness was Natasha Winslow who was in a relationship with appellant wherein the two lived together. This relationship had produced one child. Winslow testified the residence at 1218 West Webster had been originally owned by appellant's grandmother who died in the summer of 1997.

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[1] Vigil also testified that on occasion a field test can "use up" the residue, which renders the chemist unable to detect a substance, if any, from the sample. Vigil also testified that field tests are not conclusive but only presumptive. Because this testing is inconclusive, we will not consider it in our analysis of whether the evidence is sufficient. *See infra*.

Following her death, appellant and Winslow had the residence restored. While this restoration was taking place, the house was vacant. The restoration was completed in mid-August and appellant began living in two locations: the residence at 1218 West Webster and the residence where they had been living, 5903 Cleveland.

On the night of the execution of the search warrant, Winslow arrived at the West Webster residence, put her two children in the bathtub and began unpacking items for her child's birthday party, which was to be held the following day. Winslow heard a loud noise, which was the officers using a battering ram to enter the residence. The officers ordered Winslow to get on the floor and she complied.

Winslow testified that she and appellant often stayed at the residence, ate some meals there and kept their clothes there. However, Winslow testified that she had never seen appellant using the razor blades; that she had never seen the crack cocaine in the residence; that she had never seen appellant "messing" with the flowerpot where the cocaine was found; that the money seized from the bedroom was hers and in the dresser drawer because she did not have a bank account; and that the aluminum foil found in the kitchen was used for cooking. When Winslow asked appellant where the pistol came from, appellant stated the pistol was his.

Finally, Winslow denied speaking with Officer Lumpkin and directing him to the backyard in his search for contraband.

iii. Rebuttal and Sur Rebuttal

The State recalled Officer Lumpkin in rebuttal. Lumpkin testified that he entered the residence and observed Winslow who at first told Lumpkin that he "needed to look into the back yard area." Winslow then took Lumpkin to that area and motioned toward the flowerpot. Lumpkin instructed Winslow to return to the house and Lumpkin searched the flowerpot and discovered the contraband. In explaining why he had not mentioned his conversation or this transaction during his initial testimony, Lumpkin stated that he had not been asked.

In sur rebuttal, Winslow was recalled as a witness and again stated that she had neither spoken to

Lumpkin, nor led him to the backyard.

C. Analysis

1. Legal Sufficiency

In possession of controlled substance cases, two evidentiary requirements must be met: first, the State must prove that appellant exercised actual care, control, and management over the contraband; and second, that he had knowledge that the substance in his possession was contraband. *See King v. State*, 895 S.W.2d 701, 703 (Tex. Crim. App.1995) (citing *Martin v. State*, 753 S.W.2d 384, 387 (Tex. Crim. App.1988)). The affirmative links doctrine is invoked to determine whether the State has met its burden of proof. The Court of Criminal Appeals explained this doctrine in *Brown v. State*, 911 S.W.2d 744, 747 (Tex. Crim. App. 1995):

> [U]nder our law, an accused must not only have exercised actual care, control, or custody of the substance, but must also have been conscious of his connection with it and have known what it was, evidence which affirmatively links him to it suffices for proof that he possessed it knowingly. Under our precedents, it does not really matter whether this evidence is direct or circumstantial. In either case it must establish, to the requisite level of confidence, that the accused's connection with the drug was more than just fortuitous. This is the whole of the so-called "affirmative links" rule.

In *Brown*, the State invited the court to overrule the affirmative links doctrine. In declining that invitation, the court declared the current state of the law as follows: "[E]ach defendant must still be affirmatively linked with the drugs he allegedly possessed, but this link need no longer be so strong that it excludes every other outstanding reasonable hypothesis except the defendant's guilt." *Id*. at 748.

Whether the theory of prosecution is sole or joint possession, the evidence must affirmatively link the accused to the contraband in such a manner and to such an extent that a reasonable inference may arise that the accused knew of the contraband's existence and that he exercised control over it. *See Travis v. State*, 638 S.W.2d 502, 503 (Tex. Crim. App. 1982). The mere presence of the accused at a place where contraband is located does not make him a party to joint possession, even if he knows of the contraband's existence. *See Oaks v. State*, 642 S.W.2d 174, 177 (Tex. Crim. App. 1982). When an

accused is not in exclusive possession of the place where contraband is found, it cannot be concluded he had knowledge or control over the contraband unless there are additional independent facts and circumstances that affirmatively link him to the contraband. *See Brown*, 911 S.W.2d at 748; *Cude v. State*, 716 S.W.2d 46, 47 (Tex. Crim. App. 1986).

The following factors have been considered when determining whether the evidence is sufficient to affirmatively link an accused with the controlled substance:

1. The contraband was in plain view;
2. The accused was the owner of the premises in which the contraband was found;
3. The contraband was conveniently accessible to the accused;
4. The contraband was found in close proximity to the accused;
5. A strong residual odor of the contraband was present;
6. Paraphernalia to use the contraband was in view or found near the accused;
7. The physical condition of the accused indicated recent consumption of the contraband in question;
8. Conduct by the accused indicated a consciousness of guilt;
9. The accused had a special connection to the contraband;
10. The place where the contraband was found was enclosed;
11. The occupants of the premises gave conflicting statements about relevant matters; and
12. Affirmative statements connect the accused to the contraband.

See Dixon v. State, 918 S.W.2d 678, 681 (Tex. App.—Beaumont 1996, no pet.); *Watson v. State*, 861 S.W.2d 410, 414-415 (Tex. App.—Beaumont 1993, pet. ref'd), *cert. denied*, 511 U.S. 1076 (1994). Additionally, some cases consider the quantity of the contraband as an affirmative link. *See Carvajal v. State*, 529 S.W.2d 517, 520 (Tex. Crim. App. 1975), *cert. denied*, 424 U.S. 926 (1976); *Ortiz v. State*, 930 S.W.2d 849, 853 (Tex. App.—Tyler 1996, no pet.); *Washington v. State*, 902 S.W.2d 649, 652 (Tex. App.—Houston [14th Dist] 1995, pet. ref'd). The number of the factors is not as important as the logical force the factors have in establishing the elements of the offense. *See Jones v. State*, 963 S.W.2d 826, 830 (Tex. App.—Texarkana 1998, pet. ref'd); *Gilbert v. State*, 874

S.W.2d 290, 298 (Tex. App.—Houston [1st Dist.] 1994, pet. ref'd).

We will consider each factor in the context of the instant case. The contraband was not in plain view but was hidden under soil in a flowerpot in the outside of the residence. Appellant occupied the residence along with Winslow and two young children. Documents in appellant's name were recovered from the residence and appellant consumed meals in, had clothes in, and slept in the residence. Indeed, when the search warrant was executed, appellant was sitting on the bed in his underwear.

The contraband was found outside the residence, which was conveniently accessible to appellant. There is no indication in the record that the contraband was found in close proximity to the accused, which would have been the case had the contraband been found in the bedroom dresser. There is no evidence of a strong residual odor of the contraband.

The record establishes that a set of scales was *not* found in the residence. However, razor blades were found and Burdick testified that razor blades were commonly used to cut the crack cocaine "cookie" into smaller pieces for sale. Furthermore, three rolls of aluminum foil were found, which Burdick described as a "tool for drug trafficking" used to contain and store contraband. Also we recall the loaded pistol, which was found in the bedroom. Finally, we note the $700.00 cash recovered from the dresser drawer. Burdick testified crack was commonly sold in $10.00 to $20.00 increments. The cash was predominantly in $20.00 bills, which is the denomination usually found in drug trafficking.

The physical condition of appellant did not indicate recent consumption of cocaine and appellant's conduct did not indicate a consciousness of guilt.

There was a special connection between appellant and the contraband in as much as the contraband was located on property, which was at least partially controlled by appellant. The contraband was found in an enclosed space. Appellant did not give conflicting statements about any relevant matters and there were no affirmative statements that connect appellant to the contraband.

The amount of contraband may be considered large. Both Lumpkin and Burdick testified the amount was normally possessed for the purpose of distribution and not personal consumption. The

contraband was estimated to have a value of between $1,500.00 and $2,000.00.

After considering these factors, we find the evidence sufficient to affirmatively link appellant to the contraband for the following reasons. First, appellant occupied the residence where the contraband was found. He and Winslow were the sole occupants of the residence for several weeks prior to the search. Second, paraphernalia was present at the premises. The razor blades were consistent with instruments used for cutting the cookies and the aluminum foil was consistent with transporting and storing the cocaine. Third, the cocaine was discovered in an enclosed space. Fourth, the quantity of contraband was an amount greater than what someone would possess for personal consumption.

In finding the evidence legally sufficient we have not forgotten the testimony of Winslow whose testimony provided non-incriminating hypotheses for the evidence which we have found affirmatively links appellant to the contraband. However, we are mindful that the jury is the sole judge of the credibility of the witnesses. *See Sharp v. State,* 707 S.W.2d 611, 614 (Tex. Crim. App. 1986), *cert. denied,* 488 U.S. 872 (1988). The jury may believe or disbelieve all or part of any witness's testimony. *Id.* Simply because the defendant presents a different version of the facts does not render the evidence insufficient. *See Maestas v. State*, 963 S.W.2d 151, 156 (Tex. App.—Corpus Christi 1998), *affirmed,* 987 S.W.2d 59 (Tex. Crim. App. 1999). By its verdict, the jury chose to believe the State's testimony and rejected Winslow's version of the events.

2. Factual Sufficiency

Having found the evidence legally sufficient to support the jury's verdict, we now turn to determine whether the evidence is factually sufficient. We are mindful that in a factual sufficiency review, the appellate court must be appropriately deferential to avoid substituting its judgment for the fact finder's. *See Johnson,* 23 S.W.3d at 7; *Santellan v. State,* 939 S.W.2d 155, 164 (Tex. Crim. App. 1997); *Clewis v. State*, 922 S.W.2d 126, 133 (Tex. Crim. App. 1996). This level of deference ensures that the appellate court will not substantially intrude upon the jury's role as the sole judge of the weight and credibility of witness testimony. *See Jones v. State,* 944 S.W.2d 642, 648 (Tex. Crim. App. 1997), *cert. denied,* 522 U.S. 832 (1997). We find the evidence factually sufficient for two primary reasons.

First, the only evidence that supports appellant's defensive theory that he was merely present at the residence was the testimony of Winslow, whose testimony was impeached by the testimony of Lumpkin. Because of this contradictory testimony, the jury was called upon to make a credibility determination to resolve the conflict. We cannot on one hand defer to the jury on this credibility determination and on the other hand conclude the evidence standing alone is so weak as to be clearly wrong and manifestly unjust. *See Johnson*, 23 S.W.3d at 11.

Second, Winslow testified that she was employed at Texaco at the time of the execution of the search warrant. This employment kept Winslow away from the residence at least eight hours a day for five days each week. She further testified that appellant had been injured and as a result of the injury was not working at this time. Consequently, Winslow was not in a position to know what conduct appellant undertook in her absence. The jury could have rationally found that appellant engaged in the drug trade while Winslow was working and did not engage in that activity when Winslow and the children were in the residence.

Therefore, even when the evidence is viewed without the prism of in the light most favorable to the prosecution, but rather in a neutral light, favoring neither party, we still cannot conclude the evidence is so weak that appellant's conviction is clearly wrong and manifestly unjust.

The first point of error is overruled.

II. Ineffective Assistance of Counsel

The second point of error contends trial counsel was ineffective. The standard by which we review the effectiveness of counsel at all stages of a criminal trial was articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *See Hernandez v. State*, 988 S.W.2d 770, 772 (Tex. Crim. App. 1999). The Supreme Court in *Strickland* outlined a two-step analysis. First, the reviewing court must decide whether trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. If counsel's performance fell below the objective standard, the reviewing court then must determine whether there is a "reasonable probability" the result of the trial would have been different but for counsel's deficient performance. A reasonable probability is a

"probability sufficient to undermine the confidence in the outcome." *Strickland*, 466 U.S. at 694. Absent both showings, an appellate court cannot conclude the conviction resulted from a breakdown in the adversarial process that renders the result unreliable. *See id.* at 687. *See also Ex parte Menchaca*, 854 S.W.2d 128, 131 (Tex. Crim. App. 1993); *Boyd v. State*, 811 S.W.2d 105, 109 (Tex. Crim. App. 1991), *cert. denied*, 502 U.S. 971 (1991).

The defendant bears the burden of proving an ineffective assistance of counsel claim by a preponderance of the evidence. *See Jackson v. State*, 973 S.W.2d 954, 956 (Tex. Crim. App. 1998); *Riascos v. State*, 792 S.W.2d 754, 758 (Tex. App.—Houston [14th Dist] 1990, pet. ref'd). Allegations of ineffective assistance of counsel will be sustained only if they are firmly founded and affirmatively demonstrated in the appellate record. *See McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996), *cert. denied*, 519 U.S. 1119 (1997); *Jimenez v. State*, 804 S.W.2d 334, 338 (Tex. App.—San Antonio 1991, pet. ref'd).

Appellant raises four specific allegations of deficient performance by trial counsel. We will address these allegations *seriatim*.

A. Discovery Motion

First, appellant contends trial counsel was deficient in failing to file a motion for discovery. Appellant claims failure to file such a motion demonstrates a lack of preparation. We find no support for this claim in the record. The record does demonstrate, however, that appellant filed several pretrial motions and the trial court conducted a hearing on two of those motions prior to trial. Additionally, appellant does not state what information, if any, would have been revealed had a motion for discovery been filed and discovery ordered by the trial court. Finally, as the State points out, in *Willis v. State*, we held the "[f]ailure to file pre-trial motions does not result in ineffective assistance of counsel." 867 S.W.2d 852, 857 (Tex. App.—Houston [14th Dist.] 1993, pet. ref'd) (citing *Huynh v. State*, 833 S.W.2d 636, 638 (Tex. App.—Houston [14th Dist.] 1992, no pet.). For these reasons, we hold appellant has failed to meet the first prong of *Strickland*.

B. Calling Winslow as a Witness

Second, appellant claims trial counsel was ineffective in calling Winslow as a witness because her testimony could be impeached. Many claims of ineffective assistance of counsel have been lodged at trial counsel for *not* calling a particular witness to testify at the trial. In response to these claims, the Court of Criminal Appeals has held an attorney has a professional duty to present all available testimony and other evidence to support the defense of his client. *See Ex parte Ybarra*, 629 S.W.2d 943, 946 (Tex. Crim. App. [Panel Op.] 1982). Therefore, criminal defense counsel has a responsibility to seek out and interview potential witnesses and the failure to do so is to be ineffective where the result is that any viable defense available to the accused is not advanced. *See id*.

In the instant case, appellant relied on the defensive theory that he was merely present and had no knowledge of the contraband at the residence. From the record evidence before us, the only way for appellant to advance this defensive theory was to testify personally or call Winslow as a witness. The indictment alleged three prior felony convictions for the purpose of enhancing the range of punishment. Each prior conviction was alleged to be possession of a controlled substance. Following the jury's verdict, appellant pled true to two of those allegations. As each of these convictions were within the last ten years, appellant was subject to being impeached had he testified on his own behalf. *See* TEX. R. EVID. 609(b). Under these circumstances, it is reasonable to assume appellant and trial counsel decided it would be in appellant's best interest for him to not testify. Therefore, Winslow was the only available witness to advance appellant's defensive theory. While calling Winslow as a witness brought with it the risk of possible impeachment with a prior inconsistent statement, that purported impeachment would not be effective unless the jury decided to believe Lumpkin over Winslow.

In this context, it is clear the decision to call Winslow as a witness was one of trial strategy. We will review matters of trial strategy only if an attorney's actions are without any plausible basis. *See Simms v. State*, 848 S.W.2d 754, 757 (Tex. App.—Houston [1st Dist.] 1993, pet. ref'd). As there is both a plausible and sound basis for calling Winslow as a witness, we hold appellant has failed to meet the first prong of *Strickland*.

C. Failure to Move for a Mistrial

Third, appellant argues trial counsel was ineffective in failing to move for a mistrial following improper argument by the State. During its closing argument the State made two improper arguments by commenting on matters outside the record and commenting on appellant's election to not testify. Trial counsel objected to each argument and those objections were sustained. Trial counsel then requested the jury be instructed to disregard the argument and the trial court so instructed the jury. However, trial counsel failed to move for a mistrial. Appellant argues this failure resulted in these errors not being preserved for appeal.

In order to preserve jury argument error for appellate review, trial counsel is required to object and pursue her objection until she receives an adverse ruling. Generally this is accomplished by making an objection, requesting an instruction to disregard and moving for a mistrial. *See Cook v. State*, 858 S.W.2d 467, 473 (Tex. Crim. App. 1993) (quoting *Coe v. State*, 683 S.W.2d 431, 436 (Tex. Crim. App. 1984)). If trial counsel does not continue until she receives an adverse ruling, the error is not preserved for appellate review. *See Nethery v. State*, 692 S.W.2d 686, 701 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 110 (1986). Because trial counsel did not request a mistrial and, therefore, did not receive an adverse ruling, the error committed by the State's improper arguments was not preserved for appellate review. Therefore, we find trial counsel was deficient and the first prong of *Strickland*, has been met.

We now turn to the second prong and determine whether there is a reasonable probability the result of the trial would have been different but for counsel's deficient performance. As noted above, had counsel moved for a mistrial, either of two things would have occurred, the motion would have been granted and the trial would have ended, or the motion would have been denied and the error preserved for appellate review. In either event, the question boils down to whether the trial court's instruction to disregard the improper remark cured the error. If the error was cured, the trial court was not compelled to grant a mistrial and, similarly, had the error been preserved, the point of error would be overruled because the error was cured. In sum, the only way appellant can prevail on this claim of ineffective assistance of counsel is if the improper argument constituted *per se* reversible error. *See Thomas v. State*, 812 S.W.2d 346, 350 (Tex. App.—Dallas 1991 pet. ref'd).

An error in jury argument or admission of testimony can generally be cured by an instruction to disregard. *See Gardner v. State*, 730 S.W.2d 675, 696 (Tex. Crim. App. 1987), *cert. denied*, 484 U.S. 90 (1987). For years, an exception to this general rule was an improper comment on the defendant's failure to testify. *See Long v. State*, 823 S.W.2d 259, 269-70 (Tex. Crim. App. 1992), *cert. denied*, 505 U.S. 1224 (1992); *Jackson v. State*, 745 S.W.2d 4, 15 (Tex. Crim. App. 1988), *cert. denied*, 487 U.S. 1241 (1988). However, of late, this exception has fallen into disfavor with at least two courts of appeals. *See Faulkner v. State*, 940 S.W.2d 308, 315 (Tex. App.—Fort Worth 1996, pet. ref'd.); *Chimney v. State*, 6 S.W.3d 681, 703-04 (Tex. App.—Waco 1999, pet. filed). While we may disagree with the holdings in these two cases, they make it clear that the State's improper argument was not *per se* reversible error. Therefore, we cannot find trial counsel's failure to preserve the error for appellate review created a reasonable probability the result of the trial would have been different but for counsel's deficient performance. Consequently, appellant cannot prevail under the second prong of *Strickland*.

D. *Franks v. Delaware*

Finally, appellant contends trial counsel was ineffective for failing to move to suppress the contraband which was the subject of the instant prosecution. Specifically, appellant argues the contraband was inadmissible because Officer Burdick's affidavit supporting the warrant stated the information provided by the confidential informant had always proven to be true and correct. However, Burdick testified pretrial that the informant's information had not resulted in arrests one hundred percent of the time.

Trial counsel filed a motion to discover the identity of the informant and a separate motion to suppress evidence. The search warrant and supporting affidavit were admitted into evidence at the suppression hearing. The affidavit states in relevant part that Burdick had "received information from a confidential informant that crack cocaine was being kept and sold at the listed location." The affidavit further states that Burdick had received information from "a confidential and reliable informant who has provided narcotics information in the past on at least 25 prior occasions. This informant's information has lead to numerous felony arrests and seizures of narcotics. The information provided by this informant has always proven to be true and correct."

At that hearing, Burdick testified and the following exchange occurred:

> Q. Okay. Now you also indicated that [the confidential informant] had offered information to you 25 times before this one, and that it had led to numerous arrests?
>
> A. That's correct also, ma'am.
>
> Q. Okay. Has it lead to an arrest every time that he has offered you information on the 25 times?
>
> A. No. Not 100 percent, no.
>
> Q. What is the percentage?
>
> A. I don't know exactly. Sometimes you execute search warrants and people are missing at residences or there is no narcotics present. Therefore, there was not an arrest made.

Later, Burdick testified that, based upon his prior experience with the confidential informant, he believed the informant to be a credible and reliable source.

Following this hearing, the trial court conducted an in camera inspection of Burdick's file and denied the motion to disclose the identity of the informant. The trial court did not suppress the contraband, which was the subject of this prosecution, but did suppress contraband seized at a different location.

We read appellant's allegation of ineffective assistance of counsel as failing to argue for suppression of the contraband under *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). *Franks* held that when a defendant makes a substantial preliminary showing that a false statement, made knowingly, intentionally, or with reckless disregard for the truth, is included in the search warrant affidavit and that the false statement was necessary to the finding of probable cause, the Fourth Amendment requires a hearing at the defendant's request. 438 U.S. at 155-56, 98 S.Ct. at 2676; *Hinojosa v. State*, 4 S.W.3d 240, 246-49 (Tex. Crim. App. 1999). We do not read the sentence in the affidavit: "The information provided by this informant has always proven to be true and correct," when considered in light of Burdick's testimony at the motion to suppress hearing to have been a false statement, much less one that was made knowingly, intentionally, or with reckless disregard for the truth. Consequently, appellant has failed to establish the first prong of *Strickland* in relation to this claim of ineffective assistance of counsel.

The second point of error is overruled.

The judgment of the trial court is affirmed.

/s/ Charles F. Baird
Justice

Judgment rendered and Opinion filed November 16, 2000.

Panel consists of Justices Yates, Edelman and Baird.[2]

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

[2] Former Judge Charles F. Baird sitting by assignment.