Affirmed and Memorandum Opinion filed June 15, 2010.

In The

Fourteenth Court of Appeals

NOS. 14-09-00357-CR
14-09-00358-CR

THE STATE OF TEXAS, Appellant

V.

TROY MAYFIELD, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause Nos. 1157810 & 1157811

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

A jury convicted appellee Troy Mayfield of possession with intent to deliver cocaine of more than four grams and less than 200 grams in cause number 1157810; the jury also convicted appellee of possession with intent to deliver 3,4-methylenedioxy methamphetamine of more than four grams and less than 400 grams in cause number 1157811. The trial court assessed appellee's punishment at 26 years' confinement in each cause number to run concurrently. Appellee filed motions for new trial. After holding a hearing, the trial court granted both motions for new trial. The State of Texas

appeals from the trial court's orders granting appellee's motions for new trial, contending that the trial court abused its discretion by granting a new trial.[1] We affirm.

Background

At the guilt-innocence phase of appellee's trial, the State called Detective David Kot, a street crime narcotics officer with the Pasadena Police Department, as its first witness. Kot testified that, on the evening of March 12, 2008, he was driving around the area of Richey Road and State Highway 225 — an area of town known for narcotics activity and prostitution. At approximately 8:20 p.m., Kot observed appellee driving alone in a white pick-up truck and changing lanes several times without signaling. Kot testified that changing lanes without signaling is a traffic violation that makes the driver subject to being arrested. Kot requested a patrol unit to stop appellee for traffic violations because Kot was driving an unmarked vehicle without emergency lights and was not in uniform.

Officer Marco Vela responded to Kot's request and pulled up behind appellee's truck. Kot and appellee were traveling almost next to each other because Kot wanted to look inside appellee's truck to ensure appellee was traveling alone. Kot testified that appellee suddenly swerved from the inside lane into Kot's outside lane. Kot had to brake to avoid a collision. Officer Vela then turned on his lights and siren and initiated a traffic stop. Appellee immediately pulled into the parking lot of a Valero gas station convenience store. Kot testified that he observed Vela interacting with appellee. After Vela briefly talked to appellee, Vela went to his patrol car, then returned to appellee's car; asked appellee to exit his truck; handcuffed appellee; placed appellee in the back of his patrol car; and arrested him for traffic violations.

Kot testified that no more than two minutes elapsed between the time appellee pulled into the parking lot and the time Vela handcuffed appellee and placed him in the back of his patrol car. Kot testified that Vela requested a wrecker and a canine unit to

[1] The State is entitled to appeal a trial court's granting of a motion for new trial. Tex. Code Crim. Proc. Ann. art. 44.01(a)(3) (Vernon 2006).

respond to the scene. The canine unit consisting of canine handler Officer Greg Carlson and canine Barry arrived and Vela left the scene to take appellee to jail. Kot then exited his car and observed Barry perform "a smell of the exterior of the vehicle." Barry walked around appellee's truck and alerted to narcotic odor on the passenger door seam. Kot decided to search the interior of appellee's truck. Inside the truck, Kot found a styrofoam food container on the dash board; inside the container, Kot found a warm bacon cheeseburger and French fries, and two black magnetic key holders. One of the key holders contained crack cocaine and the other contained numerous Ecstasy pills.

Before the trial court allowed the State to introduce the drugs recovered from appellee's truck into evidence at trial, the court gave trial counsel an opportunity to question Kot "regarding the stop" outside the jury's presence in light of appellee's motion to suppress.[2] Appellee's trial counsel filed a motion to suppress which stated that "any evidence obtained in this case should be suppressed" because "Officers had no probable cause to search Mayfield's vehicle because the search was conducted pursuant to an illegal arrest." The motion asserted that the arrest was "illegal" because appellee "was never taken before a magistrate or given written notice to appear in court for the traffic violation for which he was arrested."

During the hearing outside the jury's presence, trial counsel questioned Kot about appellee's arrest. Trial counsel asked Kot what "the proper procedure" is for appellee's "arrest to be a proper arrest" and if there is "anything that's done differently with a traffic offense arrest other than a regular arrest." Trial counsel also questioned Kot about whether he was aware that a person who is arrested for a traffic violation must be taken immediately before a magistrate. The trial court then interrupted trial counsel and stated:

> THE COURT: Let me interrupt. All right. The subject of the motion to suppression [sic] was probable cause for the stop. The probable cause for

[2] The motion to suppress was hand-delivered to the State on January 22, 2009; the motion to suppress was file-stamped on January 23, 2009 with the Harris County District Clerk. It is undisputed that the motion to suppress was before the court at the time of trial and, more specifically, at the time of Kot's testimony. Trial counsel acknowledged that he filed a motion to suppress before the beginning of trial.

the stop was a traffic violation. The subject of the search was search incident to arrest. And so, I think that at this point I can make a finding as to whether or not there was probable cause. Because if there's probable cause for the stop which led to the arrest, then I can — the law is pretty clear.

TRIAL COUNSEL: Well, what I'm challenging is the legality of the arrest, Your Honor, based on failure to follow proper procedure under Texas law.

THE COURT: Okay. I don't know — that doesn't have any effect on whether or not there was probable cause. Probable cause is was there — probable cause is stated and the testimony is that there was probable cause for the arrest based on the traffic violation. At the time that he was arrested, he was taken to jail?

DETECTIVE KOT: Correct.

THE COURT: All right. And while he was taken to jail — well, prior to him being taken to jail, I'm sure his person was searched.

DETECTIVE KOT: Correct.

THE COURT: And in the process of him going to jail his car was searched.

DETECTIVE KOT: Correct.

THE COURT: And impounded.

DETECTIVE KOT: Correct.

THE COURT: Although you haven't said that, but I know you didn't leave it on the street though.

DETECTIVE KOT: Yes, sir.

THE COURT: Now, whether or not he received a magistrate's warning and immediately essentially means as soon as possible.

TRIAL COUNSEL: Right.

THE COURT: Whether or not he received a warning from the magistrate isn't going to affect whether or not a police officer had a right to pull his car over.

TRIAL COUNSEL: No, it's not going to affect that at all.

THE COURT: Okay. So, that's — that's where I am now. Now, I don't know the — how we get to any illegal arrest and improper —

TRIAL COUNSEL: An illegal arrest —

THE COURT: — procedure.

TRIAL COUNSEL: Well, an illegal arrest that leads to a search incident to

an arrest makes that evidence illegal.

THE COURT: It wasn't an illegal arrest. It was based on probable cause. If it's based on probable cause, then it's square with the Constitution.

TRIAL COUNSEL: So, I guess what the Court is saying is that they didn't follow proper procedure which is mandated by Transportation Code, that the arrest holds up.

THE COURT: If there's probable cause, it's square with the Constitution. All right.

TRIAL COUNSEL: Okay.

THE COURT: Okay. So, you can make a bill of exception, sir. We'll do that — we won't do that now. We can do the bill of exception like before lunch. All right. Where you can ask whatever questions you think are necessary to complete your record and your objections. Because I believe that there's probable cause for the stop and arrest. And the search flows from the probable cause for the arrest. All right. It's just incident from the arrest. But on our next break — what we'll do is we'll go ahead and take five minutes for ourselves. And then on the next break, before you're excused, sir, he'll have an opportunity to make a bill of exception for his record.

DETECTIVE KOT: Yes, sir.

THE COURT: All right. Thank you.

After the trial court concluded that probable cause existed for appellee's stop and arrest, and that the search was proper incident to appellee's arrest, the State resumed the direct examination of Kot in the jury's presence:

THE STATE: Before we get back to the two envelopes, Detective Kot, I want to go back a little bit to something we talked about at the beginning concerning how you go about doing your job.

* * *

THE STATE: Is one of the ways that you complete your duties as an undercover narcotics officer speaking with other people and getting information?

DETECTIVE KOT: Yes, sir, it is.

THE STATE: Speaking with citizens?

DETECTIVE KOT: Yes, sir.

THE STATE: Just so the jury is clear, you didn't just pick Mr. Mayfield out

of a hat that night, did you?

DETECTIVE KOT: No, sir, I did not.

THE STATE: You knew something, didn't you?

DETECTIVE KOT: Yes, sir.

THE STATE: From a citizen, correct?

DETECTIVE KOT: Yes, sir.

THE STATE: You knew about information and what was inside the car, didn't you?

DETECTIVE KOT: Yes, I did.

THE STATE: What specifically did you know?

DETECTIVE KOT: I received information that the defendant would have black magnetic key holders containing crack cocaine.

The State then introduced into evidence the two magnetic key holders Kot recovered from appellee's truck and the drugs that were in the key holders. Kot testified that the 34 "off-white-colored rocks" admitted as State's exhibit 7 tested positive for crack cocaine. He testified that State exhibit 8 was "another black magnetic key holder with . . . [21] hand pressed tablets, . . . which field-tested positive for Ecstasy." Kot testified that the amount of drugs recovered was valued between $2,000 and $2,600 and was inconsistent with personal use; the amount was typical for "mid-level narcotic dealers."

Early on during Kot's cross-examination, the following exchange occurred:

TRIAL COUNSEL: Now, you just testified that you had knowledge from an informant that Mr. Mayfield had narcotics in the vehicle?

DETECTIVE KOT: Yes, sir. I received information from a concerned citizen stating that a subject named Troy operating a white Ford truck in that area had a black key holder containing crack cocaine either in or under his vehicle.

TRIAL COUNSEL: And so, were you like driving around looking for a white Ford truck or — I mean, how did you know —

DETECTIVE KOT: Yes. That's why I went to that area.

Trial counsel then questioned Kot in front of the jury about his experience with hiding drugs in key holders and why he did not obtain a search warrant to search appellant's

truck:

> TRIAL COUNSEL: If you knew or had gained knowledge or been told that there could be narcotics in the truck — the vehicle of Mr. Mayfield and he's under arrest, which at that point you can search the vehicle, correct?
>
> DETECTIVE KOT: Once the subject is under arrest, we can do an inventory search and we can do —
>
> TRIAL COUNSEL: Okay. What was the purpose of calling in the canine?
>
> DETECTIVE KOT: Just recently after I'd received information that there may be a magnetic key holder in this vehicle — just maybe a month prior to that, I had a canine on a call which located a magnetic key holder under a vehicle, which I wouldn't be able to find out at the scene, but a canine can detect it.
>
> TRIAL COUNSEL: Okay. So, it relates back to the magnetic key holders?
>
> DETECTIVE KOT: Excuse me, sir?
>
> TRIAL COUNSEL: It relates back to the magnetic key holders —
>
> DETECTIVE KOT: Yes, sir.
>
> TRIAL COUNSEL: — the reason you called the canine? Okay. And were there any — there's nothing found underneath the vehicle or any other key holders under the vehicle or —
>
> DETECTIVE KOT: No, sir.
>
> TRIAL COUNSEL: Only in the bag, correct?
>
> DETECTIVE KOT: In the box, yes, sir.
>
> TRIAL COUNSEL: In the box, right. I'm sorry. Okay. If you know — I mean, is this something that you first encountered? You said you had had a previous incident where there was a magnetic key holder, correct?
>
> DETECTIVE KOT: Correct, sir.
>
> * * *
>
> TRIAL COUNSEL: Okay. And what would be the reason why one would probably, based on your experience, want to transport narcotics in a magnetic key holder?
>
> DETECTIVE KOT: So, it can be well-hidden and not in their pockets.

Trial counsel also elicited more testimony regarding the confidential informant in front of the jury:

> TRIAL COUNSEL: Okay. And without revealing any information —

personal information, you say you received your information from a concerned citizen.

DETECTIVE KOT: Correct, sir.

TRIAL COUNSEL: Okay. Not a police officer?

DETECTIVE KOT: No, sir.

TRIAL COUNSEL: Did you consider that person to be reliable?

DETECTIVE KOT: Absolutely.

TRIAL COUNSEL: Is that based on previous experience with that person?

DETECTIVE KOT: Yes, it is.

TRIAL COUNSEL: So, let me ask you this, Officer or Detective Kot: What was the reason why there was no warrant obtained?

DETECTIVE KOT: The information I had was that the subject had narcotics on him, not that the subject had seen the narcotics. Had the subject that called me seen the narcotics, I would have been able to obtain a search warrant.

TRIAL COUNSEL: But in your work, haven't you obtained search warrants based upon reliable information from confidential informants?

DETECTIVE KOT: I have not written — I have not written a search warrant unless an informant that I had found to be credible and reliable has personally seen narcotics. I will not.

TRIAL COUNSEL: And were you told that this person — person had seen narcotics in Mr. Mayfield's vehicle?

DETECTIVE KOT: No, I was — the person told me that he had the magnetic key holder with crack cocaine in or under his vehicle. That's what I was told.

TRIAL COUNSEL: Do you have any idea how the person knew this?

DETECTIVE KOT: 'Cause the person — the person is around the element the cocaine element — the crack cocaine element.

After trial counsel passed Kot as a witness, he complained to the trial court outside the jury's presence about Kot's testimony regarding a confidential informant:

TRIAL COUNSEL: During the officer — Detective Kot's testimony, it was elicited from him through . . . [the State] that Detective Kot received a tip from a confidential informant that Mayfield contained narcotics in his vehicle. And that's news to defense counsel. There's nothing in the report that states that. I would never — had an opportunity to try and have him

> reveal that person to me or maybe subpoena or to maybe see if it's somebody that's related to Mr. Mayfield or related to a juror. I just haven't had the opportunity to deal with that.
>
> THE COURT: I'll let you ask him questions on cross-examination. We'll go from there.
>
> THE STATE: I'm not recalling him, Judge.
>
> THE COURT: I'm sorry?
>
> THE STATE: I'm not recalling him.
>
> THE COURT: Oh, did you already pass him?
>
> TRIAL COUNSEL: Yes, sir.
>
> THE COURT: Yeah, he's still on —
>
> TRIAL COUNSEL: I passed the witness. Yes, I did.
>
> THE COURT: Oh, you passed the witness.
>
> TRIAL COUNSEL: I didn't release him, but I passed him, yes. But —
>
> THE COURT: Okay. Well, I'll let you take up that matter outside the presence of the jury some other time. You can make your bill. You can make a bill and you can make — say what you will. But at this point, I don't know what you — there's no remedy for me.

The State called Pasadena Police Officer Marco Vela as its next witness. Vela testified that he responded to Kot's request for a marked unit because he was in the area. Vela testified that Kot had described appellee's vehicle as a white Ford F-150, provided the vehicle's license plate information, and advised that appellee was traveling in the inside lane. When Vela pulled up behind appellee's truck, he observed appellee cutting into Kot's lane and almost hitting Kot's vehicle. Vela testified that, after he activated his emergency lights, appellee pulled into a gas station. As Vela approached appellee's truck, appellee was looking around nervously. Vela could smell food and saw a closed food container "in the middle of the dashboard;" the food container appeared to be within appellee's reach.

Vela testified that he pulled appellee out of the truck and arrested him because appellee "kept looking around and looking back" and because he observed a "near collision;" additionally, Kot had advised him of appellee's erratic driving over dispatch.

Vela testified that appellee's action in looking around made him nervous because Vela did not know if appellee was expecting someone. Vela testified that he took appellee to jail so he could be processed and then "stand by to speak to the judge in the morning."

Pasadena Police Officer and canine handler Greg Carlson testified that Vela advised him that Kot requested canine Barry to check the exterior of appellee's truck for narcotics. Barry alerted to the passenger door seam.

Claudia Busby, a senior forensic chemist with the Pasadena crime laboratory, testified that she field-tested the drugs that were recovered from the magnetic key holders. She testified that she only analyzes the narcotics, and she does not test for fingerprints.

After the State rested, appellee took the stand. He testified that he is self-employed and runs a successful pressure washing business. He testified that on March 12, 2008, he was spending time with his children when an acquaintance named Black called him to ask for a ride. Black's car had broken down at his girlfriend's apartment and Black needed a ride to the Villa Americana apartment complex at 5901 Selinsky. When appellee picked up Black from his girlfriend's apartment complex, Black asked appellee to stop at the nearby Denny's so Black could purchase food. Appellee testified that Black went to Denny's and ordered food. Appellee remained in the truck to text on his phone and later entered Denny's to use the restroom. When appellee returned from the restroom, Black was still inside the Denny's and appellee continued waiting for Black by his truck and spent his time texting on his phone.

When Black exited Denny's, he asked appellee to drive him back to his girlfriend's apartment so he could drop off one container of food for her. Appellee drove Black to the apartment and told Black that he would go get gas while Black dropped off the food. Appellee testified that, even though a Shell gas station was close to the apartment complex, he wanted to buy gas at the Valero gas station farther down on Richey Road because gas was cheaper there. Appellee testified that he was trying to change from the inside to the outside lane to turn right into the Valero gas station.

Appellee admitted he almost had a collision because he was trying to turn right into the gas station. Vega then activated his emergency lights, and appellee immediately turned into the gas station because he had already intended to go to that gas station.

Appellee testified that Vega told him that he almost hit another car, so appellee looked around for that car. Appellee also testified that he told Vega he needed gas and showed him the fuel tank gauge. After appellee gave Vega his driver's license, Vega handcuffed appellee and placed him in the back of his police car. While appellee was sitting in the police car, Vega checked for outstanding warrants; checked in appellee's truck for appellee's insurance and registration; and conducted a plain view search. Vega then told him he was arrested for an illegal lane change. When appellee arrived at the jail, he was "booked under a hold for Detective Kot" and only discovered the next day that he was charged with two counts of possession of drugs with intent to deliver.

Appellee admitted that he had been nervous because he had been driving with a suspended driver's license. He explained that he couldn't get his license reinstated but had to drive his truck to conduct his pressure washing business. Appellee testified that he and his wife Pilar owned the truck and that both he and his wife used the truck — although appellee and his wife are separated. Appellee maintained that the drugs found in his truck belonged to Black. Appellee also testified that he could not reach the food container on the dashboard without getting out of his seat because he is only five feet and seven inches tall.

Appellee testified that, although he had changed his life, he still had friends and acquaintances who had access to illegal narcotics because he did not want to "knock them for what they do." Appellee knew Black was selling drugs from time to time. Appellee testified that, although he knew Black sold drugs from time to time, he did not know that Black would bring drugs into his car because he told Black not to bring any; appellee testified that he did not see any drugs when Black entered his truck. Appellee testified [t]hat's pretty much how I — I have to be. I have to make sure if I do pick somebody up, they don't have any drugs on them."

Appellee also admitted that he had been convicted of burglary of a motor vehicle in 1990, of theft in 1990, of two counts of possession of a controlled substance in 1992, and of delivery of a controlled substance in 2004.

On re-direct examination, trial counsel asked appellee if he had any other drug convictions since 2004; appellee answered, "I haven't had any drug convictions or anything else since that time." Trial counsel then stated, "Well, no drug convictions[.]" The trial court thereupon asked the State and trial counsel to approach for a bench conference:

> THE COURT: Okay. If you start asking him whether — questions that relate to whether or not he's conformed with a certain behavior or has avoided a certain behavior, then the State can certainly rebut that with an argument of conformity.
>
> THE STATE: And I have offense reports that he has been arrested several times since 2004.
>
> THE COURT: So, I'm going to ask the jury —
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> TRIAL COUNSEL: Well, that's not a conviction.
>
> COURT REPORTER: I'm having a hard time hearing you.
>
> THE COURT: All right.
>
> THE STATE: He just said in response to the question, I haven't been convicted or done anything else like that.
>
> THE COURT: Okay. Hang on, please. Thank you. Look, the question that you asked goes to the issue of whether or not he has — he's in conformity with a certain type of behavior. If you ask that question, the State will have an opportunity — I will give them an opportunity to rebut it. What I will do at this point is I will ask that that question be removed and not considered by the jury unless you want to proceed down that road.
>
> TRIAL COUNSEL: Well, I just thought — I'm obviously wrong — that I was just looking at the conviction. But if it's going to go to conformity, I'll withdraw it.
>
> THE COURT: Okay. All right. Thank you.
>
> (End of conference).
>
> THE COURT: Okay. That last question was withdrawn and the jury is not to consider the question or speculate as to any answer concerning that last question. It's withdrawn and you're not to consider it.

Shortly thereafter, trial counsel asked appellee, "Now, why would you — I mean, because you told the jury that you changed your life. Why would you drive around on a suspended driver's license not in conformance with the law?" Appellee responded that he "wasn't able to get" his driver's license back and that he needed to drive to conduct his pressure washing business. The trial court held the following bench conference:

> THE STATE: Judge, he just opened the door regarding conformity there with — when he specifically asked the question not in conformity with —
>
> THE COURT: You asked him about changing his life and being in — and so, I believe you've opened the door, but limited. The question is how far are you.
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> THE STATE: We have multiple offense reports of multiple instances of conduct even in the convictions and non-convictions that we want to put on rebuttal evidence on. So, would you like to talk about it with them outside the presence of the jury?
>
> THE COURT: Yes.
>
> (End of conference)
>
> THE COURT: Okay. I'm going to have to excuse the jury for a — briefly.
>
> (Jury out).
>
> THE COURT: All right. Take your seats. Okay. The argument is that the last question opened up the door as to whether or not he's been law-abiding.
>
> THE STATE: That's correct, Judge. He's just left the impression with the jury that since 2004 he's changed his life and thus has been conforming with the law but for the fact of driving with a license suspended.
>
> TRIAL COUNSEL: That's an incorrect statement.
>
> THE COURT: Well —
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> THE STATE: That fact is not true, Judge, which then allows us to go into —
>
> THE COURT: You'll have an opportunity — one second. You'll have an opportunity to respond, sir. Okay. Please continue.
>
> THE STATE: That's not true since 2004 that Mr. Mayfield has been in conformity with the law. We have multiple offense reports and other instances that we'd be happy to put on in a rebuttal case that completely rebut the testimony that he just — and the impression that he just left with

the jury.

THE COURT: Okay. What is it — what is the evidence that you believe is admissible?

THE STATE: [State describes evidence it intends to admit relating to drugs that were found in places associated with appellee]

THE COURT: All right. I'm ready to rule. You know, the statement essentially was prefaced with you stated [sic] earlier that you changed your life, then why were you driving with the DW — with a suspended license. And that was a statement that was made on direct yesterday, that I recall. I don't recall him saying that today. But it was again stated in front of the jury, which could leave an inference that he has been law-abiding but for the DWLS. Along with — well, I think the record is clear in regards to other statements or inferences that could be made on — or that could be left with in the jury's mind based on his direct testimony. And I think that he has opened the door. I think that those incidents in 2005, they not only rebut the inference, but they might very well go to the allegation or to his statement that he had no knowledge. And also the fact that he gave a phone call and he said no drugs around me, no drugs permitted. It goes on and on. It's coming in.

On re-cross examination, the State questioned appellee regarding other instances when drugs had been found in places to which appellee had access. Appellee testified that in April 2005 someone came to his place of business looking for his "father and for drugs." Appellee testified that he was not present when police arrived to search the business and that the police called him to the scene after finding cocaine and heroin.

Appellee also testified that the police executed a search warrant in May 2006 for a residence his wife, children, and stepson lived in because they were looking for his stepson. The police found cocaine, pills, heroin, and a stolen gun at the residence. Appellee testified that (1) he was not present at the time of the search and did not know where the narcotics were found; (2) he already had moved out of the residence because he and his wife had separated; (3) mail addressed to him was found at the residence because his children live at this address so he kept the address as his mailing address; and (4) he "later testified in front of the grand jury and was exonerated, cleared."

Before closing statements, trial counsel made a bill of exception with regard to his

motion to suppress stating that appellee's arrest was illegal because appellee was not immediately brought before a magistrate or released as mandated by the Transportation Code; accordingly, he contended that the search incident to arrest was illegal. Trial counsel also stated that (1) the defense was surprised when the State elicited testimony that Kot had received a tip from a confidential informant concerning appellee; (2) the State violated the court's discovery order by not providing the defense with any information that a confidential informant had been used in this case and thereby preventing the defense from discovering the identity of the informant; and (3) neither Kot's police report nor the State's open file "reveals that Detective Kot had a tip from a confidential informant that led to the arrest of" appellee.

During closing argument, trial counsel brought up the fact that Kot testified he received a tip from a confidential informant that appellee was transporting drugs. Trial counsel questioned why the State did not call the confidential informant as a witness and questioned whether Black could have been the informant Kot relied upon. Trial counsel also speculated whether Black set up appellee in order to help himself.

The State responded in its closing argument that Black would not have had enough time to set up appellee. The State also claimed that Black is a fictitious person who does not exist because appellee would have done "everything in his power to get him to court" if Black indeed existed. The State also focused on the confidential informant's tip stating, "What do we know about the tip Detective Kot received? 'Cause it's very key. We knew that a white Ford pickup would be carrying crack cocaine and Ecstasy in black magnetic key holders. And don't you know, lo and behold, what do we find with Mr. Mayfield? Black magnetic key holders containing crack cocaine and Ecstasy. He wasn't set up. There wasn't a setup."

The jury returned a guilty verdict, and the trial court sentenced appellee to 26 years' confinement in each cause number to run concurrently. On January 27, 2009, appellee's appellate counsel filed motions for new trial in each cause number "based upon Rules 21.3(b) and 21.3(h)" of the Texas Rules of Appellate Procedure, and based

"upon the fact that . . . [appellee] received ineffective assistance of trial counsel."

On February 11, 2009, appellee filed pro se motions for new trial in each cause number asserting that (1) the trial court erred in not hearing his motion to suppress before trial began; (2) the trial court erred by allowing the arrest of appellee "to stand without the police report for arrest of traffic violation;" (3) the district attorney violated the motion for discovery by not delivering *Brady*[3]material to the defense; and (4) the district attorney violated appellee's "rights to a fair trial and due process of law by using testimony evidence regarding C. I. [confidential informant] that was not in the police report."

The trial court presiding over appellee's trial also presided over the motion for new trial hearing on March 26, 2009. At the hearing, appellee's appellate counsel called trial counsel as a witness; trial counsel previously had an opportunity to review the trial record. Trial counsel acknowledged that before trial he filed a motion to suppress the drugs found in appellee's truck and then articulated his argument to the trial court during trial because his motion to suppress was carried with the trial. Trial counsel acknowledged asking the trial court "to find that the officer didn't have probable cause to arrest and then subsequently search" appellee's truck because of a violation of the Transportation Code "[w]hich would have made the arrest invalid." Trial counsel also acknowledged that the trial court denied his motion to suppress.

Appellate counsel then read for the record Kot's trial testimony regarding the tip he received from a confidential informant and proceeded to ask trial counsel why he did not "make a proper hearsay objection before" Kot stated that an unnamed citizen told him appellee "would have black magnetic key holders containing crack cocaine." Trial counsel replied that it was "imperative that the Court heard the testimony from police officers in this case regarding their credibility" because "the motion [to suppress] was still being heard." Trial counsel stated: "When the State elicited the information about a

[3] *Brady v. Maryland*, 373 U.S. 83 (1963).

credible witness, in my mind I'm thinking okay, this is new. This is a surprise. I need to object. I'm also thinking well, you know, we have a motion to suppress that has a case that stipulates that. The Court has discretion to decide whether to suppress the — grant the motion to suppress regarding whether or not the witnesses in the case for the State or — were credible or not credible."

The following exchange occurred between appellate counsel and trial counsel:

> APPELLATE COUNSEL: Do you — do you understand as a lawyer that before Detective Kot testified in front of the jury as to what this citizen told him about the defendant carrying crack cocaine in a black magnetic key holder, that you could have approached the Court and asked the Court to hold the hearing — motion to suppress — excuse me — outside the presence of the jury before Detective Kot said what he said about the citizen's complaint or citizens' information? Do you know that?
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> TRIAL COUNSEL: No.
>
> APPELLATE COUNSEL: Okay. So, as a lawyer you didn't know that you could ask for that? Is that what you're saying?
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> TRIAL COUNSEL: Well, no. I know I could ask for it. We can ask for a lot of things. That's not a reason the Court — that doesn't mean you're going to get it.
>
> APPELLATE COUNSEL: I understand.
>
> TRIAL COUNSEL: But yes, I could have asked for it.
>
> APPELLATE COUNSEL: Okay. And you didn't ask for it?
>
> TRIAL COUNSEL: No, I didn't.
>
> APPELLATE COUNSEL: Okay. Do you think looking back upon this case that it would have been a better trial strategy to object to the hearsay testimony about the citizen saying to Detective Kot that the defendant had these drugs on him?
>
> * * *
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> TRIAL COUNSEL: Yeah. At any trial I've had where there was not a motion to suppress being heard, I would have immediately objected to that as hearsay. Not only that, but it's prejudicial to my client.
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> APPELLATE COUNSEL: It's prejudicial to your client because that is information that links the drugs that were found in the car to Mr. Mayfield.
>
> TRIAL COUNSEL: Well, it's information that does link it to Mr.

Mayfield. But when you also have the witness stating credible, reliable informant —

APPELLATE COUNSEL: Yeah —

TRIAL COUNSEL: — I mean, it's almost like, you know, the error — the harm for error is caused. It's just you can't get over it. I mean, it's an automatic guilty as far as I'm concerned.

APPELLATE COUNSEL: So, if — and I want you to state your words. I don't want to state your words for you. Did you have a sound plausible trial strategy for not objecting to that hearsay testimony?

TRIAL COUNSEL: The only strategy I can offer you is looking back to Gray V State [sic]. If you read that case, you'll see where it goes. And it totally leaves it up to the trial court's discretion regarding whether to grant that motion to suppress regarding the witness' credibility or lack of.

APPELLATE COUNSEL: Aside from the motion to suppress issue, which you now know that you could have done outside the presence of the jury and not in front of the jury, aside from that as you've very well articulated, did you have any sound trial strategy for letting Detective Kot or for at least not objecting to that testimony regarding the citizen saying the defendant had these drugs on him?

* * *

TRIAL COUNSEL: Even if I did — I mean, this happened fast. So, I had to think on my feet. I mean, there was never anything mentioned before in the record or offense report regarding any type of credible, reliable informant. So, when this information came up, I saw it as an opportunity that — you know, for the Court to see that these police officers involved in this case may not have been very credible. And that would go back to a basis for granting my motion to suppress.

APPELLATE COUNSEL: I understand that. But you can do that outside the presence of the jury.

TRIAL COUNSEL: Well, that was a decision that I just did not decide to do. And that is, ask for a motion outside the presence of the jury. We made a decision, an agreement, and that's the way it went.

APPELLATE COUNSEL: Do you think that there is any — do you understand that you should have had that hearing outside the presence of the jury? You and I have talked about that.

TRIAL COUNSEL: Are you asking me did I think that before the trial started or during?

APPELLATE COUNSEL: I'm asking you right now, looking back on it.

TRIAL COUNSEL: Well, looking back on it from what happened in this trial, I would probably argue for having a motion to suppress outside the presence of the jury.

APPELLATE COUNSEL: Okay. And you and I talked earlier also about that. And I think you indicated to me that regarding this objection or this hearsay testimony, because you had the motion to suppress issue so much on your mind, that you missed — you just missed the hearsay objection on that issue.

TRIAL COUNSEL: Yes. Because it weighed on whether or not it would be better to object or to allow the testimony to come in. Again, referring back to Gray V State [sic].

APPELLATE COUNSEL: Explain to me, if you will, and to the Judge how it is ever better to let in evidence that — for lack of a better term buries your client on a guilty verdict regarding that testimony — it's that strong — versus objecting to it and letting the Judge make a ruling. Maybe you can keep it out. Maybe you can keep the jury from hearing this testimony which absolutely links the defendant to the drugs. Explain that to me.

TRIAL COUNSEL: Explaining now from what I've learned from this trial, I would never say it was better to allow the testimony in.

APPELLATE COUNSEL: Okay. I'd like to take you now to page — Volume 3, Page 77. And this is part of your cross-examination of Detective Kot on Page 77 beginning . . . this is a question by you to Detective Kot. He's still on the stand. 'Now, you just testified that you had knowledge from an informant that Mr. Mayfield had narcotics in the vehicle.' . . . 'Answer: Yes, sir. I received information from a concerned citizen stating that a subject named Troy operating a white Ford truck in that area had a black key holder containing crack cocaine either in or under his vehicle. . . . did you have a sound plausible trial strategy for cross-examining the police officer on the piece of evidence that gets the defendant found not guilty? The worst piece of evidence in the whole case, you brought up in cross-examination. Did you have a reason why you brought that up again?

TRIAL COUNSEL: It goes back to what I just stated earlier about why I didn't object.

THE COURT: Go ahead and restate it, sir.

TRIAL COUNSEL: Basically that, you know, I felt like the Court should see and I think the Court probably could reason that the officers involved in this case obviously had a pretextural [sic] stop in mind when they arrested or when they stopped Troy Mayfield. And that again, I was going through my case thinking that the whole time, motion to suppress.

> APPELLATE COUNSEL: Do you know that the whole line of cases regarding pretext stops have been overruled — have been overturned?
>
> TRIAL COUNSEL: Yeah, you're right. But I wasn't arguing a pretext stop in the motion.
>
> APPELLATE COUNSEL: Okay.
>
> TRIAL COUNSEL: But it doesn't mean it didn't happen.
>
> APPELLATE COUNSEL: I understand that. I understand that. So, do you see . . . not only is the officer again reiterating to the jury about the defendant having drugs, but now he has — upon your cross-examination question and his answer to your question — has now been allowed to tell the jury a little bit more? Now, he even tells the jury that the subject's first name is Troy, which now we know that the defendant in this case's first name is Troy. And he also adds in that this person Troy is operating a white Ford truck. That is something — those two pieces of evidence are now added in front of the jury upon the answer to your cross-examination question, correct?
>
> TRIAL COUNSEL: Correct.
>
> APPELLATE COUNSEL: Other than what you've already indicated, do you think it helps or hurts your client for the jury now to know even more information from the — this citizen about Troy operating a white Ford truck?
>
> TRIAL COUNSEL: Well, that specific line —
>
> APPELLATE COUNSEL: I'm sorry. I wasn't — I'm sorry. That had a black key holder containing crack cocaine in the vehicle.
>
> TRIAL COUNSEL: It definitely hurt.

Appellate counsel also questioned trial counsel's trial strategy in further eliciting information from Kot regarding the confidential informant and his knowledge about the magnetic key holder's in appellee's truck:

> TRIAL COUNSEL: The only strategy, Mr. Graber, will be again trying to show the Court that the police officers involved in this case were not credible witnesses based on what they put in their offense report, based on what they testified to, based on what the drug — the traffic stop stated, that it was a traffic stop or a drug stop, rather. But he was arrested for a traffic offense. It all went back to witness credibility. I had to deal with it because I didn't object to it when initially it was elicited from the State.
>
> APPELLATE COUNSEL: So, because you didn't — in your trial your thought process is to go into this again because you realize that you should

> have objected to it when it first came up on direct examination? Is that what you meant by your answer?
>
> TRIAL COUNSEL: Yes.
>
> APPELLATE COUNSEL: You now realize, I believe — you tell me if I'm correct — that this whole line of questioning should have been done outside the presence of the jury. You should — you realize you should have done that, correct?
>
> TRIAL COUNSEL: Yes.

Appellate counsel also asked if there was a reason trial counsel brought up during closing argument Kot's testimony that he received a tip from a confidential informant that appellee had been transporting drugs. Trial counsel responded, "Yes. Because I want to show the jury that the police officers were not credible. . . . Because it was a great piece of evidence for" the State and trial counsel believed the State would stress that evidence in its closing argument to the jury.

On cross-examination at the new trial hearing, trial counsel testified that only "after the reliable informant was mentioned" did he develop a strategy about painting Black as the confidential informant. The parties then presented argument to the trial court.

After appellate counsel presented his argument and during the State's closing argument, the trial court asked the State, "What other link[s] besides the statement of the confidential informant that Mr. Mayfield would be in possession of the magnetic key holder with drugs in it were there?" The State replied that appellee admitted picking up Black because Black had car trouble; driving to Denny's to buy food; driving Black back to the apartment complex to allow Black to drop off his girlfriend's food; driving to a gas station to get gas; and agreeing to pick up Black again to drive him to another apartment complex.

The trial court then stated, "another question that I have is — I don't see this issue even coming up had the investigating officer informed the lawyers that there was a confidential informant." The trial court *sua sponte* called Kot as a witness and, after appellate counsel questioned Kot, the trial court questioned Kot as follows:

> THE COURT: All right. So, when the — when defense counsel testified that it was true that he did not know of that information until it came out in the testimony, that would be true to the best of your recollection?
>
> DETECTIVE KOT: Yes, sir.
>
> THE COURT: Okay. Are you aware that it's a requirement to inform both the State of Texas, prosecuting attorneys, and the defense of all relevant information concerning an arrest? Are you aware of that?
>
> DETECTIVE KOT: Yes, sir. All relevant information, yes, sir.
>
> THE COURT: Okay. And you're also aware of the fact that if you — if the reason you were following Mr. Mayfield that night was based on a confidential informant, that that would be relevant information?
>
> DETECTIVE KOT: Yes, I —
>
> THE COURT: Okay. Because it's a question that both the State may have regarding the credibility of that informant as well as the defense in determining, you know, whether or not that informant would have to be burned.
>
> DETECTIVE KOT: Yes, sir.
>
> THE COURT: Okay. But that's a decision that I make as a judge. You understand that?
>
> DETECTIVE KOT: Yes, sir.
>
> THE COURT: Okay. The — the people that make the arrests — okay — they don't make the determination of who or whether or not a confidential informant will be turned over. That's a call that the judge makes. You understand that?
>
> DETECTIVE KOT: Correct, sir.
>
> THE COURT: Okay. So, you know that even if the confidential informant is afraid or whatever, that that's still a call that I make?

The trial court thereafter announced that it would not immediately make a ruling and that it would read the cases provided by appellate counsel and the State. On March 27, 2009, the trial court signed an order including both cause numbers stating as follows: "The Defendant's Motion for New Trial filed March 27, 2009, is hereby: Granted."

The State filed its objection to the motion for new trial on that same day. The State claimed that appellee requested a new trial on the basis of ineffective assistance of counsel. The State objected to the trial granting a motion for new trial "on any basis

other than that set forth in Defendant's timely filed motion" and objected "to any purported oral amendments to" the motions for new trial "that may have been made during the hearing for new trial."

The State recounted that, at the new trial hearing, the trial court questioned Kot *sua sponte* about why he "did not include the hearsay statement and information about the concerned citizen in his offense report." The State also recounted that the trial court "expressed its strong disagreement with the detective's decision not to include the information in the offense report at the conclusion of the detective's testimony at the hearing." Accordingly, the State objected to the trial court "considering the detective's decision not to include information in the offense report as a basis for the motion for new trial because it was not a ground alleged in the motion. Therefore, it would be an untimely amendment as the hearing occurred outside the 30 days required to amend pursuant to Texas Rule of Appellate Procedure 21.4(b)."

The State filed a timely notice of appeal.

Analysis

In its first issue, the State argues that the trial court abused its discretion by granting appellee's motions for new trial on the basis of ineffective assistance of counsel because "the record does not support the trial court's findings that [trial] counsel performed deficiently or that prejudice resulted." In its second issue, the State contends that the trial court abused its discretion by granting appellee's motions for new trial because "the information appellee claimed was *Brady* evidence was not mitigating or exculpatory, he received the information in time and put it to effective use during the trial, and no prejudice resulted from the late disclosure."

A. Standard of Review

The granting of a new trial rests within the sound discretion of the trial court. *Lewis v. State*, 911 S.W.2d 1, 7 (Tex. Crim. App. 1995) (en banc). An appellate court will reverse the trial court's decision only when that decision is so clearly wrong as to lie

outside the zone in which reasonable persons might disagree. *State v. Provost*, 205 S.W.3d 561, 566-67 (Tex. App.—Houston [14th Dist.] 2006, no pet.). An appellate court is not to substitute its judgment for that of the trial court; rather the appellate court's role is to examine the record to determine whether the trial court granted a new trial without reference to any guiding rules or principles or, in other words, whether the trial court's decision was arbitrary or unreasonable. *See Lewis*, 911 S.W.2d at 7; *State v. Jones*, No. 678-02, 2004 WL 231309, at *8 (Tex. Crim. App. Jan. 28, 2004) (not designated for publication). The appellate court is to presume the trial court correctly granted a new trial, and the State has the burden to establish the contrary. *State v. Belcher*, 183 S.W.3d 443, 447 (Tex. App.—Houston [14th Dist.] 2005, no pet.). If no findings of fact or conclusions of law were made by the trial court, the trial court's judgment granting a new trial must be upheld if any appropriate ground exists to support it. *Id.*

The trial court is in the best position to evaluate the credibility of the witnesses. *Kober v. State*, 988 S.W.2d 230, 233 (Tex. Crim. App. 1999); *Jones*, 2004 WL 231309, at *9. The trial court may choose to believe or disbelieve all or any part of the witnesses' testimony. *See State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000) (en banc); *Jones*, 2004 WL 231309, at *9. The role of an appellate court is limited to viewing the evidence in the light most favorable to the trial court's ruling and insuring that the standards used to determine whether counsel was ineffective are properly applied. *Jones*, 2004 WL 231309, at *9. We must defer to the trial court's ruling to the extent that any reasonable view of the record will support that ruling. *Charles v. State*, 146 S.W.3d 204, 210 (Tex. Crim. App. 2004), *superseded in part on other grounds by* Tex. R. App. P. 21.8(b) *as recognized in Herndon v. State*, 215 S.W.3d 901, 905 n.5 (Tex. Crim. App. 2007).

Appellee's motions for new trial were based on Texas Rule of Appellate Procedure 21.3, sections (b) and (h). In his motions, appellee also alleged that "he received ineffective assistance of trial counsel pursuant to *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 674, 104 S. Ct. 2052 (1984)."

The Sixth Amendment right to counsel confers upon a defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, at 685-86 (1984). It does not confer the right to perfect counsel. *See Ex Parte Welborn*, 785 S.W.2d 391, 393 (Tex. Crim. App. 1990) (en banc). The Sixth Amendment "envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Strickland*, 466 U.S. at 685. Therefore, the "benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id*. at 686.

Under *Strickland*, a defendant seeking to challenge trial counsel's representation must establish that his counsel's performance (1) was deficient; and (2) prejudiced his defense. *Id*. at 687; *Smith v. State*, 286 S.W.3d 333, 340 (Tex. Crim. App. 2009). To show deficiency, a defendant must prove by a preponderance of the evidence that his counsel's representation objectively fell below the standard of professional norms. *Smith*, 286 S.W.3d at 340. To show prejudice, a defendant must show there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. "'Reasonable probability'" is a "'probability sufficient to undermine confidence in the outcome,'" meaning "'counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Id*. (quoting *Strickland*, 466 U.S. at 687, 694).

In reviewing the trial court's granting of a motion for new trial based on ineffective assistance of counsel, we do not apply the *Strickland* test in a *de novo* fashion. *State v. Kelley*, 20 S.W.3d 147, 151 (Tex. App.—Texarkana 2000, no pet.); *State v. Gill*, 967 S.W.2d 540, 542 (Tex. App.—Austin 1998, pet. ref'd). Instead, we review the trial court's application of the *Strickland* test through the prism of the abuse of discretion standard. *Kelley*, 20 S.W.3d at 151; *Gill*, 967 S.W.2d at 542. We will determine only whether a finding of ineffective assistance of counsel was clearly wrong and outside the zone of reasonable disagreement so as to amount to an abuse of discretion. *Kelley*, 20

S.W.3d at 151; *see Gill*, 967 S.W.2d at 542.

B. Ineffective Assistance of Counsel

In its first issue, the State argues that the trial court abused its discretion by granting appellee's motions for new trial on the basis of ineffective assistance of counsel.

The State first contends that trial counsel was not ineffective for permitting admission of certain extraneous offense evidence "because appellee's actions, not trial counsel's, created the false impression the prosecution offered the evidence to refute." Although trial counsel instructed appellee to merely answer "no" when asked about any convictions between 2004 and the trial date, appellee did not follow his trial counsel's instructions and volunteered that he had not done "anything else." The State then introduced extraneous offense evidence. The State also argues that the extraneous offense evidence was admissible to rebut appellee's defense under the doctrine of chances.

Second, the State contends that trial counsel was not ineffective for failing to object to Kot's recounting of information he received from a confidential informant because the State did not offer it to prove the truth of the matter asserted. The State contends that, even if Kot's testimony was hearsay, "hearsay is admissible to address a motion to suppress evidence;" the State and trial counsel "consensually relitigated the suppression motion throughout the trial;" and trial counsel's strategy was to refrain from objecting to Kot's testimony so the trial court could evaluate Kot's credibility and trial counsel could ask the trial court to reconsider "the suppression issue at the close of the evidence." Additionally, the State claims that trial counsel's decision not to object to Kot's testimony comported with a plausible trial strategy because trial counsel decided to utilize Kot's testimony and argue that Black was in fact Kot's informant.

Third, the State contends that trial counsel was not ineffective for failing to request disclosure of the confidential informant before trial because Kot failed to include any information regarding a confidential informant in his offense report and trial counsel was

therefore unaware of a confidential informant. The State further argues that, even if trial counsel had requested disclosure of the informant during trial, trial counsel "could not have met the burden to require disclosure of the informant" pursuant to Texas Rule of Evidence 508. The State also claims that trial counsel's decision not to request disclosure was based "on a plausible strategy that permitted him to presume before the jury that" appellee's friend Black "was the informant, if one existed."

Finally, the State asserts that appellee failed to show that he was prejudiced by trial counsel's alleged deficiencies. According to the State, "[t]here is no reasonable probability that the information from the informant changed the outcome of the trial in light of appellee's chosen defense." The State further argues that any "prejudicial effect of the offenses was minimal and unlikely to undermine confidence in the verdict" because appellee admitted having "three controlled substance convictions, including a delivery conviction in 2004," and the "testimony that police found drugs around him in the past, but that he was not convicted of any offense as a result, would have far less of a negative impact than his admission to the three drug convictions."

1. *Strickland*'s First Prong

The trial court's order did not state the basis for granting appellee's motions for new trial. At the motion for new trial hearing, appellate counsel vigorously criticized not only trial counsel's inaction in failing to object on hearsay grounds to Kot's testimony on direct examination regarding the tip he received from a confidential informant, but also his action in eliciting on cross-examination more damaging testimony from Kot regarding specific information he received from a confidential informant. Appellate counsel questioned why trial counsel would bring up "the worst piece of evidence in the case" on cross-examination and then during his closing argument bring up "again the piece of evidence that really hurts the defendant" and remind the jury that Kot "had information that Troy Mayfield was transporting drugs."

We begin by addressing the State's contention that "trial counsel was not ineffective for failing to object to Detective Kot's recounting of the information he

received from the confidential informant" because (1) the State did not offer the testimony to prove the truth of the matter asserted; and (2) even if Kot's testimony was hearsay, "hearsay is admissible to address a motion to suppress evidence" and trial counsel's decision not to object to Kot's testimony regarding information he received from a confidential informant comported with a plausible trial strategy.

To show ineffective assistance of counsel for the failure to object during trial, a defendant must show that the trial court would have committed error in overruling the objection. *Ex parte White*, 160 S.W.3d 46, 53 (Tex. Crim. App. 2004). The State contends that Kot's testimony was not objectionable hearsay because the State did not offer it for the truth of the matters asserted; the State contends this testimony was offered "to explain what drew Detective Kot's attention to appellee's vehicle."

"[T]estimony by an officer that he went to a certain place or performed a certain act in response to generalized 'information received' is normally not considered hearsay because the witness should be allowed to give some explanation of his behavior." *Poindexter v. State*, 153 S.W.3d 402, 408 (Tex. Crim. App. 2005). "But details of the information received are considered hearsay." *Id*. "The appropriate inquiry focuses on whether the 'information received' testimony is a general description of possible criminality or a specific description of the defendant's purported involvement or link to that activity." *Id*. (quoting *Head v. State*, 4 S.W.3d 258, 261 (Tex. Crim. App. 1999) (en banc)). The court also stated:

> Frequently, testimony will have an impermissible hearsay aspect along with a permissible nonhearsay aspect. Almost always it will be relevant for a testifying officer to relate how she happened upon the scene of a crime or accident; thus, it is permissible for her to testify that she was acting in response to "information received." "An arresting officer should not be put in the false position of seeming just to have happened upon the scene, he should be allowed some explanation of his presence and conduct." The police officer, however, should not be permitted to relate historical aspects of the case, replete with hearsay statements in the form of complaints and reports on grounds that she was entitled to tell the jury the information upon which she acted.

Id. (quoting *Schaffer v. State*, 777 S.W.2d 111, 114-15 (Tex. Crim. App. 1989) (en banc) (internal citations omitted)). The court then concluded that a police officer's testimony regarding information he received from a confidential informant constituted objectionable hearsay: "He [the informant] gave me some information about that residence, the subject in that residence, Poindexter, *being in possession of and selling narcotics.*" *Id*. (emphasis in original).

Kot testified that he "received information that the defendant would have black magnetic key holders containing crack cocaine." Kot's testimony was not merely a generalized description of possible criminality that explained Kot's presence in the area and his attention to appellee's truck. Kot revealed specific details of the information from the confidential informant; he "provided far greater detail than was reasonably necessary to explain why" Kot decided to follow appellee's truck. *See Langham v. State*, 305 S.W.3d 568, 580 (Tex. Crim. App. 2010). Kot's testimony was inadmissible hearsay and trial counsel should have objected to it. The trial court would have committed error in overruling a hearsay objection to Kot's testimony.

We next address the State's contention that trial counsel was not ineffective because his failure to object to Kot's testimony regarding information from a confidential informant comported with a plausible trial strategy. The State contends that trial counsel did not object because he (1) "considered the evidence essential to attacking Kot's credibility" and "hoped the trial court would change its suppression ruling after learning Kot did not include the information [about the informant] in his offense report;" and (2) decided to utilize Kot's testimony to argue that Black was in fact Kot's informant, "which would have explained the specificity of the information given to police."

We need not speculate about trial counsel's strategy because we have a detailed motion for new trial hearing record before us. That record includes extensive testimony from trial counsel regarding his thought process.

Trial counsel acknowledged that his failure to object to Kot's testimony was not based on trial strategy. Trial counsel admitted that he was so focused on the motion to

suppress that he "missed the hearsay objection on that issue." Trial counsel stated, "At any trial I've had where there was not a motion to suppress being heard, I would have immediately objected to that as hearsay. Not only that, but it's prejudicial to my client." Trial counsel stated that he did not know that he could have asked the trial court to hold a motion to suppress hearing outside the jury's presence. He then stated that he knew he could have asked for a hearing outside the jury's presence but "that doesn't mean . . . [he was] going to get it."

When "no reasonable trial strategy could justify the trial counsel's conduct, counsel's performance falls below an objective standard of reasonableness." *Andrews v. State*, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005). The record demonstrates that trial counsel's failure to object to Kot's objectionable hearsay testimony was not motivated by sound trial strategy, but instead was attributable to an oversight. Trial counsel stated that "the only strategy" for eliciting even more damaging testimony from Kot regarding information from the confidential informant during cross-examination and mentioning Kot's damaging testimony in closing was that trial counsel "had to deal with it because . . . [he] didn't object to it when initially it was elicited from the State." Trial counsel admitted that he should have objected to Kot's testimony on direct examination.

Trial counsel stated that he had the motion to suppress on his mind and that "the motion was still being heard during . . . [Kot's] testimony." However, the trial court had already concluded the hearing on appellee's motion to suppress outside the jury's presence and denied the motion before Kot testified regarding the informant's tip. Therefore, there was no reason for trial counsel to believe that the motion to suppress was still being heard and no reason to refrain from objecting to Kot's hearsay testimony on direct examination. Nor was there any reason to elicit more damaging hearsay testimony about the confidential informant during cross-examination — testimony that tied appellee to the drugs found in his truck.

Even if trial counsel unreasonably believed that the motion to suppress still was under consideration, eliciting more damaging hearsay testimony from Kot "to help the

trial court evaluate Kot's credibility and rule on trial counsel's motion to suppress" could not comport with reasonable trial strategy because the evidence trial counsel sought to suppress already had been admitted during Kot's direct examination.

Considering that trial "counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case," trial counsel failed to do so in this case when he failed to object to Kot's prejudicial hearsay testimony regarding information from the confidential informant; elicited more prejudicial hearsay testimony from Kot regarding information from the confidential informant during cross-examination; and then elaborated on Kot's prejudicial hearsay testimony during closing argument. *See Strickland*, 466 U.S. at 690.

Based on the record before us and considering that the trial court was in the best position to evaluate trial counsel's testimony at the motion for new trial hearing, the trial court acted within its discretion in concluding that trial counsel's performance was deficient and unsupported by a reasonable trial strategy.[4]

2. *Strickland*'s Second Prong

The State contends "there is no reasonable probability that the information from the informant changed the outcome of the trial," and that appellee failed to show that he was prejudiced by trial counsel's alleged deficiencies. In that regard, the State argues that the following evidence supports the jury's conclusion that appellee knowingly possessed the drugs found in his truck: (1) police stopped appellee after he nearly

[4] The State also argues that the trial court abused its discretion in granting appellee's motion for new trial because trial counsel was not deficient for (1) permitting the admission of certain extraneous offenses "because appellee's actions, not trial counsel's, created the false impression" which allowed the State to introduce evidence to refute the impression, and the extraneous offenses would have been admissible under the doctrine of chances; and (2) failing to request disclosure of the confidential informant because trial counsel "could not have met the burden to require disclosure of the informant" pursuant to Texas Rule of Evidence 508. However, if we determine that trial counsel's performance was deficient for (1) failing to object to objectionable hearsay; (2) eliciting damaging hearsay; and (3) elaborating on damaging hearsay testimony again in closing argument without a reasonable trial strategy, we need not address whether other instances of allegedly deficient performance also warrant the granting of a new trial.

collided with Kot's vehicle; (2) appellee was alone in his truck "with a warm box of food that contained two key holders of narcotics;" (3) "[a]ppellee's testimony, as well as his location at the time of arrest, linked him to the controlled substances;" (4) appellee admitted going to Denny's, although he denied purchasing food; (5) appellee's "story that Black accompanied him, but just did not happen to be in the vehicle at the precise moment police conducted the traffic stop because he went into the apartment complex while leaving his warm food and valuable narcotics in appellee's truck, seems far-fetched, at best;" and (6) appellee acknowledged giving Black a ride "while knowing Black often possessed and sold drugs."

The State also argues that there "is no reasonable probability that the information from the informant changed the outcome of the trial in light of appellee's chosen defense" because the information supported appellee's "claim that Black set him up by putting the drugs in his truck and notifying police with great specificity of what they would uncover if they searched it."

In addressing *Strickland*'s prejudice requirement, the totality of the evidence before the jury must be considered. *Ex Parte Ellis*, 233 S.W.3d 324, 331 (Tex. Crim. App. 2007). Each case must be judged on its own unique facts. *Davis v. State*, 278 S.W.3d 346, 353 (Tex. Crim. App. 2009). "Some errors will have . . . a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have . . . an isolated, trivial effect." *Strickland*, 466 U.S at 695-96. A prejudice analysis under *Strickland* is not identical to an analysis of sufficiency of evidence. *Davis*, 278 S.W.3d at 353. However, overwhelming evidence of a defendant's guilt bears on his claim of prejudice under *Strickland*'s second prong. *See Strickland*, 466 U.S at 696 ("a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support"); *My Thi Tieu v. State*, 299 S.W.3d 216, 226-27 (Tex. App.—Houston [14th Dist.] 2009, pet. ref'd).

In a possession with intent to deliver case, the State must prove that the defendant (1) exercised care, custody, control, or management over the controlled substance, (2) intended to deliver the controlled substance to another, and (3) knew that the substance in his possession was a controlled substance. Tex. Health & Safety Code Ann. §§ 481.002(38), 481.112(a), (d) (Vernon 2009); *Parker v. State*, 192 S.W.3d 801, 805 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). Whether direct or circumstantial, evidence "must establish, to the requisite level of confidence, that the accused's connection with the drug[s] was more than just fortuitous." *Poindexter*, 153 S.W.3d at 405-06. If a defendant is not in exclusive possession of the place where the contraband is found, then additional independent facts and circumstances must affirmatively link the defendant to the contraband in such a way that it can be concluded that he had knowledge of the contraband and exercised control over it. *Id*. at 406.

Possible links include, but are not limited to, the following: (1) whether the defendant was present when the drugs were found; (2) whether the drugs were in plain view; (3) the defendant's proximity to and the accessibility of the drugs; (4) whether the defendant was under the influence of drugs when arrested; (5) whether the defendant possessed other contraband or drugs when arrested; (6) whether the defendant made any incriminating statements when arrested; (7) whether the defendant attempted to flee; (8) whether the defendant made furtive gestures; (9) whether there was an odor of drugs; (10) whether other contraband or other drug paraphernalia was present; (11) whether the defendant owned or had the right to possess the place where the drugs were found; (12) whether the place the drugs were found was enclosed; (13) whether the defendant was found with a large amount of cash; and (14) whether the conduct of the defendant indicated a consciousness of guilt. *Evans v. State*, 202 S.W.3d 158, 162 n.12 (Tex. Crim. App. 2006).

Appellee argues that when Kot's "hearsay testimony is removed from the equation, the State's evidence is remarkably inadequate" to link appellee to the drugs because (1) appellee "was merely present in the truck where drugs were found;" (2) there

was no evidence that there were drugs on appellee's person; (3) there was no evidence that the drugs were "right next to" appellee in the truck; (4) there was "no forensic evidence, such as fingerprints, that linked the drugs to" appellee; and (5) "there were no furtive gestures or movements" by appellee "to show knowledge that the drugs were in the hamburger bag and that he was trying to hide them from the officers."

Appellee contends that the "information from the informant completely proved the State's case by bolstering the fact that Mr. Mayfield was in a white truck, that there were drugs found in a black magnetic key holder in the truck, and the fact that the subject of Kot's investigation ended up being named Troy, just like Kot said the informant told him." Appellee claims that the State recognized the importance of Kot's testimony regarding the informant's tip and argued that it was "very key" and supported appellee's guilt.

Reviewing the State's contentions in light of the totality of the evidence, we believe the trial court acted within its discretion in concluding that appellee was prejudiced by trial counsel's deficient performance.

During his direct examination, Kot testified that he did not "just pick [appellee] out of a hat" on the evening of March 12, 2008. Kot testified that he knew "from a citizen . . . about information and what was inside" appellee's truck. Kot stated, "I received information that the defendant would have black magnetic key holders containing crack cocaine." Trial counsel did not object to this testimony.

On cross-examination, trial counsel elicited the following testimony from Kot: "I received information from a concerned citizen stating that a subject named Troy operating a white Ford truck in that area had a black key holder containing crack cocaine either in or under his vehicle." He also elicited testimony that Kot drove "around looking for a white Ford truck" and that he considered the confidential informant to be "absolutely" reliable based on previous experience with the informant.

Without Kot's hearsay testimony regarding the detailed information he received

from a confidential informant that appellee would have black magnetic key holders containing cocaine in his white Ford truck, the evidence shows as follows. Kot testified that (1) he was driving in an area known for narcotics activity and prostitution when he observed appellee changing lanes without signaling; (2) he requested a patrol unit to stop appellee for traffic violations; (3) Vela responded to his request to stop appellee; (4) Vela initiated a traffic stop after he observed appellee swerving into Kot's outside lane and arrested appellee 2 minutes later; (5) after canine Barry performed "a smell of the exterior of the vehicle" and walked around appellee's vehicle, Barry alerted to narcotic odor on the passenger door seam; (6) he located a styrofoam food container containing a fresh cooked bacon cheeseburger, French fries, and 2 black magnetic key holders with cocaine and Ecstasy tablets; (7) the amount of drugs found was inconsistent with personal use and was an amount a mid-level drug dealer would possess; (8) the drugs were worth around $2,000-$2,600; and (9) no money was seized from appellee and nothing illegal was found on appellee's person.

Vela testified that (1) Kot requested a marked unit, described appellee's vehicle as a white Ford F-150, and provided the vehicle's license plate information; (2) he responded to the request and stopped appellee after he observed appellee cutting into Kot's lane and almost hitting Kot's vehicle; (3) as he approached appellee's truck, appellee looked around nervously; (4) he could smell food and saw a closed food container "in the middle" of the dashboard, and the food container appeared to be within appellee's reach; and (5) appellee's action in looking around made Vela nervous because he did not know if appellee was expecting someone so he "pulled him out of the vehicle" and placed him under arrest.

Canine handler Carlson testified that Vela advised him that Kot requested canine Barry to check the exterior of appellee's truck for narcotics; Barry started the check from the driver's side and alerted to "the bottom portion of the passenger side door." Senior forensic chemist Busby testified that she field-tested the drugs found in the key holders but she did not conduct any testing for fingerprints.

Appellee took the stand and testified that (1) he was spending time with his children at his wife's house when Black called him to ask for a ride; (2) Black's car had broken down at his girlfriend's apartment, which was approximately seven minutes away from his wife's house, and Black needed a ride; (3) when he picked up Black from the girlfriend's apartment, Black asked him to stop at a nearby Denny's so Black could buy food; (4) after Black bought the food, he asked appellee to drive him back to his girlfriend's apartment to drop off one of the two food containers he had bought; (5) while Black was dropping off the food, appellee decided to buy gas at the Valero gas station and return thereafter to pick up Black; (6) he tried to change from the inside to the outside lane to turn right into the Valero gas station when he almost hit another vehicle and was then stopped by Vela; (7) he was nervous because he had been driving with a suspended driver's license; (8) when Vela told him that he almost hit another car, he looked around for the car that had honked at him; (9) when Vela arrested him, appellee had only $8 in his wallet; (10) the drugs found in his truck belonged to Black; (11) he could not reach the food container on the dashboard without getting out of his seat because he was of short stature; (12) although he had changed his life, he still had friends and acquaintances who had access to illegal narcotics and Black was one of these acquaintances; (13) although he knew that Black sold drugs occasionally, he did not see any drugs when he picked up Black and he did not know Black would bring drugs into his car because he told Black not to bring any; (14) he had been convicted of burglary of a motor vehicle, of theft, of two counts of possession of a controlled substance, and of delivery of a controlled substance but he had since then changed his life; and (15) he made two attempts to locate Black, but he did not attempt to subpoena Black because he knew Black would not come to court.

The jury also heard about two instances in which drugs had been found in places to which appellee had access. Appellee testified that in April 2005 someone came to his place of business looking for his "father and for drugs." Appellee testified that he was not present when the police arrived to search the business and that the police called him

to the scene after finding cocaine and heroin. Appellee also testified that the police executed a search warrant in May 2006 for a residence his wife, children, and stepson lived at because they were looking for his stepson. The police found cocaine, pills, heroin, and a stolen gun at the residence. Appellee testified that (1) he was not present at the time of the search and did not know where the narcotics were found; (2) he had already moved out of the residence because he and his wife had separated; (3) mail addressed to him was found at the residence because his children live at this address so he kept the address as his mailing address; and (4) he "later testified in front of the grand jury and was exonerated, cleared."

In addition to the evidence outlined above, trial counsel brought up Kot's hearsay testimony and Kot's receipt of a tip from a confidential informant that appellee "was transporting drugs" during closing argument. The State emphasized Kot's hearsay testimony during its closing argument: "What do we know about the tip Detective Kot received? 'Cause it's very key." The State continued: "We knew that a white Ford pickup would be carrying crack cocaine and Ecstasy in black magnetic key holders. And don't you know, lo and behold, what do we find with Mr. Mayfield? Black magnetic key holders containing crack cocaine and Ecstasy."

Significantly, trial counsel stated at the motion for new trial hearing that he "felt that things were going in a bad way because of the information that was related about the confidential informant." Trial counsel stated that eliciting more specific information during cross-examination about what the informant told Kot "definitely hurt." Trial counsel stated that Kot's testimony was "prejudicial to [his] client" and also stated, "I mean, it's almost like, you know, the error — the harm for error is caused. It's just you can't get over it. I mean, it's an automatic guilty as far as I'm concerned."

We do not believe the untainted evidence was so overwhelming as to prevent the confidence in the outcome of appellee's trial from being undermined on this record. Kot's testimony about the detailed information he received from a reliable confidential informant regarding appellee was significant in that it established that appellee

knowingly possessed the drugs Kot found in his truck. The evidence highlighted by the State as establishing that appellee was tied to the drugs was not strong. When the trial court at the motion for new trial hearing asked the State what "other link[s] besides the statement of the confidential informant that [appellee] would be in possession of the magnetic key holder[s] with drugs in it" there were, the State highlighted the following evidence: appellee admitted picking up Black because Black had car trouble; driving to Denny's to buy food; driving Black back to the apartment complex to allow Black to drop off his girlfriend's food; driving to a gas station to get gas; and agreeing to pick up Black again to drive him to another apartment complex.

We also are mindful that the trial court presided over the entire trial. The trial observed appellee's trial counsel, the State, and, most importantly, the jury during trial. The trial court saw how the jury may have reacted after hearing Kot's testimony and after trial counsel and the State elaborated on the importance of Kot's testimony during closing argument.

Given the totality of the evidence, it is not possible to predict whether the jury as "the factfinder would have had a reasonable doubt respecting [appellee's] guilt" without Kot's admittedly prejudicial and harmful testimony regarding the confidential informant's tip that undoubtedly linked appellee to the drugs. *See Strickland*, 466 U.S at 695; *Wood v. State*, 260 S.W.3d 146, 149 (Tex. App.—Houston [1st Dist.] 2008, no pet.). We therefore conclude that the trial court acted within its discretion in determining that appellee met his burden to show there is a reasonable probability that, but for trial counsel's deficient performance, the result of the proceedings would have been different. *See Wood*, 260 S.W.3d at 149. Accordingly, we hold that the trial court acted within its discretion in granting appellee's motion for new trial.

Having determined that the trial court acted within its discretion in concluding that appellee was entitled to a new trial because he was prejudiced by his trial counsel's deficient performance in failing to object to inadmissible hearsay testimony, eliciting more inadmissible hearsay testimony, and elaborating on the inadmissible hearsay

testimony during closing argument, we need not resolve whether other instances of allegedly deficient performance also warranted the granting of a new trial. Having concluded that the trial court acted within its discretion in granting appellee's motions for new trial based on ineffective assistance of counsel, we need not resolve whether any alleged *Brady* violation occurred or warranted a new trial.

Conclusion

We affirm the trial court's order granting appellee's motions for new trial.

/s/ William J. Boyce
Justice

Panel consists of Justices Anderson, Boyce, and Christopher. (Christopher, J. sitting by assignment before her appointment to this Court.)

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