COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

RICHARD ZELONIS,		§	No. 08-20-00099-CR
	Appellant,	§	Appeal from the
v.		§	34th District Court
THE STATE OF TEXAS,		§	of El Paso County, Texas
	Appellee.	§	(TC# 20180D03785)

O P I N I O N

A jury convicted Richard Zelonis of two counts of tampering with or fabricating physical evidence to impair its use in an investigation or official proceeding. TEX. PENAL CODE ANN. § 37.09(c). Specifically, the jury found that Zelonis helped conceal the body of Devon Leatherbury and a firearm, after knowing an offense had been committed. Zelonis filed a pretrial motion to suppress a pillowcase and other items seized from his apartment during an investigation by police. The trial court conducted a hearing on the motion but did not issue a ruling. At trial, the trial court allowed the State to introduce a picture of the pillowcase into evidence subject to objection. In three issues on appeal, Zelonis challenges the trial court's implicit denial of his motion to suppress evidence seized from his residence. Finding no error, we affirm both convictions.

I. BACKGROUND

A. Initial Investigation

On August 16, 2016, the El Paso Police Department discovered the body of Devon Leatherbury in the desert outside of El Paso. He had been shot in the head and was partially wrapped in a bedsheet.

On August 24, 2016, Detective Gerardo Rodriguez visited Zelonis's apartment in the course of his investigation of the person found dead in the desert. When Detective Rodriguez knocked, Zelonis opened the door to him. Detective Rodriguez told Zelonis he was investigating a person who had disappeared who had stayed at his residence. Zelonis replied, "You're looking for Devon." After stepping inside the home, Rodriguez continued conversing with Zelonis. Tina McKenzie, Zelonis's wife, who was also present at the time, confirmed that Leatherbury had stayed with them. As they talked, McKenzie opened a plastic tote and pulled out a pillowcase. Detective Rodriguez noticed the pillowcase appeared to match the bedsheet found wrapped around Leatherbury's body.

Detective Rodriguez asked Zelonis and McKenzie if they would be willing to go to the police station to give a statement. He also requested that McKenzie bring the pillowcase with her, which she did. Zelonis gave a videotaped statement to detectives that same day. Zelonis described that his son, Aaron Zelonis, lived at the apartment with them and brought Leatherbury over one day.[1] Zelonis allowed Leatherbury to stay the night. At one point, Aaron left the apartment saying he was going to get gas, or going to a convenience store. Zelonis talked with Leatherbury until Zelonis fell asleep. In the early morning hours, Leatherbury woke Zelonis. He told him that Aaron had still not returned, but he was leaving. Zelonis stated that was the last time he saw Leatherbury.

[1] To avoid confusion, we will refer to the younger Zelonis by his first name only.

The next day, McKenzie told Zelonis she was missing a black tote box where she kept bed sheets and blankets. Zelonis suggested to the detectives that Leatherbury may have taken the box from the apartment. Zelonis reported he had heard a rumor that Leatherbury had overdosed on heroin.

McKenzie also provided a sworn written statement. In her statement, McKenzie described that Devon was the only person that had stayed in their house. She and her husband knew he had passed away as Aaron and her daughter had attended a vigil the previous Sunday. McKenzie also stated that she had told the detective that Devon stole a plastic box filled with bed sheets, covers and bedspreads. Her next-door neighbor had given her the items that were taken. When the detective asked if she had any other items given to her by the neighbor, she opened the clothes hamper and found one pillowcase that was part of the missing set. She confirmed in her statement that the detective asked her whether she would go to his office to provide a statement and bring the pillowcase with her. At the end of her statement, she confirmed that she had brought the pillow case to the station that Devon had left behind. She would "allow the Police to photograph the [pillowcase] and keep it if the [pillowcase] helps with the investigation."

Zelonis and McKenzie were free to go after their statements were completed. Detective Rodriguez stated they were not viewed as suspects at that time. After nearly two years of investigating Leatherbury's last movements, detectives began investigating into Zelonis's and Aaron's cell-phone records. Detectives re-interviewed Zelonis on June 21, 2018. Zelonis told police that Aaron and Leatherbury were talking in Aaron's room when he heard a loud bang. Zelonis said when he saw Leatherbury he was "stuffed in . . . that tote box" and it looked like he was shot in the head. Zelonis admitted that he drove his son to the desert, but that Aaron disposed of Leatherbury's body. Zelonis took detectives to the location where he claimed his son hid the gun used to kill Leatherbury. However, no gun was ever found.

B. Motion to Suppress

Before trial, Zelonis filed a motion to suppress the pillowcase, in addition to other things, and argued police obtained it after Detective Rodriguez illegally entered Zelonis's apartment without a warrant, exigent circumstances, or voluntary consent. Detective Rodriguez testified at the hearing on the motion to suppress. Rodriguez described that he went to Zelonis's apartment after learning it was Leatherbury's last known address. He claimed that neither Zelonis nor McKenzie were viewed as suspects at that time. Detective Rodriguez worked alone, in plainclothes, but he identified himself as a police officer by showing his badge. He did not then have a warrant of any kind. After Detective Rodriguez explained his purpose, he further testified that Zelonis invited him to step inside. Specifically, Detective Rodriguez testified that "Mr. Zelonis opened the door and he walked in and told me to come in. And that's why I walked in." Detective Rodriguez did admit, however, that he did not follow El Paso Police Department policy when he failed to get a signed consent form, or to otherwise inform the residents that they were not required to talk with him.

Neither Zelonis nor McKenzie testified at the motion to suppress hearing. But the State entered McKenzie's sworn-written statement into evidence. In her statement, McKenzie described how it was that Detective Rodriguez entered the apartment: "Today my husband and I were sleeping in our bed. Two detectives knocked on our door and woke us up. My husband got out of bed and answered the door. Minutes later my husband and the detectives walked inside."

At the conclusion of the suppression hearing, the trial court took the matter under advisement but never entered a ruling.

C. The Trial

In addition to the above evidence, the State presented evidence from the detectives investigating the case, the medical examiner, and the special agent who conducted the cellular analysis on Zelonis's and Aaron's cellphones. The State also introduced a picture of the pillowcase into evidence at trial, which the trial court admitted.

The jury subsequently convicted Zelonis of two counts of concealing evidence in violation of Texas Penal Code § 37.09(c). The jury assessed a punishment of confinement for a period of twenty years for concealing Leatherbury's body and ten years for concealing the firearm, which the trial court imposed. The trial court issued a directed verdict of not guilty on a third count alleging that Zelonis had possessed a firearm after being convicted of a felony in violation of Texas Penal Code § 46.04(a). This appeal follows.

II. DISCUSSION

Zelonis asserts three issues on appeal. In his first issue, Zelonis claims it was "error for the trial court not to suppress evidence seized without warrant from [his] residence on August 24, 2016." In issue number two, Zelonis argues the trial court erred when it did not suppress evidence seized from his residence on August 24, 2016, "when Detective Rodriguez entered said residence without a warrant, and without probable cause or exigent circumstance." In his third issue, Zelonis asserts the trial court should have suppressed evidence seized from his residence on August 24, 2016, "when Detective Rodriguez entered and searched [his] residence without receiving [v]oluntary, knowing, intelligent consent to enter and/or search." Because all three issues relate to whether Detective Rodriguez's presence in Zelonis's apartment was constitutionally valid, we consider them together.

A. Standard of Review

A trial court's ruling on a motion to suppress is reviewed on appeal for abuse of discretion. *Crain v. State*, 315 S.W.3d 43, 48 (Tex. Crim. App. 2010). We afford almost total deference to the trial court's findings of historical facts supported by the record and to mixed questions of law and fact that turn on an assessment of a witness's credibility or demeanor. *Valtierra v. State*, 310 S.W.3d 442, 447 (Tex. Crim. App. 2010); *Amador v. State*, 221 S.W.3d 666, 673 (Tex. Crim. App. 2007). We review de novo the trial court's determination of legal questions and its application of the law to facts that do not turn upon a determination of witness credibility and demeanor. *Valtierra*, 310 S.W.3d at 447; *Amador*, 221 S.W.3d at 673; *Kothe v. State*, 152 S.W.3d 54, 62-63 (Tex. Crim. App. 2004). On appellate review of a suppression motion, a reviewing court may only consider the evidence available to the trial court when it ruled on a motion to suppress. *O'Hara v. State*, 27 S.W.3d 548, 551 (Tex. Crim. App. 2000). "We uphold the trial court's ruling if it is supported by the record and correct under any theory of law applicable to the case." *State v. Iduarte*, 268 S.W.3d 544, 549 (Tex. Crim. App. 2008); *see also State v. Stevens*, 235 S.W.3d 736, 740 (Tex. Crim. App. 2007); *Armendariz v. State*, 123 S.W.3d 401, 404 (Tex. Crim. App. 2003). "When the trial court does not file findings of fact concerning its ruling on a motion to suppress, we assume that the court made implicit findings that support its ruling, provided that those implied findings are supported by the record." *Ex parte Moore*, 395 S.W.3d 152, 158 (Tex. Crim. App. 2013).

B. Applicable Law

The Fourth Amendment of the United States Constitution and article I, section 9 of the Texas Constitution protect individuals against unreasonable searches and seizures. U.S. CONST. amend. IV; TEX. CONST. art. I, § 9. "The touchstone of the Fourth Amendment is reasonableness."

Florida v. Jimeno, 500 U.S. 248, 250 (1991). Police officers entering a residence is a "search" for purposes of the Fourth Amendment. *Valtierra*, 310 S.W.3d at 448. A warrantless police entry into a person's home is presumed unreasonable "unless the entry falls within an exception to the warrant requirement." *Id*. One established exception to the warrant requirement is a search that is conducted according to consent. *Meeks v. State*, 692 S.W.2d 504, 509 (Tex. Crim. App. 1985). "Although consent must be positive, it may be given orally or by action, or shown by circumstantial evidence." *Valtierra*, 310 S.W.3d at 448. But a person must give their consent voluntarily; it must "not be coerced, by explicit or implicit means, by implied threat or covert force." *Meekins v. State*, 340 S.W.3d 454, 458-59 (Tex. Crim. App. 2011). The voluntariness of a person's consent is a question of fact determined by analyzing all the circumstances of a particular situation. *Id.* at 459. "The trial judge must conduct a careful sifting and balancing of the unique facts and circumstances of each case in deciding whether a particular consent search was voluntary or coerced." *Id.* In Texas, the State must prove voluntary consent by clear and convincing evidence. *Id.; Valtierra*, 310 S.W.3d at 448. Because issues of consent are necessarily fact-intensive, a trial court's finding of voluntariness must be accepted on appeal unless it is clearly erroneous. *Meekins*, 340 S.W.3d at 460.

C. Analysis

1. Seizure of the Pillowcase

Zelonis frames his issues on appeal as the trial court committing error by not suppressing the pillowcase "seized from [his] residence on August 24, 2016." In his statement of facts, he claims that "Detective Rodriguez entered [his] residence and seized a pillowcase as evidence. . . ." But the record on appeal does not support Zelonis's assertion that police seized the pillowcase from his apartment. Instead, the record demonstrates that Detective Rodriguez observed the

pillowcase while in Zelonis's apartment on August 24, and McKenzie voluntarily gave it to him at the police station later that day to help with the investigation of Leatherbury's murder. A warrantless seizure, like a search, is constitutionally reasonable if done with consent. *See Stewart v. State*, No. 09-98-362-CR, 1999 WL 343655, at *1 (Tex. App.—Beaumont May 26, 1999, pet. ref'd) (per curiam) (not designated for publication) ("A search and seizure conducted pursuant to consent is an exception to the warrant and probable cause requirements of the Fourth Amendment to the United States Constitution and Article 1, § 9 of the Texas Constitution.").

Zelonis appears to recognize these distinctions. Despite asserting the pillowcase was "seized from his apartment," he does not explicitly argue that it was illegally seized. Instead, he asserts a "Fruit of the Poisonous Tree" argument. Specifically, he claims the trial court should have suppressed the pillowcase because it was obtained directly from Detective Rodriguez's illegal entry into his residence. Consequently, the admissibility of the pillowcase turns on the legality of Detective Rodriguez's August 24, 2016, entrance into Zelonis's apartment. Therefore, we turn to that issue.

2. Consent to Enter the Apartment

It is undisputed that Detective Rodriguez did not have a warrant on August 24, 2016, when he visited the apartment of Zelonis and McKenzie. And the State does not contend that Detective Rodriguez entered Zelonis's apartment because of exigent circumstances. As a result, whether Detective Rodriguez was legally in Zelonis's apartment depends on whether he received voluntary consent. Detective Rodriguez testified that "Mr. Zelonis opened the door and he walked in and told me to come in. And that's why I walked in." No other evidence disputes this account. While the State introduced into evidence McKenzie's sworn written statement at the suppression hearing,

that statement itself is not necessarily contradictory of Detective Rodriguez's testimony. Where relevant, McKenzie describes that her husband left the bed and answered the door alone.[2]

Zelonis, however, argues his consent to enter his residence was not voluntary because Detective Rodriguez did not advise him that he could refuse him entry. Whether Zelonis knew that he could refuse to give consent is a relevant factor to consider in determining voluntariness. But it alone is not determinative. *See Harrison v. State*, 205 S.W.3d 549, 553 (Tex. Crim. App. 2006) ("Further, even though a person's knowledge of his or her right to refuse consent is also a relevant factor when determining voluntariness, it is not determinative."). This is especially true in a case where, like here, law enforcement did not solicit the consent to search. *Miller v. State*, 736 S.W.2d 643, 649-50 (Tex. Crim. App. 1987) (stating that whether consent was offered by the defendant or requested by the police is a relevant factor in determining voluntariness). There is no direct evidence that Detective Rodriguez particularly asked Zelonis if he could enter his apartment. Instead, Detective Rodriguez testified that Zelonis invited him into the apartment after he identified himself as a police officer.

There was also no testimony presented that Detective Rodriguez exhibited a show of force or displayed any weapons. On the contrary, Detective Rodriguez testified that he approached the apartment alone while dressed in plainclothes. *Cf. Clemons v. State*, 605 S.W.2d 567, 570-71 (Tex. Crim. App. [Panel Op.] 1980) (where one officer brandished a shotgun and each officer was armed with a service revolver, defendant's admittance of the officers found to be an acquiescence to a claim of lawful authority). Detective Rodriguez also testified that he only went to the apartment because it was the last known address of Leatherbury. He went to the address merely to obtain information. He did not then view Zelonis or McKenzie as suspects. *See Fontenot v. State*, 792

[2] As earlier stated, McKenzie's written statement reads: "My husband got out of bed and answered the door. Minutes later my husband and the detectives walked inside."

S.W.2d 250, 254 (Tex. App.—Dallas 1990, no pet.) (considering police officer's motives in approaching defendant in assessing the voluntariness of a consent to search). Based upon the totality of the circumstances, the evidence supports the trial court's implicit finding that Zelonis gave Detective Rodriguez consent to enter the apartment and that Detective Rodriguez did not exhibit any implied or actual coercion to force the consent. *Meekins*, 340 S.W.3d at 458-59 (holding that consent must be voluntary and not coerced, by explicit or implicit means, or by implied threats or covert force). As a result, the State met its burden of establishing that Zelonis gave his consent voluntarily. Therefore, the trial court did not abuse its discretion in denying Zelonis's motion to suppress the pillowcase.

We overrule Zelonis's three issues.

III. CONCLUSION

We affirm both convictions.

GINA M. PALAFOX, Justice

June 30, 2022

Before Rodriguez, C.J., Palafox, and Alley, JJ.

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