Opinion issued November 10, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00134-CR

DENNIS JOHNSON JR., Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 174th District Court
Harris County, Texas
Trial Court Case No. 1189448

MEMORANDUM OPINION

A jury convicted appellant, Dennis Johnson Jr., of the second degree felony offense of possession of between four and two hundred grams of a controlled substance, cocaine, and, after finding the allegations in an enhancement paragraph

true, assessed punishment at eight years' confinement.[1] In two issues, appellant contends that (1) the trial court erred in denying his motion to suppress evidence on the grounds that the arresting officer lacked either probable cause or reasonable suspicion to detain him and that the officer failed to obtain a search warrant for his apartment and (2) the trial court erroneously admitted two exhibits during the punishment phase because the State did not sufficiently prove that these exhibits were appellant's criminal records.

We modify the judgment of the trial court and affirm as modified.

Background

On October 28, 2008, Harris County Sheriff's Department Deputy A. Chapa was on afternoon patrol in north Harris County when he received information that narcotics transactions were occurring at a nearby Chevron station. The tipster, who was not identified, informed Deputy Chapa that a "medium to heavy-build black male, [with a] short haircut, [and] a tattoo on his neck" was selling drugs out of a small, green four-door Mitsubishi. Deputy Chapa drove to the Chevron station and "immediately observed the vehicle that the [tipster] had described."[2] Deputy

---

[1] *See* TEX. HEALTH & SAFETY CODE ANN. §§ 481.102(3)(D), 481.115(d) (Vernon 2011).

[2] Deputy Chapa requested backup and Harris County Sheriff's Department Deputy J. Glaze arrived at the Chevron station at the same time as Chapa. Although he did not testify at the suppression hearing, Deputy Glaze did testify at trial.

Chapa walked over to the driver's side window of the vehicle and knocked, and the driver, later identified as appellant, rolled down the window.

Deputy Chapa noticed that appellant had a tattoo on his neck and testified that, upon observing this tattoo, he "knew for sure that [the driver] was the person that the—that [he] had previously been informed of." Deputy Chapa also immediately noticed that "[t]here was a strong[,] distinct [odor] of marijuana coming from [appellant's] person and from within the vehicle." He asked appellant about the odor of marijuana, and appellant responded that he did not have any marijuana in the vehicle. Deputy Chapa then informed appellant that, based on his training and experience, he had reason to believe that appellant had marijuana either on his person or in his vehicle due to the strong odor. Appellant again informed Deputy Chapa that he did not have any marijuana and stated that Chapa "was free to check [appellant's] vehicle."

Deputy Chapa testified that, at the time of this conversation, appellant was not under arrest, and he was free to leave if he so desired. He agreed with the prosecutor that there was space for appellant to drive away from the Chevron station. Deputy Chapa further testified that he was being polite to appellant, that he was not raising his voice, and that he did not have his service weapon out of its holster.

Deputy Chapa then asked appellant to step out of the car, and he conducted a brief pat-down to determine if appellant was carrying any weapons. Appellant told Deputy Chapa that the car belonged to his common-law wife, later identified as Lashieka Johnson, who was sitting in the front passenger seat. Deputy Chapa approached the passenger side of the car, informed Johnson of everything he had said to appellant thus far regarding the odor of marijuana in the vehicle, and asked her for consent to search the vehicle. She agreed and signed a written consent to search form. This form informed Johnson that she had the "lawful right to refuse to consent to such a search." Deputy Chapa testified that Johnson was not under any kind of threat or coercion when she signed the form and that she had a chance to read over the form before she signed it. Johnson never revoked her consent to the search, and appellant never told her not to allow Deputy Chapa to conduct the search.

Deputy Chapa did not find any contraband during the search of the car. He walked to the rear of the vehicle to speak to appellant, and he smelled a "very distinct, fresh, unburned marijuana odor coming from [appellant's] person."[3] Deputy Chapa asked appellant to open his mouth "because [he] had reason to believe that there was somewhere on his person concealed narcotics, possibly

[3] Deputy Glaze testified at trial that appellant "had a strong odor of fresh marijuana coming from his person" and that "[e]very time [appellant] talked, [Glaze] made note that [the odor] was coming from his mouth or his person as he was speaking."

marijuana." After appellant complied, Deputy Chapa observed "a green leafy substance caked about his inner cheek and tongue area." Deputy Chapa asked appellant if he had swallowed marijuana, and appellant admitted that he had swallowed a small bag of marijuana when he saw Chapa pull into the Chevron station parking lot.

At this point, Deputy Chapa informed appellant that he had previously spoken with someone who told Chapa that he was on his way to the Chevron station to purchase marijuana from appellant and that this person had given Chapa an accurate description of appellant and his vehicle. Appellant admitted that he was supposed to meet that person at the Chevron station for the purpose of selling him marijuana. Deputy Chapa asked appellant if he had any additional narcotics at his residence or another location, and appellant told him that he had "a small amount of marijuana and possibly powder cocaine at his place of residence." Appellant informed Deputy Chapa of the precise location of the additional drugs in his apartment. Appellant told Deputy Chapa that Johnson was the leaseholder of the apartment where the drugs were located, which Johnson confirmed, and that Johnson had no knowledge of the drugs. Both appellant and Johnson gave Deputy Chapa consent to search the apartment, and Johnson signed another consent to search form. Deputy Chapa testified that neither appellant nor Johnson revoked

their consent to search, that he had not threatened Johnson to obtain her consent, and that she had freely and voluntarily consented to the search.

At the apartment, Deputy Chapa went straight to the location identified by appellant—the top of the kitchen cabinet—and discovered several small bags of marijuana, a small bag of a substance that field-tested positive as cocaine, and a scale.

On cross-examination at the suppression hearing, Deputy Chapa testified that he received the initial tip from an individual whom he had stopped for a traffic violation. Deputy Chapa did not record this individual's name, and he did not issue a ticket for the traffic violation. Deputy Chapa agreed with defense counsel that appellant's car was legally parked at the Chevron station and that he did not observe appellant engage in any illegal activity before he approached the car.

Deputy Chapa testified that he identified the substance in appellant's mouth as marijuana, but he admitted that did not take any samples of this substance for testing. Deputy Chapa stated that, after he observed the particles of marijuana in appellant's mouth, he detained appellant "for further investigation" of whether he had tampered with evidence. He agreed with defense counsel that appellant was under arrest at this point. Deputy Chapa also agreed that appellant then admitted that he had planned to sell marijuana to the anonymous tipster and that he had narcotics at his residence. He further agreed that he obtained Johnson's consent to

search the apartment after he arrested appellant. Deputy Chapa estimated that thirty minutes elapsed between when he arrived at the Chevron station and when he left for appellant's residence and that less than an hour had elapsed when Johnson let him into the apartment. Deputy Chapa acknowledged that he never attempted to obtain a search warrant for appellant's residence.

Appellant called Johnson to testify on his behalf at the suppression hearing. She testified that appellant picked her up from work and that their two children were in the car with him.[4] Appellant drove to the Chevron station, which had an attached McDonald's, so their daughter could eat dinner. Johnson testified that, as they were sitting in their car, "probably five or six [police] units . . . swooped up behind [them]" and ordered appellant to get out of the car.[5] She stated that, as Deputy Chapa approached the car, he immediately told appellant to get out of the car and told her to put her hands on the dashboard. According to Johnson, Deputy Chapa did not converse with her or appellant before he ordered appellant out of the car and Chapa took appellant directly to his patrol car. Johnson did not smell the odor of marijuana in the car.

---

[4] Deputy Chapa did not recall whether there were any children in the vehicle at the time of the search, and he testified that, if there had been, he would have included this information in his offense report. Deputy Glaze also testified at trial that he did not recall seeing any children in the car at the Chevron station.

[5] At trial, Deputy Chapa testified that only Deputy Glaze and himself were present at the Chevron station.

According to Johnson, the officers asked her and the children to get out of the car and they then walked a police dog around the car.[6] Johnson testified that the officers searched the car and Deputy Chapa commented that her children looked healthy and well taken care of, "so we're not going to worry about you" and "we're not going to call CPS on you." Johnson also testified that Deputy Chapa "threatened [her] to sign a search warrant to go to [her] house." She stated that Deputy Chapa did not allow her to call anyone and, before she signed any forms, he told her:

> We're going to keep [appellant] right here and you're going to stay right here, too, and we're—I'm going to send one of my partners back to headquarters to have a judge sign on that search warrant to come and search your house if you don't sign on it. And if we find anything in that house, you're going to jail and your kids are going to CPS.

She testified that she did not freely and voluntarily sign the consent to search form; instead, she signed it because she was "in fear for [her] kids' safety."[7] She stated that she asked Deputy Chapa if he had a search warrant, and he told her that the consent to search form was a search warrant.

---

[6] Deputy Chapa testified that Deputy Glaze is a canine handler, but he did not recall whether a police dog was present during this search. Deputy Glaze testified that he did not remember if he had his dog with him at the time, but he also testified that he did not make a police report after the incident, which he would have done if he had walked his dog around appellant's car.

[7] Deputy Chapa testified that he did not tell either appellant or Johnson that if they did not sign the consent to search forms, he would take their children to Children's Protective Services.

Johnson further testified that, en route to her apartment, Deputy Chapa stopped at a liquor store where he called her apartment complex, at Johnson's request, to make sure that her landlord would not be on the premises during the search of her apartment.[8] Johnson stated that this location was where he had her sign both of the consent-to-search forms and that they waited at this location for fifteen or twenty minutes before driving to the apartment. When Johnson signed the forms, she was "still afraid of what [the officers] were going to do if [she] didn't [sign.]" She testified that she did not freely and voluntarily let Deputy Chapa into her apartment because she "was under the fear of CPS."

On cross-examination, Johnson testified that Deputy Chapa did not let her read the consent-to-search form, but he instead told her to sign it without explaining anything. She also stated that the form was on a clipboard and that the clip covered up the part of the document that said "Voluntary Consent to Search," so that all she could see was the place for her to sign. She also agreed that she asked Deputy Chapa if they could wait before going to the apartment so her landlord could leave and that "the police officers did [her] a favor by holding up the time frame a little bit."

---

[8] Deputy Chapa testified that he did not present the consent-to-search form to Johnson at a location other than the Chevron station, and that they drove directly from the Chevron to appellant's residence. Deputy Glaze also testified that the officers did not make any stops when driving from the Chevron station to appellant's apartment.

The trial court denied appellant's motion to suppress. The trial court did not issue written findings of fact and conclusions or law, nor did the court state any findings and conclusions on the record at the end of the hearing. The jury ultimately found appellant guilty of possession of between four and two hundred grams of cocaine.

The indictment included an enhancement paragraph alleging that appellant was convicted of the felony offense of possession with the intent to deliver a controlled substance on July 23, 2001, in cause number 0869105 in the 263rd District Court of Harris County. During the punishment phase, the trial court admitted, without objection, State's Exhibit 13, a "jail card" that reflected that Dennis Johnson Jr. had been arrested for possession with intent to deliver a controlled substance on February 15, 2001. This exhibit reflected that the case, cause number 0869105, was assigned to the 263rd District Court of Harris County.

The State then called Harris County Sheriff's Department Deputy R. Schield to testify as a fingerprint expert. Deputy Schield compared appellant's fingerprints to the fingerprint contained on State's Exhibit 8, the first two pages of which were a certified copy of a judgment and sentence from a 1996 conviction for possession of marijuana, cause number 9623579, and he concluded that the fingerprints matched. The State then asked if Deputy Schield was able to make a comparison between appellant's fingerprints and the fingerprint on State's Exhibit 15, a

judgment and sentence from a July 23, 2001 conviction for possession with intent to deliver cocaine. Deputy Schield testified that he was not able to make a comparison because "[t]he print on State's Exhibit 15 is blurred out." The State then asked Deputy Schield if the cause numbers stated on Exhibit 13, the jail card, and Exhibit 15 matched, and Deputy Schield testified that they did. He stated that the cause number for both exhibits was 869105.

After the State offered several certified copies of judgments, including Exhibits 8 and 15, into evidence, defense counsel questioned Deputy Schield on voir dire. Defense counsel asked Deputy Schield about the last four pages of Exhibit 8, which were the conditions of probation for a defendant named Miguel Angel Lopez in cause number 9623577. Deputy Schield agreed that this person was not appellant. Defense counsel then made the following objections:

> [Defense counsel]: Your Honor, I would object to the admission of document 15 because the officer cannot testify that that is Mr. Johnson's print on document 15. By his own admission, the print cannot be matched up. We would object to that one. We would also object, Your Honor, to document 8.
>
> The Court: Just a minute. You're objecting to 15?
>
> [Defense counsel]: Yes, sir. I'm objecting to document 8 that's identified as paperwork of [Miguel Angel] Lopez. I have no idea who he is and he's not the defendant.

The trial court overruled defense counsel's objections and admitted Exhibits 8 and 15.

The jury found the allegations in the enhancement paragraph true and assessed punishment at eight years' confinement. This appeal followed.

Motion to Suppress

In his first issue, appellant contends that the trial court erred in denying his motion to suppress because (1) Deputy Chapa did not have probable cause or reasonable suspicion to detain him at the Chevron station and (2) Chapa impermissibly searched his apartment without obtaining a search warrant.

A. Standard of Review

We review a denial of a motion to suppress for an abuse of discretion. *Shepherd v. State*, 273 S.W.3d 681, 684 (Tex. Crim. App. 2008) (citing *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006)). When we review a trial court's denial of a motion to suppress, we give "almost total deference to a trial court's express or implied determination of historical facts [while] review[ing] *de novo* the court's application of the law of search and seizure to those facts." *Id.* The question of whether a given set of historical facts constitutes a consensual police encounter or an investigatory detention is a question of law that we review de novo. *See State v. Castleberry*, 332 S.W.3d 460, 466 (Tex. Crim. App. 2011); *State v. Garcia-Cantu*, 253 S.W.3d 236, 241 (Tex. Crim. App. 2008).

We view the evidence in the light most favorable to the trial court's ruling. *Wiede v. State*, 214 S.W.3d 17, 24 (Tex. Crim. App. 2007) (quoting *State v. Kelly*,

204 S.W.3d 808, 818 (Tex. Crim. App. 2006)). The trial court is the "sole trier of fact and judge of the credibility of the witnesses and the weight to be given to their testimony." *St. George v. State*, 237 S.W.3d 720, 725 (Tex. Crim. App. 2007). The trial court may choose to believe or disbelieve any part or all of a witness's testimony. *Green v. State*, 934 S.W.2d 92, 98 (Tex. Crim. App. 1996). We sustain the trial court's ruling if it is reasonably supported by the record and correct on any theory of law applicable to the case. *Laney v. State*, 117 S.W.3d 854, 857 (Tex. Crim. App. 2003).

B. Justification for Initial Interaction with Appellant

Appellant first contends that the trial court erred in denying his motion to suppress because the anonymous tip received by Deputy Chapa was insufficient, standing alone, to establish either probable cause or reasonable suspicion to detain him at the Chevron station. The State contends that the interaction between Chapa and appellant began as a consensual encounter, which does not implicate the Fourth Amendment and therefore does not require probable cause or reasonable suspicion, and became a lawful investigatory detention when Chapa smelled the odor of marijuana coming from appellant's car. We agree with the State.

There are three distinct types of interactions between law enforcement officers and citizens: (1) consensual encounters, (2) investigatory detentions, and (3) arrests. *State v. Woodard*, 341 S.W.3d 404, 410–11 (Tex. Crim. App. 2011).

Consensual encounters between the police and citizens do not implicate the Fourth Amendment and its protections. *Id.* at 411; *Castleberry*, 332 S.W.3d at 466. A police officer is "just as free as anyone else to stop and question a fellow citizen," and the officer needs no justification to request information from a citizen. *Castleberry*, 332 S.W.3d at 466; *see Woodard*, 341 S.W.3d at 411. A consensual encounter occurs when "an officer approaches a citizen in a public place to ask questions, and the citizen is willing to listen and voluntarily answers." *Crain v. State*, 315 S.W.3d 43, 49 (Tex. Crim. App. 2010). A citizen may, at will, terminate a consensual encounter. *Woodard*, 341 S.W.3d at 411.

An officer does not need probable cause or reasonable suspicion to initiate a consensual encounter. *State v. Velasquez*, 994 S.W.2d 676, 678 (Tex. Crim. App. 1999); *see also Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 2386 (1991) ("Our cases make it clear that a seizure does not occur simply because a police officer approaches an individual and asks a few questions. So long as a reasonable person would feel free to 'disregard the police and go about his business,' the encounter is consensual and no reasonable suspicion is required. The encounter will not trigger Fourth Amendment scrutiny unless it loses its consensual nature.") (internal citations omitted). "As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the

Constitution require some particularized and objective justification." *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877 (1980).

"Even when the officer did not communicate to the citizen that the request for information may be ignored, the citizen's acquiescence to an official's request does not cause the encounter to lose its consensual nature." *Woodard*, 341 S.W.3d at 411; *see also Castleberry*, 332 S.W.3d at 466 ("[T]he fact that the citizen complied with the request does not negate the consensual nature of the encounter."). We consider the totality of the circumstances surrounding the interaction, including the time and place, to determine whether a reasonable person in the defendant's position would have felt free either to ignore the request or to terminate the interaction. *See Woodard*, 341 S.W.3d at 411; *see also Garcia-Cantu*, 253 S.W.3d at 243 ("Each citizen-police encounter must be factually evaluated on its own terms; there are no *per se* rules."). If the defendant had the option to ignore the request or terminate the interaction, a Fourth Amendment seizure has not occurred. *Woodard*, 341 S.W.3d at 411. Although we consider the totality of the circumstances, "the officer's conduct is the most important factor when deciding whether an interaction was consensual or a Fourth Amendment seizure." *Id.*; *Crain*, 315 S.W.3d at 49 ("[T]he court focuses on whether the officer conveyed a message that compliance with the officer's request was required.").

Generally, "when an officer through force or a showing of authority restrains a citizen's liberty, the encounter is no longer consensual" and becomes either an investigatory detention or an arrest, both of which are seizures and require Fourth Amendment scrutiny. *Woodard*, 341 S.W.3d at 411. The pertinent inquiry is whether a reasonable person would have felt free to decline the officer's requests or otherwise terminate the encounter. *Crain*, 315 S.W.3d at 49; *Garcia-Cantu*, 253 S.W.3d at 243 ("It is the display of official authority and the implication that this authority cannot be ignored, avoided, or terminated, that results in a Fourth Amendment seizure."). Examples of surrounding circumstances that may indicate a seizure are "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall*, 446 U.S. at 554, 100 S. Ct. at 1877.

When determining if a detention was permissible under the Fourth Amendment, we must decide whether the officer had reasonable suspicion that the citizen, is, has been, or soon will be, engaged in criminal activity. *Woodard*, 341 S.W.3d at 411; *see also Ford v. State*, 158 S.W.3d 488, 492 (Tex. Crim. App. 2005) ("Reasonable suspicion exists if the officer has specific, articulable facts that, when combined with rational inferences from those facts, would lead him to reasonably conclude that a particular person actually is, has been, or soon will be

engaged in criminal activity."). The State bears the burden of producing specific articulable facts demonstrating reasonable suspicion. *Woodard*, 341 S.W.3d at 411.

1. Initial Consensual Encounter

Here, Deputy Chapa testified that, after receiving an anonymous tip that a man in a green four-door Mitsubishi was selling narcotics at a nearby Chevron station, Chapa requested backup and drove to the Chevron. Deputies Chapa and Glaze observed appellant's vehicle, which matched the tipster's description, legally parked in a space by the building. Deputy Chapa parked nearby and left "space for [appellant's] car to drive away." Deputy Chapa approached the driver's side of appellant's car and knocked on the window. He immediately noticed that appellant matched the physical description provided by the tipster and that a "strong distinct [odor] of marijuana [was] coming from [appellant's] person and from within the vehicle." Deputy Chapa testified that, throughout his conversation with appellant, he was polite, he did not raise his voice, and he did not have his weapon in his hand.[9]

At the suppression hearing, Johnson testified that as her family sat in their car at the Chevron station, five or six police units "swooped up behind [them]." According to her, Deputy Chapa immediately ordered appellant out of the car and

[9] Deputy Glaze testified that he was present primarily "as a cover officer for Deputy Chapa" and that he did not say anything to appellant or Johnson.

ordered her to put her hands on the dashboard. She testified that Deputy Chapa did not converse with either appellant or her before he ordered appellant to get out of the car.

The record contains evidence that the interaction occurred in a public place during the early evening; only two officers approached appellant's vehicle; they left space for appellant to drive away if he so desired; Deputy Chapa knocked on appellant's window and asked him about the odor of marijuana; neither Chapa nor Deputy Glaze brandished his weapon; Chapa spoke to appellant in a polite tone and without raising his voice; and, although Glaze was present, he did not speak to appellant and there is no testimony that he engaged in any threatening behavior. Johnson testified to the contrary and stated that "five or six" police units arrived at the Chevron station and that Deputy Chapa immediately "ordered" appellant out of the car. The trial court is the sole trier of fact and judge of the credibility of the witnesses at a suppression hearing and had the discretion to believe Deputy Chapa's account of events over Johnson's. *See St. George*, 237 S.W.3d at 725; *Green*, 934 S.W.2d at 98.

We conclude that, based on this record, the trial court could have concluded that a reasonable person in appellant's position would have felt free either to roll down the window and speak with Deputy Chapa or to decline Chapa's requests and terminate the encounter. *Compare Castleberry*, 332 S.W.3d at 468 (determining

interaction was consensual encounter when officer approached, asked for identification, inquired after defendant's purpose, and interaction took place around 3:00 a.m., but in "well-lit" area with "quite a bit" of foot traffic), *with Crain*, 315 S.W.3d at 52 ("We . . . conclude that Griffin's act of shining his patrol car's overhead lights in the appellant's direction, coupled with his request-that-sounded-like-an-order, to 'come over here and talk to me,' caused the appellant to yield to Griffin's show of authority—a reasonable person in the appellant's shoes would not have felt free to leave or decline the officer's requests."), *and Garcia-Cantu*, 253 S.W.3d at 249 ("[G]iven the facts that Officer Okland initiated the incident by blocking appellee's exit with his patrol car, turning on his spotlight, approaching appellee's truck with a long flashlight playing over the driver's side, immediately saying 'What are you doing here?', using his flashlight to wave the passenger back to the rear of the truck, and, standing toe-to-toe with appellee, shining his flashlight into appellee's eyes, it is hard to conclude that any reasonable person would feel free to drive or walk away or to terminate the encounter."). Thus, Deputy Chapa's interaction with appellant began as a consensual encounter and not as a detention.

2. Escalation to Investigatory Detention

Appellant contends that Deputy Chapa's initial interaction with him was a detention that was unjustified because the uncorroborated anonymous tip that

Chapa received did not, standing alone, establish reasonable suspicion to believe that appellant was engaged in criminal activity. *See Florida v. J.L.*, 529 U.S. 266, 272, 120 S. Ct. 1375, 1379 (2000) ("The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person."). As we have already held, the initial interaction here was a consensual encounter, not an investigatory detention, and police officers do not need any cause or justification to initiate a consensual encounter. *See Woodard*, 341 S.W.3d at 411 ("[N]o justification is required for an officer to request information from a citizen."); *Parks v. State*, 330 S.W.3d 675, 679 (Tex. App.—San Antonio 2010, pet. ref'd) ("Police do not need any articulable cause to initiate an encounter because an encounter does not implicate the Fourth Amendment."). Thus, because Deputy Chapa's initial interaction with appellant was a consensual encounter, it is irrelevant whether he had sufficiently corroborated the anonymous tip so as to establish reasonable suspicion at the time he first made contact with appellant. *See Woodard*, 341 S.W.3d at 413 ("Officer Warner did not need any information about Woodard to justify the stop and inquiry. The lack of specific, credible, and verifiable information about the accident and the driver originating from the anonymous tipster and Officer Warner's lack of personal knowledge concerning the commission of an offense by Woodard are red herrings. . . . Even without the advance information about the

accident and driver, Officer Warner was free to stop, approach, and question Woodard.").

By the time Deputy Chapa's interaction with appellant escalated to an investigatory detention, Chapa had developed probable cause to search appellant's person and his vehicle for contraband. Deputy Chapa received an anonymous tip that a man was selling narcotics at a nearby Chevron station. He arrived at the Chevron station and observed a vehicle and a person inside that vehicle who matched the descriptions provided by the tipster. He testified that when appellant rolled his window down, he immediately noticed the "strong[,] distinct [odor] of marijuana coming from [appellant's] person and from within the vehicle."

"Texas courts have found probable cause to search based solely on the smell of [marijuana]." *Dickey v. State*, 96 S.W.3d 610, 613 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *Taylor v. State*, 20 S.W.3d 51, 55 (Tex. App.—Texarkana 2000, pet. ref'd) ("Texas courts have found probable cause for searches and arrests based on officers having detected an odor of [marijuana] in their vicinity, where there was no evidence that the [marijuana] had been burned.").

In *State v. Crawford*, the Dallas Court of Appeals addressed whether the trial court correctly granted a motion to suppress marijuana found in a vehicle. 120 S.W.3d 508, 509 (Tex. App.—Dallas 2003, no pet.). The arresting officers received a "reckless driver call," arrived at a truck stop, saw the car that matched

the description given in the dispatch, and approached the vehicle. *Id.* The driver's side window was open and the officers "immediately" noticed that Crawford's eyes were bloodshot and glassy and that a strong odor of burned marijuana was coming from the vehicle. *Id.* The Dallas court held that the officers were free to approach Crawford at the truck stop and that "[n]o facts were necessary to justify the officers[']encounter with Crawford." *Id.* at 510. As a result of Crawford's appearance and the smell of burning marijuana, the officers "immediately developed probable cause to believe the car contained marijuana," and the trial court therefore erroneously granted the motion to suppress. *Id.* at 510–11.

Here, after Deputy Chapa permissibly approached appellant's vehicle and knocked on the window, appellant rolled down the window and Chapa could immediately smell the strong odor of marijuana emanating from both appellant and his vehicle. This marijuana odor provided grounds for Deputy Chapa to convert the consensual encounter with appellant into a detention to investigate the presence of contraband. The odor, combined with the anonymous tip, provided probable cause to search appellant and his vehicle.[10] *See id.* at 510; *Dickey*, 96 S.W.3d at 613.

[10] To the extent appellant argues that Deputy Chapa lacked probable cause or reasonable suspicion to request that appellant open his mouth after the search of the vehicle failed to yield contraband, we note that "[t]he odor of [marijuana] alone is sufficient to constitute probable cause to *search a defendant's person*,

We therefore conclude that because Deputy Chapa had developed probable cause by the time his encounter with appellant escalated to an investigatory detention, Chapa legally detained appellant at the Chevron station.

We overrule this sub-part of appellant's first issue.

C. Warrantless Search of Appellant's Apartment

Appellant also contends, in his first issue, that the trial court erred in denying his motion to suppress the evidence obtained from his apartment because Deputy Chapa did not obtain a warrant prior to the search and no exception to the warrant requirement applied: exigent circumstances were not present and Johnson's consent to search was involuntary, and, thus, invalid, because she consented due to threats from Chapa. The State argues that the search was permissible because appellant himself voluntarily consented to the search of the apartment—a fact that was not challenged by appellant on appeal—and Johnson likewise subsequently voluntarily consented to the search. We agree with the State.

Under the Fourth Amendment, a search conducted without a warrant issued upon probable cause is "*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 2043 (1973); *Reasor v. State*, 12 S.W.3d 813, 817 (Tex. Crim. App. 2000). One exception to the warrant requirement is a search conducted

---

vehicle, or objects within the vehicle." *Small v. State*, 977 S.W.2d 771, 774 (Tex. App.—Fort Worth 1998, no pet.) (emphasis added).

with the consent of the suspect. *Guevara v. State*, 97 S.W.3d 579, 582 (Tex. Crim. App. 2003). For consent to be a valid exception, the suspect must have given his consent voluntarily. *Gutierrez v. State*, 221 S.W.3d 680, 686 (Tex. Crim. App. 2007). "The validity of a consensual search is a question of fact, and the State bears the burden to prove by clear and convincing evidence that consent was obtained voluntarily." *Id.* As part of this burden, the State must prove that consent was not the result of duress or coercion. *Id.* We examine the totality of the circumstances surrounding the statement of consent to determine whether the suspect consented voluntarily. *Id.* at 686–87; *Reasor*, 12 S.W.3d at 818.

Here, although appellant challenges Johnson's consent as involuntary, he does not argue that his own consent was involuntary. Instead, he asserts that he did not consent at all to the search of the apartment. The record does not support this assertion. Deputy Chapa testified, at both the suppression hearing and at trial, that after he discovered the particles of marijuana in appellant's mouth and appellant admitted that he was at the Chevron station to sell narcotics and that he had additional narcotics at his residence, Deputy Chapa asked appellant for his consent to search the apartment. Appellant gave his consent and told Chapa precisely where the drugs were located in the apartment. Deputy Chapa stated that he did not threaten or coerce appellant in any way, nor did he make any promises to him to obtain his consent. He also testified that appellant was "very cooperative" and

both he and appellant were polite to one another. Deputy Chapa stated that he did not obtain appellant's written consent to search because Johnson was the leaseholder for the apartment. *See Montoya v. State*, 744 S.W.2d 15, 25 (Tex. Crim. App. 1987) ("A consent to search may be oral and still be valid."), *overruled on other grounds, Cockrell v. State*, 933 S.W.2d 73 (Tex. Crim. App. 1996). As a result, he then asked Johnson for her written consent, which she provided.

Based on this record, the trial court could have believed Deputy Chapa's testimony that appellant consented to the search of his apartment and that this consent was voluntary. *See St. George*, 237 S.W.3d at 725 (holding that trial court is sole judge of credibility of witnesses and weight to give their testimony at suppression hearing). Because appellant does not challenge the voluntariness of his consent on appeal and because the court could also have believed that Johnson's subsequent consent was voluntary, we hold that the trial court did not abuse its discretion in denying appellant's motion to suppress the evidence found during the search of his apartment. *See Laney*, 117 S.W.3d at 857 (holding that we sustain trial court's denial of motion to suppress if ruling is reasonably supported by record and correct on any theory of law applicable to case).

We overrule appellant's first issue.[11]

---

[11] At the end of his argument on the first issue, appellant includes a section in his brief entitled "Totality of errors that resulted in an illegal search and seizure at the appellant's home" and cites ten reasons why the search was impermissible. Some

Admission of Prior Criminal Records

In his second issue, appellant contends that the trial court erred in admitting during the punishment phase (1) State's Exhibit 8 because the exhibit contained the records of a different defendant and (2) State's Exhibit 15 because the fingerprint expert was unable to match the fingerprint on the exhibit to appellant's fingerprints, and, therefore, the State failed to provide sufficient proof that these two exhibits were his criminal records.

A. State's Exhibit 8

In the punishment phase, the trial court may admit "any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant . . . ." TEX. CODE CRIM. PROC. ANN. art. 37.07 § 3(a)(1) (Vernon Supp. 2010).

The first two pages of State's Exhibit 8 are a judgment and sentence against "Dennis Johnson, Jr." for the possession of marijuana in the County Criminal

---

of these reasons overlap with the arguments made in appellant's first issue (e.g., "Law enforcement had insufficient reasonable suspicion to detain the Appellant," "There were no exigent circumstances justifying a search without a warrant"). For all of these reasons, appellant provides one sentence stating the general proposition for why the search was impermissible followed by a citation to one or two authorities. Appellant does not attempt to apply these propositions to this particular case or otherwise explain why these contentions provide a basis for holding that the trial court erred in denying the motion to suppress. We therefore conclude that appellant has waived these issues for inadequate briefing, to the extent they are not addressed elsewhere in his brief with proper argument and authorities. *See* TEX. R. APP. P. 38.1(i) ("The brief must contain a clear and concise argument for the contentions made, with appropriate citations to authorities and to the record.").

Court at Law Number 14 of Harris County, cause number 9623579, dated August 26, 1996. During the punishment phase, Deputy Schield successfully matched the fingerprint on the possession of marijuana judgment contained in Exhibit 8 to appellant's fingerprints. Exhibit 8 also contains four pages describing the conditions of probation for a theft offense committed by Miguel Angel Lopez, cause number 9623577, in the County Criminal Court at Law Number 9 of Harris County, dated August 15, 1996. Defense counsel objected to the paperwork pertaining to Lopez on the ground that Lopez is not this particular defendant. Appellant did not complain, either at trial or on appeal, that the first two pages of Exhibit 8—the judgment and sentence for the possession of marijuana offense—are insufficient to link him to that prior offense.

Assuming that the trial court erred in admitting Exhibit 8 in its entirety, we hold that the error was harmless. Error in the admission of evidence is non-constitutional error subject to a harm analysis under Texas Rule of Appellate Procedure 44.2(b). TEX. R. APP. P. 44.2(b); *Jabari v. State*, 273 S.W.3d 745, 754 (Tex. App.—Houston [1st Dist.] 2008, no pet.). We disregard any non-constitutional error that does not affect a defendant's substantial rights by having a "substantial and injurious effect or influence in determining the jury's verdict." *Jabari*, 273 S.W.3d at 754 (citing *Morales v. State*, 32 S.W.3d 862, 867 (Tex. Crim. App. 2000)); *see* TEX. R. APP. P. 44.2(b). We should not reverse a

conviction for non-constitutional error if, after examining the record as a whole, we have "fair assurance that the error did not influence the jury, or had but slight effect." *Jabari*, 273 S.W.3d at 754 (citing *Johnson v. State*, 967 S.W.2d 410, 417 (Tex. Crim. App. 1998)).

The punishment range for the offense of possession of between four and two hundred grams of a controlled substance, enhanced by a prior felony conviction, is either five to ninety-nine years' confinement, or life, and a fine of up to $10,000. *See* TEX. PENAL CODE ANN. §§ 12.32, 12.42(b) (Vernon 2011). Here, the jury assessed punishment at eight years' confinement, which is on the low end of the punishment range. The State presented ample evidence of appellant's guilt, including appellant's admissions that he swallowed a bag of marijuana when he saw Deputy Chapa pull into the Chevron station, that he was at the Chevron station for the purpose of selling marijuana, and that he possessed marijuana and powder cocaine at his apartment. The trial court also admitted evidence of five previous convictions, all of which were drug-related. We therefore conclude that the trial court's admission of Exhibit 8, which included the probation conditions for another defendant in addition to appellant's unchallenged judgment and sentence for possession of marijuana, could not have caused more than a slight influence on the jury's punishment decision. *See Jabari*, 273 S.W.3d at 754. We therefore hold that the trial court's admission of Exhibit 8 in its entirety was harmless error.

B. State's Exhibit 15

Appellant also contends that the trial court erred in admitting Exhibit 15 because the State's fingerprint expert could not match the "blurred out" fingerprint on the exhibit to appellant's fingerprints. According to appellant, the State thus failed to provide sufficient proof that Exhibit 15 was his prior conviction.[12]

To establish that a defendant has been convicted of a prior offense, the State must prove beyond a reasonable doubt that (1) a prior conviction exists, and (2) the defendant is linked to that conviction. *Flowers v. State*, 220 S.W.3d 919, 921 (Tex. Crim. App. 2007); *Orsag v. State*, 312 S.W.3d 105, 115 (Tex. App.—Houston [14th Dist.] 2010, pet. ref'd). There is no requirement that the fact of a prior conviction be proven with any specific document. *Flowers*, 220 S.W.3d at 921. Although the preferred method for proving a prior conviction is by a certified copy of a final judgment and sentence, the State may prove the requisite elements in numerous ways, including: (1) the defendant's admission or stipulation, (2) testimony by a person who was present when the person was convicted of the specified crime and can identify the defendant as that person, or (3) documentary proof that contains "sufficient information to establish both the existence of a prior

---

[12] Appellant cites no authority for the proposition that the defect in Exhibit 15—a judgment and sentence with a blurry fingerprint—renders the exhibit *inadmissible*. Rather, appellant argues that this exhibit is insufficient to link him to the prior convictions. This is a sufficiency of the evidence argument, and we construe appellant's argument as such.

conviction and the defendant's identity as the person convicted." *Id.* at 921–22. "Regardless of the type of evidentiary puzzle pieces the State offers to establish the existence of a prior conviction and its link to a specific defendant, the trier of fact determines if these pieces fit together sufficiently to complete the puzzle." *Id.* at 923.

Here, the State presented certified copies of judgments and sentences for five prior offenses. Deputy Schield was able to positively compare and match appellant's fingerprints to the fingerprints on all of the judgments except State's Exhibit 15, a conviction dated July 23, 2001, in the 263rd District Court of Harris County, cause number 869105, for the offense of possession of between four and two hundred grams of cocaine with intent to deliver, committed on February 15, 2001. Deputy Schield testified that he could not make a positive comparison of these fingerprints because the fingerprint on Exhibit 15 was too blurry.

The trial court also admitted, without objection, State's Exhibit 13, a "jail card." This jail card is in the name of Dennis Johnson, "aka Dennis Johnson, Jr.," and reflects an arrest on February 15, 2001, for the offense of possession with intent to deliver between four and two hundred grams of a controlled substance. The card states that the offense was tried in the 263rd District Court of Harris County in cause number 0869105. The card also contains fingerprints, which Deputy Schield successfully compared and matched to appellant's fingerprints.

Deputy Schield also testified that the cause numbers on State's Exhibit 13—the jail card—and State's Exhibit 15—the judgment and sentence—matched.[13]

We conclude that, based on the totality of the evidence presented by the State, the State produced sufficient evidence to prove beyond a reasonable doubt that appellant was linked to the prior conviction of possession of between four and two hundred grams of cocaine with the intent to deliver—the offense alleged in the enhancement paragraph and described in Exhibit 15.[14]

We overrule appellant's second issue.

Modification of Trial Court's Judgment

We observed that the trial court judgment fails to reflect appellant's plea to the enhancement paragraph and the jury's finding regarding the allegations contained in that enhancement paragraph.

---

[13] Appellant further complains that the admission of Exhibit 15 was improper because it reflects that the judgment was signed on July 23, 2001, and the enhancement paragraph in the indictment reflects that the conviction became final on July 23, 2007. The enhancement paragraph in the original indictment does contain the allegation that appellant was convicted of possession with the intent to deliver a controlled substance on July 23, 2007. The clerk's record also includes, however, an amended indictment in which the "2007" has been circled and replaced with a "2001." Appellant raised no complaint about the amended indictment.

[14] *See Gilmore v. State*, No. 14-06-00620-CR, 2007 WL 2089294, at *7 (Tex. App.—Houston [14th Dist.] July 24, 2007, pet. ref'd) (mem. op., not designated for publication) ("Deputy Mills identified the fingerprints on the jail cards as appellant's and thus sufficiently linked appellant to the offenses on these cards. She then matched up the jail cards with the corresponding judgments and sentences by noting the identifying information found on each, such as appellant's name, birth date, and social security number, and the offense's cause number.").

An appellate court has the authority to reform a judgment to make the record speak the truth when the matter has been called to its attention by any source. *French v. State*, 830 S.W.2d 607, 609 (Tex. Crim. App. 1992) (holding that appellate court could reform judgment to reflect jury's affirmative deadly weapon finding and adopting reasoning in *Asberry v. State*, 813 S.W.2d 526, 529–30 (Tex. App.—Dallas 1991, pet. ref'd) ("The authority of an appellate court to reform incorrect judgments is not dependent upon the request of any party, nor does it turn on the question of whether a party has or has not objected in the trial court.")); *see also* TEX. R. APP. P. 43.2(b) (permitting appellate court to modify trial court judgment and affirm as modified).

Here, appellant pleaded "not true" to the allegations in an enhancement paragraph. The jury found the allegations in this enhancement paragraph to be true. The judgment, however, states "N/A" for appellant's "Plea to 1st Enhancement Paragraph" and "N/A" for the jury's "Findings on 1st Enhancement Paragraph."

We therefore modify the judgment to reflect that appellant pleaded "not true" to the enhancement paragraph and that the jury found the allegations in this enhancement paragraph to be true. *See* TEX. R. APP. P. 43.2(b) (allowing appellate courts to modify judgments and affirm as modified).

Conclusion

We modify the judgment of the trial court to reflect that appellant pleaded "not true" to the allegations in the enhancement paragraph and that the jury found the allegations in this enhancement paragraph to be true. We affirm the judgment of the trial court as modified.

Evelyn V. Keyes
Justice

Panel consists of Justices Keyes, Higley, and Massengale.

Do Not Publish. TEX. R. APP. P. 47.2(b).