Affirmed and Memorandum Opinion filed October 14, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00597-CR

JASON ARNELL FERGUSON, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 176th District Court
Harris County, Texas
Trial Court Cause No. 1128391

MEMORANDUM OPINION

A jury found the appellant, Jason Arnell Ferguson, guilty of murder and the trial court sentenced him to eight years' confinement in the Institutional Division of the Texas Department of Criminal Justice. In a single issue, Ferguson contends the trial court erred in denying his motion to suppress and admitting evidence illegally seized from his automobile. We affirm.

I

Sometime around midnight on August 6, 2007, Ferguson shot and killed Quintin Jack at the Arbor Square Apartments over a disagreement about money. A few hours later, Ferguson was seen at the apartments by a worker who had previously issued multiple trespass warnings to him. The police were called, and Ferguson was arrested for trespassing. Sergeant Richards, the arresting officer, questioned Ferguson to determine whether he had a vehicle parked on the property that needed to be towed.

Attempting to distance himself from his vehicle—in which he had earlier hidden the murder weapon—Ferguson told Richards that his vehicle was in the shop. He then told Richards that he drove an Oldsmobile, when in fact he drove a Volvo. Ultimately, Richards located Ferguson's Volvo, which was parked across the street from Arbor Square at the Sandpiper Apartments. Richards had the car impounded.

The day after being arrested for trespassing, Ferguson was interviewed by Officer Chappell of the homicide division of the Houston Police Department, who was investigating Jack's shooting. After confessing to killing Jack, Ferguson gave written consent to search his car. Ferguson told Chappell where in the car the murder weapon was located. A subsequent search of Ferguson's car uncovered the murder weapon, a nine-millimeter handgun, where Ferguson said it would be.

Both Officers Richards and Chappell testified at Ferguson's trial. Among other things, they testified that they did not believe they had probable cause to search Ferguson's car. During Chappell's direct examination, Ferguson's attorney moved to suppress all evidence found in Ferguson's car on the grounds that the car was illegally seized and searched based on only the officers' "hunch" that the vehicle might contain evidence of Jack's murder. The trial court denied the motion.

II

A

We review the trial court's ruling on a motion to suppress under an abuse-of-discretion standard. *State v. Dixon*, 206 S.W.3d 587, 590 (Tex. Crim. App. 2006). We view the record in the light most favorable to the trial court's ruling and will reverse only if the ruling is outside the zone of reasonable disagreement. *Id.* We give almost total deference to the trial court's factual determinations, especially those based on an evaluation of the witnesses' credibility and demeanor. *Guzman v. State*, 955 S.W.2d 85, 89 (Tex. Crim. App. 1997). We review de novo the trial court's application of the law of search and seizure to the facts. *Wiede v. State*, 214 S.W.3d 17, 25 (Tex. Crim. App. 2007). When the trial court has not made findings of fact, we imply findings that support the court's ruling if the findings are supported by the record. *State v. Ross*, 32 S.W.3d 853, 855–56 (Tex. Crim. App. 2000). We will sustain the trial court's ruling "if it is reasonably supported by the record and is correct on any theory of law applicable to the case." *Dixon*, 206 S.W.3d at 590.

B

Ferguson contends the evidence found in his vehicle should be suppressed under the federal and state constitutions as the fruit of an unreasonable seizure and search conducted without probable cause. Ferguson does not specify exactly what evidence he contends should have been suppressed, but we will assume he means the nine-millimeter gun that he used to kill Jack.[1] Given the record evidence, however, the trial court could have reasonably concluded that the seizure and search of Ferguson's vehicle did not violate his constitutional rights.

[1] In addition to the gun, the police recovered about one hundred rounds of ammunition, miscellaneous papers, keys to Ferguson's apartment, and a wallet containing Ferguson's identification card. The gun, however, is the only item Ferguson mentions in his brief.

Ferguson first argues that his vehicle was not lawfully impounded. *See South Dakota v. Opperman*, 428 U.S. 364, 375–76 (1976); *Benavides v. State*, 600 S.W.2d 809, 811 (Tex. Crim. App. 1980). For an automobile to be lawfully impounded, the seizure must be reasonable under the Fourth Amendment. *Benavides*, 600 S.W.2d at 811. Courts have identified a number of circumstances in which law enforcement may reasonably impound an automobile, including the following: (1) the vehicle has been used in the commission of a crime; (2) an unattended vehicle is abandoned, illegally parked, or otherwise endangering other traffic; (3) the driver is incapacitated and unable to remove the vehicle; (4) the driver is removed from his automobile, placed under custodial arrest, and his property cannot be protected by any means other than impoundment. *Lagaite v. State*, 995 S.W.2d 860, 865 (Tex. App.—Houston [1st Dist.] 1999, pet. ref'd) (citations omitted). The State bears the burden to prove a lawful impoundment. *Benavides*, 600 S.W.2d at 811; *Josey v. State*, 981 S.W.2d 831, 842 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd).

Ferguson contends that his car was legally parked in a private parking lot across the street from where he was arrested for trespassing on foot, and so there was no reasonable connection between his arrest and his car. *See Benavides*, 600 S.W.2d at 811–12 (stating that for impoundment to be lawful, "there must be some reasonable connection between the arrest and the vehicle"); *see also Gandy v. State*, 835 S.W.2d 238, 243 (Tex. App.—Houston [1st Dist.] 1992, pet. ref'd) (holding that that vehicle's impoundment was proper because the police "had not only a connection between the vehicle and the crime, but reason to believe evidence of the crime might still be contained in the vehicle"). Ferguson also points out that the police officers admitted they lacked probable cause to seize his car, and asserts they made the decision to impound his car based on no more than a suspicion that the car might contain evidence of criminal activity, which is unlawful. *See Colorado v. Bertine*, 479 U.S. 367 (1987). Consequently, Fergusons contends, any evidence found during the subsequent search of

his car should have been suppressed as "fruit of the poisonous tree." *See Wong Sun v. United States*, 371 U.S. 471, 484 (1963).

In response, the State contends that the officers' testimony that they lacked probable cause is not dispositive; the test for probable cause is objective and the officers' subjective beliefs are immaterial. *See Amador v. State*, 275 S.W.3d 872, 878 (Tex. Crim. App. 2009); *Wiede*, 214 S.W.3d at 25. To demonstrate the existence of probable cause to seize Ferguson's car, the State points to the evidence that Ferguson was a suspect in a murder that occurred just hours before his arrest at the same location where he was trespassing, he was seen in his car within hours of being arrested, and he lied to the officers about his ownership of a car that the officers knew could contain evidence of the murder. *See Wynne v. State*, 676 S.W.2d 650, 654–55 (Tex. App.—Fort Worth 1984, pet. ref'd) (police need only a "reasonable connection" between the vehicle and the offense apparently committed to justify impoundment).

We need not resolve this issue, however, as we conclude Ferguson's consent to the search of his car sufficiently attenuated any taint from an allegedly illegal seizure, and therefore the severe remedy of excluding the evidence is not required. *See Hudson v. Michigan*, 547 U.S. 586, 593–94 (2006); *State v. Powell*, 306 S.W.3d 761, 769–70 (Tex. Crim. App. 2010). Voluntary consent to search is a well-established exception to the requirement of a warrant and probable cause to search. *Gutierrez v. State*, 221 S.W.3d 680, 686 (Tex. Crim. App. 2007); *Reasor v. State*, 12 S.W.3d 813, 817 (Tex. Crim. App. 2000).

Ferguson suggests that his consent was not voluntary because the illegal seizure of his car "left him with no real option other than giving consent to a search of his car."[2]

[2] The State contends Ferguson waived any complaint about the voluntariness of his consent because he did not raise it at trial, and in fact when given an opportunity to address the issue, he expressly declined. Further, Ferguson's only stated objection to the admission of his confession was that he had "expressed the desire" to have an attorney present, which the trial court overruled. But Ferguson's written motion to suppress included an assertion that that he "was not competent to understand his legal

But he does not direct us to any evidence tending to show that the police subjected him to coercion or threats. *See Reasor*, 12 S.W.3d at 818. After agreeing to speak with Officer Chappell, Ferguson admitted shooting Jack and told Chappell exactly where in the vehicle Chappell would find the murder weapon. Ferguson then gave written consent to search his car, thus allowing Chappell to lawfully search the vehicle. *See id.* at 817; *Gutierrez*, 221 S.W.3d at 686. When Ferguson gave his statement, he was about twenty-three years old, he had an associate degree from a university, and he had worked as a licensed security guard. Chappell testified that Ferguson agreed to speak to him after Chappell read him his rights and Ferguson indicated that he wished to waive his rights. Chappell denied that he coerced Ferguson or promised him anything in exchange for his statement, and he testified that he did not display his service weapon in the interview room. Chappell also testified that it appeared to him that Ferguson was giving his statement freely and voluntarily. Ferguson offered no conflicting evidence. Therefore, viewing the totality of the circumstances, the trial court could have reasonably concluded that Ferguson's consent to the search was voluntary. *See Gutierrez*, 221 S.W.3d at 687–88; *Reasor*, 12 S.W.3d at 818–19.[3]

Further, the evidence does not support any contention that Chappell exploited the fact that Ferguson's car was already in police custody to obtain his confession or consent to search. *See Powell*, 306 S.W.3d at 770. During the recorded statement, no mention was made that Ferguson's vehicle had been impounded, and the record is at best unclear as to whether Ferguson even knew his car had been impounded. The written consent to search describes Ferguson's vehicle as being located at the police impound lot; however, there is no evidence Ferguson knew the vehicle had been taken there until he reviewed and signed the written consent form, which was after he had already agreed to give a

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rights and could not have voluntarily consented to any search or questioning." Therefore, we will address Ferguson's argument on appeal.

[3] We note that during oral argument, Ferguson's counsel conceded that his statement was voluntary.

statement to Chappell and after he had already orally consented to the search of his vehicle. Thus, there is no causal connection between the allegedly unlawful seizure and the otherwise lawful search of Ferguson's car resulting in the policing recovering the murder weapon. *See Hudson*, 547 U.S. at 592–94; *Powell*, 306 S.W.3d at 770.

Based on the record evidence, we conclude that the gun was obtained not from an unlawful seizure of Ferguson's car or police exploitation of the seizure, but from a subsequent lawful search sufficiently distinguishable from the seizure to attenuate any taint. Therefore, the exclusionary rule does not apply and the gun was admissible evidence even if the seizure of Ferguson's car was unlawful.

Even if Ferguson's consent were not given voluntarily, we would still conclude that he is not entitled to a reversal because any error in admitting the gun was harmless. In reviewing constitutional error that is subject to harmless-error review, we must reverse a judgment of conviction or punishment unless we determine beyond a reasonable doubt that the error did not contribute to the conviction or punishment. Tex. R. App. P. 44.2(a); *see Hernandez v. State*, 60 S.W.3d 106, 108 (Tex. Crim. App. 2001) (holding that harm analysis of Rule 44.2(a) was required to analyze the erroneous admission of evidence obtained in violation of the Fourth Amendment). In assessing the likelihood that the jury's decision was adversely affected by the error, we consider everything in the record, including any testimony or physical evidence for the jury's consideration, the nature of the evidence supporting the verdict, the character of the alleged error and its connection with other evidence, and whether the State emphasized the error. *See Motilla v. State*, 78 S.W.3d 352, 357–58 (Tex. Crim. App. 2002).

Ferguson argues that "the evidence discovered in the car constituted the only concrete evidence of [his] involvement" in the murder. But that is not correct. The State already had, and the jury heard, Ferguson's recorded confession to shooting and killing Jack, albeit in self-defense. Ferguson does not contend on appeal that the confession was illegally obtained or should not have been admitted. Ferguson also testified in his

defense and admitted that he shot Jack. Ferguson testified that he did so in self-defense after Jack reached for a gun in his waistband as they argued over Jack's failure to repay a loan Ferguson had made to him. Ferguson also admitted that he shot Jack with a gun he had purchased from "somebody on the street" a few weeks earlier. Two witnesses provided additional evidence connecting Ferguson to the murder. Shamira Franklin testified that Ferguson was at her apartment in the Arbor Square complex the night Jack was killed. She stated that Ferguson said Jack owed him some money "and if he kept doing what he was doing, that he was going to end up dead or in jail." Shortly after Ferguson left her apartment, she heard that Jack had been killed. Ferguson then returned later that night. Ashley Robinson testified that she was living in the Arbor Square apartments that night and saw Ferguson shortly after she heard a single gunshot. She testified that Ferguson smelled of gunpowder and he "had a look . . . like a demon was on him." She realized what Ferguson had done, and she became angry and "went off on him." She also testified that, earlier that evening when she was at Franklin's apartment, Ferguson became angry about Jack selling fake crack cocaine. He then left the apartment and said he had to go "handle some business." Both Franklin and Robinson testified that Ferguson regularly carried a gun. In closing argument, the State focused on convincing the jury that Ferguson's claim of self-defense was neither credible nor consistent with the evidence. The murder weapon was mentioned only briefly and then only in the context of addressing Ferguson's credibility.

Ferguson does not claim the allegedly erroneously admitted evidence contributed in any way to his conviction, nor does he otherwise explain how he was harmed by its admission. The State had sufficient evidence and could have proceeded to trial without ever having introduced the murder weapon. With Ferguson's confession and admission at trial that he shot Jack, the gun evidence contributed little or nothing to the State's case and did not in any way impair Ferguson's self-defense claim, as he admitted he shot Jack with his own gun. *See Strong v. State*, 138 S.W.3d 546, 555 (Tex. App.—Corpus Christi 2004, pet. ref'd) (holding error in admitting evidence illegally seized from vehicle was

harmless when evidence was not especially probative, was not emphasized by either party, and State relied on other evidence to meet its burden of proof). Having carefully evaluated the entire record, we conclude that on these facts any error in admitting the gun evidence was harmless.

We overrule Ferguson's issue and affirm the trial court's judgment.

/s/ Jeffrey V. Brown
Justice

Panel consists of Justices Brown, Sullivan, and Christopher.
Do Not Publish — TEX. R. APP. P. 47.2(b).