

SUPREME COURT OF ARKANSAS

No. CR 12-74

TERRY DEAN BIRTS

APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered September 27, 2012

APPEAL FROM THE PULASKI
COUNTY CIRCUIT COURT,
[NO. 60-CR-10-3471]

HON. WENDELL GRIFFEN, JUDGE

AFFIRMED.**DONALD L. CORBIN, Associate Justice**

Appellant, Terry Dean Birts, appeals the judgment of the Pulaski County Circuit Court convicting him of one count each of second-degree murder, first-degree murder, and capital murder. Appellant was tried by jury and sentenced by the court; he received enhanced sentences due to his use of a firearm and his four or more prior felony convictions. Because Appellant was sentenced to an aggregate sentence of life imprisonment without parole, jurisdiction of this appeal is properly in this court pursuant to Ark. Sup. Ct. R. 1-2(a)(2) (2012). As his sole point for reversal, Appellant contends the circuit court abused its discretion in excluding fingerprint and trace-DNA evidence of unknown persons found at the crime scene and at the residence of one of the victims. We find no abuse of discretion and affirm the judgment and commitment order.

Appellant does not challenge the sufficiency of the evidence presented against him at trial, but a recitation of some of that evidence is necessary to an understanding of the sole

point on appeal. Appellant was charged by felony information with the capital murder of three persons, Tammy Lawrence, Ahki Hughes, and Barry Murphy. At trial, the jury heard evidence that Lawrence and Hughes were found on May 9, 2009, inside a black sport-utility vehicle alongside Interstate 40. Murphy was found mortally wounded later that same day near Interstate 440. According to the medical examiner, all three victims died of gunshot wounds.

The jury heard testimony from Tiffany Grimes, Appellant's wife, that Appellant admitted to her that he had killed all three persons. According to Grimes, she was not with Appellant when he committed the murders but saw him shortly after they had occurred, and he gave her the following explanation of events. He told her that he, Lawrence, and Hughes had been at Lawrence's residence "snorting powder and drinking," when they left in Lawrence's black sport-utility vehicle. He told Grimes that he was in the backseat and that he shot Hughes and then Lawrence. He also told Grimes that he called his cousin, Kevin O'Donald, to come pick him up, and that O'Donald brought the third victim, Murphy, with him to the scene. Appellant told Grimes that Murphy kept saying he would not tell anyone anything and that he did not see anything. Appellant then drove Murphy away, shot him in the shoulder, and threw him out of the vehicle.

The jury also heard testimony from O'Donald, who told them that Appellant called him to meet him in a parking lot and that while he waited, he heard two shots fired and saw two flashes of light inside a black vehicle that had just pulled up. O'Donald stated that he saw Appellant exit the vehicle holding a handgun. According to O'Donald, he then followed

Appellant while Appellant drove the black vehicle to a location where Appellant staged a collision.

The jury heard the following testimony from employees at the Arkansas State Crime Laboratory. Appellant's DNA was found on several items obtained at Lawrence's residence, including a condom, a cigarette butt, and a tall drinking glass. Appellant's fingerprints were also found on a vodka bottle, a ceramic plate, and a short drinking glass, all of which were also found at Lawrence's residence. As to Lawrence's vehicle, Appellant's right-palm print appeared between the front and rear doors on the driver's side of the exterior of the vehicle, but no usable prints were found inside the vehicle. The jury was also told that none of Appellant's DNA was found inside the vehicle.

The defense made a proffer of evidence that Appellant was excluded as the source of semen found in a condom that was in the bathroom trash can at Lawrence's residence. The defense also proffered evidence that Appellant was excluded as the source of DNA found on a coffee mug at Lawrence's residence. In addition, the defense made a proffer that unknown fingerprints were found on a bottle of hemp oil that was on Lawrence's night stand, and that Appellant was excluded as the source of those prints.

The jury also saw surveillance video taken from a restaurant, which was obtained by the Arkansas State Police as part of their investigation of these murders. The investigating officer explained to the jury that the surveillance video depicted Appellant, Lawrence, Hughes, and Broderick Patrick leaving the restaurant at approximately 8:54 p.m. on May 8, 2009.

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The State waived the death penalty, and Appellant waived his right to be sentenced by the jury. The jury returned guilty verdicts for the capital murder of Murphy, first-degree murder of Lawrence, and second-degree murder of Hughes. The circuit court sentenced Appellant as previously noted. This appeal followed.

Appellant's sole point on appeal is that the circuit court abused its discretion in granting the State's motion in limine to prohibit Appellant's introduction of fingerprints and trace-DNA evidence of unknown persons found inside the crime-scene vehicle and inside Lawrence's residence. The State's motion stated in relevant part:

2) At the various crime scenes in this case, including the SUV in which Tammy Lawrence and Ahki Hughes were shot, the home of Tammy Lawrence and the body of Tammy Lawrence, the Arkansas State Crime Laboratory detected DNA and fingerprints that it was unable to determine a contributor.

3) This DNA includes both semen and touch DNA.

....

5) The fact that there is unknown DNA and fingerprints located in this investigation is not relevant, and therefore inadmissible. Ark. Rules of Evidence 402 and 403.

6) Evidence that some third party committed an offense is inadmissible unless it points directly to the guilt of the third party. "Evidence that does no more than create an inference or conjecture as to another's guilt is inadmissible." *Walker v. State*, 353 Ark. 12, 110 S.W.3d 752 (2003); *Zinger v. State*, 313 Ark. 70, 852 S.W.2d 320 (1993).

In response to the motion, defense counsel argued that the defense did not intend to point the finger at any specific individual, but just wanted to make the jury aware of *all* the evidence, not just the evidence that the State would present. Defense counsel argued further that if the State presented testimony that Appellant was inside the vehicle, then it would be

relevant for the purpose of creating reasonable doubt to allow the defense to present testimony that none of the DNA found inside the vehicle was Appellant's.

The circuit court granted the State's *Zinger*-based motion, stating as follows:

The concern I have is whether or not we are basically entering the realm of conjecture or speculation, not that Person X did this but Person Anybody Unknown did this; we've just got all this unknown DNA and unknown fingerprints and so pick one.

That sounds like the very thing we're not allowed to allow juries to do, to engage in speculation or surmise for the purpose of reaching conclusions.

....

... I think I've got to grant the motion in limine in line with the holding in *Walker* and *Zinger* because it seems to me that this is evidence that does no more than create a conjecture on the part of whoever is thinking as to another person's guilt.

And in *Walker* and *Zinger*, the Supreme Court held that that's inadmissible and it would be an abuse of discretion to allow it in. So the Court is going to grant that motion in limine.

After this initial ruling, defense counsel raised an objection that the right to present a defense as contained in the United States Constitution would be paramount to our Arkansas case law such as *Zinger*, 313 Ark. 70, 852 S.W.2d 320. The circuit court then responded:

Well, I don't think that the holding in *Walker* and *Zinger* is at odds with the constitutional right to assert a defense and a defense can be asserted, but the defense has to be governed by the law of evidence and you can assert a defense, but you have to do it based upon evidence that's relevant.

The upshot of the *Walker* and *Zinger* holdings is that evidence that is not relevant is never admissible, and I think that's sound reasoning. That's going to be the Court's ruling.¹

¹Although Appellant does not raise the constitutional argument on appeal, we have included the circuit court's ruling on the constitutional argument raised below in our review

On appeal, we must determine whether the trial court abused its discretion in refusing to allow the evidence to be admitted. *Shields v. State*, 357 Ark. 283, 166 S.W.3d 28 (2004) (citing *Walker v. State*, 353 Ark. 12, 110 S.W.3d 752 (2003); and *Birmingham v. State*, 342 Ark. 95, 27 S.W.3d 351 (2000)). As announced in *Zinger*, this court's standard for admissibility of evidence tending to incriminate other persons in the crime being charged is as follows:

A defendant may introduce evidence tending to show that someone other than the defendant committed the crime charged, but such evidence is inadmissible unless it points directly to the guilt of the third party. Evidence which does no more than create an inference or conjecture as to another's guilt is inadmissible.

.....

[T]he rule does not require that any evidence, however remote, must be admitted to show a third party's possible culpability. . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.

Zinger, 313 Ark. at 75–76, 852 S.W.2d at 323 (quoting respectively *State v. Wilson*, 367 S.E.2d 589, 600 (N.C. 1988), and *People v. Kaurish*, 802 P.2d 278, 295–96 (Cal. 1990)). This court later reconsidered the *Zinger* test and concluded that it complied with the requirement announced in *Holmes v. South Carolina*, 547 U.S. 319 (2006), that such a test focus on the strength of the evidence implicating the third person and not on the relative strength of the prosecution's evidence against the defendant. *Armstrong v. State*, 373 Ark. 347, 284 S.W.3d

under Ark. Sup. Ct. R. 4–3(i) (2012) and find no reversible error.

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1 (2008). We recently affirmed the *Zinger* test for admissibility of third-party exculpatory evidence in *State v. Harrison*, 2012 Ark. 198, ___ S.W.3d ___.

On appeal, Appellant argues that when *Zinger* is considered in light of its material facts (no evidence connecting the suspects in a nearby similar murder with the murder there on trial), it does not govern a case such as this one where circumstantial evidence in the way of trace DNA and fingerprints was found inside the crime scene. As he did below, Appellant argues on appeal that the circumstantial evidence of the presence of unknown third parties inside the crime scene and the victim's residence was relevant to create reasonable doubt in the jurors' minds as to Appellant's guilt.

The State responds that the circuit court's exclusion of the DNA and fingerprint evidence was correct based on *Zinger* because it did not point directly to the guilt of anyone else. The State suggests that Lawrence could have had any number of social guests at her home during the time she lived there, and could well have had friends or family members as passengers in her vehicle. According to the State, the mere possibility that unidentified persons were in Lawrence's home and vehicle at undetermined times is hardly relevant to suggest that someone other than Appellant shot and killed Lawrence and Hughes inside the vehicle.

We acknowledge Appellant's argument that his case is factually distinct from *Zinger* in that his case involves circumstantial evidence collected at the crime scene and the victim's residence while *Zinger* involved evidence of a similar *other* crime. However, that factual distinction is of no consequence here because, regardless of the location at which the proffered

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evidence was collected, there was nothing to connect that evidence directly with the perpetration of any of the three murders being tried. As the State correctly suggests on appeal, the fact that unknown trace DNA and fingerprints were found at the crime scene and at the victim's home tends to show nothing other than that some unknown third person was present in those two places at some unknown time—it does not directly connect the unknown third person with the commission of any of these three murders. And a direct connection with the perpetration of the crime on trial is what is required for admissibility under the *Zinger* test.

The circuit court accurately observed that the evidence Appellant proffered in this case fell into that category of evidence that is too remote and speculative to be admitted and is just that sort of evidence that *Zinger* prohibits. As the circuit court noted, the evidence Appellant intended to offer was too speculative because it related only to an unnamed third party or parties rather than to a particular third party and would require the jury to engage in conjecture to make the inference that the unknown contributor of the DNA or fingerprints committed any of these murders. The circuit court's ruling was entirely consistent with the *Zinger* test for the admissibility of third-party exculpatory evidence and *Zinger's* requirement that a direct connection with the crime on trial is required. We therefore find no abuse of discretion in the circuit court's ruling granting the State's motion in limine to exclude the proffered evidence relating to unknown third persons.

We find no merit to Appellant's point for reversal. The circuit court did not abuse its discretion. The record in this case has been reviewed for reversible error pursuant to Ark. Sup. Ct. R. 4-3(i) (2012), and none has been found.

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We affirm the judgment of conviction and sentence.

Teri L. Chambers and *Amy Jackson Kell*, Arkansas Public Defender Commission, by:
Clint Miller, Deputy Public Defender, for appellant.

Dustin McDaniel, Att’y Gen., by: *Brad Newman*, Ass’t Att’y Gen., for appellee.