IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-77,104

MICHAEL DEAN GONZALES, Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL FROM DENIAL OF MOTION FOR FORENSIC DNA TESTING IN CAUSE NO. D-23,730 FROM THE 358TH JUDICIAL DISTRICT COURT ECTOR COUNTY

***Per curiam*.**

O P I N I O N

Appellant appeals from a trial court order denying his motion for post-conviction DNA testing filed pursuant to Texas Code of Criminal Procedure Chapter 64.[1] Specifically, the trial court determined that Appellant failed to: (1) show that identity is or was an issue; (2) establish by a preponderance of the evidence that he would not have

[1] References to Chapters or Articles in this opinion are to the Texas Code of Criminal Procedure unless otherwise specified.

been convicted if exculpatory results had been obtained through DNA testing; and (3) establish by a preponderance that his request for DNA testing was not made to unreasonably delay the execution of sentence or administration of justice. After reviewing the record, we find that Appellant is not entitled to relief. Consequently, we affirm the trial court's order denying testing.

I. BACKGROUND

A. Offense Facts

Appellant was convicted and sentenced to death in December 1995 for the April 1994 murders of his neighbors, Merced Gonzales Aguirre and her husband Manuel Lujan Aguirre, committed during the same criminal transaction.[2] In our direct appeal opinion, we summarized the offense facts as follows:

> The evidence at trial established that around 9:15 on the evening of April 21, 1994, Manuel Aguirre, Jr., the victims' son, attempted to call his parents, but kept receiving a busy signal. He stopped trying to call around 10:45 p.m.. At the time he did not think it was all that unusual that he was receiving a busy signal, so he decided to wait and call them in the morning.
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> On the morning of April 22nd, Aguirre was still getting a busy signal when he dialed his parents and decided he should check up on them. His 73-year-old father had just had quintuple bypass surgery the month before, was weak, and still recovering. When he arrived he noted his parents' car was in the driveway and the front door was unlocked. Upon entering the home, Aguirre found the bodies of his father, Manuel, Sr. [Manuel], and his 65-year-old mother, Merced. Aguirre first tried to call 911 from the house,

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[2] Appellant was indicted in separate paragraphs for (1) causing Merced's death in the course of committing burglary, and (2) causing both Merced's and Manuel's deaths during the same criminal transaction. *See* TEX. PENAL CODE § 19.03(a)(2) and (a)(7). However, the State waived the first paragraph prior to the case's submission to the jury.

but both phones were off the hook and he could not get a dial tone. Therefore, he went to a neighbor's home and called the police. Aguirre also eventually reported that a microwave, a VCR, a 35-mm camera, a .22-caliber gun, and a stereo with speakers were missing from his parents' home.

An autopsy determined Manuel was stabbed eleven times with a single-edge knife while sitting in his recliner. Due to the minor defensive wounds to his hands and the fact the area around Manuel was not disturbed, Rick Pippins, a blood-spatter expert, opined that Manuel was attacked first and overcome quite quickly. According to Sparks Veasey, M.D., a forensic pathologist, Merced received stab wounds too numerous to count and had been "basically butchered." She further had numerous defensive wounds to her hands and forearms indicating she "fought valiantly for her life." Pippins testified that the attack began with Merced in a standing position, but she continued to fight even after she had fallen to the floor. Appellant was a suspect early on in the investigation. Prior to the instant crime, the police had put a "close patrol" on the victims' residence due to partying and late-night activity apparently caused by appellant whose house was just across a five-foot wide alley. Aguirre testified that his parents would occasionally help out appellant and his family financially. However, they subsequently refused to give aid directly to appellant. Aguirre stated his parents were afraid of appellant. The police also noted a blood transfer stain on the camper parked in the alley between the doors of the two homes and that the dirt alley had been recently swept "very clean." An unidentified witness told police she saw appellant sweeping this area near the time of the instant offense. Further, the police discovered unique red peppers both under Merced's body and next to appellant's back door.[4] A bowl of these peppers was recovered later that same day from appellant's refrigerator during an evidentiary search.

Linda Olivarez, an acquaintance of appellant's, testified that on the night of the murders, appellant, his wife, and child came by her home at about 10:15. Appellant had brought with him a white plastic bag which he left outside by Linda's front gate. Appellant then left with a man that drove up in a truck. He came back shortly thereafter. He asked his wife to pick up the white bag when they left.

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[4] Testimony was elicited that these peppers were not native to Texas and were unique to a certain area of Mexico. These peppers could not be found in any of the local stores.

Four or five days later, Linda and her husband, Julian, were approached by appellant who wanted to know if they wanted to buy a microwave. Julian told appellant he would have to see it first, so Julian, Linda, and appellant went back to appellant's home. When they arrived, appellant showed them that he also had a VCR, a camera, and a stereo for sale. Linda and Julian purchased the microwave, the VCR, and the stereo. Julian testified that appellant acted "a little bit nervous" when he was selling them the items. Appellant also showed Julian a .22-caliber gun with white handles, but told him it was not for sale because he was keeping it for himself. Appellant said, "They are on to me." When Julian asked what he meant, appellant responded, "No, I can't tell you." After Linda and Julian took the items to their home, appellant came and took back the stereo because they had not paid for it yet and appellant had already sold it to someone else. The stereo was later recovered from another friend of appellant's, Daniel Lugo. Lugo stated he obtained it from appellant. Although appellant had stated he wished to keep it, the gun was eventually recovered from Delia Sanchez who testified she purchased it from appellant. All items were later identified as those taken from the victim's home and appellant's fingerprint was found on the back of the stereo. Further, some empty shell casings found in a box at appellant's house were determined to have been fired from the victims' .22-caliber gun.

On the day after the murders, the police also received other evidence. Sara Cheney, a neighbor of both appellant and the victims, found Manuel's keys and a paper with his name on it in front of the dumpster by their homes. Upon further investigation that day, the police also found Merced's purse including her identification and the cover for the VCR. The dumpster was located on the way from appellant's to the Olivarez home.

The police arrested appellant on May 7, 1994. At this time, appellant had two teardrop tattoos on his face. According to Detective Snow Robertson of the Odessa Police Department, these tattoos are a gang sign signifying the number of people someone has killed. Appellant was in a gang called "Homies Don't Play." Upon a further search of appellant's residence, authorities also found a single edge knife that Dr. Veasey testified was consistent with the wounds present on Manuel and with some of the wounds inflicted upon Merced.

Finally, Charles Kenimer, a guard at the City of Odessa Jail testified that he was in charge of returning appellant to his cell after appellant had

> been interviewed by Detective Robertson and another officer. Kenimer stated appellant came out of the interview in an upset state. One of Kenimer's duties was to make sure the prisoner stayed calm and neutralize any situations that might arise. So, Kenimer testified he said to appellant, "Boy, you really got these officers upset. I don't know what you said." Appellant responded in Spanish, "They are trying to pin this rap on me this murder rap on me. They can't do it. They don't have any evidence." Kenimer testified appellant further stated, "Although I did it, you know, but they don't have nothing to go on."

Gonzales v. State, No. AP-72,317, slip op. at 2-5 (Tex. Crim. App. June 3, 1998) (not designated for publication) (footnote and brackets in original). No parties charge was given in the case. *See* Tex. Penal Code § 7.02(a)(2). The jury returned a general verdict finding Appellant guilty of capital murder as alleged in the indictment.

B. Direct Appeal and Habeas Proceedings

In his direct appeal challenging his conviction and sentence, Appellant raised eighteen points of error, including a point in which he asserted that the guilt phase evidence was both legally and factually insufficient because there was no *direct* evidence that he caused the deaths of the victims.[5] In other words, Appellant argued that the circumstantial evidence was not enough to convict him of murdering both people during the same criminal transaction. *See Gonzales*, No. AP-72,317, slip op. at 1-2.

In analyzing the legal sufficiency of the evidence, we reviewed the evidence in the

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[5] Appellant's direct appeal preceded this Court's decision in *Brooks v. State*, 323 S.W.3d 893 (Tex. Crim. App. 2010) (overruling *Clewis v. State*, 922 S.W.2d 126 (Tex. Crim. App. 1996), and holding that the *Jackson v. Virginia* legal-sufficiency standard is the only standard that a reviewing court should apply in determining whether the evidence is sufficient to support each element of a criminal offense that the state is required to prove beyond a reasonable doubt).

light most favorable to the verdict. We noted that: Appellant had admitted committing the offense to jail guard Kenimer; Appellant had possessed items stolen from the victims' home; Appellant's fingerprint was on one of those stolen items; he possessed red peppers like those found at the scene; there was blood transfer on the camper parked between Appellant's home and the victims' home; Appellant possessed a knife consistent with the victims' wounds; and the ground between the homes had been recently swept clean of footprints. *See id*. at 3-5. Applying the *Jackson v. Virginia*, 443 U.S. 307 (1979), standard to the evidence presented, we held that a rational trier of fact could have found beyond a reasonable doubt that Appellant murdered both Merced and Manuel during the same criminal transaction. *See id*. at 6.

In reviewing the factual sufficiency of the evidence,[6] we stated that we were required to view *all* of the evidence presented without the "in the light most favorable to the prosecution" prism, and would set aside the verdict "only if it is so contrary to the overwhelming weight of the evidence as to be clearly wrong and unjust." *See id*. at 7. In our record review, we observed that evidence opposing the guilty verdict consisted primarily of evidence showing that others, specifically Appellant's friends, Daniel Lugo and Jessie Perkins, were suspected of being involved in the crime, and that the medical examiner could not confirm whether one or more persons attacked Merced or if more than one weapon was used to kill her. *See id*.

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[6] *See, supra,* note 5.

Although we recognized that "a modicum of probative evidence exist[ed] that [A]ppellant may not have killed both Merced and Manuel," we also acknowledged that we should give due deference to the jury's decision regarding the weight and credibility of this evidence. *Id*. The jury knew that the police had investigated other individuals (and potentially were still investigating those individuals). The jury also heard that Dr. Veasey could not confirm whether one or more persons attacked Merced or if more than one weapon was used to kill her. Nonetheless, the jury found that Appellant murdered both victims during the same criminal transaction. Given the record, we concluded that the jury's finding was not so contrary to the overwhelming weight of the evidence as to be clearly wrong or unjust. *Id*. at 8. We overruled Appellant's points of error and affirmed his conviction and sentence.

Appellant filed his initial habeas application in the trial court on October 13, 1998, raising seven allegations. We denied relief. *Ex parte Gonzales*, No. WR-40,541-01 (Tex. Crim. App. Mar. 10, 1999) (not designated for publication).

In January 2001, Appellant filed in this Court a freestanding motion to stay his April 2001 execution. Apparently during federal habeas proceedings, the Attorney General's Office confessed that there was reversible constitutional error at the penalty phase of Appellant's trial because the State's psychologist, Dr. Walter Quijano, made a future dangerousness prediction based in part on race. We denied the motion, but the federal court stayed the execution, reversed the sentence, and ordered a new punishment

trial. *See Gonzales v. Cockrell*, No. MO-99-CA-073 (W.D. Tex. Dec. 19, 2002) (not designated for publication).

The trial court held a new punishment trial in May 2009. During this trial, the State presented testimony from Appellant's wife, Martha Reyes. Reyes testified that the statement she originally gave to the police in 1994 (that she had been asleep all night and only found out about the murders the next morning) was false and that she was terrified of Appellant. Reyes further testified that Appellant wanted to rob the Aguirres. Knowing that the Aguirres would not open the door for him, Appellant got Reyes to go to their house. After Reyes visited with them, Merced walked with her to the door. As Reyes left, she saw Appellant coming "around the corner" "[b]etween the two houses." Reyes then returned home and waited for Appellant. When Appellant returned home, he had blood on his clothes and a knife in his hand. When Reyes asked him what had happened, he told her that there had been an accident. During Reyes's testimony, Appellant, in court and in the jury's presence, threatened her for testifying. The jury answered the Article 37.071 punishment questions in a manner requiring the trial court to sentence Appellant to death.

In his automatic direct appeal to this Court after his new punishment trial, Appellant raised five points of error. We affirmed the new death sentence. *Gonzales v. State*, 353 S.W.3d 826 (Tex. Crim. App. 2011). Appellant's initial habeas application after his new punishment trial was due to be filed in the trial court on or before October 4,

2010. However, Appellant waived his statutory right to file an initial habeas application, and we accepted that waiver. *Ex parte Gonzales*, No. WR-40,541-03 (Tex. Crim. App. Nov. 10, 2010) (not designated for publication). We also dismissed a subsequent application filed in the trial court on Appellant's behalf on September 9, 2014. *Ex parte Gonzales*, 463 S.W.3d 508 (Tex. Crim. App. 2015). The trial court set Appellant's execution for March 8, 2022.

II. CHAPTER 64 AND THE STANDARD OF REVIEW

"There is no free-standing due-process right to DNA testing, and the task of fashioning rules to 'harness DNA's power to prove innocence without unnecessarily overthrowing the established system of criminal justice' belongs 'primarily to the legislature.'" *Ex parte Gutierrez*, 337 S.W.3d 883, 889 (Tex. Crim. App. 2011) (quoting *District Attorney's Office v. Osborne*, 557 U.S. 52, 62 (2009)); *see also Ex parte Mines*, 26 S.W.3d 910, 914 (Tex. Crim. App. 2000) (stating that there is no constitutional right to post-conviction DNA testing). The Texas Legislature created a process for such testing in Chapter 64.

Under Chapter 64, the convicting court may order DNA testing only if the court finds that:

1. the evidence "still exists and is in a condition making DNA testing possible";

2. the evidence "has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect";

3. "there is a reasonable likelihood that the evidence contains biological material suitable for DNA testing; and"

4. "identity was or is an issue in the case[.]"

Art. 64.03(a)(1). Additionally, the convicted person must establish by a preponderance of the evidence that:

1. he "would not have been convicted if exculpatory results had been obtained through DNA testing; and"

2. "the request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice."

Art. 64.03(a)(2).

In reviewing a judge's ruling on a Chapter 64 motion, this Court gives almost total deference to the judge's resolution of historical fact issues supported by the record and application-of-law-to-fact issues turning on witness credibility and demeanor. *Reed v. State*, 541 S.W.3d 759, 768 (Tex. Crim. App. 2017). But we consider *de novo* all other application-of-law-to-fact questions. *Id*. at 768–69.

III. APPELLANT'S CHAPTER 64 MOTION AND THE TRIAL COURT'S RULING

In December 2020, Appellant filed in the trial court his Chapter 64 motion for post-conviction DNA testing. In the motion, Appellant asserts that he is innocent of killing the Aguirres and that he did not participate in the "robbing" them.[7] Appellant requests testing of the following items:

[7] Appellant was charged with murder in the course of burglary, but he consistently states that he did not commit "robbery." Because the precise designation is not important for this opinion, we will use the term "robbery" as well.

"Fingernail Scrapings"

(1) Items 72 and 73 – fingernail scrapings from Merced Aguirre's right- and left-hand fingernails;

(2) Items 44a and 44b – fingernail scrapings from Manuel Aguirre's right- and left-hand fingernails;

"Crime Scene Evidence"

(3) Item 13 – board from the kitchen to living room threshold;

(4) Items 16 and 17 – broken glass from the kitchen;

(5) Item 18 – blue house slipper from kitchen;

(6) Item 19 – a piece of tile from kitchen;

(7) Item 23 – three pieces of board from utility room;

(8) Item 42 – wall section from kitchen;

(9) Item 47 – armchair cover from living room;

(10) Item 49 – grey trousers with a belt from Manuel Aguirre;

(11) Item 50 – white t-shirt from Manuel Aguirre;

(12) Items 56 and 57 – pair of white socks and shoes;

(13) Item 58 – towel from the storage shed;

(14) Item 62 – housecoat from Merced Aguirre;

(15) Item 76 – latent shoe impression with blood stain from utility room;

"Hair Evidence Collected from the Aguirres' Residence and Jesse Perkins's Residence"

(16) Item 5 – hairs and fibers from living room;

(17) Item 15 – hairs and fibers from kitchen;

(18) Item 24 – hair from utility room;

(19) Item 39 – hair from N.W. bathroom in bathtub;

(20) Item 67 – hair from the left foot of Merced Aguirre;

(21) Item 122 – hair from Item 121 (multi-colored flannel shirt);

"Clothing Associated with Jesse Perkins"

(22) Item 121 – multi-colored flannel shirt recovered from Jesse Perkins;

(23) Item 89 – pants recovered from Jesse Perkins; and

(24) Items 14, 31, and 83 – "rare" chile peppers.

Appellant asserts that he has met the requirements for testing under Article 64.01. That is, Appellant avers the evidence: (1) "has a reasonable likelihood of containing biological material"; (2) was secured in relation to the offense and was in the State's possession during the trial; and (3) was either not previously subjected to DNA or could now be subjected to "newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test." Appellant further asserts that he satisfies the requirements of Article 64.03(a). That is, he asserts that the evidence "still exists and is in a condition making DNA testing possible"; it "has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect"; "there is a reasonable likelihood that the evidence contains biological material suitable for DNA

testing"; and identity was or is an issue in the case.

With regard to identity, Appellant points to evidence suggesting that unindicted suspects may have actually committed the offense. Specifically, Appellant points to the fact that the only DNA testing in the record (from 2003) showed that two blood stains on a flannel shirt recovered from Jesse Perkins's residence matched the DNA profiles of the two victims.[8] Appellant then proceeds to argue why much of the non-DNA evidence connecting him to the offense should be discredited. Finally, Appellant argues that his request is not made for the purpose of unreasonable delay. Appellant also provides an Article 64.01(a-1) affidavit to accompany his motion, in which he asserts his innocence. *See* Art. 64.01(a-1) ("The motion [for Chapter 64 DNA testing] must be accompanied by

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[8] According to a 1995 Texas Department of Public Safety (DPS) letter, "testing" was conducted before Appellant's 1995 trial, but the letter only reports results for the presence of blood rather than DNA testing results. At the end of the letter, the author states that items found to contain human blood were submitted for PCR testing. The record before us does not include a final report, but in the 1995 trial record, a letter from the prosecutor to defense counsel states,

> Confirming our conversation of this date the DNA testing on this case will reveal that the blood submitted from inside the residence does not belong to either victims nor does it belong to a person named Perkins and that it is consistent with, but not definitive, as to the Defendant, Michael Dean Gonzales.
>
> As of this date the State does not intent [sic] to use the results of DNA testing.

Additional investigation in the case commenced around 2000 and new DNA testing was apparently requested by the Odessa Police Department. A 2003 DPS report showed that DNA testing on various items revealed profiles from only the two victims. The only exception to this was a profile found on a pair of pants collected from Perkins; the profile belonged to Perkins.

This appears to have been the last request for DNA testing from either party until the current request.

an affidavit, sworn to by the convicted person, containing statements of fact in support of the motion.").

But despite Appellant's assertion in his affidavit that he is innocent of killing the Aguirres or of robbing them, Appellant appears to take two opposing positions in the body of his motion for DNA testing. On the one hand, he asserts that he is not guilty of the murders or the robbery. "[He] was not there." Indeed, in his Article 64.01(a-1) affidavit, Appellant states that he did not participate in the robbery or murders; that he "was not there"; and that he never had anything stolen from the Aguirres in his house. On the other hand, Appellant argues that, even if he was there, others were involved. Appellant asserts that, if another person killed one of the victims, then he, Appellant, cannot be guilty of killing both victims during the same criminal transaction (and, therefore, cannot be guilty of capital murder as alleged in the second paragraph of the indictment). And he asserts that the DNA evidence will show that someone else committed at least one of the murders.

After a non-evidentiary hearing on Appellant's motion for DNA testing, the trial court denied the motion in a written order. Without elaborating on its reasoning, the court found that Appellant failed to: (1) show that identity is or was an issue; (2) establish by a preponderance of the evidence that he would not have been convicted if exculpatory results had been obtained through DNA testing; and (3) establish by a preponderance that his request for DNA testing was not made to unreasonably delay the execution of

sentence or administration of justice.

IV. APPELLANT'S ARGUMENTS ON APPEAL

In his appellate brief, Appellant again argues that he was wrongfully convicted of the capital murder of two people during the same criminal episode. He asserts that testing of the biological evidence "could very well demonstrate that others murdered the Aguirres, or that at least one murder was committed by someone else." If the evidence establishes either scenario, he asserts, then his innocence of capital murder, and perhaps of any murder, would be established. In support of his argument, Appellant points to: the State's concession at trial that others may have been involved in the offense; evidence presented at trial that Daniel Lugo apparently knew about the murders about an hour before the police were informed; and incriminating statements made by Jesse Perkins, along with a flannel shirt seized from him that had both of the victims' blood on it.[9] Specifically, Appellant raises four issues for review:

1. "Whether the trial court had jurisdiction to decide the DNA motion?"

2. "Whether [Appellant] satisfied the requirement for post-conviction DNA testing that 'identity was or is an issue in [his] case," Tex. Code Crim. Proc. art. 64.03(a)(1)(C), when (a) he maintained his innocence at trial, (b) he challenged trial testimony that he purportedly confessed or behaved in incriminating ways, (c) previous DNA testing excluded [Appellant] as a contributor to the crime scene evidence tested, and (d) he reiterated his innocence in his declaration

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[9] Exhibit 11, attached to Appellant's motion for DNA testing, consists of the homicide unit's Narrative Reports. When detectives interviewed Perkins, Perkins apparently told them that Appellant, after the offense, gave him the flannel shirt later recovered by the police. Other interviewees also confirmed that they had seen Appellant in the flannel shirt before the offense.

supporting the Chapter 64 motion?"

3. "Whether [Appellant] showed by a preponderance of the evidence that he 'would not have been convicted if exculpatory results had been obtained through DNA testing,' *id*. at art. 64.03(a)(2)(A), where (a) the jury charge and indictment required that the State prove that he committed both murders by himself to convict him of capital murder, (b) the only physical evidence introduced at trial connecting him to the offense did not establish he was at the crime scene or involved in committing the murders, (c) he strongly disputed making a purported incriminating statement, and (d) the remaining, circumstantial evidence of guilt left room for doubt about guilt?"

4. "Whether [Appellant's] motion for DNA testing, filed nearly nine (9) months before the trial court set an execution date and over fifteen (15) months before the execution date, was 'not made to unreasonably delay the execution of [his] sentence,' *id*. at art. 64.03(a)(2)(B)?"

V. ANALYSIS

A. Jurisdiction

In his first issue for review, Appellant asserts that the trial court denied relief on the Chapter 64 motion because it concluded that it had no jurisdiction to entertain the motion. However, he argues, Chapter 64 expressly provides for the district court to have jurisdiction over a request for DNA testing.

Appellant is correct that Chapter 64 specifically gives a convicting court jurisdiction to order forensic DNA testing if certain criteria are met. However, the trial court did not deny the motion because it believed it had no jurisdiction. At the hearing on the motion, the court expressed doubt that it had jurisdiction, but then it responded that, if it did have jurisdiction, then the motion for DNA testing was denied. The court later

issued a written order denying the motion. In that order, the court stated that Appellant failed to show that identity was an issue, failed to establish that he would not have been convicted had exculpatory DNA results been obtained, and failed to establish that the request for DNA testing was not made to unreasonably delay the execution of sentence or administration of relief. This issue does not provide a basis for relief, and it is overruled.

B. *Whether Identity Is or Was an Issue* (Article 64.03(a)(1)(C))

In arguing that the trial court erred to determine that Appellant failed to show that identity is or was an issue, Appellant asserts that he has always maintained his innocence in this case. He also notes that he contested the State's introduction of the incriminating statement that he purportedly gave to jail guard Kenimer. And Appellant reasserts his innocence in his affidavit accompanying his motion for DNA testing.

In *Prible v. State*, Prible argued that the identity issue was satisfied because he pled not guilty and the statute does not say that the identity issue must pertain to the DNA. The State responded that identity must be raised by the DNA since that is what is covered by Chapter 64. And, the issue of identity in the *Prible* case was not resolved by DNA. *Prible*, 245 S.W.3d 466, 467 (Tex. Crim. App. 2008).

We rejected Prible's argument that the Article 64.03 requirement that identity be an issue in the case is satisfied simply because the defendant pled not guilty and claimed throughout the trial that someone else committed the murders. *Id*. at 470. Rather, we held that the identity requirement in Chapter 64 relates to the issue of identity as it

pertains to the DNA evidence. *Id*. Therefore, if DNA testing would not determine the identity of the person who committed the offense or would not exculpate the accused, then the Article 64.03 identity requirement is not met. *Id*.

As in *Prible*, Appellant's own self-serving declaration of innocence is not sufficient to place identity in issue here. Further, the record supports the trial court's finding that identity is not or was not an issue.

Although Appellant contests Kenimer's testimony that Appellant essentially confessed to him, that evidence has not been invalidated. Furthermore, several people noted that they received or bought items from Appellant (and only Appellant) that were later identified as items stolen from the victims. Appellant's fingerprint was also discovered on one of the items. During the investigation, the police noticed that the area of the alley between Appellant's and the victims' home had been swept clean, and an unidentified witness told the police that she witnessed Appellant sweeping this area near the time of the offense. Finally, in the new punishment trial, Appellant's wife testified that Appellant decided to rob the Aguirres to get money for a birthday party and presents for their daughter. He constructed a plan for his wife to help him get into the Aguirres' house since he knew the victims would not open the door for him. And Appellant's wife saw him approaching the Aguirres' house as she was leaving. When Appellant returned home, his wife observed that he had blood all over him and he carried a knife.

Contrary to Appellant's argument, this evidence was clearly sufficient to show that

Appellant played a primary role in the offense. Further, the absence of DNA evidence linking Appellant to the scene would not contradict this evidence. Citing to *Blacklock v. State*, 235 S.W.3d 231, 232 (Tex. Crim. App. 2007), Appellant asserts that identity can be shown to be an issue even if the victim made a strong identification of the assailant. But *Blacklock* is not applicable here. Blacklock was convicted of aggravated robbery and aggravated sexual assault, and the evidence indicated a lone attacker. In his motion for DNA testing, Blacklock alleged that the victim's lone attacker was the donor of the material for which he sought DNA testing. On that record, we noted, exculpatory DNA test results, excluding Blacklock as the donor of the material, would establish Blacklock's innocence. But that is not the case here. In Appellant's case, the State tried Appellant as the principal actor, but it did not foreclose the possibility that others were also involved in the crime. The presence of someone else's DNA at this scene, or the absence of Appellant's, would not prove his innocence.

We agree with the trial court that identity was not and is not an issue in this case.[10]

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[10] Two months after the State filed its brief in Appellant's DNA appeal and a month after Appellant filed his reply to the State's brief, Appellant filed "Appellant's Motion to Hold Appeal, Remand His Case To the Trial Court for Consideration of Newly Discovered Evidence that Puts the Identity of the Perpetrators Further at Issue, and Stay His Execution to Allow this Process to Take Place." In the motion, Appellant asserts that newly discovered evidence will show that Lugo and Perkins committed the offense, not Appellant. He requests that we stay his execution and the appeal, and remand the case to the trial court for it to consider the new evidence.

In *Gutierrez*, we noted that "[t]he legislature has placed no barriers to the type of relevant and reliable information that the trial judge may consider when determining if identity was or is

(continued...)

Appellant's second point is overruled.

C. Whether Appellant Established that He Would Not Have Been Convicted (Article 64.03(a)(2)(A))

Before Appellant's 1995 trial on guilt, the State had no DNA evidence placing him at the scene. But it had other evidence that arguably did. According to the evidence presented at trial, Appellant lived just across the alley from the victims. Although the Aguirres had financially assisted Appellant's family in the past, at some point they refused to help Appellant directly. The Aguirres' son stated that his parents feared Appellant. Appellant was identified as selling items, including a firearm, stolen from the Aguirre home after the murders. In fact, Appellant's fingerprint was found on the Aguirres' stolen stereo. What appeared to be blood transfer was discovered on a camper parked in the alley between the Aguirres' home and Appellant's, and the alley looked like it had been recently swept. An unidentified witness told officers that she saw Appellant

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[10](...continued)
an issue in the case." *Gutierrez*, 337 S.W.3d at 893. We stated that "[t]he information must be reliable, but it need not be admissible or previously admitted at trial. In short, in a Chapter 64 proceeding, the constitution does not bar a judge from considering statements that were (or should have been) inadmissible at trial." *Id.* at 893-94.

But as the title of Appellant's motion suggests, the information that Appellant now seeks to have the trial court consider is "newly discovered." It has not been subjected to adversarial testing or otherwise reviewed for reliability by any court, and Chapter 64 provides no mechanisms for such review and testing, especially not in the middle of an appeal. Further, the affidavits contain largely hearsay statements that run contrary to other evidence presented in the case, placing the reliability of the new information even more in question. Finally, Appellant makes this request after his appellate brief and reply brief were filed and just two weeks before his scheduled execution. This indicates that the motion is made to unreasonably delay the execution of sentence or administration of justice. Appellant's motion is denied.

sweeping the alley near the time of the instant offense. Upon searching Appellant's home, authorities found a single edged knife that the medical examiner testified was consistent with the murder weapon. Finally, Kenimer testified that when he was returning Appellant to his cell after he had been interviewed by detectives, Appellant seemed upset, so Kenimer tried to calm him. At that time Appellant stated, "They are trying to pin this rap on me this murder rap on me. They can't do it. They don't have any evidence." Appellant then continued to say that, "Although I did it, you know, but they don't have nothing to go on."

In Appellant's 2009 punishment retrial, his wife testified that he planned to rob the Aguirres and that he wanted her to get them to open the door. She did as she was told, and as she was leaving the Aguirres' home, she saw Appellant alone coming around the corner between the houses. Appellant returned home shortly thereafter with blood on his clothes and a knife, and he stated that there had been an "accident."[11]

The State tried Appellant as the principal in the case, and the jury convicted him as the principal in the case. However, the State also conceded at Appellant's 1995 trial that others could have been involved in the offense.

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[11] In making an Article 64.03(a)(2)(A) determination on whether a movant for DNA testing would not have been convicted, we have said that we "do not consider post-trial factual developments." *Reed*, 541 S.W.3d at 774. "Instead, we limit our review to whether exculpatory results 'would alter the landscape if added to the mix of evidence that was available at the time of trial." *Id*. (quoting *Holberg v. State*, 425 S.W.3d 282, 287 (Tex. Crim. App. 2014)). A punishment retrial is a part of Appellant's trial. Without it, a defendant would not have a valid conviction and sentence. Rather, "post-trial factual developments" typically refer to evidence or information gleaned in post-trial writs of habeas corpus.

In cases involving accomplices, a defendant can only meet his burden under Article 64.03(a)(2)(A) if he can show that testing, if exculpatory, will establish that he did not commit the crime as either a principal or a party. *See Gutierrez*, 337 S.W.3d at 900; *see also Wilson v. State*, 185 S.W.3d 481, 485 (Tex. Crim. App. 2006) (stating that, even if DNA testing showed that an additional perpetrator was involved, it would have "no effect whatsoever" on the defendant's conviction as a party).

But Appellant asserts that this caselaw is inapplicable. In his appellate brief, Appellant asserts that the State's theory at trial was that Appellant *acted alone* in killing and robbing the Aguirres. Therefore, he asserts, "any DNA evidence that identified other individuals as involved in the murders (and excluded Appellant) would have changed the outcome of the trial." He also asserts that any DNA evidence that identified someone as a perpetrator in addition to Appellant, even if the evidence also included Appellant as a perpetrator, would prove that Appellant was not guilty of capital murder as charged (murder of two persons).

We are not persuaded by Appellant's argument. Exculpatory results that would merely "muddy the waters" are insufficient to show that a defendant would not have been convicted. *See Gutierrez*, 337 S.W.3d at 892 (citing *Rivera v. State*, 89 S.W.3d 55, 59 (Tex. Crim. App. 2002) and *Kutzner v. State*, 75 S.W.3d 427, 439 (Tex. Crim. App. 2002)). Appellant's admission to Kenimer, along with the evidence tying Appellant (and only Appellant) to the stolen property, and the other circumstantial evidence presented

strongly suggests that Appellant was a major participant in this crime. Even if all of the items Appellant requests to test came back with a third party's DNA profile, this evidence would not exculpate Appellant. For example, say the DNA under Merced's fingernails came back to Lugo or Perkins, but not Appellant. That fact would not negate a scenario where Lugo or Perkins subdued Merced, but Appellant still stabbed her, or both perpetrators stabbed her. At best, under the facts of this case, exculpatory results from testing the items Appellant requests would only "muddy the waters." Appellant has not met his burden to show by a preponderance of the evidence that he would not have been convicted. Appellant's third point is overruled.

D. Whether Appellant Established that His Request Was Not Made for Unreasonable Delay (Article 64.03(a)(2)(b))

In his fourth issue, Appellant claims that he has established that his DNA testing request was not made for unreasonable delay. However, we have determined that the court properly found that identity was not and is not an issue in the case and that Appellant failed to meet his burden to show by a preponderance of the evidence that he would not have been convicted if exculpatory results had been obtained through DNA testing. Thus, even if the trial court erred in determining that Appellant failed to establish that his request was not made for unreasonable delay, Appellant was not harmed by any such error. Appellant's claim is overruled.

V. CONCLUSION

Because Appellant has failed to meet Article 64.03's requirements, we hold that

the trial court properly denied DNA testing. We affirm the convicting court's order denying the motion for Chapter 64 forensic DNA testing, deny Appellant's motion to remand the case, and deny his motion for stay of execution.

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