

SUPREME COURT OF ARKANSAS

No. CR-18-325

TYLER JOSEPH BAREFIELD
APPELLANT

V.

STATE OF ARKANSAS

APPELLEE

Opinion Delivered: May 16, 2019

APPEAL FROM THE POPE
COUNTY CIRCUIT COURT
[NO. 58CR-16-764]

HONORABLE WILLIAM M.
PEARSON, JUDGE

AFFIRMED.

ROBIN F. WYNNE, Associate Justice

Tyler Barefield appeals following his convictions by a Pope County Circuit Court jury on two counts of premeditated and deliberated capital murder in the deaths of Aaron Brock and Beau Dewitt. He was sentenced to life imprisonment without parole for each murder, plus a total of 180 months' imprisonment under Arkansas Code Annotated section 16-90-120 (Repl. 2016) for employing a firearm in the commission of the felonies. On appeal, he argues that the circuit court (1) erred in excluding evidence corroborating the defense that the killings were perpetrated by someone other than him and otherwise exculpating him on the charges of capital murder and (2) abused its discretion in allowing testimony concerning what a person could see with a scope when the testing conditions did not replicate the conditions at the time of the incident. We find no error and affirm.

I. Background

The bodies of Aaron Brock and Beau Dewitt were discovered inside a crushed

The men had been missing since being dropped off late on the evening of Friday, September 16, to break into the salvage yard to steal vehicle parts. The last communication from Brock was a text message sent to his girlfriend, Laree Rowan, at 12:22 a.m. A person who lived near U-Pull-It called 911 and reported hearing four gunshots at approximately 12:40 a.m. Brock and Dewitt were reported missing on Saturday, September 17, and on Monday, September 19, Brock's family members searched the salvage yard in an attempt to locate the missing men. They found a cell phone and a head lamp belonging to the victims. They returned the following day, and this time, they observed blood dripping from a vehicle in a stack of crushed cars; they detected a foul odor as well. The bodies of the two men were inside the vehicle. The crushed vehicle was transported to the Arkansas State Crime Lab in Little Rock, where the top was removed and the bodies were extricated for an autopsy. During the autopsies, the medical examiner determined that each victim had died from a single gunshot wound to the back of the torso. A .223-caliber projectile was found lodged in Brock's lumbar vertebra. With that information, the lead investigator returned to the salvage yard and found a spent .223 shell casing in the area where the bodies had been discovered.

The evidence implicating appellant in the crime included the discovery of an AR-15 rifle, .223 rounds, spent shell casings, and spare magazines at his home; security video footage showing appellant wearing camouflage at U-Pull-It on that Friday night at the time of the shootings and showing that he had his AR-15 with him; his statements to law enforcement denying being present on the night of the shootings; and the fact that, on

inside. The projectile recovered by the medical examiner could not be conclusively linked to appellant's rifle, but there was testimony that the shell casing recovered at the scene had been cycled through that rifle. In addition, Brock's cell phone was found in the vehicle with the bodies, but the battery was not located. There was testimony that the phone ceased all activity, including receiving information and communicating with the cell towers (suggesting removal of the battery), at 8:00 a.m. on Saturday when appellant was at the salvage yard crushing cars. The State's theory of the case was that appellant, an operator and part owner in the family business, was tired of repeated break-ins and decided to hunt down the perpetrators himself. Appellant's defense was that he had not shot the victims. Although he was seen on surveillance video carrying a rifle, he sought to present evidence showing why other people had motives to harm the victims and why he was armed that night—due to the victims' ties to violent white-supremacist groups. At trial, the defense contended that appellant was at the salvage yard that night because it was raining, and he wanted to see the condition of the gravel that had just been brought in to deal with an erosion problem. He relied on the absence of DNA or other physical evidence connecting him to the shootings and pointed to the video footage showing patterns of moving lights that he argued showed the presence of other persons.

II. Points on Appeal

A. *Zinger* Evidence

Appellant argues that the circuit court's rulings excluding certain evidence were a misapplication of the doctrine of *Zinger v. State*, 313 Ark. 70, 852 S.W.2d 320 (1993), which

also violated his constitutional right to present a defense as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and cognate state constitutional provisions of article 2, sections 8 and 10.

This court reviews the admission of evidence by the circuit court at trial using an abuse-of-discretion standard. *Ellis v. State*, 2012 Ark. 65, at 10, 386 S.W.3d 485, 490. The decision to admit or exclude evidence is within the sound discretion of the circuit court, and we will not reverse a court's decision regarding the admission of evidence absent a manifest abuse of discretion. *Id.* Appellant argues that the application of *Zinger* is a question of law to which a de novo standard of review should be applied, but we disagree. Consistent with our case law, we apply an abuse-of-discretion standard. See *Harmon v. State*, 2014 Ark. 391, 441 S.W.3d 891 (holding that the circuit court abused its discretion in granting the State's motion in limine to exclude the evidence that there was DNA from more than one individual on several pieces of evidence); *Conte v. State*, 2015 Ark. 220, 463 S.W.3d 686, (applying an abuse-of-discretion standard to Conte's *Zinger* argument).

In *Zinger, supra*, the appellants had been convicted of first-degree murder. At trial, they had attempted to introduce testimony regarding a similar crime that had occurred approximately thirty miles away, in Louisiana, for the purpose of convincing the jury that the person who committed that crime might also have committed the murder of which they had been accused. The circuit court refused to allow the evidence. On appeal, this court wrote:

To address this issue, we must consider under what circumstances evidence

Addressing this precise issue, the Supreme Court of North Carolina stated:

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.

State v. Wilson, 322 N.C. 117, 367 S.E.2d 589 (1988). The Supreme Court of California has recognized that a defendant has the right to present evidence of third party culpability but stated:

[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.

People v. Kaurish, 52 Cal. 3d 648, 276 Cal. Rptr. 788, 802 P.2d 278 (1990).

Although there are some similarities between the crimes committed in Louisiana and Arkansas, there was no evidence presented connecting the Louisiana suspect to the Holley murder. The Trial Court was not even given the name of the Louisiana suspect or whether he or she had any connection to Holley. There was neither direct nor circumstantial evidence connecting the Louisiana perpetrator to the Arkansas crime, other than a few similarities found in the two crime scenes, and we cannot conclude the Trial Court abused his discretion in refusing to allow the evidence to be admitted.

Zinger, 313 Ark. at 75–76, 852 S.W.2d at 323. *Zinger* has been applied many times since it was decided in 1993. In *Harmon*, 2014 Ark. 391, at 8, 441 S.W.3d 891, 895, this court recognized that the standard for admission of incriminating evidence against a third person, as set forth in *Zinger*, is merely an application of the Arkansas Rules of Evidence to a specific

tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Ark. R. Evid. 401 (2018). However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Ark. R. Evid. 403.

Here, appellant argues that the circuit court erred in excluding evidence corroborating the defense that the killings were perpetrated by someone other than him and otherwise exculpating him on the charge of capital murder, i.e., showing that he was justified in being armed at the salvage yard for reasons other than a premeditated killing.

First, appellant argues that the circuit court erred in excluding photographs of footprints at the crime scene. After lead investigator Erick Riggs of the Pope County Sheriff’s Department testified on cross-examination that there were various footprints at the scene, the State objected when the defense attempted to introduce photographs of the footprints. The State’s position was that *Zinger* prevented admission of the pictures because the footprints could not be related to a particular person; appellant’s position was that they were admissible to show a lack of investigation in that officers believed that the footprints were important enough to photograph and measure, but they were never investigated further. The circuit court excluded the photographs. Here, the footprints were not sufficiently linked to the murders to be relevant, and in any event, there was testimony regarding the existence of the footprints. Under these particular facts, we hold that the circuit court did not abuse its discretion in excluding the photographs.

The other evidence on which appellant argues error concerns the following proffered but excluded witness testimony: employees McCubbin and Ibanez would have testified regarding the reasons for believing the victims would be coming to the property to steal parts and for believing that they were white supremacists; Investigator Keith Lunsford would have testified that he learned through the investigation that someone named J.J. was to have been with Brock and Dewitt at the time of their disappearance, that there was speculation that Brock Lee, the father of Rowan's child and a white supremacist, was involved, and a Randall Gordon stated that he was aware of a disturbance at a church in Casa in which a woman stated that the man with whom she had been arguing had killed two people; Erick Riggs would have discussed connections between J.J. Boen, the victims, and Brock Lee and white-supremacy groups; Officer John Reinhold would have testified that Dewitt's mother expressed concern that Brock Lee might have been involved; Doug Lewis would have testified that he was present at the church altercation in which it was stated that a man had just killed two men; Investigator Russell Hill would have testified that his interviews had disclosed the possibility that J.J. Boen, Brock Lee, and T.J. Ferguson might have been involved; and Zachary Berry would have testified that he knew Beau Dewitt and people in the Scranton area thought he was a violent hoodlum. Additionally, in the testimony of ATF agent Timothy Boles, the defense was precluded from asking him about the National Aryan Empire and the "To The Dirt" investigation. Appellant characterizes this as "evidence about the white supremacist associations of the deceased and evidence about specific persons with whom one or both of the deceased essentially were at war and thus

Appellant argues that the circuit court misapplied *Zinger* in several ways: by essentially holding that *Zinger* supersedes other grounds for the admissibility of evidence; by agreeing with the prosecution that the evidence was inadmissible unless appellant testified; by suggesting through discussion of *Schnarr v. State*, 2017 Ark. 10, that appellant was arguing justification for the shooting (which he was not); and by suggesting that appellant was required to name a specific person as the alternative perpetrator. However, the fact remains that appellant could not connect the proffered evidence to the murders. This court has rejected arguments that a circuit court abused its discretion in excluding evidence of another person's motive for committing a crime when the defendant could not link the other person to the crime. See *Conte*, 2015 Ark. 220, 463 S.W.3d 686; *Armstrong v. State*, 366 Ark. 105, 233 S.W.3d 627 (2006). To be admissible, evidence suggesting third-party guilt must be sufficiently linked to the crimes charged. Here, the circuit court did not abuse its discretion by excluding testimony that merely suggested that others may have had a motive for these crimes or that another person had been publicly accused of having killed two unnamed men.

Appellant also argues that evidence of his knowledge of potentially violent white supremacists breaking into his property should have been admitted to explain why he was armed, and the *Zinger* doctrine is not implicated. The State responds that the testimony offered by appellant—had it been admitted—would have been more prejudicial than probative because the proffered testimony did not establish that either the appellant or the witnesses: (1) actually knew the victims were associated with white-supremacist groups; (2) personally knew the victims to be violent; or (3) had any knowledge that the victims had

witnesses told appellant that they believed the victims were associated with white supremacists and that white supremacists are violent. We agree that the circuit court did not abuse its discretion in excluding this evidence.

Finally, appellant argues that this court's holding in *Zinger*, and the circuit court's application of it, deprived him of his right to present a defense. However, the constitution permits the exclusion of evidence that is repetitive, only marginally relevant, or poses an undue risk of harassment, prejudice, or confusion of the issues. *E.g.*, *Holmes v. South Carolina*, 547 U.S. 319, 326–27 (2006). Properly applied, *Zinger* prohibits evidence of third-party guilt that is irrelevant, or which is relevant but substantially outweighed by the danger of unfair prejudice or confusion because it is not sufficiently linked to the crime in question. Appellant has not shown a deprivation of his constitutional right to present a defense.

We hold that the circuit court did not abuse its discretion in excluding the evidence proffered by the defense.

B. *Telescopic Sight*

For his second point on appeal, appellant argues that the circuit court abused its discretion by permitting testimony regarding what could be seen using the telescopic sight mounted on appellant's rifle. At trial, appellant objected to the testimony of State witness Timothy Boles, a special agent with the Bureau of Alcohol, Tobacco, Firearms, and Explosives. Appellant objected to Agent Boles's testimony under Arkansas Rules of Evidence 401 and 403, arguing that it goes outside what the rules allow regarding demonstrative evidence and that the conditions under which Agent Boles used the scope

not been raining, and the lighting would be different in different areas. The circuit court overruled the objection, stating the it would be helpful for the jury to understand how the scope operates and that the probative value outweighed any prejudicial effect. Agent Boles testified that on August 21, 2017, he conducted a low-level light evaluation of the scope mounted to the rifle found at appellant's house. At about 10:50 p.m., he took the rifle just outside U-Pull-It Auto Salvage and positioned himself so that he was looking down a row of cars. Using a range finder to accurately measure distances, he assessed the capabilities of the scope by comparing what he could see with his unaided eye to what he could see through the scope at the same distance. He determined that he could see better with the scope than without it. On cross-examination, Agent Boles testified that the night was clear, and he could see the stars. He further testified that he was unable to say whether the results of his test would be different if he had been facing another direction, such as away from the waste-water treatment plant.

On appeal, appellant argues that the circuit court abused its discretion because Agent Boles's testimony should have been excluded under Rule 403.¹ According to appellant, the evidence was "prejudicial and confusing because it did not replicate the circumstances for which the testimony was offered." In this case, Agent Boles did not offer any opinion or

¹ Ark. R. Evid. 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless

testimony regarding what *appellant* could see with or without the scope on the night of the shootings. The evidence was relevant to explain to the jury the functioning of the scope, and the circuit court made the considered decision that it was not unduly prejudicial. We discern no abuse of discretion in the circuit court's decision to admit Agent Boles's testimony. Therefore, we affirm on this point.

III. Rule 4-3(i) Review

In compliance with Arkansas Supreme Court Rule 4-3(i), the record has been examined for all objections, motions, and requests made by either party that were decided adversely to appellant, and no prejudicial error has been found.

Affirmed.

Special Justice J. CLIFF MCKINNEY joins in this opinion.

WOOD and WOMACK, JJ., concur in part and dissent in part.

HART, J., dissents.

KEMP, C.J., not participating.

SUPREME COURT OF ARKANSAS

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APPELLEE

Opinion Delivered: May 16, 2019

APPEAL FROM THE POPE
COUNTY CIRCUIT COURT
[NO. 58CR-16-764]

HONORABLE WILLIAM M.
PEARSON, JUDGE

CONCURRING IN PART AND
DISSENTING IN PART.

RHONDA K. WOOD, Associate Justice

Zinger v. State established the standard for admission of evidence of a crime committed by someone other than the defendant that is similar to the crime for which the defendant stands trial. 313 Ark. 70, 75, 852 S.W.2d 320, 323 (1993). In fact, the court titled the section in *Zinger* as “5. Similar crime.” *Id.* This is not a *Zinger* case.

Here, Barefield attempted to introduce patterns of headlights and flashlights at the salvage yard after he left on the night of the murders and photographs of footprints law enforcement had taken at the scene. Defense counsel also attempted to cross-examine several of the State’s witnesses, including Karl Lunsford, Officer Reinold, and Investigator Hill, about their investigations, or lack of, into other individuals with a possible motive to harm the victims. Through this evidence and testimony, Barefield sought to challenge the thoroughness of the police investigation into other suspects. He was not comparing these murders to another murder clearly committed by someone else. Therefore, it was improper

to exclude this evidence and testimony under *Zinger*. For this reason, I concur in part and dissent in part.

WOMACK, J., joins.

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Opinion Delivered: May 16, 2019

APPEAL FROM THE POPE COUNTY
CIRCUIT COURT
[NO. 58CR-16-764]

HONORABLE WILLIAM M.
PEARSON, JUDGE

DISSENTING OPINION.

JOSEPHINE LINKER HART, Justice

The primary issue in this case is the systematic deprivation of Mr. Barefield's constitutional right to put on a defense. The circuit court's evidentiary rulings were merely the means to accomplish this end.

The State convicted Mr. Barefield with only circumstantial evidence. It is axiomatic that circumstantial evidence may provide the basis to support a conviction, but it must be consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *E.g., Edmond v. State*, 351 Ark. 495, 95 S.W.3d 789 (2003). Accordingly, the case before us must be reversed because Mr. Barefield was deprived of his right to present to the jury evidence that could support a reasonable alternative theory of who committed the murders. It is the very theory of Mr. Barefield's defense that makes the evidence that he proffered highly relevant. The majority's failure to acknowledge this crucial fact has skewed all of its analysis.

The majority cites the relevant cases but fails to apply the law to the facts of this case. Thus, while it is true, as the majority notes, that “the Constitution permits the exclusion of evidence that is repetitive, only marginally relevant, or poses an undue risk of harassment, prejudice, or confusion of the issues,” none of these concerns factor into the evidence that Mr. Barefield proffered. The majority proves this point by utterly failing to state how the proffered evidence fit any of these categories. In fact, it was *not repetitive*—even the footprint photos were independently relevant; it was *not marginally relevant*—the proffered evidence was the basis of Mr. Barefield’s defense; and the proffered evidence *did not* pose any risk, much less an undue risk, of harassment, prejudice, or confusion of the issues. Likewise, the majority is correct when it states that when “*properly applied*,” *Zinger* prohibits evidence of third-party guilt that is “irrelevant or which is relevant but substantially outweighed by the danger of unfair prejudice or confusion because it is *not* sufficiently linked to the crime in question.” However, in the case before us, the proffered evidence *was* linked to the crime in question. Mr. Barefield identified a particular suspect, a motive for committing the murders, and evidence tending to show the presence of individuals other than Mr. Barefield at and around the crime scene near the time of the murders.

Certainly the “link” in the case before us is at least as substantial as the “link” in *Harmon v. State*, 2014 Ark. 391, 441 S.W.3d 891, where this court reversed a murder conviction because the circuit court excluded unidentified DNA evidence found on clothing items that also included Harmon’s DNA. In *Harmon*, the alternative suspect was merely identified by Harmon, who claimed that he lent him his car on the night of the murder.

Our system of justice depends on adversary proceedings in which both sides must be allowed to present proof, subject only to the limitations set by our rules of evidence. When one side is prevented from fully presenting its case, we cannot have confidence in the outcome of the trial. I would reverse and remand this case for a new trial.

I respectfully dissent.

FORMAL ORDER

STATE OF ARKANSAS,)
) **SCT.**
SUPREME COURT)

**BE IT REMEMBERED, THAT A SESSION OF THE SUPREME COURT
BEGUN AND HELD IN THE CITY OF LITTLE ROCK, ON AUGUST 1, 2019,
AMONGST OTHERS WERE THE FOLLOWING PROCEEDINGS, TO-WIT:**

SUPREME COURT CASE NO. CR-18-325

TYLER JOSEPH BAREFIELD

APPELLANT

V. APPEAL FROM POPE COUNTY CIRCUIT COURT - 58CR-16-764

STATE OF ARKANSAS

APPELLEE

APPELLANT'S PETITION FOR REHEARING IS DENIED. SPECIAL JUSTICE J. CLIFF MCKINNEY AND HART AND WOOD, JJ., WOULD GRANT. APPELLANT'S MOTION FOR STAY OF THE MANDATE IN ORDER TO PETITION FOR WRIT OF CERTIORARI IS GRANTED. SPECIAL JUSTICE J. CLIFF MCKINNEY AGREES. BAKER AND WOOD, JJ., WOULD DENY. KEMP, C.J., NOT PARTICIPATING.

IN TESTIMONY, THAT THE ABOVE IS A TRUE COPY OF
THE ORDER OF SAID SUPREME COURT, RENDERED IN
THE CASE HEREIN STATED, I, STACEY PECTOL,
CLERK OF SAID SUPREME COURT, HEREUNTO
SET MY HAND AND AFFIX THE SEAL OF SAID
SUPREME COURT, AT MY OFFICE IN THE CITY OF
LITTLE ROCK, THIS 1ST DAY OF AUGUST, 2019.



CLERK

BY: _____

DEPUTY CLERK

ORIGINAL TO CLERK