



## People v. Zimmerman

2018 IL App (4th) 170695 (2018) | Cited 0 times | Appellate Court of Illinois | June 18, 2018

Illinois Official Reports

Appellate Court

People v. Zimmerman, 2018 IL App (4th) 170695

Appellate Court Caption

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellant, v. KIRK ZIMMERMAN, Defendant-Appellee.

District & No.

Fourth District

Docket Nos. 4-17-0695, 4-17-0696 cons.

Filed

June 18, 2018

Decision Under Review

Appeal from the Circuit Court of McLean County, No. 15-CF-894; the Hon. Scott Drazewski, Judge, presiding.

Judgment Affirmed.

Counsel on Appeal

Jason

John P. Rogers, of Rogers, Sevastianos & Bante, LLP, of Clayton, Missouri, for appellee.

Panel



## People v. Zimmerman

2018 IL App (4th) 170695 (2018) | Cited 0 times | Appellate Court of Illinois | June 18, 2018

JUSTICE STEIGMANN delivered the judgment of the court, with opinion.

Justices Holder White and Knecht concurred in the judgment and opinion.

### OPINION

¶ 1 In July 2015, a grand jury indicted defendant, Kirk Zimmerman, for the first degree murder (720 ILCS 5/9- -wife, Pamela Zimmerman. The State later filed two motions in limine that sought to (1) introduce identification testimony pursuant to section 115-12 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-12 (West 2016)) and Illinois Rule of Evidence 801(d)(1) (eff. Oct. 15, 2015) and (2) introduce statements by Pamela under the doctrine of forfeiture by wrongdoing. See Ill. R. Evid. 804(b)(5) (eff. Jan. 1, 2011). Defendant subsequently filed his own motions in limine to exclude the same evidence the State sought to introduce.

¶ 2 The trial court first took up the identification testimony and conducted a hearing over multiple days in March and April 2017, at which several witnesses testified. Following the witnesses could testify as to a prior identification.

¶ 3 Over five days in May 2017, the trial court conducted a hearing, at which several witnesses testified on the issue of forfeiture by wrongdoing. In July 2017, the court issued a written order finding defendant killed Pamela with the intention of preventing her from testifying. However, the court deemed only two oral statements and one set of documents admissible pursuant to the forfeiture by wrongdoing doctrine. The court excluded all other proposed statements because relevant; speculative; remote; improper lay opinion; lack[ed] \*\*\* personal knowledge; cumulative; improper character evidence; and/or Despite so ruling, the court noted the State could still seek to introduce the evidence at trial.

¶ 4 The State argued the court applied the wrong standards in evaluating the evidence and unduly explain with specificity why the court believed certain statements were inadmissible so the trial. The State also explained that it wished to properly structure its case so as to prevent an inadvertent violation of the order in limine and a mistrial. The court denied the motions to reconsider. The State filed an interlocutory appeal.

¶ 5 The State appeals, arguing that the trial court erred by (1) granting its motions in limine only in part and (2) deeming inadmissible certain prior identification testimony and certain statements under the doctrine of forfeiture by wrongdoing. We disagree and affirm.

¶ 6 I. BACKGROUND



## People v. Zimmerman

2018 IL App (4th) 170695 (2018) | Cited 0 times | Appellate Court of Illinois | June 18, 2018

¶ 7 The following testimony and documentary evidence were presented to the trial court at the hearings on the motions in limine.

### ¶ 8 A. The Underlying Murder and Initial Investigation

¶ 9 Sometime on the evening of -wife, Pamela Zimmerman, was murdered in her office in an area of Bloomington, Illinois, commonly known as Doctors Park. On November 4, 2014, at approximately 7:30 a.m., her body was discovered by Ina Hess, ry. Pamela had been shot multiple times, including once in the head. wallet was eventually located several streets from the office in a ditch, but the wallet contained

cash and all of her credit cards. Her cellular phone was also found several streets away.

¶ 10 Later that day, investigators approached defendant at State Farm Insurance Company me to the police station for an interview. He complied, and the police interviewed him for approximately six hours but ultimately released him. The police interviewed him several times in the following days but did not arrest him for the murder. The investigation continued for several months. In July 2015, a grand jury indicted defendant for first degree murder.

### ¶ 11 B. The Identification Testimony Motions and Proceedings ¶ 12 1. to Suppress

¶ 13 In September 2016, defendant filed a motion to suppress identification. Although the trial court ultimately granted that motion in part, that ruling is not at issue in this appeal. Nonetheless, the testimony presented at the hearing on that motion is pertinent to this appeal.

¶ 14 Defendant sought to suppress the identification of defendant by Mrs. Maria Legg. Defendant argued the photo lineup at which Mrs. Legg identified defendant was impermissibly

¶ 15 The trial court conducted a hearing on the motion on three separate days in March and April 2017. Bloomington Detective Tim Power testified about the police investigation of the death of Pamela Zimmerman. Power stated the police received an anonymous tip in March 2016 that someone may have seen defendant at the scene of the crime on the night of the murder. The tip led police to Ron and Annis Guenther, who informed them about a meeting that meeting, Mrs. Legg informed them she had seen defendant in the Doctors Park parking lot on November 3, 2014, and recognized him when his picture was printed in the newspaper following his July 2015 arrest.

¶ 16 Later in March 2016, Power interviewed the Leggs in their home and administered a photo lineup via a computer program. Both the interview and the lineup were recorded and reviewed by the court. During the interview, Mrs. Legg described (1) what she saw on November 3, 2014, (2) her identification of defendant as the man she saw on that night from a picture in the regarding both of these events. Power testified that following the interview, Mrs. Legg viewed



## People v. Zimmerman

2018 IL App (4th) 170695 (2018) | Cited 0 times | Appellate Court of Illinois | June 18, 2018

a photo lineup and indicated she believed the first photo was the man she saw. The first photo was defendant and was the same photo published in the local newspaper on numerous occasions.

¶ 17 Mrs. Legg testified she was dropping off recycling at St. Luke Union Church around 6 p.m. on November 3, 2014. The church shares a parking lot with Doctors Park. Mrs. Legg testified tightly holding a black garbage bag and stared directly at her. Mrs. Legg stated she was scared

because she was alone, but she looked right at the man. The parking lot was well-lit, and the man eventually walked in her direction, but before reaching her, he stopped at a car parked under a light post. He put the Legg then exited the parking lot, she drove past the man as he sat in his car. The next day, she saw in the newspaper that a murder occurred in Doctors Park. She called her husband, who was out of town, and told him what had happened. She asked him if she should talk to the police. Her husband said she should not because the man might come after them.

¶ 18 Months later, Mrs. Legg saw a photo of defendant in the newspaper and recognized him as the man she saw on the night of the murder. (The trial court took judicial notice of the fact that

¶ 19 Mrs. Legg further testified that sometime thereafter, she and her husband met the Guenthers at a fast-food restaurant, and she informed both of them about what she saw on the night of the murder. She also told them she subsequently identified defendant as the man she saw from his photo in the newspaper. Mrs. Legg also testified about the police interview and photo lineup. Additionally, Mrs. Legg made an in-court identification of defendant.

¶ 20 They did not socialize with the Leggs outside of that setting. Mrs. Guenther testified that on

one particular occasion, likely in the fall of 2015, Mrs. Legg was very upset and told them what she had seen on November 3, 2014. Mrs. Legg also told them about recognizing defendant after seeing his picture in the newspaper. Mrs. Guenther stated she did not tell the police but did share the information with others.

¶ 21 Charles Legg testified that in early November 2014, his wife called him upset because she had seen a strange man while dropping off recycling at St. Luke Union Church. He added that she later recognized the man when his picture was published in the newspaper. Mr. Legg also

experiences.

¶ 22 After the hearing, the tria photo lineup was inadmissible because it was impermissibly suggestive. However, the court

found Mrs. Legg had a sufficient independent recollection to render her in-court identification admissible.



## People v. Zimmerman

2018 IL App (4th) 170695 (2018) | Cited 0 times | Appellate Court of Illinois | June 18, 2018

### ¶ 23 2. in Limine to Admit Statements of Identification

¶ 24 In May 2017, the State filed a motion in limine to admit statements of identification pursuant to section 115-12 of the Code (725 ILCS 5/115-12 (West 2016)) and Illinois Rule of Evidence 801(d)(1)(B) (eff. Oct. 15, 2015). The State sought a ruling that testimony at the hearing on the motion to suppress identification from Charles Legg, Annis Guenther, and Ron Guenther that Maria Legg identified defendant as the man she saw on November 3, 2014, was admissible. The State argued that testimony from Charles Legg that Mrs. Legg identified defendant upon seeing him in the newspaper and her later recitation of this event to the Guenthers both constituted statements of identification and were therefore admissible.

¶ 25 the circu the fact. Accordingly, defendant argued, the testimony would be cumulative, unhelpful, and

constitute improper bolstering.

¶ 26 In August 2017, the trial court ruled that Charles Legg could testify as to the identification described a hypothetical in which Mrs. Legg recounted her identification to a crowded theater and explained that the State could not call all those witnesses to testify to the same event would not be helpful to the trier of fact in deciding what weight to give the statements of prior

identification, the court excluded that testimony.

### ¶ 27 C. The Forfeiture by Wrongdoing Motions and Proceedings ¶ 28 1. The Motions in Limine

¶ 29 In March 2017, the State filed a motion in limine to admit certain hearsay statements of Pamela pursuant to the common-law doctrine of forfeiture by wrongdoing and Rule of Evidence 804(b)(5). The State later filed several additional motions that added additional statements for admission on the same grounds.

¶ 30 In total, the State sought to introduce more than 40 statements from 16 witnesses and approximately 20 pages of documents. The proposed statements were from as far back as 2010 and as recent as the day of the murder.

¶ 31 In its motions, the State listed each specific statement to which it anticipated each witness would testify. Most of the statements dealt with the relationship between Pamela and defendant, particularly their 2012 divorce, 2013 child support enforcement proceedings, and anticipated enforcement defendant and what he might do to her over money, his retirement, and her recent engagement.

The statements will be discussed only as necessary.



## People v. Zimmerman

2018 IL App (4th) 170695 (2018) | Cited 0 times | Appellate Court of Illinois | June 18, 2018

¶ 32 Defendant filed a written response to the trial court had conducted evidentiary hearings, the State filed written arguments in support

of its motion.

¶ 33 On July 10, 2017, defendant filed a motion in limine statements. Defendant argued that the State failed to meet its burden that he murdered Pamela

with the intent of preventing her from testifying at a future proceeding. Defendant additionally asserted that even if forfeiture by wrongdoing applied, the statements were still inadmissible because they were irrelevant, speculative, remote, and substantially more prejudicial than probative.

¶ 34 2. The Forfeiture by Wrongdoing Testimony

¶ 35 in limine in order to determine if (1) defendant murdered Pamela and (2) he did so with the intent to make her unavailable as a witness. See Ill. R. Evid. 804(b)(5) (eff. Jan. 1, 2011). The court took judicial notice of the identification testimony and evidence submitted at prior hearings in this case as well as the records in the McLean County divorce case between Pamela and defendant. The parties stipulated to the admission of numerous exhibits, including crime scene and investigation photographs, autopsy reports, gunshot residue reports, cell phone records, documents.

¶ 36 At the recently decided to take him back to court to recover his half of certain child care expenses, and

eduled. The evidence presented showed Pamela sent defendant a letter in October 2014, explaining that he owed \$4000 in child care expenses and warning that if he did not pay, she would institute legal proceedings to recover the money. The letter included a spreadsheet itemizing the expenses. Other evidence showed the letter was sent via FedEx, and defendant signed for it in late October. In his interview with police the day after the murder, defendant discussed a FedEx document with police while describing his relationship with his ex-wife and their financial disagreements.

¶ 37 to particular statements Pamela made. Several friends testified that during and after the

divorc react when he found out she had gotten engaged. The evidence showed she got engaged just a

few days before she was killed. Still others testified as to statements made by Pamela before, during, and after the divorce concerning her fear of what defendant might do to her and statements made by defendant to Pamela about the divorce and child support.

¶ 38 Kathleen Kraft testified extensively concerning the 2012 divorce proceedings and the 2013 ding issue in the divorce proceedings and



## People v. Zimmerman

2018 IL App (4th) 170695 (2018) | Cited 0 times | Appellate Court of Illinois | June 18, 2018

something she discussed frequently with Pamela. Pamela repeatedly stated that defendant wanted to retire at age 55, and if she interfered with that, she was afraid of what he might do to her. Kraft advised Pamela's mediation, the parties agreed defendant would keep 100% of his pension.

¶ 39 Kraft testified that she initiated enforcement proceedings in early 2013 against defendant at defendant was not paying his share of child support. Pamela again expressed concern and fear about what defendant would do to her if enforcement proceedings interfered with his retirement. The trial court in those proceedings eventually found defendant in contempt and garnished his wages.

¶ 40 Kraft stated she spoke with Pamela in the fall of 2014, when Pamela advised her that defendant was again not paying his share of child support. Kraft advised her to send him a letter demanding payment and suggested if he did not comply, they would start enforcement proceedings again. On November 3, 2014, Pamela called Kraft and said she sent defendant the letter, he had not responded, she wished to start enforcement proceedings, and she wanted to know how much the retainer would be.

¶ 41 Marla Knuckey testified she considered Pamela to be one of her best friends. The two met while their daughters were in volleyball together and frequently saw each other at games and tournaments. Sometime after the divorce at one of those games, Pamela told Knuckey that defendant was angry because the two were going back to court over child support. Pamela stated that defendant said he should not have to pay the amount she was seeking because she made more money than he did. Pamela also reported to Knuckey that defendant told her she was ruining his life with these proceedings because he was not going to be able to retire. basically, use up all of his retirement money if he had to pay for all of this and he would not be

¶ 42 Knuckey testified that in the fall of 2014, a few weeks before Pamela died, Pamela indicated she was worried about how defendant would react when he found out she was engaged. Knuckey could not remember the setting of this conversation, but she testified that in October 2014 she attended a Big 12 Conference volleyball tournament in Champaign with Pamela. At that time, Pamela indicated she and defendant had gotten into an argument, but Knuckey could not remember any specifics. Knuckey did recall that Pamela told her at that

¶ 43 tations of

under the forfeiture by wrongdoing doctrine. The court admonish

¶ 44 Throughout the hearing, a pattern emerged. Witnesses would testify as to statements they remembered, defendant would object and argue the statements were speculative, and, occasionally, the court would admonish the witness to be as specific as possible. Eventually,

the first person.



## People v. Zimmerman

2018 IL App (4th) 170695 (2018) | Cited 0 times | Appellate Court of Illinois | June 18, 2018

¶ 45 The State al murder. A forensic report showed gunshot residue was present on the gearshift of de car.

¶ 46 Eldon Whitlow testified he was a client of Pamela, who was a financial advisor, and attended an appointment with her on the night of the murder. He reported being with Pamela until approximately 5:40 p.m., when he left to take care of a fr

¶ 47

¶ 48 around 6:40 p.m. on November 3, 2014, but defendant did not come to the door. He later texted her that he had laid down in bed to read. She testified she went over to his house after 7:20 p.m. where they had a normal evening before she returned home for bed around 9 p.m.

¶ 49 The parties stipulated to the admission of a document that contained a table depicting the text messages sent between defendant and his then-girlfriend on November 3, 2014. The table indicated that these text messages had been deleted off of both partie

¶ 50 Defendant presented evidence from a therapist whose office was located near Doctors Park. The therapist testified she and a client heard three gunshots in short succession on November 3, 2014. She stated the clock in her office indicated the time was approximately 5:30 p.m. when she heard the shots.

¶ 51 Following this testimony, the State submitted a written argument in support of the admission of the statements in question. Defendant later filed a motion in limine to exclude these statements. The trial court subsequently received extensive oral arguments from the parties on the admissibility of these statements.

¶ 52 3.

¶ 53 In July 2017, the trial court issued a written ruling that first concluded that the State had proved by a preponderance of the evidence that defendant killed Pamela with the intent to prevent her from testifying at a future proceeding relating to expenses for their children. The eletion of text be drawn via circumstantial evidence of a car similar to d -]related

expenses shared by Pamela and the defendant at

¶ 54 The trial court then analyzed the many statements offered by the State to determine which and/or documents offered by the State are





## People v. Zimmerman

2018 IL App (4th) 170695 (2018) | Cited 0 times | Appellate Court of Illinois | June 18, 2018

admissible: (1) the October 2014 FedEx letter sent from Pamela to defendant regarding \$4000

owed in child supp

r i.e.

¶ 55 The trial court then ruled, as follows:

remaining statements and/or documents sought to be introduced by the State are not admissible under the doctrine of forfeiture by wrongdoing and Illinois Rule of Evidence 804(b)(5) as one or more of the following additional evidentiary considerations apply: not probative of any material fact; irrelevant; speculative; remote; improper lay opinion; lack of personal knowledge; cumulative; improper character evidence; and/or the probative value of the evidence is substantially outweighed by its prejudicial effect

¶ 56 The trial court noted that because this was an interlocutory ruling on a motion in limine, the State could still seek to introduce the evidence at trial. However, the court cautioned the State to consider *People v. Floyd*, 103 Ill. 2d 541, 470 N.E.2d 293 (1984), and *People v. Munoz*, 398 Ill. App. 3d 455, 923 N.E.2d 898 (2010).

¶ 57 to Reconsider

¶ 58 the admissibility of the identification testimony and forfeiture by wrongdoing statements. The State argued the statements of identification from the Guenthers were admissible and relevant rule contained no limit on the number of identification witnesses who may testify and the court

should not impose one.

¶ 59 Regarding the forfeiture statements, the State argued the trial court applied the wrong standard limiting the statements to those which directly showed defendant killed Pamela to prevent her testimony. The State further asserted that the statements were relevant and admissible because they went to motive and intent. The State contended that by excluding them, the court was severely inhibiting the State from presenting its case. Alternatively, the State urged the court to address each statement individually so it could address concerns at trial.

¶ 60 the forfeiture by wrongdoing statements individually. In its ruling, the court reiterated that it

had not added any extra requirements but was simply applying the law as the court saw it. The court stated it had not considered whether it was preventing either party from presenting its case because that was not what the court was doing. Instead, the court stated it was simply acting as a gate keeper and applying the rules of evidence.



## People v. Zimmerman

2018 IL App (4th) 170695 (2018) | Cited 0 times | Appellate Court of Illinois | June 18, 2018

¶ 61 This appeal followed.

### ¶ 62 II. ANALYSIS

¶ 63 The State appeals, arguing that the trial court erred by (1) granting its motions in limine only in part and (2) deeming inadmissible certain prior identification testimony and certain statements under the doctrine of forfeiture by wrongdoing. We disagree and affirm.

#### ¶ 64 A. The Standard of Review

¶ 65 The State contends that although evidentiary decisions are ordinarily reviewed for an abuse of discretion, the t in limine should be reviewed de novo. The

and \*\*\* the question is whether the trial court properly applied a rule of l de novo review appropriate. Defendant counters that merely because the trial court applied the

law to a set of facts does not transform the standard of review from abuse of discretion to de novo. Defendant argues de novo review is only proper when the trial court applies an erroneous rule of law. The State responds that the trial court did, in fact, erroneously apply the law by adding additional requirements to the hearsay rules it analyzed that are not found in the text of the rules or common law. We agree with defendant.

¶ 66 in limine regarding the introduction or People v. Richter, 2012 IL App (4th) 101025, ¶ 97, 977 N.E.2d 1257. In People v. Perkins, 2018 IL App (1st) 133981, ¶ 52, the defendant made an argument similar to the one the State makes here namely, that because the facts are not in dispute, de novo review is proper. In rejecting the argument, the First District explained de novo review is only proper when the trial court misinterprets an evidentiary rule so that the issue presented is solely a legal one. Id. ¶¶ 52-53.

¶ 67 The Illinois Supreme Court has stated that the manifest weight of the evidence standard,

forfeiture by wrongdoing doctrine. People v. Peterson, 2017 IL 120331, ¶ 39. The court noted abuse of discretion is proper where the trial court must make a ju admission of hearsay statements into evidence pursuant to the forfeiture doctrine, however, is

Id. dependent on whether the trial court finds, by a preponderance of the evidence, that the

Id.

¶ 68 However, a careful reading of Peterson and People v. Hanson, 238 Ill. 2d 74, 939 N.E.2d 238 (2010), indicates that the manifest weight of the evidence standard applies to the trial court properly



## People v. Zimmerman

2018 IL App (4th) 170695 (2018) | Cited 0 times | Appellate Court of Illinois | June 18, 2018

found that the State had proved by a preponderance of the evidence that the defendant engaged in Peterson, 2017 IL 120331; Hanson, 238 Ill. 2d at 99. We note that both cases examined only whether the doctrine applied and did not consider the admissibility of the statements on other grounds.

Hanson indicating the trial court still has discretion to exclude statements that would otherwise be admissible under the forfeiture doctrine if they are irrelevant or are barred by some other evidentiary concern. Hanson, 238 Ill. 2d at 99.

¶ 69 In this case, neither party contests the factual findings of the court. Therefore, we review discretion only when its decision is arbitrary, fanciful, unreasonable, or no reasonable person

Richter, 2012 IL App (4th) 101025, ¶ 97.

¶ 70 B. Statements of Identification

¶ 71 The State argues that the trial court applied the wrong standard when it found the According to the State, all identification testimony under Rule 801(d)(1)(B) and section

115- the effect of eliminating the prior identification exclusion to the hearsay rule. The State further contends that the court limited the State to one identification witness even though the Rule, statute, and case law contain no such limitation. Accordingly, the State asserts the trial court

¶ 72 As additional support for this contention, the State analogizes section 115-12 to section 115-10, which deals with statements by child victims of sexual assault (725 ILCS 5/115-10 (West 2016)), and section 115-10.1, which deals with prior inconsistent statements (725 ILCS 5/115-10.1 (West 2016)), which courts have held do not limit the number of witnesses the State may present.

¶ 73 In response, defendant contends that the Stat Defendant asserts that the court did, in fact, rule that the statements were admissible as statements of prior identification but excluded them because they were cumulative. In particular, defendant asserts People v. White, 2011 IL App (1st) 092852, ¶ 44, 953 N.E.2d 398, quoting People v. Ortiz, 235 Ill. 2d 319, 335, 919 N.E.2d 941, 950

(2009))

knowledge of the identification event, distinguishing this case from People v. Beals, 162 Ill. 2d 497, 643 N.E.2d 789 (1994).

¶ 74 statements inadmissible.

¶ 75 1. The Applicable Law



## People v. Zimmerman

2018 IL App (4th) 170695 (2018) | Cited 0 times | Appellate Court of Illinois | June 18, 2018

¶ 76 ssible to corroborate the trial testimony of that witness. Id. at 507. However, this rule does not apply to statements of identification. Id. at 507-08. Section 115-12 provides:

rant testifies at the trial or hearing, and (b) the declarant is subject to cross-examination concerning the statement, and (c) the statement is one of identification of a person -12 (West 2016).

Similarly, Illinois Rule of Evidence 801(d)(1)(B) (eff. Jan. 1, 2011) not hearsay if \*\*\* [i]n a criminal case, the declarant testifies at the trial or hearing and is

subject to cross-examination concerning the statement, and the statement is \*\*\* one of and the third person are subject to cross examination at tria Beals, 162 Ill. 2d at 508.

¶ 77 informed concerning the reliability of the identification. People v. Tisdell, 201 Ill. 2d 210, 219, 775 N.E.2d 921, 926 (2002). Thus, testimony relating to prior instances of nonidentification is admissible. Id.

### ¶ 78 2. Application to the Facts of This Case

¶ 79 nts, the trial court did not apply an incorrect standard. Here, was basing its ruling on other rules of evidence, not hearsay considerations. We agree with

uld be cumulative.

Immediately after this statement, the court concluded as follows:

perspective, in assessing, and determining, and weighing what weight to give to that

¶ 80 the White, 2011 IL App (1st) 092852, ¶ 44 (quoting Ortiz, 235 Ill. 2d at 335). Here, the help the trier of fact in assessing and weighing the identification testimony. Most importantly,

the court had already ruled that Mrs. Legg would be able to offer her in-court identification of defendant, and Mr. Legg would be able to testify as to her initial identification upon seeing testimony followed a ruling to allow the testimony of the Leggs, we cannot say the court

¶ 81 The State is correct, and defendant concedes, that Rule 801(d)(1)(B) and section 115-12 do not contain any limitation on the number of witnesses a party may call to testify about prior identifications. However, the trial court did not erroneously create a rule limiting the number considerations namely, the testimony was repetitive and cumulative.

¶ 82 the police investigation and how an eyewitness came to the attention of police. The State



## People v. Zimmerman

2018 IL App (4th) 170695 (2018) | Cited 0 times | Appellate Court of Illinois | June 18, 2018

further argues the testimony could rebut a claim that Mrs. Legg fabricated the identification for

¶ 83 mally relevant. That is, the prior identification was sincere. But that does not mean their testimony was not outweighed by other

considerations. Here, the trial court was concerned that the State would have multiple witnesses testify to an out-of- concern for improper, repetitive bolstering is understandable and not unreasonable.

¶ 84 rguments as to relevancy of the statements may also be well-taken. However, we will not substitute our judgment for that of the trial court, especially when, as here, the trial court supported the exercise of its considerable discretion with a thorough and logical explanation.

¶ 85 be well-founded. Both the Illinois Supreme Court and the United States Supreme Court have acknowledged that the length of time between the event and the identification is a factor for consideration. See Tisdel - or two- People v. Tisdel, 316 Ill. App. 3d 1143, 1162, 739 N.E.2d 31, 46 (2000) (Quinn, P.J., specially concurring)); Neil v. Biggers

between the rape and the confrontation. This would be a seriously negative factor in most because of the length of time between the event and the identification.

¶ 86 However, as with all rulings on motions in limine, the trial cour present evidence or argument claiming fabrication, as the State fears might happen, the trial

court would be free to revisit its ruling and assess whether the probative value of the

¶ 87 Last, the State cites a litany of cases in which courts expressly declined to limit the number of witnesses the prosecution could call under section 115-10. See, for example, People v. Stull, 2014 IL App (4th) 120704, ¶ 93, 5 N.E.3d 328 (collecting cases). Courts analyzing both that statute and section 115-10.1 have expressly refused to limit the number of witnesses who can testify to statements because the statutes contain no such limitation. See id.; White, 2011 IL App (1st) 092852, ¶¶ 43-46 (discussing 725 ILCS 5/115-10.1 (West 2010)). We note that defendant points out that section 115- therefore, the cases are inapposite.

¶ 88 While we agree with the State that section 115-12 does not limit the number of witnesses it may call at trial, we decline the invitation to analogize the facts of this case with those analyzing section 115-10 and 115-10.1. In those cases, the issue was whether the trial court abused its discretion by allowing multiple witnesses to testify. The issue here is whether the trial court abused its discretion by not allowing more witnesses to testify. Here, the trial court determined it would permit Mr. Legg to testify and, after carefully considering the evidence, petitive and cumulative under the specific



## People v. Zimmerman

2018 IL App (4th) 170695 (2018) | Cited 0 times | Appellate Court of Illinois | June 18, 2018

facts and circumstances of this case. The trial court was free to engage in that analysis, and its ultimate ruling was not an abuse of discretion.

### ¶ 89 C. Forfeiture by Wrongdoing

¶ 90 Next, the State argues that the trial court misapplied the forfeiture by wrongdoing doctrine, which is codified in Illinois Rule of Evidence 804(b)(5) (eff. Jan. 1, 2011). The State first reasons that were not before it; specifically, the State asserts that the court erroneously

concluded the statements were admissible under the forfeiture by wrongdoing doctrine but 5).

¶ 91 that the court erred by not addressing the specific reasons for excluding each individual statement, thereby making it impossible for the State to seek to introduce the statements at trial

¶ 92 Next, the State claims the trial court erred by adding two requirements to the forfeiture by wrongdoing doctrine: (1) that the statements be specific quotations from the declarant and (2)

witness for trial.

¶ 93 Last, the State argues that the trial court abused its discretion by finding the proffered statements were irrelevant, speculative, remote, cumulative, or otherwise inadmissible under the rules of evidence.

¶ 94 In response, defendant contends that the trial court properly excluded the statements based on other evidentiary considerations raised by defendant in his own motion in limine. Defendant contends that the statements do not meet the minimum requirements for admissibility because they were, in fact, irrelevant, remote, speculative, and unduly

¶ 95 We first address whether the court properly applied the doctrine of forfeiture by in limine.

¶ 96 1. ¶ 97 engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability

Jan. 1, 2011). The forfeiture by wrongdoing rule is a codification of, and is coextensive with,

the common-law doctrine. Hanson, 238 Ill. 2d at 97. Th Id. The doctrine is based on Peterson, 2017 IL 120331, ¶ 18 (quoting Reynolds v. United States, 98 U.S. 145, 159 (1878)).

¶ 98 admission of hearsay statements under the rule: (1) that the party against whom the statement is Id. ¶ 32



## People v. Zimmerman

2018 IL App (4th) 170695 (2018) | Cited 0 times | Appellate Court of Illinois | June 18, 2018

(quoting Ill. R. Evid. 804(b)(5) (eff. Jan. 1, 2011)). The Illinois Supreme Court has explained reliability would undermine the equitable considerations at the very center of the forfeiture by

Id. ¶ 33 (citing Hanson forfeiture by Hanson,

238 Ill. 2d at 99.

¶ 99 It is important to note that, in this case, the application of the doctrine is not at issue. Unlike most cases dealing with the doctrine, neither party cha finding that defendant murdered Pamela with the intent of preventing her from testifying at a

future court proceeding. Neither party argues the hearsay rule or confrontation clause has any bearing on the admissibility of the evidence. Instead, this appeal concerns the scope of the role in determining that scope.

¶ 100

¶ 101 The State first argues that the court required the witnesses to testify to the exact wording of opposed to giving a summary. We disagree for two reasons.

¶ 102 -trial

to what you recall

¶ 103 the trial court was requiring something more from the witnesses than what is required under the rule is belied by the fact that one of the in October of 2013 or 2 erruled

witness providing a summary.

¶ 104 Second, a thorough review of the record demonstrates that the trial court did not . Instead, the court simply indicated its strong and understandable preference for specific statements and informed some of the witnesses of this preference. Thereafter, the parties elicited responses from the witnesses to the best of their abilities to recall.

¶ 105 Trial courts have broad discretion regarding how hearings on motions in limine and offers of proof will be conducted. *People v. Owen*, 299 Ill. App. 3d 818, 823, 701 N.E.2d 1174, 1178 (1998). Here, the court made clear it did not want summaries or editorial comments and asked opinions of what was said are not admissible. *People v. Riley*, 99 Ill. App. 3d 244, 252, 424

N.E.2d 1377, 1383 (1981); *People v. Holveck*, 141 Ill. 2d 84, 105-06, 565 N.E.2d 919, 928-29 (1990); *Allen*



## People v. Zimmerman

2018 IL App (4th) 170695 (2018) | Cited 0 times | Appellate Court of Illinois | June 18, 2018

B. Wrisley Co. v. Burke, 203 Ill. 250, 257, 67 N.E. 818, 821 (1903).

¶ 106 The trial court is in the best position to evaluate testimony, and we will not substitute our judgment for that of the trial court. After thoroughly reviewing the record, we do not believe the trial court abused its discretion by unduly limiting or restricting the testimony of any witness. We acknowledge that the trial court was certainly aggressive in pinning down the exact statements sought to be admitted, but this was not improper under these circumstances.

¶ 107 b. Limit of Subject Matter

¶ 108 The State next argues that the trial court erred by limiting the evidence under the forfeiture

¶ 109 The text of Rule 804(b)(5) does not limit the subject matter of the statements that may be admissible under the doctrine of forfeiture by wrongdoing. Additionally, courts that have considered this issue have held that the doctrine does not create a subject-matter limitation.

United States v. Dhinsa, 243 F.3d 635, 652-53 (

that can be offered against the defendant at trial to prove that the defendant murdered the United States v. Emery wrongdoing] rule contains no limitation on the subject matter of the statements that it exempts

United States v. Gray, 405 F.3d 227, 241 (4th Cir. State v. Ivy,

past events or prior

¶ 110 We agree that the forfeiture by wrongdoing doctrine and Illinois Rule of Evidence 804(b)(5) do not limit the subject matter of admissible statements. The Illinois Supreme Court has explicitly stated that a defendant who intends to and does prevent a witness from testifying reliability grounds. Hanson, 238 Ill. 2d at 98-99. Indeed, the supreme court has clearly held

relevant and otherwise admissible requirements must be met. (Emphasis added.) Peterson, 2017 IL 120331, ¶¶ 32-33 (quoting

Hanson, 238 Ill. 2d at 99).

¶ 111 Although the State is correct on this legal point, the State is not correct that this point has any relevance to the issue before this court on appeal. Here, the trial court explained it was defendant for up to four years prior to her murder, whether they are relevant and/or otherwise

admissible





## People v. Zimmerman

2018 IL App (4th) 170695 (2018) | Cited 0 times | Appellate Court of Illinois | June 18, 2018

question is what statements and/or documents offered by the State are evidence of the

¶ 112 prevent Pamela from being a witness is the correct inquiry when deciding whether the forfeiture doctrine applies in the first instance. Once this question is answered in the affirmative, as it was in this case, the only other questions for the trial court to consider are whether the evidence is (1) relevant and (2) otherwise admissible.

¶ 113 The record demonstrates the trial court did not abuse its discretion by admitting only three particular statements from Pamela. After delineating the admissible statements, the trial court remaining statements and or documents sought to be introduced by the State are not admissible under the doctrine of forfeiture by wrongdoing and Illinois Rule of Evidence 804(b)(5) as one or more of the following additional evidentiary considerations apply clear that the remaining statements were excluded for reasons wholly separate and apart from the analysis of whether a particular statement falls under the doctrine of forfeiture by wrongdoing.

¶ 114 was excluding the statements not because they did not meet forfeiture by wrongdoing

Hanson y she made the offered statements] even if she were still

it requires analysis and

¶ 115 ed upon all of the criteria that

that provided in the written order. Accordingly, we conclude that the trial court did not improperly add an additional requirement to the forfeiture by wrongdoing doctrine.

¶ 116 c. Whether the Statements Were Relevant and Otherwise Admissible

¶ 117 In the alternative, the State argues that the trial court abused its discretion when it ruled all remaining statements and documents were inadmissible based on other evidentiary considerations. In its brief, the State specifically addresses numerous statements it believes are particularly relevant and demonstrate why the trial court abused its discretion by finding them inadmissible. We need not address each statement directly. Instead, we will address a few statements to illustrate why the trial court did not abuse its discretion.

¶ 118 somewhat confusing. After all, the court found, based on a preponderance of the evidence, that defendant murdered Pamela to prevent her from testifying at a future hearing concerning child tatements to third parties inadmissible because, for the reasons the State argues, the statements demonstrated motive. However, the court explained the basis for its ruling in the order.

¶ 119 Specifically, the trial court relied upon documentary evidence, Mrs evidence that the court had



## People v. Zimmerman

2018 IL App (4th) 170695 (2018) | Cited 0 times | Appellate Court of Illinois | June 18, 2018

ruled could be admitted, as well as the admission of three of

believed the remaining statements offered by the State were unnecessary and of limited

probative value. This finding of the limited probative value of the remaining statements, as we shall explain, is of critical importance.

¶ 120 As soon as the trial court admitted some by wrongdoing doctrine, the probative value of the remaining statements changed. That is

because, as the State correctly notes in its brief, all evidence offered at trial is prejudicial in that case; if it were not prejudicial, it would not be relevant. See *People v. Stevenson*, 2014 IL App

(4th) 130313, ¶ Michael H. Graham, *Handbook of Illinois Evidence* § effective evidence is prejudicial in the sense of damaging the party against whom offered, only

only prohibits unfairly prejudicial evidence, and even then, only when the probative value is substantially outweighed by that prejudice. Ill. R. Evid. 403 (eff. Jan. 1, 2011); *People v. Pelo*, 404 Ill. App. 3d 839, 867, 942 N.E.2d 463, 487 (2010).

¶ 121 Once the probative value of her remaining statements decreases because those statements start to

same, if not increases, due to repetition. Thus, the Rule 403 balancing test is constantly in flux as evidence is let in or kept out. This is what makes Rule 403 such an important tool in controlling the admission of evidence and why trial courts are granted vast discretion over evidentiary matters.

¶ 122 *Floyd*, 103 Ill. 2d 541, did not provide the trial court anything happened to *Floyd* dealt

with the state of mind exception to the rule against hearsay and was decided prior to our *Floyd* also based its holding squarely on the relevancy of the proposed statements. *Id.* at 547.

¶ 123 In *Floyd*, the State alleged defendant killed his wife. *Id.* at 543. Defendant asserted it was an accident, and to rebut this defense, the State offered various statements from the victim under the state of mind exception that demonstrated she was concerned for her safety, was afraid of defendant, and if anything happened to her, she wanted her parents to take care of their children. *Id.* at 544-46. The supreme court held the statements were improperly admitted

could only likelihood of committing the crime. *Id.* at 547.

¶ 124 As in *Floyd* generalized statements in this case concerning her fear or suspicion of her ex-husband, no intent, or opportunity to commit murder. Had the testimony shown defendant made



## People v. Zimmerman

2018 IL App (4th) 170695 (2018) | Cited 0 times | Appellate Court of Illinois | June 18, 2018

threats to Pamela, and these threats caused her fears and suspicions, then the statements might be a state of mind that is, his motive and intent. See *Hanson*, 238 Ill. 2d at 97-

character, opening the door to the possibility that the jury would convict defendant on an impermissible basis.

¶ 125 Despite our unwillingness to reverse the trial court, we nonetheless have some sympathy

any particular time. The State argues before this court that the divorce proceedings and certain statements from Pamela regarding concern for his pension and retirement date are all relevant to provide context as to why he

murdered Pamela.

¶ 126 Peterson demonstrates that feelings about money, pension, and retirement can provide motive to kill both an ex-wife and a current wife. *Peterson*, 2017 IL 120331, ¶¶ 45, 75. The

and surrounding context in this case are different and not nearly as overwhelming as those present in *Peterson*.

¶ 127 Were we to consider this evidence in the first instance as the trial court did, we might very well have reached a different conclusion. However, that is not the issue before us. Our involvement in this case is as a reviewing court, which means that we will reverse the trial

not, not unreasonable based on the record before it.

¶ 128 original divorce proceedings was not unreasonable. As defendant argued to the trial court,

many of the statements the State sought to introduce were either (1) common to many divorce ]

o sought to introduce

introduce testimony from Karen Anderson, a divorce mediator, as to conversations that took

¶ 129 With the obvious exception of the last statement, many of these statements are not unusual in contentious divorce proceedings. Divorce is a stressful event for even the most well-adjusted and calm individuals. Because of the large number of statements the State sought to introduce, the trial court could have reasonably determined that in order to explain these statements, defendant would have needed to introduce testimony concerning the 2012 divorce, and the risk of confusing the jury was simply too great. This risk of confusion is certainly a year gap apparently significantly decreased the evidentiary value.



## People v. Zimmerman

2018 IL App (4th) 170695 (2018) | Cited 0 times | Appellate Court of Illinois | June 18, 2018

### ¶ 130 D. Motions in Limine in General

¶ 131 in ruling on the motions in limine and excluded the offered statements for reasons that were not before it; specifically, the court

erroneously concluded the statements were admissible under forfeiture by wrongdoing but

¶ 132 testimony would be cumulative was premature and should have been reserved for trial. The

proper, because it erred by not addressing the specific reasons for excluding each individual statement, thereby

making it impossible for the State to seek to introduce the statements at trial without violating

### ¶ 133 1. The Applicable Law

¶ 134 A motion in limine *Stevenson*, 2014 IL App (4th) 130313, ¶ 26. These motions are designed to call to the attention

of a trial court, in advance of trial, some evidence that is potentially irrelevant, inadmissible, or prejudicial and to obtain a pretrial ruling from the court excluding or permitting the evidence. *Id.* The utility of motions in limine comes from the fact that they are typically ruled on in limine often achieve great savings of issues prior to trial, they can greatly encourage settlement or guilty pleas and streamline preparations for trial. *Owen*, 299 Ill. App. 3d at 822-23. Seeking a ruling in advance of trial also greatly assists the trial court by giving it adequate time to review and consider the evidentiary issue, research the matter, and consider whether to hold an evidentiary hearing. For these and other reasons, we strongly encourage litigants to take advantage of motions in limine.

¶ 135 The Illinois Supreme Court has called motions in limine powerful and potentially dangerous weapons because of their ability to restrict evidence. *Reidelberger v. Highland Body Shop, Inc.*, 83 Ill. 2d 545, 550, 416 N.E.2d 268, 271 (1981). Accordingly, such motions *Stevenson*, 2014 IL App (4th) 130313, ¶ 27. Written motions are strongly preferred, especially

*Id.* This allows the movant to carefully identify the evidence sought to be excluded and articulate his or her argument in support, preventing confusion and misunderstanding by defining the evidence at issue and *Id.* *rties* and *Id.*

¶ 136 Likewise, rulings on motions in limine should be in writing so as to prevent confusion and misunderstanding. *Reidelberger* narrow in limine orders, anticipate proper evidence that might be excluded by the orders, and make the orders clear and precise so that all parties concerned have an accurate understanding of their limitations. An unclear order in limine *Compton v. Ubilluz*, in



## People v. Zimmerman

2018 IL App (4th) 170695 (2018) | Cited 0 times | Appellate Court of Illinois | June 18, 2018

limine, presentation of its *ca Reidelberger*, 83 Ill. 2d at 550.

¶ 137 One difficulty common to all motions in limine is that they occur by definition out of the normal trial context, and resolving such a motion requires the trial court to determine what that context will be. Thus, the court must receive offers of proof consisting either of live Owen, 299 Ill. App. 3d at 823. As the court in *Stevenson* explained:

counsel the nature of the offered evidence, thus enabling the court to take appropriate action, and (2) it provides the reviewing court with an adequate record to determine *People v. Pelo*, 404 Ill. App. 3d 839, 875, 942 N.E.2d 463, 494 (2010) \*\*\*. An offer of proof may be formal or informal, but an informal offer of proof must identify the complained-of evidence with *Pelo*, 404 Ill. App. 3d at 875, 942 N.E.2d at 494. An offer of proof is

evidence. *Id.* at 876, 942 N.E.2d at 494. While an offer of proof assists the parties, the

tr disadvantaged in ruling on a motion in limine because it is considered in a vacuum, before the presentation of the full evidence at trial that may justify admission or require *Compton Stevenson*, 2014 IL App (4th) 130313, ¶ 28.

¶ 138 The rules for offers of proof apply with equal force to motions in limine:

e court has vast discretion as to how it will conduct the hearing on a motion in limine that is, requiring live witnesses or representations, affidavits, or whatever and the court has *Owen*, 299 Ill. App. 3d at 823.

¶ 139 Trial courts are free to exercise their discretion by not entertaining a motion in limine and instead requiring that the objection be raised in the normal course of trial, outside the presence of the jury. *Id.* This is because a grants the motion against the complication or inconvenience that would result if the motion is

*Rush v. Hamdy*, 255 Ill. App. 3d 352, 365, 627 N.E.2d 1119, 1127 (1993)); and, in certain cases, the best way to ensure a correct ruling on a complicated evidentiary issue is to wait for that issue to become ripe at trial when the court has already heard the evidence, and the context in which the evidentiary ruling is to be made is clear. *Owen*, 299 Ill. App. 3d at 823-24.

¶ 140 2. The Facts of This Case

¶ 141 The State argues the trial court erred when it went beyond simply deciding if the specific doctrine at issue in each motion in limine consider the issues of prior identification and forfeiture by wrongdoing and not address other



## People v. Zimmerman

2018 IL App (4th) 170695 (2018) | Cited 0 times | Appellate Court of Illinois | June 18, 2018

evidentiary concerns. We disagree.

¶ 142 Motions in limine are a tool to streamline trials and greatly increase judicial economy. The presented by the initial movant flies in the face of this policy. Defendant argues the trial court

properly considered the arguments he raised in his responses and his motion in limine to exclude the same evidence that the State sought to introduce. However, even had defendant not done so, once a party seeks a ruling on the admissibility of evidence from the court, the court may, but is not required to, freely consider the admissibility of the evidence on any permissible basis. In other words, once the question of admissibility is presented, the trial court is a free agent and may evaluate the evidence under any and all applicable rules of evidence regardless of whether a party presented those grounds to the court. The decision whether to look beyond

¶ 143 A trial court may also decide a more limited inquiry is appropriate in certain circumstances. Thus, had the trial court decided to only address whether the doctrine of forfeiture by wrongdoing applied at all before taking up the issue of whether certain statements were

this case, the court believed, and the record reflects, there was an adequate offer of proof and arguments from the parties on the totality of the admissibility of the statements for the court to make a holistic ruling. In short, the court acted properly when it went beyond the initial question presented by the State (whether Rule 801(d)(1)(B) and Rule 804(b)(5) applied) and ruled that the proposed statements were inadmissible pursuant to other applicable rules of evidence (that is, factors considered under Rule 403).

¶ 144 in limine to admit statements under the doctrine of forfeiture by wrongdoing was overly broad because it did not address each statement individually and instead provided a list of multiple bases for exclusion. The State argues the vague nature of the order means it will be forced to guess as to the foundation for a mistrial. We disagree.

¶ 145 We are unaware of any authority requiring a trial court to make a separate ruling on each individual piece of evidence or statement offered in a motion in limine, and our holding in *Owen* indicates the contrary. *Owen*, 299 Ill. App. 3d at 824 (explaining trial courts do not abuse their discretion by declining to rule on a motion in limine). Here, although the trial court ruled on the motion in limine, it did not abuse its discretion by declining to address each individual statement or by listing the many reasons it believed the statements were inadmissible.

¶ 146 Additionally, the trial court was clear it would reconsider its ruling based upon the evidence actually presented at trial if the State would so request. We are not persuaded by the

¶ 147 Rulings on motions in limine are, by their very nature, interlocutory and made based upon an expectation of the evidence that will be presented at trial. *Stevenson*, 2017 IL App (4th) 130313, ¶¶



## People v. Zimmerman

2018 IL App (4th) 170695 (2018) | Cited 0 times | Appellate Court of Illinois | June 18, 2018

28-29. As such, a court is simply making its best guess as to what evidence will be presented and the context in which the proposed evidence will be offered.

¶ 148 Here, the parties did an excellent job of presenting evidence at the hearings on the motions in limine, and the trial court was well-served as a result. Not only did the parties thoroughly set forth the testimony they may seek to introduce at trial, but their arguments to the court set forth exactly how the evidence could be relevant and used at trial.

¶ 149 The interlocutory nature of motions in limine is why parties should reraise the issues during trial. The trial court is always free to reconsider and reassess its interlocutory rulings as the trial unfolds and context is provided.

¶ 150 The State is correct that all of the statements it sought to be admitted could be relevant at preliminary and subject to change. In fact, in its briefs to this court, the State explains in detail

how each statement could be relevant and provides the context for when they could be used at trial. Based on what the State has argued before this court, we believe it is amply prepared to lay the foundation and context necessary for the trial court to reconsider its ruling at trial. (In so observing, we in no way suggest the court must or should reach a different result, only that it will have the chance to revisit the issue in full context at trial if the State so requests.)

¶ 151 rom presenting evidence that the dispute over payment or

non- at a specific age was a long-

¶ 152 he specific statements offered by the State are inadmissible, not the underlying facts behind the statements or the subject matter of the statements. The trial court did not state in its written order that the State could not present other evidence that wo -running dispute over child-support payments and retirement age. Because the parties and the court have done such a thorough and exceptional job fleshing out the issues, it should not be difficult for the court to reconsider its ruling, if so requested, in light of the actual evidence presented at trial.

¶ 153 In closing, we commend the State for recognizing prior to trial potentially problematic evidence it believed was important to its case and for filing a motion in limine to give the trial court an opportunity to consider that evidence. We also commend defendant for skillfully and in limine. Last, we also commend the trial court for its thoughtful and careful consideration of the complex evidentiary issues presented by these motions in limine. We particularly appreciate s that accompanied its rulings.

¶ 154 III. CONCLUSION



## People v. Zimmerman

2018 IL App (4th) 170695 (2018) | Cited 0 times | Appellate Court of Illinois | June 18, 2018

¶ 155

¶ 156 Affirmed.

