

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs at Knoxville September 24, 2008

STATE OF TENNESSEE v. RICHARD CLEVELAND MARTIN

**Appeal from the Criminal Court for Davidson County
No. 2005-D-2955 Cheryl Blackburn, Judge**

No. M2007-02097-CCA-R3-CD - Filed May 18, 2009

The defendant, Richard Cleveland Martin, was convicted by a jury in the Criminal Court for Davidson County of first degree premeditated murder and first degree felony murder. The trial court merged the convictions and imposed a life sentence for first degree premeditated murder. On appeal, the defendant contends that (1) the evidence is insufficient to convict the defendant of first degree murder, (2) the trial court erred in admitting two prior violent incidents between the defendant and the victim, and (3) the trial court erred in denying the defendant's motion for mistrial or, in the alternative, a continuance when the testimony of the State's DNA expert differed qualitatively from the report provided during discovery. We affirm the judgments.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which DAVID H. WELLES and JERRY L. SMITH, JJ., joined.

Dawn Deaner, District Public Defender; and Jeffrey A. DeVasher (on appeal) and J. Michael Engle (at trial), Assistant Public Defenders, for the appellant, Richard Cleveland Martin.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Katrin Novak Miller and Bret Thomas Gunn, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

This case relates to the death of Angela Richards. At the trial, Jenna Marie Richards, the victim's daughter, testified that she met the defendant at a 2002 Narcotics Anonymous meeting, to which she had accompanied her mother. She said her mother had had a substance abuse problem with prescription drugs for as long as she could remember. She stated she met with the defendant five to seven times after that meeting, and she identified him in the courtroom. She said that while she and her brother lived in Florida at the time of trial, her mother had moved to Nashville in September 2004 "to get a fresh start" and to be away from the defendant. She said that her mother

and the defendant had been in a relationship and that she and her brother objected to it. She said she and her brother had told their mother that they did not want to have anything to do with her as long as she continued to associate with the defendant. She stated that she spoke on the telephone with her mother at least once or twice weekly, although she said she had not visited her mother in Nashville and did not know where she had been living. She said she only learned the defendant had been in Nashville when she came to Knoxville after her mother's death and spoke with a detective.

Ilesh Patel testified that he was the manager of the Madison Motel where the victim had been found in the defendant's room on July 14, 2005. He said the defendant, whom he identified in the courtroom, stayed at the motel from May 16 through July 2005. He said that the defendant listed his employer as Labor Finders and his home as Lake Park, Florida. Patel stated that he knew the defendant had a girlfriend who sometimes stayed with him at the motel. He said this girlfriend's first name was Angela. He said that there had been an incident two days before the discovery of the victim's corpse when the defendant and Angela had been arguing. He said the defendant came to the manager's office that afternoon for Patel to tell Angela to leave. Patel said he told her to leave the motel because the room was not registered in her name. He said that was the last time he saw Angela alive. He said he saw the defendant the next afternoon or early evening. He said that the following day, when housekeeping arrived to service the room, his employee had difficulty opening the door. He said the motel's normal practice was to clean the guest rooms every second day. He said that the employee came to his office and that he went to the defendant's room, where he saw Angela lying on the bathroom floor.

Brian Ewing, an officer with the Metropolitan Nashville Police Department, testified that he was patrolling the Madison area on Thursday, July 14, 2005, when he responded to a dispatch around 12:43 p.m. about a bleeding woman in a motel room. He said emergency medical personnel were already in the motel room when he arrived. He said he saw blood on the mattress and the floor. He said he saw a dead woman lying face down in the bathroom. He said that she was partially covered with a bed sheet, that a telephone cord bound her hands, that an extension cord was "draped over her," that a pair of khaki pants was around her throat, and that she had tape over her mouth. He said that he did not remember the room temperature but that July days were usually "pretty hot." He said that he did not touch anything in the room and that he left the motel room to call other officers and his supervisors, who would conduct the investigation. On cross-examination, he stated that he did not know if the first responders had moved anything, including the sheet, to examine the body before he arrived.

William Kirby, an officer with the Metropolitan Nashville Police Department's Identification Crime Scene Section, said he arrived on July 14, 2005, around 12:45 p.m. He said his department documents the crime scene and collects and processes evidence. He explained how fingerprints are discovered and recovered from crime scenes. He said that from the doorway of the hotel room, he saw the victim lying face down at the base of the commode on the bathroom floor and that there was a large "blood spot" on the stripped mattress to his left. He said that the victim's face and hands had been bound with tape, that the victim had a washcloth in her mouth, that her ankles had been bound twice with a belt and another article of clothing, and that the victim had been tied to the commode

using a telephone cord. He said items, including the contents of a purse, had been thrown around the room. He said the bloodstains, both wet and dried, on the mattress continued over the edge of the bed onto the floor. He said that a drop of blood was on a pair of shower shoes, that bloodstains were on a rug, and that papers were scattered on the floor. He said he saw two wet, bloodstained shirts in the sink. He said that a roll of tape was on the floor and that it appeared to be the same kind of tape as the tape binding the victim. He said the telephone cord missing from the telephone receiver and base was tied around the victim's hands and around the commode. He said a note on the nightstand read: "I'm sorry I don't know what happened I loved her Call her son, Nick Richards. WPB Fla. My Dad Harold Martin 954 973 4233."

Officer Kirby testified that he was able to develop latent fingerprints from a broken beer bottle, the telephone receiver and base, and an empty cigarette pack. He said he was unable to develop fingerprints on other items in the room, including the handwritten note and the roll of tape found to the right of the commode. He stated that he left the tape binding the victim on the corpse to go to the medical examiner, that those tape pieces were processed, but that he did not know if those pieces revealed any fingerprints. He stated that unlike the cellophane tape defense counsel displayed in court, the tape used to bind the victim was not clear but was instead masking tape, which was not a good substance to catch fingerprints having enough "ridge detail" to be useful.

Danny Orr, a sergeant with the Metropolitan Nashville Police Department's Identification Crime Scene Section, testified that he assisted Officer Kirby with processing the items found at the crime scene for latent fingerprints. He said he obtained latent fingerprints from a "splashy juice bottle," a Kotex bag, and the bathroom wall. He said he could not develop usable fingerprints from a cigarette lighter found in the hotel room. Sergeant Orr explained that in his experience, fingerprints are not always found at crime scenes. He stated that neither he nor William Kirby tried to develop latent fingerprints from the masking tape used to bind the victim's hands. He said, however, that perhaps "Officer Simpkins" did attempt in the crime laboratory to develop fingerprints from those pieces of tape.

Linda Wilson, a police identification analyst in the Metropolitan Nashville Police Department's Identification Crime Scene Section, testified that she compared the latent fingerprints found on items in the hotel room with known fingerprints of the defendant. She said the latent fingerprint found on the "splashy juice bottle" matched the defendant's fingerprint. She said, however, that latent fingerprints found on the tile wall next to the shower, on the tile trim, and on the Kotex bag were not the defendant's fingerprints. She said that other fingerprints found at the scene were too smeared to be useful. She said that fingerprints found on the broken beer bottle, the telephone receiver and base, and the empty cigarette pack remained unidentified. She said she only had the defendant's known fingerprint and not those of the housekeeper, Ilesh Patel, or the victim. For those unidentified fingerprints, she said that she had no known fingerprint in her database, which included only the fingerprints of arrestees, "employees," and applicants for some licenses, to which she could compare the latent fingerprints and that the search yielded no results. She acknowledged on cross-examination that the three fingerprints on the tile wall next to the shower, one fingerprint on the tile trim, and those on the Kotex bag were identifiable, but were not the fingerprints of the

defendant. She stated that the one fingerprint found on the telephone base was not the defendant's fingerprint.

Thomas C. Simpkins, of the Metropolitan Nashville Police Department's Identification Crime Scene Section, testified that he attempted to obtain the victim's fingerprints from fourteen pieces of masking tape, five pieces of telephone cord, one piece of electrical cord, two additional pieces of telephone cord, and a black belt. He said each piece had been removed from the victim at the medical examiner's office. He said that he found no latent fingerprints on any of these materials.

Charles Hardy, of the Tennessee Bureau of Investigation's Serology and DNA Analysis Unit, testified that he had known DNA samples from the defendant and the victim with which to compare the physical evidence taken from the hotel room and a sexual assault kit taken from the victim. He said he obtained "a mixture of a DNA profile" from the victim's fingernail scrapings, which meant that he had profiles from two people. In the report of his findings provided as discovery, he identified the victim as the "major contributor" to the genetic profile, and he wrote that the defendant "cannot be excluded as the minor contributor." He testified that in his scientific opinion, the defendant was the minor contributor of the profile developed from the victim's fingernail scrapings. He said that although he "normally would not report out statistical calculations" of the probability that someone other than the defendant would have this DNA profile, the District Attorney requested that he generate statistics for the areas of the DNA mixture in which the defendant's profile had been visible. He stated he developed statistics for these five areas in a subsequent report in which he stated the probability that someone unrelated to the defendant would have this genetic profile was 1 in 786,200 for Caucasians; 1 in 8,842,000 for African-Americans; 1 in 2,124,000 for the southeastern Hispanic population; and 1 in 20,700,000 for the southwestern Hispanic population.

Hardy testified that he found a "small number" of sperm in the victim's vaginal swab. He said that the DNA findings stated in his report were consistent with a mixture of genetic material, that the victim was the major contributor, and that the defendant "cannot be excluded as the minor contributor" of the genetic profile. He testified that in his scientific opinion, the defendant was the minor contributor of genetic material present in the vaginal swab. Regarding his report's other findings, he said the blood on the telephone base, two shirts, shower shoes, and broken beer bottle was the defendant's. He stated that the blood present on the masking tape pieces and roll had either degraded or was of an insufficient amount for DNA analysis. He said that in examining all the items for this case, he did not find DNA from someone other than the victim or the defendant or any unmatched DNA.

On cross-examination, Hardy testified that the DNA profile from each bloody item was the defendant's. He said his scientific opinion had not changed since he wrote his initial report. He said that his "conservative" statement that the defendant "cannot be excluded as the minor contributor of the profile" from both the vaginal swab and fingernail scrapings was consistent with his trial testimony that the defendant was "the minor contributor" of the profiles. He stated that he generated these subsequent statistics for the fingernail scrapings only because the District Attorney had not requested statistics for the vaginal swab material. On redirect-examination, Hardy testified that he

and defense counsel did not meet before trial, but that he had met with other defense attorneys in other cases, and that he would have met with defense counsel if asked. On recross-examination, he said that defense counsel did not call to request a meeting between the Thursday evening when he gave the subsequent report to the District Attorney and the Monday morning trial date.

Bruce Phillip Levy, the Chief Medical Examiner for the State of Tennessee and the County Medical Examiner for the Metropolitan Government of Nashville and Davidson County, testified that he certified the results of the autopsy, which another medical examiner performed on July 15, 2005, the day after the victim's body was discovered. He said that the cause of death of the victim was asphyxia and that the manner of death was a homicide. He said that the victim had been pronounced dead at 2:30 p.m.

Dr. Levy testified that the examining medical examiner documented findings about the state of the body before handling or touching the body: the victim's head was wrapped with a combination of tape and pieces of clothing or cloth; her hands were tied and her legs were bound together at the ankles; tape was on her face, including her mouth and nose; a white towel was partially in and protruding from her mouth; and the victim had been tied to the commode in the hotel room. He said that the medical examiner removed the tape, bindings, and washcloth to examine the body and that these pieces were given to the police. He said the victim had to be extricated from the binding to the toilet to be transported to the medical examiner's facility.

Dr. Levy testified about the body's condition after the examiner had removed the tape and bindings. He said that the victim had scrapes and bruises, swelling around her eyes, and ruptured blood vessels in the whites of her eyes. He said that these ruptured blood vessels could have been caused by both trauma and asphyxia and that because the victim had experienced both, he could not determine which caused the victim's ruptured blood vessels. He said the victim had injuries on her face, her left shoulder, the right side of her chest, both arms at the elbows, her legs, and her hands and wrists. He said that sloughing of the skin on her right leg indicated that "some period" had elapsed between her death and the time of the autopsy the day after she had been found. He said the victim had bleeding under the scalp in four specific locations: a large area on the left side, a smaller area on the right side, the forehead, and the back of the head. He said these four injuries were caused by "some type of blunt trauma" to the head, consisting of at least four separate blows. He stated that injuries on the victim's face, particularly around the victim's eyes, were caused by at least three blows other than those that caused the four scalp bleedings. He stated that although there was "no way to tell" from the victim's autopsy if her injuries had caused her to lose consciousness, it "was certainly a possibility."

Dr. Levy testified that because the victim's nose and mouth had been blocked due to the "wrappings around her face and the towel in her mouth," the victim had been unable to breathe. He said that "irreversible brain damage" requires at least four minutes of oxygen deprivation. He stated that the victim was alive at the time she was bound with the cords and clothing because (1) there was no evidence that the victim died from blunt trauma and the victim in fact died from asphyxia; and (2) her wrists, one of the places she had been bound, were bleeding, thereby indicating she had both

a heartbeat and blood pressure. He said that it was difficult to state precisely how long someone had been dead using autopsy observations because there was a “lot of variety from person to person” and certain factors can increase or hinder the development of post-mortem physical signs. He said that using the information gathered in the examination alone, the victim had been dead for twenty-four hours before the autopsy. He said that “historical information,” however, provided that the victim was alive “approximately eighteen hours” before the examiner made his findings. He stated that the autopsy findings were consistent with a statement that the victim had been dead at 7 a.m. on July 14, 2005. He said the victim was 5'3" and weighed 136.5 pounds.

Dr. Levy testified that a “sexual assault kit” consisting of a hair sample, fingernail clippings from which to gather scrapings, and oral, vaginal, and rectal swabs, was collected from the victim. He said a known blood sample from the victim was obtained to compare with blood or DNA found at the crime scene. He said that there were no injuries to the victim’s genital area but that this lack of injury was not determinative of lack of sexual assault because a sexual assault does not always cause injury.

Dr. Levy testified that a blood sample taken from the victim revealed the presence of alcohol, acetaminophen (Tylenol), citalopram (a prescription antidepressant), cocaine, and three cocaine metabolites in the victim’s bloodstream. He said that the victim’s blood alcohol content was 0.05% and that the current “legal limit for intoxication” was 0.08%. He said the Tylenol and citalopram were “present in normal therapeutic levels.” He said the presence of cocaine, as opposed to the metabolites, indicated that the victim used cocaine within a few hours of her death because cocaine breaks down rapidly in the body.

On cross-examination, Dr. Levy testified that the high level of one of the cocaine metabolites indicated that the victim had not ingested cocaine for the first time shortly before her death but was instead a chronic user of cocaine. He said that when the police were notified at 11:30 a.m. on July 14 of the victim’s body and arrived at the hotel room, they were able to see the victim was deceased at that time, although they were not able to declare her legally dead. He stated that the condition of the body at 2:30 p.m. on July 14 indicated that she had died approximately twenty-four hours earlier. He limited this period to no more than thirty-six hours because the condition of the body changes at that point.

Michael Turner testified that he was living at the Madison Motel in July 2005. He said he lived two doors down from the defendant, whose name he did not know when he lived there but whom he identified in court. He said he always saw the defendant and the victim coming and going together, although he said he did not know the victim’s name. He said he told a detective on July 14, 2005, that he had seen the victim and the defendant outside their room at approximately 10:00 p.m. on July 13. He said the victim was sitting at the doorway while the defendant was standing. He said he did not see either person again afterward.

Carla Johnson testified that she met the defendant through a Labor Finders assignment. She said she and the defendant had a “hilarious time at work.” She said the defendant spoke positively

about his girlfriend, Angie, whom she met the next day when Angie was assigned a job through Labor Finders. She said she saw the defendant and Angie every day outside of work assignments because the three of them got along so well. She said she visited them at the Madison Motel, although she stated that when she first met Angie, Angie was not living with the defendant. She said the defendant told her that he and Angie had been in a relationship for about six and one-half years. She stated that she and the victim made plans to have an apartment together because the victim was “unhappy, very miserable, and scared” about living with the defendant. She said that on the Tuesday before the victim was killed, she and the victim decided to move somewhere together. She said they were going to move into the other location that Friday. She said that on this Tuesday, she saw the victim and the defendant at the Madison Motel room between 7:00 and 8:00 p.m. She said the room’s atmosphere was uncomfortable because the victim and the defendant had been arguing about drugs, whose money would be used to buy them, and who was going to obtain them. She said that the defendant was “very angry, very erratic” and that she had never seen him this way, although she said she had been around him daily for at least one month. She said that she tried to convince the victim to leave with her but that the victim refused. She said that she called the victim the next day at the motel room and that she did not see the victim again.

Wilmoth Marie McCrary testified that she was a manager of Madison Bowl in the summer of 2005 and that the victim worked there during that time. She said that she met the defendant, whom she identified in court as “Richard,” that he was the victim’s boyfriend, and that he came to the bowling alley. She said that one week before the victim’s body was discovered, she was coming around the corner from the back office of the bowling alley and saw the defendant choking the victim. She said the defendant had one hand around the victim’s neck and stood facing the victim. She said that the defendant stopped choking the victim when he saw Ms. McCrary and that he left. She said she told the police about this incident when they spoke to her at the bowling alley after the discovery of the victim’s body. She stated on cross-examination that she did not report the incident to the police earlier because the victim had asked her not to do so.

Rohbell Pointer testified that she was a manager of the Madison Bowling Center in the summer of 2005 and that the victim had been the cashier during that time. She said she met the victim’s boyfriend, “Rich,” whom she identified as the defendant, and that he sometimes came to the bowling alley. She said the victim worked her Monday night shift and was scheduled to work again Wednesday night. She said that although the victim did not show up for her shift Wednesday night, the defendant came to the bowling alley twice on Wednesday. She stated that during his first visit, he asked her if she had seen “Angie.” She said he left after she said she had not seen her. In his second visit, she said that he was crying, that he told her Angie had taken her clothes and left him, and that he asked to borrow money from her. She said that she did not loan him any money and that she did not see either the victim or the defendant afterward.

On cross-examination, Pointer testified that the defendant came to the bowling alley Wednesday morning and that he came back after lunch. She said the police called her on Thursday after they found the victim’s body that day. She said that she saw the defendant come to the bowling alley twice on Wednesday and that she was usually off work on Thursdays. She said that on that

Thursday, she had been off, she went to the bank, and she went to the bowling alley, although she did not say why she went there on her day off. She said the defendant was standing outside when she arrived. She said she told him she did not have any money. She acknowledged that the police report stated she had seen the defendant twice on Thursday and not on Wednesday, and she said the victim's death upset her so much that perhaps she told the police she saw the defendant Thursday. On redirect examination, she stated she told the prosecutor that she did not see the defendant on Thursday because that was not a day on which she worked.

Jose Linares testified that he performed drywall finishing and that he met "Richard Martin" during the summer of 2005. He did not, however, recognize the defendant as this person. He said Richard Martin "used to show up to work sometimes" as a temporary worker in a building on which he was working. He said he saw Richard Martin walking through the building units one day during the week the job supervisor had been out of town. He said that he spoke to Richard Martin around 10:00 a.m. that day and that Richard Martin told him he could not help on a task because he had injured his hand when he hit someone. The witness stated that he told Richard Martin he must have hit this person hard and that Richard Martin had agreed with him. He said that he dropped Richard Martin off near a bus stop downtown because the traffic had been bad and that during the drive there, Richard Martin had told him he used to live in Florida. He said the job supervisor telephoned him the following week. He said he told the supervisor he had taken Richard Martin "to the bus."

Carl Hammers testified that he met the defendant, whom he identified in court, during the summer of 2005 when the defendant was a temporary worker at the construction site where he was the superintendent. He said Jose Linares worked on this site as a drywaller. Hammers said he was out of town from July 9 until July 16, 2005. He said that the defendant was not assigned to work that week. He said that when he returned, the defendant called him during the early part of the week saying that he was in Florida, that he and his girlfriend had "gotten into it," that he needed to leave, and that he had left his "I.D. and stuff" in one of the construction units. Hammers said the defendant told him that someone, particularly his girlfriend or Labor Finders, might be looking for him. He said the defendant told him where his identification card was and asked him to send it to the defendant in Florida. Hammers said that he found the identification card in the location the defendant told him but that he did not send it to the defendant because he found this conversation suspect. Hammers said that he called Labor Finders "to see what they knew" and that he was given the telephone number of a detective who had made inquiries about the defendant. He said he called the detective and told him what had happened.

On cross-examination, Hammers testified that the defendant regularly showed up for work, and he agreed that the defendant seemed to pay attention to his work. He said that the defendant gave him only an address in Florida to which to send his identification. He said the defendant told him that the address was his brother's address and that he would only be at the telephone a few minutes. He said the defendant told him he was working for friends in Florida.

Fred W. Hoag testified that he had known the defendant approximately twenty-five years. He said he lived in Fort Lauderdale, Florida, and worked as a drywaller. He said he was with the

defendant when the Fort Lauderdale police arrested the defendant in August 2005. He said he and the defendant were in his truck at the defendant's brother's house and that he was going to drive the defendant home. He said the defendant had been working for him for a few weeks.

Hoag testified that when the defendant began working for him, the defendant told him he had been in Tennessee and mentioned Angela, who had been his girlfriend. He said the defendant said he walked into the hotel room and found her dead. He said that he noticed scrapes on the defendant's arms and that the defendant told him he tried to commit suicide after Angela's death. He said the defendant did not tell him how Angela died. After reading his statement to the police, Hoag testified that the defendant told him Angela committed suicide and "died in his arms." He said the defendant also told him that he and Angela "got really bad" on crack cocaine. He said that when the police stopped them at the defendant's brother's house, the defendant had told him not to identify him as "Richard Martin" but instead to call him "Harlan [W]jells." He said that he asked the defendant to explain this and that the defendant told him he had an outstanding warrant for driving on a suspended driver's license. He said the defendant told him the name was his stepfather's. He said he was transported to the police department with the defendant, and he said he gave his statement there.

Ronald Petway testified that the defendant, whom he identified in court, told him that he had killed his girlfriend. He said the defendant claimed he "blacked"; killed his girlfriend, "Angie"; and realized what he had done when he "came back to his senses." Although he said the defendant did not tell him precisely how he had killed his girlfriend, he said the defendant did tell him that she was tied to the toilet and that she had died from strangulation or suffocation. He claimed the defendant told him that he killed his girlfriend because he and she had a "real bad argument" and that he could not bear the arguments any longer. He stated the defendant told him that he had fled because "he had a hold on him" and that he had attempted suicide by cutting his arm. He said the defendant told him no evidence found at the crime scene linked him to the crime. He particularly remembered the defendant saying that his fingerprints were not on the tape found at the crime scene. He said the defendant told him, however, that because he and the girlfriend had had intercourse a few days before the victim's death, the defendant was worried any DNA analysis would show that he raped her. He claimed the defendant had revealed he was going to tell the police that his girlfriend's drug dealer killed her over a debt. He said the defendant told him he "was heavily on drugs" and used them a lot. He also said the defendant stated that drug use made him violent. He said the defendant told him that he had kicked his girlfriend through a door the day before the killing. He stated the defendant told him that he had choked his girlfriend at a bowling alley after an argument, too.

On cross-examination, Petway acknowledged felony convictions for possession of a controlled substance with intent to sell, possession of a controlled substance with intent to resell, conspiracy to distribute and possess with intent to distribute marijuana and cocaine, two convictions for "felonious possession of a weapon," five convictions for possession with intent to distribute substances containing cocaine, and one conviction for attempted distribution and possession with intent to distribute a substance containing cocaine. He also admitted that he had not yet been sentenced for two of the convictions pending his cooperation with law enforcement, promised in a

plea agreement. He admitted that if he cooperated, federal officials would recommend a reduced sentence. He stated that his possible sentence ranged from 262 months to 327 months. He also admitted that he had drug cases pending in the trial court. He stated that he had not seen the defendant's discovery documents. On redirect examination, Petway said that when the defendant made all of these statements to him, he told his attorney. He stated that he had not spoken with the prosecution in this case.

Mark Shotwell, a homicide detective for the Fort Lauderdale Police Department, testified that the defendant had an outstanding probation violation for an assault. He said the Nashville police department contacted him regarding the defendant and a homicide in Nashville. He said that he learned the defendant was a suspect in this case and that other members of the Fort Lauderdale department arrested the defendant on August 1, 2005, a few hours after "the initial contact." He said that he and his supervisor, Sergeant Bronson, interviewed the defendant at the station. He said Fred Hoag was also transported to the station.

The videotape of the interrogation was admitted into evidence. It showed Detective Shotwell and Sergeant Bronson interrogating the defendant after reading him his Miranda rights and the defendant asking them, "What's up?" in response to whether he would speak with them. He stated that he had broken a bone in his right hand while he had "blacked out" and that he had stitches on his arm from when he had cut himself. He stated he thought he was there on a probation violation for his conviction for misdemeanor domestic violence assault, with his girlfriend, Angela Richards, as the victim. He said the domestic violence incident consisted of him saying some "rude things" to his girlfriend, whose friend called the police; grabbing the victim; but not touching the victim. He stated he was "blacked out" and had hurt his right hand. He said that his "real name" was Harlan Richard Wells and that he learned the man he thought was his father had not in fact been his biological father.

Initially, the defendant gave the appearance of not knowing that his girlfriend, the victim, was dead. However, the following timeline developed from his responses. He said that on Monday night, his girlfriend wanted him to buy her some crack cocaine but that he refused. He claimed his girlfriend "scratched the hell out of him" on his neck and burned his neck with a cigarette butt. He said his girlfriend told him to leave. He said he went to the landlord [motel manager] to get his help in telling his girlfriend to leave the room. He said that he and the landlord returned to room 149, that his girlfriend said she would stop her conduct, and that he told the landlord he no longer needed his help.

The defendant said he went back to the motel on Tuesday. He said that Phil, the landlord, saw him come back at that time and that Phil said his girlfriend was not there. The defendant said he went to his room and saw his girlfriend was not there. The defendant said he was doing some painting at the motel that day.

The defendant said that on Tuesday night, his girlfriend came to the room with Nip, her crack cocaine dealer. The defendant said his girlfriend had a black eye at that time. He said his girlfriend

used crack cocaine, alcohol, and pills. He said that she was “controlling” and that she told him to get out. The defendant said he left. He said he went to a liquor store and to Centennial Park, where he drank tequila and smoked a rock of crack cocaine. He said he woke up Thursday still in Centennial Park. He said he did not go back to the motel room because he was afraid of his girlfriend. Later, he explained that he left the motel and started drinking because his girlfriend was romantically involved with the drug dealer. He said that after he awakened in the park Thursday morning, he walked to Vanderbilt hospital because he had cut himself. He said he was in the psychiatric ward from Thursday morning until the following Tuesday morning.

After additional questioning, a second story developed. The defendant said he left the motel room Tuesday night. He said that he came back to the room Wednesday morning, that it was still dark, and that he found his girlfriend lying dead on the bathroom floor. He said she had been tied up with tape. He said that her body was cold when he touched her. He denied killing her. He said that in their relationship, he kept leaving his girlfriend—even going back to Florida but then returning to her in Tennessee. He said that he finished drinking his tequila in the motel room, that he took “four tylenol PM’s,” that he smoked a crack cocaine rock, and that he then tried to commit suicide by cutting himself with a razorblade because of his “loss.” He said that he carried the razor blade with him when he left the room, that he walked to hospital, and that he handed the razor blade to hospital security. He said that all the blood in the hotel room was his and that he did not know if the victim had been bleeding. He said the reasons he did not call the police after finding his girlfriend’s body were that he was scared, drunk, and had an outstanding probation violation warrant. He also said the victim kept holding the probation violation over his head. He said he had already been reinstated one time on probation. He said that not calling the police was a “bad decision” on his part. He tried to remember Nip’s phone number for the police. He acknowledged telling Fred, his brother, and a man he met on a bus that his girlfriend had committed suicide and that she had died in his arms. He stated this was the truth of the events.

The defendant said he was being treated at a mental health facility in Florida before he went to Tennessee. He said that he suffered from depression and that he abused drugs. He said that he was off his prescription mental health drugs, which he described as anti-psychotic medication, for ten to twelve days in Tennessee and that the psychiatric ward put him back on this medication three weeks before the interrogation. He said that when he was not taking his medication in Tennessee, he relapsed to abusing drugs and tequila. He said he was depressed because his girlfriend had left him for Nip.

In response to police questioning that he left a note in the hotel room saying he was sorry, the defendant claimed that the note could have different meanings, particularly that he was sorry the relationship was over but that he had to leave because of drug and relationship issues. He denied killing his girlfriend.

The defendant stated that he was an alcoholic and a drug addict. He said he used drugs for twenty-nine years. He said he had attempted suicide at other times in his life before this recent cutting attempt. He said he had been drug-free for two and a half years before relapsing in Tennessee

at the same time he ran out of his medication. He denied ever having “blacked out” at other times and having done things during the time he could not remember. However, he claimed to have no recollection from Tuesday night, when he said he left the motel room, to Thursday morning, when he said he woke up in the psychiatric ward. He then stated his girlfriend had been alive when he left her. Although he claimed not to know who cut him or how, he then said he cut himself with the razor blade he gave to the hospital.

The defendant said he and his girlfriend had been together for four years. He said they had been living in Madison, Tennessee, which he said was a Nashville suburb, since December 2004. He said that he left her four times since they had been in Tennessee but that he kept going back to her. He said he left her because she would not stop using drugs. The defendant admitted he and the victim had what he called “physical problems.” He said he would grab her. He said he had “had enough” of the drugs and arguments. He said that his girlfriend’s personality changed when she was on drugs and that she had “the devil coming out of her” in her words. The defendant said he learned in treatment to walk away from these confrontations but that his girlfriend would slap him. The defendant kept saying that he loved his girlfriend and that he tried to get them both off drugs. He said, “You don’t understand the anguish that woman put me through.” He adamantly denied he would physically harm her. He said his domestic violence conviction was a “verbal” dispute, but he then said he had grabbed her. He said he could not kill anyone and that he never harmed his girlfriend, whom he described as a little woman.

Sally Santen, the defendant’s attending physician at the Vanderbilt Emergency Department, testified that “Harlan Wells” was seen at to the emergency room on July 14, 2005, because he said he was suicidal and had injured himself. She stated that she and the other physicians treated him. Dr. Santen said Harlan Wells’s injuries were lacerations around his wrists and a fracture in his right hand. She stated the records reflected he was admitted around 8:00 a.m. She stated that after she or other physicians determined the patient had no “medical issues,” he was transferred to the psychiatric transition unit of the Emergency Department, where he was found to be a danger to himself in view of his injuries. She said he was transferred to the Middle Tennessee Mental Health Institute (“MTMHI”) around 1:00 p.m.

On cross-examination, Dr. Santen stated she found nursing documentation in the patient’s file that the patient remained at the hospital at 8:00 p.m. notwithstanding the discharge paperwork showing the patient had been discharged from the hospital that afternoon. She stated that the transfer of the defendant was an involuntary committal. On redirect examination, Santen said that anyone claiming to be suicidal is automatically referred to the psychiatric unit of the Emergency Department.

The defendant and the State stipulated that the medical records of Middle Tennessee Mental Health Institute reflected that “Harlan Wells” was admitted on July 14, 2005, at 10:15 p.m. and was discharged on July 18, 2005, at 2 p.m. This was the defendant’s only proof.

The jury found the defendant guilty of both first degree premeditated murder and first degree felony murder. The trial court merged the felony murder conviction with the premeditated murder conviction and sentenced the defendant to life in prison for first degree premeditated murder.

I. APPELLATE JURISDICTION

The State contends this court does not have jurisdiction for the present appeal. Citing State v. Brent Tolbert, No. M2006-01621-CCA-R3-CD (Tenn. Crim. App. June 28, 2007) (order), and State v. Gregory O. Cherry, No. W2006-00015-CCA-R3-CD, Hardin County, slip op. at 2 (Tenn. Crim. App. July 27, 2007), it claims that a trial court must issue a written order denying the motion for new trial for this court to have jurisdiction for an appeal. The defendant replies that the State misconstrues these two cases to require a written order.

We agree with the defendant. Tennessee Rule of Appellate Procedure 4(c) provides that in criminal actions, “if a timely motion or petition under the Tennessee Rules of Criminal Procedure is filed in the trial court by the defendant . . . under Rule 33(a) for a new trial, . . . the time for appeal for all parties shall run from entry of the order denying a new trial” T.R.A.P. 4(c). Until the trial court denies the motion for a new trial, this court does not have jurisdiction over the case. Evans v. Wilson, 776 S.W.2d 939, 941 (Tenn. 1989) (construed in State v. Billy Bivens, No. 03C01-9711-CR-00497, McMinn County, slip op. at 3 (Tenn. Crim. App. Oct. 12, 1989)); Hutchison v. ARO Corp., 653 S.W.2d 738, 740 (Tenn. Ct. App. 1983).

The cases the State cites required dismissal without prejudice because the record contained no evidence that the trial court had disposed of the motion for new trial, although the respective defendants filed notices of appeal. In contrast, the record in the present case contains the trial court’s minutes denying the motion for new trial. The question whether a minute entry noting the denial of a motion for new trial is sufficient to confer jurisdiction on this court is one upon which panels of this court have reached different results. Compare State v. Perry A. March, No. M2006-02732-CCA-R3-CD, Davidson County, slip op. at 2-3 (Tenn. Crim. App. July 15, 2008) (citations omitted), reh’g denied (Tenn. Crim. App. Aug. 29, 2008), app. filed (Tenn. Oct. 27, 2008) with State v. Kim McBride Murphy, No. E2007-02647-CCA-R3-CD, Cumberland County, slip op. at 2-3 (Tenn. Crim. App. Oct. 17, 2008) (concluding that the appeal should be dismissed when no “written order” denying a motion for new trial is in the record). Recently, our supreme court resolved the conflict by answering the question affirmatively. State v. Terry Lynn Byington, ___ S.W.3d ___, No. E2006-02069-SC-R11-CD, Sullivan County (Tenn. May 5, 2009) (“[W]e hold that a minute entry is sufficient to confer appellate jurisdiction under Rule 4 in a criminal case, [but] better practice dictates that the trial court enter a written order.”) We hold that this court has jurisdiction to consider the defendant’s appeal because the record contains the trial court’s minutes showing it disposed of the motion for new trial, from which the defendant filed a timely notice of appeal.

II. SUFFICIENCY OF THE EVIDENCE

The defendant contends that no rational trier of fact could have found him guilty beyond a reasonable doubt of first degree premeditated murder or felony murder. He argues for premeditated murder that “the evidence is entirely circumstantial and does not exclude every reasonable hypothesis except that of guilt.” Specifically, he argues that the State did not establish the identity of the perpetrator beyond a reasonable doubt and that the evidence does not show premeditation, such that if identity were established beyond a reasonable doubt, only a conviction for second degree murder could be obtained because none of the “relevant circumstances” from which a jury could infer premeditation were present. For felony murder, he asserts that “the State did not establish beyond a reasonable doubt a nexus between the murder and the underlying felony of kidnapping or that the defendant intended to commit kidnapping at the time of the murder.” He claims the State failed to show the defendant “intended to commit a kidnapping prior to or concurrent with the victim’s murder” as required by State v. Buggs, 995 S.W.2d 102, 107 (Tenn. 1999).

The State responds that the evidence established the defendant caused the premeditated and intentional killing of the victim. The State argues that the direct and circumstantial evidence presented in this case showed that the defendant “stuffed a rag in the victim’s mouth, wrapped tape around her head and hands, bound her hands and feet and tied her to a toilet with telephone and electrical wires” and that these acts were the proximate cause of the victim’s asphyxiation.

A. Premeditated Murder

We hold the evidence was sufficient for a jury to convict the defendant of the premeditated, intentional killing of Angela Richards. Our standard of review when the sufficiency of the evidence is questioned on appeal is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” Jackson v. Virginia, 443 U.S. 307, 319 (1979). We do not reweigh the evidence but presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Any questions about the credibility of the witnesses were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997).

First degree murder may be the unlawful, premeditated, and intentional killing of another. T.C.A. § 39-13-201, -202(a)(1) (2003). “Premeditation” is defined as an act done after the exercise of reflection and judgment. “Premeditation” means that the intent to kill must have been formed prior to the act itself. “It is not necessary that the purpose to kill pre-exist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.” T.C.A. § 39-13-202(d) (2003). The element of premeditation is a question for the jury and may be established by proof of the circumstances surrounding the killing. Bland, 958 S.W.2d at 660. “‘Intentional’ refers

to a person who acts intentionally with respect to . . . a result of the conduct when it is the person's conscious objective or desire to . . . cause the result." T.C.A. § 39-11-106(a)(18) (2003).

1. Identity

The defendant contends that a reasonable doubt exists regarding whether the defendant was the person who killed the victim. He claims that the convicting evidence is entirely circumstantial and does not exclude every reasonable hypothesis other than that the defendant was the victim's killer. He asserts that the evidence "does not exclude the reasonable hypothesis that the defendant discovered the victim's body in the motel room, became distraught and attempted suicide in the room, then panicked and fled."

"The identity of the perpetrator is an essential element of any crime." State v. Rice, 184 S.W.3d 646, 662 (Tenn. 2006). While the defendant claims that the evidence was entirely circumstantial and did not establish the defendant as the perpetrator of the killing, the evidence belies this claim. In the motel room rented in the defendant's name and in which the victim was found, the defendant left a handwritten note stating "I'm sorry" and listing the name and telephone number of his father. The blood in the motel room was the defendant's. Ronald Petway testified that the defendant admitted killing his girlfriend.

We note that although the defendant's fingerprints were not found on the roll of masking tape at the crime scene or on the masking tape binding the victim, Sergeant Danny Orr testified that fingerprints are not always found at crime scenes. Officer William Kirby testified that the tape used to bind the victim and to cover her mouth and nose was not a surface that would "catch" fingerprints having sufficient ridge detail to identify the perpetrator. Charles Hardy testified that in examining all the evidence in this case, all the DNA present for analysis, whether from blood, swabs, or scrapings, was either that of the victim or the defendant. Michael Turner testified that he saw the defendant and the victim together at the defendant's motel room the night before her body was found. Carl Hammers testified that the defendant had telephoned him to have his identification documents sent to him in Florida, and that the defendant had left these at a construction site on a day when he was not scheduled to work. The evidence showed that the defendant traveled to Florida after the killing. The evidence reflected that the defendant used the name Harlan Wells on two instances after the killing and that he told conflicting stories about the defendant's death.

We do not reweigh the evidence but presume that the jury has drawn all reasonable inferences in favor of the State. See Cabbage, 571 S.W.2d at 825. In view of the evidence, both direct and circumstantial, the evidence was sufficient for a rational jury to conclude beyond a reasonable doubt that the defendant was the person who killed Angela Richards.

2. Premeditation

Premeditation, an "act done after the exercise of reflection and judgment," can be shown through proof of the circumstances surrounding the killing. Bland, 958 S.W.2d at 660. A jury is not

limited to any specific evidence when determining whether a defendant intentionally killed the victim “after the exercise of reflection and judgment,” State v. Davidson, 121 S.W.3d 600, 615 (Tenn. 2003) (citations omitted). It may infer premeditation from evidence of the nature of the killing and evidence of motive. State v. Gentry, 881 S.W.2d 1, 5 (Tenn. Crim. App. 1993) (citation omitted); 2 Wayne R. LaFave, Substantive Criminal Law § 14.7(a) (2d ed. 2003).

The jury heard the testimony of the medical examiner regarding the condition of the body both when found and when examined. The jury also received the autopsy reports as exhibits. The testimony and exhibits reflected that tape had been wound around the victim’s head covering her eyes, nose, and mouth. The autopsy report states that tape was multiple layers thick, thereby showing that the tape had been wrapped around her head several times. Tape and a telephone cord bound the victim’s hands. The testimony also reflected that the victim had a heart beat and pulse when being bound, as determined from the presence of blood around her taped wrists. Her legs were bound with tape, clothing, and a belt. The victim was tethered to the toilet by a telephone cord. While the time involved in this taping and binding procedure may not be dispositive of a premeditated killing, “premeditation requires a previously formed design or intent to kill.” State v. West, 844 S.W.2d 144, 147 (Tenn. 1992) (citing McGill v. State, 475 S.W.2d 223, 227 (Tenn. Crim. App. 1971)). The multiple steps taken by the defendant to prevent the victim from continuing to breathe, from removing the tape from her face, and from freeing herself “may support an inference of premeditation if coupled with other evidence” that the acts “were inflicted as a result of premeditation.” State v. Brooks, 249 S.W.3d 323, 329 (Tenn. 2008) (citing State v. Brown, 836 S.W.2d 530, 542 (Tenn. 1992)).

The testimony reflected that the victim and the defendant had heated, sometimes public, arguments, that the victim tried unsuccessfully to end her relationship with the defendant in Florida by moving to Tennessee, and that the victim and the defendant were living together in the defendant’s motel room in Tennessee. The evidence also showed that the victim planned to move out of the defendant’s motel room, the very location where she was found dead. In view of the nature of the killing and the above facts regarding the relationship between the victim and the defendant, we conclude the evidence was sufficient to show that the defendant unlawfully killed the victim, Angela Richards, intentionally and with premeditation. See Gentry, 881 S.W.2d at 5 (holding that premeditation may be inferred from evidence of motive).

B. Felony Murder

The defendant claims the State did not prove a nexus between the killing and the underlying felony of kidnapping, such that the evidence is insufficient to convict the defendant for felony murder. We agree with the State that the evidence is sufficient to convict the defendant of felony murder.

A first degree murder may be the “killing of another committed in the perpetration of or attempt to perpetrate any . . . kidnapping . . .” T.C.A. § 39-13-202(a)(2) (2003). Our supreme court has held that for purposes of felony murder, the “killing may precede, coincide with, or follow the

felony” but that the “intent to commit the underlying felony must exist prior to or concurrent with the commission of the act causing the death of the victim.” State v. Buggs, 995 S.W.2d 102, 106-07 (Tenn. 1999). Whether the intent to commit the underlying felony existed prior to or concurrent with the killing is a question of fact for the jury to decide. Id. at 107. The requisite intent cannot be presumed from the act of committing the felony, but “a jury may reasonably infer from a defendant’s actions immediately after a killing that the defendant had the intent to commit the felony prior to, or concurrent with, the killing.” Id. at 108.

“Kidnapping” is defined, as pertinent to this case, as the knowing confinement of another person by force so as to interfere substantially with the other person’s liberty and under circumstances exposing the other person to substantial risk of bodily injury. T.C.A. § 39-13-301 to -303. “Knowing” means that “the person is aware of the nature of the conduct or that the circumstances exist.” T.C.A. § 39-11-106(20). The evidence at trial showed that the defendant bound the victim’s hands and feet with combinations of tape, telephone cord, and clothing, and that he tethered her to the commode. The medical examiner testified that the victim’s wrists indicated that she was alive when she was bound. The evidence showed the victim, although bound and with significant bleeding and other injuries, died from asphyxiation due to the washcloth in her mouth and taping of her face. The evidence was sufficient to convict the defendant of felony murder with kidnapping as the underlying felony.

III. THE DEFENDANT’S PRIOR ACTS AGAINST THE VICTIM

The trial court held jury-out hearings regarding the testimony of two witnesses about a prior bad act of the defendant. Wilmoth McCrary said that she worked at Madison Bowling Center as a manager and that during the summer of 2005, the victim worked there. She said she met the victim’s boyfriend, whom she identified as “Richard.” She said that an incident occurred at the bowling alley one week before the victim was found dead. She said that she saw the defendant choking the victim with his hand around her neck. She said that she went to the office and called her superior and that the defendant left. She said the victim told her that they had been arguing about money and that she wanted to leave him. She said that she did not herself hear any of the argument.

The attorneys informed the trial court the witness would only testify that she saw the defendant choke the victim and would not testify about what the victim told her. The State argued the testimony should be admitted because it was relevant to prove motive, the defendant’s identity, the relationship between the defendant and the victim, and would rebut the defendant’s videotaped statement where he denied ever physically harming the victim. The defendant argued that this testimony was not needed to demonstrate the identity of the perpetrator or to show the defendant and the victim had a relationship and that it was inadmissible under Rule of Evidence 404(b).

The trial court admitted the testimony. The trial court determined that a material issue other than character existed—the relationship between the parties, the identity of the perpetrator, motive, and intent. The court stated that all of these issues were relevant. The court stated that the testimony was more probative than unfairly prejudicial. The court, in another jury-out hearing held after the

witness testified, stated that the witness's testimony about what she saw constituted clear and convincing evidence. After the witness testified about the choking incident, the trial court instructed the jury that if they found the defendant had engaged in criminal behavior other than that being prosecuted at this trial, they were not to consider the behavior as conduct in conformity with a character trait but were instead to consider it only for the limited purposes of (1) determining the identity of the person who caused the victim's death, (2) motive, (3) the relationship between the defendant and the victim, and (4) intent.

In a jury-out hearing, Ronald Petway said that he was in a jail cell with the defendant. He stated the defendant talked to him about two specific incidents. He said the defendant told him that he and his girlfriend had an argument and that he had grabbed and choked his girlfriend in a bowling alley. He said the defendant told him that on the day before his girlfriend's death, the defendant had kicked her through a door after an argument. Petway admitted he had prior felony convictions for possession of a controlled substance with intent to sell (two state convictions), possession of a weapon by a felon (two state convictions), and two cocaine felony convictions in federal court. The court allowed the defense to mention for bias impeachment that the witness had a pending case and that his sentencing was contingent upon his cooperation with authorities.

The trial court found that the witness was telling what the defendant had told him and that proof of these incidents was clear and convincing. The trial court found that this evidence was more probative than unfairly prejudicial. The court stated that the defendant's recounted statements were relevant to show the relationship of the defendant and the victim, the defendant's intent, and the defendant's motive. The court admitted the statements and stated the defense would be able to cross-examine the witness regarding his prior convictions and bias. After Petway's direct examination, the trial court instructed the jury not to consider the testimony as character evidence but instead only for the limited purposes of motive, intent, and the relationship of the defendant and victim. Additionally, the court instructed the jury that his impeachment by prior convictions could only be considered in their determination of the witness's credibility.

The defendant contends that the trial court erred in admitting testimony from two witnesses about the defendant's prior bad acts. He claims that the testimony was not used for any purpose other than to show impermissible character evidence. Particularly, he claims the testimony did not provide evidence of motive or identity. While he acknowledges that the testimony may have been relevant to showing the relationship of the victim and defendant, he claims that State v. Gilliland precludes their admission because the two incidents were not part of the same criminal transaction and were not contextual, background evidence. Id., 22 S.W.3d 266 (Tenn. 2000). He argues that even if these incidents were relevant, the trial court should not have admitted them because the danger of unfair prejudice to the defendant from the testimony outweighed any probative value to be gained.

The State replies that the evidence was properly admitted as probative of identity, intent, the relationship between the parties, and motive evidence and that the trial court complied with the procedures listed in Rule 404(b). The State asserts that the evidence provided the jury with

contextual background evidence of the relationship between the defendant and victim and refuted his claims in a videotaped statement that he would never harm the victim and that the probative value of the evidence outweighed any danger of unfair prejudice to the defendant. The State argues the trial court complied with the procedures listed in Rule 404(b).

Tennessee Rule of Evidence 404(a) states that “[e]vidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity with the character or trait on a particular occasion, except” that the accused may introduce evidence “of a pertinent character trait.” Tenn. R. Evid. 404(a)(1). Rule 404(b) states that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait” but that this evidence may be used for other purposes. The rule lists four requirements that must be satisfied before a court determines admissibility:

- (1) The court upon request must hold a hearing outside the jury’s presence;
- (2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
- (3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and
- (4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.

Tenn. R. Evid. 404(b).

We review a trial court’s ruling on evidentiary matters under Rule 404(b) using an abuse of discretion standard, provided the trial court has substantially complied with the procedural prerequisites of the rule. State v. DuBose, 953 S.W.2d 649, 652 (Tenn. 1997). If the court did not substantially comply with the procedure, its decision is not entitled to deference by the appellate court. See id. at 653.

For each of the proposed witnesses, the trial court held a jury-out hearing and stated on the record the material issues, other than character, that it found. For Petway’s testimony, the trial court stated the material issues were the relationship of the defendant and the victim, the defendant’s intent, and the defendant’s motive, while for McCrary’s testimony, the court stated the relevant material issues were the relationship between the parties, identity of the perpetrator, motive, and intent. The trial court found that each of these aspects was relevant to issues presented at the trial. The trial court found by clear and convincing evidence that Ms. McCrary saw the choking and that the defendant made these statements to Mr. Petway. The court weighed the probative value of the testimony and found that it outweighed the danger of unfair prejudice. In view of the trial court’s compliance with the procedural prerequisites of Rule 404(b), we review its determinations pursuant to an abuse of discretion standard.

A. Testimony of Wilmoth McCrary

1. Evidence of the Relationship Between The Defendant and the Victim

Evidence regarding the defendant's and the victim's relationship is relevant to show the defendant's motive and intent to kill. State v. Glebock, 616 S.W.2d 897, 905-06 (Tenn. Crim. App. 1981); State v. Jones, 623 S.W.2d 129, 131 (Tenn. Crim. App. 1981) (citing Bunch v. State, 605 S.W.2d 227, 229 (Tenn. 1980)). Testimony that the defendant choked the victim in a public place was highly probative of their relationship, particularly in view of the defendant's videotaped claim, seen and heard by the jury, that he would never harm the victim. McCrary's testimony regarding the subject matter of the argument and the victim's plans to leave the defendant were not admitted. The probative value of the testimony outweighs the risk of unfair prejudice to the defendant. The trial court did not err in admitting the testimony of Wilmoth McCrary as evidence of the relationship between the defendant and the victim.

2. Evidence of the Defendant's Intent to Commit First Degree Murder

The defendant argues on appeal that he was not the perpetrator of the crime. However, he contends that evidence he publicly choked the victim was improperly admitted. We disagree. Clear and convincing evidence that the defendant choked the victim on a prior occasion is probative of his intent to kill the victim. Our supreme court has recognized that evidence of prior "violent episodes" may be admitted pursuant to Rule 404(b) "not to prove the [d]efendant acted in accord with this character but as part of the proof establishing his motive for the killing[]." State v. Smith, 868 S.W.2d 561, 574 (Tenn. 1993). The crime in the present case was first degree murder. Intent is an element of the offense. T.C.A. § 39-13-202 (a)(1), (d). Evidence regarding this element of the crime is relevant to issues on trial and admissible after the requirements of Rule 404(b) have been satisfied. The probative value of this testimony is not outweighed by a danger of unfair prejudice to the defendant. The trial court did not err in admitting the testimony to show the defendant's intent to kill the victim.

3. Evidence of the Defendant's Motive to Kill the Victim

"Motive is the reason why someone did a particular act." State v. Robert Gene Malone, C.C.A. No. 03-C-01-9110-CR-00307, Greene County, slip op. at 7 (Tenn. Crim. App. Mar. 31, 1992); Neil P. Cohen, Tennessee Law of Evidence 4.04[9] (5th ed. 2005). Although Wilmoth McCrary testified in the jury-out hearing that the victim told her after the choking incident that the defendant and she had been arguing about money and the victim's intent to leave the defendant, this testimony was not presented to the jury because the witness had only observed the choking and was not privy to the conversation. We conclude the testimony of the choking incident presented no motive evidence, i.e., why the defendant was choking the victim, and the trial court should not have admitted the testimony for that purpose. However, its admission of this evidence as proof of motive was harmless given its proper admission on the issue of intent and in view of the overwhelming evidence of the defendant's guilt.

4. Evidence of the Defendant's Identity As the Perpetrator

The trial court found that testimony that the defendant choked the victim in a bowling alley was relevant to evidence establishing the defendant's identity as the perpetrator of the victim's killing. This court has held, however, that "before evidence of another crime may be admitted to identify the accused as the perpetrator of the crime charged, there must be some simil[a]rity and uniqueness of the plan or method common to the two (2) offenses." State v. Bobo, 724 S.W.2d 760, 764 (Tenn. Crim. App. 1981). Although the evidence reflects that the victim died of asphyxiation and Wilmoth McCrary's testimony reveals that the defendant choked the victim in a public place, there is not sufficient similarity and uniqueness in the crimes to permit us to state that the defendant had a particular modus operandi. Instead, when used to establish the defendant's identity, this testimony only served as inadmissible character evidence that the defendant attacked the victim before and would do so again. As such, it cannot be admitted pursuant to Rule 404(b) to establish identity. See Tenn. R. Evid. 404(a). Thus, the trial court should not have admitted this testimony for the purpose of identity. Any error was harmless, however, in view of the ample evidence to convict the defendant of two counts of first degree murder.

The defendant does not specify to which of the witnesses his Gilliland objection applies, and we will apply it to both. In State v. Gilliland, our supreme court held that

when the state seeks to offer evidence of other crimes, wrongs, or acts that is relevant only to provide a contextual background for the case, the state must establish, and the trial court must find, that (1) the absence of the evidence would create a chronological or conceptual void in the state's presentation of its case; (2) the void created by the absence of the evidence would likely result in significant jury confusion as to the material issues or evidence in the case; and (3) the probative value of the evidence is not outweighed by the danger of unfair prejudice.

Id., 22 S.W.3d 266, 272 (Tenn. 2000).

We note that the State did not present McCrary's and Petway's testimony only as contextual background to the homicide. In fact, the State did not present the testimony as "contextual background evidence" but instead as evidence of motive, intent, the relationship between the parties, and identity. The trial court found Petway's testimony to be relevant to motive, intent, and the relationship between the defendant and the victim, and it found McCrary's testimony relevant to motive, intent, the relationship between the defendant and the victim, and identity. The Gilliland analysis was not necessary in the defendant's case because the State did not request the admission of the testimony as contextual background evidence and the trial court did not consider it as such. Additionally, we determined above that McCrary's testimony was properly admitted as relevant evidence of intent and the relationship between the defendant and the victim. And as we will explain

below, the trial court properly admitted Petway's testimony as relevant to intent, motive, and the relationship between the victim and the defendant. The defendant is not entitled to relief.

B. Testimony of Ronald Petway

1. Motive

The witness's testimony was relevant to the defendant's motive to kill the victim—she and the defendant engaged in arguments. The trial court determined that the testimony was admissible for the purpose of demonstrating motive. Noting that the witness testified about what he claimed were the defendant's own statements, the probative value of these statements outweighs any danger of unfair prejudice. We cannot conclude that the trial court abused its discretion in admitting the testimony for the purpose of motive to show evidence of premeditation, an element of the offense for which the defendant was being tried.

2. Intent

The witness's testimony that the defendant had choked and kicked the victim was relevant to the defendant's intent to kill the victim. The defendant's prior conduct, admissible as motive evidence, is particularly relevant to determining the defendant's intent to kill the victim. State v. Smith, 868 S.W.2d at 574. Intent is an element of first degree murder. T.C.A. § 39-13-202 (a)(1), (d). Evidence regarding this element of the crime is relevant to issues on trial and admissible after the requirements of Rule 404(b) have been satisfied. The probative value of this testimony is not outweighed by a danger of unfair prejudice to the defendant, particularly in view of the witness's actual jury testimony that the defendant told him he had killed his girlfriend. The trial court did not err in admitting the testimony to show the defendant's intent to kill the victim.

3. The Relationship of the Defendant and the Victim

Evidence regarding the defendant's and the victim's relationship is relevant to show the defendant's motive and intent to kill. State v. Glebock, 616 S.W.2d at 905-06; State v. Jones, 623 S.W.2d at 131. The witness testified that the defendant told him he had choked the victim in public and had kicked the victim the day before she was discovered dead in the defendant's hotel room. The probative value of the testimony, which the trial court found was based on clear and convincing evidence, outweighed the risk of unfair prejudice to the defendant, particularly in view of the defendant's videotaped claim that he never harmed the victim. The trial court did not err in admitting Ronald Petway's testimony as evidence of the relationship between the defendant and the victim.

IV. EXPERT TESTIMONY

In a jury-out hearing, the defendant moved for a mistrial. The defendant claimed that the expert witness's pretrial report that the defendant "cannot be excluded as the minor contributor" to

the genetic profile developed from the victim's fingernail scrapings differed significantly from his trial testimony that his "scientific opinion is that the minor contributor of this profile" was the defendant. The defendant stated that it had relied on the expert witness's pretrial discovery statements and that if it had known the expert was going "to modify" the report, the defense would have moved to continue the trial to obtain another expert to review the findings. The defendant claimed that disclosure of this second report, which it said it received the Friday before the Monday trial, did "not give the defense notice . . . that there was this variation or alteration in the witness' expected testimony." The State responded that (1) the defendant waived the motion for mistrial by not seeking it at the time of the testimony, and (2) the statistics were not inconsistent with the original report because they were based upon the findings of the original report.

The second document, entitled "Statistics Report," does not readily state to what the numbers it conveys pertain. It does, however, contain four probabilities. The expert witness testified that at the request of the District Attorney, he generated statistics based on his previous findings.

The trial court denied the motion for a mistrial after finding that (1) the report and testimony were not inconsistent, (2) because the defense received the second report before trial, it had notice of the anticipated testimony, and (3) the jurors were going to hear the defendant's videotaped statement that the victim scratched his neck, such that testimony the defendant was the minor contributor to a DNA profile developed from the victim's fingernail scrapings would not be surprising to either party. The trial court also denied the defendant's motion for a continuance to obtain an expert witness for DNA analysis.

The defendant argues on appeal that the trial court erred in denying the defense's motion for a mistrial and its motion for a continuance after the State failed to satisfy its duty pursuant to Tennessee Rule of Criminal Procedure 16(c) to explain to the defense the statistics it disclosed shortly before trial. The defendant cites a Massachusetts case to bolster the claim in his brief that "the State should not be excused from its continuing duty to disclose the results or reports of scientific testing by providing information that is incomprehensible, particularly when that information has the effect of superseding the coherent information previously disclosed."

The State replies that the trial court properly denied the motion for a mistrial because the information presented in expert testimony did not vary from the information provided during discovery to the degree necessary to grant a mistrial. It claims that (1) the statistical information provided in the second report was "an explanation and statistical refinement" of the information provided in a prior document, (2) the defense received the second report shortly after it had been provided to the State, and (3) the defense was "free at all times subsequent to the receipt of the initial report to request its own expert."

A mistrial should be declared only if there is a manifest necessity for such action. Arnold v. State, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977). The decision of whether to grant a mistrial is within the sound discretion of the trial court. State v. McKinney, 929 S.W.2d 404, 405 (Tenn. Crim. App. 1996). This court will not disturb that decision unless there is an abuse of discretion.

State v. Adkins, 786 S.W.2d 642, 644 (Tenn. 1990); State v. Williams, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996). A manifest necessity exists when there is “no feasible alternative to halting the proceedings.” State v. Knight, 616 S.W.2d 593, 596 (Tenn. 1981).

We hold that the trial court did not abuse its discretion in denying the defendant’s motion for a mistrial. The expert testified that he returned to the first report and used it as the data underlying the statistics of the second report. The trial court found that the report and testimony were not inconsistent, that the defendant received the second report before trial, and that the jurors were going to hear about the victim’s fingernail scrapings in the defendant’s videotaped interrogation. While the second report offers no explanation of the data it conveys, the defendant acknowledged receiving the document before trial. The defendant has not shown the manifest necessity of a mistrial and is not entitled to relief.

Additionally, the trial court did not abuse its discretion in denying the defendant’s motion for a continuance. The trial court found that the defendant received the second report before trial, providing him with notice of the subject of the testimony and the evidence against him. The defendant received the report one day after the witness presented it to the State. While the defendant claims that the State was under a duty to explain the second report to the defense pursuant to Rule of Criminal Procedure 16(a)(1)(G), we disagree and can see no breach of a continuing duty to disclose by the State when it provided the defendant with a copy of the report before trial. The defendant is not entitled to relief.

Based on the foregoing and the record as a whole, we affirm the judgments of the trial court.

JOSEPH M. TIPTON, PRESIDING JUDGE