

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON  
Assigned on Briefs December 6, 2022

FILED

02/02/2023

Clerk of the  
Appellate Courts

**STATE OF TENNESSEE v. MELVIN SUMMERVILLE**

**Appeal from the Criminal Court for Shelby County**  
**No. C1809332 James M. Lammey, Jr., Judge**

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**No. W2022-00021-CCA-R3-CD**

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The Defendant, Melvin Summerville, was convicted in the Shelby County Criminal Court of first degree premeditated murder and received a sentence of life in confinement. On appeal, the Defendant claims that the trial court erred by (1) allowing testimony about a previous domestic assault against the victim in violation of Tennessee Rule of Evidence 404(b); (2) allowing cellular telephone records into evidence when the State did not establish relevance for the records; and (3) failing to suppress the testimony of a material witness when the State did not reveal the name of the witness and turn over police body camera video involving the witness until the “eve” of trial. Based on our review, we affirm the judgment of the trial court.

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

JOHN W. CAMPBELL, SR., J., delivered the opinion of the court, in which ROBERT W. WEDEMEYER and KYLE A. HIXSON, JJ., joined.

Michael R. Working and Janet H. Goode (on appeal) and Jason Ballenger and Joseph McClusky (at trial), Memphis, Tennessee, for the appellant, Melvin Summerville.

Jonathan Skrmetti, Attorney General and Reporter; Samantha L. Simpson, Assistant Attorney General; Amy P. Weirich, District Attorney General; and Jamie Kidd and Justin Prescott, Assistant District Attorneys General, for the appellee, State of Tennessee.

**OPINION**

**FACTS**

In November 2018, the Shelby County Grand Jury indicted the Defendant for the first degree premeditated murder of his wife, Anitra Summerville. The indictment alleged that the Defendant killed the victim between March 28 and April 10, 2017. The Defendant

went to trial in August 2021. During opening statements, the State said the proof would show that the Defendant killed the victim about March 30. Although the Defendant does not contest the sufficiency of the evidence, we will summarize the proof presented at trial.

Cynthia Jones, the victim's older sister, testified that in 2017, the victim was living with her and her young daughter. The victim was employed and was "just in and out of the home at different times." Ms. Jones "knew of" the Defendant and first met him near Thanksgiving in 2010, 2011, or 2012. Prior to living with Ms. Jones, the victim lived with the Defendant "off and on." The victim would refer to the Defendant as her "husband," but Ms. Jones did not know whether they were legally married.

Ms. Jones testified that in March or April 2017, the victim did not come home for a few days. Ms. Jones telephoned and texted the victim but did not hear anything from her, which was unusual, so Ms. Jones telephoned the Defendant. The Defendant told Ms. Jones that he last saw the victim "[a]round" March 28, and he "went into a conversation that he hadn't seen her, lately, they had been together and then he went into a whole scenario of a story on if something happened to her, what could have happened." Ms. Jones thought the conversation was "disturbing," so she telephoned the police. An officer came to her home, and Ms. Jones and the officer made "another disturbing phone call" to the Defendant. Ms. Jones filed a missing person report and later learned on the television news that the victim's body had been found in the victim's car. Ms. Jones said that during law enforcement's investigation of the victim's death, the police showed her a store's surveillance video. She identified the victim and the Defendant in the video.

On cross-examination, Ms. Jones acknowledged testifying at a preliminary hearing that she last saw the victim alive on March 23 or 24, 2017. Ms. Jones filed the missing person report on April 6, 2017. She acknowledged that the victim and the Defendant were "estranged" when the victim went missing.

Ronnie Irvin testified that in April 2017, he worked for Alcar Recovery, an automobile repossession company, in Horn Lake, Mississippi. On the night of April 10, Mr. Irvin repossessed a vehicle on Crow Road in the Nutbush community of Memphis. A business was on the corner of Crow Road, and a field was on the right side of the road. Mr. Irvin towed the car to Alcar's lot in Horn Lake. Later that night, he learned the police were at the lot and had found a body in the car. Mr. Irvin went to the lot and gave a statement. The police would not let him near the car, but he could smell something decomposing.

On cross-examination, Mr. Irvin testified that he found the car in Shelby County from its GPS location. While he was preparing to tow the car, he "could smell something." However, a field and some woods were nearby, so he "didn't really think nothing of it."

Officer Crystal Davis of the Shelby County Sheriff's Office ("SCSO") testified that she met with Cynthia Jones on April 6, 2017, took a report, and spoke with the Defendant. The Defendant said he last saw the victim at 2:00 p.m. on March 28, 2017, when the victim "dropped him off at his mother's house."

Sergeant Anthony Barbarotto, a crime scene investigator with the Memphis Police Department ("MPD"), testified that on April 10, 2017, he was called to a wrecker lot in Horn Lake, Mississippi, and saw a grey Chevrolet with "kind of an elbow sticking out from the trunk." Police officers opened the trunk and discovered the victim's body.

Sergeant Barbarotto testified that he had the car towed to the MPD on Klink Avenue and that he inventoried the vehicle. An envelope addressed to the Defendant was in the glove compartment, and the Defendant's identification card was in the center console. A black sweater was in the rear passenger seat, and four "defects" were in the sweater. The defects were "possible holes" from a bullet, knife, "or anything which could puncture through it." A McDonald's receipt was on the floor between the front passenger seat and the front passenger door, and a "flyer" was in the pocket of the front passenger door. Sergeant Barbarotto processed the receipt and the flyer for fingerprints. He also collected some "vegetation" from outside the vehicle.

On cross-examination, Sergeant Barbarotto acknowledged that he did not know what caused the defects in the sweater or from where the vegetation came. He sprayed Blue Star reagent inside the car and saw a blue reaction, which was presumptive for blood, on the center console and the driver's seat. He collected a blood sample for testing.

Officer Nathan Gathright of the MPD's Latent Print Unit testified that the fingerprints on the flyer matched the Defendant but that no fingerprints were on the McDonald's receipt. Officer Gathright found the victim's fingerprint in the car "on the interior left rear door, upper window."

Antonio Lacy testified that at about 3:30 p.m. on March 30, 2017, he went to the "corner store" across the street from his home on Mendenhall Road in Shelby County to cash a check. Before Mr. Lacy entered the store, a car pulled up with a woman and two men inside. One of the men was driving the car, the woman was sitting in the front passenger seat, and the second man was sitting behind the driver. Mr. Lacy said that he heard the driver "cussing out the lady . . . , calling her B's and H's." He said that by "B's and H's," he meant "Bitches and Ho's." The driver was "loud" and "furious." The woman "wasn't saying much, she was just listening and she left the car as he was saying that."

When the woman got out of the car, she appeared to have a broken arm and was “stumbling and wobbling.”<sup>1</sup>

Mr. Lacy testified that he and the woman went into the store, that they walked to the cash register, and that he was standing behind her. No more than ten seconds later, she “passed out,” and Mr. Lacy “caught her before she hit the floor.” When the woman came to, she thanked him. Mr. Lacy said that by that time, the man who had been yelling outside “done walked up on me.” The man yelled at the woman, ““Bitch you trying to set me up, you tried to set me up.”” Mr. Lacy said that he “threw [his] hands up” to show he was just helping the woman. However, the man kept yelling, so Mr. Lacy “hailed off and hit him.”

Mr. Lacy testified that he and the man began fighting all over the store and that the man started yelling, ““Get the gun, go get the gun[.]”” Mr. Lacy kept hitting the man, and the woman kept saying, ““Stop, no, stop, stop, please don’t[.]”” Mr. Lacy’s cousin came into the store to help him and began fighting the man. Mr. Lacy said the man “backed off” and told Mr. Lacy, ““I ain’t got no beef with you.”” Mr. Lacy told the man that the man was not leaving the store until the police arrived, but the store owner told Mr. Lacy, ““Let him go, Antonio, just let him go.”” The man and woman left, but Mr. Lacy stayed until the police arrived. Mr. Lacy identified a video recording of the incident that was captured by the store’s surveillance camera, and the State played the video for the jury.<sup>2</sup>

On cross-examination, Mr. Lacy acknowledged that he “threw the first punch” and said that he “had [the man] in a head-lock” when the man started yelling for a gun. Mr. Lacy never saw a gun, and the fight caused thousands of dollars in damage to the store. Mr. Lacy thought the second man, who was in the car with the man and the woman, came into the store during the fight. When the police arrived, Mr. Lacy told them what had happened. He said he did not remember telling officers that the man “swung” at him and that he was just defending himself. At that point, defense counsel played police body camera video for Mr. Lacy, and he acknowledged telling the police that the man “swung first.” On redirect examination, Mr. Lacy testified that he had never seen the man or woman prior to that day.

Malcolm Alexander testified that he had known the Defendant all of the Defendant’s life and that he spent time with the Defendant and the victim together. Mr. Alexander knew they were married. One night, the Defendant telephoned Mr. Alexander and asked him to come to the Defendant’s home. At that time, Mr. Alexander did not know the victim was

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<sup>1</sup> According to the victim’s autopsy report, her left wrist was wrapped in gauze bandages, white cotton bandages, and a tan sleeve.

<sup>2</sup> We have reviewed the video. According to the date and time on the video, the fight occurred at 5:16 p.m. on March 30, 2017.

missing. When Mr. Alexander arrived, he and the Defendant were “casually talking.” Mr. Alexander stated,

He told me he killed her. And he said that they was at the store and they went in, you know what I am saying, you know and they was in the store, you know what I’m saying, he said, they got into a fight and an altercation with some guy and that is when, you know, he felt like she didn’t help him, or she set him up, or something, you know what I’m saying.

The Defendant did not tell Mr. Alexander what happened after the Defendant and the victim left the store, how the Defendant killed the victim, or if anyone was with the Defendant when he killed her.

Mr. Alexander testified that he did not want to get involved but that he contacted a Drug Enforcement Administration (“DEA”) agent, who referred him to the MPD. Mr. Alexander did not want to give a formal statement but eventually gave a written statement to the police on May 14, 2018. Mr. Alexander told the police that the Defendant claimed a man helped the Defendant move the victim’s body. The police showed Mr. Alexander a six-photograph array, and he identified the Defendant’s photograph. Mr. Alexander acknowledged that he and the Defendant had been friends since childhood. The State asked why the Defendant would tell him about killing the victim, and Mr. Alexander answered, “I don’t know, . . . I guess he felt like we was cool, but you know, . . . to be telling me that you killed your wife, . . . that’s when I draw the line[.]”

On cross-examination, Mr. Alexander testified that he contacted a DEA agent rather than the police because he had worked as an informant for the DEA and “just felt like he would point me in the right direction.” Mr. Alexander said that “[s]ome girl” was with the Defendant when the Defendant told him about killing the victim but that he did not know her identity.

On redirect examination, Mr. Alexander testified that the Defendant never told him about a woman named Katrice Hale. The police asked Mr. Alexander if the Defendant ever said Ms. Hale was involved in the victim’s death, and Mr. Alexander told them, “No, I didn’t know her, I met her a couple of times.” Mr. Alexander acknowledged that Ms. Hale was the Defendant’s girlfriend about the time of the victim’s death.

Detective Samuel Crews of the SCSO testified that he was assigned to investigate the victim’s missing person case at the end of the first week of April 2017 and that he scheduled a meeting with the Defendant for Monday, April 10. The police found the victim’s body on the morning of April 10 and advised the Defendant that her body had been located. Detective Crews determined that the MPD had jurisdiction over the case but

kept his appointment with the Defendant. The Defendant signed an Advice of Rights form and gave a statement, which Detective Crews read to the jury.

In the statement, the Defendant denied having anything to do with the victim's death and said he did not know anyone who would want to hurt her. He said that the victim was his wife; that he was not present when she was killed; and that he last saw her on March 28, 2017, when she "dropped [him] off" at a home on Scottsdale. The victim told the Defendant that she was going to her sister's house, and the Defendant and the victim did not argue or fight that day. After the victim dropped off the Defendant, the Defendant was with a woman named Karen Lemon. The Defendant texted the victim several times, but she never responded. Detective Crews asked the Defendant if he had ever been in an altercation with the victim, and the Defendant answered, "Yes, over a year ago we had an altercation, her mom called the police." Detective Crews also asked the Defendant how the victim hurt her wrist, and the Defendant responded, "I can't remember when, but she told [me] about the incident. I [took] her to the hospital and dropped her off and I picked her up, it was in March." The Defendant said that he "got jumped on in Shell's gas station, on Mendenhall, on the 28th" and that he lost his cellular telephone in the store. The next day, he bought a new telephone. The Defendant gave Detective Crews permission to search his new telephone.

On cross-examination, Detective Crews acknowledged that the Defendant voluntarily came to the police department, voluntarily gave a statement, and was cooperative. The Defendant told Detective Crews about the fight at the gas station, and the Defendant voluntarily consented to a search of his cellular telephone.

Lieutenant Clifton Andrew Dupree of the MPD testified that he was present for the Defendant's interview with Detective Crews and that the Defendant's demeanor was "back and forth" with the Defendant being "calm at points and angry at points, especially when we asked him did he kill his wife." The Defendant said that he and the victim were estranged at the time of her death, and he talked about having other girlfriends, including Katrice Hale. The officers did not arrest the Defendant and allowed him to leave after the interview. That night, Lieutenant Dupree learned from a DEA agent that an informant had information about the case. Lieutenant Dupree eventually talked with Malcolm Alexander. According to Mr. Alexander, the Defendant claimed he killed the victim "because she set him up at a gas station and he . . . got beat up, or got into a fight at a gas station with two guys." Lieutenant Dupree went to Crow Road where the victim's car had been located but did not find any evidence. On cross-examination, Lieutenant Dupree testified that the blood collected from the victim's car was not tested.

Officer George King of the MPD testified that on June 17, 2016, he and his partner were on patrol and were "flagged down" by a woman. The woman identified herself as

“Anitra Summerville” and said she had been involved in an altercation with her “husband.” Officer King identified a report prepared by his partner. According to the report, the victim identified her husband as “Melvin Summerville.” Officer King saw that the victim’s right eye was swollen shut and that she had small abrasions on the left side of her face, and he identified photographs of her injuries for the jury. He also identified a domestic violence “hold harmless” form filled out by himself, his partner, and the victim. The victim wrote on the form, ““He took me to apartment complex and started fighting me and said he was going to kill me, my eye is swollen[.]””

Dr. Zachary O’Neill testified as an expert in forensic pathology that he performed the victim’s autopsy. The victim’s body was in decomposition, her left wrist was wrapped in a bandage, and she had abrasions on her abdomen. The victim had been shot four times: twice in the left side of her back, one time in her left arm, and one time in her left thigh. Three of the bullets exited her body, and Dr. O’Neill removed fragments of a fourth bullet from her left shoulder. He found black gunpowder residue around a hole in the victim’s jeans, indicating that the gun was a few inches to a few feet away from the victim when it was fired. The hole corresponded to the gunshot wound in the victim’s left thigh, and Dr. O’Neill found black powder residue in the skin around the wound. According to the autopsy report prepared by Dr. O’Neill, the victim’s cause of death was multiple gunshot wounds and her manner of death was homicide. On cross-examination, Dr. O’Neill testified that the victim’s toxicology report showed alcohol and a therapeutic level of hydrocodone in her system.

Fabian Gipson testified that on March 30, 2017, he went with the Defendant and the victim to a Shell gas station on Mendenhall Road. The Defendant was driving, the victim was sitting in the front passenger seat, and Mr. Gipson was sitting in the back seat. The Defendant and the victim “started bickering back and forth.” Another car pulled up, and two men got out of the car and went inside the store. The victim also went inside, and the Defendant looked back at Mr. Gipson and said, ““Do you see what I am talking about, this bitch set me up?”” The Defendant went inside the store, and the victim came outside and told Mr. Gipson, “[T]hey are fighting and he wants you to come in there.” Mr. Gipson got out of the car and saw that the inside of the store was “tore up,” so he did not go inside. The Defendant came outside and was “furious.” The Defendant, the victim, and Mr. Gipson got back into the car, and the Defendant drove away.

Mr. Gipson testified that the Defendant “made a U-turn and drove off the highway to a remote place.” Mr. Gipson described the area as “like a lake, tall grass, a rocky road, but you could see it from off the highway, like [the Defendant] had been there before.” The Defendant “drove, drove and drove to the back and stopped.” Mr. Gipson was “kind of delusional” because he had been using heroin. However, he heard a gunshot and “woke up.” The Defendant had shot the victim in the left thigh. The victim jumped out of the car

and started running toward the highway, and the Defendant started shooting at her. The victim fell, and the Defendant walked up to her and shot her again. Mr. Gipson was scared and got out of the car. He said that the shooting did not make sense to him because the victim was the Defendant's wife and because Mr. Gipson "didn't see nothing she did." The Defendant walked back to the car and was "talking out his head." The Defendant and Mr. Gipson drove away, and the Defendant dismantled the gun and threw it into a sewer. That night, the Defendant and Mr. Gipson returned to the scene of the shooting, and Mr. Gipson helped the Defendant put the victim's body into the trunk of the car. The Defendant parked the car on Orchi Street, and the two men parted ways.<sup>3</sup>

On cross-examination, Mr. Gipson acknowledged that he told investigators that the Defendant shot the victim in the head. He maintained that he saw the Defendant walk up to the victim and shoot her in the head. Mr. Gipson acknowledged that he was "in and out" that day from heroin use and that he did not report what happened until 2018 or 2019. He said that he was telling the truth and that he was testifying to "clear [his] conscious." He acknowledged that heroin could affect a person's memory. On redirect examination, Mr. Gipson testified that he was sure he saw the Defendant kill the victim.

Jason David Penkethman testified that he was the Chief Engineer and custodian of records for Spireon, a company that managed GPS tracking data for four million vehicles in the United States. A GPS device was installed on the victim's Chevrolet Malibu so that the lender could locate the vehicle if necessary, and the device reported the Malibu's approximate location to Spireon every twenty-five hours. Pursuant to subpoena, Mr. Penkethman compiled a list of GPS locations for the Malibu from March 30, 2017, to April 7, 2017. According to the list, which was introduced into evidence, the Malibu was on Interstate 40 at 3:04 a.m. on March 30, 2017. At 4:04 a.m. on March 31, the Malibu was on Crow Road. The car remained on Crow Road after March 31 and was still there on April 7.

Several telecommunications employees testified that they compiled call detail records pursuant to subpoenas for cellular telephones subscribed to the victim, the Defendant, and Katrice Hale. The records spanned the time period of February 11, 2017, to April 11, 2017.

Detective Michael Garner of the MPD testified as an expert in cellular forensics that he analyzed the call detail records for the victim, the Defendant, and Ms. Hale. Detective Garner's analysis focused on the records for March 30 and March 31, 2017, and he

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<sup>3</sup> During closing arguments, the State showed the jury a map and argued that the Defendant returned to Orchi Street in the early morning hours of March 31 and moved the car "a few streets over" to Crow Road.



prepared maps showing cellular telephone towers the telephones accessed and the locations of the towers in relation to Crow Road. On March 30, the last outgoing call from the victim's telephone was made at 4:28 p.m., and the last incoming call was received at 4:33 p.m. For both calls, the telephone accessed a tower near Mendenhall Road, which was south of Crow Road. The victim's cellular telephone stopped communicating with any towers at 7:32 p.m. An outgoing call was made from the Defendant's telephone at 5:08 p.m., and his telephone accessed a tower near his home, which was south of Mendenhall Road. No further calls were made from his telephone. The Defendant's telephone stopped transmitting any data at 11:30 p.m., which could have been due to a dead battery, and a new cellular telephone was added to his account on March 31. From 4:00 p.m. to 8:30 p.m. on March 30, Ms. Hale's telephone accessed towers near her home, which was northwest of the Defendant's home and Mendenhall Road but southwest of Crow Road. At 8:37 p.m., Ms. Hale's telephone began traveling north. At 10:13 p.m., her telephone was back near her home. At 1:03 a.m. on March 31, though, Ms. Hale's telephone began moving north again. At 1:46 a.m., an outgoing call was made from her telephone, and her telephone accessed a tower "at mid-town 240, or I-69 right near Jackson, just north of the 40/split." At 2:04 a.m., the telephone received an incoming call and accessed a tower "just west" of where the victim's body was lying in her car on Crow Road. The base of the tower was less than 1,500 feet from where the victim's car was found. At 2:19 a.m., Ms. Hale's telephone received a call and accessed that same tower.

Detective Garner testified that the Defendant's records showed that from February to April 2017, his telephone made calls to and received calls from 901-830-xxxx a total of 501 times. Between 12:12 a.m. and 2:19 a.m. on March 31, Ms. Hale's telephone made calls to and received calls from that same number seven times. Ms. Hale's records did not show any other calls to or from 901-830-xxxx.

On cross-examination, Detective Garner acknowledged that the call detail records did not tell him where the victim, the Defendant, or Ms. Hale were located on March 30 and 31, 2017. The records only showed him the towers their telephones accessed and the general areas where their telephones were located. Detective Garner never identified the subscriber for 901-830-xxxx. At the conclusion of Detective Garner's testimony, the State rested its case.

Officer Reginald Robinson of the SCSO testified that he was responsible for "pick[ing] up people with warrants." On June 6, 2018, the Defendant voluntarily turned himself to law enforcement on a warrant for the first degree murder of the victim. The parties stipulated that the warrant was issued on May 21, 2018.

Glen Buckley testified for the Defendant as an expert in cellular telephone technology that cellular telephones usually, but not always, connected to the closest tower.

Mr. Buckley analyzed the same cellular telephone records as Detective Garner. On March 20 and 21, 2017, about ten days before the victim's death, Ms. Hale's telephone accessed the cellular tower near Crow Road. The Defendant's new telephone made two outgoing calls to the victim's telephone on April 6, 2017. The first call occurred at 12:47 a.m. and was two seconds in duration, and the second call occurred at 1:11 a.m. and was six seconds in duration. The short duration of the calls indicated that the victim's telephone was turned off and that the calls went "straight to voice-mail." At 12:17 p.m. on April 6, 2017, the Defendant's telephone made a third call to the victim's telephone. The duration of the call was forty-nine seconds.

At the conclusion of the proof, the jury convicted the Defendant as charged of first degree premeditated murder. The trial court immediately sentenced him to life in confinement.

## ANALYSIS

### **I. Prior Domestic Assault**

The Defendant claims that the trial court erred by allowing Officer King to testify about the Defendant's prior domestic assault of the victim because the evidence was inadmissible pursuant to Tennessee Rule of Evidence 404(b). The State argues that the evidence was admissible to show the Defendant's intent and premeditation. We conclude that the trial court did not abuse its discretion by admitting the evidence.

Before opening statements, the trial court held a hearing to determine whether the State would be allowed to present evidence of the domestic assault that the Defendant allegedly committed against the victim on June 17, 2016. The State advised the trial court that a general sessions warrant was issued after the assault and that the Defendant was arrested on the warrant on January 27, 2017. A preliminary hearing was scheduled for June 2017, but the case was dismissed after the victim's body was found.

The State called Officer King to testify at the pretrial hearing. He said he and his partner responded to the incident, and his testimony was essentially the same as his trial testimony.<sup>4</sup> Upon being questioned by the trial court, Officer King acknowledged that he was present while his partner was talking with the victim. Officer King said that the victim was "upset" and that he heard her say "she had gotten into an altercation with her husband." At that point, Officer King walked back to his patrol car to get a domestic violence hold harmless form while his partner continued speaking with the victim. Therefore, Officer

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<sup>4</sup> The record reflects that Officer's King's partner was unable to testify at the hearing or at trial due to a positive Covid-19 test.

King did not hear everything the victim said. However, he heard her say that her husband hit her in the eye, and he saw that her right eye was swollen shut. Officer King also was present when she wrote a brief statement on the hold harmless form, and both Officer King and his partner signed the form. Officer King's partner wrote the police report.

The State argued that the prior domestic assault was relevant to show the Defendant's intent and motive to kill the victim. The trial court first found that Officer King's testimony about the victim's statements was admissible under the excited utterance exception to the hearsay rule. The trial court then found proof of the prior assault to be clear and convincing. The trial court also found that the evidence was admissible to show motive because the victim was going to be a witness against the Defendant in the domestic assault case and to show the Defendant's premeditation and intent to harm the victim. Finally, the trial court found that the probative value of the evidence "severely" outweighed the danger of unfair prejudice.

After Mr. Gipson testified at trial, the trial court revisited the Rule 404(b) issue while the court was discussing the jury instructions with the parties. The trial court stated that because the State did not present any proof of the pending domestic assault case to the jury, the trial court no longer thought the prior domestic assault was relevant to show the Defendant's motive to kill the victim. However, the trial court thought the evidence was still relevant to show intent. During the final jury charge, the trial court instructed the jury as follows:

Evidence of alleged prior misconduct. If from the proof you find that the defendant has committed an alleged act of prior misconduct other than that for which he is on trial, you may not consider such evidence to prove his disposition to commit such a crime as that on trial.

The evidence may only be considered by you for the limited purpose of determining whether it tends to show:

(1) The defendant's intent, that is, such evidence may be considered by you if it tends to establish that the defendant actually intended to commit the crime with which he is presently charged.

(2) The defendant's hostility toward the alleged victim and a settled purpose to harm or injure her.

Such evidence of an alleged prior act of misconduct, if considered by you for any purpose, must not be considered by you for any purpose other than that specifically stated.

Generally, a party may not introduce evidence of an individual's character or a particular character trait in order to prove that the individual acted in conformity with that character or trait at a certain time. Tenn. R. Evid. 404(a). Similarly, evidence "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." Tenn. R. Evid. 404(b). Such evidence may be admitted for other purposes, though, if relevant to some matter actually at issue in the case and if its probative value is not outweighed by the danger of its prejudicial effect. Tenn. R. Evid. 404(b); *State v. Wyrick*, 62 S.W.3d 751, 771 (Tenn. Crim. App. 2001). Issues to which such evidence may be relevant include identity, motive, common scheme or plan, intent, or the rebuttal of accident or mistake defenses. Tenn. R. Evid. 404(b), Advisory Comm'n Cmts. Before the trial court may permit evidence of a prior crime, wrong, or act, the following procedures must be met:

- (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). Provided that the trial court has complied with these procedures, this court will not overturn the trial court's decision to admit or exclude evidence under Rule 404(b) absent an abuse of discretion. *State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997).

In support of his argument that the trial court erred, the Defendant distinguishes this case from *State v. Jarman*, 604 S.W.3d 24, 51 (Tenn. 2020), in which our supreme court held that the trial court properly admitted evidence of the defendant's assault of his girlfriend, which occurred eighteen months prior to her death, at the defendant's trial for first degree premeditated murder pursuant to Tennessee Rule of Evidence 404(b) because the evidence was relevant to the issue of intent.<sup>5</sup> First, the Defendant asserts that *Jarman* is distinguishable because in that case, an eyewitness to the assault testified at the 404(b)

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<sup>5</sup> The jury ultimately convicted Jarman of voluntary manslaughter. *Jarman*, 604 S.W.3d at 28.

hearing in addition to the police officer who responded to the scene. *See id.* at 31. While we agree that no eyewitness testified about the Defendant's prior assault of the victim, nothing in *Jarman* suggests that eyewitness testimony is required in order for a trial court to find proof of the prior act to be clear and convincing.

The Defendant also asserts that *Jarman* is distinguishable because the officer who actually spoke with the victim and observed her injuries in that case testified at Jarman's 404(b) hearing. The Defendant claims that Officer King's partner, not Officer King, was the officer who should have testified in this case. However, Officer King was present for much of his partner's conversation with the victim. Officer King heard the victim say that "her husband" hit her in the eye, and Officer King saw her injuries. He also was present when she wrote her statement on the hold harmless form. Therefore, the trial court properly considered Officer King's testimony.

Despite their differences, *Jarman* and this case are similar in that both involved only one prior act of violence against the victim, the prior assaults occurred months before the victims were killed, and both trial courts found that the prior assaults were relevant to the issue of intent. Although Tennessee Rule of Evidence 404(b) is a rule of exclusion,

Tennessee courts have recognized a "line of cases" that stand for the proposition "that violent acts indicating the relationship between the victim of a violent crime and the defendant prior to the commission of the offense are relevant to show defendant's hostility toward the victim, malice, intent, and a settled purpose to harm the victim."

*Id.* at 49 (quoting *State v. Smith*, 868 S.W.2d 561, 574 (Tenn. 1993)).

Here, as in *Jarman*, the State was required to prove premeditation and intent as elements of first degree murder. *See* Tenn. Code Ann. § 39-13-202(a)(1). The trial court complied with the procedures of Rule 404(b) and initially determined that evidence of the Defendant's assaulting the victim less than ten months before her death was relevant to motive and intent. Additionally, the trial court found that the probative value of the evidence "severely outweighed" any danger of unfair prejudice. *See Jarman*, 604 S.W.3d at 51 (stating that despite the amount of time that elapsed between the prior assault and the victim's death, evidence of the prior assault was "highly probative on the issue of intent"). We note that the Defendant's identity as the perpetrator also was a material issue at trial. This court has held that a defendant's prior act of violence against a victim was relevant to show the defendant's motive for harming the victim and, by extension, the defendant's identity as the perpetrator. *See State v. Salas-Rufino*, No. E2020-00986-CCA-R3-CD, 2021 WL 4164455, at \*5 (Tenn. Crim. App. Sept. 14, 2021). Therefore, although the trial court later determined that the prior domestic assault was not relevant to show motive, we

think the trial court also could have found the evidence admissible to show motive and identity. In any event, we conclude that the trial court acted within its discretion by allowing the evidence on the issue of intent.

## II. Ms. Hale's Telephone Records

Next, the Defendant contends that the trial court erred by allowing the State to introduce Ms. Hale's telephone records into evidence because the State failed to establish the relevance of the records. The State argues that the trial court did not err. We agree with the State.

Before the State presented any witnesses to testify about the cellular telephone records, defense counsel objected to the State's introduction of Ms. Hale's records on the basis of relevance. Defense counsel noted that Ms. Hale's name had been mentioned only once or twice during the trial and argued that Ms. Hale "is just a person that they are going to claim knows [the Defendant]." The State responded that the proof was going to show that a telephone number frequently dialed from the Defendant's cellular telephone was dialed from Ms. Hale's telephone about 2:00 a.m. on March 31. Moreover, Ms. Hale's cellular telephone "ding[ed]" from a tower that was 1,400 feet from where the victim's body was discovered. The trial court stated, "It sounds pretty relevant." At that point, defense counsel advised the trial court that the Defendant's cellular telephone "went missing" after the fight at the gas station. The trial court said, "So that makes it even more likely that he used someone else's phone." Accordingly, the trial court ruled that the evidence was admissible.

Tennessee Rule of Evidence 401 provides that "[r]elevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." It is within the trial court's discretion to determine whether the proffered evidence is relevant; thus, we will not overturn the trial court's decision absent an abuse of discretion. *State v. Forbes*, 918 S.W.2d 431, 449 (Tenn. Crim. App. 1995).

Turning to the instant case, Mr. Alexander testified that Ms. Hale was the Defendant's girlfriend about the time of the victim's death. The State theorized that the Defendant lost his telephone in the fight at the gas station on March 30, that he began using Ms. Hale's telephone after he killed the victim, and that he was still using her telephone when he moved the victim's body to Crow Road in the early morning hours of March 31. The State introduced the cellular telephone records of the victim, the Defendant, and Ms. Hale into evidence, and Detective Garner testified about the records. Notably, Detective Garner testified that the Defendant's telephone stopped transmitting any data at 11:30 p.m. on March 30, possibly due to a dead battery. Ms. Hale's telephone was near her home

most of the night. However, at 1:03 a.m. on March 31, her telephone was traveling north, toward Crow Road. By 2:04 a.m., Ms. Hale's telephone was near a telephone tower that was less than 1,500 feet from the victim's body. Her telephone was still there fifteen minutes later. During that same period of time, Ms. Hale's telephone made calls to and received calls from a number often dialed with the Defendant's telephone. We have no hesitation in concluding that Ms. Hale's records were relevant to the State's case and that the trial court did not abuse its discretion.

### **III. Motion to Exclude Evidence**

Finally, the Defendant contends that the trial court erred by denying his motion to exclude Mr. Lacy's trial testimony because the State did not reveal Mr. Lacy's name or turn over the police body camera footage until the Thursday prior to the Defendant's Monday trial. The State argues that the Defendant is not entitled to relief because he was not prejudiced by the delay. We agree with the State.

On March 18, 2020, defense counsel filed a motion for exculpatory evidence. The Defendant's trial began on August 23, 2021. On the morning of August 20, 2021, defense counsel filed a motion to exclude Mr. Lacy's trial testimony. In the motion, the Defendant claimed that the previous day, August 19, the State informed defense counsel that the State had discovered police body camera footage from law enforcement's response to the fight at the Shell gas station. The Defendant also claimed that the State had just revealed Mr. Lacy's name to the defense. The Defendant argued that due to the delayed disclosures, the trial court should exclude Mr. Lacy's testimony pursuant to Tennessee Rule of Evidence 16 and *Brady v. Maryland*, 373 U.S. 83 (1963).

The trial court addressed the Defendant's motion at a pretrial hearing on the afternoon of August 20. During the hearing, defense counsel asserted that the State must have known Mr. Lacy's name and must have known about the body camera footage well before trial. The State explained to the trial court that no one knew "Melvin Summerville" was involved in the fight at the gas station and that "one of our digital evidence analysts was able to cross-reference the date with the address of the gas station just to see if anything was reported and just so happened to stumble upon this body cam." The State said that it learned Mr. Lacy's name by watching the body camera video, that the State contacted Mr. Lacy by telephone, and that he told the State about the fight. The State said that it recorded Mr. Lacy's telephone call and that it provided the recording to defense counsel. The State noted that it provided the defense with the store's surveillance video of the fight "some years ago" and argued that the body camera footage was not exculpatory.

Defense counsel responded that the State failed to investigate its case adequately and that the State could have discovered the footage and Mr. Lacy's name "four years ago,

three years ago, two years ago.” Defense counsel argued that the police body camera video was exculpatory in that it showed Mr. Lacy lied to the police by telling them that the Defendant initiated the fight and attacked him when the store’s surveillance video showed that Mr. Lacy initiated the fight and attacked the Defendant. Defense counsel acknowledged that the defense could impeach Mr. Lacy with the body camera video but argued that the State’s late disclosure of the evidence “is still Brady.”

The trial court stated that it thought the State’s failure to turn over the evidence was a “collateral matter.” The trial court said that the Defendant had the store’s surveillance video well before trial and that the defense should have investigated whether the police were called to the store “unless [the defense] really didn’t want that information to come forward.” The trial court found that the defense could have discovered the body camera footage on its own but that the State turned over the evidence when the State obtained it. The trial court ruled that it was not going to suppress the evidence and asked defense counsel, “[W]hat is it you wish to do?” Defense counsel requested to speak with the Defendant about a continuance, and the trial court said it needed to know the Defendant’s decision that day. The trial court then took up other matters. Defense counsel later informed the trial court, in the Defendant’s presence, that the Defendant was not going to request a continuance.

The State has a constitutional duty to furnish an accused with exculpatory evidence pertaining to the accused’s guilt or innocence or to the potential punishment faced by the accused. *Brady*, 373 U.S. 83, 87 (1963). Specifically, “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Id.* This duty extends to evidence that may be used by the accused for impeachment purposes. *Giglio v. United States*, 405 U.S. 150, 154-55 (1972). When there has been a delayed disclosure of evidence, as opposed to a complete nondisclosure, *Brady* is normally inapplicable unless the delay itself causes prejudice. *State v. Larry Boykin*, No. E2005-01582-CCA-R3-CD, 2007 WL 836807, at \*13 (Tenn. Crim. App. Mar. 20, 2007). The defendant must establish that the delayed disclosure prevented him or her from using the disclosed material effectively in preparing and presenting the defendant’s case. *Id.* Furthermore, the defendant’s failure to move for a continuance after receiving the evidence may cure the potential *Brady* violation.

The Defendant claims that the State’s late disclosure of Mr. Lacy’s identity and the body camera footage did not provide the defense with sufficient time to prepare and that the trial court essentially forced him to choose between a “speedy” trial and proper preparation of his case. As the trial court noted, though, the State turned over the evidence when the State received it. Moreover, the trial court entertained the idea of a continuance, but the Defendant chose to proceed with trial, and the Defendant used the body camera



footage to impeach Mr. Lacy. The Defendant has not explained what he would have done differently to prepare and present his case if the State had made Mr. Lacy's name and the body camera footage available to him earlier. Therefore, we conclude that the Defendant is not entitled to relief.

**CONCLUSION**

Based on our review, we affirm the judgment of the trial court.

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JOHN W. CAMPBELL, SR., JUDGE