

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
July 26, 2016 Session

STATE OF TENNESSEE v. ADOLPHUS L. HOLLINGSWORTH

**Appeal from the Criminal Court for Hamilton County
No. 290430 Rebecca J. Stern, Judge**

No. E2015-01463-CCA-R3-CD – Filed January 11, 2017

The Defendant, Adolphus L. Hollingsworth, was convicted by a Hamilton County jury of second degree murder and was sentenced to twenty-two years' incarceration. On appeal, the Defendant argues: (1) the trial court erred in allowing the State to amend the indictment; (2) the trial court erred in denying his motion to dismiss based on the State's failure to preserve evidence; (3) the trial court erred in denying his motion to suppress the evidence discovered during the search of his property; (4) the trial court abused its discretion in denying his motion to exclude evidence from forensic testing; (5) the trial court erred in admitting Rule 404(b) testimony; (6) the evidence is insufficient to sustain his conviction; (7) the trial court erred in failing to provide a female bailiff to supervise the sequestered jury; and (8) the trial court erred in denying his motion for judgment of acquittal or, in the alternative, motion for new trial.¹ The judgment of the trial court is affirmed.

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

CAMILLE R. MCMULLEN, J., delivered the opinion of the court, in which THOMAS T. WOODALL, P.J., and ROBERT H. MONTGOMERY, JR., J., joined.

William M. Speek and Jonathan T. Turner, Chattanooga, Tennessee (on appeal); Steven E. Smith, District Public Defender; Steven D. Brown and Manzura Talipova, Assistant Public Defenders (at trial) for the Defendant-Appellant, Adolphus L. Hollingsworth.

Herbert H. Slatery III, Attorney General and Reporter; Lacy Wilber, Senior Counsel; M. Neal Pinkston, District Attorney General; and Lance W. Pope, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

¹ We have reordered the issues for clarity.

On August 18, 1997, the twenty-eight-year-old victim, Victoria Witherspoon Carr Hollingsworth, disappeared from her parents' home in Chattanooga, Tennessee. On June 5, 1999, her body was discovered. No suspects were indicted in the initial investigation of the victim's murder. Seventeen years after the victim's disappearance, in January 2014, the production company for the television show "Cold Justice" contracted with the City of Chattanooga to shoot an episode on the victim's case. Based on the investigation that followed, the Hamilton County Grand Jury indicted the Defendant on one count of first degree premeditated murder on January 22, 2014.

Trial. Wesley Carr, the victim's son, testified that he was nine years old when the victim disappeared. He said that he, his sister, and the victim lived with the Defendant for approximately six years, and at some point during that period the victim married the Defendant, although they were separated at the time of the victim's disappearance. Carr recalled an incident in which the Defendant acted violently toward the victim. He said that just prior to the victim's separation from the Defendant, he was awakened by screaming. When Carr entered the bathroom, he saw the Defendant pouring gasoline on the victim's face. This argument "escalated," and he saw the Defendant throw a set of keys in the victim's face. After this argument, the victim moved herself and her children into her parents' home at 1315 Duncan Avenue.

The night before the victim's disappearance, the victim asked Carr to help with some work she was doing for her new job at the Chattanooga Housing Authority. The next morning, Carr awoke at 8:00 a.m., and although the victim was supposed to take him and his sister to day care, the victim was not at home. Although the victim's parents normally cared for Carr and his sister, they were out of town that day. Carr tried to call the victim, but the call went to voice mail. Carr and his sister searched their home for the victim to no avail but discovered that the victim's car, a Ford Mustang, was parked in the driveway. Carr opened the door to the Mustang and noticed "a very foul smell." Carr went back inside the house and called his grandparents, who told him to call his father and his aunt.

Since the victim's disappearance in August 1997, the Defendant never talked to Carr about this case. When the victim's body was discovered in 1999, Carr was living with his father and spending time with his grandparents. Carr did not talk to police about the circumstances surrounding the victim's disappearance until 2010.

Kenneth Witherspoon, the victim's brother, testified that on the morning of August 18, 1997, he telephoned the victim, but she did not answer. Between 8:30 and 9:00 a.m. that morning, he went to his parent's home at 1315 Duncan Avenue to check on the victim. Upon arriving there, he saw the victim's Mustang parked in the driveway, so he tried to call the victim again and began knocking on all the doors to the home, which

were locked. At that point, he knew something was wrong. He began looking at the Mustang and noticed that it had “a piece of brush on the back[.]” His parents, who had lived at the Duncan Avenue address for thirty years, did not have that type of shrub in their yard. Witherspoon returned home and called his parents.

When he got home, Witherspoon saw the Defendant across the street at Tommy Vaughn’s house. He knew that the Defendant and Vaughn were friends and that Vaughn often acted like a “[g]opher” for the Defendant. When Witherspoon asked the Defendant where the victim was, the Defendant had a “little grin” on his face that suggested that something had happened to her. At the same time, Vaughn refused to look at Witherspoon. The Defendant told Witherspoon that he did not know where the victim was and that he had “been looking for her” himself. Witherspoon called his parents again, who informed him that they were on their way back from Memphis.

Witherspoon knew that the victim often gave the Defendant a ride to work. While the Defendant was still at Vaughn’s house, Witherspoon went to the Defendant’s house and walked around the front and back yards. He thought the Defendant might have “tied up [the victim] or something, because he was a real bad man.” When he got to the Defendant’s backyard, he noticed “skid marks” near a bush that looked that it had been run over. When Witherspoon returned to his home, he saw the Defendant sitting in an orange, 1970’s truck parked near Vaughn’s home that the Defendant had purchased that morning.

After looking around the Defendant’s home and calling the police, Witherspoon returned to his parents’ home. He opened the door to the victim’s Mustang and observed “one of the awfulest [sic] smells.” Although he first thought the smell was kerosene, he soon realized that it smelled like a substance used to “clean your car . . . when you [are] trying to cover up something.”

Over the next couple of days, Witherspoon drove past the Defendant’s house because he thought the victim might be there. Each time, he saw the Defendant’s orange truck parked in the driveway. Witherspoon said that other than briefly talking to the Defendant the morning of the victim’s disappearance, the Defendant never contacted him or his parents about the victim or her children.

Captain Corliss Cooper, who was working in the missing persons unit of the Chattanooga Police Department in 1997, testified that several individuals filed a missing person report regarding the victim. Kenneth Witherspoon filed such a report at 1:55 p.m. on August 18, 1997. The victim’s mother filed a missing person report the same day at 3:32 p.m.. On August 19, 1997, the Defendant filed a missing person report at 10:06 a.m.

Captain Cooper and Inspector Kenneth McCrary went to the residence at 1315 Duncan Avenue and talked to the victim's mother and brother. Captain Cooper observed the victim's Mustang parked in the driveway, and when he opened the door to this car, he smelled gasoline. As he and Inspector McCrary were observing the car, they noticed some "brush under the vehicle," so they notified Lieutenant Dianna Williams, who contacted the major crimes division about the case. Captain Cooper remained at the residence until the victim's car was photographed, examined, and towed to the police department.

Captain Cooper said Witherspoon told him that he had seen the Defendant driving a black Pontiac on August 18, 1997, the day the victim disappeared. The victim's mother, in her missing person report, referred to several instances of domestic abuse by the Defendant against the victim. She also said that the Defendant claimed not to have seen the victim on August 18, 1997.

Inspector Kenneth McCrary testified that following the victim's disappearance, the victim's family stayed in contact with him and often asked if there was any new information in the victim's case. He did not recall, and his notes did not show, that the Defendant ever contacted him about the victim. However, he acknowledged that the Defendant was immediately identified as a suspect and fingerprinted shortly after the victim's disappearance. During the investigation, Inspector McCrary learned that Orville Hughes might have been dating the victim at the time of her disappearance. He acknowledged that Hughes also never contacted him to discuss the victim's disappearance.

Erica Collins, a friend of the Defendant's, testified that on August 18, 1997, the Defendant called her around 6:00 a.m. to ask for a ride to work because the victim had not arrived to pick him up. Collins was upset that the Defendant had called her because her daughter was still asleep but told him that she would pick him up if she had time before work. Collins did not give the Defendant a ride and did not call him. At around 9:00 a.m. that morning, the Defendant and Tommy Vaughn came to Collins's work, and the Defendant asked to borrow her car to "take care of some business." Collins allowed the Defendant to take her car, a black two-door car, but told him he had to bring it back by 11:00 a.m., which he did. At 11:00 a.m., Collins took the Defendant and Vaughn to a used car dealership on Shallowford Road so the Defendant could purchase a car, but the dealership was closed.

Adolphus Mitchell testified that he had known the victim for twenty years and had worked with the Defendant at Jay Hall Security, where they were bouncers for several nightclubs. He was aware that the Defendant and the victim dated and eventually got married but that at the time of the victim's disappearance, they were separated. Mitchell

said that the last time he saw the victim, which was a week or so prior to her disappearance, she and the Defendant were at a flea market arguing “[a]ggressively” about a tattoo the victim had just gotten. Mitchell saw the Defendant grab the victim by the arm, so he “intervened and pulled her away from him.” After keeping the Defendant and the victim separated for a few minutes, Mitchell left.

Sergeant Brian Bergenback, who worked in the crime scene unit in August 1997, testified that he went to 1315 Duncan Avenue to collect evidence and take photographs related to the victim’s disappearance. When he arrived, he noticed “a piece of brush sticking out in the rear [of the victim’s Ford Mustang] that . . . looked like maybe it had run over a bush or something.” He photographed the brush wedged in the car’s bumper and collected portions of this brush as evidence. He also took photographs of the Mustang and processed the car for fingerprints, although none were of a suitable quality for comparison testing. He noticed a strong odor of gasoline coming from the Mustang’s interior. The following day, Sergeant Bergenback took samples of the fabric from the interior of the Mustang, which had been towed to the police department, to determine whether there was gasoline present. He also collected a hammer he found in the back seat of the car. Sergeant Bergenback said that although there would be some amount of blood evidence if a person’s throat had been slashed, he did not observe any substances appearing to be blood inside the Mustang.

Sergeant Craig Johnson, who worked in the identification unit in August 1997, testified that although he had no personal recollection of his investigation of the victim’s case, his notes helped him recall some of his duties. On August 18, 1997, he photographed and fingerprinted the Defendant at the police department. In the early morning hours of August 20, 1997, he went to the Defendant’s address with a search warrant to make a crime scene video and to take photographs. He photographed the tire tracks in the Defendant’s backyard because officers were attempting to document the length and width of the tracks with a photographic tape measure. He also photographed some trash bags inside the Defendant’s house and took photographs of the bathroom, bedroom, and kitchen. In addition, he photographed the brush lodged between the bumper and tailpipe of the victim’s Mustang and collected this brush as evidence. He also photographed and processed the Ford Mustang car. Sergeant Johnson said there was no visible blood found inside the Defendant’s home. However, he said the police in 1997 did not have alternative light source technology, which is capable of detecting bodily fluids including blood that is not visible. He said his notes did not show that he measured the wheel base of the victim’s Ford Mustang.

Janice Pruett, the victim’s supervisor at the Chattanooga Housing Authority, testified that the victim had worked for her for approximately a month prior to her disappearance. Pruett knew the Defendant and his family. She was also aware that the

Defendant and the victim were married but separated because the victim and her children were living with the victim's parents. Pruett said the victim was not dating anyone other than the Defendant at the time of her disappearance.

On the Friday before the victim's disappearance, the victim arrived at work and later went to lunch with the Defendant. The victim did not seem excited about the lunch and told Pruett that she intended to stop seeing the Defendant. When the victim returned, she had eleven red roses and a note that stated, "I would like to make love to you all weekend long." That afternoon, the victim took work orders home to put them in numerical order so they could be filed on Monday. That Monday, the victim did not come to work, which was very unusual. Because Pruett was worried, she called the victim's home. She spoke to Wesley Carr, the victim's son, and later spoke to the victim's mother and Kenneth Witherspoon, who were all looking for the victim.

Pruett said the Defendant called her work that Monday morning and asked to speak to the victim, which was strange because the Defendant never called for the victim at that time of day. Pruett told the Defendant that the victim was not at work and asked the Defendant if he knew where the victim could be.

On August 18, 1997, Pruett went to the victim's parents' home to try to determine the victim's whereabouts. She found the work orders inside the victim's car, which had been "doused with gasoline." Pruett also noticed that "[t]here was rubber hanging from the rear tires."

Gene Van Horn, a botanist accepted as an expert in plant identification, testified that the police approached him about identifying a plant in this case. After glancing at the plant they provided, he determined that it was Viburnum, which is found in gardens and is not found growing wild in Tennessee. He said the plant had "an unusual gland on the petiole or leaf stock" and "two streaks at the base of the leaf stock called stipules," which limited it to one species of Viburnum. At that point, the police then took a sample of a plant out of an envelope, and Van Horn opined that it looked exactly like the plant he had just identified. He said the "stem size was the same" and "[e]verything was the same[,]" including the "unusual gland on the leaf stock." Van Horn later sent a letter to Sergeant Phillips opining that the plant and the sample he was shown were from the same species of Viburnum.

Thomas Bodkin, who worked for the Medical Examiner's Office, was accepted as an expert in the field of forensic anthropology. He testified that in May 1999 he examined a cranium brought to him by the police and was able to provide them with an age, sex, and race estimation of the deceased individual. On June 5, 1999, he was part of a team that searched Billy Goat Hill, a "steeply sloped, heavily wooded and vegetated"

area. Bodkin stated that a member of the team discovered the remains of a body on Billy Goat Hill approximately 900 feet from where the cranium had been found at the end of Taylor Street. When the team member announced that he had found something, Bodkin observed four tires placed in a linear orientation. Although there was a lot of trash in the area, including several tires, Bodkin said these tires “were different” because “they were together” as opposed to “the other random tires that were thrown down into the woods.” Upon closer examination, he saw a human rib sticking out from underneath one of these tires.

Once the tires were removed, Bodkin found black plastic, some green material, and the skeletal remains of a body. Photographs were taken of the scapula, ribs, and the entire pelvic girdle, which were still connected. These bones were in the position of someone lying on his or her back. Along with these bones were hair extensions that were black and gold. Bodkin noted that the skeleton had “very little soft tissue” holding it together and that the ligaments were “[v]ery tough.” The mandible, or jaw bone, with the body matched the cranium found at Taylor Street. In addition, four of the teeth recovered from the Billy Goat Hill location fit into the cranium found at Taylor Street. Bodkin was able to determine that these remains belonged to an African-American woman in her late twenties. After examining the victim’s dental x-rays, Bodkin confirmed that the remains belonged to the victim.

Bodkin said that the victim’s cause of death was determined to be an incisional wound to the neck. He said that the victim had a “defect to the back of the mandible on that left side” that looked like “sharp force injury.” While he acknowledged that an incisional wound to the neck could create a large amount of blood, Bodkin said that the amount of blood would depend on what part of the neck was hit.

Sandra Sanchez testified that she dated and lived with the Defendant prior to 1997. She said that on one occasion, the Defendant took her to Billy Goat Hill.

Dr. James Metcalfe, the Hamilton County Chief Medical Examiner, reviewed the victim’s autopsy report. He said the victim’s manner of death was homicide, and her cause of death was an incisional wound to the neck. The victim sustained a stab wound that went from the back of the neck to the front, which would have cut a major artery and would have caused the victim to bleed to death.

Sergeant Justin Kilgore testified that when he was examining cold cases in 2010, he reviewed the victim’s murder. After reviewing this file, he concluded that he needed to talk to Tommy Vaughn, who had been originally interviewed by police on August 19, 1997, and he interviewed Vaughn again in 2010. Sergeant Kilgore also determined that he needed to talk to the victim’s adult children, Wesley Carr and Kajora Beasley, because

they had never been interviewed. When Sergeant Kilgore talked to Wesley Carr, the victim's son, in 2010 he learned about the gasoline incident involving the Defendant and the victim that Carr had witnessed. He also spoke to the Defendant in 2010. Sergeant Kilgore considered the victim's case again in fall 2013 when individuals from the television show "Cold Justice" contacted him about doing a special on the victim's case. He then interviewed Adolphus Mitchell, Orville Hughes, and Sandra Sanchez in 2014. He also decided to test some of the carpet samples taken from the victim's car because they had "some sort of stain on them." Because they did not have a sample of the victim's blood, the police used a buccal swab from the victim's daughter for testing, which was sent to Sorenson Forensics, a private laboratory. Sergeant Kilgore acknowledged that the television production company paid for this testing and that the police department could have obtained the buccal swab from the victim's daughter at any time and sent it to the Tennessee Bureau of Investigation (TBI) for testing.

Orville Hughes testified that he had known the victim since they were children. Prior to her death, the victim lived with her parents on Duncan Avenue, which was "around the corner" from him. Approximately two weeks before the victim disappeared, Hughes, the victim, the victim's parents, and the victim's brother were all on the front porch of the victim's parents' home when the Defendant drove up to the house at an "excessive speed," screamed at the victim, and told her "what he was going to do to her." The Defendant, who was yelling and cursing, said he "was going to kill [the victim], he was going to hurt her family." The Defendant then drove down Duncan Avenue, did a U-turn, and drove back up the street and began "saying the same thing[, that] he's going to kill her, he's going to do this to her." The Defendant then informed the victim that she would not be "coming back home." At the time, the Defendant's ill mother, who was in the car with him, was trying to reason with him, but he would not listen. The Defendant drove up and down the street six or seven times and continued to scream at the victim. Hughes said he "couldn't believe what [he] was seeing." A couple of weeks after this incident, Hughes found out that the victim had disappeared.

TBI Agent Laura Hodge was accepted as an expert in the field of microanalysis. After receiving samples of the carpet and the seats from the victim's car, she determined that all of these samples contained gasoline and some of them contained kerosene.

Sergeant Bill Phillips testified that he was assigned to this case at 4:00 p.m. on August 19, 1997, the day after the victim was reported missing. He said forensic evidence was collected, even though the case was originally classified as a missing person case, because there was evidence indicating foul play.

Sergeant Phillips helped execute the search warrant of the Defendant's home shortly after midnight on August 20, 1997. At the time, officers were looking for the

victim or her body as well as for gasoline containers and “[o]bvious weapons.” The officers found no gas containers or blood at the Defendant’s home but learned that the Defendant had purchased a truck the day the victim disappeared. During his investigation, Sergeant Phillips discovered that the victim had often given the Defendant a ride to work at 5:00 a.m., despite the fact that they were separated. He also noticed tire tracks in the Defendant’s backyard leading to a bush at the back of the Defendant’s home. He said it was clear the car leaving the tracks “had traveled back through this yard and into the bush” because the bush appeared “damaged.” He also knew there was some brush lodged in the bumper of the victim’s car. Sergeant Phillips measured the tire tracks and concluded that they matched the wheel base of the victim’s car. When Dr. Van Horn concluded that the brush samples from the shrub and the car were from the same species of plant, this information confirmed his belief that the victim’s car had recently been in the defendant’s backyard]. Sergeant Phillips stated that the victim’s skull was found on Taylor Street, which was approximately 200 feet below Billy Goat Hill. He described Billy Goat Hill as “almost a one lane very secluded travel type area.” While he acknowledged that some crime scenes contain a substantial amount of blood, he asserted that other crime scenes will not contain much blood. He explained that “[t]he blood doesn’t always come outside the body.”

After reviewing this case several times over the years, Sergeant Phillips believed that the television show “Cold Justice” could provide the necessary resources to solve the victim’s case. Some of the evidence in this case was retested after the television show became involved because the technology had improved since the original testing.

Although Sergeant Phillips admitted that he could have submitted samples from the interior of the victim’s car to the TBI as DNA technology improved, he believed that the sample that tested positive for blood would show that it was the victim’s blood, which would not have helped the police find the victim’s killer. He acknowledged that on January 12, 2014, the television production company arrived in Chattanooga and then on January 22, 2014, the case was presented for the first time to the grand jury, which resulted in the Defendant being indicted on this seventeen-year-old case. He noted that a set of keys was found close to the victim’s car, but the key to the victim’s Ford Mustang was not on this key chain.

The parties stipulated that there was no evidence that the remains of the victim’s body had been burned.

Dr. Sharon Horton-Jenkins, an agent with the TBI, was accepted as an expert in the fields of DNA and serology. When the samples from the victim’s car were submitted to the TBI on June 8, 1999, she conducted the testing and produced a laboratory report in this case on July 27, 1999. She determined that the sample from the left front seat of the

victim's car contained blood. In addition, the sample taken from the right front floor of the victim's car was inconclusive as to whether it contained blood. No blood was found on the other samples. Agent Horton-Jenkins stated that during the period from 1999 to 2008, the TBI was not able to do testing comparing the samples from the victim's car against a buccal swab taken from the victim's child to determine whether the samples contained the victim's blood.

Emily Jeske, an employee of the Sorenson Forensics, was accepted as an expert in the field of DNA comparison. She testified that Sorenson Forensics, an accredited private laboratory, conducted testing for the television show "Cold Justice" and that she tested the samples in the victim's case. After testing a sample from the right front floor section of the victim's car and a buccal swab from the victim's daughter, she concluded that the blood from the floor sample belonged to the victim. Jeske asserted that the television show "Cold Justice" never told Sorenson Forensics about the results that it desired. She asserted that her results were based on her testing and were not dictated by the television show.

Dr. Jennifer Love, who was accepted as an expert in the field of forensic anthropology, conducted a "cut mark analysis" on the victim's jaw bone. She determined that the victim had sustained a cut mark on the jaw around the time of her death that was made with a tool like a knife. The entry wound was below the victim's chin and went in an upward motion. Dr. Love said there was "one continuous passing of the weapon through the bone," and there were no indications of a sawing motion.

ANALYSIS

I. Motion to Amend the Defendant's Indictment. The Defendant contends that the trial court erred in allowing the State to amend his indictment to incorporate new tolling language alleging concealment. He maintains that the amendment amounted to a new and different charge, which required action of the grand jury. He also claims he suffered prejudice because had the trial court not allowed the amendment of the indictment, any attempt by the State to obtain a superseding indictment from a grand jury would have been time-barred by the fifteen-year statute of limitations for second degree murder. Because the amendment did not amount to a new or different charge and because the State would not have been precluded from obtaining a superseding indictment, the Defendant is not entitled to relief.

Here, the original indictment, which was filed on January 22, 2014, provided:

That [the Defendant], heretofore on or before August 18, 1997, in the County aforesaid, did unlawfully, intentionally and with premeditation kill Victoria Hollingsworth, further, the [D]efendant was not usually and publically resident within the state but residing in Alabama from 2004 until 2010 and then in the State of Texas from 2010 to present, in violation of Tennessee Code Annotated 39-13-202, against the peace and dignity of the State.

On October 27, 2014, the State filed a motion to amend the Defendant's indictment pursuant to Tennessee Rule of Criminal Procedure 7(b)(2) and Tennessee Code Annotated section 40-2-103. At the hearing the same day, the State requested that the tolling language regarding the time period the Defendant was outside the State be stricken and replaced with tolling language alleging that the Defendant concealed the offense for a period of time in accordance with Code section 40-2-103. The State noted that the tolling language was significant because it affected the statute of limitations period for the lesser included offense of second degree murder. It also said that while it could show tolling based on the Defendant living in different states, tolling based on the Defendant's concealment of the offense was more appropriate for this case because the victim's body was not discovered until long after she had disappeared. Specifically, the State asked that the old tolling language be amended to show that "the defendant concealed the fact of the crime in that the victim went missing on August 18, 1997 and was not discovered until late May 1999." At the hearing on this motion, the following discussion took place:

THE COURT: Well, this was way beyond clerical error. Unless they agree to it you're going to have to go back to the grand jury I'm afraid.

[PROSECUTOR]: Well, except that he doesn't have to consent and jeopardy is not attached and the Rule 7(b)[(2)] allows that to occur, of the Rules of Criminal Procedure.

THE COURT: [Defense counsel], what do you say to about that?

[DEFENSE COUNSEL]: Well—

THE COURT: I mean, they're going to go back to the grand jury if they have to. So it may just be more expeditious to just say okay. But Rule 7(b)?

[PROSECUTOR]: I believe that would be the 7(b)(2), Your Honor.

THE COURT: Let me look at it.

[PROSECUTOR]: 7(b)(2), [without] the defendant's consent and before jeopardy attaches[,] the Court may permit such an indictment if no additional different offense is charged and no substantial right is prejudiced. It's the same charges. There's nothing prejudice wise [sic] and obviously jeopardy is not attached.

THE COURT: What do you have to say? I think that's probably right.

[DEFENSE COUNSEL]: Judge, my main response to the motion, I think that it does have to be included in the indictment and I think it is also an element of the offense that has to be proven beyond a reasonable doubt. So I think that this would have to be included in the jury charge itself. And for the State to rely or to seek a conviction on second degree murder, they would have to prove this beyond a reasonable doubt. I think it's actually an element of the offense.

THE COURT: That he concealed the crime is an element of the offense?

[DEFENSE COUNSEL]: Yes, it would be, Judge. To get beyond the statute of limitations.

THE COURT: So you're asking—

[DEFENSE COUNSEL]: It's an added element of the offense.

THE COURT: So you don't think this is something I can do without the defendant's consent.

[DEFENSE COUNSEL]: Oh, I think you can amend the indictment at this point. But what I'm saying is that this has to be included in the jury charge and has to be found beyond a reasonable doubt.

THE COURT: Well, we can talk about that when we do the jury charge.

[DEFENSE COUNSEL]: Okay.

THE COURT: And that might be fine. All right, I'm going to sustain the State's motion to amend the indictment then.

The trial court's minute entries from October 27, 2014, and November 17, 2014, show that the court granted the State's motion to amend the indictment. However, the trial court did not enter a written order granting the motion to amend until January 5, 2015. The written order specified that the amended indictment read as follows:

That [the Defendant] heretofore on or before August 18, 1997, in the county aforesaid, did unlawfully, intentionally and with premeditation kill Victoria Hollingsworth, further, that [the Defendant] concealed the facts of the crime in that the body of Victoria Hollingsworth was not discovered until June 5, 1999, in violation of Tennessee Code Annotated 39-13-202, against the peace and dignity of the State.

Although the Defendant was charged with first degree premeditated murder in both indictments, he was convicted of the lesser included offense of second degree murder. The applicable statute of limitations for second degree murder, a Class A felony, is fifteen years from the date of the offense. T.C.A. §§ 39-13-210(c) (second degree murder is a Class A felony), 40-2-101(b)(1) ("Prosecution for a felony offense shall begin within . . . [f]ifteen (15) years for a Class A felony[.]"). "The statute of limitations relates to the time period between the commission of the offense and the beginning of prosecution." State v. Kennedy, 10 S.W.3d 280, 284 (Tenn. Crim. App. 1999) (citing State ex. rel Lewis v. State, 447 S.W.2d 42, 43 (Tenn. Crim. App. 1969)). In this case, prosecution began with the return of the original indictment. See T.C.A. § 40-2-104.

In the case at bar, both the original and amended indictments stated that the offense occurred on August 18, 1997. Therefore, both the original indictment filed on January 22, 2014, and the amended indictment were brought after the applicable limitations period for second degree murder had expired. We recognize that "an accused who is tried for a felony, which is not barred by the statute of limitations, may not be convicted of a lesser included offense which is barred by the statute." State v. Seagraves, 837 S.W.2d 615, 619 (Tenn. Crim. App. 1992), abrogation on other grounds recognized by State v. Doane, 393 S.W.3d 721, 732 (Tenn. Crim. App. 2011). However, "where the indictment is brought after the period of limitations has expired, it must be pleaded and proved that certain specific facts toll the statute of limitations." State v. Davidson, 816 S.W.2d 316, 318 (Tenn. 1991) (citing State v. Comstock, 326 S.W.2d 669, 671 (Tenn.

1959)). The tolling statute provides, “No period during which the party charged conceals the fact of the crime, or during which the party charged was not usually and publicly resident within the State, is included in the period of limitation.” T.C.A. § 40-2-103. Here, both the original indictment and the amended indictment had tolling language. The victim’s murder occurred on August 18, 1997, but the original indictment was not issued until January 22, 2014. This covered a period of 16 years, 5 months, and 4 days, which was 1 year, 5 months, and 4 days beyond the fifteen-year statute of limitations for second degree murder. However, the tolling language in the original indictment stated that the Defendant was not a resident of this state from 2004 to 2010 and from 2010 to 2014, which effectively tolled the statute of limitations for approximately ten years. Consequently, the original indictment was timely. In addition, the amended indictment was entered on January 5, 2015. The amended indictment contained tolling language stating that the Defendant concealed the crime from the date of the victim’s murder, August 18, 1997, until the date her body was discovered, June 5, 1999, which effectively tolled the statute of limitations for a period of 1 year, 9 months, and 18 days. Therefore, the amended indictment, which charged the same offense as the original indictment and included the concealment tolling language, also tolled the fifteen-year statute of limitations for second degree murder because the amendment related back to the time of filing the indictment, namely January 22, 2014, the date the original indictment was issued. See Kennedy, 10 S.W.3d at 284-85.

We have previously held that when determining whether a prosecution was commenced within the statute of limitations, an amendment to an indictment relates back to the time of filing the indictment so long as the amendment does not charge a new offense. Kennedy, 10 S.W.3d at 284-85. The original indictment stated that the Defendant had resided outside the state for several years, thereby tolling the statute of limitations. The amended indictment, which did not charge a new offense and included the concealment tolling language, also tolled the statute of limitations because the amendment related back to the time of filing the indictment, namely January 22, 2014, the date the original indictment was issued.

The record shows that the Defendant consented to this amended indictment pursuant to Tennessee Rule of Criminal Procedure 7(b)(1), or at the very least, that the indictment was amended without the defendant’s consent pursuant to Tennessee Rule of Criminal Procedure 7(b)(2). As we will explain, no additional or different offense was charged and no substantial right of the Defendant was prejudiced pursuant to Rule 7(b)(2) because the Defendant had notice that he was charged with first degree premeditated murder as well as the lesser included offense of second degree murder in the original indictment, which was timely, and the State could have obtained a superseding indictment. State v. Nielsen, 44 S.W.3d 496, 500 (Tenn. 2001) (citations omitted) (internal quotation marks omitted) (“A superseding indictment brought after the statute of

limitations has expired is valid so long as the original indictment is still pending and was timely and the superseding indictment does not broaden or substantially amend the original charges[.]”).

First, the Defendant maintains that allowing the State to amend his indictment violated Tennessee Rule of Criminal Procedure 7(b). Rule 7(b) states that an indictment may be properly amended in one of two ways:

(1) With Defendant’s Consent. With the defendant’s consent, the court may amend an indictment, presentment, or information.

(2) Without Defendant’s Consent. Without the defendant’s consent and before jeopardy attaches, the court may permit such an amendment if no additional or different offense is charged and no substantial right of the defendant is prejudiced.

Tenn. R. Crim. P. 7(b). For an indictment to be amended pursuant to Rule 7(b)(1), “an oral or written motion to amend the indictment should be made, and the defendant’s oral or written consent to the motion must be clear from the record.” State v. Stokes, 24 S.W.3d 303, 307 (Tenn. 2000). In addition, before jeopardy attaches, a trial court may allow an indictment to be amended without the defendant’s consent “if no additional or different offense is charged and no substantial right of the defendant is prejudiced.” Tenn. R. Crim. P. 7(b)(2).

The Defendant claims that the trial court erred in allowing the State to amend the indictment pursuant Rule 7(b)(1) because he did not consent to the amendment. However, during the discussion of this issue at the October 27, 2014 pretrial hearing, defense counsel stated, “Oh, I think you can amend the indictment at this point.” The record shows the trial court interpreted this statement as consent when it almost immediately replied, “All right, I’m going to sustain the State’s motion to amend the indictment then.” Moreover, defense counsel approved and signed the Indictment Amendment order entered by the trial court on January 5, 2015. This court has held that a defense counsel’s signature on an order amending an indictment is indicative of a defendant’s consent under Rule 7(b)(1). See Bobby A. Davis v. Howard Carlton, Warden, No. E2007-01279-CCA-R3-HC, 2008 WL 299067, at *5 (Tenn. Crim. App. Feb. 4, 2008) (citing Tenn. R. Crim. P. 7(b)) (rejecting the Petitioner’s argument that his conviction was void due to an improperly amended indictment when “the order of the

trial court amending the indictment contain[ed] the signatures of both the district attorney and the petitioner's trial counsel, indicating that the petitioner agreed to the amendment"). Therefore, we conclude that the Defendant, through counsel, consented to the amendment and that the indictment was properly amended pursuant to Rule 7(b)(1).

The Defendant also asserts that even if defense counsel "[a]rguably" consented to this amendment, the record shows that "the court's push for judicial efficiency over procedural fairness put any such consent under duress." He cites Spaziano v. Florida, 468 U.S. 447, 455 (1984), overruled on other grounds by Hurst v. Florida, 136 S. Ct. 616, 624 (2016), for the proposition that a criminal defendant may not be forced to waive a substantive right, such as a right to a statute of limitations defense, as a condition for receiving a constitutionally fair trial. In Spaziano, the Court held that the trial court did not err in refusing to instruct the jury on the lesser included offenses of capital murder when the petitioner was given the option of waiving the statute of limitations defense on these lesser included offenses and knowingly declined to do so. Id. at 456-57. Here, the Defendant claims that "any potential consent to an indictment amendment" cannot be seen as valid when "the [trial] court pressured [defense counsel] to accept the changes for judicial efficiency." He adds that the trial court "should have indulged in any assumption against the waiver of his right to the statute of limitations by requiring the indictment to be sent by to the grand jury."

At the hearing on the State's motion to amend the indictment, defense counsel argued that the State's proposed amendment substantially changed the elements that had to be proven beyond a reasonable doubt at trial, and the State responded that it was proposing the amendment to stay within the statute of limitations for second degree murder. The trial court noted that the State would simply go back to the grand jury if necessary but that it might be "more expeditious" to agree to the amendment. Although the Defendant argues on appeal that defense counsel agreed to the amendment of the indictment under duress, he never raised the issue of duress in his the motion for new trial, and this claim is not supported by the record. See Tenn. R. App P. 3(e) ("[I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in . . . [any] ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived."); see also State v. Martin, 940 S.W.2d 567, 569 (Tenn. 1997) (holding that a defendant loses the opportunity to argue on appeal any issues that should have been presented in a motion for new trial but were not raised in said motion). In any event, the record does not show that defense counsel was under duress when he consented to the amended indictment or that the court in any way coerced defense counsel into accepting the amendment.

Alternatively, the Defendant contends that while defense counsel may have consented, he did not personally consent to the amended indictment as required under

Rule 7(b)(1). Citing Johnson v. State, 834 S.W.2d 922, 924 (Tenn. 1992), James Francis Lorenz v. State, No. M2008-02205-CCA-R3-PC, 2010 WL 681389, at *5 (Tenn. Crim. App. Feb. 26, 2010), and Tucker v. Hardin County, 448 F. Supp. 2d 901, 908 (W.D. Tenn. 2006), he likens consent required under Rule 7(b)(1) to the “knowing and voluntary” standard required for a guilty plea. The Defendant asserts that because he was never informed that “consenting” to the amendment of the indictment for judicial efficiency meant that he waived his right to assert a statute of limitations defense, his consent through defense counsel was not knowing and voluntary and, therefore, violated due process.

Because Johnson, James Francis Lorenz, and Tucker concerned whether a petitioner entered a knowing and voluntary guilty plea, the Defendant’s reliance on these cases is misplaced. We have already noted that a defense counsel’s signature on an order amending an indictment is indicative of a defendant’s consent under Rule 7(b)(1). Moreover, to the extent that the Defendant claims he should have been required to sign a written waiver allowing the amendment to the indictment and waiving his right to a statute of limitations defense, we conclude that he is not entitled to relief. See Stokes, 24 S.W.3d at 303 (holding that the defendant’s oral or written consent to the motion to amend the indictment must be clear from the record (emphasis added)). In this case, the defendant’s oral consent to the amendment is clear from the record.

The Defendant, proceeding on the theory that he did not consent to the amendment under Rule 7(b)(1), next argues that “the proposed amendment was not just a clerical change, as was noted by the trial court, but instead broadened and substantially changed the charges set forth in the original indictment contrary to Rule 7(b)([2]) and Goodson.” Even assuming, arguendo, that defense counsel’s statement did not constitute the “clear” consent required under Rule 7(b)(1), we conclude that the trial court was nevertheless authorized to grant the amendment pursuant to Rule 7(b)(2). Rule 7(b)(2) provides that the trial court may permit an amendment to the indictment “[w]ithout the defendant’s consent and before jeopardy attaches,” if “no additional or different offense is charged and no substantial right of the defendant is prejudiced.” Tenn. R. Crim. P. 7(b)(2).

Initially, we note that in Goodson, the defendant argued the evidence was insufficient to sustain his conviction because it varied fatally from the offense charged in the indictment. State v. Goodson, 77 S.W.3d 240, 243 (Tenn. Crim. App. 2001). In that case, the defendant was indicted for driving on a revoked license but the evidence established that he was driving on a suspended license, and this court held that the proof presented regarding his suspended driving status constituted a constructive amendment of the indictment because it broadened the grounds for conviction. Id. at 244-45. The court in Goodson held that “after an indictment has been returned, its charge may not be broadened or changed except by action of the grand jury.” Id. at 244 (citing U.S. Const.

amend. V; Tenn. Const. art. I, § 14; United States v. Miller, 471 U.S. 130, 148 (1985); Stirone v. United States, 361 U.S. 212, 215 (1960)). Because Goodson involved a fatal variance between the charge and the proof presented at trial, we do not find it relevant to the issues in this case.

Here, it is undisputed that the amendment to the indictment, which occurred before the jury had been sworn, was made before jeopardy attached. The Defendant asserts that this amended indictment charged him with an additional or different offense because the new tolling language required the element of concealment to be pleaded and proven at trial. He further asserts that allowing the State to amend the indictment prejudiced his substantial right to have the grand jury make the charge on its own judgment and to be protected by the fifteen-year statute of limitations for second degree murder. See T.C.A. § 40-2-101(b)(1).

While the Defendant asserts that the modification of the tolling language in the amended indictment amounted to a substantial modification of the charged offense, the trial court at the motion for new trial hearing rejected this argument. The trial court reasoned both indictments charged the Defendant with first degree premeditated murder and that the Defendant had sufficient notice of the charge against him. We agree that the amended indictment did not charge the Defendant with an additional or different offense. The original and amended indictments involved the same case number, the same victim, the same offense of first degree premeditated murder, and the same date of the offense. Under both indictments, the Defendant was on notice that he could be found guilty of second degree murder if the State proved specific facts tolling the statute of limitations, regardless of whether the tolling was based on out-of-state residency or concealment. Therefore, we conclude that the amended indictment did not charge an additional or different offense.

Finally, the Defendant asserts that allowing the State to amend the indictment prejudiced his substantial right to have the grand jury make the charge on its own judgment and to be protected by the statute of limitations for second degree murder. He claims that had the trial court not allowed the amendment to the indictment, any attempt to obtain a superseding indictment from the grand jury would have been time-barred by the fifteen-year statute of limitations for Class A felonies.

In considering this issue, we note that the purpose of the limitations period “is to protect a defendant against delay and the use of stale evidence and to provide an incentive for efficient prosecutorial action in criminal cases.” Nielsen, 44 S.W.3d at 499 (citing State v. Pearson, 858 S.W.2d 879, 886 (Tenn. 1993)). We also note that statutes of limitations are construed “liberally in favor of the criminally accused.” State v. Ferrante, 269 S.W.3d 908, 911 (Tenn. 2008) (citing State v. Henry, 834 S.W.2d 273, 276

(Tenn.1992)). Nevertheless, we recognize that “[a] superseding indictment brought after the statute of limitations has expired is valid so long as the original indictment is still pending and was timely and the superseding indictment does not broaden or substantially amend the original charges[.]” Nielsen, 44 S.W.3d at 500 (citations omitted) (internal quotation marks omitted). Because the original indictment was timely pursuant to the tolling language and still pending, the State could have obtained a superseding indictment from the grand jury after the expiration of the fifteen-year limitations period for second degree murder. See id. Therefore, the amended indictment did not prejudice a substantial right of the Defendant’s for the purposes of Rule 7(b)(2). The Defendant is not entitled to relief.

II. Motion to Dismiss for Failure to Preserve Evidence. The Defendant also argues that the trial court erred in denying his motion to dismiss the indictment based on the State’s failure to preserve the victim’s car, a 1988 Ford Mustang. He states that “[a]t the time of trial,” his attorney asked to examine the victim’s car but was told the car had been returned to the victim’s family and was no longer in the possession or control of law enforcement. Citing State v. Ferguson, 2 S.W.3d 912, 917 (Tenn. 1999), the Defendant contends that the State had a duty to preserve this evidence, which contained the only blood found, because it might have been expected to play a significant role in his defense. He also claims that the return of this car prejudiced his right to a fair trial because it made it impossible “to examine and test the remaining interior of the vehicle, [to] measure the width of the tire track and actual tires on the vehicle, and to examine the condition of the car’s bumper” where police claimed they discovered foliage matching foliage from his backyard. Finally, he asserts that any photographs of the car and its tires are not reliable substitute evidence and that the car may have contained DNA evidence of a third party, which is now unavailable to him. We conclude that the trial court properly denied the Defendant’s motion to dismiss.

On October 2, 2014, the Defendant filed a motion to dismiss, or alternatively, a motion to suppress evidence related to the forensic testing, measurement, or photography of the victim’s 1988 Ford Mustang based on the State’s failure to preserve potentially exculpatory evidence in or on this car. In this motion, the Defendant alleged that the State failed to keep in its custody the victim’s car, which was released to a member of the victim’s family after it was processed by police.

At the hearing on this motion, Sergeant Bill Phillips testified that the victim’s 1988 Ford Mustang was seized from her parents’ house on the morning of August 18, 1997. He said this car had a “very strong” odor of some type of gasoline product, and samples of the interior were taken to identify the cause of this smell. There were also stains on portions of the interior, so samples were also taken of these areas to determine whether they were blood stains. All of these samples were forwarded to the TBI for

testing. In addition, some foliage that was lodged between the frame and the bumper of this car was also collected for testing. The police also took measurements of indentations and tire tracks that had been left in the Defendant's backyard, and the measurements of the Mustang's wheel base were compared to these measurements. The car was also dusted for fingerprints.

Sergeant Phillips said that after the victim's Mustang was processed, it was released to the victim's family. Although he did not know to whom the car was released, he said that this information was documented in the case file. He stated that it was "common procedure" for a car to be released from police custody after it was processed. He explained that the police department processed over 100 cars a year and did not have the space to store all of these cars.

While photographs were taken of officers measuring the tire tracks in the Defendant's backyard, Sergeant Phillips was unsure whether a report had been made about the width of the Mustang's wheel base. He also was unsure whether photographs of the Mustang's wheel base had been taken while it was in the processing bay. When asked if there was a way to independently measure the width of the wheel base of the victim's car, Sergeant Phillips stated, "We could go back and look at manufacturer's records and see what the wheel base is." He opined that the model of the victim's car would likely be determined from photographs taken of the car while it was in police custody.

Sergeant Phillips confirmed that he obtained a warrant to search the Defendant's residence around 12:20 a.m. on August 20, 1997. During this search, crime scene investigators took measurements of the tire tracks in the Defendant's backyard, and these tracks were later determined to be consistent with the width of the wheel base of the victim's Mustang. He said that the victim's car was seen at her parents' home around 9:00 a.m. on August 18, 1997, the day the victim was reported missing, and the car did not move until it was seized by police. Based on this evidence, Sergeant Phillips believed that sometime prior to 9:00 a.m. on August 18, 1997, the victim's Mustang had been in the Defendant's backyard and had left tire impressions that were still visible at 12:20 a.m. on August 20, 1997. He said the tire tracks led to a section of the yard where there was a shrub, and some foliage from this shrub was found in the back bumper of the Mustang.

Photographs were taken of the interior and exterior of the Mustang as well as the brush that was lodged in the bumper of the car. All of the samples from the interior of the car, the samples of the brush that was removed from the Mustang's bumper, and the samples taken from the bush in the Defendant's yard were still in existence. In addition, the case file contained the Vehicle Identification Number (VIN), from which the make

and model of the car could be determined. Sergeant Phillips added that any modification of the car's tracks or wheel base would be evident from the photographs taken of the car.

After hearing arguments from the parties, the trial court orally denied the motion, and the trial court's minute entry from October 27, 2014, also indicated that the motion to dismiss was heard and overruled. In denying the motion, the trial court found that the defense could call a rebuttal witness to testify about the wheel base of victim's car based on independent measurements of the same model car. The court also offered to provide the defense with the necessary funds to locate another 1988 Ford Mustang of the same model for independent measurement.

State v. Ferguson governs claims regarding the State's duty to preserve potentially exculpatory evidence. 2 S.W.3d at 915-17. The proper inquiry is "[w]hether a trial, conducted without the [lost or] destroyed evidence, would be fundamentally fair." State v. Merriman, 410 S.W.3d 779, 785 (Tenn. 2013) (quoting Ferguson, 2 S.W.3d at 914). When a defendant makes a Ferguson claim, the trial court first must "determine whether the State had a duty to preserve the evidence." Id. The State has a general duty to preserve all evidence subject to discovery and inspection under Tennessee Rule of Criminal Procedure 16, and other applicable law, including Brady v. Maryland, 373 U.S. 83 (1963). Id. (citing Ferguson, 2 S.W.3d at 917). "[T]he State's duty to preserve evidence is limited to constitutionally material evidence described as 'evidence that might be expected to play a significant role in the suspect's defense.'" Id. (quoting Ferguson, 2 S.W.3d at 917). To be constitutionally material, "the evidence must potentially possess exculpatory value and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Id. (footnote omitted) (citing Ferguson, 2 S.W.3d at 915, 918).

If the proof establishes the existence of a duty to preserve and further shows that the State has failed in that duty, the trial court must conduct a balancing analysis involving consideration of the following factors: (1) the degree of negligence involved, (2) the significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available, and (3) the sufficiency of the other evidence used at trial to support the conviction. Id. (citing Ferguson, 2 S.W.3d at 917). The trial court must balance these factors to determine whether a trial without the missing evidence would be fundamentally fair. Id. (citing Ferguson, 2 S.W.3d at 917). "If the trial court concludes that a trial would be fundamentally unfair without the missing evidence, the trial court may then impose an appropriate remedy to protect the defendant's right to a fair trial, including, but not limited to, dismissing the charges or providing a jury instruction." Id. at 785-86 (citing Ferguson, 2 S.W.3d at 917).

This court, in reviewing a trial court's decision regarding the fundamental fairness of a trial conducted without the missing evidence, applies a de novo standard of review. Id. at 791. However, the trial court's findings of fact are entitled to substantial deference on appeal and are conclusive unless the evidence preponderates against them. See id. (citing Tenn. R. App. P. 13(d); Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997)).

This case involves a unique set of circumstances. Although the victim's car was collected as evidence on August 19, 1997, it was released to the victim's family at some point thereafter, and the Defendant was not charged in the victim's death until January 22, 2014. Nevertheless, we agree with the trial court that a trial conducted without the missing evidence would be fundamentally fair. In reaching this conclusion, we emphasize that the victim's car was not destroyed or lost but was merely returned to the victim's family pursuant to the police department's policy. Sergeant Phillips testified that it was "common procedure" for automobiles to be released from police custody after they were processed because the police department did not have the space to store all these cars. We also recognize that the State is not required to collect evidence according to a particular method. See State v. Ethan Alexander Self, No. E2014-02466-CCA-R3-CD, 2016 WL 4542412, at *50 (Tenn. Crim. App. Aug. 29, 2016) (concluding that the State did not have an obligation under Ferguson to collect alarm clocks, which could have led to an inference regarding the victim's time of death given that both alarms were set and one alarm was sounding at the time the victim's body was discovered, because the police collected and preserved this evidence by writing down the pertinent information regarding the alarm clocks in their notes), perm. app. filed (Tenn. Oct. 28, 2016). The record shows that the police did a thorough processing of the car, took samples of all portions of the car thought to contain evidence in the victim's disappearance, and these samples were still in existence and could have been independently tested prior to the Defendant's trial.

Even if we held that the State had a duty to preserve this car, we conclude after conducting the balancing test in Ferguson that the Defendant was not denied a fundamentally fair trial without this evidence. First, as we have mentioned, the State was not negligent in failing to preserve this evidence. Although there was a lengthy delay between the crime and the defendant's indictment, we do not believe that the police department was required to preserve the victim's car from 1997 to 2014, and there is no evidence that the police department acted in bad faith when it eventually released the car to the victim's family after processing it.

Second, this missing evidence was not particularly significant, especially in light of the abundant secondary or substitute evidence, including but not limited to the numerous photographs of the interior and exterior of the victim's car, the photographs with tape measures showing the width of the tire tracks in the Defendant's backyard, the

existing samples from the interior of the victim's car, the testing results from the TBI and Sorenson Forensics that were provided to the Defendant, and the existing samples of the foliage taken from the bumper of the victim's car and of the foliage removed from the Defendant's backyard. The Defendant merely speculates that the victim's car would have in some way yielded exculpatory evidence. We have previously held that "[t]he mere possibility of exculpatory content does not trigger a finding that the State failed in its general duty to preserve evidence under Ferguson." State v. Ronnie D. Sims, No. M2004-02491-CCA-R3-CD, 2005 WL 3132441, at *8 (Tenn. Crim. App. Nov. 22, 2005) (citation omitted).

Third, there was sufficient other evidence presented at trial to support the Defendant's conviction for second degree murder. The State presented proof showing that the Defendant and the victim had a dispute in his backyard in the early morning hours of August 18, 1997, that the victim's car had been present in the Defendant's backyard shortly before she disappeared, and that the victim's car smelled strongly of gasoline. Several witnesses testified that the Defendant had acted violently toward the victim in the past, and the victim's son described an incident in which the Defendant poured gasoline on the victim's face. Even if third party DNA was found inside the victim's car, it would not have explained the other substantial evidence of the Defendant's guilt. After considering and balancing the Ferguson factors, we conclude that the Defendant's trial without this proof was not fundamentally unfair and that the trial court did not err in denying the motion to dismiss.

III. Motion to Suppress for Insufficient Search Warrant. Next, the Defendant contends that the trial court erred in denying his motion to suppress the evidence recovered from the search of his residence on August 20, 1997. He maintains that the search warrant was issued without probable cause because the supporting affidavit did not contain direct information connecting the objects of the search with his residence. He also claims it was unreasonable for the magistrate to conclude that there would be items related to the victim's disappearance at his home because the affidavit "did not state that criminal activity occurred at [his] residence or that the fruits of the search were observed there." We conclude that the Defendant is not entitled to relief because the affidavit in support of the search warrant created a sufficient nexus among the criminal activity, the Defendant's house, and the items to be seized.

When reviewing a trial court's findings of fact and conclusions of law on a motion to suppress evidence, this court is guided by the standard of review recognized in State v. Odom, 928 S.W.2d 18 (Tenn. 1996). Pursuant to this standard, a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise. Id. at 23. The prevailing party in the trial court "is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and

legitimate inferences that may be drawn from that evidence.” Id. Moreover, “[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact.” Id. Despite the deference given to trial court’s findings of fact, this court reviews the trial court’s application of the law to the facts de novo with no presumption of correctness. State v. Montgomery, 462 S.W.3d 482, 486 (Tenn. 2015) (citing State v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001)); State v. Day, 263 S.W.3d 891, 900 (Tenn. 2008) (citing State v. Williams, 185 S.W.3d 311, 315 (Tenn. 2006); State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997)). When reviewing the correctness of a trial court’s ruling on a motion to suppress, this court may consider not only the evidence presented at the suppression hearing but also the evidence adduced at trial. State v. Henning, 975 S.W.2d 290, 297 (Tenn. 1998)).

The United States and Tennessee Constitutions state that search warrants shall issue only upon probable cause. U.S. Const. amend. IV; Tenn. Const. Art. 1, § 7. “A sworn and written affidavit containing allegations from which a magistrate may determine whether probable cause exists is an ‘indispensable prerequisite’ to the issuance of a search warrant.” State v. Saine, 297 S.W.3d 199, 205-06 (Tenn. 2009) (quoting Henning, 975 S.W.2d at 294). “The affidavit must present facts upon which ‘a neutral and detached magistrate, reading the affidavit in a common sense and practical manner,’ can determine the existence of probable cause for the issuance of a search warrant.” State v. Carter, 160 S.W.3d 526, 533 (Tenn. 2005) (quoting Henning, 975 S.W.2d at 294). The affidavit must contain more than the affiant’s conclusory allegations. Saine, 297 S.W.3d at 206 (citing Henning, 975 S.W.2d at 294).

“To establish probable cause, the affidavit must show a nexus among the criminal activity, the place to be searched, and the items to be seized.” Id. at 206 (citing State v. Reid, 91 S.W.3d 247, 273 (Tenn. 2002); State v. Smith, 868 S.W.2d 561, 572 (Tenn. 1993)). When determining whether a sufficient nexus has been established, we “‘consider whether the criminal activity under investigation was an isolated event or a protracted pattern of conduct[,] . . . the nature of the property sought, the normal inferences as to where a criminal would hide the evidence, and the perpetrator’s opportunity to dispose of incriminating evidence.’” Id. (quoting Reid, 91 S.W.3d at 275) (citing Smith, 868 S.W.2d at 572). The probable cause determination made by a neutral and detached magistrate is entitled to great deference by a reviewing court. Id. at 207 (citing State v. Jacumin, 778 S.W.2d 430, 431-32 (Tenn. 1989)).

On August 20, 2014, the Defendant filed a motion to suppress evidence seized during a search of his residence on August 20, 1997. This search warrant, which was issued on August 19, 1997, directed Officer Tim Carroll of the Chattanooga Police Department to conduct a search of the Defendant’s house located at 3214 Fourth Avenue.

During this search, officers found a damaged shrub from the Defendant's backyard as well as a fire extinguisher and a red jacket in the Defendant's newly purchased truck. A non-evidentiary hearing was held on September 11, 2014. After hearing arguments from counsel, the trial court took the matter under advisement, and entered a written order denying the motion to suppress on September 17, 2014.

In its order, the trial court made the following factual findings and conclusions of law in support of its denial of the motion to suppress:

The affidavit in issue, which contains partly corroborated information from presumptively reliable sources, establishes several facts. First, on 18 August 1997, the victim's mother and brother reported her missing.

Second, it was unlikely that the victim's disappearance was voluntary. She had young children. She had a new job about which she was very excited. She did not take her vehicle.

Third, the victim's vehicle, though, unlike her keys, it was not missing, was in an unusual condition. There was an overwhelming odor of gasoline inside, there was a large piece of brush under a rear panel near the exhaust, and there were keys other than the car keys in the vicinity.

Fourth, about three weeks before, the victim had called a police officer about obtaining an order of protection from the defendant. The officer drove her to circuit court, where a clerk told her that she needed more documentation on prior incidents involving the defendant.

Fifth, by the defendant's own account, the victim was due to take him to work at 5:00 a.m. Between 5:00 and 5:30 a.m., a neighbor of the defendant, who did not know him or the victim, overheard a loud argument from the direction of the defendant's house and looked out the front door. The neighbor heard a female voice yell, "Give me my . . . keys!" Five or ten minutes later, the neighbor heard a loud car leaving from the same vicinity and traveling south on 4th Avenue. A short time later, she heard what sounded like the same car traveling north on 4th Avenue.

Sixth, about 9:00 a.m., the defendant's supervisor paged her. Thereafter, the defendant telephoned the victim's workplace.

Seventh, when, after asking for the victim and being told that she was not there, the defendant asked when the victim was due, the supervisor, having recognized the defendant's voice, was unwilling to tell him and told him that she did not know.

Eighth, about 9:00 a.m., the defendant arrived at a friend's house. The friend accompanied him to a used-car lot, where the defendant purchased a red pickup [truck].

These facts constitute probable cause to believe that, on the morning of 18 August 1997, the victim drove to the defendant's house to take him to work, as arranged, the defendant and the victim were overheard arguing loudly there, the defendant confined, injured, or killed the victim, who was not seen or heard again, the defendant disposed of any body, the defendant used gasoline to remove or mask evidence from or in the victim's car, and the defendant returned the victim's car smelling strongly of gasoline. Thus, the affidavit establishes a connection between the defendant's house and the victim's involuntary disappearance; it establishes that the house was the point of disappearance. It follows that there was probable cause to continue the search for the victim and physical evidence relating to her disappearance and the condition of her vehicle at the defendant's house.

Because the affidavit in this case "did not contain direct information connecting the objects of the search with [the Defendant's] residence," we must determine "whether it was reasonable for the magistrate to infer that the items of contraband listed in [the] affidavit would be located in [the Defendant's] residence." *Id.* at 206. The affidavit stated that on August 18, 1997, the victim's mother arrived at her home to find both of the victim's children alone and the victim missing. When the victim's mother opened the door of the victim's car, which was parked in the driveway of the home, the smell of gasoline overwhelmed her. She also saw that a large piece of brush was lodged between the bumper and the exhaust pipe. Although there was a set of keys near the car, this set did not contain the keys to the victim's car. The morning of August 18, 1997, the Defendant arrived at the victim's home looking for the victim. He told the victim's brother that the victim was supposed to have driven him to work that morning, but she never arrived. The Defendant did not appear upset that the victim was missing or that her children had been found alone in her home. Sandra Jones, the Defendant's neighbor, told

police that at 5:00 or 5:30 a.m. on August 18, 1997, she heard a loud argument coming from the direction of the Defendant's home and heard a female voice yell, "[G]ive me my f[-----] keys!" Approximately five to ten minutes later, Jones heard a loud car leaving from this area and heading south on Fourth Avenue. Shortly thereafter, she heard the same car traveling north on Fourth Avenue. The Defendant, during his interview with police on August 19, 1997, disclosed that the victim was supposed to pick him up for work at 5:00 a.m. on August 18, 1997, but she failed to appear. When Tommy Vaughn, the defendant's friend, was interviewed, he stated that the Defendant arrived at his home around 9:00 a.m. on August 18, 1997, and informed him that the victim failed to pick him up for work that morning. Shortly thereafter, Vaughn went with the Defendant to a used car lot, where the Defendant purchased a red truck. Vaughn told the police that he thought it odd that the Defendant had not reported the victim missing and said that he told the Defendant to contact the police. Officer John Carter stated that three weeks prior to the victim's disappearance, he had tried to assist the victim in obtaining an order of protection against the Defendant. Jan Pruett, the victim's supervisor, stated the Defendant was possessive of victim and called work looking for the victim at 9:00 a.m. on August 18, 1997. During this phone conversation, the Defendant told Pruett that the victim had not picked him up for work that morning and asked Pruett to have victim to call him as soon as she came in. Pruett stated that the victim would not have failed to show up at her new job and would not have abandoned her two children. From these facts contained within the affidavit, the magistrate could reasonably infer that evidence related to the victim's disappearance was located at the Defendant's residence. As we noted, this court gives great deference to the probable cause determination made by a magistrate. See id. at 207. In applying this standard of review, we conclude that the facts in the affidavit established a substantial basis on which the magistrate could conclude that proof of the Defendant's involvement in the victim's disappearance or death would be found at the Defendant's home. See id. Accordingly, we conclude that the search warrant for the Defendant's residence was supported by probable cause.

IV. Motion to Exclude Forensic Testing. The Defendant further avers that the trial court erred in denying his motion to exclude the forensic testing performed by Sorenson Forensics. He claims that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice and that "allowing forensic DNA testing paid for by a [television] company that is in partnership with the lab . . . amounts to a gross infringement of his Due Process rights[.]"

On October 2, 2014, the Defendant filed a motion to exclude the results of forensic testing performed by Sorenson Forensics, a private DNA testing and crime laboratory in Salt Lake City, Utah, which determined that the victim's blood was present on one of the samples from the victim's car. Noting that previous testing on this sample by the TBI in July 1999 was inconclusive, the Defendant argued that admission of the forensic testing

would violate his due process rights because the “partnership and pricing agreement” between the television production company and Sorenson Forensics created “a bias” that directly affected “the admissibility, and not merely the weight, of the evidence.”

At the October 27, 2014 hearing on this motion, Sergeant Bill Phillips confirmed that the television show “Cold Justice” expressed interest in the victim’s case. On January 12, 2014, the show’s production team came to Chattanooga, Tennessee to begin their investigation, and the episode regarding the victim’s case aired on March 7, 2014.

On January 7, 2014, samples from the seat and carpet of the victim’s car were sent to Sorenson Forensics in anticipation of potentially using the results on the show. A buccal swab from the victim’s daughter was also submitted to Sorenson Forensics. The TBI had previously tested the samples from the interior of the victim’s car in 1999, and one of the samples tested positive for the presence of human blood, but another sample was “inconclusive for the presence of blood.”

Sergeant Phillips acknowledged that the testing performed by Sorenson Forensics was done in connection with the television show’s investigation into the victim’s death. He stated that the television production company for the show had a contract with Sorenson Forensics to receive expedited testing results. He was also aware that the television production company paid for the testing conducted by Sorenson Forensics in January 2014. Sergeant Phillips said that although these samples could have been sent to the TBI for DNA testing, it could take “several months, maybe more than a year” to receive the results from the TBI, and the results would not have arrived in time for the television show’s investigation of the case. He acknowledged that the Defendant was indicted on January 22, 2014, shortly after the television production company arrived in Chattanooga.

Sergeant Phillips confirmed that the only sample tested by Sorenson Forensics that was not tested by TBI was the buccal swab from the victim’s daughter. He said testing technology had improved since the TBI’s testing of the samples in 1999. He also said Sorenson Forensics never indicated to him that its testing would produce a specific result. Sergeant Phillips confirmed that Sorenson Forensic’s report on the test results was in the possession of the police department and was made available to the defense. He added that the sample from the victim’s daughter was also made available to the defense.

Sergeant Phillips acknowledged that he could have sent the sample from the victim’s daughter to the TBI at any time and that the only reason the samples were sent to a private laboratory rather than the TBI in the present case was that the television production company needed expedited results in anticipation of its crew’s arrival in Chattanooga.

At the hearing, defense counsel argued that the relationship between Sorenson Forensics and the “Cold Justice” production company, the fact that the testing was paid for by this production company, and that the testing was done in anticipation of the production company’s arrival in Chattanooga rendered the testing results highly prejudicial and affected the admissibility of this evidence. At the conclusion of this hearing, the trial court orally overruled the Defendant’s motion to exclude, reasoning that the relationship between the production company and Sorenson Forensics affected the weight, rather than the admissibility, of the forensic evidence. The court stated, “Of course[,] they’re going to have to establish that they’re following proper protocols and [will have] to meet all the standards of an expert.” The court’s October 27, 2014 minute entry confirmed that the motion to exclude this evidence was overruled.

Here, the Defendant does not challenge the validity of the testing procedures utilized by Sorenson Forensics or the accuracy of its results. Instead, he claims that “allowing evidence analyzed by a private lab in connection with a popular television show adversely affected the jury and the weight it gave that portion of forensic evidence.” The Defendant claims that having Sorenson’s forensic expert “testify to the nature and results of the DNA comparison effectively bolstered an otherwise insignificant piece of evidence.” He also asserts that because the “the partnership and pricing agreement between the [t]elevision show ‘Cold Justice’ and Sorenson Forensics” created a conflict of interest, this evidence should have been excluded.

“Generally, the admissibility of evidence rests within the trial court’s sound discretion, and the appellate court does not interfere with the exercise of that discretion unless a clear abuse appears on the face of the record.” State v. Franklin, 308 S.W.3d 799, 809 (Tenn. 2010) (citing State v. Lewis, 235 S.W.3d 136, 141 (Tenn. 2007)). A trial court is found to have abused its discretion when it “applies an incorrect legal standard or reaches a conclusion that is ‘illogical or unreasonable and causes an injustice to the party complaining.’” Lewis, 235 S.W.3d at 141 (quoting State v. Ruiz, 204 S.W.3d 772, 778 (Tenn. 2006)).

To be admissible, the evidence must be relevant to an issue the jury must decide. State v. Clark, 452 S.W.3d 268, 288 (Tenn. 2014). Relevant evidence is “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.” Tenn. R. Evid. 401. However, relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” Tenn. R. Evid. 403. Unfair prejudice has been defined as “[a]n undue tendency to suggest decision on an improper basis,

commonly, though not necessarily an emotional one.’” State v. Banks, 564 S.W.2d 947, 951 (Tenn. 1978) (quoting Tenn. R. Evid. 403, Advisory Comm. Notes).

The evidence from Sorenson Forensics was relevant because it established the presence of the victim’s blood inside her car at the time of her disappearance. Other proof indicated that the victim’s car had left tire tracks in the Defendant’s backyard around the time of her disappearance. Although the television production company was partnered with Sorenson Forensics and paid for the testing done in this case, the proof showed that Sorenson Forensics was an accredited laboratory, and there was no evidence indicating that its testing procedures were improper or that its test results were inaccurate. Consequently, we conclude that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice. We further conclude that this evidence, which did not render the trial fundamentally unfair or pose a risk of unfair prejudice, did not violate the Defendant’s right to due process.

V. 404(b) Testimony. The Defendant argues that the trial court abused its discretion in admitting prior bad act testimony from Wesley Carr and Kenneth Witherspoon as well as several other unidentified witnesses in violation of Tennessee Rule of Evidence 404(b). He generally claims that this 404(b) testimony unfairly influenced the jury and established that he had a propensity for violence against the victim.

Evidence of a defendant’s character offered for the purpose of proving that he or she acted in conformity with that character is inadmissible. See Tenn. R. Evid. 404(a). However, evidence of other crimes, wrongs, or bad acts may be admissible for other purposes if this evidence satisfies the conditions in Rule 404(b).

Rule 404(b) states:

Other Crimes, Wrongs, or Acts. 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. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:

- (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). Pursuant to the Advisory Commission Comment to Rule 404, “evidence of other crimes should usually be excluded.” Tenn. R. Evid 404(b), Adv. Comm’n Cmt. However, in exceptional cases, “where another crime is arguably relevant to an issue other than the accused’s character,” such as “identity (including motive and common scheme or plan), intent, or rebuttal of accident or mistake,” the evidence may be admissible. *Id.*; see *State v. Berry*, 141 S.W.3d 549, 582 (Tenn. 2004) (stating that evidence of other crimes, wrongs, or acts may be admissible if it establishes the defendant’s motive, intent, guilty knowledge, identity of the defendant, absence of mistake or accident, a common scheme or plan, completion of the story, opportunity, and preparation).

If a trial court substantially complies with Rule 404(b)’s requirements, the court’s ruling will not be overturned absent an abuse of discretion. *Clark*, 452 S.W.3d at 287 (citing *State v. Kiser*, 284 S.W.3d 227, 288-89 (Tenn. 2009); *State v. DuBose*, 953 S.W.2d 649, 652 (Tenn. 1997)). “A trial court abuses its discretion when it applies an incorrect legal standard, reaches an illogical conclusion, bases its decision on a clearly erroneous assessment of the evidence, or employs reasoning that causes an injustice to the complaining party.” *Id.* (citing *State v. Banks*, 271 S.W.3d 90, 116 (Tenn. 2008)).

In his appellate brief, the Defendant argues that the trial court erred “when it allowed witnesses to testify where their testimony was generally speculative, or claimed he had seen the [Defendant] grab the arm of the victim and that the victim had stated that she was ‘scared’ of the [Defendant], or that he was a bad man.” He also asserts that “testimony that the smell emitted from the vehicle was foul and indicated someone was trying to cover something up and that the witness feared the [Defendant] had the victim tied up at the time of her disappearance was allowed in error for it was speculative and unfairly prejudicial.” In addition, the Defendant maintains that the trial court erred in allowing “testimony regarding the [Defendant’s] relationship with Tommy Vaughn and Vaughn’s indication that ‘something was wrong.’” Likewise, the Defendant claims that “testimony regarding the relationship status between the [Defendant] and the victim, the victim’s alleged mindset regarding her breakup with the [Defendant] and whether she was dating someone else was admitted in error as it too was speculative and only served to unfairly influence the jury.”

The Defendant has failed to properly identify the witnesses who provided the aforementioned testimony and has given only a vague description of the challenged

evidence. Many of the Defendant's references to the record do not correspond to the testimony he challenges. Finally, for at least some of the challenged testimony including the testimony from Kenneth Witherspoon, the Defendant never objected to this testimony on Rule 404(b) grounds before or during trial and never requested a hearing outside the presence of the jury regarding this specific testimony. In light of all of these glaring deficiencies, the Defendant has waived any Rule 404(b) issues regarding the aforementioned testimony. See Tenn. Ct. Crim. App. R. 10(b) ("Issues which are not supported by argument, citation to authorities, or appropriate references to the record will be treated as waived in this court."); Tenn. R. App. P. 27(a)(7) (A brief shall contain "[a]n argument . . . setting forth the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record . . . relied on."); Tenn. R. App. P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.").

The Defendant does sufficiently identify Wesley Carr's testimony, which he claims was admitted in violation of Rule 404(b). On January 6, 2015, a second 404(b) hearing was held immediately prior to trial to determine the admissibility of testimony from Carr.² Carr, the victim's son, testified that he, his younger sister, and the victim lived together with the Defendant for almost six years. During that time, he witnessed instances of the Defendant's violent behavior toward the victim.

Carr described an incident that took place a few months before the victim's disappearance. During this incident, he and his sister awoke in the middle of the night to the sound of the victim and Defendant fighting. Carr witnessed the Defendant holding the victim over the bathroom sink and pouring gasoline over her face. This fight continued into the bedroom, and Carr saw the Defendant throw a set of keys in the victim's face. Carr, who was eight or nine years old at the time, could not recall what the fight was about or why the Defendant threw keys at the victim. However, he did note that "maybe a month" after this incident occurred, he, his sister, and the victim moved in with the victim's parents.

Carr stated that the first time he told law enforcement about the gasoline incident involving the Defendant was when Detective Kilgore came to interview him in Murfreesboro in 2010. He also said that the weekend before the victim's disappearance, the victim and the Defendant had an argument over the phone, and the Defendant later

² Due to medical reasons, Carr was unable to testify at the previous 404(b) hearing on September 29, 2014.

drove by his grandparents' home, honked his horn, and threw some money and roses on the ground.

At the conclusion of this hearing, the trial court determined that Carr's testimony regarding the gasoline incident was admissible to establish the Defendant's intent. See Smith, 868 S.W.2d at 574 (“[V]iolent 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”); State v. Gilley, 297 S.W.3d 739, 758 (Tenn. Crim. App. 2008) (“Tennessee courts have accepted the use of evidence of a homicide defendant's threats or prior violent acts directed toward the homicide victim as a means of allowing the State the opportunity to establish intent.”). The court also determined that Carr's testimony was clear and convincing, that the time frame of the incident was not too far removed from the time of the victim's disappearance, and that the probative value of the testimony outweighed the danger of unfair prejudice.

The Defendant asserts that “the probative value of Wesley Carr's testimony regarding the pouring of gasoline on the face of the victim, or driving by uttering threats was not to establish a contextual background and far outweighed the danger of unfair prejudice.” He adds that allowing this testimony “when there was previous introduced evidence that the victim's vehicle emitted a smell of a fuel[-]like substance at the time of her disappearance created an instance that unfairly influenced the jury, as did allowing testimony that the [Defendant] had driven up and down the street shouting threats at the [v]ictim.”

At trial, the perpetrator's motive and intent were key issues. Carr's testimony established that shortly before the victim's disappearance, the Defendant poured gasoline on the victim during an argument. Around the time of her disappearance, the victim's car left tire tracks in the Defendant's backyard, and an individual doused the inside of her car with gasoline. Carr's testimony showed the Defendant's intent or settled purpose to harm the victim. Therefore, we conclude that the trial court did not abuse its discretion in admitting Carr's testimony. Moreover, we also conclude that the trial court did not abuse its discretion in admitting the remaining Rule 404(b) testimony.

VI. Sufficiency of the Evidence. The Defendant further asserts that the evidence is insufficient to sustain his conviction for second degree murder. He claims that the inculpatory proof presented at trial consisted solely of circumstantial evidence and “that the jury's verdict was based on speculation, conjecture and guessing. To support this contention, he emphasizes that there were no eyewitnesses to the crime, that the victim's DNA and blood were not found inside his home, that the tire tracks on his property were not conclusively determined to be from the victim's car, that no gasoline was found on

his property, that the victim's body was not burned, that there was no direct proof showing that the foliage found of the victim's bumper was from his property, that the proof regarding his relationship with the victim was circumstantial, and that the prior incident involving gasoline was not corroborated. After reviewing the record, we conclude the evidence is sufficient to support the Defendant's conviction for second degree murder.

“Because a verdict of guilt removes the presumption of innocence and raises a presumption of guilt, the criminal defendant bears the burden on appeal of showing that the evidence was legally insufficient to sustain a guilty verdict.” State v. Hanson, 279 S.W.3d 265, 275 (Tenn. 2009) (citing State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992)). When a defendant challenges the sufficiency of the evidence, the standard of review applied by this court is “whether ‘any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” State v. Parker, 350 S.W.3d 883, 903 (Tenn. 2011) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)); see Tenn. R. App. P. 13(e). When this court evaluates the sufficiency of the evidence on appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn from that evidence. State v. Davis, 354 S.W.3d 718, 729 (Tenn. 2011) (citing State v. Majors, 318 S.W.3d 850, 857 (Tenn. 2010)).

Guilt may be found beyond a reasonable doubt where there is direct evidence, circumstantial evidence, or a combination of the two. State v. Sutton, 166 S.W.3d 686, 691 (Tenn. 2005); State v. Hall, 976 S.W.2d 121, 140 (Tenn. 1998). The standard of review for sufficiency of the evidence “‘is the same whether the conviction is based upon direct or circumstantial evidence.’” State v. Dorantes, 331 S.W.3d 370, 379 (Tenn. 2011) (quoting Hanson, 279 S.W.3d at 275). The jury as the trier of fact must evaluate the credibility of the witnesses, determine the weight given to witnesses' testimony, and reconcile all conflicts in the evidence. State v. Campbell, 245 S.W.3d 331, 335 (Tenn. 2008) (citing Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978)). Circumstantial evidence alone may be sufficient to sustain a conviction. State v. Sisk, 343 S.W.3d 60, 65 (Tenn. 2011). The jury determines the weight to be given to circumstantial evidence and the inferences to be drawn from this evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence are questions primarily for the jury. Dorantes, 331 S.W.3d at 379 (citing State v. Rice, 184 S.W.3d 646, 662 (Tenn. 2006)). When considering the sufficiency of the evidence, this court shall not substitute its inferences for those drawn by the trier of fact. Id.

The Defendant was convicted of second degree murder, which is defined as “[a] knowing killing of another[.]” T.C.A. § 39-13-210(a)(1). It is well-established that second degree murder is a result-of-conduct offense. State v. Page, 81 S.W.3d 781, 787 (Tenn. Crim. App. 2002). Therefore, as pertinent in this case, a person acts knowingly

“when the person is aware that the conduct is reasonably certain to cause the result.” T.C.A. § 39-11-302(b). Whether a defendant acts knowingly in killing another is a question of fact for the jury. State v. Brown, 311 S.W.3d 422, 432 (Tenn. 2010); State v. Inlow, 52 S.W.3d 101, 104-05 (Tenn. Crim. App. 2000).

Viewing the proof in the light most favorable to the State, a rational jury could have found the Defendant guilty of second degree murder beyond a reasonable doubt. The evidence established that the Defendant had acted violently toward the victim numerous times in the past and had threatened to kill her shortly before she disappeared. The victim routinely picked up the Defendant in the early morning hours to drive him to work. However, the day of her disappearance, the Defendant claimed the victim never picked him up, and the Defendant purchased a truck later that day. Carr testified about an incident, a few months prior to the victim’s disappearance, in which the Defendant poured gasoline on the Defendant’s face. The interior of the victim’s car, which was found at her parents’ home the day of her disappearance, had been doused in gasoline. The victim’s body was found in the remote area of Billy Goat Hill, an area in which the Defendant was familiar. Emily Jeske from Sorenson Forensics determined that the victim’s blood was present on the sample from the right front floor section of the victim’s car, and Dr. Jennifer Love testified that the perpetrator stabbed the victim with a knife-like object under her chin and upward into her jaw. As we noted, we will not substitute the jury’s inferences drawn from the circumstantial evidence with our own inferences. See Dorantes, 331 S.W.3d at 379.

Moreover, although the Defendant claims that the evidence against him was solely circumstantial, there was some direct evidence connecting the Defendant to the victim’s disappearance. The foliage stuck in the bumper of the victim’s car was found to be the same foliage that was growing in the Defendant’s backyard. The day the victim disappeared, Kenneth Witherspoon and the police observed tire tracks in the Defendant’s backyard leading up to a shrub that appeared to have been run over. The wheel base of the victim’s car matched the tire tracks in the Defendant’s backyard, indicating that her car had been at the Defendant’s house around the time that she disappeared.

Based on this proof, the jury could have reasonably inferred that the Defendant knowingly killed the victim. Accordingly, we conclude that there was sufficient evidence upon which a jury could find the Defendant guilty of second degree murder beyond a reasonable doubt.

VII. Failure to Provide a Female Bailiff. The Defendant contends that he was denied his right to due process and a fair and impartial jury when the trial court failed to provide a female bailiff when the jury was of “mixed gender.” He asserts that some states expressly require the presence of a female bailiff when the jury is composed of

men and women but acknowledges that there is no similar requirement in Tennessee. In his brief, he references an issue “early in trial of jury members separating and using their phones to make calls” despite the trial court’s instruction to the contrary. He claims this incident prejudiced his right to be tried before an impartial jury with no outside influences and could have been avoided had the jury been supervised by a bailiff of each gender. We conclude that the Defendant waived this issue and that he is not entitled to plain error relief.

The record shows that the Defendant never requested a female bailiff to supervise the jury in this case, a fact that was conceded by defense counsel at the motion for new trial hearing. Because the Defendant never brought this issue to the attention of the trial court, this issue is waived. See Tenn. R. App. P. 36(a). Moreover, while the Defendant asserted in his motion for new trial that the trial court erred in failing to provide a female bailiff to supervise the sequestered jury, he now seeks to impermissibly expand this issue by raising the separation of jury issue for the first time in his appellate brief. As a result, the Defendant has waived any issue regarding jury separation by failing to include it in his motion for new trial. See Tenn. R. App. P. 3(e); see also Martin, 940 S.W.2d 567, 569 (Tenn. 1997).

Because this issue has been raised for the first time on appeal, we may consider it only under the plain error doctrine. See Tenn. R. App. P. 36(b) (“When necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal.”). In order for this court to find plain error,

“(a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is ‘necessary to do substantial justice.’”

State v. Smith, 24 S.W.3d 274, 282 (Tenn. 2000) (quoting State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994)). “[T]he presence of all five factors must be established by the record before this Court will recognize the existence of plain error, and complete consideration of all the factors is not necessary when it is clear from the record that at least one of the factors cannot be established.” Smith, 24 S.W.3d at 283.

We cannot conclude that this issue amounts to plain error. Although the Defendant contends he was prejudiced by the jury’s improper cell phone use during trial, he concedes that “the record does not clearly state whether those jurors involved were

male or female[.]” The trial transcript, which makes only a fleeting reference to the cell phone incident, does not clearly establish what occurred in the trial court. See id. at 282. Moreover, because the Defendant has failed to cite to any legal authority in Tennessee supporting the necessity of a female bailiff when there is a mixed gender jury, we cannot conclude that a clear and unequivocal rule of law has been breached or that consideration of the error is necessary to do substantial justice. See id. The Defendant is not entitled to relief.

VIII. Motion for Judgment of Acquittal or Motion for New Trial. Finally, the Defendant argues that the trial court erred in denying his motion for judgment of acquittal, or in the alternative, motion for new trial. Specifically, he contends that the jury verdict was contrary to the weight of the evidence, that the trial court failed in its role as the thirteenth juror, and that sufficient issues were raised, individually or collectively, to support a judgment of acquittal or a new trial.

The Defendant filed the original motion on May 28, 2015, and an amended motion on July 17, 2015. These motions, which alleged approximately twenty grounds for relief, were heard via the software application Skype on July 23, 2015, because the trial judge had retired to Puerto Rico.

At the beginning of this hearing, when defense counsel asked the trial judge if she remembered this case, she responded, “Yes, I remember it clearly.” When defense counsel argued that the evidence, which he claimed was solely circumstantial, was insufficient to sustain the Defendant’s conviction for second degree murder, the trial judge remembered instructing the jury that the law does not distinguish between direct and circumstantial evidence before finding that the “[c]ircumstantial evidence can support that verdict.”

Just prior to the conclusion of this hearing, there was an “interruption” in the hearing conducted through Skype. Defense counsel had been arguing that the trial court erred in allowing the State to amend the indictment without the Defendant’s consent. Following this interruption, the trial judge said, “Sorry, [defense counsel], I got interrupted by another phone call. . . . And I declined so. You were quoting from this case.” At that point, the hearing resumed. A written order denying the Defendant’s motion on all grounds was issued by the trial court on July 23, 2015.

Tennessee Rule of Criminal Procedure 33(d) provides: “The trial court may grant a new trial following a verdict of guilty if it disagrees with the jury about the weight of the evidence.” This court has held that Rule 33(d) “is the modern equivalent to the ‘thirteenth juror rule,’ whereby the trial court must weigh the evidence and grant a new trial if the evidence preponderates against the weight of the verdict.” State v. Blanton,

926 S.W.2d 953, 958 (Tenn. Crim. App. 1996). When acting as the thirteenth juror, the trial judge is not required to make an explicit statement on the record. State v. Carter, 896 S.W.2d 119, 122 (Tenn. 1995). Instead, the reviewing court may presume that the trial judge has fulfilled its duty as the thirteenth juror when it overrules a motion for new trial. Id. Only if the record contains statements by the trial court expressing dissatisfaction or disagreement with the weight of the evidence or the jury's verdict or indicating that the trial court absolved itself of its responsibility to act as the thirteenth juror may an appellate court reverse the trial court's judgment. Id. (citations omitted). Otherwise, appellate review is limited to sufficiency of the evidence pursuant to Tennessee Rule of Appellate Procedure 13(e). State v. Burlison, 868 S.W.2d 713, 718-19 (Tenn. Crim. App. 1993). If the reviewing court concludes that the trial court failed to fulfill its duty as the thirteenth juror, the appropriate remedy is to grant a new trial. State v. Moats, 906 S.W.2d 431, 435 (Tenn. 1995).

As to the Defendant's contention that the jury verdict was contrary to the weight of the evidence, we have already concluded that the evidence was sufficient to sustain his conviction for second degree murder. During this motion hearing, the trial court held that there was "sufficient" evidence to "support that verdict." A moment later, the court agreed that that the jury verdict was not contrary to the weight of the evidence. Because the record shows that the trial court considered the evidence as the thirteenth juror and approved the jury's verdict, the Defendant is not entitled to relief on this claim.

The Defendant next argues that the trial judge failed in its role as the thirteenth juror. He reiterates that at the time of the motion for new trial hearing, which was conducted via Skype, the trial judge had retired to Puerto Rico and claims that the judge "was unable to recall facts and testimony from trial, was distracted by incoming telephone calls, and was arguably unprepared for the motion hearing as she had not even seen or read the motion." While we agree that conducting the hearing via Skype was rather unorthodox, the transcript from this hearing shows that the trial court recalled sufficient details from this case and fulfilled her duty as the thirteenth juror in ruling on this motion. This court must presume that the trial court performed the thirteenth juror function unless, on the record, the trial court expresses disagreement with the verdict or dissatisfaction with the weight of the evidence or absolves itself of the responsibility to act as the thirteenth juror. See Carter, 896 S.W.2d at 121. Because the record does not show that the trial court did any of these things, the Defendant is not entitled to relief on this claim.

Finally, the Defendant claims that sufficient issues were raised, individually or collectively, to support a judgment of acquittal or a new trial. In particular, he claims that "the complexity of the motion to amend the indictment and statute of limitations issue, the clear evidence that the court pressured [him] to consent to the change for expediency

sake, and the lack of clarity of consent by [him] or his trial counsel to the indictment amendment were sufficient grounds for [his] motion to be granted.” In the first section of this opinion, we concluded that the Defendant was not entitled to relief on his issues regarding the amendment of the indictment or the statute of limitations for second degree murder. Because he references collective errors, the Defendant seems to make a cumulative error argument. See State v. Hester, 324 S.W.3d 1, 76 (Tenn. 2010) (“The cumulative error doctrine is a judicial recognition that there may be multiple errors committed in trial proceedings, each of which in isolation constitutes mere harmless error, but which when aggregated, have a cumulative effect on the proceedings so great as to require reversal in order to preserve a defendant’s right to a fair trial.”). However, the transcript from the motion for new trial hearing shows that the trial court considered each of the issues raised by the Defendant before overruling this motion, and we agree that the Defendant is not entitled to relief on any of these issues.

CONCLUSION

Based on the aforementioned authorities and reasoning, we affirm the judgment of the trial court.

CAMILLE R. MCMULLEN, JUDGE