SIXTH DIVISION
August 12, 2016

No. 1-14-3812

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 10 CR 19174
	)	
ALLAN KUSTOK,	)	Honorable
	)	John Joseph Hynes,
Defendant-Appellee.	)	Judge Presiding.

PRESIDING JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant's conviction for first degree murder is affirmed where trial court did not abuse its discretion in: (1) allowing the State to introduce evidence of defendant's extramarital contacts as proof of defendant's intent, motive and state of mind with respect to the murder of his wife; and (2) denying defendant's posttrial motion for a new trial based upon newly discovered evidence, on the grounds that the new evidence could have been discovered prior to trial by the exercise of due diligence.

¶ 2 After a jury trial, defendant-appellant, Allan Kustok, was convicted of the first-degree murder of his wife and sentenced to a term of 60 years' imprisonment. Defendant now appeals, contending that the trial court improperly allowed the State to introduce evidence of his extramarital contacts with other women and incorrectly denied his posttrial motion for a new trial

based upon newly discovered evidence. We disagree and, therefore, affirm defendant's conviction.

¶ 3 I. BACKGROUND

¶ 4 The record on appeal reflects that defendant was found guilty following a three-week jury trial, which was bookended by extensive pretrial and posttrial proceedings. Because we resolve this appeal on two relatively narrow grounds, we recite here only those facts necessary to our discussion of those issues.

¶ 5 Defendant was charged by indictment with six counts of first degree murder, each of which generally alleged that he shot and killed Anita Kustok on or about September 29, 2010.

¶ 6 The State and defendant filed a number of pretrial motions, including the State's motion *in limine* seeking to admit proof of other conduct. The record on appeal reflects that this motion sought—*inter alia*—a ruling permitting the State to introduce evidence regarding defendant's various extramarital interactions with other women. The motion was accompanied by the State's proffer of the evidence it expected to present at trial. Defendant filed a 27-page response to the State's motion, and the matter proceeded to hearing on September 30, 2013, and ruling on October 10, 2013.[1]

¶ 7 At the initial hearing, the State indicated that—as set forth in its motion—it was in possession of evidence that defendant had an extensive history of extramarital contacts with other women. First, defendant was involved in an ongoing, five-year sexual relationship with another woman at the time of his wife's death. Second, defendant had met with two women he met through a personal profile he had set up on the website "AshleyMadison.com," which was

[1] The State's written motion *in limine*, its proffer of evidence, and defendant's 27-page response are not contained in the record on appeal. Our discussion of this motion, therefore, relies on the content of the reports of the proceedings held on September 30, 2013, and October 10, 2013, along with the trial court's written order.

purportedly designed to facilitate "no strings affairs" for married individuals. These interactions occurred in the months leading up to the death of defendant's wife, and one of them led to a sexual encounter. Third, the State sought to introduce evidence that defendant was attempting to "pick up" women he met in public during the same time period. This evidence, combined with evidence that defendant told some of these women that he was unhappy in his marriage and wanted a divorce, was cited by the State as being admissible at trial to establish defendant's motive, state of mind and intent at the time he murdered his wife. The State noted that, while it also had evidence that defendant communicated with many other women, it would only be seeking to introduce evidence with respect to the seven women he actually met in person.

¶ 8 In response, defense counsel began by indicating that the defense would be relying primarily on the 27-page response. After the trial court twice noted it had reviewed the response, defense counsel argued that any evidence of extramarital affairs would be irrelevant and, even if it was relevant, the prejudicial effect of such evidence would outweigh any probative value. The trial court then continued the matter to October 10, 2013, for a ruling.

¶ 9 On that date, the trial court began the proceedings by indicating that after carefully reviewing the parties' written and oral arguments, as well as the State's proffered evidence, it had entered a written order granting the State's motion to admit evidence of defendant's extramarital affairs, subject to certain limitations. In the written order, the trial court concluded that the State's proffered evidence was relevant, not unduly prejudicial and would, therefore, be admissible at trial.

¶ 10 However, the trial court's order also reflected that this ruling would be subject to certain limitations. First, the State would have to present the trial court with any specific documentary evidence regarding defendant's postings and interactions with women on the

AshleyMadison.com website prior to its introduction at trial. The trial court would review any such documentary evidence at that time for relevance and any undue prejudice. Second, while evidence from the two women with whom defendant both met and to whom he confided his marital unhappiness in the months before the victim's death would be admissible, the state would have to "limit the number of witnesses at trial" with respect to the remaining five women so that "the issue of defendant's infidelity does not become a trial within a trial."

¶ 11 The trial court's ruling permitting the introduction of this evidence was subject to two pretrial motions to reconsider filed by defendant. While the first motion to reconsider is not included in the record on appeal, the report of proceedings reveals that it was denied on November 21, 2013, after the trial court expressed that it had reviewed both the motion and an accompanying memorandum and defendant declined the opportunity to provide any additional oral argument.

¶ 12 The second motion to reconsider was filed on February 1, 2014, and is included the record on appeal. Therein, defendant solely asked the trial court to reconsider its decision in light of a 2004 decision from a state appellate court in Indiana involving a husband's murder of his wife and children (*Camm v. State*, 812 N.E. 2d 1127 (Ind. Ct. App. 2004)), and episodes of the television shows "48 Hours" and "Dateline" discussing that case. The second motion was denied on February 13, 2014, after the trial court concluded that the Indiana decision was merely persuasive authority and that it was both factually and legally distinguishable. The trial court stated that it remained convinced that its prior analysis was correct, and noted that the State had already complied with its instruction to "pare down these witnesses because of the fear of prejudice."

¶ 13 As noted above, the matter proceeded to a three-week jury trial. We need not outline the entire, extensive amount of evidence presented at trial to resolve this appeal. Rather, it is sufficient to note the following evidence adduced at trial.

¶ 14 Defendant and his wife were married for 35 years, had two adult children, and resided in Orland Park, Illinois. By the account of many of the relatives, colleagues, and friends that testified at trial, the Kustok family appeared to be loving, successful and content. Mrs. Kustok was described as positive, upbeat and optimistic, and evidence was introduced that she had been making various plans for the future at the time of her death.

¶ 15 According to the State's evidence, at approximately 6:18 a.m. on September 29, 2010, defendant was observed by a neighbor driving away from his home. Defendant was driving a little faster than normal and did not wave as he usually did.

¶ 16 Shortly thereafter, defendant arrived at the emergency room at Palos Community Hospital. Defendant's wife was inside the defendant's vehicle, tightly wrapped in sheets and blankets. Defendant told a security guard and a nurse that his wife had shot herself and that she was dead. Both defendant and his wife were taken into the hospital. Upon examination, Mrs. Kustok was observed to have a single gunshot wound to her left check and no signs of life. She was almost immediately pronounced dead. Mr. Kustok, who had blood on his clothes, was taken to another room and provided a hospital gown to wear. He was also evaluated for a risk of suicide after he mentioned he had thought about killing himself. Defendant was cleared by hospital staff later that morning, and accompanied police officers to the Orland Park police department.

¶ 17 According to statements defendant made to hospital staff and to the police on that day, he was awoken by his wife at 3:30 a.m. that morning as she had heard a suspicious noise.

Defendant indicated that this was not uncommon, as his wife was often fearful of the potential for a break-in at their home. In response to these fears, defendant had previously installed a security system. So that she would feel secure in the home during those times he was away on business, he had also purchased a .357 Magnum handgun for his wife as an anniversary present. Defendant walked around the house, and discovering nothing he returned to the bedroom he shared with his wife and went to sleep.

¶ 18 Sometime before 5:30 a.m., defendant heard a gunshot. At one point, defendant had stated he was in the bathroom at this time, while at two other times he stated he was asleep in bed with his wife. In either case, he soon observed his wife lying on the bed with a gunshot wound to the left side of her face. The .357 Magnum handgun was in her right hand, and her arms were crossed. Defendant stated that he knew immediately that she was dead and he became distraught and considered killing himself. In order to stop himself from doing so, he discharged the remaining rounds in the handgun into an armoire in the bedroom. He then stayed in the bedroom for some time because he did not want to leave his wife. Believing that she was already dead and that she would not want a "scene" at their home, defendant then attempted to clean her and wrapped her up in bedding. He then transported her to the hospital in his own vehicle.

¶ 19 Pursuant to the ruling on the motion *in limine*, the State was permitted to introduce the testimony of five women with whom defendant had extramarital contacts prior to his wife's murder. Two of those relationships were sexual in nature. Ms. V. testified that at the time of the victim's murder, she had been involved in a five-year long, ongoing sexual relationship with defendant during which defendant stated he was "unfulfilled" in his marriage.[2] Ms. K. met

[2] We elect to refer to these witnesses solely by the first initial of their last name in this order.

defendant through the AshleyMadison.com website specifically designed to facilitate affairs, had a sexual encounter with defendant in July of 2010, in Michigan. Ms. K. and defendant attempted to meet again in the months leading up to the victim's murder, but were not successful in scheduling such a meeting.

¶ 20 Ms. R. also met defendant through the AshleyMadison.com website, just days before the murder in September of 2010. She had a lunch date with defendant two days before the murder, kissed defendant at the date's conclusion, and had made plans to see defendant again the next week.

¶ 21 Ms. G. testified that she was approached by defendant at a restaurant in August of 2010, eventually having dinner with defendant at that time, as well as another dinner and lunch in the following days. During this time, defendant made sexual advances toward Ms. G. and attempted to kiss her. Ms. G. testified that she rebuffed these advances and stated to defendant that she was not comfortable seeing him anymore due to the fact that he was married, a fact she did not realize initially because defendant was not wearing his wedding ring when the two first met. Defendant responded that he and his wife were only together for the sake of their children, would be getting a divorce, and "wouldn't be married for long." Defendant continued to call Ms. G. even after she explained that she was not comfortable seeing a married man. She did not answer his telephone calls.

¶ 22 Finally, Ms. H. testified that defendant approached her at a mall outside Chicago in July 2010, stating plainly that, while he did not know her, he would "like to know her." The two then met for a cup of coffee at a nearby café, during which Ms. H. tried to maintain her professionalism, as she saw defendant as a possible business contact with regard to her job search. However, during their conversation, defendant confided that he was not happily married

and complained that his wife was not "there for him." Ms. H. and defendant were in contact a few more times in July 2010, but the two never met again.

¶ 23 Forensic testing indicated the blood found on various items of defendant's clothing matched that of his wife. Furthermore, while defendant's hand tested positive for gunshot residue, his wife's hands did not. A medical examiner testified that she performed an autopsy on the victim, and determined the cause of death was a single gunshot wound to the left cheek, with the bullet traveling left to right through the skull before exiting behind her right ear. Stippling on the victim's face indicated that the victim's eyes were closed at the time of the shooting, and the bullet was fired from between 6 and 24 inches away. The manner of death was determined to be homicide, based upon the physical examination of the body and the fact that the victim was right-handed, the gun was purportedly found in her right hand, and the wound was to the left side the face. The medical examiner specifically ruled out accident or suicide as a cause of death.

¶ 24 The State's final witness at trial was Rod Englert, the State's expert in blood pattern analysis and crime scene reconstruction. Mr. Englert testified that he had examined all of the physical evidence in this case, including photos of the crime scene, the bedding, the pattern of the blood stains, ballistics evidence and the autopsy report. He had also conducted two reconstructions of the crime scene, one in defendant's home and one at the Orland Park Police Department.

¶ 25 In an 88-page final written report, issued on April 10, 2012, Mr. Englert opined that all of the evidence taken together indicated that the victim did not shoot herself. Rather, the evidence indicated that she was shot by someone else standing near the head of the bed. Both in his report and in his trial testimony, Mr. Englert stated that this opinion was based, in part, on the fact that there were no powder burns on any of the bedding. The lack of such burns was evidence that the

gun was fired up and away from the bed. In both the report and in his written testimony, Mr. Englert stated that these findings were based in part upon a March 28, 2012, second inspection of a single pillowcase. In the report, Mr. Englert stated that this second inspection took place at O'Hare Airport. Upon inspection, what was thought to possibly be "soot" was actually a blood clot.

¶ 26 At trial, Mr. Englert further testified that he did not perform any chemical testing to make this determination, but rather made a simple visual inspection. He acknowledged that chemical testing would have been more definitive, and if there had been soot or gunshot residue on that pillow, that fact would have been "important" for his analysis.

¶ 27 Both before and after Mr. Englert's testimony, defendant moved to test the pillowcase for gunshot residue. As defendant explained, it was only a belated disclosure of 400 pages of discovery in the weeks prior to trial which had revealed for the first time that there might be some question as whether or not the stain on that pillowcase contained "soot" or blood. Defendant contended that this fact was only made clear in a March 22, 2012, email contained in that disclosure, which disclosed for the first time that it was a member of the prosecution team itself that raised questions about the pillowcase.

¶ 28 The State objected, indicating that defendant or his own experts could have and should have asked for any such testing before trial. The trial court concluded that any such scientific testing should have taken place prior to trial, and allowing such testing midtrial would not be in conformity with the discovery procedures outlined in Supreme Court Rule 413 (Ill. S. Ct. R. 413 (eff. July 1, 1982)). It, therefore, denied defendant's request.

¶ 29 Defendant presented the testimony of two experts at trial. Paul Kish, an expert in bloodstain pattern analysis, testified that he had reviewed the evidence in the matter, as well as Mr. Englert's report. In his opinion, the evidence did not support Mr. Englert's conclusions.

¶ 30 Of particular relevance here, Mr. Kish testified that Mr. Englert's conclusions regarding the pillowcase were unfounded, because the stain on the pillowcase did not appear to contain blood. Moreover, the stain should have been chemically tested for gunshot residue, as that was the standard and accepted method to make a definitive conclusion.

¶ 31 Mr. Kish acknowledged that, well before trial, he had been aware of the reference to a second examination of the pillowcase in Mr. Englert's report. He also acknowledged that he had access to all of the evidence well before trial, and could have requested that the pillowcase be tested.

¶ 32 Mathew Noedel testified as an expert in crime scene reconstruction and ballistics. While he did not personally review the evidence in this matter, he did review all of the reports that had been generated. In his opinion, the evidence did not support Mr. Englert's conclusions.

¶ 33 The State called no witnesses to rebut this testimony.

¶ 34 At a subsequent jury instruction conference it was determined, without objection, that the jury would be instructed that—*inter alia*—any evidence of defendant's uncharged conduct could only be considered for the limited purpose of establishing his motive, intent and state of mind, pursuant to Illinois Pattern Jury Instructions, Criminal, No. 3.14 (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 3.14). Notably, the State referenced this instruction during the portion of its closing argument discussing the evidence of defendant's extramarital conduct, specifically noting that this evidence established defendant's motive, intent and state of mind at the time he

murdered his wife. The jury was then provided IPI Criminal 4th No. 3.14, both orally and in writing.

¶ 35 Following its deliberations, the jury found defendant guilty of the first degree murder of his wife.

¶ 36 Thereafter, defendant filed a motion asking that he be permitted to conduct posttrial gunshot residue testing on the pillowcase. The State did not object, and the testing was performed by the Illinois State Police (ISP) laboratory. Defendant also filed a lengthy posttrial motion seeking a new trial. That motion argued, in relevant part, that the trial court abused its discretion by granting the State's motion *in limine* as to the admissibility of evidence regarding defendant's extramarital contacts and by denying its mid-trial request to test the pillowcase for gunshot residue.

¶ 37 A hearing on defendant's posttrial motion was held on multiple dates in November and December of 2014. Testimony and evidence was presented as to the testing of the pillowcase. Nicole Fundell, a forensic scientist employed at the ISP laboratory testified that she had tested the pillowcase and the gun found at the scene. The pillowcase tested positive for lead, indicating the presence of exhaust gases from the firing of the gun. In light of all her tests, Ms. Fundell opined that the gun had been fired within six inches of the pillowcase, but not in direct contact with the pillow case.

¶ 38 Mr. Noedel also testified at the hearing, and opined that this new evidence called Mr. Englert's conclusions into serious question. He contended that the presence of gunshot residue on the pillow was not consistent with Mr. Englert's reconstruction of the crime scene or his resulting conclusion that the shot that killed the victim was fired by a second person up and away from the bed. Mr. Noedel acknowledged that he had reviewed Mr. Englert's April 10, 2012,

report before drafting his own pretrial report and well before he testified at trial. He also acknowledged that while he never specifically sought to have the pillowcase tested for gunshot residue, it was the discussion of the second examination of the pillowcase in Mr. Englert's report that lead him to discuss the general possibility of performing such testing on the bedding collected from the hospital and the crime scene.

¶ 39 In light of this evidence, defendant additionally argued at the hearing that the gunshot residue testing results constituted newly discovered evidence entitling him to a new trial.

¶ 40 After hearing all the evidence and considering the parties' arguments, the trial court denied defendant's motion for a new trial. With respect to defendant's arguments challenging the admission of evidence regarding his extramarital activities, the trial court reiterated its prior reasoning and stated that it stood by its prior conclusion that this evidence was properly admissible to show defendant's motive, state of mind and intent. The trial court also rejected defendant's contention that it improperly denied defendant's midtrial request to test the pillowcase. Finally, with respect to defendant's argument that the gunshot residue evidence constituted newly discovered evidence warranting a new trial, the trial court concluded—*inter alia*—that while this evidence was new, it could have been discovered prior to trial by the exercise of due diligence.

¶ 41 Defendant was subsequently sentenced to a term of 60 years' imprisonment, after which he timely filed the instant appeal.

¶ 42 II. ANALYSIS

¶ 43 On appeal, defendant challenges the trial court's evidentiary ruling with respect to the introduction of the evidence of his extramarital contacts with other women, as well the denial of his posttrial motion. We address each issue in turn.

¶ 44 A. Evidentiary Ruling

¶ 45 We first address defendant's contention that the trial court abused its discretion by granting the State's motion *in limine* and allowing it to introduce evidence of defendant's extramarital contacts with other women and in denying his posttrial motion for a new trial on that basis.

¶ 46 First, we note that defendant has arguably failed to present this court with a sufficiently complete record with which to review this contention. As discussed above, the record on appeal does not include the State's written motion *in limine*, its proffer of evidence, the defendant's 27-page written response thereto, or defendant's first motion to reconsider and accompanying memorandum. It is well recognized that "an appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984); see also *People v. Fair*, 193 Ill. 2d 256, 264 (2000) (applying *Foutch* in the context of a criminal appeal). Pursuant to this authority, and in light of the lack of a complete record on appeal with respect to the evidence and arguments presented below, we should arguably presume that the trial court's ruling on the State's motion *in limine* was proper.

¶ 47 Any insufficiencies in the record aside, we conclude that the record actually before us demonstrates no basis upon which to reverse either the trial court's evidentiary ruling or its denial of defendant's posttrial claim that this evidentiary ruling was cause to grant a new trial.

¶ 48 A circuit court's ruling on a motion *in limine* regarding the introduction or exclusion of evidence is reviewed under an abuse of discretion standard. *People v. Starks*, 2012 IL App (2d)

110273, ¶ 19. Similarly, "[i]t is within the trial court's discretion to decide whether evidence is relevant and admissible. [Citation.] A trial court's decision concerning whether evidence is relevant and admissible will not be reversed absent a clear abuse of discretion. [Citation.]" *People v. Morgan*, 197 Ill. 2d 404, 455-56 (2001). Furthermore, a party is generally not entitled to a new trial based upon evidentiary rulings unless the error was substantially prejudicial and affected the outcome of the case. *Bosco v. Janowitz*, 388 Ill. App. 3d 450, 462-63 (2009). "[W]here a movant fails to identify any evidentiary rulings which were either an abuse of discretion or error of law, logic necessarily dictates that a new trial is not required." *Cetera v. DiFilippo*, 404 Ill. App. 3d 20, 47 (2010).

¶ 49 Evidence is considered relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of an action either more or less probable than it would be without the evidence. [Citation.]" *Morgan*, 197 Ill. 2d at 455-56. Thus, while evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith, except in situations not relevant here, "[s]uch evidence may also be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ill. R. Evid. 404(b) (eff. Jan. 1, 2011); see also, *People v. Hendricks*, 137 Ill. 2d 31, 53 (1990) ("Motive, although not an element of murder, may be a material factor at issue in establishing guilt, particularly when the only evidence is circumstantial."). "[W]hile any evidence which tends to show that an accused had a motive for killing the deceased is relevant, such evidence, to be competent, must at least to a slight degree tend to establish the existence of the motive relied on." *People v. Nitz*, 143 Ill. 2d 82, 123-24 (1991) (quoting *People v. Stewart*, 105 Ill. 2d 22, 56 (1984)).

¶ 50 Nevertheless, even if such evidence is admissible for such a purpose, the trial court still can exclude it if the prejudicial effect of the evidence substantially outweighs its probative value. *People v. Donoho*, 204 Ill. 2d 159, 170 (2003). The determination as to the admissibility of such evidence rests within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *People v. Colin*, 344 Ill. App. 3d 119, 127 (2003). A circuit court abuses its discretion only when its decision is arbitrary, fanciful, or unreasonable or when no reasonable person would take the court's view. *Starks*, 2012 IL App (2d) 110273, ¶ 19.

¶ 51 Defendant initially contends that the trial court abused its discretion in concluding that the evidence of defendant's extramarital contacts was relevant to the issues of defendant's motive, intent and state of mind with respect to the death of his wife. We disagree.

¶ 52 Courts in Illinois have long recognized the relevance of such evidence in similar circumstances. In *People v. Branion*, 47 Ill. 2d 70 (1970), a doctor was convicted of the murder of his wife, and "[t]o establish motive the State tried to prove that defendant was having an illicit affair with a nurse, named Shirley Hudson, who worked at the same hospital as Dr. Branion, and that the Branions were not happily married." *Id*. at 77. The sole evidence as to motive was introduced through the testimony of a single witness, Maxine Brown, who testified that Ms. Hudson was employed as a nurse where defendant was also employed, the two were friends, and defendant went to the apartment of Ms. Hudson one day after the murder defendant's wife was murdered. While defendant and Ms. Hudson had a conversation in another room, Ms. Brown was in the bathroom crying. *Id*. With respect to this evidence, our supreme court concluded "[t]his testimony tended to prove *some* relationship between the defendant and Ms. Hudson, and because it *tended* to prove motive the evidence was proper." (Emphasis added.) *Id*.

¶ 53 The *Branion* decision has been repeatedly cited favorably for this proposition over the years. See *People v. Foster*, 76 Ill. 2d 365, 375 (1979) (generally noting that *Branion* concluded that evidence of adultery is properly admissible as evidence of motive); *People v. Harbold*, 124 Ill. App. 3d 363, 376-77 (1984) (while the evidence was ultimately found unduly prejudicial due to a lack of temporal connection, this court cited *Branion* in support of conclusion that evidence indicating that in late 1977 and early 1978, defendant and a woman were seen together in a variety of social settings, that they were in Florida at some unnamed time, and that in 1979 and 1980, they attended public functions along with their families "was relevant because it tended to show some relationship from which the jury could have inferred motive" for defendant to murder that woman's husband in 1981); *People v. Lopes*, 17 Ill. App. 3d 986, 990 (1974) (citing *Branion* in support of a conclusion that evidence defendant was infatuated with another woman, wanted to marry her, and was having intercourse with this woman both before and after the disappearance of his wife was proper evidence of motive). Indeed, the Committee Notes to IPI Criminal 4th No. 3.14, the pattern jury instruction given here in light of the introduction of such evidence, cites *Branion* as a decision recognizing that "evidence of defendant's extra-marital affair and marital discord [is] probative of murder." See also, *People v. Weaver*, 92 Ill. 2d 545, 562 (1982) (recognizing that evidence of wife's affair was relevant to establish that she was "unhappy in the marital home" and thus had motive to murder her husband).

¶ 54 Here, the State was permitted to introduce the testimony of five women with whom defendant had extramarital contacts prior to his wife's murder. Two of those relationships were sexual in nature, including one which resulted from defendant's activity on the AshleyMadison.com website that was specifically designed to facilitate affairs. Defendant also

attempted to engage in sexual relationships with at least two other women, and informed a number of these women that he was not happily married and would be divorcing soon.

¶ 55 On appeal, defendant contends that this was merely an improper attempt to attack defendant's character before the jury, fell short of the type and extent of extramarital contact that courts have found admissible in prior cases and was, therefore, not relevant to establish defendant's motive in this case, especially because there was no evidence that defendant's wife knew about the extramarital contacts such that those contacts caused any tension in defendant's marriage.

¶ 56 As demonstrated above, however, evidence is considered relevant if it has *any tendency* to make the existence of any fact that is of consequence more or less probable than it would be without the evidence (*Morgan*, 197 Ill. 2d at 455-56), and to be competent, any evidence of a motive to kill need only establish the existence of the motive relied on to a *slight degree* (*Nitz*, 143 Ill. 2d at 123-24). Moreover, in its seminal decision, our supreme court noted that the evidence of defendant's motive to kill his wife in that case consisted solely of a single witness's testimony that defendant and a nurse worked together, were friends, and that defendant went to the apartment of the nurse one day after defendant's wife was murdered and had a conversation in another room while the witness was in the bathroom crying. *Branion*, 47 Ill. 2d at 77. Nevertheless, "[t]his testimony tended to prove *some* relationship between the defendant and [the nurse], and because it *tended* to prove motive the evidence was proper." (Emphasis added.) *Id*. Furthermore, we again acknowledge that determination of relevance was within the trial court's discretion, and we should not overturn that determination unless it is arbitrary, fanciful, or unreasonable or when no reasonable person would take the court's view. *Starks*, 2012 IL App (2d) 110273, ¶ 19.

¶ 57 In light of the above authority and the standard of review, we find no basis to conclude that the trial court abused its discretion in finding evidence of defendant's multiple successful and attempted extramarital affairs, and his admissions that he was unhappy with his marriage and "wouldn't be married for long"—all occurring within the three months preceding September 29, 2010—to be relevant as it tended to establish defendant's motive, intent and state of mind with respect to the murder of his wife.

¶ 58 Nor do we find that the trial court abused its discretion in concluding that the probative value of this evidence was not outweighed by the possibility of undue prejudice. "Evidence which is otherwise admissible to establish motive is not rendered inadmissible by its potentially prejudicial impact." *Foster*, 76 Ill. 2d at 374. Rather, having found the State's evidence relevant in this case, the trial court only needed to exclude it if it further found the prejudicial effect of the evidence *substantially* outweighed its probative value. *Donoho*, 204 Ill. 2d at 170. Thus, "it is possible for the State to offer evidence tending to establish a defendant's motivation even though it involves the potential of disclosing a defendant's prior immoral or improper conduct." *Hendricks*, 137 Ill. 2d at 53.

¶ 59 Although our review of this issue is hampered by the incompleteness of the record on appeal, what is clear from the record before us is that in ruling on the State's motion *in limine*, the trial court concluded that the State would have to present for review any specific documentary evidence regarding defendant's interactions with and postings on the AshleyMadison.com website prior to its introduction at trial. The State would also have to "limit the number of witnesses at trial" with respect to defendant's extramarital conduct so that "the issue of defendant's infidelity does not become a trial within a trial."

¶ 60 In response to this ruling, the State declined to offer any documentary evidence relating to the AshleyMadison.com website at trial and limited the number of witnesses on this issues to five of the seven initially proffered to the trial court. In *People v. Coleman*, 2014 IL App (5th) 110274, the trial court's decision to admit evidence of a husband's motive to murder his wife was affirmed. *Id.* ¶ 139. That decision was based, in part, upon the fact that the trial court limited the number of witnesses the State originally sought to introduce on that issue to a total of five. We come to a similar conclusion here, where the record clearly reflects that the trial court was well aware of its responsibility to ensure that defendant was not unduly prejudiced by this evidence, acted in its discretion to limit the extent of the evidence of defendant's extramarital contact with other women introduced at trial, and the trial court's decision was thus not arbitrary, fanciful, or unreasonable, or such that no reasonable person would take the trial court's view. *Starks*, 2012 IL App (2d) 110273, ¶ 19.

¶ 61 We note that our supreme court has recognized that "[t]he major bulwark against prejudicing the jury is the sound discretion of the trial judge." *Foster*, 76 Ill. 2d 365, 378 (1979). And this court has recognized that the "best way to address the problem [of any unfair prejudice in the admission of other conduct] is to use the limiting instruction contained in Illinois Pattern Jury Instructions, Criminal, No. 3.14 ***, taking care that the proper limited purpose of the evidence is used." *People v. Harris*, 288 Ill. App. 3d 597, 606 (1997); see also, *People v. Musitief*, 201 Ill. App. 3d 872, 877 (1990) (recognizing that a proper limiting instruction lessens any prejudicial effect of such evidence).

¶ 62 The record in this case reveals that the trial court stated at the hearing on the State's motion *in limine* that its analysis of any possible prejudice included an understanding that the jury would be properly instructed on the limited purpose of this evidence. The jury was then

properly instructed, pursuant to IPI Criminal 4th No. 3.14, that it could *only* consider the evidence of defendant's extramarital conduct, with respect to the issues of motive, intent, and state of mind. The State's closing argument tracked that instruction, repeatedly stating that this evidence was important only with respect to those issues. "[T]here is a strong presumption that jurors follow the instructions of the court" (*id.* at 605), and we find nothing in the record before us to rebut this presumption or to convince us that the trial court abused its discretion in granting the State's motion *in limine*, admitting this evidence, and denying defendant's posttrial motion for a new trial on this basis.[3]

¶ 63 B. New Evidence

¶ 64 Defendant next asserts that the trial court incorrectly denied his posttrial motion for a new trial on the basis of newly discovered evidence. Specifically, defendant argues that the posttrial gunshot residue testing of the pillow represented newly discovered evidence that could not have been discovered prior to trial and would probably change the result on retrial. However, because the trial court concluded that this evidence could have been discovered by defendant prior to the trial through the exercise of due diligence and that conclusion was not an abuse of discretion, we affirm.

¶ 65 "[N]ewly discovered evidence warrants a new trial when: (1) it has been discovered since the trial; (2) it is of such a character that it could not have been discovered prior to the trial by the exercise of due diligence; (3) it is material to the issue and not merely cumulative; and (4) it is of such a conclusive character that it will probably change the result on retrial." *People v. Gabriel*,

[3] We do note that the Committee Notes to Illinois Pattern Jury Instructions recommend that the jury also be orally instructed as to the limited purpose of such other crime evidence at the time it is first presented, "unless the defendant objects to that instruction." IPI Criminal 4th No. 3.14. The record on appeal reflects that the trial court offered to provide this instruction at trial, just before the first of the five women testified, but defense counsel asked the trial court to "hold off."

398 Ill.App.3d 332, 350 (2010). "It is a primary requisite to the allowance of a motion for a new trial on grounds of newly discovered evidence that such evidence was not discoverable prior to trial by the exercise of ordinary diligence. [Citation.] Where it was so discoverable *** the motion will not be granted." *Pritchett v. Steinker Trucking Co*., 40 Ill. 2d 510, 512 (1968). It is the defendant's burden to show that there was no lack of due diligence on his part. *People v. Barnslater*, 373 Ill. App. 3d 512, 525 (2007) (citing *People v. Harris*, 154 Ill. App. 3d 308, 318 (1987)).

¶ 66 Furthermore, applications for a new trial based on newly discovered evidence are generally disfavored and should be subject to the "closest scrutiny" by the court "in order to prevent *** fraud and imposition which defeated parties may be tempted to practice, as a last resort, to escape the consequence of an adverse verdict." *Reese*, 54 Ill. 2d at 59 (quoting *People v. Holtzman*, 1 Ill. 2d 562, 569 (1953)). The denial of a motion for a new trial based on newly discovered evidence will not be disturbed on appeal absent an abuse of discretion. *Gabriel*, 398 Ill. App. 3d at 350.

¶ 67 Defendant's posttrial motion was denied, in part, based upon the trial court's conclusion that Mr. Englert's report was completed in April of 2012, and tendered to the defense shortly thereafter. That report explicitly stated that a second examination of a single piece of evidence, the pillowcase, was completed by Mr. Englert on March 28, 2012, and what was thought to possibly be soot was in fact a blood clot. The trial court further concluded that the evidence showed that well before trial both of the defense experts were in possession of Mr. Englert's report prior to completing their own analysis, and that they also had access to all of the State's evidence, including the pillow case. Nevertheless, neither defense counsel nor the defense experts sought to specifically examine or further test the pillowcase prior to trial.

¶ 68 Defendant does not challenge these factual conclusions on appeal. Nor do we believe that he could successfully do so, as they are well supported by the record. What defendant does challenge is the trial court's conclusion that these factual findings support a conclusion that defendant could have obtained the gunshot residue testing prior to trial by the exercise of due diligence. Defendant contends that this conclusion "overlooks two critical facts."

¶ 69 First, defendant contends that the trial court overlooked the fact that "the central importance of the gunshot residue evidence to Mr. Englert's opinions was only revealed during cross-examination at trial." Defendant contends that it was only at this point, mid-trial, that the due-diligence factor required him to seek testing of the pillowcase. However, this argument is belied by the fact that defendant himself first requested testing of the pillowcase during trial but *before* Mr. Englert testified at trial. Whatever Mr. Englert's testimony at trial may have added to defendant's understanding as to the need for such testing, that *need* was understood by defendant beforehand.

¶ 70 Second, defendant contends that the trial court overlooked the reality that "documents showing the prosecution team itself had raised questions regarding the possible presence of gunshot residue, leading to a last-minute O'Hare Airport meeting with Mr. Englert, were not disclosed until just days before trial began." Thus, defendant contends that it was not until these documents were reviewed that the need for testing was revealed for the first time, and that he acted with due diligence in seeking that testing at the earliest possible time.

¶ 71 However, the record reflects that the trial court did anything but overlook these facts or this argument. Defense counsel highlighted these very facts at the hearing on the posttrial motion for a new trial and made the same exact argument to the trial court. In response thereto, the trial court concluded as follows:

"[Mr.] Englert's final report was April 10th of 2012, which was tendered to the defense shortly thereafter. The defense expert, Paul Kish, and now Mr. Noedel, indicated that in that report they had that information of the—of the pillowcase that was viewed by Rob Englert on or about March 28th, 2012 at O'Hare Airport. That was there. That was out there for both sides. Kish was given full access to all the evidence, including the pillowcase on November 15th of 2012, and despite the potential significance, he did not ask for the pillowcase in question. Today Noedel indicated that he had the report, and he could have looked at any piece of evidence himself.

The defense was on notice that potential evidence existed since April of 2012, more than a year and a half prior to trial, whether it was inadvertence, a matter of trial strategy, the defense chose not to do anything about it. This whole idea that, all of the sudden, days before trial, this becomes significant is disingenuous. Because this information was out there. And the mountains of evidence they talk about, everybody had that. But the fact is it was overlooked until the time of trial is something that, with due diligence, the defense could have discovered. And I find that the evidence could have been discovered prior to trial with the exercise of due diligence."

¶ 72 Again, it was defendant's burden to establish that there was no lack of due diligence on his part (*Barnslater*, 373 Ill. App. 3d at 525), and any lack of due diligence was fatal to his posttrial motion for a new trial on the basis of any newly discovered evidence (*Pritchett*, 40 Ill. 2d at 512). In order for us to find that the trial court abused its discretion in denying defendant's posttrial motion on this basis, we would have to conclude that its finding of a lack of due diligence was arbitrary, fanciful, or unreasonable, or such that no reasonable person would take the trial court's view. *Starks*, 2012 IL App (2d) 110273, ¶ 19. On the record before us, we can

find no basis to reach such a conclusion, and our resolution of this issue alone is sufficient to affirm the trial court's denial of defendant's posttrial motion on this basis. *Pritchett*, 40 Ill. 2d at 512 (lack of due diligence is a "a primary requisite to the allowance of a motion for a new trial on grounds of newly discovered").

¶ 73 III. CONCLUSION

¶ 74 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 75 Affirmed.