IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

JUNE SESSION, 1994

FILED

May 16, 1997

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	**C.C.A. NO. 01C01-9401-CC-00017**
	)	
Appellee,	)	**ROBERTSON COUNTY**
	)	
	)	**HON. JOHN H. GASAWAY, III, JUDGE**
VS.	)	
	)	(Fabricating Evidence, Official Misconduct,
BOBBY GENE KECK,	)	and Private Use of County Road
	)	Materials and Equipment)
Appellant.	)	

ON APPEAL FROM THE JUDGMENT OF THE
CIRCUIT COURT OF ROBERTSON COUNTY

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OPINION FILED _____

AFFIRMED

PER CURIAM

OPINION

The Defendant appeals to this Court as of right from a judgment entered on a Robertson County jury verdict convicting him of one count of fabricating evidence, three counts of official misconduct, and two counts of private use of county road materials and equipment.[1] The Defendant presents eight issues for review: (1) That the charging instrument was defective and should have been dismissed; (2) that the trial court should have granted pretrial diversion; (3) that his pretrial statements to the Tennessee Bureau of Investigation ("T.B.I.") should have been suppressed; (4) that allowing T.B.I. Agent Taylor to testify violated Tenn. R. Evid. 615; (5) that the State engaged in harmful prosecutorial misconduct; (6) that the trial court erred by refusing to include in its instruction on the range of punishment the Defendant's removal from public office; (7) that the trial court erred by not granting a new trial, and (8) that the evidence was insufficient to support the guilty verdicts. We affirm the judgment of the trial court.

We begin with a brief summary of the facts as they relate to the counts for which the Defendant was convicted. These proceedings initially began in March of 1992, when General Pat McCutchen, who was District Attorney General for the 19th Judicial District at the time, requested that the T.B.I. investigate allegations of criminal activity in the Robertson County Highway Department ("Highway Department"). T.B.I. Agent John Taylor was assigned to the case. The Defendant, then superintendent of the Highway Department, was the focus of the investigation. Based upon the T.B.I.'s investigation, the grand jury returned a nine-count presentment against the Defendant.

As to Counts One and Four, several Department employees testified that they saw Mark Hulsey, a Highway Department employee, use the Highway Department shop and

[1]The jury found the Defendant not guilty of two additional charges: official misconduct and private use of county road materials and equipment. Moreover, another count of private use of county road materials and equipment was dismissed as a result of the State's necessary election between two counts.

tools to weld a security door and windows for an antique barn in Cross Plains, Tennessee, owned by the Defendant and his wife. The work was done at the Defendant's direction while Mr. Hulsey was at work. Tony Sutterfield, another Highway Department employee, testified that he helped Mr. Hulsey with this project. Mr. Hulsey testified that part of the steel came from the shop's inventory and part of it was purchased through Dean Oil Company. Mr. Hulsey testified that when they ran out of steel, the Defendant told him to get some more. Mr. Hulsey and David Goodman, also a Highway Department employee, then went to Dean Oil Company to pick up the steel needed to complete the work. The steel was delivered to the Highway Department shop later in the afternoon. The steel flat bars were billed to the Highway Department as grease. Mr. Goodman testified that they did not get a receipt or an invoice. Although not on the "clock" when they delivered the door and windows, the two men assisted the Defendant in installing them at the antique barn. After the investigation had begun, the Defendant told Mr. Hulsey that the T.B.I. had questioned him about the security door and windows. The Defendant told Mr. Hulsey to tell the T.B.I. that he had worked on the door and windows on his own time and that they were made from scrap metal.

Mr. Goodman testified that in July of 1992, after the investigation had begun, he went back to Dean Oil Company and asked for a receipt for two pieces of flat bar. Because he was unsure of the price, he instructed David Dean to make the receipt for $15. The receipt was back-dated April 1, 1992. Mr. Dean testified that the steel was sold in April 1992 for about $30. Mr. Goodman testified that he gave the falsified receipt to the Defendant, who put it in his wallet.

On July 13, 1992, the Defendant gave the bogus receipt to Agent Taylor. The Defendant told Agent Taylor that Mr. Goodman had brought him the receipt on or around April 1, 1992, and that he had paid Mr. Goodman back. Later, on July 30, 1992, the Defendant told Agent Taylor that the receipt may have been given to him two or three weeks after the steel was purchased.

The proof as to Count Two indicated that the Defendant's wife owned a subdivision, River Rock Village, in Robertson County. Several witnesses testified that before the subdivision was started, the existing county road to the subdivision ended at a cemetery. After the construction of the subdivision had begun, the Defendant had Highway Department employees create a gravel loop that went past the cemetery and through a wooded area. Although there was testimony that the official map of county roads was not exactly to scale, the map indicated that the road ended at the cemetery and did not include the loop. Moreover, Highway Department employees testified that the road had never been maintained as a county road. Highway Department employees cleared, graded, and put gravel on the loop in May and June of 1991.

Robert Bibb, Chairperson of the Robertson County Regional Planning and Zoning Commission, testified that when the Commission reviewed the Defendant's proposal for the River Rock Village subdivision, he asked the Defendant about the loop on the plat because it was not shown on the map. The Defendant assured Mr. Bibb that the road was set up that way and that the county maintained the loop around the cemetery. Based on the Defendant's representations, the plat was approved by the Commission.

The proof as to Count Five showed that for some period of time, the Highway Department would pave county roads upon request if the residents paid for the oil used in paving the road. Larry Henry testified that the Defendant told him the Highway Department would pave the length of his road if Mr. Henry paid six hundred dollars ($600) for the oil. Mr. Henry wrote a check to the department, but the check was never deposited.

John Hogan testified that he agreed to pay for the oil if his road was paved. The Defendant told Mr. Hogan that it would cost him five hundred dollars ($500). Mr. Hogan gave a check for five hundred dollars ($500) to the Highway Department, however, the check was never deposited.

Donna Choate testified that the Defendant told her that if she paid for the oil, the Highway Department would pave her road. The Choates wrote a check for three hundred dollars ($300) to pay for the oil, however, it was never deposited.

Freddy Hix testified that he talked to the Defendant about getting his road paved. After the work had been done, the Defendant came by his house to pick up a $500 check. Mr. Hix testified that the check was never deposited.

William Byrne, bookkeeper for the Highway Department and secretary for the Robertson County Highway Commission, testified that he first saw these four undeposited checks in the Defendant's office drawer. When Mr. Byrne inquired about the checks, the Defendant instructed him to hold on to the checks until he received further instruction. In Spring of 1992, after the T.B.I. investigation had begun, Mr. Byrne was "wired" and went to the Defendant's office to ask about the four checks. On tape, the Defendant instructed Mr. Byrne to tear up the checks. Later in the conversation, the Defendant told Mr. Byrne to put the checks in the safe. Mr. Byrne eventually gave the checks to Agent Taylor on May 7, 1992. There was proof that Mr. Byrne and the Defendant were the only ones who had access to the checks. Moreover, it was Mr. Byrne's responsibility as bookkeeper to deposit the checks with the Robertson County Trustee's Office.

Proof as to Count Six showed that Ernest and Patricia Adcock owned a farm in Robertson County which could be accessed only by a gravel road that passed over a creek bed. When there were heavy rains, the Adcocks could not access their property. The Defendant agreed to sell the Adcocks a county bridge from Hooper's Hollow. The Adcocks gave the Defendant a check for $100 on May 9, 1991, however, it was never deposited.

Highway Department equipment was used to move the bridge, which had been taken out of service, to the Adcocks' property, to cut down trees, to haul dirt, and to flatten the dirt out to level the approach to the bridge. There was also proof that the concrete used to finish the bridge cost one thousand two hundred five dollars and twenty-five cents

($1205.25) and was billed to the Highway Department. Mr. Hulsey did most of the work on the bridge and was paid by the Adcocks. The Adcocks put a "No Trespassing" sign on the bridge. The bridge was not approved by the highway commission.

The proof as to Count Nine showed that Eddie Mack White, a Highway Department employee, decided to put a driveway on the upper side of his property in Cross Plains, Tennessee. Proof showed that the Defendant authorized Calvin Grant to leave a culvert pipe at Mr. White's property without charge. Because Mr. White was on a state road, the Tennessee Highway Maintenance Department installed the pipe for Mr. White. After the pipe was installed, the Defendant drove by Mr. White's house. The Defendant said that the drive would need to be wider for Mr. White's truck and boat. A week later, another pipe appeared. This pipe was also not paid for and was installed by Highway Department employees. Mr. Grant testified that he took four men with him to install the pipe. They used a county dump truck and a backhoe to complete the job. Mr. Grant had asked the Defendant if the county would pay for the pipes because Mr. White was a Highway Department employee. The Defendant instructed Mr. Grant to bill the work to Cross Plains Road instead of Highway 25, where the pipes were installed. Mr. White said that he offered to pay for the pipes, however, the Defendant told him that he should not have to worry about it because he was a Highway Department employee.

I.

In his first issue on appeal, the Defendant argues that the trial court erred in denying his motion to dismiss the charging instrument issued against him. In particular, he contends that the charging instrument was an indictment which lacked the signature of the district attorney, thereby rendering it fatally defective. See State v. Myers, 85 Tenn. (1 Pickle) 203, 5 S.W. 377 (1886); Teas v. State, 26 Tenn. (7 Humphreys) 174 (1846); Hite v. State, 17 Tenn. (9 Yerger) 198 (1836); Foute v. State, 4 Tenn. (3 Haywood) 98 (1816). In support of his contention, the Defendant focuses on several aspects of the charging instrument which, he asserts, indicate that it is an indictment. For example, there is a

typed line for the signature of the district attorney after every count of the charging instrument. The charging instrument itself contains the language, "and prior to the finding of this indictment" (emphasis added). The names of the witnesses were listed where those names are typically listed for indictments rather than presentments. In addition, T.B.I. Agent Taylor was listed as the prosecutor as though the charging instrument were an indictment. Clearly, however, the signature of the district attorney does not appear on the charging instrument.

The State does not contest that the charging instrument lacks the signature of the district attorney. Nor does the State contest that an indictment lacking the district attorney's signature is defective. Instead, the State argues that the charging instrument is actually a valid presentment. The State points out that the charging instrument contains the signatures of all of the members of the grand jury, which the Defendant does not contest.

Prior to trial, the Defendant filed a motion to dismiss the "indictment" due to the lack of the district attorney's signature. Each party argued its position at a pretrial motion hearing conducted on March 19, 1993. After hearing argument, the trial court denied the Defendant's motion to dismiss the indictment. The trial court found that, although the charging instrument contained "certain indicators that the instrument may have been prepared in the typical fashion of an indictment," the fact that it contained the signatures of all of the grand jurors rendered it a valid presentment.

In considering this issue, we begin with the long-standing principle "that no person shall be put to answer any criminal charge but by presentment, indictment or impeachment." Tenn. Const. art. I, § 14. Although the most common method of initiating prosecution is an indictment, Tennessee law also allows for prosecution to commence by a presentment. See State v. Street, 768 S.W.2d 703, 713 (Tenn. Crim. App. 1988); Raybin, Tennessee Criminal Practice and Procedure, § 9.2. In fact, indictments and presentments are virtually identical in purpose. The general purpose of either instrument

is to advise the accused of the offense with which he or she is charged. See, e.g., Stanley v. State, 171 Tenn. (7 Beeler) 406, 104 S.W.2d 819, 821 (1937).

We note that there are no specific constitutional or statutory requirements as to the form, manner, or method in which a presentment must be made. See Stoots v. State, 205 Tenn. (9 McCanless) 59, 325 S.W.2d 532, 536 (1959); State v. Mingledorff, 713 S.W.2d 88, 88 (Tenn. Crim. App. 1986). The form of a presentment is often, by practice, sufficiently similar to the form of an indictment that the Tennessee code states that the use of indictment includes presentment "whenever the context so requires or will permit." Tenn. Code Ann. § 40-13-101(b). As the late Chief Justice Grafton Green explained, "[t]he presentment is in the form of a bill of indictment, and is signed individually by the grand jurors who returned it." State v. Davidson, 171 Tenn. (7 Beeler) 347, 103 S.W.2d 22, 23 (1937) (quoting State v. Darnal, 20 Tenn. (1 Humphreys) 290 (1839)) (emphasis added). The primary difference between the form of an indictment and that of a presentment is that an indictment must be signed by the district attorney and endorsed by the foreperson of the grand jury, whereas a presentment must be signed by all of the grand jurors but need not be signed by the district attorney. See Crumley v. State, 180 Tenn. (16 Beeler) 303, 174 S.W.2d 572, 573 (1943); Garret v. State, 17 Tenn. (9 Yerger) 389, 390 (1836); State v. Hudson, 487 S.W.2d 672, 675 (Tenn. Crim. App. 1972).

Applying those precepts to the case at bar, we conclude that the trial court did not err in finding that the charging instrument was a valid presentment. The instrument contained the signatures of all of the members of the grand jury. Regardless of the lack of the district attorney's signature, the instrument satisfied the requirements of a presentment. Thus, the Defendant's first issue lacks merit.

II.

The Defendant contends that the trial court erred by denying him pretrial diversion. After the District Attorney refused to enter into a memorandum of understanding to grant

pretrial diversion, the Defendant applied for a writ of certiorari to the trial court. After a hearing, the trial court denied the Defendant's application. Subsequently, the Defendant moved for an interlocutory appeal pursuant to T.R.A.P. 9. Review was denied, and the Defendant proceeded to trial.

He now raises on direct appeal that the trial court erred in failing to grant pretrial diversion. The State argues that the Defendant has waived this issue, and we agree. An appeal of the grant or denial of pretrial diversion is available by interlocutory appeal pursuant to Rule 9 and Rule 10 of the Tennessee Rules of Appellate Procedure. State v. Mecord, 815 S.W.2d 218, 219 (Tenn. Crim. App. 1991); State v. McDuff, 691 S.W.2d 569, 570 (Tenn. Crim. App. 1984); State v. Montgomery, 623 S.W.2d 116, 118 (Tenn. Crim. App. 1981). The Defendant argues that Mecord misinterprets the holdings of McDuff and Montgomery, and urges that an interlocutory appeal may be taken by either a Rule 9 or Rule 10 application or the issue is waived. The State contends that Mecord states the preferred rule, that the issue is waived unless the Defendant appealed through both Rule 9 and Rule 10.

However, the determination of waiver does not depend upon whether the Defendant used Rule 9 and Rule 10 in succession or simply appealed using one method. The Defendant waived the pretrial diversion issue because he proceeded to trial. Review of the granting or denial of pretrial diversion is not available in a T.R.A.P. 3 direct appeal. See State v. Nabb, 713 S.W.2d 685, 686 (Tenn. Crim. App. 1986). Mecord accurately states the process for appeal: "[T]he defendant correctly petitioned the trial court to allow an interlocutory appeal pursuant to T.R.A.P. 9. . . . Rather than proceeding to trial, the defendant should have filed an application for an extraordinary appeal by permission under T.R.A.P. 10." Mecord, 815 S.W.2d at 219. This failure to pursue the second available option for an interlocutory appeal constitutes a waiver. The usual and preferred method is to first appeal through Rule 9, and if unsuccessful, through Rule 10. If the appeal is unsuccessful after review or denial of review under Rule 10, a defendant has exhausted his or her remedies on the issue of pretrial diversion. We note, however, that judicial

diversion is a remedy that could have been pursued after trial. See Tenn. Code Ann. §40-35-313. This issue has no merit.

III.

As his next issue, the Defendant argues that the trial court erred by denying his motion to suppress three statements he made to T.B.I. Agent John Taylor. He contends that his first statement on June 17, 1992, was involuntary and that subsequent statements should have been excluded as fruits from the initial illegal statement. The Defendant was contacted by Agent Taylor and Agent Jeff Puckett at his office at the Highway Department. At the same time, other T.B.I. agents were executing a subpoena to collect the Highway Department records. Agent Taylor told the Defendant that the T.B.I. had received some complaints regarding his possible illegal conduct in the Highway Department. The Defendant was the focus of the investigation at that point because the complaints originated with him. Agent Taylor, with Agent Puckett present, interviewed the Defendant in his office; the Defendant was seated behind his desk. No Miranda warnings were given before questioning was initiated. Agent Taylor was wearing a firearm in a holster, but it is unclear whether it was visible to the Defendant. The interview lasted somewhat over an hour, during which Agent Taylor composed a handwritten statement from the Defendant's answers. The Defendant reviewed the statement, made corrections and initialed them, and signed the statement. Agent Taylor contacted the Defendant again at his place of employment on July 7 and July 30, 1992, to inquire about specific incidents. These meetings were conducted in a similar manner to the June 17 encounter.

The Defendant was later indicted for the alleged offenses. He submitted a motion to suppress all three statements on grounds that he was entitled to Miranda warnings and that the initial statement was involuntary and thus, tainted the remaining statements. The trial court conducted a hearing and denied the Defendant's motion. On appeal, the Defendant argues only one ground: that his statement made on June 17, 1992, was involuntary and that it and the remaining statements should have been excluded.

The privilege against self-incrimination protects an accused from being compelled to testify against himself. See Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The Miranda court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." Miranda, 384 U.S. at 444, 86 S.Ct. at 1612. The test for determining whether the Miranda warnings should have been given by a law enforcement officer in this state is whether there has been a "custodial interrogation." See State v. Joe L. Anderson, ___ S.W.2d ___, No. 02-S-01-9511-CC-00121 (Tenn., Jackson, Sept. 16, 1996). The United States Supreme Court has defined this phrase as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444, 86 S.Ct. at 1612. In other words, Miranda warnings are required when "there [has been] a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest.' " California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983) (quoting Oregon v. Mathiason, 429 U.S. 492, 495, 97 S.Ct. 711, 714, 50 L.Ed.2d 714 (1977)).

The United States Supreme Court has also interpreted the Fifth Amendment to require that an incriminating statement or confession be freely and voluntarily given to be admissible. This even applies to statements obtained after the proper Miranda warnings have been issued. See State v. Kelly, 603 S.W.2d 726, 729 (Tenn. 1980). Statements and confessions not made as a result of custodial interrogations must also be voluntary to be admissible. See Arizona v. Fulminante, 499 U.S. 279, 286-88, 111 S. Ct. 1246, 1252-53, 113 L.Ed.2d 302 (1991) (while an inmate, the defendant confessed to another prisoner in exchange for protection and this was held to be coerced). It must not be extracted by "any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence." Bram v. United States, 168 U.S. 532, 542-543, 18 S.Ct. 183, 187, 42 L.Ed. 568 (1897)(citations omitted). Moreover, due process requires that confessions tendered in response to either physical or psychological

coercion be suppressed. Rogers v. Richmond, 365 U.S. 534, 540-541, 81 S.Ct. 735, 739, 5 L.Ed.2d 760 (1961); Kelly, 603 S.W.2d at 728-29. This has evolved into the "totality of the circumstances" test to determine whether a confession is voluntary. Fulminante, 499 U.S. at 285-87, 111 S. Ct. at 1251-52; Frazier v. Cupp, 394 U.S. 731, 739, 89 S. Ct. 1420, 1425, 22 L.Ed.2d 684 (1969); State v. Crump, 834 S.W.2d 265, 271 (Tenn.), cert denied, 506 U.S. 905, 113 S.Ct. 298, 121 L.Ed.2d 221 (1992).

Here, the Defendant does not argue that the statements he made were elicited while undergoing a custodial interrogation. Rather, he simply contends that, because of the "surprise" visit from the T.B.I. agents, the atmosphere was such that he could not have made the statements voluntarily. He points to the fact that he was initially contacted at his office without warning. He claims he was questioned "behind closed doors for several hours." He also stresses that, while he was being questioned, T.B.I. agents were seizing hundreds of documents from the Highway Department office. This, he contends, created an atmosphere that renders any statements made on June 17, 1992, involuntary. As a result, any statements made on subsequent occasions should have been excluded as "fruit of the poisonous tree," and he cites State v. Smith, 834 S.W.2d 915 (Tenn. 1992).

However, the State counters that there is no evidence that supports the claim that the atmosphere was coercive. The Defendant agreed to be questioned and was able to remain in his own office, sitting behind his own desk. There is no evidence that the agents made any threats or promises to the Defendant. There is uncontroverted testimony that the interrogation lasted over an hour and no evidence that the meeting lasted several hours. Furthermore, the State asserts, citing authority, that the agents' simply wearing weapons does not constitute coercion and neither does the Defendant's discomfort while under close scrutiny.

We have studied the evidence, considering the totality of the circumstances, and we cannot conclude that the trial court erred by denying the Defendant's motion to suppress. A trial court's findings of fact in a suppression hearing will be upheld unless the

evidence preponderates otherwise. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). The Defendant has failed to meet his burden of demonstrating that the evidence preponderates against the trial court's findings. Although the atmosphere surrounding the interrogation may have proved distressing, there is little evidence to support that the statement was coerced. Moreover, because we find the initial statement to be voluntarily given, the other two statements the Defendant made were properly admitted. See Smith, 834 S.W.2d at 921. This issue is without merit.

IV.

In his next issue, the Defendant argues that Agent Taylor should not have been allowed to testify in violation of Rule 615 of the Tennessee Rules of Evidence. The Defendant asserts that under State v. Mothershed, 578 S.W.2d 96 (Tenn. Crim. App. 1978), once he invoked the rule to sequester witnesses, the state's representative had to testify first or waive his opportunity. We find that under Tenn. R. Evid. 615, Agent Taylor was permitted to remain in the courtroom as the state's representative.

Tennessee Rules of Evidence 615 provides:

> At the request of a party the court shall order witnesses, including rebuttal witnesses, excluded at trial or other adjudicatory hearing. Sequestration shall be effective before voir dire or opening statements if requested. The court shall order all persons not to disclose by any means to excluded witnesses any live trial testimony or exhibits created in the courtroom by a witness. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

While "the rule" may be invoked at any time and is mandatory, State v. Anthony, 836 S.W.2d 600, 605 (Tenn. Crim. App. 1992), Rule 615 provides for three exceptions. Under subsection (2), the state is permitted to designate a representative. In State v. Wingard, 891 S.W.2d 628 (Tenn. Crim. App. 1994), this Court held that the prison warden was the chief official at the correctional facility and a participant in the search for the defendant and

therefore, qualified as the state's designated representative or "prosecutor" in the case. As such, the witness was allowed to testify in rebuttal even though he had not been excluded from the courtroom during the previous testimony. Id. at 635.

In the present case, Agent Taylor was assigned the responsibility of investigating alleged criminal conduct at the Highway Department. He was clearly the representative or prosecutor for the state. As such, under subsection (2), it was not a violation of Rule 615 to allow Agent Taylor to sit at the State's table during the testimony of the first five witnesses before being called to testify. This issue is without merit.

V.

In his next issue, the Defendant raises several actions by the State which he claims constituted prosecutorial misconduct. In Harrington v. State, 215 Tenn. (19 McCanless) 338, 385 S.W.2d 758 (1965), our Supreme Court set out the test to be applied by an appellate court in reviewing instances of improper conduct, i.e., "whether the improper conduct could have affected the verdict to the prejudice of the defendant." Id. at 340, 385 S.W.2d at 759. In Judge v. State, 539 S.W.2d 340 (Tenn. Crim. App. 1976), this Court noted five factors generally accepted as those to be considered in making the determination of whether allegedly improper conduct affected the verdict to a defendant's prejudice:

1. The conduct complained of viewed in context and in light of the facts and circumstances of the case.
2. The curative measures undertaken by the court and the prosecution.
3. The intent of the prosecutor in making the improper statement.
4. The cumulative effect of the improper conduct and any other errors in the record.
5. The relative strength or weakness of the case.

Id. at 344.

We have reviewed the Defendant's contentions of prosecutorial misconduct in light of these factors and found that none has merit.

(a)

First, the Defendant argues that the State improperly and prejudicially contacted approximately seventy witnesses prior to trial. From the record, it appears that prior to trial, Mr. Byrne expressed to the District Attorney General the concerns of Highway Department employees as to whether they were obligated to talk with the Defendant and his attorney. In response, the District Attorney General dictated and sent out a letter to several witnesses. The body of the letter read as follows:

> You are a potential witness in this case. I wanted to let you know that the District Attorney cannot legally suggest to you that you not discuss what you may know about the case with the attorney representing an indicted defendant. This office is not, by this letter, suggesting that you not do so.
>
> However, no defendant or defense attorney can compel you to discuss the case with them, and your decision about whether or not you wish to do so is entirely up to you.
>
> We have written you because we have received inquiries from potential witnesses who have asked us if they must discuss this case with the defendant or his lawyer.

In Gammon v. State, 506 S.W.2d 188 (Tenn. Crim. App. 1973), this Court stated the well-recognized principle that:

> Prospective witnesses are not partisans, and they should be regarded as spokesmen for the facts as they see them. Because they do not "belong" to either party, a prosecutor, defense counsel or anyone acting for either should not suggest to a witness that he not submit to an interview by opposing counsel.

Id. at 190. Under Tennessee case law, a prospective witness has "the discretion to talk - or not to talk - to either counsel, as the witness sees fit. Of course, the law also provides that counsel may not instruct a witness not to discuss the facts of a case with opposing counsel." State v. Singleton, 853 S.W.2d 490, 493 (Tenn. 1993).

Although the letter correctly explains the rights of any witness in criminal justice litigation, the fact that copies were sent to witnesses who did not request the information is of concern. Both Prosecution Function Standard 3-3.1(d) and Defense Function Standard 4-4.3(d), ABA Standards for Criminal Justice (3d ed. 1993), provide in part that counsel "should not discourage or obstruct communication between prospective witnesses and [opposing counsel]." In the Commentary to both standards, the following is stated:

> Because witnesses do not "belong" to either party, it is improper for a prosecutor, defense counsel, or anyone acting for either side to suggest to a witness that the witness not submit to an interview by opposing counsel.
>
> It is not only proper but it may be the duty of the prosecutor and defense counsel to interview any person who may be called as a witness in the case . . . . In the event a witness asks the prosecutor or defense counsel, or a member of their staffs, whether it is proper to submit to an interview by opposing counsel or whether it is obligatory, the witness should be informed that there is no legal obligation to submit to an interview. It is proper, however, and may be the duty of both counsel in most cases to interview all persons who may be witnesses and it is in the interest of justice that witnesses be available for interview by counsel.

(Emphasis added). Thus, to the extent letters went to witnesses who had expressed concern about an obligation to talk to the defense and had sought advice, they were an appropriate response by the District Attorney General.

On the other hand, to the extent letters went to witnesses who did not seek advice from the prosecutor about their rights and who had already been interviewed by state investigators, the letters presented a risk that they could have been taken as a suggestion not to talk to defense personnel, regardless of the District Attorney General's disclaimer in the letter to the contrary. In the Commentary to Discovery Procedure Before Trial Standard 11-4.1, ABA Standards for Criminal Justice (2d ed 1980) dealing with counsel's obligation not to impede opposing counsel's investigation, including potential witness interviews, the following is stated:

> The standard imposes a duty on prosecution and defense counsel, and their respective staffs, to refrain from impeding the investigation of the charges either by advising potential witnesses not to discuss the case with opposing counsel or by taking other steps that would prevent or interfere with further investigation by opposing counsel.
>
> * * *

> Obstruction or interference with opposing counsel's investigation and preparation of the case frequently takes the form of instructing witnesses not to talk with opposing counsel or their staffs, but it may take the form of more subtle instructions.

(Emphasis added). Although the record in this case reflects that the District Attorney General had no intention of unduly interfering with or impeding defense counsel's preparation, the letter could have had that effect with witnesses who had not solicited advice.

Ultimately, though, neither the Defendant nor the record discloses the witnesses who were in either category. Also, there is no specification or showing of any prejudice that was incurred by the Defendant in his trial preparation or presentation because of a witness' reaction to the letter. Thus, under these circumstances and the fact that the record shows that there was no bad faith on the part of the District Attorney General, we do not believe that the record establishes either misconduct or harm resulting from the letter. The Defendant is not entitled to a new trial because of this issue.

(b)

Next, the Defendant argues that the State should have disclosed before trial a meeting between Agent Taylor and Mr. Hulsey, who was a key witness in the case, and his attorney pursuant to the Defendant's Motion for Disclosure of Impeaching Information and/or the Defendant's Motion for Production of Exculpatory Evidence. Specifically, the Defendant complains that he did not learn of Mr. Hulsey's meeting with Agent Taylor until Mr. Hulsey testified at trial. Accordingly, the Defendant contends that the State's failure to disclose this meeting was by definition either a violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), because the State failed to reveal exculpatory evidence, or it was a violation of the State's duty to disclose impeaching evidence pursuant to the Defendant's pretrial Motion for Disclosure of Impeaching Information, which was granted by the trial court.

During the cross-examination of Mr. Hulsey, it developed that at the beginning of

the investigation, Agent Taylor contacted Mr. Hulsey and asked if he would be willing to meet him at the T.B.I. office in Gallatin, Tennessee. Mr. Hulsey and his lawyer met with Agent Taylor in April of 1992, for approximately four and a half hours. Mr. Hulsey testified that Agent Taylor took notes during the interview and showed them to him. The Defendant did not pursue this issue during Mr. Hulsey's testimony. The notes from the interview were not made a part of this record.

In Brady v. Maryland, 373 U.S. at 87, 83 S.Ct. at 1196-97, the United States Supreme Court held that the prosecution has the duty to furnish exculpatory evidence to the accused upon request. Any "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id. The duty to disclose extends to all "favorable information" regardless of whether the evidence is admissible at trial. State v. Marshall, 845 S.W.2d 228, 232-33 (Tenn. Crim. App. 1992); Branch v. State, 4 Tenn. Crim. App. 164, 168, 469 S.W.2d 533, 536 (1969). In United States v. Bagley, 473 U.S. 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985), the Supreme Court held that both exculpatory and impeachment evidence fall under the Brady rule.

Before an accused is entitled to relief under this theory, he must establish several prerequisites: (a) the prosecution must have suppressed the evidence; (b) the evidence suppressed must have been favorable to the accused; and (c) the evidence must have been material. See Bagley, 473 U.S. at 674-75, 105 S. Ct. at 3379-80; Brady, 373 U.S. at 87, 83 S. Ct. at 1196-97; Workman v. State, 868 S.W.2d 705, 709 (Tenn. Crim. App. 1993), cert. denied, 510 U.S. 1171, 114 S.Ct. 1207, 127 L.Ed.2d 555 (1994); State v. Marshall, 845 S.W.2d 228, 232; Strouth v. State, 755 S.W.2d 819, 828 (Tenn. Crim. App. 1986). In State v. Spurlock, 874 S.W.2d 602 (Tenn. Crim. App. 1993), this Court recognized a fourth prerequisite to relief: "the accused must make a proper request for the production of the evidence, unless the evidence, when viewed by the prosecution, is obviously exculpatory in nature and will be helpful to the accused."

Id. at 609 (citations omitted).

First, we find that the State's failure to disclose this meeting with Mr. Hulsey did not violate the Defendant's request for impeaching information. Specifically, the Defendant requested information concerning all considerations or promises of consideration given to or made on behalf of prosecution witnesses. The Defendant implies that Mr. Hulsey's subsequent appointment to the Defendant's position at the Highway Department indicates that Mr. Hulsey received some consideration from the State for his testimony. We first note that Mr. Hulsey testified that Agent Taylor never indicated that he was the focus of the investigation. Moreover, there is no proof of any consideration given to Mr. Hulsey in exchange for his testimony. Also, there is no proof that the State had any connection to the subsequent promotion of Mr. Hulsey or that such promotion was in any way related to his testimony at trial. Finally, we conclude that the Defendant does not have a valid claim under Brady. Without the notes taken by Agent Taylor at the meeting with Mr. Hulsey, we are unable to find that such evidence was favorable or material.

(c)

Next, the Defendant asserts that the prosecutor improperly continued to ask and imply that witnesses from the Highway Department were afraid of losing their jobs as a result of testifying at the Defendant's trial.

Because the Defendant has failed to cite authority in support of this complaint, the issue is waived. T.R.A.P. 27(a); Tenn. Ct. Crim. App. R. 10(b); State v. Chance, 778 S.W.2d 457, 462 (Tenn. Crim. App. 1989); State v. Killebrew, 760 S.W.2d 228, 231 (Tenn. Crim. App. 1988). Moreover, the Defendant failed to make any contemporaneous objection to the prosecutor's remarks and questions objected to now. It is well settled that without a contemporaneous objection to a prosecutor's statements, the error is waived. State v. Sutton, 562 S.W.2d 820, 825 (Tenn. 1978); State v.

Compton, 642 S.W.2d 745, 747 (Tenn. Crim. App. 1982).

Regardless, any attempt by an accused to suppress, destroy, or conceal evidence is a relevant circumstance from which the guilt of the accused can be inferred. Hicks v. State, 533 S.W.2d 330, 334 (Tenn. Crim. App. 1975). It is proper to permit the introduction of testimony from a witness that he was threatened by a defendant after the offense occurred in an effort to intimidate the witness not to testify. Tillery v. State, 565 S.W.2d 509, 511 (Tenn. Crim. App. 1978). Here, any intimidation of Highway Department employees by the Defendant was relevant on the issue of the Defendant's guilt.

(d)

Next, the Defendant asserts that the State abused the use of leading questions, citing to thirty-four (34) times where the defense objected to the prosecutor's use of leading questions. The prosecutor used an inordinate number of leading questions, and the defense's objections to this practice were sustained. In reviewing the record, we do not find that the prosecutor's use of leading questions prejudiced the verdict in this case. See Judge v. State, 539 S.W.2d 340, 344. Instead, we find that the prosecutor's use of leading questions was for the most part merely the "'give and take' that occurs in any trial where emotions are high and the penalty severe." State v. Williams, 784 S.W.2d 660, 666 (Tenn. Crim. App. 1989). At the same time, we admonish the prosecution to adhere to the dictates of Tenn. R. Evid. 611(c) in future proceedings.

(e)

Next, the Defendant asserts that the State improperly dramatized the testimony of Ray Cole, a land surveyor, who flew over the Defendant's subdivision to compare it

with aerial photographs of the area. Specifically, the Defendant complains about the State asking Mr. Cole "when you went up in that little unsafe airplane, did you take with you what has been marked in evidence as Exhibit 61?"

Because the Defendant has failed to cite authority in support of this complaint, the issue is waived. T.R.A.P. 27(a); Tenn. Ct. Crim. App. R. 10(b); State v. Chance, 778 S.W.2d 457, 462; State v. Killebrew, 760 S.W.2d 228, 231. Moreover, the Defendant failed to make any contemporaneous objection to the prosecutor's remarks. As previously stated, it is well settled that without a contemporaneous objection to a prosecutor's statements, the error is waived. State v. Sutton, 562 S.W.2d 820, 825; State v. Compton, 642 S.W.2d 745, 747. Regardless, we find that the prosecutor's singular comment concerning the safety of Mr. Cole's plane was harmless error. See Tenn. R. Crim. P. 52(a).

(f)

Finally, the Defendant argues that the State improperly injected evidence regarding thirteen (13) roads not affected by this indictment, the lack of a bidding process, and alleging the Defendant was a silent partner in Mid-South Paving Company ("Mid-South"). Initially, we note that the Defendant has failed to cite authority in support of this complaint, and the issue is waived. T.R.A.P. 27(a); Tenn. Ct. Crim. App. R. 10(b); State v. Chance, 778 S.W.2d 457, 462; State v. Killebrew, 760 S.W.2d 228, 231. Regardless, we will address the issue briefly.

In Count Eight, the Defendant was charged with authorizing and knowingly permitting the private use of county equipment and materials. Specifically, the Defendant was charged with authorizing and knowingly permitting between 100 and 200 tons of county hot mix asphalt to be used to pave a private driveway owned by William W. Hinkle, Jr., owner of the Hinkle Chair Company. The State alleged that the driveway at Hinkle Chair Company was paved while the Highway Department and Mid-South were paving the intersection of Mt. Sharon and Abednego Roads. The Highway

Department had contracted with Mid-South to do the work on several roads, including Mt. Sharon and Abednego roads. The required bidding process was not followed by the Highway Department. At trial, there was extensive proof regarding the paving of Mt. Sharon and Abednego Roads and the driveway of Hinkle Chair Company. In relationship to this, there was extensive proof regarding the relationship between the Defendant, the Highway Department, and Mid-South.

We note first that the cited statements by the prosecution alleging that the Defendant was a silent partner in Mid-South were made outside the presence of the jury. As to the proof that was presented to the jury, the trial court retains broad discretion in controlling counsels' conduct occurring within its courtroom, and we will not interfere with the trial court's discretion, absent a showing that it abused its discretion. Smith v. State, 527 S.W.2d 737, 739 (Tenn.1975).

We have reviewed the questioned proof in relation to the record as a whole and in the context in which it was made. The Defendant has not shown that the proof concerning Mid-South affected the jury's verdict to the Defendant's detriment. The State presented a substantial amount of testimony concerning the work done for the Highway Department by Mid-South, however, the jury acquitted the Defendant as to Count Eight to which this proof related. Accordingly, we find that the introduction of this proof, if in fact irrelevant, was harmless error and that the state's actions did not rise to a level of prosecutorial misconduct. This issue is without merit.

VI.

In his next issue, the Defendant contends that the trial court erred by refusing his request to include a jury instruction for the range of punishment that encompassed the Defendant's removal from office. The Defendant filed a request with the trial court for jury instructions pursuant to Tennessee Code Annotated section 40-35-201(b). The applicable language states that "upon the motion of either party, filed with the court

prior to the selection of the jury, the court shall charge the possible penalties for the offense charged and all lesser included offenses." Tenn. Code Ann. § 40-35-201(b).

The Defendant was charged and convicted of three counts of official misconduct pursuant to Tennessee Code Annotated section 39-16-402. Under Tennessee Code Annotated section 39-16-406, a public servant shall be removed from office when convicted of offenses under section 39-16-402. The statute reads:

> (a) A public servant convicted under § 39-16-402, § 39-16-403 or § 39-16-404 shall be removed from office or discharged from the position.
>
> (b) A public servant elected or appointed for a specified term shall be:
>
> (1) Suspended without pay immediately upon conviction in the trial court through the final disposition of the case;
>
> (2) Removed from office for the duration of the term during which the conviction occurred if the conviction becomes final; and
>
> (3) Barred from holding any appointed or elected office for ten (10) years from the date the conviction becomes final.
>
> (c) A public servant who serves at-will shall be discharged upon conviction in the trial court. Subsequent public service shall rest with the hiring or appointing authority, provided that such authority has been fully informed of the conviction.

Tenn. Code Ann. § 39-16-406.

The Defendant argues that the jury should have been informed of all possible consequences of being convicted for official misconduct, including sentencing and the ouster from office. The trial court concluded that the removal from office constituted a change in "status" rather than a punishment subject to the requirements in Tennessee Code Annotated section 40-35-201. The Defendant asserts that the failure to instruct the jury on all the "punitive consequences" resulted in prejudicial error, and he cites State v. Cook, 816 S.W.2d 322, 326-27 (Tenn. 1991). In Cook, the trial court

erroneously charged the jury with only the Range I sentences when the defendant was actually eligible for Range II sentences. In conducting a harmless error analysis, our Supreme Court concluded that there was no affirmative evidence in the record that demonstrated an effect on the results of the trial. Id. at 326. However, the Court found prejudicial error when, on remand for resentencing, which included the proper Range II sentences, the defendant would be "sentenced to punishment not known to or contemplated by the convicting jurors." Id. at 326-27. The Defendant argues that the Cook rationale should be applied to the case at bar.

The State counters that the trial court properly denied the request for jury instructions. The State notes that ouster is a "civil disability" and not an integral part of the punishment for official misconduct. The State makes a persuasive argument that the heading of the statute may provide clarification as to the meaning of its provisions. The heading of Tennessee Code Annotated section 40-35-201 reads: "Issue of guilt and sentence to be tried separately-Instructing jury on possible sentences." (Emphasis added). The phrase "possible penalties," standing alone, could certainly be interpreted to include a removal from office. See State v. Blazer, 619 S.W.2d 370, 374 (Tenn. 1981). Indeed, holding a public office for a term has been held as a property right subject to forfeiture. See id.; State v. Kerby, 136 Tenn. (9 Thompson) 386, 389, 189 S.W. 859, 860 (1916); State ex rel. Shelby County v. Stewart, 147 Tenn. (20 Thompson) 375, 380, 247 S.W. 984, 985 (1919). Without more than the phrase "possible penalties," we would be more inclined to conclude that the removal from office constitutes a penalty of which the jury should have been instructed. Yet, the caption clearly refers to instructions for "possible sentences." Thus, we conclude that the trial court did not err in failing to instruct the jury on the ouster provisions, which are not included within the sentencing scheme of the Criminal Sentencing Reform Act. See Tenn. Code Ann. § 40-35-101 et. seq.

Even if we were to conclude that the ouster provisions were penalties that the trial court should have included in the jury instructions, we find no reversible error

because the Defendant has not demonstrated that the error affected the judgment. After considering the entire record in the case sub judice, we are satisfied that any error was harmless. T.R.A.P. 36(b); Tenn. R. Crim. P. 52(a).

VII.

In his next issue, the Defendant asserts that the trial court should have granted his motion for a new trial based on an affidavit submitted by the jury foreperson. No complete transcript of the hearing on the motion is included in the record. However, the juror foreperson's affidavit is included with the Defendant's motion for new trial. The Defendant argues two instances of bias on the part of the jury. First, the Defendant challenges the qualifications of the jurors based on the jury foreperson's disclosure in his affidavit that two members of the jury brought to the deliberations a personal bias against the Defendant because they were personally offended by the fact that either they, their families, or friends had written checks for oil to the Highway Department which were deposited in a timely manner. Secondly, the Defendant submits that the jury foreperson was affected by newly discovered evidence that after the trial Mr. Hulsey, a key state witness, sought and obtained the Defendant's position as county road superintendent. In his affidavit, the jury foreperson requested that his vote be changed to "not guilty" based on this information. The Defendant implies that Mr. Hulsey's testimony was tainted by his aspirations of obtaining the Defendant's job at the Highway Department.

The common law rules governing challenges to juror qualifications fall into two categories: (1) propter defectum and (2) propter affectum. Partin v. Henderson, 686 S.W.2d 587, 589 (Tenn. App. 1984). Objections based upon general disqualifications, such as alienage, family relationship, or statutory mandate, are within the propter defectum class and, as such, must be made before the return of a jury verdict. Literally

translated, propter defectum means "on account of defect." State v. Akins, 867 S.W.2d 350, 355 (Tenn. Crim. App.1993).

In contrast, a propter affectum challenge, translated as "on account of prejudice," is based upon the existence of bias, prejudice, or partiality towards one party in the litigation "actually shown to exist or presumed to exist from circumstances." Durham v. State, 182 Tenn. (18 Beeler) 577, 588, 188 S.W.2d 555, 559 (1945); see also Toombs v. State, 197 Tenn. (1 McCanless) 229, 232, 270 S.W.2d 649, 650 (1954). Propter affectum challenges may be made after the return of the jury verdict. State v. Furlough, 797 S.W.2d 631, 652 (Tenn. Crim. App.1990). The burden is on the defendant to show that the juror had an actual bias or prejudice. State v. Caughron, 855 S.W.2d 526, 539 (Tenn.), cert. denied, 510 U.S. 979, 114 S.Ct. 475, 126 L.Ed.2d 426 (1993).

Proof on this matter is controlled by Tenn. R. Evid. 606(b), which provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon any juror's mind or emotion as influencing that juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes, except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention, whether any outside influence was improperly brought to bear upon any juror, or whether the jurors agreed in advance to be bound by a quotient or gambling verdict without further discussion; nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.

Under Tennessee Rule of Evidence 606, a juror may testify only about extraneous prejudicial information that was improperly brought to the jury's attention, outside influence that was improperly brought to bear on any juror, and whether the jurors had agreed in advance to be bound by a quotient or gambling verdict without further discussion. N. Cohen, S. Sheppeard, D. Paine, Tennessee Law of Evidence, § 606.2 (3rd Ed. 1995). A juror cannot testify about the effect of anything in influencing a juror's mind or emotion and leading the juror to decide as he or she did. Nor can jurors testify about the information they used from their store of general knowledge, because jurors are entitled to bring their knowledge and experience to bear on their decision

making. Id. In Caldararo v. Vanderbilt University, 794 S.W.2d 738 (Tenn. App. 1990), the Court of Appeals stated:

> [J]urors are not required to be completely ignorant about a case, and a verdict will not be overturned because of jurors' generalized knowledge of the parties or of some other aspect of the case. A juror's personal experiences unrelated to the litigation are not external information. However, a juror's personal experiences directly relating to the parties or events directly involved in the litigation may be.

Id. at 744 (citations omitted).

Initially, we find that whether some jurors were personally offended by the fact that either they, their families, or friends had written checks for oil to the Highway Department which were deposited in a timely manner does not constitute extraneous prejudicial information or outside influence. The jurors were entitled to bring their knowledge and experience to bear on their decision making process and were entitled to react to the proof that four checks for oil were not deposited at the Defendant's direction. Moreover, the impact of Mr. Hulsey's subsequent promotion on the juror foreperson's verdict is irrelevant and inadmissible under Rule 606(b). Jury verdicts are to be founded on the proof presented at trial and should not be later overturned based on subsequent events unknown by and outside the control of the parties. This issue is without merit.

VIII.

The Defendant's final issue is whether there was sufficient evidence to support the guilty verdicts. When an accused challenges the sufficiency of the convicting evidence, the standard is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). Questions concerning the credibility of the witnesses, the weight and value to be given the evidence, as well as all factual

issues raised by the evidence, are resolved by the trier of fact, not this Court. State v. Pappas, 754 S.W.2d 620, 623 (Tenn. Crim. App. 1987). Nor may this Court reweigh or reevaluate the evidence. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn.1978).

A jury verdict approved by the trial judge accredits the State's witnesses and resolves all conflicts in favor of the State. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). On appeal, the State is entitled to the strongest legitimate view of the evidence and all inferences therefrom. Cabbage, 571 S.W.2d at 835. Because a verdict of guilt removes the presumption of innocence and replaces it with a presumption of guilt, the accused has the burden in this Court of illustrating why the evidence is insufficient to support the verdict returned by the trier of fact. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn.1982); Grace, 493 S.W.2d at 476. Having reviewed the proof in this case, we find that it is sufficient to support the Defendant's convictions.

First, the Defendant argues that the proof as to Count One, in which he was charged with fabricating evidence, was insufficient in that there was no proof that the Defendant knew the receipt from Dean Oil Company had been fabricated.

Tennessee Code Annotated section 39-16-503(a)(2) states that it is unlawful for any person, knowing that an investigation or official proceeding is pending or in progress to make, present, or use any record, document, or thing with knowledge of its falsity and with intent to affect the course or outcome of the investigation or official proceedings.

In this case, the evidence was sufficient to prove that the Defendant knew the receipt was false. Mr. Hulsey testified that in April 1992, the Defendant instructed him to build a security door and windows for his antique barn. When they ran out of steel at the Highway Department shop, the Defendant instructed him to get more. Mr. Hulsey and Mr. Goodman went to Dean Oil Company and charged the steel as grease to the Highway Department. After the investigation was initiated, Mr. Goodman returned to

Dean Oil Company in July 1992 and asked Mr. Dean to provide a fake receipt for $15. Mr. Goodman then took this false receipt to the Defendant, who in turn put it in his wallet. Although Mr. Goodman testified that the Defendant did not instruct him to get the false receipt, he did so because he was scared he would lose his job.

During the investigation, the Defendant gave contradictory statements concerning the receipt. In his first statement to Agent Taylor, taken on June 17, 1992, the Defendant stated that Mr. Hulsey welded the iron bars for the security door and windows on his own time, using his own equipment. The Defendant further stated that he furnished the bars himself. On July 13, 1992, the Defendant gave Agent Taylor the false receipt and made the following statement:

> On April 1st, 1992 Mark Hulsey was fixing a gate for me, I assume on his own time. He needed a piece of flat bar steel. David Goodman went to Dean Oil Company, bought the steel for me, and brought me a receipt. I paid him back. I guess the reason Goodman went instead of Hulsey was maybe he needed some things for the county and he is our purchasing agent. The receipt is dated April 1st and is in the amount of $16.16.

Finally, on July 30, 1992, the Defendant told Agent Taylor that "[t]he steel came from a scrap pile at American Limestone...The flat bar came from Dean Oil. I don't remember buying flat bar for use on a gate. David Goodman bought the flat bar and brought me the receipt. I don[']t remember when he gave me the receipt. It might have been two or three weeks later. This was the receipt that I have already turned over to the TBI." From this proof, the jury could have found that the Defendant did in fact knowingly provide the false receipt to Agent Taylor.

As to Count Two, which charged the Defendant with official misconduct, the Defendant argues that the county's records made it impossible to prove whether the gravel loop at the River Rock Village subdivision was a county road. The Defendant argues that based on the poor records kept by the county, that the proof was "50-50" as to whether the road was a private way or an abandoned county road and therefore, was insufficient to support the verdict as to this count.

Tennessee Code Annotated section 39-16-402(a)(4) provides that a public servant commits an offense who, with intent to obtain a benefit or to harm another, intentionally or knowingly violates a law relating to the public servant's office or employment. The jury found that the Defendant violated Tennessee Code Annotated section 54-7-202(a), which provides that the chief administrative officer shall not authorize nor knowingly permit the trucks or road equipment, the rock, crushed stone or any other road materials to be used for any private use or for the use of any individual for private purposes.

While there was proof that the official map of county roads was not exact, it did not show the loop at the River Rock Village subdivision as a county road. In fact, the aerial photographs of the area taken in 1974 did not show the gravel loop. Moreover, several witnesses testified that before the development of the Defendant's subdivision, there had never been a county road beyond the cemetery. The proof as to this count was overwhelming that the Defendant directed his employees to grade and gravel a new extension of the road to service his wife's subdivision.

As to Count Four, which also charged the Defendant with official misconduct, the Defendant contends that the proof does not support a conviction for false billing in that Mr. Dean of Dean Oil Company testified that he had never had any dealings with the Defendant.

The Defendant was charged with causing Dean Oil Company to send Robertson County a bill for grease when in fact the billing was actually for steel used by him for his personal use and benefit with the intent that Robertson County pay the bill for steel, and that Robertson County did in fact pay the bill. While there was no proof that the Defendant had any direct dealings with Dean Oil Company, there was testimony that the Defendant instructed Mr. Hulsey to purchase the steel on his behalf.

Even if Mr. Goodman and Mr. Hulsey were considered accomplices to this crime,

their testimony was sufficiently corroborated by the testimony of Mr. Dean and by the documentation of the transaction, both showing that the steel used on the Defendant's security door and windows was charged to and paid by Robertson County at the direction of the Defendant. When an accomplice's testimony is presented, "corroborative evidence need not be direct evidence, but the rule of corroboration is satisfied even though the evidence is entirely circumstantial." Sherrill v. State, 204 Tenn. (8 McCanless) 427, 321 S.W.2d 811 (1959). To be corroborative, the evidence need not be adequate in and of itself to convict. McKinney v. State, 552 S.W.2d 787, 789 (Tenn. Crim. App. 1977). Only slight circumstances are required to furnish the necessary corroboration. Garton v. State, 206 Tenn. (10 McCanless) 79, 87, 332 S.W.2d 169, 175 (1960). It is sufficient to meet the requirements of the legal standard if it fairly and legitimately tends to connect the defendant with the commission of the crime charged. Sherrill, 204 Tenn. at 435, 321 S.W.2d 815. The sufficiency of the corroboration is a jury determination. The jury may consider all the evidence and draw whatever reasonable inferences may exist. This Court may not substitute its judgment for that of the fact finder. State v. Copeland, 677 S.W.2d 471, 475 (Tenn. Crim. App. 1984). The proof as to this count is sufficient.

As to Count Five, in which the Defendant was charged with official misconduct, the Defendant asserts that Mr. Byrne was in sole control of the four checks that were not deposited, and that Mr. Byrne chose not to deposit them. The Defendant submits that Mr. Byrne worked for the Robertson County Highway Commission, and because he did not work directly for the Defendant, Mr. Byrne did not need his approval to deposit the checks.

The jury found that the Defendant violated Tennessee Code Annotated section 39-16-402(a)(3), which states that a public servant commits an offense who, with intent to obtain a benefit or to harm another, intentionally or knowingly refrains from performing a duty that is imposed by law or that is clearly inherent in the nature of the public servant's office or employment. Here, the jury found that the Defendant failed,

refused, and neglected to deposit the four checks, and did in fact give instructions during the month of May 1992 for all said checks to be destroyed.

The proof showed that the Defendant told four residents of Robertson County that if they would pay for the oil, the Highway Department would pave their roads. All four testified that the roads were paved, they delivered checks to the Defendant or to the Highway Department, and that the checks were never deposited. Mr. Byrne, who was secretary to the Highway Commission and was also the bookkeeper for the Highway Department under the direction of the Defendant, testified that he initially asked the Defendant what to do with the checks and was told to hold on to them until the Defendant gave him further instruction. Moreover, on tape, the Defendant told Mr. Byrne at a later date that he should tear up the checks. Later in the conversation, the Defendant told Mr. Byrne to put them in the safe until further notice.

In his statement to Agent Taylor, taken on July 30, 1992, the Defendant admitted:

> There were four checks that people sent in to pay for oil that went on their road. We might have tore up the checks because I feel that it's not right to charge someone for road work. I asked them to send in checks because I feel that it was the only way the county could afford to do the job at the time. Lately I have charged people for oil. I charged George Anderson about $8500.00 for oil on his county road but he was the only one to benefit. I told Billy Byrne to tear up the four checks because several people lived on each road.

We conclude that the proof is sufficient to show that the Defendant, in his position as superintendent, intentionally and knowingly failed to ensure that these checks were properly deposited with the county trustee.

As to Count Six, in which the Defendant was charged with the private use of county road materials and equipment, the Defendant asserts that his conviction should be dismissed because he was only helping a taxpayer and did not receive any personal compensation or benefit.

Tennessee Code Annotated section 54-7-202(a) states that the chief administrative officer shall not authorize nor knowingly permit the trucks or road equipment, the rock, crushed stone, or any other road materials to be used for any private use or for the use of any individual for private purposes. We note that regardless of the Defendant's good intentions, the statute clearly states that county equipment and materials shall not be authorized for private use. Whether the Defendant received any personal compensation or benefit is irrelevant. The proof showed that the Defendant authorized the use of a county bridge (albeit obsolete), county equipment, and county concrete to be used on the Adcocks' private property. Although the Defendant took the Adcocks' check for one hundred dollars ($100), which was intended to pay for the bridge, the Defendant never deposited it. In his July 30, 1992, statement, the Defendant admitted:

> Bub Adcock gave us a check for $100.00 for the bridge. I didn[']t deposit the check because I just didn[']t want to charge him. We used a county dozier to pull the bridge across the creek because it[']s a county road on the Robertson County side of the creek. We pushed down a few trees and graded it a little for him. Bub Adcock is the only one who benefited. We furnished part of the concrete that went in the bridge. I think Mark Hulsey poured the floor of the bridge on his own time. I think Mr[.] Adcock felt like he should share the expense. I didn[']t realize that the county paid for all the concrete. I offered to pay for half. I don[']t know where the lumber came from that was used for the forms, nor do I know whose welding equipment or rebar was used. I don[']t know why I wouldn[']t accept the $100.00 payment for the bridge if I let him pay for half the concrete. I feel this was a public project. However, it was not discussed in the commission meetings. The Commissioner Joe Teasley was not aware that this was done. I can[']t explain why the county didn[']t pay for the entire project except that Bub Adcock felt he should help with the cost. We hauled maybe fifteen loads of dirt there to build a ramp for the bridge.

We find that the proof is sufficient to support this conviction.

Finally, as to Count Nine, in which the Defendant was also charged with the private use of county equipment and materials, the Defendant argues that there was no proof of intent. He further asserts that the culvert pipes given to Mr. White could be considered as an employee bonus or to ensure that Mr. White had a safe exit onto the

busy state highway.

The jury found that the Defendant authorized and knowingly permitted county materials to be used for the private purposes of Mr. White, a Highway Department employee. Specifically, the proof showed that the Defendant authorized his employees to provide two culvert pipes for use in the driveway on Mr. White's property. Here, Highway Department employees testified that the Defendant authorized them to deliver the two culvert pipes to Mr. White's property. Mr. White testified that the first pipe appeared on his property about a week after making inquiries at the Highway Department concerning the cost of such pipes. After the first pipe had been installed, the Defendant stopped by Mr. White's house and told Mr. White he needed a second pipe to get his truck and boat safely across the drive. Subsequently, another pipe appeared on Mr. White's property. After both had been installed, Mr. White asked the Defendant if he could pay for the pipes, and the Defendant told him no because there should be some benefit to being a Highway Department employee. This is sufficient proof to support the jury's verdict.

The Court having reviewed all of the Defendant's issues and having found that they are without merit, the judgment of the trial court is affirmed.

PER CURIAM
(Tipton and Welles, J.J.)
(Bevil, S.J., not participating)