IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MARCH 1999 SESSION

FILED

December 28, 1999

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	*	C.C.A. # M1997 00080 CCA R3 CD
Appellee,	*	Davidson County
VS.	*	Honorable Walter C. Kurtz, Judge
JACK RONDAL DILLMON,	*	(Bribery of a Public Official)
Appellant.	*	

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OPINION FILED: _____

AFFIRMED IN PART; MODIFIED IN PART; REVERSED IN PART

JOHN EVERETT WILLIAMS,
Judge

OPINION

The defendant, Jack Rondal Dillmon, appeals from his conviction by a Davidson County jury. He was convicted of ten counts of bribery of a public servant and sentenced to four years on each count. The trial court ordered counts one through five to run concurrently and counts six through ten to run concurrently. These two four-year sentences were imposed consecutively for an effective eight year sentence, with one year to be served in the workhouse, day for day, and the remaining seven years on probation. Further, the trial court imposed $24,610 of restitution and $10,000 of fines. On appeal, the defendant challenges both his convictions and his sentence. He asserts that:

(1) The evidence is insufficient to support the jury verdicts;

(2) the trial court's jury instruction on the defense of "public duty" was legally insufficient;

(3) the trial court erred in refusing to conduct a post-trial hearing to investigate alleged jury misconduct;

(4) the trial court erred in several evidentiary rulings;

(5) the prosecution suppressed material exculpatory evidence;

(6) the trial court erred by not disqualifying the deputy state attorney general and his office;

(7) the trial court erred in giving jurors shirts that were allegedly demeaning to the defense;

(8) the trial court erred in denying the defense access to certain documents;

(9) the trial court erred in allowing testimony that contractor licensing examination and fire inspector examination materials were secret;

(10) the trial court erred in sentencing;

(11) the trial court erred in denying full probation; and

(12) the trial court erred in its order of restitution.

After thorough review, we MODIFY one grant of restitution and REVERSE two grants of restitution; in all other respects, we AFFIRM the judgment of the trial court.

BACKGROUND

This case is complicated, the trial testimony long and technical, and the record voluminous.[1] However, this case essentially involves two schemes: (1) A scheme to illegally secure licenses from the Tennessee Licensing Contractors' Board ("Board"); and (2) a scheme to illegally secure the Certified Fire Inspector Examination and associated materials. The defendant initiated, orchestrated, and conducted both schemes.

In the first scheme, the defendant cultivated contacts with private contractor firms by teaching a licensing class and by approaching contractors as a potential employee. In exchange for money, Dillmon offered to assist these contractors to obtain certain licenses. He would then pay Barbara Rochelle, an employee of the Board, to falsify requisite licensing documentation and issue the licenses.

This first scheme resulted in prosecution for nine counts of bribery of a public servant. At trial, Rochelle described the inner workings of this scheme and detailed the individual contractors and licenses. Further, testimony by several representatives of the various private contractors established their involvement with the defendant, his representations, and the licenses obtained. A jury convicted the defendant on all counts.

In the second scheme, the defendant attempted to purchase the Certified Fire Inspector Examination and associated materials. He first established a friendship with Betty Maddux, an employee of the Tennessee Fire Marshall's Office. He then asked her to procure the materials for him, but she notified her superiors. After an investigation, the Tennessee Bureau of Investigation ("TBI")

[1] The record comprises 44 volumes of transcripts.

caught Dillmon receiving what he believed to be the examination. At trial, Maddux testified to her particular interactions with the defendant, his propositions, and the specific details surrounding his arrest. The jury convicted the defendant of one count of bribery of a public servant.

Complicating this picture, however, are the defendant's attempts to mislead investigators. During these schemes, authorities began an investigation directed at reports that Board licenses were being sold. The defendant, when questioned by authorities, made numerous allegations and even created false affidavits designed at shifting suspicion and blame to Phyllis Blevins, the Board's executive director. In this attempt, the defendant employed both his Board contact, Rochelle, as well as Scott Klein, his employee. These attempts led to no instant charges.

SCHEME I: Contractor Licensing

The defendant was tried and convicted on nine counts of bribery of a public servant regarding contractor's license applications and certifications for the following entities:

Count 1:	July 11, 1991	Delaney Construction, Inc.
Count 2:	Sept. 12, 1991	Brigance Contractors, Inc.
Count 3:	Oct. 7, 1991	TerraCom Development, Inc.
Count 4:	Dec. 15, 1991	Atlanta Tri-Com, Inc. Gibson Dry Wall, Inc. Smokey Mt. Contracting, Inc.
Count 5:	June 25, 1992	Walker Development Corp.
Count 6:	July 3, 1992	Collier Development Co., Inc.
Count 7:	Sep. 17, 1992	Byrd Construction
Count 8:	Sept. 17, 1992	R & H Construction
Count 9:	Nov. 9, 1992	Gatlinburg Electric Company, Inc.

To obtain a license, an applicant must complete the Board's application and evaluation procedure. At trial, Donald C. Orr, a Board member, described the steps of the application and certification procedure: (1) submission of an application packet, including references and financial statements; (2) successful

completion of certain examinations; and (3) an interview with the Board or a Board member.[2]

The defendant's contact in the Board, and his means of circumventing this procedure, was Rochelle,[3] an employee of the Board's "New Applications" section. Her job duties included handling application files and mailing certifications to the new license holders.[4] The defendant befriended Rochelle while he was seeking a license, and by 1991 he was discussing with her the possibility of obtaining licensing for some of his students and new applicants.[5] These discussions led to a scheme in which, in return for money, Rochelle began falsifying application files and issuing licenses at the defendant's request. We list the counts below with a brief description:

Count 1: Rochelle testified that she added a "mechanical license classification" to Delaney Construction Company's certification. Delaney's representative, Michael Delaney, testified at trial that he paid the defendant $600 to "take the examinations" and acquire certification.

Count 2: Rochelle testified that she added multiple classifications to Brigance Contractor's certification. Ronnie Cole, a Board member, testified to irregularities in Brigance's file and certification.

Count 3: Rochelle testified that she added multiple classifications to the certification of TerraCom Development.

Count 4: Rochelle testified that she forged interviewer initials and falsified the files and certifications of Gibson Drywall, Smoky Mountain Contracting, and Atlanta Tri-Com.

Count 5: Rochelle testified that she forged interviewer initials on the file of Walker Development Corporation. A representative of Walker further testified that he paid the defendant over $2000 in connection with his class and another $1000 for the defendant to take care of the interview requirement. Larry Parks, a Board member, also testified that he did not interview

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[2] Orr also testified as to the exact contents of the various forms and to examination procedure for special classifications. Further, while this procedure was the general practice, Larry Parks, a Board member, testified that a "hardship license procedure" existed.

[3] A codefendant of Dillmon, her case was severed from his and she was granted diversion from these charges, through the Maury County Circuit Court, for her testimony against the defendant.

[4] Sharon Sanders, a coworker, also handled these applications and certifications; the two generally operated in concert.

[5] As noted earlier, Dillmon began a class for new applicants, in which he offered his assistance in the application and evaluation procedures.

anyone from Walker and that his initials on the pertinent file appeared forged.

Count 6: Rochelle testified that she added additional classifications to the certification of Philip Collier. Collier testified to his interactions with the defendant in connection with this licensing.

Count 7: Rochelle testified that she added classifications and forged interviewer initials on the file and certification of James Byrd. Byrd testified to his interaction with the defendant.

Count 8: Rochelle testified that she added classifications and forged interviewer initials on the file and certification of R and H Construction. Johnny Harris testified that his son had applied for a contractor's license. He testified that after his son applied, he received correspondence from the defendant. The witness testified that he wrote a $1000 check to his son's construction company for payment to the defendant. Subsequently, he testified that he received the license for R and H.

Johnny Harris further testified that he issued a check for $1500 to the defendant for assistance in obtaining his own license. In an out-of-jury hearing, the witness testified that the defendant said he would take the application and papers to Nashville. The witness testified that he later learned that the paperwork never arrived in Nashville.

Count 9: Rochelle testified that she added the classification "electrical" on the certification of Gatlinburg Electric Company. Dallas Atchley, owner of Gatlinburg Electric, testified to his interactions with the defendant.

In return for her role, the defendant compensated Rochelle. She testified that she received various checks, wire transfers, and cash from him.[6] The state introduced evidence of four checks and six wire transfers from the defendant to either Rochelle or her daughter[7] dating from July 11, 1991 through November 6, 1992. She testified that the defendant would call her in advance and advise her where and when he would be sending the money.

On August 22, 1991, during the course of the defendant's scheme, the Department of Commerce and Insurance began an investigation, headed by Investigator Richard Radcliffe of the Regulatory Boards, that focused on problems detected in the application procedure. Radcliffe contacted the

[6] At trial, Rochelle testified that these transfers were "loans."
[7] The checks to Rochelle's daughter were nevertheless deposited in Rochelle's account.

defendant about these problems. Radcliffe testified that the defendant responded by asserting that he could prove that licenses were being sold by the Board. At that point, however, the defendant had no proof. Radcliffe arranged a meeting with the defendant, himself, and Wade Smith, the chief investigator for the Regulatory Board. At this meeting, the defendant offered to obtain this proof, and Smith stated that he would be interested in such information.[8]

Rochelle testified that the defendant contacted her regarding a collateral scheme to shift blame to Blevins. The defendant instructed Rochelle to tell her coworker that Blevins was "on the take," and he even had Rochelle sign an affidavit attesting that she had personally left bribe money on Blevins' desk. The affidavit further stated that Blevins was operating a "license for sale" scheme and using Rochelle as her underling.

During this approximate time frame, the TBI began a separate investigation that ultimately led to the instant indictments and convictions.[9] However, the defendant was not finished. He instructed his employee, Scott Klein, a former sheriff's deputy, to state that he had paid Blevins for a license and to create a false affidavit to this effect. In December 1992, the defendant himself telephoned investigators and reiterated claims of board corruption. Finally, the defendant participated in an interview with investigators, where he again accused Blevins of corruption. Despite these various attempts and as a result of the investigation, the defendant was charged with nine counts of bribery.

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[8] At trial, the defendant invoked this and subsequent contact to assert authority to investigate the Board. Interestingly, Smith testified on the defendant's behalf at sentencing, and, equally interesting, Rochelle testified at trial that Smith contacted her at one point to suggest that she avoid one of the investigators who was seeking her. Finally, when interviewed by the Comptroller's Office, on January 5, 1993, Smith did not acknowledge that the defendant was working for him.

[9] This TBI investigation was not in response to this affidavit, which was never filed, but rather to a report the TBI received from Rochelle's coworker, Sharon Sanders. Rochelle had advised Sanders that licenses could be sold. Sanders then exchanged a license for home construction work.

SCHEME II: Fire Inspector Examination

The final count charged the defendant with bribery regarding his seeking the Fire Inspector Examination. In this scheme, the defendant again cultivated a contact on the "inside," Maddux. Maddux testified that in May of 1994 she met the defendant and the two began a friendship and relationship. The defendant then propositioned Maddux: If she could obtain Fire Inspector Examination materials for him, then he would compensate her. She testified that she agreed to this deal;[10] however, on her return to the office and after contact with her supervisor, she decided not to give the defendant the materials. Subsequently, Maddux testified that she met with a TBI agent regarding Dillmon's offer.

When she finally met with the defendant on June 7, 1994, Maddux, unbeknownst to the defendant, recorded their conversation as the defendant reiterated his need for the examination and other related information. Maddux testified that the defendant wanted the questions that afternoon; however, the two did not make contact again until Maddux called him and he suggested that she mail him the examination. No examination was sent.

Finally, on June 15, 1994, she testified that the two met at the building where she worked. She told him that she had the examination in the trunk of a car in the parking lot. At the car, she handed him an envelope purportedly containing the requested materials. Two TBI agents apprehended the defendant before he left the area, and he was charged with one count of bribery of a public official.

[10] The two also agreed that whenever the defendant wished to contact Maddux at the office, he would call and identify himself as "Joe."

Sentencing Hearing

At the sentencing hearing subsequent to the ten convictions, Cindy Collette testified that she had worked for the defendant and had been involved in a personal relationship with him. She said that the defendant moved Klein into her house to protect her.

She said that she placed a threatening telephone call to Wade Smith at the defendant's request. Collette also discovered that the telephone at her residence had been "bugged," and the defendant admitted recording her conversations. She testified that the defendant told her that he had a video camera installed in her bedroom. Collette had a personal relationship with Klein while he provided security for her, and the defendant videotaped the two in the bedroom.

She testified that during the investigation she met an investigator, Chas Taplin, at a Shoney's in Sevierville at the defendant's request. Taplin was to meet with a contractor, "Gary," to question him about his contractor's license. She said the defendant wanted her to "do the talking," thereby minimizing Gary's statements, and to determine the state's goals in questioning Gary. Further, the defendant wished her to invite Taplin out for drinks and put him in a compromising situation. Taplin, however, called her after the meeting and indicated that he knew she had used a fake name, and the plan was canceled.

Wade Smith also testified for the defendant. He testified that he met with the defendant and with Radcliffe to discuss matters pertaining to the Board. Smith further testified that various leaks had erupted during prior investigations of the Board. He stated that he told the defendant that he would be interested in the defendant's illicit purchase of a license. Smith testified that the defendant then attempted and successfully purchased some licenses. Smith testified that

he told the defendant that if they obtained solid evidence, he would approach Ernie Williams, the United States Attorney, with that data.

Smith originally met with the defendant on or about October 8 or 9, 1991. Smith recalled that he took notes and gave them to Radcliffe to write up a memo for his file.[11]

The defendant testified at his sentencing hearing. He denied any and all activities alleged by count one, and claimed that for counts two through nine he only sought to assist Smith's investigation.

At the conclusion of the defendant's proof, his attorney stated concern about potential juror misconduct. He noted that four jurors had attended the sentencing hearing. Further, he alleged that after the verdicts seven female jurors visited Blevins at her office.

ANALYSIS

SUFFICIENCY OF THE EVIDENCE

The defendant first argues that the evidence at trial was insufficient to support the jury's verdicts for all counts. When a defendant challenges the sufficiency of the evidence, this Court must determine whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of a crime beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); State v. Duncan, 698 S.W.2d 63, 67 (Tenn. 1985); Tenn. R. App. P. 13(e). The appellee is entitled to the strongest legitimate view of the evidence and all reasonable inferences that may be drawn therefrom. See State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

[11] Radcliffe, however, stated that he never received the notes and did not know their location.

The credibility of witnesses, the weight of their testimony, and the reconciliation of conflicts in the evidence are matters entrusted exclusively to the trier of fact. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Gentry, 881 S.W.2d 1, 3 (Tenn. Crim. App. 1993). A jury verdict for the state accredits the testimony of the state's witnesses and resolves all conflicts in favor of the state. See State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). Moreover, a guilty verdict removes the presumption of innocence enjoyed by defendants at trial and replaces it with a presumption of guilt. See State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973). Thus, an appellant challenging the sufficiency of the evidence carries the burden of illustrating to this Court why the evidence is insufficient to support the verdict. See State v. Freeman, 943 S.W.2d 25, 29 (Tenn. Crim. App. 1996).

Counts One Through Nine

In counts one through nine, the defendant was convicted of bribery of a public servant:

> (a) A person commits an offense who:
>
> (1) Offers, confers, or agrees to confer any pecuniary benefit upon a public servant with the intent to influence the public servant's vote, opinion, judgment, exercise of discretion or other action in the public servant's official capacity;
>
> . . . .
>
> (c) Bribery of a public servant is a Class C felony.

Tenn. Code Ann. § 39-16-102.

The defendant argues that the evidence at trial was insufficient to support these convictions. He asserts that the state failed to present sufficient evidence because:

> (1) The defendant's conferring a pecuniary benefit upon Rochelle for each of the licenses issued in these counts was not established;

(2) the prosecution did not establish that each separate payment to Rochelle was intended to carry, and did carry, its own corrupting influence;

(3) Rochelle's testimony as an accomplice was insufficiently corroborated to support convictions;

(4) variances between the dates on the issued licenses and the date of their entry in the Board's computer constitute error under the sufficiency of evidence argument; and

(5) the state did not sufficiently rebut his proffered public duty defense.

We disagree.

The defendant argues that the state did not prove that Rochelle received a pecuniary benefit, an essential element of the public bribery offense, for each of the illegitimate licenses. He proposes that the jury had to infer from the evidence that money he gave to Rochelle was consideration for the illicit licenses. He emphasizes Rochelle's testimony, characterizing the funds as "loans." However, Rochelle admitted in earlier testimony, at her own trial regarding these counts, that she accepted money from the defendant for issuing the illicit licenses. When defense counsel in the instant case asked if that earlier testimony was false, she answered, "No." The jury can and did resolve any contradictions or inconsistencies in this testimony, and the jury could, and did, reject her characterization of the payments as "loans."

The defendant's assertion that the state did not establish sufficiently concrete links between payments from the defendant to Rochelle and each of the improperly issued licenses is unpersuasive. Exact correlation, one and only one payment for each individual illegitimate license, was not necessarily established. The evidence did establish, however, that the defendant communicated with Rochelle on distinct occasions for each separate illicit license and that Rochelle understood her benefits from her illegal acts: payments covering one or more acts at the defendant's request and for his benefit.

Further, this jury heard testimony from investigators, the defendant's former clients, and Board employees that established the illicit nature of the licenses. This jury heard testimony regarding documented multiple payments from the defendant to Rochelle. We acknowledge that Rochelle was an accomplice whose testimony against the defendant must be corroborated by some fact entirely independent of the testimony which infers that the accused is implicated in a crime which has actually been committed. See State v. Bigbee, 885 S.W.2d 797, 803 (Tenn. 1994); State v. Henley, 774 S.W.2d 908, 913 (Tenn. 1989). However, the evidence at trial provided the "slight circumstances to corroborate the testimony of an accomplice." Dykes v. State, 589 S.W.2d 384, 389 (Tenn. Crim. App. 1979).

The defendant cites State v. Desirey, 909 S.W.2d 20 (Tenn. Crim. App. 1995) to support his argument that the payments did not each carry their own "corrupting influence" and that the evidence insufficiently connects any given corrupting influence to a particular license in a particular count. The relevant portion of the Desirey opinion addressed multiplicity, "the term applied to the improper charging of the same offense in more than one count." Id. at 27. "Generally, if the [relevant] statute prohibits individual acts, then each act is punished separately." Id. at 29. The pertinent bribery statute defines an offense as occurring when a person "[o]ffers, confers, or agrees to confer any pecuniary benefit upon a public servant with the intent to influence the public servant's . . . action in the public servant's official capacity . . . ." Tenn. Code Ann. § 39-16-102(a)(1)(emphasis added). The evidence presented at trial supported a jury's concluding, beyond a reasonable doubt, that some payments to Rochelle were divisible, corresponding to multiple instances of the defendant's conferring "any pecuniary benefit" for individual, discrete actions requested on individual, discrete occasions. We do not conclude that "lump sum" payments for multiple offenses, committed on distinctly separate dates, establish multiplicity under this

statute. We note that the payments were of varying amounts. Further, the Desirey opinion does not establish a hard and fast rule for evaluating all bribery charges; rather, the analysis recognizes, at the very least implicitly, that the varying circumstances of bribery cases influence the number of offenses that can be properly charged. See id at 30.

We also reject the defendant's argument regarding insufficient proof of dates asserted in the indictments for counts one through four and for count nine, an argument based at least in part on substantial differences between dates on the issued licenses and the dates of their respective computer entry. An exact date in an indictment is required if the date is a "material ingredient of the charged offense." See State v. Byrd, 820 S.W.2d 739, 740 (Tenn. 1991). The pertinent statute does not require proof of a date, see Tenn. Code Ann. § 39-16-102, and we conclude that any discernible variance is immaterial and not grounds for reversal.

Public Duty

The defendant asserts that the state did not negate, beyond a reasonable doubt, his asserted public duty defense:

> (a) Except as qualified by subsections (b) and (c), conduct is justified if the person reasonably believes the conduct is required or authorized by law, by the judgment or order of a competent court or other tribunal, or in the execution of legal process. . . .
>
> (c) The justification afforded by this section is available if:
>
> . . . .
>
> (2) The person reasonably believes the conduct is required or authorized to assist a public servant in the performance of the public servant's official duty, even though the public servant exceeds the public servant's lawful authority.

Tenn. Code Ann. § 39-11-610. The defendant asserts that the circumstances of the case establish this defense and that this Court should reverse the convictions

resulting from the jury's rejection of this defense. We disagree for the following reasons.

The record establishes pecuniary benefit bestowed upon Rochelle by the defendant prior to his alleged cooperation with investigators. These investigators sought out the defendant because of potentially problematic applications submitted for his students, not because they sought his assistance. However, when the defendant met with the investigators he assigned culpability against other persons. In furtherance of his "investigations," the defendant fabricated at least two false affidavits, allegedly providing evidence of Blevins' corruption, after his meetings with investigators. These actions weigh against any legitimate, bona fide investigation conducted by the defendant under the air of authority. The evidence supports a rational trier of fact concluding, beyond a reasonable doubt, that the defendant sought to manipulate the investigations to his benefit and to fabricate cases against other persons. This issue is without merit.

Count 10

The defendant argues against his conviction for bribery of a public servant on count 10, alleging that the crime was not proven because the documents he sought were public records. He further alleges that he was entrapped. We disagree.

The trial court instructed the jury that the materials coveted by the defendant were public records. However, the bribery statute prohibits attempts to "influence the public servant's . . . exercise of discretion in the public servant's official capacity **. . . .**" Tenn. Code Ann. § 39-16-102(a)(1). The jury was instructed that the records must be inspected and copied where they are kept and that an agency may designate specific persons to handle public record requests. The defendant requested that Maddux provide him with the

documents outside the designated mechanism. Also, Maddux was not the designated custodian of the examination. He therefore sought to induce a public servant to use her office to get documents not in her custody, and not at her discretion to dispense, and to give him those documents in a manner other than the defined legal means of access. The evidence at trial was sufficient for a rational trier of fact to conclude, beyond a reasonable doubt, that the defendant sought to influence Maddux's discretion in the course of her state employment with the lure of pecuniary benefit.

Although the defendant asserts that he was entrapped, he presents no authority in support of this defense theory, see Ct. Crim. App. R. 10(b), but instead attacks the state's theory regarding predisposition, a theory asserting that the defendant sought out and manipulated weak-willed women. The defendant discusses the personality differences between Maddux and Rochelle and asserts that he merely sought to establish schools to assist persons on state examinations. However, the record comprises ample evidence that the defendant did not so limit himself: He sought to manipulate many persons of both genders, during his activities.

The jury could infer intent from the circumstances of the case. See State v. Holland, 860 S.W.2d 53, 59 (Tenn. Crim. App. 1993). We also note that the state was unaware of the defendant's contact with Maddux until after his attempted bribe and this sequence of events negates the entrapment argument as to this count. The record comprises sufficient evidence to support a rational trier of fact's concluding, beyond a reasonable doubt, that the state established predisposition. This issue is without merit.

JURY INSTRUCTIONS–PUBLIC DUTY DEFENSE

At trial, the defendant relied almost exclusively on his assertion that any criminal conduct related to counts one through nine was justified under his reasonable belief that his conduct was in support of a public official. See Tenn. Code Ann. § 39-11-610. The defendant argues that the trial court's instruction to the jury regarding the defense of public duty was inadequate and violated his state and federal due process rights to a fair trial.

Both the state and the defense proposed jury instructions. However, the trial court rejected each, and tracking the language of the statute, see Tenn. Code Ann. § 39-11-610, instructed the jury as follows:

> It is a defense to this prosecution that the defendant's conduct is justified if he reasonably believed that conduct is required or authorized by law. The defense supported by this section is available if the person reasonably believed that conduct is required or authorized to assist a public servant in the performance of a public servant['s] official duty even though the servant exceeds the servant's lawful authority. If evidence is introduced supporting this defense the burden is on the State to prove beyond a reasonable doubt that the defendant did not act out of a public duty and then if you have a reasonable doubt whether he acted out of public duty then you must find the defendant not guilty.

The defendant argues that the instruction was insufficient to "inform, instruct and guide the jury's deliberations in this case," because that instruction implied that the public duty defense requires a showing of action in connection with some traditional, recognized law enforcement agency. This conclusion derives not from the instruction but primarily from the state's closing argument. There, the state recounted the testimony of one trial witness, Maddux, who had cooperated with the TBI as an undercover agent. The state noted the procedures employed in that relationship and the absence of a similar arrangement involving the defendant. The defense argues that the vagaries of the trial court's instruction, combined with these closing statements, led the jury to believe that only involvement with an official agency would suffice.

This, however, is neither the language nor the implication of the trial court's instruction. Rather, the instruction refers broadly, as does the statute, to assisting a "public servant." A trial court's refusal to give a specifically requested charge is not error "[i]f the instruction given by the trial court is a correct statement of Tennessee law and fully and fairly sets forth the applicable law. . . ." State v. Haynes, 720 S.W.2d 76, 85 (Tenn. Crim. App. 1986). We conclude that the instruction is a correct statement of the law, sufficient to inform and to guide the jury.

JURY MISCONDUCT

The defendant asserts that the jury was not "free of even a reasonable suspicion of bias or prejudice," thereby depriving him of his right to trial by an impartial jury under the Sixth Amendment of the United States Constitution and under Article I, § 9 of the Tennessee Constitution. The defendant asserts that he became aware of potential jury misconduct after return of the guilty verdicts and that he appropriately amended his pending motion for a new trial. In support of this amended motion, he submitted an affidavit from a professional writer who allegedly interviewed a juror, as well as a tape recording of that conversation. The defendant also expressed concern during the proceedings about four jurors who attended the sentencing hearing and about several jurors who allegedly visited Blevins' office after the verdict.

The defendant requested that the trial court call in the jurors and "independently find out what is going on." That court rejected the motion and suggested that the defendant subpoena jurors for the hearing on his motion for a new trial. However, the defendant did not present any jurors at that later hearing.

"Where a jury is not legally disqualified or there is no inherent prejudice, the burden is on the Defendant to show that a jury is in some way biased or prejudiced." State v. Caughron, 855 S.W.2d 526, 539 (Tenn. 1993). We note that inquiries into the validity of a verdict are limited: A jury's testimony in a proceeding concerning such a matter may address neither matters or statements occurring during the course of the jury's deliberations nor the effect of anything upon any juror's mind or emotion as influencing the verdict. See Tenn. R. Evid. 606(b). The exception to this general rule is that a juror may testify regarding any extraneous prejudicial information improperly brought to that juror's attention, whether outside influences improperly bore upon any juror, or whether a pre-existing agreement existed between the jurors to be bound by a quotient or a gambling verdict without further discussion. See id. Further, neither a juror's affidavit nor any other evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying may be received as evidence. See id.

The defendant failed to develop any admissible proof and waived this issue by not presenting admissible jury testimony or other evidence at the previously-mentioned hearing. Further, an alleged juror statement reflecting negatively on the defendant was given during the interview, after the trial, and reflected the result of the evidence presented to the jury. See State v. Bigbee, 885 S.W.2d 797, 805 (Tenn. 1994) (jurors seen lowering and raising arm as if pulling a lever on an electrical switch box and muttering "yeah" and hugging victim's relatives after the verdict where reactions to a verdict issued after adequate deliberation). In short, the record lacks a showing of "extraneous prejudicial information or any outside influence . . . brought to bear on a juror" that questions the validity of the verdict. State v. Parchman, 973 S.W.2d 607, 612 (Tenn. Crim. App. 1997). This issue is without merit.

EVIDENTIARY RULINGS

Public Duty Defense

The defendant next challenges certain trial court evidentiary rulings:

(1) The trial court refused the defendant's request to play tape recordings of six telephone conversations between Radcliffe and the defendant;

(2) the trial court refused the defendant's request to either play for the jury tape recordings of the defendant's conversation with another investigator, Chris Freeze, or to all hearsay statements made by Wade Smith and Carolyn Lazenby[12] to Freeze;

(3) the trial court limited testimony regarding the defendant's civil suit against the Board and his alleged ouster petition against Blevins;

(4) the trial court refused Smith's testimony regarding the defendant's state of mind; and

(5) the trial court denied the defendant's request to introduce certain exhibits.

Several of these rulings restricted admission of evidence allegedly bearing on the defendant's public duty defense, and the defendant collectively characterizes these rulings as a denial of his constitutional right to fully raise and develop his defense of public duty. However, the defendant does not argue that the rules of evidence upon which the trial court's rulings were based are unconstitutional. We, therefore, do not review the challenged rulings as a constitutional issue. "The decision to admit or exclude evidence is left to the sound discretion of the trial judge which will not be disturbed unless it has been arbitrarily exercised." State v. Baker, 751 S.W.2d 154, 163 (Tenn. Crim. App. 1987).

The defendant asserts that the trial court erred in refusing to allow the defendant to play tape recordings of six conversations between the defendant

[12] Lazenby was Blevins' secretary.

and Regulatory Investigator Rick Radcliffe. He asserts that these tapes would have "conclusively documented the origins and development of [the defendant's] assistance in uncovering corruption with the Contractors' Board." The trial court rejected the defendant's request because the prior tapes did not satisfy the requirements for inconsistent statements entered for impeachment purposes: If a witness denies a prior inconsistent statement, that statement may be entered for impeachment purposes but not as substantive evidence. See Tenn. R. Evid. 613. Description of the tapes' contents established nothing inconsistent between Radcliffe's testimony and the tape's contents, and therefore their entry into evidence was barred.

Further, given the absence of inconsistencies, the trial court determined that playing the tapes would be a waste of time. See Tenn. R. Evid. 403. We review trial court rulings regarding this rule by an abuse of discretion standard, see State v. Dubose, 953 S.W.2d 649, 654 (Tenn. 1997), and we find none.

We further agree with the state's assessment of the defendant's argument that the tapes should be admitted as substantive evidence. See State v. Coker, 746 S.W.2d 167, 172 (Tenn. 1987) (tape recordings probably fall under Tennessee Rule of Evidence 1002, the so-called "best evidence" rule). As prior inconsistent statements and hearsay, see Tenn. R. Evid. 613(b), the tapes could only be admitted for impeachment of Radcliffe, see McFarlin v. State, 381 S.W.2d 922, 924 (Tenn. 1964). We apply the same analysis to the arguments that the trial court erroneously denied the defendant's request to play a recording of interviews with Chris Freeze regarding the investigations. We reject that assertion under the same analysis and find no error on this issue. We further find no abuse of discretion in the trial court's barring entry of hearsay statements made by Smith and Carol Lazenby to Freeze.

The defendant asserts that the trial court erred by limiting testimony regarding the defendant's civil suit against the Board and alleged ouster petition against Blevins.[13] Therefore, goes the argument, he was precluded from developing evidence in support of his alleged investigative activities. He argues that he sought to force Board members to respond to allegations of misconduct through his civil suit and to then submit the developing evidence to the United States Attorney's Office. The defendant did insert references regarding the suit in his criminal trial, but the trial court rejected further development of testimony, regarding the Comptroller's Office blocking subpeonas on the basis of hearsay, irrevelance, and excessive prejudicial effect. The defendant also assigns error against the trial court's rejecting developing testimonial references to his ouster petition against Blevins, claiming that he filed the petition to "try and obtain information from Board employees by getting Ms. Blevins out of office." We find no abuse of discretion by the trial court in these rulings.

During a jury-out hearing, Smith asserted his opinion that the defendant thought he was assisting a state investigation. The defendant asserts that he should have been allowed to present Smith's proffer to the jury. The trial court rejected that motion under Tennessee Rule of Evidence 602, because the witness could not possess personal knowledge of the defendant's state of mind. Further, the defendant's trial counsel advised the trial court that he would not call Smith for another, tactical reason, unrelated to this asserted issue: The state would have a "wide-open" cross-examination of the adverse witness. This issue is without merit.

Finally, the defendant asserts that the trial court's enforcement of an "ambiguous order" regarding whether exhibits introduced during cross-

[13] According to the state's brief, a transcript of a federal hearing and sanction against the defendant regarding his civil action, introduced by the state at the sentencing hearing, was not submitted in this record.

examination had to be disclosed to the prosecution during pretrial. This enforcement precluded the entry of three documents: documents regarding Orr's telephone conferences; Sanders' letter of resignation; and the receipt Rochelle received for the work performed on her roof. However, the defendant does not elaborate as to how their preclusion prejudiced his defense. Also, during the hearing on the defendant's motion to clarify the pertinent order, he only argued as to tape recordings. The limited scope of the trial court order thus addressed only those recordings. This issue has no merit. See Tenn. R. Crim. P. 16(d)(1).

Evidence of Board and NAI[14] Records

The defendant asserts that the trial court's admitting certain documents violated Tennessee Rule of Evidence 803(6),[15] the "business record" exception to hearsay, and thus denied him a fair trial. The contested exhibits include the Board's file folders for new applicants. The defendant claims that the files submitted during discovery were "stripped down" versions and that the witness introducing the documents, Orr, was not their custodian, and therefore could not authenticate them. The defendant further contests testimony from other witnesses regarding these and other documents. The trial court characterized the defendant's objections as addressing the weight, not the admissibility, of these documents. He concludes that the trial court allowed "junk" evidence to reach the jury, because the documents were not trustworthy and the jury was not capable of fully understanding the admitted evidence.

[14] The NAI was a private company that administered the Board examinations.

[15] Records of Regularly Conducted Activity. – A memorandum, report, record, or data compilation in any form of acts, events, conditions, opinions, or diagnoses made at or near the time by or from information transmitted by a person with knowledge and a business duty to record or transmit if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used on this paragraph includes every kind of business, institution, association, profession, occupation, and calling, whether or not conducted for profit.

Authenticity of tangible evidence may be established by a witness, see State v. Ferguson, 741 S.W.2d 125, 127 (Tenn. Crim. App. 1987), and admission of tangible evidence is left to the trial court's discretion, see State v. Baldwin, 867 S.W.2d 358, 361 (Tenn. Crim. App. 1993). Testimony did establish sufficient authenticity to admit the records. For example, Rochelle was certainly qualified to testify as to the records she handled on a daily basis and as to entries she personally made. Orr could certainly testify that he did "sign" a proffered document with his initial. Further, although Orr's testimony preceded Rochelle's, admission of the documents during Orr's examination was not improper. See Tenn. R. Evid. 104(b) (The trial court may admit evidence conditioned on subsequent introduction of evidence sufficient to support a condition of entry.)

Although the defendant asserts that the files were "stripped down," he does not establish how that alleged paring affected the data on the exterior, the dates, initials, and other entries actually documenting Rochelle's forgeries and falsifications. The defendant further claims that the contents were not available for discovery and that his copies looked different from the originals. The trial court noted that the files had been available for discovery for two years. Further, the originals were occasionally different from the copies because the Board had been using them when some of the defendant's "clients" continued business with the Board.

Regarding complaints against prosecuting counsel taking custody of folders before trial, we find no error. The circumstances "established reasonable assurance of the identity of the evidence." Ferguson, 741 S.W.2d at 127. As for inconsistencies regarding dates on NAI printouts, the jury was fully advised of these problems. Further, the individual contractors identified the specific score sheets for their respective examinations. This issue is without merit.

BRADY VIOLATION

The defendant asserts that the prosecution suppressed evidence and denied that a deal existed between the Davidson County District Attorney's office and Rochelle, who was also facing bribery charges. Of course, under Brady v. Maryland, 373 U.S. 83 (1963), the prosecution has an affirmative duty to disclose material evidence that is favorable to an accused.

The state responds that the defendant had been provided with a copy of the pre-trial diversion agreement a year and one-half before trial. Although this copy was apparently illegible, the state contends the record was equally available to the defendant and to the state and argues that the defendant was obligated to obtain his own copy. We agree. See United States v. McKenzie, 768 F.2d 602, 608 (5th Cir. 1985) (The accused bears responsibility for obtaining exculpatory evidence equally available to the prosecution and the accused.); State v. Marshall, 845 S.W.2d 228, 233 (Tenn. Crim. App. 1992). The pertinent data were comprised in public records, not in the state's exclusive control. Therefore, the defendant can not show suppression, one of the elements necessary for establishing a Brady violation. See State v. Edgin, 902 S.W.2d 387, 389 (Tenn. 1995). Further, the defendant has shown no prejudice, and thus no reasonable probability of a differing result, thereby precluding a determination of materiality, another essential element. See id. at 390. This issue is without merit.

ATTORNEY DISQUALIFICATION

The defendant complains that the trial court should have disqualified the Deputy State Attorney General from participating as a prosecutor in this case. At a pretrial motion, the defendant requested disqualification based on the Deputy State Attorney General's involvement with a federal subpoena addressing

Smith's files and representing and advising the Board during the time period relevant to the instant case. The defendant asserts that the trial court erroneously declined relevant motions at pretrial and prior to opening statements. At the latter proceeding, the defense asserted that the State Attorney General's Office was a witness, participating in the questioning of Sanders in November 1993. The defendant further asserts that the trial's progression indicated that the Attorney General's Office had become a custodian of certain records entered as exhibits. The defense reasserted this complaint during Freeze's testimony. We disagree with the defendant's argument.

The state correctly identifies the focus of the policy behind DR 5-102, a Rule of the Supreme Court addressing professional responsibility and regarding withdrawal as counsel when a lawyer becomes a witness: "The purpose of DR 5-102 is not to protect adversaries from the opposing party's attorney but is to protect the attorney's client in the event his attorney's testimony is needed at trial." Coakley v. Daniels, 840 S.W.2d 367, 371 (Tenn. App. 1992) (emphasis added). The Attorney General was not required to testify at trial. Although the defendant asserted intention to call counsel, he established no "compelling need" for this witness. See United States v. Roberson, 897 F.2d 1096, 1098 (11th Cir. 1990). Further, the attorney's presence at interviews does not require disqualification. See State v. Zagorski, 701 S.W.2d 808, 815 (Tenn. 1985). The trial court, therefore, correctly found no conflict of interest mandating disqualification.

Regarding the chain of custody, we conclude that the trial court did not abuse its discretion in addressing these matters. See State v. Baker, 931 S.W.2d 232, 238 (Tenn. Crim. App. 1996) (abuse of direction standard in reviewing trial court's decisions regarding prosecutorial disqualification). Although the defendant cites In Re Ellis, 822 S.W.2d 602 (Tenn. App. 1991), as

authority for a de novo review, we disagree. The instant case does not involve that case's "attorney-client" relationship concerns. See id. at 605-06. This issue has no merit.

JUDICIAL MISCONDUCT

During the course of the defendant's trial, circumstances required numerous jury-out discussions. Because the jury had to exit frequently, the trial judge joked with the jurors that he would have to buy them shirts saying "I Walked a Mile in Fifth Circuit Court." This light-hearted theme continued between the judge and jurors until, on the day before closing arguments, the Judge presented each juror with such a shirt. The jurors then wore these shirts to court for closing arguments.

While we do not encourage the trial court's behavior, the defendant fails to establish prejudice. The defendant asserts that these shirts caused, strengthened, or demonstrated a bond between the judge and the jury that was spiteful of the defense. That is, the defendant suggests, objections by the defense were the cause of most jury-out hearings, and the judge's banter with the jury tacitly poked fun at the defense. The record reveals, however, that the state also precipitated numerous jury-out hearings, and the shirts do not facially malign the defense. Neither do we find any implicit prejudice against the defense on these facts. This issue is without merit.

ACCESS TO RECORDS AND NOTES OF WITNESS INTERVIEWS

The defendant asserts that the trial court's denying him access to certain documents, placed under seal pursuant to the trial court's inspection and rulings, was confusing and highly prejudicial to his defense. These items include exhibits 25, 56, and 59, comprising (1) a file from one of Rochelle's defense attorneys,

(2) TBI Special Agent Schlafly's notes of two interviews with Rochelle, and (3) Special Agent Schlafly's interview summary of an interview with Klein. Further, the trial court, at pre-trial, reviewed and sealed two other items, apparently TBI files comprising TBI Special Agent Fortner's report of Blevins' polygraph and Blevins' diary. The defendant asserts that the trial court erroneously ruled that the materials in question constitute neither Jencks nor Brady materials.

The record paints a confusing picture regarding field notes of various interviews conducted during the investigation. The trial court did produce to the defendant portions of Schlafly's interviews with Rochelle[16] and a transcript of the tape of Schlafly's interview with Klein on March 2, 1993.[17] The defendant asserts that he should have received all items either as Jencks statements or pursuant to Brady. The trial court found that the items did not constitute witness statements producible under Tenn. R. Crim. P. 26.2, and that the non-produced portions of the defense lawyer's file for Rochelle and the notes of the interviews with Klein and Rochelle were not producible under Brady.

Tenn. R. Crim. P. 26.2, known as the Jencks Act, states:

Production of Statements of Witness –

(a) Motion for Production. – After a witness other than the defendant has testified on direct examination, the trial court, on motion of a party who did not call the witness, shall order the attorney for the state or the defendant and the defendant's attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.

(b) Production of Entire Statement. – If the entire contents of the statement relate to the subject matter concerning which the witness has testified, the court shall order that the statement be delivered to the moving party.

(c) Production of Excised Statement. – If the other party claims that the statement contains matter that does not relate to the subject

[16] The defendant asserts that there were notes of an interview conducted by Taplin. From the record, it is possible that Taplin and Schlafly participated in an interview and that Taplin took notes for Schlafly.

[17] Apparently, Schlafly also interviewed Klein on March 18, 1993.

> matter concerning which the witness has testified, the court shall order that it be delivered to the court in camera. Upon inspection, the court shall excise the portions of the statement that do not relate to the subject matter concerning which the witness had testified, and shall order that the statement, with such material excised, be delivered to the moving party. Any portion of the statement that is withheld from the defendant over the defendant's objection shall be preserved by the attorney for the state, and, in the event of a conviction and an appeal by the defendant, shall be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.
>
> . . . .
>
> (g) Definition. – As used in this rule, a "statement" of a witness means:
>
> (1) A written statement made by the witness that is signed or otherwise adopted or approved by the witness; or
>
> (2) A substantially verbatim recital of an oral statement made by the witness that is recorded contemporaneously with the making of the oral statement and that is contained in a stenographic, mechanical, electrical, or other recording or a transcription thereof.

None of the witness summaries within the files from the TBI investigations were adopted by the state's witnesses or presented as verbatim statements. Absent showing that the summaries were "recorded contemporaneously" or "substantially verbatim recital[s]," they are not considered Jencks statements. Tenn. R. Crim. P. 26.2(g)(2). Regarding rough notes taken by Schlafly and by Rochelle's counsel, that information does not constitute Jencks statements for those same reasons. Special Agent Schlafly testified that the notes with Rochelle's interviews were not verbatim. See State v. Payton, 782 S.W.2d 490, 494-96 (Tenn. Crim. App. 1989) (holding the defense investigator's notes of telephone conversations were not Jencks statements, even to the investigator, because they were not "recorded contemporaneously"). None of these items conform to the standard for Jencks material. See State v. Robinson, 618 S.W.2d at 754, 758 (Tenn. Crim. App. 1981) (establishes determination if investigative reports are Jencks material).[18]

[18]The amended rule 26.2 incorporates this definition of "statement." See Tenn. R. Crim. P. 26.2 (g)(1),(2).

We further note that the trial court produced what it found discoverable under Brady. We find no merit in this issue.

EVIDENCE REGARDING EXAMINATION QUESTION PROCUREMENT

The defendant next challenges the trial court's admitting testimony that the defendant had obtained the questions to the contractor's examination by surreptitiously tape recording them while taking the test.[19] The defendant objected to the testimony, asserting that this recording was not an illegal act. The trial court issued a limiting instruction that clearly informed the jury that the law provides for access of public records not otherwise excluded for inspection and for copying by any citizen. Such inspection or copying, however, may occur only where the records are kept.

The state asserts that this evidence was relevant to the defendant's purposed "public duty" defense, establishing the defendant's difficulties with the Board and the NAI. These difficulties dovetail with the defendant's conspiracy theory, comprised within his public duty defense, regarding Blevins, the Board, and the NAI. The state contends it may legitimately present in its proof points that might oppose the theory of defense.

The admission of this evidence was not "prejudicially unfair," as asserted by the defendant. Further, the trial court's limiting instruction to the jury precluded any undue prejudice from that evidence. See State v. Walker, 910 S.W.2d 381, 397 (Tenn. 1995) (A jury is presumed to follow instructions).

The defendant asserts a similar issue regarding count ten. Maddux testified that Dillmon solicited her to obtain a copy of the questions to the fire

[19] Rochelle testified that the defendant told her that he had acquired some questions in this manner. The defendant claimed he would read the questions into a recording device while taking the examination.

inspector certification examination, telling her that if she did not help him, he would take the test and get the questions that way. Maddux's supervisor later testified that his office treated the fire inspector examination as confidential. This Court notes that the defendant did not object to Maddux's testimony regarding the defendant's request for the examinations, thereby waiving that issue. See Tenn. R. App. P. 3(e), 13(b), 36(a); State v. Killebrew, 760 S.W.2d 228 (Tenn. Crim. App. 1988).

Further, on cross-examination the defendant asked Maddux about the defendant's requesting the examination and specifically asked whether he had told her that what he wanted was legal. After eliciting testimony that might support the defendant's believing this procurement legal, the defendant moved in limine to prohibit Frost's testimony regarding his office's handling of the examinations, including the fact that Maddux did not have custody of them.

First, the defendant opened the door to questioning regarding the treatment of the examinations. Further, the trial court did not err in allowing testimony regarding the handling and the treatment of the examinations, especially in the context of an issued jury instruction: "the law only allows for inspection and copying at the place the records are kept and that government agencies may designate certain employees to handle public records request[s]." We find no unfair prejudice in these admissions, and this issue is without merit.

SENTENCING

The trial court sentenced the defendant to four years on each of his ten convictions and ordered that the defendant's sentences within counts one through five and six through ten run concurrently with each other. The trial court then ordered those two sets of four-year sentences to run consecutively with

each other, for a total sentence of eight years, and ordered one year of confinement, day-for-day, followed by seven years of probation. The defendant argues that the sentences were excessive and that consecutive service and split confinement, in lieu of total probation, were improper.

In addition, the trial court ordered a total of $24,610 restitution. The defendant contests the following restitution payments:

(1) 1,500 to Johnny Harris;
(2) 3,449 to Wade Odle; and
(3) 4,000 to the State of Tennessee, Department of Commerce & Insurance.

The defendant argues that these are not proper recipients of restitution.

When an accused challenges the length or manner of service of a sentence, it is the duty of this Court to conduct a de novo review on the record "with a presumption that the determinations made by the court from which the appeal is taken are correct." Tenn. Code Ann. § 40-35-401(d). This presumption "is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991). The appellant carries the burden of showing that his sentence is improper. See Tenn. Code Ann. § 40-35-401, sentencing comm'n cmts; State v. Jernigan, 929 S.W.2d 391, 395 (Tenn. Crim. App. 1996).

Length of Sentence

The defendant is a Range I offender. Bribery of a public servant is a Class C felony, carrying a Range one sentence of three to six years. See Tenn. Code Ann. §§ 39-16-102(c); 40-35-112(a)(3). At his sentencing hearing, the trial court found applicable two enhancement factors: "The defendant has a previous

history of criminal convictions or criminal behavior in addition to those necessary to establish the appropriate range"; and "[t]he defendant was a leader in the commission of an offense involving two (2) or more criminal actors; . . . ." Tenn. Code Ann. § 40-35-114(1), (2). In mitigation, the trial court found that the convictions were not for conduct threatening serious bodily injury and that the defendant was honorably discharged from the military. See Tenn. Code Ann. § 40-35-113 (1), (13). Based on these findings and weight accorded each factor, the trial court set the defendant's sentences at four years on each count.

The appellant challenges the trial court's application of both enhancement factors as well as its rejection of additional mitigating factors that were proposed by the defense. We find no error. The record supports application of enhancement factor (1). Citing State v. Brown, No. 01C01-9808-CC-00240 (Tenn. Crim. App. filed Jan. 28, 1993, at Nashville), the defendant notes that this Court has declined to apply factor (1) on the basis of multiple counts that occurred in close temporal proximity. However, the defendant committed his offenses over a period of nearly three years, much longer than the eighteen days in Brown. The nature and proximity of the defendant's ten offenses clearly indicate separate and distinct crimes, not one continuing offense. We therefore agree with the trial court that each count may be properly considered as independent bases in support of factor (1). We further note the defendant's criminal behavior outside the scope of the convictions; for example, "bugging" telephone conversations and procuring false affidavits. This criminal behavior would justify the trial court's applying (1).

As for enhancement factor (2), the defendant does not contest his leadership role in the commission of the offenses. Nonetheless, he argues that the factor is inapplicable because the language of the statute requires two or more criminal actors, and, he asserts, no proof existed that co-defendant

Rochelle committed any criminal act. We have received the record and noted Rochelle's role in the defendant's scheme. Although Rochelle denied accepting the money to issue illicit licences, she did acknowledge earlier sworn testimony in which she admitted selling licenses to the defendant. Further, her nine convictions in Maury County establish illegality in furtherance of the defendant's scheme. This argument is without merit.

Next, the defendant argues that the trial court erred in rejecting several mitigating factors: (2) the defendant acted under strong provocation; (3) substantial grounds tended to excuse or justify the criminal conduct; (9) the defendant assisted authorities in uncovering offenses committed by other persons or in detecting or apprehending other persons who had committed offenses; (10) the defendant assisted authorities in locating or recovering any property or person involved in that crime; (11) the defendant committed the crime under such highly unusual circumstances that make it unlikely that a sustained intent to violate the law motivated the criminal conduct; and (13) other arguments presented under this "catch-all" provision. See Tenn. Code Ann. § 40-35-113 (2),(3),(9),(10),(11),(13). The trial court addressed only (3), and although we review this particular issue de novo, we do not find that the record establishes the remaining mitigating factors. This issue has no merit, and the enhancement of the presumptive minimum sentence was not in error.

Consecutive Sentencing

The defendant asserts that consecutive sentencing was in error. The trial court found that the defendant's "criminal activity was extensive." See Tenn. Code Ann. § 40-35-115(a)(2). We agree that the record supports this conclusion by a preponderance of the evidence. See Tenn. Code Ann. § 40-35-115(a).

Split Confinement

The defendant asserts that as a Class C offender he is presumed a favorable candidate for alternative sentencing options. See Tenn. Code Ann. § 40-35-102(6). We initially note that he did receive the benefit of alternative sentencing: After one year of incarceration, he shall serve seven years of probation. The ordered confinement was appropriate to "avoid depreciating the seriousness of the offense. . . ."

"[T]he offense of bribery strikes at the heart of our system of justice and . . . a sentence to confinement under the circumstances [of our] case is necessary in order that the seriousness of the defendant's conduct will not be depreciated." State v. Desirey, 909 S.W.2d 20, 33 (Tenn. Crim. App. 1995). The instant case did not involve police officers, as did Desirey; however, for these offenses "confinement is particularly suited to provide an effective deterrent to others likely to commit similar offenses, ..." Tenn. Code Ann. § 40-35-163(1)(B). By its very nature, bribery is an offense needing "no extraneous proof to establish the deterrent value of punishment." State v. Charles A. Pinkham, Jr., No. 02C01-9502-CR-00040 (Tenn. Crim. App. filed May 24, 1996, at Jackson).

Further, the record does support the imposed one year of incarceration. See State v. Davis, 940 S.W.2d 558 (Tenn. 1997). Regarding the instant case, bribery of public servants, separate from the defendant's actions, occurred contemporaneously with his scheme. Sharon Sanders left the Board's employ for that very reason: She traded at least one license for construction services. Further, the defendant's own pervasive conduct of fabricating affidavits and inducing investigation supports a need for deterrence. This issue has no merit.

Restitution

As a condition of probation, the trial court ordered that the defendant pay restitution, commencing at the end of the first calendar month following the defendant's release from service of one year day-for-day confinement and continuing in equal payments for 84 months until the last month of his seven-year probationary sentence. The defendant asserts that a trial court may not impose restitution in a sentence involving split confinement and that certain recipients of restitution in the instant case are not, under applicable law, "victims" qualified for those payments. We conclude that restitution was appropriately imposed as a condition of probation but modify three of the specific grants.

The defendant cites State v. Davis, 940 S.W.2d 558, 561 n. 6 (Tenn. 1997), in support of his premise that restitution can not be associated with a sentence of split confinement. He proposes that the Tennessee Supreme Court's Davis decision concluded that the General Assembly intended restitution to apply only to sentences involving pure probation and not split confinement. The defendant notes that his offenses preceded a 1996 amendment to the pertinent code. The earlier code version allowed:

> A sentence of confinement which is suspended upon a term of probation supervision which may include community service or restitution, or both; . . . .

Tenn. Code Ann. § 40-35-104(c)(2)(1990). The current version, revised in 1996, provides for:

> payment of restitution to the victim or victims either alone or in addition to any other sentence authorized by this subsection; . . . .

Tenn. Code Ann. § 40-35-104(c)(2)(1997). He asserts that the earlier statute's language, read in the context of the amendment's allowing restitution in conjunction with "any other sentence authorized by the subsection," precludes restitution imposed with split confinement. The defendant argues that this

amendment broadened opportunities for restitution, thus implying that the earlier version of the statute restricted restitution to cases involving only total probation.

We disagree. In the Davis case, the defendant was denied any probation and received only two years of incarceration and was ordered to pay restitution during that incarceration. Our state's Supreme Court found that order in error, because restitution could not be tied to a period of incarceration. See id. at 562. Those circumstances clearly differ from those of the instant case, in that the defendant faces seven years of probation after one year of incarceration. Restitution is linked with those seven years of probation and not with the incarceration term. Although the defendant apparently emphasizes contrast between the 1990 and 1996 versions of the statute, the Davis opinion did not impose such a restrictive reading of the 1990 version. In conclusion, we find no error in general applicability of restitution in this case.

The defendant further contests the trial court's judgment regarding three specific recipients of restitution: the State of Tennessee, Wade Odle, and Johnny Harris. He asserts that these recipients are not qualifying "victims" under the law. In part, we agree.

The Code states that restitution may be ordered to a "victim of the offense[s]" for which the defendant was convicted. See Tenn. Code Ann. § 40-35-304(a). The Tennessee Supreme Court has noted legislative history indicating that "victim" includes "immediate members of [a] family" who had incurred medical and counseling expenses. State v. Alford, 970 S.W.2d 944, 947 (Tenn. 1998). We agree with the defendant that restitution is not properly imposed as to Wade Odle,[20] however, because the record shows that none of the convictions against the defendant arise from his transactions with Odle.

[20]Odle made a proffer of proof but was apparently not associated with any of the entities named in counts one through nine, and none of the convictions involve his transaction with the defendant.

Although Odle may have lost funds in a manner consistent with the transactions constituting the bases for the convictions, we find no authority for the trial court's imposing restitution outside the scope of the actual convictions.

Part of the restitution ordered to Harris, however, is appropriate. The record shows that Harris actually paid $1000 to the defendant for a license for R & H Construction, and the defendant was convicted for his bribery regarding this license. Therefore, we affirm the restitution to Harris, but only in the amount of $1000.

The defendant's final cognizable challenge to restitution addresses the trial court's ordering $4000 restitution to the Department of Commerce and Insurance, representing costs of enforcement incurred when the defendant's expert witness insisted on costly format alterations to computer records.[21]

Although the Code allows imposition of any condition of probation "reasonably related to the purpose of the offender's sentence and not unduly restrictive of the offender's liberty, or incompatible with the offender's freedom of conscience," Tenn. Code Ann. § 40-35-303(d)(9), absent authority we decline to extend the definition of "victim" to the state in this case. In State v. Cantwell, No. 01C01-9701-CC-00035 (Tenn. Crim. App. filed Nov. 16, 1998, at Nashville), a panel of this Court declined to affirm reimbursement of costs of prosecution as a condition of probation, comprising hourly wages of various Tennessee Wildlife Resource Agency employees, mileage costs for the vehicles, expenses for airplane video and still pictures, laboratory expenses, and salary costs for some witnesses. See id. This Court opined that Tenn. Code Ann. § 40-35-303(d)(9) "[did] not authorize the relief sought by the State, as that statute does

[21] The state's brief asserts that the defendant did not use this evidence at his trial.

not give unfettered authority to the trial courts to place conditions of probations upon a defendant." See id. The panel further recognized that the defendant could negotiate a plea agreement comprising cost of enforcement as a condition of probation, but absent such an agreement, authorization for such restitution "[was] a matter more appropriately addressed in specific legislation by the General Assembly and not by judicial interpretation of [the cited code]." See id. We conclude that the judgment ordering restitution to the State of Tennessee should be reversed.

CONCLUSION

We REVERSE the awards of restitution to Odle and to the State of Tennessee; we MODIFY the restitution to Harris by reducing it to $1000; in all other respects, we AFFIRM the trial court's judgment.

_____
JOHN EVERETT WILLIAMS, Judge

CONCUR:

_____
JOE G. RILEY, Judge

_____
THOMAS T. WOODALL, Judge