IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
November 29, 2006 Session

STATE OF TENNESSEE v. DAVID B. TODD, III, and DAVID JOHN

Direct Appeal from the Criminal Court for Davidson County
No. 2005-B-1073 Walter C. Kurtz, Judge

No. M2006-00142-CCA-R3-CD - Filed July 13, 2007

The appellants, David B. Todd, III, and David John, were convicted of theft of property over $60,000 and conspiracy to commit theft of property valued at $60,000 or more. Additionally, Todd was convicted of passing a worthless check valued at $1,000 or more but less than $10,000. He was sentenced as a Range I, standard offender to a total effective sentence of nine years in the Department of Correction. John was sentenced as a Range I, standard offender to a total effective sentence of nine years in the Department of Correction, all suspended except 200 days. On appeal, Todd argues that the trial court erred by (1) allowing testimonial evidence from a non-testifying codefendant; (2) failing to instruct the jurors that one of the State's witnesses was an accomplice as a matter of law; and (3) allowing the State to present evidence of prior uncharged criminal acts. John argues that (1) the evidence is insufficient to support the conviction; (2) the trial court erred by allowing proof of other bad acts; (3) the trial court erred by allowing the State to present rebuttal testimony; (4) the trial court erred by disallowing evidence that the premises had been searched for a dead body; (5) the State committed prosecutorial misconduct during the trial; and (6) the trial court erred by not granting him a fully suspended sentence. We conclude that there are no reversible errors and affirm the judgments of the trial court.

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

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID G. HAYES and D. KELLY THOMAS, JR., JJ., joined.

Peter J. Strianse (on appeal) and Karl Pulley (at trial), Nashville, Tennessee, for the appellant, David B. Todd, III, and Glenn R. Funk and James O. Martin, III, Nashville, Tennessee, for the appellant, David John.

Robert E. Cooper, Jr., Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and James W. Milam and Russell Thomas, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Facts

Rita Mitchell testified that she was a "relationship manager in private client services, vice president" with First Tennessee Bank. During the summer and early fall of 2003, Lisa Otay, another bank employee, introduced Mitchell to Appellant Todd. Otay believed Todd was a successful entrepreneur and owned a wholesale car dealership. Mitchell met with Todd, who told her that he "was currently looking for a bank" and was seeking a home equity loan on a house he owned. However, Todd decided to sell the home instead, and as the loan underwriting process for the sale proceeded, Mitchell learned that the house was actually owned by Todd's mother. Todd later referred Appellant John to First Tennessee Bank, saying that John had a mortgage company and was "looking for a relationship in private banking." Todd also told Mitchell that John was the "link" to a prospective buyer for the house.

Mitchell testified that to assist with the sale of the Todd home, she contacted Mike Smalling from First Horizon Home Loans, a company affiliated with First Tennessee Bank. The sale of the house actually involved two loans, a mortgage loan handled by Smalling at First Horizon and a home equity loan handled by Mitchell at First Tennessee. As Mitchell started the underwriting process for the home equity loan, Smalling gave her two years of tax returns from the buyer, Younus Razzaq. Mitchell later learned that the closing on the mortgage loan had not occurred on the day scheduled because Razzaq did not have the necessary funds. She understood, however, that the closing occurred on the next scheduled date. Mitchell also believed that the closing on the home equity loan occurred and that it was "a clean closing." On cross-examination, Mitchell said that Otay and Todd were dating and that "at some point in time he had asked her to marry him, and she was debating that."

Brian Basky testified that he was employed by Statewide Title and Escrow, a real estate closing company, where a mortgage closing was scheduled to occur on December 31, 2003, for the property located at 2390 Bellevue Manor Drive in Nashville. The contract for the sale of the property named Loraine Todd as the seller and Younus Razzaq as the buyer. The mortgage was to be made by First Horizon Home Loans, doing business as First Tennessee Home Loans, and the applicant on the loan application was Younus Razzaq. The loan documents included a termite inspection report signed on November 12, 2003, on behalf of Nashville Pest Control; a judgment on behalf of Jerry Pendergrass against Loraine Todd, which had resulted in a lien being placed on the property; a check for $422,802.14 from Statewide Title to AmSouth Bank; and a cashier's check, drawn on AmSouth, in the amount of $248,581 made payable to Statewide Title. According to the occupancy affidavit also contained in the loan documents, Younus Razzaq was the purchaser of the property. On cross-examination, Basky acknowledged that neither Appellant Todd nor Appellant John had signed any of the documents.

Brian McDaniel testified that he was employed in the centralized underwriting unit of First Tennessee Bank, which makes the credit decisions on loans, and that he was the underwriter for the

$240,000 equity loan on the property at 2390 Bellevue Manor Drive. As part of the process, he requested income documentation and a property appraisal. Although he received a property appraisal from Gray and Associates, he did not rely on it because it was not in the name of the person identified as the borrower. McDaniel requested another appraisal from Paul Marcum and relied upon that appraisal. Copies of Mr. and Mrs. Razzaqs' business tax returns, which were supplied to McDaniel, showed a 2001 business income of $389,607 and a 2002 income of $400,982. McDaniel believed these to be copies of the actual returns, and each return listed Allied Financial Services as the preparer. He said that had the tax returns shown annual incomes of less than $25,000, he would not have approved the loan because the total monthly payment on the mortgage and home equity loans was about $7,500. According to the first appraisal dated October 9, 2003, and upon which McDaniel did not rely because it was not in Razzaq's name, the house was valued at $1.2 million. On January 6, 2004, pursuant to the home equity loan, the bank wired $240,476.70 to Statewide Title. McDaniel said that if he had known the appraisal of $1.2 million overstated the value of the house by $400,000, he would not have approved the loan.

On cross-examination, McDaniel testified that the bank obtained Mr. Razzaq's credit report, which showed that his credit score was "average" and within the bank's guidelines. He said that Gray appraised the property at $1.205 million and that Marcum valued it at $1.2 million.

Danny Wiley testified that he was the owner of a real estate appraisal firm in Nashville. First Tennessee Bank hired him to prepare a restricted-use appraisal report for the property at 2390 Bellevue Manor Drive and to review the two previous appraisal reports. As of February 10, 2004, Wiley appraised the property in the range of $600,000 to $700,000. He said that he was "astonished" to see that the property appraisals prepared by Marcum and Gray had used the same "comparables." Wiley explained that the Todd home was one of the larger homes in the area and that "[i]t seemed highly unlikely that, working independently, two people would have selected these three comparables, especially given that they're so inappropriate." Another problem was with the Gray report, which stated, variously, that the Todd residence was on twenty acres, two acres, and one acre. Additionally, "there was a significant difference" in what the two reports showed as the square footage of the property. In sum, Wiley said that the previous two appraisals valued the property at $450,000 more than he believed it to be worth. He said the property had been listed for sale in March 2002 for $695,000, and on April 25, 2005, for $725,000.

Michael G. Smalling testified that he was employed by First Tennessee Bank as a loan officer in the mortgage division and was involved in the origination of a mortgage loan to Younus and Nasreen Razzaq for the property at 2390 Bellevue Manor Drive. The loan was based on their credit score and down payment, and the bank did not document their income, assets, or employment. The mortgage loan was to be for sixty percent of the value of the house and the home equity loan for twenty percent, resulting in a total of eighty percent of the home's value being loaned. The Razzaqs were required to provide the remaining twenty percent as a down payment. Smalling said that he and Appellant John discussed how much money the Razzaqs wanted to borrow and that Appellant Todd delivered the documents for the transactions, including Mr. Razzaq's tax returns. Smalling could not recall whether the documents included appraisals for the property, and he acknowledged

that Todd made some deliveries for John. Smalling telephoned the number given to him for John's mortgage company, and the person who answered the call said that he would be connected with John, causing Smalling to believe John was a mortgage broker.

Smalling testified that the closing was set for November 2003 and that attorney Richard Manson was selected to do the closing. Smalling gave copies of the tax returns to Rita Mitchell, who was handling the home equity loan, because that loan required income documentation. Appraisals by Thomas Gray and Paul Marcum were in the file, and for reasons Smalling did not recall, a third appraisal was requested. Smalling assumed that the mortgage loan had closed on November 13 at Bicentennial Title, and his office had a celebration lunch at First Tennessee because it was one of the larger loans his office had closed. A few weeks later, possibly around Thanksgiving, Manson informed Smalling that the loan had not closed because "Mr. Razzaq could not come up with the money that he needed to put his 20 percent down." In December 2003, John called Smalling and told him that "they had gotten the situation worked out" and that the mortgage loan could close because Razzaq had the required down payment. First Tennessee Bank initiated a new closing, the loan closed at Statewide Title, and the money from the closing was disbursed. About January 14, 2004, Smalling learned that some documents from the closing had not been returned to First Tennessee. He later went to Carmen Coats' office at Statewide Title and obtained most of the requested documents.

Lazarus John, Appellant John's brother, testified that he was a mortgage broker in North Carolina. In 2003, Appellant John asked to borrow $10,000 from Lazarus John. Appellant John told his brother that he needed the money to bail Appellant Todd out of jail. Lazarus John borrowed $10,000 from an acquaintance with the understanding that it would be repaid in less than thirty days. However, Lazarus John was not repaid, and his lender began threatening him and coming to his office. To stop the threats, Lazarus John borrowed money from a friend and repaid the lender. In January 2004, four or five months after loaning Appellant John the $10,000, Lazarus Todd received a $15,000 cashier's check made payable to him from Loraine Todd, dated January 13, 2004, and drawn on AmSouth Bank.

The record reflects that on October 9, 2003, Appellant Todd was taken into custody, apparently for a matter unrelated to this case. The next day, a "source hearing"[1] was held for Todd's bond, which had been set at $75,000. Appellant John testified at that hearing on Todd's behalf, and a transcript of his testimony was read to the jury. According to the transcript, John testified that he was a self-employed mortgage broker and could pay the $7,537 required to secure Todd's release. He stated that the money would come from his "personal earnings," that Todd was his friend and business associate, and that "[w]e are about to go into a joint business venture together."

Richard Stern testified that he was employed by First Tennessee Bank as Vice President of Asset Recovery. He said the bank's corporate security department advised him that it "had been contacted by an informant that indicated . . . there was some misrepresentation involved in that

[1] See Tenn. Code Ann. § 39-11-715.

transaction." He obtained a two-page summary of Younus Razzaq's tax returns from the Internal Revenue Service which showed that Razzaq's 2001 actual income was ten to fifteen percent of the $378,243 he had claimed it to be. Additionally, Razzaq's adjusted gross income in 2002 was only about ten percent of the $388,446 he had claimed. Stern then requested that Danny Wiley, a local appraiser, perform a retrospective appraisal of the property and review the appraisals done by Paul Marcum and Thomas Gray. Wiley appraised the property at about $700,000, which was $500,000 less than Marcum's and Gray's appraisals of $1,200,000 and $1,205,800, respectively. According to Stern, the two lenders had loaned $960,000 on the property, which was about $260,000 more than its value.

Stern testified that he interviewed the staffs at First Horizon and First Tennessee and found no evidence that anyone knew about the incorrect income or appraisal information. Stern also interviewed Carmen Coats at Statewide Title to "try and understand what had happened in the transaction." Coats told him that Appellant Todd had asked her to obtain a cashier's check for $248,581.06 made payable to Statewide Title and Escrow so that Mr. Razzaq would have the required twenty-percent down payment. He said this demonstrated Coats knew the Razzaqs were not bringing the money to the closing. Coats told him that Appellant Todd had instructed her to conduct the closing in this manner and that "it was the seller's money, and she could do what she wanted to with it." Stern said the property at 2390 Bellevue Manor Drive currently was owned by First Horizon Home Loan Corporation, which had obtained it in a foreclosure sale for $720,000. First Horizon then listed the property for sale for $725,000, and Stern opined that the property would sell for eighty-five to ninety percent of the listed price. Stern testified that no realtor had been associated with the sale of the property to the Razzaqs and that Appellant Todd had handled tasks, such as obtaining the termite inspection letter, that normally would have been handled by a realtor.

On cross-examination, Stern said that the $248,000 check went back to Statewide Title so that the escrow account would balance and "to ensure that there were sufficient proceeds available to pay off the encumbrances on the property at the time." Based on what Coats told him, Stern believed Appellant Todd directed that two checks be cut, and the second check went to Todd's mother. Stern said that Todd "provided the hard copy of the loan file, which contained fraudulent tax returns. . . . [H]e was acting more like a third party originator than he was as his mother's gopher." Stern stated that "[h]ad there been no foreclosure and had all the payments been made in a timely manner throughout the projected term of the two loans, [the bank] would not have lost any money." When the foreclosure occurred, the loans were delinquent. According to Stern, the bank "discovered material misrepresentation" and, thus, was "required by the Federal Regulators, in this case the Office of the Comptroller of the Currency, to recognize any potential loss and to act on it."

Attorney Richard Manson testified that he provided title closing services through Bicentennial Title and Escrow and that his company was involved in a planned closing for the property at 2390 Bellevue Manor Drive. Loraine Todd came in before the closing was to occur and signed the deed and other documents. One or two days later, Younus Razzaq also came to Manson's office and attempted to sign the documents but could not because he failed to bring his wife with him. The sales price for the property was to be $1.2 million. At the time of the closing, Appellant

John represented himself as a "loan originator or one that is engaged in the business of securing loans for people." Manson said that John was actually controlling the transaction, going over the documents with Mr. Razzaq and making various telephone calls to the loan originator at the bank. Manson said that John explained the documents to Razzaq in a foreign language Manson did not understand. After all the documents were signed, Manson needed to receive $248,581.06 from Razzaq but was told he did not have the money. Accordingly, Manson did not close the loan. John later scheduled a closing with a third party, who allegedly had the necessary funds in an account at SunTrust Bank. John suggested that the $248,000 check be issued to the third party, and "then she would turn right back around and cut the check to [Manson]." However, Manson refused to close the loan in this manner. John continued to try to persuade Manson to close the loan and offered him $5,000, but Manson ordered John to leave his office.

Bruce Burnett testified that in August 2003, he was the President and General Manager of Mercedes Benz of Nashville. He said that he once had a business relationship with Appellant Todd while Todd was in the car business. In August 2003, Burnett loaned Todd $25,000 to purchase a vehicle from another person. After Burnett telephoned Todd several times about the debt, Todd brought a cashier's check dated January 21, 2004, as repayment. Loraine Todd's name was on the check.

Younus Razzaq testified that he was a native of Pakistan, an American citizen, and had learned the English language since coming to the United States. At the time of trial, he was working at a hotel in Nashville but previously had owned a gas station. He said that Appellant John owned a mortgage company, that John was also a native of Pakistan, and that they both spoke the Urdu language. In 2001, John talked with Razzaq about Razzaq buying a house. John "preapproved" a loan for Razzaq, and filled out the loan application using Razzaq's W-2 form. In the summer of 2003, John told Razzaq that he was going to buy a house and offered to pay Razzaq $50,000 to use Razzaq's "name and credit." John told Razzaq that Razzaq could keep the house for eighteen months and then it would be transferred back to Appellant Todd, whom John said was the seller. Before the purchase of the property at 2390 Bellevue Manor Drive, John again asked Razzaq for financial information, which Razzaq said John could obtain from Razzaq's accountant. Razzaq said that his only knowledge about the house was that it was located in the Bellevue area; he did not see it. John brought Appellant Todd to Razzaq's store and told him that "we going to help you out, this and that, this is never good store." After that, Todd returned to Razzaq's store many times. Razzaq denied that he signed the contract for the sale of the property.

Razzaq testified that he trusted John. On December 19, 2003, Razzaq sold his store, and he thought selling the store would make it more difficult for him to buy "that big house." Nevertheless, John took Razzaq to Richard Manson's office and said he would "take care" of the money. However, the loan did not close. On another occasion, Razzaq went with the appellants to Manson's office where a woman told John, "[W]e need a check first." On a third occasion, Razzaq went with John to SunTrust Bank, where they again were told that Razzaq had to provide a check before the closing. Razzaq said he was "tired" after the three unsuccessful closings, but the appellants told him, "I bought a car for this loan, I work hard for this loan, now you -- I give you as soon as I get money,

I give you the $50,000." Razzaq said that he was not going to live in the house after the sale and that Todd was going to pay "maintenance, mortgage, electricity, telephone, . . . everything for 18 months."

Razzaq testified that John later took him to Carmen Coats' office for a closing. However, because Razzaq's wife had not signed the loan documents, Appellant Todd and Coats took him to his wife's place of employment, where she signed the documents. Razzaq did not give Coats a down payment. He did not have an adjusted gross income of $378,243 in 2001, as shown on the 1040 tax form, which was among the loan documents, and he did not report this amount as his income. He said that the first time he saw that document was when the bank sent him a copy and that the personal information on the document was known only by his accountant and John. The 1040 form for 2002 reflected that Razzaq's adjusted gross income was $388,446, but that also was incorrect. The personal information on that document was known only to Razzaq, his wife, his accountant, the IRS, and John. Razzaq's actual adjusted gross income in 2001 was $20,822, and his adjusted gross income for 2002 was $6,726. Razzaq did not know that the incorrect adjusted incomes had been reported to the bank but acknowledged that he signed the residential loan application and the HUD settlement statement. At the closing, he did not pay $248,581.06, as shown on the closing statement, nor was he paid any money following the closing. Later, Razzaq met with the appellants to inquire about the $50,000, and John said he would get the money from Appellant Todd. Razzaq denied that he ever received any money or the proceeds of a check from Loraine Todd for $25,000, dated January 13, 2004, and made payable to him.

On cross-examination, Razzaq acknowledged that his personal information on the loan documents also would have been available to other people who worked in John's office. He said he talked with Todd only about the payment he was to receive following the closing but did not give Todd any personal information.

Alan Saturn testified that he was a real estate attorney in Nashville and did mostly residential work. He was the closing attorney on August 6, 2002, when Loraine Todd purchased the home at 2390 Bellevue Manor Drive from Jerry Pendergrass for $793,000. Subsequently, the seller received a second mortgage note from Ms. Todd. In November 2002, the note had not been paid. Appellant Todd kept saying the note would be paid, but that did not happen. In early 2003, Pendergrass filed a lawsuit on the note and obtained a default judgment against Ms. Todd on August 22, 2003. On October 23, 2003, the judgment was recorded at the register's office, ensuring that a buyer for the property would have to pay the judgment in order to receive a clear title. After Ms. Todd purchased the house, she refinanced it, but the title search for the refinance overlooked the second mortgage to Pendergrass. As a result, Pendergrass' mortgage became superior to that of the refinancing bank. When the property was sold to Razzaq, Pendergrass was paid $106,120.40, the amount owed to him. According to the loan documents for the Razzaq transaction, Razzaq was to pay $248,581.06, and the seller was to receive $422,802.14. The loan should not have closed if Razzaq did not supply the money.

Earl Lipscomb, an employee of Nashville Pest Control, testified that he performed a termite inspection on the Bellevue Manor Drive property for Appellant Todd on November 12, 2003. Todd told Lipscomb that he was selling the property, and Todd gave him a check for $1,580 for the inspection.

Gregory Cochran, an employee of Nashville Pest Control, testified that he treated Appellant Todd's house for termites on November 12, 2003. Todd paid with a check, but the check was returned by the bank because the account had been closed.

Sandy Kelly, an investigator for Fifth Third Bank, testified that on July 9, 2003, an account in the name of David Todd was opened at the bank. The bank closed the account on September 19, 2003, due to a number of overdrafts. Notification of the account's closing was mailed to 2390 Bellevue Manor Drive in Nashville.

Stan Mitchell, an employee for Logic Force Consulting, testified that he previously headed the Metro Police Department's computer forensics laboratory. He recovered certain data from a computer[2], which contained a residential appraisal report dated November 9, 2003, by Gray and Associates. The first five documents on the computer were appraisals for 2390 Bellevue Manor Drive. The fifth document, the residential appraisal report by Gray and Associates, had last been opened by the user on December 8, 2003, and listed Thomas N. Gray as the sender and Mike Smalling as the recipient. The computer Mitchell examined contained a software program called Turbo Tax Premier, which allowed a user to complete a 1040 tax form. A tax form from the computer showed Loraine C. Todd as the taxpayer and that she had a 2001 adjusted gross income of $339,565. Also recovered from the computer was a tax form showing that Ms. Todd had a 2002 adjusted gross income of $270,101. Schedule C for that form listed her business as Park Place Motor Cars and its net profit as $283,942. On cross-examination, Mitchell acknowledged that he did not find any loan documents or income tax forms referring to the Razzaqs.

Loraine Cynthia Todd, Appellant Todd's mother, testified that she had purchased property in Bellevue and that her son lived there. She said she did not pay any money toward the purchase of the home and did not pay any down payment for it. Her income consisted of Social Security benefits and a disability pension as a result of having had a stroke, totaling approximately $2,500 per month. She identified her tax returns for 2000, 2001, and 2002, which showed her adjusted gross income for 2000 as $23,337 and her 2001 and 2002 adjusted gross incomes as $17,376. Her son operated a car dealership named Park Place Motors, but she had nothing to do with the operation of the business. She gave her son permission to sign tax returns for her, and she denied submitting a personal financial statement to Pinnacle National Bank showing her net worth to be $2,612,960. She explained why she purchased the Bellevue Manor Drive property in her name as follows:

[2]Mitchell's lab report, which was admitted as an exhibit, shows that the computer he examined was a "HP Pavilion 8560C Mid Tower PC, Serial # US93751461."

> It wasn't an immediate decision. It was just like the credit reports, my credit report was good and you just step out to help your children. He needed my assistance in that area to help him, and I did it. I have four kids. I do it for all of them.

Ms. Todd testified that she was not concerned about the amount of the mortgage payments on the property because her son was supposed to make the payments. She gave her son oral permission to sign the real estate contract to sell the house but did not sign a power of attorney permitting him to do so. At the closing, she did not receive $422,802.14, as shown on the documents, but instead received "174,000, in that range." At the request of Carmen Coats, Ms. Todd signed the settlement statement showing what the receipt and disbursements were to be. She said she signed the statement before she received any money from the sale. She identified a January 9, 2004 cashier's check from Statewide Title in the amount of $174,221.08 made payable to her but did not know why the title company had sent her a cashier's check rather than a check from its escrow account. Subsequently, Appellant Todd brought the check to her, and she endorsed it.

Ms. Todd testified that on January 12, 2004, she took the $174,221.08 check to AmSouth Bank and purchased another cashier's check in the amount of $165,000 made payable to herself. She deposited $4,221.08 and received $5,000 in cash. Two days later, she returned to the bank with the $165,000 check and purchased a $120,000 cashier's check made payable to herself and a $25,000 cashier's check made payable to Younus Razzaq because he had called her "continuously" after the closing, saying she owed him $50,000. Ms. Todd also purchased a $15,000 check made payable to Lazarus John for a "finder's fee." At Appellant Todd's instruction, she later cancelled the $25,000 check made payable to Razzaq and purchased another $25,000 check made payable to Mercedes Benz of Nashville to pay a debt for her son. On January 28, 2004, she again returned to the bank with the $120,000 cashier's check and purchased a $110,000 cashier's check made payable to Appellant Todd, deposited $5,000 into her account, and received $5,000 in cash. She acknowledged that her son endorsed the $110,000 check. She said her intent was to set up an account for her grandchildren's education and "to help David with his business." She was not aware that at the closing, Statewide Title had purchased a cashier's check for $248,581.06 made payable to itself.

Sandra L. Atkinson testified that she worked for Appellant John at Acceptance Capital from October 2003 until January or February 2004. The company closed after she stopped working there. Appellant Todd often came to the office to meet with John. John was supposed to train Atkinson to be a loan processor, but he was out of the office "extensively." Razzaq came to the office "quite a few times" to meet with the appellants. During the last month Atkinson worked at Acceptance Capital, the appellants and Razzaq had a meeting there. She heard raised voices, and Razzaq became "quite upset" with Todd. Atkinson denied preparing or signing the Pinnacle National Bank personal financial statement, which listed her wrong apartment number, incorrectly stated that she had worked at Acceptance Capital for five years, incorrectly showed she had $12,000 in the bank, incorrectly showed she had $123,944 in other financial institutions, and incorrectly showed she had $205,483 in marketable securities. She stated that her assets had never been in the range of $341,000 as shown

on the document, that she never gave anyone permission to sign her name on the financial statement, and that the handwriting on the statement appeared to be John's.

Atkinson testified that John asked her about entering into a partnership with him to purchase a property at 1108 Safety Harbor Cove in Nashville, but she realized it "wasn't on the up and up." She did not sign the contract, which bore her signature, for the purchase of the property and did not apply for a loan or authorize an appraisal for the property.

Tangy Givens Nobles testified that she worked at Acceptance Capital Mortgage Company from December 2003 through mid-February 2004. Before starting that job, she had been acquainted with Appellant Todd, who had a car dealership. Through a former co-worker, she met Carmen Coats, an account executive for Statewide Title. Coats handled the closing on the property at 2390 Bellevue Manor Drive on December 31, 2003. Within two weeks of meeting Coats, Appellant John was directing all of Acceptance Capital's closings to Coats.

Stanley Jablonski testified that he was a fraud investigator for the Davidson County District Attorney General's Office. In February 2004, he was contacted by First Tennessee Bank regarding a possible mortgage fraud on the property at 2390 Bellevue Manor Drive and began investigating it. He obtained a search warrant for the residence, which was occupied by Appellant Todd, to look for financial information. During the search, Jablonski seized copies of 1040 income tax forms, including those of Appellant John's former or present employees; Younus Razzaq's profit and loss statements; Loraine Todd's tax returns; and computers. Stan Mitchell conducted forensic analysis on the computers. A copy of Ms. Todd's 2002 tax return stated that her adjusted gross income was $270,101. A copy of Ms. Todd's personal financial statement prepared for Pinnacle National Bank stated that her net worth was $2,612,960. A copy of Ms. Todd's 2001 1040 form stated that her adjusted gross income was $339,565. A September 30, 2003 profit and loss statement for Younus Razzaq's store stated that its total revenue was $1,733,999, with total expenses of $1,115,215 and net income of $617,784. Razzaq's personal financial statement stated that his net worth was $449,000. Sandra Atkinson's personal financial statement stated that her net worth was $341,427. Sandra Atkinson's 2002 1040 tax form stated that her adjusted gross income in 2002 was $392,641, and a 2001 form stated that her adjusted gross income was $415,724.13. A purchase and sale agreement for the property at 1108 Safety Harbor Cove stated that the buyer was Sandra Atkinson, that the seller was Moe Lytle, and that the purchase price was $1,695,000. A 2000 1040 tax form for Loraine Todd stated that her adjusted gross income was $23,337.

Deborah Caple testified for Appellant John that she formerly worked with him at Premier Mortgage Funding. She was one of ten loan officers, in addition to an operations manager and Appellant John, who worked in the office. Loan officers would receive personal financial information regarding loan applicants, including tax returns, bank statements, and social security numbers. Appellant John would review the information and pass it along to the operations manager to process the loan. In February or March 2003, Carlton Petway, who was looking for a company to provide a second mortgage on the property at 2390 Bellevue Manor Drive, contacted Premier Mortgage and came to the office later that day with the loan documents, including the application,

tax returns, and Loraine Todd's bank statements. Caple introduced Petway to John, and John and Phillip Neely, the operations manager, took the materials to process the loan. Appellant Todd came to the office "a day or two later," and Caple introduced him to Appellant John. The two men had not met previously. John was interested in buying the property from Todd, and Caple showed the property to him and his brother, Lazarus John. Afterwards, Appellant John said that he wanted to buy the house or obtain it at foreclosure. Caple acknowledged that Appellant John could have learned about Loraine Todd's personal financial information from the loan application.

Appellant John testified that he was forty years old, was born in Pakistan, had lived in the United States since 1980, and was a United States citizen. He said one of his former employees introduced him to Younus Razzaq and Appellant Todd. At the time, Todd wanted to refinance his residence, but John's company did not handle the refinance. Afterwards, they became friends, and John expressed an interest in buying the property at 2390 Bellevue Manor Drive from Todd by paying off the outstanding liabilities of approximately $700,000. Later, Todd wanted John to help him find a buyer for the property. In 2003, John had helped Razzaq obtain a $250,000 no-income, no-asset loan for Razzaq's residence in Brentwood. To John's knowledge, he never had any of Razzaq's financial documents. Todd wanted Razzaq to buy the property at 2390 Bellevue Manor Drive and then lease it back to Todd. This procedure would allow Todd to "extract" some equity from the property for his automobile business and allow Razzaq to buy out Razzaq's business partner. The two reached an agreement for the transaction, but John did not prepare the loan package or Razzaq's tax returns. John also did not participate in obtaining the property's appraisals. He was present as Razzaq's friend at the first attempt to close on the property. He did not offer Richard Manson $5,000 to close the loan and did not select Statewide Title for the closing. He was present at the final closing but did not participate in it. Following the closing, John received telephone calls and visits from Razzaq, who was seeking money. However, John did not owe Razzaq any money. John contacted Todd, and the three of them met to discuss the matter. During the meeting, Todd and Razzaq had a "heated argument." John denied that he received any money from the transaction.

John testified that in October 2003, he received a telephone call from Todd's lawyer, saying that Todd had been "incarcerated," that his bond was $75,000, and that Todd "needed to be bailed out." John told the lawyer that he would obtain the funds from his brother, with the money coming into John's girlfriend's bank account. John said he testified truthfully at the source hearing that he could make the required bond payment. It was also truthful for him to say the money was coming from his personal funds. On cross-examination, John testified that the loan application he submitted for Razzaq included no tax information. Razzaq told John that his income was approximately $40,000 and that his wife's income was approximately $25,000.

Charlotte VanMeter testified as a rebuttal witness for the State that she was a realtor. In February 2003, she was the listing agent for the property at 1108 Safety Harbor Cove. She showed the property to John, who told her that his name was Udell Molena. Appellant Todd told her that if she "called Udell Molena's business, to use the name David John, because that's how his employees knew him." Later, Todd told her that she should "refer to Udell Molena as David John."

The parties stipulated that "[i]f Lazarus John were [re-]called to testify, he would testify that he was present at a meeting with Ms. Van Meter and his brother at Safety Harbor Cove, and that both he and his brother used their real names, David John and Lazarus John."

II. Analysis

A. Appellant Todd's Issues

1. Testimonial Evidence from a Non-testifying Codefendant

The appellant argues that State witness Richard Stern should not have been allowed to testify about out-of-court statements made by Carmen Coats, a non-testifying codefendant.[3] The State responds that this argument has been waived because no objection was made at trial to Coats' statement being read to the jury and because she was subject to a subpoena, which the appellant did not exercise. We agree that the appellant has waived this issue.

We will review how this matter arose at the trial. During Stern's testimony, he said that he had taken a statement from Carmen Coats, one of the defendants. He identified a copy of the statement and, without objection, was asked to read it aloud to the jury, which he did. Stern then was asked a number of questions about the contents of the statement, after which counsel for Appellant Todd objected, saying that it was "redundant" for Stern to testify further as to the contents of the statement and that, by his lengthy question, the prosecutor was "actually testifying on behalf of the witness." Stern next was asked whether Coats had made statements to him in addition to those in the written statement. He responded that Coats also had told him that Appellant Todd instructed her to prepare a check to be paid to the buyer at the closing. At that point, counsel for Todd objected, saying that the testimony was hearsay because "[t]hat's not anything [Stern] knows of his own personal knowledge." Upon questioning by the trial court, counsel said that his objection was pursuant to Tennessee Rule of Evidence 403, a rule related to relevance, rather than based upon a claim that it was hearsay. The court overruled the objection.

In the appellant's motion for new trial, he claimed for the first time that Stern's testimony about what Coats told him violated his right to confrontation pursuant to Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004), and State v. Maclin, 183 S.W.3d 335 (Tenn. 2006). The trial court concluded that the appellant was not entitled to relief, stating, in pertinent part, as follows:

> The Court agrees with the [appellant] that there was a confrontation problem presented by Carmen Coats' testimony. Both the written and oral statement[s] were the results of questioning by the bank investigator. Both the written and oral statements were thus "testimonial" in nature, and therefore, the [appellant] had a right to

[3] The record reflects that after the State's case-in-chief, the trial court granted Coats' motion for judgment of acquittal.

> confront the witness who made the statements. See Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354 (2004) and State v. Maclin, __ S.W.3d __, 2006 WL 120341 (Tenn. Jan. 18, 2006).
>
> While there may well have been a confrontation problem, it was waived. No objection was interposed at all to the written statement. Finally, when defense counsel did object, he never raised confrontation, and appears to have believed that the objection was relevan[t]. The issue was waived by defense counsel. See T.R.E. 103(a)(1); State v. Green, 926 S.W.2d 376, 380 (Tenn. Crim. App. 1995) (failure to make specific objection is a waiver); and State v. Coulter, 67 S.W.3d 3, 55 (Tenn. Crim. App. 2001) (party bound by the grounds asserted in the objection). See generally Cohen, Sheppeard and Paine, Tennessee Law of Evidence, § 103[4][h] and [i] (5th ed. 2005).

As the trial court correctly noted, this claim was raised for the first time in the motion for new trial by counsel, who had replaced trial counsel. Moreover, we note that the appellant failed to move for a mistrial or request a curative instruction. Tennessee Rule of Appellate Procedure 36(a) does not require "relief [to] be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error." Therefore, as the trial court correctly concluded, the appellant has waived the issue. Nevertheless, the appellant contends that this court should address his claim as plain error. Tennessee Rule of Criminal Procedure 52(b) provides that this court may, "[w]hen necessary to do substantial justice," address "an error that has affected the substantial rights of an accused at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal." See also Tenn. R. Evid. 103(d). When determining whether an error constitutes plain error, the following factors should be considered:

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

State v. Adkisson, 899 S.W.2d 626, 641-42 (Tenn. Crim. App. 1994) (footnotes omitted); see also State v. Smith, 24 S.W.3d 274, 283 (Tenn. 2000) (adopting the Adkisson test for determining plain error). The presence of all five factors must be established, and consideration of all the factors is not

necessary when it is clear from the record that at least one of the factors cannot be established. Id. Furthermore, the error "'must be of such a great magnitude that it probably changed the outcome of the trial.'" Adkisson, 899 S.W.2d at 642 (quoting United States v. Kerley, 838 F.2d 932, 937 (7th Cir. 1988)).

The appellant has failed to show that defense counsel did not waive this issue for tactical reasons. The situation trial counsel faced was that, had Richard Stern not testified about Coats' statement, the State could have called her as a witness. Her attorney advised the court that she understood she was subject to being called as a witness, saying, as we understand, that she might assert her privilege against self-incrimination when called. However, the record does not reveal whether she would have done so. Likewise, the record does not reflect what use the State would have tried to make of her statement had she been called to testify and asserted her privilege against self-incrimination. Accordingly, the record does not eliminate the possibility that the appellant's trial counsel, after his objection to relevance was denied, made the tactical decision to avoid this argument in order to prevent Coats from testifying in person. Thus, trial counsel's not objecting to Stern's testimony cannot be reviewed by this court as plain error.

2. Failure to Instruct the Jury that Younus Razzaq Was an Accomplice as a Matter of Law

Todd argues that the trial court should have instructed the jury that Younus Razzaq was an accomplice as a matter of law. Based upon this claim, he asserts that his conviction should be reversed because the evidence against him consisted of the uncorroborated testimony of an unindicted co-conspirator. The State responds that Razzaq's testimony was not the sole proof against Todd and that this claim is waived because the appellant did not request an instruction at trial. The State also contends that, in any event, the failure to give such an instruction was harmless error. We agree with the State.

In State v. Bough, 152 S.W.3d 453, 464 (Tenn. 2004), our supreme court cited with approval the holding in State v. Anderson, 985 S.W.2d 9, 17 (Tenn. Crim. App. 1997), that if the trial court fails to instruct the jury as to accomplice testimony, "it becomes the obligation of the defendant to make a special request for the instruction." If the defendant does not make such a request, "the trial court does not err by failing to instruct the jury about accomplice testimony even if the circumstances of the case warrant such an instruction." Bough, 152 S.W.3d at 465 (quoting Anderson, 985 S.W.2d at 17). In this matter, trial counsel for the appellant did not request an instruction as to accomplice testimony. Accordingly, this claim is waived.

3. Trial Court Erred by Allowing Evidence of Prior Uncharged Criminal Acts

Todd argues that the trial court erred by allowing into evidence testimony about false documents bearing the name of Sandra Atkinson and the property at 1108 Safety Harbor Cove. The State responds that the evidence was admissible to show a common scheme or plan. We agree with the State.

As we set out previously, Stanley Jablonski, a fraud investigator for the attorney general's office, testified that, pursuant to a search warrant executed at 2390 Bellevue Manor Drive, he seized computers upon which were found purported tax returns and a financial statement for Loraine Todd, showing hugely inflated income and assets; similar documents supposedly for Younus Razzaq, likewise showing hugely inflated income and assets; and similar documents bearing the name of Sandra Atkinson, showing inflated assets and income. Additionally, a purchase and sale agreement for the property at 1108 Safety Harbor Cove, listing Moe Lytle as the seller and Atkinson as the buyer with a purchase price of $1,695,000, was found on the computer.

The trial court made a detailed analysis in concluding that some of the evidence of other crimes was admissible, stating,

> On the table is the admissibility of this other evidence of, I guess we can at least call it, an untoward act. It's definitely 404(b) evidence.
>
> . . . .
>
> Now, [defense counsel] postures that Ms. Atkinson might have even been a participant in this. I guess when I think that through, my answer to that is, first of all, there's no proof of that, but assuming there even was, I mean, so what. The documents speak for themselves. The documents were in [Appellant] Todd's possession. It's reasonable, under the testimony, that [Appellant] John was involved in producing those documents, and they certainly indicate another illegal scheme.
>
> I think the proof here of that is clear and convincing evidence, and I don't find that the prejudicial effect outweighs the probative value.
>
> I think it's relevant, for several reasons, to show intent and guilty knowledge given the sort of explanation of the [appellants] both in their opening statements, which I can't place too much emphasis on the opening statement, but their cross-examination makes clear to me that the defense here is to cast sort of an innocent spin on this transaction and to make it sound like a legitimate business transaction to refinance and make money rather than a fraud on the bank, and I think there's a number of cases that support this rationale.

Tennessee law supports the trial court's ruling. As explained by Neil P. Cohen et al., Tennessee Law of Evidence, § 4.04[10] (5th ed. 2005),

> Often the "intent" proof [from evidence of other bad acts] actually serves to disprove that the conduct was accidental or inadvertent. . . . A related inference is the inference that a person intended a certain result if he or she had previously acted in the same way and achieved the same result. This inference is stronger if the previous acts and results closely resemble those alleged in the instant case.

In Thompson v. State, 101 S.W.2d 467, 473 (1937), our supreme court reviewed a ruling in an arson of a dwelling case, in which the trial court had determined to be admissible evidence that the defendant "had participated in one or more similar transactions in which secondhand furniture had been bought and put into a house soon thereafter destroyed by fire, etc." Concluding that the trial court was correct in this ruling, our supreme court held that the evidence was admissible to support the State's theory that the defendant "had guilty knowledge and intent in connection with the particular transaction for which he was being tried." Id. The court explained its rationale, stating,

> If it could be shown that in other cases he had participated in the purchase of second-hand furniture and in the procuring of over insurance and in the division of the spoils, it would clearly throw light upon the meaning of his conduct in the instant case and demonstrate that he was not acting innocently, but in line with a fraudulent course of conduct. Woodruff v. State, [51 S.W.2d 843, 846 (Tenn. (1932)], discusses this question and cites and quotes from the leading case of Defrese v. State, 50 Tenn. (3 Heisk.) 53, 8 Am. Rep. 1, and Mays v. State, 145 Tenn. 118, 238 S.W. 1096 [(1921)].

Id.

In State v. Elkins, 102 S.W.3d 578 (Tenn. 2003), our supreme court considered the appeal by a defendant who had been convicted of child rape and attempted child rape. As to the latter charge, he argued on appeal that "there was no evidence establishing [his] intent in the initial attack" on the eleven-year-old victim. Id. at 583. Citing the holding in Thompson, in addition to other Tennessee cases, the court noted the circumstances in which evidence of other crimes was admissible, stating that "Tennessee courts, as well as a large number of state and federal courts, have allowed the admission of evidence of subsequent crimes, wrongs, or acts when they bear on the issues of identity, intent, continuing scheme or plan, or rebuttal of accident, mistake, or entrapment." Id. at 583 (citations omitted). Applying this principle, the court explained why the evidence of the subsequent rape was admissible as to the attempted rape:

> In this case, the defendant on two separate occasions entered the victim's room while B.G. lay facedown on his bed. On both occasions, the defendant climbed on top of the victim. B.G. testified

> that he did not tell anyone besides Roy Carrico about the first attack because he felt embarrassed about what the defendant had done to him. From these facts, coupled with the fact that the room was dark and B.G. was in his underwear, the jury could reasonably infer that the defendant's "bouncing" actions were not playful, but rather were deviant and sexual in nature. Standing alone, B.G.'s testimony that he was embarrassed about the first attack may have been insufficient to establish that the defendant intended to rape him on that occasion. However, because both attacks were similar and sufficiently close in time (two weeks), and the defendant actually raped B.G. on the second occasion, it was permissible for the jury to infer that the defendant intended to rape B.G. the first time, but was thwarted by Roy Carrico.

Id. at 584.

Applying this holding to the present case, we conclude that the trial court did not err by determining that evidence of Todd's scheme and preparation of similar fraudulent documents was admissible as to the charge for which he was being tried. The documents were evidence of a scheme identical to that which is the basis for this appeal, and the evidence was admissible to establish guilty knowledge and intent.

B. Appellant John's Issues

1. Sufficiency of the Evidence

The appellant argues that the State failed to present sufficient proof that he intended to deprive First Tennessee Bank or First Horizon Home Loans of their property permanently because Younas Razzaq and David John testified that everyone intended for the loans to be repaid. The State responds that the proof is sufficient. We agree with the State.

When an appellant challenges the sufficiency of the convicting evidence, the standard for review by an appellate court is "whether, after viewing 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 (1979); Tenn. R. App. P. 13(e). The State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions concerning the credibility of witnesses and the weight and value to be afforded the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). This court will not reweigh or reevaluate the evidence, nor will this court substitute its inferences drawn from the circumstantial evidence for those inferences drawn by the jury. Id. Because a jury conviction removes the presumption of innocence with which a defendant is initially cloaked at trial and replaces it on appeal

with one of guilt, a convicted defendant has the burden of demonstrating to this court that the evidence is insufficient. Theft occurs when a person "with intent to deprive the owner of property, the person knowingly obtains or exercised control over the property without the owner's effective consent." Tenn. Code Ann. § 39-14-103.

The appellant asserts that "[t]he accuracy of the poverty level income tax returns submitted by Razzaq was crucial to the State's case," claiming that "[d]espite Razzaq's insistence regarding the accuracy of the returns submitted to the IRS, the proof on cross-examination suggests otherwise." However, as we have set out, this court may not make credibility determinations. By its verdict, the jury accredited the testimony of Younus Razzaq, and the record supports this determination.

We conclude that the State abundantly proved that Appellant John schemed with Appellant Todd so as to trick First Tennessee Bank and First Horizon Home Loans into lending substantially more money than the property in question was worth. Rita Mitchell testified that Todd referred John to the bank as the prospective purchaser for the house. Brian McDaniel testified that the bank received the documents for the sale of the house, including Younus Razzaq's tax returns, which Michael Smalley said were delivered by Todd. John was one of the persons who knew Razzaq's personal information which was on the false 1040 tax form bearing his name and supplied to First Tennessee Bank. Additionally, John took Razzaq to the closing. The false information supplied to the lenders claimed that Razzaq and Loraine Todd had incomes approximately ten times larger than what they actually received. Attempting to close on the house according to this scheme, John offered Richard Manson a $5,000 bribe and offered Razzaq $50,000 to act as the purchaser.

In short, the jury reasonably could have found from the proof that John was well-experienced in the mortgage business and knew that a lending institution would not loan $500,000 more than a house was worth; that the income and assets for Loraine Todd and Younus Razzaq were grossly inflated; and that the tax returns and asset statements John and Appellant Todd submitted to the lenders were not legitimate. From all of this, the jury also reasonably could have inferred that the appellant had no intention of repaying the money. The evidence is sufficient to support the conviction.

2. Trial Court Erred by Allowing Proof of Other Bad Acts

The appellant argues that the trial court erred by allowing Sandra Atkinson's testimony regarding the property at 1108 Safety Harbor Cove. The State responds that the evidence was admissible to show a common scheme or plan. As we discussed previously, we have reviewed this claim raised by Appellant Todd. Appellant John has presented no arguments which would cause us to revisit that conclusion.

3. Trial Court Erred by Allowing Rebuttal Testimony

Next, the appellant argues that the trial court erred by allowing Charlotte VanMeter to testify as a rebuttal witness for the State that he had used a false name in his dealings with her. The State

agrees that the court erred by allowing this testimony but argues that the error was harmless. Given the abundant proof of the appellant's guilt, we agree that the error was harmless. See State v. Reid, 91 S.W.3d 247, 284 (Tenn. 2002).

4. Trial Court Erred by Disallowing Testimony as to the Search of the Premises for a Dead Body

The appellant argues that he should have been allowed to question Investigator Jablonski as to whether he was aware that Metropolitan Police Department officers had searched the property at 2390 Bellevue Manor Drive for the remains of Janet March. The State responds that this evidence was irrelevant, and we agree. The appellant presented no proof to show that such testimony would have had any effect upon the value of the property. Accordingly, we agree that the trial court properly sustained the objection to this line of questioning.

5. Prosecutorial Misconduct

The appellant argues that after the trial court instructed the jury that Sandra Atkinson could not testify about who she believed forged her name to a document, the State was guilty of misconduct in "having her testify that David John had signed her signature." On appeal, the State agrees that the prosecutor "acted improperly" by soliciting this information but argues that it does not require the granting of a new trial. We conclude that the prosecutor's error does not require a new trial.

This claim is based upon the following exchange between the State and Sandra Atkinson, as she was testifying about a 1040 tax form which bore her name but was not legitimate:

> Q. Okay. Now, let's just look at the bottom of the next page where there's a line for signature.
>
> A. Okay.
>
> Q. Now, do you see your name signed there?
>
> A. Yes, sir.
>
> Q. Is that your signature that you wrote?
>
> A. No, sir.
>
> Q. Do you recognize the handwriting?
>
> A. It would appear to be David John's handwriting.

The defense objected, and during a bench conference, the State said the witness had been instructed not to attempt to identify the signature on the real estate sales contract but had not been told that the restriction applied to the fraudulent 1040 form. For that, the prosecutor accepted responsibility. The trial court then gave the following jury instruction: "Members of the jury, this witness is [in] no way qualified to identify the author of a signature and that testimony is inadmissible, and you're to consider it for no purpose whatsoever in this trial."

In order to prevail on a claim of prosecutorial misconduct, the appellant must demonstrate that the conduct committed by the prosecution was so inflammatory or improper that it affected the verdict to his detriment. Harrington v. State, 215 Tenn. 338, 385 S.W.2d 758, 759 (1965); State v. Gray, 960 S.W.2d 598, 609 (Tenn. Crim. App. 1997). In making this determination, this court is guided by five factors:

> 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.

Judge v. State, 539 S.W.2d 340, 344 (Tenn. Crim. App. 1976); see also State v. Buck, 670 S.W.2d 600, 609 (Tenn. 1984).

We conclude that the prosecutor's error does not entitle the appellant to a new trial. First, we note that the improper opinion went only to one fraudulent document. Moreover, the trial court took immediate curative action by instructing the jurors that the witness was not qualified to identify the author of the signature and that her testimony in this regard was inadmissible and not to be considered for any purpose. Following the appellant's objection, the State accepted responsibility for not advising the witness that she could not give her opinion as to the author of the signatures for all of the documents she was being shown. As for the effect of Atkinson's statement, we note that it was a single occurrence during a lengthy trial, and the appellant has not alleged any other trial misconduct by the State. As set out in our opinion, the only other trial error was the allowing of rebuttal testimony, which we have determined to be harmless. Given all of this, and the strength of the State's proof against the appellant, we conclude that the soliciting of Atkinson's opinion by the State should not result in a new trial.

6. Appellant's Sentence Should have Been Suspended in Full

Finally, the appellant argues that the trial court erred by ordering him to serve his sentence in split confinement. Specifically, he contends that the trial court should have suspended his entire sentence because the requirement that he be incarcerated for 200 days results in the punishment "not fit[ting] the offender." We conclude that the trial court properly sentenced the appellant.

At the sentencing hearing, the trial court explained the appellant's sentence as follows:

> Well, I think the State here has shown me two enhancement factors – No. 2 and 7. I accredit Ms. Atkinson's testimony and Ms. Van Meter's testimony, and I believe, by a preponderance of the evidence, that Mr. John and Mr. Todd were up to another fraudulent scheme in what we've referred to as the Safety Harbor Cove purported transaction. And that indicates that he was engaged . . . in a conspiracy, a fraudulent conspiracy, in relation to that transaction.
>
> In addition, I think the amount of property, and [defense counsel's] point is that the legislature has already graded theft; but I think the amount involved here in this theft was so far above the 60-thousand-dollar limit, that I should give some weight to No. 7 which is the damages were particularly great.
>
> On the other hand, [defense counsel] has appropriately pointed out that the defendant is a first offender, and this is a property crime. I think taken all of that into consideration, it will be the judgment of the Court that in the theft over $60,000, I'm going to sentence Mr. John to serve nine years in the penitentiary. And in the conspiracy to commit theft over $60,000, three-and-a-half years. Those two sentences will run concurrent[ly] or together.
>
> It's further my judgment, however, Mr. John, being a first offender, that I'm going to place him on probation for a period of nine years, but a condition of that probation is that he serve 200 day for day in the Davidson County Workhouse, and then upon release from that 200 days, he's to be under the ordinary conditions of probation; but in addition, he's to make restitution payments of $500 per month to the First Tennessee Bank for the length of that period of probation.

Appellate review of the length, range, or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered

by the parties on enhancement and mitigating factors; (6) any statement by the appellants in their own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210; see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentences. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169.

An appellant is eligible for alternative sentencing if the sentence actually imposed is ten years or less. See Tenn. Code Ann. § 40-35-303(a). Moreover, an appellant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing. See Tenn. Code Ann. § 40-35-102(6). In the present appeal, the appellant is a Range I, standard offender convicted of a Class B and a Class C felony. Therefore, he is not presumed to be a favorable candidate for alternative sentencing for the theft conviction.

The appellant only contests the trial court's ordering split confinement and its failure to suspend the sentence in full. We conclude that the trial court did not err by requiring the appellant to serve 200 days in confinement. The record demonstrates that the trial court adequately considered the sentencing principles and all relevant facts and circumstances, thus entitling the sentencing decision a presumption of correctness. In this matter, the amount of the theft was particularly large and the proof showed that the appellant was involved in a similar scheme to defraud. Thus, the record supports the trial court's determination as to the sentence.

III. Conclusion

Based upon the record and the parties' briefs, we affirm the judgments of the trial court.

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NORMA McGEE OGLE, JUDGE