IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs June 27, 2006

STATE OF TENNESSEE v. DANIEL DARRELL INMAN

Appeal from the Circuit Court for Blount County
No. C-14161 D. Kelly Thomas, Jr., Judge

No. E2005-01010-CCA-R3-CD - Filed December 18, 2006

A Blount County Circuit Court jury convicted the defendant, Daniel Darrell Inman, of one count of arson, a Class C felony. The trial court sentenced the defendant to four years to be served in the Department of Correction as a Range I, standard offender. The defendant appeals, claiming that the trial court erred (1) in advising the defendant's father of his constitutional rights under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602 (1966), with the jury present and telling the jury that the defendant's father had also been indicted for events related to the arson, (2) in allowing the admission of photographs, (3) in refusing to allow a juror to testify about the jury's use of photographs, (4) in denying the defendant's motion for a mistrial because the jury foreman knew the brother of the prosecutor, and (5) in allowing the impeachment of a defense witness through the use of prior inconsistent statements. We conclude that the trial court erred in telling the jury the defendant's father had been indicted and in allowing the admission of extrinsic evidence but that the errors were harmless. We affirm the judgment of the trial court.

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

JOSEPH M. TIPTON, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT W. WEDEMEYER, JJ., joined.

Gerald C. Russell, Maryville, Tennessee, for the appellant, Daniel Darrell Inman.

Robert E. Cooper, Jr., Attorney General and Reporter; Blind Akrawi, Assistant Attorney General; Michael L. Flynn, District Attorney General; Rocky H. Young, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case relates to the burning of a mill on Highway 73 in Townsend. A Blount County grand jury indicted the defendant on one count of arson. The case went to trial in February 2004, but the trial court declared a mistrial after a juror received information inappropriately concerning the case. The case was retried in April 2004, and the jury convicted the defendant as indicted.

At the trial, Darren Sharp[1] testified that he was a deputy with the Blount County Sheriff's Office. He said that on February 28, 2002, he was dispatched to the mill site located in Townsend where he met Oliver Valentine, one of the mill's owners. He said Mr. Valentine told him that he had found diesel fuel, matches, and a burn mark inside the mill. He said that he inspected the premises, that he could "smell diesel real strong," and that he could see where the diesel had been poured on the ground and the walls.

Blount County Sheriff's Deputy Ron Blair testified that around midnight on February 28, 2002, he responded to a call regarding a fire at the mill. He said when he arrived, the mill was fully engulfed in flames. The parties stipulated that a photograph of the defendant and a photograph of the injury to the defendant's leg were taken on March 25, 2002. The photographs were admitted into evidence and passed to the jury.

Special Agent Robert Watson testified that he worked for the Tennessee Bomb and Arson Division of the State Fire Marshal's Office and that he became involved in the investigation of this case in March 2002. He said he interviewed Joey Johnson, Jason Renaud, Patrick Davis, Johnny Dale Stinnett, Walter Stinnett, Emily Johnson, Crystal Keasler, Fern Keasler, and the defendant. He said the Tennessee Bureau of Investigation (TBI) Crime Lab report reflected that no accelerants had been used on the areas tested but that the results did not mean an accelerant was not used. He said that he went to the Duggan residence on March 28, 2002, to attempt to interview the defendant's neighbors but that their mother would not allow them to be interviewed. He said that a white car was at the Duggans' residence that day but that the car was not there on March 25 or 30, 2002, when he drove by the residence.

Patrick Davis declined to invoke his Fifth Amendment rights when questioned by the trial court, although he also was indicted in this case. Mr. Davis testified that he was the defendant's father. He said he gave a statement to Detective Steadmon regarding the mill fire. He said he told Det. Steadmon about a conversation he had at his house with Walter Stinnett, Joey Johnson, and Jason Renaud a week or two before the mill burned. He said that Walter Stinnett asked him how to build a fire and that he told him to use gasoline and diesel mixed together. He said that Walter Stinnett asked each of them if they wanted to make $500 by burning down the mill but that each of them declined.

Mr. Davis acknowledged that he did not give the investigator the names of Joey Johnson or Mr. Renaud but denied it was because he wanted to talk to them before they made statements. He denied offering Joey Johnson or Mr. Renaud money to give a false statement. He said he was not aware that Walter Stinnett was in Peninsula Hospital at the time the mill burned. He said that he was investigating the fire himself because the officers were not doing their jobs and that he was going to sue the state for malicious prosecution. He said that he tape-recorded a statement by Crystal Keasler but denied harassing her, threatening her, or trying to influence her testimony. He denied

[1]Several witnesses, including Darren Sharp, Joseph Johnson, and Crystal Keasler testified at the first trial but were unavailable to testify at the retrial. The witnesses' prior testimony was read into the record at the retrial.

telling Johnny Dale Stinnett that he paid the defendant to burn the mill. He denied intimidating or threatening Mr. Johnson about his testimony but said he reported Mr. Johnson two or three times for child abuse, which led to Mr. Johnson being put in jail.

On cross-examination, Mr. Davis acknowledged that another man, Gary Teague, was also at the house the night Walter Stinnett asked if any of them wanted to make $500 by burning the mill. On redirect examination, Mr. Davis acknowledged he did not tell any of the investigators that Mr. Teague was present during the conversation with Walter Stinnett.

Malcolm Johnson testified that he owned and lived at the Big Meadow Family Campground in Townsend, located approximately one hundred yards from the mill. He said that on the night of February 28, 2002, he was at the campground and noticed several cars in the area, including a Chevrolet truck and a yellow Mustang, driving extremely slowly. He said the cars drove past the campground and came back a few minutes later. He said he recognized the truck from previous incidents and seeing the truck made him very alert. He said he also saw a small white station wagon drive past the campground several times during the evening. He said he first saw the white car around 8:30 p.m. and saw it again fifteen to twenty minutes later. He said that it never drove over fifteen miles per hour and that the muffler was non-existent or not working. He said he saw the white car again around 11:00 p.m. He said the white car in the photograph shown to him by the prosecutor was "a vehicle identical to that one . . . same make, model, and color" as the white car he saw that night. He said that he saw the fire from the front porch of his office, that he called the sheriff's department, and that he went to the scene to help. He said no one was at the mill when he arrived.

On cross-examination, Malcolm Johnson stated that he saw the white car drive past the campground seven times. He said the muffler was "noticeably loud." He said the car was driving at less than twenty miles per hour. He said he saw the truck and the Mustang drive only one trip down and one trip back. He said he saw the truck parked on the bridge after the fire.

Gary Baker testified that he, Clive Valentine, and Ken Rogers were partners in the construction of the mill and that he was the president of the corporation, Old Townsend, Inc. He said they moved the mill to the property in the summer of 2000. He said that the day before the mill burned, he received a call from Mr. Valentine telling him to go to the mill. He said that when he arrived at the mill, he saw that someone had poured diesel fuel throughout the mill and attempted to set it on fire. He said a twelve-inch by twelve-inch section of the wall had been burned. He said that they decided Mr. Valentine should stay at the mill but that, because Mr. Valentine had to go home to get some things, they hired Johnny Dale Stinnett to watch the mill while Mr. Valentine was gone. He said Johnny Dale Stinnett called him around 11:15 p.m. and told him the mill was on fire. He said that on the night of the fire, there were no lightning storms and no electricity going to the building. He said that on the night of the fire and the next morning, a heavy diesel fuel smell was in the area of the fire. He said the financial loss of the mill would be in excess of $200,000. He said he never gave anyone permission to set the mill on fire.

On cross-examination, Mr. Baker acknowledged they did not have insurance on the mill because the insurance company would not insure the building until it was secured and a sprinkler system was installed. He acknowledged there was a temporary electrical pole but said that on the night of the fire, there were no electrical cords running from the pole to the mill. He said they did not leave the cords out at night because the cords could have been stolen.

Clive Valentine testified that his role in Old Townsend, Inc., was to do the construction involved in taking the mill from Grainger County and moving it to Townsend. He said the only electricity going to the building was from their extension cords. He said that earlier in the day the mill burned, he found that someone had poured diesel fuel all over the floors of the mill and on the equipment. He said that in the corner of the building they found wadded up paper towels that had been set on fire. He said he called the police immediately. He said they hired Johnny Dale Stinnett to watch the mill because he worked for them in the past. He said he never gave anyone permission to set the mill on fire. He said that on the morning after the fire, he could smell gasoline and diesel fuel at the scene.

On cross-examination, Mr. Valentine acknowledged that when he testified at the first trial he may have said he smelled diesel and not both diesel and gasoline. He said the only extension cord he had in the mill was a Y-shaped cord into which other cords could be plugged.

Joseph ("Joey") Johnson testified that he went to the Blount County Sheriff's Department in 2002 and gave a false statement. He said he told Investigator Watson that his friend, Walter Stinnett, asked how to start a fire and said he was going to start a fire at the mill. He said the statement was not true. He said he made the statement because Mr. Davis owed him $500 and told him that if he made such a statement, Mr. Davis would pay him. He said that he lived at Mr. Davis's house for two and a half to three years and that he became friends with the defendant.

Joey Johnson testified that four to five days after the fire he was at a motel room with the defendant and the defendant's girlfriend, Crystal Keasler. He said that the defendant told him and Ms. Keasler that he was inside the mill when it burned down and that he had poured some gasoline on his pants. He said the defendant told them that he set the mill on fire and that his pants leg caught on fire also. He said he saw Ms. Keasler treating a burn on the defendant's right shin. He said that he knew the defendant had a skin problem but that the injury on the defendant's leg was a burn and the hair was gone from his leg. He said that the defendant talked in detail on previous occasions, "at least twice a week," about burning the mill and that the defendant said his father paid him $500 to burn the mill. He said that on the night of the fire, the defendant called him and told him to check out the area of the mill. He said he stopped talking to the defendant after the defendant's father put him in jail for harassment. He acknowledged he had convictions for a felony drug offense, possession of a schedule IV narcotic, and shoplifting.

On cross-examination, Mr. Johnson acknowledged he signed a statement under oath that said, "I do not know who set fire to the old mill." He denied that a possession charge was dismissed because he gave a second statement regarding the fire. He acknowledged that in the first statement,

he stated that Walter Stinnett came into Mr. Davis's house, asked how to build a hot fire, and asked if anyone wanted to make $500 by setting fire to the mill. He said that three to five days after the fire, he and the defendant went over to Ms. Keasler's motel room and that Ms. Keasler bandaged up the defendant's leg. He said the defendant had his leg wrapped "many, many times" over a period of weeks. He said that the defendant's injury did not look like psoriasis and that he had seen psoriasis outbreaks. He acknowledged he was not a doctor. He denied that on the day he gave the second statement implicating the defendant, he had been in a fight with Walter Stinnett, which the defendant stopped. He acknowledged the defendant's father reported him to the Department of Children's Services (DCS) for whipping one of his children. He said the defendant's story about setting fire to the mill became more exaggerated every time the defendant told the story. On redirect, Mr. Johnson acknowledged that no one asked him to make the second statement and that he made the statement of his own free will.

Johnny Dale Stinnett testified that the defendant was his second cousin, that the defendant's father was his cousin, and that Walter Stinnett was his brother. He said he was hired to help rebuild the mill and worked on it for seven to eight months. He said that on the night of the fire, Mr. Baker asked him to stay at the mill for the night, because someone had tried to set it on fire. He said he arrived at the mill around 11:00 p.m. He said he left Timbers Restaurant across the street from the mill, stopped at Citgo, drove past the mill, and parked in a parking lot behind Smokin' Joe's where he could see the mill. He said a white station wagon drove up and down the roads around the mill and made several U-turns. He said he drove by the mill to see if anyone had walked across the bridge and then drove back to the bridge where he met the station wagon. He said he stopped at one end and the station wagon stopped at the other end. He said he saw two doors shut on the station wagon but could not tell if people were getting in or out. He said the white station wagon in the two photographs shown to him by the prosecutor was the same make and model as the car he saw that night. He said he parked behind a store and watched the mill. He said that about five to ten minutes later, he saw sparks. He said he drove around the store to a payphone and called 9-1-1. He said that he could see the mill from the payphone and that the whole corner of the mill was on fire. He said he did not see anyone at the mill. He said he did not know if the defendant was in the white car. He said that during the spring of 2003, he saw the defendant at a gas station, and the defendant told him he had burned down the mill.

On cross-examination, Mr. Stinnett said his job on the night of the fire was to watch the mill and report anything suspicious. He said he was not inside the mill or parked at the mill because he was told to watch all the property, including the restaurant, the store, and the mill. He said from where he was parked he could watch everything. He said he could have seen the backs of the other buildings from the mill but could not explain why he chose to sit on the corner rather than at the mill. He acknowledged that when the station wagon drove past the mill and made U-turns, he did not see the station wagon stop. He said the station wagon was loud, like it did not have a muffler. He acknowledged he did not know the make and model of the station wagon. He acknowledged that he "got a glimpse" of the person driving and that the driver was a white person, late thirties or early forties, with big glasses. He acknowledged that in his prior testimony, he said he saw the flames coming from the mill when he pulled into the store's parking lot, not that it was five to ten minutes

after parking at the store. He said he did not hear an explosion. He denied telling people that he had been at the restaurant eating when the fire started or that he was going to turn in the defendant for the $25,000 reward. He acknowledged that more than a year had passed from the time of the fire until the defendant told him he burned the mill. He acknowledged he did not tell anyone about the statement the defendant made to him at the gas station until two weeks before the first trial.

On redirect examination, Mr. Stinnett acknowledged he had never received a reward for information in this case. He said he was threatened and harassed by the defendant's father, who made him speak to an investigator hired by the defendant's father. He acknowledged that the only time he met with the prosecutor was two weeks before the first trial and that no investigators spoke to him between the time the defendant made the statement to him at the gas station and the meeting he had with the prosecutor two weeks before the first trial.

Emily Johnson testified that Joey Johnson was her husband and that she had known the defendant since they were children. She said that a couple of days or weeks after the fire, she went with her husband and the defendant to Ms. Keasler's motel room. She said that Ms. Keasler bandaged a burn on the defendant's leg and that she helped wrap the burn on his leg. She said she heard the defendant say on many occasions that the burn on his leg was from him setting fire to the mill. She said that the defendant said he used "some sort of gasoline," that it splashed on his leg, and that his leg caught fire when he started the fire. She acknowledged she had a felony conviction for delivery of marijuana and two convictions for shoplifting. She said that she was on probation and that her probation could be revoked if she lied in court. She said the defendant's father had nothing to do with her children being placed in DCS custody.

Crystal Keasler testified that she was the defendant's ex-girlfriend and that they had ended their relationship "way before" the fire. She said the defendant, Joey Johnson, and Emily Johnson came to her motel room to visit in late February or early March 2002. She said she bandaged a burn on the defendant's leg. She said she knew it was a burn because it "was blistered. It was bubbled out. I mean, it was bad." She said that her father received severe burns from working at a steel mill and that she learned how to bandage burns by watching the nurses bandage her father's burns. She said that she knew the defendant had psoriasis and that she had seen the psoriasis outbreaks many times. She said psoriasis looked like dry flaky skin or like chicken pox but did not look like a burn. She said that she had put lotion on the defendant's psoriasis before and that he had it on his back, arms, and stomach. She said the injury on the defendant's leg had no hair around the burn, was blistered, and was the size of a tennis ball. She said she bandaged his leg four or five times.

Ms. Keasler testified that the defendant told her it was a burn he received after putting diesel fuel inside the mill and lighting it on fire. She said she also heard the defendant talk about burning down the mill at Emily Johnson's mother's house. She said that after the fire, the defendant's father called her and asked her to testify in a lawsuit against the detectives. She said he called her five to ten times. She said she went along with the defendant's father's request because she was scared of him. She said she lied to the defendant's father to prevent him from knowing what was occurring. She said she was not threatened by the investigators.

On cross-examination, Ms. Keasler denied telling Agent Watson that the defendant sold morphine pills or that the defendant was "telling a bunch of bull and a bunch of lies." She said she did not remember telling Agent Watson that the defendant told her that he was blown out of a window at the mill. She said that she did not remember stating that the injury on the defendant's leg looked like a scab or chicken pox in her statement. She acknowledged that in her statement given on April 4, 2002, she said she last treated the defendant's burn four and one-half to five weeks earlier. She said she did not know the date that the mill burned down. She said she told Agent Watson that the defendant was "eaten up" with psoriasis when he got out of jail in January 2002 because she had seen it on his arms. She acknowledged she talked to the defendant about her pregnancy when they were at the Duggans' house in March but denied that she got into a fight with the defendant's mother. She denied that she, Joey Johnson, and Emily Johnson fabricated the story about the defendant being "blown out" of the mill.

On redirect examination, Ms. Keasler said that the defendant was a very good friend of the Duggans. She identified the Duggans' house in a photograph but said she had never before seen the car in the photograph. She said the defendant told her he burned the mill down for $500.

Jason Duggan testified that he had been a good friend of the defendant's for four years. He identified the white station wagon in the photograph as a car his family previously owned. He said the defendant never made any statements to him about the mill. He said that he never went anywhere in the white station wagon and that it was his father's car. He said the car was not running in February 2002. He said that the car was parked in front of his house for about a week and that the car was then moved to the backyard where it was repaired in May or June. He said that he did not see the defendant on the night the mill burned and that he did not know why the defendant would have him listed as an alibi witness. On cross-examination, Jason Duggan said that the car was quiet when it began running again in early June and that it had a muffler.

The defendant called Pamela Duggan who testified that she was Jason Duggan's mother and that she lived next door to the defendant and his family. She identified the white station wagon in the photographs as a car she acquired in March 2002. She said the station wagon was parked in the front of the house for a couple of days before it was moved to the backyard. She said the car did not run when they bought it, but it was fixed in early June. She said it had a muffler and was quiet. On cross-examination, she acknowledged that at the first trial she had said she bought the car in February or March 2002. She said that the car was not driven at all until after it was repaired but that they put a valid license plate on it to tow it home. She said she did not let the investigators speak to her children because they would not allow her to be with her children while they were interviewed. She said her sons had continued to be friends with the defendant.

Karen Hayes testified that she was working at Timbers Restaurant in 2003, when she became acquainted with Johnny Dale Stinnett, who had come into the restaurant several times and had worked there for a little while. She said he told her that he had been questioned about the burning of the mill and that the police had offered him $25,000 for evidence against the defendant and the defendant's father. On cross-examination, Ms. Hayes said she was not aware that a reward had been

offered by the Bakers. She said her boyfriend, Stacy Myers, worked with the defendant's father and was a friend of the defendant's father. She said she first told Mr. Myers about the statement Johnny Dale Stinnett made and that she then told the defendant's father about it at the defendant's first trial.

Gary Teague testified that he was familiar with the defendant's family because his girlfriend was the defendant's grandmother. He said he was fixing a light switch at the defendant's grandmother's house and went to the defendant's father's house to borrow some tools. He said Walter Stinnett, Joey Johnson, and Jason Renaud were there. He said Walter Stinnett was talking about him and Johnny Dale Stinnett being offered $1500 to $2000 by Gary Baker to burn the mill. He said he told Walter Stinnett that the best thing to do was to forget about it and mind his own business. He said he did not hear Walter Stinnett offer the other men money to burn the mill. He said that after the mill burned, he told Sheriff Berrong about the conversation. He said that he did not hear anything from the sheriff's department and that he approached the sheriff again near the time of the first trial. He said that he was told to talk to the district attorney and that he spoke to the prosecutor, who told him they already knew about Walter Stinnett's statement.

On cross-examination, Mr. Teague said the conversation at the defendant's father's house took place a week to ten days before the fire. He said that he walked into the middle of the conversation and that he never heard Walter Stinnett offer the other men money. He denied that the prosecutor told him to talk to the defendant's attorney about the conversation he heard. He denied ever talking to the defendant's father about being a witness in the case.

Blount County Sheriff James L. Berrong testified that he was the sheriff in 2002 and that shortly after the mill burned down, Mr. Teague came to his office regarding the fire at the mill. He said that Mr. Teague came to talk to him a second time near the time of the first trial but that he told Mr. Teague to talk to the district attorney. He said he could not remember anything specific about the conversation he had with Mr. Teague.

Harold Inman testified that he was the defendant's grandfather and that on February 28, 2002, he was returning from a gospel concert and drove past the mill. He said the mill was on fire when he drove past. He said that when he got home he told his wife and grandson, David Odom, the mill was on fire. He said that his wife called his daughter, Donna Odom, who was the defendant's mother and that he heard his wife ask if the defendant was home and say it was good that he was home because the mill was on fire. He said the defendant's mother's house was thirty-three miles from the mill, and it took approximately forty-five minutes to drive there. He said he saw the defendant a few days after the fire and that the defendant's face was not red and his hair was not singed.

On cross-examination, Harold Inman testified that he had gone to the concert in a church van. He said there was one fire truck and some police cars at the mill when they drove past. He acknowledged he had to go to the church to pick up his car before he went home. He said it took two to five minutes to get from the mill to the church and about six minutes to get from the church to his home. He said they passed the mill around 11:20 p.m. or 11:30 p.m. He said the reason his wife

called to check on the defendant was because the defendant had been arrested and accused of stealing a four-wheeler, even though the defendant was in jail at the time of the four-wheeler theft. He acknowledged his wife called because they believed the defendant would be a suspect in the fire. He acknowledged that he did not talk to the defendant on the telephone that night and that he did not contact the sheriff's department or the detectives to tell them that the defendant was home the night of the fire. He denied that he told his neighbors, Mr. and Mrs. Lynch, that he wished they would not say anything about the defendant stealing a scooter but acknowledged the defendant pled guilty to theft of the scooter. He said he apologized to them after the conversation. He denied telling Mrs. Lynch that he had six witnesses to testify for the defendant regarding the theft and that she was lying. He denied that he would lie under oath for his grandson.

Linda Inman testified that she is the defendant's grandmother. She said that her husband came home between 11:20 p.m. and 11:30 p.m. on February 28, 2002, and that he told her the mill was on fire. She said she called her daughter to see if the defendant was home. She said she talked to her daughter, the defendant, and her other grandson, Douglas Odom. She said that shortly after the mill burned, she saw the defendant and did not notice anything unusual about his face or hair. She said that after the defendant got out of jail on January 29, 2002, the defendant showed her psoriasis on his left shin. She said she noticed he had a breakout of psoriasis the last two visits she had with him in jail. She said that after the defendant got out of jail, his leg was redder and getting small blisters. She said that she bought the defendant prescription medication for his psoriasis. She said that the defendant lived with her until he was sixteen and that she had taken care of his psoriasis over the years. She stated that during one stage of psoriasis, the skin would bubble up and there would be substantial infection.

On cross-examination, Ms. Inman acknowledged that her husband had told her that he saw a fire truck at the mill. She said she told the three fire marshals and a detective that the defendant was home the night of the fire. She acknowledged she did not ask where the defendant was two hours before she called his house. She said that when she told the defendant the mill was on fire, he said, "Oh, well."

David Odom testified that on the night of fire, he was staying with his grandparents, Harold and Linda Inman. He said that his grandfather told them the mill was on fire and that his grandmother called and talked to the defendant. On cross-examination, he denied that he told his family that he did not want to testify and that his family wanted him to give a false statement that supported the defendant.

Douglas Odom testified that he was the defendant's half-brother and that on the day of the fire, the defendant was at home from the time he got home from school until his grandmother called. He denied that the defendant had a red face or singed hair after the fire. On cross-examination, he testified that the defendant was in the living room with him and their mother when their grandmother called. He acknowledged he saw a white car in front of the Duggans' house but said that he never saw the car running. He said he would have known if the defendant left the house.

Donna Odom testified that she was the defendant's mother and that on the night of the fire, her mother, Donna Inman, called and asked her if the defendant was home. She said she told her mother that he was and asked why she wanted to know. She said her mother told her the mill was on fire. She said that she did not work and was home with the defendant during the day. She said she left around 4:00 p.m. to pick up another son from school and that the defendant was on the couch asleep when she left and when she returned home. She said she was home the rest of the evening and that the defendant was home the whole time. She said the defendant had suffered from psoriasis since he was five years old. She said that she visited the defendant while he was in jail in January 2002 and that the defendant showed her psoriasis on his leg. She gave cumulative testimony to the testimony of Donna Inman regarding the stages of psoriasis. She said the hair would peel off with the skin during an outbreak.

Ms. Odom testified that sometime in March 2002, Ms. Keasler came to her house and said she wanted to talk to the defendant about her unborn child. She said that Ms. Keasler told her she was pregnant with the defendant's baby and that she told Ms. Keasler she would have to prove it. She acknowledged she threatened to take the baby away from Ms. Keasler if the baby were the defendant's. She said she called Ms. Keasler a whore, and Ms. Keasler became angry and left.

On cross-examination, Ms. Odom testified that the defendant was home the night before the fire because he did not have a car. She acknowledged that there was not much difference between the way psoriasis looked and the way a burn would look.

The defendant testified that on February 28, 2002, he was at home during the day and evening. He said his mother woke him late in the afternoon after his brother had arrived home from school. He said he was at home past 11:00 p.m. and talked to his grandmother on the telephone. He said that he was in jail from December 11, 2001, until January 29, 2002. He said that while he was in jail, he wore a thermal underwear shirt and pants underneath his uniform. He said the thermal underwear had cuffs on the arms and legs. He said that he washed them in the sink of his cell and sent them out to the jail laundry and that every time they were washed, they shrank. He said that his psoriasis "started breaking out real bad" on his right shin where the cuff of the thermal underwear was. He said that he went to the nurse once while he was in jail and that he received some medicine. He said he bought some skin care lotion and antifungal cream from the commissary. The defendant took his shirt off and pulled his pant leg up to show the jury areas of his skin where he had psoriasis outbreaks and scars.

The defendant testified that he gave a statement to Agent Watson at the Blount County Justice Center. He said he told Agent Watson he heard about the fire on the radio, although he first heard about it when his grandmother called the night of the fire. He said he did not tell Agent Watson about his grandmother's call because he was nervous. He said the officers were threatening to send him to jail over morphine that was found when the defendant and Joey Johnson were pulled over. He said that the day after they were pulled over, Joey Johnson fought with Walter Stinnett. He said that Johnson pulled out a pair of brass knuckles but that he pushed Johnson down and took the brass knuckles away, and that Johnson cursed at him. He said that he had not associated with

Joey Johnson since that incident. He denied that Ms. Keasler or Emily Johnson ever bandaged his leg or that he ever went to Ms. Keasler's motel room with Joey and Emily Johnson. He denied burning the mill and denied telling anyone that he had burned it.

The defendant testified that on February 21, 2002, he had sex with Ms. Keasler, that she saw the psoriasis on his leg, and that she told him he needed to put something on it. He said that on March 28, 2002, Ms. Keasler came to the Duggans' house to talk to him and that she said she had been at his house talking to his mother. He said he told her that her baby could not be his child, that she should get out of the house, and that her he never wanted to see her again. He said this fight with Ms. Keasler was a couple days after his fight with Joey Johnson.

On cross-examination, the defendant acknowledged that he continued to wear the thermal underwear, even though it was aggravating his psoriasis, because it was cold in the jail. He acknowledged the photograph of his leg was taken two months after he was released from jail. He said that he went to the Duggans' house often and that he was a close friend of the Duggans. He said that on the night of the fire around 12:00 a.m. or 12:30 a.m., he went to the Duggans' house and talked to Amanda Duggan. He acknowledged he had been convicted of two felony thefts. He said that he had received a burn on his ankle in the past and that the difference in the appearance of psoriasis and a burn was "[n]ot a whole lot." He said he told Mr. Watson and Officer Ledbetter that he heard about the fire on the radio because they threatened him and he wanted to go home. He said his cousin, Johnny Dale Stinnett, fabricated the story about the defendant to collect the reward money.

The defendant acknowledged Ms. Keasler put lotion on his psoriasis in the past but denied that she treated a burn on his leg. He acknowledged he wanted the jury to believe that Joey Johnson made up his testimony because of the fight between them and because the defendant's father turned Joey Johnson in to DCS. He acknowledged he wanted the jury to believe that Ms. Keasler made up her testimony because the two of them had a "falling-out" on March 28, 2002. He said Emily Johnson made up her testimony to "go along with her husband." He acknowledged that Joey Johnson was his "running-around buddy" and that he was not aware of Joey Johnson knowing Ms. Keasler in any way except through the defendant. He said he was not aware of Emily Johnson ever meeting Ms. Keasler. He said that Joey Johnson, Emily Johnson, and Ms. Keasler had changed their stories three or four times.

On rebuttal, Jeff Caylor testified that he was the director of the Blount County 9-1-1 Center. He said that on February 28, 2002, the first call about the mill fire was made at 11:16 p.m. from Doc's Motel. He said the first emergency personnel, a Townsend police unit, arrived on the scene at 11:23 p.m. He said that Blount County Law Enforcement arrived at 11:29 p.m. On cross-examination, Mr. Caylor said he did not remember hearing a call from Johnny Stinnett on the 9-1-1 tape.

Donna Lynch testified that she knew the defendant and his grandfather, Harold Inman. She said she was a potential witness in another case involving the defendant. She said that Harold Inman

came into her business on December 13, 2001, and asked her to change her story from what she had told the police. She said he told her he had six witnesses that would say the defendant was not there the night of the incident and that "something bad would happen" if she testified. On cross-examination, Ms. Lynch said she had no prejudice against the defendant or Harold Inman. She acknowledged that after leaving, Harold Inman returned to her business to apologize. Andre Lynch was called as a witness and testified to the same facts as Ms. Lynch.

Gary Baker testified he did not offer money to Walter Stinnett to burn down the mill. He said that during the first trial, he overheard a conversation involving Mr. Teague and the defendant's attorney. He said he heard Mr. Teague say that Mr. Teague had gone over to the defendant's father's garage and heard Walter Stinnett say that Mr. Baker had offered Walter Stinnett $2500 to burn the mill. He acknowledged Mr. Teague said the garage and not the living room.

On surrebuttal, Harold Inman was recalled as a witness. He denied telling Mr. or Mrs. Lynch that he had six witnesses that could testify in another case involving the defendant. He also denied making any threats to Mrs. Lynch.

Gary Teague was recalled as a witness by the defendant. He said the defendant's father did not have a garage anywhere on his property. He said that when he talked to the defendant's attorney after the first trial, he told the defendant's attorney that he heard the conversation in the living room. He denied that Mr. Baker was present during the conversation he had with the defendant's attorney.

I. RIGHT AGAINST SELF-INCRIMINATION

The defendant contends that the trial court erred when it advised Patrick Davis, the defendant's father, of his Miranda rights in front of the jury and told the jury that the defendant's father had also been indicted for the arson, although both the state and the defendant requested the court to give the warnings without the jury being present. The defendant contends the information disclosed to the jury by the trial court influenced the jury and prejudiced the defendant. He contends that telling the jury that the defendant's father was a co-defendant who was jointly charged for the same arson would cause the jury to infer the defendant was more likely to be guilty because his father was also involved. He contends that the evidence presented to the jury by the trial court about the defendant's father also being charged with the arson raises a suspicion that illegal evidence made the jury impartial. He contends he did not waive this issue because he requested that the judge question the co-defendant outside the presence of jury.

The state contends the trial court properly advised Mr. Davis of his Miranda rights before his testimony. The state asserts the defendant failed to object and has waived the issue. It argues that the defendant's request to give the warning outside the presence of a jury was not sufficient and that the defendant should have objected. Alternatively, the state contends the trial court did not abuse its discretion. The state argues the jury could infer that the defendant was innocent of the allegations and that Mr. Davis was the guilty party. The state contends any error in the trial court's procedure was harmless because the evidence of the defendant's guilt was overwhelming.

During the defendant's first trial, the trial court advised Mr. Davis of his Fifth Amendment rights when the jury was not in the courtroom. At the retrial, the following exchange occurred when Mr. Davis was called by the state to testify in front of the jury.

> [COURT]: Mr. Davis, it's my understanding that you have been indicted arising - -
> [DEFENSE]: Your Honor - -
> [COURT]: - - out of these same - -
> [DEFENSE]: Your Honor, could we do this out of the hearing of the Jury?
> [COURT]: No need to. He's not a defendant that this Jury is ever going to hear, his case.
>
> You've been indicted arising out of these events alleged on the 28th of February of '02. And I want to make you aware, before you're asked any questions by the Attorney General or [defense counsel] about these events, that you do not have to answer any questions if you want to invoke your Fifth Amendment privilege.
>
> [WITNESS]: Okay. But, no, I'm fine with it.
> [COURT]: But if you want to answer questions, of course, you can. And also, you may have your attorney present, if you wish.
> [WITNESS]: No, I'm fine.

At the motion for a new trial hearing, the trial court stated,

> I do not recall why I advised Mr. Davis of his Fifth Amendment rights in front of the Jury at that time or why I did it when the Jury was out the first time. I don't. . . . But I think the Jury would be entitled to know that a person's - - that his testimony could be influenced by the fact that he was charged and his testimony could be self-serving or not. I mean, that's something that they could decide.

We first address the state's assertion that the defendant waived this issue for failing to object. The transcript reveals that the defendant's attorney asked the trial court to send the jury out while he questioned Mr. Davis but that the trial court responded, "No need to. He's not a defendant that this Jury is ever going to hear, his case." The trial court immediately continued to inform Mr. Davis of his Fifth Amendment right. The defendant's request was sufficient to preserve this issue.

The Tennessee Constitution prohibits judges from commenting on the evidence in a case. Tenn. Const. art. VI, § 9. A trial judge must be "very careful not to give the jury any impression as

to his feelings or to make any statement which might reflect upon the weight or credibility of evidence or which might sway the jury." State v. Suttles, 767 S.W.2d 403, 407 (Tenn. 1989). "It is natural that jurors should be anxious to know the mind of the court and follow it. Therefore a court cannot be too cautious in his inquiries." McDonald v. State, 89 Tenn. 161, 164, 14 S.W. 487, 488 (1890). Rule 605 of the Tennessee Rules of Evidence states that the judge "presiding at the trial may not testify in that trial." In effect, when the judge stated that Mr. Davis had also been indicted for the events arising on February 28, 2002, he was providing facts to the jury that were not in evidence. Therefore, the trial court erred in telling the jury that Mr. Davis was a co-defendant.

However, the state contends that any error in the trial court's procedure was harmless, and we agree. If the trial court had not made the statement that Mr. Davis was also indicted in this case, the state would have been able to elicit this information in its direct examination. "A witness in a criminal prosecution may be asked if he is not under indictment for a crime growing out of the same transaction as the case in which he is a witness, for the reason that the questions are designed to show the interest or bias of the witness in the case on trial." Pique v. State, 499 S.W.2d 4, 6 (Tenn. Crim. App. 1973); see also State v. Thomas Sinclair, No. 02C01-9503-CC-00066, Madison County, slip op. at 9 (Tenn. Crim. App. Apr. 17, 1996) (concluding trial court did not err in ruling that the state could cross-examine a witness about his pending indictment for accessory of the crime on trial because the witness had an interest in the outcome of the case). "One of the rules for weighing testimony is that the jury should consider the testimony in light of the interest or lack of interest the witness may have in the outcome of the lawsuit." Shelton v. State, 479 S.W.2d 817, 820 (Tenn. Crim. App. 1972). The record does not reflect the crime with which Mr. Davis was charged, only that he was charged in the events arising on February 28, 2002. Nevertheless, the fact that a witness was indicted for the same events is something the jury should be able to consider in assessing his or her credibility. Therefore, we conclude the trial court's statement that the defendant's father was also indicted was harmless beyond a reasonable doubt. The defendant is not entitled to relief on this issue.

II. PHOTOGRAPHS

The defendant contends the trial court erred in allowing the state to enter into evidence two photographs of a white station wagon owned by the defendant's neighbors, the Duggans, when no witnesses could identify the station wagon as the one being in close proximity to the mill before it burned. The defendant argues that the witnesses in the first trial could not identify the car and said only that it was the same make and model as the car they saw and that the trial court was aware of those witnesses' previous testimony when it denied the defendant's motion to suppress before the retrial. He contends the photographs could not help prove the issue of guilt because thousands of cars could fit the witnesses' general descriptions. He contends that in the first trial, Johnny Dale Stinnett testified that the car in the photograph was the "same car" he had seen but that on cross-examination he said it was only similar. He contends that probative value is completely lacking and that the photographs are prejudicial to the defendant. He contends it was plain error for the judge to admit the photographs.

The state argues that the trial court properly admitted the photographs of the white car suspected to have been used in the arson. The state asserts that Malcolm Johnson testified that he saw the white car the night of the fire that looked identical to the one in the photographs and that Johnny Dale Stinnett testified that the car in the photographs was the same make and model as the car he saw the night of the fire. The state contends the evidence was relevant to corroborate the witnesses' testimony that they saw the car the night of the fire. The state argues that the witnesses do not have to testify that the car in the photographs was the same car they saw the night of the fire but that it was sufficient for them to say it was similar.

In a pretrial motion, the defendant argued the photographs should not be allowed into evidence at the trial. The trial court denied the motion finding that

> [T]he white station wagon . . . there's a witness that says it's the same make and model as the car that he saw and another one that said that that's the car. Now, they may be discredited, but that doesn't mean that it can't come in. I mean, it's up to the Jury to decide whether it means anything. But certainly that's enough identification to allow somebody to testify about it.

The decision to admit a photograph into evidence is within the discretion of the trial court and will only be reversed upon a clear showing of an abuse of discretion. State v. Harris, 839 S.W.2d 54, 73 (Tenn. 1992). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401. Tennessee Rule of Evidence 403 provides that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence." "A photograph is admissible if it is relevant to an issue in dispute and if its probative value is not outweighed by its prejudicial effect." State v. Vann, 976 S.W.2d 93, 102 (Tenn. 1998); see also State v. Evans, 838 S.W.2d 185, 193 (Tenn. 1992).

The two photographs at issue show a white station wagon sitting outside the Duggans' house. Malcolm Johnson testified that "a small white station wagon" drove by his campground several times the night of the arson at a very slow speed. He said the white station wagon he saw was identical to the one in the photograph. He said, "I did not see the license plates, but yes, same make, model, and color." Johnny Dale Stinnett testified that he met a white station wagon on the bridge and saw two of the car doors close. He said the car in the photographs was the "same make and model" as the car he saw that night. There was also testimony by members of the Duggan Family that the car was not operational during the time of the arson, that the car was towed to the house and then moved to the backyard, and that the car did not run until June.

The photographs were relevant to show that the defendant may have had access to a car seen the night of the arson. Whether the jury believed the car was nonoperational and never loaned to the

defendant was a credibility determination to be made by the jury. 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. State v. Gentry, 881 S.W.2d 1,3 (Tenn. Crim. App. 1993). We conclude the defendant failed to prove that the trial court abused its discretion in admitting the photographs. The defendant is not entitled to relief on this issue.

III. JUROR TESTIMONY

The defendant contends that the trial court denied him due process by misinterpreting Tennessee Rule of Evidence 606(b) when it refused to let a juror testify whether the jury used the photographs of the station wagon to reach its verdict. The defendant asserts that his attorney saw one of the jurors from the defendant's trial at Wal-Mart and that the juror told his attorney that the jury used the photographs of the station wagon to look at the muffler and determine that the car had a loud muffler and was used by the defendant to travel to and from the fire. The defendant asserts that he subpoenaed the juror to the motion for new trial hearing but that the trial court refused to allow the juror to testify. The defendant contends the juror's testimony would not have been presented to attack the validity of the verdict but to show that the defendant was prejudiced by the introduction of the photographs.

The state responds that the trial court properly concluded that the juror could not testify regarding how the two photographs of the white station wagon were used during the jury's deliberation. The state contends that the exhibits used by the jury were properly admitted into evidence and that it was proper for them to use them during deliberation. The state claims the defendant did not assert that extraneous information was improperly brought to the jury's attention.

At the motion for new trial hearing, Debra VanHusen testified that she sat on the jury for the defendant's arson trial. The trial court ruled Ms. VanHusen could not answer the remaining questions because the juror would be testifying about jury deliberations, which is not allowed under Rule 606 of the Tennessee Rules of Evidence. The trial court stated, "The Rules of Evidence provide that jurors cannot testify about things that happened during their deliberations and they can't testify about what effect, if any, any of the proof had on them and how they weighed all the proof to reach their verdict."

Tennessee Rule of Evidence 606(b) provides that

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon any juror's mind or emotions as influencing that juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes, except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention, whether any outside influence was improperly

> brought to bear upon any juror, or whether the jurors agreed in advance to be bound by a quotient or gambling verdict without further discussion . . . .

As the Advisory Commission Comment notes, this rule is the codification of the supreme court's adoption of Rule 606(b) of the Federal Rules of Evidence, in State v. Blackwell, 664 S.W.2d 686, 688 (Tenn. 1984). "Tennessee Rule of Evidence 606(b) permits juror testimony to establish the fact of extraneous information or improper influence on the juror; however, juror testimony concerning the effect of such information or influence on the juror's deliberative processes is inadmissible." Walsh v. State, 166 S.W.3d 641, 649 (Tenn. 2005). "The information that the jurors provided the defendant cannot be offered in court unless it qualifies under one of the three exceptions in 606(b)." State v. Smith, 151 S.W.3d 533, 542 (Tenn. Crim. App. 2003).

If the defendant shows that the jury has been subjected to extraneous prejudicial information or improper influence, then the trial court must presume prejudice and the burden shifts to the state to rebut this presumption by either explaining the exposure or proving that it was harmless. State v. Blackwell, 664 S.W.2d 686, 689 (Tenn. 1984). In the present case, the information at issue does not fall under one of the three exceptions to the rule. Therefore, we conclude that the trial court properly denied the defendant's motion for a new trial. The defendant is not entitled to relief on this issue.

IV. JURY FOREMAN

The defendant contends that the trial court erred in denying his motion for a new trial because the foreman of the jury either knew before the trial or learned during the trial that he knew the prosecutor's brother, Robert Young. He contends he was denied a fair trial by jury. He asserts that the foreman refused to inform the court that he was a friend of the prosecutor's brother and that the foreman denied knowing about the relationship until the end of the trial. He contends that this raises a reasonable suspicion of bias or prejudice and that the defendant is entitled to a new trial.

The state responds that the trial court properly denied the defendant's motion for new trial predicated upon the post-trial discovery of asserted potential juror misconduct. It contends that the defendant's rights were not violated and that the defendant received a fair trial before an impartial jury. The state asserts the jurors were not asked during voir dire if they knew any of the prosecutor's family. It contends the foreman had no obligation to come forward when he learned he knew the prosecutor's brother because their relationship was not a close friendship but an acquaintanceship relative to their children. The state contends the defendant failed to show he was prejudiced and failed to ask the foreman if his acquaintanceship had any influence on his deliberations.

At the motion for a new trial hearing, Brian Moody testified that he was the foreman of the jury that decided the defendant's case. He said that he had a conversation about this case with Robert Young, who was the prosecutor's brother. He said that after the trial, he was at his child's baseball game and was asked where he had been all week. He said he told them he had been on a

jury, and Robert Young asked who the prosecutor was. He said he told him Rocky Young, and Robert Young responded, "[T]hat's my little brother." He said he did not know during the trial that Robert Young was related to the prosecutor. He said that he knew Robert Young because their children went to school together and saw him at baseball games but that they were not "big buddies." He said he had been to Robert Young's house three times to drop off or pick up his daughter. He said he had dinner with Robert Young when all the parents and children on the team would go out together. He denied telling Robert Young that he knew the prosecutor was his brother after hearing a statement made by the prosecutor during the closing argument.

Robert Young testified that Mr. Moody told him that the prosecutor said something during the trial that caused Mr. Moody to recognize that he and the prosecutor were brothers. He said he could not remember if Mr. Moody had told him the statement was made during the closing argument or on the last day of the trial. He said that if he told Mr. Myers, an investigator who interviewed him, that it was the last day of the trial or during the closing argument, then that would probably be more accurate than his memory. On cross-examination, Robert Young acknowledged that Mr. Myers did not interview him until seven months after the trial. He said that he did not ask Mr. Moody who the prosecutor was and that Mr. Moody told him that his brother was the prosecutor in the case.

The trial court denied the defendant's motion for a new trial. The trial court found that

> My weighing of that testimony that I heard is that Mr. Moody did not, until after the trial was over and done with, make any connection or have any recognition of [the prosecutor]. I think the contact between Robert Young and Mr. Moody was just a casual in-passing conversation, and if I had to say who was more correct about what they had to say that night than the other, I would say Mr. Moody was more correct. At any rate, there was no - - the proof was that their association was extremely casual. Their only contact was related to children playing ball, they weren't friends apart from that. And I think the record will reflect that the Juror was not asked about whether or not he knew Mr. Young's brothers and there was no reason that he should say. And I don't think anything sinister can be gleaned from that - - or inferred from that.

Challenges to juror qualifications generally fall into two categories - propter defectum or propter affectum. Carruthers v. State, 14 S.W.3d 85, 94 (Tenn. Crim. App. 2003). General disqualifications such as alienage, family relationship, or statutory mandate are classified as propter defectum and must be challenged before the return of a jury verdict. State v. Akins, 867 S.W.2d 350, 355 (Tenn. Crim. App. 1993). An objection based upon bias, prejudice, or partiality is classified as propter affectum and may be made after the jury verdict is returned. Id. "Where a juror is not legally disqualified or there is no inherent prejudice, the burden is on the Defendant to show that a juror is in some way biased or prejudiced." State v. Caughron, 855 S.W.2d 526, 539 (Tenn. 1993) (citing Bowman v. State, 598 S.W.2d 809, 812 (Tenn. Crim. App. 1980)).

In Akins, this court addressed the issue of a juror's failure to disclose information reflecting potential bias or partiality and stated as follows:

> We hold that when a juror's response to relevant, direct voir dire questioning, whether put to that juror in particular or to the venire in general, does not fully and fairly inform counsel of the matters which reflect on a potential juror's possible bias, a presumption of bias arises. While that presumption may be rebutted by an absence of actual prejudice, the court must view the totality of the circumstances, and not merely the juror's self-serving claim of lack of partiality, to determine whether the presumption is overcome.

867 S.W.2d at 357. The court also stated that the "integrity of the voir dire process depends upon the venire's free and full response to questions posed by counsel. When jurors fail to disclose relevant . . . information, counsel are hampered in the jury selection process. As a result, the defendant's right to trial by a fair and impartial jury is significantly impaired." Id.

During voir dire, the trial court asked Mr. Moody, "Mr. Moody, are you related by blood or marriage to the prosecuting attorneys or the prosecuting witness or acquainted with any of them?" In responding to the question, the transcript states Mr. Moody "indicates in the negative." Mr. Moody testified he did not become aware of his relationship to the prosecutor's brother until after the trial had ended. The trial court accredited the testimony of Mr. Moody. Because Mr. Moody did not know that Robert Young was the brother of the prosecutor and did not make the connection until after the trial had ended, Mr. Moody could not be expected to disclose such information during voir dire or during the trial. Additionally, the defendant did not question Mr. Moody about possible bias and has not shown that he was prejudiced by Mr. Moody serving on the jury. Therefore, we conclude the defendant has failed to meet his burden, and the defendant is not entitled to relief on this issue.

V. IMPEACHMENT OF HAROLD INMAN

The defendant contends the trial court erred by allowing the state to question Harold Inman, the grandfather of the defendant, about three alleged prior instances of the witness's conduct and allowing the state to offer extrinsic evidence to prove the conduct. The defendant asserts the three specific instances of prior conduct include: (1) the criminal offenses of making threats to two witnesses, (2) trying to obtain perjured testimony, and (3) conspiracy to get six other witnesses to commit perjury in an unrelated case. He asserts the questions regarding Harold Inman's conversation with Mr. and Mrs. Lynch were not related to prior statements that he made on direct examination and were not prior statements about the instant case. He contends that the state told the trial court that it wanted to use one statement to impeach Harold Inman but proceeded to question him on three specific instances of prior conduct. He contends that the questions asked by the state were prejudicial to the character of Harold Inman, who was an alibi witness. He contends that the state's questions about Harold Inman's conversation with the Lynches referred to specific instances

of prior conduct and not prior inconsistent statements. He contends that the testimony of the Lynches was inadmissible under Tennessee Rules of Evidence 608(b) and 613 and that the prejudicial effect of their testimony outweighed the probative value.

The state responds that the trial court properly admitted the prior inconsistent statements of Harold Inman for impeachment purposes. The state contends that the statements were lawfully admitted as prior inconsistent statements for purposes of credibility. It also contends that the defendant failed to request a special jury instruction and that the jury instructions are not included in the record on appeal. The state asserts it did not seek to introduce testimony from the Lynches until (1) the state asked Harold Inman under oath if he requested Mrs. Lynch to change the story she gave the police implicating the defendant in a theft and (2) Harold Inman denied ever making such a statement. The state contends the testimony of the Lynches would not have been needed had Harold Inman admitted making the statements.

The defendant presented five alibi witnesses at the trial: Harold Inman, Linda Inman, David Odom, Douglas Odom, and Donna Odom. On cross-examination, Harold Inman was asked about a conversation he had with the Lynches regarding testifying against the defendant in an unrelated theft case. Harold Inman acknowledged talking to Mrs. Lynch but denied telling Mrs. Lynch that she was lying, that she better change her story, and that he had six witnesses to testify on the defendant's behalf. He said he told the Lynches he wished they would not have accused the defendant of the theft. He said he loved the defendant, his grandson, and he hoped he did not go to jail, but he said he would not lie under oath for him. The conversation between Harold Inman and the Lynches involved a theft offense and was unrelated to the present case.

Mrs. Lynch testified that Harold Inman asked her to change the story she told the police about an incident involving the defendant. She said he told her that he had six witnesses that would say the defendant did not commit the theft and that something bad would happen if she testified. Mr. Lynch testified that he heard his wife tell Harold Inman that she would not perjure herself. He said Harold Inman told his wife that he had six alibi witnesses for the defendant and made a "veiled threat."

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," and is generally admissible. Tenn. R. Evid. 401, 402. The trial court has discretion in determining if evidence meets the test for relevancy. State v. Forbes, 918 S.W.2d 431, 449 (Tenn. Crim. App. 1995). Assessing the probative value and danger of unfair prejudice regarding the evidence also falls within the trial court's discretion. State v. Burlison, 868 S.W.2d 713, 720-21 (Tenn. Crim. App. 1993). This court will only reverse a trial court's decision if the trial court abused that discretion. State v. Williamson, 919 S.W.2d 69, 78 (Tenn. Crim. App. 1995).

Tennessee Rule of Evidence 608(a) provides that

> The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) the evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked.

However, extrinsic evidence of specific instances of conduct is inadmissible. Tenn. R. Evid. 608(b). Extrinsic evidence of a prior inconsistent statement is admissible if the witness is given the opportunity to explain or deny the statement and the opposing party is given an opportunity to interrogate the witness. Tenn. R. Evid. 613.

Before putting on rebuttal proof, the trial court determined which witnesses the state would be allowed to call in rebuttal. The trial court heard argument from both the state and the defendant about the testimony of the Lynches. The following discussion regarding the testimony of Harold Inman and rebuttal proof from the Lynches ensued:

> [COURT]: Why was it relevant to ask [Harold Inman] that in the first place? What was the relevance of that question? I think I know, but you tell me what you intended it to be.
>
> [STATE]: Right. My relevance - - and, of course, if he'd admitted it, I wouldn't be putting them on.
>
> [COURT]: Well, I know, but why did you ask it in the first place?
>
> [STATE]: Because I was hoping he would lie so that I could - - because this case is so much about credibility.
>
> . . . .
>
> [STATE]: . . . And it's particularly important - - you know, when he's making statements - - when he's making statements to witnesses in another case, I can get six witnesses to say that he was somewhere else, which is exactly what they're doing here in this case - - or by the State's position.

The initial intent of the state was to show that Harold Inman would have suborned perjury to protect the defendant. Essentially, this was a direct attack on Harold Inman's credibility and an indirect attack on the credibility of the defendant's other witnesses. For impeachment purposes, Rule 608 would allow the state to ask Harold Inman if he tried in a previous case involving the defendant to suborn perjury, threaten a witness, and claimed he could produce witnesses for the defendant. However, once Harold Inman denied doing those things, Rule 608(b) precluded the state from proving those specific instances of prior conduct.

The state asserts, though, that once Harold Inman denied making the statements to Mrs. Lynch, the state was entitled to impeach him by extrinsic evidence of his prior statements to Mrs. Lynch that were inconsistent with his trial testimony denying making the statements. It relies on Tennessee Rule of Evidence 613(b) which provides:

> Extrinsic Evidence of Prior Inconsistent Statement of Witness. – Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless and until the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require.

We see several problems with the state's view. First, Harold Inman's questioning regarding his statements to Mrs. Lynch was permissible by Rule 608(b) because it was relevant to Inman's character for truthfulness. In this regard, the state viewed his purported statements to Mrs. Lynch as the conduct that bore on his truthfulness. His denial, though, precluded the state's proving extrinsically that he made the statements. Unless otherwise relevant, we do not believe the state could then use Rule 613(b) to subvert the prohibition in Rule 608(b) against proving the conduct extrinsically.

In this regard, and second, we view the state's use of the inconsistent statements to impeach Harold Inman to run afoul of the "collateral fact rule." Under that rule, "the statement of a witness made during cross-examination as to a collateral fact may not be impeached by extrinsic evidence of a prior inconsistent statement as to that fact." State v. Leach, 148 S.W.3d 42, 56 (Tenn. 2004).

In any event, though, we believe the error was harmless. The defendant made statements to several people on multiple occasions that he burned the mill. Joey Johnson testified that four or five days after the fire the defendant told him that he was inside the mill when it burned down, that he had poured some gasoline on his pants, and that he burned his leg. He also testified that he saw the burn on the defendant's leg. He said that the defendant talked in detail "at least twice a week" about burning the mill and that the defendant told him the defendant's father had paid him $500 to burn the mill. Johnny Dale Stinnett, the defendant's cousin, testified that in the spring of 2003, the defendant told him that he had burned the mill. Emily Johnson testified that she heard the defendant say on many occasions that he burned his leg when he set fire to the mill and that she helped wrap the burn on his leg. Crystal Keasler testified that the defendant told her he burned his leg while setting the mill on fire and that she bandaged the burn. Given the evidence against the defendant, we do not believe that the jury's hearing about Harold Inman's conversation with the Lynches more probably than not affected the result of the trial. See Tenn. R. Crim. P. 52(a).

CONCLUSION

Based on the foregoing and the record as a whole, we affirm the judgment of the trial court.

_____
JOSEPH M. TIPTON, PRESIDING JUDGE