IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1996 SESSION

FILED

July 16, 1997

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)
	) C.C.A. No. 03C01-9512-CR-00410
Appellee,	)
	) Hamilton County
V.	)
	) Honorable Russell C. Hinson, Judge
	)
MARCUS ANTHONY ROBINSON,	) (Attempted Aggravated Robbery)
	)
Appellant.	)

FOR THE APPELLANT:

Robert D. Lawson, Jr.
Attorney at Law
Suite 200 Market Court
537 Market Street
Chattanooga, TN 37402-1225

FOR THE APPELLEE:

Charles W. Burson
Attorney General & Reporter

TImothy F. Behan
Assistant Attorney General
Criminal Justice Division
450 James Robertson Parkway
Nashville, TN 37243-0493

Gary D. Gerbitz
District Attorney General

Leland Davis
Assistant District Attorney General

David Denny
Assistant District Attorney General
Courts Building
600 Market Street
Chattanooga, TN 37402

OPINION FILED: _____

REVERSED IN PART; AFFIRMED IN PART

PAUL G. SUMMERS,
Judge

O P I N I O N

The appellant, Marcus Anthony Robinson, was convicted by a jury of attempted aggravated robbery and aggravated assault. He was sentenced to six years incarceration on each conviction. The sentences were ordered to run consecutively for an effective sentence of twelve years. On appeal he raises the following issues for our review: 1) whether he was improperly convicted of both attempted aggravated robbery and aggravated assault; 2) whether the state improperly excluded a juror on the basis of race; 3) whether the trial court erred in failing to sever his trial from that of his codefendants; and 4) whether the trial court erred in allowing him to be tried in absentia. Upon review, we reverse in part and affirm in part.

FACTS

An employee of Mack Oil in Chattanooga, Franklin Price, was working outside when the appellant and his accomplice approached the gas station. The appellant wanted to purchase a pack of cigarettes. Simultaneously, a car pulled into the gas station. The driver of the car also wanted to purchase cigarettes. Price gave the driver cigarettes and took his money. As Price walked towards the store to make change for the driver, the appellant's accomplice attempted to take the cash in his hand. Price was armed. As he struggled to maintain his hold on the cash, he fell to the ground just inside the station's doorway. The appellant entered the store and fired two shots at Price.[1] The appellant and his accomplice fled on foot. The employee fired several shots at the fleeing robbers.

The appellant was found at the hospital suffering from a gunshot wound. His accomplice was also arrested; he had been shot in the chest. Both the appellant and his accomplice stated they were shot while trying to buy cigarettes.

I

[1]Price was not hit but did receive injuries from splintering wood caused by the two gunshot blasts.

In his first issue the appellant contends that he was improperly convicted of both attempted aggravated robbery and aggravated assault. The appellant was charged by presentment with attempted aggravated robbery. He was indicted for attempted first degree murder. The jury was charged that it could convict the appellant of aggravated assault, a lesser included offense of attempted first degree murder.

The appellant argues that aggravated assault is a lesser included offense of attempted aggravated robbery and, therefore, the aggravated assault conviction should have been merged into the conviction for attempted aggravated robbery. The state concedes that the appellant's conviction for aggravated assault cannot stand. It, however, avers that the conviction cannot stand because aggravated assault is not a lesser included offense nor a lesser grade of attempted first degree murder. Therefore, the state concedes that the appellant was convicted and sentenced for an offense for which he was never charged. We agree.

In State v. Trusty, our Supreme Court held that aggravated assault is not a lesser grade or lesser included offense of the inchoate crime of attempted first degree murder. State v. Trusty, 919 S.W.2d 305, 312 (Tenn. 1996). In Tennessee, because a lawful accusation is a prerequisite to jurisdiction, a prosecution cannot proceed without an indictment that sufficiently informs the accused of the essential elements of the offense. State v. Morgan, 598 S.W.2d 796, 797 (Tenn. 1979). A defendant cannot be legally convicted of an offense which is not charged in the indictment or which is not a lesser included offense of the indicted charge. State v. Lampkin, 619 S.W.2d 520 (Tenn. 1981). Moreover, a conviction based on an unindicted charge is a nullity. Warden v. State, 381 S.W.2d 244, 246 (Tenn. 1964). Therefore, the appellant's conviction for aggravated assault is reversed and dismissed.

II

The appellant next contends that the state improperly excluded a member of the jury venire based solely on race in violation of the equal protection clause. The state asserts that its reasons for excluding the juror were neutral and not racially motivated. It claims the juror was excluded because he was familiar with the area where the crime occurred and that his close friend had been murdered three weeks prior to the trial.

In Batson v. Kentucky, the United States Supreme Court held that the prosecutor's use of peremptory challenges to intentionally exclude jurors of the defendant's race violated his equal protection rights under the Fourteenth Amendment to the United States Constitution. 476 U.S. 79 (1986); See TENN. CONST. art. I, § 9. Also, in Batson, the Supreme Court established a three-step process to enable a trial court to determine the validity of an equal protection challenge to the state's exercise of its peremptory challenges. Under this process, the defendant must first make a prima facie case showing that the state purposefully discriminated against a prospective juror of the defendant's race. Id. at 97. Second, the burden then shifts to the state to come forward with a race-neutral reason for striking the juror in question. Id. This explanation must be more than an assumption that jurors of the defendant's race will be partial to him simply because of racial sameness. Id. On the other hand, the explanation need not rise to the level justifying a challenge for cause. Id. Third, the trial court must then determine whether the state engaged in unconstitutional purposeful discrimination in violation of the defendant's equal protection rights Id. at 98. The core issue is the prosecutor's discriminatory intent. The trial court's finding "largely will turn on evaluation of credibility." Id.

We find no error in the trial court's exclusion of the prospective juror. The state articulated a sound reason for its use of a peremptory challenge of the juror. Nothing in the record reveals a discriminatory intent to exclude African-Americans from the appellant's jury. This issue is without merit.

III

The appellant next contends that the trial court erred in failing to allow severance of his trial from that of a codefendant. He claims that his codefendant's statement, which was redacted and read to the jury, incriminated him in violation of Bruton v. United States, 391 U.S. 123 (1968). The state avers that Tenn. R. Crim. P. Rule 14(c)(1)(ii) allows a joint trial if the codefendant's statement has been altered so that all references to the defendant have been deleted. The state claims it has precisely complied with Rule 14.

In Bruton, the Supreme Court held that admission at a joint trial of a codefendant's confession implicating the defendant constituted prejudicial error even though the trial court gave an instruction that the confession could only be used against the codefendant and must be disregarded with respect to the defendant. Post-Bruton cases make it clear, however, that the rule in Bruton does not apply to confessions which do not implicate the nonconfessing defendant. Also, Bruton does not apply to confessions from which all references to the moving defendant have been effectively deleted, provided that, as deleted, the confession will not prejudice the moving defendant. United States v. Alvarez, 519 F.2d 1052 (3d Cir. 1975); White v. State, 497 S.W.2d 751 (Tenn. Crim. App. 1973); Taylor v. State, 493 S.W.2d 477 (Tenn. Crim. App. 1972).

Upon review of the record, we find no error in the trial court's refusal to sever the appellant's and his codefendant's trial. The references to the appellant in his codefendant's statement, as read to the jury, were completely deleted. Nothing in the statement implicated the appellant. We find that the trial court did not abuse its discretion. This issue is without merit.

IV

In his final issue, the appellant contends that the trial court committed reversible error when it elected to try the appellant in absentia. The state avers that the appellant voluntarily left and in so doing waived his right to be present.

This Court has held that "an accused who has notice of the time and place of the trial and of his right to attend, and who nonetheless voluntarily absents himself, will be deemed to have waived his right to be present." State v. Kirk, 699 S.W.2d 814, 819 (Tenn. Crim. App. 1985); Tenn. R. Crim. P. 43.[2]

The record reveals that just before jury voir dire began, a jury-out hearing was conducted. The appellant stepped out of the courtroom and left the building. A search was conducted but the appellant was not located. The trial court found that the appellant had willfully waived his right to be present and proceeded with the trial. We find nothing in the record to indicate the trial judge abused his discretion. This issue is without merit.

The appellant's aggravated assault conviction is reversed. His conviction for attempted aggravated robbery is affirmed.

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PAUL G. SUMMERS, Judge

CONCUR:

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JOSEPH M. TIPTON, Judge

_____
JOHN K. BYERS, Senior Judge

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[2]Rule 43 states that whenever a defendant, initially present, voluntarily is absent after the trial has commenced implicitly waives the right to be present. We note that the language "after the trial has commenced" found in Rule 43 is included to insure the accused knew of the time and place of the proceedings against him or her. In this case the appellant sat in court until jury selection was to begin. He obviously knew the trial was to commence shortly. It would be anomalous to hold that a defendant cannot waive his right to be present during voir dire questioning but can waive that right during witness testimony.

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STATE OF TENNESSEE, Appellee,	)	No. 03C01-9512-CR-00410
v.	)	Hamilton County
	)	Honorable Russell C. Hinson, Judge
MARCUS ANTHONY ROBINSON, Appellant.	)	(Attempted Aggravated Robbery)

CONCURRING OPINION

I concur in the majority opinion. I only add that the federal cases upon which our court in State v. Kirk, 699 S.W.2d 814 (Tenn. Crim. App. 1985), based its interpretation of our Rule 43,[3] given its similarity to the federal Rule 43, have all been overruled by the United States Supreme Court.

In Crosby v. United States, 113 S. Ct. 748 (1993), the defendant did not appear on the date of his trial nor could he be found. Evidence indicated that he had "cleaned out" his house and absconded the previous evening. The district court held that the defendant waived his right to be present and proceeded to try him in absentia with his three remaining codefendants. In reversing the defendant's convictions, a unanimous

[3]In pertinent part, Rule 43, Tenn. R. Crim. P., provides the following:

> (a) Presence Required. Unless excused by the court upon defendant's motion, the defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.
>
> (b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict and imposition of sentence shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present:
>
> (1) voluntarily is absent after the trial has commenced (whether or not he or she has been informed by the court of the obligation to remain during the trial) . . . .

Supreme Court held that the "language, history, and logic of Rule 43 support a straightforward interpretation that prohibits the trial in absentia of a defendant who is not present at the beginning of trial." Id. at 753.

Thus, in the appropriate case, the Kirk analysis may need to be revisited, but this is not that case. The record reflects that the defendant was in the courtroom on the day of trial and was advised with the other participants by the trial judge that jury selection would proceed after a short recess. The venire of prospective jurors heard preliminary comments from the trial judge and then were removed from the courtroom. The trial judge then asked for the various defendants to return, at which time the defendant's disappearance was noticed. The jury venire then returned to the courtroom. During the short time that the venire was not in the courtroom, the trial judge and counsel discussed the positioning of the jurors, including alternates,
in the jury box.

In Crosby, the Supreme Court stated that the beginning of trial is a "plausible place" at which to draw the line in determining the point that costs of delay are likely to outweigh the interest of the defendant and society in having the defendant present. 113 S. Ct. at 752. Also, it believed that the defendant's initial presence at trial served to assure that the defendant's flight would indeed reflect a knowing waiver of presence with an understanding of the consequences of absence. Id. I believe that these considerations have been met in the present case and that the record reflects sufficient compliance with Rule 43 to allow the trial judge, in his discretion, to proceed with the defendant's trial in absentia.

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Joseph M. Tipton, Judge

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STATE OF TENNESSEE,	)	C.C.A. NO. 03C01-9612-CR-00410
	)	
Appellee	)	HAMILTON COUNTY
	)	
v.	)	HON. RUSSELL C. HINSON,
	)	JUDGE
MARCUS ANTHONY ROBINSON,	)	
	)	(Attempted Aggravated Robbery)
Appellant	)	

CONCURRING OPINION

I concur in each of of my colleagues' opinions: in Judge Summers because it properly addresses and decides the issue raised, in Judge Tipton's because the opinion of the Court in *State v. Kirk*, 699 S.W.2d 814 (Tenn. Crim. App. 1985) should, in the proper case, be considered in light of *Crosby v. United States*, 113 S.Ct. 748 (1993).

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John K. Byers, Senior Judge