

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs March 22, 2005

STATE OF TENNESSEE v. MITCHELL PRESNELL

Appeal from the Circuit Court for Cocke County
No. 6413 Rex Henry Ogle, Judge

No. E2004-00266-CCA-R3-CD - Filed August 17, 2005

DAVID G. HAYES, J., separate concurring.

With respect to the defendant's issue (2), whether the trial court erred in not charging lesser offenses, I join in the result, but for reasons other than those reached by the majority.

The majority concludes that this court's opinion in *State v. Robert Page*, No. W2003-01342-CCA-R3-CD (Tenn. Crim. App. at Jackson, August 26, 2004), *perm. to appeal granted*, (Tenn. Jan. 18, 2005), is correct in its holding that the provisions of Tennessee Code Annotated section 40-18-110(a)-(c) are unconstitutional, thus, the defendant's issue requires scrutiny under lesser included and harmless error analysis. In the final analysis, the majority opines the error is harmless.

As noted by my dissent in *Page*, I find the legislature's enactment of Tennessee Code Annotated section 40-18-110 (a)-(c) constitutional, thus, I find the issue waived.

David G. Hayes, Judge