

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
June 28, 2005

STATE OF TENNESSEE v. DONALD LUKE SEIBER, ALIAS

**Direct Appeal from the Criminal Court for Knox County
No. 73049 Ray L. Jenkins, Judge**

No. E2004-01794-CCA-R3-CD - Filed October 25, 2005

JAMES CURWOOD WITT, JR., J., concurring.

Respectfully, I find I cannot fully concur in the opinion because, based upon the absence of a contemporaneous objection, it treats as waived the issue of the trial court's "reading the aggravated kidnapping as a lesser-included offense out of order during the charge to the jury." The instructional problem alleged is one of instructional *error*, not instructional *omission*. In the case of the former, no contemporaneous objection is required, unlike when an instruction is omitted. *See, e.g., State v. Johnny Wade Meeks*, No. 03C01-9811-CR-00411, slip op. at 8-9 (Tenn. Crim. App., Knoxville, Dec. 3, 1999).

Even though I see no requirement that appellate review of this issue is occluded based upon a lack of contemporaneous objection, I nevertheless would not reverse the conviction of aggravated kidnapping. In my view the arrangement of the jury instructions, if error, was harmless beyond a reasonable doubt.

JAMES CURWOOD WITT, JR., JUDGE