

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

**FILED**  
January 5, 1996  
Cecil Crowson, Jr.  
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

VS.

RANDALL SCOTT,

Appellant.

) C.C.A. NO. 01C01-9007-CK-00210  
)  
) DAVIDSON COUNTY  
)  
) HON. ANN LACY JOHNS, JUDGE  
)  
) (Especially Aggravated Robbery,  
) Conspiracy to Commit Especially  
) Aggravated Kidnapping, Especially  
) Aggravated Kidnapping, and  
) Attempted Felony Murder)  
)

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OPINION FILED \_\_\_\_\_

REVERSED AND REMANDED IN PART;  
REVERSED AND DISMISSED IN PART;  
AFFIRMED IN PART

GARY R. WADE, JUDGE

### OPINION

The defendant, Randall Scott, was convicted of especially aggravated robbery, conspiracy to commit especially aggravated kidnapping, especially aggravated kidnapping, and attempted felony murder. The jury found the defendant not guilty of conspiracy to commit especially aggravated robbery. The trial court imposed sentences of 25, 12, 25, and 25 years, respectively, an aggregate term of 87 years.

The following issues have been presented for review:

- (1) whether the evidence was sufficient to support the conviction of especially aggravated robbery;
- (2) whether the defendant's conviction for especially aggravated robbery violated double jeopardy;
- (3) whether the trial court should have instructed the jury on the lesser included offense of aggravated robbery; and
- (4) whether the evidence was sufficient to support a finding that the offenses of conspiracy to commit especially aggravated kidnapping, especially aggravated kidnapping, and attempted felony murder occurred in Davidson County.

The victim, Ms. Mackie Driver, is a retired school teacher residing in Nashville, Tennessee. On the morning of August 27, 1990, she drove to Lewisburg in order to make health care arrangements for her step-mother. Upon her return to Nashville that same afternoon, the victim stopped at several stores in the Charlotte Avenue area where she purchased items of clothing and a fan for the Stork's Nest, a national community service project designed to provide for some of the needs of disadvantaged mothers and their infant

children.

That same day, the defendant, Larry (Maurice) Moore, and Mannie Young, all of whom had spent three days in Nashville with the defendant's brother, Broderick Scott, prepared to return to their home in Memphis. At some point, Young decided to steal a car. The three men rode around in Moore's Toyota until they saw the victim enter her driveway in a Pontiac GrandAm. Young grabbed a pistol, got out of Moore's vehicle, and confronted the victim.

The victim testified that she was unloading her purchases from the trunk of her car when two of the men, one of whom was armed, grabbed her bags. She recalled that someone hit her and threw her into the trunk. The victim identified the defendant as the man with the gun.

After locking the victim in the trunk of the stolen vehicle, the three men returned to Broderick Scott's house to retrieve their bags. They stopped for gas before driving to the interstate in order to return to Memphis. Young drove the victim's car. The defendant drove the Toyota; Moore was a passenger.

Upon arriving in Memphis that evening, the three men first proceeded to Young's apartment and then to the defendant's house. When they returned to Young's apartment, Young opened the trunk to the Pontiac and noticed that the victim had torn loose some speaker wires. The men then bound

and gagged the victim with telephone wire and duct tape. After discussing what they should do with her, the men drove the victim to a secluded, wooded area, assaulted her, and returned to Young's apartment at Scott Avenue.

The victim's husband, Reverend Rogers Driver, who arrived at his residence in the late afternoon, became alarmed when his wife was not home by 8:30 or 9:00 P.M. and contacted police. On the following day, Detective Clinton Vogel, with the Homicide Division of the Nashville Metropolitan Police Department, began an intensive investigation. He made inquiries of family, friends, other local law enforcement agencies, hospitals, and stores in the Charlotte Avenue area and placed information about the victim and her car in the National Crime Information Center ("N.C.I.C."). Detective Vogel also prepared flyers, passed them out to the local precincts, and notified newspaper and television stations.

Officer Venica Jones of the Memphis Police Department arrested the defendant on the day following the abduction for driving on a suspended driver's license. Driving the stolen Pontiac, the defendant almost collided head-on with Officer Jones' patrol car in the driveway behind Young's apartment. Not realizing that the vehicle was stolen, Officer Jones had the vehicle towed to the impound lot.

Sergeant Detective Larry Anthony of the Memphis Police discovered that the Pontiac had been reported as stolen. When interrogated, the defendant claimed that someone had left the Pontiac for him and Moore to wash. The defendant

claimed that he was driving the car to be washed when stopped by the police.

During the early morning hours of the second day after the incident, the Nashville Metropolitan Police Department received a report that the defendant had been apprehended. Detective Vogel and three other officers went to Memphis to further investigate. When they searched the car for evidence, they noticed that the trunk liner was missing.

The officers then went to Young's apartment building to see if they could uncover any clues as to the victim's whereabouts. One of the officers noticed a gray-speckled carpet trunk liner, matching the carpet in the victim's trunk, hanging on a stoop and they knocked on the door of an apartment. Young, who was not then a suspect, answered the door and agreed to be questioned at the police station. Later, his brother, Joe Young, arrived at the police station with Moore. Joe Young returned to his brother's apartment, found the victim's license and car registration, and turned them over to police. Thereafter, officers recovered the victim's ring and watch from Moore's bedroom.

By then, the defendant, Young, and Moore were all suspects in the abduction. When the defendant admitted to police that he had been in Nashville with Young and Moore at the time of the victim's disappearance, all three men were placed under arrest for the crimes. Over the next several hours, the officers interviewed the three suspects on a

continuous basis. Moore was the first to reveal where the victim had been left and offered to guide several of the officers to her location. When Detective Johnny Crumby of Nashville told the defendant that they were "going out to the ball field and [they] wasn't [sic] going to play ball," the defendant reacted by stating that he wanted to talk. He had not provided any helpful information until that point. Sergeant Eugene Cole of Memphis and Detective Lawrence of Nashville took the statement from the defendant while Moore helped the other officers find the victim.

On the day the officers located the victim, temperatures reached 104 degrees. The victim was found lying in a fetal position on her right side. Her wrists and ankles were bound tightly with telephone cord and duct tape. The tape had been wrapped around her mouth from her nose to the bottom of her chin. Four large pieces of newspaper had been stuffed in her mouth. There was blood on the victim's face, neck, and hair. She had ants and maggots on open wounds. She smelled of urine and excrement.

When the victim arrived at a nearby hospital, she was near death. She was dehydrated, had a very low blood pressure, and a slowed heart rate. The victim had suffered sunburn, a severely swollen eye, drainage from her eyes, an internal injury to her ear, wounds to her neck, and multiple abrasions. The injuries to her ear eventually required surgery. The victim, whose last recollection was being locked in a very hot car trunk, remained hospitalized for

approximately two weeks and by the time of trial was still under the care of a physician. Since her abduction, she had suffered from intense muscular pains in her legs and had experienced mental deficiencies. The latter condition was apparently due to the lengthy period of oxygen loss due to low blood pressure and slow pulse.

In his statement to the police, the defendant admitted that he, Moore, and Young had stolen the car. He claimed that Young, who was armed with a pistol, confronted the victim and struck her. As Moore helped Young place the victim in the trunk of her car, the defendant turned around the Toyota. The defendant stated that he drove the Toyota back to Memphis and claimed that Young drove the victim's car.

The defendant told police that he and the others had checked on the victim upon their arrival in Memphis and then bound her with telephone cord and duct tape. The three men stopped at Moore's house to get a shovel before driving to the wooded area near a ballpark. The defendant acknowledged that he and the others moved the victim behind some bushes to a ditch. At that point, Moore started choking the victim and either Moore or Young threw beer bottles at her. The defendant admitted that he had struck the victim on the head to see if she was dead. When she gasped, Moore then pressed the blade of the shovel against the victim's neck or face. Again, the victim gasped for air. The defendant claimed that he then directed Moore to stop and they left her among several trees. The defendant claimed that Young stole some \$55 from

the victim, but conceded that he had received \$20 of the amount taken. He said that Young kept the fan and the baby clothes. The defendant told officers that just prior to his arrest, Moore had washed the car; Young had cleaned out the trunk because of the urine smell.

The defendant did not present any proof at trial.

I.

The defendant first argues that the evidence was insufficient to support his conviction for especially aggravated robbery. In particular, he asserts that the state failed to submit adequate proof of a necessary element of the crime: serious bodily injury. Tenn. Code Ann. § 39-13-403. While the defendant does not contest that the victim suffered serious bodily injury, he claims that the injuries occurred after the robbery had already been committed and that they bore a closer relationship to the kidnapping charge.

In response, the state argues that because the victim was not physically deprived of her vehicle until she was abandoned in the woods, that the robbery had not been completed until that time. The state maintains that the serious bodily injury sustained by the victim occurred both during the commission of the especially aggravated robbery and the especially aggravated kidnapping.

On appeal, the state is entitled to the strongest legitimate view of the evidence and to all reasonable

inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 836 (Tenn. 1978). When the sufficiency of the evidence is challenged, the relevant question for the appellate court is whether, after reviewing the evidence in a 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, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983); Tenn. R. App. P. 13(e). This same standard of review applies when this court is called upon to review the propriety of the trial court's denial of a motion for judgment of acquittal.

Especially aggravated robbery is robbery accomplished with a deadly weapon where the victim suffers serious bodily injury. Tenn. Code Ann. § 39-13-403. An individual commits robbery through the "intentional or knowing theft of property from the person of another by violence or putting the person in fear." Tenn. Code Ann. § 39-13-401(a). "Serious bodily injury" is statutorily defined as "bodily injury which involves (A) A substantial risk of death; (B) Protracted unconsciousness; (C) Extreme physical pain; (D) Protracted or obvious disfigurement; or (E) Protracted loss or substantial impairment of a function of a bodily member, organ, or mental faculty[.]" Tenn. Code Ann. § 39-11-106(a) (33).

The evidence adduced at trial established that the defendant was among three men who accosted the victim at

gunpoint in Nashville, locked her in the trunk of her vehicle, and drove to Memphis. Confinement in the extremely high temperatures caused her protracted unconsciousness. Upon arriving in Memphis, the defendant participated in binding and gagging the victim and then assaulting and abandoning her. There was more than adequate proof that the victim suffered serious bodily injury at some point during the course of the robbery. Because there was proof that the victim received multiple, qualifying injuries during the continuing course of the robbery, the jury acted within its prerogative in determining that "serious bodily injury" accompanied the crime.

In our view, the evidence was clearly sufficient to support the conviction.

## II.

In his second issue, the defendant argues that the trial court erred by failing to grant a judgment of acquittal on the charge of especially aggravated robbery. The defendant more specifically claims that the conviction violates the due process guarantees of Article I, Section 8 of the Tennessee Constitution as announced in State v. Anthony, 817 S.W.2d 299 (Tenn. 1991). This argument is based upon his contention that the only proof of serious bodily injury to the victim is also related to the especially aggravated kidnapping conviction. While the defendant concedes that the evidence is sufficient to justify an independent prosecution for kidnapping, he asserts that only those injuries suffered by the victim up to

the point when the defendant and his co-defendants locked her in the trunk should be weighed in establishing the required elements of especially aggravated robbery. In response, the state argues that the especially aggravated kidnapping is clearly separate and distinct from the especially aggravated robbery.

In our view, separate convictions for each of the crimes do not violate due process. In Anthony, our supreme court addressed the issue of whether dual convictions of armed robbery and aggravated kidnapping violated the due process guarantees of Article I, Section 8 of the Tennessee Constitution. The court concluded that when a confinement, movement, or detention is "essentially incidental" to the accompanying felony, it is not sufficient to support a separate conviction for kidnapping. Id. at 306. The court warned that the kidnapping statute should be narrowly construed "so as to make its reach fundamentally fair and to protect the due process rights of every citizen..." Id.

The test applied in Anthony, as taken from Faison v. State, 426 So.2d 963, 965 (Fla. 1983), was as follows:

[I]f a taking or confinement is alleged to have been done to facilitate the commission of another crime, to be kidnapping the resulting movement or confinement:

- a) Must not be slight, inconsequential and merely incidental to the other crime;
- (b) Must not be of the kind inherent in the nature of the other crime; and

- (c) Must have some significance independent of the other crime in that it makes the other crime substantially easier of commission or substantially lessens the risk of detection.

817 S.W.2d at 306.

In Anthony, the supreme court noted that every robbery involves some confinement, and therefore, necessarily included a kidnapping. It ruled, however, that the legislature did not intend for every robbery to also be a kidnapping. Id.

This court has rejected attempts to interpret Anthony as meaning that the state should be prohibited from obtaining convictions for separate offenses which are committed in the same criminal episode and for which each offense requires proof that the victim suffered serious bodily injury. In State v. Oller, 851 S.W.2d 841 (Tenn. Crim. App. 1992), where the defendant was convicted of especially aggravated burglary, especially aggravated robbery, and first degree murder, this court found that "proving the elements of any of the alleged offenses, would not inherently or necessarily prove the elements of either of the other two offenses." Id. at 842-43.<sup>1</sup> Thus, this court ruled that Anthony did not preclude separate convictions. Id. at 843. See State v. John Robert Tory, No. 03C01-9306-CR-00202 (Tenn. Crim. App., at Knoxville, Aug. 3, 1994), perm. to app. denied,

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<sup>1</sup>In Oller, the conviction for especially aggravated burglary was reduced to burglary under Tenn. Code Ann. § 39-14-404(d). 851 S.W.2d at 843.

(Tenn. 1994); State v. Frank B. Jackson, Jr. and Robert Joe Randolph, No. 03C01-9206-CR-00222 (Tenn. Crim. App., at Knoxville, July 29, 1993), perm. to app. denied, (Tenn. 1993).

While the robbery and the kidnapping were obviously related, neither was incidental to the other. That the victim was locked for hours in the trunk of her car, eventually bound, gagged, beaten, and left to die was significantly independent of the robbery. That the defendant's continuing misconduct "substantially increased the risk of harm over and above that necessarily present in the crime of robbery" is apparent in this case. State v. Anthony, 817 S.W.2d at 306.

### III.

The defendant next contends that the trial court erred by failing to instruct the jury on the lesser included offense of aggravated robbery. The defendant argues that there is no proof as to the element of serious bodily injury. In response, the state asserts that the evidence simply did not support such an instruction. We find that the trial court's failure to instruct the jury on the lesser included offense was clearly erroneous.

The trial court has a duty to give a complete charge of the law applicable to the facts of the case. State v. Harbison, 704 S.W.2d 314, 319 (Tenn.), cert. denied, 476 U.S. 1153 (1986). It is settled law that "where there are any facts that are susceptible [to an inference] of guilt on any lesser included offense or offenses, then there is a mandatory

duty upon the trial judge to charge on such offense or offenses. Failure to do so denies a defendant his constitutional right of trial by a jury." State v. Wright, 618 S.W.2d 310, 315 (Tenn. Crim. App. 1981) (citations omitted). When there is a trial on a single charge of a felony, there is also a trial on all lesser included offenses, "as the facts may be." Strader v. State, 210 Tenn. 669, 675, 362 S.W.2d 224, 227 (1962). Trial courts may omit an instruction on a lesser included offense only when the record is devoid of evidence to support an inference of guilt of the lesser offense. State v. Stephenson, 878 S.W.2d 530, 550 (Tenn. 1994); State v. Boyd, 797 S.W.2d 589, 593 (Tenn. 1990), cert. denied, 498 U.S. 1074 (1991); State v. Dulsworth, 781 S.W.2d 277, 287 (Tenn. Crim. App. 1989). There is an affirmative duty on the part of the trial judge to charge the jury on lesser included offenses charged in the indictment whether requested to do so or not. See Howard v. State, 578 S.W.2d 83, 85 (Tenn. 1979).

Here, the defendant was charged with especially aggravated robbery, defined as a robbery "accomplished with a deadly weapon where the victim suffers serious bodily injury." Tenn. Code Ann. § 39-13-403(a). Aggravated robbery, defined as robbery "accomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon" or "[w]here the victim suffers serious bodily injury," is a lesser included offense. Tenn. Code Ann. § 39-13-402(a).

While the defendant does not dispute that a deadly weapon was used in the robbery, he contends that there was insufficient proof that the victim suffered serious bodily injury due to the robbery thus warranting an instruction on aggravated robbery. No matter how tenuous the claim, whether the serious bodily injuries suffered by the victim should have been associated with both the robbery and the kidnapping or whether the injuries should have only been considered as a result of the kidnapping was for the jury to decide. To omit the instruction effectively deprived the defendant of his right to jury on the issue. Our guiding principle is that if there is any evidence in the record from which the jury could have concluded that the lesser included offense was committed, there must be an instruction for the lesser offense. See Johnson v. State, 531 S.W.2d 558, 559 (Tenn. 1975).

In State v. Dhikr Abban Boyce, No. 01C01-9402-CR-00053 (Tenn. Crim. App., at Nashville, Feb. 2, 1995), this court ruled that an omission of a lesser included offense from the charge to the jury always requires a new trial. The opinion was largely based upon the ruling of our supreme court in Poole v. State, 61 Tenn. 288, 294 (1872):

However plain it may be to the mind of the Court that one certain offense has been committed and none other, he must not confine himself in his charge to that offense. When he does so he invades the province of the jury, whose peculiar duty it is to ascertain the grade of the offense. However clear it may be, the Court should never decide the facts, but must leave them unembarrassed to the jury. By the standard set forth in Jackson v. Virginia,

443 U.S. 307 (1979), there was more than enough proof that the

victim suffered serious bodily injury as a result of the robbery. Based upon the evidence appearing in this record, it is our view that the jury would have likely convicted the defendant of the greater offense even if the lesser offense had been charged. Yet the law clearly mandated an instruction on the lesser included offense. Among the most treasured of all of our constitutional rights is the trial by jury; that right applies as to all possible lesser included offenses. We are, therefore, constrained to hold that the trial court's failure to instruct on this requires a reversal of the conviction and the grant of a new trial as to the indictment for especially aggravated robbery.

#### IV(A).

The defendant next contends that the trial court erred by denying his motion for judgment of acquittal on the charge of conspiracy to commit especially aggravated kidnapping because the state failed to show that this crime occurred in Davidson County. He also claims that the jury verdict should be set aside on the basis that the evidence of venue, in this record, was insufficient to support the jury's verdict. He adds that the jury's not guilty verdict on the charge of conspiracy to commit especially aggravated robbery lends persuasive argument that the jury relied on the events which occurred in Memphis in reaching their verdict since there was less evidence of a kidnapping conspiracy occurring in Davidson County than there was of a robbery conspiracy.<sup>2</sup>

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<sup>2</sup>There is no requirement of consistency in multiple-count indictments. An acquittal of one cannot be considered res judicata to another count, even though both counts stem from the same criminal episode. Wiggins v. State, 498 S.W.2d 92, 94 (Tenn. 1973); see State v. Gennoe, 851

We find that the evidence of proper venue was sufficient.

Article I, Section 9 of the Tennessee Constitution provides that in all criminal prosecutions by indictment or presentment, the accused has a right to a trial by an impartial jury chosen from the county in which the crime was committed. See Tenn. R. Crim. P. 18. Thus founded in the Constitution, proof of venue is necessary to establish jurisdiction. Hopson v. State, 201 Tenn. 337, 343, 299 S.W.2d 11, 14 (1957). Venue may be shown only by a preponderance of the evidence. The burden of proof is on the state. Harvey v. State, 213 Tenn. 608, 611, 376 S.W.2d 497, 498 (1964). Slight evidence, including circumstantial evidence, will be sufficient if the evidence is uncontradicted. State v. Bennett, 549 S.W.2d 949, 951 (Tenn. 1977). A jury may derive reasonable inferences as to venue from the proven facts. Smith v. State, 607 S.W.2d 906 (Tenn. Crim. App. 1980).

If one or more elements of a crime are committed in one county and other elements in another, the offense may be prosecuted in either county. Tenn. R. Crim. P. 18(b); State v. Knight, 616 S.W.2d 593, 595 (Tenn.), cert. denied 454 U.S. 1097 (1981). Venue is a jury question. State v. Hamsley, 672 S.W.2d 437, 439 (Tenn. Crim. App. 1984).

Initially, the defendant submits that driving the victim to a secluded place and putting her in the bushes was the overt act necessary to consummate the crime of conspiracy.

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S.W.2d 833 (Tenn. Crim. App. 1992).

See State v. Perkinson, 867 S.W.2d 1 (Tenn. Crim. App. 1992). He claims that there was no proof connecting the overt act with any conspiracy developed in Nashville. We disagree.

The essence of conspiracy is the agreement to commit a crime. State v. Shropshire, 874 S.W.2d 634, 641 (Tenn. Crim. App. 1993). In order to prove a conspiracy, it is not necessary that the state show a formal agreement between the parties to do the unlawful act. Instead, a mutual implied understanding is sufficient, although not manifested by any formal words or by a written agreement. The unlawful confederation may be established by circumstantial evidence and the conduct of the parties in the execution of the criminal enterprises. Randolph v. State, 570 S.W.2d 869, 871 (Tenn. Crim. App. 1978). Specifically, in State v. Reed, 845 S.W.2d 234, 238 (Tenn. Crim. App. 1992), this court held that venue for prosecution of a conspiracy could properly be found in the county in which discussions were initiated.

Here, the proof unequivocally established that the defendant and his two codefendants locked the victim in the trunk of her car in Nashville. While making their getaway, the men first stopped to pick up their bags and then stopped for gas. Although there was no direct proof that the defendant and his codefendants agreed during that period of time to commit the kidnapping, that can be properly inferred from their acts; that is, locking the victim in the trunk and then driving her in tandem to Shelby County. While the three men may not have decided at that moment that they were going

to leave her in a ditch located in a secluded area in Memphis, the jury could have properly concluded that their joint plan was to transport the victim a considerable distance against her will. Under these circumstances, we hold that the state has established venue in Davidson County by a preponderance of the evidence. See State v. Bloodsaw, 746 S.W.2d 722, 725 (Tenn. Crim. App. 1987).

IV(B).

In a related issue, the defendant argues that the evidence cannot support a finding of venue in Davidson County for both the conspiracy to commit especially aggravated kidnapping and the especially aggravated kidnapping. The defendant submits that it is illogical to conclude that one could perform the requisite overt act for the conspiracy to kidnap when the victim had already been kidnapped. Thus, the defendant contends that because the act of driving the victim to a secluded area and leaving her in a ditch happened in Memphis, the crime of especially aggravated kidnapping occurred entirely in Shelby County.

In the alternative, the defendant asserts that the conspiracy to commit especially aggravated kidnapping conviction must be dismissed because the overt act alleged in the indictment occurred after the kidnapping had already occurred. He argues that the overt act alleged occurred in Memphis and was not in pursuance of the conspiracy because the kidnapping had already been completed in Nashville.

The facts, however, support the conclusion that what started as an aggravated kidnapping in Nashville had progressed to an especially aggravated kidnapping (including a serious bodily injury) by the time the victim was found by the police in Memphis. As pointed out by the defendant, the courts have permitted the state wider latitude regarding venue in prosecuting kidnapping offenses where the kidnapping continues over county lines. See State v. Holtcamp, 614 S.W.2d 389, 393 (Tenn. Crim. App. 1980). Venue has been established when its presence is based upon more than mere speculation. See State v. Bloodsaw, 746 S.W.2d at 725. There is more than mere speculation here that the kidnapping began in Davidson County.

Likewise, we find as unpersuasive the defendant's argument that the conspiracy could not have occurred in Davidson County because the kidnapping would have terminated before the overt act. Under Tenn. Code Ann. § 39-12-103(e) (1), a conspiracy is "a continuing course of conduct which terminates when the objectives of the conspiracy are completed or the agreement that they be completed is abandoned by the person and by those with whom the person conspired. The objectives of the conspiracy include, but are not limited to, escape from the crime, distribution of the proceeds of the crime, and measures, other than silence, for concealing the crime or obstructing justice in relation to it." Having compared the facts and this statute, we find sufficient proof of venue as to the conspiracy charges.

IV(C).

Finally, the defendant contends that the evidence is insufficient to support a finding of venue as to the conviction for attempt to commit felony murder. Because, however, an attempt to commit felony murder is not a crime in this state, we do not reach that issue. See State v. Brian Keith Kimbrough, No. 02C01-9308-CR-00182 (Tenn. Crim. App. 1994), perm. to app. granted (Tenn. 1995).

A plain error is one that is obvious or clearly shown in the record and affects a substantial right of a party so as to warrant our considering if action should be taken to do substantial justice. See State v. Adkisson, 899 S.W.2d 626, 636-42 (Tenn. Crim. App. 1994). That is the case here.

The offense of felony murder is defined as follows:

A reckless killing of another committed in the perpetration of, or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping...

Tenn. Code Ann. § 39-13-202(a)(2).

The term "reckless" is defined by Tenn. Code Ann. § 39-11-302(c):

"Reckless" refers to a person who acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as

viewed from the accused person's standpoint.

A criminal attempt is governed by Tenn. Code Ann.

§ 39-12-101(a) (1)-(3):

A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense:

(1) Intentionally engages in action or causes a result that would constitute an offense if the circumstances surrounding the conduct were as the person believes them to be;

(2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or

(3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

In State v. Kimbrough, this court ruled that "[a]n attempt to commit felony murder would, therefore, require that a defendant intend to commit a reckless killing." Slip op. at 5 (emphasis in original). That, the court held, was a contradiction in terms:

By definition, felony murder is an unintended result, i.e., a reckless killing. Criminal attempt, on the other hand, requires the intent to commit a crime. Thus, the crime of attempted felony murder is a self-contradiction: an attempt to achieve an unintended result. As such, we hold that the crime of attempted felony murder does not exist in Tennessee.

Slip op. at 7.

That ruling, which apparently reflects the majority view of the states, governs here.<sup>3</sup> The conviction for attempt to commit felony murder must, therefore, be reversed and the charge must be dismissed.

In summary, the conviction for especially aggravated robbery is reversed and remanded for a new trial. The convictions for especially aggravated kidnapping and conspiracy to commit especially aggravated kidnapping are affirmed. Finally, the defendant's conviction for attempted felony murder is reversed and dismissed.

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GARY R. WADE, JUDGE

CONCUR:

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JOE B. JONES, JUDGE

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ALLEN R. CORNELIUS, JR., SPECIAL JUDGE

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<sup>3</sup>"Most of the courts which have rejected recognition of attempted felony murder refused to expand the inferred malice in felony murder to the proof of specific intent necessary to sustain an attempt conviction.... Thus, the result oriented nature of the doctrine and the unpopularity of felony murder are among the concerns which persuade us not to recognize the crime of attempted felony murder." State v. Price, 726 P.2d 857, 859-860 (N.M. App. 1986); see also Head v. State, 443 N.E.2d 44 (Ind. 1982) (the crime of attempted felony murder can be said to exist logically but refused to recognize the rule on policy ground).