IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

NOVEMBER 1995 SESSION

FILED

April 2, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 03C01-9503-CR-00089
	)	
	)	Hamilton County
v.	)	
	)	Hon. Douglas A. Meyer, Judge
	)	
JOHNNY LEE CLEVELAND, III, a/k/a AKEM ISMIL FUGUAN,	)	(Attempted Aggravated Rape)
	)	
	)	
Appellant.	)	

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(AT TRIAL)

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OPINION FILED:_____

REVERSED AND REMANDED

Joe D. Duncan
Special Judge

O P I N I O N

The defendant, Johnny Lee Cleveland, III, a/k/a Akem Ismil Fuguan,[1] was convicted of attempted aggravated rape and was sentenced to the Department of Correction for twenty (20) years as a Range II, multiple offender.

The issues presented for review are as follows:

(1) whether the trial court erred in denying the defendant's motion for judgment of acquittal;

(2) whether improper lay witness testimony, regarding the defendant's sanity, was allowed;

(3) whether the trial court erred in denying the defendant funds for an independent psychiatric examination;

(4) whether evidence about defendant's prior criminal history was improperly allowed;

(5) whether certain remarks by the state's attorney, in his closing argument, created error;

(6) whether the trial court erred in failing to instruct the jury on the lesser offense of aggravated assault; and

(7) whether error occurred by reason of one of the jurors being absent during a part of the state's closing argument.

We find reversible error regarding the sixth and seventh issues, and the case must be remanded for a new trial.

In his first issue, the defendant claims that the trial court erred by denying his motion for judgment of acquittal.

The state presented the testimony of five witnesses, namely: the victim, two maintenance men from the apartment building where the crime occurred, and two

[1] Subsequent to the defendant's conviction, by agreement of the parties, the indictment was amended to show the defendant's name as Akem Ismil Fuguan.

police officers. The defendant relied on the defense of insanity, but he neither testified himself nor called any witnesses in his own behalf.

The defendant argued at trial and now argues on appeal that a reasonable doubt as to his sanity was raised by the state's evidence which then shifted the burden to the state to establish his sanity to the satisfaction of the jury beyond a reasonable doubt, and that the state failed to carry its burden. Thus, in his first issue, the defendant argues that because the state did not carry its burden, the trial judge erred in denying his motion for judgment of acquittal, and therefore we should reverse his conviction and dismiss this prosecution. We find no merit to this issue.

The actual facts surrounding the commission of this crime are not seriously disputed. The victim, Ms. Rosie Mae Hughes, was sixty years old and lived in an apartment in the Patten Towers in Chattanooga. The defendant was twenty-three years of age at the time of the crime. They were acquainted in the neighborhood and had conversed with each other on several occasions in the past. The defendant had always been friendly with the victim and ofttimes referred to her as "Mama." He had never acted "ugly" towards her prior to this occasion.

On April 14, 1993, Ms. Hughes saw her daughter and the defendant coming out of a liquor store, nearby where she lived. After some conversation, the defendant asked Ms. Hughes to show him were she lived so that he could come and visit her sometime. She agreed. Ms. Hughes was not apprehensive about allowing the defendant to go with her to her apartment because of their prior cordial relationship. Along the way to the apartment the defendant saw several people with whom he was acquainted and had conversations with them.

After the defendant and Ms. Hughes arrived at her apartment, they continued to talk in a friendly manner. He declined her invitation to have a drink of water. He looked out the window and commented on the beautiful view. Then, all of a sudden, the defendant grabbed Ms. Hughes, wrestled her to the floor, forcibly took off most of her clothes and undressed himself. At one point in his attack upon the victim, the defendant obtained a large fork from the kitchen, ran it through her hair, threatened to kill her, and called her a "bitch" several times.

Several items of furniture in the apartment were turned over as a result of the struggle between them. Finally, Ms. Hughes was able to pull an emergency cord, which served to alert the building office that something was amiss in the victim's room.

Two maintenance men, Danny Sweeton and Thomas Geppart, answered the emergency call. After they arrived at the apartment, Sweeton told Geppart to go call the police, and Sweeton went into the apartment where he found the defendant and the victim, both in a state of undress. The maintenance men told the defendant he would have to leave the building, and he did, taking off running, followed by Geppart. Subsequently, the police apprehended the defendant nearby.

Clearly, the undisputed evidence is overwhelming to show that the defendant attempted to commit aggravated rape upon the victim. The only question is whether the defendant was legally sane at the time the offense was committed. The jury concluded that he was and we agree.

Where insanity is presented as a defense in a criminal case, the evidence must be evaluated in the light of several well recognized principles of law.

First, if the evidence adduced by either the defendant or the state raises a reasonable doubt as to the defendant's sanity, then the burden of proof falls on the state to prove that the defendant had the capacity to appreciate the wrongfulness of his conduct and the ability to conform his conduct to the requirements of law. State v. Patton, 593 S.W.2d 913 (Tenn. 1979); Graham v. State, 547 S.W.2d 531 (Tenn. 1977). In Edwards v. State, 540 S.W.2d 641 (Tenn. 1976), our supreme court said:

> This burden can be met by the state through the introduction of expert testimony on the issue, or through lay testimony where a proper foundation for the expressing of an opinion is laid, or through the showing of acts or statements of the petitioner, at or very near the time of the commission of the crime, which are consistent with sanity and inconsistent with insanity.

540 S.W.2d at 646.

Second, a jury is not required to accept testimony of medical experts on the issue of sanity to the exclusion of lay testimony or to the exclusion of evidence of the actions of the defendant that are inconsistent with insanity. State v. Patton, supra; Edwards v. State, supra.

Third, the issue of insanity at the time of a crime is a question for the jury to decide. Spurlock v. State, 212 Tenn. 132, 368 S.W.2d 299 (1963).

Prior to the trial, the defendant, on motion of his counsel, was evaluated as to his mental competency on two occasions by the Johnson Mental Health Center. On October 6, 1993, the medical authorities at the center advised the trial court that the defendant was mentally competent to stand trial and that a defense of insanity could not be supported. On January 13, 1994, after the defendant's reevaluation, the medical authorities at the center advised the trial court the same thing.

We note that at the defendant's trial, neither the state nor the defendant offered any medical testimony regarding the defendant's mental condition.

At the end of the state's proof, the defendant moved to dismiss the case. The trial court, in overruling the motion, stated: ". . . I guess you might say that you've raised a question at least about insanity by your cross examination of witnesses, so the burden has shifted to the state to prove sanity." However, the trial court followed this statement with this comment: "But there is adequate proof on which the jury could determine that he was sane and that he is guilty as charged."

From our review of the trial evidence, we find very little in the state's proof that would suggest any mental abnormality on the part of the defendant at the time of the crime. The defendant argues that certain testimony of the victim raised a reasonable doubt as to his sanity which was sufficient to shift the burden of proof on this issue to the state.

At one point in the victim's direct testimony, she stated: "He snapped just like that. He just turned all of a sudden." On cross-examination, defense counsel asked her: "Do you recall telling me in your phone conversation with me that it was like he just went like you snap your finger, he changed that fast?" Her answer was: "Well, it happened so quick."

We seriously question whether the above testimony by the victim could be said to raise a reasonable doubt as to the defendant's sanity so as to place any burden on the state to prove his sanity beyond a reasonable doubt. Further, we have carefully reviewed all of the direct and cross-examination testimony of the other state witnesses, and we find nothing of substance in that testimony that related to any mental abnormality on the part of the defendant.

Thus, while we hesitate to agree with the trial judge that the burden of proof on the issue of the defendant's sanity had shifted to the state, we are in agreement with his other comment that there was adequate proof for the jury to determine that the defendant was sane and that he was guilty of the offense.

In support of this latter conclusion on our part, we will refer to a few examples in the testimony of the witnesses about the actions and statements of the defendant at and near the time of the crime which well illustrate that the defendant had the capacity to appreciate the wrongfulness of his conduct and the ability to conform his conduct to the requirements of the law.

For example, the victim testified that on the way to her apartment, the defendant met several acquaintances, and that he stopped and had normal conversations with them. Also, the defendant signed a fictitious name in the Patten Towers register when they entered the building. It is reasonable to assume that even at the outset of the incident, the defendant, by signing a false name, was laying the groundwork to confuse his identity.

Additionally, when Mr. Sweeton, the maintenance man, answered the emergency call to the victim's apartment, he knocked on the door and asked if "everything was okay," and the defendant replied, "Yeah, everythings [sic] okay; go away." When Sweeton entered the room and told the defendant to put his clothes on, the defendant complied and said he "didn't want any trouble."

While they were on the elevator, the defendant was polite in manner and told Sweeton that he and the victim had been dating for a month, and that she went crazy when her daughter came and knocked on the door. We point out that there was

no evidence in the case to support these allegations, and from these statements, it is reasonable to conclude that the defendant was trying to come up with a story which might convince Sweeton that his wrongful conduct should be excused.

The other maintenance man, Mr. Geppart, told about the defendant running away from the apartment building, and quite clearly, this attempt to avoid apprehension by the police demonstrates rationality on the defendant's part.

Also, in an attempt to exculpate himself from his crime, the defendant said to Officer Mike Stro, who caught the defendant, that "I haven't done anything. I've been on Martin Luther King partying all day."

Further, soon after the incident, Detective Sergeant Charles Dudley of the Chattanooga Police Department, interviewed the defendant. The defendant had no problem answering questions. Detective Dudley said the defendant was very "alert, very cooperative," answered his questions "appropriately," and did not say or behave in any way to suggest that he was not in control of his faculties. The defendant denied to Detective Dudley that he had attacked the victim, admitted that he had seen her earlier in the day, but denied going to the victim's apartment.

We need not cite other examples of the defendant's acts and statements that are demonstrated by the evidence that are consistent with his sanity and inconsistent with insanity. Suffice it to say, even if, arguably, one could say that the burden of proof regarding the defendant's sanity had shifted to the state, the evidence in this case clearly shows that the state carried this burden.

Under this first issue, the defendant also argues that the trial court should have given the jury an instruction on diminished capacity. There is no merit to this

argument. Even if the defendant had requested such an instruction, which he did not, the trial court would not have been authorized to give it. The defendant did not put on any evidence of diminished capacity on his part, nor was there any other proof developed in the testimony of the state's witnesses, that would serve to negate the mens rea element of attempted aggravated rape. See State v. Shelton, 854 S.W.2d 116, 122 (Tenn. Crim. App. 1992).

The trial court correctly overruled the defendant's motion for judgment of acquittal.

In his second issue, the defendant complains about the testimony of Detective Dudley. He says that Dudley's testimony about the defendant's appearance and behavior was irrelevant on the issue of sanity, citing State v. Clayton, 656 S.W.2d 344 (Tenn. 1983), and State v. Hammock, 867 S.W.2d 8, 13 (Tenn. Crim. App. 1983).

As we have mentioned previously in our discussion of the defendant's first issue, the trial court denied, at the end of the state's proof, the defendant's motion for judgment of acquittal, ruling that there was adequate proof from which the jury could determine that the defendant was sane and guilty as charged.

Under this second issue, the defendant seems to argue that the trial court was basing this conclusion solely on the testimony of Detective Dudley, but the record is clear that the trial court was considering all of the evidence that had been offered by the state's witnesses in arriving at this ruling.

It is true that in Clayton and Hammock, the courts held that lay testimony regarding the outward appearance of the defendant to be nonprobative on the issue of

sanity, but Detective Dudley's testimony went much further than describing the defendant's outward appearance.

Detective Dudley did not testify simply as to how the defendant looked, which was the objectionable testimony in Clayton. He testified about the defendant's behavior, his actions and statements, all of which pass muster under our case law. State v. Sparks, 891 S.W.2d 607, 616-617 (Tenn. 1995); State v. Jackson, 890 S.W.2d 436, 440 (Tenn. 1994); Edwards v. State, supra; State v. Cherry, 639 S.W.2d 683, 686 (Tenn. Crim. App. 1982).

Additionally, Detective Dudley did not violate the rule in Sparks, supra, which prohibits an officer in Dudley's position from giving a lay opinion on a defendant's sanity. He merely testified that the defendant did not say or behave in any way to suggest that he was not in control of his faculties, and that the defendant "seemed to be in control of his faculties as far as intoxication goes." On cross-examination, Detective Dudley conceded that he was not a "psychiatrist," and that he had come across people who at first seemed to be normal, but later turned out to be mentally ill.

We conclude that the trial court acted properly in considering Detective Dudley's testimony, along with all of the other evidence, in overruling the defendant's motion for judgment of acquittal.

In his third issue, the defendant claims that the trial judge erred in not granting his motion for funds to pay for an independent psychiatric examination.

The trial judge was of the opinion that under Tennessee law he was not authorized to order the expenditure of funds on behalf of indigent defendants for the employment of expert witnesses in non-capital cases. With regard to the prevailing law

in Tennessee at the time of the present trial, the trial judge ruled correctly. State v. Williams, 657 S.W.2d 405, 411 (Tenn. 1983); Graham v. State, 547 S.W.2d 531, 536 (Tenn. 1977); State v. Aucoin, 756 S.W.2d 705, 713-14; State v. Chapman, 724 S.W.2d 378, 380 (Tenn. Crim. App. 1986).

We do point out that in the recent case of State v. Barnett, 909 S.W.2d 423 (Tenn. 1995), our supreme court, for the first time regarding a non-capital case, held that, pursuant to Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed.2d 53 (1985), constitutional due process requires the state to provide an independent psychiatric expert to an indigent criminal defendant if that defendant, at an ex parte hearing, makes a threshold showing of particularized need for the assistance of an expert.

At the hearing on the defendant's motion, the defendant testified about having had some emotional and behavioral problems of a sexual nature, beginning when he was eleven or twelve years old. He told about having undergone some psychiatric counseling during times when he was institutionalized in penal facilities, and about medications that had been prescribed to him in the past.

While, as we have indicated above, the decision in Barnett post-dated the trial of the present case, still, even under the dictates of Barnett, the defendant was not entitled to a favorable ruling on his motion because the record shows that he failed to make the required threshold showing of a particularized need for an independent psychiatric examination.

The record shows that at the time of the hearing on the defendant's motion, the defendant, at defense counsel's request, had, pursuant to T.C.A. § 33-7-301, undergone two evaluations by the Johnson Mental Health Center, regarding his

mental status. Each evaluation had been conducted by separate clinical psychiatrists, and the result of each evaluation was that the defendant was mentally competent to stand trial, and that an insanity defense could not be supported.

At the hearing, defense counsel suggested that the court should appoint someone to "go step by step through [defendant's] psychological history to determine if there were not some patterns that would lead to a mental disease or defect being identified which might support, might lend credence to a defense of not guilty by reason of insanity." In Barnett, the supreme court held that the trial court did not err in refusing further psychiatric testing when "[a]ll the facts and circumstances taken together demonstrate that further testing was being sought in the 'mere hope or suspicion' that favorable evidence could be obtained." 909 S.W.2d at 431.

In his ruling denying the defendant's motion, the trial judge, taking cognizance of the fact that the defendant had already been twice examined regarding his mental status, commented that he saw no need for additional examinations. We agree. This issue is without merit.

In his fourth issue, the defendant says that the assistant district attorney general improperly argued the absence of expert witnesses who were to testify regarding the defendant's sanity.

Specifically, the defendant complains that in the assistant district attorney general's closing argument he improperly remarked to the jury: "I guess all of you are surprised. Where's all those witnesses? Where's all those Doctors who says he's crazy?"

The defendant did not interpose an objection to these remarks. Thus, the issue has been waived. State v. Pritchett, 621 S.W.2d 127, 135 (Tenn. 1981); State v. Compton, 642 S.W.2d 745, 747 (Tenn. Crim. App. 1982); T.R.A.P. 36.

Moreover, we note that in the defense counsel's opening statement to the jury, she stated that the defense would call witnesses regarding the defendant's mental problems. Also, the record shows that the defense had witnesses available to testify in support of his insanity defense, but chose not to call them. Therefore, some comment on absent witnesses was proper.

However, we do not see in the record that the defendant had specific doctors available to testify in his behalf. It appears that the defendant intended to rely on counselors, other lay witnesses, and medical records, rather than specific doctors, to support his plea, and so, to this extent, the prosecuting attorney's reference to "Doctors" should not have been made. Nevertheless, had a timely objection been made, the trial court could have easily solved the problem by giving a curative instruction. In the context of the facts and circumstances of this case, this minor error was harmless.

For the reasons stated, this issue is overruled.

Next, the defendant contends that the trial court erred in allowing evidence of his prior criminal history.

After the defendant was arrested, he gave a tape recorded statement to Detective Dudley. He denied that he had been to the victim's apartment, and said that when he was arrested, after stepping out of the "Alleyway," he was on his way to meet his "parole officer." At another point in his statement, he said he and someone named

"Paul" had "been out to Silverdale" together on a prior occasion. He said that just prior to his arrest he "asked Paul what time it was," and Paul said "about 2:00 something," and that he then advised Paul he "had to go meet his parole officer."

The tape, containing the defendant's statement, was played to the jury, without any objection on the defendant's part. The defendant argues that his statement should have been redacted so as to delete the portions of which he now complains, but the defendant never at any time requested any redaction of his statement. Further, this issue was not listed as a ground for relief in the defendant's motion for a new trial. Under all of these circumstances, this issue has been waived. State v. Sutton, 562 S.W.2d 820 (Tenn. 1978); State v. Leach, 684 S.W.2d 655, 658 (Tenn. Crim. App. 1984).

Moreover, even on the merits of the issue, the defendant would not be entitled to relief. The evidence did not go to show the defendant's propensity to commit the crime on trial.

The ambiguous reference to his parole officer conveyed no information to the jury about the specifics or nature of the defendant's prior criminal history. Also, the brief statement that he had been with "Paul" in "Silverdale," which the defendant says in his brief was a county workhouse, told the jury nothing about any specific crime in which the defendant might have been involved.

Also, it is reasonable to say that the evidence was beneficial to the defendant, as he needed to offer some explanation in support of his contention that he was not at the victim's apartment, but was instead occupied with other matters.

We conclude that the defendant sustained no prejudice as a result of this unobjected to evidence. Any error was harmless.

In his sixth issue, the defendant contends that the trial judge erred in failing to charge the jury on the lesser included offense of aggravated assault. We agree.

As a general rule, if there is any evidence which reasonable minds could accept as to the existence of a lesser included offense, the defendant is entitled to an instruction thereon. Johnson v. State, 531 S.W.2d 558, 559 (Tenn. 1975). If a lesser offense can be inferred from any of the facts in the case, it is obligatory on the trial judge to charge the jury concerning the lesser offense. State v. Staggs, 554 S.W.2d 620, 626 (Tenn. 1977).

The defendant was charged with the offense of attempted aggravated rape. The indictment alleged, in part, that the defendant "did unlawfully, forcibly, or coercively attempt to engage in sexual penetration with Rosie Hughes, while he was armed with a deadly weapon or an article used or fashioned in a manner to lead the victim to believe it to be a weapon . . . ."

The trial court charged the jury on six lesser included offenses of attempted aggravated rape, namely, attempted rape, aggravated sexual battery, attempted aggravated sexual battery, sexual battery, attempted sexual battery and assault. The trial court specifically declined to charge aggravated assault.

As set forth in our review of the evidence, the victim testified that the defendant assaulted her, knocked her down, choked her, took her clothes off, got a large fork which he ran through her hair and threatened to kill her with it, saying, "Bitch

you see this what I'm gonna kill you with." Also, the record shows that the victim sustained "visible abrasions, scratch marks about her neck," and a "carpet burn or a rub type burn on her shoulder area."

T.C.A. § 39-13-102 states that:

(a) A person commits aggravated assault who:

(1) Commits an assault as defined in § 39-13-101,[2] and

(A) Causes serious bodily injury to another; or

(B) Uses or displays a deadly weapon . . . .

We agree with the state's assertion that Ms. Hughes' injuries would not rise to the level of being "serious bodily" injuries. We disagree, however, with the state's argument that the large fork used in this attack was not a "deadly weapon."

T.C.A. § 39-11-106(a)(5)(A) and (B) defines the term "deadly weapon" as:

> (A) A firearm or anything manifestly designed, made or adapted for the purpose of inflicting death or serious bodily injury; or
>
> (B) Anything that in the manner of its use or intended use is capable of causing death or serious bodily injury.

The large fork used in the present assault would clearly fall within the definition of a "deadly weapon" as described in subsection (B) of the statute.

Some weapons are deadly per se, such as firearms. Others are deadly by reason of the manner in which they are used. Morgan v. State, 220 Tenn. 247, 415 S.W.2d 879, 882 (1967). A dangerous or deadly weapon is any weapon or instrument

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[2] T.C.A. § 39-13-101 provides that "(a) A person commits assault who: (1) Intentionally, knowingly or recklessly causes bodily injury to another; (2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or (3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative."

which, from the manner it is used or attempted to be used is likely to produce death or cause great bodily harm. Id. See also State v. Haynes, 720 S.W.2d 76, 81 (Tenn. Crim. App. 1986).

In the present case, during the defendant's assault on the victim, he ran the large fork through her hair and threatened to kill her with it. Under the circumstances in this case, the large fork was clearly a "deadly weapon."

In State v. Reed, 689 S.W.2d 190, 193 (Tenn. Crim. App. 1984), where the court held that the offense of aggravated assault could be a lesser included offense of aggravated rape, depending upon the allegations in the indictment and the proof, the court pointed out that where the "aggravated" element is predicated on the fact that a deadly weapon was used, this is particularly true. See also State v. Johnson, 670 S.W.2d 634, 637 (Tenn. Crim. App. 1984).

The proof in the present case establishes the main offense and all lesser included offenses, and the defendant had a constitutional right to have a "correct and complete charge of the law given by the Judge." State v. Staggs, supra at 626.

Therefore, since the evidence in this case established the elements of aggravated assault, and given the allegations in the indictment, we conclude that aggravated assault was a lesser included offense of attempted aggravated rape, the principal offense charged in the indictment. Thus, a charge on aggravated assault should have been included in the trial court's charge to the jury. Since it was not, we find reversible error.

We also find merit to the defendant's final issue in which he claims that error occurred because one of the jurors was absent during a portion of the final arguments in this case. See State v. Trusty, 914 S.W.2d 481 (Tenn. 1996).

On the morning of the second day of the trial, one of the original jurors, Chad Parker, was not present in court. The trial court stated: "We're ready to proceed and we will use the alternate as the twelfth juror."

The jury was brought into the courtroom and the trial court announced:

> Ms. Runnion, you are now a regular juror. Something must have happened to Mr. Parker. He's not with us. Could have been an accident or anything could happen, so you are now one of the regular jurors, so we have twelve jurors to continue the case.

The state had rested its case at the end of the prior day, and after the alternate juror, Ms. Runnion, was seated with the jury, the defense announced (in the absence of juror Parker) that it rested also, without putting on any proof.

The case then proceeded to final argument, and after the prosecuting attorney had almost completed his opening argument, juror Parker arrived at court. At that point, the prosecuting attorney said to the court: "Do I need to start over?" The trial court suggested he should start over, but the prosecuting attorney responded: "I tell you what, I'll let the other jurors tell him about it."

Subsequently, the prosecuting attorney finished his opening argument by making a few more remarks, then after defense counsel argued, the prosecuting

attorney made his final argument. Then, the trial court excused the alternate juror, Ms. Runnion, leaving the tardy juror, Mr. Parker, to deliberate with the other eleven jurors in deciding the case.

The record indicates that the trial court was of the view that since juror Parker had heard all of the proof, and had heard all of the defense argument and the prosecuting attorney's rebuttal argument, missing only a portion of the prosecuting attorney's opening argument, then it would be in order to allow the case to proceed in the manner it did, and that no harm had been done to the defendant.

The state argues essentially the same thing on appeal, and says the defendant was not prejudiced. Also, the state argues that the complaint has been waived because the defendant did not object at the time, nor did he raise the complaint in his motion for a new trial. Ordinarily, we would be inclined to agree that the complaint has been waived, but this error is the type that must be noticed by us as plain error.

Also, we are not in a position to categorically say that no prejudice resulted to the defendant. The defendant was entitled to have twelve jurors to hear the whole case, and that included all of the closing arguments. While it appears that juror Parker only missed about twenty minutes of the proceedings, he was not aware of what had taken place during his absence, unless, as the prosecuting attorney had suggested, he learned it from the other jurors. And quite clearly, this is not the proper way for jurors to learn about the in-court proceedings in a case.

Among the essentials of a right to trial by jury is the right guaranteed to all defendants to have the facts involved tried and determined by twelve jurors. State v. Bobo, 814 S.W.2d 353 (Tenn. 1991); Willard v. State, 130 S.W.2d 99 (Tenn. 1939). Also included in the guarantee of right to trial by jury is the right to have all the jurors present for all the proceedings. In Bobo, supra, the supreme court held that "any errors affecting the constitutional right to trial by jury will result in such prejudice to the judicial process that automatic reversal is required." Id. at 358, citing T.R.A.P. 36(b), State v. Perry, 740 S.W.2d 723 (Tenn. 1987), and State v. Onidas, 635 S..W. 2d 516 (Tenn. 1982). "Such violations are defects in the structure of the trial mechanism and thus defy analysis by harmless error standards." Bobo at 358.

For the reasons stated, we find reversible error to be present regarding the defendant's two final issues. The defendant's conviction is reversed and the case is remanded for a new trial.

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Joe D. Duncan, Special Judge

CONCUR:

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Gary R. Wade, Judge

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Joseph M. Tipton, Judge