IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JULY 1996 SESSION

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 02C01-9601-CR-00038**
Appellee,	)	
	)	**SHELBY COUNTY**
VS.	)	
	)	**HON. ARTHUR T. BENNETT, JUDGE**
ROBERT W. BENTLEY,	)	
	)	
Appellant.	)	(Reckless endangerment - 2 counts)

FOR THE APPELLANT:

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(On Appeal)

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FOR THE APPELLEE:

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OPINION FILED:_____

AFFIRMED

JOHN H. PEAY,
Judge

O P I N I O N

The defendant was indicted on two charges of attempted first-degree murder. After a jury trial, he was acquitted of the lesser included charges of attempted second degree murder and attempted voluntary manslaughter, but convicted of two offenses of felony reckless endangerment. For these convictions he received concurrent two year terms in the local workhouse.

In this appeal as of right, the defendant contends that his convictions cannot stand because reckless endangerment is not a lesser included offense of attempted first-degree murder. The State concedes the defendant's point, but argues that the defendant's indictments were amended with the defendant's consent to include the offense of reckless endangerment. The defendant also contends that, even if his convictions for reckless endangerment can stand under the indictments, he can properly be convicted only of the misdemeanor version of that offense. After a review of the record, we affirm the convictions.

We first note that neither of the defendant's issues was raised in his motion for new trial, and are therefore waived. T.R.A.P. 3(e). However, even considered on the merits, we find no reversible error.

The first indictment against the defendant reads as follows:

> Robert W. Bentley on March 15, 1994, in Shelby County, Tennessee, and before the finding of this indictment, did unlawfully attempt to commit the offense of First Degree Murder, as defined in T.C.A. [§]39-13-202; in that he, the said Robert W. Bentley, did unlawfully, intentionally, deliberately and with premeditation attempt to kill Alicia Horton, in violation

> of T.C.A. [§]39-12-101, against the peace and dignity of the State of Tennessee.

The second indictment is identical, other than the name of the victim.

No amendments to the indictments were made prior to trial. However, after the close of all proof, defense counsel requested a jury instruction on the offense of reckless endangerment,[1] apparently thinking that it was a lesser included offense of attempted first-degree murder. The State made no objection. The court responded that it would include an instruction on the "class-E felony, reckless endangerment." The only objection noted by defense counsel at that point was the trial court's refusal to also include a charge on aggravated assault.

The jury charge given by the judge (as evidenced by a copy in the technical record but not transcribed from the actual instructions given) included the following:

> Any person who commits the offense of reckless endangerment is guilty of a crime.
>
> For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements:
>
> > (1) that the defendant engaged in conduct which placed or might have placed another person in imminent danger of death or serious bodily injury; and
> >
> > (2) that the offense was committed with a deadly weapon; and
> >
> > (3) that the defendant acted recklessly.

This is a portion of the Tennessee Pattern Jury Instruction on felony reckless

[1] T.C.A. §39-13-103, which provides: "(a) A person commits an offense who recklessly engages in conduct which places or may place another person in imminent danger of death or serious bodily injury. (b) Reckless endangerment is a Class A misdemeanor; however, reckless endangerment committed with a deadly weapon is a Class E felony."

endangerment. No instruction was given on misdemeanor reckless endangerment.

The jury instruction on reckless endangerment, given with the consent of both parties, constituted, in effect, an amendment to the defendant's indictments. While no one at trial specifically addressed the necessity of amending the indictments to include the offense of reckless endangerment, this oversight was merely the result of the trial court, defense counsel and the State all mistakenly concluding that reckless endangerment is a lesser included offense of attempted first-degree murder. However, indictments "may be amended in all cases with the consent of the defendant." Tenn. R. Crim. P. 7(b). The defendant here, through his counsel, not only consented to being tried on the charge of reckless endangerment, but actively sought this result. For the purposes of this appeal, we find the defendant's actions to have constituted consent to an effective amendment to his indictments.[2] He will not now be heard to complain about convictions on an offense which, without his own counsel's intervention, would not have been charged to the jury. See T.R.A.P. 36(a) ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.") This issue is without merit.

The defendant also complains that he was improperly sentenced for committing a felony because the jury verdict found him guilty merely of "reckless endangerment," a class A misdemeanor, rather than of "reckless endangerment with a deadly weapon," a class E felony. However, the jury verdict actually recites (twice) that "We, the jury, find the defendant guilty of reckless endangerment as included in the indictment." The indictments were effectively amended, as set forth above, to include

[2]This finding disposes of the defendant's "correlative issue" that the indictments did not allege the elements of the offense of reckless endangerment.

only the felony version of reckless endangerment. No mention to the jury was ever made, as far as is revealed by the record, of misdemeanor reckless endangerment. Moreover, the judgments entered by the trial court describe the defendant's conviction offenses as reckless endangerment and specify the conviction class as E felony. Thus, the defendant was sentenced appropriately. This issue is without merit.

For the reasons set forth above, the judgment below is affirmed.

_____
JOHN H. PEAY, Judge

CONCUR:

_____
DAVID H. WELLES, Judge

_____
CORNELIA A. CLARK, Special Judge