

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT JACKSON

Assigned on Briefs June 3, 2003

**STATE OF TENNESSEE v. TERRANCE G. MOTLEY**

**Appeal from the Criminal Court for Shelby County**  
**No. 00-01715, 16 Joseph B. Dailey, Judge**

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**No. W2002-02079-CCA-R3-CD - Filed November 14, 2003**

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JOSEPH M. TIPTON, J., concurring.

I concur in the result reached and most of the reasoning in the majority opinion. However, I do not believe that we should rely on T.C.A. § 40-18-110 to bar relief in this case relative to a jury instruction for the lesser included offense of attempted voluntary manslaughter. The state has not raised the statute to bar the defendant's jury instruction claim, and, obviously, the defendant has not had an opportunity to address the validity of the statute. In this respect, I believe that legitimate questions exist about the constitutionality of, at least, part of T.C.A. § 40-18-110 but that this case is not the one to answer those questions. The fact that no harm could flow to the defendant under the circumstances in this case is sufficient, by itself, to warrant affirming the judgments of conviction. Therefore, I concur in the majority opinion.

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JOSEPH M. TIPTON, JUDGE