

COURT OPINIONS ON LESSER INCLUDED OFFENSES (LISTED BY THE TPI NUMBER OF THE INDICTED OFFENSE)

Updated by the Committee thru November 9, 2015

WARNING!! The following is a list of decisions by the Tennessee Supreme Court and Tennessee Court of Criminal Appeals which have applied Tenn. Code Ann. § 40-18-110(f)-(g) and State v. Burns, 6 S.W.3d 453 (Tenn. 1999), to lesser included offenses. In these opinions, the court determined ONLY whether particular crimes were lesser included offenses but did NOT necessarily list all lesser included offenses for each indicted offense. Some offenses are not listed here because their lesser included offenses are obvious and have never been challenged on appeal. The statute and the Burns test are set out on the last page of this list.

It is very possible that lesser included offenses listed which are lessers due to part (b) of the Burns test, offenses containing “a different mental state indicating a lesser kind of culpability; and/or ... a less serious harm or risk of harm to the same person, property or public interest,” have been abrogated by the 2009 amendment to 40-18-110, which codified Burns parts (a) and (c), but left out part (b). The Tennessee Supreme Court held on 10/27/14 that the

2009 amendment codified parts (a) and (c) of the Burns test. Section 40-18-110(f)(1) corresponds to part (a) of the Burns test, and section 40-18-110(f)(2)-(4) corresponds to part (c) of the Burns test. Significantly, the statutory definition set out in section 40-18-110(f) does not include part (b) of the Burns test. Because the resolution of this appeal involves only section 40-18-110(f)(1), which is identical to part (a) of the Burns test, we need not address whether part (b) of the Burns test has been superseded by statute.

State v. Broderick Devonte Fayne, 451 S.W.3d 362, 369 n.5 (Tenn. 2014) (emphasis supplied).

As Facilitation, Solicitation and Attempt to commit an offense are lessers of the offense facilitated, attempted or solicited (see Burns part (c) and 40-18-110(f)), cases with those holdings are not included in this list. However, as offenses with reckless mental states cannot be facilitated, attempted or solicited, and some offenses already have Attempt as an element, cases holding that they are not lessers are listed here.

TPI 3.01 - CRIMINAL RESPONSIBILITY

Lessers include:

Facilitation - Facilitation is a lesser-included offense of criminal responsibility. State v. Gomez, 367 S.W.3d 237, 243 (Tenn. 2012); State v. Fowler, 23 S.W.3d 285, 287-88 (Tenn. 2000).

TPI 3.03 - ACCESSORY AFTER THE FACT

This offense is never a lesser included offense of the felony committed - State v. Christopher Bryan Hancock, No. E2011-00111-CCA-R3-CD (Tenn. Crim. App. September 24,

2012) (citing State v. Hodgkinson, 778 S.W.2d 54, 63 (Tenn. Crim. App. 1989), State v. Hoosier, 631 S.W.2d 474, 476 (Tenn. Crim. App. 1982)); State v. Jon Robert Goodale, No. M2000-02140-CCA-R3-CD, (Tenn. Crim. App. Sept 14, 2001), app. denied (Tenn. Feb. 19, 2002); accord State v. Timothy Wayne Holland, No. M2001-03129-CCA-R3-CD, (Tenn. Crim. App. Sept. 4, 2002).

TPI 4.01 - CRIMINAL ATTEMPT (in alphabetical order by attempted offense)

ATTEMPTED AGGRAVATED CHILD NEGLECT

Lessers do not include:

Reckless Aggravated Assault - State v. Dwaniko Martez Sudberry, No. M2011-00432-CCA-R3-CD, (Tenn. Crim. App. November 14, 2012).

ATTEMPTED AGGRAVATED SEXUAL BATTERY

Lessers include:

Attempted Child Abuse - State v. Thomas E. Campbell, No. M2010-00666-CCA-R3-CD, (Tenn. Crim. App. March 31, 2011) app. denied (Tenn. May 25, 2011)

ATTEMPTED FIRST DEGREE MURDER

Lessers include:

Solicitation of First Degree Murder - Orlando Crenshaw v. State, No. M2004-00045-CCA-R3-CD, (Tenn. Crim. App. Dec. 16, 2004) (stating that solicitation of first degree murder is a lesser included offense of attempted first degree murder, app. denied (Tenn. May 2, 2005).

Attempted Second Degree Murder - State v. Reginald Merriweather, Nos. W1999-02050-CCA-R3-CD, W2001-02206-CCA-RM-CD, (Tenn. Crim. App. Feb. 11, 2002) (stating without analysis that attempted second degree murder is a lesser included offense of attempted first degree murder); accord State v. Tony Price, No. W2002-01376-CCA-R3-CD, (Tenn. Crim. App. Sept. 25, 2003).

Attempted Voluntary Manslaughter - State v. Tony Price, No. W2002-01376-CCA-R3-CD, Shelby County (Tenn. Crim. App. Sept. 25, 2003).

Misdemeanor Reckless Endangerment - State v. Rush, 50 S.W.3d 424 (Tenn. 2001)(holding that it is a Burns part b lesser).

Lessers do not include:

Aggravated Assault and Assault (Class A or B misdemeanor) - Demonbreun v. Bell, 226 S.W.3d 321, 324 (Tenn. 2007).

Facilitation of Aggravated Assault - Orlando Crenshaw v. State, No. M2004-00045-CCA-R3-CD, (Tenn. Crim. App. Dec. 16, 2004), app. denied (Tenn. May 2, 2005).

Reckless Aggravated Assault - State v. Rush, 50 S.W.3d 424, 429-31 (Tenn. 2001)

Attempted Reckless Homicide - State v. Vernon Lamar Bryant, No. E2002-01234-CCA-R3-CD, (Tenn. Crim. App. Oct. 21, 2003) (reversing defendant's conviction because attempted reckless homicide is not a crime in Tennessee), app. denied (Tenn. Mar. 22, 2004); see also State v. Kenneth Anthony Henderson, No. M1999-00547-CCA-R3-CD, Davidson County (Tenn. Crim. App. Apr. 11, 2002).

Felony Reckless Endangerment - State v. Rush, 50 S.W.3d 424, 431 (Tenn. 2001).

Attempted Criminally Negligent Homicide - State v. Kenneth Anthony Henderson, No. M1999-00547-CCA-R3-CD, (Tenn. Crim. App. Apr. 11, 2002) (observing that attempted criminally negligent homicide does not exist as an offense in Tennessee); accord State v. William Binkley, No. M2001-00404-CCA-R3-CD, (Tenn. Crim. App. Apr. 5, 2002) (noting that one “cannot intend to perform an unintentional act”), app. denied (Tenn. Nov. 4, 2002).

ATTEMPTED RAPE

Lessers do not include:

Sexual Battery - State v. Bowles, 52 S.W.3d 69, 79 (Tenn. 2001).

ATTEMPTED ROBBERY

Lessers include:

Attempted Theft - State v. Lewis, 36 S.W.3d 88, 99-100 (Tenn. Crim. App. 2000) (holding that attempted theft is a lesser included offense of attempted robbery under the Burns test, part (a)). [Note: With regard to the justification or second prong of the Burns analysis, Lewis’s conclusion on p.100 that “the trial court is not obliged to give the lesser-included offense instruction where there is no evidence of the lesser offense other than the very same evidence which supports the greater offense,” has been rejected by the supreme court in State v. Allen, 69 S.W.3d 181, 188 (Tenn. 2001).]

ATTEMPTED SECOND DEGREE MURDER

Lessers do not include:

Felony Reckless Endangerment and Reckless Aggravated Assault - State v. Rush, 50 S.W.3d 424, 430-31 (Tenn. 2001).

Aggravated assault - State v. Albert James Saavedra, No. M2004-02889-CCA-R3-CD, (Tenn. Crim. App., Mar. 13, 2006), perm. app. denied (Tenn. Aug. 21, 2006); State v. Korey Bradley, No. W2009-02024-CCA-R3-CD, (Tenn. Crim. App. Aug. 22, 2011), perm. app. denied (Tenn. Jan. 11, 2012).

TPI 4.03 - CONSPIRACY

Lessers include:

Facilitation - State v. Vasques, 221 S.W.3d 514 (Tenn. 2007).

TPI 6.02 and 6.02(a) - AGGRAVATED ASSAULT

Lessers include:

Reckless Aggravated Assault - ONLY IF BODILY INJURY IS ALLEGED IN THE INDICTMENT, State v. Goodwin, 143 S.W.3d 771, 776-77 (Tenn. 2004). If only fear of bodily injury is alleged, it is not a lesser.

Felony Reckless Endangerment - ONLY IF BODILY INJURY IS ALLEGED IN THE INDICTMENT, State v. Hatfield, 130 S.W.3d 40 (Tenn. 2004). If only fear of bodily injury is alleged, it is not a lesser. State v. Cross, 362 SW2d 512, 522-23 (Tenn. 2011); State v. Moore, 77 S.W.3d 132, 135-36 (Tenn. 2002).

Simple Assault (A misd.) - Either through bodily injury or fear of bodily injury, depending on the language of the indictment.

Misdemeanor Assault by Extremely Offensive or Provocative Physical Contact (B misd.) - ONLY IF BODILY INJURY IS ALLEGED IN THE INDICTMENT. State v. Smiley, 38 S.W.3d 521, 524 (Tenn. 2001).

Child Abuse and Child Neglect or Endangerment - 39-15-401(f)

TPI 6.03 - RECKLESS ENDANGERMENT w/ DEADLY WEAPON

Lessers include:

Misdemeanor Reckless Endangerment

Lessers do not include:

Reckless driving - State v. Lawrence D. Ralph, No. M2013-01100-CCA-R3-CD (Tenn. Crim. App. December 23, 2013) app. denied (Tenn. May 30, 2014).

TPI 6.04 - VEHICULAR ASSAULT

Lessers include:

Driving Under the Influence of an Intoxicant. State v. Iris A. Jones, 2014 Tenn Crim App LEXIS 811, No. M2013-00938-CCA-R3-CD (August 20, 2014).

Felony and Misdemeanor Reckless Endangerment – State v. William George Soller, No. E2008-02420-CCA-R3-CD (Tenn. Crim. App. June 9, 2010) (DESIGNATED NOT FOR CITATION).

Child Abuse and Child Neglect or Endangerment - 39-15-401(f)

TPI 7.01 - PREMEDITATED FIRST DEGREE MURDER

Lessers include:

Second Degree Murder - 40-18-110(g)(1)

Voluntary Manslaughter - Lesser statute, 40-18-110(g)(2)

Reckless Homicide - State v. Ely, 48 S.W.3d 710, 720-22 (Tenn. 2001) held Reckless Homicide to be a lesser under the Burns test, part (b). Even if the lesser statute, 40-18-110, abolished the Burns test, Reckless Homicide would be a lesser under 40-18-110(f)(1), because the element of “reckless” is necessarily included in “intentional,” per 39-11-301(a)(2).

Criminally Negligent Homicide - State v. Ely, 48 S.W.3d 710, 720-22 (Tenn. 2001) held Reckless Homicide to be a lesser under the Burns test, part (b). Even if the Lesser Statute, 40-18-110, abolished the Burns test, Reckless Homicide would be a lesser under 40-18-110(f)(1), because the element of “criminal negligence” is necessarily included in “intentional,” per 39-11-301(a)(2).

Child Abuse and Child Neglect or Endangerment - 39-15-401(f)

Lessers may or may not include:

Aggravated Assault (serious bodily injury), Reckless Endangerment (A misd.) and Assault (bodily injury) - There are several unpublished cases deciding this issue both ways. Some are State v. Paul Graham Manning, No. M2002-00547-CCA-R3-CD, (Tenn. Crim. App. Feb. 14, 2003) (holding that intentional, knowing, or reckless aggravated assault committed by causing serious bodily injury is a lesser included offense of first degree murder under the Burns

test, part (a)), app. denied (Tenn. Dec. 15, 2003); accord State v. Lia Bonds, No. W2006-019430CCA-R3-CD, Shelby County (Tenn. Crim. App. Nov. 2, 2007) (holding that under Manning, misdemeanor reckless endangerment and assault are lesser included offenses of second degree murder). But see State v. John C. Walker, III, No. M2003-01732-CCA-R3-CD, (Tenn. Crim. App. Aug. 11, 2004) (holding that no form of aggravated assault is a lesser included offense under Burns, but analyzing only under part (a)), app. granted and case remanded (Tenn. Crim. App. Sept. 24, 2004), on remand, M2005-01432-CCA-RM-CD (Tenn. Crim. App. July 28, 2005), app. denied (Tenn. Dec. 19, 2005). The latest case stating they are not lessers is State v. William Matthew Black, No. M2013-00612-CCA-R3-CD (Tenn. Crim. App. April 25, 2014) app. denied (Tenn. Sept. 22, 2014). "This court has concluded that aggravated assault is not a lesser included offense of first degree murder. See State v. John C. Walker, III, No. M2005-01432-CCA-RM-CD, 2005 Tenn. Crim. App. LEXIS 784, *27 (Tenn. Crim. App. July 28, 2005) (applying the same test identified in T.C.A. § 40-18-110(f)(1) to conclude that aggravated assault is not a lesser included offense of first degree murder)." Given the lack of clarity, the trial judge may wish to consider charging these offenses if the issue in the trial is not whether there was an assault by the defendant, but whether or not the assault was the cause of death.

Lessers do not include:

Vehicular Homicide - Vincent Love Williams v. Henry Steward, Warden, No. W2011-01954-CCA-R3-HC (Tenn. Crim. App. June 18, 2012) at n. 3 ("vehicular homicide is not a lesser included offense of first degree murder. State v. Hester, No. 03C01-9704-CR-00144, 2000 Tenn. Crim. App. LEXIS 275, 2000 WL 294964, at *7 (Tenn. Crim. App. Mar. 22, 2000)").

**TPI 7.02 - FIRST DEGREE MURDER (DESTRUCTIVE DEVICE OR BOMB) and
TPI 7.03- FIRST DEGREE MURDER (KILLING IN PERPETRATION OF OTHER
CRIMES)**

Lessers include:

Second Degree Murder - 40-18-110(g)(1)

Child Abuse and Child Neglect or Endangerment - 39-15-401(f)

Lessers may or may not include:

Voluntary Manslaughter - The lesser statute, 40-18-110(g)(2), states that "Voluntary manslaughter is a lesser included offense of premeditated first degree murder and second degree murder," omitting the other two ways to commit First Degree Murder. State v. Ely, 48 S.W.3d 710, 720-22 (Tenn. 2001) held Voluntary Manslaughter to be a lesser included offense under the Burns test, part (b). If the lesser statute abolished the Burns test, part (b), then Voluntary Manslaughter may not be a lesser offense. The trial judge may wish to consider charging Voluntary Manslaughter as a lesser of Second Degree Murder, as Voluntary Manslaughter is a lesser included offense of Murder Second Degree under the statute. 40-18-110(g)(2).

Reckless Homicide and Criminally Negligent Homicide - State v. Ely, 48 S.W.3d 710, 720-22 (Tenn. 2001) held these offenses to be lessers under the Burns test, part (b). If the lesser statute, 40-18-110, has abolished the Burns test, Reckless Homicide and Criminally Negligent Homicide would not be lessers because their mental states of recklessness and criminal negligence would not pass the "same elements" test of 40-18-110(f)(1).

Lessers do not include:

Vehicular Homicide - Vincent Love Williams v. Henry Steward, Warden, No. W2011-01954-CCA-R3-HC (Tenn. Crim. App. June 18, 2012) at n. 3 (“vehicular homicide is not a lesser included offense of first degree murder. State v. Hester, No. 03C01-9704-CR-00144, 2000 Tenn. Crim. App. LEXIS 275, 2000 WL 294964, at *7 (Tenn. Crim. App. Mar. 22, 2000)”).

Aggravated Child Abuse - State v. Godsey, 60 S.W.3d 759, 778 (Tenn. 2000).

TPI 7.05(a) - SECOND DEGREE MURDER (KNOWING KILLING)

Lessers include:

Voluntary Manslaughter - 40-18-110(g)(2)

Reckless Homicide - State v. Ely, 48 S.W.3d 710, 720-22 (Tenn. 2001) held Reckless Homicide to be a lesser under the Burns test, part (b). Even if the lesser statute, 40-18-110, abolished the Burns test, Reckless Homicide would be a lesser under 40-18-110(f)(1), because the element of “reckless” is necessarily included in “intentional,” per 39-11-301(a)(2).

Criminally Negligent Homicide - State v. Ely, 48 S.W.3d 710, 720-22 (Tenn. 2001) held Reckless Homicide to be a lesser under the Burns test, part (b). Even if the Lesser Statute, 40-18-110, abolished the Burns test, Reckless Homicide would be a lesser under 40-18-110(f)(1), because the element of “criminal negligence” is necessarily included in “intentional,” per 39-11-301(a)(2).

Child Abuse and Child Neglect or Endangerment - 39-15-401(f)

Lessers may or may not include:

Aggravated Assault (serious bodily injury), Reckless Endangerment (A misd.) and Assault (bodily injury) - There are several unpublished cases deciding this issue both ways. Some are State v. Paul Graham Manning, No. M2002-00547-CCA-R3-CD, (Tenn. Crim. App. Feb. 14, 2003) (holding that intentional, knowing, or reckless aggravated assault committed by causing serious bodily injury is a lesser included offense of first degree murder under the Burns test, part (a)), app. denied (Tenn. Dec. 15, 2003); accord State v. Lia Bonds, No. W2006-019430CCA-R3-CD, Shelby County (Tenn. Crim. App. Nov. 2, 2007) (holding that under Manning, misdemeanor reckless endangerment and assault are lesser included offenses of second degree murder). But see State v. John C. Walker, III, No. M2003-01732-CCA-R3-CD, (Tenn. Crim. App. Aug. 11, 2004) (holding that no form of aggravated assault is a lesser included offense under Burns, but analyzing only under part (a)), app. granted and case remanded (Tenn. Crim. App. Sept. 24, 2004), on remand, M2005-01432-CCA-RM-CD (Tenn. Crim. App. July 28, 2005), app. denied (Tenn. Dec. 19, 2005). The latest case stating they are not lessers is State v. William Matthew Black, No. M2013-00612-CCA-R3-CD (Tenn. Crim. App. April 25, 2014) app. denied (Tenn. Sept. 22, 2014). “This court has concluded that aggravated assault is not a lesser included offense of first degree murder. See State v. John C. Walker, III, No. M2005-01432-CCA-RM-CD, 2005 Tenn. Crim. App. LEXIS 784, *27 (Tenn. Crim. App. July 28, 2005) (applying the same test identified in T.C.A. § 40-18-110(f)(1) to conclude that aggravated assault is not a lesser included offense of first degree murder).” Given the lack of clarity, the trial judge may wish to consider charging these offenses if the issue in the trial is not

whether there was an assault by the defendant, but whether or not the assault was the cause of death.

Lessers do not include:

Assisted Suicide (39-13-216) - State v. Wendi Nicole Garrison, 2012 Tenn Crim App LEXIS 560, No. E2011-00496-CCA-R3-CD (July 27, 2012) app. denied (Tenn. January 19, 2013).

TPI 7.07 - CRIMINALLY NEGLIGENT HOMICIDE

Lessers do not include:

Felony Reckless Endangerment and Misdemeanor Reckless Endangerment - State v. Michael Ashley, No. W2004-01319-CCA-MR3-CD (Tenn. Crim. App. Apr. 5, 2006) (holding that neither felony nor misdemeanor reckless endangerment are lesser included offenses under Burns (b)(1) because the requisite intent for reckless endangerment is a greater mens rea than required for criminally negligent homicide)

Child Abuse and Child Neglect or Endangerment - 39-15-401(f)

TPI 7.08 - VEHICULAR HOMICIDE

Lessers include:

DUI if the homicide was by 7.08(b) (Intoxication) or 7.08(c) (.08% or greater alcohol content). State v. Thomas W. Cothran, No. M2005-00559-CCA-R3-CD (Tenn. Crim. App. Nov. 29, 2005) (holding that dual convictions for vehicular homicide and DUI violate Double Jeopardy because the “evidence essential to the vehicular homicide by intoxication conviction is inclusive of the evidence necessary to prove DUI”), app. denied (Tenn. May 1, 2006).

Reckless Homicide, Criminally Negligent Homicide and Reckless Driving if the homicide was by 7.08(a) (Reckless Conduct) or 7.08(d) (Drag Racing).

Child Abuse and Child Neglect or Endangerment - 39-15-401(f)

TPI 8.03 - ESPECIALLY AGGRAVATED KIDNAPPING (by a deadly weapon or with serious bodily injury)

Lessers include:

Aggravated Kidnapping - State v. Tracy F. Leonard, No. M2001-00368-CCA-R3-CD (Tenn. Crim. App. Aug. 28, 2002), app. denied (Tenn. Dec. 16, 2002).

Kidnapping - State v. Gary Lee Miller, No. M1998-00788-CCA-R3-CD (Tenn. Crim. App. Nov. 6, 2000), app. denied (Tenn. Nov. 6, 2000)(holding it is a Burns part b lesser).

False Imprisonment - State v. Evangeline Combs & Joseph D. Combs, Nos. E2000-02801-CCA-R3-CD, E2000-2800-CCA-R3-CD, (Tenn. Crim. App. Sept. 25, 2002), app. denied (Tenn. Jan. 27, 2003).

Lessers do not include:

Aggravated Assault - State v. Evangeline Combs & Joseph D. Combs, Nos. E2000-02801-CCA-R3-CD, E2000-2800-CCA-R3-CD, (Tenn. Crim. App. Sept. 25, 2002) (noting that the nature of the crimes is dissimilar and holding that aggravated assault is not a lesser included because assault requires intent to cause injury while kidnapping requires confinement that results in injury), app. denied (Tenn. Jan. 27, 2003).

TPI 9.01 - ROBBERY

Lessers include:

Theft - State v. Hayes, 7 S.W.3d 52, 56 (Tenn. Crim. App. 1999).

TPI 9.02 – AGGRAVATED ROBBERY

Lessers include:

Robbery and Theft - State v. Hayes, 7 S.W.3d 52, 56 (Tenn. Crim. App. 1999).

Aggravated assault - State v. Franklin, 130 S.W.3d 789, 798 (Tenn. Crim. App. 2003)

TPI 9.03 - ESPECIALLY AGGRAVATED ROBBERY

Lessers include:

Aggravated Robbery - State v. Locke, 90 S.W.3d 663, 674 (Tenn. 2002).

Robbery - State v. Allen, 69 S.W.3d 181, 187 (Tenn. 2002).

Aggravated Assault and Assault- State v. Swift, 308 S.W.3d 827, 832 n.6 (Tenn. 2010).

Theft - State v. Bowles, 52 S.W.3d 69, 79-80 (Tenn. 2001).

Unauthorized Use of an Automobile - State v. John David Palmer, No. W1999-01310-CCA-R3-CD, (Tenn. Crim. App. Feb. 7, 2001); State v. David Michael Gamble, No. 03C01-9812-CR-0042, (Tenn. Crim. App. Jan. 21, 2000) (renumbered E1998-00014-CCA-R3-CD); State v. James McClennon, No. M2002-00153-CCA-R3-CD, (Tenn. Crim. App. June 24, 2003), app. denied (Tenn. June 18, 2001), all applying the Burns test, part (b).

TPI 9.04 - CARJACKING

Lessers include:

Unauthorized use of a motor vehicle (joyriding) - State v. Troy Ector, No. W2011-02039-CCA-R3-CD, (Tenn. Crim. App. August 8, 2012) (holding it is a Burns part b lesser, committed prior to the passage of the lesser statute in 2009) app. denied (Tenn. January 8, 2013).

Lessers do not include:

Robbery and Theft - State v. Wilson, 211 S.W.3d 714, 722 (Tenn. 2007) (holding that robbery and theft are not lesser included offenses of carjacking because robbery and theft require that the defendant have the intent to deprive the owner of the property, whereas carjacking only requires an intentional or knowing taking.)

TPI 10.01 - AGGRAVATED RAPE

Lessers include:

Aggravated Sexual Battery, Sexual Battery by an Authority Figure, Sexual Battery - 40-18-110(g).

Rape - Rashe Moore v. State, No. W2013-00674-CCA-R3-PC (Tenn. Crim. App. April 22, 2014) app. pending; State v. Haskel D. Finch, No. M2001-00340-CCA-R3-CD, (Tenn. Crim. App. June 5, 2002), app. denied (Tenn. Oct. 28, 2002).

Child Abuse and Child Neglect or Endangerment - 39-15-401(f).

Lessers do not include:

Aggravated Assault - Robert James Yoreck, III, No. M2001-02448-CCA-R3, (Tenn.

Crim. App. Jan. 15, 2003), rev'd on other grounds (Tenn. Apr. 22, 2004) (holding that aggravated assault, which requires that the defendant intentionally or knowingly cause serious bodily injury to the victim or intentionally or knowingly cause bodily injury while using or displaying a deadly weapon, is not a lesser included offense of rape accomplished by force or coercion).

Spousal Rape - State v. Dominy, 6 S.W.3d 472, 477-78 (Tenn. 1999).

Incest - William Hackworth v. State, No. M2003-02148-CCA-R3-PC, (Tenn. Crim. App. July 28, 2004).

Statutory Rape - State v. Stokes, 24 S.W.3d 303, 305-06 (Tenn. 2000) (holding that statutory rape is not a lesser included offense of rape).

TPI 10.02 - RAPE

Lessers include:

Sexual Battery and Sexual Battery by an Authority Figure - 40-18-110(g)(4).

Lessers do not include:

Statutory Rape - State v. Stokes, 24 S.W.3d 303, 306 (Tenn. 2000).

Incest - State v. Britzman, 639 S.W.2d 652, 654 (Tenn. 1982).

Child Abuse and Child Neglect or Endangerment - 39-15-401(f)

TPI 10.03 - AGGRAVATED SEXUAL BATTERY

Lessers include:

Sexual Battery by an Authority Figure, Sexual Battery - 40-18-110(g).

Child Abuse and Child Neglect or Endangerment - 39-15-401(f)

Class B Misdemeanor Assault - State v. Swindle, 30 S.W.3d 289, 292-93 (Tenn. 2000) (applying the Burns test, part (b)(2), to hold that Class B misdemeanor assault is a lesser included offense of aggravated sexual battery).

Lessers do not include:

Incest - William Hackworth v. State, No. M2003-02148-CCA-R3-PC, (Tenn. Crim. App. July 28, 2004).

TPI 10.12 – RAPE OF A CHILD

Lessers may or may not include:

Aggravated Sexual Battery (Child Under Age 13) - State v. Evans, 108 S.W.3d 231 (Tenn. 2003) (providing that State v. Elkins, 83 S.W.3d 706, 713 (Tenn. 2002), recognized that aggravated sexual battery is a lesser included offense of child rape under Burns part b). **HOWEVER**, since that Supreme Court case was decided, a Court of Criminal Appeals panel has stated that aggravated sexual battery is no longer a lesser-included offense of rape of a child for double jeopardy purposes for crimes occurring after 7/1/09, because the legislature left it out when enacting 40-18-110(f)-(g). State v. John J. Ortega, No. M2014-01042-CCA-R3-CD (Tenn. Crim App. April 23, 2015). The Court reduced the defendant's conviction for Aggravated Sexual Battery to a conviction for Child Abuse. No appeal was taken from this decision by either the state or defense. Also, two additional Court of Criminal Appeals panels have stated that aggravated sexual battery is no longer a lesser-included offense of rape of a child for double jeopardy purposes for crimes occurring after 7/1/09, because the legislature left it out when enacting 40-18-110(f)-(g). See

State v. Dallas Jay Stewart, No. M2011-01994-CCA-R3-CD, at *37 (Tenn. Crim. App. July 22, 2013) (remanded to the trial court on other grounds, not appealed) and State v. Glen B. Howard, No. E2014-01510-CCA-R3-CD (Knoxville, August 4, 2015), in which cert is pending (filed 10/7/15).

Lessers include:

Child Abuse and Child Neglect or Endangerment - 39-15-401(f) and Ortega, cited in the above paragraph.

Class B Misdemeanor Assault - State v. Elkins, 83 S.W.3d 706 (Tenn. 2002) (holding that Class B misdemeanor assault is a lesser included offense of aggravated sexual battery due to Burns part b, on which the jury was instructed). See also State v. Swindle, 30 S.W.3d 289, 292-93 (Tenn. 2000) (applying the Burns test, part (b), to hold that Class B misdemeanor assault is a lesser included offense of aggravated sexual battery).

Lessers do not include:

Rape - State v. Evangeline Combs & Joseph D. Combs, Nos. E2000-02801-CCA-R3-CD, E2000-2800-CCA-R3-CD, (Tenn. Crim. App. Sept. 25, 2002) (holding that rape is not a lesser included offense of aggravated rape involving sexual penetration of a victim under age thirteen (T.C.A. § 39-2-603(4), which was repealed in 1989) because rape requires that one of three circumstances (force or coercion, mentally or physically defective victim, or accomplished by fraud) must accompany the penetration), app. denied (Tenn. Jan. 27, 2003).

Incest - Studdard v. State, 182 S.W.3d 283, 286 (Tenn. 2005).

Statutory Rape - State v. Ealey, 959 S.W.2d 605, 610-11 (Tenn. Crim. App. 1997).

Aggravated Assault - State v. Eric R. Hinton, No. E2007-00657-CCA-R3-CD, (Tenn. Crim. App. December 15, 2008).

TPI 11.01 - THEFT

Lessers may include:

Unauthorized Use of an Automobile (only if the theft was not in failing to return rental property) - State v. David Michael Gamble, No. 03C01-9812-CR-0042, (Tenn. Crim. App. Jan. 21, 2000) (renumbered E1998-00014-CCA-R3-CD) (holding that unauthorized use of an automobile is a lesser included offense of theft of a vehicle under part (b) of Burns, because unauthorized use contains a “different mental state indicating a lesser kind of culpability because the offender need not have the intent to deprive the owner of the vehicle” and “the taking of a vehicle without the intent to deprive the owner of that vehicle causes less serious harm or risk of harm to the owner and the property because the owner is more likely to get the property back”); accord State v. James McClennon, No. M2002-00153-CCA-R3-CD, (Tenn. Crim. App. June 24, 2003) (relying on Gamble and pre-Burns cases); compare State v. William Belchia, No. W2004-01168-CCA-R3-CD, (Tenn. Crim. App. Mar. 30, 2005) (holding that although unauthorized use of an automobile is a lesser included offense of theft of an automobile, a jury instruction was not warranted when theft was based upon failure to return rental car and no evidence supported unauthorized use as opposed to theft), app. denied (Tenn. Feb. 21, 2006).

Lessers do not include:

Unauthorized Use of an Automobile (if the theft was in failing to return rental property) - State v. William Belchia, No. W2004-01168-CCA-R3-CD, (Tenn. Crim.

App. Mar. 30, 2005), app. denied (Tenn. Feb. 21, 2006).

TPI 11.35(a) - IDENTITY THEFT

Lessers do not include:

Theft, Fraudulent Use of a Driver's License, Criminal Impersonation - Montorius G. Herron v. State, No. W2012-00482-CCA-R3-PC, (Tenn. Crim. App. November 6, 2012); State v. Ronald Bowman, No. W2003-02389-CCA-R3-CD, (Tenn. Crim. App. Jan. 13, 2005), app. denied (Tenn. May 23, 2005).

TPI 13.02 - AGGRAVATED ARSON (destruction of structure or place of worship)

Lessers do not include:

Setting Fire to Personal Property or Land - State v. Gene Shelton Rucker, Jr., No. E2002-02101-CCA-R3-CD, (Tenn. Crim. App. Dec. 22, 2003) (holding that setting fire to personal property or land is not a lesser when the defendant is accused in indictment of destruction of structure or place of worship), app. denied (Tenn. Mar. 21, 2005).

TPI 14.02 - AGGRAVATED BURGLARY

Lessers include:

Burglary of Building - State v. Charles O. Emesibe, No. M2003-02983-CCA-R3-CD, (Tenn. Crim. App. Mar. 28, 2005) (stating that "[b]y definition, burglary is a lesser included offense of aggravated burglary because the elements of burglary must be proven in order to support proof of aggravated burglary"), app. denied (Tenn. Oct. 17, 2005).

Aggravated Criminal Trespass of Habitation, Aggravated Criminal Trespass and Criminal Trespass - State v. Pope, 427 SW3d 363, 374 n. 3 (Tenn. 2013); State v. Terry, 118 S.W.3d 355, 359 (Tenn. 2003) (holding that aggravated criminal trespass is a lesser included offense of aggravated burglary under the Burns test, part (b)).

Lessers do not include:

Theft - State v. George Andrew Stanhope, No. M2011-00272-CCA-R3-CD, (Tenn. Crim. App. September 12, 2013) ("our supreme court has previously held that theft is not a lesser included offense of aggravated burglary and that the two offenses are "codified in distinct statutory provisions and are intended to protect different interests." See State v. Davis, 613 S.W.2d 218, 221 (Tenn. 1981)).

Attempted Criminal Trespass - State v. Reginald D. Terry, No. W2001-03027-CCA-RM-(Tenn. Crim. App. Aug. 27, 2002) (Attempt of a Class C misdemeanor is not a crime) rev'd on other grounds, 118 S.W.3d 355 (Tenn. 2003).

TPI 21.01 - AGGRAVATED CHILD ABUSE OR NEGLECT

Lessers include:

Knowing or Reckless Aggravated Assault - State v. Honeycutt, 54 S.W.3d 762, 771 (Tenn. 2001). **HOWEVER**, this is not a lesser when the indictment does not allege serious bodily injury, but one of the other forms of abuse, such as being especially heinous, atrocious or cruel, or involving the infliction of torture to the victim. – State v. Perry, M2014-00029-CCA-R3-CD, at *22 (Tenn. Crim. App. June 5, 2015), appeal denied (October 15, 2015).

Knowing or Reckless Assault - State v. Russell Maze, No. M2000-02249-CCA-R3-CD, (Tenn. Crim. App. Aug. 16, 2002). **HOWEVER**, this is not a lesser when the indictment does not allege serious bodily injury, but one of the other forms of abuse, such as being especially heinous, atrocious or cruel, or involving the infliction of torture to the victim. – State v. Perry, M2014-00029-CCA-R3-CD, at *22 (Tenn. Crim. App. June 5, 2015), appeal denied (October 15, 2015).

Misd. Reckless Endangerment - State v. Honeycutt, 54 S.W.3d 762, 771-72 (Tenn. 2001) (applying Burns test, part (b)).

Child Abuse - State v. Hanson, 279 S.W.3d 265, 268 (Tenn. 2009).

Attempted Child Neglect - State v. Mateyko, 53 S.W.3d 666, 678 (Tenn. 2001) (reversing child neglect conviction and remanding case for “a new trial on the lesser-included offense of attempted child abuse through neglect” without specifically analyzing lesser included offense issue).

Lessers do not include:

Aggravated Assault by Failure to Protect Child - State v. Misty Brunelle, No. E2006-00467-CCA-R3-CD, (Tenn. Crim. App. July 13, 2007), app. denied (Tenn. Oct. 22, 2007).

Reckless Homicide - State v. Watkins, 362 SW2d 530, 558 (Tenn. 2011).

TPI 23.01 - POSSESSION OF CONTRABAND (CONTROLLED SUBSTANCE) IN A PENAL INSTITUTION

Lessers include:

Simple Possession - State v. Steven Bryan Maxwell, No. E1999-01363-CCA-R3-CD, (Tenn. Crim. App. Mar. 22, 2000).

POSSESSION OF CONTRABAND (A WEAPON) IN A PENAL INSTITUTION

Lessers do not include:

Possession of a Prohibited Weapon - State v. James Anthony Hill, No. M2003-00516-CCA-R3-CD, (Tenn. Crim. App. Mar. 9, 2004), app. denied (Tenn. Sept. 7, 2004).

TPI 27.01 - ESCAPE FROM FELONY

Lessers do not include:

Escape from

Misdemeanor – Anthony E. Brasfield v. State, No.W2001-00169-CCA- R3-PC, (Tenn. Crim. App. July 19, 2001) (holding that misdemeanor escape is not a lesser under part (a) of the Burns test because it involves escape while being held for a misdemeanor rather than a felony and that it is not a lesser under part (b) because not all misdemeanors pose a less serious risk of harm than all felonies), app. denied (Tenn. Dec. 10, 2001).

TPI 27.04 - RESISTING ARREST

Lessers do not include:

Attempted Resisting Arrest - State v. William Harlon Adams, No.M2003-02952- CCA-R3-CD, slip. op at 13 (Tenn. Crim. App. June 8, 2005) (concluding there cannot “be an attempt to resist arrest where the crime itself is defined as an attempt to do an act or accomplish a result”), app. denied (Tenn. Dec. 5, 2005).

TPI 27.05(a) - EVADING ARREST (misdemeanor)

Lessers do not include:

Resisting arrest - State v. Brandon D. Thomas, No. M2008-01395-CCA-R3-CD, (Tenn. Crim. App. March 4, 2009).

TPI 27.05(b) CLASS D EVADING ARREST IN AUTOMOBILE

Lessers include:

Class E Felony Evading Arrest in Automobile - State v. Gregory Dunnorm, No. E2001-00566-CCA-R3-CD, (Tenn. Crim. App. June 12, 2002); State v. Kerry L. Dowell, No. M2002-00630-CCA-R3-CD, (Tenn. Crim. App. June 27, 2003), app. denied (Tenn. Nov. 24, 2003).

Reckless Driving - State v. James McClennon, No. M2002-00153-CCA-R3-CD, (Tenn. Crim. App. June 24, 2003) (applying the Burns test, parts (a) and (b)).

Lessers do not include:

Attempted Evading Arrest in Automobile - State v. Frank Johnson, No. W2000-00386-CCA-R3-CD, (Tenn. Crim. App. June 26, 2001) (holding that evading arrest already includes the “attempt[] to elude,” and so cannot be a lesser offense of E felony evading arrest), app. denied (Tenn. Oct. 22, 2001).

Misdemeanor Evading Arrest - State v. Tony Eric Pickett, Jr., No. E2012-01383-CCA-R3-CD, (Tenn. Crim. App. September 27, 2013) “This court has previously held that misdemeanor evading arrest is not a lesser included offense of Class D felony evading arrest under Burns. See State v. Gregory Dunnorm, No. E2001-00566-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 501, 2002 WL 1298770, at*11 (Tenn. Crim. App. at Knoxville, June 12, 2002). Specifically regarding part (b) of the Burns test, this court has concluded that the offenses require the same mental state and that misdemeanor felony arrest does not present a less serious harm or risk of harm than the felony offense. Id. This court additionally concluded that the statutes address different concerns because misdemeanor evading arrest may be committed on public or private property and felony evading arrest must be committed on a public roadway. Id. We conclude that the same analysis applies when considering whether misdemeanor evading arrest is a lesser-included offense of Class E felony evading arrest.”

[Dis]Obedience to Police Officers - State v. Joe David Sloan, No. W2000-02861-CCA-R3-CD, (Tenn. Crim. App. Jan. 4, 2002) (holding that disobedience to police officers, requiring failure to comply with “any lawful order or direction,” is not a lesser included offense of Class E felony evading arrest, which requires failure to comply with a specific signal to stop).

TPI 27.07 - PERMITTING OR FACILITATING ESCAPE

Lessers do not include:

Accessory After the Fact, Escape (of the person whom the defendant was charged with permitting to escape), Criminal Responsibility for the Escape of Another and Facilitation of Escape - State v. Christine D. McClain, No. M2001-00020-CCA-R3-CD, (Tenn. Crim. App. June 7, 2002), app. denied (Tenn. Nov. 18, 2002) (DESIGNATED NOT FOR CITATION).

TPI 28.02 - AGGRAVATED PERJURY

Lessers include:

Perjury - State v. Evangeline Combs & Joseph D. Combs, Nos. E2000-02801-CCA-R3-CD, E2000-2800-CCA-R3-CD, (Tenn. Crim. App. Sept. 25, 2002), app. denied (Tenn. Jan. 27, 2003).

TPI 29.14(b) - ABUSE OF AN ADULT

Lessers include:

Knowing or Reckless Assault - State v. Stephen Rene Morris, No. M2013-01265-CCA-R3-CD, Tenn. Crim. App. Nov. 12, 2014).

Lessers do not include:

Intentional Assault - State v. Stephen Rene Morris, No. M2013-01265-CCA-R3-CD, Tenn. Crim. App. Nov. 12, 2014).

TPI 31.01 - MANUFACTURE OF A CONTROLLED SUBSTANCE

Lessers include:

Simple Possession - State v. Blair, 145 S.W.3d 633 (Tenn. Crim. App. 2004)..

Lessers do not include:

Possession of Drug Paraphernalia - State v. Bobby Blair, No. M2002-01610-CCA-R3-CD, (Tenn. Crim. App. Feb. 13, 2004), app. denied (Tenn. June 21, 2004).

SALE OR DELIVERY OF A CONTROLLED SUBSTANCE

Lessers include:

Simple Possession - State v. Benjamin Patterson and Charles P. Yokley, No. M2009-01516-CCA-R3-CD, (Tenn. Crim. App. September 26, 2011); State v. Tambora N. Simmons, No. 03C01-9905-CR-00188, (Tenn. Crim. App. Feb. 16, 2000), app. denied (Tenn. Sept. 18, 2000).

Casual Exchange - State v. Benjamin Patterson and Charles P. Yokley, No. M2009-01516-CCA-R3-CD, (Tenn. Crim. App. September 26, 2011); State v. Edward P. Harris, No. M1998-00628-CCA-R3-CD, (Tenn. Crim. App. Jan. 13, 2000) (holding that casual exchange remains a lesser included offense of the sale of cocaine because any additional elements in casual exchange establish a less serious harm to the same public interest - Burns part (b)).

Attempted Simple Possession - State v. Michael E. Wallace, No. M1999-02187-CCA-R3- CD, (Tenn. Crim. App. Mar. 1, 2001).

Lessers do not include:

Sale of Counterfeit Controlled Substance – State v. Devon O’Neal Wiggins, No. W2009-02095-CCA-R3-CD (Tenn. Crim. App. March 30, 2011).

TPI 31.03 - FELONY DRUG PARAPHERNALIA

Lessers include:

Misdemeanor drug paraphernalia - State v. Anthony Laren Tweedy, II, No. W2011-

02373-CCA-R3-CD (Tenn. Crim. App. July 13, 2012) (“[W]e are unable to find any evidence of the Defendant's intent to deliver the paraphernalia. Thus, we must modify the conviction to misdemeanor possession of drug paraphernalia, a lesser included offense "that does not include the element of transfer." State v. Edward Poe, 2008 Tenn. Crim. App. LEXIS 219, 2008 WL 732147, at *6).

TPI 31.04 - POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO SELL OR DELIVER

Lessers include:

Simple Possession - State v. Jimmy Joe Rittenberry, No. E2000-02722-CCA-R3-CD, (Tenn. Crim. App. Nov. 20, 2001); accord State v. Timothy Tyrone Sanders, No. M2000-00603-CCA-R3- CD, (Tenn. Crim. App. Jan. 18, 2001).

Lessers do not include:

Solicitation - Kenneth Strickland v. State, No.M2004-02295-CCA-R3-CD, (Tenn. Crim. App. May 31, 2005) (concluding that solicitation is not a lesser included offense of possession of cocaine with intent to sell or deliver), app. denied (Tenn. Oct. 17, 2005).

Casual Exchange - State v. Nelson, 275 S.W.3d 851, 865 (Tenn. Crim. App. 2008).

TPI 31.15 - INITIATING THE MANUFACTURE OF METHAMPHETAMINE

Lessers do not include:

Manufacture of methamphetamine, promotion of methamphetamine, and unlawful drug paraphernalia - State v. Francisco I. Bustamonte and Scott Carroll, Jr., No. M2012-00102-CCA-R3-CD (Tenn. Crim. App. May 7, 2013) app. denied (Tenn. October 16, 2013).

TPI 34.04 AGGRAVATED SEXUAL EXPLOITATION OF A MINOR

Lessers include:

Sexual Exploitation of a Minor - State v. John Michael Whitlock, No. E2010-00602-CCA-R3-CD, (Tenn. Crim. App. June 6, 2011).

TPI 36.06(c) - EMPLOYMENT OF A FIREARM DURING A DANGEROUS OFFENSE

Lessers include:

Possession of a firearm during a dangerous offense -State v. Broderick Devonte Fayne, __S.W.3d __, 2014 Tenn. LEXIS 872, No. W2012-01488-SC-R11-CD, 2014 WL 5430049, at *26-28 (Tenn. Oct. 27, 2014).

TPI 38.01 - DRIVING UNDER THE INFLUENCE OF AN INTOXICANT

Lessers include:

Underage Driving While Impaired - 55-10-415(c).

Lessers do not include:

Reckless Driving - State v. Treva Dianne Green, No. E1999-02204-CCA-R3-CD, (Tenn. Crim. App. Dec. 14, 2000), app. denied (Tenn. May 21, 2001).

Adult Driving While Impaired - State v. Humphreys, 70 S.W.3d 752, 764 (Tenn. Crim. App. 2001).

TPI 38.14(a) - FELONY LEAVING THE SCENE OF AN ACCIDENT INVOLVING DEATH

Lessers include:

Misdemeanor Leaving the Scene of an Accident Involving Death or Personal Injury - State v. Jashua Shannon Sides, No. E2006-01356-CCA-R3-CD, Hamilton County (Tenn. Crim. App. Feb. 28, 2008).

TPI 38.15 - DRIVING ON REVOKED, SUSPENDED LICENSE

Lessers do not include:

Driving without a license - State v. Richard Cleophus Smith, No. E2013-00215-CCA-R3-CD, (Tenn. Crim. App. August 27, 2014) app. denied (Tenn. January 16, 2015).

LESSER INCLUDED STATUTE
Tenn. Code Ann. § 40-18-110(f)-(g)

(f) An offense is a lesser included offense if:

- (1) All of its statutory elements are included within the statutory elements of the offense charged;
- (2) The offense is facilitation of the offense charged or of an offense that otherwise meets the definition of lesser included offense in subdivision (f)(1);
- (3) The offense is an attempt to commit the offense charged or an offense that otherwise meets the definition of lesser included offense in subdivision (f)(1); or
- (4) The offense is solicitation to commit the offense charged or an offense that otherwise meets the definition of lesser included offense in subdivision (f)(1).

(g) (1) Second degree murder is a lesser included offense of first degree murder as defined in § 39-13-202.

(2) Voluntary manslaughter is a lesser included offense of premeditated first degree murder and second degree murder.

(3) Aggravated sexual battery is a lesser included offense of aggravated rape.

(4) Sexual battery and sexual battery by an authority figure are lesser included offenses of rape and aggravated rape.

STATE V. BURNS, 6 S.W.3D 453, 466-67 (TENN. 1999)

An offense is a lesser-included offense if:

- (a) all of its statutory elements are included within the statutory elements of the offense

charged; or

(b) it fails to meet the definition in part (a) only in the respect that it contains a statutory element or elements establishing

(1) a different mental state indicating a lesser kind of culpability; and/or

(2) a less serious harm or risk of harm to the same person, property or public interest; or

(c) it consists of

(1) facilitation of the offense charged or of an offense that otherwise meets the definition of lesser-included offenses in part (a) or (b); or

(2) an attempt to commit the offense charged or of an offense that otherwise meets the definition of lesser-included offenses in part (a) or (b); or

(3) solicitation to commit the offense charged or of an offense that otherwise meets the definition of lesser-included offenses in part (a) or (b).