

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

Updated by the Committee thru March 10, 2020

**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.

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, [2012 WL 4340693](#) (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, [2001 WL 1077965](#) (Tenn. Crim. App. September 14, 2001), perm. app. denied (Tenn. Feb. 19, 2002); accord State v. Timothy Wayne Holland, No. M2001-03129-CCA-R3-CD, [2002 WL 31007428](#) (Tenn. Crim. App. September 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, [2012 WL 5544611](#) (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, [2011 WL 1197595](#) (Tenn. Crim. App. March 31, 2011), perm. app. denied (Tenn. May 25, 2011)

**ATTEMPTED FIRST DEGREE MURDER** [*without serious bodily injury to the victim*] [See 4.01(a) below for Attempted First Degree Murder Where the Victim Suffers Serious Bodily Injury]

**Lessers include:**

**Solicitation of First Degree Murder** - Orlando Crenshaw v. State, No. M2004-00045-CCA-R3-CD, [2004 WL 2984856](#) (Tenn. Crim. App. Dec. 16, 2004) (stating that solicitation of first degree murder is a lesser included offense of attempted first degree murder), perm. 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, [2002 WL 1482742](#) (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, [2003 WL 27376007](#) (Tenn. Crim. App. Sept. 25, 2003).

**Attempted Voluntary Manslaughter** - State v. Tony Price, No. W2002-01376-CCA-R3-CD, [2003 WL 27376007](#), Shelby County (Tenn. Crim. App. Sept. 25, 2003).

**Misdemeanor Reckless Endangerment** - State v. Rush, 50 S.W.3d 424 (Tenn. 2001) holds that this offense 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, [2004 WL 2984856](#) (Tenn. Crim. App. Dec. 16, 2004), perm. 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, [2003 WL 22398460](#) (Tenn. Crim. App. Oct. 21, 2003) (reversing defendant's conviction because attempted reckless homicide is not a crime in Tennessee), perm. app. denied (Tenn. Mar. 22, 2004); see also State v. Kenneth Anthony Henderson, No. M1999-00547-CCA-R3-CD, [2002 WL 537042](#), 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, [2002 WL 537042](#) (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, [2002 WL 517138](#) (Tenn. Crim. App. Apr. 5, 2002) (noting that one "cannot intend to perform an unintentional act"), perm. 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, [2006 WL 618299](#) (Tenn. Crim. App., Mar. 13, 2006), perm. app. denied (Tenn. Aug. 21, 2006); State v. Korey Bradley, No. W2009-02024-CCA-R3-CD, [2011 WL 3689032](#) (Tenn. Crim. App. Aug. 22, 2011), perm. app. denied (Tenn. Jan. 11, 2012).

### **T.P.I. 4.01(a) – CRIMINAL ATTEMPT, TO WIT: FIRST DEGREE MURDER WHERE THE VICTIM SUFFERS SERIOUS BODILY INJURY [See 4.01 above for Attempted Murder without Serious Bodily Injury]**

#### **Lessers include:**

**Solicitation of First Degree Murder** - Orlando Crenshaw v. State, No. M2004-00045-CCA-R3-CD, [2004 WL 2984856](#) (Tenn. Crim. App. Dec. 16, 2004) (stating that solicitation of first degree murder is a lesser included offense of attempted first degree murder), perm. 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, [2002 WL 1482742](#) (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, [2003 WL 27376007](#) (Tenn. Crim. App. Sept. 25, 2003).

**Aggravated Assault (by serious bodily injury) and Assault (bodily injury) (Class A misdemeanor only)** - It is the opinion of the Committee that as serious bodily injury is an element of this offense, the holding in Demonbreun v. Bell, 226 S.W.3d 321, 324 (Tenn. 2007) that these offenses are not lesser included offenses of Criminal Attempt: Murder First Degree does not apply.

**Facilitation of Aggravated Assault (serious bodily injury)** – It is the opinion of the Committee that as serious bodily injury is an element of this offense, the holding in Orlando Crenshaw v. State, No. M2004-00045-CCA-R3-CD, [2004 WL 2984856](#) (Tenn. Crim. App. Dec. 16, 2004), perm. app. denied (Tenn. May 2, 2005), that this offense is not a lesser included offense of Criminal Attempt: Murder First Degree does not apply.

**Reckless Aggravated Assault** – It is the opinion of the Committee that as serious bodily injury is an element of this offense, the holding in State v. Rush, 50 S.W.3d 424, 429-31 (Tenn. 2001), that these offenses are not lesser included offenses of Criminal Attempt: Murder First Degree does not apply.

**Attempted Voluntary Manslaughter** - State v. Tony Price, No. W2002-01376-CCA-R3-CD, [2003 WL 27376007](#), Shelby County (Tenn. Crim. App. Sept. 25, 2003).

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

**Lessers do not include:**

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

**Assault (Class B misdemeanor only)** – Demonbreun v. Bell, 226 S.W.3d 321, 324 (Tenn. 2007).

**Attempted Reckless Homicide** - State v. Vernon Lamar Bryant, No. E2002-01234-CCA-R3-CD, [2003 WL 22398460](#) (Tenn. Crim. App. Oct. 21, 2003) (reversing defendant’s conviction because attempted reckless homicide is not a crime in Tennessee), perm. app. denied (Tenn. Mar. 22, 2004); see also State v. Kenneth Anthony Henderson, No. M1999-00547-CCA-R3-CD, [2002 WL 537042](#), Davidson County (Tenn. Crim. App. Apr. 11, 2002).

**Attempted Criminally Negligent Homicide** - State v. Kenneth Anthony Henderson, No. M1999-00547-CCA-R3-CD, [2002 WL 537042](#) (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, [2002 WL 517138](#) (Tenn. Crim. App. Apr. 5, 2002) (noting that one “cannot intend to perform an unintentional act”), perm. app. denied (Tenn. Nov. 4, 2002).

### **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. Leroy Myers, Jr., 581 S.W.3d 173 (Tenn 2019). Although lesser in felony grade, “reckless aggravated assault cannot be a lesser-included offense of aggravated assault based on knowingly...causing another to reasonably fear imminent bodily injury because... reckless aggravated assault requires an element that is not found in the charged offense – bodily injury” citing State v. Goodwin, 143 S.W.3d 771, 776-77 (Tenn. 2004).

**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 S.W.2d 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.

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

**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).

**TPI 6.03 - RECKLESS ENDANGERMENT w/ DEADLY WEAPON**

**Lessers include:**

**Misdemeanor Reckless Endangerment** – State v. William George Soller, No. E2008-02420-CCA-R3-CD, [2010 WL 2301748](#) (Tenn. Crim. App. June 9, 2010) (DESIGNATED NOT FOR CITATION), perm. app. denied (Tenn. Jan. 13, 2011).

**Lessers do not include:**

**Reckless driving** - State v. Lawrence D. Ralph, No. M2013-01100-CCA-R3-CD, [2013 WL 6835156](#) (Tenn. Crim. App. December 23, 2013) perm. 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, No. M2013-00938-CCA-R3-CD, [2014 WL 4101210](#) (Tenn. Crim. App. August 20, 2014).

**Felony and Misdemeanor Reckless Endangerment** – State v. William George Soller, No. E2008-02420-CCA-R3-CD, [2010 WL 2301748](#) (Tenn. Crim. App. June 9, 2010) (DESIGNATED NOT FOR CITATION), perm. app. denied (Tenn. Jan. 13, 2011).

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

**TPI 6.08 and 6.08(a) – DOMESTIC ASSAULT**

**Lessers include:**

**Assault** (A misd.) - Either through bodily injury or fear of bodily injury, depending on the language of the Domestic Assault indictment. In the opinion of the committee, as Domestic Assault can carry up to two years probation, simple assault is a lesser included offense of domestic assault.

**Misdemeanor Domestic Assault by Extremely Offensive or Provocative Physical Contact** (B misd.) - ONLY IF BODILY INJURY IS ALLEGED IN THE INDICTMENT State v. Lloyd Arlan Jones, No. M2015-00657-CCA-R3-CD, [2016 WL 158460](#) (Tenn. Crim. App. Jan. 14, 2016) perm. app. denied (Tenn. Mar. 30, 2016), assuming as a matter of course that the State v. Smiley, 38 S.W.3d 521, 524 (Tenn. 2001) test applies to domestic assaults the same way it does to assaults.

**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).

**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).

**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, [2003 WL 354510](#) (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)), perm. app. denied (Tenn. Dec. 15, 2003); accord State v. Lia Bonds, No. W2006-01943-CCA-R3-CD, [2007 WL 3254711](#), (Tenn. Crim. App. Nov. 2, 2007) (holding that under Manning, misdemeanor reckless endangerment and assault are lesser included offenses of second degree murder), perm. app. denied (Tenn. April 14, 2008). But see State v. John C. Walker, III, No. M2003-01732-CCA-R3-CD, [2004 WL 1947813](#) (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, [2005 WL 1798758](#) (Tenn. Crim. App. July 28, 2005), perm. 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, [2014 WL 1669965](#) (Tenn. Crim. App. April 25, 2014) perm. 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, [[2005 WL 1798758](#)] (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, [2012 WL 2308094](#) (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)

**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).

**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).



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

**Lessers do not include:**

**Vehicular Homicide** - Vincent Love Williams v. Henry Steward, Warden, No. W2011-01954-CCA-R3-HC, [2012 WL 2308094](#), (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).

**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).

**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, [2003 WL 354510](#) (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)), perm. app. denied (Tenn. Dec. 15, 2003); accord State v. Lia Bonds, No. W2006-019430CCA-R3-CD, [2007 WL 3254711](#), (Tenn. Crim. App. Nov. 2, 2007) (holding that under Manning, misdemeanor reckless endangerment and assault are lesser included offenses of second degree murder), perm. app. denied (Tenn. April 14, 2008). But see State v. John C. Walker, III, No. M2003-01732-CCA-R3-CD, [2004 WL 1947813](#) (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, [2005 WL 1798758](#) (Tenn. Crim. App. July 28, 2005), perm. 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, [2014 WL 1669965](#) (Tenn. Crim. App. April 25, 2014) perm. 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, [[2005 WL 1798758](#)] (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, No. E2011-00496-CCA-R3-CD, [2012 WL 3079238](#) (Tenn. Crim. App. July 27, 2012), perm. app. denied (Tenn. January 14, 2013).

**TPI 7.07 - CRIMINALLY NEGLIGENT HOMICIDE**

**Lessers include:**

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

**Lessers do not include:**

**Felony Reckless Endangerment and Misdemeanor Reckless Endangerment** - State v. Michael Ashley, No. W2004-01319-CCA-MR3-CD, [2006 WL 889567](#) (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).

**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, [2005 WL 3199275](#) (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”), perm. 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, [2002 WL 1987963](#) (Tenn. Crim. App. Aug. 28, 2002), perm. app. denied (Tenn. Dec. 16, 2002).

**Kidnapping** - State v. Gary Lee Miller, No. M1998-00788-CCA-R3-CD, [2000 WL 246452](#) (Tenn. Crim. App. Nov. 6, 2000), (holding it is a Burns part b lesser), perm. app. denied (Tenn. Nov. 6, 2000).

**False Imprisonment** - State v. Evangeline Combs & Joseph D. Combs, Nos. E2000-02801-CCA-R3-CD, E2000-2800-CCA-R3-CD, [2002 WL 31118329](#) (Tenn. Crim. App. Sept. 25, 2002), perm. 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, [2002 WL 31118329](#) (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), perm. 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, [2001 WL 124527](#) (Tenn. Crim. App. Feb. 7, 2001), perm. app. denied (Tenn. June 18, 2001); State v. David Michael Gamble, No. 03C01-9812-CR-0042, [2000 WL 45718](#) (Tenn. Crim. App. Jan. 21, 2000) (renumbered E1998-00014-CCA-R3-CD); State v. James McClennon, No. M2002-00153-CCA-R3-CD, [2003 WL 21458671](#) (Tenn. Crim. App. June 24, 2003), 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, [2012 WL 3201985](#) (Tenn. Crim. App. August 8, 2012) (holding it is a Burns part b lesser) perm. app. denied (Tenn. January 14, 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) aff'd by Moore v State, 485 S.W.3d 411, 424 (Tenn. 2016) without deciding the lesser

included issue; State v. Haskel D. Finch, No. M2001-00340-CCA-R3-CD, [2002 WL 1204931](#) (Tenn. Crim. App. June 5, 2002), perm. app. denied (Tenn. Oct. 28, 2002).

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

**Lessers may or may not include:**

**Class B Misdemeanor Assault** - In State v. Prentis Lee, No. W2015-01538-CCA-R3-CD, [2016 WL 6915582](#) (Tenn. Crim. App. Nov. 23, 2016), at \*25, perm. app. denied (Tenn. April 13, 2017), the court held as follows:

[t]his court has recognized that assault through extremely offensive or provocative contact is a lesser-included offense of rape by force or coercion. See State v. David Gene Hooper, No. E2004-01053-CCA-R3-CD, [2005 WL 1981789](#), at \*13 (Tenn. Crim. App. Aug. 16, 2005); see also State v. Michael Elvis Green, No. W2001-00455-CCA-R3-CD, [2002 WL 1482680](#), at \*6 (Tenn. Crim. App. Mar. 8, 2002) (stating that “it is arguable that Class B misdemeanor assault is a lesser-included offense of rape” under part (b) of Burns). While the Defendant was not convicted of rape by force or coercion, this court also has recognized that assault through extremely offensive or provocative contact is a lesser-included offense of rape without consent. See State v. Haskel D. Finch, No. M2001-00340-CCA-R3-CD, [2002 WL 1204931](#), at \*14-15 (Tenn. Crim. App. June 5, 2002).

**Lessers do not include:**

**Aggravated Assault** - Robert James Yoreck, III, No. M2001-02448-CCA-R3, [2003 WL 141051](#) (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, [2004 WL 1686610](#) (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).

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

**Lessers may or may not include:**

**Class B Misdemeanor Assault** - In State v. Prentis Lee, No. W2015-01538-CCA-R3-CD, [2016 WL 6915582](#) (Tenn. Crim. App. Nov. 23, 2016), at \*25, perm. app. denied (Tenn. April 13, 2017), the court held as follows:

[t]his court has recognized that assault through extremely offensive or provocative contact is a lesser-included offense of rape by force or coercion. See State v. David Gene Hooper, No. E2004-01053-CCA-R3-CD, [2005 WL 1981789](#), at \*13 (Tenn. Crim. App. Aug. 16, 2005); see also State v. Michael Elvis Green, No. W2001-00455-CCA-R3-CD,

[2002 WL 1482680](#), at \*6 (Tenn. Crim. App. Mar. 8, 2002) (stating that “it is arguable that Class B misdemeanor assault is a lesser-included offense of rape” under part (b) of *Burns*). While the Defendant was not convicted of rape by force or coercion, this court also has recognized that assault through extremely offensive or provocative contact is a lesser-included offense of rape without consent. See *State v. Haskel D. Finch*, No. M2001-00340-CCA-R3-CD, [2002 WL 1204931](#), at \*14-15 (Tenn. Crim. App. June 5, 2002).

**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).

**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, [2004 WL 1686610](#) (Tenn. Crim. App. July 28, 2004).

**TPI 10.12 – RAPE OF A CHILD**

**Lessers include:**

**Aggravated Sexual Battery (Child Under Age 13)** – *State v. Howard*, 504 S.W.3d 260 (Tenn.2016), and 40-18-110(g).

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

**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. See also *State v. Swindle*, 30 S.W.3d 289, 292-93 (Tenn. 2000)).

**Lessers do not include:**

**Rape** - *State v. Evangeline Combs & Joseph D. Combs*, Nos. E2000-02801-CCA-R3-CD, E2000-2800-CCA-R3-CD, [2002 WL 31118329](#) (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), perm. 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, [2008 WL 5206434](#) (Tenn. Crim. App. December 15, 2008) perm. app. denied (Tenn. May 4, 2009).

## **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, [2000 WL 45718](#) (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, [2003 WL 21458671](#) (Tenn. Crim. App. June 24, 2003) (relying on Gamble and pre-Burns cases); compare State v. William Belchia, No. W2004-01168-CCA-R3-CD, [2005 WL 729166](#) (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), perm. 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, [2005 WL 729166](#) (Tenn. Crim. App. Mar. 30, 2005), perm. app. denied (Tenn. Feb. 21, 2006).

## **TPI 11.35- 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, [2012 WL 5416595](#) (Tenn. Crim. App. November 6, 2012); State v. Ronald Bowman, No. W2003-02389-CCA-R3-CD, [2005 WL 94365](#) (Tenn. Crim. App. Jan. 13, 2005), perm. app. denied (Tenn. May 23, 2005).

**Fraudulent Use of a Credit Card** – Tehren Wilson v. State, No. W2016-00770-CCA-R3-PC, [2017 WL 1041593](#) (Tenn. Crim. App. Mar. 17, 2017) perm. app. denied (Tenn. Jul. 19, 2017).

## **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, [2004 WL 2827004](#) (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), perm. 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, [2005 WL 711898](#) (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”), perm. app. denied (Tenn. Oct. 17, 2005).

**Aggravated Criminal Trespass of Habitation, Aggravated Criminal Trespass and Criminal Trespass** - State v. Pope, 427 S.W.3d 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, 476 S.W.3d 382, 401 (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, [2002 WL 31259488](#) (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, [2015 WL 3540554](#) (Tenn. Crim. App. June 5, 2015), perm. app. denied (October 15, 2015).

**Knowing or Reckless Assault** - State v. Russell Maze, No. M2000-02249-CCA-R3-CD, [2002 WL 1885118](#) (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, [2015 WL 3540554](#) (Tenn. Crim. App. June 5, 2015), perm. app. 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”), cited in State v. Jessica Lauren Smith, W2019-00853-CCA-R3-CD, 2020 WL 507648 (Tenn. Crim. App., Jackson, 1/31/20) (reducing child neglect conviction to attempted child neglect, when there was an intent to neglect but no proof of actual harm).

**Lessers do not include:**

**Aggravated Assault by Failure to Protect Child** - State v. Misty Brunelle, No. E2006-00467-CCA-R3-CD, [2007 WL 2026616](#) (Tenn. Crim. App. July 13, 2007), perm. app. denied (Tenn. Oct. 22, 2007).

**Reckless Homicide** - State v. Watkins, 362 S.W.2d 530, 558 (Tenn. 2011).

**TPI 21.02 – CHILD ABUSE OR NEGLECT**

**Lessers include:**

**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”), cited in State v. Jessica Lauren Smith, W2019-00853-CCA-R3-CD, 2020 WL 507648 (Tenn. Crim. App., Jackson, 1/31/20) (reducing child neglect conviction to attempted child neglect, when there was an intent to neglect but no proof of actual harm).

**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, [2000 WL 295603](#) (Tenn. Crim. App. Mar. 22, 2000).

**TPI 23.01 – POSSESSION OF CONTRABAND (WEAPON) IN PENAL INSTITUTION**

**Lessers do not include:**

**Possession of a Prohibited Weapon** - State v. James Anthony Hill, No. M2003-00516-CCA-R3-CD, [2004 WL 431481](#) (Tenn. Crim. App. Mar. 9, 2004), perm. 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, [2001 WL 846066](#) (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), perm. app. denied (Tenn. Dec. 10, 2001).

**TPI 27.04 - RESISTING ARREST**

**Lessers do not include:**

**Attempted Resisting Arrest** - State v. William Harlon Adams, 238 S.W.3d 313, 328 (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”), perm. 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, [2009 WL 537544](#) (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, [2002 WL 1298770](#) (Tenn. Crim. App. June 12, 2002); State v. Kerry L. Dowell, No. M2002-00630-CCA-R3-CD, (Tenn. Crim. App. June 27, 2003), perm. 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), perm. app. denied (Tenn. Oct. 22, 2001).

**Misdemeanor Evading Arrest** - State v. Tony Eric Pickett, Jr., No. E2012-01383-CCA-R3-CD, [2013 WL 5436818](#) (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, [2002 WL 1558586](#) (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, [2002 WL 1270198](#) (Tenn. Crim. App. June 7, 2002), perm. 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, [2002 WL 31118329](#) (Tenn. Crim. App. Sept. 25, 2002), perm. 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, [2014 WL 5840221](#) (Tenn. Crim. App. Nov. 12, 2014).

**Lessers do not include:**

**Intentional Assault** - State v. Stephen Rene Morris, No. M2013-01265-CCA-R3-CD, [2014 WL 5840221](#) (Tenn. Crim. App. Nov. 12, 2014).

**TPI 29.15 - AGGRAVATED NEGLECT OF [AN ELDERLY] [A VULNERABLE] ADULT**

**Lessers include:**

Either **Neglect of [an elderly] [a vulnerable] adult [due to abandonment or confinement alone without injury]** or **Neglect of [an elderly] [a vulnerable] adult [other than due to abandonment or confinement alone without injury]**, depending on the indictment and the facts of the case. (This should be considered a lesser included offense, in the opinion of the Committee, even though there is currently no case law available.)

**TPI 29.16 - AGGRAVATED NEGLECT OF [AN ELDERLY] [A VULNERABLE] ADULT**

**Lessers include:**

**Neglect of [an elderly] [a vulnerable] adult [due to abandonment or confinement alone without injury]**. (This should be considered a lesser included offense, in the opinion of the Committee, even though there is currently no case law available.)

**TPI 31.01 - MANUFACTURE OF A CONTROLLED SUBSTANCE**

**Lessers include:**

**Simple Possession** - State v. Bobby Blair, 145 S.W.3d 633 (Tenn. Crim. App. 2004) perm. app. denied (Tenn. June 21, 2004).

**Lessers do not include:**

**Possession of Drug Paraphernalia** - State v. Bobby Blair, 145 S.W.3d 633 (Tenn. Crim. App. 2004), perm. app. denied (Tenn. June 21, 2004).

**TPI 31.01, 31.17 and 31.18 - 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, [2011 WL 4436630](#) (Tenn. Crim. App. September 26, 2011); State v. Tambora N. Simmons, No. 03C01-9905-CR-00188, [2000 WL 190230](#) (Tenn. Crim. App. Feb. 16, 2000), perm. app. denied (Tenn. Sept. 18, 2000).

**Casual Exchange** – State v. Michael Lee Hogan, No. M2017-01115-CCA-R3-CD, [2018 WL 3493160](#) (Tenn. Crim. App. Jul. 20, 2018), perm. app. denied (Tenn. Nov. 14, 2019) (holding that although casual exchange was a lesser included offense of sale of a controlled substance, the facts of that case did not warrant a lesser included instruction); State v. Benjamin Patterson and Charles P. Yokley, No. M2009-01516-CCA-R3-CD, [2011 WL 4436630](#) (Tenn. Crim. App. September 26, 2011); State v. Edward P. Harris, No. 01C01-9810-CR-00392, [2000 WL 19536](#) (Tenn. Crim. App. Jan. 13, 2000) (renumbered M1998-00628-CCA-R3-CD) (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, [2001 WL 208511](#) (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, [2011 WL 1223410](#) (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, [2012 WL 2875506](#) (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, [2001 WL 1464556](#) (Tenn. Crim. App. Nov. 20, 2001); accord State v. Timothy Tyrone Sanders, No. M2000-00603-CCA-R3- CD, [2001 WL 43558](#) (Tenn. Crim. App. Jan. 18, 2001).

**Lessers do not include:**

**Solicitation** - Kenneth Strickland v. State, No.M2004-02295-CCA-R3-PC, [2005 WL 1303127](#) (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), perm. 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, [2013 WL 1907870](#) (Tenn. Crim. App. May 7, 2013) perm. 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, [2011 WL 2184966](#) (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, 451 S.W.3d 362 (Tenn. 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, [2000 WL 1839130](#) (Tenn. Crim. App. Dec. 14, 2000), perm. 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, [2008 WL 538983](#) (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, [2014 WL 4215882](#) (Tenn. Crim. App. August 27, 2014) perm. 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, aggravated rape of a child, and rape of a child.

(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).