

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

**STATE OF TENNESSEE v. CLINT T. MELTON**

**Direct Appeal from the Criminal Court for Knox County  
No. 67737**

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**No. E1999-02090-CCA-R3-CD  
OCTOBER 19, 2000**

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James Curwood Witt, Jr., J., concurring.

I concur in Judge Hayes's excellent opinion, and I agree that the jury charge on the lesser-included offense of theft is not justified in this case. I write separately, however, to express my view that the first prong of the Burns justification analysis test, rather than the second prong, is dispositive of the issue. See State v. Burns, 6 S.W.3d 453, 469 (Tenn. 1999).

The first prong of the justification test requires the trial court to determine whether any evidence exists that reasonable minds could accept as to the application of the lesser-included offense. I conclude that this prong means that a charge on the lesser-included offense is not justified when there is no evidence that the defendant committed the lesser offense as opposed to the greater, as is the case before us. See State v. Robbie James, No. M2000-00304-CCA-RM-CD, slip op. at 5 (Tenn. Crim. App., Nashville, Mar. 20, 2000) (Witt, J., concurring); State v. Terry T. Lewis, No. M1999-00876-CCA-MR3-CD, slip op. at 17-19 (Tenn. Crim. App., Nashville, Mar. 17, 2000).

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James Curwood Witt, Jr., Judge