IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
June 16, 1999 Session

STATE OF TENNESSEE v. KHANH V. LE

Appeal from the Criminal Court for Shelby County
No. 96-01118 W. Fred Axley, Judge

No. W1998-00637-CCA-R3-CD - Filed January 25, 2002
No. W2001-01615-CCA-RM-CD - Filed January 25, 2002

DAVID H. WELLES, J., concurring.

I concur with the majority opinion that this case must be reversed and remanded for a new trial due to the trial court's failure to instruct on lesser-included offenses. I write separately because I disagree with the statement in the majority opinion that "a failure to instruct a jury on lesser-included offenses will only be found harmless beyond a reasonable doubt under the circumstances presented" in State v. Williams, 977 S.W.2d 101, 106 (Tenn. 1998).

For those offenses which are lesser-included of others under part (a) of the Burns test,[1] proof of the greater offense will always provide proof of the lesser offense. See, e.g., State v. Bowles, 52 S.W.3d 69, 80 (Tenn. 2001) (noting that, "[i]n proving robbery, . . . the State also proved [the lesser-included offense of] theft, for all of the elements of theft are included within the elements of

[1] In State v. Burns, our supreme court set forth a three-part test for determining lesser-included offenses. Part (a) of the test provides that an offense is a lesser-included offense if "all of its statutory elements are included within the statutory elements of the offense charged." 6 S.W.3d 453, 466-67 (Tenn. 1999).

robbery.") Thus, under the reasoning of Bowles, it would be error to fail to charge such a lesser-included offense. Where proof of the additional element required for the greater offense is certain and undisputed, however, I would find any error in failing to give the lesser-included offense instruction harmless beyond a reasonable doubt.

For instance, the accused commits an aggravated assault with a gun. There is absolutely no question or dispute about the defendant's use of the gun in committing the assault. Clearly, assault is a lesser-included offense of aggravated assault, under part (a) of the Burns test. However, in order to convict the defendant of assault instead of aggravated assault, the jury in this hypothetical would have to ignore the fact that the gun was used. A reasonable jury would not do this, and therefore I believe that any error by the trial court in failing to give an instruction on assault would be harmless beyond a reasonable doubt.

In applying this standard of review, I find helpful the United States Supreme Court's opinion in Chapman v. California, 386 U.S. 18 (1967). In that case, the Supreme Court was called upon to determine whether a trial error violating an accused's federal constitutional rights could be harmless. Id. at 20. The Court concluded that such error could be harmless, and suggested that a reviewing court resolve the issue by determining "'whether there is a reasonable possibility that the [error] complained of might have contributed to the conviction.'" Id. at 24, quoting Fahy v. Connecticut, 375 U.S. 85, 86-7 (1963) (emphasis added). When the reviewing court can declare a belief that the error was harmless beyond a reasonable doubt, reversal is not required. Chapman, 386 U.S. at 24.

Where the evidence adduced at trial is such that there is no reasonable possibility that the jury would have convicted the defendant of the lesser-included offense, other than through its de facto power of nullification, then I believe any error in failing to give the instruction is harmless beyond a reasonable doubt. I do not interpret the decisions of our supreme court to restrict a harmless error analysis solely to the circumstances presented in Williams.

I concur in all other respects with the majority opinion.

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DAVID H. WELLES, JUDGE