

LESSER INCLUDED OFFENSES

As of February 28, 2008

**Joseph M. Tipton, Presiding Judge
Tennessee Court of Criminal Appeals**

**POST-BURNS DECISIONS OF THE TENNESSEE COURTS
AS TO LESSER INCLUDED OFFENSES FOR
INSTRUCTION PURPOSES**

The following are decisions of the Tennessee Supreme Court and Tennessee Court of Criminal Appeals, as of February 28, 2008, applying 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.**

**INDICTED
OFFENSE:**

CONSPIRACY [T.C.A. § 39-12-103, -107 (one felony class lower than the offense which is the object of the conspiracy unless the object offense is a violation of T.C.A. § 39-17-417(i) or (j) in which case the felony class is the same as the object offense class)]

Lesser Included Offenses include:

Facilitation [T.C.A. § 39-11-403(a) (one felony class lower than the underlying offense)]
State v. Roberto Vasques, No. M2004-00166-CCA-R3-CD, Davidson County (Tenn. Crim. App. Oct. 7, 2005) (holding that facilitation is a lesser included offense of conspiracy under part (c) of the Burns test), *aff'd*, 221 S.W.3d 514 (Tenn. 2007) (*affirming Court of Criminal Appeals' determining that failure to give lesser included offense instruction on facilitation was not plain error*).

**INDICTED
OFFENSE:**

AGGRAVATED ASSAULT [T.C.A. § 39-13-102(a)(1) (Class C felony)]

Lesser Included Offenses include:

- (a) **Reckless Aggravated Assault** [T.C.A. § 39-13-102(a)(2)-Class D felony]
State v. Michael P. Healy, No. W1999-01510-CCA-R3-CD, Shelby County (Tenn. Crim. App. June 26, 2001) (holding that reckless aggravated assault is a lesser included offense of aggravated assault because “the statute defining aggravated assault itself includes assault as an element, and reckless aggravated assault differs only in that a different mental state indicating a lesser kind of culpability, i.e. reckless

instead of intentionally or knowing, is required”);¹ accord State v. Brandon Patrick, No. 03C01-9905-CC-00201, Blount County (Tenn. Crim. App. Jan. 26, 2000) (holding that although reckless aggravated assault contains an additional element—that of bodily injury—and is therefore not a lesser included offense under part (a) of the Burns test, “under subsection (b), reckless aggravated assault, an assaultive offense against the person requiring a lesser culpability than that required of intentional or knowing aggravated assault, is a lesser included offense of intentional or knowing aggravated assault”).² But see State v. Goodwin, 143 S.W.3d 771, 776-77 (Tenn. 2004) (holding that reckless aggravated assault is not a lesser included offense of aggravated assault based on knowingly or recklessly causing another to reasonably fear imminent bodily injury because reckless aggravated assault requires an element that is not found in such offense—bodily injury).

(b) **Felony Reckless Endangerment** [T.C.A. § 39-13-103(a), (b)-Class E felony]

State v. Hatfield, 130 S.W.3d 40 (Tenn. 2004) (holding that felony reckless endangerment is a lesser included offense of aggravated assault committed by intentionally or knowingly causing bodily injury involving use or display of a deadly weapon, §§ 39-13-101(a)(1), -102(a)(1)(B)). But see State v. Moore, 77 S.W.3d 132, 135-36 (Tenn. 2002) (holding that felony reckless endangerment is not a lesser included offense of aggravated assault committed by intentionally or knowingly causing another reasonably to fear imminent bodily injury involving use or display of a deadly weapon, §§ 39-13-101(a)(2), -102(a)(1)(B)).

(c) **Simple Assault** [T.C.A. § 39-13-101(a)(1)-Class A misdemeanor]

State v. Michael P. Healy, No. W1999-01510-CCA-R3-CD, Shelby County (Tenn. Crim. App. June 26, 2001) (holding generally that simple assault is a lesser included offense of intentional or knowing aggravated assault because “the statute defining aggravated assault itself includes assault as an element”); accord State v. Henry Marshall, Jr., No. W1999-01159-CCA-R3-CD, Madison County (Tenn. Crim. App. Jan. 26, 2001) (holding that intentionally or recklessly causing

¹In Michael P. Healy, the defendant was indicted for aggravated assault by causing fear involving the use or display of a deadly weapon.

²In Brandon Patrick, the defendant was indicted for aggravated assault by causing fear involving the use or display of a deadly weapon.

bodily injury to another is a lesser included offense of aggravated assault³ under the Burns test, part (a)).

- (d) **Assault by Causing Reasonable Fear of Bodily Injury** [T.C.A. § 39-13-101(a)(2)-Class A misdemeanor]

See State v. Brandon Patrick, No. 03C01-9905-CC-00201, Blount County (Tenn. Crim. App. Jan. 26, 2000) (stating without analysis that assault by causing reasonable fear of bodily injury is a lesser included offense of intentional and knowing aggravated assault); accord State v. Thomas Wayne Shields, No. W2000-01524-CCA-R3-CD, Henry County (Tenn. Crim. App. Jan. 4, 2002) (applying the Burns test, part (a), in holding assault to be a lesser included offense because it is an essential element of aggravated assault).⁴

- (e) **Misdemeanor Assault by Extremely Offensive or Provocative Physical Contact** [T.C.A. § 39-13-101(a)(3)-Class B misdemeanor]

State v. Smiley, 38 S.W.3d 521, 524 (Tenn. 2001) (applying Burns test, part (a)).⁵

Lesser Included Offenses do not include:

- (a) **Reckless Aggravated Assault** [T.C.A. § 39-13-102(a)(2)-Class D felony]

State v. Goodwin, 143 S.W.3d 771, 776-77 (Tenn. 2004) (holding that reckless aggravated assault is not a lesser included offense of aggravated assault based on knowingly or recklessly causing another to reasonably fear imminent bodily injury because reckless aggravated assault requires an element that is not found in such offense—bodily injury).

³In Henry Marshall, Jr., the defendant was indicted for aggravated assault by causing bodily injury to the victim with a deadly weapon..

⁴Thomas Wayne Shields determines that assault is a lesser included offense of aggravated assault generally because it is an element of aggravated assault. It then determines that the trial court must have instructed (no instructions in the record) on assault by intentionally or knowingly putting another in fear of imminent bodily injury. Despite the defendant's failure to include the jury instructions in the appellate record, the court assumed that the trial court instructed the jury on assault by intentionally or knowingly causing another to reasonably fear imminent bodily injury because (1) the record was devoid of evidence of bodily injury and (2) the defendant was convicted of a Class A misdemeanor, thereby eliminating Class B misdemeanor assault as a possibility

⁵In Smiley, the defendant was charged with aggravated assault by serious bodily injury.

(b) **Felony Reckless Endangerment** [T.C.A. § 39-13-103(a), (b)-Class E felony]

State v. Moore, 77 S.W.3d 132, 135-36 (Tenn. 2002) (holding that felony reckless endangerment is not a lesser included offense of aggravated assault committed by intentionally or knowingly causing another reasonably to fear imminent bodily injury involving use or display of a deadly weapon, §§ 39-13-101(a)(2), -102(a)(1)(B)). But see State v. Hatfield, 130 S.W.3d 40 (Tenn. 2004) (holding that felony reckless endangerment is a lesser included offense of aggravated assault committed by intentionally or knowingly causing bodily injury involving use or display of a deadly weapon, §§ 39-13-101(a)(1), -102(a)(1)(B)).

(c) **Reckless Driving** [T.C.A. § 55-10-205-Class B misdemeanor]

State v. Andrew Boone, No. W2005-00158-CCA-R3-CD, Shelby County (Tenn. Crim. App. Dec. 27, 2005) (holding, in a case where the indicted offense was aggravated assault but the conviction offense was reckless aggravated assault, that reckless driving is not a lesser included offense of reckless aggravated assault under the Burns test because “the elements of reckless aggravated assault are separate from the elements of reckless driving”).

**INDICTED
OFFENSE:**

FELONY RECKLESS ENDANGERMENT [T.C.A. § 39-13-103(a)-
(b)-Class E felony]

Lesser Included Offenses include:

Misdemeanor Reckless Endangerment [T.C.A. § 39-13-103-Class A misdemeanor]

State v. Jashua Shannon Sides, No. E2006-01356-CCA-R3-CD, Hamilton County (Tenn. Crim. App. Feb. 28, 2008) (citing State v. Brandon R. Patrick, No. 03C01-9712-CC-00548, Blount County (Tenn. Crim. App. Feb. 19, 1999) and State v. Leslie R. Holt, No. 01C01-9804-CR-00188, Wilson County (Tenn. Crim. App. Mar. 11, 1999), which are pre-Burns cases holding the misdemeanor to be a “lesser grade” offense of the felony).

Lesser Included Offenses do not include:

Reckless Driving [T.C.A. § 55-10-205-Class B misdemeanor]

State v. Kerry D. Hewson, No. M2004-02117-CCA-R3-CD, Williamson County (Tenn. Crim. App. Sept. 28, 2005) (holding that reckless driving is not a lesser included offense of felony reckless endangerment under Burns part (a))

or (b) because felony reckless endangerment does not require the use of a vehicle and does not entail a lesser degree of culpability or a lesser degree of risk).

**INDICTED
OFFENSE:**

VEHICULAR ASSAULT [T.C.A. § 39-13-106-Class D felony]

Lesser Included Offenses include:

Driving Under the Influence of an Intoxicant [T.C.A. § 55-10-401(a)-Class A misdemeanor]

State v. Thomas W. Cothran, No. M2005-00559-CCA-R3-CD, Hickman County (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) .

**INDICTED
OFFENSE:**

FIRST DEGREE MURDER [T.C.A. § 39-13-202]

Lesser Included Offenses include:

(a) **Facilitation of First Degree Murder** [T.C.A. §§ 39-11-403(a), 39-13-202-Class A felony]

State v. Dellinger, 79 S.W.3d 458, 496 (Tenn. 2002) (appendix) (affirming that facilitation is a lesser included offense virtually every time one is charged with criminal responsibility for another’s conduct).

(b) **Attempted First Degree Murder** [T.C.A. §§ 39-12-101, 39-13-202-Class A felony]

Applying Burns test, part (c).

(c) **Second Degree Murder** [T.C.A. § 39-13-210-Class A felony]

State v. Thomas Gatewood, No. M2001-01871-CCA-R3-CD, Davidson County (Tenn. Crim. App. June 5, 2002) (applying Ely to hold that second degree murder is a lesser included offense of first degree, premeditated murder), app. denied (Tenn. Oct. 28, 2002); see State v. Ely, 48 S.W.3d 710, 720-22 (Tenn. 2001) (applying Burns test, part (b) to hold that second degree murder is a lesser included offense of felony murder).

(d) **Facilitation of Attempted First Degree Murder** [T.C.A. §§ 39-11-403(a), 39-12-101, 39-13-202-Class B felony]

State v. Tony Price, No. W2002-01376-CCA-R3-CD, Shelby County (Tenn. Crim. App. Sept. 25, 2003) (observing that facilitation of any charged offense is a lesser included offense by definition under part (c)(1) of the Burns test and, therefore, facilitation of attempted first degree murder is a lesser included offense of attempted first degree murder); see also State v. Reginald Merriweather, Nos. W1999-02050-CCA-R3-CD, W2001-02206-CCA-RM-CD, Madison County (Tenn. Crim. App. Feb. 11, 2002).

- (e) **Attempted Second Degree Murder** [T.C.A. §§ 39-12-101, 39-13-210—Class B felony]

State v. Kenneth Anthony Henderson, No. M1999-00547-CCA-R3-CD, Davidson County (Tenn. Crim. App. Apr. 11, 2002).

- (f) **Facilitation of Attempted Second Degree Murder** [T.C.A. §§ 39-11-403, 39-12-101, 39-13-210—Class C felony]

State v. Ronald Haynes, No. M2000-00204-CCA-R3-CD, Davidson County (Tenn. Crim. App. June 1, 2001) (holding that facilitation of attempted second degree murder is a lesser included offense of attempted second degree murder).

- (g) **Voluntary Manslaughter** [T.C.A. § 39-13-211(a)—Class C felony]

State v. Sims, 45 S.W.3d 1, 21 (Tenn. 2001) (appendix) (applying Burns test, part (b)); State v. Dominy, 6 S.W.3d 472, 477 n.9 (Tenn. 1999) (noting that “voluntary manslaughter is a lesser included offense of first and second degree murder”); accord State v. Walter Wilson, No. W2001-01463-CCA-R3-CD, Shelby County (Tenn. Crim. App. Sept. 4, 2002) (applying the Burns test, part (b)), app. denied (Tenn. Jan. 27, 2003) [Note: Walter Wilson holds with regard to the justification step (the second prong of the Burns analysis), that when an offense is a lesser under part (b) of the statutory elements test, it does not fall within the general rule of State v. Allen, 69 S.W.3d 181, 188 (Tenn. 2002), that the instruction should be given. But see State v. Asata Lowe, No. E2000-01591-CCA-R3-CD, Blount County (Tenn. Crim. App. Sept. 16, 2002) (holding that the rule in Allen required the trial court to instruct on voluntary manslaughter), app. denied (Tenn. Feb. 3, 2003).]; see State v. Wilson, 92 S.W.3d 391 (Tenn. 2002). [Note: In Wilson, the supreme court held that the mens rea required for voluntary manslaughter is the same as that for first or second degree murder, and, therefore, the jury’s conviction on second degree murder when also charged on voluntary manslaughter does not indicate that the failure to instruct on reckless homicide or criminally negligent homicide was harmless beyond a reasonable doubt under the rationale of State v. Williams, 977 S.W.2d 101, 106 (Tenn. 1998).]

- (h) **Aggravated Assault** [T.C.A. § 39-13-102(a)(1)(A),-(a)(2)(A)–Class C or D felony]

State v. Paul Graham Manning, No. M2002-00547-CCA-R3-CD, DeKalb County (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 and noting that State v. John C. Walker, III, infra, relies only on attempted murder cases), app. filed (Tenn. Jan. 2, 2008). But see State v. John C. Walker, III, No. M2003-01732-CCA-R3-CD, Putnam County (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).

- (i) **Attempted Voluntary Manslaughter** [T.C.A. §§ 39-12-101, 39-13-211(a)–Class D felony]

State v. William Binkley, No. M2001-00404-CCA-R3-CD, Rutherford County (Tenn. Crim. App. Apr. 5, 2002) (applying the Burns test, part (b)), app. denied (Tenn. Nov. 4, 2002); accord State v. Kenneth Anthony Henderson, No. M1999-00547-CCA-R3-CD, Davidson County (Tenn. Crim. App. Apr. 11, 2002). [Note: Analyzing State v. Allen, 69 S.W.3d 181, 188 (Tenn. 2002), with regard to the justification portion of the Burns test, Henderson holds that although lesser included offenses under part (a) should generally always be charged, for lesser included offenses under part (b)--like those under part (c)--proof of the greater offense will not necessarily prove the lesser.]

- (j) **Reckless Homicide** [T.C.A. § 39-13-215–Class D felony]

State v. Thomas Gatewood, No. M2001-01871-CCA-R3-CD, Davidson County (Tenn. Crim. App. June 5, 2002) (applying Ely to hold that reckless homicide is a lesser included offense of first degree, premeditated murder), app. denied (Tenn. Oct. 28, 2002); accord State v. Walter Wilson, No. W2001-01463-CCA-R3-CD, Shelby County (Tenn. Crim. App. Sept. 4, 2002) (applying the Burns test, part (a)), app. denied (Tenn. Jan. 27, 2003) [Note: Walter Wilson holds with regard to the justification step (the second prong of the Burns analysis), that State v. Allen, 69 S.W.3d 181, 188 (Tenn. 2002), requires an instruction to be given when an offense is a lesser under part (a) of the statutory elements test.]; State v. Jerry W. Jordan, No. M1999-00813-CCA-R3-CD,

Davidson County (Tenn. Crim. App. Oct. 11, 2001) [Note: The majority opinion in Jerry W. Jordan declined to hold the erroneous failure to instruct on reckless homicide to be harmless error even though the jury convicted the defendant of second degree murder and was instructed on voluntary manslaughter. It concluded that the analysis in State v. Williams, 977 S.W.2d 101, 106 (Tenn. 1998), did not apply because voluntary manslaughter is outside of the traditional line of homicide culpability categories: intentional, knowing, reckless, and negligent.]; see State v. Ely, 48 S.W.3d 710, 720-22 (Tenn. 2001) (applying Burns test, part (b) to hold that reckless homicide is a lesser included offense of felony murder).

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- (k) **Criminally Negligent Homicide** [T.C.A. § 39-13-212-Class E felony] State v. Sims, 45 S.W.3d 1, 21 (Tenn. 2001) (appendix); accord State v. Walter Wilson, No. W2001-01463-CCA-R3-CD, Shelby County (Tenn. Crim. App. Sept. 4, 2002) (applying the Burns test, part (a)), app. denied (Tenn. Jan. 27, 2003) [Note: Holding with regard to the justification step (the second prong of the Burns analysis), that State v. Allen, 69 S.W.3d 181, 188 (Tenn. 2002), requires an instruction to be given when an offense is a lesser under part (a) of the statutory elements test.]; see State v. Ely, 48 S.W.3d 710, 720-22 (Tenn. 2001) (applying Burns test, part (b), to hold that criminally negligent homicide is a lesser included offense of felony murder).
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- (l) **Assault** [T.C.A. § 39-13-101(a)(1)–Class A misdemeanor] State v. Paul Graham Manning, No. M2002-00547-CCA-R3-CD, DeKalb County (Tenn. Crim. App. Feb. 14, 2003) (holding that assault committed by causing 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. W2006-019430-CCA-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 and noting that Walker relies only on attempted murder cases), app. filed (Tenn. Jan. 2, 2008). But see State v. John C. Walker, III, No. M2003-01732-CCA-R3-CD, Putnam County (Tenn. Crim. App. Aug. 11, 2004) (holding that no form of assault is a lesser included offense under Burns, but analyzing only under part (a)), app. granted and remanded (Tenn. June 20, 2005), on remand, M2005-01432-CCA-RM-CD (Tenn. Crim. App. July 28, 2005), app. denied (Tenn. Dec. 19, 2005).
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- (m) **Misdemeanor Reckless Endangerment** [T.C.A. § 39-13-103-Class A misdemeanor]

State v. Rush, 50 S.W.3d 424, 431-32 (Tenn. 2001) (applying Burns test, part (b), to hold that misdemeanor reckless endangerment is a lesser included offense of attempted second degree murder). [Note: Under the evidence there was a rational basis for instructing the jury as to misdemeanor reckless endangerment, and it was not error to do so.]

Lesser Included Offenses do not include:

(a) **Solicitation of First Degree Premeditated Murder** [T.C.A. § 39-12-102(a)-Class B felony]
State v. Robinson, 146 S.W.3d 469 (Tenn. 2004) (citing section 39-12-102(a) and holding that solicitation is not a lesser included offense where the solicited offense results in a completed act, i.e. death).

(b) **Vehicular Homicide** [T.C.A. § 39-13-213(a)-Class C felony]
State v. Harvey Phillip Hester, No. 03C01-9704-CR-00144, Hamilton County (Tenn. Crim. App. Mar. 22, 2000) (holding that vehicular homicide required an element—the operation of a motor vehicle—not found in first degree murder), app. denied (Tenn. Dec. 11, 2000) (renumbered E2000-00647-CCA-RM-CD) [Note: In his concurring opinion, Judge Witt points out that the differing element in vehicular homicide is a more specific subset of first degree murder thereby making vehicular homicide a lesser included offense under the Burns test, part (b). On the other hand, he agrees with the majority that the indictment did not put the defendant on notice of the element. He also notes the potential for confusion inherent in looking to the elements as charged in the indictment in order to determine whether an offense is a lesser included offense and, instead, favors a literal statutory elements approach.]; accord State v. Eric James Taylor, No. E2002-00966-CCA-R3-CD, Knox County (Tenn. Crim. App. July 9, 2003), app. denied (Tenn. Oct. 6, 2003).

(c) **Aggravated Assault** (Class C or D felony) **and Assault** (Class A or B misdemeanor) [T.C.A. §§ 39-13-101(a), 39-13-102(a)]
State v. John C. Walker, III, No. M2003-01732-CCA-R3-CD, Putnam County (Tenn. Crim. App. Aug. 11, 2004)(holding that no form of assault is a lesser included offense under Burns, but analyzing only under part (a)), app. granted and remanded (Tenn. June 20, 2005), on remand, M2005-01432-CCA-RM-CD (Tenn. Crim. App. July 28, 2005), app. denied (Tenn. Dec. 19, 2005). But see State v. Paul Graham Manning, No. M2002-00547-CCA-R3-CD, DeKalb County (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), but

footnoting in dictum that aggravated assault committed with a deadly weapon and assault by causing another to reasonably fear imminent bodily injury are not lesser included offenses of first degree murder under the Burns test), app. denied (Tenn. Dec. 15, 2003) ; see also 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 and noting that Walker relies only on attempted murder cases), app. filed (Tenn. Jan. 2, 2008).

INDICTED OFFENSE: **FIRST DEGREE PREMEDITATED MURDER based upon CRIMINAL RESPONSIBILITY for Conduct of Another** [T.C.A. § 39-11-402(2), 39-13-202]

Lesser Included Offenses include:

- (a) **Criminal Responsibility for Facilitation of a Felony** [T.C.A. § 39-11-403-Class A felony]
State v. Burns, 6 S.W.3d 453, 469-70 (Tenn. 1999) (applying the Burns test, parts (a) and (c)).
- (b) **Solicitation** [T.C.A. § 39-12-102(a)-Class B felony]
State v. Burns, 6 S.W.3d 453, 471 (Tenn. 1999) (applying Burns test, part (a) and (c)). But see State v. Robinson, 146 S.W.3d 469 (Tenn. 2004) (citing section 39-12-102(a) and holding that solicitation is not a lesser included offense where the solicited offense results in a completed act, i.e. death).

INDICTED OFFENSE: **FELONY MURDER** [T.C.A. § 39-13-202(a)(2), (b)]

Lesser Included Offenses include:

- (a) **Facilitation of Felony Murder** [T.C.A. § 39-11-403-Class A felony]
State v. Ely, 48 S.W.3d 710, 720 (Tenn. 2001) (applying Burns test, part (c)).
- (b) **Second Degree Murder** [T.C.A. § 39-13-210-Class A felony]
State v. Ely, 48 S.W.3d 710, 720-22 (Tenn. 2001) (applying Burns test, part (b)); see also State v. Locke, 90 S.W.3d 663, 669 (Tenn. 2002).
- (c) **Voluntary Manslaughter** [T.C.A. § 39-13-211(a)-Class C felony]

State v. Daniel Wade Wilson, No. E2000-01885-CCA-R3-CD, Sullivan County, slip. op at 15 (Tenn. Crim. App. Aug. 2, 2001) (holding voluntary manslaughter is a lesser included offense of felony murder under part (b)(1) of Burns because it constitutes a less culpable mental state), app. denied (Tenn. March 11, 2002); see also State v. Alfonzo Williams, No. W2001-00452-CCA-R3-CD, Shelby County, slip op. at 6 (Tenn. Crim. App. Mar. 15, 2002) (agreeing with Daniel Wade Wilson and stating without analysis that voluntary manslaughter is a lesser included offense of felony murder), app. denied (Tenn. Sept. 23, 2002).

(d) **Reckless Homicide** [T.C.A. § 39-13-215-Class D felony]

State v. Ely, 48 S.W.3d 710, 720-22 (Tenn. 2001) (applying Burns test, part (b)); see also State v. Locke, 90 S.W.3d 663, 669 (Tenn. 2002); accord State v. Mitchell Shephard, No. E2002-02851-CCA-RM-CD, McMinn County (Tenn. Crim. App. Jan. 10, 2003) [Note: Jury’s rejection of aggravated child abuse and child abuse does not render the trial court’s erroneous failure to charge reckless homicide and criminally negligent homicide harmless beyond a reasonable doubt. The court observes that reckless and criminally negligent homicide correspond with the defense theory, noting that aggravated child abuse and child abuse are not homicide offenses and “require the jury to find the defendant acted ‘knowingly, other than by accidental means.’”].

(e) **Criminally Negligent Homicide** [T.C.A. § 39-13-212-Class E felony]

State v. Ely, 48 S.W.3d 710, 720-22 (Tenn. 2001) (applying Burns test, part (b)). [Note: See pp. 723-24 for analysis as to whether the evidence warranted a jury instruction as to these lesser offenses.]; see also State v. Locke, 90 S.W.3d 663, 669 (Tenn. 2002).

**INDICTED
OFFENSE:**

FELONY MURDER WITH RECKLESS KILLING [T.C.A. § 39-13-202(a)(2) (repealed 1995)⁶]

Lesser Included Offenses include:

Second Degree Murder [T.C.A. § 39-13-210-Class A felony]

William Glenn Wiley v. State, No. M2003-00661-CCA-R3-PC, Davidson County (Tenn. Crim. App. Sept. 23, 2004) (holding that second degree murder, which requires a knowing mental state, is a lesser included offense of felony

⁶Before July 1, 1995, T.C.A. 39-13-202(a)(2) defined felony murder as a “reckless killing of another committed in the perpetration of, or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, or aircraft piracy.”

murder as defined before the 1995 amendment because “[t]he additional mens rea of recklessness in the prior statute would not eliminate second degree murder as a lesser-included offense of felony murder under the rationale of [State v. Ely, 48 S.W.3d 710 (Tenn. 2002)]”), rev’d on other grounds, 183 S.W.3d 317 (Tenn. Jan. 26, 2006) (stating through dicta that “[t]he trial court . . . failed to instruct the jury on second degree murder even though it was required to do so under Trusty. See Ely, 48 S.W.3d at 722-23 (noting that second degree murder was a lesser grade of homicide under Trusty)). Contra State v. Ben Mills, No. W1999-01175-CCA-R3-CD, Shelby County (Tenn. Crim. App. May 3, 2002) (holding that second degree murder, which requires a knowing mental state, is not a lesser included offense of felony murder as defined before the 1995 amendment), app. dismissed (Tenn. Aug. 15, 2002).

Lesser Included Offenses do not include:

Second Degree Murder [T.C.A. § 39-13-210-Class A felony]

State v. Ben Mills, No. W1999-01175-CCA-R3-CD, Shelby County (Tenn. Crim. App. May 3, 2002) (holding that second degree murder, which requires a knowing mental state, is not a lesser included offense of felony murder as defined before the 1995 amendment), app. dismissed (Tenn. Aug. 15, 2002). Contra William Glenn Wiley v. State, No. M2003-00661-CCA-R3-PC, Davidson County (Tenn. Crim. App. Sept. 23, 2004) (holding that second degree murder, which requires a knowing mental state, is a lesser included offense of felony murder as defined before the 1995 amendment because “[t]he additional mens rea of recklessness in the prior statute would not eliminate second degree murder as a lesser-included offense of felony murder under the rationale of [State v. Ely, 48 S.W.3d 710 (Tenn. 2002)]”), rev’d on other grounds, 183 S.W.3d 317 (Tenn. Jan. 26, 2006) (stating through dicta that “[t]he trial court . . . failed to instruct the jury on second degree murder even though it was required to do so under Trusty. See Ely, 48 S.W.3d at 722-23 (noting that second degree murder was a lesser grade of homicide under Trusty)).

**INDICTED
OFFENSE:**

**FIRST DEGREE MURDER FOR THE RECKLESS KILLING OF A
CHILD BY AGGRAVATED CHILD ABUSE** [T.C.A. § 39-13-202(a)(4)
(repealed 1994)⁷]

⁷Subsection (4) defining first degree murder as the “reckless killing of a child less than sixteen (16) years of age, if the child’s death results from aggravated child abuse, as defined by § 39-15-402, committed by the defendant against the child” was effective until July 1, 1995.

Lesser Included Offenses include:

Aggravated Child Abuse [T.C.A. § 39-15-402-Class A or B felony depending upon the victim's age]

State v. Ducker, 27 S.W.3d 889, 893-95 (Tenn. 2000) (applying Burns test, part (a)). [Note: See pp. 897-99 for discussion of need for instruction as to the age of the child.]

**INDICTED
OFFENSE:**

ATTEMPTED FIRST DEGREE MURDER [T.C.A. §§ 39-12-101(a), 39-13-202]

Lesser Included Offenses include:

(a) **Solicitation of First Degree Murder** [T.C.A. § 39-12-102(a)-Class B felony]

Orlando Crenshaw v. State, No. M2004-00045-CCA-R3-CD, Lawrence County (Tenn. Crim. App. Dec. 16, 2004) (stating that solicitation of first degree murder is a lesser included offense of attempted first degree murder under (c)(3) of the Burns test), app. denied (Tenn. May 2, 2005).

(b) **Facilitation of Attempted First Degree Murder** [T.C.A. §§ 39-11-403(a), 39-12-101, 39-13-202-Class B felony]

State v. Tony Price, No. W2002-01376-CCA-R3-CD, Shelby County (Tenn. Crim. App. Sept. 25, 2003) (observing that facilitation of any charged offense is a lesser included offense by definition under part (c)(1) of the Burns test and, therefore, facilitation of attempted first degree murder is a lesser included offense of attempted first degree murder); see also State v. Reginald Merriweather, Nos. W1999-02050-CCA-R3-CD, W2001-02206-CCA-RM-CD, Madison County (Tenn. Crim. App. Feb. 11, 2002).

(c) **Attempted Second Degree Murder** [T.C.A. §§ 39-12-101, 39-13-210-Class B felony]

State v. Reginald Merriweather, Nos. W1999-02050-CCA-R3-CD, W2001-02206-CCA-RM-CD, Madison County (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, Shelby County (Tenn. Crim. App. Sept. 25, 2003).

(d) **Facilitation of Attempted Second Degree Murder** [T.C.A. §§ 39-11-403, 39-12-101, 39-13-210-Class C felony]

State v. Reginald Merriweather, Nos. W1999-02050-CCA-R3-CD, W2001-02206-CCA-RM-CD, Madison County (Tenn. Crim. App. Feb. 11, 2002)

(inferring that facilitation of attempted second degree murder, as a lesser included offense of attempted second degree murder, is also a lesser included offense of attempted first degree murder).

- (e) **Attempted Voluntary Manslaughter** [T.C.A. §§ 39-12-101, 39-13-211(a)-Class D felony]

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

- (f) **Facilitation of Attempted Voluntary Manslaughter** [T.C.A. §§ 39-11-403, 39-12-101, 39-13-211(a)-Class E felony]

State v. Reginald Merriweather, Nos. W1999-02050-CCA-R3-CD, W2001-02206-CCA-RM-CD, Madison County (Tenn. Crim. App. Feb. 11, 2002) (observing that the trial court failed to instruct the jury on facilitation of the charged felonies and facilitation of their lesser included offenses).

- (g) **Reckless Endangerment** (Class A misdemeanor) [T.C.A. § 39-13-103]

State v. Rush, 50 S.W.3d 424 (Tenn. 2001) (holding that misdemeanor reckless endangerment is a lesser included offense of attempted second degree murder under the Burns, part (b)); see also State v. Horace Demon Pulliam, No. M2001-00417-CCA-R3-CD, Davidson County (Tenn. Crim. App. Jan. 23, 2002) (citing Rush and holding that if misdemeanor reckless endangerment is a lesser included offense of attempted second degree murder, then it is also a lesser included offense of attempted first degree murder), app. denied (Tenn. May 28, 2002).

Lesser Included Offenses do not include:

- (a) **Aggravated Assault** (Class C or D felony) **and Assault** (Class A or B misdemeanor) [T.C.A. §§ 39-13-101, 39-13-102]

State v. Christopher Todd Brown, No. M1999-00691-CCA-R3-CD, Davidson County (Tenn. Crim. App. Mar. 9, 2000) (holding that any variety of aggravated assault and assault is not a lesser included offense of attempted first degree murder under the Burns test), app. denied (Tenn. Sept. 10, 2001); accord State v. Albert James Saavedra, No. M2004-02889-CCA-R3-CD, Humphreys County (Tenn. Crim. App. Mar. 13, 2006) (holding that aggravated assault is not a lesser included offense of attempted second degree murder), app. denied (Tenn. Aug. 21, 2006); State v. Renne Efren Arellano, No. M2002-00380-CCA-R3-CD, Maury County (Tenn. Crim. App. Feb. 26, 2003) (holding that plain error required reversal of the defendant's conviction upon his guilty plea to aggravated assault because the defendant was originally charged with attempted first degree murder and aggravated assault is not a lesser included offense of that crime pursuant to Christopher Todd Brown),

app. granted, remanded (Tenn. June 30, 2003), aff'd on other grounds, (Tenn. Crim. App. June 29, 2004) (addressing sentencing issue on remand).

- (b) **Facilitation of Aggravated Assault** [T.C.A. § 39-11-403(a), 39-13-102(a)(1)-Class D felony] Orlando Crenshaw v. State, No. M2004-00045-CCA-R3-CD, Lawrence County (Tenn. Crim. App. Dec. 16, 2004) (stating that facilitation of aggravated assault is not a lesser included offense of attempted first degree murder), app. denied (Tenn. May 2, 2005).
- (c) **Reckless Aggravated Assault** [T.C.A. § 39-13-102(a)(2)-Class D felony] State v. Rush, 50 S.W.3d 424, 429-31 (Tenn. 2001) (holding that reckless aggravated assault is not a lesser included offense of attempted second degree murder; see also State v. Bobby J. Hughes, No. W1999-00360-CCA-R3-CD, Shelby County (Tenn. Crim. App. Jan. 26, 2001) (holding that aggravated assault and assault are not lesser included offenses of attempted second degree murder under the Burns test). [Note: The court observes that under Burns, “descriptive language in a charging instrument will not create a lesser-included offense if the statutory elements of the greater offense do not include all of the elements of the lesser offense or otherwise indicate inclusion via parts (b) or (c) of Burns.”]
- (d) **Attempted Reckless Homicide** [T.C.A. § 39-12-101, 39-13-215-Class E felony] State v. Vernon Lamar Bryant, No. E2002-01234-CCA-R3-CD, Hamilton County (Tenn. Crim. App. Oct. 21, 2003) (reversing defendant’s conviction for attempted reckless homicide as a lesser included offense of attempted first degree murder 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) (observing that attempted reckless homicide is not a lesser included offense of attempted first degree murder because it does not exist as an offense in Tennessee).
- (e) **Felony Reckless Endangerment** [T.C.A. § 39-13-103(a)-(b)-Class E felony] State v. Rush, 50 S.W.3d 424, 431 (Tenn. 2001) (holding that felony reckless endangerment is not a lesser included offense of attempted second degree murder).
- (f) **Attempted Criminally Negligent Homicide** [T.C.A. § 39-12-101, 39-13-212-Class A misdemeanor]

State v. Kenneth Anthony Henderson, No. M1999-00547-CCA-R3-CD, Davidson County (Tenn. Crim. App. Apr. 11, 2002) (observing that attempted criminally negligent homicide is not a lesser included offense of attempted first degree murder because it does not exist as an offense in Tennessee); accord State v. William Binkley, No. M2001-00404-CCA-R3-CD, Rutherford County (Tenn. Crim. App. Apr. 5, 2002) (noting that one “cannot intend to perform an unintentional act”), app. denied (Tenn. Nov. 4, 2002).

**INDICTED
OFFENSE:**

SECOND DEGREE MURDER [T.C.A. § 39-13-210-Class A felony]

Lesser Included Offenses Include:

- (a) **Misdemeanor Reckless Endangerment** [T.C.A. § 39-13-103-Class A misdemeanor]
State v. Lia Bonds, No. W2006-019430CCA-R3-CD, Shelby County (Tenn. Crim. App. Nov. 2, 2007), app. filed (Tenn. Jan. 2, 2008).
- (b) **Assault** [T.C.A. § 39-13-101-Class A or B misdemeanor]
State v. Lia Bonds, No. W2006-019430CCA-R3-CD, Shelby County (Tenn. Crim. App. Nov. 2, 2007), app. filed (Tenn. Jan. 2, 2008).

**INDICTED
OFFENSE:**

CRIMINALLY NEGLIGENT HOMICIDE [T.C.A. § 39-13-212-Class E felony]

Lesser Included Offenses do not include:

- (a) **Felony Reckless Endangerment** [T.C.A. § 39-13-103-Class E felony]
State v. Michael Ashley, No. W2004-01319-CCA-MR3-CD, Shelby County (Tenn. Crim. App. Apr. 5, 2006) (holding that under Burns (a) and (b)(1), (2), felony reckless endangerment is not a lesser included offense of criminally negligent homicide)
- (b) **Misdemeanor Reckless Endangerment** [T.C.A. § 39-13-103-Class A misdemeanor]
State v. Michael Ashley, No. W2004-01319-CCA-MR3-CD, Shelby County (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)

**INDICTED
OFFENSE:**

VEHICULAR HOMICIDE [T.C.A. § 39-13-213(a)-Class C felony]

- (a) **??Criminally Negligent Homicide??** [T.C.A. § 39-13-212(a)-Class E felony]
See State v. Eunyce Marie Saunders, No. E1998-00230-CCA-R3-CD, Sullivan County (Tenn. Crim. App. June 8, 2000) (Witt, J., dissenting) (stating that the vehicular homicide conviction should be reversed because the defendant was not reckless and that a conviction on the lesser included offense of criminally negligent homicide should be imposed).
- (b) **Driving Under the Influence of an Intoxicant** [T.C.A. § 55-10-401(a)-Class A misdemeanor]
State v. Thomas W. Cothran, No. M2005-00559-CCA-R3-CD, Hickman County (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 DUP”), app. denied (Tenn. May 1, 2006).

**INDICTED
OFFENSE:**

ESPECIALLY AGGRAVATED KIDNAPPING [T.C.A. § 39-13-305-
Class A felony]

Lesser Included Offenses include:

- (a) **Aggravated Kidnapping** [T.C.A. § 39-13-304-Class B felony]
State v. Tracy F. Leonard, No. M2001-00368-CCA-R3-CD, Montgomery County (Tenn. Crim. App. Aug. 28, 2002) (holding aggravated kidnapping to be a lesser included offense of especially aggravated kidnapping accomplished with a deadly weapon and especially aggravated kidnapping when the victim suffers serious bodily injury), app. denied (Tenn. Dec. 16, 2002).
- (b) **Kidnapping** [T.C.A. § 39-13-303-Class C felony]
State v. Gary Lee Miller, No. M1998-00788-CCA-R3-CD, Davidson County (Tenn. Crim. App. Nov. 6, 2000) (applying the Burns test, part (b), to hold that kidnapping is a lesser included offense of especially aggravated kidnapping), app. denied (Tenn. Nov. 6, 2000).
- (c) **False Imprisonment** [T.C.A. § 39-13-302-Class A misdemeanor]
State v. Evangeline Combs & Joseph D. Combs, Nos. E2000-02801-CCA-R3-CD, E2000-2800-CCA-R3-CD, Sullivan County (Tenn. Crim. App. Sept. 25, 2002) (noting that false imprisonment is incorporated by reference into the statutory definition of especially aggravated kidnapping)

and, therefore, is a lesser included offense), app. denied (Tenn. Jan. 27, 2003).

- (d) **Attempted False Imprisonment** [T.C.A. §§ 39-12-101(a), 39-13-302-Class B misdemeanor]

State v. John Henry Sparrow, III, No. M2000-03238-CCA-R3-CD, Dickson County (Tenn. Crim. App. Apr. 16, 2002) (holding that attempted false imprisonment is a lesser included offense of attempted especially aggravated kidnapping under the Burns test, part (a)), app. denied (Tenn. Nov. 18, 2002) (DESIGNATED NOT FOR CITATION). [Note: John Henry Sparrow, III, holds that the trial court would not have been justified under the second prong of the Burns test in charging attempted false imprisonment because reasonable minds could not have accepted that the victims were older than age thirteen.]

Lesser Included Offenses do not include:

Aggravated Assault [T.C.A. § 39-13-102-Class C or D felony]

State v. Evangeline Combs & Joseph D. Combs, Nos. E2000-02801-CCA-R3-CD, E2000-2800-CCA-R3-CD, Sullivan County (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).

**INDICTED
OFFENSE:**

ESPECIALLY AGGRAVATED ROBBERY [T.C.A. § 39-13-403-Class A felony]

Lesser Included Offenses include:

- (a) **Facilitation of Especially Aggravated Robbery** (Class B felony) and **Facilitation of Aggravated Robbery** (Class C felony) [T.C.A. §§ 39-11-403, 39-13-402, 39-13-403]

State v. Flemming, 19 S.W.3d 195, 199 (Tenn. 2000); accord State v. Reginald Merriweather, Nos. W1999-02050-CCA-R3-CD, W2001-02206-CCA-RM-CD, Madison County (Tenn. Crim. App. Feb. 11, 2002) (observing that facilitation of any felony is a lesser included offense by definition under the Burns test). [Note: Contrary to the analysis in Reginald Merriweather, the supreme court in State v. Locke, held that facilitation is not the immediate lesser of the charged offense using the harmless error analysis in State v. Williams, 977 S.W.2d 101, 106 (Tenn. 1998), but is “is a separate and distinct theory of liability from that of a

principal offender or someone who is criminally responsible for the conduct of another.” 90 S.W.3d 663, 672 (Tenn. 2002).]

- (b) **Aggravated Robbery** [T.C.A. § 39-13-402-Class B felony]

State v. Locke, 90 S.W.3d 663, 674 (Tenn. 2002) (holding that aggravated robbery and robbery are lesser included offenses under part (a) of the Burns test).
- (c) **Attempted Aggravated Robbery** [T.C.A. §§ 39-12-101, 39-13-402-Class C felony]

State v. Walter Wilson, No. W2001-01463-CCA-R3-CD, Shelby County (Tenn. Crim. App. Sept. 4, 2002)(applying the Burns test, part (a), to hold that attempted aggravated robbery and attempted robbery are lesser included offenses of attempted especially aggravated robbery), app. denied (Tenn. Jan. 27, 2003); accord State v. Mario Rogers, No. W1999-01454-CCA-R3-CD, Shelby County (Tenn. Crim. App. June 26, 2001) (applying Burns test, part (c), to hold that attempted aggravated robbery is a lesser included offense of aggravated robbery).
- (d) **Robbery** [T.C.A. § 39-13-401-Class C felony]

State v. Allen, 69 S.W.3d 181, 187 (Tenn. 2002) (under Burns test, part (a))⁸ [Note: See p.188 for analysis of sufficiency of evidence in charging a lesser included offense (lesser should be charged although proof of an element, which distinguishes the greater from the lesser, is uncontroverted) and harmless error (not limited to a situation in which the jury has rejected an intermediate lesser, e.g. State v. Williams, 977 S.W.2d 101, 106 (Tenn. 1998).]; accord State v. Darrell Presnell, No. E2000-02544-CCA-R3-CD, Cocke County (Tenn. Crim. App. Aug. 20, 2001) (applying Burns test, part (b)), app. denied (Tenn. Mar. 18, 2002).
- (e) **Facilitation of Attempted Aggravated Robbery** [T.C.A. §§ 39-11-403(a), 39-12-101, 39-13-402-Class D felony]

State v. Herman Majors, Jr., No. M2001-02143-CCA-R3-CD, Montgomery County (Tenn. Crim. App. Aug. 29, 2002) (applying the Burns test, part (c), and noting that almost every time a defendant is charged with a felony by virtue of criminal responsibility for another’s conduct, facilitation of the felony is a lesser included offense).
- (f) **Attempted Robbery** [T.C.A. §§ 39-12-101, 39-13-401-Class D felony]

⁸The defendant in Allen was indicted for aggravated robbery accomplished with a deadly weapon, but the court discusses whether robbery is a lesser included offense of aggravated robbery generally.

State v. Richmond, 90 S.W.3d 648, 660 (Tenn. 2002) (holding that attempted robbery is a lesser included offense of attempted aggravated robbery under part (a) of the Burns test). [Note: The court held that the failure to instruct on robbery and attempted robbery was harmless beyond a reasonable doubt because no reasonable jury would have convicted the defendant of these lesser offenses in light of the “uncontroverted and overwhelming evidence” of the defendant’s direct participation and the use of deadly weapons.]

- (g) **Facilitation of Robbery** [T.C.A. §§ 39-11-403, 39-13-401-Class D felony]

State v. Allen, 69 S.W.3d 181, 187 (Tenn. 2002) (applying the Burns test, part (c)(1)). [Note: “For lesser offenses under part (c), proof of the greater offense will not necessarily prove the lesser offense.” Allen, 69 S.W.3d at 188.]

- (h) **Aggravated Assault** [T.C.A. § 39-13-102-Class C or D felony]

State v. Jason C. Carter, No. M1998-00798-CCA-R3-CD, Davidson County (Tenn. Crim. App. Apr. 27, 2000) (applying the Burns test, part (a)), app. denied (Tenn. Nov. 20, 2000); accord State v. Marcus Johnson, No. W2002-00987-CCA-R3-CD, Shelby County (Tenn. Crim. App. Sept. 4, 2003) (stating that under the Burns test, part (a), aggravated assault by intentionally or knowingly causing another reasonably to fear imminent bodily injury by use of a deadly weapon is a lesser included offense of especially aggravated robbery), app. denied (Tenn. Jan. 26, 2004).

- (i) **Assault** [T.C.A. § 39-13-101(a)(2)-Class A misdemeanor]

State v. James Eric Alder, No. M1999-02544-CCA-R3-CD, Sequatchie County (Tenn. Crim. App. Oct. 27, 2000) (applying the Burns test, part (a), to hold that assault by intentionally or knowingly causing another reasonably to fear imminent bodily injury is a lesser included offense of aggravated robbery by use of a deadly weapon).

- (j) **Theft** [T.C.A. § 39-14-103-Class B felony through Class A misdemeanor depending upon value of property taken, T.C.A. § 39-14-105]

State v. Bowles, 52 S.W.3d 69, 79-80 (Tenn. 2001) (holding that theft is a lesser included offense of robbery); 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).]

- (k) **Unauthorized Use of an Automobile** [T.C.A. § 39-14-106-Class A misdemeanor]
State v. John David Palmer, No. W1999-01310-CCA-R3-CD, Gibson County (Tenn. Crim. App. Feb. 7, 2001) (applying the Burns test, part (b), to hold that unauthorized use of an automobile is a lesser included offense of especially aggravated robbery), app. denied (Tenn. June 18, 2001); accord State v. David Michael Gamble, No. 03C01-9812-CR-0042, Hamilton County (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 the Burns test, part (b), because unauthorized use of an automobile 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”); see also State v. James McClennon, No. M2002-00153-CCA-R3-CD, Davidson County (Tenn. Crim. App. June 24, 2003) (relying on Gamble and pre-Burns cases to hold unauthorized use of an automobile is a lesser included offense of theft).

**INDICTED
OFFENSE:**

CARJACKING [T.C.A. § 39-13-404-Class B felony]

Lesser Included Offenses do not include:

- (a) **Robbery** [T.C.A. § 39-13-401-Class C felony]
State v. Wilson, 211 S.W.3d 714 (Tenn. 2007) (holding that robbery and theft are not lesser included offenses of carjacking under Burns (a) and (b) 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, and the additional element of intending to deprive the owner of property is not reflective of a different mental state with lesser culpability or less serious harm or risk of harm)
- (b) **Theft** [T.C.A. § 39-14-103-Class B felony through Class A misdemeanor depending upon value of property taken, T.C.A. § 39-14-105]
State v. Wilson, 211 S.W.3d 714 (Tenn. 2007) (holding that robbery and theft are not lesser included offenses of carjacking under Burns (a) and

(b) 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, and the additional element of intending to deprive the owner of property is not reflective of a different mental state with lesser culpability or less serious harm or risk of harm)

INDICTED OFFENSE: ATTEMPTED CARJACKING [T.C.A. §§ 39-13-404; 39-12-101-Class C felony]

Lesser Included Offenses do not include:

- (a) **Attempted robbery** [T.C.A. §§ 39-13-401; 39-12-101-Class D felony]
State v. Harold Holloway, Jr., No. E2004-00882-CCA-R3-CD, Hamilton County (Tenn. Crim. App. Aug. 15, 2005), pet. to rehear denied (Tenn. Crim. App. Oct. 7, 2005), app. denied (Tenn. Feb. 26, 2007).
- (b) **Attempted theft** [T.C.A. §§ 39-14-103, -105; 39-12-101-Class C felony through Class B misdemeanor depending on value of property attempted to be taken]
State v. Harold Holloway, Jr., No. E2004-00882-CCA-R3-CD, Hamilton County (Tenn. Crim. App. Aug. 15, 2005), pet. to rehear denied (Tenn. Crim. App. Oct. 7, 2005), app. denied (Tenn. Feb. 26, 2007).

INDICTED OFFENSE: AGGRAVATED RAPE [T.C.A. § 39-13-502-Class A felony]

Lesser Included Offenses include:

- (a) **Rape** [T.C.A. § 39-13-503(a)-Class B felony]
State v. Haskel D. Finch, No. M2001-00340-CCA-R3-CD, Humphreys County (Tenn. Crim. App. June 5, 2002), app. denied (Tenn. Oct. 28, 2002).
- (b) **Aggravated Sexual Battery** [T.C.A. § 39-13-504-Class B felony]
State v. Gary J. Greer, No. 01C01-9808-CR-00337, Davidson County (Tenn. Crim. App. Mar. 17, 2000) (renumbered M1998-00789-CCA-R3-CD) (holding that under the Burns test, part (b), aggravated sexual battery accomplished by the use of force or coercion and while armed with a weapon is a lesser included offense of aggravated rape, similarly accomplished by the use of force or coercion and while armed with a weapon), app. denied (Tenn. Sept. 24, 2001) .

- (c) **Sexual Battery** [T.C.A. § 39-13-505-Class E felony]
State v. Bowles, 52 S.W.3d 69, 77 (Tenn. 2001) (applying the Burns test, part (b), to hold that sexual battery is a lesser included offense of aggravated rape).
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Lesser Included Offenses do not include:

- (a) **Aggravated Assault** [T.C.A. § 39-13-102(a)(1)-Class C felony]
Robert James Yoreck, III, No. M2001-02448-CCA-R3, Montgomery County (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).
- (b) **Spousal Rape** [T.C.A. § 39-13-507-Class C felony]
State v. Dominy, 6 S.W.3d 472, 477-78 (Tenn. 1999) (holding that spousal rape is not a lesser included offense of aggravated rape).
- (c) **Incest** [T.C.A. § 39-15-302-Class C felony]
William Hackworth v. State, No. M2003-02148-CCA-R3-PC, Davidson County (Tenn. Crim. App. July 28, 2004).
- (d) **Statutory Rape** [T.C.A. § 39-13-506(a)-Class E felony]
State v. Stokes, 24 S.W.3d 303, 305-06 (Tenn. 2000) (holding that statutory rape is not a lesser included offense of rape).
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**INDICTED
OFFENSE:**

ATTEMPTED RAPE [T.C.A. §§ 39-12-101, 39-13-503-Class C felony]

Lesser Included Offenses do not include:

Sexual Battery [T.C.A. § 39-13-505]
State v. Bowles, 52 S.W.3d 69, 79 (Tenn. 2001).

**INDICTED
OFFENSE:**

AGGRAVATED SEXUAL BATTERY [T.C.A. § 39-13-504-Class B felony]

Lesser Included Offenses include:

- (a) **Sexual Battery** [T.C.A. § 39-13-505(a)(1)-Class E felony]
State v. Randall Vertis Grainger, No. M2001-02178-CCA-R3-CD, Williamson County (Tenn. Crim. App. Oct. 22, 2002), app. denied (Tenn.
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Mar. 3, 2003) (noting in dicta that sexual battery committed by force or coercion is a lesser included offense under the Burns test, part (a), of aggravated sexual battery committed by force or coercion when the defendant is armed with a deadly weapon, T.C.A. § 39-13-504(a)(1)).

- (b) **Class B Misdemeanor Assault** [T.C.A. § 39-13-101(a)(3)]

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). But see State v. Billy Bivens, No. E1999-00086-CCA-R3-CD, McMinn County (Tenn. Crim. App. July 14, 2000), app. dismissed (Tenn. Nov. 2, 2000) (holding that assault generally is not a lesser included offense of sexual battery). [Note: Billy Bivens conflicts with Swindle, 30 S.W.3d at 292-93, in including Class B misdemeanor assault with assault generally as not being a lesser included offense of sexual battery.]

Lesser Included Offenses do not include:

- (a) **Attempted Rape of a Child** [T.C.A. §§ 39-12-101, 39-13-522-Class B felony]

State v. Jeffrey L. Marcum, No. W2000-02698-CCA-R3-CD, Madison County (Tenn. Crim. App. Jan. 23, 2002) (holding that attempted rape of a child is not a lesser included offense of aggravated sexual battery), overruled on other grounds, 109 S.W.3d 300 (Tenn. 2003).
- (b) **Incest** [T.C.A. § 39-15-302-Class C felony]
William Hackworth v. State, No. M2003-02148-CCA-R3-PC, Davidson County (Tenn. Crim. App. July 28, 2004).
- (c) **Sexual Battery** [T.C.A. § 39-13-505-Class E felony]

State v. Randall Vertis Grainger, No. M2001-02178-CCA-R3-CD, Williamson County (Tenn. Crim. App. Oct. 22, 2002) (holding that sexual battery is not a lesser included offense of aggravated sexual battery defined as sexual contact with a victim under age thirteen, T.C.A. § 39-13-504(a)(4), because sexual battery requires additional elements none of which establish “either a different mental state, indicating a lesser culpability, or a less serious harm or risk of harm to the victim”), app. denied (Tenn. Mar. 3, 2003). [Note: The court in Randall Vertis Grainger observes that sexual battery may be a lesser included offense of aggravated sexual battery as defined in § 39-13-504(a)(1)-(3). For example, it notes in dicta that sexual battery committed by force or coercion is a lesser included offense under the Burns test, part (a), of aggravated sexual battery committed by force or coercion when the defendant is armed with a deadly weapon, T.C.A. § 39-13-504(a)(1)).]

**INDICTED
OFFENSE:**

RAPE OF A CHILD [T.C.A. § 39-13-522-Class A felony]

Lesser Included Offenses include:

- (a) **Attempted Rape of a Child** [T.C.A. §§ 39-12-101, 39-13-522-Class B felony]

State v. Marcum, 109 S.W.3d 300 (Tenn. 2003) (applying the Burns test, part (c)). [Note: With regard to the second prong of the Burns test, the court held that unless the evidence viewed in the light most favorable to the defense supports an instruction on attempt, an instruction on attempt is not warranted.]
- (b) **Aggravated Sexual Battery (Child Under Age 13)** [T.C.A. §39-13-504(4)-Class B felony]

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); State v. Joey L. Salcido, No. M1999- 00501-CCA-R3-CD, Giles County (Tenn. Crim. App. Mar. 8, 2001) (applying the Burns test, part (b)), app. denied (Tenn. Sept. 17, 2001).
- (c) **Child Abuse** [T.C.A. § 39-15-401(a)-Class A misdemeanor, unless victim is age six or younger, then a Class D felony]

State v. Elkins, 83 S.W.3d 706 (Tenn. 2002) (holding that the legislature has statutorily designated child abuse as a lesser included offense of any sexual offense involving a child and that the instruction on child abuse is in addition to, not an alternative to, an assault instruction).
- (d) **Class B Misdemeanor Assault** [T.C.A. § 39-13-101(a)(3)]

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, on which the jury was instructed).

Lesser Included Offenses do not include:

- (a) **Rape** [T.C.A. § 39-13-503(a)-Class B felony]

State v. Evangeline Combs & Joseph D. Combs, Nos. E2000-02801-CCA-R3-CD, E2000-2800-CCA-R3-CD, Sullivan County (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) (repealed 1989)] under the Burns test, part (a), because rape requires that one of three circumstances—force or

coercion, mentally or physically defective victim, or accomplished by fraud--accompany the penetration), app. denied (Tenn. Jan. 27, 2003).

- (b) **Incest** [T.C.A. § 39-15-302-Class C felony]
William Hackworth v. State, No. M2003-02148-CCA-R3-PC, Davidson County (Tenn. Crim. App. July 28, 2004).

INDICTED _____ **THEFT** [T.C.A. § 39-14-103-Class B felony through Class A misdemeanor
OFFENSE: based upon value of property taken]

Lesser Included Offenses Include:

- (a) **Unauthorized Use of an Automobile** [T.C.A. § 39-14-106-Class A misdemeanor]
State v. David Michael Gamble, No. 03C01-9812-CR-0042, Hamilton County (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 McClellon, No. M2002-00153-CCA-R3-CD, Davidson County (Tenn. Crim. App. June 24, 2003) (relying on Gamble and pre-Burns cases); compare State v. William Belchia, No. W2004-01168-CCA-R3-CD, Shelby County (Tenn. Crim. App. Mar. 30, 2005) (holding that although unauthorized use of an automobile is a lesser included offense of theft of an automobile, jury instruction 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).

Lesser Included Offenses do not Include:

- (a) **Temporary Taking of Vehicle–Joyriding–Neglect to Return** [T.C.A. § 55-5-104(c)-Class E felony]
State v. William Belchia, No. W2004-01168-CCA-R3-CD, Shelby County (Tenn. Crim. App. Mar. 30, 2005) (holding that temporary taking/joyriding/neglect to return of a rental car is not a lesser included offense of theft under part (a), (b), or (c) of Burns), app. denied (Tenn. Feb. 21, 2006).

**INDICTED
OFFENSE:**

IDENTITY THEFT [T.C.A. § 39-14-150-Class D felony]

Lesser Included Offenses do not include:

Misdemeanor Theft [T.C.A. § 39-14-105(1)-Class A misdemeanor]

State v. Ronald Bowman, No. W2003-02389-CCA-R3-CD, Shelby County (Tenn. Crim. App. Jan. 13, 2005) (holding that misdemeanor theft is not a lesser included offense of identity theft under part (a) or (b)(2) of the Burns test), app. denied (Tenn. May 23, 2005).

Fraudulent Use of a Driver License [T.C.A. § 55-50-601-Class C misdemeanor]

State v. Ronald Bowman, No. W2003-02389-CCA-R3-CD, Shelby County (Tenn. Crim. App. Jan. 13, 2005) (holding that fraudulent use of a driver license is not a lesser included offense of identity theft under part (a) or (b)(2) of the Burns test; however, in dissent, Judge Wade concludes that fraudulent use of a driver license is a lesser included offense of identity theft under part (a) of the Burns test), app. denied (Tenn. May 23, 2005).

Criminal Impersonation [T.C.A. § 39-16-301(a)-Class B misdemeanor]

State v. Ronald Bowman, No. W2003-02389-CCA-R3-CD, Shelby County (Tenn. Crim. App. Jan. 13, 2005) (holding that criminal impersonation is not a lesser included offense of identity theft under part (a) or (b)(2) of the Burns test), app. denied (Tenn. May 23, 2005).

**INDICTED
OFFENSE:**

AGGRAVATED ARSON [T.C.A. § 39-14-302-Class A felony]

Lesser Included Offenses do not include:

Setting Fire to Personal Property or Land [T.C.A. § 39-14-303-Class E felony]

State v. Gene Shelton Rucker, Jr., No. E2002-02101-CCA-R3-CD, Hamilton County (Tenn. Crim. App. Dec. 22, 2003) (holding that setting fire to personal property or land is not a lesser included offenses of aggravated arson under Burns part (a), (b) or (c) when the defendant is accused in the indictment of arson under T.C.A. § 39-14-301), app. filed (Tenn. Feb. 26, 2004), app. dismissed (Tenn. Mar. 9, 2004), mandate issued (Tenn. Mar. 23, 2004), mandate recalled (Tenn. Dec. 9, 2004), app. filed (Tenn. Feb. 8, 2005), app. denied (Tenn. Mar. 21, 2005).

**INDICTED
OFFENSE:**

AGGRAVATED BURGLARY [T.C.A. § 39-14-403-Class C felony]

Lesser Included Offenses include:

- (a) **Burglary** [T.C.A. § 39-14-402-Class D felony]
State v. Charles O. Emesibe, No. M2003-02983-CCA-R3-CD, Davidson County (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).
- (b) **Attempted Burglary** [T.C.A. §§ 39-12-101(a), 39-14-402-Class E felony]
State v. George Redd, No. W2000-01620-CCA-R3-CD, Shelby County (Tenn. Crim. App. Aug. 9, 2001) (applying the Burns test, part (c), to hold that attempted burglary is a lesser included offense of burglary), app. denied (Tenn. Mar. 4, 2002); accord State v. Thomas Mitchell, No. 02C01-9808-CR-00234, Shelby County (Tenn. Crim. App. Dec. 20, 1999) (renumbered W1998-00509-CCA-R3-CD) (holding that attempted burglary of a building is a lesser included offense of burglary of a building under the Burns test, part (c)), app. denied (Tenn. June 12, 2000).
- (c) **Facilitation of Burglary** [T.C.A. §§ 39-11-403(a), 39-14-402-Class E felony]
State v. George Redd, No. W2000-01620-CCA-R3-CD, Shelby County (Tenn. Crim. App. Aug. 9, 2001) (applying the Burns test, part (c)), app. denied (Tenn. Mar. 4, 2002).
- (d) **Aggravated Criminal Trespass** [T.C.A. § 39-14-406-Class A or B misdemeanor depending upon location entered]
State v. Terry, 118 S.W.3d 355 (Tenn. 2003) (holding that aggravated criminal trespass is a lesser included offense of aggravated burglary under the Burns test, part (b)).
- (e) **Attempted Aggravated Criminal Trespass** [T.C.A. §§ 39-12-101, 39-14-406-Class B or C misdemeanor depending upon location entered]
State v. Terry, 118 S.W.3d 355 (Tenn. 2003) (holding that because aggravated criminal trespass is a lesser included offense of aggravated burglary under part (b) of the Burns test, then attempted aggravated criminal trespass must be a lesser included offense of attempted aggravated burglary under part (c) of the test).
- (f) **Criminal Trespass** [T.C.A. § 39-14-405(a)-Class C misdemeanor]
State v. Terry, 118 S.W.3d 355 (Tenn. 2003) [Note: In Terry, the supreme court held that aggravated criminal trespass is a lesser included offense

of aggravated burglary and that attempted aggravated criminal trespass is a lesser included offense of attempted aggravated burglary. Before Terry, State v. Townes, 56 S.W.3d 30, 38-39 (Tenn. Crim. App. 2000), had held that under the Burns test criminal trespass is not a lesser included offense of burglary. However, the supreme court in Terry stated that “so far as this holding conflicts with cases holding otherwise, including State v. Townes, 56 S.W.3d 30, 39 (Tenn. Crim. App. 2000), those cases are overruled.”] See also State v. George Redd, No. W2000-01620-CCA-R3-CD, Shelby County (Tenn. Crim. App. Aug. 9, 2001) (holding criminal trespass to be a lesser included offense of simple burglary under part (b) of the Burns test without mentioning Townes), app. denied (Tenn. Mar. 4, 2002).

Lesser Included Offenses do not include:

- (a) **Theft** [T.C.A. § 39-14-402(a)-Class D or E felony depending upon the location entered]

State v. Donald R. Mobbley, No. W2002-00202-CCA-MR3-CD, Shelby County (Tenn. Crim. App. Oct. 22, 2002) (holding that generally theft is not a lesser included offense of burglary under pre-Burns cases, nor under the Burns test), app. denied (Tenn. Mar. 22, 2003) (DESIGNATED NOT FOR CITATION).
- (b) **Attempted Criminal Trespass** [See T.C.A. §§ 39-12-101, 39-14-405]

State v. Reginald D. Terry, No. W2001-03027-CCA-RM-CD, Shelby County (Tenn. Crim. App. Aug. 27, 2002) (noting that the trial court did not err in failing to charge attempted criminal trespass, which is not an existing offense under Tennessee law, see T.C.A. § 39-12-107(a)), rev'd on other grounds, 118 S.W.3d 355 (Tenn. 2003).

**INDICTED
OFFENSE:**

AGGRAVATED CHILD ABUSE [T.C.A. § 39-15-402-Class B felony unless victim is age six or younger, then Class A felony]

Lesser Included Offenses include:

- (a) **Attempted Aggravated Child Abuse** [T.C.A. §§ 39-12-101, 39-15-402-Class C felony]

State v. Anderson Toliver, No. E2001-00584-CCA-R3-CD, Hamilton County (Tenn. Crim. App. Aug. 5, 2002) (applying the Burns test, part (c)), rev'd on other grounds, 117 S.W.3d 216 (Tenn. 2003).

- (b) **Knowing (Class C felony) or Reckless (Class D felony) Aggravated Assault** [T.C.A. § 39-13-102]
State v. Honeycutt, 54 S.W.3d 762, 771 (Tenn. 2001) (applying Burns test, part (a)).
-
- (c) **Knowing or Reckless Assault** [T.C.A. § 39-13-101(a)(1)-Class A misdemeanor]
State v. Russell Maze, No. M2000-02249-CCA-R3-CD, Davidson County (Tenn. Crim. App. Aug. 16, 2002) (under the analysis in Honeycutt, knowing and reckless, but not intentional, assault are lesser included offenses of aggravated child abuse under the Burns test, part (a)).⁹
-
- (d) **Reckless Endangerment** [T.C.A. § 39-13-103(a)-Class A misdemeanor]
State v. Honeycutt, 54 S.W.3d 762, 771-72 (Tenn. 2001) (applying Burns test, part (b)(2)); accord State v. Kathryn Lee Adler, No. W2001-00951-CCA-R3-CD, Fayette County (Tenn. Crim. App. Feb. 19, 2002) (applying Honeycutt to hold that misdemeanor reckless endangerment is a lesser included offense of aggravated child neglect), app. denied (Tenn. Sept. 9, 2002).
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- (e) **Child Abuse** [T.C.A. § 39-15-401-Class A misdemeanor]
State v. Russell Maze, No. M2000-02249-CCA-R3, Davidson County (Tenn. Crim. App. Aug. 16, 2002) (applying the Burns test, part (a)).
-
- (f) **Attempted Child Neglect** [T.C.A. §§ 39-12-101, 39-15-401-Class B misdemeanor, unless victim is age six or under, then Class E felony]
See, e.g., 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).

Lesser Included Offenses do not include:

- (a) **Intentional Aggravated Assault** [T.C.A. § 39-13-102(a)(1)-Class C felony]
State v. Honeycutt, 54 S.W.3d 762, 771 (Tenn. 2001).
- (b) **Intentional Assault** [T.C.A. § 39-13-101(a)(1)-Class A misdemeanor]

⁹Analyzing assault under the bodily injury provisions. T.C.A. § 39-13-101(a)(1).

State v. Russell Maze, No. M2000-02249-CCA-R3-CD, Davidson County (Tenn. Crim. App. Aug. 16, 2002).

- (c) **Aggravated Assault by Failure to Protect Child** [T.C.A. § 39-13-102(b)]
State v. Misty Brunelle, No. E2006-00467-CCA-R3-CD, Greene County (Tenn. Crim. App. July 13, 2007), app. denied (Tenn. Oct. 22, 2007).

**INDICTED
OFFENSE:**

POSSESSION OF A CONTROLLED SUBSTANCE IN A PENAL INSTITUTION [T.C.A. § 39-16-201(a)(2)-Class C felony]

Lesser Included Offenses include:

Simple Possession [T.C.A. § 39-17-418(a)-Class A misdemeanor]
State v. Steven Bryan Maxwell, No. E1999-01363-CCA-R3-CD, Sullivan County (Tenn. Crim. App. Mar. 22, 2000) (applying the Burns test, part (a)).

**INDICTED
OFFENSE:**

POSSESSION OF A WEAPON IN A PENAL INSTITUTION [T.C.A. § 39-16-201(a)(2)-Class C felony]

Lesser Included Offenses do not include:

Possession of a Prohibited Weapon [T.C.A. § 39-17-1302(a)-Class B, C, or E felony or Class A misdemeanor depending upon the weapon, T.C.A. § 39-17-1302(d)]
State v. James Anthony Hill, No. M2003-00516-CCA-R3-CD, Marshall County (Tenn. Crim. App. Mar. 9, 2004) (applying the Burns test, parts (a) and (b)), app. denied (Tenn. Sept. 7, 2004).

**INDICTED
OFFENSE:**

RESISTING ARREST [T.C.A. § 39-16-602-Class A or B misdemeanor depending upon the use of a weapon]

Lesser Included Offenses do not include:

Attempted Resisting Arrest [T.C.A. §§ 39-12-101, -107; 39-16-602-One class lower than the indicted offense]
State v. William Harlon Adams, No. M2003-02952-CCA-R3-CD, Coffee County, 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).

**INDICTED
OFFENSE:**

CLASS D FELONY EVADING ARREST [T.C.A. § 39-16-603(b)(3)]

Lesser Included Offenses include:

- (a) **Class E Felony Evading Arrest** [T.C.A. § 39-16-603(b)(1)]
State v. Gregory Dunnorm, No. E2001-00566-CCA-R3-CD, Anderson County (Tenn. Crim. App. June 12, 2002) (applying the Burns test, part (a)); State v. Kerry L. Dowell, No. M2002-00630-CCA-R3-CD, Davidson County (Tenn. Crim. App. June 27, 2003), app. denied (Tenn. Nov. 24, 2003).
- (b) **Reckless Driving** [T.C.A. § 55-10-205(a)]
State v. James McClennon, No. M2002-00153-CCA-R3-CD, Davidson County (Tenn. Crim. App. June 24, 2003) (applying the Burns test, parts (a) and (b)(2)).

Lesser Included Offenses do not include:

- (a) **Attempted Evading Arrest** [T.C.A. §§ 39-12-101, 39-16-603(b)-Class A misdemeanor]
State v. Frank Johnson, No. W2000-00386-CCA-R3-CD, Shelby County (Tenn. Crim. App. June 26, 2001) (holding that evading arrest includes the “attempt[] to elude” and that, therefore, attempted evading arrest is not a lesser offense of Class E felony evading arrest), app. denied (Tenn. Oct. 22, 2001).
- (b) **Misdemeanor Evading Arrest** [T.C.A. § 39-16-603(a)(1)-Class A misdemeanor]
State v. Gregory Dunnorm, No. E2001-00566-CCA-R3-CD, Anderson County (Tenn. Crim. App. June 12, 2002).
- (c) **Obedience to Police Officers** [T.C.A. § 55-8-104-Class C misdemeanor]
State v. Joe David Sloan, No. W2000-02861-CCA-R3-CD, Madison County (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).

**INDICTED
OFFENSE:**

FELONY ESCAPE [T.C.A. § 39-16-605(a), (b)(2)-Class E felony]

Lesser Included Offenses do not include:

Misdemeanor Escape [T.C.A. § 39-16-605(a), (b)(1)-Class A misdemeanor]
Anthony E. Brasfield v. State, No. W2001-00169-CCA-R3-PC, Weakley
County (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).

**INDICTED
OFFENSE:**

PERMITTING OR FACILITATING ESCAPE [T.C.A. § 39-16-607-
Class C felony]

Lesser Included Offenses do not include:

- (a) **Accessory After the Fact** [T.C.A. § 39-11-411-Class E felony]
State v. Christine D. McClain, No. M2001-00020-CCA-R3-CD,
Wayne County (Tenn. Crim. App. June 7, 2002), app. denied (Tenn.
Nov. 18, 2002) (DESIGNATED NOT FOR CITATION).
- (b) **Escape (of the person whom the defendant was charged with
permitting to escape)** [T.C.A. § 39-16-605-Class E felony]
State v. Christine D. McClain, No. M2001-00020-CCA-R3-CD,
Wayne County (Tenn. Crim. App. June 7, 2002) (holding that
although facilitating escape literally contains all of the elements of
escape, permitting or facilitating escape requires that someone other
than the escapee be involved), app. denied (Tenn. Nov. 18, 2002)
(DESIGNATED NOT FOR CITATION).
- (c) **Criminal Responsibility for the Escape of Another** [T.C.A. §§ 39-
11-402, 39-16-605-Class E felony]
State v. Christine D. McClain, No. M2001-00020-CCA-R3-CD,
Wayne County (Tenn. Crim. App. June 7, 2002) (holding that a
general statute prescribing the same conduct as a specific statute is
not a lesser included offense of that specific statute pursuant to
T.C.A. § 39-11-109), app. denied (Tenn. Nov. 18, 2002)
(DESIGNATED NOT FOR CITATION).
- (d) **Facilitation of Escape** [T.C.A. §§ 39-11-403, 39-16-605-Class A
misdemeanor]

State v. Christine D. McClain, No. M2001-00020-CCA-R3-CD, Wayne County (Tenn. Crim. App. June 7, 2002) (holding that because escape is not a lesser included offense of permitting or facilitating escape, facilitation of escape is also not a lesser included offense of permitting or facilitating escape under the Burns test, part (c)), app. denied (Tenn. Nov. 18, 2002) (DESIGNATED NOT FOR CITATION).

**INDICTED
OFFENSE:**

AGGRAVATED PERJURY [T.C.A. § 39-16-703-Class D felony]

Lesser Included Offenses include:

Perjury [T.C.A. § 39-13-702-Class A Misdemeanor]

State v. Evangeline Combs & Joseph D. Combs, Nos. E2000-02801-CCA-R3-CD, E2000-2800-CCA-R3-CD, Sullivan County (Tenn. Crim. App. Sept. 25, 2002) (applying the Burns test, part (a)), app. denied (Tenn. Jan. 27, 2003).

**INDICTED
OFFENSE:**

MANUFACTURE OF A CONTROLLED SUBSTANCE [T.C.A. § 39-17-417(a)(1)-Felony class depends upon the amount and type of drug involved]

Lesser Included Offenses include:

Simple Possession [T.C.A. § 39-17-418(a)-Class A misdemeanor]

State v. Blair, 145 S.W.3d 633 (Tenn. Crim. App. 2004) (applying the Burns test, part (a)), app. denied (Tenn. June 21, 2004).

Lesser Included Offenses do not include:

Possession of Drug Paraphernalia [T.C.A. § 39-17-425(a)-Class A misdemeanor]

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

**INDICTED
OFFENSE:**

SALE OR DELIVERY OF A CONTROLLED SUBSTANCE [T.C.A. § 39-17-417(a)(2)-(3)-Felony class depends upon the amount and type of drug involved]

Lesser Included Offenses include:

- (a) **Facilitation** [T.C.A. §§ 39-11-403, 39-17-417-Felony class is one class lower than the facilitated offense]

State v. Jerry Wayman Travis, No. W1999-01089-CCA-R3-CD, Henry County (Tenn. Crim. App. Mar. 10, 2000) (applying the Burns test, parts (a) and (c)).¹⁰
- (b) **Simple Possession** [T.C.A. § 39-17-418(a)-Class A misdemeanor]

State v. Tambora N. Simmons, No. 03C01-9905-CR-00188, Knox County (Tenn. Crim. App. Feb. 16, 2000), app. denied (Tenn. Sept. 18, 2000).
- (c) **Casual Exchange** [T.C.A. § 39-17-418(a)-Class A misdemeanor]

State v. Edward P. Harris, No. M1998-00628-CCA-R3-CD, Davidson County (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).
- (d) **Attempted Simple Possession** [T.C.A. §§ 39-12-101(a), 39-17-418(a)-Class B misdemeanor]

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

**INDICTED
OFFENSE:**

POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO SELL OR DELIVER [T.C.A. § 39-17-417(a)(4)-Felony class depends upon the amount and type of drug involved]

Lesser Included Offenses include:

- (a) **Attempted Possession** [T.C.A. §§ 39-12-101(a), 39-17-417, 39-11-403-Felony class is one class lower than the offense attempted]

State v. Michael E. Wallace, No. M1999-02187-CCA-R3-CD, Davidson County (Tenn. Crim. App. Mar. 1, 2001).
- (b) **Facilitation** [T.C.A. §§ 39-11-403, 39-17-417-Felony class is one class lower than the facilitated offense]

State v. Nash, 104 S.W.3d 495 (Tenn. 2003) (affirming that facilitation of possession of marijuana with intent to deliver is a lesser included offense of possession of marijuana with intent to deliver under the Burns test, part (c)).

¹⁰Defendant indicted for the manufacture, sale, or delivery of less than .5 grams of cocaine, which is a Class C felony.

(c) **Simple Possession** [T.C.A. § 39-17-418(a)-Class A misdemeanor] State v. Jimmy Joe Rittenberry, No. E2000-02722-CCA-R3-CD, Anderson County (Tenn. Crim. App. Nov. 20, 2001) (applying the Burns test, part (a)); accord State v. Timothy Tyrone Sanders, No. M2000-00603-CCA-R3-CD, Bedford County (Tenn. Crim. App. Jan. 18, 2001) (holding that simple possession is a lesser under the Burns statutory elements test and as so designated by the legislature in T.C.A. § 39-17-419).

Lesser Included Offenses do not include:

(a) **Solicitation** [T.C.A. § 39-12-102, 107-Felony class is two classes lower than the solicited felony offense] Kenneth Strickland v. State, No. M2004-02295-CCA-R3-CD, Rutherford County (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).

(b) **Casual Exchange** [T.C.A. § 39-17-418(a)-Class A misdemeanor] State v. Grady Paul Gatlin, M2000-02356-CCA-R3-CD, Marshall County (Tenn. Crim. App. Sept. 25, 2001) (Witt, J., concurring and dissenting, and Riley, J., dissenting) (concluding that casual exchange is not a lesser included offense of possession with intent to sell); accord State v Timothy Wayne Grimes, M2001-01460-CCA-R3-CD, Dickson County (Tenn. Crim. App. Oct. 16, 2002) (but instruct on the statutory inference for casual exchange because it bears on felonious intent).

**INDICTED
OFFENSE:**

CONSPIRACY TO POSSESS A CONTROLLED SUBSTANCE WITH INTENT TO SELL OR DELIVER WITHIN 1000 FEET OF A SCHOOL ZONE [T.C.A. §§ 39-12-103; 39-17-417(a)(4), -432-Felony class depends upon the amount and type of drug involved and is increased one level from the base offense for occurring within 1000 feet of a school zone]

Lesser Included Offenses include:

Facilitation of Possession with Intent to Sell or Deliver Within 1000 Feet of a School Zone [T.C.A. §§ 39-11-403; 39-17-417(a)(4), -432-Felony class is one level lower than the indicted offense] State v. Roberto Vasques, No. M2004-00166-CCA-R3-CD, Davidson County (Tenn. Crim. App. Oct. 7, 2005) (holding that facilitation is a lesser included offense of conspiracy under part (c) of the Burns test), *aff'd*, 221 S.W.3d 514

(Tenn. 2007) (affirming Court of Criminal Appeals' determining that failure to give lesser included offense instruction on facilitation was not plain error).

**INDICTED
OFFENSE:**

**FELONY LEAVING THE SCENE OF AN ACCIDENT INVOLVING
DEATH**

[T.C.A. § 55-10-101(a), (b)(2)-Class E felony]

Lesser Included Offenses include:

***Misdemeanor Leaving the Scene of an Accident Involving Death or
Personal Injury***

[T.C.A. § 55-10-101(a), (b)(2)-Class A misdemeanor]

*State v. Jashua Shannon Sides, No. E2006-01356-CCA-R3-CD, Hamilton
County (Tenn. Crim. App. Feb. 28, 2008).*

**INDICTED
OFFENSE:**

DRIVING UNDER THE INFLUENCE OF AN INTOXICANT

[T.C.A. § 55-10-401(a)-Class A misdemeanor]

Lesser Included Offenses include:

Underage Driving While Impaired [T.C.A. § 55-10-415(a)-Class A
misdemeanor]

See *State v. Burns*, 6 S.W.3d 453, 467 n.12 (Tenn. 1999) (noting that the legislature has statutorily designated in T.C.A. § 55-10-415(c) underage driving while impaired as a lesser included offense of driving while intoxicated).

Lesser Included Offenses do not include:

(a) ***Reckless Driving*** [T.C.A. § 55-10-205-Class B misdemeanor]
*State v. Treva Dianne Green, No. E1999-02204-CCA-R3-CD, Blount
County (Tenn. Crim. App. Dec. 14, 2000), app. denied (Tenn. May
21, 2001).*

(b) ***Adult Driving While Impaired*** [T.C.A. § 55-10-418(a)-Class B
misdemeanor through Class E felony depending upon number of prior
convictions]
State v. Humphreys, 70 S.W.3d 752, 764 (Tenn. Crim. App. 2001).

**INSTRUCTION
ON:**

CRIMINAL RESPONSIBILITY FOR ANOTHER'S CONDUCT

[T.C.A. § 39-11-402]

Lesser Included Offenses include:

Facilitation of a Felony [T.C.A. § 39-11-403(a)]

State v. Fowler, 23 S.W.3d 285, 287-88 (Tenn. 2000) (holding that “facilitation of a felony is a lesser-included offense when a defendant is charged with criminal responsibility for the conduct of another”).

**INSTRUCTION
ON:**

FELONY OFFENSE

Lesser Included Offenses do not include:

Accessory After the Fact [T.C.A. § 39-11-411]

State v. Jon Robert Goodale, No. M2000-02140-CCA-R3-CD, Davidson County (Tenn. Crim. App. Sept 14, 2001), app. denied (Tenn. Feb. 19, 2002) (analyzing accessory after the fact under the Burns test); accord State v. Timothy Wayne Holland, No. M2001-03129-CCA-R3-CD, Robertson County (Tenn. Crim. App. Sept. 4, 2002) (holding that “accessory after the fact is a separate and distinct offense, rather than a lesser-included offense of a felony committed by the perpetrator of a crime”).

STATE V. BURNS, 6 S.W.3D 453 (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).