IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

DECEMBER 1994 SESSION

FILED

July 23, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE, Appellee	No. 03C01-9406-CR-00209
vs.	SEVIER COUNTY
	Hon. Rex Henry Ogle, Judge
HOLLIS RAY WILLIAMS, Appellant	(Vehicular Homicide)

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OPINION FILED: _____

REVERSED AND REMANDED

Robert E. Burch
Special Judge

OPINION

_____Appellant was convicted by a jury of the crime of vehicular homicide by reason of operation of a motor vehicle while intoxicated, vehicular homicide by reckless operation of a motor vehicle and driving under the influence of an intoxicant. The latter two verdicts were merged by the trial court into the more serious offense of vehicular homicide by reason of operation of a motor vehicle while intoxicated. He was sentenced to six (6) years in the Department of Corrections. Much aggrieved, he appeals to this Court assigning four questions for review. Two of these questions concern the jury instructions. Since one of these amounts to reversible error, we will confine our examination to the jury instructions.

FACTS

On April 13, 1993, the deceased was returning home from her employment at Dollywood. She was driving within the speed limit and in her proper lane of travel. A witness was traveling in the same direction just behind her. According to the testimony of the witness, defendant was first observed traveling on a straight portion of the roadway in the opposite direction just after he had negotiated a slight curve. Appellant then immediately crossed the double yellow center line of the road "just a little", then swerved to the right to the extent that his right wheels left the pavement and traveled for a time on the shoulder of the road. He then abruptly crossed into deceased's lane and collided with her vehicle in a "sideswipe" type collision. The deceased died within minutes. The witness estimated appellant's speed at about fifty (50) miles per hour. The extensive damage to both vehicles corroborates this testimony. According to the witness, the windshield of appellant's truck went into the air to about the height of a nearby utility pole.

The investigating officer found three empty beer cans and several full ones in the bed of appellant's truck. He also found one unopened beer can in the cab along with one which was in an unopened condition but had ruptured. No opened beer cans were found in the cab of the truck.

A blood alcohol test was performed upon appellant at the University of Tennessee Medical Center, where he had been transported because of his injuries. The result of said test was a level of .11.

At the trial, appellant's able counsel requested His Honor to instruct the jury on the "lesser included offense" of Criminally Negligent Homicide. His Honor refused the request.

STANDARD OF REVIEW

Lesser offenses are of two types:

(1). Lesser included offenses;

(2). Lesser grades or classes of offenses.

Justice White in State v Trusty 914 S.W.2d 481 (Tenn. 1996) clarified the differences between the two. We paraphrase that explanation.

Lesser included offenses

An offense is necessarily included in another if the elements of the greater offense (as those elements are set forth in the indictment) include, but are not congruent with, all the elements of the lesser. State v. Howard 578 S.W.2d 83,85 (Tenn. 1979). In other words, the lesser offense may not require proof of any element not included in the greater offense as charged in the indictment. State v. Trusty, supra.

For the mathematically inclined, an offense qualifies as a lesser included offense only if the elements of the included offense are a proper subset of the elements of the charged offense and only if the greater offense cannot be committed without also committing the lesser offense. See Schmuck v U.S.

489 U.S. 705, 716, 103 L,Ed2d 734, 109 S.Ct. 1443(1989).

Lesser classes or grades of offenses

An offense is a lesser class or grade of the indicted offense if it is within the same statutory classification as the indicted offense. For example, T.C.A. §§39-13-201 et seq contains the various grades and classes of criminal homicide. Thus, the lesser grades or classes of murder in the first degree(§39-13-202) are: second degree murder (-211), voluntary manslaughter (-211), criminally negligent homicide (-212), vehicular homicide(-213), reckless homicide (-215), and assisted suicide (-216).

For example, it is obvious that assisted suicide cannot be a lesser **included** offense of murder in the first degree but it is a lesser **class or grade** of first degree murder.

Whether an offense is a lesser included offense or a lesser class or grade of the offense, it is reversible error to fail to charge either of them, if the evidence would sustain a conviction of the lesser offense. See Trusty, supra.

Failure to instruct on a lesser included offense denies a defendant his constitutional right to trial by jury. State v. Wright 618 S.W.2d 310,315 (Tenn. Crim. App. 1981). This being true, the error is reversible unless the record clearly shows that the defendant is guilty of the greater offense and is devoid of any evidence permitting an inference of guilt of the lesser offense. Whitwell v. State 520 S.W.2d 338 (Tenn. 1975). This "unless" test could be alternately stated that the defendant is either guilty of the principle offense or he is guilty is nothing.

T.C.A. § 40-18-110(a) requires trial judges to charge the jury, whether requested to or not, on lesser grades or classes of the offense charged in the indictment which are supported by the evidence. Failure to do so is reversible error if the evidence

would support a conviction for the lesser offense. See State v Trusty, supra.

ANALYSIS

Criminally negligent homicide may be a lesser included offense of vehicular homicide by intoxicated driving under a proper set of facts. See State v Ben Jordan (unreported) Court of Criminal Appeals at Nashville CCA # 01C01-9311-CC-00419 filed 6/13/95. Some argument may be made that the elements of recklessness ("is aware") and criminally negligent conduct ("ought to be aware") are not synonymous, while others may argue the T.C.A. § 39-11-301(a)(2) provides that the requirement of criminal negligent conduct is satisfied if it is shown that the defendant acted knowingly, intentionally or recklessly. Of course, reckless homicide would exactly fit as a lesser included offense but the effective date of T.C.A. §39-13-215 was 31 days after the date of this accident. In any event, this particular battle is for another day. The offense is a lesser grade or class of the indicted offense. "You must go to war only when there is no alternative". Sun Tzu, The Art of Warfare.

Criminally negligent homicide (T.C.A. §39-13-212) is a lesser grade or class of vehicular homicide (T.C.A. §39-13-213). See State v Trusty, supra. If the evidence in this case would support a conviction of criminally negligent homicide, the error is reversible.

In the case sub judice, evidence exits which would establish criminally negligent conduct if the jury did not find that the fatal accident was proximately caused by the appellant's intoxication.

Appellant was exceeding the speed limit. The weather was clear. The road was dry, straight and in good condition, but during the entire time that he was observed by the only testifying witness to the accident, appellant was swerving across

the center line and onto the shoulder of the road. He crossed a double yellow line and hit the deceased's vehicle in her lane of travel. Appellant smelled of alcohol and registered .11 on the blood alcohol test. These actions created a condition of substantial and unjustifiable risk of injury to others of which appellant should have been aware. The failure to perceive this risk constituted a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the accused person's viewpoint. See T.C.A. §39-11-302(d). See also similar facts in State v Ramsey 903 S.W.2d 709 (Tenn. Crim. App. 1995). In fact, in the case sub judice, the jury did find the defendant guilty of the offense of vehicular homicide by reckless operation of a motor vehicle. This verdict was properly merged with the more serious offense. The jury was instructed to return a verdict on both charges. What would they have done if they had been instructed to consider a lesser degree of homicide as an alternative to finding the appellant guilty of the charged offense? What would they have done if they had the option of finding the appellant guilty of an offense requiring that the appellant "ought to be aware" of the risk (criminal negligence) instead of an offense requiring that the appellant be aware of the risk (recklessness)? We cannot answer these questions. The appellant has a right to have to jury consider all of the legally available options.

The proof of intoxication was not strong. The only evidence thereof was that appellant smelled of alcohol and tested .11% on his blood alcohol test. There were no open beer cans found in the cab of appellant's truck and appellant's physical circumstances after the wreck make it unlikely that he disposed of any prior to the arrival of the officer. The smell of alcohol **could** have been from the ruptured beer can (presumably ruptured in the accident). The blood alcohol level was just over the inferential level of intoxication. Of course from the facts of

other cases which we have considered, we are not unaware of the practice of persons drinking beer while driving and disposing of the empty cans by throwing them into the bed of the truck. Their was, however, no proof that this occurred in this case. Although we do not disagree with the verdict of the jury, we would note that the evidence does not clearly make out a case of guilt of vehicular homicide by intoxication to the exclusion of lesser offenses. The jury would have been justified in not finding the element of proximate causation by intoxication had they so chosen. Therefore, the proof does not clearly make out the indicted offense. The error is reversible in nature. See State v McKinney 605 S.W.2d 842 (Tenn. Crim. App. 1980).

We are painfully aware that this opinion will require a retrial which will be very difficult for the family and friends of the deceased. We have read their letters to His Honor which were considered at the sentencing hearing. We do not undertake this course lightly. Failure to instruct on a lesser offense denies a defendant his right to a jury trial because the jury did not have all of the allowable options before them. State v. Wright 618 S.W.2d 310 (Tenn. Crim. App 1981). The law must be equally applied to all or it is guaranteed to none.

The judgement of the trial court is reversed and the case remanded for further proceedings consistent with this opinion.

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Robert E. Burch,
Special Judge

CONCUR:

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Gary R. Wade, Judge

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Joseph M. Tipton, Judge