

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

OCTOBER SESSION, 1999

FILED

January 26, 2000

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,

Appellee,

vs.

BRANDON PATRICK,

Appellant.

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No. 03C01-9905-CC-00201

BLOUNT COUNTY

Hon. D. Kelly Thomas, Jr., Judge

(Reckless Aggravated Assault)

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OPINION FILED: _____

REVERSED AND REMANDED

David G. Hayes, Judge

OPINION

The appellant, Brandon Patrick, was convicted by a Blount County jury of one count of reckless aggravated assault, a class D felony. The trial court imposed a three year sentence and ordered that the sentence be served in the Department of Correction. The appellant now appeals the conviction raising the following issues for our review:

- I. Whether a conviction for reckless aggravated assault, Tenn. Code Ann. § 39-13-102(2)(B) is a lesser included offense of aggravated assault, Tenn. Code Ann. § 39-13-102(1)(B);
- II. Whether the trial court properly instructed the jury as to the offense of reckless aggravated assault.

Finding both issues meritorious, we reverse the judgment of conviction and remand for a new trial on lesser included offenses.

Background

In 1995, the twenty year old appellant was involved in a relationship with eighteen year old Stephanie Webb. Stephanie and her small child lived with her mother in Alcoa. The appellant was the father of the small child. By early December, the relationship had become strained and the two “were on the verge of breaking up.”

On the afternoon of December 8, 1995, Stephanie telephoned the appellant to inquire as to whether the appellant wanted to visit with his son. The appellant responded that he would like to see his son. He told Stephanie that “he was going to come and get the baby and take him down to his mom’s house to visit with her.” After removing the child from the Webb residence, the appellant telephoned Stephanie and informed her that “[she] would never see [her] son again.” Shortly thereafter, the appellant returned to the Webb residence with the baby. The appellant was accompanied by Sammy Garner. Stephanie stated that the appellant appeared “angry.” When he entered the residence, “he had the baby” in his left arm and, in his right hand, “he had a gun.” “He was threatening to kill [Stephanie] and

[her] family.” Stephanie and her mother tried to talk the appellant into leaving. He warned them that if they “called the cops, he was going to have a shootout.” Before he left, “he smacked [Stephanie Webb] in the face and walked out.” The entire incident lasted about 20 -25 minutes. Stephanie conceded that after this incident she was still in love with the appellant and tried to get the charges against him dropped.

I. Sufficiency of Evidence

The appellant contends that the evidence and the indictment are insufficient to sustain his conviction for reckless aggravated assault. The indictment returned by the Grand Jury charged the appellant with one count of aggravated assault. Specifically, the indictment charged:

. . . BRANDON PATRICK on or about the 8th day of December, 1995, . . . did unlawfully and knowingly by the display of a deadly weapon cause Stephanie Webb to reasonably fear imminent bodily injury by threatening her with a pistol, in violation of Tennessee Code Annotated, Section 39-13-102. . . .

(Emphasis added).

At the time of the offense, aggravated assault as defined by Tenn. Code Ann. § 39-13-102 (1995 Supp.) provided:

- (a) A person commits aggravated assault who:
- (1) Intentionally or knowingly commits an assault as defined in § 39-13-101 and:
 - (A) Causes serious bodily injury to another; or
 - (B) Uses or displays a deadly weapon; or
 - (2) Recklessly commits an assault as defined in § 39-13-101(a)(1), and:
 - (A) Causes serious bodily injury to another; or
 - (B) Uses or displays a deadly weapon.

Likewise, Tenn. Code Ann. § 39-13-101(1991) provided that:

- (a) A person commits assault who:
- (1) Intentionally, knowingly or recklessly causes bodily injury to another;
 - (2) Intentionally or knowingly causes another to reasonably fear imminent bodily injury; or
 - (3) Intentionally or knowingly causes physical contact with another and a reasonable person would regard the contact as extremely offensive or provocative.

The appellant contends that the indictment is insufficient in that (1) the offense of reckless aggravated assault requires actual bodily injury and (2) the evidence at trial does not establish bodily injury. The three primary functions of an indictment are (1) to inform the defendant of the substantive offense charged; (2) to enable a trial court upon conviction to enter an appropriate judgment and sentence; and (3) to protect the defendant against double jeopardy. See State v. Byrd, 820 S.W.2d 739, 741 (Tenn. 1991); State v. Lindsay, 637 S.W.2d 886, 890 (Tenn. Crim. App.1982). Inherent within these functions is the due process guarantee that the indictment provide the accused a fair opportunity to defend against the charges. U.S. CONST. amend. V (1791); see also TENN. CONST. Art. I. Sec. 14 (1870).

The trial court has the statutory duty to charge the jury as to the law of each offense “included” in an indictment. See State v. Brenda Anne Burns, No. W1996-00004-SC-R11-CD (Tenn. at Jackson, Nov. 8, 1999) (*for publication*) (citing Tenn. Code Ann. § 40-18-110 (1997)). The focus then becomes what offenses are a lesser included offense of the offense charged in the indictment. In State v. Brenda Anne Burns, our supreme court, overruling State v. Trusty, 919 S.W.2d 305 (Tenn. 1996), adopted a three part test defining what constitutes a lesser included offense. State v. Brenda Anne Burns, No. W1996-00004-SC-R11-CD at 22.

- 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
 - (2) an attempt to commit the offense charged. . .; or
 - (3) solicitation to commit the offense charged. . . .

State v. Brenda Anne Burns, No. W1996-00004-SC-R11-CD at 22-23.

Because reckless aggravated assault requires proof of the additional element of “bodily injury,” it fails to meet subsection (a) of the Burns test which is essentially an adoption of the Howard test, *i.e.*, 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.”

See State v. Brenda Anne Burns, No. W1996-00004-SC-R11-CD at 23; see also Howard v. State, 578 S.W.2d 83, 85 (Tenn. 1979). See generally Tenn. Code Ann. § 39-13-102(a)(2)(B); Tenn. Code Ann. § 39-13-101(a)(1). Moreover, it is obvious that reckless aggravated assault does not constitute an inchoate offense of facilitation, attempt or solicitation. Accordingly, reckless aggravated assault is not a lesser included offense under part (c) of the Burns test for lesser included offenses.

Thus, we are left to determine whether reckless aggravated assault is a lesser included offense of intentional or knowing aggravated assault under subsection (b). “Under part (b), the lesser-included offense may contain a statutory element or elements establishing: (1) a different mental state indicating a lesser kind of culpability. . . .” See State v. Brenda Anne Burns, No. W1996-00004-SC-R11-CD at 23. Included within this category are “offenses that are still logically related to the charged offense in terms of the character and nature of the offense but in which the injury or risk of injury, damage, or culpability is of a lesser degree than that required for the greater offense.” See State v. Brenda Anne Burns, No. W1996-00004-SC-R11-CD at 21-22. We conclude that, 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.

Our inquiry, however, is not concluded; the question remains whether the evidence justifies a jury instruction on such a lesser offense. State v. Brenda Anne Burns sets forth a two-step analysis for determining whether a lesser included offense instruction should be given.

First, the trial court must determine whether any evidence exists that reasonable minds could accept as to the lesser-included offense. In making this determination, the trial court must view the evidence liberally in the light most favorable to the existence of the lesser-included offense without making any judgments on the credibility of such evidence. Second, the trial court must determine if the evidence, viewed in this light, is legally sufficient to support a conviction for the lesser-included offense.

State v. Brenda Anne Burns, No. W1996-00004-SC-R11-CD at 26-27.

At trial, the total extent of the victim’s testimony relating to the assault was

that “[the appellant] smacked [her] in the face and he walked out.”¹ Tenn. Code Ann. § 39-11-106(a)(2) (1995 Supp.) provides that “bodily injury” includes “a cut, abrasion, bruise, burn or disfigurement; physical pain or temporary illness or impairment of the function of bodily member, organ, or mental faculty.” “Pain” is defined as “a bodily . . . sensation causing often acute discomfort or suffering.” See WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY V. II, 1621 (1981). The State failed to elicit any testimony at trial that the victim sustained “discomfort or suffering” by the appellant’s actions. We cannot conclude that the appellant’s action of “slapping” the victim in the face “caused bodily injury to her.” See Tenn. Code Ann. § 39-13-101(a)(1). Thus, the proof did not support an instruction on the lesser offense of reckless aggravated assault.

Notwithstanding this conclusion, we note that, although the court failed to instruct the jury on the lesser included offense of assault, such instruction is supported by the evidence at trial. See Tenn. Code Ann. § 39-13-101(a)(2). The appellant’s actions of “slapping” the victim in the face and his use of a weapon are sufficient to cause another to “reasonably fear imminent bodily injury.” Id. Accordingly, we remand to the trial court for further proceedings as to this offense.

II. Jury Instructions

Notwithstanding our conclusion that the evidence is insufficient to support a conviction for reckless aggravated assault, we also review the appellant’s final issue that the trial court improperly instructed the jury as to the definition of reckless aggravated assault. Specifically, the appellant avers that the trial court “broadened the definition of reckless, aggravated assault by listing the following as one of the essential elements: “1. That the Defendant recklessly caused another to reasonably fear imminent bodily injury.”” The appellant contends that the “fear of bodily injury” is not an element of reckless aggravated assault. The State responds that the

¹In addition to the testimony of the victim, her mother testified that the appellant “slapped” Stephanie on both sides of her face. The appellant conceded that he “mugged” Stephanie in the face and Sammy Gardner, a friend of the appellant, testified that “[the appellant] shoved [Stephanie] in the face or something, pushed her down on the couch.”

appellant has waived any challenge to this issue as he raises it for the first time in this appeal.

Initially, we note that a challenge to the jury instruction was not made in the appellant's written motion for new trial. Moreover, pertinent parts of the transcript are not included in the appellate record to enable this court to discern whether or not such objection was made during the trial or if such issue was orally raised at the motion for new trial. Notwithstanding the appellant's failure to bring this omission to the attention of the trial court during the submission of the jury instructions, we find this issue to be inherently encompassed within the appellant's challenge to the sufficiency of the evidence. Additionally, the waiver principle generally will not apply when the trial court's instructions completely omit an essential element of the offense to be considered by the jury. See State v. Teel, 793 S.W.2d 236, 249 (Tenn.), cert. denied, 498 U.S. 1007, 111 S.Ct. 571 (1990). See also State v. Roy McCamey, No. 03C01-9601-CC-00037 (Tenn. Crim. App. at Knoxville, Feb. 12, 1997).

The trial court provided the following instruction to the jury as to the elements of reckless aggravated assault:

Any person who commits the offense of **reckless aggravated assault** is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt, the existence of the following essential elements:

1. That the defendant recklessly caused another to **reasonably fear imminent bodily injury**:

and

2. That the defendant used or displayed a deadly weapon.

(Emphasis added).

As stated previously, reckless aggravated assault requires proof that the defendant "(1) Intentionally, knowingly or recklessly **causes** bodily injury to another." Tenn. Code Ann. § 39-13-101(a)(1). The trial court's erroneous instruction effectively removed this element from the jury's consideration. Indeed, the instruction provided by the court does not constitute an offense under Tennessee

law.

For the foregoing reasons, the appellant's conviction for reckless aggravated assault is reversed and vacated. We remand this case to the trial court for proceedings consistent with this opinion.

DAVID G. HAYES, Judge

CONCUR:

GARY R. WADE, Presiding Judge

DAVID H. WELLES, Judge