

IN THE COURT OF APPEALS OF IOWA

No. 3-215 / 12-1072
Filed April 10, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RICHARD EARL HALTERMAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg,
Judge.

Richard Halterman appeals from his conviction of homicide by vehicle by operating a motor vehicle while under the influence of alcohol contending the district court erred in refusing to give a homicide by vehicle by reckless driving instruction as a lesser included offense. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David A. Adams (until withdrawal) and Stephan J. Japuntich, Assistant Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller, Assistant Attorney General, John P. Sarcone, County Attorney, and James P. Ward, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

A jury found Richard Halterman guilty of the crime of homicide by vehicle by operating a motor vehicle while under the influence of alcohol, in violation of Iowa Code section 707.6A(1) (2011), a class “B” felony. He was sentenced to a term of imprisonment not to exceed twenty-five years. He appeals contending the district court erred in refusing to give his requested homicide-by-vehicle-by-reckless-driving instruction as a lesser included offense. We believe the issue is controlled by our supreme court precedent of *State v. Massick*, 511 N.W.2d 384 (Iowa 1994), and we therefore affirm the district court.

The test for determining whether an offense is a lesser-included offense has been stated as follows:

[U]nder the legal test the lesser offense is necessarily included in the greater offense if it is impossible to commit the greater offense without also committing the lesser offense. If the lesser offense contains an element not required for the greater offense, the lesser cannot be included in the greater. This is because it would be possible in that situation to commit the greater without also having committed the lesser. In using this test, we look to the statutory elements rather than to the charge or the evidence.

State v. Braggs, 784 N.W.2d 31, 35-36 (Iowa 2010) (citation omitted). In applying this test, we look only to the statutory elements of the offense. *Id.* at 36. If the lesser offense contains an element not included in the greater offense, it is not included. *Id.*

Iowa Code section 707.6A(1), homicide by vehicle by operating a motor vehicle while intoxicated, provides: “A person commits a class ‘B’ felony when the person unintentionally causes the death of another by operating a motor vehicle while intoxicated, as prohibited by section 321J.2.” Section 707.6A(2)(a),

homicide by vehicle by reckless driving, provides: “A person commits a class ‘C’ felony when the person unintentionally causes the death of another by . . . [d]riving a motor vehicle in a reckless manner with willful or wanton disregard for the safety of persons or property, in violation of section 321.277.” Other than the addition of the unintentionally causing the death of another element, the elements of the offenses of homicide by vehicle by operating a motor vehicle while intoxicated and homicide by vehicle by reckless driving are identical to the offenses of operating while intoxicated and reckless driving respectively.

Upon comparing the elements of the offenses of operating while intoxicated, section 321J.2, and reckless driving, section 321.277, our supreme court concluded that “reckless driving is not a lesser included offense of operating while intoxicated.” *Massick*, 511 N.W.2d at 387. In view of the fact that the offenses under consideration here are identical to the offenses compared in *Massick*, other than the addition of the death element, it follows that the offense of homicide by vehicle by reckless driving is not a lesser included offense of homicide by vehicle by operating while intoxicated. See *id.* But Halterman argues otherwise.

Halterman asserts *Massick*’s distinction between “operating” a vehicle and “driving” a vehicle has been erased by the holding in *State v. Adams*, 810 N.W.2d 365 (Iowa 2012). As part of its basis for concluding reckless driving is not a lesser included offense of operating while intoxicated, the *Massick* court pointed out that reckless driving requires proof the defendant moved the vehicle, whereas operating while intoxicated does not. *Massick*, 511 N.W.2d at 387. The

Adams court held that under section 707.6A(1), “[a] defendant may be found guilty of homicide by vehicle only if the jury finds beyond a reasonable doubt that his criminal act of *driving* under the influence of alcohol caused the victim’s death.” *Adams*, 810 N.W.2d at 371 (emphasis added). We need not decide whether or not the *Adams* holding obviates the distinction made by the *Massick* court between “operating” a vehicle and “driving” a vehicle for purposes of a lesser included offense analysis of sections 707.6A(1) and 707.6A(2)(a), for there still remains another *Massick* distinction between operating while intoxicated and reckless driving.

“In addition, reckless driving requires proof of willful or wanton disregard for the safety of others or property. This is the recklessness element. Although driving under the influence is certainly reckless behavior, proof of recklessness is not an essential element of operating while intoxicated.” *Massick*, 511 N.W.2d at 387. So, even in light of *Adams*, homicide by vehicle by reckless driving is not a lesser included offense of homicide by vehicle by operating while intoxicated because.

The district court did not err in refusing to submit to the jury Halterman’s requested lesser included offense instruction. Therefore, we affirm.

AFFIRMED.