



Tyshekia Burris appeals her conviction of Criminal Recklessness,<sup>1</sup> a class D felony, challenging the sufficiency of the evidence supporting that conviction as the sole issue on appeal.

We reverse.

On the morning of May 26, 2009, Burris argued in her apartment with Troy Powell, the man with whom she was living at the time. When the argument became physical, Burris and her daughter, with the help of a Mr. Harris, were able to leave the apartment. Harris's car was parked near the apartment with its engine running. Burris jumped into the car and drove off. Powell and Burris's daughter chased after her. Burris managed to let her daughter into the car while eluding Powell. Burris then drove her daughter to a friend's apartment in the same complex and let her out there. At that point, Burris drove away, intending to leave the apartment complex. She noticed a cell phone lying on the floor board. She picked up the phone and, looking down, began to dial her mother's number. At the time, she was traveling at approximately twenty-five to thirty miles per hour. The speed limit at that location was fifteen miles per hour. Burris looked up and saw Powell in front of the car. The car struck Powell, who was thrown into the windshield of the car, suffering injuries to his head, arm, and chest. As a result of the impact, Powell's blood splattered over the car. Powell got into the car so Burris could take him to the hospital. When Burris heard sirens, however, she abandoned the car and ran to a neighbor's house.

When police arrived on the scene moments later, they found Powell bleeding profusely. Detective Martha Richardson of the Indianapolis Metropolitan Police Department

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<sup>1</sup> Ind. Code Ann. § 35-42-2-2 (West, Westlaw through 2009 1st Special Sess.).

was dispatched to the scene. When she arrived, she discovered a large crowd and a white vehicle “that was sitting in the roadway covered in blood.” *Transcript* at 47. There were no visible skid marks. Detective Richardson received a call advising her that Burris had turned herself in at the police station. The detective traveled to the station and interviewed Burris. Burris explained that she was traveling at between twenty-five to thirty miles per hour when she looked down to dial her telephone. When she looked up again, she saw Powell, but too late to avoid striking him. Detective Richardson later learned that on May 26, 2009, Burris was driving on a suspended driver’s license.

Burris was charged with criminal recklessness with a deadly weapon, a class D felony, as well as failure to stop after an accident involving bodily injury and driving with a suspended license, both as class A misdemeanors. She was convicted on all counts following a bench trial.

We note initially that the State did not file an appellee’s brief. When an appellee fails to submit a brief, we apply a less stringent standard of review with respect to the showing necessary to establish reversible error. *State v. Necessary*, 800 N.E.2d 667 (Ind. Ct. App. 2003). In such cases, we may reverse if the appellant establishes prima facie error, which is an error at first sight, on first appearance, or on the face of it. *Id.* Moreover, we will not undertake the burden of developing legal arguments on the appellee’s behalf. *Id.*

Burris challenges the sufficiency of the evidence with respect to only one of her convictions, i.e., criminal recklessness. Our standard of review for challenges to the sufficiency of evidence is well settled.

When considering a challenge to the sufficiency of evidence to support a

conviction, we respect the fact-finder's exclusive province to weigh conflicting evidence and therefore neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the verdict, and "must affirm 'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" *Id.* at 126 (quoting *Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

*Gleaves v. State*, 859 N.E.2d 766, 769 (Ind. Ct. App. 2007).

A review of the language of the charging information related to this count reveals that Burris was convicted under I.C. § 35-42-2-2(c)(2)(A), which provides that a person commits criminal recklessness as a class D felony when that person "recklessly, knowingly, or intentionally performs ... an act that creates a substantial risk of bodily injury to another person ... while armed with a deadly weapon[.]" Noting that the State did not allege that she acted knowingly or intentionally, Burris contends the evidence failed to establish that she acted recklessly.

Burris's was the only eyewitness account of the incident that appears in the record. At trial, Powell, the victim, testified that he did not even know who hit him, much less how it occurred. Burris's statement to police, which was admitted at trial, included the following description of the occurrence:

So as I'm [driving] past the mailbox before I can get past the last mailbox I'm dialing the number. I'm looking down. I'm, at the fourth number and my mother's number, as I look up [Powell is] already in front of the car. I'm already going forward. I'm not break [sic], I'm not stopped or anything. I'm already going forward. As [sic] he's in front of a car and I look up I see him. It was already too late for me to hit the brakes. It was already, 'cause he was already in front of the car. He was like, I don't know how many feet it was, but it wasn't enough break [sic] space for me to break [sic].

*Exhibits Binder* at 29. Burris later stated that she was traveling at between twenty-five and

thirty miles per hour at the time. Thus, the evidence relevant to the manner in which Burris operated the vehicle at the time of the incident showed that, while driving ten to fifteen miles per hour over the speed limit, she looked down to dial a cell phone call. When she looked back up at the road, Powell was standing in her path and was so near that she did not have time to apply the brakes. It appears that there were three aspects to her operation of the vehicle that might arguably be considered reckless within the meaning of I.C. § 35-42-2-2(c)(2)(A). First, she was driving at twenty-five to thirty miles per hour, which was ten to fifteen miles per hour in excess of the posted speed limit in that area. Second, she briefly looked down to dial a cell phone while she was driving. Third, she failed to apply her brakes before striking Powell. Clearly, the latter cannot be considered reckless in this case because the evidence shows that Burris did not see Powell until it was too late to react in that fashion. Can either of the other acts be considered “reckless” in this context?

This court has attempted to fashion guidelines for defining “criminal recklessness” in the context of driving an automobile. We have noted that “[t]he general definition given to willful and/or wanton misconduct is in vital respects similar to the criminal law definition of recklessness.” *Clancy v. State*, 829 N.E.2d 203, 208 (Ind. Ct. App. 2005), *trans. denied*. We also noted that our Supreme Court has approved of descriptions of willful or wanton misconduct to include: (1) “intentional acts done with reckless disregard of the natural and probable consequence of injury to a known person under the circumstances known to the actor at the time”; or (2) “omissions or failures to act when the actor has actual knowledge of the natural and probable consequence of injury and his opportunity to avoid the risk.” *Id.* (citing *Witham v. Norfolk & Western Ry. Co.*, 561 N.E.2d 484, 486 (Ind. 1990)). With these

in mind, we cannot agree that glancing down briefly to dial a cell phone while driving comports with these guidelines. This is especially so where, as here, Burris was driving at no more than thirty miles per hour in a residential area and saw no one in front of her when she glanced down.

We reach a similar conclusion with respect to the conviction for criminal recklessness being premised upon the speed at which Burris was operating the vehicle. We can find no bright-line rule with respect to the amount by which a driver must exceed the speed limit in order to be considered “reckless” in this context. We note, however, that in *Whitaker v. State*, 778 N.E.2d 423 (Ind. Ct. App. 2002), *trans. denied*, this court discussed the degree of recklessness necessary to support a conviction of reckless homicide when operating a vehicle. We stated, “Speed may support a reckless homicide conviction, but only greatly excessive speeds, such as twenty or more miles per hour over the posted speed limit, or where inclement weather and poor road conditions render higher speeds greatly unreasonable.” *Id.* at 426. Applying this principle in the instant context, we cannot conclude that the speed at which Burris was operating her vehicle was “greatly excessive”; it certainly was not greatly excessive under the circumstances. Although the evidence showed that Burris was violating the traffic code with respect to the speed at which she operated her vehicle when she struck Powell, it cannot reasonably be said that her speed was “greatly unreasonable.” *Id.*

Burris has demonstrated prima facie error with respect to the sufficiency of the evidence supporting her conviction for criminal recklessness as a class D felony. *See State v. Necessary*, 800 N.E.2d 667. Therefore, that conviction must be reversed.

Judgment reversed.

KIRSCH, J., and ROBB, J., concur.