

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 95-KA-00708 COA**

**CARL WILLIAMS**

**APPELLANT**

**v.**

**STATE OF MISSISSIPPI**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED,  
PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	06/19/95
TRIAL JUDGE:	HON. ISADORE W. PATRICK, JR.
COURT FROM WHICH APPEALED:	WARREN COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	DONALD W. BOYKIN
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: PAT S. FLYNN
NATURE OF THE CASE:	CRIMINAL - FELONY
TRIAL COURT DISPOSITION:	WILLIAMS WAS CONVICTED OF AGGRAVATED ASSAULT AND SENTENCED TO TWELVE YRS IN THE CUSTODY OF MDOC
DISPOSITION:	REVERSED AND REMANDED - 11/04/97
MOTION FOR REHEARING FILED:	11/13/97
CERTIORARI FILED:	2/4/98
MANDATE ISSUED:	4/15/98

BEFORE THOMAS, P.J., COLEMAN, AND DIAZ, JJ.

DIAZ, J., FOR THE COURT:

Carl Williams was tried and found guilty of aggravated assault. He was sentenced to serve twelve years in the custody of the Mississippi Department of Corrections. Aggrieved, Williams now appeals to this Court alleging six errors. Because we reverse and remand on the first issue, we will not address the remaining five issues.

FACTS

Carl Williams was indicted for aggravated assault for the shooting of Demetrius Thomas in Vicksburg, Mississippi. Williams was in his truck in the "drug-dealing" part of town when a group of people approached his truck. Although the reasons are in dispute, it is unquestioned that Williams's windshield was smashed. Williams left the area and returned on foot. There was testimony that Williams then fired a shot across the street striking Thomas. There was no testimony as to whom Williams intended to shoot.

Williams was indicted for aggravated assault under Miss. Code Ann. §97-3-7(2)(b)(Rev. 1994). He was found guilty and sentenced to twelve years imprisonment. He now appeals arguing that, among other things, an instruction given to the jury amended the indictment or was otherwise in significant variance with the indictment.

## ISSUE

Should instruction S1B have been denied because it amended the indictment or was otherwise in significant variance with the indictment?

Williams was indicted under Miss. Code Ann. § 97-3-7(2)(b)(Rev. 1994) which states:

(2)A person is guilty of aggravated assault if he . . . (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon or other means likely to produce death or serious bodily harm;. . .

Williams argues that because jury instruction S1B was granted, his indictment was in effect, amended. The instruction in question, S1B, gave the jury the option of finding Williams guilty for having shot the victim purposefully or recklessly. The term "recklessly" is only used in part (a) of the statute, not in part (b), the part under which Williams was indicted. Therefore, Williams contends the instruction effectively added the elements of part (a) to the indictment which caused it to read as if Williams were charged under Miss. Code Ann. § 97-3-7(2)(a)(Rev. 1994) which reads:

(2)A person is guilty of aggravated assault if he (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; . . . .

The facts in this case are almost identical to those in *Quick v. State*, where the defendant was indicted for aggravated assault under § 97-3-7(2)(b), but the jury was instructed as to recklessness and extreme indifference to the value of human life. 569 So. 2d 1197, 1198 (Miss. 1990). The court in *Quick*, reversed and remanded stating that Quick was charged with a specific subsection and a factual situation which had no reference to an element of reckless indifference. They went on to say that, via the jury instruction, there was a new element added to the charge even though it was not in the indictment. *Id.* at 1200.

As in *Quick*, Williams was charged in the indictment under section (b ) of the statute, and the jury instruction given contained an element which was not in the indictment. It has been long held that the State can prosecute only on the indictment returned by the grand jury and that there is no authority granted to the State or the court to amend the indictment at trial in any material manner. *Van Norman v. State*, 365 So. 2d 644, 647 (Miss. 1978). This insertion of the new element results in a

change of substance not just form. *Quick*, 569 So. 2d at 1200.

Because we are bound by the precedent enunciated in *Quick v. State*, we hold that the lower court erred in giving the jury instruction, and that the error was prejudicial to Williams. We reverse and remand for a new trial.

**THE JUDGMENT OF THE CIRCUIT COURT OF WARREN COUNTY IS REVERSED AND REMANDED FOR PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS ARE ASSESSED TO WARREN COUNTY.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.**