

**IN THE COURT OF APPEALS 06/18/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 94-KA-00300 COA**

**MARCUS KELLY**

**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

TRIAL JUDGE: HON. ROBERT WALTER BAILEY

COURT FROM WHICH APPEALED: LAUDERDALE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

DAVID A. STEPHENSON

ATTORNEY FOR APPELLEE:

W. GLENN WATTS

DISTRICT ATTORNEY: E. J. MITCHELL

NATURE OF THE CASE: AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: GUILTY OF AGGRAVATED ASSAULT, SENTENCED TO  
SERVE 20 YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF  
CORRECTIONS, PAY RESTITUTION AND COURT COSTS

BEFORE FRASIER, P.J., DIAZ, AND MCMILLIN, JJ.

DIAZ, J., FOR THE COURT:

Marcus Kelly (Kelly) was indicted, tried, and convicted of aggravated assault by the Lauderdale County Circuit Court and sentenced to serve twenty years in the custody of the Mississippi Department of Corrections, pay restitution and court costs. On appeal, Kelly argues that the trial court erred by refusing to grant a lesser-included offense instruction. Finding no reversible error, we affirm.

## FACTS

Larry Collier (Collier), a security officer for the Meridian Public Schools, was patrolling the schools around midnight on March 28, 1993, in his 1984 Chevy pickup. While traveling between the junior high and elementary schools on 42nd Street, Collier was approached by a vehicle driving on the wrong side of the road. The automobile swerved to avoid him, and Collier yelled out the window at the other vehicle. Thereafter, Collier noticed the same vehicle closely following him, and he called the police station on his radio to request assistance. The vehicle continued to follow Collier for five to ten minutes. While being followed, Collier heard three gunshots and felt something hit the back of his head. He fell to the seat and continued driving. Collier reached 34th Street and raised up to locate the vehicle firing the shots. The vehicle had turned off its lights and made a left turn on 24th Street. Collier radioed the police and informed them of the car's vicinity. The police stopped the car, and Collier identified the four individuals in the car as the persons who had shot at him. Kelly was one of the individuals in the car. A .25 caliber automatic pistol was found several feet behind where the officers stopped the car. Additionally, a .25 caliber shell was found in the vehicle occupied by Kelly and the three other individuals.

Upon investigation, it was determined that a bullet entered the rear window of the truck and struck a shovel handle on a gun rack directly behind Collier's head. Collier was most likely struck by a piece of glass when the rear window shattered. The bullet was found buried in the seat next to Collier.

Although Kelly did not testify at trial, the other occupants of the vehicle testified to seeing Kelly with the handgun and admitted seeing him leaning from the car window when the gunshots were fired.

## DISCUSSION

Kelly contends that the evidence justified an instruction on the lesser included offense of shooting into a motor vehicle pursuant to section 97-25-47. The State argues that section 97-25-47 is an offense against public utilities and does not conform to the facts or the evidence presented.

Initially, it must be determined whether the offense defined by section 97-25-47 can be deemed a "lesser included offense" of the crime of aggravated assault. By definition, a lesser included offense is one which contains essential elements of the offense for which the accused was indicted, but not all of the essential elements of the indicted offense. *Payton v. State*, 642 So. 2d 1328, 1334 (Miss. 1994). If the evidence in a case would allow a reasonable juror to find the accused not guilty of the principal

offense charged yet guilty of the lesser included offense, then the lesser included offense instruction is warranted and should be granted. *Mease v. State*, 539 So. 2d 1324, 1330 (Miss. 1989). Additionally, every essential ingredient of the lesser included offense must also constitute essential ingredients of the more serious offense for which the accused was indicted. *Payton*, 642 So. 2d at 1334. Kelly requested instruction D-2 for the lesser included offense contained in section 97-25-47. This instruction reads as follows:

The Court instructs the jury that if the State of Mississippi has failed to prove any one or more of the essential elements of aggravated assault beyond a reasonable doubt, then you must find Marcus Kelly not guilty of aggravated assault.

If you find Marcus Kelly not guilty of aggravated assault, you may continue your deliberations to determine whether or not Marcus Kelly is guilty of shooting a firearm into a motor vehicle.

In order to find Marcus Kelly guilty of the crime of shooting into a motor vehicle, the State of Mississippi must prove beyond a reasonable doubt that:

1. On or about March 28, 1993 in Lauderdale County, Mississippi;
2. Marcus Kelly did willfully shoot a firearm;
3. Into a motor vehicle occupied by Larry Collier.

If you find that the State of Mississippi has proven each and every element of the crime of shooting into a motor vehicle against Marcus Kelly beyond a reasonable doubt then you should find Marcus Kelly guilty of the crime of shooting into a motor vehicle.

If the State of Mississippi has failed to prove any one or more of the essential elements of the crime of shooting into a motor vehicle against Marcus Kelly beyond a reasonable doubt, then you shall find him not guilty.

The statute upon which instruction D-2 claims to be based is section 97-25-47. It provides as follows:

## CHAPTER 25

### Offenses Affecting Railroads, Public Utilities and Carriers

§ 97-25-47. Railroad trains, buses, trucks, motor vehicles, depots, stations, and other transportation facilities; wilfully shooting or throwing at.

If any person or persons shall wilfully shoot any firearms or hurl any missile at, or into, any train, bus, truck, motor vehicle, depot, station, or any other transportation facility, such person shall, upon conviction, be punished by a fine of not less than one hundred dollars (\$100.00) nor more than two hundred fifty dollars (\$250.00), or be committed to the custody of the department of corrections not less than one (1) year nor more than five (5) years, or by both such fine and imprisonment.

Miss. Code Ann. § 97-25-47 (1972).

Lesser included offense instructions should not be indiscriminately or lightly granted, but should only be granted after the trial court has carefully considered the evidence. *Murrell v. State*, 655 So. 2d 881, 885 (Miss. 1995). The statute violated in instruction D-2 characterizes Kelly's act as an offense against a public utility. This instruction was correctly refused by the trial judge. The crime of shooting at a public utility is not encompassed within the definition of the more serious offense of aggravated assault. If the State proved the elements of aggravated assault, it would not necessarily follow that all the elements of section 97-25-47 were also proved. At trial, Kelly and the other occupants of the car maintained that they did not mean to harm Collier, but only to scare him. Accepting this testimony and ignoring the State's unfavorable evidence, there is a clear lack of evidence to support an intent to commit an offense affecting a public utility as Chapter 25 clearly

demands. Based on these facts the trial court properly refused Kelly's request for a lesser included offense instruction on shooting into a motor vehicle pursuant to section 97-25-47.

**THE JUDGMENT OF THE LAUDERDALE COUNTY CIRCUIT COURT OF CONVICTION OF AGGRAVATED ASSAULT AND SENTENCE OF TWENTY YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS AND TO PAY RESTITUTION OF \$201.10 IS HEREBY AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO LAUDERDALE COUNTY.**

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