

STANLEY *v.* STATE.

Opinion delivered June 22, 1931.

1. **HOMICIDE—MURDER IN FIRST DEGREE.**—A conviction of murder in the first degree will not be sustained where there was no evidence of premeditation or deliberation.
2. **HOMICIDE—FAILURE TO INSTRUCT AS LIFE IMPRISONMENT.**—In a prosecution for murder in the first degree, failure of the court to instruct that the jury might fix the punishment at life imprisonment, instead of death, *held error.*
3. **HOMICIDE—REDUCTION OF PUNISHMENT.**—Where, in a murder case, a conviction of murder in the first degree inflicting the death penalty was had without the jury being instructed that they might impose life imprisonment, the case will be reversed, and, where the evidence failed to show premeditation or deliberation, the conviction will be modified so as to sentence the defendant for murder in the first degree.

Appeal from Dallas Circuit Court; *P. Henry*, Judge; modified and affirmed.

STATEMENT OF FACTS.

This appeal is prosecuted from a judgment of conviction inflicting the death penalty upon appellant for the murder of one James Homer.

The grand jury of Dallas County returned an indictment against appellant, a negro boy under 17 years of age, on the 17th day of November, 1930, for murder in the first degree for the killing of one James Homer. On the 18th the court appointed an attorney to defend him, and he was placed on trial the next day, the 19th, which resulted in the verdict of murder in the first degree.

It appears from the record that appellant and deceased were employed in the cafe of Mr. Kaufman at Fordyce, appellant as dishwasher and deceased as cook. That on the evening of the killing appellant went into the kitchen about 11 o'clock, and told the cook he wanted a bowl of chili, and asked how about charging it, to which the cook replied: "Mr. Kaufman says you can get about fifteen cents' worth." Appellant ordered the bowl of chili, and, when it was placed before him, began to eat. "He says, 'You think you are smart, don't you?'" and I said

'No, sir; I don't think I am smart.' And he says: 'You don't like me, do you?' and I says, 'Yes, sir, I like you.' "

Appellant stated further that the cook kept picking at him and would not let him eat. "He got two sticks of wood and chunked at me. The first time he threw he missed, but the second time he chunked me, he hit me on the neck. He told me to get on out, and I says: 'I am getting on out if you will let me.' Just as I went to open the door, he 'chunked' the second stick at me and hit me on the neck. I went out the door running. I opened both doors and jumped out, and he was close behind me. He could have reached out and got me, but I jumped out the door and ran. He came out on the ground, and I ran on by the wood box, about fourteen feet from the back door, and reached and got a stick and throwed it under my arm like that (indicating). I don't know whether I threw it hard or not, but it hit the man.. I looked back-like and seen that it hit him. I went on running. I ran because I was afraid of him. * * * I threw the stick because I was afraid of him. I did not throw it because I was mad at him, but because I was afraid of him. If he had got hold of me, I did not know what he would do to me. I ran on to the other side of the railroad track, and I saw John Bell and asked him if I hurt Mr. Homer much, and he said he thought I had. I went to the Fordyce Lumber Company fire pit and spent the night and was arrested by Mr. Parker as I got home early next morning." Said also that he saw John Bell standing on the platform of the wholesale house, as he ran out of the door.

The physician testified that he was called to see the wounded man at the cafe, and found him suffering from a wound above and behind the right ear, about two or three inches long, and the blow which inflicted same had also fractured the skull. The wound was apparently inflicted by some blunt instrument. The man was delirious, and was sent at once to a hospital in Little Rock, where he died from the effects of the wound.

Thomas Wood, a waiter in the white department of Kaufman's Cafe, testified that Bubber Stanley was usually fed in the kitchen after he had finished washing the dishes and scrubbing; that he came in the back room the night of the difficulty and asked for a bowl of chili. Mr. Homer set the bowl of chili out to him and said: "This is all you are going to get. * * * Mr. Kaufman said not to let you have any more." Just previous to this, witness had served one Roma Lewis, who had come into the front. "Then I heard a noise in the back room like a door slam or something hit against the wall. As soon as I heard the noise, I went back to the kitchen, and got there just in time to see Mr. Homer fall in the door. Went to the door and saw Stanley and another colored fellow running off together. Homer was lying flat on his back on the floor with legs out on the ground from knees down hanging out the back door." On cross-examination, witness said he heard Homer order the man to get out of the kitchen, saying, "Get out!" and the man replied, "I am getting out." He heard a noise as of something slamming or hitting the wall, and then rushed in the kitchen. He only had to travel about 8 feet from where he was standing in the front room to get into the kitchen, where he could see; didn't know how many seconds it took, but he went pretty fast. "When I heard the noise in the kitchen, I walked rapidly to the folding door behind me, pushed it open and saw Homer in the act of falling."

Roma Lewis said he was in the front of the cafe sitting at a counter eating when the difficulty occurred; heard Homer tell the defendant to "Get out," and heard defendant reply: "I am getting out." Then there was a loud racket, and Tommy Wood rushed back into the kitchen, and I followed him and saw the cook lying on his back on the floor." He called the doctor, saw the wound two or three inches long on the back or side of his head. I heard the cook tell some one to "get out, get out" pretty loud, and the man he was talking to replied: "I

am getting out." He then heard a noise like a door or something—could have been a stick of wood—strike the wall. He went into the kitchen as quickly as he could, just behind Mr. Wood, who had only six or seven feet to go to get into the kitchen. Witness had to walk about twenty-five feet to get into the kitchen, and just as soon as they heard the noise, Mr. Wood went running into the kitchen.

Charles Parker, night marshal at Fordyce, went to the cafe on hearing a gun shot fired after appellant ran away and found Mr. Homer lying in the back part of the cafe, with a wound over his ear on the back of his head; and arrested appellant next morning. "Defendant told me he went to the cafe for a bowl of chili and Mr. Homer told him that Mr. Kaufman had told him not to let him have meals on a credit, and they began quarreling a little, and Homer told him to 'get out,' and he said he didn't go, and Mr. Homer told him the second time, and he still didn't go, and Mr. Homer walked back to the stove and picked up a stick of stove wood and threw it at him. Defendant stated he went on out the back door, and went out and got a stick of wood and placed himself on the right-hand side of the door and called Homer to come out, and, when Homer stuck his head out, he pitched the stick at him and hit him. Defendant stated that he was standing on the platform to the right of the door-platform, about on level with the door. Homer always appeared to be a mighty nice man. His reputation in Fordyce was good. I never knowed him to bother anybody at all."

John Bell, an ex-convict, stated that he was passing the back door of Kaufman's cafe on his way home when the trouble occurred in the back of the cafe between Mr. Homer and the defendant. The sidewalk ran close up to the back door, and as he passed he heard some one inside throwing bottles or dishes or something against the back door. Went up the steps on to the platform running along the front of the wholesale house and stopped.

Heard the defendant say: "I will get out if you will let me." The boy ran out the back door, leaving both doors open, and on out to a box of stove wood in the street. As he reached the wood box, Homer stepped out the back door, and the boy snatched a stick out of the box and throwed it at him." Witness thought it hit him on the neck, but they told him afterwards it hit him on the head. He was about five feet from Mr. Homer, and about fourteen feet from the black boy when he threw the stick, and when he threw the stick he just turned and "lit out." "The white man sat down in the door and I walked on down the platform on my way home." Witness, on cross-examination, admitted he had been in the penitentiary for killing a woman. Said he did not run off with Bubber Stanley. He was at the door of the wholesale house when Mr. Wood got back to the back door. "The stick of wood that the defendant threw fell outside on the ground. Bubber was standing on a street corner on my way home and asked me if he hurt Mr. Homer much, and I told him I believed he did. Three or four things were thrown against the door while I stood there. The bottom of the door is wood with glass at the top. I could not see in at the door from where I was standing on the platform." Heard no words after he got even with the door, except Bubber say: "I will get out if you will let me." Witness did not stop walking until he passed the cafe door and went on up on the platform. "I had just passed when he ran out. Mr. Homer had no weapons that I seen. The stick that hit him fell on the outside, right at his feet."

Appellant denied having made the statement as testified to by Mr. Parker about his having called Homer out and struck him down.

The court instructed the jury, not telling them that they might assess the punishment of appellant at either death or imprisonment for life in case they found him guilty of murder in the first degree.

Paul G. Matlock, for appellant.

Hal L. Norwood, Attorney General, and *Pat Mehaffy*, Assistant, for appellee.

KIRBY, J., (after stating the facts). It is first urged that the evidence is not legally sufficient to warrant the verdict of murder in the first degree, and in any event that the court erred in not instructing the jury of the lesser punishment they could have inflicted if they found defendant guilty of murder in the first degree.

The testimony is set out at some length, and we are constrained to agree with the contention that it is not sufficient to warrant the verdict of murder in the first degree. There is no testimony indicating any deliberate or premeditated intention to kill or to take the life of the deceased, or that, prior to the difficulty, appellant harbored any malice or ill will towards him. No threats of any kind are shown to have been made. No killing can be murder in the first degree in the absence of premeditation and deliberation. Section 2338, Crawford & Moses' Digest; *Harris v. State*, 119 Ark. 85, 177 S. W. 421. In the case cited, the court, quoting from an earlier case, *Bivens v. State*, 11 Ark. 455, said: " * * * The distinctive feature of this particular class of cases of murder in the first degree being a wilful, deliberate, malicious and premeditated specific intention to take life. The inquiry then in cases of this class of murder in the first degree must always be, was the killing wilful, deliberate, malicious and determined on before the act of killing? If it was, then that degree of malice has superinduced the act that is necessary to make it rank in the highest grade of murder. * * * And it is only necessary that the premeditated intention to kill should have actually existed as a cause determinately fixed on before the act of killing was done, and was not brought about by provocation received at the time of the act, or so recently before as not to afford time for reflection."

The killing appears to have been the result of a sudden quarrel, difficulty or row provoked and brought on by the deceased in the serving of appellant with the

bowl of chili that he had ordered, as he had the right to do, in the place where he was employed. There was no conversation testified to by any witness that should have provoked deceased into attempting to eject appellant from the premises, and, from the statements testified to, it appeared defendant was willing to go, if permitted to do so. Regardless of the merits of the controversy, the testimony shows that the deceased provoked the difficulty and followed it up, throwing stove wood at appellant in trying to eject him from the premises, continued to be the aggressor until appellant had gotten out of the kitchen; that appellant claimed that he only threw the stick of wood, that he had snatched up from the box in the street, at his assailant, when he was pursuing him out of the back door, in order to protect himself. It is true the marshal testified that appellant told him he stood by the door on the outside, called the deceased to come out and then threw the stick of wood, striking him as he came out. The appellant denied this story and was corroborated by another witness, who said he saw him throw the stick of wood from where he had gotten it out of the wood box in the street, and saw it strike the deceased. Even if he stood by the side of the door and threw the missile at deceased, who provoked the difficulty and pursued him beyond the door, where the marshal said he had confessed he was standing, when he threw the wood at deceased, it was but in continuation of the difficulty and altercation, provoked by the deceased, so recent as to have afforded appellant no time for reflection, or cooling time, that would have constituted the result of killing his pursuer, under circumstances, murder in the first degree. The majority have concluded that, under the circumstances and according to the undisputed testimony, the killing could not have been murder in the first degree, and that the evidence is insufficient to support a conviction for a greater offense than murder in the second degree, for which the punishment shall be

imprisonment in the penitentiary for a period of five years.

The court erred, of course, in not informing the jury that it was authorized to assess the lesser penalty of life imprisonment, if they found the appellant guilty of murder in the first degree, in accordance with the statute and our decisions, and the confession of error of the attorney general on this point is sustained. *Crowe v. State*, 178 Ark. 1121, 13 S. W. (2d) 606; *Cook v. State*, 179 Ark. 244, 15 S. W. (2d) 323; *Williams v. State*, ante p. 873.

In accordance with the practice, for the said error of the court in the failure to instruct the jury as to the punishment they could have assessed, life imprisonment, on a conviction of murder in the first degree, and because the evidence is insufficient to support the verdict for a greater offense than that of murder in the second degree, the judgment will be modified here, reducing the offense to murder in the second degree, with a sentence of 5 years in the penitentiary. *Simpson v. State*, 56 Ark. 19, 19 S. W. 99; *Roult v. State*, 61 Ark. 594, 34 S. W. 262; *Crowe v. State*, 178 Ark. 1121, 13 S. W. (2d) 606.

It is so ordered.
