ADCOCK *v.* STATE.

Opinion delivered September 23, 1929.

1. CRIMINAL LAW—CONTINUANCE—ILLNESS OF COUNSEL.—In a prosecution for murder where both attorneys for defendant were present at the trial, the court did not abuse its discretion by refusing a continuance, although one of the attorneys was ill and had been in bed the day before.
2. HOMICIDE—ADMISSIBILITY OF DYING DECLARATIONS.—It is within the province of the court to hear the circumstances under which

alleged dying declarations were made and to determine whether they are admissible.

3. HOMICIDE—EFFECT OF DYING DECLARATIONS.—After admission of dying declarations, it is the province of the jury to determine their credibility.
4. HOMICIDE—DYING DECLARATION.—In a prosecution for murder testimony that, after deceased had been shot by defendant, he began to pray for defendant, was admissible as a dying declaration for the purpose of showing the state of mind of deceased toward defendant at the time of the shooting.
5. HOMICIDE—SUBSEQUENT CONDITIONS OF LOCALITY.—Where defendant shot deceased while standing in a wagon in a country road which was little traveled, testimony of a witness who examined this road on the day following the shooting, describing the condition of the road with reference to the wagon tracks, was admissible, as the question whether the condition of the road had changed in the meantime was for the jury.
6. HOMICIDE—FOUNDATION FOR DYING DECLARATION.—In a prosecution for murder, testimony showing that a dying declaration had been made, written down and signed by deceased at a time when he thought he was going to die and when death was impending, was admissible, not being open to the objection that the written statement was the best evidence.
7. CRIMINAL LAW—EVIDENCE AS TO LOCATION OF BULLET.—In a prosecution for murder, testimony of a physician as to the location of a bullet was admissible, although an X-ray picture had been made, as the picture would show only the location of the bullet, while the physician could testify as to the location both of the bullet and of the wound.
8. CRIMINAL LAW—INSTRUCTIONS AS TO BURDEN OF PROOF.—In a prosecution for murder, instructions as to burden of proof approved.
9. CRIMINAL LAW—BURDEN OF PROOF.—Although defendant admitted having killed deceased, the burden on the whole case rested upon the State.

Appeal from Miller Circuit Court; *James H. McCollum,* Judge; affirmed.

STATEMENT OF FACTS.

This is an appeal from a judgment of conviction upon a verdict finding the defendant guilty of murder in the second degree and fixing his punishment at five years in the State Penitentiary.

The material facts may be briefly stated as follows: The record shows that in the first part of November,

1928, Minor Patterson was shot with a pistol by Horace Adcock, in Miller County, Arkansas, and died in a hospital at Texarkana, Arkansas, the next morning, about 7:30 o'clock.

According to the testimony of Jim Patterson, he was a nephew of Minor Patterson, and was a cousin of Horace Adcock. Early in the morning of November 6, 1928, he went to the home of Minor Patterson and rode with him in an automobile to a town about four miles distant. About the middle of the afternoon they started home, and his uncle was driving the car. They traveled the main road until they got within a half mile of his uncle's house, when they turned up a lane, for the purpose of going home. Just after they started up the lane they saw a wagon and team across the road two or three hundred yards away. When they got within about forty yards of the wagon, they saw Horace Adcock standing up in it. When they got close to the wagon, Adcock held out his hand as if to stop them. The wagon and team were in the way of the car, and they could not get by. The car was stopped by the side of the wagon. Adcock spoke to Minor Patterson about a pair of gum-boots, and the latter replied that they were at Louis Wood's. Adcock told Minor Patterson that he had promised him a new pair of boots, and that he was going to have a new pair right then. Minor Patterson told Adcock that he was not going to give him any new boots, and Adcock then shot him. Witness jumped out of the car, and started to run. Minor Patterson told Adcock not to shoot any more. Adcock then demanded pay for his boots, and Minor Patterson told witness to give him some money. Witness gave Adcock two or three dollars in money. The feet of Minor Patterson had become paralyzed, and Adcock helped witness to move him away from the steering wheel in the car. The team hitched to the wagon had run away with it when the shot was fired, and witness drove away with Minor Patterson in the car with him. When they had gone about one hundred yards, Minor

Patterson began to pray for Adcock. When they arrived at the home of Minor Patterson, they telephoned for his physician, and Dr. J. R. Allen came, and carried Minor Patterson to a hospital at Texarkana, Arkansas. It was about three o'clock in the afternoon when Minor Patterson was shot, and he died about seven o'clock the next morning. Witness never saw any pistol on the person of Minor Patterson at the scene of the killing, and never saw a pistol at Minor Patterson's house. Adcock had two pistols when he followed witness from the car, and witness thought he heard one of the pistols snap.

Other evidence showed that Adcock had become angered at Minor Patterson during the preceding summer about a pair of gum-boots which they had carried on a fishing trip, and which Adcock thought his uncle had left in the sun during the summer and which caused them to crack open. He wanted his uncle to pay for the boots, and his uncle declined to do so because he said that he was not the cause of them being ruined.

The widow of the deceased testified that the defendant came to their house on the day of the killing and asked to see her husband. She told him that her husband was not at home, and the defendant replied that he would have to get him a pair of boots that day or that he would get him. She offered to pay the defendant for the boots, but he refused to take it. A sister of the deceased also testified that, a short time before the killing occurred, the defendant came by her house, and claimed that his uncle had ruined his boots and would have to get him a new pair. When he left the house, the defendant said that he was going up the road and wait until his uncle came by. The defendant said that his uncle was going to pay him for the boots or get him a new pair. The defendant then went on down the road about two hundred yards, and waited until his uncle came along, and shot him. The defendant told her that his uncle would pay for the boots or one of them would never top the hill at Rufus Butler's. The killing occurred near the top of the hill at Rufus Butler's place.

The deputy prosecuting attorney wrote down the dying declaration of Minor Patterson, detailing the circumstances of the killing substantially as above stated. Deceased stated that, after his nephew had shot him, he cursed him, and also snapped his pistol at his cousin, who was in the car with him. Deceased told defendant that he had left his boots at a neighbor's house, and the defendant said, "I'll just kill you," and then fired at him.

According to the testimony of the defendant, he merely asked his uncle to pay him for the boots, and his uncle replied that he would not do so, and drew a pistol on him and tried to shoot him with it. The defendant then drew his own pistol and shot his uncle is his own self-defense. He denied having threatened to kill his uncle. He denied also that he had any ill feeling towards his uncle. Other witnesses for the State testified that he had become angered at his uncle, and had threatened him several times during the summer preceding the killing.

While the testimony is very voluminous, we think the above is sufficient to present the assignments of error relied upon for a reversal of the judgment.

Will Steel and *Pratt P. Bacon,* for appellant.

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

HART, C. J., (after stating the facts). It is earnestly contended by counsel for appellant that the circuit court erred in refusing to continue the case on account of the illness of one of his attorneys. The record shows that both of the attorneys for the defendant represented him at his examining trial. After the indictment was found, the case was set for trial at an adjourned term of court. Both of his attorneys were present, but one of them represented that he was ill with appendicitis, and had been in bed all the day before. The court refused to continue the case, and both the attorneys actively participated in the trial. The record shows that the defendant was ably and skillfully represented at the trial, and that no injury

resulted to him on account of the illness of one of his attorneys. Under these circumstances it cannot be said that the circuit court abused its discretion in overruling the defendant's motion for a continuance. *Holmes* v. *State,* 144 Ark. 617, 224 S. W. 394, and *C. H. Robinson Co.* v. *Hudgins Produce Co.,* 138 Ark. 500, 212 S. W. 305.

It is next contended that the court erred in permitting Jim Patterson to testify that, immediately after they left the scene of the shooting, Minor Patterson began to pray for the defendant, Horace Adcock. Witness said that they had not gone a hundred yards when the praying commenced. The record shows that, when objection was made to the testimony, the court stated that he would overrule the objection for the present. The witness drove home with his uncle, and telephoned for a doctor. The physician came, and at once carried Minor Patterson to a hospital at Texarkana. At about 7:30 o'clock in the evening the deputy prosecuting attorney came and took down his dying statement, after Patterson had declared that he knew he was going to die. He did die the next morning at about 7:30 o'clock. The physician who attended him testified that he was shot on the right side, between the eighth and ninth ribs, and that the bullet lodged in the muscle. The physician said that the bullet was calculated to produce death. It is within the province of the court to hear the circumstances under which the alleged dying declarations were made and to determine whether they are admissible. After they are made, it is within the province of the jury to weigh them and the circumstances under which they were made, and give them such credit upon the whole evidence as they may think they deserve. *Jones* v. *State,* 88 Ark. 579, 115 S. W. 166; *Robinson* v. *State,* 99 Ark. 209, 137 S. W. 831; *Rhea* v. *State,* 104 Ark. 162, 147 S. W. 463; *Stewart* v. *State,* 148 Ark. 540, 230 S. W. 590; and *Lowmack* v. *State,* 178 Ark. 128, 12 S. W. (2d) 909.

In these cases the court has held that the inference that the declarant was under a sense of certain and

speedy death may not only be found from what the declarant stated on the subject, but also from the character of the wound itself and the fact that he died within a short time, in connection with the other attendant circumstances.

In the first place, the trial court admitted the testimony of the witness to the effect that the deceased had prayed for the defendant without first ascertaining whether the proper foundation had been laid for admitting the testimony as a dying declaration, but that this ruling was temporarily made. The record shows that soon thereafter the trial court did hear testimony on this point, and made an affirmative finding to the effect that a proper foundation for a dying declaration had been laid. He did not rule out the testimony referred to, and it is fairly inferable that he considered it admissible as a dying declaration. It was admissible for that purpose as a declaration showing the state of mind of the deceased to the defendant at the time of the shooting. Hence we do not think that the court erred in admitting this testimony.

It is next insisted that the court erred in allowing witnesses to testify that, on the next day after the shooting, they examined the scene, and allowed them to describe the condition of the ground with reference to the wagon tracks across the road and tracks of the team hitched to the wagon. It is claimed that, the shooting having occurred on a public road, the condition of the ground easily changed, and that the testimony could shed no light as to the appearance of the ground at the time of the shooting. This was a matter for the jury. The evidence showed that the shooting occurred on a country road which was not traveled much. The jury was the judge of the credibility of the witnesses, and could tell from their descriptions of the ground whether or not there had been sufficient passage of other teams and vehicles to materially change the condition of the ground from that which existed at the time of the shooting.

It is next insisted that the court erred in admitting the oral testimony of the witness Cook as to the dying declaration, which had been reduced to writing. It is insisted that the written declaration is the best evidence. The court only admitted the testimony of Cook to show that the dying declaration was made, written down, and signed by the deceased at a time when he thought he was going to die, and that his death was immediate and impending. Under the authorities above cited, the testimony of Cook was necessary to lay a proper foundation for the dying declaration.

It is next insisted that the court erred in allowing Dr. Allen to testify as to the location of the bullet, because an X-ray picture had been made, and the X-ray photograph would be the best evidence of the location of the bullet. We do not agree with counsel in this contention. The physician had practiced medicine for more than twenty years, and was competent to testify not only as to the location of the wound, which he could do from actual observation, but also as to the location of the bullet, which he could know by probing in the wound. The X-ray photograph would only show the location of the bullet. If the body of the deceased showed no place of exit of the bullet, it was necessarily lodged somewhere within the body. The exact location was not material, because the point of entrance could be observed, and the physician testified that the wound was calculated to produce death, and it actually did produce death on the next morning after the deceased was shot. Hence no prejudice could possibly have resulted to the defendant from the admission of this testimony.

Finally, it is insisted that the court erred in giving State's instruction No. 9, which reads as follows:

"The killing being proved, the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve upon the accused, unless, by proof on the part of the prosecution, it is sufficiently manifest that the offense only amounted to manslaughter, or that

the accused was justified or excused in committing the homicide, provided you find from the evidence on the whole case, beyond a reasonable doubt, that the defendant is guilty."

In this connection it may also be said that the court gave the defendant's instruction No. 6, which reads as follows:

"In this case the killing is admitted, and the burden of proving circumstances of mitigation that justify or excuse the homicide shall devolve on the accused, unless, by proof on the part of the prosecution, it is sufficiently manifest that the offense only amounts to manslaughter, or that the accused was justified or excused in committing the homicide; and you are further instructed, however, that upon the whole case the burden is on the prosecution to establish defendant's guilt beyond a reasonable doubt."

It is insisted that the instructions are conflicting. We do not think so. The killing was admitted by the defendant while he was on the stand, and his theory was that it was done in necessary self-defense. The court properly gave to the jury § 2342 of Crawford & Moses' Digest, and qualified it by telling the jury that the burden of the whole case rested upon the State. The fact that the defendant admitted the killing, and that it was established by the undisputed proof to have been done by the defendant, did not relieve the State from establishing the guilt of the defendant by evidence beyond a reasonable doubt, because in any event the burden of proof on the whole case rested upon the State. *Tignor v. State,* 76 Ark. 489, 89 S. W. 96; *Parsley* v. *State,* 148 Ark. 418, 230 S. W. 587; and *Sheppard* v. *State,* 160 Ark. 315, 254 S. W. 657.

We find no reversible error in the record, and the judgment is therefore affirmed.