KILLIAN *v.* STATE.

Opinion delivered September 28, 1931.

1. HOMICIDE—EVIDENCE AS TO WOUND.—Admission of testimony regarding the nature of the wound inflicted *held* proper as relating to the intent of the person committing the assault and the degree of the offense.
2. CRIMINAL LAW—EVIDENCE INCRIMINATING OTHERS.—Testimony that another has been indicted for the same offense of which defendant is accused *held* properly refused, where there was no testimony tending to show that such other person was the guilty party.

3. CRIMINAL LAW—INSTRUCTION—EXPRESSION OF OPINION.—An instruction informing the jury that it would be possible to find defendant not guilty of assault with intent to kill and to find him guilty of aggravated assault *held* not to indicate the court's opinion on the evidence.
4. HOMICIDE—MALICE.—Where the jury found that defendant threw the stone which caused the injury, and there were no circumstances of mitigation, justification or excuse shown, the law implies malice.
5. HOMICIDE—SUFFICIENCY OF EVIDENCE.—Evidence *held* to sustain a conviction of assault with intent to kill.

Appeal from Izard Circuit Court; *John L. Bledsoe*, Judge; affirmed.

STATEMENT OF FACTS.

Appellant was convicted of assault with intent to kill under an indictment charging him with assaulting one Arthur Harris, marshal of the town of Calico Rock, with a rock thrown with the intent to kill and murder.

It appears from the testimony that one Aubrey Hayes had an altercation with Palmer Killian, appellant, and Kirby Killian, his cousin, on the night of December 13, 1930. Homer Scott came to Hayes' assistance, and Hayes left the scene after having been struck by Kirby Killian. Hayes informed Marshal Harris of the trouble, and he went to the scene and told Scott to get in his car and go home. Scott got into his car and the two Killian boys grabbed hold of the fenders and stopped it in front of the cafe a short distance from where the trouble started. Palmer Killian walked around the side of the car away from Harris and Kirby Killian started up the street as the marshal approached, Harris followed Kirby Killian, trying to catch him, and at that time Palmer Killian was about 10 feet from Harris, when he threw a rock about the size of a man's fist, striking Harris in the head and grievously wounding him. The skull was fractured and the witness, Dr. Smith, testified that in his opinion the wound would have caused death if Harris had not been immediately treated and the skull raised to prevent pressure on the brain. Appellant defended on the ground that he did not throw the rock which struck Harris.

The marshal stated that he heard of the row and went to stop it and was hit on the head; said the last thing he remembered he and Kirby Killian were scuffling, and when he awoke he was in the hospital in Little Rock; that he did not know what he was struck with and was not trying to arrest appellant, who was a cousin of Kirby Killian. Other witnesses said it was too dark to tell what happened.

Appellant testified that he did not throw the rock; that he was trying to help stop the trouble, and that he had nothing against Mr. Harris; that, after Harris was hit, he went to get Earnest Wiseman and called Dr. Smith for the injured man; that he was somewhere near the middle of the street when Harris was struck, about 8 feet from the sidewalk and 12 feet from Harris, south of him toward the depot, and that Kirby Killian was struggling with Harris and was between him and Harris.

The court refused to allow appellant to introduce evidence that Homer Scott had been indicted for the same offense for which appellant was being tried and claimed that the court erred in giving instruction No. 4 without an instruction defining a deadly weapon, and also in giving instructions Nos. 5 and 6.

The jury found the defendant guilty, and from the judgment on the verdict this appeal is prosecuted.

Northcutt & Northcutt, for appellant.

Hal L. Norwood, Attorney General, and *Robert F. Smith,* Assistant, for appellee.

KIRBY, J., (after stating the facts). It is first urged that the court erred in allowing Dr. Smith to testify that in his opinion the wound inflicted on the marshal would have proved fatal if he had not received immediate treatment and the portion of the skull lifted from the brain. There was no error in the admission of the testimony as to the nature and extent of the wound inflicted for the consideration of the jury in determining the intent of the person committing the assault and the degree of the offense. Underhill, Criminal Evidence, 3d ed., § 540.

Neither did the court err in excluding the testimony relative to the indictment of Homer Scott for the offense for the commission of which appellant was on trial. There was no offer to introduce any testimony tending to show that Scott was the guilty person, but only that he had been charged as being such.

The instructions complained of, though erroneous, could not have been prejudicial, since, notwithstanding the jury was told that it would be possible for it, under the testimony, to find the defendant not guilty of the crime of assault with intent to kill and find him guilty of aggravated assault, the suggestion, if it amounted to such, was disregarded, and the appellant found guilty of assault with intent to kill. The instruction was not aptly worded, but the majority is of opinion, in which the writer does not concur, that it did not indicate the court's opinion, under the testimony, nor amount to a suggestion of the opinion of the court on the degree of importance to be attached to the testimony or an opinion of the court about the weight and sufficiency of the evidence.

Although the defendant denies that he threw the stone or struck the marshal and attempted to show that another had been indicted for the offense, there was some testimony that he did throw it, and the jury found it to be a fact, and there were no circumstances of mitigation, justification or excuse shown, and the law implies malice. If death had resulted it would have at least constituted murder in the second degree, and the testimony is sufficient to sustain the conviction of assault with intent to kill. *Turner* v. *State,* 175 Ark. 232, 298 S. W. 1028; *Cheeks* v. *State,* 169 Ark. 1192, 278 S. W. 10.

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

BUTLER, J., dissents.