

LEVY v. STATE.

Opinion delivered May 10, 1902.

MURDER—PROOF OF UNCONNECTED CRIME.—While it is error to permit a defendant accused of murder to be cross-examined as to a difficulty he had with another man, yet, if the uncontroverted proof shows that he was at least guilty of murder in the second degree, a conviction of murder in the first degree will be set aside, and the cause remanded with instructions to sentence for murder in the second degree.

Appeal from Nevada Circuit Court.

JOE D. CONWAY, Judge.

Reversed.

Chess Levy was convicted of murder in the first degree for the killing of one H. C. Cox in Nevada county. On cross-examination he was asked if he didn't shoot or cut another man in Nevada county, and replied, "No, sir; I got shot." Question: "Whom did you have the difficulty with?" Answer: "I don't know who it was." Question: "Didn't you cut him?" Answer: "No, sir."

Question: "What did you do?" Answer: "I didn't do nothing but strike him with my fist." This testimony was excepted to by defendant, who has appealed.

J. O. A. Bush, for appellant.

The eighth instruction asked by the state should not have been given. 36 Ark. 133; 51 Mich. 199; 1 McClain, Cr. Law, § 328. There is no evidence to support the ninth instruction, and the evidence does not sustain the verdict. 53 Ark. 518; 2 Bish. Cr. Law, § 652; Sand. & H. Dig., 1967-8, 1972-3, 5257; 55 Am. Dec. 97; 1 McClain, Cr. Law, § 328; 153 U. S. 614; 1 Bish. Cr. Law, § 868; 3 Greenleaf, Ev. § 123; 41 S. W. 294; 8 L. R. A. 535; 49 Ark. 453; 52 L. R. A. 751.

George W. Murphy, Attorney General, for the State.

The overruling of the demurrer was proper. 65 Ark. 559.

Wood, J. The court erred in allowing appellant to be examined on cross-examination as to the difficulty he had with a man in Prescott, and this testimony was prejudicial. The uncontroverted proof shows that appellant was at least guilty of murder in the second degree. The cause will be remanded to the circuit court with directions to sentence for murder in second degree.