

## STATE vs. MURPHY.

Indictment for escape; indictment charges that defendant was convicted of larceny in the Johnson Circuit Court, sentenced to the Penitentiary, and escaped therefrom—*Held*, that the fact that the accused was the same person that had been convicted of larceny in the Johnson Circuit Court was a material and traversable averment in the indictment, and by pleading the general issue he did not admit his identity in respect to that conviction.

The offence could only be committed by a convict, and to fix that character upon defendant it devolved upon the State to prove his conviction by the record, and his personal identity *aliunde*.

Circumstantial evidence of identity in such case would be sufficient; direct proof is not required.

*Writ of Error to Pulaski Circuit Court.*

At the October Term, 1848, of the Pulaski Circuit Court, Westley Murphy was indicted for an escape from the Penitentiary, in substance as follows:

“The Grand Jurors, &c., do present that Westley Murphy, late, &c., on the sixteenth day of October, A. D. 1848, which said Westley Murphy had been before then, *to wit*: on the fifth day September, A. D. 1845, by the consideration and judgment of the Circuit Court of Johnson county, at and during the term thereof which was begun and held at the Court-house in the town of Clarksville in said county of Johnson and State aforesaid, on the first Monday after the fourth Monday in August, it being the first day of September in the year last aforesaid, lawfully convicted and sentenced to imprisonment in the Jail and Penitentiary house

of the State of Arkansas for the term and period of five years, commencing on the said fifth day of September in the year last aforesaid, for the crime of larceny, and in pursuance thereof was then undergoing confinement in said Jail and Penitentiary house, with force and arms in the county of Pulaski aforesaid, feloniously, wilfully and unlawfully. did escape from such confinement in said Jail and Penitentiary house there situate, contrary to the form of the Statute, &c.” *Geo. C. Watkins, Att’y Gen’l.*

The defendant was tried on the plea of not guilty, and the jury returned the following verdict: “We, the jury, not being satisfied that this is the man convicted in Johnson county, find him not guilty.” Judgment of acquittal. The Attorney General took a bill of exceptions setting out the following facts:

On the trial of this cause the State proved, by a full and complete, and duly certified transcript of the record of the Circuit Court of Johnson county, that Westley Murphy, on the 5th day of Sept., 1845, by the consideration and judgment of the Circuit Court of Johnson county, at and during the term thereof, which was begun and held at the Court house in the town of Clarksville, in said county of Johnson, and State aforesaid, on the first Monday after the fourth Monday in August, it being the first day of September in the year last aforesaid, was lawfully convicted and sentenced to imprisonment in the Jail and Penitentiary house of the State of Arkansas for the term and period of five years, commencing on the 5th day of September, A. D. 1845, for the crime of larceny; and that the prisoner at the bar was, prior to the 16th day of October, 1848, turned over to George Brodie, the present agent of the Penitentiary along with other prisoners confined therein, and was then undergoing confinement in said Penitentiary; and that on the day and year last aforesaid, in the county of Pulaski aforesaid, the prisoner at the bar escaped from such confinement in manner and form as described in said indictment; and three days thereafter was recaptured, and brought back to said Penitentiary, pursuant to a reward offered for him by the agent thereof. Which was all the evidence adduced in the cause, but no evidence whatever, other than the said transcript of the

record of the Johnson Circuit Court, was offered by said State to prove that the prisoner at the bar is the same identical Westley Murphy who was so convicted, and sentenced for the crime of larceny as charged in the indictment in this cause. Whereupon the prisoner at the bar moved the Court to instruct the jury that they could not find the prisoner guilty, unless they were satisfied from the evidence that he was the same identical Westley Murphy who was so convicted and sentenced for larceny; which instruction the Court gave to the Jury. The Attorney General then moved the Court to instruct the Jury that any such question as to the personal identity of the prisoner at the bar was waived by his plea of not guilty to the indictment in this case; and that upon the introduction of the transcript of the record aforesaid of the Johnson Circuit Court, the Jury here were bound, by law, to presume, in the absence of any proof to the contrary, that the prisoner at the bar, is the same identical Westley Murphy, appearing by said transcript to have been so convicted and sentenced for the crime of larceny; which latter instruction the Court refused to give. To the giving of the first, and refusal of the second instruction, the Attorney General excepted.

The State brought error.

WATKINS, Attorney General. The instruction given by the Court was calculated to mislead the Jury, as is shown by their verdict; on the other hand, the instruction asked by the State was strictly correct and ought to have been given. The defendant by pleading *not guilty*, confessed that he is the Westley Murphy named in the indictment, and in the absence of any proof to the contrary, the Jury were bound to presume Westley Murphy named in the record produced.

E. H. ENGLISH, *contra*. In an indictment for an escape it is necessary to prove the former conviction, the imprisonment, and the escape as charged. The plea of not guilty admits that defendant is properly named in the present indictment, but it does not admit the former conviction, or that he is the same man charged

to have been previously convicted; on the contrary, it puts these facts in issue: There may be as many Westley Murphy's as there are *Jo. Smiths*.

MR. CHIEF JUSTICE JOHNSON delivered the opinion of the Court.

The fact that the accused was the same individual that had been convicted of larceny in the Johnson Circuit Court, was a material and traversable averment in this indictment, and by coming in and pleading the general issue, he did not admit his identity in respect to that conviction. The offence charged upon the defendant in the Court below, can be committed by a convict only, and in order to fix that character upon him it devolves upon the State to prove his conviction by the record, and his personal identity by proof aliunde. That the record shows that a person of the same name was convicted of larceny in the Johnson Circuit Court, by no means proves that the present defendant was thus convicted. That he was the identical individual which the record of that Court purports to have been convicted, is a question of fact, and that it clearly devolves upon the State to make out before she can claim a conviction for the offence charged in the present indictment. We do not conceive that, in order to show the fact of his identity, it would be essential for a witness expressly to testify that he was present at the former trial, and that he knew the present defendant to be the same identical individual who was then and there put upon his trial and actually convicted of the crime of larceny. This most unquestionably could be established by circumstantial evidence. The fact that a particular person had been brought and delivered to the keeper of the Penitentiary by the Sheriff of a certain county, or a person representing himself as such Sheriff, or others acting under his authority, and then of his having escaped and been recaptured, all this when taken in connection with the record showing upon its face the conviction of a party of the same name, would raise a strong presumption of identity, and, if not rebutted, would fully warrant the Jury in inferring that he was the identical individual which

error therefore in the instruction given by the Court that the Jury could not find the defendant guilty unless they are satisfied from the evidence that he was the same identical Westley Murphy who was so convicted and sentenced as represented in the record of the Johnson Circuit Court. Had the Attorney General called the attention of the Court to the facts actually proven, and asked that they might be given in charge as competent evidence, it would doubtless have been done, but if not, the State could have properly complained. The circumstance that the same individual had submitted to his punishment by going into the Penitentiary raises a strong presumption that he was the identical party, who is shown by the record to have been convicted of larceny.—The Court committed no error in refusing the instruction asked by the Attorney General. The judgment is therefore affirmed.

