CROWE *v.* STATE.

Opinion delivered February 11, 1929.

1. HOMICIDE—SUFFICIENCY OF EVIDENCE.—Evidence *held* to sustain conviction of murder in the first degree.
2. CRIMINAL LAW—CREDIBILITY OF WITNESSES.—The jury is the judge of the credibility of the witnesses.
3. HOMICIDE—EVIDENCE OF THREATS.—In a prosecution for murder, evidence of threats made by defendant against deceased is admissible to prove motive and ill will.
4. HOMICIDE—COMPETENCY OF THREATS.—In a prosecution for murder, evidence of threats made by defendant during the four months preceding the killing was not incompetent as too remote.
5. HOMICIDE—FAILURE TO INSTRUCT AS TO 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.
6. HOMICIDE—CURING ERROR BY REDUCING PUNISHMENT.—Error in failing in a murder case to instruct the jury that they might fix the punishment at life imprisonment, instead of death, will be cured on appeal by reducing the punishment from death to life imprisonment.
7. CRIMINAL LAW—HARMLESS ERRORS.—The Supreme Court will not reverse a judgment and remand a cause for a new trial for errors which could not be prejudicial.

Appeal from Union Circuit Court, First Division; *L. S. Britt,* Judge; modified and affirmed.

STATEMENT OF FACTS.

W. M. Crowe prosecutes this appeal to reverse a judgment of conviction for murder in the first degree.

The record shows that Joe Ossenback was killed near his office, on an oil lease, in Union County, Arkansas, in the latter part of August, 1928. Ossenback was foreman of the lease, and had the power to employ and discharge the workmen on the lease. Crowe was an oil pumper on the lease, and sometimes was directed by Ossenback to drive a team. Crowe worked near where the office of Ossenback was situated from twelve o'clock noon to twelve o'clock night. Ossenback was seen to drive by a store, near where his office was situated, about 6:30 P. M. on the day he was killed. About one-half hour later a storekeeper heard several pistol shots from the direction of Ossenback's office. A short time before the shooting occurred, Crowe was seen near Ossenback's office, and had on a blue suit of clothes. On the evening of the killing J. D. Walker, a gang-pusher under Ossenback on the lease in question, passed the latter's office, on his way home. He saw Ossenback's car in a ditch about 130 feet from his office. A little further on Walker met Crowe, and asked him where Ossenback was. Crowe replied that he did not know. Walker told him that Ossenback's car was in the ditch, and that he was bound to be near there somewhere. They examined the car, and found the body of Joe Ossenback lying on his side, with his feet to the front of his car and his body resting on the cushion, with his face down. The body was not under the steering wheel, but was on the other side of the Ford coupe. Crowe said, "What are all the people going to say that were on the lease when this happened?" Walker replied that he did not know anything about that, but that he could prove where he was. The dead body was found about 8:15 o'clock in the evening.

Dr. Henry Riddiman, a physician and surgeon, examined the body of the deceased. He found a knife wound on the left side, which was about two inches long. Another witness said that the knife wound was big enough for you

to put your finger in and feel around. There was a bullet wound just below the region of the heart, which looked as if it would strike the heart. There was a bullet wound on the sixth rib on the left, and there was a bullet wound on the back, on the right side, that would strike the lung on either side. These bullet wounds were sufficient to cause the death of the deceased, and, in the opinion of the physician, Ossenback died as the result of them.

Clyde Duck, a deputy sheriff, was notified, and he arrested the defendant on the night in question, and carried him to El Dorado and placed him in jail. On the night in question the deputy sheriff made an investigation of the office of Ossenback, and did not find any weapons of any kind in it. There might have been an ink bottle on his desk. There were no weapons of any kind in the drawers of his desk or on his body when it was found. The door of the office had been locked, and the key was in Ossenback's pocket when the body was found.

The defendant denied that he knew anything about the killing on the night he was arrested, but the next morning he confessed that he had killed Ossenback. The defendant said that he walked into the office, where Ossenback was sitting in a chair, and that Ossenback got up and said something about some blue-prints. Ossenback then went back and sat down at his desk, and they got into a discussion or row. The defendant shot Ossenback once in the office, and Ossenback ran out of the door of his office, and he shot him again in the back. He then locked the office door and took the key and put it in Ossenback's pocket, and put Ossenback in the car and drove up the road towards the boiler-house. The car ran into a ditch, and he could not get it out. He then left the body in the car.

Another witness for the State, who was special agent for an oil company, said that he did not see any blood in the office of Ossenback, and told the defendant so. The defendant then confessed that Ossenback was sitting at his desk, and said he was going to turn the defendant off. They got into an argument, and Ossenback pulled the

drawer of his desk open, and the defendant thought he was getting a gun. He then shot Ossenback, and Ossenback got up and ran out of the door of his office. The defendant shot Ossenback again. He shot him three times in all. He at first denied stabbing Ossenback, but later on confessed that he stabbed him before he put him in the car. He first said that Ossenback drove the car off himself. The witness said, "Now, I have seen too many men shot to believe that." The defendant then confessed that he put the body of Ossenback in the car, and started to drive the car off himself, and ran it in the ditch. He confessed that he stabbed Ossenback before he put him in the car. There was considerable blood on the ground near there. A part of a set of false teeth, which the defendant said belonged to Ossenback, was found near the car. When the defendant was arrested, on the evening of the killing, he had changed from his blue suit to a fresh khaki suit. When the officer approached to arrest him, he was washing with gasoline a knife which had blood on the handle. It was also proved that, during the first part of the summer and on down to about the time of the killing, the defendant had made threats against the life of the deceased. He appeared to be mad at him because the deceased had threatened to turn him off for getting drunk, and also because at intervals the deceased would require him to drive a team.

The wife of the deceased testified that he did not own a pistol, and never carried one. Walker, a gang-pusher who lived right near his office, testified that he had never seen deceased with a pistol. According to the testimony of the defendant, the deceased was reaching in his desk drawer to get a pistol with which to kill him, and he shot and killed the deceased in his necessary self-defense.

McNalley & Sellers, for appellant.

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

HART, C. J., (after stating the facts). It is first earnestly insisted by counsel for the defendant that the evi-

dence is not legally sufficient to warrant the jury in finding him guilty of murder in the first degree. We do not agree with counsel in this contention. The jury were the judges of the credibility of the witnesses, and, when all the attendant circumstances are considered, it had the right to find that defendant killed the deceased with premeditation and after deliberation. The defendant confessed to killing the deceased, and there is nothing whatever in the record tending to show that the confession was not voluntary. There were three bullet wounds in the body of the deceased. One of them was in the back, which might indicate to the jury that the defendant shot the deceased while he was running away, and that the deceased did not at any time attempt to hurt the defendant. There was also a knife wound in the body of the deceased, on the left side, which was about two inches long and big enough for a man to insert his fingers in and feel around. The defendant admitted that he made this knife wound in the body of the deceased before he put it in the car. The State also proved that the defendant had made threats against deceased at various times. These facts and circumstances, testified to by the witnesses for the State, if believed by the jury, fully warranted it in returning a verdict of guilty of murder in the first degree. *Owens* v. *State,* 120 Ark. 563, 179 S. W. 1014; *Thomas* v. *State,* 161 Ark. 644, 257 S. W. 376; *Beason* v. *State,* 166 Ark. 142, 265 S. W. 956; *Harris* v. *State,* 169 Ark. 627, 276 S. W. 361; *Lesieurs* v. *State,* 170 Ark. 560, 280 S. W. 9; and *Adams* v. *State,* 176 Ark. 916, 5 S. W. (2d) 946.

It is next insisted that the court erred in admitting the testimony as to the threats made by the defendant against the deceased. According to the evidence for the State, the defendant was the aggressor, and, according to the testimony of the defendant, the deceased was the aggressor. Threats are circumstantial facts which tend to show motive. In any case, uncommunicated threats are admissible as tending to show who was the aggressor and to show ill will or motive for the killing, if made by the defendant. The threats proved by the State in the

present case were made during the months of May, June, July and August of 1928, and the killing occurred in the latter part of August of the same year. Hence they were not so remote in time as to render incompetent the testimony, nor can it be said that they were so ambiguous as to render them inadmissible. *Combs* v. *State,* 163 Ark. 550, 260 S. W. 736; and *Humpolak* v. *State,* 175 Ark. 786, 300 S. W. 426.

We have carefully examined the instructions given by the court, and find them to be in accordance with the settled principles of law, except in one respect. The defendant was indicted for murder in the first degree, and the jury returned a verdict in which they found him guilty of murder in the first degree as charged in the indictment. The defendant was sentenced to death by the court. The court did not instruct the jury as to its right to render a verdict of life imprisonment in the State Penitentiary, at hard labor, in accordance with the provisions of § 3206 of Crawford & Moses' Digest. Under this section of the statute the jury had the right to fix the punishment of the defendant at life imprisonment, at hard labor in the penitentiary. This was the lesser penalty provided by the statute, and the court erred in not so instructing the jury. There is no other error, however, in the record; and the error in this respect can be cured by modifying the judgment of the lower court by reducing the punishment from the death penalty to life imprisonment in the State Penitentiary, at hard labor. This is accordingly done.

There being no other error in the record, the court can remove all prejudice that might have resulted to the defendant from the failure of the court to instruct the jury that it might impose the lesser penalty provided by the statute by reducing the punishment to life imprisonment. It is well settled that the court does not reverse a judgment and remand a cause for a new trial for errors which the record affirmatively shows could not be prejudicial to the rights of the defendant. That this is the proper procedure was decided in *Davis* v. *State,* 155

Ark. 245, 244 S. W. 750. As bearing on the question, see *Bullen* v. *State;* 156 Ark. 148, 245 S. W. 493; and *Clark* v. *State,* 169 Ark. 717, 276 S. W. 849.

With the modification above stated, the judgment will be affirmed.