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EVIDENCE-ADMISSIBILITY OF UNCOMMUNICATED THREATS

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EVIDENCE—ADMISSIBILITY OF UNCOMMUNICATED THREATS—The defendant was convicted of murder in the first degree, following his killing of one Hunter as the outcome of a quarrel. The defendant had pleaded self-defense, contending that Hunter had appeared to threaten him. The defendant was the only witness to testify as to any aggression on the part of Hunter, while the four eyewitnesses to the killing all testified that the accused had attacked Hunter without warning and had fired upon Hunter's wife and child. Defendant's motion for new trial on the ground of newly discovered evidence showing that Hunter had in his pocket an open knife, which constituted an uncommunicated threat against him, was dismissed. *Held,* order reversed, motion for new trial granted. Such evidence was relevant as it could be construed by the jury as a threat which, although uncommunicated to the prisoner, bore on the question of the apparent conduct of the deceased. Judge Clark dissented. *Griffin v. United States,* (D.C. Cir. 1950) 183 F. (2d) 990.

As pointed out by Professor Wigmore,[1] the great majority of courts have considered evidence of an uncommunicated threat made by the deceased against the prisoner to be relevant to a plea of self-defense. The rule is based on the fact that, although such threats will not serve as direct justification for defensive action, they do throw light on the design of the deceased to harm the accused. The principal grounds of Judge Clark's dissent were that the act of carrying an open knife in one's pocket was too ambiguous to be considered a threat[2] and that, even should it be so considered, it was not relevant in the face of unanimous testimony of the four eyewitnesses that the deceased made no overt act of aggression.[3] As to the first ground, there is little guiding authority, because the cases usually deal with unambiguous verbal threats directed against the defendant. Courts have excluded threats felt not fairly to justify the inference that the deceased was the aggressor, such as a threat against a third person,[4] or a statement by the deceased that "he would go there as much as he pleased; that he was not afraid of . . . [defendant or] . . . of his shooting."[5] They have allowed, however, evidence that the deceased was habitually a dangerous and quarrelsome man.[6] As to the second ground, it is true that the courts have usually restricted the operation of the rule to cases where some corroborating evidence of the deceased's aggression is present.[7] This is due perhaps to the fear that such evidence of threats would have undue weight with the jury, and the fact that the relevance of the previous threats is diminished in the absence of other evidence that the deceased still entertained his design. The test of admissibility has not been whether there were eyewitnesses to the homicide, although possibly the courts have been more ready to admit the evidence in the absence of eyewitness' testimony.[8] The better rule, however, is that presented by a well-considered Mississippi case which pointed out that such evidence is irrelevant even where there is no eyewitness if all testimony points toward lack of aggres-

[1] WIGMORE, EVIDENCE §111 (1940), and general collection of cases there cited.

[2] The fact that the open knife was not held by Hunter, but instead was resting in his pocket, tends to refute the contention of a threat. Principal case at 994-995.

[3] Principal case at 995.

[4] Tucker v. Gurley, 176 Miss. 708, 170 S. 230 (1936).

[5] Combs v. State, 75 Ind. 215 at 217 (1881). See also Hollingsworth v. Warnock, 112 Ky. 96, 65 S.W. 163 (1901) (threat to "kill someone before morning" excluded as too general). Cf. Winner v. State, 144 Md. 682, 125 A. 397 (1924) (threat to kill "every union man in the village" allowed, when deceased was a "union" man).

[6] State v. Thompson, 49 Ore. 46, 88 P. 583 (1907) (deceased a dangerous man); Reynolds v. State, 1 Kelly (Ga.) 222 (1846) (evidence that deceased was armed); People v. Lamar, 148 Cal. 564, 83 P. 993 (1906) (deceased a quarrelsome man). See also State v. Hopper, 142 Mo. 478, 44 S.W. 272 (1898), which held the vagueness of the threat was a matter for the jury.

[7] See cases in notes 9 and 10 infra.

[8] See State v. Rider, 90 Mo. 54, 1 S.W. 825 (1896). Here no eyewitness was present, and the court allowed the evidence with no express restriction. Cf. Saunders v. State, 4 Okla. Cr. 264, 111 P. 965 (1910) (no eyewitness, evidence allowed) and Commonwealth v. Peronace, 328 Pa. 86, 195 A. 57 (1937) (eyewitness present, evidence excluded). In each case there is little supporting evidence of aggression except for defendant's own testimony.

sion by the deceased.[9] In the presence of direct, conflicting testimony the threats have been allowed, consistent with the general rule allowing such if supported by other evidence,[10] while the evidence is excluded if all eyewitnesses agree upon the deceased's lack of aggression.[11] This result obtains although the accused himself has testified to the deceased's aggression, if his testimony concerns only acts observed also by other witnesses.[12] The evidence is admitted, however, when the accused testifies as to acts of aggression without the purview of the eyewitnesses.[13] Thus, the principal case seems counter to the general rule in admitting evidence of uncommunicated threats in the face of unanimous eyewitness testimony that there was no aggression, although the accused's testimony did not cover acts beyond the scope of this testimony.

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[9] Johnson v. State, 54 Wis. 430 (1877). See also Johnson v. State, 192 Ga. 571, 15 S.E. (2d) 786 (1941); State v. Thomas, 138 Mo. 168, 39 S.W. 459 (1897).

[10] White v. Terr. of Washington, 3 Wash. Terr. 397, 19 P. 37 (1888); Trap v. Terr. of New Mexico, (8th Cir. 1915) 225 F. 968; Wiggins v. Utah, 93 U.S. 465 (1876); State v. Minton, 228 N.C. 15, 44 S.E. (2d) 346 (1947); Stewart v. Texas, 36 Tex. Cr. 130, 35 S.W. 985 (1896); State v. Tarter, 26 Ore. 38, 37 P. 53 (1894); State v. Alexander, 66 Mo. 148 (1877); State v. Wooten, 136 La. 560, 67 S. 366 (1915).

[11] Holly v. State, 55 Miss. 424 (1877); Turpin v. State, 55 Md. 462 (1880); Bond v. State, 21 Fla. 738 (1886); Keener v. State, 18 Ga. 194, 224 (1855); Vaughn v. State, 88 Ga. 731, 16 S.E. 64 (1891). But see State v. Faile, 43 S.C. 52, 20 S.E. 798 (1893), where the one eyewitness testified that the deceased was not the aggressor. The court felt that there was room for the jury to doubt her credibility, and held it error to exclude the uncommunicated threat.

[12] State v. Carter, 197 La. 155, 1 S. (2d) 62 (1941).

[13] Ott v. State, 87 Tex. Cr. 382, 222 S.W. 261 (1920). Here accused testified that through a conversation with deceased, she knew he was going for his gun. Eyewitnesses testified only that the accused shot the deceased while he had his back to her.