State v. Maher

25 Nev. 465 (1900) | Cited 3 times | Nevada Supreme Court | December 31, 1900

By the Court, Massey, J.:

The appellant was charged by indictment with the crime of grand larceny, and upon a trial therefor was convicted, and sentenced to imprisonment for a term of five years. He appeals from the judgment.

First—It is contended that the court erred in refusing to give to the jury instructions numbered 2, 12, 13 and 14 asked by the appellant. Each of the instructions bears the endorsement of the district judge to the effect that it has been given in other instructions. It has been repeatedly decided by this court that it is not reversible error to refuse an instruction which has already been given in substance and in terms as clear, full, and favorable as those in which the court is asked to repeat it. (State v. Cardelli, 19 Nev. 330, 10 Pac. 433; State v. McLane, 15 Nev. 364; State v. O'Connor, 11 Nev. 425;

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State v. Rover, 13 Nev. 24; State v. Millain, 3 Nev. 409; State v. Waterman, 1 Nev. 543.) It has also been held that, if an instruction is refused because its substance has already been given, that fact should be stated, and noted on the instruction. (State v. Ferguson, 9 Nev. 106.) Appellant contends that it does not appear from the record that the instructions asked were given in substance, as required by the rule. If this claim be tenable, he is at fault in not bringing to this court all the instructions given. The record purports to contain the instructions given by the court on its own motion, but the papers containing these instructions are no part of the record, not being contained in a bill of exceptions, as required by the provisions of the criminal practice act. (State v. Rover, 11 Nev. 343; State v. Forsha, 8 Nev. 137; State v. Burns, 8 Nev. 251.) It rests upon the appellant to show error. He must affirmatively show by the record that the instructions asked were not embraced in the charge given; otherwise, how can we ascertain whether or not the law contained in the charge given did not embrace the instruction refused? The only inference which can be indulged from the record upon which the appellant relies is that the instructions were refused because given in the instructions not carried up in the record. (Bolen v. State, 26 Ohio St. 371; Delhaney v. State, 115 Ind. 499; Garrett v. State, 109 Ind. 527; 2 Enc. Pl. & Prac. 482, 483; 11 Enc. Pl. & Prac. 300.)

Second—The appellant assigns as error the action of the court in modifying instructions 1 and 6 asked by him. These instructions, as modified and given, are set out in the record. The instructions as asked are not in the record. It is not claimed that the modified instructions do not contain a correct statement of the law. It is well settled that the court may modify instructions so as to relieve

them of any possible ambiguity, and make their meaning more certain. (State v. Watkins, 11 Nev. 30; State v. Smith, 10 Nev. 106; State v. Davis, 14 Nev. 407.) In the absence of any claim of error in the instructions as modified and given, and without the record containing the instructions as asked, how can be predicate error in the mod

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ification made under the rule announced? Conceding, for the argument only, that it was the duty of the court to endorse upon each of these instructions as asked the part given and the part refused, the appellant is not in a position to complain of the failure in this respect, as he has not brought to this court the instructions as asked, showing such failure, and we cannot, without having these instructions before us, say that the proper endorsements were not made. In fact, the record does not show that the court either failed or refused to comply with the statute in this respect.

Third—It is claimed that the court erred in giving instruction No. 18 asked by the appellant, as modified. The instruction set out in the record as given is so mutilated by erasure and interlineations that it would be only a guess for us to attempt to say to what extent it was modified. As given it reads as follows: "You are instructed that every material fact going to the guilt should be fully established in the same manner and to the same extent as if the whole issue rested upon it. You must be satisfied that each link in the chain of circumstances essential to the conclusion sought to be established by the prosecution has been fully proved beyond a reasonable doubt; otherwise, you must acquit." This instruction, it seems to us, contains a fair statement of two propositions of law.

We believe it is well settled that every material fact going to the guilt of a person charged with a crime should be fully established in the same manner and to the same extent as if the whole issue rested upon it.

We are also of the opinion that, when the court charges the jury that, "You must be satisfied," it is equivalent to charging the jury that the facts embraced must be proved to their satisfaction, and is sufficient without a repetition thereof.

The claim that the judgment should be reversed because the court imposed as a part of the penalty "at hard labor" is without merit. The question was determined in Ex Parte Maher, 25 Nev. 422. Even if the claim possessed merit, we could, under the statute, in this proceeding modify the judgment by striking therefrom the words "at hard labor."

The judgment will be affirmed.