

SUPREME COURT DECISION.

(Continued From Page Two.)

ed an unqualified opinion in regard to the guilt or innocence of the accused. He stated on his voir dire that he had heard the case discussed and what purported to be the facts. That he had not discussed it himself and had not talked with the witnesses regarding it. That from rumor and reading the newspapers he had formed an opinion regarding the guilt or innocence of the defendant. That his opinion was not unqualified and that it would require evidence to change it.

After he had been challenged by the defendant the Court gave him the following examination:

Q. Mr. Hombold, from what source did you get your information?

A. Why, through the papers and through hearing talk generally.

Q. Do I understand you to say that you have not discussed the case yourself?

A. I have not, no, sir.

Q. And do I understand that the opinion you have formed is not a fixed, settled, positive opinion?

A. It is not.

Q. Has any one purported or attempted to detail to you what evidence was in this case?

A. No, sir.

Q. Have you heard any of the witnesses talk on the case that you know of?

A. No, sir.

Q. Have you any firm, fixed opinion as to whether you heard or not what you read was the truth or not?

A. Well, I could not say that, Judge. I listened in a hearsay kind of a way. I could not express an opinion of a man innocent or guilty unless I heard the evidence.

Q. Until you heard the evidence?

A. No.

Q. Well, now, the opinion that you have got, as I understand it, depends entirely upon the truth or falsity of what you have heard.

A. Exactly.

Q. Well, now, supposing that there were no facts detailed upon the trial of this case as you have heard on the outside. What effect would what you have heard on the outside have upon your mind in determining this case?

A. It would not have very much.

Q. Would it have any?

A. It would have some until I heard the evidence.

Q. Then do I understand that you could not divest yourself of any opinion that you might have and decide this case upon the evidence as it is produced here?

A. I could.

Q. You could. And would you do so?

A. I would.

Q. Well, now, supposing it would make no difference as to what you had heard, or supposing upon the trial of this case the State did not prove to your satisfaction beyond a reasonable doubt by the evidence adduced here upon the stand, that this man was guilty of any offense included in or charged in the indictment, what would you do then in a case of that kind?

A. I would give the defendant the benefit of the doubt.

Q. If they had not proved it beyond a reasonable doubt, you would acquit him?

A. Beyond a reasonable doubt, I would.

Q. You would acquit him?

A. Yes, sir.

Q. You understood, Mr. Hombold, in law, that an acquittal may simply amount to this: That the State has not proven the defendant guilty beyond a reasonable doubt?

A. I understand that.

Q. Now, if you were chosen as a juror in this case, could you divest your mind of all opinion that you have in the case, and hear evidence and determine it solely upon that and the law as given to you by the Court?

A. Certainly.

Q. Is your mind made up that this man is either innocent or guilty?

A. Well, I could not say as it is made up, but I have an opinion from what I have heard talked of.

Q. Well, you are prepared to say that his man is either guilty or innocent?

A. I am not.

Q. Did the persons who talked about this case pretend to have been listening to the evidence, or know what the evidence was in the case?

A. Well, I could not say that.

Q. You do not know whether they did or not.

A. No.

Q. Is your opinion based upon what would be termed street rumor or street talk?

A. That is it.

THE COURT: Challenge is denied.

The condition of the juror's mind should be determined from the whole of his examination and doubts should be resolved in favor of the accused, as in other matters, to the end that he may be tried by twelve fair and unbiased men.

State vs. Burrall, 37 Nev.

Considering all the juror said, it was apparent that from reading the papers and talking with others who are not shown to have had any direct knowledge of the facts or any information acquired from sources other than newspapers, he had formed an opinion regarding defendant's guilt or innocence such as any one might have acquired who read the news usually published regarding such crimes. In this era of education, intelligence and diffusion of knowledge when the telegraph and cable flash information from the most distant parts of the earth in a few seconds, and when an army of men are employed in gathering and reporting the important happenings of the world, and improved

printing presses invented and operated by ingenious minds and cunning hands are publishing millions of papers daily, the man who does not read and talk and form opinions regarding such crimes as murders committed in his locality, is better fitted to have lived in the dark ages than to serve on juries in the twentieth century.

Still, in order to be a good juror, any opinion he may have must be a qualified one and he must conscientiously feel that he can discard it in arriving at a verdict, and realize that under our system of jurisprudence persons charged with crime are not to be prejudged or convicted upon newspaper reports or hearsay, or found guilty by anything excepting evidence introduced in court under the sanctity of an oath, or in conformity to legal practice. Everyone, however humble or great, accused of crime is entitled to be tried by jurors whose minds will be guided by such evidence only in arriving at their verdict. It is apparent that this juror was not disqualified under this test, that the opinion he possessed was only such an one as any disinterested, intelligent citizen who reads and thinks might form, and although that opinion would naturally remain in his mind until something occurred to remove it, it appears to have been qualified by a doubt as to the truth or falsity of the information on which it was based, and that it was not a settled conviction regarding the defendant's guilt which would weigh with him in considering the testimony or swerve or influence his mind in arriving at a verdict.

The case in regard to this juror is not, as contended in the brief, similar to that relating to the one, the denial of whose challenge on the first trial was cause for reversal. The record indicated that after talking with persons who purported to know the facts he had expressed an unqualified opinion, which, under the statute, rendered him incompetent. Here it merely appears that the juror had formed a qualified opinion based largely on newspaper reports which the Criminal Practice Act provides shall not disqualify, and that regardless of the source of his information his mind was not in a condition that rendered him incompetent to serve.

Exception was taken to the admission of the dying declarations of the deceased, Jack Welsh. The evidence showing their admissibility appears to have been quite as strong as that on the trial of the three defendants indicted with this one, and for the reasons stated in the opinion in their case, the declarations were properly admitted against Williams. The written dying statement was in narrative form and it is further objected here that the questions were not included in the writing. It is sufficient to say that they were proven verbally on the trial and the written declaration was complete without them.

In his opening statement to the jury, the attorney acting for the prosecution said: "Now, there may be, and probably will be, another feature of this case introduced on the part of the State. And it will be evidence to show that this defendant was duly convicted in Humboldt county, in conjunction with Sevens and Roberts and Gorman, of murder in the first degree, and sentenced to be hanged for that crime."

"That while they were confined in the Carson penitentiary, awaiting the execution of that sentence, that this defendant, without solicitation, without promise of reward, without any conditions attached thereto, made a written statement. That he declared to the Warden of the penitentiary, Mr. Considine, that he wished to make a written statement concerning the crime; not through expectancy of reward, or of clemency, but for the sole purpose of relieving his mind and letting the world know the exact conditions that surrounded the commission of that crime. That he was warned of his rights, fully protected in his rights, and still persisted in making a written statement."

"That statement will probably be read to you in evidence, and in that statement this defendant declared what was done with the plunder that he received off of Jack Welsh and Albert Waldman. Tells what was done with the plunder that was taken off of Townsend on the east bound train. Tells where it was cached, down near Lovelock. Tells how they went from there into the town of Lovelock, how they were arrested, and gives the full particulars of this commission of the crime."

The purpose of an opening statement is to relate the facts that will be offered in evidence so that the court and jury may better and more readily understand the testimony when it is introduced. It behooves all attorneys, but is especially incumbent on those representing the State, to limit their opening remarks to the facts they in good faith expect to prove. It was improper to detail the particulars of a confession, or to state that one had been made and thereby bring to the attention of the jury matters prejudicial to the defendant, unless or until it was the intention to prove them. When the attorney for the State said they might or might not offer proof of the confession it was in order for defendant's counsel to object and for the court, on its own motion, to strike out and restrain any allusion to it until the prosecution had direct assurance that they intended to prove it. Thompson on Trials, Sec. 958.

An attorney who is prosecuting may be excused for stating facts which he expects and believes he will prove but which later cannot be shown because they are irrelevant or for some good reason unknown to him at the time can not be established later. State v. Grafton, 89 Iowa, 109. People v. Gleason, 127 Cal. 323, 53 P. 598.

12 Cyc 570, Note 50.

No exception was taken to this objectionable detail of a confession at

the time it was made. State v. McMahon, 17 Nev. 376. Numerous cases cited in the note 146 L. R. A. 642. No evidence was offered to sustain these statements made by the attorney after he had brought them to the attention of the jury, and yet he ought to have been well aware that no fact, and especially one so vital to the defendant, should be stated, unless it was his intention to support it by evidence. It was his duty to seek conviction only on facts proved or earnestly sought to be presented by proper evidence, and not by reference to any others in his opening statement in the presence of the jury. The use of every fair and honorable means is commendable in the effort to win cases but in the heat and anxiety of trials even eminent counsel have too often so far forgotten their duty to themselves, to a worthy profession and to the court as to seek to prejudice or influence juries by bringing to their attention facts which they are well aware could not be proven or presented under proper practice and the ordinary rules of evidence. Every high minded attorney should scorn and rise above such petty and reprehensible methods. Giving an eloquent dissertation regarding the impropriety of statements made by counsel, which were not supported by the evidence, the Supreme Court of Georgia said: "But let nothing tempt them to pervert the testimony or surreptitiously array before the jury, facts which, whether true or not, have not been proven."

10 Georgia, 523. "The right of discussing the merits of the cause, both as to the law and the facts, is unbridled. The range in discussion is wide. He may be heard in argument upon every question of law. In his address to the jury it is his privilege to descend upon the facts proved or admitted in the pleadings to arraign the conduct of the parties; to impugn, excuse, justify or condemn motives, so far as they are developed in evidence, assail the credibility of witnesses when it is impeached by direct evidence or by the inconsistent or incoherence of their testimony, their manner of testifying, their appearance upon the stand or by circumstances. His illustrations may be as various as the resources of his genius; his argumentation as full and profound as learning can make it; and he may, if he will, give play to his wit or wings to his imagination. To this freedom of speech, however, there is some limitation. This manner must be decorous. All courts have power to protect themselves from contempt, and indecency in words or sentences is contempt. This is a matter of course in courts of civilized communities but not of form merely. No court can command from an enlightened public that respect necessary to an even administration of the law without maintaining in its business proceedings that courtesy, dignity and purity which characterize the intercourse of gentlemen in private life. So, too, what a counsel does or says in his argument of a cause must be pertinent to the matter on trial before the jury, and he takes the hazard of its not being so. Now, statements of facts not proved and comments thereon are outside of the case and irrelevant to the matter in question and are therefore not pertinent. If not pertinent, they are not within the privilege of counsel."

Tucker v. Hennekir, 41 N. H. 383. Hatch v. State, 89 Tex. App. 423. Thompson on Trials, 750. State v. Berry, 10 Ga. 522. "The profession of the law is instituted for the administration of justice. The duties of the bench and bar, differ in kind, not in purpose. The duty of both alike is to establish the truth and to apply the law to it. It is essential to the proper administration of justice, frail and uncertain at best, that all that can be said for each party, in the determination of fact and law should be heard. Forensic strife is but the method, and a mighty one, to ascertain the truth, and the law governing the truth. It is the duty of the counsel to make the most of the case which his client is able to give him; but counsel is out of his duty and the right, and outside of the principal object of his profession, when he travels out of his client's case and assumes to supply its deficiencies. Therefore, it is that the nice sense of the profession regards with such distrust and aversion the testimony of a lawyer in favor of his client. The very fullest freedom of speech, within the duty of his profession, should be accorded to counsel; but it is license, not freedom of speech, to travel out of the record, basing his argument on facts not appearing, and appealing to prejudices when it is introduced. It behooves all attorneys, but is especially incumbent on those representing the State, to limit their opening remarks to the facts they in good faith expect to prove. It was improper to detail the particulars of a confession, or to state that one had been made and thereby bring to the attention of the jury matters prejudicial to the defendant, unless or until it was the intention to prove them. When the attorney for the State said they might or might not offer proof of the confession it was in order for defendant's counsel to object and for the court, on its own motion, to strike out and restrain any allusion to it until the prosecution had direct assurance that they intended to prove it. Thompson on Trials, Sec. 958.

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Equally with the court, the district attorney, as the representative of law and justice, should be fair and impartial. He should remember that it is not his sole duty to convict, and that to use his official position to obtain a verdict by illegitimate or unfair means is to bring his office and the court into disrepute. We make due allowance for the zeal which is the natural result of such a legal battle as this, and for the desire of every lawyer to win his case, but these should be overcome by the conscientious desire of a sworn officer of the court to do his duty, and not go beyond it.

At the close of the testimony for the prosecution counsel for the defendant moved the court "that the State be required to produce the confession that they alleged was made at the State Prison, and introduce it in evidence, or in lieu of that, that the Court grant the defendant permission to introduce the same." The judge replied:

"The court will not make either one of the orders that have been asked. If you want the document itself you may ask the State's attorney for it and if you want to introduce it in evidence you may do so, and when it is offered the court will rule upon the offer." after further discussion the court said: "Now, if you want an instruction upon what it is the duty of the jury to do in a case of this kind, you may prepare your instruction and present it to the court." Counsel for the defendant did not avail themselves of the privilege of securing the confession and offering it in evidence subject to the inspection of the court, and until it was presented and could be examined, and its contents ascertained, the refusal to make an order for its admission was quite proper. If the contention of counsel were correct, and it, as claimed, it were error for the court to refuse to order the confession introduced in evidence under these circumstances and without knowing its contents, it may still be said that there is no copy of it in the record, and nothing indicating that it was different from or more favorable to the defendant than what had been stated by the attorney for the State, or that it contained anything beneficial to the accused, or that its exclusion could have injured him in any degree.

During the closing argument of the attorney for the State, while he was making his remarks in answer to the argument of counsel for the defendant in relation to the failure of the State to produce the alleged confession of the defendant, the following occurred: Mr. Pike: The defendant is here. He could have taken the stand. If the statement is good reduced to writing, why isn't a good when given from the stand? Mr. Packard: If your Honor please, we object to the statement of Counsel in regard to the defendant not taking the stand. Mr. Pike: The statute also says, may it please the Court and gentlemen of the Jury, that a self-serving declaration has no value and cannot be used in Court. The State's attorney never at any time declared that they would use that statement, that declaration, or that statement reduced to writing. They said they might use it and they might not. And after consulting together we concluded to might not, and we have not used it, but that throws no injury upon the defense. That reverts no damage to them. Their man is here, and if he has anything to say to this Jury, why in the name of common sense hasn't he taken the witness stand, as he had a right to do, and declared it.

Mr. Packard: Your Honor, we object to that. The Court: I suppose you want a ruling of the court upon this question? Mr. Packard: We want a ruling of the Court upon this question: That no comments shall be made upon this witness not taking the witness stand.

Mr. Pike: None made, excepting in connections with your own allegations.

The Court: Well, the Statute does not provide that no comments in answer to arguments by Counsel for the defendant can be made. It says that the fact that a person is not a witness cannot be considered against him in the trial of the case. But in view of the argument made by Counsel for the defendant, it is proper for counsel for the State to reply thereto. But no inference can be taken against the defendant by reason of his not testifying in the case. The objection to the argument is overruled.

Mr. Packard: We note an exception on the ground stated in the objection. We are cited to numerous decisions reversing cases because the prosecuting attorney had commented upon the failure of the accused to take the stand. In several States, statutes different from ours provide that no comment shall be made in that regard, and in a number of these and in some states without such a provision, but with one more like that in force here, referring by the prosecuting attorney to the defendant's omission to testify has been deemed reversible error.

In State v. Harrington, 12 Nev. 122, this court following the language of the opinion in People v. McCoughill, 41 Cal. 430, said: "If he does not choose to avail himself of the statutory privilege, unfavorable inference can not be made to his prejudice from that circumstance" and quoting Judge Cooley, "What we intend to affirm is that the privilege to testify in his own behalf is one which the accused may waive without justly submitting himself to unfavorable comments."

The Act of Congress provides that a defendant in a criminal action may appear as a witness in his own behalf, and that his failure to testify shall not create any presumption against him. In Wilson v. U. S., 149 U. S. 68, it was held that the refusal of the court

to condemn the reference of the district attorney and to prohibit any subsequent reference to the failure of the defendant to appear as a witness tended to his prejudice before the jury, and that this effect should be corrected by a new trial. Other cases holding directly that it was error for the State's attorney to comment on the failure of the accused to testify are cited in defendant's brief. The jury was properly instructed that the defendant was under no obligation to testify, that the statute expressly declared that his neglect to take the stand shall not create any presumption of guilt against him, and that they should decide the case with reference alone to the evidence actually introduced before them and without reference to what might or might not have been proved if other persons had testified. The decisions are not uniform but a number hold that comment by the prosecuting attorney on the failure of the accused to testify is error that cannot be cured by the instructions of the court.

There is a review of cases in State v. Chisnell, 36 W. Va., 667, and those in Ohio and Indiana adhering to this rule are there disapproved. It was said that where the court corrects the error by excluding the comment and admonishing the jury to disregard it, the authorities fairly sustain the proposition that it will not be ground for setting the verdict aside.

It will be noticed that the District Judge sustained the alleged objectionable remarks only upon the ground that they were in answer to what the defendant's attorney had said in his argument, something that does not appear in the record, but what must be presumed to have justified a reply. Brown v. Com., 20 Ky. L. 761. Livingston v. State, 141 Ind. 131. State v. Hutchinson, 95 Iowa, 566, 64 N. W. 610. Hoffman v. State, 65 Wis. 46. State v. Burrall, 37 Nev.

The text and citations at Sec. 960 of Thompson on Trials are to the effect that an objection by the opposing counsel, promptly interposed, followed by a rebuke and admonition from the trial judge to the jury to disregard the prejudicial statement is generally, but not always, held sufficient to cure the prejudice. 1 Spelling, N. T. and App. P. Sec. 90.

If it be conceded that the spirit of our statute prohibits unfavorable comment, when unprovoked, by prosecuting attorneys on the failure of accused persons to testify, and that such comment is reversible error which cannot be cured by the instructions of the court, nevertheless it seems that under the weight of authority the rule does not apply if the statements of the attorney prosecuting are in reply to remarks made by the defendant or his counsel.

Under a statute providing that the failure of the defendant to testify shall not be taken as a circumstance against him, nor be alluded to or commented upon by counsel in the case, it was deemed that any comment on the part of the State regarding his omission to appear as a witness, and even if in reply to statements of his counsel, was ground for a new trial, and that the error could not be cured by instructions of the court. Hunt v. State, 28 Tex. App. 149, 18 Am. St. 215. The cases do not generally go so far even under statutes more stringent than ours.

In Ohio, under a statute providing that the defendant's "neglect or refusal to testify" shall not create any presumption against him, nor shall any reference be made to, nor any comment upon such neglect or refusal" it appeared, that on the trial of the case in the court below, after the close of the evidence, and while the counsel for the State was arguing the case to the jury, and commenting on what he claimed to have been established as matter of fact, the prisoner interrupted him by speaking out and asserting the fact to instructions. Whereupon the counsel turned to him and said in the hearing of the jury: "Mr. Calkins, you had an opportunity to testify in this case, and did not do so."

The remark having been provoked was not held to be error. Calkins v. State, 18 Ohio St. 372.

In State v. Balco, 2 p. 611, the court stated: "It must be remembered that this statement of the County attorney was not provoked or called forth by anything said by the defendant or his counsel; nor was it said incidentally in some argument addressed to the Court."

In Parker v. State, 48 S. W. 612: "We hold that when appellant brings his matter to the attention of the jury he cannot complain, if the State's reply, remarks upon his suggestions."

State v. Hyland, 144 No. 392: "He had no right to object to the argument and complain if it was not promptly met and refuted."

Parkman v. State, 52 S. W. 72. Crompton v. State, 138 U. S. 364. Moore v. State, 28 S. W. 686. State v. Glave, 51 Kan. 330. State v. State, 69 Wis. 32. State v. Potts, 83 Iowa, 317.

In Siberry v. State, 133 Ind. 677, it was held that "where, in a criminal action, counsel for the defendant steps outside the bounds of legitimate argument, and discusses matters not proper to be considered, the defense is in no position to complain if counsel for the State follow them without such bounds and reply to such argument; although discussion ought to be confined to matters properly within the case."

At page 522 of 12 Cyc it is said that remarks of the prosecuting attorney which ordinarily would be improper are not ground for exception if they are provoked by defendant's counsel and are in reply to his statements, and a long list of cases in support of this text is given in note 26, and in 14 Cent. Dig. at Sec. 1881 and at p. 671 of 46 L. R. A.

There is another reason why the comments of the attorney for the State are not ground for reversal, if

they be admittedly improper, the case ought not to be remanded on errors and technicalities which could not have injured the defendant. He was recognized on the trial night by Townsend, Waldman and the deceased at the time he and the others indicted with him, robbed them. He was traced with the others by the Mexican coins taken from Townsend. The evidence, direct and circumstantial, showing their guilt was clear, conclusive and uncontradicted. His only witness, a physician and surgeon, did not refute any of the pertinent facts. Regardless of the impropriety of the remarks of the attorney for the State, there could be no doubt of his guilt and no opportunity for the jury to find any verdict except the one of murder in the first degree. The result would have been the same and consequently there was no injury to the accused. If there had been a substantial conflict in the evidence or any uncertainty regarding the case proved by the State, a doubt might arise in favor of the defendant as to whether the jury had been prejudiced or influenced in finding the verdict by these comments, but the undisputed facts point so conclusively to the guilt of the prisoner, that they could not have arrived at a different conclusion. Under such circumstances neither reason nor justice demands a reversal of the case and the incurrance of the delay and expense of a new trial.

In Wilson v. U. S., 149 U. S. 70, the Supreme Court quoting from the decision in Austin v. People, 102 Ill. 264, said:

"We do not see how this statute can be completely enforced unless it be adopted as a rule of practice, that such improper and forbidden reference by counsel for the prosecution shall be regarded good ground for a new trial in all cases where the proofs of the guilt are not so clear and conclusive that the court can say affirmatively that accused could not have been harmed from that cause." The criminal code of Illinois provided that the "neglect of the defendant to testify should not create any presumption against him nor should the court permit any reference or comment to be made to, or upon such neglect." The difference in our statute leaves room for a distinction and in regard to remarks in reply to statements by the defendant or his attorney.

In State v. Ahern, 54 Minn. 197, the court stated:

"The county attorney commented upon the fact that the defendant had not testified in his own behalf. This is admitted on the part of the State to have been error. It was a violation of an express provision of the statute passed for the protection of defendants in criminal cases. But it was harmless in this case, and the fact that the evidence so conclusively showed the defendant's guilt that the jury could not have returned a verdict for the defendant without fully disregarding their duty, and it is not to be supposed that they would have done that. The evidence on the part of the State was complete, positive and uncontradicted, and nothing appears to raise a doubt as to its credibility. It is unreasonable to suppose that a result might have been different if counsel had not made the improper remark referred to."

In a recent case, People v. McRoberts 21 p. 735, certain statements of the district attorney were held to be a gross and reprehensible violation of duty, but the court said:

"The question remains should the judgment be set aside for this misconduct? The homicide was admitted and the evidence was such to make it reasonably certain that the jury was not misled by the misconduct of the district attorney to return a verdict which they otherwise would not have found."

And again in Patterson v. Hawley, 33 Neb. 445: "All appeals to the jury upon matters outside of the case tend to defeat the due administration of justice, and any statement of an alleged fact outside of the evidence prejudicial to one of the parties, may be sufficient to cause a reversal of the judgment. A court of justice does not condemn unheard, nor upon ex parte statements of opposing counsel, and it will not permit one of its officers to abuse his position by such unauthorized statements. We are satisfied however, that the verdict in this case is the only one that the jury should have returned under the evidence and the error will be disregarded."

State v. Shawn, 40 W. Va. 11 and cases cited.

Also, 46 L. R. A. 672. State v. Zumbushon, 86 Ma. 111. Thompson, Sec. 960.

The judgment and order are affirmed and the district court will fix a time for having its sentence of death carried into effect.

Talbot, J. We concur: Fitzgerald, C. J. Niccross, J. Filed, Sept. 19, 1905.

W. G. Douglas, Clerk.

By J. W. Legate, Deputy.

Notice is hereby given that the Assessor has this day delivered to the undersigned the assessment roll for the current fiscal year, together with the map book and the original lists of property and that the Board of County Commissioners will meet as a Board of Equalization at the County Clerks office, Monday Sept. 18th instant at 10 o'clock a. m., and continue in session from time to time, as provided by law, until the business of equalization is disposed of. H. B. Van Etten, Clerk of the Board of County Commissioners. Dated Sept. 11, 1905.