14 defendant, but a doubt to authorize an acquittal should be a substantial doubt of his guilt and not a mere possibility of his innocence.

To the giving of said instructions the defendant by his Counsel then and there excepted at the time and now here still excepts.

The defendant upon his part prayed the Court to instruct the Jury as follows

Ref to Instruction

No 1 Unless the Jury believe from the evidence and that to beyond a reasonable doubt that about the 30th day of October 1887 in this County the defendant did commit the crime of Sodomy by then and there feloniously having carnal intercourse with a certain female dog they will find the defendant not guilty.

No 2 The Jury are instructed that in order to convict the defendant it devolves upon the State to prove that the private parts of the defendant entered the body of the dog; that is to say the defendant must have had sexual intercourse with said dog.

Which instructions the Court refused to which refusal of the instructions thereof prayed the defendant by his Counsel then and there excepted and now here still excepts.

finding of Jury

Under the instructions the Jury found the defendant guilty of an attempt to commit the offence charged and assessed his punishment at two years in the penitentiary

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And on the 16th day of December 1887 and within four days after the Verdict was returned the defendant filed his Motion for a new trial as follows.

Motion for a new trial

State of Missouri }
vs }
David Frantz }

Comes now the defendant and moves the Court to set aside the Verdict of the Jury herein rendered against him and Grant him a new trial in this Cause and for grounds therefor states.

1st Because the Verdict of the Jury is against the evidence

2nd Because the Verdict of the Jury is against the law as declared by the Court.

3rd Because the Court erred in giving its Instructions No 1 to me and two on behalf of State.

4th Because the Court erred in refusing to give instructions No 1 & 2 asked on behalf of the defendant.

5th Because the defendant was not present during the entire trial of this Cause, but was in the custody of the Sheriff of the County and confined in the Jail of said County during the calling of the Jury and was not present in Court when the State challenge the Jury herein and not present in Court until after the attorney for the defendant had challenged two of said Jurors.

6th Because the defendant has not convicted of the offences alleged against him in the indictment or of any degree of such offence.

7th Because the indictment herein did not inform the defendant of the nature of the offence for which he was convicted

7th. Because the Court erred in refusing defendants

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request to correct the record so as to show defendants absence from the Court room at the time of challenging the Jury herein

Booher & Williams
Attys for Defendant.

Which said Motion the Court on the 16th day of Dec 1887 overruled, to which ruling of the Court the defendant then and there at the time excepted and now here still excepts

~~[illegible]~~ And on said 16th day of Dec 1887 the defendant filed his motion in arrest of Judgment as follows.

Motion in Arrest.

State of Missouri Pltff
vs
David Straub Deft

Now comes the defendant and moves the Court to arrest the judgment herein against the defendant on the Verdict of the Jury for the reasons.
1st Because the verdict is against the law.
2nd Because the indictment does not support the Verdict;
3rd Because the Court improperly instructed the Jury as to an attempt to commit the offense charged,
4th Because the Verdict is illegal in form.
5th Because the Verdict is not responsive to the indictment.
6th Because the indictment is not sufficient

Booher & Williams
Attys for Deft.

Which said Motion the Court then and there overruled to which ruling and order of the Court the defendant then and there at the time excepted and now here still excepts.

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Whereupon the Court rendered final judgment on said verdict against the defendant to the rendering of which judgment the defendant at the time excepted and now here still excepts.

The defendant therefore prays the Court to allow and sign this bill of exceptions and that the same may be signed and sealed and made part of the record herein which is done this —— day of December 1887

Cyprus A. Anthony Circ Judge of the Andrew Circuit Court.

It is agreed that the foregoing may be signed as the bill of exceptions in this case.

Booher & Williams Attys for deft
J A Sanders
Pros Atty.

State of Missouri } ss
County of Andrew } I J C Brooks Clerk of the Circuit Court in and for said County hereby certify that the above and foregoing is a true and Complete Transcript of the record in the cause herein including the bill of exceptions. Judgment & Sentence and indictment and opening order of the Court at the trial of the cause

Witness my hand as clerk and the seal of said Court. Done at office in Savannah Mo this 2nd day of February A.D. 1888.

J C Brooks Clerk

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IN THE SUPREME COURT,

STATE OF MISSOURI.

October Term, 1890.

THE STATE OF MISSOURI, *Respondent,*
vs.
DAVID FRANK, *Appellant.*

No. 4830.

Appeal from Andrew County.

Appellant's Statement, Abstract and Brief.

BOOHER & WILLIAMS, Attorneys for Appellant.

IN THE SUPREME COURT,
STATE OF MISSOURI.

October Term, 1890.

THE STATE OF MISSOURI,
Respondent,
vs.
DAVID FRANK,
Appellant.

No. 4830.

Appeal from Andrew County.

Appellant was indicted in the Circuit Court of Andrew county, at the December term, 1887. The indictment, omitting the caption, is as follows:

"The Grand Jurors for the State of Missouri, duly empaneled, sworn and charged to inquire within and for the body of the county of Andrew and State aforesaid, upon their oaths present and charge that David Frank, on the 30th day of October, 1887, at the county of Andrew and State of Missouri, feloniously, wickedly and against the order of nature, did commit the detestable and abominable crime against nature with a certain beast, to-wit: a female dog; against the peace and dignity of the State. JULIUS A. SANDERS,
"Prosecuting Attorney."

At the same term of the Court the defendant was placed upon trial and convicted of an attempt to commit the crime charged in the indictment, and his punishment assessed at two years imprisonment in the Penitentiary.

After all the evidence had been given the Court instructed the jury on the part of the State, as follows, to the giving of which the defendant at the time objected:

"The Court instructs the jury that if they believe from the evidence beyond a reasonable doubt, that the defendant, in this county and State, at any time within three years next before the finding of the indictment in this case, did not have carnal knowledge by actual penetration into the body of the dog with the sexual organs of the defendant, but that he made an attempt to copulate or have intercourse with said dog, and in such attempt did any act

towards the commission of said offense, and failed in the perpetration of said offense, or was prevented or intercepted in executing the same, then and in that case the jury will find the defendant guilty of an attempt to commit the offense charged, and so state in their verdict, and assess his punishment at imprisonment in the Penitentiary for not less than two years.

"2d. The Court instructs the jury that the defendant is presumed to be innocent of the offense charged, or any attempt to commit the same, and if they have a reasonable doubt as to the guilt of the defendant, they should acquit the defendant, but a doubt to authorize an acquittal should be a substantial doubt of his guilt, and not a mere possibility of his innocence."

The defendant, by his counsel, asked the following instructions, which the Court refused to give; to which refusal to give the defendant at the time excepted:

"1st. Unless the jury believe from the evidence, and that, too, beyond a reasonable doubt, that about the 30th day of October, 1877, in this county, the defendant did commit the crime of sodomy, by then and there feloniously having carnal intercourse with a certain female dog, they will find the defendant not guilty.

"2d. The Court instructs the jury that in order to convict the defendant under the indictment in this case, it devolves upon the State to prove that the private parts of the defendant entered the body of the dog, that is to say, the defendant must have had sexual intercourse with said dog."

The jury returned the following verdict:

"We the jury find the defendant guilty of an attempt to commit the offense charged, and assess his punishment at imprisonment in the penitentiary for a period of two years.

"WM. F. FORD, Foreman."

Defendant in due time filed his motion for a new trial, as follows, omitting caption:

"Comes now the defendant, and moves the court to set aside the verdict of jury herein rendered against him, and grant him a new trial and for grounds therefor, states:

"1st. Because the verdict of the jury is against the evidence.

"2d. Because the verdict of the jury is against the law, as declared by the court.

"3d. Because the court erred in giving instruction number one on behalf of the State.

"4th. Because the court erred in refusing to give in structions numbers one and two, asked on behalf of the defendant."

The court overruled said motion, and the defendant at the time excepted to the action of the court.

The defendant filed his motion in arrest, which is as follows, omitting caption:

"1st. Because the verdict is against the law.

"2d. Because the indictment does not support the verdict.

"3d. Because the court improperly instructed the jury as to an attempt to commit the offense charged.

"4th. Because the verdict is not responsive to the indictment.

"5th. Bceause the indictment is not sufficient."

The court overruled said motion in arrest, and the defendant excepted; and in due time filed his affidavit for appeal to the Supreme Court.

BRIEF.

The court erred in giving instruction number one on behalf of the State. The crime charged against the defendant does not consist of different degrees, and for that reason the provisions of Sections 1654 and 1655, Revised Statutes of 1879, does not apply.

Section 3796, R. S. 1879.

State vs. Gabriel, 88 Mo., 631—643.

State vs Burk, 89 Mo., 635.

State vs. Johnson, 91 Mo., 439—444.

State vs. Lowe, 93 Mo., 547—574.

For the reason above stated, the court erred in refusing to give instructions numbers one and two on behalf of the defendant, and we call the attention of the court upon this point to the authorities cited above.

ARGUMENT.

The defendant could not be convicted under the indictment in this cause, for an attempt to commit the crime charged. The indictment charged the actual commission of the offense. The action of the learned Judge of the trial court, in giving and refusing instructions, can only be sustained upon the theory that sections 1654, 1655 and 1927, R. S. 1879, apply to cases of this character.

This Court, in State vs. Gabriel, 88 Mo., 643, held that 1654, while it allows a conviction for a lesser offense when a greater one is charged, only allows such conviction when the evidence shows the higher offense to have been committed in cases of homicidal crimes. Sodomy can not be safely set down in that category.

In the case of the State vs. Johnson, 91 Mo., 444, this Court held that the trial court did not commit error in refusing to give an instruction for an assault to commit rape, upon the ground that the crime of rape was charged, of which there were no degrees; and in the case of State vs. Burk, 89 Mo., 635, it is held that sections 1654, 1655, and 1927, R. S., 1879, apply only to that class of offenses of which there are different degrees.

We do not print the evidence in the case, for the reason that the error complained of is in the giving and refusal of instructions by the trial court, and as the court can determine that question from the indictment and instructions, we omit the evidence.

We think that the error complained of is so plain that no lengthy brief or argument is necessary to convince the court that our position is correct on this point.

Again, we insist that the Court erred, even if there could be a conviction in this case under this indictment, when it told the jury that if the defendant "did any act towards the commission of said offense and failed in the perpetration," &c. The Court should have instructed the jury what act or acts were necessary. There must be a combination of act and intent. We think this is fundamental.

The jury should have been instructed upon this point, and not be left to guess the defendant into the penitentiary. They may have concluded that if he whistled to the bitch, that that was such an act as the court meant.

We think the case should be dismissed.

BOOHER & WILLIAMS,
Att'ys for Def't.

4830

State of Missouri

v.

David Franke

Affirmed

Supreme Court of Missouri.
DIVISION NO. 2.

Opinion

L & A Rep

Mcfarlane

In the Supreme Court of Missouri.

October term I890.

Division No 2.

State of Missouri,

v

David Frank.

....

Defendant was indicted for the crime of Sodomy. Upon ~~the~~ a trial under the indictment the evidence tended to prove an unsuccessful attempt to commit the offense charged. The jury was instructed "that if defendant made an attempt to copulate, or have intercourse with said dog, and in such attempt did any act toward the commission of said offense and failed in the perpetration of said offense, or was prevented or intercepted in executing the same, then and in that case the jury will find the defendant guilty of an attempt to commit the offense charged, and so state in their verdict, and assess his punishment at imprisonment in the penitentiary for ~~xxxxx~~ not less than two years".

The jury found defendant guilty of an attempt to commit the crime charged and fixed his punishment at two years imprisonment in the penitentiary , and judgment was entered accordingly from which defendant prosecutes his appeal.

It is contended by defendants counsel that sections I654, I655 and I927 R.S. I879, do not apply to offenses of this character, and unless defendant had been found guilty of the actual commission of the crime charged he should have been acquitted.

Section I539 fixes the punishment of the crime of sodomy and section I645 ~~provided~~ provides that "every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the

perpetration thereof, or shall be prevented or intercepted in executing it upon conviction thereof " should be punished as therein provided. There can be no doubt, under this section, that an attempt to commit the offense of sodomy is a crime in itself, and punishable, as such. So it was also at common law. II Bish Crim Law Sec II74; I Russ. on Crimes 939; I Bish Crim Law Sec 689; Rex v Hickman I Moody 34; Reg v Rowea 6 Jur 396.

2 — Defendant's counsel insists further, that though the attempt be a crime in itself, a conviction cannot be had therefor, under an indictment for the actual perpetration of the offense, and cite confidently as authority for their contention the cases of State v Johnson 9I Mo 444 and State v Burk 89 Mo 635. ~~Which,~~ these cases it is contended, decide that sections I654, I655, and I927 are only applicable to those crimes, to which the law has fixed different degrees. The opinion in the case of State v Johnson gives strong ground for the contention, but, if the court in that case, intended to decide that section I655 has no application to cases, other than these of which there are different degrees, which if strongly ~~indicates~~ intimates, we are not willing to give it our approval, or to follow it. There can be no doubt that Sections I654, and I927, do only apply to that class of cases of which there are different degrees. Section I655 is much broader in its scope, and was evidently intended to apply to another class of offenses altogether, otherwise it would be entirely superfluous. The latter clause of the section provides that in all other cases, "the jury or court trying the case may find the defendant not guilty of the offense as charged, and find him guilty of any offense, the commission of which is necessarily included in that charged against him". The learned judge who wrote the opinion in case of State v Johnson, supra draws his conclusion from what he supposed had been decided in the case of the

State v Burk 89 Mo 635. An examination of that case will show that the decision was misconstrued, in fact, as we read the opinion, it decides, as to the scope of section I655, the very reverse, and that ~~section~~ it applies only to cases in which there are no degrees fixed by law.

In that case the indictment was under section I262, for felonious assault with intent to kill, and defendant was found guilty of the lesser offense under section I263. The question in the case was whether that could be done, defendant insisting that a law justifying a conviction for a different offense, than the one charged, would be unconstitutional, . To meet this objection the court held that the offense described in Secs I262 & I263, were distinct offenses, and not different degrees of the same offense, and that by virtue of section I655 defendant was liable to be convicted of the lesser offense mentioned in section I263 on an indictment under section I262. The court then goes on to say speaking through Judge Ray: "If the offenses specified in sections I262 and I263 are, as we have held, distinct offenses and not different degrees of the same offense, then section I927 of the Revised Statutes I879, has no reference to the case at bar. That section it is manifest, had application only to that class of offenses which by law consists of different degrees of the same offense, such as those specified in section I654 Revised Statutes, I879. The offenses mentioned in section I262 and I263 are not of that class, and under the law have no degrees, consequently the requirements of section I927 can, in no event, have any application to the case at bar. The verdict of the jury in this case is good under either section I262 or I263 since both authorize an assessment of two years imprisonment in the penitentiary".

It will be seen, that the opinion nowhere states, or intimates, that section I655 applies to those offenses only, of which there are different degrees, indeed the argument is to show that that section does not apply to that class of offenses, but to such as are not classed into degrees.

Previous to the enactment of this statute (Sec I655) unless the exact crime charged was proved, the state was defeated in its prosecution and the criminal either went free or the state was put to the trouble, and delay, of another indictment, and trial. State v Webster 77 Mo 566. To obviate the trouble, doubtless the act was passed. The first clause of this section applying to assaults has been sustained by this court in a number of cases, though there are no degrees of such offenses fixed by law. State v Johnson 8I Mo 60; State v Burk 89 Mo 637; State v Schloss 93 Mo 36I; State v Melton decided at this term.

No reason has been shown, or can be seen, why the second clause of said section should not also be valid. Indeed, at common law, where offenses are included within ane another, a party indicted for the larger of those, may be convicted of the lesser. I Bish Crim Law (3d Ed) Sec 807. "Whatever the offense alleged, any other offense may be shown to have been committed, and the indictment will be sufficient, provided the offense proved is included also within the words of the allegation". I Bish Crim Law Sec 809. It has been ~~devised~~ denied that one indicted for a substantive offense, in the absence of a statute authorizing it, can be convicted for an attempt to commit the same offense. We ~~dont~~ do not find that the power has ever been questioned, when authorized by a proper statute. I Bish Crim Law Sec 8I3; Clifford v State I0 Ga 422.

We are not able to conceive how it could be possible to prove

the offense charged against this defendant without proving also the attempt to commit it, ~~and~~ and the evidence sufficiently shows an attempt the action of the court in its instruction was clearly authorized by section I655 R.S. I879.

Objection is made to the instruction in not pointing out and advising the jury as to the specific acts that would constitute an attempt to commit the offense. The instruction follows the language of the statute (Sec I645) and is we think sufficiently specific. If the evidence ~~fails~~ had failed to show any act towards the commission of the offense charged, the court ~~should~~ would have so instructed the jury. Finding no error in the record the judgement is affirmed. All concur - Appeal dismissed

No. 4830

State of Missouri
Resp

vs

David Frank
Aff

Brief of Resp.

No. 4330.

In the Supreme Court of Missouri,

October Term 1890.

State of Missouri Respondent

vs.

David Frank Appellant.

The only point raised by the Appellant, is, whether upon a charge for Sodomy, the defendant can be convicted of an attempt to commit that offense.

I. The charge of the commission of the offense, necessarily included the charge of the attempt to commit the offense. The offense could not be committed, at all, without first the attempt, followed by the actual perpretration of the crime, hence an attempt to commit the offense, is necessarily included in the charge of its actual commission.

The evidence showed, clearly, ~~that~~ an attempt to commit the offense charged, and under the provisions of sections 1655 and 1645 R.S. 1879, the instructions complained of were proper.

We respectfully submit, that the judgment, in this case should be affirmed.

John M. Wood

Attorney General,

For Respondent.