3409

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO.

ANTONIO BENEDICT,
Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF COLORADO,
Defendant in Error.

No. 3409.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

BYRON L. CARR,
Attorney General.

F. P. SECOR and
L. W. DOLOFF,
Of Counsel.

THE SMITH-BROOKS PRINTING CO., DENVER, COLO.

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I.

The plea of mental unsoundness to the extent of incapacity to commit the crime charged in the information, was not interposed by the defendant's counsel during the trial of said cause, nor was it attempted to be, except indirectly and inferentially, by

evidence tending to show that at the time of the commission of the offense charged, the defendant was in such a state of intoxication that he did not know what he was doing, and could not have formed an intention to do a wrong. If the mental unsoundness of the defendant, to a degree verging upon idiocy, had existed at the time of the commission of the offense, and at the time of the trial in the court below, it is certainly unreasonable that it had not been discovered by his attorney, his friends, and many other people who knew him. The fact that no direct testimony was introduced by the defense tending to show idiocy, imbecility, mania, dementia or other defect in mental power, of the defendant, certainly raises the presumption of fact that it did not exist. The brother of the defendant, in his affidavit (as it appears in folios 40 and 41, page 8, abstract), declares that the defendant has and had many friends and acquaintances in said Gilpin county, etc. It is rather remarkable that an idiot or imbecile should have been capable of so many friendships. Idiots are not usually much sought after. It is contended by the attorney for the plaintiff in error that the verdict in said cause was returned through a misapprehension or mistake on the part of the jurors; that some of the jurors were of the opinion that persons mentally unsound to the extent of not being able to distinguish right from wrong, were capable of committing crime, and that idiocy can afford no defense, and that the refusal of of the court to give instruction No. 9, asked for by defendant, left the jurors in ignorance of the law on this point, and made it possible for them to punish a man who is innocent in the eye of the law. If we admit that said instruction No. 9 embodies a correct

proposition of law, its refusal can be justified on the ground that it had already been given, substantially, in instruction No. 1, asked by defendant and given by the court, which reads as follows: "The court instructs the jury that a crime or misdemeanor consists in the violation of a public law, in the commission of which there shall be a union or joint operation of act and intention or criminal negligence; and that intention is manifested by the circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused."

II.

That affidavits of jurors impeaching, or tending to impeach, their verdict, cannot be received in support of a motion for a new trial, is a principle of law too well settled to require argument or citation of authority.

III.

It is true that our criminal code requires that every person charged with a felony shall be furnished, previous to his arraignment, with a copy of the indictment or information, and a list of the jurors and witnesses; but it is not contended that in this case the law was not fully complied with; that the defendant was not, before his arraignment, furnished with a copy of the information and a list of the jurrors and witnesses, but that the court erred in ordering the record to be amended (after sentence, and upon the statement of the sheriff and clerk of the court that it had been done). The law requires that these things shall be done before arraignment, but does not re-

quire that the record shall show them to have been done at the time indicated. When the attention of the court was called to the omission in the record, there was no claim on the part of the defense that the requirements of the law had not been complied with, thereby admitting by their silence that it had been. It is sufficient if the record is complete when it comes to this court; that it shows a full compliance with the law.

IV.

In regard to the objection that the court erred in not allowing the defendant a public trial, we have to say that "a public trial," within the meaning of our constitution, was had in this case. It was a trial in which the court, the officers of the court, the witnesses for both parties, the jury, the defendant and his counsel were present, who certainly constitute a part of the public in numbers, and are the legal representatives of the public in general which has placed them there to administer the law. It could not have been the intention of our constitution makers to provide that idlers—mere curiosity-seekers—should be admitted to every trial. It might be asked, "What good purpose could their presence serve?" Certainly our courts have a discretion in limiting the number of persons who shall be admitted to the court room, and are so far the guardians of public morals that they may exclude from the court room, during certain trials, such disinterested persons belonging to the general public as are likely to become contaminated by being present and listening to the proceedings. It is as much the duty of the courts to prevent a violation of the law as it is to punish offenders.

The very nature of the offense charged in this case is revolting to most people, who would have no desire to be present at such a trial; but to that small portion of the public to whom it is not especially revolting, great and incalculable injury may have been done to their morals by being present at such a trial, and they were properly excluded.

The judgment should be affirmed.

Respecfully submitted,

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F. P. SECOR and
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Of Counsel.