166

STATE OF MICHIGAN.

THE SUPREME COURT

EXCEPTIONS FROM CALHOUN.

THE PEOPLE

—*vs.*—

ORIN J. FREY.

BRIEF FOR THE PEOPLE.

A. W. LOOKTON,
Prosecuting Attorney.

O. S. CLARK,
Ex-Prosecuting Attorney.

STATE OF MICHIGAN.

THE SUPREME COURT.

THE PEOPLE
vs.
ORIN J. FREY.

BRIEF FOR PEOPLE.

STATEMENT.

The respondent and one Brot were charged jointly with the offense set forth in the information, and both testified at the trial (Rec., p. 6), from which it appears they admitted obtaining the notes, amounting to $2,000, from the complaining witness, without any consideration whatever, excepting that they should say nothing in regard to the alleged transaction; that they met on the morning in question, by appointment, to watch for Doubleday, who was in the habit of going past the slaughter house on his way to his barn.

It is undoubtedly true that the admissions of the respondents that they thus mulcted the old man out of such an amount, under such circumstances, had a tendency to prejudice them in the minds of the jury,

and induced the jury to accept and believe the testimony of any other witness, rather than the testimony of parties who could plan and carry into execution so diabolical a scheme, and then brazenly admit it on the stand. In other words, the respondents were convicted on their own damaging admissions, and there was, and is, no defense, excepting of a purely technical nature, one such attempt having already been made in this court.

See Frey vs. Calhoun Circuit Judge, 64 N. W. 1047.

LAW AND ARGUMENT.

Following the precedent in respondent's brief, we take up—

ASSIGNMENTS 1, 2, 3 AND 4,

In which it is claimed that the information is defective in not sufficiently and specifically setting forth the fact that respondents threatened to set the criminal law in motion, etc.; and, further, that the evidence does not show that such threats were actually made.

As to the sufficiency of the information:—

A careful examination of all the assignments of error in record fails to reveal any claim of this nature, which, if made at all, should have been by plea in abatement, or on motion to quash.

In statutory offenses, such as the case at bar, the information is sufficient if in substantial compliance with the statute.

People vs. Kent, 1 Doug. 42.

Rice vs. People, 15 Mich. 9.

People vs. Taylor, 96 Mich. 576–8.

After verdict, the information shall be held good, if in language of the statute.

2 How. An. Stat., Sec. 9539.

People vs. Wakely, 62 Mich. 300.

As to evidence in support of the proposition that respondents threatened to put the criminal law in motion, and the citation in respondent's brief (People vs. Braman, 30 Mich. 459), we fail to see the application to the facts and evidence in this case. The distinction drawn by the two eminent judges in that case have no application here, except in the theory and imagination of the counsel, and not on this record.

The pretended statement in respondent's brief, as to the testimony of complaining witness (bottom p. 2), falls far short of giving *all* that the record shows on this subject.

The entire train of circumstances and facts are to be taken into account.

People vs. Knapp, 26 Mich. 112.

Though incomplete, the record (bottom p. 2) shows that respondents, after telling complaining witness that the penalty was twenty-five years in the state prison, adds, "And that they would swear him there." Then follows (pp. 2 and 3). The same day, and before any notes were passed, witness followed Frey into the Justice's office, and for the reason, "They were going to get out the papers, and I told Charlie (the Justice), 'I am here if you want me.'" To the average mind, this would appear very conclusive "that they themselves would set in motion the criminal

machinery of the state." It would appear to be "A menace that they themselves would cause proceedings to be taken where the 'swearing' would be of avail, to-wit: in some court."

Witness then goes on to detail the trip to Union City, the same forenoon, and before the transaction closed, to which place he is followed by Brot and Constable Bruce; the delivery by witness to them of the first $1,000 in notes. The next day witness met Frey and told him of his intended trip to Kent county. "And I said to Frey, 'Will you let me go?' and he said, 'If you will let me have the notes.' And I did." "Q.—How did you happen to say, 'Will you let me go?'" "A.—*He threatened to put the papers to me.*"

"That the only consideration he received for the $2,000, was that they would let him alone. *and not send him to Jackson.*" (Record, p. 3.)

That he was willing to pay the $2,000, "*rather than go to Jackson.*" And that he went into the Justice's office because he "thought they were in there *getting the papers.*" (Record, top p. 4.)

Justice Standiford corroborates the evidence of the complaining witness, with the addition that Frey said, "You will hear the damndest lawsuit before night you ever heard of." "He kind of looked at Doubleday, and winked as though he meant him." (Record, pp. 4 and 5.)

Also Constable Bruce, the tool of respondents, who went to Union City with Brot, and says of the complaining witness, "I suppose he thought we were after him." Though an unwilling witness, he admitted that before he went to Union City with Brot, he went into the office of a Mr. Love and inquired as to the penalty, etc.

(Rec. p. p. 5 and 6.)

Respondent Brot also testified (p. 6) when asked the object of his trip to Union City with the Constable, "That kind of made Doubleday feel uneasy and made him give up the other thousand."

If a *Justice of the Peace*, "*papers*," a *Constable* and a *prison* are not "the criminal machinery of the State," then we request counsel to define terms. And if they are, then the argument in People vs. Braman, as well as the citation 25 Am. and Eng. Ency. 1070 are worthless for the purposes of this case.

ASSIGNMENTS 5, 6, 7, AND 8.

Counsel, in brief (pp. 4 and 5), selects from the charge of the Court certain isolated phrases and urges that they are improper; for instance, they quote from record, top p. 28, but brief stops the quotation at first period, line 3, while what immediately follows qualifies and places in contrast in the most fair and impartial manner the clause complained of.

We give this simply as an illustration, and are satisfied that a careful examination of the charge will convince the Court that the trial judge fully guarded the interests of the respondent, and did so in a very patient and commendable manner.

ASSIGNMENT 9.

While we admit, that had the respondent been on trial for sodomy or bestialty, the crime should have been more specifically defined; but upon this issue and

for the purposes of this case, and after a careful reading of the charge on that point (Rec. p. 22), we conclude that this objection is frivolous. As well might it be insisted in a case of breaking and entering with intent to steal, that the Court should go into a long and elaborate dissertation upon larceny and be compelled to explicitly point out all the different elements of the minor offense. We submit that it was entirely unnecessary to technically define that offense, or to inject into this case an element of which the parties themselves were totally ignorant, and a knowledge of which would not in the least degree assist the jury, but on the contrary, have a tendency to confuse their minds. This, too, was given verbatim from the respondent's second request to charge. (Record bot. p. 31 and top p. 32.) So here we find counsel objecting to their own definition.

ASSIGNMENTS 10 AND 11.

Upon the question involved in these assignments we reply: We assume that a party claiming the right to a new trial by reason of error committed in the trial must show two things:

1. Substantial error by the trial court, and
2. That such error was prejudicial to the rights of the respondent.

The record in this case fails to show either; but on the contrary, shows that all the requests to charge as given by the respondent were given "word for word." (Letter, Rec. p. 30.)

The only claim as to the work of the stenographer is in regard to the charge of the Court before the jury first retired; and the subsequent instructions of the

judge, as well as the evidence of the various witnesses, appear to be unobjectionable.

The Record (pp. 15 to 19, inclusive, and 25 to 28, inclusive,) shows that there is no substantial dispute as to what was said and done after the jury first returned into court for further instructions, and we submit that it appears conclusively that not only were the requests to charge given verbatim, but that the rights of the respondent were protected in every particular, and in relation to every possible theory and claim of the defense.

This Court has no right to assume that the trial court committed error prejudicial to respondent, when not only is none shown, but it affirmatively appears that his counsel virtually dictated the instructions given. While we are compelled to concede the law to favor a respondent in almost everything, we are not prepared to admit that the rule should be carried to the extreme of presuming that a convicted party is improperly so convicted.

Justice Brewer, of the U. S. Supreme Court, a few years since, in a public address in Chicago, as reported in the daily papers, recommended a change in our criminal practice to the extent of doing away with the right of appeal merely on technical grounds, making the result in the trial court conclusive, subject only to review by Board of Pardons on the merits, and to whom might be referred any prejudice or misconduct of the officers or court, affecting the merits of the case, but not those of a merely technical nature.

And Judge Anthony, in an address before the Bar Association of Illinois a few years ago, is reported to have said:—

"Our method of criminal procedure is vicious, and the practice still worse. The rights of the defendant are regarded as supreme, while those of the public are almost entirely ignored. It is the practice to favor the accused as against the state in everything. Dissatisfaction in regard to the methods is widespread, and it is not to be wondered that the people in some portions of the republic, exasperated at the trifling and juggling with public justice, have wreaked summary vengeance on thugs and assassins to the disgrace of the present age. In no other country calling itself civilized does it require so long a time, or is it so difficult, to convict a criminal as here."

We give these opinions of eminent jurists, not as a reason that the adjudications of this court should be ignored or overruled, but as a reason why justice should not be further defeated by a novel decision of of this Court, based on a mere *assumption* that there was error committed in the trial court, while the undisputed record shows directly the contrary.

The case at bar is easily distinguished from the Nebraska cases cited in respondent's brief, in that in those cases the stenographer failed to furnish the *evidence of witnesses*, thus leaving a total blank in an important part of the record; while here, the substance of the charge is given, and the omission supplied, from which it appears the respondent's rights could not have been prejudiced.

The distinction is between the total absence of record on one hand, and on the other, an assumption merely that the trial judge committed error when he charged the jury, and again, when he corrected the record.

ASSIGNMENT 12.

As to questions upon cross-examination of witnesses in regard to character and reputation of respondent.

Our claim is that witnesses called for this purpose may be cross-examined fully and exhaustively as to their acquaintance with the respondent, not for the purpose of proving any other specific offense, but for the purpose only of showing their ability to be judges of his character. Any other rule would make cross-examination a nullity. The claim of counsel that this was a "plan of the prosecution . . . to impress the jury," etc., is an assumption merely.

We concede that suicide, or attempt at suicide, is no offense in Michigan, and the question was not asked for the purpose, or with the intention, of showing the commission of a crime, and could not have been so construed by the jury. With equal force, might it be claimed that in numerous instances, suicide is not only commendable, but heroic in the highest degree, as where one sacrifices his own life in order to save life, or to secure the liberty of others. Moral turpitude is by no means a necessary element of suicide.

We entirely agree with the language quoted in respondent's brief (p. 9) from 34 Mich. 45 and we further coincide with, and insist upon the conclusion of counsel, that "there is nothing necessarily criminal, or necessarily even immoral in suicide, or in an attempt." We go still farther and insist that suicide may be highly commendable in a person in his right mind; but we cannot allow the defense to speculate upon the theory of the prosecution, when the record fails to show any ground for such a theory. The

matter was left by the prosecution upon the bare statement of the witnesses *without explanation or comment*. The jury would be justified in concluding that there was nothing in the act of a degrading character, as the witnesses swore to respondent's good reputation notwithstanding their knowlenge of the fact that he had attempted suicide. Te be sure the defense would have been allowed to show such a state of facts—had they existed—as to make such a conclusion inevitable; but this they did not attempt to do, preferring to instruct the Court as to our theory rather than attempt to introduce evidence in support of their own.

The fact is that no amount of proof of character could counterbalance the contempt that the jury must have felt for men, confessedly by their own testimony, guilty of a most despicable offense, the only question with the two jurors as appears by the record, being the usual stumbling block, "a reasonable doubt."

Then agreeing fully, as we do with the argument of counsel, as to the causes of suicide and the reasons why committed, the only question remaining is whether the trial judge did, or did not, properly restrict the cross-examination.

The cross-examination of a witness is not limited to facts brought out on direct examination, but may be extended to elicit the whole truth which may be supposed to have been only partially explained, and where the whole truth would present them in a different light.

Chandler vs. Allison, 10 Mich. 460.

Overruling { People vs. Horton, 4 Mich. 67.
Compton vs. Dewey, 9 Mich. 381.

Also, see Haynes vs. Ledyard, 33 Mich. 319.

Child vs. Det. Manf. Co., 72 Mich. 623.
Hemminger vs. West. Assurance Co., 95 Mich. 355.
People vs. Barker, 60 Mich. 277.

The latitude allowed on cross-examination as to collateral matters is largely discretionary with the trial court, and a verdict will not be disturbed unless abuse of that discretion is shown.

McGinnis vs. Kempsey, 27 Mich. 363.
Beebe vs. Knapp, 28 Mich. 53, Note An. Ed.
Bissell vs. Starr, 32 Mich. 297.
Threadgool vs. Litogot, 22 Mich. 271.
McBride vs. Wallace, 62 Mich. 451.
Helwig vs. Lascowski, 82 Mich. 619.

It is competent on cross-examination to call out, not only any fact contradicting or qualifying any particular statement made on direct examination, but also anything tending to rebut or modify *any conclusion* or *inference* resulting from such statement.

Det. & M. R. Co. vs. VanSteinburg, 17 Mich. 99.
Wilson vs. Wager, 26 Mich. 452.

If this be true, then how much stronger the reason why the cross-examination should include the *facts* upon which the *witness* bases *his conclusion* as to character.

Cross-examination may include any question calculated not only to test witness' credibility, and the *extent* and *means* of his knowledge, but to draw out any fact which might tend either to contradict, weaken or explain any *statement*, or any *inference* that might be drawn from the whole or any part of his testimony.

Thompson vs. Richards, 14 Mich. 172, Note An. Ed,
O'Donnell vs. Segar, 25 Mich. 367.

A witness can only judge of the character and reputation by specific acts, either within his personal knowledge or from hearsay, hence his information in regard to such acts, not only become material, but absolutely essential in order to estimate the value of

his testimony, the evidence is admissable, and the fact that it is liable to be taken by the jury as substantive proof does not make it objectionable.

For an analogous case, where this claim was made in this Court, see—

People vs. Case, *et al.*, 62 N. W. 1017, mid. first col. p. 1019.

In which this language is used: "The danger of its being taken as substantive evidence is no greater in such cases than it is where the contradictory declarations are proved by the adverse party." (Referring to 1 Green. on Ev., par. 444.)

Then, looking at the case as a whole, we have an attempt—the second—to defeat or delay justice in this case with mere technical objections, when, as we have said, there is no possible defense upon the merits, from respondent's own theory and evidence, from which it appears that two thousand dollars was obtained from an old and decrepit neighbor in a manner compared with which burglary or robbery would be commendable.

Quoting again from the report of the able address of Judge Anthony: "He reviewed the abuses now attached to the criminal practice in the United States, showing the devices resorted to by the defense to defeat justice. It is high time that the bandage should be removed from the eyes of the Goddess of Justice, so that in administering both the civil and the criminal law, she should be able to see things as they are."

We therefore submit that no prejudicial error is shown and that the Circuit Court should be instructed to proceed to judgment.

A. W. LOCKTON,
Prosecuting Attorney.

O. SCOTT CLARK,
Ex-Prosecuting Attorney, for the People.