

STATE V. JOHNSON, 1916-NMSC-011, 21 N.M. 432, 155 P. 721 (S. Ct. 1916)

**STATE
vs.
JOHNSON**

No. 1829

SUPREME COURT OF NEW MEXICO

1916-NMSC-011, 21 N.M. 432, 155 P. 721

February 21, 1916

Appeal from District Court, Grant County; Colin Neblett, Judge.

Albert Johnson was convicted of larceny, and appeals.

SYLLABUS

SYLLABUS BY THE COURT

While, under the statute, it is the duty of the court to instruct the jury in writing, unless written instructions are waived by both parties, entered on the record, yet where a party fails to object to the action of the court in instructing the jury orally until after verdict by the jury his objection comes too late.

COUNSEL

George L. Reese of Portales, for appellant.

Court erred in giving oral instructions to jury.

Secs. 2793, 2794, 2796, 2800, Code 1915; Territory v. Perea, 1 N.M. 627; Territory v. Lopez & Casias, 3 N.M. 156; United States v. Densmore, 12 N.M. 108.

Harry S. Bowman, Assistant Attorney General, for the State.

No exception was taken to action of court in orally instructing jury until after jury had returned their verdict. Therefore the appellant cannot now be heard to raise the question.

State v. Eaker, 17 N.M. 479; Territory v. Romine, 2 N.M. 114; Leonardo v. Territory, 1 N.M. 291; State v. Padilla, 18 N.M. 573; State v. Lucero, 18 N.M. 484; U. S. v. Cook, 15 N.M. 124; Lund v. Ozanne, 13 N.M. 293; Territory v. Watson, 12 N.M. 419; Padilla v.

Territory, 8 N.M. 462; Laird v. Upton, 8 N.M. 409; Territory v. O'Donnell, 4 N.M. 208; Territory v. Baker, Id. 283.

JUDGES

Roberts, C. J. Hanna and Parker, J.J., concur.

AUTHOR: ROBERTS

OPINION

{*433} OPINION OF THE COURT.

{1} This is an appeal from a judgment of the district court of Grant county, sentencing appellant to serve a term in the state penitentiary, which said judgment was based upon the verdict of a jury finding appellant guilty of the larceny of a bay mare, the property of one Edward Dickinson. Appellant relies upon two alleged errors for a reversal: First, that the court erred in instructing the jury orally as to the law of the case; and, second, that there is no substantial evidence warranting the verdict.

{2} From the transcript it appears that no objection was interposed by appellant to the action of the court in giving oral instructions to the jury, which said instructions were taken down by the court stenographer. After the verdict of the jury was returned, appellant filed written exceptions to the action of the court in instructing the jury {*434} orally. He was too late with his objections. It was his duty to object to the oral instructions at the time they were delivered to the jury, and, had he done so, doubtless the court would have reduced them to writing, and thus the alleged error would have been avoided. Exceptions not having been taken to the giving of oral instructions at the time they were given, appellant loses his right to object, for, as we said in State v. Eaker, 17 N.M. 479, 131 P. 489:

"Courts are not infallible, and it is the duty of attorneys to call attention to errors at the time of their commission, so that they may be corrected."

{3} This court has repeatedly held that the correctness of instructions given by the trial court will not be reviewed on appeal, unless exceptions are saved and an opportunity for correction given. State v. Padilla, 18 N.M. 573, 139 P. 143; State v. Eaker, 17 N.M. 479, 131 P. 489; State v. Lucero, 17 N.M. 484, 131 P. 491; United States v. Cook, 15 N.M. 124, 103 P. 305; Lund v. Ozanne, 13 N.M. 293, 84 P. 710; Territory v. Watson, 12 N.M. 419, 78 P. 504; Padilla v. Territory, 8 N.M. 562, 45 P. 1120; Laird v. Upton, 8 N.M. 409, 45 P. 1010; Territory v. O'Donnell, 4 N.M. 196, 12 P. 743; Territory v. Baker, 4 N.M. 236, 13 P. 30. In the case of Leonardo v. Territory, 1 N.M. 291, this very question was passed upon, and the court held that, while instructions should be in writing, still judgment will not be reversed on the ground that they were oral, unless the instructions were excepted to at the time they were given.

{4} We have read the evidence, and believe that it fully warranted the verdict; hence the cause must be affirmed, and it is so ordered.