

TERRITORY V. MIERA, 1866-NMSC-004, 1 N.M. 387 (S. Ct. 1866)

**TERRITORY OF NEW MEXICO
vs.
GREGORIO MIERA and JACK COLLINS**

[NO NUMBER IN ORIGINAL]

SUPREME COURT OF NEW MEXICO

1866-NMSC-004, 1 N.M. 387

January 1866 Term

Appeal from the District Court for Santa Ana County. The case appears from the opinion.

COUNSEL

C. P. Clever, attorney-general, for the appellant.

Tompkins and Ashurst, for the appellee.

JUDGES

Benedict, C. J.

AUTHOR: BENEDICT

OPINION

{*387} {1} This cause was an indictment against the defendants under the eleventh section of chapter 55, page 360, of the Revised Statutes, which provides: "That if any person shall unlawfully assault or threaten another in a menacing manner, or shall unlawfully strike or wound another, the person so offending shall, upon conviction thereof, be fined in any sum not exceeding one hundred and fifty dollars, or imprisoned in the county jail not exceeding thirty days, or both, at the discretion of the court, and shall moreover be liable to the suit of the party injured."

{2} The defendants, upon trial, were found guilty by the jury. They then moved in arrest of judgment, upon the ground of the insufficiency of the indictment, and the court sustained the motion, and arrested the judgment. The attorney-general {*388} then appealed to this court, in pursuance of a statute of this territory. The indictment charges that the defendants "did beat, bruise and wound" one Guadalupe Lopez, but omits to aver that it was done "unlawfully," in the language of the statute above quoted.

{3} The offense specified is one created by the statute, and is usually termed an "aggravated assault and battery." An indictment which describes an offense in the language of the statute which declares and defines it, is held in courts and practice to be sufficient in substance. Any material omission in charging the offense as the statute defines it will render the indictment bad. In this case there was a fatal omission, in not charging that the acts of the defendants were "unlawfully" done.

{4} "Unlawfully assault or threaten another," or "unlawfully strike or wound another," is the language of the statute upon which the indictment in this case was intended to be framed. There are many strikings which are not unlawful, and so are not offenses which the laws punish; such as parents correcting their children, or an executive officer executing the sentence of a court upon a person convicted of a crime. So, too, one man may lawfully beat, bruise, and wound another in the necessary defense of himself, wife or child.

{5} By using the word "unlawfully" in the statute, the legislature intended to discriminate between acts of violence which may be lawful and those which are not. To the evident intention disclosed, the indictment in this case should have conformed. The omission was a substantial omission, and the court below decided properly in arresting the judgment.

{6} The judgment of the court below is affirmed by this court.