ever, instructed the jury on this subject that they could take the testimony into consideration in estimating the efficiency of the prosecutrix's resistance to the act of carnal intercourse. Now, "efficiency" means, "able to accomplish; adequate; effective." Evidently, if her evidence is to be believed, her resistance was not effective; for she testifies that he accomplished his purpose. Instead of this charge, we are of opinion that the court should have instructed the jury substantially to the effect that they might take into consideration, if they believed the evidence showing prosecutrix to be of weak mind, her condition of mind, together with all the circumstances surrounding her at the time, in determining whether or not she yielded her consent voluntarily to the act of carnal intercourse, or whether she was overcome by force, and appellant copulated with her without her consent; that is, in judging of the force, the jury were authorized to look to the mental condition of the woman at the time of the alleged offense. The writer would observe here that the learned judge who tried the case appears to have instructed the jury in the language of the syllabus or headnote in Baldwin's Case, 15 Tex. App. 285. This is not a quotation from the opinion itself, nor is it borne out by the case. The opinion does not use the expression copied in the charge, "that the mental capacity of the female is a proper consideration in estimating the efficiency of the resistance made by the female." The language of the opinion merely indicates, as above stated, the purpose for the admission of such testimony.

We furthermore believe that, under the circumstances of this case, the court should have given the special requested instruction, the refusal of which is complained of in appellant's tenth bill of exceptions. This charge, in effect, instructed the jury, if they believed Maxwell, Potter, and Hill committed an outrage on prosecutrix, but defendant took no part in the same, that they could not convict him on said account, and that they could not convict him unless they believed that he himself used violence on the person of the prosecutrix and had carnal intercourse with her against her consent, and that if she was willing to meet defendant's embraces the jury should find him not guilty. It will be seen by reference to the prosecutrix's testimony that her evidence shows appellant was present at the time Maxwell, Hill, and Potter outraged her, and if he were present, aiding and encouraging said outrages, he would be responsible as a principal, and could be convicted on account of said outrages. He testified that he was not present on said occasion, and did not know these parties had copulated with her; that he went to Barfield's with her from the place where it is said these outrages occurred, and on the way he copulated with her, she consenting. If this version be true, he was not present, as the prosecutrix testified, when the outrages were committed by other parties on her, and did not participate therein, and he could not be held responsible for their acts; and if it be true, as testified by him, that his only connection with the case was afterwards, and with her consent, the attention of the jury should have been called to this particular phase of the case as presented by his own testimony.

In view of the evidence, we believe the court should have given the special instruction requested by appellant as to force. The charge of the court in this respect did not sufficiently call the attention of the jury to the amount of force required. The evidence adduced by appellant in effect shows that the prosecutrix was a common bawd, and was plying her vocation promiscuously; that appellant had himself copulated with her previously; and we think the jury should have been fully instructed on the question of consent and the use of force.

There are other assignments, but we do not deem it necessary to discuss them. For the errors pointed out, the judgment is reversed, and the cause remanded.

McARTHUR v. STATE.

(Court of Criminal Appeals of Texas. April 18, 1900.)

LIBEL—VARIANCE—REPUTATION OF PERSON LIBELED—EVIDENCE—DECLARATIONS OF DEFENDANT — JURY — INSTRUCTION — JUROR—CHALLENGE—REHEARING—COSTS.

1. Where a juror testifies on his voir dire that he is a single man, boarding at one place and rooming at another, it is not error to sustain the state's challenge to him on the ground that he is not a householder.

2. In a prosecution for libel, the fact that the title-page of the libelous pamphlet, as set out in the indictment, omits the phrase, "For sale by N. J. McArthur, Austin, Texas," does not constitute a variance.

3. In a prosecution for libel based on the publication of a libelous pamphlet, objections that excerpts from such pamphlet included in the indictment omit quotation marks in several places, and in others use the article "a" for "the," are hypercritical and not well taken.

4. The use of the word "bubbledupes" in an indictment for libel, where the pamphlet which is alleged to be libelous used the word "bubbledupe," does not constitute a variance between the indictment and the pamphlet.

5. Since it is only necessary, in a prosecution for libel, to prove substantially the words alleged, the fact that the indictment omits a sentence from its quotation of the libelous matter does not constitute a variance, where such omission does not alter the meaning of the matter quoted.

6. Where, in a prosecution for libel, the person alleged to have been libeled is not a witness, and his reputation for truth and veracity is not in issue, it is proper to exclude evidence of his bad reputation in these respects.

7. Evidence of the bad reputation for honesty and fair dealing of one alleged to have been libeled is not admissible in a criminal prosecution for such libel.

8. Where, in a prosecution for libel, the state had offered proof of the declarations of defendant as to his motives in writing and publishing the libelous matter, it was not error to exclude

proof of other declarations of defendant, which were not a part of the conversations and declarations introduced by the state.

9. Under Pen. Code, art. 748, constituting the jury in libel cases the judges of both the law and the facts under the direction of the court, it is not intended that they shall construe the law without direction from the court, and hence, in such cases, it is proper to instruct them.

10. Where the defendant advisedly and deliberately publishes a libelous pamphlet for the purpose of challenging an investigation of his charges, he cannot claim an innocent intention in the writing and publication thereof.

On Rehearing.

1. A rehearing will not be granted where the propositions insisted on as ground for such rehearing are the same as were considered and decided by the court at the first hearing.

2. Where defendant is convicted of criminal libel it is not proper to tax, as costs against him, the costs of another case against him in the same court, which had been dismissed.

3. Witnesses in a criminal case are entitled to mileage for only one trip, going and coming, at any one term of court, and their per diem only for the days on which they actually attend the court, including the time consumed in going and coming.

Appeal from Travis county court; William Von Rosenberg, Jr., Judge.

N. J. McArthur was convicted of libel, and he appeals. Affirmed.

J. R. Hamilton and Walton, Hill & Walton, for appellant. Rector, Thomson & Rector and Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of libel, and his punishment assessed at a fine of $100; hence this appeal.

Appellant in his first assignment urges that the court committed an error in sustaining the state's challenge to the juror Farwell. The objection urged by the state to this juror was that he was not a householder. On this point the juror showed by his voir dire that he was a single man; that he boarded at one place and rented a room in another lodging house from a different person than the one with whom he ate, and in a different part of the city of Austin; that he rented a room in a lodging house; that his landlady lived in the house and rented him the room; that he controlled the room as long as he paid his rent. We do not believe the court erred in holding that this juror was not qualified to sit in the case. Lane v. State, 29 Tex. App. 310, 15 S. W. 827. This latter case overrules the former case on this subject. Robles v. State, 5 Tex. App. 346. Besides, appellant did not exhaust his challenges, and there is nothing to show he was not tried by a fair and impartial jury. Mays v. State, 36 Tex. Cr. R. 437, 37 S. W. 721.

Appellant reserved a number of exceptions to the admission of the alleged libelous pamphlet and the various parts thereof. We will only consider such as we think deserve any notice. Appellant objected to the introduction of said pamphlet because of a variance between the title-page as set out in the indictment and the title-page contained in the pamphlet. He insists that the title-page as set out by the indictment, disconnected from the pamphlet itself, which is a part of the indictment, fails to show, in addition to that which is set out, the following: "For sale by N. J. McArthur, Austin, Texas." In reply to this we might content ourselves with saying that the pamphlet itself, constituting a part of the indictment, sufficiently showed upon its face the sentence which it is alleged was not contained in the indictment. However, conceding that the allegations in other parts of the indictment did not contain the phrase set out above, this would not constitute a variance. State v. Jeandell, 5 Har. 475.

Appellant complains that a number of excerpts taken from said pamphlet, and alleged as libelous, varied from said pamphlet, because there were no quotation marks connected with the same as in said pamphlet; and he also excepts to a number of said excerpts on the ground that same were not properly punctuated, and that in several instances the article "a" was used for "the." We regard these matters as hypercritical.

On pages 59 and 60 of the transcript appellant claims there was a variance between the word "bubbledupe" in the pamphlet and the word "bubbledupes" in the indictment; that is, that the singular was changed to the plural. This would not constitute a variance. The sense was not altered. Barr v. Gaines, 3 Dana, 258.

Appellant also complains that the following, which appears in the pamphlet, was left out of the first allegation of the alleged libelous matter contained in the indictment, to wit: "And is it not so, that the great assembly of bubbledupes have accepted the report which nameth only seventy and seven thousand dollars as the amount of exchange stock which hath been taken?" On examination we find that this is correct. But an inspection of this charge of libel will show that the omission of the above does not in any wise alter the sense of the libelous matter, but is merely additional words. This, under the authorities, would not constitute a variance; the rule being that it is sufficient to prove substantially the words charged, and proof of additional words not altering the meaning of those alleged will not constitute a variance. See 13 Enc. Pl. & Prac. pp. 63–65, and authorities there cited; Townsh. Sland. & L. § 367. And the same observations and authorities apply to a number of other objections urged on the ground of variance. By an inspection of the record in this case it will be seen that in no instance was there such a material variance between the pamphlet, which was set out in full in the indictment, and the distinct allegations, as would authorize a rejection of the proof offered. Furthermore, as explained by the court, the pamphlet itself was

made a part of the indictment, and there was no variance between it and the proof offered, and there was no material variance between it, as stated above, and the allegations contained in the indictment on which the libel was predicated. If there was an omission of words, these did not alter the sense. If the pamphlet contains additional words, neither do these alter the sense.

Appellant proposed to prove, by a number of witnesses, the bad reputation of John D. Fields, the party alleged to have been libeled, for truth and veracity in the community where he lived. The court, in explaining this bill, says that said Fields was not put upon the stand, and his truth and veracity were not in issue. In this the court was correct.

Appellant also offered to prove by the same witnesses that the reputation of said Fields for honesty and fair dealing was bad in the community where he lived. It is contended that this character of testimony was admissible in order to enable the jury to properly gauge their verdict; that is, to enable them to determine how much Fields, the alleged libeled party, was injured by the charge made against him. This might be the rule in civil cases, but we do not think it is applicable to a criminal case. The object in a criminal prosecution is not to recover damages, but rather to preserve the peace and good order of society; and so proof that the libelee bore a bad reputation in regard to the trait of character charged against him would be no answer to the criminal prosecution. If, however, it be conceded that said testimony might go in mitigation of the penalty assessed, it is a sufficient answer to that proposition to say that in this case the jury found the lowest penalty against appellant.

Appellant also complains that the state offered certain proof of the declarations of defendant as to his motives, purposes, and intention in writing and publishing the pamphlet in which the alleged libel is contained, and that therefore the court erred in not admitting proof from other witnesses that on other occasions appellant declared to others, to wit, Maxwell and Beck, his motives, purpose, and intention in writing and publishing said pamphlet. It would be a sufficient answer to this to say that the bill of exceptions does not disclose what said witnesses would have testified on behalf of defendant; but the explanation as given by the court was sufficient to authorize the exclusion of such testimony. He states that same constituted no part of the conversations or declarations introduced by the state.

It is complained by appellant that the court erred in instructing the jury at all in the case, because the jury are constituted, under our statute, judges of the law. The court merely instructed the jury in accordance with the provisions of article 748, Pen. Code. We do not understand this article of our Code to contravene the provisions of our constitution on this subject (see Bill of Rights, § 8), but it is in consonance therewith. This provision makes the jurors simply the judges of the law under the direction of the court, as in other cases. In other cases the jury take the law from the court, and are required to be governed thereby; and we understand the constitution and the statute to mean the same thing, and it was never intended that the jury, with reference to libel, should construe the law for themselves and without direction from the court.

Other portions of the charge are objected to because not intelligible and as not being the law of the case. We have examined the charge of the court carefully, and in our opinion it is a full and fair charge, presenting all the issues arising in the case in a succinct and connected manner.

It is contended that, the state having alleged the falsity of the charge contained in the libel, it was necessary to prove the same, and that there was a failure on the part of the state to respond to this allegation by evidence. If it be conceded that the state was bound to make this proof, we cannot agree to this contention, as it occurs to us the testimony contained in the record shows the falsity of the alleged charges contained in the indictment. That they were made maliciously there can be no question, as an examination of the pamphlet on which the charge of libel is based shows appellant published the statements advisedly; that he did so for the purpose of challenging an investigation of his charges; and if the matter alleged by him was libelous, which we understand to be conceded, he cannot claim an innocent intention in the writing and publication thereof. The jury were fully authorized to find him guilty, and they assessed against him the lowest punishment, and we see no reason to disturb their verdict. The judgment is affirmed.

On Motion for Rehearing.

(June 27, 1900.)

HENDERSON, J. This case was affirmed at a previous day of this term, and now comes before us on motion for rehearing. We have examined the same, but it presents no satisfactory reasons to our mind for granting it, the propositions insisted upon being the same heretofore considered by the court.

In connection with the motion for rehearing is an application to retax the costs of the court below. We have examined this motion, and it suggests that the court, in taxing the costs in the case in which appellant was convicted, also taxed costs which had accrued in a certain other case against appellant, pending in the same court, which had been dismissed. It also suggests that certain witnesses, to wit, S. D. A. Duncan and B. J. Kendrick, made out their accounts for more mileage and days than they were entitled to. The motion is not full or explicit enough to authorize us to go into an investigation of these

matters. We hold, however, that no costs pertaining to the case which was dismissed against appellant should be made a charge against him in this case; and we also hold that no witness is entitled to mileage for more than one trip, going and coming, at any one term of court, and is entitled to his per diem only for the days on which he actually attended the court, including the time consumed in going and coming; and the clerk below will revise and retax the costs in this case in accordance with the views herein expressed. The motion for rehearing is overruled.

PRENDERGAST v. STATE.[1]

(Court of Criminal Appeals of Texas. Dec. 18, 1899.)

INDICTMENT AND INFORMATION—DUPLICITY—LOTTERY—ESTABLISHMENT — CONVICTION — APPEAL—EVIDENCE — INSTRUCTIONS — GAMING DEVICE—ACCOMPLICE.

1. It is not error to refuse to quash an indictment which charges that appellant did unlawfully establish a lottery, and did by said lottery dispose of certain personal property, since, though it charges two separate offenses, they are each different phases of the same transaction, and not repugnant to each other, and are punishable in the same manner, and hence may be charged conjunctively.

2. One convicted of establishing a lottery under an indictment which charged him with establishing a lottery, and with disposing of certain property thereby, on appeal cannot allege, as a ground of reversal, the fact that the indictment did not state to whom the ticket was sold, where the evidence sustains the allegation charging the establishment of the lottery, since such proof is not necessary to sustain a conviction.

3. A nickel in the slot machine was so constructed that if the nickel, in falling into the machine, touched certain springs, a valve would be opened, and the machine would pay a certain amount of money in excess of the deposit. The nickel deposited would remain in the machine, and the proportion of times when one playing the machine would win was less than the times when he would lose. *Held*, it was not error to charge the jury that such machine constituted a lottery.

4. That one keeping and maintaining a nickel in the slot machine was indictable for maintaining a gaming device is no reason why he should not also be indicted for establishing a lottery.

5. Defendant placed a nickel in the slot machine in his saloon. One who worked for defendant put nickels therein, and played the machine. *Held*, the latter was not an accomplice to the establishment of a lottery, so as to require an instruction on the question of accomplice testimony in connection with his testimony.

6. Defendant placed a slot machine in his saloon. The machine was so constructed that by placing a five-cent piece in the slot and pressing a lever the machine would work automatically, and if the nickel, in falling into the machine, touched certain springs, a valve would be opened, and the machine would pay a certain amount of money in excess of the deposit. The machine was so constructed that the nickel deposited would remain in the machine, and the proportion of times when one playing the machine would win was less than the times when he would lose. *Held* sufficient to support a verdict finding defendant guilty of establishing a lottery.

Appeal from district court, Galveston county; E. D. Cavin, Judge.

James Prendergast was convicted of establishing a lottery, and he appeals. Affirmed.

James B. & Charles J. Stubbs, for appellant. Robt. A. John, Asst. Atty. Gen., for the State.

HENDERSON, J. Appellant was convicted of establishing a lottery, and his punishment assessed at a fine of $100, and he prosecutes this appeal.

Appellant moved to quash the indictment on the ground, as alleged by him, that both counts in same were duplicitous, in that it charged that appellant did unlawfully establish a lottery, etc., and did then and there by said lottery dispose of certain personal property, etc.; the contention being that the establishing of a lottery, and disposing of property by lottery, are two distinct offenses, and cannot be charged in the same count. While it is true that they are distinct offenses, yet they are different phases of the same transaction, and not repugnant to each other. Duplicitous or repugnant matter will not be tolerated in the same count; but where there are several ways set forth in the same statute by which an offense may be committed, and are all embraced in the same general definition, made punishable in the same manner, while they are distinct offenses they may be charged conjunctively in the same count. Willis v. State, 34 Tex. Cr. R. 148, 29 S. W. 787; State v. Randle, 41 Tex. 292.

Appellant also contends that the indictment, or at least that part of the count charging the disposition of the ticket, should give the name of the party to whom the ticket was sold. It is not necessary to discuss this question, inasmuch as the count for establishing the lottery is good, and the proof appears to sustain said charge.

Appellant complains that the court instructed the jury that a slot machine was a lottery, on the ground that this was taking a question of fact from the consideration of the jury. This question resolves itself into the proposition as to what the proof showed. The evidence establishes these facts without controversy: That the alleged lottery was operated by means of a slot machine, which was about five feet high; that on the inside thereof was certain machinery, so constructed as to make it work automatically when it was in running order; that there were five slots, of different colors; that if you put a nickel into the slot of either red or black colors, and in falling into the machine it happened to touch a certain spring, it would set the machinery in motion, open a certain valve, and pay out a dime into a little pocket on the side of

[1] Rehearing denied June 29, 1900.