

STATE V. ROWLAND, 1917-NMSC-037, 22 N.M. 613, 166 P. 1183 (S. Ct. 1917)

**STATE
vs.
ROWLAND**

No. 1966

SUPREME COURT OF NEW MEXICO

1917-NMSC-037, 22 N.M. 613, 166 P. 1183

July 30, 1917

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

Eugene Rowland was convicted of assault with intent to kill with a deadly weapon, and he appeals.

SYLLABUS

SYLLABUS BY THE COURT

An appellate court will not consider assignments of error based on the giving or refusal of instructions, where the record fails to show that all the instructions are embraced in the transcript.

COUNSEL

Terrell & Black, of Silver City, for appellant.

H. S. Bowman, Asst. Atty. Gen., for the state.

JUDGES

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

AUTHOR: ROBERTS

OPINION

{*614} {1} OPINION OF THE COURT. Appellant, upon trial, was found guilty by a jury of assault with intent to kill with a deadly weapon. Judgment was pronounced by the court upon the verdict, sentencing him to a term in the penitentiary. From this judgment he

appeals, and seeks a reversal upon an alleged error committed by the court in modifying a requested instruction.

{2} The transcript of record contains no instruction given by the court, save the one of which he complains, and the state contends that this instruction cannot properly be considered by the Supreme Court, because of his failure to incorporate in the bill of exceptions and bring up in the record the remaining instructions given by the court. The Attorney General is correct, because the court, in the state of the record, is unable to determine whether or not there was any error committed in the giving of the portion of the instruction complained of; for, if it be assumed that the modification was not a correct statement of the law, standing alone, other instructions given by the court may have cured the error, or have rendered it harmless. An appellate court will not consider assignments of error based on the giving or refusal of instructions, where the record fails to show that all the instructions are embraced in the transcript. In 4 C. J. p. 546, it is said:

"It is further essential to a review of an assignment of error, based on the giving or refusal of an instruction, that all the instructions given be included in the record, unless the instruction complained of is so erroneous that it could not have been cured by another proper instruction."

{3} And on page 547 (4 C. J. 547) it is said:

"In most jurisdictions where the question has been decided it has been held that alleged errors in the giving or refusal of instructions are not reviewable, unless the record affirmatively shows that it embraces all the instructions given."

{4} Many authorities are cited under both statements of the law fully sustaining the text. See, also, *Humpeler v. People*, 92 Ill. 400; *State v. Hendy*, 148 Mo. 300, 49 S. W. {*615} 988; *Barton v. State*, 154 Ind. 670, 57 N.E. 515; *Knickerbocker Ice Co. v. Gray*, 165 Ind. 140, 72 N.E. 869, 6 Ann. Cas. 607.

{5} For the reason stated, the judgment will be affirmed; and it is so ordered.