

1941

State of Utah v. Jesse Andersen : Brief of Respondent

Utah Supreme Court

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6300

No. 6300

In
The Supreme Court
of the
State of Utah

STATE OF UTAH,

Plaintiff and Respondent.

VS

JESSE ANDERSON,

Defendant and Appellant.

Appeal From Third District Court, Salt Lake County
Honorable M. J. Bronson, Judge

RESPONDENT'S BRIEF

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APR 30 1941

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STATE OF UTAH,

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vs

JESSE ANDERSON,

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RESPONDENT'S BRIEF

STATEMENT OF THE CASE

The defendant, Jesse Anderson, was convicted by a jury in the District Court of the Third Judicial District in and for Salt Lake County, State of Utah for having committed the crime of involuntary manslaughter. The defendant has appealed to this Court from that conviction.

The statement of the case and of the facts as set forth by counsel for the appellant in appellant's brief, is, in the main, correct, and for that reason

we will dispense herein with any statement of the facts except as we refer to them in argument.

Counsel for the defendant has assigned numerous errors, 39 in all; but in his brief he combines them under eight headings and nine different points or questions for argument. A number of assignments are made by defendant, charging the court with error in the admission of certain evidence and in the failing to sustain objections made by the defendant to certain questions. The defendant has not argued these assignments except with respect to the evidence connected with the hypothetical question submitted to the expert. The defendant by failing to argue these assignments has waived any claim to error he may have in connection with them. We will, therefore, direct our argument solely to the questions argued by the defendant under the nine subheadings in his brief.

ARGUMENT NUMBER I.

On pages 6 to 8 of defendant's brief, counsel contends that the complaint, which was originally filed before the magistrate upon which the preliminary hearing was based, was not sufficient to charge the defendant with a crime and did not state facts sufficient to advise the defendant of the nature and cause of the accusation against him. Counsel cites the case of *State v. Gesas*, 49 Utah 181; 162 Pac. 366, to the effect that an information must state "the particular circumstances of the offense" and that under such a case the original complaint, as filed herein, failed to state sufficient facts to charge the defendant with involuntary manslaughter or with any other crime. In answer to this statement, we would merely call to counsel's attention the fact that the original complaint and

the information as filed in this case were filed under the reformed procedure which has been adopted in this State, and that, therefore, cases defining what is necessary under the earlier procedure may not be controlling herein. In order to get the matter properly before us, and to see what our statute requires, we would like to quote the provisions of the 1935 Laws of Utah, which set up the form of procedure.

Section 105-21-8, Chapter 118, Laws of Utah, 1935, p. 223 provides:

“(1) The information or indictment may charge, and is valid and sufficient if it charges the offense for which the defendant is being prosecuted in one or more of the following ways:

“(a) By using the name given to the offense by the common law or by a statute. . . .”

Section 105-21-47 of Chapter 118, Laws of Utah, 1935, p. 228 provides as follows:

“The following forms may be used in the cases in which they are applicable: . . .

“Manslaughter — A. B. unlawfully killed C. D. . . .”

In the complaint as filed before the magistrate, it was charged that Jesse Anderson, on the 25th day of February, 1940, at the County of Salt Lake, State of Utah, did commit the crime of involuntary manslaughter. . . .

If nothing more had been said in the complaint, this would have been in direct compliance with paragraph (a) of Subsection 1 of Section 105-21-8, supra. The defendant, thereby, was charged with

a crime by using the name which has been legally given to that crime, both by common law and by statute. The defendant complains because the original complaint did not stop with the charge of the crime under the common law or statutory name, but went further and alleged specific facts. We call attention to the wording of Subsection 1 of Section 105-21-8, where it provides that the charge is valid and sufficient if it charges the offense *in ~~the~~ one or more of the ways designated.*

There has been more charged in the complaint as originally filed than was absolutely necessary under paragraph (b); but that should not invalidate the charge of the crime under its common law or statutory name even if what follows thereafter is not sufficient to make out a charge of the crime in a different way. There is nothing in the balance of the complaint which negatives the fact that the defendant committed the crime charged, and nothing appears inconsistent with his having committed the crime.

Counsel argues that by the particular statement in the latter part of the original complaint, the effect of the prior charge under the term "involuntary manslaughter" is nullified, and he cites the case of *State v. Rolio*, 71 Utah 91; 262 P. 987, both from its original report and as quoted in the case of *Thomas v. Ogden State Bank*, 80 Utah 138; 13 P. (2d) 636, to the effect that where specific allegations are in conflict with general allegations, the specific allegations will control. However, counsel fails to point out where the specific allegations in this case are in conflict with the general allegations. The case of *State v. Rolio*, cited by counsel, in itself shows that the contention of counsel cannot prevail in this case. In that case, the State filed a suit to quiet the title to certain land border-

ing Utah Lake. In the complaint, the State alleged generally its ownership of the land. The complaint then went on to allege specifically that the State, in its sovereign capacity upon its admission into the Union as a State, became the owner in fee of and was entitled to possession of all lands underlying navigable water within the State, that the land in question at the time the State was admitted was covered by the water of Utah Lake; but that since said time, the water of the lake has receded and the land in question had become "unwatered" or dry land, suitable for farming.

The Court in that case did state that where title is alleged in general terms and then specific facts are alleged, the specific averments may be regarded as controlling, if they are inconsistent with the general allegations. The Court discussed the connection between the general and specific allegations in that complaint and then stated:

"Thus, the general allegations in the complaint as to the State's title and ownership are in no particular impaired, but strengthened by the further allegations as to the State's source of title."

In the case at bar, there is no conflict or inconsistency between a general statement or charge that Jesse Anderson did commit the crime of involuntary manslaughter, and the subsequent factual allegations to the effect that Jesse Anderson killed Clark Romney without malice contrary to the provisions of the statute of the State, etc.

The words "contrary to the provisions of the statute" are in effect the same as "Jesse Anderson killed Clark Romney unlawfully," or "A. B. killed C. D. contrary to law." The words contrary to statute or contrary to law and the word unlawfully

have the same meaning. By Section 105-21-47, *supra*, the State can properly charge the crime of manslaughter either voluntary or involuntary merely by stating: "A. B. unlawfully killed C. D."

At the oral argument the suggestion was made that these words "contrary to the provisions of the statute," etc., were a necessary part of the information and could not be used as supplying the word "unlawfully." Those words are not otherwise necessary in this complaint.

Chapter 143, Laws of Utah, 1937.

Chapter 118, Section 105-21-6 and 7, Laws of Utah, 1935.

In effect, the charge as it was originally filed before the magistrate charged the defendant with the crime of involuntary manslaughter in "one or more" of the ways provided and prescribed by

Chapter 118, Laws of Utah, 1935.

It charged the defendant with the crime "by using the name given to the offense by the common law or by statute," as allowed by Section 8 and it charged the same crime in the form provided by Section 47. The two modes were in no manner inconsistent, but, as was stated in the case of *State v. Rolio*, the general allegation was not impaired by the specific statement that followed, but, if anything, was strengthened thereby, and clearly there was no inconsistency between the two.

ARGUMENT NUMBER II.

We admit as good law the cases and authorities cited by counsel under his second proposition on pages 9 and 10 of his brief. His argument there, however, proceeds upon the erroneous assumption

that the complaint before the magistrate was not sufficient and that, therefore, the defendant had not had a proper preliminary hearing. What we have stated under the heading Argument I hereinabove as well as what follows hereinafter in answer to defendant's argument under his third proposition, we feel is a sufficient answer to show that the defendant's premise is wrong, and while we admit his authorities as good law, we most urgently insist that the defendant was properly charged before the magistrate and was given a proper preliminary hearing. The complaint complied sufficiently with the requirements of the Code of Criminal Procedure. The defendant was advised therein with respect to the charge brought against him. In addition to that, the defendant had the right to demand a bill of particulars if he wanted a detailed statement of the facts involved in the charge. He made such a demand and was furnished with a bill of particulars giving him a detailed statement of the facts for his benefit upon the preliminary hearing. The trial court, therefore, did not err in denying the motion to quash, and the district attorney did have full authority to file the information in the cause.

ARGUMENT NUMBER III.

The matters set forth in defendant's brief in arguing on his third proposition are very similar to those set forth in his argument under the first proposition. On pages 10 and 11, counsel argues that the information did not advise the defendant of the nature and cause of the accusation against him. The defendant does not, under this heading, set forth the Constitutional provision, but he is evidently attacking the procedure adopted in and prescribed by

Chapter 118, Laws of Utah, 1935 upon Constitutional grounds. This reformed procedure has already been attacked in previous cases before this Court, and we really feel that it is unnecessary to repeat the arguments cited in some of the briefs already filed on behalf of the State in those cases. The defendant does not state under his argument 3 whether or not, in his opinion, the information complies with or meets the requirements of Chapter 118, Laws of Utah, 1935. But a comparison with the statute as quoted *supra* reveals that it would be hard to draw an information which would meet the requirements of the statute more fully than the one involved here does. As we pointed out above, a statement that A. B. unlawfully killed C. D., as far as the meaning of the words are concerned and in legal effect, is no different from a statement charging that A. B. killed C. D. contrary to law or contrary to the provisions of the statutes of the State of Utah. If it is done contrary to the provisions of a statute, it is done unlawfully because it is done contrary to law. The word "unlawfully" appears in the information. Thus, we respectfully urge that both the complaint before the magistrate and the information filed by the district attorney fully comply with the short-form procedure set forth in Chapter 18, Laws of Utah, 1935.

With respect to the Constitutional question, we will merely repeat what has been stated in previous briefs before this Court. This reformed procedure has been adopted by our State Legislature along with the legislatures of various other States in the Union after lengthy and detailed study on the matter, by and upon recommendation of the American Law Institute.

The argument advanced by defendant on pages 10 and 11 of his brief by a mere repetition reveals its

absurdity. Counsel argues that the defendant cannot tell "whether he is charged with involuntary or voluntary manslaughter," and, further, "we respectfully submit that the defendant in this case should have been advised in the information sufficient facts to determine whether he is being charged with voluntary or involuntary manslaughter . . ."

When such arguments are advanced, it is no wonder that the lay members of the public become disgusted with the "technicalities" urged and argued by legal minds, and with the "hocus pocus" which still exists and is practiced in the trial of law suits. The defendant was clearly informed that he was charged with involuntary manslaughter because on a certain day, at a certain place, he killed a man unlawfully, although without malice. If the defendant could logically argue that this isn't sufficient to inform him as to the charge placed against him, he could just as logically argue that he does not know what he has to meet, unless the State be compelled to include and set forth in its complaint every bit of detail of evidence which it expects to introduce at the trial.

One of the earliest cases upholding this reformed procedure repeats with approval some particular remarks of a New York Commissioner, concerning the absurdities and artificialities of the technical procedure followed in the past, and which counsel for the defendant, with others, is still trying to cling to in order to provide a technical loophole for his client to crawl through.

People v. Bogdanoff, 254 N. Y. 16; 171 N. E. 890; 69 A. L. R. 1378:

"They are not ignorant of the fact that their proposed reform will strike at the root of a system artificial and absurd in itself.

and which is only saved from the contempt it merits, by the frequent use of the names of venerable legal authorities, under whose sanction it has grown and ripened into maturity . . . Nor will they allow themselves to believe that absurdities and fictions so glaring and gross in themselves as to provoke the laughter and contempt of the intelligent, will be permitted to continue longer than until a safe substitute for them can be found.”

We have been unable to find any case holding the short-form procedure unconstitutional; but we refer the Court to the following cases, which are a few of the cases in which the question has been raised:

- People v. Brady, 272 Ill. 401; 112 N. E. 126; Ann. Cs. 1918 C. 540 (1916).
- State v. Roy, 40 N. M. 397; 60 Pac. (2d) 646; 116 A. L. R. 110.
- State v. Engler, 217 Iowa 138; 251 N. W. 88.
- State v. Keturokis, 224 Iowa 491; 276 N. W. 600 (1937).
- Hurd v. Commonwealth, 159 Va. 880; 165 S. E. 536.
- Dealy v. United States, 152 U. S. 539; 38 L. Ed. 545; 14 Sup. Ct. 680 (1893).
- State v. Continental Purchasing Company, Inc., 119 N. J. L. 257; 195 Atl. 827 (1938).
- People v. Busick, 32 Cal. App. (2d) 315; 89 Pac. (2d) 657 (1939).
- State v. Domanski, 57 Rhode Island 500; 190 Atl. 854 (1937).
- State v. Capaci, 179 La. 462; 143 So. 417.
- Rosenberg v. State, 212 Wis. 434; 249 N. W. 541 (1933).

It may be here noted that the provisions of

Article 1, Section 12 of the Utah State Constitution

do not require that the details of the nature and cause of the accusation against the defendant be included in a complaint or information. The Constitution merely provides that he has the right to demand (which includes the right to receive) information and facts giving the nature and cause of the accusation. The law in question makes it mandatory that the defendant be given details in a bill of particulars, if demanded — the Constitution only gives the defendant the right to demand — and if not demanded the Court may still order it to be given.

We confidently conclude that the provisions of our statutes setting up this short-form of procedure do not conflict with any of the provisions of our State Constitution.

ARGUMENT NUMBER IV.

In his fourth point, counsel for the appellant asserts that since the Bill of Particulars alleged that the defendant was driving his automobile at a dangerous and excessive speed, and that the defendant did not stop at a stop sign, it was incumbent on the court to instruct the jury that they must find that both of these acts cooperated in causing the death of Clark Romney. He points out that instructions number five and six and six-A permitted the jury to convict the defendant if they determined that any one of the said acts caused the death of Clark Romney. He also points out that his requested in-

structions number one and two raised this point, and that the court should have given those instructions. Under this argument, he also contends that the Stipulation, as he terms it, found at Record 235 to 237 inclusive, was a further limitation on the court in this regard.

In the first place, this was not a Stipulation. The colloquy between court and counsel occurred at the time that the attorney for the defendant requested a further Bill of Particulars, and in determining whether or not that further Bill should be given, the District Judge noted that he did not believe the court would permit the State to prove any facts, which were not specifically alleged in their Bill of Particulars, and with this statement, counsel for the State agreed. Counsel for the State pointed out that the State would ask that the proposition of reckless driving be put to the jury, but that reckless driving would consist only of the two acts, that is, excessive speed and failing to stop at a stop sign. In other words, this colloquy only went to the question of what evidence the State would be permitted to prove under the Bill of Particulars and certainly was not a limitation at that time upon the proof yet to be offered during the trial of the case. Counsel for the State stated the proposition in the conjunctive, just as he set forth the three acts of reckless driving, excessive speed, and going through a stop sign, in the Bill of Particulars.

Counsel for the defendant relies upon the case of *State v. Vance*, 38 Utah 1; 110 Pac. 434, as sustaining his argument that the court, in its instructions, should have required the jury to find that all the acts set forth in the Bill of Particulars cooperated in causing the death of Clark Romney, and apparently contends that if the death were caused by excessive speeding alone, that his client is not guilty.

The Vance case does not sustain any such proposition.

As originally filed, the Information in the Vance case contained three counts charging the defendant with murder in each count. The first count alleged that the defendant, by poisoning the deceased, committed murder. In the second count the Information alleged that the murder was committed by kicking and beating the deceased. The third count alleged that the poisoning of the deceased took place on one day, the kicking and beating of the deceased occurred on another day, and that the two causes together resulted in the death of the deceased. The State dismissed the first two counts, and went to the jury on the third count alone. It should also be pointed out in this connection that the proof of the State showed that the two causes cooperated together and resulted in the death of the deceased and did not singly cause her death. The court in that case points out that if the Information had properly alleged the poisoning and kicking and beating as causes of death, they could have relied on each of these. The Court stated:

“If the pleader had desired to rely on the two causes separately as well as upon their combined effect, he easily could have done so by stating in one count that the means used by the appellant to kill were beating, kicking, bruising, and by administering poison, and by any other means which the pleader thought the evidence might show were used.”

The Bill of Particulars in the case at bar conforms to this last quotation from the opinion in the Vance case. The statement is that the defendant while driving recklessly and at an excessive speed and without stopping at a stop sign, collided with the

car of Clark Romney, from which the said Romney sustained injuries and from which he died. We submit that under the Vance case, it was permissible for the court, under this Bill of Particulars, to instruct the jury that if any one or all of said acts caused the death of Clark Romney, they could find the defendant guilty of Involuntary Manslaughter.

In the two Utah cases of

State v. Rasmussen, 92 Utah 357; 68 1
(2d) 176 and

State v. Johnson, 76 Ut. 84; 287 P. 909,

this Court indicated that where allegations were in the conjunctive in the Information, the Trial Court can give the type of instruction which was here given. Both of these latter cases are Involuntary Manslaughter cases.

In the case of

State v. Jones, 81 Utah 503; 20 Pac. (2d)
614, and

State v. Gorham, 93 Utah 274; 72 Pac. (2d)
656,

it is held that where a charge of Forgery is in the conjunctive, towit: That the defendant did make and pass the check in question, a conviction of Forgery can be had upon proof of either or both such making and passing. In

Smith v. State, 186 Ind. 252; 115 N. E. 943, the defendant was charged with Involuntary Manslaughter. The second count alleged that the defendant violated the speed statute and drove while under the influence of liquor. The Court held that this count was not duplicitous because it charged one offense, that is, Involuntary Manslaughter. The defendant also contended on appeal that the

trial court, by its instructions, improperly permitted the conviction of the defendant under this count on proof that the accident was the result of defendant's intoxication alone. The Supreme Court held that such instructions were not in error, and that proof of either one of these acts, thus alleged would sustain the conviction of the defendant.

The case of

Thompson v. State, 41 Wyo. 72; 283 Pac.
151,

is another Manslaughter case. The Court there held that where the offense may be committed in one of several ways, the Information in one count may charge the commission in any one or all of the ways specified in the statutes, and if not inconsistent, and proof of either of the ways will sustain conviction, the State need not elect. In

People v. Von Eckartsberg, 133 Cal. App.
1; 23 P. (2d) 819,

the defendant was charged with Involuntary Manslaughter and contended that the evidence was insufficient to sustain the conviction. The Court pointed out that there were three traffic law violations upon which the conviction could be based -- speed, reckless driving and driving on the wrong side of the road. The Court found sufficient evidence to support the last traffic violation mentioned and held that this was enough to support the conviction. In

Gore v. State, 25 Okl. Cr. 214; 219 P. 153,
the Court had a situation before it that came within the rule herein quoted from State v. Vance, supra. In that case the defendant was charged with having murdered the victim by burning and shooting, but one transaction was involved, and the

Court held that there could be a conviction on either or both of the alleged burning and shooting.

We submit that under the foregoing authorities, the court clearly instructed the jury that the defendant could be convicted if he violated any one or more of the statutes set forth in the instruction, if the act in violation of said statute evinced a marked disregard for the rights and safety of others.

ARGUMENT NUMBER V.

Under this division of his brief, counsel for the appellant contends that the State's expert Seymour S. Taylor based his opinion on the speed of the defendant's automobile at the time of the collision on facts other than those proven in the case or observations made by the expert himself. Counsel sets out portions of the abstract on the examination of Mr. Taylor wherein he claims that Taylor admitted using information outside of the record or his own personal observation. It will be noted that the italicized portion of the abstract found at page 43, purporting to reflect the record on page 178 is not correct. Counsel apparently gets the italicized portion from the following question and answer on that page of the record.

"Q. The opinion you have given is taking into consideration certain information Mr. Pierce gave you at some other time?

"A. I read the statement of the witnesses he has in his police report."

That is not a direct statement that he used, in reaching his opinion, evidence other than was introduced in the case. What Mr. Taylor was undoubtedly referring to was the fact that previous

to the trial, he had worked out the mathematical calculations, and in doing so, had received certain information from the police report. However it is the contention of the State that all of the items upon which he based his opinion were introduced in evidence or personal observations were made by Taylor himself. From a consideration of Taylor's entire testimony, this last statement is obviously correct.

Mr. Taylor stated on pages 155-156 of the record (page 34 of the abstract) that he divided his problem into two main propositions — first, the decrease of speed of the defendant's automobile previous to the point of impact, and second, the decrease of speed after the impact and until the defendant's automobile came to a complete stop.

In the first propositions relative to the decrease of speed before impact, the witness Taylor took into consideration the length of the skid marks which appeared at the intersection together with the coefficient of friction between the tires and the pavement. Officer Pierce testified that the tire marks were 44 feet long and that all four wheels were locked. (See Record 111-112; Ab. 21). As the coefficient, Taylor used .7. Taylor looked over the scene of the accident, and from his experience in determining the coefficient of friction, decided that .7 was the correct one to use. It is true that he did not see the intersection until one or two days after the accident, but Officer Pierce also made calculations in connection with the decrease in speed caused by the skid marks, and he used this same coefficient after an examination of the intersection immediately after the accident occurred. (Record 135). At Record 165, Taylor pointed out the items which he took into consideration in arriv-

ing at the decrease of speed under proposition number one, and that the formula he used had been accepted generally in the United States.

Based in these items, which were either in evidence, or came from his personal observation, he gave it as his opinion that the speed of the car was decreased 30.5 miles per hour by the skid marks. (See Record 146). In connection with this matter, it should be noted that Officer Pierce testified that the speed was decreased 30.35 miles per hour by the skid marks, and the evidence came in without objection. (See Record 119-120).

Taylor then stated that he took into consideration under the second proposition relative to the decrease of speed after impact, five different things. The first was the extent of the damage done to the Ford car of the defendant and second the damage done to the Oldsmobile car. Taylor personally examined both automobiles, identified the automobiles from exhibits which had been identified by persons at the scene of the accident and at the time thereof. Taylor called upon the experience which he had had in investigating and watching collisions between automobiles in determining the energy expended by the defendant's car in damage to the Oldsmobile car. These considerations were a matter of personal observation by the expert.

The third consideration was the amount of energy involved in forcing the Oldsmobile (driven by the deceased) to the pavement so that it leaped into the air. The energy involved in bringing about this result and its translation into decrease of speed in miles per hour was based upon the height which the Oldsmobile was forced into the air and its weight. On the proposition of weight, Mr. Taylor

took the shipping weight of both automobiles, the Ford car being 2927 pounds, and the Oldsmobile 3185 pounds. Mr. Taylor used the figure three feet as being the height that the Oldsmobile reached. The witness Alex Engstrom testified that the Oldsmobile went into the air about five or six feet (see Record 73 and 83). The witness Kenneth H. Silcox stated that the Oldsmobile went into the air about five or six feet (see Record 99 and 100). It might be pointed out to the Court that Taylor testified that the one witness' testimony which he read said five or six feet, but that he used three feet (see Record 187). This indicates the extent to which outside information was used by Mr. Taylor. The two witnesses testified to the very facts which Mr. Taylor took into consideration, and he figured the height less than either witness testified to.

The fourth consideration was the amount of energy involved in forcing the Oldsmobile from its intended path to a path 10 feet distant. Exhibit C is drawn to scale and shows that the Oldsmobile was forced in a northwesterly direction 21 feet before it struck the ground. By using the scale set forth on the diagram of Exhibit C, it appears that the distance north that the Oldsmobile travelled before again striking the ground is over ten feet. The items of this consideration were clearly in evidence.

The fifth consideration under this proposition is the energy involved by the movement of the Ford after the impact to its position of rest. Officer Pierce testified to the skid marks 14 feet in length and which were made by the defendant's Ford automobile. These considerations and propositions are set out in the witnesses' testimony at Record 155 and 156, Abstract Page 34.

We submit that the matters taken into consideration by the expert Taylor were either introduced in

evidence or were personally observed by him. We point out to the Court that the defendant does not in any way question the qualifications of Mr. Taylor as an expert to testify to the things to which he did testify. The witness went thoroughly into the things which he took into consideration, and the manner in which he determined the speed of the defendant's automobile. All this was before the jury and the weight to be given to the question of speed which he gave was a question for the jury. There certainly could be no prejudicial error here.

ARGUMENT NUMBER VI.

Under this numbered argument defendant's counsel contends that the State was limited to the acts of excessive rate of speed to wit, forty miles per hour and failing to stop at a stop sign, as the basis for a conviction of Involuntary Manslaughter, and he sets out at length instruction number five given by the court. It should be noted that the laws set out as first and second in said instruction is a break-down of the reckless driving statute into two parts.

Revised Statutes of Utah, 1933, Section
57-7-15.

The third and fourth statutes set out are the two definitions of speeding as contained in the statutes.

Laws of Utah, 1935, Ch. 48, Section 57-7-16.

The statute indicated as fifth was the statute relating to stop signs. As heretofore indicated, the Bill of Particulars as well as the statement by counsel for the State indicated to the defendant that the

State would rely upon reckless driving, excessive speeding and running a stop sign. The reckless driving would be made up only of the acts of speeding and running a stop sign. The court then in instruction number six stated that if the jury found that the defendant violated any of the foregoing provisions of the statutes in such a manner as to evince marked disregard for the safety of others, the defendant could be found guilty of manslaughter. These instructions were taken from the opinion of this Court in

State v. Lingemen, 97 Utah 180; 91 P.
(2d) 457.

Counsel contends that these instructions permitted the jury to speculate on numerous grounds of recklessness not set forth in the Bill of Particulars. Counsel also admits in his brief on pages 18 and 19 that there was no evidence introduced other than the acts of failing to stop at the stop sign and the speed at which the car was travelling. The jury was instructed in instruction number 11, set out at abstract page 65, that it was their imperative and sworn duty to hear and determine the case on the testimony of the witnesses given on the trial and that in determining questions of fact, they were not at liberty to indulge in conjectures not based on evidence introduced in the case, and it was pointed out to the jury that they should look solely to the evidence for the facts and to the instructions given by the court for the law, and to return a verdict according to the facts established by the evidence and law laid down by the court. Certainly this Court cannot say that the jury did not follow the instructions given by the court and based their verdict on something that was not in evidence. The State did not go outside of the Bill of Particulars

in proving its case, and counsel for the defendant admits this.

In view of this state of the record, it is difficult to see how counsel could say that paragraph two of instruction number five would permit the jury to determine that the defendant drove his car without due caution and circumspection, regardless of whether he violated any speed law or failed to stop at the stop sign, when these two facts were the only ones introduced in evidence

Under this numbered argument, counsel also contends that it was necessary for the State to prove a speed in excess of forty miles an hour under its Bill of Particulars. The Bill of Particulars stated that defendant drove into an intersection at a dangerous and excessive speed, to wit, in excess of forty miles per hour. The statement that this speed was dangerous and excessive shows that the State intended to charge a violation of the speeding laws of this State. Certainly any speed which violated these laws was an act which, if done in a manner that evinced a marked disregard for the safety of others, would sustain a conviction of Involuntary Manslaughter. The State would not be limited to a speed in excess of forty miles, but any speed which constitutes a violation of the speed laws would be sufficient. In civil cases where a speed in miles per hour is alleged, the pleader is not limited to proof of such a speed. See

Waller v. Graff, (Mo. App.), 251 S. W. 733.

Debes v. Greenstone, (Tex.), 260 S. W. 211.

Morrison v. Antwine, (Tex.), 51 S. W. (2d) 820.

White v. Zell, (Iowa), 276 N. W. 76.

Hall v. Ponder, (Ga.), 179 S. E. 243.

Alendal v. Madsen, 275 N. W. 352.

Instructions on speed in the words of statutes similar to that in the State of Utah have been held sufficiently specific without requiring the jury to find that the automobile in question was going at any particular speed in miles per hour.

Schultz v. State, 89 Neb. 34; 130 N. W. 972;
33 L. R. A. (N. S.) 403; Ann. Cas. 1912
C 495.

People v. Marconi, 118 Cal. App. 683; 5 P.
(2d) 974.

People v. Von Eckartsberg, Supra.

We submit that there was no error in the instructions given.

ARGUMENT NUMBER VII.

Under this argument, counsel for the appellant in part reiterates some arguments heretofore made and which we have answered.

He relies upon the court's refusal to give the defendant's requested instruction number seven. In that request he wanted it pointed out to the jury that in districts outside of business or residence districts, that speed at all times should be reasonable and safe under the general circumstances prevailing on the highways, providing that such speed should not exceed fifty miles per hour. In so far as this part of the instruction is concerned, the court placed no limit upon the speed at which the defendant could drive his automobile, so long as it was a safe and reasonable speed within the provisions of the law as set forth in instruction number five. Counsel certainly cannot object to a failure to place a top limit on the speed at which the

defendant travelled. He then defines the business district as territory so designated by local authorities, and clearly defined by signs posted on the highway at the limit of said district on the highway, and the residence district being the territory in cities and towns other than business districts. Under the Stipulation of counsel, which appears at Record 206, Abstract 54, it appears that the south line of 21st South Street is the end of Salt Lake City limits, and that the land south of that line is in Salt Lake County. The accident occurred within Salt Lake City since it was within the intersection of 3rd East and 21st South, which appears from this Stipulation, to be within Salt Lake City, and under the definition given by counsel in this requested instruction, the speed of fifty miles per hour is not applicable.

The defendant's requested instructions numbers nine, ten, and twelve were merely different ways of stating the disregard which defendant's conduct should evince before a conviction could be had. For instance in number nine, counsel requests that the jury must find a calloused disregard of human life, and in number ten, that the acts of the defendant must be done either with a wilful intent to injure, or that recklessness and wanton disregard of the rights and safety of another as would be equivalent to an intent to injure, and in number twelve, that the act be with a wilful and wanton disregard for the rights of others. The words of the *Lingeman* case are that the conduct must evince a marked disregard for the safety of others, and this was the language used by the court in its instructions.

No error was made in refusing these requests.

ARGUMENT NUMBER VIII.

Counsel under this argument contends that the evidence is insufficient to support the verdict of guilty rendered by the jury. It is the position of the State that the question of the defendant's guilt was one of fact which was properly left to the jury under the facts of this case.

State v. Lingeman, Supra.

The evidence shows that the defendant, while in a hurry to get his girl home at 7:00 A. M. in the morning, drove his automobile into the intersection of 3rd East and 21st South without stopping at a stop sign, which he should have done, at a speed of between forty and fifty-nine miles per hour, and ran into the automobile of Clark Romney, thereby causing his death.

We submit that it takes no argument that such conduct violated the heretofore mentioned statutes of the State of Utah, and that his conduct in doing this evinced a marked disregard for the safety of others. Counsel argues that there was not much traffic on the highway. There was certainly enough traffic on the highway to require the defendant to act differently than he did. The deceased's car was on the highway, as well as the automobile of the witness Silcox. Defendant might well have

expected some traffic to be on the highway and especially at an intersection marked by a stop sign.

CONCLUSION

We submit that we have answered all of the arguments of counsel that there is no error in the record, and certainly nothing transpired prejudicial to the rights of the defendant.

We therefore submit that the verdict and judgment should be affirmed.

Respectfully submitted,

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