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The State of Utah v. C. H. Chealey : Brief of Respondent

Utah Supreme Court

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Grover A. Giles; Attorney General; Calvin Rampton; Assistant Attorney General; Attorneys for Respondent;

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In the Supreme Court

OF THE

State of Utah

STATE OF UTAH,

Plaintiff and Respondent

vs.

CH. CHEALEY,

Defendant and Appellant

Case No.

RESPONDENT'S BRIEF

Respectfully submitted,

GROVER A. GILES,
Attorney General,

CALVIN RAMPTON,
Assistant Attorney General

Attorneys for Respondent.

FILED

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STATE OF UTAH,
Plaintiff and Respondent

vs.

C. H. CHEALEY,
Defendant and Appellant

} Case No.

RESPONDENT'S BRIEF

STATEMENT OF FACTS

This is an appeal from the Third Judicial District Court of the State of Utah in and for Salt Lake County, Honorable Will L. Hoyt presiding, in which case the defendant, C. H. Chealey, was convicted by a jury of the crime of involuntary manslaughter.

The complaint was filed in the City Court on the 25th day of October, 1939, charging the defendant with the crime of involuntary manslaughter as follows:

“That C. H. Chealey on the 16th day of September, A. D. 1939, at the County of Salt Lake, State of Utah, did commit the crime of involuntary manslaughter as follows, to-wit: That the said

C. H. Chealey at the time and place aforesaid killed Harlan Junior Kofold without malice.”

The defendant after a preliminary hearing was regularly bound over to the district court to stand trial on the offense. The information in the case was filed on the 1st day of December, 1939, by the District Attorney. On December 2, 1939, the defendant was arraigned, waived time in which to plead and entered a plea of “not guilty.” The case came on for trial on the 22nd day of January, 1940.

The evidence showed that the defendant C. H. Chealey at the time charged in the complaint was driving a truck north on U. S. highway 91, south of Salt Lake City; that as he approached the Draper cross roads he ran the truck off the road with the result that the truck tipped over killing one Harlan Junior Kofold, who was at the time riding on the rack at the back of the truck.

The evidence in the case clearly shows that the defendant had been drinking. He had driven the car on the day in question from Centerfield, Utah, bringing with him a minor, Donald Beck. Beck testified that they picked up a number of hitchhikers along the way, among them the deceased, Kofold, and one Luther Smith. The evidence shows that they stopped at Nephi, Utah, where the defendant and Smith drank some beer in a store, and also purchased a pint bottle of Gold Bond Whiskey which was consumed by the defendant and Smith by the time they reached Pleasant Grove. At Pleasant Grove they purchased another pint bottle of Gold Bond Whiskey, of which a portion was consumed at the time of the accident.

The evidence shows that the weather at the time of the accident was good, and the road was dry. The evidence presented by the State indicates that the road was clear, and that there were no other cars approaching the truck driven by the defendant. The defendant and Smith, who was riding with him in the cab, both testified that it was necessary for the defendant to drive the car off the road in order to avoid hitting an oncoming car which was attempting to pass a second oncoming car, and so was in the wrong lane of traffic. However, impeaching testimony was introduced by the State showing that Smith, while he was in the hospital before the trial, had made the statement that he knew nothing about how the accident occurred because he was asleep in the cab at the time. Evidence was also presented by the State to the effect that the defendant immediately after the accident showed obvious signs of intoxication.

ARGUMENT I

THE COURT MADE NO ERROR IN REFUSING TO DISMISS EDWIN BLISS FROM THE JURY ON A CHALLENGE FOR CAUSE.

Defendant's first assignment of error is that the court erred in refusing to sustain the defendant's challenge to a juror, Edwin Bliss, on the ground that Bliss was biased against persons driving after they had been drinking.

In answer to the question as to whether or not any of the jurors had any prejudice or scruples against a man taking a drink, Bliss replied, "I distinctly believe a man should not drink that drives an automobile."

On subsequent questions the Court asked, "Would the fact that defendant was a drinking man cause you to have any prejudice?"

Bliss replied, "Absolutely not."

The Court then asked, "In this case although the State might show the defendant had imbibed liquor to the extent that his mental faculties were a little less alert, if you were not satisfied by the evidence in the case as to how intoxicating liquor affects a man would you be inclined to hold the defendant guilty because of this present notion as to the effect intoxicating liquor has on a man?"

Bliss replied, "Certainly not."

The court then asked in effect if the evidence showed that the defendant had been drinking but there was a conflict of evidence as to whether he had consumed enough liquor to affect the method in which he drove the automobile, if the juror would give the defendant the benefit of the doubt. To this Bliss replied, "The defendant would be entitled to the doubt."

There is nothing contained in any of Bliss's statements which would indicate that he had any prejudice or bias which would render him unfit for jury service in this case. It is true he stated that he had a prejudice against men drinking when they were driving automobiles, and on questioning stated, "I don't think a man should drink that drives an automobile." This was merely an expression of an opinion which it is to be hoped is shared by the majority of the citizens of the State of Utah.

On subsequent questioning for the purpose of clarifying his statements and giving the Court and counsel full understanding of his position on the matter, Bliss definitely stated that he had no prejudice which would prevent him from rendering a fair decision in the case and that he would give the defendant the benefit of the doubt wherever conflict in testimony occurred as to whether or not the defendant had consumed sufficient liquor to affect the manner in which he operated his automobile.

The defendant maintains that this case is comparable to the case of *State of Montana vs. Huffman*, 296, Pac. 789. In that case, the Supreme Court refused to reverse a case because the trial court dismissed a juror who had indicated a definite bias but who had later contradicted his position. An examination of the facts in that case, however, indicate that it is not at all comparable to the case at bar. In that case it appeared that the juror was a friend of the accused and was asked if he believed the defendant were guilty beyond a reasonable doubt under the law, if he would vote to convict him. To this question the juror replied, "No sir." Later the juror reversed his position, but the court nevertheless excused him.

The appellate court did not pass directly upon the proposition as to whether the juror should have been excused or not. It is indicated, however, that the trial court did commit error in excusing the juror on these grounds, but the court stated, "Here, we are asked to apply that rule to the action of the court in excusing a prospective juror although

the record does not disclose that an impartial jury was not thereafter obtained. Under the circumstances shown, there is no ground for reversal even though we concede that the court committed a technical error.”

The defendant cites two Utah cases, *State of Utah vs. Nell*, 23 Utah 541, and *State of Utah vs. Seybolt*, 65 Utah 204, in support of his position. Neither of these cases has any bearing upon the point at issue. In the case of *State vs. Neel* the juror was excused on the ground that he had formed an opinion regarding the merits of the case at trial. There is no evidence in this case indicating that juror Bliss had formed an opinion or even knew anything about the facts of the case upon which he was called to sit.

In *State vs. Seybolt*, the juror was excused for no apparent cause which this court held was an abuse of the trial court's discretion. This court refused, however, to reverse the case upon the ground expressed in the following reasoning of the court:

“It has been often held by this court that in this jurisdiction prejudice is not presumed from error.” (See one of the latest cases, *State vs. Nell*, 59 Utah 68, 202 P. 7.) The statutes of the state (Comp. Laws 1917, Section 9231), expressly declare that this court in criminal cases on appeal must give judgment without regard to errors which have not resulted in a miscarriage of justice. It is further provided that, if error has been committed, it shall be not presumed to have resulted in a miscarriage of justice, and that the court must be satisfied that it has before it is warranted in reversing the judgment. The statute is revolutionary in its effect in that it entirely abrogates the old rule under which if error

was found prejudice was presumed. It has now become the duty of this court in criminal cases, on appeal, to go further than the mere finding of error. It must be satisfied that the error is prejudicial before it is warranted in reversing the judgment."

The great weight of authority is to the effect that a mere bias or prejudice against crime or a particular type of crime is not sufficient grounds for challenge of a juror. 35 C. J. 329 reads:

"The fact that a person is prejudiced against the sale of intoxicating liquors does not render him incompetent as a juror on the trial of a liquor dealer for an offense having no relation to such business, nor is a juror necessarily incompetent by reason of such prejudice in a criminal prosecution for a violation of the liquor law."

In the case of *Page vs. State*, 27 S. W. (2d) 219, the court stated:

"Bill of exception No. 2 presents as error the action of the court in overruling appellant's challenge for cause to Juror Busby and being forced to exercise a preemptory challenge on said juror. The effect of this bill is to show that this juror with many others had signed a statement commending the efforts of the sheriff's department in enforcing the law and suppressing the liquor traffic. It is sufficient to show a bias of the juror in favor of the prohibition law and a prejudice against liquor law violators. This is not sufficient to disqualify the juror where the juror, as in this case, answered that he had no predjudice against the defendant nor against people charged with violation of the liquor law nor any opinion that would affect his verdict."

The facts in that case are substantially the same as those in the case now being considered.

All of the cases quoted by the defendant in support of his position are cases which hold that the court committed no error in excusing jurors when certain bias was shown. It does not follow that the court would have committed an error in the same circumstances if it had refused to excuse the juror. To contend for such a position would be to hold that there is no discretion in the trial court at all, and that anything which the court may do, it must do. Furthermore, even if one were to concede that the court committed a technical error in this case, there is no showing that such error in any way prejudiced the substantial rights of the defendant. The record shows that a peremptory challenge was taken to Bliss, and there is no evidence to show that a fair and impartial jury was not obtained to sit upon the case. In view of the language of this court quoted above from the case of *State vs. Seybolt*, in the absence of such a showing, even though error were committed, it would not be grounds for reversal.

ARGUMENT II

THE COURT DID NOT ERR IN REFUSING DEFENDANT'S MOTION FOR DISMISSAL FOR LACK OF CASUAL CONNECTION BETWEEN THE UNLAWFUL ACT AND THE DEATH OF THE DECEASED OR IN REFUSING THE DEFENDANT'S MOTION FOR A DIRECTED VERDICT.

As defendant's assignment of error relating to the refusal of the court to grant a dismissal and his assignment regarding the refusal of the court to direct a verdict rely upon the same points, they will here be considered together.

The State agrees with the position stated by the defendant in the first part of his argument on these points; that the death must have been the natural and proximate result of the unlawful act in order for the defendant to be convicted of manslaughter. The State, however, does not agree with the position to which the defense finds its way in the latter part of the argument, namely that the death must have been a natural and necessary result of the unlawful act in order for conviction to be sustained. If it were required that death be the necessary result of the wrongful act, seldom if ever would it be possible to obtain a conviction for homicide of any kind. Even the most grievous wound inflicted deliberately and intentionally will not necessarily result in the death of the person injured. A person might very conceivably recover. However, death would certainly be a natural and proximate result of the infliction of such a wound. *No where* in the case of *Porter vs. State*, 70 N. E. 129, which defendant relies upon for his contention that death must have been a necessary result, has the State been able to find such a holding or even such an implication by the Indiana Court. The court does state as follows:

“It must appear that the homicide was a natural or necessary result of the act of the appellant in carrying the revolver in violation of statute.”

It should be observed, however, that the words “natural” and “necessary” are used in the disjunctive and not in the conjunctive.

In that case the defendant was carrying a gun contrary to the statutes of the state, which gun was discharged

during a friendly scuffle with the deceased, the bullet striking and killing the deceased. The court properly refused to sustain a conviction because the act of carrying a gun which was the unlawful act alleged, was not the proximate cause of the death of the deceased. The proximate cause of death of the deceased was the friendly scuffle which resulted in the discharge of the gun, which act was not unlawful and could not sustain a conviction.

In the case of *People vs. Barnes*, 148 N. W. 400, also relied upon by defendant, the case was reversed because of an instruction given by the court to the effect that if the jury found that the defendant was driving an automobile more than ten miles per hour at the time the fatal collision occurred, they should find him guilty. The court pointed out there that ten miles an hour was not an unreasonable or unsafe speed, and that the accident might just as well have happened if the defendant had been going nine miles an hour as if he had been going eleven miles an hour. Furthermore the court pointed out that the deceased stepped in front of the car, and the court implies that the deceased's negligence was the proximate cause of the death.

In order for an act to be a proximate cause of an injury it is not necessary that the injury would necessarily follow from the act or even that the person acting negligently should be able to see that the precise type of injury might occur as a result of the act. It is sufficient if a person of ordinary caution and prudence would have been able to foresee that some injury would likely result from the act, not necessarily that the specific injury would result from the act.

Neiswender vs. Topeka Township, (Kan.) 79 P (2d) 839; Railway Co. vs Parry (Kan.) 73 P. 105; Hartnett vs. Boston Store of Chicago, (Ill.) 106 N. E. 837; Smith vs. Lampe, 64 Fed. (2d) 201; Handleys vs. Texas and Pacific Coal Co. (Tex.) 207 S. W. 375; Cleveland C. C. & St. L. R. Co. vs. Tauer (Ind.) 96 N. E. 758; Voshall vs. Northern Pacific Terminal Co., (Ore.) 240 P. 891.

It is of course necessary that the unlawful act directly caused or set in motion a chain of events uninterrupted by any independent unforeseeable event, which caused the injury or death. Applying these tests to the case at issue there can be little doubt that an unlawful act of the defendant was the proximate cause of the death of Harlan Junior Kofold. The jury from the evidence presented might very well have found that the defendant was driving while under the influence of intoxicating liquor, or they might very well have found that he operated his vehicle carelessly and negligently, and with disregard of the safety of others in that he drove the vehicle off the road at a place where the road was clear of other traffic at sufficient speed that the truck hit the shoulder of the road and tipped over.

An examination of the evidence leaves little doubt that there was sufficient evidence on which the jury might have made either of these findings. In regard to the drunkenness of the defendant, we have testimony from both defense witnesses that he had been drinking. Furthermore, we have the testimony of the State's witness, Shieb, that the defendant was obviously drunk some minutes after the acci-

dent when he was taken to the County Jail. The defendant makes the claim that Shieb's testimony on this point is contrary to the testimony of another State's witness, Mr. Kinney. However, an examination of the record does not sustain this point. Shieb's testimony was to the effect that the defendant was confused as to the direction he was driving. This is corroborated by Kinney. The fact that Shieb said the defendant was incoherent, while Kinney stated he was able to understand him, indicates no conflict. There are various degrees of incoherency. A man may merely be difficult to understand or it may be impossible to understand him.

As to the condition of the highway at the time the accident occurred, the State produced two witnesses who were there at the time who testified that they saw no traffic on the highway at the time or immediately preceding the accident. The testimony of the defendant's witness Smith that he saw a California car approaching, which forced the defendant to turn out to miss it, was completely impeached by evidence as to Smith's prior inconsistent statements, while the jury evidently chose, as well they might, to disbelieve the testimony of the defendant in this regard. It can scarcely be claimed, therefore, that there was not sufficient evidence upon which the jury might base a finding either of drunken driving or gross and culpable negligence.

ARGUMENT III

THE COURT COMMITTED NO ERROR IN
PERMITTING THE WITNESS, LEROY D. WIL-

LIAMS, TO TESTIFY AS AN EXPERT ON HAND- WRITING.

The defendant in attacking the qualifications of the State's witness, Leroy D. Williams, to testify as a handwriting expert seems to proceed on the theory that it is necessary for a person to attend a special school where handwriting is studied in order to qualify as an expert. The defendant quotes from Jones, Commentaries on Evidence, Section 369, as follows:

"An expert must have made the subject upon which he gives his opinion a matter of particular study, practice, or observation and he must have particular and special knowledge on the subject."

The next sentence, which they omitted from the argument, reads:

"While it is clear that the witness in order to be competent as an expert must show himself to be skilled in the business or profession to which the subject relates, there is no precise rule as to the mode in which such skill or experience must be acquired. Thus the witness may have become qualified by actual experience or long observation without having made a study of the subject."

In the case of *In Re Burbank*, 93 N. Y. Sup. 866, the court describes a handwriting expert as:

"Any person who has had such experience in the examination of handwriting as to enable him to note and distinguish the characteristics of handwriting."

In *Griffin vs. Working Womens' Association*, 151 Ala. 604, in discussing the problem of expert testimony as to handwriting, the court states:

“To legalize such testimony the witness must be first shown to be an expert, that is accustomed to and skilled in the matter of handwriting genuine and spurious.

With this standard or rule the question of competency of the witness seems to be one addressed to the sound judgment and discretion of the court, and its ruling is not reviewable on appeal unless there is shown an abuse of this discretion.”

In the case at issue the witness Williams testified, that for four years while working for the State Liquor Commission it had been his responsibility to compare handwritings, and that during this time he had been called upon to give his opinion as to handwriting, and that he had testified regarding such matters in courts of record. For the six years previous to that he had been in charge of files for the Union Pacific Railroad where he had occasion to use his knowledge of handwriting very extensively. The defendant bases his assignment of error solely upon the statement of the witness on cross examination that he had no special training, but had just picked up his skill as an expert in handwriting. The State submits that in view of the above cited authorities special training is not necessary, and that such skill can very well be gained by experience. The matter of whether or not the witness should have been permitted to testify is a matter which was within the discretion of the trial court, and there is nothing to indicate an abuse of that discretion.

Furthermore, if it should be held that the court was in error in admitting Williams' testimony, such testimony cannot be held to have impaired the substantial rights of the de-

fendant. Williams' testimony merely went to prove that handwriting on certain liquor sales slips was the defendant's handwriting. This, of course, was for the purpose of proving that the defendant purchased liquor at certain stores at a certain time. This matter, however, ceased to be in controversy in the case when the defendant's witness Smith testified as recorded on pages 164 and 165 of the transcript that Chealey had bought liquor at the times and places claimed by the State. The defendant himself on cross examination, recorded on page 181 of the transcript, admitted that he bought the two bottles of whiskey. Williams' testimony, therefore, merely went to a point which was later admitted by the defense, and so whether properly or improperly admitted, cannot be said to prejudice the defendant in any way.

ARGUMENT IV

STATE'S EXHIBIT A WAS PROPERLY ADMITTED IN EVIDENCE.

State's Exhibit A in this case was a bottle of whiskey which was found by officers in the field adjacent to the scene of the accident on the day following the accident. It was the brand of whiskey purchased by the defendant in the case which he subsequently admitted was in the car at the time of the accident. The State's witness Sjoberg moreover testified that he had seen a bottle of whiskey at the scene of the accident which to all appearances was identical with Exhibit A. This is sufficient evidence to give some reasonable basis for identity and while the evidence may not have a great deal of weight, that is a matter which should be left

to the jury. The defendant had, and no doubt took advantage of, an opportunity to point out to the jury the fact that this evidence had very little bearing upon the case. However, as stated above, this is a matter of weight and not of admissibility.

This same question was involved in the Iowa case of *State vs. Jenkins*, 212 N. W. 475, in which case the defendant who was accused of drunken driving tipped his car over. A bottle of whiskey was found in the vicinity of the car in a ditch and was admitted in evidence. In this case although there was no testimony as to the appearance of the bottle or no testimony that the defendant had any whiskey in his car the court upheld the admission of this evidence. See also in this regard *State vs. Tibbetts* (Iowa) 22 N. E. 423.

In *Hess vs. State* (Ind.) 151 N. E. 405, the following language is found:

“Appellant’s motion to strike from the record all evidence pertaining to the liquor found in the stove-pipe for the reason that there was no evidence showing that this liquor belonged to appellant or that he had any knowledge of its being there was overruled, and this ruling is one of the causes assigned for a new trial.* * * It seems to us the question thus presented challenges the weight of the evidence rather than its admissibility. The overruling of the motion to strike out was not error.”

In *Kelly vs. State*, 278 S. W. 449, the Supreme Court of Texas upheld the admission into evidence of whiskey found along the bank of the creek where the defendant was seen to walk in the direction of the creek carrying a package and to return without the package.

The evidence here presented, which is undisputed, is to the effect that the defendant purchased a bottle of Gold Bond whiskey which was in the truck with him at the time of the accident; and that the whiskey bottle was seen at the scene of the accident immediately after the accident occurred. This is sufficient certainly to give rise to an inference that the whiskey picked up in the field immediately next to the scene of the accident was the same bottle of whiskey, and the most that can be attacked about such evidence is its weight, and not its admissibility.

ARGUMENT V

THE COURT PROPERLY ADMITTED EVIDENCE AS TO THE CONVERSATION BETWEEN LUTHER W. SMITH AND LOTE KINNEY FOR THE PURPOSE OF IMPEACHING SMITH'S TESTIMONY.

The rule of law that a witness may be impeached by the introduction of evidence as to prior conflicting statements or conduct of such witnesses is elementary. Jones' Commentaries on Evidence at Section 845, 1 Ed., says:

"There is hardly any more familiar practice in judicial procedure than that of impeaching witnesses by proof of their former statements which are inconsistent with their present testimony."

In order to introduce evidence as to such prior conflicting statements, it is necessary that a foundation be laid by asking the witness to be impeached on cross examination whether or not he made such statements in order that he might have an opportunity to explain away the inconsistencies, if there is any explanation. In this case the district attor-

ney questioned the defendant, Smith, about his prior inconsistent statements, and Smith freely admitted that he had made these statements so that it was unnecessary for the state to introduce evidence as to the statements. Smith's only explanation of the inconsistencies was a claim that he had lied when making the former statements.

There are two recent Utah cases in which this court passed upon the matter here assigned as error. In the first of these, Buckley vs. Francis, 78 Utah 606, 6 Pac. (2d), 188, the court stated:

"It is an elementary rule of law that a witness may be impeached as to testimony given upon a material issue by proof that such witness has made prior self-contradictory statements."

In State vs. Fairclough, 86 Utah 326, 44 Pac. (2d), 692 in which the defendant was charged with mayhem, committed on his sister-in-law, and in which case his wife testified for him, a prior inconsistent statement of the wife to the effect that her husband had bitten off the end of her sister's nose, was admitted.

The defense counsel in that case objected that such testimony was hearsay as to the defendant. The court stated:

"It is also objected that the conversations were hearsay and hence inadmissible. This undoubtedly was hearsay, but was admissible for the purpose of impeachment, and for that purpose only. The assignment is without merit."

In the case now before this court, Smith testified that the accident occurred when the defendant drove the truck off the road to avoid striking the oncoming car, which Smith claimed he saw approaching them. The prior statements made

by Smith were to the effect that he was asleep at the time of the accident. It is obvious, therefore, that these prior statements could have no effect upon the case, except to impeach Smith's testimony, and were offered for and accepted for no other purpose.

ARGUMENT VI

THE COURT PROPERLY REFUSED DEFENDANT'S REQUESTED INSTRUCTION NO. 2.

The defendant submitted a written request for an instruction as follows:

"You are instructed that the term 'criminal negligence' under the laws of the State of Utah does not merely mean the failure to exercise ordinary care or that degree of care which an ordinary prudent person would exercise under like circumstances. It means gross negligence. It is such negligence as amounts to a reckless disregard of the consequences, and of the rights and safety of others."

Just what purpose could be served by a definition of the term "criminal negligence" is hard to determine in view of the fact that the trial court at no place in its other instructions used the term "criminal negligence." Nor is the State able to determine from the case of *State vs. Lingman*, 97 Utah 180, which is relied upon by the defendant herein, that it is necessary or proper in charging the jury in an involuntary manslaughter case that the court must use the term "criminal negligence."

In Instruction No. 5 the court undertook to instruct the jury regarding the elements of the crime of involuntary manslaughter. An examination of the terminology used in this instruction will reveal that the court has attempted to follow

the terminology approved by this court in *State vs. Lingman*, and at nowhere does the term “criminal negligence” appear. Therefore, no need arises for instructing the jury regarding the proper definition of such term. Such an instruction could only tend to confuse the minds of the jury.

Whether or not Instruction No. 5 is in all regards in compliance with the rules laid down in *State vs. Lingman* is, of course, not before this court, as the defendant does not in his brief make any argument regarding the propriety of this instruction.

Instruction No. 5 lists five acts all of which are prohibited by Title 57, R. S. U. and so under the ruling in the *Lingman* case come under arm (a) of the involuntary manslaughter statute. All of these acts with the possible exception of No. 5c are *malum in se* and under the ruling laid down in the *Lingman* case will support a charge of involuntary manslaughter when death results therefrom whether it is alleged that they are done in a reckless and careless manner or not. As to whether or not the court’s instruction 5C is proper we need not discuss here as there is no evidence which was introduced in the case from which the jury could have found that the defendant was driving in excess of fifty miles an hour, and the giving of this instruction was not argued in the defendant’s brief.

ARGUMENT VII

THE COURT PROPERLY REFUSED TO GIVE
DEFENDANT’S REQUESTED INSTRUCTIONS NO.
3 AND 4.

Defendant's requested Instructions No. 3 and 4 are regarding matters which are fully and completely covered in other instructions given by the court and to assign error on this ground would merely be quibbling over the use of words which convey the same meaning. The attention of this court is directed to Instruction No. 6 given by the trial court. This instruction covers the entire ground which would have been covered by the defendant's requested Instruction No. 3

The attention of this court is also called to Instruction No. 8 given by the trial court. This instruction states the rule of law regarding the "reasonable prudent man doctrine" in much clearer terms and in a light much more favorable to the defendant than does defendant's requested Instruction No. 4.

The State submits that the defendant was fairly tried before a jury and found guilty. No proof has been made by the defendant of any error which in any way affected his substantial rights. The action of the trial court should therefore be upheld.

Respectfully submitted,
 GROVER A. GILES,
 Attorney General,
 CALVIN RAMPTON,
 Assistant Attorney General
 Attorneys for Respondent.