

1942

State of Utah v. Grant Allen Adamson : Brief of Respondent

Utah Supreme Court

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**In the Supreme Court
of the
State of Utah**

STATE OF UTAH,

Plaintiff and Respondent,

vs.

GRANT ALLEN ADAMSON,

Defendant and Appellant.

} Case
No. 6375

BRIEF OF RESPONDENT

Appeal from the Third Judicial District Court,
Salt Lake County, Utah
Hon. M. J. Bronson, *Judge, Presiding*

STATEMENT OF FACTS

The defendant, Grant Allen Adamson, was charged with the crime of Involuntary Manslaughter and after a trial to a jury was found guilty of that offense. The following are the facts as produced at the trial of this case:

Shortly after 8:00 P. M. on August 8, 1940, Karl Moulton was just driving out of a drive-in ice cream parlor, located on Second West Street between Third and Fourth South Streets in Salt Lake City, Utah. (R. 72, 73.) Two trucks proceeding southerly, side by side, on said Second West Street attracted his attention. (R. 73.) There are four lanes of traffic on this street (R. 100) and the trucks were on the two right hand lanes. The truck nearest the center of the road was a gasoline truck (Exhibit "A" is a picture of it). (R. 74.)

The defendant was driving this truck (R. 85). The other truck was a truck and semi-trailer with timber on it. (R. 73, 74.) Moulton followed these trucks south to Ninth South Street. While following them he paced them to determine their speed. (R. 74, 82.) He checked their speed by his speedometer. They were travelling between 35 and 38 miles per hour. (On direct examination Moulton testified they were travelling between 38 and 40 miles per hour. (R. 74, 75.) On cross examination he admitted that on preliminary hearing he testified that these trucks were travelling between 35 and 38 miles per hour. (R. 80.) He also testified on cross examination that it had been some time since he had had this matter brought to his attention and that he had testified on the preliminary hearing possibly a week after the accident. (R. 79, 80.) As the trucks approached the intersection of Second West Street with Ninth South Street the green light of the semaphore at that intersection was in their favor. The truck with timber on it went straight on

through the intersection and the gasoline truck made a left hand turn to go east on Ninth South Street. (R. 75.) Moulton testified that he could not say exactly but what this truck did slow to some extent in making this turn. (R. 75.) He further testified that there was absolutely no way of telling how much he slowed down (R. 80) and that he believed that in the preliminary hearing he testified that the gasoline truck slowed down appreciably on arriving at the corner. (R. 80.) Moulton intended to turn to the left but as he crossed the pedestrian lane he saw the accident. (R. 75.) He saw some object fly up in the air and light on the pavement. It was Sylvester Kanon.

Sylvester Kanon was on a bicycle travelling in a northerly direction on Second West. As he passed the southeast corner of the intersection he was travelling about two feet from the curb. (R. 84.) There was an impact between Kanon and the truck driven by the defendant. Officer R. T. Anderson made measurements on this intersection immediately after the collision and from metal marks and red paint marks he determined the probable point of impact as being on a line with the east curb line of Second West Street and forty-four feet into the intersection from the south curb line of Ninth South Street. (R. 99.) (These measurements are indicated in Exhibit "B," a map drawn by the officer.) The impact occurred in the north half of the intersection. The body of Kanon came to rest 18 feet due east of the point of impact and the bicycle 35 feet from that point of im-

fact in a south-easterly direction. (R. 99.) Defendant's truck proceeded east on Ninth South Street 157 feet from the point of impact before it stopped. (R. 100.)

This intersection is a well-lighted intersection. A service station is on the southeast corner and one is on the northeast corner. The lights of both of these stations were on at the time of this collision. Also there is an arc light on the southwest corner which was on at this time. (R. 83, 84.)

Dr. Eric Simonson examined Kanon upon his arrival at the County Hospital. It appeared that Kanon had massive fractures of the occipital and parietal bones. these were crushed and loose. The third and fourth ribs to the right of the sternum were broken. Blood was running out of his right ear. There were several fractures of the pelvis. The skin was evulsed from the upper part of the left arm exposing the muscle. Kanon was dead on arrival. (R. 94.)

An examination of the truck driven by the defendant discloses that there was a long scratch mark in the center of the bumper having the appearance that it had come in contact with metal, the grill was bent and milk was spilled all over the windshield and left fender. R. 108-109). From an examination of the intersection it appeared that there were no skid marks or tire marks of any kind. (R. 107.) The testimony of one of the police officers showed that Second West Street north of Ninth South is 83 feet wide and south of Ninth South Street is 45 feet wide. The east curb of Second West Street

south of Ninth South Street is 22 feet further west than the east curb line of said Second West Street north of Ninth South Street.

One of the defense witnesses testified that he stopped on the southeast corner of this intersection of Second West and Ninth South Street just as the semaphore light for north and south bound traffic was changing from red to green. An automobile was waiting for the light to change in order to proceed north on Second West Street across said intersection. Upon the light changing the automobile proceeded across the intersection. The defendant's truck was coming south on Second West Street. The Kanon boy, on a bicycle, passed by this witness going North on Second West Street and his attention was next called to the intersection by a crash which he heard, and upon looking North he saw the Kanon boy going down between the cab and the semi-trailer.

Based upon the foregoing evidence the jury in this case found that the conduct of the defendant evinced a marked disregard for the safety of others and that he was guilty of the crime of Involuntary Manslaughter as charged in the information.

POINTS INVOLVED

The defendant has assigned twenty errors. The errors relied upon are classified under two headings; First, that the evidence was insufficient to support the verdict, and second, errors were committed in instructing

the jury. The State will follow the order these points are taken up in the brief of appellant.

From the following argument we believe that it will conclusively appear that the evidence in this case was sufficient to support the verdict of the jury, and that there was no prejudicial error in the instructions given to the jury or in the refusal of the trial court to give certain requested instructions.

ARGUMENT

1. THERE IS SUBSTANTIAL EVIDENCE IN THE RECORD TO SUPPORT THE VERDICT FINDING THE DEFENDANT GUILTY OF THE CRIME OF INVOLUNTARY MANSLAUGHTER.

Instruction Five (R. 43), given to the jury, sets forth in five paragraphs three unlawful acts and instructed the jury that if they found that any one of the unlawful acts had been committed by the defendant that they could take them into consideration in determining the guilt of said defendant. These three unlawful acts were: (1) Driving at an excessive speed; (2) failing to yield the right of way and; (3) reckless driving. It was upon these acts that the case was submitted to the jury and if there is any substantial evidence showing that the defendant committed any one of these unlawful acts and his conduct in so doing was reckless or evinced a marked disregard for the safety of others then the verdict of the jury must be upheld. The State bases this contention upon the fact that the defendant took a general excep-

tion to the whole of Instruction Five. We believe that there was substantial evidence on all three of these unlawful acts and sufficient upon which the jury could make a finding of their commission.

a. *The Defendant's Speed.*

Section 57-7-16, Chapter 48, Laws of Utah 1935 was in force at the time of the commission of the crime charged in the information in this case. It is not necessary for the State to prove that the defendant was going at any particular speed in miles per hour. Those statutes provide as follows:

“On all public highways, it is unlawful for any person to drive a vehicle upon a highway at a speed greater than is reasonable and prudent, having due regard to the traffic, surface and width of the highway and the hazard at intersections and any other condition then existing.

Nor shall any person drive at a speed which is greater than will permit the driver to exercise proper control of the vehicle and to decrease speed or to stop as may be necessary to avoid colliding with any person, vehicle or other conveyance upon or entering the highway in compliance with legal requirements and with the duty of drivers and other persons using the highway to exercise due care;”

Counsel for the appellant limits his discussion entirely to the miles per hour which the defendant was going at the intersection of Ninth South Street and Second West or whether or not he was going slow or fast without taking into consideration the surrounding cir-

cumstances. Counsel states that he cannot determine from the evidence where it was on Second West Street between Third South and Ninth South Streets that the defendant was driving between 35 and 40 miles per hour. We believe that a fair interpretation of the testimony of Moulton is that he followed the defendant from the ice cream parlor to Ninth South Street and during that time he paced the defendant. (R. 74.) We submit that it is a reasonable interpretation of this testimony that the defendant maintained this speed until making the turn at the intersection of Ninth South and Second West Street, at which time he slowed down in making that turn. The witness testified, of course, that he could not tell exactly how much the defendant had slowed down. However, the jury could have taken into consideration the fact that the defendant's truck was driven a distance of 157 feet from the point of impact before he brought it to a stop. The jury could also have considered the force with which Kanon was struck. This is evidenced by the various injuries which he received. The evidence indicates that the bones of his skull were crushed and two ribs were broken, there were several fractures of his pelvis and the upper part of his left arm was severely injured.

As indicated by the foregoing statute, the jury could take into consideration the traffic on the highway and the hazard at the intersection and any other conditions therein existing in determining whether or not the defendant was driving at a speed which was greater than was reasonable and prudent. We submit that the evi-

dence indicates that the defendant was not keeping a proper look-out. The intersection was well-lighted as heretofore indicated. It is apparent that the defendant did not see the Kanon boy inasmuch as no skid marks were made indicating an application of the brakes to avoid a collision. It does not appear that the defendant turned in any manner in attempting to avoid this collision. He just sailed into the intersection, making a left hand turn, in the face of oncoming traffic, and after hitting the Kanon boy finally came to a stop 157 feet east of the point of impact. We submit that coming into an intersection, protected by a semaphore light, and making a turn in the face of oncoming traffic at almost any speed could well be found an unreasonable speed by the jury, especially where a vehicle in that oncoming traffic was hit by the vehicle making such turn.

When we consider the size of this truck that was being driven by the defendant and his inability to bring it to a stop in less than 157 feet, impresses one with the fact that going through this intersection as he did the defendant must have been going at a speed which was greater than was then and there reasonable and prudent within the meaning of the statute heretofore quoted.

One of the defendant's duties was to determine whether or not he could make this turn without endangering oncoming traffic. He cannot be heard to say that he did not expect traffic to be coming toward him. Defense testimony indicates an automobile had just passed through the intersection. It was defendant's duty to

see if there was any traffic coming toward him in a northerly direction. If he was going at a speed which would prevent him from stopping or turning out to avoid such oncoming traffic then his speed was not reasonable and prudent. If he was not looking to determine if such traffic was coming in a northerly direction then, of course, any speed would not be reasonable or prudent. We submit this evidence also indicated that the speed of the defendant was greater than would permit him to exercise proper control of his vehicle and to decrease speed or to stop to avoid persons or vehicles on the highway.

The case of *Dunville vs. State*, 188 Ind. 373, 123 N. E. 689 (1919) is not helpful to the Court in determining the question of whether or not this defendant violated the speed statute of this State. The evidence in that case indicates that the deceased, a little girl, ran into the street in front of the defendant's motorcycle and the defendant was unable to avoid hitting her . . . a very different thing than making a left hand turn at an intersection, the traffic of which is enough to require the placement of a semaphore light to aid traffic.

In the Dunville case it could well be said that the defendant could not expect a child to run out into the street in front of his motorcycle. In the case at bar we have an intersection collision and the defendant ran into oncoming traffic which he might well expect to be there.

Appellant does not think that any assumption can or should be drawn from the fact that defendant's truck

went a distance of 157 feet from the point of impact before defendant brought it to a stop. And why not? Certainly upon running into somebody the most usual thing for a person to do, if he was in complete possession of his faculties, would be to bring his automobile to a stop as soon as possible. We think the jury might well infer that the truck was brought to a stop as soon as the defendant could do so. The absence of skid marks proves nothing other than the defendant did not see Kanon whom he should have seen.

Counsel cites *State vs. Gutheil*, 98 Utah 205, 98 Pac. (2) 943 and asks what it was that Adamson did or did not do that shows that he acted recklessly and in marked disregard of the rights of others. The simple answer to this question is that the defendant, without keeping a proper lookout, made a left hand turn at an intersection in the face of oncoming traffic and disregarded his duties by failing to determine whether there was any oncoming traffic before making that left hand turn and in crossing the intersection in the manner in which he did and not being able to stop his truck before it had gone 157 feet beyond the point of impact.

Appellant contends that there is no evidence that the defendant failed to keep a proper lookout. From the evidence in this case he did not see the Kanon boy. We can reasonably infer this from the fact that no effort was made by the defendant to stop or to turn out before the point of impact. The Kanon boy was in the path of the defendant's truck. We can reasonably infer this from

the fact that he was hit. He should have been seen by the defendant. We can reasonably infer this from the fact that the intersection is well-lighted. The defendant had a duty to determine the presence of oncoming traffic because he was turning in the face of it. We submit there is evidence that the defendant made this turn without keeping a proper lookout. This should be taken into consideration in determining whether there is any substantial evidence that the defendant violated the speeding statutes of this State.

b. *The defendant failed to yield the right of way to Sylvester Kanon.*

The statute on right of way provides as follows, 57-7-31, Revised Statutes of Utah 1933:

“The driver of a vehicle within an intersection intending to turn to the left shall yield to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard, but such driver having so yielded and having given a signal when and as required by law may make such left turn, and other vehicles approaching the intersection from the opposite direction shall yield to the driver making the left turn.”

Counsel for appellants contends there is no substantial evidence that defendant violated this statute.

Defendant was driving a vehicle within the intersection of Second West Street and Ninth South Street. He intended to make a left hand turn at that intersection. This is evidenced by the fact that he made such a turn.

The statute, under such circumstances, imposed upon him a duty to yield to any vehicle approaching from the opposite direction if that vehicle was within the intersection or so close thereto as to constitute an immediate hazard.

Is there any evidence showing that Kanon's bicycle came within this statute and was entitled to the right of way? Kanon and his bicycle were hit by the front of the truck driven by the defendant. The probable point of impact was four feet north of the center of Ninth South Street and on a line with the east curb of Second West Street. T. A. Fowler testified that he looked north, saw the truck of the defendant approaching the intersection, looked back and Kanon went by and then he heard the impact. (R. 118.) This is certainly substantial evidence that at the time the defendant intended to make the left hand turn Kanon was either in the intersection or so close thereto as to constitute an immediate hazard. A jury could reasonably infer that both defendant and Kanon were entering the intersection at about the same time and could find that the defendant, in failing to yield to Kanon, violated the foregoing statute.

Apparently counsel for appellant seem to think that if the defendant yielded to the Ford which just preceded Kanon across the intersection that he could then proceed to make his left hand turn and Kanon would have to yield to defendant. Under this statute the defendant before making a left hand turn would have to yield to every vehicle coming in the opposite direction so

long as such vehicle was either within the intersection or so close thereto as to constitute an immediate hazard. There is evidence that defendant slowed down to some extent but that he continued to make the turn. In order to obtain the right of way the defendant, in addition to the above, would have to give a signal as required by law in making a left hand turn. There is no evidence that he gave such signal.

We submit that there is substantial evidence which would support a finding that the defendant violated the foregoing statute.

c. The evidence supports a finding that the defendant violated the reckless driving statute.

The first and second paragraphs of Instruction Five sets forth the reckless driving statute (57-7-15, Revised Statutes of Utah 1933) and the jury by that instruction were permitted to deliberate upon the proposition of whether or not the defendant violated that statute.

The conduct of the defendant in driving into the oncoming traffic at the intersection of Second West Street and Ninth South, at a speed which was not reasonable and prudent under the circumstances, without keeping a proper or any lookout and without yielding the right of way to Kanon is substantial evidence supporting a finding that the defendant violated the reckless driving statute.

The defendant was driving a large truck between 35 and 40 miles per hour along Second West Street until

he arrived at the intersection of that street and Ninth South at which time the truck was slowed down to some extent. He made a left hand turn into traffic coming in the opposite direction. The intersection was well-lighted. From the fact that he neither applied his brakes nor made any attempt to avoid hitting Kanon indicates at least that he did not see Kanon. Kanon was there, however. He should have seen him. There is no reason for his failure to see him unless he was not looking. At least the jury could reasonably infer that defendant was not looking. Defendant was under a very positive duty to determine whether there was any traffic crossing that intersection and going in an opposite direction before making that left hand turn. This he did not do. He just sailed through the intersection and across the path of oncoming traffic. The force of the impact is shown by the condition of the deceased after the impact. Defendant then continued on 157 feet before he brought the truck to a stop.

We submit that making this left hand turn under the conditions then existing, is substantial evidence of a violation of the reckless driving statute.

(d.) *Defendant's conduct was reckless and evinced a marked disregard for the safety of others.*

Under the case of *State vs. Lingman*, 97 Utah 180, 91 P. (2) 457 (1939) in order to sustain a conviction of involuntary manslaughter there must be not only substantial evidence of an unlawful act committed by the defendant but there must also be substantial evidence

that the conduct of the defendant was reckless or evinced a marked disregard for the safety of others. The trial court recognized this rule and the jury under Instruction Six was required to so find beyond a reasonable doubt before returning a verdict of guilty in this case. The jury certainly found beyond a reasonable doubt that the conduct of defendant was reckless and evinced a marked disregard for the safety of others.

Were they justified in so finding?

What has been said under (c) above on reckless driving applies to this point now under consideration. For emphasis we again say; the defendant was driving in an intersection whereon traffic was directed by a semaphore. When he entered that intersection the defendant knew that north and south bound traffic were to proceed through the intersection. To make a left hand turn he knew that he would be crossing the path of traffic which had a right to proceed across the intersection. He was changing his course. His speed should have been such that this large truck was under such control that he could stop it to avoid colliding with north bound traffic. He should have looked to see if there was any north bound traffic which would obstruct the path of his truck. It was his duty to yield to any vehicle which was within the intersection or so close thereto as to constitute an immediate hazard. Defendant obviously disregarded his duties aforesaid, at least there is substantial evidence that he did. He made the left hand turn, hit Kanon who was going north, and proceeded on east on Ninth South

157 feet. This conduct was certainly reckless, it evinced a marked disregard for the safety of others. The jury so found. This Court should not upset this finding.

(e) *Authorities relating to the sufficiency of the evidence.*

A reading of the instructions in the case discloses that the rules laid down in *State vs. Lingman*, supra, were closely followed by the trial court. The instructions were given upon the theory that the case came under the so-called arm (a) of the involuntary manslaughter statute. That is, to convict, the jury must find an unlawful act plus reckless conduct or conduct evincing a marked disregard for the safety of others. This rule for the sufficiency of evidence or the elements of the crime of which defendant was found guilty is clear and there can be no question but what the trial court had the correct rule in mind. The only question here is its application to the facts in the case at bar, or put in another way, are the facts in this case sufficient to comply with the rule.

In the foregoing discussion of the facts, we believe we have demonstrated that there is substantial evidence in the record from which the jury might reasonably find that defendant committed one or more unlawful acts and that his conduct in so doing was reckless and evinced a marked disregard for the safety of others.

As might be expected the decisions relating to the sufficiency of evidence in involuntary manslaughter cases are not very helpful as far as facts are concerned.

Each case is decided upon its own perculiar facts and circumstances and in most all jurisdictions the court then determines whether or not, in their opinion, the facts in the record are such that the jury was justified in finding recklessness or a disregard for the safety of others.

We will cite a few cases wherein rules are laid down which we believe are applicable to the case at bar. As shown by the case of *People vs. Smaszcz*, 344 Ill. 494, 176 N. E. 768 (1931), it is not necessary that an eye witness testify to the speed of an automobile of the accused in order to justify a finding that it was going at an excessive rate of speed at the time of the fatal collision. If an unreasonable speed can be determined from the force of the impact, the severity of the injuries sustained, the distance travelled after the impact by the automobile or automobiles involved, etc., it is sufficient to support a verdict based thereon. See also *State vs. Hedinger*, 126 N. J. L. 288, 19 A. (2) 322 (1941).

To have had his car under proper control the defendant should have been operating it at such a speed and with such attention to it as would enable him to bring it to a stop with a reasonable degree of quickness or within a reasonable distance and to guide it safely around objects on the highway. *State vs. Elliott*, (Del.) 8 A. (2) 873. Certainly within this definition of proper control the evidence was that the defendant did not comply with his duty to have the truck under proper control. He could not stop his truck with any degree of quickness or within a reasonable distance. The evidence that he

did not stop it with any degree of quickness and within a reasonable distance is certainly substantial evidence that he could not so stop it.

People vs. Przybyl, 365 Ill. 515, 6 N. E. (2) 848, laid down a similar rule. In that case the defendant passed another car going in the same direction that he was going and then hit and killed a pedestrian who was crossing the street. Apparently the defendant could not see what was on the other side of this car as he passed it. The court said that he was under a duty to have his car under such control that he could avoid a collision with any person crossing the street and that his failure to do so was an utter disregard of the safety of others. In other words, in that case the defendant might well expect that someone would be crossing the street and that he could not be able to see it because of the other car. Since the defendant there could have expected such a situation the court held that he was under a duty to have his car in such control that he could avoid hitting a person who might be expected on the street.

In the case at bar, the defendant certainly could expect that there would be north bound traffic as he attempted to make the left hand turn. Hence he should have had his car under such control that he could avoid colliding with any such north bound traffic. His failure so to do under the authority of the *Przybyl* case constituted an utter disregard for the safety of others.

Another case which applies a similar rule is *Cornett vs. Commonwealth*, 282 Ky. 322, 138 S. W. (2) 492 (1940).

In that case the court held that where a defendant was driving between 30 and 35 miles per hour on a highway and approached children playing with a ball on the edge of the highway the ball is likely to get out of their control and the defendant should therefore bring his car under such control as to avert an accident if a child should dart in front of his automobile. His failure to have his car under such control would be such recklessness as to make the case a question for the jury.

In the case at bar the defendant did not have his truck under the control as required by the foregoing cases, and we submit that such being the case he violated the speed statute requiring him to have his truck under immediate control.

It is axiomatic that to violate a speeding statute such as that in Utah it is not necessary that the accused should drive his automobile in excess of a prescribed speed such as in excess of 25 miles per hour in a residential district. Circumstances and conditions may make a speed unlawful which otherwise would be lawful. *State vs. Goldstone*, 144 Minn. 405, 175 N. W. 892 (1920); *People vs. Van Echartsberg*, 133 Cal. App. 1, 23 P. (2) 819 (1933); *Mulkern vs. State*, 176 Wis. 490, 187 N. W. 190 (1922); *State vs. Mills*, 181 N. C. 530, 106 S. E. 677 (1921).

In *State vs. Elliott, supra*, it is pointed out that the person operating a vehicle must maintain constantly a proper lookout for persons or other vehicles, and the duty to look requires the duty to see that which is in

plain sight, unless some reasonable explanation is offered. It is negligence not to see what is plainly visible when there is nothing to obstruct the vision of the driver, for he is required not only to look but is required to exercise his sense of sight in such a careful and intelligent manner as will enable him to see what a person in the exercise of the ordinary care and control would see under the circumstances.

In *State vs. Biewen*, 169 Iowa 256, 151 N. W. 102, it was held that where a driver of an automobile has an unobstructed view of a person upon the highway and there is no obstacle to turning aside to avoid a collision and a collision occurs with such other person, a death resulting from such collision may be found to be a consequence of such driver's recklessness. The court held that it made no difference whether the driver saw such person or not because if he did not see that person he should have done.

In *People vs. McKeon*, 236 N. Y. S. 591 (1929), the defendant was convicted of reckless driving and appealed on the grounds that the evidence was insufficient. The defendant was proceeding north on a highway and his car collided with a car driving south. Defendant had made a sharp turn to the left in order to go west on an intersectional highway and he hit the car of the injured person. The court upheld the conviction based upon this evidence and with relation to the defendant's duty it stated:

“Whenever a driver on a highway intends to make a left turn, he must take every precaution in making that turn so as not to endanger traffic coming in the opposite direction, for the left turn swings him directly in front of traffic lawfully proceeding on the right side of the thoroughfare.”

2. NO PREJUDICIAL ERROR WAS MADE BY THE COURT IN GIVING HIS INSTRUCTIONS NOR IN REFUSING TO GIVE CERTAIN REQUESTED INSTRUCTIONS.

(a.) *No error was committed by the court in instructing on right of way.*

Instruction Number Five contains the instruction on right of way and is the paragraph therein numbered “Fifth”. Counsel contends that the giving of the instruction on the subject of right of way was erroneous because there was no evidence that the defendant failed to yield the right of way or that the Kanon boy had the right of way, and for the further reason that the entire statute relating to right of way was not placed in the instruction. We have heretofore indicated the evidence on which the State relies as substantially tending to show that the defendant did fail to yield the right of way and we refer the Court to Point 1 (b).

Counsel contends that the Kanon boy had lost his right of way because of the fact that he violated the law in two particulars: (1) in failing to have a light on his bicycle and (2) in failing to keep on the right side of the road. It is unquestionable that the evidence

is to the effect that Kanon had no light on his bicycle but we do not believe that as a matter of law the Court can say that Kanon thereby lost his right of way. If the defendant saw him would this Court for one minute hold that Adamson could run him down at will or that he could take the right of way from Kanon although Kanon was then within the intersection or so close thereto as to constitute an immediate hazard? The Court would have to go this far in order to hold that this right of way instruction should not have been given.

Counsel also claims that Kanon lost his right of way because he violated a city ordinance and a state statute requiring persons to drive as closely as practicable to the right hand edge or curb of a highway. The ordinance by its wording particularly applies to riders of bicycles. The evidence is that Kanon was riding within two or three feet of the curb of Second West south of Ninth South. He had not driven to the east of the line at the time he was hit by the defendant. Counsel apparently contends that it was the duty of Kanon under this statute and ordinance to drive in a northeast direction across the intersection. It is submitted that this is not the proper interpretation of the statute or ordinance. There was no curb or edge of the highway in the middle of this intersection and hence no evidence that Kanon in any way violated the law.

Counsel cites *Dixon vs. Bergin*, 64 Ut. 195, 228 P. 744 (1924). In that case the accident did not occur in the intersection but in the middle of the block. The

evidence shows that the plaintiff was from 25 to 27 feet from the edge or curb of the highway. Certainly it is not like the case at bar where Kanon was driving his bicycle as closely as practicable to the right hand edge or curb of the highway.

We do not believe that the Court erred in leaving out the latter part of the right of way statute, Section 57-7-31, R. S. U. 1933. The following is the part of the statute which was left out of the court's instruction:

“but such driver having so yielded and having given a signal when and as required by law may make such left turn, and other vehicles approaching the intersection from the opposite direction shall yield to the driver making the left turn.”

There was no evidence of any kind in the record from which the jury could have made any finding in relation to this portion of the statute. Counsel states that the evidence is to the effect that the defendant yielded within the meaning of this statute and the Kanon boy thereby lost his right of way. Of course, there is evidence that the defendant slowed down but certainly that is no evidence that he had yielded the right of way to vehicles which were within the intersection or so close as to constitute an immediate hazard. Another thing that should be noted is that the defendant did not obtain the right of way until he both yielded and gave a signal as required by law to make a left hand turn. Of course, there is absolutely no evidence in the record of such signal being given and that being true the above quoted

portion of the statute was properly taken out of the instruction given by the court.

(b.) *No error was committed by the Court in refusing the requested instructions of the defendant pertaining to the conduct of the deceased as the proximate cause of the accident.*

This point requires a consideration of the rule relating to the contributory negligence of a deceased person in an involuntary manslaughter case.

One of the leading cases in this country on this proposition is the case of *State vs. Campbell*, 82 Conn. 671, 74 Atl. 927, 135 Am. St. Rep. 293, 18 Ann. Cas. 236 (1910). In that case it was clearly held that contributory negligence is no defense in an involuntary manslaughter case. In that case it was pointed out that the court did not eliminate the deceased's conduct from the case. The court stated:

“The court properly said to the jury that the State must clearly show that the deceased's death was the direct result of the defendant's negligence, but that the injured man's conduct became material only as it bore upon the question of such negligence of the accused, and that if the culpable negligence of the accused was the cause of Mr. Morgan's death, the accused was responsible under the criminal law, whether Mr. Morgan's failure to use due care contributed to his injury or not.”

Another leading case on this subject is the case of *Schultz vs. State*, 89 Neb. 34, 130 N. W. 972, 33 L. R. A.

(N. S.) 403, Ann. Cas. 1912 C. 495 (1911). The court stated:

“Contributory negligence as such is not available as a defense in a criminal prosecution for a homicide caused by the gross and reckless misconduct of the accused, although the decedent’s behavior is admissible in evidence, and may have a material bearing upon the question of the defendant’s guilt. If, however, the culpable negligence of the accused is found to be the cause of the decedent’s death, the former is responsible under the criminal law whether the decedent’s failure to use due care contributed to the injury or not.”

It should be noted that in the case of *People vs. Campbell*, 237 Mich. 244, 212 N. W. 97, cited by appellant, the conduct of the deceased person was eliminated from the case by the court’s instruction. The trial court instructed the jury that as a matter of law the defendant was not guilty of contributory negligence. The court held that the negligence of the deceased is only material if it bears upon the negligence of the defendant. This case holds that the contributory negligence is no defense.

In *People vs. Barnes*, 182 Mich. 179, 148 N. W. 400, another case cited by appellant, the trial court submitted the case to the jury on the bald proposition that if at the time the defendant struck the deceased he was operating a car in excess of ten miles an hour he was guilty of manslaughter for there was no doubt that defendant’s car struck and ran over the deceased and

caused her death. It was held that this was reversible error. So far as the quotation is concerned on page 36 of appellant's brief there can be no question that the conduct of the deceased is relevant and should not be eliminated from the case. It is apparent that the conduct of the defendant in the case at bar was not eliminated.

In *People vs. Hurley*, 13 Cal. App. (2) 208, 56 P. (2) 978, the court was considering only the question of the sufficiency of the evidence in that case to support a verdict of guilty of manslaughter. The court in determining whether or not the defendant's conduct was reckless took into consideration the conduct of the deceased. This case and *State vs. Sisneros*, 42 N. M. 500, 82 Pac. (2) 274, merely stand for the proposition that the jury should take into consideration the conduct of the deceased in determining the question of proximate causation and also on the question of the negligence of the defendant. The other cases cited by counsel for appellant are to the same effect.

We will take up these requested instructions in the order in which they appear in appellant's brief. The first one is Requested Instruction No. 15. The first sentence is "you are instructed that a driver may presume that others in the road will conduct themselves in a lawful manner." We do not believe that the foregoing statement is a proper one to place in an instruction to the jury. See *State vs. Campbell, supra*. The balance of this instruction is to the effect that if Kanon was

riding his bicycle in an unlawful manner and it was because of his so riding in an unlawful manner that the defendant failed to see him, then the defendant did not act unlawfully in failing to yield to Kanon. We believe this instruction too general in not informing the jury what unlawful conduct of the deceased would bring about such a result.

In *Blackford vs. Kaplan*, 135 Ohio St. 268, 20 N. E. (2) 522 (1939), the trial court had refused to give the following requested instruction:

“You are instructed that if you find that the defendant in approaching or entering the intersection where the collision in this case took place was not proceeding in a lawful manner, he therefore did not enjoy any preferential status or privilege over the driver of the other car which the statute of Ohio might have otherwise given him.”

It was held that the request was objectionable because it did not in any way explain what act would be unlawful and work a forfeiture. The court pointed out that it should not be left to the jury to determine what was or what was not unlawful. In this Blackford case a requested instruction similar to the first sentence of Requested Instruction No. 15 was held to be properly refused.

Defendant's Requested Instruction No. 20 would have been instructing the jury as to the contents of a Salt Lake City ordinance to the effect that bicycles upon a city street should drive as closely as practicable

to the right hand edge or curb of the street. Defendant's Requested Instruction No. 21 was that if Kanon was not following as closely to the right hand side of the street as practicable then the jury should find that he did not have the right of way. It is submitted that there was no evidence that would justify either of these last two requested instructions. The only evidence was to the effect that Kanon was as close to the right hand curb as was practicable as long as there was a curb where he was riding. He certainly did not make a right hand turn to follow the curb line as he entered the intersection of Second West Street and Ninth South, but we do not believe that these ordinances and statutes required such conduct.

Requested Instructions No. 12, 13 and 14 relate to the failure of Kanon to have a light on his bicycle. These instructions tell the jury that the law requires a lighted lamp on a bicycle and that if Kanon was riding without a lighted lamp it was unlawful and if found to be the proximate cause of his death the defendant should be acquitted, that the failure to have a light should be considered in connection with all other matters pertaining to the accident. We submit that the contents and subject matter of the requested instructions No. 12 to 14 were sufficiently presented to the jury by the instructions given. The conduct of Kanon was in no way eliminated from the case.

In Instruction No. 7A the court specifically instructed the jury that they should consider the conduct

of Kanon together with all the other facts and circumstances surrounding the accident and that if his conduct was the sole proximate cause of his death then the defendant should be acquitted. The question in this case was whether or not the reckless conduct of the defendant caused the death. If it in any way contributed to the death of Kanon then the defendant is guilty of the crime of Involuntary Manslaughter. By Instruction No. 6 the jury was required, before they could return a verdict of guilty, to find beyond a reasonable doubt that the conduct of the defendant caused the death. The jury found the defendant guilty and of necessity found that it was the defendant's conduct which caused the death. Such finding, of course, is also a finding that the conduct of the deceased Kanon was not the sole proximate cause of his own death.

Based upon similar reasoning courts have held that it is not necessary to instruct the jury on unavoidable accident. In other words, if a jury is required to find that the reckless conduct of an accused caused the death before returning a verdict of guilty, then when they do return a verdict of guilty they have, of necessity, excluded the existence of unavoidable accident in the case. See *State vs. Richardson*, 216 Iowa 809, 249 N. W. 211 (1933); *Bowen vs. State*, 100 Ark. 232, 140 S. W. 28 (1911); *State vs. Murphy*, 324 Mo. 183, 23 S. W. (2) 136 (1929).

In *State vs. Richardson, supra*, the court stated:

“The omission of any specific reference therein (instructions) to the so-called theory of the defendant that the unfortunate death of the youth was due to unavoidable accident and not to criminal negligence is fully, in effect, covered by the instruction. The jury was clearly told that to justify a conviction it was incumbent upon the state to prove beyond a reasonable doubt that the defendant at the time was operating his automobile in a careless, heedless and negligent manner in willful or wanton disregard of the safety of others.

Further the court told the jury that to justify a conviction it was incumbent upon the state to also prove that the defendant was guilty of criminal negligence in the manner in which and the speed at which he drove his car. This language clearly eliminated the possibility of a conviction if the act charged was the result of unavoidable accident. The jury could not, upon any theory of fair reasoning, have believed that the defendant was free from criminal negligence and have returned a verdict of guilty. The jury must have understood that unavoidable accident possesses none of the elements of criminal negligence or of willfulness, heedlessness and wantonness. The point here urged by appellant is also without substantial merit.”

Following the reasoning of these cases, the jury could not have believed that the conduct of Kanon was the sole proximate cause of his own death where it returned a verdict of guilty and in so doing was required to find that the conduct of the defendant caused the death.

In *People vs. Marconi*, 118 Cal. App. 683, 5 P. (2) 974 (1931) the court stated:

“The requested instruction is faulty in that it could be understood as conveying the idea that contributory negligence is a defense, which it is not, *People vs. McKee* 80 Cal. App. 200, 251 P. 675; *People vs. Leutholtz* 102 Cal. App. 493, 283 P. 292, Note in 67 A. L. R. 922. * * * * The court did admonish the jury that the defendant was not responsible unless the death was caused by his own act or omission, thus more correctly covering the point appellant sought to cover.”

In *People vs. Pociask*, 14 Cal. (2) 679, 96 P. (2) 788 (1939) it was held that an instruction, that the negligence of deceased was no defense, that such negligence would exonerate only if it was the sole proximate cause of the accident but that the defendant was not exonerated if the jury found that he was guilty of negligence which proximately contributed to the injuries, correctly covered the law on the subject of the deceased's conduct. To the same effect see *State vs. Phelps*, 153 Kan. 337, 110 P. (2) 755 (1941).

In *State vs. Graff*, (Iowa) 290 N. W. 97 (1940) the following instruction was held to correctly state the law:

“You are instructed that the negligent or careless act of the deceased, if any, or of persons other than defendant, if any, that might have contributed to the death of said deceased, will not relieve the defendant of criminal responsibility if the death of said deceased was naturally and proximately caused by the doing of the defendant of an unlawful act or acts as herein-

before defined in such a manner as to show a wanton or reckless disregard and indifference to the safety of others who might be reasonably expected to be injured thereby.”

In *State vs. Wilbanks*, 168 La. 861, 123 So. 600 (1929) it was held that there was no error in refusing the following requested instructions:

“(1) That it is unlawful for an automobile to operate upon the public roads without lights; and that it is also a violation of the law for a horse-drawn vehicle to operate upon any of the roads etc., without a light that can be seen 500 feet away. (2) That if you find that the failure to have lights on the buggy was the cause of the accident, or if you find that if the buggy had lights on it the accident would not have occurred you must acquit.”

In that case the defendant’s automobile ran into a buggy. The defendant’s automobile was being driven at night without lights.

In *Pratt vs. State*, (Ala. App.) 171 So. 393 (1936) the defendant requested an instruction that if the jury had a reasonable doubt as to whether the deceased was guilty of negligence which proximately caused his death that it must acquit. The court held that contributory negligence is no defense and that the request was properly refused.

Defendant’s Requested Instruction No. 16 is an abstract instruction. It is not in any way made applicable to the case at bar. Is it applicable to the defendant’s

negligence or to the question of proximate cause? We submit that a general and abstract instruction such as this could not in any way aid the jury in their deliberation and its refusal was not error.

Defendant's Requested Instruction No. 10 was properly refused. The only persons involved in the accident were the defendant and Kanon. Just why a general instruction of this kind should be given is not evident. The law with relation to proximate cause was fully set out in the instructions given. The instructions properly limited the deliberations of the jury on the question of proximate causation to the proposition of whether the conduct of the defendant or that of Kanon caused the death.

Defendant's Requested Instruction No. 17 is similar to No. 16, above mentioned, and for the same reasons the trial court properly refused to give such request.

Defendant's Requested Instructions No. 18 and 19 relate to the claimed failure of Kanon to keep as close to the right hand curb or edge of the highway. There was no evidence that he did not so drive his bicycle and hence these requests were properly refused.

We submit that the jury was clearly instructed concerning all of the law applicable to the issues of the case at bar. In Instruction No. 6 the jury was clearly told that before it could convict the defendant it must find beyond a reasonable doubt that the defendant while operating his automobile violated one of the statutes set

forth in Instruction No. 5, that his conduct in so doing was reckless or evinced a marked disregard for the safety of others and that his said conduct was the proximate cause of the collision between his automobile and Kanon. In Instruction No. 7 the jury were particularly instructed that if it believed that the acts or conduct of the defendant in no way proximately caused the collision of his automobile and Kanon and the injuries to Kanon then it must return a verdict of not guilty. By Instruction No. 7-A the jury was told that in determining the guilt of the defendant it must take into consideration the conduct of Kanon and if it believed such conduct to be the sole proximate cause of his death then it must acquit the defendant.

We submit that the foregoing instructions stated the law as set forth in the cases cited in this brief and in that of appellant.

(c.) The burden of proof was not cast upon the defendant and no prejudicial error was committed in giving Instruction No. 7-A.

Instruction No. 7-A set forth the law as follows:

“You are instructed that in determining whether or not the defendant is guilty of the crime charged in the information you should consider the conduct, insofar as there is evidence thereof, of Sylvester Kanon immediately prior to the accident and at the time of the accident together with all the other facts and circumstances surrounding the accident which have been given in evidence. If you believe from all the evidence in the case that the sole proximate cause of the

injuries to and the death of the said Sylvester Kanon was a result of the acts and conduct of the said Sylvester Kanon then you should return a verdict of not guilty.”

Appellant took his exception to this instruction as follows:

“Mr. McKay: Comes now the defendant and excepts to the Court’s instructions to the jury as given, as follows: *** Excepts to Instruction No. 7-A, and the whole thereof”. (R. 134, 135).

The instruction contains two distinct propositions of law: (1) That in determining the guilt of the defendant the jury should consider the conduct of Kanon and (2) that if it believed the conduct of Kanon was the sole proximate cause of his death then it should acquit the defendant.

There can be no question but that the first proposition of law contained in said instruction is correct and was properly given. In fact defendant requested that that proposition of law be given to the jury. Defendant’s Requested Instruction No. 9.

It is well established that where exception is taken to the whole of an instruction containing two or more propositions of law and one of said propositions is correct then the Supreme Court will not reverse the case because one of the other propositions of law may be incorrect. An error cannot be predicated upon such an exception. *State vs. Warner*, 79 Ut. 500, 291 P. 307 (1930); *State vs. McNaughton*, 92 Ut. 99, 58 P. (2) 5,

92 Ut. 114, 66 P. (2) 137 (1936); *State vs. Riley*, 41 Ut. 225, 126 P. 294 (1912).

The reason for this rule is obvious. Exceptions are taken to give the trial court an opportunity to correct any errors made in the instructions. By specifically pointing out the latter portion of the instruction it may be that the trial court would have been advised of the contention of the appellant. It was not pointed out to the trial court that it was the second sentence of said Instruction No. 7-A that defendant contended was incorrect.

We also submit that the wording of this instruction was brought about by appellant's counsel. A number of requests were made by said counsel on the question of the conduct of Kanon. Defendant's Requested Instruction No. 13 was as follows:

“You are instructed that if you find that at the time of the accident Sylvester Kanon was riding a bicycle which was not equipped with a lighted lamp, that such riding was unlawful, and if you find that his so riding was the proximate cause of his death you must find the defendant not guilty.”

It will be noted that the wording of this request is identical with the last sentence of Instruction No. 7-A. Both are to the effect that if the jury believes that the conduct of Kanon was the proximate cause of his death then they must find the defendant not guilty. Defendant's Requested Instruction Nos. 11, 14, 15, 18, 19 and 21 are similarly worded.

The trial court in preparing his instructions had before him these requests and rather than give these particularized requests he stated in one instruction to the jury that if it believed the conduct of Kanon was the sole proximate cause of his death then it should acquit the defendant. This followed the wording of the requests made by the defendant. He should not now be permitted to say that the trial court erred in following the wording of said requests.

By said Instruction No. 7-A, the trial court was not attempting to fix the burden of proof. The jury was told on more than one occasion in said instructions that the burden was upon the State to prove the elements of the offense to the satisfaction of the jury beyond a reasonable doubt. The jury was specifically told that it must find beyond a reasonable doubt that the defendant committed an unlawful act evincing a marked disregard for the safety of others which proximately caused the death of Kanon before it could convict the defendant. If the jury could not so find it was specifically instructed that it could not convict the defendant.

No. 7-A states the jury must acquit defendant if it believes Kanon's conduct caused the death. This is a correct statement of law. Certainly it is the law that if the jury so believed it was duty bound to acquit the defendant. The instruction did not go the next step and state that if the jury had a reasonable doubt as to whether Kanon's conduct was the sole proximate cause of his death then defendant should be acquitted. Appellant

never did request the court to give an instruction on this latter subject wherein this matter would be specifically called to the jury's attention. The failure to so instruct cannot now be raised by defendant, he should have made such a request.

The burden of proof was by the instructions placed upon the state to prove its case beyond a reasonable doubt and this burden was never changed or shifted by the instructions.

In light of the foregoing circumstances, it is submitted that *State vs. Laris*, 78 Ut. 183, 2 P. (2) 243, cited by appellant, is not in point.

Appellant claims undue emphasis is laid upon the proposition that to justify acquittal the conduct of Kanon must be the sole proximate cause of the death. That such is the law is clear from the cases cited in appellant's brief and also this brief dealing with the question of the contributory negligence of the deceased.

(d.) *There was no error in the trial court's refusal to give defendant's Requested Instruction No. 3 defining "without due caution or circumspection."*

The jury was instructed in accordance with *State vs. Lingman, supra*, that to find the defendant guilty of involuntary manslaughter that it must find that the conduct of the defendant was reckless or evinced a marked disregard for the safety of others. (See Instruction No. 6.)

In Instruction No. 10 the jury was told that in the case at bar there must be a union or joint operation of an unlawful act and criminal negligence. Criminal negligence is there correctly defined.

We submit that the jury was very clearly instructed on the matter requested by defendant in his request No. 3 and to have given that request would not have improved the clarity of the instructions. They were clear and definite.

CONCLUSION

Substantial evidence of the defendant's guilt was introduced in this case, the instructions to the jury correctly stated the law and defined the issues and the jury found beyond a reasonable doubt that the defendant was guilty of the crime charged. No errors were committed and the defendant's rights were in no way prejudiced but were fully protected. We submit the verdict and judgment of the court should be affirmed.

Respectfully submitted,

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